

No. _____

TENTH DISTRICT

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,

Plaintiffs,

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

From Wake County
No. 21 CVS 500085

**PETITION FOR
DISCRETIONARY REVIEW
PRIOR TO DETERMINATION
BY THE COURT OF APPEALS
AND MOTION TO SUSPEND
APPELLATE RULES**

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,

Defendants.

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TUCKER, IN HIS OFFICIAL CAPACITY AS
MEMBER OF THE NORTH CAROLINA
STATE BOARD OF ELECTIONS,
Defendants.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners are North Carolina voters who respectfully petition this Court to certify for discretionary review, prior to determination by the Court of Appeals, the Order entered on 3 December 2021 in *Harper v. Hall*, No. 21 CVS 50085 (N.C. Super. Ct., Wake Cty.), as well as any related petitions or appellate motions relating to the Order. In the Order, a three-judge panel of the Superior Court denied Petitioners' Motion for a Preliminary Injunction to bar use of North Carolina's 2021 congressional map (the "2021 Plan") in the 2022 primary and general elections for Congress and to enact a remedial process for drawing a new congressional map that is consistent with the North Carolina Constitution.

The Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board must receive final redistricting plans by 14 December 2022 for use in the 8 March 2022 primary election. This Court must therefore

grant review now to enable review in time to for the March primary election. If the Court is unable to review the decision below prior to 14 December 2022, the State Board has attested that it is feasible to move the primary date to 17 May 2022. That step would not eliminate the need for the Court to grant this petition and review this matter in the first instance now, because the State Board has stated that it would need final remedial plans before 18 February 2022 to enable a May 2022 primary. To that end, Plaintiffs have proposed a briefing schedule at the conclusion of this petition.

As the three-judge panel acknowledged, this matter is of extreme urgency due to the General Assembly's own actions. The U.S. Census Bureau informed states earlier this year that, because of the COVID-19 pandemic, there would be at least a five-month delay in the release of the demographic data needed to begin the redistricting process. Despite widespread recognition that this delay would necessitate postponing North Carolina's 8 March 2022 congressional primary election date (and the candidate filing window for that primary election, which begins at noon on 6 December 2021), the Republican-controlled General Assembly sat on its hands: It postponed certain municipal elections but refused to do the same for the congressional primary date in order to leave less time for legal challenges to the gerrymandered congressional districts. This Court should not countenance this obvious effort to evade judicial review of a redistricting plan that so flagrantly violates the rights of millions of North Carolina citizens.

INTRODUCTION

North Carolina is perhaps the most gerrymandered state in the nation. In nearly every congressional and legislative election in the last decade, the people of this State were forced to vote in districts that were gerrymandered. After the State's congressional and legislative maps were struck down as unconstitutional racial gerrymanders, the legislature replaced them with egregious partisan gerrymanders to entrench Republican majorities into power no matter how people voted. In 2019, a three-judge panel of the Superior Court recognized that extreme partisan gerrymandering is a scourge that has plagued this State for decades—a scourge for which both parties are responsible—and that North Carolina's Constitution compels and indeed requires the judiciary to prevent legislatures from entrenching themselves in power and subverting the democratic will. *See* App. 133, Order Granting Mot. for Prelim. Inj. at 7, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Oct. 28, 2019) (“*Harper I*”); *see also Common Cause v. Lewis*, 2019 WL 4569584, at *18, 42 (N.C. Super. Ct. Sep. 3, 2019).

Legislative Defendants chose not to appeal *Common Cause* or *Harper I* to this Court because they wanted to be free to argue that no “binding” precedent prohibited partisan gerrymandering in the next redistricting cycle. And sure enough, when it came time to redistrict for 2022, they argued that those cases were not binding, and chose to once again to engage in extreme partisan gerrymandering by locking in 10 Republican seats in Congress regardless of the political environment.

This is the Court's opportunity to finally end the scourge of extreme partisan gerrymandering in this State. If the Court does not accept this appeal—now—North

Carolinians will be forced to vote in egregiously gerrymandered maps in 2022. Declining review will signal to the General Assembly that its tactics here—delaying passage of the maps until the last possible moment, while simultaneously demanding one of the earliest primaries in the country—are surefire mechanisms for evading full judicial review. The legislature should not get one free gerrymandered election every redistricting cycle. Nor should the uncertainty about whether North Carolina’s Constitution permits partisan gerrymandering continue for even one more election cycle. The Court should grant discretionary review.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C.G.S. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, Petitioners respectfully petition this Court to exercise its authority to grant discretionary review of the Order prior to determination by the Court of Appeals. As set forth below, this case satisfies all five of the statutory criteria under N.C.G.S. § 7A-31(b) for certification prior to determination by the Court of Appeals, any one of which is sufficient to justify this Court’s exercise of discretionary review.

STATEMENT OF THE CASE

A. The *Harper I* court preliminarily enjoins the Legislative Defendants’ 2016 congressional plan, finding it to be an extreme partisan gerrymander.

In 2016, a three-judge federal court invalidated North Carolina’s 2011 congressional map as racially gerrymandered and ordered the General Assembly to redraw the districts. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604-05 (M.D.N.C. 2016). The redrawn map (the “2016 Plan”) produced 10 safe Republican seats and 3 safe

Democratic seats. Legislative Defendants freely acknowledged that the 2016 Plan was a partisan gerrymander, and that it was the most extreme gerrymander possible in North Carolina. *See* App. 30-31 (Joint Select Committee on Redistricting Co-Chair David Lewis explaining that the Committee “dr[e]w the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats”).

On September 27, 2019, the same Plaintiffs here filed *Harper I*, a lawsuit challenging the 2016 Plan as an extreme partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses of the North Carolina Constitution. App. 127. A three-judge panel was appointed days later, and the plaintiffs promptly moved for a preliminary injunction. App. 128. Plaintiffs cited the three-judge panel’s September 2019 opinion in *Common Cause v. Lewis*, striking down North Carolina’s gerrymandered legislative districts and concluding that extreme partisan gerrymandering violated the North Carolina constitution.

On October 28, 2019, the court granted a preliminary injunction barring use of the 2016 Plan in the 2020 elections. App. 144. The court held that the plaintiffs were likely to succeed on the merits of their claims that the 2016 Plan, designed to “give a partisan advantage to 10 Republicans and 3 Democrats,” violated the Free Elections Clause, the Equal Protection Clause, and the Freedom of Speech and Assembly Clauses. App. 139-40. It further held that “[t]he loss to Plaintiffs’ fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional districts are allowed to proceed under the 2016 congressional districts.” App. 140. And the court

explained that this harm to North Carolina voters outweighed potential concerns about “disruption, confusion, and uncertainty in the electoral process.” App. 141.

In mid-November 2019, the General Assembly enacted a remedial plan that produced 8 safe Republican seats and 5 safe Democratic seats. The court *sua sponte* enjoined the candidate filing period pending its review of that remedial map. App. 148-49. At a hearing on December 2, 2019, the court declined to resolve whether the 2019 Plan was constitutional. App. 158-59. In doing so, the court expressed its “fervent hope that the past 90 days” since the decisions in *Common Cause* and *Harper I* would become “a foundation for future redistricting in North Carolina and that future maps are crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people.” App. 160.

B. Legislative Defendants enact another extreme gerrymander following the 2020 decennial census.

North Carolina gained a fourteenth congressional seat following the 2020 census after seeing its population grow by 9.5% over the previous decade. *See* North Carolina: 2020 Census, U.S. Census Bureau (Aug. 25, 2021).¹ Overall, more than 78% of North Carolina’s population growth came from the Triangle area and the Charlotte metro area. App. 265. But even though North Carolina gained a congressional seat due to population growth in overwhelmingly Democratic areas—and little had changed in terms of voter

¹ Available at <https://www.census.gov/library/stories/state-by-state/north-carolina-population-change-between-census-decade.html>.

behavior since the enactment of the 2019 remedial map—Legislative Defendants enacted a map that once again produces at least 10 Republican seats.

Legislative Defendants enacted an extreme gerrymander by manipulating the redistricting process itself. While the General Assembly’s prior redistricting criteria provided that “[r]easonable efforts shall be made not to divide a county into more than two districts,” App. 163, Legislative Defendants eliminated that requirement from the criteria governing the enactment of the 2021 Plan. App. 166-67. Legislative Defendants then proceeded to divide each of the three largest Democratic Counties in North Carolina—Wake, Guilford, and Mecklenburg—into three districts, thereby dramatically diluting Democratic voting power in the state. App. 260. No other county is divided three ways.

To be sure, the 2021 Adopted Criteria provide that “[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.” App. 166. Although Legislative Defendants repeatedly stated that *Common Cause* and *Harper I* were not binding on them, unlike in 2016, they were no longer willing to openly admit their intent to gerrymander a map guaranteeing 10 safe Republican seats. App. 138-39. But the prohibition on partisan considerations was a farce. While legislators drew and submitted maps using software on computer terminals in the redistricting committee hearing rooms, Legislative Defendants chose not to prohibit legislators from simply bringing political data—or maps drawn by political consultants using political data—with them into the map-drawing room, even after they were specifically asked to ban this practice. App. 73-74. Instead, Legislative

Defendants interpreted the 2021 Adopted Criteria to allow the use of political data in the drawing of maps so long as the data were not loaded onto the computer terminals. *Id.*

This process achieved its intended goal. The Republican-controlled Redistricting Committees exploited the loopholes they built into this process to produce a map that guarantees—once again—10 safe Republican seats. *See* App. 260. As described in greater detail herein and in Petitioners’ preliminary injunction submissions below, the 2021 Plan meticulously packs and cracks Democratic voters in every district and has been unanimously panned as an extreme gerrymander by neutral third-party observers and by the same statistical and demographic experts who have been repeatedly credited by courts in North Carolina and across the country. App. 76-91. Both the House and Senate passed the 2021 Plan on strict party-line votes on November 2 and November 4, respectively. *See* Charles Duncan, *Redistricting in NC: New Maps Approved, Favoring GOP*, Spectrum News 1 (Nov. 4, 2021).²

C. Legislative Defendants refuse to postpone candidate filing deadlines despite a six-month delay in the redistricting process due to the COVID-19 pandemic.

The urgency of this litigation is directly attributable to the Republican-controlled General Assembly. For decades, North Carolina has generally held its primary elections in May. The General Assembly moved the State’s primary election date from May to

² Available at <https://spectrumlocalnews.com/nc/charlotte/politics/2021/11/04/redistricting-in-n-c---new-maps-approved--favoring-gop>.

March in 2016. *See* Dallas Woodhouse, *Upcoming North Carolina Election Dates in Jeopardy*, *Carolina J.* (Feb. 12, 2021).³

The General Assembly chose to adhere to the March primary date this year even though delays in the release of redistricting data from the U.S. Census Bureau rendered such a date impracticable. On February 12, 2021, the U.S. Census Bureau announced that the release of demographic data for redistricting, initially planned for March 31, would be delayed by roughly five months, until August 2021.⁴ Because of this extraordinary delay in receiving census data, the General Assembly chose to postpone certain municipal elections in roughly a third of North Carolina's counties. *See* N.C. Sess. Law 2021-56; App. 484-85. But it chose *not* to delay the December candidate filing window for the 2022 congressional primary (or the primary date itself—despite being urged to do so by the State Board of Elections—in an effort to derail any legal challenges to the gerrymandered congressional districts.⁵ The choice left only 32 days between the enactment of the plan and the opening of the candidate filing window. App. 484-85.

D. Plaintiffs file this lawsuit and move for preliminary injunctive relief.

Plaintiffs in this action are North Carolina voters who reside in congressional districts gerrymandered under the 2021 Plan. Plaintiffs brought this action in Wake

³ Available at <https://www.carolinajournal.com/news-article/upcoming-north-carolina-election-dates-in-jeopardy/>.

⁴ Available at <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>.

⁵ Lucille Sherman, *Delay This Year's Local Elections and NC's 2022 Primary, State Official Says*, *News & Observer* (Feb. 23, 2021), <https://bit.ly/3ly4IWb>.

County Superior Court on November 11, 2021. The Complaint alleges that the 2021 Plan violates the Free Elections Clause, the Equal Protection Clause, and the Free Speech and Assembly Clauses of the North Carolina Constitution.

A three-judge panel was named on November 22, 2021, and plaintiffs moved for a preliminary injunction on November 30, 2021. The same panel was assigned to preside over *NCLCV v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct.), a lawsuit challenging the congressional and state legislative maps as unlawful gerrymanders. The *NCLCV* plaintiffs also moved for a preliminary injunction.

The panel heard argument on both preliminary injunction motions on December 2. At the hearing, the court explained that the need for a compressed litigation schedule was fully attributable to the General Assembly, which failed to move the deadlines for the 2022 primary congressional election despite doing the same for municipal elections:

JUDGE SHIRLEY: But let's be honest, we are on this compressed schedule, being required to make a determination [five days] from the date that filings begin because the legislature wouldn't move back the filing period or the primaries for the congressional and legislative districts while they were – did that or at least gave that possibility to municipal [elections] [W]e're all here because there is apparently a sense of urgency in part created by the legislature.

App. 582.

The court ultimately denied both preliminary injunction motions. It concluded that Plaintiffs' claims were not justiciable because the "state constitution left the decision on . . . redistricting to a political [branch]." App. 620. The court further observed that "partisan advantage can be taken into account in redistricting," and concluded that plaintiffs therefore "failed to demonstrate a substantial likelihood of success on the

merits.” *Id.* The court acknowledged the urgency of the litigation and asserted that it would “enter an order as expeditiously as possible and [would] certify the same for immediate appeal should the parties choose to do so.” *Id.*

A written order issued later that day. The panel stated that Plaintiffs’ claims were not justiciable and added that all plaintiffs lacked standing. App. 7-8. Although expert evidence showed that 8 of the *Harper* plaintiffs would be in less packed or less cracked districts nearly 100% of the time in a non-gerrymandered map, and 2 of the plaintiffs in guaranteed Republican districts would be in Democratic districts nearly 100% of the time, the court concluded that no plaintiff in a partisan gerrymandering case could *ever* have standing because “Plaintiffs are presumed to be represented by their designated representatives.” App. 8. It further held that Plaintiffs were unlikely to prevail on the merits of their constitutional claims even if they were justiciable. App. 10-12. The panel stated that “some evidence of intent is required to prove [a] claim of extreme partisan gerrymandering.” App. 11. The panel then incorrectly stated that “Plaintiffs have not claimed intent,” *Id.*, even though Plaintiffs repeatedly argued below—in both their Complaint and in their preliminary injunction submissions—that “[t]he 2021 Plan is an intentional extreme gerrymander.” App. 91; *see* App. 95, 104, 105, 111. Plaintiffs further offered extensive expert evidence of intentional partisan gerrymandering. App 91.

The *Harper* Plaintiffs promptly filed a notice of appeal on December 3, 2021. App. 623.

E. The deadline to finalize remedial plans for the 2022 primary elections.

North Carolina's 2022 statewide primary election is currently scheduled for 8 March 2022. App. 484. On 2 December 2021, the Executive Director of the State Board of Elections submitted an affidavit to the Superior Court asserting that remedial plans must be finalized for use in the March 8 primaries by "December 3-7, 2021." App. 488. The Board's Executive Director explained that it would be feasible to move the primary contest to a later date, but no later than 17 May 2022. App. 492. The Board would likely need final remedial plans "no later than February 14 to February 18, 2022" for use in a May 2022 primary. *Id.*

**REASONS WHY CERTIFICATION SHOULD ISSUE
PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

Under N.C.G.S. § 7A-31(b), this Court may certify a cause for discretionary review before determination by the Court of Appeals if, in this Court's opinion, any of five conditions are met. This case satisfies all five of those conditions.

I. This appeal is of enormous public interest.

This appeal warrants this Court's immediate discretionary review because "[t]he subject matter of the appeal has significant public interest." N.C.G.S. § 7A-31(b)(1). This appeal easily satisfies this condition because it will decide whether millions of North Carolinians will be forced to vote in congressional districts that violate the North Carolina Constitution by entrenching politicians in power against the popular will. And it will determine whether North Carolina courts can redress the state's persistent and extreme gerrymandering.

The 2021 Plan is inarguably an extreme partisan gerrymander. Just five years ago, Legislative Defendants enacted a congressional map that guaranteed Republicans would win at least 10 of the state's 13 districts in nearly every plausible political environment. It was, in their own words, the most extreme gerrymander possible in North Carolina. *See* App. 30-31 (Joint Select Committee on Redistricting Co-Chair David Lewis explaining that the Committee “dr[e]w the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats”). After the *Harper I* court preliminarily enjoined that map as an extreme partisan gerrymander, Legislative Defendants enacted a remedial plan that produced 8 Republican seats and 5 Democratic seats. And now, after North Carolina gained a fourteenth seat because of population growth in predominantly Democratic-leaning areas, the Legislative Defendants passed the 2021 Plan—a map that once again guarantees at least 10 seats to the Republicans. Just like in 2016, that is the most extreme gerrymander possible in this state.

The 2021 Plan is a textbook partisan gerrymander. Legislative Defendants took the three largest bastions of Democratic votes in North Carolina—Wake, Mecklenburg, and Guilford Counties—and divided each of them among three congressional districts. There was no population-based reason to do this and no other counties are split three times in the 2021 Plan. App. 260. The 2021 Plan destroyed Representative Manning's Piedmont Triad district, dividing High Point, Greensboro, and Winston-Salem among three districts so that none of these predominantly Democratic cities will have a Democratic representative in Congress. To achieve its partisan ends, the 2021 Plan likewise unites

far-flung portions of the state with little in common. This manipulation of district boundaries, which occurs to varying degrees in every congressional district under the 2021 Plan, *see* App. 76-91, cannot be explained as anything other than the intentional and illegal efforts by the Legislative Defendants to entrench Republicans in power.

That conclusion is reinforced by the expert statistical analyses of Dr. Wesley Pegden and Dr. Jowei Chen, both of whom presented expert analysis that was accepted by a three-judge Superior Court in *Common Cause v. Lewis* after rigorous cross-examination. *See* No. 18 CVS 014001, 2019 WL 4569584, at *18, 42 (N.C. Super. Ct. Sep. 3, 2019). Dr. Pegden concluded that the enacted map is more carefully crafted to favor Republicans than more than 99.99% of billions of comparison maps that he generated by making tiny random changes to the district lines, while respecting the General Assembly's non-partisan redistricting criteria. The theory behind Dr. Pegden's work is that if a map was not intentionally crafted to maximize partisan advantage, making tiny random changes around the edges should not significantly decrease the plan's partisan bias. App. 94-95.

Dr. Chen's analysis is in accord. Dr. Chen produced a set of 1,000 random simulated plans using the General Assembly's redistricting criteria and found that "[b]y subordinating traditional districting criteria, the General Assembly's Enacted Plan was able to achieve partisan goals that could not otherwise have been achieved under a partisan-neutral districting process that follows the Adopted Criteria." App. 339. The goal of a partisan gerrymander is to (1) spread the favored party's voters across as many districts as possible while still retaining enough of a margin to win in all of them and (2)

concentrate the disfavored party's remaining voters in as few districts as possible. In other words, partisan gerrymanders produce as many districts as possible that safely favor one party but not by large margins and a small number of districts that heavily favor the other party. Dr. Chen's analysis reveals that this is precisely what the General Assembly did here. Dr. Chen analyzed the ten most Republican districts in the 2021 Plan and found that they each have Republican vote shares in the narrow range of 52.9 to 61.2 percent, which is the product of packing Democrats in a handful of safe districts while efficiently distributing Republican voters across the remaining districts. *Not one* of Dr. Chen's simulated plans came close to creating ten Republican districts that fall in that narrow range. App. 92-94. In contrast, Democratic voters are packed into three districts that each have a Democratic vote share between approximately 63 and 73 percent. App. 318. Dr. Chen also found that seven of the districts in the 2021 Plan have a more extreme partisan distribution than was observed in 100% of their corollary districts in the simulated maps, and three additional districts have a more extreme partisan distribution than was observed in at least 95% of the simulated maps. *Id.* Dr. Chen found that 2021 Plan ensures 10 seats for Republicans regardless of the electoral environment, even where the Democrats win most of the votes and where the Republican candidates would win only 6, 7, or 8 seats under any of his 1,000 random nonpartisan maps.

Neutral third-party observers also are unanimous in their view that the 2021 Plan is an extreme gerrymander. The Princeton Gerrymandering Project gave the map a Partisan Fairness grade of "F" while describing North Carolina as "one of the most

extremely gerrymandered states in the nation.”⁶ FiveThirtyEight described the 2021 Plan as “one of the most Republican-biased maps [the General Assembly] could have chosen.”⁷ And Dave Wasserman of the nonpartisan Cook Political Report described the enactment of the 2021 Plan as “NC Republicans going for the jugular.”⁸

There is no doubt that the 2021 Plan is an extreme gerrymander that, absent this Court’s immediate intervention, will violate the constitutional rights of millions of North Carolinians next year and beyond. As multiple North Carolina courts have held, partisan gerrymandering violates the Free Elections Clause’s guarantee that elections shall be “conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” App. 133, *Harper I*, slip op. at 7; *Common Cause*, 2019 WL 4569584, at *109-110. It “runs afoul of the North Carolina Constitution’s guarantee that no person shall be denied the equal protection of the laws.” App. 134, *Harper I*, slip op. at 8; *Common Cause*, 2019 WL 4569584, at *113. And it is irreconcilable with the “important guarantees in the North Carolina Constitution of the freedom of speech and the right of the people in our

⁶ See North Carolina 2021 CST-13 Final Congressional Map, Princeton Gerrymandering Project (last accessed Dec. 4, 2021), <https://gerrymander.princeton.edu/redistricting-report-card?planId=rec1jFkj1lne3m1RS>; North Carolina, Princeton Gerrymandering Project (last accessed Dec. 4, 2021), <https://gerrymander.princeton.edu/reforms/NC>.

⁷ Mackenzie Wilkes, *North Carolina Republicans Passed a Heavily Skewed Map. How Will the Court Respond?*, FiveThirtyEight (Nov. 10, 2021), <https://fivethirtyeight.com/features/north-carolina-republicans-passed-a-heavily-skewed-congressional-map-how-will-the-courts-respond/>.

⁸ Dave Wasserman, Twitter (Nov. 4, 2021), <https://twitter.com/redistrict/status/1456285548058927106?lang=en>.

State to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances.” App. 136-37, *Harper I*, slip op. at 10-11; *Common Cause*, 2019 WL 4569584, at *118-19. Discretionary review from this Court now is necessary to prevent these constitutional violations from occurring during next year’s primary and general elections for Congress.

Finally, this appeal is of enormous public interest because it will resolve the question of whether North Carolina courts have the power to redress these constitutional injuries at all. The Superior Court incorrectly held that these claims are not justiciable. App. 7. That holding presents enormous consequences for the public because the North Carolina judiciary is the only institution realistically capable of redressing partisan gerrymandering in this state. Federal courts are powerless to adjudicate partisan gerrymandering claims under the federal constitution after the U.S. Supreme Court’s decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The Governor lacks authority to veto redistricting legislation. N.C. Const. art. II, § 22(5). And the General Assembly has proven itself unable to reform the redistricting process. That is no surprise given that “[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering,” and “because those politicians maintain themselves in office through partisan gerrymandering, the chances for reform are slight.” *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

II. This appeal involves legal principles of utmost significance to the state's jurisprudence.

This Court's discretionary review is also warranted because this appeal "involves legal principles of major significance to the jurisprudence of the State." N.C.G.S. § 7A-31(b)(2). This appeal presents the following critically important questions:

1. Do North Carolina courts have authority to review challenges to gerrymandered redistricting plans under the North Carolina Constitution?
2. Does partisan gerrymandering, where district lines are drawn to entrench partisan advantage in intent and effect, violate the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses of the North Carolina Constitution?
3. Have Petitioners likely established that the 2021 congressional plan is a partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses?

Each of these questions has deep jurisprudential significance. The first, regarding whether partisan gerrymandering claims are reviewable by North Carolina courts, has profound implications for the democratic process and the separation of powers. Although the North Carolina Constitution directs the General Assembly to revise and reapportion districts after each census, this Court has long recognized that "[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly's execution of the legislative reapportionment process." *Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002). This Court has not hesitated to enforce these

constitutional protections: It has adjudicated claims that redistricting plans violate multiple provisions of the North Carolina Constitution, including its Equal Protection Clause, on which Petitioners here rely. *See Stephenson*, 355 N.C. at 376, 380-81, 562 S.E.2d at 392, 395; *Blankenship v. Bartlett*, 363 N.C. 518, 522-28, 681 S.E.2d 759, 763-66 (2009); *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). And just two years ago, a three-judge panel of the Superior Court properly adjudicated challenges to gerrymandered congressional and state legislative plans under each of the constitutional provisions on which Petitioners rely. *See App. 132, Harper I*, slip op. at 6; *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 3, 2019).

These cases from the redistricting context—as well as this Court’s decisions expounding the political question doctrine—establish that partisan gerrymandering claims are reviewable under the State’s broad constitutional protections for individual voting rights. “This case bears no resemblance to cases in which North Carolina courts have applied the political question doctrine,” which have involved constitutional provisions that “expressly commit[] the substance of the [challenged] power to the *sole discretion*” of a political branch. *Common Cause*, 2019 WL 4569584, at *127 (quoting *Bacon v. Lee*, 353 N.C. at 698, 549 S.E.2d at 854). And the constitutional provisions Petitioners invoke supply “satisfactory, manageable standards” for determining whether, for example, “the partisan will of the mapmaker predominates over the ascertainment of the fair and truthful will of the voters.” *Id.* Yet this Court, in contrast to other state supreme courts, has never expressly resolved whether partisan gerrymandering claims are

justiciable. *Cf., e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 132 (2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015) (“there can hardly be a more compelling interest than the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering.”); *Terrazas v. Ramirez*, 829 S.W.2d 712, 717 (Tex. 1991) (“A judicial determination that an apportionment statute violates a constitutional provision is no more an encroachment on the prerogative of the Legislature than the same determination with respect to some other statute.”). There is pressing need for guidance on this fundamental jurisdictional question, which will otherwise recur every decade.

The separation of powers—which is expressly guaranteed by the North Carolina Constitution, art. I, § 6—underscores the deeper significance of the justiciability question here. When this Court first recognized the power to declare state statutes unconstitutional, it observed that without judicial review, members of the General Assembly could “render themselves the Legislators of the State for life, without any further election of the people.” *Bayard v. Singleton*, 1 N.C. 5, 7 (1787). Those legislators could even “from thence transmit the dignity and authority of legislation down to their heirs male forever.” *Id.* If extreme and unconstitutional partisan gerrymandering cannot be checked by judicial oversight, legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves and their party’s members of Congress in power anew decade after decade.

The United States Supreme Court recently made clear that because “state constitutions can provide standards and guidance for state courts to apply,” claims

seeking to halt this antidemocratic practice are not “condemn[ed] ... to echo into a void.” *Rucho*, 139 S. Ct. at 2507. But without this Court’s immediate review of the decision below, Petitioners’ claims and others like them will do just that.

The second question presented, regarding the scope of the Free Elections, Equal Protection, and Free Speech and Assembly Clauses of the North Carolina Constitution, has similarly profound importance. As the United States Supreme Court recognized, “excessive partisanship in districting leads to results that reasonably seem unjust,” and is “incompatible with democratic principles.” *Rucho*, 139 S. Ct. at 2506. The court held that “the solution [does not] lie[] with the federal judiciary.” *Id.* It is thus hard to imagine a question of greater jurisprudential significance than the question whether North Carolina’s Constitution bars extreme partisan gerrymandering—whether any provision in North Carolina’s constitution allows a solution to this anti-democratic menace.

North Carolina courts have construed the free elections, equal protection, and free speech and assembly protections broadly, consistent with their text and history. *Supra* pp. ##. But this Court has had limited occasion to apply them—especially the Free Elections Clause, which has no parallel in the U.S. Constitution. *See Common Cause*, 2019 WL 4569584, at *109 (“The broad language of the Free Elections Clause has not heretofore been extensively interpreted by our appellate courts.”). Likewise, this Court has construed the State’s guarantees of equal protection and free speech and assembly to extend more broadly than their federal counterparts, but it has never determined how to apply them in challenges to extreme partisan gerrymandering. *Stephenson*, 355 N.C. at 381 n.6, 562 S.E.2d at 395 n.6 (invalidating districting practice that was lawful under

federal equal protection clause); *Blankenship*, 363 N.C. at 522-28, 681 S.E.2d at 763-66 (2009) (same); *Corum v. Univ. of N.C. ex rel. Bd. of Gov'rs*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (state free-speech protection affords a direct cause of action for damages against government officers for speech violations, even though federal law does not). This Court should grant immediate review to vindicate these important individual rights and to confirm that they forbid systematically manipulating district boundaries to maximize partisan advantage.

In addition to these broader jurisprudential questions about the constitutionality of partisan gerrymandering, this Court's evaluation of the 2021 Plan in particular will provide much-needed guidance to lower courts and to the General Assembly. As explained, overwhelming evidence establishes that the 2021 Plan is an extreme partisan gerrymander, including expert analysis showing its districts to be extreme partisan outliers explicable only by an intent to maximize partisan advantage. *Supra* pp. 17-21. Although the three-judge panel below found that Petitioners were unlikely to succeed on the merits, it took no issue with their evidence or their experts' analysis. This Court's assessment of whether Petitioners have established violations of one or more provisions of the North Carolina Constitution will be invaluable to both courts and mapmakers going forward.

Continued division over these significant jurisprudential questions is untenable. Two three-judge panels of the Wake County Superior Court—the court that by statute must hear all redistricting challenges—have recently faced materially identical constitutional challenges to legislative and congressional redistricting plans and have

come to opposite conclusions. The courts have divided not just on the merits, but on the critically important question of whether partisan gerrymandering claims are justiciable at all, and whether anyone can have standing to challenge them. The three-judge panel in *Common Cause* and in *Harper I* held that claims challenging partisan gerrymandering under the North Carolina Constitution are justiciable; that an individual whose district is packed or cracked has standing to challenge their county cluster (for the legislature) or the entire map (for the congressional districts); that extreme partisan gerrymandering violates several provisions of the North Carolina Constitution; and (in *Harper I*) that a congressional map drawn to entrench a 10-3 Republican majority violated those constitutional provisions. *Common Cause*, 2019 WL 4569584, at *105-134; App. 131-42, *Harper I*, at 3-14. In sharp contrast, the panel in this case openly disagreed, holding that even plaintiffs whose district alignment would *flip* under a non-gerrymandered map lack standing because “Plaintiffs are presumed to be represented by their designated representatives”; North Carolina courts lack jurisdiction to hear partisan gerrymandering claims at all; and even if the panel had jurisdiction, no provision of the North Carolina Constitution prohibits partisan gerrymandering, no matter how extreme. Order at 7-12. Only this Court can conclusively resolve the conflict. And without swift resolution, millions of North Carolina voters will be forced to vote in 2022 in congressional districts that are flatly unconstitutional under the holdings of *Common Cause* and *Harper I*.

Finally, the rationale of the decision below confirms the paramount need for this Court’s immediate review. The three-judge panel’s sole reason for holding Petitioners’ claims nonjusticiable was that the “State Constitution delegates to the General Assembly

the power to create congressional districts”; in the court’s view, “a delegation of a political task to a political branch of government implies a delegation of political discretion.” App. 7 (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2011)). That conclusion is not just wrong as a matter of political question doctrine, but flouts decisions of this Court adjudicating the constitutionality of redistricting plans despite the Constitution’s “delegation” to the General Assembly. In fact, the lower court’s reasoning is indistinguishable from the Legislative Defendants’ primary argument in *Stephenson*, which this Court rejected. The legislators there argued that the adjudication of a constitutional challenge to the composition of legislative districts “usurped the authority that the Constitution of this State unambiguously confers on the legislature”; that “redistricting ... involves inherently legislative judgments”; and that questions about the constitutionality of legislative districts thus “are nonjusticiable ‘political questions’ that are beyond the authority of the judiciary.” App. 424-25, *Stephenson*, 2002 WL 34451548 (Mar. 21, 2002) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). This Court disagreed. Not only did the Court resolve the plaintiffs’ constitutional challenge, but it held that the General Assembly’s districts violated the State Constitution’s Equal Protection Clause because it restricted the “fundamental right under the State Constitution” to “substantially equal voting power and substantially equal legislative representation”—one of the constitutional rights likewise invoked in this case. 355 N.C. at 378, 562 S.E.2d at 393.

Like in *Stephenson*, this Court should grant review to confirm that a constitutional “delegation” of authority does not give the General Assembly carte blanche to run

roughshod over other constitutional rights. By authorizing the General Assembly to draw districts, the North Carolina Constitution confers “discretion to establish its own redistricting criteria and craft maps.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Sep. 03, 2019). What the Constitution does *not* delegate is the power to “systematically pack[] and crack[] voters to the extent that their votes are subordinated and devalued for no legitimate governmental purpose, but rather the purposes of entrenching a political party in power.” *Id.* This Court’s immediate review is necessary to ensure the continued vitality of this State’s constitutional protections, and to ensure that North Carolina voters are not yet again forced to vote in unconstitutional districts.

III. Failure to certify will cause enormous harm by preventing appellate review of the 2021 Plan before the 2022 elections.

This Court independently should grant discretionary review because “[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.” N.C.G.S. § 7A-31(b)(3). If this Court does not grant review now, it is highly unlikely that the Court will be able to adjudicate the constitutionality of the 2021 Plan in time for the 2022 elections.

Key deadlines for the 2022 congressional elections are imminent. Primary elections are currently scheduled to be held on 8 March 2022—the second-earliest primary date in the country—due to the General Assembly’s 2018 legislation that moved primaries from May to March. *See* N.C.G.S. § 163A-700(b); 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). And as the court below noted, “we are on this compressed schedule”

because the General Assembly “wouldn't move back the filing period or the primaries for the congressional and legislative districts while they ... gave that possibility to municipal[]” elections. App. 582. The window for candidates to file for party primary nominations is set to open at noon today, and to close on 17 December 2022. *See* N.C.G.S. § 974(b). Most importantly, the Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board likely must receive final plans by 14 December 2022 for use in the March 2022 primaries. App. 488. There is no doubt that, to enable review in time to go forward with the March 2022 primaries, this Court must grant review now.

If, as seems likely, the Court will need to delay the primary election to 17 May 2022—the date currently scheduled for second primaries, *see* N.C.G.S. § 163-111(e)—that would not eliminate the need for the Court to grant this petition and review this matter in the first instance. The State Board has stated that it would need final remedial plans before 18 February 2022 to enable a May 2022 primary. App. 492.

In these circumstances, there is no time for intermediate appellate proceedings in the Court of Appeals. Absent certification by this Court now, the gerrymandered 2021 Plan will go into effect for the 2022 primaries without this Court's review of the three-judge panel's decision and without resolution of the enormously consequential legal questions presented in this case.

IV. The expeditious administration of justice requires certification.

Immediate discretionary review also is appropriate where “[t]he work load of the courts of the appellate division is such that the expeditious administration of justice

requires certification.” N.C.G.S. § 7A-31(b)(4). As explained, the expeditious administration of justice simply does not allow time for two levels of appellate review, and it should be this Court that resolves these issues of substantial public importance.

V. The question of whether the remedial plans cure the constitutional violations found is critical to the jurisdiction and integrity of the court system.

Finally, this Court should grant immediate discretionary review because “[t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.” N.C.G.S. § 7A-31(b)(5). Ensuring that state officials cure constitutional violations that the courts of this State have found is of the utmost importance to the jurisdiction and integrity of the court system. Respectfully, the order on appeal does not do so for the 2021 Plan.

ISSUES FOR WHICH REVIEW IS SOUGHT

Petitioners respectfully request that the Court allow discretionary review on the following issues:

1. Whether North Carolina courts have authority to review challenges to gerrymandered redistricting plans under the North Carolina Constitution.
2. Whether partisan gerrymandering, where district lines are drawn to entrench partisan advantage in intent and effect, violate the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses of the North Carolina Constitution.
3. Whether Petitioners likely established that the 2021 congressional plan is a partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses.
4. Whether Petitioners likely established standing to challenge the 2021 congressional plan.

MOTION TO SUSPEND APPELLATE RULES

In addition to petitioning for discretionary review prior to determination by the Court of Appeals under Rule 15(a), Petitioners also respectfully move under Rules 2 and 37(a) to suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal.

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions” of the North Carolina Rules of Appellate Procedure in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” This Rule “relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quotation marks omitted). Appellate courts exercise this discretionary residual power “with a view towards the greater object of the rules.” 361 N.C. at 316, 644 S.E.2d at 205. This Court also possesses general supervisory authority under article IV, § 12(1) of the North Carolina Constitution, which the Court “will not hesitate to exercise ... when necessary to promote the expeditious administration of justice.” *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

This is the paradigmatic case for exercising this Court’s supervisory authority and residual power under Rule 2. In light of the exceptionally important and singularly urgent questions at stake, suspending the appellate rules here is not only appropriate, but necessary.

Petitioners thus respectfully request that this Court grant this petition and set an expedited schedule that will allow for sufficient time for a decision by this Court, and, if Petitioners prevail on appeal, for the Superior Court to adopt a remedial congressional map on remand before the 17 December deadline.

If, as is likely, the Court must move the 8 March 22 primary date to 17 May 2022, Petitioners request that the Court set an expedited schedule that will allow for sufficient time for a decision by this Court, and, if Petitioners prevail on appeal, for the Superior Court to adopt a remedial congressional map before the 18 February 2022 deadline.

Pursuant to the above, Plaintiffs propose the following briefing schedule:

- Opening Brief and Record on Appeal: Noon on December 10, 2021
- Response Brief: Noon on December 17, 2021
- Reply Brief: Noon on December 21, 2021
- Argument: As soon as possible

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court allow discretionary review of the Superior Court's 2 December 2021 order prior to determination by the Court of Appeals, assume immediately jurisdiction over this appeal and any related petitions or appellate motions relating to the Order, and suspend the appellate rules to expedite a decision on these matters in the public interest.

Respectfully submitted this 6th day of December, 2021.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed
have authorized me to list their names on
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CERTIFICATE OF SERVICE

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel for defendants:

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Counsel for the Legislative Defendants

This the 6th day of December, 2021.

Electronically Submitted
Narendra K. Ghosh

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Appendix

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2021 DEC -3 PM 3:35 FILE NO. 21 CVS 015426

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

WAKE CO., C.S.C.

BY _____

Plaintiffs,

v.

**ORDER ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

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 Representatives;
SENATOR PHILIP E. BERGER, in his
official capacity as President
Pro Tempore of the North Carolina
Senate; THE STATE

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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,

Defendants

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL,
IN HIS OFFICIAL CAPACITY AS

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

**ORDER ON PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

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 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

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CAROLINA STATE BOARD OF
ELECTIONS,

Defendants

THESE MATTERS came on to be heard before the undersigned three-judge panel on December 3, 2021. Upon considering the pleadings, parties' briefs and submitted materials, arguments, pertinent case law, and the record established thus far, the Court finds and concludes, for the purposes of this Order, as follows:

As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rule of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

In this litigation, the North Carolina League of Conservation Voters, Inc. and individual Plaintiffs in Civil Action 21 CVS 015426 (hereinafter "NCLCV Plaintiffs") have asserted the following causes of action against Defendants:

1. That Defendants' enacted redistricting maps for state legislative and congressional districts (hereinafter referred to as "Enacted Plans") constitute extreme partisan gerrymanders in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution; the Equal Protection

Clause under Article I, Section 19 of the North Carolina Constitution; the Free Speech and Free Assembly Clauses under Article I, Sections 12 and 14 of the North Carolina Constitution; and

2. That the Enacted Plans cause unlawful racial vote dilution in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution and the Equal Protection Clause under Article I, Section 19 of the North Carolina Constitution; and
3. That the Enacted Plans were drawn in violation of the Whole County Provisions of Article II, Sections 3(3) and 5(3) of the North Carolina Constitution, and *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

NCLCV Plaintiffs have moved for a preliminary injunction solely on their partisan gerrymandering-based claims.

NCLCV Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022 primary elections and any subsequent elections for Congress, the North Carolina Senate, or the North Carolina House of Representatives using the Enacted Plans. Plaintiffs further request that to the extent the General Assembly fails to adopt redistricting plans—within two weeks from the date of this Court’s entry of a preliminary injunction—that adequately remedy the Enacted Plans, then the 2022 primary elections and 2022 general elections for Congress, North Carolina Senate, and the North Carolina House of Representatives shall be conducted under Plaintiffs’ Optimized Maps, as outlined in their Verified Complaint.

The individual Plaintiffs in Civil Action 21 CVS 500085 (hereinafter “Harper Plaintiffs”) have asserted the following causes of action against Defendants, claiming that the Enacted Plans for congressional districts are unlawful partisan gerrymanders in violation of: the Free Elections Clause of Article I, Section 10 of the North Carolina

Constitution; the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution; and the Freedom of Speech and Freedom of Assembly Clauses of Article I, Sections 12 and 14 of the North Carolina Constitution.

Harper Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022, primary elections and any subsequent elections for the United State House of Representatives using the Enacted Plans. Harper Plaintiffs further prays this Court set forth a remedial process to create a new plan that complies with the North Carolina Constitution, to include a court-ordered remedial plan if the General Assembly fails to timely enact an adequate remedial plan.

Legislative Defendants (the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the Senate, and the redistricting committees of each respective chamber) have responded to plaintiffs' motions by asserting that Plaintiffs' lack standing, present a political question, and that the Free Elections, Equal Protection, Freedom of Speech and Freedom of Assembly claims have been misapprehended by Plaintiffs.

State Defendants (the State of North Carolina, State Board of Elections, members of the State Board of Elections in their official capacity, and the Director of the State Board of Elections) have taken no position on the merits of Plaintiffs' motions for preliminary injunction but have provided information as to election administration concerns and deadlines.

PROCEDURAL HISTORY

On August 12, 2021, the United States Census Bureau released new census data. North Carolina gained a congressional seat due to population growth pursuant to Article I,

Section 2, Clause 3 of the United States Constitution, and Title 13 of the United States Code. On November 4, 2021, the General Assembly enacted S.L. 2021-173 (North Carolina Senate districts); S.L. 2021-174 (United States House of Representatives districts); S.L. 2021-175 (North Carolina House of Representatives districts). NCLCV Plaintiffs filed their Complaint in this matter on November 16, 2021, contemporaneously with the present Motion for Preliminary Injunction. Harper Plaintiffs filed their Complaint in this matter on November 18, 2021, and the present Motion for Preliminary Injunction on November 30, 2021. The undersigned three-judge panel was assigned to preside over the NCLCV and Harper matters pursuant to N.C.G.S. § 1-267.1 on November 19, 2021, and November 22, 2021, respectively.

POLITICAL QUESTION DOCTRINE

Plaintiffs' claims are not likely to succeed because they are not justiciable. North Carolina courts lack jurisdiction over political questions. *See, e.g., Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). The State Constitution delegates to the General Assembly the power to create congressional districts. Because a constitution cannot be in violation of itself, a delegation of a political task to a political branch of government implies a delegation of political discretion. Because Plaintiffs' claims are not justiciable, they have not shown a likelihood of success on the merits.

STANDING OF PLAINTIFFS

Plaintiffs are unlikely to establish standing. It is clear that a voter is only directly injured by specific concerns with that voter's districts. *Gill v. Whitford*, 138 S. Ct. 1916,

1932 (2018). A plaintiff has standing to challenge the district in which that plaintiff lives, but cannot raise generalized grievances about redistricting plans. Additionally, a “hope of achieving a Democratic [or Republican] majority in the legislature” is not a particularized harm. *Id.* Additionally, a district’s partisan composition is not a cognizable injury is a similar composition would result “under any plausible circumstance.” *Id.* at 1824, 1932.

None of the Harper Plaintiffs reside in six of the challenged congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13). Additionally, though the Harper Plaintiffs claim that Democratic voters are “packed” in CD9 and CD6, they admit that these districts would be “packed” with Democratic voters in any event. This is also true for the “cracking” claimed in CD1, CD7, and CD10. For the remaining districts (CD4 and CD14), the Harper Plaintiffs are presumed to be represented by their designated representatives and it is therefore not self-evident that these individual plaintiffs are harmed.

The NCLCV Plaintiffs reside in only 6 of the congressional districts, 8 of the Senate districts, and 9 of the House districts. The individual plaintiffs do not establish that their own districts would shift from Republican-leaning to Democratic-leaning under a different configuration or that they are prevented from electing their candidates of choice. The organizational plaintiffs have not shown how the redistricting legislation has negatively impacted their ability to complete their organizational mission.

The Plaintiffs are unlikely to prove standing and therefore have not shown a likelihood of success on the merits.

INJUNCTIVE RELIEF

“It 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).

Plaintiffs have moved for a preliminary injunction pending a resolution of this action on the merits. “The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an “extraordinary remedy” and will issue “only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Injunctive relief “may be classified as ‘prohibitory’ and ‘mandatory.’ The former are preventive in character, and forbid the continuance of a wrongful act or the doing of some threatened or anticipated injury; the latter are affirmative in character, and require positive action involving a change of existing conditions—the doing or undoing of an act.” *Roberts v. Madison Cty. Realtors Ass’n*, 344 N.C. 394, 399-400, 474 S.E.2d 783, 787 (1996) (citations and quotation omitted).

Status Quo

Plaintiffs have asked that this Court enjoin the 2021 congressional and state legislative district legislation and to move the March 2022 primary schedule. However, this requested relief alters the status quo. Plaintiffs are not asking this Court to restore what has been unlawfully changed, but to create a new condition that has not existed to this point. *See Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 287 N.C. 88, 96, 74 S.E.2d 430, 436 (1953). Plaintiffs here have never voted under a redistricting plan like the one they request and so are asserting rights that have never existed. *Id.*

Likelihood of Success on the Merits

Plaintiffs burden on a motion for preliminary injunction is to show a likelihood of success in proving beyond a reasonable doubt that the enacted congressional and state legislative districts are unconstitutional. This Court finds on these facts that Plaintiffs have failed to carry this burden.

The Supreme Court of North Carolina has ruled that “[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions.” *Stephenson v. Bartlett*, 355 N.C. 534, 371, 562 S.E.2d 377, 390 (2002). The North Carolina Constitution “clearly contemplates districting by

political entities” and redistricting is “root-and-branch a matter of politics.” *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.).

Plaintiff have not shown a likelihood of success on their Free Elections Clause claims. The decision in *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 relied heavily on the evidence of intentionally partisan gerrymandering, stating that they were “designed specifically to ensure that Democrats would not win a majority.”

While the decision in *Common Cause v. Lewis* is not binding on this Court, it seems clear that some evidence of intent is required to prove of claim of extreme partisan gerrymandering. Plaintiffs have not claimed intent. In fact, the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent.

Plaintiffs have also not shown a likelihood of success on the merits on their Equal Protection Clause claims. Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51-53, 707 S.E.2d 199, 206 (2011). Additionally, political considerations in redistricting do not impinge on the fundamental right to vote. These considerations do not deny the opportunity to vote nor do they result in the unequal weighing of votes.

Plaintiffs likewise have not shown a likelihood of success on the merits of their Freedom of Speech and Assembly claims. Political considerations in redistricting do not place any restraints on speech and do not discourage those who wish to speak. Additionally, associational rights do not guarantee a favorable outcome, only the ability to participate in the political process. These rights are not infringed by political considerations in redistricting.

Additionally, Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution. However, it is the federal Constitution which

provides the North Carolina General Assembly with the power to establish such districts. In order to address these claims, this Court must derive authority from the federal Constitution. Since claims under the federal Constitution have not been alleged, Plaintiffs have not shown a likelihood of success on the merits.

Irreparable Harm

As discussed above, Plaintiffs have challenged districts in which they do not live, districts that would not likely be meaningfully different under any reasonable maps, and have asserted only abstract harms. They have not alleged that they are unable to obtain representation in Congress or the General Assembly by whomever is ultimately elected. As such, they have not shown that they will suffer irreparable harm should their request be denied.

Weighing of the Equities

Though Plaintiffs have not shown that they will suffer harm should their request be denied, the State and the public will suffer irreparable harm should the request be granted. It is obvious that any time a statute is enjoined, the State suffers irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 133 (2012). This is particularly true in the area of elections due to the State's indisputably compelling interest in preserving the integrity of the election process. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Additionally, an injunction will cause significant disruption, confusion, and uncertainty in the election process. As such, the equities weigh in favor of denial.

CONCLUSION

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall not issue in regard to the 2021 Enacted Plans. To the extent necessary, this Court determines that there is no just reason for delay and certifies this order for immediate appeal pursuant to Rule 54 of the North Carolina Rules of Civil Procedure.

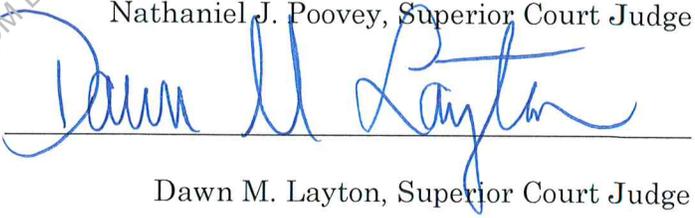
This the 3 day of December, 2021.



A. Graham Shirley, Superior Court Judge



Nathaniel J. Poovey, Superior Court Judge



Dawn M. Layton, Superior Court Judge

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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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Bell*

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 3rd day of December 2021.



B. Davis Cooper, Judicial Assistant
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STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

Docket No. _____

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,

Plaintiffs,

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 AS CHAIRMAN OF THE NORTH

COMPLAINT

(Three-Judge Court Pursuant to
N.C. Gen. Stat. § 1-267.1)

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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,

Defendants.

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Plaintiffs, complaining of Defendants, say and allege:

INTRODUCTION

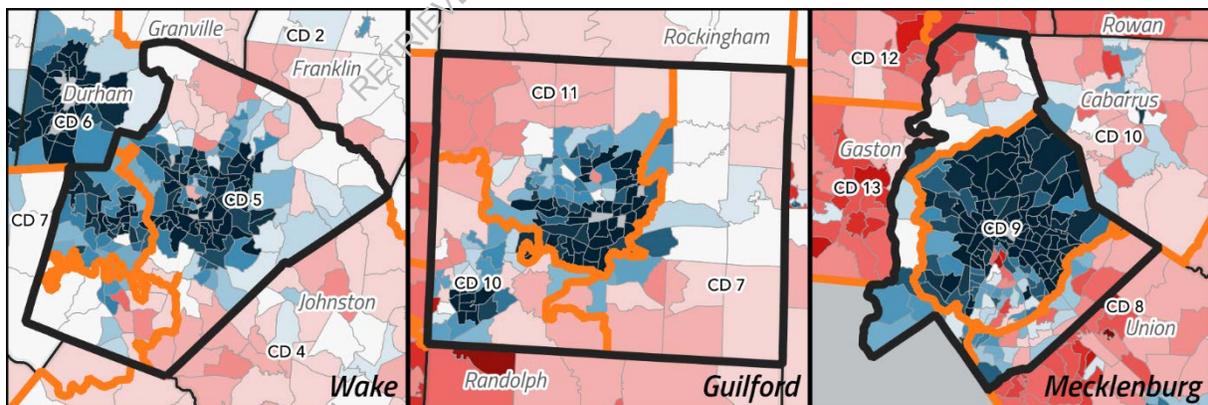
1. Partisan gerrymandering, where partisan mapmakers manipulate district boundaries from behind a computer to maximize their own party's advantage and guarantee the outcome of elections before anyone casts a ballot, is incompatible with "North Carolinians' fundamental rights guaranteed by the North Carolina Constitution." Order on Inj. Relief, *Harper v. Lewis*, No. 19-CVS-012667 ("*Harper I*"), at 15. It violates the Free Elections Clause's guarantee that elections shall be "conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 7 (citing *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 298-307). It "runs afoul of the North Carolina Constitution's guarantee that no person shall be denied the equal protection of the laws." *Id.* at 8 (citing *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 307-17). And it is irreconcilable with the "important guarantees in the North Carolina Constitution of the freedom of speech and the right of the people in our State 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.* at 10-11 (citing *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 317-31).

2. In 2019, a three-judge panel of this Court held in *Harper I* that the same Plaintiffs here were likely to prevail on the merits of their claims that North Carolina's "2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14." *Id.* at 14. The Court enjoined the Legislative Defendants and State Board Defendants from administering the 2020 primary and general elections for Congress using these unconstitutional districts, which were intentionally designed to entrench a partisan advantage of 10 Republicans and 3 Democrats in

this closely divided state. *Id.* at 13. It later directed that North Carolina’s 2020 congressional elections be conducted under a remedial map enacted just weeks before the December 2, 2019 candidate filing period. Order Lifting Inj., *Harper I*, at 1.

3. Following the 2020 decennial census, from which North Carolina gained an additional congressional seat, Legislative Defendants recently enacted a new congressional map. But rather than adhere to the *Harper I* Court’s admonition that extreme partisan gerrymanders unconstitutionally deprive millions of North Carolinians of fundamental rights, Legislative Defendants enacted another extreme and brazen partisan gerrymander. Like the 2016 congressional map (the “2016 Plan”), the new districts enacted this year (the “2021 Plan”) will entrench an overwhelming partisan advantage for Republicans.

4. While Legislative Defendants did not so openly admit to enacting an extreme partisan gerrymander this time, the results speak for themselves: The 2021 Plan flagrantly dilutes Democratic votes in large part by trisecting each of the three most heavily Democratic counties in the state—Wake, Guilford, and Mecklenburg.



5. The 2021 Plan packs North Carolina’s Democratic strongholds in Raleigh, Durham and Cary combined, and Charlotte into three congressional districts. And it cracks the State’s remaining Democratic voters across the remaining districts to ensure an overwhelming

majority of safe Republican seats. The result is as intended: A map that produces 10 safe Republican seats, 3 safe Democratic seats, and 1 competitive district.

6. As the *Harper I* Court explained in invalidating the 2016 Plan, extreme partisan gerrymandering “entrench[es] politicians’ power,” “evinces a fundamental distrust of voters by serving the self-interest of political parties over the public good,” and “dilute[s] and devalue[s] votes of some citizens compared to others” in violation of the North Carolina Constitution. Order on Inj. Relief, *Harper I*, at 7. The new map, like its 2016 predecessor, violates the fundamental constitutional rights of North Carolinians. It should meet the same fate as the unconstitutional 2016 Plan, and Plaintiffs will promptly file a motion for a preliminary injunction. This Court should enjoin use of the 2021 Plan immediately, enjoin any further intentional dilution of the voting power of citizens based on their political views or party affiliation, and order a new, constitutional map for use in the 2022 primary and general elections.

7. Plaintiffs here, who are also the plaintiffs in *Harper I*, have filed a motion in *Harper I* seeking leave under Rule 15(d) to file a supplemental complaint challenging the 2021 Plan on the same grounds set forth in this Complaint. The motion for leave has not been acted upon by the *Harper I* Court, which is presently composed of only a single judge (due to one retirement and one recusal), and Legislative Defendants have taken the position that Plaintiffs’ claims against the 2021 Plan should be filed in a new case. While Plaintiffs believe that their proposed supplemental complaint in *Harper I* should be allowed, they are commencing this action in light of the fast-approaching candidate filing period to ensure that some three-judge trial court will timely adjudicate their constitutional claims, including their forthcoming motion for a preliminary injunction.

PARTIES

A. Plaintiffs

8. Plaintiff Amy Clare Oseroff is a retired teacher residing in Greenville, North Carolina. Ms. Oseroff's residence was located within Congressional District 1 under the 2016 Plan and remains in District 1 under the 2021 Plan. Ms. Oseroff is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

9. Plaintiff Rebecca Harper is a real estate agent residing in Cary, North Carolina. Ms. Harper's residence was located within Congressional District 2 under the 2016 Plan and is now located within District 6 under the 2021 Plan. Ms. Harper is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

10. Plaintiff Donald Rumph is an Army and Air Force combat veteran and retired registered nurse residing in Greenville, North Carolina. Mr. Rumph's residence was located within Congressional District 3 under the 2016 Plan and is now located within District 1 under the 2021 Plan. Mr. Rumph is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

11. Plaintiff John Anthony Balla is a digital marketing strategist residing in Raleigh, North Carolina. Mr. Balla's residence was located within District 4 under the 2016 Plan and is now located within District 5 under the 2021 Plan. Mr. Balla is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

12. Plaintiff Richard R. Crews is a retired stockbroker residing in Newland, North Carolina. Mr. Crews's residence was located within Congressional District 5 under the 2016 Plan and is now located within District 14 under the 2021 Plan. Mr. Crews is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

13. Plaintiff Lily Nicole Quick is a homemaker residing in Greensboro, North

Carolina. Ms. Quick's residence was located within Congressional District 6 under the 2016 Plan and is now located within District 7 under the 2021 Plan. Ms. Quick is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

14. Plaintiff Gettys Cohen Jr. is a dentist residing in Smithfield, North Carolina. Dr. Cohen's residence was located within Congressional District 7 under the 2016 Plan and is now located within District 4 under the 2021 Plan. Dr. Cohen is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

15. Plaintiff Shawn Rush is part owner of a marketing firm, a Meals on Wheels organizer, and Mayor Pro Tem of East Salisbury residing in East Spencer, North Carolina. His residence was located within Congressional District 8 under the 2016 Plan and is now located within District 10 under the 2021 Plan. Mr. Rush is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

16. Plaintiff Jackson Thomas Dunn, Jr. is a retired attorney and law professor residing in Charlotte, North Carolina, within Congressional District 9 under both the 2016 and 2021 Plans. Mr. Dunn is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

17. Plaintiff Mark S. Peters is a retired physician assistant residing in Fletcher, North Carolina. Mr. Peters's residence was located within Congressional District 10 under the 2016 Plan and is now located within District 14 under the 2021 Plan. Mr. Peters is registered as an unaffiliated voter and has consistently voted for Democratic candidates for the U.S. House of Representatives.

18. Plaintiff Kathleen Barnes is the owner of a small publishing company residing in Brevard, North Carolina. Ms. Barnes's residence was located within Congressional District 11

under the 2016 Plan and is now located within District 14 under the 2021 Plan. Ms. Barnes is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

19. Plaintiff Virginia Walters Brien is a sales manager residing in Charlotte, North Carolina. Ms. Brien's residence was located within Congressional District 12 under the 2016 Plan and is now located within District 9 under the 2021 Plan. Ms. Brien is a registered unaffiliated voter who has consistently voted for Democratic candidates for the U.S. House of Representatives.

20. Plaintiff David Dwight Brown is a retired computer systems analyst residing in Greensboro, North Carolina. Mr. Brown's residence was located within Congressional District 13 under the 2016 Plan and is now located within District 11 under the 2021 Plan. Mr. Brown is a registered Democrat who has consistently voted for Democratic candidates for the U.S. House of Representatives.

B. Defendants

21. Defendant Destin Hall is a member of the North Carolina House of Representatives and currently serves as the Chair of the House Standing Committee on Redistricting. Mr. Hall is sued in his official capacity only.

22. Defendant Warren Daniel is a member of the North Carolina Senate and currently serves as a co-Chair of the Senate Standing Committee on Redistricting and Elections. Mr. Daniel is sued in his official capacity only.

23. Defendant Ralph E. Hise, Jr. is a member of the North Carolina Senate and currently serves as a co-Chair of the Senate Standing Committee on Redistricting and Elections. Mr. Hise is sued in his official capacity only.

24. Defendant Paul Newton is a member of the North Carolina Senate and currently

serves as a co-Chair of the Senate Standing Committee on Redistricting and Elections. Mr. Newton is sued in his official capacity only.

25. Defendant Timothy K. Moore is the Speaker of the North Carolina House of Representatives. Mr. Moore is sued in his official capacity only.

26. Defendant Philip E. Berger is the President Pro Tempore of the North Carolina Senate. Mr. Berger is sued in his official capacity only.

27. Defendant North Carolina State Board of Elections is an agency responsible for the regulation and administration of elections in North Carolina.

28. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections. Mr. Circosta is sued in his official capacity only.

29. Defendant Stella Anderson is the Secretary of the North Carolina State Board of Elections. Ms. Anderson is sued in her official capacity only.

30. Defendant Jeff Carmon III is a member of the North Carolina State Board of Elections. Mr. Carmon is sued in his official capacity only.

31. Defendant Stacy Eggers IV is a member of the North Carolina State Board of Elections. Mr. Eggers is sued in his official capacity only.

32. Defendant Tommy Tucker is a member of the North Carolina State Board of Elections. Mr. Tucker is sued in his official capacity only.

JURISDICTION AND VENUE

33. This Court has jurisdiction of this action pursuant to Articles 26 and 26A of Chapter 1 of the General Statutes.

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

35. Under N.C. Gen. Stat. § 1-267.1, a three-judge court must be convened because

this action challenges the validity of a redistricting plan enacted by the General Assembly.

FACTUAL ALLEGATIONS

A. North Carolina Voters are Closely Divided Politically

36. For more than a decade, North Carolina’s voters have been closely divided between the Republican and Democratic Parties. Democrats have won three out of four gubernatorial elections since 2008 while Republican presidential and U.S. Senate candidates have each won the state three out of four times, nearly all in close races.

37. The most recent election cycle illustrates just how evenly divided this state is. In 2020, the Republican nominee for President narrowly defeated the Democratic nominee by a margin of 49.9% to 48.6%. The gubernatorial race was also close, with the Democratic nominee defeating the Republican nominee by a margin of 51.5% to 47.0%. And the race for Attorney General was closer still: the Democratic nominee defeated the Republican nominee by a margin of 50.1% to 49.9%. These razor-thin margins in statewide races reflect what everyone familiar with North Carolina knows—this is a closely divided state.

38. Nevertheless, due to consistent, systematic, and egregious gerrymandering by the Republican-controlled General Assembly, the popular will has not been reflected in the state’s congressional delegation for over a decade.

B. National Republican Party Officials Target North Carolina for Partisan Gerrymandering Prior to the 2010 Elections

39. In the years leading up to the 2010 decennial census, national Republican leaders undertook a sophisticated and concerted effort to gain control of state governments in 13 critical swing states such as North Carolina. The Republican State Leadership Committee (RSLC) code-named the plan “the REDistricting Majority Project” or “REDMAP.” REDMAP’s goal was to “control[] the redistricting process in . . . states [that] would have the greatest impact on

determining how both state legislative and congressional district boundaries would be drawn” after the 2010 census. The RSLC’s REDMAP website explained that fixing these district lines in favor of Republicans would “solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade.”

40. North Carolina was a key REDMAP “target state.” REDMAP aimed to flip both chambers of the North Carolina General Assembly from Democratic to Republican control.

41. To spearhead its efforts in North Carolina, the RSLC enlisted the most influential conservative donor in North Carolina, Art Pope. Together, the RSLC and Pope targeted 22 races in the North Carolina House and Senate. Pope helped create a new non-profit organization called “Real Jobs NC” to finance spending on the races, and the RSLC donated \$1.25 million to this new group. Pope himself made significant contributions, in total, Pope, his family, and groups backed by him spent \$2.2 million on the 22 targeted races. This represented three-quarters of the total spending by all independent groups in North Carolina on the 2010 state legislative races.

42. The money was well spent. Republicans won 18 of the 22 races the RSLC targeted, giving Republicans control of both the House and Senate for the first time since 1870.

C. Republican Mapmakers Create the 2011 Plan from Party Headquarters with the Intent to Advantage Republicans and Disadvantage Democrats

43. Following the 2010 election, the House and Senate each established redistricting committees that were jointly responsible for preparing a congressional redistricting plan. Representative David Lewis, in his capacity as the Senior Chair of the House Redistricting Committee, and Senator Robert Rucho, in his capacity as Senior Chair of the Senate Redistricting Committee, were responsible for developing the proposed congressional districting plan (the “2011 Plan”).

44. The House and Senate Redistricting Committees engaged Dr. Thomas Hofeller,

who also served on a REDMAP redistricting team, to draw the 2011 Plan. Dr. Hofeller and his team drew the 2011 Plan at the North Carolina Republican Party headquarters in Raleigh using mapmaking software licensed by the North Carolina Republican Party.

45. Legislative Defendants did not make Dr. Hofeller available to Democratic members of the General Assembly during the 2011 redistricting process, nor did Dr. Hofeller communicate with any Democratic members in developing the 2011 Plan.

46. Representative Lewis and Senator Rucho, both Republicans, orally instructed Dr. Hofeller regarding the criteria he should follow in drawing the new plan. Dr. Hofeller later testified that the Committee Chairs instructed him to “create as many districts as possible in which GOP candidates would be able to successfully compete for office.” Deposition of Thomas Hofeller (“Hofeller Dep.”) at 123:2-23 (Jan. 24, 2017). Following these instructions, Dr. Hofeller sought to “minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate.” Hofeller Dep. at 127:19-21. Dr. Hofeller consulted “political voting history” as reflected in “past election results,” which he testified is “the most important information in trying to give one party or the other a partisan advantage in the redistricting process,” because it is “the best predictor of how a particular geographic area is likely to vote” in future elections. Hofeller Dep. at 14:7-15:14, 16:8-12, 132:14-134:13.

47. Dr. Hofeller sought to minimize the opportunities for Democratic voters to elect Democratic representatives by using past election data to concentrate as many Democratic voters as possible into Congressional Districts 1, 4, and 12. *See* Hofeller Dep. at 127:19-128:6. In his testimony, Dr. Hofeller admitted that the resulting 2011 Plan diminished the “opportunity to elect a Democratic candidate in the districts in which [he] increased Republican voting strength.” *See* Hofeller Dep. at 128:17-21.

48. The scheme worked. North Carolina conducted two congressional elections using the 2011 Plan, both of which handed outsized power to Republican congressional candidates. In 2012, Republicans won a *minority* of the statewide congressional vote but won 9 of the 13 seats.

Year	North Carolina State-Wide Votes in U.S. House Elections		Representatives Elected to U.S. House for North Carolina	
	Percentage of <i>Votes</i> Received by Democratic Congressional Candidates	Percentage of <i>Votes</i> Received by Republican Congressional Candidates	Percentage of <i>Seats</i> Won by Democratic Congressional Candidates	Percentage of <i>Seats</i> Won by Republican Congressional Candidates
2012	51%	49%	31% (4 of 13)	69% (9 of 13)
2014	46%	54%	23% (3 of 13)	77% (10 of 13)

D. Legislative Defendants Create the 2016 Plan with the Explicit Partisan Goal of Guaranteeing a 10-3 Republican Advantage in Congressional Seats

49. On February 5, 2016, a three-judge federal district court struck down the 2011 Plan as racially gerrymandered in violation of the Fourteenth Amendment's Equal Protection Clause. *See Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). The Court ordered the General Assembly to draw a new congressional map.

50. At that time, Republicans held supermajority control of both chambers of the North Carolina General Assembly, and thus had the power to draw the new congressional district lines unilaterally. Representative Lewis and Senator Rucho again took charge of the mapmaking process, and again engaged Dr. Hofeller to draw the remedial congressional plan.

51. On February 9, 2016, in a meeting at Dr. Hofeller's home, Representative Lewis and Senator Rucho gave Dr. Hofeller oral instructions regarding the criteria he should use in drawing the remedial plan, directing him to use political data to create the new districts. This political data included precinct-level election results from all statewide elections, excluding presidential elections, dating back to January 1, 2008. Representative Lewis and Senator Rucho

specifically instructed Dr. Hofeller to use this partisanship data to draw a map that would ensure 10 Republican seats and 3 Democratic seats. *See* Deposition of Representative David Lewis (“Lewis Dep.”) at 162:24-163:7, 166:13-169:1 (Jan. 26, 2017); Hofeller Dep. at 175:19-23, 178:14-20, 188:19-190:2.

52. Working on his personal computer, Dr. Hofeller sought to achieve Representative Lewis and Senator Rucho’s partisan objectives through the use of a partisanship formula he created to score every voting tabulation district (VTD) in North Carolina. Dr. Hofeller’s partisanship formula measured the average Democratic and Republican vote share in each VTD across the following seven statewide elections: the 2008 Gubernatorial, U.S. Senate, and Commissioner of Insurance elections; the 2010 U.S. Senate election; the 2012 Gubernatorial and Commissioner of Labor elections; and the 2014 U.S. Senate election.

53. Dr. Hofeller testified that he used the averaged results from these seven elections “to get a pretty good cross section of what the past vote had been,” Hofeller Dep. at 212:16-213:9, and “[t]o give [him] an indication of the two-party partisan characteristics of VTDs,” Deposition of Thomas Hofeller (“Hofeller Dep. II”) at 267:5-6 (Feb. 10, 2017). Dr. Hofeller said that “he had drawn numerous plans in the state of North Carolina over decades,” and that in his experience, “the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it.” Trial Testimony of Thomas Hofeller (“Hofeller Testimony”) at 525:6-10, *Common Cause v. Rucho*, No. 1:16-CV-1026, 1:16-CV-1164, 2018 WL 4214334 (M.D.N.C. Sept. 4, 2018), *vacated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *see* Hofeller Dep. at 149:5-18. “So once a precinct is found to be a strong Democratic precinct,” Dr. Hofeller explained, “it’s probably going to act as a strong Democratic precinct in every subsequent election. The same would be true for Republican precincts.” Hofeller

Testimony at 525:14-17.

54. As he drew the district lines in the Maptitude software program, Dr. Hofeller color-coded voting districts (“VTD”) on his screen based on his partisanship formula. Dr. Hofeller admitted that he used this partisan color-coding to guide him in assigning VTDs “to one congressional district or another,” using red to show VTDs where voter history data was “the most Democratic” and dark blue for areas that were “the most Republican.” Hofeller Dep. at 102:14-104:22, 106:23-107:1. He further admitted that he similarly used his partisanship formula to assess the partisan performance of draft plans as a whole. Hofeller Dep. II at 282:1-7.

55. Dr. Hofeller testified that he conveyed to Representative Lewis his assessment of the partisan performance of districts for which the partisan result wasn’t “really obvious.” Hofeller Dep. II at 290:17-25. Representative Lewis admitted in sworn testimony that “[n]early every time” he reviewed Dr. Hofeller’s draft plans, Representative Lewis assessed the plans’ partisan performance using the results from North Carolina’s 2014 Senate race between Senator Thom Tillis and former Senator Kay Hagan, because it was “in [his] mind the closest political race with equally matched candidates who spent about the same amount of money.” Lewis Dep. at 63:9-64:17.

56. Both Representative Lewis and Dr. Hofeller admitted that Dr. Hofeller had nearly finished drawing the final 2016 Plan before the House and Senate Redistricting Committees ever met, and that Dr. Hofeller pre-drew the plan with express partisan intent. Dr. Hofeller recalled that “the plan was actually brought into a form to be presented to the legislature long before [February] 16th.” Hofeller Dep. at 175:10-18. Indeed, on February 10, 2016, Dr. Hofeller met with Representative Lewis and Senator Rucho and showed them several draft plans. Lewis Dep. at 58:13-61:17. Representative Lewis visited Dr. Hofeller’s house several more times over the

next few days to review additional draft plans. *Id.* at 73:7-74:7, 77:7-20.

57. The maps Representative Lewis reviewed with Dr. Hofeller over the three days following the February 10 meeting were “near-final versions of the 2016 map” that Representative Lewis intended to submit to the legislature for approval. *Id.* at 77:7-20. Dr. Hofeller and Representative Lewis agreed on a draft plan on either February 12 or 13, 2016. *Id.* That plan was “ultimately adopted with a minor distinction for an incumbency issue.” *Id.* at 77:21-24.

58. On February 12, 2016, after the 2016 Plan was already nearly finished, the Republican leadership of the General Assembly appointed Representative Lewis and Senator Rucho as co-chairs of the newly formed Joint Select Committee on Redistricting (the “Joint Committee”). The Joint Committee consisted of 25 Republicans and 12 Democrats.

59. The Joint Committee held a public hearing on February 15, 2016. But because Dr. Hofeller finished drawing the 2016 Plan before the hearing took place, the final plan did not reflect any public input.

60. At a meeting on February 16, 2016, the Joint Committee adopted a set of criteria (the “2016 Adopted Criteria”) to govern the creation of the 2016 Plan.

61. The Joint Committee adopted “Partisan Advantage” as one official criterion. This criterion required the new plan to preserve Republicans’ existing 10-3 advantage in North Carolina’s congressional delegation. The criterion read as follows:

Partisan Advantage: The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina’s congressional delegation.

62. In explaining this Partisan Advantage criterion, Representative Lewis proposed that the Committee “draw the maps to give a partisan advantage to 10 Republicans and 3

Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." Joint Comm. Session, Feb. 16, 2016, at 50:6-10.

63. Representative Lewis "acknowledge[d] freely that this would be a political gerrymander." *Id.* at 48:4-5.

64. The Joint Committee adopted "Political Data" as another criterion, which stated:

Political Data: The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting districts ("VTDs") should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.

65. Representative Lewis left no doubt as to how this political data would be used, telling the Joint Committee members he "want[ed] to make clear that to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood." Joint Comm. Session, Feb. 16, 2016, at 53:24-54:4.

66. The remaining criteria adopted by the Joint Committee were to provide for equal population, to make the districts contiguous, to eliminate the then-current configuration of District 12, to improve the compactness of the existing districts, to keep more counties and VTDs whole than the existing districts, and to avoid pairing incumbents.

67. The Joint Committee adopted the Political Data and Partisan Advantage criteria on a party-line vote. The other criteria were passed on a bipartisan basis. Representative Lewis reassured the Committee that "the criteria that will be available to the mapmaker . . . will only be the criteria that this . . . committee has adopted," *id.* at 140:8-13, despite knowing that the 2016 Plan was "for the most part finished by the time the criteria were formally adopted by the committee," Hofeller Dep. at 177:9-14. He later emphasized that "the criteria that this committee

debated and adopted . . . are the criteria that *were used to draw these maps.*” Joint Comm. Session, Feb. 17, 2016, at 43:4-14 (emphasis added).

68. The Joint Committee authorized Representative Lewis and Senator Rucho to engage a consultant to assist the Committee’s Republican leadership in drawing the remedial plan. Representative Lewis and Senator Rucho immediately sent Dr. Hofeller an engagement letter, which he signed the same day. Dr. Hofeller then downloaded the 2016 Plan, which he had completed several days earlier, onto a state legislative computer.

69. Democratic members of the Joint Committee were not allowed to consult with Dr. Hofeller, nor were they allowed access to the state legislative computer on which he downloaded the 2016 Plan.

70. Dr. Hofeller later testified that the 2016 Plan followed the Committee’s Partisan Advantage and Political Data criteria. *See* Hofeller Dep. at 129:14-15.

71. On February 17, 2016, just one day after the Joint Committee adopted the official criteria, Representative Lewis and Senator Rucho presented the 2016 Plan to the Committee. *See* Joint Comm. Session, Feb. 17, 2016, at 11:8-15. During the presentation, Representative Lewis discussed the partisan performance of the proposed districts and asserted that the 2016 Plan would “produce an opportunity to elect ten Republicans members of Congress.” *Id.* at 12:3-7. To prove it, Representative Lewis provided Committee members with spreadsheets showing the partisan performance of the proposed districts in twenty previous statewide elections. *E.g., id.* at 17:4-18:23. The Committee then approved the 2016 Plan on a party-line vote.

72. On February 19, 2016, the North Carolina House of Representatives debated the 2016 Plan. During the debate, Representative Lewis “freely acknowledge[d] that [he] sought partisan advantage.” N.C. House Floor Session, Feb. 19, 2016, at 31:14-17. He defended the

Partisan Advantage criterion by stating: “I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country.” *Id.* at 34:21-23.

73. The North Carolina House and Senate approved the 2016 Plan on February 18 and February 19, 2016, respectively. No Democrat in either chamber voted for the 2016 Plan.

74. In sworn testimony, Senator Rucho confirmed that the 2016 Plan “satisfied” “all criteria,” including the criteria requiring a 10-3 partisan advantage for Republicans. Deposition of Senator Robert A. Rucho (“Rucho Dep.”) 193:24-194:14 (Jan. 25, 2017).

E. The 2016 Plan Achieves Its Intended Effect of Propelling Ten Republican Congressional Candidates to Electoral Victory Every Two Years

75. The 2016 Plan achieved precisely its intended partisan effects—a guaranteed 10-3 Republican advantage in North Carolina’s congressional delegation.

76. In the 2016 elections, Democratic congressional candidates in North Carolina won a combined 47% of the statewide vote, and yet won only 3 of 13 seats (23%).

77. The results were even more striking in 2018. Democrats won a majority of the statewide vote (50.9%, when adjusting for one uncontested race in which Democrats did not field a candidate) but carried only 3 of the 13 seats (23%).

F. A Three-Judge Panel of this Court Enjoins Use of the 2016 Plan as an Extreme Partisan Gerrymander

78. Plaintiffs filed a lawsuit on September 27, 2019, alleging that the 2016 Plan was an extreme partisan gerrymander that violated North Carolina’s Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. *See* Compl., *Harper I*, No. 19-CVS-012667. In *Harper I*, Plaintiffs alleged that the 2016 Plan “reflect[ed] an extreme and intentional effort to maximize Republican advantage.” *Id.* ¶ 2. On September 30, 2019, pursuant to N.C. Gen. Stat. § 1-267.1, a three-judge panel was convened.

79. Attempting to evade state-court jurisdiction, Legislative Defendants unsuccessfully removed the case to federal court on October 14, 2019. *See* Notice of Removal, *Harper v. Lewis*, No. 5:19-CV-00452-BO (E.D.N.C. Oct. 14, 2019), ECF No. 5. The federal court promptly granted Plaintiffs' motion to remand the case to state court. Order Granting Remand at 9, *Harper*, No. 5:19-CV-00452-BO (E.D.N.C. Oct. 22, 2019), ECF No. 33; *see also* *Common Cause v. Lewis*, 956 F.3d 246 (4th Cir. 2020) (affirming remand in state-legislative challenge).

80. Plaintiffs moved for a preliminary injunction, arguing that they would suffer irreparable harm if they were forced to vote in the 2020 primary and general elections in egregiously gerrymandered congressional districts. The Court agreed and granted the motion for a preliminary injunction on October 28, 2019. Order on Inj. Relief, *Harper I*, at 15.

81. The preliminary injunction ruling resolved two threshold jurisdictional questions: First, the Court rejected Legislative Defendants' contention that Plaintiffs' claims presented non-justiciable political questions, holding that "partisan gerrymandering claims specifically present justiciable issues." *Id.* at 3. Second, the Court rejected Legislative Defendants' contention that Plaintiffs lacked standing to challenge the 2016 Plan. The Court held that Plaintiffs had standing to challenge the plan because they "have shown a likelihood of 'a personal stake in the outcome of the controversy' and a likelihood that the 2016 congressional districts cause them to 'suffer harm.'" *Id.* at 5 (quoting *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006); and *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008)).

82. On the merits, the Court reaffirmed its holding in *Common Cause v. Lewis*, 18-CVS-14001, that extreme partisan gerrymandering violates multiple provisions of the North Carolina Constitution. It violates the Free Elections Clause by preventing elections from being

“conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* at 7. It violates the Equal Protection Clause by “treat[ing] individuals who support candidates of one political party less favorably than individuals who support candidates of another party.” *Id.* at 8. And it violates the Freedom of Speech and Freedom of Assembly Clauses by diluting the votes of “certain disfavored speakers (e.g., Democratic voters) because of disagreement with the views they express when they vote.” *Id.* at 10.

83. On October 30, 2019, Speaker Moore announced the creation of a joint House and Senate Select Committee to draw a remedial plan. The full House and Senate passed the remedial plan (the “2019 Plan”), this one an 8-5 partisan gerrymander, on straight party-line votes on November 14 and 15, 2019.

84. Legislative Defendants moved for summary judgment in *Harper I* on November 15, arguing that the case was moot and that Plaintiffs must file a new lawsuit to challenge the 2019 Plan. The Court *sua sponte* proceeded to enjoin the filing period for the 2020 congressional primary elections pending review of the remedial map. Order Enjoining Filing Period, *Harper I*, at 1-2.

85. At a hearing on Legislative Defendants’ motion for summary judgment, the Court explained that it had not determined whether the 2019 Plan was constitutional and that it “d[id] not reach th[e] issue” of “whether this action is moot.” *See* Ex. A, at 6. The Court observed that “although one can certainly argue that the process” leading to the enactment of the 2019 Plan “was flawed or that the result is far from ideal,” the “net result” was that the “grievously flawed 2016 congressional map has been replaced.” *Id.* at 7. The Court accordingly determined that it would not invoke its equitable authority to further delay the election. *Id.* at 8. And it expressed “fervent hope that the past 90 days” since the filing of the original complaint in this case would

become “a foundation for future redistricting in North Carolina and that future maps are crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people.” *Id.* at 9.

86. The Court subsequently lifted its injunction of the filing period, but did not conduct any further proceedings or hold that the 2019 Plan was constitutional.

G. Legislative Defendants Create the 2021 Plan with the Overt Goal of Guaranteeing a 10-3-1 Republican Advantage in Congressional Seats

87. In flagrant disregard of the *Harper I* Court’s directive that the General Assembly enact maps that “yield[] elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people,” Ex. A, at 9, Legislative Defendants replaced the 2019 Plan with yet another extreme partisan gerrymander.

88. The U.S. Census Bureau released data for states to begin redistricting efforts on August 12, 2021. North Carolina gained a congressional seat following the 2020 census after seeing its population grow by 9.5% over the previous decade. Several of the most populous counties in the state have grown even more rapidly over the same period: Wake County grew by 22.6%, Mecklenburg County by 20.3% Durham County by 18.4%, and Guilford by 9.7%. North Carolina’s new congressional map accordingly contains 14 congressional districts.

89. Also on August 12, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections adopted criteria to guide the enactment of new maps. While the adopted criteria provide that “[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans,” they freely permitted the use of “local knowledge of the character of communities and connections

between communities,” as well as “[m]ember residence.”¹ Unlike the 2016 adopted criteria, which provided that “[r]easonable efforts shall be made not to divide a county into more than two districts,” the 2021 criteria did not counsel against splitting counties more than twice. The adopted criteria were otherwise materially identical to those used in drawing the 2016 Plan.

90. Over the next two months, Legislative Defendants undertook an opaque and constricted redistricting process that flagrantly flouted the prohibition on partisan considerations.

91. Legislative Defendants gave little notice to North Carolinians on the schedule for public hearings to discuss the redistricting process. The House and Senate redistricting committees waited until September 1 to announce initial public hearings that would be held from September 8 through September 30. And the number of hearings held by these committees was a small fraction of those held during the 2010 redistricting cycle.

92. Worse, Legislative Defendants held public hearings in smaller Republican counties while carefully avoiding Democratic strongholds, including Guilford County which the 2021 Plan splits into three congressional districts. Legislative Defendants also held hearings at far fewer sites compared to the previous cycle: While the House and Senate Committees held public hearings on the redistricting process at 64 different sites in 2011, they held hearings at only 13 sites in 2021. Legislative Defendants offered no options to participate virtually.

93. Legislative Defendants also largely ignored public testimony submitted during these hearings. For example, residents in the Sandhills overwhelmingly asked that their communities be united in one congressional district centered in Cumberland County. But the 2021 Plan entirely disregards this request by dividing the Sandhills communities among three

¹ House Committee on Redistricting & Senate Committee on Redistricting and Elections, Criteria Adopted by the Committees (Aug. 12, 2021), <https://ncleg.gov/documents/sites/committees/Senate2021-154/2021/08-12-2021/Criteria.adopted.8.12.pdf>.

different congressional districts, diluting their influence and further inhibiting the ability to coalesce around preferred candidates.

94. While the House and Senate Committees scheduled additional public hearings on October 25 and 26 regarding the proposed maps, they provided only a few days' notice and allowed only 210 North Carolinians to attend. Each attendee, moreover, was given only two minutes to speak.

95. On October 6, legislators began drawing potential maps for consideration by the House and Senate Committees. This map-drawing process, however, entirely ignored the prohibition on partisan data.

96. The House and Senate Committees set up rooms where legislators could draw and submit maps on computers with the assistance of legislative staff. But while Legislative Defendants prohibited partisan data from being uploaded onto these computers, they did not restrict legislators from bringing maps into the room that had been drawn using partisan data and copying those maps onto the computer.

97. When confronted with this obvious loophole that allowed the submission of maps using partisan data, Legislative Defendants asserted in committee meetings that they had no interest in preventing it—ensuring that the House and Senate Committees would receive maps drawn in violation of the adopted criteria.

98. Thus, although the adopted criteria nominally forbade use of partisan data, the 2021 Plan was in fact drawn based on maps that incorporated that very data.

99. The 2021 Plan was voted out of the Senate Committee as Senate Bill 740 on November 1. It was then voted out of the House Committee on November 3.

100. The full Senate and House passed the 2021 Plan on November 2 and November 4,

respectively. The 2021 Plan passed on strict party-line votes.

101. On November 5, Plaintiffs in *Harper I* filed a motion for leave under Rule 15(d) to file a supplemental complaint challenging the 2021 Plan. The Court has not ruled on that motion. Neither Legislative Defendants nor State Board Defendants have opposed the motion to supplement; Legislative Defendants instead have filed a “motion to transfer” the case to a newly-constituted three-judge panel. Because leave in *Harper I* has not been granted, and in light of the fast-approaching election cycle, Plaintiffs have filed this complaint to ensure that they have a venue in which to assert their rights under the North Carolina Constitution as to the 2021 Plan. Swift attention to these claims is warranted so that Plaintiffs are not forced to vote under an unconstitutional map in the forthcoming elections.

H. The 2021 Plan Packs and Cracks Democratic Voters in Every District

102. Unsurprisingly, this process resulted in the General Assembly enacting another extreme partisan gerrymander. Like the 2016 Plan, the 2021 Plan meticulously packs and cracks Democratic voters in every district—without exception.

103. The 2021 Plan trisects each of the three largest Democratic counties in the state—Wake, Guilford, and Mecklenburg.

104. And the 2021 Plan packs Democratic strongholds throughout the state into a handful of districts. The upshot is a map that results in 10 safe Republican seats, 3 safe Democratic seats, and 1 competitive seat—a nearly identical result to the 2016 Plan that produced a 10-3 Republican map in this evenly divided state.

105. As with the 2016 Plan, expert analysis confirms that the 2021 Plan is an intentional, extreme partisan gerrymander that dilutes Democratic votes and prevents Democratic voters from electing candidates of their choice. Dr. Jowei Chen, a professor of political science at the University of Michigan, generated hundreds of nonpartisan simulated maps respecting North

Carolina's political geography and traditional redistricting principles including equal population, contiguity and compactness, and avoiding splitting counties and VTDs. Dr. Chen found that the 2021 Plan was extraordinarily anomalous and heavily gerrymandered.

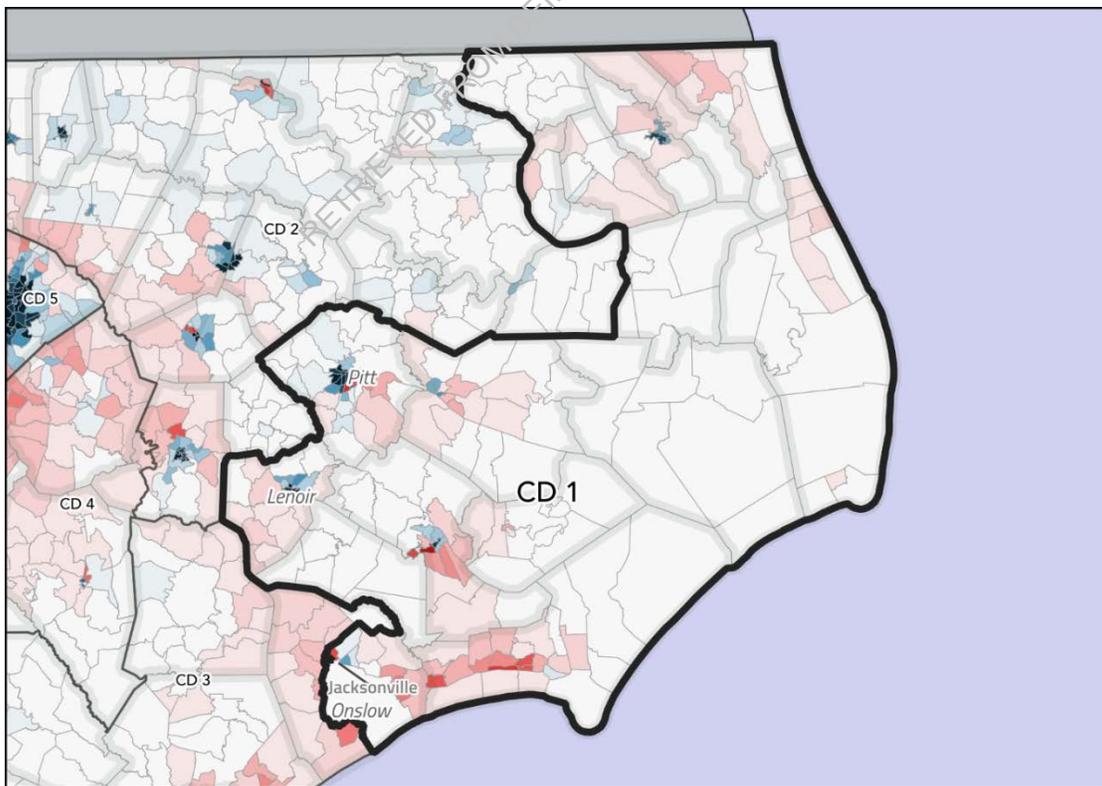
106. The sections below describe some of the most egregious examples of packing and cracking in each district.

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Congressional District 1

107. Similar to District 3 in the 2016 Plan, Legislative Defendants drew District 1 to be a safe Republican seat while undermining Democratic voting strength in the neighboring District 2—the predecessor of which was a Democratic-leaning seat represented by Congressman G.K. Butterfield. District 1 receives nearly all of Pitt County’s Democratic VTDS from Congressman Butterfield’s former district (District 1 in the 2019 Plan), including the entire city of Greenville.

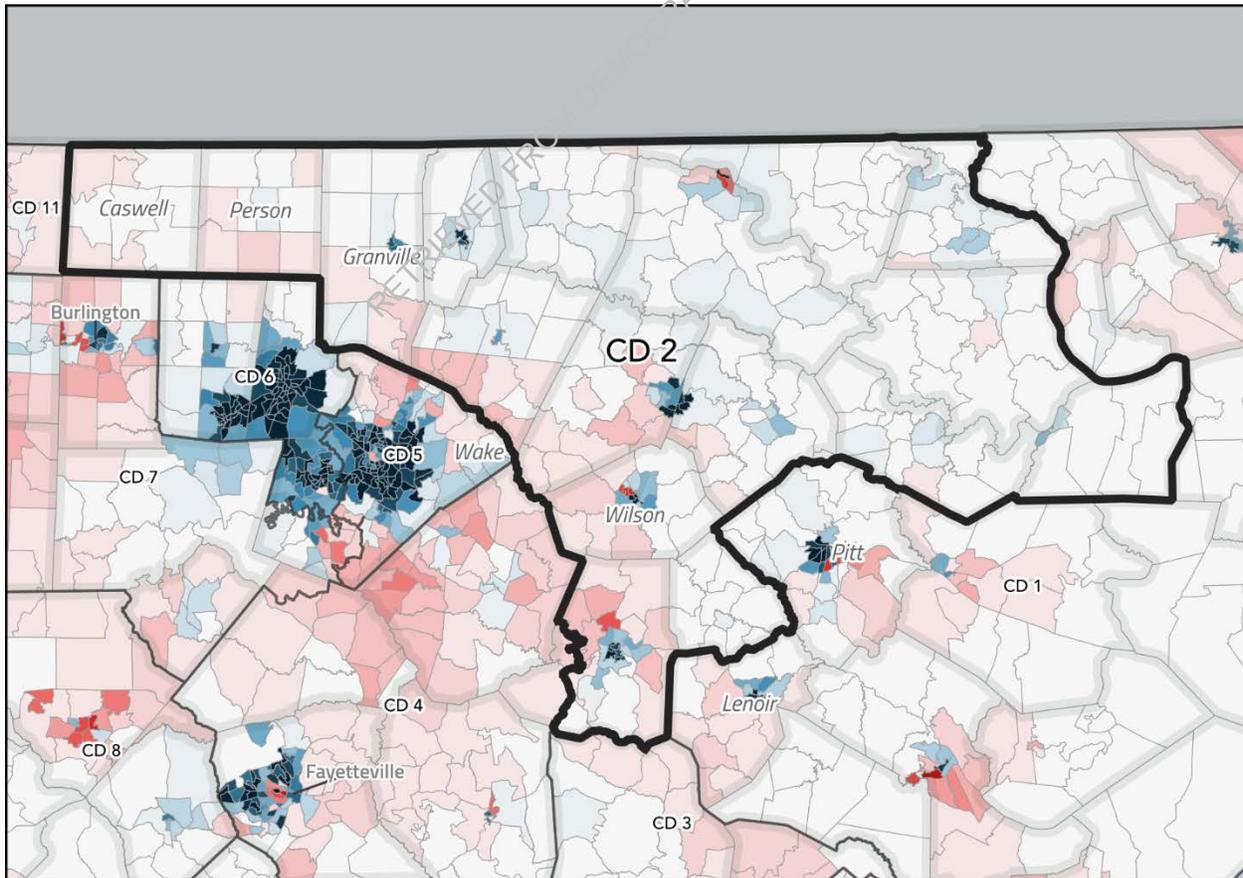
108. The following image (and others below) shows the district’s boundaries and the partisanship of its VTDS using a composite of the results of the 2020 North Carolina Attorney General and 2020 North Carolina Labor Commissioner races, with darker blue shading for the VTDS that voted more heavily Democratic, darker red for VTDS that voted more heavily Republican, and lighter shading for VTDS that were closer to a tie—with the shading adjusted for the VTD’s population.



109. The upshot of Legislative Defendants' engineering is a safe Republican seat where Democratic voters have no meaningful chance of electing the candidate of their choice. In the 2020 presidential election, for example, Democratic candidate Joe Biden won only 43.2% of the vote in the new District 1.

Congressional District 2

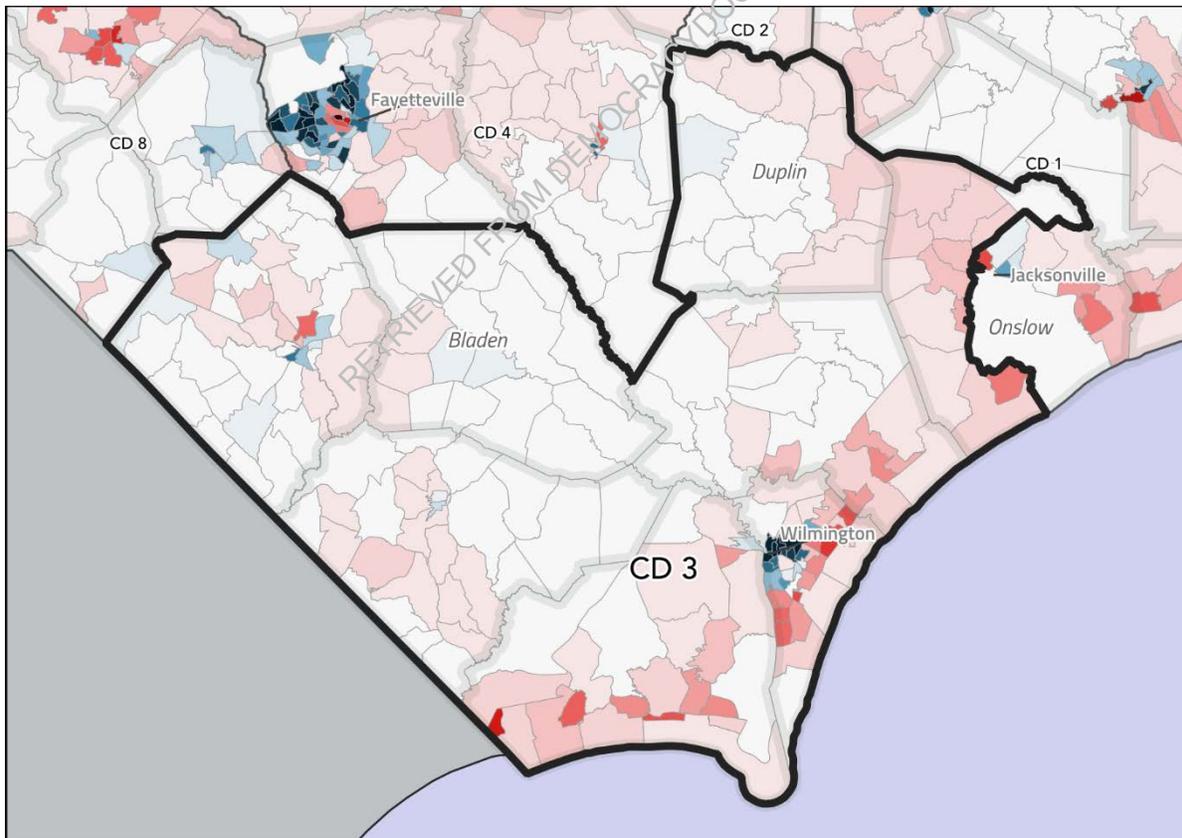
110. District 2 was a Democratic district under both the 2016 and 2019 Plans. The 2021 Plan significantly improves Republicans' voting strength in the district by removing the Democratic stronghold of Greenville from Congressman Butterfield's district and placing it into the new District 1. Legislative Defendants further undermined Democratic voting strength in this district by expanding the boundaries of its predecessor westward, stretching nearly 200 miles from the east to encompass the Republican strongholds of Caswell and Person Counties.



111. Legislative Defendants succeeded in undermining Democratic competitiveness in this district: President Biden won 51% of the vote in this new district, compared to 54% under the predecessor district in the 2019 Plan.

Congressional District 3

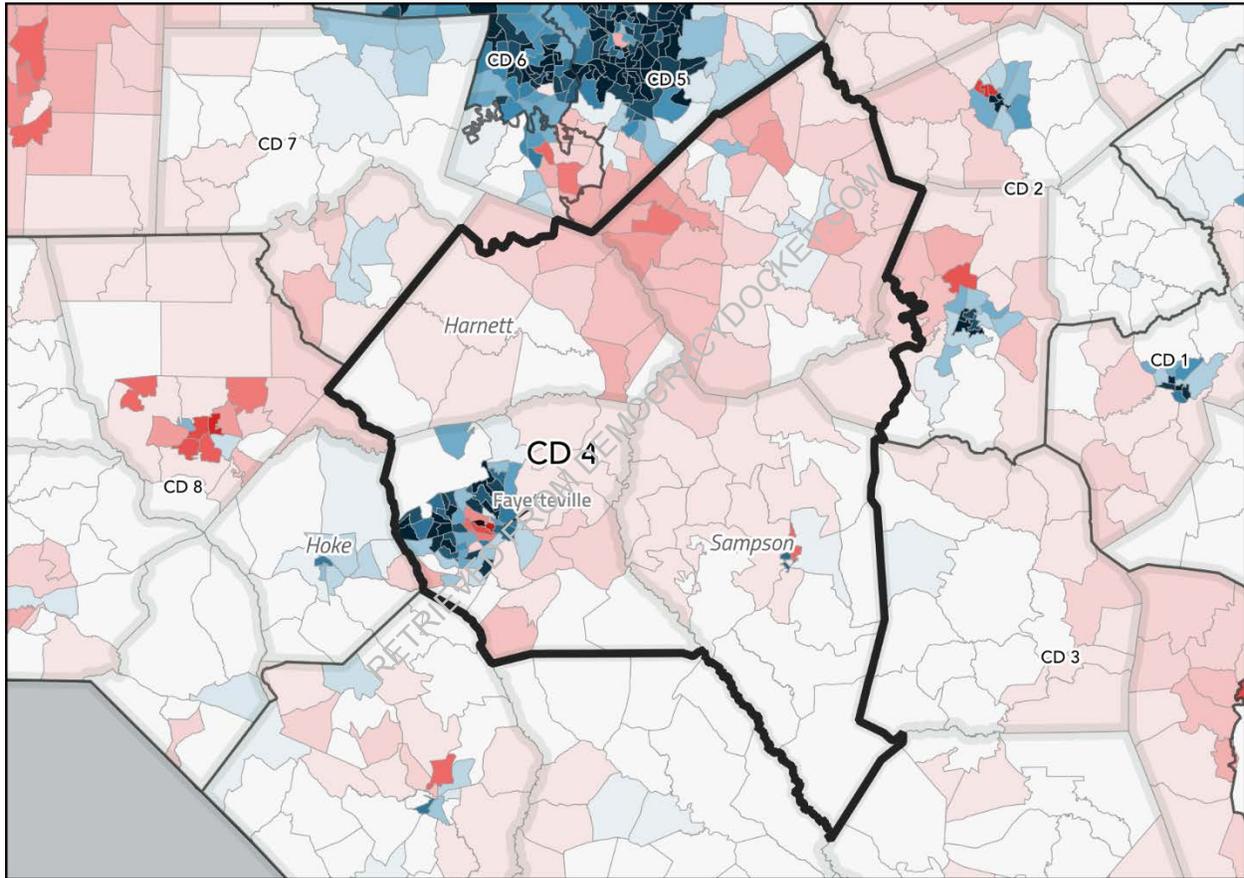
112. Ignoring the overwhelming calls of constituents to place the competitive Sandhills region in a single congressional district, the 2021 Plan splits it across Districts 3, 4, and 8. The plan creates a safe Republican seat in District 3 by combining the eastern part of the region with counties along the southeastern coastline. The eastern boundary hews around the relatively Democratic city of Jacksonville, which is instead placed in District 1 where its residents have no realistic prospect of electing a Democratic candidate.



113. District 3 is indeed a safe Republican seat: President Biden won only 41.5% of the vote in this district in the 2020 election.

Congressional District 4

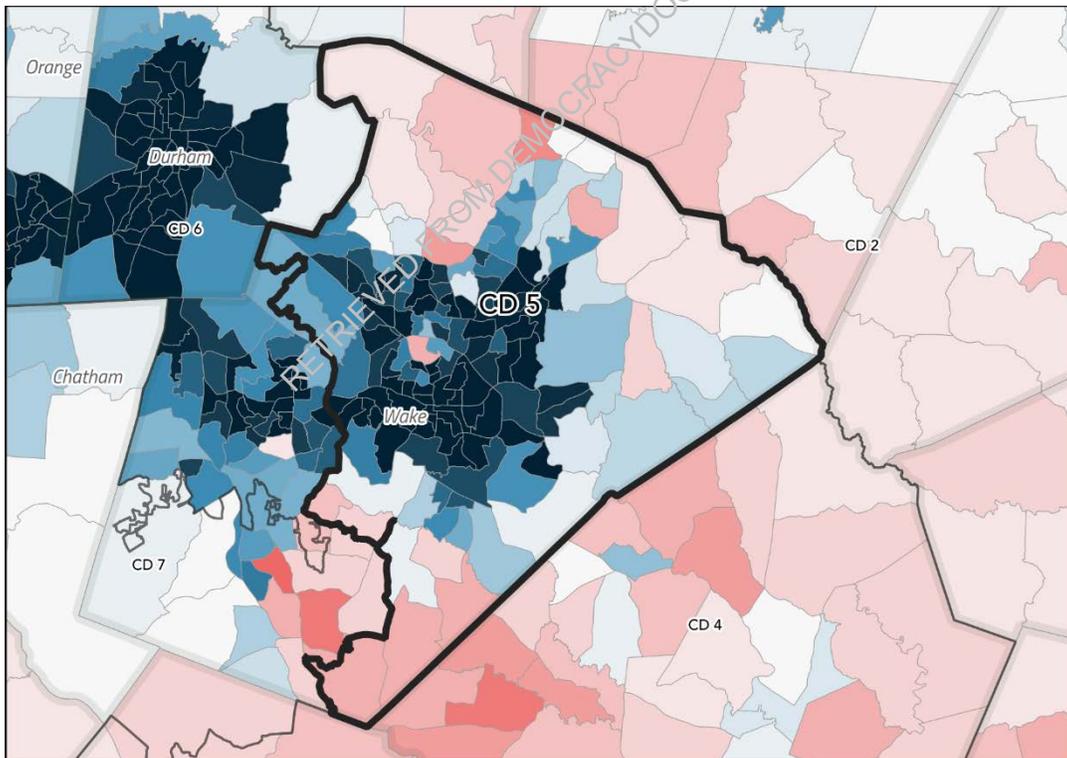
114. Legislative Defendants likewise engineered District 4 to be a safe Republican seat that destroys the voting power of Democrats in Cumberland County—home to Fayetteville and Fort Bragg. District 4 combines the Democratic stronghold of Cumberland County with the three overwhelmingly Republican counties of Sampson, Johnston, and Harnett. The district also picks up heavily Republican VTDs in Wayne County.



115. As expected, the new District 4 performs as a Republican district. In the 2020 presidential election, President Biden received only 46.5% of the vote.

Congressional District 5

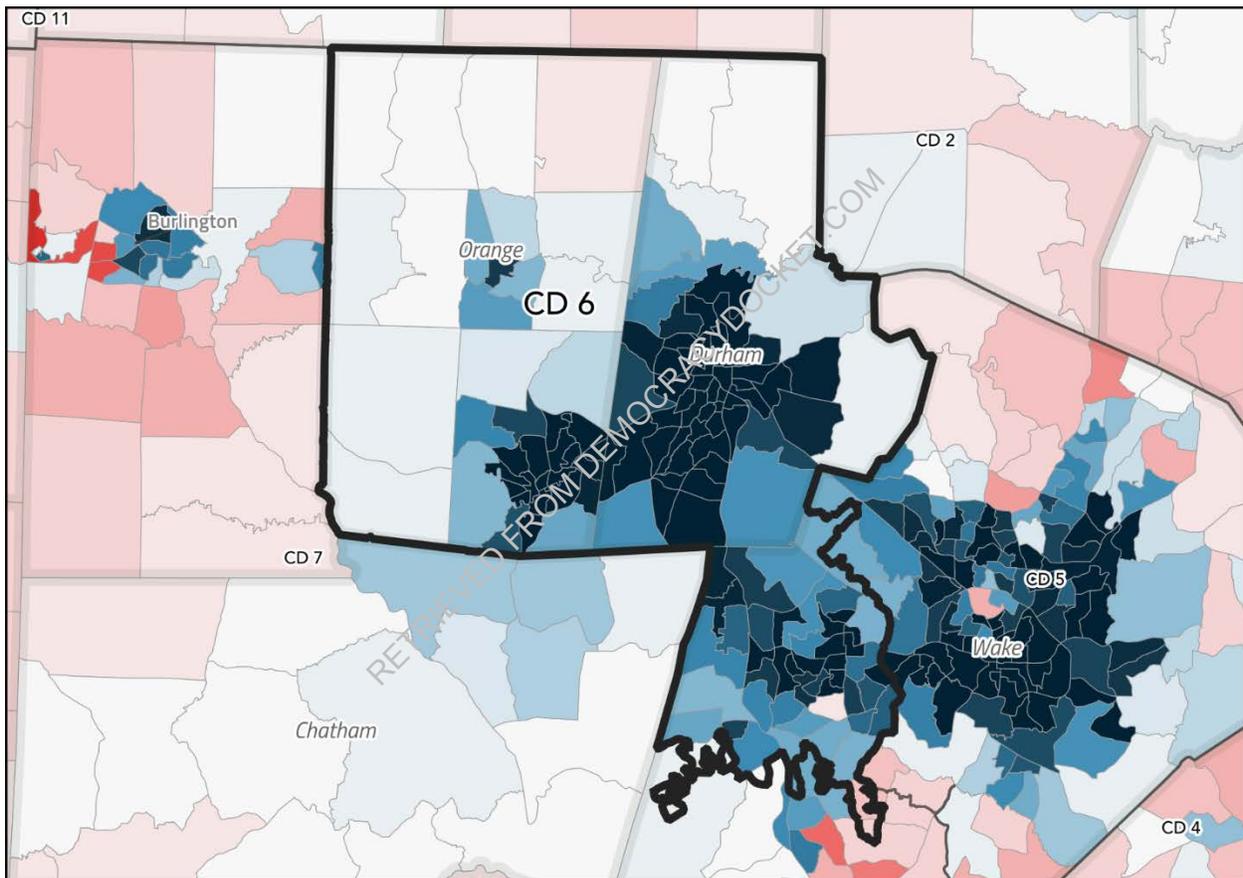
116. District 5 is the result of flagrant packing and cracking of Democratic voters in the largest Democratic stronghold in the state—Wake County. The 2021 Plan packs these voters by creating a single, safe Democratic district—District 5—out of most of Wake County, including all of its most Democratic VTDs. It then splits the remaining Wake County Democratic voters into two neighboring districts to dilute their power: Voters in Cary and Apex are packed into the safe Democratic District 6, which contains heavily Democratic Orange and Durham Counties, while the remaining population is roped into the overwhelmingly Republican District 7, which stretches west across the state to pick up heavily Republican Randolph and parts of Davidson and Guilford Counties.



117. Legislative Defendants succeeded in creating a safe Democratic district: President Biden won an overwhelming 65.5% of the vote in the new District 5 in the 2020 presidential election.

Congressional District 6

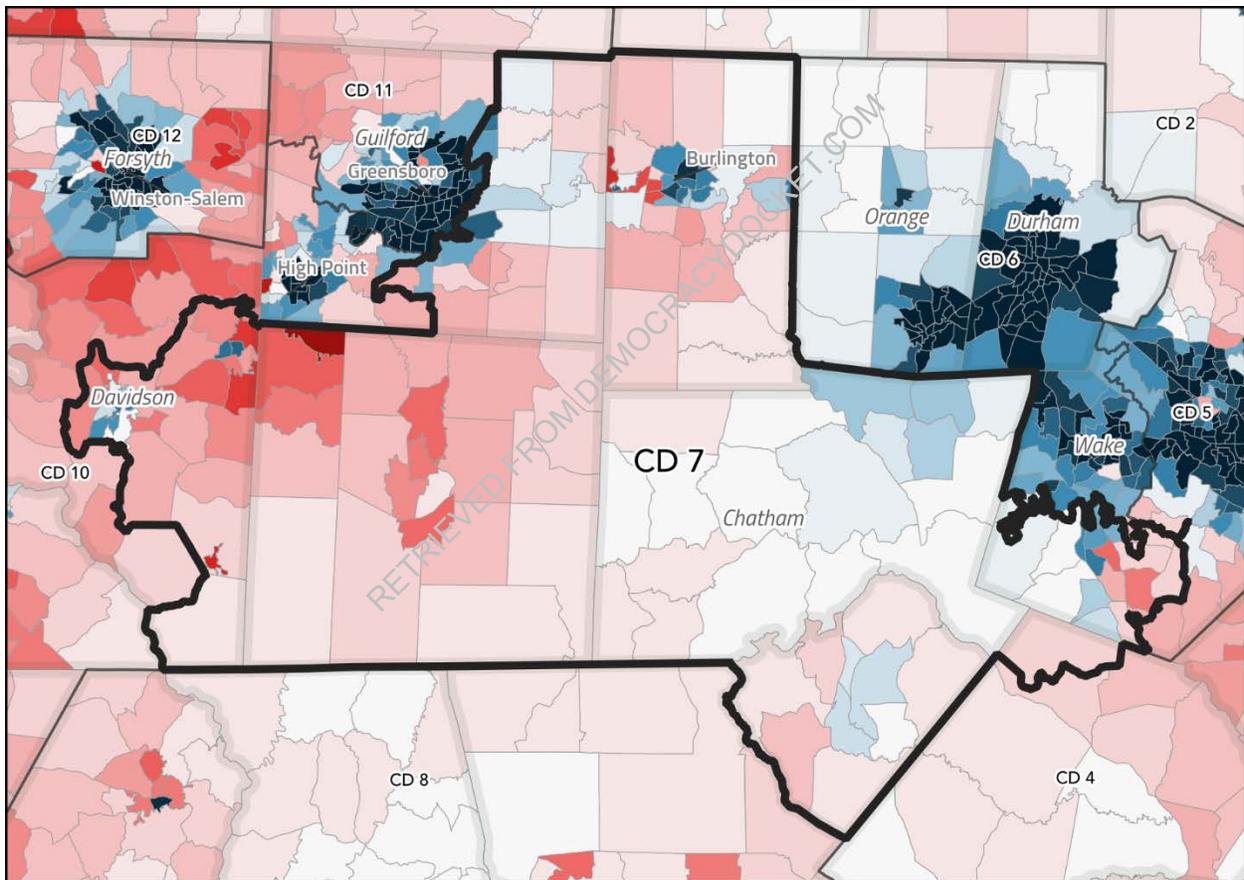
118. Legislative Defendants packed Democratic voters into District 6 to create a safe Democratic seat. They did so by combining the heavily Democratic Orange and Durham Counties into a single district. District 6 also includes a heavily Democratic swath of voters from the fractured Wake County. This pairing is comparable to the way in which these areas were packed in the 2016 plan.



119. As expected, District 6 is an overwhelmingly Democratic district where Democrats' votes are wasted: President Biden won 73.3% of the vote in the new District 6.

Congressional District 7

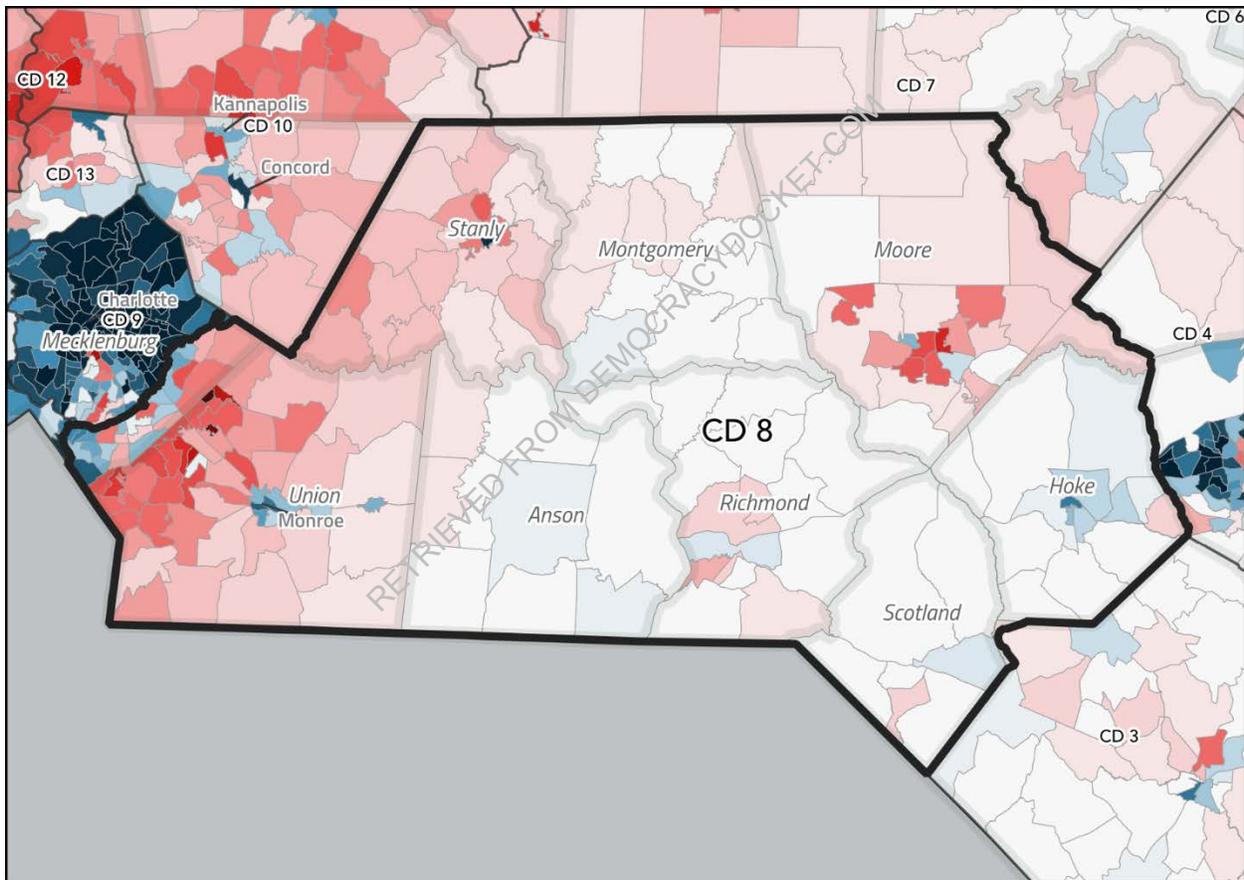
120. Legislative Defendants created a safe Republican seat in District 7 by fracturing the Democratic stronghold of Guilford County. District 7 stitches together Democratic voters from the southeastern portion of Greensboro and Guilford County, along with Democratic-leaning Chatham County and Democratic-leaning voters from the fractured Wake County, with heavily Republican Randolph, Alamance, and Lee Counties. District 7 also borrows heavily Republican VTDs from Davidson County in the western part of the district.



