No. 417P19 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE JR; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; CARLTON E. CAMPBELL SR.,	From Wake County 18-CVS-014001 ********** **MOTION TO RECUSE JUSTICE EARLS** **********
Plaintiffs,	

v.)
)
REPRESENTATIVE DAVID R. LEWIS,)
IN HIS OFFICIAL CAPACITY AS)
SENIOR CHAIRMAN OF THE HOUSE)
SELECT COMMITTEE ON)
REDISTRICTING; SENATOR RALPH E.)
HISE, JR., IN HIS OFFICIAL)
CAPACITY AS CHAIRMAN OF THE)
SENATE COMMITTEE ON)
REDISTRICTING; SPEAKER OF THE)
NORTH CAROLINA HOUSE OF)
REPRESENTATIVES TIMOTHY K.)
MOORE; PRESIDENT PRO TEMPORE)
OF THE NORTH CAROLINA SENATE)
PHILIP E. BERGER; THE STATE OF)
NORTH CAROLINA; THE NORTH)
CAROLINA STATE BOARD OF)
ELECTION AND ETHICS)
ENFORCEMENT; 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)
CAORLINA STATE BOARD OF)
ELECTIONS; KENNETH RAYMOND,)
IN HIS OFFICIAL CAPACITY AS A)
MEMBER OF THE NORTH CAROLINA)
STATE BOARD OF ELECTIONS; JEFF)
CARMON, IN HIS OFFICIAL)
CAPACITY AS A MEMBER OF THE)
NORTH CAROLINA STATE BOARD OF)
ELECTIONS; DAVID C. BLACK, IN HIS)
CAPACITY AS MEMBER OF THE)
NORTH CAROLINA STATE BOARD OF)
ELECTIONS,)

Defendants.)
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

No. 417P19 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE JR; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; CARLTON E. CAMPBELL SR.,	)
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	From Wake County 18-CVS-014001
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	MOTION TO RECUSE JUSTICE EARLS
	**********

v.)
)
REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE COMMITTEE ON REDISTRICTING; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTION AND ETHICS ENFORCEMENT; 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 CAORLINA STATE BOARD OF ELECTIONS; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAVID C. BLACK, IN HIS CAPACITY AS MEMBER OF THE)
)

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

This case is the latest chapter in an inextricably intertwined series of cases challenging North Carolina's redistricting plans this decade. As a lawyer, Anita Earls was a lead player in those prior cases. As a justice, she should not participate in this one.

One of the lead plaintiffs here, Common Cause, is a former co-litigant alongside a client of Justice Earls. Another, the North Carolina Democratic Party, is her principal campaign donor. It, in fact, gave more than 40 times the amount of any other donor to her campaign. And the real party defendant is the Republican-controlled General Assembly, which has been adverse to Justice Earls in every redistricting dispute this decade predating her joining this Court. Justice Earls was not shy to criticize the General Assembly's leadership in public statements. For example, before this case was filed, she stated both in court and in public speeches that the plans challenged in this case are unconstitutional partisan gerrymanders. Indeed, given the case history, it is likely that, Lawyer Earls laid the groundwork for this litigation.

For better or worse, the public would have an objective basis to view Justice Earls as a sure vote against the General Assembly and for Plaintiffs. Plaintiffs appear to believe this as well. They waited to file this

case until after Justice Earls won election, and this creates an objective appearance that one of the parties voted waited until their candidate was elected before they decided to file this case. The integrity of this proceeding will not be served by Justice Earls' participation, and the General Assembly respectfully requests that she be recused from this case.

FACTUAL BACKGROUND

Before her election to this Court in November 2018, Anita Earls was a civil-rights attorney affiliated with the Southern Coalition For Social Justice. In that capacity, lawyer Earls filed multiple cases against redistricting legislation enacted since 2011 (when the most recent census data was released) by the Republican-controlled General Assembly.

Also in that capacity, Justice Earls engaged in public commentary on North Carolina redistricting and voting rights issues. Much of this rhetoric was highly partisan and was targeted at the General Assembly's Republican leadership. Justice Earls stated on Twitter that the "GOP's push to suppress vote threatens democracy" and that the "GOP voting crackdown in NC threatens minorities." *See* Exhibit ("Ex.") 1, Earls

Twitter Excerpts. She referred to Republicans as "Angry White Guys" and (also on Twitter) exclaimed, "GOP good for women? Please." *Id.*

A. The *Covington* Litigation

Earls was the lead attorney in *Covington v. North Carolina*, 1:15-cv-399 (M.D.N.C. 2017), a challenge to the 2011 State House and Senate redistricting plans under the Fourteenth Amendment. The *Covington* plaintiffs asserted that majority-minority districts in those plans were "racial gerrymanders" in violation of the principle the U.S. Supreme Court announced in *Shaw v. Reno*, 509 U.S. 603 (1993), and its progeny. Ultimately, the *Covington* plaintiffs were successful, a federal court invalidated 28 House and Senate districts, and the General Assembly was required to enact new districting maps to remedy the federal constitutional violations. *See generally Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016).

The General Assembly conducted a redistricting process in 2017, enacted new House and Senate plans, and submitted them to the *Covington* court for approval. Earls, on behalf of the *Covington* plaintiffs, objected to many of the districts, asserting that they did not remedy the

racial-gerrymandering violations. Ex. 2, *Covington* Plaintiffs' Objections at 20–30.

The brief also contained a section called "Partisan Gerrymander Objection Reserved." *Id.* at 42–43. The section alleged that the House and Senate plans "are unconstitutional partisan gerrymanders." *Id.* at 42. Exhibit 1 to the brief is a letter by Earls to Thomas Farr, Phillip Strach, and Michael McKnight, counsel to the General Assembly here, citing statistical evidence in support of her view that the 2017 plans "are in fact, grossly unconstitutional partisan gerrymanders." Ex. 3, Earls Letter to Thomas Farr et al., at 2. But Earls did not ask that the *Covington* court throw out the maps on this basis; it instead asserted that "addressing whether these districts are partisan gerrymanders requires more evidence" and referenced an intent to file "additional challenges." Ex. 2 at 43. Earls's co-counsel in *Covington* was Edwin Speas, counsel to Plaintiffs in this case.

The *Covington* remedial phase resulted in the replacement of some legislatively enacted districts with districts drawn by a special master, a federal district court ruling on remedial issues, *Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018), and a U.S. Supreme

Court ruling affirming in part and reversing in part, *North Carolina v. Covington*, 138 S. Ct. 2548 (2018).

B. Other Redistricting Litigation Since 2011

Earls was also the lead attorney in *Dickson v. Rucho*, No. 201PA12-3 (N.C.), which was a racial-gerrymandering challenge to the same 2011 districts challenged in the *Covington* case and to North Carolina's congressional districts. The case also included a challenge under the North Carolina Constitution's Good of the Whole clause, which Earls argued is "one source of the anti-gerrymandering limitations imposed on the General Assembly." Ex. 4, *Dickson* Appellants' Br. at 176.[1] As in *Covington*, Earls litigated alongside Edwin Speas.

This case was decided in the North Carolina Supreme Court against the *Dickson* plaintiffs, *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015), but the U.S. Supreme Court vacated the federal-law portions of the ruling for reconsideration, and the federal-law portions were ultimately mooted by the *Covington* decision, *see Dickson v. Rucho*, 137 S. Ct. 2186 (2017); *Dickson v. Rucho*, 821 S.E.2d 836, 837 (N.C. 2019).

[1] This Court concluded that the claim was "not based upon a justiciable standard." *Dickson v. Rucho*, 368 N.C. 481, 534, 781 S.E.2d 404, 440 (2015).

Earls was also the lead attorney in *Common Cause v. Rucho*, 1:16-cv-1026 (M.D.N.C.), a federal partisan-gerrymandering challenge to the 2011 congressional districts. Lawyer Earls represented the League of Women Voters in a companion case that was consolidated with the case brought by Common Cause, one of the Plaintiffs here. The cases were joined into one action, and Lawyer Earls filed briefs alongside Common Cause. Ordinarily, clients litigating side-by-side in this fashion have a joint-defense agreement, though Legislative Defendants have no way to know if one existed in this case. If it did, then communications between Lawyer Earls, Common Cause, and counsel for Common Cause would have been privileged, just as if Common Cause were the client of Lawyer Earls.

In that litigation, Lawyer Earls employed Dr. Jowei Chen, the expert whose work Plaintiffs advance as the basis for their appeal here. Ultimately, that case resulted in a U.S. Supreme Court holding that partisan-gerrymandering challenges are non-justiciable political questions under the U.S. Constitution. *See generally Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

Lawyer Earls was involved in other challenges to election laws passed by the Republican-controlled General Assembly since 2011, including a challenge to its voter identification requirements, *see N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) and a challenge to the General Assembly's alterations to the Guilford County Board of Commissioners, *see NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 517 (M.D.N.C. 2012).

C. Justice Earls' Campaign and Election

Earls ran in 2018 for a seat on this Court. Her campaign took in total contributions of $1,575,933.54.[2] Of that, $231,964.53, or 14.7%, was a direct or in-kind contribution from the North Carolina Democratic Party.[3] North Carolina law allows political parties to make unlimited contributions to candidates. By contrast, contributions by individual donors were capped at $5,200.

The election occurred on November 6, 2018. Justice Earls won approximately 49.6% of the vote, but, because she ran against two

[3] These campaign reports can be found at https://cf.ncsbe.gov/CFOrgLkup/ReportDetail/?RID=163811&TP=REC and https://cf.ncsbe.gov/CFOrgLkup/ReportDetail/?RID=163811&TP=SUM

Republican candidates who split the remaining vote total, she was elected to office.

D. This Litigation

Seven days after that election, the plaintiffs, who are petitioners here ("Plaintiffs"), filed this case. Plaintiffs include the North Carolina Democratic Party, Earls's leading campaign donor, and Common Cause. Plaintiffs are (as noted) represented by Edwin Speas, Earls's former co-counsel, among other lawyers.

Plaintiffs challenged the 2017 House and Senate plans that resulted from the *Covington* litigation. Some of the districts were redrawn in 2017 as part of the *Covington* remedial phase; others were drawn in 2011 and, hence, were challenged in the *Dickson* case as violating alleged gerrymandering prohibitions of the Good of the Whole Clause of the State Constitution—a challenge that ultimately proved unsuccessful. Whether in *Dickson*, *Covington*, or in public advocacy, Justice Earls is on record as contending that most if not all of these districts are unconstitutional partisan gerrymanders.[4]

[4] At a speech in February 2018, Earls stated that the "racially gerrymandered districts" have "been replaced with partisan

The General Assembly's officers, Rep. David Lewis, Sen. Ralph Hise, House Speaker Timothy K. Moore, and Senate President Pro Tempore Philip Berger (collectively, "Legislative Defendants" or "the General Assembly"), were named in their official capacities as defendants. *See* N.C.G.S. §§ 1-72.2, 120.32.6(b). Legislative Defendants undertook the sole defense of the districts; the other defendants took no position in the case and the North Carolina Attorney General (a Democrat) filed a brief contending that the House and Senate districts are unconstitutional.

The three-judge panel below ruled in Plaintiffs' favor at the liability phase and invalidated all of the House and Senate districts they challenged.[5] It allowed the General Assembly two weeks to enact new House and Senate plans. The General Assembly did so. For both the House and Senate plans, the respective House and Senate Redistricting Committees drew random maps created by Plaintiffs' expert, Dr. Jowei

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gerrymandered districts." Recording of Earls February 2018 speech at appr'x 1:00, available at https://www.youtube.com/watch?v=1k7kcisr08k.

[5] *Common Cause v. Lewis,* 2019 WL 4569584 (N.C. Super. 2019) referred to here as "Liability Judgment") is not reproduced here due to its size.

Chen, from a machine provided by the State Lottery Commission to create "base maps." From there, the Committees—operating in televised public sessions—made minor changes to the base maps principally to unpair incumbents. This was the most transparent and fair redistricting in North Carolina history.[6]

That was not good enough for Plaintiffs. They cherry-picked several House groupings and challenged them as partisan gerrymanders. The superior court rejected all of their contentions. Dissatisfied with that result, they brought this appeal and have demanded an emergency hearing on the merits with this Court. *See generally* Plaintiffs' Petition for Discretionary Review ("PDR").

LEGAL STANDARD

"It is not enough for a judge to be just in his judgments; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds." *Ponder v. Davis*, 233 N.C. 699, 706, 65 S.E.2d 356, 360 (1951). Accordingly, the Code of

[6] *See, e.g.*, Tyler Dukes, Latest redistricting process led to much fairer maps, analysis shows, WRAL.com (Oct. 21, 2019), https://www.wral.com/latest-redistricting-process-led-to-much-fairer-maps-analysis-shows/18703971/.

Judicial Conduct provides that, "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned." NC R CJC Canon 3. Examples of instances satisfying this standard include when (a) "[t]he judge has a personal bias or prejudice concerning a party," and (b) "[t]he judge served as lawyer in the matter in controversy," but the recusal requirement is not limited to these or any other enumerated instances of real or apparent impartiality. *Id.* Canon 3(a), (b).

Likewise, due process requires "that a judge must recuse himself when he has a direct, personal, substantial, pecuniary interest in a case," *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quotation marks omitted), including an interest predicated on campaign donations, *Id.* at 882, or the judge's "participation in an earlier proceeding," *Id.* at 880.

It is the movant's burden to "demonstrate objectively that grounds for disqualification actually exist." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002). But, once the movant presents evidence of "sufficient force" to require findings of fact, the judge whose recusal is requested should either disqualify herself or refer the matter to another

judge to rule on the motion. *See, e.g.*, *N. Carolina Nat. Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976).

ARGUMENT

Justice Earls has been, for years, an adverse attorney to the General Assembly in the redistricting cases, and those cases set the stage for this case and this appeal. Indeed, this case is the mere continuation of the *Covington* litigation, where Justice Earls herself alleged that the 2017 plans are unconstitutional partisan gerrymanders and announced an intention to challenge them in court. The case is brought by her former client and principal campaign donor, who are represented by her former co-counsel in redistricting matters. They waited until Justice Earls won election to file this case, which may lead a reasonable observer to conclude they may have never done so had she lost. Justice Earls likely helped conceive and plan this case, and Plaintiffs placed many aspects of the *Covington* case at issue in this case, including at the remedial phase. The public would "reasonably question[]" Justice Earls' participation in litigation stemming from a case where she served as counsel adverse to the General Assembly.

The public would also reasonably question Justice Earls' impartiality when the North Carolina Democratic Party outspend Earls's other donors by orders of magnitude. The Party spent over 40 times what any other donor could spend, and the timing of this case, filed a mere seven days after she won a seat on this Court, raises at least the impression that the Party believed it needed to invest in her win in order to obtain a favorable ruling in this case.

The participation of Justice Earls would violate the ethical canons and the Due Process Clause, and she therefore should not participate.

I. Justice Earls Served as an Attorney in the Matter in Controversy

Recusal is required here because Justice Earls "served as a lawyer in the matter in controversy." NC R CJC Canon 3(C)(1)(b). Canon 3(C)(1)(b) "provides us with a concrete example where the appearance of partiality suffices to establish a ground for recusal…even absent actual bias," and thus is a sufficient basis for recusal. *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991) (interpreting materially identical subsection of 28 U.S.C. § 455).

To be sure, Justice Earls has not served as counsel in the case captioned *Common Cause v. Lewis*, 417P19 (N.C.), but the Canon

references "matter in controversy," not "case" or "case number." Accordingly, courts interpreting the substantially identical federal rule, *see* 28 U.S.C. § 455(b)(2), have held that it is not limited "to cases in which the judge's conflict was with the parties named in the suit." *Preston*, 923 F.2d at 735. "Rather, the focus has consistently been on the question whether the relationship between the judge and an interested party was such as to present a risk that the judge's impartiality in the case at bar might reasonably be questioned by the public." *Id.* at 735. In other words, "the definition of 'matter in controversy' is not as narrow as the legal question in the current proceeding." *In re Letters Rogatory from Supreme Court of Ontario, Canada*, 661 F. Supp. 1168, 1174 (E.D. Mich. 1987); *see also Hoffenberg v. United States*, 333 F. Supp. 2d 166, 174 (S.D.N.Y. 2004) (same).

Were the law otherwise, a lawyer could give legal advice to a client not in connection with any live case and then, as a judge, sit on a later-filed case and adjudicate the validity of that very advice and the actions of that very client in reliance on it. The rule, in short, cannot logically be tied to case captions and other formalities. It instead must necessarily call for a functional look at the relationship between the judge's work as

a lawyer and the controversy that later comes before the same person, sitting as a judge.

A. This Case Carries Forward the *Covington* Litigation

Under this functional test, the *Covington* case and this case present the same controversy over North Carolina's legislative districts, which has been raging since the 2011 redistricting. It is a mere continuation of the *Covington* case.

1. It is plausible, if not likely, that Justice Earls was involved in planning this lawsuit. The 2017 State House and Senate plans challenged in this case were drawn in the *Covington* remedial phase. Justice Earls's brief objecting to those remedial plans asserted that they are "unconstitutional partisan gerrymanders" and expressed the intention of challenging them in court as such. By signing a brief reserving a partisan-gerrymandering objection, Justice Earls indicated an intent to bring a partisan-gerrymandering claim. And the fact that her co-counsel subsequently brought this case indicates that it is, in fact, the contemplated action.

It is, then, very likely that Justice Earls discussed this partisan-gerrymandering challenge with Mr. Speas and may well have done work

in preparation for it. Because those discussions are likely protected by privilege or work-product doctrine, their content cannot be known.[7] At a minimum, Justice Earls's involvement in this case would raise questions on whether she would be ruling on a case that she helped develop and plan. And that in turn creates, at a minimum, the appearance of bias—since it is natural for an attorney who helped conceive and plan a lawsuit to root for its success.

2. Because the plans challenged here were enacted as part of the *Covington* litigation, this case saw a substantial overlap of questions of law and fact stemming from *Covington*.

The allegation of partisan gerrymandering was leveled in *Covington*, and that issue was relitigated here. Although the *Covington* plaintiffs technically reserved the issue for later, Earls took positions on partisan gerrymandering that are equally relevant here. For example, as an attorney, Earls argued that "[t]he partisan bias in the [2017] districts

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[7] For example, the brief and letter signed by Justice Earls assert that 2017 districts violate the federal Constitution, but one might reasonably assume that, at some point, Justice Earls and Speas discussed a state-law challenge, which ultimately morphed into this case. It is hardly plausible that two lawyers who lodged state-law challenges in *Dickson* would not have thought of the State Constitution at some point in planning a partisan-gerrymandering challenge.

was not caused by the need to comply with the Whole County provision." Ex. 2 at 13. One issue in this case, both at the liability and remedial phases, is the extent to which any partisan advantage results from the natural geography of North Carolina and the strict Whole County provision. Similarly, Earls argued against a criterion that allowed "the 2017 districts [to] protect the incumbents elected under the 2011 districts." Ex. 2 at 6. Here, Plaintiffs challenge a similar criterion, approved in the trial court, allowing the General Assembly to protect incumbents at the remedial phase. *See* PDR App. 76–77 (citing *Covington* for the proposition that incumbency protection improperly maintained invalid district configuration).

By taking positions on material questions as an attorney on behalf of clients, Justice Earls handcuffed her ability to be impartial here. Revisiting those positions with an open mind in this appeal may mean taking positions contrary to those she took for clients—e.g., that North Carolina's Whole County provision does result in partisan advantage or that incumbency protection is not an improper partisan consideration that carries forward the effects of a prior unlawful plan. That would compromise her loyalty to a former client. On the other hand, if she

adheres to that loyalty and stands by the positions she took on behalf of those clients, she will have achieved a pre-determined position on matters to be litigated this case. And these are not simply abstract questions of principle; they concern the application of law to facts.

Indeed, the substantial overlap between this case and *Covington* makes it impossible for the court not address matters decided in *Covington*. The parties extensively litigated issues that were either litigated in or arose from *Covington*:

- The *Covington* remedial phase resulted in some special-master-drawn districts, because Earls successfully challenged some of the legislatively drawn remedial districts. But some of those special-master-drawn districts were invalidated in the Supreme Court on appeal. The impact of the special master's districts on the line-drawing was contested in this case, *see* PDR App. 159, 199, including at the remedial phase, *see, e.g.*, Ex. 5, Remedial Order at 16.

- The *Covington* remedial phase involved litigation over when the General Assembly's consultant, Dr. Thomas Hofeller, prepared the 2017 plans. Earls signed the brief calling into question the timing of that map-drawing activity, Ex. 6, Opposition to Motion to Quash at 6, and she signed a stipulation reaching an answer to that question without discovery, Ex. 7, Stipulation on Hofeller Map-Drawing. Plaintiffs placed that question at issue again here and Legislative Defendants placed the stipulation signed by Earls at issue in defending this challenge. *See* Liability Judgment ¶¶ 690–704.

- *Covington* resulted in an order directing Legislative Defendants "to implement the Special Master's recommended

Plans" and to use "the State's 2017 Plans…in future North Carolina legislative elections." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C.). The parties litigated the reach of that order, and the Court ruled on it. Liability Judgment ¶¶ 150–54.

- Plaintiffs placed at issue the General Assembly's compliance with the criteria used in 2017 during the *Covington* remedial phase. They contended that the General Assembly violated the criteria barring the use of racial data and went so far as to accuse Legislative Defendants and some of their lawyers of misleading the *Covington* court on these and related issues.

In short, this case is a mere continuation of *Covington* and constitutes the same "matter" and "controversy." It would, without a doubt, be subject to reasonable question whether a lawyer who litigated the *Covington* matter could act with impartiality in sitting on this case, when the two are so closely connected.

B. The Narrow Scope of This Appeal Does Not Break the Nexus With *Covington*

The connection between *Covington* and this matter extends to the remedial phase, and any contention that recusal is not required because this appeal concerns the remedial phase, rather than the liability phase, would lack merit.

1. The likelihood that Earls participated as a lawyer in conceiving and planning this case confirms that she should have no part in it, including at the remedial phase. When planning an action, a lawyer

considers, not only the basis of the claim, but the client's ultimate *goal*—the real-world result the client wants to achieve. Planning a suit for, say, breach of contract necessarily entails the question of how much can be obtained in the ultimately recovery. So a lawyer who planned to obtain $50,000 for a client plainly cannot sit on an appeal of a remedial order allowing $45,000. The fact that the appeal is narrow and involves only a small subset of issues in the case does not change the fact that the judge plainly is on the side of full recovery of the hoped-for amount.

Here, Lawyer Earls took the position that the 2017 plans had a poor "efficiency gap"—i.e., a gap in the ratio of the predicted seats attainable based on votes received by the respective major parties. She also took the position that a more Democratic-favorable gap is attainable and desirable under North Carolina's law and political geography. Ex. 2 at 12–13. Even though Plaintiffs prevailed below, they are dissatisfied with the remedy and believe it can be more friendly to the Democratic Party. This means that all that was hoped for at the planning stage did not bear out in the

remedy. Whatever role Earls had in planning cannot be separated from the effort to bring those plans to full, rather than partial, fruition.[8]

In any event, the Canon's concern that a judge's impartiality be beyond "reasonabl[e] question[]" clarifies any doubt on recusal here. A lawyer who states in a brief that a partisan gerrymandering challenge is forthcoming can be expected to sympathize with that challenge and to do so until its culmination. The public would reasonably expect that Justice Earls would be in Plaintiffs' corner if she were to sit on this case, and any superficial differences between the liability and remedial phases would not change that fact. Justice Earls's impartiality can be reasonably questioned on this basis alone.

2. What's more, this remedial phase—like the liability phased—carries forward questions of fact and law from the liability phase. Although the remedial phase will *not* involve a review of the question of whether the North Carolina Constitution forbids partisan redistricting (a principle not challenged and applicable merely as law of the case), it

[8] In particular, the North Carolina Democratic Party has not been shy to assert that the purpose of this case is to obtain court assistance in winning a majority of the General Assembly. It seems natural, if not inevitable, that plans to obtain a majority were discussed at the planning stage.

does involve applying that principle to the facts here, and those facts are the continuation of facts at issue in *Covington*.

Most notably, the criteria the three-judge panel imposed and the General Assembly, in turn, adopted are virtually identical to the *Covington* criteria, PDR at 7, Ex. 5 at 10–11, their interpretation was a core question in the liability phase, and Plaintiffs have placed them at issue again here. *See* PDR at 7, 11. Plaintiffs contend, for example, that, because the superior court found that some criteria "were subordinated to unpairing incumbents," *partisanship* predominated. *Id.* at 10, 13–15. Evaluating this argument requires (in part) assessing the meaning of the incumbency-protection criterion—a criterion at issue in the 2017 remedial phase, addressed by Earls in her remedial brief, and litigated again at the liability phase here. *See* Ex. 2 at 6–9. Indeed, the *Covington* experience on incumbency protection was re-litigated extensively at the remedial phase here and was referenced on the floor at the 2019 redistricting. *See* PDR App 75–77.

The overlap between the liability and remedial phases is further confirmed in Plaintiffs' assertion that the remedial districts they challenge are unlawful because "incumbents restored specific elements

of the prior gerrymander." PDR at 8. Legislative Defendants intend to argue (among other things) that the similarities are not material, and that there are significant differences. To evaluate this argument, the Court may need to assess (among other things) which aspects of similarity and differences are meaningful and which are not.[9] A lawyer who litigated the contours of the prior districts will inevitably have a pre-conceived view on that question, formed by her experience in the litigation that produced those "prior" districts and "specific elements" rather than by an impartial view of the facts and arguments presented in this case.

Likewise, Plaintiffs' factual assertions are carried forward from the 2011 redistricting that Justice Earls challenged as a lawyer. One of their core allegations is that the General Assembly must have considered politics at the remedial phase because it utilized the services of Clark Bensen, who (they say) "previously assisted Legislative Defendants in

[9] Of course, because Legislative Defendants did not appeal the liability ruling by the superior court on appeal the Supreme Court is limited to review of whether the trial court based it's order on competent evidence. Therefore, Legislative Defendants' intend to argue that substantial deference is owed to the trial court. But Plaintiffs' attempt to re-litigate facts will require an impartial Court as to the facts under any standard of review.

gerrymandering districts in North Carolina," including by providing "political data for them in drawing the 2011 plans." App 40, 42. For that proposition, they cite exhibits produced in the *Dickson* litigation, which Earls also spearheaded. The superior court credited Mr. Bensen's assertion that his role in the remedial phase was extremely limited and involved no partisan data or evaluation, Ex. 5 at 8–10, but Earls may have a different view based on her litigation experience.

C. Justice Earls's Other Work in This Cycle's Redistricting Litigation Adds to the Appearance of Partiality

Justice Earls participated in other matters relevant to this case, and they too should be considered as part of a holistic, functional review regarding her ability to sit here without so much as the appearance of impartiality.

1. In addition to *Covington*, Earls was the lead attorney in the *Common Cause v. Rucho* case, a federal gerrymandering challenge to the State's congressional districts, and in the *Dickson* case, and a gerrymandering state-court challenge against the 2011 House and Senate districts—which (as mentioned) adduced evidence Plaintiffs have cited in the remedial phase. These cases add to the cumulative

involvement of Lawyer Earls in redistricting matters adverse to the General Assembly and call her ability to remain impartial into further doubt. In *Dickson*, Lawyer Earls challenged the 2011 House and Senate plans as gerrymanders, and many of those districts were carried forward into this case. In *Rucho*, Lawyer Earls represented a co-litigant to Common Cause, one of the Plaintiffs here.

Also in *Rucho*, Lawyer Earls employed Dr. Jowei Chen as an expert and defended his mapping-simulation work against multiple methodological challenges. *See* Ex. 8, *Common Cause v. Rucho* Post-Trial Brief at 22–23; *Common Cause v. Rucho*, 218 F. Supp. 3d 777, 819–20 & nn.9–10 (M.D.N.C. 2018). Plaintiffs rely on Dr. Chen heavily in their appeal. PDR 8–10, 12–13, 15. But the superior court did not find Dr. Chen's remedial-phase mapping analysis to be a reliable basis for judging the remedial districts and. The Court instead found that—although Dr. Chen simulated 1,000 maps for the groupings Petitions challenge on appeal—Plaintiffs produced "no alternative map that better achieved" the General Assembly's non-partisan criteria. Ex. 5 at 24. In *Rucho*, Lawyer Earls argued that Dr. Chen's method tracks the non-partisan criteria used by the legislature. Ex. 8 at 16, calling into doubt her ability

to adjudicate what will undoubtedly be an appeal focused on Dr. Chen's method.

2. Of additional relevance are the numerous statements in public advocacy antagonistic to the General Assembly's Republican leadership. The constant refrain of Lawyer' Earls's legal and public advocacy since 2011 has been that the Republican-led General Assembly "suppress[ed]" voting rights and "threaten[ed] democracy" and "minorities." She called Republicans "Angry White Guys" and openly asserted that the Republican Party could not be "good for women." On top of that, in case after case, Earls repeatedly asserted that the General Assembly engaged in legal wrongdoing. When confronted with prior gerrymandering by the Democratic Party, Earls responded that "these cases are not actually troubling."[10] Ex. 8 at 19.[11]

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[10] Those districts have, in fact, been cited as the most egregious since the days of rotten boroughs.

[11] These statements approach the level of bias evident in statements held to require recusal in precedent. *See Ponder v. Davis*, 233 N.C. 699, 703, 65 S.E.2d 356, 359 (1951), or expressed an opinion on its merits or about a litigant in it, *see, e.g.*, *State v. Hill*, 45 N.C. App. 136, 141, 263 S.E.2d 14, 17 (1980) (holding that statement that a defendant "had implicated himself" in testimony in another case, "which to a reasonable person would mean that the judge had formed an opinion against defendant"); *Matter of Dale*, 37 N.C. App. 680, 685, 247 S.E.2d 246, 249 (1978) (finding

All of this has a cumulative impact. On their own, these facts might not arise to a level of actual or apparent bias sufficient to require recusal, but together with the *Covington* case, they create the objective impression that Earls is the candidate set to rule against the General Assembly in any redistricting case. The day this case was filed, an article asserted that Plaintiffs can expect the "help of civil rights attorney Anita Earls" in this case. Mark Joseph Stern, Democrats Are Poised to Wipe Out Republicans' North Carolina Gerrymander in Time for the 2020 Election, Slate (Nov. 13, 2018).[12] The article explained:

> As a result, Democrats will soon hold a 5–2 majority on the court. And Earls played a major role challenging earlier GOP gerrymanders. When she announced her candidacy, Earls declared that she sought to shield "the right of all citizens to cast a ballot that is counted equally," a clear reference to partisan gerrymandering. There is no reason to doubt that she and her Democratic colleagues on the court will be prepared to invalidate the current

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assertion by judge that lawyer had behaved "negligently" was objective indicia that judge had pre-judged the case); *State v. Fie*, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987) (finding assertions by judge related to the defendants required recusal). Given the combination of factors, these statements do not need to be evaluated on their own to establish the necessity of recusal. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

[12] https://slate.com/news-and-politics/2018/11/north-carolina-gerrymandering-lawsuit-anita-earls.html

> legislative maps when this case reaches their docket.

Id.

Whatever their reality—which is impossible to know, *see Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009)—these appearances cannot be overcome at this late stage. The public assumption will be that Justice Earls will sign on to Plaintiffs' position, and, if Plaintiffs' win, that the result will have followed from a partisan election, not from the law and facts applicable to this case. On the other hand, even a ruling in favor of the General Assembly—and even with the vote of Justice Earls—cannot be free from questions about ulterior motive, since a judge may act in a biased manner by overtly trying to avoid the appearance of partiality and ruling on that basis for the party against whom the judge is presumed to be biased. This is a no-win situation, and recusal is the only way out of it.

D. The Participation of Justice Earls Would Violate Due Process

That participation by Justice Earls would violate the Code of Judicial Conduct is a sufficient basis to grant the General Assembly's motion. But it bears noting that this case is sufficiently severe as to violate the higher standards of the Due Process Clause of the U.S.

Constitution. Due process can be violated "because of a conflict arising from [a judge's] participation in an earlier proceeding." *Caperton*, 556 U.S. at 880. For example, an individual who sits as a *de facto* prosecutor at an investigative stage of a proceeding cannot, consistent with due process, be the judge at a later stage. *See In re Murchison*, 349 U.S. 133, 137 (1955).

It is no better from a due-process perspective for an individual to participate in one phase of a legal challenge as a lawyer and, in another, as a judge. Here, Justice Earls has taken many positions as a lawyer (adverse to the General Assembly) on matters at the heart of this litigation; it would deny Legislative Defendants their right to due process to have an adverse attorney deciding this appeal. The fact that this appeal involves a narrow subset of issues does not extenuate these due-process defects. As discussed above, the issues at the liability and remedial phases of this case are inextricably intertwined with each other and with issues raised in *Covington* and *Dickson*. It would be fundamentally unfair for Legislative Defendants to have to argue this appeal before a Justice who was, in the same string of litigation, an adverse attorney.

II. There Is Substantial Evidence of Partiality That Calls Justice Earls's Ability To Remain Impartial Into Substantial Doubt

An independent basis for recusal lies in the fact that Justice Earls, as a candidate for this Court, received substantial contributions from the lead Plaintiff in this case, which dwarfed other contributions her campaign received (or, at least, was allowed to receive). Under the circumstances, the participation of Justice Earls would violate both the due-process standard and create reasonable questions about her impartiality under the Code of Judicial Ethics.

The facts here mirror those of *Caperton*, the Supreme Court's groundbreaking ruling that campaign spending can violate due process. As in *Caperton*, several factors together require recusal.

The first is the comparative size of the contribution. *See Caperton*, 556 U.S. at 873. The North Carolina Democratic Party, a Plaintiff here, gave $231,964.53 in direct or in-kind contributions. The amount is problematic on its face, but the comparative worth is staggering. Contributions by individual donors are capped at $5,200, and political parties alone are allowed unlimited contributions. As a result, the North

Carolina Democratic Party donated more than 40 times in excess of what any other donor could give to the Earls campaign.

And, importantly, these are donations directly to the Earls campaign, not independent expenditures. Thus, the direct and in-kind contributions fell fully within the control of the campaign, whereas independent expenditures, though potentially helpful to a candidate, are not within the candidate's control and can, as a result, be used in ways the candidate would prefer they not be used. In that respect, the donations here are *more problematic* than the money spent in *Caperton*, which overwhelmingly consisted of donations to a 527 independent group. *See id.* at 873.

Another factor is the timing of this case. *See Caperton*, 556 U.S. at 886. The money was spent in the 2018 Supreme Court race, and Plaintiffs filed their action a mere seven days after the 2018 election. They plainly had plans to file the case and the timing creates an inference that they were apparently awaiting the outcome of the election before pulling the trigger. It was, then, "reasonably foreseeable, when the campaign contributions were made, that the…case would be before the newly elected justice." *Id.* It was readily apparent to all observers that her

election dramatically increased Plaintiffs' odds of success. The appearance of an effort to cash in on a campaign donation is devastating to public trust in judicial impartiality.

