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**In The Supreme Court of the United States**

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REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

*Applicants,*

v.

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETER; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

*Respondents,*

&

REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the North Carolina House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections; and SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the North Carolina Senate Standing Committee on Redistricting and Elections,

*Applicants,*

v.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTER, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND

DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; AND COSMOS GEORGE,

*Respondents,*

&

COMMON CAUSE,

*Intervenor-Respondent.*

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**APPENDIX**

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# Supreme Court of North Carolina

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN

v

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity

---

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNOS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

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From N.C. Court of Appeals  
( P21-525 )  
From Wake  
( 21CVS015426 21CVS500085 )

**ORDER**



The following order has been entered on the motion filed on the 23rd of February 2022 by Plaintiffs (Harper, et al.) for Temporary Stay:

"Motion Denied by order of the Court in conference, this the 23rd of February 2022."

**s/ Hudson, J.  
For the Court**

Upon consideration of the petition filed by Plaintiffs (Harper, et al.) on the 23rd of February 2022 for Writ of Supersedeas, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference, this the 23rd of February 2022."

**s/ Hudson, J.  
For the Court**

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of February 2022.



Grant E. Buckner  
Clerk, Supreme Court of North Carolina

*M. C. Hackney*  
M. C. Hackney  
Assistant Clerk, Supreme Court Of North Carolina

Copy to:

North Carolina Court of Appeals

Mr. Narendra K. Ghosh, Attorney at Law, For Harper, Rebecca, et al. - (By Email)

Mr. Terence Steed, Assistant Attorney General, For State Board of Elections, et al. - (By Email)

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Ms. Stephanie A. Brennan, Special Deputy Attorney General, For State Board of Elections, et al. - (By Email)

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N.C. Supreme Court Clerk - (By Email)

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HARPER V. HALL

Order of the Court

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and Elections; REPRESENTATIVE TIMOTHY )  
K. MOORE, in his official capacity as Speaker of )  
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BOARD OF ELECTIONS; DAMON CIRCOSTA, )  
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BELL, in her official capacity as Executive )  
Director of the North Carolina State Board of )  
Elections )

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HARPER V. HALL

*Order of the Court*

ORDER

Pursuant to Appellate Rule 32(b), it is HEREBY ORDERED, that the clerk shall enter judgment in this matter and issue the mandate of the Court, on 24 February 2022.

By order of the Court in conference, this the 15<sup>th</sup> day of February 2022.



For the Court

Chief Justice NEWBY and Justices BERGER and BARRINGER dissent.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15<sup>th</sup> day of February 2022.





AMY L. FUNDERBURK

Clerk of the Supreme Court

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Carolina Senate; THE STATE OF NORTH )  
CAROLINA; THE NORTH CAROLINA STATE )  
BOARD OF ELECTIONS; DAMON CIRCOSTA, )  
in his official capacity as Chairman of the North )  
Carolina State Board of Elections; STELLA )  
ANDERSON, in her official capacity as Secretary )  
of the North Carolina State Board of Elections; )  
JEFF CARMON III, in his official capacity as )  
Member of the North Carolina State Board of )  
Elections; STACY EGGERS IV, in his official )  
capacity as Member of the North Carolina State )  
Board of Elections; TOMMY TUCKER, in his )  
official capacity as Member of the North Carolina )  
State Board of Elections; and KAREN BRINSON )  
BELL, in her official capacity as Executive )  
Director of the North Carolina State Board of )  
Elections )

\*\*\*\*\*



ORDER

This matter was heard on direct appeal from an order of a three-judge panel of the Superior Court in Wake County, filed 11 January 2022. The case was fully briefed and argued before this Court on 2 February 2022 and is ready for decision. Because time is pressing, the Court enters the following order, to be followed by an opinion; based on the matters presented to the Court, including the findings of fact of the three-judge panel, it is ordered:

1. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). The North Carolina General Assembly, in turn, has the duty to reapportion North Carolina's congressional and state legislative districts; however, exercise of this power is subject to limitations imposed by other constitutional provisions, including the Declaration of Rights. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," including the free elections clause, N.C. Const. art. I, § 10, the equal protection clause, N.C. Const. art. I, § 19, the free speech clause, N.C. Const. art. I, § 14, and the freedom of assembly clause, N.C. Const. art. I, § 12, "are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782. It is the duty of this Court "to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," *id.* at 783, including the legislative power

of apportionment. See *Stephenson v. Bartlett*, 355 N.C. 354, 380–81 (2002). We conclude that claims asserting that congressional and state legislative districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights in article I, sections 10, 19, 14, and 12, respectively, of the North Carolina Constitution are, consistent with the text and structure of our State’s constitution and our system of separation of powers, justiciable in North Carolina courts.

2. This Court concludes that, to the extent Legislative Defendants have challenged any of the trial court’s findings of fact, these findings are supported by competent evidence and are therefore not clearly erroneous. Accordingly, all of the trial court’s factual findings are binding on appeal and we adopt them in full.

3. Based on the trial court’s factual findings, we conclude that the congressional and legislative maps enacted in S.L. 2021-175 (“An Act to Realign North Carolina House of Representatives Districts Following the Return of the 2020 Federal Decennial Census”), S.L. 2021-173 (“An Act to Realign the Districts of the North Carolina State Senate Following the Return of the 2020 Federal Decennial Census”), and S.L. 2021-174 (“An Act to Realign the Congressional Districts Following the Return of the 2020 Federal Decennial Census”) are unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North

Carolina Constitution. We hereby enjoin the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on **24 February 2022** for elections in 2022, including primaries scheduled to take place on **17 May 2022**.

4. To comply with the limitations contained in the North Carolina Constitution which are applicable to redistricting plans, the General Assembly must not diminish or dilute any individual's vote on the basis of partisan affiliation. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. This encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental right to vote.

5. The General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation. Showing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters—

which can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions—suffices to establish the diminishment or dilution of a voter’s voting power on the basis of his or her views. Here, the trial court specifically found that the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation. *See, e.g., N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at \*29 (N.C. Super. Ct. Jan. 11, 2022) (§§ 140, 142). Such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is “narrowly tailored to advance a compelling governmental interest.” *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party’s level of statewide voter support is neither a compelling nor a legitimate governmental interest.

6. There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew



necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional. The General Assembly shall submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.

7. Federal law does not prohibit consideration of partisanship and incumbency protection in the redistricting process. *Stephenson*, 355 N.C. at 371. The federal Constitution does not prohibit reliance on partisan criteria in an effort to "achieve 'political fairness' between the political parties." *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973). Incumbency protection may be a permissible redistricting criterion if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.

8. To comply with this Order, redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria. Traditional neutral districting criteria as enumerated in the North Carolina Constitution and this Court's precedents include the drawing of single-member districts which are as nearly equal in population as is practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties. N.C. Const.

art. II, §§ 3, 5. The “Whole County Provision” must be applied in a manner consonant with the requirements of the Voting Rights Act and federal “one-person, one-vote” principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters. Partisan advantage is not a traditional neutral districting criterion under state law.

9. In accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution. The General Assembly shall submit such plans for review to the trial court on or before **18 February 2022** at 5:00 p.m. Should the General Assembly choose not to submit new congressional and state legislative districting plans on or before this deadline, the trial court will select a plan which comports with constitutional requirements based upon the findings it entered in its prior order. Regardless, all parties to this proceeding and intervenors may submit to the trial court proposed remedial districting plans by **18 February 2022** at 5:00 p.m., and comments on any maps submitted shall be filed with the trial court by **21 February 2022** at 5:00 p.m. The trial court will approve or adopt compliant congressional and state legislative districting plans no later than noon on **23 February 2022**. Any emergency application for a stay pending appeal



HARPER V. HALL

Order of the Court

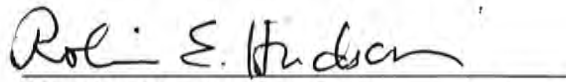
must be filed no later than **23 February 2022** at 5:00 p.m.

10. State Defendants are advised to anticipate that new districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives will be available by **23 February 2022** and are directed to take all necessary measures to ensure that the **17 May 2022** primary election and all subsequent elections occur as scheduled using the remedial districting plans. Further, all ballot items, including referenda, that would have appeared on the **8 March 2022** ballot prior to this Court's prior Order enjoining elections for public office shall appear on the **17 May 2022** ballot; municipal elections in circumstances where a second primary is not required under N.C.G.S. § 163-111 will be conducted on **26 July 2022**.

Opinion to follow.

Remanded to the trial court for remedial proceedings.

By order of the Court in conference, this the 4<sup>th</sup> day of February 2022.

  
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4 day of February 2022.



  
AMY L. FUNDERBURK  
Clerk of the Supreme Court

Chief Justice NEWBY dissenting.

I dissent from the decision of the Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in an "unprecedented expansion of judicial power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). "[J]udicial action must be governed by *standard, by rule,*' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." *Id.* (alteration and emphases in original) (citation omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279, 124 S. Ct. 1769, 1777 (2004) (plurality opinion)) (noting that the Supreme Court of United States has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years"). By choosing to hold that partisan gerrymandering violates the North Carolina Constitution and by devising its own remedies, there appears to be no limit to this Court's power.

"All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Our state constitution is our foundational document for government; its text reflects the express will of the people. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The will of the people is best served, and everyone's rights are best protected, when the

plain language of the constitution is followed. Recognizing special rights to one favored person or group invariably diminishes the rights of others.

Unlike the United States Constitution, the North Carolina Constitution “is in no matter a grant of power.” *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)). Rather, “[a]ll power which is not limited by the Constitution inheres in the people.” *Id.* (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). The people act through the General Assembly. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. Since the General Assembly serves as the “agent of the people for enacting laws,” *id.*, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be *express and proven beyond a reasonable doubt*. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. art. I, § 6. “[A]s essentially a function of the separation of powers,” *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), a court should not review questions better suited for the political branches. This Court must refuse to resolve a dispute “(1) when the Constitution commits [the] issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue.” *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599

S.E.2d 365, 391 (2004) (emphasis omitted) (citing *Baker*, 369 U.S. at 210, 82 S. Ct. at 706). The issue before us—partisan consideration in redistricting—is both constitutionally committed to another branch of government, the General Assembly, and lacking in satisfactory legal standards. Thus, a claim for partisan gerrymandering presents a nonjusticiable political question.

The North Carolina Constitution expressly acknowledges that the authority to redistrict belongs to the General Assembly. See N.C. Const. art. II, §§ 3, 5; U.S. Const. art. I, § 4, cl. 1. In a system based upon popular sovereignty, this structure makes sense because legislators, as opposed to judges, are in the best position to address the people's interests. See *Vieth*, 541 U.S. at 358, 124 S. Ct. at 1824 (Breyer, J., dissenting) (“It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.”).

The General Assembly's redistricting authority is checked by the people through express constitutional provisions as interpreted by this Court. Our constitution subjects redistricting by the General Assembly to only four express limitations. See N.C. Const. art. II, §§ 3, 5. Since these limitations say nothing about the permissibility of partisan gerrymandering, the issue has only two legitimate avenues for reform: a statute or a constitutional amendment that imposes a restraint for the Court to apply. As such, unless and until the people alter the law to either limit or prohibit the practice of partisan gerrymandering, this Court is without any satisfactory or manageable legal standard and thus must refuse to resolve such a claim.



A majority of this Court, however, tosses judicial restraint aside, seizing the opportunity to advance its agenda. There is no express provision of the constitution supporting the decision of the majority; there is no showing that the enacted redistricting plans are unconstitutional beyond a reasonable doubt. A summary pronouncement by the majority to the contrary does not make it so. In the majority's view, it is this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting arising from complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority alone to amend their constitution. *See* N.C. Const. art. XIII, §§ 2, 3, 4.

In essence, the majority rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. It seeks to support this view with various provisions of our Declaration of Rights that are designed to protect individual and personal rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In doing so, it magically transforms the protection of individual rights into the creation of a protected class for members of a political party, subjecting a redistricting plan to strict scrutiny review. The majority presents various views about what constitutes unconstitutional partisan gerrymandering. *See* Order, ¶¶ 4–6 (providing a variety of observations about what the constitution requires). Absent from the order is any mention of “extreme partisan gerrymandering,” which was the issue presented to the Court. Perhaps the sentence best characterizing the majority's

holding is that “[t]he General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation.” Order, ¶ 5. The question of *how much* partisan consideration is unconstitutional remains a mystery, as does what is meant by “substantially equal voting power on the basis of partisan affiliation.” Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process have now been transferred to the Court.

In seeking to hide its partisan bias, the majority states that “redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria.” Order, ¶ 8. Ironically, the majority claims the General Assembly should not subordinate traditional neutral districting criteria to partisan considerations, but its litmus test of constitutionality *requires* a satisfactory partisanship analysis. In fact, only a satisfactory partisanship analysis makes a plan constitutional. But, the Court provides no guidance as to what constitutes an acceptable partisanship analysis. The Court further says that the constitution requires the use of various political science techniques of voting analysis. In addition to the remedial maps, the Court requires the General Assembly to report “an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.” Order, ¶ 6. Glaringly, it fails to mention which data or methods are acceptable or what results would be satisfactory. Apparently, the majority alone

knows what would be constitutional. Further, the Court allows other groups to submit alternate plans but does not mandate the same disclosures.

In rejecting the notion that claims of partisan gerrymandering present a justiciable issue, the Supreme Court of the United States noted the unreliability of political science models:

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

*Rucho*, 139 S. Ct. at 2503–04.

Nonetheless, the Court mandates a political-science-based approach without complying with the direct statutory requirements triggered when a redistricting plan is found unconstitutional. North Carolina law requires that

[e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.3 (2021). The majority's order today provides no specificity—only a vague and undefined ambition of “political fairness”—which ultimately only the majority can measure and determine if its desired result is accomplished.

In 2019 the trial court required the General Assembly to redraw the districts. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*135 (N.C. Super. Ct. Sept. 3, 2019). The 2020 election took place under these constitutionally compliant districts. The people have expressed their will by electing the current members of the General Assembly. The people were aware that the legislators elected in 2020 would be tasked with drawing new districts according to the census, see N.C. Const. art. II, §§ 3, 5, and by any standard, the process used by the General Assembly to follow the nonpartisan criteria meets the requirements of the 2019 trial court order. Thus, the General Assembly and any neutral observer would have to inquire what about our constitutional text has changed from 2019 to 2022 resulting in this newfound constitutional requirement.

The 2019 remedial order required that for a plan to be constitutional, “[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*136 (N.C. Super. Ct. Sept. 3, 2019) (emphasis added). The order today contradicts this directive by requiring partisan data be used. Similarly, the court-approved constitutional districts drawn in 2019 provided that Voting Rights Act districts are not required anywhere in North Carolina. The majority today also



contradicts that finding. It should be noted that the trial court here also found that no Voting Rights Act districts are necessary in North Carolina.

Finally, the majority's managed timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority follows the Governor's lead in mandating a May primary. No reason is given, nor does one exist—except for perceived partisan advantage—for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

To avoid the “smothering of freedom beneath the robes of a judicial despotism,” *Dilday v. Beaufort Cnty. Bd. of Educ.*, 267 N.C. 438, 455, 149 S.E.2d 345, 347 (1966) (Lake, J., concurring), this Court should respect the constitutional role of the General Assembly. Further, the Court must provide a manageable standard to determine when a proposed redistricting plan is constitutional. The Court has failed to do so. The majority's requirements are so vague as to only allow this Court to ultimately determine a plan's constitutionality. With this ruling, the majority moves beyond traditional judicial decision-making in favor of judicially amending the constitution. I respectfully dissent.

Dissenting opinion to follow.

Justices BERGER and BARRINGER join in this dissenting opinion.

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IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-17

No. 413PA21

Filed 14 February 2022

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v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of

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Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from the unanimous decision of a three-judge panel of the Superior Court in Wake County, denying plaintiffs' claims and requests for Declaratory Judgment and Permanent Injunctive Relief. On 8 December 2021, pursuant to N.C.G.S. § 7A-31 and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed plaintiffs' petitions for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2022.

*Patterson Harkavy LLP, by Narendra K. Ghosh, Burton Craige, and Paul E. Smith; Elias Law Group LLP, by Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White; and Arnold and Porter Kaye Scholer LLP, by Elisabeth S. Theodore, R. Stanton Jones, and Samuel F. Callahan, for Harper plaintiff-appellants.*

*Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, John R. Wester, Adam K. Doerr, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Karthik P. Reddy, and Urja*

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*Mittal, for North Carolina League of Conservation Voters, Inc. plaintiff-appellants.*

*Southern Coalition for Social Justice, by Hilary H. Klein, Allison J. Riggs, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogan Lovells US LLP, by J. Tom Boer and Olivia T. Molodanof, for Common Cause plaintiff-appellant.*

*North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, and Terence Steed, Mary Carla Babb, and Stephanie A. Brennan, Special Deputy Attorneys General, for State defendant-appellees.*

*Nelson Mullins Riley & Scarborough, LLP, by Phillip J. Strach, Alyssa M. Riggins, John Branch, and Thomas A. Farr; and Baker & Hostetler LLP, by Katherine L. McKnight and E. Mark Braden, for Legislative Defendants defendant-appellees.*

*Abraham Rubert-Schewel, Chris Lamar, and Orion de Nevers, for Campaign Legal Center, amicus curiae.*

*Haynsworth Sinkler Boyd, P.A., by William C. McKinney, Jonathan D. Klett and Sara A. Sykes; and States United Democracy Center, by Christine P. Sun and Ranjana Natarajan, for former governors, amici curiae.*

*Poyner Spruill LLP, by Edwin M. Speas Jr. and Caroline P. Mackie, for Buncombe County Board of Commissioners, amicus curiae.*

*Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, James W. Doggett, Deputy Solicitor General, and Zachary W. Ezor, Solicitor General Fellow, for Governor Roy A. Cooper II and Attorney General Joshua H. Stein, amici curiae.*

*Phelps Dunbar LLP, by Nathan A. Huff and Jared M. Burtner, for National Republican Congressional Committee, amicus curiae.*

*Forward Justice, by Kathleen E. Roblez, Caitlin A. Swain, Daryl V. Atkinson, Ashley M. Mitchell, and Aviance Brown; and Irving Joyner for NC NAACP, amicus curiae.*

*Poyner Spruill LLP, by Caroline P. Mackie, for Professor Charles Fried, amicus curiae.*

HUDSON, Justice.

¶ 1 Today, we answer this question: does our state constitution recognize that the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? We hold that our constitution’s Declaration of Rights guarantees the equal power of each person’s voice in our government through voting in elections that matter.

¶ 2 In North Carolina, we have long understood that our constitution’s promise that “[a]ll elections shall be free” means that every vote must count equally. N.C. Const. art. I, § 10. As early as 1875, this Court declared it “too plain for argument” that the General Assembly’s malapportionment of election districts “is a plain violation of fundamental principles.”<sup>1</sup> *People ex rel. Van Bokkelen, v. Canaday*, 73 N.C. 198, 225 (1875). Likewise, this Court has previously held that judicial review

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<sup>1</sup> Even earlier, in 1787, this Court held that the courts must interpret the constitution and invalidate laws that violate it. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787).



was appropriate in legislative redistricting cases to enforce the requirements of the state constitution, even when doing so means interpreting state constitutional provisions more expansively than their federal counterparts. *See Stephenson v. Bartlett*, 355 N.C. 354, 379–82 (2002).

¶ 3

“A system of fair elections is foundational to self-government.” *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 86 (Newby, C.J., concurring in the result). While partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, “with almost surgical precision,”<sup>2</sup> undermine our constitutional system of government.<sup>3</sup> Indeed, the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter

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<sup>2</sup> We note this expression was coined to describe the precision with which the North Carolina General Assembly targeted African American voters through the identification and exclusion of various forms of voter photo identification. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). We believe it is equally apt as a description of the technical proficiency with which legislators across the country dilute the power of votes through the drawing of district lines.

<sup>3</sup> In fact, the term “gerrymander” was coined in 1812 after the redrawing of Massachusetts Senate election districts to ensure the advantage of the Democratic-Republican Party under then-Governor Elbridge Gerry, in reference to a district drawn in a manner so contrived that it was said to resemble a salamander. The gerrymander was successful, as although the Federalist Party ousted Governor Gerry and flipped the Massachusetts House in the 1812 election, the Democratic-Republicans retained control of the state senate under this map. *See Elmer C. Griffith, The Rise and Development of the Gerrymander* 73–77 (1907).

preferences shift. Fortunately, the technology that makes such extreme gerrymanders possible likewise makes it possible to reliably evaluate the partisan asymmetry of such plans and review the extent to which they depart from and subordinate traditional neutral redistricting principles.

¶ 4 Partisan gerrymandering creates the same harm as malapportionment, which has previously been held to violate the state constitution: some peoples' votes have more power than others. But a legislative body can only reflect the will of the people if it is elected from districts that provide one person's vote with substantially the same power as every other person's vote. In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution.

¶ 5 Here, the General Assembly enacted districting maps for the United State Congress, the North Carolina House of Representatives, and the North Carolina Senate that subordinated traditional neutral redistricting criteria in favor of extreme

partisan advantage by diluting the power of certain people’s votes.<sup>4</sup> Despite finding that these maps were “extreme partisan outliers[,]” “highly non-responsive” to the will of the people, and “incompatible with democratic principles[,]” the three-judge panel below allowed the maps to stand because it concluded that judicial action “would be usurping the political power and prerogatives” of the General Assembly.

¶ 6

We emphatically disagree. Although the task of redistricting is primarily delegated to the legislature, it must be performed “in conformity with the State Constitution.” *Stephenson*, 355 N.C. at 371. It is thus the solemn duty of this Court to review the legislature’s work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by “condemn[ing] complaints about districting to echo into a void.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Today, we hold that the enacted maps violate several rights guaranteed to the people by our state constitution. Accordingly, we reverse the judgment of the trial court below and remand this case back to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court.

¶ 7

Our dissenting colleagues have overlooked the fundamental reality of this case. Rather than stepping outside of our role as judicial officers and into the policymaking realm, here we are carrying out the most fundamental of our sacred duties: protecting

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<sup>4</sup> The 2021 enacted plans for Congress, the North Carolina House of Representatives, and the North Carolina Senate have been attached in an appendix for ease of reference.

the constitutional rights of the people of North Carolina from overreach by the General Assembly. Rather than passively deferring to the legislature, our responsibility is to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state. Here, our responsibility is to determine whether challenged apportionment maps encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power. This role of the courts is not counter to precedent but was one of the earliest recognized. In 1787, in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), in a passage quoted by the dissenters, the Court held that it must step in to keep the General Assembly from taking away the state constitutional rights of the people, and “if the members of the General Assembly could do this, they might with equal authority . . . render themselves the Legislators of the State for life, without any further election of the people[.]” *id.* at 7. This we cannot countenance.

¶ 8

The dissenters here do not challenge in any way, as Legislative Defendants presented no evidence at trial to disprove, the extensive findings of fact of the trial court, to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others. Instead, they attempt at some length to justify our taking no action to correct the constitutional violations or to ignore them altogether. For example, while acknowledging that the “right to vote *on equal terms*

is a fundamental right,” citing *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990) (emphasis by the dissent), the dissent asserts, contrary to the findings and the extensive evidence at the trial and with no citation to the record or other authority, that “partisan gerrymandering has no significant impact upon the right to vote on equal terms.”

¶ 9 Our contrary view is the beating heart of this case. Accordingly, we must act as a Court to make sure that the rights of the people are treated with proper respect. In so doing, we are protecting the individual rights of voters to cast votes that matter equally, as guaranteed by our constitution in article I, sections 10, 12, 14, and 19:

Sec. 10. Free elections.

All elections shall be free.

Sec. 12. Right of assembly and petition.

The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; . . . .

Sec. 14. Freedom of speech and press.

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

Sec. 19. Law of the land; equal protection of the laws.

. . . No person shall be denied the equal protection of the laws; . . . .

N.C. Const. art. I, §§ 10, 12, 14, 19. We ground our decision in the text, structure, history, and intent of these provisions from the Declaration of Rights.

¶ 10 Despite the dissenters' repeated assertions, we seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group. We are only upholding the rights of individual voters as guaranteed by our state constitution. As the dissenters have noted, in *Deminski* and *Corum*, this Court has recently recognized and even expanded the role of the Court to interpret and protect individual rights enumerated in the state constitution.

¶ 11 In this opinion, we give as much direction as appropriate to the General Assembly while fully respecting their authority to proceed first in the effort to draw maps that meet constitutional standards. Should they be unable to do so or if they produce maps that fail to protect the constitutional rights of the people, the trial court may select maps by the process it deems best, subject to our review, in accordance with the timeline already set out in our order of 4 February 2022.

## I. Factual and Procedural Background

### A. Redistricting Process

¶ 12 Article II, sections 3 and 5 of the North Carolina Constitution require that “[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the [legislative] districts and the apportionment of Senators [and Representatives] among those districts, subject to [certain] requirements[.]” N.C. Const. art. II § 3, 5. This redistricting authority is subject to limitations contained in the North Carolina

Constitution, including both in the provisions allocating the initial redistricting responsibility to the General Assembly and in other provisions which have been interpreted by this Court to be applicable to the redistricting process. *See, e.g., Stephenson*, 355 N.C. 354; *Blankenship v. Bartlett*, 363 N.C. 518 (2009). Additionally, the General Assembly must comply with all applicable provisions of federal law, including federal one-person-one-vote requirements and the Voting Rights Act, under Article I, sections 3 and 5 of the North Carolina Constitution. *See id.*

¶ 13 On 12 February 2021, the United States Census Bureau announced that its release of the 2020 census data would be delayed by the COVID-19 pandemic and would not be released until the fall of 2021. On 24 February 2021, North Carolina State Board of Elections Executive Director Karen Brinson Bell recommended to the House Elections Law and Campaign Finance Reform Committee that the 2022 primary elections be delayed to a 3 May primary, 12 July second primary, and 8 November general election. The Committee, however, “did not follow the Board’s recommendations to delay the primaries and provide more time for the redistricting cycle.” The full census data was ultimately released to the states on 12 August 2021.

¶ 14 On 5 August 2021, the General Assembly’s Senate Committee on Redistricting and Elections and House Redistricting Committee convened a Joint Meeting to begin the discussion on the redistricting process. On 9 August 2021, the chairs of the Joint Redistricting Committee released its “2021 Joint Redistricting Committee Proposed

Criteria.” During the subsequent public comment period and committee debate, several citizens (including counsel for plaintiff Common Cause) and legislators (including Senate Minority Leader Dan Blue Jr.) urged the committee to change the criteria, which mandated a “race-blind” approach, to allow for the consideration of racial data in order to ensure compliance with the Voting Rights Act (VRA). The Joint Committee rejected these proposals. On 12 August 2021, the Joint Committee adopted the final redistricting criteria (Adopted Criteria), which were as follows:

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

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

**Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county



lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

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

**Racial Data.** Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

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

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

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

**Election Data.** Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

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

**Community Consideration.** So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

¶ 15 On 5 October 2021, after thirteen public hearings across the state during the month of September, the House and Senate redistricting committees convened separately to begin the redistricting process. The committee chairs announced that beginning on 6 October 2021, computer stations would be available in two rooms for legislators to draw potential maps. These stations would be open during business hours, and both the rooms and the screens of the station computers would be live-streamed and available for public viewing while the stations were open. In an apparent effort to show transparency and instill public confidence in the redistricting process, Legislative Defendants “requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. That software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software.” “According to Representative [Destin] Hall, [Chair of the House Standing Committee on Redistricting,] the Committee and ‘the House as a whole’ would ‘only consider maps that are drawn in this committee room, on one of the four stations.’”

¶ 16 However, “[w]hile the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data.” For instance, between sessions at the public computer terminals, Representative Hall, who “personally drew nearly all of the House map [later] enacted[,] . . . met with his then-General Counsel . . . and others about the map-drawing in a private room adjacent to the public map-drawing room.” During these meetings, and sometimes while sitting at the public terminals, Representative Hall viewed “concept maps” created on an unknown computer and using unknown software and data.<sup>5</sup> Further, “Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced.”

¶ 17 Proposed versions of the congressional and House maps were filed on 28 and 29 October 2021 and then passed several readings in each chamber without alteration. A proposed version of the Senate map was filed on 29 October 2021. On 1 November 2021 the Senate Redistricting Committee adopted a substitute map. On 2

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<sup>5</sup> On 21 December 2021, during trial, the court ordered Legislative Defendants to produce these “concept maps” and related materials. Legislative Defendants never did so. Instead, Legislative Defendants asserted in verified interrogatory responses that “the concept maps that were created were not saved, are currently lost[,] and no longer exist.”

November 2021, the Committee adopted two amendments offered by Senator Natasha Marcus and Senator Ben Clark, respectively. On 3 and 4 November 2021, the final versions of each map passed several readings in each chamber without further alteration.

¶ 18 On 4 November 2021, the congressional, House, and Senate reapportionment maps were ratified into law as S.L. 2021-174, S.L. 2021-175, and S.L. 2021-173, respectively. Each map passed along strict party-line votes in each chamber.

### **B. Litigation**

¶ 19 On 16 November 2021, plaintiffs North Carolina League of Conservation Voters, Inc., Henry M. Michaux Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernos, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George (NCLCV Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure. NCLCV Plaintiffs' complaint alleged

that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech

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and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

¶ 20 On 18 November 2021, plaintiffs Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, Virginia Walters Brien, Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Lauren Floor, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, Kristiann Herring, and David Dwight Brown (Harper Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 500085) and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485. On 13 December 2021, Harper Plaintiffs amended their complaint. Harper Plaintiffs' complaint "allege[d] that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14."

¶ 21 On 19 and 22 November 2021, "the NCLCV and Harper actions, respectively, were assigned to [a] three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1." On 3 December 2021, the panel consolidated the two cases

pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' motions for preliminary injunction. On 3 December 2021, "after considering the extensive briefing and oral arguments on the motions, the [panel] denied [the parties'] Motion for Preliminary Injunction."

¶ 22 NCLCV Plaintiffs and Harper Plaintiffs subsequently filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, "[a]fter initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay." NCLCV Plaintiffs and Harper Plaintiffs subsequently filed several items with this Court: two petitions for discretionary review prior to determination by the Court of Appeals; a motion to suspend appellate rules to expedite a decision; and a motion to suspend appellate rules and expedite schedule. On 8 December 2021, this Court granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." "The Order further directed [the panel] to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before [11 January 2022]."

¶ 23 On 13 December 2021, the panel "entered a scheduling order . . . expediting discovery and scheduling [a] trial to commence on [3 January 2022]." That same day,



“Common Cause moved to intervene in the[ ] consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature’s partisan gerrymandering goals.” On 15 December 2021, the panel granted plaintiff Common Cause’s motion. On 16 December 2021, plaintiff Common Cause filed its complaint, alleging

that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

¶ 24 On 17 December 2021, “Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter “Legislative Defendants”) filed their Answer to NCLCV Plaintiffs’ Complaint.” Legislative Defendants asserted numerous affirmative defenses, including, *inter alia*, that: (1) granting the requested relief will violate the

VRA and the Constitution of the United States; (2) granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; (3) the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; (4) plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; (5) plaintiffs' claims are barred by the doctrine of laches; (6) plaintiffs have failed to state claims upon which relief can be granted; (7) plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; (8) the only limitations on redistricting legislation are found in article II, sections 2, 3, 4, and 5 of the North Carolina Constitution; (9) plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; (10) plaintiffs' claims are nonjusticiable and fail to provide judicially manageable standards; (11) plaintiffs lack standing; and (12) plaintiffs have unclean hands and therefore are not entitled to equitable relief.

¶ 25 On 17 December 2021, defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their answer to Harper

Plaintiffs' amended complaint. That same day, these same defendants along with defendant State of North Carolina and defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their answer to NCLCV Plaintiffs' complaint.

¶ 26 “Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the [c]ourt expeditiously ruled upon over ten discovery-related motions . . . .” “Plaintiffs collectively designated eight individuals as expert witnesses and submitted accompanying reports[, and] Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports.” The parties' discovery period closed on 31 December 2021, and a three-and-one-half day trial commenced on 3 January 2022.

### **C. Trial Court's Judgment**

#### ***1. Findings of Fact***

¶ 27 First, the trial court made extensive factual findings based on the evidence presented at trial. In short, these factual findings confirmed plaintiffs' assertions that each of the three enacted maps were “extreme partisan outliers” and the product of “intentional, pro-Republican partisan redistricting.”

##### ***a. Plaintiffs' Extreme Partisan Gerrymandering Claims***

¶ 28 After reviewing the factual and procedural history summarized above, the trial court made factual findings regarding plaintiffs' constitutional claims of extreme

partisan gerrymandering. First, the court considered whether the evidence presented showed partisan intent and effects. Addressing direct evidence, the court found that “[t]here is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans” and noted that “[t]he Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans.” Further, the court noted that “[n]o elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans.” However, the lack of direct evidence of intent did not stop the trial court from determining that the enacted plans were intentionally constructed to yield a consistent partisan advantage for Republicans in a range of electoral environments.

¶ 29 Instead, the trial court turned to circumstantial evidence of partisan intent and effects. After surveying the recent history of partisan redistricting litigation and legislation and the neutral districting criteria Legislative Defendants claimed they had adhered to, the court reviewed plaintiffs’ and Legislative Defendants’ expert analyses of the enacted plans. The court’s extensive factual findings regarding each expert’s analysis are summarized below.

¶ 30 ***Harper Plaintiffs’ Expert Dr. Jowei Chen.*** “Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems.” “Dr. Chen analyzed the

partisan bias of the enacted congressional plan on a statewide and district-by-district basis.” Specifically, Dr. Chen analyzed the congressional plans using

various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. Dr. Chen’s simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. Specifically, by holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations.

¶ 31 “Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan cannot be explained by North Carolina’s political geography or adherence to the Adopted Criteria.”

¶ 32 ***Harper Plaintiffs’ Expert Dr. Christopher Cooper.*** “Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina.” Using

statewide voting data from the 2020 election, “Dr. Cooper analyzed the 2021 Congressional Plan [and] the partisan effects of each district’s boundaries.” Based on Dr. Cooper’s analysis, the court observed that “[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election.” This decrease, the court observed, is enacted “by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each.” The court further noted that “[t]here was no population-based reason” for these splits.

¶ 33 After reviewing Dr. Cooper’s maps showing these redistricted congressional lines as compared to county boundaries and VTD boundaries, the court noted that “[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state.” Accordingly, the court found “that the ‘cracking and packing’ of Democratic voters in Guilford, Mecklenburg, and Wake counties has ‘ripple effects throughout the map.’”

¶ 34 Reviewing Dr. Cooper’s analysis of a few specific congressional districts within the new map as exemplars, the court noted that “[t]he 2021 Congressional Plan places



the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, ‘virtually guaranteeing’ that the Democratic incumbent will lose her seat.” Similarly, the court observed that “[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] ‘overwhelmingly favors’ the Republican candidate based on the district’s partisan lean.”

¶ 35 The court then found that the 2021 North Carolina House and Senate Plans “similarly benefit the Republican party.” The court noted that “Legislative Defendants’ exercise of . . . discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates’ partisan advantage, and this finding is consistent with a finding of partisan intent.” Finally, the court noted Dr. Cooper’s finding that the “partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina’s citizenry and their representatives in the General Assembly.”

¶ 36 ***Harper Plaintiffs and Plaintiff Common Cause’s Expert Dr. Jonathan Mattingly.***

Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability.

. . . Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo (“MCMC”) Algorithm to create a representative set, or “ensemble,” of 100,000 maps for the

state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. The algorithm produced maps that accorded with traditional districting criteria. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits.

“After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans.”

¶ 37 The trial court found, “based upon Dr. Mattingly’s analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting.” The court further determined that “[t]he Congressional map is ‘an extreme outlier’ that is ‘highly non-responsive to the changing opinion of the electorate.’”

¶ 38 Regarding the North Carolina legislative districts, the court likewise found, “based upon Dr. Mattingly’s analysis, that the State House and Senate plans are extreme outliers that ‘systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.’” The court found that “[t]he intentional partisan redistricting in both chambers is especially effective in

preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly’s ensemble would have broken it.”

¶ 39           Regarding the North Carolina House map, the court further found that “the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered.” The court determined that the North Carolina House “map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is ‘astronomically small.’” The court determined that

[t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. In every election scenario, Republicans won more individual seats than they statistically should under nonpartisan maps.

. . . The 2021 House Plan’s partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 democratic seats or fewer, even in situations where virtually all of the plans in the

nonpartisan ensemble would elect 49 Democratic seats or more.

¶ 40

Regarding the North Carolina Senate, the court found that

the results are the same: the enacted plan is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a [Republican] supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

¶ 41

The court then considered Dr. Mattingly's "cracking and packing" analysis of the congressional, House, and Senate maps. Here, the court found

that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates, as shown in [Dr. Mattingly's] charts. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—*i.e.*, the competitive districts—in comparison to the enacted plan.

¶ 42

The trial court found similar "cracking and packing" in the House maps, noting that "the enacted maps, as compared to the sample maps, there is an

overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts.” The court found that “the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps.” In contrast, the court found that

[i]n the middle districts—between the 60th most Democratic seat and the 80th most democratic seat—the Democratic vote fraction in the enacted plan is far below the . . . nonpartisan plans. These are the seats that determine the supermajority line and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The [c]ourt [found] that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map’s partisan outlier behavior. Those Democrat[ic] votes are instead placed in the 90th to 105th most Democratic district[s], where they are wasted because those seats are already comfortably Democratic.

¶ 43           Regarding cracking and packing in the Senate maps, the court found that “the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats.”

¶ 44           Next, the court determined that “a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan.”

¶ 45           The court also observed that the General Assembly selectively prioritized preserving municipalities within the maps, choosing to do so “only when doing so advantaged Republicans.” “Put differently, prioritizing municipality preservation in

the Senate plans appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, . . . prioritizing municipalities would not have favored the Republican party in comparison.”

¶ 46 Finally, the court found that “[t]he partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble could not be explained by political geography or natural packing.”

¶ 47 ***Harper Plaintiffs’ Expert Dr. Wesley Pegden.*** “Dr. Pegden was qualified and accepted as an expert at trial in probability.”

In this case, Dr. Pegden used . . . outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan constraints, and then evaluated the partisan characteristics of the resulting comparison maps.

The trial court noted that “Dr. Pegden applied these constraints in a ‘conservative’ way, to ‘avoid second-guessing the mapmakers’ choices in how they implemented the districting criteria.” The court observed that Dr. Pegden’s algorithm repeated this process “billions or trillions of times”: “begin[ning] with the enacted map, mak[ing] a small random change complying with certain constraints, and us[ing] historical voting data to evaluate the partisan characteristics of the resulting map.”

¶ 48 Based on Dr. Pegden’s analysis, the court found “that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated.” Accordingly, the court determined that “the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden’s] algorithm.” In every “run” of the analysis, the court found, “the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated by making tiny random changes to the district’s boundaries.” “[I]f the districting had not been drawn to carefully optimize its partisan bias,” the court stated, “we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect.”

¶ 49 The court found similar extremes regarding North Carolina’s legislative districts. Regarding the North Carolina House, the court determined based on Dr. Pegden’s analysis that “the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries.” Accordingly, the court found “that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints.” Regarding the North Carolina Senate, the court determined “that the



enacted Senate map was more favorable to Republicans than 99.9% of comparison maps.” Accordingly, the court found “that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints.” “These results,” the court determined, “cannot be explained by North Carolina’s political geography.”

¶ 50 ***NCLCV Plaintiffs’ Expert Dr. Moon Duchin.*** “Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting.” The trial court noted that Dr. Duchin’s analysis “uses a Close-Votes-Close-Seats principle, [in which] ‘an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split.’” The trial court observed that “Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where ‘a party or group with more than half of the votes should be able to secure more than half of the seats.’”

¶ 51 Based on Dr. Duchin’s analysis, the trial court found “that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party.” Rather, the court determined, “[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates.” The results of Dr. Duchin’s analysis, the court found, “reveal a partisan skew in close elections.” For instance, the court determined that in a recent

statewide election in which the Republican candidate won by less than 500 total votes,

[t]he Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina’s congressional districts, 28 (56%) of North Carolina’s Senate districts, and 68 (57%) of North Carolina’s House districts. Nor is that election unusual.

In fact, the court found “that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state’s congressional delegation, the State House, and the State Senate.” “This is true[,]” the court noted, “even when Democrats win statewide by clear margins.” Or, more plainly, “more Democratic votes usually do not mean more [D]emocratic seats.” Accordingly, the trial court determined that “[t]he Enacted Plans resiliently safeguard electoral advantage for Republican candidates. This skewed result is not an inevitable feature of North Carolina’s political geography.” Rather, the court found, “[t]he plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins.”

¶ 52 Next, the court specified that these findings were consistent across all three of the enacted maps. First, regarding the enacted congressional plan, the court found that “a clear majority of Democratic votes does not translate into a majority of seats.”

The court determined “that the Enacted Congressional Plan achieves these results by the familiar means of ‘packing’ and ‘cracking’ Democratic voters across the state.”

¶ 53

Second, the court found that

[t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

“As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . .”

¶ 54

Third, the court likewise determined that

the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates.

“As with the Enacted Congressional Plan and the Enacted Senate Plan, the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . .”

¶ 55

***Plaintiff Common Cause’s Expert Dr. Daniel Magleby.*** “Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering.” Like plaintiffs’ previous experts, Dr. Magleby “used a peer-reviewed algorithm . . . to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps.” “Dr. Magleby . . . used this algorithm to develop a set of between 20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature’s 2021 criteria for drawing districts.” Using voting data from statewide races between 2016 and 2020, Dr. Magleby compared expected performance under the enacted maps with performance in the neutral sample maps. More specifically, Dr. Magleby’s analysis utilized “median-mean” calculations. Median-mean calculations compare “the average Democratic vote share” in districts statewide with “the median Democratic vote share” in those districts “by lining up the enacted . . . districts from least Democratic to most Democratic and identifying the districts that fell in the middle. In a nonpartisan map, a low median-mean difference is expected.”

¶ 56

Based on Dr. Magleby’s analysis, the trial court found “that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina.” Specifically, the court determined

“that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps.” In fact, the court found, “[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage.”

¶ 57

***Legislative Defendants’ Expert Dr. Michael Barber.***

Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting.

. . . Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs’ Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts.

. . . Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. In Dr. Barber’s simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries, minimization of county traversals within clusters, and geographic compactness. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed . . . .

¶ 58

Although Dr. Barber was qualified as an expert, the trial court found that “Dr. Barber’s method is not without limitations.” “Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals[,]” the court noted, “differences between the range of his simulated plans and the 2021 Plans may

be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals.” The court observed that “under Dr. Barber’s analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations.” The court noted Dr. Barber’s subsequent conclusion that “the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers.” Notably, the court did not adopt Dr. Barber’s findings as its own as it did for plaintiffs’ experts and later explicitly rejected his conclusions regarding the impact of political geography on the enacted maps.

¶ 59

***Legislative Defendants’ Expert Dr. Andrew Taylor.*** “Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina[ ] and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions.” The trial court reviewed Dr. Taylor’s analysis of the enacted maps under political science principles, including noting that “in political science, an election is generally regarded as ‘equal’ so long as ‘[e]ach person has one vote to elect one legislator who has one vote in the legislature,’ and departures even from that ideal are tolerated.” Likewise, the court noted Dr. Taylor’s opinion that “[i]n political science, equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual

participation as a citizen.” The court further noted Dr. Taylor’s opinion that “purportedly ‘fair’ redistricting plans are not understood in the political-science field as germane to free speech, [because free speech] can occur regardless of the shapes and sizes of districts.” “For many of these reasons,” the court noted, “measuring gerrymanders can be elusive, problematic, and beyond the consensus of political scientists.”

¶ 60 The trial court also noted Dr. Taylor’s opinion that the “significant change in North Carolina’s political geography over the past thirty years . . . ‘is not the result of redistricting[,]’ ” but is instead “a function of slow social and economic forces, changes in the state’s citizenry, and party ideology.” As with Dr. Barber’s similar conclusion noted above, the trial court again later explicitly rejected Dr. Taylor’s conclusions regarding the impact of political geography on the enacted maps.

¶ 61 ***Legislative Defendants’ Rebuttal Expert Sean Trende.*** “Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps[,] and analyzing redistricting maps.” The trial court noted that Mr. Trende used color-coded maps of North Carolina counties “noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally.” It is unclear



how, if at all, the trial court considered Mr. Trende's testimony. This concluded the trial court's review of the expert testimony.

¶ 62 After considering the analysis of each expert, the trial court engaged in a district-by-district analysis of each of the three enacted maps: those for the North Carolina Senate, North Carolina House, and Congress, respectively.

¶ 63 ***North Carolina Senate Districts.*** The trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the Senate district groupings to not be the result of intentional, pro-Republican redistricting through packing and cracking.

¶ 64 ***North Carolina House of Representatives District.*** The trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the “packing” and “cracking” of Democratic voters as the “result of intentional, pro-Republican partisan redistricting”: the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Notably, however, the trial court found the Duplin-Wayne House County Grouping and the Onslow-Pender House County Grouping “to not be the result of intentional, pro-Republican partisan redistricting.”

¶ 65 ***North Carolina Congressional Districts.*** Next, the trial court found “that the 2021 Congressional plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina’s Congressional delegation.” The court found that the enacted congressional map “fails to follow and subordinates the Adopted Criteria’s requirement[s]” regarding splitting counties and VTDs. Further, the court found

that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria’s requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be

under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

Further, “when compared to the 1,000 computer-simulated plans[,]” the court found that “the enacted congressional plan is a statistical outlier” in regard to the total number of Republican-favoring districts it creates.

¶ 66 Next, the court noted four types of analyses in particular that confirm the “extreme partisan outcome” of the congressional map that “cannot be explained by North Carolina’s political geography or by adherence to Adopted Criteria”: (1) “mean-median difference” analysis ; (2) “efficiency gap” analysis (“measur[ing] . . . the degree to which more Democratic or Republican votes are wasted across an entire districting plan”); (3) “the lopsided margins test”; and (4) “partisan symmetry” analysis. Based on these methods, the trial court found “that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage.”

¶ 67 Next, the trial court considered “whether the congressional plan is a statistical partisan outlier at the regional level.” Here, the court found “that the enacted congressional plan’s districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions.” These included the Piedmont Triad area, the Research Triangle area, and the Mecklenburg County area. “The [c]ourt [found] that the packing and cracking of Democrats in [these

regions] could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria." "The enacted congressional map[,] the court determined, "was therefore designed in order to accomplish the legislature's predominant partisan goals." Later, the court again confirmed "that the enacted congressional plan's partisan bias goes beyond any 'natural' level of electoral bias caused by North Carolina's political geography or the political composition of the state's voters, and this additional level of partisan bias . . . can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party."

¶ 68 Next, as it did for the North Carolina House and Senate districts, the trial court engaged in a district-by-district analysis of all fourteen enacted congressional districts. After individual analysis, the court found all fourteen districts "to be the result of intentional, pro-Republican partisan redistricting."

¶ 69 Finally, the trial court noted that "elections are decided by any number of factors." Statistical analyses, the court observed, "treat the candidates as inanimate objects" and "assume that voters will vote along party lines." In essence, the court doubted that a computer analysis could ever "take the human element out of the human." "Notwithstanding these doubts," though, the court "conclude[d] based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting." This concluded the court's factual findings regarding plaintiffs' partisan gerrymandering claims.

*b. Plaintiffs' Intentional Racial Discrimination and Racial Vote Dilution Claims*

¶ 70 Second, the trial court considered plaintiffs' intentional racial discrimination and racial vote dilution claims. Beginning with intentional racial discrimination, the court found that "[t]here is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans." Next, the court noted plaintiffs' circumstantial evidence of racial discrimination, including testimony from plaintiff Common Cause's expert James Leloudis II, regarding the historical connection between North Carolina's past racial gerrymandering practices and the current plans.

¶ 71 The trial court then considered plaintiffs' racial vote dilution claims. After reviewing the evidence presented by plaintiffs' and Legislative Defendants' experts on this matter, the court found that "[r]ace was not the predominant, overriding factor in drawing the districts in the Enacted Plans." The court found that "[t]he General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations." Accordingly, the court found that a district-by-district analysis of racial vote dilution, as it had previously performed for the extreme partisan gerrymandering claim, was not necessary. This concluded the trial court's findings regarding plaintiffs' intentional racial discrimination and racial vote dilution claims.

*c. Plaintiffs' Whole County Provision Claims*

¶ 72 Finally, the court made findings regarding plaintiffs' whole county provision claim. Here, the court noted that under the enacted plans, 35 senate districts and 107 North Carolina House districts split counties. The court observed that the Senate districts divided 15 total counties, while the House districts divided 37 total counties. The court noted that in instances where "multiple county groupings were possible under the Supreme Court's interpretation of the Whole County Provision[,] . . . groupings were chosen from the range of legally possible groupings." "Within each remaining county grouping containing a district challenged under the Whole County Provision," the court found, "the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria."

## ***2. Trial Court's Conclusions of Law***

¶ 73 After making these extensive findings of fact, the trial court concluded as a matter of law that claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. Accordingly, the court concluded that the enacted maps are not unconstitutional as a result of partisan gerrymandering.

### ***a. Standing***

¶ 74 First, the court addressed plaintiffs' standing to bring their various claims. Because "[i]ndividual private citizens and voters of a county have standing to sue to

seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5[.]” the court held, “the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing.” However, based on its legal conclusion that “Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution[.]” the court concluded that all plaintiffs lack standing for these claims.

¶ 75 Finally, the court addressed NCLCV Plaintiffs’ and Common Cause Plaintiffs’ standing to bring claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because the court found “there to be no factual basis underlying these asserted claims,” it concluded that “there is a lack of the requisite ‘direct injury’—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, [the court concluded that] these Plaintiffs do not have standing for these claims.” Similarly, the court concluded that “Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment . . . directing the legislative process to be undertaken in redistricting.”

*b. Partisan Gerrymandering Claims*

¶ 76 Next, the court addressed plaintiffs’ partisan gerrymandering claims under various provisions of the North Carolina Constitution. Here, the court determined that plaintiffs’ claims amounted to political questions that are nonjusticiable under the North Carolina Constitution. Specifically, after surveying the history of the



constitutional provisions under which plaintiffs brought their claims, the court concluded that “redistricting is an inherently political process” that “is left to the General Assembly.”

¶ 77 The court then addressed each of plaintiffs’ constitutional claims. First, the court held that the enacted maps do not violate the free elections clause, which mandates that “[a]ll elections shall be free.” N.C. Const. art. I, § 10. The court noted that “[w]hile the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause.” Based on a survey of the clause’s history, the court “conclude[d] that the Free Elections Clause does not operate as a restraint on the General Assembly’s ability to redistrict for partisan advantage.”

¶ 78 Second, the trial court addressed plaintiffs’ claims under the free speech clause and the equal protection clause. After reviewing the historical background of the addition of these clauses to the constitution in 1971, the court concluded that “the incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 was not intended to bring about a fundamental change to the power of the General Assembly.” Accordingly, the court refused to “assume that . . . the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting.”

¶ 79 From this historical foundation, the court concluded that “the Enacted Maps do not violate the Equal Protection Clause.” The court concluded that although “[i]t is true that there is a fundamental right to vote[,] . . . [r]edistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person’s right to cast a vote.” Accordingly, and because political affiliation is not a suspect class, the court concluded that “[a]ny impingement is limited and distant and as such is subject to rational basis review.” The court then concluded “that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause.”

¶ 80 Third, the court likewise concluded that “the Enacted Plans do not violate the Free Speech Clause.” Specifically, the court concluded that “plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district.”

¶ 81 Fourth, the trial court concluded that “the Enacted Plans do not violate the Right of Assembly Clause.” Specifically, the court noted that “Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district.”

¶ 82 In total, the trial court concluded that “[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech[,] or Freedom of Assembly

Clauses found in Article I of the 1971 Constitution.” “Therefore, the [c]ourt conclude[d] that our Constitution does not address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs’ claims on the basis of ‘extreme partisan advantage’ fail.”

*c. Justiciability*

¶ 83 Next, the court again addressed justiciability. First, the court considered whether the North Carolina Constitution delegates the responsibility and oversight of redistricting exclusively to the General Assembly. Citing article II, sections 3, 5, and 20, the court concluded that “[t]he constitutional provisions relevant to the issue before [it] establish that redistricting is in the exclusive province of the legislature.”

¶ 84 Second, the court considered “whether satisfactory and manageable criteria or standards exist for judicial determination of the issue.” Here, relying on its analysis of the Supreme Court of the United States in *Rucho*, 139 S. Ct. at 2506–07, regarding the justiciability of partisan gerrymandering claims in *federal* courts, the trial court “determine[d] that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach.”

¶ 85 In reaching this conclusion, the court noted that it

agree[s] with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. *Rucho*, 139 S. Ct.] at 2504. Furthermore, it has the potential to violate

“the core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 567 U.S. 787, 824 . . . (2015). Also, it can represent “an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.” *LULAC v. Perry*, 548 U.S. 399, 456 . . . (2006) (Stevens, J., concurring in part and dissenting in part) (quotation and citation omitted)).

The Court then added that it “neither condones the enacted maps nor their anticipated potential results” and that it has a “disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule.” Nevertheless, the court concluded that because redistricting “is one of the purest political questions which the legislature alone is allowed to answer[,]” judicial action “in the manner requested . . . would be usurping the political power and prerogatives of an equal branch of government.” Accordingly, the trial court concluded that plaintiffs’ partisan gerrymandering claims are nonjusticiable.

*d. Intentional Racial Discrimination and Racial Vote Dilution*

¶ 86 Next, the trial court addressed plaintiffs’ claims of intentional racial discrimination and racial vote dilution. The court “conclude[d] that based upon the record before [it], Plaintiffs have failed to prove the merit of their claim.”

¶ 87 Here, the court noted that “[t]he North Carolina Constitution’s guarantees of ‘substantially equal voting power’ and ‘substantially equal legislative representation’ are violated when a redistricting plan deprives minority voters of ‘a fair number of

districts in which their votes can be effective,’ measured based on ‘the minority’s rough proportion of the relevant population[.]’ ” quoting *Bartlett v. Strickland*, 556 U.S. 1, 28–29 (2009) (Souter, J., dissenting). The court then stated that “[a]n act of the General Assembly can violate North Carolina’s Equal Protection Clause if discriminatory purpose was ‘a motivating factor.’ ” “And whether discriminatory purpose was a motivating factor[.]” the court observed, “can be ‘inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.’ ” “To determine whether this is true,” the court stated, “the court may weigh the law’s historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law’s disproportionate impact.”

¶ 88 Based upon these standards, the court then concluded that “NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn.” The court first reached this conclusion based on plaintiffs’ “fail[ure] to show a predominant racial motive through direct [or circumstantial] evidence.” Second, the court concluded, “Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*.” Third, the court concluded that “Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength

of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group.” Although the court agreed with plaintiffs’ showing “that a substantial number of Black voters are affiliated with the Democratic Party[,]” it nevertheless concluded that plaintiffs had not shown

how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before th[e] [c]ourt showing that race *and* partisanship were *coincident* goals predominating over all other factors in redistricting.

Accordingly, the court rejected plaintiffs’ claims of intentional racial discrimination within the enacted plans.

¶ 89 Second, the court addressed plaintiffs’ claims of racial vote dilution in violation of the free elections clause. Having previously concluded that the free elections clause should be narrowly interpreted to not apply in the redistricting context, the court concluded that “NCLCV Plaintiffs’ claim that the Enacted Plans unnecessarily dilute the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis.” Accordingly, the court rejected this claim.

*e. Whole-County Provision Claims*

¶ 90 Next, the trial court addressed plaintiffs' claims under the whole county provision of article II, sections 3 and 5 of the North Carolina Constitution. Although the boundaries of certain legislative districts under the enacted plans indeed crossed county lines, the court "conclude[d] that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383[-]84 . . . (2002)." Accordingly, the court "conclude[d] that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting."

*f. Declaratory Judgment Claim*

¶ 91 Finally, the trial court addressed plaintiff Common Cause's declaratory judgment claim regarding the redistricting process laid out in *Stephenson* and *Dickson v. Rucho*, 368 N.C. 481 (2015). On this issue, the court stated that "[t]he requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WPC and VRA." But, the court noted, "[t]here is nothing in *Stephenson* that requires any particular analysis

prior to making a decision as to whether VRA districts are necessary.” Accordingly, the court concluded that “[t]he fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required.” The court then stated that, in this situation, “[w]hat Plaintiff Common Cause asks of this [c]ourt is to impose a judicially-mandated preclearance requirement . . . [that] does not exist in *Stephenson*.” Therefore, the court concluded as a matter of law “that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief.”

### **3. Trial Court’s Decree**

¶ 92 Following these extensive factual findings and conclusions of law, the trial court issued its ultimate decree. Specifically, the trial court ordered that (1) plaintiffs’ requests for declaratory judgment are denied; (2) plaintiffs’ requests for permanent injunctive relief are denied; (3) the court’s judgment fully and finally resolves all claims of plaintiffs, judgment is entered in favor of Legislative Defendants, and plaintiffs’ claims are dismissed with prejudice; and (4) the candidate filing period for the 2022 primary and municipal elections is set to resume at 8:00 a.m. on Thursday, 24 February 2022, and shall continue through and end at 12:00 noon on Friday, 4 March 2022.

### **D. Present Appeal**

¶ 93 Pursuant to this Court’s 8 December 2021 order certifying the case for discretionary review prior to determination by the Court of Appeals, all plaintiffs filed



notices of appeal to this Court from the trial court's final judgment on 11 and 12 January 2022. The parties' briefs and arguments before this Court largely echoed the arguments made before the trial court. Namely, plaintiffs asserted that the enacted plans constitute extreme partisan gerrymandering in violation of the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the North Carolina Constitution and that these state constitutional claims were justiciable in state court. Legislative Defendants argued that plaintiffs' claims presented nonjusticiable political questions and therefore did not violate any of the asserted state constitutional provisions. The Court also accepted amicus briefs from several interested parties. Due to the time-sensitive nature of this case, oral arguments were calendared and heard in a special session on 2 February 2022.

## **II. Legal Analysis**

¶ 94 Now, this Court must determine whether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution. After careful consideration, we conclude that partisan gerrymandering claims are justiciable under the North Carolina Constitution and that Legislative Defendants' enacted plans violate each of these provisions of the North Carolina Constitution beyond a reasonable doubt.

## A. Standing

¶ 95 As a threshold issue, we must determine whether plaintiffs have standing to bring their claims. As noted above, the trial court ruled that individual NCLCV Plaintiffs had standing to challenge the enacted plans under the whole county provision but that plaintiffs lacked standing to bring their partisan gerrymandering claims because they had “not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution.” The court further determined that NCLCV Plaintiffs and plaintiff Common Cause likewise lacked standing to bring their intentional racial discrimination and racial vote dilution claims under the North Carolina Constitution. Specifically, the court ruled that “[b]ecause . . . there [is] no factual basis underlying these asserted claims, there is a lack of the requisite ‘direct injury’—i.e., the deprivation of a constitutionally guaranteed personal right.”

¶ 96 We cannot agree. As this Court held in *Committee to Elect Dan Forest v. Employees Political Action Committee*, “the federal injury-in-fact requirement has no place in the text or history of our Constitution.” 376 N.C. 558, 2021-NCSC-6, ¶ 73. Rather, in the case of direct constitutional challenges to statutes or other acts of government, we require only the requisite “concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Id.* ¶ 64 (quoting *Stanley v. Dep’t of Cons. and Dev.*,

284 N.C. 15, 28 (1973)). Accordingly, as a “prudential principle of judicial self-restraint” and not as a limitation on the judicial power, we have required that a person challenging government action be directly injured or adversely affected by it. *Id.* ¶ 63. This prudential requirement that the person challenging a statute be directly injured or adversely affected thereby is purely to ensure that the putative injury belongs to them and not another, and hence that they “can be trusted to battle the issue.” *Id.* ¶ 64 (citing *Stanley*, 284 N.C. at 28). Accordingly, “[t]he ‘direct injury’ required in this context could be, *but is not necessarily limited to*, ‘deprivation of a constitutionally guaranteed right or an invasion of his property rights,’ ” *id.* ¶ 62 (emphasis added), and “[w]hen a person alleges the infringement of a legal right . . . arising under . . . the North Carolina Constitution, . . . the legal injury itself gives rise to standing,” *id.* ¶ 82 (emphasis added). This direct injury requirement does not require a showing that a party will in fact prevail under the constitutional theory they advance. Rather, alleging the violation of a legal right which belongs to them, even if widely shared with others and even if they are not entitled to relief under their theory of the legal right, is sufficient to show the requisite “concrete adverseness” in our courts which we, for purely pragmatic reasons, require in the resolution of constitutional questions. To hold otherwise would resuscitate an injury-in-fact requirement as a barrier to remedy by the courts in another form.

¶ 97

The trial court contravened the concrete adverseness rationale for the direct injury requirement by concluding that plaintiffs lacked standing because their partisan gerrymandering claims, which they contended violated their constitutional rights under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause, were not “cognizable.”<sup>6</sup> The allegation of violations of these constitutional rights was sufficient to generate an actual controversy and hence concrete adverseness, whether or not their theory of the violation ultimately prevailed in the courts. For example, in *Baker v. Carr*, from which this Court in part derived its concrete adverseness rationale, see *Comm. to Elect Dan Forest*, ¶ 64, the Supreme Court of the United States announced for the first time that claims of vote dilution were cognizable and justiciable under the Equal Protection Clause. See generally *Baker v. Carr*, 369 U.S. 186 (1962); see also *Comm. to Elect Dan Forest*, ¶ 46 (“[T]he only injury asserted [in *Baker*] is the impairment of a constitutional right broadly shared and divorced from any ‘factual’ harm experienced by the plaintiffs”). The constitutional right to equal protection of the laws existed although the *Baker* Court had not yet extended it to the precise theory the plaintiffs advanced. Similarly, here, the plaintiffs all had standing to challenge the maps based on their allegation of violations of their constitutional rights under the free elections clause, equal

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<sup>6</sup> The trial court also conflated the existence of a “cognizable” claim under the state constitution with one that is justiciable. A claim may violate the constitution yet not be justiciable because it is a political question.

protection clause, free speech clause, and freedom of assembly clause of our Declaration of Rights, which are injuries to legal rights that they directly suffered, irrespective of whether courts previously or the court below determined their particular theory under those rights ultimately entitled them to prevail.

¶ 98 Finally, the court also determined that “the organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution” and that “organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” We agree.

¶ 99 Taken together, the trial court’s findings are sufficient to establish that each individual and organizational plaintiff here meets the standing requirements under the North Carolina Constitution as summarized above. Accordingly, the trial court erred in ruling to the contrary.

### **B. The Political Question Doctrine**

¶ 100 We next address Legislative Defendants’ contention that plaintiffs’ claims present only nonjusticiable political questions. Whether partisan gerrymandering claims present a nonjusticiable “purely political question” under North Carolina law is a question of first impression. We have held that certain claims raising “purely

political question[s]” are “nonjusticiable under separation of powers principles.” *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 618 (2004). Purely political questions are those questions which have been wholly committed to the “sole discretion” of a coordinate branch of government, and those questions which can be resolved only by making “policy choices and value determinations.” *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)). Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 638–39 (declining to reach the merits after concluding that “the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly”).

¶ 101 The trial court and Legislative Defendants rely in part on *Rucho* and other federal cases. These cases may be instructive, but they are certainly not controlling. We have previously held that “[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.” *Goldston v. State*, 361 N.C. 26, 35 (2006). This principle extends to all justiciability doctrines. “Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text,

but are the fruit of judicial interpretation of Article III’s extension of the ‘judicial Power’ to certain ‘Cases’ or ‘Controversies.’ ” *Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 35. Originally, federal courts showed great reluctance to involve themselves in policing redistricting practices at all. The result was both the grossly unequal apportionment of representation of legislative and congressional seats and the drawing of district lines in pursuit of partisan advantage.<sup>7</sup> The judicial repudiation of any role in redistricting was summarized in *Colegrove v. Green*, where the Supreme Court declared a challenge to the drawing of congressional districting lines in Illinois nonjusticiable under the Fourteenth Amendment. 328 U.S. 549, 556 (1946). Writing for the Court, Justice Frankfurter reasoned that “effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not [fit] for judicial determination.” *Id.* at 552. “Authority for dealing with such problems resides elsewhere.” *Id.* at 554. The Court concluded, revealing the prudential basis of its reasoning, that “[c]ourts *ought not* to enter this political

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<sup>7</sup> Before the “reapportionment revolution” of *Baker v. Carr* and its progeny in the 1960s, “states had much more leeway over when, and even if, to redraw district boundaries. One result was that in many states, district lines remained frozen for decades—often leading to gross inequalities in district populations and substantial partisan biases.” Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 13 (2013). “Connecticut, for instance, kept the exact same congressional district lines for 70 years (1842–1912).” *Id.* at 8. Other state legislatures redrew maps whenever they wanted. “In every year from 1862 to 1896, with one exception, at least one state redrew its congressional district boundaries. Ohio, for example, redrew its congressional district boundaries six times between 1878 and 1890.” *Id.* Moreover, “parties were willing to push partisan advantage to the edge. To do so, partisan mapmakers carved states into districts with narrow, yet winnable, margins.” *Id.*

thicket.” *Id.* at 556 (emphasis added).

¶ 102

In the landmark decision of *Baker v. Carr*, the Supreme Court reversed course and held in a case involving claims that malapportionment violates the Equal Protection Clause of the Fourteenth Amendment that such claims are justiciable since they do not present political questions. 369 U.S. 186, 209 (1962). The *Baker* Court began its justiciability analysis by noting that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words.” *Id.* (cleaned up). After reviewing cases to discern the threads that, in various formulations, comprise a nonjusticiable political question, the Court identified what has become the standard definition of the political question doctrine under federal law:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Id.* at 217. The Court in *Baker* held that the plaintiffs’ claim under the Equal Protection Clause, unlike prior claims under the Guaranty Clause, was justiciable



because it presented, *inter alia*, “no question decided, or to be decided, by a political branch of government coequal with th[e] Court” and no “policy determinations for which judicially manageable standards are lacking,” as “[j]udicial standards under the Equal Protection Clause are well developed and familiar,” which are “that a discrimination reflects no policy, but simply arbitrary and capricious action.” *Id.* at 226. Accordingly, over a dissent written by Justice Frankfurter and joined by Justice Harlan, the Court entered the political thicket. The Court did not in that decision announce a remedy for the violation of the Equal Protection Clause but in later cases held that the principle of “one person, one vote” required as close to mathematical equality as practicable in the drawing of congressional districts and “substantial equality” in the drawing of legislative districts. *Cf. Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.”).

¶ 103           Although federal courts concluded that malapportionment claims were justiciable, the Supreme Court of the United States did not expressly hold that a

partisan gerrymandering claim was justiciable until *Davis v. Bandemer*, where it held that a partisan gerrymandering claim existed under the Fourteenth Amendment that did not present a nonjusticiable political question.<sup>8</sup> 478 U.S. 109, 124 (1986) (plurality opinion), *abrogated by Rucho*, 139 S. Ct. 2484. The plurality opinion in *Bandemer* identified the claim as being “that each political group in a State should have the same chance to elect representatives of its choice as any other political group,” and although the claim was distinct from that in *Reynolds* involving districts of unequal size, “[n]evertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable.” *Id.* The plurality adopted as a test that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.” *Id.* at 132. Justice O’Connor concurred in the judgment, arguing in part that the Court’s decision would result in a requirement for “roughly proportional representation.”<sup>9</sup> *Id.* at 147 (O’Connor, J., concurring in the judgment).

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<sup>8</sup> As noted in the plurality opinion in *Bandemer*, the Supreme Court did address a partisan gerrymandering claim in *Gaffney v. Cummings*, by holding that a districting plan which incorporated a “political fairness principle” across the plan did not violate the Equal Protection Clause; however, no concern about justiciability was raised in *Gaffney*. 412 U.S. 735, 751–52 (1973).

<sup>9</sup> The plurality responded that their decision did not reflect “a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status.” *Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986).

¶ 104 Eighteen years later the Supreme Court overruled *Bandemer* in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a challenge to Pennsylvania’s 2001 congressional redistricting plan on the grounds that it was a political gerrymander. Justice Scalia wrote the plurality opinion, in which three other justices joined, and would have also held partisan gerrymandering claims to be nonjusticiable political questions because they lack a “judicially discernable and manageable standard[.]” *id.* at 306—“judicially discernible in the sense of being relevant to some constitutional violation[.]” *id.* at 288. Justice Kennedy concurred in the judgment but refused to hold partisan gerrymandering nonjusticiable because “in another case a standard might emerge.” *Id.* at 312 (Kennedy, J., concurring in the judgment).

¶ 105 In *Rucho*, completing its retreat from *Bandemer*, the Supreme Court of the United States abandoned the field in policing partisan gerrymandering claims. The Supreme Court held that claims alleging that North Carolina’s and Maryland’s congressional districts were unconstitutionally gerrymandered for partisan gain were nonjusticiable in federal court. *Rucho*, 139 S. Ct. at 2493–2508. It reached this conclusion because it could find “no legal standards discernible in the [United States] Constitution for” resolving partisan gerrymandering claims, “let alone limited and precise standards that are clear, manageable, and politically neutral.” *Id.* at 2500.

¶ 106 Three concerns appear to have motivated the Court in *Rucho*. The first premise which concerned the Court in *Rucho* was the absence of a “judicially discernable”

standard, that is, one that is “relevant to some constitutional violation.” *Vieth*, 541 U.S. at 288; *see Rucho*, 139 S. Ct. at 2507 (“[J]udicial action must be governed by *standard, by rule,*’ and must be ‘principled, rational, and based upon reasoned distinctions’ founded in the [United States] Constitution or laws.” (first alteration in original) (quoting *Vieth*, 541 U.S. at 278)). In essence, the Supreme Court concluded that no provision of the United States Constitution supplied a cognizable legal basis for challenging the practice of partisan gerrymandering. *See, e.g., Rucho*, 139 S. Ct. at 2501 (“[T]he one-person, one-vote . . . requirement does not extend to political parties.”); *id.* at 2502 (“[O]ur racial gerrymandering cases [do not] provide an appropriate standard for assessing partisan gerrymandering.”); *id.* at 2504 (“[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue.”); *id.* at 2506 (“The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.”).

¶ 107

The second premise underpinning *Rucho*’s political-question holding was the absence of a standard that the Court deemed to be “clear, manageable[,] and politically neutral.” *Id.* at 2500. This rationale was particularly pressing because, “while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in constitutional political gerrymandering’ ” under federal law. *Id.* at 2497 (quoting

*Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)). According to the Court, “the question is one of degree,” and “it is vital in such circumstances that the Court act only in accord with especially clear standards.” *Id.* at 2498. However, the Court held the plaintiffs had not supplied standards to answer the question, “At what point does permissible partisanship become unconstitutional?” *Id.* at 2501. Moreover, the tests adopted by the lower courts were unsatisfactory because they failed to articulate such a standard that was sufficiently “clear” and “manageable.” *Id.* at 2503–05. Finally, the dissent’s proposed test, using “a State’s own districting criteria as a neutral baseline” was unmanageable because “it does not make sense to use criteria that will vary from State to State and year to year.” *Id.* at 2505.

¶ 108 A third consideration animating the Court’s decision was a prudential evaluation of the role of federal courts in the constitutional system. *Rucho*, 139 S. Ct. at 2494 (framing the question presented as “whether there is an ‘appropriate role for the *Federal Judiciary*’ in remedying the problem of partisan gerrymandering” (emphasis added) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018))); *id.* at 2507 (“Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.”); *id.* (advocating action through states, including by state supreme courts on state law grounds); *id.* at 2508 (suggesting Congress could act); *id.* at 2499 (“But federal courts

are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.”).

¶ 109 In summary, federal courts initially forswore virtually any role in the “political thicket” of apportionment. *See Colegrove*, 328 U.S. at 556. However, in *Baker* and its progeny, the Supreme Court of the United States entered that thicket at least to the extent of policing malapportionment. *See Baker*, 369 U.S. 186. The Court’s reasons for entering the thicket are relevant today: the Supreme Court recognized that absent its intervention to enforce constitutional rights, our system of self-governance would be representative and responsive to the people’s will in name only. The Court entered the political thicket for a time as well to review partisan gerrymandering claims in *Bandemer*, but ultimately rejected that decision in *Vieth*, and in *Rucho*, the Court removed such claims from the purview of federal courts altogether. The premises that animated the Court in *Rucho* are substantially the same as those that kept it from policing malapportionment claims in the first place: the perception that there is no “discernable” right to such claims cognizable in the federal Constitution, a prudential evaluation that courts are ill-equipped to hear such claims, and a belief that courts should not involve themselves in “political” matters.

¶ 110 However, simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts, as Chief Justice Roberts himself

noted in *Rucho*. *Rucho*, 139 S. Ct. at 2507 (“Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”). First, our state constitution “is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.” *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783 (1992). Second, state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require our court system to consider fifty separate sets of criteria, as would federal court involvement. Finally, *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level. The role of state courts in our constitutional system differs in important respects from the role of federal courts.

¶ 111 Having canvassed relevant federal decisions, we now consider whether as a matter of state law plaintiffs’ partisan gerrymandering claims are justiciable under the North Carolina Constitution. We conclude that they are.

### **C. The Question Presented Is Not Committed to the “Sole Discretion” of the General Assembly**

¶ 112 Under North Carolina law, courts will not hear “purely political questions.” This Court has recognized two criteria of political questions: (1) where there is “a textually demonstrable constitutional commitment of the issue” to the “sole

discretion” of a “coordinate political department[.]” *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); and (2) those questions that can be resolved only by making “policy choices and value determinations[.]” *id.* (quoting *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

¶ 113

We first consider the issue of whether there is a textually demonstrable commitment of the issue to the “sole discretion” of a coordinate branch of government. The constitution vests the responsibility for apportionment of legislative districts in the General Assembly under article II of our state constitution. Article II provides: “The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts.” N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5 (stating the same requirement for the North Carolina House). Legislative Defendants contend that “a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task” and that these provisions evidence such a textual commitment. They argue that this Court “has repeatedly acknowledged that this constitutional text is a grant of unreviewable political discretion to the legislative branch.” This argument—that gerrymandering claims are categorically nonjusticiable because reapportionment is committed to the sole discretion of the General Assembly—is flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly’s redistricting authority. We have interpreted and applied both the



expressly enumerated limitations contained in article II, sections 3 and 5, and the limitations contained in other constitutional provisions such as the equal protection clause. *Stephenson v. Bartlett*, 355 N.C. 354, 370–71, 378–81 (2002) (determining whether the General Assembly’s use of its article II power to apportion legislative districts complied with federal law in accordance with article I, sections 3 and 5 of our constitution, and our state’s equal protection clause in article I, section 19); *Blankenship v. Bartlett*, 363 N.C. 518, 525–26 (2009) (holding that General Assembly’s exercise of its power under article IV, section 9 to establish the election of superior court judges in judicial districts must comport with our state’s equal protection clause in article I, section 19). Legislative defendants’ argument is, essentially, an effort to turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*. Yet, as the facts of this case demonstrate, the need for this Court to continue to enforce North Carolinians’ constitutional rights has certainly not diminished in the intervening years.

¶ 114

Relatedly, but more specifically, Legislative Defendants argue that even if certain gerrymandering claims may be justiciable, claims alleging partisan gerrymandering in violation of state constitutional provisions are nonjusticiable because this Court has endorsed the consideration of partisan advantage in the redistricting process. In support of this proposition, Legislative Defendants cite to our decision in *Stephenson*, where we stated the following in full:

The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or “objective constraints” that the people of North Carolina imposed on legislative redistricting and reapportionment in the State Constitution.

355 N.C. at 371. Legislative Defendants misread this statement. We did not conclude that the text of our state constitution permits the General Assembly to “consider partisan advantage and incumbency protection”; we concluded that *federal law* permitted that consideration by citing to the decision of *Gaffney v. Cummings*, 412 U.S. 735 (1973). *See Stephenson*, 355 N.C. at 371. Moreover, *Gaffney* in no way supports Legislative Defendants’ argument that we have endorsed their interest in securing partisan advantage to any extent and which results in systematically disfavoring voters of one political party. In *Gaffney*, the Supreme Court of the United States rejected a partisan gerrymandering claim to an apportionment plan that pursued a principle of “political fairness” in order to “allocate political power to the parties *in accordance with their voting strength*.” *Gaffney*, 412 U.S. at 754 (emphasis added). We expressly reserved the question of whether the General Assembly could consider such criteria “in conformity with the State Constitution,” while also affirming the applicability of “constitutional limitations” that the people imposed on the legislative redistricting process in other provisions of the North Carolina

Constitution, such as the equal protection clause. *Stephenson*, 355 N.C. at 371. Simply put, resolving *Stephenson* did not require us to decide the legality of partisan gerrymandering under the North Carolina Constitution.

¶ 115 The commitment of responsibility for apportionment to the General Assembly in article II provides no support for the Legislative Defendants’ argument. First, the list of criteria the General Assembly is required to consider by that section does *not* include “partisan advantage.” See N.C. Const. art. II, § 3. Furthermore, we cannot infer the non-justiciability of partisan gerrymandering purely from the structural fact that the decennial apportionment of legislative districts is committed to a “political” branch. The General Assembly has the legislative power of apportionment under article II, but exercise of that power is subject to other “constitutional limitations.” *Stephenson*, 355 N.C. at 371. Put another way, the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly’s decisions in carrying out its responsibility are fully immunized from any judicial review. That startling proposition is, again, entirely inconsistent with our modern redistricting precedents and, on a more fundamental level, inconsistent with this Court’s obligation to enforce the provisions of the North Carolina Constitution dating to 1787.

¶ 116 *Stephenson* itself is incompatible with Legislative Defendants’ argument. *Stephenson* was a vote-dilution challenge under the equal protection clause of our

state constitution. If *Stephenson* concluded that redistricting decisions were exclusively constitutionally committed to the General Assembly because of article II, then no other constitutional limitations would be applicable. Plainly they are. *See id.* at 379.

¶ 117 This case does not ask us to remove all discretion from the redistricting process. The General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts in accordance with traditional neutral districting criteria that will require legislators to exercise their judgment. Rather, this case asks how constitutional limitations in our Declaration of Rights limit the General Assembly’s power to apportion districts under article II. It is thus analogous to *Cooper v. Berger*, 370 N.C. 392 (2018), in that it “involves a conflict between two competing constitutional provisions,” and it “involves an issue of constitutional interpretation, which this Court has a duty to decide.” *Id.* at 412.

¶ 118 More fundamentally, Legislative Defendants’ argument that the textual grant of a power to a “political” branch is sufficient to render exercise of that power unreviewable strikes at the foundation stone of our state’s constitutional caselaw—*Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). In *Bayard*, the courts of North Carolina first asserted the power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith. *Id.* at 7. In holding that we had the power of judicial review we specifically

reasoned that if “members of the General Assembly” could violate some constitutional rights, “they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, [but] from thence transmit the dignity and authority of legislation down to their heirs male forever.”

*Id.* It was out of concern for the very possibility that the legislature might intercede in the elections for their own office, which our constitution delegates the legislature power over, in contravention of the constitutional rights of the people to elect their own representatives that led this Court to assert the power of judicial review. To conclude that the mere commitment of the apportionment power in article II to the General Assembly renders its apportionment decisions unreviewable would require us to betray our most fundamental constitutional duty. “It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.” *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992).

¶ 119

The General Assembly has the power to apportion legislative and congressional districts under article II and state law, but exercise of that power is subject to other “constitutional limitations,” including the Declaration of Rights. The question is whether the General Assembly complied with provisions of the Declaration of Rights in its exercise of the apportionment power. There is no textually demonstrable commitment of that issue to the legislative branch.

¶ 120 In determining whether plaintiffs' claims would require the court to make "policy choices and value determinations," *Bacon*, 353 N.C. at 717, we must determine whether, as plaintiffs argue, the Declaration of Rights of the North Carolina Constitution prohibits partisan gerrymandering and, if so, whether the application of those claims would require such determinations. As we long ago established and have since repeatedly affirmed, "[t]his Court is the ultimate interpreter of our State Constitution." *Corum*, 330 N.C. at 783 (citing *Bayard*, 1 N.C. (Mart.) 5). So too when it comes to reapportionment. *Stephenson*, 355 N.C. at 370–71, 378–81; *Blankenship*, 363 N.C. at 525–26.

**D. Partisan Gerrymandering Violates the Declaration of Rights in the North Carolina Constitution and Is Justiciable**

¶ 121 Plaintiffs argue that Legislative Defendants' districting plans violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution's Declaration of Rights. Accordingly, we must examine the text and structure of the Declaration of Rights as well as the intent and history of these constitutional provisions to determine whether the rights plaintiffs allege are protected by the Declaration of Rights and whether this Court is empowered by the constitution to guarantee those rights.

¶ 122 Before examining specific provisions in detail, we make some general observations about the Declaration of Rights in article I of our constitution. First, "[t]he Declaration of Rights was passed by the Constitutional Convention on 17

December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers.”<sup>10</sup> *Corum*, 330 N.C. at 782. The Declaration of Rights preceded the constitution, and hence the rights reserved by the people preceded the division of power among the branches therein. “The relationship is not that exhibited by the U.S. Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the basic institutions of government. Instead, North Carolina’s declaration of rights . . . is logically, as well as chronologically, prior to the constitutional text.” John V. Orth & Paul M. Newby, *The North Carolina Constitution* 5–6 (2d ed. 2013). That logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the constitution itself as article I.

¶ 123

Second, early in this Court’s history we “recognized the supremacy of rights protected in Article I and indicated that [we] would only apply the rules of decision

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<sup>10</sup> The primacy of the Declaration of Rights over the powers allocated in the constitutional text in the minds of the framers is fitting for a people so opposed to government tyranny coalesced in any source. North Carolinians preceded the Revolution by ten years through the Regulator Movement opposing the Royal Governor William Tryon. They preceded the Declaration of Independence with the Halifax Resolves. After the Revolution they only belatedly approved by convention the federal Constitution because of its failure to include a Bill of Rights, an implicit rejection of the notion that structural protections of rights, like the separation and division of powers, would suffice. It is worth noting that a leading argument for the adoption of a federal Bill of Rights, in the words of Thomas Jefferson, was “the legal check which [such a Bill would put] into the hands of the judiciary,” as “a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.” Laurence H. Tribe, *American Constitutional Law* 8 & n.8 (3d ed. 2000) (quoting 14 *The Papers of Thomas Jefferson* 659 (Julian P. Boyd ed., 1958)).

derived from the common law and such acts of the legislature that are consistent with the Constitution.” *Corum*, 330 N.C. at 783 (citing *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 57 (1805)). In tying judicial review to the primacy of the Declaration of Rights, we recognized that

[t]he fundamental purpose for [the Declaration’s] adoption was to provide citizens with protection from the State’s encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

*Id.* at 782–83 (citing *State v. Manuel*, 20 N.C. 144 (1838)); *see also id.* at 782 (“The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . .”).

¶ 124

Finally, the framers of our Declaration of Rights and constitution guarded against not only abuses of executive power but also the tyrannical accumulation of power that subverts democracy in the legislative branch. William Hooper, a North Carolina delegate to the Continental Congress, urged that the state constitution prevent legislators from making “their own political existence perpetual.” Letter from William Hooper to the Provincial Congress of North Carolina (Oct. 26, 1776), *in* 10 *Colonial and State Records of North Carolina* 867–68, available at <https://docsouth.unc.edu/csr/index.php/document/csr10-0407>. John Adams, “already



a renowned authority on constitutionalism,” Orth & Newby at 5, submitted two letters of advice to the Convention, recommending that to prevent the legislature from “vot[ing] itself perpetual” the constitution must divide the General Assembly into two chambers so each could check the other. Essay by John Adams on “Thoughts on Government” (March 1776), in 11 *Colonial and State Records of North Carolina* 321, 324, available at <https://docsouth.unc.edu/csr/index.php/document/csr11-0189>. And so the framers did create two chambers, and we have maintained that division to this day. See N.C. Const. of 1776, § 1; N.C. Const. art. II, § 1.

¶ 125

Despite these protections, the primacy of the Declaration of Rights suggests that our framers did not believe that division of power alone would be sufficient to protect their civil and political rights and prevent tyranny. Accordingly, they enshrined their rights in the Declaration of Rights. They also created a state judiciary invested with the “judicial power.” See N.C. Const. of 1776, § 1; N.C. Const. art. IV, § 1. This independent judiciary was another structural protection. In *Bayard*, we concluded that our courts have the power, and indeed the obligation, to review legislative enactments for compliance with the North Carolina Constitution and to strike down unconstitutional laws. 1 N.C. (Mart.) at 7. The Court reasoned that if we abdicated this power and obligation, legislators could make themselves “Legislators of the State for life” and insulate themselves from “any further election of the people.” *Id.* Giving effect to the will of the people through popular sovereignty and the rights

protected by the Declaration of Rights, including the rights to free and frequent elections, were central to our recognition of the necessity of judicial review.

¶ 126

Having reviewed these structural and historical aspects of the Declaration of Rights, we now turn to the text to analyze whether plaintiffs' partisan gerrymandering claims have a discernible basis therein. Indeed, the very text of the Declaration of Rights calls us back time and again to itself, the source of constitutional meaning, by providing that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.<sup>11</sup> In a leading case from Virginia, construing a cognate provision of the Virginia Declaration of Rights, Judge Roane defined "fundamental principles" as

those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.

*Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 40 (1793); see Orth & Newby at 92 (discussing same). These "landmarks" serve as an important backdrop to aid in interpreting the "spirit" of the North Carolina Constitution and the scope of the

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<sup>11</sup> By this text, "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 91 (2d ed. 2013).

sweeping provisions of its Declaration of Rights.

¶ 127

North Carolina’s Declaration of Rights as it exists today in article I was forged not only out of the revolutionary spirit of 1776 but also the reconstruction spirit of 1868. See John L. Sanders, *Our Constitutions: An Historical Perspective*, [https://www.sosnc.gov/documents/guides/legal/North\\_Carolina\\_Constitution\\_Historical.pdf](https://www.sosnc.gov/documents/guides/legal/North_Carolina_Constitution_Historical.pdf) (“Drafted and put through the convention by a combination of native Republicans and a few carpetbaggers, . . . [f]or its time, [the Constitution of 1868] was a progressive and democratic instrument of government.”); *id.* (“The Constitution of 1868 incorporated the 1776 Declaration of Rights into the Constitution as Article I and added several important guarantees”), *id.* (“[T]he Constitution of 1971 brought forward much of the 1868 language with little or no change.”). Our Declaration of Rights begins with the declaration of two fundamental principles, the costly fruit paid in the blood of the Civil War and Revolutionary War, respectively: equality of persons and the democratic principle of popular sovereignty.<sup>12</sup> Article I, sections 1 and 2 provide:

Section 1. The equality and rights of persons.

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

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<sup>12</sup> Article I, section 1 originates from the 1868 constitution, while article I, section 2, originates from the 1776 constitution.

Sec[tion] 2. Sovereignty of the people.

All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, §§ 1–2.

¶ 128 Under article I, section 1, equality logically precedes sovereignty, as equality is “self-evident.” Article I, section 1 recognizes the self-evident fundamental principle of equality; however, that does not mean it is not a source of cognizable rights by its own terms as well. *See, e.g., Tully v. City of Wilmington*, 370 N.C. 527, 533, 536 (2018) (holding each person’s “inalienable right” to the “enjoyment of the fruits of their own labor” protects the fundamental right to “pursue his chosen profession free from” unreasonable government interference). This section deliberately borrowed the language of the Declaration of Independence, which was quoted and expanded upon in the Gettysburg Address just a few years prior to the 1868 Reconstruction Convention. Article I, section 1’s recognition of the first principle that “all persons are created equal” is universal.

¶ 129 Article I, section 2 locates the source of all “political power” under the Declaration of Rights in “the people.” N.C. Const. art. I, § 2. It specifies that “all government of right” can only “originate[ ] from the people.” *Id.* This “government of right” is only established when it is “founded upon [the people’s] will only,” and “instituted solely for the good of the whole.” *Id.* Section 2 of the Declaration of Rights

can fruitfully be read together with the first clause of section 3. N.C. Const. art. I, § 3, cl. 1 (“The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof . . .”). “These two sections contain both a general and a specific *assertion of democratic theory*.” Orth & Newby at 48 (emphasis added). Section 2’s declaration that “[a]ll political power is vested in and derived from the people” is an “abstract statement of principle.” *Id.* Meanwhile, section 3’s declaration that “the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof,” is “a specific local application of the general rule.” *Id.* These sections “now serve as a fuller theoretical statement” of the core democratic principle: “the revolutionary faith in popular sovereignty.” *Id.*; see *Thrift v. Bd. of Comm’rs*, 122 N.C. 31, 37 (1898) (“Our theory of government, *proceeding directly from the people, and resting upon their will*, is essentially different — at least, in principle — from that of England . . .” (emphasis added)). Under popular sovereignty, the democratic theory of our Declaration of Rights, the “political power” of the people which is “vested in and derives from [them],” is channeled through the proper functioning of the democratic processes of our constitutional system to the people’s representatives in government. N.C. Const. art. I, § 2. Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be “founded upon their will only.” *Id.*

¶ 130

The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights. N.C. Const. art. I, §§ 1–2. The principle of equality, adopted into our Declaration of Rights from the Declaration of Independence and the Gettysburg Address, provides that “all persons are created equal.” N.C. Const. art. I, § 1. Meanwhile, under the principle of popular sovereignty, the “political power” of the people is channeled through the proper functioning of the democratic processes of our constitutional system to the people’s representatives in government. N.C. Const. art. I, § 2. While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty. See Abraham Lincoln, “On Slavery and Democracy,” *I Speeches and Writings*, 484 (1989) (“As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy.”); “Address at Gettysburg, Pennsylvania,” *II Speeches and Writings* at 536 (connecting “the proposition that all men are created equal” to “government of the people, by the people, for the people”). Consequently, sections 1 and 2 of our Declaration of Rights, when read together, declare a commitment to a fundamental principle of democratic and political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln’s Gettysburg Address and the Reconstruction Convention to our Declaration of Rights

today, can mean only one thing—to be effective, the channeling of “political power” from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to “derive[ ]” its power from the people or to be “founded upon their will only,” and the principle of political equality that is fundamental to our Declaration of Rights and our democratic constitutional system is violated. N.C. Const. art. I, §§ 1, 2; see *Bayard*, 1 N.C. (Mart.) at 7 (recognizing this principle in holding that judicial review is needed to prevent legislators from permanently insulating themselves from popular will); see also John Hart Ely, *Democracy and Distrust* 103 (1980) (“In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking of the channels of political change to ensure that they will stay in and the outs will stay out.”).