121. Democrats have no meaningful chance of electing a candidate of their choice in the new District 7: President Biden won only 41.1% of the vote in this district during the 2020 presidential election.

Congressional District 8

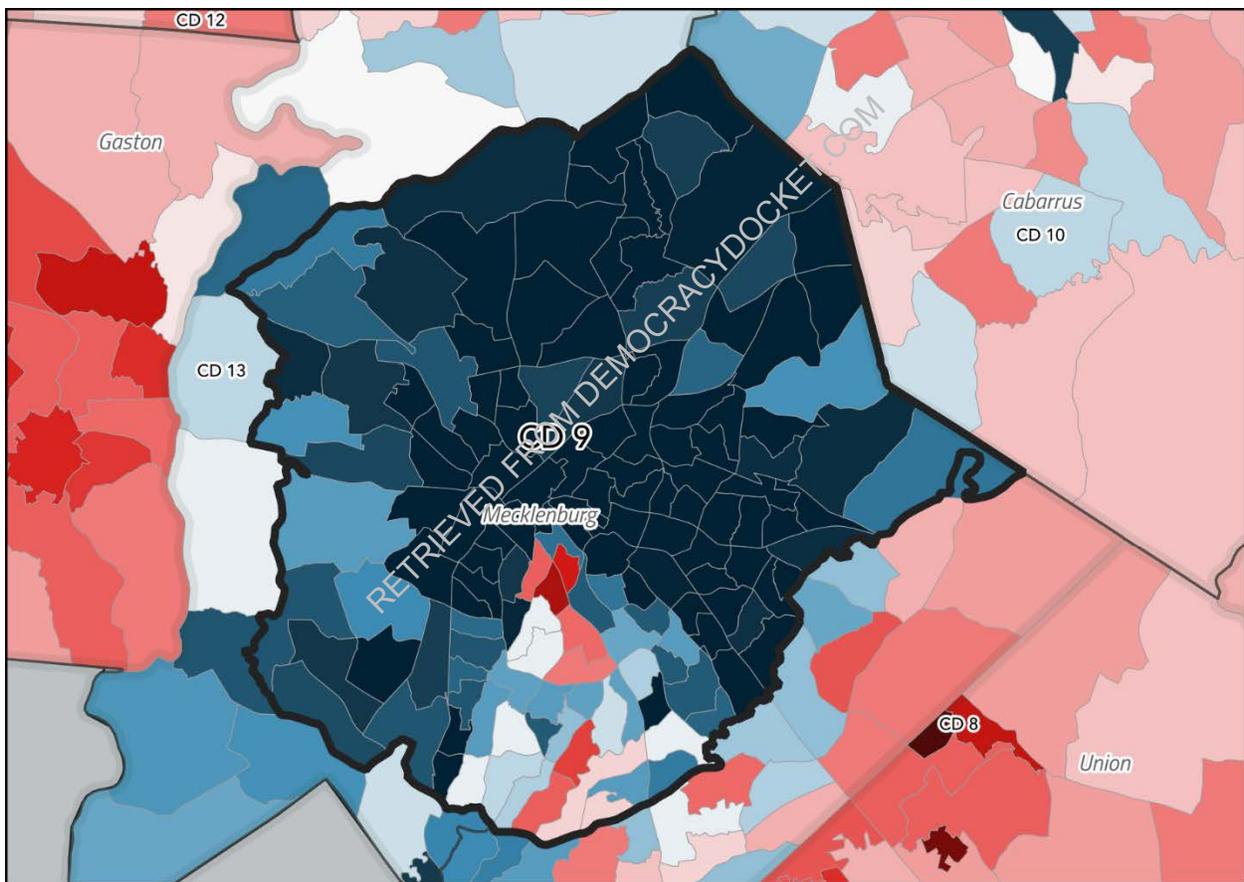
122. Legislative Defendants created a safe Republican seat in District 8 by combining Democratic-leaning Hoke and Anson Counties with heavily Republican Union, Moore, Montgomery, and Stanly Counties. As discussed in greater detail below, Legislative Defendants also included portions of heavily Democratic Mecklenburg County in District 8, splitting Charlotte and ensuring that Democratic votes in that county would be wasted in this safe Republican seat.



123. District 8 performs as expected: President Biden won only 41.1% of the vote in the new District 7.

Congressional District 9

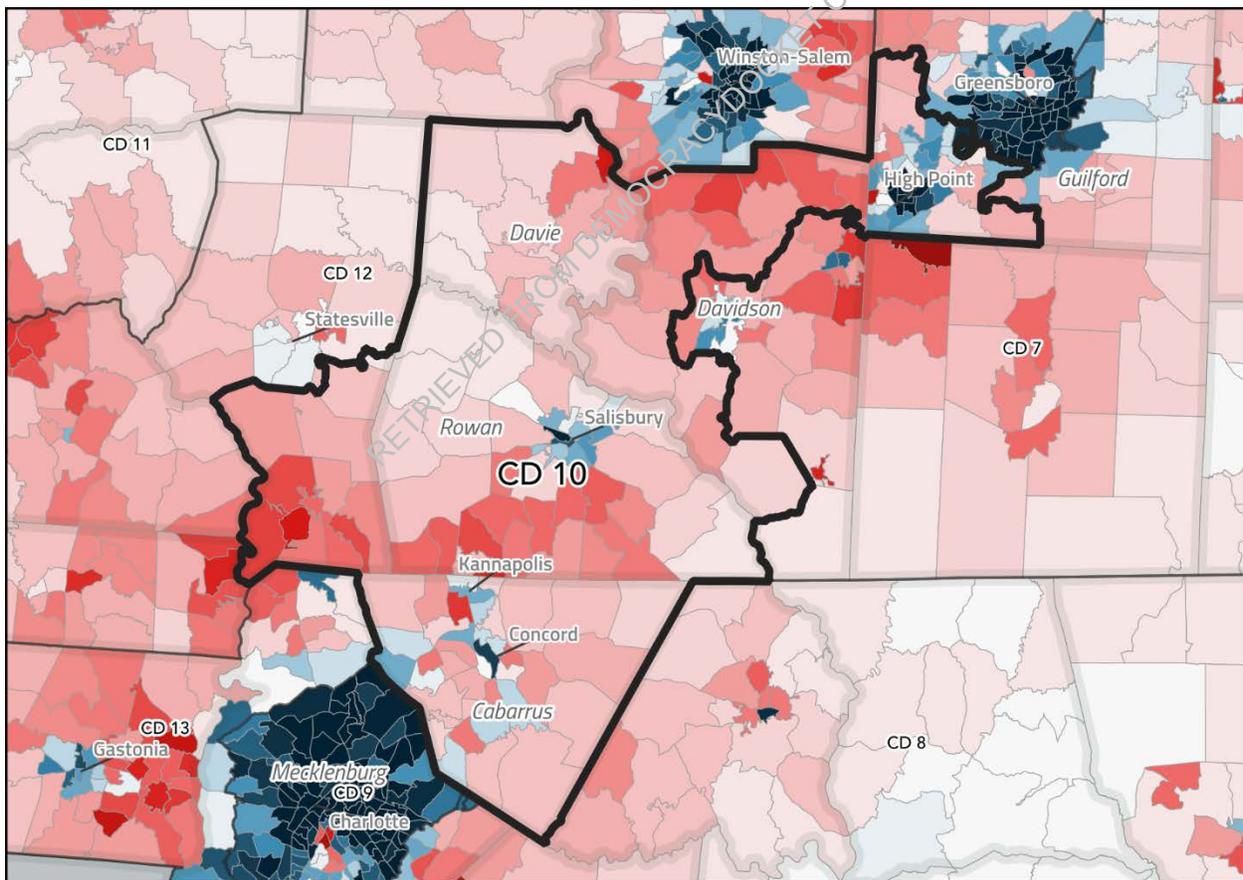
124. District 9, a guaranteed Democratic district capturing a carefully hewn chunk of Charlotte, reflects flagrant packing of Democratic voters in heavily Democratic Mecklenburg County. As discussed earlier, Legislative Defendants divided this Democratic stronghold into three districts: many (but not all) of Mecklenburg County's most Democratic VTDs are packed into District 9. The rest of Mecklenburg's Democratic voters are meticulously cracked between District 8 and District 13.



125. Legislative Defendants inarguably succeeded in wasting Democrats' votes by packing them into this district: President Biden won an overwhelming 75.8% of the vote in this district in the 2020 presidential election, an increase from 71.5% under the Charlotte-based District 12 in the 2019 Plan.

Congressional District 10

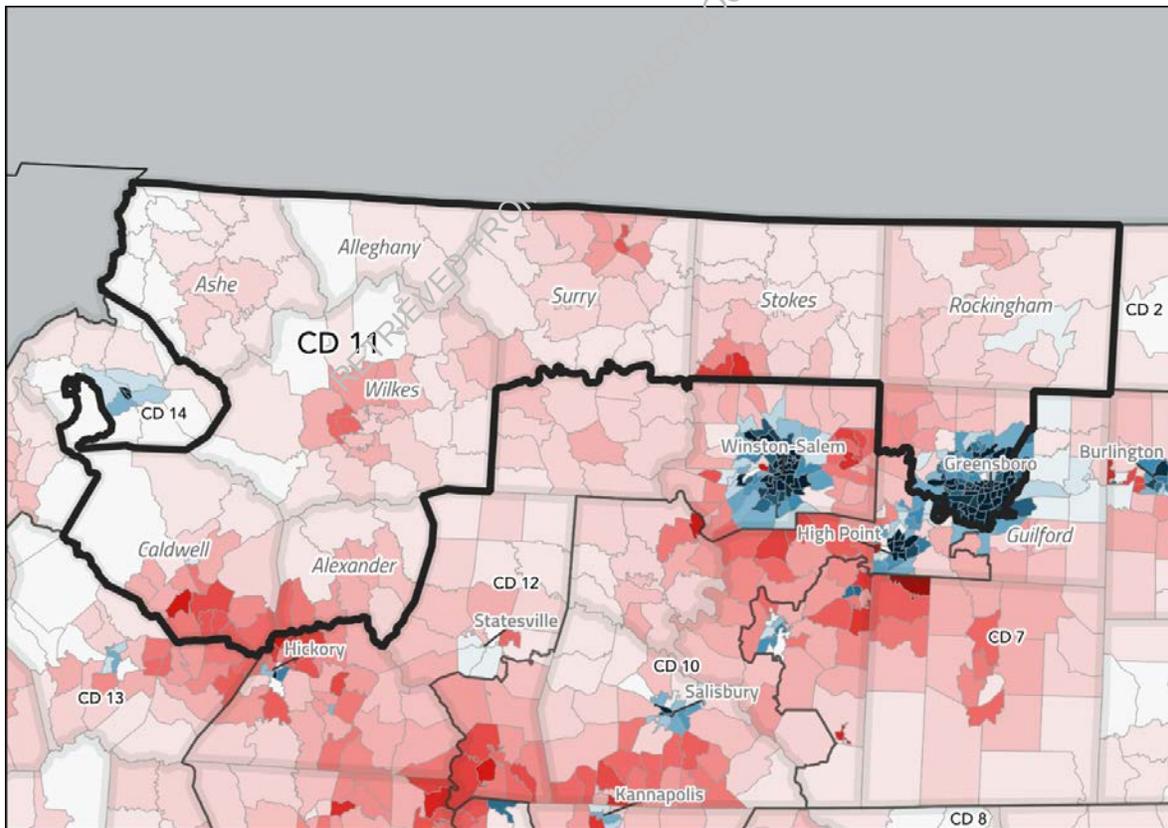
126. As discussed, Legislative Defendants cracked Guilford County—one of the largest Democratic counties in the state—among three different districts, ensuring that all Democratic votes in Guilford County are wasted. District 10, the southeastern district in the tripartite split, groups the heavily Democratic voters in High Point with the overwhelmingly Republican neighboring counties of Davidson, Cabarrus, Rowan, and Davie. District 10 in the 2021 Plan thus closely resembles District 13 in the 2016 Plan, which similarly paired High Point and other Democratic Guilford County voters with several of the same Republican counties to the west.



127. Legislative Defendants succeeded in creating another safe Republican seat here: President Biden won only 39.5% of the vote in the new District 10 in the 2020 election.

Congressional District 11

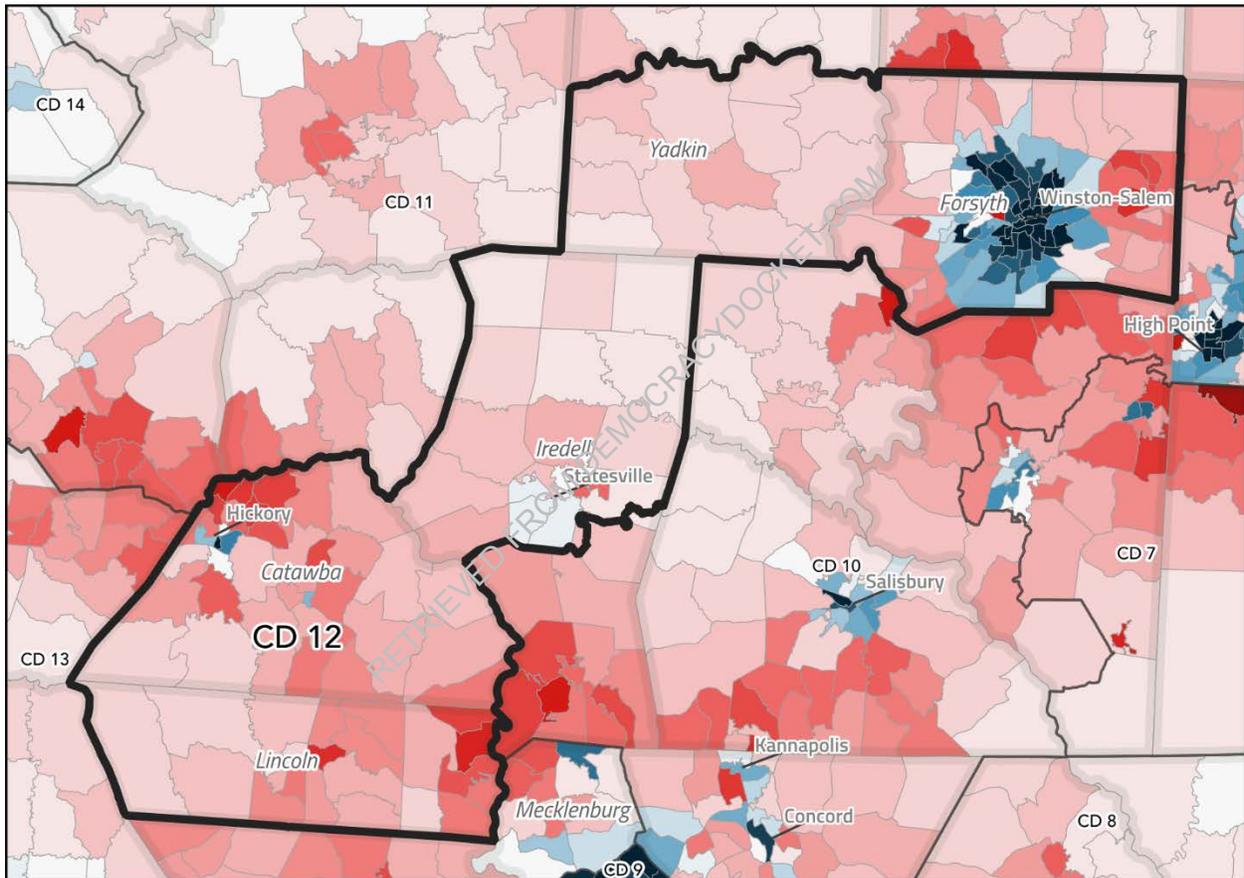
128. Evoking a handgun aiming eastward, District 11 takes the third portion of the fractured Guilford County—including much of the heavily Democratic city of Greensboro—and combines it with heavily Republican counties in the northwestern part of the state, ensuring that Greensboro’s Democratic voters have no influence in a safe Republican district. District 11 also cuts out a bizarre, boot-like bit of Watauga County to encompass the residential address of Republican incumbent Congresswoman Virginia Foxx, in a seemingly intentional effort to place her in the same district as Congresswoman Manning. District 11 thus takes the same basic approach to splitting apart the Triad area as District 5 did in the 2016 Plan, but swaps Guilford’s Democratic voters in for those in Forsyth County.



129. As expected, the new District 11 is a safe Republican seat: President Biden won a mere 42.9% of the vote here in 2020.

Congressional District 12

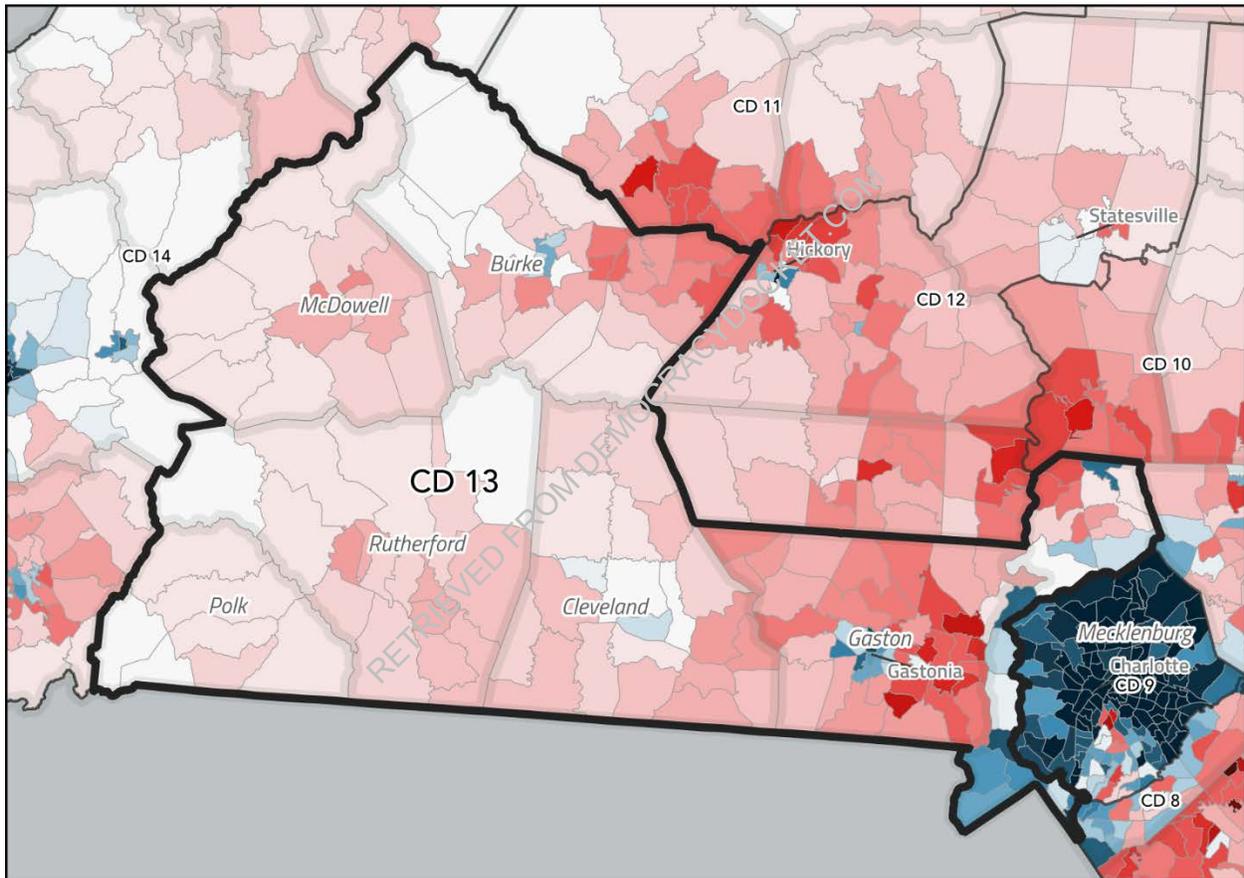
130. District 12 pieces together heavily Democratic Forsyth County, including Winston-Salem, with four heavily Republican counties to the south and west. District 12 also splits Iredell County in half with District 10, and fences in the Democratic cities of Statesville and Hickory. The result is a safe Republican district that effectively guarantees that Democratic voters in Winston-Salem, Statesville, and Hickory cannot elect a candidate of their choice.



131. In the 2020 presidential election, President Biden won only 43.4% of the vote in this new district.

Congressional District 13

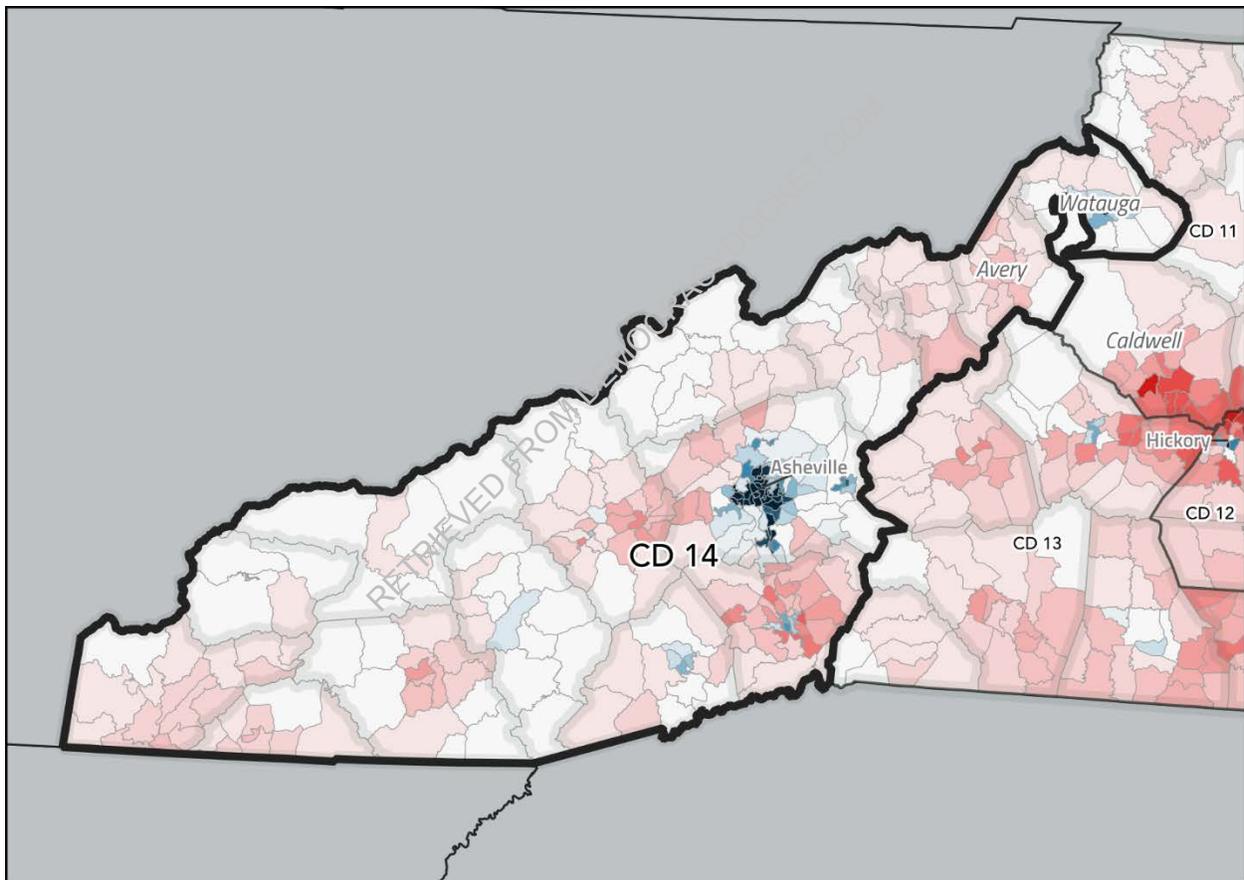
132. Akin to District 10 in the 2016 Plan, Legislative Defendants created a safe Republican seat in District 13 by combining voters from the cracked Mecklenburg County and from Gastonia with heavily rural and Republican counties to the west. While two incumbents are double bunked in neighboring District 11, no incumbent resides in District 13, which includes Defendant Speaker Moore's residence.



133. The new District 13 performs as expected: President Biden won 39.2% of the vote here in the 2020 election.

Congressional District 14

134. Finally, similar to District 11 in the 2016 Plan, Legislative Defendants created a safe Republican seat in District 14 by capturing heavily Republican counties in the western part of the state, pairing them with Asheville's Democratic voters to ensure that they cannot elect a candidate of their choice. District 14 pairs Watauga County and Buncombe for the first time since the 1870s and meticulously avoids the Watauga County boot covering Republican incumbent Virginia Foxx.



135. Democrats have little chance of electing a candidate of their choice here:
President Biden won 46.3% of the vote here in 2020.

COUNT ONE
Violation of the North Carolina Constitution's
Free Elections Clause, Art. I, § 10

136. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

137. Article I, Section 10 of the North Carolina Constitution, which has no counterpart in the U.S. Constitution, provides that “All elections shall be free.”

138. North Carolina’s Free Elections Clause traces its roots to the 1689 English Bill of Rights, which declared that “Elections of members of Parliament ought to be free.” Bill of Rights 1689, 1 W. & M. c. 2 (Eng.); see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992).

139. This provision of the 1689 English Bill of Rights was a product of the king’s efforts to manipulate parliamentary elections, including by changing the electorate in different areas to achieve “electoral advantage.” J.R. Jones, *The Revolution of 1688 in England* 148 (1972). The king’s efforts to maintain control of parliament by manipulating elections led to a revolution. After dethroning the king, the revolutionaries called for a “free and lawful parliament” as a critical reform. Grey 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).

140. North Carolina has strengthened the Free Elections Clause since its adoption to reinforce its principal purpose of preserving the popular sovereignty of North Carolinians. The original clause, adopted in 1776, provides that “elections of members, to serve as Representatives in the General Assembly, ought to be free.” N.C. Declaration of Rights, VI (1776). Nearly a century later, North Carolina revised the clause to state that “[a]ll elections ought to be free,” thus expanding the principle to include all elections in North Carolina. N.C. Const. art. I, § 10 (1868). And another century later, North Carolina adopted the current version which provides that “[a]ll elections *shall* be free.” As the North Carolina Supreme Court later

explained, this change was intended to “make [it] clear” that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights “are commands and not mere admonitions” to proper conduct on the part of the government. *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639 (1982) (internal quotations omitted).

141. Based on the text and history of North Carolina’s Free Elections Clause, “the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” Order on Inj. Relief at 6. “[E]xtreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* at 7.

142. “[P]artisan gerrymandering . . . strikes at the heart of the Free Elections Clause.” *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 305. “[E]xtreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* at 302. Simply put, “[e]lections are not free when partisan actors have tainted future elections by specifically and systematically designing the contours of the election districts for partisan purposes and a desire to preserve power.” *Id.* at 305.

143. The 2021 Plan violates the Free Elections Clause in the same way as the

invalidated 2016 Plan and 2017 state legislative plans. In creating the 2021 Plan, Legislative Defendants “specifically and systematically design[ed] the contours of the election districts for partisan purposes and a desire to preserve power.” *Id.* at 305. The 2021 Plan “unlawfully seek[s] to predetermine election outcomes in specific districts” and across the state as a whole. *Id.* Because of Legislative Defendants’ extreme partisan gerrymandering of the 2021 Plan, congressional elections in North Carolina are not “conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* at 302. In particular, the 2021 Plan takes the three largest Democratic counties in the state and trisects each one among different congressional districts, effectively diluting Democratic voting power throughout the state. And it packs the remaining Democratic strongholds into a handful of congressional districts, resulting in a map that produces 10 safe Republican seats, 3 safe Democratic seats, and 1 competitive seat.

COUNT TWO
Violation of the North Carolina Constitution’s
Equal Protection Clause, Art. I, § 19

144. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

145. Article I, Section 19 of the North Carolina Constitution provides in relevant part that “[n]o person shall be denied the equal protection of the laws.”

146. North Carolina’s Equal Protection Clause affords broader protections to its citizens in the voting rights context than the U.S. Constitution’s equal protection provisions. *See Stephenson v. Bartlett*, 355 N.C. 354, 376–81 & n.6 (2002); *Blankenship v. Bartlett*, 363 N.C. 518, 523–24, (2009).

147. Irrespective of its federal counterpart, North Carolina’s Equal Protection Clause protects the right to “substantially equal voting power.” *Stephenson*, 355 N.C. at 379. “It is well settled in this State that the right to vote on equal terms is a fundamental right.” *Id.* at 378 (internal quotation marks omitted). Thus, the North Carolina Supreme Court has enforced the

State's Equal Protection Clause to invalidate other redistricting schemes, such as the combined use of single-member and multi-member districts in a redistricting plan that "impermissibl[y] distin[guished] among similarly situated citizens" and thus "necessarily implicate[d] the fundamental right to vote on equal terms." *Id.* at 377–78.

148. Partisan gerrymandering violates North Carolina's Equal Protection Clause. "[P]artisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party." Order on Inj. Relief at 8.

149. The 2021 Plan violates North Carolina's Equal Protection Clause in the same ways as the invalidated 2016 Plan and 2017 state legislative plans. In drawing the new congressional map, Legislative Defendants "acted with the intent, unrelated to any legitimate legislative objection, to classify voters and deprive citizens of the right to vote on equal terms." *Common Cause v. Lewis*, 18-CVS-014001, slip. op. at 312. Legislative Defendants drew and enacted a congressional map that systematically discriminates against Democratic voters, and that cannot be explained in any other way. Legislative Defendants' intent is laid bare by the packing and cracking of particular Democratic communities described above.

150. And, as with the 2016 Plan and 2017 state legislative plans, these efforts have produced discriminatory effects for Plaintiffs and other Democratic voters. On a statewide basis, Democrats will continue to receive far fewer congressional seats than they would absent the gerrymander. The grossly disproportionate number of seats that Republicans have won and will continue to win in the congressional delegation relative to their share of the statewide vote

cannot be explained or justified by North Carolina’s political geography or any legitimate redistricting criteria. The packing and cracking of Democratic voters under the 2021 Plan burdens the representational rights of Democratic voters individually and as a group, and discriminates against Democratic candidates and organizations individually and as a group. “[P]acking dilutes the votes of Democratic voters such that their votes, when compared to the votes of Republican voters, are substantially less likely to ultimately matter in deciding the election results.” *Common Cause*, 18-CVS-014001, slip. op. at 314. And “the entire purpose of cracking likeminded voters across multiple districts is so they do not have sufficient ‘voting power’ to join together and elect a candidate of their choice.” *Id.* Legislative Defendants can offer no legitimate justification for their overriding partisan intent in drawing the 2021 Plan.

COUNT THREE

**Violation of the North Carolina Constitution’s
Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14**

151. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

152. Article I, § 12 of the North Carolina Constitution provides in relevant part: “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.”

153. Article I, § 14 of the North Carolina Constitution provides in relevant part: “Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained.”

154. “There is no right more basic in our democracy than the right to participate in electing our political leaders—including, of course, the right to vote.” Order on Inj. Relief, *Harper I*, at 9. “Political belief and association constitute the core of those activities protected by the First Amendment.” *Id.* And in North Carolina, “the right to assembly encompasses the right of association.” *Id.* “[F]or elections to express the popular will, the right to assemble and consult

for the common good must be guaranteed.” *Id.* (quoting John V. Orth, *The North Carolina State Constitution* 48 (1995)).

155. Irrespective of the U.S. Constitution, the 2021 Plan violates Article I, § 14 of the North Carolina Constitution by “burden[ing] protected expression based on viewpoint by making Democratic votes less effective.” *Common Cause*, 18-CVS-014001, slip. op. at 322. Legislative Defendants “identified certain preferred speakers (e.g., Republican voters), while targeting certain disfavored speakers (e.g., Democratic voters) because of disagreement with the views they express when they vote.” Order on Inj. Relief, *Harper I*, at 10. Legislative Defendants singled out Democratic voters for disfavored treatment by packing and cracking them into districts with the aim of diluting their votes and, in the case of cracked districts, ensuring that these voters are significantly less likely, in comparison to Republican voters, to be able to elect a candidate who shares their views. “The fact that Democratic voters can still cast ballots under gerrymandered maps changes nothing. The government unconstitutionally burdens speech where it renders disfavored speech *less effective*, even if it does not ban such speech outright.” *Common Cause*, 18-CVS-014001, slip. op. at 323.

156. Irrespective of the U.S. Constitution, the 2021 Plan independently violates Article I, § 12 because it “severely burden[s]—if not outright preclude[s]”—the ability of Democratic voters to associate by eroding their ability to “instruct” and “obtain redress” from their members of Congress on issues important to them. *Common Cause*, 18-CVS-014001, slip. op. at 326-27.

157. Irrespective of the U.S. Constitution, the 2021 Plan independently violates Article I, Sections 12 and 14 of the North Carolina Constitution by retaliating against Plaintiffs and other Democratic voters based on their exercise of political speech. The 2021 Plan takes adverse action against Plaintiffs and other Democratic voters, retaliates against their protected speech and

conduct, and would not have taken the adverse action but for Legislative Defendants' retaliatory intent to pack and crack Democratic voters because of their prior political speech and associations.

158. There is no legitimate state interest in discriminating and retaliating against Plaintiffs because of their political viewpoints, voting histories, and affiliations. Nor can the 2021 Plan be explained or justified by North Carolina's geography or any legitimate redistricting criteria.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment in their favor and against Defendants, and

a. Declare that the 2021 Plan is unconstitutional and invalid because it violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14;

b. Enjoin Defendants, their agents, officers, and employees from administering, preparing for, or moving forward with the 2022 primary and general elections for Congress using the 2021 Plan;

c. Establish a new congressional districting plan that complies with the North Carolina Constitution, if the North Carolina General Assembly fails to enact a new congressional districting plan comporting with the North Carolina Constitution in a timely manner;

d. Enjoin Defendants, their agents, officers, and employees from using past election results or other political data in any future redistricting of North Carolina's congressional districts to intentionally dilute the voting power of citizens or groups of citizens based on their political beliefs, party affiliation, or past votes;

e. Enjoin Defendants, their agents, officers, and employees from otherwise intentionally diluting the voting power of citizens or groups of citizens in any future redistricting of North Carolina's congressional districts based on their political beliefs, party affiliation, or past votes; and

f. Grant Plaintiffs such other and further relief as the Court deems just and appropriate.

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Dated: November 18, 2021

By:  _____

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** Pro hac vice application forthcoming*

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**PLAINTIFFS' MOTION FOR
A PRELIMINARY
INJUNCTION**

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Pursuant to N.C. R. Civ. P. 65 and N.C. Gen. Stat. § 1-485, Plaintiffs hereby move for a preliminary injunction (1) barring Defendants from administering, preparing for, or moving forward with the 2022 primary and general elections for the U.S. House of Representatives using the 2021 congressional redistricting plan; and (2) setting forth a remedial process to create a new plan that complies with the North Carolina Constitution, including a court-ordered remedial plan if the General Assembly fails timely to enact a new plan that comports with the North Carolina Constitution. In support of this motion, Plaintiffs state as follows:

INTRODUCTION

Partisan gerrymandering, where partisan mapmakers manipulate district boundaries to predetermine the outcome of elections before anyone casts a ballot, erodes the integrity of our democracy by diluting the voting power of certain citizens based on their party affiliation, past votes, and political beliefs. It is also incompatible with the North Carolina Constitution. By predetermining election outcomes, partisan gerrymandering violates the Free Election Clause's guarantee that elections shall be conducted "to ascertain, fairly and truthfully, the will of the people—the qualified voters." *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *109-110 (N.C. Super. Ct. Sep. 3, 2019) (quoting *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915)); *see also* Decl. of Lalitha Madduri ("Madduri Decl."), Ex. A, Order Granting Mot. for Prelim. Inj. at 7, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Oct. 28, 2019) ("*Harper I*") (same). And by reducing the voting power of citizens based on ideological and partisan differences, partisan gerrymandering is irreconcilable with the North Carolina Constitution's guarantees that the State shall not deny to any person the equal protection of the laws, *see* N.C. Const., art. I, § 19, and that the State shall not punish citizens based on their speech or expression, *see id.*, art. I, §§ 12, 14.

The General Assembly's new congressional plan (the "2021 Plan") violates the constitutional rights of millions of North Carolina citizens. This is one of the most closely divided states in the country. But as Plaintiffs' expert testimony makes abundantly clear, the 2021 Plan is engineered to guarantee that Republicans will win 10 or 11 of North Carolina's 14 congressional seats in nearly every conceivable political environment. Indeed, Democrats would need to win the statewide popular vote by an astonishing 7 percentage points to win just *half* of North Carolina's congressional districts. The 2021 Plan, by design, ensures that the will of North Carolina voters will never truthfully be reflected in the state's congressional delegation.

This Court's immediate intervention is required to avoid irreparable injury to millions of North Carolina voters. As a three-judge panel of this Court explained in 2019 in granting a preliminary injunction against use of the gerrymandered 2016 congressional plan, "[t]he loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional elections are allowed to proceed under" gerrymandered districts. *Harper I*, slip op. at 14. And that deprivation of fundamental rights "outweighs the potential harm[s]" likely to be identified by the Legislative Defendants here, such as "disruption, confusion, and uncertainty in the electoral process for them, candidates, election officials, and the voting public." *Id.* at 15. Now, as then, preliminary injunctive relief is necessary to ensure that North Carolina administers its congressional elections under a map that ensures that elections fairly and truthfully reflect the will of the people.

FACTUAL BACKGROUND

A. The General Assembly repeatedly enacts extreme gerrymanders.

North Carolina is one of the most closely divided states in the country. Nevertheless, over the past decade, the General Assembly has repeatedly enacted extreme gerrymanders that guarantee an overwhelming majority of safe Republican seats in the General Assembly and in Congress. As a result of these unlawful gerrymanders, “[t]he voters of this state, since 2011, have been subjected to a dizzying succession of litigation over North Carolina’s legislative and Congressional districts in state and federal courts.” *Common Cause*, 2019 WL 4569584, at *1.

The General Assembly repeatedly gerrymandered North Carolina’s congressional districts following the 2010 decennial census. A three-judge federal district court struck down the 2011 congressional map as racially gerrymandered in violation of the Fourteenth Amendment’s Equal Protection Clause and ordered the General Assembly to draw a remedial map. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604-05 (M.D.N.C. 2016). The General Assembly then illegally gerrymandered the remedial plan (the “2016 Plan”), prompting a three-judge panel of this Court to issue a preliminary injunction barring use of that plan. *See Harper I*, slip op. at 18; *infra* pp. 4-5.

The General Assembly repeatedly gerrymandered North Carolina’s state legislative districts as well. A three-judge federal district court held that the 2011 state legislative maps enacted by the General Assembly were racially gerrymandered in violation of the Fourteenth Amendment’s Equal Protection Clause. *Covington v. North Carolina*, 316 F.R.D. 117, 124-25 (M.D.N.C. 2016), *aff’d* 137 S. Ct. 2211 (2017). And a three-judge panel of this Court later held that the remedial legislative districts drawn by the General Assembly after *Covington* were unlawful partisan gerrymanders. *See Common Cause*, 2019 WL 4569584, at *3.

B. The *Harper I* court preliminarily enjoins use of the 2016 plan in advance of the candidate filing period, finding it to be an extreme partisan gerrymander.

On September 27, 2019, the same Plaintiffs here filed a lawsuit challenging the 2016 Plan as an extreme partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses of the North Carolina Constitution. *Harper I*, slip op. at 1. A three-judge panel was appointed days later, and the plaintiffs promptly moved for a preliminary injunction. *Id.* at 2. The *Harper I* court ordered expedited briefing, ensuring that it would resolve the plaintiffs' motion for preliminary relief in advance of the December 2, 2019 commencement of the candidate filing period for the 2020 congressional primaries. *Id.*

On October 28, 2019, the court granted a preliminary injunction barring use of the 2016 Plan in the 2020 elections. *Id.* at 18. The court held that the plaintiffs were likely to succeed on the merits of their claims that the 2016 Plan, designed to "give a partisan advantage to 10 Republicans and 3 Democrats," violated the Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. *Id.* at 13-14. It further held that "[t]he loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional districts are allowed to proceed under the 2016 congressional districts." *Id.* at 14. And the court explained that this harm to North Carolina voters outweighed potential concerns about "disruption, confusion, and uncertainty in the electoral process." *Id.* at 15.

In mid-November 2019, the General Assembly enacted a remedial plan. The court *sua sponte* enjoined the candidate filing period pending its review of that remedial map. Madduri Decl., Ex. B, Order Enjoining Filing Period at 1-2, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Nov. 20, 2019). At a hearing on December 2, 2019, the court declined to resolve whether the 2019 Plan was constitutional. *See* Madduri Decl., Ex. C, Hr'g Tr. at 7:23-8:8, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Dec. 2, 2019) ("*Harper I* Summ. J. Hr'g Tr."). In doing so,

the court expressed its “fervent hope that the past 90 days” since the filing of the *Harper I* case would become “a foundation for future redistricting in North Carolina and that future maps are crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people.” *Id.* at 9:3-8.

C. Legislative defendants enact another extreme gerrymander.

North Carolina gained a fourteenth congressional seat following the 2020 census after seeing its population grow by 9.5% over the previous decade. *See* North Carolina: 2020 Census, U.S. Census Bureau (Aug. 25, 2021).¹ Several of the most populous counties in the state have grown even more rapidly: Wake County grew by 22.6%, Mecklenburg by 20.3% Durham by 18.4%, and Guilford by 9.7%. Overall, more than 78% of North Carolina’s population growth came from the Triangle area and the Charlotte metro area. Madduri Decl., Ex. G, Expert Rep. of Christopher Cooper at 8 (“Cooper Rep.”).

On August 12, 2021, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections adopted criteria to guide the enactment of new maps. While the adopted criteria provide that “[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans,” they freely permitted the use of “local knowledge of the character of communities and connections between communities,” as well as “[m]ember residence.” Madduri Decl., Ex. D, House Committee on Redistricting & Senate Committee on Redistricting and Elections, Criteria Adopted by the Committees (Aug. 12, 2021) (the “2021 Adopted Criteria”). Unlike the 2016 criteria, which provided that “[r]easonable efforts shall be made not to divide a county into more than two

¹ Available at <https://www.census.gov/library/stories/state-by-state/north-carolina-population-change-between-census-decade.html>.

districts,” Madduri Decl., Ex. E, Joint Committee on Redistricting, 2016 Contingent Congressional Plan Committee Adopted Criteria (the “2016 Adopted Criteria”), the 2021 Adopted Criteria contained no similar limitation. *See* 2021 Adopted Criteria at 1-2. The 2021 Adopted Criteria were otherwise materially identical to the 2016 Adopted Criteria.

On October 6, 2021, legislators began drawing potential maps for consideration by the House and Senate Committees. Despite *Harper I’s* admonition to use a transparent process that would follow the adopted criteria and eschew the use of election data, the process that followed was designed to produce another partisan gerrymander. Legislative Defendants sought to instill public confidence in that preordained result by requiring legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. Madduri Decl., Ex. F, *Hearing Before the House Committee on Redistricting*, 2021 Leg., 155th Sess. 3:1-20 (N.C. 2021) (statement of Rep. Destin Hall, Chairman, H. Comm. on Redistricting) (“Oct. 5, 2021 H. Redistricting Comm. Hr’g Tr.”). According to Defendant Hall, Chairman of the House Redistricting Committee, North Carolinians could be confident in the process because that software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software. Oct. 5, 2021 H. Redistricting Comm. Hr’g Tr. at 52:3-8.

But there was an obvious and intentional loophole that rendered that supposed restriction meaningless. Legislators asked Chairman Hall if the Committees would prevent legislators from simply bringing prohibited political data—or maps drawn by political consultants using prohibited political data—with them into the map-drawing room. Chairman Hall responded that the Committees did not intend to prevent this practice, and made clear that he interpreted the 2021 Adopted Criteria to allow the use of political data in the drawing of maps so long as the data were

not loaded onto the computer terminals.

CHAIRMAN HALL: And on these computers in this room, you essentially are bound by that criteria because there is no racial data or election data that's loaded into these computers.

REPRESENTATIVE HARRISON: But it seems like if you come in, and you might have the material with you, it might not be actually loaded in the software, but you might actually have [it] with you. I just didn't know if there was some way to enforce that, or how you plan to do that?

CHAIRMAN HALL: I don't plan to search every member who comes into this committee room, nor do I want to do that . . . So, you know, members . . . are free to handle those issues as they see fit, but they will follow the criteria in the sense that that data is not in these computers.

Oct. 5, 2021 H. Redistricting Comm. Hr'g Tr. at 52:18-53:13 (emphasis added); *see also id.* at 66:11-66:16 (Representative Reives asserting that this process "sounds [like] an easy get around, in a legal sense, around the criteria that we've set up"); *id.* at 66:17 (Chairman Hall responding: "I don't think I have the ability to police members of this committee, nor do I want to . . . I know I'm not going to bring in a map and sit down and draw it, but you know, the reality is, we're elected officials.").

Various legislators proposed solutions like not allowing legislators to have maps with them at the computer terminals or requiring members to disclose if they were copying maps drawn by external political consultants. *Id.* at 54:21-25, 67:25-68-3. Chairman Hall rejected these proposals. *Id.* at 55:4-6, 68:4-25; *see also id.* at 70:2-7 (Chairman Hall: "I think it ultimately results in the best path forward to just say, you know, look folks, the map you draw has got to be the one that you do in here and nowhere else. And that's up to the members and their integrity as to how they want to handle that."). And he tacitly acknowledged that legislators had already been presented with maps drawn by outside political consultants. *Id.* at 61:19-23 (Representative Hawkins: "I want to make sure that there have been no maps drawn outside of this building that any of us have

been privy to. Can we say that unequivocally that that's been the case?"); *id.* at 61:24-62:2 ("I can't speak for other members of this committee. What I'll say is that I have not contributed to the drawing of any map, at all.").

Legislative Defendants also held public hearings to discuss the map-drawing process primarily in Republican counties while carefully avoiding more heavily Democratic areas. And they ignored public testimony submitted during these hearings that would have resulted in fair representation for North Carolinians. For example, residents in the Sandhills overwhelmingly asked that their communities be united in one congressional district centered in Cumberland County. Cooper Rep. at 8. But the 2021 Plan disregards this request by dividing the Sandhills communities among three different congressional districts, diluting their influence and further inhibiting the ability to coalesce around preferred candidates.

This process predictably resulted in the Republican-controlled Redistricting Committees choosing a map that produced 10 safe Republican seats, 3 safe Democratic seats, and 1 competitive seat. *See* Cooper Rep. at 1. The 2021 Plan was voted out of the Senate Committee as Senate Bill 740 on November 1. It was then voted out of the House Committee on November 3. The full Senate and House passed the 2021 Plan on November 2 and November 4, respectively, on strict party-line votes. *See* Charles Duncan, *Redistricting in NC: New Maps Approved, Favoring GOP*, Spectrum News 1 (Nov. 4, 2021).²

D. The 2021 Plan packs and cracks Democratic voters in every district.

The 2021 Plan meticulously packs and cracks Democratic voters in each and every district—without exception. Dr. Christopher Cooper, the Robert Lee Madison Distinguished

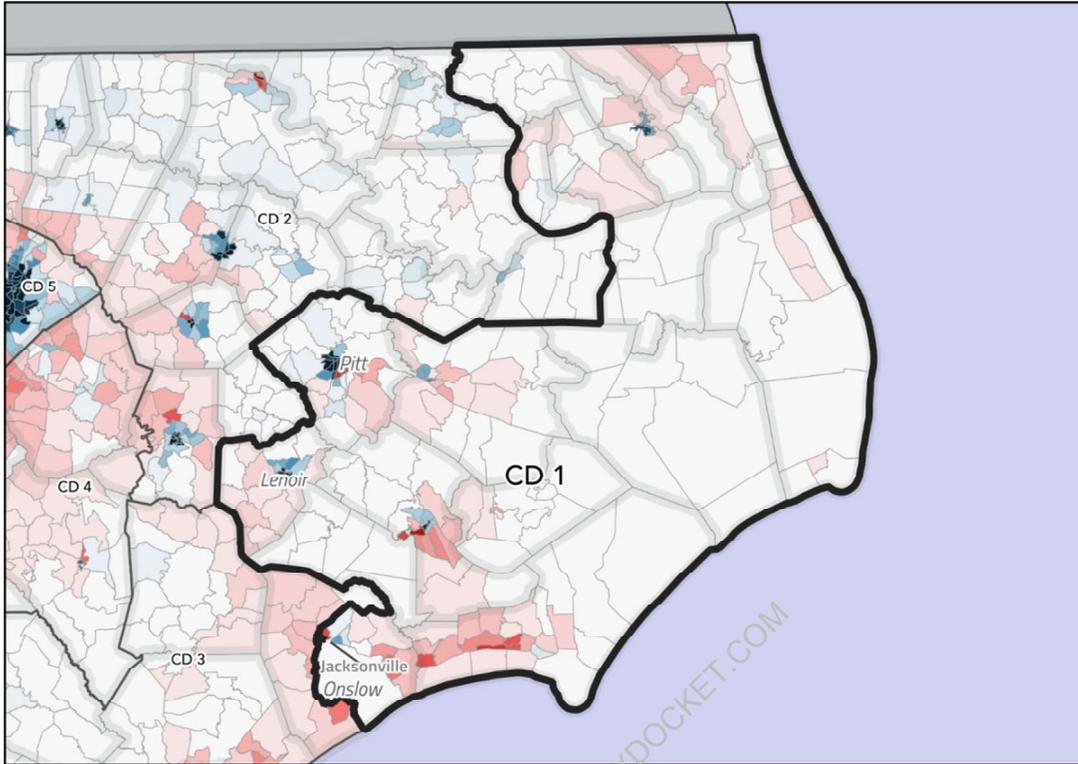
² Available at <https://spectrumlocalnews.com/nc/charlotte/politics/2021/11/04/redistricting-in-n-c---new-maps-approved--favoring-gop>.

Professor of Political Science and Public Affairs at Western Carolina University, describes the packing and cracking in his expert report. Dr. Cooper has been a professor at Western Carolina University since 2002 and is an expert in North Carolina’s elections, political geography, and political history. Dr. Cooper was accepted as an expert in *Common Cause v. Lewis*, where the court found his analysis “persuasive” and gave it “great weight.” *Common Cause*, 2019 WL 4569584, at *17, 43.³

Congressional District 1

Legislative Defendants drew District 1 to be a safe Republican seat while undermining Democratic voting strength in the neighboring District 2—the predecessor of which was a Democratic-leaning seat represented by Congressman G.K. Butterfield. District 1, which is mostly comprised of District 3 in the 2019 Plan, receives nearly all of Pitt County’s Democratic VTDs from Congressman Butterfield’s former district (District 1 under the 2019 Plan), including the entire city of Greenville as shown below.

³ The images reproduced below from Professor Christopher Cooper’s Expert Report show each district’s boundaries and the partisanship of its VTDs using a composite of the results of the 2020 North Carolina Attorney General and 2020 North Carolina Labor Commissioner races, with darker blue shading for the VTDs that voted more heavily Democratic, darker red for VTDs that voted more heavily Republican, and lighter shading for VTDs that were closer to a tie—with the shading adjusted for the VTD’s population.



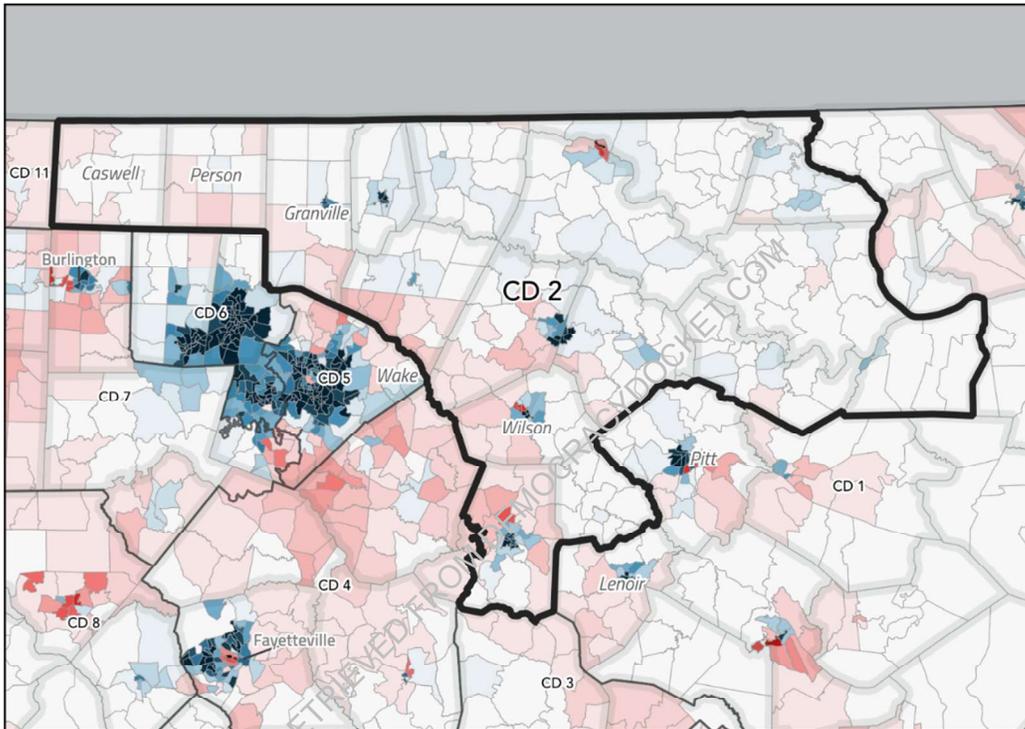
The upshot of Legislative Defendants’ engineering is a safe Republican seat where Democratic voters have no meaningful chance of electing the candidate of their choice. The PVI⁴ of this district is R+10 and no Democratic member of Congress represents a district that leans so heavily Republican. Cooper Rep at 8.

Congressional District 2

District 2 was a Democratic district under both the 2016 and 2019 Plans. The 2021 Plan significantly improves Republicans’ voting strength in the district by removing the Democratic stronghold of Greenville from Congressman Butterfield’s district and placing it into the new District 1. Legislative Defendants further undermined Democratic voting strength in this district by expanding the boundaries of its predecessor westward, stretching nearly 200 miles from the east to encompass the Republican strongholds of Caswell and Person Counties. In addition to

⁴ PVI refers to the Cook Political Report’s Partisan Voting Index, a standard bipartisan metric of the expected “lean” of a district using a composite of past elections. Cooper Rep. at 4.

producing a clear partisan shift toward Republicans, “the district is difficult to understand from a communities of interest perspective,” as it “no longer includes any of Pitt County nor the campus of East Carolina University, which provided much of the economic engine of the [predecessor] district, and now stretches from the Albemarle Sound to the Raleigh Durham-Chapel Hill MSA.” *Id.* at 10. Dr. Cooper concludes that the new district “splits communities in important ways.” *Id.*

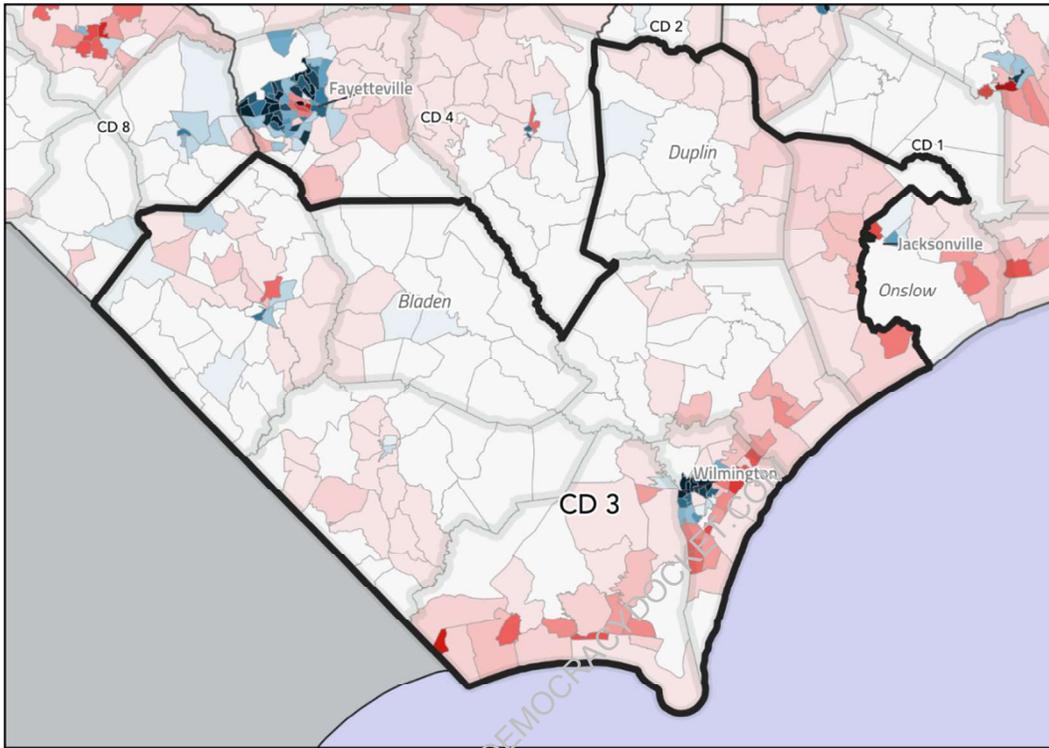


Legislative Defendants succeeded in eliminating a Democratic district: While the prior congressional district in this area had a D+12 PVI, making it a safe Democratic seat, the PVI of the new District 2 is “even.” *Id.* at 10.

Congressional District 3

Ignoring the repeated calls of constituents to place the competitive Sandhills region in a single congressional district, the 2021 Plan splits it across Districts 3, 4, and 8. The plan creates a safe Republican seat in District 3 by combining the eastern part of the region with counties along the southeastern coastline. *Id.* at 12. The eastern boundary hews around the relatively Democratic

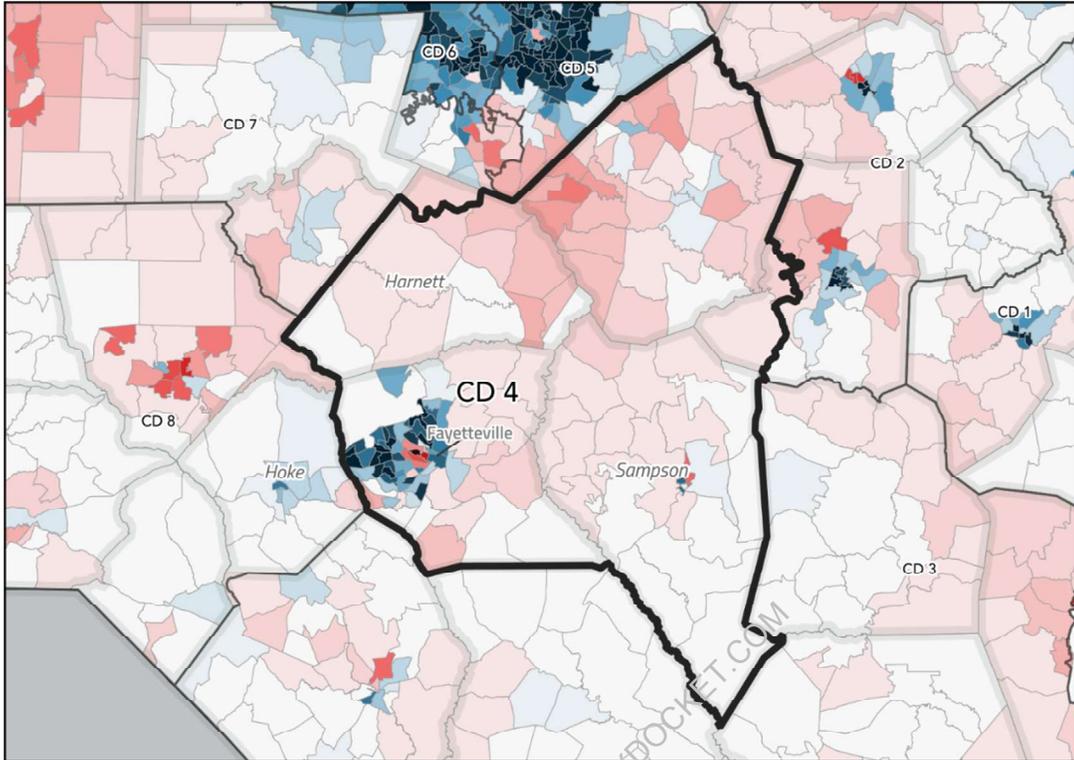
city of Jacksonville, which is instead placed in District 1 where its residents have no realistic prospect of electing a Democratic candidate.



District 3 is indeed a safe Republican seat: The PVI of District 3 is R+10 and Donald Trump won the district with more than 58% of the vote in 2020. *Id.* at 12.

Congressional District 4

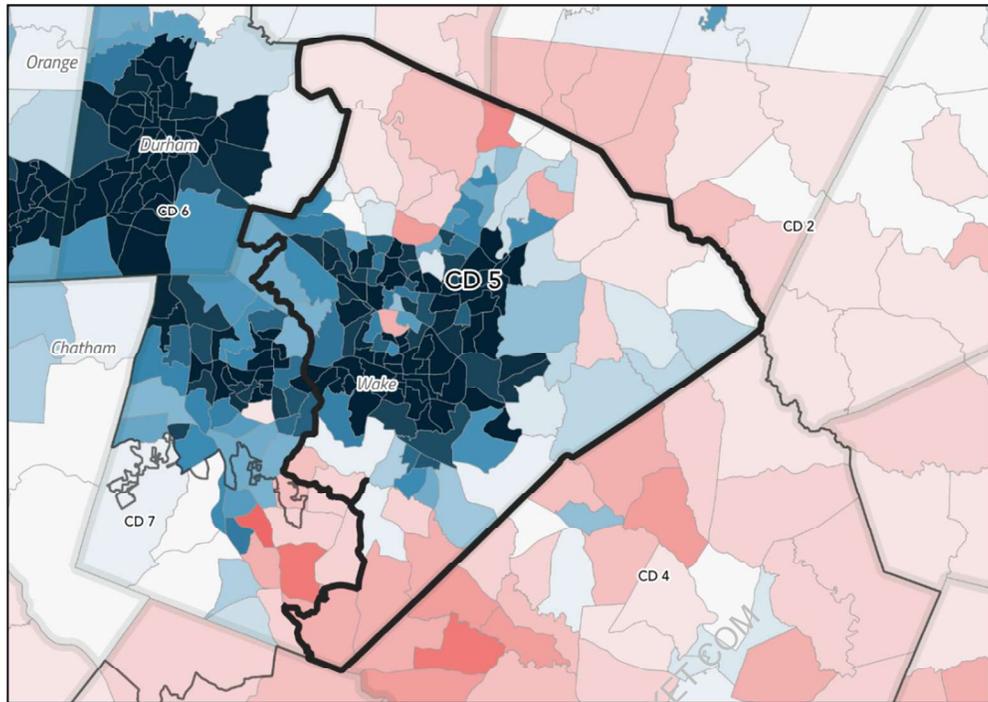
Legislative Defendants likewise engineered District 4 to be a safe Republican seat that destroys the voting power of Democrats in Cumberland County—home to Fayetteville and Fort Bragg. District 4 combines the Democratic stronghold of Cumberland County with overwhelmingly Republican counties of Johnston and Harnett. The district also picks up Republican VTDs in Wayne County. *Id.* at 12.



As expected, the new District 4 is a Republican district. District 4 has a PVI of R+5, and Donald Trump won 53% of the vote in the 2020 Presidential Election. *Id.* at 4, 14.

Congressional District 5

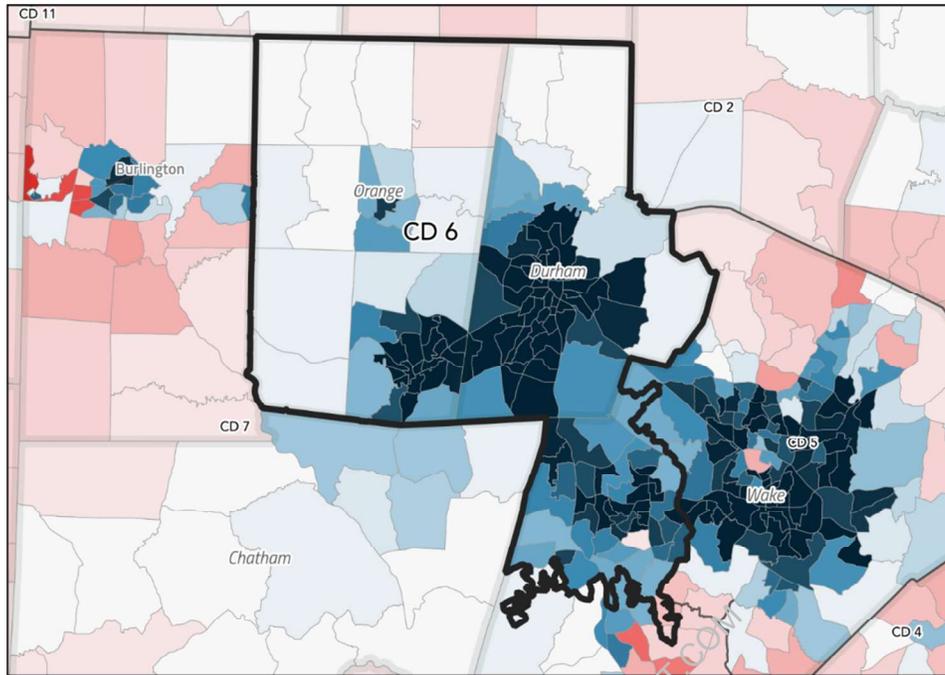
District 5 is the result of flagrant packing and cracking of Democratic voters in the largest Democratic stronghold in the state—Wake County. The 2021 Plan packs these voters by creating a single, safe Democratic district—District 5—out of most of Wake County, including all of its most Democratic VTDs. It then splits the remaining Wake County Democratic voters into two neighboring districts to dilute their power: Voters in Cary and Apex are packed into the safe Democratic District 6, which contains heavily Democratic Orange and Durham Counties, while the remaining population is roped into the overwhelmingly Republican District 7, which stretches west across the state to pick up heavily Republican Randolph County and parts of Davidson and Guilford Counties. Wake County is split between three districts, “despite the fact that there is no population-based reason to divide” it three times. *Id.* at 3; *see also id.* at 16, 18, 20.



Legislative Defendants succeeded in creating an overwhelmingly safe Democratic district in which Republican voters have no meaningful chance to elect a candidate of their choice: District 5 has a PVI of +12 and Donald Trump won only 34% of the vote here in the 2020 presidential election. *Id.* at 4, 16.

Congressional District 6

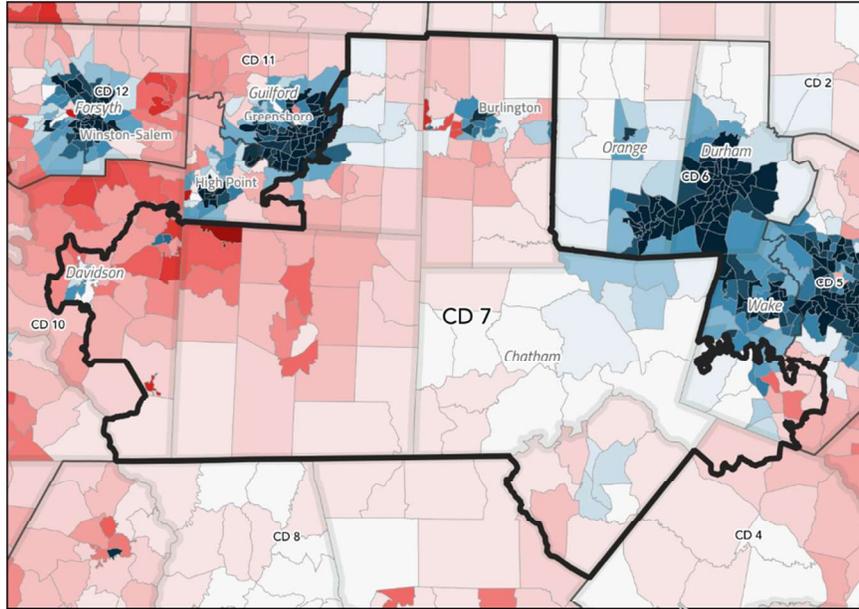
Legislative Defendants packed Democratic voters into District 6 to create a safe Democratic seat. They did so by combining the heavily Democratic Orange and Durham Counties into a single district. District 6 also includes a heavily Democratic swath of voters from the fractured Wake County. *Id.* at 18. This pairing is comparable to the way in which these areas were packed in the 2016 plan. “This district packs a greater proportion of Democratic voters in a single district than any district from” the 2019 Plan. *Id.* at 18.



Republicans have no chance to win this district, and Republican voters in this district have no chance of representation from a member of their own party. District 6 is a D+22 district, and Donald Trump won only 25% of the vote here in 2020. *Id.* at 18.

Congressional District 7

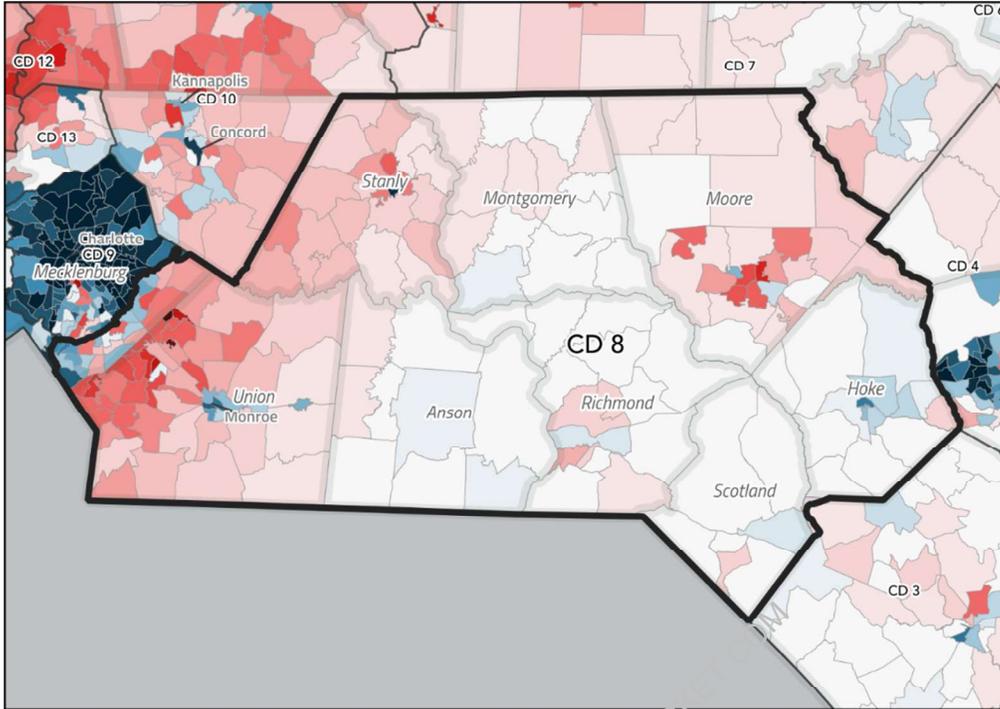
Legislative Defendants created a safe Republican seat in District 7 by fracturing the Democratic stronghold of Guilford County. District 7 stitches together Democratic voters from the southeastern portion of Greensboro and Guilford County, along with Chatham County and Democratic-leaning voters from the fractured Wake County, with heavily Republican Randolph, Alamance, and Lee Counties. District 7 also borrows heavily Republican VTDs from Davidson County in the western part of the district. “Despite including portions of two of the most Democratic counties in North Carolina, the district studiously avoids the Democratic-leaning areas of both counties.” *Id.* at 20.



Democrats have no meaningful chance of electing a candidate of their choice in the new District 7: District 7 has a PVI of R+11 and Donald Trump won 57% of the vote in this district during the 2020 presidential election. *Id.* at 20.

Congressional District 8

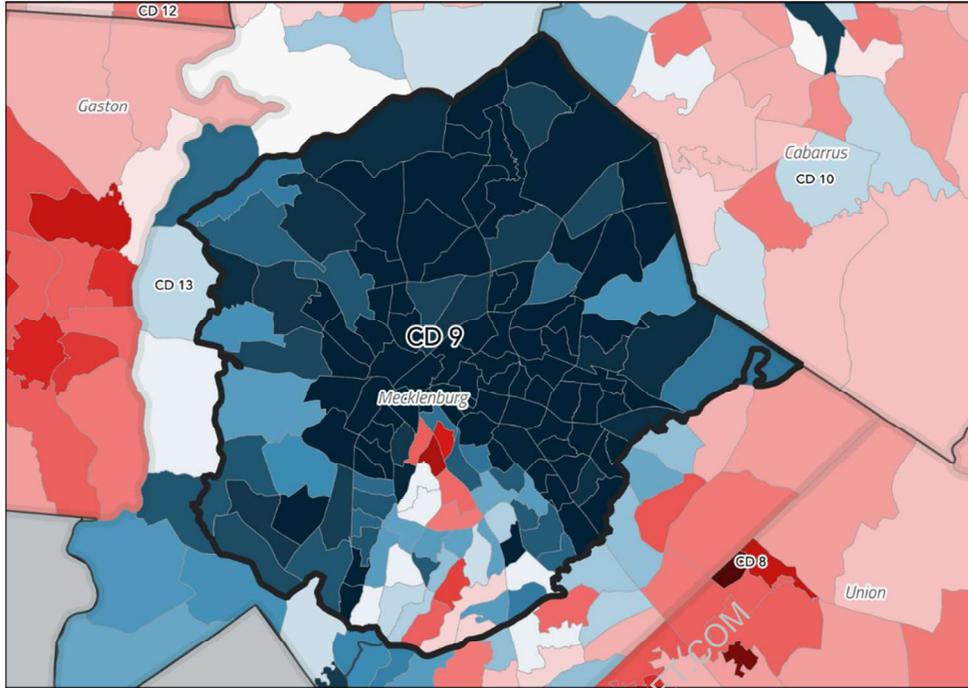
Legislative Defendants created a safe Republican seat in District 8 by combining Democratic-leaning Hoke and Anson Counties with heavily Republican Union, Moore, Montgomery, and Stanly Counties. As discussed in greater detail below, Legislative Defendants also included portions of heavily Democratic Mecklenburg County in District 8, splitting Charlotte and ensuring that Democratic votes in that county would be wasted in this safe Republican seat. *Id.* at 22.



District 8 performs as expected: The Cook Political Report calls it an R+11 District, and Donald Trump won 57% of the vote in the new District 8. *Id.* at 14, 22.

Congressional District 9

District 9, a guaranteed Democratic district capturing a carefully hewn chunk of Charlotte, reflects flagrant packing of Democratic voters in heavily Democratic Mecklenburg County. As discussed earlier, Legislative Defendants divided this Democratic stronghold into three districts: many (but not all) of Mecklenburg County's most Democratic VTDs are packed into District 9. The rest of Mecklenburg's Democratic voters are meticulously cracked between District 8 and District 13. *Id.* at 24.

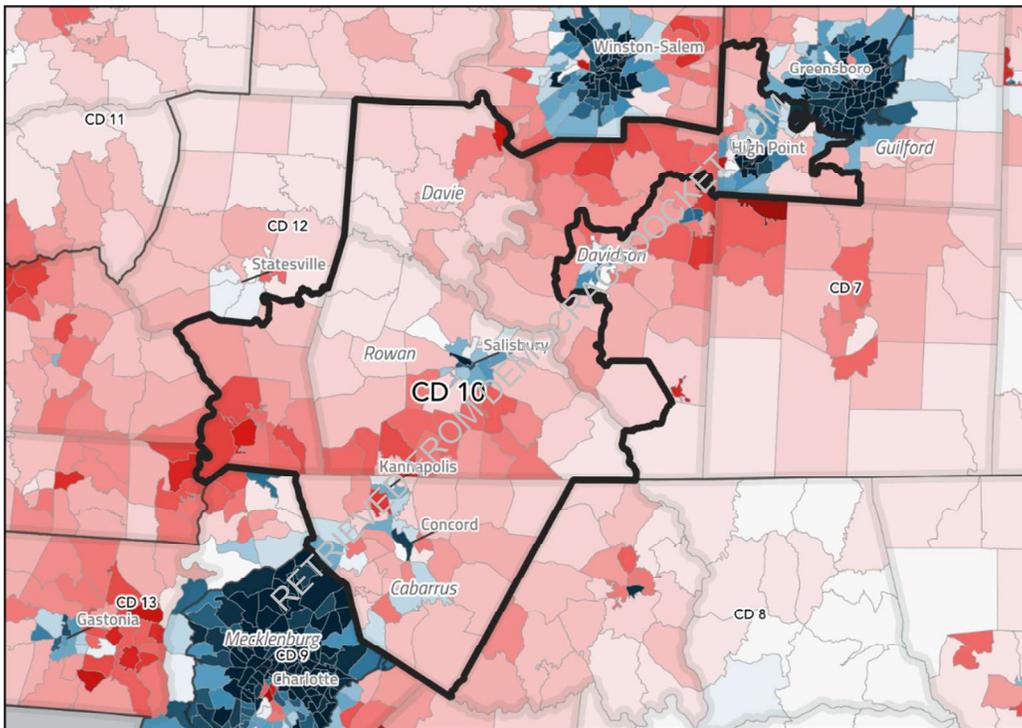


By creating a safe Democratic seat in District 9, “Republican voters will be more efficiently distributed across other districts, where they can affect the outcome.” *Id.* at 24. But that also “has the effect of ensuring that Republican voters in [District 9] have no chance of securing representation from a member of their own party.” *Id.* Donald Trump won 25% of the vote in this district in 2020. *Id.* at 24.

Congressional District 10

As discussed, Legislative Defendants cracked Guilford County—one of the largest Democratic counties in the state—among three safe Republican districts, ensuring that all Democratic votes in Guilford County are wasted. District 10, the southeastern district in the tripartite split, groups the heavily Democratic voters in High Point with the overwhelmingly Republican neighboring counties of Davidson, Cabarrus, Rowan, and Davie. District 10 in the 2021 Plan thus closely resembles District 13 in the 2016 Plan, which similarly paired High Point and other Democratic Guilford County voters with several of the same Republican counties to the west. As Dr. Cooper explains: “The enacted NC-10 includes High Point, while NC-11 includes

most of Greensboro and NC-12 contains Winston-Salem, meaning that the enacted map splits all three points of North Carolina’s Piedmont Triad into separate congressional districts that favor Republicans. In the current map, this community of interest is together in NC-6, represented by Democrat Kathy Manning.” *Id.* at 26. Confirming that this area constitutes a well-recognized community of interest, the Piedmont Triad shares an airport, a local television market with common local news channels, and a weekly newspaper—the Triad Business Journal—that focuses on business developments in Greensboro, High Point, and Winston-Salem.⁵



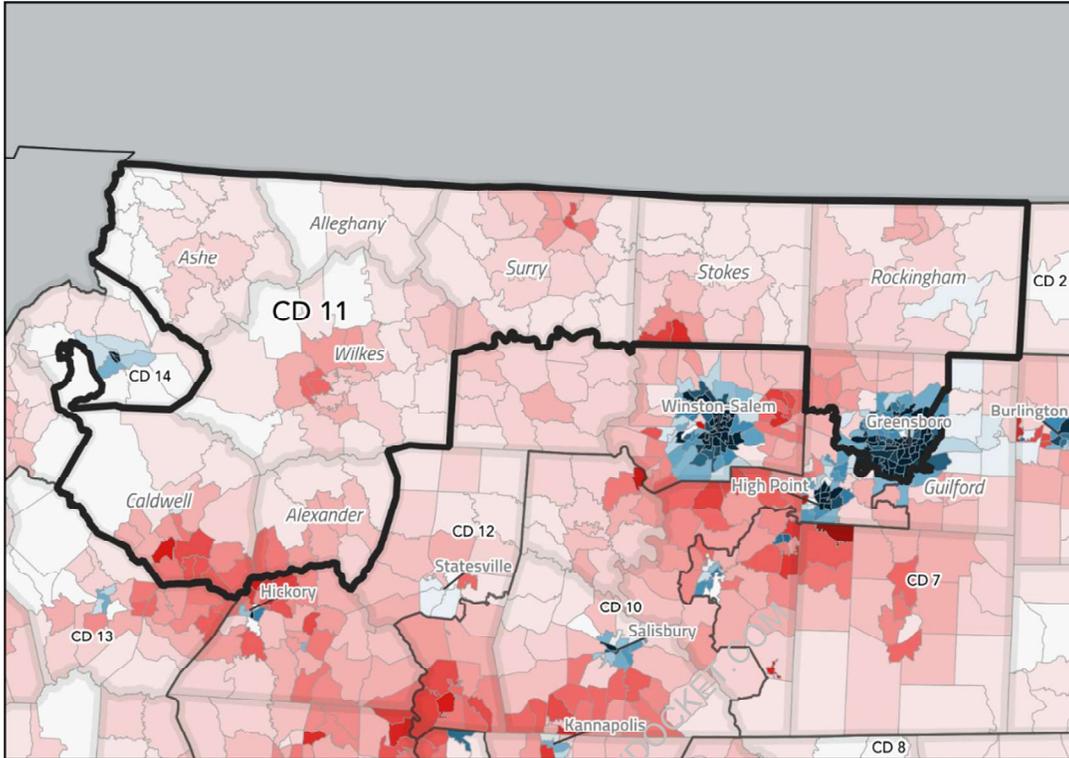
Legislative Defendants succeeded in creating another seat where Democratic voters in High Point, Salisbury, Kannapolis, Concord, and Cabarrus have no realistic possibility of electing a member of their own party: District 10 has an R+14 PVI and Donald Trump won over 60% of the Presidential vote here in 2020. *Id.* at 26.

⁵ See Greensboro/Winston-Salem/High-Point News, Triad Bus. J (last accessed Nov. 30, 2021), available at <https://www.bizjournals.com/triad/news/>.

Congressional District 11

Evoking a handgun aiming eastward, District 11 takes the third portion of the fractured Guilford County—including much of the heavily Democratic city of Greensboro—and combines it with heavily Republican counties in the northwestern part of the state, dividing the communities of interest in the Piedmont Triad while ensuring that Greensboro’s Democratic voters have no influence in this safe Republican district. District 11 also cuts out a bizarre, boot-like bit of Watauga County to encompass the residential address of Republican incumbent Congresswoman Virginia Foxx, placing her in the same district as Congresswoman Manning. District 11 thus takes the same basic approach as District 5 in the 2016 Plan, but swaps Guilford’s Democratic voters in for those in Forsyth County.

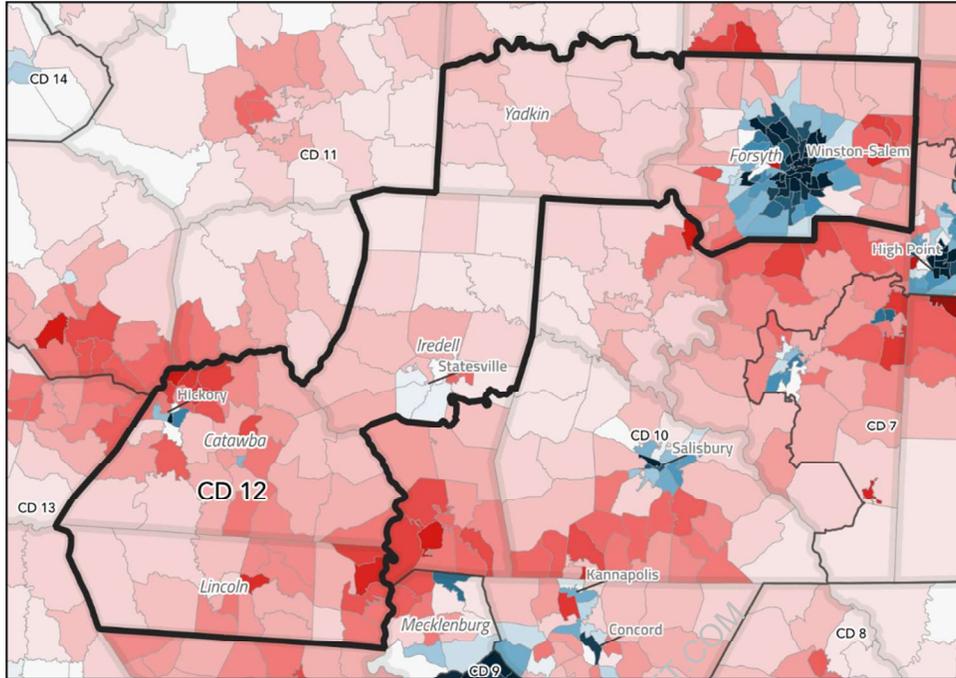
District 11 has little in the way of shared interests: “Geographically, [District 11] span[s] radically different parts of the state.” *Id.* at 28. “The corners of the district have different area codes, are served by different media markets, and share virtually no characteristics in common other than the fact that they are both within North Carolina.” *Id.*



As expected, the new District 11 is a safe Republican seat: The PVI is R+9 and Donald Trump won 57% of the vote here in 2020. *Id.* at 28.

Congressional District 12

District 12 pieces together heavily Democratic Forsyth County, including Winston-Salem, with four heavily Republican counties to the south and west. District 12 also splits Iredell County in half with District 10, and fences in the Democratic cities of Statesville and Hickory. The result is a safe Republican district that effectively guarantees that Democratic voters in Winston-Salem, Statesville, and Hickory cannot elect a candidate of their choice.

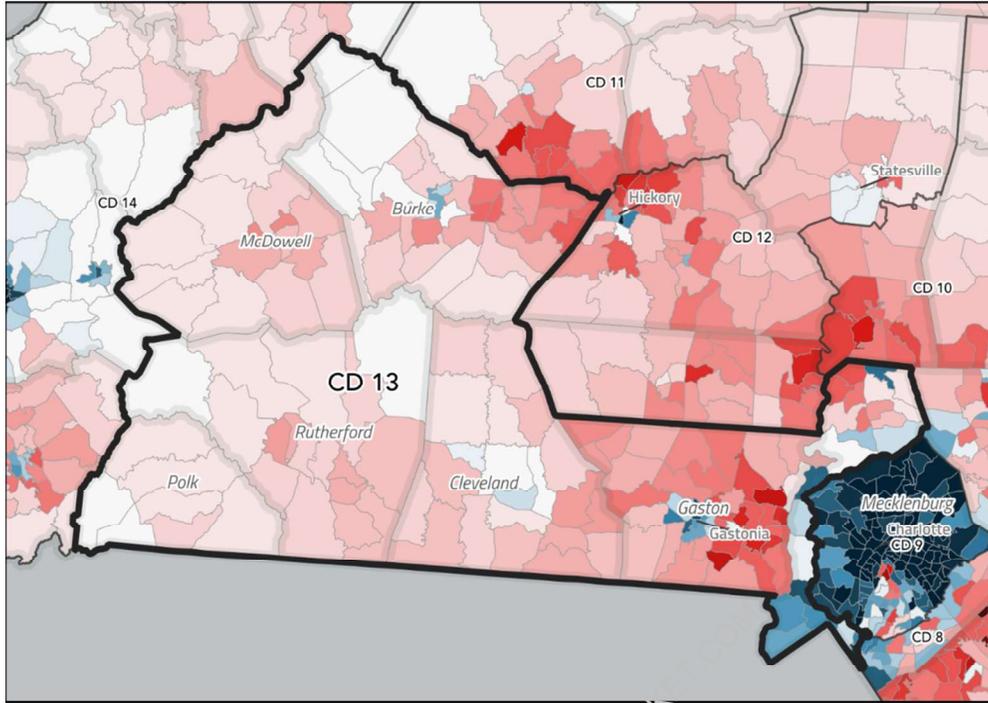


The PVI of District 12 is R+9 and Donald Trump won over 56% of the vote here in 2020.

Id. at 30.

Congressional District 13

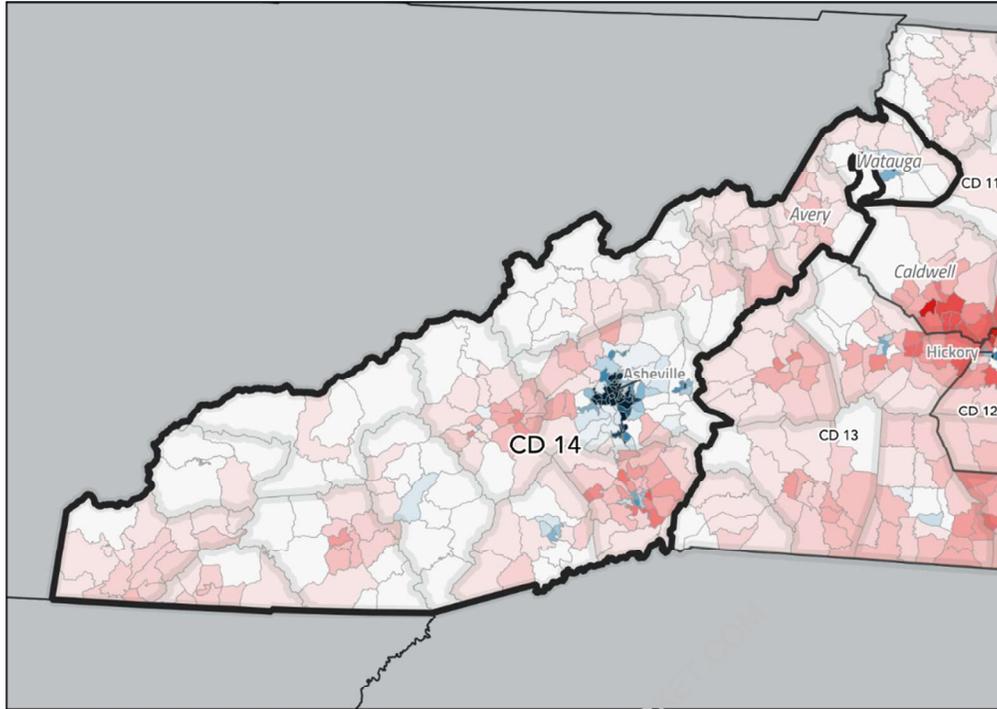
Akin to District 10 in the 2016 Plan, Legislative Defendants created a safe Republican seat in District 13 by combining voters from the cracked Mecklenburg County and from Gastonia with heavily rural and Republican counties to the west. While two incumbents are double bunked in neighboring District 11, no incumbent resides in District 13, which includes Defendant Speaker Moore's residence. Republican Congressman Madison Cawthorne recently announced he would run in District 13, prompting Speaker Moore to announce that he would stay in the General Assembly. *Id.* at 32.



The new District 13 performs as expected: The District has a PVI of R+13 and Donald Trump won 60% of the vote here in the 2020 election. *Id.* at 32.

Congressional District 14

Finally, similar to District 11 in the 2016 Plan, Legislative Defendants created a safe Republican seat in District 14 by capturing heavily Republican counties in the western part of the state, pairing them with Asheville's Democratic voters to ensure that they cannot elect a candidate of their choice. District 14 pairs Watauga County and Buncombe for the first time since the 1870s and meticulously avoids the Watauga County boot covering Republican incumbent Virginia Foxx. *Id.* at 34.



Democrats have little chance of electing a candidate of their choice here: Donald Trump won 53% of the vote here in 2020 and District 14 has an R+7 PVI. *Id.* at 4, 34.

E. The 2021 Plan is an intentional extreme partisan gerrymander.

Expert analysis confirms that the 2021 Plan is an intentional, extreme partisan gerrymander that dilutes Democratic votes and prevents Democratic voters from electing candidates of their choice. Dr. Cooper concluded:

After analyzing the characteristics of the map as a whole as well as the characteristics of each district in isolation, it is clear that the enacted map will increase the number of Republican members of Congress and decrease the number of Democratic members of Congress in North Carolina's congressional delegation. Democratic voters in the vast majority of the districts will have no chance at representation from a member of their own party and Republican voters in the districts that pack Democrats will have no chance of representation from a member of their own party. This is not a result of natural packing, or geographic clustering, but rather because the congressional district lines shifted in ways that, taken together, benefit the Republican Party. Not only does the enacted map create a substantial partisan advantage for which there is no apparent explanation other than gerrymandering, but it unnecessarily splits communities of interest and will alters representational linkages in ways that, in some cases, have never been seen in North Carolina's history.

Cooper Rep. at 36.

Expert statistical analysis is in accord:

Dr. Jowei Chen

Dr. Jowei Chen is a professor of political science at the University of Michigan. He is one of the “foremost political science scholars on the question of political geography and how it can impact the partisan composition of a legislative body,” and “helped pioneer the methodology of using computer simulations to evaluate the partisan bias of a redistricting plan.” *Common Cause*, 2019 WL 4569584, at *15. Dr. Chen produced a set of computer-simulated plans for North Carolina’s congressional districts by following the 2021 Adopted Criteria. Madduri Decl., Ex. H, Expert Rep. of Jowei Chen at 4 (“Chen Rep.”). “By randomly drawing districting plans with a process designed to strictly follow non-partisan districting criteria, the computer simulation process gives us an indication of the range of districting plans that plausibly and likely emerge when map-drawers are not motivated primarily by partisan goals.” *Id.* at 5. And by comparing the 2021 Plan against the simulated plans with respect to partisan measurements, Dr. Chen was able to determine the extent to which a map-drawer’s subordination of nonpartisan districting criteria, such as geographic compactness and preserving political subdivision boundaries, was motivated by partisan goals. *Id.* at 5. Dr. Chen employed a similar analysis in *Common Cause*, and the court gave “great weight to Dr. Chen’s findings” and adopted his conclusions. *Common Cause*, 2019 WL 4569584, at *18.

Dr. Chen found that the Enacted Plan fails to follow three of the 2021 Adopted Criteria’s mandated districting principles—minimizing county splits, minimizing voting district splits, and maximizing district compactness—and produces levels of partisan bias that are an extreme

statistical anomaly when compared against the 1,000 computer-simulated maps that were randomly generated in accordance with the 2021 Adopted Criteria. Specifically, the Enacted Plan contains 14 county splits, which is more than are contained in any of the 1,000 computer-simulated maps. Chen Rep. at 11. The Enacted Plan splits 25 voting districts, which is nearly double the 13 voting district splits achieved by all 1,000 computer-simulated maps. *Id.* at 14. And of the two common measurements of district compactness, the Enacted Plan scores worse than 100% of simulated maps on the Polsby-Popper score and worse than 97.7% of the simulated maps on the Reock score. *Id.* at 16.

These deviations from the 2021 Adopted Criteria helped enable severe levels of partisan bias that are apparent by any measure. Dr. Chen found that seven of the districts in the Enacted Plan have a more extreme partisan distribution than was observed in 100% of their corollary districts in the simulated maps, and three additional districts have a more extreme partisan distribution than was observed in at least 95% of the simulated maps. *Id.* at 27-28. Notably, for *each* of these 11 outlier districts, the extreme partisan distribution occurs in the direction that benefits Republicans. *Id.* What's more, the Enacted Plan contains ten districts that are safely Republican without being excessively packed with Republican voters—that is, they contain a Republican vote share between 52.9% and 61.2%. *Id.* at 28. Of the 1,000 simulated plans created using the partisan-blind computer algorithm, *none* create 10 seats within this coveted range; instead, the vast majority of simulated maps create only between two to six seats with this favorable vote share. *Id.* at 29. Consistent with these results, Dr. Chen found the Enacted Plan contains fewer competitive districts than 94.2% of the simulated maps, and fewer Democratic districts than 96.6% of the simulated maps. *Id.* at 30-32.

Finally, Dr. Chen compared the Enacted Plan to the 1,000 plans produced by his computer simulations along common measures of partisan bias, including the mean-median difference (which measures how skewed the median-performing district is in favor of the advantaged party), the efficiency gap (which measures how many more votes are “wasted” by the disadvantaged party), and the lopsided margins measure (which measures the extent to which the disadvantaged party’s voters are packed into a small number of districts that are won by a lopsided margin). *Id.* at 34-44. Analysis of each of these measures demonstrates that the Enacted Plan is an extreme statistical outlier in its bias toward the Republican Party, which is unexplainable by North Carolina’s political geography or by compliance with the 2021 Adopted Criteria. *Id.* Based on these findings, Dr. Chen concluded that partisanship predominated in the drawing of the Enacted Plan and subordinated the prescribed districting criteria of avoiding county splits, minimizing voting district splits, and achieving geographic compactness. *Id.*

Dr. Wesley Pegden

Dr. Wesley Pegden is an associate professor in the Department of Mathematical Sciences at Carnegie Mellon University, and an expert in probability. Dr. Pegden employs a mathematically rigorous form of sensitivity analysis to determine whether a map is carefully crafted to achieve a particular partisan outcome, and to determine the likelihood that mapmakers who were not considering partisanship would have landed on that map. Dr. Pegden’s method works by starting with the enacted plans, using a computer algorithm making a sequence of billions or trillions of small random changes to the maps—i.e., swapping precincts at the edge of each district—while respecting nonpartisan districting principles, and then evaluating the partisan characteristics of the resulting comparison maps. Madduri Decl., Ex. I, Expert Rep. of Wesley Pegden at 2-3 (“Pegden Rep.”). Dr. Pegden has described his method, and the mathematical theorems proving that the

method can rigorously identify outliers, in multiple peer-reviewed publications. Dr. Pegden applied this same analysis to North Carolina's legislative maps in *Common Cause v. Lewis*, and the court gave "great weight to Dr. Pegden's testimony, analysis, and conclusions." 2019 WL 4569584, at *42. The basic intuition behind Dr. Pegden's work is that if a map was not intentionally crafted to maximize partisan advantage, making tiny random changes around the edges should not significantly decrease the plan's partisan bias.

For his initial analysis, Dr. Pegden did 32 runs starting from the initial map, making 34 billion random changes for each run. Pegden Rep. at 2, 4-5. He required the maps generated by his random changes to have comparable population deviation and compactness, and no more precinct splits and county traversals than the enacted map. *Id.* at 2. Dr. Pegden then did 3 more sets of 32 runs, adding additional conditions, including protecting the same incumbents as the enacted plan. *Id.* at 5-6. Dr. Pegden compared the partisan characteristics of the enacted map to the partisan characteristics of his generated maps by calculating the number of seats Republicans would win in each map, on average, if a random "uniform swing" was repeatedly applied to the 2020 Attorney General results. *Id.* at 3. The idea, well known and widely used by redistricting experts, is to take a basic historical distribution of votes across the state and then uniformly swing the votes in each precinct in favor of the Republicans or Democrats to account for how a map would perform in better and worse years for each party.

In each of Dr. Pegden's 32 initial runs using the criteria of compactness, population equality, precinct splits, and county traversals, the enacted map showed more pro-Republican partisan bias than 99.9989% of the comparison maps generated by the algorithm making tiny random changes. The results were similar for his runs using additional conditions. *Id.* at 5-6.

For the next step of analysis, Dr. Pegden used mathematical theorems he developed and published in peer-reviewed journals to translate the results described above into a rigorous statement about how the enacted plan compares against *all* other possible districtings of North Carolina satisfying the nonpartisan districting criteria. *Id.* at 2, 3. Applying those theorems, Dr. Pegden found that, for each of his four sets of 32 runs, the enacted map is more carefully crafted for partisan advantage than at least 99.9935% of all possible plans. *Id.* at 5-6. On the basis of this analysis, Dr. Pegden concluded that the 2021 Plan “is optimized for Republican partisan bias to an extreme degree, more so than 99.99% of all alternative districtings satisfying the” nonpartisan redistricting criteria. *Id.* at 6.

F. The 2021 Plan harms plaintiffs and other Democratic voters.

Plaintiffs in this action are North Carolina voters who reside in Congressional districts gerrymandered under the 2021 Plan. Each Plaintiff consistently votes for Democratic congressional candidates. *See* Madduri Decl., Exs. J-U, Plaintiff Affidavits. The 2021 Plan harms Plaintiffs and other Democratic voters in North Carolina by packing and cracking them to reduce their electoral influence.

Plaintiffs Jackson Thomas Dunn and Virginia Walters Brien each reside in District 9 under the 2021 Plan. *See* Madduri Decl., Ex. L. Plaintiffs John Anthony Balla and Rebecca Harper reside in Districts 5 and 6 under the 2021 Plan, respectively. *See id.* Madduri Decl., Exs. J, P. The 2021 Plan dilutes the voting power of these Plaintiffs and other Democratic voters by placing them into these packed districts. *See supra* pp. 8-23. The 2021 Plan dilutes the voting power of the remaining Plaintiffs—Amy Clare Oseroff, Donald Rumph, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, and David Dwight Brown—by placing them into cracked districts. *See* Madduri Decl., Exs. K, M, N, O, Q, R, S, T, U. The 2021 Plan

fractures Democratic voters across these cracked districts to ensure that each district will remain reliably Republican.

ARGUMENT

I. Legal Standard

A preliminary injunction should issue if (1) the plaintiff can “show likelihood of success on the merits of his case,” (2) the plaintiff “is likely to sustain irreparable loss unless the injunction is issued,” and (3) a “balancing of the equities” supports injunctive relief. *Triangle Leasing Co. v. McMahan*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). The Court in *Harper I* applied these standards to grant a preliminary injunction barring the use of the 2016 Plan in the 2020 elections. *Harper I*, slip op. at 11-14.

When assessing the preliminary injunction factors, the Court “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted.” *Id.* at 11 (quoting *Williams v. Greene*, 36 N.C. App. 80, 86 (1978)). “In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.” *Id.*

As set forth in greater detail below, preliminary relief should issue here just as it did in 2019. Legislative Defendants have enacted another extreme gerrymander in defiance of the *Harper I* court’s directive that “future maps [be] crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people.” *Harper I* Summ. J. Hr’g Tr. at 9:3-8. Like in 2019, administrative deadlines for the upcoming elections are fast approaching. And like in 2019, “the case is urgent and the right is clear.” *Auto Dealer Res., Inc. v. Occidental Life Ins. Co.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972).

II. Plaintiffs are likely to succeed on the merits of their claims that the 2021 Plan violates the North Carolina Constitution.

Plaintiffs are likely to succeed on their claims in this case for the same reasons that led the *Harper I* court to grant a preliminary injunction against the 2016 Plan. The 2021 Plan plainly violates the North Carolina Constitution’s Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses.

A. The 2021 Plan violates North Carolina’s Free Elections Clause.

The Free Elections Clause of the North Carolina Constitution declares that “[a]ll elections shall be free.” N.C. Const., art. I, § 10. The Free Elections Clause, which has no parallel in the U.S. Constitution, reflects that “[o]ur government is founded on the will of the people. Their will is expressed by the ballot.” *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). It traces back to a similar provision of the 1689 English Bill of Rights, which sought to prevent the King from manipulating the electorate to achieve “electoral advantage” in parliamentary elections. J.R. Jones, *The Revolution of 1688 in England* 148 (1972). But North Carolina’s version is stronger than its historical analogue. After initially providing that elections “ought to be free,” the state in 1968 amended the Clause to direct that all elections “shall” be free, “mak[ing] clear” that the right to free elections, like the other rights secured to the people by the Declaration of Rights, “are commands and not mere admonitions.” *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639, 286 S.E.2d 89, 97 (1982) (internal quotations omitted).

North Carolina courts have thus interpreted the Free Elections Clause to require “that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Common Cause*, 2019 WL 4569584, at *110. And in interpreting the state constitution, the North Carolina Supreme Court has directed that courts “should keep in mind that this is a

government of the people, in which the will of the people—the majority—legally expressed, must govern.” *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897).

“[P]artisan gerrymandering ... strikes at the heart of” these principles. *Common Cause*, 2019 WL 4569584, at *112. Extreme partisan gerrymanders—i.e., “redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others”—are “contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Harper I*, slip op. at 7. The *Harper I* court applied these principles to hold that Plaintiffs were likely to succeed on the merits of their claim that the 2016 Plan—which was designed to ensure 10 safe Republican seats and 3 safe Democratic seats—was an extreme partisan gerrymander that prevented congressional elections from reflecting the popular will. *Id.* at 7, 12-13.

The 2021 Plan, too, violates the Free Elections Clause. North Carolina is one of the most closely divided states in the country. Yet the 2021 Plan guarantees a lopsided Republican congressional delegation no matter how the people vote. The plan “is expected to produce 3 Democratic wins, 10 Republican wins, and 1 competitive seat.” Cooper Rep. 1-2; *see also* Princeton Gerrymandering Project, North Carolina 2021 CST-13 Final Congressional Map (similar, and giving the 2021 Plan an overall grade of “F” for Partisan Fairness).⁶ The margin in this new congressional plan is virtually identical to the 2016 Plan that was preliminarily enjoined in *Harper I*, which was designed to produce 3 Democratic seats and 10 Republican seats. *Harper I*, slip op. at 12-13. And critically, the 2021 Plan is designed to guarantee a Republican majority even if there are major shifts in the political wind. *See* Cooper Rep. at 3; Chen Rep. at 28.

⁶ Available at <https://gerrymander.princeton.edu/reforms/NC>.

Entrenchment of that magnitude violates “the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.”

Harper I, slip op. at 7.

This extreme partisan advantage is the result of deliberate packing and cracking of Democratic voters throughout the state. The 2021 Plan dilutes Democratic voting power principally by splitting each of the three largest counties in North Carolina—which are also the three most heavily Democratic areas in the state—across three districts, “despite the fact that there is no population-based reason to split them this many times.” Cooper Rep. at 1. And the packing and cracking in the 2021 Plan is not limited to these three Democratic strongholds. As discussed, *supra* pp. 8-23, the lines of *every district* are carefully manipulated to ensure that Republican voters are efficiently distributed throughout the state while Democratic voters are distributed in a manner that largely wastes their votes. Cooper Rep. at 3-20. “Given that nothing has changed since the last map in terms of electoral behavior or political geography, it is difficult to understand how these changes could be a result of anything other than gerrymandering.” *Id.* at 1.

That conclusion is reinforced by the expert analyses of Dr. Jowei Chen and Dr. Wes Pegden. Dr. Chen found the Enacted Plan unnecessarily deviates from at least three of the 2021 Adopted Criteria’s requirements and achieves severe levels of partisan bias that are extremely rare—and often non-existent—in simulated plans that are drawn without regard to partisan advantage. *See supra* pp. 23-28; Chen Rep. at 45. For example, the 2021 Plan includes more Republican voters in the six districts that should be most competitive than is seen in nearly 100% of the simulated maps. Chen Rep. at 24. As a result, he found that “[b]y subordinating traditional districting criteria, the General Assembly’s Enacted Plan was able to achieve partisan goals that could not otherwise have been achieved under a partisan-neutral districting process that follows

the Adopted Criteria.” *Id.* Thus Dr. Chen concluded that the Enacted Plan is “an extreme partisan outlier.” *Id.* Dr Pegden’s simulations similarly showed that the 2021 Plan showed more partisan bias than 99.99% or more of the comparison maps generated by making tiny random changes, and indeed more partisan bias than 99.99% of *all* possible plans satisfying the nonpartisan redistricting criteria. *See supra* p. 24; Pegden Rep. at 6. As Dr. Pegden concluded, the 2021 Plan “is optimized for Republican bias to an extreme degree.” Pegden Rep. at 6.

Like in *Harper I*, Legislative Defendants obtained this outcome by engineering a redistricting process at the committee level to guarantee that the General Assembly would enact a partisan gerrymander. The *Harper I* court observed that Legislative Defendants adopted criteria requiring map-drawers to “use . . . political data to draw a map that would maintain the existing partisan makeup of the state’s congressional delegation” of “10 Republicans and 3 Democrats.” *Harper I*, slip op. at 13. And it found persuasive that “the redistricting committee, and ultimately the General Assembly as a whole, approved the 2016 congressional districts by party-line vote.” *Id.*

Legislative Defendants knew this time that they could not adopt redistricting criteria explicitly stating that “[t]he partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats,” *id.* (quoting *Rucho*, 318 F. Supp. 3d at 805), and could not openly load partisan data into public terminals. *See also id.* at 13 (Chair of the House Redistricting Committee admitting that he “propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.”). So they devised a workaround. *See Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 223 (1964). Although political data was not loaded onto the computer terminals at which legislators drew and

submitted maps, Legislative Defendants allowed legislators to sit down at those terminals and simply copy maps drawn by outside political consultants using prohibited political data. *See supra* pp. 6-8.

In addition to rendering the criterion against the use of political data meaningless, Legislative Defendants also enacted new criteria designed to facilitate a partisan gerrymander. While the adopted criteria for the 2016 Plan prevented lawmakers from “divid[ing] a county into more than two districts,” 2016 Adopted Criteria at 2, Legislative Defendants removed this requirement for 2021. *See generally* 2021 Adopted Criteria. Taking advantage of this newfound freedom, Legislative Defendants proceeded to trisect three heavily Democratic counties (Mecklenburg, Wake, and Guilford), profoundly diluting the voting power of these counties’ Democratic residents. Cooper Rep. at 3. No other county is split three times under the 2021 Plan. Chen Rep. at 11. And just like the 2016 Plan enjoined in *Harper I*, the gerrymandered nature of the 2021 Plan is reflected in the fact that it was approved on strict party-line votes.⁷

This redistricting process and the congressional plan that resulted make clear that the 2021 Plan is an extreme partisan gerrymander. Similar to the 2016 Plan that was enjoined in *Harper I*, it is designed to produce 10 to 11 Republican seats no matter how the people vote. This sort of gerrymander “entrench[es] politicians in power” and ensures that congressional elections will not “be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Harper*

⁷ The Senate and House Committees approved the 2021 Plan on November 1 and 3, respectively, with all Republicans on both committees voting in favor and all Democrats voting against. The full Senate and House then passed the 2021 Plan on November 2 and November 3, respectively, again on strict party line votes. *See* Charles Duncan, *Redistricting in NC: New Maps Approved, Favoring GOP*, Spectrum News 1 (Nov. 4, 2021), available at <https://spectrumlocalnews.com/nc/charlotte/politics/2021/11/04/redistricting-in-n-c---new-maps-approved--favoring-gop>.

I, slip op. at 7. And as such Plaintiffs are likely to succeed on their claim that it violates the Free Elections Clause.

B. The 2016 Plan violates North Carolina’s Equal Protection Clause.

The North Carolina Constitution’s Equal Protection Clause declares that “[n]o person shall be denied the equal protection of the laws.” N.C. Const., art. I, § 19. This clause provides greater protection for voting rights than its federal counterpart. *Harper I*, slip op. at 7. Specifically, North Carolina’s Equal Protection Clause protects “the fundamental right of each North Carolinian to *substantially equal voting power.*” *Id.* (citing *Stephenson v. Bartlett*, 355 N.C. 354, 3379, 562 S.E.2d 377, 394 (2002) (emphasis in original)). “It is well settled in this State that ‘the right to vote on equal terms is a fundamental right.’” *Common Cause*, 2019 WL 4569584, at *113 (citing *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty.*, 326 N.C. at 747, 392 S.E.2d at 356)). “These principles apply with full force in the redistricting context.” *Id.* As *Harper I* explained, “partisan gerrymandering runs afoul of the State’s obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party.” *Harper I*, slip op. at 8. In *Common Cause*, the court held that extreme partisan gerrymandering infringes upon a “fundamental right,” because “the classification of voters based on partisanship in order to pack and crack them into districts is an impermissible distinction among similarly situated citizens aimed at denying equal voting power.” *Common Cause*, 2019 WL 4569584, at *113 (internal quotation marks omitted).

In evaluating whether an alleged partisan gerrymander violates North Carolina’s Equal Protection Clause, this Court applies a three-part test. *Harper I*, slip op. at 8. First, plaintiffs challenging a districting plan must prove that state officials’ predominant purpose in drawing

district lines was to entrench their party in power by diluting the votes of citizens favoring their rival. *Id.* (citing *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015)). Second, plaintiffs must establish that the lines drawn in fact have the intended effect by “substantially” diluting their votes. *Id.* (citing *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018)). Finally, if the plaintiffs make those showings, “the State must provide a legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map.” *Id.* (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting)). The 2021 Plan fails at every step.

First, as discussed above, the General Assembly intentionally entrenched Republicans in power through the 2021 Plan. To determine whether discriminatory intent is at play, “a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Holmes v. Moore*, 270 N.C. App. 7, 16–17, 840 S.E.2d 244, 254–55 (2020) (citing *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977)). Discriminatory purpose need not be “the sole or even a primary motive,” but rather just “a motivating factor.” *Id.* (internal quotation marks and citation omitted). And discriminatory purpose can be inferred from the totality of the relevant facts. *Id.* In determining intent in other contexts, North Carolina courts have looked to the *Arlington Heights* factors. *Id.* These include: “[t]he historical background of the [challenged] decision”; “[t]he specific sequence of events leading up to the challenged decision”; “[d]epartures from normal procedural sequence”; the legislative history of the decision; and of course, the disproportionate “impact of the official action.” *Id.* (citing *Arlington Heights*, 429 U.S. at 266-67).

As to the historical background of redistricting in North Carolina, there can be no dispute that the General Assembly has repeatedly and intentionally discriminated against both Black North

Carolinians and Democratic voters in redistricting. *See supra* pp. 3-4. Additionally, the process of enacting the 2021 Plan is replete with evidence demonstrating intentional discrimination. In violation of its own guidelines, and *Harper I*'s clear instruction that legislators should not "seek[] to diminish the electoral power of supporters of a disfavored party," *Harper I*, slip op. at 8, the Committees' process flagrantly allowed map drawers to consider partisan data and draw a plan that favors Republicans. Legislators intentionally turned a blind eye towards map drawers submitting maps that had been drawn using partisan data, and Defendant Hall openly admitted that he had no desire to prevent legislators from introducing partisan data into maps. Oct. 5, 2021 H. Redistricting Comm. Hr'g Tr. at 52:18-53:13. Moreover, the Committee constructed its guidelines to enable the packing and cracking of voters in all the State's largest and most Democratic counties and went on to do just this, trifurcating Mecklenburg, Wake, and Guilford Counties. *See* 2021 Adopted Criteria (eliminating the criterion from the 2016 Adopted Criteria that "reasonable efforts shall be made not to divide a county into more than two districts"); 2016 Adopted Criteria. And Legislators excluded Democratic communities from public hearings and ignored the limited input they allowed these communities to offer. Cooper Rep. at 8. Finally, like its predecessor, the plan passed through committees and the full General Assembly on strict party-line votes. *Harper I*, slip op. at 13.

Expert evidence also confirms that the 2021 Plan was intended to entrench the Republican party in power. Dr. Pegden's analysis concludes that the 2021 Plan is more favorable to Republicans than 99.98% of plans generated by making small changes to district boundaries. The likelihood of that happening by chance, as opposed to by intent, is infinitesimal. Of the 1,000 maps that Dr. Chen generated, every single one complied more closely with the 2021 Adopted Criteria

compared to the Enacted Plan, and none of the computer-simulated maps conveyed such significant advantages to the Republican Party across a broad range of statistical measures.