A third factor is that the election was close. Justice Earls did not receive a majority of the vote and won only because two Republican candidates split the remaining vote, which constituted a majority of the total votes cast. Whether the contributions "were a necessary and sufficient cause" of the victory is unknowable and beside the point. *See id.* at 885. What matters is that the race was hotly contested, and the outsized spending of the North Carolina Democratic Party, a litigant here, creates "the risk" of "actual bias." *Id.*

These factors together qualify this case as "an extraordinary situation where the Constitution requires recusal." *Id.* at 887. But even if that were not so, it would still qualify as a case requiring recusal under the lower standards of the Code of Judicial Ethics. The appearance of a justice ruling in a case brought by a big-money political party donor demeans the integrity of the process and therefore is a case where the impartiality of Justice Earls may "reasonably be questioned."

Indeed, Justice Earls wrote about strikingly similar issues as an attorney. In representing the Campaign Legal Center and Democracy 21 in defense of North Carolina's campaign contributions, she observed that "those who make contributions to a political committee, whose chief aim is to nominate or elect candidates often do so in an attempt to purchase influence. Candidates know where large contributions come from, particularly those that benefit them or harm their opponent." Ex. 9, *Amicus* Br. in *N.C. Right to Life v. Leake*, at 10–11. Justice Earls is no exception; she knows the North Carolina Democratic Party paid an enormous sum to help her attain election to this Court. And, by the same token, the Party knows why it sought to put her there. That is intolerable and should be held to violate state law, even if the U.S. Constitution somehow allows it.

CONCLUSION

Legislative Defendants respectfully submit that Justice Earls should not participate in this case.

Respectfully submitted,

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it

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CERTIFICATE OF SERVICE

This is to certify that pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the clerk of the North Carolina Supreme Court by Electronic Submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email and U.S. First class Mail:

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This 6th day of November, 2019.

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Exhibit 1

Anita Earls @Anita_Earls · 7 May 2012
Stop election chaos in North Carolina signon.org/s/SHeDny #signon

Anita Earls @Anita_Earls · 1 Aug 2012
Compelleting example from PA of why voter id laws disenfranchise legitimate voters: Like a Modern Day Poll Tax bit.ly/Mk10LR

Anita Earls @Anita_Earls · 3 Sep 2012
GOP good for women? Please cnn.com/2012/09/01/opi... #cnn

Anita Earls @Anita_Earls · 5 Nov 2012
GOP's push to suppress vote threatens democracy - CNN.com
cnn.com/2012/11/04/opi...

Anita Earls @Anita_Earls · 4 Apr 2013
Stop VOTER ID in NC -- sign up NOW to speak next Wednesday at a public hearing in Raleigh: ncleg.net/Applications/R...

Anita Earls @Anita_Earls · 5 Apr 2013
This week was vote suppression on steroids in the NC legislature: Check out

7 Ways North Carolina Republicans are Trying to M...
Seventy-five new voting restrictions have been introduced in 30 states in 2013. North Carolina is leading the way.
thenation.com

1

Anita Earls @Anita_Earls · 8 Apr 2013

GOP voting crackdown in NC threatens minorities on.msnbc.com/11xuWsx via @msnbc

Anita Earls @Anita_Earls · 11 Apr 2013

Pick a side, NC: Our voting rights are on the chopping block | Other Views | NewsObserver.com newsobserver.com/2013/04/09/281... via @twitterapi

Anita Earls @Anita_Earls · 13 Apr 2013

Angry White Guys: The Roots of Reactionary America | NationofChange nationofchange.org/angry-white-gu... via @nationofchange

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-399

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al,*

Defendants.

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' REMEDIAL DISTRICTS AND MEMORANDUM OF LAW

Table of Contents

Exhibits to Plaintiffs' Objections and Memorandum of Law

Exhibit 1: Letter from Anita Earls, Counsel for Plaintiffs, to Thomas Farr, et al., (August 23, 2017)

Exhibit 2: Public Written Comments Submitted to the General Assembly

Exhibit 3: Campaign Legal Center August 22, 2017 Analysis Submitted to the General Assembly

Exhibit 4: Campaign Legal Center August 24, 2017 Analysis Submitted to the General Assembly

Exhibit 5: Declaration of Senator Gladys Robinson

Exhibit 6: Declaration of Anthony E. Fairfax

Exhibit 7: Declaration of William R. Gilkeson, Jr.

Exhibit 8: Declaration of Senator Robert Benjamin Clark, III

Exhibit 9: Senate District Compactness and Incumbent Pairing Data

Exhibit 10: Declaration of Dr. Gregory Herschlag

Exhibit 11: House District Compactness and Incumbent Pairing Data

Exhibit 12: Hofeller Deposition Excerpt in *LWV v. Rucho*

Exhibit 13: Gimpel Deposition Excerpt in *LWV v. Rucho*

I. INTRODUCTION

Following an evidentiary hearing on July 27, 2017 on Plaintiffs' motions for additional relief and for a court-ordered timeline for the adoption of new districts to remedy the constitutional violations found in nine senate districts and nineteen house districts, this Court allowed the Defendants until September 1, 2017 to enact new House and Senate districts "remedying the constitutional deficiencies with the Subject Districts", Order 8, July 31, 2017, ECF No. 180. Plaintiffs object to the remedial districts enacted by the General Assembly on two grounds: first, that two of the newly drawn Senate Districts, (SD 28 and SD 21) and two of the newly drawn House Districts (HD 21 and HD 57) fail to cure the racial gerrymandering violations identified by this Court; and second, that one Senate District (SD 41) and seven House Districts (HD 10, 36, 37, 40, 41, 83, and 105) cannot be used as remedial districts because they violate the North Carolina Constitution. The Court has before it all the evidence necessary to make these determinations and should itself remedy these particular constitutional defects in the state's maps.[1] *See Chapman v. Meier,* 420 U.S. 1, 27 (1975) (If the legislative body responds with a legally unacceptable remedy, "the responsibility falls on the District Court."); *White v. Weiser,* 412 U.S. 783, 797 (1973) (District court should "defer to state

[1] Plaintiffs also object to the remedial districts on the grounds that they are an unconstitutional partisan gerrymander, but as explained below, *infra at* 42, acknowledge that the record is not complete on this issue.

policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge.").

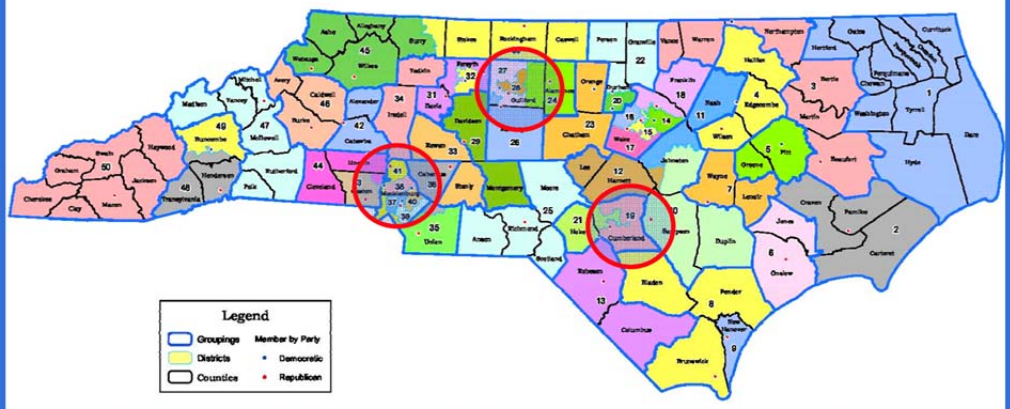
It is this Court's responsibility to fully remedy the constitutional violations suffered by Plaintiffs. *Brown v. Plata*, 563 U.S. 493, 571 (2011) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (internal citation omitted). At the same time, "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited," *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Therefore Plaintiffs ask this Court to order the use of Plaintiffs' proposed remedial districts only in the areas of the state impacted by the remaining constitutional defects in the Defendants' districts or alternatively to appoint a special master to draw remedial districts in those limited areas where the constitutional violations have not been cured or new constitutional violations exist. *See Personhuballah v. Alcorn,* 155 F. Supp. 3d 552 (E.D. Va. 2016) (three judge court) (implementing redistricting plan drawn by special master to remedy racial gerrymander).

To be clear, this Court originally found constitutional violations in 28 districts. In order to comply with the Court's remedial order to correct those violations and remain consistent with the North Carolina Constitution, the General Assembly altered a total of 116 House and Senate districts. Plaintiffs object to 12 of those newly drawn districts as violating the federal and state constitutional provisions applicable to legislative

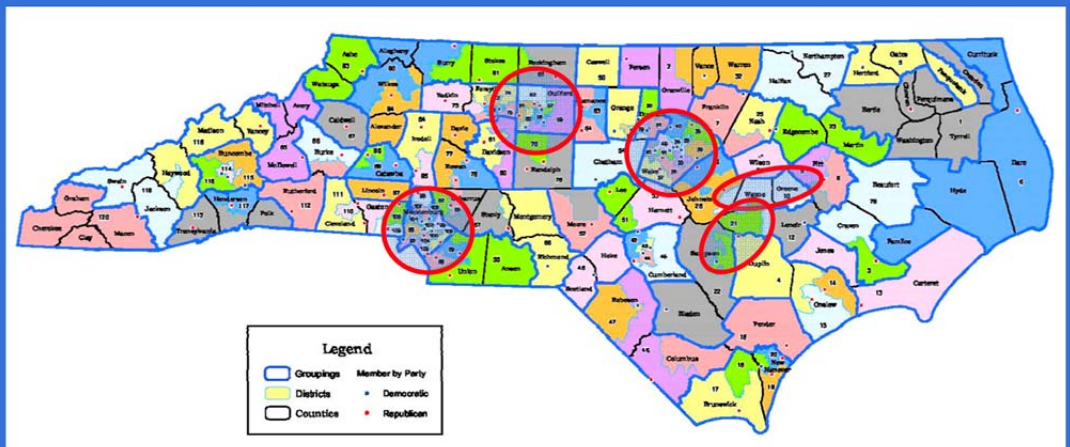
redistricting in North Carolina. Those objections, and alternative maps that cured those problems, were presented to the North Carolina General Assembly by Plaintiff Rev. Julian Pridgen at the public hearing on August 22, 2017 and by a letter to Counsel for Defendants dated August 23, 2017, well before the final remedial districts were adopted on August 31, 2017. *See* Raleigh Public Hr'g Tr. 143:20-145:23, Aug. 22, 2017, ECF No. 184-10; Letter from Anita Earls to Thomas Farr, et al. (Aug. 23, 2017) (attached as Ex. 1). None of the constitutional flaws identified by Plaintiffs were altered in the final enacted districts.

Plaintiffs do not contend that all 116 newly drawn House and Senate districts must be rejected, but only that the 12 unconstitutional districts cannot be used and alternative, constitutionally-compliant districts must be ordered by this Court. The areas impacted by these districts in each plan are illustrated by the red circles on these maps:

2017 Senate Redistricting Plan



2017 House Redistricting Plan A2



II. STATEMENT OF THE CASE

On August 15, 2016, this Court issued a Memorandum Opinion holding that twenty-eight House and Senate districts are racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment, and issued an accompanying order enjoining the state from using those districts in conducting any elections after November 8, 2016. Op., ECF No. 123. In a subsequent remedial order the Court allowed the General Assembly until March 15, 2017 to enact new districts and required the state to hold special primary and general elections using those new districts in 2017. Order, ECF No. 140 (Nov. 29 2016). That Order was stayed by the United States Supreme Court pending review of the merits of Plaintiffs' claims. *North Carolina v. Covington,* 137 S. Ct. 808 (2017) (mem.).

On June 5, 2017, the Supreme Court summarily affirmed this Court's judgment on the merits of the case in favor of Plaintiffs. *North Carolina v. Covington*, No. 16-649 (U.S. 2017). That same day the Court vacated this Court's remedial order and remanded the case for a balancing of the equities and imposition of a remedy. *North Carolina v. Covington*, No. 16-1023, slip op. at 2-3 (U.S. June 5, 2017) (per curiam). On July 31, this Court issued an order allowing the Defendants until September 1, 2017, or up to two weeks longer if requested, to redraw the unconstitutional districts and submit them to the Court for review. Order 8, 10, ECF No. 180. The Defendants did not request an

extension of deadlines, enacted remedial districts on August 31, 2017, and filed the newly enacted plans and related materials with the court on September 7, 2017.

III. STATEMENT OF FACTS

A. The legislative process for enactment of S.L. 2017-207 and S.L. 2017-208

Redistricting committees adopted faulty criteria.

At the outset of the redistricting process, the House and Senate redistricting committees adopted map-drawing criteria to be provided to Dr. Thomas Hofeller, whom the General Assembly again hired to draw its 2017 remedial maps. *See* Joint Redistricting Comm. Meeting Tr. 4:23-25, 69:12-16, Aug. 10, 2017, ECF No. 184-9. One of these criteria directly perpetuated the effects of the unconstitutional 2011 districts by requiring that, to the extent possible, the 2017 districts protect the incumbents elected under the 2011 districts. Adopted Criteria for House and Senate Plans, ECF No. 184-37. That is, applying this criterion, the committee cemented the harms created by the state's 2011 unconstitutional actions in districts that were supposed to remedy the earlier maps' unconstitutionality.

The committees expressly forbade any consideration of racial data in drawing district lines. *See id.* ("No Consideration of Racial Data. Data identifying the race of individuals or voters shall not be used in the drawing of legislative districts in the 2017 House and Senate plans." (emphasis in original)). Members of both committees pressed the chairmen for an explanation of how the General Assembly could ensure the racial

gerrymanders in the 2011 maps had been cured if the legislature refused to consider racial data when adopting remedial maps, in some cases reading directly from this Court's July 31 remedial order. *See, e.g.*, Joint Redistricting Comm. Meeting Tr. 151:6-154:17, 155:21-156:12, 177:14-19, Aug. 10, 2017, ECF No. 184-9; House Select Comm. on Redistricting Meeting Tr. 21:22-23:7, Aug. 25, 2017, ECF No. 184-18. Rep. David Lewis, chairman of the House Select Committee on Redistricting, explained the legislative leadership's interpretation of this Court's August 11, 2016 opinion and July 31, 2017 order as follows:

> Despite the voluminous record that was established by the General Assembly during the 2011 redistricting process, the three-judge panel in the Covington case said that this did not constitute substantial evidence that would justify using race to draw districts in compliance with the VRA. Therefore, we do not believe it is appropriate given the Court's order in this case for these committees to consider race when drawing districts.
>
> . . .
>
> We do not believe, in light of the Covington opinion, that there is substantial evidence in the record to justify the use of race in drawing districts. Given the Court's order in this case, we believe the only way to comply with the legal requirements regarding the drawing of districts is not to consider race in that process.

Joint Redistricting Comm. Meeting Tr. 149:4-14, 158:11-18, Aug. 10, 2017, ECF No. 184-9. An amendment to allow for consideration of racial data was rejected by the committees in formal votes along political party lines. *See* Joint Redistricting Comm. Meeting Tr. 174:24-186:14, Aug. 10, 2017, ECF No. 184-9.

While stopping short of explicitly adopting "partisan advantage" as a criterion as the committee did in the 2016 congressional redistricting process, the committees broadly provided for "political considerations" to be taken into account in drawing district lines. *Compare* 2016 Contingent Congressional Plan Committee Adopted Criteria, N.C. General Assembly, http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf *with* Adopted Criteria for House and Senate Plans, ECF No. 184-37.

The proposed criteria were adopted by the redistricting committees within hours of their introduction, without amendment. *See generally* Joint Redistricting Comm. Meeting Tr., Aug. 10, 2017, ECF No. 184-9. The public was afforded no opportunity to comment on the proposed criteria between their introduction and adoption, but members of the public, including Plaintiffs, later formally objected to the criteria and called upon the committees to revise them.[2] *See, e.g.*, Raleigh Public Hr'g Tr. 78:11-80:14, Aug. 22, 2017, ECF No. 184-10 (comments of Plaintiff Channelle James). The committees declined to revise the criteria in response to public input.

[2] A week before the proposed criteria were introduced, the joint redistricting committees held a meeting to receive public input on criteria for drawing maps. Recurring requests from members of the public during this meeting included requests that the General Assembly exclude partisan advantage and incumbency protection as criteria, and consider racial data in a way that ensured the racial gerrymanders identified by this Court were in fact cured. *See, e.g.*, Joint Redistricting Comm. Meeting Tr. 29:19-30:23, 58:20-59:11, Aug. 4, 2017, ECF No. 184-8. Members of the public also repeatedly called for the maps to be drawn by someone other than the consultant who drew the 2011 maps struck down by this Court. *E.g., id.* at 33:25-34:2, 44:4-10, 66:18-67:9.

In adopting criteria, the redistricting committees provided no guidance to Dr. Hofeller as to which of the criteria should take precedence over others, beyond the requirement that the maps must comply with state and federal law. *See* House Select Comm. on Redistricting Meeting Tr. 62:4-6, Aug. 25, 2017, ECF No. 184-18.

Redistricting committees minimized and disregarded public input.

More than a week after redistricting criteria were adopted, the proposed remedial maps for the House and Senate were released over the weekend of August 19-20, 2017, ahead of public hearings scheduled at six sites throughout the state on Tuesday, August 22. However, the block assignment files and statistical data associated with the maps, which were necessary for any meaningful analysis, were not released to legislative committee members or the public until midday Monday, August 21, the day before the public hearings.[3]

The public hearings were held on a weekday afternoon, with six satellite meeting sites teleconferenced into a central meeting site in Raleigh. Several of the satellite sites were filled beyond capacity, in part because they were held in locations that held as few

[3] Plaintiffs' counsel sent an email to Defendants' counsel on Saturday, August 19 explaining that the block assignment files and underlying data were necessary for conducting any meaningful analysis of the maps. Plaintiffs' counsel requested that the block assignment files and underlying data be furnished simultaneously with release of the maps, and further requested an explanation for why that information was not being provided at the time the maps were released. Plaintiffs' counsel received no response to their email.

as 25 people in populous areas.[4] From the start, this arrangement was plagued with technical difficulties, and two and a half hours into the meeting Rep. David Lewis announced a decision to separate the proceedings into seven concurrent meetings.[5] *See* Raleigh Public Hr'g Tr. 111:1-9, Aug. 22, 2017, ECF No. 184-10; *see id.* at 110:11-16 (announcing that more than 200 people remained signed up to speak as of 6:30 p.m.); *see also* House Select Comm. on Redistricting Meeting Tr. 30:10, Aug. 25, 2017, ECF No. 184-18 (acknowledging "technical problems" during the hearings).

Following the public hearings, transcripts of the comments received at the six sites were not timely furnished to members of the redistricting committee for review. House Select Comm. on Redistricting Meeting Tr. 29:4-18, Aug. 25, 2017, ECF No. 184-18. Nor were the more than 4,300 comments submitted in writing via an online portal, and

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[4] For example, the Guilford County site held 25-30 people, and the Mecklenburg County site held 45-55 people. Aug. 22, 2017 Redistricting Public Hr'g Sites, N.C. General Assembly, http://www.ncleg.net/documentsites/committees/house2017-183/8-22-2017/Sites%20for%20Public%20Comment.pdf; *see also* House Select Comm. on Redistricting Meeting Tr. 30:3-8, Aug. 25, 2017, ECF No. 184-18 ("some of the satellite sites weren't as big as perhaps we would have chosen if we could go back and do it again"). By contrast, a satellite site in Caldwell County, in a part of the state where no districts were being redrawn in 2017, was not full. *See* Hudson Public Hr'g Tr. 2:5-11, Aug. 22, 2017, ECF No. 184-14.

[5] By this time, many people who had signed up to speak but had not yet been called upon to address the committee had left the meetings. See Raleigh Public Hr'g Tr. 122:13-21, Aug. 22, 2017, ECF No. 184-10 (noting "many individuals have left" and overflow room had been closed as roll calls go unanswered). The meetings nonetheless lasted well into the night, with the Raleigh site adjourning shortly before 10 p.m. See House Select Comm. on Redistricting Meeting Tr. 29:7-8, Aug. 25, 2017, ECF No. 184-18.

the redistricting committees had no plan for reviewing those comments.[6] *See id.* at 30:20-31 ("I don't know that anyone was specifically tasked with looking at them.").

Plaintiffs submitted alternative maps and objections, which were rejected.

Before either redistricting committee convened to consider the proposed maps, Plaintiffs' counsel sent a letter to the redistricting committee chairs identifying districts in the map where the racial gerrymanders identified by this Court had been perpetuated. Letter from Anita Earls to Thomas Farr, et al. (Aug. 23, 2017). This letter also identified several districts that had been drawn in violation of the state constitution. *Id.*; *see also* Raleigh Public Hr'g Tr. 143:20-145:23, Aug. 22, 2017, ECF No. 184-10 (comments of Plaintiff Julian Pridgen). Before either committee debated or voted on the proposed maps, Plaintiffs provided the committees with alternative House and Senate maps illustrating how the constitutional violations they had identified could be corrected. *See* ECF No. 184-28 (Plaintiffs' House plan, introduced after submission as an amendment by Rep. Darren Jackson); ECF No. 184-34 (Plaintiffs' Senate plan, introduced after submission as an amendment by Sen. Dan Blue); *see also* Rev. Julian Pridgen Comments and Maps, Senate Redistricting Comm., http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=357&sFolderName=\08-22-2017\Submitted%20public%20comments\Rev.%20Julian%20Pridgen (last

[6] As of the time of this filing, those written comments had also not been submitted to this Court. They are attached here as Ex. 2.

visited Sept. 15, 2017). The Plaintiffs' House and Senate maps were introduced for consideration in both committees and on the Senate floor, and in each case were rejected by a formal vote along party lines, in part because racial data had been taken into consideration in drawing the district lines. *See* Senate Redistricting Comm. Meeting Tr. 130:18-15, Aug. 24, 2017, ECF No. 184-17; Senate Floor Session Tr. 120:18-20, Aug. 25, 2017, ECF No. 184-19; House Select Comm. on Redistricting Meeting Tr. 112:3-117:7, Aug. 25, 2017, ECF No. 184-18. No changes were ultimately made to the enacted maps in response to any of the Plaintiffs' suggestions. House Select Comm. on Redistricting Meeting Tr. 19:17-21, Aug. 25, 2017, ECF No. 184-18.

Partisan impact of enacted maps was made clear to legislators.

During the legislative process, the nonpartisan Campaign Legal Center conducted an analysis of the political symmetry of the proposed House and Senate plans. That analysis found a nearly 12% efficiency gap in favor of Republicans in both the House and Senate maps, among the largest gap of any state legislative plan in the nation and well beyond the level experts consider presumptively unconstitutional. Memo from Ruth Greenwood to House Select Comm. on Redistricting & Senate Redistricting Comm., Aug. 22, 2017 (attached as Ex. 3) (finding 11.98% efficiency gap in House map and 11.87% efficiency gap in Senate map, and stating that experts consider gaps of 7% presumptively unconstitutional).

Campaign Legal Center formally submitted this analysis to the redistricting chairs for consideration during the legislative process, and legislators and members of the public brought the analysis and other politically asymmetrical aspects of the proposed maps to the committees' attention. *See id.*; Raleigh Public Hr'g Tr. 167:13-168:18, Aug. 22, 2017, ECF No. 184-10 (comments of Bob Hall); Senate Redistricting Comm. Meeting Tr. 26:24-29:12, Aug. 24, 2017, ECF No. 184-17 (Sen. Ben Clark). The partisan bias in the districts was not caused by the need to comply with the Whole County provision as a second analysis comparing the legislature's proposed districts with those submitted by the Plaintiffs showed that it is possible to remedy the constitutional violations with districts that have less than a 2% efficiency gap. *See* Memo from Ruth Greenwood to House Select Comm. on Redistricting & Senate Redistricting Comm., Aug. 24, 2017 (attached as Ex. 4). No changes were ultimately made to the enacted maps to address the partisan asymmetry identified by the Campaign Legal Center and others. *See generally* Senate Redistricting Comm. Meeting Tr., Aug. 24, 2017, ECF No. 184-17; House Select Comm. on Redistricting Meeting Tr., Aug. 25, 2017, ECF No. 184-18.

Changes made during the process were minor and largely protected incumbents.

The few amendments made to the maps during the legislative process were minor and came largely at the request of incumbents with regard to their own districts or other districts within their county groupings. Senate Redistricting Comm. Meeting Tr. 67:15-19, Aug. 24, 2017, ECF No. 184-17 (adjusting boundary between two districts in Wake

County at incumbent's request); *id.* at 52:5-9 (adjusting boundary between two districts in Cumberland and Hoke counties at incumbent's request); House Select Comm. on Redistricting Meeting Tr. 16:2-18, Aug. 25, 2017, ECF No. 184-18 (amending maps at request of members in Surry, Richmond, and Bladen county groupings); *id.* at 16:18-17:2, 36:4-16 (renumbering districts in Mecklenburg, Forsyth, and Nash counties); House Floor Session Tr. 31:19-32:2, Aug. 28, 2017, ECF No. 184-20 (adjusting district boundaries in Wake County at the request of a county delegation member).

Maps were adopted in largely party-line votes.

All of the African-American legislators in both the House and Senate voted against the 2017 enacted maps on second reading, as did all of the Democratic legislators.[7] Aside from a few Republican legislators who voted against one or both enacted maps because of their opposition to particular district lines or county groupings, *e.g.*, Senate Floor Session Tr. 59:5-9, Aug. 25, 2017, ECF No. 184-19, all committee and floor votes to adopt the 2017 enacted maps largely adhered to political party lines.

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[7] *See* H.R. Roll-Call Tr. for 2d Reading of H.B. 927, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=H&RCS=924 (last visited Sept. 15, 2017); S. Roll-Call Tr. for 2d Reading of H.B. 927, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=S&RCS=548; S. Roll-Call Tr. for 2d Reading of S.B. 691, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=S&RCS=542; H.R. Roll-Call Tr. for 2d Reading of S.B. 691, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=H&RCS=926.

B. The enacted districts

In response to this Court's July 31 order, ECF No. 180, the General Assembly redrew 79 of its 120 House districts and 36 of its 50 Senate districts. *Compare* 2011 House map *with* Map of 2017 House Redistricting Plan, ECF No. 184-1; 2011 Senate map *with* Map of 2017 Senate Redistricting Plan, ECF No. 184-4.

Three of the redrawn districts are majority black:

District	County	Pre-2011 TBVAP%	2011 TBVAP%	2017 TBVAP%
HD 57	Guilford	21.38%	50.69%	60.75%
HD 101	Mecklenburg	50.60%	51.31%	50.82%
SD 28	Guilford	44.18%	56.49%	50.52%

When asked how they would justify adoption of those three majority-black districts in response to the Court's July 31 order, legislative leaders responded either by saying the Court's order did not permit them to consider race when drawing the maps or vaguely suggesting that the Court had left the door open to drawing majority-black districts that were naturally occurring. Joint Redistricting Comm. Meeting Tr. 151:6-154:17, Aug. 10, 2017, ECF No. 184-9; Senate Redistricting Comm. Meeting Tr. 101:4-18, Aug. 24, 2017, ECF No. 184-17.

In addition to the three majority-black districts, nine of the redrawn districts not composed of whole counties have a total black voting age population of more than 47%:

District	County	Pre-2011 TBVAP%	2011 TBVAP%	2017 TBVAP%
HD 31	Durham	44.71%	51.81%	49.56%
HD 32	Granville, Vance, Warren	36.22%	50.45%	49.12%

HD 38	Wake	31.63%	51.37%	48.30%
HD 43	Cumberland	48.69%	51.45%	49.96%
HD 72	Forsyth	43.40%	45.02%	47.51%
HD 99	Mecklenburg	28.29%	54.65%	49.54%
HD 107	Mecklenburg	50.48%	52.52%	49.39%
SD 21	Cumberland, Hoke	41.00%	51.53%	47.51%
SD 38	Mecklenburg	47.69%	52.51%	48.46%

As with the three majority-black districts, no explanation was provided during the legislative process as to why these nine districts were drawn with greater than 47% total black voting age population. *See generally* ECF No. 184-17 through -25.

In single-county groupings, the General Assembly redrew all of the districts within each single-county group, including districts that had not been held unconstitutional and did not border a district that had been held unconstitutional. *See* Map of 2017 House Redistricting Plan, ECF No. 184-1 (HD 26, 37, 40, 41, 105). Twice in groupings with multiple counties the General Assembly drew districts composed of portions of multiple counties where the district could have satisfied population requirements while traversing fewer county lines. *See id.* (HD 10, 83).

IV. ARGUMENT

Defendants failed to cure the unconstitutional racial gerrymanders in four districts: Senate District 21 in Cumberland and Hoke Counties, Senate District 28 in Guilford County, House District 21 in Wayne and Sampson Counties, and House District 57 in Guilford County. Race predominated in the drawing of these district lines, and Defendants offer no compelling governmental interest to justify those districts.

Nothing in any of the court's orders in this case authorizes or requires the General Assembly to ignore the dictates of the North Carolina Constitution as it specifically relates to redistricting.[8] However, Senate District 41 in Mecklenburg County, and seven House Districts in the 2017 enacted plans violate various provisions of the North Carolina Constitution. Those districts are not legally permissible remedial districts and cannot be an acceptable remedy for the violations that exist in the 2011 districts.

A. The Court Must Consider Whether the Defendants' Remedial Districts are Legally Acceptable

This Court has both the authority and the responsibility to ensure that the General Assembly's 2017 Senate and House redistricting plans are in fact a true and legal remedy. *See Chapman v. Meier,* 420 U.S. 1 (1975) (reversing the lower court's approval of remedial legislative districts that violated the one-person, one-vote requirement). Indeed, "while a court must not overreach when fashioning a remedy of its own, it must determine whether the legislative remedy enacted at its behest is in fact a lawful substitute for the original unconstitutional plan." *Harris v. McCrory,* No. 13-cv-949, 2016 U.S. Dist. LEXIS 71853, at *5 (M.D.N.C. June 2, 2016). The Fourth Circuit's seminal precedent on this question is *McGhee v. Granville County,* 860 F.2d 110 (4th Cir.

[8] Indeed, Defendants acknowledge that when redrawing districts to cure the racial gerrymanders, they needed to change the county grouping configurations in much of the state in order to comply with the Article II, Sections 3(3) and 5(3) of the North Carolina Constitution which state respectively that "[n]o county shall be divided in the formation of a senate district" and "[n]o county shall be divided in the formation of a representative district." *See* Notice of Filing 6, Sept. 7, 2017, Doc. 184 (explaining that ideal county grouping maps were provided to the Senate and House redistricting committees).

1988), where the court held that when reviewing a jurisdiction's proposed remedial districts, a court must consider "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights." *Id.,* at 115. *See also, Wilson v. Jones,* 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom. Wilson v. Minor,* 220 F. 3d 1297 (11th Cir. 2000) ("When … the districting plan is offered as a replacement for one invalidated by the court and will be implemented solely by virtue of the court's power, the court has an independent duty to assess its constitutionality and cannot ignore substantial evidence of improper racial motivation.").

It is widely understood that a remedial plan which itself fails constitutional muster is afforded no deference. *See, e.g., White v. Weizer,* 412 U.S. 783, 797 (1973) (reviewing court "should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms"). Courts have appropriately refused to implement legislative remedies that are themselves unlawful or fail to remedy the original violation. *See, e.g., Large v. Fremont Cnty,* 670 F.3d 1133, 1135 (10th Cir. 2012) (affirming district court's order rejecting the county's proposed remedial plan because it violates state law); *Harvell v. Blytheville Sch. Dist. No. 5,* 126 F.3d 1038, 1040 (8th Cir. 1997) (affirming district court's rejection of school board's remedial plan because the plan did not completely remedy the violation); *Buchanan v. City of Jackson,* 683 F. Supp. 1537, 1541 (W.D. Tenn. 1988) (rejecting commissioners' remedial plan). Here, in the areas of the state where the General Assembly's remedial districts do not cure the racial gerrymander, and

in other areas where the remedial districts violate the state constitution, those districts cannot be used and the Plaintiffs alternative districts should be substituted as the proper remedy.

B. The Defendants Have the Burden of Proving That the Districts They Drew Fully Cure the Constitutional Violation

Under equal protection jurisprudence, Defendants bear the burden to prove that their proposed remedial districts have fully cured the constitutional violation found in this case. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 26 (1971) (school authorities proposing desegregation plans "have the burden of showing that such school assignments are genuinely nondiscriminatory"); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (school boards have an "affirmative responsibility" to ensure desegregation efforts and a "heavy burden" of showing that their actions "serve important and legitimate ends"); *Vaughns v. Bd. of Education*, 758 F.2d 983, 991 (4th Cir. 1985) (district court erred in placing the burden of "proving the causal connection between the prior unconstitutional condition and the need for ancillary relief" upon plaintiffs); *Everett v. Pitt County Bd. of Educ.*, 678 F.3d 281, 288 (4th Cir. 2012) (it is the inescapable burden of a school board to demonstrate that an assignment plan works toward desegregation, "particularly where [the] plan allegedly causes immediate and substantial adverse effects").

Similarly, this is the case in other contexts as well. *See, e.g., Muhammad v. Giant Food*, 108 Fed. Appx. 757 (4th Cir. 2004) (burden in remedial phase of class action

employment discrimination suit is on employer); *Coleman v. Brown*, 938 F. Supp. 2d 955 (E.D. Cal. 2013) (where defendant prison officials were found to have violated the Eighth Amendment, the burden remained on the defendants to prove constitutional compliance during the remedial proceedings); *Smith v. Bounds*, 813 F.2d 1299 (4th Cir. 1987) (burden of proving compliance with constitutional standards is on department of corrections after court finds systemic constitutional violations). Defendants must show that their proposed 2017 districts fully remedy the unconstitutional use of race that occurred when those districts were initially drawn in 2011.

C. Four Districts are Still Racial Gerrymanders

Plaintiffs object to SD 21, SD 28, HD 21 and HD 57 because they fail to cure the constitutional violation originally found by this court to exist in those districts and in the area of the state where they are located. *See Covington v. N.C.,* 316 F.R.D. 117, 146-48, 155-56, 163 (M.D.N.C. 2016). As a threshold matter, it is important to note that the Court ordered that Defendants explain "as to any district with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the Voting Rights Act obligated it to draw the district at greater than 50% BVAP." Order 9, July 31, 2017, ECF No. 180. The Defendants' only explanation is that "[t]o the extent that any district in the 2017 House and Senate redistricting plans exceed 50% BVAP, such a result was naturally occurring and the General Assembly did not conclude that the Voting Rights Act obligated it to draw any such district." Notice of Filing 10-11, ECF No. 184. Thus, the

only issue is whether Defendants have demonstrated that race did not predominate in the drawing of any of the remedial districts, as Defendants offer no compelling governmental interest to justify these districts.

It is also important to note that Plaintiffs are not objecting to all of the redrawn districts that are close to or greater than 50% black in voting age population. *See supra* at 14-15 (of the redrawn districts that are not composed of whole counties, three are majority-BVAP and nine are greater than 47% in total BVAP). Plaintiffs' objection to these four districts is not based solely on the racial composition of the districts but rather includes circumstantial evidence such as the shapes of the districts and the populations contained within them. While the implications of this data may be contested, the facts themselves, the compactness scores, the district lines and the census data, are not contested.