¶ 131 In *Dickson v. Rucho*, we held a partisan gerrymandering challenge that legislative reapportionment plans violated the “Good of the Whole” clause failed because that argument “is not based upon a justiciable standard.” 368 N.C. 481, 534 (2015). Of course, the judgment in *Dickson* was vacated on federal law grounds, 137 S. Ct. 2186 (2017). However, taken as a valid proposition of state law, it does not

follow that sections 1 and 2 *in toto* provide no guidance for determining the constitutionality and justiciability of partisan gerrymandering or do not aid in construing other constitutional provisions. The principle of political equality which we have articulated is a fundamental principle of our Declaration of Rights. *See* N.C. Const. art. I, § 35. Such fundamental principles guide us in part through the light they throw on other constitutional provisions. Accordingly, interpreting article I, section 2, we have held that “[t]his is a government of the people, by the people, and for the people, founded upon the will of the people, and in which the will of the people, legally expressed, must control” and reasoned that “[i]n construing [other] provisions of the constitution, we should keep in mind” this fundamental principle. *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428–29 (1897). While plaintiffs do not contend the enacted plans constitute partisan gerrymanders in violation of article I, sections 1 and 2, the fundamental principle of political equality underpinning those sections guides our interpretation of other provisions of the Declaration of Rights.

¶ 132

Plaintiffs allege Legislative Defendants’ enacted plans violate the free elections clause under section 10, the free speech clause under section 14, the freedom of assembly clause under section 12, and the equal protection clause under section 19 of the Declaration of Rights as partisan gerrymanders. Along with guidance from the fundamental principles described above, in construing these provisions in the Declaration of Rights, we are mindful that:



It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

*Corum*, 330 N.C. at 783 (cleaned up). More broadly, “a Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions.” *Elliott v. Gardner*, 203 N.C. 749, 753 (1932). In interpreting these provisions, we remain mindful of our “duty to follow a reasonable, workable, and effective interpretation that maintains the people’s express wishes.” *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002).

### **1. Free Elections Clause**

¶ 133 Plaintiffs first argue that partisan gerrymandering violates the free elections clause in section 10 of our Declaration of Rights. The free elections clause has no analogue in the federal Constitution and is, accordingly, a provision that makes the state constitution “more detailed and specific than the federal Constitution in the protection of the rights of its citizens.” *Corum*, 330 N.C. at 783. This clause provides, in laconic terms, “[a]ll elections shall be free.” N.C. Const. art. I, § 10.

¶ 134 We turn to the history of the free elections clause. *See Sneed v. Greensboro City*

*Bd. of Educ.*, 299 N.C. 609, 613 (1980) (noting in constitutional interpretation we consider “the history of the . . . provision and its antecedents”). The free elections clause was included in the 1776 Declaration of Rights. It was modeled on a nearly identical clause in Virginia’s declaration of rights. *See Va. Const. of 1776, Declaration of Rights, § 6 (1776)*; Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929). The Virginia clause was derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. at 221. That provision provided “election of members of parliament ought to be free.” Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). This provision of the 1689 English Bill of Rights was adopted in response to the king’s efforts to manipulate parliamentary elections by diluting the vote in different areas to attain “electoral advantage,” leading to calls for a “free and lawful parliament” by the participants of the Glorious Revolution. J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007). Avoiding the manipulation of districts that diluted votes for electoral gain was, accordingly, a key principle of the reforms following the Glorious Revolution.

North Carolina’s free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia. *See John V.*

Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992). Pennsylvania’s free elections clause was enacted in response to laws that manipulated elections for representatives to Pennsylvania’s colonial assembly. *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 804 (2018). Pennsylvania’s version of the free elections clause was intended to end “the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs,” *League of Women Voters of Pa.*, 645 Pa. at 108, 178 A.3d 737 at 808, and to codify an “explicit provision[ ] to establish protections of the right of the people to fair and equal representation in the governance of their affairs[.]” *id.* at 104, 178 A.3d 737 at 806.

¶ 136

Under North Carolina law, our free elections clause was also intended for that purpose. This clause was enacted with the preceding clause requiring “frequent elections,” which provides that “[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held.” N.C. Const. art. I, § 9. Construing these provisions *in pari materia*, it follows that the “elections” which the prefatory clause of section 9 calls for must be “free” as well as “frequent.” As a matter of fundamental principle, these sections “concern[ ] the application of the principle of popular sovereignty, first stated in Section 2.” Orth & Newby at 55. The free elections clause, accordingly, provides “free elections” as the most fundamental democratic process by which the principle of popular sovereignty is applied, and the government

“derive[s]” its power from the people and is “founded upon their will only.” N.C. Const. art. I, § 2; *see also Quinn*, 120 N.C. at 426.

¶ 137

The free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain “electoral advantage” through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be “free and lawful.” De Krey, *Restoration and Revolution in Britain* at 250. Legislative Defendants argue and the trial court concluded that the free elections clause could not be read to speak on partisan gerrymandering because Patrick Henry, one of the drafters of the Virginia free elections clause on which ours was based, engaged in the practice of partisan gerrymandering “to the detriment of James Madison” at the time of that clause’s drafting.

¶ 138

We are unpersuaded by this evidence. First, the framers of our constitution did not establish fixed rules preemptively attempting to address every possible contingency. Thus, Legislative Defendants’ attempt to fix the meaning of these provisions by sole reference to the practices thought permissible at the time they were enacted is not only inconsistent with hundreds of years of constitutional development, but it is also inconsistent with the intent of the people as expressed in their choice to espouse broad principles rather than narrow rules. Furthermore, the framers of North Carolina’s constitution repeatedly articulated their intent to make the North Carolina Constitution responsive to the broader principles of the Glorious

Revolution.<sup>13</sup> The framers of North Carolina's constitution, such as James Iredell, believed that the American Revolution represented the fulfillment of the same principles vindicated by England's Glorious Revolution. *See generally* Speech by James Iredell to the Edenton District Superior Court Grand Jury (May 1778), in 13 *Colonial and State Records of North Carolina* 434–36, available at <https://docsouth.unc.edu/csr/index.php/document/csr13-0498>. And in 1775, prior to the drafting of the state constitution, North Carolina's delegates to the Continental Congress urged North Carolina to fight British attempts to infringe “those glorious Revolution principles.” Circular letter from William Hooper, Joseph Hewes, and Richard Caswell to the inhabitants of North Carolina, in 10 *Colonial and State Records of North Carolina* 23. Finally, North Carolina's leaders demanded the election of delegates to the Provincial Congress “be free and impartial.” Minutes of the North Carolina Council of Safety (Aug. 22, 1776), in 10 *Colonial and State Records of North Carolina* 702. These primary sources indicate that our founders did not hold the limited view that the only requirement for an election to be a “free” election was that those qualified had access to the ballot box, although that is also within the

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<sup>13</sup> The trial court concluded the free elections clause in our Declaration of Rights “does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage,” based in part on the history of the free elections clauses in the Virginia Declaration of Rights and the English Bill of Rights. But based on the history we have recounted, the perceived unfairness of drawing of borough lines for partisan advantage was a central concern of the Glorious Revolution, and the framers of the North Carolina Declaration of Rights and Constitution in 1776 expressed a strong commitment to the principles of the Glorious Revolution, including an insistence on elections being “impartial.”

ambit of the clause; rather, they adhered to the broad principles of the Glorious Revolution—that all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the “rotten boroughs” of England, would be prohibited. Such a reading is consonant with section 2, which adopts the principle of popular sovereignty in order that the government be “founded upon [the people’s] will only.” N.C. Const. art. I, § 2.

¶ 139 Moreover, the precise wording of the free elections clause has changed over time. It originally read, “[E]lections of Members to serve as Representatives in General Assembly ought to be free.” In 1868, in concert with its adoption of the equality principle in section 1, the Reconstruction Convention amended the free elections clause to read “[a]ll elections ought to be free.” In 1971, the present version was adopted, changing “ought to” to the command “shall.” This change was intended to “make it clear” that the free elections clause, along with other “rights secured to the people by the Declaration of Rights[,] are commands and not mere admonitions to proper conduct on the part of government.” *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982) (quoting John L. Sanders, “The Constitutional Development of North Carolina,” in *North Carolina Manual* 87, 94 (1979)). Accordingly, though those in power during the early history of our state may have viewed the free elections clause as a mere “admonition” to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement.

¶ 140

Finally, from the earliest language, the framers evidenced an intent to enshrine a broad principle of “free” elections, and this language is a direct application of the principle of popular sovereignty in section 2. *See* N.C. Const. art. 1, § 2. Since the Reconstruction Convention of 1868, it must also be textually read in concord with—and as giving effect to—the fundamental principle of equality, that “all persons are created equal,” announced in section 1. *See* N.C. Const. art. 1, § 1. Therefore, even if “free” originally meant the electoral process would be available for some, at least since 1868, it must also mean that voters must not be denied voting power on an equal basis in harmony with this fundamental principle. Although our understanding of what is required to maintain free elections has evolved over time, there is no doubt these fundamental principles establish that elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government. When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters’ partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people. This violates the free elections clause as interpreted against the backdrop of the fundamental principles in our Declaration of Rights. Accordingly, for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis.

¶ 141 Thus, partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. Partisan gerrymandering prevents election outcomes from reflecting the will of the people and such a claim is cognizable under the free elections clause.

## **2. Equal Protection Clause**

¶ 142 Plaintiffs also argue that partisan gerrymandering is cognizable under the equal protection clause because partisan gerrymandering may violate every individual voter's fundamental right to vote on equal terms and the fundamental right to substantially equal voting power. We agree.

¶ 143 The equal protection clause provides that “[n]o person shall be denied the equal protection of the laws.” N.C. Const. art. I, § 19. This clause was added to our Declaration of Rights with the adoption of the 1971 constitution. Although the language of this provision mirrors the federal Equal Protection Clause, “[i]t is beyond dispute that this Court ‘ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.’” *Stephenson*, 355 N.C. at 381 n.6



(second alteration in original) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). Our state constitution provides greater protection of voting rights than the federal Constitution. *Blankenship v. Bartlett*, 363 N.C. 518, 522–24 (2009); *Stephenson*, 355 N.C. at 376, 380–81, 381 n.6.

¶ 144 The equal protection clause in section 19 of our Declaration of Rights requires that if a government classification “impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification.” *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990).

¶ 145 We have held that under our equal protection clause, “the right to vote on equal terms is a fundamental right.” *Stephenson*, 355 N.C. at 378 (quoting *Northampton*, 326 N.C. at 747). In *Stephenson*, we further held that our equal protection clause protects “the fundamental right of each North Carolinian to substantially equal voting power.” 355 N.C. at 379. Under our state constitution, the fundamental right to vote in elections, which is the central democratic process in our constitutional system through which the “political power” that inheres in the people under the fundamental principles of our Declaration of Rights is channeled to the people’s representatives in government, encompasses “the principles of substantially equal voting power and substantially equal legislative representation.” *Id.* at 382.

¶ 146 Accordingly, our state constitution’s equal protection clause in article I, section 19 provides greater protections in redistricting cases than the federal constitution. In

*Stephenson*, we also held that the use of single-member and multi-member districts in a redistricting plan violated our state’s equal protection clause. It did so because voters in multi-member districts had a greater opportunity to influence representatives, as “those living in [multi-member] districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative.” *Id.* at 379. This “classification of voters” between single-member districts and multi-member districts created an “impermissible distinction among similarly situated citizens[,]” implicated “the fundamental right to vote on equal terms,” *id.* at 378, and restricted the right to “substantially equal voting power and substantially equal legislative representation[,]” *id.* at 382. Accordingly, the redistricting plan triggered strict scrutiny, not because the government drew a distinction on the basis of a protected classification, but because the distinction the government drew implicated a fundamental right. *Id.* at 378. Under *Stephenson*, the fundamental right to substantially equal voting power is more expansive than any analogous fundamental right under the Equal Protection Clause of the Fourteenth Amendment, since that provision does not prohibit the use of single-member and multi-member legislative districts in one map. *See Fortson v. Dorsey*, 379 U.S. 433, 437 (1965) (holding that the use of multi-member and single-member districts in the same legislative map did not violate the Equal Protection Clause where there was “no mathematical disparity”

between voters).

¶ 147 Furthermore, the equal protection clause in article I, section 19 applies in circumstances where the federal Equal Protection Clause is silent. In *Blankenship v. Bartlett*, we held that our state’s equal protection clause “requires a heightened level of scrutiny of judicial election districts,” because it implicates the fundamental “right to vote on equal terms in representative elections,” although federal courts have held the one-person, one-vote standard of the federal Equal Protection Clause is inapplicable to state judicial elections. *Blankenship*, 363 N.C. at 522–23 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)).

¶ 148 We hold here that partisan gerrymandering claims are cognizable under the equal protection clause of our Declaration of Rights. “[T]he fundamental right to vote on equal terms[,]” *Stephenson*, 355 N.C. at 378, includes the right to “substantially equal voting power and substantially equal legislative representation[,]” *id.* at 382. This necessarily encompasses the opportunity to aggregate one’s vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens’ views. Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority. Like the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power

diminishes the “representational influence” of voters. *Id.* at 377. Except, in the case of partisan gerrymandering, the effect on the representational influence is more severe because those who have been deprived equal voting power lack the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner voters of the favored party a governing majority. Accordingly, those voters have far fewer legislators who are “responsive” to their concerns and who can together “press their interests.” *Id.* at 379.

¶ 149

Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality. See N.C. Const. art. I, §§ 1, 2. Popular sovereignty requires that for a government to be “of right” it must be “founded upon [the people’s] will only.” N.C. Const. art. I, § 2. In a statewide election, ascertaining the will of the people is straightforward. But in legislative elections, voters only have equal “representational influence” if results fairly reflect the will of the people not only district by district, but in aggregate, and on equal terms. See *Stephenson*, 355 N.C. at 377 (examining the effect of single-member and multi-member districts across the state). Otherwise, the “will” on which the government “is founded” is not that of the people of this state but that of the ruling party.

¶ 150

We conclude that when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter’s opportunity to aggregate

with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter’s fundamental rights to vote on equal terms and to substantially equal voting power. Classifying voters on the basis of partisan affiliation so as to dilute their votes in this manner is subject to strict scrutiny because it burdens a fundamental right and is presumed unconstitutional unless narrowly tailored to a compelling governmental interest. *See Northampton*, 326 N.C. at 746 (“[I]f a classification impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification. Under the strict scrutiny test the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.”).

### **3. *Free Speech Clause and Freedom of Assembly Clause***

¶ 151 Finally, plaintiffs argue that partisan gerrymandering is cognizable under the free speech clause under section 14 and the freedom of assembly clause under section 12 of our Declaration of Rights. We agree.

¶ 152 Our free speech clause provides that “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained.” N.C. Const. art. I, § 14. Our freedom of assembly clause provides, in pertinent part, that “[t]he people have a right to assemble together to consult for their common good, to

instruct their representatives, and to apply to the General Assembly for redress of grievances.” *Id.* § 12. These provisions textually differ from their federal analogues, and we have construed them to provide greater protection than those provisions.

¶ 153

In *Corum*, this Court construed the free speech clause in our Declaration of Rights. 330 N.C. at 781. The plaintiff alleged “retaliation against plaintiff for his exercise of certain free speech rights.” *Id.* at 766. He brought a claim for, *inter alia*, a direct cause of action under article I, section 14 of the state constitution. *Id.* We reasoned that “[t]he words ‘shall never be restrained’ are a direct personal guarantee of each citizen’s right of freedom of speech[,]” *id.* at 781; that this provision “is self-executing[,]” *id.* at 782; and, accordingly, “the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right[,]” *id.* We observed concerning the free speech clause that

[t]his great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. A direct action against the State for its violations of free speech is essential to the preservation of free speech.

*Id.* (cleaned up). Under the Court’s decision in *Corum*, government action that burdens people because of disfavored speech or association violates the free speech clause. *Id.* at 766. The retaliation in *Corum* involved the allegation that government

actors conditioned the plaintiff's public employment (in that case, through demotion) on limitations upon the plaintiff's free speech and expression. *See id.* at 776. In essence, by allegedly conditioning a public right or benefit (the plaintiff's employment) on speech, the government accomplished indirectly what it could not have accomplished directly, and it penalized plaintiff's protected free speech rights based on his views.

¶ 154 In recognizing a direct cause of action for plaintiff's retaliation claim under the free speech clause, we construed the clause more expansively than the Supreme Court of the United States has construed the Free Speech Clause of the First Amendment, since that Court has not recognized a comparable direct constitutional claim under that provision for retaliation. Even when federal free speech principles are persuasive, we reserve the right to extend the reach of our free speech clause beyond the scope of the First Amendment. *See Libertarian Party v. State*, 365 N.C. 41, 47 (2011).

¶ 155 Free speech and freedom of assembly rights are essential to the preservation of our constitutional system. We have held that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party*, 365 N.C. at 49. In *Libertarian Party*, we reasoned that "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Id.* at 49.

¶ 156 The role of free speech is also central in our democratic system. As one scholar has noted:

Once one accepts the premise of the Declaration of Independence—that governments derive ‘their just powers from the consent of the governed’—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970). Since 1776, the people of North Carolina have founded our constitutional system on the premise that “[a]ll political power is vested in and derived from the people” and that “government of right” must “originate[ ] from the people” and be “founded upon their will only.” N.C. Const. art. I, § 2. Since 1868, they have recognized that “all persons are created equal.” N.C. Const. art. I, § 1. And since 1971, they have recognized that “[f]reedom of speech” is one “of the great bulwarks of liberty” and therefore “shall never be restrained.” N.C. Const. art. I, § 14.

¶ 157 Partisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system. In *Corum*, we recognized that under the free speech clause, state officials may not penalize people for the exercise of their protected rights. But partisan gerrymandering does just that. When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting



power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny. *See State v. Petersilie*, 334 N.C. 169, 182 (1993). This practice subjects certain voters to disfavored status based on their views, undermines the role of free speech and association in formation of the common judgment, and distorts the expression of the people’s will and the channeling of the political power derived from them to their representatives in government based on viewpoint.

#### **4. *The Declaration of Rights and the Law of Partisan Gerrymandering Summarized***

¶ 158

In summary, the two most fundamental principles of our Declaration of Rights are equality and popular sovereignty. N.C. Const. art. I, §§ 1, 2. Together, they reflect the democratic theory of our constitutional system: the principle of political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln’s Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of “political power” from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to “derive[ ]” its power from the people or to be “founded upon their will only,” and the principle of

political equality that is fundamental to our Declaration of Rights and our constitutionally enacted representative system of government is violated.

¶ 159 This principle is reflected in various provisions of our Declaration of Rights. The free elections clause under section 10 guarantees the central democratic process by which the people's political power is transferred to their representatives. The equal protection clause prohibits government from burdening on the basis of partisan affiliation the fundamental right to equal voting power. And the free speech clause and the freedom of assembly clause prohibit discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity.

¶ 160 Partisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights. To comply with the constitutional limitations contained in the Declaration of Rights which are applicable to redistricting plans, the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. The right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens

to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.

¶ 161 This diminution or dilution of a voter's voting power on the basis of his or her views can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions. Similarly, the diminution or dilution of voting power based of partisan affiliation in this way suffices to show a burden on that voter's speech and associational rights. Accordingly, such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental

interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government as secured in the above provisions in the Declaration of Rights.

¶ 162 Here, the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district.<sup>14</sup> Certainly it is possible, as the plaintiffs and the trial court demonstrated, to identify which individual districts in the state legislative maps ignore traditional redistricting principles to achieve a partisan outcome that otherwise would not occur. It is possible to identify the most gerrymandered individual districts. But here the violation is statewide because of the evidence that on the whole, the districts have been drawn such that voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party. The effect is stark and even more severe than what this Court identified in *Stephenson* as the equal protection clause violation arising from the use of both single-member and multi-member districts in a redistricting plan. *See Stephenson*, 355 N.C. at 379–82.

¶ 163 We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively

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<sup>14</sup> This is not to rule out the possibility that under an equal protection theory or a free speech theory there may be a circumstance where a single district is a partisan gerrymander but that is not the situation here.

demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.”). As in *Reynolds*, “[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.” *Id.* However, as the trial court’s findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina’s unique political geography.<sup>15</sup> If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across

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<sup>15</sup> Further, while adherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest, the disregarding of neutral criteria such as compactness, contiguity, and respect for political subdivisions, particularly when the effect of the map subordinates those criteria to pursuit of partisan advantage, may also be some evidence a map burdens the fundamental right to equal voting power.

the plan, then the plan is presumptively constitutional.

¶ 164 To be sure, the evidence in this case and in prior partisan gerrymandering cases provides ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders. There is such a thing as a plan that creates a level playing field for all voters. Indeed, historically, there is evidence indicating that most redistricting plans actually have provided for partisan fairness instead of partisan advantage. *See, e.g., Common Cause v. Rucho*, 318 F. Supp. 3d 777, 886–87 (M.D.N.C. 2018), *rev'd on other grounds* 139 S. Ct. 2484 (2019) (finding that North Carolina's efficiency gap of 19.4% was the largest of all states studied and that between 1972 and 2016, the distribution of efficiency gaps centered on zero "meaning that, on average, the districting plans in [t]his sample did not tend to favor either party"). Those who deny such standards exist ignore what the public sees and experiences and what political scientists have demonstrated.

¶ 165 Several possible bright-line standards have emerged in the political science literature and in the parties' briefing before this Court. For example, Dr. Duchin testified at the trial to having analyzed North Carolina historical election data over a period of years, by using a simple overlay method, overlaying the maps onto data from all 52 of the statewide elections since 2012 to determine whether "close votes" resulted in "close seats," as one would see in all of the alternative maps to the enacted

plans. Under this method, which Dr. Duchin has written about extensively, a plan which persistently resulted in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional. As Dr. Duchin noted, “I don’t think you get that large and durable [an effect of partisan skew] by accident.”

¶ 166

Second, at the trial court below, Dr. Daniel Magleby presented a report in rebuttal of the testimony of Dr. Barber, in which he proposed using the measurement of the mean-median difference to determine the degree of partisan skew in a particular instance. His report described the method as follows:

One of the simplest measures of symmetry we can apply to redistricting scenarios is the median-mean difference (see Katz, King and Rosenblatt 2020; MacDonald and Best 2015; Best et al. 2017) . . . We find [the median-mean difference] by taking the mean (average) of the district-level vote share and comparing it to the median district-level vote-share, the district-level vote share for which there are an equal number of districts with higher vote shares as there are districts with lower vote shares. When the median and mean are equal, the distribution of districts is symmetrical and the map will treat the parties with symmetry. If the median-mean is not zero, it means the map will not treat vote cast for the parties equally.

Thus, based on Dr. Magelby’s testimony, any mean-median difference that is not zero could be treated as presumptively unconstitutional. However, using the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina’s congressional redistricting plans was 1%. *Common Cause*, 318 F.

Supp. 3d at 893. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.

¶ 167 With regard to the efficiency gap measure, courts have found “that an efficiency gap above 7% in any districting plan’s first election year will continue to favor that party for the life of the plan.” *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev’d on other grounds* 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional. The efficiency gap, like other measures of partisan symmetry, “is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner’s bonus should be approximately the same for both parties.” *Common Cause*, 318 F. Supp. 3d at 889.

¶ 168 Other manageable standards appear in the evidence before the trial court as well. Legislative Defendants’ own expert witness proposed using computer simulations to draw redistricting plans solely on the basis of traditional redistricting criteria, with any adopted redistricting plan with a partisan bias that fell within the middle 50% of simulation results being presumptively constitutional. It was also suggested that the legislature could be required to draw districts “within 5% of the median outcome expected from nonpartisan redistricting criteria, at a statewide



level, across a range of electoral circumstances.” The development of such metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (“Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State.” (citations omitted)).

¶ 169 There may be other standards the parties wish to suggest to the trial court. These are primarily questions of what evidence might be relevant to prove a redistricting plan’s discriminatory effect under the free elections and equal protection clauses and a discriminatory burden to a right or benefit on the basis of protected political activity amounting to viewpoint discrimination and retaliation under the free speech and freedom of assembly clauses of the state constitution. Because this is not a strict proportionality requirement, there is no magic number of Democratic or Republican districts that is required, nor is there any constitutional requirement that a particular district be competitive or safe. To be clear, the fact that one party commands fifty-nine percent of the statewide vote share in a given election does not entitle the voters of that party to have representatives of its party comprise fifty-nine percent of the North Carolina House, North Carolina Senate, or North Carolina

congressional delegation. But those voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised fifty-nine percent of the statewide vote share in that same election. What matters here, as in the one-person, one-vote context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.

¶ 170

Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and “the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.” *Northampton*, 326 N.C. at 746. As noted above, partisan advantage—that is, achieving a political party's advantage across a map incommensurate with its level of statewide voter support—is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative

government.<sup>16</sup> Rather, compelling governmental interests in the redistricting context include the traditional neutral districting criteria expressed in article II, sections 3 and 5 of the North Carolina Constitution. Incumbency protection may ordinarily be a permissible governmental interest if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution; however, incumbency protection is not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power under the North Carolina Constitution. Other widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests. If the General Assembly has created a map that infringes on individual voter's fundamental right to equal voting power and cannot show that the map is narrowly tailored to a compelling governmental interest, courts must conclude the map is unconstitutional and forbid its use.

¶ 171

The dissent contends that the partisan gerrymandering claims we recognize as violating both fundamental principles and particular provisions of our Declaration of Rights are not cognizable claims under that document. Our fundamental

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<sup>16</sup> Political fairness, or the effort to apportion to each political party a share of seats commensurate with its level of statewide support, is a permissible redistricting criterion. *See Gaffney*, 412 U.S. at 736. However, achieving such a goal involves a government's prioritization of, rather than diminution and dilution of, each person's right to substantially equal voting power.

disagreement stems in one respect from a difference in method. Here, we have “recurre[d]” to those “fundamental principles” by which “[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and [to] rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation.” Orth & Newby, at 91. In this light, the dissenters insist that the only way to discern the meaning of provisions of the North Carolina Constitution is to adhere to their own assessment of historical practice. In so doing, they interpret the state constitution in a manner the Framers and the constitution they enacted firmly rejected. If constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the dissent’s view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people. Fortunately, the Framers and the people of North Carolina chose to adopt a constitution containing provisions which “provide[s] the elasticity which ensures the responsive operation of government.” *State ex rel. Martin v. Preston*, 325 N.C. 438, 458 (1989).

¶ 172

Second, our disagreement with the dissenting opinion is compelled in part by our divergent views of the role of the courts in conducting judicial review for constitutionality. The justification for judicial review in North Carolina is motivated

by the concern for securing both the fundamental rights contained in our Declaration of Rights and our constitution, and for ensuring the effective functioning of the democratic system of government established by the same. In North Carolina, we presume the legislature has complied with the constitution. Where legislation does not violate a particular constitutional limitation, and particularly where it does not violate the rights protected by the Declaration of Rights, the presumption that the issue will be resolved through the ordinary political process is justified, and legislation will be upheld if there is a rational basis supporting it. However, in *Bayard v. Singleton* and since, we have identified two circumstances justifying judicial review by this Court. First, we will protect constitutional rights and, although they are by no means the only enforceable provisions of our constitution, the “civil rights guaranteed by the Declaration of Rights in Article I of our Constitution,” in particular. *Corum*, 330 N.C. at 782. “The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State,” including the General Assembly. *Id.* at 783. Accordingly, “[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.” *Id.* Fundamentally, “[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of [its people]; this obligation

to protect the fundamental rights of individuals is as old as the State.” *Id.* Indeed, we have recognized this duty since *Bayard*, where we held that legislation violated the right to a trial by jury. 1 N.C. (Mart.) at 7. *Bayard* justified review of all such rights on the ground that any erosion of rights endangered other rights. *See id.* (justifying review of “right to a decision of his property by a trial by jury” on the grounds 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 without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all”).

¶ 173

Further this court has recognized an even greater justification for judicial review of acts that restrict the democratic processes through which the “political power” is channeled to the people’s representatives, and which undermine the very democratic system created by our constitution. In *Bayard*, this Court justified judicial review of acts of the coordinate branches not only because without it they might violate fundamental rights, but also on the grounds of an even greater harm that without judicial review “the members of the General Assembly . . . might with equal authority, . . . render themselves the Legislators of the State for life, without any further election of the people.” *Id.* Just as it is the duty of this Court under *Bayard* to guarantee constitutional rights protecting liberty, person, and property, it is the duty of this Court under *Bayard* to protect the democratic processes through which the

“political power” of the people is exercised, and that each person’s voice is heard on “equal” terms through the vote. N.C. Const. art. I, §§ 2, 1; *see, e.g., Stephenson* 355 N.C. at 379 (recognizing “the fundamental right of each North Carolinian to substantially equal voting power”); *Northampton*, 326 N.C. at 747 (holding the “right to vote on equal terms is a fundamental right”); *People ex rel. Van Bokkelen*, 73 N.C. at 225 (holding it to be “too plain for argument” that the General Assembly’s malapportionment of election districts “is a plain violation of fundamental principles”); Ely, *Democracy and Distrust* at 103 (“Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.”).

¶ 174

Partisan gerrymandering claims do not require the making of “policy choices and value determinations.” *Bacon*, 353 N.C. at 717. As we have discussed, such claims are discernable under the North Carolina Constitution and precedent. Moreover, we have described several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation. Accordingly, we hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights.

#### **E. Legislative Defendants’ Elections Clause Argument**

¶ 175

Legislative Defendants also argue that “the federal constitution bars

plaintiffs[] claims against the congressional plan” under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, because the word “Legislature” in that clause forbids state courts from reviewing a congressional districting plan violates the state’s own constitution. We disagree. This argument, which was not presented at the trial court, is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015. It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.

¶ 176 First, this theory contradicts the holding of *Rucho*, where the Supreme Court of the United States, in an opinion authored by Chief Justice Roberts, said that “[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply” in a case addressing the justiciability of partisan gerrymandering claims in *congressional* plans. 139 S. Ct. at 2507 (emphases added).

¶ 177 Second, a long line of decisions by the Supreme Court of the United States confirm the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding the Elections Clause does not “endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided” (emphasis added)). The state legislature’s enactment of election laws reflects an exercise of the lawmaking power;



accordingly, the legislature must comply with all of “the conditions which attach to the making of state laws,” *id.* at 365, including “restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power,” *id.* at 369; *see also Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm’n*, 576 U.S. 787, 817–18 (2015) (“Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State’s constitution.”); *Grove v. Emison*, 507 U.S. 25, 33–34 (1993) (emphasizing “[t]he power of the judiciary of a State to require valid reapportionment” of congressional districts and rejecting the federal district court’s “mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State’s courts”).

#### **F. The 2021 Enacted Plans Violate the Declaration of Rights as Partisan Gerrymanders**

¶ 178 Now, we must apply these legal principles to the 2021 enacted plans in order to determine if the current maps constitute partisan gerrymanders in violation of the North Carolina Constitution’s Declaration of Rights. We conclude that they do and therefore enjoin the enacted plans from use in any future elections and, in accordance with N.C.G.S. § 120-2.4(a), provide the General Assembly the opportunity to submit new redistricting plans that satisfy all provisions of the North Carolina Constitution.

¶ 179 As discussed above, the General Assembly triggers strict scrutiny under the free elections clause and the equal protection clause of the North Carolina

Constitution when, on the basis of partisan affiliation, it deprives a voter of his or her fundamental right to substantially equal voting power. This fundamental right encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly infringes upon that voter's fundamental right to vote. Similarly, this action is subject to strict scrutiny under the free speech clause and freedom of assembly clause because it burdens voters on the basis of protected political activity.

¶ 180

To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views. Such a demonstration can be made using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can

plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

¶ 181 The right to vote on equal terms is a fundamental right in this state and thus when a challenging party demonstrates that a redistricting plan, on the basis of partisan affiliation, infringes upon his or her fundamental right to substantially equal voting power, strict scrutiny is the appropriate standard for reviewing that act. *See Stephenson*, 355 N.C. at 377 (“Strict scrutiny . . . applies when the classification impermissibly interferes with the exercise of a fundamental right . . . .” (cleaned up)). Strict scrutiny is “this Court’s highest tier of review.” *Id.* “Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest.” *Id.* Within the redistricting context, compliance with traditional neutral districting principles, including those enumerated in article II, sections 3 and 5 of the North Carolina Constitution, may constitute a compelling governmental interest. Partisan advantage, however, is not a compelling governmental interest.

¶ 182 Here, we apply this standard to each of the three 2021 enacted maps: the congressional map, the North Carolina House map, and the North Carolina Senate map. As noted previously, we have adopted in full the extensive and detailed factual findings of the trial court summarized above and have attached the maps themselves to this opinion.

### **1. Congressional Map**

¶ 183 First, we apply this constitutional standard to the 2021 congressional map. Based on the trial court's factual findings, we conclude that the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 184 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found "that the Congressional Map is the product of intentional, pro-Republican partisan redistricting. Indeed, the court found that

[a]cross [the] 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—*i.e.*, the competitive districts—in comparison to the enacted plan.

¶ 185 Accordingly, the court found that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.'" The

court found that this high non-responsiveness was a product of “cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts,” which the court described as “the key signature of intentional partisan redistricting.”

¶ 186 Based on Dr. Cooper’s analysis, the court observed that “[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election.” This decrease, the court observed, is enacted “by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each.” The court further noted that “[t]here was no population-based reason” for these splits.

¶ 187 Based on Dr. Pegden’s analysis, the court found “that the enacted congressional plan is more favorable to Republicans than 99.9999% of the [billions or trillions of] comparison maps his algorithm generated.” Accordingly, the court determined that “the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden’s] algorithm.”

¶ 188 Based on Dr. Duchin’s analysis, the trial court found “that the political

geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party.” Rather, the court determined, “[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates.”

¶ 189 Based on Dr. Cooper’s close-votes-close-seats analysis, the trial court found that individual congressional districts were drawn to favor certain current or future Republican representatives. For instance, the court found that the congressional map “places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, ‘virtually guaranteeing’ that the Democratic incumbent will lose her seat.” Similarly, the court observed that “[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] ‘overwhelmingly favors’ the Republican candidate based on the district’s partisan lean.”

¶ 190 The trial court found that the congressional map constituted a statistical partisan outlier on the regional level, as well. Specifically, the court found that “that the enacted congressional plan[s] districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions.”

¶ 191 More broadly, though, the trial court found that “[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a

particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state.” Accordingly, the court found “that the ‘cracking and packing’ of Democratic voters in [larger urban] counties has ‘ripple effects throughout the map.’”

¶ 192 The trial court considered several different types of statistical analysis in confirming that the “extreme partisan outcome” of the congressional map that “cannot be explained by North Carolina’s political geography or by adherence to Adopted Criteria.” These included: (1) “mean-median difference” analysis; (2) “efficiency gap” analysis; (3) “the lopsided margins test”; and (4) “partisan symmetry” analysis.

¶ 193 In sum, the trial court found “that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina’s Congressional delegation.” The court found that the enacted congressional map “fails to follow and subordinates the Adopted Criteria’s requirement[s]” regarding splitting counties and VTDs. Further, the court found “that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria’s requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.” Ultimately, the court “concluded based upon a

careful review of all the evidence that the [congressional map is] a result of intentional, pro-Republican partisan redistricting.”

¶ 194 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 congressional map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs’ fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally. Accordingly, we must review the congressional map under strict scrutiny.

¶ 195 Defendants have not shown the 2021 congressional map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted above, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of plaintiffs’ fundamental right to substantially equal voting power, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly’s own Adopted Criteria, or other articulable



neutral principles. Here, the General Assembly has failed to make that showing. Indeed, the trial court explicitly found that the congressional maps demonstrate a *subordination* of traditional neutral criteria, including compactness and minimizing county and VTD splits, in favor of partisan advantage. We conclude that the General Assembly has not demonstrated that the congressional map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. Accordingly, the congressional map fails strict scrutiny and must be rejected.

## 2. *State House Map*

¶ 196 Next, we apply this constitutional standard to the 2021 North Carolina State House map. Based on the trial court's factual findings, we conclude that the 2021 State House map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 197 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found that

[t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the

partisan results were more extreme than what would be seen from nonpartisan maps.

¶ 198 Indeed, the court found that “the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered.” The court determined that the state House “map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is ‘astronomically small.’” Further, the court found that the mapmakers’ selective failure to preserve municipalities in the House map, when they did preserve them in the Senate map, was based solely on considerations of partisan advantage.

¶ 199 Based on Dr. Pegden’s analysis, the court found that “the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries.” Accordingly, the court found “that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints.”

¶ 200 Based on Dr. Cooper’s analysis, the trial court found that “Legislative Defendants’ exercise of . . . discretion in the . . . House 2021 Plans resulted in . . . House district boundaries that enhanced the Republican candidates’ partisan

advantage, and this finding is consistent with a finding of partisan intent.”

¶ 201 Based on Dr. Duchin’s close-votes-close-seats analysis, the court found that the House map is “designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates.” “As with the Enacted Congressional Plan . . . , the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . .”

¶ 202 Based on Dr. Magleby’s median-mean differential analysis, the trial court found “that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina.” Specifically, the court determined “that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps.” In fact, the court found, “[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage.”

¶ 203 Finally, based on all of the evidence presented, the trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the “packing” and “cracking” of Democratic voters as the “result of intentional, pro-Republican partisan

redistricting”: the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Ultimately, the court “conclude[d] based upon a careful review of all the evidence that the [House map is] a result of intentional, pro-Republican partisan redistricting.”

¶ 204 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina House map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs’ fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the House map under strict scrutiny.

¶ 205 Defendants have not shown the 2021 House map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted already, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those

expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional map above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria in the creation of the House map, the General Assembly has not demonstrated that the House map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some neutral priority. Indeed, the evidence establishes that the General Assembly subordinated these neutral priorities, such as preserving municipalities, in favor of partisan advantage. Accordingly, the North Carolina House map fails strict scrutiny and must be rejected.

### **3. State Senate Map**

¶ 206 Third and finally, we apply this constitutional standard to the 2021 North Carolina State Senate map. Based on the trial court's factual findings, we conclude that the 2021 State Senate map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 207 As with the two previous maps, numerous factual findings compel our conclusion. For instance, based on Dr. Cooper's analysis, the court found that "Legislative Defendants' exercise of . . . discretion in the Senate . . . Plans resulted in . . . district boundaries that enhanced the Republican candidates' partisan advantage,

and this finding is consistent with a finding of partisan intent.”

¶ 208 Based on Dr. Mattingly’s ensemble analysis, the court found “that the State . . . Senate plans are extreme outliers that ‘systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.’ ” The court found that this intentional partisan redistricting in the Senate “is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly’s ensemble would have broken it.” Specifically, the court found that the Senate plan “is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the supermajority.”

¶ 209 Based on Dr. Pegden’s analysis, the court determined “that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps.” Accordingly, the court found “that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints.”

¶ 210 Based on Dr. Duchin’s close-votes-close-seats analysis, the court found that

[t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a

majority in the Senate even when Democrats win more votes. Even in an essentially tied election or in a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

“As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . .”

¶ 211 Finally, based on all of the evidence presented at trial, the trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the “packing” and “cracking” of Democratic voters as the “result of intentional, pro-Republican partisan redistricting”: the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the

Senate district groupings it considered to not be the result of intentional, pro-Republican redistricting through packing and cracking. Ultimately, the court “concluded based upon a careful review of all the evidence that the [Senate map is] a result of intentional, pro-Republican partisan redistricting.

¶ 212           Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina Senate map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs’ fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the Senate map under strict scrutiny.

¶ 213           Conducting that review, we conclude that defendants have not shown the 2021 Senate map is narrowly tailored to a compelling governmental interest and therefore the map fails strict scrutiny. Partisan advantage is not a compelling governmental interest. Rather, the General Assembly must show that the Senate map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly’s own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional and House maps above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that



partisan advantage predominated over any traditional neutral districting criteria in the creation of the Senate map, the General Assembly has not demonstrated that the Senate map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. To the contrary, the evidence demonstrates that the Senate map prioritized considerations of partisan advantage above traditional neutral districting principles. Accordingly, the North Carolina Senate map fails strict scrutiny and must be rejected.

#### G. Compliance with *Stephenson* requirements

¶ 214

Finally, we further hold that under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines. Notably, the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law. In *Stephenson*, this Court sought to harmonize several sections of our state constitution—namely the whole county provision of article II, sections 3(3) and 5(3) and the supremacy clause of article I, section 3—in light of the federal requirements established by Section 5 and Section 2 of the VRA. 355 N.C. at 359. Of course, since the 2013 decision of the Supreme Court of the United States in *Shelby County v. Holder*, 570 U.S. 529 (2013), in which it held that the coverage formula for the preclearance requirement under Section 5 of the VRA was no longer justified under

the Fourteenth Amendment and held that section was unconstitutional, North Carolina has not been subject to that preclearance requirement.

¶ 215 Nevertheless, the *Stephenson* Court ruling relied exclusively on interpretation of the North Carolina Constitution. Indeed, after the *Stephenson* defendants initially removed the case to federal district court, the district court remanded the case, stating that “the redistricting process was a matter primarily within the province of the states, that plaintiffs have challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions, that the complaint ‘only raises issues of state law,’ and that defendants’ removal of th[e] suit from state court was inappropriate.” *Stephenson*, 355 N.C. at 358. Further, when the *Stephenson* defendants “subsequently filed a notice of appeal from the District Court’s order with the United States Court of Appeals for the Fourth Circuit[,] . . . [t]he Fourth Circuit denied defendants’ motion to stay the District Court’s order of remand.” *Id.*

¶ 216 Here, as in *Stephenson*, plaintiffs’ claims arise under the same provisions of the North Carolina Constitution implicated in *Stephenson*—namely article I, sections 3 and 5 and article II, sections 3 and 5. Here, as in *Stephenson*, this Court serves as the highest and final authority in interpreting those state constitutional provisions. And here, as in *Stephenson*, we hold that compliance with those provisions, when read in harmony, requires the General Assembly to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any

steps must be taken to avoid the dilution of minority voting strength.

### III. Conclusion

¶ 217 Article I, section 2 of the North Carolina Constitution establishes that “[a]ll political power is vested in and derived from the people,” that “all government of rights originates from the people,” and “is founded upon their will only.” N.C. Const. art I, § 2. Furthermore, article I, section 1 of the constitution provides that “all persons are created equal.” N.C. Const. art I, § 1. Subsequent constitutional provisions within the Declaration of Rights, including the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, protect fundamental rights of the people in order to ensure, among other things, that their government is indeed “founded upon their will only.” *See id.*

¶ 218 When North Carolinians claim that acts of their government violate these fundamental rights, and particularly when those acts choke off the democratic processes that channel political power from the people to their representatives, it is the solemn duty of this Court to review those acts to enforce the guarantees of our constitution. *See Corum*, 330 N.C. at 783. Such judicial review ensures that despite present day challenges our constitution’s most fundamental principles are preserved. Indeed, “[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.” N.C. Const. art I, § 35.

¶ 219 Today, this Court recurs to those fundamental principles. Specifically, we have

considered whether partisan gerrymandering claims present a justiciable question, whether constitutional provisions supply administrable standards, and whether, having applied these standards, the General Assembly's 2021 enacted plans constitute such a violation of plaintiffs' constitutional rights.

¶ 220 First, we hold that claims of partisan gerrymandering are justiciable under the North Carolina Constitution. Although the primary responsibility for redistricting is constitutionally delegated to the General Assembly, this is not a delegation of unlimited power; the exercise of this power is subject to restrictions imposed by other constitutional provisions, including the Declaration of Rights. Further, as demonstrated through our analysis of the constitutional provisions at issue and the extensive factual findings of the trial court, claims of partisan gerrymandering can be carefully discerned and governed by manageable judicial standards.

¶ 221 Second, we hold that the General Assembly infringes upon voters' fundamental rights when, on the basis of partisan affiliation, it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights. We hold it also constitutes viewpoint discrimination and retaliation based on protected political activity in violation of the free speech clause and the freedom of assembly clause in our Declaration of Rights. When a redistricting plan creates such an infringement of fundamental rights, strict scrutiny must be applied to determine whether the plan is

nevertheless narrowly tailored to advance a compelling governmental interest.

¶ 222 Here, we hold that the General Assembly’s 2021 enacted plans are partisan gerrymanders that on the basis of partisan affiliation substantially infringe upon plaintiffs’ fundamental right to equal voting power. Finally, we hold that the enacted plans fail strict scrutiny and must therefore be struck down.

¶ 223 We reverse the trial court’s judgment and remand this case to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court. In accordance with our 4 February 2022 order and our decision today, the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution.<sup>17</sup> It is the sincere hope of this Court that these new maps ensure that the channeling of “political power” from the people to their representatives in government through elections, the central democratic process envisioned by our constitutional system, is done on equal terms so that ours is a “government of right” that “originates from the people” and speaks with their voice.

REVERSED AND REMANDED.

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<sup>17</sup> In doing so, we hold they must also conduct racially polarized voting analysis to comply with the constitutional requirements under *Stephenson*. As we have reversed the judgment of the trial court based on its conclusions about the partisan gerrymandering claims, we decline to determine whether NCLCV Plaintiffs could also prevail on their minority vote dilution claim or whether plaintiff Common Cause could prevail on its intentional racial discrimination claim at this time.

Justice MORGAN concurring.

¶ 224 While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed. The substantive construction of the constitutional provision is buttressed by the contextual construction of the brief, yet potent, directive.

¶ 225 The entirety of article I, section 10 of the North Carolina Constitution states: “All elections shall be free.” N.C. Const. art. I, § 10. The dissenting view of this Court, the order of the trial court, and the presentations of Legislative Defendants have largely declined the opportunity to address the manner in which the term “free” should be interpreted as compared to plaintiffs’ significant reliance on the applicability of the Free Elections Clause. In this regard, plaintiffs’ invocation of the constitutional provision has either been cast as inapplicable to this case or relegable to a diminished role. To the extent that the word “free” in article I, section 10 has been construed here by Legislative Defendants, they conflate the right to a free election with the right to be free to participate in the election process, stating “there is no barrier between any voter and a ballot or a ballot box, no restriction on the candidates the voter may select, and no bar on a person’s ability to seek candidacy for any office” and also citing the proposition that “[t]he meaning [of North Carolina’s Free Elections Clause] is plain: free from interference or intimidation,” quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed.

2013). And curiously, instead of focusing on how elections *must* be free, the dissent chooses to focus on how the General Assembly should be free to create legislative election maps admittedly based on politically partisan considerations.

¶ 226

In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination. Commensurate with the General Assembly's constitutional authority to draw legislative maps is one's constitutional right to participate in legislative elections which shall be free of actions—such as the General Assembly's creation of the legislative redistricting maps here—which are tantamount to the predetermination of elections and, hence, constitute constitutional abridgement.

Justice EARLS joins in this concurring opinion.

Chief Justice NEWBY dissenting.

¶ 227 How should a constitution be interpreted? Should its meaning be fixed or changing? If changing, to whom have the people given the task of changing it? When judges change the meaning of a constitution, does this undermine public trust and confidence in the judicial process? Traditionally, honoring the constitutional role assigned to the legislative branch, this Court has stated that acts of the General Assembly are presumed constitutional and deserving of the most deferential standard of review: To be unconstitutional, an act of the General Assembly must violate an explicit provision of our constitution beyond a reasonable doubt. We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by its text. This approach of having a fixed meaning and a deferential standard of review ensures a judge will perform his or her assigned role and not become a policymaker.

¶ 228 With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting. They change the time-honored meaning of various portions of our constitution by inserting their interpretation to reach their desired outcome. They justify this activism because their understanding of certain constitutional provisions has “evolved over time.” They lament that the people have not placed a provision in our constitution for a “citizen referendum” and use the absence of such a provision to justify their judicial activism to amend our constitution. The majority



says courts must protect constitutional rights. This is true. Courts are not, however, to judicially amend the constitution to create those rights. As explicitly stated in our constitution, the people alone have the authority to alter our foundational document, and the people have the final say.

¶ 229 In its analysis, the majority misstates the history, the case law of this Court, and the meaning of various portions of our Declaration of Rights. In its remedy the majority replaces established principles with ambiguity, basically saying that judges alone know which redistricting plan will be constitutional and accepted by this Court based on analysis by political scientists. This approach ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences.

¶ 230 Generally, the majority takes a sweeping brush and enacts its own policy preferences of achieving statewide proportionality as determined by political scientists and approved by judges. While mentioning traditional, neutral redistricting criteria, its primary focus is instead on the final partisanship analysis to achieve statewide parity.

¶ 231 The majority requires the General Assembly to finalize corrected maps within two weeks of the 4 February 2022 order along with an accompanying political science analysis. The majority invites others, who have not been elected by the people, to provide alternative maps without that same required analysis, thus inviting private

parties to usurp legislative authority to make the laws with respect to redistricting without explanation. The majority forces this directive into an artificial timeline which could support the majority's adopting its own maps.

¶ 232 A recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations. N.C. Comm'n on the Admin. of L. & Just., *Final Report* 67 (2017). Today's decision, which dramatically departs from our time-honored standard of requiring proof that an explicit provision of the constitution is violated beyond a reasonable doubt, will solidify this belief.<sup>1</sup>

¶ 233 The people speak through the express language of their constitution. They have assigned specific tasks to each branch of government. When each branch stays within its lane of authority, the will of the people is achieved. When a branch grasps a task assigned to another, that incursion violates separation of powers and thwarts the will of the people. This decision, with its various policy determinations, judicially amends the constitution. Furthermore, it places redistricting squarely in the hands of four justices and not the legislature as expressly assigned by the constitution. The

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<sup>1</sup> It does not help public confidence that in an unprecedented act, a member of the majority used social media to publicize this Court's initial order when it was released, despite the fact that the case was still pending. See Anita Earls (@Anita\_Earls), Twitter (Feb. 4, 2022, 6:28 PM), [https://twitter.com/Anita\\_Earls/status/1489742665356910596](https://twitter.com/Anita_Earls/status/1489742665356910596) ("Based on the trial court's factual findings, we conclude that the congressional and legislative maps . . . are unconstitutional beyond a reasonable doubt." (alteration in original)).

majority's determinations violate the will of the people, making us a government of judges, not of the people. I respectfully dissent.

### I. Standard of Review

¶ 234

The question presented here is whether the enacted plans violate the North Carolina Constitution. While the standard of review is significant in all cases, it is particularly important in cases challenging the constitutionality of a statute.

The idea of one branch of government, the judiciary, preventing another branch of government, the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) (“[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation.”), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805) (Hall, J., dissenting) (“A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another’s error of judgment . . . when he reflects that each has given the same pledges to support the Constitution.”). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with “great reluctance,” *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336–37, 410 S.E.2d 887, 890 (1991).

*State ex rel. McCrory v. Berger*, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part) (footnote omitted).

¶ 235

All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *Baker*, 330 N.C. at 337, 410 S.E.2d at 891. Unlike the United States Constitution, the North Carolina Constitution “is in no matter a grant of power.” *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff’d*, 360 U.S. 45, 79 S. Ct. 985 (1959)). Rather, “[a]ll power which is not limited by the Constitution inheres in the people.” *Id.* at 515, 119 S.E.2d at 891 (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). Because the General Assembly serves as “the agent of the people for enacting laws,” *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), the General Assembly has plenary power, and a restriction on the General Assembly is in fact a restriction on the people themselves, *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be (1) express and (2) proved beyond a reasonable doubt. *Id.* at 334, 410 S.E.2d at 889. When this Court looks for constitutional limitations on the General Assembly’s authority, it looks to the plain text of the constitution.<sup>2</sup>

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<sup>2</sup> Furthermore, “[i]ssues concerning the proper construction of the Constitution of North Carolina ‘are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.’” *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d

¶ 236

This standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the nation’s first reported case of judicial review. The majority cites *Bayard* in an effort to support its contention that judicial interference is necessary here “to prevent legislators from permanently insulating themselves from popular will.” But *Bayard*, rightly understood, was simply about the authority of the Court to declare unconstitutional a law which violated an *express* provision of the constitution. It was not about limiting the General Assembly’s authority to make discretionary political decisions within its express authority. *Bayard* involved a pointed assault on a clearly expressed and easily discernible *individual* right in the 1776 constitution, the right to a trial by jury “in all controversies at Law respecting Property.” N.C. Const. of 1776, § XIV. There the court weighed the General Assembly’s ability to enact a statute that abolished the right to a jury trial for property disputes—for some citizens in some instances—in direct contradiction of the express text of the constitution, the fundamental law of the land:

That 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 without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General

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473, 478 (1989)). “In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere.” *Id.* (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479).

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*, 1 N.C. at 7. Thus, the holding of *Bayard v. Singleton* is easily understood: A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and express will of the people; it is the role of the judiciary to perform this judicial review. The *Bayard* holding, however, does not support the proposition that this Court has the authority to involve itself in a matter that is both constitutionally committed to the General Assembly and lacking in manageable legal standards. Thus, plainly stated and as applied to this case, the uncontroverted standard of review asks whether plaintiffs have shown that the challenged statutes, presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt.

## II. Justiciability

¶ 237

The Supreme Court of the United States has explained that “as essentially a function of the separation of powers,” courts must refuse to review issues that are better suited for the political branches; these issues are nonjusticiable.

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is

found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962); *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Thus, respect for separation of powers requires a court to refrain from entertaining a claim if any of the following are shown: (1) a textually demonstrable commitment of the matter to another political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution of a matter without expressing lack of the respect due to a coordinate branch of government. Often the second, third, and fourth factors are collectively referred to as lacking a manageable standard.

### **A. Manageable Standards**

¶ 238

In addressing the manageable standards analysis, the Supreme Court recently held that partisan gerrymandering claims present nonjusticiable political questions, and it warned of the pitfalls inherent in such claims. *See Rucho v. Common Cause*,

139 S. Ct. 2484, 2506–07 (2019).<sup>3</sup> In *Rucho* “[v]oters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders.” *Id.* at 2491. “The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution.” *Id.* As such, the Supreme Court was tasked with deciding “whether claims of excessive partisanship in districting are ‘justiciable’—that is, properly suited for resolution by the federal courts.” *Id.*

¶ 239

In seeking to answer this question, the Court provided the following historical background:

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. . . .

. . . .

. . . The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, “it will . . . not be denied that a discretionary power over

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<sup>3</sup> It should be noted that several of the attorneys in *Rucho* are also litigating this case. Similar claims are presented here and similar remedies requested, only this time based on our state constitution, not the Federal Constitution. Neither the Federal Constitution nor the state constitution have explicit provisions addressing partisan gerrymandering. Likewise, some of the plaintiffs’ experts in *Rucho* are the same experts as used here.



elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former.” The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

*Id.* at 2494–96 (alteration in original). The Court then noted that “[i]n two areas— [equal voting power defined as] one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.” *Id.* at 2495–96. It specified, however, that

[p]artisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw [v. Reno]*, 509 U.S. [630,] 646, 113 S.Ct. 2816[, 125 L.Ed. 2d 511 (1993)]). *See also Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that “[p]olitics and political considerations are inseparable from districting and apportionment”).

*Id.* at 2497 (last alteration in original). Thus, the Court reasoned that

[t]o 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. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth [v. Jubelirer]*, 541 U.S. [267,] 296, 124 S.Ct. 1769 [(2004)] (plurality opinion). See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

*Id.* The Court then highlighted its "mindful[ness] of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment)." *Id.* at 2498. The Court further clarified that

[a]n important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis v. Bandemer*, 478 U.S. [109,] 145, 106 S.Ct. 2797 [(1986)] (opinion of O'Connor, J.). See *Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

*Id.* (first alteration in original). As such, the Supreme Court concluded that “[i]f federal courts are to ‘inject [themselves] into the most heated partisan issues’ by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. at 2797 (opinion of O’Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’” *Id.* at 2499 (second alteration in original) (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1545).

¶ 240 The Court also explained that partisan gerrymandering claims are effectively requests for courts to allocate political power based upon a principle of proportionality:

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 the departure from proportionality, the more suspect an apportionment plan becomes.” [*Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797.] “Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) (“The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.”).

The Founders certainly did not think proportional representation was required. For more than 50 years after

ratification of the Constitution, many States elected their congressional representatives through at-large or “general ticket” elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: “their party garnered 43 percent of the statewide vote, yet did not receive a single seat.” *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably 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 2499. The Court thus determined that “federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.” *Id.* (quoting *Vieth*, 541 U.S. at 291, 124 S.Ct. 1769 (plurality opinion) (stating that: “‘Fairness’ does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.”)).

¶ 241 The Court also explained that the Federal Constitution is devoid of any metric for measuring political fairness:

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But 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. 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 2501. The Court then turned to the shortcomings of the political science-based tests that the plaintiffs proposed for determining the permissibility of partisan gerrymandering:

The appellees assure us that “the persistence of a party’s advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions.” Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and

Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

*Id.* at 2503–04 (citations omitted).

¶ 242 The Supreme Court concluded “that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.” *Id.* at 2506–07. The Court’s discussion in *Rucho* of its previous decision in *Bandemer*, especially its reference to Justice O’Connor’s concurring opinion, serves as a cautionary tale for the dangers that loom when a court thrusts

itself into the political thicket guided by nothing more than a “nebulous standard.” *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O’Connor, J., concurring). The Supreme Court did state that some state constitutions might provide the explicit guidance necessary to adjudicate partisan gerrymandering claims.

¶ 243 For specific guidance, the Court mentioned a case in which “the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution.” *Rucho*, 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015)). Notably, in *Detzner* the state court was directed by the following express constitutional provision:

In establishing congressional district boundaries:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not

be read to establish any priority of one standard over the other within that subsection.

Fla. Const. art. III, § 20 (footnotes omitted). When the Supreme Court referenced the use of state constitutions to address claims of partisan gerrymandering, it was referring to explicit prohibitions found in state constitutions, not to those created by judges as this Court does today. When asked by the dissent why the majority did not follow the Florida court's lead, the majority said, "The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution." *Rucho*, 139 S. Ct. at 2507.

¶ 244

Here the majority opinion confirms the truth of all the warnings given by the Supreme Court that there is no manageable standard for adjudicating claims of partisan gerrymandering. The will of the people of Florida is fully and clearly expressed in their constitution. Like the Federal Constitution, there is no provision in our state constitution remotely comparable to this express provision in the Florida Constitution. As the Supreme Court said, with an express provision, states are better "armed with a standard that can reliably differentiate" between constitutional and unconstitutional political gerrymandering. *See Rucho*, 139 S. Ct. at 2499. Instead, the majority inexplicably takes the Court's statement that the "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," *id.* at 2507, as an unrestricted license to judicially amend our constitution. In doing so, the majority wholly ignores the fact that the Court in *Rucho* identified several state constitutional provisions and statutes that are clear, manageable, and



express as examples of workable standards for assessing political gerrymandering. *See id.* at 2507–08.

¶ 245 The North Carolina Constitution could have a provision like the Florida Constitution. But, to do so properly requires the amendment process authorized in the constitution itself, allowing the people to determine the wisdom of this new policy. Instead of following the constitutionally required process for properly amending the constitution, the majority now does so by judicial fiat, effectively placing in the constitution that any redistricting plan cannot “on the basis of partisan affiliation . . . deprive[ ] a voter of his or her fundamental right to substantially equal voting power” as determined by certain political science tests. Would the people have adopted this constitutional amendment? We do not know, and the majority does not care.

¶ 246 The plaintiffs in *Rucho* presented arguments and evidence similar to what was presented here—that the use of certain political science theories could provide a manageable standard. The Supreme Court disagreed. *See id.* at 2503–04. Here the majority’s new constitutional standard requires litigants and courts to utilize those rejected approaches to predict the electoral outcomes that various proposed plans would produce. In doing so, the majority adopts various policies. First, the majority makes the initial policy determination that the constitution mandates a statewide proportionality standard. Next, it determines that the constitution requires the use of political science tests to adhere to this standard and designates which political

science tests should be used. But, the majority refuses to identify how the standard can be met: “We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.” “[B]asing [its] constitutional holdings on unstable ground outside judicial expertise,” *Rucho*, 139 S. Ct. at 2504, the majority’s decision effectively results in the creation of a redistricting commission comprised of selected political scientists and judges.

¶ 247 The majority simply fails to recognize that its political science-based approach involves policy decisions and that these are the same policy determinations about which the Supreme Court warned in *Rucho*. *See id.* at 2503–04; *id.* at 2504 (“For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.”). Why did the majority choose this approach and these specific tests instead of others? The expert witnesses in this case looked to selected past statewide elections results for data, and the majority approves such a practice. Left unanswered is which past elections’ results are germane to predicting future ones. Moreover, what if the experts approved by the majority tend to favor one political party over the other as shown by their trial testimony in various cases? Could such experts be considered politically neutral?

¶ 248 As found by the trial court, “[t]he experts’ analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible.” The trial court also found that the “statewide races [used by plaintiffs’ experts] have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina.”

¶ 249 The majority inserts a requirement of “partisan fairness” into our constitution. Under the majority’s newly created policy, any redistricting that diminishes or dilutes an individual’s vote on the basis of partisanship is unconstitutional. This outcome results, as predicted by the Court in *Rucho*, in a statewide proportionality standard. According to the majority, when groups of voters of “equal size” exist within a state, elections should result in an equal amount of representatives. Again, this vague notion of fairness does not answer how to measure whether groups of voters are of equal size or how to predict the results an election would produce.

¶ 250 The majority also bases its reasoning on several false assumptions. First, plaintiffs’ experts and now the majority appear to assume that voters will vote along party lines in future elections. This assumption is especially troubling considering that in 2020 over eight percent of North Carolinians voted for both a Republican candidate for president and a Democratic candidate for governor on the same ballot.

Though individuals self-select their party affiliation, the views can often differ from one individual to another within that affiliation. Second, in equating partisan affiliation to an immutable characteristic and then elevating its protection to strict scrutiny, the majority also fails to consider that party affiliation can change at any point or be absent altogether. How can the General Assembly forecast the appropriate protections for the unaffiliated voter, a group growing by rapid number in the state? What is the standard for that group's fair representation? The majority certainly provides no answer for these important questions.

¶ 251 Third, the majority's policy decision erroneously assumes that a voter's interests can never be adequately represented by someone from a different party. Representative government is grounded in the concept of geographic representation. Though partisanship may influence the representative's attention to certain political issues, the representative is likely to attend to numerous other issues important to the shared community interests that affect his or her constituents. The constitution cannot guarantee that a representative will have the same political objectives as a given constituent because it is an impossible requirement. Representatives are *individuals* with their own beliefs and who pursue their own motivations, often in opposition to other members of their own party. As the trial court correctly found, plaintiffs' experts, and now the majority, treat candidates and representatives "as inanimate objects in that they do not consider the personality or qualifications of each

candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate.” Not only does the majority assume that voters will vote along party lines, but it also likewise transforms the individual representatives into partisan robots. Such reasoning is divorced from reality but nonetheless is the expected result when a court involves itself in a “policy determination of a kind clearly for nonjudicial discretion.” *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. As in this case, the plaintiffs in *Rucho* argued that addressing concerns of partisan gerrymandering was comparable to the process used in the one-person, one-vote legal analysis. Again, the Supreme Court of the United States disagreed. *See Rucho*, 139 S. Ct. at 2501. The one-person, one-vote rule is just “a matter of math.” *Id.* But the Constitution does not provide an “objective measure” of how to determine if a political party is treated “fairly.” *Id.* Again, rejecting the Supreme Court’s guidance, the majority holds that one-person, one-vote and partisan gerrymandering use comparable assessments and even asserts that violations related to partisan gerrymandering are more egregious than violations of one-person, one-vote. In sum, there is no judicially discernible manageable standard. As thoroughly discussed in *Rucho*, the majority’s approach is replete with policy determinations. Thus, the case is nonjusticiable.

**B. Textual Commitment**

¶ 252

In addition to the fact that partisan gerrymandering claims are lacking in manageable standards, the issue is textually committed to the General Assembly. Under our state constitution, the General Assembly possesses plenary power as well as responsibilities explicitly recognized in the text. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. Both the Federal Constitution and the North Carolina Constitution textually assign redistricting authority to the legislature. The Federal Constitution commits the drawing of congressional districts to the state legislatures subject to oversight by the Congress of the United States. “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.” U.S. Const. art. I, § 4, cl. 1. Our constitution also plainly commits redistricting responsibility to the General Assembly. See N.C. Const. art. II, § 3 (“The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts . . . .” (emphasis added)); *id.* § 5 (“The General Assembly . . . shall revise the representative districts and the apportionment of Representatives among those districts . . . .” (emphasis added)). The governor has no role in the redistricting process because the

constitution explicitly exempts redistricting legislation from the governor's veto power. *Id.* § 22(5)(b)–(d).

¶ 253 The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law. Under our historic standard of review, the Court should not venture beyond the express language of the constitution. This Court is simply not constitutionally empowered nor equipped to formulate policy or develop standards for matters of a political, rather than legal, nature.

¶ 254 Our constitution places only the following four enumerated objective limitations on the General Assembly's redistricting authority:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

*Id.* § 3; *see id.* § 5 (setting the same limitations for the state House of Representatives). These express limitations neither restrict nor prohibit the General Assembly’s presumptively constitutional discretion to engage in partisan gerrymandering. *See Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478. The majority seriously errs by suggesting the General Assembly needs an express grant of authority to redistrict for partisan advantage. Under our state constitution, the opposite is true; absent an express prohibition, the General Assembly can proceed.

¶ 255

In a landmark case this Court considered the explicit limitations in Article II, Sections 3 and 5 and concluded that these objective restraints remain valid and can be applied consistently with federal law. In *Stephenson* the plaintiffs challenged the 2001 state legislative redistricting plans as unconstitutional in violation of the Whole County Provisions (WCP) of Article II, Sections 3 and 5. *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002). The defendants argued that “the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act [(VRA)].” *Id.* at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the Whole County Provisions, this Court first had to address “whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not



preempted or otherwise superseded by federal law.” *Id.* at 369, 562 S.E.2d at 388. In doing so, we explained that

an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal “one-person, one-vote” standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.

.... The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, [93 S. Ct. 2321,] 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or “objective constraints” that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

*Id.* at 371–72, 562 S.E.2d at 389–90. Thus, we referred to the Whole County Provisions and the other explicit limitations of Article II, Sections 3 and 5 as the “objective constraints” that the people have imposed upon the General Assembly’s redistricting authority. We then concluded that “the WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law.” *Id.* at 372, 562 S.E.2d at 390. Having decided that the Whole County Provisions remained enforceable to the extent not preempted or otherwise superseded by federal law, we held that the 2001

redistricting plans violated the Whole County Provisions because “the 2001 Senate redistricting plan divide[d] 51 of 100 counties into different Senate Districts,” and “[t]he 2001 House redistricting plan divide[d] 70 out of 100 counties into different House districts.” *Id.* at 371, 562 S.E.2d at 390.

¶ 256

Having found that the maps violated the still valid Whole County Provisions, out of respect for the legislative branch, we then sought to give the General Assembly detailed criteria for fashioning remedial maps. The plaintiffs “contend[ed] that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected ‘at-large.’” *Id.* at 376, 562 S.E.2d at 392. As such, we “turn[ed] to address the constitutional propriety of such districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant case.” *Id.* at 377, 562 S.E.2d at 393. In doing so, we noted that “[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms.” *Id.* at 378, 562 S.E.2d at 393. We explained that

voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or “clout” as voters represented by a slate of legislators within a multi-member district.

*Id.* at 377, 562 S.E.2d at 393 (emphasis added). Thus, we concluded that the use of both single-member and multi-member districts within the same redistricting plan

infringes upon “the fundamental right of each North Carolinian to substantially equal voting power.” *Id.* at 379, 562 S.E.2d at 394. In other words, “substantially equal voting power” meant that each legislator should represent a similar number of constituents. This is an application of the one-person, one-vote concept. Here the majority changes the concept of “substantially equal voting power” of one-person, one-vote to apply now to “party affiliation.”

¶ 257 We did not discuss the political party of the constituents in *Stephenson* but provided the following remedial directive:

[T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting plans, and the VRA districts contained therein, on 11 February 2002.<sup>4</sup> This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

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<sup>4</sup> North Carolina is no longer subject to this requirement of Section 5 of the Voting Rights Act. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215–16 (4th Cir. 2016) (“[I]n late June 2013, the Supreme Court issued its opinion in *Shelby County*. In it, the Court invalidated the preclearance coverage formula, finding it based on outdated data. *Shelby [Cnty. v. Holder]*, [570 U.S. 529, 556–57,] 133 S. Ct. [2612,] 2631 [(2013)]. Consequently, as of that date, North Carolina no longer needed to preclear changes in its election laws.”).

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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.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with “one-person, one-vote” requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with “one-person, one-vote” requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent “one-person, one-vote” standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent “one-person, one-vote” standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the “exterior” line of the multi-county grouping; provided, however, that the resulting interior county lines created by

any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent “one-person, one-vote” standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent “one-person, one-vote” standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

Because multi-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.

Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

*Id.* at 383–84, 562 S.E.2d at 396–97.

¶ 258 The majority attempts to analogize the classification of voters in *Stephenson* that were placed into both single and multi-member districts to the classification of voters based upon partisan affiliation. It does so by concluding, without any citation or other reference to legal support or any explanation, that the right to vote on equal terms “necessarily encompasses the opportunity to aggregate one’s vote with likeminded citizens to elect a governing majority of elected officials who reflect those

citizens' views." The majority thus reasons that "[l]ike the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power diminishes the 'representational influence' of voters" because "those voters have far fewer legislators who are 'responsive' to their concerns and who can together 'press their interests.'"

¶ 259 The majority, however, fails to recognize that at least some partisan considerations are permitted under *Stephenson*. *Id.* at 371, 562 S.E.2d at 390 ("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" (internal citation omitted)); *Rucho*, 139 S. Ct. at 2497 (recognizing that legislators must be permitted to take some "partisan interests into account when drawing district lines"). Furthermore, our *Stephenson* decision thus directs that the Whole County Provisions of Article II, Sections 3 and 5 are still enforceable to the extent that they are compatible with the VRA and one-person, one-vote principles. When understanding *Stephenson* in context, it becomes clear that the Court's statement—that the General Assembly's practice of partisan gerrymandering must still conform with the constitution—refers to the express objective limitations present in Article II, Sections 3 and 5. The Court in *Stephenson* did not identify any other restrictions on the General Assembly's redistricting

authority arising from the state constitution; the Court only recognized the express limitations, which deal exclusively with geographic and population-based measures.

¶ 260 The majority’s misunderstanding of *Stephenson* is further expressed through its requirement from the 4 February 2022 order that “[t]he General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters.”<sup>5</sup> Contrarily, *Stephenson* in no way requires the General Assembly to conduct an independent analysis under Section 2 of the VRA before enacting a redistricting plan. Similarly, federal precedent does not have this requirement.<sup>6</sup>

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<sup>5</sup> Interestingly, the language in the majority’s opinion now attempts to contextualize this requirement, noting that “the General Assembly’s responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law.” But this attempted contextualization is senseless considering the directive from the majority’s order specifically instructed the General Assembly to apply the federal VRA.

<sup>6</sup> “The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans.” *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Thus, absent a “sufficient justification,” a state is prevented from “separat[ing] its citizens into different voting districts on the basis of race.” *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911, 115 S. Ct. 2475, 2486 (1995)). A plaintiff must first “prove that ‘race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.’ That entails demonstrating that the legislature ‘subordinated’ other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to ‘racial considerations.’” *Cooper*, 137 S. Ct. at 1463–64 (citation omitted) (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488).

¶ 261 In *Stephenson* we explained that “Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen’s opportunity to participate in the political process and to elect representatives of his or her choice.” *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 2762 (1986)). We then stated that “[o]n remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts.” *Id.* at 383, 562 S.E.2d at 396–97. We provided this approach to alleviate the tension between the Whole County Provisions and the VRA because the legislative defendants in *Stephenson* argued that “the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act.” *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson* was not forcing the legislative defendants to conduct a VRA analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the Whole County Provisions.

¶ 262 Legislative defendants here made the decision not to draw any VRA districts. As the trial court correctly noted, “[i]f the [l]egislative [d]efendants are incorrect that no VRA Districts are required, [p]laintiff Common Cause has an adequate remedy at



law and that is to bring a claim under Section 2 of the VRA.” There is no requirement under the North Carolina Constitution or federal law that the General Assembly must conduct a racially polarized voting analysis before enacting a redistricting plan. Here the trial court found that there was no showing that race was the predominant factor in drawing the districts. Similarly, the trial court concluded that the state legislative district plans did not violate the Whole County Provisions because the plans contained the minimum number of county traversals necessary to comply with one-person, one-vote principles and because the traversals were done predominantly in pursuit of traditional redistricting principles. Since the trial court formed these conclusions based upon findings of fact supported by competent evidence, its conclusions should be upheld.

¶ 263

Similar to our holding in *Stephenson* is *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875). There the General Assembly divided the City of Wilmington into three wards, with three aldermen elected in each ward. While the first and second wards each had about 400 voters, the third ward had 2800. *Id.* at 225. While the first and second wards each consisted of one precinct for registration and voting, the third ward had four precincts divided by a “meets and bounds” description which omitted a portion of the city. *Id.* at 223. To be eligible to vote, voters needed to register to vote in their assigned precincts. Lastly, the act required a ninety-day residency in the ward, whereas the constitution provided for thirty days. *Id.* at 216, 221. The Court

held that these obstacles to voting amounted to “the disfranchisement of the voters.” *Id.* at 223. Furthermore, it observed that the great disparity of voters in the third ward as compared to the others meant that a third ward voter’s vote was not equal. *Id.* at 225. The vote in the two wards “counts as much as seven votes in the third ward.” *Id.* This malapportionment was “a plain violation of fundamental principles.” *Id.* The “fundamental principle” is that representation shall be apportioned to the popular vote as near as may be. In other words, the Court recognized a basic one-person, one-vote principle. This case has no application to partisan gerrymandering. Notably, for the more than one hundred years since this case was decided, it has never been cited for the proposition for which the majority seeks to use it here.

¶ 264

Since 1776 this Court has exercised restraint absent an express limitation on the authority of the General Assembly. Moreover, this Court has long recognized that responsibilities reserved for the legislature are not reviewable by this Court because they raise political questions. In *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909), the board of education in Haywood County created a school district and then held a vote to enable those in the district to determine whether a special tax should be imposed. *Id.* at 575–76, 66 S.E. at 572. A majority of the qualified voters in the newly drawn district voted in favor of the tax. *Id.* at 576, 66 S.E. at 572. The plaintiffs, who were taxpayers within that district, brought an action to annul creation of the special-tax school district and to enjoin collection of the tax. *Id.* at 575, 66 S.E. at 572. The

plaintiffs argued that the district was neither compact nor convenient, indicating to them that the district had been gerrymandered based on political views to ensure that a majority would vote in favor of the tax. *Id.* at 575–76, 66 S.E. at 572.

¶ 265

This Court, however, recognized that the creation of a special-tax school district was a legislative task, which at that time the legislature had delegated to local boards of education by a special act. *Id.* at 581, 66 S.E. at 572; *see also* Atwell C. McIntosh, *Special Tax School Districts in North Carolina*, 1 N.C. L. Rev. 88, 88–89 (1922). As such, the Court noted that the board’s creation of the district was “no more subject to review than the act of the Legislature itself.” *Howell*, 151 N.C. at 581, 66 S.E. at 574. Because “questions of compactness and convenience must be addressed to somebody’s judgment and discretion,” and because the duty to create districts at that time was “unequivocally delegate[d] . . . to the county board of education,” the plaintiffs’ challenge to the district’s creation and composition raised a political question. *Id.* at 578, 66 S.E. at 573. The Court also noted that “[f]or the courts to undertake to pass upon such matters would be manifestly unwise.” *Id.* at 578, 66 S.E. at 573. Moreover, the Court stated: “There is no principle better established than that *the courts will not interfere* to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion.” *Id.* at 578, 66 S.E. at 573 (emphasis added).

¶ 266 The Court expressed its concern about the politically motivated gerrymandering of special-tax districts to produce a favorable result and commented that perhaps “the overzealous overstep[ped] the limitations of prudence.” *Id.* at 582, 66 S.E. at 574. Nonetheless, the Court recognized that a question about the creation of districts, even when a court disagrees with the district’s creation, raises a political question “to be fought out on the hustings”—or, through the political process—not through the judiciary. *Id.* at 581, 66 S.E. at 574. In recognition of the constitutionally assigned authority to the General Assembly, the Court held it was prohibited from interfering.

¶ 267 In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government or there is not a manageable standard by which to decide it, including whether the matter involves a policy determination. Both elements are present here. In addition to the legislature’s plenary power, the constitution expressly assigns the General Assembly redistricting authority subject only to express limitations. The decision to implement a political fairness requirement in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard. Here this Court’s intrusion is a violation of separation of powers. By striking down the enacted plans as unconstitutional partisan gerrymanders, the majority today wholeheartedly ushers this Court into a new

chapter of judicial activism, severing ties with over two hundred years of judicial restraint in this area. The majority seizes this opportunity to advance its agenda by grafting a prohibition of partisan gerrymandering onto several provisions of the Declaration of Rights. A review of these provisions, however, demonstrates that none specifically address redistricting. They are designed to protect only “individual and personal rights” rather than a group’s right to have a party’s preferred candidate placed in office. The majority seems to concede that there is no express provision of the constitution which addresses partisan gerrymandering. Undeterred, it untethers itself from history and case law in this case to apply an evolving understanding to these rights.

### III. Declaration of Rights

¶ 268

To properly understand what the drafters meant when they included various rights in the Declaration of Rights, and particularly the application, if any, they may have in structuring voting districts, the historical context of our apportionment and elections process is significant. As recognized by the trial court, North Carolina has had some form of elected, representative body since 1665.<sup>7</sup> Leading up to the

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<sup>7</sup> As early as 1663, the Lords Proprietors could enact laws in consultation with the freeman settled in their province. Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina (Mar. 24, 1663), in 1 *Colonial and State Records of North Carolina* 23 (William L. Sanders ed., 1886). In 1665 certain “concessions” by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freeman representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), in 1 *Colonial and State*

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enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress were elected by geographic location, by county or town. See Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of North Carolina Annotated* xii–xiv (1911). The text of the 1776 constitution established the General Assembly as the Senate and the House of Commons. N.C. Const. of 1776, § I. Senators were elected annually by county without regard to the population size of that county, *id.* § II, and representatives were also elected annually but with two representatives per county or specified town, *id.* § III. Only certain towns were included in the representation, *id.* but other towns were later added.<sup>8</sup> This apportionment was done at the same time certain Declaration of Rights provisions, namely the popular sovereignty provision, N.C. Const. of 1776, Declaration of Rights, § I, the free elections clause, *id.* at § VI,

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*Records of North Carolina* 81 (William L. Sanders ed., 1886). The 1669 Fundamental Constitutions of Carolina divided those representatives into counties, divided again into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), in 1 *Colonial and State Records of North Carolina* 188 (William L. Sanders ed., 1886). The assembly met every two years and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the people in Carolina were electing their representatives in districts.

Later under the Royal Governor, the bicameral assembly consisted of an upper house to advise the Royal Governor and a lower house that represented the people and their interests. See Charles Lee Raper, *North Carolina, A Study in English Colonial Government* 71–100 (1904) [hereinafter *English Colonial Government*]. The lower house consisted of freeman elected by county and certain towns. *Id.* at 89–91.

<sup>8</sup> The towns represented initially were Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax, while others were added over the years. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1769 (1992) (discussing Article III of the 1776 constitution and including that Fayetteville, for example, was added to that list in 1789).

and the right to assembly and petition, *id.* at § XVIII, were enacted. Given the apportionment provisions, clearly these clauses did not mean “equal voting power,” even based on population. Furthermore, partisan gerrymandering was well known to the framers, yet none of these provisions were crafted to address it. *See Rucho*, 139 S. Ct. at 2496.

¶ 269 Through the years, the population of the state shifted radically from the east to the piedmont and west. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1770–71 (1992). Nonetheless, the eastern region received additional representation. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, tipping the numbers of representatives in favor of the east despite population growth trends in other areas. *Id.* at 1770–71. This county-town approach, combined with the power of the General Assembly to divide existing counties to create new ones, resulted in superior political power in the east despite the shift in population. *See id.* This malapportionment led to civil unrest and a crisis which culminated with the 1835 constitutional convention. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 3, 13 (2d ed. 2013) [hereinafter *State Constitution*]. No one argued that the provisions of the Declaration of Rights made the legislative apportionment acts unconstitutional.

¶ 270 In 1835 a constitutional convention met to, among other things, adjust the representative system to better address differences in population. *See id.* That

convention resulted in amendments that required senatorial districts to be drawn by the General Assembly based on the taxes paid by each county, N.C. Const. of 1776, amends. of 1835, art. I, § 1, and included the predecessor of the Whole County Provisions, *see* N.C. Const. art. II, § 3(3), that prohibited a county from being divided to create the senatorial districts, N.C. Const. of 1776, amends. of 1835, art. I, § 1. House seats were allotted based on population, allowing the more populated counties to have additional representatives. *Id.* art. I, § 2. Like today, the General Assembly was instructed to reconsider the apportionment of the counties based on population according to the census taken by order of Congress. *Id.* art. I, § 3. Each county was required to have at least one House representative. *Id.* art. I, § 2. Likewise, the convention implemented other changes to representation such as lengthening legislative terms from one year to two years, *id.* art. I, §§ 1–2, and allowing the voters to elect the governor, *id.* art. II, § 1.

¶ 271 The constitutional convention of 1868 placed the Declaration of Rights in Article I, the forefront of the constitution. *See* N.C. Const. of 1868, art. I. The convention added Article I, Section 1, incorporating the provision from the Declaration of Independence that acknowledged our God-given, equal rights. *See id.* art. I, § 1. Significant here, the Senate became apportioned by population. *Id.* art. II, § 5. Along with the express limitation imposed by the Whole County Provisions, the 1868 amendments required senatorial districts to be contiguous and only be redrawn



in connection with the decennial census. *Id.* The convention lengthened the term of the governor to four years, *id.* art. III, § 1, and constitutionally created a separate judicial branch, *see id.* art. IV, with judges being elected by the voters for eight-year terms, *id.* art. IV, § 26.

¶ 272 For almost one hundred years, apportionment remained unchanged until the 1960s. During that time, the Speaker of the House received the authority to apportion the House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Also, to comply with a federal lawsuit and the decision in *Baker v. Carr*, the constitution was amended in 1968 to reflect the one-person, one-vote requirement. *State Constitution* 31. This change affected the structure of the House of Representatives in particular. *Id.* Significantly, the number of House members remained at 120, but the representatives were no longer apportioned by county; instead, the 120 representatives were allotted among districts now drawn based on equal population. N.C. Const. of 1868, amends. of 1961, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the Whole County Provisions, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See* N.C. Const. of 1868, amends. of 1967, art. II, §§ 4, 6.

¶ 273 The current version of our constitution, ratified by the people at the ballot box in 1971 along with five new amendments, came about as a “good government

measure,” *State Constitution* 32–33, or, in other words, an attempt to consolidate the 1868 constitution and its subsequent amendments along with editorial and organizational revisions and amendment proposals. *See, e.g.*, N.C. State Constitution Study Comm’n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968).

¶ 274 Based upon our history and the constitutional structure, when the people had concerns about ineffective political representation, they addressed those concerns by amending the constitution itself, rather than relying on judicial amendment through litigation. Each of the provisions relevant to the claims here have existed since 1971, with some dating back to the 1776 constitution. They are all housed in Article I of our constitution, the Declaration of Rights. None of those clauses have been interpreted as a restriction on partisan considerations in redistricting—even after hundreds of years of apportionments and decades of redistricting litigation—until today.

¶ 275 The Declaration of Rights is an expressive yet nonexhaustive list of protections afforded to *individual* citizens against government intrusion, along with “the ideological premises that underlie the structure of government.” *State Constitution* 46. The Declaration of Rights sets out “[b]asic principles, such as popular sovereignty and separation of powers,” which are “given specific application in later articles.” *Id.* As such, each provision within the Declaration of Rights must be considered with the related, more specific provisions of the constitution that outline the practical

workings for governance. That understanding comports with the general principles for interpreting all legal documents, treating statutes and constitutional text alike.<sup>9</sup>

¶ 276

The frequent elections provision provides a classic example of when a general principle set forth in the Declaration of Rights is practically developed by other constitutional text. Article I, Section 9 states: “For redress of grievances and for amending and strengthening the laws, elections shall be often held.” N.C. Const. art. I, § 9. This provision appeared in the original Declaration of Rights, *see* N.C. Const. of 1776, Declaration of Rights, § XX, and in 1776 “often” meant annual elections, *see, e.g.,* N.C. Const. of 1776, §§ V, VI, XV. The frequency of elections changed in 1835 through amendments providing for biannual legislative elections. N.C. Const. of 1776, amends. of 1835, art. I, §§ 1, 2. Even though it changed the frequency of elections from one to two years, this constitutional amendment did not violate the stated goal to have frequent elections as a timely means of holding accountable an unresponsive elected legislature. The concept of frequent elections remained embodied in the biannual election cycle.

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<sup>9</sup> Compare *Piedmont Publ’g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177–78 (1993) (“One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling.”), with *Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (“Issues concerning the proper construction of the Constitution of North Carolina ‘are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.’” (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

¶ 277 Similarly, the 1868 constitution for the first time set the three branches on different election cycles. For example, in recognition of its policymaking authority, the General Assembly stayed on a biannual election cycle, *see* N.C. Const. of 1868, art. II, §§ 3, 6; however, the executive officers received four-year terms, *id.* art. III, § 1, and the Justices of the Supreme Court received eight-year terms, *id.* art. IV, § 26. Did this change violate the frequent elections provision? The answer is no—the principle of “often” elections in the Declaration of Rights is defined by other provisions of the constitution.

¶ 278 This Court recently read a provision of the Declaration of Rights in Article I, Section 15 together with a more specific and applicable provision in Article IX, Section 2. *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. Article I, Section 15 acknowledges the “right to the privilege of education” and the State’s duty “to guard and maintain that right.” N.C. Const. art. I, § 15. Placed in the working articles of the constitution, Article IX, entitled “Education,” *see id.* art. IX, actually “implements the right to education as provided in Article I,” *Deminski*, ¶ 14. This Court explained that “these two provisions work in tandem,” *id.* in that

“Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.” *Leandro [v. State]*, 346 N.C. [336], 347, 488 S.E.2d [249,] 255 [(1997).] . . . .

Further, Article I, Section 15 places an affirmative duty on the government “to guard and maintain that

right.” N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

*Id.* ¶¶ 14–15. Thus, to arrive at a proper and harmonious interpretation of the constitutional text, the Court read the principles regarding the privilege of education enshrined in our Declaration of Rights in conjunction with the specific application given to education in a later article. As done in *Deminiski*, this Court should construe the general provisions of the Declaration of Rights in harmony with the more specific provisions addressing redistricting.

¶ 279 Moreover, “[t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution *are individual and personal rights* entitled to protection against state action.” *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added); *id.* at 783, 413 S.E.2d at 290 (“Having no other remedy, our common law guarantees *plaintiff* a direct action under the State Constitution for alleged violations of *his* constitutional freedom of speech rights.” (emphases added)).

¶ 280 Finding no explicit constitutional provision prohibiting partisan gerrymandering, the majority creatively attempts to mine the Declaration of Rights to find or create some protection for a political group’s right to their preferred form of representation and a “fair” share of the “voting power.” The majority seems to say

that this entitlement is based on the political party registrants associated with that group. Under a *Corum* analysis, however, an *individual* plaintiff has a direct cause of action against state officials who, acting in their official capacity, violate his constitutional rights as protected by the Declaration of Rights. *Id.* at 783–84, 413 S.E.2d at 290; see *Deminiski*, ¶¶ 16–18 (outlining the *Corum* framework as the legal mechanism for bringing a proper claim under the Declaration of Rights).<sup>10</sup> Even when considering a self-identified class of individuals, such as self-selection of political affiliation, the Court has concluded that the Declaration of Rights protects the individual’s rights, not the political group’s rights. *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204–05 (2011) (explaining that casting votes in alignment with political beliefs implicates “*individual* associational rights” (emphasis added)). This principle rings true even when alleging a violation of an associational right such as those implicated in the free speech and assembly clauses. *Id.* at 49, 707 S.E.2d at 204–05 (“In North Carolina, statutes governing ballot access by political parties implicate *individual* associational rights rooted in the free speech and assembly clauses of the state constitution.” (emphasis added) (citing N.C. Const. art. I, §§ 12, 14)). Nonetheless, in the majority’s view, “political equality” based on a

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<sup>10</sup> The holdings in *Corum* and *Deminiski* did not expand the role of the Court in remedying violations of constitutional rights as protected by the Declaration of Rights. Rather, like in *Bayard*, those cases involved the Court’s interpretation of express provisions within the text of the constitution.

group's party affiliation is a fundamental, albeit unwritten, principle of the Declaration of Rights akin to an immutable characteristic that deserves the highest form of protection under the state constitution.

¶ 281 Contrary to the majority's assertion, even a cursory review of the applicable history and case law supports the basic understanding that the Declaration of Rights protects individual rights such as the freedom of an individual to vote his conscience in an election which is free from fraud. The individual right to participate in a "free election" does not include the right to have one's preferred candidate elected or a political group's right to proportional representation. Moreover, because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, this Court must construe Article II, Sections 3 and 5 and the provisions that the majority relies upon—Article I, Sections 10, 12, 14, and 19—harmoniously. We address each provision in turn.

#### **A. Free Elections Clause**

¶ 282 Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appears in the 1776 constitution, providing that "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI.<sup>11</sup> The 1868 constitution restated the free elections clause

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<sup>11</sup> Under the 1776 constitution, the members of the General Assembly were the only elected officials. The General Assembly thus had the exclusive power to: (1) elect the

as “[a]ll elections ought to be free.” N.C. Const. of 1868, art. I, § 10. Even though the word “ought” in both the 1776 and 1868 constitutions was changed to “shall” in the 1971 constitution, this change is not a substantive revision to the free elections clause. *See Report of the North Carolina State Constitution Study Commission* 73–75; *see also Smith v. Campbell*, 10 N.C. (3 Hawks) 590, 598 (1825) (declaring that “ought” is synonymous with “shall,” noting that “the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively”). “Free” means having political and legal rights of a personal nature or enjoying personal freedom, a “free citizen,” or having “free will” or choice, as opposed to compulsion, force, constraint, or restraint. *See Free, Black’s Law Dictionary* (11th ed. 2019). As a verb, “free” means to liberate or remove a constraint or burden. *Id.* Therefore, giving the provision its plain meaning, “free” means “free from interference or intimidation.” *State Constitution* 56.<sup>12</sup>

¶ 283

While the provision protects the voter, it also protects candidates; however, there are limits. The terms “elections” and “free,” N.C. Const. art. I, § 10, must be

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Governor, N.C. Const. of 1776, § XV; (2) appoint the Attorney-General, *id.* § XIII; (3) appoint Judges of the Supreme Courts of Law and Equity and Judges of Admiralty, *id.*; (4) appoint the general and field officers of the militia, *id.* § XIV; (5) elect the council of State, *id.* § XVI; (6) appoint a treasurer or treasurers of the State, *id.* § XXII; (7) appoint the Secretary of State, *id.* § XXIV; and (8) recommend the appointment of Justices of the Peace to the Governor who shall commission them accordingly, *id.* § XXXIII.