Second, the 2021 Plan has had its “intended effect” of diluting the votes of Plaintiffs and other Democratic voters, depriving them of substantially equal voting power and the right to vote on equal terms. As detailed above, Dr. Chen’s and Dr. Cooper’s analyses confirm that Legislative Defendants succeeded in their goal of creating 10-11 Republican seats. *See supra* pp. 23-28. The 2021 Plan achieves this result by “packing and cracking Democratic voters” across the 14 districts, just like the 2016 Plan enjoined in *Harper I* and the 2017 state legislative plans struck down under the Equal Protection Clause in *Common Cause. Harper I*, slip op. at 18; *Common Cause*, 2019 WL 4569584, at *116. As under those plans, the margins of victory under the 2021 Plan—and not just the seat counts—confirm the vote dilution. Assuming a statewide vote breakdown in line with recent elections, Democrats under the 2021 Plan would win four districts with an average of 65.4% of the vote, while Republicans would average 57.3% in the remaining 10 districts—a margin of 8.1%, an outcome never generated in Dr. Chen’s 1000 simulated maps. *Chen Rep.* at 42-43. “This packing and cracking diminishes the ‘voting power’ of Democratic voters” in all 14 districts. *Common Cause*, 2019 WL 4569584, at *116. Thus, Democratic voters in the three packed districts “are substantially less likely to ultimately matter in deciding the election results” when compared to Republican voters in the remaining districts. *Id.*

The 2021 Plan “not only deprive[s] Democratic voters of equal voting power in terms of electoral outcomes, but also deprive[s] them of substantially equal [congressional] representation.” *Id.* at *116. “When a district is created solely to effectuate the interests of one group”—as the process and Dr. Chen’s analyses make clear, *see Chen Rep.* 45,—“the elected official from that district is more likely to believe that their primary obligation is to represent only the members of

that group, rather than their constituency as a whole.” *Common Cause*, 2019 WL 4569584, at *116 (internal quotation marks omitted).

Dr. Chen’s analysis in this case independently confirms that the 2021 Plan deprives Plaintiffs of substantially equal voting power and the right to vote on equal terms. Dr. Chen concluded that five Plaintiffs would be in more Democratic leaning or more competitive districts under a map that was not drawn to maximize Republican advantage and that three Plaintiffs would be in less packed Democratic districts, in plans drawn using traditional nonpartisan criteria. Chen Rep. at 48.

Finally, there is no legitimate, nonpartisan justification for the 2021 Plan’s extreme partisan bias. Legislative Defendants cannot conceivably show that the 2021 Plan is narrowly tailored to achieve a compelling government interest. Indeed, Legislative Defendants designed the 2021 Adopted Criteria to allow them to crack the State’s three Democratic strongholds for partisan gain, and even then, they failed to follow other of their own criteria for partisan ends.

In short, in drawing the 2021 Plan, Legislative Defendants engaged in the “intentional ‘classification of voters’ based on partisanship in order to pack and crack them into districts” and to “deprive [them] of the right to vote on equal terms.” *Common Cause*, 2019 WL 4569584, at *117. Plaintiffs are likely to succeed on their Equal Protection Clause claim.

C. The 2021 Plan violates North Carolina’s Freedom of Speech and Assembly Clauses.

The 2021 Plan burdens protected expression and association by making Democratic votes less effective and by preventing Democratic voters from associating with one other to elect and instruct representatives. Because Legislative Defendants cannot establish that the 2021 Plan was narrowly tailored to achieve a compelling government interest, it fails strict scrutiny.

1. The 2021 Plan unconstitutionally discriminates against protected expression and association.

The North Carolina Constitution’s Freedom of 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. The Freedom of Assembly Clause provides in relevant part that “[t]he people have a right to assemble together for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances.” *Id.* § 12. These clauses provide greater protection for speech and association than their federal counterparts. *Common Cause*, 2019 WL 4569584, at *118-19.

Common Cause held that “[v]oting for the candidate of one’s choice and associating with the political party of one’s choice are core means of political expression protected by” these clauses. *Id.* “Voting provides citizens a direct means of expressing support for a candidate and his views,” and “is no less protected ‘merely because it involved the act’ of casting a ballot.” *Id.* at *119 (quoting *State v. Bishop*, 368 N.C. 869, 874, 787 S.E.2d 814, 818 (2016)). Similarly, “[c]itizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs.” *Id.* at *120 (quoting *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204-05 (2011)). “[B]anding together with likeminded citizens in a political party” thus “is a form of protected association.” *Id.* As the *Harper I* Court recognized, those holdings apply in the context of congressional elections just as they did in the context of state legislative elections in *Common Cause*. See *Harper I*, slip op. at 10-11.

a. A districting plan is subject to strict scrutiny where it burdens protected expression based on viewpoint by discriminatorily making the votes cast for one party’s candidates less effective. “The guarantee of free expression ‘stands against attempts to disfavor certain subjects or viewpoints.’” *Id.* at 9 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Notably, a

plan “need not explicitly mention any particular viewpoint to be impermissibly discriminatory.” *Common Cause*, 2019 WL 4569584, at *121. And “[v]iewpoint discrimination is *most* insidious where the targeted speech is political.” *Harper I*, slip op. at 9. “When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g. Republican voters) while targeting certain disfavored speakers (e.g. Democratic voters) because of disagreement with the views they express when they vote.” *Id.* at 10.

The 2021 Plan replicates features that led the *Common Cause* Court to conclude that the 2017 state legislative plans violated the Freedom of Speech Clause. Here too, the Legislative Defendants “singled out [Democratic voters] for disfavored treatment by packing and cracking them into districts with the aim of diluting their votes and, in the case of cracked districts, ensuring that these voters are significantly less likely, in comparison to Republican voters, to be able to elect a candidate who shares their views.” *Common Cause*, 2019 WL 4569584, at *120.

As in *Common Cause*, it “changes nothing” that “Democratic voters can still cast ballots under gerrymandered maps.” *Id.* at 121. “The government unconstitutionally burdens speech where it renders disfavored speech *less effective*, even if it does not ban such speech outright.” *Id.* Like the invalidated 2017 state legislative plans, the 2021 Plan’s “sorting of Plaintiffs and other Democratic voters based on disfavor for their political views has burdened their speech by making their votes less effective.” *Id.* “Plaintiffs and other Democratic voters live in districts where their votes are guaranteed to be less effective—either because the districts are packed such that Democratic candidates will win by astronomical margins or because the Democratic voters are cracked into seats that are safely Republican.” *Id.*

b. The 2021 Plan independently violates Article I, § 12 by burdening the ability of Democratic voters to associate effectively. As *Harper I* explained, “a legislature that engages in

extreme partisan gerrymandering burdens the associational rights of disfavored voters.” *Harper I*, slip op. at 10. The *Common Cause* court held that a districting plan is subject to strict scrutiny where it burdens disfavored association by restricting “the ability of like-minded people across the State to affiliate in a political party and carry out [their] activities and objects.” *Common Cause*, 2019 WL 4569584, at *122 (internal quotation marks omitted); *see also Harper I*, slip op. at 8-11. The *Common Cause* court concluded that under the 2017 state legislative plans, “Democratic voters who live in cracked districts have little to no ability to instruct their representatives or obtain redress from their representatives on issues important to those voters.” *Id.* The same is true under the 2021 Plan. The 2021 Plan places Democrats in ten cracked districts that diminish their voting strength. The Democratic voters in these cracked districts have virtually no chance of successfully banding together to elect a candidate of their choice, and their Republican representatives have little incentive to consider the views of Democratic constituents.

c. The 2021 Plan fails strict scrutiny—and indeed any scrutiny. “Discriminating against citizens based on their political beliefs does not serve any legitimate government interest.” *Common Cause*, 2019 WL 4569584, at *123. “Blatant examples of partisanship driving districting decisions are unrelated to any legitimate legislative objective.” *Id.* at *115 (internal quotation marks omitted). “[P]artisan gerrymanders are incompatible with democratic principles” and are “contrary to the compelling governmental interests established by the North Carolina Constitution ‘in having fair, honest elections,’ where the ‘will of the people’ is ascertained ‘fairly and truthfully.’” *Id.* at *115-16 (quoting *Petersilie*, 334 N.C. at 182, 432 S.E.2d at 840, and *Skinner*, 169 N.C. at 415, 86 S.E.2d at 356)).

2. The 2021 Plan unconstitutionally retaliates against protected expression and association.

The 2021 Plan independently violates the Freedom of Speech and Assembly Clauses by retaliating against voters based on their protected speech and association. “In addition to forbidding discrimination,” North Carolina’s Freedom of Speech and Assembly Clauses “also bar *retaliation* based on protected speech” or conduct. *Id.* at *123. “Courts carefully guard against retaliation by the party in power.” *Harper I*, slip op. at 10. To prevail on a retaliation theory, a plaintiff must show that “(1) the [challenged plan] take[s] adverse action against them, (2) the [plan] w[as] created with an intent to retaliate against their protected speech or conduct, and (3) the [plan] would not have taken the adverse action but for that retaliatory intent.” *Common Cause*, 2019 WL 4569584, at *123.

Like the 2017 state legislative plans invalidated in *Common Cause*, the 2021 Plan satisfies all three of these requirements. As to adverse action, “[i]n *relative* terms, Democratic voters under the [2021 Plan] are far less able to succeed in electing candidates of their choice than they would be under plans that were not so carefully crafted to dilute their votes. And in *absolute* terms, Plaintiffs are significantly foreclosed from succeeding in electing preferred candidates.” *Id.* As to intent, highly probative circumstantial evidence confirms that the 2021 Plan “intentionally targeted Democratic voters based on their voting histories.” *Id.* at *124; *see supra* pp. 33-34. And as to causation, “[t]he adverse effects described above would not have occurred if Legislative Defendants had not cracked and packed Democratic voters and thereby diluted their votes.” *Common Cause*, 2019 WL 4569584, at *124. As he did in *Common Cause*, Dr. Chen “compared the districts in which the Individual Plaintiffs currently reside under the enacted plan[] with districts in which they would have resided under each of his simulated plans,” and found that eight

of the Plaintiffs reside in districts that have a more extreme partisan distribution than was observed in at least 95% of the simulated maps. *Id.*; see Chen Rep. 48.

D. All Plaintiffs have established a likelihood of standing.

All thirteen Plaintiffs have established a likelihood of standing to sue in this case. “[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) (internal 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 ... , the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.”). “At a minimum, a plaintiff in a North Carolina court has standing to sue when it would have standing to sue in federal court.” *Common Cause*, 2019 WL 4569584, at *105.

“The North Carolina Supreme Court has broadly interpreted Article I, § 18 to mean that ‘[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm.’” *Id.* at *106 (quoting *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008)). The “gist” of standing under North Carolina law involves “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 (quotation marks omitted). Although the North Carolina Supreme Court “has declined to set out specific criteria necessary to show standing in every case, the Supreme Court has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury.” *Davis*, 811 S.E.2d at 727-28. Moreover, to obtain a preliminary injunction, a plaintiff need only show “a likelihood

that plaintiff has standing.” *Action NC v. Strach*, 216 F. Supp. 3d 597, 630 (M.D.N.C. 2016) (internal quotation marks omitted).

The *Harper I* court recognized these Plaintiffs have standing to challenge their gerrymandered congressional districts. *Harper I*, slip op. at 5. Indeed, as to the second factor, previous remedial orders in *Harper I* and in *Common Cause* demonstrate that this Court is fully capable of remedying partisan gerrymandering. And as to the first, Plaintiffs have suffered legally cognizable injuries in the drawing of their individual districts. In *Common Cause*, this Court held that the plaintiffs had standing where they had introduced “district-specific evidence that [they] live in ... districts that are outliers in partisan composition relative to the districts in which they live under Dr. Chen’s nonpartisan simulated plans.” *Common Cause*, 2019 WL 4569584.

Here, Dr. Chen has performed precisely the same district-specific analysis that he performed in *Common Cause*. Dr. Chen created computer simulations for North Carolina’s congressional districts that, like the simulations he created in *Common Cause*, strictly adhere to the nonpartisan traditional redistricting criteria within the 2016 Adopted Criteria. Chen Rep. at 5. Using these simulations, Dr. Chen has identified the extent to which each Plaintiff here lives in a congressional district that is a partisan outlier relative to the district in which he or she would live under neutral maps. *Id.* at 48. Dr. Chen finds that eight of the Plaintiffs reside in districts that have a more extreme partisan distribution than was observed in at least 95% of the simulated maps. *See* Chen Rep. at 48. In *Common Cause*, the court held that a plaintiff with standing to challenge his or her individual district necessarily had standing to challenge his or her entire county grouping “because the manner in which one district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that grouping.” *Common Cause*, 2019 WL 4569584, at *108. But congressional districts in North Carolina are not drawn in county

groupings—the entire statewide map is a single grouping. The drawing of *every* congressional district therefore “is tied to the drawing of some, and possibly all, of the other” districts. *See also Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002), *abrogated on other grounds by League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (holding that individual voters have standing to challenge entire congressional plan, because a congressional plan “acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole”). As Dr. Cooper explains, “[w]hile the district-by-district analysis is key to understanding the ways in which the current map is gerrymandered, the map itself is best thought of as a single organism, rather than 14 separate districts—when one district moves in one direction, another district must move in response.” Cooper Rep. at 2. Therefore, all 13 Plaintiffs have standing to challenge the entire 2021 Plan.

III. Plaintiffs are likely to suffer irreparable harm absent a preliminary injunction.

Absent a preliminary injunction, Plaintiffs are “likely to sustain irreparable loss.” *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856-57. As the *Harper I* court explained in ruling on Plaintiffs’ request for preliminary relief regarding the 2016 Plan, “[t]he loss to Plaintiffs’ fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional elections are allowed to proceed under the 2016 congressional districts.” *Harper I*, slip op. at 14. Thus, “issuance [of preliminary relief] is necessary for the continued protection of Plaintiffs’ fundamental rights guaranteed by the North Carolina Constitution during the course of the litigation.” *Id.*

So too here. If an injunction does not issue, Plaintiffs will be forced to vote in 2022 in unlawful districts that violate multiple fundamental rights guaranteed by the North Carolina Constitution. That alone is irreparable injury. The loss of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373

(1976), and an infringement of “voting and associational rights . . . cannot be alleviated after the election.” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental rights irreparable injury.”).

Indeed, North Carolinians have been forced to vote in districts that a court later held unconstitutional in nearly every congressional election since the 2010 decennial census. Once again, only a nonpartisan remedial plan can ensure that Plaintiffs no longer live in districts that were not the product of illegal discrimination by their government.

IV. There is adequate time to implement a remedy before the 2022 primaries.

There is more than enough time to establish a remedial plan for use in the March 2022 primaries. This is not a matter of speculation—the remedial processes in *Harper I* and in *Common Cause* in 2019 confirms it. After the court in *Harper I* issued a preliminary injunction enjoining use of the 2016 Plan, the General Assembly established new congressional districts just two and a half weeks later. The General Assembly moved even faster in *Common Cause*, passing both the state House and state Senate remedial plans in less than two weeks.

Common Cause, moreover, involved *more than five times* as many districts than are at issue here. That court invalidated a total of 77 districts across 21 different county groupings in two different legislative bodies. This case involves just one statewide map consisting of 14 districts, and does not require application of the complicated Whole County Provision that applies to state legislative districts. The events of 2019 prove the General Assembly can pass remedial maps quickly, and well in advance of the March 2022 primaries.

Deadlines leading up to the March 2022 primaries can be moved as necessary to provide effective relief, which Defendants have previously admitted. *Harper I*, slip op. at 15. The State Board of Elections has authority “to make reasonable interim rules and regulations” to move

administrative deadlines in the event that any North Carolina election law “is held unconstitutional or invalid by a State or federal court.” N.C. Gen. Stat. § 163A-742. And this Court has remedial authority to move deadlines related to the 2022 congressional primary elections, if necessary. Indeed, in 2019, the *Harper I* court enjoined the candidate filing period to adjudicate Plaintiffs’ motion for summary judgment. Order Enjoining Filing Period at 1-2. Like in *Harper I*, this Court can enjoin the candidate filing period for congressional candidates only, or it could enjoin the filing period for candidates for all races. *Id.*

Moreover, if needed, the Court could move the congressional primaries. *See Common Cause*, 2019 WL 4569584, at *135. One possibility would be to move the congressional primaries to the “Second Primary” date on April 26, 2022, that has taken place in every recent election cycle for primary run-offs.

There is precedent for doing so. In 2016, after a federal court enjoined the State’s congressional plan as an unconstitutional racial gerrymander, the General Assembly moved only the congressional primaries, while leaving other primaries on the originally scheduled date. *See* N.C. Sess. Law 2016-2 § 1(b). Such changes are not necessary at this stage, however, as sufficient time remains for the Court to receive briefing and argument, issue a preliminary injunction, and oversee a remedial process well in advance of the March 2022 primaries.

V. The balance of equities strongly favors a preliminary injunction.

Finally, “a careful balancing of the equities,” *A.E.P. Indus.*, 308 N.C. at 400, 302 S.E.2d at 759, weighs decidedly in favor of an injunction. Plaintiffs seek to vindicate interests of the highest importance. Just as with the 2016 Plan, absent an injunction now “the people of [North Carolina] will lose the opportunity to participate in congressional elections conducted freely and honestly.” *Harper I*, slip op. at 15. And “[f]air and honest elections are to prevail in this state.” *Common Cause*, 2019 WL 4569584, at *128 (quoting *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E.

132, 134 (1896)). The North Carolina Supreme Court “has elevated this principle to the highest legal standard, noting that it is a ‘compelling interest’ of the State ‘in having fair, honest elections.’” *Id.* (quoting *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993)). Plaintiffs’ claims implicate “fundamental right[s] ... enshrined in our Constitution’s Declaration of Rights, a compelling governmental interest, and a cornerstone of our democratic form of government.” *Id.*, 2019 WL 4569584, at *109.

In contrast, Defendants will suffer no comparable harm. Like in 2019, the primary possible interest Legislative Defendants have in conducting elections under the 2021 Plan (aside from unfair partisan advantage) is a vague and generalized one in “effectuating an act of the General Assembly.” *Harper I*, slip op. at 15. As the Court held before, this, nor any other concerns over disruption, confusion, or uncertainty of the electoral process outweigh the specific and grave harm to Plaintiffs “from the irreparable loss of their fundamental rights guaranteed by the North Carolina Constitution.” *Id.*

This case is about the rights not just of Plaintiffs, but of *all* North Carolina citizens to vote in lawful districts that will reveal, “fairly and truthfully, the will of the people.” *Id.* Absent a preliminary injunction, Plaintiffs and their fellow citizens will be forced to cast their ballots in invalid, unconstitutional congressional districts in 2022. It would be inequitable in the extreme to force them to do so.⁸

⁸ This Court should not require Plaintiffs to post a bond. North Carolina Rule of Civil Procedure 65(c) provides that “[n]o ... preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.” But it is well settled that there are “some instances when it is proper for no security to be required of a party seeking injunctive relief.” *Staton v. Russell*, 151 N.C. App. 1, 12, 565 S.E.2d 103, 110 (2002) (quotation marks omitted). This is just such an instance. There is no prospect that any party to this case will be “wrongfully enjoined” or incur any recoverable “costs or

CONCLUSION

For the foregoing reasons, the Court should enter a Preliminary Injunction in substantially the form of the attached proposed order.

Dated: November 30, 2021

By: Burton Craige

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damages” therefrom. And no security is required where, as here, “one purpose of the ... injunction is to preserve the court’s jurisdiction.” 151 N.C. App. at 13, 565 S.E.2d at 110.

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Counsel for Plaintiffs

* *Pro hac vice* application forthcoming

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing to counsel for Defendants North Carolina State Board of Elections and its members via *e-mail*, and served a copy of the foregoing to the remaining defendants by *U.S. mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

Warren Daniel
300 N. Salisbury Street
Rm. 627
Raleigh, N.C. 27603

Paul Newton
300 N. Salisbury Street
Rm. 312
Raleigh, N.C. 27603

David R. Lewis
16 West Jones Street
Rm. 2301
Raleigh, N.C. 27601

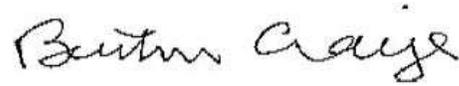
Ralph E. Hise
300 N. Salisbury St.
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Timothy K. Moore
16 West Jones Street

Rm. 2304
Raleigh, N.C. 27601

Philip E. Berger
16 West Jones Street
Rm. 2007
Raleigh, N.C. 27601

This the 30th day of November, 2021.



Burton Craige, NC Bar No. 9180

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**CORRECTED CERTIFICATE OF SERVICE OF PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

I hereby certify that I have this day served a copy of Plaintiffs' Motion for a Preliminary Injunction *by U.S. mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

Destin Hall
16 West Jones Street
Rm. 2301
Raleigh, NC 27601

Philip E. Berger
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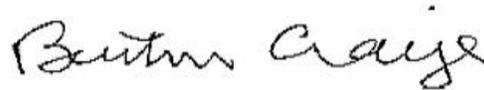
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Katelyn Love
General Counsel
NC State Board of Elections
430 N. Salisbury St.
Suite 3128
Raleigh, NC 27603

A copy of Plaintiffs' Motion for a Preliminary Injunction was also sent by *U.S. Mail* to the Attorney General as agent for defendants Philip E. Berger, Timothy K. Moore, Paul Newton, Ralph Hise, Destin Hall, and Warren Daniel, addressed as follows:

Josh Stein
Attorney General
114 West Edenton Street
Raleigh, NC 27603

This the 30th day of November, 2021.



Burton Craige, NC Bar No. 9180

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIR OF THE HOUSE
STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**DECLARATION OF
LALITHA D. MADDURI**

I, Lalith D. Madduri, declare and say as follows:

1. I am over the age of eighteen (18) and competent to testify as to the matters set forth herein.
2. I am a counsel with the law firm Elias Law Group LLP and one of the attorneys representing Plaintiffs in this case.
3. I submit this declaration in support of Plaintiffs' Motion for a Preliminary Injunction.
4. Attached as Exhibit A is a true and correct copy of the order granting plaintiffs' motion for a preliminary injunction in *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super Ct. Oct. 28, 2019).
5. Attached as Exhibit B is a true and correct copy of the order enjoining the filing period for congressional elections in *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Nov. 20, 2019).

6. Attached as Exhibit C is a true and correct copy of the transcript of the hearing on plaintiffs' motion for summary judgment in *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Nov. 20, 2019).

7. Attached as Exhibit D is a true and correct copy of the Redistricting Criteria for the 2021 Congressional Plan adopted by the North Carolina House Committee on Redistricting and Senate Committee on Redistricting and Elections on August 12, 2021.

8. Attached as Exhibit E is a true and correct copy of the Redistricting Criteria for the 2016 Congressional Plan adopted by the North Carolina General Assembly Joint Committee on Redistricting on February 16, 2016.

9. Attached as Exhibit F is a true and correct copy of the transcript of the October 5, 2021 hearing before the North Carolina House of Representatives Committee on Redistricting.

10. Attached as Exhibit G is a true and correct copy of the expert report of Christopher Cooper.

11. Attached as Exhibit H is a true and correct copy of the expert report of Jowei Chen.

12. Attached as Exhibit I is a true and correct copy of the expert report of Wesley Pegden.

13. Attached as Exhibit J is a true and correct copy of the affidavit of Plaintiff John Anthony Balla.

14. Attached as Exhibit K is a true and correct copy of the affidavit of Plaintiff Kathleen Barnes.

15. Attached as Exhibit L is a true and correct copy of the affidavit of Plaintiff Virginia Walters Brien.

16. Attached as Exhibit M is a true and correct copy of the affidavit of Plaintiff David Dwight Brown.

17. Attached as Exhibit N is a true and correct copy of the affidavit of Plaintiff Gettys Cohen Jr.

18. Attached as Exhibit O is a true and correct copy of the affidavit of Plaintiff Richard R. Crews.

19. Attached as Exhibit P is a true and correct copy of the affidavit of Plaintiff Rebecca Harper.

20. Attached as Exhibit Q is a true and correct copy of the affidavit of Plaintiff Amy Clare Oseroff.

21. Attached as Exhibit R is a true and correct copy of the affidavit of Plaintiff Mark S. Peters.

22. Attached as Exhibit S is a true and correct copy of the affidavit of Plaintiff Lily Nicole Quick.

23. Attached as Exhibit T is a true and correct copy of the affidavit of Plaintiff Donald Rumph.

24. Attached as Exhibit U is a true and correct copy of the affidavit of Plaintiff Shawn Rush.

Respectfully submitted this 30 day of November, 2021

/s/ 
Lalitha D. Madduri

EXHIBIT A

RETRIEV

On September 30, 2019, Plaintiffs filed a motion for a preliminary injunction seeking to bar Defendants from administering, preparing for, or moving forward with the 2020 primary and general elections in North Carolina for the United States House of Representatives using the 2016 congressional districts. Plaintiffs also filed a motion for expedited briefing and resolution of Plaintiffs' motion for a preliminary injunction. On October 2, 2019, Defendants North Carolina State Board of Elections and its members (collectively hereinafter "State Defendants") notified the Court that, among other things, candidate filing for congressional primaries is set to begin on December 2, 2019. On October 9, 2019, a motion to intervene was filed by three incumbent Congressional Representatives seeking to intervene in this action in both their capacity as Representatives and as residents and voters in three of the congressional districts challenged in Plaintiffs' verified complaint.

On October 10, 2019, the Court granted in part Plaintiffs' motion for expedited briefing, establishing a briefing schedule on Plaintiff's motion for preliminary injunction and setting for hearing Plaintiffs' motion for preliminary injunction and the motion to intervene.

On October 14, 2019, Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker Timothy K. Moore, President Pro Tempore Philip E. Berger, Senator Warren Daniel, and Senator Paul Newton (hereinafter "Legislative Defendants") removed this case to the United States District Court for the Eastern District of North Carolina. On October 21, 2019, State Defendants and Legislative Defendants each filed in federal court a brief in response to Plaintiffs' motion for preliminary injunction in accordance with the Court's October 10, 2019 order. Plaintiffs notified and provided to the Court the

Defendants' briefs on October 22, 2019, and, on the same date, the federal court remanded this case to state court.

On October 22, 2019, the Congressional Representatives seeking to intervene in this case submitted a brief in response to Plaintiffs' motion for preliminary injunction. On October 23, 2019, Plaintiffs filed a motion to strike the Congressional Representatives' response brief, the Congressional Representatives submitted a response brief to Plaintiffs' motion, and Plaintiffs submitted a brief in reply to that response brief. Additionally, on October 23, 2019, Plaintiffs submitted a brief in reply to Legislative Defendants' brief in response to Plaintiffs' motion for preliminary injunction.

These matters came on to be heard on October 24, 2019, during which time the Court granted the Congressional Representatives (hereinafter "Intervenor-Defendants") permissive intervention and notified the parties that Intervenor-Defendants' response brief would be considered by the Court in its discretion. Plaintiffs' motion for preliminary injunction was taken under advisement.

The Court, having considered the pleadings, motions, briefs and arguments of the parties, supplemental materials submitted by the parties, pertinent case law, and the record proper and court file, hereby finds and concludes, for the purposes of this Order, as follows.

Political Question Doctrine

Legislative Defendants contend Plaintiffs' claims—challenges to the validity of an act of the General Assembly that apportions or redistricts the congressional districts of this State—present non-justiciable political questions. Such claims are within the statutorily-provided jurisdiction of this three-judge panel, N.C.G.S. § 1-267.1, and the Court concludes that partisan gerrymandering claims specifically present justiciable issues, as

distinguished from non-justiciable political questions. Such claims fall within the broad, default category of constitutional cases our courts are empowered and obliged to decide on the merits, and not within the narrow category of exceptional cases covered by the political question doctrine. Indeed, as the Supreme Court of the United States recently explained, partisan gerrymandering claims are not “condemn[ed] . . . to echo in the void,” because although the federal courthouse doors may be closed, “state constitutions can provide standards and guidance for state courts to apply.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).¹

Standing of Plaintiffs

Legislative Defendants and Intervenor-Defendants contend that Plaintiffs lack standing to pursue their claims in this action. The North Carolina Constitution, however, provides: “All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation 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. “[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.”).

¹ Likewise, Legislative Defendants’ and Intervenor-Defendants’ contentions that federal law—*i.e.*, the Elections clause and Supremacy clause of the United States Constitution—serves as a bar in state court to Plaintiffs’ action seeking to enjoin the 2016 congressional districts on state constitutional grounds is equally unavailing. Our state courts have jurisdiction to hear and decide claims that acts of the General Assembly apportioning or redistricting the congressional districts of this State run afoul of the North Carolina Constitution.

The North Carolina Supreme Court has broadly interpreted Article I, § 18 to mean that “[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm.” *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). The “gist of the question of standing” under North Carolina law 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)). Although the North Carolina Supreme Court “has declined to set out specific criteria necessary to show standing in every case, [it] has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury.” *Davis*, 811 S.E.2d at 727-28.

Plaintiffs in this case have standing to challenge the congressional districts at issue because Plaintiffs have shown a likelihood of “a personal stake in the outcome of the controversy,” *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879, and a likelihood that the 2016 congressional districts cause them to “suffer harm,” *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281.

Applicable Legal Standards

At its most basic level, partisan gerrymandering is defined as: “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (U.S. 2016). Partisan gerrymandering operates through vote dilution—the devaluation of one citizen’s vote as compared to others. A mapmaker draws district lines to

“pack” and “crack” voters likely to support the disfavored party. *See generally Gill v. Whitford*, 138 S. Ct. 1916 (2018).

Plaintiffs claim the 2016 congressional districts are partisan gerrymanders that violate the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution’s Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14. Extreme partisan gerrymandering violates each of these provisions of the North Carolina Constitution. *See Common Cause v. Lewis*, 18-CVS-014001, slip. op. at 298-331 (N.C. Sup. Ct. Sept. 3, 2019).

Free Elections Clause

The North Carolina Constitution, in the Declaration of Rights, Article I, § 10, declares that “[a]ll elections shall be free.” Our Supreme Court has long recognized the fundamental role of the will of the people in our democratic government: “Our government is founded on the will of the people. Their will is expressed by the ballot.” *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). In particular, our Supreme Court has directed that in construing provisions of the Constitution, “we should keep in mind that this is a government of the people, in which the will of the people--the majority--legally expressed, must govern.” *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) (citing N.C. Const. art. I, § 2). Therefore, our Supreme Court continued, because elections should express the will of the people, it follows that “all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will.” *Id.* “[F]air and honest elections are to prevail in this state.” *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896). Moreover, in giving meaning to the Free Elections Clause, this Court’s construction of the words contained therein must

therefore be broad to comport with the following Supreme Court mandate: “We think the object of all elections is to ascertain, fairly and truthfully, the will of the people--the qualified voters.” *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915) (quoting *R. R. v. Comrs.*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895)).

As such, the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. In contrast, extreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Common Cause*, 18-CVS-014001, slip. op. at 298-307.

Equal Protection Clause

The Equal Protection Clause of the North Carolina Constitution guarantees to all North Carolinians that “[n]o person shall be denied the equal protection of the laws.” N.C. Const., art. I, § 19. Our Supreme Court has held that North Carolina’s Equal Protection Clause protects “the fundamental right of each North Carolinian to *substantially equal voting power*.” *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002) (emphasis added). “It is well settled in this State that ‘the right to vote *on equal terms* is a fundamental right.” *Id.* at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added)).

Although the North Carolina Constitution provides greater protection for voting rights than the federal Equal Protection Clause, our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal

protection analysis. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978); *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Generally, this test has three parts: (1) intent, (2) effects, and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing district lines was to "entrench [their party] in power" by diluting the votes of citizens favoring their rival. *Ariz. State Legis.*, 135 S. Ct. at 2658. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). Finally, if the plaintiffs make those showings, the State must provide a legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

Generally, partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party. *Cf. Lehr v. Robertson*, 463 U.S. 248, 265, 103 S. Ct. 2985 (1983) ("The concept of equal justice under law requires the State to govern impartially.")

As such, extreme partisan gerrymandering runs afoul of the North Carolina Constitution's guarantee that no person shall be denied the equal protection of the laws. *See Common Cause*, 18-CVS-014001, slip. op. at 307-17.

Freedom of Speech and Freedom of Assembly Clauses

The Freedom of Speech Clause in Article I, § 14 of the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." The Freedom of Assembly Clause in Article I, § 12

provides, in relevant 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.”

“There is no right more basic in our democracy than the right to participate in electing our political leaders”—including, of course, the right to “vote.” *McCutcheon v. FEC*, 572 U.S. 185, 191, 134 S. Ct. 1434, 1440 (2014) (plurality op.). “[P]olitical belief and association constitute the core of those activities protected by the First Amendment.” *Elrod v. Burns*, 427 U.S. 347, 356, 96 S. Ct. 2673, 2681 (1976). In North Carolina, the right to assembly encompasses the right of association. *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (2014). Moreover, “citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs.” *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204-05 (2011). And “for elections to express the popular will, the right to assemble and consult for the common good must be guaranteed.” John V. Orth, *The North Carolina State Constitution* 48 (1995).

It is “axiomatic” that the government may not infringe on protected activity based on the individual’s viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516 (1995). The guarantee of free expression “stands against attempts to disfavor certain subjects or viewpoints.” *Citizens United v. FEC*, 558 U.S. 310, 340, 130 S. Ct. 876, 898 (2010). Viewpoint discrimination is *most* insidious where the targeted speech is political; “in the context of political speech, . . . [b]oth history and logic” demonstrate the perils of permitting the government to “identif[y] certain preferred speakers” while burdening the speech of “disfavored speakers.” *Id.* at 340-41, 130 S. Ct. at 899.

The government may not burden the “speech of some elements of our society in order to enhance the relative voice of others” in electing officials. *McCutcheon*, 572 U.S. at 207, 134 S. Ct. at 1450; *see also Winborne v. Easley*, 136 N.C. App. 191, 198, 523 S.E.2d 149, 154 (1999) (“political speech” has “such a high status” that free speech protections have their “fullest and most urgent application” in this context (quotations marks omitted)). The government also may not retaliate based on protected speech and expression. *See McLaughlin*, 240 N.C. App. at 172, 771 S.E.2d at 579-80. Courts carefully guard against retaliation by the party in power. *See Elrod*, 427 U.S. at 356, 96 S. Ct. at 2681; *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S. Ct. 2729 (1990). When patronage or retaliation restrains citizens’ freedoms of belief and association, it is “at war with the deeper traditions of democracy embodied in the First Amendment.” *Elrod*, 427 U.S. at 357, 96 S. Ct. at 2682 (quotation marks omitted).

When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g. Republican voters) while targeting certain disfavored speakers (e.g. Democratic voters) because of disagreement with the views they express when they vote. Then, disfavored speakers are packed and cracked into legislative districts with the aim of diluting their votes and, in cracked districts, ensuring that these voters are significantly less likely, in comparison to favored voters, to be able to elect a candidate who shares their views. Moreover, a legislature that engages in extreme partisan gerrymandering burdens the associational rights of disfavored voters to “instruct their representatives, and to apply to the General Assembly for redress of grievances.” N.C. Const. art. I, § 12. As such, extreme partisan gerrymandering runs afoul of these important guarantees in the North Carolina Constitution of the freedom of speech and the right of the people of our State to assemble together to consult for their common good, to instruct their

representatives, and to apply to the General Assembly for redress of grievances. See *Common Cause*, 18-CVS-014001, slip. op. at 317-31.

Injunctive Relief

“It 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).

“The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an “extraordinary remedy” and will issue “only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a

standard of relative substantiality as well as irreparability.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Status Quo

The 2011 congressional districts, enacted by the General Assembly on July 28, 2011, were struck down as unconstitutional racial gerrymanders and ordered to be redrawn on February 5, 2016. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). As a result, the 2016 congressional districts were then enacted by the General Assembly on February 19, 2016. N.C. Sess. Laws 2016-1. Plaintiffs’ challenge to the 2016 congressional districts is a challenge to S.L. 2016-1 as enacted; hence, the status quo which Plaintiffs desire to preserve is the existing state of affairs prior to the enactment of S.L. 2016-1. Therefore, the existing state of affairs—*i.e.*, the status quo—prior to the enactment of S.L. 2016-1 was the period in which no lawful congressional district map for North Carolina existed absent the enactment of a remedial map by the General Assembly.

Plaintiffs are Likely to Succeed on the Merits

Quite notably in this case, 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. *See Rucho*, 318 F. Supp. 3d 777. As such, there is a detailed record of both the partisan intent and the intended partisan effects of the 2016 congressional districts drawn with the aid of Dr. Thomas Hofeller and enacted by the General Assembly. *See Rucho*, 318 F. Supp. 3d at 803-10 (detailing the history of the drawing and enactment of the 2016 congressional districts); *see also* Declaration of Elisabeth S. Theodore (attaching as exhibits a number of documents from the record in federal court); *Rucho*, 139 S. Ct. at 2491-93.

For instance, Dr. Hofeller was directed by legislators “to use political data — precinct-level election results from all statewide elections, excluding presidential elections, dating back to January 1, 2008 — in drawing the remedial plan,” and was further instructed to “use that political data to draw a map that would maintain the existing partisan makeup of the state's congressional delegation, which, as elected under the racially gerrymandered plan, included 10 Republicans and 3 Democrats.” *Rucho*, 318 F. Supp. 3d at 805 (internal citations omitted).

As another example, the redistricting committee approved several criteria for the map-drawing process, including the use of past election data (*i.e.*, “Political Data”) and another labeled “Partisan Advantage,” which was defined as: “The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.” *Id.* at 807. In explaining these two criteria, Representative David Lewis “acknowledged freely that this would be a political gerrymander,” which he maintained was “not against the law,” *id.* at 808 (citation omitted), while also going on to state that he “propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it[would be] possible to draw a map with 11 Republicans and 2 Democrats,” *id.* (alterations in original).

Moreover, when drawing the 2016 congressional districts, Dr. Hofeller used “an aggregate variable he created to predict partisan performance” all while “constantly aware of the partisan characteristics of each county, precinct, and VTD.” *Id.* at 805-06.

Finally, the redistricting committee, and ultimately the General Assembly as a whole, approved the 2016 congressional districts by party-line vote. *Id.* at 809.

In light of the above, this Court agrees with Plaintiffs and finds there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14.

Plaintiffs Will Suffer Irreparable Loss Unless the Injunction is Issued

The loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional elections are allowed to proceed under the 2016 congressional districts. As discussed above, Plaintiffs' have shown a likelihood of succeeding on the merits of their claims that these districts violate multiple fundamental rights guaranteed by the North Carolina Constitution. And as Defendants have emphasized, the 2020 primary elections for these congressional districts—the final congressional elections of this decade before the 2020 census and subsequent decennial redistricting—are set to be held in March of 2020 with the filing period beginning December 2, 2019.

As such, this Court finds that Plaintiffs are likely to sustain irreparable loss to their fundamental rights guaranteed by the North Carolina Constitution unless the injunction is issued, and likewise, issuance is necessary for the continued protection of Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution during the course of the litigation.

A Balancing of the Equities Weighs in Favor of Plaintiffs

On one hand, Legislative Defendants contend a general harm to them will result from issuing the injunction because the General Assembly will be prevented from

effectuating an act of the General Assembly. On the other hand, Plaintiffs' and all North Carolinians' fundamental rights guaranteed by the North Carolina Constitution will be irreparably lost, as discussed above, if the injunction is not granted. Simply put, the people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. The Court finds that this specific harm to Plaintiffs absent issuance of the injunction outweighs the potential harm to Legislative Defendants if the injunction is granted.

Legislative Defendants and Intervenor Defendants also contend the issuance of the injunction will result in disruption, confusion, and uncertainty in the electoral process for them, candidates, election officials, and the voting public. But, again, such a proffered harm does not outweigh the specific harm to Plaintiffs from the irreparable loss of their fundamental rights guaranteed by the North Carolina Constitution. Moreover, while State Defendants would prefer not to move elections or otherwise change the current schedule for the 2020 congressional primary election they recognize that proceeding under the 2016 congressional districts "would require the Board to administer an election that violates the constitutional rights of North Carolina voters" and acknowledge that the election schedule can be changed if necessary. State Defs. Response Brief at 2. In that vein, State Defendants agree with Plaintiffs that "it would be appropriate for this Court to issue an injunction that relieves the Board of any duty to administer elections using an unconstitutionally gerrymandered congressional redistricting plan." *Id.*

Finally, Legislative Defendants and Intervenor-Defendants contend Plaintiffs simply waited too long to bring their challenge to the 2016 congressional districts in state court. Plaintiffs, however, filed this action in state court only a matter of months after litigation reached its conclusion in federal court, at a time still prior to the candidate filing

period. While the timing of Plaintiffs' action does weigh against Plaintiffs, the Court does not find that the timing of Plaintiffs' filing of this action should bar them from seeking equitable relief in the form of the requested preliminary injunction.

Consequently, after weighing the potential harm to Plaintiffs if the injunction is not issued against the potential harm to Defendants if injunctive relief is granted, this Court concludes the balance of the equities weighs in Plaintiffs' favor. Indeed, the harm alleged by Plaintiffs is both substantial and irreparable should congressional elections in North Carolina proceed under the 2016 congressional districts.

Conclusion

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regard to the 2016 congressional districts. The Court further concludes that security is required of Plaintiffs pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure to secure the payment of costs and damages in the event it is later determined this relief has been improvidently granted.

This Court recognizes the significance and the urgency of the issues presented by this litigation, particularly when considering the impending 2020 congressional primary elections and all accompanying deadlines, details, and logistics. This Court also is mindful of its responsibility not to disturb an act of the General Assembly unless it plainly and clearly, without any reasonable doubt, runs counter to a constitutional limitation or prohibition. For these reasons, the Court will, upon the forthcoming filing of Plaintiffs' motion for summary judgment, provide for an expedited schedule so that Plaintiffs' dispositive motion may be heard prior to the close of the filing period for the 2020 primary election.

This Court observes that the consequences, as argued by Legislative Defendants and Intervenor-Defendants, resulting from a delay in the congressional primary—*e.g.*, decreased voter turnout, additional costs and labor for the State Board of Elections—would be both serious and probable should the primary schedule be adjusted as a result of this Order and Plaintiffs' ultimate success on the merits of this action. But as discussed above, should Plaintiffs prevail through motion or trial, these consequences pale in comparison to voters of our State proceeding to the polls to vote, yet again, in congressional elections administered pursuant to maps drawn in violation of the North Carolina Constitution.

This Court, however, notes that these disruptions to the election process need not occur, nor may an expedited schedule for summary judgment or trial even be needed, should the General Assembly, on its own initiative, act immediately and with all due haste to enact new congressional districts. This Court does not presume, at this early stage of this litigation, to have any authority to compel the General Assembly to commence a process of enacting new Congressional districts, and this Court recognizes that such a decision is wholly within the discretion of a co-equal branch of government. The General Assembly, however, has recently shown it has the capacity to enact new legislative districts in a short amount of time in a transparent and bipartisan manner, and that the resulting legislative districts, having been approved by this Court, are districts that are more likely to achieve the constitutional objective of allowing for elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Common Cause v. Lewis*, 18-CVS-014001 (N.C. Sup. Ct., October 28, 2019). The Court respectfully urges the General Assembly to adopt an expeditious process, as it did in response to this Court's mandate in the September 3, 2019, Judgment in *Common Cause v. Lewis*, that ensures full transparency and allows for bipartisan participation and consensus to create new

congressional districts that likewise seek to achieve this fundamental constitutional objective.

Accordingly, the Court, in its discretion and for good cause shown, hereby ORDERS that Plaintiffs' motion for preliminary injunction is GRANTED as follows:

1. Legislative Defendants and State Defendants, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing for or administering the 2020 primary and general elections for congressional districts under the 2016 congressional districts established by S.L. 2016-1.
2. Security in an amount of \$1,000 shall be required of Plaintiffs pursuant to Rule 65.
3. The Court retains jurisdiction to move the primary date for the congressional elections, or all of the State's 2020 primaries, including for offices other than Congressional Representatives, should doing so become necessary to provide effective relief in this case.

SO ORDERED, this the 28th day of October, 2019.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties by emailing a copy thereof to the address below, in accordance with the October 10, 2019 Case Management Order:

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This the 28th day of October, 2019.



Kellie Z. Myers

Trial Court Administrator – 10th Judicial District

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EXHIBIT B

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congressional districts. The Court suggested the General Assembly proceed in a manner that ensured full transparency and allowed for bipartisan participation and consensus that would result in congressional districts more likely to achieve the constitutional objective of allowing for those elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people. On November 15, 2019, new congressional districts were established by an act of the General Assembly. N.C. Sess. Laws 2019-249 (hereinafter S.L. 2019-249). Shortly thereafter on November 15, 2019, Legislative Defendants filed a motion for summary judgment arguing Plaintiffs' present action—challenging the constitutionality of S.L. 2016-1—is moot, and Plaintiffs filed a response and motion for expedited review of the newly-enacted congressional districts.

Section 163-106.2 of our General Statutes provides that “[c]andidates seeking party primary nominations for the following offices shall file their notice of candidacy with the State Board no earlier than 12:00 noon on the first Monday in December and no later than 12:00 noon on the third Friday in December preceding the primary: . . . Members of the House of Representatives of the United States.” N.C.G.S. § 163-106.2(a). In the Court’s October 28, 2019, Order, the Court retained jurisdiction to adjust the State’s 2020 congressional primary elections should doing so become necessary to provide effective relief in this case. In light of the recent developments in this litigation, including the enactment of S.L. 2019-249, Legislative Defendants’ motion for summary judgment, and Plaintiffs’ motion for the Court’s review of S.L. 2019-249, and to allow the Court sufficient opportunity to fully consider the significant issues presented by the parties, the Court will enjoin the filing period for the 2020 congressional primary elections in North Carolina until further order of the Court.

Accordingly, the Court, in its discretion and pursuant to its inherent authority,
hereby ORDERS that:

1. On the Court's own motion, the filing period provided by N.C.G.S. § 163-106.2(a) is hereby enjoined for only the 2020 congressional primary elections, and the North Carolina State Board of Elections shall not accept for filing any notices of candidacy from candidates seeking party primary nominations for the House of Representatives of the United States until further order of the Court.
2. Any party to this action may respond to Plaintiffs' motion for review of the newly-enacted congressional districts, S.L. 2019-249, by submitting a response brief to the Court by 11:59 p.m. on November 22, 2019, in the manner set forth in the Case Management Order. Plaintiffs shall have until 11:59 p.m. on November 26, 2019, to submit a reply to any response brief in the manner set forth in the Case Management Order.
3. The Court's November 1, 2019, Order establishing a briefing schedule for summary judgment motions remains in effect.
4. The following will be heard by the Court at 9:00 a.m. on December 2, 2019:
 - a. Plaintiffs' motion for summary judgment;
 - b. Legislative Defendants' motion for summary judgment; and,
 - c. Plaintiffs' motion for review of S.L. 2019-249.

SO ORDERED, this the 20th day of November, 2019.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

EXHIBIT C

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STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 19-CVS-12667

REBECCA HARPER, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
REPRESENTATIVE DAVID R. LEWIS,)
et al.,)
)
 Defendants.)

DECISION ON NEW CONGRESSIONAL DISTRICTS

HONORABLE JUDGES PAUL C. RIDGEWAY, JR.,
ALMA L. HINTON AND JOSEPH N. CROSSWHITE

MONDAY, DECEMBER 2, 2019

By: Denise Myers Byrd, CSR 8340, RPR

1 JUDGE RIDGEWAY: All right. Ladies and
2 gentlemen, we've had an opportunity to review these
3 matters and confer among ourselves, and I will read to
4 you the unanimous decision of this Court, which is
5 comprised of Judge Joseph Crosswhite and
6 Judge Alma Hinton and myself, and my colleagues have
7 asked that I read this into the record.

8 Three months ago on September 3rd, 2019, this
9 court announced its judgment in Common Cause versus
10 Lewis, and declared that extreme partisan gerrymandering
11 was unconstitutional under the North Carolina
12 constitution. In the 90 days following that ruling, the
13 voters of North Carolina now have new General Assembly,
14 House, and Senate maps drafted by the General Assembly
15 and approved by the courts that remedy the extreme
16 partisan gerrymandering of past maps. And as a result
17 of this litigation that brings us here today, this
18 Court -- after this Court preliminarily enjoined the
19 further use of the 2016 congressional maps, the voters
20 of North Carolina now have a new congressional map,
21 namely the one enacted by the General Assembly on
22 November 15, 2019.

23 Moreover, in this same 90-day period, the
24 citizens of North Carolina, for the first time, were
25 witnesses to the drafting of their voting districts.

1 The new General Assembly districts and the congressional
2 districts were not drawn in the basement of a political
3 operative's home, as was the case with prior maps, but
4 were drawn in open by the General Assembly in public
5 hearings with live-stream audio and video, in a process
6 that began with non-partisan base maps, which were then
7 amended without reference to past election data.

8 Much has changed with respect to North Carolina
9 redistricting in the past three months. Three months
10 from today, voters in North Carolina are scheduled to
11 vote in the March 2nd, 2020, primary election. Among
12 the many important constitutional and legal issues
13 argued today, the most critical one for the Court is a
14 practical question: Whether the Court should exercise
15 its broad equitable authority to delay the primary
16 election for congressional elections.

17 The Court has considered the nature of the
18 claims likely to be asserted should further review of
19 the newly enacted congressional maps be undertaken. In
20 sum, Plaintiffs contend the 2019 congressional districts
21 bear many of the same constitutional infirmities as its
22 predecessor, the 2016 constitutional map --
23 congressional map, and that these infirmities compel
24 further remedy.

25 In the short time that the parties have had

1 since the enactment of the new congressional districts
2 to frame the issues surrounding the challenge to the
3 newly enacted congressional districts, it is evident
4 that many of these challenges raise significant factual
5 issues that must be resolved prior to the Court reaching
6 the legal conclusion of the constitutionality of these
7 maps.

8 For example, just one of the significant
9 factual disputes that must be resolved by the Court is
10 as follows: Legislative Defendants, while denying any
11 partisan intent in drawing the new congressional
12 districts, argue that the ultimate result of the
13 map-drawing process is a map that shows no extreme
14 partisan gerrymandering because it yields eight
15 Republican-leaning districts and five Democratic-leaning
16 districts, as opposed to the 2016 map which yielded 10
17 Republican-leaning districts and 3 Democrat. This
18 8-to-5 split, the Legislative Defendants point out, is
19 the same as the most frequent and most likely outcome of
20 the thousands of simulations generated by Plaintiffs'
21 experts. Legislative Defendants argue that to advocate
22 for a different split, say 7 to 6, is to advocate for a
23 partisan result far less likely to occur through
24 non-partisan map drafting, according to Plaintiffs' own
25 expert simulations.

1 Plaintiffs, on the other hand, argue that one
2 should not focus on the numerical split but rather
3 concentrate on -- or rather the concentration of
4 Democrats in the 5 Democratic-leaning districts and the
5 concentration of Republicans in the 8 Republican-leaning
6 districts which show, according to the Plaintiffs, an
7 intention to pack voters in into districts making each
8 district impervious to the true will of voters and to
9 lock in the 8-to-5 split in virtually all realistic
10 election environments.

11 But Legislative Defendants disagree, saying
12 that the districts are not as impervious as the
13 plaintiffs contend because when their expert used widely
14 cited online redistricting tool planscore.org to analyze
15 the newly enacted districts, he reported that
16 the PlanScore analysis of the 2019 congressional maps
17 show 7 Democratic-leaning districts to 6 Republican
18 districts. Plaintiffs challenge the accuracy of the
19 PlanScore algorithm.

20 Rulings on factual issues such as this cannot
21 be hastily made by this Court. Our judicial system
22 operates under a rule of law. Our judicial decision --
23 decisions are forged in the crucible of an adversarial
24 process. The decision of this Court in Common Cause
25 versus Lewis that declared the legislative districts

1 enacted by the legislative -- by the General Assembly
2 for House and Senate districts to be unconstitutional
3 was the week of nearly a year of vigorous adversarial
4 litigation culminating in a two-week trial.

5 Likewise, the record before the Court
6 supporting its preliminary injunction of the 2016
7 congressional maps was based on a record compiled before
8 a federal three-judge panel through vigorous adversarial
9 litigation that spanned nearly three years. The
10 thorough and methodical judicial review of redistricting
11 issues is not merely necessitated by the complexity of
12 redistricting challenges, which is certainly a factor,
13 but more importantly is necessary because the
14 Plaintiffs, in challenging maps crafted by the General
15 Assembly, are required through evidence and law to
16 overcome the strong presumption of the constitutionality
17 of acts of the General Assembly and to persuade the
18 Court that there is no reasonable doubt that the
19 districts are unconstitutional and cannot be upheld on
20 any ground. Due process does not allow shortcuts to a
21 thorough and complete judicial review.

22 Much has been argued as to whether this action
23 is moot due to the enactment of the new congressional
24 districts. The Court does not reach that issue today but
25 takes this issue under advisement.

1 But one thing is for certain: The Court, in
2 entering its preliminary injunction on October 28, 2019,
3 expressed grave concerns about delaying and disrupting
4 the voting process and urged the General Assembly to
5 adopt a new congressional map through a process similar
6 to the one undertaken to remedy the House and Senate
7 maps in the Common Cause versus Lewis litigation. The
8 General Assembly did enact a new congressional map, and
9 although one can certainly argue that the process was
10 flawed or that the result is far from ideal, the net
11 result is that the grievous -- grievously flawed 2016
12 congressional map has been replaced.

13 This Court's concern about delaying the
14 electoral process is even more pronounced today than on
15 October 28th. In this regard, the Court finds that the
16 balance of equities has shifted over the past month.
17 This action was commenced by the Plaintiffs on
18 September 27, 2019, late in the election cycle. Had it
19 been commenced earlier, say immediately after the
20 United States Supreme Court June 2019 ruling in Rucho
21 versus Common Cause, the adversarial process could more
22 fully have run its course to allow for a more thoughtful
23 and informed decision. As a practical matter, in the
24 Court's view, there's simply not sufficient time to
25 fully develop the factual record necessary to decide the

1 constitutional challenges to the new congressional
2 districts without significantly delaying the primary
3 elections.

4 After fully considering the record proper and
5 the arguments of counsel, the Court has determined that
6 it will not invoke its equitable authority to further
7 delay the election of members of Congress in
8 North Carolina. It is time for the citizens to vote.
9 The injunction entered by the Court on November 20,
10 2019, delaying the filing period for congressional
11 candidates until further order of this Court is set
12 aside, and it is ordered that the North Carolina State
13 Board of Elections may immediately accept for filing any
14 notices of candidacy from candidates seeking party
15 primary nominations for the United States House of
16 Representatives for congressional districts as defined
17 by the newly enacted Session Law 2019-249, which we've
18 also referred to as House Bill 1028.

19 Much has changed with respect to redistricting
20 in North Carolina in the past 90 days, both with respect
21 to the law and with respect to the process by which maps
22 have been drawn. The results are not perfect, and
23 indeed some may contend that the results are far from
24 perfect, but the current legislative and congressional
25 maps resulting from a decade of litigation will

1 themselves be replaced after the 2020 election cycle
2 because of the upcoming decennial census. It is the
3 Court's fervent hope that the past 90 days becomes a
4 foundation for future redistricting in North Carolina
5 and that future maps are crafted through a process
6 worthy of public confidence and a process that yields
7 elections that are conducted freely and honestly to
8 ascertain fairly and truthfully the will of the people.

9 So ordered.

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STATE OF NORTH CAROLINA)
) C E R T I F I C A T E
COUNTY OF WAKE)

I, DENISE MYERS BYRD, Court Reporter and Notary Public, do hereby certify that the transcription of the recorded Decision by Superior Court Three-Judge Panel for Redistricting Challenges was taken down by me stenographically to the best of my ability and thereafter transcribed under my supervision; and that the foregoing pages, inclusive, constitute a true and accurate transcription of said recording.

Signed this the 22nd day of April 2020.

Denise Myers Byrd
CSR 8240, RPR, CLR 102409-2

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EXHIBIT D

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2016 Contingent Congressional Plan Committee Adopted Criteria

Equal Population

The Committee will use the 2010 federal decennial census data as the sole basis of population for the establishment of districts in the 2016 Contingent Congressional Plan. 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

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

Political data

The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting districts (“VTDs”) should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.

Partisan Advantage

The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina’s congressional delegation.

Twelfth District

The current General Assembly inherited the configuration of the Twelfth District from past General Assemblies. This configuration was retained because the district had already been heavily litigated over the past two decades and ultimately approved by the courts. The Harris court has criticized the shape of the Twelfth

District citing its “serpentine” nature. In light of this, the Committee shall construct districts in the 2016 Contingent Congressional Plan that eliminate the current configuration of the Twelfth District.

Compactness

In light of the Harris court’s criticism of the compactness of the First and Twelfth Districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of the current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact. Reasonable efforts shall be made not to divide a county into more than two districts.

Incumbency

Candidates for Congress are not required by law to reside in a district they seek to represent. However, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan.

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EXHIBIT E

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Criteria Adopted by the Committees

- **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 ("perimeter") 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.

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EXHIBIT F

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TRANSCRIPTION OF AUDIO FILE
NORTH CAROLINA HOUSE COMMITTEE
ON REDISTRICTING
OCTOBER 5, 2021

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DIGITAL EVIDENCE GROUP
1730 M Street, NW, Suite 812
Washington, D.C. 20036
(202) 232-0646

1 UNKNOWN MALE: House Committee on
2 Redistricting, Tuesday, October 5, 2021, 643 LOB.

3 CHAIRMAN HALL: Committee will come to
4 order. The Chair apologizes for delay in getting
5 started this afternoon. Thanks to the committee
6 members for their patience.

7 Members, I want to start off by thanking
8 you all, the members, staff, and the public who
9 chose to participate in our public hearings across
10 the state over the last several weeks. I think we
11 heard varying opinions. It was great to see folks
12 engaged, and we had members, many -- many member,
13 not even just the folks on this committee, but
14 several members of the House and the Senate, who are
15 not on this committee, who attended those meetings
16 and gave folks a chance to be heard about what they
17 want this process to look like.

18 The purpose of today's meeting is to --
19 just to do some Housekeeping to give folks an idea
20 of what the map-drawing process is going to look
21 like. And we anticipate, beginning tomorrow,
22 starting the map-drawing process, and so we want to
23 lay out very clearly what the criteria will be -- or
24 rather the rules will be for this committee for
25 drawing maps.

1 So we'll just jump right into it. We're
2 going to have four terminals. And if you look
3 around this room, you see the big screens. There
4 are going to be four of those. One will be
5 dedicated to the chair of this committee. One will
6 be dedicated to the minority leader, or his
7 designee. I should have said on the first station,
8 it will be dedicated to the chairman or chair's
9 designee. And then the other two will be for any
10 other committee member, or any member of the House
11 who wishes to come in and draw on those terminals.

12 For now, the plan is to go from 9:00 to
13 5:00 each day. So we'll come in, gavel in at 9
14 o'clock. This committee room will stay open
15 throughout the day. Those of you who have been
16 through this before, you know it's not like a
17 typical committee where we're always with a chair
18 standing up here, like I am right now. What we
19 typically do, we'll gavel in, and folks can go draw.

20 We may take breaks throughout the day. We
21 may just leave the committee room open. We want to
22 be cognizant of staff, let them be able to eat
23 lunch, and that sort of thing, so we may take a few
24 breaks and there. But by and large, the committee
25 room is going to be open from 9:00 to 5:00. We're

1 going to plan to do that Monday through Friday, for
2 now.

3 So, as of right now, chair anticipates
4 having this committee room open throughout the rest
5 of this week, until Friday at 5 o'clock. But the
6 chair will say that if significant progress is made,
7 we may not keep the committee open all day on
8 Friday, so that we don't have to keep staff here.
9 And obviously, folks will be -- members will be
10 traveling back to their districts. To prevent them
11 from having to travel back on Friday night, we may
12 go ahead and may not have a committee meeting Friday
13 or may end the committee early on Friday. So just
14 wait and see on that front.

15 And this is a rule that I want to make sure
16 all members are clear on, but this committee, and
17 the House as a whole, will only consider maps that
18 are drawn in this committee room, on one of the four
19 stations. So if a map is not drawn on one of these
20 four stations, in this committee room, during those
21 committee hours that the committee is open, then
22 those maps will not be considered for a vote by this
23 committee, and of course, will not be considered for
24 a vote by the House.

25 And we'll be able to know because when you

1 put a map into one of these computers, that becomes
2 a matter of public record, and we can tell which
3 were drawn on these computers. It has to be drawn
4 in this committee room.

5 When this committee is open, we'll maintain
6 a live stream and live audio during the whole time
7 of map-drawing, so that the process will be, we
8 believe, just about as transparent as we humanly can
9 do. And that's what we heard in public comment. We
10 heard folks say, "We want a transparent process."

11 Well, that's what we're going to give the
12 public. We're going to give the members of this
13 body and the public a transparent process where we
14 draw maps in this room with a live audio feed and a
15 live video feed. And we're going to create a rule
16 that we're only going to consider the maps that are
17 drawn in this room, in the House, in this committee,
18 and ultimately, in the House.

19 Members, we're going to continue to have
20 session, of course, regular session, throughout this
21 process. As the members know, we're still dealing
22 with the budget right now. And so, obviously, the
23 speaker is aware that this process of redistricting
24 takes a lot of labor, and we'll give us ample time
25 to do that. But we have to continue with the

1 business of the House in general, so we'll do just
2 the best we can on that, understanding we're
3 operating under a tight time line.

4 And we've talked about that a lot
5 throughout this committee process that, because of
6 the delay in the census data, we're just now getting
7 to a point where we can draw these maps, after doing
8 the public comment we wanted to do. But with filing
9 coming in December, we really need to get these maps
10 drawn as close as we can, or at least by the end of
11 this month, if not sooner.

12 That's going to be our goal to try to get
13 these things done by the end of the month. That way
14 we can give the board of elections time to get
15 ballots printed and let folks know what districts
16 they're going to be in, so they can decide if they
17 want to run or not run. Whether they be members of
18 this committee, or folks who are not in the General
19 Assembly at all.

20 Members, with that being said --

21 REPRESENTATIVE RICHARDSON: Mr. Chairman,
22 can I have a quick question?

23 CHAIRMAN HALL: I'm going to take questions
24 in a little while, but you know, if it's something
25 that's really important right now, okay. All right.

1 I'm going to take questions at the end.

2 So for ground rules, that's it for now. I
3 may have left something out, and if so, members can
4 ask me in a moment.

5 The second step in today's committee is
6 going to be the presentation of the optimum county
7 groupings that have been come up with by the non-
8 partisan staff. And so the chair is going to turn
9 this over to Erika Churchill, in just a moment, to
10 make a presentation on the optimum county groupings
11 that have been crafted by the non-partisan staff.

12 But what the chair will ultimately say
13 about these groupings is: in years past, if you've
14 been on this committee, you know that we have
15 adopted certain groupings. Chair does not
16 anticipate adopting any particular grouping this
17 time around because there are multiple options
18 within the county groupings. And that's what you've
19 got in front of you, and that Ms. Churchill is going
20 to explain in more detail here in just a bit.

21 Rather than limit any member of this
22 committee into just certain groupings, what the
23 chair anticipates is that members can use whichever
24 combination of the groupings that you see before
25 you, in drawing whichever map a member sees fit to

1 draw.

2 The only groupings that will be considered
3 are those that are in the packet that's in front of
4 you. These were initially put forth by Duke
5 University, and a non-partisan staff has also drawn
6 their own groupings and confirmed that the Duke
7 groupings were correct. And so we're confident that
8 using the algorithm, as required in the law, that
9 these are the possible groupings -- the possible
10 optimum groupings.

11 Again, I'll answer questions momentarily on
12 that front. But with that, the chair is going to
13 turn it over to Erika Churchill to speak to the
14 county groupings and to also show an example of how
15 to use the terminals when drawing the maps.

16 Ms. Churchill, you're recognized.

17 MS. CHURCHILL: Thank you, Mr. Chair. As
18 you mentioned, central staff, were asked to take a
19 presentation by Christopher Cooper, Blake Esselstyn,
20 Gregory Herschlag, Jonathan Mattingly, and Rebecca
21 Tippet from the quantifying gerrymandering group,
22 which is a non-partisan research group centered at
23 Duke Math.

24 And they produced a paper entitled, "North
25 Carolina General Assembly County Clusterings from

1 the 2020 Census." It was posted by Mr. Herschlag on
2 August 17, 2021. And we took it as a recipe,
3 because throughout this, they gave instructions as
4 to what they believed were the optimum county
5 groupings.

6 I would note that they particularly say,
7 "However, there are often multiple optimal county
8 clusterings that minimize county splitting." And
9 they reference two other blogs that they have
10 posted. The release of the 2020 census data allows
11 us to determine the possible county clusterings for
12 both the North Carolina State House and State Senate
13 redistricting processes.

14 The one part of Stephenson v. Bartlett
15 which this analysis does not reflect, is compliance
16 with the Voting Rights Act. To determine the county
17 clusters, we used the implementation of the court
18 order procedure described in Carter, et al." The
19 site they gave for Carter, et al. is "Optimal
20 Legislative County Clustering in North Carolina" by
21 Daniel Carter, Zach Hunter, Dan Teague, Gregory
22 Herschlag, and Jonathan Mattingly. Statistics and
23 Public Policy Volume 7, 2020.

24 For the state House, what you have before
25 you in hardcopy, on the screen, and I believe they

1 will be posted to the web, are the nine maps that
2 resulted from this paper with respect to the North
3 Carolina State House. The very first one does not
4 have the entire state assigned. They call this the
5 fixed groupings. Throughout the maps that we'll go
6 through, you will find that these will be hash
7 tagged. A little bit of crosshatching on them to
8 identify these are the ones that this particular
9 group say are the optimal.

10 They created 33 clusters containing 107 of
11 the 120 districts that are fixed based on
12 determining optimal county clusters. 11 of these
13 clusters contain 1 district, meaning that 11 of the
14 120 House districts are fixed.

15 So as you're looking at the map, whether in
16 hardcopy or online, you will see that there is a
17 letter assigned to each. I'm just going to pick on
18 Carteret and Craven, in the eastern part of the
19 state, in the blue shading, it is Q2. The Q is just
20 an easy letter reference if you need to talk about
21 that particular grouping with anyone. The 2 means
22 that that is population sufficient for 2 House
23 members. The same if you look just to the left, in
24 the gray, the green Lenore Jones BB cluster, or
25 grouping, has a 1 underneath it, meaning that would

1 be a single member grouping.

2 So the white areas that are left can each
3 be assigned two different ways. So that would get
4 you to the lovely House maps that are left.

5 (Sound interruption)

6 So starting with the Western area that was
7 left kind of unassigned, needs to be grouped. As
8 you will see it on the Duke House 01 map, it would
9 be districts HH and II. The first option here would
10 be to combine Surry, Wilkes, and Alexander to create
11 a two-member district. And Alleghany, Ashe,
12 Watauga, and Caldwell to create a two-member
13 district.

14 If you will skip over to Duke House 05,
15 this would give you a visual of the second option
16 for this particular grouping. It would be a
17 combination of Surry, Alleghany, Ashe, and Wilkes
18 for a two-member grouping. And Watauga, Caldwell,
19 and Alexander for a two-member grouping.

20 Staying on the Duke House 05, and heading
21 east to the southeast, the options in that southeast
22 area here would be to combine Wayne and Sampson into
23 a two-member district. Duplin and Onslow into a
24 three-member district. And Pender and Bladen into a
25 one-member district.

1 And so if you just fast forward one to Duke
2 House 08, the second option in the southeastern
3 corner would be to combine Wayne and Duplin into a
4 two-member district. Sampson and Bladen into a one-
5 member district and Onslow and Pender into a three-
6 member district.

7 Duke House 05 will be our example of the
8 northeastern corner. Option one would be to combine
9 Hertford, Gates, Pasquotank, and Camden into a
10 single-member district. And Currituck, Dare, Hyde,
11 Pamlico, Beaufort, Washington, Tyrrell, Perquimans,
12 and Chowan into a two-member district.

13 The other option in the northeastern
14 corner, if you will go to Duke House 06, you can see
15 a visual of that. The single member district would
16 be Currituck, Pasquotank, Perquimans, and Tyrrell.
17 The two-member district would be Beaufort, Pamlico,
18 Hyde, Dare, Washington, Chowan, Camden, Gates, and
19 Hertford.

20 Each of the multimember districts
21 throughout all of these would need to be divided
22 into single-member districts for compliance with
23 Stephenson opinion.

24 I should probably note, just so that
25 everybody is aware, the ideal population for a North

1 Carolina House district is 86,995 people, according
2 to the 2020 Decennial Census, with a plus or minus 5
3 percent deviation. That leaves a range of 82,645 to
4 91,345 people.

5 CHAIRMAN HALL: Okay, members. The chair
6 is going to give Ms. Churchill an opportunity in a
7 moment to display and give an example of how the
8 terminals will work.

9 But if that is it for your presentation on
10 groupings, if you'll stand there for just a second.

11 MS. CHURCHILL: Yes, sir.

12 CHAIRMAN HALL: Committee members, do any
13 members have any questions for legislative staff at
14 this point about groupings? And again, chair's
15 going to take some questions at the end.

16 Representative Torbett.

17 REPRESENTATIVE TORBETT: Just if she could
18 repeat the numbers she used there at the last time.
19 There was three. There was a total and the range.

20 MS. CHURCHILL: Okay. Ideal population for
21 a North Carolina House of Representatives districts,
22 86,995. Creating a plus or minus 5 percent range of
23 82,645 to 91,345 people.

24 CHAIRMAN HALL: The chair is going to make
25 sure that all committee members have a document

1 showing the ideal population for each level of
2 grouping. So for one-member grouping, two-member.
3 And I know we've had that in the past, and it may
4 have already been passed out at one of the meetings
5 we've had. So let's make sure, if we will -- we'll
6 send that out to the committee via email, and we'll
7 have some paper copies at the meeting tomorrow.

8 MS. CHURCHILL: We will actually have a
9 laminated copy at every station.

10 CHAIRMAN HALL: Okay, great.

11 MS. CHURCHILL: And we will also be glad to
12 email that out to everyone. It has been passed out
13 at a previous meeting.

14 CHAIRMAN HALL: And we're going to go ahead
15 and have paper copies for folks to be able to take
16 with them if they want to.

17 MS. CHURCHILL: Glad to take care of that.

18 CHAIRMAN HALL: Representative Harrison.

19 REPRESENTATIVE HARRISON: Thank you,
20 Mr. Chair. Thank you, Erika.

21 If I heard you right, so did you -- when
22 you started -- and I've got the article in front of
23 me from Doctors Mattingly, et al. -- did you say
24 that the fixed -- the fixed clusters -- we're
25 working from a basis of the fixed clusters, and

1 those represent 107 of the 120 members; is that
2 right?

3 MS. CHURCHILL: Yes, ma'am.

4 REPRESENTATIVE HARRISON: And then our
5 options are to figure out how to manipulate the
6 other white, unshaded counties, and that's what
7 we're going to be doing with the other map options?

8 MS. CHURCHILL: Mr. Chair?

9 CHAIRMAN HALL: Lady is recognized to
10 respond.

11 MS. CHURCHILL: Yes, Representative
12 Harrison. With the crosshatched districts in the
13 Duke House fixed, that would establish the groupings
14 for 107 of the 120 districts. Of that 107, 11 -- or
15 of the 33 clusters, 11 of those clusters would be
16 single-member districts. The remainder would still
17 need to be divided into single-member districts. So
18 the counties in white that have no shading, no
19 crosshatching, would be the options to combine
20 together to create the remaining 13 House districts.

21 CHAIRMAN HALL: And members, and for those
22 folks listening at home, the chair has often
23 referred to these maps as groupings, and you hear
24 Ms. Churchill refer to them as clusters, and those
25 are synonymous terms, just for those listening, to

1 make sure everybody understands. If you've been
2 through this before, you know that. But if you're
3 new to this committee, or you're listening online
4 and haven't watched this committee before, that may
5 be confusing.

6 But is that your understanding,
7 Ms. Churchill?

8 MS. CHURCHILL: Yes, sir. There's actually
9 three terms that I've heard for it. There's the
10 clustering, which is the phrase that the group from
11 Duke used in their paper, which is what I was
12 reading from. There's also groupings, which is kind
13 of in the court orders, as well as clustering. The
14 other phrase I've heard used to describe this is
15 podding, or creating a pod. I believe all three to
16 be completely interchangeable.

17 CHAIRMAN HALL: That's right. That's the
18 chair's understanding as well.

19 Representative Harrison.

20 REPRESENTATIVE HARRISON: Mr. Chair, if we
21 have questions about the clusters and the process,
22 should we ask them now of you and the committee, or
23 do you want her to talk about the technical and then
24 have the questions after that?

25 CHAIRMAN HALL: At this point, if you've

1 got a question for the chair, let's just wait. This
2 is just questions for right now to Ms. Churchill.
3 She's not going to leave after this. She'll be
4 right up here, so if we have another question for
5 her later. But while they're there at the podium,
6 the chair thinks it's appropriate to give members
7 the opportunity to ask them questions.

8 Representative Warren.

9 REPRESENTATIVE WARREN: I've got a question
10 for Ms. Churchill.

11 I'm sorry, when you look at the white
12 clusters, and the different iterations of them on
13 the following maps, I noticed that the numbers stay
14 the same within those configurations. So is this
15 just a matter of looking at those particular
16 counties in terms of their connection to each other,
17 continuity of it, or the contiguousness of it, or
18 whatever the word is we're looking for there?

19 MS. CHURCHILL: So, Mr. Chair, if I might?

20 CHAIRMAN HALL: Lady may answer.

21 MS. CHURCHILL: So you are absolutely
22 correct. So starting kind of in that western
23 corner, the counties of Surry, Alleghany, Ashe,
24 Watauga, Wilkes, Caldwell, and Alexander, that white
25 area has a population in it sufficient to support

1 four single-member districts. So it becomes a
2 question of how to group those counties together to
3 best create districts that are in compliance with
4 Stephenson. And there are two options there. Both
5 would be two-member districts. It's just a matter
6 of what the committee chose to use.

7 REPRESENTATIVE WARREN: And follow-up?

8 CHAIRMAN HALL: The gentleman is
9 recognized.

10 REPRESENTATIVE WARREN: So, Ms. Churchill,
11 one of the things I noticed in the hearings I
12 attended was some folks in the general public not
13 having an understanding that we try to do these in
14 terms of, not breaking down counties or
15 municipalities, but to stay within the mandates of
16 the population, and you're staying within this
17 cluster. That, in some cases, creates a situation
18 where you have no choice but to comply with the
19 district's population; is that correct?

20 CHAIRMAN HALL: The lady is recognized.

21 MS. CHURCHILL: I will attempt that one.
22 And I'm going to pick on the chair for just a
23 moment. His home county of Caldwell --

24 CHAIRMAN HALL: Join the club.

25 MS. CHURCHILL: -- as an example.

1 According to the federal decennial census, it's
2 80,652 people, which is outside that ideal range of
3 82,645 to 91,345 for a single-member district. So
4 it would need to be combined with some other
5 contiguous county to create a single-member
6 district. Or it would need to be divided with some
7 other contiguous counties to create two
8 single-member districts. That would be up to the
9 committee how they wanted to do that.

10 REPRESENTATIVE WARREN: Thank you very
11 much.

12 CHAIRMAN HALL: Further questions or any
13 comments for legislative staff?

14 Representative Dixon.

15 REPRESENTATIVE DIXON: Thank you,
16 Mr. Chair.

17 Ms. Churchill, without having to add them
18 up, how many House seats are there in the white area
19 including Duplin and then this white area with
20 Tyrrell?

21 MS. CHURCHILL: So --

22 Mr. Chair?

23 The area --

24 CHAIRMAN HALL: The lady is recognized.

25 MS. CHURCHILL: -- including Duplin, Wayne,

1 Sampson, Bladen, Pender, and Onslow is population
2 sufficient to support six single-member House
3 districts. That northeastern corner beginning at
4 Pamlico, running all the way up to Currituck and
5 over to Hertford, is population sufficient to
6 support three single-member districts.

7 REPRESENTATIVE DIXON: Thank you.

8 CHAIRMAN HALL: Further discussion or any
9 questions for legislative staff?

10 Okay. Ms. Churchill, if you want to give
11 us an example of how to use these terminals, the
12 lady is recognized to do that.

13 MS. CHURCHILL: I'm going to ask Will.
14 He's going to come up and help me.

15 CHAIRMAN HALL: Along with -- yeah,
16 absolutely.

17 MS. CHURCHILL: So I would note a couple of
18 things, as Will is getting us started. Each one of
19 these terminals will be directly fed to a
20 livestream. An audio from that terminal will be fed
21 to the livestream. There will not be a video
22 associated with that terminal. There will be a
23 video of the room that will be seen by the public.
24 The public here in the room can choose to use the
25 screens here, or they can choose to use the North

1 Carolina General Assembly Wi-Fi to log on, if they
2 wanted to focus on just one of the four terminals.

3 And I'm going to walk over to the terminal,
4 so we can turn that on, so you'll see what it's
5 going to look like. So from here, you will be able
6 to see a House plan. And so, these are just
7 examples that we have been testing to make sure that
8 everything works. These are existing plans; they
9 are nothing new. We just wanted to make sure that
10 everyone had a map that could be seen, can be used;
11 the software works.

12 So this is what you would see on the screen
13 in the room. We will leave this up and going until
14 after the committee adjourns, so that someone can
15 walk around and see what an actual drawing station
16 would look like as you were sitting at it to engage
17 with the staff to instruct us how to draw a map of
18 your choosing.

19 CHAIRMAN HALL: And, Ms. Churchill, if you
20 will describe what's the large TV to your right for?

21 MS. CHURCHILL: They are identical. So a
22 staff member will be sitting at the smaller screen.
23 Member, or whoever -- whatever group of members are
24 together, will have the larger screen available to
25 them to stand behind, to sit behind, just so that

1 it's a little larger, a little easier to see.

2 CHAIRMAN HALL: Members, do we have any
3 questions for -- questions or debate about how the
4 process will work in terms of what Ms. Churchill has
5 just described? Again, I'm going to stand for some
6 questions.

7 Representative Torbett.

8 REPRESENTATIVE TORBETT: Just for
9 reference, it's my understanding -- I think she
10 eluded to it -- the staffer is there to actually to
11 the map drawing with assistance and information from
12 the member; is that how that's going to work?
13 Because some of us in here have never done map
14 drawing.

15 CHAIRMAN HALL: The staff folks are there
16 because they understand how to use the software, but
17 it will be completely up to the member to direct the
18 staff member as to how to draw those maps. And
19 staff will -- it wouldn't be appropriate, of course,
20 for staff to make decisions about how to draw. But
21 to answer your question, yeah. You're absolutely
22 right. It will be up to the member to tell the
23 staff member, who knows how to use the technology,
24 how to draw.

25 Representative Carney.

1 REPRESENTATIVE CARNEY: So I'm not sure if
2 this question is for now or later, but. So if I
3 come in as a member and I'm drawing on a map, and I
4 leave the room, somebody else comes in, draws
5 another map, and then I want to make an amendment,
6 how does that work?

7 CHAIRMAN HALL: The chair is going to
8 initially respond to that and let Ms. Churchill
9 respond to sort of the mechanics of how that works.
10 But, in the past, what has happened is, if you go in
11 and draw a map, and let's say you want to take a
12 break and go eat lunch, or whatever it is you want
13 to do, you can save your map in the system, so that
14 somebody doesn't come behind you and start drawing
15 on the map that you've already created. So you'll
16 be able to save that. You'll be able to come back
17 later on and draw that map.

18 Now, Ms. Churchill, is that correct, in
19 terms of technology?

20 And I'm going to continue on with that to
21 try to answer what I think your whole question is,
22 but yeah.

23 REPRESENTATIVE CARNEY: Okay.

24 MS. CHURCHILL: So, yes, sir. Unlike with
25 our drafting system where you were used to us being

1 able to get to any prior iteration that we have
2 drafted for you, the mapping software doesn't work
3 quite like that. But we are set up internally to
4 make sure that the map that you closed out before
5 you stepped away to get a bite to eat or go to a
6 committee meeting is always there.

7 When you come back, we will be copying that
8 map to pick up exactly where you left off, so that
9 we will always have that first map, just in case
10 something goes wrong, and you just need to go back
11 to it. So there will be an option for you to pick
12 up wherever you left off and continue going from
13 there. There will be an option for you, if you
14 really like what you -- hated what you did in that
15 second session, you can go back to the first session
16 and pick up again and start over.

17 CHAIRMAN HALL: And to answer your question
18 about how to, perhaps, change a member that another
19 member's drawn -- and I guess the real question is
20 amendments -- there will be an opportunity for
21 members of the committee to put forth amendments on
22 whatever map or maps this committee ultimately takes
23 up.

24 And the chair anticipates, as we've done in
25 the past, members can decide whether they want to

1 put forth a whole map of the state as an amendment,
2 or whether they're just wanting to amend certain
3 groups or I guess even certain districts. Members
4 will be given an opportunity to put those forth.

5 REPRESENTATIVE CARNEY: So just a follow-
6 up.

7 CHAIRMAN HALL: Yes. Lady is recognized.

8 REPRESENTATIVE CARNEY: And I have never
9 drawn these maps before, so that's why I have all
10 these questions. So these amendments would come --
11 our amendments would come after we have a map?

12 CHAIRMAN HALL: Yeah. So if the lady will
13 think about it just like a normal committee meeting,
14 where a bill is before the committee --

15 REPRESENTATIVE CARNEY: Right.

16 CHAIRMAN HALL: -- and members are putting
17 forth their own amendments, or perhaps they're
18 wanting their own bills to be put forth at a given
19 time. Really, the easier way to think of it is,
20 members are wanting to put forth their amendments to
21 the bill that's on the floor. The opportunity to do
22 that will be there.

23 If, let's just say that you like the map
24 that's before the committee, but for a couple of the
25 groupings, and you know, rather -- if you just want

1 to focus your argument, or whatever the case may be,
2 on those two groupings, the lady can say, look, here
3 are the two groupings. I'm just putting those forth
4 as an amendment. I'm okay with the rest of the map.
5 The opportunity to do that will be given.

6 REPRESENTATIVE CARNEY: Thank you very
7 much.

8 CHAIRMAN HALL: And let me say with that,
9 obviously, we're under a tight time constraint. And
10 so we don't have time for the committee to consider
11 100 maps from every member, you know, who's on
12 there. So at some point, the chair will have to
13 limit that. But as of now, the chair doesn't
14 anticipate having to limit members amendments or
15 proposed maps. Chair thinks that we'll be able to
16 do that in a time efficient way, and still get our
17 work done in time for filing.

18 Other questions or debate again for
19 legislative staff?

20 REPRESENTATIVE RICHARDSON: Mr. Chairman?

21 CHAIRMAN HALL: Representative Richardson.

22 REPRESENTATIVE RICHARDSON: If I might.

23 Would it be the best practice if when we're drawing
24 -- if we're doing a map, that we articulate our
25 reasonings? Like the criteria that we have listed

1 and adopted, like communities of interest, should we
2 -- if we do an amendment, or do part of a map, or do
3 part of a district, should we state the reasoning on
4 there that it follows the criteria and which
5 criteria it follows or just not comment? Or what
6 are we -- give us some guidance on that.

7 CHAIRMAN HALL: You know, that's really up
8 to each individual member as to what they want to
9 say while they're drawing the map. And if a member
10 wants to say, "Here's why I'm doing this," every
11 member is free to do that. This committee has
12 adopted a set of criteria that's to be used in
13 drawing the maps, and so that will be the member's
14 choice whether they think that is a best practice or
15 not a best practice.

16 Further questions or debate?

17 Representative Carney.

18 REPRESENTATIVE CARNEY: Thank you,
19 Mr. Chairman. So if -- did I hear you or Erika say
20 that the public is going to have access to all these
21 portals; is that correct?

22 CHAIRMAN HALL: So --

23 REPRESENTATIVE CARNEY: As we are drawing.

24 CHAIRMAN HALL: -- I'll let --

25 Ms. Churchill, go ahead and answer that,

1 and I may weigh in.

2 MS. CHURCHILL: Okay.

3 So, Representative Carney, as this is set
4 up currently, a member of the public can choose to
5 look at what is happening at station one online. A
6 member of the public could choose to come to the
7 room and sit in the back and could see all four
8 stations going simultaneously. But to the best of
9 our knowledge, the public will not be standing
10 behind a station, over your back, over staff's back,
11 instructing, conversating, that kind of thing.

12 REPRESENTATIVE CARNEY: Okay. Just a
13 follow-up.

14 CHAIRMAN HALL: The lady is recognized.

15 REPRESENTATIVE CARNEY: So will that --
16 each time a member comes and draws a map, is that
17 archived for the public?

18 CHAIRMAN HALL: So the chair's
19 understanding is that any map that's drawn by a
20 member of this committee in this committee room
21 becomes a public record.

22 Ms. Churchill, will you speak to that?

23 MS. CHURCHILL: Yes, sir.

24 Our understanding, as well, because this
25 map is being drawn in public before the committee,

1 it is a public record. We will have a copy of it.
2 It will be saved forevermore. At this time, we have
3 not been instructed to place any of those maps
4 online. If the committee so instructs, we will be
5 happy to do that.

6 REPRESENTATIVE CARNEY: So that -- may I
7 just comment why I'm asking that question?

8 CHAIRMAN HALL: The lady is recognized.

9 REPRESENTATIVE CARNEY: Is through the
10 public hearings, I was -- attended a lot of those,
11 and that was one of the questions that kept coming
12 up over and over again is, will the public have an
13 opportunity to be a part of drawing these maps, or
14 seeing, actually having access to the drawing of
15 these maps, publicly. That was why I was going that
16 way.

17 CHAIRMAN HALL: Representative Cooper-
18 Suggs.

19 REPRESENTATIVE COOPER-SUGGS: Thank you,
20 Mr. Chair.

21 And thank you, Erika.

22 Still on that same vein, in talking about
23 the public, and the maps that we're going to see, we
24 know that the public has had that keen interest, by
25 attending the sessions, as well as the feedback that

1 they have given. So what steps are you proposing to
2 assure that the public be involved in these maps
3 that represent them?

4 CHAIRMAN HALL: And if the lady will
5 indulge me to wait just a minute, until I can let
6 Ms. Churchill sit down. Because the chair is going
7 to take questions like that one, for example.

8 If there are any other questions for
9 Ms. Churchill --

10 And I will come back to you, Representative
11 Cooper-Suggs.

12 REPRESENTATIVE COOPER-SUGGS: Thank you so
13 much.

14 CHAIRMAN HALL: Representative Torbett.

15 REPRESENTATIVE TORBETT: Thank you. I was
16 going hope I think this one fits in this segment.
17 Is there intent -- should we have an anomaly or a
18 glitch in the technology, do we think the mapping
19 should suspend until such time that that glitch will
20 reconnect or --

21 CHAIRMAN HALL: We'll deal with that if and
22 when it happens at the time. Let's hope it doesn't.
23 Representative Brockman.

24 REPRESENTATIVE BROCKMAN: I'm not really
25 sure if this question was answered, but

1 Representative Carney asked if members of the public
2 would know who was drawing maps at the specific
3 time. Will they know, say, for example,
4 Representative Brockman is working on a map at this
5 time; will they know that?

6 CHAIRMAN HALL: Ms. Churchill?

7 MS. CHURCHILL: At this time, the way it is
8 set up, no, sir. They will know that -- they will
9 be able to see what is being drawn on station one.
10 From the audio, they would be able to hear your
11 voice, your instructions, but there would not be a
12 label that was there at all times to say that this
13 is Representative Brockman speaking. We can try to
14 work on something of that nature, if the committee
15 would like.

16 CHAIRMAN HALL: The gentlemen is
17 recognized.

18 REPRESENTATIVE BROCKMAN: But there would
19 be something that says, at the end of the day, that
20 this is Representative Brockman's map; is that
21 correct?

22 CHAIRMAN HALL: Yes. So the chair will
23 speak to that. There will be something on the final
24 map that says who has drawn that map, at least the
25 original part of it. It may be amended, but the

1 amendment will have the member's name on that. And
2 we've done that in the past.

3 Ms. Churchill.

4 MS. CHURCHILL: And I might kind of step in
5 just a little bit to remind everyone that the maps
6 are not what the General Assembly enacts. It is the
7 bill that is sponsored by a bill sponsor, just like
8 every other bill in the institution. The amendments
9 the same way. For an amendment offered by
10 Representative Brockman, the amendment will state
11 that it was offered by Representative Brockman. It
12 will have attached with it a visual of the map, but
13 it is still technically the amendment that the
14 General Assembly is voting on. So yes, sir. All of
15 that will come together.

16 CHAIRMAN HALL: Okay, members. Are there
17 any questions that are just for Ms. Churchill, at
18 this point? I know another one may arise, so she's
19 not leaving.

20 Okay. If not, Ms. Churchill, thank you
21 very much for your eloquent presentation.

22 Members, the chair is going to hand the
23 gavel over to Representative Saine and stand for
24 questions.

25 VICE CHAIR SAINE: All right,

1 Representative Hall. Are you ready?

2 CHAIRMAN HALL: I am. And, Mr. Chairman,
3 if you will start with Representative Cooper-Suggs.
4 She had a question that was appropriate for the
5 chair, but I wanted to wait until I got over here to
6 answer it.

7 VICE CHAIR SAINÉ: The chair would be happy
8 to do that.

9 Representative Cooper-Suggs.

10 REPRESENTATIVE COOPER-SUGGS: I can wait.
11 I can hold off for a moment. If that's all right.

12 CHAIRMAN HALL: Okay. Fair enough.

13 VICE CHAIR SAINÉ: Fair enough. Thank you,
14 Representative Cooper-Suggs.

15 Representative Richardson, I think I've got
16 you, and then maybe Representative Harrison.

17 REPRESENTATIVE RICHARDSON: Mr. Chairman,
18 thank you for taking these questions. When we went
19 to these public hearings, I heard over, and over,
20 and over again several things, you know, communities
21 of interest, you know, and the like. But one thing
22 I heard repeatedly was -- is that the public wanted
23 input after we came up with maps, before we voted on
24 them. I know we're on a tight budget, a tight
25 schedule, you know, with this, and it's going to be

1 tough. But is it your plan to have some public
2 hearings after -- before we vote on the final maps,
3 but while the maps are up for consideration?

4 CHAIRMAN HALL: Thank you, Representative
5 Richardson. So what I will say is that I do
6 anticipate there being some manner of public hearing
7 on whatever the final proposed version of the map
8 is, before the House approves that. And we've done
9 that in the past.

10 But, you know, I want to speak to what I
11 think is often missed sort of in the story about
12 when or how we're going to do public comment this
13 time around. And that is, the way that we're doing
14 this, the way this committee, as well as the Senate
15 committee, has decided to do this process is simply
16 unprecedented.

17 The folks on this committee could decide as
18 a committee that we're not going to do this out in
19 the open. The law would allow committee members, we
20 could just simply have somebody draw these maps
21 behind closed doors, as has been done in the past.
22 The law would allow the use of election data to be
23 used in these maps, and there's no binding
24 precedent, whatsoever, that prevents this committee
25 from using election data in drawing those maps and

1 preventing the committee from doing it behind closed
2 doors.

3 We are voluntarily saying we don't think
4 that's the best way to do this. We think the best
5 way to do this is in this committee room, with these
6 screens, the technology to allow members of the
7 public to watch what's going on, to listen to what
8 we're saying as we're drawing these maps, to
9 literally, in real time, watch us draw these maps.
10 That has never been done before in a voluntary
11 manner.

12 In 2019, you were here, Representative
13 Richardson, and many members of this committee were
14 here, we did that in some fashion because we were
15 court ordered to. Gentleman's a lawyer, I think
16 he'll agree, there's no binding precedent from that
17 decision, and this committee would be free to go
18 right back to having some consultant draw these
19 behind closed doors, put them on the floor here, and
20 vote on them. But we're choosing not to do that.

21 We're taking the unprecedented step of
22 being as transparent as I believe we possibly can
23 with the way that we're doing this committee
24 process. Obviously, you know, things can always be
25 done better. We want to do that, if we can. But

1 the unprecedented amount of transparency should not
2 be lost, not only on the members of this committee,
3 but the members of the public, as they watch us do
4 our business.

5 REPRESENTATIVE RICHARDSON: Thank you.

6 VICE CHAIR SAINE: Thank you.

7 Representative Harrison.

8 REPRESENTATIVE HARRISON: Thank you,
9 Mr. Chair.

10 Thank you, Chair Hall. Looking at --
11 looking at Doctors Carter, Mattingly, et al.'s
12 article -- and Erika Churchill mentioned this --
13 they say they want -- that's the one part of the
14 Stephenson v. Bartlett decision this analysis does
15 not reflect its compliance with is the Voting Rights
16 Act.

17 So I sort of skimmed Stephenson v.
18 Bartlett, in anticipation of this meeting, and I'm
19 just wondering, because that seems a very important
20 point of the Stephenson decision is compliance with
21 the Voting Rights Act. So how -- so we're starting
22 with maps that don't take that into account at all,
23 and I'm just wondering how we're complying with
24 that?

25 CHAIRMAN HALL: Thank you for the question,

1 Representative Harrison. As the lady knows, this
2 committee has made a decision to not use race at all
3 in the drawing of our maps. I'll also note that, as
4 you know, there's been a lot of litigation in this
5 state over the redistricting process in general.
6 We've had many, many lawsuits going back to when
7 Democrats were in the majority and since Republicans
8 have been the majority. It's really been no
9 different. We've had many, many lawsuits.

10 What we've seen in those lawsuits, at least
11 in the last few lawsuits that we've seen, is the
12 plaintiffs in those suits that were trying to set
13 aside those maps have said that there is no legally
14 significant racially polarized voting in North
15 Carolina. That's the plaintiffs and their own
16 experts who are saying that.

17 We've drawn maps in both 2017 and 2019, not
18 using racial data at all. And those maps have been
19 approved -- groupings, rather -- the lady's question
20 is specifically as to groupings, and I'm sort of
21 answering the grouping and map question in one. But
22 we've used groupings in 2017 and in 2019, not taking
23 into account any sort of racial data at all. And
24 courts have uniformly upheld those groupings that
25 we've used, without using racial data.

1 So we are going to stick with the criteria
2 of the committee and not consider any racial data at
3 all. And based on the past precedent of doing this,
4 we're confident that that will comply with the
5 Voting Rights Act.

6 REPRESENTATIVE HARRISON: Follow up?

7 VICE CHAIR SAINÉ: You're recognized.

8 REPRESENTATIVE HARRISON: I appreciate that
9 very thoughtful answer. I actually meant with
10 regard actually to the whole mapping process, so you
11 anticipated my question. But I'm looking at section
12 two, that provides to states that "political
13 subdivisions can't impose any voting qualification
14 or prerequisite that impairs or dilutes, on account
15 of race or color, a citizen's opportunity to
16 participate in the political process to elect the
17 representative of his or her choice."

18 So how do we know -- if we don't take into
19 account race, how do we know that we're complying
20 with the Voting Rights Act? And I kind of
21 understood you to say that we're relying on past,
22 but I'm just -- can you respond to that, please?

23 CHAIRMAN HALL: And that's the way -- the
24 way we know is because we've already done it. We've
25 done it before and courts have upheld the drawings

1 of these maps, the groupings and the districts
2 themselves, without this committee using any racial
3 data at all. We've done that twice now, so I'm
4 confident that, without using racial data, we will
5 comply with the Voting Rights Act.

6 REPRESENTATIVE HARRISON: One more follow-
7 up, I think.

8 VICE CHAIR SAINÉ: You're recognized for
9 follow-up.

10 REPRESENTATIVE HARRISON: Thank you.

11 And I guess a lot of my questions have to
12 do with compliance with the Voting Rights Act, and I
13 think I understand your answer is going to be the
14 same, so I'll move to the Common Cause decision that
15 you referenced earlier. And I appreciate the
16 committee's commitment to transparency.

17 You did say it's an non-binding precedent,
18 so you all don't anticipate -- do you anticipate
19 using any of the ruling from the holding from that
20 decision to guide this process? Do you all feel
21 bound by any of that decision in terms of following
22 the process that the court ordered?

23 CHAIRMAN HALL: From a strictly legal
24 stance, it's not a binding precedent that anyone is
25 required to follow. But as the lady knows, based on

1 the criteria the committee has adopted, that is
2 something that this committee has to follow. And
3 we've taken a lot of language out of that opinion
4 and put it into this committee's criteria.

5 The computers that you see here and the
6 online audio and video, none of that is binding. We
7 are voluntarily doing that. You know, frankly, we
8 learned from that case that perhaps a better process
9 is one that is just like we're doing -- like we did
10 then, like we're doing now, as an open and
11 transparent process. So, you know, while it may not
12 be binding, the committee has chosen to impose upon
13 itself some of the principle outlined in the Common
14 Cause case.

15 REPRESENTATIVE HARRISON: I think I'm going
16 stop for now and let somebody else ask questions. I
17 might have more. Thank you.

18 VICE CHAIR SAINE: Thank you,
19 Representative Harrison.

20 I have Representative Cooper-Suggs and then
21 Representative Hawkins.

22 Representative Cooper-Suggs, you're
23 recognized.

24 REPRESENTATIVE COOPER-SUGGS: Thank you so
25 much, Mr. Chair, and Representative Hall. Thank you

1 so much.

2 My question was -- it goes back to the
3 public's input and that the keen interest that
4 they've had in this process, and we've seen that,
5 you know, as I stated earlier, through the
6 districting process as well as through the online
7 portals too. Over 3000 people have responded, so we
8 know that there's interest out there.

9 And so my question deals with, what steps
10 are you proposing to assure that the public be
11 involved in the efforts to create maps that
12 represent them?

13 CHAIRMAN HALL: Thank you, Representative
14 Cooper-Suggs, for the question. So I'll go back to
15 what I said previously in response to, you know,
16 what efforts are we making to make sure those folks
17 can follow this process to make sure that it's doing
18 whatever they feel like it should do. Because some
19 of members of the public feel one way about what
20 this process should ultimately end up with, and
21 others feel in different ways. They're differing
22 opinions.

23 Again, I think it's important to understand
24 context of what's happened in the past, in this
25 building, for the past 200 years when this body has

1 drawn maps. What has happened in the past is some
2 outside entity, a consultant, goes and they draw the
3 map behind closed doors. We would come into this
4 committee, just like we're in right now, and throw a
5 map down in front of the committee members and say,
6 "Here's the map that we propose."

7 We're not doing that this time. What we're
8 going to do this time is a more open and
9 deliberative process for this committee. We will
10 literally be drawing on the stations that you see,
11 so members of the public across the state and, in
12 fact, across the world, can log onto the website and
13 watch these maps as we draw them in live fashion.

14 And then, we've seen that the public
15 comment portal is actually much more popular than
16 the in-person public comment method, for one reason
17 or the other. We get many more comments through
18 that portal. We get many more emails, as members of
19 this committee can attest. You receive emails all
20 the time from folks and, you know, probably messages
21 in many different ways and phone calls.

22 So the public has favored that online
23 portal in telling us how they want to see this done.
24 That portal is going to stay open throughout this
25 process, so an individual sitting anywhere in our

1 state, and again, anywhere in the world, can sit and
2 watch what's happening. Can literally send a
3 comment right then, simultaneous with that drawing
4 going on and say, "I'm watching station four. I
5 don't like what I see in X district," or "I do like
6 what I see in X district."

7 That's going to be time-stamped. The
8 committee members are going to have a chance to read
9 every one of those. And so, there is ample
10 opportunity for members of the public to weigh in on
11 these maps. Again, in the past, there's been little
12 opportunity because the maps are already drawn.
13 Folks can come in here and talk all they want, but
14 the map has been drawn.

15 That's not the case here. We had public
16 comment ahead of time. We're going to draw these in
17 public. And I do anticipate at least some in-person
18 public comment moving forward. With all of that
19 said, I do anticipate at least some form of in-
20 person public comment at the end of this.

21 REPRESENTATIVE COOPER-SUGGS: Follow-up
22 question.

23 VICE CHAIR SAINÉ: You're recognized for a
24 follow-up.

25 REPRESENTATIVE COOPER-SUGGS: I just want

1 to make sure I fully understand this. So how are we
2 going to use the comments -- the public comments
3 when drawing these maps? Their actual comments, how
4 are we going to use those?

5 CHAIRMAN HALL: So that's up to each member
6 of this committee to decide what they want to
7 discern from a given comment. We know that if you
8 read all of these comments, there are some of them
9 that you can't do what both of them say. So you can
10 pick out two messages, and one person wants you to
11 do one thing; and the other person wants you to do
12 something else. So what do you do? Well, that's
13 the decision for each member of this committee to
14 make, what they want to do in response to that
15 public comment. What I can tell you this committee
16 has done in response to that is to ensure that we
17 have the most transparent process in the history of
18 this state.

19 REPRESENTATIVE COOPER-SUGGS: Thank you so
20 much.

21 VICE CHAIR SAINÉ: Thank you.

22 Representative Hawkins.

23 REPRESENTATIVE HAWKINS: Thank you,
24 Mr. Chairman.

25 Thank you, Chairman Hall. I really

1 appreciate you taking the time, and not only to sort
2 of travel across the state for these public
3 hearings, but to take these questions.

4 And so, one of the things that you
5 mentioned that I want to follow up on is you said,
6 "throughout this process." Meaning that the public
7 comment portal will be opening throughout this --
8 can you define what that is? Because I know I've
9 actually received that question on our start and
10 ending time, so that people know how to engage it
11 fully, and sort of when their last time is to do so.

12 CHAIRMAN HALL: I anticipate that public
13 comment portal being open until at least the time
14 that this body adopts -- meaning the House and the
15 Senate, the General Assembly, at least until the
16 time the General Assembly adopts state House maps,
17 state Senate maps, and congressional maps. That
18 public comment portal will stay open until at least
19 that time.

20 REPRESENTATIVE HAWKINS: Follow-up.

21 VICE CHAIR SAINÉ: You're recognized for a
22 follow-up.

23 REPRESENTATIVE HAWKINS: Thank you,
24 Mr. Chairman.

25 So a follow-up question is around I think,

1 you know, earlier, yourself or Erika Churchill
2 mentioned hearings. And so, of course that's
3 probably the most popular question is if we're going
4 to have hearings after this. And you said that that
5 would be up to this body.

6 Can you give us a time line in the way you
7 see this and when we would kind of make that
8 decision? And when you think that this body should,
9 you know, between now and when we actually have to
10 file, when we need to do that? Because I think,
11 again, a lot of folks would want to know if we're
12 going to sort of go back out on the road and talk
13 about these again.

14 CHAIRMAN HALL: You know, I'll answer that
15 by saying, you know, as the gentleman knows, we're
16 on an extremely truncated time line, and that's
17 nobody's fault in this body, on either side of the
18 aisle. We just simply didn't get the data in time
19 to do this in the way that it's been done in the
20 past. And especially when you couple it with the
21 fact that the maps aren't being drawn by a
22 consultant somewhere and being delivered here, and
23 us going and voting on them. We're going to do
24 that.

25 We're going to take the time to draw these

1 in this committee, out in the open, and that takes
2 time. As the gentleman knows, you know, we've drawn
3 these maps together in years past. We haven't done
4 it this year, for everybody listening at home. He
5 and I, in the past, we've worked together on drawing
6 maps in prior sessions.

7 So it's difficult to say and commit to some
8 form of public comment afterwards because the
9 reality is we've got to get these done in time for
10 the state board of elections to get ballots
11 finalized. I don't know, frankly, how long it's
12 going to take us to draw these maps. I expect to
13 hopefully start to get some gauge as we get in this
14 thing tomorrow, but for all I know, you know, it may
15 be the last week of October and we're still in this
16 room trying to finalize one version of these maps.

17 And they really need to all be done in the
18 sense that we need to have some final map in place
19 before that public comment comes in, so that they
20 can comment on whatever it is that we're
21 considering.

22 Again, I will say that I do anticipate at
23 least some form of in-person public comment. I just
24 don't know the method, where it will be at, and how
25 much it will be, because of our truncated time line.

1 But I will just again say, the online version has
2 been extremely popular. We've had a lot more
3 comments there than we've had at some of the in-
4 person sites, where we didn't have a ton of people
5 show up. Some sites, we did have a lot, and others,
6 not so much.

7 So, you know, folks across the state still
8 have the ability to directly communicate with us and
9 they've got the chance to watch this happen live.
10 So, you know, I am satisfied that the public's got
11 ample opportunity to weigh in on what we're doing
12 in.

13 REPRESENTATIVE HAWKINS: Thank you.

14 One last follow-up, Mr. Chairman.

15 REPRESENTATIVE SAINE: You're recognized
16 for a follow-up.

17 REPRESENTATIVE HAWKINS: Again, to be
18 clear, in 2019, when we worked on this project
19 together on behalf of the citizens of North
20 Carolina, we both had -- and everyone did -- had a
21 keen interest in groupings because we understand
22 that the way that counties are grouped directly
23 relates to how districts are potentially drawn.

24 And so one thing that came up last time,
25 but I think we can sort of potentially get ahead of

1 it this time, is how, you know -- how the committee
2 will approve the entire map. Or is it possible for
3 us to go and approve grouping by grouping, once we
4 go through this process?

5 Because I think, again, if you remember, a
6 division of the vote in the 2019 session, that would
7 have given us the ability to isolate and really draw
8 down on each individual grouping, which I think
9 could be really helpful. But I wanted to see what
10 the chairman thought about that ability for us to do
11 that this go round, sort of understanding how we did
12 operate in 2019.

13 CHAIRMAN HALL: You know, I anticipate, as
14 I said earlier, taking up member's amendments that
15 they have, in whatever format that they want to put
16 forth, whether that be an entirely new map or a
17 specific grouping, with the only caveat of saying we
18 can't take up -- every member of this committee
19 can't up with 50 or 100 amendments and us possibly
20 have time to get this done.

21 So assuming that doesn't take place --
22 which it hasn't in the past, and so I don't
23 anticipate that being the case this time around -- I
24 think it will be similar to what we saw last time,
25 and that is, you know, members can put the amendment

1 in whatever form they really saw fit.

2 REPRESENTATIVE HAWKINS: I keep saying one
3 last follow-up, Mr. Chairman.

4 VICE CHAIR SAINÉ: Well we'll give you one
5 last follow-up.

6 REPRESENTATIVE HAWKINS: And so, you know,
7 I, like you, native North Carolinian, and my
8 birthday is in May, so I was always used to having a
9 May primary. And I understood, you know, why we
10 moved it to March, to play in the presidential. But
11 this is a mid-term, and so, is there any appetite,
12 potentially, to move the primary back to May, in the
13 mid-term, versus the way we do it in presidential
14 years? To give us the ample amount of time to work
15 on these maps and have the potential public comment
16 and have the fun that we did last go round on this
17 project.

18 CHAIRMAN HALL: You know, I'll answer that
19 question by saying you know, I haven't seen that
20 appetite from the body. You know, I chair
21 redistricting and rules and I will leave it at that.
22 You know, I don't anticipate us moving that deadline
23 back, I think for a number of reasons.

24 But one of the best reasons, I think, is
25 folks have planned for that for some time now, and I

1 certainly understand the gentleman's argument that
2 perhaps it gives us more time to get it done. But
3 on the same token, you've got folks who have been
4 running for maybe statewide offices, and you've got
5 folks who have planned to run at given times, and
6 so, at this point in the game, I anticipate keeping
7 our filing deadlines as is.

8 REPRESENTATIVE HAWKINS: Sure. Well I
9 would just argue, Mr. Chairman, that it gives those
10 people -- North Carolina has ten and a half million
11 people, and it's a pretty big state, so that would
12 give those statewide folks a lot of time to know the
13 people of North Carolina. But I really appreciate
14 your time, Mr. Chairman. And thank you for the
15 ability to ask questions.

16 CHAIRMAN HALL: Thank you, sir.

17 VICE CHAIR SAINE: Thank you.

18 Any other questions?

19 Representative Harrison, and then
20 Representative Carney.

21 REPRESENTATIVE HARRISON: Thank you, Mr.
22 Chair.

23 And Chair Hall, when you were talking about
24 us being bound by the criteria of not using race or
25 partisan data, so any individual can -- any member

1 of the House can draw a district, will they be bound
2 by the same criteria?

3 CHAIRMAN HALL: Yes. So to be clear, only
4 a map that's drawn in this room is going to be
5 considered by this committee. And on these
6 computers in this room, you essentially are bound by
7 that criteria because there is no racial data or
8 election data that's loaded into these computers.

9 But to answer your question, yes.
10 Everybody will be bound by the same criteria. It's
11 not that a member that's not on the committee can go
12 draw whatever map they want to and sort of get
13 around our rules because they're not on the
14 committee. They must follow the criteria.

15 REPRESENTATIVE HARRISON: For a follow-up?

16 VICE CHAIR SAINTE: You're recognized for
17 follow-up.

18 REPRESENTATIVE HARRISON: But it seems
19 like if you come in, and you might have the material
20 with you, it might not be actually loaded in the
21 software, but you might actually have -- I just
22 didn't know if there was some way to enforce that,
23 or how do you plan to do that?

24 CHAIRMAN HALL: Well, you know, I don't
25 plan to search every member who comes into this

1 committee room, nor do I want to do that. I don't
2 want to know what some of you all have in there.
3 But, you know, it's one of those things where, at
4 the end of the day, the members of this committee
5 are elected representatives. You're elected by your
6 constituents to come up here and do a job. And, you
7 know, I'm not going to -- I always try not to
8 question people's motives when they do something,
9 and I think this falls in that same vein.

10 So, you know, members can -- are free to
11 handle those issues as they see fit, but they will
12 follow the criteria in the sense that that data is
13 not in these computers. But I'm not going to -- I'm
14 not going to search their bags when they walk in.

15 VICE CHAIR SAINE: Recognized for a follow-
16 up.

17 REPRESENTATIVE HARRISON: Thank you.
18 Appreciate that.

19 And I think in 2019 we had a portal open
20 for the public to draw maps. Are we planning on
21 doing that this time around?

22 CHAIRMAN HALL: We are.

23 And if the chair will recognize
24 Ms. Churchill to speak to that.

25 MS. CHURCHILL: Yes, ma'am. Representative

1 Harrison, there will be two public terminals
2 available for use starting tomorrow morning at 9:00
3 a.m. The public will be asked to schedule in
4 advance, so that they can assure that a terminal is
5 there during the time that they want to use it.
6 They will be asked to bring a thumb drive, or other
7 device where they can save their work, because the
8 terminal will be reduced back to its original state
9 when they leave.

10 REPRESENTATIVE HARRISON: I appreciate
11 that.

12 I think I have two more questions, and
13 they're quick, hopefully. I don't want to belabor
14 the point, but in the last meeting we had on August
15 18th, several of us had gotten together and
16 advocates had proposed a public participation
17 process and a transparency process.

18 We also all received a letter from Caroline
19 Fry, on Friday, that came from a large group of
20 advocates asking for procedures to be followed by
21 this committee. One of those is transparency
22 related to third-party participation, disclosure of
23 that. Is there any plan to the extent that folks
24 are consulting with counsel or data people, or -- is
25 there any plan for disclosure of that sort of issue?

1 CHAIRMAN HALL: You know, in the same vein
2 of -- as chair of this committee, I'm not going to
3 make it a practice to search people's folders or
4 their bags when they come into this room. I'm also
5 not going to inquire into everybody that they're
6 talking to one way or the other. Again, we're all
7 elected here. You've got a duty to your
8 constituents, and you've got the decision to make as
9 to how you want to carry out that duty. But I, as
10 the chair of this committee, I'm not going to police
11 who folks are talking to.

12 REPRESENTATIVE HARRISON: I appreciate
13 that. And just last follow-up. I don't think I was
14 asking about policing, but just disclosure. And I
15 think that was what the public was asking for.
16 Thank you.

17 VICE CHAIR SAINE: Thank you.

18 I've got Representative Carney and then
19 Representative Hawkins.

20 Representative Carney.

21 REPRESENTATIVE CARNEY: Thank you,
22 Mr. Chairman, and Representative Saine.

23 And Mr. Chairman, thank you for taking all
24 of our questions this afternoon. I want to go back
25 to the drawing of these maps in this room. And I

1 guess I am one that envisioned, at first, that this
2 committee would come in here for two weeks, gathered
3 around the maps, work together in a non-partisan way
4 to draw these maps out in the public, as you've
5 stated. But I'm hearing now, and I'm understanding,
6 member -- when you said any member can come in here
7 from 9:00 to 5:00 Monday through Friday for two
8 weeks -- correct me if I'm wrong.

9 CHAIRMAN HALL: That's right.

10 REPRESENTATIVE CARNEY: But any member of
11 the legislature. House members in here, and I guess
12 the Senate will be doing the same. So it is going
13 to be beyond -- the map drawing will go beyond just
14 the committee members; is that correct?

15 CHAIRMAN HALL: Yes. And one thing I do
16 what to correct that you said. You said Monday
17 through Friday for two weeks. I don't know if it's
18 going to be two weeks or not. I don't know how long
19 it's going to take. But -- and I understand why the
20 lady is asking the question.

21 And, you know, having done this in a
22 similar fashion in 2019, what ends up happening when
23 you leave this committee room open for that long, it
24 gives members an opportunity to come in and draw as
25 they see fit. Just as you and I have the right as

1 House members to draft -- to have drafted whatever
2 bill we want to have drafted.

3 The reason that we're doing it that way is,
4 you know, we wouldn't tell members, prior to the
5 filing or bill drafting deadline, we wouldn't say,
6 you know, only certain members can file bills. You
7 know, sometimes that may be preferable for our given
8 caucuses, but unfortunately, maybe unconstitutional.

9 So, in the same vein, I want to give every
10 member of the House an opportunity to be able to
11 draft their bill, so to speak, if they want to do
12 that. But you also see happening, especially sort
13 of in peak hours, so to speak -- so, you know, in
14 the mornings I would anticipate on like Tuesday,
15 Wednesday, Thursday, you're going to have several
16 people in here. And Representative Hawkins and I
17 have done this in the past. Some of those parts of
18 the maps that we're under right now, he and I
19 literally drew together in this committee room. I
20 mean, substantial parts of them. We didn't have to
21 agree on every single thing, but substantial parts
22 of them, you know, we sat down and drew them
23 together.

24 So some of that will happen. You know,
25 members may ask members from given districts to come

1 over and say, "Hey, what do you think about, you
2 know, this given area? You know it better than I
3 do." So that's going to be allowed, I mean, that
4 teamwork, so to speak. But the reason for leaving
5 it open so much is just to give members the
6 opportunity to have their voice heard, so to speak,
7 in this committee room.

8 REPRESENTATIVE CARNEY: So a follow-up?

9 VICE CHAIR SAINÉ: You're recognized.

10 REPRESENTATIVE CARNEY: If there are 120
11 members out of 120 -- let's say every member decided
12 to come in and put something in to these maps, a
13 little section, or their own, or whatever, their own
14 districts, how do we pull all of that together? And
15 I know staff will be the ones that will pull that so
16 that it meets all of the criteria, and pass all the
17 must, or whatever. Will we come up with one map, or
18 two, or three maps that then the committee would
19 vote on? I'm just asking.

20 CHAIRMAN HALL: I think we'll have multiple
21 maps that the committee will vote on. You know,
22 just like with any other committee, if you're not a
23 member of this committee, if you want to draw a map,
24 you're going to need to get a member of this
25 committee to present that for you. Just like on any

1 other committee, if you've got a bill that, if you
2 can't be in a given committee, or you're not on it,
3 you just want somebody on it to present, they need
4 to present it for you.

5 That's probably -- and actually, now that I
6 say that, it depends on the timing. Let me actually
7 take that back. Because if we have time, you know,
8 to let other members come in and speak to that, just
9 like we would other committees, we'll do that. But
10 I do anticipate that sort of creating a time crunch
11 for us. And so most likely what we're going to do
12 is limit it to the members of this committee
13 presenting amendments and presenting their various
14 maps.

15 REPRESENTATIVE CARNEY: And one final. How
16 will this be -- how will we let the other members
17 know -- and of the course the public that is
18 listening -- how will we let them know about this
19 process? Is there going to be an email sent out to
20 everyone that they will understand what we're doing?

21 CHAIRMAN HALL: We will probably send
22 something out just to say, you know, if you want to
23 come in and draw, that you can. But I think that,
24 you know, the rules are fairly simple. Once you get
25 in here you see, you know, you can go to the station

1 and draw as you see fit. But we will make it known
2 that all House members have the ability to come in
3 here and draw maps during the committee period.