Additionally, the principles that this Court outlined in its original opinion concerning the relevance and probative value of this evidence to prove that race predominated in the drawing of the districts in 2011 is equally applicable to the 2017 districts. *See Covington v. North Carolina,* 316 F.R.D. 117, 140 (M.D.N.C. 2016) (explaining concepts and categories of evidence relevant to a racial gerrymander claim). Lack of geographic compactness, whether measured mathematically or assessed visually, repeatedly has been relied upon as a "sign of race predominating," as has contiguity. *Id.,* 316 F.R.D. at 141. Similarly, racial demographic data and the race of individuals added

to or subtracted from the benchmark district, "may signify whether 'race was the predominant factor motiving the legislature's decision to place a significant number of voter within or without a particular district.'" *Id.* (*quoting Miller v. Johnson,* 515 U.S. 900, 916 (1995)).

1. Senate District 28

The 2017 enacted version of Senate District 28 is contained wholly within Guilford County, as were the 2011 and 2003 versions of the district. The benchmark version of the district before the 2011 redistricting included 47.20% BVAP, which in 2011 was increased to 56.49% BVAP, in part through the inclusion of an arm that "protrude[d] west, then hook[ed] south" into an area of concentrated black population in the city of High Point. Op. at 71, ECF No. 123. In the 2017 version of SD 28, the High Point arm has been cut off at the shoulder by means of a split precinct where incumbent Sen. Gladys Robinson lives, but the district's core shape and other features of the racially gerrymandered 2011 district that this Court found persuasive in 2016 remain. *See* Map of 2017 Senate Redistricting Plan, ECF No. 184-4; Decl. of Gladys Robinson ¶ 13 (attached as Ex. 5).

The 2017 version of SD 28 has a total BVAP of 50.52%. Additional Statistics on 2017 Senate Redistricting Plan 22, ECF No. 184-6. To achieve that concentration of black voters in SD 28, as in the 2011 plan, the map drawers again "outline[d] areas with a high proportion of African-Americans," Op. at 73, ECF No. 123, continuing to employ a

reverse "L" shape that follows the contours of the black population of Greensboro while majority-white areas of the city are left out of the district. Decl. of Anthony Fairfax ¶ 21 & Figure 2 (attached as Ex. 6). In the 2017 version of SD 28, every majority-black VTD in Greensboro falls within the district's boundaries, *id.* ¶ 20, and as in 2011 the district splits Greensboro along racial lines, Op. at 73, ECF No. 123.

In maintaining SD 28 as a majority-minority district, the General Assembly chose to add whole precincts with significant BVAP levels to the district, while removing whole precincts with lower BVAP levels. *See* Robinson Decl. ¶ 23. In at least one case, the General Assembly departed from its criterion of respecting municipal boundaries to split a precinct that is home to "several pockets of African-American residents." *Id.* ¶ 22. In adding population to SD 28 to offset the lost High Point arm, the General Assembly split longstanding communities of interest in Greensboro. *Id.* ¶¶ 19-20. During the legislative process for the 2017 plan, the Senate rejected alternative maps that would have kept communities of interest in Greensboro together while returning SD 28 to its pre-2011 BVAP levels. *Id.* ¶¶ 28-30.

Even without its High Point arm, the 2017 enacted version of SD 28 scores at the bottom of its class in compactness. Only five of fifty Senate districts have lower Polsby-Popper scores than SD 28's 0.17, which is 50% lower than the 0.34 mean compactness score for the 2017 Senate plan as a whole. Measures of Compactness 6-9, Senate Redistricting Comm.,

http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf. [9] Alternative maps introduced during the legislative process illustrate that SD 28 could have been drawn more compactly while meeting population goals and other race-neutral redistricting criteria. *See* ECF No. 184-34 at 23.

As in 2011, the General Assembly's retention of the core shape of the 2011 version of SD 28, continued use of boundary lines that outline black population and divide Greensboro along racial lines, selection of heavily black precincts for inclusion in the district while more heavily white precincts are excluded from the district, and disregard of communities of interest and municipal boundaries has resulted in a configuration of SD 28 with greater than 50% total BVAP and substandard compactness scores. Taken together, these factors demonstrate that race predominated in the construction of the 2017 enacted version of SD 28.

2. Senate District 21

In both the 2011 and the 2017 redistricting plans, Senate District 21 is one of two districts drawn in a two-county cluster that includes Hoke and Cumberland Counties. *Compare* Tr. Ex. 2116 *with* ECF No. 184-8 at 10, and ECF No. 136-1 at 18. In both plans, SD 21 includes all of Hoke County and must reach in to Fayetteville in Cumberland County to have enough population to satisfy the one person, one vote

[9] Compactness data on the 2017 House and Senate plans is available on the General Assembly's website and was available during the legislative redistricting process but as of the date of this filing had not been submitted to this Court. It and incumbent pairing data also available during the legislative process are attached as Ex. 9 (Senate) and Ex. 11 (House).

requirement. *Compare* Tr. Ex. 2114 *with* ECF No. 184-4 at 2. In the 2011 plan, the BVAP in SD 21 was increased from 44.93% in the 2003 plan to 51.53%. *Covington,* 316 F.R.D. at 146. As a consequence, the 2011 district had a bizarre shape, and contained "multiple appendages, which are so thin and oddly shaped that it is hard to see exactly where the district begins and ends. Some portions of the district are so narrow that the district is nearly non-contiguous." *Id.*

The 2017 version of SD 21 made only minimal changes to the district. The district still has a BVAP of 47.51%, which is ten percentage points higher than the overall cluster BVAP of 36.86%. Decl. of Ben Clark ¶ 11(d) (attached as Ex. 8). A comparison of the areas moved out of the district and those moved into the district shows very little difference between the 2011 and 2017 districts. *See* Clark Decl. at 3, Figure 1. Most significantly, the BVAP in the Cumberland County portions of SD 21 is 51.66% while the BVAP in SD 19 is only 25.99%. Clark Decl. ¶ 11(a). Numerous other demographic facts further illustrate the continued packing of African-American voters into SD 21, including a detailed examination of a notched intersection between the two districts which can only be explained by the sorting of voters on the basis of race. *See* Clark Decl. ¶ 11(e); Gilkeson Decl. ¶¶ 38-40.

Furthermore, the General Assembly's disposition of two proposed amendments to SD 19 and SD 21 in the enacted Senate map illustrates that the racially gerrymandered nature of the district remains. An amendment that did not change the racial composition

of the district was accepted, but an amendment that would have made the district lines much more regular but that would also have reduced the BVAP in SD 21 was rejected. *See* Clark Decl. ¶¶ 13-16.

Examining the racial demographics of the district also illustrates how the district lines were drawn to pack most of the black voters in Cumberland County into SD 21. The district cuts through downtown Fayetteville, picking up only the majority black VTDs as well as almost all of the city's majority-black census blocks.[10] Fairfax Decl. ¶ 17-19, Figure 1 & App. 4.

The 2017 version of SD 21 is not geographically compact. The overall compactness score for the district is just .25 using the Polsby-Popper measure. *See* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf. Equally damning is the fact that a more compact district can be drawn, as illustrated by the district configuration in Plaintiffs' proposed remedial districts in Cumberland County, in which SD 21 has a Polsby-Popper score of .37. *See* ECF No. 184-34 at 2, 23 (Senator Blue's amendment, which was the Covington Plaintiffs' Senate plan and which was defeated in committee and on the floor of the Senate).

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[10] Additional evidence is that an illustrative district drawn solely for the purpose of testing the hypothesis that racial considerations predominated in the drawing of SD 21, shows that, if it were constitutional to draw districts to achieve a partisan advantage, and Plaintiffs contend it is not, the same partisan outcome could be achieved in the Cumberland/Hoke county grouping without packing black voters into SD 21. Gilkeson Decl. ¶¶ 54-57.

Most telling is an analysis performed by Dr. Gregory Herschlag, a member of the Mathematics Department at Duke University. *See* Decl. of Gregory Herschlag (attached as Ex. 10). He used traditional redistricting criteria and established mathematics principles to generate simulated maps of two senate districts within the Hoke/Cumberland county grouping. He then compared the racial composition of those simulated maps to the racial composition of enacted SD 19 and SD 21. The purpose of his analysis was to test the likelihood that districts drawn within that grouping based on traditional redistricting criteria and not race, would include a district like enacted SD 21 with a BVAP of 47.51% for the district and 51.66% for the portion in Cumberland. Dr. Herschlag generated 78,485 maps for the Hoke/Cumberland grouping that contained two senate districts. Not one of those maps contained a district with BVAP numbers as high as enacted SD 21. Herschlag Decl. ¶ 8 & Figure 1. This finding conclusively establishes that Defendants have failed to cure the racial gerrymander in the Hoke/Cumberland grouping.

Taken together, these facts lead to only one possible conclusion. The Defendants have failed to demonstrate that the minor changes they made to SD 21 cured the unconstitutional use of race in the 2011 version of the district.

3. House District 57

The 2017 enacted version of House District 57 is contained wholly within Guilford County, as were the 2011 and 2003 versions of the district. The district changed

radically between 2009 and 2011, when the General Assembly reconfigured HD 57 to create a third majority-black House district in Guilford County. Op. at 121, ECF No. 123 (noting "almost no discernable overlap" between the 2009 and 2011 versions of HD 57). In 2011, the legislature increased the BVAP of HD 57 from 29.93% to 50.69%. *Id.* at 120, 121. The increased BVAP in 2011 resulted from two changes: (1) relocating the core of the district to Northeast Greensboro, a heavily black community of interest that had not been included in previous iterations of HD 57, and (2) extending "a tail" east into Sedalia, a predominantly black community. *Id.* at 120-21, 123. In the 2017 version of HD 57, the Sedalia tail has been shorn off, but other features of the racially gerrymandered 2011 district remain. *See* Map of 2017 House Redistricting Plan, ECF No. 184-1; Robinson Decl. ¶ 32.

The 2017 version of HD 57 has a total BVAP of 60.75%, the highest total BVAP percentage of any House or Senate district in the state. Additional Statistics on 2017 House Redistricting Plan 30-32, ECF No. 184-3; *see* Additional Statistics on 2017 Senate Redistricting Plan 22, ECF No. 184-6. To achieve that concentration of black voters in HD 57, as in the 2011 plan, the map drawers again drew district boundaries that closely track concentrations of black population. Fairfax Decl. ¶¶ 26-27 & Figure 4. As in 2011, HD 57 splits Greensboro along racial lines. *See id.* at 123.

This continued pattern of racial sorting may be most stark in the Irving Park neighborhood and southeastern Greensboro. In not only maintaining HD 57 as a

majority-minority district but also significantly increasing its total black voting age population beyond the 2011 level, the General Assembly chose to add heavily black precincts in southeastern Greensboro to the district, while removing majority-white precincts in the Irving Park area. *See* Robinson Decl. ¶¶ 39-41. In doing so, the General Assembly severed Irving Park from a community of interest near downtown Greensboro. *Id.* ¶ 40. And in adding southeastern Greensboro to HD 57, the General Assembly displaced without explanation a distinct, historic, civically engaged African-American community, which has never before been a part of HD 57. *See id.* ¶ 41. During the legislative process for the 2017 plan, incumbent Rep. Pricey Harrison of HD 57 pressed the committee chairs for clarification on why the BVAP in her district was being increased after the district had been found unconstitutional at a lower BVAP level. *See* House Select Comm. on Redistricting Meeting Tr. 119:6-15, Aug. 25, 2017, ECF No. 184-18. Her comment received no substantive response. *Id.* at 120:2-6.

Even without the Sedalia tail, the 2017 enacted version of HD 57 scores below the statewide mean Polsby-Popper and Reock compactness scores for the 2017 House plan as a whole, despite the "inherent compactness" the district benefits from as a result of its location in Greensboro. Op. at 121-22, ECF No. 123 (noting that compactness alone does not establish that race did not predominate in drawing district boundaries); *see* Measures of Compactness 8-10, House Redistricting Comm., http://www.ncleg.net/Sessions/2017/h927maps/HB%20927%203rd%20Ed.Combined.pdf

. Plaintiffs' alternative House map introduced during the legislative process illustrates that HD 57 could have been drawn more compactly while meeting population goals and other race-neutral redistricting criteria. *See* ECF No. 184-28 at 9, 12.

In addition, the General Assembly's retention of the core of the 2011 version of HD 57, continued use of boundary lines that outline black population and divide Greensboro along racial lines, selection of heavily black precincts for inclusion in the district while more heavily white precincts are excluded from the district, and disregard of communities of interest has resulted in a configuration of HD 57 with greater than 50% total BVAP and substandard compactness scores. Taken together, these factors demonstrate that race predominated in the construction of the 2017 enacted version of HD 57.

4. House District 21

In finding that the 2011 version of House District 21 was an unconstitutional racial gerrymander, this court noted that at 51.90% BVAP and a Reock score of .19, splitting three counties, and dividing seven municipalities, the district geography indicated that race was the predominant motive for drawing the district lines. *Covington,* 316 F.R.D. at 155-56. The 2017 version of HD 21 is even less compact. Its Reock score is .12, standing alone as the absolute lowest of all 120 house districts. Measures of Compactness 8-10, House Redistricting Comm. http://www.ncleg.net/Sessions/2017/h927maps/HB%20927%203rd%20Ed.Combined.pdf

. On the Polsby-Popper measure the district scores .29, which is in the lowest 10% of all 120 districts.

While the 2017 version is now contained in just two counties, Wayne and Sampson, the irregular shape continues to follow the racial demographics of the region, stretching up to Goldsboro and down to Clinton to pick up the black populations in those areas. Fairfax Decl. ¶¶ 22-25 & Figure 3. This district is one of seven districts that must be drawn in a seven county grouping. *See* ECF No. 136-1 at 21. In contrast to the minimal changes made by the Defendants, the Plaintiffs' proposed map shows that it is completely possible to redraw these districts in a geographically compact manner, where the lowest Reock score for any of the seven districts is just .36 instead of .12. *See* ECF No. 184-28 at 2, 8-10. With a BVAP of 42.34%, this district continues to assign voters on the basis of their race and is not a naturally occurring concentration of black voters. Given this data, the Defendants cannot demonstrate that they have cured the racial gerrymander in HD 21.

5. Defendants' Assertions of Colorblindness Are Not Persuasive Evidence that Racial Considerations Did Not Predominate in These Four Districts

The Defendants' insistence that race could not predominate if racial data was not used by Dr. Hofeller or looked at by the committees is false. Indeed, the Supreme Court has taken it as a given that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is

aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S. Ct. 2816, 2826 (1993). But even more obviously, Dr. Hofeller does not need access to racial data to know that if he draws a district in approximately the same way the racially gerrymandered district was drawn, it would achieve the same effect, illegally separating black voter from white voters based on their race. And he has said exactly that. Under oath in a deposition earlier this year, testifying regarding his drawing of North Carolina's 2016 Congressional Districts where again, racial data allegedly was not "used" to draw the districts, Dr. Hofeller was asked "how did you go about ensuring Voting Rights Act compliance in drawing the 2016 congressional plan." Dep. of Thomas Hofeller 246:10-12, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017) (attached in excerpted format as Ex. 12). His response was that since it was drawn in the same general area as it had been before, and based on his past experience, he did not have to actually look at the racial data to know that the district would comply with the Voting Rights Act. *Id.* at 246:13-247:7. Indeed, here, the district lines themselves reveal that race predominated.

In the same case, the Defendants' identified an expert witness, Dr. James G. Gimpel, who, when asked whether he thought that the General Assembly considered race data when drawing the 2016 Congressional districts, testified as follows:

> You don't have to consider race data. You don't have to consider race data, okay. There's no need to go to race data, you know, to know, okay – especially given the knowledge that a lot of these folks have of what's going on in this state and how long they've been around, you don't need race data to consider race data in order to draw maps that ensure the representation of African Americans in the state of North Carolina. And, you know, one of the ways that you can do that, by the way, and not consider race data is by falling back on districts that look in many ways like the districts from previous elections.

Dep. of James Gimpel 165:25-166:14, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Apr. 27 ,2017) (attached in excerpted format as Ex. 13). Dr. Gimpel explains here why claiming to be colorblind by not looking at race data is no proof that race did not predominate in the drawing of a legislative district, particularly when that district is drawn by Dr. Hofeller, who has decades of experience with North Carolina redistricting.

D. Certain House and Senate Districts Violate the North Carolina Constitution

The state's proposed remedial maps also contain several violations of the state constitution and, as such, cannot and should not be approved as an appropriate remedy by this Court. This is the case because "where [a jurisdiction's] remedial plan contravenes state laws that have not been remedially abrogated by the Supremacy Clause," remedial plans offered by a legislative body must still respect the policy choices that sovereign state constitutional law demands. *Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Bodker v. Taylor*, Civ. A. No. 1:02-cv-999ODE, 2002 U.S. Dist. LEXIS 27447, at *5 (N.D. Ga. 2002) (court would not order a jurisdiction's preferred redistricting plan when

ordering implementation of that plan would contravene state law). *See also Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) ("[I]f a violation of federal law necessitates a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs."). Here, the General Assembly is not authorized to disregard the state policies inherent in, and commanded by, the state constitution and cannot disregard those commands unless specifically abrogated by this court's order identifying a violation of federal law.

In *Fremont*, the Tenth Circuit upheld a district court's rejection of a county's proposed plan to remedy violations of Section 2 of the Voting Rights Act. The district court correctly concluded that the county, a subordinate legislative body in Wyoming, could not override state law in crafting a remedy if it was not necessary to do so. 670 F.3d at 1148-49. There, state law prohibited the use of multi-member districts in county elections, but the county's proposed remedial plan would utilize both single-member and multi-member districts. *Id*. at 1136. The court concluded that it was possible to remedy the Section 2 violation using only single-member districts and thus comply with state law. *Id*. at 136-37. Just as the county was subordinate to and controlled by state law, the General Assembly here is subordinate to and controlled by state constitutional law. Where, by alternate maps, Plaintiffs can demonstrate that it is not necessary to abrogate compliance with the state constitution to remedy the federal constitutional violations

identified in this case, this Court should not allow a remedial plan that unnecessarily disregards that ultimate designation of state policy choice—the North Carolina Constitution.

Article II, Sections 3 and 5 of the North Carolina Constitution lay out the restrictions imposed upon the General Assembly when engaging in state legislative redistricting. Sections 3(3) and 5(3), collectively, establish the state's Whole County Provision ("WCP") and Sections 3(4) and 5(4) explicitly prohibit the legislature from redrawing state legislative districts, once enacted, until after the next decennial census. N.C. CONST. Article II, Sections 3(3-4) and 5(3-4). As discussed below, the 2017 Enacted Plans violate these provisions, going far beyond the necessary abrogation of the state constitution by this Court's August 11, 2016 order (ECF No. 123), and must thus be rejected.

1. *The General Assembly Exceeded the Authority Granted it by this Court's Orders and Redrew Districts in Violation of the State Constitutional Prohibition on Mid-Decade Redistricting*

On August 11, 2016, this Court "ordere[ed] the North Carolina General Assembly to draw remedial districts…to correct the constitutional deficiencies in the Enacted Plans." ECF No. 123. That order, however, did not, and could not, authorize the General Assembly to redraw districts not required to be redrawn to correct those federal constitutional deficiencies in violation of the state constitutional prohibition on mid-decade redistricting.

The plain language of the state constitution prohibits mid-decade redistricting. N.C. CONST. Article II, Sections 3(4) and 5(4) (i.e., "When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress."). This state law prohibition controls unless a district has been invalidated by a court. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The plain language of the state constitution on this matter invites no serious dispute over its interpretation and in the only case where the North Carolina Supreme Court has interpreted this constitutional provision, the court went to great lengths to avoid violating the prohibition on mid-decade redistricting. *Comm'rs of Granville Co. v. Ballard*, 69 N.C. 18 (1873). Plaintiffs in that case challenged a state statute that changed the boundaries between Franklin and Granville Counties, arguing that the statute violated Article II, Section 5, because it would have the effect of transferring part of Granville County from SD 21 to SD 7. *Id*. at 19. The Supreme Court said that violation of the mid-decade redistricting prohibition could be avoided by interpreting the statute to mean that while Granville residents would now be residents in Franklin County, they would continue to vote in SD 21. The plaintiffs had urged against such a construction, arguing that it would then violate Article II, Section 5(3), which requires whole counties be used in the construction of Senate districts. *Id*. at 20. But in rejecting the plaintiffs' arguments, the Supreme Court

established the supremacy of that prohibition against mid-decade redistricting, *id.*, and this Court can and should respect that unambiguous state constitutional rule.

Here, in both Wake and Mecklenburg Counties, the General Assembly has violated Art. II, Sections 3(4) and 5(4) by unnecessarily altering districts mid-decade. House Districts 36, 37, 40 and 41 in Wake County were not declared unconstitutional, and they do not touch a district that was ruled unconstitutional. The same is true for House District 105 in Mecklenburg County. These districts are modified in the enacted remedial House plan in those counties, but it is not necessary to alter those districts in order to correct the two districts in Wake County (33 and 38) and the three districts in Mecklenburg County (99, 102 and 107) that were declared unconstitutional. Gilkeson Decl. ¶ 42-49. Plaintiffs have demonstrated that with their proposed alternative map introduced at the public hearing on August 22, 2017.

This court's order invalidating only certain house districts in Wake and Mecklenburg County does not mandate or allow abrogation of the state constitutional prohibition against mid-decade redistrict except insofar as absolutely necessary to remedy the violation. Moreover, partisan goals cannot trump state constitutional compliance. *Compare* ECF No. 184-28 at 40-51 *with* Stat Pack for 2017 House Redistricting Plan 4-15, ECF No. 184-2 (HD 40, currently represented by a Democrat, is altered to become Republican-performing district). The General Assembly has already redrawn HD 40 and the other identified districts once this decade—its 2011 unconstitutional acts cannot now

justify a complete disregard of the state constitution's prohibition on mid-decade redistricting. Thus, because Plaintiffs' proposed maps in these counties remedy the racial gerrymandering violation without affecting House Districts 36, 37, 40, 41 and 105, it is clear that the enacted Wake and Mecklenburg County House district configurations violate the state constitutional prohibition on mid-decade redistricting and cannot be enacted or approved by this Court.

2. *Remedial House Districts Violate the State Constitutional Whole County Provision*

The state's remedial house plan also runs afoul of the North Carolina Constitution's Whole County Provision ("WCP"). N.C. Const. Article II, Sections 3(3) and 5(3). The North Carolina Supreme Court first established nine criteria for validly-constructed state legislative districts in *Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-97 (N.C. 2002) ("*Stephenson I).* Importantly here, the court instructed: (a) "[w]ithin any [] contiguous multi-county grouping…the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard"; and (b) "[t]he intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 383-84, 562 S.E.2d at 397

In 2007, the Supreme Court further fleshed out these instructions, invalidating a state house district in Pender and New Hanover Counties for failure to comply with the WCP. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (N.C. 2007). There, at that time, Pender County did not have the population to warrant an entire state house district, and New Hanover County had the population to warrant more than two state house districts, but not three. *Id.* at 494, 649 S.E.2d at 366. The two counties grouped together were assigned three state house districts. *Id.* The legislature drew a house district between Pender and New Hanover counties that did not keep either county whole (HD 18). *Id*. Because there was not Voting Rights Act justification for this drawing of HD 18, the Court held that the Pender County boundaries should be respected and "a voting district that includes Pender County must add population across a county line, but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 509, 649 S.E.2d at 376 (internal quotations omitted).

There are two instances where the General Assembly violated this rule in the 2017 plan. Cabarrus County has the population to justify more than two house districts. As such, two whole districts must be drawn in the county, with only enough population in a neighboring county added to the remainder of the Cabarrus County population to bring it to within plus or minus five percent of the ideal district population. Instead, in the enacted map, there is only one district, HD 82, wholly within Cabarrus County, and HD

83 traverses the county line to include a portion of Rowan County with Cabarrus County. Where, as here, it is possible to draw both HD 82 and HD 83 entirely within Cabarrus County (as Plaintiffs' map demonstrates), the failure to draw two districts entirely within Cabarrus County violates the Supreme Court's instructions from *Stephenson I* on maximum compliance with the WCP.

Likewise, House District 10 also does not comply with the North Carolina Supreme Court's instructions from *Stephenson I*. House District 10 is at one end of a seven-county cluster. Greene County, where that district is based in the proposed remedial plan, does not have enough population to support a House District on its own. Enough population could be added from the adjacent and larger county, Wayne County, to satisfy the equal population requirement with only one county traverse. That construction would be consistent with the state constitutional commands as defined by the North Carolina Supreme Court and as Dr. Hofeller explained in sworn testimony. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397 ("only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined'); *see also* Hofeller Testimony, *Covington* Trial Tr. Vol V, at 10:18-23 (Apr. 15, 2016) ("Also, if you have, for instance, a two-county group, the smaller county with the smallest population should be left intact, and the larger county should make up the share that the smaller county needs to bring it to the proper population."). Instead of simply adding the population from Wayne County necessary to

bring a Greene County-based district up to within plus or minus five percent of the ideal population, House District 10 traverses two counties—Wayne County and then stretches into Johnston County. Because Plaintiffs' House map demonstrates that it is possible to draw this cluster with the same number of traverses and the maximally compliant version of HD 10 (Greene and Wayne Counties only), the enacted district violates the WCP.

3. *A Remedial Senate District Violates the State Constitutional Compactness Requirement*

Finally, SD 41 in Mecklenburg County also violates the WCP because it is grossly non-compact. In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II"*), the North Carolina Supreme Court upheld a trial court's rejection of the legislature's remedial redistricting plans because the trial court found that districts in the remedial map demonstrated "substantial failures in compactness." *Id*. at 309, 582 S.E.2d at 252. The trial court found that districts were not sufficiently compact, within a county, when they were drawn "in a horseshoe manner," combined northern parts of the county with southern parts of the county, and "jut[ted]" and "meander[ed]" throughout the county. *Id*. at 310-11, 582 S.E.2d at 253. The trial court additionally emphasized that the challenged districts were "not compact, particularly as compared to the way in which they might have been drawn as demonstrated by plaintiffs' [proposed Senate Plan]." *Id*. at 311, 582 S.E.2d at 253.

Likewise, in the instant case, SD 41 exhibits these very same traits: the district is a horseshoe shape, starting in the northern part of the county before meandering along the

county's western boundary, at times narrowing dramatically, before jutting down to capture the county's southern-most point. SD 41 has the absolute lowest compactness score of any senate district in the entire plan on the Reock measure. At .19, there is not another district that comes anywhere close to that number, *see* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf, and it is well below the mean of .42 for all senate districts in the same plan. *See* Gilkeson Decl. ¶ 12. The district is also at the bottom of the scale on the Polsby-Popper measure of compactness, at .13. *See* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf.

Plaintiffs' alternative map draws that district in a substantially more compact manner. Gilkeson Decl. Ex. B. Thus, following the North Carolina Supreme Court's straightforward rejection of remedial districts that do just the same, this Court should reject SD 41 as violating the state constitutional compactness requirement.

E. Partisan Gerrymander Objection Reserved

Plaintiffs contend that both the House and Senate plans are unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments. However, as noted by the trial court in *Harris v. McCrory,* at this stage of the proceedings, without even a limited opportunity for discovery by the parties, the Court does not have the record before it to resolve this question. *See Harris v. McCrory*, No. 1:13-cv-949, 2016

U.S. Dist. LEXIS 71853, at *8 (M.D.N.C. June 2, 2016) ('[I]t does not seem, at this stage, that the Court can resolve this question based on the record before it."). Unlike Plaintiffs' other objections, which are based on prior findings of fact, and undisputed facts in the record, addressing whether these districts are partisan gerrymanders requires more evidence.

Plaintiffs therefore ask this Court to make clear that whatever disposition it makes with regard to Plaintiffs other objections does not constitute, or imply, a finding that these maps are not partisan gerrymanders, or foreclose any additional challenges to the 2017 House and Senate plans on those grounds. *See id.,* ("The Court reiterates that the denial of the plaintiffs' objections does not constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan.").

V. CONCLUSION

Plaintiffs respectfully request that this court sustain their objections to Senate Districts 21, 28 and 41; and House Districts 10, 21, 36, 37, 40, 41, 57, 83, 105 on the grounds identified herein, and Order the Defendants to conduct the 2018 legislative elections using their 2017 Senate Districts with the Plaintiffs' proposed districts in the 1) Guilford, 2) Mecklenburg and 3) Cumberland county groupings; and their 2017 House Districts with the Plaintiffs' proposed districts in the following county groupings: 1) Guilford, 2) Wake, 3) Mecklenburg, 4) Rowan, Cabarrus, Stanly, and 5) Lee, Harnett, Johnston, Wayne, Greene, Sampson and Bladen. In the alternative, Plaintiffs request that

the Court sustain their objections and order a special master to redraw the districts in these limited county groupings.

Respectfully submitted this 15th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic notification of the same to the following:

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This 15th day of September, 2017.

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Exhibit 3

Exhibit 1

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VIA ELECTRONIC MAIL

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Re: 2017 Proposed Remedial Maps – House and Senate

Dear Counsel and Members of the Redistricting Committees,

On behalf of Plaintiffs in *Covington v. North Carolina,* we write you today to offer alternative plans for the North Carolina State House and State Senate that remedy the constitutional violations identified by the three-judge court in *Covington* and also comply with the state and federal constitution in all other regards. Additionally, based on our initial analysis, your proposed plans do not offer an adequate remedy and do not represent appropriate remedies free from other state and federal constitutional flaws. We would like to take this opportunity to highlight some of those flaws for you.

Constitutional Flaws in the State House and Senate Remedial Plans

First, it is plain that in several areas of both the House and Senate proposed maps, the constitutional violations are not cured and, indeed, the racially gerrymandering continues. For example, proposed Senate District 21 retains the same odd shape as invalidated Senate District 21, with the edges of the protrusion into Cumberland County only slightly smoothed out. Dr. Hofeller obviously does not need access to racial data to know that if he draws the district in approximately the same way the racially gerrymandered district was drawn, it would achieve the same effect—the illegal separation of black from white voters in Cumberland County and the packing of black voters into the district, thus limiting their political impact.

In the House, we observe the same phenomenon in Guilford County, where House Districts 57, 58 and 60 are centered right over their locations in the 2011 map—Dr. Hofeller again does not need access to racial data to know that he if he puts the new district in exactly the same location as it was in their unconstitutional form, they will have the same effect. Likewise,

while House District 21 is now in only two counties, as opposed to three, it is still very non-compact and appears to us to be drawn in a way to capture black populations in those two counties.

We anticipate there may be other examples of this problem that we may determine with some additional time to review the proposed maps. What is clear is that these districts do not fully correct the constitutional violations identified by the three-judge panel, whose findings were unanimously affirmed by the United States Supreme Court. We request that these errors be remedied immediately and in full. Absent such action, we believe the court will have to draw a plan itself that fully remedies the violations, as it will not be able to approve these districts as an appropriate remedy.

Additionally, analyses performed by the Campaign Legal Center ("CLC") and submitted to the Committees on August 22, 2017, confirm that these proposed remedial plans are in fact, grossly unconstitutional partisan gerrymanders. Redistricting plans are unconstitutional where they treat voters unequally, diluting the electoral influence of one party's supporters in violation of the Equal Protection Clause. CLC performed an efficiency gap analysis of the committee's proposed plans after the data was releasted late Monday morning (August 21, 2017). The efficiency gap analysis employed by CLC has: (1) been endorsed by federal courts, *see, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. Nov. 21, 2016); (2) is a peer-reviewed methodology, *see* Eric McGhee, *Measuring Efficiency in Redistricting*, 16 ELECTION L.J. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=30 07401; and (3) can be used prospectively (and accurately) to predict the efficiency gap in proposed plans. *Compare LWVNC v. Rucho*, 1:16-cv-01164, ECF No. 1 at ¶9 (M.D.N.C. Sept. 22, 2016) (Complaint) *with* Plaintiffs' Response in Opposition to Motion to Dismiss, *LWVCNC v. Rucho*, ECF No. 34 at 4 (M.D.N.C. Dec. 19, 2016). The legislature may not remedy constitutional violations by enacted plans with new constitutional violations.

State Constitutional Flaws in the House Remedial Plan

Our initial analysis also reveals that several areas in the State House proposed remedial map additionally violate the North Carolina state constitution—both its plain language and as it has been interpreted by the North Carolina Supreme Court.

First, the configurations of House districts in Wake and Mecklenburg County violate the state constitutional prohibition on mid-decade redistricting. Article II, Sections 3 and 5 prohibits the legislature from redrawing districts, once enacted, until after the next decennial census. This prohibition controls unless a district has been invalidated by a court. House Districts 36, 37, 40 and 41 in Wake County were not declared unconstitutional, and do not touch a district that was ruled unconstitutional. The same is true for House District 105 in Mecklenburg County. These districts are modified in the proposed remedial House maps in those counties, but it is not necessary to alter those districts in order to correct the two districts in Wake County (33 and 38) and the three districts in Mecklenburg County (99, 102 and 107) that were declared

unconstitutional. Plaintiffs have demonstrated that with a remedial map introduced at the public hearing on August 22, 2017. Thus, the proposed Wake and Mecklenburg County House district configurations violate the state constitution and cannot be enacted or approved by the *Covington* court.

Second, Article II, Sections 3(3) and 5(3) state that "[n]o county shall be divided in the formation of a senate district" and "[n]o county shall be divided in the formation of a representative district," respectively. These prohibitions are collectively referred to as state's Whole County Provision [WCP]. At least two areas in the House map violate the North Carolina Supreme Court's interpretation of the WCP.

In 2002, the North Carolina Supreme Court explained how the legislature should draw state legislative districts to comply with the WCP. *Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-97 (N.C. 2002) ("*Stephenson I*"). First, the Court noted the "long-standing tradition of respecting county lines during the redistricting process in this State," 355 N.C. at 366, 562 S.E.2d at 386. The Court went on to establish nine criteria for validly-constructed state legislative redistricting. Three of the criteria are particularly relevant here:

- When two or more non-VRA legislative districts may be created within a single county…single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

- […] Within any [] contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard."

- The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined.

355 N.C. at 383-84, 562 S.E.2d at 397.

In 2007, the Supreme Court further explained these rules in application when examining how a state house district in Pender County was drawn. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (N.C. 2007). There, at that time, Pender County did not have the population to warrant an entire state house district, and New Hanover County had the population to warrant more than two state house districts, but not three. 361 N.C. at 494, 649 S.E.2d at 366. The two counties grouped together were assigned three state house districts. *Id.* The legislature drew a house district between Pender and New Hanover counties that did not keep either county whole (House District 18). *Id*. Because there was not Voting Rights Act justification for this drawing of House District 18, the Court held that the state was required to perfectly comply with the WCP, and that configuration of the district did not do so because it did not keep Pender County whole. 361 N.C. at 507, 649 S.E.2d at 374. Instead, the Court said "a voting district that includes Pender County must add population across a county line, but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." 361 N.C. at 509, 649 S.E.2d at 376 (internal quotations omitted).

In Cabarrus County, the house district configuration plainly violates the *Stephenson I* criteria. That county has the population to justify more than two non-VRA districts. As such, two whole districts must be drawn in the county, with only enough population in a neighboring county added to the remainder of the Cabarrus County population to bring it to within plus or minus five percent of the ideal district population. What the proposed map does instead is draw only one district, House District 82, in Cabarrus, and then two additional districts are drawn in the county, but neither is contained wholly within the county. Specifically, HD 83 traverses the county line to include a portion of Rowan County with Cabarrus County, when it is possible to draw both HD 82 and HD 83 entirely within Cabarrus County. Even though doing so does create a traverse elsewhere in the county grouping, the failure to draw two districts entirely within Cabarrus County, even though the overall number of county traverses is unchanged, violates the Supreme Court's instructions from *Stephenson I* on maximum compliance with the WCP. Our version of this cluster keeps two counties wholly within Cabarrus County and does not increase the number of traverses when compared to your version of the cluster. As such, this portion of your proposed remedial House map is unconstitutional.