<sup>12</sup> The full text of the Virginia Declaration of Rights, from which the North Carolina free elections clause was taken, provides a clearer idea of the intention behind the text.



read, for example, in the context of Article VI, entitled “Suffrage and Eligibility to Office,” *see id.* art. VI. Even though “elections shall be free,” they are nonetheless restricted in certain ways in Article VI. *See, e.g.*, N.C. Const. art. VI, § 1 (requiring a North Carolina voter to be a citizen of the United States and at least 18 years old); *id.* § 2(1)–(2) (placing residency requirements on voters); *id.* § 2(3) (placing restrictions on felons’ voting rights); *id.* § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* § 5 (requiring that votes by the people be by ballot); *id.* § 7 (requiring public officials to take an oath before assuming office); *id.* § 8 (outlining certain disqualifications from holding public office); *id.* § 9 (prohibiting dual office holding); *id.* § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

¶ 284 Based on our constitution’s plain language and history, the framers had a specific meaning of the free elections clause. With respect to the history of the clause, the trial court found that inclusion of the clause was intended to protect against abuses of executive power, not to protect the people from their representatives who

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That elections of members to serve as representatives of the people, in Assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. of 1776, Declaration of Rights, § 6.

frequently face election by the people.<sup>13</sup> For the same reason, the 1776 constitution allowed the General Assembly to elect the Governor. N.C. Const. of 1776, § XV. The trial court found in part:

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<sup>13</sup> The trial court found in part:

. . . [T]he words as originally used in the English Bill of Rights ([1689]) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England*, 148 (1972). . . Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.

. . . At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed. After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.

. . . The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to

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the elected members of parliament from interference by the Crown.

. . . By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.

. . . Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. [*English Colonial Government*], at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.

. . . No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly. This remained in effect until 1754 when the legislation was repealed by the Crown. [*English Colonial Government*, at] 90–91.

. . . .

. . . At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the

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*Newby, C.J., dissenting*

Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. . . .

. . . The circumstances under which the English Free Election Clause was written were far different than those which caused the same language to be used in the 1776 Constitution.

. . . .

. . . Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. . . .

. . . Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

As noted by the trial court, under the 1776 constitution, voters did not vote for any executive branch members, including the governor, nor did voters elect judges. The General Assembly selected the members of the executive and judicial branches. *See* N.C. Const. of 1776, §§ XIII, XV, XXII, XXIV. Despite the existence of the free elections clause, under this constitutional structure, the voter did not have the right

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authority, but the House believed they had a role in the process in the creation of counties. [*English Colonial Government*,] at 89–90.

As the trial court found, aside from disputes over representation, the lower house fought the Royal Governor over a myriad of issues, including the right to establish a quorum for the legislature and, most seriously, over fiscal matters and the appointment of judges.

to vote for these offices at all and certainly was not entitled to see his *preferred* candidate in office.

¶ 285 Because of its plain meaning, this Court has issued few opinions interpreting the free elections clause though it has been part of our constitution since 1776. The first instance was in *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), in which the plaintiff, a candidate who ostensibly lost an election for the office of county commissioner of Wilkes County, brought a quo warranto action, alleging that the Wilkes County Board of Elections fraudulently deprived him of the office by altering the vote count. *Id.* at 700–01, 191 S.E. at 746. In response, the defendant argued the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. *Id.* at 701, 191 S.E. at 746. After the trial court rejected the defendant's argument, the defendant appealed, arguing that it was the sole duty of the County Board of Elections, rather than the judiciary, "to judicially determine the result of the election from the report and tabulation made by the precinct officials." *Id.* at 701, 191 S.E.2d at 747. In affirming the trial court's decision, we provided the following rationale:

One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers

or other officers of an election.

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 Constitution 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 must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

*Id.* at 702, 191 S.E. at 747 (internal citations omitted) (quoting N.C. Const. of 1868, art. I, § 10). Therefore, we interpreted “free” to mean the right to an honest vote count, free from fraud.

¶ 286

The next time we addressed the merits of a free election claim was in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964). The plaintiff in *Clark* challenged a statute that required voters wishing to change their party affiliation to first take an oath with the following language: “I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law.” *Id.* at 140, 134 S.E.2d at 169. We held that the provision in the statute requiring certain provisions of the oath was invalid, explaining that:

Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a *deterrent to his exercising a free choice among available candidates at the election*—even by casting a write-in ballot. His membership in his party and

his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.

When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of *freedom of conscience*. It denies a free ballot—one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

*Id.* at 142–43, 134 S.E.2d at 170 (emphases added) (citing N.C. Const. of 1868, art. I, § 10). Thus, we interpreted “free” to mean freedom to vote one's conscience. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

¶ 287 The majority judicially amends the free elections clause to read “elections shall be free from depriving a voter of substantially equal voting power on the basis of party affiliation” with the voting power to be measured by modern political science analysis. To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had this unbounded meaning is absurd. The mandated political science methods did not

even exist. Our hundreds of years of constitutional history confirms that this creative idea has no support in our history or case law.

¶ 288 Based upon this Court’s precedent with respect to the free elections clause, a voter is deprived of a “free” election if (1) the election is subject to a fraudulent vote count, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747, or (2) a law prevents a voter from voting according to one’s judgment, *see Clark*, 261 N.C. at 142, 134 S.E.2d at 170. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation. The free elections clause was not meant to restrict the General Assembly’s presumptively constitutional ability to engage in partisan gerrymandering.

### **B. Equal Protection Clause**

¶ 289 Next, the majority claims its decision is supported by the equal protection clause. Article I, Section 19 provides, in relevant part, that “[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.” N.C. Const. art. I, § 19. With respect to the history of this clause, the trial court found as follows:

The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution . . . . The addition of the Equal Protection Clause, while a substantive change, was not meant to “bring about a fundamental change” to



the power of the General Assembly. Report of Study Comm'n at 10.

This Court reviews claims brought under the equal protection clause as follows:

Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made.

When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some “suspect” basis, the upper tier of equal protection analysis is employed. Calling for “strict scrutiny”, this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.

When an equal protection claim does not involve a “suspect class” or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.

For strict scrutiny to be properly applied in evaluating an equal protection claim, it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right. It has been held that a class is deemed “suspect” when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary. The underlying rationale of the theory of suspect classification is that where legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down.

*Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980)

(internal citations omitted).

¶ 290 Classification based upon affiliation with one of the two major political parties in the United States—especially the Democratic Party in North Carolina<sup>14</sup>—does not trigger heightened scrutiny because neither party has historically been relegated to a position of political powerlessness. Allegations of partisan gerrymandering likewise do not trigger heightened scrutiny because the practice of partisan gerrymandering alone does not constitute “an infringement of a fundamental right.” *Id.* at 11, 269 S.E.2d at 149.

¶ 291 This Court has explained that “[t]he right to vote *on equal terms* is a fundamental right.” *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added). The fundamental right to vote on equal terms simply means that each vote should have the same weight. This is a simple mathematical calculation. *Rucho*, 139 S. Ct. at 2501. The historic understanding of equal voting power is stated in Article II, Sections 3(1) and 5(1), requiring that legislators “represent, as nearly as may be, an equal number of inhabitants.” Party affiliation is not mentioned. This understanding of equal voting power meaning one-person, one-vote is supported by our cases such as *Stephenson*

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<sup>14</sup> The trial court found that “[b]etween 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly.” This finding, which is binding on appeal, demonstrates that throughout North Carolina’s history, members of the Democratic Party certainly have not been relegated to a position of political powerlessness.

and *Canaday*. To reach its approved application of the equal protection clause, the majority begins by radically changing the meaning of the fundamental right to vote. It takes this individual right and transforms it into a right to “substantially equal voting power on the basis of party affiliation” and then declares a right to statewide proportional representation. In its unparalleled distortion of the right to vote, it singles out equal representation based on political affiliation, i.e., the two major political parties. What about the unaffiliated voters or voters in “non-partisan,” issue-focused groups organized for political influence? Of course, nothing about this approach is supported by the constitutional text or case law.

¶ 292

Only when a redistricting enactment infringes upon the “right to vote on equal terms for representatives” does heightened scrutiny apply. *See Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 (“The classification of voters into both single-member and multi-member districts within [the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard.”); *Blankenship v. Bartlett*, 363 N.C. 518, 518, 523–24, 681 S.E.2d 759, 763–64, 766 (2009) (applying heightened scrutiny where the plaintiffs showed a “gross disparity in voting power” because some judicial districts had five times the population of others). The “right to vote on equal terms” has been carefully defined in our case law.

¶ 293 In *Stephenson* this Court explained that “[t]he classification of voters into both single-member and multi-member districts [in the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms.” 355 N.C. at 378, 562 S.E.2d at 393. We reasoned that

voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or “clout” as voters represented by a slate of legislators within a multi-member district.

*Id.* at 377, 562 S.E.2d at 393 (emphasis added).

¶ 294 Likewise, in *Blankenship* the plaintiffs demonstrated a “gross disparity in voting power between similarly situated residents of Wake County” by making the following showing:

In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D.

363 N.C. at 527, 681 S.E.2d at 766. We explained that the above showing implicated the fundamental “right to vote on equal terms in representative elections—a one-person, one-vote standard,” and we thus employed a heightened scrutiny analysis. *Id.* at 522, 681 S.E.2d at 762–63.

¶ 295

Unlike the classifications in *Stephenson* and *Blankenship*, partisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard. In other words, an effort to gerrymander districts to favor a political party does not alter *voting power* so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts. Therefore, because partisan gerrymandering does not infringe upon a fundamental right, rational basis review applies. As such, read in harmony with Article II, Sections 3 and 5, Article I, Section 19 only prohibits redistricting plans that fail to “bear some rational relationship to a conceivable legitimate governmental interest.” *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.<sup>15</sup> Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Rucho*, 139 S Ct. at 2506–07 (finding no manageable standards for assessing partisan considerations in redistricting despite claims that the federal Equal Protection Clause had been violated). The plan here does not violate the equal protection clause.

---

<sup>15</sup> Here the enacted plans pass rational basis review because they are rationally related to the General Assembly’s legitimate purpose of redrawing the legislative districts after each decennial census.

### C. Freedom of Assembly and Freedom of Speech Clauses

¶ 296

The majority also engrafts new meaning into Article I, Sections 12 and 14.

These sections provide as follows:

**Sec. 12. Right of assembly and petition.**

The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

....

**Sec. 14. Freedom of speech and press.**

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, §§ 12, 14. The trial court made the following findings with respect to the history of these clauses:

Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution . . . . The addition of the Free Speech Clause, while a substantive change, was not meant to “bring about a fundamental change” to the power of the General Assembly. Report of Study Comm’n at 10.

....

. . . The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that “the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the

Legislature, for redress of grievances.” 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause “that.” 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution . . . . The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to “bring about a fundamental change” to the power of the General Assembly. Rept. of Study Comm’n at 10.

¶ 297 The right to free speech is violated when “restrictions are placed on the espousal of a particular viewpoint,” *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by the contents of an individual’s speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 477–78, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing “that the plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage” in a “constitutionally protected activity,” including First Amendment activities), *appeal dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999) (determining “there was no forecast of evidence” to support a retaliation claim).

¶ 298 Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint. Rather, redistricting enactments in North Carolina are subject to the typical policymaking customs of open debate and

compromise. *See Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (noting that the structure of the legislature “ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise”). As such, opponents of a redistricting plan are free to voice their opposition.

¶ 299

Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout our state’s history. *See Rucho*, 139 S. Ct. at 2494 (“Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.”) As such, it is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party. *See Toomer*, 155 N.C. App. at 477–78, 574 S.E.2d at 89. It is plausible that an individual may be less inclined to voice his political opinions if he is unable to find someone who will listen. Article I, Sections 12 and 14, however, guarantee the rights to speak and assemble without government intervention, rather than the right to be provided a receptive audience. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286, 104 S. Ct. 1058, 1066 (1984) (stating that individuals “have no constitutional right as members of the public to a government audience for their policy views”); *Johnson v. Wisc. Elections Comm’n*, 967 N.W.2d 469, 487 (Wis. 2021) (“Associational rights guarantee



the freedom to *participate in* the political process; they do not guarantee a favorable outcome.” (emphasis added)).

¶ 300 This Court and the Court of Appeals have interpreted speech and assembly rights in alignment with federal case law under the First Amendment. *See Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841; *Feltman v. City of Wilson*, 238 N.C. App. 246, 252–53, 767 S.E.2d 615, 620 (2014); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite having the similar express protections of speech and assembly rights. *Rucho*, 139 S. Ct. at 2505–07. Therefore, when interpreted in harmony with Article II, Sections 3 and 5, it is clear that Article I, Sections 12 and 14 do not limit the General Assembly’s presumptively constitutional authority to engage in partisan gerrymandering. As with the prior Declaration of Rights clauses, there is nothing in the history of the clauses nor the applicable case law that supports the majority’s expanded use of them.

#### **D. Summary**

¶ 301 In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each must be read in harmony with the more specific provisions that outline the practical workings for governance. Notably, Article II, Sections 3 and 5 outline the practical workings of the General Assembly’s

redistricting authority. These provisions contain only four express limitations on the General Assembly's otherwise plenary power, none of which address partisan gerrymandering. Therefore, because the constitution expressly assigns to the General Assembly the authority to redistrict, and this Court is without any satisfactory or manageable standards to assess redistricting decisions by the legislative branch, we should not and cannot adjudicate partisan gerrymandering claims. The claims here present a nonjusticiable political question, and this Court's intrusion violates separation of powers.

¶ 302

Recognizing that there is no explicit constitutional provision supporting its position, the majority resorts to an evolving understanding to support its expansive approach. The majority cites Article I, Sections 1 and 2 as supporting its statewide proportionality argument. *See* N.C. Const. art. I, § 1 (“We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”); *id.* § 2 (“All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”). Undoubtedly, Article I, Sections 1 and 2, are bedrock constitutional principles, recognizing that all are created equal and endowed with God-given rights and acknowledging that all political power originates and is derived from the people.

Neither provision speaks expressly to limitations on the General Assembly's authority to redistrict. Undeterred, however, the majority reads into our constitution a proportionality requirement which appears to be more akin to the European parliamentary system, rather than the American system. Furthermore, the "will of the people" is expressed in the words of our constitution. The best way to honor the "will of the people" is to interpret the constitution as written and as the drafters intended. At no point in 1776, 1835, 1868, or 1971 did the drafters or refiners intend for the selected provisions of the Declaration of Rights to limit the legislature's authority to redistrict. The limitations the people placed upon the General Assembly regarding redistricting are expressly stated in Article II, Sections 3 and 5.

¶ 303 The people expressed their will in the 2020 election, which utilized constitutionally compliant maps. Knowing that the 2021 General Assembly would be tasked with redistricting, the people elected them. Nonetheless, the majority says it is simply "recur[ing] to fundamental principles." Its analysis and remedies, however, are new, not fundamental. Judicially modified constitutional provisions and judicial intrusion into areas specifically reserved for the legislative branch are not a "recurrence to fundamental principles." Rather, the decisions of the majority are a significant departure threatening "the blessings of liberty."

**IV. Remedy**

¶ 304 The majority's remedy mandates its approved political scientists and their approaches. Apparently, the majority's policy decisions guide these selections. The majority's required timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority mandates a May 2022 primary. No reason is given, nor does one exist for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

¶ 305 The majority defines "partisan advantage" as "achieving a political party's advantage across a map incommensurate with its level of statewide voter support." The majority also defines "political fairness" as "the effort to apportion to each political party a share of seats commensurate with its level of statewide support." These definitions demonstrate the majority's desire to judicially amend our constitution to include a requirement of statewide proportional representation. *See Proportional representation, Black's Law Dictionary* (11th ed. 2014) ("An electoral system that allocates legislative seats to each political group in proportion to its actual voting strength in the electorate.") Just as there is no proportionality requirement in our constitution, there is none in the Federal Constitution: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional

representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Rucho*, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

¶ 306

The majority asserts that

[i]f constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the majority’s [sic] view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people.

This claim is wholly unfounded. Slavery was officially abolished by the Thirteenth Amendment to the United States Constitution ratified in 1865. Article I, Section 17, of the 1868 state constitution explicitly prohibits slavery. N.C. Const. of 1868, art. I, § 17. Similarly, the Nineteenth Amendment to the United States Constitution gave women the right to vote. The state constitution was modified accordingly. *See* N.C. Const. art. VI, § 1. As discussed elsewhere, the free election and assembly clauses were enacted in 1776 and were never applied to voter qualifications. Free speech and equal protection clauses were added to the state constitution in 1971, after equal voting qualifications were established. In sum, the issues raised by the majority are specifically addressed in the Federal Constitution and the state constitution.

## V. Conclusion

¶ 307 Historically, to prove an act of the General Assembly is unconstitutional we have required a showing that, beyond a reasonable doubt, an express provision of the constitution is violated. No express provision of our constitution has been violated here. Nonetheless, in the majority's view, it is the members of this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting when met with complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority to amend their constitution. As explicitly stated in our constitution, the people alone have the authority to alter this foundational document. N.C. Const. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of . . . altering . . . their Constitution . . ."); *see also id.* art. XIII, § 2. Under our constitution's expressed process, the people have the final say. *Id.* art. XIII, §§ 3–4.

¶ 308 The majority asserts that its holding somehow adheres to "the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights." It cannot point to any text or case law to support its deciphering of the "spirits and intent" of the document because there is nothing in the text of the constitution, its history, or our case law that supports the majority's position. The majority simply rules that the North Carolina Constitution now has a statewide

proportionality requirement for redistricting. In doing so, the conclusion magically transforms the protection of individual rights into the creation of a protected class consisting of members of a political party, thereby subjecting a redistricting plan to strict scrutiny review. The majority presents various general views about what constitutes unconstitutional partisan gerrymandering and provides a variety of observations about what the constitution requires. Absent from the opinion is what is meant by “substantially equal voting power on the basis of partisan affiliation.” Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process seem to have been transferred to the Court.

¶ 309

The vagaries within the opinion and the order only reinforce the holding of the Supreme Court in *Rucho* that there is no neutral, manageable standard. The four members of this Court alone will approve a redistricting plan which meets their test of constitutionality. This case substantiates the observations of the Supreme Court of the United States as to the many reasons why partisan gerrymandering claims are nonjusticiable. The Court observed that redistricting invariably involves numerous policy decisions. It noted that “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation,” *Rucho*, 139 S. Ct. at 2499, and that “plaintiffs inevitably 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.* In

other words, plaintiffs ask the courts “to reallocate political power between the two major political parties.” *Id.* at 2507. Despite these well-reasoned warnings, the majority of this Court proceeds, and in the process, proves the Supreme Court’s point.

¶ 310

The Supreme Court also warned of the need for courts to provide a clear standard so legislatures could “reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’” *Id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551). It observed that:

“Fairness” does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.

*Id.* at 2499–500 (alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (opinion of Scalia, J.)). The majority ignores all these warnings, fails to articulate a manageable standard, and seems content to have the discretion to determine when a redistricting plan is constitutional. This approach is radically inconsistent with our historic standard of review, which employs a presumption that acts of the General Assembly are constitutional, requiring identification of an express constitutional provision and a showing of a violation of that provision beyond a reasonable doubt.



HARPER V. HALL

2022-NCSC-17

*Newby, C.J., dissenting*

¶ 311 The Supreme Court cautioned that embroiling courts in cases involving partisan gerrymandering claims by applying an “expansive standard” would amount to an “unprecedented intervention in the American political process.” *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306, 124 S. Ct. at 1793 (opinion of Kennedy, J.)). Sadly, the majority does just that. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 015426

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

*Plaintiffs,*

COMMON CAUSE,  
*Plaintiff-Intervenor,*

v.

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

FILED  
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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,  
*Plaintiffs,*

v.

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

ORDER ON REMEDIAL PLANS

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THIS MATTER comes before the undersigned three-judge panel pursuant to the February 4, 2022, Order of the Supreme Court of North Carolina (“Supreme Court Remedial Order) for review of Remedial Redistricting Plans to apportion the state legislative and congressional districts within North Carolina (hereinafter collectively referred to as the “Remedial Plans”) enacted by the North Carolina General Assembly on February 17, 2022. 2022 N.C. Sess. Laws. 2 (also known as Senate Bill 744 and hereafter referred to as “Remedial Senate Plan”); 2022 N.C. Sess. Laws. 4 (also known as House Bill 980 and hereafter referred to as “Remedial House Plan”); 2022 N.C. Sess. Laws. 3 (also known as Senate Bill 745 and hereafter referred to as “Remedial Congressional Plan”).

The Remedial Plans were enacted following entry of the Supreme Court Remedial Order. This Court entered a Judgment on January 11, 2022, wherein the Court upheld the constitutionality of the 2021 Enacted State Legislative and Congressional redistricting plans (hereinafter “Enacted Plans”). Thereafter, Harper Plaintiffs, North Carolina League of Conservation Voters Plaintiffs, and Plaintiff-Intervenor Common Cause (hereinafter collectively referred to as “Plaintiffs”) appealed this Court’s Judgment directly to the Supreme Court of North Carolina. On February 4, 2022, the Supreme Court of North Carolina entered its Remedial Order, with opinion to follow, adopting in full this Court’s findings of fact in the January 11, 2022, Judgment; however, the Supreme Court concluded that the Enacted Plans are unconstitutional under N.C. Const., art. I, §§ 10, 12, 14, and 19 and remanded the action to this Court for remedial proceedings. On February 14, 2022, the Supreme



Court filed its full opinion in this action. *Harper v. Hall*, 2022-NCSC-17 (Feb. 14, 2022).

Pursuant to the Supreme Court Remedial Order and full opinion, and after reviewing all remedial and alternative plans submitted to this Court, as well as additional documents, materials, and information pertaining to the submitted plans, including the report of this Court's appointed Special Masters and comments received from the parties, this Court sets out the following:

## FINDINGS OF FACT

### I. Summary of Requirements for Remedial Process

1. The Supreme Court's Order required the submission to this Court of remedial state legislative and congressional redistricting plans that "satisfy all provisions of the North Carolina Constitution"; both the General Assembly, and any parties to this action who chose to submit proposed remedial plans for this Court's consideration, were required to submit such plans, and additional information, on or before February 18, 2022, at 5:00 p.m.

2. The Supreme Court's Order also provided for a comment period in which parties to these consolidated cases were permitted to file and submit to this Court comments on any plans submitted for this Court's consideration by February 21, 2022 at 5:00 p.m.

3. The Supreme Court's Order also mandated that this Court must approve or adopt constitutionally compliant remedial plans by noon on February 23, 2022.

4. This Court subsequently entered an order on February 8, 2022, providing initial guidance on the remedial phase of the litigation before this Court,

requiring written submissions containing the information the Supreme Court set forth in its Order pertaining to redistricting plans in general and the ordered Remedial Plans specifically. The written submissions were required to provide an explanation of the data and other considerations the mapmaker relied upon to create any submitted proposed remedial plan and to determine that the proposed remedial plan was constitutional—*i.e.*, compliant with the Supreme Court Remedial Order. The full opinion of the Supreme Court, *Harper v. Hall*, 2022-NCSC-17, thereafter provided further guidance for the Remedial Plans.

5. On February 16, 2022, this Court entered an Order appointing three former jurists of our State appellate and trial courts—Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross—to serve as Special Masters for the purposes of: 1) assisting this Court in reviewing any Proposed Remedial Plans enacted and submitted by the General Assembly or otherwise submitted to the Court by a party in these consolidated cases; and, 2) assisting this Court in fulfilling the Supreme Court's directive to this Court to develop remedial plans based upon the findings in this Court's January 11, 2022, Judgment should the General Assembly fail to enact and submit Proposed Remedial Plans compliant with the Supreme Court's Order within the time allowed. This Appointment Order also required the submission of additional information, data, and materials for review by the Court, the parties, and the Special Masters.

6. The Appointment Order further provided that the Special Masters were authorized to hire assistants and advisors reasonably necessary to complete their



work. Pursuant to this authorization, the Special Masters hired the following advisors to assist in evaluating the Remedial Plans:

- a. Bernard Grofman: PhD in political science from the University of Chicago, and currently the Jack W. Peltason Endowed Chair and Distinguished Professor at the University of California, Irvine, School of Social Sciences;
- b. Tyler Jarvis: PhD in mathematics from Princeton University, and currently a Professor at Brigham Young University's College of Physical and Mathematical Sciences;
- c. Eric McGhee: PhD in political science from the University of California, Berkeley, and currently a Senior Fellow at Public Policy Institute of California, a non-partisan, non-profit think tank; and,
- d. Samuel Wang: PhD in Neurosciences from Stanford University, and currently a Professor of neuroscience at Princeton University and Director of the Electoral Innovation Lab.

7. The Court finds that these advisors were reasonably necessary to facilitate the work of the Special Masters to provide this Court with an analysis of the Remedial Plans.<sup>1</sup>

## II. The General Assembly's Remedial Plans as a Whole

8. Pursuant to the Supreme Court's directive, the General Assembly enacted Remedial Plans and, through the Legislative Defendants, timely submitted the Remedial Plans to this Court on February 18, 2022.

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<sup>1</sup> On February 20, 2022, counsel for Harper Plaintiffs submitted a notice of communications wherein the Court was informed that Dr. Wang and Dr. Jarvis had contacted some of Harper Plaintiffs' retained experts by email regarding their algorithms and analysis models. Legislative Defendants subsequently filed a motion to disqualify Dr. Wang and Dr. Jarvis from assisting the Special Masters. The Special Masters have provided additional review of the issues presented in this motion, as noted in the Report attached to this Order, and the Court will address the Motion in a separate order that will be filed contemporaneously herewith.

**A. Participants in the General Assembly's Drawing of Remedial Plans**

9. The House participants involved in the drawing of the Remedial Plans consisted of twenty-one Republican members and one Democratic member, with five Republican staff members and two Democratic staff members.

10. The Senate participants involved in the drawing of the Remedial Plans consisted of four Republican members and five Democratic members, with four Republican staff members and one Democratic staff member.

11. The General Assembly members were also supported by fifteen Legislative Analysis and Bill Drafting Division staff members, as well as four Information Systems Division staff members.

12. Legislative Defendants, through counsel, also relied for limited purposes on their experts and non-testifying experts in this case, including Clark Bensen and Sean Trende for statistical analysis, Dr. Jeffrey Lewis to conduct a Racially Polarized Voting Analysis for both the 2021 and the 2022 districts, and Dr. Michael Barber for statistical analyses of the Remedial Plans and other BVAP-related information.

**B. The General Assembly's Remedial Criteria for Drawing the Remedial Plans**

13. The General Assembly's Remedial Criteria governing the remedial map drawing process were those neutral and traditional redistricting criteria adopted by the Joint Redistricting Committees on August 12, 2021, (received into evidence at trial as exhibit LDTX15) unless the criteria conflicted with the Supreme Court Remedial Order and full opinion.



14. Although expressly forbidden by the previously-used August 2021 Criteria, the General Assembly as part of its Remedial Criteria intentionally used partisan election data as directed by the Supreme Court's Remedial Order. The General Assembly did so by loading such data into Maptitude, the map drawing software utilized by the General Assembly in creating districting plans. The elections used by the General Assembly to evaluate the projected partisan effects of district lines were as follows: Lt. Gov 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lt. Gov. 2020, US Senate 2020, Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, and Governor 2020.

15. The Court finds that the General Assembly's use of partisan data in this manner comported with the Supreme Court Remedial Order.

**C. The General Assembly's Racially Polarized Voting Analysis**

16. Paragraph 8 of the Supreme Court Remedial Order required the General Assembly to "assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters."

17. The General Assembly conducted an abbreviated racially polarized voting ("RPV") analysis to determine whether racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African American voters during the remedial process. Legislative Defendants' expert Dr. Jeffery B.

Lewis ran an analysis and concluded that all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice.

18. The Court finds that the General Assembly satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act.

**D. Plaintiffs' Objections and Comments to the Plans**

19. Pursuant to the Supreme Court's directive, Plaintiffs timely submitted comments on and objections to the Remedial Plans on February 21, 2022.

20. NCLCV Plaintiffs object to the Remedial Senate and Congressional Plans. NCLCV Plaintiffs do not specifically object to the Remedial House Plan but instead request the Court conduct its own analysis of the Remedial House Plan.

21. Harper Plaintiffs object to the Remedial Congressional Plan and Remedial Senate Plan. Harper Plaintiffs do not object to the Remedial House Plan.

22. Plaintiff Common Cause objects to all three Remedial Plans in general and specifically contends the Remedial Senate and House Plans must be redrawn for Senate District 4 and House District 10.

**E. Report of Special Masters**

23. Pursuant to this Court's Appointment Order, the Special Masters prepared a Report containing their analysis and submitted that Report to this Court for its consideration. The Report is attached to this Order as an exhibit and has been filed with the Court.

24. The Special Masters, and their advisors, conducted an analysis of the Remedial Plans using a variety of metrics to determine whether the submitted maps

meet the requirements of the North Carolina Constitution as set out by the Supreme Court of North Carolina in its Remedial Order and full opinion.

25. The Special Masters' findings demonstrate that the Remedial House and Senate Plans meet the requirements of the Supreme Court's Remedial Order and full opinion.

26. The Special Masters' findings demonstrate that the Remedial Congressional Plan does not meet the requirements of the Supreme Court's Remedial Order and full opinion.

27. This Court adopts in full the findings of the Special Masters and sets out additional specific findings on the Remedial Plans' compliance with the Supreme Court Remedial Order below.

### **III. Remedial Congressional Plan**

#### **A. The General Assembly's Starting Point and Subsequently Proposed Amendments**

28. In determining the base map for the Congressional Districts in the Remedial Congressional Plan that was eventually enacted, the Senate started from scratch.

29. There was a House Draft of a remedial congressional plan that was never voted on and therefore never considered by a committee or the full General Assembly.

30. Senator Clark offered one amendment to the Remedial Congressional Plan, a statewide plan, that was tabled.



31. The Remedial Congressional Plans passed the Senate by a vote of 25-19. The “aye” votes in the Senate were solely by members of the Republican party, while the “no” votes in the Senate were solely by members of the Democratic Party. The Remedial Congressional Plan passed the House by voice vote along party lines.

**B. Analysis of Partisanship Reflected in the Remedial Congressional Plan**

32. The Remedial Congressional Plan reflects key differences from the 2021 Enacted Congressional Plan in the projected partisan makeup of certain districts.

- a. Four congressional districts are some of the most politically competitive in the country (*i.e.*, presidential election differences of less than 5%): District 6, District 7, District 13, and District 14.
- b. Wake and Mecklenburg Counties are only split across two districts unlike in the 2021 Enacted Congressional Plan when each county was split across three districts.

33. The Supreme Court Remedial Order stated that a combination of different methods could be used to evaluate the partisan fairness of a districting plan; of those methods, the General Assembly used the “mean-median” test and the “efficiency gap” test to analyze the partisan fairness of the Remedial Plans.

34. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Congressional Plan is not satisfactorily within the statistical ranges set forth in the Supreme Court’s full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

35. The Court finds that the partisan skew in the Remedial Congressional Plan is not explained by the political geography of North Carolina.

#### **IV. Remedial Senate Plan**

##### **A. The General Assembly's Starting Point and Subsequently Proposed Amendments**

36. In determining the base map for the State Senate Districts, the Senate also started from scratch. The Senate altered two county groupings and adopted groupings for Senate Districts 1 and 2 that were preferred by Common Cause Plaintiffs. The remaining county groupings remained the same. As a result, the 13 wholly-contained single district county groupings in the Remedial Plan were kept from the Enacted Plan.

37. Alternative county groupings were proposed but not adopted.

- a. The Senate considered the Democratic members' preferred alternate grouping for Forsyth County, which pairs it with Yadkin instead of Stokes County, but it was determined that the resulting districts in Alexander, Wilkes, Surry, and Stokes Counties would have been less compact. Additionally, Yadkin County is more Republican than Stokes County.
- b. Alternative county groupings around Buncombe County were considered as well, but the Senate determined that any change from the chosen grouping would have resulted in districts that would have been significantly less compact.

38. The Remedial Senate Plan passed the Senate by a vote of 26-19. The “aye” votes in the Senate were solely by members of the Republican party, while the “no” votes in the Senate were solely by members of the Democratic Party. The Remedial Senate Plan passed the House by voice vote along party lines.

**B. Analysis of Partisanship Reflected in the Remedial Senate Plan**

39. The process for the development of the Remedial Senate Plan began with separate maps being drawn by the Senate Democratic Caucus and the Republican Redistricting and Election Committee members, respectively. The plans were then exchanged and discussed; however, after the two groups could not come to a resolution, the plan proposed by the Republican Redistricting and Election Committee members was then put to a vote by the Senate Committee and advanced to the full chamber.

40. The Remedial Senate Plan includes ten districts that were within ten points in the 2020 presidential race.

41. The Remedial Senate Plan reflects key differences from the 2021 Enacted Senate Plan in the projected partisan makeup of districts in certain county groupings.

- a. In the Cumberland-Moore County grouping, Senate District 21 is now more competitive.
- b. In the Iredell-Mecklenburg County grouping, one district is more competitive.



- c. In New Hanover County, the districts were made more competitive, resulting in a Senate District 7 that leans Democratic.
- d. In Wake County, Senate Districts 17 and 18 are more Democratic leaning.

42. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Senate Plan is satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. See *Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

43. The Court finds that to the extent there remains a partisan skew in the Remedial Senate Plan, that partisan skew is explained by the political geography of North Carolina.

**C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria**

44. For the Remedial Senate Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as "incumbents."

45. In the Senate, incumbency was considered evenly. No Senators are double bunked unless as a result of the mandatory county groupings, and no Democratic members are double bunked with other incumbents.

46. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan were applied evenhandedly.

47. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis* and, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

48. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan do not perpetuate a prior unconstitutional redistricting plan.

49. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan are consistent with the equal voting power requirements of the North Carolina Constitution.

50. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial Senate Plan.

## **V. Remedial House Plan**

### **A. The General Assembly's Starting Point and Subsequently Proposed Amendments**

51. In determining the base map for the State House Districts, the House started from scratch after keeping only the 14 districts that were the product of single district county groupings.



52. The Remedial House Plan was ultimately amended by six amendments offered by Democratic Representatives.

- a. Three amendments, drawn by Representative Reives, redrew certain districts in Wake, Mecklenburg, and Buncombe, which were already Democratic leaning, to be more Democratic leaning.
- b. An additional amendment, also drawn by Representative Reives, added an additional district in Cabarrus County that is more Democratic leaning.
- c. An amendment offered by Representative Meyer swapped two precincts in Orange County in order to keep Carrboro whole.
- d. An amendment offered by Representative Hawkins adjusted district lines in Durham County in order to better follow educational district lines.

53. The Remedial House Plan passed the House by a vote of 115-5 and was passed by the Senate by a vote of 41-3. The “aye” votes in the House and Senate were by members of both political parties. The “no” votes in the House and Senate were solely by members of the Democratic Party.

**B. Analysis of Partisanship Reflected in the Remedial House Plan**

54. The Remedial House Plan reflects key differences from the 2021 Enacted House Plan in the projected partisan makeup of districts in certain county groupings.

- a. Buncombe County, which consisted of 1 Republican and 2 Democratic districts in the Enacted Plan, consists of 3 Democratic districts in the Remedial House Plan.
- b. Pitt County, which consisted of 1 Republican and 1 Democratic district in the Enacted Plan, consists of 2 Democratic districts in the Remedial House Plan.
- c. Guilford County now consists of 6 Democratic leaning districts.
- d. Cumberland County now consists of 3 Democratic districts and 1 competitive district.
- e. Mecklenburg and Wake Counties now consist of 13 Democratic leaning districts each.
- f. New Hanover, Cabarrus, and Robeson Counties now contain an additional competitive district each.

55. The Court finds, based upon and confirmed by the analysis of the Special Masters and their advisors, that the Remedial House Plans are satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1% or less) and ¶167 (efficiency gap less than 7%).

56. The Court finds that to the extent there remains a partisan skew in the Remedial House Plan, that partisan skew is explained by the political geography of North Carolina.

**C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria**

57. For the Remedial House Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as "incumbents."

58. In the House, incumbency was considered evenly. The only discretionary double bunking in the Remedial House Plan pairs two Republican members. There was no discretionary double bunking of Democratic members. The few double bunked members are double bunked solely as a result of the mandatory county groupings.

59. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan were applied evenhandedly.

60. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis* and, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

61. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan do not perpetuate a prior unconstitutional redistricting plan.

62. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan are consistent with the equal voting power requirements of the North Carolina Constitution.



63. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial House Plan.

#### **VI. Plaintiffs' Alternative Remedial Plans**

64. The following alternative remedial plans for the Court's consideration were submitted by NCLCV Plaintiffs, Harper Plaintiffs, and Plaintiff-Intervenor Common Cause on February 18, 2022 (hereinafter referred to as "NCLCV Alternative Plans"; "Harper Alternative Plans"; "Common Cause Alternative Plans"; or collectively, "Alternative Plans").

65. Although Plaintiffs submitted Alternative Plans, because the Court is satisfied with the Remedial House and Senate Plans, the Court did not need to consider an alternative plan for adoption.

66. Furthermore, the Court, in following N.C.G.S. § 120-2.4(a1), has chosen to order the use of an interim districting plan for the 2022 North Carolina Congressional election that differs from the Remedial Congressional Plan to the extent necessary to remedy the defects identified by the Court.

#### **VII. Special Masters' Interim Congressional Plan**

67. As part of their Report, the Special Masters have developed a recommended congressional plan ("Interim Congressional Plan") for this Court to consider due to their findings, which the Court has adopted, that the Remedial Congressional Plan does not satisfy the requirements of the Supreme Court Remedial Order and full opinion.

68. The Court finds that the Interim Congressional Plan recommended by the Special Masters was developed in an appropriate fashion<sup>2</sup>, is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion.

Based upon the foregoing findings of fact, the Court makes the following:

### CONCLUSIONS OF LAW

1. In *Harper v. Hall*, 2022-NCSC-17, the Supreme Court stated:

We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.”). As in *Reynolds*, “[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.” *Id.* However, as the trial court’s findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina’s unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional.

*Id.* at ¶163.

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<sup>2</sup> The data files (e.g., block equivalency, shape files, population deviation results) are included in the court file with this order in native format. The equivalent of the “stat pack” has been requested from the Special Masters’ advisor and will be placed in the court file and provided to the parties as soon as available.



2. Plaintiffs have urged upon this court that we must adopt plans that “treat voters of both political parties fairly.” They argue that the “LD Congressional and Senate Plans are not fair.” Further, they argue that the Supreme Court ordered “fair maps” and that “[b]ecause the LD Congressional and Senate Plans are not fair maps, . . . the Court should adopt one of the fairer maps before it – such as the NCLCV Maps.” We see Plaintiffs’ arguments as tantamount to urging this Court to adopt a proportional representation standard, which the Supreme Court, in its order, specifically disavowed. *Id.* at ¶169.

3. The Court concludes that the Remedial Senate Plan satisfies the Supreme Court’s standards.

4. The Court concludes that the Remedial House Plan satisfies the Supreme Court’s standards.

5. Because the Court concludes that the enacted Remedial Senate and House Plans meet the Supreme Court’s standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Senate and House Plans are presumptively constitutional.

6. Furthermore, no evidence presented to the Court is sufficient to overcome this presumption for the Remedial Senate and House Plans, and those plans are therefore constitutional and will be approved.

7. The Court concludes that the Remedial Congressional Plan does not satisfy the Supreme Court’s standards.

8. Plaintiffs suggest that if we conclude that a Remedial Plan passed by the General Assembly does not satisfy the Supreme Court's standards, we should simply jettison that plan and adopt one of their plans. We do not believe that our conclusion on the Remedial Congressional Plan—that it fails to satisfy the Supreme Court's standards—automatically results in the adoption of an alternate plan proposed by Plaintiffs. Given that the ultimate authority and directive is given to the Legislature to draw redistricting maps, we conclude that the appropriate remedy is to modify the Legislative Remedial Congressional Plan to bring it into compliance with the Supreme Court's order. *See* N.C.G.S. § 120-2.4(a1).

9. Because the Court concludes that the enacted Remedial Congressional Plan does not meet the Supreme Court's standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Congressional Plan is not presumptively constitutional and is therefore subject to strict scrutiny.

10. The General Assembly has failed to demonstrate that their proposed Congressional map is narrowly tailored to a compelling governmental interest, and we therefore must conclude that the Remedial Congressional Map is unconstitutional.

11. The Interim Congressional Plan as proposed by the Special Masters satisfies the Supreme Court's standards and should be adopted by this Court for the 2022 North Carolina Congressional elections.

**DECREE**


BASED UPON THE FOREGOING findings and conclusions, the Court here by  
ORDERS the following:

1. The Remedial Senate Plan and Remedial House Plan, enacted into law by the General Assembly on February 17, 2022, are hereby APPROVED by the Court.
2. The Remedial Congressional Plan, enacted into law by the General Assembly on February 17, 2022, is hereby NOT APPROVED by the Court.
3. The Interim Congressional Plan as recommended by the Special Masters is hereby ADOPTED by the Court and approved for the 2022 North Carolina Congressional elections.
4. As the Special Masters and their retained experts may be called upon to assist this Court in this matter should the need arise in the future, the prohibition in this Court's prior order appointing the Special Masters against contacting the Special Masters or their experts remains in full force and effect.

SO ORDERED, this the 23rd day of February, 2022.

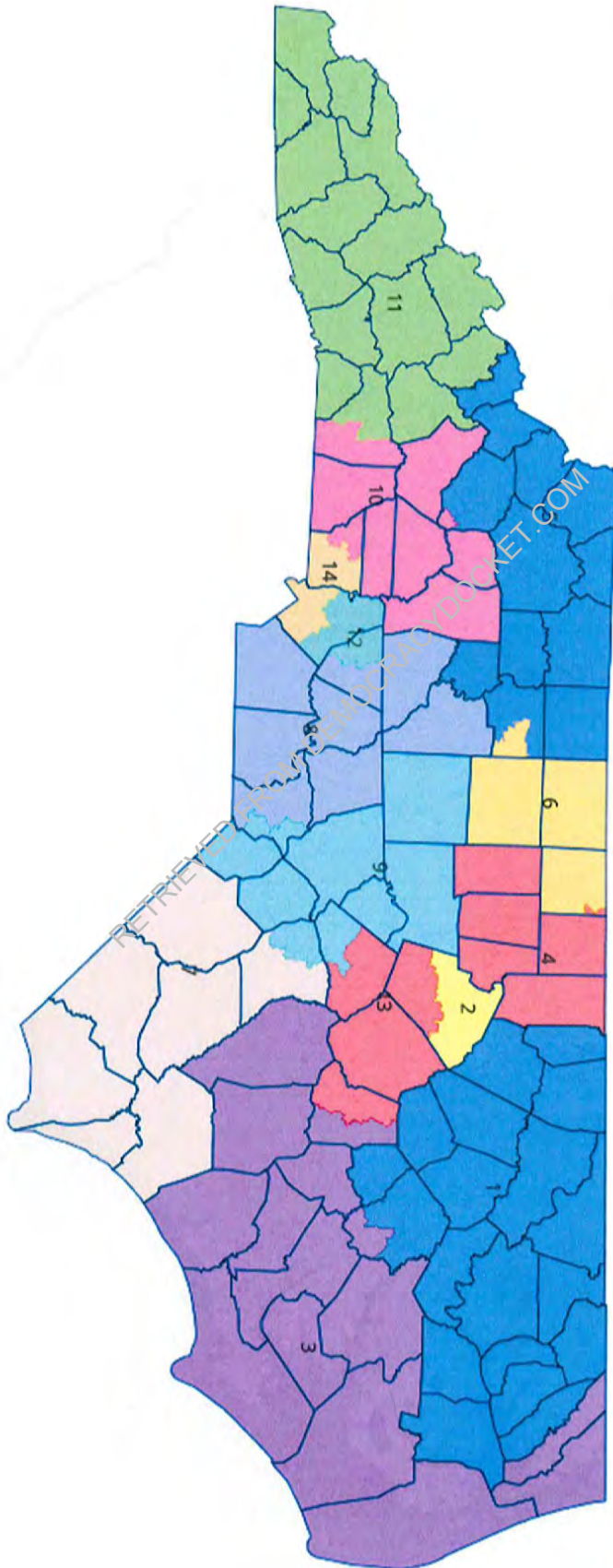
  
A. Graham Shirley, Superior Court Judge

  
Nathaniel J. Poovey, Superior Court Judge

  
Dawn M. Layton, Superior Court Judge



Interim Congressional Plan



TO: Judges Shirley, Poovey, and Layton

FROM: Special Masters

DATE: February 23, 2022

SUBJECT: Special Masters' Report – Analysis and Recommendations

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### **Introduction**

Pursuant to the trial court's "Order Appointing Special Masters" on February 16, 2022, ¶ 6, the undersigned now file the following report with the three-judge panel in this case.

### **Motion for Disqualification**

In its Order Appointing the three Special Masters, the Court authorized the undersigned Special Masters (hereinafter "Special Masters") to "hire research and technical assistants and advisors reasonably necessary to facilitate [our] work." We subsequently retained Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang to assist us in satisfying our duties as Special Masters. The Curriculum Vitae for each of these individuals (hereinafter referred to as "advisors") is attached to this report. In this same Order, this Court also ordered the "parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." *Id.*

We have been informed that Legislative Defendants have filed a motion in this case requesting that this Court disqualify Dr. Wang and Dr. Jarvis as advisors to the Special Masters and take further steps to destroy any work product completed by them and otherwise prohibit the undersigned from considering any information or materials obtained from them. We have investigated this matter and below is a detailed review of our findings.

On February 18, 2022, at 1:01 pm, Dr. Wang emailed Dr. Mattingly requesting the underlying data utilized in his analysis of the 2021 redistricting plans. On this same date at 1:57 p.m., Dr. Mattingly responded, and correspondence between Dr. Wang and Dr. Mattingly continued through February 20, 2022 at 10:23 a.m.

On February 18, 2022, at 1:21 p.m., Dr. Wang emailed Dr. Pedgen, expert for Harper Plaintiffs, seeking the underlying data Dr. Pedgen utilized in his analysis of the 2021 redistricting plans. On this same date at 2:31 p.m., Dr. Pedgen responded to Dr. Wang's inquiry, directing him to use the method utilized by Dr. Mattingly, expert for Harper Plaintiffs and Plaintiff Common Cause. On February 19, 2022, at 6:59 a.m., Dr. Wang responded to Dr. Mattingly's correspondence.



On February 19, 2022, at 4:46 p.m., Dr. Jarvis contacted Dr. Mattingly to request clarification on Dr. Mattingly's analysis and underlying data. Later that day, at 8:13 p.m., Dr. Jarvis contacted Dr. Herschlag, Dr. Mattingly's colleague at Duke University, regarding Dr. Herschlag's analysis and underlying data supporting his analysis of the 2021 redistricting plans to which Dr. Herschlag responded on that same date. All email correspondence between Dr. Wang and Dr. Jarvis and the plaintiff experts Mattingly and Pegden is attached to this report and the email correspondence attached is all of the communication that occurred between the advisors and any of the experts of the parties.

The undersigned acknowledge the technical breach of this Court's mandate that no *ex parte* communication occur between parties and non-parties with the Special Masters. The undersigned, however, respectfully recommend that the Court deny the motion for the following reasons:

- First, these communications between the advisors and Drs. Mattingly and Herschlag do not appear to have been made in bad faith and constitute the only communications between them, written or otherwise. The advisors immediately ceased contact with Drs. Mattingly and Herschlag, and have provided copies of the communications. Therefore, all parties are privy to the extent of the communications.
- Second, their communications directed at experts for Harper Plaintiffs were solely for the purpose of proceeding as quickly as possible within the abbreviated time frame allotted for the remedial process.
- Third, the Special Masters emphasize that, while the communications were in the context of the advisors' preliminary steps to evaluate the 2022 Remedial Plans, the communications sought background information pertaining to the earlier analysis of the 2021 Redistricting Plans performed by Drs. Pegden, Mattingly, and Herschlag in the merits stage of this case that was ultimately received and relied upon by the Court at trial. Additionally, as was later determined, the information sought by Dr. Wang and by Dr. Jarvis was publicly available on Dr. Herschlag's website at the time of the communications questioned herein by the Legislative Defendants.
- Finally, though the analysis provided by Drs. Wang and Jarvis was helpful and consistent with the analysis of our other expert advisors, it was not determinative of any recommendations made by the Special Masters to the court.



## **Review of Proposed Remedial Plans**

Pursuant to the North Carolina Supreme Court's opinion, any plan with a mean-median difference of 1% or less (*Harper*, 2022-NCSC-17 at ¶ 166) and an efficiency gap below 7% (*Harper*, 2022-NCSC-17 at ¶ 167) should be considered presumptively constitutional. Additionally, as the Supreme Court recognized, other metrics may be instructive (*Harper*, 2022-NCSC-17 at ¶ 168). The Special Masters considered the full Order and Opinion of the North Carolina Supreme Court along with, the submissions from all of the parties as well as the reports of the advisors and reached the following conclusions:

### **I. Proposed Remedial House Plan**

The advisors as well as the experts of the parties ("experts") all found the efficiency gap of the proposed remedial House plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial House plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court that the proposed remedial House plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial House plan.

### **II. Proposed Remedial Senate Plan**

All of the advisors and experts found the efficiency gap of the proposed remedial Senate plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court the remedial Senate plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial Senate plan.



### III. Proposed Remedial Congressional Plan

Unlike the proposed remedial House and Senate plans, there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%. The Special Masters considered this evidence along with the advisors' findings on the partisan symmetry analysis and the declination metrics. There is disagreement among the parties as to whether the proposed remedial congressional plan meets the presumptively constitutional thresholds suggested by the Supreme Court. The Special Masters, considering the reports of their advisors and the experts of the parties while giving appropriate deference to the General Assembly, are of the opinion that the proposed remedial congressional plan fails to meet the threshold of constitutionality and recommend that the Trial Court reject the proposed remedial congressional plan as being unconstitutional.

Given the recommendation that the Trial Court reject the proposed remedial congressional plan, and consistent with the instructions from the three-judge panel and the Order of the Supreme Court of North Carolina, the Special Masters have submitted a modified version of the proposed remedial congressional plan submitted by the Legislative Defendants. It is our opinion that the attached plan satisfies the requirements of the Supreme Court.

The following data files for the modified congressional plan are included with this report:

1. Block equivalency files in .CSV format for each district and the plan as a whole;
2. Environmental Systems Research Institute, Inc. (ESRI) shapefiles for each district and the plans as a whole;
3. Color maps in .PDF format of the plan as a whole;
4. Population totals and deviations for each district based on the 2020 Census P.L. 94-171 dataset; and
5. Note: due to time constraints, the functional equivalent of what the General Assembly includes in its "stat pack" is not included with this report; however, if requested we will endeavor to obtain this from Dr. Grofman.

In redrawing certain district lines, the undersigned considered all of the submitted plans and related commentary. Being mindful that the Constitution of North Carolina provides that the General Assembly has the responsibility of redistricting, we focused on the proposed remedial congressional plan submitted by the Legislative Defendants. On that basis, the Special Masters worked solely with Dr. Bernard Grofman and his assistant to amend the Legislative Defendants' plan to



enhance its consistency with the opinion of the Supreme Court of North Carolina, the Constitutions of the United States and of North Carolina, and the expressed will of the General Assembly.

Dr. Grofman prepared a preliminary exemplar map at the Special Masters' request and thereafter at the instruction of the Special Masters prepared three maps for consideration. One of these maps raised potential VRA concerns and so was discarded. A second map did not meet the 1% threshold for mean-median difference and so was likewise discarded. The Special Masters then modified the third prepared map in order to improve the efficiency gap and mean-median difference scores as well as compactness and contiguity measures.

The following parties were involved in the process of redrawing the plans:

- a. Robert F. Orr
- b. Robert H. Edmunds, Jr.
- c. Thomas W. Ross
- d. Dr. Bernard N. Grofman
- e. Zachary R. Griggy (Research Assistant to Dr. Grofman)
- f. Adam H. Steele, Senior Judicial Fellow (for administrative purposes only)
- g. Alison J. Rossi, Judicial Fellow (for administrative purposes only)
- h. Danielle Smith, Judicial Fellow (for administrative purposes only)

Dave's Redistricting App was used in the redrawing of the plan.

The Special Masters believe the modified congressional plan recommended for adoption to the Trial Court achieves the partisan fairness and "substantially equal voting power" required by the Supreme Court of North Carolina without diluting votes under the Voting Rights Act while maintaining the number of county splits, retaining equal population, compactness, and contiguity, as well as respecting municipal boundaries. Dr. Grofman's analysis of the modified congressional plan recommended by the Special Masters indicates that the plan has an efficiency gap of 0.63%, a mean-median difference of 0.69%, seat bias of 0.28%, and vote bias of 0.10%. According to Dr. Grofman, "this is the most non-dilutive plan in partisan terms of any map that has been submitted to the Court."

Accordingly, the Special Masters recommend to the Trial Court that it order the State of North Carolina to utilize the modified congressional plan prepared by the Special Masters in the 2022 Congressional election.

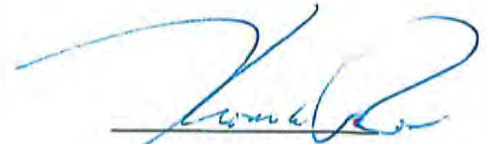
This the 23rd day of February 2022.



Robert H. Edmunds, Jr.



Robert F. Orr



Thomas W. Ross

**Acknowledgement**

We would like to thank the advisors, Dr. Grofman, Dr. Jarvis, Dr. McGhee, and Dr. Wang for their analysis and advice in the extremely compressed timeframe. Additionally, we would like to thank the Judicial Fellows, Adam Steele, Alison Rossi, and Danielle Smith for their administrative support and assistance in preparing this report and for the long hours of work in bringing this matter to a conclusion.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via electronic transmission by e-mail addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 23<sup>rd</sup> day of February 2022.

  
\_\_\_\_\_  
Kellie Z. Myers  
Court Administrator - 10<sup>th</sup> Judicial District  
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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 015426

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

COMMON CAUSE,  
*Plaintiff-Intervenor*,

v.

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

FILED  
2022 FEB 23 AM 11:01  
WAKE CO., C.S.C.  
RY

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,  
*Plaintiffs*,

v.

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

**ORDER DENYING LEGISLATIVE DEFENDANT'S MOTION TO DISQUALIFY**

THIS MATTER comes before the undersigned three-judge panel upon Legislative Defendant's Motion to Disqualify Dr. Samuel Wang and Dr. Tyler Jarvis as Assistants to the Special Masters, filed February 21, 2022.

Legislative Defendants, through the present Motion, request this Court to disqualify Dr. Wang and Dr. Jarvis as assistants or advisors to the Special Masters, requiring any work

product completed by them to be immediately destroyed, prohibiting the Special Masters from considering any information or materials obtained from Dr. Wang or Dr. Jarvis, and requiring the Special Masters and their assistants to produce any communications had with third parties related to North Carolina redistricting.

In the Report of the Special Masters, filed contemporaneously with this Order as part of this Court's Remedial Order, the Special Masters set forth multiple reasons why Drs. Wang and Jarvis should not be disqualified from serving as their advisors. This Court agrees and, for the reasons expressed in the Special Masters' Report, will deny Legislative Defendant's Motion to Disqualify.

BASED UPON THE FOREGOING and in the exercise of the Court's discretion, the Court ORDERS that Legislative Defendant's Motion is DENIED.

SO ORDERED, this the 23 day of February 2022.

  
A. Graham Shirley, Superior Court Judge

**/s/ Nathaniel J. Poovey**

Nathaniel J. Poovey, Superior Court Judge

**/s/ Dawn M. Layton**

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via electronic transmission by e-mail addressed as follows:

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*Counsel for State Board Defendants*

Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 23<sup>rd</sup> day of February 2022.

  
\_\_\_\_\_  
Kellie Z. Myers  
Court Administrator - 10<sup>th</sup> Judicial District  
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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

21 CVS 015426

21 CVS 500085

2022 FEB 21 A 11:13

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

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

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

Defendants.

WAKE CO., C.C.C.

**LEGISLATIVE DEFENDANTS'  
MOTION TO DISQUALIFY  
SAM WANG AND TYLER JARVIS  
AS ASSISTANTS TO THE  
SPECIAL MASTERS**

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore (collectively, "Legislative Defendants"), by and through undersigned counsel, and pursuant to Rule 7 of the North Carolina Rules of Civil Procedure and the Court's inherent authority, move this Court for an order (1) disqualifying Sam Wang and Tyler Jarvis as assistants to the Special Masters; (2) requiring any work product completed by Wang or Jarvis to be immediately destroyed; (3) prohibiting the Special Masters from considering any information or materials obtained from Wang or Jarvis; and (4) requiring the Special Masters and their assistants to immediately produce any other communications they have had with third parties related to North Carolina redistricting. In support of this motion, Legislative Defendants respectfully submit the following:

1. On February 16, 2022, this Court entered an Order appointing three Special Masters to aid the Court in the remedial process: Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W.

Ross. The Order also authorized the Special Masters “to hire research and technical assistants and advisors reasonably necessary to facilitate their work.” (February 16 Order at ¶ 3). Of specific import, the Order stressed that “Parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation.” (February 16 Order at ¶ 5(b)). The Order also required all parties submitting Proposed Remedial Plans to timely submit them by 5:00 p.m. on Friday, February 18, 2022.

2. On Friday, February 18 at 5:54 p.m., the parties were informed via email that the Special Masters would utilize four assistants in this process: Bernard Grofman, Tyler Jarvis, Eric McGhee, and Sam Wang.

3. On Sunday, February 20, 2022 at 3:12 p.m., Legislative Defendants were informed by counsel for *Harper* Plaintiffs for the first time that two of the appointed assistants, Tyler Jarvis and Sam Wang, engaged in substantive *ex parte* communications with Plaintiffs’ experts, Drs. Mattingly, Herschlag, and Pegden, both prior to and following their formal appointments as assistants, seeking advice regarding the data and information relating to this remedial phase.

4. First, on February 18, 2022 at 1:21 p.m., Sam Wang emailed Dr. Pegden disclosing that he had “been approached to evaluate the remedial plans for North Carolina” and sought data and information underlying Dr. Pegden’s analysis in the above-captioned case. Approximately one hour later, Dr. Pegden actively engaged Wang and provided substantive advice for Wang to use Dr. Mattingly’s method as a benchmark. A copy of the correspondence between Dr. Pegden and Wang is attached hereto as **Exhibit A**, including Wang’s follow up email seeking additional advice as to cluster-by-cluster analysis.

5. Similarly, on Friday, February 18 at 1:01 p.m., Wang reached out to Dr. Mattingly seeking advice regarding the underlying data supporting his report in the above-captioned matter.

Dr. Mattingly quickly responded within the hour, and gave his opinion as to the Court's remedial order. The correspondence continued through the weekend, with Dr. Mattingly acknowledging that "the court order forbids [him] from engaging with the special masters team," but then went on to clarify an "error" in his initial correspondence. A copy of the correspondence between Dr. Mattingly and Wang is attached hereto as **Exhibit B**.

6. Lastly, Tyler Jarvis contacted Dr. Herschlag on Saturday, February 19 and engaged in substantive conversations regarding Dr. Herschlag's analysis and underlying data supporting his report in the above-captioned matter. A copy of the correspondence between Dr. Herschlag and Jarvis is attached hereto as **Exhibit C**.

7. Wang and Jarvis did not copy any counsel of record or the parties in their correspondence with Drs. Pegden, Mattingly, and Herschlag.

8. To the best of Legislative Defendants knowledge, Wang and Jarvis only reached out to Plaintiffs' experts.

9. Special Masters were prohibited from having *ex parte* communications with the parties. (See February 16 Order at ¶ 5(b)). This prohibition would be meaningless if it did not also apply to their "agents." Certainly, a Special Master who is prohibited from having *ex parte* communications cannot evade the requirements of this rule by directing his assistant to make those communications for him. And if the assistant made *ex parte* communications without the permission of the Special Master, this would indicate that the assistant had exercised his own discretion to have *ex parte* communications, a procedure that the Special Master cannot directly make without violating the court's Order. Moreover, the reasons to prohibit *ex parte* communications includes the need for transparency and equal treatment of the parties. The communications disclosed by the *Harper* Plaintiffs' counsel already show that the process is



tainted and that the Special Master's assistants intend to rely on Plaintiffs' experts for privately conveyed information as opposed to public flings that are available to the parties and the public.

10. Courts routinely rely on Special Masters in redistricting litigation to provide impartial guidance on complex, public issues. Allowing Wang and Jarvis to engage in *ex parte* communications here would be the equivalent of the *Covington* court relying on Dr. Persily's Report if his research assistants had directly reached out to either Plaintiffs or Defendants experts to assist in writing the Report that the court relied upon. That did not happen in *Covington*, and should not happen here.

11. Allowing Wang and Jarvis to continue as assistants to the Special Masters would prejudice Legislative Defendants. Specifically, seeking information only from Plaintiffs' experts in a one-sided *ex parte* project will bias the assistants, the Special Masters, and possibly the Court. This conduct is inappropriate for individuals appointed by the Court to assist their impartial review.<sup>1</sup>

12. Keeping Wang and Jarvis on as assistants to the Special Masters will cast a pall on the impartiality of these proceedings. Nor would it be the first time that Professor Wang's actions raised issues as to transparency and impartiality. For example, just recently Professor Wang and his Princeton Gerrymandering Project were the subject of allegations in a lawsuit alleging improper contact and with a member of the New Jersey Redistricting Commission.<sup>2</sup>

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<sup>1</sup> In fact, Wang displayed prejudice before his appointment as an assistant to the Special Masters against Legislative Defendants as he tweeted a criticism of Legislative Defendants' expert Dr. Barber during trial in this very matter. See <https://twitter.com/SamWangPhD/status/1478192492432535558>.

<sup>2</sup> See *In re Establishment of Congressional Districts by the New Jersey Redistricting Commission*, No. 086587, ¶ 34 (Feb. 3, 2022), <https://www.njcourts.gov/courts/assets/supreme/R3-21.pdf?c=1SK>; *Claiming partisan fairness models are proprietary, Princeton Gerrymandering Project won't show their work*, New Jersey Globe (Jan. 27, 2022), <https://newjerseyglobe.com/redistricting/claiming-partisan-fairness-models-are-proprietary-princeton-gerrymandering-project-wont-show-their-work/>; see also *New congressional voting map reignites calls for redistricting reform*, NJ Spotlight News (Feb. 1, 2022), <https://www.njspotlightnews.org/2022/02/nj-new-congressional-voting-map-redistricting-reform-new-jersey-supreme-court-republicans-object/>.

13. The interests of justice require disqualification of Wang and Jarvis in this pending matter of public interest.

WHEREFORE, for the foregoing reasons, Legislative Defendants move the Court to enter an Order:

1. Disqualifying Sam Wang and Tyler Jarvis as assistants to the Special Masters;
2. Requiring any work product completed by Wang or Jarvis to be immediately destroyed;
3. Prohibiting the Special Masters from considering any information or materials obtained from Wang or Jarvis;
4. Requiring the Special Masters and their assistants to immediately produce any other communications they have had with third parties related to North Carolina redistricting; and
5. Granting any further relief as this Court deems necessary and just.

Respectfully submitted, this the 21st day of February, 2022.

/s/ Phillip J. Strach

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It is hereby certified that on this the 21st day of February, 2022, the foregoing was served on the individuals below by email:

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/s/ Phillip J. Strach

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# Exhibit A

RETRIEVED FROM DEMOCRACYDOCKET.COM

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**From:** "Samuel S. Wang" <[sswang@princeton.edu](mailto:sswang@princeton.edu)>  
**Sent:** February 19, 2022 6:59:24 AM EST  
**To:** Wesley Pegden <[wes@math.cmu.edu](mailto:wes@math.cmu.edu)>  
**Subject:** Re: North Carolina ensemble analysis

Dear Wes,

That's a good point. I forgot that what you do is explore the space around a specific plan. Sorry to be spacey that way.

I am requested to evaluate the remedial plans, focusing on the eight statewide plans from Harper plaintiffs, NCLCV, and the Legislative Defendants. I think Common Cause's single districts and the Democrats' single-cluster alternatives are secondary, though I am pondering them.

I wrote Mattingly too. He thinks ensembles are not at the heart of the court's thinking. If the court wants partisan-fairness metrics (mean-median difference, efficiency gap, etc.) that is certainly easier for me to write about. It's more in the territory of turning measures and statistical tests into legally comprehensible concepts, which is more in my usual zone. I am kind of old-fashioned that way.

Cluster-by-cluster analysis...the statistical measures aren't suited for that, right? I wonder what I would do there. Maybe just a simple table of safe D/competitive/safe R?

Best,  
Sam

>>>

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Election analytics: [election.princeton.edu](http://election.princeton.edu)

---

**From:** Wesley Pegden <[wes@math.cmu.edu](mailto:wes@math.cmu.edu)>  
**Sent:** Friday, February 18, 2022 2:31 PM  
**To:** Samuel S. Wang <[sswang@princeton.edu](mailto:sswang@princeton.edu)>  
**Subject:** Re: North Carolina ensemble analysis

Hi Sam!

I can certainly send you a bunch of histograms (and in any case all of the reports from that case are a matter of public record), but I think as a benchmark to compare to, it is more sensible to compare to a method like Mattingly's which has the design goal of generating a representative sample.

(Since my method is aimed instead at detecting optimization by testing sensitivity to perturbation, it is not actually a design goal of the algorithm that the distribution of partisan outcomes of the comparison districtings are globally representative of the distribution of all maps, and for various reasons you expect that if you used my histograms as proxies for a representative sample, you would underestimate the extent to which the enacted map is truly gerrymandered; i.e., my comparison maps tend to be more similar to the map they are being used to evaluate than a truly random map would be).

For example, in my reports, I even caution against making comparative statements about one cluster vs another of the same districting, i.e., I discourage concluding, e.g., that cluster A is more gerrymandered than cluster B because A is a more statistically significant outlier; instead, the right interpretation is that my method is better able to generate rigorous evidence that A is an outlier.

So generally I would use caution using the results in this way (especially in an analysis that was not using the same implementation of the Markov chain). For example, I have testified multiple times that my method is not an appropriate way to demonstrate that a districting is not gerrymandered.

(Have you been asked to analyze the districting cluster-by-cluster or just at the whole state level?)

-Wes

On 2/18/22 13:21, Samuel S. Wang wrote:

> Hi, Wes. I wonder if you can help me out.

>

> I've been approached to evaluate the remedial plans for North Carolina.

> A very useful benchmark would be the analysis you have done. Is it

> possible to get the histograms of the analysis you've done? That would

> allow a direct apples to apples comparison, which the court might like.

>

> Best,

> Sam



>  
> >>>>  
>  
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>  
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>  
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> Sam's election analytics:[election.princeton.edu](http://election.princeton.edu)  
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>  
>  
> Sent from my iPhone

--  
Sent from my Android device with K-9 Mail. Please excuse my brevity.

RETRIEVED FROM DEMOCRACYDOCKET.COM

# Exhibit B

RETRIEVED FROM DEMOCRACYDOCKET.COM

**From:** "Samuel S. Wang" <[sswang@princeton.edu](mailto:sswang@princeton.edu)>  
**Date:** February 20, 2022 at 10:23:45 AM EST  
**To:** Jonathan Mattingly <[jonm@math.duke.edu](mailto:jonm@math.duke.edu)>  
**Subject:** Re: Histogram data

In light of this, I will not write about ensembles at all. For the record, I feel that mainly you pointed me towards publicly posted files.

>>>>

Prof. Samuel S.-H. Wang  
Neuroscience Institute, Washington Road  
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Redistricting: [gerrymander.princeton.edu](http://gerrymander.princeton.edu)  
Sam's election analytics: [election.princeton.edu](http://election.princeton.edu)

Sent from my iPhone

On Feb 20, 2022, at 9:59 AM, Jonathan Mattingly <[jonm@math.duke.edu](mailto:jonm@math.duke.edu)> wrote:

Sam,

I did not know you were working with the special master. I have been told that the court order forbids me and greg from engaging with the special masters team. It makes sense as you are to be at arms-length and we are associated with the plaintiffs.

I will clarify one error I made in my first email. I meant to point you to the "No Municipality" ensemble not the incumbency plots. This is the primary for the house and the secondary for the Senate.

If we have been miss informed about interacting with the special master, please let us know. This is what counsel has told us.

Jonathan

On Feb 19, 2022, at 7:10 AM, Samuel S. Wang <[sswang@princeton.edu](mailto:sswang@princeton.edu)> wrote:

Hi, Jonathan.

Thinking about one of your points, I will mostly focus on scalar statistical measures such as mean-median difference and so on. There is plenty to think about there. The special masters have also contacted Tyler Jarvis to work on ensemble analysis, which is a more natural fit.

My group has generated its own histograms. We have our own ensembles, based on 2020 election data. It is a small fraction of what you and Herschlag have done, but maybe it will do for my purposes.

I am going through your Github today. If you can point me toward a file in there that corresponds to the histograms in Figures 5.1.1 and 5.2.1, that would be helpful. It would also orient me inside your Github!

Best,  
Sam

From: Jonathan Mattingly <[jonm@math.duke.edu](mailto:jonm@math.duke.edu)>  
Sent: Friday, February 18, 2022 1:57 PM  
To: Samuel S. Wang <[sswang@princeton.edu](mailto:sswang@princeton.edu)>  
Subject: Re: Histogram data

Hi sam,

Which histograms in particular? Do you mean like page 19? there are a lot of histograms.

Notice there are two different ensembles for the house and senate. One which is more strict about preserving municipalities. The court order don't seem to valorize that one as much. In general it is not clear that comparing the ensembles is as relevant given that the court asked about partisan symmetry and other measure which the ensemble should be judged. A new ensemble could/should be generated or the old one could be filtered (maybe)

Here is most of our data is here:

<https://git.math.duke.edu/gitlab/gjh/ncanalysis2020>

Jonathan

From: "Samuel S. Wang" <[sswang@princeton.edu](mailto:sswang@princeton.edu)>  
Date: Friday, February 18, 2022 at 1:01 PM  
To: Jonathan Mattingly <[jonm@math.duke.edu](mailto:jonm@math.duke.edu)>  
Subject: Histogram data

Hi, Jonathan. How are you?

I have been asked to help evaluate the remedial maps produced by the North Carolina General Assembly. I wonder if you are willing to share the outputs of the ensemble analysis that went into your expert report. Specifically, I seek the numbers that went into the histograms. Is that possible?

I have read your report (and the other reports) with interest, and am studying up to make sure I do not miss anything. There is a lot of expert testimony here, which is good.

Best,  
Sam

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Election analytics: [election.princeton.edu](http://election.princeton.edu)

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# Exhibit C

RETRIEVED FROM DEMOCRACYDOCKET.COM

----- Forwarded message -----

From: **Tyler Jarvis** <[jarvis@math.byu.edu](mailto:jarvis@math.byu.edu)>  
Date: Sat, Feb 19, 2022, 9:33 PM  
Subject: Re: quick question about data  
To: Gregory Herschlag <[gjherschlag@gmail.com](mailto:gjherschlag@gmail.com)>

Thank you! I really appreciate your taking time to answer so quickly.

On Sat, Feb 19, 2022 at 7:26 PM Gregory Herschlag <[gjherschlag@gmail.com](mailto:gjherschlag@gmail.com)> wrote:

1. Primary in the senate: `mcd_on_1`  
Secondary in the senate `mcd_on_0`

Primary in the house: `primary`  
Secondary in the house: `mcd_on_1`

2. Convergence study was the same in the congressional. Only a subset of the full convergence study was shown in the report

On Sat, Feb 19, 2022, 9:04 PM Tyler Jarvis <[jarvis@math.byu.edu](mailto:jarvis@math.byu.edu)> wrote:  
Thank you so much! This is very helpful.

I have two more quick follow-up questions, if you have time:

1. Jonathan talks about a "primary" and a "secondary" ensemble in his expert report. It sounds like the `mcd_on_1` is what he called "primary" and `mcd_on_0` is what he called "secondary"? And the third tuned ensemble for the house is the one in the directory called `primary`?

2. I couldn't see anything in Jonathan's expert report about convergence of the congressional ensemble--there's a section header, but I see no text or plots. Can you tell me anything about the convergence of that ensemble? I assume you also used parallel tempering with an independent sample reservoir. Were results similar to the convergence of the legislative ensemble?

Best,  
Tyler

On Sat, Feb 19, 2022 at 6:47 PM Gregory Herschlag <[gjherschlag@gmail.com](mailto:gjherschlag@gmail.com)> wrote:  
Hi Tyler,

Nice to hear from you. To answer your question, the `mcd_on_0` and `mcd_on_1` ensembles refer to whether or not municipalities were considered when drawing the ensembles. These ensembles were developed before the now-overtaken maps came out. We found that the `mcd_on_1` ensemble had similar municipal splitting to the senate map, but the house plan split municipalities more than our `mcd_on_1` ensemble but less than our `mcd_on_0` ensemble, so we tuned a third ensemble here to reflect the amount of municipal splitting seen in the house map.

Hope this helps! Let me know if not or if you have other questions,  
Greg

On Sat, Feb 19, 2022 at 8:13 PM Tyler Jarvis <[jarvis@math.byu.edu](mailto:jarvis@math.byu.edu)> wrote:  
Dear Greg,

I am sorry to bother you on a long weekend, but I have been asked to help evaluate the remedial maps for the North Carolina special masters on a very short deadline.

Because there is no time for my team to generate large ensembles that meet the clustering and other criteria specific to North Carolina, I was directed by the masters to your ensemble data and to Jonathan's expert report.

I would be extremely grateful if you could help clarify one thing about the data.

From Jonathan's report I understand that you ran both a Primary and a Secondary ensemble with different properties, especially in regard to splitting municipalities. Sam Wang tells me that Jonathan thinks the court didn't really valorize the secondary ensemble, so it might make sense to focus on the primary ensemble.

I assume that both these ensembles are in the directory `observables/electionResults/`, but I am not sure which subfolder corresponds to which ensemble. Specifically, in the senate you have just two directories: `mcd_on_0` and `mcd_on_1`, whereas in the house you have three directories: `mcd_on_0`, `mcd_on_1`, and `primary`, so it is not entirely clear which is primary and secondary of these three.

Thanks again for any help you can provide.

Best,  
Tyler



STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 015426

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

COMMON CAUSE,  
*Plaintiff-Intervenor,*

v.

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

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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,  
*Plaintiffs,*

v.

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

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## INTRODUCTION

These consolidated cases present this Court with the unique challenge of balancing the competing interests of fairness, the role of the judiciary, statutory and constitutional construction, the interpretation of prior court rulings, and good old fashion common sense. Sometimes, courts are required to make decisions that are not popular, but because judges take an oath to uphold the law, those rulings are mandated. And sometimes, redress of a perceived wrong does not lie with the judiciary, but rather, with one of the other co-equal branches of government.

All of Plaintiffs' claims in these lawsuits, in essence, stem from the basic argument that the 2021 redistricting maps passed by the North Carolina General Assembly are unconstitutional under the North Carolina Constitution. We have taken great lengths to examine that document. At the end of the day, after carefully and fully conducting our analysis, it is clear that Plaintiffs' claims must fail. Judges, just like many of the citizens they serve, do not always like the results they reach. That fact notwithstanding, judges have a solemn duty to uphold the law. We have done our best to perform that duty, regardless of the consequences. Our complete ruling is more fully set forth in the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

### I. Summary of Relevant Procedural History

1. Plaintiffs North Carolina League of Conservation Voters, Inc.; Henry M. Michaux, Jr.; Dandrielle Lewis; Timothy Chartier; Talia Fernos; Katherine Newhall; R. Jason Parsley; Edna Scott; Roberta Scott; Yvette Roberts; Jereann King Johnson; Reverend Reginald Wells; Yarbrough Williams, Jr.; Reverend Deloris L. Jerman; Viola Ryals Figueroa; and Cosmos George (hereinafter "NCLCV Plaintiffs") filed their Complaint (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to

Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure on November 16, 2021. The NCLCV Plaintiffs' Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

2. Plaintiffs Rebecca Harper; Amy Clare Oseroff; Donald Rumph; John Anthony Balla; Richard R. Crews; Lily Nicole Quick; Gettys Cohen Jr.; Shawn Rush; Mark S. Peters; Kathleen Barnes; Virginia Walters Brien; Eileen Stephens; Barbara Proffitt; Mary Elizabeth Voss; Chenita Barber Johnson; Sarah Taber; Joshua Perry Brown; Laureen Floor; Donald M. MacKinnon; Ron Osborne; Ann Butzner; Sondra Stein; Bobby Jones; Kristiann Herring; and David Dwight Brown (hereinafter "Harper Plaintiffs") filed their Complaint (Civil Action No. 21 CVS 500085) on November 18, 2021, and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485 on November 30, 2021. Harper Plaintiffs amended their Complaint on December 13, 2021, and the Harper Plaintiffs' operative Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14.

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<sup>1</sup> Plaintiffs Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Flood, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, and Kristiann Herring were added as Plaintiffs upon the filing of Harper Plaintiffs' Amended Complaint.

3. On November 19, 2021, and November 22, 2021, the NCLCV and Harper actions, respectively, were assigned to the undersigned three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1.

4. On December 3, 2021, the undersigned consolidated these respective cases pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' Motions for Preliminary Injunction. On December 3, 2021, after considering the extensive briefing and oral arguments on the motions, the undersigned denied NCLCV Plaintiffs' and Harper Plaintiffs' Motions for Preliminary Injunction.

5. NCLCV Plaintiffs and Harper Plaintiffs thereafter filed a notice of appeal with the North Carolina Court of Appeals. After initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay on December 6, 2021.

6. On December 8, 2021, on NCLCV Plaintiffs' and Harper Plaintiffs' Petitions for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule, the Supreme Court of North Carolina granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." SCONC order on Pls motion p. 3. The Order further directed this Court to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before January 11, 2022.

7. In light of our Supreme Court's directive and the history of redistricting litigation in our state courts, including the Common Cause v. Lewis action in 2019 in which a final judgment was not entered until almost a year after the filing of the plaintiffs' complaint and an extensive discovery period culminated in a two-week trial, this Court

entered a scheduling order on December 13, 2021, expediting discovery and scheduling trial to commence on January 3, 2022. This Case Scheduling Order was thereafter supplemented on December 28, 2021, and December 30, 2021.

8. On December 13, 2021, Common Cause moved to intervene in these consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals. On December 15, 2021, this Court granted Common Cause's motion to intervene as a plaintiff in these consolidated cases, and Plaintiff-Intervenor Common Cause filed its Complaint on December 16, 2021.<sup>2</sup> Plaintiff Common Cause's Complaint alleges that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

9. The North Carolina Congressional Districts challenged by Plaintiffs collectively include all fourteen enacted Congressional Districts.

10. The North Carolina Senate Districts challenged by Plaintiffs collectively include Senate Districts 1, 2, 13, 14, 15, 16, 17, 18, 19, 21, 26, 27, 28, 31, 32, 37, 38, 39, 40, 41, 42, 46, 47, 49, 50.

11. The North Carolina House of Representatives Districts challenged by Plaintiffs collectively include House Districts 2, 4, 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 29, 30, 31,

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<sup>2</sup> Unless specifically designated otherwise in the remainder of this Judgment, "Plaintiffs" collectively refers to NCLCV Plaintiffs, Harper Plaintiffs, and Plaintiff Common Cause.



33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 49, 57, 58, 59, 60, 61, 62, 71, 72, 74, 75, 88, 91, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 112, 114, 115, and 116.

12. On December 15, 2021, this Court entered a Protective Order to govern the production and exchange of the parties' documents, and any testimony at deposition relating to such documents, that reflect the parties' confidential information.

13. On December 17, 2021, Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter "Legislative Defendants") filed their Answer to NCLCV Plaintiffs' Complaint, asserting seventeen affirmative defenses, and Harper Plaintiffs' Amended Complaint, asserting fifteen affirmative defenses.

14. Affirmative defenses raised by Legislative Defendants include inter alia that granting the requested relief will violate the Voting Rights Act and the United States Constitution; that granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; that the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; that Plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; that Plaintiffs' claims are barred by the doctrine of laches; that Plaintiffs have failed to state claims upon which relief can be granted; that Plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; that the only limitations on redistricting legislation are found in Article II, Sections 2, 3, 4,

and 5 of the North Carolina Constitution; that Plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; that Plaintiffs' claims are non-justiciable and fail to provide judicially manageable standards; that Plaintiffs lack standing; and, that Plaintiffs have unclean hands and therefore are not entitled to equitable relief.

15. Defendant Ralph E. Hise, Jr. is a Republican member of the North Carolina Senate, representing Senate District 47, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Hise is sued in his official capacity only. Defendant Hise resides in Senate District 47 in the 2021 districting plan.

16. Defendant Warren Daniel is a Republican member of the North Carolina Senate, representing Senate District 46, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Daniel is sued in his official capacity only. Defendant Daniel resides in Senate District 46 in the 2021 districting plan.

17. Defendant Paul Newton is a Republican member of the North Carolina Senate, representing Senate District 36, and the Chairman of the Senate Standing Committee on Redistricting and Elections. Defendant Newton is sued in his official capacity only. Defendant Newton resides in Senate District 34 in the 2021 districting plan.

18. Representative Destin Hall is Republican member of the North Carolina House of Representatives, representing House District 87, and the Chairman of the House Standing Committee on Redistricting. Defendant Hall is sued in his official capacity only. Defendant Hall resides in House District 87 in the 2021 districting plan.

19. Defendant Timothy K. Moore is a Republican member and the Speaker of the North Carolina House of Representatives, representing House District 111. Defendant Moore is sued in his official capacity only. Defendant Moore resides in House District 111 in the 2021 districting plan.

20. Defendant Philip E. Berger is a Republican member and the President Pro Tempore of the North Carolina Senate, representing Senate District 30. Defendant Berger is sued in his official capacity only. Defendant Berger resides in Senate District 26 in the 2021 districting plan.

21. On December 17, 2021, Defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their Answer to Harper Plaintiffs' Amended Complaint. Also on December 17, 2021, these same Defendants along with Defendant State of North Carolina and Defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their Answer to NCLCV Plaintiffs' Complaint.<sup>3</sup>

22. Legislative Defendants and State Defendants did not file an answer to Plaintiff Common Cause's Complaint. Pursuant to this Court's order granting Common Cause's intervention, however, the allegations and requested relief in Plaintiff Common Cause's Complaint are deemed denied by all Defendants.

23. Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the Court expeditiously ruled upon over ten discovery-related motions—a number far exceeding the number of such motions filed in *Common Cause v. Lewis*, in which discovery spanned a period of over five months.

24. Pursuant to the Court's Case Scheduling Order, pre-trial submissions began with the exchange and submission of initial expert reports on December 23, 2021. Plaintiffs

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<sup>3</sup> For simplicity, unless specifically designated otherwise in the remainder of this Judgment, "State Defendants" refers to the State Board of Elections-related Defendants as well as Defendant State of North Carolina.

collectively designated eight individuals as expert witnesses and submitted accompanying reports. Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports. The initial reports and accompanying materials submitted on behalf of the expert witnesses for all parties exceeded a collective 900 pages of materials.

25. Rebuttal expert reports were exchanged and submitted on December 28, 2021. Plaintiffs collectively submitted five rebuttal reports. Legislative Defendants submitted three rebuttal reports. The rebuttal reports and accompanying materials submitted on behalf of the expert witnesses for all parties exceeded a collective 100 pages of materials.

26. The discovery period closed on December 31, 2021—the date upon which all fact and expert witness depositions were to be conducted pursuant to the Case Scheduling Order. The parties thereafter submitted, in lieu of pre-trial briefs, an initial stipulation of facts and initial proposed findings of fact and conclusions of law. The parties collectively listed approximately 1,200 pre-marked exhibits for trial.

27. Commencing on January 3, 2022, this Court conducted a three-and-one-half day trial, receiving testimony from numerous fact and expert witnesses and receiving approximately 1,000 exhibits into evidence. The following findings of fact are made upon this voluminous record.<sup>4</sup>

## **II. The Challenged Redistricting Legislation**

### **A. Background on Decennial Redistricting**

28. Following each decennial census, the North Carolina General Assembly must redraw the districts for the North Carolina House of Representatives, the North Carolina Senate, and the North Carolina Congressional map.

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<sup>4</sup> Due to the time limitations between the conclusion of trial and the entry of this Final Judgment, and to avoid confusion when reviewing the finalized trial transcript, citations to the trial transcript are only to a specific day on which a witness testified and are denominated as “Trial Tr. [Date of Testimony].”

29. In North Carolina, legislative redistricting is performed exclusively by the General Assembly. The Governor of North Carolina has no power to veto redistricting bills.

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

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

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

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

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

31. Between 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly.

32. After the 2010 election, for the first time since 1870, Republicans constituted a majority of both the North Carolina House of Representatives and the North Carolina Senate.

33. Republicans have constituted a majority in both the North Carolina House of Representatives and the North Carolina Senate from 2010 to present day and have therefore controlled each of the last two cycles of redistricting in North Carolina.

#### **B. 2020 Census Data for the 2021 Redistricting Process**

34. On February 12, 2021, the U.S. Census Bureau announced that its release of P.L. 94-171 redistricting data would be delayed by the COVID-19 pandemic, and would not be released until the fall of 2021, and specifically that it would deliver the Public Law 94-171 redistricting data to all states by September 30, 2021. PX131.

35. On March 15, 2021, the United States Census Bureau announced that it would release a “legacy” format summary redistricting data file to all states by mid-to-late August 2021, in addition to the “tabulated” P.L. 94-171 block-level data released before September 30, 2021, “[i]n recognition of the difficulties this timeline creates for states with redistricting and election deadlines prior to Sept. 30.” PX132.

36. On April 26, 2021, the United States Census Bureau released data indicating that North Carolina’s population increased from 9,535,483 residents in 2010 to 10,439,388 residents in 2020. PX142; PX133; PX143. This 9.5 percent population increase resulted in North Carolina being given an additional Congressional seat following the 2020 Census, resulting in North Carolina’s congressional delegation growing from 13 to 14 members. PX144.

37. On August 12, 2021, the U.S. Census Bureau released the 2020 Census Redistricting Data (Public Law 94-171) Summary File for all states, including North Carolina, in “legacy” format. PX134.

**C. Adoption of the 2021 Redistricting Criteria**

38. On February 24, 2021, after the U.S. Census Bureau announced that its release of P.L. 94-171 redistricting data would be delayed, the North Carolina State Board of Elections Executive Director Karen Brinson Bell presented recommendations to the House Elections Law and Campaign Finance Reform Committee to move the 2022 primary to a May 3 primary, July 12 second primary, and November 8 general election. PX1402.

39. When Senator Hise received Director Bell’s recommendations, he had “no idea” how long the redistricting process would take. PX146 Hise. Dep. 155:3-18. Nonetheless, he and his co-chairs did not follow the Board’s recommendations to delay the primaries and provide more time for the redistricting cycle. *Id.* at 140:18-25. Senator Hise did, however, co-

sponsor a senate bill that modified the deadline for municipalities similarly impacted by the census delay. *Id.* at 143:1-8.

40. Legislative Defendants were aware that the delay in the release of Census Data would shorten the amount of time available to pass new state Legislative and Congressional maps before relevant deadlines, including the one-year residency deadline that state Legislative candidates would have to meet and the candidate-filing deadline on December 6, 2021, for all 2022 general election candidates. PX146 Hise Dep. 149:23-150:5. Nonetheless, they chose not to convene the Senate and House Redistricting Committees earlier to plan for the process, PX146 Hise Dep. 143:8-22, and chose not to propose or set forth a schedule for the redistricting process that would have allowed the public or their Democratic colleagues to prepare for the steps that would be taken before final enactment of state Legislative and Congressional plans. PX146 Hise Dep. 153:7-13. The Chairs of the Redistricting Committees had the general authority to make such decisions and set forth a predictable schedule but chose not to. PX146 Hise Dep. 143:12-19.

41. On Thursday, August 5, 2021, at 2:00 PM, the Senate Committee on Redistricting and Elections convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee to begin discussion on the redistricting process. PX138.

42. Following this meeting, staff member Erika Churchill distributed to the joint committee members the legislative redistricting criteria ordered by the North Carolina Superior Court for Wake County in its September 3, 2019, Judgment in the matter *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (the “2019 Criteria”). PX1404. Consistent with state Constitutional requirements, including the Supremacy Clauses in Article I, Sections 3 and 5, the 2019 Criteria set forth by the court in *Common Cause* specifically required that new maps comply with the VRA and other federal

requirements concerning the racial composition of districts, and required the parties to submit briefing and expert analysis on whether VRA districts were required within 14 days of the order, including consideration of whether the minimum Black Voting Age Population (“BVAP”) thresholds were met to implicate the VRA. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at \*417 (N.C. Super. Ct. Sept. 3, 2019).

43. On Monday, August 9, 2021, the redistricting chairs of the joint committees released the “2021 Joint Redistricting Committee Proposed Criteria.” PX33.

44. The Joint Redistricting Committees received in-person public comment on the Proposed Criteria on Tuesday, August 10, 2021, beginning at 8:30 AM.

45. At that public comment period, Plaintiff Common Cause’s Counsel Allison Riggs urged legislators to change the criterion providing that “Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2021 Congressional, House and Senate plans,” PX33, stating the following:

It is neither appropriate nor required to draw districts race-blind. As long as redistricting has occurred, it has been a tool used to harm voters of color. Beyond compliance with the Voting Rights Act, it is entirely appropriate to advance race-equity to consider race in the drawing of districts, to ensure that voters of color are not being packed or cracked. Additionally, in *Covington v. North Carolina*, this legislative body tried the same thing with respect to race-blind redistricting. A three-judge panel, including Republican and Democratic appointees, and a unanimous Supreme Court, rejected your race-blind remedial drawing of two Senate districts and two House districts. In fact, there is apparently not a federal judge out there who agrees with this approach, and we urge you to abandon that criteria.

PX1487.

46. On Thursday, August 12, 2021, the Joint Redistricting Committees convened to debate and vote on the 2021 Joint Redistricting Committee Proposed Criteria.

47. At this meeting, Senator Newton, Chair of the Senate Redistricting Committee, made the following statement:



The second question I want to address is the decision to exclude racial data from being used by this committee in the drawing of districts; of course we understand that North Carolina is obligated to comply with Section 2 of the Voting Rights Act when drawing districts in the 2021 Congressional, House, and Senate plans, but during the last decade the Supreme Court told us that there is not sufficient evidence of racially polarized voting in North Carolina to justify the consideration of race when drawing districts. If you have new evidence or new studies of racially polarized voting in North Carolina, we would be willing to examine that evidence, and nothing in this criteria prevents any member from bringing forward such evidence during this process.

PX77 at 10-11 (8/12/2021 Transcript).

48. In response, Senator Dan Blue stated that the Supreme Court of North Carolina held in *Stephenson v. Bartlett* that legislators were first required to determine whether districts are required to comply with the VRA. PX77 at 15 (8/12/2021 Transcript). Senator Blue queried how this would be possible without the use of racial data, stating, “I think that *Stephenson* makes it relatively clear that before you consider clustering or groupings, you have to make that VRA determination.” PX77 at 15 (8/12/2021 Transcript).

49. Senator Newton replied, “The chairs have considered the various options and we will comply with the law and the methodology we used in 2019 [sic] passed muster and we’re going to continue with that methodology.” PX77 at 15 (8/12/2021 Transcript).

50. Senator Warren Daniel then proposed that the Joint Committees add a sentence under the criteria stating, “The Committee will draw districts that comply with the Voting Rights Act.” PX77 at 15 (8/12/2021 Transcript). The amendment was adopted into the final criteria. PX77 at 18-19 (8/12/2021 Transcript).