4 REPRESENTATIVE CARNEY: Thank you.

5 REPRESENTATIVE SAINE: Thank you.

6 Representative Hawkins.

7 REPRESENTATIVE HAWKINS: Yes, sir. Thank
8 you, so much, for the second opportunity to ask
9 questions about redistricting. The first question
10 is around the ability for multiple language speakers
11 to use this portal and have their languages
12 translated properly.

13 Representative Torbett and I were in
14 Durham, and he was so kind to allow for a
15 translator, a Spanish speaking translator, for our
16 Spanish speaking population to take part. And maybe
17 this is a question for staff, since we potentially
18 may not have in-person public hearings in the
19 future, how are multiple languages being transferred
20 into the English language, so that we can decipher
21 it and make sure that they have a part in the
22 process?

23 VICE CHAIR SAINE: Ms. Churchill.

24 MS. CHURCHILL: Representative Hawkins, I'm
25 not going to commit to anything, because I'm not

1 sure what we can do with the technology, but we are
2 absolutely happy to look into what our options are,
3 and report that back to the chair.

4 REPRESENTATIVE HAWKINS: Okay. I also
5 heard you were Erika Churchill, and you can do all
6 things, but just putting that out there.

7 MS. CHURCHILL: Speaking French is not one
8 of those things.

9 REPRESENTATIVE HAWKINS: Okay. 10-4. Just
10 --

11 CHAIRMAN HALL: I believe she said not yet.

12 REPRESENTATIVE HAWKINS: Follow up,
13 Mr. Chairman.

14 VICE CHAIR SAINTE: You're recognized for a
15 follow-up.

16 REPRESENTATIVE HAWKINS: And this is just,
17 you know, full transparency, Mr. Chairman, so that
18 the public can know that we're, you know, working
19 with all cards up. Is there, you know, any -- I
20 want to make sure that there have been no maps drawn
21 outside of this building that any of us have been
22 privy to. Can we say that unequivocally that that's
23 been the case?

24 CHAIRMAN HALL: I can't speak for other
25 members of this committee. What I'll say is that I

1 have not contributed to the drawing of any map, at
2 all.

3 REPRESENTATIVE HAWKINS: Awesome. Thank
4 you, Mr. Chair.

5 VICE CHAIR SAINE: Thank you.
6 Representative Warren.

7 REPRESENTATIVE WARREN: Thank you. I
8 propose this to the Chair, but probably going to
9 deflect it to Ms. Churchill. Can you explain what
10 the matrix is on page 2 of this stack of maps?

11 VICE CHAIR SAINE: Ms. Churchill.

12 REPRESENTATIVE WARREN: I knew it. She can
13 do anything.

14 CHAIRMAN HALL: When we're using the word
15 "matrix," generally I'm going to go ahead and
16 deflect that one on over.

17 MS. CHURCHILL: So, Representative Warren,
18 I'm not sure that it is a matrix in the form that
19 many people think of when you say that word. But it
20 was our attempt to keep up with how the group from
21 Duke was allocating the options to create the eight
22 different combinations for a fully assigned
23 statewide map.

24 So when you see the A1 option in the Duke
25 House 01 through 04, that is associated with the

1 western part of the state, that northwestern corner
2 that was unassigned in the fixed map. The option
3 one, the combination is Surry, Wilkes, Alexander,
4 for two members. And Alleghany, Ashe, Watauga, and
5 Caldwell for two members. And so it's just, we
6 wanted you all to know that we were trying to
7 methodical and systematic, following the recipe. So
8 it's just simply the designations they were using to
9 tell us whether to add salt or to add sugar.

10 VICE CHAIR SAINÉ: Thank you, sir.

11 Any other questions for Chairman Hall?

12 Representative Brockman.

13 Representative Brockman, Representative
14 Reives, and then Representative Harrison.

15 REPRESENTATIVE BROCKMAN: I know we're not
16 considering race, but are we considering party
17 registration when we're drawing the maps, as
18 criteria?

19 CHAIRMAN HALL: Nope.

20 VICE CHAIR SAINÉ: Representative Reives.

21 REPRESENTATIVE REIVES: Thank you, Mr.
22 Chair. I had a -- I wouldn't call them a series,
23 but you may call them a series of questions --

24 VICE CHAIR SAINÉ: You're recognized for a
25 series, sir.

1 REPRESENTATIVE REIVES: All right. Thank
2 you.

3 I wanted to make sure, and I apologize if
4 this is repeating anything, I don't know that I have
5 the answer in my head, and I know that when we walk
6 out of this room, that I'm going to get all these
7 questions, so I'm trying to kind of figure out where
8 we are.

9 So on the drawing of the maps, I think my
10 big question is -- and I've got to get my glasses
11 back on because I had to type this because I can't
12 see, and I can't read anymore. See what you guys
13 did to me in 10 months. I had 2020 vision when I
14 got here.

15 But I guess first following up on
16 Representative Hawkins' question, and again, it's
17 just the question we've got to ask. He asked if
18 there have been any maps drawn outside this
19 building. I would like to know if there have been
20 any maps drawn inside the building?

21 CHAIRMAN HALL: No. Great lawyer question.
22 But no.

23 REPRESENTATIVE REIVES: Just making sure.
24 I got to ask.

25 CHAIRMAN HALL: You know, again, I'm

1 speaking for myself, as the gentleman understands.
2 I can't speak for what other members have done, on
3 either side of the aisle, or in the Senate, but I
4 have not participated inside or outside of the
5 drawing of any maps, for this session.

6 REPRESENTATIVE REIVES: That's good. I
7 appreciate that. And going on that same issue, and
8 you really, you and I have talked, and now I want to
9 say publicly, you have been very good about keeping
10 me up to date with what we're trying to do, how
11 we're trying to do it, and I appreciate that. And
12 we had this discussions, but I want to kind of get
13 it clearer now.

14 So my concern is similar to Representative
15 Harrison's concern because here seems to be the
16 problem that you run into. So let's say somebody --
17 and I'll use somebody who would never do this. I'm
18 going to use Representative Bell. So let's say
19 Representative Bell comes in and he's gone, and he's
20 talked to, you know, non-member Billy Richardson,
21 and Billy has said, "Oh, man. This would be a great
22 map for you, John Bell, because, you know, you put
23 all the democrats over here. You put all the
24 republicans here. And then you got you all the
25 black people here and the white people here, and all

1 that stuff." Obviously using racial and partisan
2 data that we're not using.

3 And so then he says, "Here's my map, so you
4 don't have to worry about drawing it." Well if
5 Representative Bell, under what I'm hearing, brings
6 that map in, sits it down in front of him at the
7 terminal, and just draws it on a computer, then he,
8 at that time, has been allowed to draw a map that's
9 been drawn on a computer, so it can be used, but
10 it's still using racial and partisan data.

11 And I'm just like Representative Harrison,
12 I'm definitely not asking anybody to police anyone,
13 but do we have anything in place that would kind of
14 help prevent that? Because to me, that sounds an
15 easy get around, in a legal sense, around the
16 criteria that we've set up.

17 CHAIRMAN HALL: Well, you know, I would
18 initially say that the problem that you face at the
19 end of the day, as the gentleman already knows, and
20 as I've said, I don't think I have the ability to
21 police members of this committee, nor do I want to
22 try to do that. I don't think it can effectively be
23 done.

24 The committees of this -- the members of
25 this committee have an elective duty to do things, I

1 think in the right way. And we have a set of
2 criteria that we have used in here. I know I'm not
3 going to bring in a map and sit down and draw it,
4 but you know, the reality is, we're elected
5 officials, and people will talk to us, and they call
6 us all the time. And throughout this process, many
7 members of the committee and the body are going to
8 be told by folks, whether in their district or in
9 the halls out here, what they think they should do.

10 And in fact, as many of the questions today
11 have shown us, the members of this committee really
12 want the public's comment. And, you know, those
13 members of the public may say, "Representative
14 Reives, I want you to draw the district this way and
15 I want you to do this precinct." And that's up to
16 you to determine how you want to handle doing that.

17 But at the end of the day, I think we've
18 done all that we can, in the sense of we're only
19 putting the data that's allowed to be used in the
20 computers, in this room, and we've got a live audio
21 feed, and a live video feed. I'm not sure that we
22 can do a whole lot else, humanly, to prevent any
23 sort of noise, so to speak, from coming in, other
24 than doing those things.

25 REPRESENTATIVE REIVES: Is it possible,

1 just as a follow-up, that we could at least prevent
2 the bringing in of a physical map to draw from? Is
3 that something possible?

4 CHAIRMAN HALL: Yeah. You know, and you
5 and I talked about this the other day, and I thought
6 it was a great question, something I hadn't really
7 thought about. And, you know, and I certainly, I
8 see your point. But what I don't want to get into,
9 as the chair of this committee, is when, you know,
10 Representative Warren comes in here and he's got
11 this big spread, me, you know, telling the sergeant
12 in arms to take Representative Warren, you know --
13 or take his map away from him or take him out of
14 this committee room. You know, I want to avoid
15 that.

16 And, you know, it's one of those things
17 that there might be a scenario where, you know, you
18 draw one map in here -- you've been through this
19 before -- you draw a map, you have it printed out,
20 and you might take it with you to study it and think
21 about it, and to determine what you want to do to
22 perhaps change it. Maybe you want to take it to
23 your constituents and say, "Look, here's what I'm
24 thinking. What do you think about this?" And maybe
25 they give you input.

1 And you might want to bring that very map
2 back in here, that you drew in this committee, and
3 sit down and, based on the changes -- the input,
4 rather -- the input you've got from other folks, and
5 make those changes. And I don't know how we would -
6 - again, I go back to the word policing it -- how I
7 -- I can't stand over somebody's shoulder and say,
8 "Now that's not the map you drew in here. That's a
9 map -- I don't know where that came from." I just
10 don't -- I don't think it's possible to do that.

11 But what I can tell the members of this
12 committee, as the chair, I won't be bringing any maps
13 in here to draw off of. But I want to be clear that
14 when members of the public that are watching these
15 live video feeds, or members who are sitting in the
16 back, they're going to see members of this committee
17 walking around with maps in their hands. Some
18 people like to have a sheet of paper in front of
19 them. You know, you're probably like me. I like to
20 read, you know, a statute printed out, rather than
21 read it on a computer screen, so that I can write on
22 it, and think about it a little easier.

23 So, because of that, I'm afraid, you know,
24 even if we tried to do that, the optics of removing
25 members from this committee, and people seeing

1 people walking around with maps that have been
2 printed out because they were drawn in here, I think
3 it ultimately results in the best path forward to
4 just say, you know, look folks, the map you draw has
5 got to be the one that you do in here and nowhere
6 else. And that's up to the members and their
7 integrity as to how they want to handle that.

8 REPRESENTATIVE REIVES: And I would say
9 then, based on that, I'm assuming we will be
10 instructing members that you are not to use racial
11 or partisan data in the drawing of the maps that you
12 do in here.

13 CHAIRMAN HALL: Absolutely.

14 REPRESENTATIVE REIVES: And I would also, I
15 guess, say that once we're down to the maps that
16 we're going to be voting on, I mean, I would think
17 that's something that we can ask members when
18 they're presenting a map. You know, if a member
19 comes up and says, "This is my map we're voting on,"
20 you could say, "Okay. You didn't use racial or
21 partisan data," and that won't be considered out of
22 line.

23 CHAIRMAN HALL: I think that's, you know, a
24 fair question for any member of this committee or
25 anyone in the House to ask those very questions.

1 REPRESENTATIVE REIVES: All right. Well
2 then that gets us to the next question I've got.
3 We've got criterion that we've put in place that we
4 set up for the whole map drawing process. What my
5 question is is what criteria are we going to use to
6 choose between grouping options? Are we going to
7 have some plain set out criteria saying this is what
8 gives us the best grouping options?

9 CHAIRMAN HALL: So the committee is not
10 going to adopt any specific of the options and
11 groupings. We have said, as I said a moment ago
12 when I was chairing, the only groupings that we're
13 going to consider, are those that's in this packet.
14 But as you know, and the committee members know,
15 there are multiple possible groupings within that
16 packet. We're not going to vote on which one
17 members have to use.

18 So that's going to be up to the members of
19 this committee what combination of groupings each
20 member wants to use in drawing their maps. Within
21 that, there might be, you know, one particular
22 grouping, or set of groupings, that somehow results
23 in a map that more fairly meets the criteria, over
24 some other set of groupings. But that's -- you
25 know, in large part, some of that is subjective.

1 Not all of it, but some of it is subjective.

2 But it's going to be up to the committee
3 members to decide what set of groupings they want to
4 use. We're not going to limit the committee to any
5 one combination of groupings.

6 REPRESENTATIVE REIVES: Thank you for that.
7 And back to some of Pricey's questions on the Voting
8 Rights Act. Because I'll be the first to say, I
9 don't practice in that area, so I don't profess to
10 completely understand what we're supposed to do.

11 I think what my question would be is, what
12 do you feel like our obligations are under the
13 Voting Rights Act, at this point? Because I
14 understand that you're saying that we won't be using
15 racial data to determine what those districts look
16 like, initially, which I think was done before. So
17 what do you think our obligations would be and how
18 are we going to comply?

19 CHAIRMAN HALL: Well, obviously, you know,
20 we're obligated to comply with section two of the
21 Voting Rights Act. But as I said earlier, we've
22 seen a lot of litigation in this state, and you've
23 followed that, I've followed it. I can't say I've
24 read every line of every single case, because that's
25 all you would ever do, you know, if you were going

1 to go do that. But I've read a lot of it, and in my
2 opinion, what the plaintiffs have said -- so those
3 folks who have tried to set aside maps -- have said
4 -- and their experts, by the way. The experts that
5 they hired to go to court for them. They've all
6 said that there is no legally significant racially
7 polarized voting in North Carolina.

8 That's the evidence in the record from past
9 cases that we have. In my opinion, that's what the
10 Covington Court found. So Judge Wynne found that
11 there was no legally significant racially polarized
12 voting in North Carolina. But certainly, the
13 plaintiffs and their experts made that claim.

14 So without that, we believe, as we've done
15 in the past two sessions that we've redrawn, not
16 considering race is actually, not only proper, but
17 it's the best way forward to make sure that we are
18 complying with, not only the Voting Rights Act, but
19 other state and federal laws.

20 REPRESENTATIVE REIVES: And also, based on
21 the court decisions, I heard you earlier say that we
22 are choosing not to use partisan data, but since
23 there's no binding precedent -- was your statement
24 about that -- then what obligations do
25 you feel like we have, based on the case that talked

1 about partisan gerrymander? Do you feel like that
2 we have any obligations based on that case, or
3 that's just something we all have to talk about?

4 CHAIRMAN HALL: It's not a legally binding
5 precedent. It's not an appellant, because the
6 gentleman knows it wasn't an appellate court that
7 made any of those decisions. So to answer the
8 technical aspect of your question, it is not legally
9 binding.

10 However, we have adopted some of the
11 opinion in our criteria, so to the extent that we
12 adopted it into our criteria, that's binding on this
13 committee. We've also taken some things that we
14 didn't really adopt as criteria, but simple
15 instructions to the committee that was in that case,
16 and that is all of these computer stations that we
17 see around, the live audio, live video, we're
18 voluntarily doing that.

19 Again, not binding on us at all. There is
20 certainly no state law that requires this body to
21 have TV cameras to watch us do anything. I mean, we
22 can have -- we have to have open meetings, when the
23 body's meeting, but there's no law that requires us
24 to be transparent in this process. We are
25 voluntarily choosing, at every single step along

1 this line. We are going above and beyond what the
2 law requires us to do, in my opinion, in terms of
3 transparency.

4 REPRESENTATIVE REIVES: All right. And I
5 think I've got one follow-up that may be more
6 appropriate for staff, but if you'll just determine,
7 Mr. Chair, who is best to do it. Because while you
8 were talking, I was also thinking back on the Voting
9 Rights Act. I guess my question is, how do we know
10 we're in compliance with the Voting Rights Act with
11 a map then, if we're not using racial data during
12 this time?

13 CHAIRMAN HALL: Well, again, I would fall
14 back on what we've done in the past. And we have
15 done this in the past in the very method -- with the
16 very method that we're using right now. We haven't
17 used racial data. And those courts have upheld that
18 process. So we're essentially sticking with what
19 works.

20 As the gentleman knows, this is an
21 ever-evolving body of law around redistricting. All
22 we can do is try to stick with what we know works
23 based on past precedent. And in this particular
24 instance, we're confident, just as we've done in the
25 past, that we should not use racial data at all, and

1 that doing so, we'll be in compliance with all state
2 and federal laws.

3 REPRESENTATIVE REIVES: Okay. And I'm
4 going to repeat what I think I'm hearing, and just
5 tell me if I'm accurate. So, if I'm hearing you
6 correctly, we won't be doing anything proactively to
7 see if we're in compliance. What we'll be doing is
8 we'll draw maps, and it's our believe that those
9 maps will comply. And then if the courts tell us
10 they're not in compliance, then that would be when
11 remedial measures would be taken.

12 CHAIRMAN HALL: In my opinion, not using
13 racial data will ensure that we are in compliance
14 with those laws. So yes.

15 REPRESENTATIVE REIVES: Okay. Got it. And
16 when we get down to the point on voting on these
17 maps, I mean, are we going to do any kind of culling
18 -- I'm with you in the sense I want this to be more
19 of an efficient process, and if I'm hearing
20 correctly, what our process is, in theory, 120
21 members can walk in here and draw 120 maps, and then
22 can have 120 amendments, which could really kind of
23 have us all over the place. Is there anything that
24 we're doing to kind of cull this down so that we're
25 not voting on 120 maps when we make our committee

1 vote?

2 CHAIRMAN HALL: Well, you know, the
3 gentleman may want to address that in caucus, before
4 we vote on these maps. But outside of that, you
5 know, it's one of those things that I don't know how
6 many we're going to have. I don't want to sit here
7 and say, now look, we're not going to consider --
8 we're only going to consider 10 maps, so come up
9 with your best 10. I don't want to do that. I want
10 to give members of this body who are elected the
11 opportunity to be heard.

12 You know, on the floor, people can put
13 forth amendments all day, just like, you know, we
14 see them often do. And so we don't want to limit
15 that. But what I'll say is, you know, if we get in
16 here as a committee, and we've got a ton of these
17 amendments and proposed maps coming in, at some
18 point -- and the chair -- I will say, I will talk to
19 you about this ahead of time -- at some point, you
20 and I are going to have to get together and say, you
21 know, we're going to have to talk to the folks in
22 our respective caucuses and limit the number of maps
23 and amendments that we're putting forth in this
24 committee, and tell them, save it for the floor. If
25 you want to put it forth on the floor, they're

1 certainly welcome to do that.

2 But what I'll commit to is an interactive
3 process with you, especially, and really all the
4 members of this committee, that we try to get it
5 done in an efficient process. And that may take,
6 you know, you and I putting our heads together and
7 figuring out which amendments we should take up on
8 this committee, and which may need to wait for the
9 floor.

10 REPRESENTATIVE REIVES: All right. Well I
11 think those are my questions. Thank you.

12 VICE CHAIR SAINÉ: Thank you, sir.

13 Next, Representative Harrison.

14 REPRESENTATIVE HARRISON: Thank you, Mr.
15 Chair.

16 And Mr. Chair, I apologize for the barrage.
17 I think these are really simple questions. If I
18 heard Erika correctly, the public can draw maps on
19 public terminals that are set up, but not in this
20 room or in 544; is that accurate?

21 REPRESENTATIVE SAINÉ: Ms. Churchill.

22 MS. CHURCHILL: Yes, Representative
23 Harrison. That is accurate. The drawing stations
24 in room 544 and 643 are reserved solely for members
25 of the General Assembly.

1 REPRESENTATIVE HARRISON: So as a follow-up
2 to that, did I hear that we're only considering maps
3 that are drawn in this room and in 544? And if
4 that's the case, then what are we doing with the
5 public's maps?

6 CHAIRMAN HALL: So --
7 Mr. Chairman, sorry.

8 REPRESENTATIVE SAINE: Go ahead.

9 CHAIRMAN HALL: So if a member of the
10 public comes in, and as I've said earlier, just like
11 any other bill, you know, one of your constituents
12 or the member of the public may say, "Look,
13 Representative Harrison, here's what I think you
14 should do," you're obviously welcome to take a look
15 at that. And herein lies sort of the friction
16 between the position that Representative Reives
17 talked about, and what you're saying right now.

18 So if I'm to say, as the chair of this
19 committee, you cannot bring a map in here, period,
20 well, if one of your constituents says,
21 "Representative Harrison, I went to the portal
22 downstairs, I drew this map, and I really think this
23 is a good idea," and you agree with it, if we have
24 that rule in place, you wouldn't be able to bring
25 that map in this room. You wouldn't be able to take

1 into account the -- and that's literally public
2 input that you wouldn't be able to take into
3 account.

4 So the maps that we take up must be drawn
5 in this committee room. Now, we'll talk about maps
6 that are drawn, you know, downstairs, but with the
7 same data loaded into the computers, and how we'll
8 go about handling that, you know, if a member
9 literally wants to take one of those up. But what I
10 anticipate right now is requiring that it be drawn
11 in this committee room.

12 REPRESENTATIVE HARRISON: I appreciate
13 that, and I just have one question and I think I'm
14 done. I must have missed the congressional map
15 discussion. Have we talked about that? When does
16 it happen?

17 CHAIRMAN HALL: So one thing I do want to
18 clarify. So in this room, we won't be drawing any
19 state Senate maps. Just as, you know, we're not
20 going to let them screw up our state House maps, so
21 they're not going to be able to draw ours. The
22 congressional maps, so I think technically, and
23 staff can correct me if I'm wrong, I think the data
24 is in there right now to be able to draw a
25 congressional map.

1 Is that right, Ms. Churchill, just in
2 general --

3 Okay. So you could start on a
4 congressional map if you wanted to. That's up to
5 each member of this committee. I know my hope is is
6 that we sort of tackle the state House map first, as
7 a committee. So if you're drawing, just know, the
8 first map that I anticipate taking up as a chair, is
9 going to be the state House map. So you need to
10 work on that one first if you want it to be ready to
11 go to put forth whatever your amendment may be. And
12 then after that, at some point, we'll do the
13 congressional map.

14 REPRESENTATIVE HARRISON: If I could follow
15 up --

16 VICE CHAIR SAINE: You're recognized for a
17 follow-up.

18 REPRESENTATIVE HARRISON: And I'm sorry if
19 you said this -- so when do you think we're going to
20 be done with all these maps, in terms of us enacting
21 them?

22 CHAIRMAN HALL: Yeah. You know, I really
23 don't know when we're going to be done. What I'll
24 say is that I believe we need to be done by the end
25 of this month. We may have a few more days past

1 that, that the state board of elections can still
2 give us turnaround. But the mindset that I've had
3 is let's get this done by the end of October, that
4 way everyone gets ample time to know what districts
5 are going to look like and the state board of
6 elections can get things done.

7 But, you know, the problem is, you know, we
8 are drawing the whole map for the first time, I
9 guess since 2011. And what we've done, you know,
10 since I've been in this body -- I've been through
11 this process a number of times, but it's always
12 typically been with a more limited part of the map
13 that we're required to redraw. So that's one of the
14 issues. And that is, this is so unprecedented, we
15 have never done it this way. This body has never
16 drawn the whole map in complete public view with
17 live audio, live video. We don't know how long that
18 process is going to take. But, you know, the goal
19 is to get it done by the end of October.

20 REPRESENTATIVE SAINE: Representative
21 Carney.

22 REPRESENTATIVE CARNEY: Just one last
23 question, and Mr. Chairman, thank you so much for
24 your indulgence. And we're about to beat the Senate
25 on this committee meeting length of all of us being

1 able to answer questions, so I appreciate that.

2 I'm just hung up on the maps being drawn in
3 this room, and I'm trying not to be. Because on one
4 hand we're stating that the only maps we will
5 consider will be the maps that are drawn on these
6 computers, in these rooms. But now I'm hearing that
7 it doesn't preclude someone coming to me, from the
8 public, and giving me information and a map, and
9 then I come in here and transport it into the
10 portal.

11 That takes that to the level of there can
12 be maps -- and help me understand if I'm wrong --
13 there can be maps drawn outside of this building,
14 from any group, and given to a member, or a group of
15 members, and they can come in and put it into the
16 portal. It would be under their name. Is that
17 correct?

18 CHAIRMAN HALL: Well, I guess in a literal
19 sense, you certainly could hear from somebody else,
20 and come in here, and draw a map. And there's
21 really nothing we can do about that. It's a first
22 amendment issue. The members of this committee have
23 a first amendment right to go talk and hear from
24 their constituents. Their constituents have a first
25 amendment right to talk to their legislatures. Well

1 even if you're not their legislature. The folks of
2 this country have a right to say what they want to,
3 and if you're walking down the street, they can come
4 up to you and say, "Representative Carney, here's
5 what I think you should do."

6 It's then up to you, as a member of this
7 committee, to handle that in whatever way you see
8 fit. Just like you would a bill. Some individual
9 in your district, or not your district, may write
10 out a bill for you. You're not going to go
11 introduce that, obviously, and us vote on it to go
12 through the bill drafting process. So in some ways,
13 you know, it's very similar.

14 The other thing that I'll say though, I
15 think what may be getting lost in the weeds is, when
16 you actually sit down to do this, this is a big
17 state. There's a bunch of precincts on the
18 congressional maps. You have to get things -- with
19 zero deviation it's going to be very difficult to
20 sit down and memorize an entire map, and come in
21 here and sit down and pinpoint, you know, wherever
22 an outside map was that you saw.

23 But I think, fundamentally, the issue is
24 going back to the law would allow exactly what
25 you're saying, but even on another level. It would

1 allow you to go hire somebody to draw whatever map
2 you felt like was the best map, and bring it in
3 here, and put it before this committee. But we're
4 going above and beyond what the law requires, in
5 terms of transparency. We're going to require them
6 to be drawn in here.

7 REPRESENTATIVE CARNEY: Thank you.

8 REPRESENTATIVE SAINE: Any other questions
9 for Chairman Hall? Seeing none, I believe the
10 business of the committee is completed today.

11 Is that right, Chairman Hall?

12 CHAIRMAN HALL: That's right, Chairman
13 Saine. And the members, we'll be back in here at 9
14 o'clock in the morning. We'll give in, and members
15 will be able to draw. And let's see how much we can
16 get done tomorrow and perhaps part of Thursday and
17 see if we need to work on Friday.

18 REPRESENTATIVE SAINE: You've heard the
19 gentleman. Come in tomorrow ready to work. With
20 that --

21 I'm sorry. Representative Carney.

22 REPRESENTATIVE CARNEY: So that turned into
23 one more question.

24 VICE CHAIR SAINE: You're recognized.

25 REPRESENTATIVE CARNEY: Does that mean that

1 the full committee, Monday through maybe Friday, if
2 we have a duration, we are to be present in here
3 every day that the maps are being drawn?

4 CHAIRMAN HALL: No. You don't have to
5 present. That's completely up to you as a committee
6 member. You can come for all of it or come for none
7 of it. But it's up to you.

8 REPRESENTATIVE CARNEY: We have a choice.
9 Thank you.

10 VICE CHAIR SAINTE: We stand adjourned.
11 Thank you.

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I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.

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Expert Report on North Carolina's Enacted Congressional Districts

Christopher A. Cooper

November 29, 2021

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Introduction

My name is Christopher A. Cooper. I have been asked to provide a brief analysis of the partisan characteristics of North Carolina's congressional maps, enacted on November 4, 2021, for purposes of Plaintiffs' motion for preliminary relief in *Harper v. Hall*, No. 21 CVS 500085. I am conducting this analysis as a private citizen and am not speaking for my employer, nor am I conducting this work on university time, or using university resources.

I am the Robert Lee Madison Distinguished Professor of Political Science and Public Affairs at Western Carolina University, where I have been a tenured or tenure-track professor since 2002. I hold a PhD and MA in Political Science from the University of Tennessee, Knoxville and a BA in Political Science and Sociology from Winthrop University. My academic research focuses on state politics and policy, elections, and southern politics—with particular application to North Carolina. To date, I have published over 50 academic journal articles and book chapters, co-edited one book, and co-authored one book (both with the University of North Carolina Press). I teach courses on state and local politics, political parties, campaigns, and elections, southern politics, research methods, and election administration. In 2013, I was named the North Carolina Professor of the Year by the Carnegie Foundation for the Advancement of Teaching and I have received Western Carolina University's highest honors in teaching (Board of Governors Teaching Award) and scholarship (University Scholar).

Much of my academic and applied research relates to North Carolina politics and policy and I am a frequent source for news media seeking comments about politics in the Old North State. My quotes have appeared in national and international outlets including the New York Times, Washington Post, Politico, BBC, and the New Yorker, as well as in North Carolina-based outlets including the News and Observer, Charlotte Observer, Asheville Citizen Times, Carolina Journal, Spectrum News, and National Public Radio affiliates in Chapel Hill, Charlotte, and Asheville. I have written over 100 op-eds on North Carolina, southern and national elections and politics, including pieces in the Atlanta Journal Constitution, NBC.com, the News and Observer, Charlotte Observer, and Asheville Citizen Times, and regularly give talks about North Carolina politics, North Carolina elections, and the redistricting process to groups throughout the state. I previously served as an expert witness in *Common Cause v. Lewis*.

I am being compensated at a rate of \$300 per hour.

The bulk of the analysis that follows analyzes the consequences of the choices made district by district. Before proceeding into this analysis, however, a few points of context:

- North Carolina is, by virtually any measure, a “purple state” with healthy two-party competition. The North Carolina Governor is a Democrat, while the US Senators are Republicans. There are more registered Democrats than Republicans in the state, and in the 2020 election, the two-party vote share difference between Trump and Biden was the smallest of any state that Donald Trump won.
- North Carolina does not show as much evidence of “natural clustering” as other states. According to Stanford University political geographer Jonathan Rodden, “Due to the presence of a sprawling knowledge-economy corridor, a series of smaller automobile cities with relative low partisan gradients, and the distribution of rural African Americans, Democrats are relatively efficiently distributed in North Carolina at the scale of congressional districts.”¹ In other words, massive partisan disparities in election outcomes in favor of one party or the other cannot be discounted as simply a result of where Democrats and Republicans happen to live.
- Gerrymandering, drawing districts to benefit one party at the expense of the other, is generally accepted as a threat to democracy in North Carolina and across the nation. This statement is true regardless of partisanship. For example, a 2018 Elon Poll found that just 10% of registered voters in North Carolina believe the current redistricting system is “mostly fair.” A recent op-ed in the *News and Observer* by Republican Carter Wrenn and Democrat Gary Pearce illustrates bi-partisan agreement on the evils of gerrymandering in clear terms. They explain, “We agree that gerrymandering is a major problem that undermines the foundations of our democracy. We agree that districts shouldn’t be drawn to help one political party, no more than college basketball games should be rigged to favor one team.”² The preference for fair maps is not a partisan one.

¹ Rodden, Jonathan, *Why Cities Lose* (New York: Basic Books, 2019), 173.

² Gary Pearce and Carter Wrenn. “We’re usually on opposite sides of political battles. But we agree on NC voting maps.” *News and Observer*. October 21, 2021.

While the district-by-district analysis is key to understanding the ways in which the map will translate into advantage for one party or the other in any given district, the map is best thought of as a single organism, rather than 14 separate congressional districts---when one district moves in one direction, another district must shift in response. As a result, it is worth pausing and considering some of the general characteristics of the map before moving into a district-by-district analysis.

- North Carolina earned an additional congressional seat because of population growth that occurred mostly in urban areas: according to an analysis of U.S. census data by the News and Observer, more than 78% of North Carolina’s population growth came from the Triangle area and the Charlotte metro area.³ Despite that fact, the number of Democratic seats actually *decreases* in the current map, as compared to the last map. The last map produced 5 Democratic wins and 8 Republican wins; this map is expected to produce 3 Democratic wins, 10 Republican wins and 1 competitive seat.
- Democratic strongholds Mecklenburg, Guilford, and Wake Counties are each divided across three districts, despite the fact that there is no population-based reason to divide them this many times. In the previous map, Mecklenburg was divided into two districts, Wake into two districts, and Guilford fell completely in one district. The strategic splits in the enacted map ensure that large numbers of voters will have no chance of being represented by a member of their own party. These splits will also lead to voter confusion and fractured representational linkages. The shaded red-and-blue maps that follow this introductory section provide a graphical representation of each of these county splits.
- The map produces geographic contortions that combine counties in ways that, in some circumstances, have never existed before.
- The double-bunking that occurs in the enacted map advantages the Republican Party. A Republican (Virginia Foxx) and a Democrat (Kathy Manning) are both drawn into in an overwhelmingly Republican district, thus virtually guaranteeing that the Democrat (Manning) will lose her seat. There are no cases where two Republican incumbents seeking re-election are double-bunked. The map also produces at least one district with no incumbents, but that district overwhelmingly favors the Republican Party.
- Neutral, third-party observers have been uniform in their negative assessment of the map. For example, The Princeton Gerrymandering Project gives the map an “F” overall, an “F” in partisan fairness and a “C” in competitiveness. Dave’s Redistricting App assess the map as “very bad” in proportionality and “bad” in terms of competitiveness. Both of these groups are nonpartisan and have given similar grades to Democratic gerrymanders in other states.

³ David Raynor, Tyler Dukes, and Gavin Off. “From population to diversity, see for yourself how NC changed over 10 years.” News and Observer, Oct. 18, 2021, <https://www.newsobserver.com/news/local/article253546964.html>.

In the text that follows, I refer to the “current” maps as the maps that were used in the 2020 election and the “enacted” maps as the maps that have been approved by the North Carolina General Assembly for use in the 2022 elections. While I conducted all of the analysis that follows and wrote all of the verbiage, the shaded red-and-blue maps were produced by John Holden, a GIS expert, using a composite measure of partisanship that I selected and describe below.

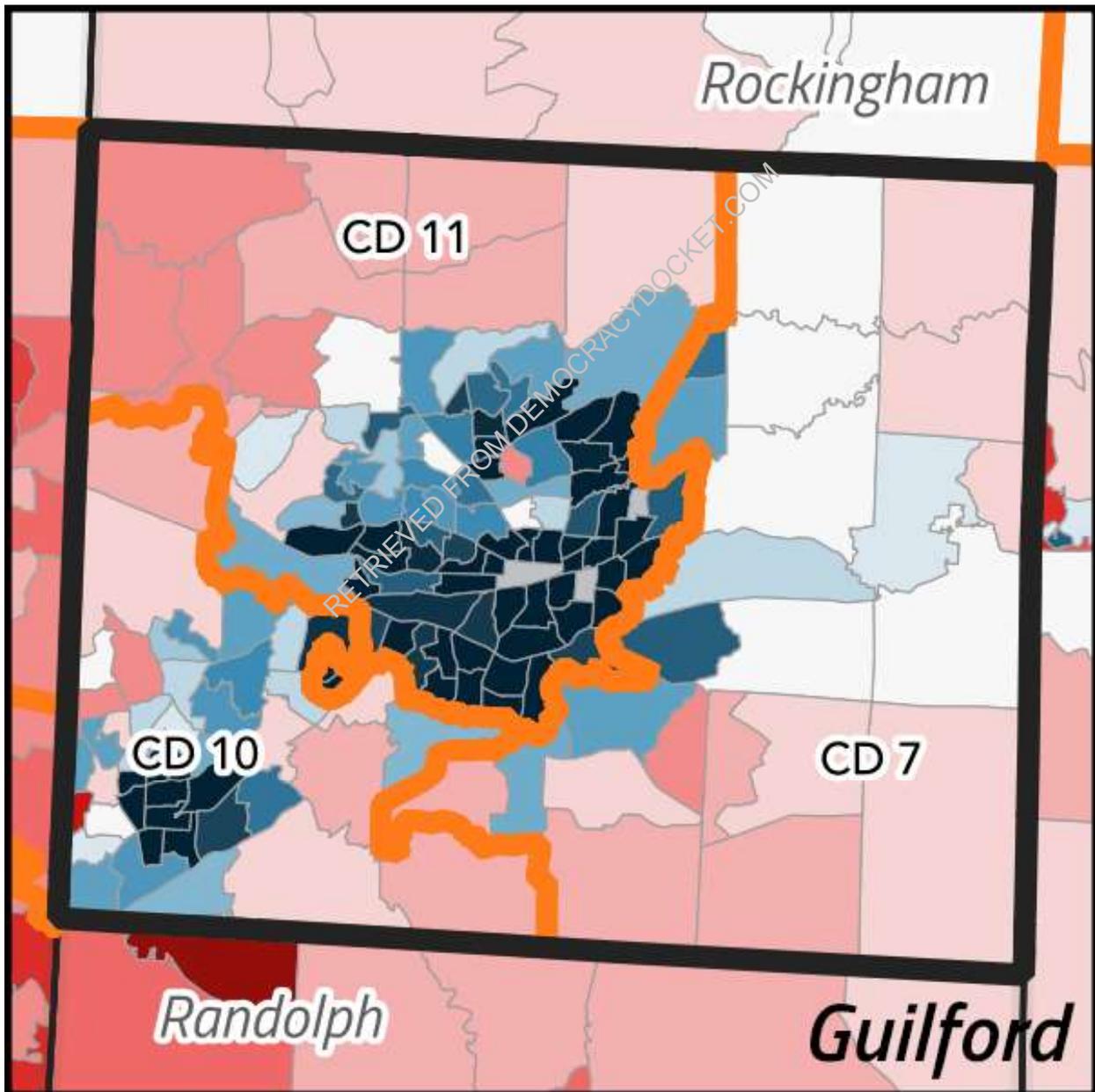
I use three different metrics in the analysis that follows. The first is the Cook Political Report’s Partisan Voter Index (PVI), a standard metric of the expected “lean” of a district using a composite of past elections. The second is a metric created for this analysis that combines the results of the Secretary of Labor and Attorney General races, the two closest Council of State races in North Carolina in 2020, into one measure, which I term the Competitive Council of State Composite (CCSC). This measure allows us to use relatively low-profile elections to get a sense of the “true partisanship” of the district. It is presented below as the raw difference in votes and is used in the shaded red-and-blue maps that follow. Finally, I mention the percent of the electorate that voted for Donald Trump in the 2020 election to give yet another sense of the partisan lean of the district. As the table below shows, the metrics all tell a similar story: the enacted map will produce 10 Republican seats, 3 Democratic seats, and one competitive seat. At most, the enacted map could be expected to elect four Democrats to office in 2022—fewer than in the current map and far below Democratic representation statewide, or the results of other recent statewide elections.

Table 1. Summary Data for Each Enacted Congressional District

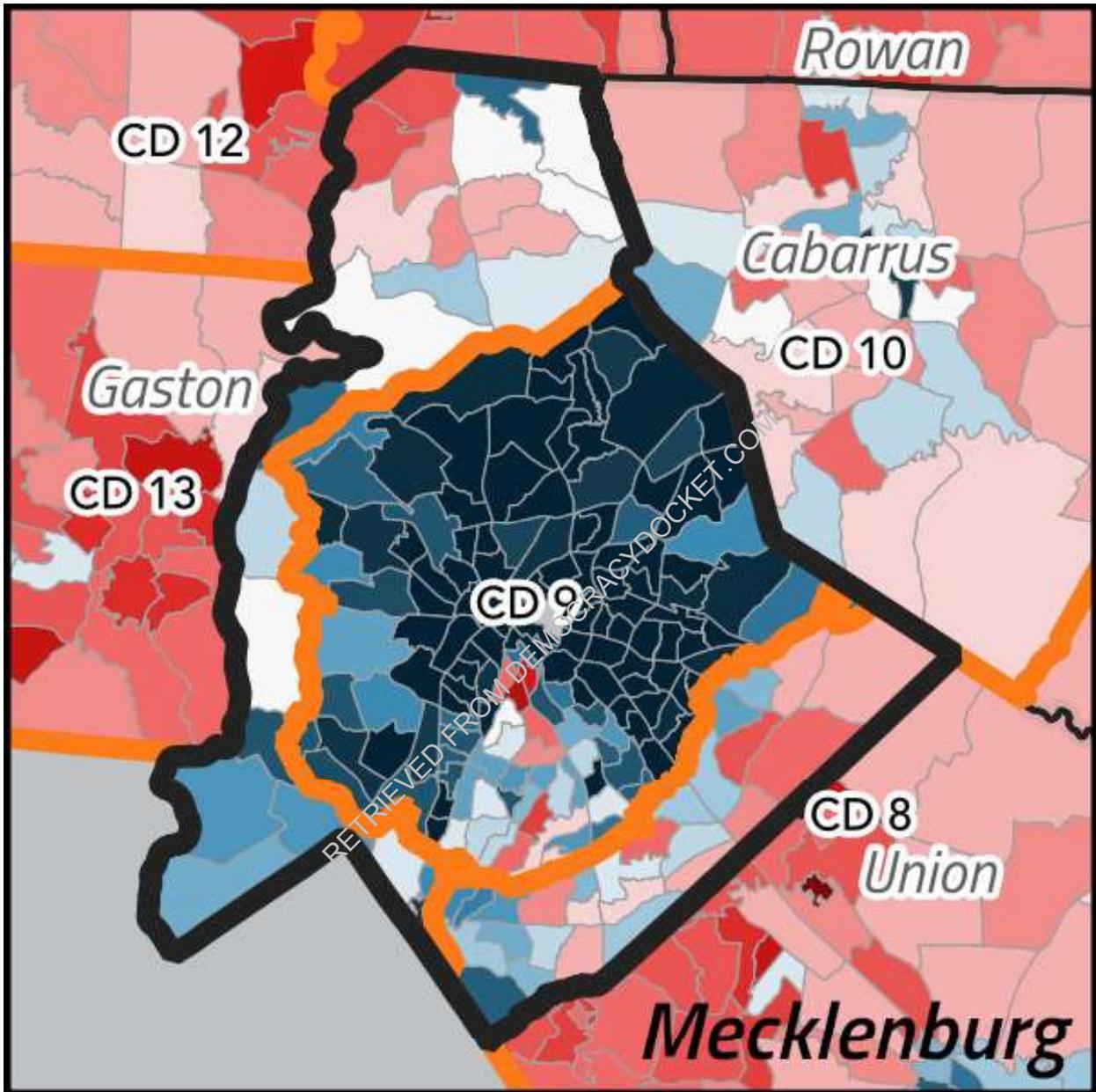
District	PVI	CCSC	Trump Perc
1	R+10	R + 98,969	57%
2	Even	D +40,396	48%
3	R+10	R +111,451	58%
4	R+5	R + 28,045	53%
5	D+12	D +227,327	34%
6	D+22	D + 374,786	25%
7	R+11	R + 115,682	57%
8	R+11	R +125,842	57%
9	D+23	D + 325,717	25%
10	R+14	R + 156,833	60%
11	R+9	R + 94,407	57%
12	R+9	R + 102,404	56%
13	R+13	R + 150,187	60%
14	R+7	R + 58,387	53%

I begin by showing shaded red-and-blue maps demonstrating the trisection of Wake County, Mecklenburg County, and Guilford County. These maps show county lines in black, VTD lines in gray, and district lines in orange. The red and blue shading represents the relative vote margin using my CCSC composite—the composite of the Secretary of Labor and Attorney General races in North Carolina in 2020—in each VTD, with darker blue shading representing larger Democratic vote margins and darker shades of red indicating larger Republican vote margins (both normalized by acreage).

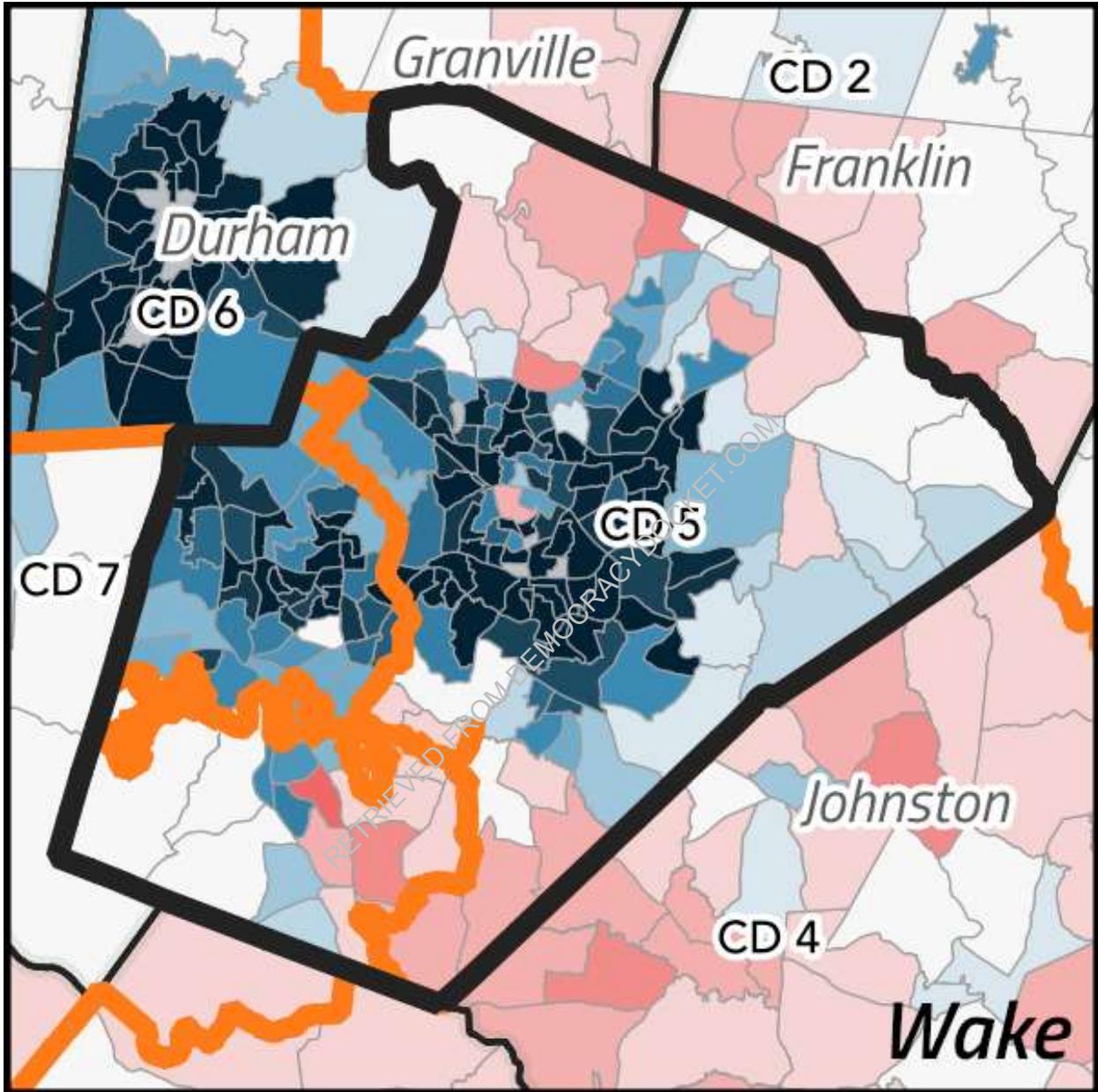
Map 1. Close-Up of Wake County VTD CCSC estimates across three districts



Map 2. Close-Up of Mecklenburg County VTD CCSC estimates across three districts



Map 3. Close-Up of Guilford County VTD CCSC estimates across three districts



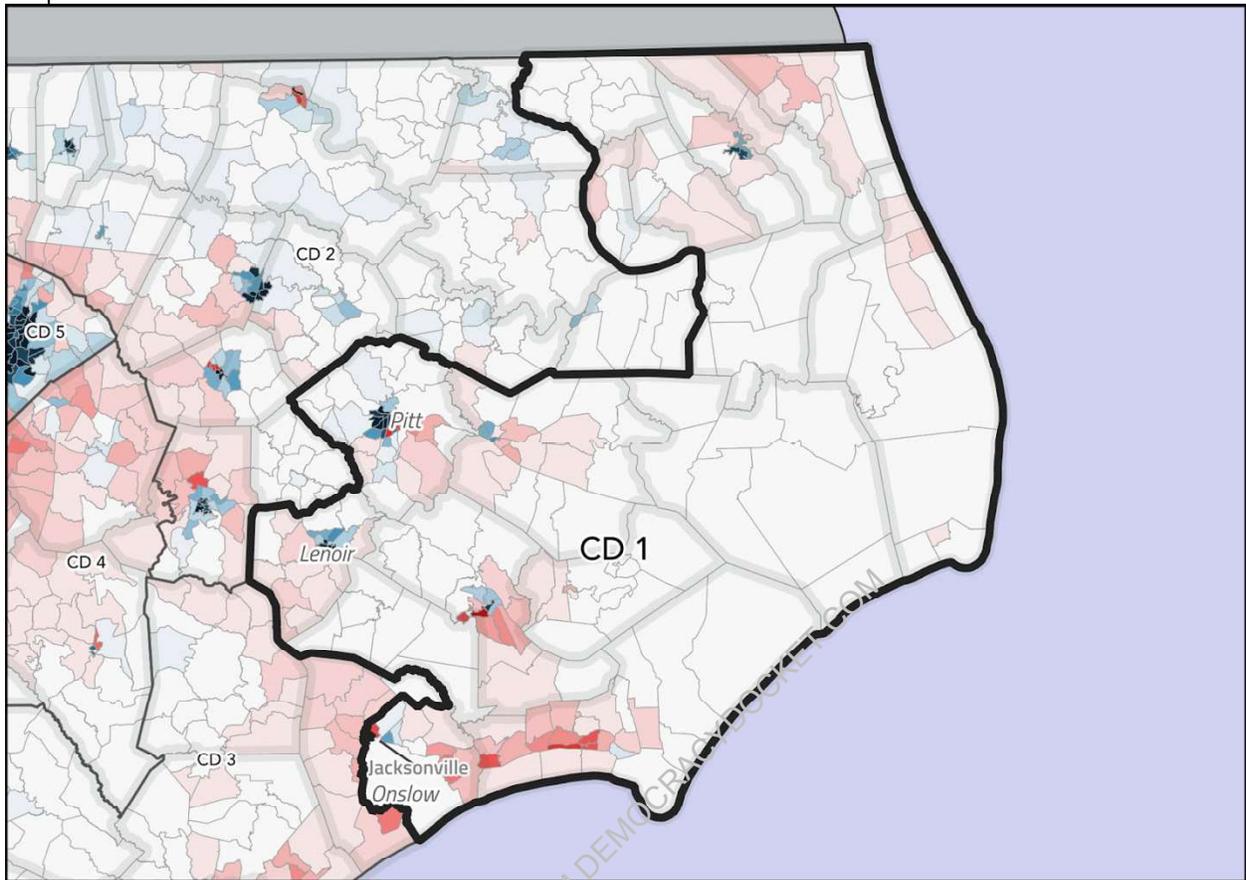
NC-1

The enacted 1st congressional district is mostly comprised of the current NC-3, but also includes part of the current NC-1. Most potential congressional districts in this part of North Carolina would likely lean towards the Republican Party, but to create extra advantage for the Republican Party in other parts of the map, the current map brings the Democratic-leaning areas of Pitt County into District 1, thus removing them from NC-2 and allowing NC-2 to become much more competitive for the Republican Party.

Despite moving the district line westward to include the Democratic portion of Pitt County, the enacted district remains virtually a guaranteed Republican victory with a PVI of R+10 (the current NC-3 is R+14). No Democratic member of Congress in the country represents a district that leans this far towards the Republican Party.

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Map 4: VTD CCSC estimates for NC-1



NC-2

The enacted 2nd congressional district includes the core of the current NC-1, along with portions of the current NC-4 and NC-13 districts. The area that largely comprises the new 2nd district is currently represented by Democrat GK Butterfield and is considered a D +12 district by the Cook Political Report, making it a safe Democratic seat. Butterfield has the longest uninterrupted tenure of any member of North Carolina's congressional delegation. Under the enacted map, however, Butterfield's district changes radically, loses many of its Democratic strongholds (including the aforementioned loss of the Democratic areas in Pitt County) and now picks up enough Republican voters to move the district to "even," according to the Cook Political Report. For example, it picks up Caswell County, which does not include a single Democratic-leaning VTD, according to the 2020 Attorney General/Secretary of Labor "CCSC" composite in the map shown below. The 2020 Presidential vote share and composite score reinforce that this is an extremely competitive district. This is an enormous shift for what was formerly a Democratic stronghold.

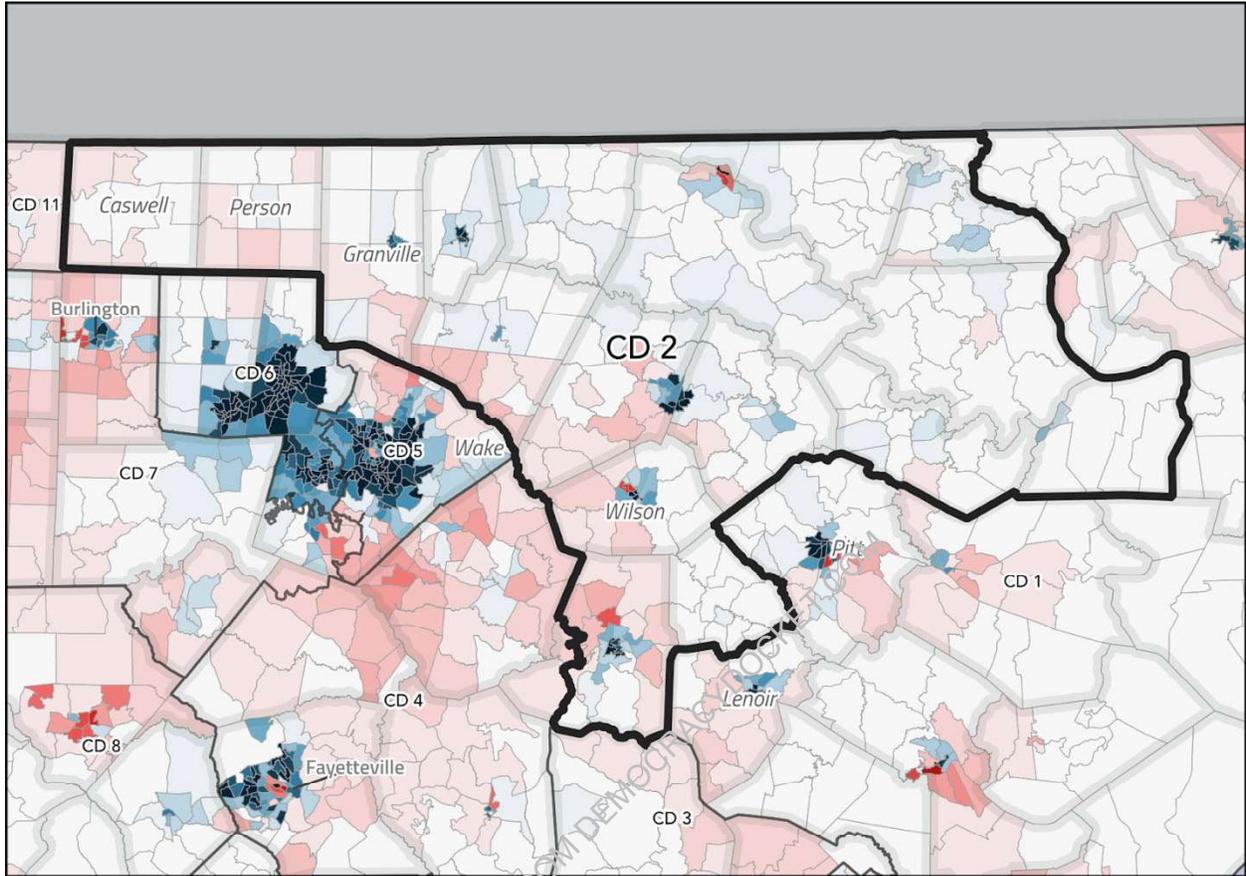
In addition to producing a clear partisan shift, the district is difficult to understand from a communities of interest perspective. The enacted district no longer includes any of Pitt County nor the campus of East Carolina University, which provided much of the economic engine of the district, and now stretches from the Albemarle Sound to the Raleigh-Durham-Chapel Hill metropolitan area, and eventually terminates in Caswell County, just northeast of Greensboro. Notably, Washington County and Caswell Counties have never been paired together in a congressional map in the history of North Carolina, further illustrating how little these counties have in common.

At a micro-level, the changes will split communities in important ways. For example, the cut-out in Wayne County, just west of Goldsboro, NC, splits the students and families in Westwood Elementary School (which is located in NC-2) into two separate districts (NC-2 and NC-4). At one point, NC-2 passes through a narrow cut-off between the Neuse River to Old Smithfield Road that is less than one-third of a mile wide.

After the maps were enacted, G.K. Butterfield announced that he will not seek re-election,⁴ making the district even more likely to shift to the Republican Party. If the Republicans take over this seat, it will be the first time that this part of North Carolina has been represented by a Republican since the late 19th Century.

⁴ Bryan Anderson, "Democrat Rep. Butterfield to Retire, New District is a Toss-Up." Associate Press News. <https://apnews.com/article/elections-voting-north-carolina-voting-rights-redistricting-e221c0732f457b2273f54ef102424eca>

Map 5. VTD CCSC estimates for NC-2



NC-3

The enacted third congressional district is mostly carved out of the current 7th congressional district, but also includes portions of the 3rd, and 9th districts. The current 7th district is considered R+11 by the Cook Political Report.

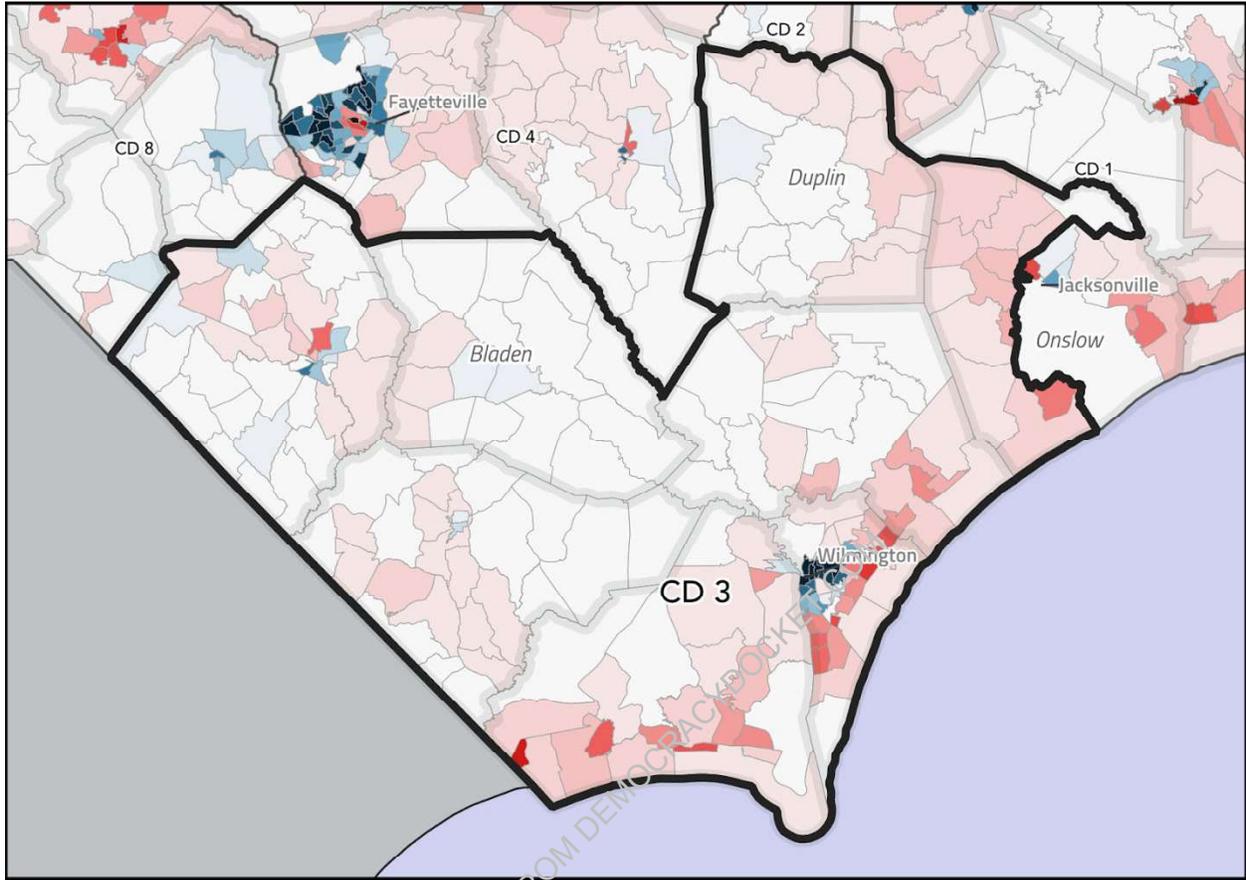
This district once again denies North Carolina's Sandhills a consistent district of their own, despite repeated calls during the redistricting process,⁵ and instead places portions of the Sandhills with the coastal enclave in and around Wilmington. The enacted map also creates an odd appendage in Onslow County that, as described in the section on NC-1, makes little sense from a communities of interest perspective.

The enacted district will almost certainly elect a Republican. It is slightly less Republican than the current NC-7 but still is considered R+10 district by the Cook Political Report, favored the Republicans by over 110,000 votes in the 2020 Attorney General/Secretary of Labor "CCSC" composite, and Donald Trump won the district with 58% of the vote. It is currently represented by Republican David Rouzer and is expected to remain in Republican hands.

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⁵ See, for example, Dreilinger, Danielle, "1 woman, 1 North Carolina address, 5 congressional districts. As North Carolina prepares to add a 14th congressional seat, Sandhills residents asked: why can't it be theirs? *Fayetteville Observer*. Nov 5, 2021.

Map 6. VTD CCSC estimates for NC-3



NC-4

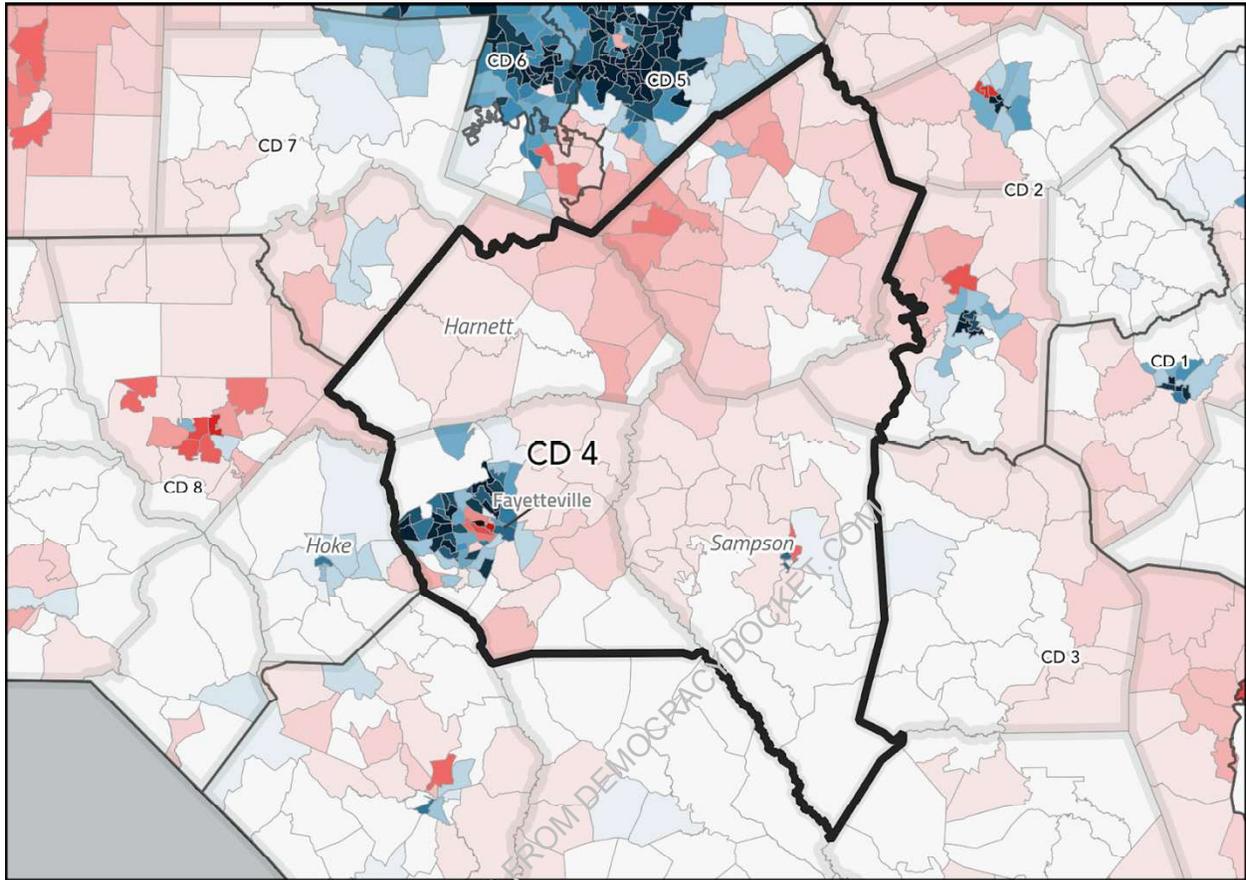
The enacted 4th congressional district is carved out of a pocket of North Carolina that includes Johnston County and a portion of Harnett County, both of which are adjacent to Wake County, as well as portions of the Sandhills. The district is carved out of leftover portions from districts 7 and 8 which were R+11 and R+6, respectively. It combines the Democratic-leaning area of Fayetteville with those areas to create a Republican-leaning district.

In addition to the carve out of Republican-leaning VTDs in Wayne County referenced above, this district takes a series of confusing jogs in the Northwest part of Harnett County. A citizen driving Southwest on Cokesbury Road would begin in NC-7, then rest on the line between NC-7 and NC-3, then into NC-4, then back on the line between the two, just before Cokesbury turns into Kipling Road whereupon the driver would move back into NC-7.

This district, which has no incumbent, is considered an R+5 district by the Cook Political Report, gave 53% of its vote share to Donald Trump in 2020, and gave an advantage to Republicans of about 28,000 votes in the 2020 Attorney General/Secretary of Labor "CCSC" composite.

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Map 7. VTD CCSC estimates for NC-4



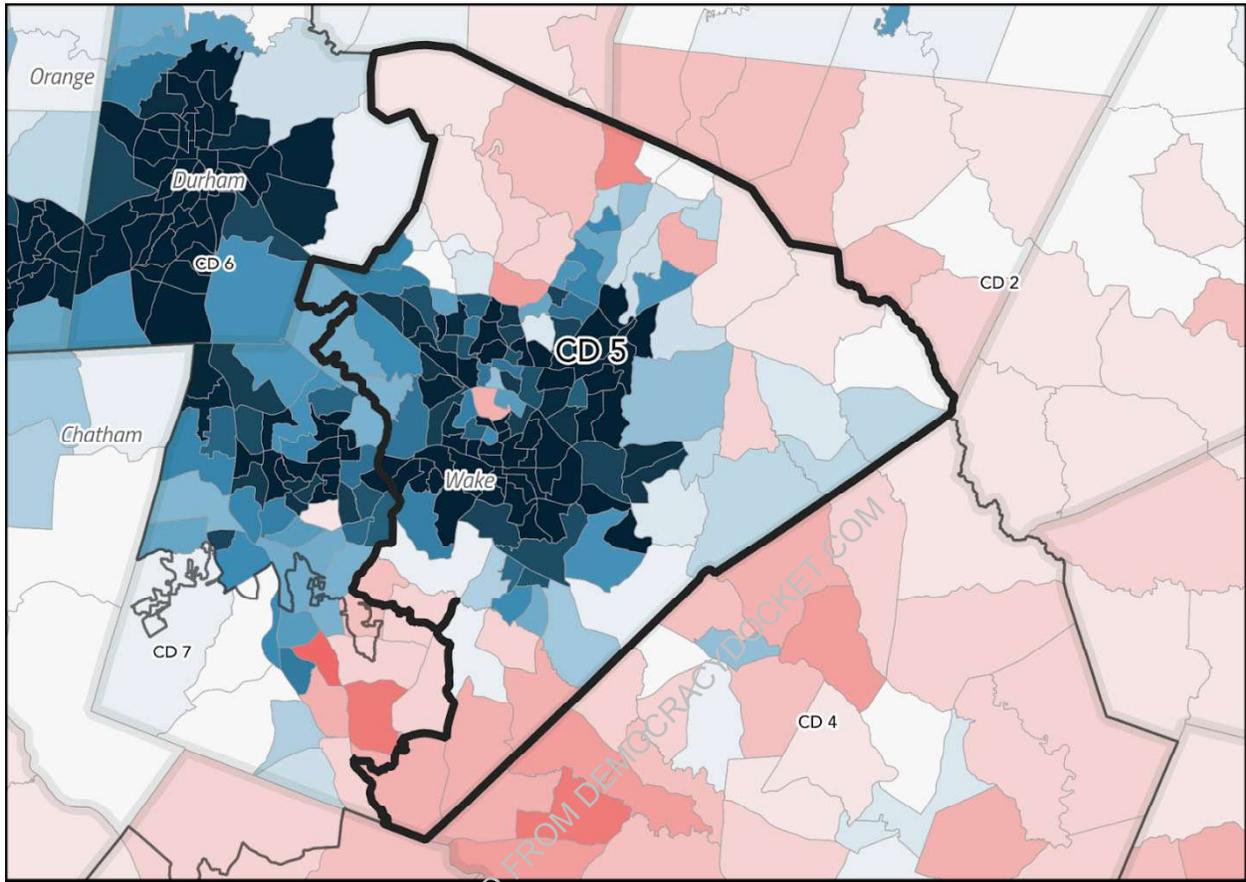
NC-5

The enacted map cracks Democrats in Wake County into three districts. Unlike NC-6 and NC-7, NC-5 is situated completely within Wake County and is made up of portions of current NC-2 and NC-4, districts that were D+12 and D+16. The effects of this are to pack Democratic voters into one district, thus increasing the probability that Republicans can win at least one of the adjacent districts. The enacted district is rated by the Cook Political Report as D+12, the CCSC shows a Democratic advantage of over 227,000 votes and Donald Trump won just 34% of the vote.

This map clearly splits communities of interest. In one particularly egregious example, a small vein runs up Fayetteville Road by McCuller's Crossroads in Fuquay-Varina, where the vein itself is in NC-7 and the areas on either side of it are in NC-5.

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Map 8. VTD CCSC estimates for NC-5



NC-6

The 6th district packs all of Orange, Durham counties and part of Wake County together into one overwhelmingly Democratic district, which is created out of portions of the current Districts 4 and 2 (previously D+16 and D+12, respectively). As the map below demonstrates, the district only includes four marginally Republican VTIDs, according to the 2020 Attorney General/Secretary of Labor “CCSC” composite. Cook Political Report estimates this to be a D+22 district, Democrats had more than a 374,000 vote advantage in the CCSC and Donald Trump won only 25% of the vote in 2020. This district packs a greater proportion of Democratic voters in a single district than any district from the previous map. This district, like NC-5, includes Wake County, which is divided across three districts in the enacted map. The packing of Democrats in this district enables adjacent districts, in particular NC-7, to be drawn in ways that make it easier for Republican candidates to win.

The contours of this district border with NC-7 on the southern end splits communities of interest in almost comical ways. In one example, a person traveling south on New Hill Olive Chapel Road would, in a matter of a few miles, move from enacted NC-7 to the line between NC-6 and -7, back into NC-7, through NC-6, back into NC-7, back to the border between the two, back into NC-7, back to the border between the two, then back into NC-7. The contours of these lines are confusing to voters, and, as the map demonstrates, serve to pack as many Democratic precincts as possible into NC-6.

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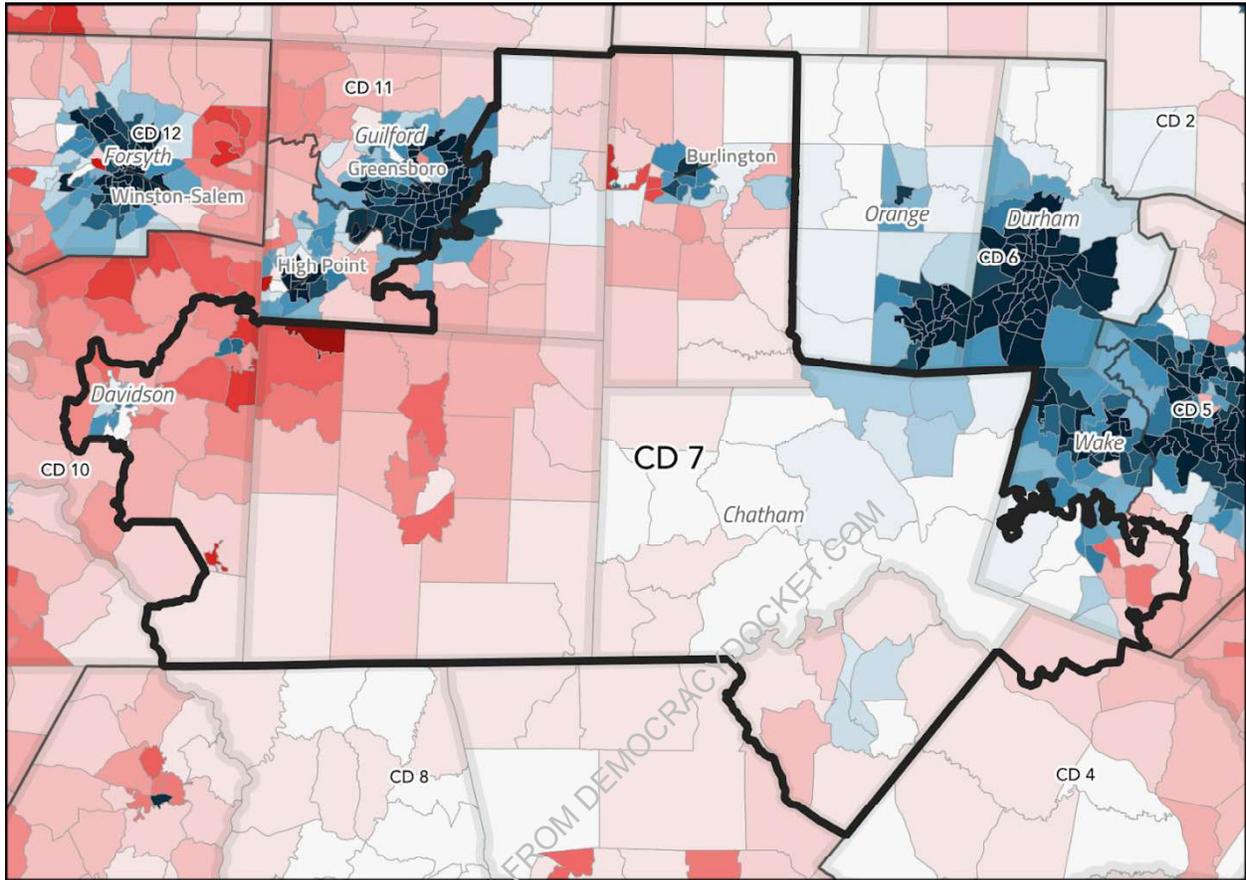
NC-7

The enacted 7th district includes the Republican-leaning Randolph, Alamance, Chatham and Lee Counties as well as portions of Guilford, Wake, and Davidson Counties. It is carved out of districts 13, 6, 4 and 2 from the current map. This district as it is drawn splits both Guilford and Wake Counties (each of which of is divided three times in the map as a whole). Despite including portions of two of the most Democratic counties in North Carolina, the district studiously avoids the Democratic-leaning areas of both counties. The eastern portion of the district in Wake County, near Apex, takes the unusual and confusing contours described in the description of NC-6 above.

The enacted NC-7 is considered R + 11 by the Cook Political Report, it gave Republicans a 115,682 vote advantage in the CCSC, and Donald Trump won 57% of the vote in this district. A Democratic candidate has virtually no chance of victory in the enacted 7th.

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Map 10: VTD CCSC estimates for NC-7



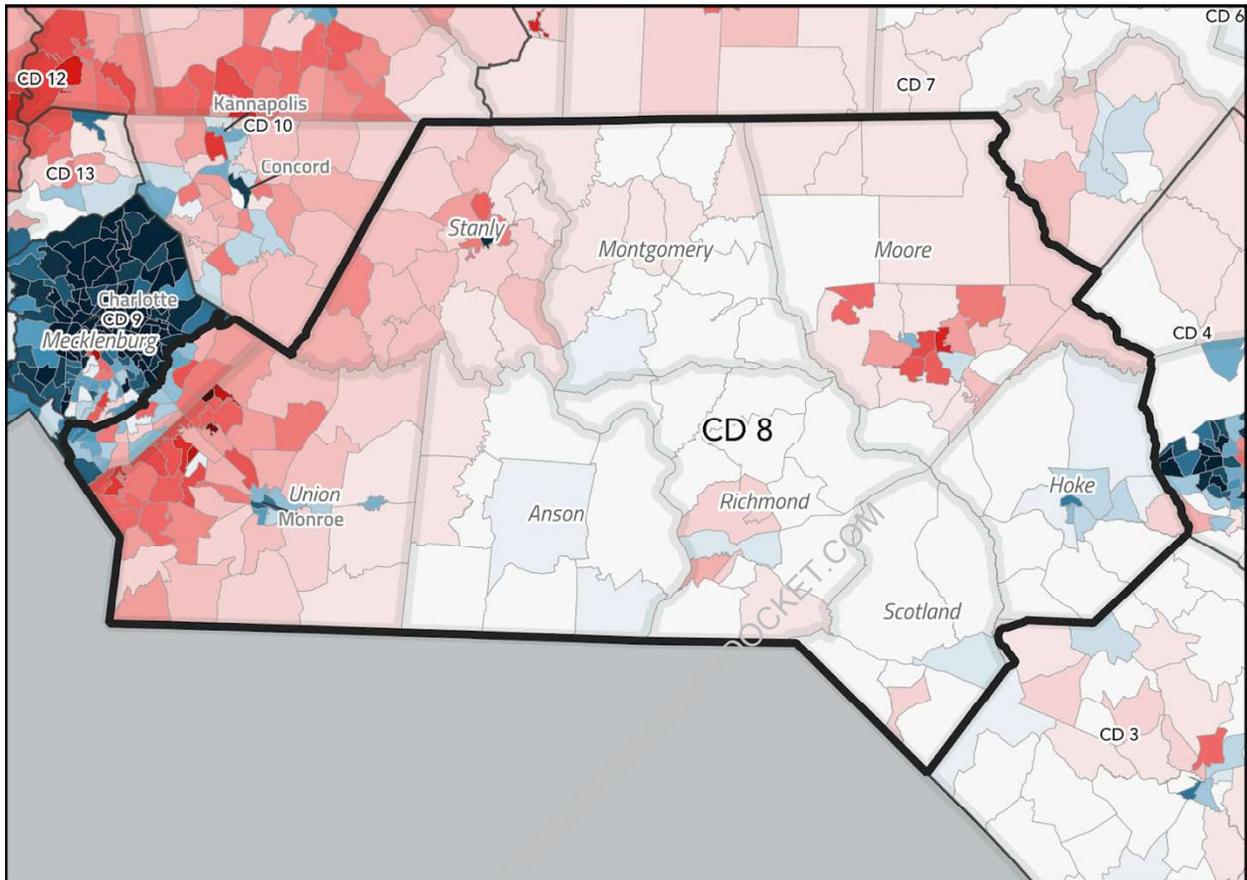
NC-8

The 8th congressional district stretches from the Sandhills into Mecklenburg County and includes portions of the current 9th, 12th, and 8th districts. The core of the district comes from NC-9, currently R+6. The enacted NC-8 includes the entirety of Scotland, Hoke, Moore, Montgomery, Anson, Union, and Stanley counties as well as the southern and eastern edge of Mecklenburg County. Although it includes portions of Mecklenburg County, one of the most Democratic-leaning areas in the state, as well as Democratic municipalities of Union, Anson, and Hoke, the 8th district is unlikely to elect a Democrat under any reasonable scenario. The enacted map stops just shy of the some of the darkest blue VTDs in Mecklenburg County.

The Cook Political Report calls the enacted NC-8 an R+11 district, the CCSC shows that the Republican candidate garnered over 115,000 more votes than the Democratic candidates for the two closest Council of State races, and Donald Trump won approximately 57% of the vote in the 2020 election.

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Map 11: VTD CCSC estimates for NC-8



NC-9

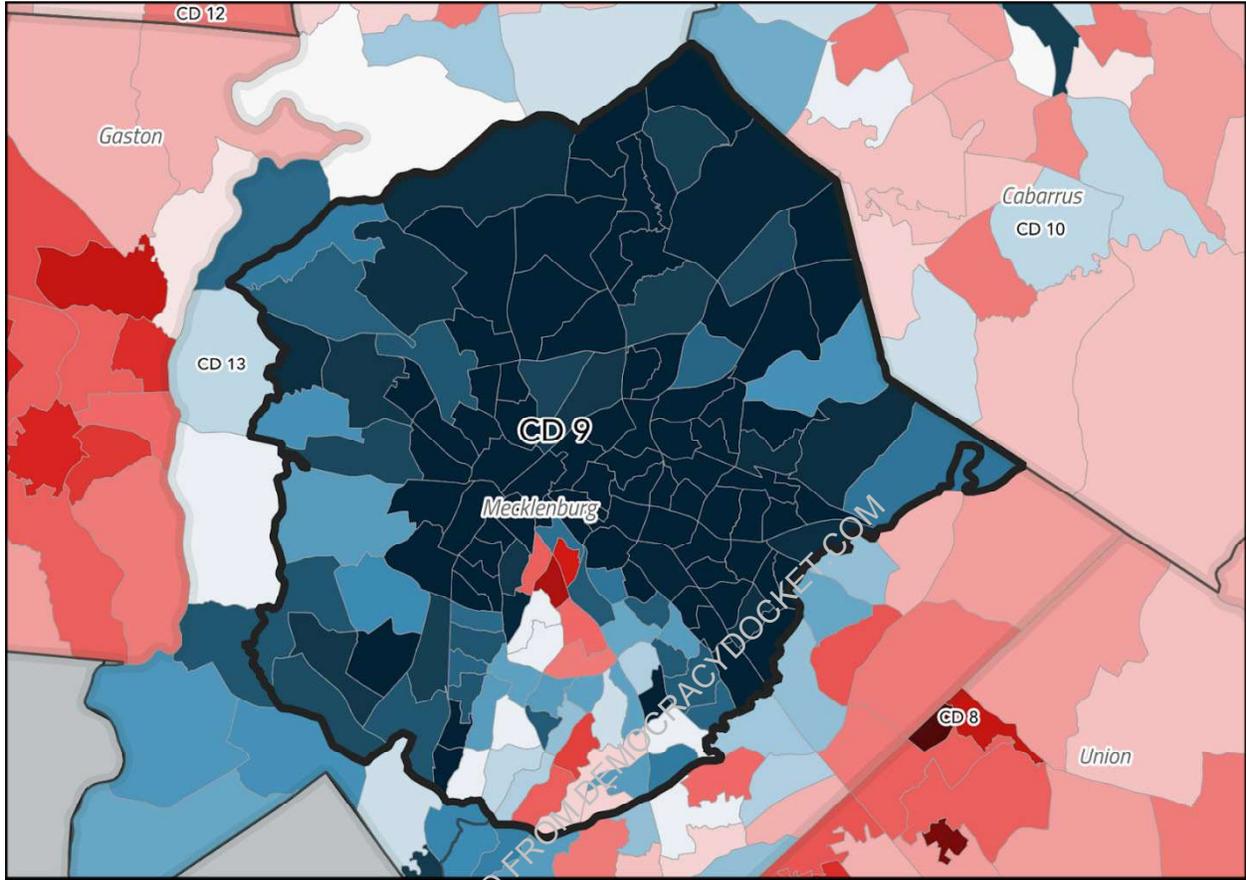
The core of the enacted 9th congressional district come from NC-12, but it also includes portions of the current NC-9. The result is the most packed district in the enacted map. The Cook Political Report rates the enacted NC-9 as a D+23 district, meaning that it leans more heavily towards the Democratic Party than any district in the last map. Donald Trump won just 25% of the vote in this district in the 2020 Presidential election and the CCSC indicates that the Democrats won over 325,000 more votes than the Republicans in the two closest Council of State races in 2020.

As with all examples of packing, the key to understanding this district is its effects on the surrounding districts. By ensuring that the Democratic candidate in NC-9 wins by an overwhelming margin, Republican voters will be more efficiently distributed across other districts, where they can affect the outcome. This ensures that neighboring district 8, for example, will not be competitive. This also has the effect of ensuring that Republican voters in NC-9 have no chance of securing representation from a member of their own party.

The geographic contortions of this district are most apparent on its western edge, where a mere 8 miles separates the western edge of district 9 and the Mecklenburg County line.

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Map 12. VTD CCSC estimates for NC-9



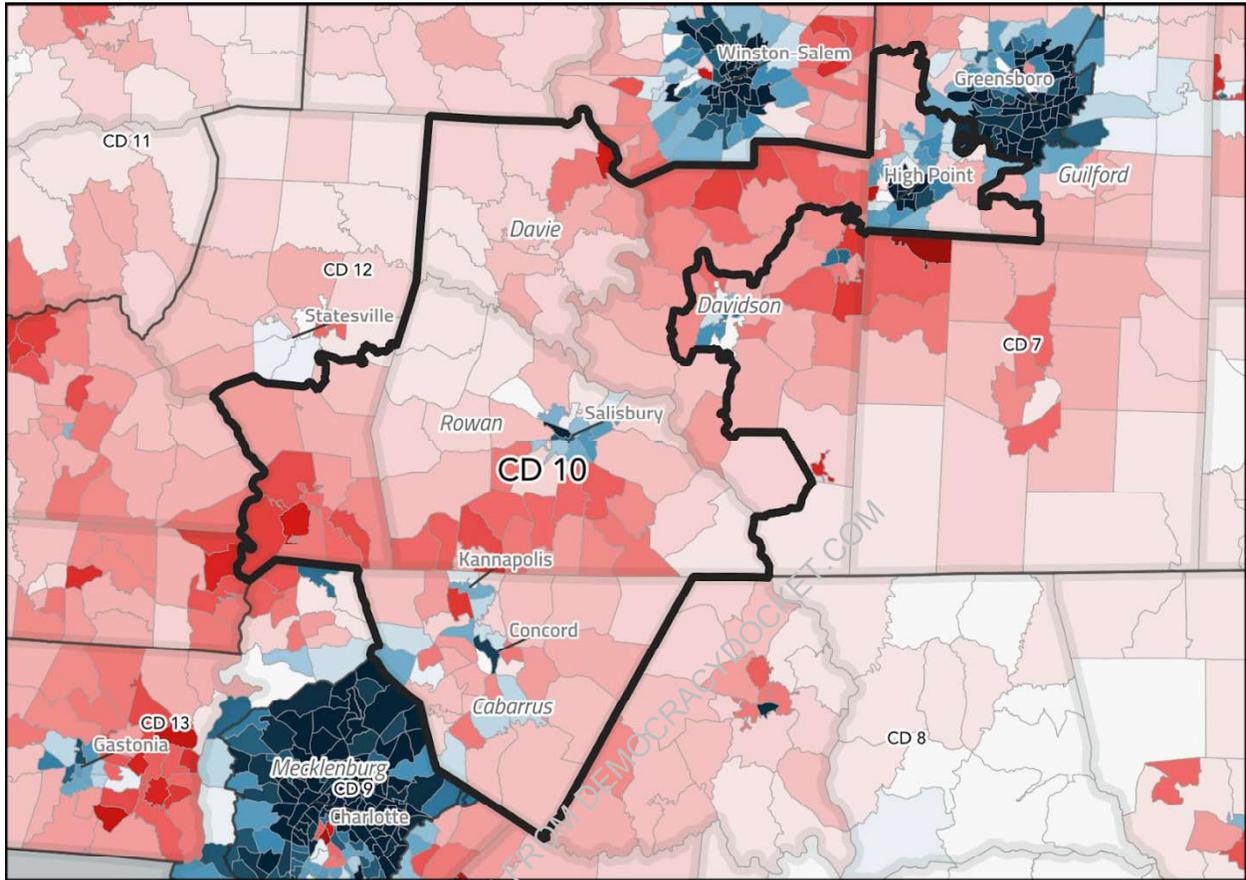
NC-10

The enacted NC-10 includes all of Rowan, Cabarrus and David County and parts of Iredell, Davidson and Guilford Counties. It is drawn out of portions of the current 10th, 9th, 6th, and 13th districts. Despite the inclusion of carefully curated portions of Democratic Guilford County, this district is a safe Republican seat and effectively removes any possibility that Democratic voters in High Point, Salisbury, Kannapolis, Concord, and Cabarrus can elect a member of their own political party. The Cook Political Report rates this district as R+14, the CCSC indicates that Republicans won more than 156,000 additional votes in the two key council of state races, and Donald Trump won over 60% of the Presidential vote in the enacted district.

The enacted NC-10 includes High Point, while NC-11 includes most of Greensboro and NC-12 contains Winston-Salem, meaning that the enacted map splits all three points of North Carolina's Piedmont Triad into separate congressional districts that favor Republicans. In the current map, this community of interest is together in NC-6, represented by Democrat Kathy Manning.

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Map 13: VTD CCSC estimates for NC-10



NC-11

The enacted 11th congressional district is carved out of the 5th, 10th, and 6th districts. This map places a portion of Guilford County, including the City of Greensboro in a district with Rockingham, Stokes, Surrey, Alleghany, Ashe, Wilkes, Caldwell, and Alexander counties as well as a tiny boot-shaped sliver of Watauga County.

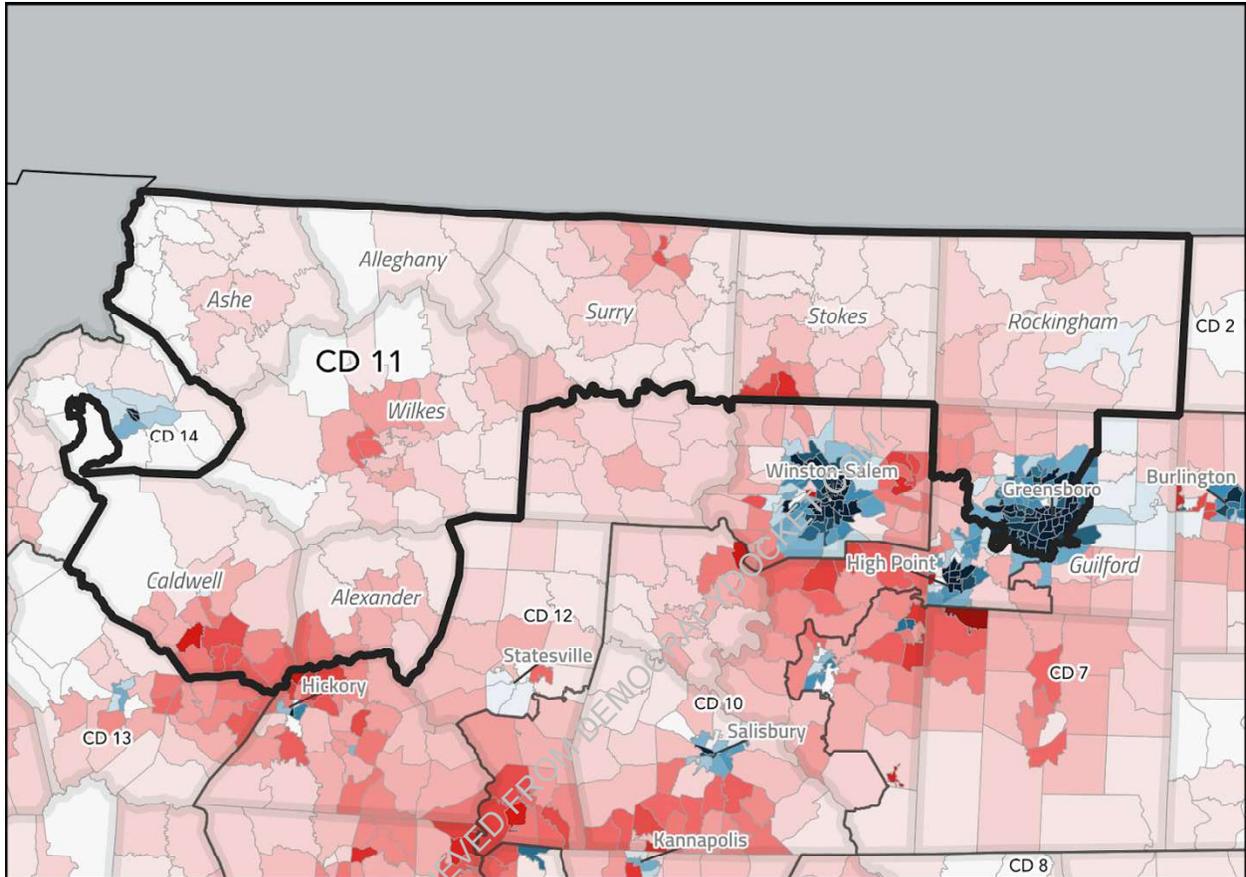
As discussed elsewhere, the enacted map splits Guilford County across three districts (the 10th, 11th, and 7th) and puts all three points of the Piedmont triad in separate districts. By placing most of Greensboro in this overwhelmingly Republican district, this ensures that the City of Greensboro, among the most Democratic and racially diverse cities in the state of North Carolina, will not be represented by a Democrat.

The enacted district is rated by Cook as R+9, 57% of the district voted for Donald Trump in the 2020 election, and Republicans held a 94,000 vote lead in the two closest Council of State elections. No Democrat in the current Congress represents a district that leans this heavily Republican.

It is difficult to imagine any sense in which this district has shared interests. Geographically, it spans radically different parts of the state. Greensboro is firmly in the Piedmont, resting at under 900 feet elevation. Watauga and Ashe counties, by comparison, reside in the high country, with elevations that consistently run above 5500 feet. The corners of the district have different area codes, are served by different media markets, and share virtually no characteristics in common other than the fact that they are both within North Carolina. In the history of North Carolina, Caldwell and Rockingham Counties have never shared a congressional representative.

In addition to its geographic span, the enacted district stands out for its double-bunking of Republican Virginia Foxx and Democrat Kathy Manning. To shoe-horn Virginia Foxx into the new district, the mapmakers carved out a tiny sliver of Watauga County to allow her house to fall into the redrawn district. This passage is so narrow, in fact, that is connected by a stretch of land that is roughly 3 miles wide and requires a traverse of the Daniel Boone Scout Trail.

Map 14: VTD CCSC estimates for NC-11



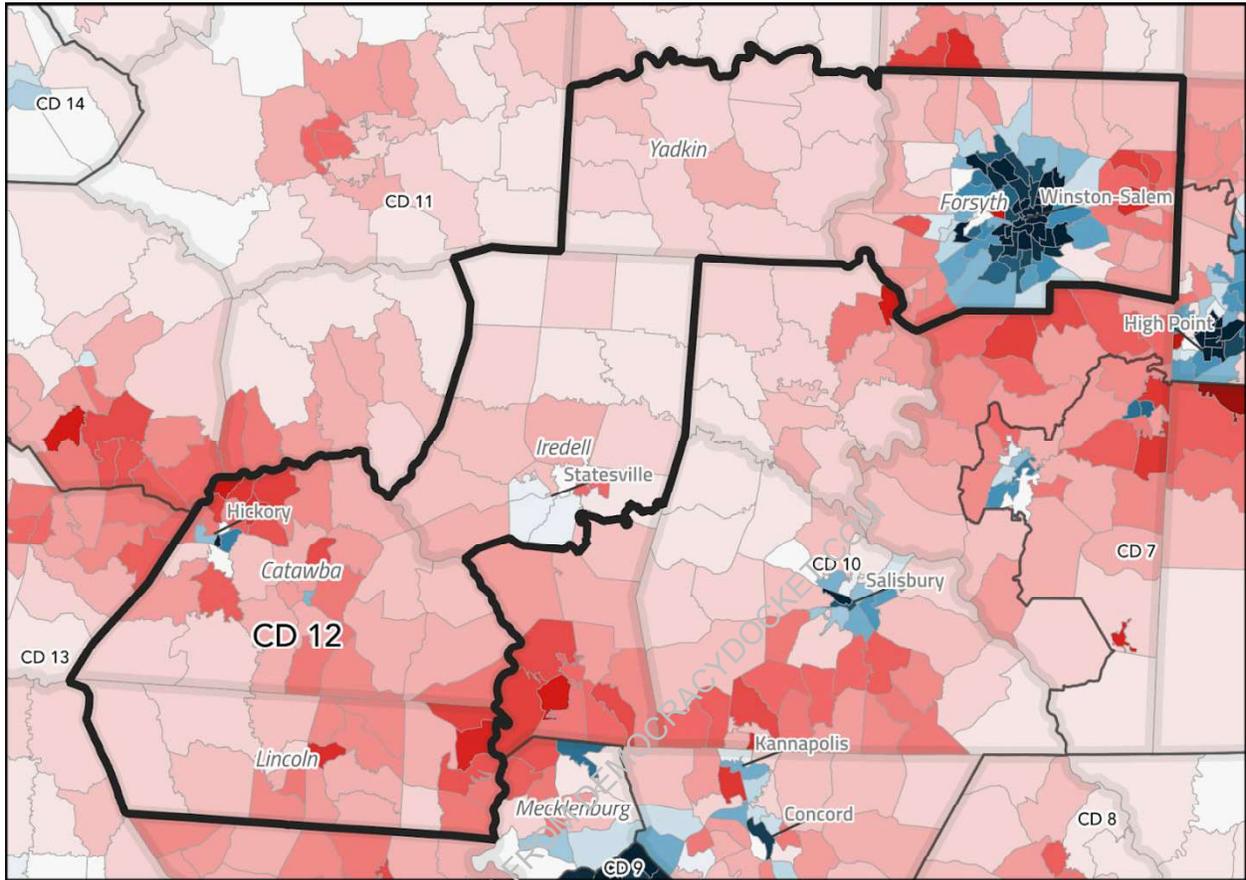
NC-12

The 12th congressional district stretches from Lincoln County at the southwestern corner through Catawba, the Northern part of Iredell, Yadkin, and Forsyth Counties. As the map below makes clear, by including Winston-Salem with this overwhelmingly red swath of geography and walling it off from Democratic voters in High Point, the enacted map ensures that Republican member of Congress Patrick McHenry, who lives at the southeast corner of this district, will maintain his seat and the Democratic voters in Winston-Salem will have virtually no chance to elect a member of their own party.

The Cook Political Report rates this district as R+9, Republicans had over a 100,000 vote margin in the two closest Council of State races, and Donald Trump won over 56% of the vote in this district.

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Map 15: VTD CCSC estimates for NC-12



NC-13

The 13th congressional district is carved out of portions of the old 11th, 5th, and 12th, and 10th districts. As the map that follows demonstrates, the district includes Polk, Rutherford, McDowell, Burke, Cleveland, Gaston, and part of Mecklenburg County.

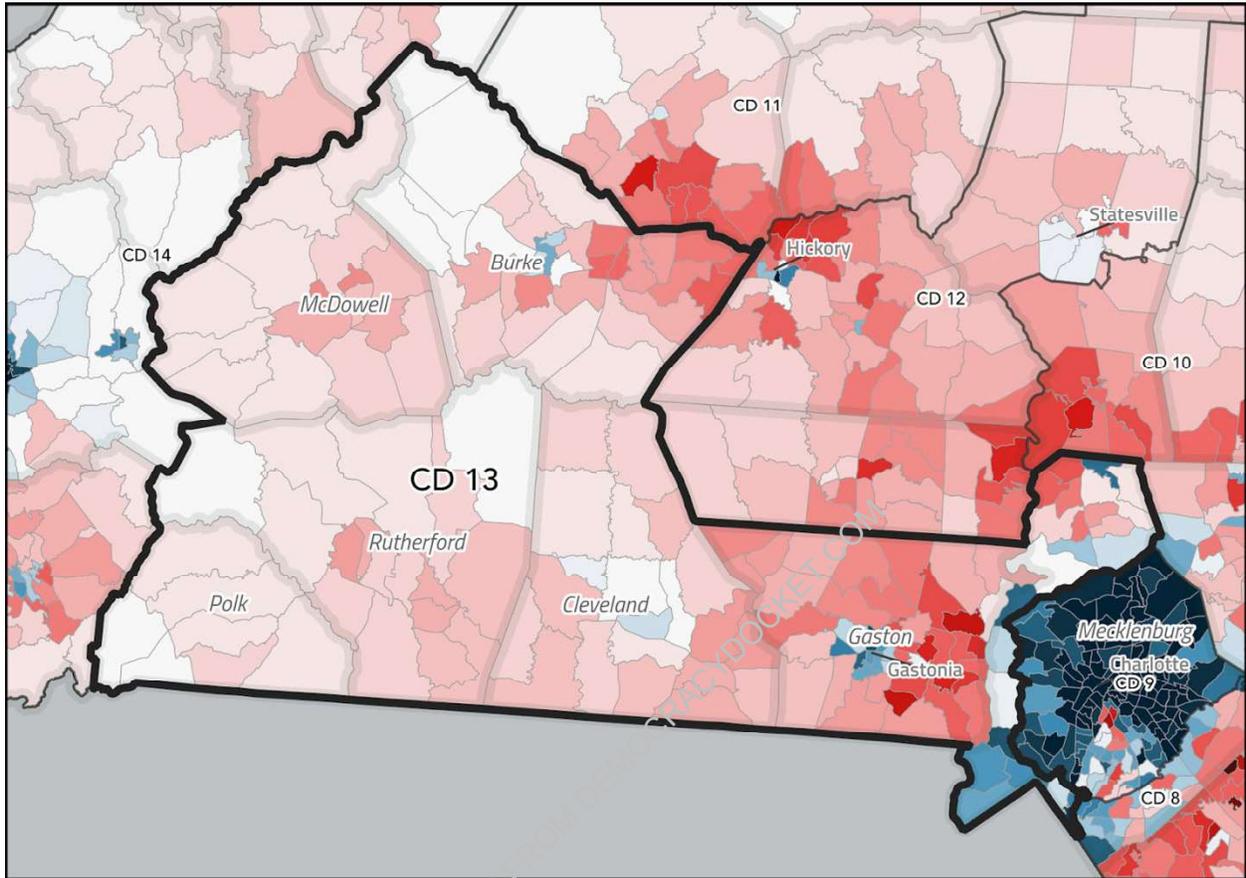
The district was generally understood to be created for Republican Speaker of the House Tim Moore who lives in Cleveland County—the *Charlotte Observer*'s editorial board even referred to it as “Moore’s designer district.”⁶ Republican Madison Cawthorn recently announced that he will run in the 13th, and Moore soon noted that he would stay in the General Assembly. While the specifics of the candidates have changed, the fact that this is a Republican district that will elect a Republican candidate has not. This district was rated by the Cook Political Report as R+13, has a CCSC of R+150,187 votes, and gave 60% of its votes to Donald Trump in 2020.

As mentioned in the discussion of NC-9, the narrow passageway that is necessary to squeeze NC-13 into Mecklenburg County only consists of a few miles at one point--stretching from a Food Lion to the Mecklenburg County line. The enacted district also creates unusual pairings of counties that share little in common. For example, Polk and Mecklenburg Counties have never resided in the same district.

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⁶ <https://www.charlotteobserver.com/opinion/article255769626.html>

Map 16. VTD CCSC estimates for NC-13



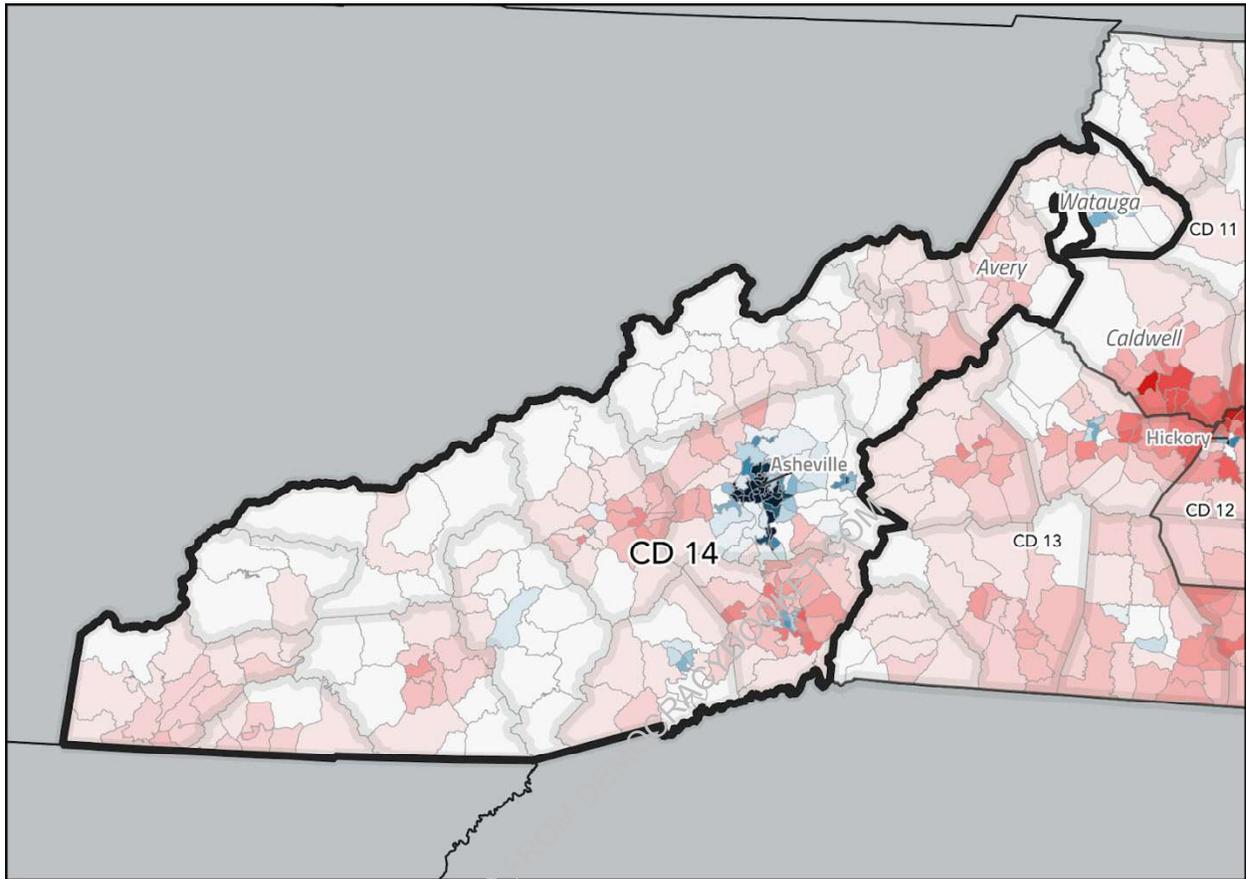
NC-14

The enacted 14th district includes most of the 11th congressional district and includes part of Watauga County, which previously sat in the 5th congressional district. The former 11th congressional district also lost the Republican strongholds of Polk and McDowell counties, as well as part of Rutherford County. These changes shifted the district slightly in the Democratic direction (from a PVI of R+9 to R+7), although not enough to give a Democratic candidate a reasonable chance of victory. No Democrat in Congress represents a district that has a PVI score that leans this heavily towards the Republican Party. As a result, the 14th is expected to stay squarely in Republican hands.

Geographically, the 14th is a sprawling district that includes three media markets. Traversing the district from its western end in Murphy to its northeastern corner in Stony Fork would take approximately four hours. Perhaps because of the geographic incompatibility, Watauga has not been in a district with the western end of the state since 1871—before Graham and Swain Counties were even in existence. Adequately representing this massive swath of geography would be difficult for any member of Congress—Republican or Democrat.

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Map 17. VTD CCSC estimates for NC-14



Conclusion

After analyzing the characteristics of the map as a whole as well as the characteristics of each district in isolation, it is clear that the enacted map will increase the number of Republican members of Congress and decrease the number of Democratic members of Congress in North Carolina's congressional delegation. Democratic voters in the vast majority of the districts will have no chance at representation from a member of their own party and Republican voters in the districts that pack Democrats will have no chance of representation from a member of their own party. This is not a result of natural packing, or geographic clustering, but rather because the congressional district lines shifted in ways that, taken together, benefit the Republican Party. Not only does the enacted map create a substantial partisan advantage for which there is no apparent explanation other than gerrymandering, but it unnecessarily splits communities of interest and will alter representational linkages in ways that, in some cases, have never been seen in North Carolina's history.



Christopher A. Cooper

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EXHIBIT H

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No.21 CVS 500085

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,

Plaintiffs,

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 AS
CHAIRMAN OF THE NORTH

**EXPERT REPORT OF DR. JOWEI
CHEN**

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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,

Defendants.

I, Dr. Jowei Chen, upon my oath, declare and say as follows:

1. I am over the age of eighteen (18) and competent to testify as to the matters set forth herein.
2. I am an Associate Professor in the Department of Political Science at the University of Michigan, Ann Arbor. I am 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. In 2007, I received a M.S. in Statistics from Stanford University, and in 2009, I received a Ph.D. in Political Science from Stanford University.
3. I have 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. My academic areas of expertise include legislative elections, spatial statistics, geographic information systems

(GIS) data, redistricting, racial politics, legislatures, and political geography. I have expertise in the use of computer simulations of legislative districting and in analyzing political geography, elections, and redistricting.

4. I have authored expert reports in the following redistricting court cases: *The League of Women Voters of Florida v. Detzner* (Fla. 2d Judicial Cir. Leon Cnty. 2012); *Romo v. Detzner* (Fla. 2d Judicial Cir. Leon Cnty. 2013); *Missouri National Association for the Advancement of Colored People v. Ferguson-Florissant School District & St. Louis County Board of Election Commissioners* (E.D. Mo. 2014); *Raleigh Wake Citizens Association v. Wake County Board of Elections* (E.D.N.C. 2015); *Brown v. Detzner* (N.D. Fla. 2015); *City of Greensboro v. Guilford County Board of Elections* (M.D.N.C. 2015); *Common Cause v. Rucho* (M.D.N.C. 2016); *The League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania* (No. 261 M.D. 2017); *Georgia State Conference of the NAACP v. The State of Georgia* (N.D. Ga. 2017); *The League of Women Voters of Michigan v. Johnson* (E.D. Mich. 2017); *Whitford v. Gill* (W.D. Wis. 2018); *Common Cause v. Lewis* (N.C. Super. 2018); *Harper v. Lewis* (N.C. Super. 2019); *Baroody v. City of Quincy, Florida* (N.D. Fla. 2020); *McConchie v. Illinois State Board of Elections* (N.D. Ill. 2021). I have testified either at deposition or at trial in the following cases: *Romo v. Detzner* (Fla. 2d Judicial Cir. Leon Cnty. 2013); *Missouri National Association for the Advancement of Colored People v. Ferguson-Florissant School District & St. Louis County Board of Election Commissioners* (E.D. Mo. 2014); *Raleigh Wake Citizens Association v. Wake County Board of Elections* (E.D.N.C. 2015); *City of Greensboro v. Guilford County Board of Elections* (M.D.N.C. 2015); *Common Cause v. Rucho* (M.D.N.C. 2016); *The League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania* (No. 261 M.D. 2017); *Georgia State Conference of the NAACP v. The State of Georgia* (N.D. Ga. 2017); *The*

League of Women Voters of Michigan v. Johnson (E.D. Mich. 2017); *Whitford v. Gill* (W.D. Wis. 2018); *Common Cause v. Lewis* (N.C. Super. 2018); *Baroody v. City of Quincy, Florida* (N.D. Fla. 2020).

5. I have been retained by Plaintiffs in the above-captioned matter. I am being compensated \$550 per hour for my work in this case.

6. Plaintiffs' counsel asked me to analyze the SB 740 districting plan for North Carolina's congressional districts (the "Enacted Plan"), as passed on November 4, 2021. Plaintiffs' counsel asked me to produce a set of computer-simulated plans for North Carolina's congressional districts by following the criteria adopted by the North Carolina General Assembly's Joint Redistricting Committee on August 12, 2021 (the "Adopted Criteria"). Plaintiffs' counsel asked me to compare the district-level partisan attributes of the Enacted Plan to those of the computer-simulated plans and to identify any districts in the Enacted Plan that are partisan outliers. Plaintiffs' counsel also asked me to compare the partisan composition of the individual Plaintiffs' congressional districts under the Enacted Plan to the partisan composition of Plaintiffs' districts under the computer-simulated plans and to identify any Plaintiffs whose Enacted Plan districts are partisan outliers.

7. ***The Use of Computer-Simulated Districting Plans:*** In conducting my academic research on legislative districting, partisan and racial gerrymandering, and electoral bias, I have developed various computer simulation programming techniques that allow me to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using US Census geographies as building blocks. This simulation process ignores all partisan and racial considerations when drawing districts. Instead, the computer simulations are 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, I am able to assess an enacted plan drawn by a state legislature and determine whether partisan goals motivated the legislature to deviate from these traditional districting criteria. More specifically, by holding constant the application of nonpartisan, traditional districting criteria through the simulations, I am able to determine whether the enacted plan could have been the product of something other than partisan considerations. With respect to North Carolina's 2021 Congressional Enacted Plan, I determined that it could not.

8. I produced a set of 1,000 valid computer-simulated plans for North Carolina's congressional districts using a computer algorithm programmed to strictly follow the required districting criteria enumerated in the August 12, 2021 Adopted Criteria of the General Assembly's Joint Redistricting Committee. In following these Adopted Criteria, the computer algorithm uses the same general approach that I employed in creating the simulated state House and state Senate plans that I analyzed in *Common Cause v. Lewis* (2019) and the simulated congressional plans that I used in *Harper v. Lewis* (2019).

9. By randomly drawing districting plans with a process designed to strictly follow nonpartisan districting criteria, the computer simulation process gives us an indication of the range of districting plans that plausibly and likely emerge when map-drawers are not motivated primarily by partisan goals. By comparing the Enacted Plan against the distribution of simulated plans with respect to partisan measurements, I am able to determine the extent to which a map-drawer's subordination of nonpartisan districting criteria, such as geographic compactness and preserving precinct boundaries, was motivated by partisan goals.

10. These computer simulation methods are widely used by academic scholars to analyze districting maps. For over a decade, political scientists have used such computer-simulated districting techniques to analyze the racial and partisan intent of legislative map-drawers.¹ In recent years, several courts have also relied upon computer simulations to assess partisan bias in enacted districting plans.²

11. ***Redistricting Criteria:*** I programmed the computer algorithm to create 1,000 independent simulated plans adhering to the following the seven districting criteria, as specified in the Adopted Criteria:

- a) Population Equality: Because North Carolina's 2020 Census population was 10,439,388, districts in every 14-member congressional plan have an ideal population of 745,670.6. Accordingly, the computer simulation algorithm populated each districting plan such that precisely six districts have a population of 745,670, while the remaining eight districts have a population of 745,671.
- b) Contiguity: The simulation algorithm required districts to be geographically contiguous. Water contiguity is permissible. I also programmed the simulation algorithm to avoid double-traversals within a single county. In other words, for every simulated district, the portion of that district within any given county will be geographically contiguous.

¹ E.g., Carmen Cirincione, Thomas A. Darling, Timothy G. O'Rourke. "Assessing South Carolina's 1990s Congressional Districting," *Political Geography* 19 (2000) 189–211; Jowei Chen, "The Impact of Political Geography on Wisconsin Redistricting: An Analysis of Wisconsin's Act 43 Assembly Districting Plan." *Election Law Journal*

² See, e.g., *League of Women Voters of Pa. v. Commonwealth*, 178 A. 3d 737, 818-21 (Pa. 2018); *Raleigh Wake Citizens Association v. Wake County Board of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *City of Greensboro v. Guilford County Board of Elections*, No. 1:15-CV-599, 2017 WL 1229736 (M.D.N.C. Apr 3, 2017); *Common Cause v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Jan 11, 2018); *The League of Women Voters of Michigan v. Johnson* (E.D. Mich. 2017); *Common Cause v. David Lewis* (N.C. Super. 2018).