Likewise, the configuration of House District 10 also does not comply with the North Carolina Supreme Court's instructions from *Stephenson I*. House District 10 is at one end of a seven-county cluster. Greene County, where that district is based in the proposed remedial plan, does not have enough population to support a House District on its own. Enough population could be added from the adjacent and larger county, Wayne County, to satisfy the equal population requirement with only one county traverse. That construction would be consistent with the state constitutional commands as defined by the North Carolina Supreme Court and as Dr. Hofeller, the state's mapdrawer, explained in sworn testimony. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397 ("only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined); *see also*, Hofeller Testimony, *Covington* Trial Tr. Vol V, at 10:18-23 (Apr. 15, 2016) ("Also, if you have, for instance, a two-county group, the smaller county with the smallest population should be

left intact, and the larger county should make up the share that the smaller county needs to bring it to the proper population."). Instead of simply adding the population from Wayne County necessary to bring a Greene County-based district up to within plus or minus five percent of the ideal population, House District 10 traverses two counties—Wayne County and then stretches into Johnston County. This configuration is not permissible under the state constitution if it is possible to construct HD 10 comprised of only Greene and Wayne, which it is. Our version of the this county grouping has the same number of total county traverses, but constructs the Greene County-based district (House District 21 in our plan) as instructed by the North Carolina Supreme Court: adding population from a neighboring county to a county too small to warrant its own House district, but only adding as much as necessary from one neighboring county as necessary to achieve acceptable population in the district. Thus, this portion of your proposed remedial House map is also unconstitutional.

Plaintiffs' Alternative Map

Plaintiffs have developed alternative maps for House and Senate that correct the unconstitutional racially gerrymandered districts identified by the three-judge court, do not constitute unconstitutional partisan gerrymanders, and fully comply with the North Carolina state constitution.

We can immediately provide the block assignment files for these plans to counsel and chairs of the redistricting committees, and any other individuals you to whom you request that we send the files.

If you have any questions about these proposed alternative plans, please do not hesitate to contact us.

Sincerely,

/s/ Anita S. Earls_____
Anita S. Earls
Allison J. Riggs
Emily S. Seawell
Southern Coalition for Social Justice

Edwin M. Speas
Caroline Mackie
Poyner Spruill, LLP

John W. O'Hale

Counsel for Plaintiffs

Exhibit 4

No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

MARGARET DICKSON, *et al.*, *Plaintiffs,* v. ROBERT RUCHO, *et al.*, *Defendants.* NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	**From Wake County**

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PLAINTIFF-APPELLANTS' BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

No. 201PA12-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

MARGARET DICKSON, *et al.*, *Plaintiffs,* v. ROBERT RUCHO, *et al.*, *Defendants.* NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs,* v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants.*	)	**From Wake County**

****

PLAINTIFF-APPELLANTS' BRIEF

****

ISSUES PRESENTED

I. WAS IT ERROR FOR THE TRIAL COURT TO HOLD THAT COMPLYING WITH SECTION 5 OF THE VOTING RIGHTS ACT PROVIDED DEFENDANTS WITH A COMPELLING GOVERNMENTAL INTEREST TO INTENTIONALLY CREATE A PROPORTIONATE NUMBER OF MAJORITY AFRICAN-AMERICAN DISTRICTS FOR THE NORTH CAROLINA HOUSE AND SENATE AND FOR THE UNITED STATES CONGRESS DESPITE THE FACT THAT THE UNITED STATE SUPREME COURT HAD JUST RULED

THAT SECTION 5 DOES NOT CONSTITUTIONALLY APPLY TO NORTH CAROLINA?

II. WAS IT ERROR FOR THE TRIAL COURT TO HOLD THAT THE VOTING RIGHTS ACT PROVIDES A COMPELLING GOVERNMENTAL INTEREST FOR DEFENDANTS TO INTENTIONALLY CREATE A PROPORTIONATE NUMBER OF MAJORITY AFRICAN-AMERICAN ELECTION DISTRICTS DESPITE THE UNITED STATES SUPREME COURT RULINGS THAT SUCH RACIAL BALANCING IS *PER SE* UNCONSTITUTIONAL?

III. DID THE TRIAL COURT ERR IN HOLDING THAT THE RACIALLY GERRYMANDERED DISTRICTS ENACTED BY THE GENERAL ASSEMBLY WERE NARROWLY TAILORED WITHOUT ENGAGING IN A SEARCHING INQUIRY TO ASSURE THAT RACE WAS NOT USED MORE THAN NECESSARY TO COMPLY WITH THE VOTING RIGHTS ACT?

IV. DID THE TRIAL COURT ERR IN FINDING THAT RACE DID NOT PREDOMINATE IN THE DRAWING OF SENATE DISTRICT 32 AND CONGRESSIONAL DISTRICT 12?

V. DID THE TRIAL COURT ERR IN HOLDING THAT COMPLIANCE WITH THE WHOLE COUNTY PROVISION OF THE NORTH CAROLINA CONSTITUTION IS NOT MEASURED BY THE NUMBER OF COUNTIES KEPT WHOLE BUT RATHER BY THE NUMBER OF COUNTY CLUSTERS, THEREBY SANCTIONING DEFENDANTS' PLANS DIVIDING MORE COUNTIES THAN NECESSARY?

VI. WAS IT ERROR TO HOLD THAT THE NORTH CAROLINA CONSTITUTION DOES NOT REQUIRE GEOGRAPHICALLY COMPACT HOUSE, SENATE AND CONGRESSIONAL DISTRICTS DESPITE THE CLEAR MANDATE OF THE *STEPHENSON* CASES THAT DISTRICTS MUST BE COMPACT?

VII. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE EXTRAORDINARY AND UNPRECEDENTED NUMBER OF DIVIDED PRECINCTS IN THE HOUSE AND SENATE PLANS DOES NOT VIOLATE THE FUNDAMENTAL RIGHT TO VOTE AND THE EQUAL

PROTECTION OF THE LAWS GUARANTEED BY THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS?

VIII. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' CLAIM THAT THE GENERAL ASSEMBLY'S REDISTRICTING PLANS VIOLATE THE GOOD OF THE WHOLE CLAUSE IN ARTICLE I, SECTION 2 OF THE CONSTITUTION?

STATEMENT OF THE CASE

Following the 2010 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives,[1] North Carolina Senate,[2] and United States House of Representatives[3] on 27 and 28 July 2011. The enacted plans were pre-cleared administratively by the United States Attorney General on 1 November 2011.[4] Plaintiffs filed separate suits on 3 and 4 November 2011 challenging the constitutionality of the enacted plans and seeking a preliminary injunction. Plaintiffs filed amended complaints on 9 and 12 December 2011. (R pp 42-140,

[1] Session Law 2011-404 (July 28, 2011) also known as "Lewis-Dollar-Dockham 4" (hereinafter "Enacted House Plan").

[2] Session Law 2011-402 (July 27, 2011) also known as "Rucho Senate 3" (hereinafter "Enacted Senate Plan").

[3] Session Law 2011-403 (July 28, 2011) also known as "Rucho-Lewis Congress 3" (hereinafter "Enacted Congressional Plan"). Collectively, the 2011 plans are referred to as the "Enacted Plans."

[4] The General Assembly passed legislation on 7 November 2011 to cure a technical defect in the plans. Session Laws 2011-413, 2011-414, and 2011-416. The United States Attorney General pre-cleared the revised plans on 8 December 2011.

141-258). In accordance with N.C.G.S. § 1-267.1, the Chief Justice appointed a three-judge panel to hear both actions.

The trial court consolidated the cases on 19 December 2011. (R p 391). On the same day Defendants filed their answers (R p 259-325, 326-86) and moved to dismiss the suit. (R p 387). Plaintiffs moved for a preliminary injunction which was denied on 20 January 2012. (R p 439). On 6 February 2012 the trial court entered an order allowing in part and denying in part Defendants' motion to dismiss. (R p 444).

On 20 April 2012 the trial court entered an order compelling the production of certain documents. The trial court's order was appealed as a matter of right to the North Carolina Supreme Court. On 25 January 2013 the Supreme Court issued its ruling on that interlocutory matter, reversing the trial court. *Dickson v. Rucho*, 366 N.C. 332, 737 S.E.2d 362 (2013).

On 5 October 2012, Plaintiffs moved for summary judgment (R p 634-38) and on 10 December 2012 Defendants cross-moved for summary judgment. (R p 644-46). During the week of 25 February 2013 the trial court conducted hearings on those motions. On 13 May 2013 the trial court ordered that two issues be separated from the remaining pending issues and that a bench trial be held on those

two issues. (R p 669-72). The two issues separated for trial in the 13 May 2013 order were:

> (A) Assuming application of a strict scrutiny standard and, in considering whether the Enacted Plans were narrowly tailored, was each challenged Voting Rights Act ("VRA") district drawn in a place where a remedy or potential remedy for racially polarized voting was reasonable for purposes of preclearance or protection of the State from vote dilution claims under the Constitution or under § 2 of the VRA?
>
> (B) For six specific districts (Senate Districts 31 and 32, House Districts 51 and 54 and Congressional Districts 4 and 12 – none of which is identified as a VRA district), what was the predominate factor in the drawing of those districts?

(R pp 669-70). A bench trial was held on 5 and 6 June 2013 before the three judges of the trial court, who received evidence through record designations, trial exhibits, and trial witnesses.[5] On 8 July 2013, the court issued a ruling in favor of the Defendants on all claims. (R pp 1264-1444). On 22 July 2013, Plaintiffs timely appealed. (R pp 1437-39).

[5] Trial witnesses for Plaintiffs were Senator Dan Blue from Wake County, former Senator Eric Mansfield from Cumberland County, former Senator Linda Garrou from Forsyth County, Representative Larry Hill from Durham County, Congressman Mel Watt from Mecklenburg County, Goldie Wells from Guilford County, Albert Kirby from Sampson County, Walter Rogers from Scotland County and Professor Alan Lichtman from American University. (R p 703). Defendants' designated trial witness was Thomas Hofeller from Washington D.C.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This is an appeal as of right, pursuant to N.C.G.S. § 120-2.5, from a final judgment issued 8 July 2013 by a three-judge panel in Wake County Superior Court, convened pursuant to N.C.G.S. § 1-267.1, declaring constitutional the districts in the 2011 legislative and congressional redistricting legislation challenged in this litigation. "Appeal lies of right directly to the Supreme Court from any final order or judgment of a court declaring unconstitutional or otherwise invalid in whole or in part and for any reason any act of the General Assembly that apportions or redistricts State legislative or congressional districts." N.C.G.S. § 120-2.5. This Court has interpreted this statute to apply to appeals declaring redistricting plans both constitutional and unconstitutional. *Pender County v. Bartlett*, 361 N.C. 491, 497, 649 S.E.2d 364, 368 (2007).

STATEMENT OF FACTS

These lawsuits challenge the validity of the legislative and congressional redistricting plans enacted by the General Assembly in 2011 and a series of districts contained in those plans. Most of the evidence consists of maps, demographic and electoral data, documents authored by Defendants that speak for themselves and historical information. That evidence is summarized below.

Evidence pertinent to specific issues, particularly the State constitutional issues, is discussed in the context of those arguments.

A. Overview of the 2011 House and Senate Redistricting Process.

Senator Robert Rucho and Representative David Lewis were appointed Chairs of the Senate and House Redistricting Committees, respectively, on 27 January and 15 February 2011. (R p 276). Senator Rucho was responsible for developing the challenged Senate plan. (Doc. Ex. 2264-68). Representative Lewis was responsible for developing the challenged House plan. *Id.* Dr. Thomas Brooks Hofeller (Hofeller) was retained by the Ogletree law firm to design and draw the House and Senate plans for Senator Rucho and Representative Lewis. (Doc. Ex. 1896, 1903). He began working for Senator Rucho and Representative Lewis in December, 2010 and began drawing plans in March 2011 following receipt of new census data. (Doc. Ex. 1943). Senator Rucho described Hofeller as the "chief architect" of the plans and Hofeller described himself the same way. (Doc. Ex. 3068, 1895).

Senator Rucho and Representative Lewis were the sole source of instructions to Hofeller regarding the design and construction of the House, Senate and Congressional plans. These instructions were all oral. (Doc. Ex. 1921-22, 2306, 3078-79, 3184-85). Senator Rucho and Representative Lewis told Hofeller:

"draw a 50% plus one district wherever in the state there is a sufficiently compact black population" to do so. (Doc. Ex. 2451, 3087-89, 3167). Rucho and Lewis also directed Hofeller to draw House and Senate plans that provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." (Doc. Ex. 1216, 2363-64, 3087-89, 3167).

Hofeller used the same process and criteria to draw the House and Senate plans. (Doc. Ex. 1993-94). He began the process by calculating how many majority Black state House and state Senate districts would need to be drawn to achieve proportionality between the percentage of the state's population that is Black and the percentage of districts that would be majority-Black. (Doc. Ex. 1945-46). The proportionality chart Hofeller prepared for Defendants is attached as Appendix 1.

Hofeller made this calculation as soon as the 2010 Census data was released, (Doc. Ex. 1943), long before the General Assembly had compiled any data about the extent to which voting is still racially polarized in the state, (T p 87), and without any knowledge of where in the state candidates of choice of African-American voters had been elected. *Id.*

Senator Rucho first filed a Senate plan and first made that plan public on 17 June 2011. (Doc. Ex 540). That plan was a partial plan drawn by Hofeller. (Doc.

Ex. 3169). It was labeled "Rucho Senate VRA Districts" and contained only 10 districts. (Map Notebook, Rucho Senate VRA Districts). Each of the 10 districts had a Black voting age population higher than 50% except SD 32 in Forsyth. (Map Notebook, Rucho Senate VRA Districts, Stat Pack). Eight of these 10 districts (3, 4, 5, 13, 14, 20, 28, 38 and 40) were enacted on 27 July 2011, essentially as first filed and made public on 17 June 2011. (Map Notebook, Rucho Senate 2). Senate District 21 as first made public was located entirely in Cumberland County. (Map Notebook, Rucho Senate VRA Districts). It was modified prior to enactment to include Hoke County as well as part of Cumberland County. (Map Notebook, Rucho Senate 2). That modification increased the number of split precincts from 27 to 33 and increased the TBVAP from 51.03% to 51.53%. (Map Notebook, Rucho Senate VRA Districts, Stat Pack). District 32 in Forsyth was also modified. That modification increased the number of split precincts from 1 to 43 and increased the total Black voting age population (hereinafter "TBVAP") from 39.32% to 42.53%. *Id.*

Following Senator Rucho's example, Representative Lewis first filed and made public a proposed House plan on 17 June 2011.[6] (Doc. Ex. 546). That plan was a partial plan drawn by Hofeller. (Doc. Ex 2332). It was labeled "Lewis

[6] Due to an error the 17 June plan was slightly modified on 21 June.

House VRA Districts" and only contained 27 districts, 24 of which had a Black voting age population higher than 50%. (Map Notebook, Lewis House VRA Districts, Stat Pack). Twenty-one of these 24 districts were enacted on 28 July 2011, essentially as first filed and made public on 21 June 2011. (Map Notebook, Lewis-Dollar Dockham 4). House District 8 was reconfigured prior to enactment to include parts of Wilson and Pitt Counties and renumbered as HD 24 but the TBVAP remained above 50% at 57.38%. (Map Notebook, Lewis-Dollar Dockham 4, Stat Pack). District 21 was also reconfigured prior to enactment to include pieces of Wayne, Sampson and Duplin Counties instead of pieces of Wayne, Sampson and Pender Counties. (Map Notebook, Lewis-Dollar Dockham 4). The TBVAP, however remained above 50% at 51.90%. (Map Notebook, Lewis-Dollar Dockham 4, Stat Pack). District 20 was eliminated prior to enactment. *Id.* That proposed district was formed out of pieces of Bladen, Columbus, Brunswick and New Hanover Counties and would have had a TBVAP of 56.85%. (Map Notebook, Lewis House VRA Districts, Stat Pack).

B. The Public Statements Made by Senator Rucho and Representative Lewis Describing the Criteria that Shaped the Challenged House and Senate Districts.

Senator Rucho and Representative Lewis issued public statements on 17 June, 21 June and 12 July describing the factors that had determined the number,

location and shape of the "VRA districts" challenged in these cases. (Doc. Ex. 540-53, 563-68). These public statements reflect the oral instructions Senator Rucho and Representative Lewis had earlier given Hofeller to apply in drawing the districts (Doc. Ex. 1921-22, 2306, 3078-79, 3184-85), and they are attached as Appendix 2. Those instructions were:

1. To draw each "VRA District" where possible so that African American citizens constitute at least a majority of the voting age population in the district.[7]

2. To draw "VRA Districts" in numbers equal to the African American proportion of the State's population.[8]

Senator Rucho and Representative Lewis also publicly stated that any alternative plan that compromised or strayed from strict adherence to these

[7] See App. 2 p 5 ("districts created to comply with Section 2 of the Voting Rights Act must be created with a "Black Voting Age Population" ("BVAP") as reported by the census, at least at a level of 50% plus one."); App. 2 p 16 ("Districts must be drawn with an actual black majority voting age population."); and App. 2 p 30 (districts "must be drawn with a black voting age population in excess of 50% plus one.")

[8] See App. 2 p 6 ("Each plan [must] include a sufficient number of African-American districts to provide North Carolina's African-American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice. Based upon the statewide TBVAP figures, proportionally for the African-American citizens in North Carolina means 24 majority African-American House districts and 10 majority African-American Senate districts." See also App. 2 p 31 ("our proposed plan provides black voters in North Carolina with substantial or rough proportionality in the numbers of VRA districts.")

instructions to Hofeller would be rejected. In their 21 June public statement, Senator Rucho and Representative Lewis said:

> We would entertain any specific suggestions from the Black Caucus or others identifying more compact majority black populations to form the core of alternative majority black districts, provided the total districts proposed provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Strickland v. Bartlett*, and be drawn at a level that constitutes a true majority of black voting age population.

(App. 2 p 18). African-American legislators did not share Senator Rucho and Representative Lewis' views about the State's Voting Rights Act ("VRA") obligations or potential liability. Numerous African-American legislators spoke out against all plans proposed by Senator Rucho and Representative Lewis.[9] (T p

[9] Other than Senator Rucho, no Republican member of the General Assembly filed any bill to redistrict the Senate. Senate Democrats did file two Senate redistricting bills: "Possible Senate Districts" filed by Senator McKissick on behalf of the Senate Black Caucus (hereinafter "Black Caucus Senate Plan") and "Senate Fair and Legal" filed by Senator Nesbitt. Both bills were defeated. (R p 551, 664-65). Other than the bill sponsored by Representatives Lewis, Dollar and Dockham, no Republican member of the General Assembly filed any bill to redistrict the House. House Democrats did file two House redistricting bills: "Possible House Districts" proposed as an amendment by Representative Alexander on behalf of the House Black Caucus (hereinafter "Black Caucus House Plan") and "House Fair and Legal" filed as a proposed amendment by Representative Grier Martin. Both amendments were defeated. (R pp 664-65) Draft legislative and congressional maps were provided to the General Assembly on behalf of AFRAM but those maps were never filed as bills in the General Assembly and do not resemble the bills filed by Senators McKissick, Nesbitt and Stein or Representatives Martin, Alexander and Hackney. *See* Map Notebook.

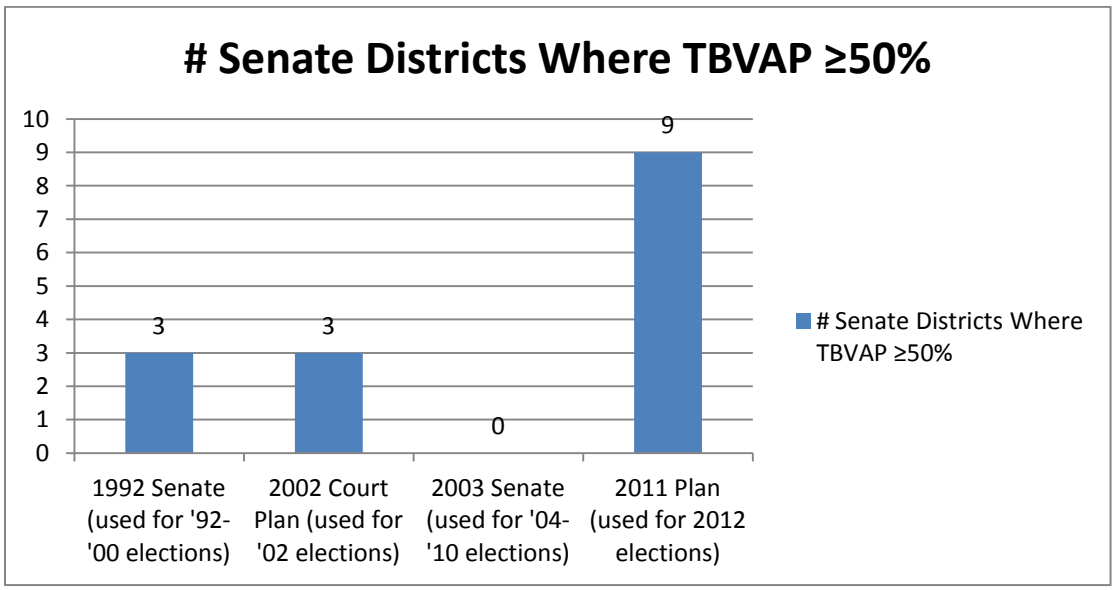
114, lines 12-21). No African-American Senator or Representative voted in favor of any of the plans proposed by Senator Rucho and Representative Lewis, including the enacted plans. (T pp 30, 114).

In addition, once the VRA maps were introduced, citizens from around the state testified at public hearings that the districts went beyond what was required for compliance with the Voting Rights Act. (Doc. Ex. 7726: D:\Native Format\ CDs\PS79\NC111-S-28F-3(m)). Well before the final plans were enacted, the Defendants were specifically informed in written testimony that the VRA districts they were proposing were premised on a fundamental misunderstanding of constitutional and civil rights law. (Doc. Ex. 7726, D:\Native Format\CDs\PS83\ Depositions\Exhibits\Exhibits 199-216\211) (Attached as Appendix 3). Writing on behalf of a citizen group, the Alliance for Fair Redistricting and Minority Voting Rights, or AFRAM, on 23 June 2011, counsel explained that "it does appear that these districts go beyond what the Voting Rights Act requires both in terms of the number of majority-minority districts and in terms of the Black population percentages in the Voting Rights Act districts." *Id.* It also states that the Voting Rights Act does not require proportional representation, that Section 5 does not require maximization of the number of majority Black districts, that Section 5 does not require districts to be 50% Black in voting age population, and that the districts

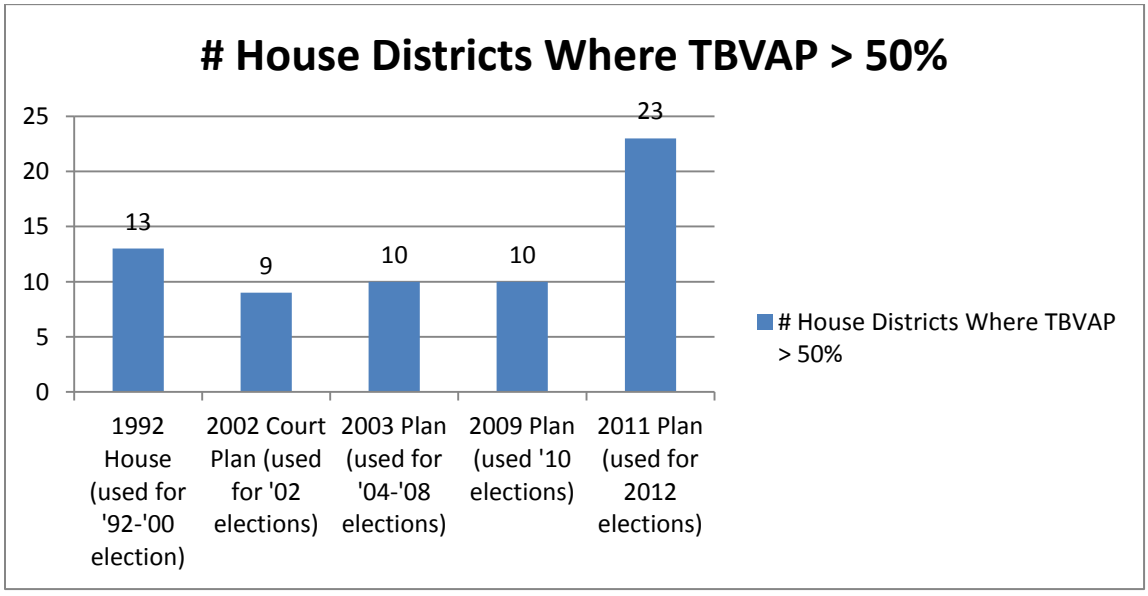
as drawn "threaten the very principles that the Voting Rights Act exists to promote." *Id.* The Defendants were aware, prior to enacting the VRA districts, that the NAACP and many other citizens were opposed to those districts being created as majority-Black districts.

C. A Comparison of Districts in the Enacted Plans and Previous Plans.

The legislative record contained data regarding the number of majority Black districts drawn by the 1992 and 2003 sessions of the General Assembly and by the courts in 2002. (Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Ex. 80-84, (Churchill Dep. Ex. 81-83)). The following chart compares the number of Senate districts judged by the 1992 and 2003 sessions of the General Assembly and the courts in 2002 as necessary to meet the State's obligations under the Voting Rights Act compared to the number of districts judged by the 2011 General Assembly to be necessary for that purpose.



The following chart compares the number of House districts judged by the 1992, 2003 and 2009 sessions of the General Assembly and the courts in 2002 to be necessary to meet the State's obligations under the Voting Rights Act with the number of such districts judged to be necessary for that purpose by the 2011 General Assembly.



All of these plans were precleared by the United States Department of Justice ("US DOJ"), and none of these plans were challenged on Section 2 grounds. (T pp 26-27).

The record before the Legislature also established the counties in which past sessions of the General Assembly and the courts in 2002 had determined that either Section 2 or 5 required the creation of one or more majority African-American districts.[10] Notably, the 2011 plan doubles the number of majority Black Senate districts in Mecklenburg County and adds a majority Black Senate district in 11 counties for the first time, including Wake, Durham, Guilford and Cumberland counties. (Map Notebook, Lewis-Dollar Dockham 4, Stat Pack). The 2011 House Plan increased the number of majority Black districts in Mecklenburg from 2 to 5, in Guilford from 2 to 3, in Wake from 1 to 2, in Cumberland from 0 to 2 and in Durham from 0 to 2. *Id.* It also created a majority Black House district for the

[10] Attached as Appendix 4 are two charts, one for Senate Districts and one for House Districts, that list each county in which a district containing > 50% TBVAP was located (a) under the legislative plan used for the 1992-2000 elections; (b) under the Court drawn plan used for the 2002 elections; (c) under the legislative plan used for the 2004-2010 elections; and (d) under the challenged 2011 plan. Appendix 5 is a chart showing the judgment of the General Assembly in 1991, 2003 and 2009 and the courts of this state in 2002, with regard to the scope of the State's obligations under Section 2 in the counties in which Section 2 violations had been found compared to Senator Rucho and Representative Lewis' belief as to the scope of that obligation.

first time in 10 counties: Pasquotank, Franklin, Duplin, Sampson, Wayne, Durham, Hoke, Richmond, Robeson, and Scotland. *Id.*

The legislative record also included alternative plans introduced during the 2011 session of the General Assembly by the Democratic Caucus and the Black Caucus that reflected the judgment of their members about the scope of the State's Voting Rights Act obligation. (Map Notebook, Fair & Legal House, Fair & Legal Senate, Possible House, Possible Senate). Those plans contained far fewer majority-Black House and Senate districts. (Map Notebook, Stat Packs, Fair & Legal House, Fair & Legal Senate, Possible House, Possible Senate). The Legislative Black Caucus proposed two majority-Black Senate Districts and 10 majority-Black House Districts; the Democratic Caucus proposed one majority-Black Senate District and nine majority-Black House Districts. *Id.*

D. The Evidence Before Defendants Regarding the Decreased Need for Majority-Black Districts in North Carolina.

Even as the number of majority-Black districts was decreasing prior to 2011, the number of Black legislators in the General Assembly steadily increased. (T pp 32-35; R p 676). This reflects the fact that since *Gingles*, voters in North Carolina have made significant progress towards achieving the goals of inclusion and fair representation embodied in the Voting Rights Act. Levels of Black voter registration and participation in elections today are greater or equal to that of white

voters, (T pp 383-84), in contrast to the factual finding by the district court in *Gingles* in 1982 that African-Americans voters as a percentage of voting age population lagged behind whites by 14 percentage points statewide (66.7% white VAP registered vs. 52.7% Black VAP registered) and by as much as 23 percentage points in many counties. *Gingles v. Edmisten*, 590 F. Supp. 345, 360 (E.D.N.C. 1984), *aff'd in part, rev'd in part, sub nom Thornburg v. Gingles,* 428 U.S. 30 (1986). Similarly, the increasing willingness of white voters to support Black candidates at the ballot box has meant that when Black voters go to the polls, they have a reasonable chance of electing their candidates of choice even when those candidates are Black and even where Black voters are not a majority of the electorate.

By 2011, the record as developed by the General Assembly[11] showed that fifty-six times between 2006 and 2011, Black candidates won election contests in state house and senate districts that were not majority-Black, and twenty-two times

[11] At the request of Senator Rucho, legislative staff at the General Assembly compiled a list of every racially contested election in the state of North Carolina from the years 2006 through 2010 and for every racially contested Congressional election from 1992-2010. (Doc. Ex. 1824; Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Ex. 80-84). Churchill Dep. Ex. 80-84. The data compiled by legislative staff included the race of all candidates, the district number, the winner and loser of the election, the margin of victory, and the racial demographics of the district in which the election was conducted. (Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Ex. 80-84Churchill Dep. Exs. 81-83.)

those candidates were running in majority-white districts.[12] (Doc. Ex. 7726 PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Ex. 80-84). Attached as Appendix 6 is a table listing these candidates and elections. Most of these elections involved candidates of different races in which the Black candidate defeated the white candidate, some of whom were incumbents. *Id*.

Defendants were advised by attorneys at the School of Government that *Gingles* data was outdated and could not be relied on for 2011 redistricting decisions.[13] (Doc. Ex. 7726 (PS \PS83\Depositions\Exhibits\Exhibits 44-94

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[12] Among many examples is Durham County, where the enacted plan creates a majority-black senate district and two majority-black house districts, even though Durham County previously never had a majority-black legislative district and the *Gingles* court ruled none was needed in 1986. African-American candidates Mickey Michaux, Larry Hall, Jeanne Lucas, and Floyd McKissick won a total of nine election contests between 2006 and 2011, winning contested general elections with over 70% of the vote. Appendix 6. In Wake County, where there had never been a majority-black senate district and no majority-black house district since 2002, Linda Coleman, an African-American, won election in 2006 and 2008 in a house district that was 26.70% black in voting age population.

[13] Michael Crowell and Bob Joyce wrote: "In considering whether Section 2 requires the drawing of majority African American legislative districts today it should be kept in mind that the *Gingles* decision was based on demographics as they existed in 1982 and an election history primarily from the 1960s and 1970s; likewise, the Section 2 litigation involving local governments mostly was concluded by the early 1990s. North Carolina has changed significantly since then, especially in the piedmont urban areas, so that more recent analysis of voting patterns and the other Section 2 elements would be necessary to assert with any confidence that a Section 2 violation might be found in a particular part of the state today." (Doc. Ex. 7726 (PS \PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill)) (Dep. Ex. 57)).

(Churchill)) Dep. Ex. 57-58). However, there is no evidence in the legislative record of any effort by Defendants to review or analyze more recent election data. Had Defendants reviewed this data they would have found:

1. that seven African-American State Senators were elected from eight of the prior Senate districts with Black voting percentages between 42.52% and 49.70% in the past four election cycles. (R pp 283-91, 366);

2. that in the 40%+ Black voting age population Senate districts relevant to this litigation, African-American candidates or the candidates of choice of African-American voters prevailed in all elections in 7 of 8 districts in the 2008 and 2010 primary and general elections, for a win rate of 88 percent. (Doc. Ex. 962);

3. that in the 40%+ Black voting age population State House Districts relevant to this litigation, Black candidates or a white candidate of choice of Black voters prevailed in 19 out of 21 districts in the 2008 and 2010 primary and general elections, for a win rate of 90 percent. *Id.*;

4. that in the State House districts that were above 40% Black voting age population but below 50% Black voting age population, the candidate of choice of Black voters prevailed in all elections in 10 of the 11 districts, and prevailed in 3 out of 4 of the elections in the 11th district, for a win rate of 91%. (Doc. Ex. 1304);

5. that in the State House districts that were above 50% Black voting age population, the candidate of choice of Black voters prevailed in 8 of the 10 majority Black districts, for a win rate of 80%, which is lower than the win rate in districts between 40% and 50% Black voting age population. (Doc. Ex. 1306);

6. that Congressional Districts 1 and 12 previously were less than 50% Black in voting age population and that both districts elected candidates of choice of Black voters in the 2008 and

2010 primary and general elections. (R p 380; Doc. Ex. 7726; CDs\PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) Churchill Dep. Ex. 80-84 Churchill Dep. Ex. 81); Doc. Ex. 1322)

7. that in all districts, state legislative and Congressional, the candidate of choice of Black voters prevailed in 28 of 31 districts with 40%+ Black voting age population, for a win rate of 90%. (Doc. Ex. 962). This win rate is no different than the win rate for African-American candidates and white candidates of choice of African-American voters in districts that are 50%+ in Black voting age populations. (Doc. Ex. 1303).

The General Assembly also had available information about the margin of victory of African-American candidates in the earlier elections under prior plans and the extent to which African-American candidates were unopposed in those elections. Appendix 5 attached hereto summarizes that information for each challenged district.

At trial, voters and elected officials testified about the extent of election of candidates of choice of Black voters around the state. (T pp 15-16, 20-24, 63-64, 103, 141). Their testimony described an evolving process whereby Black voters and Black candidates have increasingly been woven into the fabric of political life in this state. From Rencher N. Harris' election to the Durham City Council in 1953 (T pp 100-101), and Harvey Gantt's first election to the Charlotte City Council in 1974 (T pp 168- 69), to Dan Blue's ascent to the position of Speaker of the House in 1991 (T p 17), Ralph Campbell's statewide election as State Auditor

in 2004 (T p 102), Malcolm Graham's defeat of incumbent Fountain Odom in 2006 (T p 173), and to Dr. Eric Mansfield's election to the Senate from Fayetteville in 2010 (T p 62), Black candidates have built successful multi-racial campaigns, with strong support from whites and Blacks in their communities. Black and white voters have seen their common interests united behind the values that they share, and they have seen their elected leaders, honorable and capable men and women of color, ably represent Black and white voters together.