51. After Senator Daniel proposed his amendment, Senator Blue proposed an amendment titled “Voting Rights Act.” This amendment provided: “As condemned by the United States Supreme Court in *Cooper v. Harris* and *Covington v. State of North Carolina*, African-Americans shall not be packed into any grouping or district to give partisan advantage to any political party.” PX77 at 53-55 (8/12/2021 Transcript); PX73 (proposed

amendment). During debate on this amendment, Senator Blue offered the following comment on the amendment:

The amendment is sort of self-explanatory. I simply say that for the four decades since the 1980s redistricting, starting with *Gingles v. Edmisten*, and through *Shaw v. Reno*, and through the series of cases at the early part of this century, and the cases in the last redistricting cycle, North Carolina has basically been the state with the chin out before the Supreme Court to get our redistricting plans struck down. And we've spent tens of millions of dollars over that time period, from the 80s forward, to have the Supreme Court basically say no to all of those efforts that we've done. So this is an effort to make sure that we make an effort to try and save the taxpayers what now is collectively more than 50 million dollars in efforts and futility, by setting forth that related to Senator Daniel's earlier amendment, that we know what the Voting Rights Act requires, we know what the Supreme Court has said, and this is the language that they have used with respect to, in both *Cooper v. Harris* and *Covington v. North Carolina*, what you've got to do to comply with the Voting Rights Act. I just offer the amendment so that it's constantly before us, so that we don't get tempted to sort of skirt to the edge again and cost the taxpayers another 10 to 20 million dollars defending this thing back up through the Court of Appeals or the Supreme Court, or a three-judge panel and the Supreme Court. So, I move for the adoption of the amendment.

PX77 at 53-55 (8/12/2021 Transcript).

52. During debate on the amendment, Senator Clark raised concerns about how North Carolina could comply with the VRA without considering racial data: "How do we intend to comply with the Voting Rights Act if we don't use the racial data that is required to comply with it?" PX77 at 56 (8/12/2021 Transcript). In response, Defendant Daniel expressed the view that prior case law in North Carolina did not require the use of racial data:

Just as Senator Newton explained at the beginning of the meeting, in the event that evidence is presented to the committee that there's racially polarized voting in North Carolina then that might be something the committee would need to address. At this point, the courts in 2019 and even the Democrats' own expert have said that there is not racially polarized voting in North Carolina, and so that's sort of where we think we're at.

53. PX77 at 56-57 (8/12/2021 Transcript). Senator Clark then responded: "Given that the *Stephenson* requirement is there, that we do VRA districts first, is it not incumbent upon the General Assembly itself to perform racially polarized studies in order to make that

determination that, as we are here today, that there is no racial polarization in North Carolina with regard to voting?” PX77 at 57 (8/12/2021 Transcript). Senator Daniel responded by saying, “We don’t feel that that is necessary at this point at the outset of the map drawing.” PX77 at 57 (8/12/2021 Transcript).

The amendment offered by Senator Blue failed. PX77 at 63 (8/12/2021 Transcript).

In that same meeting, Representative Hall said:

We’re agreeing – or at least we’re proposing in this criteria not to use racial data at all in the drawing of these maps, but as Senator Daniel has said, members of the committee and members of the public are welcome to gather whatever evidence and put forth evidence that might fall under Section 2 of the Voting Rights Act, that that may require some use of racial data. And, of course, that will be up to this body, to this committee, and ultimately two bodies of the two chambers as to whether to consider that and how to do that. But at this point, none of that evidence has been put forth.

PX77 at 86:10-23 (8/12/2021 Joint Committee Transcript).

54. On August 12, 2021, the Joint Redistricting Committees adopted the final redistricting criteria (“Adopted Criteria”), which were as follows:

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

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

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

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

**Racial Data.** Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

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

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

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

**Election Data.** Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

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

**Community Consideration.** So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

PX34; LDTX15.

**D. Establishing the District Lines in the 2021 Enacted Plans**

55. On Wednesday, September 1, 2021, the Joint Redistricting Committees announced a Joint Public Hearing Schedule, that would consist of 13 public hearings held from September 8, 2021, through September 30, 2021.<sup>5</sup>; PX86.

56. The 13 public hearings listed in the Joint Public Hearing Schedule were as follows:

- a. 6:00 PM on Wednesday, September 8, 2021, at Caldwell Community College and Technical Institute;
- b. 4:00 PM on Tuesday, September 14, 2021, at Forsyth Technical Community College;
- c. 5:00 PM on Tuesday, September 14, 2021, at Elizabeth City State University;
- d. 6:00 PM on Wednesday, September 15, 2021, at Durham Technical Community College;
- e. 5:00 PM on Wednesday, September 15, 2021, at Nash Community College;
- f. 5:00 PM on Thursday, September 16, 2021, at Alamance Community College;
- g. 3:00 PM on Thursday, September 16, 2021, at Pitt Community College;
- h. 5:00 PM on Tuesday, September 21, 2021, at Western Carolina University;
- i. 3:00 PM on Wednesday, September 22, 2021, at Central Piedmont Community College;
- j. 3:00 PM on Thursday, September 23, 2021, at Mitchell Community College, Iredell County Campus;
- k. 4:00 PM on Tuesday, September 28, 2021, at UNC Pembroke;
- l. 5:00 PM on Wednesday, September 29, 2021, at UNC Wilmington; and,
- m. 6:00 PM on Thursday, September 30, 2021, at Fayetteville Technical Community College.

PX86.

**1. Selection of County Groupings**

57. On Tuesday, October 5, 2021, the Senate Committee on Redistricting and Elections and the House Committee on Redistricting each convened separately. The General

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<sup>5</sup> 9.1.21 released Hearing schedule:  
<https://www.ncleg.gov/documentsites/committees/House2021-182/2021/Public%20Hearing%20Schedule.pdf>

Assembly's members were tasked with creating State House districts containing between 82,645 and 91,345 people; that is 86,995 plus or minus 5% from the ideal population. PX79 12:25–13:4 (Oct. 5, 2021). Members were tasked with creating Senate districts containing between 198,348 and 219,227 people; that is 208,788 people plus or minus 5% from the ideal population. PX80 6:5–10 (Oct. 5, 2021).

58. In both meetings, the Redistricting Chairs announced utilization of county groupings described in the academic paper *N.C. General Assembly County Clusterings from the 2020 Census* (the “Duke Academic Paper”), published on the Duke University website “Quantifying Gerrymandering.” PX79 at 8:2-4 (10/5/2021 House Redistricting Transcript); PX80 at 1–21 (10/5/2021 Senate Redistricting Transcript); PX70 (Quantifying Gerrymandering). These groupings were then verified by non-partisan staff. PX79 8:4-7 (Oct. 5, 2021).

59. The Duke Academic Paper states that “[t]he one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act,” PX70 (Quantifying Gerrymandering), a fact that was known to the Redistricting Chairs and announced publicly in both the House and Senate Redistricting Committee Meetings. PX80 at 18:6-9 (10/5/2021 Senate Redistricting Transcript); PX79 at 9:14-16 (10/5/2021 House Redistricting Transcript).

60. In the meeting of the Senate Committee on Redistricting and Elections, Defendant Hise provided the set of sixteen possible Senate cluster options, based upon the Duke Academic Paper, that constituted the set of options eligible for adoption (the “Duke Senate Clusters”). PX71 (“Duke Senate Groupings Maps 11x17”).

61. In this meeting, Senator Blue asked how leadership had ensured compliance with the VRA, as required under the North Carolina Constitution, in the mandated clusters without any demographic analysis. PX80 at 20-21 (10/5/2021 Senate Redistricting

Transcript). Senator Marcus stated the committee needed to conduct a Racial Polarization Analysis (“RPV”) study to ensure legal compliance. PX80 at 26 (10/5/2021 Senate Redistricting Transcript). Chair Hise confirmed the Chairs’ views that no demographic data was legally required, and that there was no directive to staff to order any RPV analysis or provide racial data to members drawing maps. PX80 at 26-27 (10/5/2021 Senate Redistricting Transcript); PX80 at 24:16-24 (10/5/2021 Senate Redistricting Transcript); PX146 Hise Dep. 185:14-22. Defendant Hise also said “this committee is still open to consider any information that exists on racially polarized voting,” Ex 80 at 31:24-32:2 (10/5/2021 Senate Redistricting Transcript), and that “if information does come forward regarding racially polarized voting, we will consider it.” PX80 at 26:12-15 (10/5/2021 Senate Redistricting Transcript).

62. In the meeting of the House Committee on Redistricting, Defendant Hall provided the set of eight possible House cluster options, based upon the Duke Academic Paper, that constituted the set of options eligible for adoption (the “Duke House Clusters”). PX72 (“Duke House Groupings Maps 11x17”).

63. In this Meeting, Representative Harrison similarly questioned how the committee would comply with the VRA, as the Duke Academic Paper stated its analysis did not reflect compliance with the VRA as required by *Stephenson*. PX79 at 36 (10/5/2021 House Redistricting Transcript). Representative Reives inquired about the obligations under the VRA and how to comply with them. PX79 at 75 (10/5/2021 House Redistricting Transcript). Chair Hall stated the committees made a decision not to use racial data, contrary to redistricting criteria used in the previous two sessions, which Chair Hall alleged to be “the best way” to ensure compliance with the VRA as well as other state and federal law. PX79 at 35 (10/5/2021 House Redistricting Transcript).

64. On Friday, October 8, 2021, Legislative Defendants received a letter from Allison J. Riggs, current counsel for Plaintiff Common Cause, concerning the county

clustering option maps introduced on Tuesday, October 5, 2021. PX1412. Representative Hall chose not to read this letter, and Sen. Hise took no action after receiving this letter. PX146 Hise Dep. 200:23-201:1, PX145 Hall Dep. 249:11-16.

65. On Monday, October 25, 2021, Legislative Defendants received a second letter from Allison J. Riggs, current counsel for Plaintiff Common Cause, concerning draft Senate map, “SST-4,” and its chosen grouping “Duke Senate 02.” PX1413. No action was taken in response to this letter. PX146 Hise Dep. 206:17-20, 211:2-6.

66. Overall, the redistricting chairs unilaterally decided not to undertake or commission any racially polarized voting study for the 2021 redistricting cycle. PX146 Hise Dep. 135:19-25. Plaintiffs evidence, however, fails to sufficiently show that any of the districts were required to be VRA districts and, to the extent *Stephenson* requires this determination at the outset, Plaintiffs do not assert a VRA claim.

## 2. The Map-Drawing Process

67. At the October 5, 2021, meetings, the House and Senate Chairs of the Redistricting Committees announced in their respective committee meetings that they would make computer stations available to legislators to draw maps, beginning the morning of October 6, 2021. PX1468 Daye Aff. ¶ 6. There would be four stations available to the House in Room 643 of the Legislative Office Building, and there would be four stations available to the Senate in Room 544 of the Legislative Office Building. *Id.* The stations would be open during business hours, and both the rooms and the screens of the station computers would be live streamed while the stations were open. *Id.*

68. Legislative Defendants sought to instill public confidence by requiring legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. PX79 at 3:1-20 (statement of Rep. Destin Hall, Chairman, H. Comm. on Redistricting) (Oct. 5, 2021, H. Redistricting Comm. Hr’g Tr.). That



software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software. *Id.* at 52:3-8.

69. According to Representative Hall, the Committee and “the House as a whole” would “only consider maps that are drawn in this committee room, on one of the four stations.” PX79 at 4:15-19. “So, if a map is not drawn on one of these four stations, in this committee room, during those committee hours that the committee is open, then those maps will not be considered for a vote by this committee, and of course, will not be considered for a vote by the House.” *Id.* at 4:19-24. Legislators could ensure that was the case, Representative Hall asserted, because “when you put a map into one of these computers, that becomes a matter of public record, and we can tell which were drawn on these computers. It has to be drawn in this committee room.” *Id.* at 4:25-5:4. Representative Hall assured the public that this process would be fundamentally different from “what’s happened in the past,” where “some outside entity, a consultant, goes and they draw the map behind closed doors”; in 2021, we “will literally be drawing on the stations that you see.” *Id.* at 41:23-42:13.

70. The Committees chose this method to draw the maps on their own accord—not because the law required them to. *See, e.g.*, PX79 34:17–35:4 (Oct. 5, 2021). The Committees took “the unprecedented step of being as transparent” as they possible could. PX79. 35:21–24 (Oct. 5, 2021).

71. The Committees chose not to take racial data into account in selecting county groupings because they did not take into account in 2017 and 2019, and courts approved the 2017 and 2019 plans. PX79 37:17–25 (Oct. 5, 2021). This gave them “confidence that, without using racial data, [they would] comply with the Voting Rights Act.” PX79 39:3–5 (Oct. 5, 2021). Further, they took into account the fact plaintiffs’ experts in previous cases “all said that there is no legally significant racially polarized voting in North Carolina.” PX79 37:10-16 (Oct. 5, 2021); *see also* PX80 26:3-15 (Oct. 5, 2021).

72. Representative Hall testified that he personally drew nearly all of the House map enacted as House Bill 976, and that he did so over multiple days at an official computer terminal. PX145 at 110:4-9, 116:11-15, 120:5-24; Trial Tr. 01/05/2022. Representative Hall also testified that, between his sessions at the public terminal, he met with his then-General Counsel, Dylan Reel, and others about the map-drawing in a private room adjacent to the public map-drawing room. *Id.* at 128:2-132:17.

73. While the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data. PX79 at 66:11-66:16. Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced. PX145 at 70:22-71:1 (Hall Dep.); PX 146 at 40:2-6.

### **3. The 2021 Redistricting Plans are Enacted**

74. A placeholder version of the state House Map was filed on Thursday, October 28, 2021, as House Bill 976 (“HB976”) where it passed its first reading. A committee substitute (“HBK-14”) received a favorable review and, after one amendment, passed its second and third readings on the House and its first reading in the Senate on November 2, 2021. It received a favorable report from the Senate Redistricting Committee on November 3, 2021, without alteration and passed its second and third readings on November 4, 2021.

75. HB976 was ratified into law on November 4, 2021, as S.L. 2021-175. S.L. 2021-175 is entitled “AN ACT TO REALIGN NORTH CAROLINA HOUSE OF REPRESENTATIVES DISTRICTS FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS” and re-writes N.C.G.S. § 120-2(a) to divide the State of North Carolina into one-hundred-twenty (120) districts, with each district electing one

Representative, “[f]or the purpose of nominating and electing members of the North Carolina House of Representatives in 2022 and periodically thereafter.” 2021 N.C. Sess. Laws 175, § 1.

76. A proposed version of the state Senate map (“SST-13”) was filed on Friday, October 29, 2021, as Senate Bill 739 (“SB739”) and received its first reading in the Senate that day. It was then referred to the Senate Redistricting Committee on November 1 where the Redistricting Committee adopted a substitute along party lines (“SBK-7”). On November 2, Senator Marcus offered an amendment entitled “SBVAmend-2” to the Senate Redistricting Committee.<sup>6</sup> Senator Clark also offered an amendment entitled “SCGAmend-3” to the Senate Redistricting Committee.<sup>7</sup> Both amendments were adopted and included in the final version of SB739. The bill then passed its second and third readings in the Senate on November 3 along party lines and passed all three readings and the House Redistricting Committee without any alteration on November 3 – 4, 2021.

77. SB739 was ratified into law on November 4, 2021, as S.L. 2021-173. S.L. 2021-173 is entitled “AN ACT TO REALIGN THE DISTRICTS OF THE NORTH CAROLINA STATE SENATE FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS” and re-writes N.C.G.S. § 120-1(a) to establish the composition of the fifty (50) senatorial districts in the State of North Carolina, and apportion seats among those districts with each district electing one senator, “[f]or the purpose of nominating and electing members of the Senate in 2022 and periodically thereafter.” 2021 N.C. Sess. Laws 173, § 1.

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<sup>6</sup> <https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/11-02-2021/Adopted%20Amendments/S739-ATU-40.printing.pdf>

<sup>7</sup> <https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/11-02-2021/Adopted%20Amendments/S739-ABA-40.printing.pdf>

78. A proposed Congressional map (“CST-13”) was filed on October 29, 2021, as Senate Bill 740 (“SB740”) and passed its first reading and received a favorable report from the Senate Redistricting Committee on November 1, 2021. It proceeded unaltered through its second and third readings in the Senate and its first reading in the House on November 2, received a favorable report from the House Redistricting Committee on November 3, and proceeded unaltered through its second and third readings in the House on November 4, 2021.

79. SB740 was ratified into law on November 4, 2021, as S.L. 2021-174. S.L. 2021-174 is entitled “AN ACT TO REALIGN THE CONGRESSIONAL DISTRICTS FOLLOWING THE RETURN OF THE 2020 FEDERAL DECENNIAL CENSUS” and re-writes N.C.G.S. § 163-201(a) to divide the State of North Carolina into fourteen (14) districts “[f]or purposes of nominating and electing members of the House of Representatives of the Congress of the United States in 2022 and periodically thereafter[.]” 2021 N.C. Sess. Laws 174, § 1.

80. The State House, State Senate and Congressional Maps all passed along party lines.

81. The State House map, HB976, passed the House on a strict party line vote, with 67 Republican Representatives in favor and 49 Democratic Representatives opposed. HB976 also passed the Senate on a strict party line vote, with 25 Republican Senators in favor and 21 Democratic Senators opposed.

82. The State Senate map, SB739, passed the Senate on a strict party line vote, with 26 Republican Senators in favor and 19 Democratic Senators opposed. SB739 also passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed.

83. The Congressional map, SB740, passed the Senate on a strict party line vote, with 27 Republican Senators in favor and 22 Democratic Senators opposed. SB740 also

passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed.

84. Plaintiffs challenge the North Carolina Congressional Districts, North Carolina Senate Districts, and North Carolina House of Representatives Districts established, respectively, by acts of our General Assembly ratified on November 4, 2021, in N.C. Sess. Laws 2021-174 (hereinafter “S.L. 2021-174” or “S.B. 740”), N.C. Sess. Laws 2021-173 (hereinafter “S.L. 2021-173” or “S.B. 739”), and N.C. Sess. Laws 2021-174 (hereinafter “S.L. 2021-175” or H.B. 976”) (collectively hereinafter, the “Enacted Plans”).

### **III. Extreme Partisan Gerrymandering Claims**

#### **A. Evidence Showing Partisan Intent, Effects, or a Lack Thereof**

##### **1. Direct Evidence**

85. There is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans.

86. The Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans.

87. No elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans.

88. The 2021 Congressional Plan was passed on strict party-line votes in the House on November 4 and the Senate on November 2. No member of the Democratic party in either chamber voted for the plan.

89. The General Assembly enacted the 2021 House Plan, on strict party-line votes, on November 4. No member of the Democratic party in either chamber voted for the plan.

90. The General Assembly enacted the 2021 Senate Plan, on strict party-line votes, on November 4. No member of the Democratic party in either chamber voted for the plan.

## 2. Circumstantial Evidence

### a. Recent History of Partisan Redistricting Litigation and Legislation

91. The General Assembly's intentional redistricting for partisan advantage has been subject to judicial review in multiple cases over the past decade.

92. First, in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the plaintiffs challenged North Carolina's congressional districting maps in federal court as unconstitutional partisan gerrymanders. The well-established record showed that Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten republicans and three democrats. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 807-808 (M.D.N.C. 2018).

93. The federal district court concluded that all but one of the districts in North Carolina's 2016 Congressional Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In examining intent, effects, and causation, the concern was that such a degree of vote dilution meant the elected representatives would feel free to ignore the concerns of the supporters of the minority party. *Id.* at 867. The district court also found partisan gerrymandering claims justiciable under the First Amendment. *Id.* at 929. Despite the undisputed findings of partisan intent in drawing the challenged districts, the Supreme Court of the United States held that partisan gerrymandering claims present political questions beyond the reach of the federal courts. 139 S. Ct. at 2506-07.

94. Then, in *Common Cause v. Lewis*, 18 CVS 14001 (N.C. Super. Ct. Sep. 03, 2019), the plaintiffs challenged North Carolina's legislative maps in state court as unconstitutional partisan gerrymanders. After a federal court had struck down certain districts as unconstitutional racial gerrymanders, *Id.* at 13-14, and in 2017, the Senate

Redistricting Committee and the House Select Committee on Redistricting met to enact new plans where leaders stated that they would again employ the same mapmaker to draw these new plans and the adopted criteria allowed for political considerations and the use of election data results, *id.* at 14-16. While Republican legislators did not publicly state that they drew the maps for partisan advantage, there was meaningful dispute that this was the case. *Id.* at 23.

95. Prior to final judicial approval of the 2019 remedial maps, the court in *Common Cause* determined that the 2017 legislative maps at issue were the result of extreme partisan gerrymandering, and ordered those maps to be remedied to the extent necessary to cure that defect—in other words, to redraw the 2017 legislative maps so that the partisan gerrymandering would not be classified as “extreme.” To the extent the 2021 redistricting committees sought to retain the district lines of the 2019 maps, partisan bias, although not “extreme” by the *Common Cause* standard, is present in the Enacted Maps.

96. The three-judge panel concluded that 14 of the House district county groupings and 7 of the Senate district county groupings violated the North Carolina Constitution by operating through vote dilution such that an election would not reflect the will of the people, *Id.* at 302, by seeking to diminish the electoral power of supporters of a disfavored party, *id.* at 307, and by burdening the protected expression and association of voting, banding together in a political party, and spending on elections. *Id.* at 320. Unlike the federal court, however, the three-judge panel found that these claims were justiciable and the standards for evaluating the plaintiffs’ claims were satisfactory and manageable.

97. Finally, in *Harper v. Lewis*, 19 CVS 12667 (N.C. Super. Ct. Oct. 28, 2019), the plaintiffs sought a declaration that the 2016 congressional districts, as challenged in *Rucho v. Common Cause*, violated the rights of Democratic voters in North Carolina under the North

Carolina Constitution’s Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Freedom of Assembly Clauses. *Id.* at 1. The three-judge panel agreed with the ruling in *Common Cause v. Lewis* that extreme partisan gerrymandering is violative of the North Carolina Constitution and presented justiciable issues. *See Harper v. Lewis generally.* Noting that “the 2016 congressional districts have already been the subject of years-long litigation in federal court arising from challenges to the districts on partisan gerrymandering grounds,” the Court found that there was a detailed record of the partisan intent and effects of the 2016 congressional plan. The Court held that the Plaintiffs had shown a likelihood of success on the merits and granted the preliminary injunction, enjoining the use of the 2016 congressional districts in the 2020 election.

98. Redistricting for political gain occurred well before these most recent instances, but it has not been forbidden by the people of North Carolina through a constitutional amendment or legislative act.

99. Since the 2000 Census, there has been several proposed redistricting bills in both the House and Senate of the General Assembly. The most prominent proposed redistricting bill has been related to establishing—by constitutional amendment and statute—an independent redistricting commission.

100. In all the various iterations of proposed bills, this commission would be tasked with either the redistricting process in its entirety, removing this power from the General Assembly, or with introducing plans to the General Assembly. In all these proposed bills, the redistricting plans were to be done without consideration of political affiliation of voters, voting data from previous elections, location of incumbents’ residences, or demographic data outside of that provided by the U.S. Census Bureau. None of these bills passed, or even crossed over. With few exceptions, when Democrats have controlled the House and Senate,



Republicans have introduced these bills; and when Republicans have controlled the House and Senate, Democrats have introduced these bills.

101. From 2001-2010, the Democratic Party had control of the General Assembly. A version of the independent redistricting commission was proposed and, with the exception of the 2005-2006 session where a Democrat was the primary sponsor of the bill, Republican members of the legislature were the primary sponsors of these bills. These bills were introduced at least once during each session. H.B. 318, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 283, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 285, 2001 Leg., 144th Sess. (N.C. 2001); S.B. 1437, 2001 Leg., 144th Sess. (N.C. 2001); H.B. 1060, 2003 Leg., 145th Sess. (N.C. 2003); H.B. 1090, 2003 Leg., 145th Sess. (N.C. 2003); S.B. 650, 2003 Leg., 145th Sess. (N.C. 2003); S.B. 651, 2003 Leg., 145th Sess. (N.C. 2003); H.B. 1425, 2005 Leg., 146th Sess. (N.C. 2005); H.B. 1448, 2005 Leg., 146th Sess. (N.C. 2005); S.B. 430, 2005 Leg., 146th Sess. (N.C. 2005); H.B. 76, 2007 Leg., 147th Sess., (N.C. 2007); S.B. 1122, 2007 Leg., 147th Sess., (N.C. 2007); H.B. 252, 2009 Leg., 148th Sess., (N.C. 2009); S.B. 25, 2009 Leg., 148th Sess., (N.C. 2009); H.B. 894, 2009 Leg., 148th Sess., (N.C. 2009).

102. Similarly, from 2011-present, Republicans have had control over the General Assembly, and a version of this bill has had a Democratic primary sponsor; however, in the 2011-2012, 2013-2014, 2015-2016, 2016 Extra Session 4, and 2017-2018 sessions, at least one Republican was a primary sponsor of these bills. Since Republican control, Democrats have been the prominent sponsor of these bills in both the House and Senate. H.B. 783, 2011 Leg., 149th Sess., (N.C. 2011); S.B. 591, 2011 Leg., 149th Sess., (N.C. 2011); H.B. 824, 2011 Leg., 149th Sess., (N.C. 2011); H.B. 606, 2013 Leg., 150th Sess., (N.C. 2013); H.B. 910, 2013 Leg., 150th Sess., (N.C. 2013); S.B. 155, 2013 Leg., 150th Sess., (N.C. 2013); S.B. 722, 2013 Leg., 150th Sess., (N.C. 2013); H.B. 49, 2015 Leg., 152nd Sess., (N.C. 2015); S.B. 28, 2015 Leg., 152nd Sess., (N.C. 2015); H.B. 92, 2015 Leg., 152nd Sess., (N.C. 2015); H.B. 6, 2015 Leg.,

152nd Sess., (N.C. 2015); H.B. 200, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 209, 2017 Leg., 153rd Sess., (N.C. 2017); H.B. 674, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 702, 2017 Leg., 153rd Sess., (N.C. 2017); S.B. 800, 2017 Leg., 153rd Sess., (N.C. 2017); H.B. 69, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 574, 2019 Leg., 154th Sess., (N.C. 2019); S.B. 641, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 648, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 827, 2019 Leg., 154th Sess., (N.C. 2019); S.B. 673, 2019 Leg., 154th Sess., (N.C. 2019); H.B. 436, 2021 Leg., 155th Sess., (N.C. 2021); H.B. 437, 2021 Leg., 155th Sess., (N.C. 2021); H.B. 542, 2021 Leg., 155th Sess., (N.C. 2021); S.B. 716, 2021 Leg., 155th Sess., (N.C. 2021).

**b. Stated Redistricting Objectives of the General Assembly in the 2021 Enacted Plans**

103. The General Assembly established a detailed record of the stated purposes of the configurations of the 2021 districts.

**(i) *The 2021 Congressional Plan***

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

- a. CD1 is anchored in northeastern North Carolina to incorporate suggestions from a public hearing in Pasquotank that this region be maintained as a community of interest. The district was configured to take in the Outer Banks and most of the State's shoreline and to keep the finger counties of northeastern North Carolina together, as well as most of the counties that run along the State's border with Virginia. LDTX78 Senate Tr. 3:7–4:3 (Nov. 1, 2021).
- b. CD2 was configured to contain most of rural northeastern North Carolina, to maintain whole counties (16 of 18 are whole), and to avoid splitting municipalities (none are split). One precinct is split in Pitt County and one in Wayne County for the purpose of equalizing population. LDTX78 Senate Tr. 4:4–15 (Nov. 1, 2021).
- c. CD3 was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district and to improve the compactness of the prior district. Input from a public hearing in New Hanover was incorporated, including that Cape Fear River Basin be kept in one district, that New Hanover and Brunswick Counties be kept together, and that Bladen and Columbus Counties be maintained in single district. LDTX78 Senate Tr. 4:16–5:11 (Nov. 1, 2021).

- d. CD4 was configured to be a four-county district south of Raleigh. These counties were chosen because they have similar geography, industry, and proximity to population base in the region in Fayetteville and Raleigh. An online comment requested that Cumberland, Harnett, and Sampson Counties be kept together in a congressional district, and this was accomplished by adding population in Johnston and one precinct in Wayne County. The district is highly compact and splits no municipalities. LDTX78 Senate Tr. 5:12–6:7 (Nov. 1, 2021).
- e. CD5 was configured to be based entirely in Wake County, comprising Garner, Knightdale, Raleigh, Rolesville, Wake Forest, Wendell, and Zebulon. These municipalities are viewed as sharing common interests, given that people live and work and commute within these municipalities; no municipalities were split. Any VTDs split were done for the purposes of maintaining municipal boundaries or equalizing population. LDTX78 Senate Tr. 6:8–20 (Nov. 1, 2021).
- f. CD6 was configured to include Durham and Orange Counties and a portion of Wake County that contains Apex, Cary, and Morrisville, which were all viewed as a coherent community of interest, and to match the configuration of this district that has existed in this region, in roughly the same form, for decades. No municipalities were split. LDTX78 Senate Tr. 6:21–7:11 (Nov. 1, 2021).
- g. CD7 runs from the Triangle west through the Central Piedmont region encompassing four whole counties, to include Alamance, Chatham, Lee, and Randolph; parts of Davidson, Guilford, and Harnett Counties and a portion of Wake County to bring together rural areas and smaller cities and towns. VTDs were only split for the purpose of equalizing population or keeping cities together. LDTX78 Senate Tr. 7:12–25 (Nov. 1, 2021).
- h. CD8 is rooted in the Sandhill region of North Carolina including eight whole counties and a portion of Mecklenburg County. The configuration was created in part based on a comment by the Moore County Democratic Chair, who suggested that Sandhills counties including Moore, Scotland, and Hoke to be kept together in a Sandhills district. LDTX78 Senate Tr. 8:3–22 (Nov. 1, 2021).
- i. CD9 constitutes the General Assembly’s effort to keep the City of Charlotte together in one district, given its cohesive community. This was not strictly possible, given that Charlotte is too large for one congressional district, but the adopted configuration succeeded in keeping 83% of Charlotte in one district that, in turn, is 97% composed of Charlotte. LDTX78 Senate Tr. 8:23–9:5 (Nov. 1, 2021).
- j. CD10 is composed of suburban and exurban areas that stretch between the population centers of Charlotte and the Triad region, which constitute a community of interest. The district keeps all of the City of High Point in a single district, based on a comment at a public hearing in Forsyth. There is one split municipality in Greensboro. LDTX78 Senate Tr. 9:6–20 (Nov. 1, 2021).
- k. CD11 is based in the northwest corner of North Carolina, containing eight whole counties and two partial counties. This was done out of a desire to maintain the incumbent in the district. Another key goal was maintaining Greensboro as much

as possible in the district, and the goal was achieved with more than 90% of Greensboro included. LDTX78 Senate Tr. 9:21–10:6 (Nov. 1, 2021).

- l. CD12 was configured to join suburbs outside Charlotte to an area in and around Winston-Salem, which was achieved by incorporating four whole counties and one partial county. No municipalities were split. LDTX78 Senate Tr. 10:7–16 (Nov. 1, 2021).
- m. CD13 contains municipalities and towns to the west and north of Charlotte based on an online comment suggesting that towns in North Mecklenburg, including Cornelius, Huntersville, and Davidson, be joined into a single district. LDTX78 Senate Tr. 10:17–11:5 (Nov. 1, 2021).
- n. Finally, CD14 is anchored in western North Carolina to take in the mountain counties up to the westernmost tip of the State; the General Assembly implemented a comment at a Jackson County public hearing asking that McDowell and Polk Counties be removed from the district and that it be drawn into Watauga County. LDTX78 Senate Tr. 11:6–21 (Nov. 1, 2021).

105. The Committees concluded that the congressional map satisfies the adopted criteria. LDTX78 Senate Tr. 11:22–12:16 (Nov. 1, 2021). All districts were drawn to zero population deviation or to one person less than ideal. There was no point contiguity used in the map and districts are compact. LDTX78 Senate Tr. 11:22–25; 12:10-11 (Nov. 1, 2021). County, VTD, and community of interest divisions were minimized. The 2021 Congressional Plan divided 11 counties solely to equalize population. VTDs were split only when necessary to balance population or keep municipalities whole, and a total of 24 VTDs were split. And there are districts wholly within Mecklenburg and Wake Counties, the only two counties of sufficient population to contain a whole Congressional district. Only two municipalities were split in the entire State, and community consideration was considered to keep cities and towns together. LDTX78 Senate Tr. 11:22–12:16 (Nov. 1, 2021).

106. The Committee concluded that no racial or political data was used in drawing the map. Member residence was considered. LDTX78 Senate Tr. 12:6-7; 12:12-16 (Nov. 1, 2021). Senator Daniel stated that, due to the political geography of the state—with Democrats congregated in the urban areas—the only way to accomplish a roughly equal

Republican-Democratic split is with a partisan gerrymander in favor of Democrats. LDTX78 Senate Tr. 18:11–21 (Nov. 1, 2021). Indeed, the largest counties had to be split to satisfy one-person, one-vote standards. *See, e.g.*, LDTX78 Senate Tr. 24:13–17 (Nov. 1, 2021).

107. One Senator noted that when metropolitan areas are split (as many have to be because of the population size), the metropolitan areas get more representatives in Congress who are able to advocate for the municipality as a whole. LDTX78 Senate Tr. 33:21–34:12 (Nov. 1, 2021). The online portal received over 4,000 comments between when they opened at November 1, 2021. LDTX78 Senate Tr. 39:5–14 (Nov. 1, 2021).

**(ii) The 2021 Senate Plan**

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

- a. SD1 was created out of county groupings in the northeastern corner of the State that would need to be comprised of 8 or 10 counties. The district includes 4 of the 5 “Finger Counties” together and combines them with the Northern Outer Banks, a suggestion made by persons at public hearings. About 70% of the counties and 81% of the population are in the Norfolk media market, with the others in the Greenville and Raleigh market. This district does not split VTDs or municipalities within the counties, as it comprises only whole counties. LDTX80 Senate Tr. 3:8–4:5 (Nov. 2, 2021); Trial Tr. 01/05/2022.
- b. SD2 follows the Roanoke River from Warren County to Albemarle Sound in Washington County. This comprises many of the counties on the Sound, including Chowan County, Hyde County, and Pamlico County. Five of the eight included counties are in the Greenville media market, with the others split between the Raleigh and Norfolk media markets. Two-third of the population of the district is within the Greenville media market. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 4:7–24 (Nov. 2, 2021).
- c. SD3 was created by the base county grouping map. It includes Beaufort, Craven, and Lenoir Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 4:25–5:4 (Nov. 2, 2021).
- d. SD4 was created by the base county grouping map. It includes Green, Wayne, and Wilson Counties. This district does not split VTDs or municipalities within the

- counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 5:5–9 (Nov. 2, 2021).
- e. SD5 was created by the base county grouping map. It includes Edgecombe and Pitt Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 5:11–15 (Nov. 2, 2021).
  - f. SD6 is a single-county district containing only Onslow County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. LDTX80 Senate Tr. 5:17–20 (Nov. 2, 2021).
  - g. SD7 contains the majority of New Hanover County in the southeast corner of the State. Because New Hanover County’s population was slightly larger than the maximum allowable population in a single district, the Committee carved out three precincts and included them in SD7. These three precincts were selected to keep all municipalities in New Hanover County whole and to keep as much population as possible in SD7. SD7 contains no split VTDs or municipalities. LDTX80 Senate Tr. 5:21–6:13 (Nov. 2, 2021).
  - h. SD8 contains Brunswick and Columbus Counties, in addition to three precincts of New Hanover County. It contains no split VTDs or municipalities. LDTX80 Senate Tr. 6:15–19 (Nov. 2, 2021).
  - i. SD9 and SD12 comprise a two district, seven county cluster created by the base county groupings in the southeastern part of the State. SD9 contains all of Bladen, Jones, Duplin, and Pender Counties, as well as the majority of Sampson County. SD12 contains a small portion of Sampson County, as well as all of Harnett and Lee Counties. The Committee endeavored to keep as much of Sampson County as possible in SD9. The Committee considered moving a single precinct from northern Sampson County into SD12, but that would have split two municipalities and placed more Sampson County residents in SD12 than the chosen route: splitting two precincts, but leaving Spivey’s Corner intact in SD9 and Plainview whole in SD12. Both SD9 and SD12 contain two split VTDs, but no split municipalities. LDTX80 Senate Tr. 6:21–7:24 (Nov. 2, 2021).
  - j. SD10 is a single-county district containing only Johnston County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. LDTX80 Senate Tr. 8:1–4 (Nov. 2, 2021).
  - k. SD11 was created by the base county grouping map. It includes Franklin, Nash, and Vance Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 8:5–8 (Nov. 2, 2021).
  - l. SD13, SD14, SD15, SD16, SD17, and SD18 were created out of the two-county grouping of Granville and Wake Counties. The Committee attempted to keep municipalities whole, while splitting as few precincts as possible. Some VTDs had to be split, however, to comply with one-person, one-vote standards. Raleigh had

to be split between multiple districts; 98% of Raleigh is within 3 Senate districts, though. Further, Cary and Apex were unable to be contained within a single district due to their populations and geographic constraints. All other municipalities (Fuquay-Varina, Holly Springs, Garner, Knightdale, Morrisville, Rolesville, Wake Forest, Wendell, and Zebulon) were kept whole. All in all, 10 VTDS were split to keep the municipalities whole and to balance out population. LDTX80 Senate Tr. 8:10–9:13 (Nov. 2, 2021), Trial Tr. 01/05/2022.

- a. SD13 contains all of Granville County, unincorporated areas in northern Wake County, as well as Rolesville, Wake Forest, Zebulon, and 2% of the population of Raleigh. LDTX80 Senate Tr. 9:14–23 (Nov. 2, 2021). Granville could be kept whole, so it had to be kept whole. However, it is not large enough to be a district by itself so it needed to be joined with a part of Wake County. Trial Tr. 01/05/2022.
- b. SD14 contains all of Garner, Knightdale, Wendell, and 21% of the population of Raleigh, including portions of southeast and downtown Raleigh. LDTX80 Senate Tr. 10:8–15 (Nov. 2, 2021).
- c. SD15 contains the western part of Raleigh, portions of downtown Raleigh, and portions of east Cary. 36% of the population of Raleigh resides within the district. The majority of the district's population is from Raleigh (85%), with 12% from Cary. SD15 splits two precincts with other districts to balance population. LDTX80 Senate Tr. 10:24–11:7 (Nov. 2, 2021).
- d. SD16 is centered in Cary and contains western Wake County, including portions of Apex and all of Morrisville. 80% of Cary's population is in the District, as well as 45% of Apex's population. 69% of the district's population is from Cary, 15% from Morrisville, and 13% from Apex. There are two split precincts to balance population. LDTX80 Senate Tr. 11:8–16 (Nov. 2, 2021).
- e. SD17 contains Holly Springs and Fuquay-Varina, as well as most of Apex and a small part of Cary. Three VTDs were split to keep Garner whole in SD 13, and another VTD was split to balance population between SD 16 and SD 17. LDTX80 Senate Tr. 11:20–25 (Nov. 2, 2021).
- m. SD19 and SD21 were created out of Cumberland and Moore Counties. SD19 is contained entirely within Cumberland County and was drawn to encompass as much of Fayetteville as possible, although Fayetteville has an irregular shape and many satellite annexations; indeed, it shares some precincts with other municipalities, such as Hope Mills. Ultimately, the Committee was unable to keep all of Fayetteville together but created a district that includes 88% of Fayetteville's population and includes nearly 15% of the population of Hope Mills. The district has no split VTDs. SD21 includes all of Moore County and remainder of Cumberland County, including the remainder of Fayetteville and Hope Mills' population. LDTX80 Senate Tr. 12:11–13:11 (Nov. 2, 2021), Trial Tr. 01/05/2022.
- n. SD20 and SD22 were created out of Chatham and Durham Counties. SD20 includes all of Chatham County, most of incorporated Durham County—including the portions of Chapel Hill in Durham County—and several peripheral Durham City precincts. The bulk of Durham City (70% of its population), which is too large

to comprise its own Senate District, is within SD22. No VTDs were split in either district. LDTX80 Senate Tr. 13:12–14:7 (Nov. 2, 2021).

- o. SD23 was created by the base county grouping map. It includes Caswell, Orange, and Person Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 14:9–13 (Nov. 2, 2021).
- p. SD24 was created by the base county grouping map. It includes Hoke, Robinson, and Scotland Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80 Senate Tr. 14:15–15:8 (Nov. 2, 2021).
- q. SD25, SD29, SD34, and SD35 were created out of a seven-county grouping in the center of the State, including Alamance, Randolph, Cabarrus, Anson, Montgomery, Richmond, and Union Counties. Due to population disparities, Randolph, Cabarrus, and Union Counties were split between districts; the remainder were left whole. LDTX80, Senate Tr. 14:22–15:7 (Nov. 2, 2021).
  - a. SD25 contains all of Alamance County and eastern Randolph County. Faced with a choice between splitting VTDs and splitting municipalities, the Committee chose the former. One precinct was split, then, to keep all of Randleman in SD25. LDTX80, Senate Tr. 15:8–15:18 (Nov. 2, 2021).
  - b. SD29 includes all of Anson, Montgomery, and Richmond Counties; the remainder of Randolph County, including Asheboro; and the eastern half of Union County. Union County was split so as to keep all precincts whole. LDTX80, Senate Tr. 15:25–16:12 (Nov. 2, 2021).
  - c. SD34 contains most of Cabarrus County, minus the southern precincts which are in SD35. The Committee aimed to keep as much of the population of the county together as possible, which required splitting a precinct to avoid the District having a higher-than-allowable population. Another precinct was split so that all of Midland was kept in the same district. LDTX80, Senate Tr. 16:15-16-23; 17:14–17:19 (Nov. 2, 2021).
  - d. SD35 contains the remaining portions of Cabarrus and Union Counties. LDTX80, Senate Tr. 16:13–16:15 (Nov. 2, 2021).
- r. SD26, SD27, and SD28 are comprised of Guilford and Rockingham Counties. Each contains part of Greensboro, which is itself too large to comprise its own district. SD26 contains all of Rockingham County, as well as some unincorporated portions of Guilford County and some of Greensboro’s bedroom communities. While it does not contain any Greensboro precincts, it includes 4% of the city’s population. SD26 contains one VTD split, to keep the entire population of Kernersville in the district. SD27 includes southern parts of Greensboro, as well as High Point. SD28 contains the northern portion (about 2/3) of Greensboro and the majority (68%) of its population. LDTX80, Senate Tr. 17:20–19:4 (Nov. 2, 2021).
- s. SD30 was created by the base county grouping map. It includes Davie and Davidson Counties. This district does not split VTDs or municipalities within the



counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 19:5–19:9 (Nov. 2, 2021).

- t. SD31 and SD32 are comprised of Stokes and Forsyth Counties. The Committee paired Forsyth with Stokes County, rather than with Yadkin County, because this pairing led to more compact districts and minimized municipality splitting; Germantown and King span the Stokes/Forsyth county line. SD31 includes all of Stokes County as well as suburban municipalities on the outskirts of Winston-Salem, such as Bethania, Clemons, Germantown, Kernersville, King, Lewis, Rural Hall, Tobaccoville, and Walkertown. Given that Winston-Salem is too large for one district, SD31 also contains 16% of the city’s population. SD32 contains the vast majority of the population of Winston-Salem (84%). Neither district contains split VTDs. LDTX80, Senate Tr. 19:11–21:4 (Nov. 2, 2021). Stokes County could be kept whole, so it was. Winston Salem is too populous to be a district by itself. Trial Tr. 01/05/2022.
- u. SD33 was created by the base county grouping map. It includes Rowan and Stanly Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 21:19–21:24 (Nov. 2, 2021).
- v. SD36 is made up of Alexander, Surry, and Yadkin Counties and is the remainder of the grouping stemming from the combination of Stokes and Forsyth counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. LDTX80, Senate Tr. 21:5–21:18 (Nov. 2, 2021).
- w. SD37, SD38, SD39, SD40, SD41, and SD42 were created out of the two-county grouping of Iredell and Mecklenburg Counties. Naturally, Charlotte—the largest city in the State—is split between 5 of these Mecklenburg-based districts. Senate Tr. 21:25–22:4 (Nov. 2, 2021).
  - a. SD37 includes all of Iredell County and the northmost parts of Mecklenburg County, including Davidson (which spans both counties). SD37 also contains 33% of the population of Cornelius, which is too large to fit in SD37 alone; it is the only split municipality in the district. There are no split VTDs. LDTX80, Senate Tr. 22:5–23:22 (Nov. 2, 2021); Trial Tr. 01/05/2022.
  - b. SD38 includes much of northern Mecklenburg County, including the remainder of Cornelius, Huntersville and 14% of Charlotte. There are no split VTDs. LDTX80, Senate Tr. 23:3–23:14 (Nov. 2, 2021).
  - c. SD39 includes portions of western Mecklenburg County, including unincorporated territory along the Gaston County line and border with South Carolina. It also includes portions of Uptown, Still Creek, and West Charlotte. Indeed 81% of the district’s population is in Charlotte and the district contains 20% of the population of Charlotte. There are no split VTDs in the district. LDTX80, Senate Tr. 23:15–24:4 (Nov. 2, 2021).
  - d. SD40 includes northeastern Charlotte and unincorporated portions of Mecklenburg County running along the border with Cabarrus County. 24%

- of Charlotte's population resides in the district. The district contains no split VTDs. LDTX80, Senate Tr. 24:5–24:13 (Nov. 2, 2021).
- e. SD41 includes south Charlotte, Matthews, and Mint Hill, as well as some unincorporated territory. 18% of Charlotte's population is in this district, comprising about 71% of the district's population. The district contains no split VTDs. LDTX80, Senate Tr. 24:14–24:25 (Nov. 2, 2021). This district encompasses Matthews and Mint Hill. Trial Tr. 01/05/2022.
  - f. SD42 includes portions of Uptown Charlotte, south Charlotte, and east Charlotte. No other portions of Mecklenburg County are included. 25% of Charlotte's population lives in this district no split VTDs. LDTX80, Senate Tr. 25:1–25:18 (Nov. 2, 2021).
- x. SD43 and SD44 include Gaston, Cleveland, and Lincoln Counties. SD43 contains most of Gaston County, although 5 VTDs (in Cherryville, Landers Chapel, and Tryon) were placed in SD44 to even out population. SD44 includes these VTDs, as well as all of Lincoln and Cleveland Counties. LDTX80, Senate Tr. 25:19–26:6 (Nov. 2, 2021).
  - y. SD45, SD47, and SD50 are drawn from a grouping of 17 western North Carolina counties. Given the counties' geographic locations and populations, two of the 17 counties (Caldwell and Haywood) were required to be split. SD45 includes all of Catawba County, as well as the southeast portion of Caldwell County. SD47 contains the remainder of Caldwell County, including Lenoir. (Two VTDs were split between SD45 and SD47 to keep Lenoir whole.) SD47 also contains portions of Haywood County, including Canton, and all of Alleghany, Ashe, Avery, Madison, Mitchell, Watauga, and Yancey Counties. SD50 includes the remainder of Haywood County, and all of Cherokee, Clay, Graham, Jackson, Macon, Swain, and Transylvania Counties. SD50 contains no split precincts or municipalities. LDTX80, Senate Tr. 27:3–28:18 (Nov. 2, 2021).
  - z. SD46 includes all of Burke and McDowell Counties, as well as some unincorporated portions and small towns in Buncombe County. LDTX80, Senate Tr. 26:13–16 (Nov. 2, 2021). One VTD is split with SD49 to keep all of Woodfin within that district. SD49 contains the remainder of Buncombe County, including Asheville, Biltmore Forest, and Weaverville. LDTX80, Senate Tr. 26:21–26:2 (Nov. 2, 2021).
  - aa. There were two options for how the Buncombe grouping could be formed. They opted for the one that formed Burke County, McDowell County, and Buncombe County together because it was the more compact version. The committee determined that Burke and McDowell counties could be kept whole, so they were. SD49 was drawn to include the precincts that make up Asheville. Trial Tr. 01/05/2022.
  - bb. SD48 includes the whole of Henderson, Polk, and Rutherford Counties. LDTX80, Senate Tr. 26:7–26:12 (Nov. 2, 2021).

109. Ultimately, two amendments were accepted in the Senate Committee: (1) An amendment offered by Senator Clark changing the Guilford/Rockingham County grouping (SD26, SD27, and SD28). Senator Hise testified that this amendment was presented at the behest of Senator Robinson, a Democratic member from Guilford, who, under the version presented by the chairs, was double-bunked with Senator Garrett. Trial Tr. 01/05/2022. During debate, Senator Robinson attested in Committee that she understood the amendment complied with the VRA and considered it a fair draw. *Id.*; LDTX80, Senate Tr. 104:3–105:4 (Nov. 2, 2021). (2) An amendment offered by Senator Marcus changing the Durham/Chatham County grouping (SD20 and SD22). Senator Murdock, a Democratic member from Durham, attested in Committee that she understood the amendment complied with the VRA and considered it a fair draw. LDTX80, Senate Tr. 98-100 (Nov. 2, 2021).

110. The Committee concluded that the 2021 Senate Plan complies with the adopted criteria. The Committee determined that the Senate map successfully balances the criteria considered by Senators, including compliance with *Stephenson*, refusal to consider racial and political data, and minimizing the division of municipalities and VTDs. LDTX80, Senate Tr. 72:21–73:15 (Nov. 2, 2021).

**(iii) The 2021 House Plan**

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

- a. The mapmakers made every effort to keep previous districts intact. LDTX76, House Tr. 9:12–15 (Nov. 1, 2021).
- b. Rural areas lost immense population in the 2010s and, therefore, changes were necessary. For instance, House District 23 previously included only Edgecombe and Martin Counties. But Bertie County had to be added to meet population requirements. LDTX76, House Tr. 8:14–23 (Nov. 1, 2021).
- c. The House Committee Chair endeavored to keep counties whole whenever it was possible. For instance, although Chatham, Lee, and Polk Counties could have been split, they were not. LDTX76, House Tr. 9:20–10:4 (Nov. 1, 2021).

- d. The Chair also sought to minimize the splitting of VTDs. While the 2011 map had hundreds of split VTDs, the proposed map had only 6 VTD splits. LDTX76, House Tr. 10:5–11 (Nov. 1, 2021).
- e. The Chair honored municipal boundaries and made every effort to keep municipalities whole. To the extent splits were necessary, the majority of them were in areas with little to no population. LDTX76, House Tr. 10:12–19 (Nov. 1, 2021).
- f. Every district in the map proposed by the Chair is contiguous. LDTX76, House Tr. 10:20–21 (Nov. 1, 2021).
- g. The bare minimum number of incumbents were “double-bunked” into the same districts. LDTX76, House Tr. 10:22–10:25 (Nov. 1, 2021).

112. Goals for certain House districts in certain counties were as follows:

- a. Because the Wake county grouping added two house districts during this redistricting cycle, Representative Hall was unable to keep the districts similar to the previous redistricting plan. Towns like Wake Forest, Rolesville, and Fuquay-Varina were sought to be kept whole, with Raleigh in as few districts as possible. Trial Tr. 01/05/2022.
- b. Because Mecklenburg County grouping added one House District and an attempt was made to keep it similar to the previous redistricting plan for the county. Mint Hill was unsplit and combined with Matthews because the two communities are similar. Trial Tr. 01/05/2022.
- c. The Guilford County grouping added no seats, and a goal was to change the districts as little as possible considering past litigation of districts in the county. Only a few precincts were moved for population balancing. Trial Tr. 01/05/2022.
- d. Pitt County was previously paired with Lenoir, and therefore its configuration could no longer be kept the same. An attempt was made to not split Greenville and ECU. Trial Tr. 01/05/2022.
- e. In the Buncombe County grouping, Asheville had been divided up and a goal was to keep Asheville entirely within two districts. Trial Tr. 01/05/2022.
- f. Districts in New Hanover County were intended to remain largely the same. Wilmington is kept almost entirely within Districts 18 and 20. Trial Tr. 01/05/2022.
- g. The goal for the Cumberland County grouping was to change the districts as little as possible considering past litigation of districts in the county. A small number of precincts were changed for population purposes. Trial Tr. 01/05/2022.

- h. The Forsyth County cluster districts are largely similar to the districts in the previous map with the biggest difference being that the county is now paired with Stokes county instead of Yadkin county. A goal was to not divide schools, including Wake Forest University. Winston-Salem had to be split because of its population. Trial Tr. 01/05/2022.

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

114. As shown above, although the redistricting process must start anew at the beginning of each decade, and no prior maps were loaded onto the map-drawing machines for legislators or other maps allowed into the room, Representative Hall sought to draw districts as close as possible to districts used in the past and with potential litigation in mind.

**c. Plaintiffs' and Legislative Defendants' Experts Analysis of the Enacted Plans**

**(i) Harper Plaintiffs' Expert Dr. Jowei Chen**

115. Plaintiffs' expert Jowei Chen, Ph.D., is an Associate Professor in the Department of Political Science at the University of Michigan, Ann Arbor. PX482 at 2 ¶2. Dr. Chen is also a Research Associate Professor at the Center for Political Studies of the Institute for Social Research at the University of Michigan and a Research Associate at the Spatial Social Science Laboratory at Stanford University. *Id.*

116. Dr. Chen has extensive experience in redistricting matters. PX482 at 2 ¶4. Dr. Chen has published academic papers on legislative districting and political geography in several political science journals, including *The American Journal of Political Science* and *The American Political Science Review*, and *Election Law Journal*. *Id.* at 2 ¶3. His academic areas of expertise include legislative elections, spatial statistics, geographic information systems (GIS) data, redistricting, racial politics, legislatures, and political geography. *Id.* He also has expertise in the use of computer simulations of legislative districting and in

analyzing political geography, elections, and redistricting. *Id.* Dr. Chen has presented expert testimony regarding his simulation methodology in numerous prior partisan gerrymandering lawsuits, including *Common Cause v. Lewis*.

117. Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems. Trial Tr. 01/03/2022.

118. Dr. Chen analyzed the partisan bias of the enacted congressional plan on a statewide and district-by-district basis. PX482 at 3 ¶6. Dr. Chen did not analyze the state legislative districts in the Enacted Plan. Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan cannot be explained by North Carolina's political geography or adherence to the Adopted Criteria. PX482 at 49 ¶¶77-78, 98, 100.

119. In his academic research on legislative districting, partisan and racial gerrymandering, and electoral bias, Dr. Chen has developed various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. PX482 at 4 ¶7. Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. *Id.* By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. *Id.* Specifically, by

holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations. *Id.*

120. Because Dr. Chen analyzed only the enacted congressional plan, findings based upon his statewide, regional, and district-level analysis are made in more detail below.

**(ii) Harper Plaintiffs' Expert Dr. Christopher Cooper**

121. Christopher A. Cooper, Ph.D., has been a tenured or tenured-track professor in the field of political science since 2002 and is currently the Robert Lee Madison Distinguished Professor of Political Science and Public Affairs at Western Carolina University. PX425 at 1 (Cooper Rep.). Dr. Cooper was previously accepted as an expert in *Common Cause v. Lewis, et al.*, 18 CVS 014001 (Sept. 3, 2019).

122. Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina. Trial Tr. 01/03/2022.

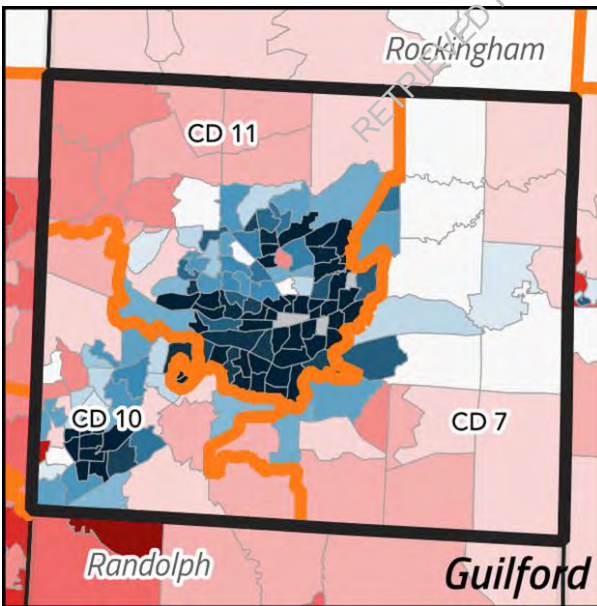
123. Dr. Cooper analyzed the 2021 Congressional Plan the partisan effects of each district's boundaries.

124. Although North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election. PX425 at 3. Trial Tr. 01/03/2022.

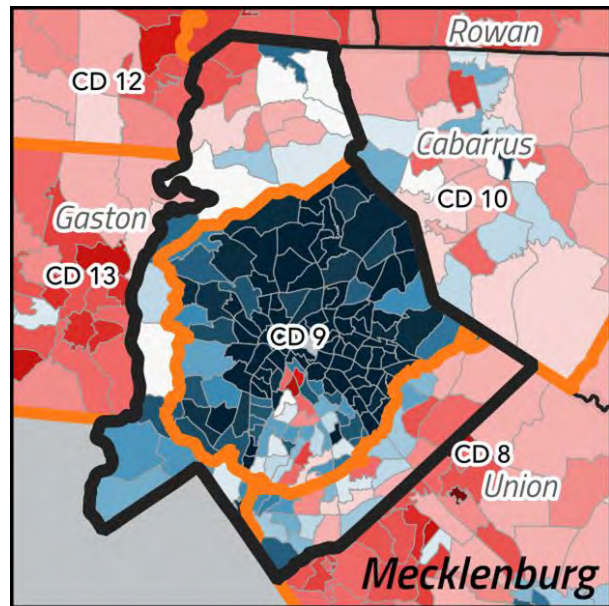
125. The 2021 Congressional Plan reduces the anticipated number of Democratic seats, disadvantaging Democratic voters, by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each. PX425 at 3.

There was no population-based reason to divide each of these three Democratic-leaning counties across three districts and in the congressional plan in effect for the 2020 election, Guilford County fell entirely within one district, while Mecklenburg and Wake counties were each divided into only two districts. PX425 at 3; Trial Tr. 01/03/2022.

126. Dr. Cooper produced a series of maps showing the congressional district boundaries in Guilford, Mecklenburg, and Wake counties, displaying the congressional district boundaries in yellow, the county boundaries in black, and VTD boundaries in gray. Dr. Cooper also used the combined, two-party vote differential in the results of the 2020 Secretary of Labor and Attorney General elections to measure and display partisanship of the VTDs on these maps. In each map, darker red shading indicates a larger Republican vote margin in the VTD, darker blue shading indicates a larger Democratic vote margin in the VTD, and lighter colors indicate VTDs that were closer to evenly split in Democratic and Republican vote shares in the 2020 Secretary of Labor and Attorney General elections. PX425 at 15.

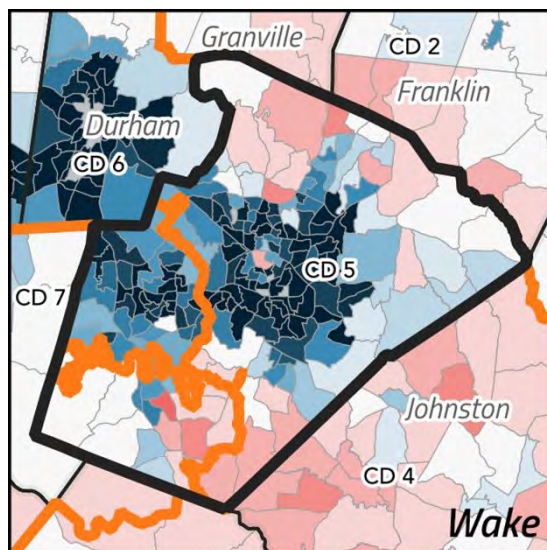


PX436 (Cooper Map 1)



PX437 (Cooper Map 2)

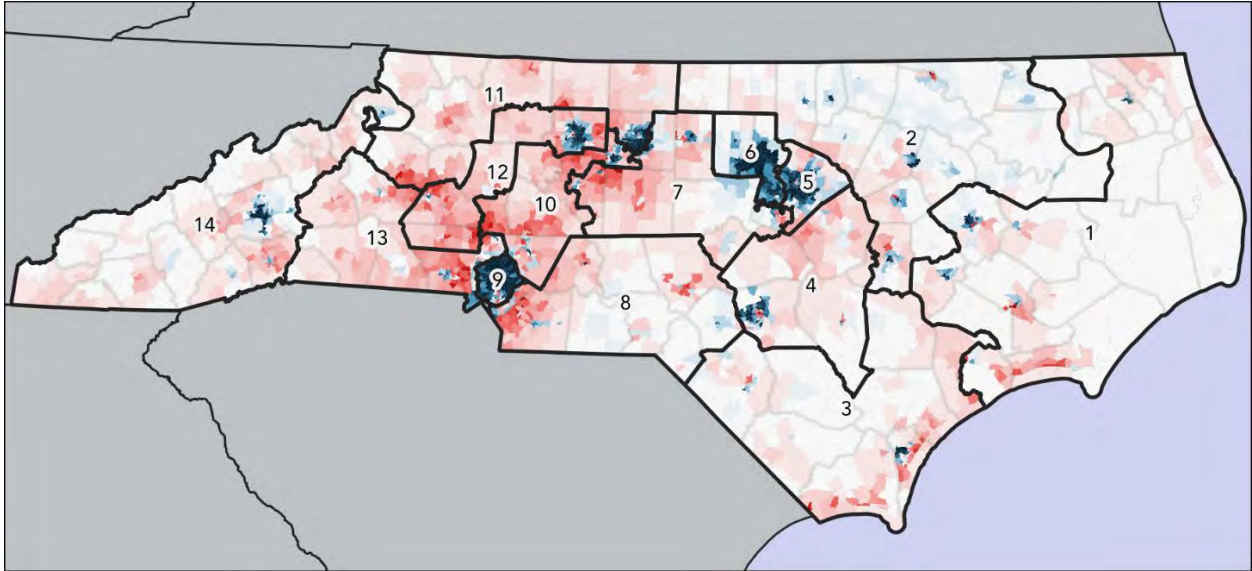




PX438 (Cooper Map 3)

127. The congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for districts elsewhere in the state. PX425 at 15. Trial Tr. 01/03/2022. Thus, the Court finds that the “cracking and packing” of Democratic voters in Guilford, Mecklenburg, and Wake counties has “ripple effects throughout the map.” PX425 at 15.

128. Dr. Cooper produced a map showing the state-wide congressional map with red-and-blue shading of VTDs based on the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections. PX425 at 15.



PX439 (Cooper Map 4)

129. Dr. Cooper calculated the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections for the districts in the 2021 Congressional Plan in order to estimate the partisan lean of each district. By this measure, the Court finds that the 2021 Congressional Plan will result in 10 Republican seats, 3 Democratic seats, and 1 competitive seat. PX425 at 20 & Table 1. Other measures of the partisan lean of each district in the 2021 Congressional Plan, including the Cook Political Report’s Partisan Voter Index (PVI) and the percentage of the electorate that voted for Donald Trump in the 2020 election, are consistent with the two-party vote margin in the results of the 2020 Secretary of Labor and Attorney General elections. PX425 at 20 & Table 1.

130. The 2021 Congressional Plan places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, “virtually guaranteeing” that the Democratic incumbent will lose her seat. PX425 at 4. The 2021 Congressional Plan includes one district where no incumbent congressional representative resides. *Id.* That district, NC-4,

“overwhelmingly favors” the Republican candidate based on the district’s partisan lean. PX425 at 4.

131. The 2021 House and Senate Plans similarly benefit the Republican Party. PX425 at 49. Although certain county groupings were mandated by the *Stephenson* county grouping rule, Legislative Defendants retained discretion over certain county groupings where there were alternate possibilities. *Id.* Specifically, Legislative Defendants chose from between 16 potential different county grouping maps in the Senate and 8 different potential county grouping maps in the House. *Id.* In addition, Legislative Defendants retained discretion over where to draw the district boundaries within each grouping, with the exception of single district county groupings. *Id.*

132. Legislative Defendants’ exercise of this discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates’ partisan advantage, and this finding is consistent with a finding of partisan intent.

133. Dr. Cooper also explained how partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina’s citizenry and their representatives in the General Assembly.

134. Findings based upon Dr. Cooper’s analysis of each district in the 2021 Congressional Plan and State Senate and House Plans are made below.

**(iii) *Harper Plaintiffs’ and Plaintiff Common Cause’s  
Expert Dr. Jonathan Mattingly***

135. Jonathan Mattingly, Ph.D., is a North Carolina native, and the James B. Duke Professor of Mathematics at Duke. PX629; PX630. Dr. Mattingly submitted a report for Harper Plaintiffs that demonstrates the extent of partisan redistricting in each of the enacted maps through longstanding statistical methods. PX629. Dr. Mattingly is an expert in applied

mathematics, probability, and statistical science. Dr. Mattingly developed his method of evaluating partisan gerrymandering in his academic research, where he leads a group at Duke University which conducts non-partisan research to understand and quantify gerrymandering. *Id.*; Trial Tr. 01/03/2022. The General Assembly, in fact, used Dr. Mattingly's publicly-released findings from his nonpartisan research to determine possible county clusters. *Id.* at 6.

136. Dr. Mattingly has testified in two previous cases. In the federal partisan gerrymandering case relating to North Carolina's congressional districts and in the 2019 *Common Cause* case, in which the court found that "Dr. Mattingly's simulated maps provide a reliable and statistically accurate baseline against which to compare the 2017 Plans," that "[b]y comparing Dr. Mattingly's simulated plans to the enacted plans, the Court can reliably assess whether the characteristics and partisan outcomes under the enacted plans could plausibly have resulted from a nonpartisan process," and that Dr. Mattingly's analysis allows the court to "reliably assess whether the enacted plans reflect extreme partisan gerrymanders." *Common Cause*, 2019 WL 4569584, at \*29.

137. Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability. Trial Tr. 01/03/2022.

138. Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo ("MCMC") Algorithm to create a representative set, or "ensemble," of 100,000 maps for the state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. PX629 at 10, 72; Trial Tr. 01/03/2022. The algorithm produced maps that accorded with traditional districting criteria. *Id.* at 9, 72; Trial Tr. 01/03/2022. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits. *Id.* Dr. Mattingly

also designed the algorithm to develop maps that respected the county clustering requirement for state legislative maps under *Stephenson I. Id.* at 5–6. The algorithm did not incorporate as output requirements any ideas of proportional representation or notions of fairness. *Id.* at 2. The MCMC Algorithm that Dr. Mattingly employed ensured that the collection of maps was a stable, random and representative sample from the distribution of nonpartisan maps that adhere to the redistricting criteria. *Id.* at 72; Trial Tr. 01/03/2022.

139. For Congressional Districts, Dr. Mattingly ensured that the total population of any district was within 1% of the ideal district population; he has verified in his prior work that the small changes necessary to require perfect population balance, which would require splitting VTDs, do not affect the results seen in an ensemble of maps where 1% population deviation is permitted. *Id.* After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans. PX629 at 74; Trial Tr. 01/03/2022.

140. The Court finds, based upon Dr. Mattingly’s analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting. PX629 at 75. The enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8. PX629 at 75. The Congressional map is “an extreme outlier” that is “highly non-responsive to the changing opinion of the electorate.” *Id.* at 74-75.

141. For State House and Senate Districts, after generating the sample of maps, Dr. Mattingly used historical elections data to simulate how his nonpartisan maps would perform under a variety of political climates. *Id.* at 10; Trial Tr. 01/03/2022. He considered the following statewide election contest in the years 2016 and 2020: races for Governor,

Lieutenant Governor, Attorney General, United States Senate, Commissioner of Insurance, State Treasurer, Secretary of State, and State Auditor. *Id.*

142. The Court finds, based upon Dr. Mattingly's analysis, that the State House and Senate plans are extreme outliers that "systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps." PX629 at 2. The intentional partisan redistricting in both chambers is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it. *Id.* at 3, 10. The House map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. *Id.* The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is "astronomically small." *Id.* at 3.

143. For the State House Districts, the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections he considered. PX629 at 11. It is an outlier in its favoring of Republicans in the vast majority of the elections used in Dr. Mattingly's analysis. *Id.* The only three elections where the enacted map is not an extreme outlier are in elections that have strong Republican vote fractions (Treasurer 2020, Senate 2016, and Lieutenant Governor 2016) where the Republicans do not need to gerrymander to keep a supermajority. PX629 at 12; PX634.

144. The North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. *Id.* at 10. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. *Id.* Likewise, maps that would normally produce a Republican majority under nonpartisan maps

produce a Republican supermajority under the enacted maps. *Id.* Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. *Id.* at 11; Trial Tr. 01/03/2022. In every election scenario, Republicans won more individual seats than they statistically should under nonpartisan maps. *Id.* at 11.

145. The 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 Democratic seats or fewer, even in situations where virtually all of the plans in the nonpartisan ensemble would elect 49 Democratic seats or more. *Id.* at 11; PX633 (Mattingly Figure 5.1.1).

146. For the State Senate Districts, the results are the same: the enacted plan is an outlier or an extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. PX629 at 21. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. *Id.* But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a Democratic supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

147. Dr. Mattingly demonstrated the supermajority firewall by plotting the results of the statewide elections using the enacted Senate plan and his nonpartisan simulations in Figure 5.2.1, which is similar to Figure 5.1.1 for the House. PX629 at 22; PX643.

148. Although the effect is not as significant as in the House, the enacted plan elects fewer Democrats in each election than the majority or vast majority of plans in the non-partisan ensemble. *Id.* And in particular, the Senate plan sticks at 20 Democratic seats

across a variety of elections in which the overwhelming majority of non-partisan plans hit 21 and break the supermajority. *Id.*

149. Dr. Mattingly also performed an analysis to determine the extent of “cracking” and “packing” in the enacted maps. *Id.* at 12. In maps that are cracked and packed, it is expect to see that the concentrations of Democratic voters are outliers as compared to nonpartisan maps. *Id.* at 12.

150. For the Congressional maps, Dr. Mattingly ordered the fourteen districts in the congressional plan in his ensemble of nonpartisan plans from lowest to highest based on the Democratic vote fraction in each district, using statewide elections. PX629 at 75, Fig. 9.0.2; *see also id.* at 95-97.

151. The Court finds that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan’s non-responsiveness when more voters favor Democratic candidates, as shown in his charts. *Id.* at 75-76; Trial Tr. 01/03/2022. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts – *i.e.*, the districts Democrats would win no matter what – in comparison to the enacted plan. *Id.* And not a single one had the same or more Republican voters in the next seven districts – *i.e.*, the competitive districts – in comparison to the enacted plan. *Id.* That was true across every single statewide election in 2016 and 2020. *Id.*

152. For the House, the enacted maps, as compared to the sample maps, there is an overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts. *Id.* at 16; PX637. The Court finds that the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan



maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps. *Id.*; Trial Tr. 01/03/2022.

153. In the middle districts—between the 60th most Democratic seat and the 80th most Democratic seat—the Democratic vote fraction in the enacted plan is far below the boxes representing the nonpartisan plans. PX629 at 16. These are the seats that determine the supermajority line and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The Court finds that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map’s partisan outlier behavior. *Id.* Those Democrat votes are instead placed in the 90th to 105th most Democratic district, where they are wasted because those seats are already comfortably Democratic. *Id.*

154. For the Senate, the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats. *See* PX629 at 24; PX645.

155. While a redistricting plan’s resiliency to electoral environments is an important indicator of partisan intent, the Court finds that even if a districting plan is the product of an intentional partisan redistricting, a political gerrymander can still be broken in a wave election under the intentionally partisan maps. Trial Tr. 01/03/2022.

156. Dr. Mattingly also conducted a secondary analysis for each chamber in which he only considered plans that preserved the same or fewer incumbents than the enacted plans. The Court finds that this did not affect his results and that “a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan.” PX629 at 19, 27.

157. Finally, Dr. Mattingly observed that the enacted Senate plan appeared to split very few municipalities in comparison to what was possible under a nonpartisan ensemble, while the enacted House plan split many more municipalities. PX629 at 10. He explored why the House and Senate plans would have treated municipality splits differently by creating two entirely new ensembles for the House and Senate – in the House, he created a new ensemble that prioritized preserving municipalities (as opposed to matching the enacted plan’s preservation of municipalities), and in the Senate, he created an ensemble that did not prioritize preserving municipalities. *Id.*

158. Dr. Mattingly concluded that the choice to preserve municipalities in the Senate but not in the House appeared to have been a partisan choice. He compared the partisan properties of the new ensembles to his original ensembles and found that, for the Senate plan, relaxing the requirement to preserve municipalities leads to an ensemble that is more favorable to the Democrats, meaning that the enacted plan would be an extreme outlier in more situations. *Compare* Figure 5.2.7 with Figure 5.2.1. Put differently, prioritizing municipality preservation in the Senate plan appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, he found that his new ensemble prioritizing municipalities would not have favored the Republican party in comparison. PX629 at 10. The Court finds that the mapmakers focused on municipalities in the state legislature only when doing so advantaged Republicans.

159. The partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble of plans could not be explained by political geography or natural packing. PX629 at 3. Moreover, Dr. Mattingly’s analysis did not rest on any assumption about proportional representation. *Id.*

**(iv) Harper Plaintiffs' Expert Dr. Wesley Pegden**

160. Wesley Pegden, Ph.D., is Associate Professor in the Department of Mathematical Sciences at Carnegie Mellon University, and testified as an expert in probability. PX523 at 1 (Pegden Report). Dr. Pegden has published numerous papers on discrete mathematics and probability in high-impact, peer-reviewed journals, and has been awarded multiple prestigious grants, fellowships, and awards. *Id.*; PX524 (Pegden CV). He previously served on Pennsylvania's bipartisan Redistricting Reform Commission under appointment by the Governor. PX523 at 1.

161. Dr. Pegden's academic work on redistricting involves Markov Chains. A Markov Chain is "a sequence of random changes." PX523 at 1 (Pegden Report). In 2017, before Dr. Pegden had ever served as an expert in redistricting litigation, he published a peer-reviewed article (PX628) entitled "Assessing Significance in a Markov Chain Without Mixing" in the Proceedings of the National Academy of Sciences—a top-ranked, science-wide journal. PX523 n.1. This article provides a new way to demonstrate that a given object is an outlier compared to a set of possibilities. PX628.

162. Dr. Pegden was qualified and accepted as an expert at trial in probability. Trial Tr. 01/03/2022.

163. Dr. Pegden explained that there are three ways to show that a given object is an outlier. One of these forms of outlier analysis, developed by Dr. Pegden and his co-authors, begins with the object in question, uses a Markov chain to make a series of small, random changes to the object, and then compares the objects generated by making the small changes to the original object. PX628 at 1. Dr. Pegden's article illustrates this methodology using a redistricting plan. *Id.* at 3-5. The article demonstrates that, by using an existing plan as a starting point and then making small random changes to the district boundaries, one can prove the extent to which the existing plan is an outlier compared to all possible maps

meeting certain criteria. *Id.* Dr. Pegden’s article proves mathematical theorems showing that this approach can establish a redistricting plan’s outlier status in a way that is rigorously grounded in mathematics. PX523 at 4 (Pegden Report). In 2020—before this case was filed or the 2021 Plans were enacted—Dr. Pegden and three co-authors (including Dr. Mattingly) published a peer-reviewed article (PX627) titled “Separating Effect from Significance in Markov Chain Tests” in the journal *Statistics and Public Policy*.

164. In this case, Dr. Pegden used his form of outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan constraints, and then evaluated the partisan characteristics of the resulting comparison maps. PX523 at 3-11.

165. Dr. Pegden’s analysis proceeded in several steps. He began with the enacted map. His computer program then randomly selected a geographic unit on the boundary line between two districts and attempted to move or “swap” the unit from the district it is in into the neighboring district. PX523 at 8-9. Dr. Pegden’s method uses two different geographic units, VTDs and geounits. PX523 at 8. For the congressional plan, Dr. Pegden’s primary analysis used VTDs, not geounits. *Id.* But to verify that the choice between VTDs and geounits did not affect his results, he also repeated his analyses using geounits, which allows for the splitting of VTDs. *Id.* at 8, 46. Created by a computer program, geounits are compact collections of census blocks that lie entirely within one VTD and one district, containing on average 1000 people. There are roughly four geounits per VTD. *Id.* at 8.

166. When attempting to swap a randomly selected VTD or geounit from one district to another, Dr. Pegden allowed the swap to occur only if certain constraints were satisfied. PX523 at 7 (Pegden Report). These constraints were based on the 2021 Adopted Criteria and

included: contiguity, compact districts, county preservation, municipal preservation, VTD preservation, incumbency protection, and population deviation. *Id.*

167. Dr. Pegden applied these constraints in a “conservative” way, to “avoid second-guessing the mapmakers’ choices in how they implemented the districting criteria.” PX523 at 7. For example, his algorithm generated a comparison map only if it included an equal or lesser number of county splits, municipal splits, and VTD splits as the enacted plan. *Id.* His comparison maps could not double-bunk any incumbents that were not double-bunked in the enacted plan. *Id.* For compactness, comparison maps needed to have a Polsby-Popper score within a 5% margin of the enacted plan. And for population deviation, comparison maps needed to have district populations within 2% of the ideal district population. *Id.*

168. Dr. Pegden ran several “robustness checks” to ensure that implementing the criteria differently would not affect the results of his analysis. PX523 at 39-47. For incumbency, he re-ran his analysis without restricting the double-bunking of incumbents. *Id.* at 41. For compactness, he re-ran his analysis allowing for 0% difference between the compactness of generated maps and the enacted map, and also allowing for a 10% difference. *Id.* at 42-43. He also used a different measure of compactness altogether to ensure that using the Polsby-Popper measure was not affecting his results. *Id.* at 44. For district population, Dr. Pegden re-ran his analysis with a 1% threshold for population deviation and a 0.5% deviation (the latter of which allowed for VTD splits). *Id.* at 10, 45-46. He also ran a version of his analysis using, as his baseline map, a version of the enacted map that split no VTDs. *Id.* at 10, 47. None of these changes affected Dr. Pegden’s conclusion that the congressional map is an extreme partisan outlier and is more carefully crafted to ensure Republican advantage than nearly every possible redistricting plan. *Id.* at 41-47.

169. Because of this conservative implementation of the enacted criteria, Dr. Pegden's algorithm does not seek to generate maps better than the enacted plan in terms of their adherence to non-partisan criteria like compactness. PX523 at 7. Rather, Dr. Pegden's approach accepts the decisions the map-maker made and asks whether, "even if we accept that the mapmakers have made appropriate choices with respect to nonpartisan criteria such as compactness, population deviation, municipality preservation, incumbency protection, and so on, does their plan nevertheless stand out with respect to its *partisan* qualities?" *Id.*

170. Once Dr. Pegden's algorithm made a swap satisfying his constraints, his algorithm evaluated the partisan characteristics of the comparison map that resulted from the swap. PX523 at 5, 9-10. For his main analysis, Dr. Pegden used data from the 2020 Attorney General race to analyze the congressional plan. *Id.* at 39. Dr. Pegden also re-ran his analysis using three additional elections—the 2020 Presidential election, the 2020 Lieutenant Governor election, and the 2020 Governor election. *Id.* at 39-40. Using these different historical elections did not alter Dr. Pegden's conclusions. *Id.*

171. To evaluate the partisan characteristics of each comparison map, Dr. Pegden's algorithm calculates the number of seats Democratic candidates would win, on average, if a random uniform swing were repeatedly applied to the historical voting data being used. PX523 at 9-10. This metric captures how a given comparison map would perform over a range of electoral environments centered around the base election being used (*i.e.*, the 2020 Attorney General's election for Dr. Pegden's primary analysis). *Id.*

172. Dr. Pegden's algorithm repeats the foregoing steps billions or trillions of times. The algorithm begins with the enacted map, makes a small random change complying with certain constraints, and uses historical voting data to evaluate the partisan characteristics of the resulting map. PX523 at 5. The algorithm then repeats those steps, each time using the comparison map generated by the previous change as the starting point. *Id.* By repeating

this process many times, Dr. Pegden’s algorithm generates a large number of comparison maps in sequence, each map differing from the previous map only by one small random change. *Id.* at 5, 8.

173. Each sequence of billions or trillions of small changes in Dr. Pegden’s analysis is one “run.” PX523 at 5. For the congressional plan, a run consisted of approximately one trillion small changes. *Id.* His algorithm performs multiple runs for each map being analyzed, with each run beginning with the enacted plan as the starting point. *Id.*

174. The comparison maps generated by Dr. Pegden’s algorithm are not intended to provide a baseline for what neutral, nonpartisan maps of the North Carolina House or Senate should look like. PX523 at 7, 10. Instead, Dr. Pegden’s comparison maps are intended to be *similar* to the enacted map in question with respect their relevant nonpartisan characteristics, in order to assess how carefully created the enacted plan is to maximize partisan advantage. *Id.* Thus, when Dr. Pegden reports the number of Democratic seats expected under a particular set of generated maps, that does not necessarily reflect the number of Democratic seats that would be expected under a representative set of neutral, nonpartisan districting maps. *Id.* at 10. Nor does Dr. Pegden’s method “evaluate the fairness of a districting by whether it produces a ‘small’ or ‘large number of seats for one party.’” *Id.* The number of Democratic seats expected “is merely a metric used to compare one map to another”—*i.e.*, to determine whether “the enacted map is [an] extreme outlier with respect to how optimized for partisanship it is compared to the set of alternative comparison districts of North Carolina satisfying the districting criteria [he] impose[s].” *Id.*

175. As explained in further detail below, Dr. Pegden found, and the Court so finds, that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated by making small random changes to the enacted

plans. *Id.* at 13. And based on these results, Dr. Pegden’s theorems prove, and the Court so finds, that the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in his algorithm. *Id.*

176. The Court finds that even without using applying the mathematical theories developed in his academic papers, Dr. Pegden’s first-level analysis provides evidence that the 2021 congressional plan was “drawn to optimize partisan advantage in the enacted plan.” PX523 at 5. In every run, the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated making tiny random changes to the district’s boundaries. PX523 at 13. “[I]f the districting had not been drawn to carefully optimize its partisan bias, we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect.” *Id.* at 5. And the Court also finds that Dr. Pegden’s second-level analysis provides mathematically precise calculations of how carefully crafted the plan is—that is, how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans—when compared not just to the comparison maps generated in each run of his algorithm, but to all possible maps of North Carolina that satisfy his constraints. PX523 at 6-7.

177. Dr. Pegden conducted analyses of the 2021 House and Senate maps using the same method underlying his analysis of the congressional map. PX523 at 14-15. The Court finds, as did Dr. Pegden, that the House and Senate maps are partisan outliers in their partisan bias and the degree to which they are optimized for partisan advantage. *Id.*

178. While Dr. Pegden’s overall method for analyzing the House and Senate maps was the same as for the congressional map, he made certain changes to his criteria to account for differences in how state legislative maps are drawn in North Carolina. In particular, his comparison house and Senate maps used the same county clustering as used in the enacted



maps. PX523 at 7. And his House and Senate comparison maps needed to have district populations within 5% of the ideal district population—the same threshold that the General Assembly permitted in the 2021 Adopted Criteria. *Id.*; see PX34. All other criteria—contiguity, compactness, county traversals, municipality preservation, VTD preservation, and incumbency protection—were the same as for the congressional analysis. PX523 at 7. And Dr. Pegden performed similar robustness checks to ensure that changes to these criteria (for example, using a different compactness threshold) did not affect his results, which they did not. *Id.* at 48-59.

179. For some county groupings, because of Dr. Pegden’s conservative application of his constraints, it was impossible for his algorithm to find a swap that satisfied all of the constraints. PX523 at 8. When this occurred, Dr. Pegden ran a modification of his algorithm allowing multiple swaps in one step. *Id.* at 8-9.

180. Although Dr. Pegden found that the House and Senate maps are extreme partisan outliers on a statewide basis, his primarily analysis was inconclusive as to four particular House county clusters—Alamance, Brunswick/New Hanover, Cabarrus/Davie/Rowan/Yadkin, and Cumberland—which are discussed in more detail below. PX523 at 33. For these clusters, Dr. Pegden also re-ran his analysis using a different partisan metric—the “wave threshold”—to determine whether they may have been drawn to achieve “other conceivable partisan goals” besides merely maximizing Republican seat count, “such as facilitating the re-election of particular representatives in particular districts.” *Id.* The wave threshold metric captures, for a given map, the smallest uniform swing in election results that would be required to give the Democrats an additional seat. *Id.* Put differently, this metric captures how large of a Democratic wave election the cluster could withstand without losing any Republican seats. *Id.* For multiple of these groupings discussed further below, the Court finds that the enacted map was an extreme outlier in the degree to which

Democratic election performance would need to increase to produce an additional Democratic seat. *Id.* at 34-36.

181. The Court finds, as Dr. Pegden shows in his first-level analysis, that—in every run—the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries. PX523 at 14. The Court also finds that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps. *Id.* at 15.

182. As with the congressional plan, Dr. Pegden's second-level analysis provides mathematically precise calculations of how carefully crafted the 2021 House and Senate maps are—that is, how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans—when compared not just to the comparison maps generated in each run of his algorithm, but to all possible maps of North Carolina that satisfy his constraints. For the enacted House map, the Court finds that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying his constraints. PX523 at 14. The Court also finds that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying Dr. Pegden's constraints. *Id.* at 15.

183. These results cannot be explained by North Carolina's political geography. PX523 at 4. Dr. Pegden's algorithm compares the enacted map to other maps of North Carolina, with the very same political geography. And Dr. Pegden's theorems do not depend on any aspect of North Carolina's political geography. *Id.*

(v) *NCLCV Plaintiffs' Expert Dr. Moon Duchin*

184. Dr. Duchin holds a Ph.D. and an M.S. in Mathematics from the University of Chicago as well as an A.B. in Mathematics and Women's Studies from Harvard University. She is a Professor of Mathematics and a Senior Fellow in the Jonathan M. Tisch College of Civic Life at Tufts University. PX150 at 2.

185. Dr. Duchin's general research areas are geometry, topology, dynamics, and applications of mathematics and computing to the study of elections and voting. Her redistricting-related work has been published in venues such as the Election Law Journal, Political Analysis, Foundations of Data Science, the Notices of the American Mathematical Society, Statistics and Public Policy, the Virginia Policy Review, the Harvard Data Science Review, Foundations of Responsible Computing, and the Yale Law Journal Forum. *Id.*

186. Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting. Trial Tr. 01/04/2022.

187. Dr. Duchin's analysis seeks to address how a certain quantitative share of the vote should be translated to a quantitative share of the seats in a state legislature or Congressional delegation. *Id.* at 4. Dr. Duchin uses a Close-Votes-Close-Seats principle, which is where "an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split." *Id.* Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where "a party or group with more than half of the votes should be able to secure more than half of the seats." Close-Votes-Close-Seats is essentially a corollary (or byproduct) of Majority Rule; it is not practicable to design a map that always attains these properties. *Id.*

188. Dr. Duchin has previously analyzed the impacts of political geography in Massachusetts and found that even though Republicans tended to typically get over one-third

of the statewide vote, it was impossible to draw a single Congressional district with a Republican majority. *Id.* In North Carolina, however, Dr. Duchin's analysis shows, and the Court so finds, that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party. *Id.* at 4-5.

189. The Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates. Applying a standard technique in the field, Dr. Duchin overlaid each plan onto historical voting patterns from all 52 partisan elections since 2012 in order to show how the Enacted Plans would have performed in actual North Carolina elections. PX150 at 4-5.

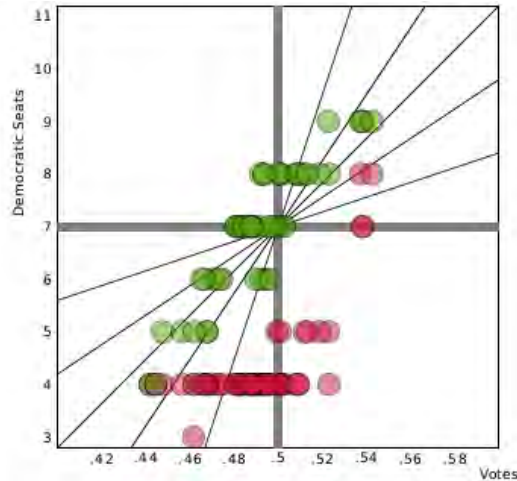
190. The results reveal a partisan skew in close elections. PX150 at 4. For instance, the 2020 vote for Chief Justice of the North Carolina Supreme Court resulted in a virtual tie, with the Republican candidate winning by 401 votes. PX150 at 6. The Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina's congressional districts, 28 (56%) of North Carolina's Senate districts, and 68 (57%) of North Carolina's House districts. PX150 at 6 (line labeled JS120). Nor is that election unusual.

191. Under this analysis, the Court finds that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state's congressional delegation, the State House, and the State Senate. PX150 at 5-6. This is true even when Democrats win statewide by clear margins. For example, under this analysis, in the 2020 gubernatorial race, although voters in that election preferred the Democratic candidate by 4.6 percentage points, the Enacted Plans translate that preference into a Republican 10-4 (71%) majority in the state's congressional delegation, a 27-23 (54%) majority in the state Senate, and a 62-58 (52%) majority in the state House—all when voters clearly prefer the other party. PX150 at 6.

192. The Enacted Plans resiliently safeguard electoral advantage for Republican candidates. PX150 at 5. This skewed result is not an inevitable feature of North Carolina's political geography.

193. The result of Dr. Duchin's "overlay" analysis for the Enacted Congressional Plan is clear: The plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins. The Enacted Congressional Plan will almost always yield 10 Republican seats and 4 Democratic seats. PX150 at 6. This includes Democratic victories as well as close elections. PX150 at 6.

194. The below figure demonstrates the bias the Enacted Congressional Plan creates across all 52 elections that Dr. Duchin studies by comparing Democratic vote share (on the x-axis) with Democratic seat share (on the y-axis) for every election. PX150 at 7. A map that responds to voters' preferences would roughly track one of the diagonal lines crossing at the "(50, 50)" point, where a 50% vote share generates a 50% seat share. Along those lines, as either party wins more votes, it wins more seats. And if either party wins a majority of votes, it wins a majority of seats. But as the figure shows, the Enacted Congressional Plan (red dots) does not come near the diagonal lines or pass anywhere close to the (50, 50) point.



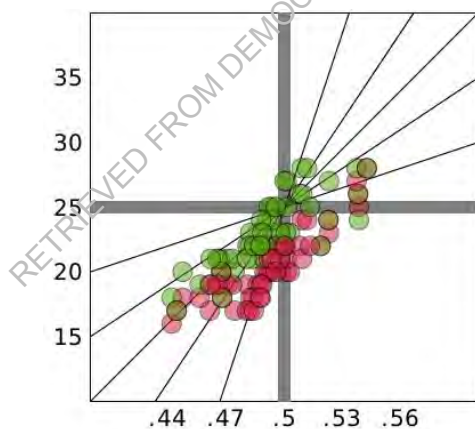
PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV Congressional Maps)

195. This shows that, under the Enacted Congressional Plan, more Democratic votes usually do not mean more Democratic seats, reflected in the flat red line near the bottom of the figure. Indeed, the bulk of the red dots are stuck on that line, where Democrats carry only 4 of 14 districts. And in each of the 12 statewide contests where the Democratic candidate won by less than seven percentage points, the winner carried only 4 or 5 of the 14 districts (these are the red dots in the lower-right quadrant, where more than half the votes generated less than half the seats for Democratic candidates). Under the Enacted Congressional Plan, a clear majority of Democratic votes does not translate into a majority of seats. The Court finds that the Enacted Congressional Plan achieves these results by the familiar means of “packing” and “cracking” Democratic voters across the state, as further described below.