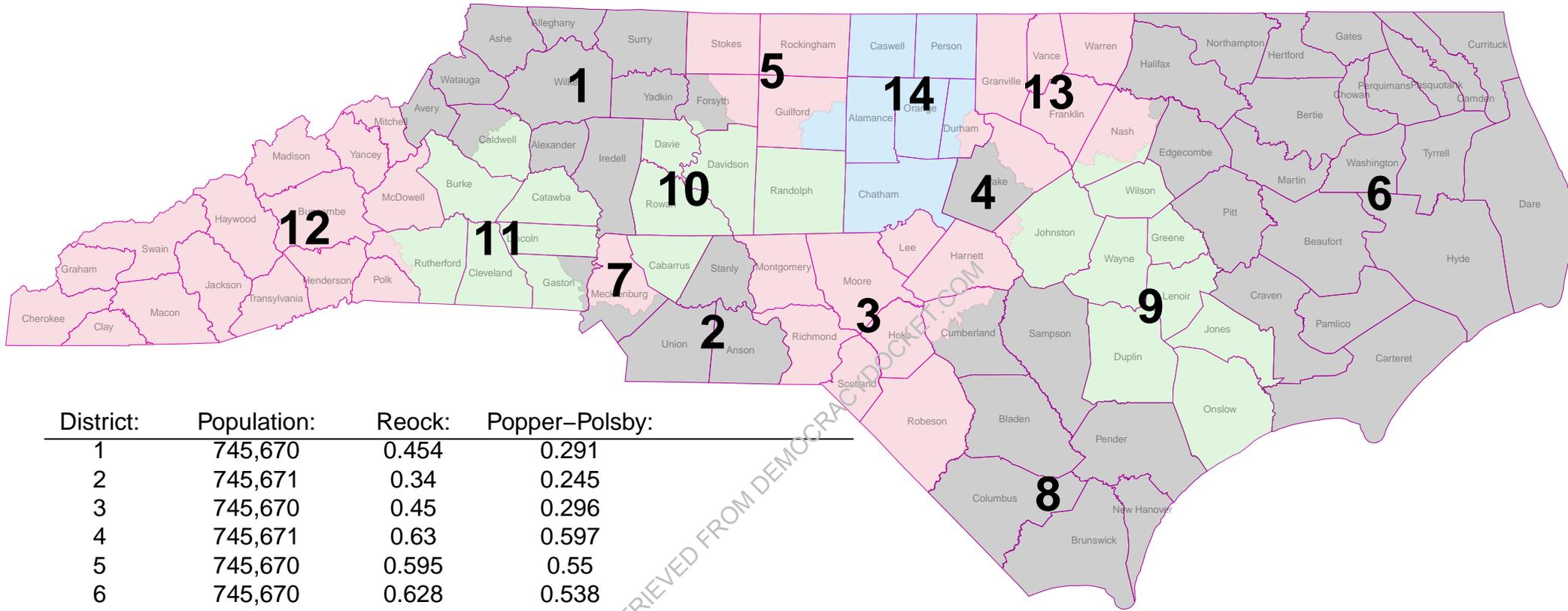
- c) Minimizing County Splits: The simulation algorithm avoided splitting any of North Carolina's 100 counties, except when doing so is necessary to avoid violating one of the aforementioned criteria. When a county is divided into two districts, the county is considered to have one split. A county divided into three districts is considered to have two splits. A county divided into four districts is considered to have three splits, and so on. For the purpose of creating equally populated districts, each newly drawn congressional district requires only one county split. But the fourteenth and final district drawn in North Carolina does need not create an additional county split, since this final district should simply be the remaining area unassigned to the first thirteen districts. Therefore, an entire plan of 14 congressional districts requires only 13 county splits. Accordingly, I require that every simulated plan contain only 13 county splits. The 2021 Adopted Criteria do not prohibit splitting a county more than once, so I allow some of these 13 county splits to occur within the same county. As a result, the total number of counties containing one or more splits may be fewer than 13.
- d) Minimizing VTD Splits: North Carolina is divided into 2,666 VTDs. The computer simulation algorithm attempted to keep these VTDs intact and not split them into multiple districts, except when doing so is necessary for creating equally populated districts. For the purpose of creating equally populated districts, each newly drawn congressional district requires one VTD split. But the fourteenth and final district drawn in North Carolina does need not create an additional VTD split, since this final district should simply be the remaining area unassigned to the first thirteen districts. Therefore, an entire plan of 14

congressional districts requires only 13 VTD splits. I therefore require that every simulated plan split only 13 VTDs in total.

- e) Geographic Compactness: The simulation algorithm prioritized the drawing of geographically compact districts whenever doing so does not violate any of the aforementioned criteria.
- f) Avoiding Incumbent Pairings: North Carolina's current congressional delegation includes two incumbents, Representatives Ted Budd and David Price, who announced before the Enacted Plan was adopted that they will not run for reelection in 2022. For the remaining eleven congressional incumbents, the simulation algorithm intentionally avoids pairing multiple incumbents in the same district. Hence, in every computer-simulated plan, each district contains no more than one incumbent's residence.
- g) Municipal Boundaries: The simulation algorithm generally favors not splitting municipalities, but this consideration is given lower priority than all of the aforementioned criteria. For example, the algorithm would not intentionally split a VTD in order to preserve a municipality, as the Adopted Criteria clearly prioritizes VTD preservation over municipal boundaries.

12. On the following page of this report, Map 1 displays an example of one of the computer-simulated plans produced by the computer algorithm. The lower half of this Map also reports the population of each district, the compactness scores for each district, and the county splits and VTD splits created by the plan. As with every simulated plan, this plan contains exactly 13 VTD splits and 13 county splits, with 11 counties split into two or more districts.

Example of a Computer-Simulated Congressional Plan Protecting all 11 Incumbents



District:	Population:	Reock:	Popper-Polsby:
1	745,670	0.454	0.291
2	745,671	0.34	0.245
3	745,670	0.45	0.296
4	745,671	0.63	0.597
5	745,670	0.595	0.55
6	745,670	0.628	0.538
7	745,671	0.555	0.44
8	745,671	0.555	0.402
9	745,671	0.494	0.345
10	745,671	0.527	0.535
11	745,670	0.592	0.295
12	745,671	0.354	0.313
13	745,671	0.629	0.396
14	745,670	0.513	0.439

Plan Average: 745,670.6 0.523 0.406

11 Split Counties:

- Caldwell (Districts 1, 11)
- Cumberland (Districts 3, 8)
- Durham (Districts 13, 14)
- Forsyth (Districts 1, 10, 5)
- Gaston (Districts 11, 2)
- Guilford (Districts 14, 5)
- Johnston (Districts 3, 9)
- Mecklenburg (Districts 2, 7)
- Nash (Districts 13, 6, 9)
- Rutherford (Districts 11, 12)
- Wake (Districts 13, 4)

13 Split VTD's:

- VTD 00PR32 in Caldwell County (Districts 1 and 11)
- VTD 00CC17 in Cumberland County (Districts 3 and 8)
- VTD 055-11 in Durham County (Districts 13 and 14)
- VTD 000051 in Forsyth County (Districts 1 and 10)
- VTD 000301 in Forsyth County (Districts 1 and 5)
- VTD 000025 in Gaston County (Districts 11 and 2)
- VTD 000PG1 in Guilford County (Districts 14 and 5)
- VTD 00PR33 in Johnston County (Districts 3 and 9)
- VTD 000216 in Mecklenburg County (Districts 2 and 7)
- VTD 00P16A in Nash County (Districts 13 and 6)
- VTD 00P22A in Nash County (Districts 13 and 9)
- VTD 000018 in Rutherford County (Districts 11 and 12)
- VTD 001-36 in Wake County (Districts 13 and 4)

The Enacted Plan's Compliance with the Adopted Criteria:

13. Although all seven of the criteria listed above are part of the General Assembly's Adopted Criteria, five of these criteria are ones that the Joint Redistricting Committee "shall" or "should" follow in the process of drawing its Congressional districting plan. These five mandated criteria are: equal population; contiguity, minimizing county splits, minimizing VTD splits, and geographic compactness.³

14. I assessed whether the 2021 Enacted Plan complies with these five mandated criteria, and I describe my findings in this section. I found that the Enacted Plan does not violate the equal population requirement, nor do any of its districts violate contiguity.

15. However, by comparing the Enacted Plan to the 1,000 computer-simulated plans, I found that the Enacted Plan fails to minimize county splits, fails to minimize VTD splits, and is significantly less geographically compact than is reasonably possible. I describe these findings below in detail.

16. ***Minimizing County Splits:*** In comparing the total number of county splits in the Enacted Plan and in the computer-simulated plans, I counted the total number of times a county is split into more than one district. Specifically, a county fully contained within a single district counts as zero splits. A county split into two full or partial districts counts as one split. And a county split into three full or partial districts counts as two splits. And so on.

17. Using this standard method of accounting for total county splits, I found that the Enacted Plan contains 14 total county splits, which are detailed in Table 1. These 14 total county splits are spread across 11 counties. Eight of these 11 counties are split only once, but Guilford,

³ In listing these five mandated criteria, I am not including the Adopted Criteria's prohibitions on the use of racial data, partisan considerations, and election results data. I did not assess whether the Enacted Plan complies with the prohibition on racial considerations.

Mecklenburg, and Wake Counties are each split into three districts, thus accounting for two splits each. Thus, the Enacted Plan has 14 total county splits, as listed in Table 1.

Table 1: Total Number of County Splits in the 2021 Enacted Plan

	County:	Congressional Districts:	Total County Splits:
1	Davidson	7 and 10	1
2	Guilford	7, 10, and 11	2
3	Harnett	4 and 7	1
4	Iredell	10 and 12	1
5	Mecklenburg	8, 9, and 13	2
6	Onslow	1 and 3	1
7	Pitt	1 and 2	1
8	Robeson	3 and 8	1
9	Wake	5, 6, and 7	2
10	Watauga	11 and 14	1
11	Wayne	2 and 4	1
Total County Splits:			14

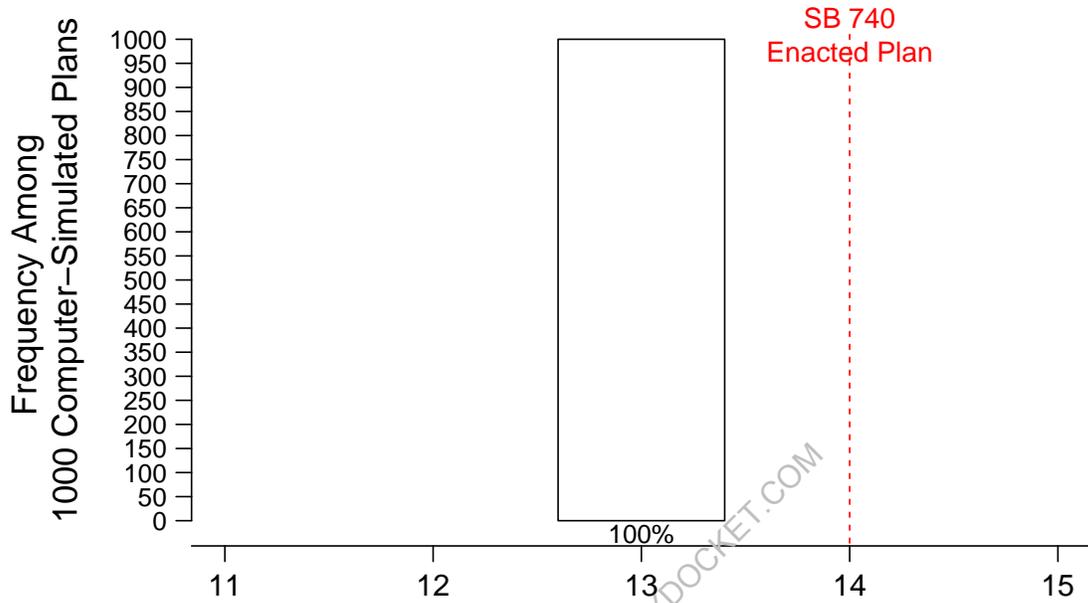
18. As explained in the previous section, a congressional plan in North Carolina needs to contain only 13 county splits if the map-drawer is attempting to minimize the splitting of counties. The Enacted Plan's 14 county splits is therefore one more split than is necessary. This "extra" split is specifically found at the border between District 7 and District 10. In general, the border between any two congressional districts in North Carolina needs to split only one county, at most. But in the Enacted Plan, the border between Districts 7 and 10 creates two county splits: One split of Davidson County and one split of Guilford County. Creating two county splits of Davidson and Guilford Counties was not necessary for equalizing district populations. Nor was it necessary for protecting incumbents, as no incumbents reside in the

portions of Davidson and Guilford Counties within District 7 and District 10. Hence, the “extra” county split in Davidson and Guilford Counties does not appear to be consistent with the 2021 Adopted Criteria, which mandate that “Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking.”

19. Indeed, I found that the computer simulation algorithm was always able to draw districts complying with the Adopted Criteria without using an “extra” 14th county split. As the upper half of Figure 1 illustrates, all 1,000 computer-simulated plans contain exactly 13 county splits. The Enacted Plan clearly contains more county splits than one would expect from a map-drawing process complying with the Adopted Criteria. Therefore, I conclude that the Enacted Plan does not comply with the Adopted Criteria’s rule against unnecessary division of counties.

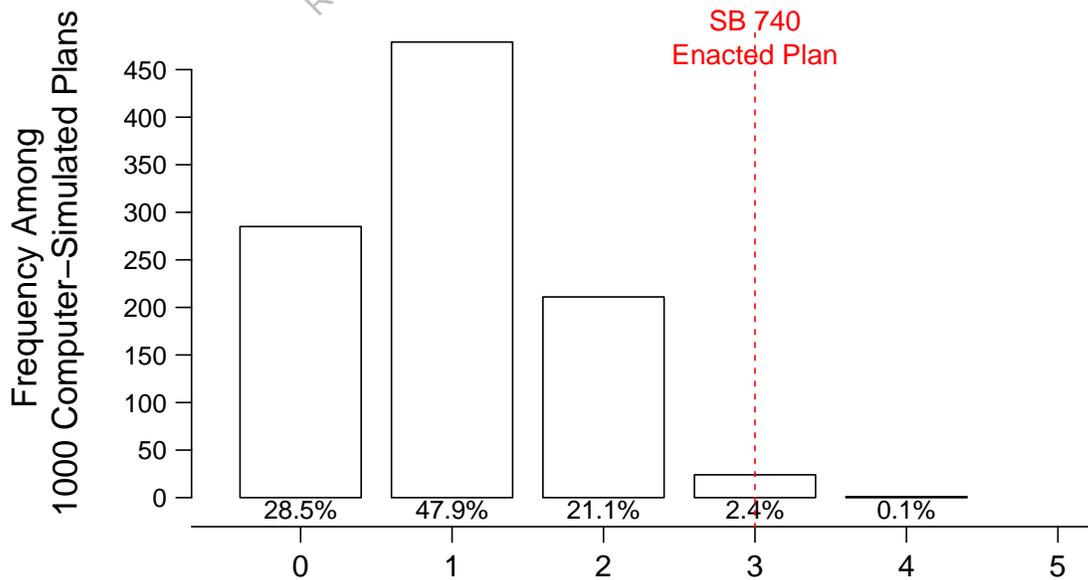
20. The Adopted Criteria do not explicitly limit the number of county splits within any single county. Nevertheless, it is notable that under the Enacted Plan, three different counties (Guilford, Mecklenburg, and Wake) are split multiple times. These three counties are each split into three districts under the Enacted Plan. This is an outcome that rarely occurs under the computer-simulated plans. As the lower half of Figure 1 illustrates, only 2.5% of the computer-simulated plans similarly split three or more counties multiple times. Thus, it is clear that the Enacted Plan’s level of concentrating multiple county splits within a single county is an outcome that generally does not occur in a vast majority of the simulated plans drawn according to the Adopted Criteria.

Figure 1:
Comparison of Total County Splits in Enacted SB 740 Plan and 1,000 Computer-Simulated Plans



Total Number of County Splits in Each Congressional Plan
(Counting Multiple Splits in Counties Divided into Three or More Districts)

**Number of Counties Split Multiple Times
in Enacted SB 740 Plan and 1,000 Computer-Simulated Plans**



Number of Counties Split into Three or More Districts
Within in Each Congressional Plan

21. **Minimizing VTD Splits:** The Adopted Criteria mandates that “Voting districts (“VTDs”) should be split only when necessary.” As explained earlier in this report, each newly drawn congressional district needs to create only one VTD split for the purpose of equalizing the district’s population. But the fourteenth and final district drawn in North Carolina does need not create an additional VTD split, since this final district should simply be the remaining area unassigned to the first thirteen districts. Therefore, an entire plan of 14 congressional districts needs to create only 13 VTD splits.

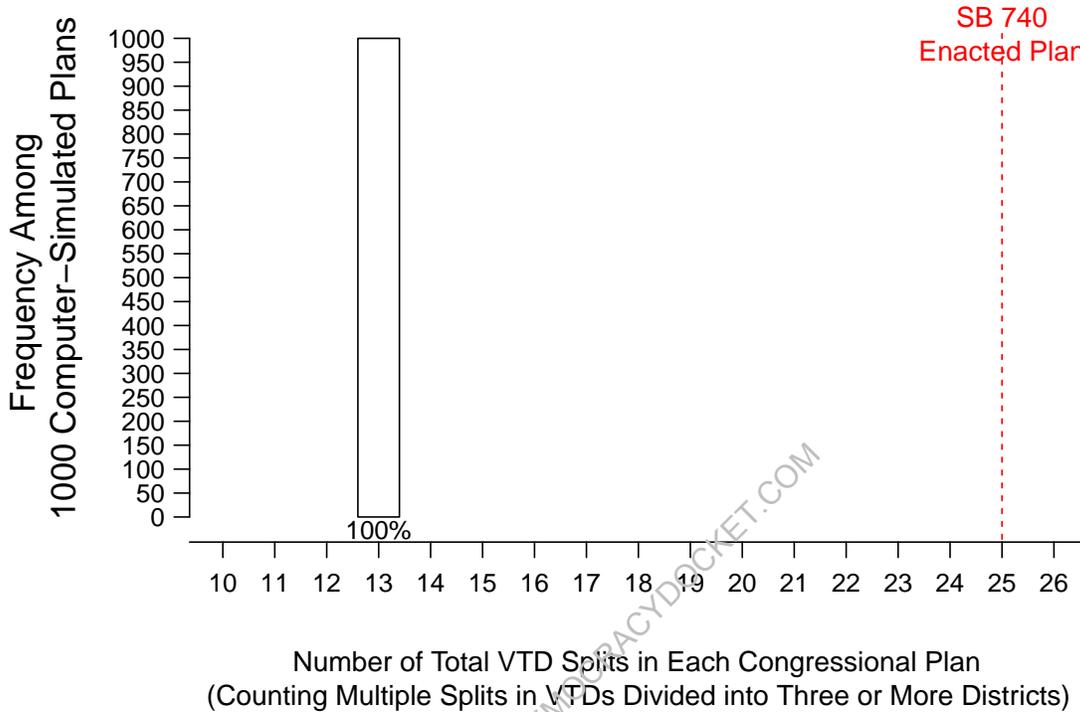
22. However, the Enacted Plan creates far more VTD splits than is necessary. As the General Assembly’s “StatPack” Report⁴ for the Enacted SB 740 Plan details, the Enacted plan splits 24 VTDs into multiple districts. Among these 24 split VTDs, 23 VTDs are split into two districts, while one VTD (Wake County VTD 18-02) is split into three districts. Thus, using the same method of accounting for splits described earlier, the Enacted Plan contains 25 total VTD splits, and 24 VTDs are split into two or more districts.

23. The Enacted Plan’s 25 total VTD splits is far more than is necessary to comply with the Adopted Criteria’s equal population requirement. As explained earlier, only 13 VTD splits are necessary in order to produce an equally-populated congressional plan in North Carolina. Thus, as Figure 2 illustrates, every one of the 1,000 computer-simulated plans contains exactly 13 VTD splits, and the Enacted Plan’s 25 total VTD splits is clearly not consistent with the Adopted Criteria’s requirement that “Voting districts (‘VTDs’) should be split only when necessary.”

⁴ Available at:
<https://webservices.ncleg.gov/ViewBillDocument/2021/53447/0/SL%202021-174%20-%20StatPack%20Report>.

Figure 2:

Comparison of Total VTD Splits in Enacted SB 740 Plan and 1,000 Computer–Simulated Plans



24. **Measuring Geographic Compactness:** The August 12, 2021 Adopted Criteria mandates that the Joint Redistricting Committee “shall” attempt to draw geographically compact congressional districts. The Adopted Criteria also specify two commonly used measures of district compactness: the Reock score and the Polsby-Popper score.

25. In evaluating whether the Enacted Plan follows the compactness requirement of the Adopted Criteria, it is useful to compare the compactness of the Enacted Plan and the 1,000 computer-simulated plans. The computer-simulated plans were produced by a computer algorithm adhering strictly to the traditional districting criteria mandated by the Adopted Criteria and ignoring any partisan or racial considerations. Thus, the compactness scores of these computer-simulated plans illustrate the statistical range of compactness scores that could be

reasonably expected to emerge from a districting process that solely seeks to follow the Adopted Criteria while ignoring partisan and racial considerations. I therefore compare the compactness of the simulated plans and the Enacted Plan using the two measures of compactness specified by the 2021 Adopted Criteria.

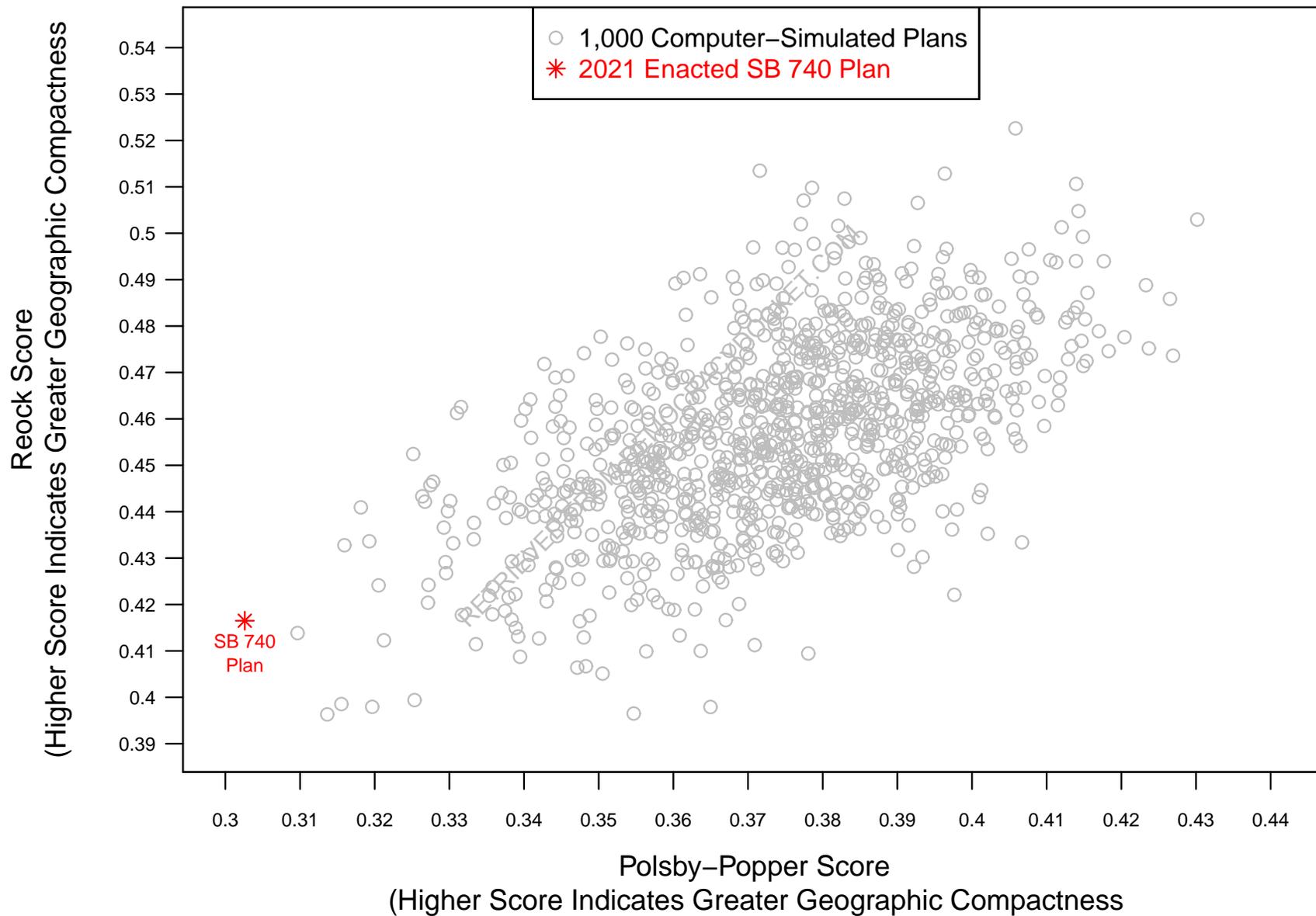
26. First, I calculate the average Polsby-Popper score of each plan's districts. The Polsby-Popper score for each individual district is calculated as the ratio of the district's area to the area of a hypothetical circle whose circumference is identical to the length of the district's perimeter; thus, higher Polsby-Popper scores indicate greater district compactness. The 2021 Enacted Plan has an average Polsby-Popper score of 0.3026 across its 14 congressional districts. As illustrated in Figure 3, every single one of the 1,000 computer-simulated House plans in this report exhibits a higher Polsby-Popper score than the Enacted Plan. In fact, the middle 50% of these 1,000 computer-simulated plans have an average Polsby-Popper score ranging from 0.36 to 0.39, and the most compact computer-simulated plan has a Polsby-Popper score of 0.43. Hence, it is clear that the Enacted Plan is significantly less compact, as measured by its Polsby-Popper score, than what could reasonably have been expected from a districting process adhering to the Adopted Criteria.

27. Second, I calculate the average Reock score of the districts within each plan. The Reock score for each individual district is calculated as the ratio of the district's area to the area of the smallest bounding circle that can be drawn to completely contain the district; thus, higher Reock score indicate more geographically compact districts. The 2021 Enacted Plan has an average Reock score of 0.4165 across its 14 congressional districts. As illustrated in Figure 3, 97.7% of the 1,000 computer-simulated plans exhibit a higher Reock score than the Enacted Plan. In fact, the middle 50% of these 1,000 computer-simulated plans have an average Reock

score ranging from 0.44 to 0.47, and the most compact computer-simulated plan has an average Reock score of 0.52. Hence, it is clear that the Enacted Plan is significantly less compact, as measured by its Reock score, than what could reasonably have been expected from a districting process adhering to the Adopted Criteria.

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Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans on Polsby-Popper and Reock Compactness Scores



Measuring the Partisanship of Districting Plans

28. In general, I use actual election results from recent, statewide election races in North Carolina to assess the partisan performance of the Enacted Plan and the computer-simulated plans analyzed in this report. Overlaying these past election results onto a districting plan enables me to calculate the Republican (or Democratic) share of the votes cast from within each district in the Enacted Plan and in each simulated plan. I am also able to count the total number of Republican and Democratic-leaning districts within each simulated plan and within the Enacted Plan. All of these calculations thus allow me to directly compare the partisanship of the Enacted Plan and the simulated plans. These partisan comparisons allow me to determine whether or not the partisanship of individual districts and the partisan distribution of seats in the Enacted Plan could reasonably have arisen from a districting process adhering to the Adopted Criteria and its explicit prohibition on partisan considerations. Past voting history in federal and statewide elections is a strong predictor of future voting history. Mapmakers thus can and do use past voting history to identify the class of voters, at a precinct-by-precinct level, who are likely to vote for Republican or Democratic congressional candidates.

29. In the 2011, 2016, and 2017 rounds of state legislative and congressional redistricting last decade, the North Carolina General Assembly publicly disclosed that it was relying solely on recent statewide elections in measuring the partisanship of the districting plans being created. I therefore follow the General Assembly's past practice from last decade by using results from a similar set of recent statewide elections in order to measure the partisanship of districts in the Enacted Plan and in the computer-simulated plans.

30. *The 2016-2020 Statewide Election Composite:* During the General Assembly's 2017 legislative redistricting process, Representative David Lewis announced at the Joint

Redistricting Committee's August 10, 2017 meeting that the General Assembly would measure the partisanship of legislative districts using the results from some of the most recent elections held in North Carolina for the following five offices: US President, US Senator, Governor, Lieutenant Governor, and Attorney General.

31. To measure the partisanship of all districts in the computer-simulated plans and the 2021 Enacted Plan, I used the two most-recent election contests held in North Carolina for these same five offices during 2016-2020. In other words, I used the results of 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. I use these election results because these 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.

32. I obtained precinct-level results for these ten elections, and I disaggregated these election results down to the census block level. I then aggregated these block-level election results to the district level within each computer-simulated plan and the Enacted Plan, and I calculated the number of districts within each plan that cast more votes for Republican than Democratic candidates. I use these calculations to measure the partisan performance of each simulated plan analyzed in this report and of the Enacted Plan. In other words, I look at the census blocks that would comprise a particular district in a given simulation and, using the actual election results from those census blocks, I calculate whether voters in that simulated district collectively cast more votes for Republican or Democratic candidates in the 2016-2020 statewide

election contests. I performed such calculations for each district under each simulated plan to measure the number of districts Democrats or Republicans would win under that particular simulated districting map.

33. I refer to the aggregated election results from these ten statewide elections as the “2016-2020 Statewide Election Composite.” For the Enacted Plan districts and for all districts in each of the 1,000 computer-simulated plans, I calculate the percentage of total two-party votes across these ten elections that were cast in favor of Republican candidates in order to measure the average Republican vote share of the district. In the following section, I present district-level comparisons of the Enacted Plan and simulated plan districts in order to identify whether any individual districts in the Enacted Plan are partisan outliers. I also present plan-wide comparisons of the Enacted Plan and the simulated plans in order to identify the extent to which the Enacted Plan is a statistical outlier in terms of common measures of districting plan partisanship.

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District-Level and Plan-Wide Partisan Comparisons of the Enacted Plan and Simulated Plans

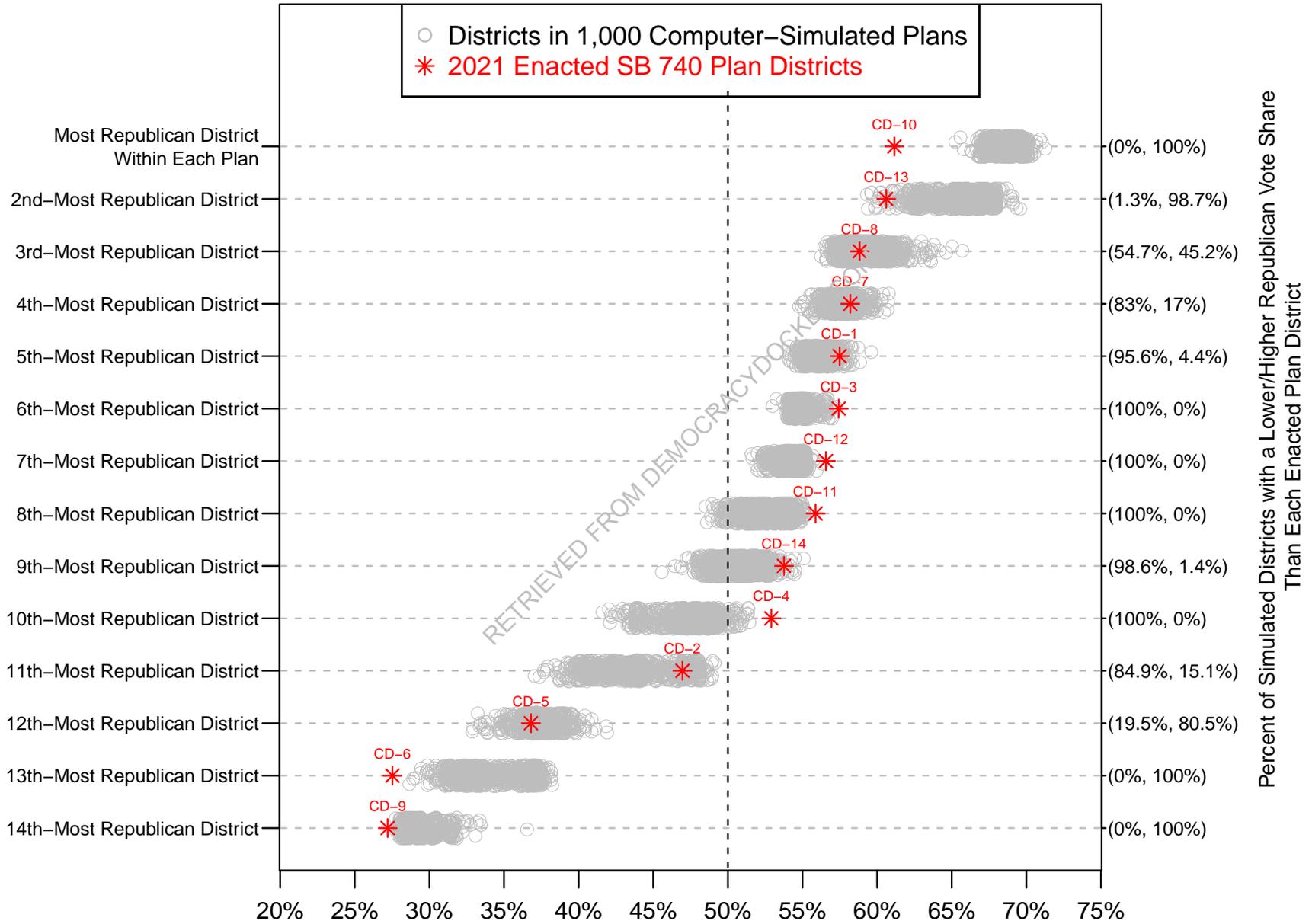
34. In this section, I present partisan comparisons of the Enacted Plan to the computer-simulated plans at both a district-by-district level as well as a plan-wide level using several common measures of districting plan partisanship. First, I compare the district-level Republican vote share of the Enacted Plan's districts and the districts in the computer-simulated plans. Next, I compare the number of Republican-favoring districts in the Enacted Plan and in the computer-simulated plans. Finally, I use several common measures of partisan bias to compare the Enacted Plan to the computer-simulated plans. Overall, I find that the several individual districts in the Enacted Plan are statistical outliers, exhibiting extreme partisan characteristics that are rarely or never observed in the computer-simulated plan districts drawn with strict adherence to the Adopted Criteria. Moreover, I find that at the plan-wide level, the Enacted Plan creates a degree of partisan bias favoring Republicans that is more extreme than the vast majority of the computer-simulated plans. I describe these findings in detail below:

35. ***Partisan Outlier Districts in the Enacted Plan:*** In Figure 4, I directly compare the partisan distribution of districts in the Enacted Plan to the partisan distribution of districts in the 1,000 computer-simulated plans. I first order the Enacted Plan's districts from the most to the least-Republican district, as measured by Republican vote share using the 2016-2020 Statewide Election Composite. The most-Republican district appears on the top row, and the least-Republican district appears on the bottom row of Figure 4. Next, I analyze each of the 1,000 computer-simulated plans and similarly order each simulated plan's districts from the most- to the least-Republican district. I then directly compare the most-Republican Enacted Plan district (CD-10) to the most-Republican simulated district from each of the 1,000 computer-simulated plans. In other words, I compare one district from the Enacted Plan to 1,000 computer-simulated

districts, and I compare these districts based on their Republican vote share. I then directly compare the second-most-Republican district in the Enacted Plan to the second-most-Republican district from each of the 1,000 simulated plans. I conduct the same comparison for each district in the Enacted Plan, comparing the Enacted Plan district to its computer-simulated counterparts from each of the 1,000 simulated plans.

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Comparisons of Enacted SB 740 Plan Districts to 1,000 Computer-Simulated Plans' Districts



District's Republican Vote Share Measured Using the 2016–2020 Statewide Election Composite (50.8% Statewide Republican 2-Party Vote Share)

36. Thus, the top row of Figure 4 directly compares the partisanship of the most-Republican Enacted Plan district (CD-10) to the partisanship of the most-Republican district from each of the 1,000 simulated plans. 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 plan district. Similarly, the second row of this Figure compares the second-most-Republican district from each plan, the third row compares the third-most-Republican district from each plan, and so on. In each row of this Figure, the Enacted Plan's district is depicted with a red star and labeled in red with its district number; meanwhile, the 1,000 computer-simulated districts are depicted with 1,000 gray circles on each row.

37. As the bottom row of Figure 4 illustrates, the most-Democratic district in the Enacted Plan (CD-9) is more heavily Democratic than 100% of the most-Democratic districts in each of the 1,000 computer-simulated plans. This calculation is numerically reported in the right margin of the Figure. 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. It is thus clear that CD-9 packs together Democratic voters to a more extreme extent than the most-Democratic district in 100% of the computer-simulated plans. I therefore identify CD-9 as an extreme partisan outlier when compared to its 1,000 computer-simulated counterparts, using a standard threshold test of 95% for statistical significance.

38. The next-to-bottom row of Figure 4 reveals a similar finding regarding CD-6 in the Enacted Plan. This row illustrates that the second-most-Democratic district in the Enacted

Plan (CD-6) is more heavily Democratic than 100% of the second-most-Democratic districts in each of the 1,000 computer-simulated plans. 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. In other words, CD-6 packs together Democratic voters to a more extreme extent than the second-most-Democratic district in 100% of the computer-simulated plans. I therefore identify 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.

39. Meanwhile, the top two rows of Figure 4 reveal a similar finding: As the top row illustrates, the most-Republican district in the Enacted Plan (CD-10) is less heavily Republican than 100% of the most-Republican districts in each of the 1,000 computer-simulated plans. A similar pattern appears in the second-to-top row of Figure 4, which illustrates that the second-most-Republican district in the Enacted Plan (CD-13) is less heavily Republican than 98.7% of the second-most-Republican districts in each of the 1,000 computer-simulated plans.

40. It is especially notable that these four aforementioned Enacted Plan districts – the two most Republican districts (CD-10 and CD-13) and the two most Democratic districts (CD-9 and CD-6) in the Enacted Plan – were drawn to include more Democratic voters than virtually all of their counterpart districts in the 1,000 computer-simulated plans. These “extra” Democratic voters in the four most partisan-extreme districts in the Enacted Plan had to come from the remaining ten more moderate districts in the Enacted Plan. Having fewer Democratic voters in these more moderate districts enhances Republican candidate performance in these districts.

41. Indeed, the middle six rows in Figure 4 (i.e., rows 5 through 10) confirm this precise effect. The middle six rows in Figure 4 compare the partisanship of districts in the fifth, sixth, seventh, eighth, ninth, and tenth-most Republican districts within the Enacted Plan and the 1,000 computer-simulated plans. In all six of these rows, the Enacted Plan district is a partisan outlier. In each of these six rows, the Enacted Plan's district is more heavily Republican than over 95% of its counterpart districts in the 1,000 computer-simulated plans. Four of these six rows illustrate Enacted Plan districts that are more heavily Republican than 100% of their counterpart districts in the computer-simulated plans. The six Enacted Plan districts in these six middle rows (CD-1, 3, 4, 11, 12, and 14) are more heavily Republican than nearly all of their counterpart computer-simulated plan districts because the four most partisan-extreme districts in the Enacted Plan (CD-6, 9, 10, and 13) are more heavily Democratic than nearly all of their counterpart districts in the computer-simulated plans.

42. I therefore identify the six Enacted Plan districts in the six middle rows (CD-1, 3, 4, 11, 12, and 14) of Figure 4 as partisan statistical outliers. Each of these six districts has a Republican vote share that is higher than over 95% of the computer-simulated districts in its respective row in Figure 4. I also identify the four Enacted Plan districts in the top rows and the bottom two rows (CD-6, 9, 10, and 13) of Figure 4 as partisan statistical outliers. Each of these four districts has a Republican vote share that is lower than over 98% of the computer-simulated districts in its respective row in Figure 4.

43. In summary, Figure 4 illustrates that 10 of the 14 districts in the Enacted Plan are partisan outliers: Six districts (CD-1, 3, 4, 11, 12, and 14) in the Enacted Plan are more heavily Republican than over 95% of their counterpart computer-simulated plan districts, while four

districts (CD-6, 9, 10, and 13) are more heavily Democratic than over 98% of their counterpart districts in the computer-simulated plans.

44. The Appendix of this report contains ten additional Figures (Figures A1 through A10) that each contain a similar analysis of the Enacted Plan districts and the computer-simulated plan districts. Each of these ten Figures in the Appendix measures the partisanship of districts using one of the individual ten elections included in the 2016-2020 Statewide Election Composite. These ten Figures generally demonstrate that the same extreme partisan outlier patterns observed in Figure 4 are also present when district partisanship is measured using any one of the ten statewide elections held in North Carolina during 2016-2020.

45. **“Mid-Range” Republican Districts:** Collectively, the upper ten rows in Figure 4 illustrate that the Enacted 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. Specifically, the Enacted Plan’s ten most-Republican districts all have Republican vote shares within the narrow range of 52.9% to 61.2%. As explained earlier, this narrow range is the product of two distinct dynamics: In the top two rows of Figure 4, the Enacted Plan’s districts are significantly less Republican than nearly all of the simulated plans’ districts in these rows. But in the fifth to tenth rows of Figure 4, the Enacted Plan’s districts are more safely Republican-leaning than over 95% of the computer-simulated districts within each of these six rows. The overall result of these two distinct dynamics is that the Enacted Plan contains ten districts that all have Republican vote shares within the narrow range of 52.9% to 61.2%. I label any districts within this narrow range of partisanship as “mid-range” Republican-leaning districts, reflecting the fact that these districts have generally favored Republican candidates, but not by overwhelmingly large margins.

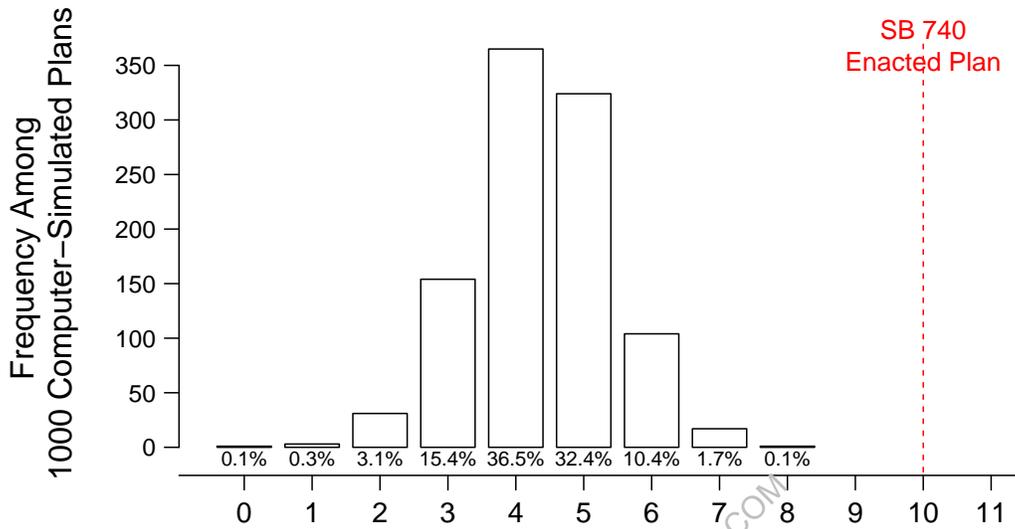
46. Is the Enacted Plan's creation of ten such "mid-range" Republican-leaning districts an outcome that ever occurs in the 1,000 computer-simulated plans? I analyzed the simulated plans and counted the number of districts within each plan that are similarly "mid-range" with a Republican vote share between 52.9% and 61.2%. As Figure 5 illustrates, the Enacted Plan's creation of ten "mid-range" Republican districts is an extreme statistical outlier. None of the 1,000 simulated plans comes close to creating ten such districts. Virtually all of the simulated plans contain from two to six "mid-range" Republican districts, and the most common outcome among the simulations is four such districts. Hence, the Enacted Plan is clearly an extreme partisan outlier in terms of its peculiar focus on maximizing the number of "mid-range" Republican districts, and the Enacted 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.

47. **Competitive Districts:** The Enacted Plan's maximization of "mid-range" Republican districts necessarily comes at the expense of creating more competitive districts. As Figure 4 illustrates, the Enacted Plan contains zero districts whose Republican vote share is higher than 47.0% and lower than 52.9%, as measured using the 2016-2020 Statewide Election Composite. In other words, there are zero districts in which the Republican vote share is within 5% of the Democratic vote share.

48. I label districts with a Republican vote share from 47.5% to 52.5% as "competitive" districts to reflect the fact that such districts have a nearly even share of Republican and Democratic voters, and election outcomes in the district could therefore swing in favor of either party. The Enacted Plan contains zero "competitive" districts, as measured using the 2016-2020 Statewide Election Composite.

Figure 5:

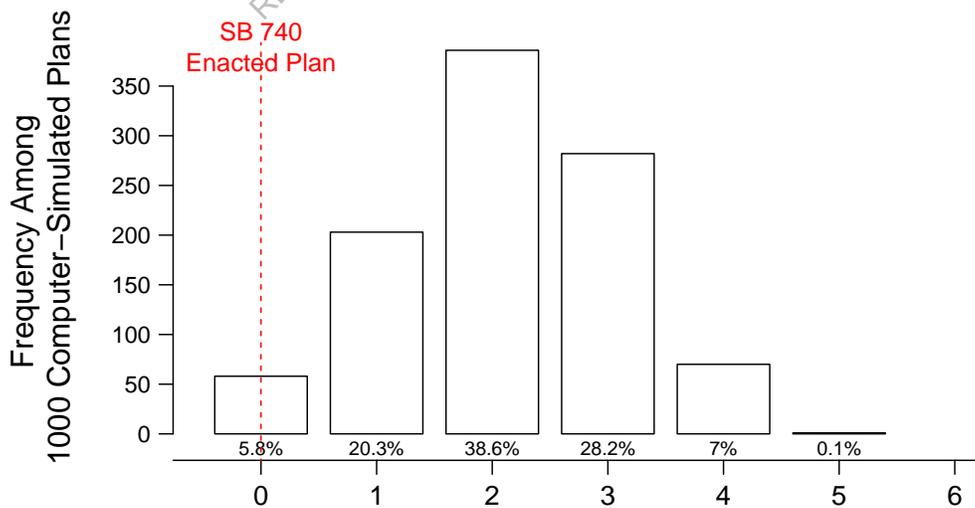
**Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
On Number of Mid-Range Republican Districts**



Number of Mid-Range Republican Districts with 52.9% to 61.2% Republican Vote Share Within Each Plan
Using the 2016–2020 Statewide Election Composite
(50.8% Statewide Republican 2-Party Vote Share)

Figure 6:

**Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
On Number of Competitive Districts**



Number of Competitive Districts with 47.5% to 52.5% Republican Vote Share Within Each Plan
Using the 2016–2020 Statewide Election Composite
(50.8% Statewide Republican 2-Party Vote Share)

49. Is the Enacted Plan's failure to create any "competitive" districts an outcome that ever occurs in the 1,000 computer-simulated plans? I analyzed the simulated plans and counted the number of districts within each plan that are "competitive" districts with a Republican vote share between 47.5% and 52.5%. As Figure 6 illustrates, the Enacted Plan's creation of zero "competitive" districts is almost a statistical outlier: Only 5.8% of the 1,000 simulated plans similarly fail to have a single "competitive" district. The vast majority of the computer-simulated plans contain two or more "competitive" districts. Over 94% of the computer-simulated plans create more "competitive" districts than the Enacted Plan does.

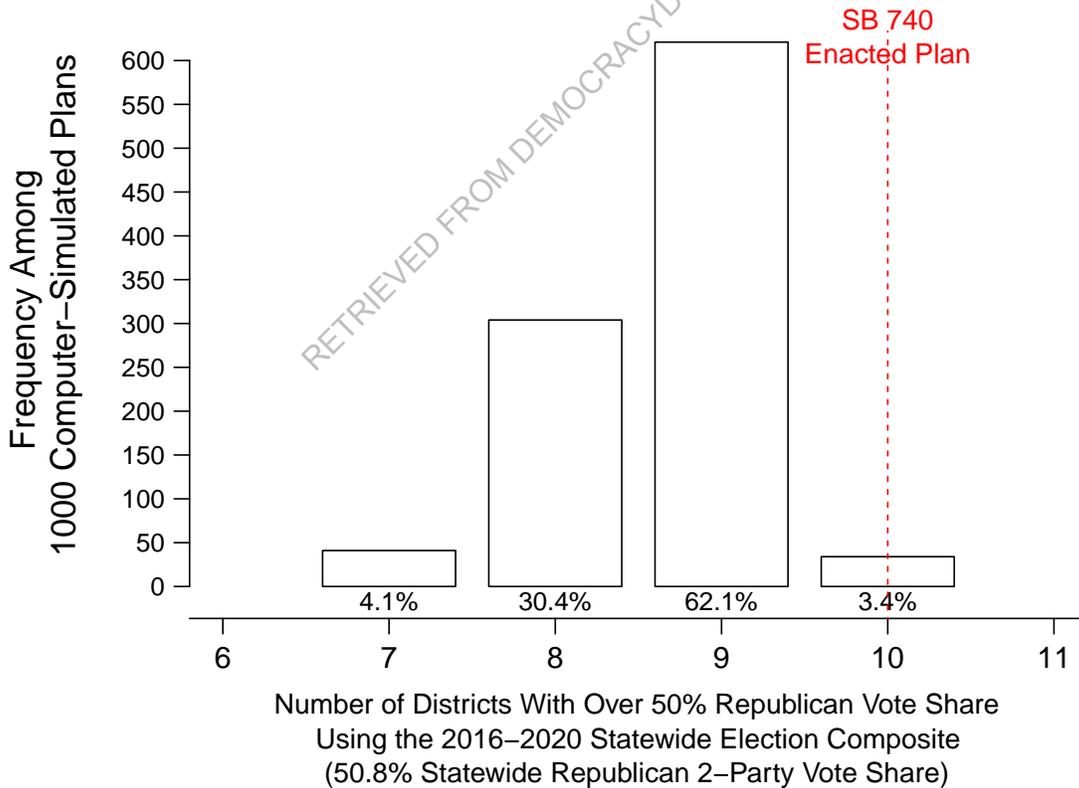
50. ***Number of Democratic and Republican Districts:*** Figure 7 compares the partisan breakdown of the computer-simulated plans to the partisanship of the Enacted Plan. Specifically, Figure 7 uses the 2016-2020 Statewide Election Composite to measure the number of Republican-favoring districts created in each of the 1,000 simulated plans. Across the entire state, Republican candidates collectively won a 50.8% share of the votes in the ten elections in the 2016-2020 Statewide Election Composite. But within the 14 districts in the Enacted Plan, Republicans have over a 50% vote share in 10 out of 14 districts. In other words, the Enacted Plan created 10 Republican-favoring districts, as measured using the 2016-2020 Statewide Election Composite.. By contrast, only 3.4% of the computer-simulated plans create 10 Republican-favoring districts, and no computer-simulated plan ever creates more than 10 Republican districts.

51. Hence, in terms of the total number of Republican-favoring districts created by the plan, the 2021 Enacted Plan is a statistical outlier when compared to the 1,000 computer-simulated plans. The Enacted Plan creates the maximum number of Republican districts that ever occurs in any computer-simulated plan, and the Enacted Plan creates more Republican districts

than 96.6% of the computer-simulated plans, which were drawn using a non-partisan districting process adhering to the General Assembly's 2021 Adopted Criteria. I characterize the Enacted Plan's creation of 10 Republican districts as a statistical outlier among the computer-simulated plans because the Enacted Plan exhibits an outcome that is more favorable to Republicans than over 95% of the simulated plans.

Figure 7:

Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans



52. Notably, the ten elections included in the Statewide Election Composite all occurred in two election years and in electoral environments that were relatively favorable to Republicans across the country (November 2016 and November 2020). North Carolina did not hold any statewide elections for non-judicial offices in November 2018, which was an electoral environment more favorable to Democrats across the country.

53. Hence, the projected number of Republican seats would be even lower in the computer-simulated plans if one measured district partisanship using a statewide election whose outcome was more partisan-balanced or even favorable to Democrats. In the Appendix, I present ten histograms (labeled as Figures B1 to B10), each presenting the projected number of Republican seats across all of the simulated plans and the Enacted Plan using only one of the ten elections in the Statewide Election Composite.

54. The ten histograms in Figures B1 to B10 illustrate how the partisanship of the Enacted Plan compares to the partisanship of the 1,000 computer-simulated plans under a range of different electoral environments, as reflected by the ten elections in the Statewide Election Composite. Most notably, under all ten of these elections, the Enacted Plan always contains exactly 10 Republican-favoring districts and 4 Democrat-favoring districts. Hence, it is clear that the Enacted Plan creates a 10-to-4 distribution of seats in favor of Republican candidates that is durable across a range of different electoral conditions.

55. Moreover, the histograms in Figures B1 to B10 demonstrate that the Enacted Plan becomes a more extreme partisan outlier relative to the computer-simulated plans under electoral conditions that are slightly to moderately favorable to the Democratic candidate. For example, Figure B1 compares the Enacted Plan to the computer-simulated plan using the results of the 2016 Attorney General election, which was a near-tied statewide contest in which Democrat Josh

Stein defeated Republican Buck Newton by a very slim margin. Using the 2016 Attorney General election to measure district partisanship, the 2021 Enacted Plan contains 10 Republican-favoring districts out of 14. The Enacted Plan's creation of 10 districts favoring Republican Buck Newton over Democrat Josh Stein is an outcome that occurs in only 0.2% of the 1,000 computer-simulated plans, indicating that the Enacted Plan is a partisan statistical outlier under electoral conditions that are more favorable for Democrats (and thus relatively more unfavorable for Republicans) than is normal in North Carolina.

56. An even more favorable election for the Democratic candidate was the 2020 gubernatorial contest, in which Democrat Roy Cooper defeated Republican Dan Forest by a 4.5% margin. Figure B7 compares the Enacted Plan to the computer-simulated using the results of this 2020 gubernatorial election. Using the results from this election, the 2021 Enacted Plan contains 10 Republican-favoring districts out of 14. None of the 1,000 simulated plans ever contain 10 districts favoring the Republican candidate. The Enacted Plan's creation of 10 Republican-favoring districts is therefore an extreme partisan outlier that is durable even in Democratic-favorable electoral conditions. In fact, the 10-to-4 Republican partisan advantage under the Enacted Plan appears to become even more of an extreme partisan outlier under Democratic-favorable elections.

57. ***The Mean-Median Difference:*** I also calculate each districting plan's mean-median difference, which is another accepted method that redistricting scholars commonly use to compare the relative partisan bias of different districting plans. The mean-median difference for any given plan is calculated as the mean district-level Republican vote share, minus the median district-level Republican vote share. For any congressional districting plan, the mean is calculated as the average of the Republican vote shares in each of the 14 districts. The median, in

turn, is the Republican vote share in the district where Republican performed the middle-best, which is the district that Republican would need to win to secure a majority of the congressional delegation. For a congressional plan containing 14 districts, the median district is calculated as the average of the Republican vote share in the districts where Republican performed the 7th and 8th-best across the state.

58. Using the 2016-2020 Statewide Election Composite to measure partisanship, the districts in the 2021 Enacted Plan have a mean Republican vote share of 50.8%, while the median district has a Republican vote share of 56.2%. Thus, the Enacted Plan has a mean-median difference of +5.4%, indicating that the median district is skewed significantly more Republican than the plan's average district. The mean-median difference thus indicates that the Enacted Plan distributes voters across districts in such a way that most districts are significantly more Republican-leaning than the average North Carolina congressional district, while Democratic voters are more heavily concentrated in a minority of the Enacted Plan's districts.

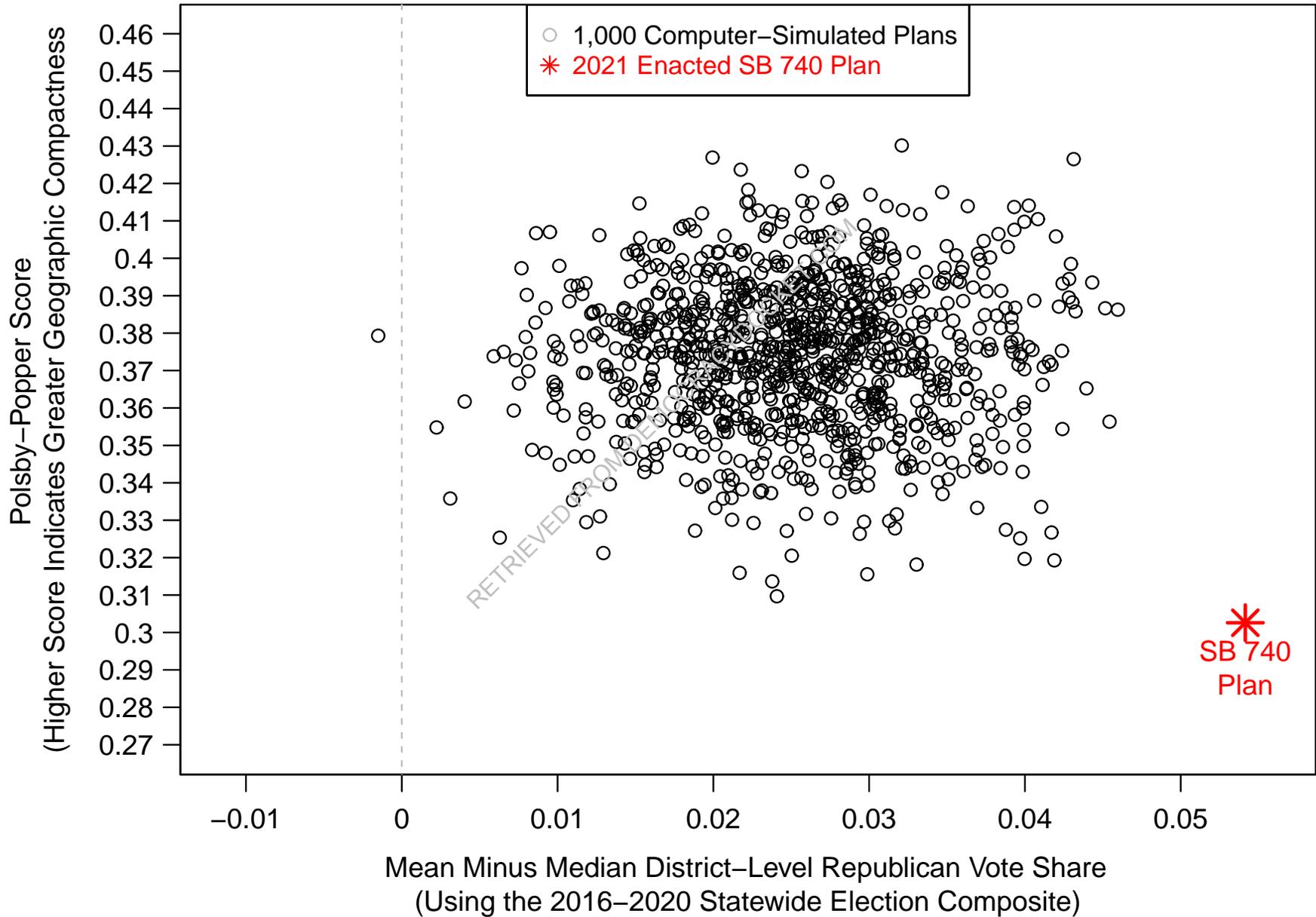
59. I perform this same mean-median difference calculation on all computer-simulated plans in order to determine whether this partisan skew in the median congressional districts could have resulted naturally from North Carolina's political geography and the application of the Adopted Criteria. Figure 8 compares the mean-median difference of the Enacted Plan to the mean-median difference for each the 1,000 computer-simulated plans.

60. Figure 8 contains 1,000 gray circles, representing the 1,000 computer-simulated plans, as well as a red star, representing the 2021 Enacted Plan. The horizontal axis in this Figure measures the mean-median difference of the 2021 Enacted Plan and each simulated plan using the 2016-2020 Statewide Election Composite, while the vertical axis measures the average Polsby-Popper compactness score of the districts within each plan, with higher Polsby-Popper

scores indicating more compact districts. Figure 8 illustrates that the Enacted Plan's mean-median difference is +5.4%, indicating that the median district is skewed significantly more Republican than the plan's average district. Figure 8 further indicates that this difference is an extreme statistical outlier compared to the 1,000 computer-simulated plans. Indeed, the Enacted Plan's +5.4% mean-median difference is an outcome never observed across these 1,000 simulated plans. The 1,000 simulated plans all exhibit mean-median differences that range from -0.2% to +4.6%. In fact, the middle 50% of these computer-simulated plans have mean-median differences ranging from +2.0% to +3.0%, indicating a much smaller degree of skew in the median district than occurs under the 2021 Enacted Plan. These results confirm that the Enacted Plan creates an extreme partisan outcome that cannot be explained by North Carolina's voter geography or by strict adherence to the required districting criteria set forth in the General Assembly's Adopted Criteria.

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Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans on Mean-Median Difference and Compactness



61. Figure 8 illustrates that the Enacted Plan is less geographically compact than every single one of the computer-simulated plans, as measured by each plan's average Polsby-Popper score. The simulated plans have Polsby-Popper scores ranging from 0.31 to 0.43. In fact, the middle 50% of these computer-simulated plans have Polsby-Popper scores ranging from 0.36 to 0.39. Meanwhile, the Enacted Plan exhibits a Polsby-Popper score of only 0.30, which is lower than all 1,000 of the computer-simulated plans. Hence, it is clear that the Enacted Plan did not seek to draw districts that were as geographically compact as reasonably possible. Instead, the Enacted Plan subordinated geographic compactness, which enabled the Enacted Plan to create a partisan skew in North Carolina's congressional districts favoring Republican candidates.

62. ***The Efficiency Gap:*** Another commonly used measure of a districting plan's partisan bias is the efficiency gap.⁵ To calculate the efficiency gap of the Enacted Plan and every computer-simulated plan, I first measure the number of Republican and Democratic votes within each Enacted Plan district and each computer-simulated district, as measured using the 2016-2020 Statewide Election Composite. Using this measure of district-level partisanship, I then calculate each districting plan's efficiency gap using the method outlined in *Partisan Gerrymandering and the Efficiency Gap*.⁶ Districts are classified as Democratic victories if, using the 2016-2020 Statewide Election Composite, the sum total of Democratic votes in the district during these elections exceeds the sum total of Republican votes; otherwise, the district is classified as Republican. For each party, I then calculate the total sum of surplus votes in districts

⁵ Eric McGhee, "Measuring Partisan Bias in Single-Member District Electoral Systems." *Legislative Studies Quarterly* Vol. 39, No. 1: 55-85 (2014).

⁶ Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 *University of Chicago Law Review* 831 (2015).

the party won and lost votes in districts where the party lost. Specifically, in a district lost by a given party, all of the party's votes are considered lost votes; in a district won by a party, only the party's votes exceeding the 50% threshold necessary for victory are considered surplus votes. A party's total wasted votes for an entire districting plan is the sum of its surplus votes in districts won by the party and its lost votes in districts lost by the party. The efficiency gap is then calculated as total wasted Republican votes minus total wasted Democratic votes, divided by the total number of two-party votes cast statewide across all seven elections.

63. Thus, the theoretical importance of the efficiency gap is that it tells us the degree to which more Democratic or Republican votes are wasted across an entire districting plan. A significantly positive efficiency gap indicates far more Republican wasted votes, while a significantly negative efficiency gap indicates far more Democratic wasted votes.

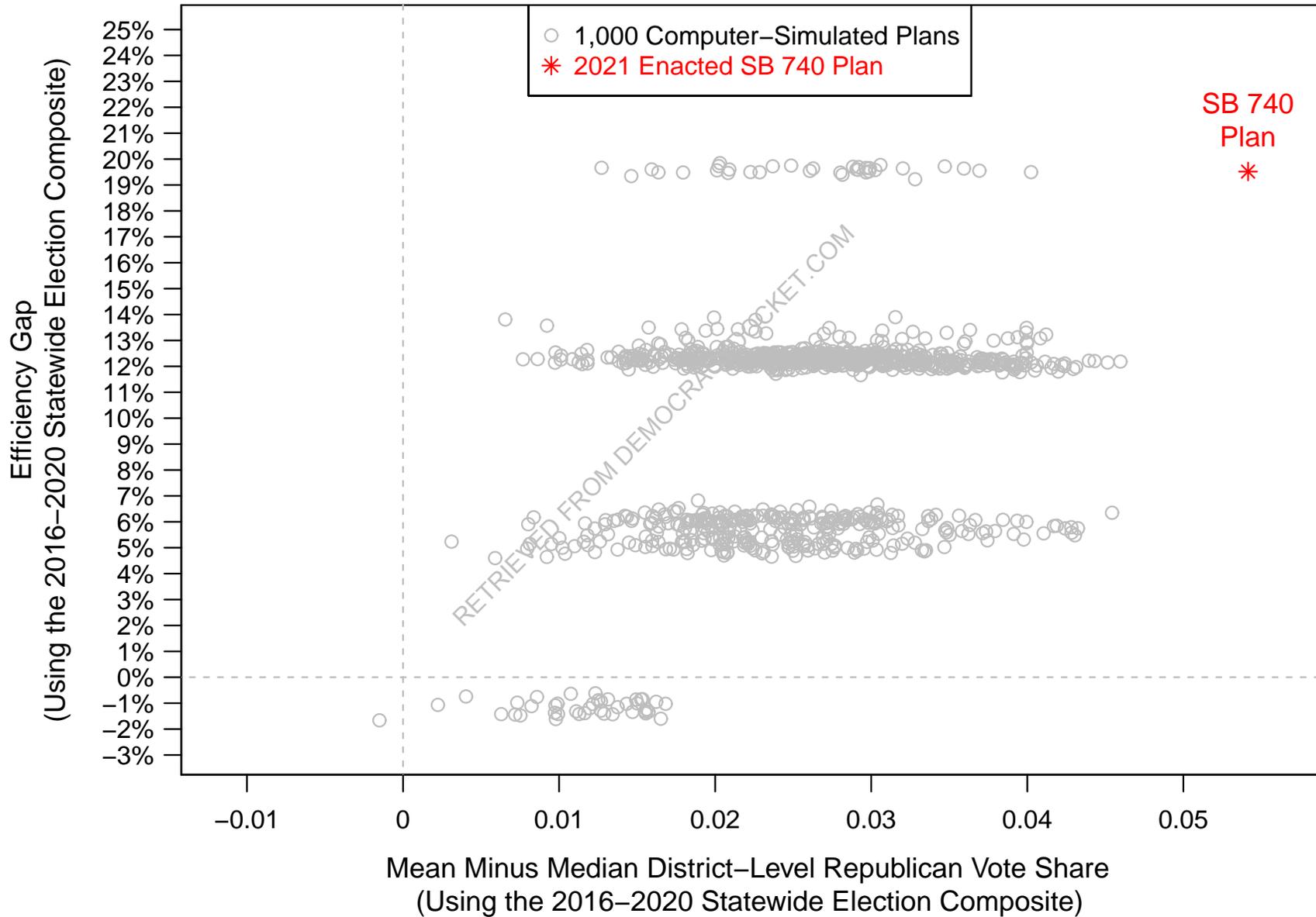
64. I analyze whether the Enacted Plan's efficiency gap arises naturally from a map-drawing process strictly adhering to the mandated criteria in the General Assembly's Adopted Criteria, or rather, whether the skew in the Enacted Plan's efficiency gap is explainable only as the product of a map-drawing process that intentionally favored one party over the other. By comparing the efficiency gap of the Enacted Plan to that of the computer-simulated plans, I am able to evaluate whether or not such the Enacted Plan's efficiency gap could have realistically resulted from adherence to the Adopted Criteria.

65. Figure 9 compares the efficiency gaps of the Enacted Plan and of the 1,000 computer-simulated plans. As before, the 1,000 circles in this Figure represent the 1,000 computer-simulated plans, while the red star in the lower right corner represents the Enacted Plan. Each plan is plotted along the vertical axis according to its efficiency gap, while each plan is plotted along the horizontal axis according to its mean-median difference.

66. The results in Figure 9 illustrate that the Enacted Plan exhibits an efficiency gap of +19.5%, indicating that the plan results in far more wasted Democratic votes than wasted Republican votes. Specifically, the difference between the total number of wasted Democratic votes and wasted Republican votes amounts to 19.5% of the total number of votes statewide. The Enacted Plan's efficiency gap is larger than the efficiency gaps exhibited by 97.7% of the computer-simulated plans. This comparison reveals that the significant level of Republican bias exhibited by the Enacted Plan cannot be explained by North Carolina's political geography or the Adopted Criteria alone.

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Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans on Mean-Median Difference and Efficiency Gap



67. ***The Lopsided Margins Measure:*** Another measure of partisan bias in districting plans is the "lopsided margins" test. The basic premise captured by this 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. Thus, for example, a map-drawer attempting to favor Party A may pack Party B's voters into a small number of districts that very heavily favor Party B. This packing would then allow Party A to win all the remaining districts with relatively smaller margins. This sort of partisan manipulation in districting would result in Party B winning its districts by extremely large margins, while Party A would win its districts by relatively small margins.

68. Hence, the lopsided margins test is performed by calculating the difference between the average margin of victory in Republican-favoring districts and the average margin of victory in Democratic-favoring districts. The 2021 Enacted Plan contains four Democratic-favoring districts (CD-2, 5, 6, and 9), and these four districts have an average Democratic vote share of 65.4%, as measured using the 2016-2020 Statewide Election Composite. By contrast, the Enacted Plan contains ten Republican-favoring districts (CD-1, 3, 4, 7, 8, 10, 11, 12, 13, and 14), and these ten districts have an average Republican vote share of 57.3%. Hence, the difference between the average Democratic margin of victory in Democratic-favoring districts and the average Republican margin of victory in Republican-favoring districts is +8.1%, which is calculated as $65.4\% - 57.3\%$. I refer to this calculation of +8.1% as the Enacted Plan's lopsided margins measure.

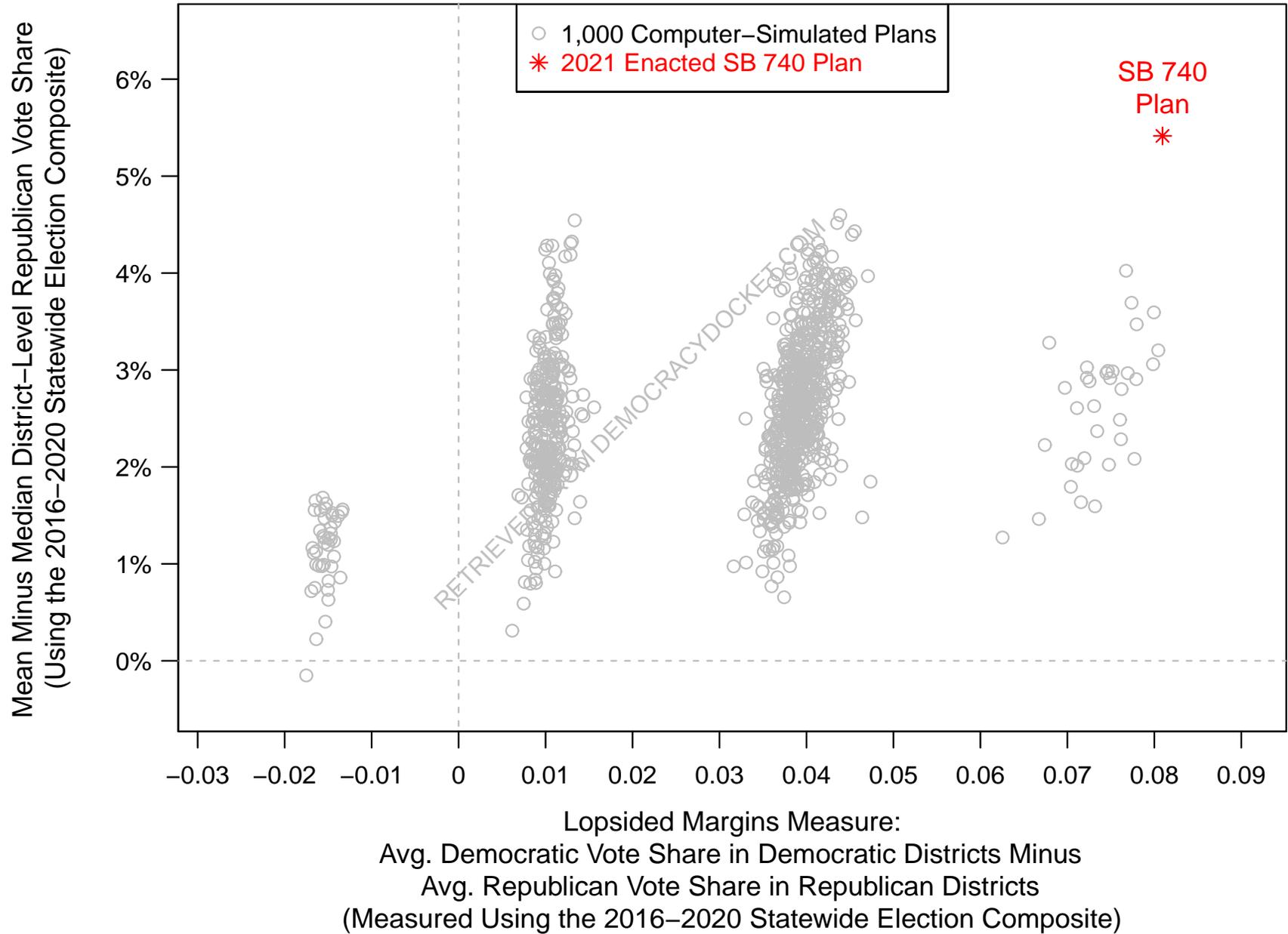
69. How does the 8.1% lopsided margins measure of the Enacted Plan compare to the same calculation for the 1,000 computer-simulated plans? Figure 10 reports the lopsided margins calculations for the Enacted Plan and for the simulated plans. In Figure 10, each plan is plotted

along the horizontal axis according to its lopsided margins measure and along the vertical axis according to its mean-median difference.

70. Figure 10 reveals that the Enacted Plan's +8.1% lopsided margins measure is an extreme outlier compared to the lopsided margins measures of the 1,000 computer-simulated plans. All 1,000 of the simulated plans have a smaller lopsided margins measure than the Enacted Plan. In fact, a significant minority (34.5%) of the 1,000 simulated plans have a lopsided margins measure of between -2% to +2%, indicating a plan in which Democrats and Republicans win their respective districts by similar average margins.

71. By contrast, the Enacted Plan's lopsided margins measure of +8.1% indicates that the Enacted Plan creates districts in which Democrats are extremely packed into their districts, while the margin of victory in Republican districts is significantly smaller. The "lopsidedness" of the two parties' average margin of victory is extreme when compared to the computer-simulated plans. The finding that all 1,000 simulated plans have a smaller lopsided margins measure indicates that the Enacted Plan's extreme 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.

Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans on Lopsided Margins Measure and Mean-Median Difference



Conclusions Regarding Partisanship and Traditional Districting Criteria:

72. The analysis described thus far in this report lead me to reach two main findings: First, among the five traditional districting criteria mandated by the General Assembly's 2021 Adopted Criteria, the Enacted Plan fails to minimize county splits, fails to minimize VTD splits, and is significantly less geographically compact than is reasonably possible under a districting process that follows the Adopted Criteria. Second, I found that the Enacted Plan is an extreme partisan outlier when compared to computer-simulated plans produced by a process following the Adopted Criteria. The Enacted Plan contains 10 districts that are partisan outliers when compared to the simulated plans' districts, and using several different common measures of partisan bias, the Enacted Plan creates a level of pro-Republican bias more extreme than in over 95% of the computer-simulated plans. In particular, the Enacted Plan creates more "mid-range" Republican districts than is created in 100% of the computer-simulated plans (Paragraphs 45-46).

73. Based on these two main findings, I conclude that partisanship predominated in the drawing of the 2021 Enacted Plan and subordinated the traditional districting principles of avoiding county splits, avoiding VTD splits, and geographic compactness. Because the Enacted Plan fails to follow three of the Adopted Criteria's mandated districting principles while simultaneously creating an extreme level of partisan bias, I therefore conclude that the partisan bias of the Enacted Plan did not naturally arise by chance from a districting process adhering to the Adopted Criteria. Instead, I conclude that partisan goals predominated in the drawing of the Enacted Plan. By subordinating traditional districting criteria, the General Assembly's Enacted Plan was able to achieve partisan goals that could not otherwise have been achieved under a partisan-neutral districting process that follows the Adopted Criteria.

The Effect of the Enacted Plan Districts on Plaintiffs

74. I evaluated the congressional districts in which each Plaintiff would reside under the 1,000 computer-simulated using a list of geocoded residential addresses for the Plaintiffs that counsel for the Plaintiffs provided me. I used these geocoded addresses to identify the specific district in which each Plaintiff would be located under each computer-simulated plan, as well as under the Enacted Plan. I then compared the partisanship of each individual Plaintiff's Enacted Plan district to the partisanship of the Plaintiff's 1,000 districts from the 1,000 computer-simulated plans. Using this approach, I identify whether each Plaintiff's district is a partisan outlier when compared to the Plaintiff's 1,000 computer-simulated districts.

75. Figure 11 present the results of this analysis. This Figure lists the individual Plaintiffs and describes the partisanship of each Plaintiff's district of residence in the Enacted Plan, as well as the partisanship of the district the Plaintiff would have resided in under each of the 1,000 simulated congressional plans.

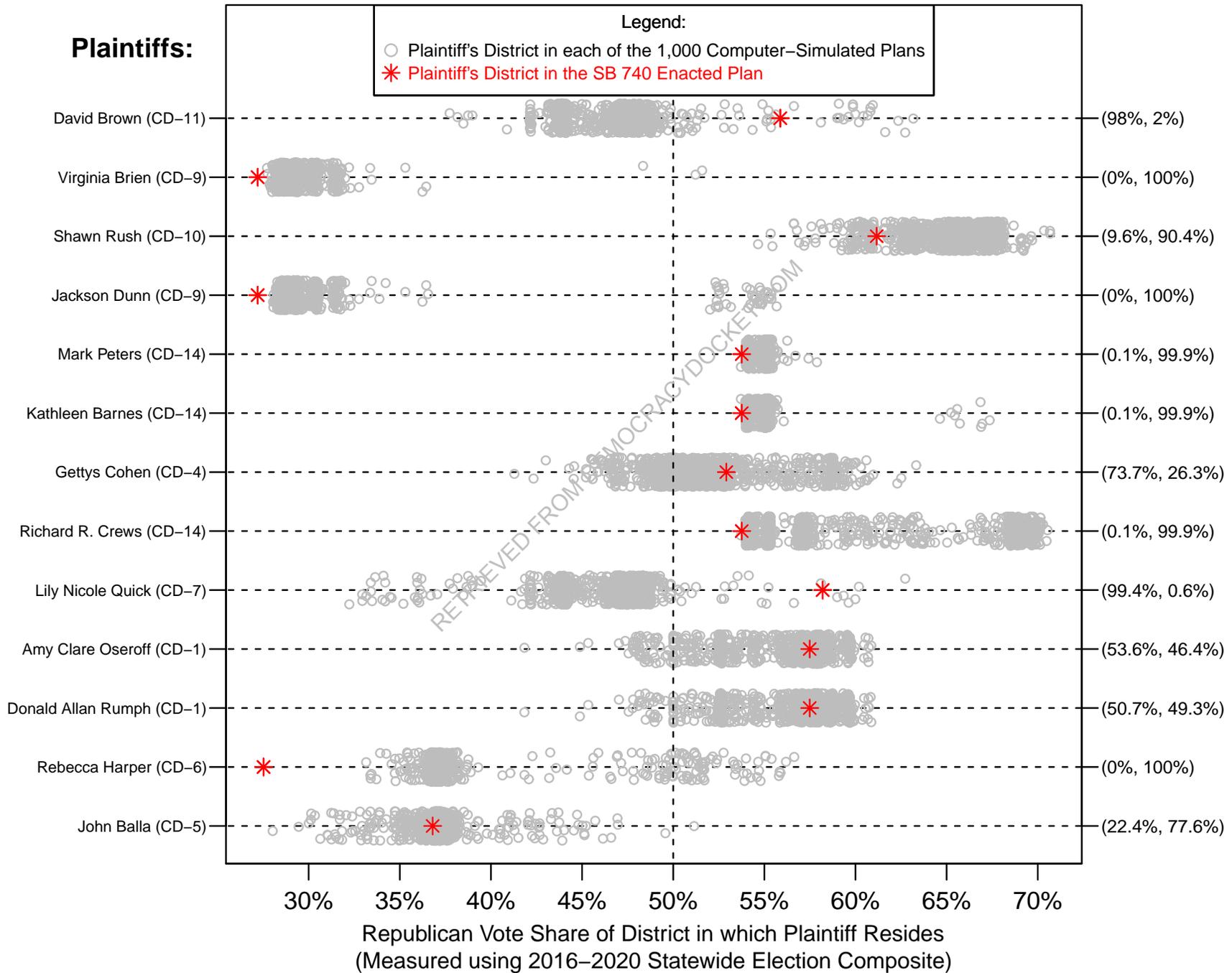
76. To explain these analyses with an example each row in Figure 11 corresponds to a particular individual Plaintiff. In the first row, describing Plaintiff David Brown, the red star depicts the partisanship of the Plaintiff's Enacted Plan district (CD-11), as measured by Republican vote share using the 2016-2020 Statewide Election Composite. The 1,000 gray circles on this row depict the Republican vote share of each of the 1,000 simulated districts in which the Plaintiff would reside in each of the 1,000 computer-simulated plans, based on that Plaintiff's residential address. In the margin to the right of each row, I list in parentheses how many of the 1,000 simulated plans would place the plaintiff in a more Democratic-leaning district (on the left) and how many of the 1,000 simulations would place the plaintiff in a more Republican-leaning district (on the right) than the Plaintiff's Enacted Plan district. Thus, for

example, the first row of Figure 11 reports that 98% of the 1,000 computer-simulated plans would place Plaintiff David Brown in a more Democratic-leaning district than his actual Enacted Plan district (CD-11). Therefore, I can conclude that Plaintiff David Brown's Enacted Plan district is a partisan statistical outlier when compared to his district under the 1,000 simulated plans.

77. Figure 11 shows that two Plaintiffs residing in Republican-leaning districts under the Enacted Plan would be placed in a more Democratic-leaning district in over 95% of the computer-simulated plans: David Brown (CD-11) and Lily Nicole Quick (CD-7).

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Plaintiffs' Districts in the SB 740 Plan and in 1,000 Computer-Simulated Plans



78. Additionally, Figure 11 shows that six Plaintiffs would be placed in a more Republican district in 99.9% or more of the simulated plans relative to their districts under the Enacted Plan: Virginia Brien (CD-9), Jackson Dunn (CD-9), Mark Peters (CD-14), Kathleen Barnes (CD-14), Richard R. Crews (CD-14), and Rebecca Harper (CD-6).

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

This 30th day of November, 2021.

A handwritten signature in black ink, appearing to read "Jowei Chen", written over a horizontal line.

Dr. Jowei Chen

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Jowei Chen
Curriculum Vitae

Department of Political Science
University of Michigan
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Ann Arbor, MI 48109-1045
Phone: 917-861-7712, Email: jowei@umich.edu
Website: <http://www.umich.edu/~jowei>

Academic Positions:

Associate Professor (2015-present), Assistant Professor (2009-2015), Department of Political Science, University of Michigan.

Research Associate Professor (2016-present), Faculty Associate (2009-2015), Center for Political Studies, University of Michigan.

W. Glenn Campbell and Rita Ricardo-Campbell National Fellow, Hoover Institution, Stanford University, 2013.

Principal Investigator and Senior Research Fellow, Center for Governance and Public Policy Research, Willamette University, 2013 – Present.

Education:

Ph.D., Political Science, Stanford University (June 2009)

M.S., Statistics, Stanford University (January 2007)

B.A., Ethics, Politics, and Economics, Yale University (May 2004)

Publications:

Chen, Jowei and Neil Malhotra. 2007. "The Law of k/n : The Effect of Chamber Size on Government Spending in Bicameral Legislatures."

[*American Political Science Review*. 101\(4\): 657-676.](#)

Chen, Jowei, 2010. "The Effect of Electoral Geography on Pork Barreling in Bicameral Legislatures."

[*American Journal of Political Science*. 54\(2\): 301-322.](#)

Chen, Jowei, 2013. "Voter Partisanship and the Effect of Distributive Spending on Political Participation."

[*American Journal of Political Science*. 57\(1\): 200-217.](#)

Chen, Jowei and Jonathan Rodden, 2013. "Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures"

[*Quarterly Journal of Political Science*, 8\(3\): 239-269.](#)

Bradley, Katharine and Jowei Chen, 2014. "Participation Without Representation? Senior Opinion, Legislative Behavior, and Federal Health Reform."

[*Journal of Health Politics, Policy and Law*. 39\(2\), 263-293.](#)

Chen, Jowei and Tim Johnson, 2015. "Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating and Explaining Ideological Change in Executive Agencies."

[*Journal of Theoretical Politics*, Volume 27, No. 1: 151-174.](#)

Bonica, Adam, Jowei Chen, and Tim Johnson, 2015. "Senate Gate-Keeping, Presidential Staffing of 'Inferior Offices' and the Ideological Composition of Appointments to the Public Bureaucracy."

[*Quarterly Journal of Political Science*. Volume 10, No. 1: 5-40.](#)

Chen, Jowei and Jonathan Rodden, 2015. "Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders."

[*Election Law Journal*. Volume 14, Number 4: 331-345.](#)

Chen, Jowei and David Cottrell, 2016. "Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House."

[*Electoral Studies*. Volume 44 \(December 2016\): 329-340.](#)

Chen, Jowei, 2017. "Analysis of Computer-Simulated Districting Maps for the Wisconsin State Assembly."

[*Election Law Journal*. Volume 16, Number 4 \(December 2017\): 417-442.](#)

Chen, Jowei and Nicholas Stephanopoulos, 2020. "The Race-Blind Future of Voting Rights."

[*Yale Law Journal*, Forthcoming. Volume 130, Number 4: 778-1049.](#)

Kim, Yunsieg and Jowei Chen, 2021. "Gerrymandered by Definition: The Distortion of 'Traditional' Districting Principles and a Proposal for an Empirical Redefinition."

[*Wisconsin Law Review*, Forthcoming, Volume 2021, Number 1.](#)

Chen, Jowei and Nicholas Stephanopoulos, 2021. "Democracy's Denominator."

[*California Law Review*, Accepted for Publication, Volume 109.](#)

Non-Peer-Reviewed Publication:

Chen, Jowei and Tim Johnson. 2017. "Political Ideology in the Bureaucracy."

[*Global Encyclopedia of Public Administration, Public Policy, and Governance*.](#)

Research Grants:

"How Citizenship-Based Redistricting Systemically Disadvantages Voters of Color". 2020 (\$18,225). Combating and Confronting Racism Grant. University of Michigan Center for Social Solutions and Poverty Solutions.

Principal Investigator. [National Science Foundation Grant SES-1459459](#), September 2015 – August 2018 (\$165,008). "The Political Control of U.S. Federal Agencies and Bureaucratic Political Behavior."

"Economic Disparity and Federal Investments in Detroit," (with Brian Min) 2011. Graham Institute, University of Michigan (\$30,000).

"The Partisan Effect of OSHA Enforcement on Workplace Injuries," (with Connor Raso) 2009. John M. Olin Law and Economics Research Grant (\$4,410).

Invited Talks:

September, 2011. University of Virginia, American Politics Workshop.

October 2011. Massachusetts Institute of Technology, American Politics Conference.

January 2012. University of Chicago, Political Economy/American Politics Seminar.

February 2012. Harvard University, Positive Political Economy Seminar.

September 2012. Emory University, Political Institutions and Methodology Colloquium.

November 2012. University of Wisconsin, Madison, American Politics Workshop.

September 2013. Stanford University, Graduate School of Business, Political Economy Workshop.

February 2014. Princeton University, Center for the Study of Democratic Politics Workshop.

November 2014. Yale University, American Politics and Public Policy Workshop.

December 2014. American Constitution Society for Law & Policy Conference: Building the Evidence to Win Voting Rights Cases.

February 2015. University of Rochester, American Politics Working Group.

March 2015. Harvard University, Voting Rights Act Workshop.

May 2015. Harvard University, Conference on Political Geography.

October 2015. George Washington University School of Law, Conference on Redistricting Reform.

September 2016. Harvard University Center for Governmental and International Studies, Voting Rights Institute Conference.

March 2017. Duke University, Sanford School of Public Policy, Redistricting Reform Conference.

October 2017. Willamette University, Center for Governance and Public Policy Research

October 2017, University of Wisconsin, Madison. Geometry of Redistricting Conference.

February 2018: University of Georgia Law School

September 2018. Willamette University.

November 2018. Yale University, Redistricting Workshop.

November 2018. University of Washington, Severyns Ravenholt Seminar in Comparative Politics.

January 2019. Duke University, Reason, Reform & Redistricting Conference.

February 2019. Ohio State University, Department of Political Science. Departmental speaker series.

March 2019. Wayne State University Law School, Gerrymandering Symposium.

November 2019. Big Data Ignite Conference.

November 2019. Calvin College, Department of Mathematics and Statistics.

September 2020 (Virtual). Yale University, Yale Law Journal Scholarship Workshop

Conference Service:

Section Chair, 2017 APSA (San Francisco, CA), Political Methodology Section

Discussant, 2014 Political Methodology Conference (University of Georgia)

Section Chair, 2012 MPSA (Chicago, IL), Political Geography Section.

Discussant, 2011 MPSA (Chicago, IL) "Presidential-Congressional Interaction."

Discussant, 2008 APSA (Boston, MA) "Congressional Appropriations."

Chair and Discussant, 2008 MPSA (Chicago, IL) "Distributive Politics: Parties and Pork."

Conference Presentations and Working Papers:

"Ideological Representation of Geographic Constituencies in the U.S. Bureaucracy," (with Tim Johnson). 2017 APSA.

"Incentives for Political versus Technical Expertise in the Public Bureaucracy," (with Tim Johnson). 2016 APSA.

"Black Electoral Geography and Congressional Districting: The Effect of Racial Redistricting on Partisan Gerrymandering". 2016 Annual Meeting of the Society for Political Methodology (Rice University)

"Racial Gerrymandering and Electoral Geography." Working Paper, 2016.

"Does Deserved Spending Win More Votes? Evidence from Individual-Level Disaster Assistance," (with Andrew Healy). 2014 APSA.

"The Geographic Link Between Votes and Seats: How the Geographic Distribution of Partisans Determines the Electoral Responsiveness and Bias of Legislative Elections," (with David Cottrell). 2014 APSA.

"Gerrymandering for Money: Drawing districts with respect to donors rather than voters." 2014 MPSA.

“Constituent Age and Legislator Responsiveness: The Effect of Constituent Opinion on the Vote for Federal Health Reform.” (with Katharine Bradley) 2012 MPSA.

“Voter Partisanship and the Mobilizing Effect of Presidential Advertising.” (with Kyle Dropp) 2012 MPSA.

“Recency Bias in Retrospective Voting: The Effect of Distributive Benefits on Voting Behavior.” (with Andrew Feher) 2012 MPSA.

“Estimating the Political Ideologies of Appointed Public Bureaucrats,” (with Adam Bonica and Tim Johnson) 2012 Annual Meeting of the Society for Political Methodology (University of North Carolina)

“Tobler’s Law, Urbanization, and Electoral Bias in Florida.” (with Jonathan Rodden) 2010 Annual Meeting of the Society for Political Methodology (University of Iowa)

“Unionization and Presidential Control of the Bureaucracy” (with Tim Johnson) 2011 MPSA.

“Estimating Bureaucratic Ideal Points with Federal Campaign Contributions” 2010 APSA. (Washington, DC).

“The Effect of Electoral Geography on Pork Spending in Bicameral Legislatures,” Vanderbilt University Conference on Bicameralism, 2009.

“When Do Government Benefits Influence Voters’ Behavior? The Effect of FEMA Disaster Awards on US Presidential Votes,” 2009 APSA (Toronto, Canada).

“Are Poor Voters Easier to Buy Off?” 2009 APSA (Toronto, Canada).

“Credit Sharing Among Legislators: Electoral Geography’s Effect on Pork Barreling in Legislatures,” 2008 APSA (Boston, MA).

“Buying Votes with Public Funds in the US Presidential Election,” Poster Presentation at the 2008 Annual Meeting of the Society for Political Methodology (University of Michigan).

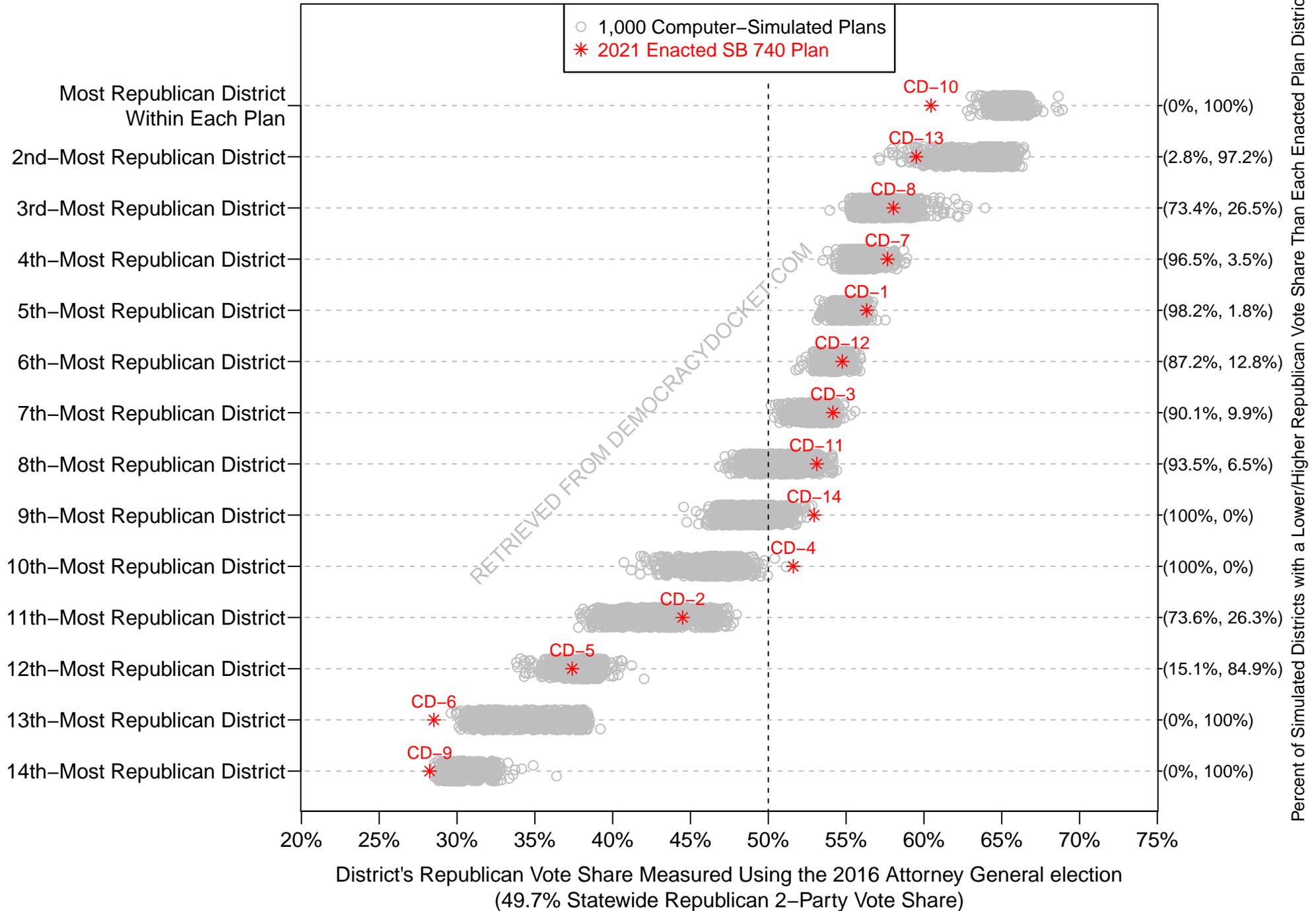
“The Effect of Electoral Geography on Pork Spending in Bicameral Legislatures,” 2008 MPSA.

“Legislative Free-Riding and Spending on Pure Public Goods,” 2007 MPSA (Chicago, IL).

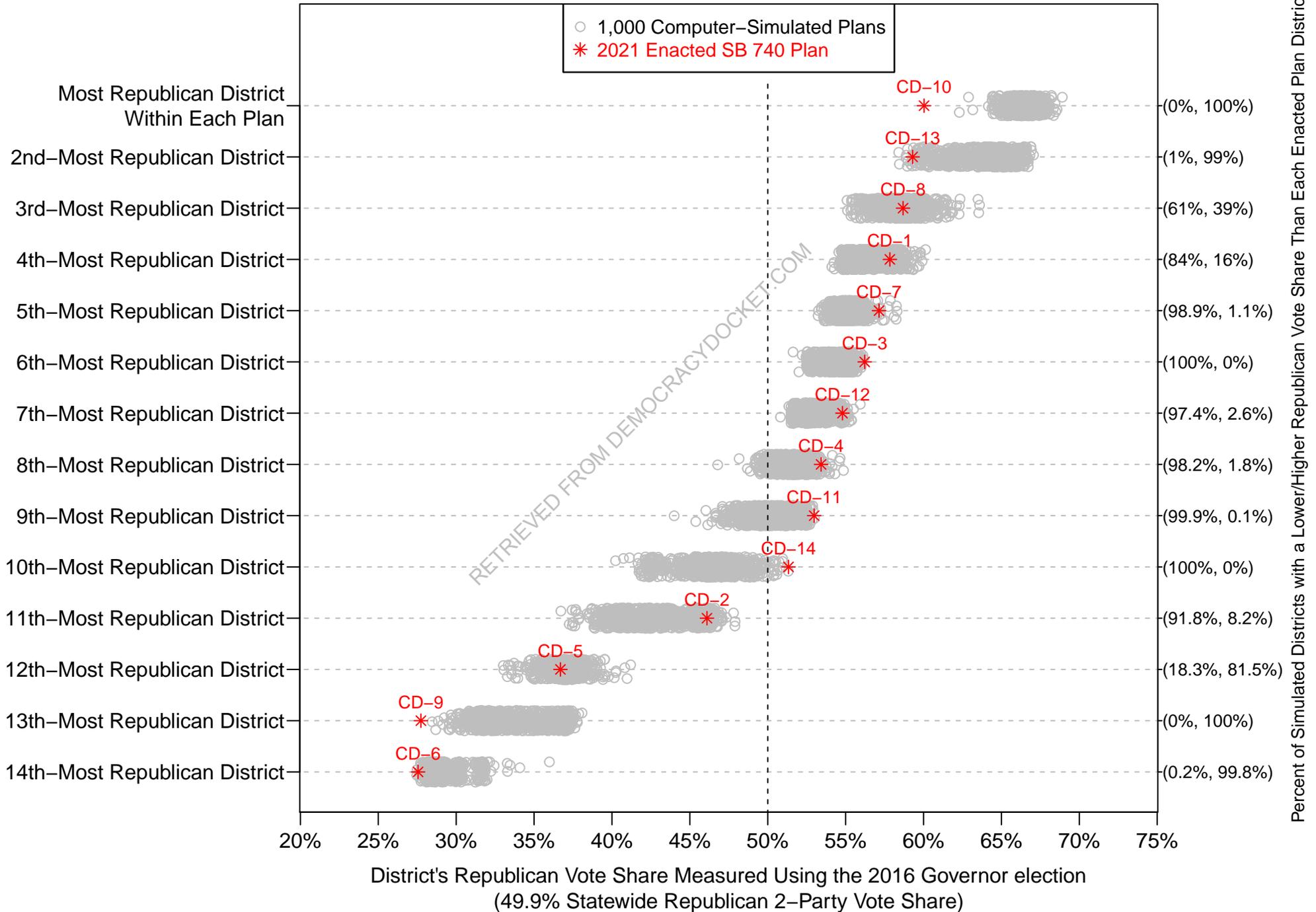
“Free Riding in Multi-Member Legislatures,” (with Neil Malhotra) 2007 MPSA (Chicago, IL).

“The Effect of Legislature Size, Bicameralism, and Geography on Government Spending: Evidence from the American States,” (with Neil Malhotra) 2006 APSA (Philadelphia, PA).