Senator Dan Blue and Congressman Mel Watt explained how over the past 30 to 40 years more and more white candidates have supported Black candidates. (T pp 21-23, 172-76). Relative newcomers, such as Representative Larry Hall and Dr. Eric Mansfield, testified that politics in this state are increasingly about issues and values, and less about the race of the candidate. (T p 62, 98-99). Politically active citizens at the local level, such as Goldie Wells, Albert Kirby and Walter Rogers, described the multi-racial coalitions that have been formed in their communities to address common issues. (T p 82-83, 144-47).

E. Polarized Voting Studies.

The legislative record contained two studies indicating that racially polarized voting is present in varying degrees throughout the State. (Doc. Ex. 1053, 1113). One study was authored by Dr. Ray Block and presented at a public hearing on 9

May 2011, in Raleigh. (Doc. Ex. 1053). The other study was authored by Dr. Thomas Brunell and filed with the General Assembly on 14 June 2011, three days before Senator Rucho and Representative Lewis made public the partial plans containing the challenged districts. (R p 451-87).

Dr. Brunell's study primarily examined statewide races and provides numerous examples across the state of Black candidates receiving substantial support from white voters. (R p 451-87) (finding that in precincts that were at least 90% white, Black candidates received 39.3-43.8% of the vote in the 2004 State Auditor election, the 2008 Democratic presidential primary, and the 2008 presidential election). Dr. Brunell's study fails, however, to consider the critical question of whether the level of racially polarized voting in a particular area results in the white bloc usually defeats the candidate of choice of Black voters. Additionally, Dr. Brunell's methodology was flawed on a very basic level, requiring him to file, long after the General Assembly had relied on his report, an affidavit and updated report correcting those errors. (Doc. Ex. 5716).

Ray Block's study looked at state legislative contests, and similarly showed that Black candidates receive substantial support from white voters. (Doc. Ex. 1057-59). Block's study did not include information about whether the candidates of choice of Black voters won election. *Id.*

F. Evidence of Geographical Compactness.

The redistricting record compiled by the General Assembly contained the results of 8 separate mathematical measures of the geographic compactness of each of the enacted plans and alternate plans filed in the General Assembly. (Doc. Ex. 900, 4913) The Defendants did not use these mathematical measures in evaluating the degree to which a potential plaintiff in a Section 2 lawsuit could meet the compactness requirement of a Section 2 claim or whether the districts complied with the state Constitutional compactness requirement as established in *Stephenson*. (Doc. Ex. 2141-2142). Indeed, neither Senator Rucho or Representative Lewis for themselves, nor Hofeller on their behalf, made any focused or independent effort to evaluate the compactness element of a Section 2 claim for the challenged districts. (Doc. Ex. 2997, 3027).

Using the mathematical measures of compactness contained in the legislative record, Anthony Fairfax compared the compactness of the challenged districts in the enacted plans with the compactness of the alternative plans filed by the Democratic and Black Caucus. (Doc. Ex. 367-68). He found that all three 2011 enacted redistricting plans scored overall less compact than prior redistricting plans and less compact than other redistricting plans introduced during the 2011 redistricting process. (Doc. Ex. 378).

Hofeller agrees that mathematical standards of compactness can be a meaningful tool for measuring compactness. In what he previously referred to as his "seminal study of measures of compactness," Hofeller argued that "quantitative scores should be used to make comparisons. The fact that compactness is a relative measure does not render it meaningless." (Doc. Ex. 7726, D:\Native Format\CDs\PS83\Depositions\Exhibits\Exhibits 504-566 (Hofeller) Hofeller Dep. Ex. 517, p.1176). His study went on to conclude that when "multiple measures coalescence in support of a single plan, the evidence in its favor is very strong." *Id*. at 1117.

Defendants stated that the highly irregular shapes of the districts are due to their effort to comply with the proportionality quota. *See* Section IV Of Defendants' Memorandum in Support of Motion for Summary Judgment (Doc. Ex. 3546-3619). The results of their efforts are demonstrated in Appendix 8, which shows that the lines twist and turn to encompass areas with concentrations of Black citizens.

G. Comparison of Divided Counties in Plans Drawn to Achieve Proportion, and Plans Not Drawn for that Purpose.

The 2003 Senate redistricting plan used for the 2004-10 elections was not drawn to create majority African-American districts in numbers proportional to the State's African-American population. Only 12 counties were divided by that

plan.[14] (Map Notebook, 2003 Senate). By contrast, the 2011 Senate Plan, which was drawn to create majority African-American districts proportional to the State's African-American population, divides 19 counties or seven more than were divided by the 2003 Senate Plan. (Doc. Ex. 910).

An alternative plan entitled "Senate Fair and Legal" was introduced by Senator Martin Nesbitt on 25 July 2011. (Map Notebook, Fair & Legal Senate). That plan was not drawn to create majority African-American districts proportional to the African-American population. It would have divided 14 counties or 5 fewer counties than the enacted 2011 Senate Plan. *Id.* Another alternative plan entitled "Possible Senate Districts" was introduced by Senator Floyd McKissick on 25 July. (Map Notebook, Possible Senate). That plan was not drawn to create majority African-American districts in numbers proportional to the State's African-American population. It would have divided 15 counties or 4 fewer counties than the enacted 2011 Senate Plan. *Id.*

The same pattern is present in the House. The 2003 House Plan used for the 2004-08 elections and the 2009 House Plan used for the 2010 election were not drawn to create majority African-American districts in numbers proportional to the State's African American population. Forty-six counties were divided by the 2003

[14] Appendix 6 is a chart showing all the counties divided by the various redistricting plans discussed here.

House Plan and forty-five counties were divided by the 2009 House Plan. (Map Notebook, 2003 and 2009 House Redistricting Plan Maps). By contrast, the 2011 enacted House Plan was drawn to create majority African-American districts proportional to the State's African-American populations. (Map Notebook, Lewis Dollar Dockham 4). Forty-Nine counties are divided by that House Plan or four more than were divided by the 2003 House Plan and five more than were divided by the 2009 House Plan enacted following *Stephenson I*. *Id.*

Representative Grier Martin introduced a plan on 25 July 2011 entitled "House Fair and Legal." (Map Notebook, Fair and Legal House). That plan did not create majority African-American districts in numbers proportional to the State's African-American population. (Map Notebook, Fair and Legal House). It would have divided 44 counties or 5 fewer counties than the challenged 2011 House Plan. *Id.* Representative Kelly Alexander introduced a plan on 25 July entitled "Possible House Districts." (Map Notebook, Possible House Districts). That plan was not drawn to create majority African-American districts in numbers proportional to the State's African-American population. It would have four fewer counties than the challenged 2011 House Plan. *Id.*

H. Comparison of Split Precincts in Plans Drawn to Achieve Proportion and Plans Not Drawn for that Purpose.

Preservation of precincts and VTDs is not one of the criteria listed in the public statements issued by Senator Rucho and Representative Lewis on 17 June, 22 June, and 12 July incorporating the oral instructions they gave Hofeller for drawing House and Senate districts. (Doc. Ex. 540-598).[15] Hofeller stated in his affidavit that "splitting VTD lines is often necessary in order to create TBVAP districts." (Doc. Ex. 7726, D:\Native Format\CDs\PS83\Depositions\Exhibits\ Exhibits 504-566 (Hofeller)\513). Hofeller further acknowledged that he split precincts for the purpose of increasing the Black population in a district, in order to achieve Rucho and Lewis' instruction to create majority African American districts in numbers proportional to the state's African American population. (Doc. Ex. 2164, 2160-61).

[15] Preservation of counties and precincts is specifically listed as criterion that was considered in designing and constructing congressional districts. (Doc. Ex. 561). VTDs are comparable to precincts. VTDs are the voting tabulation districts reported to the Census. They are based on the voting precincts in effect on 1 January 2008 and cannot be altered by the Board of Elections. In most cases, VTDs correspond exactly with precincts. However, in limited cases, local boards of election may have altered the precinct boundary within a VTD after 1 January 2008. Because of the similarity between precincts and VTDs, Plaintiffs use the term precinct to refer to VTDs.

The following chart shows the number of split precincts in the enacted plans compared to other plans introduced during the legislative process and compared to prior redistricting plans in North Carolina:

Plan	**Split Precincts**
2003 House	198
2011 Legislative Black Caucus House	212
2011 Fair and Legal House	129
2011 Enacted House	**395**
2003 Senate	55
2011 Legislative Black Caucus Senate	10
2011 Fair and Legal Senate	6
2011 Enacted Senate	**257**

(R pp 342, 550-52). Overall in 2011, 563 of the state's 2,692 precincts were split into more than 1,400 pieces in the three plans. More than one-fourth (27.2%) of the state's voting-age population lives in these split precincts. (Doc. Ex. 423). In some cases, district lines divide single family homes and apartment complexes into different districts. (D:\Native Format\CDs\PS83\Depositions\Doss (Guilford BOE)

Deposition, Doss Dep. Tr. p. 25-263; D:\Native Format\CDs\PS83\Depositions\ Fedrowitz Deposition Fedrowitz Dep. Tr. p. 65-67).

When the General Assembly splits precincts between or among districts, there is an increased risk that voters will be assigned to the wrong district. (Doc. Ex. 1485). An examination of the voter assignments in just six of the State's 100 counties (Durham, Robeson, Wilson, Richmond, Wayne, and Wake) showed 2056 voters were assigned to the wrong districts in the May, 2012 primary across the House, Senate, and Congressional plans. (Doc. Ex. 3282). Ninety-seven percent of those 2056 wrongly assigned voters live in split precincts. *Id.*

A subsequent audit by the State Board of Elections of all 100 counties revealed many more voters remained incorrectly assigned after the 2012 primary and general elections. (Doc. Ex. 6320). In Johnston County alone, approximately 2200 voters were wrongly assigned. *Id.* Based on the state audit, 6,340 voters were potentially wrongly assigned in the State House plan, 3,557 voters were potentially misassigned in the State Senate plan, and 2,793 voters in the Congressional plan. (Doc. Ex. 6321).

A disproportionately high percentage of African-American voters live in split precincts. Dan Frey, a GIS analyst at the General Assembly confirmed that 26.8% of the state's any part Black voting age population ("VAP") lives in a split

precinct in the enacted House plan, while only 16.6% of the state's white VAP lives in a split precinct in the enacted House plan. (Doc. Ex. 1202). Frey also confirmed that the enacted 2011 House Plan contained a higher percentage of Black voters residing in a split precinct than any other House plan proposed in the legislative process. *Id.* Similarly, 19.4% of the state's any part Black VAP lives in a split precinct in the enacted Senate plan, while only 11.8% of the state's white VAP lives in a split precinct in the enacted Senate plan. *Id.* The 2011 enacted Senate Plan contained a higher percentage of Black voters residing in a split precinct than any other Senate plan proposed in the legislative process. *Id.*

I. Overview of the Congressional Redistricting Process.

The process followed by Senator Rucho and Representative Lewis in developing the congressional plan was similar to the process they followed in developing the House and Senate plans. As Chairs of the House and Senate Redistricting Committees, they were jointly responsible for developing the Congressional Plan. (Doc. Ex. 3061, R p 276), and Thomas Hofeller was engaged by the Ogletree law firm to as "chief architect" for the congressional plan as he was for the House and Senate plan. (Doc. Ex. 1895; Doc. Ex. 3068). Senator Rucho and Representative Lewis were the sole sources of instructions to Hofeller

regarding the design and construction of the congressional plan and those instructions were oral. *Id.*

Senator Rucho and Representative Lewis filed a congressional plan labeled "Rucho-Lewis Congressional 1" and first made that plan public on 1 July 2011. (Doc. Ex. 555). They filed a modified plan on 19 July (Rucho-Lewis Congressional 2), 20 July (Rucho-Lewis Congress 2A), and 26 July (Rucho-Lewis Congress 3). Rucho-Lewis Congress 3 was enacted on 26 July as Session Law 2011-403.

Senator Rucho and Representative Lewis issued public statements on 1 and 19 July 2011 describing the factors that shaped the challenged congressional districts, CD 1, 4, and 12. (Doc. Ex. 555-68). These public statements reflected the oral instructions Senator Rucho and Representative Lewis had given to Hofeller to apply in drawing the districts and are included in Appendix 2.

With regard to CD 1, Senator Rucho and Representative Lewis stated that CD 1 had been drawn in 1992 "to comply with the Section 2 of the Voting Rights Act." (App. 2 p 22). With regard to CD 12, they stated that "because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a Black voting age level that is above the percentage of Black voting age population found in the current Twelfth Districts." *Id.* at 24. The stated

purpose for drawing CD 12 at this level was to "ensure preclearance of the plan." *Id.* The characteristics of these districts are compared to past plans in Appendix 9.

SUMMARY OF OPINION BELOW

On 8 July 2013, the trial court issued its Judgment and Memorandum of Decision regarding each of the federal and state constitutional challenges to the enacted legislation and congressional plans, and district within those plans. (R pp 1264-1434). The court's rulings on these challenges are summarized separately below.

A. Plaintiffs' Equal Protection Claims Under the 14th Amendment to the United States Constitution.

Most of the trial court's 171 page decision addresses Plaintiffs' claims that 30 legislative and congressional districts created by the redistricting legislation enacted by the General Assembly in 2011 constitute racial gerrymanders in violation of the Equal Protection Clause of the United States Constitution.

The court began this discussion by resolving a dispute between the parties regarding the burden of proof and its allocation. Plaintiffs had acknowledged that they had the burden of proof on the issue of whether race was the predominant factor the Defendants used in assigning voters to districts, but argued that if they carried that burden, the burden then shifted to Defendants to prove that those decisions were made to meet a compelling government interest and to prove that

each of those districts was narrowly tailored to meet that compelling interest. The Defendants countered that the burden of proof was with Plaintiffs on all issues encompassed within their equal protection claims. They did acknowledge that if Plaintiffs proved that race was the predominant factor used to assign voters to districts Defendants then had the burden of production, but not the burden to prove, that those districts were drawn to meet a compelling interest and were narrowly tailored to meet that interest. The panel adopted Defendants' position. (R pp 1272-75).

Applying this standard, the panel first concluded that the Plaintiffs had carried their burden for 26 legislative and congressional districts and proved that "the shape, location and racial composition of each VRA district was predominately determined by a racial objective and was the result of a racial classification sufficient to trigger the application of strict scrutiny as a matter of law." (R p 1278).

Turning to this compelling interest issue, the court observed that the "Defendants assert that the VRA Districts in the Enacted Plans were drawn to protect the State from liability under § 2 of the VRA, and to ensure preclearance of the Enacted Plans under § 5 of the VRA." (R p 1279). The trial court then held:

> A redistricting plan furthers a compelling governmental interest if the challenged districts are "reasonably established" to avoid liability

> under § 2 of the VRA or the challenged districts are "reasonably necessary" to obtain preclearance of the plan under § 5 of the VRA.

(R p 1280). In determining whether Plaintiffs carried the burden the court had assigned to them to prove the districts were not "reasonably established" to avoid § 2 liability, the court concluded that it was "required to defer to the General Assembly's 'reasonable fears of, and their reasonable efforts to avoid, § 2 liability.'" (R p 1281). In determining whether the Plaintiffs carried the burden the court had assigned to them to prove that the districts were not "reasonably necessary" to obtain preclearance under § 5, the panel concluded: "A legislature's efforts to ensure preclearance must be based upon its reasonable interpretation of the legal requirements of § 5 of the VRA." (R p 1285).

Examining the evidence in this light, the trial court concluded with respect to the Defendants' potential § 2 liability:

> [T]hat the General Assembly had a strong basis in evidence to conclude that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution.

(R pp 1283-84). With respect to the Defendants' § 5 obligations the trial court concluded:

> [T]hat the General Assembly had a strong basis in evidence to conclude that the Enacted Plans must be precleared, and that they

> must meet the heightened requirements of preclearance under the 2006 amendments to § 5 of the VRA.

(R p 1285). Having concluded that Plaintiffs had failed to carry their burden to prove that the Defendants did not have a compelling interest in avoiding § 2 liability and in obtaining § 5 preclearance, the trial court then considered whether Plaintiffs had carried their burden to prove that the Defendants had not narrowly tailored the challenged districts to meet their § 2 and § 5 interests. The trial court concluded that Plaintiffs had failed to prove that Defendants had not narrowly tailored the challenged districts to meet their § 2 and § 5 interests. The trial court's reasons for accepting Defendants' arguments are explained in the following passage:

> [T]he General Assembly had a strong basis in evidence for concluding that "rough proportionality" was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA…The trial court therefore concludes that the number of VRA districts created by the General Assembly in the Enacted Plans is not inconsistent with the General Assembly's obligation to narrowly tailor the plans under strict scrutiny.

(R p 1291). The trial court's reasons for rejecting Plaintiffs' arguments are explained in the following passage:

> Plaintiffs' arguments are not persuasive because Plaintiffs have not produced alternative plans that are of value to the trial court for comparison in this narrow tailoring analysis. None of the alternative plans proposed or endorsed by the Plaintiffs contain VRA districts in

> rough proportion to the Black population in North Carolina. None of the alternative plans seek to comply with the General Assembly's reasonable interpretation of *Strickland* by populating each VRA district with >50% TBVAP. None of the alternative plans comply with the N.C. Supreme Court's mandate in *Stephenson v. Bartlett* to "group [ ] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard.

(R p 1305).

B. Plaintiffs' Claims that SD 32 and CD 12 are Unconstitutional Racial Gerrymanders.

While the trial court concluded that race was the predominant factor used by Defendants to assign voters to 26 legislative and congressional districts, it concluded that race was not the principal explanation for the assignment of voters in 6 districts, SD 31 and 32, HD 51 and 54 and CD 4 and 12. (R p 1309-10).

C. Plaintiffs' Claims that the Enacted House and Senate Plans Violate the Whole County Provisions of the State Constitution.

There is no factual dispute among the parties on this issue. The Enacted House and Senate plans created more clusters of counties than proposed, competing plans, and the proposed, competing plans divided fewer counties, fewer times than the enacted plans. Concluding that it was "bound by the precedent established by the N.C. Supreme Court in *Stephenson I* and *Stephenson II*" (R p 1320), the trial court awarded summary judgment for the Defendants on this claim.

D. Plaintiffs' Compactness Claims Under the Equal Protection Clause of the State Constitution.

The court also awarded summary judgment to the Defendants on Plaintiffs' claims that the non-compact shapes of the challenged districts violated the Equal Protection Clause of the State Constitution because compactness is not an independent constitutional requirement under the State Constitution. The court further determined that even if compactness were an independent constitutional requirement, it could not measure compliance because there is no adopted judicial standard by which to measure compliance. (R p 1325).

E. Plaintiffs' Claims that Split Precincts Violate the Right to Vote Under the State Constitution.

Finally, the court concluded that Defendants were entitled to summary judgment on Plaintiffs' claims that the excessive, race-based splitting of precincts violated the equal protection guarantees of both the state and federal constitutions. (R p 1332). The court found, as a matter of law, that while the splitting of precincts may be circumstantial evidence of impermissible racial motive, it is not, in and of itself, a constitutional defect, regardless of the harm caused to citizens. (R p 1333).

ARGUMENT

In enacting the 2011 redistricting plans, the Defendants turned the Voting Rights Act on its head and used it as a means to justify the subversion of the rights of North Carolina's citizens under both the State and federal constitutions. They used a law designed to protect the voting rights of the country's most vulnerable citizens to in fact segregate those voters by race and to reduce their proven ability to form cross-racial coalitions. Their explicit goal of increasing the number of majority-Black Senate and House districts to match the Black percentage of the state's population not only meant that race predominated in the drawing of those districts, it also led them to (a) use the racial identity of voters as the determinative basis for drawing other, non-Voting Rights Act districts, (b) divide more counties than necessary, (c) create oddly shaped, non-compact districts, and (d) divide an unprecedented number of precincts, impacting approximately two million voters and disproportionately disadvantaging African-American voters. This litigation seeks to right that wrong.

Defendants made four fundamental mistakes of law in constructing the districts that comprise their 2011 legislative and congressional redistricting legislation.

> First, they did not heed the rule that seeking, and achieving, racial proportionality in electoral districts is *per se* unconstitutional, not a

> safe harbor from litigation. Defendants' reliance on the Voting Rights Act as a justification for creating a pre-determined, proportional number of African American election districts resulted in just the sort of racial segregation the Act forbids and was designed to eliminate. (Arguments I, II, & IV below.)
>
> Second, they did not apply the rule that narrow tailoring in redistricting requires legislative bodies to minimize, rather than maximize, racial considerations. (Part III below.)
>
> Third, they failed to honor the words of the Constitution and constructed districts to maximize county clusters rather than minimize county splits. (Argument V below.)
>
> Finally, they ignored this Court's clear message in *Stephenson I* and explicit holding in *Stephenson II* that state equal protection principles forbid assigning some citizens to compact electoral districts and other citizens to non-compact districts except when required by federal law. (Argument VI below.)

The trial court declined to hold the Defendants accountable for these failures to honor the constitutional rights of all citizens because of a misplaced deference for the Defendants' litigation "fears" (R p 1281) and the perceived need to give the Defendants "leeway" (R p 1290) in drawing districts. Constitutional rights may not be sacrificed to fears or eroded to ease the legislature's burden. That much was settled in *Bayard v. Singleton*, 1 N.C. 42 (1787). As this court explained:

> The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of

> the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

State ex rel. Attorney General v. Knight, 169 N.C. 333, 352, 85 S.E. 418, 427 (1915). Plaintiffs respectfully request this Court to declare that the districts in Defendants' legislative and congressional redistricting legislation were constructed on an unconstitutional foundation and must be redrawn.

I. THE TRIAL COURT ERRED IN HOLDING THAT SECTION 5 OF THE VOTING RIGHTS ACT IS A COMPELLING GOVERNMENTAL INTEREST JUSTIFYING THE DEFENDANTS' RACIALLY GERRYMANDERED DISTRICTS WHEN THE U.S. SUPREME COURT RULED THAT SECTION 5 DOES NOT CONSTITUTIONALLY APPLY TO NORTH CAROLINA.

A. Standard of Review.

A trial court's conclusions of law are reviewed *de novo* — the least deferential standard of review. Under *de novo* review, the appellate court considers the issue anew and freely substitutes its judgment for that of the trial court. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002). *See also State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Defendants Cannot Have An Interest in Complying with an Unconstitutional Law.

The trial court's holding that the Defendants had a compelling governmental interest in achieving racial proportionality with districts over 50% Black in voting age population in order to ensure preclearance of those plans by the United States Department of Justice under Section 5 of the Voting Rights Act is based on two errors of law. First, the trial court failed to acknowledge that Section 5 of the Voting Rights Act, as reauthorized in 2006, does not constitutionally apply to North Carolina. (R p 1298-1299). Second, as argued in Argument II, *infra* at 49-71, even if Section 5's non-retrogression standard did apply, the trial court erroneously deferred to the Defendants' view that in order to ensure preclearance, the Defendants needed to enact a plan containing a number of majority-Black districts proportionate to the Black percentage of North Carolina's population. (R p 1298-99).

Citing the enormous gains in participation rates by African-American voters in states throughout the South in the decades since the Voting Rights Act was passed in 1965, on 25 June 2013 the U.S. Supreme Court issued an opinion in *Shelby County v. Holder*, 570 U.S. ___, 133 S. Ct. 2612 (2013), holding that the formula that determines which jurisdictions are covered under Section 5 of the Voting Rights Act, as reauthorized by Congress in 2006, is unconstitutional. Since

the coverage formula contained in Section 4(b) of the Act was not updated in 2006 when the "extraordinary measures" which are a "drastic departure from basic principles of federalism" were extended for another 25 years, the Court ruled that the formula cannot be a basis for subjecting certain jurisdictions and not others to the preclearance requirement. *Shelby County,* 133 S. Ct. at 2618, 2631.

"There is no denying" the Court explained, "that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions. By 2009, 'the racial gap in voter registration and turnout [was] lower in the States originally covered by §5 than it [was] nationwide.'" *Id.,* 133 S. Ct. at 2618-19, *citing Northwest Austin Municipal Util. Dist. No. One v. Holder,* 557 U.S. 193, 203-204 (2009). *Shelby County v. Holder* stands for the proposition that Congress, when seeking to remedy racial discrimination in voting, must "ensure that the legislation it passes to remedy that problem speaks to current conditions." *Shelby County*, 133 S. Ct. at 2631.

Despite the fact that the gains in participation rates by African-American voters over the past fifty years are as true of North Carolina as in the rest of the South, with African-American voters in North Carolina participating today at higher rates than white voters, *see* T p 384; S. Rep. No. 109-295, p. 11 (2006); H. R. Rep. No. 109-478, at 12, the trial court nevertheless held that compliance with

the unconstitutional statute was a compelling governmental interest justifying the decision to assign voters to districts based on their race in order to create nine majority-Black Senate districts where previously there were none and twenty-four majority-Black House districts where previously there were eight.

Although the Plaintiffs requested permission to brief this issue after the *Shelby County* decision was announced, the trial court denied the motion but accepted it as notice of supplemental authority. (R p 1262). In a footnote the trial court did recognize that the *Shelby County* decision meant that North Carolina is no longer under any obligation to comply with Section 5 of the Voting Rights Act, but concluded that:

> [t]his holding has no practical effect upon the outcome of this case because the measure of the constitutionality of the Enacted Plans depends upon the compelling governmental interests *at the time of the enactment* of the Enacted Plans. At the time of enactment in 2011, preclearance by the USDOJ was required of all North Carolina legislative and congressional redistricting plans.

(R p 1284, fn. 16) (emphasis in original). This is incorrect. An unconstitutional law (or, in this case, the unconstitutional application of Section 5 to North Carolina) cannot be a compelling governmental interest.

There are at least two independent reasons why the U.S. Supreme Court's ruling in the *Shelby County* case means that compliance with Section 5 of the Voting Rights Act cannot be a compelling governmental interest justifying the

continued use of racially gerrymandered districts. First, under strict scrutiny analysis, what matters is whether at the time strict scrutiny is applied, there exists a compelling government interest to use the racial classifications at issue. Second, it is well established that when the Court declares a law unconstitutional, the law is unconstitutional from the time it was enacted, not from the date of the court's decision.

1. Strict scrutiny applies current legal standards.

The question here is not whether the *Shelby County* decision applies retroactively, but rather, whether under strict scrutiny the compelling governmental interest relied upon by the defendants to justify their use of racial classifications must be one that exists currently or may be an interest that existed when the law was enacted but is no longer a valid interest. The notion that a compelling interest justifying the use of a racial classification is frozen in time from the date of the government's reliance on that interest contradicts fundamental principles of strict scrutiny review propounded by the United States Supreme Court. It has long been well established that "in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Regents of*

Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (*citing In re Griffiths*, 413 U.S. 717, 721-22 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). There is nothing in that standard to suggest that what matters is the governmental interest at the time of enactment rather than at the time of the searching judicial inquiry that strict scrutiny requires.

This is reinforced by the U.S. Supreme Court's opinion in *Fisher v. Univ. of Tex. at Austin*, 570 U.S. ___, 133 S. Ct. 2411 (2013). There, after reminding us that racial distinctions are "by their very nature odious to a free people … contrary to our traditions…" and must be "subjected to the most rigid scrutiny," the Court instructs that "judicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.' Strict scrutiny is a searching examination, and it is the government that bears the burden to prove 'that the reasons for any [racial] classification [are] clearly identified and *unquestionably legitimate*.'" *Fisher*, 133 S. Ct. at 2418-19 (emphasis added) (internal citations omitted).

Since Section 5's protections are no longer validly applied to North Carolina, the use of racially-gerrymandered districts cannot be justified by an interest in complying with Section 5 of the Voting Rights Act. In evaluating

whether the State of Michigan had a compelling governmental interest in enacting a 1980 law that established a state contracting set aside for minority and women owned businesses, the Sixth Circuit faced an analogous situation following the Supreme Court's decision in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). *See Michigan Rd. Builders Ass'n v. Milliken,* 834 F.2d 583 (6th Cir. 1987). Pre-*Wygant*, the Sixth Circuit rule was that contracting set-aside programs needed to be justified by a "significant" governmental interest. *Michigan Rd. Builders Ass'n,* 834 F.2d at 587. Post-*Wygant*, it was clear that the constitutional standard required a "compelling" government interest. The *Michigan Rd. Builders Ass'n* court held that even though the state program had been enacted at a time when constitutional doctrine required only a "significant" governmental interest for such programs, the Sixth Circuit was clear that "an appellate court must apply the law in effect at the time it renders its decision." *Id.* at 589. Thus, the court did not apply the constitutional rule in effect *at the time of the enactment* of the challenged statute but rather applied the rule in effect *at the time of its ruling*. The same logic applies here. The U.S. Supreme Court has ruled that under the 2006 reauthorization, Section 5 of the Voting Rights Act could not constitutionally be applied to North Carolina after 2006. Compliance with Section 5 cannot now be used to justify racially gerrymandered districts enacted in 2011.

2. A Supreme Court ruling declaring a law unconstitutional means the law was unconstitutional at the time it was enacted, not at the time of the ruling.

The Supreme Court's view of the nature of the Constitution and its judicial function is incompatible with the proposition that a law "becomes" unconstitutional when the Court rules but was constitutional prior to that point. In *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), Justice Scalia explained that prospective decision making is incompatible with the role of the judiciary to "say what the law is, not to prescribe what it shall be." *Id.* at 201. When it holds that a law is unconstitutional, the Court is interpreting what the Constitution forbids, not what the Court forbids. Thus, it does not make sense to ask whether a particular decision of the Court could only apply prospectively. The statute is either constitutional or it is unconstitutional from the time of its enactment and "the issue of whether to 'apply' that decision needs no further attention."[16] *Id.*

Thus, Section 5 was unconstitutional when it was enacted and all courts adjudicating federal law must give effect to that rule. It necessarily follows that

[16] This question was addressed again a year later in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991). In *Beam*, a majority of the Justices agreed that a rule of federal law, once announced, must be given full retroactive effect by all courts adjudicating federal law. *See also Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993) (the Court's application of a rule of federal law must be given full effect in all open cases).

Defendants do not have a compelling governmental interest in complying with an unconstitutional law.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE VOTING RIGHTS ACT PROVIDES A COMPELLING GOVERNMENTAL INTEREST FOR DEFENDANTS TO INTENTIONALLY CREATE A PROPORTIONATE NUMBER OF MAJORITY BLACK DISTRICTS

A. Standard of Review.

This is a question of law reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review.") A *de novo* standard of review is also appropriate because this issue involves constitutional rights. *Libertarian Party v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011) ("[*D*]*e novo* review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

B. The Trial Court Erroneously Concluded that Racial Proportionality is A Compelling Government Interest.

At the heart of the trial court's equal protection analysis of the racially gerrymandered districts it upheld is the conclusion that "the General Assembly had a strong basis in evidence for concluding that 'rough proportionality' was reasonably necessary to protect the State from anticipated liability under § 2 of the VRA and ensuring preclearance under § 5 of the VRA." (R p 1291). This conclusion is wrong as a matter of law because racial proportionality, whether

exact or rough, is never a compelling governmental interest, nor is it required by the Voting Rights Act. The VRA was not designed to guarantee majority-minority voting districts, but to guarantee that the processes, procedures, and protocols would be fair and free of racial discrimination.

1. Racial Proportionality Can Never Be a Compelling Governmental Interest.

The Supreme Court has been long been clear that "outright racial balancing … is patently unconstitutional." *Fisher,* 133 S. Ct. at 2419. Citing *Bakke, Grutter* and *Parents Involved*, the *Fisher* Court explained that using "some specified percentage of a particular group merely because of its race or ethnic origin" as a definition of diversity would amount to outright racial balancing and that "[r]acial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it 'racial diversity'." *Id.*

Here, as the trial court found, "the General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a 'roughly proportionate' number of Senate, House and Congressional districts as compared to the Black population in North Carolina." (R p 1277). Each VRA district also had to be at least 50% Black in voting age population. *Id.*

Racial balancing is no more constitutional in the redistricting context than it is in law school admissions, *Grutter v. Bollinger,* 539 U.S. 306, 330 (2003)

(outright racial balancing … is patently unconstitional"), public school student assignment policies, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* 551 U.S. 701, 730 (2007) ("Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to … the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class"), public sector employment, *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) ("Title VII is express in disclaiming any interpretation of its requirements as calling for outright racial balancing. § 2000e-2(j)."), or government contracting, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989). The Supreme Court has stated that:

> Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race' will never be achieved." An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."

Parents Involved, 551 U.S. at 730. There is nothing in Voting Rights Act jurisprudence to create an exception to this rule in the redistricting context.

2. Section 2 of the VRA Does Not Require Racial Proportionality.

The Voting Rights Act does not require a legislature to draw a number of majority-Black districts proportional to the Black voting age population in the state.[17] The text of the Voting Rights Act itself states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). Furthermore, the Supreme Court has stated that neither § 2 of the Voting Rights Act, nor § 5 requires proportionality between the percentage of African-Americans in the jurisdiction and the percentage of districts in which African-Americans are a

[17] In order to justify using a racial proportionality standard under strict scrutiny, the question for the Defendants is not what the Voting Rights Act permits, but what it requires. This is so for two important reasons: First, to use racial considerations in redistricting beyond that the VRA requires is to violate the equal protection clause; *Shaw v. Reno*, 509 U.S. 630, 654 (1993). Second, the state constitutional whole county provision can be disregarded only to the extent necessary to comply with the VRA. *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 251. If the Defendants do have a compelling governmental interest in complying with the VRA, it is only in complying with what the VRA requires, they do not have the discretion to enact a plan that may be permitted, but not required, by the VRA.

majority of the voting age population.[18] *Johnson v. DeGrandy*, 512 U.S. 997 (1994) *Miller v. Johnson,* 515 U.S. 900 (1995).

In *DeGrandy,* Justice Kennedy explained why the Court's decision in that case did not endorse proportionality as a safe harbor under § 2 of the Voting Rights Act, forewarning Defendants here of the constitutional dangers inherent in the very practice they chose to follow:

> Operating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid Section 2 litigation. Likewise, a court finding a Section 2 violation might believe that the only appropriate remedy is to order the offending

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[18] Defendants were made aware of the very basic legal tenet that racial proportionality is not required by § 2 of the VRA during the redistricting process by staff attorneys in the General Assembly. In a memorandum to the chairs of the redistricting committees, under the heading, "Maximization Not Required; Proportionality Not a Safe Harbor—*Johnson v. DeGrandy*," staff attorneys at the General Assembly explained that:

> In *Johnson v. DeGrandy*, the Supreme Court focused on the "totality of the circumstances" as articulated in *Gingles*. The Supreme Court rejected a rule that would require a state to maximize majority-minority districts. The Supreme Court also rejected an absolute rule that would bar Section 2 claims if the number of majority-minority districts is proportionate to the minority group's share of the relevant voting age population. The Court rejected this rule, feeling that a "safe harbor" might lead to other misuses.

(Doc. Ex. 7726) (PS \PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill) \58). But the legislative leaders were committed to their racial quotas in redistricting from the very outset of the process and simply disregarded any advice to the contrary from whatever source.

> State to engage in race-based districting and create a minimum number of districts in which minorities constitute a voting majority. The Department of Justice might require (in effect) the same as a condition of granting preclearance [under Section 5]. Those governmental actions, in my view, tend to entrench the very practices and stereotypes the Equal Protection Clause is set against. As a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions.