196. The Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-

proof 30-seat majority. PX150 at 6. And that result holds even when Democrats win by larger margins. *Id.*

197. The below figure demonstrates the bias in the Enacted Senate Plan across all 52 recent partisan elections by comparing Democratic vote share (on the x-axis) with Democratic seat share (on the y-axis) across the 52 elections that Dr. Duchin used to analyze the plan. PX150 at 7. A map that responds to voters' preferences would roughly track one of the diagonal lines crossing at the "(50, 50)" point, where a 50% vote share generates a 50% seat share. As with the Enacted Congressional Plan, the Enacted Senate Plan (red dots) does not come near the diagonal lines or pass anywhere close to the (50, 50) point. Instead, the Enacted Plan falls well below all of the lines on the y-axis and crosses the x-axis far to the right of the midpoint, showing a plan that consistently denies Democrats majorities even when voters clearly prefer Democratic candidates.

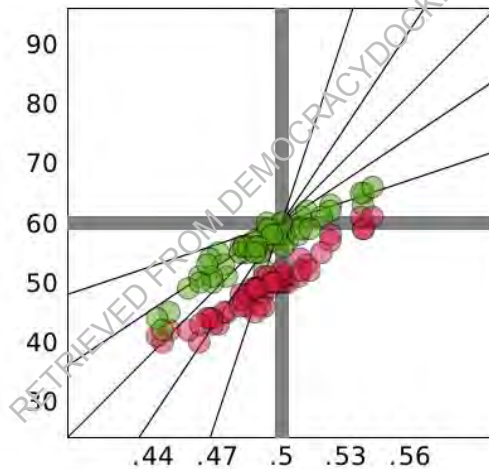


PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV Senate Maps)

198. As with the Enacted Congressional Plan, the Court finds that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts, as further described below.

199. Similarly, the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates. PX150 at 6.

200. The below figure plots Democratic vote share against Democratic seats across all 52 recent partisan elections studied by Dr. Duchin. Again, the Enacted House Plan (red dots) does not pass anywhere close to the (50, 50) point. Instead, the Enacted Plan falls well below the block trendlines on the y-axis and crosses the x-axis far to the right of the midpoint, showing a plan that consistently denies Democrats majorities or even a tie.



PX153 (Figure 2: Vote Shares and Seat Shares in Enacted & NCLCV House Maps)

201. As with the Enacted Congressional Plan and the Enacted Senate Plan, the Court finds that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters, as further described below.



**(vi) Plaintiff Common Cause's Expert Dr. Daniel Magleby**

202. Dr. Magleby is a professor at Binghamton University, where he holds a courtesy appointment in the Department of Economics and is the director of the Center for the Analysis of Voting and Elections. PX1483 at 3.

203. Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering. Trial Tr. 01/04/2022.

204. Dr. Magleby used a peer-reviewed algorithm that he developed to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps. PX1483 at 6. He designed this algorithm to prioritize maintaining voting districts and to draw maps that were contiguous and roughly equal in population. *Id.* Dr. Magleby then used this algorithm to develop a set of between 20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature's 2021 criteria for drawing districts. *Id.* at 6.

205. Dr. Magleby then aggregated statewide votes from statewide races between 2016 and 2020 to the voting district level in order to determine typical partisan performance in North Carolina state elections (a "seats carried" analysis). *Id.* at 8, 9. In order to match up the vote share to the newly enacted districts, Dr. Magleby determined which simulated district a precinct would fall in and assigned that precinct's vote count to the hypothetical district. *Id.* at 7. If the precinct fell in more than one simulated district, Dr. Magleby assigned to the sample district the proportion of the votes as determined by the precinct's population that fell in the simulated district. *Id.* at 7.

206. The Court finds, as Dr. Magleby found, that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina. *Id.* at 10.

207. In the neutral maps drawn using the Adopted Criteria for drawing maps, Dr. Magleby's analysis found that Democrats most commonly won 52 seats in the North Carolina House of Representatives. *Id.* at 13. In the enacted map, on the other hand, Democrats won only 48 seats. *Id.* at 13. Out of 1,000 possible maps that the algorithm drew, only one map resulted in Democrats winning as few as 48 seats. *Id.* at 13. That amounts to a 0.1% chance that Democrats would win as few as 48 seats absent partisan bias under his analysis.

208. Because an analysis of "seats carried" is not sufficient to identify all partisan redistricting, Dr. Magleby also used median-mean calculations to measure the extent of partisan advantage—specifically, to understand how dramatically Democratic voters were treated from Republican voters and how durable that gerrymander is. *Id.* at 9. To calculate the median-mean difference, Dr. Magleby first calculated the average Democratic vote share in the House districts. *Id.* at 9–10. He then found the median Democratic vote share by lining up the enacted House districts from least Democratic to most Democratic and identifying the districts that fell in the middle. *Id.* at 10. In a nonpartisan map, a low median-mean difference is expected. *Id.*

209. The Court finds, as Dr. Magleby found, that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps. The nonpartisan House maps that Dr. Magleby drew most commonly had a median-mean difference in the Democratic vote share of between 0.0225 and -0.025. *Id.* at 15. The lowest median-mean difference in the generated maps was -0.034, and the highest was -0.005. *Id.* The enacted maps have a median-mean difference in Democratic vote share of -0.04. *Id.* No randomly

generated map had such an extreme median-mean share—meaning that in his analysis, he saw no simulated map that was as extreme and durable in terms of partisan advantage. *Id.*

**(vii) Legislative Defendants' Expert Dr. Michael Barber**

210. Dr. Barber is an associate professor of political science at Brigham Young University and faculty fellow at the Center for the Study of Elections and Democracy in Provo, Utah. He received his PhD in political science from Princeton University in 2014 with emphases in American politics and quantitative methods and statistical analyses. Dr. Barber teaches undergraduate courses in American politics and quantitative research methods, including classes about political representation, Congressional elections, statistical methods, and research design. LDTX107 at 6. Dr. Barber's research uses advanced statistical methods for the analysis of quantitative data, oftentimes in the context of election- and voting-related topics, and his research has been published numerous times in peer-reviewed journals. LDTX107 at 7.

211. Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting. Trial Tr. 01/05/2022.

212. Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs' Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts. LDTX107 at 5.

213. Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. LDTX107 at 5. In Dr. Barber's simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries,

minimization of county traversals within clusters, and geographic compactness. LDTX107 at 22-23. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed by utilizing two-party election results from eleven statewide elections from the past ten years; these results are disaggregated to the level of the VTD and then reassembled at the district level to compute the proportion of votes. LDTX107 at 23-24.

214. Dr. Barber's method is not without limitations. Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals—which can be idiosyncratic and district-specific—differences between the range of his simulated plans and the 2021 Plans may be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals. In Dr. Barber's opinion, there is no way, then, to be sure that differences in partisan effects from simulated plans versus legislatively enacted plans result from partisan intent rather than from non-partisan goals the algorithm was not programmed to achieve. This means that the simulation method can be indicative on the question of partisan intent, but not necessarily dispositive, and under Dr. Barber's analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations.

215. Dr. Barber's definition of a partisan outlier is if the number of Democratic districts generated by the plan falls outside the middle 50% of simulation results, which he considers a conservative definition of an outlier rather than the traditional definition of falling outside the middle 95% or 90% of the comparison distribution. LDTX107 at 29. In the House of Representatives, one county grouping is a partisan outlier under this analysis, and in the Senate, two county groupings are partisan outliers under this analysis. LDTX107 at 5; *id.* at 157 (Guilford House grouping); *id.* at 227 (Granville and Wake Senate grouping); *id.* at 233 (Iredell and Mecklenburg Senate grouping).

216. Supporting Dr. Barber's finding of limited partisan outliers is the spatial distribution of voters throughout the state, which can have an impact on the partisan

outcomes of elections when a state is, by necessity, divided into a number of legislative districts. This is largely the case because Democratic-leaning voters tend to cluster in dense, urban areas while Republican-leaning voters tend to be more equally distributed across the remainder of the state. This pattern holds true in North Carolina. LDTX107 at 10-13.

217. As a result of the spatial distribution of voters throughout the state, under Dr. Barber's analysis there are many more VTDs with efficient Republican majorities than there are VTDs with efficient Democratic majorities. LDTX107 at 14. And therefore, Dr. Barber concludes the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers. LDTX107 at 15.

***(viii) Legislative Defendants' Expert Dr. Andrew Taylor***

218. Dr. Taylor is a tenured professor of political science at North Carolina State University and has taught at NC State since receiving his Ph.D. from the University of Connecticut in 1995. He teaches an array of courses in American politics, served as chair of the Department of Political Science from 2006 to 2010, and served as President of the North Carolina Political Science Association in 2012-13. LDTX108 at 2.

219. Dr. Taylor has written four books and published extensively in political science journals, including authoring twenty-eight peer-reviewed articles and other published work. His work utilizes a diverse array of methodologies, including different statistical techniques, and has included research on redistricting and North Carolina politics. *Id.*

220. Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina, and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions. Trial Tr. 01/04/2022.

221. Dr. Taylor analyzed the Enacted Plans deploying his knowledge of North Carolina political history and legislative politics, comparative politics, and American national and state politics and policy. LDTX108 at 2-3.

222. There is no recognized baseline of transparency for legislative redistricting, and the 2021 redistricting was a transparent and participatory process in comparison to North Carolina's past redistricting and that by legislative bodies in other states. TR 01/04/2022.

223. Complaints about unfair district lines as removed from the concepts of free elections, equal protection, and free speech and assembly are different than how those ideas have historically been understood by political scientists. LDTX108 15–25. A free election is not generally understood by political scientists to be one without burdens on the right to vote (since basic regulatory frameworks necessarily place some burden on that right), and a given districting system is not generally understood as essential to the meaning of free elections (since even free elections have limited options in all events). *Id.* at 21–22.

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

225. Similarly, purportedly “fair” redistricting plans are not understood in the political-science field as germane to free speech, which can occur regardless of the shapes and sizes of districts. *Id.* at 24–25.

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

227. Prominent political science measures of “fairness” have proven incapable of commanding consensus because they are all deficient in one or more respects. *Id.* at 29–38. Those methods tied to a measure of vote totals and seat totals are too tied into proportionality to present a meaningful notion of fairness, especially given that avoiding this problem would require gerrymandering in favor of the party complaining of unfairness. *Id.* at 34–37. Many measures of fairness are too subjective to be of use to political scientists. *See id.* at 38. All measures require judgment calls like choice of metrics and elections data for measuring partisan effect, which is a fluid concept that changes year to year. *Id.* at 37.

228. The Democratic Party’s message is successful only in limited geographic areas, LDTX108 at 38–41, so any partisan “effect” the Democratic Party or its supporters complain of could be understood as the natural and probable consequences of neutral factors that cannot be considered unfair or adverse as a factual matter. There has been a significant change in North Carolina’s political geography over the past thirty years. *Id.* at 39-40.

Whereas Democrats formerly did well in rural areas, especially in the eastern part of the state, and Republicans were competitive in urban and suburban areas, that is no longer true. “The transformation is not the result of redistricting.” *Id.* at 40. Instead, it is a function of slow social and economic forces, changes in the state’s citizenry, and party ideology. *Id.* at 40-41.

**(ix) Legislative Defendants’ Rebuttal Expert Sean Trende**

229. Sean Trende is currently enrolled as a doctoral candidate in political science at The Ohio State University. His coursework for his Ph.D. and M.A.S. included, among other things, classes on G.I.S. systems, spatial statistics, issues in contemporary redistricting, machine learning, non-parametric hypothesis tests and probability theory. He expects to receive his Ph.D. in May of 2021. His dissertation focuses on applications of spatial statistics to political questions. LDTX106 at 1-2. Mr. Trende is a Senior Elections Analyst with RealClearPolitics, where he’s been since January of 2009 after practicing law for 8 years. He is also a Visiting Scholar at the American Enterprise Institute and has authored or co-authored books analyzing demographic and political trends as well as the dynamics behind elections. He has spoken on these topics as well and has taught classes on American Politics and the Mass Media, Political Participation and Voting Behavior. *Id.* at 2. He sits on the advisory panel for the “States of Change: Demographics and Democracy” project, sponsored by the Hewlett Foundation. The project looks at trends among eligible voters and the overall population to explain the impact of changes on American politics. *Id.* at 4.

230. Mr. Trende has authored expert reports in 15 voting rights cases and currently serves as one of two special masters appointed by the Supreme Court of Virginia to redraw districts that will elect the commonwealth’s representatives to the House of Delegates, state Senate, and U.S. Congress. *Id.* at 7.



231. Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps and analyzing redistricting maps. Trial Tr. 01/05/2022.

232. Mr. Trende created images by examining the Complaints filed by the plaintiffs in this action. He examined whether the districts were challenged as either partisan gerrymanders or districts that diluted minority voting power. LDTX106 at 7. He then downloaded the enacted plans from the legislative redistricting website and used R, a statistical programming tool, to color-code the districts by plaintiff group, based upon who challenged which districts. *Id.* In Exhibit 2 to his affidavit, Mr. Trende submitted 8 maps identifying the districts challenged by each Plaintiff group in these consolidated cases. *Id.* He also created color-coded maps showing each county in North Carolina, noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally. *Id.* at 8.

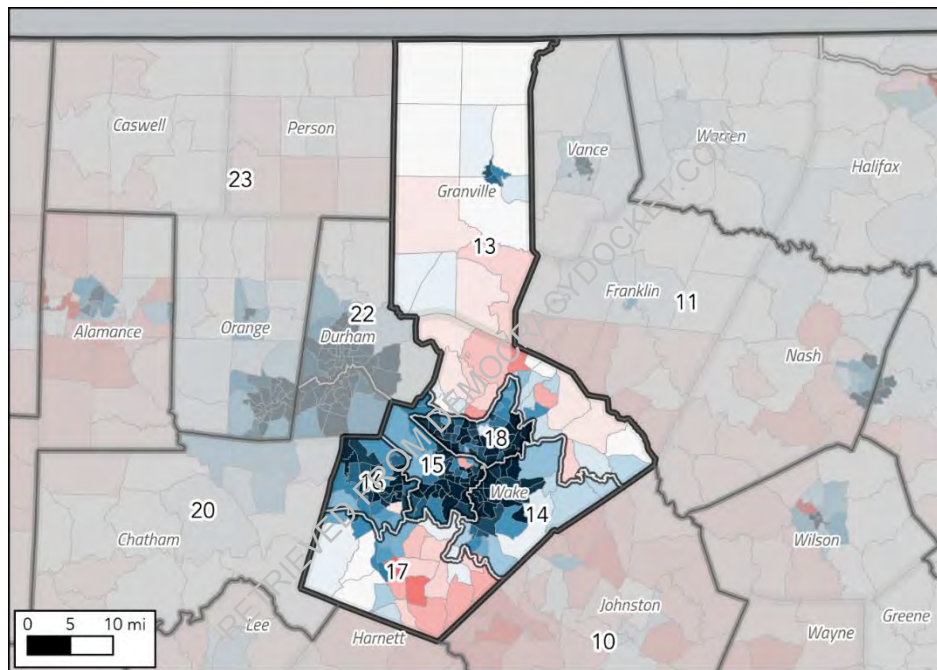
**B. District-by-District Analysis**

**1. North Carolina Senate Districts**

233. Plaintiffs' experts analyzed specific county groupings in the enacted Senate plan. Plaintiffs' experts concluded that partisan redistricting and bias in these groupings was responsible for the partisan bias that they found in their statewide analysis of the enacted Senate plan. The results of the analysis conducted by Legislative Defendants' expert Dr. Barber reinforce this conclusion.

**a. Granville-Wake Senate County Grouping**

234. The Granville-Wake County Grouping contains Senate District 13 (“SD13”), Senate District 14 (“SD14”), Senate District 15 (“SD15”), Senate District 16 (“SD16”), Senate District 17 (“SD17”), and Senate District 18 (“SD18”). SD13 is comprised of Granville County and portions of Wake County. SD14, SD15, SD16, SD17, and SD18 are comprised of portions of only Wake County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

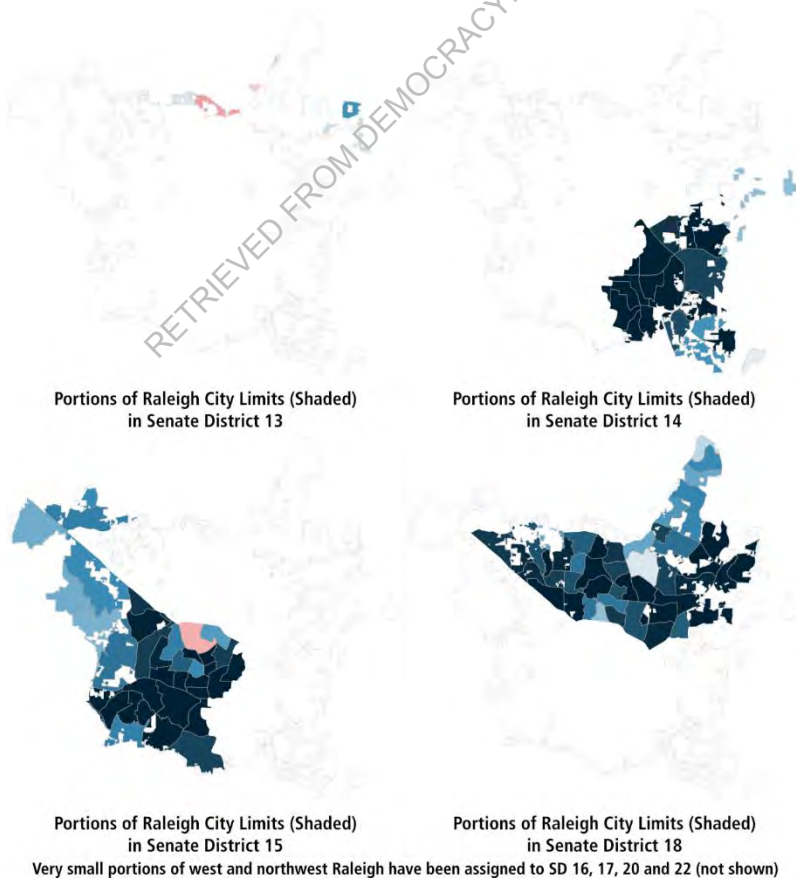


PX454 (Cooper Map 19)

235. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Rebecca Harper resides in SD17. Individual Harper Plaintiff John Anthony Balla resides in SD18. No Individual Plaintiff resides in SD13, SD14, SD15, or SD16. Organizational Plaintiff NCLCV challenges every Senate District in this county grouping. Organizational Plaintiff Common Cause challenges every Senate District in this county grouping except for SD13 and 18.

236. The district lines in this cluster pack Democratic-leaning VTDs into Senate Districts 14, 15, 16, and 18, in order to make Senate District 13, in the north, and Senate District 17, in the south, as competitive as possible for Republican candidates. Senate District 13 pairs all of “purple” Granville County with the Republican-leaning VTDs on the northern and northeastern portions of Wake County, avoiding the Democratic-leaning VTDs in North Raleigh. Some of the Democratic-leaning VTDs in North Raleigh are packed into Senate District 18, leading to a “horn-shaped section” of that district that borders Senate District 13. PX425 at 50.

237. Raleigh is divided into all of the districts in this cluster, with most of Raleigh’s few Republican-leaning VTDs included in Senate District 13, in the north. PX425 at 50; PX455.



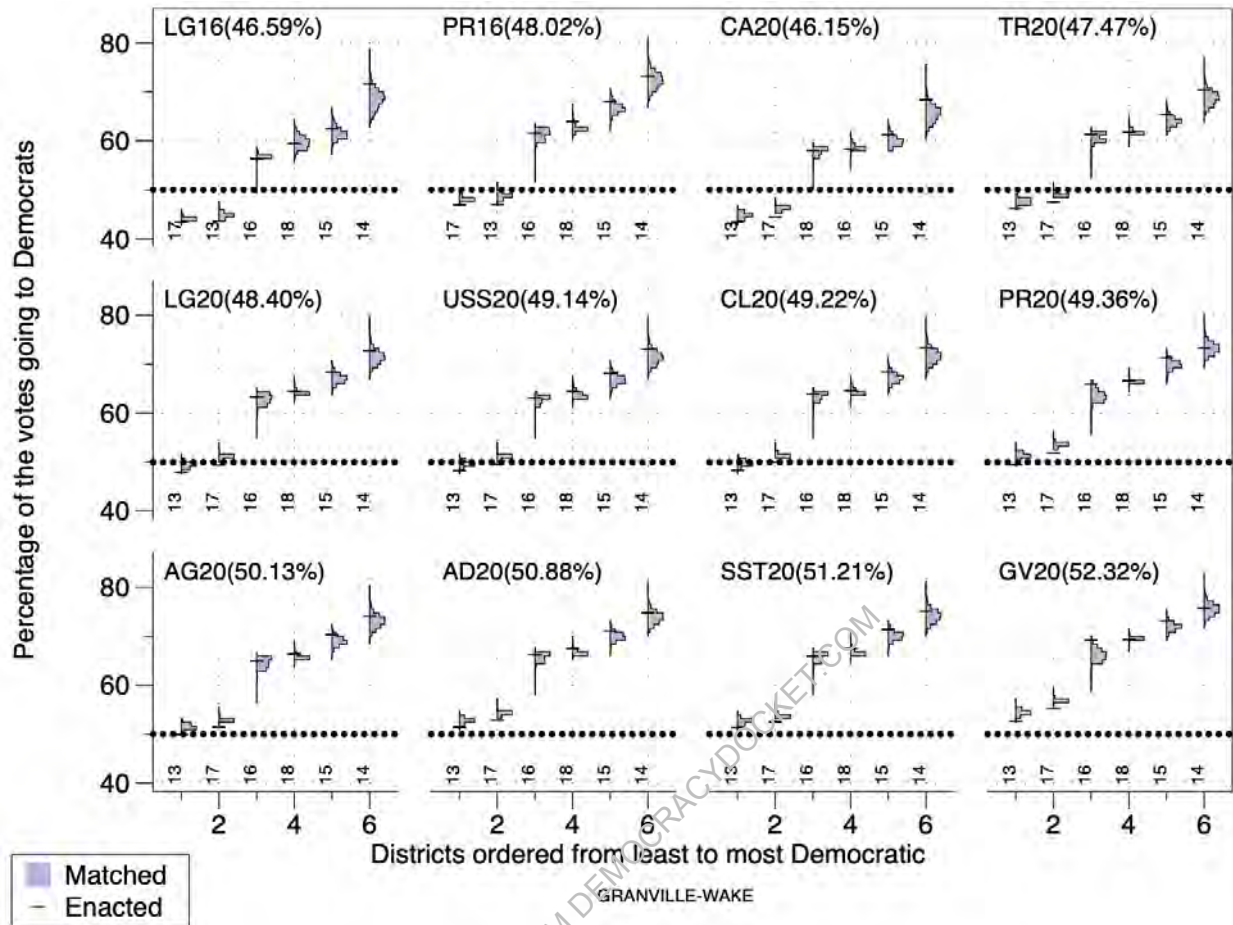
PX455 (Cooper Map 20)

238. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Granville-Wake county grouping is an intentional, pro-Republican partisan redistricting.

239. Dr. Mattingly analyzed individual county groupings by plotting the Democratic vote fraction in each district in the grouping, ordered from least to most Democratic. *See* PX629 at 29. He conducted this analysis for the enacted plan (represented by a black line in his county-grouping-level figures) and for his ensemble of nonpartisan plans (represented by the blue histograms), using 12 prior statewide elections in 2020 and 2016. PX629 at 38; PX654. If the black line representing the enacted plan is above the dotted black line at 50%, the Democrats win that district under the enacted plan. *Id.* If all or the bulk of the blue histogram representing the ensemble is above the dotted black line at 50%, the Democrats would expect to win that district under the ensemble. *Id.* Dr. Mattingly labeled the historical election whose statewide vote counts he was using at the top of each plot. Black lines that are at the bottom of the corresponding blue histogram represent districts that Democrats have been cracked out of, because the enacted plan has many fewer Democrats than would be expected in the nonpartisan plans; black lines that are at the top of the corresponding blue histogram represent districts that Democrats have been packed into. *Id.*

240. Figure 6.2.4 shows Dr. Mattingly’s analysis of this grouping.

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PX663 (Mattingly Figure 6.2.4)

241. The Court finds that Democrats were cracked out of the two most Republican districts (District 17 and 13) and packed into the most Democratic districts (Districts 14, 15, 16, and 18). PX629 at 57; PX663. (Page 57 of Dr. Mattingly’s report concerning Granville-Wake contains a typo that he identified at his deposition: he states that Districts 17 and 18 are cracked, when he meant (and the Figure shows) that districts 17 and 13 are packed. He correctly states that “districts 14, 15, 16, and 18” are in fact packed.) The effect is that the Republicans win two out of six districts under the enacted plan in several elections where they never would under the nonpartisan ensemble, such as the Lieutenant Governor 2020 or Senate 2020 election. PX629 at 57; PX663. Dr. Mattingly quantified the cracking of Democrats: Across every election he considered, *none* of the approximately 40,000 plans in

his ensemble had as low a fraction of Democrats in the two most Republican districts in the Granville-Wake cluster as in the enacted plan. *Id.*

242. District 13 and District 17 favor Republicans in nearly all elections in Dr. Duchin's sample as well. PX201 "SL-173" B14:BA19.

243. The Court finds, as Dr. Pegden's findings show, that the Granville-Wake Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.999989% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.999969% of all possible districting of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 30.

244. Drawing the districts in this manner also reduced compactness: The average Polsby-Popper score of Districts 13, 14, 15, 16, 17, and 18 is 0.31. PX150 at 15. Drawing more compact districts in Wake and Granville Counties would have generated more competitive districts in the cluster.

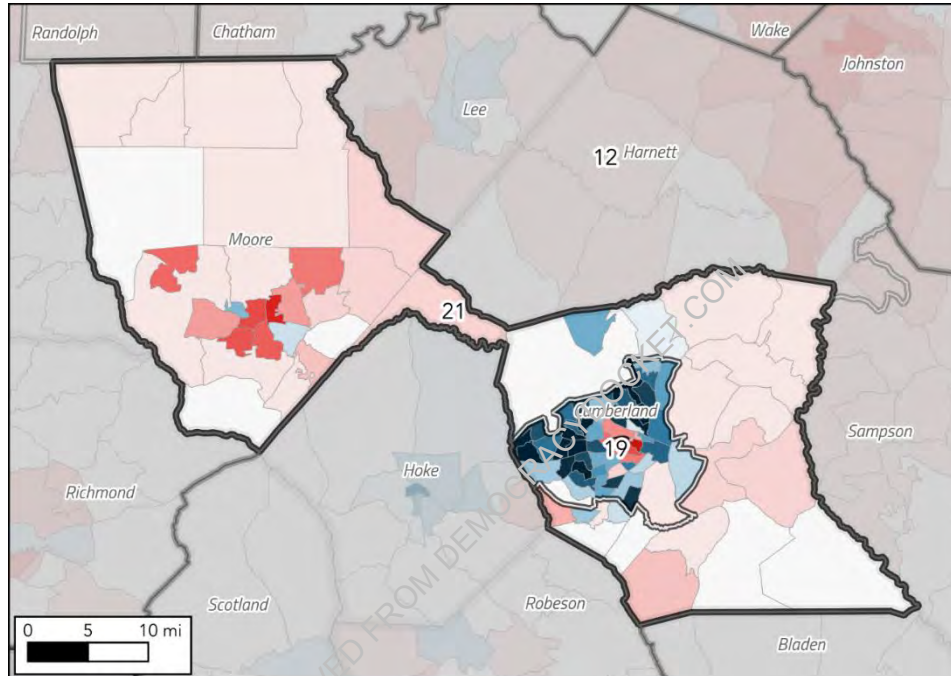
245. In the Granville-Wake Senate cluster, which Legislative Defendants' expert Dr. Barber refers to as "solidly Democratic" and found to be a partisan outlier, *see* LDTX107 at 221, the enacted map is a partisan outlier under 10 of the 11 elections Dr. Barber analyzed. Under seven of those 11 elections, Democrats win fewer seats under the enacted map that they would under 96-100% of his simulations. *Id.* at 228.

246. The Court finds the districts in the Granville-Wake Senate county grouping, SD13, SD14, SD15, SD16, SD17, and SD18, to be the result of intentional, pro-Republican partisan redistricting.



**b. Cumberland-Moore Senate County Grouping**

247. The Cumberland-Moore County Grouping contains Senate District 19 (“SD19”) and Senate District 21 (“SD21”). SD19 is comprised of portions of Cumberland County. SD21 is comprised of Moore County and portions of Cumberland County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

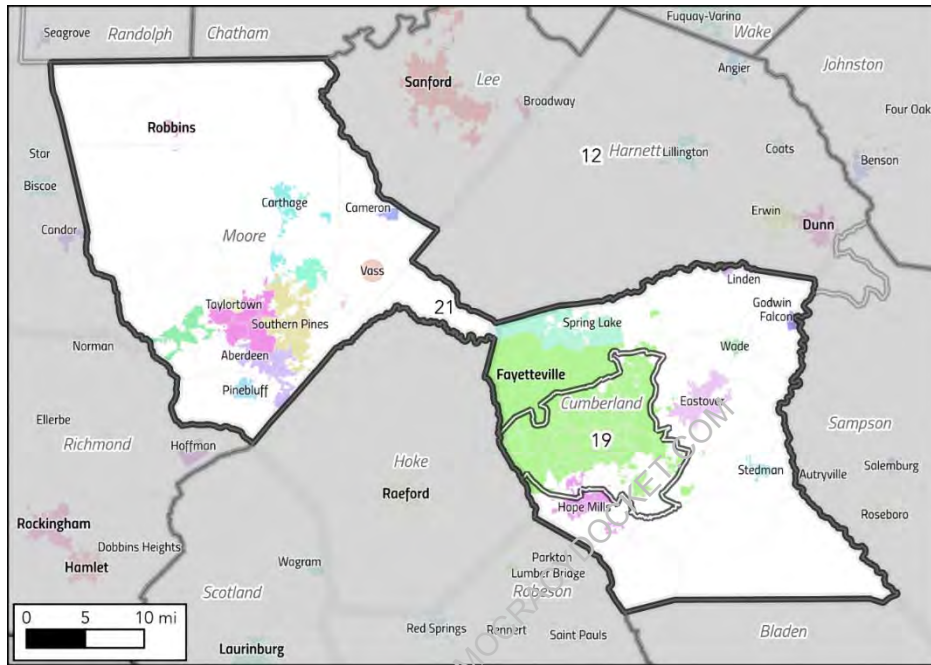


PX459 (Cooper Map 24)

248. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Sarah Taber resides in SD19. No Individual Plaintiff resides in SD21. Organizational Plaintiff Common Cause challenges both Senate Districts in this county grouping.

249. The district lines pack Democratic voters in and around Fayetteville into Senate District 19, leaving Senate District 21 as a Republican-leaning district. PX425 at 59; Trial Tr. 01/03/2022.

250. The district lines split the cities of Fayetteville and Hope Mills across both districts in the cluster, PX460, but the most Democratic-leaning VTDs in those cities are packed into Senate District 19. PX425 at 59; PX459; Trial Tr. 01/03/2022.



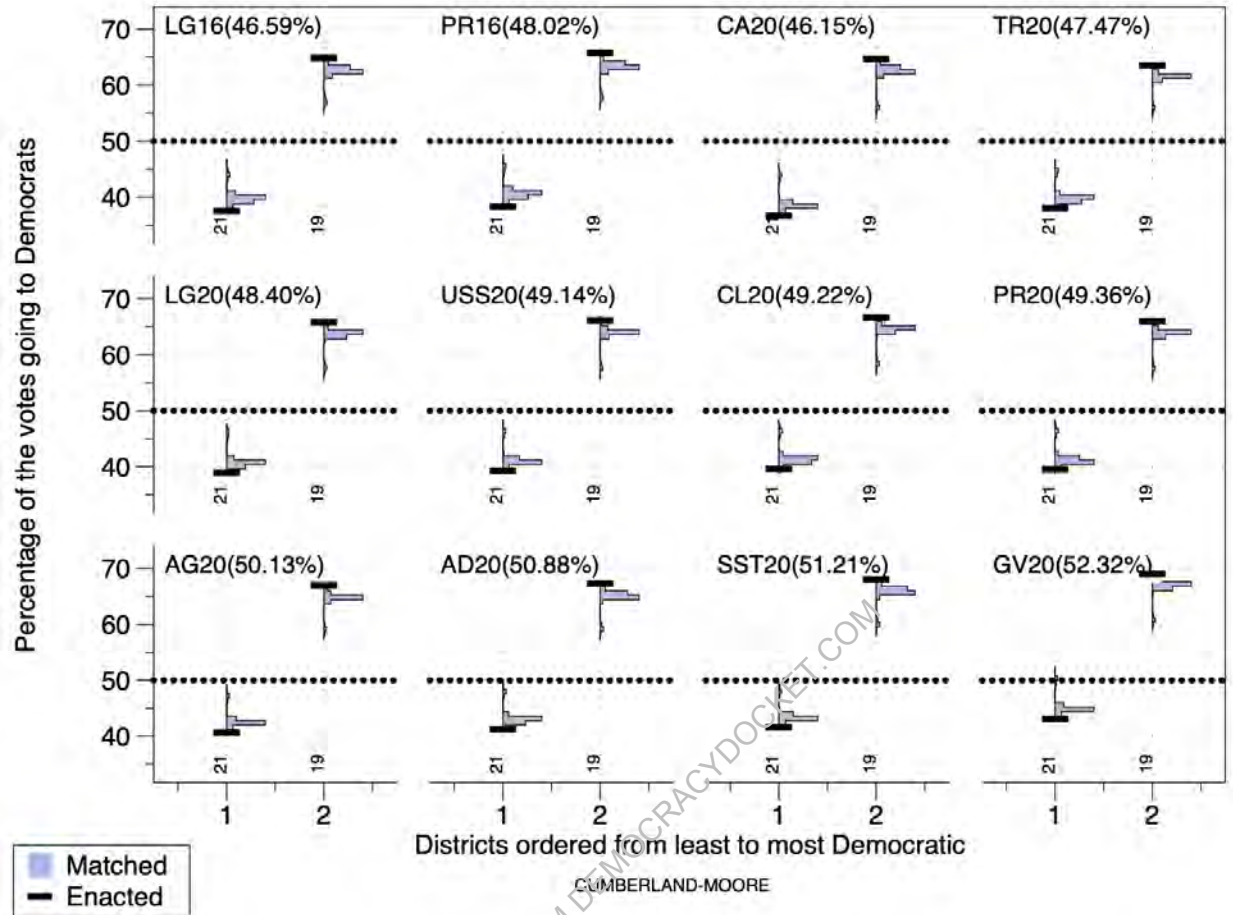
PX460 (Cooper Map 25)

251. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Cumberland-Moore county grouping is an intentional, pro-Republican partisan redistricting.

252. Figure 6.2.10 shows Dr. Mattingly’s analysis of this grouping.

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PX665 (Mattingly Figure 6.2.10)

253. The Court finds that Democrats were cracked out of the most Republican district and packed into the most Democratic district to make the map maximally nonresponsive, even though this does not affect the number of seats won in the particular 12 elections that Dr. Mattingly considered. PX629 at 61; PX665.

254. The Court finds, as Dr. Pegden's findings show, that the Cumberland-Moore Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.9999949% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least

99.999984% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 28.

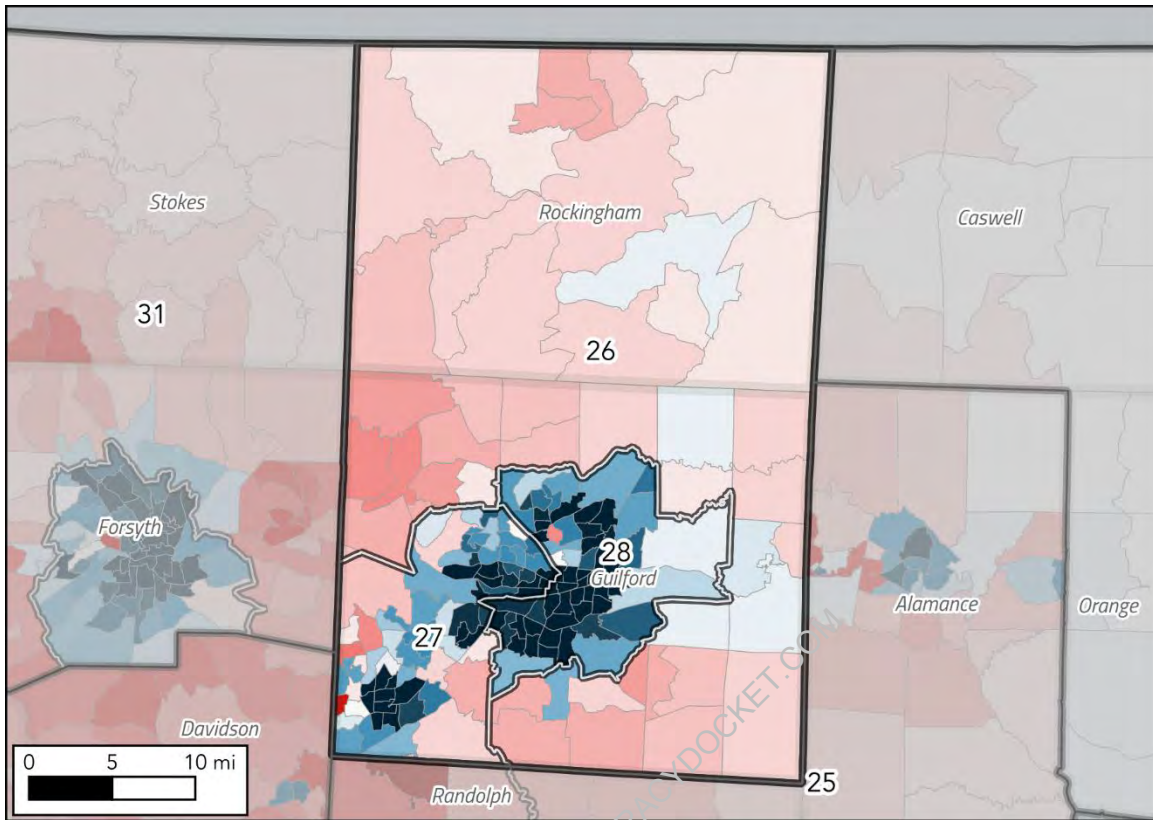
255. In the Cumberland-Moore Senate county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win one seat under the enacted map and in 77% of Dr. Barber's simulations, LDTX107 at 184, even though, under one election, Democrats would have won two seats under 93% of Dr. Barber's simulations. *Id.* at 188.

256. The Court finds the districts in the Cumberland-Moore Senate county grouping, SD19 and SD21, to be the result of intentional, pro-Republican partisan redistricting.

**c. Guilford-Rockingham Senate County Grouping**

257. The Guilford-Rockingham County Grouping contains Senate District 26 ("SD26"), Senate District 27 ("SD27"), and Senate District 28 ("SD28"). SD26 is comprised of Rockingham County and portions of Guilford County. SD27 and SD28 are comprised of portions of only Guilford County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.

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PX456 (Cooper Map 21)

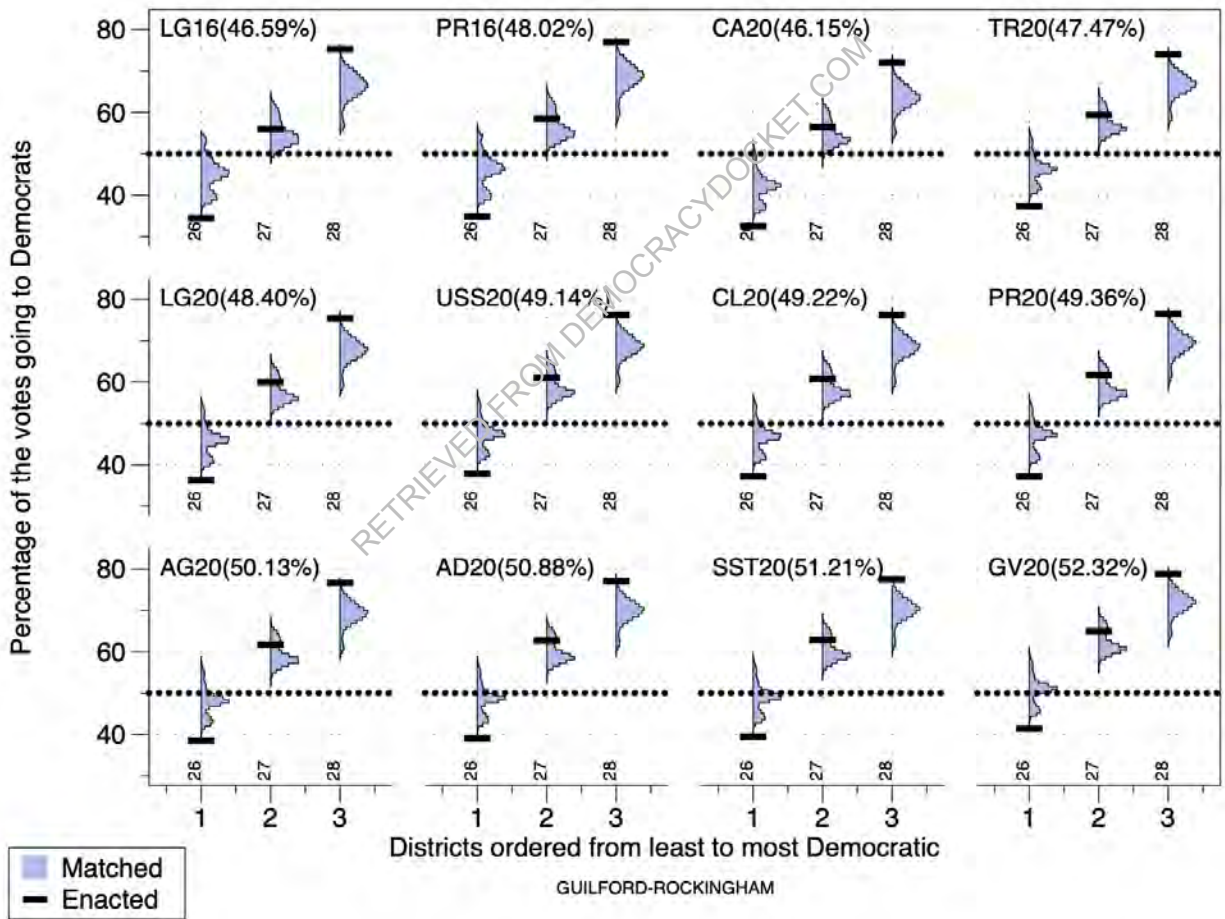
258. Harper Plaintiffs and Individual NCLCV Plaintiffs challenge this Senate county grouping. Individual NCLCV Plaintiffs Dandrielle Lewis and Talia Fernos and Individual Harper Plaintiffs David Dwight Brown, Joshua Perry Brown and Donald M. MacKinnon reside in SD27. Individual Harper Plaintiff Lily Nicole Quick resides in SD28. No Individual Plaintiff resides in SD26. Organizational Plaintiff NCLCV challenges all three Senate Districts in this county grouping. Organizational Plaintiff Common Cause challenges only SD27 and SD28.

259. Guilford County, which includes Greensboro and High Point, is among the most Democratic counties in North Carolina, while Rockingham leans toward the Republicans. The district lines pack Democratic voters into Senate Districts 27 and 28, allowing for a “safe Republican” Senate District 26 to wrap around those other districts in a

“C-shape” that connects the northern and southern boundaries of this cluster. House District 26 extends from Rockingham County into the Republican-leaning VTDs in western Guilford County on one side, and into southern Guilford County on the other, avoiding the most Democratic-leaning VTDs on the district’s inner borders. PX425 at 53.

260. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Guilford-Rockingham county grouping is an intentional, pro-Republican partisan redistricting.

261. Figure 6.2.13 shows Dr. Mattingly’s analysis of this grouping.



PX666 (Mattingly Figure 6.2.13)

262. The Court finds that the three districts in the Guilford-Rockingham grouping are constructed to pack an exceptional number of Democrats in the most Democratic district

(District 28) to crack Democrats out of the most Republican district (District 26). PX629 at 63. The effect is to ensure a Republican victory in the district 26, when in some elections in the nonpartisan ensemble that district would go to the Democratic Party. PX629 at 63. None of the plans in Dr. Mattingly's nonpartisan ensemble had fewer Democrats in the most Republican district than the enacted plan – in other words, zero of the plans in his nonpartisan ensemble cracked Democrats as substantially as the enacted plan. *Id.*

263. In the 2020 presidential election, 61% of Senate District 27's major-party voters voted for President Biden. In Senate District 28, that figure was 76%. PX201 "SL-173" AO28:AO29. By wasting these surplus Democratic votes, the Enacted Senate Plan ensures that Senate District 26 will reliably vote for Republican candidates: In the same race, only 37% of District 26's major-party voters cast their ballots for President Biden. PX201 "SL-173" AO27:AO29; PX422 at 53.

264. The Court finds, as Dr. Pegden's findings show, that the Guilford-Rockingham Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.999957% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.99987% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 31.

265. This grouping's formation departs from traditional redistricting principles and reduces the compactness of these districts: The average Polsby-Popper score of the three districts is 0.33. PX150 at 15.

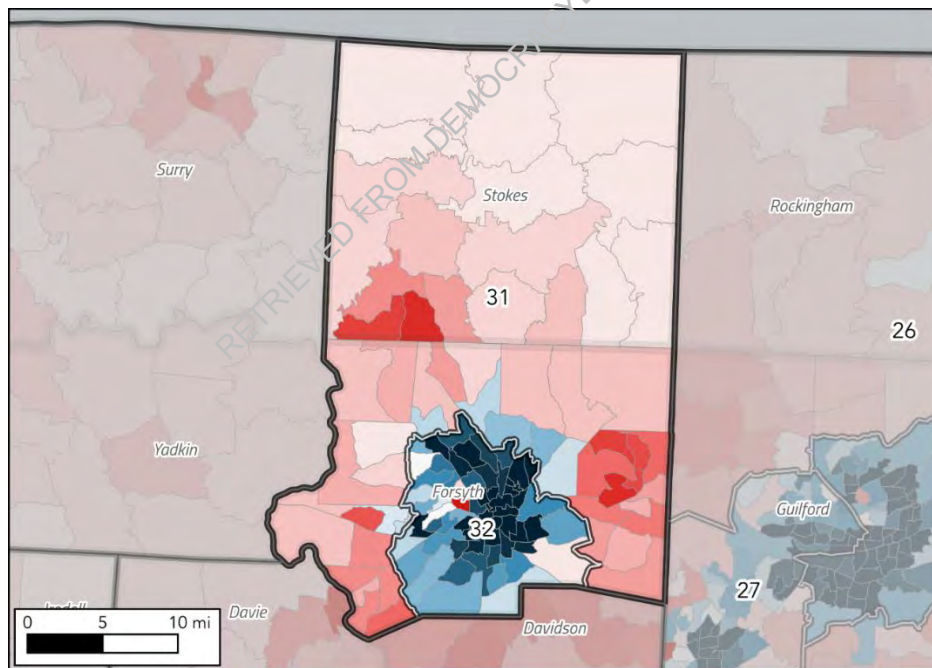


266. In the Guilford-Rockingham Senate cluster, which Legislative Defendants’ expert Dr. Barber refers to as “solidly Democratic,” the enacted map is in alignment with Dr. Barber’s simulations by creating two Democratic leaning districts. LDTX107 at 209, 215.

267. The Court finds the districts in the Guilford-Rockingham Senate county grouping, SD26, SD27, and SD28, to be the result of intentional, pro-Republican partisan redistricting.

**d. Forsyth-Stokes Senate County Grouping**

268. The Forsyth-Stokes County Grouping contains Senate District 31 (“SD31”) and Senate District 32 (“SD32”). SD31 is comprised of Stokes County and portions of Forsyth County. SD32 is comprised of portions of only Forsyth County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



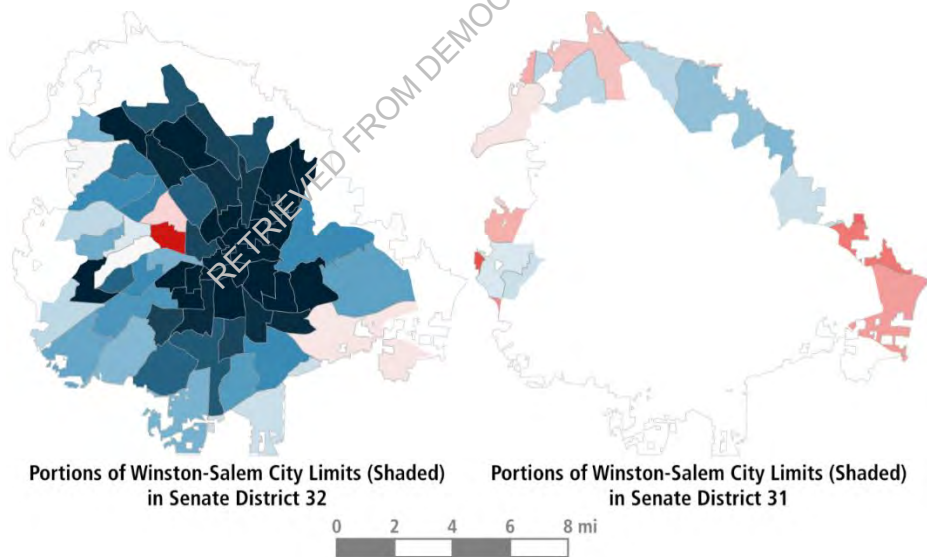
PX461 (Cooper Map 26)

269. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Chenita Barber Johnson reside in SD32. No Individual Plaintiff resides in SD31. Organizational Plaintiff NCLCV challenges both Senate Districts in this county grouping.

270. Legislative Defendants decided to pair Forsyth County with Stokes County in this cluster, rather than pairing Forsyth County with Yadkin County, to the west; since Yadkin County has a lower Republican vote advantage than Stokes County, Legislative Defendants' choice of pairing provided them with a better counter-weight to the heavily-Democratic VTDs in Winston-Salem. PX425 at 62.

271. Within the chosen cluster, Legislative Defendants packed the Democratic VTDs in Winston-Salem into Senate District 32, leaving Senate District 31 to wrap around three sides of the city and remain safely Republican. PX425 at 62-63; PX461.

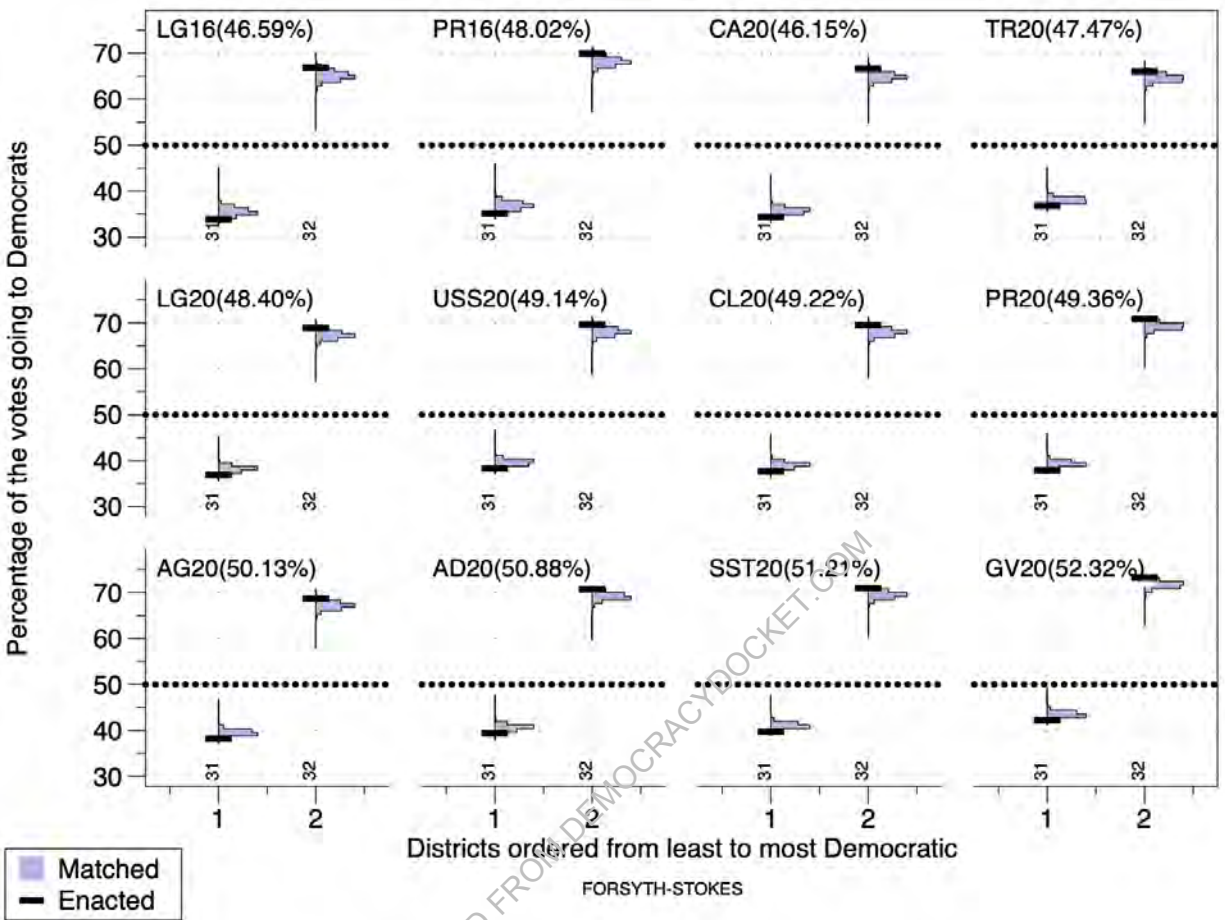
272. While Winston-Salem is split between both districts, a comparison of Dr. Cooper's red-blue map (PX461) and his map showing the municipal boundaries within this cluster (PX462) illustrates how Senate District 31 captures the more Republican VTDs on the city's edges. PX425 at 62.



PX462 (Cooper Map 27)

273. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Forsyth-Stokes county grouping is an intentional, pro-Republican partisan redistricting.

274. Figure 6.2.7 shows Dr. Mattingly’s analysis of this grouping.



PX664 (Mattingly Figure 6.2.7)

275. The Court finds that, even though this does not affect the number of seats won in the particular elections that Dr. Mattingly considered, the two districts in Forsyth-Stokes maximize the number of Democrats in the most Democratic district and the number of Republicans in the most Republican district in a way that is almost never seen in the enacted map. PX629 at 59; PX664.

276. The Enacted Plan concentrates Forsyth County’s Democratic voters into one district—District 32—where Democratic candidates will win elections by more than 30-point margins. PX201 “SL-173” B33:BA33. District 32’s design foreordains electoral outcomes in



Senate District 31, which is safely Republican and never once elects a Democrat in any of the 52 elections Dr. Duchin studies. PX201 “SL-173” B32:BA32.

277. The Court finds, as Dr. Pegden’s findings show, that the Forsyth-Stokes Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan’s version of this grouping is more favorable to Republicans than 99.9983% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.9947% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 29.

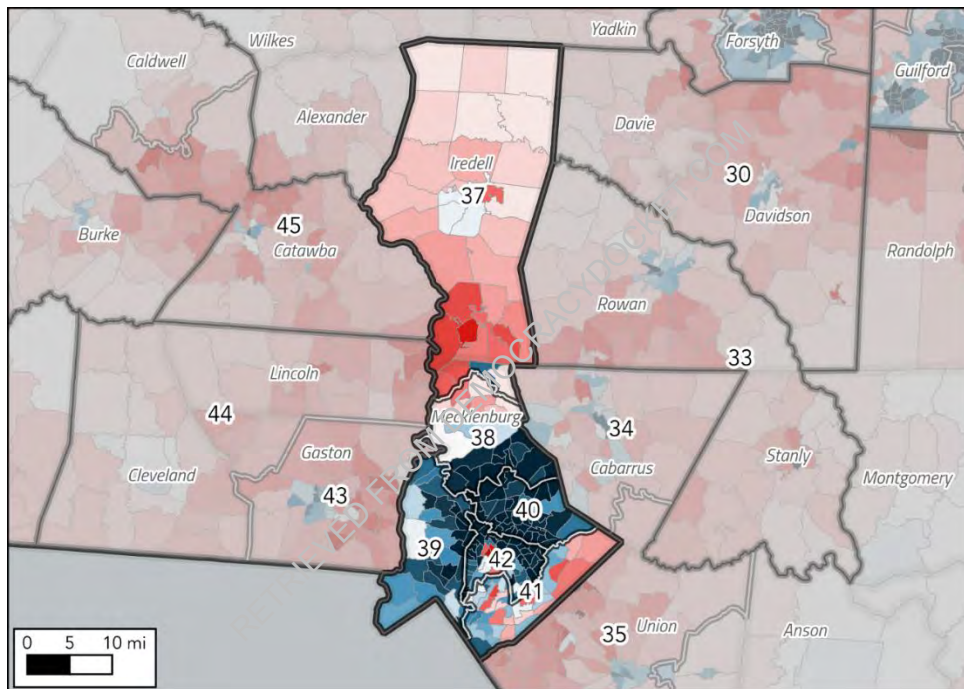
278. The Republican advantage in District 31 was the product of both a clustering decision and a drawing decision. District 32 is drawn to “pack” all of Winston-Salem’s most Democratic areas into one district, but Districts 31 and 32 clearly could have been configured such that Senate District 32 is not “packed” with Democrats.

279. In the Forsyth-Stokes Senate county grouping, a “slightly Democratic” grouping, 100% of Dr. Barber’s simulations, like the enacted maps, produce one Democratic leaning district. LDTX107 at 244. Under each of the 11 elections that Legislative Defendants’ expert Dr. Barber considered, Democrats win one seat under the enacted map, even though, under two of those elections, Democrats would have won two seats under 94% and 98% of Dr. Barber’s simulations, respectively. *Id.* at 248.

280. The Court finds the districts in the Forsyth-Stokes Senate county grouping, SD31 and SD32, to be the result of intentional, pro-Republican partisan redistricting.

**e. Iredell-Mecklenburg Senate County Grouping**

281. The Guilford-Rockingham County Grouping contains Senate District 37 (“SD37”), Senate District 38 (“SD38”), Senate District 39 (“SD39”), Senate District 40 (“SD40”), Senate District 41 (“SD41”), and Senate District 42 (“SD42”). SD37 is comprised of Iredell County and portions of Mecklenburg County. SD38, SD39, SD40, SD41, and SD42 are comprised of portions of only Mecklenburg County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



PX457 (Cooper Map 22)

282. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Virginia Walters Brien resides in SD40. Individual Harper Plaintiff Barbara Proffitt resides in SD41. No Individual Plaintiff resides in SD37, SD38, SD39, or SD42. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge all six Senate Districts in this county grouping.

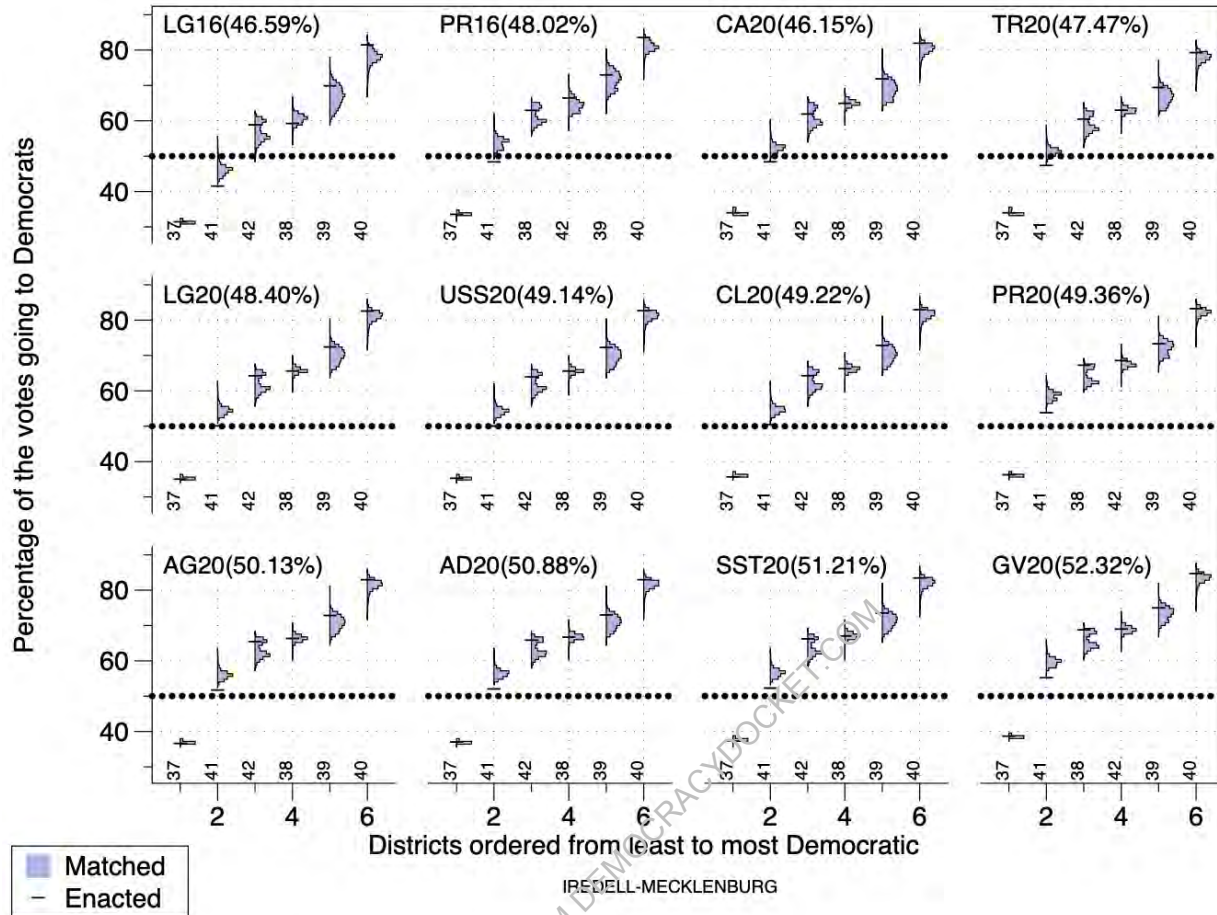
283. Mecklenburg County is the second most populous county in North Carolina and a Democratic stronghold. Every member of the current state legislative delegation from Mecklenburg County is a Democrat, as are all nine of its county commissioners. Democratic candidates also received the plurality of votes in every 2020 county-wide contest in Mecklenburg County. Yet Legislative Defendants drew district lines to create four “safe Democratic” seats, one “safe Republican” seat, and a “toss-up” seat. PX425 at 55.

284. The district lines pack Democratic voters into Senate Districts 38, 39, 40, and 42, allowing for Senate Districts 37 and 41 to be artificially favorable to Republican candidates. PX457. Senate Districts 39 and 40 do not include a single Republican-leaning VTD and almost all Republican-leaning VTDs in Mecklenburg County are included in either Senate District 37, a “safely Republican” seat, or Senate District 41, a “toss-up” seat. PX425 at 55-56.

285. Senate District 37 includes the residence of an incumbent Democrat and incumbent Republican in the same district, effectively eliminating the incumbent Democrat. The Democratic incumbent whose residence Legislative Defendants included in the safely Republican Senate District 37 lives approximately one mile from the Democratic-leaning district to the south, Senate District 38. PX425 at 55.

286. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Iredell-Mecklenburg county grouping is an intentional, pro-Republican partisan redistricting.

287. Figure 6.2.1 shows Dr. Mattingly’s analysis of this grouping.



PX662 (Mattingly Figure 6.2.1)

288. The Court finds that Democrats were cracked out of the second most Republican district (District 41), and packed into SD40 and, to a lesser extent, SD39 (the two most Democratic districts). PX629 at 55; Figure 6.2.1. The effect is that the Republicans win two out of six districts under the enacted plan in many elections where the majority or vast majority of plans in the ensemble would elect only one Republican. PX629 at 55. One example is the President 2016 election. Dr. Mattingly quantified the cracking of Democrats: Across every election he considered, *none* of the approximately 80,000 plans in his ensemble had as low a fraction of Democrats in the two most Republican districts as in the enacted plan. *Id.*

289. The Enacted Senate Plan's packing of Democratic voters in Mecklenburg County, thereby converting District 41 from a swing district into a district that will usually elect Republican candidates, results in a far lower average compactness score of 0.33, PX150 at 15, as well as a significant improvement in Republican performance. Enacted District 41 elected a Democrat in only 13 of the 52 studied elections. PX201 "SL-173" B42:BA42.

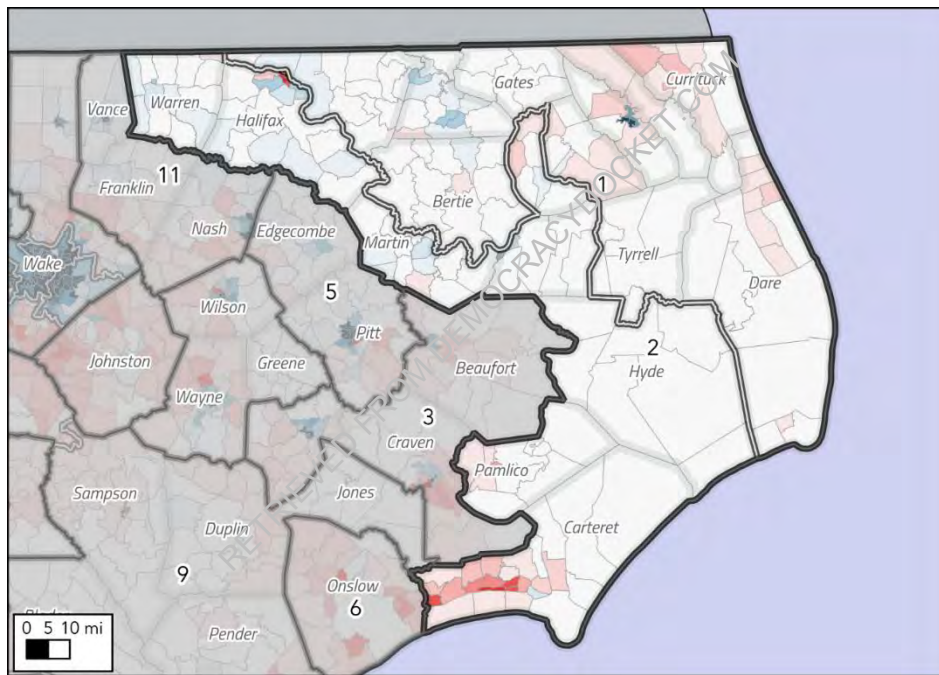
290. Dr. Pegden's findings show that the Iredell-Mecklenburg Senate county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.998% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.9943% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 32.

291. In the Iredell-Mecklenburg Senate cluster, which Legislative Defendants' expert Dr. Barber found to be a partisan outlier, *see* LDTX107 at 229, under two of the 11 elections Dr. Barber considered, Democrats win four seats under the enacted map, even though Democrats would have won 5 seats under 93% and 95% of Dr. Barber's simulations, respectively. *Id.* at 234.

292. The Court finds the districts in the Iredell-Mecklenburg Senate county grouping, SD37, SD38, SD39, SD40, SD41, and SD42, to be the result of intentional, pro-Republican partisan redistricting.

**f. Northeastern Senate County Grouping**

293. The Northeastern County Grouping contains Senate District 1 (“SD1”) and Senate District 2 (“SD2”). SD1 is comprised of Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, and Tyrrell County. SD2 is comprised of Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, Washington County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.



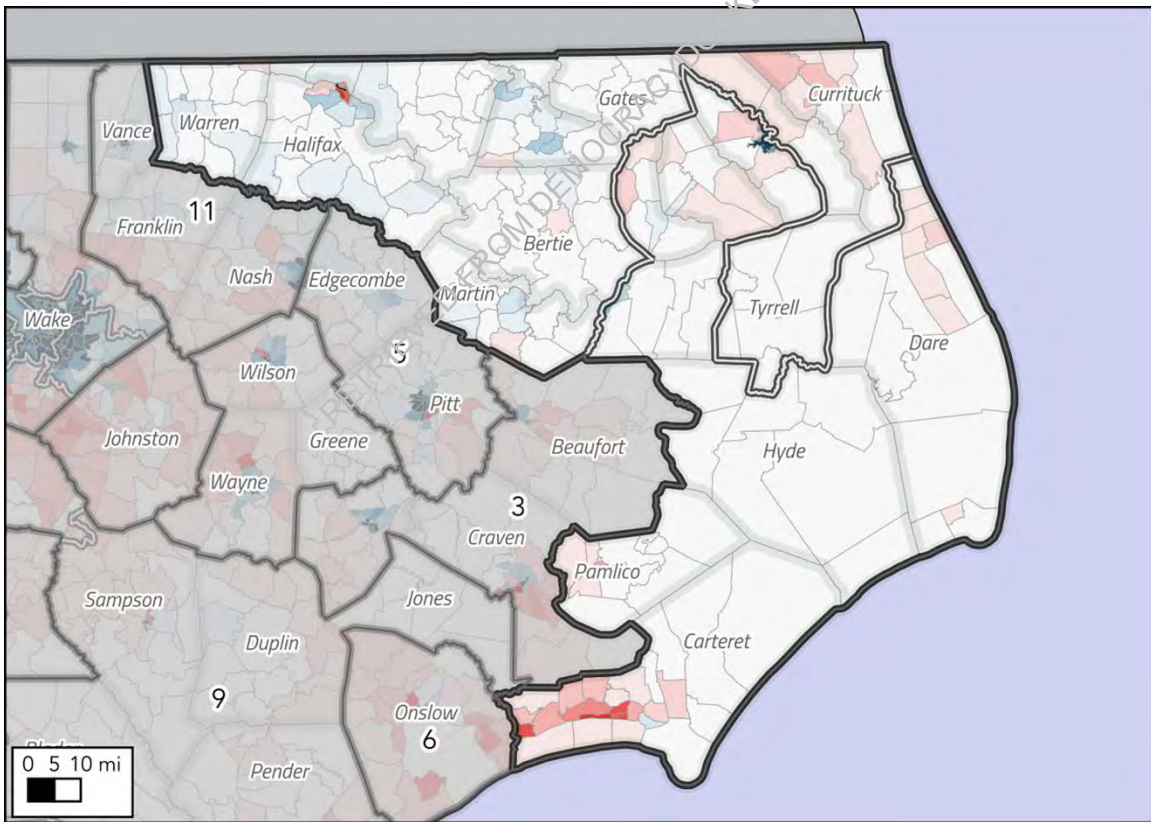
PX463 (Cooper Map 28)

294. Harper Plaintiffs and Individual NCLCV Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Lauren Flood resides in SD1. Individual NCLCV Plaintiffs Edna Scott, Roberta Scott, Yvette Roberts, Dr. Cosmos George, Jereann King Johnson, Yarbrough Williams, Jr., and Reverend Dr. Deloris L. Jerman reside in SD2. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge both Senate Districts in this county grouping.



295. Legislative Defendants had two potential county grouping options to choose from for the Northeastern counties when drawing the 2021 Senate Plan. The size of the counties in each potential cluster is such that each cluster option is large enough for one Senate district. PX425 at 65.

296. Legislative Defendants' choice of clusters paired more Republican-leaning VTDs together in an arrangement that resulted in two Republican-leaning districts. PX425 at 65. The alternative county cluster groupings, which Legislative Defendants chose against, would have included Carteret, Chowan, Dare, Hyde, Pamlico, Pasquotank, Perquimans, and Washington counties in one district and Bertie, Camden, Currituck, Gates, Halifax, Hertford, Martin, Northampton, Tyrrell, and Warren counties in a second district. PX425 at 65; PX464.



PX464 (Cooper Map 29)

297. The alternative county cluster groupings that Legislative Defendants chose against would have created one district on the northern state border that included many of the more racially diverse counties in the state and that would favor the Democrats, and another district to the south that would favor Republicans. Such an arrangement would have been more representative of the counties included in these clusters, most of which include a large number of competitive VTDs (shown in light, non-colored shading in Dr. Cooper's maps). PX425 at 65.

298. The Court finds, as Dr. Mattingly also showed, that their choice significantly advantaged the Republican Party. PX629 at 65. In the alternative cluster choice that the General Assembly rejected, Democrats would have won one seat under the results in every single 2016 and 2020 statewide election. In the cluster choice that the General Assembly rejected, the Republicans win both seats under the results in every single 2016 and 2020 statewide election. *Id.*

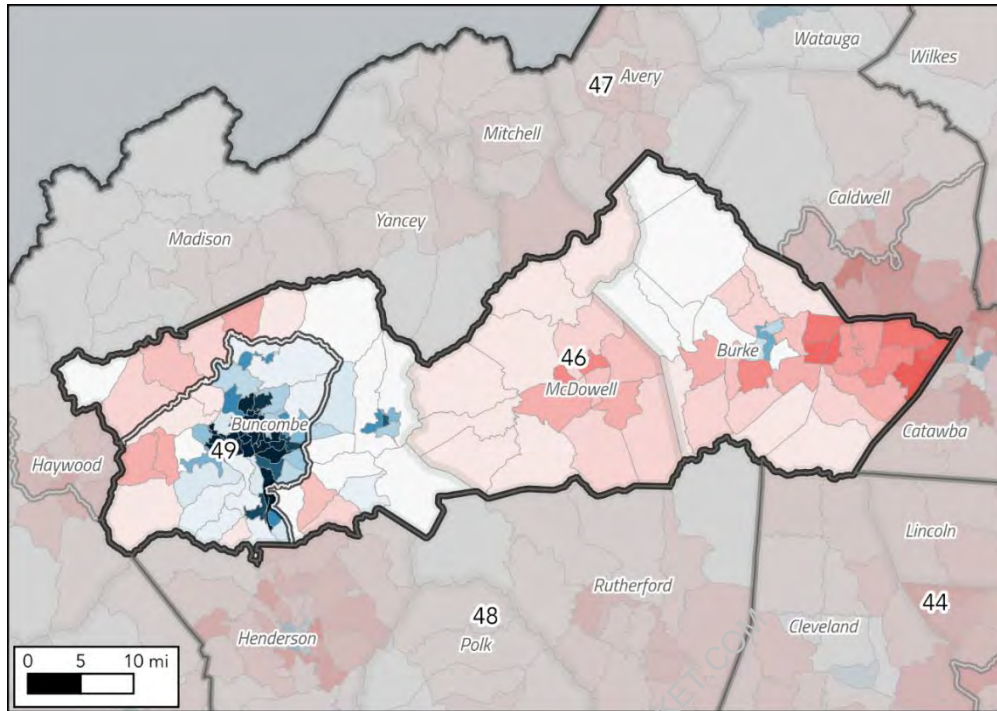
299. The enacted district configuration has 24 county traversals. District 2's Polsby-Popper compactness score is just 0.11, and the average score of both districts is 0.16. PX150 at 15.

300. The Court finds the districts in the Northeastern Senate county grouping, SD1 and SD2, to be the result of intentional, pro-Republican partisan redistricting.

**g. Buncombe-Burke-McDowell Senate County Grouping**

301. The Buncombe-Burke-McDowell County Grouping contains Senate District 46 ("SD46") and Senate District 49 ("SD49"). SD46 is comprised of Burke County, McDowell County, and portions of Buncombe County. SD49 is comprised of portions of only Buncombe County. Plaintiffs challenge these Senate Districts as the product of unlawful partisan gerrymanders.





PX458 (Cooper Map 23)

302. Harper Plaintiffs challenge this Senate county grouping. Individual Harper Plaintiff Mark S. Peters resides in SD46. Individual Harper Plaintiff Ann Butzner resides in SD49. Organizational Plaintiff NCLCV challenges both Senate Districts in this county grouping.

303. Legislative Defendants had discretion as to the counties included in this cluster and the adjacent cluster to the south. Rather than pair Buncombe County with Henderson County, which has become a “bedroom community” of Asheville, Legislative Defendants grouped Buncombe County with Burke and McDowell counties, to the east. Burke and McDowell counties include a greater number of heavily-Republican VTDs than does Henderson County, allowing for Legislative Defendants to neutralize the Democratic stronghold in and around Asheville to a greater extent than under the alternate potential grouping.

304. Within this county grouping, the mapmakers maximized Republican advantage by drawing one lopsidedly Democratic district (District 49), leaving the remaining district (District 46) reliably Republican. Notably, District 46 *never* elects a Democrat in any of the 52 elections in Dr. Duchin’s study. PX201 “SL-173” B47:BA47.

305. The Court finds that Legislative Defendants’ chosen county grouping allowed them to draw a map that packed Democratic voters in Senate District 49, leaving Senate District 46 to favor the Republican Party. PX425 at 57-58.

306. Grouping Henderson County with Polk and Rutherford counties in the bordering cluster to the south also allowed for Legislative Defendants to create a single-district cluster there that heavily favors the Republican candidate. PX425 at 57.

307. Dr. Barber’s analysis reflects that in 100% of his simulations, as with the enacted map, there is one Democratic district in this “very slightly Democratic” grouping, LDTX107 at 235, and 100% of his simulations produce 1 Democratic leaning district like the enacted maps under all 11 elections used in his analysis. *Id.* at 239.

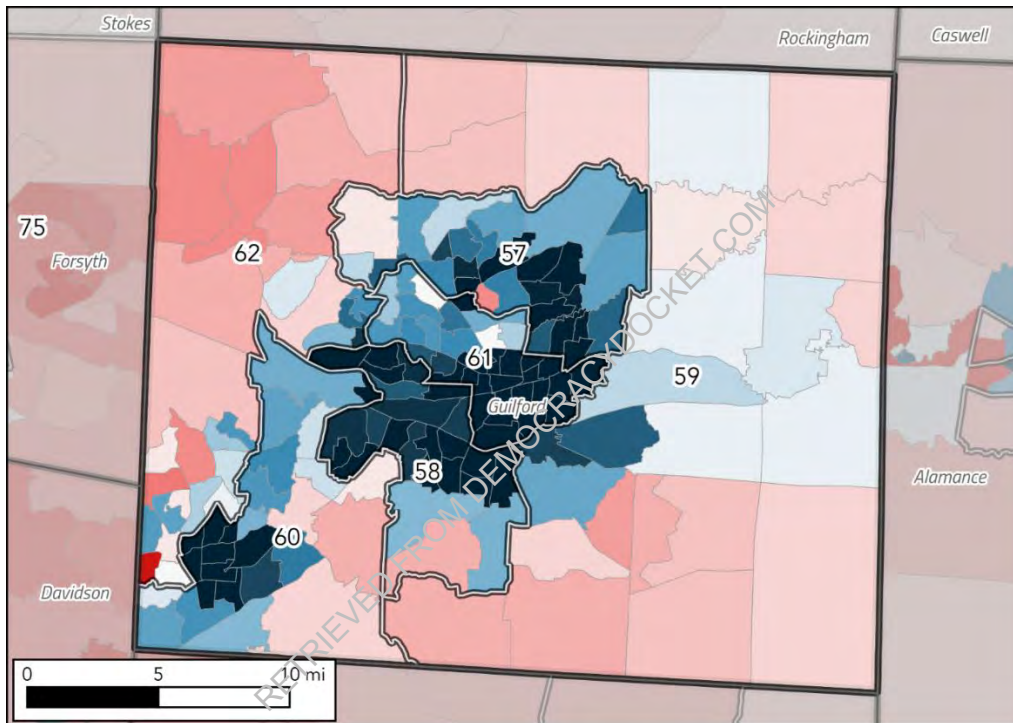
308. The Court finds the districts in the Buncombe-Burke-McDowell Senate county grouping, SD46 and SD49, to be the result of intentional, pro-Republican partisan redistricting.

## **2. North Carolina House of Representatives Districts**

309. Plaintiffs’ experts analyzed specific county groupings in the enacted House plan. Plaintiffs’ experts concluded that partisan redistricting and bias in these groupings were responsible for the partisan bias that they found in their statewide analysis of the enacted House plan. The results of the analysis conducted by Legislative Defendants’ expert Dr. Barber largely reinforce this conclusion.

**a. Guilford House County Grouping**

310. The Guilford House County Grouping contains House District 57 (“HD57”), House District 58 (“HD58”), House District 59 (“HD59”), House District 60 (“HD60”), House District 61 (“HD61”), and House District 62 (“HD62”). All six House Districts are comprised of portions of only Guilford County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



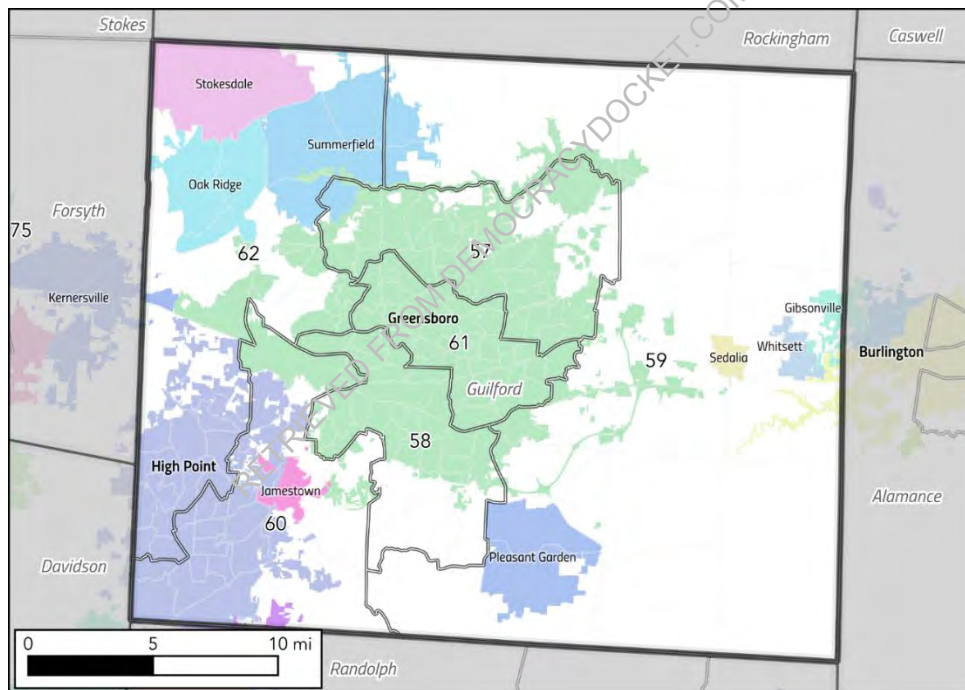
PX470 (Cooper Map 35)

311. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff David Dwight Brown resides in HD58. Individual Harper Plaintiff Lily Nicole Quick resides in HD59. Individual Harper Plaintiff Joshua Perry Brown resides in HD60. Individual Harper Plaintiff Donald M. MacKinnon resides in HD62. Individual NCLCV Plaintiff Talia Fernos resides in HD61. No Individual Plaintiff resides in HD57. Organizational Plaintiff Common Cause challenges every House District in this county

grouping. Organizational Plaintiff NCLCV challenges only HD59 and HD62 in this county grouping.

312. Legislative Defendants packed Democratic-leaning VTDs into House Districts 57, 58, 60, and 61, allowing House Districts 59 and 62 to be artificially favorable to Republican candidates. PX425 at 76; TR 01/03/2022.

313. A comparison of Dr. Cooper’s red-blue map (PX470) and his map showing the municipal boundaries within this cluster (PX471) illustrates how the district boundaries split Greensboro and High Point in a way that ensures the most Democratic-leaning VTDs in those municipalities are kept out of House Districts 59 and 62. PX425 at 76.

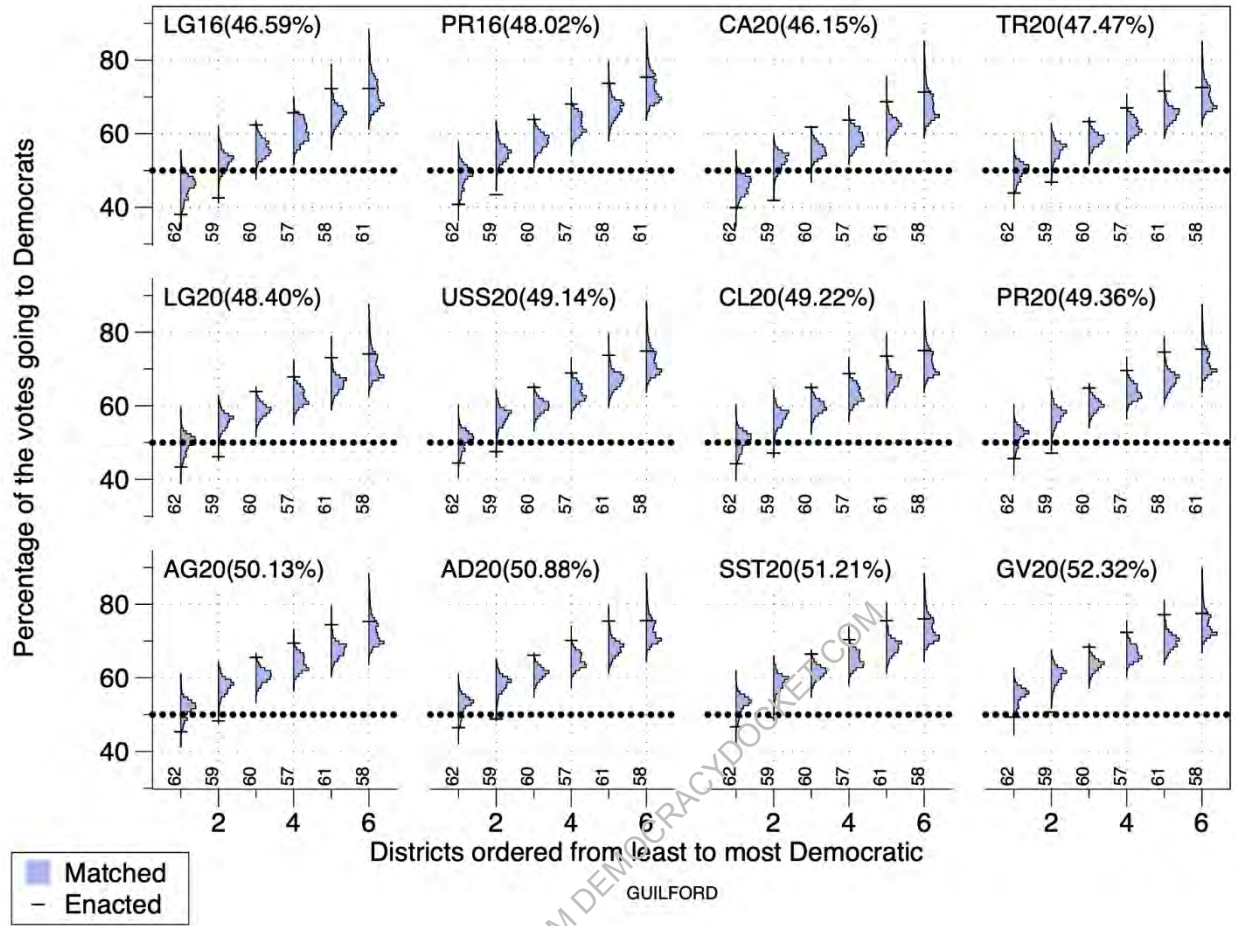


PX471 (Cooper Map 36)

314. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Guilford county grouping is an intentional, pro-Republican partisan redistricting.

315. Figure 6.1.10 shows Dr. Mattingly’s analysis of this grouping.





PX653 (Mattingly Figure 6.1.10)

316. The Court finds that Democrats were again cracked out of the two least Democratic (*i.e.*, most-Republican) districts in this grouping (Districts 59 and 62) and packed into heavily Democratic districts (Districts 57, 58, 60, and 61). PX629 at 36; PX653. The effect is that the Republicans regularly win two out of six seats in this cluster even in situations where the Democrats would win all six in the majority or vast majority of plans in the nonpartisan ensemble. This is seen in the Senate 2020, President 2020, and Attorney General 2020 races, among others. PX653. Dr. Mattingly quantified the cracking and packing of Democrats in the Guilford cluster: over all of the elections considered and all of the around 80,000 plans in the ensemble, none of the plans have a higher Democratic fraction in the four most Democratic districts or a lower Democratic fraction in the two most

Republican districts, in comparison to the enacted plan. PX629 at 36. In other words, this grouping shows more cracking and packing of Democrats than every single plan in the nonpartisan ensemble. *Id.*

317. Due to the packing in two districts—Districts 59 and 62—that favor Republican candidates, District 62 never elected a Democrat in Dr. Duchin’s 52-election sample, and District 59 did so only once. PX201 “SL-175” B60:BA60, B53:BA63.

318. The Court finds, as Dr. Pegden’s findings show, that the Guilford House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan’s version of this grouping is more favorable to Republicans than 99.99997% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.99991% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 19.

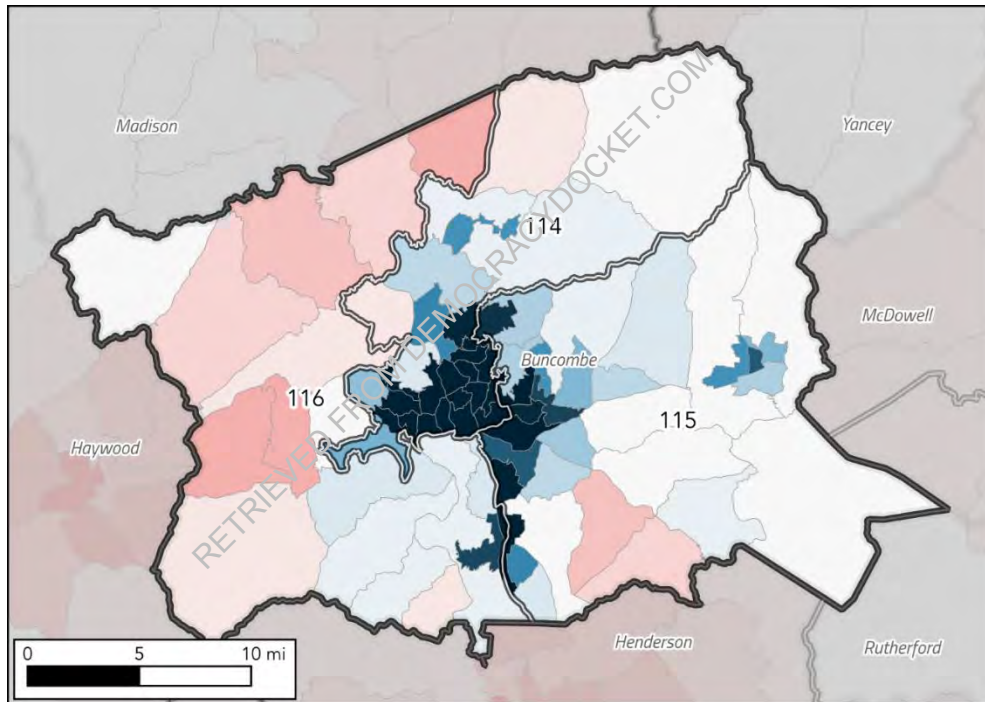
319. The Enacted Plan for this grouping has an average Polsby-Popper score of 0.30. PX150 at 16.