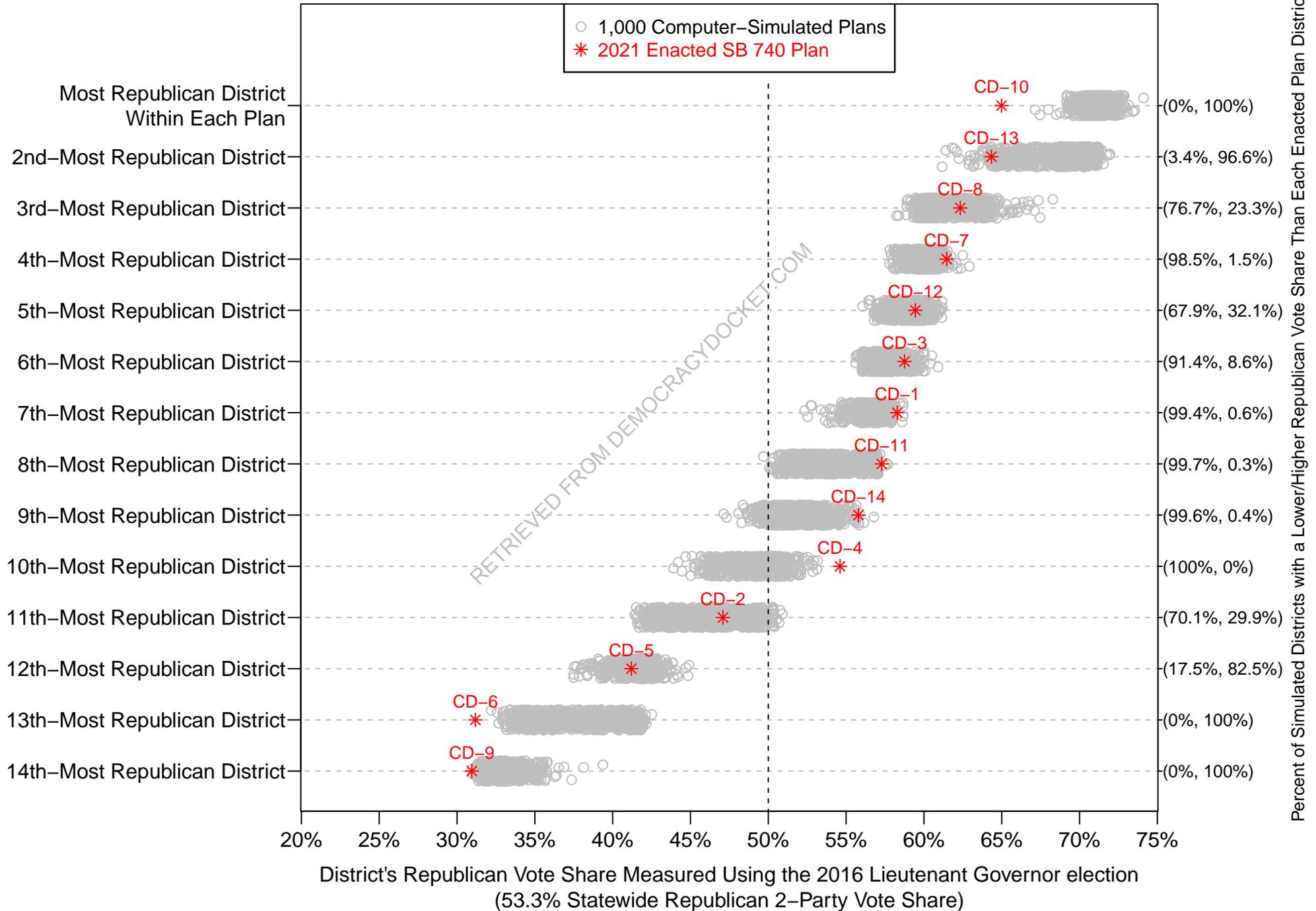
**Figure A1: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2016 Attorney General Election Results**



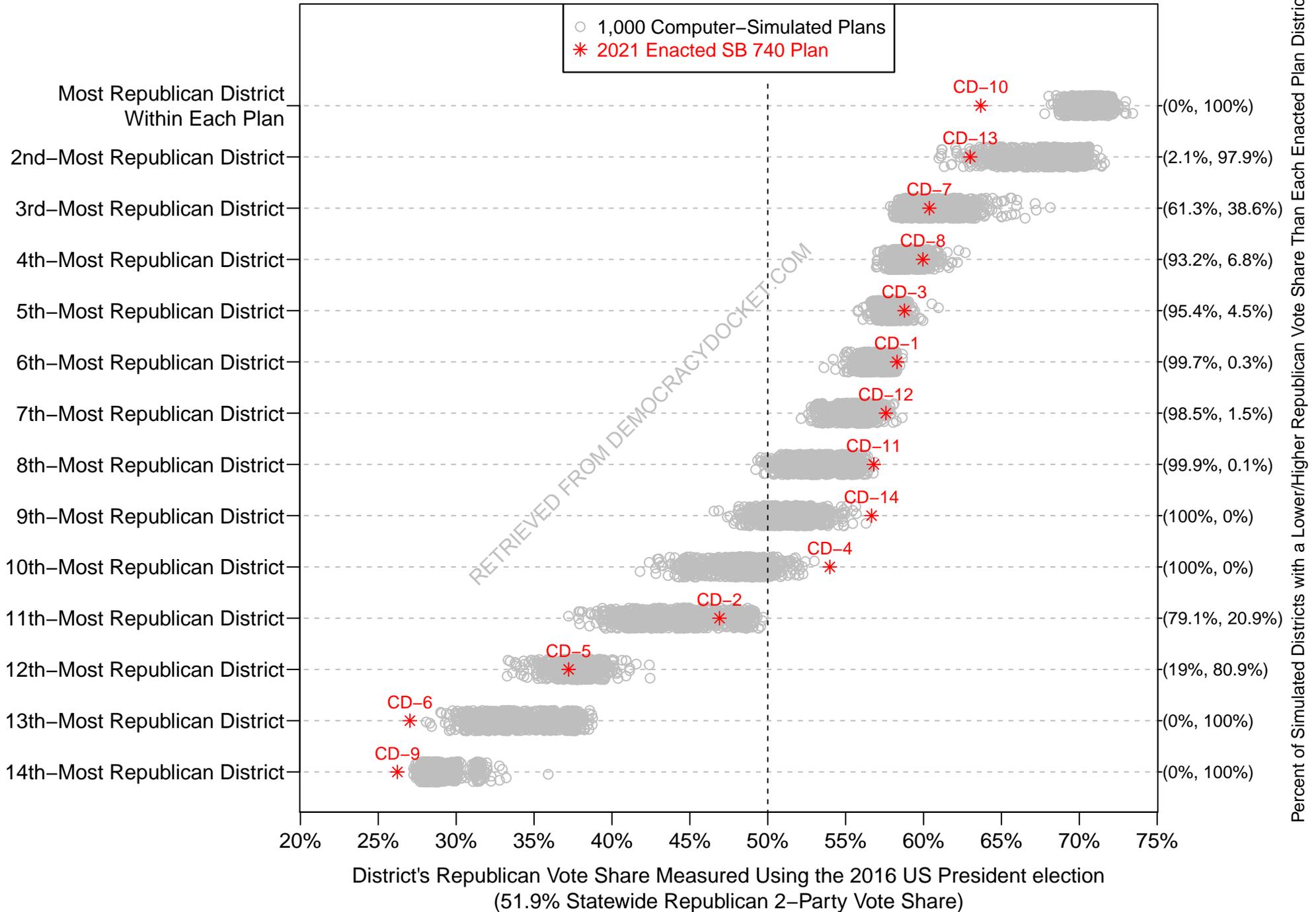
**Figure A2: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2016 Governor Election Results**



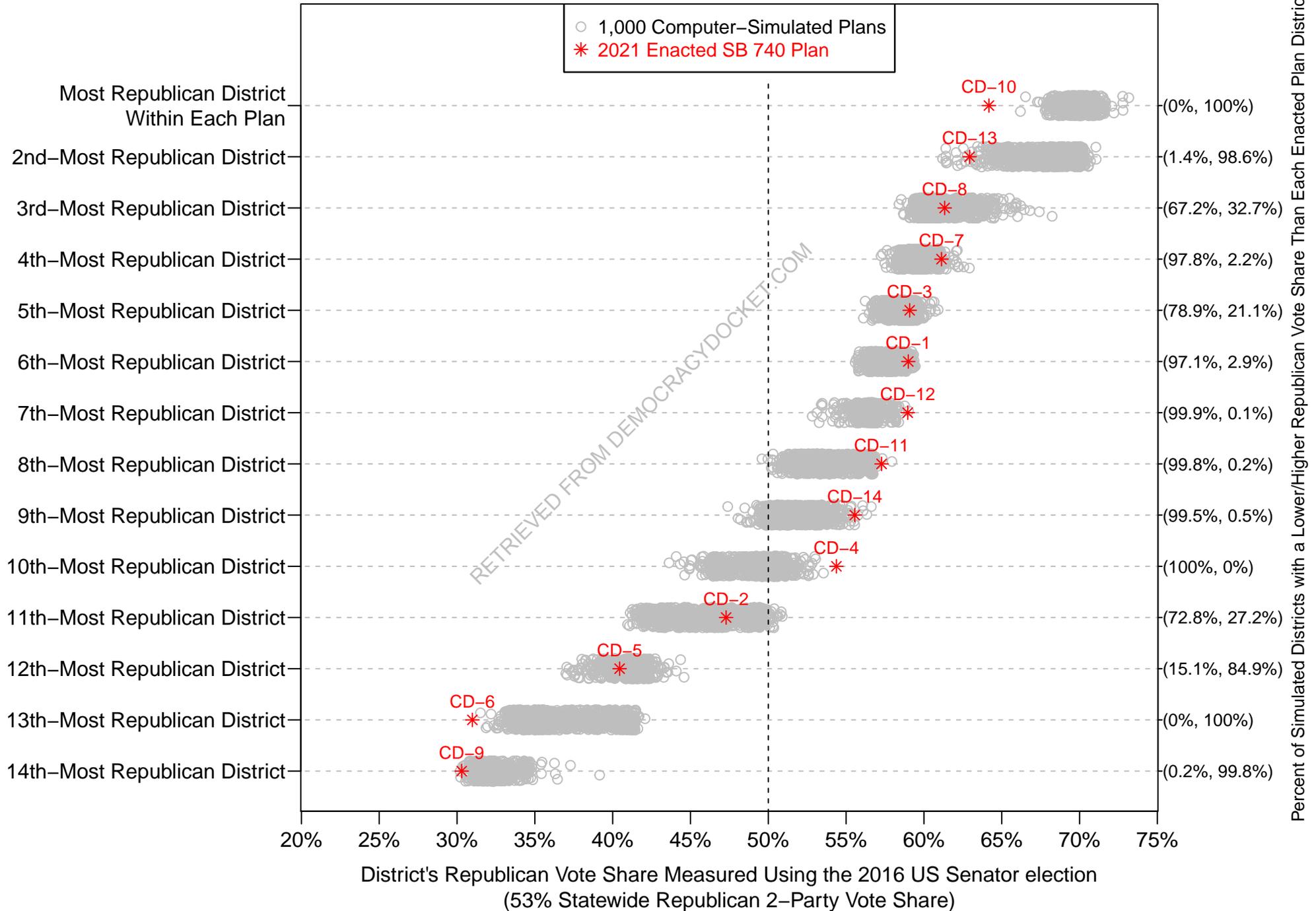
**Figure A3: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2016 Lieutenant Governor Election Results**



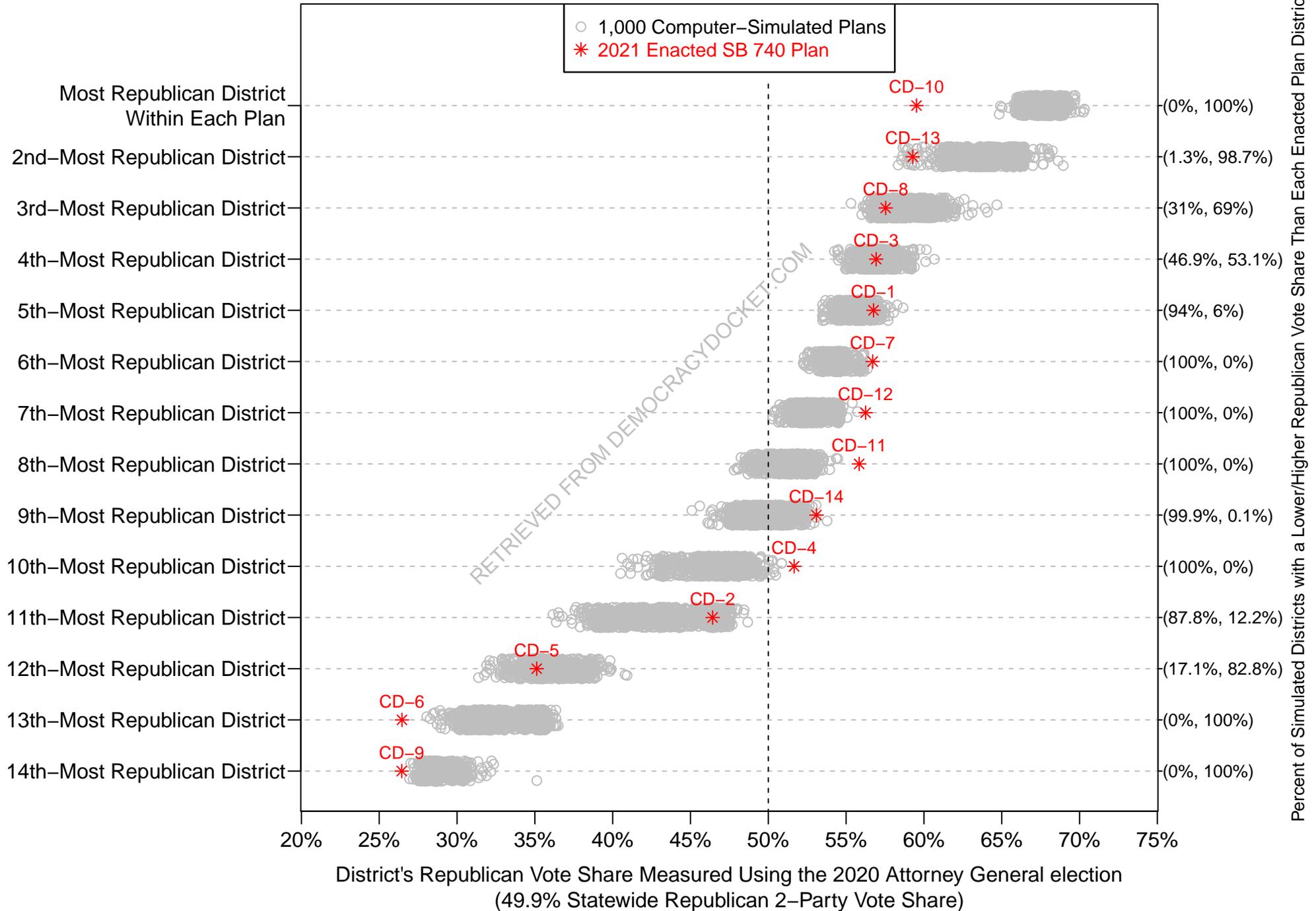
**Figure A4: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2016 US President Election Results**



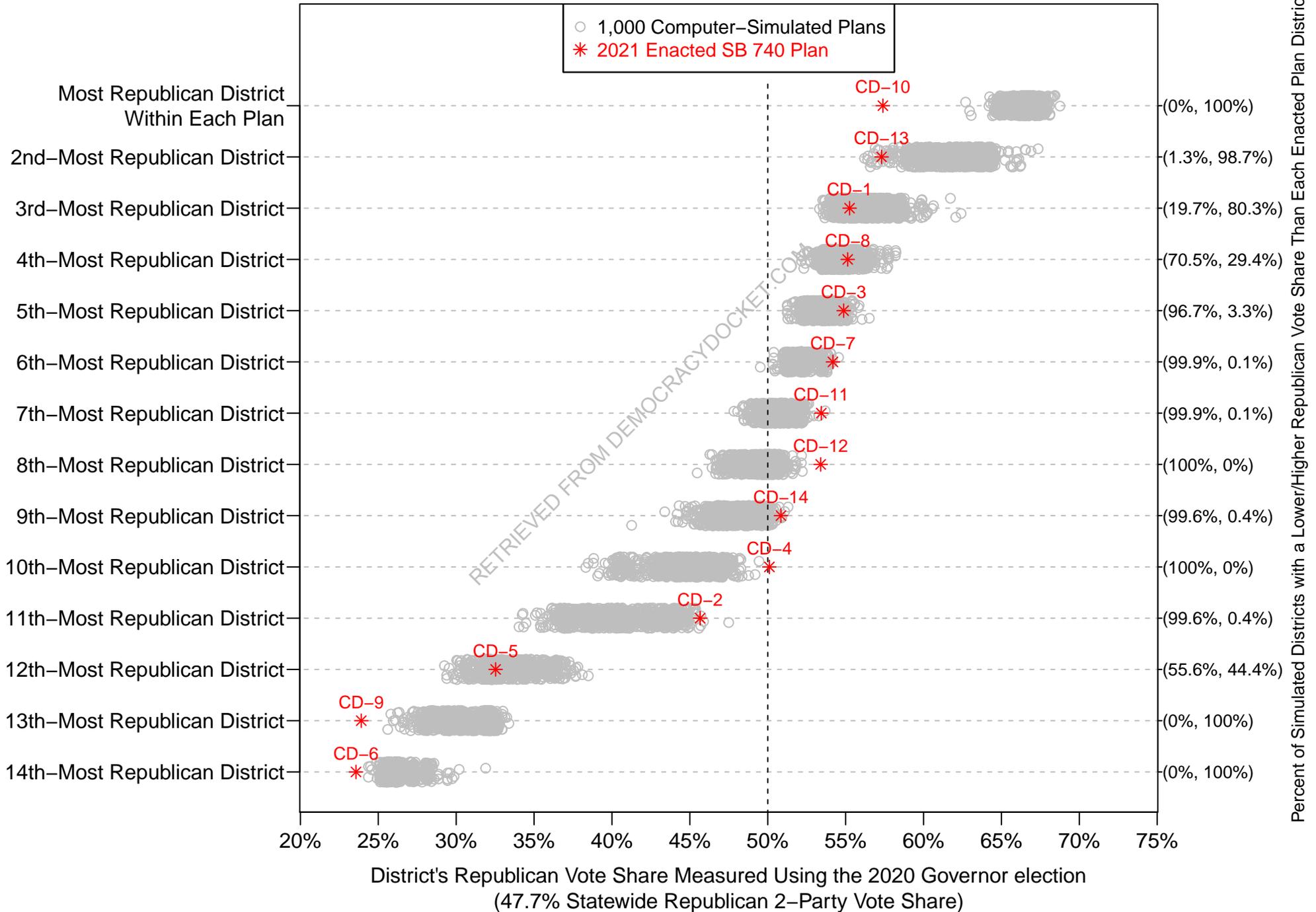
**Figure A5: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2016 US Senator Election Results**



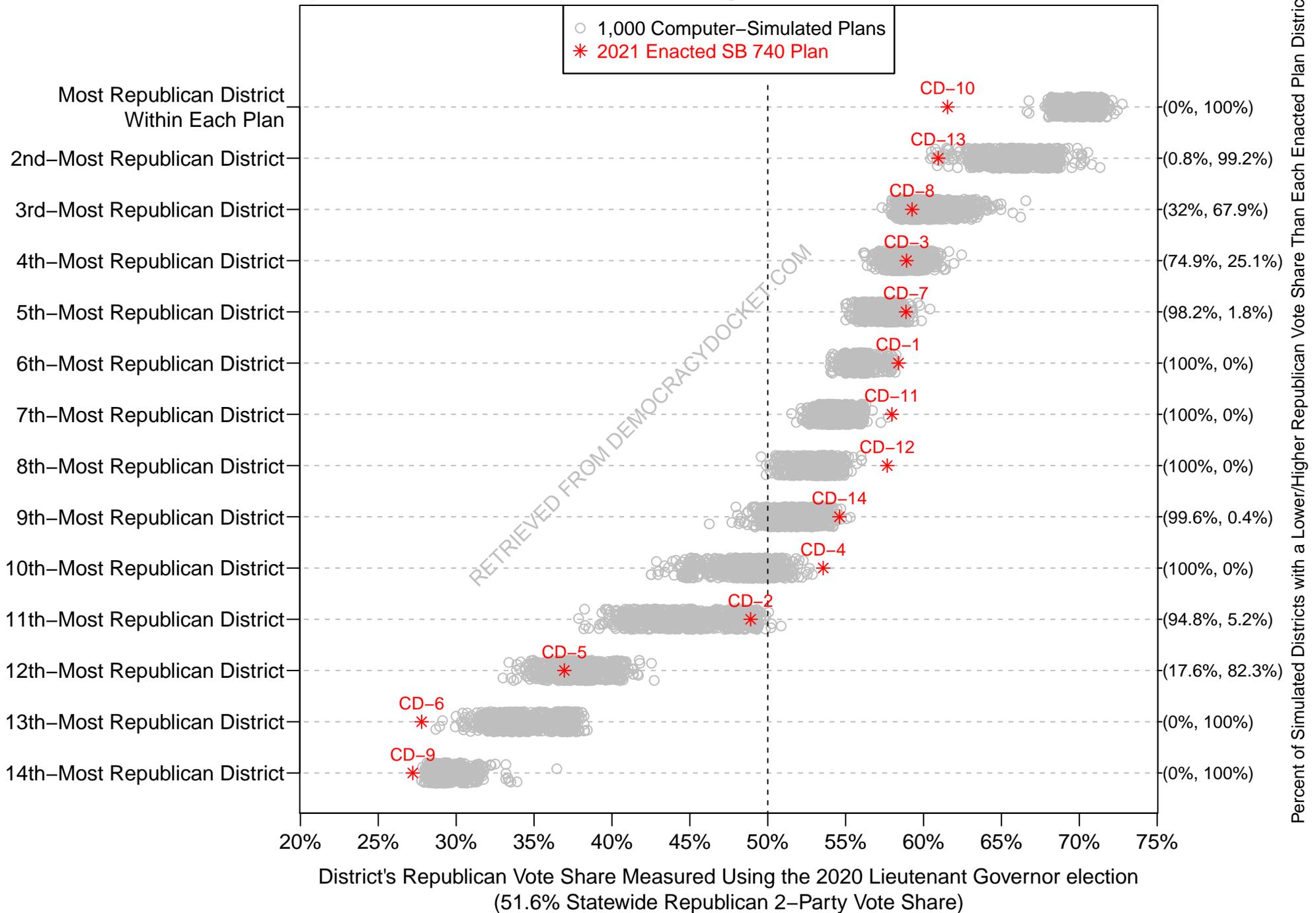
**Figure A6: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2020 Attorney General Election Results**



**Figure A7: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2020 Governor Election Results**



**Figure A8: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2020 Lieutenant Governor Election Results**



**Figure A9: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans:
Districts' Republican Vote Share Measured Using the 2020 US President Election Results**

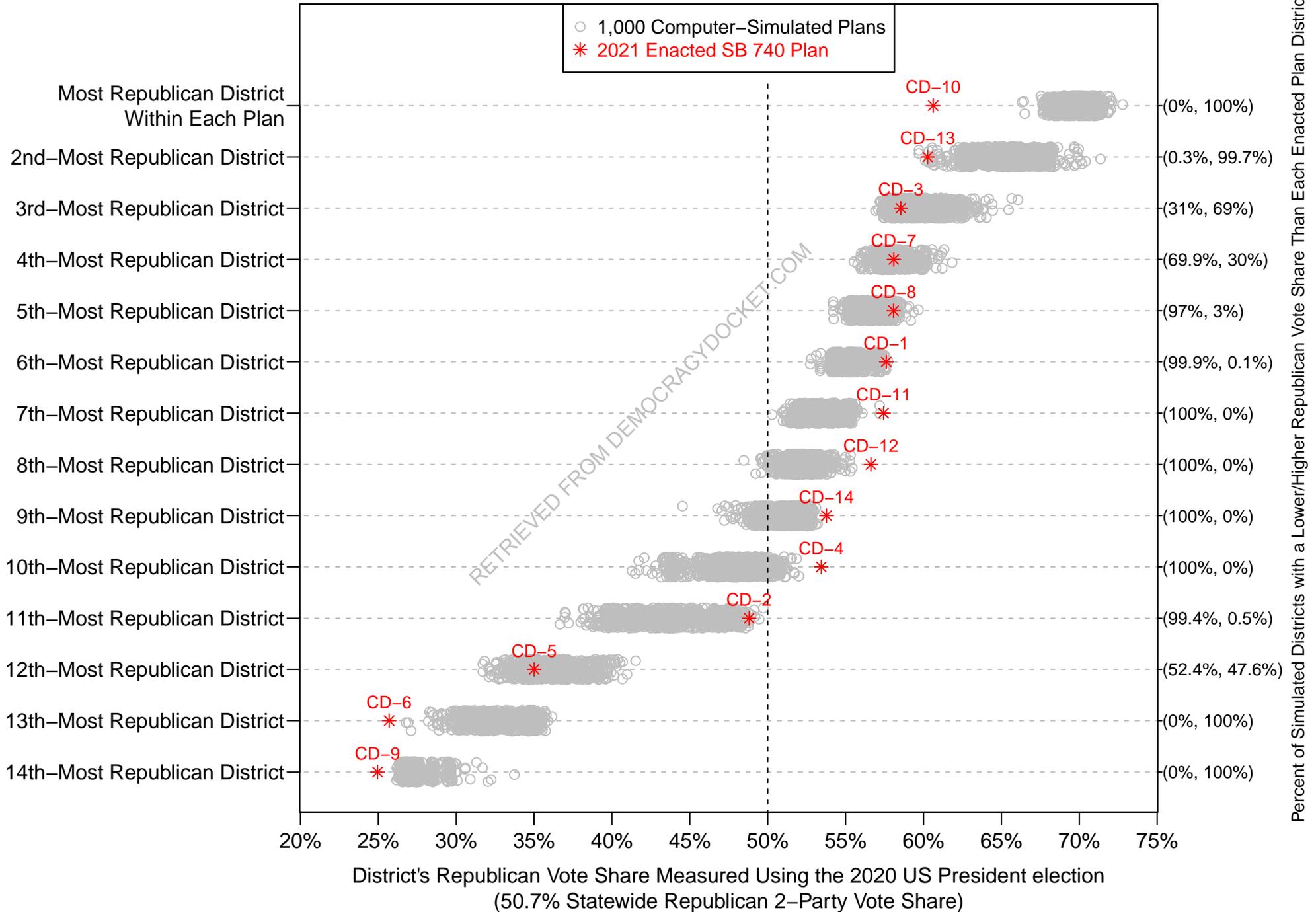


Figure A10: Comparison of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans: Districts' Republican Vote Share Measured Using the 2020 US Senator Election Results

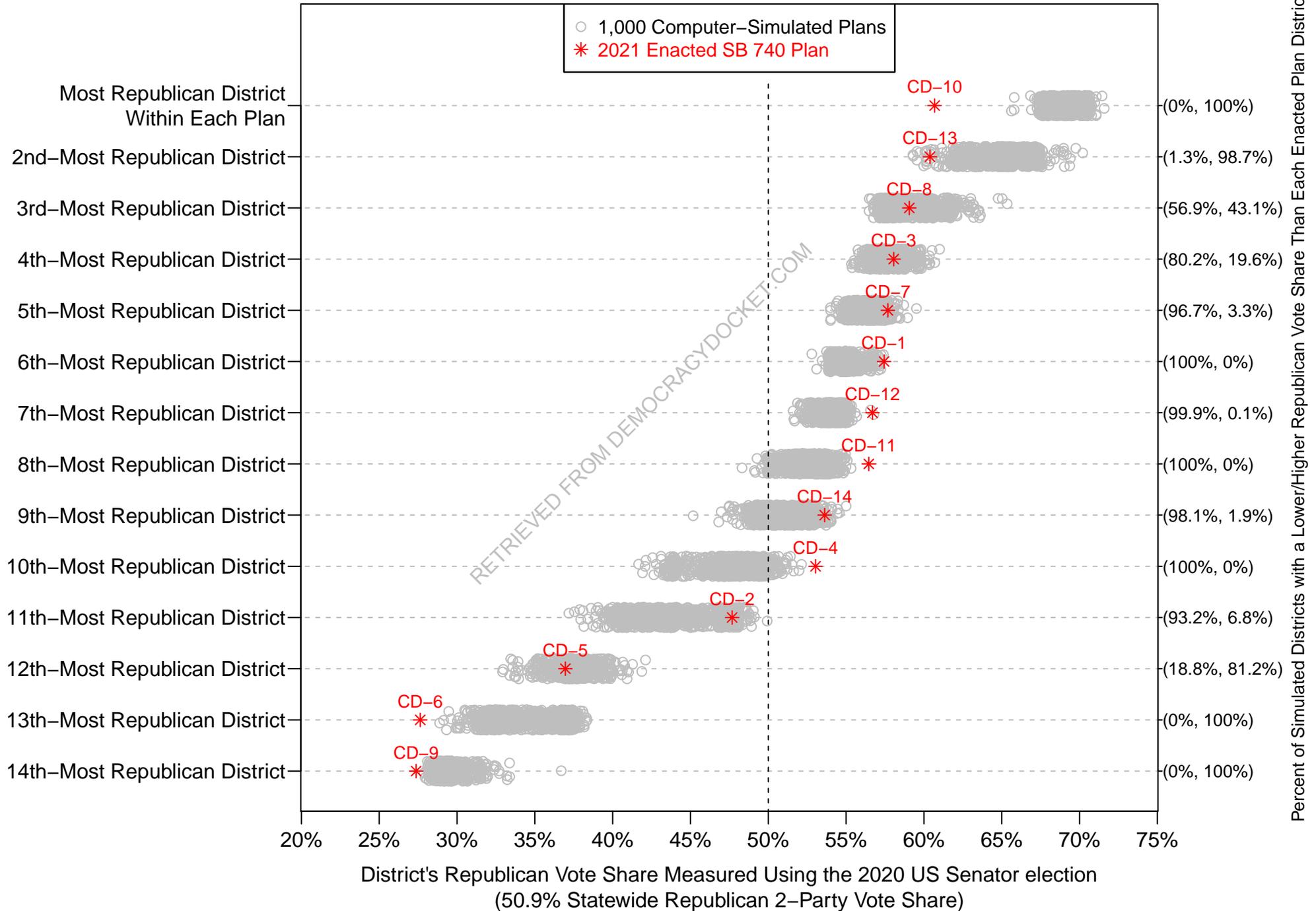
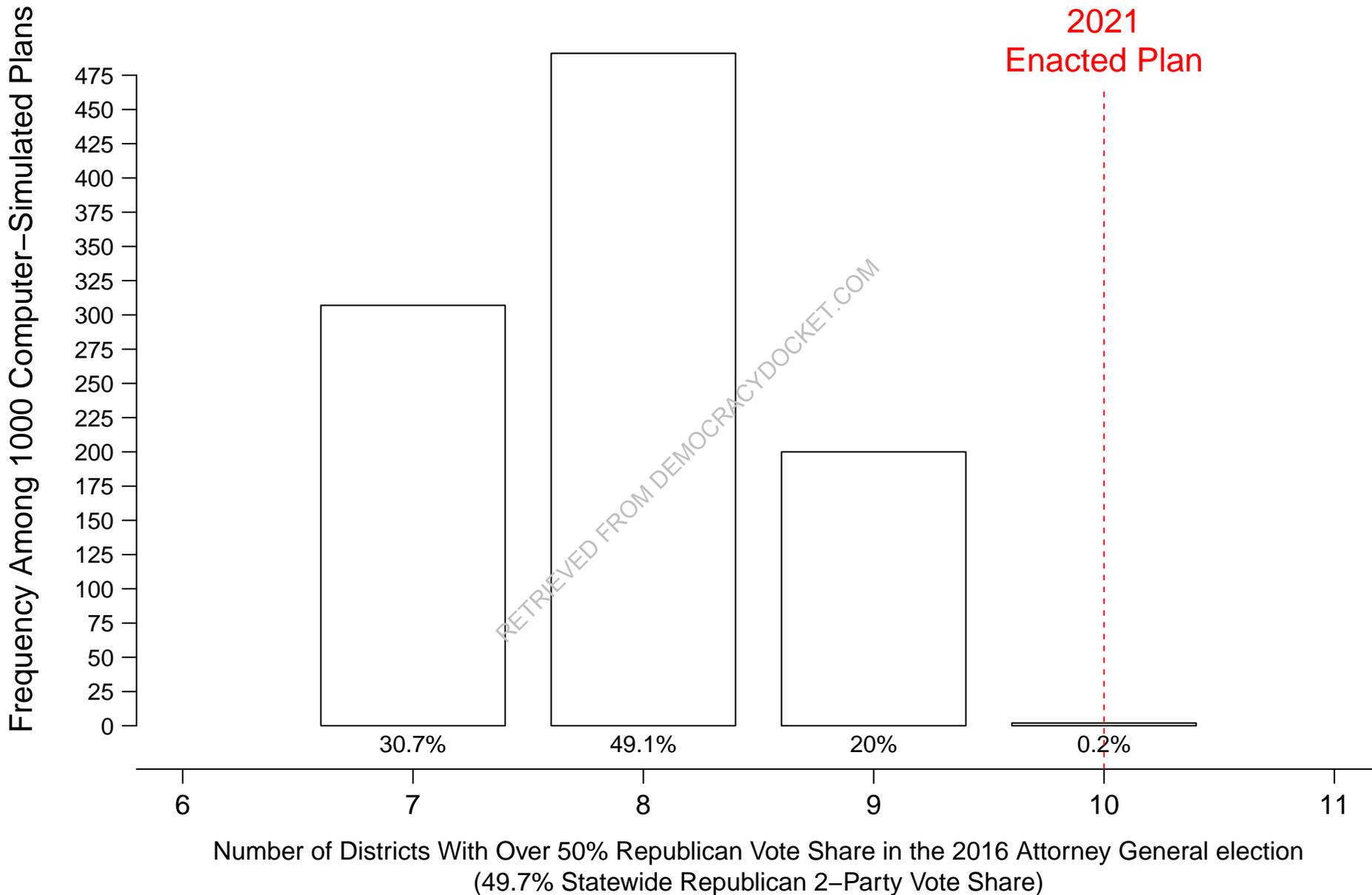


Figure B1: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2016 Attorney General election
(49.7% Statewide Republican 2-Party Vote Share)



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Figure B2: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2016 Governor election
(49.9% Statewide Republican 2-Party Vote Share)

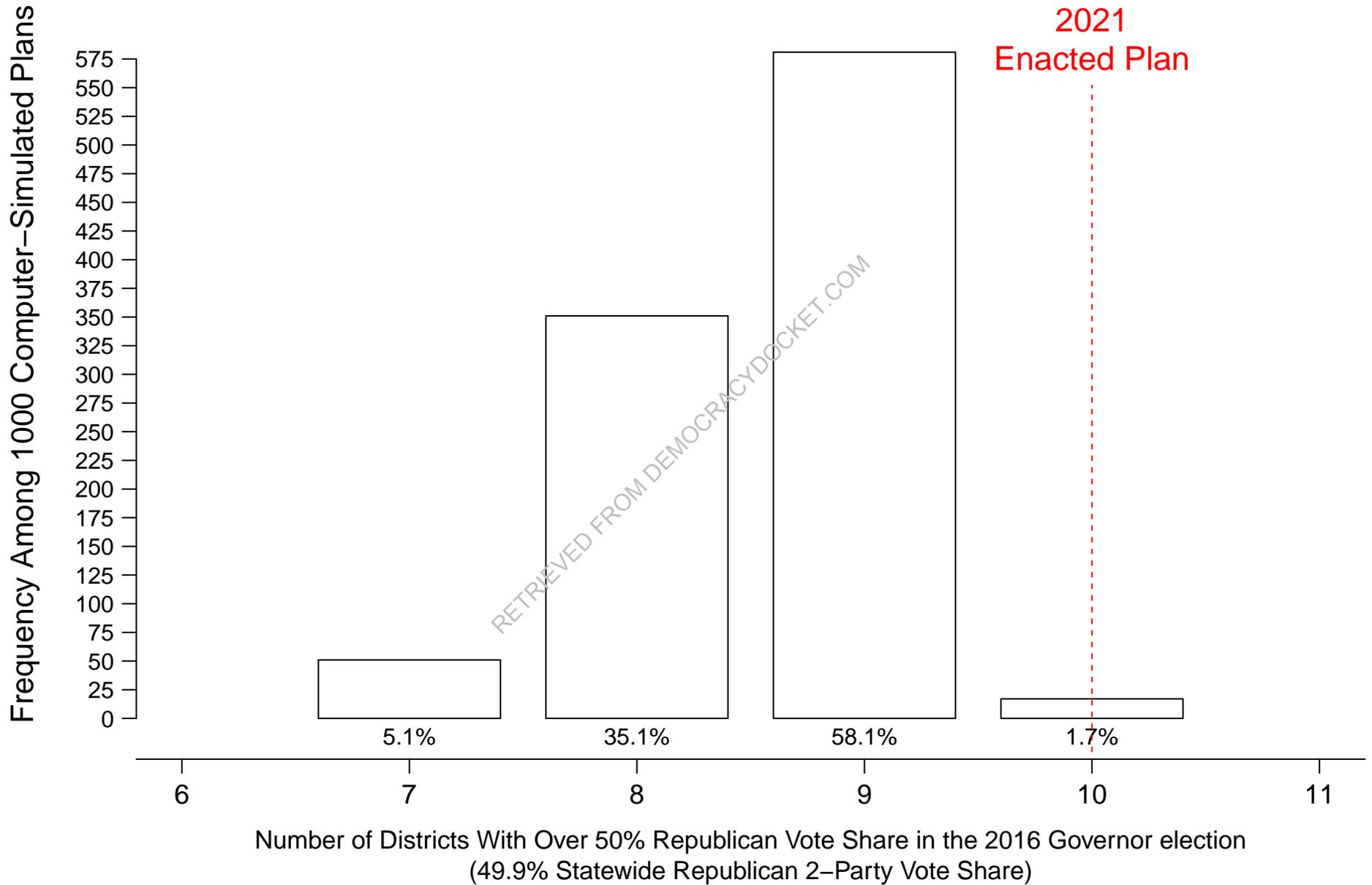


Figure B3: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2016 Lieutenant Governor election
(53.3% Statewide Republican 2-Party Vote Share)

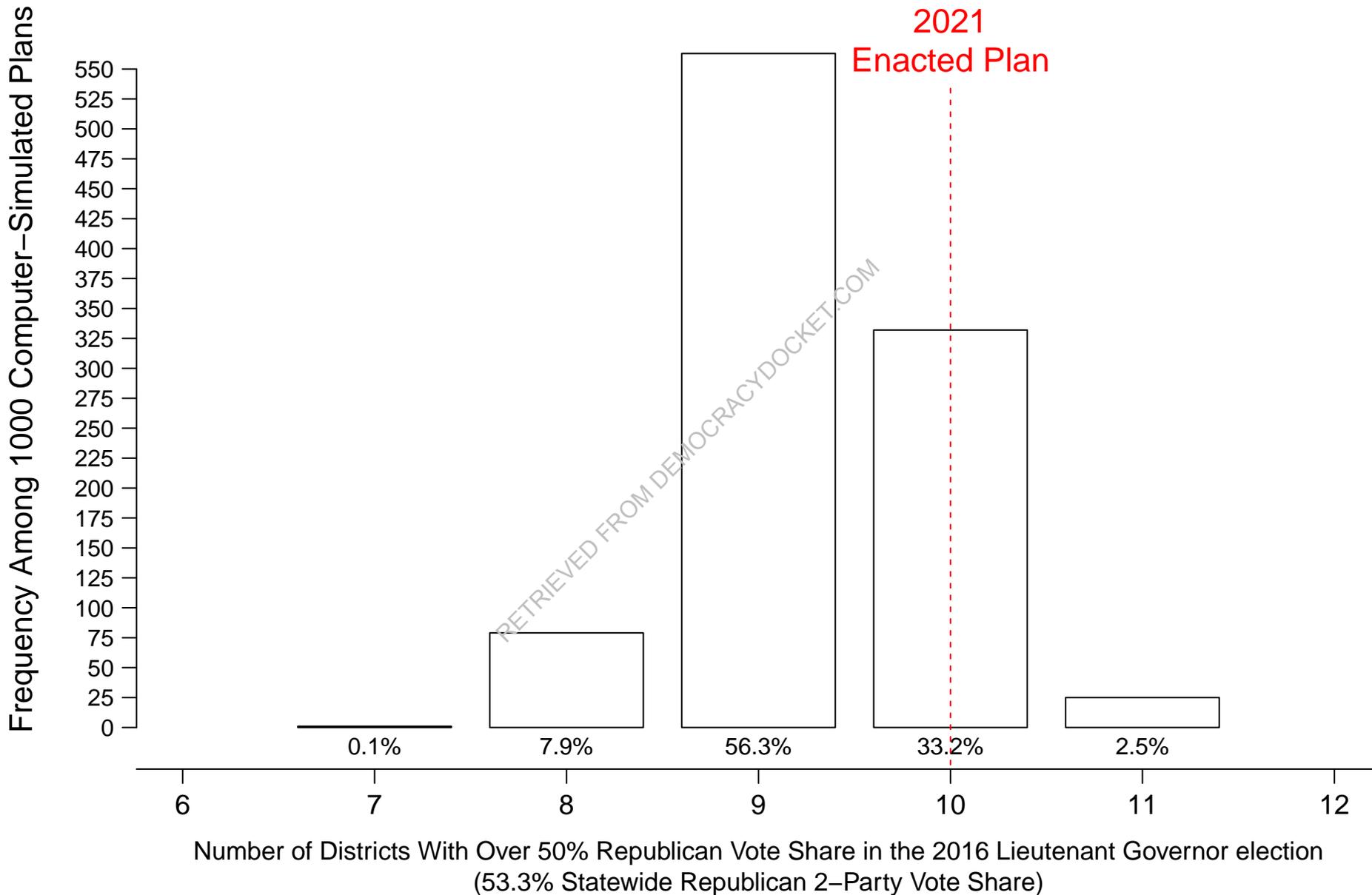


Figure B4: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2016 US President election
(51.9% Statewide Republican 2-Party Vote Share)

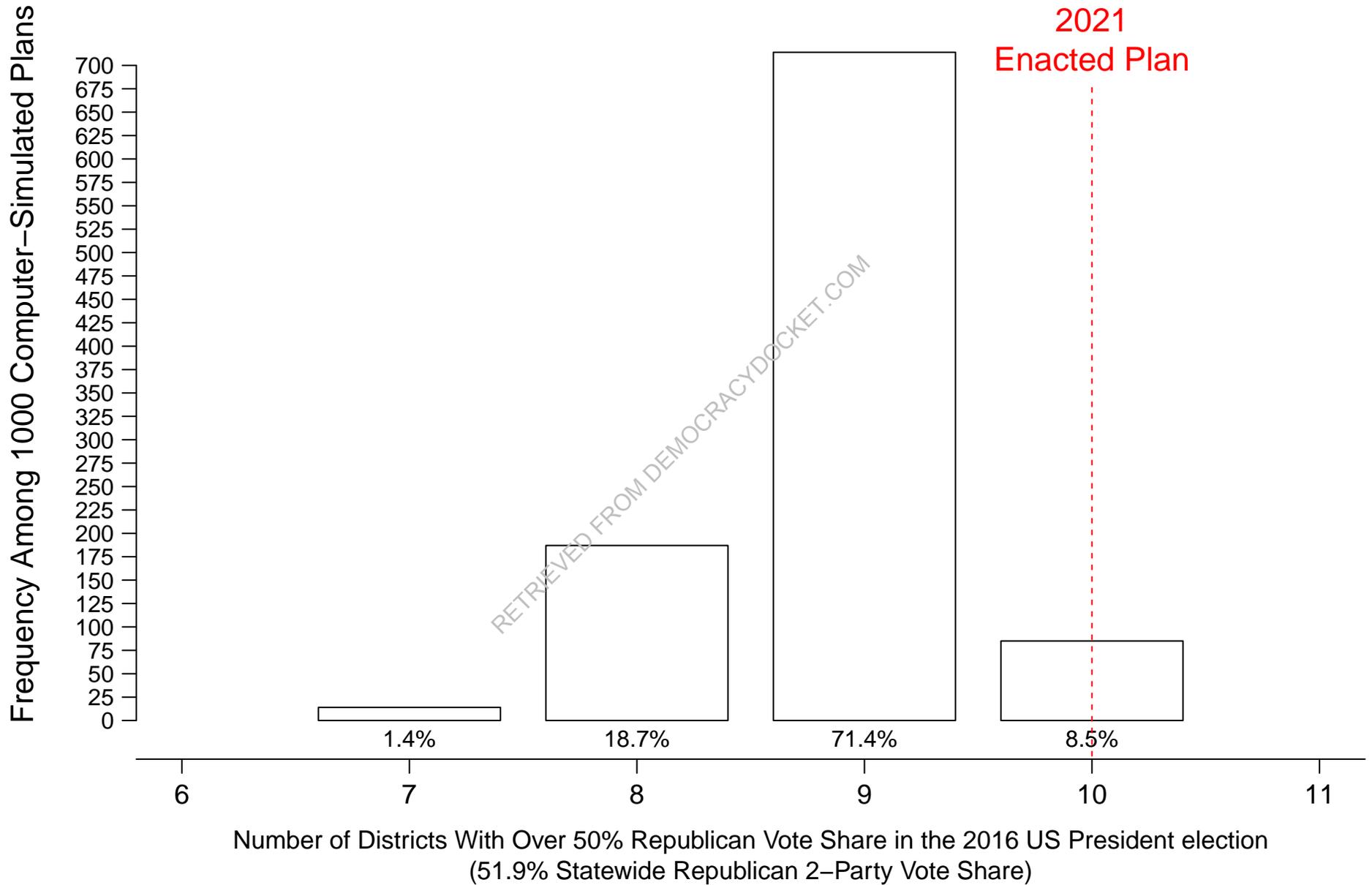


Figure B5: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2016 US Senator election
(53% Statewide Republican 2-Party Vote Share)

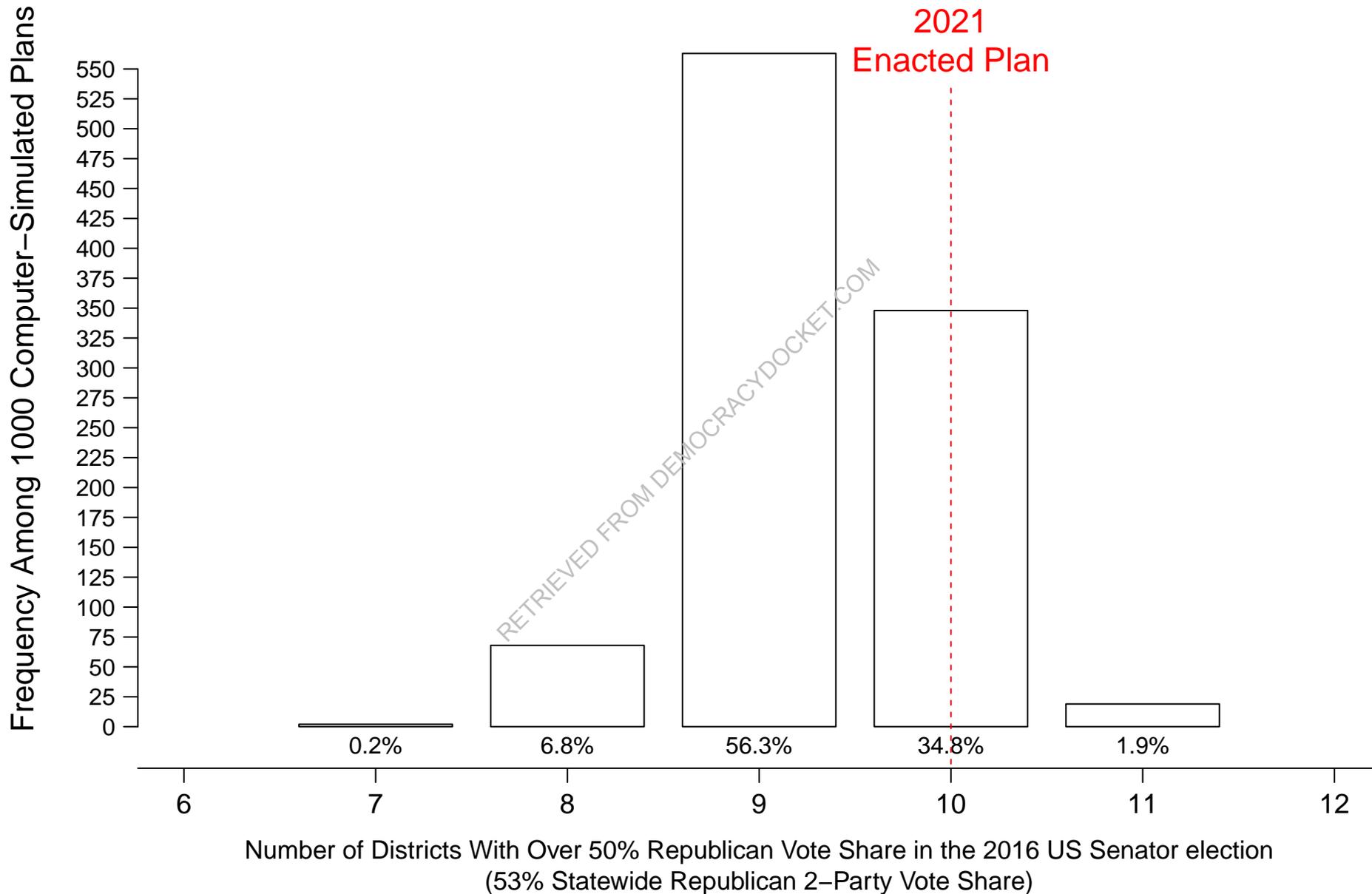


Figure B6: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2020 Attorney General election
(49.9% Statewide Republican 2-Party Vote Share)

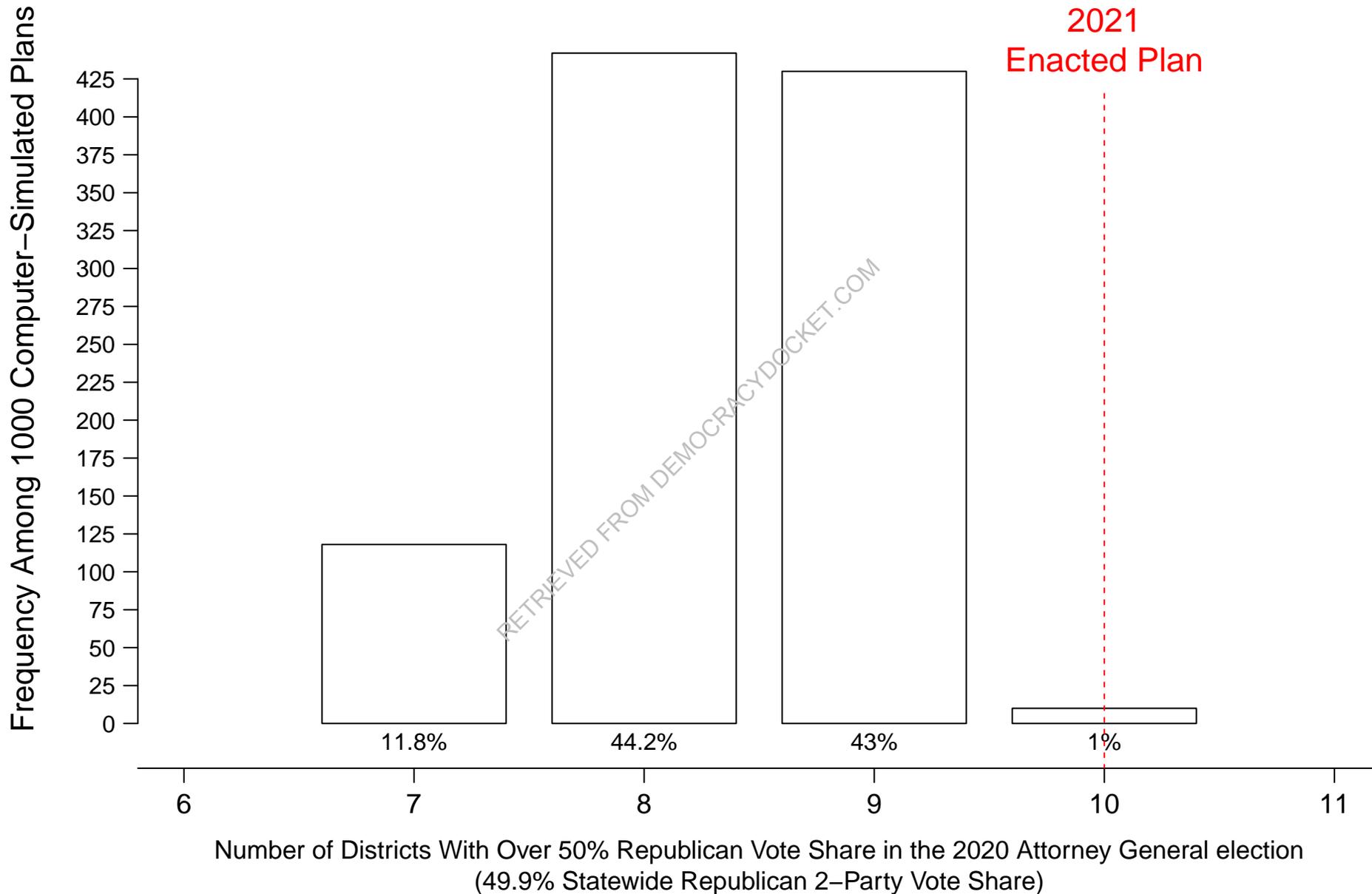


Figure B7: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2020 Governor election
(47.7% Statewide Republican 2-Party Vote Share)

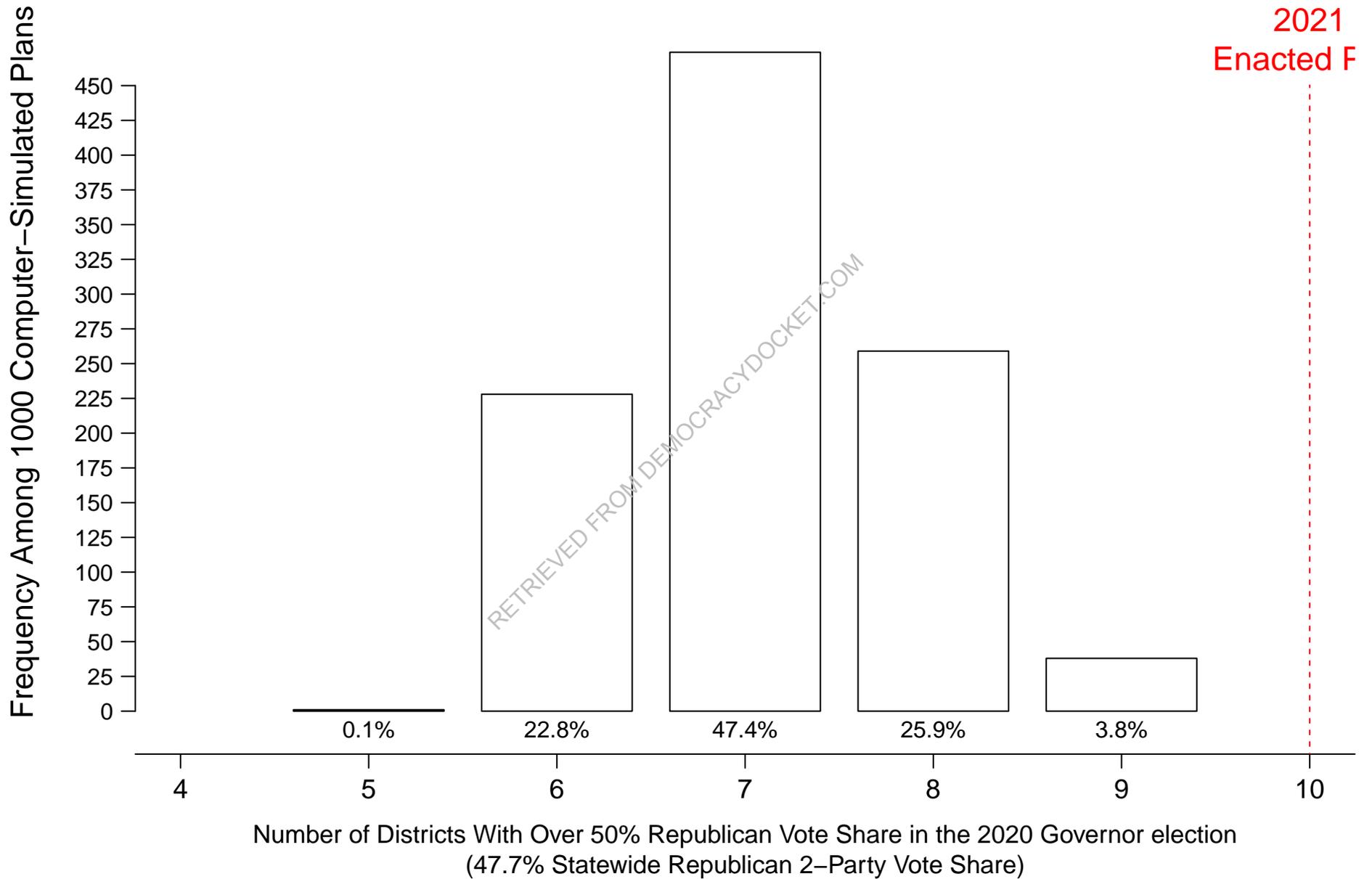


Figure B8: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2020 Lieutenant Governor election
(51.6% Statewide Republican 2-Party Vote Share)

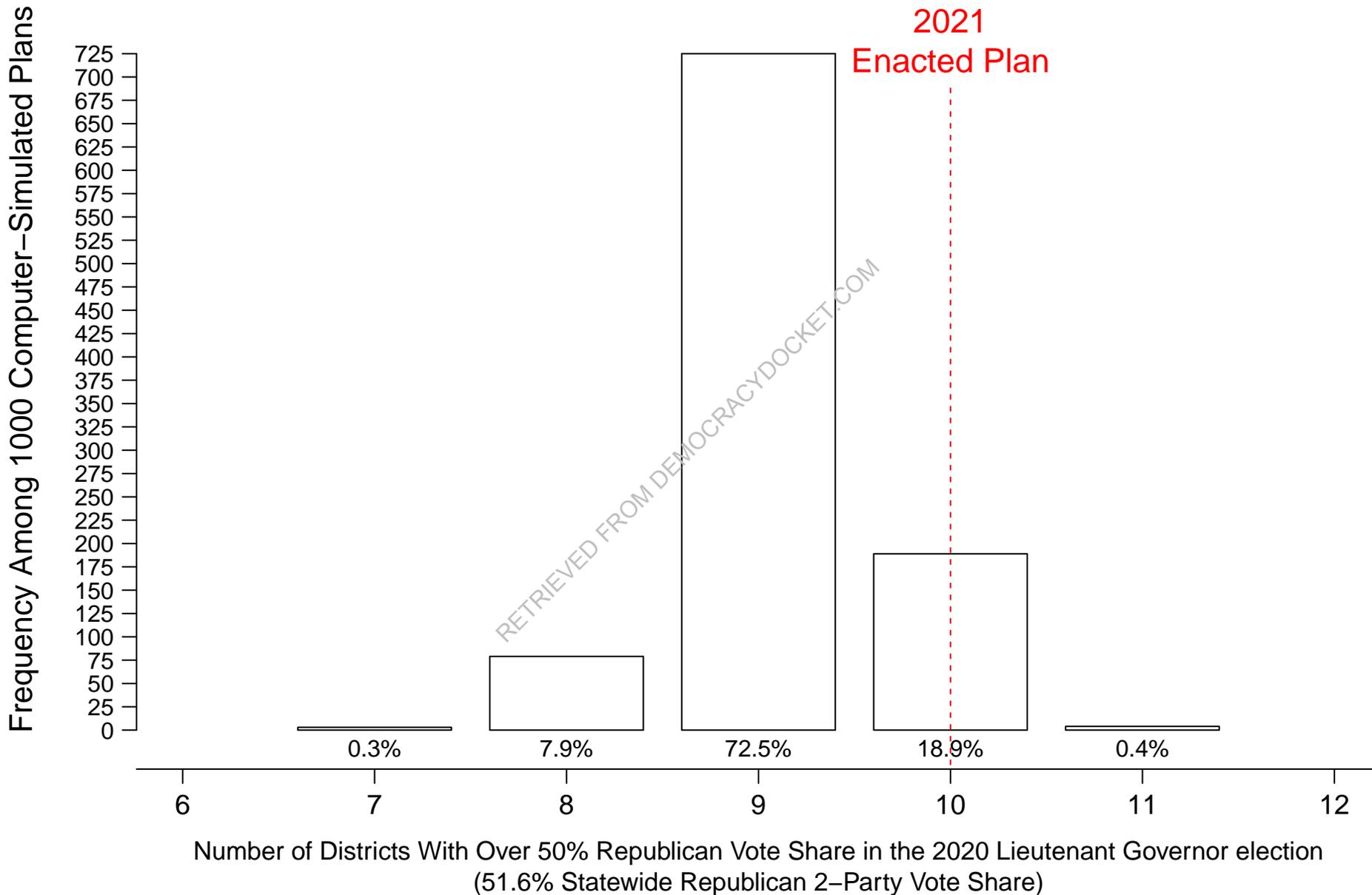


Figure B9: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2020 US President election
(50.7% Statewide Republican 2-Party Vote Share)

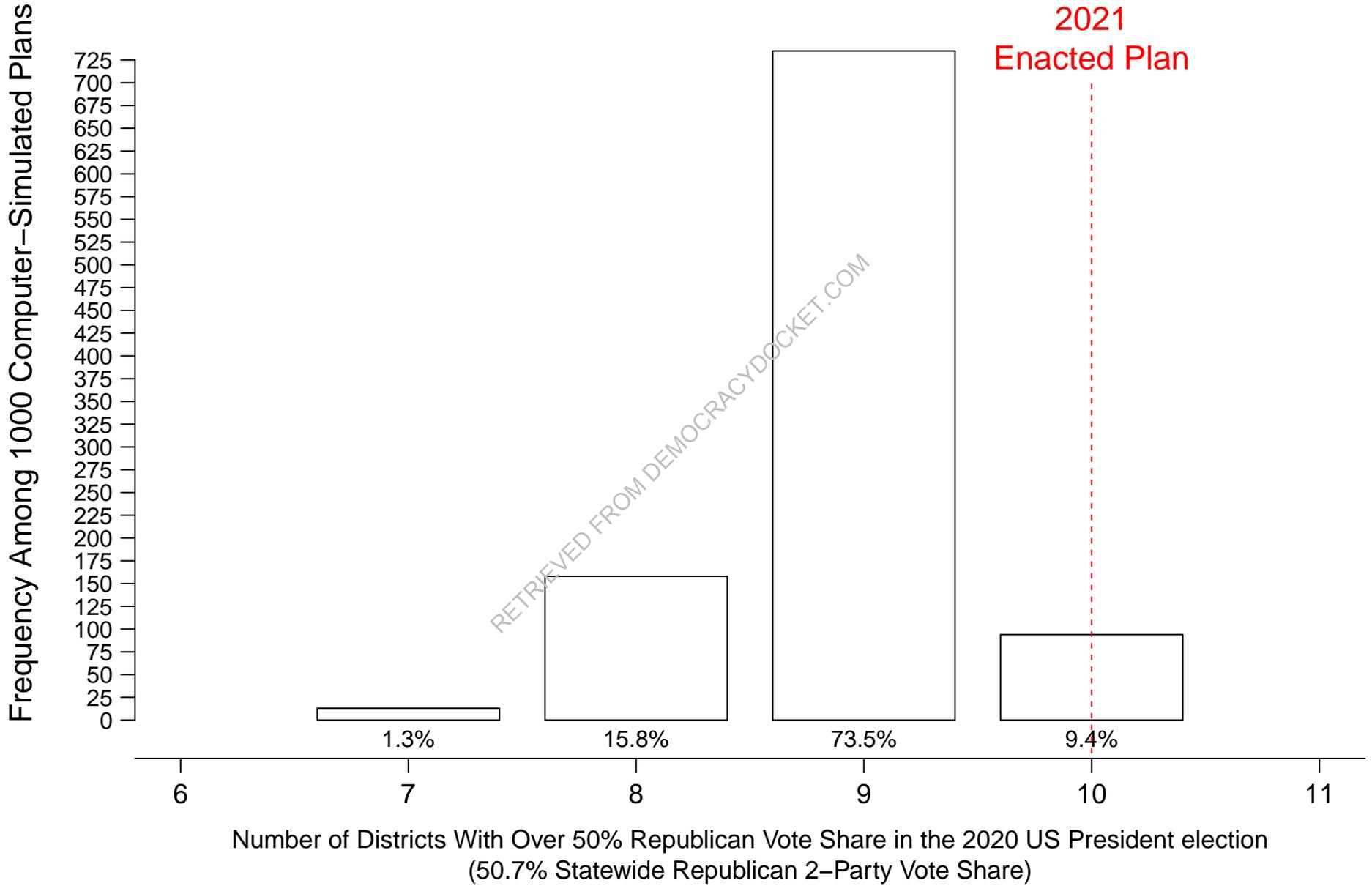


Figure B10: Comparisons of Enacted SB 740 Plan to 1,000 Computer-Simulated Plans
Number of Districts With Over 50% Republican Vote Share in the 2020 US Senator election
(50.9% Statewide Republican 2-Party Vote Share)

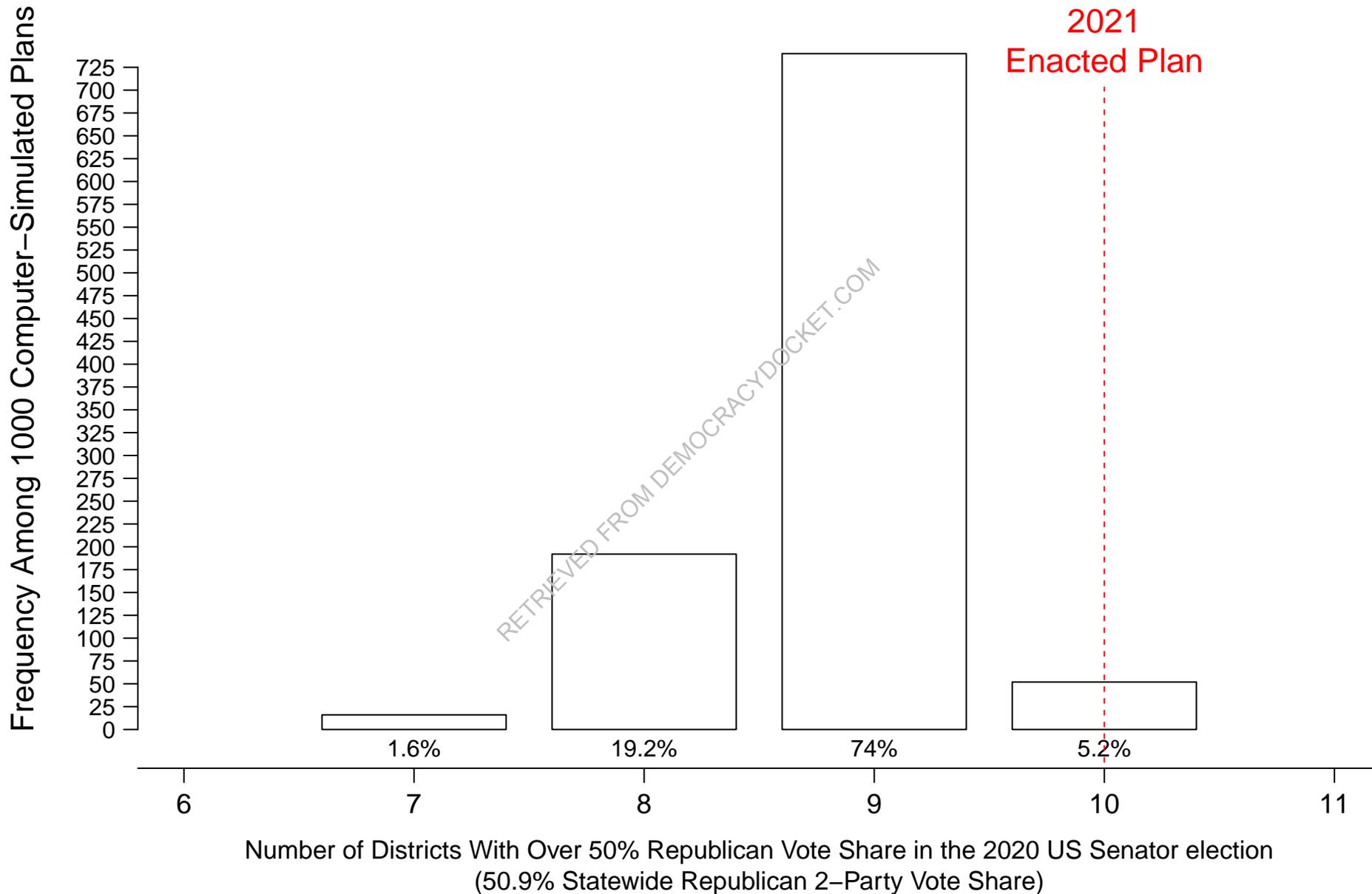


EXHIBIT I TM

RE

Preliminary analysis of SL 2021-174 Congressional districting

Wesley Pegden

November 29, 2021

1 Qualifications

I am an associate professor in the department of Mathematical Sciences at Carnegie Mellon University, where I have been a member of the faculty since 2013. I received my Ph.D. in Mathematics from Rutgers University in 2010 under the supervision of József Beck, and I am an expert on stochastic processes and discrete probability. My research has been funded by the National Science Foundation and the Sloan Foundation. A list of my publications with links to online manuscripts is also available at my website at <http://math.cmu.edu/~wes>. I am an expert on the use of Markov Chains for the rigorous analysis of gerrymandering, and have published papers^[1] developing techniques for this application in *Proceedings of the National Academy of Sciences* and *Statistics and Public Policy*, hereafter referred to by [CFP] and [CFMP], respectively.

I testified as an expert witness in the *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania* case in which the 2011 Congressional districting was found to be an unconstitutional partisan gerrymander, and as well as the *Common Cause v. Lewis* case in North Carolina. I previously served as a member of the bipartisan Pennsylvania Redistricting Reform Commission under appointment by the governor.

2 Executive Summary

I was asked to conduct a preliminary analysis of whether the S.L. 2021-174 Congressional Districting passed in North Carolina drawn in a way which made extreme use of partisan considerations.

To conduct my analysis, I take the enacted plan as a starting point and make a sequence of many small random changes to the district boundaries. This methodology is intended to detect whether the district lines were carefully drawn to optimize partisan considerations; in particular, if the plans in question were not intentionally drawn to maximize partisan advantage, then making small random changes should not significantly decrease the plan's partisan bias.

Specifically, my method begins with the enacted plan and uses a Markov Chain—a sequence of random changes—to generate billions of comparison districtings against which I compare the enacted plans. These comparison districtings are generated by making a sequence of small random changes to the enacted plans themselves, and preserve districting criteria such as population deviation, compactness, and splitting of counties.

The analysis I conduct of the enacted plan using this data has two levels. The first level of my analysis consists simply of comparing the partisan properties of the enacted plans to the large sets of comparison maps produced by my Markov Chain, and I report how unusual the enacted plans are with respect to their partisan properties, against this comparison set. **Quantitatively, I find the enacted S.L. 2021-174 Congressional plan exhibits greater partisan bias than 99.99% of the billions of comparison districtings of North Carolina produced by my algorithm.**

[1]

- M. Chikina, A. Frieze, W. Pegden. Assessing significance in a Markov Chain without mixing, in *Proceedings of the National Academy of Sciences* **114** (2017) 2860–2864
- M. Chikina, A. Frieze, J. Mattingly, W. Pegden. Separating effect from significance in Markov chain tests, in *Statistics and Public Policy* **7** (2020) 101–114.

The next level of my analysis uses the mathematical results I have developed with my co-authors in [CFP] and [CFMP] to translate the results of the above comparison into a statement about how the enacted plans compare against *all* other districtings of North Carolina satisfying the districting criteria I consider in this report. In other words, the theorem that I use in the second level analysis allows me to compare the enacted plan against not only the billions of plans that my simulations produce through making small random changes, but also against all other possible districtings of North Carolina satisfying the districting criteria I consider.

Consider the following: when I make a sequence of small random changes to an enacted plan as described above, this can be viewed as a test of whether the partisan bias in the current districting is fragile, in the sense that it evaporates when the boundary lines of the district are perturbed. The theorems proved in [CFP] and [CFMP] establish that it is mathematically impossible for the political geography of a state to cause such a result. That is: while political geography might conceivably interact with districting criteria to create a situation where typical districtings of a state are biased in favor of one party, it is mathematically impossible for the political geography of a state to interact with districting criteria to create a situation where typical districtings of a state exhibit a *fragile* or *optimized* partisan bias, which quickly evaporates when small changes are made. This allows us to rigorously demonstrate that a districting is optimized with respect to partisanship, and is an outlier among *all* districtings of a state satisfying the criteria I consider, with respect to this property.

2.1 Comparison Criteria

The comparison districtings used by method are required to satisfy various criteria in ways that constrain them to be similar in several respects to the enacted map being evaluated. For the preliminary analysis, all comparison maps were constrained to have population deviation at most 2%, and to have compactness scores at good as the enacted map, up to an error of at most 2%, no more precinct splits than the enacted map, and no more county traversals than the enacted map. These restrictions are denoted “conditions A” in the results below. I also conducted three additional tests which additionally constrain the number of municipality splits (“conditions B”), additionally constrain incumbents protected by the enacted map to be protected by all comparison maps (“conditions C”), or additionally constrain both (“conditions D”).

2.2 Note on Population Deviation

My method does not simulate the results of elections for hypothetical elections at the per-person level, and thus do not enforce 1-person population deviation on districts (instead using a cutoff like 2%, as described above), as direct voter preference data is not available at sufficient granularity. Note that this same limitation faces mapmakers who might try to draw a favorable districting for their party; a practical approach is to first use the available data to draw a “coarse” map with the desired properties, and then make small changes to the map (e.g., which split VTDs) to satisfy the population constraint.

I verify that the distinction between 1-person and 2% population deviation do not drive the results of my analysis in two ways.

First, I simply redo my most constrained analysis (“Conditions D”) with a 1% population deviation constraint, and obtain similar results.

Second, I analyze a course VTD-level version of the enacted map (itself with nearly 2% population deviation), and show that even this coarse version of the enacted map is an extreme outlier with respect to partisan bias, before small changes are made to it to produce the enacted 1-person-deviation map. This demonstrates that the course VTD-level “blueprint” for the map is an extreme outlier, optimized for partisan considerations, among alternative VTD-level maps with similar population deviation, even before the small changes used to achieve 1-person deviation are accounted for.

These results are shown in Section 3.

2.3 Election data

The partisan characteristics of each of the billions of maps generated by my algorithm is compared to that of the enacted map through the lens of historical election data. I use the 2020 Attorney General race as

a proxy for expected partisan voting patterns given knowledge available at the time the disputed plan was drawn.

2.4 Comparison metric

Using the election data indicated above, my analysis compares the partisanship of districtings according to **the average number of seats Republicans would expect to win in the districting**, based on a random uniform swing model with the historical voting data I use.

The *uniform swing* is a simple model frequently used to make predictions about the number of seats a party might win in an election, based on partisan voting data. Suppose, for example, that given data from a previous Congressional election in North Carolina, we would like to predict how many seats Republicans will win in an upcoming Congressional election with the same districting, assuming that at a statewide level, we expect them to outperform by 1.5 percentage points their results from the last election.

A uniform swing would simply add 1.5 percentage points to Republican performance in every district in data from the last election, and then evaluate how many seats would be won with these shifted voting outcomes.

When I am evaluating the partisanship of a comparison districting (to compare it to the enacted plan), I am interested in the number of seats we expect Republicans might win in the districting, given unknown shifts in partisan support. In particular, the metric I use is:

How many seats, on average, would Republicans win in the given districting, if a random^[2] uniform swing is applied to the historical voting data being used?

2.5 First level analysis

The first level of my analysis simply uses the procedure described above to generate a large set of comparison districtings against which one can compare the enacted plan. As discussed above, these comparison maps adhere to districting criteria in ways that constrain them to be similar in several respects to the enacted map being evaluated.

We will see below that in hundreds of runs of my algorithm, the enacted plan is found to exhibit more partisan bias than 99.99% of comparison maps, i.e., it is among the most partisan 0.01% of found by the algorithm, since $100\% - 99.99\% = 0.01\%$.

The first level of my analysis simply reports the comparison of the enacted map to the comparison districtings produced in these runs. Even without applying the mathematical theorems we have developed in [CFP] and [CFMP], this gives strong, intuitively clear evidence of intent to create partisan bias in the districting: if 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.

2.6 Second level analysis

In the first level of my analysis, I compare enacted plans to comparison districtings produced by my algorithm (which makes random changes to the existing map while preserving districting criteria).

The next level of my analysis goes further than this, and enables a rigorous comparison to *all* alternative districtings of North Carolina satisfying the districting criteria I consider here. It does this by comparing how optimized for partisanship an evaluated plan is to how optimized alternative plans are.

2.6.1 Defining “optimized for partisanship”

Roughly speaking, when I say that a districting is *optimized for partisanship*, I mean that its partisan characteristics are highly sensitive to small random changes to the boundary lines.

^[2]The random choice of my uniform swing is made from a normal distribution whose standard deviation is 4 percentage points, which is roughly the standard deviation of the swing in the past five North Carolina gubernatorial elections.

Formally, when I say that a districting is *optimized for partisanship* in this report, I mean that there is a high probability that when I make small random changes to the districting, its partisanship will be an extreme outlier among the comparison maps produced by the small random changes.

The yardstick I use to measure this property of a given map is the ε -*fragility* of a map. Given a small threshold ε like $\varepsilon = 00.01\%$, I can ask: what is the probability that when I make a sequence of small random changes to the map, the map will be in the most extreme ε fraction of maps encountered in the sequence of random changes? The probability of this occurrence is the ε -fragility of the map, and it is this probability that I use to quantify how optimized for partisanship a map is.

In other words, **one districting is considered more optimized for partisanship than another if it is more likely to have its partisan qualities consistently reduced when making a random sequence of small changes to its boundary lines.**

2.6.2 Comparing an enacted plan to the set of *all* alternatives

My analysis enables a rigorous comparison of an enacted plan to **all possible districting plans of the state** satisfying the districting criteria I consider, with respect to how optimized for partisanship the districtings are.

My method produces a rigorous p -value (statistical significance level) which precisely captures the confidence one can have in the findings of my “second level” analyses. In particular my second-level claims in this report are all valid at a statistical significance of $p = .002$. This means that the probability that I would report an incorrect number (for example, claiming that a districting is among the most optimized for partisanship 00.01% of all districtings, when in fact it is merely among the most 00.015% optimized for partisanship) is at most 00.2%. To put this in context, clinical trials seeking regulatory approval for new medications frequently target a significance level of $p = .05$ (5%), a much looser standard than I hold myself to in this report.

2.6.3 Some intuition for why this is possible

It should be emphasized that it may seem remarkable that I can make a rigorous quantifiable comparison to *all* possible districtings, without actually generating all such districtings; this is the role of our theorems from [CFP] and [CFMP], which have simple proofs which have been verified by the mathematical community.

To give some nontechnical intuition for why this kind of analysis is possible, these results roughly work by showing that in a very general sense, it is not possible for an appreciable fraction of districtings of a state to appear optimized for partisanship in the sense defined in Section 2.6.1. In other words, it is *mathematically impossible* for any state, with any political geography of voting preferences and any choice of districting criteria, to have the property that a significant fraction of the possible districtings of the state satisfying the chosen districting criteria appear optimized for partisanship (as measured by their ε -fragility).

2.7 Results

For each of the four conditions described in 2.1, I did $2^{35} \approx 34$ billion steps. In this section I give the first-level and second-level analyses of these results, along with the output of each run.

2.7.1 Conditions A

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.999943%	9	99.999943%	17	99.99971%	25	99.9998%
2	99.999973%	10	99.999908%	18	99.999987%	26	99.999953%
3	99.99978%	11	99.99972%	19	99.99992%	27	99.999962%
4	99.9998%	12	99.99933%	20	99.9994%	28	99.99964%
5	99.999901%	13	99.999927%	21	99.999988%	29	99.999979%
6	99.99967%	14	99.999962%	22	99.99904%	30	99.99964%
7	99.999985%	15	99.999983%	23	99.999965%	31	99.9989%
8	99.999908%	16	99.99977%	24	99.999986%	32	99.999976%

- **First level analysis:** In *every* run, the districting was in the most partisan 00.0011% of districtings (in other words, 99.9989% were less partisan, in *every* run).
- **Second level analysis:** My theorems imply that the enacted Congressional districting is among the most optimized-for-partisanship 00.003% of all alternative districtings of North Carolina satisfying my districting criteria (in other words, 99.997% are less optimized for partisanship), measured by their ε -fragility for $\varepsilon = 00.0011\%$.

2.7.2 Conditions B

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.999989%	9	99.9995%	17	99.999943%	25	99.9978%
2	99.9986%	10	99.9999981%	18	99.99982%	26	99.999915%
3	99.99962%	11	99.999955%	19	99.99929%	27	99.99957%
4	99.999901%	12	99.999959%	20	99.9985%	28	99.99998%
5	99.999914%	13	99.99988%	21	99.99945%	29	99.999972%
6	99.999982%	14	99.9988%	22	99.99976%	30	99.999935%
7	99.99986%	15	99.99964%	23	99.99979%	31	99.99964%
8	99.999926%	16	99.9989%	24	99.999996%	32	99.999958%

- **First level analysis:** In *every* run, the districting was in the most partisan 00.0021% of districtings (in other words, 99.9979% were less partisan, in *every* run).
- **Second level analysis:** My theorems imply that the enacted Congressional districting is among the most optimized-for-partisanship 00.0063% of all alternative districtings of North Carolina satisfying my districting criteria (in other words, 99.9937% are less optimized for partisanship), measured by their ε -fragility for $\varepsilon = 00.0021\%$.

2.7.3 Conditions C

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.999998%	9	99.999938%	17	99.999965%	25	99.9999941%
2	99.99964%	10	99.99982%	18	99.99945%	26	99.99982%
3	99.9978%	11	99.99987%	19	99.999924%	27	99.999957%
4	99.9995%	12	99.99984%	20	99.99987%	28	99.99984%
5	99.99998%	13	99.99921%	21	99.999956%	29	99.99987%
6	99.99979%	14	99.99961%	22	99.99949%	30	99.99955%
7	99.999979%	15	99.99972%	23	99.99962%	31	99.99988%
8	99.99982%	16	99.99921%	24	99.99938%	32	99.99984%

- **First level analysis:** In *every* run, the districting was in the most partisan 00.0022% of districtings (in other words, 99.9978% were less partisan, in *every* run).
- **Second level analysis:** My theorems imply that the enacted Congressional districting is among the most optimized-for-partisanship 00.0065% of all alternative districtings of North Carolina satisfying my districting criteria (in other words, 99.9935% are less optimized for partisanship), measured by their ε -fragility for $\varepsilon = 00.0022\%$.

2.7.4 Conditions D

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.9997%	9	99.99976%	17	99.99958%	25	99.99979%
2	99.99989%	10	99.99924%	18	99.999942%	26	99.99986%
3	99.99962%	11	99.99982%	19	99.99963%	27	99.9978%
4	99.99976%	12	99.999986%	20	99.999983%	28	99.99969%
5	99.99988%	13	99.99979%	21	99.99954%	29	99.9995%
6	99.99958%	14	99.99986%	22	99.999904%	30	99.99984%
7	99.99986%	15	99.99954%	23	99.99989%	31	99.99955%
8	99.99956%	16	99.99965%	24	99.99971%	32	99.99962%

- **First level analysis:** In *every* run, the districting was in the most partisan 00.0022% of districtings (in other words, 99.9978% were less partisan, in *every* run).
- **Second level analysis:** My theorems imply that the enacted Congressional districting is among the most optimized-for-partisanship 00.0065% of all alternative districtings of North Carolina satisfying my districting criteria (in other words, 99.9935% are less optimized for partisanship), measured by their ε -fragility for $\varepsilon = 00.0022\%$.

3 Conclusion

Based on my analysis, I find the enacted S.L. 2021-174 Congressional plan is optimized for Republican partisan bias to an extreme degree, moreso than 99.99% of all alternative districtings satisfying the criteria I examined in this report.

Appendix: Population deviation analysis

In this section we show results from running our algorithm under conditions discussed in Section 2.2.

First, we use the most restrictive “Conditions D” but impose a requirement of $\leq 1\%$ population deviation, obtaining the following results:

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.9986%	9	99.99947%	17	99.9975%	25	99.99907%
2	99.99939%	10	99.99987%	18	99.99928%	26	99.99969%
3	99.99961%	11	99.99958%	19	99.99973%	27	99.99984%
4	99.99923%	12	99.999969%	20	99.99929%	28	99.9996%
5	99.99963%	13	99.9999%	21	99.99916%	29	99.99998%
6	99.9998%	14	99.99989%	22	99.99922%	30	99.99983%
7	99.9989%	15	99.99982%	23	99.9988%	31	99.998%
8	99.99911%	16	99.9988%	24	99.99934%	32	99.99945%

Next, we run our algorithm on a coarse “whole-precinct” version of the enacted map. This is the districting obtained by assigning each split VTD to the district with which its intersection is greatest, and is a coarse starting point from which one can obtain a 1-person deviation map by carefully splitting VTD’s. Its population deviation from ideal is 1.8%. In the results below, we see that this coarse version of the enacted map also exhibits extreme partisan bias, demonstrating that the appearance of partisan bias is not created by the maps adherence to strict constraints on population deviation.

Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan	Run	Percentage of comparison maps less partisan than enacted plan
1	99.99937%	9	99.99942%	17	99.99942%	25	99.99939%
2	99.99949%	10	99.99917%	18	99.9997%	26	99.99941%
3	99.9989%	11	99.99942%	19	99.99988%	27	99.99992%
4	99.99921%	12	99.9989%	20	99.99987%	28	99.99986%
5	99.9982%	13	99.99926%	21	99.99976%	29	99.99981%
6	99.99924%	14	99.999904%	22	99.99969%	30	99.999903%
7	99.9995%	15	99.99972%	23	99.99904%	31	99.99954%
8	99.99976%	16	99.9996%	24	99.99976%	32	99.99951%

I hereby certify that the foregoing statements are true and correct to the best of my knowledge, information, and belief.



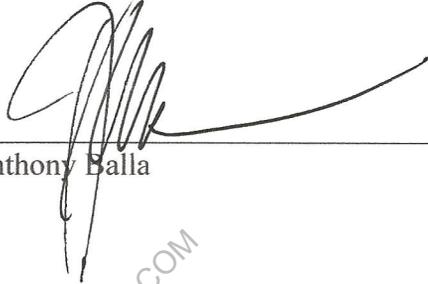
Wesley Pegden
11/29/21

EXHIBIT J

RETRIEVED FROM .

AFFIDAVIT

I, John Anthony Balla, hereby state that I am a Plaintiff in the above-titled action. I am a digital marketing strategist residing in Raleigh, North Carolina. My residence was located within District 4 under the 2016 Plan and is now located within District 5 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.



John Anthony Balla

Sworn and subscribed before me this the 10 day of November, 2021.

Notary Public: Angel Frink

Name: Angel Frink

My commission expires: 5/2/2026

RETRIEVED FROM DEMOCRACYDOCKET.COM

ANGEL FRINK
NOTARY PUBLIC
WAKE County
North Carolina
My Commission Expires MAY 2, 2026

EXHIBIT K

RETRIEVED FROM DE

AFFIDAVIT

I, Kathleen Barnes, hereby state that I am a Plaintiff in the above-titled action. I am the owner of a small publishing company residing in Brevard, North Carolina. My residence was located within Congressional District 11 under the 2016 Plan and is now located within District 14 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.

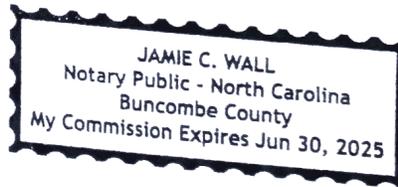

Kathleen Barnes

Sworn and subscribed before me this the 10th day of November, 2021.

Notary Public: 

Name: Jamie C. Wall

My commission expires: June 30th, 2025



RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT L

RETRIEVED FRC

AFFIDAVIT

I, Virginia Walters Brien, hereby state that I am a Plaintiff in the above-titled action. I am a sales manager residing in Charlotte, North Carolina. My residence was located within Congressional District 12 under the 2016 Plan and is now located within District 9 under the 2021 Plan. I am a registered unaffiliated voter and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Virginia Walters Brien

Sworn and subscribed before me this the 09 day of November, 2021.



Notary Public: _____

Name: Michelle Rivers

My commission expires: August 22, 2023

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT M

RETRIEVED .

AFFIDAVIT

I, David Dwight Brown, hereby state that I am a Plaintiff in the above-titled action. I am a retired computer systems analyst residing in Greensboro, North Carolina. My residence was located within Congressional District 13 under the 2016 Plan and is now located within District 11 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.

David Dwight Brown
David Dwight Brown

Sworn and subscribed before me this the 12 day of November, 2021.



Notary Public: Katie Marie Gritton

Name: Katie Marie Gritton

My commission expires: November 6, 2024

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT N

RETRIP

AFFIDAVIT

I, Gettys Cohen Jr., hereby state that I am a Plaintiff in the above-titled action. I am a dentist residing in Smithfield, North Carolina. My residence was located within Congressional District 7 under the 2016 Plan and is now located within District 4 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.


Gettys Cohen Jr

Sworn and subscribed before me this the 10 day of November, 2021.

ANTENOR D. NIXON
NOTARY PUBLIC
JOHNSTON COUNTY, N.C.
My Commission Expires 4-8-22

Notary Public: 

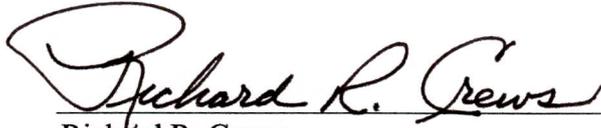
Name: Antenor D. Nixon

My commission expires: 4-8-22

EXHIBIT O

AFFIDAVIT

I, Richard R. Crews, hereby state that I am a Plaintiff in the above-titled action. I am a retired stockbroker residing in Newland, North Carolina. My residence was located within Congressional District 5 under the 2016 Plan and is now located within District 14 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.


Richard R. Crews

Sworn and subscribed before me this the 12th day of November, 2021.



Notary Public: 
Name: Felece Prather
My commission expires: July 5th 2025

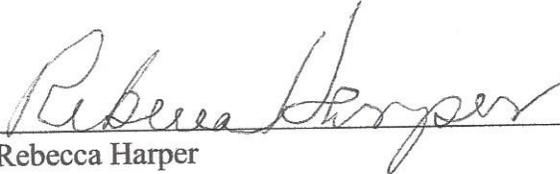
Send to: SAM.CALLAHAN@ARNOLDporter.com

EXHIBIT P

RETRIEVED

AFFIDAVIT

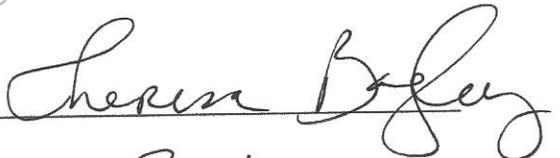
I, Rebecca Harper, hereby state that I am a Plaintiff in the above-titled action. I am a real estate agent residing in Cary, North Carolina. My residence was located within Congressional District 2 under the 2016 Plan and is now located within District 6 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Rebecca Harper

Sworn and subscribed before me this the 11th day of November, 2021.

THERESA BAGLEY
NOTARY PUBLIC
WAKE COUNTY, N.C.
My Commission Expires 12.7.2024

Notary Public: 
Name: Theresa Bagley
My commission expires: 12.7.2024

RETRIEVED FROM MEMOPRACYDOCKET.COM

EXHIBIT Q

RETRIEVED FROM DEM.

AFFIDAVIT

I, Amy Clare Oseroff, hereby state that I am a Plaintiff in the above-titled action. I am a retired teacher residing in Greenville, North Carolina. My residence was located within Congressional District 1 under the 2016 Plan and remains in District 1 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Amy Clare Oseroff

Sworn and subscribed before me this the 9th day of November, 2021.



Notary Public: Ronnie Peo
Name: Ronnie Peo
My commission expires: February 10, 2023

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT R

RETRIL

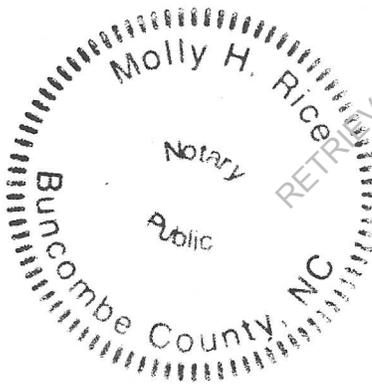
AFFIDAVIT

I, Mark S. Peters, hereby state that I am a Plaintiff in the above-titled action. I am a retired physician assistant residing in Fletcher, North Carolina. My residence was located within Congressional District 10 under the 2016 Plan and is now located within District 14 under the 2021 Plan. I am registered as an unaffiliated voter and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Mark S. Peters

Sworn and subscribed before me this the 12 day of November, 2021.



Notary Public: Molly H. Rice

Name: Molly H. Rice

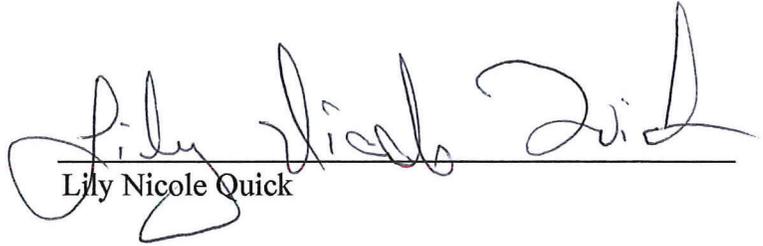
My commission expires: 9.20.22

EXHIBIT S

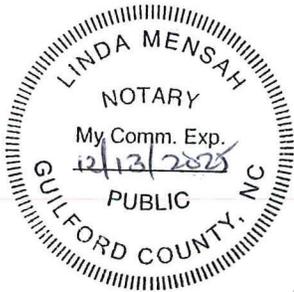
RETRIEVED FROM

AFFIDAVIT

I, Lily Nicole Quick, hereby state that I am a Plaintiff in the above-titled action. I am a homemaker residing in Greensboro, North Carolina. My residence was located within Congressional District 6 under the 2016 Plan and is now located within District 7 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.


Lily Nicole Quick

Sworn and subscribed before me this the 10th day of November, 2021.



Notary Public: 
Name: Linda Mensah
My commission expires: 12/13/2025

RETRIEVED FROM DEMOCRACYDOCKET.COM

EXHIBIT T

RETRIL

AFFIDAVIT

I, Donald Rumph, hereby state that I am a Plaintiff in the above-titled action. I am an Army and Air Force combat veteran and retired registered nurse residing in Greenville, North Carolina. My residence was located within Congressional District 3 under the 2016 Plan and is now located within District 1 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Donald Rumph

Sworn and subscribed before me this the 9 day of November, 2021.

Notary Public: Diamonds A. Komegay
Name: Diamonds A. Komegay
My commission expires: 4/19/2024

RETRIEVED FROM DEMOCRACYDOCKET.COM

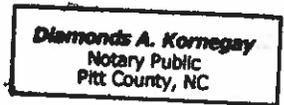
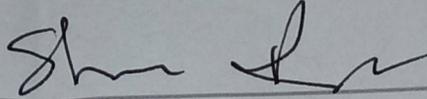


EXHIBIT U

RETRIEVED FRC

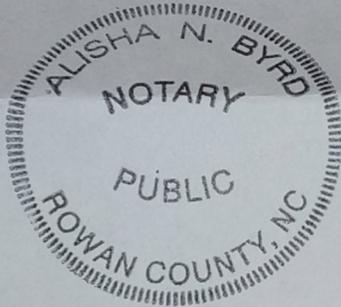
AFFIDAVIT

I, Shawn Rush, hereby state that I am a Plaintiff in the above-titled action. I am a part owner of a marketing firm and a Meals on Wheels organizer residing in East Spencer, North Carolina. My residence was located within Congressional District 8 under the 2016 Plan and is now located within District 10 under the 2021 Plan. I am a registered Democrat and have consistently voted for Democratic candidates for the U.S. House of Representatives.



Shawn Rush

Sworn and subscribed before me this the 14th day of November, 2021.



Notary Public: Alisha N. Byrd

Name: Alisha N. Byrd

My commission expires: 04/25/2022

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, et al.,

Plaintiffs,

vs.

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

Defendants.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

REBECCA HARPER, et al.,

Plaintiffs,

vs.

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

Defendants.

**LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
NCLCV AND HARPER PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

In 2019, a three-judge panel issued the unprecedented ruling that partisan intent in redistricting is unconstitutional, even though the North Carolina Supreme Court seventeen years earlier had ruled that “[t]he General Assembly may consider partisan advantage and incumbency

protection in the application of its discretionary redistricting decisions.” *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002). Notwithstanding that the North Carolina Constitution “clearly contemplates districting by political entities” and that this is “root-and-branch a matter of politics,” *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.), the panel determined that the way redistricting had occurred in North Carolina for decades—primarily under Democratic Party control—was suddenly unconstitutional. But that opinion offered no standards or guidance to guide future General Assemblies in crafting constitutional districting plans.

Now, the preliminary-injunction motions pending before this Court seek to extend that panel’s holding, thereby exposing it as a threat to constitutional order in this State. Despite that the 2021 redistricting was the most transparent and non-partisan legislative redistricting in North Carolina and voluntarily followed to the letter the process the three-judge panel ordered for the 2019 remedial phase, a few private persons employing sophisticated experts who can make a computer simulation show anything at will—are dissatisfied. They think there are better district configurations than what the peoples’ representatives chose. And they ask this Court to employ the judicial power of the State to pick their preferred configurations over the General Assembly’s, even though the North Carolina and U.S. Constitutions delegate this *legislative* power to the General Assembly. These suits show that the *Common Cause* ruling does not provide any judicially manageable standard and will lead only to constant redistricting litigation, regardless of what the General Assembly actually does. Future plaintiffs could as easily disagree with the present Plaintiffs as the present Plaintiffs can disagree with the General Assembly.

This Court should reject the justiciability holding of the 2019 panel or, at a minimum, restrict the holding to its facts, which are not remotely present in 2021. These lawsuits are not likely to succeed, and there is no equitable merit to the motions for interlocutory injunctions, which

seek to impose on a *provisional* basis the will of a tiny minority against “the will of the people, legally expressed.” *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 638 (1897). The motions should be denied.

Background

A. Historical Background and Prior Litigation

After each decennial census, “States must redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In North Carolina, the State Constitution commits that task solely to the authority of the General Assembly. N.C. Const. art. II, §§ 3, 5. “Redistricting is never easy.” *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). It has not been easy in North Carolina. The lawsuits of both sets of Plaintiffs should be understood against a lengthy historical and procedural background, which is summarized below.

1. Reconstruction Through the 2000s Cycle

“North Carolina has an extensive history of problematic redistricting efforts tracing back to the 1730s, which has generated significant litigation.” *Dean v. Leake*, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008). From Reconstruction through the 2000 redistricting cycle, the Democratic Party controlled the redistricting process and was responsible for those “problematic redistricting efforts.”

a. “After the Reconstruction Era and the rejuvenation of the Democratic Party, the practice of gerrymandering . . . became a favored tactic in gaining partisan control of the congressional delegation.” D. Orr, Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 *Southeastern Geographer* 29, 43 (1969). The paradigmatic example were the “bacon-strip” districts:

Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic

interests prevail. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats have chosen the dispersal alternative. A few Republican counties are grouped with Democratic counties in the central section of the state. The effect created one-county wide congressional districts that run horizontally across the state, creating what some have called bacon strips.

Leroy C. Hardy, *Considering the Gerrymander*, 4 Pepp. L. Rev. 243, 258–59 (1976). “One such district extended from Pender County on the coast, westward along the South Carolina line through seven more counties all the way to Mecklenburg, a total distance of approximately 250 miles.” Orr, *supra*, at 43.

No equal-population requirement curbed the Party’s political aims, and the notion that a partisan-fairness requirement was lurking then and there in the State Constitution was preposterous to them. *Id.* The result of “180 years” of Democratic dominance in redistricting was “the rural domination of the [S]tate’s congressional delegation” and the frustration of “the rising tide of Republicanism” in the State. *Id.* at 39.

In fact, when a Republican congressional candidate, Charles Jonas, successfully tailored his message to win one of the bacon-strip districts, the Democratic General Assembly promptly redrew the lines to pair him with a Democratic member in a district predominantly composed of Democratic-leaning territory (which could as easily be identified then as now, because vote totals then and now are reported at the precinct level). *Id.* at 44. But voters have free will:

Amid Republican charges of gerrymandering, Jonas soundly defeated [the Democratic incumbent] in the 1962 election. In addition, when the legislators ‘stacked’ the Eighth District boundaries so as to include a preponderance of Democratic counties, they simultaneously gave the adjoining Ninth District an increased Republican character, an oversight which allowed another Republican, James T. Broyhill of Caldwell County, also to be elected to Congress.

Id. Rep. Jonas received no assistance from the State courts in winning elections.

In the first redistricting after the Supreme Court announced the one-person, one-vote rule, the Democratic-controlled General Assembly drew districts that “were as distorted as could be found in any state in the country.” *Id.* at 46. A court invalidated that plan for failure to comply with the one-person, one-vote rule, but allowed an election to occur under it because of “the tremendous gulf which existed between the status quo and the constitutional requirements” and the “imminence of the 1966 primaries.” *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966). Democrats set right back to work, drawing a district that was publicly described as “a dinosaur or a left-handed monkey wrench” that was “‘packed’ with a projected vote favorable to Representative Jonas far in excess of that needed to win.” Orr, *supra*, at 49. Stated differently, Democratic map drawers sought to collect Republican voters in one district and remove them from neighboring districts to make the neighboring districts more favorable to Democratic electoral prospects. Other districts were “hardly compact and barely contiguous.” *Id.* The federal court expressed its disappointment with the obvious gerrymandering, noting “[r]egretfully, we note that tortuous lines still delineate the boundaries of some of the districts” and hoped that, “following the 1970 decennial census,” the districts would be drawn to be “reasonabl[y] compact.” *Drum v. Seawell*, 271 F. Supp. 193, 195 (M.D.N.C. 1967). Nevertheless, it allowed the districts to be used, allowing the Democratic Party to again achieve the spoils of their electoral victory—which “is a compelling reminder that, indeed, ‘elections have consequences.’” *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. July 08, 2013) (Ridgeway, Crosswhite, Hinton, JJ.).

b. The Democratic Party was not done. After the 1980 census, the Democratic-controlled General Assembly redrew the congressional lines, and a paramount concern was its “need . . . to protect its turf and its incumbents.” Beeman C. Patterson, *The Three Rs Revisited: Redistricting, Race and Representation in North Carolina*, 44 *Phylon* 232, 233 (1983). Among the

results of this approach “was the incongruous lines drawn in the Second Congressional District to satisfy the incumbent, L.H. Fountain, who wanted to be sure that urban areas, such as the city of Durham, would be excluded from his district,” resulting in an odd shape “called ‘Fountain’s Fishhook’ because of the way it curved around urban areas.” *Id.* In creating the district, the General Assembly used race as a proxy for politics, as “white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters.” J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 2487 (1999). Indeed, “racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the ‘ripple effects’ of changes in one district on the shape of another.” *Id.*

“The incident shows that in drawing districts for a specific political purpose, 20th Century North Carolina legislators [were] not much different from their counterparts in 19th Century Massachusetts.’ ‘The Legislature,’ [a prominent newspaper] paper noted in another editorial a few days later, ‘has given the state districts that are hooked, humped, and generally ungainly—in a word, gerrymandered—to protect incumbents.’” *Id.* at 251 (citation omitted).

c. In 1992, the Democratic-controlled General Assembly drew perhaps the most infamous district of all time, known as the Freeway District:

It is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas “until it gobbles in enough enclaves of black neighborhoods.” Northbound and southbound drivers on I-85 sometimes find themselves in separate districts in one county, only to “trade” districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that “[i]f you drove down the

interstate with both car doors open, you'd kill most of the people in the district.”

Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (*Shaw I*) (citations omitted). In fact, the entire redistricting plan was, as one redistricting expert described it, “a contortionist’s dream,” composed of four of the least compact districts in the nation and districts that “plainly violate the traditional notion of contiguity.” Timothy G. O’Roarke, *Shaw v. Reno and the Hunt for Double Cross-Overs*, 28 Political Science and Politics 36, 37 (March 1995). The plan was drawn in secret by Democratic political consultant John Merritt and “emerged as the result of consultations among aides to incumbent congressmen and members of the redistricting committees”—which, of course, occurred in secret. *See Shaw v. Hunt*, 861 F. Supp. 408, 466 (E.D.N.C. 1994). In short, “the North Carolina legislature threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race.” *Id.*

Republican-affiliated redistricting plaintiffs asserted that the plan was an unconstitutional partisan gerrymander, and their claim was promptly dismissed. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff’d*, 506 U.S. 801 (1992).¹ Another set of plaintiffs challenged the majority-minority districts as racial gerrymanders, and their claim succeeded. *See Shaw I*, 509 U.S. at 657–58 (recognizing a cause of action for racial gerrymandering); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (*Shaw II*) (striking down the district under this cause of action).

In his dissent, Justice Stevens observed “that this case reveals the *Shaw* claim to be useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends.” *Shaw II*, 517 U.S. at 920 (Stevens, J., dissenting).² He observed that Democratic legislators “rejected Republican Party

¹ The “Blue” in that case was now-Senator Dan Blue, who was Speaker of the House at the time.

² *See also Shaw v. Hunt*, 861 F.Supp. 408, 462, 465, 468 (E.D.N.C. 1994) *vacated on other grounds*, noting that Districts 1 and 12 were drawn to primarily protect Democrat incumbents.

maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans.” *Id.* at 937. In other words, the hideous *Shaw* districts were, in his view, really partisan gerrymanders.

Justice Stevens anticipated the Democratic Party’s next move. The General Assembly enacted a new congressional plan containing a new bizarrely shaped district, which “retains the basic ‘snakelike’ shape and continues to track Interstate 85.” *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) (*Cromartie I*). This time, the General Assembly asserted that it “drew its district lines with the intent to make District 12 a strong Democratic district.” *Id.* at 549.

The Supreme Court accepted this “legitimate political explanation for its districting decision” and rejected the challenge—thereby allowing the Democratic Party to reap the benefit of its control of the General Assembly. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). In fact, the Supreme Court gave the partisanship defense a privileged status in redistricting litigation. It emphasized that, where this defense is raised, extra “[c]aution is warranted,” given that “race and political affiliation are highly correlated.” *Id.* Most importantly, the Supreme Court imposed an onerous requirement for a redistricting plaintiff, when the partisanship defense is raised, to present “alternative ways” in which “the legislature could have achieved its legitimate political objectives” with a “greater racial balance.” *Id.* at 258. Partisanship had been established as the best defense to a claim of racial gerrymandering.³

d. Now that partisan gerrymandering had been approved—and became a legally advisable tactic—the Democratic Party plowed into the 2001 redistricting with partisan impunity.

³ Although a state may also defend on the ground that “traditional districting principles,” rather than race, predominated, this has proven to be a weak defense. A plaintiff need not show “alternative ways” in which the redistricting plan could have been drawn, and the plaintiff need not show a departure from traditional districting principles at all. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797–800 (2017).

The 2001 congressional plan, like all the Democratic Party’s plans, “were drawn outside of the General Assembly,” in secret. Ex.1, Churchill Dep. 19:11–16. What was *not* secret was the partisan motive. Democratic Representative Wright stated expressly at a Redistricting Committee hearing that the plan was drawn “with the intent of certainly keeping the Democratic advantage.” Ex.2, Nov. 14, 2001 Congressional Redistricting Comm. Tr. 25:22–26. He also agreed that District 13, another visible oddity that ran from Wake County to the Virginia border and then south into Guilford county to pick up highly Democratic areas, was “done to make sure that the 13th was a Democratic district” and, in fact, to be “a more stronger Democrat district than” before, and he expressly clarified that Democratic members were “looking at ways to enhance the performance Democratically” Ex. 2, Nov. 14, 2001 Congressional Redistricting Comm. Tr. 36:8–37:21.⁴

Because this was the legally correct course of action, none of these districts were invalidated. Indeed, no challenge was filed.

2. The 2010s Cycle

In 2011, the Republican Party controlled both chambers of the General Assembly for the first time since Reconstruction—control gained by winning seats in House and Senate redistricting plans drawn and passed by a Democratic-controlled legislature.

a. In the 2011 redistricting, the General Assembly interpreted the Supreme Court’s decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that VRA § 2 imposes a “majority-minority” rule, *id.* at 17, to require the creation of majority-minority districts with a black voting-age population, or “BVAP,” of at least 50%. Accordingly, the General Assembly included 28 majority-minority house and senate districts in the 2011 legislative plans and two additional

⁴ Like the 1992 Congressional Plan, Democrats in 2001 drew their plan that was eventually adopted by the General Assembly “off site” and in secret. *Dickson v. Rucho* Deposition of Erika Churchill pp. 17-19 & 156-160, attached hereto as Exhibit 1.

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

The State defended some of the districts on the ground that they were drawn for predominantly political, not racial, reasons. *Cooper v. Harris*, 137 S. Ct. 1455, 1468–69, 1472–73 (2017). That is, the State raised the *Cromartie II* defense, but the district court in the congressional case rejected it. *Harris v. McCrory*, 159 F. Supp. 3d 600, 618–21 (M.D.N.C. 2016). Central to that ruling was its finding that the political explanation was not a sufficiently prominent rationale to protect District 12 because it “was more of a post-hoc rationalization than an initial aim.” *Id.* at 620. The court emphasized that the redistricting chairpersons’ contemporaneous public statements “attempted to downplay” the role of politics and did not, at the time, assert “that their sole focus was to create a stronger field for Republicans statewide.” *Id.* If it had, the legislature could have had sufficient justification for the plan.⁵ A similar ruling was issued in the legislative case. *Covington*, 316 F.R.D. at 139 (“[T]here is no evidence in this record that political considerations played a primary role in the drawing of the challenged districts.”). The Supreme Court affirmed both decisions. *Cooper*, 137 S. Ct. 1455; *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

b. Having been denied the defense established in *Cromartie II* that allowed the Democrat majority to draw maps favoring their party, the General Assembly set to work redistricting with the Supreme Court’s—and Plaintiffs’ lawyer’s—admonitions in mind. The

⁵ That was the position of the plaintiffs in that case. Their briefing criticized the General Assembly for “revisionist history” and for public statements affirming the importance of the Voting Rights Act while omitting any reference to partisanship. Brief for Appellees, *Cooper*, 133 S. Ct. 1455 (2017) (No. 15-1262) 2016 WL 5957077, at *20 (2016).

General Assembly did not consider race in redrawing the legislative and congressional lines. But because not considering race was insufficient in *Cooper*—since the courts found that it *did* use race despite its contrary assertions—it was necessary to make a clear record to establish the *Cromartie II* defense. In redrawing legislative and congressional boundaries, the General Assembly represented in its criteria and in public statements that partisan data was a predominant criterion used in redistricting.

Plaintiffs, represented by lawyers in this case, sued. First, in November 2018, they challenged the legislative plans in this Court. *Common Cause v. Lewis*, 18 CVS 014001 (filed Nov. 13, 2018). After a year of discovery and a two-week trial, the *Common Cause* court ruled for the first time in North Carolina history that partisan motive in redistricting renders a plan invalid under various provisions of the State Constitution, including its Equal Protection Clause and its Free and Fair Elections Clause. The *Common Cause* court, however, insisted that it was not claiming a judicial right “to engage in policy-making by comparing the enacted maps with others that might be ‘ideally fair’ under some judicially-envisioned criteria.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Sep. 03, 2019). Rather, it believed that the judicial task is “to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see ‘how far the State had gone off that track because of its politicians’ effort to entrench themselves in office.’” *Id.* (quoting *Common Cause v. Rucho*, 139 S. Ct. 2484, 2521 (2019) (Kagan, J., dissenting)). The finding of partisan motive was not particularly difficult because “Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017.” *Id.* at *115. The *Common Cause* court also relied in part on expert mapping-simulation reports that

purported to show that the legislative plans were partisan outliers when compared to a baseline of innumerable maps supposedly drawn to achieve the General Assembly's own criteria. *Id.* at *17.

The *Common Cause* court soon learned the problem with that latter reliance. The *Common Cause* court placed exceptional limits on the General Assembly's remedial process, *id.* at *133, and the General Assembly responded with a process—conducted completely in public on live audio and video livestream—that selected districts at random from maps provided at the liability phase by one of the *Common Cause* plaintiffs' experts (Dr. Chen), follow by subsequent minor modification. Nevertheless, the *Common Cause* plaintiffs objected, called the resulting plan an extreme partisan gerrymander, and presented an expert report of Dr. Chen purporting to show that *his own simulated districts* (with minor modifications) were partisan outliers. Ex. 3, Plaintiffs' Objections to Remedial Plans at 14–44, *Common Cause v. Lewis*, No. 18 CVS 014001 (filed Sept. 27, 2019). The *Common Cause* court overruled the objections. Ex. 4, Order on Remedial Plans, *Common Cause v. Lewis*, No. 18 CVS 014001 (entered Oct. 28, 2019).

Plaintiffs, represented by the same lawyers, challenged the congressional plan enacted to remedy the *Shaw* violation, and the same panel that decided the *Common Cause* case issued an injunction. Ex. 5, Order on Injunctive Relief, *Harper v. Lewis*, 19 CVS 012667 (entered Oct. 28, 2019). The court, however, found a likelihood of success predicated entirely on the General Assembly's "detailed record . . . of partisan intent and the intended partisan effects . . ." *Id.* at 12. The court found that the General Assembly had formally permitted consideration of partisan data in the criteria and instructed the map-drawing consultant to use partisan data in constructing the districts. *Id.* at 12–13. The court *did not* rely on the expert mapping simulations in *Harper*.

The General Assembly conducted another redistricting, again in public view and without a partisan-intent criterion. Again, the *Common Cause* plaintiffs objected, presented expert mapping

simulations purporting to show that the new plan was “an extreme and obvious partisan gerrymander,” and again asked for injunctive relief. Ex. 6, Plaintiffs’ Motion to Set Schedule for Review of Remedial Plan, *Harper v. Lewis*, 19 CVS 012667 (filed Nov. 15, 2019). The panel had now seen expert simulations purporting to show that every plan the General Assembly adopted, no matter how public and no matter how close to the *Plaintiffs’* prior simulated maps, constituted an extreme partisan gerrymander. The panel had enough and rejected the challenge. Ex. 7, Order, *Harper v. Lewis*, 19 CVS 012667 (filed Dec. 2, 2019).

B. The 2021 Redistricting

1. The 2021 redistricting was uniquely difficult because of a five-month delay in the release of the census results due to the global Covid-19 pandemic. North Carolina did not receive the census data necessary to redistrict until August 12, 2021. And because that data did not come in a “ready to draw” package, it took several additional weeks for legislative staff to load data and configure software for terminals that legislators and the public could use.

The General Assembly worked promptly to redistrict all the same. Both the House Redistricting Committee the Senate Redistricting and Elections Committee had already been conducting meetings, and they adopted criteria to govern the congressional and legislative line-drawing before the census results were announced. On August 12, 2021, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections met, and adopted Joint Criteria for redistricting. These criteria largely mirror traditional districting criteria, including in relevant part instructions that:

- the number of people in each congressional district be as equal as practicable under the 2021 decennial census;
- the number of people in each legislative district be within 5 percent of the ideal population under the 2021 decennial census;
- districts be contiguous;

- that voting districts (VTDs) should be split only when necessary;
- the Committees make reasonable efforts to draw compact districts;
- the Committees may consider municipal boundaries;
- the Committees may consider member residence;

Exhibit 8. To avoid violations identified in the 2010 cycle, the criteria also included the following directives:

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.

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.

Id. An additional criterion relevant to this case reads in full:

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.

Id. There was no priority to the criteria. *Id.* at 56:50 *et seq.*

The General Assembly conducted public hearings across the State, beginning on September 8, 2021 and running through September 30, 2021.⁶ Legislators then began drawing

⁶ The *Harper* Plaintiffs allege that the General Assembly avoided having hearings in large urban areas, and that only three hearings occurred outside of the typical workday. This is false. Hearings were held in the State's largest cities, including Charlotte, Winston-Salem, Fayetteville, Durham, and Wilmington. Eight hearings began at 5:00 PM or later. Hearings were also held in every one of the then 13 congressional districts. Furthermore, constituents from all over the State were free to communicate with members of both redistricting committees via email, phone, or any other method of virtual communication. This is in addition to the public access to at least one room where the general public could build their own districts, and the public portal opened for public input on redistricting that was open throughout the process. The public made use of all of these methods of providing comment.

maps, on public terminals during sessions that were recorded. All of the map-drawing occurred in this public process. After submissions and proposals by legislators and the public, additional hearings were held throughout the State on October 25 and 26, 2021, including hearings in Raleigh, Wilmington, and Greenville.

2. In early November, maps were proposed and voted on leading to the adoption of enacted plans on November 4, 2021 (the “2021 Plans”). During all Senate and House Redistricting Committee meetings, and during all full sessions of the House and Senate, Democratic members were given a meaningful opportunity to offer amendments, and comment on proposed plans. In addition, the General Assembly established a detailed record of the reasoning for the configurations of the districts. Some of the goals for the 2021 Congressional Plan are summarized here:

- CD1 is anchored in northeastern North Carolina based on testimony 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. 2011-11-01 Senate Committee Hr’g 37:50, *et seq.*⁷

Indeed, Democratic members of the General Assembly praised the Chairs’ attempts to create a “public transparent process” to draw the maps, as well as their ability to collaborate with the Republican members to develop the scheduling of the public hearings and other public input. See 2021-11-03 House Redistricting Committee Hr’g 48:28 (available at <https://www.youtube.com/watch?v=M53S7TbN6ew>) (statement from Rep. Harrison); 2021-11-01 Senate Redistricting and Elections Committee Hr’g 1:18:02 (available at <https://www.youtube.com/watch?app=desktop&v=KgSkfFY7r7g>) (statement from Sen. Davis).

⁷ The November 1, 2021 hearing can be found at: <https://www.youtube.com/watch?v=KgSkfFY7r7g>

- 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). *Id.* at 39:07, *et seq.*
- CD3 was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district and to improve the compactness of the prior district; extensive input from a public hearing in New Hanover was incorporated, including that Cape Fear River Basin be kept in one district, that New Hanover and Brunswick Counties be kept together, and that Bladen and Columbus Counties be maintained in a single district. *Id.* at 39:45, *et seq.*
- CD4 was configured to be a nearly perfect four-county district south of Raleigh, and 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. *Id.* at 40:42 *et seq.*
- 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. *Id.* at 41:41 *et seq.*
- 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. *Id.* at 42:12 *et seq.*

- CD7 runs from the Triangle west through the Central Piedmont region encompassing Davidson, Guilford, and Harnett Counties and a portion of Wake County, the purpose being to bring together rural areas and smaller cities and towns. *Id.* at 42:51 *et seq.*
- 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. *Id.* at 43:40, *et seq.*
- 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. *Id.* at 44:25 *et seq.*
- 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, based on a comment at a public hearing in Forsyth. *Id.* at 44:47, *et seq.*
- CD11 is based in the northwest corner of North Carolina containing eight whole counties and two partial counties based on a desire to maintain the incumbent in the district; a key goal was maintaining Greensboro as much as possible in the district, and the goal was achieved with more than 90% of Greensboro included. *Id.* at 45:26 *et seq.*

- 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. *Id.* at 45:55.
- 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. *Id.* at 46:22 *et seq.*
- 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. *Id.* at 47:01 *et seq.*

The legislative record is filled with information regarding goals like these. Specifically, in introducing the bill that ultimately was enacted as the House and Senate plans, Sen. Hise explained in detail, on a district-by-district and sometimes a VTD-by-VTD basis, the rationale for the decisions made in drawing the map that was ultimately passed as the 2021 Senate Plan. 2021-11-02 Senate Committee Hr'g 1:01:21, *et seq.* (available at <https://www.youtube.com/watch?v=G0VerOsNMm4> (titled "2021-11-02 Committee (Senate)")). Sen. Hise explained, for example, why three New Hanover County precincts were selected for inclusion in Senate District 8, *id.* at 1:04:47, the reason for VTD splits and efforts to keep municipalities whole in Wake County, *id.* at 1:08:00 and 1:12:48, why Forsyth County was paired with Stokes County as opposed to Yadkin County, *id.* at 1:21:56, and the choices concerning the southwestern North Carolina county grouping configurations involving Cleveland, Gaston, Lincoln, Henderson, Polk, and Rutherford Counties, *id.* at 1:29:00. Similarly, while Rep. Hall did not go into detail each of 120 House districts, at the House Redistricting Committee hearing on

November 2, 2021, Rep. Hall gave an overview of the 2021 House Plan, describing how the proposed map followed the adopted criteria and the overarching goal of retaining the cores of prior districts where possible. 2021-11-02 House Committee Hr’g at 9:41:17 *et seq.* (available at <https://www.youtube.com/watch?v=7pyfVT6VOc4&t=34565s> (titled “2021-11-01 Redistricting Map Drawing (House))). Rep. Hall answered all questions from committee members as to why districts are configured as they are. The General Assembly also made available extensive data pertaining to each of the enacted plans.⁸

In addition, the legislative record shows that the Senate Committee received and adopted two amendments from Black Democratic Members, Gladys Robinson and Natalie Murdock, concerning the Durham/Chatham and Guilford/Rockingham regions. 2021 Senate Redistricting and Elections Committee Hr’g 3:45:46 *et seq.*⁹ (consideration and approval of proposed amendment to districts in Durham and Chatham counties) and 3:52:00 *et seq.* (consideration and approval of proposed amendment to districts in Guilford and Rockingham counties). Democratic members testified stated in open committee that they supported the groupings districts as amended

⁸ These are available online:

Senate : <https://webservices.ncleg.gov/ViewBillDocument/2021/53447/0/SL%202021-174%20-%20StatPack%20Report>

Congressional: <https://webservices.ncleg.gov/ViewBillDocument/2021/53447/0/SL%202021-174%20-%20StatPack%20Report>

House: <https://webservices.ncleg.gov/ViewBillDocument/2021/53428/0/SL%202021-175%20-%20StatPack%20Report>

⁹ Available at <https://www.youtube.com/watch?v=G0VerOsNMm4>

and that the amended districts had no VRA issues. *Id.* at 3:48:04 and 3:52:49. The committee adopted them, and they are in the 2021 Senate Plan.

C. The Present Lawsuits

Two sets of plaintiffs filed the two lawsuits before the Court on motions for preliminary injunctions, and they are referred to here respectively as the *NCLCV* Plaintiffs and the *Harper* Plaintiffs. Both lawsuits rely on the *Common Cause* ruling and assert partisan gerrymandering claims.¹⁰

1. The *NCLCV* Plaintiffs challenge the 2021 Congressional, House, and Senate Plans under the North Carolina Constitution’s Free Elections, Equal Protections, Free Speech, and Free Assembly Clauses. The *NCLCV* Plaintiffs allege that these plans are unlawful partisan gerrymanders because they are insufficiently proportional. Their theory is that “an electoral climate with a 50-50 split in partisan preference should produce a roughly 50-50 representational split.” Moon Affidavit § 3.1; *NCLCV* Compl. ¶¶ 3, 88, 126–131. According to the *NCLCV* Plaintiffs, the “mark[]” of a map as a “partisan gerrymander” is “that it prevents the disfavored party from receiving a majority of seats, even when that party’s candidates earn a majority of votes statewide.” *NCLCV* PI Mem. 23. Absent from the *NCLCV* Plaintiffs’ complaint and its preliminary-injunction papers is a plausible allegation that the General Assembly adopted a partisan-data criterion or otherwise announced a partisan purpose behind any of the 2021 Plans. Instead, the *NCLCV* Plaintiffs allege that, because it was *possible* for legislators to draw lines for partisan reasons, it *did* happen. *See, e.g.*, *NCLCV* Compl. ¶¶ 69–71.

¹⁰ The *NCLCV* Plaintiffs also assert racial claims but do not move for preliminary relief on that basis.

The *NCLCV* Plaintiffs believe they can draft better maps than the General Assembly by “harnessing the power of mathematics and computer science.” *NCLCV* Compl. ¶ 1. They assert that better maps than the General Assembly’s can be created using “high-performance computers,” “cutting-edge computational methods and resources” unavailable to the General Assembly, and a set of unidentified criteria, *id.* ¶ 154. They have purported to create one map approaching “Pareto optimality” for each House of the General Assembly and the congressional delegation. *Id.* But they leave what that means to the imagination. Their preliminary-injunction motion asks the Court to enjoin the use of the 2021 Plans in the 2022 elections, including the general election. Perhaps recognizing that such an injunction would be preempted by federal law, *see* 2 U.S.C. § 7; *Foster v. Love*, 522 U.S. 67 (1997), they also ask that, if the General Assembly cannot draft and finalize maps remediating the infirmities they supposedly identify in two weeks’ time, the Court should order the State to use the *NCLCV* Plaintiffs’ map in the 2022 elections. Compl. Prayer for Relief ¶ g; PI Mem. 58–59. In short, the *NCLCV* Plaintiffs ask this Court to determine that their plans are better than the General Assembly’s and legislate their own plans into North Carolina law—at the *preliminary-injunction stage*.

2. The *Harper* Plaintiffs present a similar case predicated on *Common Cause* and its novel theory of partisan gerrymandering, but these plaintiffs challenge only the 2021 Congressional Plan, not the legislative plans. These are many of the same plaintiffs who challenged the 2019 congressional plan and whose challenge was rejected at the preliminary-injunction stage, based on a record much like the one before this Court.¹¹ Like the *NCLCV* Plaintiffs, the *Harper*

¹¹ In fact, the *Harper* Plaintiffs first attempted to bring this suit through a motion to amend their complaint in the prior *Harper* case for the purpose of keeping the same panel that decided *Common Cause*. That forum-shopping effort failed, and now they have voluntarily dismissed the prior *Harper* case.

Plaintiffs have no direct evidence that partisan motive entered the line-drawing, and, like the *NCLCV* Plaintiffs, they ask for the negative inference that partisan motive *must* have impacted lines because it cannot be proven *not* to have done so. *See, e.g.*, PI Mem. 5–8. The *Harper* Plaintiffs also rely on an expert analysis criticizing district lines and mapping simulations purporting to show that the 2021 Plans are extreme partisan outliers. The *Harper* Plaintiffs ask for a new court-drawn congressional plan to govern the 2022 election—as *preliminary relief*.

The Legal Standard

“A preliminary injunction . . . is an extraordinary measure taken by a court to *preserve the status quo* of the parties during litigation.” *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (N.C. 1977) (emphasis added). It will be issued only if (1) “a plaintiff is able to show likelihood of success on the merits of his case,” (2) “a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation,” and (3) a “weigh[ing] [of] the equities” supports a preliminary injunction. *Holmes v. Moore*, 270 N.C. App. 7, 15, 34 840 S.E.2d 244, 254, 265 (N.C. App. 2020) (citations omitted).

Argument

These very lawsuits stand as a testament against their own underlying legal theory. Once the *Common Cause* panel invited partisan gerrymandering lawsuits, it should have recognized that partisan interest groups would overstay that welcome. After all, plaintiffs sued the General Assembly last cycle for *every* choice it made. When it failed to prioritize partisan goals, it was sued for racial gerrymandering. When it announced partisan goals, it was sued for partisan

gerrymandering. Now that it has forbidden both racial and partisan goals—it is sued for both.¹² Under Plaintiffs’ theory, the facts simply do not matter; these cases are about political power. The 2021 redistricting was the most transparent, open, and non-partisan legislative redistricting in the history of North Carolina, if not the United States. It mirrored what the *Common Cause* court ordered the last time the General Assembly faced suit. But no amount of transparency or neutral criteria will satisfy these Plaintiffs. Until the General Assembly (or at least its current Republican majority) no longer draws the lines, the floodgates will never close. They should never have been opened. The *Common Cause* justiciability holding contravened binding precedent, and it should be rejected.

In any event, this case is not *Common Cause*. The General Assembly did not use partisan data, its criteria forbade any such use, and neither set of plaintiffs has credible evidence to the contrary. The *NCLCV* Plaintiffs disagree with the State Constitution’s delegation of authority over redistricting to the General Assembly and contend that, if a “better” plan can exist, the Constitution demands it, and it should be afforded the force of law. But that would be a baffling result: the *NCLCV* Plaintiffs’ plans enjoy no popular support, they were drawn in private quarters and in secret, and the *NCLCV* Plaintiffs have not even given a transparent account of the criteria controlling their line-drawing—much less the detailed account of line-by-line purpose the General Assembly has provided. No public hearings informed the proposed plans, and no public comment has been afforded. Yet the *NCLCV* Plaintiffs demand that this Court impose these black-box plans on 10.4 million North Carolina residents, with no questions asked—not even in discovery. Even if

¹² As noted, the *NCLCV* Plaintiffs have not sought provisional relief under their racial theories, but these theories illustrate the conundrum the State and this Court face.

“good government” were the law, the *NCLCV* Plaintiffs are on the wrong side of “good government.”

So, too, are the *Harper* Plaintiffs. Like the *NCLCV* Plaintiffs, they have no direct evidence to support their claims. Instead, they dropped piles of paper, including lengthy expert reports, on the Court and opposing parties at 3:30pm on Tuesday, November 30, less than 72 hours before their preliminary-injunction hearing and in violation of this Court’s rules. This Court should not be fooled. The expert reports have not been vetted in a fair adversarial process, they do not establish the predicates of their claims, and they provide no basis for this Court to find that the General Assembly did not follow its own criteria. The *Harper* Plaintiffs’ experts did not seek to input the General Assembly’s non-partisan goals into their algorithms, which is essential to make an even arguably fair assessment of partisan motive and intent. Instead, they rewrote their criteria in a transparent effort to rig the analysis in such a way to register any non-partisan goal not accounted for in the algorithm as partisan. And the analysis shows, on its own terms, only a muted partisan intent and effect. That is no basis to impose an undemocratic plan on 10.4 million North Carolinians.

I. Plaintiffs Are Unlikely To Succeed on the Merits

A. Plaintiffs Lack Standing

Plaintiffs are unlikely to succeed in establishing their own standing to challenge the 2021 Plans. “Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public.” *Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965); *see also New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 116, 840 S.E.2d 194, 204 (2020), *as modified on denial of reh’g* (May 18, 2020) (“[T]he only persons

entitled to “call into question the validity of a statute [are those] who have been injuriously affected thereby in their persons, property or constitutional rights.”). “The direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient concrete adverseness to address difficult constitutional questions.” *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021) (quotation marks omitted).