DeGrandy, 512 U.S. 997, 1029 (Kennedy, J. concurring) (internal citations omitted). The *DeGrandy* court could not have been clearer that proportionality of the sort the Defendants assert as a compelling governmental interest is not a safe harbor: "[n]or does the presence of proportionality prove the absence of dilution. Proportionality is not a safe harbor for States; it does not immunize their election schemes from § 2 challenge." *Id.* at 1026 (O'Connor, J. concurring). And again: "As today's decision provides, a lack of proportionality is 'never dispositive' proof of vote dilution, just as the presence of proportionality 'is not a safe harbor for States [and] does not immunize their election schemes from § 2 challenge.'" *Id.* at 1028 (Kennedy, J., concurring).

Nevertheless, the court below, relying on part but not all of a paragraph in the *DeGrandy* opinion, held that because in its misreading of the *DeGrandy* decision, no Section 2 violation can be found where there is proportionality, the "General Assembly should be given leeway to seek to emulate those circumstances in its Enacted Plans." (R p 1290). The phrase left out of the *DeGrandy* passage

quoted by the trial court is "[w]hile such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of circumstances …" *DeGrandy*, 512 U.S. at 1013.

It was a fundamental error of law to turn a "relevant fact" into a "safe harbor" that then becomes a compelling government interest when "there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course." *DeGrandy*, 512 U.S. at 1031.

DeGrandy is not the only case in which this issue has arisen. The state defendants in 1990s Georgia redistricting litigation, like the Defendants here, admitted that achieving proportional representation was a goal motivating their decision to create additional majority-minority congressional districts. *Johnson v. Miller*, 864 F. Supp. 1354, 1378 (S.D. Ga. 1994), *aff'd sub nom Miller v. Johnson,* 515 U.S. 900 (1995). Georgia enacted a plan with 3 majority-Black districts—its previous plan contained only one majority-Black district. *Id.* at 1360-61. Georgia even indicated that it believed it had a compelling interest in achieving proportionality apart from avoiding Section 2 vote dilution. *Id.* at 1379. To that, the District Court in *Johnson v. Miller* replied that "[t]o erect the goal of proportional representation is to erect an implicit quota for Black voters. Far from

a compelling state interest, such an effort is unconstitutional." 864 F. Supp. at 1379 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.)).

3. Compliance with Section 5 Does Not Require Racial Proportionality.

In addition to the failure to properly apply *Shelby County v. Holder* as argued in the first issue above, *see, supra* at pp. 41-49, the trial court also erred in concluding that rough proportionality was reasonably necessary to ensure preclearance under § 5 of the VRA, had it been constitutionally applied to North Carolina, and that "ensuring preclearance under Section 5" is a compelling governmental interest. (R p 1291).

The Supreme Court has held that as compared to § 2 of the VRA, § 5 has a "limited substantive goal: to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Bush v. Vera*, 517 U.S. 952, 982-83 (1996) (internal quotations omitted). That substantive goal is

known as non-retrogression.[19] In *Bush v. Vera*, the Court held that a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression. *Id.* at 983. Specifically, in that Texas case, the Court rejected the state's contention that compliance with Section 5 required it to increase the BVAP in a congressional district that elected an African-American congress person from 35.1% BVAP to 50.1% BVAP. *Id*. The Court explicitly rejected the argument that Section 5 could be used to "justify not maintenance, but substantial augmentation, of the African-American population percentage" in the congressional district challenged as a racially gerrymander. *Id*. Indeed, the state had "shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression." *Id.* Significantly, the plan containing the unconstitutional racial gerrymander was precleared by the Department of

[19] The trial court misreads *Shelby County* as holding that the effect of the 2006 amendments to the VRA required jurisdictions to do more to obtain Section 5 preclearance. (R p 1285). What the Supreme Court was referring to was Congress' decision to prohibit intentional discrimination prohibited under Section 5, not that jurisdictions must increase the percentage of black population or the number of majority black districts in order to obtain preclearance. *See Shelby County,* 570 U.S. ___, 133 S. Ct. 2612, 2636, citing *Reno v. Bossier Parish School Bd.*, 520 U. S. 471, 480-482 (1997). In briefing for the trial court, plaintiffs documented examples of 2011 redistricting plans from other jurisdictions that were precleared without increases in the number of majority-black districts or in the percentages of black population. (Doc. Ex. 5966-72).

Justice. *Id.* at 956. A plan that goes beyond that which is required by Section 5 would have certainly ensured preclearance, but that is not the strict scrutiny question that the Supreme Court has applied when determining whether there is a compelling government interest in complying with Section 5.

Likewise, in *Miller v. Johnson*, where the Department of Justice had refused to preclear a Georgia congressional redistricting plan until the number of majority-Black districts was increased, the court still focused the strict scrutiny analysis on what was actually necessary to comply with Section 5, not what would ensure preclearance from the Department of Justice. 515 U.S. at 917-918. Specifically, the Court held: "It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Voting Rights Act. We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 921-22. In *Miller*, the state surely was acting reasonably, following two objections from the Department of Justice, to ensure preclearance. But compliance with Section 5 is the correct inquiry for a reviewing court to pursue, not "ensuring preclearance," and compliance does not require a maximization of the number of majority-minority districts. *Id.* at 925.

The *Miller* Court also held that proportionality is not required by § 5 of the VRA. It further noted that Georgia's redistricting plan "overstepped the requirements for section 5 compliance because it was designed to secure proportional representation for black voters in Georgia, not adhere to the VRA." *Id.* at 910. Thus, § 5 of the VRA, even if it had been constitutionally applied to North Carolina, does not require the racial balancing that the Defendants pursued and achieved in their redistricting plans.

C. The Trial Court Erred in Ruling that the General Assembly had a Strong Basis in Evidence for Believing that it was Violating the Voting Rights Act.

1. There Was No Strong Basis in Evidence that § 2 of the VRA Required Creating the Majority-Black Districts Challenged Here.

In addition to applying the wrong legal standard for what constitutes a compelling governmental interest, the trial court also erred in concluding that there was a strong basis in evidence for believing "that each of the *Gingles* preconditions was present in substantial portions of North Carolina and that, based upon the totality of circumstances, VRA districts were required to remedy against vote dilution." (R p 1283-84). As a matter of law, the prior success of candidates of choice of African-American voters is fatal to a Section 2 claim. *Thornburg v. Gingles*, 478 U.S. at 77. "Compliance with federal antidiscrimination laws cannot

justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller v. Johnson*, 515 U.S. at 921. Here, the prior success of candidates of choice of African-American voters was well documented, *see supra* at 17-22, and both the Defendants and the trial court failed to properly apply fundamental Section 2 legal principles evaluating whether and where majority-Black districts were required by Section 2.

To prove that Section 2 required each of the Voting Rights Act districts in their plans, the Defendants must prove there is a substantial basis in evidence that minority voters "have less opportunity than other members of the electorate to…elect representatives of their choice," 42 U.S.C. § 1973(b), in the area of the state where each district is located. *Shaw v. Hunt*, 517 U.S. 899, 917 (1996).

To establish a Section 2 violation, a plaintiff must prove three threshold factors: 1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district;" 2) that the minority group is "politically cohesive;" and 3) that the majority votes "sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. at 50-51. These are necessary preconditions, and the absence of any one element is fatal to a Section 2 claim,

even if other conditions have been met. *Pender County v. Bartlett*, 361 N.C. 491, 499, 649 S.E.2d 364, 370(2007) *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009). Further, when race is the predominant factor in drawing a district, the burden of proving these preconditions falls on the defendants. *Id*. at 496, 649 S.E. 2d. at 368.

The Defendants have themselves admitted:

> As a matter of law, racially polarized voting exists only when minority voters need a majority of the voting population in a single member district to elect their preferred candidate of choice. If minorities can elect their preferred candidate in a district that is less than majority minority, then racially polarized voting must not exist as a matter of law.

(R p 266). Nevertheless, the crucial error in the logic employed by the Defendants and endorsed by the trial court is the assumption that the mere presence of racially polarized voting anywhere (and at any time) equates to legally cognizable racial polarization every time.

The question Defendants faced when enacting these legislative and congressional districts was not whether statistically significant racially polarized voting exists, but rather whether white bloc voting exists at levels high enough usually to defeat the candidate of choice of Black voters in the areas where majority-Black districts are proposed. Yet the trial court based its ruling on findings such as "not a single witness testified that racial polarization had vanished

either statewide or in areas in which the General Assembly had enacted past VRA districts." (R p 1349). This finding misses that point entirely. The existence of racially polarized voting alone does not require a remedy and Defendants were not justified in creating majority-Black districts merely because racially polarized voting exists. As explained in *Gingles*, a remedy is required only where white bloc voting usually defeats the candidate of choice of Black voters. *Gingles*, 478 U.S. at 49-50.

In determining whether there was substantial evidence in the record that the Defendants faced potential liability under § 2, the burden is on the Defendants to assess whether there is anywhere in this state where Black voters are consistently shut out of the political process such that majority Black districts, a temporary and remedial measure, are the only way that Black voters can have a fair opportunity to elect their candidates of choice. The 90% success rate of Black candidates from 2006 to 2010 is by itself enough information to answer this question. The repeated, successful election of Black candidates does not require sophisticated expert analysis; it is within the personal knowledge of everyone who is active in the political process. The legal implication of this fact is plain. Where candidates of choice of Black voters are elected without majority Black districts, there is no Section 2 violation.

There are numerous examples of unsuccessful § 2 plaintiffs who lose because the repeated success of Black or Latino candidates means a plaintiff cannot establish legally significant white bloc voting, the third prong of *Gingles. See, Cottier v. City of Martin,* 604 F.3d 553, 558 (8th Cir. 2010) (en banc) *cert. denied* ___ U.S. ___, 131 S. Ct. 598, (2010) (no Section 2 violation where in countywide elections between candidates of different races, countywide elections between white candidates, and state and federal elections between white candidates, white voters did not vote sufficiently as a bloc usually to defeat the Indian-preferred candidate.); *Askew v. City of Rome,* 127 F.3d 1355 (11th Cir. 1997) (city not sufficiently racially polarized to conclude that Sec. 2 had been violated where 23 of 33 African American preferred candidates were elected.) *Vecinos de Barrio Uno v. City of Holyoke*, 960 F. Supp. 515, 526 (D. Mass. 1997) (Hispanic voters failed to establish Section 2 violation where white bloc voting occurred but did not defeat candidate of choice of Hispanic voters); *Clay v. Board of Education*, 90 F.3d 1357, 1362 (8th Cir. 1996) (Plaintiffs did not prove white bloc voting when Black voters elected their preferred candidates to the Board 57.9 percent of the time); *Clarke v. City of Cincinnati,* 40 F.3d 807, 813 (6th Cir. 1994) (noting the success of Black-preferred Black candidates implied a lack of white bloc voting, thus leading the court to conclude that "this success rate gives us no

reason to find that blacks' preferred black candidates have 'usually' been defeated."); *Valladolid v. National City*, 976 F.2d 1293 (9th Cir. 1992) ("unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability "to elect."); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) ("the sustained history of electoral success by black and Mexican-American candidates … refuted the contention of racially polarized voting.").

The trial court's order contains 178 findings of fact regarding narrow tailoring, but not one of them addresses the relevant legal inquiry Defendants and the trial court were required to make. Standing *Bartlett* v. *Strickland* on its head, the trial court's findings rely on examples of the success of African-American candidates in coalition districts (districts that are less than 50% majority-Black) to justify creating majority-Black districts. (*See, e.g.*, R p 1341). Similarly, in the findings regarding election results, the trial court recites data on registered voters in the districts, how much funding was raised by certain candidates, and whether the districts are cross-over districts, (*see, e.g.*, R p 1389-1422), but not once addresses the rule that § 2 of the Voting Rights Act is not violated where candidates of choice of Black voters can win elections in districts that are not majority-Black in voting age population.

Remarkably, the trial court also adopts the wrong burden of proof, making findings such as this one: "Plaintiffs did not offer post-enactment election results as evidence showing the absence of racially polarized voting in the following challenged districts …" (R p 1388-89). Once strict scrutiny applies, the defendants have the burden of proof to establish they had a strong basis in evidence for believing they needed to draw 20 or 21% of the state's districts as majority Black districts in order to comply with the VRA.[20]

When the correct legal standard is applied, Defendants' own expert Dr. Thomas Brunell's racially polarized voting analysis demonstrates that new majority-Black districts throughout the state, drawn to meet a substantial proportionality requirement, are not required because white voters are widely supporting Black candidates in North Carolina.[21] (R pp 451-87). In his report, Dr. Brunell noted: "[t]here are some counties, like Wake, Durham, Jackson, Mecklenburg, in which there is a considerable amount of white cross-over voting." (R p 459). He found that the percentage of white voters voting for the Black

[20] Plaintiffs point the Court to the arguments of Amici on the burden of proof issue.

[21] In a memorandum dated 3 June 2011, former Supreme Court Justice Robert Orr, quoting from *Bartlett v. Strickland,* 556 U.S. at 24, advised Senator Rucho and Representative Lewis that "[i]n areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third Gingles precondition." (Doc. Ex. 7726 (PS \PS83\Depositions\Exhibits\Exhibits 44-94 (Churchill))\57).

candidate in the 2008 presidential election was at least 40% in each county, and was 59.4% in Durham County. *Id.* And yet, Defendants chose to draw new majority Black districts in most of those counties listed by Dr. Brunell. In fact, in Wake, Durham, and Mecklenburg Counties alone—counties identified by Dr. Brunell as counties with substantial white crossover voting—Defendants chose to draw 12 new majority Black districts: House Districts 29, 31, 38, 48, 99, 102, 106, and 107; Senate Districts 14, 20, 38 and 40. (Doc. Ex. 550) Mot. for Jud. Not. ¶ 1(a)(i) ("Stat Pack" for NC House "Existing District Plan"); ¶ 1(a)(vii)("Stat Pack" for "Lewis-Dollar-Dockham 4").

Dr. Brunell's report regarding crossover voting by whites is consistent with this Court's findings in 2007 that "[p]ast election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates." *Pender County v. Bartlett*, 361 N.C. 491, 494, 649 S.E.2d 364, 367 (2007).

2. The Trial Court Erred as a Matter of Law in Deferring to the Defendants' Judgment On This Issue.

In *Shaw v. Hunt* the Supreme Court held: "[w]e assume arguendo that a State may have a compelling interest in complying with the properly interpreted

VRA. But a State must have a strong basis in evidence for believing that it is violating the Act. It has no such interest in avoiding meritless lawsuits." *Shaw v. Hunt,* 517 U.S. at 908 n.4. In *Shaw,* Justice Stevens in dissent argued that the legislature had an interest in avoiding litigation, the very interest asserted here, and the majority rejected that argument, saying it "sweeps too broadly." *Id.*

The court below believed it was "required to defer to the General Assembly's reasonable fears of; and their reasonable efforts to avoid, § 2 liability." R p 1281 (citing *Bush v. Vera,* 517 U.S. at 978.) However, such deference exists only where race has not predominated in the redistricting process. The Court in *Bush v. Vera* emphasized that once a state, in the course of avoiding § 2 liability, subordinates traditional redistricting principles to race, a constitutional problem arises and "[s]trict scrutiny remains, nonetheless, strict." *Id.* at 978. Indeed, once strict scrutiny applies, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson,* 488 U.S. at 500 (1989).

There is good reason why, under strict scrutiny, legislative assurances of good intention do not forgive an impermissible use of race. *Fisher,* 133 S. Ct. at 2421. Racial classifications imposed by the government may be motivated by illegitimate notions of racial inferiority, *Croson,* 488 U.S. at 493, or rest on

unproven assumptions about racial patterns in voting. *Shaw v. Reno*, 509 U.S. 630, 653 (1993) ("We unanimously reaffirmed that racial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2.")

Strict scrutiny is necessary to ferret out when racial classifications are being motivated by "simple racial politics," *Croson*, 488 U.S. at 493, or by the desire to "placate a politically important racial constituency." *Ricci v. DeStefano*, 557 U.S. 557, 597 (2009) (Alito, Scalia & Thomas, JJ. concurring). Indeed, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

In this case, the trial court accepted without inquiry the Defendants' assertion that they drew 26 majority-Black districts in order to avoid potential liability under § 2 of the Voting Rights Act, and to ensure preclearance under § 5 of the VRA and then erroneously concluded that those were, as a matter of law, compelling governmental interests. That was plain error.

The process used by the General Assembly to achieve racial proportionality in its redistricting plans casts further doubt on the constitutionality of those plans

because it was a form of reverse-engineering. The Supreme Court's opinion in *Shelby County v. Holder* is relevant on this question. 570 U.S. ___, 133 S. Ct. 2612 (2013). The Court rejected the notion that is was constitutionally permissible for Congress to determine which jurisdictions it wanted to be subject to preclearance and then employ a formula that captures those jurisdictions, holding that the coverage formula must be relevant to the problem that Congress seeks to address. *Id.* Similarly, in this case, the General Assembly's decision to draw a proportional number of majority-Black districts and then after-the-fact seek to justify those districts by incompletely examining the areas of the state where those districts were drawn, was reverse-engineering that is not constitutionally sound.

Where racial quotas were devised at the beginning of the redistricting process and the challenged districts were drawn pursuant to those instructions, Defendants have failed to meet strict scrutiny and no compelling VRA interest exists. Where no African-American legislator voted for or rose in defense of Defendants' proportionality goal or the need under the VRA to draw the challenged districts, and where no lawsuit has ever been filed challenging any congressional district on Section 2 grounds and no lawsuit has been filed since 1986 challenging any legislative district on Section 2 grounds, Defendants have failed to meet strict scrutiny and no compelling VRA interest exists.

Where the 1992 and 2003 sessions of the General Assembly evaluated their legal obligations under the VRA and did not draw majority Black districts in numbers proportional to the State's Black population, and where the courts of this state in 2002 evaluated the State's VRA obligations and did not draw majority Black districts in numbers proportional to the State's Black population, Defendants have failed to meet strict scrutiny that such districts are required in 2011 and no compelling VRA interest exists.

Where the data in front of Defendants in 2011 established that on 56 occasions between 2006 and 2010 Black candidates were elected to office in districts less than 50% Black, often by wide margins, and where Defendants' own data shows that Black candidates on average receive 58% of the vote in a district that is 40% Black, Defendants have failed to meet strict scrutiny and no compelling VRA interest exists.

Rather than defer to the General Assembly's political discretion to draw racial gerrymanders, it is the court's role to apply strict scrutiny precisely because political motivations may be at work. Segregating this state's Black voters into majority Black districts based on a racial proportionality quota cannot be justified by partisan goals or left to the political judgment of the party drawing the districts. "Indeed, we rejected the notion that separate can ever be equal--or 'neutral'--50

years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), and we refuse to resurrect it today." *Johnson v. California*, 543 U.S. 499, 506 (2005).

III. THE TRIAL COURT ERRED IN HOLDING THAT THE RACIALLY GERRYMANDERED DISTRICTS ENACTED BY THE GENERAL ASSEMBLY WERE NARROWLY TAILORED

A. Standard of Review.

This is a question of law reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review.") A *de novo* standard of review is also appropriate because this issue involves constitutional rights. *Libertarian Party v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-03 (2011) ("[*D*]*e novo* review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

B. The Defendants Failed to Meet Their Burden of Proving that the Plans They Drew Were Narrowly Tailored to Comply with the VRA.

The trial court failed to follow the analysis the United States Supreme Court has established to determine whether the challenged districts were narrowly tailored to advance a compelling state interest. Plaintiffs have shown in Argument II, *supra* at p 49-71, that the trial court erred in concluding that Defendants met their burden to demonstrate compelling interests in creating each of the challenged districts. However, even if they had, the districts are far from narrowly tailored,

and they fail that inquiry on at least four independent grounds: the challenged districts were drawn to satisfy a quota, the challenged districts are geographically non-compact, the challenged districts were packed with more Black voters than was necessary to comply with the Voting Rights Act, and the challenged districts were sited in places in the state where a VRA remedy was not needed. At least in part, these four erroneous conclusions of law resulted from the trial court's improper imposition of the burden of proving narrow tailoring on Plaintiffs and its improper deference to legislative discretion.

1. The Trial Court Wrongly Placed the Burden of Proof on the Plaintiffs and Wrongly Deferred to Legislative Discretion.

The trial court essentially required Plaintiffs to prove the challenged districts and plans were not narrowly tailored. This is an incorrect application of the law. It is fundamental that once the court establishes the existence of a racial classification, as the trial court properly concluded here, the burden then shifts to Defendants to demonstrate the challenged districts were narrowly tailored to satisfy a compelling state interest. *Shaw v. Hunt*, 515 U.S. at 908 ("North Carolina, therefore, must show…its districting legislation is narrowly tailored"); *Miller*, 515 U.S. at 920 ("the State must demonstrate that its districting legislation is narrowly tailored"); *Vera v. Richards*, 861 F. Supp. 1304, 1342 (S.D. Tx. 1994) ("The State has the burden of producing evidence of narrow tailoring to achieve its

compelling state interest); *see also Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995) (Court will demand "any governmental actor subject to the Constitution justify any racial classification "as narrowly tailored); *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003) ("[t]he Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way") (Kennedy, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) ("we put the burden on state actors to demonstrate their race-based policies are justified"); *Fisher*, 133 S. Ct. at 2420 ("it remains at all times the University's obligation to demonstrate" narrow tailoring).

The trial court's erroneous conclusion that the burden to prove narrow tailoring rested with Plaintiffs carried with it another error. In the trial court's view, the court must give Defendants some "leeway" in evaluating the extent to which the challenged districts are narrowly tailored. (R p 1275). The Supreme Court's recent decision in *Fisher* expressly rejects the notion that governmental bodies are entitled to "leeway" or deference in evaluating whether a racial classification is narrowly tailored. "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference." *Fisher*, 133 S. Ct. at 2420.

The essence of narrow tailoring in the redistricting context has been described with the following analogy: "just as a homicide defendant may not use excessive force to stop an aggressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the state." *Hays v. Louisiana*, 839 F. Supp. 1188, 1206-07 (W.D. La. 1993), *appeal dismissed*, 18 F.3d 1319 (5th Cir. La. 1994). The state must affirmatively provide evidence and argument demonstrating that it did not go further than necessary in imposing a racial remedy and that it considered race-neutral alternatives.

Defendants have never articulated a race-neutral or less-race-focused alternative that they considered and why they rejected it. In each of the four narrow tailoring questions examined by the court below, the trial court accepted, without subjecting to critical questioning, Defendants' assertions that the challenged districts were narrowly tailored and instead concluded that Plaintiffs had not disproved that the districts were narrowly-tailored. For example, on the question of whether racial polarization was so strong as to necessitate the extreme and affirmative remedy of a majority Black district, the Court said "[t]he fact that incumbent black candidates or strong black candidates have won elections in majority-minority coalition districts with TBVAP between 40% and 49.99% does

not prove the absence of racially polarized voting." (R p 1389) (emphasis added). Of course it was the Defendants' burden to prove the presence of legally-significant racially polarized voting in each particular place where they sited a majority Black district, rather than Plaintiffs' burden to prove its absence. Additionally, the court was required to subject the Defendants' proof to strict scrutiny, which it failed to do.

As another example, the trial court placed the entire burden on Plaintiffs to disprove the first *Gingles* prong, whether districts are compact. The court refused to find the districts insufficiently compact because the plans Plaintiffs pointed to—the Senate and House Fair and Legal plans, which had more compact districts—did not contain the same extreme number of majority black districts. (R p 1306). The court thereby improperly placed the burden on Plaintiffs to prove that the districts were not compact, at the same time requiring them to demonstrate more compact districts could be crafted in a plan with a proportionate number of majority Black districts, a plan that would be *per se* unconstitutional. As discussed more below, in every element of the court's narrow tailoring analysis, the court relieved Defendants of their burden to demonstrate that it used only as much "force" as was necessary to reasonably defend itself.

2. The Redistricting Plans are Not Narrowly Tailored Because they Create More Majority-Black Districts than are Necessary to Comply with the VRA.

The 2011 districts challenged in this litigation fail narrow tailoring scrutiny primarily because they were drawn in order to achieve a quota for the number of majority Black districts. Such a quota system can never, as a matter of law, satisfy the demands of narrow tailoring.

Just as racial balancing can never be a compelling governmental interest, drawing districts to meet a proportionality goal cannot meet the requirement that a government's use of race be narrowly tailored. *Bakke*, 438 U.S. at 315-16. In *Grutter*, the Court clarified further how a racial classification system could avoid falling into a "quota" trap. 539 U.S. at 334. The Court explained that race may only be used, constitutionally, in a "flexible" and "nonmechanical" way because equal protection requires "individualized assessments." *Id.* If race as "one factor among many" was considered in a state actor's path to effectuating a compelling governmental interest, then a reviewing court will be satisfied that the action that includes racial considerations is narrowly tailored. *Id.* at 340.

In the redistricting context, this same constitutional rejection of quotas in the number of majority-minority districts drawn applies. In *Miller v. Johnson*, because the Department of Justice had determined that it was possible to draw 3 majority

Black congressional districts in Georgia following the 1990 census, the Department set that number as essentially a quota for the number of majority Black districts the state's enacted plan must contain in order to obtain preclearance under Section 5 of the Voting Rights Act. *Miller*, 515 U.S. at 918. As discussed above, this was a flawed interpretation of the Act. But beyond that, the Supreme Court noted approvingly the District Court's conclusion that because the Voting Rights Act "did not require three majority-black districts, and…Georgia's plan for that reason was not narrowly tailored to the goal of complying with the Act. *Id*. at 910 (quoting *Johnson v. Miller*, 864 F. Supp. 1354, 1392-1393 (S.D. Ga. 1994)).

In light of the long history of Supreme Court precedent rejecting the use of quota systems to achieve racial equity, purportedly or actually, the proportionality quota established by Defendants condemns the plans and challenged districts as unconstitutional. The trial court also erred in its narrow tailoring analysis by failing to appreciate that a rigid quota was not "necessary" for advancing equal opportunities for voters to participate in the political process. The court below erroneously equated districts with 40-50% BVAP with districts that are over 50% BVAP for the purpose of achieving the desired number of "VRA" districts. (R p 1288). After equating the two kinds of district, the court seemed to conclude that the enacted plans, prior plans, and Plaintiffs' demonstrative plans (which, like the

prior plans, contained more 40-50% districts and fewer majority Black districts) approximately achieved the set quota. *Id.* As such, the court found the quota neither dramatically different from comparative plans nor constitutionally problematic. (R p 1291). This is incorrect because, as discussed in more detail below, a district with a 40-50% BVAP can be naturally occurring and compact and would not require the explicit block-by-block construction of tortured districts lines necessary to reach that 50% mark. Thus, a set quota for a number of majority Black districts requires much more "mechanical" and "inflexible" map-drawing than does a plan that can flexibly include districts with only 40-50% BVAP. This is the approach adopted by previous legislatures and courts, and it allowed the state for nearly 30 years to avoid Section 2 liability—the purported compelling interest relied on by Defendants. Thus, following *Bakke* and other narrow tailoring cases, it is clear that a quota of majority Black districts is forbidden.

3. The Districts are Not Narrowly Tailored Because the Districts are Not Geographically Compact.

The United States Supreme Court has held that a district that is intentionally created as a majority Black district is not narrowly tailored if it is not compact. *Shaw v. Hunt*, 517 U.S. at 916.; *Bush v. Vera*, 517 U.S. at 957. The trial court refused to require Defendants to offer proof that the many irregularly-shaped, non-compact districts drawn in disregard of traditional redistricting principles were

narrowly tailored. Its failure to demand this proof and its failure to subject the districts to strict scrutiny as to compactness was error under *Shaw v. Hunt* and *Bush v. Vera*.

It is ironic that the compactness analysis ignored in this case was first established in *Shaw v. Hunt*, 517 U.S. at 916, a case from North Carolina that first established racial gerrymandering rules. When the Supreme Court looked at North Carolina's Congressional District 12 in the 1990s, it noted that "[n]o one looking at District 12 could reasonably suggest that the district contains a "geographically compact" population of any race," and thus, "District 12 is not narrowly tailored to the State's asserted interest in complying with § 2 of the Voting Rights Act." *Id.* at 916, 918 (internal citations omitted).

The state in *Shaw v. Hunt* did "not defend District 12 by arguing that the district is geographically compact," and instead argued that "once a legislature has a strong basis in evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn." *Id*. at 916-17. Defendants' argument here is much the same. The Court in *Shaw v. Hunt* unequivocally rejected that argument as unpersuasive. *Id*. at 917.

In *Bush v. Vera*, the Court invalidated three districts on the same grounds: that the districts were non-compact and thus failed the narrow tailoring inquiry. 517 U.S. at 979. There, the Court reiterated that a district drawn on the basis of race could be narrow tailored to comply with Section 2 if the district "is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *Id.* at 977. The Court noted that "District 30, for example, reaches out to grab small and apparently isolated minority communities which, based on the evidence presented, could not possibly form part of a compact majority-minority district, and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race as a proxy to further neighboring incumbents' interests." *Id.* Such "characteristics defeat any claim that the districts are narrowly tailored." *Id.*

The legislative record in this case included the results of eight separate measures of mathematical compactness for each of the plans filed in the General Assembly. Neither Senator Rucho or Representative Lewis for themselves, nor their expert Hofeller on their behalf, made any focused or independent effort to evaluate the compactness of their district using those mathematical measures or to determine whether they could achieve compliance with the Voting Rights Act with more compact, less-race-focused districts. Hofeller has previously stated that

mathematical standards of compactness can be a meaningful tool for measuring compactness. In what he previously referred to as his "seminal study of measures of compactness," Hofeller had argued that "quantitative scores should be used to make comparisons. The fact that compactness is a relative measure does not render it meaningless." (Doc. Ex. 7726, D:\Native Format\CDs\PS83\Depositions\ Exhibits\Exhibits 504-566 (Hofeller) (Hofeller Dep. Ex. 517)). His study went on to conclude that when "multiple measures coalescence in support of a single plan, the evidence in its favor is very strong." *Id.* at 1117. However, in this case, he did not conduct any compactness inquiry or analysis to comply with Defendants' burden to justify the districts under *Gingles*, nor was he instructed to do so by the Defendants.

The trial court, for its part, refused to subject each challenged district to strict scrutiny as required by *Shaw v. Hunt* and *Bush v. Vera* to determine whether the districts were compact. Instead, it concluded that it lacked a "judicially manageable standard for measuring" compactness despite the mandate of the Supreme Court to engage in such an inquiry and the fact that the trial court and this Court made such judgments in the *Stephenson* cases. (R p 1325). A court that does not engage in any compactness analysis does not fulfill its strict scrutiny obligations.

Moreover, even had the court below been willing to engage in the compactness inquiry necessitated by a narrow tailoring review of a redistricting plan, it could not have arrived at the conclusion that the districts were narrowly tailored. Just as the Court found Congressional District 30 in Texas reached out to grab isolated minority communities, each district challenged in this litigation is highly non-compact and possesses tortured appendages that are designed only to pull in isolated minority communities. *Bush v. Vera*, 517 U.S. at 979; *see* Appendix 8. For example, House District 48 has three narrow tentacles that grab dispersed minority pockets of population in four different counties. Under *Hunt* and *Vera,* this cannot be a district narrowly tailored to satisfy Section 2 of the Voting Rights Act. Complex mathematical measures of compactness are useful but not necessary.[22] Where the Supreme Court has been content to use an "eye

[22] Using the mathematical measures of compactness contained in the legislative record, expert demographer Anthony Fairfax compared the compactness of the challenged districts in the enacted plans with the compactness of the alternative plans filed by the Democratic and Black Caucus. Fairfax Aff. ¶¶ 8-9. He found:

a. All three 2011 enacted redistricting plans scored overall less compact than prior redistricting plans and less compact than other redistricting plans introduced during the 2011 redistricting process. (Doc. Ex. 378)).

b. Nine of the thirteen districts in the 2011 enacted congressional redistricting plan are less compact than the districts in the prior plan and eleven of the thirteen district in the enacted plan were less compact than the Congressional Fair and Legal plan introduced during the redistricting process. (Doc. Ex. 371).

(Footnote Continued)

ball" test to strike down a non-compact district and a visual examination alone of the challenged districts demonstrates that they too are non-compact, the districts challenged do not survive a narrow tailoring inquiry.

4. The Districts are Not Narrowly Tailored Because they Pack Black Voters.

Defendants' theory is that their purpose in packing of Blacks into separate districts is to provide Blacks with a remedy to which they are entitled under the VRA, even though it is not one they have sought. The remedy for racial discrimination must be no greater than the discrimination it is designed to remedy. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977)). A proper narrow tailoring inquiry must examine whether, in a district purportedly devised to avoid liability under Section 2 of the Voting Rights Act, the legislature has placed more Black voters into a district, thus being over-inclusive and painting a remedy with too broad a brush. The Supreme Court has not minced words on this topic: a racial classification must be "remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of

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c. 41 of the 50 districts in the enacted Senate Plan are less compact that the previous plan. (Doc. Ex. 372). Compared to the Senate Fair and Legal Plan, 25 out of the 50 enacted districts were less compact. *Id.*

d. 91 of the 120 districts in the enacted House Plan were less compact than the previous plan. (Doc. Ex. 377). Compared to the House Fair and Legal Plan, 78 out of the 120 districts were less compact. *Id.*

discriminatory conduct to the position they would have occupied in the absence of such conduct'"). *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977)).

Thus, the validity of Defendants' districts turns on whether they adopted a remedy that only provides an equal opportunity to participate and no more. As discussed above, an invalid or unconstitutional interpretation of Section 2 cannot suffice as a compelling governmental interest. A district is therefore not narrowly tailored if it is more racially-divisive and intentionally race-focused than is necessary under the law. In his opinion, concurring in part and dissenting in part, in *LULAC v. Perry*, 548 U.S. 399, 519 (2006), Justice Scalia framed the test for narrow tailoring in compliance with the VRA as an inquiry as to whether "a State use[d] racial considerations to achieve results beyond those that are required to comply with the statute."

If Black voters in a district Durham County have established their opportunity and, indeed, ability to elect the candidate of their choice when the district is approximately 40% BVAP, then there "neither has been a wrong nor can be a remedy." *Shaw I*, 509 U.S. at 653. Secondly, assuming there is a need for a remedy, increasing the BVAP in the district to 50 or 55% does not "restore" Black voters to the position they would have occupied absent discriminatory conduct—it

goes much further than that, and thus is not narrowly tailored. The legislature repeated this scenario in dozens of districts across the state—all of the districts challenged as racial gerrymanders in this litigation.

Likewise, the challenged districts are not narrowly tailored to comply with Section 5 of the Voting Rights Act. The Supreme Court noted that "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. The trial court committed legal error when it concluded that Section 5 required the challenged districts to be drawn to over 50% BVAP. (R p 1298-99). In fact, the Supreme Court has explicitly rejected such a conclusion. In *Bush v. Vera*, the Court noted:

> The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage in District 18. At the previous redistricting, in 1980, District 18's population was 40.8% African-American. As a result of Hispanic population increases and African-American emigration from the district, its population had reached 35.1% African-American and 42.2% Hispanic at the time of the 1990 census. The State has shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression.

Vera, 517 U.S. at 983 (internal citations omitted). Indeed, what Texas did in *Vera* is absolutely analogous to what Defendants did in 2011—relied upon the Voting Rights Act to justify not maintenance, but substantial augmentation, of districts

that were already enabling minority voters to elect their candidates of choice. In this context, substantial augmentation goes beyond the requirements of the law and is therefore not a narrowly tailored remedy. Defendants have not met their burden of justifying their packing of Blacks into districts, and the trial court failed to strictly hold them to their burden.