320. In the Guilford House county grouping—which Legislative Defendants’ expert Dr. Barber himself labeled a “partisan outlier,” *see* LDTX107 at 5 (“the Guilford County grouping in the House of Representative . . . is a partisan outlier”)—the enacted map is a partisan outlier under each of the 11 elections he considered. Under nine of those 11 elections, the enacted map produces fewer Democratic districts than 93-100% of his simulations. *Id.* at 158. Under four of those nine elections, the enacted map produces four Democratic districts when 100% of his simulations produce a greater number, and under three more of the nine elections, the enacted map produces four or five Democratic districts when 99% of his simulations produce a greater number. *Id.*

321. The Court finds the districts in the Guilford House county grouping, HD57, HD58, HD59, HD60, HD61, and HD62, to be the result of intentional, pro-Republican partisan redistricting.

**b. Buncombe House County Grouping**

322. The Buncombe House County Grouping contains House District 114 (“HD114”), House District 115 (“HD115”), and House District 116 (“HD116”). All three House Districts are comprised of portions of only Buncombe County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



PX472 (Cooper Map 37)

323. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Mark S. Peters and Ann Butzner reside in HD115. No Individual Plaintiff resides in HD114 or HD 116. Organizational Plaintiffs NCLCV and Common Cause challenge the House Districts in this county grouping.

324. Buncombe County is an overwhelmingly Democratic county and has been trending more Democratic each year. PX425 at 79. All three House Districts in Buncombe are currently represented by members of the Democratic Party. *Id.*

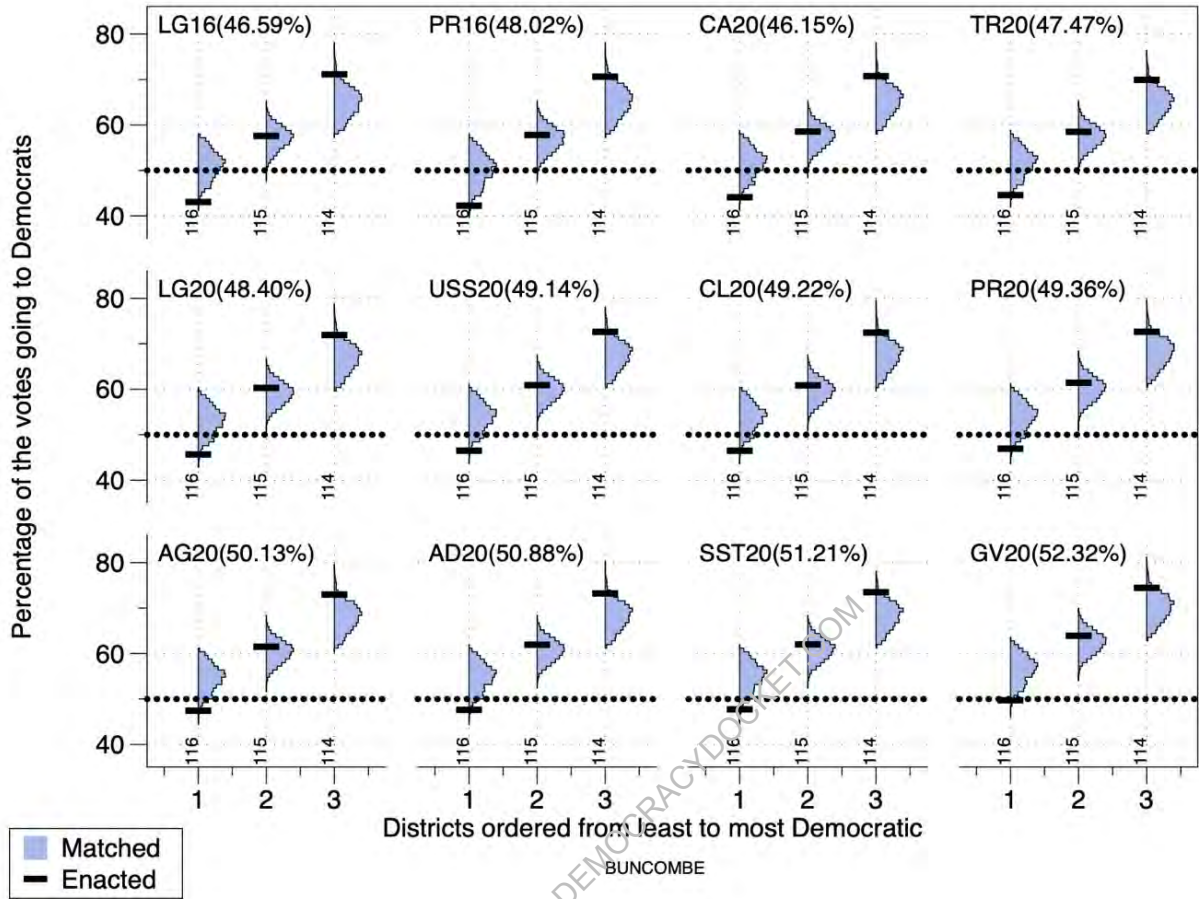
325. Legislative Defendants shifted the district lines where they meet in Asheville to pack as many Democratic voters as possible into House District 114, thereby creating a Republican-leaning district in House District 116. Prior to the enactment of these lines in the 2021 House Plan, the district in the western part of Buncombe County that is now House District 116 was considered a safely Democratic district. PX425 at 79.

326. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Buncombe county grouping is the result of intentional, pro-Republican partisan redistricting.

327. Figure 6.1.13 shows Dr. Mattingly's analysis of the Buncombe House county grouping:

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PX654 (Mattingly Figure 6.1.13)

328. The Court finds that Democrats were packed into the most Democratic leaning district in this grouping (114) and cracked out of the most Republican district (116). PX629 at 38; PX654. In the enacted plan, there is a huge jump in Democratic vote share between the least Democratic district and the middle Democratic district. *Id.* This jump means that elections in the grouping will be nonresponsive to the votes cast and, as the figure above shows, cost Democrats a seat in multiple electoral environments, because the black line for District 116 often falls below the 50% line in elections where the majority or overwhelming majority of the blue histogram rises above it (for example, the Governor 2020, President 2020, and Senate 2020 race, among other examples). *See* PX629 at 38; PX654.

329. Dr. Mattingly mathematically quantified the cracking and packing across all the 2020 and 2016 statewide elections he considered. Specifically, Dr. Mattingly calculated the average Democratic vote share in the two least Democratic districts and the average Democratic vote share in the three most Democratic districts, for both the enacted plans and his ensemble plans. PX629 at 16. He found that, across every election, at most 1.2% of the plans in the nonpartisan ensemble had the same or fewer Democrats in the least Democratic district as the enacted plan (District 116). PX629 at 38. The Court finds that this signifies cracking of Democrats to enable Republicans to win a district they would not win under the nonpartisan ensemble.

330. The Court finds, as Dr. Pegden's findings show, that the Buncombe House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.979% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.938% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 16.

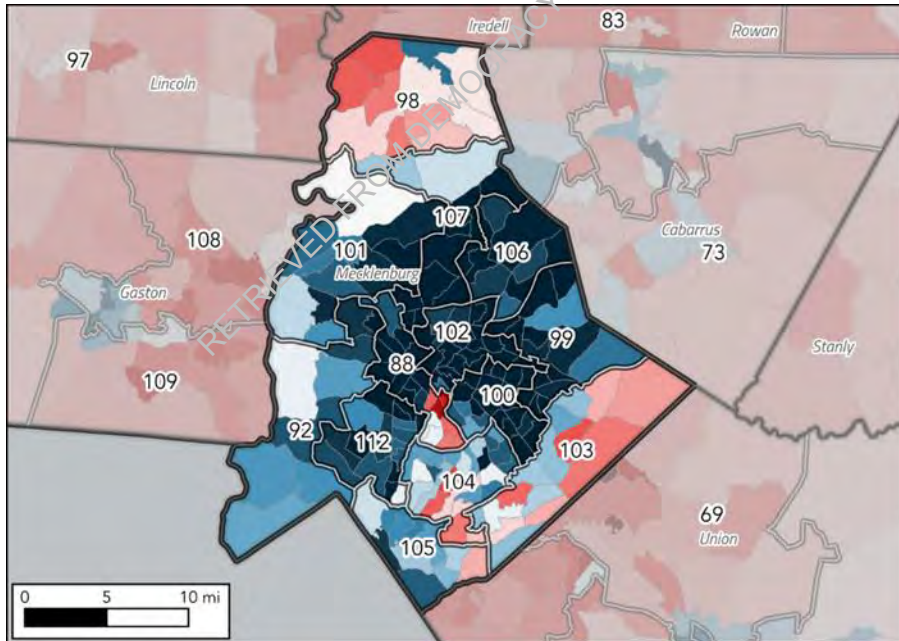
331. HD116 is the least compact district in the entire Enacted House Plan and is designed such that it never elects a Democrat in the entire set of 52 elections compiled by Dr. Duchin. PX150 at 16; PX201 "SL-175" B118:BA118.

332. In the Buncombe House county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win two seats under the enacted map, even though, under 10 of those 11 elections, Democrats would have won three districts in the majority of Dr. Barber's simulations, including in 98% of the simulations under the 2020 Governor election. LDTX107 at 98.

333. The Court finds the districts in the Buncombe House county grouping, HD114, HD115, and HD116, to be the result of intentional, pro-Republican partisan redistricting.

**c. Mecklenburg House County Grouping**

334. The Mecklenburg House County Grouping contains House District 88 (“HD88”), House District 92 (“HD92”), House District 98 (“HD98”), House District 99 (“HD99”), House District 100 (“HD100”), House District 101 (“HD101”), House District 102 (“HD102”), House District 103 (“HD103”), House District 104 (“HD104”), House District 105 (“HD105”), House District 106 (“HD106”), House District 107 (“HD107”), and House District 112 (“HD112”). All thirteen House Districts are comprised of portions of only Mecklenburg County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



PX465 (Cooper Map 30)

335. Harper Plaintiffs challenge this House county grouping. Individual NCLCV Plaintiff Timothy Chartier resides in HD98. Individual Harper Plaintiff Mary Elizabeth Voss resides in HD101. Individual Harper Plaintiff Virginia Walters Brien resides in HD102.

Individual Harper Plaintiff Barbara Proffitt resides in HD103. No Individual Plaintiff resides in HD88, HD92, HD99, HD100, HD104, HD105, HD106, HD107, or HD112. Organizational Plaintiff NCLCV challenges HD98 and HD103 in this county grouping. Organizational Plaintiff Common Cause challenges the House Districts in this county grouping.

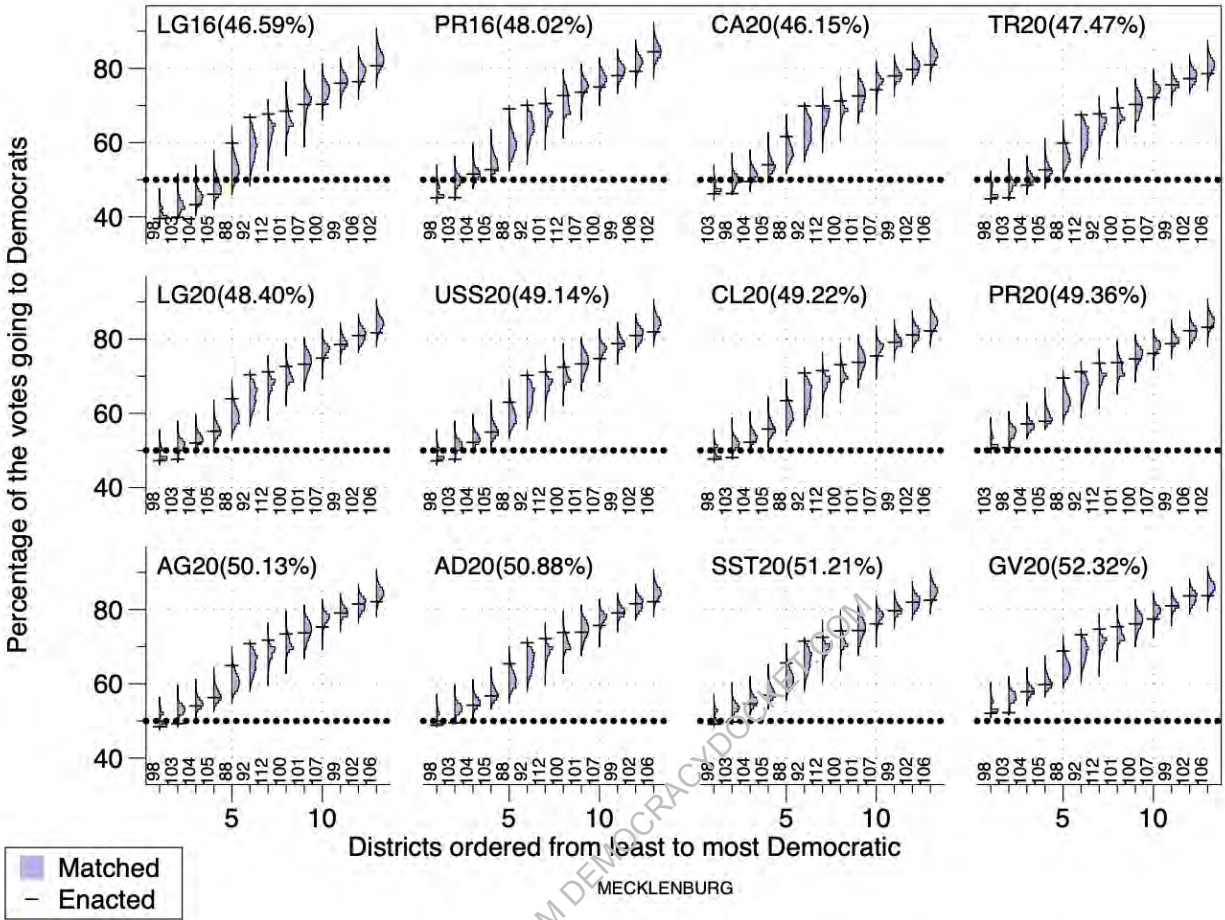
336. Mecklenburg County is the home of Charlotte as well as six other municipalities. Mecklenburg County is dominated by Democratic voters and is becoming even more so as the county continues to grow in population. PX425 at 68.

337. The district boundaries in this grouping place no Republican-leaning VTDs in House Districts 92, 99, 100, 101, 102, 106, 107, and 112, leaving every Republican-leaning VTD in House Districts 88, 103, 104, and 105. House District 98, in the north, and House District 103, in the south, are carved out of the pockets of Republican-leaning VTDs in the north and southeast portions of Mecklenburg County so as to be particularly favorable to Republican candidates. PX425 at 68.

338. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Mecklenburg county grouping is the result of intentional, pro-Republican partisan redistricting.

339. Figure 6.1.1 shows Dr. Mattingly's analysis of this grouping.

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PX650 (Mattingly Figure 6.1.1)

340. The Court finds that Democrats were again cracked out of the two least Democratic (i.e., most-Republican) districts in this grouping (Districts 98 and 103), and packed into heavily Democratic districts (Districts 100, 112, 92, and 88). PX629 at 29; PX650. The effect is to make those districts competitive, or to turn them into Republican seats, when in the majority of the nonpartisan plans those two seats safely elect Democrats. PX629 at 29. An example is the Attorney General 2020 election. Dr. Mattingly quantified the cracking and packing of Democrats in the Mecklenburg cluster: across every election he considered, the percentage of maps in the ensemble which have more Democrats packed into the most Democratic districts than the enacted plan is always less than 0.11%. PX629 at 29.

341. Although the County is one of the most Democratic in North Carolina, the Enacted House Map carves out at least two districts that Republicans will ordinarily win. PX201 “SL-175” B99:BA99, B104:BA105.

342. The Court finds, as Dr. Pegden’s findings show, that the Mecklenburg House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan’s version of this grouping is more favorable to Republicans than 98.3% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 95.0% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 20.

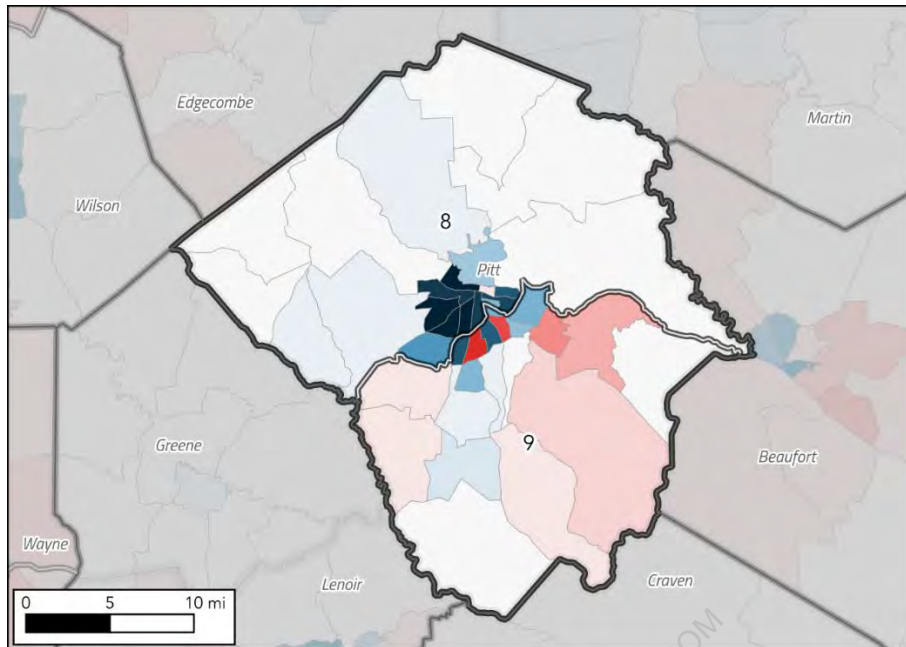
343. In the Mecklenburg House county grouping, under 4 of the 11 elections that Legislative Defendants’ expert Dr. Barber considered, Republicans outperform the majority of Dr. Barber’s simulations, but Democrats never outperform a majority of the simulations. Under the 2020 Attorney General election, Democrats win 11 seats under the enacted map, even though Democrats would have won 12 seats under 91% of Dr. Barber’s simulations. LDTX107 at 168.

344. The Court finds the districts in the Mecklenburg House county grouping, HD88, HD92, HD98, HD99, HD100, HD101, HD102, HD103, HD104, HD105, HD106, HD107, HD112, to be the result of intentional, pro-Republican partisan redistricting.

**d. Pitt House County Grouping**

345. The Pitt House County Grouping contains House District 8 (“HD8”) and House District 9 (“HD9”). HD8 and HD9 are comprised of portions of only Pitt County. Harper Plaintiffs and NCLCV Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



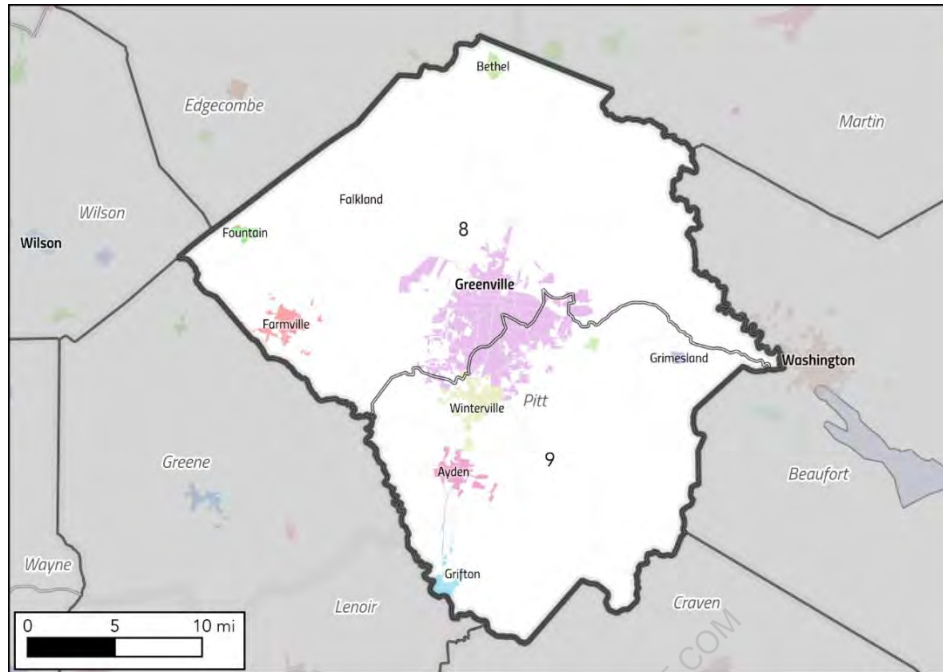


PX473 (Cooper Map 38)

346. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Amy Clare Oseroff resides in HD8, and Individual Harper Plaintiff Donald Rumph resides in HD9. Organizational Plaintiff NCLCV challenges only HD9 in this county grouping.

347. The two House districts in Pitt County are both currently represented by Democrats and Pitt County gave 55% of its vote share to President Joe Biden in the 2020 election, making it the 19th most Democratic county in the state according to that metric. PX425 at 81. But by splitting Greenville “at a particularly consequential location,” the Legislative Defendants packed the most heavily Democratic VTDs together in House District 8, allowing for House District 9 to lean towards the Republican candidate. *Id.*

348. The split of Greenville, *see* PX474, cannot be explained with reference to communities of interest or natural geography. Some students at East Carolina University will take classes in House District 9, while living in residence halls that are located in House District 8. PX425 at 81.



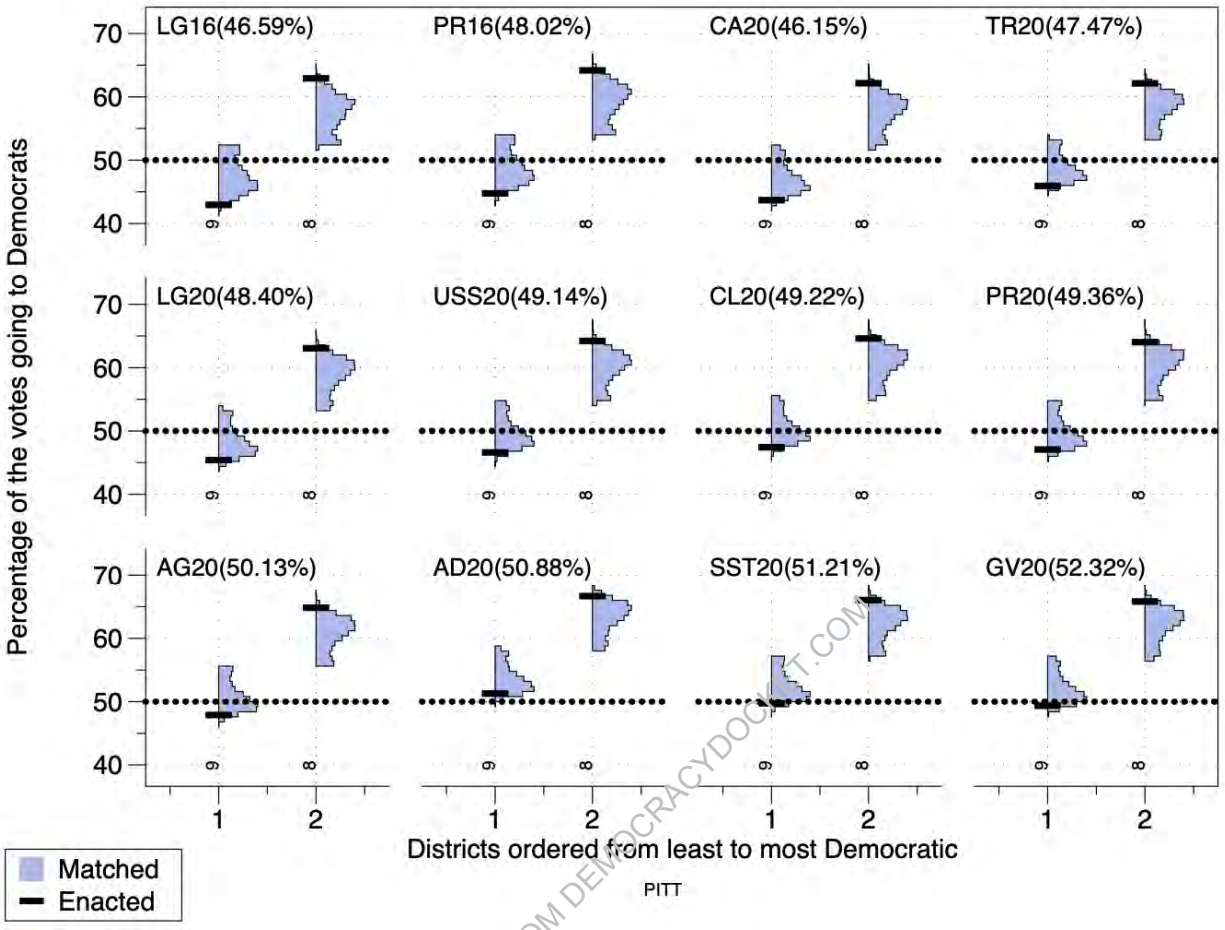
PX474 (Cooper Map 39)

349. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Pitt county grouping is an intentional, pro-Republican partisan redistricting.

350. Figure 6.1.16 shows Dr. Mattingly’s analysis of this grouping.

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PX655 (Mattingly Figure 6.1.16)

351. The Court finds that Democrats were packed into the most Democratic district in Pitt County (District 8) and cracked out of the most Republican district (District 9). PX629 at 40; PX655. The effect is that the Republicans regularly win one of the two seats in situations where in the nonpartisan ensemble plans would not, including in the Attorney General 2020, Governor 2020, and Secretary of State 2020 elections. Dr. Mattingly quantified the cracking and packing of Democrats in Pitt County: over all of the elections considered, the percentage of plans in the non-partisan ensemble that have more Democrats in District 8 than the enacted plan fluctuates between 1.1% and 5.3%. PX629 at 40.

352. The Court finds, as Dr. Pegden’s findings show, that the Pitt House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level

analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 96.3% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 89.1% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 21.

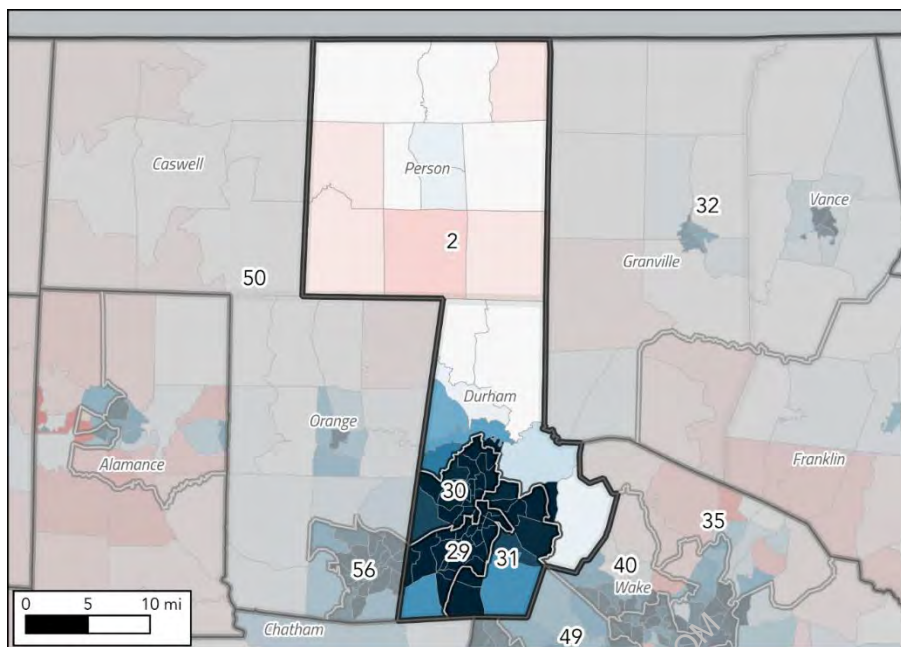
353. In Dr. Barber's analysis, in 91% of his simulations there is one Democratic leaning district and in the remaining 9% of the simulations there are two Democratic leaning districts. Although the current seats in this county grouping are both held by Democrats, the Enacted Map aligns with the outcome of his simulations and now creates only one Democratic district. LDTX107 at 39, 43.

354. The Court finds the districts in the Pitt House county grouping, HD8 and HD9, to be the result of intentional, pro-Republican partisan redistricting.

**e. Durham-Person House County Grouping**

355. The Durham-Person House County Grouping contains House District 2 ("HD2"), House District 29 ("HD29"), House District 30 ("HD30"), and House District 31 ("HD31"). HD2 is comprised of Person County and portions of Durham County. HD29, HD30, and HD31 are comprised of portions of only Durham County. Harper Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

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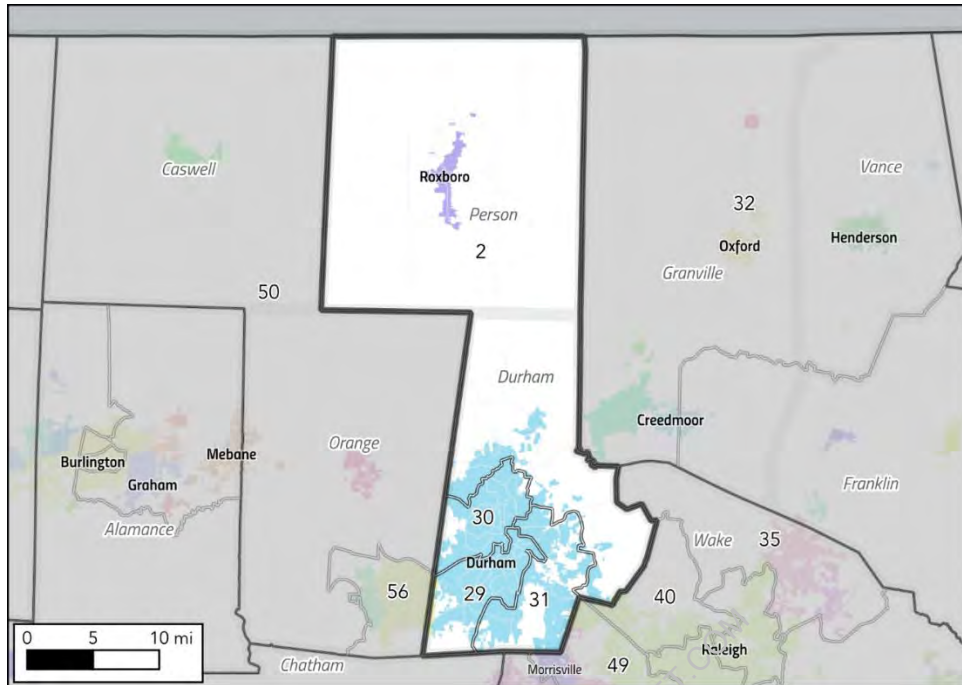


PX475 (Cooper Map 40)

356. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Sondra Stein resides in HD2. No Individual Plaintiff resides in HD29, HD30, or HD31. No Organizational Plaintiff challenges the House Districts in this county grouping.

357. Durham County is the most Democratic county in North Carolina, having given 81.6% of its two-party vote share to President Biden in the 2020 election and having “voted overwhelmingly Democratic candidates in every 2020 county-wide election.” PX425 at 84. But the enacted district lines create an artificially competitive district in this cluster, HD2, by joining the more competitive VTDs in eastern and northern Durham County with Person County, to the north. *Id.*

358. Although the City of Durham is split across all four House districts in this county grouping, a comparison of Dr. Cooper’s red-blue map (PX475), and his map showing the municipal boundaries within this cluster (PX476), indicates that Legislative Defendants packed the most Democratic portions of the City of Durham into House Districts 29, 30, and 31.

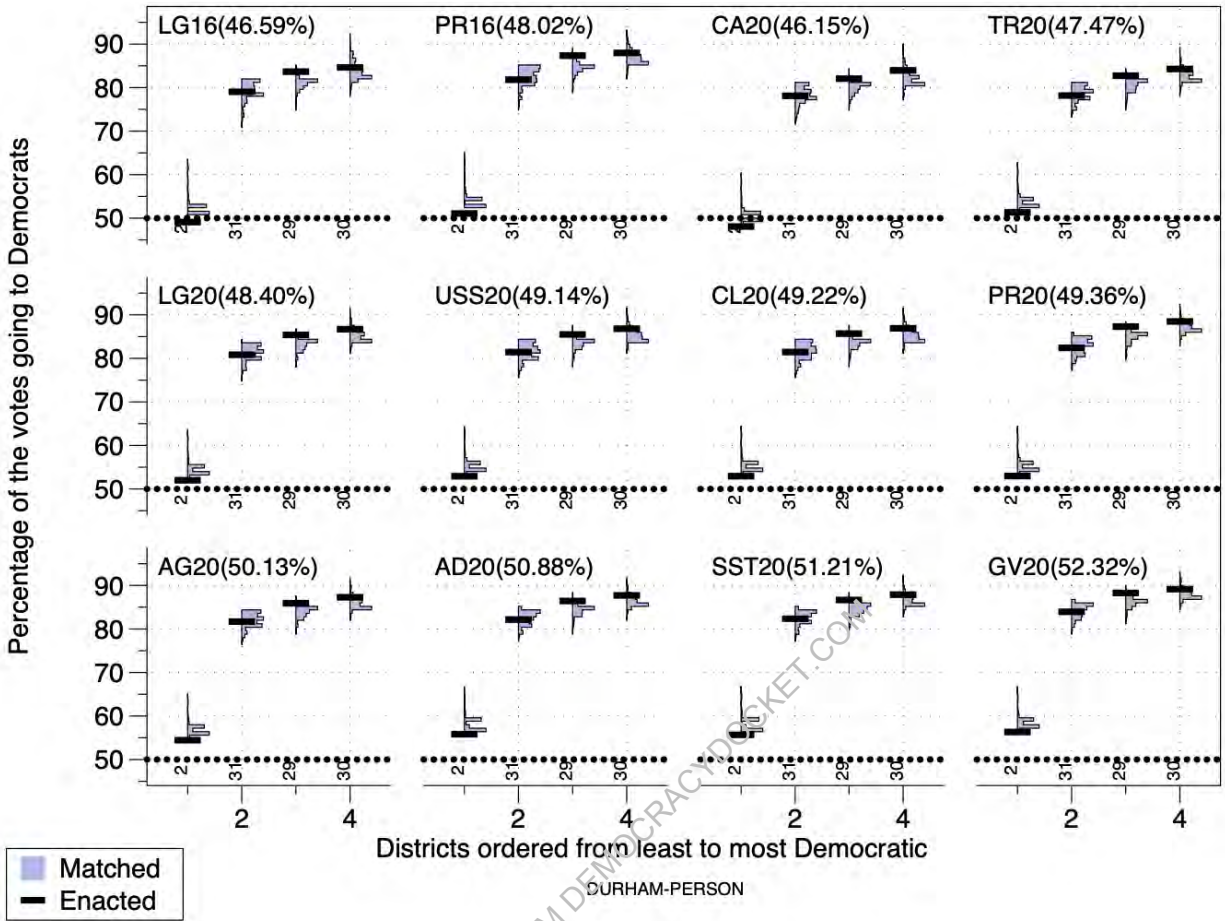


PX476 (Cooper Map 41)

359. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Durham-Person county grouping is an intentional, pro-Republican partisan redistricting.

360. Figure 6.1.22 shows Dr. Mattingly's analysis of this grouping.

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PX657 (Mattingly Figure 6.1.22)

361. The Court finds that Democrats were again cracked out of the most Republican district in the Durham-Person grouping. PX629 at 44; PX657. The nonpartisan ensemble shows that there are typically three highly Democratic districts and one more moderately Democratic district. *Id.* But in the enacted plan, the Democrats are cracked out of the moderately Democratic district, such that in Republican wave elections, the Republicans gain that seat even though they rarely would under the nonpartisan ensemble. In particular, in the Lieutenant Governor 2016 and Commissioner of Agriculture 2020 elections, where the Democrats only get around 46% of the statewide vote fraction, this cracking would be enough to deny a seat to the Democrats even though they would win the seat in a nonpartisan map. Not a single map in the non-partisan ensemble across any of the elections Dr. Mattingly

considered showed a smaller fraction of Democrats in the most Republican district than the enacted plan. PX629 at 44. In other words, this cluster shows more cracking of Democrats than every single plan in the nonpartisan ensemble. *Id.*

362. The Court finds, as Dr. Pegden's findings show, that the Durham-Person House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.932% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.79% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 25.

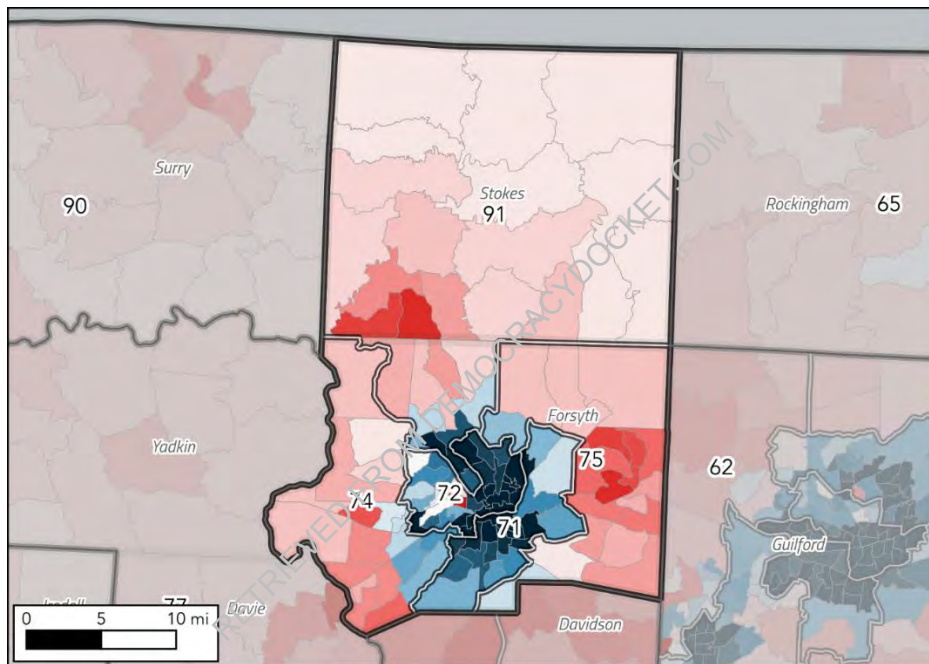
363. In the Durham-Person House county grouping, under each of the 11 elections that Legislative Defendants' expert Dr. Barber considered, Democrats win four seats under 100% of Dr. Barber's simulations, but under two of those elections (2016 Senate and 2016 Lt. Governor), Democrats win only three seats under the enacted map—an outcome never once encountered in the 37,800 simulations for this cluster generated by Dr. Barber's algorithm. LDTX107 at 131.

364. The Court finds the districts in the Durham-Person House county grouping, HD2, HD29, HD30, and HD31, to be the result of intentional, pro-Republican partisan redistricting.



**f. Forsyth-Stokes House County Grouping**

365. The Forsyth-Stokes House County Grouping contains House District 71 (“HD71”), House District 72 (“HD72”), House District 74 (“HD74”), House District 75 (“HD75”), and House District 91 (“HD91”). HD71, HD72, HD74, and HD75 are comprised of portions of only Forsyth County. HD91 is comprised of Stokes County and portions of Forsyth County. Harper Plaintiffs and Plaintiff Common Cause challenge these House Districts as the product of unlawful partisan gerrymanders.

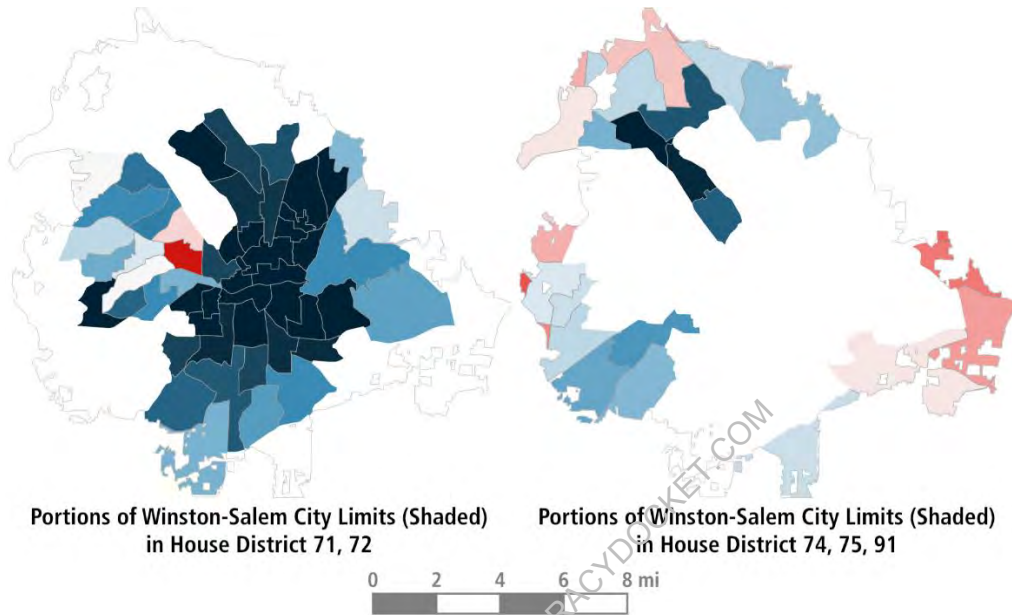


PX468 (Cooper Map 33)

366. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Chenita Barber Johnson resides in HD72. No Individual Plaintiff resides in HD71, HD74, HD75, or HD91. Organizational Plaintiff Common Cause challenges the House Districts in this county grouping.

367. Legislative Defendants created Republican-leaning districts in House Districts 74, 75, and 91 by packing the Democratic voters in and around Winston-Salem into House Districts 71 and 72. PX425 at 73.

368. While the district boundaries in this grouping split Winston-Salem across all five districts, the district boundaries pack most Democratic voters in Winston-Salem into House Districts 71 and 72. *Id.*



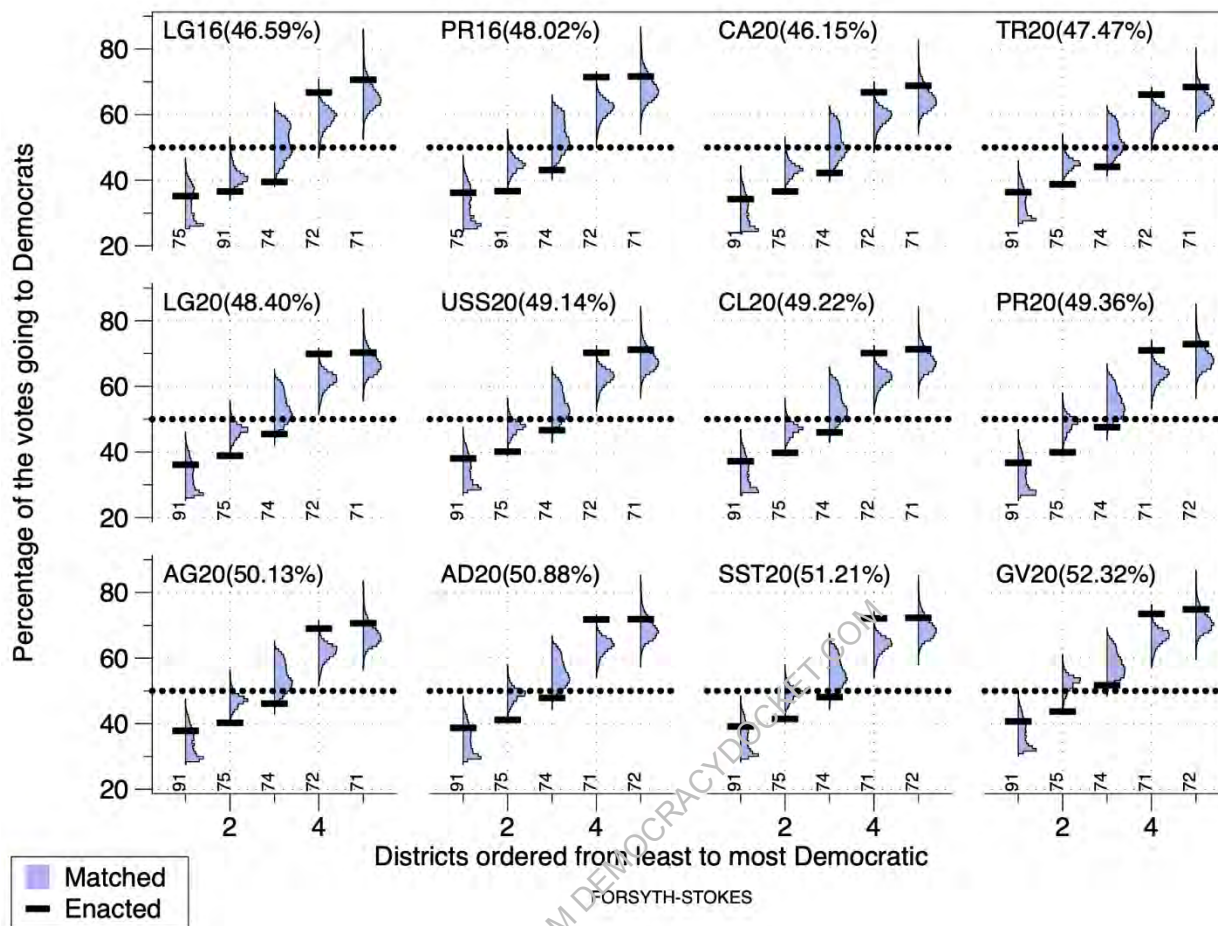
PX469 (Cooper Map 34)

369. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Forsyth-Stokes county grouping is an intentional, pro-Republican partisan redistricting.

370. Figure 6.1.7 shows Dr. Mattingly's analysis of this grouping.

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PX652 (Mattingly Figure 6.1.7)

371. The Court finds that Democrats were again cracked out of the three least Democratic (*i.e.*, most-Republican) districts in this grouping and packed into heavily Democratic districts (Districts 72 and 71). PX629 at 34; PX652. The effect is that the Republicans regularly win three out of five seats in this cluster even in situations where the Democrats would win three in the vast majority of plans in the nonpartisan ensemble. This is seen in the Senate 2020, President 2020, President 2016, and Attorney General 2020 races, among others. PX629 at 34. Dr. Mattingly quantified the cracking and packing of Democrats in the Forsyth-Stokes cluster: across every election he considered, less than 0.02% of the plans in the ensemble have a lower Democratic fraction in the three most Republican districts than the enacted plan, signaling extreme cracking. *Id.*

372. To preserve District 74's Republican lean, District 91—which is heavily Republican and at no risk of electing a Democrat—cuts into Winston Salem to pick up those Democratic precincts that cannot be incorporated into Districts 71 and 72. The result is a district line that cuts to the core of Winston-Salem and preserves Republican advantage in District 74. PX201 “SL-175” B75:BA75, B80:BA80. This configuration comes at a cost of compactness; the Enacted House Plan in Forsyth and Stokes Counties has an average Polsby-Popper score of 0.33. PX150 at 16.

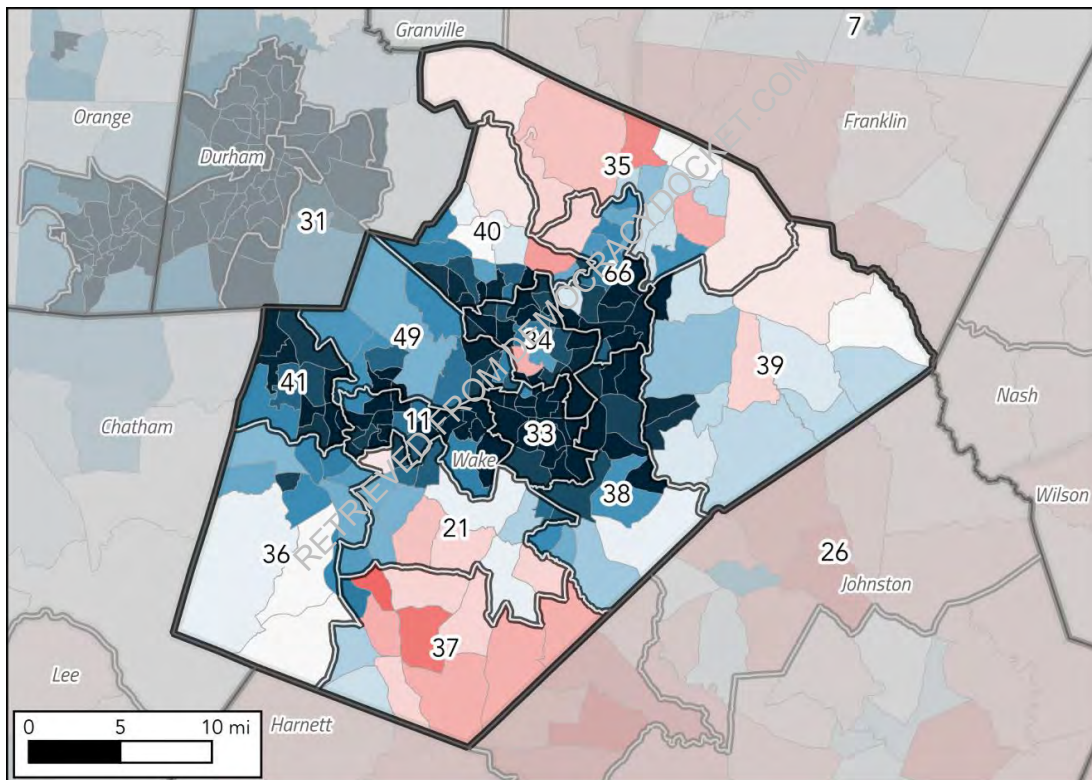
373. The Court finds, as Dr. Pegden's findings show, that the Forsyth-Stokes House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.912% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 99.73% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 18.

374. In the Forsyth-Stokes House cluster, the enacted map is a partisan outlier under three of the elections that Legislative Defendants' expert Dr. Barber considered. Under the 2020 President election, Democrats win only two seats, even though they would have won three seats under 50% of Dr. Barber's simulations and four seats under 35% of the simulations—a two-seat shift. Under eight of the 11 elections, the enacted map produces fewer Democratic seats than a majority of Dr. Barber's simulations—a metric Dr. Barber himself has relied upon. LDTX107 at 142.

375. The Court finds the districts in the Forsyth-Stokes House county grouping, HD71, HD72, HD74, HD75, and HD91, to be the result of intentional, pro-Republican partisan redistricting.

**g. Wake House County Grouping**

376. The Wake House County Grouping contains House District 11 (“HD11”), House District 21 (“HD21”), House District 33 (“HD33”), House District 34 (“HD34”), House District 35 (“HD35”), House District 36 (“HD36”), House District 37 (“HD37”), House District 38 (“HD38”), House District 39 (“HD39”), House District 40 (“HD40”), House District 41 (“HD41”), House District 49 (“HD49”), and House District 66 (“HD66”). All thirteen House Districts are comprised of portions of only Wake County. Plaintiffs challenge these House Districts, with the exception of HD66, as the product of unlawful partisan gerrymanders.



PX466 (Cooper Map 31)

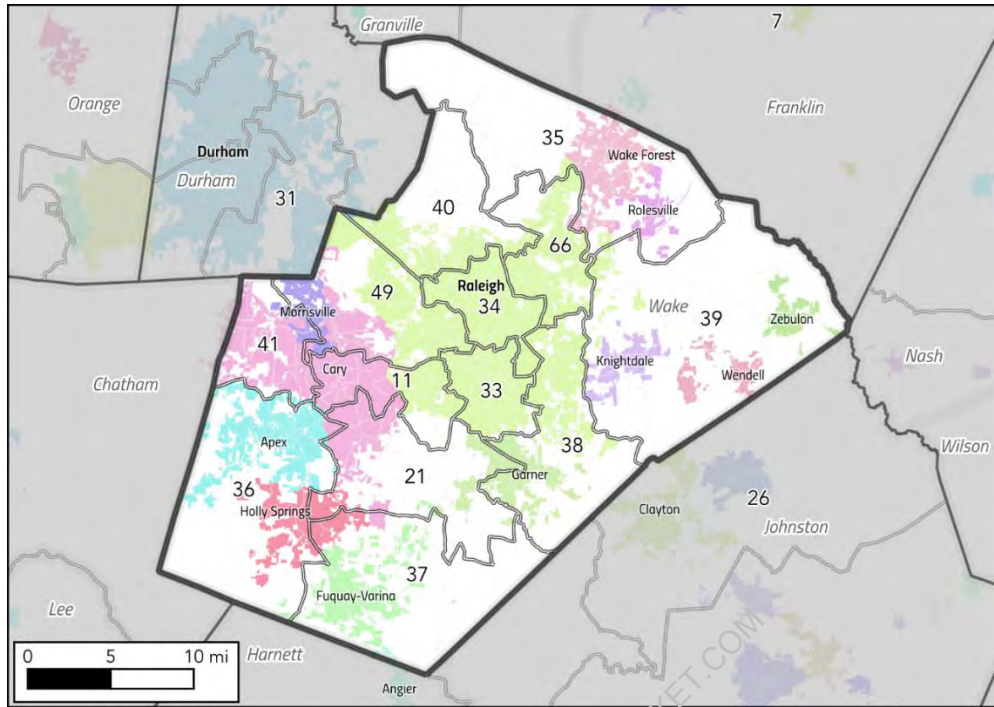
377. Harper Plaintiffs challenge this House county grouping. Individual Harper Plaintiff Rebecca Harper resides in HD21. Individual Harper Plaintiff John Anthony Balla resides in HD40. No Individual Plaintiff resides in HD11, HD33, HD34, HD35, HD36, HD37, HD38, HD39, HD41, or HD49. Organizational Plaintiff NCLCV challenges HD35, HD37, and

HD38 in this county grouping. Organizational Plaintiff Common Cause challenges HD35 in this county grouping.

378. Wake County includes Raleigh and 11 other municipalities. The county is strongly Democratic, LDTX107 at 169, and there are no Republicans on the county commission, PX425 at 70. The district boundaries in this grouping pack Democrats into as few districts as possible, leaving House Districts 11, 33, 36, 38, 41, and 49 without any Republican-leaning VTDs, House Districts 34 and 66 with only one Republican-leaning VTD, and House District 40 with only two Republican-leaning VTDs. Packing the majority of Democratic voters within these districts allows House Districts 35, to the north, and 37, to the southeast, to favor Republican candidates. *Id.*

379. House District 66 includes a “spike” that juts north to include a Democratic-leaning VTD on its boundary, effectively keeping the Democratic voters in that VTD “fenced off” from the House District 35, where they would otherwise make the election more favorable for a Democratic candidate. *Id.*

380. To the extent that Legislative Defendants argue that preserving municipal boundaries was a governing criterion, the district lines in this cluster split a number of cities, including Raleigh (split across 10 of the 12 districts), Cary, Garner, Fuquay-Varina, Apex, Holly Springs, and Morrisville. PX37.



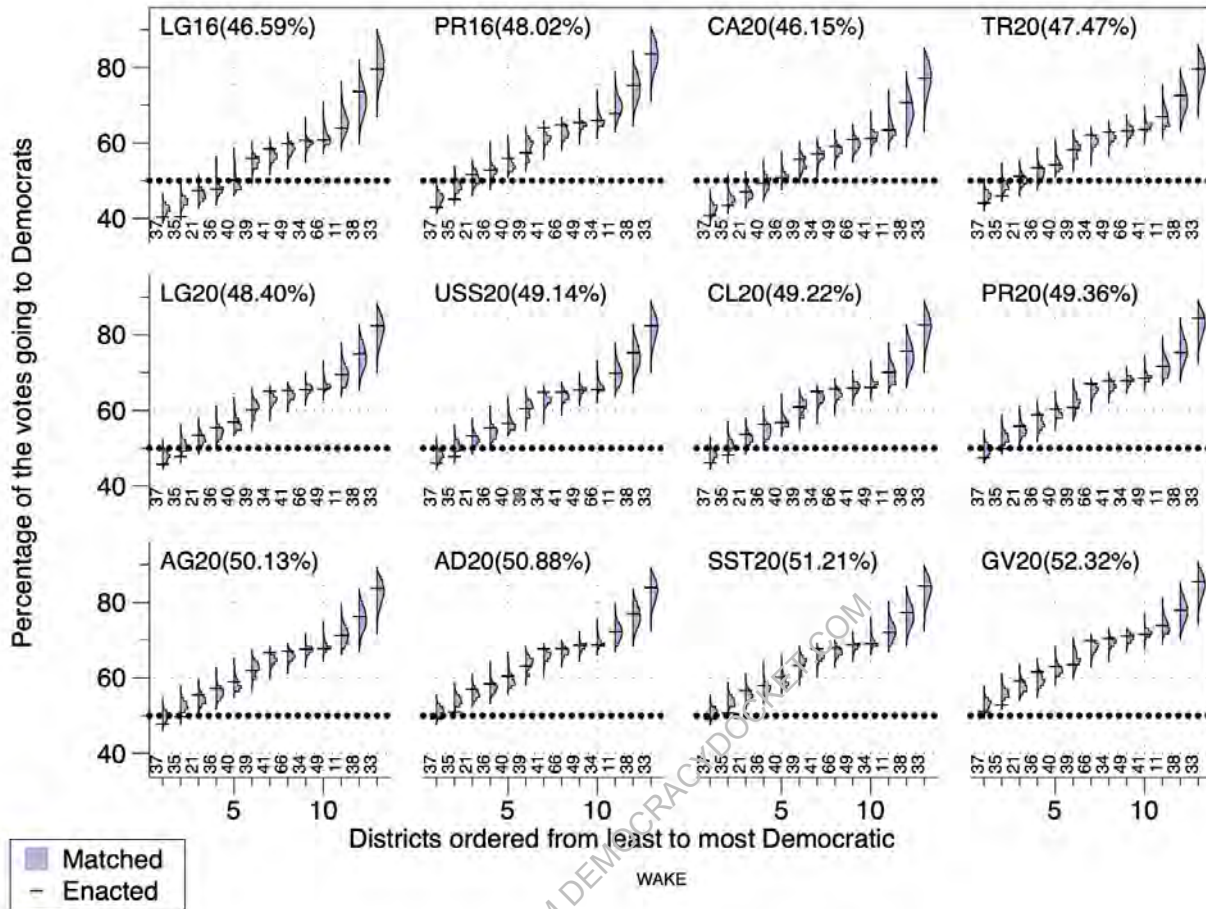
PX467 (Cooper Map 32)

381. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Wake county grouping is the result of intentional, pro-Republican partisan redistricting.

382. Figure 6.1.4 shows Dr. Mattingly’s analysis of this grouping.

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PX651 (Mattingly Figure 6.1.4)

383. The Court finds that Democrats were cracked out of the two least Democratic (*i.e.*, most-Republican) districts in this grouping (Districts 37 and 35) and packed into heavily Democratic districts. PX629 at 32; PX651. The effect is to swing the two most Republican districts into play in elections where they would not be under the ensemble. For example, in the Attorney General 2020 election, Republicans win two districts under the enacted plan and Democrats win 11 even though Democrats would always win 12 under the ensemble and often win all 13. Dr. Mattingly quantified the cracking of Democrats out of those two most Republican districts: across every election he considered, the number of maps in the ensemble which have a lower Democratic vote fraction in the two most Republican districts than they do in the enacted plan is less than 0.42%, except for the Commissioner of Agriculture 2020

election, where it is 1.2%. That is, the enacted plan is in the most extreme 0.42% percent of plans in terms of cracking of Democrats. PX629 at 32.

384. The Court finds, as Dr. Pegden's findings show, that the Wake House county grouping is the result of intentional, pro-Republican partisan redistricting. In his first-level analysis, Dr. Pegden found that the enacted plan's version of this grouping is more favorable to Republicans than 99.27% of the maps that his algorithm encountered by making small changes to the district boundaries. In his second-level analysis, Dr. Pegden found that this grouping is more carefully crafted to favor Republicans than at least 97.8% of all possible districtings of this county grouping that satisfy the criteria Dr. Pegden used. PX523 at 22.

385. In the Wake House county grouping, the enacted map is a partisan outlier under four of the elections that Legislative Defendants' expert Dr. Barber considered. Under three of those elections, the enacted map produces fewer Democratic districts than 90-98% of Dr. Barber's simulations, and under the fourth election, the enacted map produces fewer Democratic districts than 85% of Dr. Barber's simulations. LDTX107 at 173.

386. The Court finds the challenged districts in the Wake House county grouping, HD11, HD21, HD33, HD34, HD35, HD36, HD37, HD38, HD39, HD40, HD41, and HD49, to be the result of intentional, pro-Republican partisan redistricting.

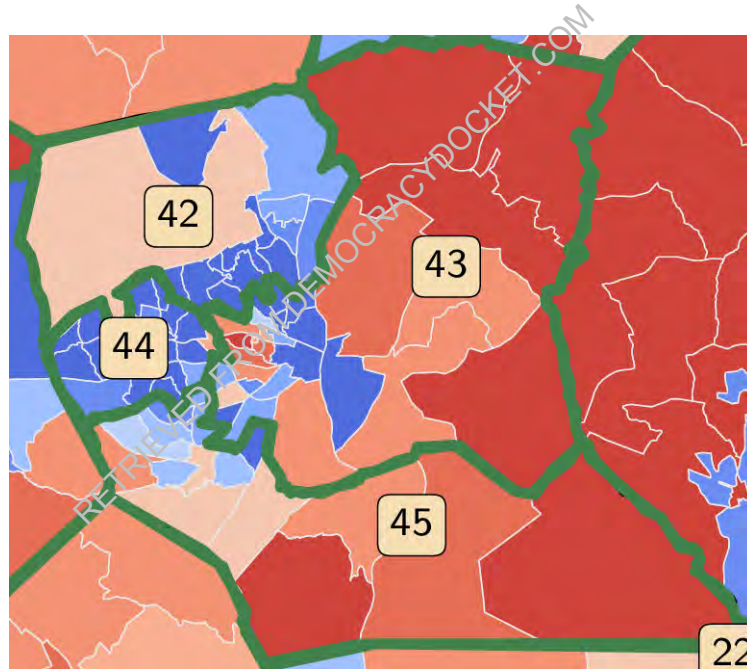
#### **h. Cumberland House County Grouping**

387. The Cumberland House County Grouping contains House District 42 ("HD42"), House District 43 ("HD43"), House District 44 ("HD44"), and House District 45 ("HD45"). Each of these four House Districts are comprised of portions of only Cumberland County. The Organizational Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.

388. No Individual NCLCV Plaintiff resides in any House District within this county grouping. Organizational Plaintiff Common Cause challenges every House District in

this county grouping. Organizational Plaintiff NCLCV challenges only HD43 and HD45 in this county grouping.

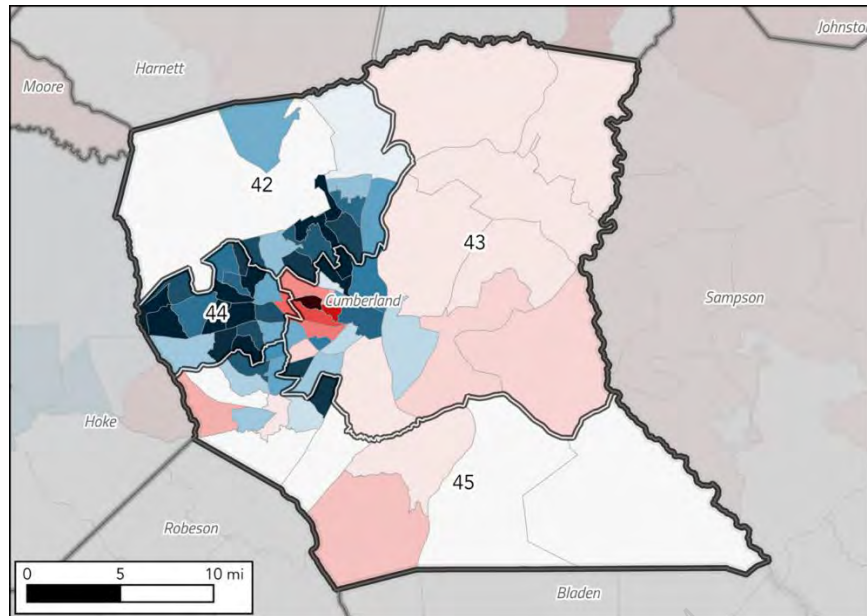
389. The Enacted Plan sacrifices compactness in order to maximize Republican advantage in this grouping. It does so by packing Democrats into two Districts 42 and 44. PX201 “SL-175” AO43, AO45. The result of this packing is that Districts 43 and 45 favor Republicans. 50.5% of District 43’s major-party voters voted for President Trump in the 2020 election; the same figure in District 45 was 50.8%. PX201 “SL175” AO44, AO46. This result came at the cost of lowering the average compactness score of the four districts to 0.34. PX150 at 16.



PX181 (Figure 31: Enacted House Districts 42, 43, 44 & 45)

390. Harper Plaintiffs do not challenge the districts in this county grouping; however, Harper Plaintiffs' experts, as part of their overall analysis in these consolidated cases, analyzed this county grouping as shown below.





PX478 (Cooper Map 43)

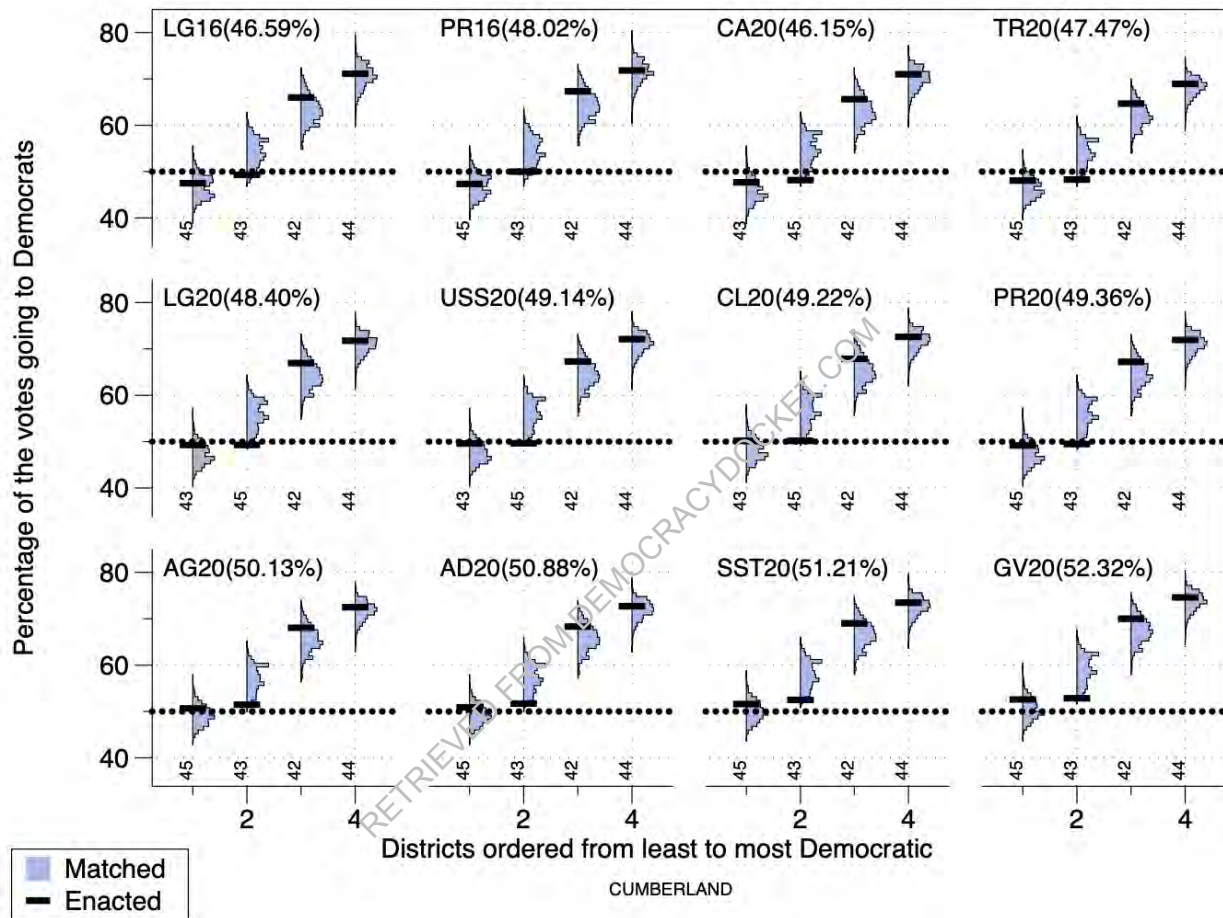
391. Cumberland County is a “heavily Democratic county” that provided 58% of its two-party vote share to Joe Biden in 2020 and that has not provided a plurality of votes to a Republican Presidential candidate since 2004. PX425 at 89.

392. Despite Cumberland County’s strong Democratic tilt, Legislative Defendants drew district lines that created two competitive districts, House District 43 in the east and House District 45 in the south, by packing the most heavily Democratic VTDs in Fayetteville into House Districts 42 and 44. *Id.*; TR 01/03/2022.

393. Fayetteville is split among all four districts in this county House District 43 includes almost all of the few Republican-leaning VTDs within Fayetteville, while House District 45 includes Republican-leaning and more competitive VTDs in the south of the city. PX425 at 89-90; TR 01/03/2022. These district lines allowed House District 43 to be more favorable than it otherwise would be for the first-term incumbent Republican candidate in that district. PX425 at 89.

394. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper’s analysis and independently establish that the Cumberland county grouping is an intentional, pro-Republican partisan redistricting.

395. Figure 6.1.28 shows Dr. Mattingly’s analysis of this grouping.



PX659 (Mattingly Figure 6.1.28)

396. The Court finds that Cumberland County is a partisan outlier. Democrats have been cracked out of the second most Republican district (District 43), which normally is comfortably Democratic, but under the enacted plan frequently produces a Republican seat. For each of the elections considered, the number of plans in the ensemble with smaller fraction of Democrats in the second most Republican district is typically around 1% with, for a few elections, the percentage reaching as high as 7% or as low as 0.4%. PX629 at 48; PX659.

397. The Court finds, as Dr. Pegden's findings show, that the Cumberland House county grouping is the result of intentional, pro-Republican partisan redistricting. Dr. Pegden's first-level analysis determined that the enacted plan's version of the Cumberland county grouping is more favorable to Republicans than 83.5% of maps that his algorithm encountered by making small changes to the district boundaries. PX523 at 27. This result was not an unusual enough result to enable a statistically significant second-level analysis. *Id.* But Dr. Pegden's "wave threshold" analysis found the Cumberland county grouping to be a partisan outlier. *Id.* at 36. As explained, the wave threshold metric captures, for a given map, the smallest uniform swing in election results that would be required to give the Democrats an additional seat. Using this alternative analysis allowed Dr. Pegden to assess whether this grouping may have been drawn to achieve "other conceivable partisan goals" besides merely maximizing Republican seat count, "such as facilitating the re-election of particular representatives in particular districts." *Id.* at 33. Dr. Pegden concluded, and the Court finds, that the enacted plan's version of this county grouping had a wave threshold more favorable to Republicans than 99.59% of maps that his algorithm encountered by making small changes to the district boundaries. *Id.* at 36.

398. In the Cumberland House county grouping, under six of the individual elections Legislative Defendants' expert Dr. Barber considered, Democrats win two seats under the enacted map. While Dr. Barber notes that in these cases the enacted plans create one, or occasionally two, competitive districts that could be heavily contested, in each case Democrats would have won more than two seats in 100% of Dr. Barber's simulations. LDTX107 at 116.

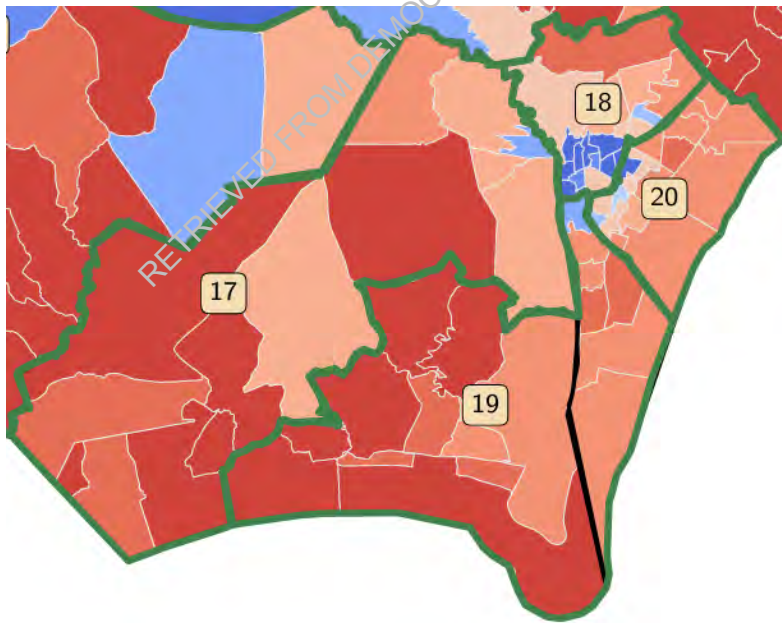
399. The Court finds the districts in the Cumberland House county grouping, HD42, HD43, HD44, and HD45, to be the result of intentional, pro-Republican partisan redistricting.

**i. Brunswick-New Hanover House County Grouping**

400. The Brunswick-New Hanover House County Grouping contains House District 17 (“HD17”), House District 18 (“HD18”), House District 19 (“HD19”), and House District 20 (“HD20”). HD17 is comprised of portions of only Brunswick County. HD19 is comprised of portions of Brunswick and New Hanover Counties. HD18 and HD20 are comprised of portions of only New Hanover County. NCLCV Plaintiffs challenge this county grouping as the product of an unlawful partisan gerrymander.

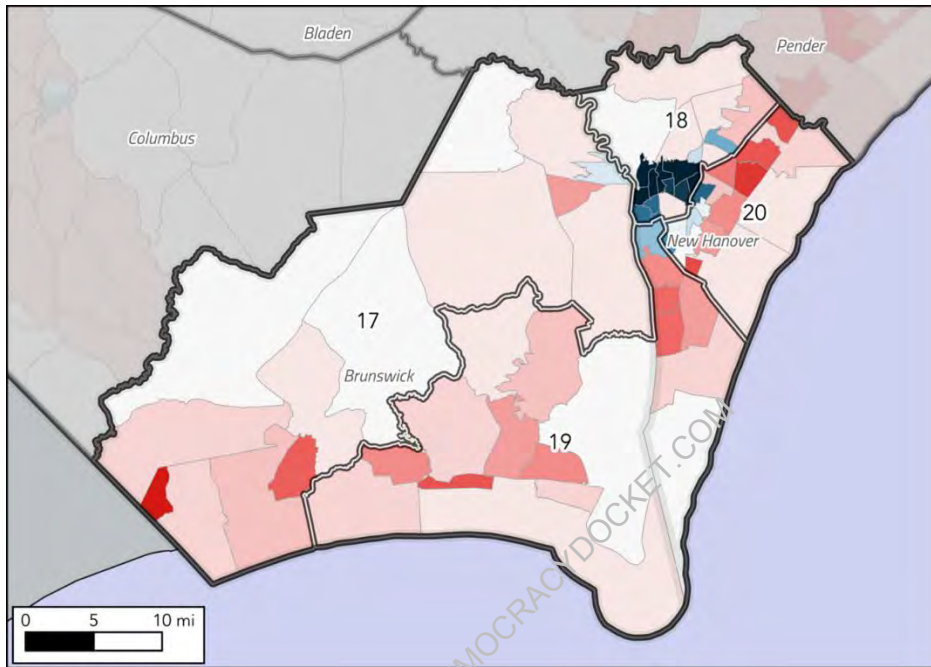
401. NCLCV Plaintiffs challenge this House county grouping. No Individual NCLCV Plaintiff resides in these House Districts. Organizational Plaintiff NCLCV challenges all House districts in this county grouping.

402. The Enacted House Plan creates three Republican districts in this cluster: House Districts 17, 19, and 20. PX425 at 96; PX201 “SL175” B18:BA21.



PX181 (Figure 26: Enacted House Districts 17, 18, 19 & 20)

403. Harper Plaintiffs do not challenge the districts in this county grouping; however, Harper Plaintiffs' experts, as part of their overall analysis in these consolidated cases, analyzed this county grouping as shown below.



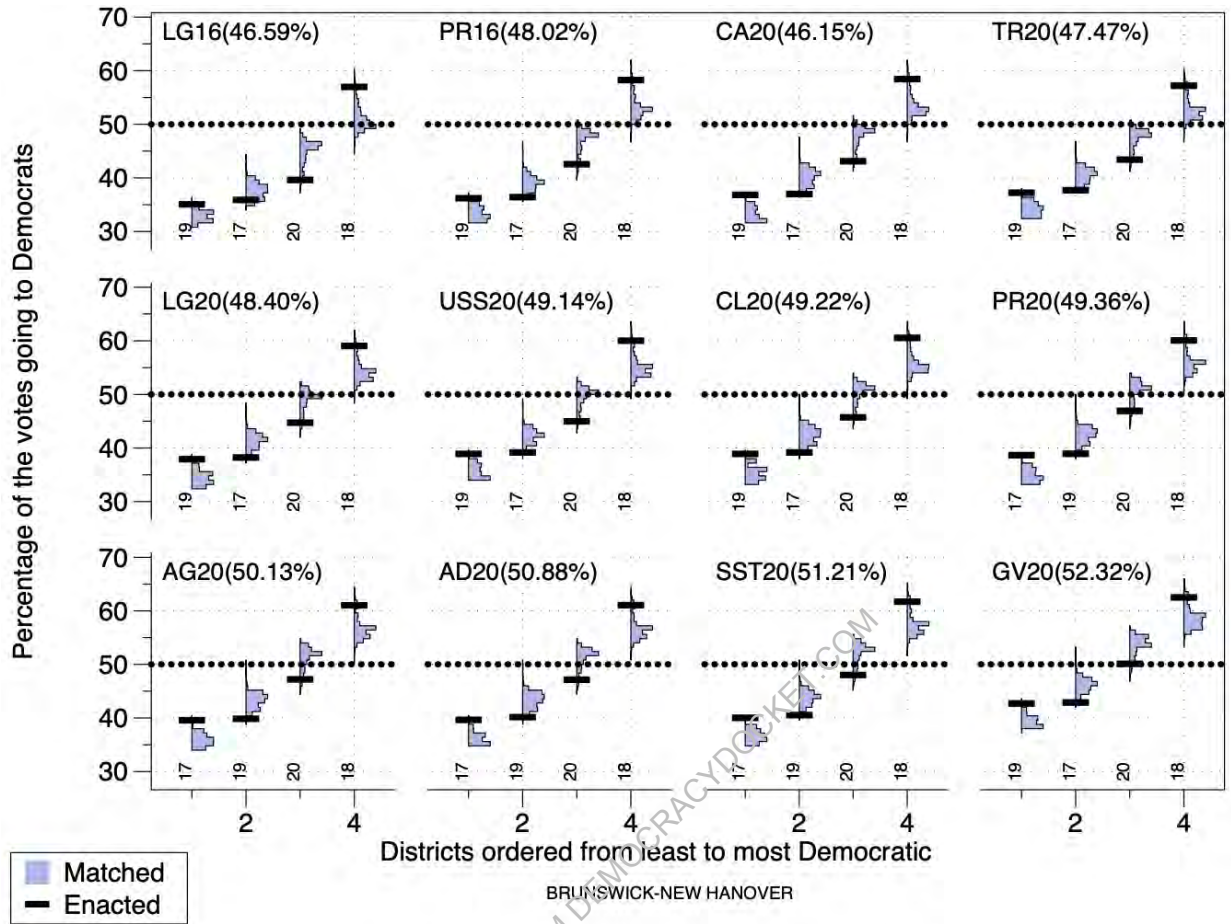
PX481 (Cooper Map 46)

404. This grouping is located in the southeastern corner of the state and includes the heavily Democratic City of Wilmington. The district lines pack Democratic voters in and around Wilmington into House District 18, allowing the other three districts, particularly House District 20, to lean more heavily towards the Republican candidate. PX425 at 95. House District 19 includes a Democratic-leaning VTD south of Wilmington, which has the effect of keeping those Democratic voters out of House District 20, keeping that district safer for the Republican candidate. PX425 at 95.

405. The simulations of Drs. Mattingly and Pegden confirm Dr. Cooper's analysis and independently establish that the Brunswick-New Hanover county grouping is an intentional, pro-Republican partisan redistricting.

406. Figure 6.1.34 shows Dr. Mattingly's analysis of this grouping.





PX661 (Mattingly Figure 6.1.34)

407. The Court finds that Democrats were again packed and cracked in the Brunswick-New Hanover cluster. PX629 at 52; PX661. In particular, they are packed into the most Democratic district (District 18) and cracked out of the middle-most Republican districts. PX661. This enables Republicans to safely win three out of four districts, even in situations where Democrats would almost always win two seats under the nonpartisan ensemble. PX629 at 42. Examples of this are in the Attorney General 2020, State Auditor 2020, and Secretary of State 2020 elections. Over each of the elections considered, the fraction of plans in the nonpartisan ensemble where there are fewer Democratic votes in the second and third most Republican districts than in the enacted plan is always less than 0.5%

and often much smaller. PX629 at 52. In other words, the enacted plan cracks more Democrats in those districts than all but 0.5% of plans in the nonpartisan ensemble.

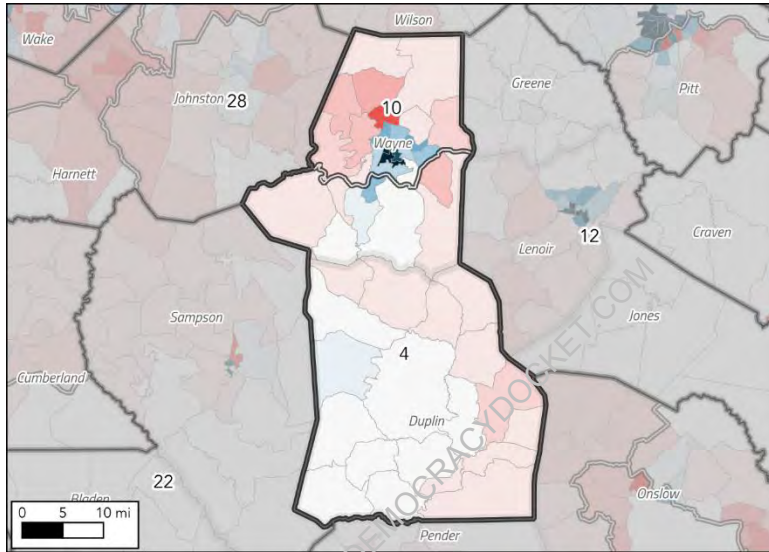
408. The Court finds, as Dr. Pegden's findings show, that the Brunswick-New Hanover House county grouping is the result of intentional, pro-Republican partisan redistricting. Dr. Pegden's first-level analysis determined that the enacted plan's version of the Brunswick-New Hanover county grouping is more favorable to Republicans than 89.4% of maps that his algorithm encountered by making small changes to the district boundaries. PX523 at 24. This result was not an unusual enough result to enable a statistically significant second-level analysis. *Id.* But Dr. Pegden's "wave threshold" analysis found this county grouping to be a partisan outlier. *Id.* at 34. Dr. Pegden concluded, and the Court finds, that the enacted plan's version of the Brunswick-New Hanover county grouping had a wave threshold more favorable to Republicans than 99.72% of maps that his algorithm encountered by making small changes to the district boundaries. *Id.* In particular, for the enacted map, Democratic performance could increase by 10.1 percentage points in every district, yet Democrats still would capture only two of the four seats. *Id.*

409. In 100% of Legislative Defendants' expert Dr. Barber's simulations, there is one Democratic leaning district in this Republican leaning county cluster. Under Dr. Barber's analysis, the enacted plans are in alignment with his simulations in creating one Democratic district. LDTX107 at 132, 136.

410. The Court finds the districts in the Brunswick-New Hanover House county grouping, HD17, HD18, HD19, and HD20, to be the result of intentional, pro-Republican partisan redistricting.

**j. Duplin-Wayne House County Grouping**

411. The Duplin-Wayne House County Grouping contains House District 4 (“HD4”) and House District 10 (“HD10”). HD4 is comprised of Duplin County and portions of Wayne County. HD10 is comprised of portions of only Wayne County. Plaintiffs challenge these House Districts as the product of unlawful partisan gerrymanders.



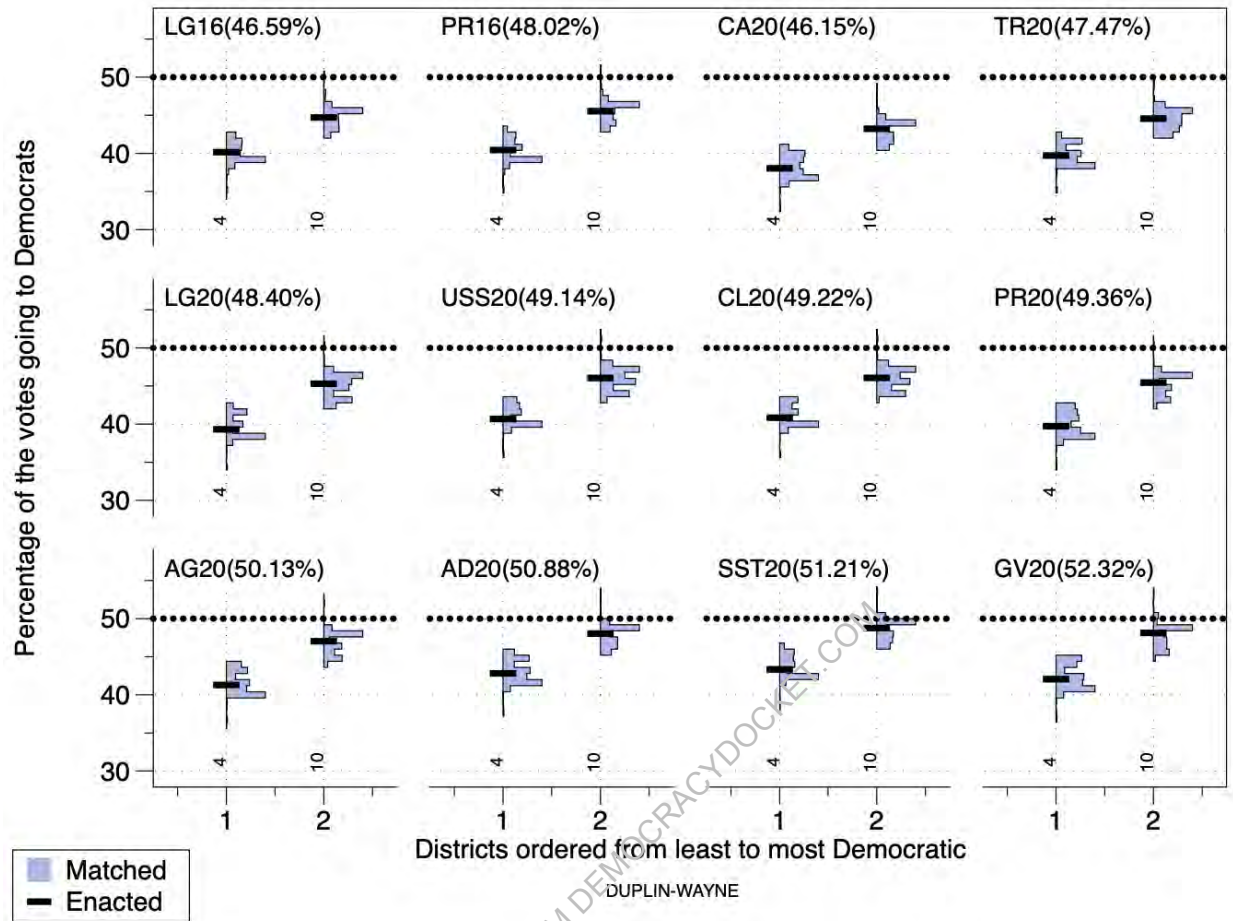
PX477 (Cooper Map 42)

412. Harper Plaintiffs and NCLCV Plaintiffs challenge this House county grouping. Individual Harper Plaintiffs Bobby Jones and Kristiann Herring reside in HD10. No Individual Plaintiff resides in HD4. Organizational Plaintiff NCLCV challenges both House districts in this county grouping.

413. The district boundary that runs through Wayne County ensures that this cluster will contain two safely-Republican districts. PX425 at 87.

414. Figure 6.1.19 shows Dr. Mattingly’s analysis of this grouping.





PX656 (Mattingly Figure 6.1.19)

415. Dr. Mattingly’s analysis did not find that Duplin-Wayne was an outlier, because the black bars representing the enacted plan fall within the middle of the blue histograms representing the nonpartisan ensemble. PX629 at 42.

416. Dr. Pegden was unable to generate any comparison districtings of this House county grouping due to his conservative methodology. PX523 at 17; *see id.* at 11. The fact that his algorithm cannot generate comparison maps does not say one way or the other whether the enacted map of this grouping is the result of intentional, pro-Republican partisan redistricting. *Id.* at 11.

417. Under Legislative Defendants’ expert Dr. Barber’s analysis, this county grouping is moderately Republican and, after discarding simulations for containing more

county traversals or being less compact, zero simulated maps remained for Dr. Barber to analyze. After retaining 2,704 of his simulated maps that have the highest compactness score, the enacted maps match his simulated maps in producing no Democratic leaning districts in this county grouping for all 11 elections. LDTX107 at 58, 63.

418. The Court finds the districts in the Duplin-Wayne House county grouping, HD4 and HD10, to not be the result of intentional, pro-Republican partisan redistricting.

**k. Onslow-Pender House County Grouping**

419. The Onslow-Pender House County Grouping contains House District 14 (“HD14”), House District 15 (“HD15”), and House District 16 (“HD16”). HD14 and HD15 are each comprised of portions of only Onslow County. HD16 is comprised of Pender County and portions of Onslow County. NCLCV Plaintiffs challenge this county grouping as the product of an unlawful partisan gerrymander.

420. No Individual Plaintiff resides in these House Districts. Organizational Plaintiff NCLCV challenges HD14 and HD15 in this county grouping.

421. Although one of the districts in this cluster—District 15—could have centered around Jacksonville, Legislative Defendants instead split the Jacksonville area’s Democrats between two districts—House Districts 14 and 15—in order to create three heavily Republican districts that prevent Onslow County’s Democratic voters from having any meaningful say in elections. PX201 “SL-175” B15:BA16. This, again, came at the cost of compactness: the average compactness score for Districts 14, 15, and 16 is 0.30. PX150 at 16.

422. The Court finds the districts in the Onslow-Pender House county grouping, HD4 and HD10, to not be the result of intentional, pro-Republican partisan redistricting.

### 3. North Carolina Congressional Districts

423. The analysis and conclusions of Plaintiffs' experts establishes that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation. Plaintiffs' experts employed computer simulations to generate alternative Congressional plans to serve as a baseline for comparison to the enacted Congressional plan. Even though these experts employed different methodologies, each expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage. Plaintiffs' expert Dr. Christopher Cooper explained how this intentional, pro-Republican partisan redistricting was carried out in each of the 14 congressional districts and has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly. The Court agrees with the findings of each of these experts and finds that the 2021 Congressional Plan is an intentional, and effective, pro-Republican partisan redistricting.

424. Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting.

#### a. Harper Plaintiffs' Expert Dr. Chen's Analysis of the Congressional Plans

##### (i) *Analysis of the Congressional Plan's Adherence to the Adopted Criteria*

425. In his simulation set, Dr. Chen programmed his algorithm to follow the traditional districting principles mandated by the General Assembly's Adopted Criteria. PX482 at 5 ¶8; PX34. This is the same method Dr. Chen employed in *Common Cause v. Lewis*, 2019 WL 4569584, and *Harper v. Lewis*, No. 19 CVS 012667 (N.C. Super. 2019). PX482 at 5 ¶8.

426. Specifically, Dr. Chen programmed the computer algorithm to create 1,000 independent simulated plans adhering to the following seven districting criteria mandated by the 2021 Adopted Criteria: (1) population equality (2) contiguity, (3) minimizing county splits and (4) minimizing VTD splits and prioritizing the other traditional redistricting principles set forth in the Adopted Criteria of (5) compactness, (6) avoiding incumbent pairings, and (7) avoiding splitting municipalities. PX482 at 6-9 ¶11; PX34.

427. The Court finds that Dr. Chen's computer algorithm properly adhered to the Adopted Criteria, as well as traditional redistricting principles. The Court further finds that Dr. Chen's interpretation and application of the Adopted Criteria is fully consistent with General Assembly's requirements and guidance. The Court further finds that Dr. Chen's application of these criteria is consistent with generally accepted redistricting principles and practice.

428. First, Dr. Chen compared the number of counties that the simulated and enacted congressional plans split. The enacted congressional plan splits 14 counties. PX482 at 11-12 ¶17; PX484. Dr. Chen concluded this was one more split than necessary. *Id.* at 12-13 ¶17-18. From this, Dr. Chen concluded that the enacted congressional plan does not comply with the Adopted Criteria's rule against unnecessary division of counties. *Id.* at 13 ¶18. Dr. Chen also found that counties were only split multiple times in 1.8% of his simulations, and that within that small percentage Mecklenburg, Wake, and Guilford were not all split multiple times. *Id.* at 19; PX485.

429. The Court finds that the enacted congressional plan fails to follow and subordinates the Adopted Criteria's requirement that counties be split only for reasons of population equality or for the protection of incumbents. The Court finds that the enacted congressional plan splits more counties than is necessary. The Court also finds that the

enacted congressional plan unnecessarily splits three heavily Democratic counties—Mecklenburg, Wake, and Guilford Counties—into three districts each.

430. Dr. Chen also compared the number of VTDs split in the enacted congressional plan to his 1,000 simulations. Dr. Chen found that, in comparison to his simulations, the enacted congressional plan contains 25 VTD splits, almost double the number of VTDs that are necessary to split to maintain population equality. PX482 at 15 ¶¶21-22. From this, Dr. Chen concluded that the enacted congressional plan violates the Adopted Criteria’s requirement that VTDs “should be split only when necessary.” *Id.* at 15 ¶¶23; PX486.

431. The Court finds that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria’s requirement of avoiding the unnecessary splitting of VTDs. The Court finds that the enacted congressional plan splits more VTDs than is necessary.

432. Dr. Chen found that the enacted congressional plan is also less compact than almost all of his 1,000 simulations. Dr. Chen employed the measures of compactness set forth in the Adopted Criteria, known as Reock and Polsby-Popper scores. PX482 at 17 ¶¶24. PX34. For both measures, a higher score indicates that a plan’s districts are more compact. PX482 at 17-18 ¶¶26-27.

433. Dr. Chen found that, as measured by Polsby-Popper scores, the enacted congressional plan is far less compact than all 1,000 simulated congressional plans. PX482 at 17 ¶¶26. He further found, as measured by Reock scores, the enacted congressional plan is far less compact than almost all 1,000 simulated congressional plans. *Id.* at 18 ¶¶27. From this, Dr. Chen concluded that the enacted congressional plan is significantly less compact than would have been expected from a districting process adhering to the Adopted Criteria. *Id.* at 17-18 ¶¶26-27; PX487.

434. The Court finds that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The Court finds that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

**(ii) Analysis of Whether the Congressional Plan is a Statistical Partisan Outlier**

435. To compare the partisanship of his simulated plans to the enacted congressional plan, Dr. Chen used census block-level election results from recent statewide elections in North Carolina. PX482 at 21 ¶¶31-32. For his analysis, Dr. Chen used the following ten elections: 2016 US President, 2016 US Senator, 2016 Governor, 2016 Lieutenant Governor, 2016 Attorney General, 2020 US President, 2020 US Senator, 2020 Governor, 2020 Lieutenant Governor, and 2020 Attorney General. *Id.* at 21 ¶31. Dr. Chen aggregated the results of these elections into a single composite, referred to as the "Statewide Election Composite." *Id.* at 22 ¶33.

436. Dr. Chen analyzed these elections because they are the same state and federal offices whose election results were used by the General Assembly during its 2017 legislative redistricting process, and the 2017 redistricting process was the most recent one in which the leadership of the General Assembly's redistricting committees publicly announced how the General Assembly would evaluate the partisanship of its own districting plans. PX482 at 21 ¶31. Additionally, past voting history in federal and statewide elections is a strong predictor of future voting. *Id.* at 20 ¶28.

437. By overlaying these past election results onto the enacted congressional plan, Dr. Chen calculated the Republican share of the votes cast from within each district in the enacted congressional plan and in each simulated plan. PX482 at 20 ¶28. Based on these

calculations, Dr. Chen directly compared the partisanship of the enacted congressional plan and the simulated plans. *Id.* Dr. Chen used these comparisons to determine whether the partisanship of individual enacted districts and the partisan distribution of seats in the enacted congressional plan could reasonably have arisen from a districting process adhering to the Adopted Criteria and its explicit prohibition on partisan considerations. *Id.*

438. The Court finds that the use of statewide elections by Plaintiffs' experts to measure the partisanship of simulated and enacted districts to be a reliable methodology.

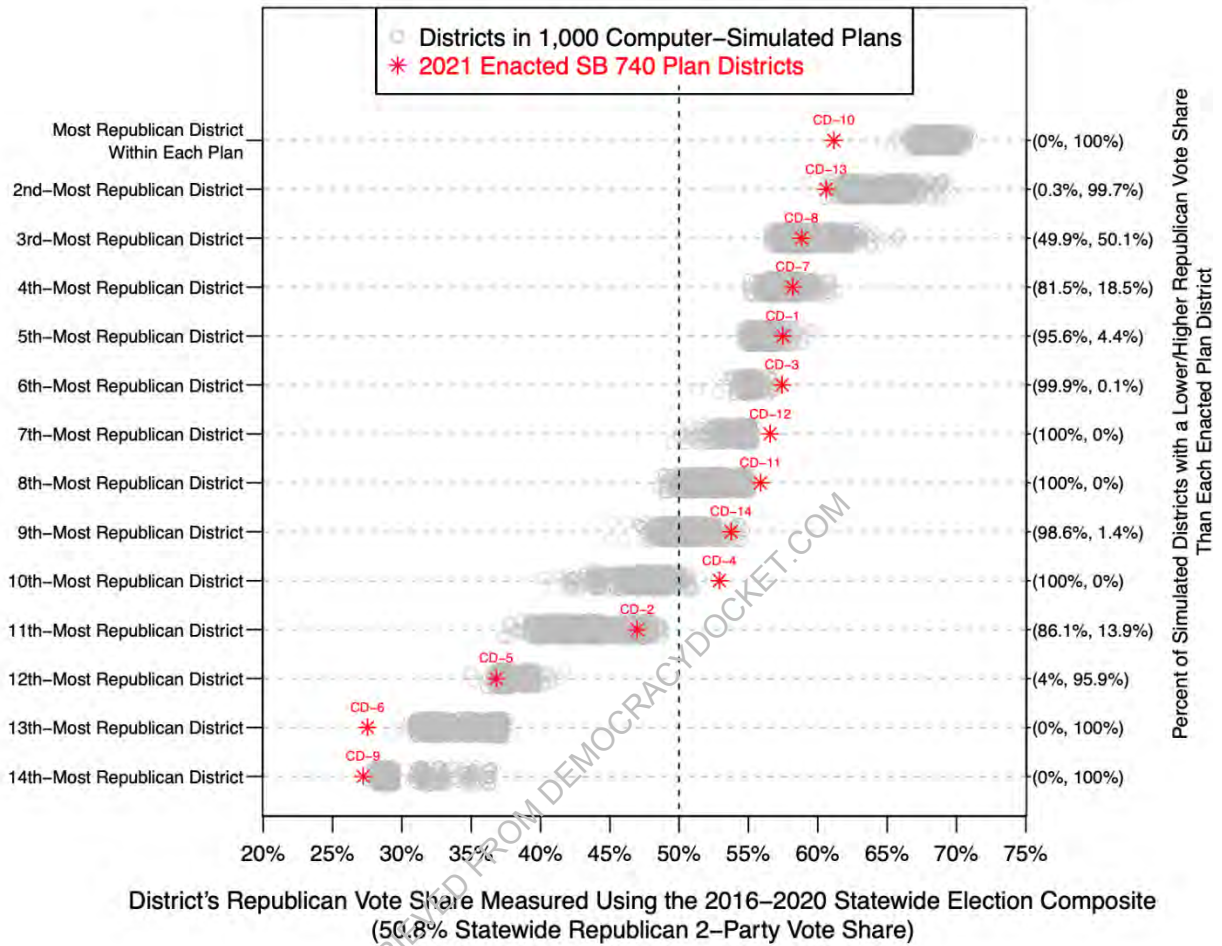
439. To measure the partisanship of his simulated districts and the enacted districts, Dr. Chen obtained precinct-level results for the elections in the ten elections in the Statewide Election Composite and aggregated the census block-level results to the district level. PX482 at 21 ¶32. In other words, using the census blocks that would comprise a particular district in a given simulation and the actual election results from those census blocks, Dr. Chen calculated the percentage total two-party votes in that simulated district for Republican candidates in the 2016-2020 statewide election contests. *Id.* at 21-22 ¶32-33.

440. Figure 4 in Dr. Chen's report compares the partisan distribution of districts in the enacted congressional plan to the partisan distribution of districts in the 1,000 computer-simulated plans:

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Figure 4:

Comparisons of Enacted SB 740 Plan Districts to 1,000 Computer-Simulated Plans' Districts



PX488 (Chen Figure 4)

PX482 at 22 ¶33; *id.* at 23 ¶35.

441. In Figure 4, the enacted congressional plan's districts are ordered from the most to the least-Republican district, as measured by Republican vote share using the Statewide Election Composite. PX482 at 23 ¶35; PX488. The red stars mark enacted districts and are labeled with district numbers, while the gray dots represent the corresponding 1,000 simulated districts. In other words, each row compares one district from the enacted congressional plan to 1,000 computer-simulated districts based on Republican vote share. *Id.* at 23-24 ¶35. The two percentages in parentheses in the right margin of this



Figure report the percentage of these 1,000 simulated districts that are less Republican than, and more Republican than, the enacted congressional plan's district. *Id.* at 26 ¶36.

442. The Court finds, as the bottom row of Figure 4 illustrates, the most-Democratic district in the enacted congressional plan (CD-9) is more heavily Democratic than 100% of the most-Democratic districts in each of the 1,000 computer-simulated plans. PX482 at 26 ¶37; PX488. Every single one of the computer-simulated counterpart districts would have been more politically moderate than CD-9 in terms of partisanship: CD-9 exhibits a Republican vote share of 27.2%, while all 1,000 of the most-Democratic districts in the computer-simulated plans would have exhibited a higher Republican vote share and would therefore have been more politically moderate. *Id.* at 26 ¶36. Based on this, Dr. Chen concluded, and the Court so finds, that CD-9 packs together Democratic voters to a greater extent than the most-Democratic district in 100% of the computer-simulated plans. *Id.* Dr. Chen therefore concluded that CD-9 is an extreme partisan outlier when compared to its 1,000 computer-simulated counterparts, using a standard threshold test of 95% for statistical significance. *Id.* Dr. Chen uses the standard threshold test of 95% for statistical significance throughout his analysis.

443. The Court finds that the same pattern observed for CD-9, exists for CD-6. PX482 at 26-27 ¶38; PX488. Again, CD-6 is more heavily Democratic than 100% of the corresponding second-most-Democratic districts in each of the 1,000 computer-simulated plans. *Id.* Again, every single one of its computer-simulated counterpart districts would have been more politically moderate than CD-6 in terms of partisanship: CD-6 exhibits a Republican vote share of 27.5%, while 100% of the second-most-Democratic districts in the computer-simulated plans would have exhibited a higher Republican vote share and would therefore have been more politically moderate. *Chen Id.* The Court finds, like CD-9, CD-6 packs together Democratic voters to a greater extent than the second-most-Democratic

district in 100% of the computer-simulated plans. *Id.* at 27 ¶38. From these results, Dr. Chen identified CD-6 as an extreme partisan outlier when compared to its 1,000 computer-simulated counterparts, using a standard threshold test of 95% for statistical significance. *Id.*

444. The Court finds that CD-5, the next most Democratic district in the enacted congressional plan, similarly contains more Democratic voters than over 95% of its counterpart simulated plans. PX488.

445. The Court finds that the same partisan skew exists for the two most-Republican districts in the enacted congressional plan. As the top row of Figure 4 illustrates, and the Court so finds, the most-Republican district in the enacted congressional plan (CD-10) is less heavily Republican and more heavily Democratic than 100% of the most-Republican districts in each of the 1,000 computer-simulated plans. PX482 at 27 ¶39; PX488.

446. The Court finds that a similar pattern appears in the second-to-top row of Figure 4, which illustrates that the second most-Republican district in the enacted congressional plan (CD-13) is less heavily Republican and more heavily Democratic than 99.7% of the second-most-Republican districts in each of the 1,000 computer-simulated plans. *Id.*

447. The Court finds that the two most Republican districts (CD-10 and CD-13) and the three most Democratic districts (CD-9, CD-6, and CD-5), which include more Democratic voters than virtually all of their counterpart districts in the 1,000 computer-simulated plans, draw Democratic voters out of the more moderate districts in the enacted congressional plan. PX482 at 27 ¶40. Having fewer Democratic voters in these more moderate districts enhances Republican candidate performance in these districts. *Id.*

448. The Court finds that the middle six rows in Figure 4 confirm this effect. These rows compare the partisanship of districts in the fifth, sixth, seventh, eighth, ninth, and

tenth-most Republican districts (CD-1, 3, 4, 11, 12, and 14) within the enacted congressional plan and the 1,000 computer-simulated plans. For all six districts, the enacted congressional plan district is a partisan outlier; the enacted congressional plan's district is more heavily Republican than over 95% of its counterpart districts in the 1,000 computer-simulated plans, with three being more heavily Republican than 100% of their counterpart districts. PX482 at 28 ¶41; PX488

449. These six enacted congressional plan districts, CD-1, 3, 4, 11, 12, and 14, are more heavily Republican than nearly all of their counterpart computer-simulated plan districts because the five most partisan-extreme districts in the enacted congressional plan, CD-5, 6, 9, 10, and 13, are more heavily Democratic than nearly all of their counterpart districts in the computer-simulated plans. *Id.*

450. Based on these findings, Dr. Chen identified the enacted congressional plan's six most moderate districts, CD-1, 3, 4, 11, 12, and 14 as partisan statistical outliers. PX482 at 28-29 ¶¶42-43. Each of these six districts has a Republican vote share that is higher than over 95% of the computer-simulated districts. *Id.* He also concluded that the four most extreme districts in the enacted congressional plan in terms of partisanship, CD-6, 9, 10, and 13, are partisan statistical outliers. *Id.* Each of these four districts has a Republican vote share that is lower than at least 99.7% of the computer-simulated districts. *Id.* CD-5 likewise is a partisan statistical outlier, containing more Democratic voters than 95.9% of the computer-simulated districts. PX482 at Figure 4. Dr. Chen thus concluded that overall, eleven individual districts in the enacted congressional plan are extreme statistical outliers, exhibiting partisan characteristics that are rarely or never observed in the computer-simulated plan districts. *Id.* at 23 ¶34; *id.* at 29 ¶44.

451. The Court finds that the enacted congressional plan contains 11 districts, CD-1, 3, 4, 5, 6, 9, 10, 11, 12, 13, and 14, that are partisan outliers, which cannot be explained by

adherence to the Adopted Criteria. The Court finds that these enacted congressional districts have partisan compositions that would not have arisen under a map-drawing process that adhered to the Adopted Criteria. The Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

452. The enacted congressional plan's ten most-Republican districts exhibit a significantly narrower range of partisanship than is exhibited by the ten most-Republican districts in each of the computer-simulated plans. PX482 at 30 ¶46. Specifically, the enacted congressional plan's ten most-Republican districts all have Republican vote shares within the narrow range of 52.9% to 61.2%. *Id.* at 29 ¶45. Dr. Chen refers to these districts as "Mid-Range Republican Districts," meaning they favor Republican candidates within this narrow range. *Id.*

453. The creation of ten Mid-Range Republican Districts is an outcome that never occurs in the computer-simulated plans and is therefore an extreme statistical outlier. PX482 at 30 ¶46. Instead, virtually all of the simulated plans contain from two to six Mid-Range Republican Districts, with the most common outcome among the simulations being four such districts. *Id.* Based on this, Dr. Chen concluded that the enacted congressional plan is an extreme partisan outlier in terms of maximizing the number of Mid-Range Republican Districts, and that the enacted congressional plan did so to an extreme degree far beyond any of the 1,000 simulated plans created using a partisan-blind computer algorithm that follows the Adopted Criteria. *Id.*; see PX489.

454. The enacted congressional plan's maximization of Mid-Range Republican Districts necessarily results in fewer competitive districts. PX482 at 30 ¶47. The enacted congressional plan contains zero districts in which the Republican vote share is within 5% of the Democratic vote share. *Id.* Dr. Chen labels districts within this range as "Competitive Districts." The enacted congressional plan contains no Competitive Districts as measured

using the Statewide Election Composite. *Id.* at 30 ¶48. Only about 5% of the 1,000 simulated plans fail to have a single Competitive District, and the vast majority of the computer-simulated plans contain two or more such districts. *Id.*; see PX490.

455. Dr. Chen's analysis of Mid-Range Republican and Competitive Districts is evidence of the intent and effects of Legislative Defendants' pro-Republican partisan redistricting. Dr. Chen's analysis of Mid-Range Republican and Competitive Districts is evidence that the enacted congressional plan was designed specifically to ensure that Republicans can efficiently and consistently win at least ten congressional seats and that Democrats are packed into the remaining districts. The frequency of Mid-Range Republican and Competitive Districts in the enacted congressional plan would not have occurred under a map-drawing process that adhered to the Adopted Criteria, and the Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

456. Dr. Chen also analyzed the number of total Republican-favoring districts in the enacted congressional plan, which are defined as a district having greater than 50% Republican vote share as measured using the Statewide Election Composite. PX482 at 32 ¶50; Figure 7. While the enacted congressional plan has 10 Republican districts, only 3% of the computer-simulated plans create 10 Republican-favoring districts, and no computer-simulated plan ever creates more than 10 Republican districts. *Id.*

457. Based on these results, in terms of the total number of Republican-favoring districts created by the plan, the enacted congressional plan is a statistical outlier when compared to the 1,000 computer-simulated plans. *Id.* at 32 ¶51. The enacted congressional plan creates the maximum number of Republican districts that ever occurs in any computer-simulated plan, and more Republican districts than 97% of the computer-simulated plans,

which were drawn using a non-partisan districting process adhering to the Adopted Criteria. *Id.*; see PX491.

458. Dr. Chen also measured the number of Republican districts that would exist under his simulated plans and the enacted congressional plan under a variety of electoral environments. PX482 at 34 ¶54; *id.* at 86-95; PX513-522 (Figures B1-B10). The ten individual elections in the Statewide Election Composite showed a range of different electoral outcomes, ranging from a Republican vote share of 47.7% to 53.3%. *Id.* at 86-95, PX513-522. Across this range of electoral environments, the enacted congressional plan always creates a 10-4 distribution of seats in favor of Republican candidates. *Id.* at 34 ¶54. Based on this, the enacted congressional plan's 10-4 distribution is durable across a range of electoral conditions. *Id.*

459. Dr. Chen's analysis of the enacted congressional plan under various electoral outcomes is evidence that the enacted congressional plan was designed specifically to ensure that Democrats cannot win more than four congressional seats under any reasonably foreseeable electoral environment. The number of Republican-leaning districts in the enacted congressional plan would be lower under a map-drawing process that adhered to the Adopted Criteria. The Court finds this to be evidence that the enacted congressional plan was intentionally designed to give Republicans a partisan advantage.

460. Dr. Chen also examined the enacted congressional plan as compared to the simulated plans under a variety of methods redistricting scholars commonly use to compare the relative partisan bias of different districting plans.

461. First, Dr. Chen examined the enacted congressional plan's mean-median difference and compared it to the simulated plans. PX482 at 36 ¶59. A plan's mean-median difference is calculated as the mean district-level Republican vote share, minus the median district-level Republican vote share. *Id.* at 35 ¶57.

462. The mean-median difference analysis confirms that the enacted congressional plan creates an extreme partisan outcome that cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria. PX482 at 37 ¶60; PX492.

463. Second, Dr. Chen analyzed another commonly used measure of a districting plan's partisan bias called the efficiency gap. PX482 at 39 ¶62. The efficiency gap provides a measure of the degree to which more Democratic or Republican votes are wasted across an entire districting plan. *Id.* at 40 ¶63. The efficiency gap is calculated using the total sum of surplus votes in districts a party won and lost votes in districts where that party lost. *Id.* at 39-40 ¶62. Dr. Chen found that the enacted congressional plan exhibits an efficiency gap of 19.5%, indicating that the plan results in far more wasted Democratic votes than wasted Republican votes. PX482 at 40-41 ¶66; PX493.

464. The efficiency gap analysis confirms that the enacted congressional plan creates an extreme partisan outcome that cannot be explained by North Carolina's political geography or the Adopted Criteria. *Id.*

465. Third, Dr. Chen analyzed another commonly used measure of a districting plan's partisan bias called the lopsided margins test. PX482 at 43 ¶67. The basic premise of the lopsided margins measure is that a partisan-motivated map-drawer may attempt to pack the opposing party's voters into a small number of extreme districts that are won by a lopsided margin. *Id.* Dr. Chen compared the enacted congressional plan's lopsided margins measure with the computer simulated plans and found that the simulated plans all have a smaller lopsided margins measure than the enacted congressional plan. PX482 at 44 ¶70; PX494.

466. The enacted congressional plan is an extreme outlier compared to the simulated plans on the lopsided margins measure, and the enacted congressional plan's

packing of Democrats into Democratic-favoring districts was not simply the result of North Carolina's political geography, combined with adherence to the Adopted Criteria. *Id.* at ¶71.

467. Fourth, Dr. Chen analyzed another common measure of partisan bias in a districting plan based on the concept of partisan symmetry. PX482 at 46 ¶72. This analysis, which Dr. Chen calls “partisan symmetry based on uniform swing,” examines what share of seats a party would win under the enacted congressional plan in a hypothetical tied election. *Id.*

468. Based on the results of this analysis, the enacted congressional plan creates a durable Republican majority for North Carolina's congressional delegation, such that even when Democrats win 50% of the statewide vote, Republicans will still be favored in 10 out of 14 (71.4%) of the congressional districts, while Democrats will only be favored in 4 out of the 14 (28.6%) districts. *Id.* at 47 ¶76; PX495.

469. Based on Dr. Chen's overall statewide conclusions based on his computer simulations, the Court adopts these conclusions and finds that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage.

**(iii) Analysis of Whether the Congressional Plan is a  
Statistical Partisan Outlier at the Regional Level**

470. In addition to the above statewide analyses, Dr. Chen also examined the extent to which partisan bias affected the map-drawing process within specific cities and regions of the state. PX482 at 50 ¶79. Dr. Chen found, and the Court so finds, that the enacted congressional plan's districts in each region examined exhibit political bias when compared to the computer-simulated districts in the same regions. *Id.*

471. Dr. Chen first examined the Piedmont Triad area. The enacted congressional plan splits Guilford County into three different districts: CD-7, 10, and 11. PX482 at 50 ¶80.



These three fragments of Guilford County voted solidly Democratic in recent statewide elections but were each combined with more Republican areas in surrounding counties across the Piedmont Triad area. *Id.* This splitting results in CD-7, 10, and 11 being safely Republican, each with a Republican vote share between 55.9% and 61.2%. *Id.*

472. The enacted congressional plan cracked Democratic voters in the region to a greater extent than virtually all of the computer-simulated plans. PX482 at 50 ¶81 - 54 ¶81. The enacted congressional plan achieved this result by creating districts that are significantly less compact than virtually all of the Guilford County districts in the computer-simulated plans. *Id.*; see PX496. The vast majority (75.6%) of simulated plans did not split Guilford County a single time, and if the County was split, it was usually split only once. PX497.

473. The Court finds that the three-way splitting of Guilford County and resulting creation of three safe Republican districts in the Piedmont Triad area could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

474. Dr. Chen next conducted similar analyses of the districts in the Research Triangle. PX482 at 56 ¶ 88; PX498. In this area of the state, the enacted congressional plan's Raleigh-based district (CD-5) and Durham-based district (CD-6) are more heavily packed with Democrats than almost 100% of the simulated districts containing Raleigh and Durham. *Id.* CD-5 and CD-6 are also less geographically compact than nearly 100% of the computer-simulated districts containing Raleigh and Durham. PX482 at 56 ¶ 89; PX499.

475. Because the enacted congressional plan packs Democratic voters into CD-5 and CD-6, the surrounding districts are more safely Republican than they would have been in the absence of such packing. PX482 at 56 ¶ 90; PX499. CD-7 is a partisan outlier that was enabled by the packing of Democratic voters in CD-5 (Raleigh) and CD-6 (Durham). *Id.*

476. The Court finds that the enacted congressional plan packs Democrats in its Raleigh-based and Durham-based districts by subordinating geographic compactness in the drawing of CD-5 and CD-6, and this could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

477. Finally, Dr. Chen examined Mecklenburg County. PX482 at 60 ¶91; PX500. The enacted congressional plan's CD-9 is more heavily Democratic than 100% of the simulated plans' districts containing the most of Charlotte. *Id.* As a result, the surrounding suburban districts in the enacted congressional plan, including CD-13 in Northern Mecklenburg County and CD-8 in Eastern Mecklenburg County, are more safely Republican than their geographic counterparts in all of the computer-simulated plans. PX482 at 60 ¶92-93.

478. Based on this data, the enacted congressional plan packed Democrats in Mecklenburg County to an extent greater than what naturally occurs as a result of the area's political geography. PX482 at 60 ¶94.

479. The Court finds that the enacted congressional plans created a Charlotte district that is more heavily Democratic than what could be expected from a partisan-blind map-drawing process, and this could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria.

480. The Court finds that the packing and cracking of Democrats in the Piedmont Triad Area, the Research Triangle Area, and Mecklenburg County could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria. The enacted congressional map was therefore designed in order to accomplish the legislature's predominant partisan goals.

**(iv) Effect of Political Geography**

481. Political geography can create a natural advantage for Republicans in Republican vote share in suburban and rural districts, where for example, Democratic voters are clustered in urban areas because of the common districting principle of drawing geographically compact districts. *Id.* at 63 ¶95. But Dr. Chen programmed a computer algorithm that drew simulated plans using North Carolina’s unique political geography. *Id.* 63, ¶96. As Dr. Chen, explained “the entire premise of conducting districting simulations is to fully account for North Carolina’s unique political geography, its political subdivision boundaries, and its districting criteria, as mandated by the Adopted Criteria.” *Id.* Thus, the simulation analysis allowed Dr. Chen to identify how much of the electoral bias in the enacted congressional plan is caused by North Carolina’s political geography and how much is caused by the map-drawer’s intentional efforts to favor one political party over the other. *Id.* at 63-64 ¶97.

482. The Court finds that the enacted congressional plan’s partisan bias goes beyond any “natural” level of electoral bias caused by North Carolina’s political geography or the political composition of the state’s voters, *Id.* at 64 ¶98, and this additional level of partisan bias in the enacted congressional plan can be directly attributed to the map-drawer’s intentional efforts to favor the Republican Party, *Id.* at 64 ¶100.

483. Additional, district-specific findings in addition to those made above are as follows:

**b. Individual Congressional Districts**

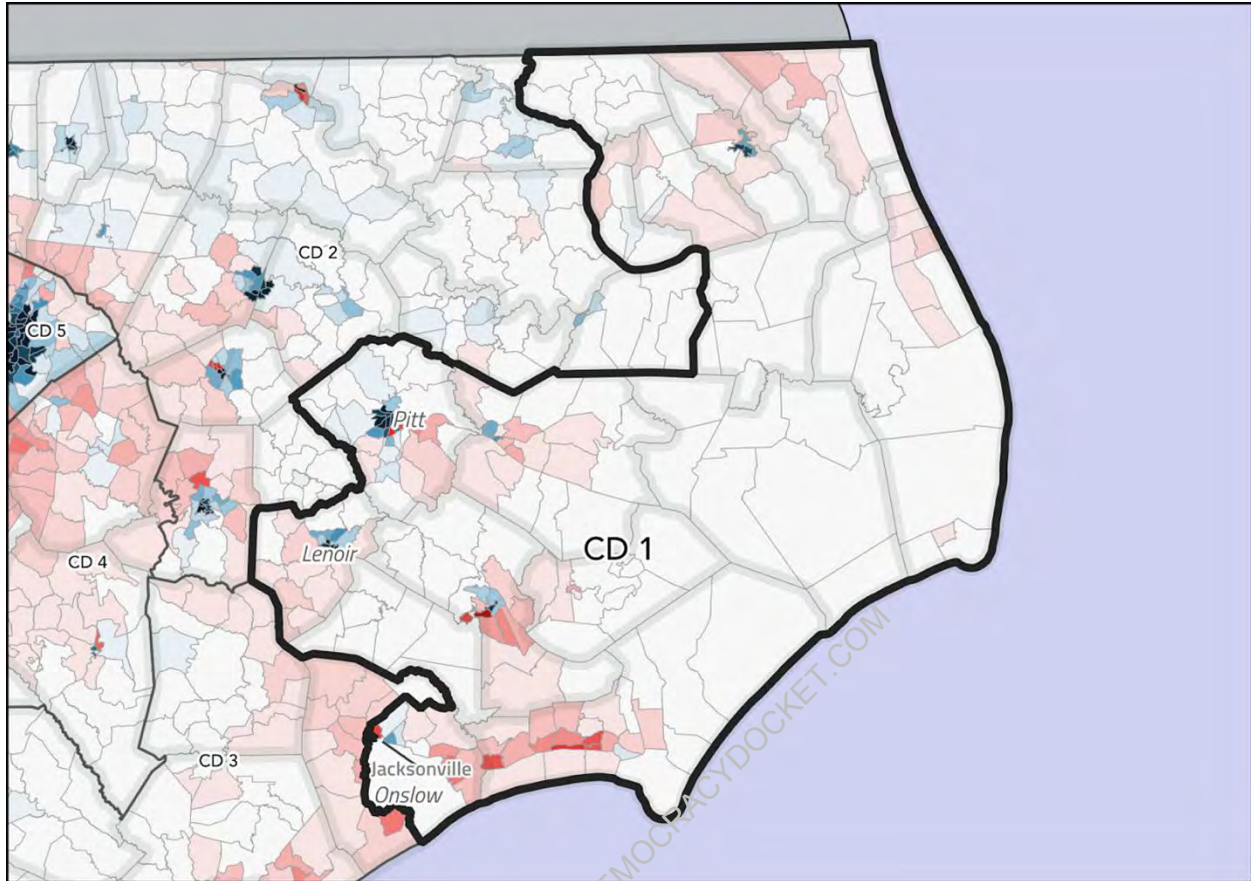
**(i) Congressional District No. 1 (“CD1”)**

484. CD1 is comprised of Beaufort County, Camden County, Carteret County, Chowan County, Craven County, Currituck County, Dare County, Gates County, Hyde County, Jones County, Lenoir County, Pamlico County, Pasquotank County, Perquimans County, Tyrrell County, portions of Onslow County, and portions of Pitt County. Harper Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

485. Individual Harper Plaintiffs Amy Clare Oseroff and Donald Rumph reside in and challenge CD1.

486. CD1 is in the northeastern corner of the state and includes part of the former CD1 and CD3. PX425 at 21. As Dr. Cooper’s reported and his map illustrates, Legislative Defendants included the Democratic-leaning areas of Pitt County within CD1, allowing for a greater Republican advantage in bordering CD2, to the west. *Id.*

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PX446 (Cooper Map 5)

487. CD1 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD1, as well as other measures. PX425 at 21.

488. The Court finds this congressional district, CD1, to be the result of intentional, pro-Republican partisan redistricting.

**(ii) Congressional District No. 2 (“CD2”)**

489. CD2 is comprised of Bertie County, Caswell County, Edgecombe County, Franklin County, Granville County, Greene County, Halifax County, Hertford County, Martin County, Nash County, Northampton County, Person County, Vance County, Warren County, Washington County, Wilson County, portions of Pitt County, and portions of Wayne

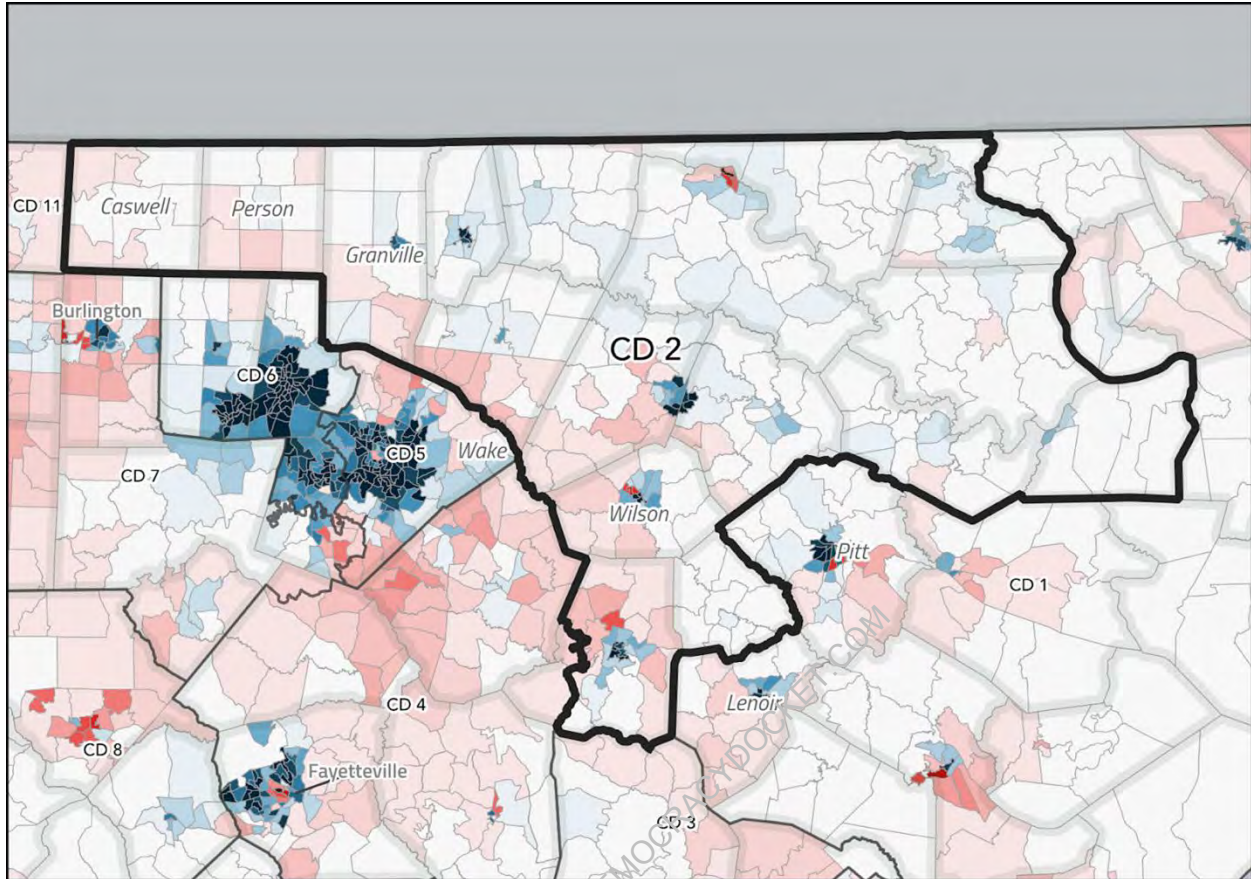
County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

490. Individual Harper Plaintiffs Lauren Flood, Bobby Jones, and Kristiann Herring reside in and challenge CD2. Organizational Plaintiff Common Cause challenges CD2 as well.

491. CD2 stretches from Albemarle Sound, in the east, to the Raleigh-Durham-Chapel Hill metropolitan area and includes Caswell County, northeast of Greensboro, to the west. Washington County and Caswell County have never been paired together in a congressional map in North Carolina's history, no matter which political party was in charge. PX425 at 23; Trial Tr. 01/03/2022.

492. CD2 includes the "core" of former CD1, as well as portions of the former CD4 and CD13. While the former CD1 previously included Pitt County, home to East Carolina University in Greenville, CD2 does not include Pitt County. PX425 at 21-23.

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PX441 (Cooper Map 6)

493. CD2 is now a “competitive” district based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD2, as well as other measures. PX425 at 23. CD2 is “the lone competitive district in the state of North Carolina under the Enacted Maps.” Trial Tr. 01/03/2022.

494. Most of the area that comprises CD2 is represented by Democrat G.K. Butterfield in a Democratic-leaning district. Representative Butterfield, who is the longest serving member of North Carolina’s congressional delegation, announced that he will not seek re-election after the 2021 Congressional Plan was enacted. PX425 at 23.

495. The Court finds this congressional district, CD2, to be the result of intentional, pro-Republican partisan redistricting.

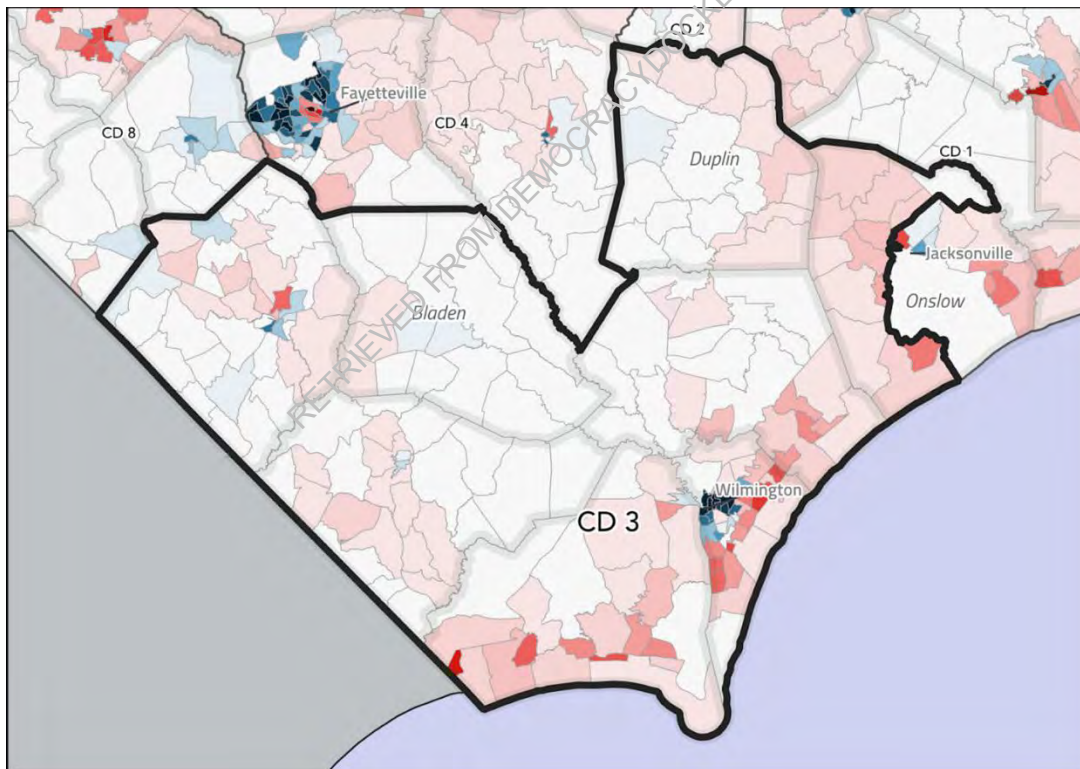


**(iii) Congressional District No. 3 (“CD3”)**

496. CD3 is comprised of Bladen County, Brunswick County, Columbus County, Duplin County, New Hanover County, Pender County, portions of Onslow County, and portions of Robeson County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

497. Individual Harper Plaintiff Eileen Stephens resides in and challenges CD3. Organizational Plaintiff NCLCV challenges CD3 as well.

498. CD3 combines portions of the Sandhills, on its western boundary, with the coastal enclave in and around Wilmington and a piece of Onslow County, in the east. CD3 includes portions of three former districts: CD3, CD7, and CD9. PX425 at 25.



PX442 (Cooper Map 7)



499. CD3 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD3, as well as other measures. PX425 at 25.

500. The Court finds this congressional district, CD3, to be the result of intentional, pro-Republican partisan redistricting.

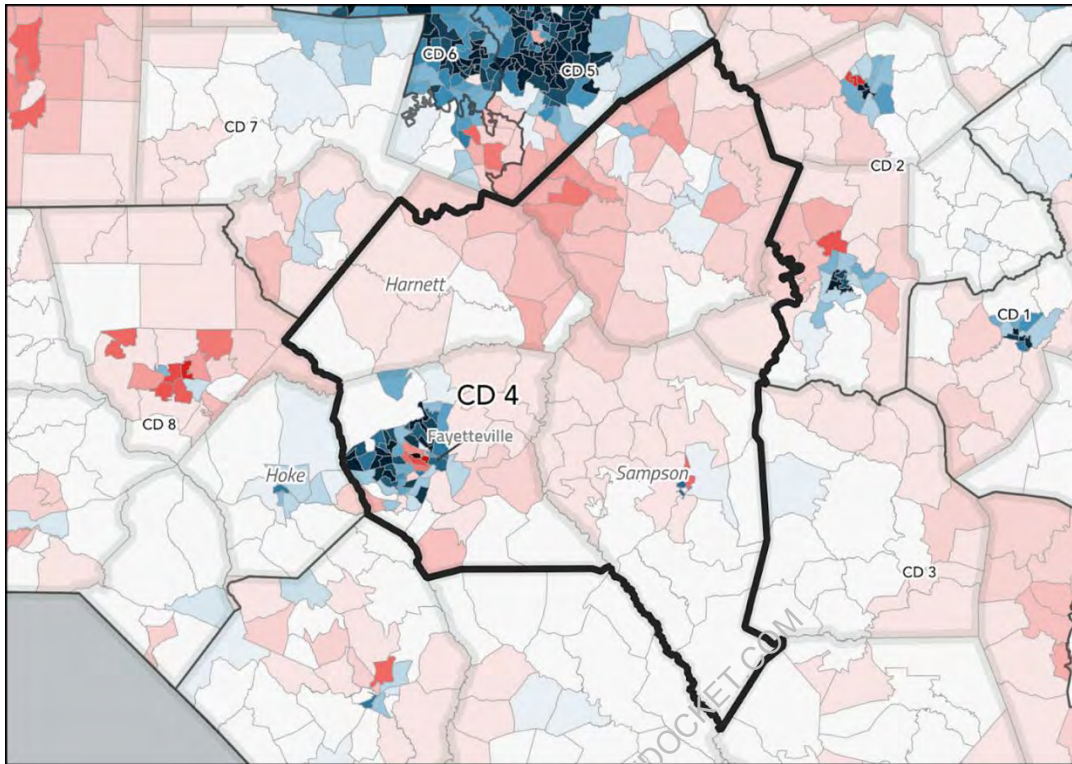
***(iv) Congressional District No. 4 (“CD4”)***

501. CD4 is comprised of Cumberland County, Johnston County, Sampson County, portions of Harnett County, and portions of Wayne County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

502. Individual NCLCV Plaintiff Reverend Reginald Wells and Individual Harper Plaintiffs Gettys Cohen, Jr. and Sarah Taber reside in and challenge CD4. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD4 as well.

503. CD4 contains portions of the Sandhills, including Cumberland and Johnston counties along with parts of Harnett and Wayne counties. CD4’s boundaries thereby combine the Democratic-leaning areas in Fayetteville with Republican-leaning areas that were in the former CD7 and CD8. PX425 at 27.

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PX443 (Cooper Map 8)

504. CD4 does not contain the residence of an incumbent congressional representative. CD4 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD4, as well as other measures. PX425 at 27.

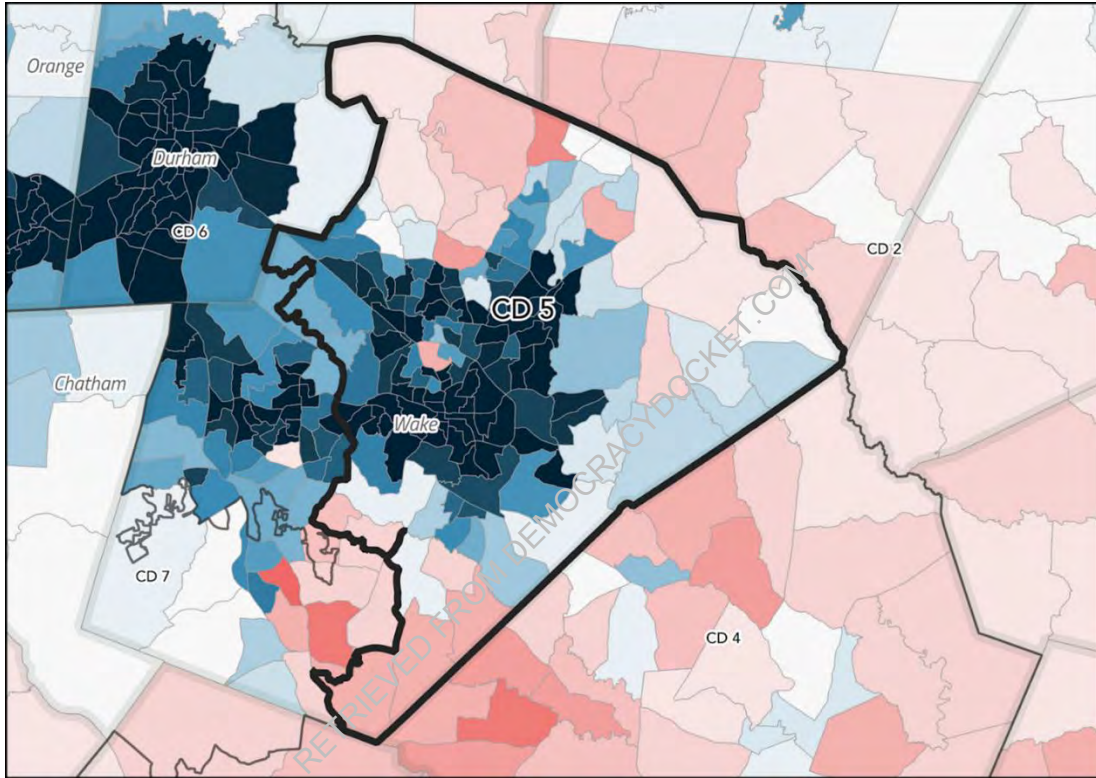
505. The Court finds this congressional district, CD4, to be the result of intentional, pro-Republican partisan redistricting.

**(v) Congressional District No. 5 (“CD5”)**

506. CD5 is comprised of portions of only Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

507. Individual Harper Plaintiff John Anthony Balla resides in and challenge CD5. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD5 as well.

508. CD5 sits entirely within Wake County and is one of the three districts that includes a part of that county. Trial Tr. 01/03/2022. It is made up of portions of former CD2 and CD4 and packs the Democratic voters in these heavily-Democratic areas into one district, increasing the probability that Republican candidates will win in the adjacent districts. PX425 at 29.



PX444 (Cooper Map 9)

509. CD5 is likely to elect a Democratic candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD5, as well as other measures. PX425 at 29.

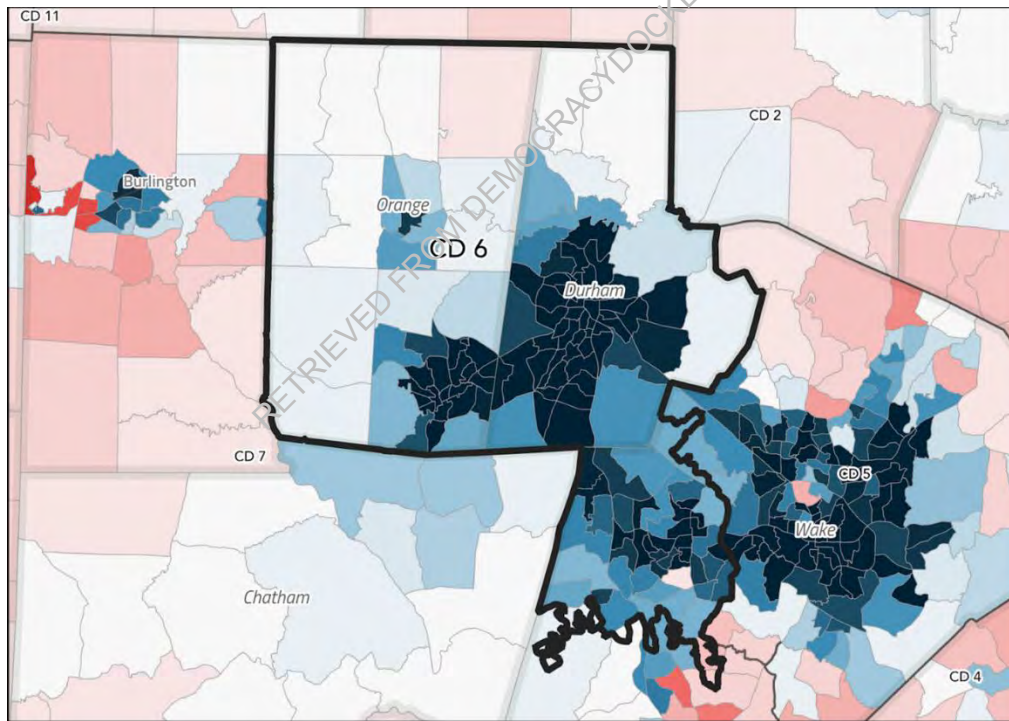
510. The Court finds this congressional district, CD5, to be the result of intentional, pro-Republican partisan redistricting.

**(vi) Congressional District No. 6 (“CD6”)**

511. CD6 is comprised of Durham County, Orange County, and portions of Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

512. Individual NCLCV Plaintiffs Henry M. Michaux, Jr. and Katherine Newhall and Individual Harper Plaintiffs Rebecca Harper and Sondra Stein reside in and challenge CD6. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD6 as well.

513. CD6 is another district including parts of Wake County and combines portions of the former CD4 and CD2.



PX445 (Cooper Map 10)

514. CD6 is a really good example of packing Democratic voters across multiple counties and adds a greater proportion of Democratic voters into a single district than any district from the former congressional plan, increasing the probability that Republicans can



win in the adjacent districts. There are only four marginally Republican-leaning VTDs in CD6. PX425 at 31; Trial Tr. 01/03/2022.

515. CD6 is likely to elect a Democratic candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD6, as well as other measures. PX425 at 31.

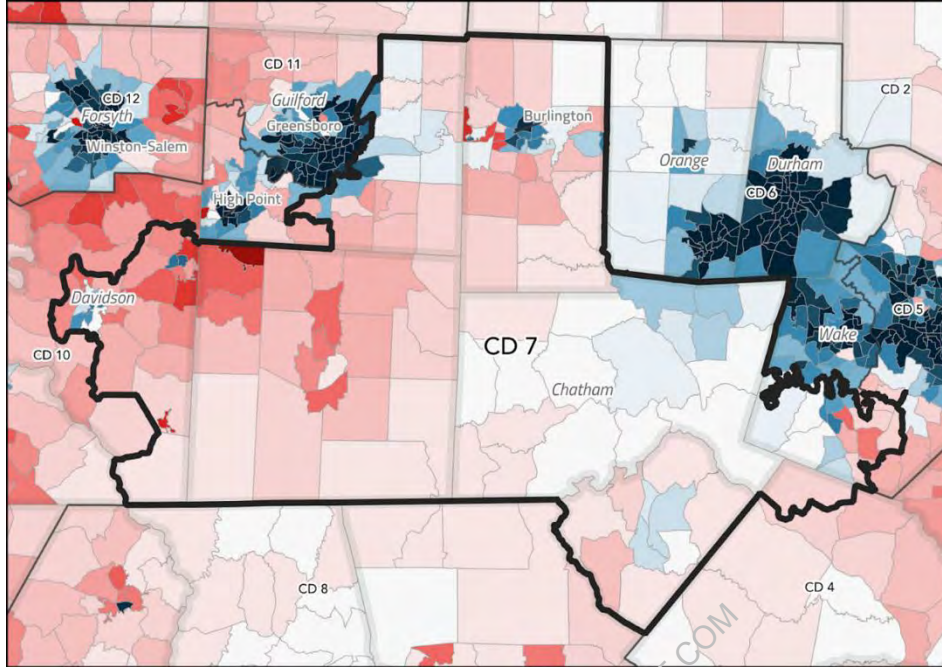
516. The Court finds this congressional district, CD6, to be the result of intentional, pro-Republican partisan redistricting.

***(vii) Congressional District No. 7 (“CD7”)***

517. CD7 is comprised of Alamance County, Chatham County, portions of Davidson County, portions of Guilford County, portions of Harnett County, Lee County, Randolph County, and portions of Wake County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

518. Individual Harper Plaintiffs Lily Nicole Quick and Ron Osborne reside in and challenge CD7. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD7 as well.

519. CD7, one of three districts to include parts of Guilford county. is made up of portions of former CD2, CD4, CD6, and CD13. The boundaries of CD7 split Guilford and Wake counties but do not include the most Democratic-leaning VTDs in those counties within the district. PX425 at 33.



PX446 (Cooper Map 11)

520. CD7 leans heavily towards the Republican Party and is going to be a Republican district as a result of how this district is drawn alongside CD6. Trial Tr. 01/03/2022. CD7 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD7, as well as other measures. PX425 at 33.

521. Because District 7 is drawn to include several heavily Republican counties while carefully avoiding concentrations of Democratic voters, the result is a district that will reliably elect Republicans to office; in Dr. Duchin's analysis of 52 elections, District 7 never once elects a Democrat. PX201 "SL-174" A8:BA8.

522. As a result of packing in Congressional District 6, and cracking in Guilford County, District 7 is less compact. District 7 has a Polsby-Popper compactness score of only 0.20 (on a scale of 0 to 1, where 1 is the most compact). PX150 at 14. It was not necessary to trisect Wake County in this manner.

523. The Court finds this congressional district, CD7, to be the result of intentional, pro-Republican partisan redistricting.

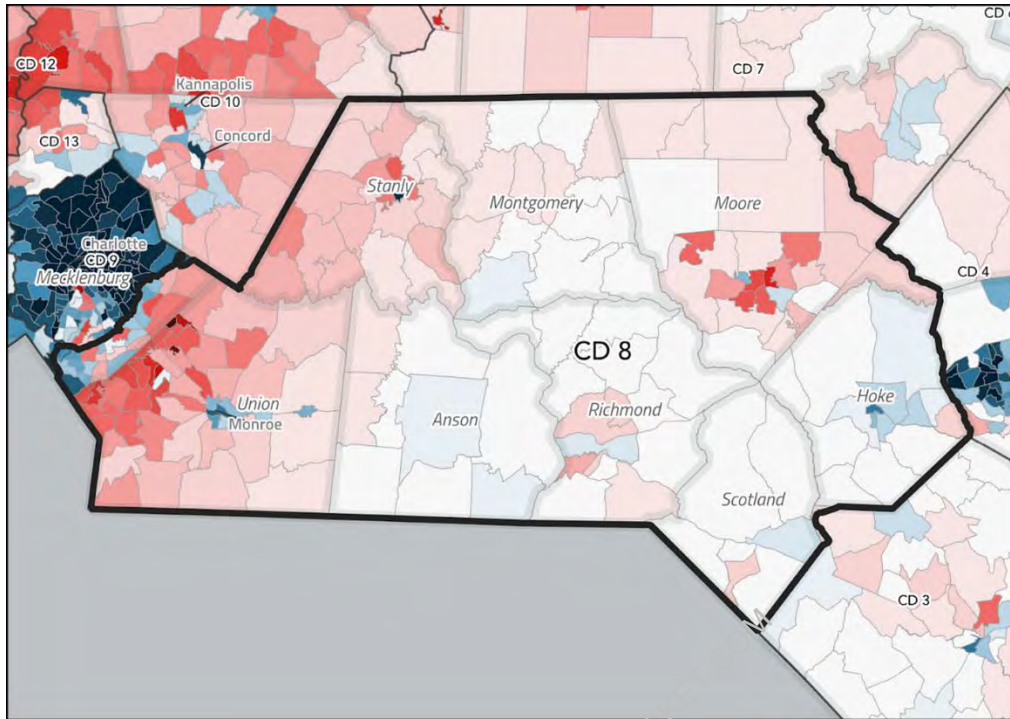
***(viii) Congressional District No. 8 (“CD8”)***

524. CD8 is comprised of Anson County, Hoke County, portions of Mecklenburg County, Montgomery County, Moore County, Richmond County, portions of Robeson County, Scotland County, Stanly County, and Union County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

525. Individual Harper Plaintiff Barbara Proffitt resides in and challenges CD8. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD8 as well.

526. CD8 includes portions of the Sandhills, stretching from the eastern side of Mecklenburg County, in the west, to include Hoke and Scotland counties, in the east. It is one of three districts to contain portions of Mecklenburg County and is made up of portions of former CD8, CD9, and CD12. CD8’s western boundary splits Mecklenburg County in such a way that the most Democratic-leaning VTDs within that county fall outside of CD8. PX425 at 35.

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PX447 (Cooper Map 12)

527. CD8 is likely to elect a Republican candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD8, as well as other measures. PX425 at 35.

528. The Court finds this congressional district, CD8, to be the result of intentional, pro-Republican partisan redistricting.

**(ix) Congressional District No. 9 (“CD9”)**

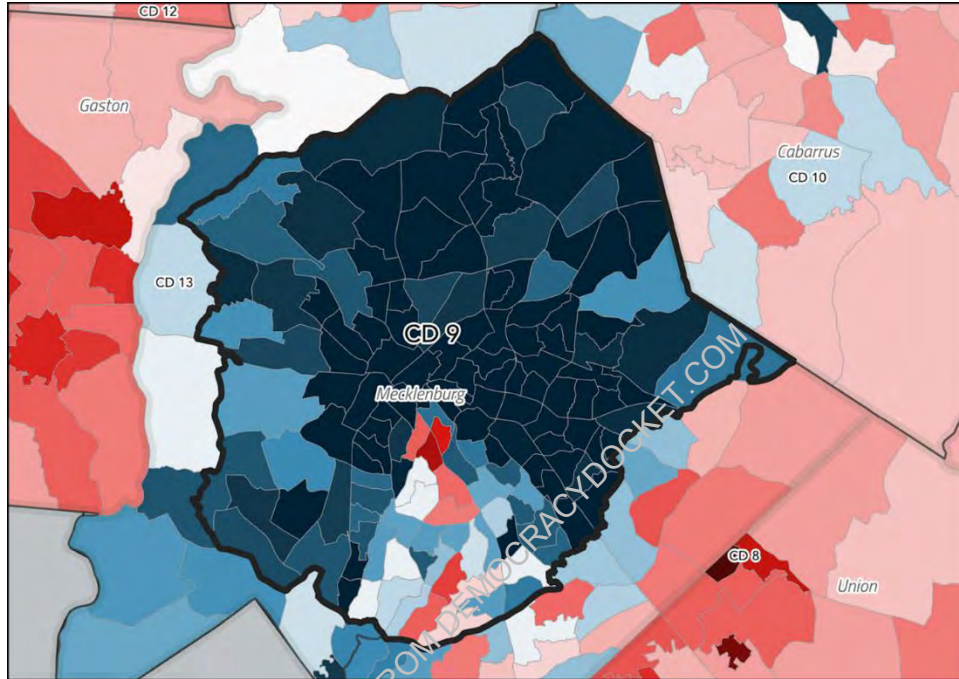
529. CD9 is comprised of portions of only Mecklenburg County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

530. Individual Harper Plaintiff Virginia Walters Brien resides in and challenges CD9. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD9 as well.

531. CD9, one of three districts to contain portions of Mecklenburg County, sits wholly within Mecklenburg County and includes portions of the former CD9 and CD12. CD9



packs the most-Democratic VTDs in Mecklenburg County within one district, while most Republican-leaning and competitive VTDs are placed outside its boundaries, in CD13 to the west and CD8 to the east, allowing those districts to be more favorable to Republican candidates. PX425 at 37.



PX448 (Cooper Map 13)

532. CD9 is likely to elect a Democratic candidate based on his calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD9, as well as other measures. PX425 at 37. Mecklenburg County need not have been fractured three times, and District 9 need not have been “packed.”

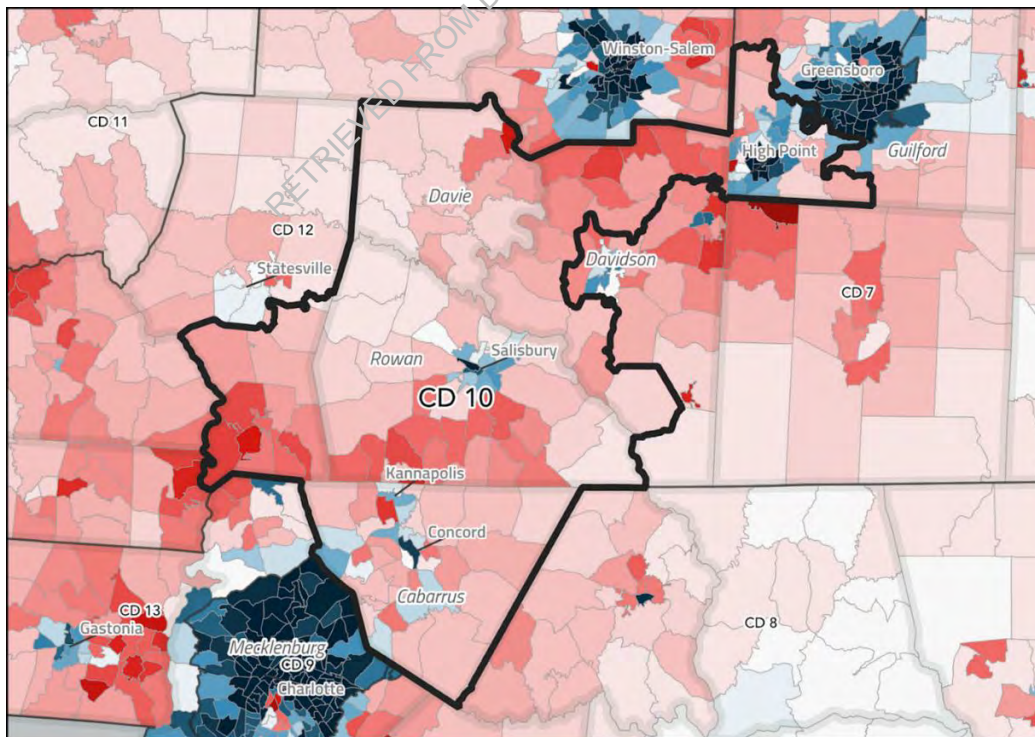
533. The Court finds this congressional district, CD9, to be the result of intentional, pro-Republican partisan redistricting.

(x) **Congressional District No. 10 (“CD10”)**

534. CD10 is comprised of Cabarrus County, portions of Davidson County, Davie County, portions of Guilford County, portions of Iredell County, and Rowan County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

535. Individual Harper Plaintiffs Shawn Rush, Joshua Perry Brown, and Donald M. MacKinnon reside in and challenge CD10. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD10 as well.

536. CD10, one of three districts to contain portions of Guilford County, combines portions of former CD6, CD9, CD10, and CD13. PX425 at 39. CD10 includes heavily-Democratic VTDs in High Point, within Guilford County, as well as Democratic-leaning VTDs in Salisbury, Kannapolis, and Concord, in Rowan and Cabarrus counties. *Id.* at 40. But CD10 separates the Democratic voters in those areas from other pockets of Democratic voters just across CD10’s boundaries in Guilford, Forsyth, and Mecklenburg counties. *Id.*



PX449 (Cooper Map 14)

537. While North Carolina's Piedmont Triad (High Point, Winston-Salem, and Greensboro) was previously kept together in one district (former CD6), the Piedmont Triad—and the Democratic voters there—are split across three districts, CD10, CD11, and CD12. PX425 at 39.

538. Because District 10 cuts west to avoid Democratic populations in central Davidson County and then turns 90 degrees to the south, bringing within its bounds Republican voters as distant as the suburbs of Charlotte, District 10 has a Polsby-Popper score of just 0.20. PX150 at 14.

539. The former CD6 is represented by Democrat Kathy Manning, who is now “double-bunked” with Republican Virginia Foxx in CD11, a Republican leaning district. PX425 at 4.

540. CD10 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD10, as well as other measures. PX425 at 39.

541. Because of the way in which the Enacted Plan divides the county's Democratic voters, Districts 7, 10, and 11 do not elect a Democrat in a single one of the 52 elections Dr. Duchin studied. PX201 “SL-174” A8:BA9, A11:BA11. Just as with Mecklenburg and Wake Counties, there was no need to trisect Guilford County into CD7, CD10, and CD11 in this manner.

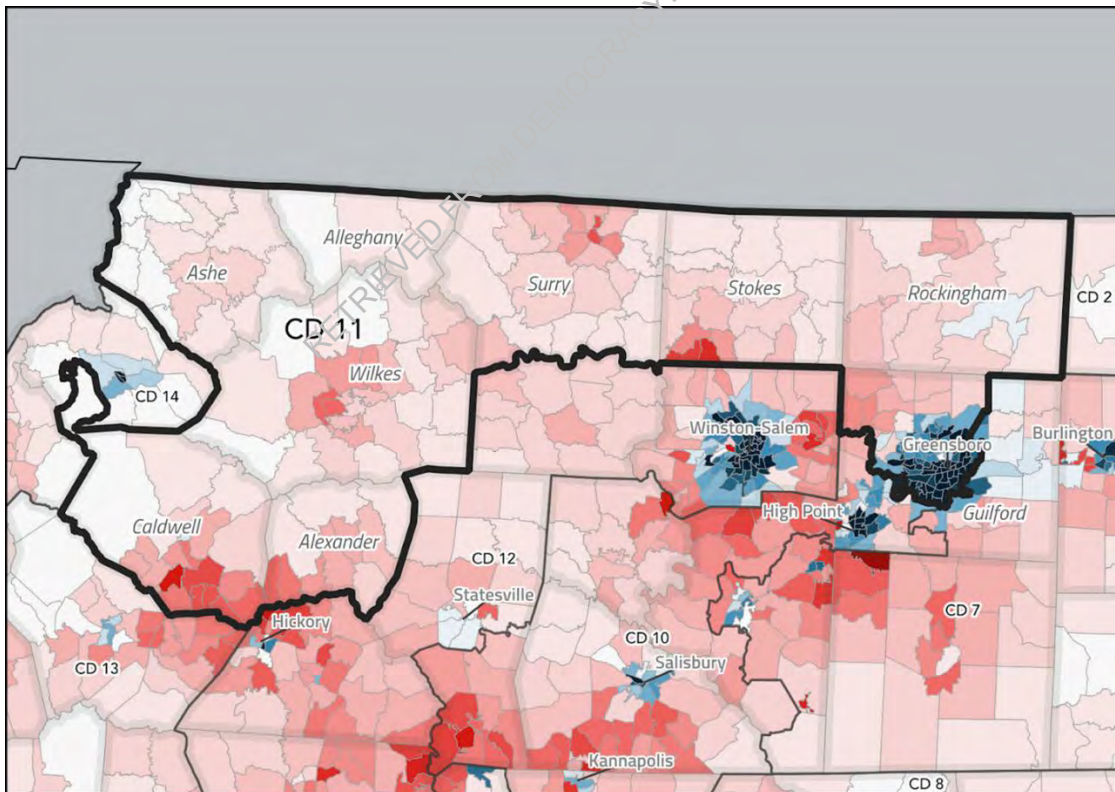
542. The Court finds this congressional district, CD10, to be the result of intentional, pro-Republican partisan redistricting.

**(xi) Congressional District No. 11 (“CD11”)**

543. CD11 is comprised of Alexander County, Alleghany County, Ashe County, Caldwell County, portions of Guilford County, Rockingham County, Stokes County, Surry County, portions of Watauga County, and Wilkes County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

544. Individual NCLCV Plaintiffs Dandrielle Lewis and Talia Fernos and Individual Harper Plaintiff David Dwight Brown reside in and challenge CD11. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD11 as well.

545. CD11, one of three districts to contain portions of Guilford County, is made up of portions of the former CD5, CD6, and CD10. PX425 at 41.



PX450 (Cooper Map 15)

546. Caldwell County, in the west, and Rockingham, in the east, have never shared a congressional representative in the history of North Carolina. Some of the locations in CD11—particularly the “high country” areas in Watauga and Ashe counties and Greensboro, in the Piedmont—sit in different media markets, with different area codes. PX425 at 41; Trial Tr. 01/03/2022.

547. CD11 includes the Democratic-leaning VTDs in Greensboro in the same district as heavily-Republican VTDs to the north and the west in an “overwhelmingly Republican district,” thereby ensuring that Greensboro voters will not be represented by a Democrat. PX425 at 41.

548. District 11’s boundaries, by bending to avoid Forsyth County and stretching far west through Republican-majority counties all the way to the Tennessee border, result in a Polsby-Popper score of just 0.21. PX150 at 14.

549. The portion of CD11 that includes the residence of Republican incumbent Virginia Fox is a tiny sliver of Watauga County that is connected to Caldwell County by a narrow passage of land that is roughly three miles wide and requires a traverse of the Daniel Boone Scout Trail. PX425 at 41-42. This inclusion leads to a double bunking with a Republican and incumbent Democrat in another current district together in a new district that leans heavily towards the Republican Party. Trial Tr. 01/03/2022.

550. CD11 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD11, as well as other measures. PX425 at 41.

551. The Court finds this congressional district, CD11, to be the result of intentional, pro-Republican partisan redistricting.

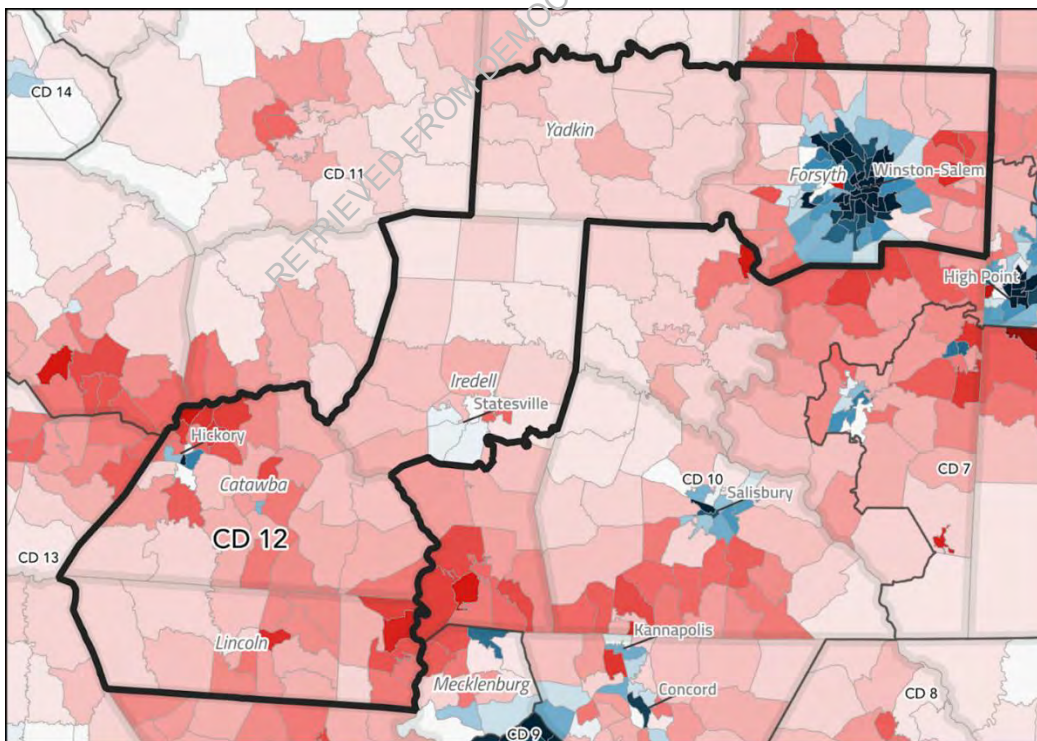


**(xii) Congressional District No. 12 (“CD12”)**

552. CD12 is comprised of Catawba County, Forsyth County, portions of Iredell County, Lincoln County, and Yadkin County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

553. Individual Harper Plaintiff Chenita Barber Johnson resides in and challenges CD12. Organizational Plaintiff NCLCV challenges CD12 as well.

554. CD12 stretches from Lincoln County, in the southwest, through Catawba, Iredell, Yadkin, and Forsyth counties, in the northeast. PX425 at 43. CD12’s boundaries separate the Democratic-leaning VTDs in Winston-Salem and the Democratic-leaning VTDs in High Point (in CD10), combining Winston-Salem with Republican-leaning VTDs further south. PX425 at 44. Republican incumbent Patrick McHenry currently resides in the southeast corner of CD12, on the other end of the district from Winston-Salem. PX425 at 43.



PX451 (Cooper Map 16)

555. CD12 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD12, as well as other measures. PX425 at 43.

556. The Court finds this congressional district, CD12, to be the result of intentional, pro-Republican partisan redistricting.

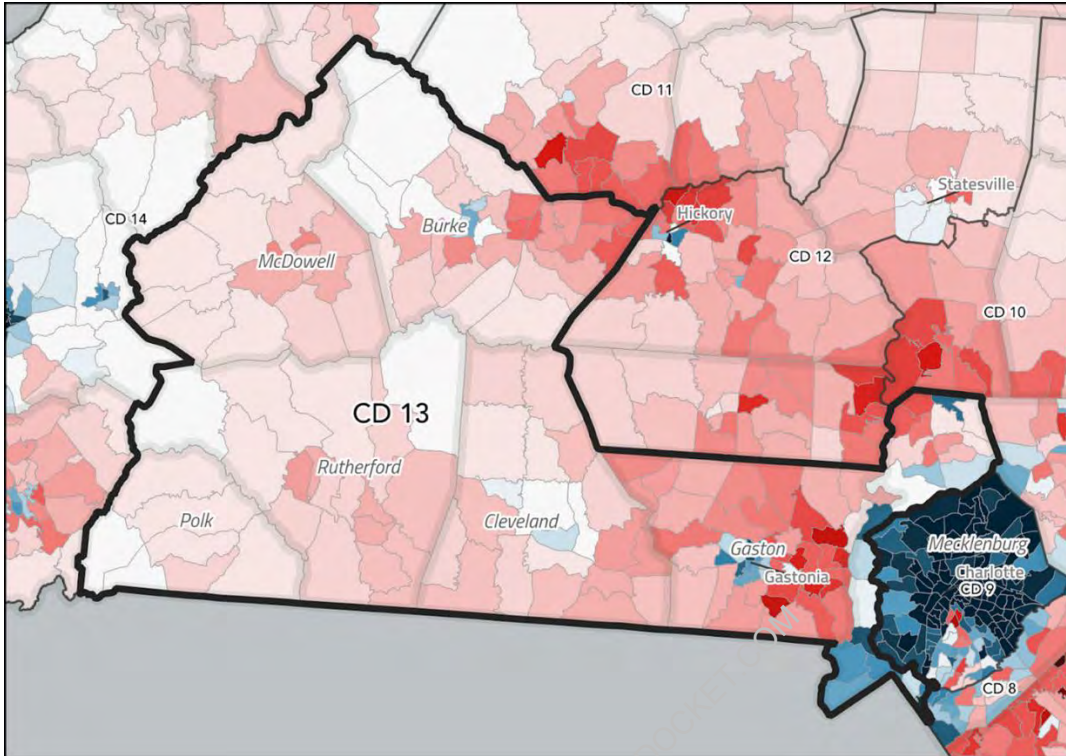
***(xiii) Congressional District No. 13 (“CD13”)***

557. CD13 is comprised of Burke County, Cleveland County, Gaston County, McDowell County, portions of Mecklenburg County, Polk County, and Rutherford County. Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.

558. Individual NCLCV Plaintiff Timothy Chartier and Individual Harper Plaintiff Mary Elizabeth Voss reside in and challenge CD13. Organizational Plaintiff NCLCV and Organizational Plaintiff Common Cause challenge CD13 as well.

559. CD13, one of three districts to include portions of Mecklenburg County, is made up of portions of former CD5, CD10, CD11, and CD12. *Id.* Until the 2021 Congressional Plan, Polk County and Mecklenburg County have never been included in the same congressional district. PX425 at 45.

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PX452 (Cooper Map 17)

560. CD13 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD13, as well as other measures. PX425 at 45.

561. The Court finds this congressional district, CD13, to be the result of intentional, pro-Republican partisan redistricting.

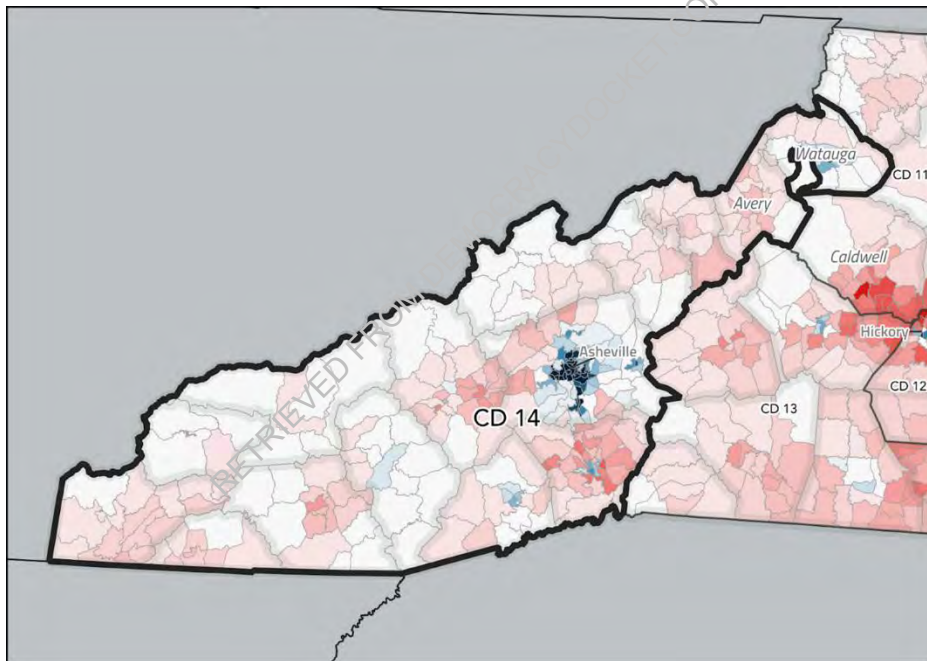
***(xiv) Congressional District No. 14 (“CD14”)***

562. CD14 is comprised of Avery County, Buncombe County, Cherokee County, Clay County, Graham County, Haywood County, Henderson County, Jackson County, Macon County, Madison County, Mitchell County, Swain County, Transylvania County, portions of Watauga County, and Yancey County. Harper Plaintiffs challenge this congressional district as the product of unlawful partisan gerrymanders.



563. Individual Harper Plaintiffs Richard R. Crews, Mark S. Peters, Kathleen Barnes, and Ann Butzner reside in and challenge CD14. Organizational Plaintiff NCLCV challenges CD14 as well.

564. CD14 sits in the southwestern corner of the state and includes most of the former CD11, as well as part of Watauga County, to the northeast. PX425 at 47. The former CD11 also included “Republican strongholds” of Polk and McDowell counties, as well as part of Rutherford County, which are now placed in CD13. *Id.* Watauga County has not been in the same congressional district with the southwestern end of the state since 1871, before Graham and Swain counties were in existence. *Id.*



PX453 (Cooper Map 18)

565. CD14 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD14, as well as other measures. PX425 at 47.

566. The Court finds this congressional district, CD14, to be the result of intentional, pro-Republican partisan redistricting.

**C. Elections are Decided by any Number of Factors**

567. All of Plaintiff's statistical experts, except Dr. Pegden, used as a baseline or point of comparison nonpartisan maps to determine whether the Enacted Maps are partisan "outliers." Even Plaintiffs would have to concede that under *Stephenson*, the General Assembly is at least, to some degree, allowed to draw districts for partisan advantage. The experts' analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible.

568. Many of the opinions of the experts at trial were informed by either the vote share of a party on a single or aggregated statewide race or races. These statewide races include presidential and gubernatorial races as well as Attorney General, Judicial and Council of State races. These statewide races have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina. The function and responsibilities of our legislature and our members of congress differ from these statewide and national offices. Also, these races do not take into account the individual needs and issues that are important to each of the 170 legislative districts and 14 congressional districts at issue. They also treat the candidates as inanimate objects in that they do not consider the personality or qualifications of each candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate. Moreover, these opinions assume that voters will vote along party lines. Testimony of the experts that by considering many statewide races across a significant period of time somehow washes these considerations out is not persuasive. In effect, they believe the computer can take the human element out of the human. That is a process we doubt they can do and hope will never happen.

569. Notwithstanding these doubts, we conclude based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting.

#### **IV. Intentional Racial Discrimination and Racial Vote Dilution Claims**

##### **A. Intentional Racial Discrimination**

###### **1. Direct Evidence**

570. There is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans.

571. The Adopted Criteria expressly proscribed the use of data identifying the race of individuals or voters in the construction or consideration of districts in the Enacted Plans while also requiring each redistricting committee to draw districts that comply with the Voting Rights Act.

572. There also is no evidence that the Enacted Plans were evaluated based on racial considerations after the respective congressional, Senate, and House plans were selected and prior to enactment. Defendants Expert Dr. Lewis stated that he was only asked to do the RPV study after he was retained on November 12, 2021. Trial Tr. 01/05/2022.

###### **2. Circumstantial Evidence**

###### **a. Recent Race-Based Redistricting Litigation**

573. The General Assembly's intentional racial gerrymandering has been subject to judicial review in multiple cases over the past decade.

574. First, in *Dickson v. Rucho*, 367 N.C. 542 (2014), the plaintiffs challenged North Carolina's redistricting plans for the North Carolina Senate, House of Representatives, and Congressional delegation as unconstitutional racial gerrymanders. 367 N.C. at 548.

575. The three-judge panel that heard the challenges concluded that 26 of the challenged districts were predominately motivated by race, and thus were subject to strict

scrutiny and determined that these districts were intended by the General Assembly to be “VRA districts” that necessarily required the drafters to classify residents by race. *Id.* at 551. The Supreme Court of North Carolina determined that the consideration of race to the degree necessary to comply with Section 2 of the VRA does not rise to the level of a “predominate motive,” though this was not fatal to the order, *Id.* at 522, because of the three-judge panel’s determination that compliance with Section 2 and Section 5 of the VRA are compelling state interests. *Id.* at 562-563.

576. The Supreme Court of the United States reviewed this decision, vacated the judgment, and remanded the case for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). See *Dickson v. Rucho*, 368 N.C. 481, 484 (2015). The Supreme Court of North Carolina, again, affirmed the ruling of the three-judge panel, determining that the trial court did the appropriate district-by-district analysis without giving improper weight to population equalization. 368 N.C. at 485.

577. Second, in *Covington v. North Carolina*, 316 F.R.D. 176 (M.D.N.C. 2016), the plaintiffs challenged North Carolina state legislative redistricting plans as unconstitutional racial gerrymanders. The court determined that race was the predominate factor motivating the drawing of all the challenged districts, based on the redistricting committee’s criteria of creating “VRA districts” that reach a 50%-plus-one BVAP threshold first, *Id.* at 130-31, and that the defendants had not shown that their use of race was reasonably necessary to remedy a violation of Section 2 of the VRA because they had not demonstrated that any of the districts challenged were based on evidence that the majority votes sufficiently as a bloc, pursuant to *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). 316 F.R.D. at 124. The court ordered new maps be drawn. *Id.*

**b. Plaintiff Common Cause's Expert James Leloudis, II**

578. Dr. James Leloudis, a professor of history at the University of North Carolina at Chapel Hill, submitted an expert report and was accepted as an expert during trial for Plaintiff Common Cause in the areas of North Carolina history, politics, race relations, and government policy. Trial Tr. 01/04/2022.

579. Dr. Leloudis received his B.A. and Ph.D. from the University of North Carolina at Chapel Hill, and M.A. from Northwestern University. PX1486 (Leloudis Report) p. 4.

580. Dr. Leloudis' primary expertise is in the history of the United States, with specialization in the history of race, politics, labor, and reform in the 19th and 20th century American South. *Id.* Dr. Leloudis conducted qualitative research on the history of race, voting rights, voter suppression, and redistricting in North Carolina, from the end of the Civil War to the present. He examined the historical context for recent attempts to limit minority citizens' voting rights and ability to elect candidates of their choice. PX1486 (Leloudis Report) p. 5.

581. North Carolina has had a long and cyclical history of suppressing minority political participation. Over the last century and a half, there have been numerous instances where white conservatives have employed a variety of measures to limit the rights of racial and ethnic minorities. PX1486 (Leloudis Report) p. 77.

582. Dr. Leloudis found that although Republicans may claim that the redistricting process was conducted race-blind, accepting this contention "asks us to believe that history has ended and that in a society deeply scarred by slavery and Jim Crow, race no longer matters; and that politicians vying for public office in the racially polarized America of the 21st century lack an intimate knowledge of where people live and how they vote." PX1486 (Leloudis Report) p. 77.

## **B. Racial Vote Dilution**

583. As noted above, the process in creating the Enacted Plans deviated from past procedure in not following *Stephenson* by drawing VRA districts first.

### **1. The Parties' Experts**

#### **a. NCLCV Plaintiffs' Expert Dr. Duchin**

584. Dr. Moon Duchin, as noted above, submitted an expert report on behalf of NCLCV Plaintiffs. PX150. During trial, Dr. Duchin was accepted as an expert witness.

585. Dr. Duchin used well-recognized ecological inference statistical tools to assess racial voting trends in North Carolina and to determine if racial vote polarization persists today. *Id.* at 11. She designated 8 elections (4 generals and 4 primaries)—by prioritizing more recent elections that had a Black candidate on the ballot, that was polarized, and close enough to produce variation at the district level—to determine the opportunity to elect Blacks' candidates of choice. *Id.* at 11.

586. Dr. Duchin found that there is a consistent pattern of polarization in statewide general elections. More specifically, the Enacted Congressional districts had two effective districts for Black voters while the NCLCV map had four effective districts. The Enacted Senate map had eight effective districts while the NCLCV map had 12 effective districts. The Enacted House districts were effective for Black voters in 24 districts, while the NCLCV map had 36 effective districts. *Id.* at 12.

587. During trial, however, Dr. Duchin was asked about conducting a *Gingles* analysis, to which Dr. Duchin stated she did do *Gingles* two and three, by doing an RPV analysis, but didn't do *Gingles* one. Trial Tr. 01/04/2022. When asked whether a district-by-district analysis was conducted, Dr. Duchin stated that the EI is run on the statewide basis, but it makes inferences about every precinct's preferences. Trial Tr. 01/04/2022.

**b. Plaintiff Common Cause's Expert Jonathan Mattingly**

588. In his addendum report, Dr. Mattingly examined the correlation between the fraction of the black voting age population and the partisan makeup of (i) the North Eastern cluster choices in the North Carolina State Senate, and (ii) the districts within the Duplin-Wayne county cluster in the North Carolina State House. PX1485 (Mattingly Addendum) at 1.

589. The enacted plan splits the Black voters roughly in half between the two districts, whereas the other potential clustering would have concentrated Black voters into one of the two districts. PX1485 (Mattingly Addendum) at 2. Additionally, the enacted plan leads to two stable Republican districts when measured across a range of historic voting patterns. *Id.* In contract, the alternate clustering would have allowed the district with the larger BVAP (42.33% BVAP) to reliably elect a Democratic candidate. *Id.* Thus, the chosen cluster is the choice that favors the Republican Party and significantly fractures Black voters in that area. *Id.*

590. In examining the Duplin-Wayne cluster, Dr. Mattingly used the 2020 Governor race and plotted the relationship between the BVAP and the vote fraction in the ensemble maps he created and the exacted plan. PX1485 (Mattingly Addendum) at 2. Using this analysis, it is possible to draw districts with significantly higher BVAPs and raising the BVAP would likely raise the Democratic vote fraction. *Id.* Trial Tr. 01/04/2022.

**c. Defendants' Expert Jeffrey Lewis**

591. Dr. Jeffery B. Lewis, a Professor of Political Science at UCLA, received a B.A. in Political Science and Economics from Wesleyan University. He received a Ph.D. in Political Science from the Massachusetts Institute of Technology. LDTX109 at 1-2 (Lewis Rep.).

592. Dr. Lewis specializes in quantitative political methodology with a focus on making inferences about preferences and behavior from the analysis of voting patterns in the

mass public and in legislatures. *Id.* at 2. He submitted an expert report and was accepted as an expert witness on behalf of Legislative Defendants in the areas of political methodology and racial bloc voting analysis. Trial Tr. 01/05/2022.

593. Dr. Lewis presented summaries of the results of North Carolina general and Democratic primary election contests held in 2014, 2016, 2018, and 2020. He considered how each contest would have turned out if only the votes of those residing in each current and in each enacted State House, State Senate, and Congressional district had been counted. This allowed for the consideration of the voting strength of Black voters in each existing and proposed legislative district. *Id.* at 2.

594. For each of the reconstituted elections in each district, Dr. Lewis used weighted ecological regression (ER) to estimate the degree of Black voter cohesion and non-Black voter crossover. He omitted contest-district combinations where the number of voting precincts available for the analysis or Black share of voters was too small. *Id.* at 3. He evaluated 420 individual contests including over 190 that included a Black candidate. *Id.* at 5-6. He then used and relaxed, without endorsing, Dr. Duchin's definition of effective Black districts (greater than 75% Black preferred win rate in races with minority candidates combined with greater than 25% BVAP). *Id.* at 6.

595. Using Dr. Duchin's definition of effective Black districts against Dr. Lewis's data set and comparing it with more relaxed requirements of this definition, the Court finds that in no district, enacted or in 2020, does it appear that a majority of BVAP is needed for that district to regularly generate majority support for minority-preferred candidates in the reconstituted elections. *Id.* at 7.



**2. A District-by-District Analysis of Racial Vote Dilution Is Not Necessary**

596. Plaintiffs failed to set forth racial polarization data supporting a district-by-district analysis and relied solely on an argument as to the process as a whole.

597. Race was not the predominant, overriding factor in drawing the districts in the Enacted Plans.

598. The General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations.

**V. Whole-County Provision Claim**

599. The Senate Districts in which counties were divided in their formation are as follows: 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 25, 26, 27, 28, 29, 31, 32, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, and 50. S.L. 2021-173.