1. The *Harper* Plaintiffs

The *Harper* Plaintiffs are unlikely to establish standing, and their own presentation shows it. Because the right to vote is individual and unique to each person, and any “interest in the composition of ‘the legislature as a whole’” is “not an individual legal interest,” the U.S. Supreme Court has recognized that a voter is only directly injured by specific concerns with that voter’s districts. *Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018). A plaintiff has standing to challenge the districts in which that plaintiff lives, but cannot raise generalized grievances about redistricting plans. *See id*; *see also United States v. Hays*, 515 U.S. 737, 745 (1995). The U.S. Supreme Court also offered parameters for assessing individualized injury. One is that a “hope of achieving a Democratic [or Republican] majority in the legislature” is not a particularized harm; the voter’s interest is in the voter’s own district, where the voter votes. *Gill*, 138 S. Ct. at 1932. Another is that a district’s partisan composition is not a cognizable injury if a similar composition would result “under any plausible circumstance.” *Id.* at 1924, 1932. A third is that injury must be proven, not merely alleged. *Id.* at 1931–32.¹³ The *Harper* Plaintiffs are unlikely to establish standing under this test.

¹³ Though not binding, U.S. Supreme Court precedent is “instructive” for interpreting North Carolina standing requirements. *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006). It is especially instructive here, where the case law is unanimous and directly on point.

To begin, the *Harper* Plaintiffs claim to live only in CD1, CD4, CD6, CD7, CD9, CD10, CD11, and CD14 under the 2021 plan. *Harper* PI Mot. at Ex. A, Madduri Decl., Exs. J-U. That means the *Harper* Plaintiffs have no colorable assertion of standing to challenge six of the congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13).

Next, some *Harper* Plaintiffs reside in CD9 and CD6, which they allege (along with CD5 and CD12, where no *Harper* Plaintiff resides) are “packed” with Democratic voters and admit would be naturally packed in all events. *See Harper* Ex. H, at 56. According to their own evidence, these Democratic voters are able to elect their preferred candidates under the 2021 Congressional Plan and would continue to have that ability in their expert’s numerous counter-factual scenarios. These Plaintiffs have clearly not suffered any harm. *Gill*, 1916 S. Ct. at 1932.

Next, some *Harper* Plaintiffs reside in CD1, CD7, and CD10. *See Harper* Ex. H, at 56. Although these districts are heavily Republican (as are CD3, CD12, CD8, and CD13, where no *Harper* Plaintiff resides), the *Harper* Plaintiffs’ own expert’s analysis shows that this is so as a matter of natural geography; they would live in heavily Republican districts in all events. *See Harper* Ex. H, at 56. Moreover, the *Harper* Plaintiffs’ expert’s analysis shows that many districts are not partisan outliers (including CD5, CD11, CD3, CD12, CD1, CD7, CD8, and CD13). *See Harper* Ex. H, at 56. Individuals in these districts have no colorable claim to a direct injury at all.

That leaves only two districts, CD4 and CD14, where, according to their allegations, residents can plausibly claim that a different configuration might yield a different electoral result. *See Harper* Ex. H, at 56. These individuals’ claims fall short as well. For one thing, numerous possible configurations of these districts would *still* be highly favorable to Republican electoral prospects. *See id.* And, regardless, American law and democratic tradition presume that a person is represented by the person’s designated representative, regardless of descriptive similarity or

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

2. The *NCLCV* Plaintiffs

The *NCLCV* Plaintiffs lack standing to sue to pursue a generalized interest in more Democratic Party-friendly plans, to “harness[] the power of mathematics and computer science” to advance a “new [academic] field known as ‘computational redistricting’” in redistricting lawsuits, *NCLCV* Compl. ¶ 1–2, or for any other academic or partisan pursuit. As an initial matter, the *NCLCV* Plaintiffs claim to live in CD2, CD4, CD6, CD11, CD12, and CD13, as well as Senate Districts 2, 4, 12, 20, 23, 27, 32, 37, and House Districts 6, 10, 27, 29, 56, 58, 61, 72, and 98. *NCLCV* Compl. ¶¶ 14–28. This means the *NCLCV* Plaintiffs lack standing to challenge eight congressional districts, 42 out of 50 Senate districts, and 111 out of 120 House districts. Further, the *NCLCV* Plaintiffs do not establish that their own districts would shift from being Republican-leaning to Democratic-leaning under a different configuration, or that in all election scenarios they are prevented from electing their candidate of choice. Their arguments all concern an alleged statewide injury. *See, e.g., NCLCV* PI Mem. 26–27, 33–34, 41. They also have failed to establish standing. *See Gill*, 138 S. Ct. at 1930–31.

The organizational plaintiff, the North Carolina League of Conservation Voters, Inc., fares no better. It alleges it is a “nonpartisan nonprofit advocacy organization whose mission is to protect the health and quality of life of all North Carolinians, by fighting to build a world with clean air, clean water, clean energy, and a safe climate, all protected by a just and equitable democracy.”

NCLCV Compl. ¶ 11. NCLCV claims that its membership includes “voters of all political stripes— Democrats, Republicans, and independents,” *id.* at ¶ 11 n.4, and that it engages in the electoral process to elect candidates who “share its values, to build a pro-environment majority” in North Carolina. *Id.* at ¶ 11. NCLCV has not shown how any redistricting legislation has negatively impacted its ability to advocate for its positions or to fundraise. Nor would such an assertion make sense, because redistricting legislation does not control how a private organization may speak, solicit donations, or associate with allies. Further, NCLCV has not accounted for how electing an increased number of Democrats might cause “harm” to their Republican members.

NCLCV alternatively claims to bring a claim on behalf of its members, and this too is unavailing. 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. v. City of Raleigh*, 326 N.C. 100, 129-30, 388 S.E.2d 538, 555 (1990). None of those elements are satisfied. To the first element, for the reasons set forth above, the *NCLCV* Plaintiffs lack standing in their own right. Indeed, NCLCV concedes that it cannot confirm that it has members in many districts. *NCLCV* Compl. at ¶ 11 n.4. As for the second element, NCLCV claims to be a nonpartisan organization with both Republicans and Democrats and that it focuses its work on environmental advocacy. That is not germane to assisting the ability of Democratic Party voters to elect Democratic Party candidates, which is the avowed purpose of this suit. To the extent it claims to pursue a “just and equitable democracy,” that is not a basis for standing. “Generally available grievance[s] about government” do not confer standing. *Gill*, 138 S. Ct. at 1923 (internal quotation omitted). And finally, the right to vote is individual and personal to each

citizen. *Id.* at 1929. NCLCV has members of all political “stripes” and cannot plausibly claim to fully understand, let alone represent, the personal political and voting preferences of its members. It is improper for an organization to assert its members’ individual right to vote.

B. The Federal Constitution Bars Plaintiffs’ Claims Against the Congressional Plan

The *Harper* Plaintiffs and *NCLCV* Plaintiffs challenge the 2021 Congressional Plan solely under the State Constitution. But the *federal* Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts. “The Framers addressed the election of Representatives to Congress in the Elections Clause.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019). It provides that “[t]he Times, Places and Manner” of congressional elections “shall be prescribed in each State by the Legislature thereof” unless “Congress” should “make or alter such Regulations.” U.S. Const. art. I, § 4, cl. 1. The Elections Clause harbors no ambiguity; the word “Legislature” was “not one of uncertain meaning when incorporated into the Constitution.” *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Here, it refers undisputedly to the General Assembly, not the North Carolina courts.

Thus, “[t]he only provision in the Constitution that specifically addresses” politics in congressional redistricting plans “assigns [the matter] to the political branches,” not to judges. *Rucho*, 139 S. Ct. at 2506. What’s more, the Elections Clause is the *sole* source of state authority over congressional elections; regulating elections to federal office is not an inherent state power. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Thus, for a court applying state law to have any authority to address Plaintiffs’ claims, it must derive from the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

This case is in all material respects like *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), where the Eighth Circuit rejected a state court’s effort to alter state legislation on the ground that the state constitution required that change. In *Carson*, the Minnesota Secretary of State “agreed” with private plaintiffs “to *not* enforce the ballot receipt deadline” codified by Minnesota statute, and a “state court entered the consent decree order” against such enforcement on state constitutional grounds. *Id.* at 1056. The Eighth Circuit found that this likely violated the federal Constitution, reasoning “that the Secretary’s actions in altering the deadline for mail-in ballots likely violates the Electors Clause of Article II, Section 1 of the United States Constitution,” which, like the Elections Clause, delegates power over presidential elections to state legislatures. *Id.* at 1059. “Simply put, the Secretary has no power to override the Minnesota Legislature.” *Id.* at 1060. So too here: this Court should decline Plaintiffs’ invitation to overstep separation of powers and override the North Carolina General Assembly in setting the lines of congressional districts.

C. Plaintiffs’ Claims Are Not Justiciable

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

Both sets of Plaintiffs rely on the justiciability holding of *Common Cause* for the proposition that partisan considerations in redistricting are unconstitutional. But that decision

disregarded the direct opposite conclusion of the North Carolina Supreme Court, which has made clear that “[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions.” *Stephenson*, 355 N.C. at 371, 562 S.E.2d at 390. To be sure, this must occur “in conformity with the State Constitution,” *id.*, but *Stephenson* was referring to the textual limitations the North Carolina Constitution imposes on redistricting, such as the whole-county rules governing legislative plans. *See id.* Although the Constitution subjects the General Assembly’s discretionary exercise of redistricting authority to a series of specific criteria—including that districts be of approximately equal population and that county lines not be unnecessarily crossed—and although the State courts have correctly asserted the prerogative to enforce these express provisions, this only emphasizes the non-justiciable nature of Plaintiffs’ claims. Just as “[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly’s execution of the legislative reapportionment process,” *id.* at 389, they *could* have chosen to adopt express partisan fairness metrics that would, in turn, be judicially enforceable. The absence of the criteria Plaintiffs propose from the Constitution is proof that the State courts are not free to invent them. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473, 486 (1989) (finding express redistricting requirements in some constitutional provisions to foreclose inferring requirements in others); *Cooper v. Berger*, 371 N.C. 799, 810–11, 822 S.E.2d 286, 296 (2018) (“All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” (citation omitted)).

Beyond the textually clear restrictions on redistricting, courts in North Carolina have repeatedly refused to encroach on the power of the General Assembly. “Our North Carolina Supreme Court has observed that ‘we do not believe the political process is enhanced if the power

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

Indeed, it has been settled for over 100 years in North Carolina that these claims are non-justiciable. *Howell* rejected as non-justiciable a claim that lines of a special-tax school district “were so run as to exclude certain parties opposed to the tax and include others favorable to it.” *Howell*, 151 N.C. at 575, 66 S.E. at 572. The court (1) found that an “attempt to gerrymander” the district “was successfully made,” (2) could not “refrain from condemning” that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 575, 66 S.E. at 574. And yet the court *still* held that “the courts [are] powerless to interfere and aid the plaintiffs.” *Id.* “There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion.” *Id.* at 575, 66 S.E. at 573. This line of judicial prudence was upheld less than twenty years later in *Leonard v. Maxwell*, when the North

Carolina Supreme Court held that the “the question [of reapportionment] is a political one, and there is nothing the courts can do about it.” 216 N.C. 89, 3 S.E.2d 316, 324 (1939). This Court should follow this binding precedent and refuse to “cruise in nonjusticiable waters.” *Id.* Numerous other cases hold that the lines of legislatively created districts are not subject to judicial review. *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (N.C. 1911) (holding the General Assembly’s authority to “declare and establish” the “true boundary between...counties...is a political question, and the power to so declare is vested in the General Assembly.”); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62 74 S.E.2d 310, 317 (1953) (“[T]he power to create or establish municipal corporations...is a political function which rests solely in the legislative branch of the government.”); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) (“The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function.”); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) (“Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate.”); *Raleigh and Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 465 (1837) (“The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road....”).

The claims here are no different from the claim the North Carolina Supreme Court rejected in *Dickson v. Rucho*, 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014),¹⁴ under the “Good of the Whole” clause found in Article I, Section 2. The court held that an argument that plans favorable to one political party were not enacted for the “best” interests of “our State as a whole” is “not based upon a justiciable standard.” *Id.* Although styled under different provisions, Plaintiffs’

¹⁴ *Cert. granted, judgment vacated on other grounds*, 575 U.S. 959 (2015).

claims are no different in substance or in terms of justiciability. This Court is bound to follow this precedent as written. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (finding lower court “acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina”); *Respass v. Respass*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014). The failure of the *Common Cause* court to honor binding precedent does not excuse this Court from the same obligation.

Further, no satisfactory or manageable criteria or standards exist to adjudicate the sorts of claims Plaintiffs make. “The lack of standards by which to judge partisan fairness is obvious from even a cursory review of partisan gerrymandering jurisprudence.” *Johnson*, 2021 WL 5578395, at *9. Both sets of Plaintiffs here admit that their demand is for proportional representation, but “[t]his theory has no grounding in American or [North Carolina] law or history, and it directly conflicts with traditional redistricting criteria.” *Id.* “Even if a state’s partisan divide could be accurately ascertained, what constitutes a ‘fair’ map poses an entirely subjective question with no governing standards grounded in law.” *Id.* It is elementary that “the wisdom and expediency of the enactment is a legislative, not a judicial, decision.” *Wayne Cty. Citizens Ass’n for Better Tax Control v. Wayne Cty. Bd. of Comm’rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991) (internal quotations and citations omitted). There is no rule “that this Court can address the problem of partisan gerrymandering because it must.” *Gill*, 138 S. Ct. at 1929. It is not the role of the State courts to update the Constitution to address “existing conditions”; “[h]owever liberally [a court] may be inclined to interpret the fundamental law, [the court] [would] offend every canon of construction and transgress the limitations of [the court’s] jurisdiction to review decisions upon matters of law or legal inference [and] undert[ake] to extend the function of the court to a judicial amendment of the Constitution.” *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918, 922 (1932).

Plaintiffs here want a constitutional amendment. Claims asserting that a districting plan is somehow harmful to democracy are “not based upon a justiciable standard.” *Dickson*, 367 N.C. at 575, 766 S.E.2d at 260. Because “[p]olitics and political considerations are inseparable from districting and apportionment,” *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), a “partisan gerrymandering” claim could only proceed with some reliable standard for distinguishing good from bad politics. Plaintiffs cannot offer any test for discerning “at what point” politics “went too far.” *Rucho*, 139 S. Ct. at 2501. That is because this question simply asks whether a political act is wise or unwise.

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

The problems with maintaining judicial impartiality in the face of highly partisan redistricting lawsuits ring as true in state court as in federal court. The *Common Cause* court’s justiciability holding has been shown to open the proverbial floodgates of litigation: there has been a partisan-gerrymandering claim pending in this State at every moment since the *Common Cause* liability ruling was handed down. Continuation of this anomaly would only invite more litigation and at all levels of government. It would subject legislative will to judicial oversight and invade this discretionary sphere on a highly subjective basis. And each case would tempt the presiding

judge or judges to abandon neutral rules of law in favor of partisan preference. Vindicating a fear that legislatures might place “too much” weight on partisan considerations would pose the unquestionably unacceptable risk that judges will place *any* weight on such considerations—thereby trading partisan redistricting for partisan redistricting *litigation*. There is no reason to open this door and every reason to close it.

D. Plaintiffs’ Claims Are Not Cognizable

Justiciability aside, the rights Plaintiffs claim do not fall within the scope of the constitutional provisions they cite. All of these provisions guarantee distinct individual rights, not the group rights to partisan fairness that form the basis of Plaintiffs’ claims. The constitutional starting point is the presumption that any act of the General Assembly is constitutional. *Wayne Cnty. Citizens Ass’n for Better Tax Control*, 328 N.C. at 29, 399 S.E.2d at 315. “The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.” *Id.* (quotation marks omitted). “A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground.” *Id.*; see also *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781, 784 (1936) (same); *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (same). Plaintiffs cannot meet this onerous standard.

1. *Free and Fair Elections*. Plaintiffs’ claim under the Free Elections Clause runs directly counter to that Clause’s plain text and purpose to preserve elections from the very inter-branch intermeddling Plaintiffs advocate. “The meaning [of North Carolina’s Free Elections Clause] is plain: free from interference or intimidation.” John Orth & Paul Newby, *The North*

Carolina State Constitution (“Orth”) 56 (2d ed. 2013). The Free Elections Clause simply bars any act that would deny a voter the ability to freely cast a vote or seek candidacy. *See Clark v. Meyland*, 261 N.C. 140, 142-43, 134 S.E.2d 168, 170 (1964). Plaintiffs make no assertion that any voter is prohibited from voting or faces intimidation likely to deter the exercise of this right—only that the Free Elections Clause guarantees “each major political party . . . to fairly translate its voting strength into representation.” Compl. ¶ 198. But the right to win or assistance in winning is not encompassed by this provision. *Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 741 (2002) (ruling the free elections clause does not require public financing of campaigns). “The idea that partisan gerrymandering undermines popular sovereignty because the legislature rather than the people selects representatives is rhetorical hyperbole masked as constitutional argument. When legislatures draw districts, they in no way select who will occupy the resulting seats.” *Johnson*, 2021 WL 5578395, at *12 (citation omitted).

Reading the Free Elections Clause to contain such rights would be ahistorical and counter-productive to free elections. *See Stephenson*, 355 N.C. at 370-71, 562 S.E.2d at 389 (looking to “history of the questioned provision and its antecedents” in interpreting the State Constitution). The Free Elections Clause derives from the English Declaration of Rights of 1689, which provided that “election of members of Parliament ought to be free.” Orth 56.¹⁵ No one thought that this contained a prohibition against “partisan gerrymandering.” Elections to the English Parliament were often conducted in so-called rotten boroughs—districts far and away more gerrymandered than anything possible now because they could be created with only a handful of constituents.

¹⁵ *See also* English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (“English Declaration of Rights”), Yale Law School: The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp (last visited Dec. 2, 2021).

Rotten boroughs were not eliminated in England until the Reform Act of 1832, so the notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable. What the free-elections provision of the English Declaration of Rights *did* do was prohibit other branches of government from meddling with elections to Parliament. Put another way, the declaration that elections would be “free” vindicated separation-of-powers concerns. Going forward, Parliament controlled the “methods of proceeding” as to the “time and place of election” to Parliament. 1 William Blackstone, Commentaries 163, 177–179 (George Tucker ed., 1803); 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797).

What Plaintiffs want would sound eerily familiar to the English and the framers of the North Carolina Constitution. And they would recoil at it. Plaintiffs are avowed supporters of the Democratic Party and do not want “fair” elections; they want the North Carolina courts to tamper with the political composition of the 2021 Plans. This is an attack on, not a vindication of, free elections. As history shows, commitment to separation of powers preserves free elections. The Free Elections Clause does not “authorize[] this court to recast itself as a redistricting commission in order to make its 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.” *Johnson*, 2021 WL 5578395, at *10. The Free Elections Clause is best read to *forbid* that.

Indeed, the *NCLCV* Plaintiffs double down and argue that the Free Elections Clause promises them favorable districts regardless of whether the General Assembly redistricted with partisan intent—i.e., that the Constitution requires that the General Assembly *must affirmatively assist them in electing their preferred candidates*. *NCLCV* PI Mem. 47. They are asking for favoritism not equality. “A proportional party representation requirement would effectively force

the two dominant parties to create a ‘bipartisan’ gerrymander to ensure the ‘right’ outcome.” *Johnson*, 2021 WL 5578395, at *11. The *NCLCV* Plaintiffs do not hide from this fact; they trumpet it. The Wisconsin Supreme Court adequately addressed this absurd idea, which is the logical conclusion of the arguments of both sets of Plaintiffs:

Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the “major” parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional. The populace that voted for Libertarians is scattered throughout the state, thereby depriving them of any real voting power as a bloc, regardless of how lines are drawn. Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance. Proportional partisan representation would require assigning each third party a “fair” share of representatives (while denying independents any allocation whatsoever), but doing so would in turn require ignoring redistricting principles explicitly codified in the Wisconsin Constitution.

Johnson, 2021 WL 5578395, at *11 (citation omitted). Predictably, the *NCLCV* Plaintiffs’ supposedly “optimized” maps do nothing to assure persons who favor third-party or non-party candidates an opportunity to elect their preferred candidates. It is a theory of major-party favoritism, and it is anathema to the Constitution.

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

While the right to vote is fundamental, political considerations in redistricting do not “impinge” that right in any way, much less to a degree warranting strict scrutiny. *Town of Beech Mountain v. Cnty. of Watauga*, 324 N.C. 409, 413, 378 S.E.2d 780, 783 (1989) (applying rational basis scrutiny when restrictions “impinge[d] to some limited extent on” the exercise of a fundamental right and expressly declining to apply strict scrutiny). There is nothing in the Enacted Plans that operates to “totally den[y] . . . the opportunity to vote.” *Dunn v. Blumstein*, 405 U.S. 330, 334–35 (1972) (cited approvingly by *Town of Beech Mountain*, 378 S.E.2d at 783). Nor is there an unequal weighting of votes as occurs when districts are of markedly unequal population or where districts have different numbers of representatives. See *Stephenson*, 355 N.C. at 378-79, 562 S.E.2d at 394 (finding unequal weighting where voters in some districts elected five representatives and voters in others elected one or two). Here, all individual votes are counted and equally weighted. Plaintiffs’ contention is that voters of each major party do not have an equal opportunity to prevail, but equal-protection principles do not protect the right to win. In fact, there “is not a fundamental right” even to have “the party of a voter’s choice appear on the ballot.” *Libertarian Party of North Carolina*, 2008 WL 8105395, at *7, *aff’d*, 365 N.C. 41, 707 S.E.2d at 199. If the law were otherwise, the *Stephenson* Court would not have endorsed “consider[ation] [of] partisan advantage and incumbency protection in the application of its discretionary redistricting decisions.” *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 390. Thus, rational-basis review applies, and any plan that complies with the equal-population rule and other legal requirement is amply supported by a rational basis. The Enacted Plans clearly meet this standard.

3. *Speech and Assembly*. Plaintiffs’ free speech and association claims fare no better. North Carolina courts interpret the rights to speech and assembly in alignment with federal case law under the First Amendment. *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d

615, 620 (2014); *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). The right to free speech is impinged when “restrictions are placed on the espousal of a particular viewpoint,” *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 478, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing that “plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage” in a “constitutionally protected activity,” including First Amendment activities); see *Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999). If there are no restraints on speech, then redistricting cannot fairly be characterized as retaliation.

Nothing in the Enacted Plans place “restrictions . . . on the espousal of a particular viewpoint,” *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or “would likely chill a person of ordinary firmness from continuing to engage” in expressive activity, *Toomer*, 155 N.C. App. At 478, 574 S.E.2d at 89. Plaintiffs “appear to desire districts drawn in a manner ensuring their political speech will find a receptive audience; however, nothing in either constitution gives rise to such a claim.” *Johnson*, 2021 WL 5578395, at *13. “Associational rights guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome.” *Id.* Simply put, “there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. 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. People are free to speak their mind and petition the Legislature—no matter whether they affiliate with the same political party with their representative or not. And they remain free to join the Democratic Party and vote for

Democrats. What the Constitution guarantees is the right to meet up and speak up—not to be listened to. Plaintiffs present no evidence that they chose to forbear from speech or association for fear of gerrymandered districts, and no such assertion would be credible given that real gerrymandering actually took place in this State at the hands of their own Democratic Party. Indeed, taken to its logical end, Plaintiffs’ theory would lead to the absurd result that any person who did not vote for their elected representative would have a free speech and free assembly claim under North Carolina’s Free Speech and Free Assembly Clauses.

E. Plaintiffs’ Claims Are Unlikely To Succeed Under Any Theory That May Be Justiciable and Cognizable

Even if partisan gerrymandering claims were justiciable, the claims of both sets of Plaintiffs in these cases would still be unlikely to succeed because they do not satisfy any standard that may arguably apply. There can be no serious quarrel with the principle that “the power of the courts” should not be “consistently invoked to second-guess the General Assembly’s redistricting decisions.” *Pender Cnty.*, 361 N.C. at 506, 649 S.E.2d at 373. Accordingly, those jurists who have argued that partisan gerrymandering claims should be viewed as constitutionally justiciable and cognizable have opined that courts must “not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, [the correct standard] takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain.” *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). The *Common Cause* decision could not have been clearer that it was *not* claiming a judicial right “to engage in policy-making by comparing the enacted maps with others that might be ‘ideally fair’ under some judicially-envisioned criteria.” 2019 WL 4569584, at *128. Rather, it believed that the judicial task is “to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see ‘how far the State had gone off that track because of its politicians’ effort to entrench themselves

in office.” *Id.* (quoting *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting)). Although the plaintiffs in that case were found to have established constitutional violations under this method, Plaintiffs here do not.

1. Intent

An essential element of any cognizable constitutional partisan gerrymandering claim is discriminatory intent. *See Common Cause*, 2019 WL 4569584, at *114 (“[T]he plaintiffs challenging a districting plan must prove that state officials’ predominant purpose in drawing district lines was to entrench their party] in power by diluting the votes of citizens favoring their rival.” (quotation and edit marks omitted)). In *Common Cause*—after a full trial on the merits—the trial court found this element met based in large part on “direct evidence”: “Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017.” *Id.* at *115. This case is different. The General Assembly adopted a criterion rejecting the use of political data in redistricting, and the line-drawing process was conducted in public, amounting to the most transparent legislative redistricting in United States history.

Neither set of Plaintiffs identifies direct evidence that contradicts the General Assembly’s own assertions of its intent. That omission alone should be sufficient to reject Plaintiffs’ claims. “The good faith of [public] officers is presumed and the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies.” *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). This Court at this preliminary, highly expedited stage is in no position to discredit a co-equal branch of government, and neither set of Plaintiffs provides a basis for such an exceptional ruling. Instead, both sets rely on indirect evidence that was belatedly

dumped on the Court, which has not been vetted in an appropriate adversarial proceeding, and which fails on its face.

a. The *NCLCV* Plaintiffs attempt to shift the burden, contending that it is *possible* that legislators utilized political data or relied on personal knowledge of political demographics. *See, e.g., NCLCV* Compl. ¶¶ 69–71. But *possibility* does not equal a showing of likelihood of success in *proving* this occurred. It is “the plaintiffs” who “*must prove* that state officials’ predominant purpose . . . was to entrench their party in power.” *Common Cause*, 2019 WL 4569584, at *114 (quotation and edit marks omitted) (emphasis added). They also contend that the General Assembly’s criteria permitted partisan considerations because the criteria permitted legislators to use their “local knowledge” in drawing districts, but the criteria expressly permitted this only “[s]o long as a plan complies with the foregoing criteria,” including the *express bar* on partisan considerations. Exhibit 8. So, the criterion means exactly the opposite of what the *NCLCV* Plaintiffs say.

The *NCLCV* Plaintiffs also contend that discriminatory intent may be inferred from the alleged fact that statewide election results, when transposed onto the 2021 Plans, “translate[] competitive elections, including elections with statewide Democratic victories, into Republican candidates winning at least 10 of 14 seats.” *NCLCV* Compl. ¶ 91; *see also id.* ¶ 101 (similar assertion regarding 2021 Senate Plan); *id.* ¶ 114 (similar assertion regarding 2021 House Plan). But that is unremarkable when the North Carolina Constitution does not utilize proportional representation. Democratic and Republican constituents are not evenly divided in the State; the Democratic Party appeals to concentrated groups of voters in urban areas, and the Republican Party has broader geographic appeal. 2021-11-01 Senate Committee Hr’g 55:08; Ex. 9, Affidavit

of Sean Trende ¶¶ 30–32 & Exs. 2-A & 2-B.¹⁶ As a result, any number of plans, drawn without legally cognizable discriminatory intent, will reveal a natural geographic advantage for the Republican Party. The Democratic Party’s recourse is to tailor its message to a similarly dispersed population, not to seek a court injunction. Plaintiffs’ assertion says nothing of discriminatory intent, only of the *NCLCV* Plaintiffs’ “desire for proportional representation,” *Rucho*, 139 S. Ct. at 2499, which was rejected out of hand as not a legally cognizable claim in *Common Cause*, see 2019 WL 4569584, at *100 (“Plaintiffs do not seek proportional representation.”). Indeed, *Common Cause* recognized that non-partisan computer simulations would yield “scenarios where Democrats would win 50% of the statewide vote but less than 50% of the seats in either chamber.” *Id.*

The *NCLCV* Plaintiffs resort to extensive line-by-line criticisms of districts in the 2021 Plans. See, e.g., *NCLCV* Compl. ¶¶ 93–99. But the *NCLCV* Plaintiffs make no effort to assess whether those lines may be the result of “the Adopted Criteria that the General Assembly itself, in its sole discretion, established.” *Common Cause*, 2019 WL 4569584, at *128. As shown above, in public hearings the General Assembly presented detailed explanations for district configurations across plans, yet neither set of Plaintiffs addresses that explanation. They instead rely on speculation about the purpose and effect of lines, but this speculation has no foundation in the legislative record and cannot substitute for the legislative record that exists. They are not likely to succeed in showing that post hoc guesswork, rather than the General Assembly’s own explanation for lines, is accurate. At base, the *NCLCV* Plaintiffs simply opine that—using “the power of mathematics and computer science,” Compl. ¶ 1—they can think of better ways to redistrict. To that end, they present three maps drawn with unknown criteria, which they present as “Optimized”

¹⁶ This recording can be found at: <https://www.youtube.com/watch?v=KgSkfFY7r7g>

plans. This Court, unlike the court in *Common Cause*, is transparently “called upon to engage in policy-making by comparing the enacted maps with others that might be ‘ideally fair’ under some judicially-envisioned criteria.” *Common Cause*, 2019 WL 4569584, at *128. It should reject that overture.

b. The *Harper* Plaintiffs fare no better. As an initial matter their presentation is profoundly prejudicial because it consists of a 50-page brief and hundreds of pages of exhibits, including lengthy expert reports, served on Legislative Defendants on Tuesday, November 30, after 3:30 pm. This was after the deadline for their filing, N.C. R. Civ. P. 6(d), and Legislative Defendants did not have adequate time to examine, vet, and prepare rebuttals to this lengthy presentation. The adversarial process cannot function properly to disclose the truth when one side is so thoroughly hamstrung in its response. There is no basis for the Court to make election decisions impacting 10.4 million residents without properly vetting the validity and bases of this showing. The motion should be denied on that basis alone.

Regardless, the *Harper* Plaintiffs fail to establish a likelihood of success. Like the *NCLCV* Plaintiffs, they open by opining that a “closely divided state[]” should have closely divided legislative bodies, PI Mem. 5, an overt appeal to proportional representation. They also ask for a negative-inference presumption against the General Assembly, that because it was possible for partisan considerations to enter the process, they *did*—and to a legally cognizable extent. *Id.* at 5–8.¹⁷ That is a far cry from *Common Cause*, where “Legislative Defendants openly admitted that

¹⁷ The *Harper* Plaintiffs take remarkable license with the facts, interpreting Chairman Hall’s statement that he “can’t speak” to whether “other members of this committee” reviewed maps by consultants as his “tacitly acknowledge[ing] that legislators had already been presented with maps drawn by outside political consultants.” PI Mem. 7–8 (citation omitted). In turn, Plaintiffs later refer to this already stretched assertion by stretching it further: “Legislative Defendants allowed legislators to sit down at those terminals and simply copy maps drawn by outside political consultants using prohibited political data.” *Id.* at 35. That statement is unsupported, to put it

they used prior election results” 2019 WL 4569584, at *115. The *Harper* Plaintiffs supply no basis for the Court to disregard the legislators’ assertion that partisan considerations did not enter the process. Like the *NCLCV* Plaintiffs, the *Harper* Plaintiffs engage in extensive criticism of district lines, *see, e.g.* PI Mem. 8–14, with no analysis of the General Assembly’s criteria or stated purposes for those lines.¹⁸ They think they could do better than the General Assembly, but that is legally irrelevant. *Common Cause*, 2019 WL 4569584, at *128. Grasping at straws and confirming the obvious incentive Democrats had not to vote for the plans, the *Harper* Plaintiffs also opine that “the gerrymandered nature of the 2021 Plan is reflected in the fact that it was approved on strict party-line votes.” PI Mem. 35. If that theory held currency, a minority party could obtain an automatic judicial veto of any legislation simply by voting against it, leading to absurd lawsuits and chaos.

The *Harper* Plaintiffs also rely on expert mapping simulations, which purport “to determine the extent to which a map-drawer’s subordination of nonpartisan districting criteria, such as geographic compactness and preserving political subdivision boundaries, was motivated by partisan goals.” PI Mem. 25. But these exercises produce meaningful results (if at all) only where they were “generated in accordance with” the General Assembly’s non-partisan criteria. *Id.* at 26. None of the mapping exercises matched the General Assembly’s non-partisan goals. As outlined in detail above, the General Assembly announced its non-partisan goals for each district,

charitably. The drawing room terminals were broadcast live and archived on the General Assembly’s website. If Plaintiffs had evidence of this sort of maneuvering, they had every opportunity to present it to the Court.

¹⁸ The Cooper expert report lacks the rigor necessary to qualify as admissible or credible expert opinion. The report walks through district lines *ad hoc* displaying confirmation bias, i.e., narrating the alleged purpose behind lines that support a pre-conceived narrative. There is no comprehensive catalogue of work or consistently applied methodology. The opinion is not “the product of reliable principles and methods.” *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016).

including, for example, that CD1 take in the outer banks and most of the State's shoreline and keep the finger counties of northeastern North Carolina together, that CD4 combine counties south of Raleigh with similar interests, and that CD11 maintain the incumbent in the district. As the *Common Cause* court explained, "the plaintiff must show that the redistricting body intended to apply partisan classifications or deprive citizens of the right to vote on equal terms in an invidious manner or in a way unrelated to any legitimate legislative objective," and legitimate objectives include "maintain[ing] communities of interest" and "avoid[ing] the pairing of incumbents." 2019 WL 4569584, at *114 (quotation marks omitted). "[A] plaintiff in a partisan gerrymandering case cannot satisfy the discriminatory intent requirement simply by proving that the redistricting body intended to rely on political data or to take into account political or partisan considerations." *Id.* Without accounting for the General Assembly's own non-partisan goals, the *Harper* Plaintiffs' experts cannot show that partisan intent is causing the supposed partisan effect—or that partisan intent even exists.

Importantly, it is readily apparent, even from a cursory review of the *Harper* Plaintiffs' experts' work, that they have overtly misapplied the criteria. Dr. Chen, for example, programmed his algorithm to give municipal boundaries "lower priority" than other criteria. *Harper* Plaintiffs' Ex. H, at 8. Dr. Pegden, meanwhile, did not program his algorithm to avoid splitting municipalities—or to adhere to the General Assembly's criteria at all—but rather picked three criteria: "preserve districting criteria such as population deviation, compactness, and splitting of counties." *Harper* Plaintiffs' Ex. I, at 1. But, as shown, the legislative record establishes that keeping municipalities whole was a priority, as again and again, the General Assembly sought and achieved configurations that split no municipalities. Indeed, the contemporaneous legislative record that the entire 2021 Congressional Plan split only *two* municipalities. 2011-11-01 Senate

Committee Hr’g 55:08 *et seq.*¹⁹ Further, as detailed above, the legislative history shows the retaining district cores was a priority, but the experts’ algorithms give this criterion no weight. And, as also shown above, the legislative history shows that criteria were not formally ranked, yet Dr. Chen’s algorithm was programed to rank criteria in a manner Dr. Chen chose in *his* discretion. All Plaintiffs’ experts’ algorithms show is that different criteria can lead to different results—nothing more. *Compare Harper* Plaintiffs’ Ex. I, at 2 (stating that Dr. Pegden’s method relies on “the districting criteria I consider” (emphasis added)) *with Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (opining that a proper analysis “takes as its baseline a State’s *own* criteria”).

Finally, even a cursory review of the *Harper* Plaintiffs’ showing undercuts their likelihood of showing partisan intent. As noted above, their expert’s report shows that more districts fall within the range of completely non-partisan maps than falls outside the range. *See Harper* Ex. H, at 56 (showing that CD5, CD11, CD3, CD12, CD1, CD7, CD8, and CD13 have the same partisan configuration as simulated maps drawn with no partisan intent). To prevail in showing discriminatory intent without any direct evidence, a plaintiff must “show a clear pattern, unexplainable on grounds other than” unlawful intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The *Harper* Plaintiffs’ have not made this showing.

2. Effect

Another essential element of any arguably cognizable partisan gerrymandering claim is discriminatory effect. *Common Cause*, 2019 WL 4569584, at *116 (“Plaintiffs must also establish that the enacted legislative districts actually had the effect of discriminating against—or subordinating— voters who support candidates of the Democratic Party”). Neither set of Plaintiffs is likely to establish this element at trial.

¹⁹ See <https://www.youtube.com/watch?v=KgSkfFY7r7g>

a. The Court can make quick work of the *NCLCV* Plaintiffs' likelihood of success on this element, because their case is predicated solely on their "desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. They provide two benchmarks for measuring effect, and both assume proportionality. First, they allege that transposing statewide election results in a close race should yield the same result in a lawfully drawn legislative or congressional plan. *NCLCV* Compl. ¶¶ 91, 101, 114. Stated differently, any departure from proportional representation constitutes an unlawful effect, in their view. No serious jurist agrees. *See Rucho*, 139 S. Ct. at 2509 (Kagan, J, dissenting) (stating that legitimate "standards . . . do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other"). Second, the *NCLCV* Plaintiffs posit that "optimized" maps can be drawn to achieve an "almost evenly divided" delegation or body. *NCLCV* Compl. ¶¶ 161; *see also id.* ¶¶ 166, 174. This, too, simply asks the Court "to rely on [its own] ideas of electoral fairness," not on a cognizable legal standard. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). The Court should decline the invitation "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause*, 2019 WL 4569584, at *128. In all events, *NCLCV* Plaintiffs and "the power of mathematics and computer science" cannot change the simple fact that redistricting in North Carolina (and every other state) is an inherently geographic exercise, and Republicans in North Carolina hold a geographic advantage in having more voters spread out around the State. *See* Ex. 9, Affidavit of Sean Trende ¶¶ 30–32 & Exs. 2-A & 2-B.

b. The *Harper* Plaintiffs are also not likely to establish a legally significant partisan effect. As discussed above, the *Harper* Plaintiffs rely on mapping-simulation exercises that do not correctly account for the General Assembly's non-partisan considerations. Just as those exercises

are not capable of showing intent, they are not capable of showing effect because they did not account for the General Assembly's "chosen districting criteria." *Rucho*, 139 S. Ct. at 2520. And, because many districts fall within the same partisan electoral effect as non-partisan simulated maps, the *Harper* Plaintiffs are unlikely to establish an improper partisan effect.

II. The Equitable Factors Cut Decisively Against a Preliminary Injunction

Equitable considerations alone defeat the provisional relief requested by both sets of plaintiffs. "A preliminary injunction is "an extraordinary remedy and will not be lightly granted." *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483 (1976). The Court is obligated to "engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (N.C. App. 1978). This means both that a movant must establish irreparable harm, *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856 (1990), and that "the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams*, 243 S.E.2d at 160, 36 N.C. App. at 86. And Plaintiffs bear an even heavier burden than do most, because they challenge an Act of the General Assembly. *See Fox v. Board of Commissioners*, 244 N.C. 497, 500-01, 94, S.E.2d 482, 485 (1956) (the constitutionality of an act of the General Assembly may not be enjoined "unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury."); *see also Plemmer v. Matthewson*, 281 N.C. 722, 726, 190 S.E.2d 204, 207 (1972).

Here, the balance of equities is no contest. As explained above, the Plaintiffs have, at best, a difficult path to establishing a sufficient injury even to confer standing. *See* § I.A, *supra*. Denying them provisional relief is unlikely to cause them any harm at all, let alone a *substantial* and

irreparable harm, *Williams*, 243 S.E.2d at 160, 36 N.C. App. at 86. On the other hand, the harm to the State, the General Assembly, and the general public is difficult to overstate. The 2021 Plans were enacted through a democratic process, in full public view, by the peoples' elected representatives. Plaintiffs want that plan replaced either in a highly expedited and truncated process without sufficient time for public input or—more likely—by a remedial plan drawn behind closed doors according to an undisclosed set of criteria.²⁰ No public comments informed either the simulated or supposedly “optimized” plans, no elected representative has sponsored them, and there is zero transparency concerning their configurations. For all the Court knows, partisan intent predominated. The Court is asked to jettison work of the most transparent and non-partisan legislative redistricting in history to engraft Plaintiffs and their counsel and experts as a fourth branch of North Carolina government. To say this is unfair and undemocratic does not begin to describe the constitutional insult an injunction would impose. Fortunately, no principle of law or equity supports this request.

1. *Status Quo*. Plaintiffs demand that this Court enjoin the lawfully enacted 2021 plans, order an expedited remedial process, and in the case of the NCLCV Plaintiffs, adopt their preferred “optimized” plans. *Harper* PI Mot 1; *NCLCV* PI Mot. 1–2, ¶ 4. They also ask the Court to move the March 2020 primary schedule. *Harper* PI Mot. at 49; *NCLCV* PI Mot. at 3, ¶ 7(c). But this requested relief alters the *status quo* and is unavailable as a matter of law. A preliminary injunction is an “extraordinary measure taken by a court to *preserve the status quo* of the parties during litigation.” *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759 (quoting *Investors, Inc. v.*

²⁰ Under N.C.G.S. § 120-2.4, the Court must first afford the General Assembly the opportunity to enact remedial districts before engaging in judicial districting.

Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)) (emphasis added).²¹ The status quo in this case is a primary schedule established by law and a set of plans duly adopted by the General Assembly.

Binding precedent bars Plaintiffs' request to depart from that status quo. In *Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963), the North Carolina Supreme Court held that movants "asserting rights they have not previously exercised" were "not seeking to preserve the status quo" and were categorically barred from preliminary relief. *See also Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 287 N.C. 88, 96, 74 S.E.2d 430, 436 (1953) (reversing a preliminary injunction because it was "not to restore what has been unlawfully changed, but to create a new condition not theretofore existing; not to prevent a wrong but to obtain opportunity to exercise a right; not to prevent a disruption of existing service, but to create a new service."); *Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 740, 71 S.E.2d 21, 23–24 (N.C. 1952) (same). This case is no different. The rights asserted are ones Plaintiffs have "never exercised," since they have never voted under a redistricting plan that satisfies their notion of a lawful plan.²²

2. *Harm to the State and the Public.* The harm to voters and the public from the requested provisional injunctions would be severe and irreparable. To begin, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a

²¹ The *NCLCV* Plaintiffs miss this point in asserting that they may obtain a mandatory injunction. *See NCLCV PI Mem.* 13 n.8. Even a mandatory injunction must be tailored to "restore a status quo." *Automobile Dealer Resources Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (N.C. App. 1972) (emphasis added).

²² The panel in the first *Harper* case avoided this problem only by a peculiar legal fiction that the *status quo* in that case was the time when the 2016 congressional plan was invalidated in federal court and, hence, "no lawful congressional district map for North Carolina existed." Ex. 5, *Harper PI Order* at 12.

form of irreparable injury.” *Maryland v. King*, 567 U.S.1301, 1303 (2012) (internal quotations and citations omitted). This is even truer for statutes relating to elections because “[a] State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). This alone is a good reason not to enjoin the duly enacted 2021 redistricting plans before even resolving these lawsuits fully upon the merits after a proper opportunity to develop a record.

Another reason to not issue an injunction is that the injunction will cause significant disruption, confusion, and uncertainty into the State’s election processes—an election process already on a tightened timeframe due to the census delay this year. Those concerns are so significant that courts do not automatically intrude into upcoming elections *even* when there has been a final judgment on the merits. *See, e.g., Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (“The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.”); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (same). Even good-intentioned judicial reforms of election laws can be counter-productive, since the intrusion itself causes harm. Any action must occur “at a time sufficiently early to permit the holding of elections...without great difficulty” or else *no* action should occur. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). That is true both under federal law (which governs congressional elections) and North Carolina law.

North Carolina courts recognize and apply this concept in redistricting litigation, and rightfully so. In *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), the North Carolina Supreme Court affirmed a lower court final judgment striking down the state legislative plan in its decision (issued August 2007), but *stayed* the remedial phase until *after* the 2008

elections to “to minimize disruption to the ongoing election cycle” *Id.* at 510, 649 S.E.2d at 376. Likewise, in *Dickson v Rucho*, No. 11 CVS 16896, 2012 WL 7475634 (N.C. Super. Jan. 20, 2012), the court applied *Pender County* and denied a preliminary-injunction motion filed in early November of 2011 because of “the proximity of the forthcoming election cycle and the mechanics and complexities of state and federal election law.” *Id.* at *1. The panel emphasized that its ruling did not imply “a lack of merit” and said that the plaintiffs “raised serious issues and arguments” in challenging the plan. *Id.* Still, that was insufficient to warrant an injunction because of the difficulties involved in administering elections and also because the short time frame “leaves little time for meaningful appellate review” or “curative measures by the General Assembly.” *Id.* That analysis flows from the fundamental point that last-minute changes in election procedure harm election administration, which itself burdens the right to vote. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (outlining factors courts should weigh when deciding to enjoin an impending election). The Court in *Dickson* reached this decision 25 days prior to the opening of the filing period, and approximately four months prior to the primary. If such a time frame was too short to disturb the election framework in *Dickson*, the three days prior to the opening of the filing period and three months before the March 2022 primaries is clearly too short as well.

Federal courts—where status quo-altering preliminary injunctions occasionally are allowed—are similarly reluctant to grant such extraordinary relief, reasoning that “the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs” *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996). Such cases recognize that courts “must balance the need to protect voting rights that may be affected by the [challenged] plans with the need to avoid the adverse effect on voting rights that comes with delay and confusion” – that by ramming through a remedial

plan immediately, “the shifting district and precinct lines would leave candidates in limbo, voters confused, and election officials with the burden of implementing new maps in a timely manner with very limited resources.” *Perez v. Texas*, No. 11-CA-360, 2015 WL 6829596, *4 (W.D. Tex. Nov. 6, 2015). Other federal cases are in accord. *See, e.g., Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) (“spawning chaos rather than confidence in the election process is a result we cannot endorse”); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (denying preliminary injunctive relief in redistricting case); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 501 (S.D.N.Y. 2004) (same); *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991), *aff’d in part and vacated in part as moot*, 502 U.S. 954 (1991) (even if the possibility of corrective relief under a districting plan at a later date exists, does not merit a preliminary injunction); *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) (denying a preliminary injunction because when “disruption to the political process...is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity requires that we deny relief.”); *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (taking it as a given that a redistricting plan could not be *created* and *imposed* at the preliminary-injunction stage and thus observed that preliminary injunction could take only the form of delaying an election).

This is in line with numerous other cases finding belated requests for relief too late to impact an upcoming election. *See, e.g., Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 609 (4th Cir. 1970) (thirteen weeks prior to candidate filing deadline held too late); *Dean v. Leake*, 550 F. Supp. 2d 594, 606 (E.D.N.C. 2008) (four months prior to election too late); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff’d sub nom. Ely v. Klahr*, 403 U.S. 108 (1971) (five months out from election too late); *Kilgarlin v. Martin*,

252 F. Supp. 404, 444 (S.D. Tex. 1966), *aff'd in relevant part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (ten months too late).

Simply stated, the injunctive relief Plaintiffs seek would cause disruption on a massive scale. Voters, political parties, and candidates have been spending the past 30 days—since final passage of the plans on November 4, 2021—learning the new districts, recruiting supporters, aligning with candidates, and getting ready for the primaries. Disturbing those settled expectations and upending the State’s political processes through a rushed process creates exactly the confusion and chaos disapproved in cases like *Pender County*, *Dickson*, *Perez*, and *Kostick*. The Court would also have to afford the General Assembly “a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law.” N.C. Gen. Stat. Ann. § 120-2.4. If the General Assembly were unsuccessful, the Court would be required to conduct a *provisional* remedial process—which might ultimately prove unnecessary—requiring the appointment of a special master, objections to that appointment, proposals and a report by the special master, litigation over that report, and another hearing on the plan. There is no way to accomplish that in the necessarily careful and deliberative manner that will be required to protect the public’s right to vote—much less to afford objecting parties the opportunity to seek redress and comply with all election law deadlines ahead of the 2022 election.

3. *Non-Harm to Plaintiffs.* Comparatively, Plaintiffs have not demonstrated the type of harm necessary to warrant the drastic injunctive relief they seek. They allege they live in districts that, based on various metrics and analyses performed by Plaintiffs’ experts, have been politically gerrymandered such that it is either too easy for them to elect their candidates of choice (packed districts) or too hard (cracked districts). But, as discussed above, they ask for districts where they do not reside to be invalidated, many districts would not likely be meaningfully different in a

partisan sense in a computer-simulated plan—even under their own analysis—and the injury they claim is, in all events, abstract. Neither set of Plaintiffs has alleged or shown that they are unable to obtain representation in Congress or the General Assembly by whomever will ultimately represent them. As explained, there is a legal and historical presumption that a person is represented by the elected representative for the person’s district—even if the person did not vote for that representative. See, e.g., *Bandemer*, 478 U.S. at 132.

Injuries far more serious than those Plaintiffs alleged in their preliminary-injunction motions have been rejected by courts as a basis to hastily grant injunctive relief. See, e.g., *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff’d Bush v. Vera*, 517 U.S. 952 (1996) (declining to issue relief, even after finding egregious racial gerrymanders, either for the 1994 or 1996 elections, even though the violation was finally adjudicated in September 1994); *Ashe v. Bd. of Elections in the City of N.Y.*, 1988 WL 68721 (E.D.N.Y. June 8, 1988) (denying preliminary injunction even after finding a likelihood of success on a Voting Rights Act violation due to proximity to election). The purported harm of living in alleged unconstitutional districts does not outweigh the enormous practical impact of the demanded injunction.

CONCLUSION

The motions should be denied.

Respectfully submitted this the 2nd day of December, 2021.



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Exhibit 9

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, et al.,

Plaintiffs,

vs.

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

Defendants.

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2021 DEC -2 P 12: 2 ACVS 015426

WAKE CO., C.S.C.

BY SPD

AFFIDAVIT OF SEAN P. TRENDE

Now comes affiant Sean P. Trende, having been first duly cautioned and sworn, deposes and states as follows:

1. I am over the age of 18 and am competent to testify regarding the matters discussed below.
2. I currently reside at 1146 Elderberry Loop, Delaware, OH 43015. My e-mail is trende.3@buckeyemail.osu.edu.
3. I have been retained in this matter by the Legislative Defendants, and am being compensated at \$400.00 per hour for my work in this case.
4. My *curriculum vitae* is attached to this report as Exhibit 1.

EXPERT CREDENTIALS

5. I am currently enrolled as a doctoral candidate in political science at The Ohio State University. I have completed all of my coursework and have passed comprehensive examinations in both methods and American Politics. My coursework for my 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. I expect to receive my Ph.D. in May of 2021. My dissertation focuses on applications of spatial statistics to political questions.

6. I joined RealClearPolitics in January of 2009. I assumed a fulltime position with RealClearPolitics in March of 2010. My title is Senior Elections Analyst. RealClearPolitics is a company of around 40 employees, with offices in Washington D.C. It produces one of the most heavily trafficked political websites in the world, which serves as a one-stop shop for political analysis from all sides of the political spectrum and is recognized as a pioneer in the field of poll aggregation. It produces original content, including both data analysis and traditional reporting. It is routinely cited by the most influential voices in politics, including David Brooks of *The New York Times*, Brit Hume of *Fox News*, Michael Barone of *The Almanac of American Politics*, Paul Gigot of *The Wall Street Journal*, and Peter Beinart of *The Atlantic*.

7. My main responsibilities with RealClearPolitics consist of tracking, analyzing, and writing about elections. I collaborate in rating the competitiveness of Presidential, Senate, House, and gubernatorial races. As a part of carrying out these responsibilities, I have studied and written extensively about demographic trends in the country, exit poll data at the state and federal level, public opinion polling, and voter turnout and voting behavior.

8. In particular, understanding the way that districts are drawn and how geography and demographics interact is crucial to predicting United States House of Representatives races, so much of my time is dedicated to that task.

9. I am currently a Visiting Scholar at the American Enterprise Institute, where my publications focus on the demographic and coalitional aspects of American Politics. My first paper focused on the efficiency gap, a metric for measuring the fairness of redistricting plans.

10. I am the author of *The Lost Majority: Why the Future of Government is up For Grabs and Who Will Take It*. In this book, I explore realignment theory. It argues that realignments are a poor concept that should be abandoned. As part of this analysis, I conducted a thorough analysis of demographic and political trends beginning in the 1920s and continuing through the modern times, noting the fluidity and fragility of the coalitions built by the major political parties and their candidates.

11. I co-authored the 2014 *Almanac of American Politics*. The Almanac is considered the foundational text for understanding congressional districts and the representatives of those districts, as well as the dynamics in play behind the elections. PBS's Judy Woodruff described the book as "the oxygen of the political world," while NBC's Chuck Todd noted that "[r]eal political junkies get two *Almanacs*: one for the home and one for the office." My focus was researching the history of and writing descriptions for many of the newly-drawn districts, including tracing the history of how and why they were drawn the way that they were drawn.

12. I have spoken on these subjects before audiences from across the political spectrum, including at the Heritage Foundation, the American Enterprise Institute, the CATO Institute, the Bipartisan Policy Center, and the Brookings Institution. In 2012, I was invited to Brussels to speak about American elections to the European External Action Service, which is the European Union's diplomatic corps. I was selected by the United States Embassy in Sweden to discuss the 2016 elections to a series of audiences there, and was selected by the United

States Embassy in Spain to fulfil a similar mission in 2018. I was invited to present by the United States Embassy in Italy, but was unable to do so because of my teaching schedule.

13. In the winter of 2018, I taught American Politics and the Mass Media at Ohio Wesleyan University. I taught Introduction to American Politics at The Ohio State University for three semesters from Fall of 2018 to Fall of 2019. In the Springs of 2020 and 2021, I taught Political Participation and Voting Behavior at The Ohio State University. This course spent several weeks covering all facets of redistricting: How maps are drawn, debates over what constitutes a fair map, measures of redistricting quality, and similar topics.

14. It is my policy to appear on any major news outlet that invites me, barring scheduling conflicts. I have appeared on both Fox News and MSNBC to discuss electoral and demographic trends. I have been cited in major news publications, including *The New York Times*, *The Washington Post*, *The Los Angeles Times*, *The Wall Street Journal*, and *USA Today*.

15. I sit on the advisory panel for the “States of Change: Demographics and Democracy” project. This project is sponsored by the Hewlett Foundation and involves three premier think tanks: The Brookings Institution, the Bipartisan Policy Center, and the Center for American Progress. The group takes a detailed look at trends among eligible voters and the overall population, both nationally and in key states, to explain the impact of these changes on American politics, and to create population projections, which the Census Bureau abandoned in 1995. In 2018, I authored one of the lead papers for the project: “In the Long Run, We’re All Wrong,” available at <https://bipartisanpolicy.org/wp-content/uploads/2018/04/BPC-Democracy-States-of-Change-Demographics-April-2018.pdf>.

16. I previously authored an expert report in *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super Ct., Wake County), which involved North Carolina’s 2012 General Assembly and

Senate maps. Although I was not called to testify, it is my understanding that my expert report was accepted without objection. I also authored an expert report in *Covington v. North Carolina*, Case No. 1:15-CV-00399 (M.D.N.C.), which involved almost identical challenges in a different forum. Due to what I understand to be a procedural quirk, where my largely identical report from *Dickson* had been inadvertently accepted by the plaintiffs into the record when they incorporated parts of the *Dickson* record into the case, I was not called to testify.

17. I authored two expert reports in *NAACP v. McCrory*, No. 1:13CV658 (M.D.N.C.), which involved challenges to multiple changes to North Carolina's voter laws, including the elimination of a law allowing for the counting of ballots cast in the wrong precinct. I was admitted as an expert witness and testified at trial. My testimony discussed the "effect" prong of the Voting Rights Act claim. I did not examine the issues relating to intent.

18. I authored reports in *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio), and *Ohio Democratic Party v. Husted*, Case 15-cv-01802 (S.D. Ohio), which dealt with challenges to various Ohio voting laws. I was admitted and testified at trial in the latter case (the former case settled). The judge in the latter case ultimately refused to consider one opinion, where I used an internet map-drawing tool to show precinct locations in the state. Though no challenge to the accuracy of the data was raised, the judge believed I should have done more work to check that the data behind the application was accurate.

19. I served as a consulting expert in *Lee v. Virginia Board of Elections*, No. 3:15-cv-357 (E.D. Va. 2016), a voter identification case. Although I would not normally disclose consulting expert work, I was asked by defense counsel to sit in the courtroom during the case and review testimony. I would therefore consider my work *de facto* disclosed.

20. I filed an expert report in *Mecinas v. Hobbs*, No. CV-19-05547-PHX-DJH (D. Ariz. 2020). That case involved a challenge to Arizona's ballot order statute. Although the judge ultimately did not rule on a motion in limine in rendering her decision, I was allowed to testify at the hearing.

21. I authored two expert reports in *Feldman v. Arizona*, No. CV-16-1065-PHX-DLR (D. Ariz.). Plaintiffs in that case challenged an Arizona law prohibiting the collection of voted ballots by third parties that were not family members or caregivers and the practice of most of the state's counties to require voters to vote in their assigned precinct. My reports and testimony were admitted. Part of my trial testimony was struck in that case for reasons unrelated to the merits of the opinion; counsel for the state elicited it while I was on the witness stand and it was struck after Plaintiffs were not able to provide a rebuttal to the new evidence.

22. I authored an expert report in *Smith v. Perrera*, No. 55 of 2019 (Belize). In that case I was appointed as the court's expert by the Supreme Court of Belize. In that case I was asked to identify international standards of democracy as they relate to malapportionment claims, to determine whether Belize's electoral divisions (similar to our congressional districts) conformed with those standards, and to draw alternative maps that would remedy any existing malapportionment.

23. I authored expert reports in *A. Philip Randolph Institute v. Smith*, No. 1:18-cv-00357-TSB (S.D. Ohio), *Whitford v. Nichol*, No. 15-cv-421-bbc (W.D. Wisc.), and *Common Cause v. Rucho*, NO. 1:16-CV-1026-WO-JEP (M.D.N.C.), which were efficiency gap-based redistricting cases filed in Ohio, Wisconsin and North Carolina.

24. I also authored an expert report in the cases of *Ohio Organizing Collaborative, et al v. Ohio Redistricting Commission, et al* (No. 2021-1210); *League of Women Voters of Ohio, et al v. Ohio Redistricting Commission, et al* (No. 2021-1192); *Bria Bennett, et al v. Ohio Redistricting Commission, et al* (No. 2021-1198). These cases are pending in original action before the Supreme Court of Ohio.

25. I currently serve as one of two special masters appointed by the Supreme Court of Virginia to redraw the districts that will elect the commonwealth's representatives to the House of Delegates, state Senate, and U.S. Congress.

SUMMARY OF WORK PERFORMED

26. I certify that the images attached as Exhibit 2 are true and correct copies of images that I created and that I describe below.

27. To create these images, I first downloaded county-level shapefiles from the United States Census Bureau. Using R, a widely utilized statistical programming tool, I joined county-level vote totals for U.S. presidential races in 2012, 2016 and 2020.

28. Attached as Exhibit 2-A are maps I generated with counties colored red if the Republican candidate won that county, and blue if the Democratic candidate won that county.

29. I then centered these results on national popular vote results for the respective years, an accepted mechanism that is used to enable analysts to compare results that occur in differing electoral environments. *See, e.g.,* Bernard Fraga, "Candidates or Districts? Reevaluating the Role of Race in Voter Turnout," *60 Am. Jrnl. Pol. Sci.* 97, 115 (2016). Because the national popular vote reflected reasonably close Democratic wins in all four years, the effect of doing this computation is marginal.

30. Attached as Exhibit 2-B are maps I generated with counties colored red if the Republican candidate performed better in the county than they did nationally, and blue if the Republican candidate performed worse in the county than they did nationally. If the Republican candidate performed better in the county than they did nationally, I refer to that performance as “leaning” Republican.

31. As shown in Table 1 below, in 2012, the Republican presidential candidate won 70 of North Carolina’s 100 counties. In 2016, the Republican presidential candidate won 76 counties, and in 2020, the Republican presidential candidate won 75 counties.

32. As shown in Table 1 below, in 2012, the number of counties in North Carolina that leaned¹ Republican in the Presidential Election was 73 out of 100, in 2016 that figure was 77 out of 100, and in 2020 that figure was 80 out of 100.

TABLE 1

Election Year	# of N.C. Counties that voted Republican	# of N.C. Counties that leaned Republican
2012	70/100	73/100
2016	76/100	77/100
2020	75/100	80/100

¹ “Leaned” is as defined in ¶ 30.

Executed on December 1, 2021

DocuSigned by:
Sean P. Trende
D329B1A55F6D4B4...
Sean P. Trende

Sworn or affirmed before me and subscribed in the presence the 1st day of December, 2021, in
the state of Texas and County of Harris



DocuSigned by:
Mary S. Lee
2FAD7787555D439...
Notary Public

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Exhibit 1

RETRIEVED FROM DEMOCRACYDOCKET.COM

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EDUCATION

Ph.D., The Ohio State University, Political Science, expected 2022.

M.A.S. (Master of Applied Statistics), The Ohio State University, 2019.

J.D., Duke University School of Law, *cum laude*, 2001; Duke Law Journal, Research Editor.

M.A., Duke University, *cum laude*, Political Science, 2001. Thesis titled *The Making of an Ideological Court: Application of Non-parametric Scaling Techniques to Explain Supreme Court Voting Patterns from 1900-1941*, June 2001.

B.A., Yale University, with distinction, History and Political Science, 1995.

PROFESSIONAL EXPERIENCE

Law Clerk, Hon. Deanell R. Tacha, U.S. Court of Appeals for the Tenth Circuit, 2001-02.

Associate, Kirkland & Ellis, LLP, Washington, DC, 2002-05.

Associate, Hunton & Williams, LLP, Richmond, Virginia, 2005-09.

Associate, David, Kamp & Frank, P.C., Newport News, Virginia, 2009-10.

Senior Elections Analyst, RealClearPolitics, 2009-present.

Columnist, Center for Politics Crystal Ball, 2014-17.

Gerald R. Ford Visiting Scholar, American Enterprise Institute, 2018-present.

BOOKS

Larry J. Sabato, ed., *The Blue Wave*, Ch. 14 (2019).

Larry J. Sabato, ed., *Trumped: The 2016 Election that Broke all the Rules* (2017).

Larry J. Sabato, ed., *The Surge: 2014's Big GOP Win and What It Means for the Next Presidential Election*, Ch. 12 (2015).

Larry J. Sabato, ed., *Barack Obama and the New America*, Ch. 12 (2013).

Barone, Kraushaar, McCutcheon & Trende, *The Almanac of American Politics 2014* (2013).

The Lost Majority: Why the Future of Government is up for Grabs – And Who Will Take It (2012).

PREVIOUS EXPERT TESTIMONY

Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct., Wake County) (racial gerrymandering).

Covington v. North Carolina, No. 1:15-CV-00399 (M.D.N.C.) (racial gerrymandering).

NAACP v. McCrory, No. 1:13CV658 (M.D.N.C.) (early voting).

NAACP v. Husted, No. 2:14-cv-404 (S.D. Ohio) (early voting).

Ohio Democratic Party v. Husted, Case 15-cv-01802 (S.D. Ohio) (early voting).

Lee v. Virginia Bd. of Elections, No. 3:15-cv-357 (E.D. Va.) (early voting).

Feldman v. Arizona, No. CV-16-1065-PHX-DLR (D. Ariz.) (absentee voting).

A. Philip Randolph Institute v. Smith, No. 1:18-cv-00357-TSB (S.D. Ohio) (political gerrymandering).

Whitford v. Nichol, No. 15-cv-421-bbc (W.D. Wisc.) (political gerrymandering).

Common Cause v. Rucho, No. 1:16-CV-1026-WO-JEP (M.D.N.C.) (political gerrymandering).

Mecinas v. Hobbs, No. CV-19-05547-PHX-DJH (D. Ariz.) (ballot order effect).

Fair Fight Action v. Raffensperger, No. 1:18-cv-05391-SCJ (N.D. Ga.) (statistical analysis).

Pascua Yaqui Tribe v. Rodríguez, No. 4:20-CV-00432-TUC-JAS (D. Ariz.) (early voting).

COURT APPOINTMENTS

Appointed as Voting Rights Act expert by Arizona Independent Redistricting Commission

Appointed redistricting expert by the Supreme Court of Belize in *Smith v. Perrera*, No. 55 of 2019 (one-person-one-vote).

INTERNATIONAL PRESENTATIONS AND EXPERIENCE

Panel Discussion, European External Action Service, Brussels, Belgium, *Likely Outcomes of 2012 American Elections*.

Selected by U.S. Embassies in Sweden, Spain, and Italy to discuss 2016 and 2018 elections to think tanks and universities in area (declined Italy due to teaching responsibilities).

Selected by EEAS to discuss 2018 elections in private session with European Ambassadors.

TEACHING

American Democracy and Mass Media, Ohio Wesleyan University, Spring 2018.

Introduction to American Politics, The Ohio State University, Autumn 2018, 2019, 2020, Spring 2018.

Political Participation and Voting Behavior, Spring 2020, Spring 2021.

REAL CLEAR POLITICS COLUMNS

Full archives available at http://www.realclearpolitics.com/authors/sean_trende/

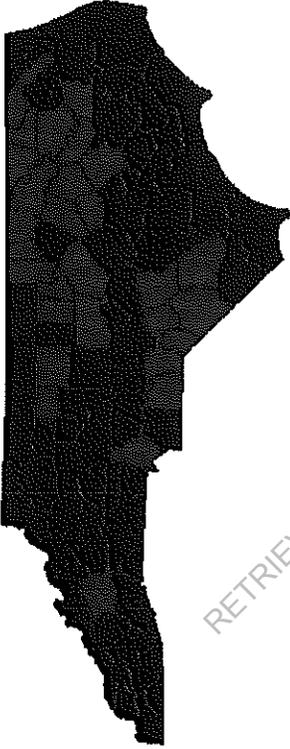
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Exhibit 2

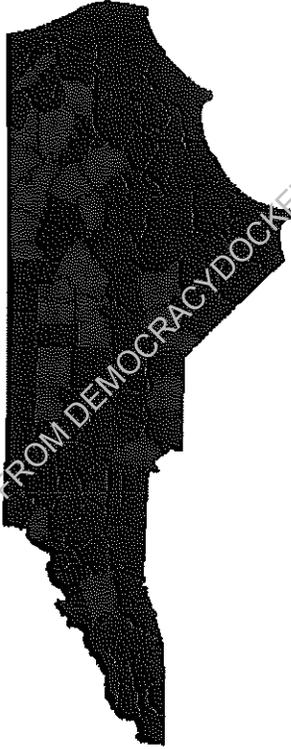
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Exhibit 2-A

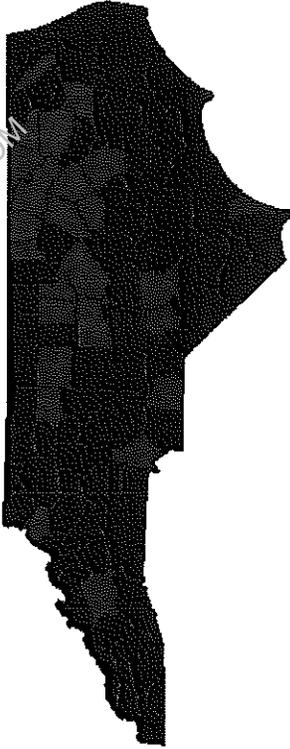
Republican Wins and Losses, County-Level Two-Party Presidential Vote in NC, 2012



Republican Wins and Losses, County-Level Two-Party Presidential Vote in NC, 2016



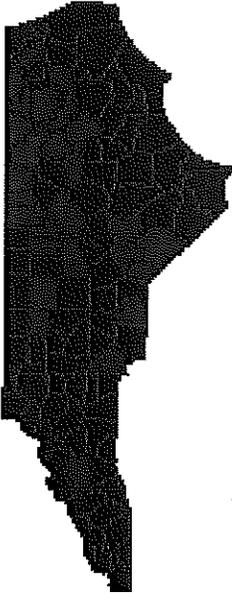
Republican Wins and Losses, County-Level Two-Party Presidential Vote in NC, 2020



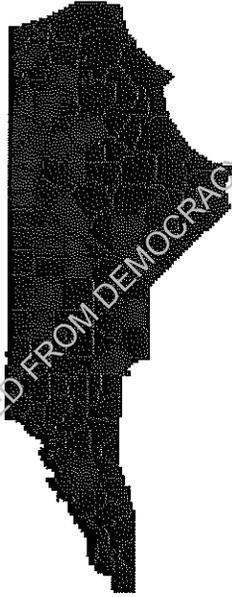
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Exhibit 2-B

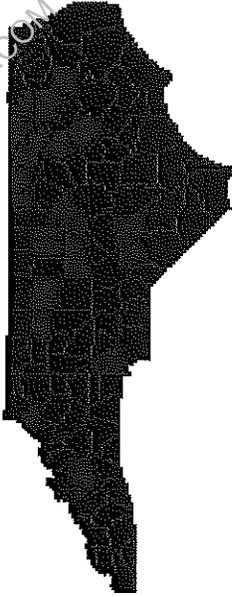
Republican Share of the Centered County-Level
Two-Party Presidential Vote in NC, 2012



Republican Share of the Centered County-Level
Two-Party Presidential Vote in NC, 2016



Republican Share of the Centered County-Level
Two-Party Presidential Vote in NC, 2020



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STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

REBECCA HARPER. et al.,

Plaintiffs,

v.

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

Defendants.

NOTICE OF FILING:

**AFFIDAVIT OF
KAREN BRINSON BELL**

NOW COME Defendants the North Carolina State Board of Elections and its members (collectively, the “State Board Defendants”), by and through the undersigned counsel, to hereby submit the attached Affidavit of Karen Brinson Bell, previously filed in the matter of *North Carolina State Conference of the NAACP, et al. v. Berger, et al.*, 21 CVS 14476, and filed here in support of State Board Defendants’ Response to Plaintiffs’ Motion for Preliminary Injunction. A copy of that Memorandum is being delivered to the Court via email.

Respectfully submitted this 2nd day of December, 2021.

N.C. DEPARTMENT OF JUSTICE

/s/ Stephanie A. Brennan
Stephanie A. Brennan
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State Bar No. 35955

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Senior Deputy Attorney General
State Bar No. 24668

Terence Steed
Special Deputy Attorney General
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing document in the above titled action upon all parties to this cause by via email and addressed as follows:

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Hall*

This the 2nd day of December, 2021.

/s/ Stephanie A. Brennan
Stephanie A. Brennan
Special Deputy Attorney General

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General Assembly, state judicial contests at all levels, district attorneys, and county offices. Additionally, voters in roughly a third of North Carolina's counties will have municipal contests on their ballot, due to special legislation delaying certain municipal contests due to delays in receiving U.S. Census data. *See* N.C. Sess. Law 2021-56. For the non-municipal contests, if no candidate reaches the vote share necessary to become the party nominee after the first primary (at least 30% of the vote plus one), a second primary may be held on April 26, or May 17 if a federal office is involved. *See* N.C.G.S. § 163-111. For municipal contests that use the primary-and-election or election-and-runoff methods of voting, the second municipal election will be held on April 26, unless a second primary is being held in a federal contest, in which case the municipal second election will also be held on May 17.¹

4. In our state, the county boards of elections administer elections in each county, including, among other things, providing for the distribution of voting systems, ballots, and pollbooks, training elections officials, conducting absentee and in-person voting, and tabulation and canvassing of results. The State Board is responsible for development and enhancement of our Statewide Elections Information Management System ("SEIMS"), which includes managing functions that assign voters to their relevant voting districts, a process known as "geocoding." The State Board also supports the county boards and their vendors in the preparation and proofing of ballots.

5. For North Carolina electoral districts, the geocoding process starts when the State Board receives district shapefiles from the legislature, which include geographic data setting the boundaries for legislative districts. The State Board's staff then works with county board staff to

¹ North Carolina municipalities conduct elections using one of four election methods: nonpartisan plurality, nonpartisan election and runoff, nonpartisan primary and election, and partisan primary and election. *See* N.C.G.S. §§ 163-291, -292, -293, -294.

use the shapefiles to update the voting jurisdictions that are assigned to particular addresses in SEIMS. This process then allows the State Board to work with county board staff and ballot-preparation vendors to prepare ballots. The State Board must perform an audit of the geocoding to ensure its accuracy before ballot preparation.

6. The amount of time required for geocoding generally corresponds with the number of district boundaries that are redrawn within the counties. In this case, most counties will experience changes to their districts following decennial redistricting—including state legislative, congressional, and local jurisdiction districts—and a significant number of those counties are likely to have newly drawn district boundaries within the counties' borders. Staff estimates that, given what we currently know, geocoding would likely take at least 21 days (including holidays and weekends) for the 2022 primary.

7. Ballot preparation and proofing can begin after geocoding is complete and candidate filing closes. For the 2022 primary elections, candidate filing occurs between noon on December 6, 2021, and noon on December 17, 2021. *See* N.C.G.S. § 163-106.2(a). The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control checkpoints that precede ballot printing and the coding of voting machines. This includes proofing each ballot style for content and accuracy, ballot printing, and delivery of all ballot materials to county boards. Staff estimates that, given what we currently know, ballot preparation and proofing would likely take between 17 and 21 days (including holidays and weekends) for the 2022 primary, depending on the number of ballot styles to prepare, which largely depends on the degree of change to intracounty district lines, and the number of contested nominations.

8. Geocoding and candidate filing may occur concurrently, although that is not ideal

because the completion of geocoding permits candidates and county boards to verify if a candidate desiring to file for election lives in a particular district. It is possible, however, to check candidate eligibility while geocoding is still taking place.

9. In contrast, geocoding and ballot preparation must occur consecutively. Ballots cannot be prepared until the proper geographical boundaries for voting districts are set in SEIMS and the candidates are known after the candidate-filing period closes. Additionally, the end-of-year holidays could pose difficulties for available staff time for the State Board, county boards, and vendors. Therefore, the total time required for geocoding and ballot preparation is likely between 38 and 42 days (including holidays and weekends).

10. Under N.C.G.S. § 163-227.10(a), the State Board must begin mailing absentee ballots 50 days prior to the primary election day, unless the State Board authorizes a reduction to 45 days or there is “an appeal before the State Board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal.” The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) requires that absentee ballots that include elections for federal office be made available by 45 days before a primary election, *see* 52 U.S.C. § 20302(a)(8)(A), unless I request a waiver of this requirement based on a legal contest delaying the preparation of ballots (or another enumerated hardship), and that waiver is granted by the federal official designated to administer UOCAVA, *see id.* § 20302(g). The state requesting a waiver must present a comprehensive plan that provides absentee UOCAVA voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the federal election.² Based on the current primary date of March 8, 2022, 50 days before the primary election falls on January 17, 2022; but because that

² https://www.fvap.gov/uploads/FVAP/EO/2012_waiver_guidance.pdf.

day is a holiday, the county boards must be prepared to begin distributing absentee ballots on the prior business day, which is January 14, 2022. The 45-day federal deadline falls on January 22, 2022 for the primary election; but because that day is a Saturday, in practice, the federal ballot distribution deadline is Friday, January 21, 2022.

11. In sum, the State Board would need to receive the shapefiles for geocoding and ballot preparation between now and 38 to 42 days before the deadline for distributing absentee ballots. Currently, that deadline is January 14, 2022, which means any new shapefiles must arrive between now and December 3–7, 2021. If that deadline were moved to January 21, 2022, new shapefiles would need to arrive between now and December 10–14, 2021.

12. If the deadlines for distributing absentee ballots were extended beyond what is required by UOCAVA, the State Board would also have to factor in additional administrative steps that must be prepared before in-person voting occurs. Currently, in-person early voting is set to begin on February 17, 2022 for the 2022 primary.

13. Before in-person voting occurs, the State Board must work with county boards to load data onto physical media cards that are placed in voting tabulation machines, a process called “burning media.” The media cards ensure that the tabulators anticipate the layout of ballots and properly attribute votes based on the ballot markings. The county boards must also conduct logic and accuracy testing to ensure that tabulation machines accurately read ballots and to correct any errors in coding. Staff estimates that burning media, preparing ballot marking devices and tabulators, and logic and accuracy testing would likely take the counties 14 days. After that process, the State Board works with the county boards to conduct a mock election, which takes one day, and generally affords two weeks thereafter to remedy any technical problems identified during the mock election. That two-week period could be reduced, but the

State Board generally believes that the two-week period fully insures against risks associated with technical problems that may be identified in the mock election.

14. Accordingly, regardless of when the absentee ballot distribution deadline falls, allowing 29 days after ballots have been prepared to prepare for in-person election voting is preferable. Under the current deadlines for distributing absentee ballots, which falls roughly a month before early voting begins, these processes can be accommodated. The time requirements for these processes would only become relevant if the absentee distribution deadline is shortened to less than what is currently required by statute.

15. If the Court were to order a separate primary for the challenged contests, a different set of administrative requirements would be triggered that could ultimately lead to disruption of the general election in the fall.

16. First, it is not technically possible to perform geocoding while in-person voting is occurring, and it is difficult to perform geocoding during the canvass period after the election. This is because making changes in SEIMS related to geocoding inhibits the actual voting process. County canvass takes place 10 days following an election. Generally, at that point, geocoding may begin, assuming no recount has been ordered. Accordingly, we recommend that geocoding for any delayed primary not begin any earlier than March 19, 2022. Relying on the aforementioned estimates, it would take between 38 and 42 days to geocode and prepare ballots for a separate primary. Candidate filing could occur before or simultaneous with geocoding.

17. However, if this Court chose to delay only the contests challenged by this action and allowed the other races to proceed on March 8, 2022 (judicial, prosecutorial, county, and municipal races), in order to accommodate a second primary or second municipal election for those races (see paragraph three above) on April 26 or May 17, the geocoding time period would

be interrupted as there will be a second blackout period for geocoding from April 7 to May 6 (if the election is April 26), or April 28 to May 27 (if the election is May 17). This represents an interruption in geocoding of 30 days, resulting in the work of geocoding and ballot preparation not being completed until approximately May 26-30, 2022, at the earliest. At that point, absentee ballots could be distributed pursuant to N.C.G.S. § 163-227.10(a).

18. Second, state law regarding the deadline for distributing absentee ballots would again require 50 days' time prior to the primary election day, unless the State Board reduced that time to 45 days or there is "an appeal before the State Board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal." N.C.G.S. § 163-227.10(a). The federal UOCAVA deadline would not apply if the primary did not involve federal offices. Therefore, accounting for absentee ballot distribution deadlines, the earliest that a separate primary could occur is 45 days later, which would result in a primary election day of Tuesday, July 12, 2022.

19. Third, one-stop early voting would have to begin 20 days before the primary election day under N.C.G.S. § 163-227.2(b). Accordingly, all of the administrative processes that must occur before in-person voting begins (geocoding, ballot preparation, burning media, preparing touch-screen ballots, logic and accuracy testing, mock election, and technical fix period, among other things), which are estimated to take between 67 and 71 days total, would need to occur between March 19, 2022, and 20 days before the date of the separate primary, with an additional 30 day delay caused by the blackout period around the second primary as described in paragraph 17 above. Therefore, even putting aside absentee ballot distribution deadlines and then accounting for in-person voting timelines, the earliest that separate primary could occur is, again, Tuesday, July 12, 2022.

20. Such a late date for a primary would make any second primary, if triggered and requested under N.C.G.S. § 163-111, infeasible. A second primary under this scenario would occur on either August 30, 2022 or September 20, 2022 (*i.e.*, 7 or 10 weeks after the initial primary, depending on whether there was a federal contest involved). This would interfere with the August 19 to August 23 deadline to begin preparing ballots for the general election. Absentee ballots must be mailed out for the general election on September 9, 2022 pursuant to N.C.G.S. § 163-227.10(a), and staff require 17-21 days to prepare those ballots ahead of that date as described in paragraph 7 above.

21. Fourth, there are additional administrative challenges that counties would face if a separate primary were held. Among these challenges would be recruiting poll workers and securing voting locations, along with the associated costs. Increasingly, county elections officials have found it necessary to spend more time recruiting early voting and election day poll workers, especially because of statutorily mandated early voting hours and technological advances in many counties that require elections workers to be familiar with computers. Additionally, a large portion of precinct voting locations in the state are housed in places of worship or in schools, with still others located in privately owned facilities. Identifying and securing appropriate precinct voting locations and one-stop early voting sites requires advance work by county board staff and coordination with the State Board.

22. In sum, enjoining and delaying only the challenged primary contests would result in significantly greater administrative burden on the boards of elections, could result in significant voter confusion, and could potentially lead to an administratively infeasible timeline in late summer. In contrast, if all currently scheduled contests set for March 8, 2022 were moved to a later date, this would still raise significant administrative burdens, but it would be possible to

implement as geocoding of any new shapefiles can begin immediately upon receipt by the State Board, without blackout interruptions, and voters would not need to keep track of multiple primary dates for the 2022 elections.

23. Under those circumstances, and backtracking from the earliest relevant deadline for the general election—the ballot preparation deadline of August 19 to August 23³—the second primary can occur no later than Tuesday, July 26, 2022,⁴ and the first primary can occur no later than Tuesday, May 17, 2022,⁵ which in turn requires that the State Board be provided with any new shapefiles no later than February 14 to 18, 2022.⁶

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³ Absentee ballots must be mailed out for the general election on September 9, 2022 pursuant to N.C.G.S. § 163-227.10(a), and staff require 17-21 days to prepare those ballots ahead of that date as described in paragraph 7 above.

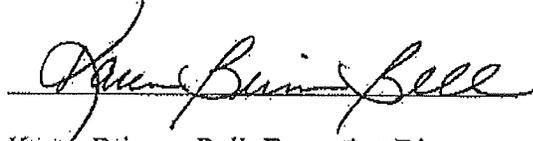
⁴ 21 days are required by the State Board to complete statewide canvass and certify the election results, which must be completed prior to preparing ballots. This results in a date range of Friday, July 29 to Sunday, August 2, with Tuesday, July 26 being the nearest feasible day to hold the election.

⁵ The allowance of 10 weeks is required between the first and second primaries, pursuant to N.C.G.S. § 163-111(e).

⁶ 38 to 42 days to geocode and prepare ballots plus the 50 days before the election when absentee ballots must be mailed.

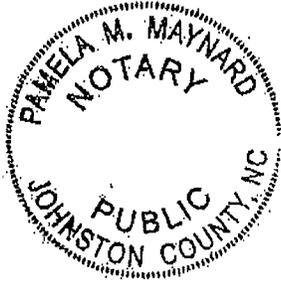
This concludes my affidavit.

This the 23rd day of November, 2021.



Karen Brinson Bell, Executive Director
N.C. State Board of Elections

Sworn to and subscribed before me this 23rd day of November, 2021.



(Notary Public)

My commission expires: 11-2-23

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

**STATE BOARD DEFENDANTS'
RESPONSE TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

NOW COME Defendants the North Carolina State Board of Elections and its members (collectively, the "State Board" or "State Board Defendants"), by and through undersigned counsel, to submit this response to Plaintiffs' motion for preliminary injunction.

INTRODUCTION

State Board Defendants take no position on the merits of Plaintiffs' claims.

Rather, this response is provided to inform the Court and the parties of the State Board's administrative considerations and concerns. Should the Court reach consideration of granting the requested relief, the State Board Defendants note that while such relief would impose a significant burden on the State Board's and county boards' administration of the upcoming elections, moving the election schedule as requested to allow time for redistricting issues to be decided would not be insurmountable or impossible if the considerations outlined below by the State Board regarding relevant limitations and deadlines are taken into account.

FACTUAL BACKGROUND

A. Current Election Schedule

On March 8, 2022, North Carolina is scheduled to hold its 2022 statewide primary election. *See* Affidavit of Karen Brinson Bell, ¶ 3. Contests on the ballot include the U.S. Senate and House of Representatives, the N.C. General Assembly, state judicial contests at all levels, district attorneys, county offices, and some municipal offices. *Id.* For the non-municipal contests, if no candidate reaches the vote share necessary to become the party nominee after the first primary (at least 30% of the vote plus one), a second primary may be held on April 26, or May 17 if a federal office is involved. *See* N.C.G.S. § 163-111. For some municipal contests, a second election *will* occur on the date of the second primary. Bell Aff., ¶3, Fn1 citing N.C.G.S. §§ 163-291, -292, -293, -294.

B. State Board Implementation Considerations

In our state, the county boards of elections administer elections in each county, including, among other things, providing for the distribution of voting systems, ballots, and pollbooks, training elections officials, conducting absentee and in-person voting, and tabulation and canvassing of results. *Id.*, ¶4. The State Board is responsible for development and enhancement of our Statewide Elections Information Management System (“SEIMS”), which includes managing functions that assign voters to their relevant voting districts, a process known as “geocoding.” *Id.*

The geocoding process starts as soon as the State Board receives legislative district shapefiles, which include geographic data setting the boundaries for legislative districts. *Id.*, ¶ 5. The State Board’s staff then works with county board staff to use the shapefiles to update the voting jurisdictions that are assigned to particular addresses in SEIMS. *Id.* The State Board

estimates that geocoding would likely take at least 21 days (including holidays and weekends) for the districts at issue in the 2022 primary. *Id.*, ¶ 6.

Ballot preparation and proofing can begin only after geocoding is complete and candidate filing closes. *Id.*, ¶ 7. For the 2022 primary elections, candidate filing occurs between noon on December 6, 2021, and noon on December 17, 2021. *See* N.C.G.S. § 163-106.2(a). Generating and proofing ballots is complex and involves multiple technical systems and quality-control checkpoints that precede ballot printing and the coding of voting machines. *Id.* This includes proofing each ballot style for content and accuracy, ballot printing, and delivery of all ballot materials to county boards. *Id.* Based on prior experience, the State Board estimates that ballot preparation and proofing would likely take between 17 and 21 days (including holidays and weekends) for the 2022 primary, depending on the number of ballot styles to prepare, which largely depends on the degree of change to intra-county district lines, and the number of contested nominations. *Id.*

While not ideal, geocoding and candidate filing may occur concurrently. *Id.*, ¶ 8. However, geocoding and ballot preparation must occur consecutively. *Id.*, ¶ 9. Ballots cannot be prepared until the proper geographical boundaries for voting districts are set in SEIMS and the candidates are known after the candidate-filing period closes. *Id.* Therefore, the total time required for geocoding and ballot preparation is likely between 38 and 42 days (including holidays and weekends). *Id.* This work must be completed before the beginning of the absentee by mail voting period.

The State Board is required by statute to begin mailing absentee ballots 50 days prior to the primary election day or 45 days under limited exceptions pursuant to N.C.G.S. § 163-227.10(a). *Id.*, ¶ 10. The federal Uniformed and Overseas Citizens Absentee Voting Act

(UOCAVA) requires mailing 45 days before a primary election, *see* 52 U.S.C. § 20302(a)(8)(A), unless Executive Director Bell requests a waiver of this requirement based on a legal contest delaying the preparation of ballots (or another enumerated hardship), and that waiver is granted by the federal official designated to administer UOCAVA, *see id.* § 20302(g). Bell Aff., ¶ 10. As a result, the current deadline by which county boards must be prepared to begin distributing absentee ballots is January 14, 2022, or January 21, 2022 if the period is shortened as provided above. *Id.* In order to maintain the current deadlines for the March 8, 2022 primary, the State Board's assessment is that it must receive map shapefiles for geocoding and ballot preparation no later than December 3–7, 2021, or December 10–14, 2021, if the absentee mailing period is shortened. *Id.*, ¶ 11.

If the absentee mailing period were shortened, the State Board would then need to take into account the impact on preparations for in-person voting. Currently, in-person early voting is set to begin on February 17, 2022 for the 2022 primary. *Id.*, ¶ 12. Before in-person voting occurs, the State Board must work with county boards to prepare voting tabulation machines, and the county boards must conduct logic and accuracy testing of the equipment. *Id.*, ¶ 13. The State Board estimates that this would likely take the counties 14 days. *Id.* Then the State Board and county boards conduct a mock election day followed by two weeks to remedy any technical problems identified during the mock election. *Id.* Accordingly, regardless of when the absentee ballot distribution deadline falls, the State Board estimates it would require 29 days after ballots have been prepared in order for staff to prepare for in-person election voting. *Id.*, ¶ 14.

Finally, for reasons more thoroughly explained in the Affidavit of Executive Director Bell, the delay of any contest currently scheduled for the March 8, 2022 primary, would, as a practical matter, necessitate the delay of all contests scheduled for that date. *Id.*, ¶ 15-21. For

instance, if only the contests subject to legislative redistricting were delayed, this would create a different set of administrative requirements caused by blackout periods in which the geocoding process must be halted for 30 days while in-person voting is occurring and county boards canvass results in the other contests that do not involve redistricting. *Id.*, ¶¶ 16-17. In order to accommodate the second primary for the other contests allowed to proceed on March 8, 2022 (including certain municipal contests that are certain to occur), this would create a second blackout period further disrupting preparation for the delayed races. *Id.*, ¶ 17. This represents an interruption in geocoding of another 30 days, resulting in the work of geocoding and ballot preparation not being completed until approximately May 26-30, 2022, at the earliest. *Id.*

When the blackout periods are combined with the need to have absentee ballots prepared for distribution 50 days (or 45 if shortened) before the election date pursuant to N.C.G.S. § 163-227.10(a), the earliest that a separate primary could occur is 45 days later, which would result in a primary election day of Tuesday, July 12, 2022. *Id.*, ¶¶ 17-18.

The absentee distribution deadline is not the only consideration. One-stop early voting is required to begin 20 days before the primary election day under N.C.G.S. § 163-227.2(b). Accordingly, all of the administrative processes that must occur before in-person voting begins (geocoding, ballot preparation, burning media, preparing touch-screen ballots, logic and accuracy testing, mock election, and technical fix period, among other things), which are estimated by State Board staff to take between 67 and 71 days total, would need to occur between March 19, 2022, and 20 days before the date of the separate primary. *Bell Aff.*, ¶19. A second primary in the unchallenged contests will cause this period to be extended by an additional 30 day delay caused by the second blackout period as described above. *Id.*, ¶¶ 16-17. Therefore, even putting aside absentee ballot distribution deadlines, and only accounting for the in-person voting

timelines, the earliest that separate first primary for the challenged contests could occur is, again, Tuesday, July 12, 2022. *Id.*, ¶ 19.

Such a late date for a first primary would make any second primary infeasible if triggered and requested under N.C.G.S. § 163-111. *Id.*, ¶ 20. If that occurs, a second primary under this scenario would occur on either August 30, 2022 or September 20, 2022 (*i.e.*, 7 or 10 weeks after the initial primary, depending on whether there was a federal contest involved) pursuant to N.C.G.S. § 163-111(e). *Id.* This would interfere with the August 19 to August 23 deadline to begin preparing ballots for the general election because absentee ballots must be mailed out for the general election on September 9, 2022 pursuant to N.C.G.S. § 163-227.10(a), and staff require 17-21 days to prepare those ballots. *Id.*

Separate primaries also incur more practical administrative challenges for counties, including added difficulty recruiting poll workers, securing voting locations, and associated costs. *Id.*, ¶ 21.

Thus, enjoining and delaying only the challenged primary contests would result in significantly greater administrative burden on the boards of election, could result in significant voter confusion, and could potentially lead to an administratively infeasible timeline in late summer. *Id.*, ¶ 22. In contrast, if all currently scheduled contests set for March 8, 2022 were moved to a later date, this would still raise significant administrative burdens, but it would be more feasible to implement. This is because geocoding of any new shapefiles can begin immediately upon receipt by the State Board, without blackout interruptions, and voters would not need to keep track of multiple primary dates for the 2022 elections. *Id.*

Under those circumstances, keeping in mind all of the estimates of time needed to prepare for the elections outlined above, and backtracking from the earliest relevant deadline for

the general election—the ballot preparation deadline of August 19 to August 23—the State Board staff’s assessment is that the second primary would need to occur no later than Tuesday, July 26, 2022, and the first primary by no later than Tuesday, May 17, 2022. That, in turn, would require that the State Board be provided with any new shapefiles no later than February 14 to 18, 2022. *Id.*, ¶ 23, and Fn 3-6.

LEGAL ARGUMENT

Legal Standard

In considering a motion for preliminary injunction, the Court must “engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant[s] if injunctive relief is granted.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). “A preliminary injunction should not be granted if a serious question exists in respect of the defendant’s right to do what the plaintiffs seek to restrain and the granting thereof would work greater injury to the defendant than is reasonably necessary for the protection *Pendente lite* of the plaintiffs’ rights.” *Setzer v. Annas*, 286 N.C. 534, 540, 212 S.E.2d 154, 157–58 (1975).

I. Administrative Burdens, Considerations, and Important Deadlines.

Should this Court choose to grant the relief requested by Plaintiffs, and delay the March 8, 2022 to a date in May of 2022, it would impose significant burdens on the State Board, but it would be administratively feasible so long as certain considerations and deadlines are set.

The affidavit of State Board Executive Director Karen Brinson Bell, which has been filed contemporaneously with the service of this brief, provides a detailed discussion of the relevant administrative processes that the State Board and county boards carry out in preparation for an election. It identifies the amount of time required to accomplish each process that occurs after

the State Board receives map shapefiles, and before absentee ballots are distributed and in-person voting can begin. *See* Bell Aff. ¶¶ 4-14. Certain time estimates are provided as ranges due to certain contingencies, as explained in the affidavit. *Id.* The affidavit further explains the administrative difficulties that would be triggered if a separate primary were ordered for only the races challenged in this action and why that is likely not administratively feasible. *Id.*, ¶¶ 15-21.

Rather than restate the contents of Ms. Bell's affidavit, which appear above in detail in the facts section of this response, State Defendants highlight the two primary issues most relevant to the Court's consideration of Plaintiffs' requested relief.

First, if the Court decides that any contests scheduled for the March 8, 2022 primary should be delayed, then all contests scheduled for that date should be delayed. Delaying a portion of the contests would result in significantly greater administrative burdens for the State Board, could create significant voter confusion, and could impact the deadlines required to carry out the general election in the fall of 2022. *Id.*, ¶ 22.

Second, if all races are delayed from the March 8, 2022 to latest date deemed practicable by the State Board, May 17, 2022, and new maps are ordered by this Court, then the new shapefiles must be received by the State Board no later than February 14-18, 2022 in order for them to be implemented ahead of that delayed primary. *Id.*, ¶ 23. It should be noted that the State Board's assessment is that these are dates of last resort that provide the maximum amount of time to resolve any redistricting issues the Court determines to address, before the burden would likely become administratively infeasible for the State Board to conduct orderly elections in 2022.

CONCLUSION

State Board Defendants ask that the Court consider the administrative issues above. State Board staff are available to answer any further questions from the Court regarding administrative considerations relevant to the Court's determination of the motion.

Respectfully submitted this 2nd day of December, 2021.

N.C. DEPARTMENT OF JUSTICE



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This the 2nd day of December, 2021.



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STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

No.21 CVS 500085

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,

Plaintiffs,

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 AS
CHAIRMAN OF THE NORTH

ERRATA OF DR. JOWEI CHEN

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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,

Defendants.

I, Dr. Jowei Chen, upon my oath, declare and say as follows:

1. I am over the age of eighteen (18) and competent to testify as to the matters set forth herein.
2. On November 30, 2021, I submitted a declaration entitled “Expert Report of Jowei Chen.”
3. My November 30, 2021, declaration contained the following typographical errors.
4. The final sentence of Paragraph 62 said: “The efficiency gap is then calculated as total wasted Republican votes minus total wasted Democratic votes, divided by the total number of two-party votes cast statewide across all seven elections.” It should say: “The efficiency gap is then calculated as total wasted Democratic votes minus total wasted Republican votes, divided by the total number of two-party votes cast statewide across all seven elections.”
5. The final sentence of Paragraph 63 said: “A significantly positive efficiency gap indicates far more Republican wasted votes, while a significantly negative efficiency gap

indicates far more Democratic wasted votes.” It should say: “A significantly positive efficiency gap indicates far more Democratic wasted votes, while a significantly negative efficiency gap indicates far more Republican wasted votes.”

6. The second sentence of Paragraph 65 said: “As before, the 1,000 circles in this Figure represent the 1,000 computer-simulated plans, while the red star in the lower right corner represents the Enacted Plan.” It should say: “As before, the 1,000 circles in this Figure represent the 1,000 computer-simulated plans, while the red star in the upper right corner represents the Enacted Plan.”

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

This 3rd day of December, 2021.



Dr. Jowei Chen

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CERTIFICATE OF SERVICE

I hereby certify that I will this day serve a copy of the foregoing to counsel for all parties in this case via *e-mail*.

This the 3rd day of December, 2021.



Narendra K. Ghosh, NC Bar No. 37649

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IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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

Plaintiffs,
v.

Wake County
21-CVS-15426

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

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,
v.

Wake County
21-CVS-500085

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

TRANSCRIPT, Volume 1 of 1

Pages 1 - 114

Friday, December 3, 2021

December 3, 2021, Civil Session

The Honorables A. Graham Shirley, Nathaniel J. Poovey,
and Dawn M. Layton, Judges Presiding

Plaintiffs' Motion for Preliminary Injunction

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1 (Superior Court of Wake County convened civil
2 court session December 3, 2021, before the
3 Honorables A. Graham Shirley, Nathaniel J.
4 Poovey, and Dawn M. Layton. The cases of
5 North Carolina League of Conservation Voters,
6 et al. v. Hall, et al., and Harper, et al. v.
7 Hall, et al., were called for hearing at
8 10:01 a.m.)

9 JUDGE SHIRLEY: Good morning, everyone. We are
10:01AM 10 here in North Carolina League of Conservation Voters, Inc.,
11 et al., v. Representative Destin Hall, et al., and that is
12 File 21-CVS-15426, and in Rebecca Harper, et al., v.
13 Representative Destin Hall, 21-CVS-500085.

14 Let me go ahead and -- it's dangerous when you put me
10:02AM 15 in charge of technology.

16 (Pause in proceedings.)

17 JUDGE SHIRLEY: If counsel could please identify
18 themselves for the record.

19 MR. FELDMAN: Good morning, Your Honor. Stephen
10:05AM 20 Feldman of Robinson Bradshaw for the North Carolina League
21 of Conservation Voters plaintiffs.

22 MR. ZIMMERMAN: Erik Zimmerman also with Robinson
23 Bradshaw for the North Carolina League of Conservation
24 plaintiffs.

10:05AM 25 MR. SCHAUF: Zach Schauf also for the League,

1 from Jenner & Block.

2 MR. WHITE: Graham White for the Elias Law Group
3 for the Harper plaintiffs.

10:05AM

4 MR. CALLAHAN: Sam Callahan from Arnold & Porter
5 for the Harper plaintiffs.

6 MS. THEODORE: Elisabeth Theodore from Arnold &
7 Porter for the Harper plaintiffs.

10:05AM

8 MR. STRACH: Good morning, Your Honor.
9 Phil Strach of Nelson & Mullins for the Legislative
10 Defendants.

11 MS. MCKNIGHT: Good morning, Your Honor. Kate
12 McKnight with Baker Hostetler for the Legislative
13 Defendants.

10:06AM

14 MR. BRANCH: Good morning, Your Honor. John
15 Branch with Nelson Mullins for the Legislative Defendants.

16 MR. BRADEN: Good morning. Mark Braden, Baker &
17 Hostetler, for the Legislative Defendants.

10:06AM

18 MR. STEED: Good morning, Your Honors.
19 Terence Steed for the State Board of Elections and its
20 members.

10:06AM

21 JUDGE SHIRLEY: All right. I have previously
22 signed orders granting pro hac vice for, I think,
23 Ms. McKnight; is that correct? If I have not, I've signed
24 one for Mr. Braden, and I've signed one for -- I think I
25 need to sign one for Mr. White; is that correct?

1 MR. WHITE: Yes.

2 JUDGE SHIRLEY: And Mr. Callahan; is that
3 correct? And I believe -- so, those -- I will sign those.

4 As an administrative matter, the panel has concluded in
10:06AM 5 its discretion that as these two cases involve common issues
6 of law and fact, they will be consolidated for purposes --
7 for all purposes, and the lead case will be the case that
8 was filed first, which was the North Carolina League of
9 Conservation Voters, Inc., case.

10:07AM 10 How long do counsel believe their arguments will take?
11 I'll hear from Plaintiffs first. How long do you believe
12 your argument will take?

13 MR. SCHAUF: I mean, however long the Court finds
14 useful, but perhaps 20, 30 minutes.

10:07AM 15 JUDGE SHIRLEY: Okay.

16 MS. THEODORE: I think about the same. Of
17 course, it will depend on the number of questions from the
18 Court.

19 JUDGE SHIRLEY: Mr. Strach?

10:07AM 20 MR. STRACH: I think part of it will depend on
21 how long their presentation is. Probably, hopefully, no
22 more than 45 minutes or so.

23 JUDGE SHIRLEY: All right.

24 MR. STEED: Your Honor, the State's taking no
10:07AM 25 position on the merits, so to the extent you have questions

1 about the administrative issues, then we have no argument.

2 JUDGE SHIRLEY: All right. With respect to those
3 people -- individuals viewing WebEx, via WebEx, the Court
4 welcomes you. I will remind you your participation via
10:08AM 5 WebEx is just as if you were seated in the gallery.

6 Therefore, if you are -- I would request that you mute your
7 microphones.

8 I noticed pretty much everyone has their cameras off.
9 If your camera is turned on, your actions are visible to the
10:08AM 10 Court, and the Court would expect them to comply with the
11 decorum that would be expected of anyone in the courtroom.

12 Anyone have any additional administrative matters
13 before we hear argument? All right. We'll hear from the
14 North Carolina League of Conservation Voters first. You
10:08AM 15 may -- if you are actively arguing, you may take your -- you
16 may remove your mask. That helps us. It also helps the
17 court reporter.

18 MR. SCHAUF: So, thank you. May it please the
19 Court. Zack Schauf for the plaintiffs in the League of
10:09AM 20 Conservation Voters case. I'm here representing a coalition
21 of plaintiffs, not just the League, but civil rights
22 leaders, individual voters from across the state, and
23 professors of math, computer science, and statistics from
24 UNC, Wake Forest, Davidson, and High Point University, among
10:09AM 25 others. My clients come from different walks of life and

1 have different perspectives on many things, but they share a
2 common view on this matter that's brought them here.

3 First, that elections should be fair and free, which
4 means that, at minimum, the party that wins a majority of
10:09AM 5 seats should have a fair chance of winning a majority of
6 votes, and second -- or that wins the majority of votes
7 should have a fair chance of winning the majority of seats.
8 And, second, the tools of math and computer science should
9 be used to identify plans that depart from those principles.

10:10AM 10 In the Common Cause and Harper cases, Judges Ridgeway,
11 Crosswhite, and Hinton correctly recognized that the North
12 Carolina State Constitution bars partisan gerrymanders.

13 JUDGE SHIRLEY: Now, you would admit, wouldn't
14 you, that that case is only persuasive and not binding on
10:10AM 15 this Court?

16 MR. SCHAUF: So, we have taken the position in a
17 footnote that it could be regarded as binding. I don't
18 think it's clear under North Carolina law, but we think it's
19 persuasive, in any event.

10:10AM 20 JUDGE SHIRLEY: Right. And we have an
21 independent duty of our own to examine the constitutionality
22 of the acts of the legislature, don't we?

23 MR. SCHAUF: Absolutely, you do. You do.

24 JUDGE SHIRLEY: And in determining whether the
10:10AM 25 act of the legislature is constitutional or not, is there

1 any guidance from the North Carolina Supreme Court as to the
2 burden that must be presented to us in order to declare an
3 act of the constitution -- an act of the legislature
4 unconstitutional?

10:11AM

5 MR. SCHAUF: I would agree that we bear the
6 burden as plaintiffs to show that the act is
7 unconstitutional at the preliminary injunction stage. That
8 just means, of course, we need to show a likelihood of
9 success, as with any other preliminary injunction. But I
10 agree that we bear the burden, and we think that we've
11 carried that burden.

10:11AM

12 JUDGE SHIRLEY: What is that burden?

10:11AM

13 MR. SCHAUF: I think it's a preponderance of the
14 evidence. If you're asking about what we think the
15 substantive standard is, you know, I think we think that it
16 is sufficient to show a partisan gerrymander that the map is
17 systematically drawn to entrench one party in power even if
18 voters prefer the other party by a significant margin.

10:11AM

19 And, you know, particularly where, as we've shown
20 through the affidavit of Dr. Moon Duchin, a noted
21 mathematician and redistricting expert, you can draw a map
22 that complies fully with traditional districting principles
23 that does not yield those same skewed effects.

10:11AM

24 JUDGE SHIRLEY: When you talk about traditional
25 districting principles, based upon the complaint and based

1 upon what was said in Harper v. Lewis, it looks like
2 traditional districting principles have involved political
3 gerrymandering back to prior to Colonial times.

4 MR. SCHAUF: Well, so, I think when we refer to
10:12AM 5 traditional districting principles, we mean things like
6 compactness, continuity, respect for political subdivisions,
7 respect for municipalities, where we have presented in our
8 complaint these optimized maps that do better on all of
9 those metrics than the ones the legislature passed.

10:12AM 10 But to directly address your question, I think there is
11 truth in it, but it is also true that going back to Colonial
12 times, there were grossly misapportioned districts, and that
13 did not stop courts from holding that the
14 one-person-one-vote principle requires proportionality. And
10:12AM 15 we think it is the same here.

16 And it's actually, I think, easier here, because you do
17 have the lineage of the Free Elections Clause going back to
18 the 1689 English Bill of Rights where it was put there
19 precisely to address gerrymandering that the king was
10:12AM 20 engaged in to manipulate parliament by manipulating the
21 electors for different seats.

22 And that was a principle that the framers of the North
23 Carolina Constitution took and made part of North Carolina
24 law that they expected would be traditionally enforced, just
10:13AM 25 like the framers of the Pennsylvania Constitution put it

1 into Pennsylvania law, and just like the Supreme Court of
2 Pennsylvania a couple years ago found that that constitution
3 prohibited partisan gerrymandering and that those claims
4 were justiciable.

10:13AM

5 JUDGE SHIRLEY: Your position is there can be no
6 partisan gerrymandering?

7 MR. SCHAUF: So, we agree that there is a
8 threshold showing of sort of substantiality required, but we
9 think, you know, it's more than been shown here, and this is
10 a not close case.

10:13AM

11 JUDGE SHIRLEY: Can there be partisan
12 gerrymandering under the North Carolina Constitution?

13 MR. SCHAUF: It depends, I suppose, what you mean
14 by partisan gerrymandering. I think if you mean fixing
15 elections for political gain, I think the answer is no. I
16 think if it's thinking about political considerations, then,
17 you know, I think sometimes that can be permissible. And
18 the thing that I --

10:13AM

19 JUDGE SHIRLEY: Well, in fact, didn't Chief
20 Justice Lake indicate that that was a proper factor that
21 could be considered by the legislature in the Stephenson v.
22 Bartlett decision?

10:14AM

23 MR. SCHAUF: So, what that said is that you may
24 consider politics. And I think there's a very big
25 difference between considering partisan considerations and

10:14AM

1 partisan gerrymandering. But also that that is limited by
2 other aspects of the North Carolina State Constitution,
3 including the Free Elections Clause, the Equal Protections
4 Clause, the Free Speech Clause, and the Freedom of Assembly
5 Clause.

10:14AM

6 JUDGE SHIRLEY: Why didn't our -- didn't the
7 people specifically, when they addressed how districts were
8 to be formed, set forth the criteria that the legislature
9 was to use?

10:14AM

10 MR. SCHAUF: I mean, I think if you mean the sort
11 of specific districting criteria about population and no
12 mid-decade redistricting you know, they did. But it's
13 quite clear that those aren't exclusive, because if they
14 were, you couldn't have found an equal protection violation
15 in Stephenson that came from the more general principles of
16 the Equal Protection Clause. And we think the same is true
17 here with the Free Elections Clause and the other provisions
18 that we invoke.

10:15AM

19 So, perhaps with that, I'll pivot to why we think that
20 the maps here indeed constitute the sort of extreme partisan
21 gerrymanders that were --

10:15AM

22 JUDGE SHIRLEY: To constitute extreme partisan
23 gerrymandering, does there have to be intent on the part of
24 the legislature to seek political gain?

10:15AM

25 MR. SCHAUF: So, our view is the answer is no, at

1 least under the Free Elections Clause. We've cited in our
2 brief the Van Bokkelen case from the North Carolina Supreme
3 Court, which says that when you have laws like this that
4 implicate voting rights, it is, quote, the effect and not
10:15AM 5 the intent of a legislature that renders it void. But I
6 also don't think you have to agree with me on that, because
7 there's ample evidence of intent that we've identified here.
8 And I would also say that the bar for showing intent in
9 these cases is going to be low, and the U.S. Supreme Court
10:16AM 10 has explained why it's low. I would point you to the
11 Gaffney case we've cited in our brief where the Supreme
12 Court explains that it is most unlikely when you've got a
13 legislature drawing maps that the partisan effects of the
14 maps they're drawing wouldn't be understood when they passed
10:16AM 15 the maps. And if they understand the partisan effects and
16 they pass them anyway, it is intended.
17 The Supreme Court said much the same thing in the
18 Davis v. Bandemer case; that said, again, it is most likely
19 that whenever a legislature redistricts, those responsible
10:16AM 20 will know the likely partisan consequences of what they do.
21 And when you look at what the maps here do, they
22 entrench a majority in every chamber that is impervious to
23 any plausible electoral outcome in North Carolina. As we've
24 shown through the affidavit of Dr. Duchin, in Congress, it
10:17AM 25 entrenches a 10-4 political majority, 9-5 if Democrats get

1 very lucky. In the Senate, it is -- in even elections will
2 guarantee a six-seat Republican majority in the House. It's
3 16 seats.

4 And, indeed, that -- you can have results where you
10:17AM 5 have Democrats win statewide elections, like they did in
6 2016 for the gubernatorial election and the attorney general
7 election, where if you take those results and transpose them
8 onto the districts that were drawn here, those actually
9 yield Republican supermajorities in every chamber, 30 seats
10:17AM 10 in the Senate, 70 seats in the house.

11 And, you know, I think when we're talking about intent,
12 it is most implausible to think that they drew those maps
13 with those effects and didn't understand what they were
14 doing, and particularly given where, you know, we are here
10:17AM 15 after two cases in 2019 where the maps at issue there, which
16 were passed in 2016, were passed expressly in order to be a
17 partisan gerrymander where the argument is that is
18 consistent with the North Carolina Constitution, and they
19 sort of forthrightly proclaimed that was what they were
10:18AM 20 doing, yielded very similar results where you had elections
21 where Republicans lost the statewide vote, like in 2018, and
22 nonetheless had ten seats in Congress, 65 seats in the
23 House, and 29 seats in the Senate, almost the exact same
24 results you get here.

10:18AM 25 And it's just not plausible to say that, well, you

1 know, they drafted those maps with express partisan intent
2 but got the very same result here while not considering
3 partisanship at all. It's just not plausible. And even
4 more so because this came up during the legislative
10:18AM 5 hearings. People said these are partisan gerrymanders that
6 will skew the election results, and instead of pausing and
7 saying --

8 JUDGE SHIRLEY: So, a Republican said that?

9 MR. SCHAUF: Republicans did not say it. They
10:19AM 10 were Democrats. But instead of saying, that's not what we
11 had in mind, we didn't mean for these to yield unfair
12 results, they pressed ahead and passed the maps on
13 party-line votes. And, you know, I think the natural
14 implication of that is that they intended those results.

10:19AM 15 And, indeed, I mean, it would require, you know,
16 legislators, I think, to be almost angelic to, you know, be
17 a set of people who, you know, live and breathe politics
18 every day, and then when they go and do districting to say,
19 we are not going to take partisan considerations into
10:19AM 20 account at all. I understand they have the criteria --

21 JUDGE SHIRLEY: In fact, when we gave our
22 governor the right to veto in 1996, the people of this state
23 decided that he would not be able to veto congressional
24 redistricting or legislative redistricting. They left it
10:19AM 25 with the bodies that seem to be the most overtly political

1 in the state, whether they be controlled by Republicans or
2 Democrats. The people in this state made that choice,
3 didn't they?

10:20AM 4 MR. SCHAUF: They did. But they also made the
5 choice to put in the constitution the Free Elections Clause,
6 the Equal Protection Clause, and the other clauses we rely
7 on. And we think the task here is to put those clauses
8 together and apply them to the maps that are before the
9 Court.

10:20AM 10 And, you know, I think in terms of both the intent and
11 the effect, it is telling that when you look at the brief
12 that came in from the other side last night and the expert
13 report they filed the day before, there's nothing there to
14 dispute the showing we've made about the degree of skew in
10:20AM 15 these maps. That in all three maps, so long as you have
16 results that are within seven points, which in North
17 Carolina, the way it is today, is every election, you are
18 going to have baked-in majorities for the incumbent party in
19 every chamber.

10:20AM 20 And it does that in a way that is, contrary to what
21 we've heard from the other side, not something that flows as
22 some inevitable effect of North Carolina's political
23 geography. And we know that because, again, we've put in
24 maps that show that you can do better with respect to
10:21AM 25 compactness, with respect to keeping counties together and

1 avoiding traversals, with respect to municipalities, and
2 also have results that are fair to both parties.

3 JUDGE SHIRLEY: Do you believe that there can
4 be -- both sides can take a reasonable position that
10:21AM 5 partisan gerrymandering is allowed in this state under the
6 constitution?

7 MR. SCHAUF: If the question is do I think that
8 that is a frivolous argument, I don't think it's a frivolous
9 argument. I think it's a wrong argument. And, you know,
10:21AM 10 we're here to support the position that, in fact, the Free
11 Elections Clause and the other provisions we've invoked do
12 impose a limit. But I understand why my friends on the
13 other side are making the arguments they do. They're
14 respectable arguments.

10:21AM 15 JUDGE SHIRLEY: You don't believe -- you would
16 say they're incorrect, but they're not necessarily
17 unreasonable? I mean, it's not a frivolous argument, is it?

18 MR. SCHAUF: No, no. Absolutely not.

19 JUDGE SHIRLEY: So, reasonable minds can differ
10:22AM 20 as to whether -- well, as to whether you can have partisan
21 gerrymandering in this state?

22 MR. SCHAUF: I mean, look, I think there's some
23 distance between an argument not being frivolous and, you
24 know, it being reasonable. I think, for us, the key point
10:22AM 25 is that we think it is wrong, and we think it is the job of

1 North Carolina courts and this Court to say that it is
2 wrong.

3 JUDGE SHIRLEY: Now, we have to be convinced
4 beyond a reasonable doubt that an act is unconstitutional
10:22AM 5 before we declare it unconstitutional, don't we?

6 MR. SCHAUF: I don't know that you have to be
7 convinced beyond a reasonable doubt. I think our view is
8 the standard is, you know, a preponderance on the merits,
9 and, here, a likelihood of success on the merits.

10:22AM 10 JUDGE SHIRLEY: So, when our Supreme Court has
11 said, "It is well settled in this state that the courts have
12 the power, and it is their duty in proper cases, to declare
13 an act of the General Assembly unconstitutional, but it must
14 be plainly and clearly the case. If there is any reasonable
10:23AM 15 doubt, it will be resolved in favor of the lawful exercise
16 of their powers by the representatives of the people," so
17 that's the Supreme Court telling us that if there's any
18 reasonable doubt, we have to rule in the favor of the acts
19 of the people through their elected representatives.

10:23AM 20 MR. SCHAUF: That simply is not our view. We
21 think it is a preponderance standard, a likelihood of
22 success standard here at the preliminary injunction stage,
23 and we think we have gotten there based on the evidence
24 we've put in.