5. The Challenged Districts Are Not Narrowly Tailored Because they are Drawn in Areas of the State Where a VRA Remedy is Not Required under Section 2 or Section 5.

Any proactive remedy drawn to avoid a potential violation of the VRA must be drawn in the area of the state where the potential violation exists. *Shaw v. Hunt*, 517 U.S. at 917. "[R]acial bloc voting and minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2." *See Growe v. Emison*, 507 U.S. 25, 40-41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy")." *Shaw I*, 509 U.S. at 653.

It is the court's duty to examine closely any such districting, placing the burden squarely on Defendants to establish that any remedy it enacts be tailored to remedy a prospective violation. As the Supreme Court wrote forty years ago, "[s]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a

'heavy burden of justification,' that the State must demonstrate that its [racial classification] has been structured with precision and is tailored narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

On this issue of whether there was justification for making the majority Black districts challenged by the Plaintiffs, the trial court received two days of evidence, and appended to its memorandum 178 findings of fact. However, for all the reasons explained in above, those facts do not support the legal conclusion that the Defendants carried their burden of establishing that the majority-Black districts challenged in this case were drawn in areas of the state where plaintiffs could have filed and won a lawsuit under § 2 of the Voting Rights Act.

The evidence of racially polarized voting in North Carolina relied upon by the Defendants, the Block and Brunell reports, did give some estimates of the levels of racially polarized voting in certain areas, but did not take the second step that the General Assembly had the responsibility of taking—namely to consider whether white bloc voting usually defeats the candidate of choice of Black voters. This step would have radically changed their conclusions. In many of the same elections analyzed by these two political scientists, the candidate of choice of

Black voters was successful. *See* Appendix 6. The third prong of *Gingles* asks 1) does a pattern of racially polarized voting exist, and 2) is that pattern consequential. As Dr. Lichtman testified, the question of statistical significance that the Defendants focused on is not the dispositive issue. (T pp 377-79; Doc. Ex. 7726, CDs, PS76, Deposition Transcripts, Brunell, Thomas – Transcript, 67:20-68:8). *Gingles* requires a showing of legally significant racially polarized voting. The detailed evidence of the past success of Black candidates provides a strong basis for rejecting any reasonable claim that the challenged districts were narrowly tailored to remedy a potential § 2 violation.

The trial court's factual findings on this point appear to suggest that when a candidate of choice of Black voters is successful in a district that is not majority-Black, it must be due to "special circumstances" such as incumbency or exceptionally well-financed campaigns, so that the Defendants were justified in drawing majority Black districts as a precaution. (*See Gingles*, 478 U.S. at 77) (discussing special circumstances that may lead to minority candidate election.) The 90% success rate in such districts over many elections, as shown by Dr. Lichtman, demonstrates that Defendants' mapping strategy violates the third prong of *Gingles* in each of the challenged districts. When the argument was made in Illinois that a 75% success rate for Latino candidates was only due to special

circumstances, the Illinois District Court recently explained: "we decline plaintiffs' invitation to be the first court ever to count actual Latino victories as putative white victories, and to conclude, on that basis, that *Gingles*' third prong has been met, despite uncontroverted evidence that Latino victories in fact outnumbered white victories three-to one in RD 23." *Radogno v. Illinois State Bd. of Elections*, 836 F. Supp. 2d 759 (N.D. Ill. 2011). This Court should likewise decline to be the first court to endorse the legal proposition that a 90% success rate for Black candidates in recent elections in districts that are less than 50% Black in voting age population constitutes the "usual defeat" of Black candidates under the *Gingles* standard.

The trial court also made factual findings that victories by Black candidates came in districts that were not majority white, or they were in districts where Black voters were the majority in the Democratic Party primary. (R pp 1341, 1360-1420). Other findings assert that the victory of Black candidates do not prove that whites vote for Black candidates and therefore imply that by application of the holding in *Bartlett v. Strickland,* majority-Black districts are necessary. (*See, e.g*, R p 1341). However, twenty-two of the fifty six elections from 2006 to 2010 were in majority-white districts. *See* App. 6 pp 60-61. Moreover, the huge margins by which Black candidates were winning make clear that those candidates were

attracting the votes of a substantial number of white voters as well as minority voters. (R p 1064). Third, the uncontradicted lay witness testimony in this case is that Black candidates do attract support from white voters, just as Black voters have a record of supporting (and at times, preferring) white candidates. But most importantly, nothing about the fact that some districts electing Black candidates were majority-minority instead of majority-white justifies drawing those districts now as majority-Black districts. If Black candidates are winning elections, there obviously is no need to provide a remedy, no matter the racial composition of the district.

Members of the General Assembly asked whether particular majority-Black districts were required on several occasions during the legislative debate over the proposed redistricting plans. Representative Martin, for example, asked Representative Lewis whether there was evidence of racially polarized voting in Cumberland County, and the answers he received were that "to forestall the chance of a lawsuit, we chose simply to use the definition that a majority-minority district needs to be one in which is drawn to have a majority of minorities in there." 27 July House Session p. 27, lines 13-18, and that "I do not recall the specific findings in regard to Cumberland County." When Representative Lucas asked if Senate District 21 has been held by an African-American since the 1980's,

Representative Lewis allowed that it had been, in fact, he was not aware of a time "when it was not so held." *Id.*, p. 29, line 17. However, when asked if the district had previously been a majority-Black district, Representative Lewis answered that "I did not actually go back and look at the historical data as it applies to race and that seat." *Id.*, p.29, line 25 to p. 30, lines 1-2.

The proponents of the redistricting plans sought to include as many majority-Black districts as possible in order to achieve proportionality and they drew them in areas of the state where the third prong of *Gingles* cannot be satisfied. This is the very antithesis of narrow tailoring.

The floor debates demonstrate that the proponents of these redistricting plans did not narrowly tailor their use of race to a compelling governmental interest. They ignored evidence that showed such districts are not necessary, ignored extensive testimony in public hearings that the districts are not necessary, (Doc. Ex. 7726: D:\Native Format\CDs\PS79 NC111-S-28F-3(m) June 23rd Public Hearing Tr.) and chose instead to rely on faulty assumptions rather than facts. (T p 240 (Hofeller)) ("And I would have operated under the assumption that [racially polarization] was present this time.") "The purpose of the *Voting Rights Act* is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *Georgia v.*

Ashcroft, 539 U.S. 461, 490 (2003). North Carolina is in the midst of that transformation. Drawing majority-Black districts where they are not necessary turns an opportunity for participation into a restriction on forming multi-racial collaborations. Segregating voters by race into majority-Black districts when such districts are not narrowly tailored to what is strictly required by law is unconstitutional.

IV. THE TRIAL COURT ERRED IN FINDING THAT RACE DID NOT PREDOMINATE IN THE DRAWING OF SENATE DISTRICT 32 AND CONGRESSIONAL DISTRICT 12

A. Standard of Review.

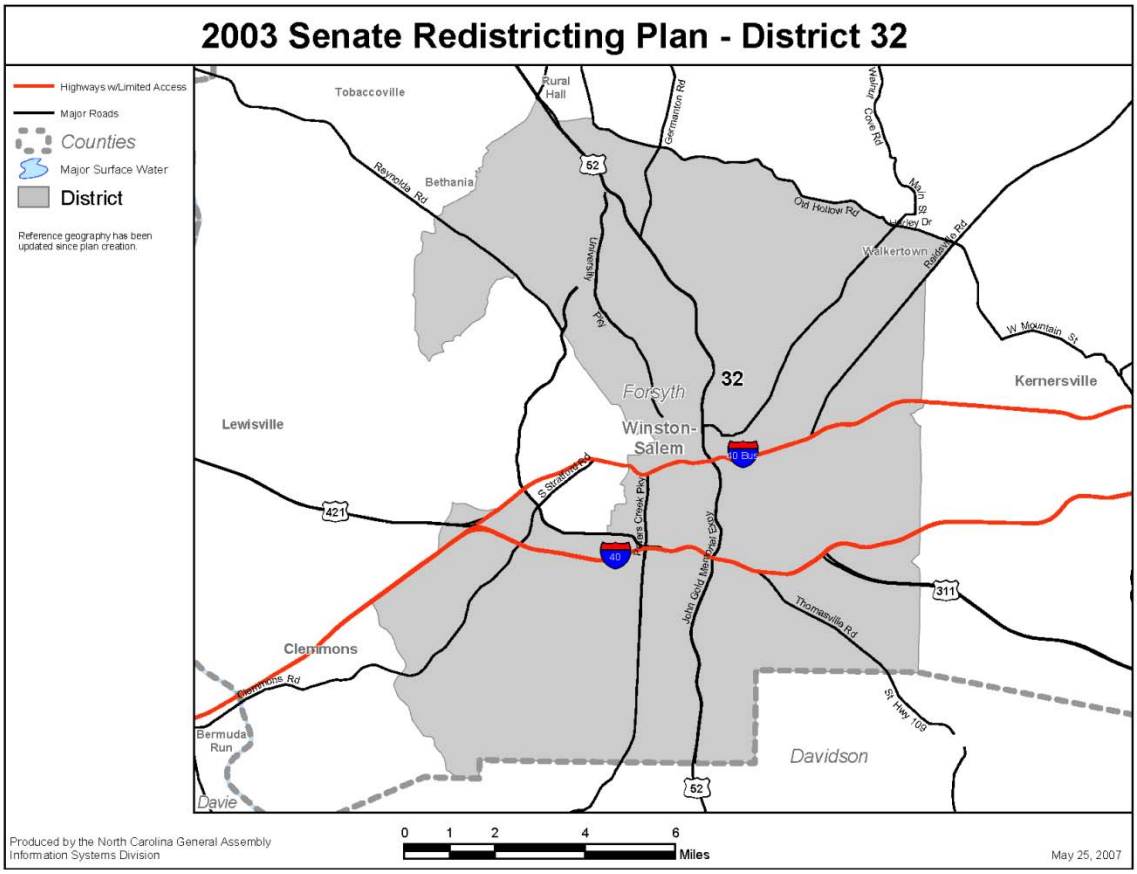
The legislature's motivation is a factual question. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999). Here the trial court found that race was not the predominant factor used by Defendants in drawing SD 32 and CD 12. (R p 1429-32, 1424-26). That factual finding was committed to the trial court's discretion and is conclusive on appeal unless it is "manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). As will be demonstrated, the trial court's finding that race was not the predominant factor in drawing SD 32 and CD 12 "could not have been the result of a reasoned decision" and should be reversed.

B. Race was Manifestly the Predominant Factor In the Construction of SD 32.

The trial court's finding that race was not the predominant factor in drawing SD 32 was not based on findings that traditional redistricting factors predominated over race in the construction of that district or that those traditional factors better explain the district's shape than does race. Rather, the trial court's finding was based on the General Assembly's VRA liability concerns. Specifically, the trial court found: (1) "because of concerns regarding the State's potential liability under § 2 and § 5, Hofeller was instructed by the redistricting chairs to base the 2011 Senate District 32 on the 2003 version of Senate District 32" and (2) because of § 2 and § 5 liability concerns, "Dr. Hofeller was instructed by the Redistricting Chairs to re-draw the State's version of Senate District 32 so that it would at least equal the SCSJ version in terms of TBVAP." (R pp 1430-31). Drawing districts to comply with the VRA is necessarily a race-based process. The role of traditional redistricting factors in that process is not even explained by the trial court, and as Plaintiffs will demonstrate, only one reasoned conclusion is plausible: race trumped traditional redistricting criteria in the construction of SD 32.

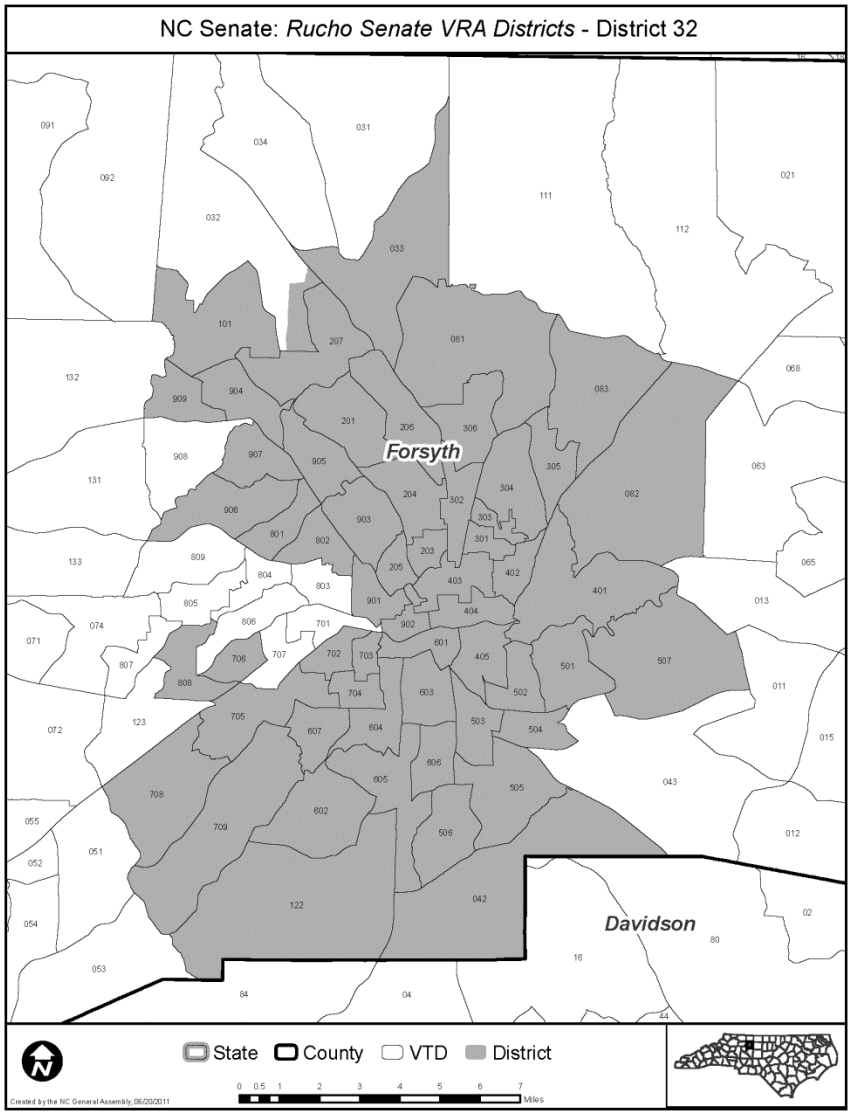
The 2003 version of SD 32, which the trial court found was the initial model for the 2011 challenged district, was a relatively compact district that, except on its

western side, followed county lines and major highways. It had a TBVAP of 42.52% (R p 1430) and is depicted below:

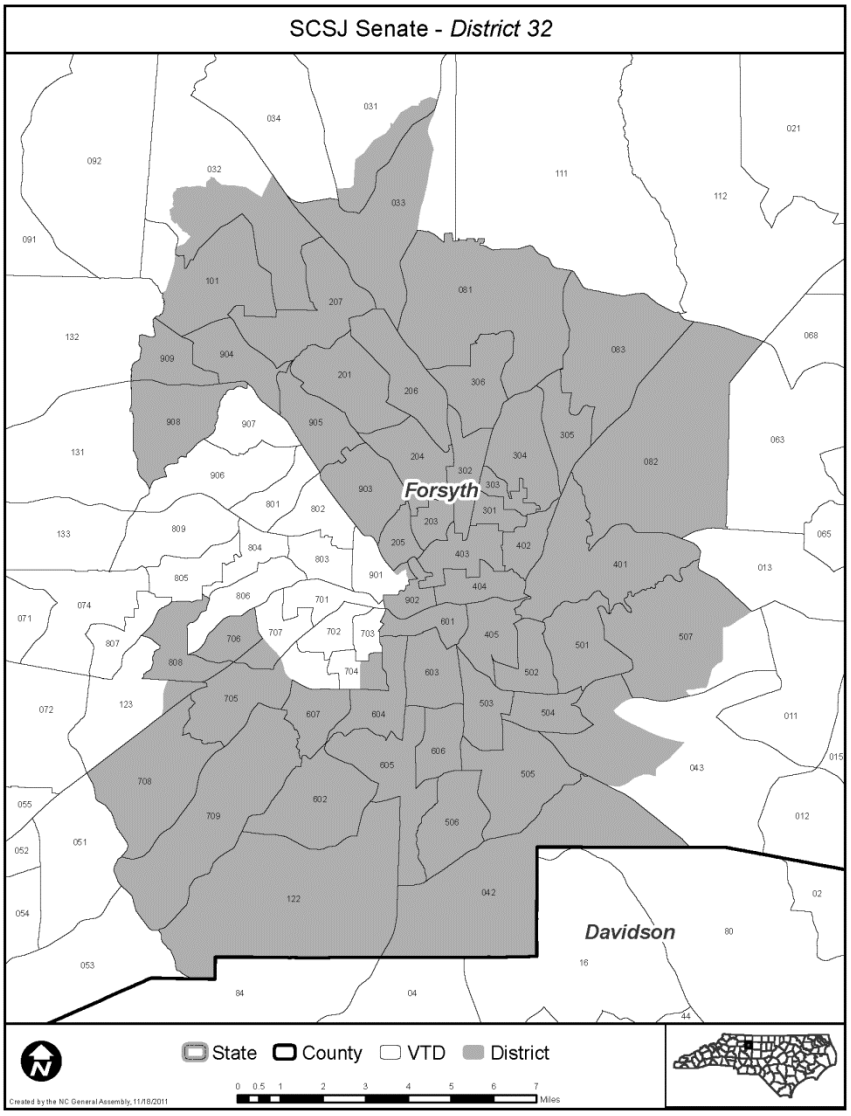


The version of SD 32 drafted by Hofeller and made public on 17 June 2011 as one of the "VRA Districts" did resemble the 2003 version of SD 32 as Senator Rucho had instructed. It only split one precinct, but its BVAP was 39.32%, or 2.2% lower than the 2003 version of SD 32. (R p 1431). In the statement released contemporaneously with the VRA districts, Chairmen Rucho and Lewis asserted that SD 32 would also have a Hispanic Voting Age population of 12.12% thus

rendering this district as a majority-minority district. (Doc. Ex. 549). This first 2011 version of SD 32 is depicted below:



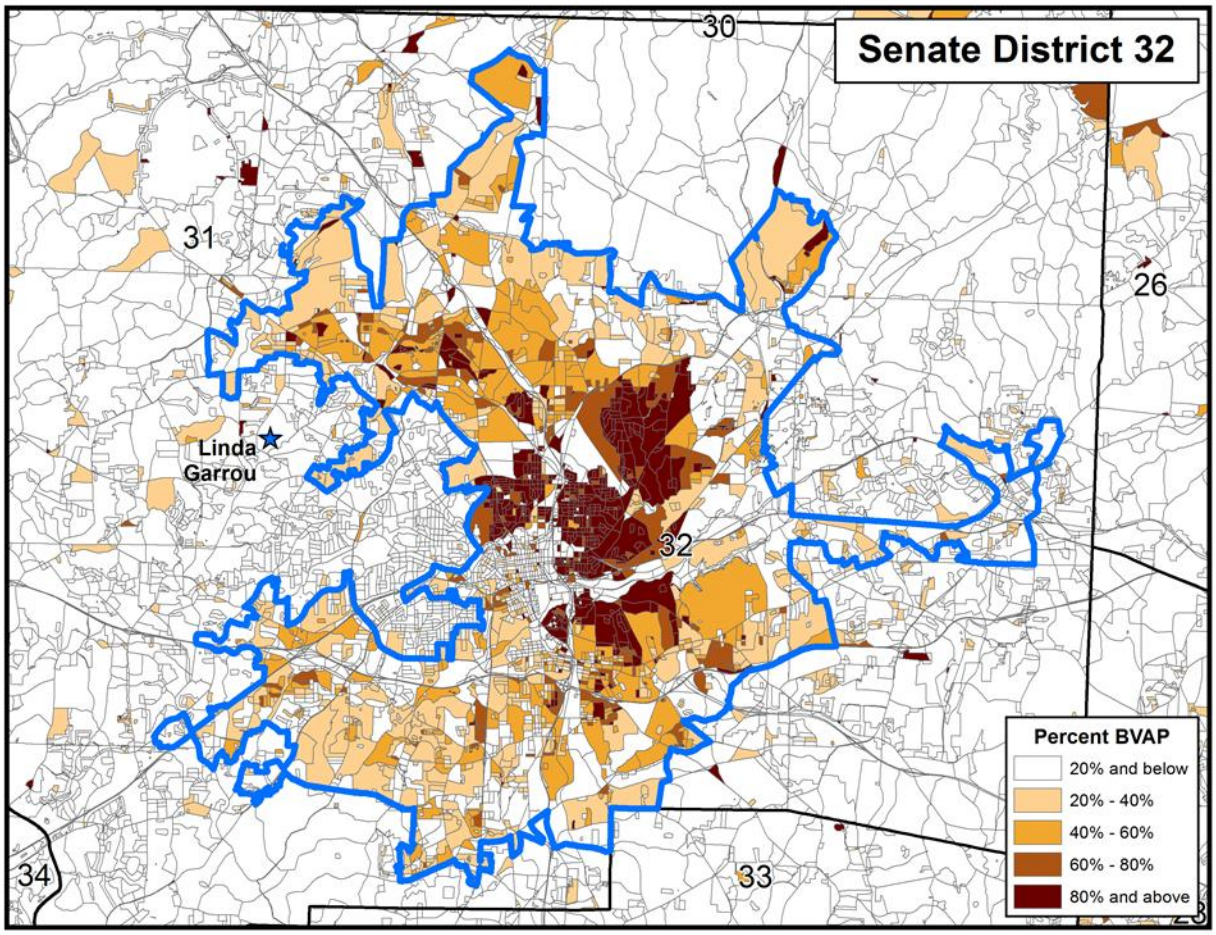
On 23 June 2011, SCSJ provided the legislature a community-drawn map with a version of SD 32 that closely resembled the 2003 version of SD 32.[23] It had a TBVAP of 41.95% and is depicted below (R p 1431):



[23] This map was drawn by AFRAM, not SCSJ, but in the interest of clarity, Plaintiffs will follow the trial court and refer to this map as the SCSJ map.

As instructed by Senator Rucho, and as found by the trial court, Hofeller revised SD 32 as first proposed by Senator Rucho on 17 June 2011 so that it would equal or exceed the BVAP in the 23 June SCSJ version of SD 32. In accordance with these instructions, Hofeller revised SD 32 so that its BVAP was increased to 42.53% (R p 1433) and thus exceeded the BVAP in the SCSJ version by 0.78%. This small change in numbers had a huge impact on traditional redistricting criteria and clearly demonstrates that race was the factor which could not be compromised in the Defendants' construction of SD 32.

As revised and enacted, SD 32 is highly irregular in its shape and does not resemble the relatively compact 2003 version of SD 32. Its boundary no longer follows county lines and highways and meanders around parts of Forsyth County following no path explainable on any grounds other than race. A map of racially-gerrymandered SD 32 as revised in accordance with Senator Rucho's directions, and as enacted by Defendants, is depicted below. At the end of every contested appendage, the Court will find a concentration of African-American voters; in every area removed from the district, the court will find concentrations of white voters.



The highly irregular path for the boundary of the district chosen by the General Assembly required the number of split precincts to be increased from one to forty-three. Race was plainly the factor that determined which part of a split precinct the General Assembly assigned to SD 32 and which part it assigned to SD 31. 79.5% of the African-American voters in those 43 split precincts were assigned to SD 32, while only 20.5% of those citizens were assigned to neighboring SD 31. (R pp 658-60).

Defendants' stark racial goal in drawing their plans is most plainly demonstrated by Senator Rucho's description of the reasons for the construction of SD 32. In his 17 June 2011 public statement, Senator Rucho declared that "the current white incumbent for Forsyth [will] not be included in SD 32." (Doc. Ex. 545). The only explanation for drawing the white incumbent out of the district was that she was white. (Doc. Ex. 6691, 3230-31). These statements do not reflect any reasonable, fact-based effort to comply with the VRA. It has long been recognized in VRA jurisprudence that the candidate of choice of Black voters may well be white.

> To indulge the contrary presumption, that every black person necessarily prefers a black candidate over a white candidate, or that every white person necessarily prefers a white candidate over a black candidate, would itself constitute invidious discrimination of the kind that the Voting Rights Act was enacted to eradicate, effectively disenfranchising every minority citizen who casts his or her vote for a non-minority candidate.

Lewis v. Alamance County, 99 F.3d 600, 607(4th Cir. 1996).

Senator Linda Garrou, the "white incumbent" to whom Senator Rucho referred, had been elected from SD 32 for seven consecutive terms beginning in 1998. She was clearly the choice of Black voters in the district, having defeated Black opponents twice by 4-1 margins. (Doc. Ex. 6597). Thus, under Defendants'

quota regime, SD 32 was drawn based on skin color without regard for established VRA principles.

C. Race was Manifestly the Predominant Factor in the Construction of CD 12.

In concluding that race was not the predominant factor explaining the path followed by the General Assembly in defining the boundary of CD 12, the trial court found that the 2011 version of CD 12 was drawn based on "the same principles that motivated the 1997 version" of CD 12, and that the United States Supreme Court in *Easley v. Cromartie,* 532 U.S. 234 (2001), found that politics, more than race, explained the shape and boundary of the district. (R p 1424).

The trial court's finding is not plausible or reasoned. In their 1 July 2011, public statement explaining the shape and boundaries of the congressional districts, Senator Rucho and Representative Lewis jointly informed all North Carolinians:

> Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan.

(Doc. Ex. 559) (emphasis added). When that public statement is examined in context, it becomes manifest that race is the factor that explains the differences between the 1997 district upheld in *Easley v. Cromartie* as predominantly the product of politics and CD 12 as enacted by the General Assembly in 2011.

As enacted by the General Assembly in 1997 and approved by the United States Supreme Court, CD 12 had a BVAP of 43.36%. The structure of the 1997 version of CD 12 was maintained in the plan enacted by the General Assembly in 2001 following the 2000 census. The BVAP for CD 12 in the 2001 plan was reduced to 42.31%. CD 12 as enacted in 2011 stands in stark contrast to the 1997 and 2001 plans. It increases the BVAP in the district to 50.66%. That percentage reflects a 7% BVAP increase over the 1997 version of CD 12 declared not a racial gerrymander in *Easley v. Cromartie* and an 8% increase over the unchallenged version of CD 12 in the 2001 plan. That percentage in fact approximates the BVAP (53.34%) in the version of CD 12 declared an unconstitutional racial gerrymander in *Shaw v. Hunt*, 517 U.S. 899 (1996).

Plaintiffs presented to the trial court a statistical study that demonstrated that race was the predominant factor that determined the boundary of CD 12. The trial court however, does not mention that study in its Judgment and Memorandum of Decision. At Plaintiffs' request, Dr. David Peterson, an accomplished statistician, conducted a segment analysis of the boundary of CD 12 to determine whether race or politics better explained the path of the boundary of the district. As Dr. Peterson explained:

> Segment analysis breaks down the border of a voting district into many pieces, and examines whether, based on the race and political

> behavior of residents just inside and outside each segment, the overall pattern suggests that, as between race and political affiliation, one consideration dominated the other in the process that defined the voting district.

(Doc. Ex. 349). Based on that analysis Dr. Peterson concluded:

> The analysis indicates that racial considerations better account for the boundary definition of the 12th NC Congressional Voting District than do party affiliation consideration. There is no indication that party affiliation dominated racial considerations.

(Doc. Ex. 352).

The failure of the trial court to acknowledge Dr. Peterson's study in its decision is extraordinary in light of the dispositive role Dr. Peterson's analysis played in the U.S. Supreme Court's decision in *Cromartie v. Easley*, 532 U.S. 234 (2000), the very case upon which the trial court based its conclusions that race did not predominate in the construction of CD 12.

The segment analysis Dr. Peterson conducted for Plaintiffs in this case was methodologically identical to the segment analysis he had earlier conducted for the State in the litigation challenging the 1997 version of CD 12 as a racial gerrymander. His studies of the 1997 district (BVAP 42.31%) and the 2011 district (BVAP 50.66%) not surprisingly resulted in different conclusions—politics better explained the boundary of the 1997 district and race better explained the boundary of the 2011 district.

The State used Dr. Peterson's study to defend the 1997 version of CD 12 as the product of politics and not race. The trial court in that case, however, awarded summary judgment to the plaintiffs concluding that race, not politics, was the predominant factor in the construction of CD 12 and that the district was unconstitutional because it was not narrowly tailored to serve any compelling interest. On appeal, the U.S. Supreme Court unanimously reversed the trial court, holding that disputed facts regarding the issue of racial predominance made summary judgment for plaintiffs inappropriate. "More important" to the Court's holding "was the affidavit of an expert, Dr. David W. Peterson." *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999).

On remand, the trial court again concluded that race, not politics, better explained the path of CD 12 and that the district was unconstitutional because it was not narrowly tailored to comply with the VRA. *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000). On appeal, the Supreme Court again reversed, holding that the trial court's findings that the boundary of the district was better explained by the race than politics "are clearly erroneous." *Easley v. Cromartie*, 532 U.S. 234, 237 (2001). Dr. Peterson's study was again central to the Supreme Court's decision. *Id.* at 244-45, 251-52 (discussing Peterson's study).

Just as the United States Supreme Court concluded in *Easley v Cromartie* that the trial court's rejection of Dr Peterson's segment analysis there was "clearly erroneous," so too should this Court conclude that the trial court's failure to consider Dr. Peterson's analysis was not "the result of a reasoned decision."

In the final analysis, the facts about CD 12 are incontrovertible, and when the correct legal analysis is applied, the only reasoned conclusion is that race is the predominant factor Defendants used to determine the exact placement of the boundary of CD 12. On 1 July 2011, Defendants told all North Carolinians that they had increased the BVAP for the district from 42.31% to 50.61% to "ensure preclearance of the plan." (Doc. Ex. 559). Preclearance is ensured by the racial composition of a district, not its partisan composition. Dr. Peterson's precise and comprehensive examination of the segments along the boundary of the district shows that the placement of the boundary of District 12 correlates exactly with Defendants' 1 July 2011 public statement. Race, not politics, determined its boundary.

V. THE TRIAL COURT ERRED IN REJECTING PLAINTIFFS' ARGUMENTS THAT THE ENACTED SENATE AND HOUSE PLANS VIOLATE THE WHOLE COUNTIES PROVISION OF THE NORTH CAROLINA CONSTITUTION

A. Standard of Review and Introduction.

"The [Whole Counties Provision of the North Carolina Constitution] forbids the division of a county in the formation of a legislative district, N.C. Const. art. II, §§ 3(3), 5(3), except to the extent the WCP conflicts with the VRA and 'one-person, one-vote principles.'" *Stephenson v. Bartlett*, 355 N.C. 354, 374, 562 S.E.2d 377, 391 (2002) ("*Stephenson I*") (emphasis added and certain internal citations omitted). "*De novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Libertarian Party v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-203 (2011).

The Enacted Senate and House Plans divide more counties than other proposed plans, including the Senate and House Fair and Legal Plans. In the trial court below, the Defendants argued that the larger number of divided counties resulted from (1) purported compliance with the Voting Rights Act; and (2) purported compliance with the county grouping (or "clustering") procedure set forth in *Stephenson I* through the rubric of creating clusters with a minimum number of counties. (R p 1313). The trial court agreed with the Defendants' arguments and concluded "as a matter of law the Enacted House Plan and the

Enacted Senate Plan conform to the [Whole Counties Provision] set out in Article II, § 3 and § 5, of the North Carolina Constitution." (R p 1320).

This Court should reverse the trial court and should hold that the Enacted Senate and House Plans violate the WCP. In numerous instances, it was unnecessary for Defendants to divide counties in order to comply with either the Voting Rights Act or the county-grouping system set forth in *Stephenson I* (or for any other reason). Defendants also exploited loopholes in the county-grouping system to achieve a result contrary to the intent of *Stephenson*. Most egregiously, Defendants created a 20-county "cluster giganticus" stretching from the Outer Banks to Montgomery County—just 50 miles from downtown Charlotte—and then used that 20-county cluster as a shelter for freely dividing counties. The intent of *Stephenson*, of course, was to create fewer divided counties, not *more* divided counties, and the Defendants' Enacted Senate and House Plans directly contravene what this Court was seeking to achieve in *Stephenson*.

For these reasons, as explained below in greater length, this Court should reverse the trial court and should hold that the Enacted Senate and House Plans violate the WCP.

B. The Trial Court's Holding is Inconsistent with the Intent of the North Carolina Constitution and this Court's Holding in *Stephenson* and *Stephenson II*.

1. The Constitutional Provisions And The Context Of The *Stephenson* Decisions.

Article II, Section 3(5) of the Constitution as adopted in 1971 provides: "No county shall be divided in the formation of a senate district." Article II, Section 5(5), likewise adopted in 1971, provides: "No county shall be divided in the formation of a representative district."

The history of these provisions of the Constitution, and the manner in which their predecessor constitutional provisions have been applied by the General Assembly, was reviewed by the Supreme Court in *Stephenson I*. "There is a long standing tradition of respecting county lines during the redistricting process." *Stephenson I*, 355 N.C. at 366, 562 S.E.2d at 386. That tradition dates to the 1776 Constitution, which based representation in both chambers of the General Assembly on counties. This tradition was carried forward in the 1868 and 1971 Constitutions. *Id.* Consistent with this tradition, the first redistricting legislation enacted after the adoption of the 1971 Constitution "did not divide any counties into separate legislative districts." *Id.*, 532 S.E.2d at 387.

However, in 1982, as the result of the refusal of the United States Department of Justice to approve the General Assembly's 1981 redistricting

efforts, the General Assembly enacted an amended House plan that divided 24 counties and an amended Senate plan that divided 8 counties. *Id.* In 1983, a three-judge federal court determined that Article II, Sections 3 and 5 of the 1971 Constitution were unenforceable in the 40 North Carolina counties covered by Section 5 of the 1965 Voting Rights Act because it was inconsistent with federal law. *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). The court further declared, as a matter of state law, that those constitutional provisions were void in the remaining 60 counties because the state's citizens would not have approved those provisions in 1971 had they known that they could not be enforced in all counties. *Id.* Assuming that as a consequence of *Cavanagh* that it was no longer constrained by Article II, Sections 3 and 5 of the Constitution, the General Assembly enacted House and Senate plans in 1992 that divided 58 and 43 counties, respectively. These plans were not challenged in court. In 2001, the General Assembly enacted a House plan that would have divided 70 counties and enacted a Senate plan that would have divided 51 counties. The constitutionality of these plans was challenged.

In *Stephenson I*, the Supreme Court (1) rejected the federal court's analysis in *Cavanagh* that Article II, Sections 3 and 5 were not enforceable parts of the Constitution and held that those constitutional provisions remain "valid and

binding on the General Assembly during the redistricting and reapportionment process … except to the extent superseded by federal law;" (2) declared that the use of multi-member districts violated equal protection principles "unless it is established that the use of multi-member district advances a compelling state interest;" and (3) directed the trial court, during "the remedial stage" of the litigation, to apply the methodology prescribed by the Court to any alternative plans adopted by the General Assembly or drawn by the trial court. *Id.* at 371-72, 381, 383, 562 S.E.2d at 390, 395, 396.