600. Across all fifty Senate Districts, eighty-five (85) counties were kept whole and fifteen (15) counties were divided in the formation of a Senate District. S.L. 2021-173.

601. In the Senate District County Groupings, there are a total of 97 county boundary traversals (*i.e.*, the number of times a district crosses between adjacent counties within a grouping). PX150 at 17.

602. The House Districts in which counties were divided in their formation comprise 107 total House Districts, with the following House Districts being the only districts comprised solely of whole counties: 5, 12, 22, 23, 27, 48, 65, 67, 86, 97, 118, 119, and 120. S.L. 2021-175.

603. Across all 120 House Districts, sixty-three (63) counties were kept whole and thirty-seven (37) counties were divided in the formation of a House District. S.L. 2021-175.

604. In the House District County Groupings, there are a total of 69 county boundary traversals. PX150 at 17.

605. The number of persons in each state legislative district must be within plus or minus 5% of the ideal district population and, as determined under the most recent federal decennial census, this is a population of 86,995 in the House and 208,788 in the Senate. PX150 at 12; LDTX107 at 22.

606. NCLCV Plaintiffs present the sole challenge under the Whole County Provisions of the North Carolina Constitution, N.C. Const. art. II, §§ 3(3) and 5(3), and challenge Senate Districts 1, 2, 43, 44, 47, 50, 46, 49, and 48, and House Districts 1 and 79 as impermissibly traversing county lines in violation of the respective Whole County Provisions.

607. The North Carolina Constitution requires that State House and Senate districts comply with a series of requirements adopted to implement the Constitution's Whole County Provisions, including establishing districts within county groupings.

608. In several regions, multiple county groupings were possible under our Supreme Court's interpretation of the Whole County Provisions. In such instances, groupings were chosen from the range of legally possible groupings, as identified in the Duke Academic Paper.

609. NCLCV Plaintiffs do not bring a VRA claim, and there is on the record before the Court no evidence that majority-minority districts under Section 2 of the VRA are required anywhere in North Carolina, such that a deviation from these chosen county groupings is necessary to comply with the VRA.

610. The face of S.L. 2021-173 shows, and NCLCV Plaintiffs do not offer evidence to the contrary, that SD1, SD2, and SD 48 do not traverse county lines and are, therefore, each comprised of only whole counties.

611. Within each remaining county grouping containing a district challenged under the Whole County Provisions, the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria.

## **VI. Individual and Organizational Plaintiffs' Standing**

### **A. Individual NCLCV Plaintiffs**

612. Individual NCLCV Plaintiffs reside in North Carolina Congressional Districts 2, 4, 6, 11, and 13. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these Congressional Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

613. Individual NCLCV Plaintiffs reside in North Carolina Senate Districts 2, 12, 20, 27, and 37. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these Senate Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking. Furthermore, some are located in counties that have been divided in the formation of the Senate Districts and which further contribute to the resulting partisan packing and cracking.

614. Individual NCLCV Plaintiffs reside in North Carolina House of Representatives Districts 6, 27, 29, 58 and 98. PX206-211. As shown by the Individual NCLCV Plaintiffs residing in these House Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking. Furthermore, some are located in counties that have been divided in the formation of the House Districts and which further contribute to the resulting partisan packing and cracking.

**B. Individual Harper Plaintiffs**

615. Individual Harper Plaintiffs reside in all North Carolina Congressional Districts. PX400-424. As shown by the Individual Harper Plaintiffs residing in these Congressional Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking:

616. Individual Harper Plaintiffs reside in North Carolina Senate Districts 1, 18, 19, 27, 32, 40, 41, 46, and 49. PX400, 405, 407, 408, 410, 412, 413, 414, 415, 416, and 418. As shown by the Individual Harper Plaintiffs residing in these Senate Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

617. Individual Harper Plaintiffs reside in North Carolina House Districts 2, 8, 9, 10, 21, 40, 58, 59, 60, 62, 72, 101, 102, 103, and 115. PX400, 402, 405, 407, 408, 410, 411, 412, 414, 416, 418, 419, 420, 421, 422, 423, and 424. As shown by the Individual Harper Plaintiffs residing in these House Districts, these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are the result of partisan packing or cracking.

**C. North Carolina League of Conservation Voters**

618. Organizational Plaintiff NCLCV is a “nonpartisan nonprofit advocacy organization whose mission is to protect the health and quality of life for all North Carolinians, by fighting to build a better world with clean air, clean water, clean energy, and a safe climate, all protected by a just and equitable democracy.” NCLCV Compl. ¶ 11; PX203 ¶ 3. NCLCV attempts to complete this mission by helping to “elect legislators and statewide

candidates who share it's values," and working "to hold elected official accountable for their votes and actions." *Id.*

619. Plaintiff NCLCV has members who reside in every challenged North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives district. PX203 ¶ 5.

620. Plaintiff NCLCV's interests it seeks to protect in this litigation are its ability to effectively advocate for candidates who will protect the environment, its ability to build a pro-environment majority, and its ability to hold legislators accountable, which is frustrated by the predetermining of elections they allege will occur under the Enacted Plans. NCLCV Compl. ¶ 12; PX203 ¶ 6.

621. The partisan composition of the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives Districts significantly affect NCLCV's ability to fulfill its mission and purpose because pro-environment candidates will often be unable to win individual elections and will certainly not be able to win individual elections. Additionally, when incumbent legislators know their seats and their majorities are safe regardless of their votes on legislation, NCLCV cannot fulfil its mission of "[i]nstill[ing] fear into NC's elected leaders of the consequences of taking anti-environment actions." PX203 ¶ 6. Additionally, when potential pro-environment candidates do not believe they can win, they are less likely to run for office. *Id.* at ¶ 7. Lastly, it will diminish the effectiveness of NCLCV's limited funds and resources and so will require the expenditure of more resources while at the same time making fundraising more difficult. *Id.* at 8-9.

622. Plaintiff NCLCV's interests it seeks to protect in this litigation on behalf of its members are the ability of its members' efforts to address environmental harms. NCLCV Compl. ¶ 13; PX203 ¶ 12.

623. Neither the claims asserted, nor the relief requested, by Plaintiff NCLCV requires the participation of individual members in the lawsuit.

**D. Common Cause**

624. Organizational Plaintiff-Intervenor Common Cause is “a non-profit nonpartisan democracy organization with over 1.5 million members and local organizations in 30 states, including North Carolina.” Common Cause Compl. ¶ 17; PX1480 ¶ 2. Common Cause is “dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people.” *Id.*; PX1480 ¶ 5. The organization attempts to meet this goal by assisting voters in navigating the elections process, providing resources for voters to determine their districts and their polling locations, and mobilizing voters to engage in political advocacy. Common Cause also advocates for redistricting reform. *Id.*; PX1480 ¶¶ 5-6.

625. Plaintiff-Intervenor Common Cause has members who reside in every challenged North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives district. PX1480 ¶ 9.

626. Plaintiff-Intervenor Common Cause’s interests it seeks to protect in this litigation are its ability to engage with voters because Common Cause alleges the Enacted Plans will diminish the voices of these voters, its ability to direct its resources effectively, and it will be forced to divert these resources toward “combatting the ill effects of unlawful redistricting,” and its ability to increase voter engagement and holding government officials accountable, which is allegedly frustrated by “preordained election results.” Common Cause Compl. ¶ 17; PX1480 ¶ 7. Common Cause also seeks to protect its interest in advocating for redistricting reform measures. Common Cause Compl. ¶ 17.

627. The partisan composition of the North Carolina Congressional, North Carolina Senate, and North Carolina House of Representatives Districts significantly affect Common

Cause's ability to fulfill its mission and purpose because it frustrates Common Cause's organizational mission of increasing democratic engagement and voter participation by insulating elected officials from the democratic process and, in turn, voters are much less likely to contact their representatives, vote in elections, or engage in the democratic process. PX1480 ¶ 7.

628. Plaintiff-Intervenor Common Cause's interests it seeks to protect in this litigation on behalf of its members are the members', registered as Democrats, right to have representation in the State Legislature in compliance with the North Carolina Constitution, right to be free from unequal treatment, and right to free association.

629. Neither the claims asserted, nor the relief requested, by Plaintiff Common Cause requires the participation of individual members in the lawsuit.

**E. Standing to Assert Intentional Racial Discrimination and Racial Vote Dilution Claims**

630. Individual NCLCV Plaintiffs have shown that they are Black registered voters. PX206, 207, 208, 209, and 211. Organizational Plaintiffs NCLCV and Common Cause have shown that some of its members are Black registered voters. PX203 ¶ 14, PX205; PX1480 ¶ 10.

631. However, none of these plaintiffs have shown that the redistricting plan that affects their Congressional, State Senate, or State House district was the product of intentional racial discrimination.

632. Additionally, the NCLCV plaintiffs have not shown that the Congressional, State Senate, and State House redistricting plans provide one racial group with less opportunity than other members of the electorate to nominate and elect members of their choice.

## CONCLUSIONS OF LAW

### I. Standing

#### A. General Principles

1. The North Carolina Constitution provides: “All courts shall be open; every person, for an injury done him in this lands, goods, person, or reputations shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. CONST. art. I, § 18. This provision should be read to guarantee standing where a legal right arising under the North Carolina Constitution has been infringed. *Comm. to Elect Forest v. Employees PAC*, 2021-NCSC-6, ¶ 81, 376 N.C. 558 (“*Elect Forest*”).

2. “[B]ecause North Carolina courts are not constrained by the ‘case or controversy’ requirement of Article III of the United States Constitution, our State’s standing jurisprudence is broader than federal law.” *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (quotation marks omitted); accord *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (“While federal standing doctrine can be instructive as to general principles. . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.”).

3. The “gist of the question of standing” is whether the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (quoting *Stanley v. Dep’t of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). “[T]he ‘concrete adverseness’ rationale undergirding our standing doctrine is grounded on prudential principles of self-restraint in exercise of [the courts’] power of judicial review for constitutionality[.]” *Elect Forest*, 2021-NCSC-6, ¶ 65 (internal citations omitted).



4. An action, such as the case at bar, arising under the Declaratory Judgment Act does require that the plaintiff make a showing of direct injury. *Id.* at ¶ 61. This is because “only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue.” *Id.* at ¶ 64 (quoting *Stanley*, 284 N.C. at 28). “The ‘direct injury’ required in this context could be, but is not necessarily limited to, ‘deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.’” *Id.* at ¶ 82 (quoting *State ex rel. Summerell v. Carolina-Virginia Racing Ass’n*, 239 N.C. 591, 594, 80 S.E.2d 638, 640 (1954)); see also *Piedmont Canteen Services, Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (holding only persons “who have been injuriously affected . . . in their persons, property or constitutional rights” may challenge the constitutionality of a statute).

5. “An association may have standing to in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.” *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211 (1975)).

6. A plaintiff association may also assert that it has standing to sue on behalf of its members. See *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990); *Shearon Farms Townhome Owners Ass’n v. Shearon Farms Dev., LLC*, 847 S.E.2d 229, 235 (N.C. Ct. App. 2020). Under North Carolina law, an organization has standing to bring suit on behalf of its members if: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *River Birch Assocs.*, 326 N.C. at 129-30, 3388 S.E.2d at 555. An associational plaintiff need not show that *all* of its members would have standing to sue in their own right when seeking declaratory or injunctive relief; rather, it is sufficient

if any “one” member would have individual standing. *Id.*; see also *State Employees Ass’n of N.C., Inc. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003) (reversing lower court decision that had required every member of association or organization to have standing).

## **B. Plaintiffs’ Standing**

7. As recognized by the Supreme Court of the United States, the right to vote is individual and unique to each person. Any “interest in the composition of ‘the legislature as a whole’” is “not an individual legal interest. See *Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018). As such, in federal court, a voter is only injured by specific concerns with that voter’s districts and has standing to challenge the districts in which the voter lives. *Id.* The “hope of achieving a Democratic [or Republican] majority in the legislature” is not a particularized harm. *Id.* at 1932. Additionally, a district’s partisan composition cannot constitute a cognizable injury if a similar composition would result “under any plausible circumstance.” *Id.* at 1924.

8. The Supreme Court of the United States has previously held that individual voters have standing under the federal Constitution to challenge only their own districts on gerrymandering grounds, *Gill*, 138 S. Ct. at 1930-31; however, in light of the different, prudential standing principles in our State, see *Comm. to Elect Forest*, 376 N.C. at 563, and because the unique manner in North Carolina in which one state legislative district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that same grouping, a challenge to the entire county grouping by an individual plaintiff constitutes the necessary “personal stake in the outcome of the controversy” for a plaintiff to have standing to challenge all districts within a county grouping. *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879; see *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that a “reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole” and that an “allegation that a litigant’s district was improperly gerrymandered necessarily involves a

critique of the plan beyond the borders of his district”), *abrogated on other grounds by League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

9. Individual private citizens and voters of a county have standing to sue to seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5. *See Pender County v. Bartlett*, 361 N.C. 491, 497 (2007); *see also Pender County v. Bartlett*, 04-CVS-0696, slip op. at 139-171 (N.C. Sup. Ct. Dec. 2, 2005).

10. The individual Plaintiffs in these consolidated cases challenging a district as the product of impermissible extreme partisan gerrymandering reside either in the district challenged or, in the case of the state legislative districts, the county grouping containing a challenged district.

11. For those reasons, the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing.

12. The organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution.

13. Similarly, the organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

14. However, as discussed below, Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution. As such, Plaintiffs lack standing.

15. “Courts never anticipate a question of constitutional law before the necessity of deciding it arises.” *Chemical Co. v. Turner*, 190 N.C. 471, 130 S.E.2d 154 (1925). “They will not listen to an objection made to the constitutionality of an ordinance by a party whose rights it does not affect and who therefore as no interest in defeating it.” *State v. Trantham*, 230

N.C. 641, 644, 33 S.E.2d 198 (1949). In the equal protection context, “[i]t is not sufficient to show discrimination. It must appear that the alleged discriminatory provisions operate to hurt the [plaintiff] or adversely affect his rights or put him to a disadvantage.” *Id.* “He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.” *Id.* *See also Munger v. State*, 2002 N.C. App. 404, 410-11 (2010) (using the same standard in the context of taxpayer standing).

16. NCLCV Plaintiffs and Plaintiff Common Cause assert claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because this Court finds there to be no factual basis underlying these asserted claims, there is a lack of the requisite “direct injury”—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, these Plaintiffs do not have standing for these claims.

17. Similarly, Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment from this Court directing the legislative process to be undertaken in redistricting.

## II. Partisan Gerrymandering Claims

18. These consolidated cases raise important constitutional issues in which we are asked to strike down, as unconstitutional, redistricting maps enacted by the General Assembly based in part upon what is termed “extreme partisan gerrymandering.”

19. The function of the judiciary is to faithfully interpret the law through judicial review and determine whether it is compliant with the constitution. *State ex. Rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) citing N.C. Const. art. IV, § 1; *Bayard v. Singleton*, 1 N.C. 5, 6-7, 3 N.C. 42, 1 Martin 48 (1787). While *Bayard* and *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L.Ed 60 (1803), establish the right of the court to say what the law is, “sometimes, however, ‘the law is that the judicial department has no

business entertaining the claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights.” *Rucho v. Common Cause*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2484, 2494 (2019) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004)).

20. The political power in this State has always been invested in and derived from its citizens. N.C. Const. of 1776, Decl. of Rights § 2; N.C. Const. of 1868 art. I, § 2; N.C. Const. of 1971, art. I, § 3. Likewise, the sole and exclusive right to regulate the government of this State has always been vested in its citizens. N.C. Const. of 1776, Decl. of Rights § 2; N.C. Const. of 1868, art. I, § 3; N.C. Const. of 1971, art. I, § 3.

21. “The will of the people as expressed in the Constitution is the supreme law of the land.” *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citing *Warrenton v. Warren County*, 215 N.C. 342, 2 S.E.2d 463 (1939)). “The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.” *Wayne County Citizens Ass’n for Better Tax Control v. Wayne County Bd of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991) (citing *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)). “[T]he power of the people, through their elected representatives in the General Assembly, is constrained by the specific limitations imposed by duly adopted constitutional provisions.” *Stephenson v. Bartlett*, 355 NC 354, 390, 562 S.E.2d 377, 402 (2002) (Orr, J. dissenting).

22. It is not the function of the judiciary to express the will of the people or to right perceived wrongs allowed by laws that public sentiment deems unwise or ill-advised. *Blankenship v. Bartlett*, 363 N.C. 518, 523, 681 S.E.2d 759, 763 (2009) (citing *Chisom v. Roemer*, 501 U.S. 380, 400 (1991) (“Judges are ‘often called upon to disregard, or even to defy,

popular sentiment,’ creating a ‘fundamental tension between the ideal character of the judicial office and the real world of electoral politics”)); *People ex rel Von Bokkelen v. Canady*, 73 N.C. 198, 221 (1875) (“Whether [an act of the General Assembly] is wise or unwise, the Court can give no opinion. Our province is to expound the Constitution and laws as they are made, and not to make them”).

23. Declaring as unconstitutional, an act of the branch of government that represents the people is a task that is not to be taken lightly. There is a strong presumption that enactments of the General Assembly are constitutional. *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997). Despite the presumption of the constitutionality of an enactment of the legislature, “[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.” *City of Asheville v. State*, 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). “An act of the General Assembly will be declared unconstitutional only when ‘it [is] plainly and clearly the case,’ . . . and its unconstitutionality must be demonstrated beyond a reasonable doubt.” *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016).

24. Plaintiffs request that this Court strike down the Enacted Maps is based upon the following clauses of the North Carolina Constitution: (1) Free Elections Clause; (2) Equal Protections Clause; (3) Freedom of Speech Clause; and (4) Freedom of Assembly Clause.

25. In *Stephenson*, a case cited and relied upon by the Plaintiffs, the North Carolina Supreme Court explained the framework of the analysis this Court must use in interpreting and giving meaning to the terms of our state Constitution:

“Issues concerning the proper construction of the Constitution of North Carolina ‘are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.’” *Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). . . .

As part of our constitutional interpretation, it is fundamental “to give effect to the intent of the framers of the organic law and of the people adopting it.” *Perry*, 237 N.C. at 444, 75 S.E.2d at 514. More importance is to be placed upon the intent and purpose of a provision than upon the actual language used. *Id.* “In arriving at the intent, we are not required to accord the language used an unnecessarily literal meaning. Greater regard is to be given to the dominant purpose than to the use of any particular words. . . .” *Id.* This Court will consider the “history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation” when interpreting the State Constitution in light of federal requirements. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980); see also *Perry*, 237 N.C. at 444, 75 S.E.2d at 514.

*Stephenson* at 370-371, 562 S.E.2d at 389.

26. As our Supreme Court stated in *State v. Emery*, 224 N.C. 581, 584, 31 S.E. 858, 861 (1944):

It is a cardinal principle, in the interpretation of constitutions, that they should receive a consistent and uniform construction, **so as not to be given one meaning at one time and another meaning at another time, even though circumstances may have so changed as to render a different construction desirable. The will of the people as expressed in the organic law is subject to change only in the manner prescribed by them.**

*Id.* (emphasis added).

27. In order to determine the intent of the drafters, “[i]nquiry should be directed to the old law, the mischief and the remedy.” *Perry*, 237 N.C. at 444, 75 S.E.2d at 514 (1953).

The “court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided.” *Id.* The circumstances and conditions which existed at the time of the enactment of the constitutional provision must be given prime consideration in the construction of the language. *Id.* at 447, 75 S.E.2d at 516.

28. As Justice Orr stated in his partial dissent in *Stephenson*,

If the provisions of [an Article of the State Constitution] are obsolete or ill-adapted to existing conditions, this Court is without power to devise a remedy. However liberally we may be inclined to interpret the fundamental law, we should offend every canon of construction and transgress the limitations of our jurisdiction to review decisions upon matters of law or legal inference if we undertook to extend the function of the Court to a judicial amendment of the Constitution.

*Stephenson*, 355 at 410-411, 562 S.E.2d at 414 (Orr, J. dissenting) *citing Elliott v. State Bd. of Equalization*, 203 N.C. 749, 756, 166 S.E. 918, 922 (1932).

29. The principles stated above are bedrock principles of constitutional construction that have existed in the jurisprudence of this state for at least 150 years. The Court is not excused or relieved from this analytical framework because we disagree with the result it brings or even find personally repugnant.

30. Trial judges admonish jurors on an almost daily basis that it is “absolutely necessary that you understand and apply the law as [we] give it to you, not as you think the laws is, or as you might like it to be.” (N.C. Pattern Jury Instruction Civil 101.5; Criminal 101.5). It is our duty to apply the law as to the construction of the Constitution as set forth above. It is not our prerogative to deviate from this long-established analytical framework.

31. To date, no appellate court in North Carolina has examined the specific question of whether “extreme partisan gerrymandering” is violative of our State Constitution.



Plaintiffs, in support of their position that extreme partisan gerrymandering is unconstitutional, rely on two cases decided by a three-judge panel established pursuant to N.C. Gen. Stat. § 1-267.1(a): *Common Cause v. Lewis*, Wake County File No. 18CVS 14001 and its Judgment dated September 3, 2019; and (b) *Harper v. Hall*, Wake County, File No. 19 CVS 12667 (“*Harper I*”) and the Order on Injunctive Relief entered in that matter on October 28, 2019. In *Common Cause*, a prior three judge-panel, empaneled in 2010 pursuant to N.C. Gen. Stat. § 1-267.1(a), declared the legislative maps enacted in 2017 unconstitutional as a result of “extreme partisan” gerrymandering. That same panel, in *Harper I*, found congressional maps enacted by the N.C Legislature in 2016 unconstitutional as a result of “extreme partisan gerrymandering.”

32. While instructive and persuasive, the court’s legal analysis and conclusions in *Common Cause* and *Harper I* are not binding on this Court.

33. In reaching a decision, it is necessary for the Court to examine the history of the geographic areas from which legislators have been elected and the legislative body that was responsible for creating those districts and any limitations placed upon the same. In addition, it is necessary to review the history of the four constitutional provisions Plaintiffs claim are violated by the enactment of the maps at issue.

#### **A. Historical Background**

##### **1. Structure of Government, Apportionment and Election of Members to Legislative Bodies Under the Lord Proprietors 1663-1729**

34. North Carolinians have been electing individuals to representative bodies for approximately 350 years. The original 1663 Charter of Carolina from Charles II to the eight Lord Proprietors of Carolina and the 1665 Charter of Carolina gave the Lord Proprietors power to enact laws and constitutions with the “advice, assent and approbation of the freemen of the said province . . . or of their delegates.” Charter granted by Charles, II, King

of England to the Lords Proprietors of Carolina, March 24, 1663, The Colonial Records of North Carolina, Ed. William Sanders, Vol. 1 Raleigh, N.C. P.M. Hale, Printer to the State, 1886, 20-23 at 23, Documenting the South 2007, 2007 University Library, The University of North Carolina, <http://docsouth.edu/csr/>. (Colonial Records from docsouth are hereinafter referred to as C.R.)

35. In 1665 the Concessions and Agreements of the Lord Proprietors of the Province of Carolina were published. C.R. 1:75-93. The Concessions and Agreements provided for the election of freemen representatives to a General Assembly. The freemen were to be elected from certain political subdivisions within each county, with the election occurring annually on January 1. C.R. 1:81.

36. On March 1, 1669, the Lord Proprietors published the Fundamental Constitutions of Carolina (C.R. 1:187-206) which divided the province of Carolina into counties each of which consisted of four precincts. (C.R.1:80, Item Three) There were four precincts in each county. A parliament, consisting in part of freeholders elected from each precinct, was created and was required to meet every two years. (C.R. 1:99, Item 71). Elections for freeholder representatives were to be held on September 1 every two years. (C.R.1:200, Item 75).

## **2. Structure of Government, Apportionment and Election of Members to The General Assembly During Colonial Rule 1729-1996**

37. In 1729 the Lord Proprietors sold their interest in the province of Carolina to the Crown and North Carolina became an official English Colony. See Charles Lee Raper, NORTH CAROLINA, A STUDY IN ENGLISH COLONIAL GOVERNMENT, P 1-2 (1904). See also, C.R. 3:32-47

38. The Royal Governor, who was appointed by the Crown by way of a commission (*see*, C.R. 3:68) and given authority or directives from the Crown by way of instructions (*see*,

C.R.3:93), was “the supreme ruler in [North Carolina] and responsible to the crown for all of his acts, and not to the people whose affairs he was to administer.” Charles S. Cooke, *THE GOVERNOR, COUNSEL AND ASSEMBLY IN ROYAL NORTH CAROLINA*, Vol. 12, No. 1 The James Sprunt Historical Publications, (J.G. DeRoulhac Hamilton, Henry McGilbert Wagstaff, Eds.) p. 13, 23 (1912). *See also*, Raper at 27.

39. Pursuant to the letters and instructions to each governor, North Carolina was to be governed by a bicameral General Assembly. The General Assembly consisted of the upper house, which included the Royal Governor’s Council, and the lower house, also called the House of Burgesses. Raper at 85-71; *See also*, C.R. 3:90.

40. The Council was comprised of a set number of individuals recommended by the Royal Governor and appointed by the Crown and were largely under the control of the Royal Governor. Cooke at 16-17. The Council was essentially an executive body that advised the Royal Governor. In the absence or death of the governor, the president of the Council became the acting governor. Finally, the Council, as the upper house of the legislature, had the ability to hold up legislation by giving its consent to the same. Raper at 75, Cooke at 19-20. “[T]he governor and council were practically a unit in their point of view and in their attempt to maintain the rights and interest of the Crown.” Cooke at 40, *see also*, Raper at 71.

41. The authority for the existence of a lower house was set forth in commissions given to each Royal Governor. *See* C.R. 3:66 Raper at 85. The lower house “stood not merely for the representative principle in government but also for distinctly local interests.” Cooke at 23. The House of Burgesses consisted of freeman elected from each county and certain towns.

42. Beginning in 1774 there were five extralegal provincial congresses that met in North Carolina culminating in the Fifth Provincial Congress that drafted North Carolina’s First Constitution in 1776 (1776 Constitution). During the First Provincial Congress the

concept of voting by counties and towns was established as the best method of deciding any differences that would arise during the deliberations of the Provincial Congresses. The membership of the Provincial Congresses mirrored closely the membership of the House of Burgesses.

**3. Structure of Government, Apportionment and Election of Members to the General Assembly of the State of North Carolina 1776-Present**

43. The 1776 Constitution<sup>8</sup> drafted and approved by the Fifth Provincial Congress provided, in part, as follows:

Wherefore, in our present state, in order to prevent anarchy and confusion, it becomes necessary that government should be established in this State; therefore we, the Representatives of the freemen of North-Carolina, chosen and assembled in Congress, for the express purpose of framing a Constitution, under the authority of the people, most conducive to their happiness and prosperity, do declare, that a government for this State shall be established, in manner and form following, to wit:

I. That the legislative authority shall be vested in two distinct branches both dependent on the people, to wit, a *Senate* and *House of Commons*.

II. That the Senate shall be composed of Representatives annually chosen by ballot, one for each county in the State.

III. That the House of Commons shall be composed of Representatives annually chosen by ballot, two for each counts [sic] and one for each of the towns of Edentown, Newbern, Wilmington, Salisbury, Hillsborough and Halifax.

IV. That the Senate and House of Commons, assembled for the purpose of legislation, shall be denominated, *The General Assembly*.

44. In 1789, and as part of the constitutional convention in North Carolina that was called for the purpose of ratifying the new U.S. Constitution, the 1776 Constitution was amended to allow Fayetteville to elect a representative to the House of Commons. John L.

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<sup>8</sup> The 1776 Constitution was not presented to the people for ratification.

Sanders, *Amendments to the Constitutions of North Carolina, 1776-1996*, 1 (1997) (hereinafter referred to as “*Sanders, Amendments to the Constitution of N.C.*”).

45. While not expressly provided for in the 1776 Constitution, the power to create counties and draw their boundaries was necessarily vested in the people of this State, through their elected representatives. See, *Wayne County Citizens Ass’n for Better Tax Control*, 328 N.C. at 29, 399 S.E.2d at 319 (citation omitted).

#### 4. 1835 Amendments to the N.C. Constitution of 1776

46. In 1835 a Constitutional Convention met in Raleigh for the purpose of, again, amending the 1776 Constitution. The convention was a result of “dissatisfaction with the legislative representation system, which gave no recognition to population.” John L. Sanders, *Our Constitutions: An Historical Perspective*, p. \_\_\_\_, (200\_) (hereinafter “*Sanders, Our Constitutions*”)(the document available to the Court was not dated and did not include page numbers).

47. As a result of the 1835 Constitutional Convention, the 1776 Constitution was amended, in part, to provide one senator per district to be laid out by the General Assembly based upon public taxes paid by each county into the Treasury of the State. The amendment also prohibited a county from being divided in the creation of a Senate district. 1776 Constitution, amend. of 1835, art. I, § 1.<sup>9</sup> The provision that a county not be divided in the formation of a district has become known as the “Whole County Provision.”

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<sup>9</sup> Due to the public interest in this case and the facts that the prior Constitutions of North Carolina and amendments thereto may not be readily or easily accessible to the public, the Court has elected to provide the relevant text of the same in footnotes.

Article 1 of the N.C. Const. of 1776 amend. of 1835 provide in relevant part:

§ 1. The Senate of this State shall consist of fifty Representatives, biennially chosen by ballot, and to be elected by districts; which districts shall be laid off by the General

48. The 1835 amendments also provided for 120 seats in the House of Commons, each county being guaranteed one seat with the remaining seats being distributed among the counties according to their population. 1776 Constitution, amend. of 1835, art. I, § 2. The apportionment on population favored the more populous counties. Sanders, *Our Constitutions*, 1.

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Assembly, at its first session after the year one thousand eight hundred and forty-one; and afterwards, at its first session after the year one thousand eight hundred and fifty-one; and then every twenty years thereafter, in proportion to the public taxes paid into the Treasury of the State, by the citizens thereof; and the average of the public taxes paid by each county into the Treasury of the State, for the five years preceding the laying off of the districts, shall be considered as its proportion of the public taxes, and constitute the basis of apportionment: *Provided*, That no county shall be divided in the formation of a Senatorial district. And when there are one or more counties having an excess of taxation above the ratio to form a Senatorial district, adjoining a county or counties deficient in such ratio, the excess or excesses aforesaid shall be added to the taxation of the county or counties deficient, and if, with such addition, the county or counties receiving it, shall have the requisite ratio, such county and counties each, shall constitute a Senatorial district.

§ 2. The House of Commons shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by counties according to their federal population, that is, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons, and each county shall have at least one member in the House of Commons, although it may not contain the requisite ratio of population.

§ 3. This apportionment shall be made by the General Assembly, at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off; and the said apportionment shall be made according to an enumeration to be ordered by the General Assembly, or according to the census which may be taken by order of Congress, next preceding the period of making such apportionment.

§ 4. In making the apportionment in the House of Commons, the ratio of representation shall be ascertained by dividing the amount of Federal population in the State, after deducting that comprehended within those counties which do not severally contain the one hundred and twentieth part of the entire Federal population aforesaid, by the number of Representatives less than the number assigned to the said counties. To each county containing the said ratio, and not twice the said ratio, there shall be assigned one Representative; to each county containing twice, but not three times the said ratio, there shall be assigned two Representatives, and so on progressively, and then the remaining Representatives shall be assigned severally to the counties having the largest fractions.

49. The 1835 Amendments also provided, for the first time, for the popular election of the Governor. 1776 Constitution, amend. 1835, art. 2, §1.

### **5. The North Carolina Constitution of 1868**

50. In 1868, a constitutional convention was called at the initiative of the Federal Government in order to provide for a constitution that would allow North Carolina to rejoin the Union after the Civil War. While Article I largely became what had previously been known as the Declaration of Rights, Article II now set forth those provisions related to the Legislature.

51. Under the 1868 Constitution, the number of and apportionment of members of the newly renamed House of Representative remained relatively the same as set forth in the 1776 Constitution, amend. of 1835, art. I, § 2. However, apportionment of the Senate was now based upon population. The Whole County Provision remained and for the first time Senate districts drawn by the General Assembly were required to be contiguous, and once drawn could not be redrawn until the next statewide “enumeration” or census. 1868 Constitution, art. II, § 5. As the census was required every 10 years, the provision against redrawing districts until the next census has become known as the Mid-Decade Provision.<sup>10</sup>

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<sup>10</sup> Article II of the 1868 Constitution provides in relevant part:

Sec. 1. The Legislative authority shall be vested in two distinct branches, both dependent on the people, to wit: a Senate and House of Representatives.

Sec. 2. The Senate and House of Representatives shall meet annually on the third Monday in November and when assembled shall be denominated the General Assembly. Neither House shall proceed upon public business, unless a majority of all the members are actually present.

SEC. 3. The Senate shall be composed of fifty Senators biennially chosen by ballot.

. . .

Sec. 5. An enumeration of the inhabitants of the State shall be taken under the direction of the General Assembly in the year one thousand eight hundred and seventy-five, and at the end of every ten years thereafter; and the said Senate districts, shall be so altered by the General Assembly, at the first session after the return of every

## 6. Amendments to the North Carolina Constitution of 1868

52. In 1962, the voters of this State ratified a proposed Constitutional Amendment amending the apportionment of members of the House of Representatives by giving the Speaker of the House the authority of apportionment. 1868 Constitution, amend. of 1962, art. II, § 5.<sup>11</sup> The apportionment of the members of the Senate remained unchanged.

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enumeration taken as aforesaid, or by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more Senators.

Sec. 6. The House of Representatives shall be composed of one hundred and twenty Representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation. This apportionment shall be made by the General Assembly at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off.

Sec. 7. In making the apportionment in the House of Representatives, the ratio of representation should be ascertained by dividing the amount of the population of the State, exclusive of that comprehended within those counties which do not severally contain the one hundred and twentieth part of the population of the State, by the number of Representatives, less the number assigned to such counties; and in ascertaining the number of the population of the State, aliens and Indians not taxed, shall not be included. To each county containing the said ratio and not twice the said ratio, there shall be assigned one representative; to each county containing twice but not three times the said ratio, there shall be assigned two representatives, and so on progressively, and then the remaining representatives shall be assigned severally to the counties having the largest fractions.

<sup>11</sup> The amendment of 1962 to art. II, § 5, reads in part:

The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation. This apportionment shall be made by the Speaker of the House of Representatives at the first regular Session of the General Assembly convening after the return of every enumeration by order of Congress. The formula set out in Section 6 of this Article shall be applied by the Speaker and the new apportionment entered on the Journal of the House of Representatives on or before the 60th calendar day of the Session. When so entered, the new apportionment shall have the same force and effect as an Act of the



53. In 1968, the voters of this State ratified a proposed Constitutional Amendment which amended the apportionment of members in both the Senate and House. 1868 Constitution, amend. of 1968, art. II, §§ 4-5<sup>12</sup>: In the Senate the provisions remained almost the same with certain exclusions from the population omitted. 1868 Constitution, amend. of 1968, art. II, §§ 4-5. The 1968 Amendment had the greatest impact on the apportionment of seats in the House of Representatives. While keeping the membership of the House at 120

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General Assembly, and shall become effective at the next election for members of the General Assembly.

<sup>12</sup> The amendment of 1968 to art. II, § 5, reads in part:

Sec. 4. Senate Districts; Apportionment of Senators. The Senators shall be elected from districts. The General Assembly shall, at the first regular Session convening after the return of every decennial enumeration taken by order of Congress, revise the Senate Districts and the apportionment of Senators among those districts, subject to the following requirements:

- (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants which each Senator represents being determined for this purpose by dividing the population of the district he represents by the number of Senators apportioned to that district;
- (2) Each Senate District shall at all times consist of contiguous territory;
- (3) No county shall be divided in the formation of a Senate District;
- (4) When established, the Senate Districts and the apportionment of Senators shall remain unaltered until the return of another decennial enumeration taken by order of Congress

Sec. 5. Number of Representatives. The House of Representatives shall be composed of 120 Representatives, biennially chosen by ballot.

Sec. 6. Representative Districts; Apportionment of Representatives. The Representatives shall be elected from districts. The General Assembly shall, at the first regular Session convening after the return of every decennial enumeration taken by order of Congress, revise the Representative Districts and the apportionment of Representatives among those districts, subject to the following requirements:

- (1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants which each Representative represents being determined for this purpose by dividing the population of the district he represents by the number of Representatives apportioned to that district;
- (2) Each Representative District shall at all times consist of contiguous territory;
- (3) No county shall be divided in the formation of a Representative District;
- (4) When established, the Representative Districts and the apportionment of Representatives shall remain unaltered until the return of another decennial enumeration taken by order of Congress.

members, representatives were no longer apportioned by county, but instead by districts to be drawn by the General Assembly with apportionment based upon equal population. In addition, districts had to be contiguous, were subject to the While County Provision and Mid-Decade Provision. N.C. Const. of 1868, amend. of 1968, art. II, §§ 4-5.

## 7. The North Carolina Constitution of 1971

54. In March, 1968, the North Carolina State Constitution Study Commission (“Study Commission”) was “created by the North Carolina State Bar and North Carolina Bar Association, acting concurrently on the recommendation of His Excellency Governor Dan K. Moore . . . to give consideration to the question of whether there is need for either rewriting or amending the Constitution . . . .” Report of the North Carolina State Constitution Commission, p. iii (December 16, 1968) (hereinafter referred to as “Report of Study Comm’n”). The Study Commission made recommendations to change certain language in the 1868 Constitution. Changes to the 1868 Constitution were made in two ways: to the body of the constitution itself in the form of a “proposed constitution; and proposed amendments to the “proposed constitution” once it had been ratified. The changes to be effected in the “proposed constitution” were typically grammatical or stylistic changes. Those substantive changes contained in the “proposed constitution” were not calculated “to bring about any fundamental change in the power of state and local government or the distribution of that power.” Report of Study Comm’n at 10. Any substantive change reflected in the “proposed constitution itself [was] not of significant magnitude” to justify their treatment in separate proposed amendments. *Id.* Those proposed changes that were significant in magnitude or in which citizens of the State would strongly differ were recommended to be voted on through separate proposed amendments. *Id. at 9-10.*

55. In 1971, a new constitution was ratified by the voters of this state. The 1971 Constitution did not modify Article II of the 1868 Constitution as it pertains to apportionment in any substantive manner.

56. Table 1 below reflects a summary of the progression of how districts for state legislative seats were to be created and the requirements, if any, for those districts from 1776 to the present.

<b>TABLE 1</b>	
<b>Senate</b>	
<b>Year</b>	<b>Method for creating districts</b>
1776	One senator per county
1835	50 districts with one senator per district to be laid out by General Assembly, apportionment based on the amount of public taxes paid into the Treasury; includes a whole-county provision
1868	50 districts with one senator per district to be laid out by General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision (with only exception being if a county's population was large enough, then the county was entitled to two senators)
1968	50 districts with one senator per district to be laid out by the General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision
1971	Only slight grammatical changes to 1968 amendment
<b>House of Representatives (initially referred to as House of Commons)</b>	
<b>Year</b>	<b>Method for creating districts</b>
1776	Two representatives per county with six towns receiving an additional representative
1835	120 representatives elected by the counties and each county must have at least one representative, apportionment based on population
1868	120 representatives elected by the counties and each county must have at least one representative, apportionment based on population
1962	Apportionment now made by the Speaker of the House of Representatives
1968	120 representatives now elected in districts with one representative per district to be laid out by General Assembly, apportionment based on equal population; includes mid-decade provision, a contiguous territory provision, and whole-county provision
1971	Only slight grammatical changes to 1968 amendment

## 8. The Governor's Power to Veto Acts of the General Assembly

57. As noted above, neither the 1776 Constitution, the 1868 Constitution, nor the 1971 Constitution as originally enacted, gave the Governor veto power over acts of the legislature.

58. In 1968, the Study Commission recommended nine separate amendments to the proposed constitution that provided such substantial changes that they believed the voters should have a chance to act upon them individually. Report Of Study Comm'n at 11-12. One proposed amendment would have granted the Governor the right to veto legislation passed by the General Assembly. *Id.* at 10, 102. In its commentary to the proposed amendment giving the Governor veto power, the Study Comm'n stated, "[i]t is intended to add to the legislative process one participant who is responsible to a state wide constituency, and who is in a position to consider the impact of a bill on the state as a whole and in the light of considerations perhaps not known to the majority of the General Assembly." *Id.* at 104. While the General Assembly, at that time, proposed 5 amendments to the Constitution, it did not submit the proposed amendment giving the Governor the power to veto acts passed by the General Assembly.

59. Finally, in 1995, the General Assembly placed a proposed amendment to the 1971 Constitution on the ballot in the 1996 general election to provide the Governor the power to veto ordinary statewide legislation enacted by the General Assembly. N.C. Sess. Laws. 1995, Chapter 5. The act placing the proposed amendment on the ballot was passed by a House of Representatives controlled by the Republican Party and a Senate controlled by the Democratic Party. This amendment was ratified on November 5, 1996, by a vote of 1,652,294 to 544,335. John L. Sanders, *Amendments to the Constitution of N.C.*, 24 (1997). Notably excepted from the Governor's veto power, as proposed by the General Assembly and approved by the people of this State, was the authority of the Governor to veto legislative or

congressional redistricting maps enacted by the General Assembly. 1971 Constitution, amend. of 1995, art. II, § 22(5)(b)-(d).

60. Over the last twenty years numerous bills have been submitted to the approximately 11 different General Assemblies in North Carolina which would require bipartisan or nonpartisan redistricting. Each party has had the ability to pass redistricting reform, yet each party has failed to take advantage of these opportunities.

### **9. Power to Draw Congressional Districts.**

61. While Congress has the ability to regulate districting with respect to congressional maps, it has largely left the redistricting of congressional districts to the state legislatures or other bodies. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (citations omitted). Despite having this ability and the repeated public outcry concerning partisan gerrymandering, Congress has not taken any action to address the problem. The lack of will to address the problem is not limited to a single political party as the Republicans had an opportunity to address the issue between 2017 and 2018 when they controlled both houses of Congress as well as the Presidency. Likewise, with the results of the 2020 census and redistricting of congressional districts looming, Democrats have had an opportunity in 2021 to address the issue as it has control over both chambers of Congress as well as the Presidency. Congress' inaction has left the Equal Protection Clauses in both our State and Federal Constitution as they relate to racial gerrymandering, the Voting Rights Act of 1965, and the one person one vote requirement set forth in *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) as the only constraints placed on our General Assembly in the drawing of congressional districts.

## **B. The Constitutional Provisions Plaintiffs Claim Have Been Violated**

### **1. Free Elections Clause**

62. The 1776 Constitution provided that “[t]he election of members, to serve as representatives, ought to be free.” N.C. Const. of 1776, Decl. of Rights §, IV. This has become known as the Free Elections Clause. With the ratification of the 1868 Constitution, the Free Elections Clause was restated as “[a]ll elections ought to be free.” 1868 Const. art. I, § 10. Finally, the Free Elections Clause was again amended as part of the 1971 Constitution and now states “[a]ll Elections shall be free.” “[O]ught was changed to shall throughout the Declaration of Rights to make clear the rights are commands.” Report of Study Comm’n at 74-75). The change to the Free Elections Clause was not meant as a substantive change that was intended to “bring about a fundamental change” to the power of the General Assembly. *Id.*

### **2. Equal Protection Clause**

63. The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution and provided “[n]o person shall be denied equal protection of the laws, nor shall any person be subjected to discrimination because of race, color, religion or national origin.” 1971 Const. art. I, § 19. The addition of the Equal Protection Clause, while a substantive change, was not meant to “bring about a fundamental change” to the power of the General Assembly. Report of Study Comm’n at 10.

### **3. Free Speech Clause**

64. Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution and now reads “freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.” 1971 Const. art. I, § 14. The addition of the Free Speech Clause, while a substantive change, was not meant to

“bring about a fundamental change” to the power of the General Assembly. Report of Study Comm’n at 10.

#### **4. Freedom of Assembly Clause**

65. The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that “the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances.” 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause “that.” 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution which now reads “The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.” 1971 Const. art. I, § 12. The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to “bring about a fundamental change” to the power of the General Assembly. Rept. of Study Comm’n at 10.

#### **C. Redistricting is an Inherently Political Process**

66. Under our State Constitution, redistricting of Senate and House Districts is left to the General Assembly. As stated above, the drawing of congressional maps has been left to the discretion of state legislative bodies. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) (citations omitted). In that redistricting is left to legislative bodies, bodies which are inherently political in nature, the United State Supreme Court has indicated that a State may engage in “constitutional political gerrymandering.” *Rucho*, \_\_\_ U.S. \_\_\_, 139 S. Ct. at 2947. Likewise, the North Carolina Supreme Court has stated:

[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or “objective constraints” that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

*Stephenson I*, 355 N.C. at 371-372, 562 S.E.2d at 390.

67. Indeed, redistricting “inevitably has and is intended to have substantial consequences” as it is part of the American political process. *Rucho*, \_\_\_ U.S. at \_\_\_, 139 S. Ct. at 2497. While the United States Supreme Court has attempted to address partisan gerrymandering on a number of occasions, in *Rucho* it determined that claims for partisan gerrymandering were not justiciable because they:

present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the [Federal] Constitution, and no legal standards to limit and direct their decisions.

*Id.* at \_\_\_, 139 S. Ct. at 2506-07.

68. While determining that political gerrymandering claims were beyond the reach of the federal courts, the U.S. Supreme Court noted that “[t]he States . . . are actively addressing the issue on a number of fronts,” and “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” *Id.* at 2507.

69. In *Rucho*, the U.S. Supreme Court pointed to examples of how the States are specifically addressing the issue and how statutes and constitutions can provide standards and guidance for the state courts to apply. In Florida, the Fair Districts Amendment to the Florida Constitution was adopted in 2010 and specifically provides that in creating congressional or legislative districts “[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent . . . .” Fla. Const. Art. III, §§ 20-21. In Michigan, the state constitution was amended in 2018 to provide for an independent citizens redistricting commission. Mich. Const. Art. IV, §6. Missouri has added



language to its constitution that requires that “[d]istricts be drawn in a manner that achieves both partisan fairness, and secondarily, competitiveness. . . .” Mo. Const. Art. III, § 3(b)(5). Other states identified by the Supreme Court, Iowa and Delaware, have elected to address the issue through their state statutes. All of the states identified and the manner in which they are addressing the problem have one thing in common: the problem was addressed by the people, their legislatures, or both—not the judiciary.

**D. The Enacted Maps Are Not Unconstitutional as a Result of Partisan Gerrymandering.**

**1. The Enacted Maps Do Not Violate the Free Elections Clause**

70. While the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause. In *Clark v. Meyland*, 261 N.C. 140, 136 S.E.2d 168 (1964), the plaintiff, a registered Democrat sought to change his party affiliation to that of a Republican in order to vote in the next Republican primary. *Id.* at 141, 136 S.E.2d at 169. At the time, the then existing N.C.G.S. § 106-50, required a person changing their party affiliation to take an oath in which they agreed to support the nominees to their new party in all elections until such time as they change their party again. *Id.* The Court found that the provision of the oath requiring the plaintiff to vote for the candidate of his new party operated as a “detrant [sic] to his exercising a free choice among available candidates at the election ---even by casting a write-in ballot.” *Id.* at 142-143, 136 S.E.2d at 170. The Court found this to be violative of the Free Elections Clause. *Id.* at 143, 134 S.E.2d 170.

71. In *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937) the Supreme Court found that an allegation of fraud in an election was contrary to the Free Elections Clause and thus could serve as a basis to try title to an office through the *quo warranto* procedure. *Id.* at 701-02; 191 S.E. at 746.

72. In *Obie v. North Carolina State Board of Elections*, 762 F. Supp. 119 (E.D.N.C. 1991), the United States District Court for the Eastern District of North Carolina found that a requirement that an unaffiliated voter obtain the signature of 10% of the registered voters in the district in which they were running for office impeded the ability to gain access to the ballot and thus, among other things, violated the Free Elections Clause. *Id.* at 121.

73. None of the aforementioned cases deal with redistricting for partisan advantage. However, as noted above, “[t]he 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*, 355 N.C.at 371-72, 562 S.E.2d at 390. (citations omitted).

74. The Court must now seek to construe the Free Elections Clause as well as the redistricting provisions of the North Carolina Constitution within the analytical framework dictated by our Supreme Court, as set forth above and in light of the language of *Stephenson*.

75. The Free Elections Clause was first set forth as part of the North Carolina Declaration of Rights which was specifically incorporated as part of the 1776 Constitution. N.C. Const. of 1776, § XLIV. The Free Elections clause plainly and simply provided “[t]he election of members, to serve as representatives, ought to be free.” N.C. Const. of 1776, Decl. of Rights, § IV. “The word ‘free’ originally derives by way of Section 3 of the Virginia Declaration of Rights<sup>13</sup>, and from the English Bill of Rights (1689)<sup>14</sup>.” John V. Orth, *The North Carolina State Constitution: A Reference Guide*, 56 (1993). “The meaning is plain: free from interference or intimidation.” *Id.*

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<sup>13</sup> [E]lections of members to serve as representatives of the People, in assembly, ought to be free . . . .” Va. Decl. of Rights, §3.

<sup>14</sup> [E]lections of members of Parliament ought to be free.”

76. In addition to the clear meaning of the words found in our Free Elections Clause, we are directed to also consider the circumstances and conditions which existed at the time of the enactment of the same. *Perry*, at 447, 75 S.E.2d at 516.

77. As Plaintiffs correctly point out, the words as originally used in the English Bill of Rights (1689) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England*, 148 (1972). However, that is where the Plaintiffs' analysis ends. Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.

78. At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed.<sup>15</sup> After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.

79. The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own

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<sup>15</sup> In 1669, and prior to his ascension to the throne, King James, II converted to Catholicism.

interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to the elected members of parliament from interference by the Crown.

80. By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.

81. Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. Raper at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.

82. No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly.

This remained in effect until 1754 when the legislation was repealed by the Crown. Raper 90-91.

83. Disputes also arose as to whether the Governor could require counties and towns to obtain charters of incorporation prior to being able to elect representative to the legislature. As this was specifically allowed in his instructions from the Crown, the colonists did not continually press this particular issue. Raper at 69.

84. At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the authority, but the House believed they had a role in the process in the creation of counties. Raper at 89-90.

85. The House of Burgesses fought the Royal Governor over the right to establish a quorum for the legislature to act - the governor desiring a smaller number, feeling they would be easier to influence. Raper at 216-217.

86. The House of Burgesses and Governor also had disputes regarding land, quit-rents and the form of payment thereof, (Cooke at 35, Raper at 191-193), the nomination of public treasurers, (Raper at 205), the appointment of agents to England, (Raper at 26), and disposition of public revenue, Raper at 197-199; Cooke at 37.

87. The most serious disputes between the Royal Governor and the House of Burgesses arose over fiscal matters, the courts and appointment of judges. Raper at 208-209; Cooke at 38.

88. At the time of the adoption of the 1776 Constitution, North Carolina was:

much more democratic than many of her sister states, such as Virginia and Maryland. There was an absence of any landed aristocracy as found in Virginia and the absence of any large ports had hindered the development on an influential commercial class. Lastly, the Church of England with its aristocratic tendencies, was weaker in North Carolina than in her sister colonies directly north and south.

Ketcham at 216.

89. Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. Unlike Parliament, who after the passage of the Declaration of English Rights continued to have to deal with the Crown as part of the constitutional monarchy, North Carolinians and their General Assembly were no longer subservient to parliament, the Crown, or its representatives: the Royal Governor and his Council.

90. The circumstances under which the English Free Election Clause was written were far different than those which caused the same language to be used in the 1776 Constitution.

91. It was the experience of the people of the State of North Carolina that was the most important source for the creation of the 1776 Constitution. Ketcham at 230. By far, the greatest change in the structure of North Carolina's government, other than elimination of the parliament and the Crown, was the vast reduction in the powers of the Governor and the substantial increase in the powers of the General Assembly. These changes were made to make "the governor that figurehead in law which in fact the colonial legislature had long sought to make him." *Id.* Turning the Governor into a figurehead was a result of the experience of the colonists with "the overbearing colonial governors who presided over North Carolina." John V. Orth, *North Carolina Constitutional History*, 70 *North Carolina Law Review*, 1759, 1764 (Sept. 1, 1992).

92. Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. First, apportionment was by county and town. As past disputes between the Royal Governor and the House of Burgesses dealt

primarily with what role the lower house had in creation of counties, that dispute was eliminated with the severance of ties with the Monarch and the Royal Governor. The General Assembly, and only the General Assembly, had the right to create counties.

93. In addition to having authority to create counties and towns, the legislature had the exclusive power to: (1) elect the Governor (N.C. Const. of 1776, § XV); (2) appoint the Attorney General; (3) appoint Judges of the Supreme Court of Law and Equity and Judges of Admiralty (*id.* at § XIII); (4) appoint the general and field officers of the militia (*id.* at § XIV); (5) elect the council of State (*id.* at. XVI); (6) appoint a treasurer or treasurers of the State (*id.* at §. XXII); (7) appoint the Secretary of State (*id.* at § XXXIII); and (8) recommend the appointment of Justice of the Peace to the Governor who shall commission them accordingly. (*id.* at § XXXIII). Moreover, unlike the Royal Governor, the Governor of the State of North Carolina was not given the power to veto acts of the legislature. The lack of veto and the sweeping powers granted to the legislature caused the governor's "executive authority to be hemmed in on every side." John v. Orth, *Constitutional History of North Carolina*, 70 North Carolina Law Review, 1759, 1764 (Sept 1, 1992). Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

94. The drafters of the 1776 Constitution discussed how to place a check on legislative excess. See, C.R. 10:498-99, Letter from Samuel Johnston to James Iredell dated April 20, 1776. Their solution was simple and direct: have elections often.

95. The check on any excesses of the legislature was embodied in Section XX of the Declaration of Rights of the 1776 Constitution which states "[t]hat for redress of grievances and for amending and strengthening the laws, elections ought to be often held." Further solidifying the check on legislative excesses was the requirement that Senators and Representatives be elected annually. N.C. Const. of 1776, arts. II & III. "Annual elections

ensured accountability” to the people of North Carolina. *The North Carolina State Constitution*, John V. Orth, Paul Martin Newby, 2<sup>nd</sup> Ed., p. 6 (2013).

96. While the legislature did not specifically draw districts from 1776 to 1835, they did create counties. In 1776 there were approximately 35 counties in North Carolina and by 1835 that number exceeded 60. There were no constitutional checks on the legislature’s ability to create counties, the basis of representation during that time, nor is there any evidence of the need for any constraints on that authority. As the General Assembly was given the authority to lay out Senate districts in 1835, objective constraints were placed on the General Assembly starting with a Whole County Provision. N.C. Const. of 1776, amended 1835, art. I, §1. Over time, additional objective constitutional constraints have been placed on the General Assembly so as today there are four objective constraints delineated in the North Carolina Constitution: (1) apportionment of the district by population such that the representative or senators in each district shall represent, as nearly as may be, an equal number of inhabitants; (2) A contiguity requirement; (3) a Whole County Provision; and (4) a Mid-Decade Provision.<sup>16</sup> At no point has restriction of redistricting for partisan advantage ever been made part of any North Carolina Constitution.

97. Further evidence that the North Carolina Free Elections Clause was not intended to operate as a restriction on the authority of the General Assembly to redistrict is how the framers of the English Bill of Rights and Virginia Declaration of Rights understood how the provisions applied at the time they were enacted and immediately thereafter.

98. Before, during and after the Glorious Revolution, and the signing of the English Bill of Rights, there existed in England what were known as Rotten Boroughs. These

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<sup>16</sup> These are in addition to constraints/requirements imposed by the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act of 1965.



were Boroughs where there were very few residents but that elected the same number of members of parliament as heavily populated districts.

99. Thomas Paine in *The Rights of Man* explained:

The County of York, which contains nearly a million of souls, sends two county members; and so does the county of Rutland, which contains not an hundredth part of that number. The old town of Sarum, which contains not three houses, sends two members; and the town of Manchester, which contains upwards of sixty thousand souls, is not admitted to send any.

Thomas Paine, *The Rights of Man*, Part, the First, Being an Answer to Mr. Burke's Attack on the French Revolution.

100. Old Sarum was once the site of a cathedral and a fort, but when the cathedral moved, the population dwindled. Despite this, it continued to send two members to parliament. This allowed whoever controlled the land to elect the members. Old Sarum was just one of many Rotten Boroughs and it and others existed as such before, at the time of and after the signing of the English Bill of Rights.

101. Rotten Boroughs allowed fathers to pass on a constituency to their sons ensuring their son or a person of their choosing would have the power of a member of Parliament. <https://www.historylearningsite.co.uk/british-electoral-history-since-1832/rotten-boroughs/> (last visited 01/07/2022)

102. Despite the Free Elections Clause in the English Bill of Rights, the Rotten Boroughs were allowed to continue to exist until the Reform Act of 1832.<sup>17</sup> At the time of the passage of the reform Act of 1832 more than 140 parliamentary seats out of a total of 658 or 21% of members of parliament came from Rotten Boroughs. Of those Rotten Boroughs, 50 had fewer than 50 voters.<sup>18</sup>

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<sup>17</sup> [Parliament.uk/about/living-heritage/evolutionofparliament/reformacts/overview/reformactof1832/](https://www.parliament.uk/about/living-heritage/evolutionofparliament/reformacts/overview/reformactof1832/)

<sup>18</sup> <http://www.britannica.com/topic/rotten-borough> (last visited January 7, 2022).

103. Given the existence of these Rotten Boroughs at the time of the signing of the English Bill of Rights, and their continued unopposed use of the same until 1832, it is doubtful that such boroughs maintained by or for members of parliament were subject to the English Free Elections Clause.

104. North Carolina's Free Election Clause is modeled and taken from a similar clause in the Virginia Declaration of Rights written by George Mason and approved by the Fourth Virginia Convention in 1775. Members of the convention who approved the Virginia Declaration of Rights included Patrick Henry and James Madison.

105. In *Rucho*, the United States Supreme Court noted that

During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, *The First Gerrymander?* 9 *Early Am. Studies* 792-794, 811 (2011). See 5 *Writings of Thomas Jefferson* 71 (P. Ford ed. 1895) (Letter to W. Short (Feb. 9, 1789)) (“Henry has so modelled the districts for representatives as to tack Orange [county] to counties where he himself has great influence that Madison may not be elected into the lower federal house”).

*Rucho*, \_\_\_ U.S. at \_\_\_, 139. S. Ct. at 2494.

106. What is telling is that Patrick Henry, who was responsible in part for the Free Elections Clause in the Virginia Declaration of Rights, was attempting to partisan gerrymander districts to the detriment of James Madison, who was also responsible in part for the Free Elections Clause in the Virginia Declaration of Rights. If the Virginia Free Elections Clause applied to partisan gerrymandering, two of the men responsible for the clause did not seem to think it applied. It did not stop Patrick Henry from his actions, nor did Madison or his supporters assert the Free Election Clause to stop Patrick Henry. If the two men who were responsible or approving the clause did not think it applied to partisan gerrymandering, this Court is certainly hesitant to do so. In fact, it was not until 2020 that Virginia addressed the issue of partisan gerrymandering, not by judicial fiat, but buy a

constitutional amendment providing for a bipartisan districting commission. Va. Const. of 1971, amend. 2020, art. II, § 6-A. The Virginia General Assembly also passed legislation setting standards and criteria for redistricting. One of these standards specifically prohibits maps “when considered on a statewide basis from unduly favoring or disfavoring a political party.” Va. Code § 24.2-304.4 (8).

107. Given the history and factors described above, this Court concludes that the Free Elections Clause does not operate as a restraint on the General Assembly’s ability to redistrict for partisan advantage.

**2. The Incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 Was Not Intended to Bring About a Fundamental Change to the Power of the General Assembly**

108. In determining whether the Equal Protection Clause and Free Speech Clause were intended to apply to the political question of partisan gerrymandering, it is necessary to examine the intent of the framers and citizens who adopted it. *Sneed*, 299 N.C. at 613, 264 S.E.2d at 110. This necessarily entails an examination of “history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration” *Perry*, 237 N.C. at 444, 75 S.E.2d at 514.

109. The Equal Protection Clause was incorporated into our State constitution in 1971 as part of the Law of the Land Clause. N.C. Const. of 1971, art. I, § 19. The Free Speech Clause was incorporated into our State constitution in 1971 as part of Free Press Clause. N.C. Const. of 1971, art. I, § 14. Prior to the adoption of the “proposed constitution” in 1971, no version of an Equal Protection Clause or Free Speech Clause was found in any of our State’s prior Constitutions. *See* N.C. Const. of 1776, as amended; N.C. Const. of 1868 as amended. At the time the Equal Protection Clause and Free Speech Clause were added to the State Constitution, the North Carolina legislature had been dominated by the Democratic

Party since the end of Reconstruction, a period of over 90 years representing 45 legislative elections.

110. In 1967, and just three years prior to the addition of the Equal Protection Clause and Free Speech Clause to the State Constitution, the Legislature placed on the ballot for ratification a constitutional amendment setting forth the objective constraints placed on the legislature in the drawing of legislative districts. 1967 Sess. Laws ch. 640. This amendment was ratified on November 8, 1968, by a vote of 582,633 to 373,395. John L. Sanders, *Amendments to the Constitution of North Carolina 1776-1996*, 15 (1997). N.C. Const. of 1868, amend. 1968, art. II, §§ 4 & 6. The objective constraints listed in the amended Article II of the 1868 Constitution are the only objective constraints that the framers of the North Carolina Constitution and amendments thereto saw fit to place on the legislature in drawing legislative maps. *Id.* The constraints are overall consistent with the progression of constraints placed upon the legislature in the two prior constitutions. *See* Table 1.

111. Plaintiffs would have this Court infer that it was the intent of the framers of the 1971 Constitution, by including the Equal Protection Clause and Free Speech Clause in the State Constitution, to limit the legislature's ability to redistrict for partisan advantage to some degree. As previously stated, the addition of the Equal Protection Clause and Free Speech Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10. If the framers did intend to limit the partisan advantage that could be obtained through redistricting, "it is reasonable to presume it would have been declared in direct terms and not be left as a matter of inference." *Sneed*, 299 N.C. at 616, 264 S.E.2d at 112. We will not "assume that, whatever the intent of the framers, the citizens intended by their adoption at the polls of the 1970 constitutional changes" that the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting. *See Id.; Perry v. Stancil*, 237 N.C.

442, 447, 75 S.E.2d 512, 516 (1953) (“In the absence of an express provision to that effect, we should be slow in adopting the conclusion that it was the intention of the framers of the Constitution to enact so radical a change in the law; because if such was the intention, it is reasonable to presume it would have been declared in direct terms and not left to a matter of inference.”)

112. Perhaps most probative of the intent of the framers and citizens of 1971 was the refusal of the legislature, as the representative of the people, to accept the recommendation of the Study Commission to give the Governor, as a person elected on a Statewide basis by the majority of the voters of this State, the power of the veto as a check on the excesses of the Legislature.

**a. The Enacted Maps Do Not Violate the Equal Protection Clause**

113. Plaintiffs also ask this Court to strike down the enacted maps as unconstitutional as a violation of our State Constitution’s Equal Protection Clause.

114. As an initial matter, this Court notes that the United States declined to strike the partisan gerrymandered maps in *Rucho* as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. \_\_\_ U.S. at \_\_\_, 139 S.Ct. at 2504. It is true that in some instances greater protection has been afforded to citizens of North Carolina under our State Constitution than under the Federal Constitution. However, those occasions are rare. *Stephenson*, 355 N.C. at 397-98, 398 S.E.2d at 406-07 (Orr, J. concurring in part, dissenting in part).

115. It is also true that our Courts have found on several occasions that certain circumstances involving elections or the right to vote may give rise to equal protection claims under our state Constitution. In *Common Cause*, the court relied upon *Stephenson*, *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2007), and *Northampton County*

*Drainage District No. One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990), to justify application of the equal protection clause to strike down the 2017 redistricting plan as unconstitutional based upon extreme partisan gerrymandering.

116. In *Stephenson*, the North Carolina Supreme Court held that “[t]he classification of voters into both single-member and multi-member districts within plaintiffs’ proposed remedial plans necessarily implicates the fundamental right to vote on equal terms . . . .” *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393-94. The Court went on to reason that members in multi-member districts had greater representation, in terms of members, than those voters in a single member district. *Id.*

117. In *Blankenship*, the Court held that the Equal Protection Clause was implicated and that the legislature’s actions were examined with heightened scrutiny when judicial districts created by the General Assembly represented a great disparity of residents to judge when one such district had five times the voting power of another district. *Blankenship*, 363 N.C. at 527-28, 681 S.E.2d at 766.

118. In *Northampton County Drainage No. One*, commissioners of the drainage district could assess members for maintenance or improvements in the district. 326 N.C. at 745-46, 392 S.E.2d at 355. The commissioners were appointed by the Northampton County Clerk of Court. *Id.* Because the drainage district encompassed land in Hertford County, the landowners within the Hertford County district were unable to vote for the Clerk of Court of Northampton County. *Id.* This gave Northampton County members voting rights that member in Hertford County lacked. *Id.* The North Carolina Supreme Court found that this deprived the Hertford County residents of Equal Protection under the law. 326 N.C. at 747, 392 S.E.2d at 356.

119. *Blankenship* and *Stephenson* are cases dealing with the ratio between the voters in a district and the elected representatives in that district. *Northampton* deals with the right to vote on equal terms with other members of the voting district.

120. In analyzing Plaintiffs' Equal Protection Claims as it relates to redistricting for partisan advantage, Plaintiffs are not denied the right to vote, nor are they in a district where they have less voting power than those in other districts. Plaintiffs are not part of a suspect class. Plaintiffs cite no appellate case where a person's membership in a political party is a suspect classification. The opposite seems to be true. See *Libertarian Party of North Carolina v. State*, 365 N.C. 41, 51, 707 S.E.2d 199, 206 (2011). To find as such would subject any person affected by a political decision of the state to heightened scrutiny.

121. It is true that there is a fundamental right to vote. However, if "no individual minority voter has a right to be included in a majority-minority district," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 504, 126 S. Ct. 2594, 2659 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (citing *Shaw v. Hunt*, 517 U.S. 899, 917, and n. 9, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996) (*Shaw II*); *id.*, at 947, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (Stevens, J., dissenting)), then an individual voter would not be entitled to be included in a district that is more likely to elect a candidate from their own party.

122. Moreover, there is no requirement that each party must be influential in proportion to its number of supporters. *Rucho*, 139 S.Ct. at 951.

123. Redistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person's right to cast a vote. Any impingement is limited and distant and as such is subject to a rational basis review. "Under the rationality standard of review, '[s]tate legislatures are presumed to have

acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” See *Beech Mountain v. County of Watauga*, 324 N.C. 409, 414, 378 S.E.2d 780, 783 (1989) (citations omitted). The Court finds that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause.

**b. The Enacted Plans Do Not Violate the Free Speech Clause.**

124. As stated above, the incorporation of the Free Speech Clause into the 1971 Constitution was not intended to bring about a fundamental change to the power of the General Assembly.

125. Our appellate courts have interpreted the rights to free speech in alignment with cases interpreting the First Amendment to the United States Constitution. *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019); *Feltman v. City of Wilson*, 283 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014). The United States Supreme Court addressed the issue of whether partisan gerrymandering impinged upon free speech and other rights protected by the First Amendment to the United States Constitution. Their analysis was direct and to the point: “To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.” *Rucho*, 139 S. Ct. at 2504. The same is true with the enacted plans. Plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district.

126. Plaintiffs’ claims based upon the Free Speech Clause fail.

**c. The Enacted Plans Do Not Violate the Right of Assembly Clause.**

127. The 1971 Constitution, art. I, § 14 provides: “The people have a right to assemble together to consult for their common good, to instruct their representatives, and to



apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.” With the exception of the provision relating to the “right to instruct,” the language of the Freedom of Assembly Clause closely resembles the language in the First Amendment to the United States Constitution which guarantees, in part, the right of the people “to assemble and petition the government for a redress of grievances.”

128. In *Libertarian Party*, our Supreme Court

[J]oin[ed] a growing number of federal courts applying the Supreme Court’s associational rights analysis to equal protection challenges in the context of ballot access restrictions on political parties and candidates. [They did] so because the interests of equal protection bear a strong relationship to the associational rights protected by our state constitution’s free speech and assembly provisions.

(citations omitted) *Libertarian Party*, 365 NC. at 48, 707 S.E.2d at 204. See *Feltman*, 238 N.C. App. at 253, 767 S.E.2d at 620 (recognizing that “[t]he right to freedom of assembly is similar to the right of freedom of association embodied within the federal constitution” and analyzing a claim based upon freedom of assembly in light of federal case law).

129. Given our appellate courts’ adoption of the United States Supreme Court’s associational rights analysis and other federal precedent, we find no reason not to adopt the United States Supreme Court’s analysis and findings on the effect of redistricting plans to the right of assembly and petition as set forth in *Rucho*, 139 S.Ct. at 2504. Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district.

130. There is absolutely no evidence that the Plaintiffs’ right to instruction was violated during the redistricting process or that the Enacted Maps somehow inhibit the right to instruct.

131. Plaintiffs’ claims based upon the Right of Assembly Clause fail.

132. As the North Carolina Supreme Court has stated:

[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 37 L. Ed. 2d 298, 93 S. Ct. 2321 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or “objective constraints” that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

*Stephenson I*, 355 N.C. at 371-372, 562 S.E.2d at 390.

133. The objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech or Freedom of Assembly Clauses found in Article I of the 1971 Constitution.

134. Therefore, the Court concludes that our Constitution does address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs' claims on the basis of “extreme partisan advantage” fail.

#### **E. Plaintiffs' Claims Are Nonjusticiable**

135. In North Carolina, our Supreme Court has had an opportunity on a number of occasions to address whether the creation of boundaries is a question that presents a justiciable controversy. In those instances, the Supreme Court has found that they were political questions and thus non-justiciable. *See e.g., Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909) (rejecting partisan-gerrymandering challenge to a special-tax district); *Norfolk & S.R. Co. v. Washington County*, 154 N.C. 333, 335-36, 70 S.E. 634, 635 (1911) (holding the General Assembly's authority to “declare and establish what it deemed the true boundary between . . . counties . . . is a political question, and the power to so declare is vested in the General Assembly.”); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) (“[T]he power to create or establish municipal corporations . . . is a political function which rests solely in the legislative branch of the

government.”); *State ex. Rel. Tillett v. Mustain*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) (“The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function.”); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) (“Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate.”).

136. In *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004), in adopting the United States Supreme Court’s definition on what constitutes a nonjusticiable claim, the North Carolina Supreme Court held that “any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error.” *Id.* at 639, 599 S.E.2d at 391. The North Carolina Supreme Court stated:

the United States Supreme Court has defined issues as nonjusticiable when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue.

*Id.* (citing *Baker v. Carr*, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682, 82 S. Ct. 691 (1962)).

137. The constitutional provisions relevant to the issue before the Court establish that redistricting is in the exclusive province of the legislature. N.C. Const. of 1971, amend 1996, art. II §§ 3, 5, and 20. Moreover, redistricting of congressional districts is largely left to the legislatures of the individual states. *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 414, 126 S. Ct. 2594, 2607 (2006).

138. As to whether satisfactory and manageable criteria or standards exist for judicial determination of the issue, the United States Supreme Court’s analysis in *Rucho* is instructive. *See Rucho* 139 S. Ct. at 2498-2506.

139. As the role apportionment plays is critical and a traditional part of American politics, “[a]ny standard for resolving such claims must be grounded in a ‘limited and precise rationale’ and be ‘clear, manageable, and politically neutral.’” *Id.* at 2498.

140. This Court has not been asked to eliminate all partisan gerrymandering, only “extreme” partisan gerrymandering. In short, we are asked to decide how much partisanship is “extreme.” In attempting to do so, we necessarily require “especially clear standards” because “[w]ith uncertain limits [we] – even when proceeding with the best intentions – would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Id.* (citing *Vieth, v. Jubelirer*, 541 U.S. 267, 307 (2004)).

141. “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. . . . But such a claim is based on a ‘norm that does not exist’ in our electoral system— ‘statewide elections for representatives along party lines.’” *Id.* at 2499. (citations omitted.)

142. In order to avoid repeating the entirety of *Rucho*, it is safe to say that all of the arguments as to justiciability in the present case were made before the United States Supreme Court in *Rucho* and after an exhaustive analysis, the United States Supreme Court determined that:

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” *Arizona State Legislature*, 576 U. S., at \_\_\_, 135 S. Ct. 2652, 192 L. Ed. 2d 704, 716, does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by *standard, by rule*,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. *Vieth*, 541 U. S., at 278, 279, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

*Id.* at 2506-07

143. In essence we are asked to apportion political power as a matter of fairness. This is no different than what our Supreme Court was asked to determine in *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014). In that case, the North Carolina Supreme Court stated:

Finally, plaintiffs argue that the enacted plans violate the “Good of the Whole” clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs’ proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs’ argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy “a strong presumption of constitutionality,” *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs’ claims fail.

*Id.* at 575, 766 S.E.2d at 260, vacated and remained on other grounds *Dickson v. Rucho*, \_\_\_ U.S. \_\_\_ 135 S. Ct. 1843 (2015).

144. Utilizing the test for determining whether a claim is nonjusticiable as adopted in *Hoke County Bd. Of Education*, and following the extensive analysis of the nonjusticiability of partisan gerrymandering claims in *Rucho*, this Court determines that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach.

145. We agree with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. *Rucho*, 139 S.Ct. at 2504. Furthermore, it has the potential to violate “the core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 567 U.S. 787, 824, 135 S. Ct. 2652, 2658 (2015). Also, it can represent “an abuse of power that, at its core, evinces a

fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.” *LULAC v. Perry*, 548 U.S. 399, 456, 126 S.Ct. 2594, 2631 (2006) (Stevens, J. concurring in part and dissenting in part) (quotation and citation omitted)).

146. In addition, excessive partisan gerrymandering can subject the State to unwanted attention, ridicule and derision. As this Court mentioned at the hearing on Plaintiffs' Motions for Preliminary Injunction, the Supreme Court in *Stephenson* pointed out:

Since *Cavanagh*, many North Carolina legislative districts have been increasingly gerrymandered to a degree inviting widespread contempt and ridicule. See, e.g., “Red-Light District: It’s time to draw the line on gerrymandering,” John Fund’s Political Diary, WSJ.com Opinion Journal from the Wall Street Journal Editorial Page, at <http://www.opinionjournal.com/diary/?id=105001756> (Mar. 13, 2002) (“elections in many semi-free Third World nations routinely offer more choices than many North Carolina residents will have” under the 2001 legislative redistricting plans); *How to Rig an Election*, *The Economist*, Apr. 27, 2002, at 29, 30 (“In a normal democracy, voters choose their representatives. In America, it is rapidly becoming the other way around” and asserting that “North Carolina [has been] long notorious for outrageous reapportionment.”)

*Stephenson*, 355 N.C. at 375, 562 S.E.2d at 392.

147. Over 19 years have elapsed since *Stephenson* was decided. The political party drawing North Carolina’s legislative maps has changed, yet the ridicule has continued. See, “Gerrymandering Puts Partisanship in Overdrive; Can California Slow It” Gerald F. Seib, WSJ.com from the Wall Street Journal Politics Page at <https://www.wsj.com/articles/gerrymandering-puts-partisanship-in-overdrive-can-california-reverse-it-11638198550> (November 29, 2021).

148. This Court neither condones the enacted maps nor their anticipated potential results. Despite our disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule, this Court must remind itself that these maps are the result of a democratic process.

149. The drafters of the 1776 Constitution were elected from eligible males to the Fifth Provincial Congress who were responsible for drafting and approving the 1776 Constitution. Beginning with the 1835 Amendments to the 1776 Constitution, every proposed change since then relating to the drawing of legislative districts was proposed by elected representatives of the people of this State and ratified by the eligible voters. This democratic process left redistricting solely in the province of the legislature subject to only four objective restraints and accountability through frequent elections.

150. The decision of the voters of this State to approve an amendment to the Constitution giving the Governor the right to veto acts of the General Assembly, which excepted the right to veto redistricting maps, by an almost 3-1 margin, put out of reach any control over redistricting by a person elected by the majority of the citizens of this State.

151. The Enacted Maps comply with the objective constraints contained in the North Carolina Constitution of 1971, art. II, §§ 3 & 5., and were thereafter approved by a majority of the elected members of the General Assembly, all of whom were elected pursuant to maps that had previously been determined constitutional by the courts of North Carolina.

152. The people of this State enacted this political process and specifically declined to place any checks on their representatives, other than the objective constraints set forth in the North Carolina Constitution of 1971, art. II, §§ 3 & 5. Some of these people, perhaps even a majority, now ask this Court to undo what they have allowed to be done through the democratic processes of this State. To do so would require us to act outside the bounds of our constitutional authority.

153. Redistricting is a political process that has serious political consequences. It is one of the purest political questions which the legislature alone is allowed to answer. Were we as a Court to insert ourselves in the manner requested, we would be usurping the political power and prerogatives of an equal branch of government. Once we embark on that slippery

slope, there would be no corner of legislative or executive power that we could not reach. Indeed, under Plaintiffs' rationale, we could require the Governor to ensure that the partisan makeup of his political appointees matched or closely resembled the percentage of votes that his political opponent received.

154. We are aware of the effects of partisan gerrymandering. This Court is not without power remedy some of those effects. If partisan gerrymandering dilutes the vote of minorities, remedies under Section 2 of the Voting Rights Act are available. However, either for strategic reasons or a lack of evidence, Plaintiffs have repeatedly informed the Court that they are not pursuing a Voting Rights Act claim, but rather, are only pursuing a State Constitutional claim for racial gerrymandering. This is true despite the fact that it potentially would be easier to prove a violation of the Voting Rights Act, as one only need prove effect and need not prove intent.

155. Plaintiffs' theory of extreme partisan gerrymandering necessarily entails a calculation of the number of seats a party is expected to win in any given election. Seats that are deemed outliers based upon certain calculations are the result of "extreme partisan gerrymandering."

156. In a scenario where a party is expected to win 65 seats and the legislatively approved extreme partisan gerrymandered maps would result in a win of 75 seats, those seats in excess of 65 would be outliers and under plaintiffs' theories, are the product of extreme partisan gerrymandering. The Court would be required to order the mapmakers to redraw the maps so that they are consistent with the number of seats a party would expect to win. Given that the party could reach the 65 seat projection through the use of allowable partisan gerrymandering, some of the voters in the 65 permitted districts would suffer the same effects from partisan gerrymandering that the voters in the 10 excessively gerrymandered districts would have suffered had the maps not been withdrawn. To accept



the Plaintiffs' arguments that the maps are unconstitutional on the theories advanced would necessarily mean that no partisan gerrymandering is allowed as no voter should suffer from the effects of the same. This is contrary to the established precedent of the United States Supreme Court and the North Carolina Supreme Court. *Rucho*, 139 S. Ct. at 2504; *Stephenson*, 355 N.C. at 371-372, 562 S.E.2d at 390.

### III. Intentional Racial Discrimination and Racial Vote Dilution Claims

#### A. Intentional Discrimination and Voter Dilution in Violation of the Equal Protection Clause

157. NCLCV Plaintiffs and Plaintiff Common Cause have asserted a claim that the Enacted Plans unnecessarily dilute the voting strength of Black North Carolinians and intentionally discriminate against Black North Carolinians in violation of the Equal Protection Clause of the North Carolina Constitution. The Court concludes that based upon the record before the Court, Plaintiffs have failed to prove the merit of their claim.

158. Under North Carolina's Equal Protection Clause, North Carolina's citizens—including its minority voters—have “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *White v. Pate*, 308 N.C. 759, 768, 304 S.E.2d 199, 205 (1983). In particular, North Carolina's minority voters have a right to “substantially equal voting power” and “substantially equal legislative representation.” *Stephenson I*, 355 N.C. at 379.

159. The North Carolina Constitution's guarantees of “substantially equal voting power” and “substantially equal legislative representation” are violated when a redistricting plan deprives minority voters of “a fair number of districts in which their votes can be effective,” measured based on “the minority's rough proportion of the relevant population.” *Bartlett v. Strickland*, 556 U.S. 1, 28-29 (2009) (Souter, J., dissenting)

160. An act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was "a motivating factor." *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (quoting *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 220-21 (4th Cir. 2016)); see also *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (quoting *White*, 308 N.C. at 766, 304 S.E.2d at 204) (strict scrutiny is triggered under North Carolina's Equal Protection Clause when it creates a "classification" that "operates to the peculiar disadvantage of a suspect class"). And whether discriminatory purpose was a motivating factor can be "inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Holmes*, 270 N.C. App. at 17. To determine whether this is true, the court may weigh the law's historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law's disproportionate impact. *Id.* at 17.

161. The Supreme Court has observed that "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Dickson v. Rucho*, 368 N.C. 481, 506, 781 S.E.2d 404, 423 (2015), *cert. granted, judgment vacated on other grounds*. The Court considers three factors:

First, in light of the interplay detailed below between the Fourteenth Amendment, which virtually forbids consideration of race, and the VRA, which requires consideration of race, the Supreme Court has acknowledged that the existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional.

Second, the Supreme Court has recognized the importance of the states' own traditional districting principles, holding that states can adhere to them without being subject to strict scrutiny so long as those principles are not subordinated to race.

Finally, the Supreme Court has accepted that some degree of deference is due in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities.

*Id.* (internal citations omitted).

162. North Carolina's Equal Protection Clause is treated the same as the Equal Protection Clause of the United States Constitution. "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19.

163. "[A] finding that race was the predominant motive in drawing a district does not automatically render that district unconstitutional. Nor does it signify that the legislature acted in bad faith or with discriminatory intent in its redistricting." *Covington v. N.C.*, 316 F.R.D. 117, 129 (2016). Further, a legislature's knowledge of racial demographics is most certain, "but that sort of race consciousness does not lead inevitably to impermissible race discrimination." *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)).

164. If a plaintiff shows "that race predominated over traditional race-neutral redistricting principles, [then the court is to] apply strict scrutiny," and the government defendants then "have the burden of show[ing] not only that [their] redistricting plan was in pursuit of a compelling state interest, but also that [their] redistricting legislation is narrowly tailored to achieve [that] compelling interest." *Id.* (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)) (internal quotations omitted).

165. A "discriminatory purpose may often be inferred from the totality of the relevant facts," even when no discriminatory purpose is "express or appear[s] on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241-42, 96 Ct. 2040, 2048 (1976).

166. The relevant framework for analyzing whether an official action was motivated by discriminatory purpose is set forth in *Village of Arlington Heights v. Metro. House. Dev. Corp.*, 429 U.S. 252 (1977). Courts must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266; *State v. Jackson*,

322 N.C. 251, 261, 318 S.E.2d 838, 843-44 (1988) (Frye, J., concurring). The Supreme Court of the United States in *Arlington Heights* laid out a non-exhaustive list of factors for courts to consider. *Holmes v. Moore*, 270 N.C. App. 7, 18 (2020). Those factors include: (1) the law’s historical background, (2) the specific sequence of events leading to the law’s enactment, including any departures from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another.” *Arlington Heights*, 429 U.S. at 266-68.

167. NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn.

168. First, Plaintiffs have failed to show a predominant racial motive through direct evidence. The Adopted Criteria proscribed the use of racial considerations in the drawing of the Enacted Plan, nor did the General Assembly consider race by, for instance, conducting a racially polarized voting study on the selected plans prior to their enactment.

169. Plaintiffs have also failed to show a predominant racial motive through circumstantial evidence. Though the testimony elicited from Plaintiff’s expert, Dr. Leloudis, provided a contextual backdrop for the way redistricting maps have been drawn, litigated, and accordingly struck down in the past, it is incumbent upon this Court to afford the legislature a presumption of good faith. *N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020). “A legislature’s past acts do not condemn acts of a later legislature, which we must presume acts in good faith.” *Id.* at 298 (citing *Abbot v. Perez*, 138 S. Ct. 2305, 2324 (2018)). Plaintiffs have failed to link past, impermissible race-based redistricting to the current legislature and have failed to provide sufficient circumstantial evidence in accordance with the requirements of the *Arlington Heights* analysis.

170. Second, Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*. Plaintiffs provide insufficient evidence that the instances in which traditional districting principles were not adhered to was because of *racial* considerations. Instead, as discussed above, the General Assembly consistently acted with an intent to redistrict for partisan advantage, and nothing in the record shows that to be a pretext for underlying racial considerations.

171. Third, giving deference to the redistricting process as conducted by the General Assembly, Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group. Plaintiffs have shown, and the Court agrees, that a substantial number of Black voters are affiliated with the Democratic Party. What Plaintiffs have not shown, however, is how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before this Court showing that race *and* partisan gain were *coincident* goals predominating over all other factors in the redistricting.

172. Plaintiffs, for the same reasons, have failed to satisfy their burden of showing that the General Assembly was motivated by discriminatory purpose with regard to violating the Equal Protection Clause. Plaintiffs have presented no direct evidence as to discriminatory purpose, and the circumstantial evidence presented is insufficient to sustain their burden pursuant to *Arlington Heights*.

**B. Voter Dilution in Violation of the Free Elections Clause**

173. NCLCV Plaintiffs' claim that the Enacted Plan unnecessarily dilutes the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis.

174. Under North Carolina's Free Elections Clause, "the object of all elections is to ascertain, fairly and truthfully the will of the people." *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E.351, 356 (1915).

175. As explained above, the Free Elections Clause has been interpreted narrowly, and Courts have upheld violations of the Free Elections Clause infrequently. "The meaning [of the word free] is plain: free from interference or intimidation." John V. Orth, *The North Carolina State Constitution: A Reference Guide*, 56 (1993). The Free Elections Clause is inapplicable to NCLCV Plaintiffs' voter dilution claim.

176. Further, Plaintiffs failed to assert a claim under the Voting Rights Act of 1965 ("VRA"), and their application of the *Gingles* analysis, even if used in support of a VRA claim, is insufficient—Plaintiffs failed to conduct a complete *Gingles* analysis. While Dr. Duchin conducted an analysis and made findings concerning the "effective" districts for Black voters, admittedly, she did not conduct step 1 of the *Gingles* analysis.

**IV. Whole-County Provision Claims**

177. NCLCV Plaintiffs claim that certain state legislative districts violate the Whole County Provision of the North Carolina Constitution. While the boundaries for these districts, noted in the findings of fact, cross county lines, the Court concludes that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such

a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383,84, 562 S.E.2d 377, 397 (2002).

178. The Court further concludes that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting.

**V. Declaratory Judgment Claim Regarding the Redistricting Process Laid Out in *Stephenson I* and *Dickson*.**

179. Intervenor-Plaintiff Common Cause, in its First Claim for Relief requests that this Court declare that

Plaintiff and its members and the voters it serves are entitled to, and Legislative Defendants have a duty to undertake, a redistricting process that adheres to the requirements of Article II, Sections 3 and 5 of the North Carolina Constitution as set forth in *Stephenson v. Bartlett*, including a requirement to undertake the analysis of racial data necessary to ascertain what districts are required by the VRA.

Common Cause Complaint, ¶ 157.

180. Plaintiff Common Cause further seeks injunctive relief requiring

the North Carolina General Assembly to adhere to the requirements of Article II, Sections 3 and 5, as set forth in *Stephenson v. Bartlett*, and specifically to perform a meaningful attempt to determine whether there are any districts compelled by the VRA, which, at a minimum, requires the consideration of racial data to understand changing demographics and performing a racially polarized voting analysis where the racial demographics indicate potential VRA problems before designating county clusters required in Senate and House legislative maps.

Common Cause Complaint, ¶ 159.

181. At the outset, the Court notes that in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), the Supreme Court of North Carolina was asked to address whether the legislative plans enacted in 2001 violated the Whole County Provision (WCP) of the State Constitution. *Id.* 355 N.C. at 360, 520 S.E.2d at 383. The Supreme Court stated “the

expanded question before this Court, in light of the VRA, is whether the WCP is now entirely unenforceable . . . or, alternatively, whether the WCP remains enforceable throughout the State to the extent not preempted or otherwise superseded by federal law.” *Id.* at 369, 562 S.E.2d at 388.

182. The Court then embarked on an analysis to harmonize the WCP and VRA. The *Stephenson* Court, in reconciling the VRA and WCP, required the formation of single-member legislative districts to ensure compliance with the VRA according to the following criteria:

[L]egislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

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.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within



plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.

*Id.* at 355 N.C. at 381-84, 520 S.E.2d at 396-97.

183. The requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WCP and VRA. There is nothing in *Stephenson* that requires any particular analysis prior to making a decision as to whether VRA districts are necessary. In this case, having just been involved in multiple redistricting lawsuits, the Legislative Defendants determined, based on their prior experience, that no VRA districts were required. FOF 41-50, 52, 72. The Legislative Defendants were open to considering any VRA analysis submitted. While counsel for Common Cause "raised concerns," no VRA analysis was provided to Legislative Defendants that contradicted the Legislative Defendant's perception of the need, or lack thereof, for VRA districts. Whether the decision to rely on prior experience rather than an expert analysis was prudent or wise, that is not for the Court to decide and would impermissibly intrude on the internal decision-making processes of the Legislature. The fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required.

184. What Plaintiff Common Cause asks of this Court is to impose a judicially-mandated preclearance requirement. Such a requirement does not exist in *Stephenson*.

185. If the Legislative Defendants are incorrect that no VRA Districts are required, Plaintiff Common Cause has an adequate remedy at law and that is to bring a claim under Section 2 of the VRA. Plaintiff Common Cause has made it abundantly clear that it has not made such a claim and have presented no evidence to support such as claim.

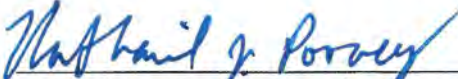
186. For the reasons stated above, the Court concludes, as a matter of law, that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief pursuant to its First Claim for Relief.

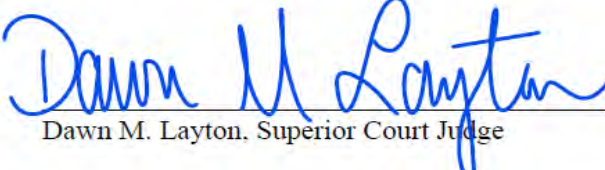
### DECREE

Having considered all of the evidence, the memoranda and arguments of counsel, and the record proper, and based upon the foregoing Findings of Fact and Conclusions of Law, the Court ORDERS the following:

- I. Plaintiffs' requests for Declaratory Judgment are DENIED.
- II. Plaintiffs' requests for Permanent Injunctive Relief are DENIED.
- III. This Judgment fully and finally resolves all claims of all Plaintiffs raised in the consolidated cases and Judgment is hereby entered in favor of Legislative Defendants, and Plaintiffs Claims are hereby dismissed with prejudice.
- IV. The candidate filing period for the 2022 primary and municipal elections is hereby set and shall resume at 8:00 A.M. on Thursday, February 24, 2022 and shall continue through and end at 12:00 noon on Friday, March 4, 2022.  
SO ORDERED, this the 11th day of January, 2022.

  
A. Graham Shirley, Superior Court Judge

  
Nathaniel J. Poovey, Superior Court Judge

  
Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 11<sup>th</sup> day of January 2022.

/s/ Kellie Z. Myers  
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10<sup>th</sup> Judicial District  
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