10:23AM 25 JUDGE SHIRLEY: But when we talk about whether

1 there can be partisan political gerrymandering, that is not
2 a factual question. That is a legal question, isn't it?
3 Whether you can -- whether the constitution prohibits --
4 and, listen, I would dare say that most of us don't like
5 extreme partisan political gerrymandering, but that's --
6 we're not here about our personal preferences. We're here
7 because we have a job that is set, and we have certain
8 restraints placed on us by the North Carolina Constitution
9 and the Supreme Court.

10:23AM

10:24AM

10 And our Supreme Court has told us if we have any
11 reasonable doubt, we have to rule in favor of
12 constitutionality. And it seems to me the threshold
13 question before you get to the facts is can you, as a matter
14 of constitutional law, have extreme partisan -- or not even
15 extreme, can you have partisan gerrymandering in the state
16 without violating the constitution?

10:24AM

17 Because if the question is yes, because you're telling
18 me there's a difference between political and partisan, and
19 I read Harper v. Lewis as saying there's -- you can't have
20 partisan gerrymandering. I would read Common Cause v. Lewis
21 as saying no partisan gerrymandering. Now, in your
22 complaint, you use the term "extreme partisan
23 gerrymandering." What's the difference between partisan
24 gerrymandering and extreme partisan gerrymandering, from a
25 legal standpoint?

10:24AM

10:25AM

1 MR. SCHAUF: Right. So, I mean, I think the
2 reason why Common Cause and Harper used extreme partisan
3 gerrymandering is that that is sufficient to show a
4 violation of the Free Elections Clause and the other
10:25AM 5 provisions. They didn't hold it's necessary.

6 And, you know, we don't necessarily think it's
7 necessary, but I also don't think you need to agree with me
8 with me about that, because, again, what we have shown
9 through the evidence we've put in is that these maps render
10:25AM 10 elections in North Carolina a formality, because anytime you
11 have a statewide vote total within seven percentage points,
12 it bakes in a single result. And, you know, I think that is
13 an extreme partisan gerrymander by any measure, whether or
14 not that is required.

10:25AM 15 JUDGE SHIRLEY: All right. And I just want to
16 make sure, you are not arguing for a preliminary injunction
17 based off of any sort of racial gerrymandering, are you?

18 MR. SCHAUF: We have not. We've got racial
19 gerrymandering claims in our complaint. We have not moved
10:26AM 20 for a preliminary injunction on those claims.

21 JUDGE SHIRLEY: And, so, if we deny this motion
22 for preliminary injunction, when can we expect to see the
23 motion for preliminary injunction based off of racial
24 gerrymandering?

10:26AM 25 MR. SCHAUF: We have no plans right now to

1 file -- to be very precise, it's a claim about racial vote
2 dilution, not racial gerrymandering.

3 JUDGE SHIRLEY: Right.

4 MR. SCHAUF: But we're not filing right now. If
10:26AM 5 you rule against us on this today, we are not going to come
6 in here on Monday and be filing for a preliminary injunction
7 on those other claims. These are our preliminary injunction
8 claims, and we brought these because, you know, they are the
9 same legal theories as were at issue in Harper and Common
10:26AM 10 Cause, and we think we've got nearly the same facts.

11 JUDGE SHIRLEY: There are plenty of cases that
12 deal with the racial dilution claims that you couldn't
13 rely -- could rely on to seek a preliminary injunction,
14 aren't there?

10:26AM 15 MR. SCHAUF: There are in different contexts, but
16 this is the choice we've made in terms of what we are moving
17 on, and we think we've got quite clear evidence that this
18 does constitute all -- across all three maps, the same type
19 of extreme partisan gerrymander that you had in Common Cause
10:27AM 20 and Harper.

21 JUDGE SHIRLEY: And, so, you're asking us to
22 accept the rationale of the court in Common Cause and --
23 Common Cause v. Lewis and Harper v. Lewis as the standard
24 for determining whether political gerrymandering is
10:27AM 25 prohibited or permitted?

1 MR. SCHAUF: So, I think our view is that the
2 standards set forth in those cases is sufficient to show a
3 partisan gerrymandering in violation of the North Carolina
4 Constitution, and we think we have made the showing that it
5 was sufficient in those cases.

10:28AM

6 JUDGE SHIRLEY: Again, you're asking -- and that
7 was a standard never announced before in any appellate court
8 in North Carolina as it relates to partisan gerrymandering;
9 is that correct?

10:28AM

10 MR. SCHAUF: Well, so, I think, you know, that
11 was the partisan gerrymandering case --

12 JUDGE SHIRLEY: Okay.

13 MR. SCHAUF: -- in North Carolina, but it drew on
14 a deep well of North Carolina precedent from --

10:28AM

15 JUDGE SHIRLEY: I've read a lot of the precedent,
16 and there are -- a lot of those cases also have verbiage
17 that would run against you as well.

18 MR. SCHAUF: So, perhaps. I mean, it's hard to
19 say in the abstract, but what I can tell you is --

10:28AM

20 JUDGE SHIRLEY: It wasn't abstract. It's in
21 black and white, isn't it? It's the printed word.

22 MR. SCHAUF: Well, I mean, without knowing sort
23 of which printed words you mean. But what I can point you
24 to is *Quinn v. Lattimore* where the North Carolina Supreme
25 Court emphasized that under the Free Elections Clause, the

10:28AM

1 will of the people, the majority, legally expressed, must
2 govern.

3 JUDGE SHIRLEY: And tell me the factual
4 background of that case.

10:29AM

5 MR. SCHAUF: So, it was not a partisan
6 gerrymandering case. It was about a different issue.

7 JUDGE SHIRLEY: What issue was it about?

8 MR. SCHAUF: It was about, I think,
9 qualifications for particular office. I don't remember the
10 office.

10:29AM

11 JUDGE SHIRLEY: Was that the case where someone
12 was going to have to swear that they would -- that they
13 would have to vote for the member of their party that
14 they're registering for?

10:29AM

15 MR. SCHAUF: I don't recall whether that was that
16 case or whether it was a different case, but it did announce
17 that broad principle, which was reiterated in Hill v.
18 Skinner. The object of all elections must be to ascertain,
19 faithfully and truthfully, the will of the people. And
20 that, we think, is the fundamental thing that is problematic
21 with partisan gerrymandering.

10:29AM

22 When you have a partisan gerrymander, the point of
23 elections isn't to ascertain the will of the people, it's to
24 make the will of the people irrelevant and to entrench one
25 party in power.

10:29AM

1 JUDGE SHIRLEY: When you talk about the will of
2 the people, you're determining the will of the people from
3 how the state votes -- how the state votes on a partisan
4 basis statewide?

10:30AM

5 MR. SCHAUF: I don't think that's quite right,
6 because what we have done is we've taken it down to a
7 district-by-district level by looking at 52 general
8 elections going back over the course of the last decade and
9 then seeing -- you know, if, for example, you took the 2020
10 presidential election, then you attribute the votes there
11 that went to President Trump to the Republican candidate
12 under each district and you see what the outcomes are.

10:30AM

13 And, you know, that's where we get the figures that we
14 provide in our complaint and our motion, showing exactly how
15 thoroughly this election -- these maps entrench one party's
16 advantage. And this --

10:30AM

17 JUDGE SHIRLEY: Again, when we talk about the
18 will of the people, are you telling me if these -- we allow
19 these maps and the vote occurs and it happens as -- as you
20 project, that the will of the people that voted will not be
21 reflected in the results?

10:30AM

22 MR. SCHAUF: That's right. I mean, I think if
23 you have results like -- you know, take the 2020
24 gubernatorial election in North Carolina. Significant
25 democratic victory by almost five percentage points. But if

10:31AM

1 you project that across all three of these maps, it still
2 gives you, I think, ten Republican congressional seats, 26
3 or 27, a majority, of the Senate, and, I think, 62 House
4 seats.

10:31AM

5 And, you know, that, I think, is the archetype of
6 extreme partisan gerrymander, where you can have that be the
7 preference of the people expressed throughout the state and
8 yet have completely the opposite result under these maps.
9 In a way, again, and I think this is important --

10:31AM

10 JUDGE SHIRLEY: So when you look at the election
11 that won, you to look how much the Democrat candidate --
12 what percentage of the vote they received and how much the
13 Republican received?

14 MR. SCHAUF: That's right. So, you take --

10:31AM

15 JUDGE SHIRLEY: But -- but what you're saying --
16 by saying that, you're concluding that people vote based off
17 of the party and not on the individual.

18 MR. SCHAUF: Well, so, that's why we don't do
19 this just looking at a single election and, instead, our
20 expert aggregated 52 elections going back a decade. And you
21 get a really remarkable result. And when you look at all, I
22 think, 38 elections decided by a margin of seven points or
23 less, every single one of those delivers majorities in all
24 the chambers to the incumbent party, which is what we think,
25 you know, certainly is sufficient to show an extreme

10:32AM

1 partisan gerrymander, and in the way that is not dictated by
2 North Carolina's political geography or by traditional
3 districting principles.

10:32AM

4 And that, I think, is an important point. This is the
5 argument that you often hear on the other side and that, you
6 know, we've heard here, that the issue here is not partisan
7 gerrymandering, it's that Republicans are -- tend to be more
8 dispersed, Democrats tend to be more concentrated, and
9 that's why you see the results you see.

10:32AM

10 And, you know, Dr. Duchin's analysis proves that that's
11 not true. Instead, you can draw maps, as we have, that are
12 more compact, traverse fewer counties, break fewer
13 municipalities, and also treat both parties in a more fair
14 fashion, where, in almost every one of those 52 elections, I
15 think, with four exceptions in Congress and six in the
16 legislative maps, you get the party receiving a majority of
17 the votes also receiving a majority of the seats.

10:33AM

18 And that, you know, I think, just goes to so that this
19 is not something that is compelled by North Carolina's
20 political geography. It was a choice that was made, and I
21 think we think it is a choice that is inconsistent with the
22 North Carolina State Constitution.

10:33AM

23 JUDGE SHIRLEY: Does a Republican voter have a
24 right to be in a Republican district, to be placed in a
25 Republican district?

10:33AM

1 MR. SCHAUF: On an individual basis, you
2 obviously are always going to have some voters who are not
3 going to be able to elect the candidates they prefer,
4 because that's how districts work. But our fundamental
10:34AM 5 submission is that when you take the entire state and you
6 systematically structure the map so that the one party is
7 going to remain in control, even if voters reject that party
8 by significant margins, then that is the hallmark, or a
9 hallmark anyway, of a partisan gerrymander that is
10:34AM 10 inconsistent with the North Carolina State Constitution.

11 JUDGE SHIRLEY: Okay.

12 JUDGE POOVEY: Your argument is basically that
13 each party is entitled to proportional representation; is
14 that fair?

10:34AM 15 MR. SCHAUF: That is not correct, Your Honor.
16 Proportional representation means that if your party gets 40
17 percent of the vote, you should get 40 percent of the seats;
18 50 percent, 50 percent; 60 percent, 60 percent, and so on.
19 That is not our argument. We are -- we have no problem with
10:35AM 20 a map where one party maybe gets 55 percent of the votes,
21 they've got a great election, and they end up with 65, 70
22 percent of the seats. That's not our argument here.

23 Our -- the much more modest proposition we're advancing
24 is that when you have maps that systematically ensure one
10:35AM 25 party majority, even when they lose the popular vote by

1 significant margins, that is inconsistent with fundamental
2 democratic principles, particularly, again, when it is done
3 in a way that is not compelled by the state's political
4 geography or any neutral districting principle. And,
10:35AM 5 indeed, you can do better on all of those principles, as
6 we've shown, with a map that is also more fair.

7 Perhaps just as an illustration, I can put up our first
8 figure. And I don't think I'm going to go through nearly
9 all of these, but just to highlight graphically what we're
10:36AM 10 talking about here. These are some of the figures that --
11 one of the figures that our expert has produced. And what
12 you would see in a map that sort of perfectly translated
13 votes into seats is you'd be following one of these trend
14 lines, and, you know, they might be narrow -- shallower,
10:36AM 15 they might be steeper, but you would follow one of them, and
16 you cross at the origin where you'd get a majority of
17 seats -- a majority of votes translating into a majority of
18 seats.

19 But what you see instead in the congressional map is
10:36AM 20 Democratic congressional candidates -- these are the red
21 dots at the bottom -- parked at four seats, maybe five if
22 they get very lucky. And the place where you start to see
23 the possibility of getting a tie is not until you are around
24 54 percent of the two-party vote.

10:36AM 25 That is nearly identical to the map that was enjoined

1 in Harper where, I think, the number was 55 percent. And,
2 again, we think this is -- this is a mark of an extreme
3 partisan gerrymander. But it's not just a matter of what's
4 done in terms of the statewide map, it is effectuated by
10:37AM 5 some classic gerrymandering tactics.

6 Stephen, if you could do the Mecklenburg map. So, this
7 is a classic pack and crack where you have Democratic voters
8 in Charlotte packed into District 9, as many as possible, so
9 that then you can crack the remainder out into District 13,
10:37AM 10 which then stretches far west to accumulate enough
11 Republican areas to overcome their votes. And, basically,
12 the same thing on the east in District 8. And, you know,
13 even more so, I think you can see this in Guilford.
14 Stephen, if you could switch it to Guilford.

10:38AM 15 So this, again, is some classic -- the classic tools of
16 partisan gerrymandering, cracking one of the three biggest
17 Democratic strongholds in the state, currently represented
18 by a Democratic congressperson, into three districts where
19 the voters cannot affect any of these elections. So, you
10:38AM 20 see downtown Greensboro in District 11 cracked up. And, you
21 know, we don't have this on the figure, but it stretches all
22 the way far west to the Tennessee border.

23 District 7, the same one we were talking about a minute
24 ago, picks off a few of the Democratic voters on the east
10:38AM 25 and submerges them into a very Republican district that's

1 drawn to have Republican majority. And then last, in
2 District 10, you can see how High Point is split off where
3 you have one of these shapes that, again, is your sort of
4 classic gerrymandering shape. We don't get all of this on
10:39AM 5 this figure, but it sort of snakes off and then takes a
6 90-degree turn south just off the map.

7 And the results of all of this are, you know, what
8 we've talked about, an entrenched Republican majority that
9 is nearly impervious to any plausible electoral outcome that
10:39AM 10 you are going to have in a 50/50 state like North Carolina.

11 Now, I've been up here for a while, and, you know,
12 we've got similar figures we could show for the other maps,
13 but those figures all come from our briefs and from our
14 verified complaint. So, I think I'm inclined to, you know,
10:39AM 15 sort of leave it there unless the panel has further
16 questions that, you know, I can address, and, you know,
17 emphasize that we think that all three of these maps are
18 partisan gerrymanders that violate the North Carolina
19 Constitution and that we have shown a likelihood of success
10:39AM 20 across all three of these maps.

21 JUDGE SHIRLEY: Those maps are congressional
22 maps?

23 MR. SCHAUF: These maps are congressional maps.
24 When I say "all of these maps" --

10:40AM 25 JUDGE SHIRLEY: Okay.

1 MR. SCHAUF: -- I mean Senate and House and
2 Congress. And I am happy to go through sort of blow by blow
3 the other maps, but I'm also respectful of the Court's time
4 and mindful that we have two cases and four sets of lawyers.

10:40AM

5 JUDGE POOVEY: Do you have the map that your
6 experts put forth?

7 MR. SCHAUF: We have it, but we didn't blow it
8 up.

9 JUDGE POOVEY: Sorry?

10:40AM

10 MR. SCHAUF: It's in the record. We have not
11 blown it up. If there's no further questions, I'll let my
12 colleague proceed.

13 JUDGE SHIRLEY: All right.

14 MR. SCHAUF: Thank you.

10:41AM

15 MS. THEODORE: Good morning, Your Honors.

16 JUDGE SHIRLEY: Good morning.

17 MS. THEODORE: I'm Elisabeth Theodore on behalf
18 of the Harper plaintiffs. North Carolina's congressional --

19 THE REPORTER: You need to speak up, please. I
20 can't hear you.

10:41AM

21 JUDGE SHIRLEY: You can take your mask off.

22 MS. THEODORE: Sorry about that. If I sit down,
23 I might be a little closer to the microphone.

24 JUDGE POOVEY: Maybe you could move the
25 microphone up and move it a little closer to you.

10:41AM

1 MS. THEODORE: Is this better?

2 JUDGE POOVEY: Yes.

3 MS. THEODORE: Thank you. North Carolina's
4 congressional plan is an extreme partisan gerrymander that
10:41AM 5 predetermines elections and guarantees ten or sometimes 11
6 seats for Republicans and three or four seats for the
7 Democrats. And in 2016, the Legislative Defendants passed a
8 map that they said was the best they could do. They said it
9 was the most extreme possible gerrymander for North
10:41AM 10 Carolina's congressional districts. It was ten Republican
11 seats and three Democratic seats.

12 After Harper I struck it down, they passed an 8-5 map.
13 And now, after North Carolina gained a 14th seat because of
14 overwhelming population growth in Democratic-leaning areas,
10:42AM 15 it passed another map that guarantees ten seats to the
16 Republicans. Just like in 2016, that is the most extreme
17 possible gerrymander in North Carolina's congressional maps.

18 And they didn't try to hide what they were doing. They
19 cracked the three largest Democratic counties in North
10:42AM 20 Carolina, Wake, Mecklenburg, and Guilford. There's no
21 population-based reason for that. They cracked the Piedmont
22 Triad to cause three districts so that none of these
23 overwhelming Democratic cities have a Democratic
24 representative in Congress.

10:42AM 25 There was no community- and interest-based reason to do

1 this. These cities share an airport. They share a media
2 market. They share a newspaper. They double bunked
3 Representative Manning and Representative Foxx into an
4 overwhelmingly Republican district. And as the red-blue
10:42AM 5 maps that we've included in our preliminary injunction
6 motion show, every district was carefully drawn to crack and
7 pack Democratic voters.

8 And we've put forward overwhelming statistical evidence
9 from Dr. Pegden and Dr. Chen confirming this. Both of their
10:43AM 10 analyses were accepted by the Common Cause court. They were
11 subjected to search and cross-examination by the Legislative
12 Defendants. Dr. Pegden concludes that the enacted map is
13 more carefully crafted to favor Republicans than over 99.99
14 percent of billions of comparison maps that he generated by
10:43AM 15 making tiny random changes to the precincts at the borders
16 of the districts. In other words, you touch the map, and it
17 starts to break down.

18 And to be clear, he was following the same constraints
19 that the legislature offered in its redistricting criteria.
10:43AM 20 No more county splits, no more precinct splits, no more
21 municipality splits than the enacted map did, and it
22 protected the same incumbents in the enacted map.

23 The one thing that he did slightly differently was
24 population because of the way his system works. By swapping
10:44AM 25 precincts, he doesn't get down to person-by-person

1 population, but he verified that the difference between 2
2 percent and 1 percent population deviation, both of which he
3 did, doesn't -- mathematically can't make a difference, and
4 it can't be that the difference between the 1 percent, which
10:44AM 5 was his lowest threshold, and the zero plus or minus one
6 person in the enacted map explains the partisan bias. And
7 as I said, his very similar analysis, identical analysis,
8 was given great weight by a unanimous court in Common Cause.

9 Dr. Chen's analysis confirms the same thing. He's one
10:44AM 10 of the foremost academic experts on using simulations to
11 evaluate maps, and his testimony has been repeatedly
12 accepted, including in Common Cause and in Harper.

13 And, ultimately, the hallmark of an effective
14 gerrymander is that you want to spread your votes across as
10:44AM 15 many districts as possible while still retaining enough
16 edge --

17 THE REPORTER: I'm sorry. Can you slow down?

18 MS. THEODORE: Yes. I said ultimately the
19 hallmark of an effective gerrymander is you want to spread
10:45AM 20 your votes across as many districts as possible while still
21 retaining as much edge to win in all of them. So, you want
22 districts -- as many districts as possible that safely favor
23 your party, but not by overwhelmingly large margins.

24 And so, Dr. Chen looked at the most -- the ten
10:45AM 25 most-Republican districts. He finds that in the enacted

1 plan, they have Republican vote shares using a composite of
2 elections in this narrow range of 52.9 percent to 61.2
3 percent. So, that's the product of packing Democrats in the
4 Democratic districts and then unpacking Republican votes
10:45AM 5 from districts that would be naturally packed Republican
6 districts to enable these ten safe districts.

7 And he finds that this is an extreme statistical
8 outlier. Not a single one of his 1,000 random simulated
9 plans comes close to creating ten districts in this range of
10:46AM 10 safe but not too packed for the Republicans. And virtually
11 all of his plans only create two to six such districts. And
12 that's what makes this gerrymander so extreme.

13 What those ten districts do is it enables the plan to
14 stick with ten Republican districts, essentially, regardless
10:46AM 15 of Democratic performance. And so, if you look at the
16 Governor Cooper election in 2020 where the Democrats had a
17 4.5 percent margin -- and this is at page 62 of his
18 report -- the enacted plan still produces ten Republican
19 districts. And not a single one of his 1,000 simulated
10:46AM 20 plans produces ten. Most produce seven or eight Republican
21 districts and some produce only six.

22 And so, again, precisely in the circumstances where it
23 matters most, in the elections where the Democrats convince
24 a lot of people to vote for them, the map subverts the will
10:47AM 25 of the people. So, those are the facts. We think it's

1 clear beyond any reasonable doubt that this is an extreme
2 partisan gerrymander.

3 On the law, the Court held in Common Cause, which we
4 would ask this Court to follow because we think it's correct
10:47AM 5 and persuasive, that extreme partisan gerrymandering
6 violates the constitution. The U.S. Supreme Court in Rucho
7 said that state courts can apply state constitutions to
8 strike down gerrymander congressional plans, and we think
9 the Court should do that here.

10:47AM 10 JUDGE SHIRLEY: Well, they can use them so long
11 as the state constitutions allow you to strike it down.
12 They weren't just saying we're not going to do it, you do
13 it. You can only do it if your constitution allows you to.

14 MS. THEODORE: Of course, Your Honor. But what
10:47AM 15 the court -- what Chief Justice Roberts said is that
16 partisan gerrymandering claims are not, I think he said,
17 condemned to sound in the void because state constitutions
18 can protect against them. That's what he said.

19 And the court in Common Cause held that it's clear that
10:48AM 20 extreme partisan gerrymandering violates the Free Elections
21 Clause. I don't want to repeat too much what Mr. Schauf
22 said, but, you know, the court said, and this is clearly the
23 purpose of the Free Elections Clause, that when partisan
24 actors are specifically systematically designing,
10:48AM 25 manipulating the contours of election districts for partisan

1 gain to preserve power, that elections aren't free under
2 that circumstance. Elections aren't freely ascertaining the
3 will of the people when, under any natural circumstances,
4 you could have two or three or four more seats for a
10:48AM 5 particular party than you get as a consequence of the
6 manipulation by the legislature.

7 On the Equal Protection Clause, the court held in
8 Common Cause that the right to vote on equal terms is a
9 fundamental right under the North Carolina Equal Protection
10:48AM 10 Clause. The Supreme Court of North Carolina has held the
11 exact same thing. Stephenson held that the Equal Protection
12 Clause requires substantial equal voting power, and it's not
13 enough to say that everyone gets to cast their vote. If it
14 were enough just to say that, Stephenson would not have
10:49AM 15 struck down the districts that had a single member and
16 multimember districts in the same -- in the same district.

17 Multiple North Carolina Supreme Court opinions have
18 held that the Equal Protection Clause is broader in North
19 Carolina than in the U.S. Constitution, including
10:49AM 20 specifically in the context of voting rights.

21 JUDGE SHIRLEY: I do recall in Stephenson,
22 Justice -- then-Justice Orr said, well, that is the case.
23 That was -- Stephenson v. Bartlett is one of the few times
24 that that court had exercised that authority to interpret
10:49AM 25 the North Carolina -- while you can, the North Carolina

1 Equal Protection Clause greater than the U.S. Equal
2 Protection Clause.

3 MS. THEODORE: Well, I don't think -- I don't
4 think it's done it a lot of times, but it's certainly does
10:49AM 5 it several times in important election contexts that are
6 analogous to this context. So, for example, in the context
7 of -- like the case that held that judicial elections in
8 North Carolina have to follow one-person-one-vote even
9 though the U.S. Constitution doesn't require that. And,
10:50AM 10 again, the Stephenson v. Bartlett holding about finding
11 combining multimember and single-member districts.

12 JUDGE SHIRLEY: But most of these were looking at
13 the effects that the then-existing laws had on the ability
14 of African-Americans to vote and to ensure that they had
10:50AM 15 equal representation with other citizens in the state; is
16 that correct?

17 MS. THEODORE: I don't think that's what
18 Stephenson said. I think Stephenson said that, you know,
19 your ability to affect your representative and to have
10:50AM 20 representation, you know, is significantly and unfairly
21 enhanced compared to your fellow citizens if you have
22 several members representing you as opposed to one. It
23 wasn't in the context of racial discrimination.

24 They held that voting is a fundamental right under the
10:51AM 25 Equal Protection Clause, and it wasn't -- it wasn't in the

1 context of saying that it was discriminating against
2 African-Americans.

3 And so, you know, the court from Common Cause adopted
4 a --

5 THE REPORTER: I'm sorry. You have to repeat
6 that.

7 MS. THEODORE: The court from Common Cause
8 adopted a three-part test for finding a violation of the
9 Equal Protection Clause. They said if the predominant
10 purpose is to entrench the party in power by diluting votes
11 and it has the intended effect of substantially diluting
12 votes, then unless the legislature comes forward with a
13 legitimate justification and compelling justification, it's
14 unconstitutional.

10:51AM 15 And here, for the reasons I've explained, we've
16 satisfied, very clearly satisfied, all of those standards.
17 And equally for the reasons in our brief, we've explained
18 why the law violates the free speech and assembly
19 requirements.

10:51AM 20 I'd like to respond based on the proportional
21 representation question. Common Cause addresses this and
22 explains why precisely the same arguments, using the same
23 experts, that we're making in this case don't require
24 proportional representation. And I think you could just
10:52AM 25 look, for example, at Dr. Chen's chart number B2. So, he's

1 showing that the natural non-gerrymandered outcome in North
2 Carolina of an essentially 50/50 election might be eight or
3 nine Republican seats under certain circumstances. He's not
4 saying it has to be seven, but that it's never ten. Or it's
10:52AM 5 almost never ten, when it's 50/50. When it's 50/50.

6 I think the irreparable harm here is clear. The
7 voters, millions of North Carolina voters, will again be
8 forced to vote in districts where they have no meaningful
9 chance to elect a representative. And as Common Cause and
10:52AM 10 as Harper held, that clearly trumps the kinds of interests
11 that the Legislative Defendants have put forward.

12 And, you know, I would also say I think with respect
13 to -- with respect to an injunction, there's clearly time to
14 do it. In the Harris case, the federal district court
10:53AM 15 enjoined the North Carolina congressional primaries one
16 month before the scheduled March primary. In Stephenson,
17 the North Carolina Supreme Court enjoined the state
18 legislative plans two months before the primary. So, this
19 Court clearly has the ability to issue an injunction here
10:53AM 20 protecting constitutional rights.

21 I'd be glad to address some of the Legislative
22 Defendants' arguments about the elections clause or
23 justiciability or any other arguments if the Court likes,
24 or --

10:53AM 25 JUDGE SHIRLEY: You'll have an opportunity after

1 they argue.

2 MS. THEODORE: Thank you, Your Honor.

3 JUDGE SHIRLEY: Why don't we take a ten-minute
4 recess before we hear from the defendants.

10:54AM

5 THE BAILIFF: Court will stand in recess for ten
6 minutes.

7 (A recess was taken from 10:54 a.m. to
8 11:11 a.m.)

11:11AM

9 JUDGE SHIRLEY: All right. We will hear from the
10 Legislative Defendants.

11 MR. STRACH: Your Honor, good morning. Phil
12 Strach. Your Honor, we believe that Stephenson expressly
13 allows partisan advantage in redistricting. But what's
14 remarkable about the redistricting that occurred this time
15 around is that the legislature handcuffed themselves. They
16 realized that they could pursue partisan advantage, but they
17 did multiple things to literally handcuff their ability to
18 pursue partisan advantage. The first thing they did --

11:11AM

19 JUDGE SHIRLEY: Mr. Strach, one of the real
20 ironies is in Stephenson, they quote a Wall Street Journal
21 article talking about how bad redistricting is and
22 gerrymandering is in North Carolina, don't they?

11:12AM

23 MR. STRACH: They do.

24 JUDGE SHIRLEY: And on this past Wednesday, the
25 Wall Street Journal once again ran an article talking about

11:12AM

1 partisanship. And the Wall Street Journal talked about the
2 non-partisan group out of Princeton that looks at district
3 maps, and it talked about four states that were given an F,
4 one of which is North Carolina.

11:12AM

5 And the real irony is the state that the Wall Street
6 Journal holds up as maybe being the beacon of light as to
7 how we should go forward, of all states, is California,
8 saying that California is better -- well, is much better
9 than North Carolina in this process.

11:12AM

10 MR. STRACH: My response to that, Your Honor, is
11 thank God we don't let journalists and academics decide the
12 law in our state.

11:13AM

13 JUDGE SHIRLEY: Well, how -- if probably the one
14 news outlet that is most favorable to Republicans on a
15 national basis talks about North Carolina getting an F, how
16 in the world did that occur when the legislature cuffed
17 their hands going back in to draw the maps?

11:13AM

18 MR. STRACH: Your Honor, the Princeton
19 gerrymandering methodology is like a black hole. I don't
20 think anybody really understands it. We have no idea how
21 they're measuring that. We have no idea what they're using.
22 We don't know what their formula is. And so, it's just like
23 Dr. Chen's materials, these are black box algorithms, and
24 it's garbage in, garbage out. However you want it to score
25 the map, you can make it score the map that way. So, I

11:13AM

1 can't speak to that because I have no idea what they do or
2 how they do it.

3 JUDGE SHIRLEY: What's -- this shows my
4 ignorance. What is the congressional breakdown in North
11:13AM 5 Carolina now in terms of Republican versus Democratic? Is
6 it 8-5?

7 MR. STRACH: It's currently 8-5. Correct. So,
8 but, Your Honor, they did handcuff themselves. There are
9 lots of things they could have done that could have produced
11:14AM 10 a map that was much more partisan than however this maps
11 turns out to be. We don't really know that until we
12 actually hold elections under it. Nobody has a crystal ball
13 and can make accurate predictions about what's going to
14 happen.

11:14AM 15 Political coalitions change. No one would have
16 believed that Robeson County would be a deep red county. No
17 one. If I had stood up and said that eight years ago,
18 they'd have laughed at me. No one would have thought that
19 some of counties in the northeastern part of this state
11:14AM 20 would flip from deep blue to deep red in just eight years.
21 No one would have believed that. So, the political
22 coalitions change. We have no idea how any of these
23 districts are going to perform in 2022 or, certainly, not in
24 2030, down the road.

11:14AM 25 So but what they did to ensure as fair and transparent

1 a process as possible, they did this completely in the open.
2 They literally -- and the Court can go to the legislature's
3 website and see the livestream. They opened up the
4 committee room and had the cameras on. All the computer
11:15AM 5 screens were on the camera. They had open mics in the room
6 to pick up conversations.

7 And let me just tell you this, because I've been
8 working around redistricting stuff for a long time.
9 Legislators of both parties in other states would rather be
10 shot than to have to draw maps in the open like that. They
11 would rather be shot. They would never do it. We may be
12 the only state in the nation that does it that way.

13 And, so, literally, if the Senate redistricting
14 chairman went in there and starting messing around with VTDs
11:15AM 15 and drawing maps, it was all in the public. And you would
16 know that because if you read Twitter, what would happen is
17 they'd start moving VTDs around and it would be popping up
18 on Twitter. People would be commenting on it in real time.
19 People had the ability literally to influence the districts
11:16AM 20 in real time because it was done in the public that way.

21 So, we think North Carolina legislators should be
22 applauded and commended for this, because it was -- it takes
23 a lot of courage in a process which you could keep secret to
24 nonetheless do it in the open. The other thing is they
11:16AM 25 didn't use any election data. There was no election data

1 loaded into the machine.

2 Now, the legislative leadership did not say to all the
3 Republicans, okay, before you sit down in front of that
4 computer terminal, you have to go have a lobotomy and take
11:16AM 5 out all your political knowledge. Nobody expected them to
6 do that, and that wouldn't be fair. But they didn't have
7 any election data.

8 And the reason that's a key difference is because in
9 the past in redistricting, what would happen is you'd have
11:16AM 10 the election data loaded into the computer, and if you --
11 and that election data would allow you to score partisanship
12 down to the VTD level. So as you move VTDs around on the
13 computer screen, you could see how it shifted the
14 partisanship of that district in real time and you could
11:17AM 15 score it.

16 JUDGE SHIRLEY: Well, with respect to the
17 legislature's -- legislators that would go in and sit down
18 at the terminal, how many focused solely on the districts
19 that they knew and how many -- you know, did people from the
11:17AM 20 west go out and look at the east and --

21 MR. STRACH: The tape would tell the tale on
22 that, Your Honor. I don't know. I haven't watched all the
23 video. But I do know that the leaders of the committees
24 would go in there and draw entire maps. So, you could
11:17AM 25 literally see, say, the House redistricting chairman,

1 Representative Hall, you could literally see him sit and
2 draw the map. And I think he drew it in sections. And so,
3 that was live, that was, you know, real time.

11:17AM

4 JUDGE LAYTON: Where did the legislators get the
5 base maps they started with in that process?

11:18AM

6 MR. STRACH: They start off with a clean slate.
7 It was a clean slate. They went in there with an empty map
8 and they went in there and they drew it. Now, they
9 obviously had stuff in their heads, right? They had ideas.
10 They had concepts. Redistricting requires you to kind of go
11 in with sort of at least an overall plan, kind of how are we
12 going to do this, because it's very complicated, but they
13 didn't carry any prior work in there with them. They just
14 started from scratch. And then the public was able to watch
15 how it developed.

11:18AM

16 JUDGE SHIRLEY: Well, I think the complaint,
17 verified complaint, alleges they took -- take notes in.

11:18AM

18 MR. STRACH: I'm not aware of that. I know some
19 Democrats did. I'm not aware of Republicans that did. They
20 certainly didn't bring draft maps in there, that I'm aware
21 of. I'm sure if there was specific video to the contrary,
22 it would have been pointed out. But I'm not aware of that.
23 And so, it was a very transparent process.

11:19AM

24 And so, what they were not able to do is when
25 Chairman Hall was sitting there on the computer moving VTDs

11:19AM 1 around, unlike in the past when we could have seen, oh, wow,
2 this makes it more Republican, this makes it more
3 Democratic, he couldn't see that. He might have a
4 guesstimate in his mind as what the politics would be, but
5 he couldn't use any data to -- as Plaintiffs have said in
6 the past, to engineer the districts, to squeeze every bit of
7 partisanship out of them that you could get. That was not
8 possible to do this time, and it was not done.

11:19AM 9 So, the other thing that was done this time, that's
10 much different than prior years, there were detailed
11 explanations given in public, in committee meetings, on the
12 floor of the Senate, on the floor of the House on why the
13 districts were drawn the way they were. In the past, the
14 leader, the legislative leadership, if they wanted to, they
15 didn't have to explain anything. They just come in there,
16 drop the map, call the vote. It's done.

11:20AM 17 JUDGE SHIRLEY: How did the congressional
18 districts from a Republican versus Democrat standpoint stack
19 up to what was originally proposed that the Harper v. Lewis
20 court struck down?

21 MR. STRACH: The composition of the congressional
22 delegation at the time of the Harper case, I think, was ten
23 Republicans, three Democrats.

11:20AM 24 JUDGE SHIRLEY: And now it would be, under these
25 proposed maps? Or these maps, they're not proposed anymore.

1 MR. STRACH: Well, the plaintiffs claim it's
2 10-4. I have no idea, but we'll see. We'll see what
3 happens in 2022.

11:20AM

4 JUDGE SHIRLEY: Well, you can certainly determine
5 that by running numbers, can't you?

6 MR. STRACH: You could guess. I have no idea.

7 JUDGE SHIRLEY: No -- you're telling me no one's
8 guessed?

11:20AM

9 MR. STRACH: Yeah, they have. People have
10 guessed 9-5, 10-4, 11-3. The guesstimates are all over the
11 board.

12 JUDGE SHIRLEY: Are there any guesstimates in
13 favor of the Democrats?

11:21AM

14 MR. STRACH: I haven't seen any. No, that's a
15 fair point, but I haven't seen it.

16 JUDGE SHIRLEY: I would assume you -- your -- the
17 legislature's position is they can engage in partisan
18 gerrymandering?

11:21AM

19 MR. STRACH: The legislature's position is that
20 Stephenson allows them to redistrict for partisan advantage.

21 JUDGE SHIRLEY: Can they do it for extreme
22 partisan advantage?

11:21AM

23 MR. STRACH: I have no idea what that means,
24 Your Honor. There is no definition of that. I have no
25 idea. The legislature can't answer that. Nobody can answer

1 that. Dr. Chen tries to answer that; Ms. McKnight will tell
2 you why he can't. But no one knows the answer to that
3 question.

11:21AM

4 What people do is they take data, Your Honor, and they
5 plug it into these black box algorithms that they can rig on
6 the front end with the criteria that they use to spit the
7 results out. It's just rigged. It's garbage in, garbage
8 out. You feed it the criteria you want it to feed, and it's
9 going to spit out the results that you want it to give.

11:21AM

10 And when this case goes to trial, the Court will see a
11 lot of evidence on that and why that's the case here. But
12 at the end of the day, people are just guessing. They're
13 just flat-out guessing. And the reason -- and they're not
14 only guessing, but they're often guessing wrong, because the
15 political coalitions shift so much over the course of a
16 decade that the map that you pass in 2021 could be a
17 completely different map in 2030. I would remind you --

11:22AM

18 JUDGE SHIRLEY: Yeah, but legislators who face
19 election every two years, when they go sit down at the
20 terminal, they have a greater understanding what the
21 political realities are in their district at the time they
22 sit down, and I would almost guarantee you weren't relying
23 on what made the data in 2000 or 2010.

11:22AM

24 MR. STRACH: Well, certainly, legislators know
25 their own areas. And the criteria here took that into

11:22AM

1 account. It didn't bar legislators from using their local
2 knowledge about the local areas and the local communities,
3 and not just in a partisan way, but in any way.

11:23AM

4 In lots of areas of the state, there's communities that
5 have typically been grouped together in redistricting, and
6 the local people know that, and they know where the
7 communities are. They know the neighborhoods, and they know
8 where the churches are, and they've got all that local
9 knowledge. That was allowed to be used, and I'm sure it was
10 used, but that wasn't a solely partisan thing.

11:23AM

11 And so, yeah, the local -- the local legislators sit
12 down at the computer and mess around with it and draw
13 something.

11:23AM

14 JUDGE SHIRLEY: So, what were the -- what was the
15 criteria given to the legislators that they were required to
16 use?

11:23AM

17 MR. STRACH: So, those are in the record,
18 Your Honor. They were passed in August. And so, they said
19 no election data. And as to the legislative maps, they had
20 to follow the Stephenson requirements. They had a threshold
21 for compactness.

22 JUDGE SHIRLEY: When you say "follow the
23 Stephenson requirement," you mean creating the VRA districts
24 first and then --

11:24AM

25 MR. STRACH: That would be following the whole

1 county construction rules that Stephenson laid out.

2 JUDGE SHIRLEY: And the first rule is you create
3 your VRA districts first?

4 MR. STRACH: That's -- whether that's a rule or
11:24AM 5 not, I would argue that recognizes the supremacy of federal
6 law.

7 JUDGE SHIRLEY: Well, that's what Chief Justice
8 Lake said, here's the way you're to do it.

9 MR. STRACH: Right. He laid out a series of
11:24AM 10 construction rules for constructing districts. It wasn't
11 necessarily a process, it was basically construction.
12 Because that's what you do with districts, you literally
13 build them VTD by VTD. And that's what -- the court kind of
14 provided a roadmap for how you do that. So, they had to do
11:24AM 15 that.

16 They also had a criteria that strove to keep
17 municipalities whole. If you look at the congressional map
18 in this case, out of 500-and-some municipalities, only two
19 are split. That is remarkable. I can guarantee you that's
11:24AM 20 never been done in the history of North Carolina
21 redistricting. And, Your Honor, the criteria that we're
22 talking about in August is Exhibit 8 to our brief, and
23 they're all laid out there.

24 So, there was an attempt to keep municipalities whole,
11:25AM 25 there was a threshold, sort of a floor, for compactness, and

1 they were allowed to consider incumbency and where members
2 lived. And then they were allowed to use local knowledge.
3 But even that, Your Honor, was subordinate to all the other
4 criteria, because it said so long as a plan complied with
11:25AM 5 all the other criteria, you could use local knowledge of the
6 community.

7 JUDGE SHIRLEY: Going back to Stephenson, I mean,
8 it was a mandate, wasn't it, that VRA districts be
9 required -- created first?

10 MR. STRACH: To the extent, Your Honor, you could
11 read Stephenson to require VRA districts in priority in
12 terms of chronologically like literally drawing them first,
13 I don't think that's necessarily what Stephenson says.

14 JUDGE SHIRLEY: Well, it says, "On remand, to
11:26AM 15 ensure full compliance with federal law, legislative
16 districts required by the VRA shall be formed prior to
17 creation of non-VRA districts." So, that's temporal. If
18 there are VRA districts that are required to be created,
19 you've got to create those before you do the non-VRA.

20 MR. STRACH: Your Honor, that's a reasonable
21 interpretation. I think it could be interpreted otherwise.
22 In fact, the Covington court didn't know how to interpret
23 it, and they dropped a footnote saying they expressed no
24 opinion about that.

11:26AM 25 I would note, though, it also says that you -- to the

1 extent it is temporal and chronological, it's only -- you
2 only have to do it for the districts that are required by
3 the VRA.

4 JUDGE SHIRLEY: Right.

11:26AM

5 MR. STRACH: And so, obviously, the legislature
6 didn't believe there were any required by the VRA.

7 JUDGE SHIRLEY: Wouldn't you have to look at
8 racial data before you come to that conclusion?

11:26AM

9 MR. STRACH: No, Your Honor, I don't believe you
10 would. And I appreciate the opportunity to address this
11 again. When you look at the racial issue, which I
12 understand are not really at issue in this case --

13 JUDGE SHIRLEY: I understand that.

11:27AM

14 MR. STRACH: -- but it is helpful to understand
15 that, you know, we've briefed the litigation that occurred
16 over the last decade, and there's a tension between the
17 Voting Rights Act and the Equal Protection Clause.

18 JUDGE SHIRLEY: Absolutely.

11:27AM

19 MR. STRACH: And some would say it's more than a
20 tension, it's an outright conflict. And so, if you look at
21 racial data, there's a significant chance that just looking
22 at it -- it's kind of like a discrimination case. Somebody
23 applies for a job, and they tell you, I've got bipolar
24 disorder, then they don't get hired. What are they going to
25 say? Well, I didn't get hired because I told you I had

11:27AM

1 bipolar disorder.

2 If you look at the racial data, then you're
3 automatically accused of violating the Equal Protection
4 Clause. You looked at it, you --

11:27AM

5 JUDGE SHIRLEY: It has to be a predominant
6 factor.

7 MR. STRACH: It has to be a predominant factor.
8 But that's a mushy standard. It's very easy to be accused
9 of that. So, you don't want to look at it unless you really
10 think you have to. And what we learned in the last decade
11 was the courts repeatedly told us, no, you don't need it,
12 because there's not legally significant racially polarized
13 voting.

11:28AM

14 JUDGE SHIRLEY: That was in certain districts.
15 That was in districts where there was alleged to be packing,
16 and they said no, no need to pack, that's using racial data,
17 and because there's no racially polarized voting, you don't
18 meet the third prong of the Gingles test.

11:28AM

19 MR. STRACH: Right.

11:28AM

20 JUDGE SHIRLEY: So that district is not a VRA
21 district.

22 MR. STRACH: Right.

23 JUDGE SHIRLEY: It didn't say there were no VRA
24 districts in the state, it just said that particular
25 district is not a VRA.

11:28AM

1 MR. STRACH: Well, they said that, though,
2 Your Honor, all over the state. They were at least 28 at
3 issue in the Covington case. And then in the Harper and
4 Common Cause litigation, the court did an analysis that
11:28AM 5 looked at districts all over the state. Not 100 percent of
6 the state, to be fair, but all over the state.

7 So, the message was pretty loud and clear. The Gingles
8 factors are not going to be satisfied pretty much anywhere
9 in the state. And so, then we got to this redistricting
11:29AM 10 with the 2020 data, and we had plaintiffs' lawyers, not
11 these plaintiffs' lawyers, other plaintiffs' lawyers,
12 sending us letters where they were admitting, hey,
13 African-Americans are being elected in districts under 50
14 percent.

11:29AM 15 Well, that on its face shows us that the Gingles
16 preconditions are going to be met. So, why would we look at
17 race and run the risk of an equal protection challenge when
18 everything we're being told all along is, hey, you don't
19 need to look at race?

11:29AM 20 JUDGE SHIRLEY: I'm sorry I got us off track with
21 the VRA.

22 MR. STRACH: Thank you. I appreciate you asking
23 that, Your Honor, because I actually -- I didn't think I
24 gave a good enough explanation the other day. So, I
11:29AM 25 appreciate the opportunity to do it today.

1 But the point being, Your Honor, I think -- I say all
2 this to say I think we need to maintain some perspective
3 here. No one does redistricting in North Carolina like we
4 do it here in terms of the transparency, not using election
11:30AM 5 data, and then giving fulsome explanations in public of why
6 the districts look the way they do. And all this
7 information is on the legislature's website. We've cited to
8 it in our briefing. You can go click the link, and you can
9 get a full explanation.

11:30AM 10 And so, when the constitutional standard is beyond a
11 reasonable doubt and you've got the evidence that they did
12 it in the open, no election data, and they gave all these
13 explanations, which the plaintiffs have not engaged with
14 those explanations, they haven't said, oh, those are a
11:30AM 15 lie --

16 JUDGE SHIRLEY: But they argue that we're at a
17 preliminary injunction and beyond a reasonable doubt doesn't
18 apply.

19 MR. STRACH: I think that's incorrect. I don't
11:30AM 20 think the preliminary injunction standard can overrule the
21 standard of proof or the burden of proof that the Supreme
22 Court says applies in these cases.

23 JUDGE SHIRLEY: All right. Once again, unless
24 you're a member of the press, please do not take photographs
11:30AM 25 with your phone. Members of the press may. Go ahead.

1 MR. STRACH: Thank you, Your Honor. So, my
2 presentation initially was just really to try to create that
3 I think we should maintain perspective. It really is done
4 uniquely different in a more transparent and fair way in
11:31AM 5 North Carolina than anywhere in the country, even
6 California.

7 JUDGE SHIRLEY: Then how do you explain what
8 the -- the plaintiffs have said if you look at results of
9 this redistricting, they are substantially similar to what
11:31AM 10 the Harper and Common Cause courts called unconstitutional
11 because of partisan gerrymandering.

12 MR. STRACH: Number one, we obviously disagree
13 with those rulings.

14 JUDGE SHIRLEY: And Common Cause v. Lewis was a
11:31AM 15 final judgment. A final judgment was entered; is that
16 correct?

17 MR. STRACH: That's correct.

18 JUDGE SHIRLEY: And no one appealed that?

19 MR. STRACH: No.

11:31AM 20 JUDGE SHIRLEY: And Harper v. Lewis was an
21 interlocutory order, there's no final judgment?

22 MR. STRACH: Right. I'm trying to remember, Your
23 Honor, if they actually enjoined the map. What they did is
24 they entered an injunction. They may have enjoined the
11:32AM 25 filing period or something. I'm trying to remember exact.

1 But in Harper, it is important to note the legislature
2 voluntarily redrew the map. The court said, hey, we're
3 going to have a summary judgment hearing, it's going to be
4 pretty quick, and so, the legislature decided, for the sake
5 of the voters, for the sake of finality, they said, we'll
6 just redraw the map. And that's what they did, and the
7 court approved it.

8 And so, now, I think it's interesting to note that, for
9 the Court, on the legislative districts, the legislative
10 redraw was ultimately approved by the Common Cause court.
11 Okay? We had some litigation over that, and the plaintiffs
12 in that case challenged the redrawn -- a bunch of the
13 redrawn districts, and they didn't challenge others. They
14 challenged some. The Common Cause court approved those.
15 That was not appealed.

16 So, elections were held under the redrawn districts
17 under the Common Cause standard. And in the House, the
18 membership went from 65 Republican to 69 Republican. And in
19 the Senate, they still elected 28 Republicans, almost a
20 supermajority. So, that should tell the Court that that's
21 what happens in North Carolina because of the way
22 Republicans are spread out and Democrats are not. That's
23 what's happened.

24 Under a so-called fair standard, under a so-called fair
25 map approved by a court, Republicans increased their

1 majorities. And, so, this notion that you can somehow just
2 kind of predict what these maps are going to look like, I
3 just -- I want to emphasize it is a baseless notion. It is
4 pie in the sky, black box, math, calculus, whatever you want
11:33AM 5 to call it, but at the end of the day, it is not meaningful.
6 It is not meaningful.

7 The people decide elections. The voters decide
8 elections. The issues decide elections. The political
9 dynamics decide elections. That's what decide elections in
11:34AM 10 North Carolina, not these districts, and not some computer
11 algorithm.

12 JUDGE SHIRLEY: Well, the districts decide who
13 the voters get to decide on.

14 MR. STRACH: The districts decide who gets to
11:34AM 15 run. The voters decide who wins.

16 JUDGE SHIRLEY: But the ultimate outcome, in
17 terms of the political makeup of the legislature, begins at
18 the district level and where the district -- and how the
19 districts are located.

11:34AM 20 MR. STRACH: I don't think so. I think,
21 certainly, they are elected from districts. You have to
22 draw the districts in order for somebody to be elected. The
23 people in those districts decide who wins those elections.
24 And you've got -- you've got Republican-leaning districts
11:34AM 25 that elect Democrats. You've got Democrat-leaning districts

1 that elect Republicans. To say it's a foregone conclusion,
2 you've got -- the national dynamics often will drive
3 elections, so who is running for president, or if there's a
4 presidential election, will often impact what happens.

11:35AM

5 The Sean Trende affidavit that we submitted Wednesday
6 is a stark example of that. When you have a Mitt Romney on
7 the Republican side running in 2012 versus a Donald Trump in
8 '16 and '20, completely scrambles the map. It scrambles
9 political coalitions. And it's just not fair to lay this
10 all at the feet of a district.

11:35AM

11 The district, obviously, has some impact, but it's not
12 fair to lay it all at the feet of the district. And that's
13 particularly true when the districts are drawn
14 transparently, openly, without election data, and full
15 explanations are provided to the public of why they were
16 drawn the way they were drawn.

11:35AM

17 JUDGE SHIRLEY: And so, the plaintiffs' request
18 is based upon what was set forth in Common Cause v. Lewis
19 and Harper v. Lewis. So you're just saying the court was
20 wrong?

11:36AM

21 MR. STRACH: Correct.

22 JUDGE SHIRLEY: And is it persuasive authority
23 for this Court?

24 MR. STRACH: Okay. So, in the sense of is it
25 authority this Court can consider, sure. In that sense, it

11:36AM

1 would be. I think a Court would call it persuasive. In my
2 opinion, it's not actually, in fact, persuasive. I think --

3 JUDGE SHIRLEY: Well, I assumed that's the case,
4 because you really --

11:36AM

5 MR. STRACH: The Court can certainly consider it.
6 We would certainly not say that the Court couldn't consider
7 it. Certainly not binding on this Court and on this panel,
8 but the Court can certainly consider it. And, frankly, I
9 would love for the Court to really read it in depth, and the
10 Court may already have. Because when you read that opinion,
11 it's clear it is not an opinion. There is no standard.
12 It's basically, hey, legislature, just go back and redraw,
13 but we're not going to really tell you how to do it.

11:36AM

14 And I would point out there is a statute in North
15 Carolina that says anytime a map is enjoined, the
16 legislature has to get at least two weeks to redraw it,
17 but --

11:37AM

18 JUDGE SHIRLEY: Enjoined? Enjoined or voided?

19 MR. STRACH: Struck down.

11:37AM

20 JUDGE SHIRLEY: Because if we enjoin it, that
21 map's still there. And while you can redraw congressional
22 maps mid-decade, because there's no constitutional provision
23 against it, as long as there is a map that hasn't been
24 declared unconstitutional, can you, under the mid-decade
25 prohibition in the constitution, redraw maps?

11:37AM

1 MR. STRACH: Well, if the map is enjoined, i.e.,
2 can't be used, then the Court has an obligation to let the
3 legislature try again. And but in doing so, statute's very
4 clear, the Court has to identify the specific defects in the
5 plan.

11:37AM

6 And I bring up that statute to say in the Common Cause
7 opinion, even though that was a final judgment that said
8 you've got to redo this, it did not identify the specific
9 defects. It did not go through district by district and
10 say, legislature, this is what you did wrong, and this is
11 how you fix it. That's what the statute requires. So, for
12 that reason alone, we think Common Cause is of no use to
13 this Court, and we believe it got the legal standard
14 completely wrong.

11:38AM

15 The legal standard is set by Stephenson. It's okay to
16 district for partisan advantage. And until the Supreme
17 Court says otherwise --

11:38AM

18 JUDGE SHIRLEY: Well, I think they said it was
19 okay to district for political advantage.

11:38AM

20 MR. STRACH: Well, Stephenson said partisan
21 advantage, specifically. Those are the two words that
22 Stephenson used. And now, even the Common Cause court, you
23 know, approving the new districts, recognized there was some
24 banter that went on in the redraw process where the
25 politicians were bantering back and forth about I want this

11:38AM

1 area, I'll take this area, and you take this area. And the
2 plaintiffs complained about that. So, that was the partisan
3 or whatever.

11:39AM

4 And even the Common Cause court said, well, that's a
5 political consideration. That's going to happen. That's
6 okay. And so, even the Common Cause court kind of
7 distinguished between so-called political considerations
8 versus just purely partisan considerations.

11:39AM

9 But Stephenson says partisan advantage is okay. And if
10 the Court remembers from Stephenson, there were allegations
11 made by Stephenson -- I happen to know this because I
12 litigated Stephenson, along with my law partners, when I was
13 a baby lawyer. But there were allegations in that case
14 about how Democrat majorities in the past had carved up
15 counties for political gain, to maintain their majorities.
16 So, the Stephenson court had that before it.

11:39AM

17 And so, I mean, in my opinion, this was the Stephenson
18 court saying so long as you follow these rules, you have
19 discretionary decisions that remain once you follow the
20 rules, partisan advantage is okay.

11:40AM

21 JUDGE SHIRLEY: Well, if we find that Common
22 Cause v. Lewis and Harper v. Lewis are authoritative and
23 were correctly decided, what does that do to your argument?

11:40AM

24 MR. STRACH: I think that puts this -- I think
25 that puts this Court's ruling, as well as those two, in

1 conflict with Stephenson.

2 JUDGE SHIRLEY: Well, that's not my question.
3 If -- if Common Cause and Harper were correctly decided,
4 what does that do to your argument?

11:40AM

5 MR. STRACH: Correct. Fair point. We have also
6 argued even if the Court were to follow Common Cause,
7 Harper, these maps don't violate it. The Court will recall
8 that the Common Cause court had an intent element. And the
9 Court -- if the Court reads the Harper opinion where they
10 said, we're inclined to enjoin this map, we'll give you a
11 chance, we urge you to redraw it, they focused on the intent
12 aspect. And they used evidence from 2016 where it was
13 openly said, hey, we're drawing these for partisan
14 advantage, et cetera.

11:40AM

11:41AM

15 JUDGE SHIRLEY: We give -- we give instructions
16 every day in criminal court that intent is seldom
17 determinable by direct evidence and often -- and we tell the
18 juries that, you know, often it's circumstantial evidence
19 that you have to rely on.

11:41AM

20 Are you saying there's no circumstantial evidence of
21 intent that exists?

11:41AM

22 MR. STRACH: Well, point one that I'm making,
23 Your Honor, is there was abundant evidence of intent in that
24 case. So, it was easy for the Court. That evidence is not
25 here at this time. So, I would think you would need

1 overwhelming circumstantial evidence.

2 JUDGE SHIRLEY: The law makes no distinction
3 between the weight to be given to direct evidence or
4 circumstantial evidence. That's another thing we tell
5 jurors.

11:41AM

6 MR. STRACH: Right. So, Your Honor, here it's
7 easy, because, as Ms. McKnight can explain, will explain to
8 the Court, there is no circumstantial evidence. The
9 computer, the black box computer algorithms, et cetera, are
10 not worth the paper they're written on, and we can explain
11 why. But that is not circumstantial evidence of anything
12 other than that you can rig an algorithm to spit out
13 whatever you want it to spit out. That's all that proves.
14 Other than that, there is no evidence of so-called extreme
15 partisan gerrymandering in this case.

11:42AM

11:42AM

16 JUDGE SHIRLEY: I think, generally, people intend
17 the natural and probable consequences of their acts. I
18 think that's a general rule of law I've heard before.

19 MR. STRACH: Sure. When the legislators sat down
20 there and they were drawing districts without election data,
21 they drew what they drew. But you have to understand that
22 because of the way voters -- Republicans are spread out and
23 Democrats are not, it's not surprising at all that you would
24 get a Republican majority map as the way people are.

11:42AM

11:42AM

25 Now, if the Republican Party starts trying to speak to

1 urban voters and get those voters, and if the Democratic
2 Party starts trying to speak to rural voters, it might
3 scramble the map.

11:43AM

4 JUDGE SHIRLEY: That actually might be a good
5 idea.

11:43AM

6 MR. STRACH: It might be a good idea. It might
7 actually be a good idea. I can tell you this, from a
8 redistricting perspective, it would scramble the map. And
9 it would be much harder, it would be much harder to produce
10 a map that favored anybody if political people would start
11 talking to the other side and not just themselves. That's
12 the problem.

13 JUDGE SHIRLEY: But, unfortunately, that's
14 something we can't do in court.

11:43AM

15 MR. STRACH: Exactly. The Court can't do that.
16 I can't fix that. But that doesn't -- because political
17 people aren't speaking to the other sides doesn't give the
18 plaintiffs a claim in this court. And so, just because you
19 can currently sit down and draw a map without election data
20 that may elect Republican majorities, that's a problem this
21 Court can't fix, and that's not the Legislative Defendants'
22 fault.

11:43AM

23 JUDGE SHIRLEY: Well, it's certainly not the
24 plaintiffs' fault, either.

11:44AM

25 MR. STRACH: Just because it's not their fault

1 doesn't mean they have a claim. Your Honor, I'd like
2 Ms. McKnight to address some of the expert testimony so we
3 make sure we've addressed that in proper fashion.

4 JUDGE SHIRLEY: Sure.

11:44AM

5 MS. MCKNIGHT: May it please the Court. Kate
6 McKnight for Legislative Defendants. I would like to start
7 by discussing a piece that is missing from these cases and
8 is often misunderstood. And a misunderstanding of this
9 piece leads very smart people, very well regarded Wall
10 Street Journal newspapers to think that a map, a properly
11 drawn map, was systematically drawn to entrench one party.

11:44AM

12 Redistricting in the United States is a geographic
13 exercise. What does that mean. Right? There are plenty of
14 systems in the world, plenty of systems of ways to elect
15 representatives. You can look to Europe. There's a list
16 system in some countries there, which will support more
17 proportional representation, right, than is here. There are
18 thousands of articles out there. You can go and see them.
19 But, obviously, those aren't the systems here. It is a
20 geographical representation system.

11:45AM

11:45AM

21 So, what does that mean? It means that every ten years
22 when map-drawers are drawing maps, they must start with a
23 map. They are drawing a map. They are not selecting
24 voters. They must divide up their map in a way that breaks
25 down into districts that are of roughly equal size. And by

11:45AM

1 size, that's number of population.

2 So, what does this mean for North Carolina and North
3 Carolina politics? North Carolina is not unlike many of the
4 states in this country where Democratic voters tend to be
11:45AM 5 tightly and highly clustered in urban areas or cities.
6 Republican voters tend to be more spread out, evenly spread
7 out, cities, rural areas, suburban areas. I think as an
8 illustration of this, I'd like to reference the affidavit
9 that we submitted at Exhibit 9 of our brief.

11:46AM 10 This is the affidavit of Sean Trende. And, again, it's
11 Exhibit 9 to our brief. And if you turn to the last two
12 pages, this is Exhibit 2A and 2B. And this is just to
13 illustrate this point of the dispersion of voters and -- of
14 Republican voters and concentration of Democratic voters.

11:46AM 15 JUDGE POOVEY: You don't happen to have an extra
16 copy of that, do you?

17 MS. MCKNIGHT: Yes, we do, Your Honor.

18 JUDGE POOVEY: I've got about 150 e-mails in this
19 case and I'm trying to find the right one.

11:47AM 20 MS. MCKNIGHT: Pardon me, Your Honor. May I
21 approach the bench?

22 JUDGE POOVEY: Yes, ma'am.

23 MS. MCKNIGHT: There you go, Your Honor.

24 JUDGE POOVEY: Thank you.

11:47AM 25 JUDGE SHIRLEY: This was the affidavit that we

1 got earlier this week? Is this the affidavit we got earlier
2 this week?

11:47AM 3 MS. MCKNIGHT: Correct, Your Honor. Now we
4 submitted it twice, to be fair. We served and filed it, I
5 believe, on Wednesday, and then we attached it as Exhibit 9
6 to our brief that we served yesterday.

7 JUDGE SHIRLEY: Okay.

11:47AM 8 MS. MCKNIGHT: Let me just give you an
9 understanding of what you're seeing here. Exhibit 2A,
10 what's been done here is Mr. Trende plotted out all the
11 counties. Here you have North Carolina, the map of North
12 Carolina, divided into its counties. The color-coding in
13 Exhibit 2A correlates to Republican wins and losses, the
14 county-level two-party presidential vote in North Carolina.

11:48AM 15 So, there are three maps. Map Number 1 are election
16 results from the presidential election in 2012, Map Number 2
17 are election results from the presidential election in 2016,
18 and Map Number 3 are those results from 2020. What this is
19 showing you is whether that county voted for the Republican
11:48AM 20 candidate or the Democratic candidate in that election.

21 Now, as you can see, in North Carolina, most of the
22 counties outside of the cities are red, indicating that the
23 Republican candidate won in those counties. Let me show you
24 slightly different maps so you understand just the
11:48AM 25 difference between 2A and 2B. What's been done at 2B is

1 Mr. Trende compared these counties to the national average
2 and determined that there were some counties that, even
3 though they went -- the county voted for the Democratic
4 candidate, it was actually leaning more Republican than the
11:49AM 5 national average. That's how we use the term "lean" in this
6 affidavit and in these counties.

7 As you'll see, there were no counties in North Carolina
8 that trended more Democratic, that went blue. Right? It's
9 not more blue, it stayed red, and, in fact, became more red
11:49AM 10 when you consider nationwide averages.

11 Now, to put this into numbers for you, if you turn to
12 the end of the affidavit there's a table, Table 1. And I'm
13 sorry to move you around in this affidavit.

14 JUDGE SHIRLEY: Okay. But that's -- okay.

11:49AM 15 MS. MCKNIGHT: This is page 8 of the affidavit.
16 Now, this table correlates to those maps so you can pick
17 what makes more sense to you to look at. But what Table 1
18 shows you is that in 2012, the number of North Carolina
19 counties that voted Republican, it was 70 out of 100.
11:50AM 20 Right? 2016, that number rose to 76. 2020, that number
21 went to 75 out of 100. Right? So, this is showing you out
22 of 100 counties how many voted Republican, how many voted
23 Democratic.

24 Now, this is not related to -- these counties are not
11:50AM 25 gerrymandered. Counties are set political boundaries.

1 Right? And one of the problems, the primary problem with
2 many of the analyses done by plaintiffs' experts is they do
3 not respect the political boundaries that the General
4 Assembly respected in drawing this map. What do I mean by
11:50AM 5 "respect"? What political boundaries am I talking about?
6 This includes counties, this includes some VTDs, this
7 includes municipalities. Right?

8 And now, you don't need to just listen to me, lawyer
9 for the Democrats, telling you that this is an issue that
11:51AM 10 Republicans are spread out in the State of North Carolina
11 and it matters in elections. You can listen to plaintiffs'
12 own experts. Right? This is a known issue in political
13 science. And as plaintiffs' own expert Dr. Chen said at a
14 recent redistricting conference held for plaintiffs' lawyers
11:51AM 15 and plaintiffs' experts -- this was in September, they held
16 a redistricting conference. And I can pass up a paper
17 showing this quote, but let me read it for you first.

18 What Dr. Chen said there is, "Democrats are
19 concentrated in urban areas, and that's part of the
11:51AM 20 political geography. Any time, any time you produce maps
21 that are just following county boundaries, following
22 municipal boundaries, just following geographic compactness,
23 there is going to be a partisan effect."

24 His meaning there is when you comply with these
11:52AM 25 political boundaries, when you comply with geographic

1 compactness, you are going to have an effect that appears to
2 be partisan, but it's baked in. It is a natural effect of
3 having Republican voters spread out more across the state
4 than the highly concentrated Democratic votes in cities.

11:52AM

5 Would it help for me to pass up the article that
6 quoted --

11:52AM

7 JUDGE SHIRLEY: That's fine. Are compactness and
8 following boundaries political -- when I say "political,"
9 county boundaries, municipal boundaries, one of the things
10 that you would look at, especially in racial gerrymandering?

11 Well, let me put it this way. Are those traditional
12 principles of redistricting, following those type
13 boundaries?

11:53AM

14 MS. MCKNIGHT: It's a great question. And, you
15 know, the term that's used in these cases is "traditional
16 districting criteria." And following political boundaries,
17 like counties, municipalities, VTDs, that is considered a
18 neutral traditional districting criteria. And let me go one
19 step further, because North Carolina is unique with its
20 county grouping rule.

11:53AM

21 As Your Honor is familiar with from your review of
22 Stephenson, there is a whole county rule in North Carolina
23 for the legislative and Senate districts, which requires
24 that they stay whole. Now, it's a little bit of a complex
25 equation, but I'll just say that the end result is the State

11:53AM

1 Constitution puts primacy on keeping counties whole as much
2 as possible. Right? There's a recognition that you may
3 need to split some counties when they're too large, there
4 are too many people for one-person-one-vote and Voting
5 Rights Act.

11:54AM

6 So, I think your question had to do with whether the
7 whole county provision played into --

8 JUDGE SHIRLEY: Well, just -- the question was
9 do -- does compactness and following traditional boundaries
10 say -- not just the counties, but municipalities, are
11 those -- whatever you call them -- traditional districting
12 criteria or principles?

11:54AM

13 MS. MCKNIGHT: So, yes, Your Honor, they are
14 traditional districting criteria, in general. In North
15 Carolina, not only is the whole county rule codified and
16 part of a special North Carolina rule, but these were also
17 put in the criteria that the map-drawers used.

11:54AM

18 This is Exhibit 8 to our brief. This is the criteria
19 adopted by the committees. And you'll see there counties,
20 groupings, and traversals. That is in the criteria. You
21 have VTDs should only be split when necessary, and there's
22 municipal boundaries here.

11:54AM

23 JUDGE SHIRLEY: And you've got to pardon my
24 ignorance. Traversal is when you cross a line; is that
25 correct?

11:55AM

1 MS. MCKNIGHT: That's correct, when you cross.
2 Correct.

3 So, now, understanding this effect, and I think it
4 bears noting that, you know, I heard from plaintiffs'
11:55AM 5 counsel this notion that a partisan advantage has been baked
6 in. They use the term "baked in" to this map by the General
7 Assembly. And I would urge the Court to consider the
8 political geography and the spread of voters in North
9 Carolina when they consider whether that is something the
11:55AM 10 General Assembly did or whether those were the ingredients
11 given to the General Assembly that those were the only
12 ingredients they had to work with in drawing this map.

13 So, now I would like to turn to how did plaintiffs'
14 experts handle this issue in their analyses. And now I must
11:56AM 15 for a moment state that we received these briefs and this
16 analysis Tuesday afternoon for this Friday morning hearing.

17 JUDGE SHIRLEY: I understand. But let's be
18 honest, we are on this compressed scheduled, being required
19 to make a determination five hours and four minutes before
11:56AM 20 the next business -- five hour and four business minutes
21 from the date that the filings begin because the legislature
22 wouldn't move back the filing period or the primaries for
23 the congressional and legislative districts while they
24 were -- did that or at least gave that possibility to
11:56AM 25 municipals (sic).

1 So, you know, I understand that, and most times I would
2 be sympathetic, I think the Court would be, but here we're
3 all here because there is apparently a sense of urgency in
4 part created by the legislature.

11:57AM

5 MS. MCKNIGHT: Well, Your Honor, I appreciate
6 that point. We're all under pressure because of the census
7 delay, and I believe that the General Assembly --

8 JUDGE SHIRLEY: When does the census normally
9 come out?

11:57AM

10 MS. MCKNIGHT: Usually comes out in the spring.
11 So, for 2020, it would have come out by February, March.

12 JUDGE SHIRLEY: And it came out in August?

13 MS. MCKNIGHT: August. That's correct.

11:57AM

14 JUDGE SHIRLEY: And yet the legislature made the
15 decision, based off of that, even though it was a half year,
16 February to August, even though it was a six-month delay,
17 not to delay at least the statewide races or state races?

11:57AM

18 MS. MCKNIGHT: Correct, Your Honor. Because the
19 legislature believed, and it was correct in believing, that
20 it could handle and it could put forth one of the most
21 transparent processes in map-drawing history in North
22 Carolina, maybe in this country, and set forth criteria that
23 protect -- that handcuffed it from so-called extreme
24 partisan gerrymandering and protected it and was able to
25 prepare a map that could be prepared and ready to be used in

11:57AM

1 time for the primary.

11:58AM 2 JUDGE SHIRLEY: Listening to both sides, I feel
3 like there are two streams from two different courtrooms,
4 because what they contend and what you contend happen are
5 two diametrically opposed. I mean, wouldn't you agree?

6 MS. MCKNIGHT: I would agree, Your Honor. Yes.
7 And I think, for now, I think it is -- it is useful for me
8 to briefly touch on, and I won't belabor the point, but just
9 if this case goes forward, we look forward --

11:58AM 10 JUDGE SHIRLEY: We're not disposing of the case
11 today one way or another. So the case is going forward.
12 There's no motion to dismiss here.

13 MS. MCKNIGHT: Pardon me, Your Honor, I didn't
14 mean to interrupt you. We look forward to a chance to --
11:58AM 15 deposing these experts, cross-examining them, preparing
16 rebuttal reports. We believe those would be very useful for
17 the Court in understanding these reports and their extreme
18 limitations.

19 I just want to give you some flavor of some of those
11:58AM 20 limitations. Number one, they did not respect those
21 political boundaries. They each did it in their own
22 different way. Right? I fully expect plaintiffs' counsel
23 to stand up and say, well, Dr. Chen did this in this way and
24 Dr. Pegden did it in this way, but let me tell you, when you
11:59AM 25 look at their reports, you'll see Dr. Chen, after

11:59AM 1 acknowledging, right, acknowledging that protecting
2 municipal boundaries creates a map that is likely to be more
3 Republican, what did he do here? And understanding -- not
4 only that, understanding that the General Assembly had that
5 as a priority, had that at as criteria, here he lowered it
6 as a priority.

11:59AM 7 All he writes in his report is that I lowered municipal
8 boundaries as a criteria. What does that mean? We don't
9 know. I take him at his word that he did not prioritize it
10 the way the General Assembly did. There are 500 -- around
11 500 municipalities in North Carolina. The General Assembly
12 split two. We don't know how many Chen split or where in
13 his algorithm, we just know that he lowered that priority.

12:00PM 14 Now, Dr. Pegden will say it in a different way, but
15 both -- the problems are in Dr. Pegden's analysis as well.
16 And, here, I think it's important. I heard Your Honor ask a
17 question of how do you define extreme partisan
18 gerrymandering. I'd like to refer to a comment made by
19 plaintiffs' counsel about Dr. Chen's analysis.

12:00PM 20 And you can also look at Dr. Chen's report at page 32,
21 Table 7, to support what plaintiffs' counsel said, which was
22 "Dr. Chen showed that, on average, in his simulations, nine
23 Republican congressional districts could be expected."
24 Okay? That's what Chen is saying, that in a perfectly fair
12:00PM 25 world, and I'm taking his argument -- we respectfully

1 disagree with what his analysis shows, but even if you take
2 his analysis in whole, all he's telling you is that nine
3 congressional districts should be expected to be Republican.
4 And then in the same brief, they're telling you, well, you
12:01PM 5 know, this is an extreme partisan gerrymander because it
6 might get Republicans ten.

7 Your Honors, I submit to you that that one seat is not
8 the definition of extreme partisan gerrymandering. We may
9 yet have years to go before we get to a definition of
12:01PM 10 extreme partisan gerrymandering, but I offer that this is
11 not that case.

12 JUDGE POOVEY: Is it allowed?

13 MS. MCKNIGHT: Is what allowed?

14 JUDGE POOVEY: Extreme partisan gerrymandering.
12:01PM 15 Assuming we don't take the prior panel's ruling, is it
16 constitutional to have extreme partisan gerrymandering? I
17 understand the nebulous definition and all that sort of
18 thing, but assuming without deciding that this is or isn't,
19 what's your argument?

12:01PM 20 MS. MCKNIGHT: Your Honor, I beg your pardon, I'm
21 about to give you an answer that is a little longer than I
22 think you want, if you could bear with me for a moment.

23 JUDGE SHIRLEY: That's what attorneys do.

24 MS. MCKNIGHT: As a lawyer who has practiced in
12:02PM 25 these cases and in the area of redistricting and has had

1 many a Thanksgiving-meal discussion with family members from
2 all sides of the political divide, I can tell you there is a
3 fundamental and deep misunderstanding in the public media
4 and in the public about what is a gerrymander, what does
5 that mean.

12:02PM

6 I hear people use the terms "pack" and "crack" very
7 casually, very loosely. Now, that's fine outside of a
8 courtroom. You can talk however you'd like. But when you
9 come into a courtroom, all of those terms, "packing" and
10 "cracking," those have legal meaning. There is a way to
11 define those terms. And that's not what we have here.
12 Plaintiffs would not be able to support that case here of
13 packing and cracking.

12:02PM

14 So, when you talk about extreme partisan
15 gerrymandering, I would say what has happened is here you
16 have redistricting where partisanship was not considered, it
17 was not in the criteria. To the extent it was in any of the
18 minds of the map-drawers when they were drawing the plan,
19 that is allowed. Stephenson guides us that that is allowed.
20 To the extent there is any consideration or sense of what
21 the politics are of a case, that's permitted.

12:02PM

12:03PM

22 Now, do I think -- so, that leads me to the point of
23 saying, I don't even know what I believe my definition of an
24 extreme partisan gerrymander is. That might be that I-95
25 district that was drawn by Democrats, and briefed in our

12:03PM

1 brief, a number of years ago where, you know, you could open
2 the car doors and hit both sides of the districts.

3 JUDGE POOVEY: I-85.

4 MS. MCKNIGHT: I-85. Pardon me, Your Honor. I
12:03PM 5 would say that would probably pass the extreme partisan
6 gerrymandering test. But when I look at these districts,
7 where you have compliance with written criteria, you have
8 compactness, you don't have any of these snaking districts,
9 you don't have any of these so-called bacon strips out of a
12:04PM 10 city, you have compact districts, you have -- if you look at
11 the county voting, you have almost exact precision; 70 out
12 of 100, ten out of 14.

13 And that's just taking plaintiffs' word for it. I
14 don't know that Republicans will get ten districts. They
12:04PM 15 may get nine. They may get eight. We don't know. But what
16 you're seeing here in this case is not it.

17 JUDGE POOVEY: I understood you to argue that is
18 not it. My question was a little different, which is,
19 assuming you have it, is it unconstitutional?

12:04PM 20 MS. MCKNIGHT: Your Honor, I'd argue that the
21 constitution here is clear, what's allowed and what's not
22 allowed. And I don't think in -- I don't mean to quibble
23 with you, Your Honor, but I don't fall on a clear
24 understanding of what extreme partisan gerrymandering is.

12:05PM 25 JUDGE POOVEY: Okay.

1 MS. MCKNIGHT: I would say there are other flaws
2 with the expert reports. Dr. Pegden uses a 2 percent
3 deviation, for example. That's not appropriate. You need
4 to get down lower, to a lower deviation.

12:05PM

5 Dr. Moon Duchin's report where you have the
6 different -- the optimization plans, the problem with that
7 is there's no requirement that the General Assembly optimize
8 its redistricting plan. Right? And Moon Duchin's analysis
9 is almost even worse than Chen and Pegden where they admit
10 they're not using the criteria. There's a real black box
11 problem with her optimization. So, not only are you
12 optimizing, but we don't understand what's in it. If
13 there's an algorithm being used, we'd like to see it, we'd
14 like to understand how it works.

12:05PM

12:06PM

15 Your Honor, I'd like to try to wind down, answer any
16 questions you'd like, but I'd like to finish by drawing your
17 attention back to the Trende maps, these maps showing the
18 spread of Republican voters. And I'd posit to you that
19 doing what plaintiffs ask you to do in this case, which is
20 to go in and tweak and redraw maps to encourage greater
21 electoral results for Democrats, would violate these neutral
22 provisions of redistricting, because what it would require
23 us to do is exactly what they -- they're blaming us for
24 doing.

12:06PM

12:06PM

25 We would need to go in, consider politics, sort voters

1 based on their political affiliation, and break rules of
2 municipal boundaries, county boundaries, VTDs, you name it,
3 to create more districts just because these voters have
4 voted Republican or Democratic in another election.

12:07PM

5 As you know, this is an inherently political process.
6 Democratic candidates should go out to these suburban and
7 rural areas and campaign and adjust their message. There is
8 such a thing as a conservative Democrat, and that candidate
9 could be very successful in some of these districts.

12:07PM

10 Now, our country made a decision a long time ago to
11 have geographical representation. And what that means is it
12 decided a long time ago to not let highly concentrated
13 cities overcome and subsume more spread-out rural areas.

12:07PM

14 The fact that our country made that decision years ago
15 should not be laid blame on the General Assembly's floor for
16 drawing a map that responded to these neutral districting
17 criteria, did not consider political election results, and
18 shows exactly what plaintiffs' experts tell you it will
19 show, which is that Republicans are spread out, there is
20 likely and there is an effect on these neutrally drawn maps.

12:08PM

21 So unless there are any other questions, I'm happy to
22 defer to the Court.

23 JUDGE SHIRLEY: Judge Poovey, do you have
24 anything?

12:08PM

25 JUDGE POOVEY: I don't.

1 JUDGE SHIRLEY: All right. We'll hear from the
2 plaintiffs.

3 JUDGE LAYTON: Sorry, not a question, but the
4 maps -- and I don't know that they're in Harper, but the
12:08PM 5 maps that you all called the optimized maps, where are they
6 at in your packets?

7 MR. SCHAUF: So, they are in the Feldman
8 affidavit that we filed on the 16th of November. They're
9 Exhibits D, E, and F.

10 JUDGE LAYTON: D through F?

11 MR. SCHAUF: That's right.

12 JUDGE LAYTON: Thank you. I'm sorry.

13 JUDGE POOVEY: I didn't know if Mr. Steed had
14 anything to say.

15 JUDGE SHIRLEY: Oh, I'm sorry.

16 MR. STEED: Thank you, Judge Poovey. I did not
17 intend to stand up, but I had a minor point of
18 clarification, Your Honors. The filing period opens at noon
19 on Monday, so you have four additional business hours. I
12:09PM 20 just wanted to make sure the Court was aware of that.

21 JUDGE POOVEY: Let me ask you a question. From
22 the State Board of Elections perspective, the -- what is the
23 last date that the filing period could be open and the
24 election still occur, the primary election still occur in
12:09PM 25 March as currently scheduled? Is that the end date now?

1 You may not know that. I don't know.

2 MR. STEED: I'm convinced that that's a union
3 question, and these are complicated, as you can see from the
4 affidavit we put forward. I believe the safe answer right
12:09PM 5 now would be December 17th. But there's issues with the
6 geocoding. If it changes, that's a whole new amount of work
7 for them. It takes a certain amount of time, as explained
8 in the affidavits. And if there's a specific question
9 you're looking for, I'd be able to get you that answer as
10 quickly as I could.

11 JUDGE POOVEY: When do the absentee ballots go
12 out?

13 MR. STEED: Fifty --

14 JUDGE POOVEY: In other words, I forget what day
12:10PM 15 the primary is in March.

16 MR. STEED: March 8th.

17 JUDGE POOVEY: March 8th. So how many days
18 before that do you have to have the ballots go out? And I
19 know it takes time to get those ballots ready and all that
12:10PM 20 sort of thing.

21 MR. STEED: The statute requires 50 days.

22 JUDGE POOVEY: Fifty?

23 MR. STEED: Fifty days is when they're supposed
24 to go out. The state board has authority to shorten that,
12:10PM 25 but only to 45 days. So, it's not allowed without a court

1 intervention to change that.

2 JUDGE POOVEY: Okay. Thank you.

3 JUDGE SHIRLEY: I guess it's true that there are
4 a whole slew of races that will be decided in November that
5 are unaffected by anything we hear -- we do today.

12:10PM

6 MR. STEED: Absolutely. Yes, Your Honor.

7 JUDGE SHIRLEY: Judges, district attorneys,
8 clerks of court, municipal elections --

9 MR. STEED: Pretty much everything else. Yes,
10 Your Honor.

12:11PM

11 JUDGE SHIRLEY: -- conservation district
12 elections, things like that.

13 JUDGE POOVEY: Let me give you back this
14 affidavit that you handed up. Thank you. I did find it
15 after that.

12:11PM

16 MS. MCKNIGHT: After the fact. Thank you,
17 Your Honor.

18 JUDGE SHIRLEY: All right. We'll go ahead and
19 hear from the plaintiffs.

12:11PM

20 MR. SCHAUF: So, thank you, Your Honor. Good to
21 be back up. I wanted to start just by clarifying something
22 that I said at the outset. So, we had a colloquy about what
23 the standard is and whether it was beyond a reasonable
24 doubt. And I just want to be very clear that we think that
25 if the standard is reasonable doubt, we have met that

12:11PM

1 standard. We've carried it with the evidence that we've
2 talked about.

3 Going to what we've heard from my friends on the other
4 side, starting on the partisan effects of this map, I think
12:12PM 5 we have heard basically no argument that the standard set
6 forth in Harper and Common Cause, if that standard --

7 JUDGE SHIRLEY: What is the standard? Because
8 I'm trying to decide, okay, it seems that Stephenson clearly
9 says you can take partisan -- you can consider partisan
10 advantage. So, we've got that. And we've got extreme
11 partisan gerrymandering.

12 First of all, it seems like we're going back to the
13 Supreme Court's old pornography days, we can't define it,
14 but we know it when we see it, which is not a very good
12:12PM 15 standard for -- for -- to give to a legislature to draft
16 maps by. We can't tell you how to do it, but we're going
17 to -- we know it's bad when we see it.

18 So, what is the standard?

19 MR. SCHAUF: So, I think the standard that Common
12:13PM 20 Cause holds is sufficient. I would point to the passage
21 where it says that the maps have been drawn systematically
22 to prevent one party from obtaining a majority of seats even
23 when they get a majority of votes. And I think we could add
24 to that when it's permissible -- or, rather, when it's
12:13PM 25 possible to not do that and still respect traditional

1 districting criteria and North Carolina's political
2 geography.

12:13PM 3 And I want to address the argument that we've heard
4 from the other side that was all about political geography.
5 But that, I think, is a clear administrable standard that
6 the Court can apply just like the Common Cause court did.
7 But, from the other side, aside from these justiciability
8 arguments, they barely engage with the partisan effects that
9 we've shown in the map.

12:13PM 10 There's no evidence to -- that's been put in to counter
11 Dr. Duchin's affidavit, which, by the way, was not served on
12 Tuesday. We filed it on, I believe, the 16th of November,
13 which was 12 days after the maps were enacted. My friends
14 on the other side had, I think, 17 days between that point
12:14PM 15 when we filed and now, and the only thing we received is
16 this very vague affidavit from Mr. Trende. And so, they
17 simply haven't engaged with the expert analysis we've put
18 forward.

12:14PM 19 JUDGE SHIRLEY: You would agree that we -- our
20 elections are based off of geography?

21 MR. SCHAUF: That is right. That is right. So,
22 let's talk about --

23 JUDGE SHIRLEY: Stephenson talked about the
24 importance of counties and why we -- why there was a whole
12:14PM 25 county provision of the constitution.

1 MR. SCHAUF: Right. So, I think the argument
2 we've heard from the other side is that, you know, this is
3 basically about the dispersion of Republicans and the
4 concentration of Democrats, but what we have put in evidence
12:14PM 5 on this very point, as have the Harper plaintiffs, one of
6 the things that our optimized maps show is that you can draw
7 maps that do better in terms of compactness, that traverse
8 fewer boundaries.

9 JUDGE SHIRLEY: How many city boundaries are
10 traversed in your maps?

11 MR. SCHAUF: So, this is in -- two points on
12 that. One, it's clear the people are measuring things in a
13 different way, but what we've got is we've got Table 2 from
14 Dr. Duchin's affidavit where she goes through and shows that
12:15PM 15 the enacted maps for Congress break municipalities into 90
16 different pieces compared with -- and that's a little
17 different from how many municipalities you break, it's the
18 number of pieces you get if you put them together. But 90
19 in their map compared to 58 in ours. In the Senate maps,
12:15PM 20 it's 152 in their map compared to 125 in ours. In the
21 House, it's 292 compared in 201 in ours.

22 Now, my friend on the other side has said they split
23 only two municipalities in the congressional map. And it's
24 hard to square with what they have put -- "they" meaning the
12:16PM 25 legislature has put in the stat pack that's available on

12:16PM 1 their website. I don't actually have it to hand around,
2 because the brief came in yesterday. Not complaining about
3 that, but just don't have it. It lists splits in the
4 following cities, at least: Cary, Charlotte, Davidson,
5 Durham, and Greensboro.

6 You know, the Greensboro one is particularly telling
7 because that's the one that I put up on the board earlier
8 today that sort of illustrates this classic gerrymandering
9 of lopping off the north side of the city in order to
10 combine it with this district that stretches all the way
11 west to the Tennessee border.

12 JUDGE POOVEY: Do you have a written copy of the
13 maps you say are right?

14 MR. SCHAUF: Well, so --

12:16PM 15 JUDGE POOVEY: You said the Feldman affidavit
16 Exhibits D, E, and F?

17 MR. SCHAUF: So, I don't have extra copies of
18 that one with me. I'm sorry about that. They are -- they
19 are filed, and if we end up coming back after a break, I
20 can --

21 JUDGE POOVEY: Feldman, spell that for me.

22 MR. SCHAUF: F-e-l-d-m-a-n. Did I get that
23 right?

24 JUDGE POOVEY: Okay. Thank you. That's what I
12:17PM 25 thought it was.

1 MR. SCHAUF: Just to be very clear on the
2 purposes we offered those maps, there's two. One is we
3 think these are maps that, after the existing maps are
4 struck down, could and should be adopted, but they really go
12:17PM 5 straight to my colleague's argument that this is compelled
6 by political geography. They show, again, that you can be
7 more compact and split fewer municipalities, have fewer
8 county crossings, and still have maps that don't have this
9 degree of partisan gerrymandering.

12:17PM 10 And, you know, again, it's sort of telling that they
11 haven't put in any evidence to address that at all. And on
12 this general point about this being a geographic exercise, I
13 mean, it being a geographic exercise doesn't explain why
14 Mecklenburg and Wake and Guilford and only those three
12:18PM 15 counties in the Senate map are trisected three times. It
16 doesn't explain why you have parts of Greensboro in the same
17 district with counties bordering Tennessee.

18 And, indeed, if you look at that set of congressional
19 maps or congressional districts around Guilford County, what
12:18PM 20 you'll see is they all have what's called a Polsby-Popper
21 score -- this is one of the metrics of compactness, like how
22 funny are the lines, that was relied on in Common Cause --
23 that are around 0.2, which means very not compact. And the
24 reason for that is they were drawn to pursue partisan
12:18PM 25 advantage. And it's not just those.

1 Stephen, would you be able to put up Figure 6 from our
2 briefs? This is northeastern North Carolina. So, this is
3 in the enacted Senate plan. It's Districts 1 and 2, and --

4 JUDGE SHIRLEY: Do we have this?

12:19PM

5 MR. SCHAUF: Yeah. So, this is Figure 6 in our
6 preliminary injunction brief, just blown up real big. And
7 what you'll see here is the legislature drew the map this
8 way in order to just bisect this big population of

12:19PM

9 Democratic voters into two districts. And so, as a result,
10 even though you have this very large Democratic population,
11 you end up in this area with two solidly Republican seats.

12 And it's not just that. These districts are less
13 compact than a fair amount would be, and we show in our
14 papers that you can draw a map that is more compact that
15 complies with Stephenson. And by doing it this way, this
16 map also traverses more county boundaries than our
17 alternative does, which, again, I think shows that it's just
18 not right to say, you know, the only thing going on here is
19 geography and dispersion. And for another example of that,
20 you can look at Wayne County, which is Figure 13 from our
21 brief. It should be towards the back.

12:19PM

12:20PM

22 JUDGE SHIRLEY: We're not here arguing about
23 whole county provision or anything like this, this is
24 clearly partisan?

12:20PM

25 MR. SCHAUF: I mean, we've got a Stephenson

1 violation.

2 JUDGE SHIRLEY: I'm talking about for the
3 preliminary injunction.

4 MR. SCHAUF: Not directly, but I think it's
12:20PM 5 telling that there are excess county traversals in these
6 maps in three places that we've identified.

7 JUDGE SHIRLEY: But that's not the basis for your
8 motion for preliminary injunction?

9 MR. SCHAUF: But there are also places where
12:20PM 10 doing the maps the way the legislature has done them result
11 in a partisan advantage for the Republican Party. So,
12 they've subordinated the imperative to minimize traversals.
13 And this is actually not an example of that. This is a
14 different point.

12:20PM 15 But in northeastern North Carolina, the map that was
16 just up there, you get an extra traversal from the way the
17 legislature has drawn their maps. Around Buncombe County,
18 the way they arrange the counties there, you end up with, I
19 think, two extra traversals there, as we show in our briefs.
12:21PM 20 And then around Forsyth County and Stokes, you get extra
21 traversals there, again, due to partisan advantage.

22 JUDGE SHIRLEY: And that's for partisan
23 advantage?

24 MR. SCHAUF: That's right. That's right. So,
12:21PM 25 they traversed more counties specifically in order to pursue

1 partisan advantage. And this is another just illustration
2 that what we're talking about here isn't geography. This is
3 Wayne County, and what you see is the city of Goldsboro,
4 lots of Democratic voters there, is divided from the
12:21PM 5 communities of Brogden and Spring Hill just to the south.
6 So instead of getting what you would probably expect in an
7 area like this, one Republican district and one Democratic
8 district, or maybe two toss-up districts where you could
9 have competitive elections -- what a thing that would be --
10 instead, you get, just like in the Senate map that was up
11 there a minute ago, two solidly Republican districts.

12 JUDGE SHIRLEY: So, when Stephenson said you
13 could pursue -- use partisan advantage as a criteria, what
14 did they mean?

12:22PM 15 MR. SCHAUF: So, I don't know. I mean, I don't
16 think they said -- I think pursuing partisan advantage or
17 making partisan considerations is a long way off from what
18 we see in these maps --

19 JUDGE SHIRLEY: Well, but --

12:22PM 20 MR. SCHAUF: -- which is --

21 JUDGE SHIRLEY: -- you're asking us for a
22 standard, so we need to understand what Stephenson was
23 allowing. So, when Stephenson says you can pursue partisan
24 advantage -- I'm trying to find the exact quote -- what did
12:22PM 25 they mean, or how should we define that?

1 MR. SCHAUF: Well, so, I guess the first thing I
2 would say is I wouldn't read Stephenson to necessarily bless
3 any degree of what we would call partisan gerrymandering,
4 because it also says that that is limited by other
12:22PM 5 provisions in the constitution, including the Free Elections
6 Clause. And so, I just don't think they address this issue.

7 JUDGE SHIRLEY: But they are saying -- the
8 Supreme Court's statement in Stephenson that you can -- may
9 consider partisan advantage and incumbency protection in the
12:23PM 10 application of its discretionary redistricting decisions,
11 but it must do so in conformity with the state constitution,
12 that is explicitly recognizing that those are things you can
13 consider. They're not saying you can't consider those.

14 So, they're not saying that the state constitution --
12:23PM 15 or they're not leaving it up to say okay that you can do it,
16 but subject to the state constitution. They may be saying
17 there are constitutional limitations. So, where is -- where
18 does that begin? What is permissible under Stephenson and
19 what's not?

12:23PM 20 MR. SCHAUF: I think what is on the other side of
21 the line is, you know, the standard that Common Cause found
22 was sufficient, which is when you have a map that is
23 systematically drawn to entrench one party in power even
24 when voters prefer the other party by significant margins,
12:24PM 25 and even when it's clear that that is not dictated by -- I'm

1 sorry.

2 JUDGE SHIRLEY: When we vote -- the elections
3 that they're going on, that a lot of this -- the voters will
4 come from are statewide elections; is that right?

12:24PM

5 MR. SCHAUF: Sorry. Can you repeat the question
6 again?

7 JUDGE SHIRLEY: When we talk about -- we're
8 looking at statewide elections to determine what the voters'
9 will is, the will of the voters; is that right?

12:24PM

10 MR. SCHAUF: So, the method, you know, Dr. Duchin
11 for example, has used to assess the likely effects of these
12 elections is to look at a set of 52 statewide elections and
13 then --

12:24PM

14 JUDGE SHIRLEY: But the elections we're talking
15 about are broken up by geographical boundaries; is that
16 correct?

17 MR. SCHAUF: That's correct.

18 JUDGE SHIRLEY: And, in fact, they're required
19 to -- required to be as a matter of law?

12:24PM

20 MR. SCHAUF: That's right. They are broken up.
21 And Dr. Duchin accounts for that by looking at what effects
22 the boundaries have on -- when they're applied to, you know,
23 those statewide elections, taking a sample of 52.

12:25PM

24 JUDGE SHIRLEY: Well, if in 2016 you had 76
25 percent of the counties voting Republican, and in 2020 you

1 had 75 percent voting Republican, wouldn't that --
2 regardless of what the overall state elections are, wouldn't
3 that influence election outcomes dependent upon geography?

12:25PM

4 MR. SCHAUF: Well, so, the question sounds like
5 it comes from Mr. Trende's affidavit.

6 JUDGE SHIRLEY: No, the question comes from me.

12:25PM

7 MR. SCHAUF: Well, so wherever it comes from, I
8 think part of the answer is that one thing that ignores is
9 that North Carolina has cities, has urban areas, that have
10 an effect as well on election results.

11 JUDGE SHIRLEY: Sure.

12:26PM

12 MR. SCHAUF: And, you know, that analysis ignores
13 that fact. And it also ignores again, you know, we've got
14 evidence in the record that shows you can have all the
15 county integrity that you want, better county integrity than
16 is in the enacted plans, and not have that degree of skew.
17 And this sort of goes back to the intent point, that when
18 you nonetheless get the skew that we see in these maps, it's
19 because the General Assembly intended to put it there.

12:26PM

20 Now, I think I heard my friend on the other side say
21 that it was fine for the legislators to use partisan
22 considerations in drawing these maps so long as they sort of
23 brought them in in their heads. But, you know, that I think
24 sort of gives the game away. I mean, that concedes that you
25 can do whatever you want outside the hearing room, and as

12:26PM

1 long as you can come in the hearing room and reproduce it,
2 then that's all fine.

3 And, you know, that, I think -- you know, the sort of
4 proof is in the pudding. We see the effects of that sort of
12:26PM 5 approach, and I think to -- for the Legislative Defendants
6 to say that, you know, they never analyzed and apparently
7 still haven't analyzed the partisan effects of the maps they
8 passed, I just don't think, you know, would stand scrutiny.

9 JUDGE SHIRLEY: What percentage of the maps drawn
10 show -- that your experts have drawn show a nine-to-five
11 advantage?

12 MR. SCHAUF: Our expert didn't do the same that
13 sort of undertaking. So, what she did was look at the
14 advantage that the enacted plans created and then used what
12:27PM 15 we've identified as the optimized maps to address whether
16 that was something that was compelled by political
17 geography, as you've heard from the other side, and she
18 found that it wasn't.

19 JUDGE POOVEY: You think the only way these maps
12:27PM 20 can be drawn is by computer? I mean, that's what you've
21 said, basically, right? By using a computer and algorithms
22 and the technology that we have today, why do we leave this
23 up to humans, why don't we just do this like we're doing
24 everything else, automated --

12:28PM 25 MR. SCHAUF: Well --

1 JUDGE POOVEY: -- and, you know, insert
2 artificial intelligence into it and let it -- you know, let
3 it do it for us?

4 MR. SCHAUF: -- Your Honor, I'm not here to tell
12:28PM 5 you that our maps were drawn without human intervention or
6 that you should do that. Our position is that the best way
7 to draw maps is, indeed, to leverage the tremendous power
8 that computers give us to do all sorts of good things,
9 including making more compact districts, split fewer
10 municipalities, fewer counties, all of those things. But I
11 don't think you need to agree with that proposition to
12 invalidate the maps that we have here, because what shows,
13 you know, that they are unlawful is the degree of partisan
14 bias they bake in.

12:28PM 15 And, you know, we can have a separate conversation
16 about what the remedial maps would be. And in that
17 conversation, like we intend to vigorously defend the maps
18 that we've put forward. But that very much is I think a
19 separate conversation.

12:29PM 20 If there's no further questions, I think that's all
21 I've got.

22 JUDGE SHIRLEY: All right. We'll hear from the
23 Harper plaintiffs.

24 MS. THEODORE: Thank you, Your Honor. If I could
12:29PM 25 just start by addressing, I think, the question that you

1 just asked about sort of why we use statewide elections to
2 address partisanship, as opposed to using the results of
3 local elections. That's a very standard approach in
4 political science. And the reason is because if you were to
12:29PM 5 take the votes in a particular district, then the lines of
6 the district would affect the results; that is, if you're in
7 a particular congressional district where it's gerrymandered
8 for one party or another, you might expect that voters of
9 the party that's going to lose might not come out as much.

12:30PM 10 So, it's not an accurate way of assessing the
11 underlying partisanship. And that's why, for example, the
12 Legislative Defendants in 2016 and 2017, when they admitted
13 that they were gerrymandering, they said also that they were
14 using a lot of different statewide elections in North
12:30PM 15 Carolina, like governor and president and attorney general,
16 and those statewide elections were how you assess the
17 underlying partisanship. So, that's the answer to that
18 question.

19 JUDGE SHIRLEY: So, it's a nine-to-five split.
12:30PM 20 Do you consider that extreme partisan gerrymandering?

21 MS. THEODORE: I think -- it's not a question you
22 can answer without asking the question of nine-to-five split
23 under what electoral circumstances. Right? So, if you look
24 at --

12:30PM 25 JUDGE SHIRLEY: Well, as they exist today. I

1 mean --

2 MS. THEODORE: But that's what I'm saying,
3 Dr. Chen's histograms, the bar charts that he shows, they're
4 all saying here's what would happen under the enacted map,
5 as opposed to my simulated maps, if the Democrats won 48
6 percent or if the Democrats won 53 percent.

7 JUDGE SHIRLEY: Statewide.

8 MS. THEODORE: Statewide. And so, you get very
9 different numbers. And that's why Ms. McKnight's comment
10 about Dr. Chen's -- I think it was Figure 7 where she says
11 it's nine districts and it's not extreme because, you know,
12 a lot of -- a lot of the simulated maps in Figure 7 show
13 nine districts, that's why that's very misleading, because
14 that's -- that Figure 7 is under a composite where the
15 Republicans win 50.8 percent of the vote.

16 JUDGE SHIRLEY: The question, again, is nine to
17 five extreme -- a result of extreme partisan gerrymandering
18 with these maps that have been enacted?

19 MS. THEODORE: It can be. And what I'm saying --
20 let me -- can I point you to page 62 of Dr. Chen's report?
21 And we have copies if that would be helpful.

22 JUDGE POOVEY: Probably would be helpful to me.

23 MS. THEODORE: Okay.

24 JUDGE SHIRLEY: What page?

25 MS. THEODORE: If you look at page 62. And let

1 me just explain what this -- what this is. This is
2 Figure A7. And so, what he's doing here -- is everyone
3 there?

4 JUDGE SHIRLEY: Yes.

12:32PM

5 MS. THEODORE: Okay. So, what Dr. Chen is doing
6 here is you see at the bottom he's using the 2020 governor
7 election results. And that's an election where the
8 Republican -- where the Democrats did pretty well. The
9 Republicans get 47.7 percent of the vote. And so, the red

12:33PM

10 dots are -- and if you go from left to right across the
11 horizontal axis, you're showing increasing Republican vote
12 share. And then that dotted vertical line is that
13 50-percent mark that shows whether the Republicans win a
14 district. And then the gray dots -- the gray circles are a
15 thousand computer-simulated plans that respect the
16 legislature's other districting principles. And I'll get to
17 that a little bit later.

12:33PM

18 But, so, what you can see here is that if you had an
19 election where the Democrats did as well as they did here,
20 where they get, you know, 52 percent, 52.3 percent of the
21 vote, in the enacted plan, the Republicans still win ten
22 seats. And you can see that because that

12:33PM

23 tenth-most-Republican district, which is CU4, it's just
24 barely to the right, that red dot is just barely to the
25 right of the dotted line. Right? And that's an outcome

12:34PM

1 that never happens. Not a single one of Dr. Chen's
2 simulated maps produces ten Republican seats. And, in fact,
3 not a single one of his maps produces nine Republican seats.

4 So, you see that in all of Dr. Chen's maps, if you look
12:34PM 5 at the bottom five gray -- the bottom five rows of gray
6 dots, every single dot on those bottom five rows is to the
7 left of the vertical dotted line. What that's signaling,
8 again, is that every single one of his simulated maps in a
9 scenario where the Democrats get 52 percent of the votes,
10 the Democrats get at least five seats, and the
11 overwhelmingly majority of the time, they get six seats.

12 You can see that because that ninth-most-Republican-district
13 line shows that the overwhelming majority of that gray
14 conglomeration of dots is to the left of the vertical line.

15 And they often get -- they often get seven seats, and
16 you can see that because three quarters or so of that gray
17 conglomerate of dots on the line that says
18 eighth-most-Republican district is to the left of the line.

19 And so, that's what shows that this is such an extreme
12:35PM 20 partisan gerrymander, is because it's a gerrymander that
21 sticks with ten Republican seats regardless of how well the
22 Democrats do in the election. It entrenches ten Republican
23 seats, no matter what the popular will says.

24 And if you sort of look at how the --

12:35PM 25 JUDGE SHIRLEY: Are you saying every -- that

1 those seats are always going to go Republican, those ten,
2 and they won't be affected by issues of the day? I mean,
3 because if you -- what happened in Virginia where we
4 haven't (sic) had a Democratic governor in years and years,
12:36PM 5 and all of a sudden out of the blue you have a Republican
6 governor? I mean, issues affect elections just as much as
7 people do, the candidates, don't they?

8 MS. THEODORE: I'm not disputing that if there
9 was a Democratic wave election where the Democrats won 60
12:36PM 10 percent of the statewide vote that this map might not hold
11 up to ten seats. But, of course, if that were true, a
12 non-partisan map that wasn't drawn to entrench partisan
13 advantage would probably give a lot more than six Democratic
14 seats.

12:36PM 15 JUDGE SHIRLEY: So, you want -- your argument is
16 that maps should not be drawn for partisan advantage,
17 period?

18 MS. THEODORE: Our argument is that maps should
19 not be drawn to systematically entrench one party in power.
12:36PM 20 And, you know --

21 JUDGE SHIRLEY: So, they can be drawn for
22 partisan advantage?

23 MS. THEODORE: Well, let me address the colloquy
24 that you had about Stephenson earlier. I think what
12:36PM 25 Stephenson said, as the Court knows, is that you can

1 consider partisan advantage, and there are many ways of
2 doing that that are far short of entrenching a systematic
3 partisan advantage.

12:37PM

4 And one example might be drawing a district to allow
5 the Speaker of the House to run in that district. That's a
6 consideration of partisan advantage. And that might have
7 been one of the things that Stephenson talked about. We
8 don't know, because it was dicta and none of this was raised
9 in Stephenson. But there are many ways to consider partisan
10 advantage that don't involve systematically subverting the
11 will of millions of North Carolinians.

12:37PM

12 Let me address a few of the points that Mr. Strach and
13 Ms. McKnight raised. So, with respect to the handcuffs, the
14 argument that the Legislative Defendants handcuffed
15 themselves, you know, it is very clear that the people who
16 were drawing maps were allowed to bring whatever they wanted
17 into the room. People did bring paper into the room.

12:37PM

18 That's what makes this so different than the remedial
19 process that the Common Cause court ordered, because the
20 remedial process that the Common Cause court ordered forbade
21 legislators from drawing maps at the stations based on paper
22 that they brought in from outside. So, that's the
23 difference here.

12:38PM

24 JUDGE SHIRLEY: So, how many Republicans are on
25 video bringing map -- paper in?

12:38PM

1 MS. THEODORE: The video doesn't allow you to see
2 with that level of granularity. Like, the video doesn't --
3 you can see the people have paper, but it doesn't allow you
4 to look and see, like, is the person at the map station
12:38PM 5 looking at a map.

6 JUDGE SHIRLEY: That's not what I asked. What --
7 what does -- how many Republican legislators actually
8 brought paper in? It could have been the -- you know, their
9 shopping list. Do we know?

10 MS. THEODORE: I don't know. I don't know. But
11 I will say that the -- as Your Honor alluded to, the expert
12 reports that we have overwhelmingly show that there is no
13 possible way that this map could have been produced without
14 consideration of partisan advantage.

15 JUDGE LAYTON: Are you saying none of the
16 Democrats did that? Did they not use any partisan
17 information?

18 MS. THEODORE: They may have. I don't know. I'm
19 not saying anything one way or the other about it. Yeah.

12:39PM 20 So, I want to talk a little bit about some of the
21 criticisms of our experts. And I want to state that
22 Mr. Strach, I think, said these experts were a black box.
23 That's not true. The Legislative Defendants, including my
24 colleagues, these lawyers right here, had full access to all
12:39PM 25 of the code of Dr. Chen and Dr. Pegden during the Common

1 Cause case. They had every opportunity to cross-examine
2 those experts. These are -- Dr. Pegden's theorems and his
3 analysis has been published in multiple peer-reviewed
4 journals, such as the Proceedings of the National Academy of
5 Sciences.

12:39PM

6 Dr. Chen's analysis has also been published in multiple
7 peer-reviewed journals. So, it's just not true that this is
8 a black box and that people don't know what they're doing.

9 JUDGE SHIRLEY: I'm not sure that -- okay. Go
10 ahead.

12:40PM

11 MS. THEODORE: So, then I think -- so on
12 natural -- on geography. Our experts very, very clear
13 accounted for that. The Common Cause court explained why
14 every single one of our experts base in geography. And I
15 think Ms. McKnight said that Dr. Chen was doing something
16 different than what the legislators suggested because he
17 prioritizes municipalities lower than --

12:40PM

18 THE REPORTER: I'm sorry. Can you repeat that?

19 MS. THEODORE: Ms. McKnight said that Dr. Chen
20 gave a lower priority to municipalities than to VTD splits
21 and counties, but that's because that's what the enacted
22 criteria do, too. They say you shall not split counties
23 except for a couple reasons, I think, like equal --
24 population equality and one other, and they say you shall
25 not split VTDs unless it's necessary, and then they say you

12:41PM

1 may consider municipalities. So, that's why he did it the
2 way he did it. He was just following exactly what they
3 said.

12:41PM

4 Dr. Pegden also considered municipalities, and he
5 constrained his algorithm so that it was just as good as the
6 enacted map with respect to the number of split VTDs, the
7 number of split counties, and the number of split
8 municipalities. He did a bunch of different runs, but some
9 of his runs constrained with respect to all of those things,
10 and they produced the same results.

12:41PM

11 And just more generally with respect to political
12 geography, again, that's the whole magic of this method is
13 it takes into account the political geography. And then, of
14 course, you know, taking a step back, the notion that the
15 congressional map here was aimed at preserving counties and
16 the political geography of North Carolina just naturally, it
17 just doesn't pass the smell test.

12:41PM

18 I didn't hear any explanation here as to why the three
19 largest Democratic counties in the State of North Carolina
20 were split three times even though there was absolutely no
21 population-based reason to do that, and even though the
22 enacted criteria on their face forbade splitting those
23 counties three times when it wasn't necessary. So, again,
24 this isn't about the political geography.

12:42PM

12:42PM

25 And I should say that the random maps that Dr. Chen

1 drew split far fewer counties. 100 percent of all of his
2 random maps are significantly more compact than the actual
3 enacted map that the legislature drew.

4 Let me see. All right. Let me just say a few other
12:43PM 5 things. Just a few factual points. In Harper, just to be
6 clear, because I think Mr. Strach said he didn't remember,
7 they did issue an injunction prohibiting the Legislative
8 Defendants from going forward under the 2016 congressional
9 map.

10 I would say that their notion, their argument that this
11 is sort of unbounded and that what the Common Cause and
12 Harper courts did in barring extreme partisan gerrymanders
13 are unbounded are -- is rebutted by the very remedial
14 schemes that the Harper and the Common Cause court allowed.

15 As Mr. Strach noted, we objected in Common Cause to the
12:43PM 16 remedial maps and said they were partisan gerrymanders. And
17 the Common Cause court rejected it and said it didn't meet
18 the test for being an extreme partisan gerrymander. So, I
19 think that itself establishes that the test that the Common
12:44PM 20 Cause court created is not something that will, you know,
21 bar all partisan considerations all the time.

22 I would also note that in Stephenson, which, of course,
23 as you know, enjoined maps, they didn't apply a reasonable
24 doubt standard. We think we meet the reasonable doubt
12:44PM 25 standard, but Stephenson did not apply that reasonable doubt

1 standard in issuing its injunction. In fact, the defendant
2 criticized it for not applying it, but it didn't apply it.

3 I think, you know, going back to the figure from
4 Dr. Chen that I walked through, I think the thing to keep in
12:44PM 5 mind with respect to knowing whether something is a partisan
6 gerrymander is not necessarily the seat count in any
7 particular situation, but it's the margins of victory. And
8 that's what the -- that's what the Dr. Chen report talks
9 about, like, how all of these ten Republican districts are
10 constrained in this range where they're essentially
11 impervious to the will of the voters.

12 And then, finally, in terms of the remedy, I just want
13 to say that we, the Harper plaintiffs, are not advocating
14 those particular optimized maps that the NCLCV plaintiffs
12:45PM 15 are advocating. Our view is that the Court should issue an
16 injunction, suspend the filing period, give the legislators
17 the opportunity, the 14 days that are required by statute,
18 to issue new maps, and then create a remedial process, you
19 know, either following that or in conjunction with that in
12:45PM 20 case they don't issue constitutional remedial maps, and we
21 would want the opportunity to put in our own proposed
22 remedial map.

23 JUDGE SHIRLEY: Anything else?

24 MS. THEODORE: Unless the Court has questions.

12:45PM 25 JUDGE SHIRLEY: Would you all like one last word?

1 MR. STRACH: Just to make a brief technical point
2 on the whole municipal split issue, I wanted to make it
3 clear. So, the congressional map splits two out of
4 500-and-some municipalities. That's -- the way the
12:46PM 5 legislature counted that, which was explained by Senator
6 Hise, is if a municipality is split by a county boundary,
7 that doesn't count as a municipal split, because it's the
8 county boundary splitting the municipality, it's not the
9 legislature.

12:46PM 10 And then there were some municipal splits that had zero
11 population, so it didn't affect any voters or anybody in
12 particular, because there was just zero population in that
13 little block or whatever. They didn't count that as a
14 split.

12:46PM 15 We don't know how Dr. Duchin counted municipal splits,
16 because she doesn't say in her report. But that's -- there
17 could be a difference in how they were -- how she's defining
18 it versus how the legislature was defining it. So, just
19 wanted to make that point.

12:46PM 20 JUDGE SHIRLEY: Ms. McKnight, anything?

21 MS. MCKNIGHT: Your Honor, very briefly just to
22 pick up on the last point that counsel for the Harper
23 plaintiffs mentioned. She said that those plaintiffs are
24 not putting forward the simulation map by Dr. Duchin. I
12:46PM 25 think there's a good reason for that, Your Honor.

1 Dr. Duchin's optimized map would likely fail Chen's
2 simulation. I think you see the problem when you start to
3 suggest simulated maps and algorithms should replace human
4 map-drawing, you get into this issue with maps going back
12:47PM 5 and forth that have no relation to the criteria at hand.
6 Thank you.
7 JUDGE SHIRLEY: All right.
8 JUDGE LAYTON: The Feldman exhibits, I'm trying
9 to download, it's going to take quite a while. Do you have
12:48PM 10 those in paper form?
11 MR. SCHAUF: I think I may have one copy.
12 JUDGE LAYTON: Okay. That's fine. We can look
13 at them together.
14 MR. SCHAUF: Let me just double check.
12:48PM 15 JUDGE SHIRLEY: We're going to be in recess until
16 2:00 p.m.
17 THE BAILIFF: Court stands in recess until
18 2:00 p.m.
19 (A recess was taken from 12:49 p.m. to
01:14PM 20 2:28 p.m.)
21 JUDGE SHIRLEY: Good afternoon.
22 (Pause in proceedings.)
23 JUDGE POOVEY: I'll just say while he's waiting
24 on that, I commend you all for the excellent job that you
02:30PM 25 did on behalf of your respective clients. You may -- all of

1 you made very excellent arguments, and I appreciate your
2 candor to the Court.

3 And your respective clients should be proud of the job
4 that you did for them. Part of the reason it took us a
02:30PM 5 little while is because your arguments were so good, it's
6 hard to decide. It's a tough case. So, we appreciate you
7 putting in the effort.

8 (Pause in proceedings.)

9 JUDGE SHIRLEY: All right. I'd like to echo
02:33PM 10 Judge Poovey's comments. This is not a decision we take
11 lightly. It is clear to us that the framers of our state
12 constitution left the decision on districting, or
13 redistricting, to a political party. It is, in many
14 respects, a political question which the Supreme Court of
02:33PM 15 the United States has often recognized. It results in an
16 ill that has affected this country and state since Colonial
17 days. The people of this state have had an opportunity on
18 numerous occasions, both through revision in total of the
19 constitution or through amendments, to correct this ill, but
02:33PM 20 have chosen not to do so.

21 Stephenson makes clear that partisan advantage can be
22 taken into account in redistricting. Given the inherent
23 political nature of districting, or redistricting, we cannot
24 read that permission by Stephenson as narrowly as the
02:34PM 25 plaintiffs would have us do so. To the extent the

1 plaintiffs have proven extreme partisan gerrymandering, our
2 ruling should not be construed as condoning such, only that
3 we have a reasonable doubt on these facts as to whether
4 these acts of the General Assembly are unconstitutional,
02:34PM 5 and, therefore, find that the plaintiffs have failed to
6 demonstrate a substantial likelihood of success on the
7 merits. Therefore, the motions for preliminary injunction
8 are denied.

9 We will enter an order as expeditiously as possible,
02:34PM 10 and we will certify the same for immediate appeal should the
11 parties choose to do so.

12 Thank you all for your attention, and we will be at
13 recess sine die. Court is adjourned sine die.

14 (Proceedings concluded at 2:35 p.m.)
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CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken the December 3, 2021, Session of Wake County Superior Court is a true and accurate transcript of the proceedings as reported by me and transcribed by me or under my supervision. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This, the 4th day of December, 2021.



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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No.21 CVS 500085

REBECCA HARPER, et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, et al.,

Defendants.

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiffs hereby give notice of appeal to the North Carolina Court of Appeals from the order entered on December 3, 2021, in the North Carolina Superior Court for Wake County denying Plaintiffs' Motion for Preliminary Injunction.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following counsel for defendants:

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