In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*"), the Court reviewed and affirmed the 31 May 2002 order of the trial judge declaring that the remedial plans enacted by the General Assembly in 2002 failed to adhere to *Stephenson I*. Reciting the rule that findings of fact supported by the evidence are conclusive on appeal, the Supreme Court affirmed a series of mixed findings of fact and conclusions of law entered by the trial judge. *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 252. The constitutional deficiencies affirmed on this ground in the Senate plan included (a) excessive "cuts across interior county boundaries," (b) clustering "portions of counties," and (c) lack of "compactness" in Senate Districts 6, 10, 11, 14, 16, 21, 26, 36 and 44. *Id.* at 310-11, 582 S.E.2d at 252-53. The deficiencies affirmed on this ground in the House

plan included (a) the excessive cutting of county lines, (b) the arbitrary separation of communities in House Districts 52, 95 and 96, and (c) lack of compactness in House Districts 14, 18, 41, 51, 52, 57, 58, 59, 60, 61, 62, 63, 64, 76, 77, 95, 96, 110 and 118. *Id.* at 311-13, 582 S.E.2d at 253.

The Supreme Court did list the trial court's finding that the challenged plans failed "to create the maximum number of two-county groupings" in its recitation of the trial court's findings, *Id.* at 307, 582 S.E.2d at 250, but that finding is not listed among the trial court's findings affirmed. *Id*. at 309-313, 582 S.E.2d at 251-54. By contrast, the Court did list the trial judge's finding that some House districts "divided the county boundary in multiple locations" among the findings it affirmed. *Id*. at 311, 582 S.E.2d at 253.

2. The Trial Court's Holding Has No Basis In The Words Of The Constitution.

The trial court's holding that compliance with Article II, Sections 3 and 5 of the Constitution is measured by the number of groups of counties contained in a legislative redistricting plan and not the number of counties kept whole has no basis in the Constitution and mistakes a means for constitutional compliance with the end of compliance.

The words of the Constitution are "no county shall be divided in the formation" of a House or Senate district. The Constitution does not state: House

and Senate districts "shall be formed from the maximum number of groups of counties" or that "the maximum number of two-county groups shall be used to form House and Senate districts." Substituting those words for the actual words of the Constitution, as the Defendants ask the Court to do, would constitute an amendment to the Constitution. The Courts, of course, have no power under the guise of interpretation to amend the Constitution. *See Elliott v. State Board of Equalization*, 203 N.C. 749, 756, 166 S.E. 918, 922 (1932) ("However liberally we may be inclined to interpret the fundamental law, we should offend every canon of construction and transgress the limitations of our jurisdiction to review decisions upon matters of law or legal inference if we undertook to extend the function of the Court to a judicial amendment of the Constitution."); *Andrews v. Clay County*, 200 N.C. 280, 282, 156 S.E. 855, 856-57 (1931) (stating that a court may not construe the North Carolina Constitution in a manner that "would in effect result in its amendment by the courts and not by the people").

Logically, the *Stephenson* clustering requirements were not intended by the Court as the measurement of compliance with the Whole County provisions but rather as one step in the process of achieving compliance. In truth, the county grouping requirement is simply one stop on the road to compliance with the constitutional direction that "no county be divided." Once county groupings are

formed, districts still have to be formed within the groupings, and the formation of those districts within those groups presents the greatest temptation for the General Assembly to place politics or other interests in front of the Constitution. For example, Defendants' House Plan contains one county grouping that includes 20 counties stretching from Dare County to Stanly County. Within this 20 county grouping, the Defendants formed 14 districts, and in the process of forming those 14 districts, they split 16 of the 20 counties contained in the grouping. Measuring compliance with the requirement that "no county be divided" by counting county groupings is like declaring the winner of a mile-long run at the one-half mile mark.

This Court should again declare, as it did in *Stephenson I* and *II*, that the North Carolina Constitution requires the Defendants not to split any counties except as required to comply with federal law.

3. The *Stephenson* Decision In Fact Made It Clear That The Measure Of Compliance With The Whole County Provision Is The Number Of Counties Kept Whole.

The requirements established in *Stephenson* must be understood in the context of the dilemma facing the Court. On the one hand, the Court determined that it had no power to consign to the dustbin of history a constitutional provision adopted by the people and not repealed by them. "We are not permitted to construe the WCP mandate as now being in some fashion unmanageable, or to

limit its application to a handful of counties." *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396. On the other hand, federal one-person, one-vote and Voting Rights Act requirements made the full application of the whole county provisions impossible. "Prior to the imposition of one-person, one-vote and VRA requirements, implication of this provision was simple and straight forward." *Id.* at 383, 562 S.E.2d at 396.

This Court determined that in this circumstance its duty was "to follow a reasonable, workable and effective interpretation that *maintains the people's express wishes to contain legislative district boundaries within county lines whenever possible*." *Id.* at 382, 562 S.E.2d at 396 (emphasis added). As the Supreme Court's express words in *Stephenson* make clear, the duty to "contain legislative districts within county lines," does not end with the formation of clusters containing 2 or more counties:

> Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be traversed *but only to the extent necessary to comply with the at or within five plus or minus five percent one-person, one-vote standard*. The intent underlying the WCP must be enforced to the maximum extent possible; thus only the smallest number of counties necessary to comply with the at or within plus or minus five percent one-person, one-vote standard shall be combined in the formation of compact and contiguous electoral districts.

Id. at 384, 562 S.E.2d at 397 (emphasis added). Nothing in *Stephenson II* changes these words.

4. The Supreme Court's Decision In *Pender County v. Bartlett* Confirms That Keeping Counties Whole Is The Measure Of Compliance With The Whole County Provision Of The Constitution.

In *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), this Court considered the validity of the General Assembly's decision not to keep Pender County whole but rather to divide it into 2 districts, one of which (HD 18) had a BVAP of 42%. The General Assembly's purpose in creating that district was to comply with the perceived requirements of the Voting Rights Act. In *Pender County*, the Court addressed two issues: (1) whether the VRA required the creation of the district containing 42% BVAP; and (2) if not, whether dividing Pender County between two districts when it would have been kept whole violated the WCP.

After determining that the VRA did not require the creation of House District 18, this Court addressed the WCP question. It held:

> As we noted at the beginning of this opinion, the formation of legislative districts must comport with the requirements of our State Constitution, unless federal law supersedes those provisions. *Accordingly, because current House District 18 is not required by Section 2, it must comply with the redistricting principles enunciated by this Court in* Stephenson I. *The WCP forbids the division of a county in the formation of a legislative district, N.C. Const. art. II,*

> *§ § 3(3), 5(3), except to the extent the WCP conflicts with the VRA and "one-person, one-vote: principles,* Stephenson I, *355 N.C. at 381, 562 S.E.2d at 396*.

Pender County, 361 N.C. at 507, 649 S.E.2d at 374 (emphasis added and certain internal citations omitted).

But for the General Assembly's perceived need to create House District 18 to comply with the VRA, Pender County could have been kept whole and a district meeting one-person, one-vote principles drawn by adding to Pender County a portion of the population of neighboring New Hanover County. The failure to draw House District 11 in this manner violated the *Stephenson* requirement that the boundary of a county located in a cluster of counties may not be crossed for any reason except to meet one-person, one-vote requirements. *Id.* at 509, 649 S.E.2d at 376 ("Therefore, to comply with the fifth *Stephenson I* requirement, a voting district that includes Pender County must add population across a county line, but 'only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard.'").

The cure for the defective House District 18 was not to regroup Pender County. It was either to keep Pender County whole and form a complete district by adding the necessary population from New Hanover or to draw a district encompassing a minority population in excess of 50% assuming that was feasible

and required by the VRA. The General Assembly chose the former cure and kept Pender whole.

5. The Trial Court's Holding Leads to the Splitting of More—Not Fewer—Counties.

The trial court held that *Stephenson* and *Stephenson II* require the creation of "the maximum number of two-county groupings," and then "within the framework of remaining counties," the "smallest three-county groupings, and then four-county groupings, etc., as possible." (R p 1316). Not only does the Defendants' methodology, as adopted by the trial court, result in a greater *number* of divided counties, but those counties' boundaries are traversed *more times* than in competing plans.[24] In *Stephenson II*, this Court was clear that compliance with the *Stephenson* criteria requires a minimal number of traverses. The Court affirmed the trial court's finding that "[o]verall, within multi-county groupings, defendants' revised House Plan cuts county lines 48 times, as compared to the 43 county line traverses in plaintiffs' House Plan." *Stephenson II*, 357 N.C. at 312, 582 S.E.2d at 253. Indeed, that proposition was explained at even greater length by the *Stephenson* plaintiffs in the trial court, when they argued as follows:

[24] A county is either "whole" or "divided." If the county is divided, then each time that the legislative boundary cuts across the county line is referred to as a "traverse." *See* Fourth Affidavit of Chris Ketchie (Doc. Ex. 6199).

> A comparison of the split unit report for both the 2002 Senate Plan and plaintiffs' Remedial Plan, modified to eliminate these districts that are wholly within a particular county, shows that plaintiffs' Remedial Plan traverses interior county lines to create single-member districts twenty-three times, while the 2002 Senate Plan traverses county lines twenty-eight times. As compared to plaintiffs' proposed Remedial Plan, the 2002 Senate Plan therefore does not minimize the times county lines are traversed in creating single-member districts; therefore, it fails to 'strictly' comply with the *Stephenson* criteria, and must be rejected.

(D:\Native Format\CDs\PS79\Exhibit 11 - Plaintiffs' Memo in *Stephenson II* in Support of Plaintiffs' Remedial Plans and in Opposition to the 2002 Plans.pdf). The following chart compares the size of the county clusters in the Enacted Senate Plan and Senate Fair and Legal Plan.

Counties in Clusters	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**Total**
Enacted Senate Plan	1	11	4	3	1	1	1	2	1	1	26
Senate Fair and Legal	1	11	3	7	1	2	2	0	1	0	28

(Doc. Ex. 1189). Significantly, Senate Fair and Legal and the Enacted Senate Plan have the same number (11) of two-county clusters, but Senate Fair and Legal has more total clusters (28) than the Enacted Senate Plan (26). Senate Fair and Legal also divides 5 fewer counties than the Enacted Senate Plan.

Moreover, although the Senate Fair and Legal plan has two more total county groupings than the enacted Senate plan, the Senate Fair and Legal plan has eleven *fewer* traverses, as shown in the table below:

	Divided Counties	**Traverses**	**County Groupings**
Enacted Senate Plan	19	27	26
Senate Fair and Legal	14	16	28

With regard to the House, the following chart compares the sizes of the county clusters in the Enacted House Plan with House Fair and Legal.

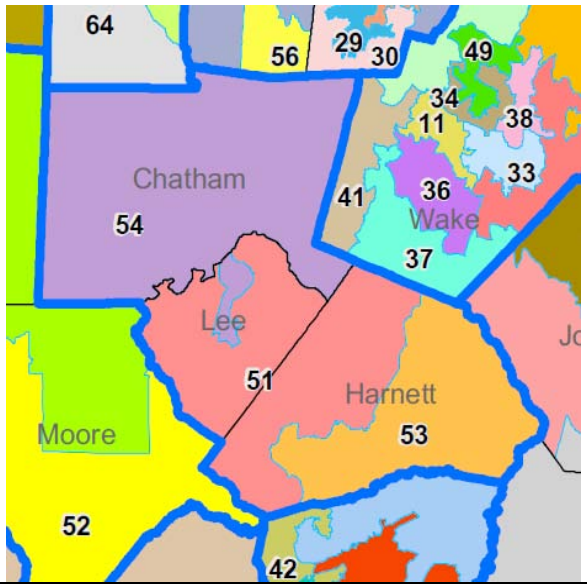
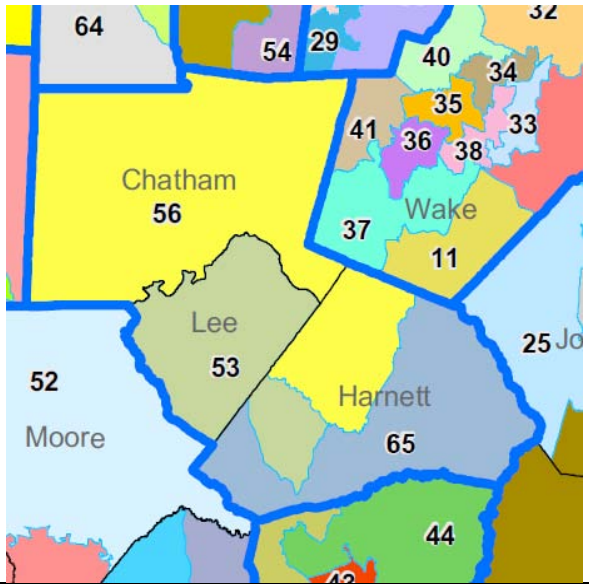
Counties in Cluster	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**	**11**	**20**	**Total**
Enacted House Plan	11	15	4	2	2	0	0	0	1	0	0	1	36
House Fair and Legal	11	9	6	5	3	1	1	0	1	0	0	0	36

(Doc. Ex. 1189).

The Enacted House Plan and House Fair and Legal both have 36 total clusters. While the Enacted House Plan has more two-county clusters than House Fair and Legal, the Enacted House Plan has a 20 county cluster. Nevertheless, House Fair and Legal divides 5 fewer counties than the Enacted House Plan. Moreover, the House Fair and Legal plan has six *fewer* traverses, as shown in the table below:

	Divided Counties	Traverses	County Groupings
Enacted House Plan	49	50	36
House Fair and Legal	44	44	36

This supports the claim that establishing county groupings is only one step in the process of compliance with WCP, and it establishes that the Enacted Plans violate the Whole Counties Provision, properly interpreted. Once county groupings are established, there are still decisions to be made, and those decisions can affect the number of traverses and split counties. One example from the Enacted House Plan, which is set forth below, illustrates this point. In the county grouping (or "cluster") depicted below, the cluster in the enacted plan and the competing House plan is identical. The cluster consists of Chatham, Lee, and Harnett Counties.

Enacted House Plan	**House Fair and Legal Plan (Not Enacted)**
2 divided counties (Harnett and Lee) 1 whole county (Chatham) 2 traverses within the cluster • H54 traverses from Chatham into Lee • H51 traverses from Lee into Harnett (or vice-versa)	1 divided county (Harnett) 2 whole counties (Chatham and Lee) 2 traverses within the cluster • H56 traverses from Chatham into Harnett • H53 traverses from Lee into Harnett
	

The Enacted House Plan splits more counties than the House Fair and Legal Plan (2 versus 1), and the number of traversals is equal (2 versus 2). In the trial court below, Defendants defended this cluster in the enacted plan as follows:

> The difference is that the House Fair and Legal Plan would divide Harnett County twice, while the enacted Plan does so only once.

(Doc. Ex. 2229). The total number of traversals in the cluster, however, is the same (2 versus 2). Defendants' argument is that the number of traversals within a

cluster must be "spread around" to different counties, instead of being "stacked up" in one particular county. *Stephenson* says nothing about any such requirement, and the Defendants' argument adds a much more specific requirement to the *Stephenson* criteria. At the same time, the argument allows Defendants to violate the fundamental purpose of *Stephenson*, which seeks to minimize the number of divided counties.

The court upheld the constitutionality of this county grouping but did not explain why the enacted districts are constitutional; it merely stated as follows:

> [W]hile the Fair and Legal configuration has more whole counties (two) as compared to the 2011 House Plan (one), both plans form three districts by two traversals of a county line.

(R p 1252). Impliedly, the trial court's rationale must have been something along the lines of: "Even if the General Assembly divides a greater number of counties than the competing plan in a particular cluster, that is not unconstitutional, as long as the number of traversals within the General Assembly's cluster is equal to the competing plan."

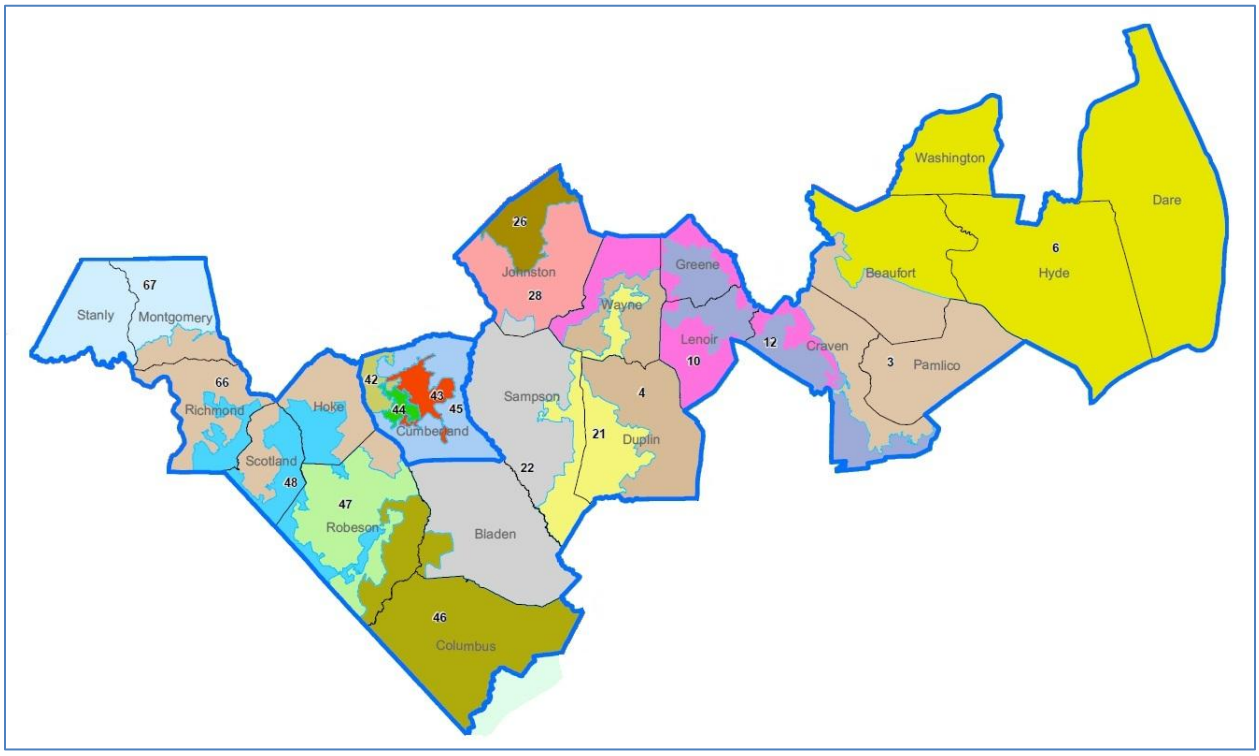
The two most apparent flaws with this holding are:

1. It means that the number of traversals is more important than the number of divided counties. That proposition simply cannot be correct.

2. However, even if that reasoning is correct, then based on that same logic, the Enacted Senate and House Plans should be

> invalid, because the Enacted Plans contained more traversals on a statewide basis.

The broader problem with the holding is that it appears to require that county groupings be analyzed at a level of great detail, for which other measures (*e.g.*, average cluster size) should also be relevant criteria for evaluating the maps (but which the trial court did not discuss). For example, it is clear that the Defendants' methodology results, on average, in clusters containing more counties, not fewer counties. Most egregiously, the Enacted House Plan includes a very large group of 20 counties, spanning Cape Hatteras to the suburbs of Charlotte:



The principal architect of the plan, Thomas Hofeller, referred to that group as the "Cluster Giga[n]ticus." The Defendants appear to have used the 20-county

cluster as a mechanism for traversing county boundaries many more times than would have been feasible in a smaller county cluster. This methodology violates both the letter and the spirit of the *Stephenson* criteria.

In summary, no matter how the Court measures compliance with *Stephenson*, it is clear that the Senate and House Fair and Legal Plans are superior for purposes of enforcing the Whole Counties Provision to the "maximum extent possible," as is shown in the table below:

Criterion	**Analysis**
Absolute Number of Counties Divided	The Enacted Senate and House Plans *divide more counties* than the competing Senate and House Fair and Legal Plans.
Absolute Number of Boundary Traverses	The Enacted Senate and House Plans *traverse county boundaries more times* than the competing Senate and House Fair and Legal.
Size of County Groupings	The Enacted House Plan includes a 20-county cluster.

In light of the foregoing analysis, the enacted maps violate the intent of the North Carolina Constitution and this Court's holding in *Stephenson* and *Stephenson II*.

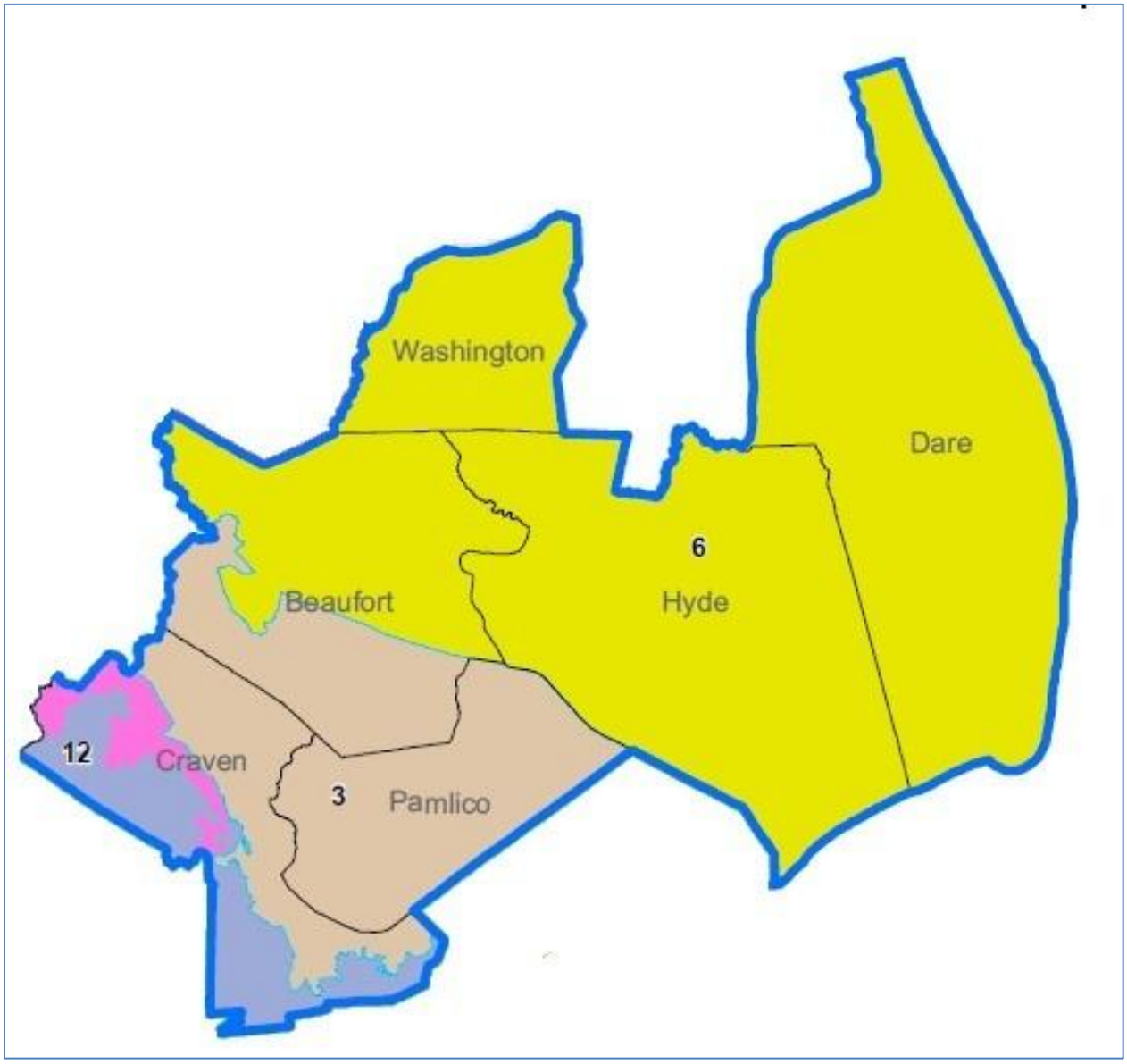
C. Violations of the Whole County Provisions in the Enacted Senate and House Plans.

1. There Is No VRA Or One-Person, One-Vote Justification For Splitting Beaufort County And Lee County In The Enacted House Plan.

Under *Stephenson*, a county must be kept whole unless constitutional one-person, one-vote principles or compliance with the federal Voting Rights Act requires the county to be divided. Defendants have in effect conceded that there is no plausible one-person, one-vote or VRA justification for dividing Beaufort and Lee Counties in the Enacted House Plan.

(a) Beaufort County.

There is no valid VRA or one-person, one-vote ground for dividing Beaufort County. A map of the Enacted House Plan with regard to Beaufort County is set forth below:



At his deposition, Representative Lewis testified that he directed that Beaufort be split for political reasons:

> Q. There's another change, Representative Lewis, that Beaufort county is divided in Lewis-Dollar-Dockham 3 but not divided in Lewis-Dollar-Dockham 2?
>
> A. Yes, sir. This was—This was a change that was made at the request of one of our members, Representative Sanderson.

> Sometimes when you're in the political world and you've got to get enough votes to pass a plan, sometimes you have to make some hard calls. Representative Cook was opposed to this call, but ultimately it was—it was my choice to make.

(Doc. Ex. 2379).

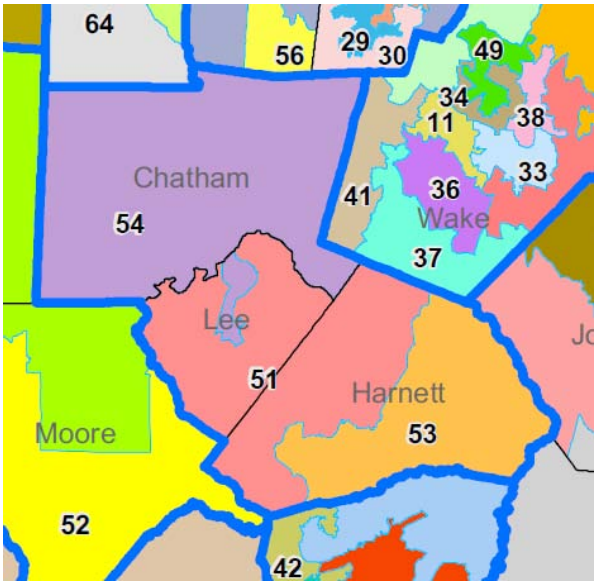
Moreover, Beaufort County was not divided in the 1992, 2002, 2003 or 2009 enacted House plans or in Judge Jenkins's 2002 Interim Plan, and would not have been divided by House Fair and Legal.[25] Defendants have articulated no valid reason for dividing Beaufort County in the Enacted House Plan.

(b) Lee County.

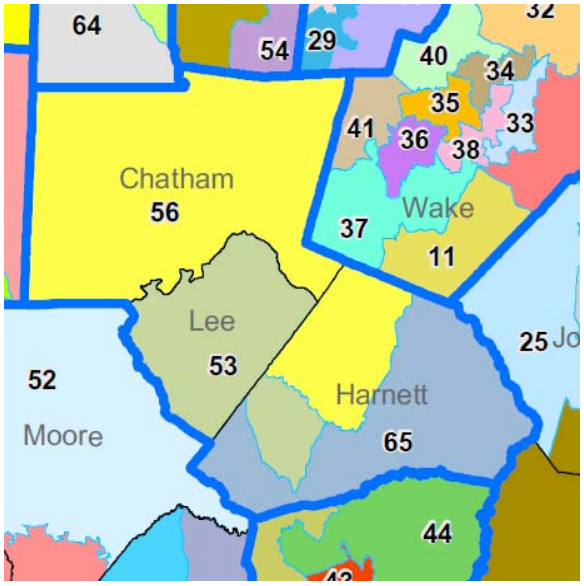
A comparison of the Enacted House Plan to the House Fair and Legal demonstrates that there is no one-person, one-vote justification for splitting Lee County:

[25] See 1992 House Base Plan 5 Map, 2002 Proposed House Plan – Sutton 5 Map, 2003 House Redistricting Plan Map, 2009 House Redistricting Plan Map, 2002 Jenkins Interim House Redistricting Plan Map and House Fair and Legal Map. LDD1 and LDD2 as drawn by Hofeller and presented by Representative Lewis likewise would have kept Beaufort whole. See LDD1 Map and LDD2 Map. Beaufort was first divided in LDD3, *see* LDD3 Map, and that division was carried forward in the Enacted House Plan.

Enacted House Plan



House Fair and Legal Plan (Not Enacted)



Lee County was not divided in the 1992, 2001, 2002, 2003 or 2009 enacted House plans and would not have been divided in the House Fair and Legal Plan.[26] Representative Lewis agreed that this district is not a VRA district in the Enacted House Plan. (Doc. Ex. 2391). Defendants have articulated no valid reason for dividing Lee County in the Enacted House Plan.

[26] See 1992 House Base Plan 5 Map; 2001 Sutton House Plan 3 Map; 2002 Proposed House Plan – Sutton 5 Map; 2003 House Redistricting Plan Map; 2009 House Redistricting Plan Map; and House Fair and Legal Map.

2. Defendants Have The Burden Of Proving That A Section 2 Violation Would Have Occurred In Each District Constructed Using Parts Of One Or More Counties And Drawn For The Purpose Of Preempting A Section 2 Lawsuit.

The Court in *Pender County* established the burden of proof the Defendant must bear in defending the formation of House and Senate districts from parts of counties in order to preempt Section 2 lawsuits. It held:

> Here, defendants drew House District 18 as a preemptive measure against the possibility that a lawsuit might be filed challenging the absence of a Section 2 district in southeastern North Carolina. Plaintiffs claim that the current configuration of House District 18 was not required by Section 2 and that the District violates the WCP, thus placing defendants in the unusual position of having to defend a legislative district by proving that a Section 2 violation would have occurred if current House District 18 had not been created. *Accordingly, defendants here must bear the burden, normally borne by plaintiffs, of establishing the Gingles preconditions*. If they succeed, defendants can demonstrate that the drawing of House District 18 was required by Section 2, obviating the need to comply with the WCP.

Pender County, 361 N.C. at 496, 649 S.E.2d at 367 (emphasis added). Defendants cannot sustain that burden for either the Enacted Senate or House Plans. As the United States Supreme Court has stated:

> The state appellees suggest that a covered jurisdiction may have a compelling interest in creating majority-minority districts in order to comply with the Voting Rights Act. The States certainly have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied. *But in the context of a Fourteenth Amendment challenge, courts must bear in*

> *mind the difference between what the law permits and what it requires*.

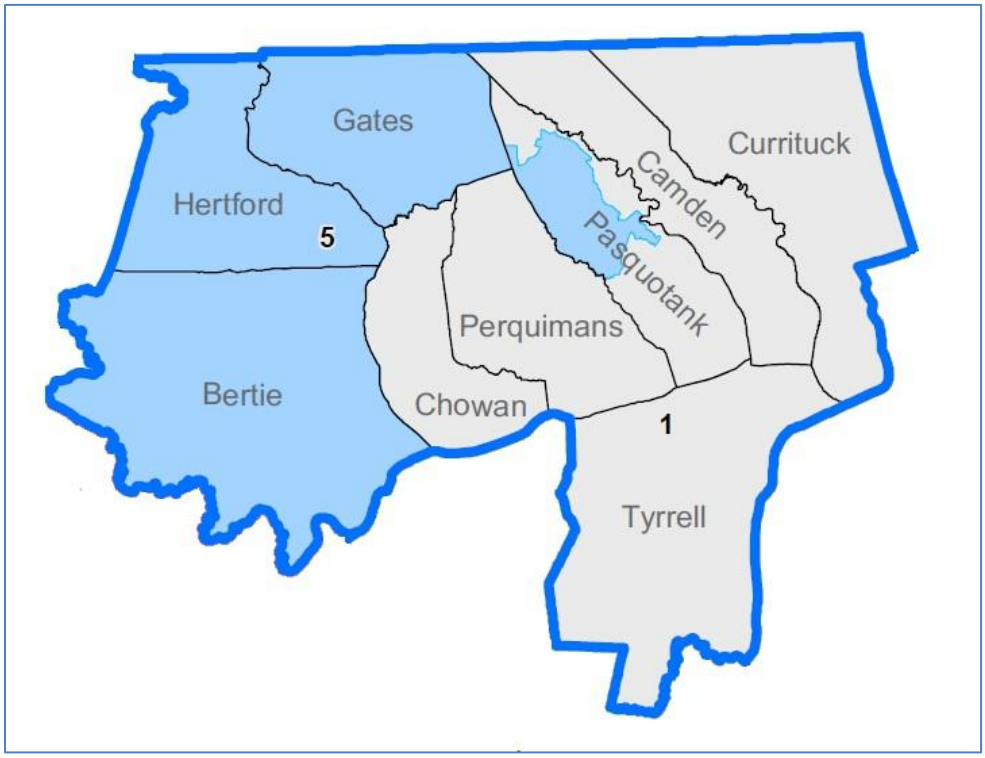
Shaw v. Reno, 509 U.S. 630, 654 (1993) (emphasis added). In the following sections, Plaintiffs will demonstrate that in numerous instances the Defendants divided counties for reasons not required by the VRA, including for example, the pursuit of proportionality. *Pender County* places the burden on Defendants to prove the necessity to divide a county to meet VRA requirements, a burden they did not, and cannot, carry. That failure, as this Court explained in *Stephenson II*, violates the WCP:

> In *Stephenson I*, this Court harmonized the provisions of Article I, Section 2, 3 and 5, and the WCP of Article II, Sections 3(3) and 5(3) of the State Constitution and *mandated that in creating legislative districts, counties shall not be divided except to the extent necessary to comply with federal law, including the "one-person, one-vote: principle and the VRA.*

Stephenson II, 357 N.C. at 309, 582 S.E.2d at 251 (emphasis added).

(a) Pasquotank County.

A map of the Enacted House Plan with regard to Pasquotank County is set forth below:



Pasquotank County has historically been kept whole and not used to construct a VRA district.[27]

[27] Pasquotank County was not divided in the House plans enacted in 1991, 2001, 2002, 2003 or 2009 or in Judge Jenkins's 2002 Interim Plan. See 1992 House Base Plan 5 Map, 2001 Sutton House Plan 3 Map, 2002 Proposed House Plan – Sutton 5 Map, 2003 House Redistricting Plan Map, 2009 House Redistricting Plan Map, and 2002 Judge Jenkins Interim House Redistricting Plan Map. The BVAP in the districts in which Pasquotank was included in those plans in those years did not exceed 28%. See Combined House Voting Age Population Tables for 1992, 2001, 2002, 2003, 2009, and 2002 Interim Plans. Pasquotank also would not have been divided in House Fair and Legal. See House Fair and Legal Map. Under that plan, Pasquotank would have been joined with Camden, Currituck and Tyrell—which would also have been kept whole—to form a district around the rim of the Albemarle Sound. The BVAP in that district would have been 25.35%. See House Fair and Legal District 1 Statistics. In the Enacted House Plan, Defendants joined part of Pasquotank with Bertie, Hertford and Gates to form House District 5 with a BVAP of 53.54% and joined the remainder of Pasquotank with Currituck,

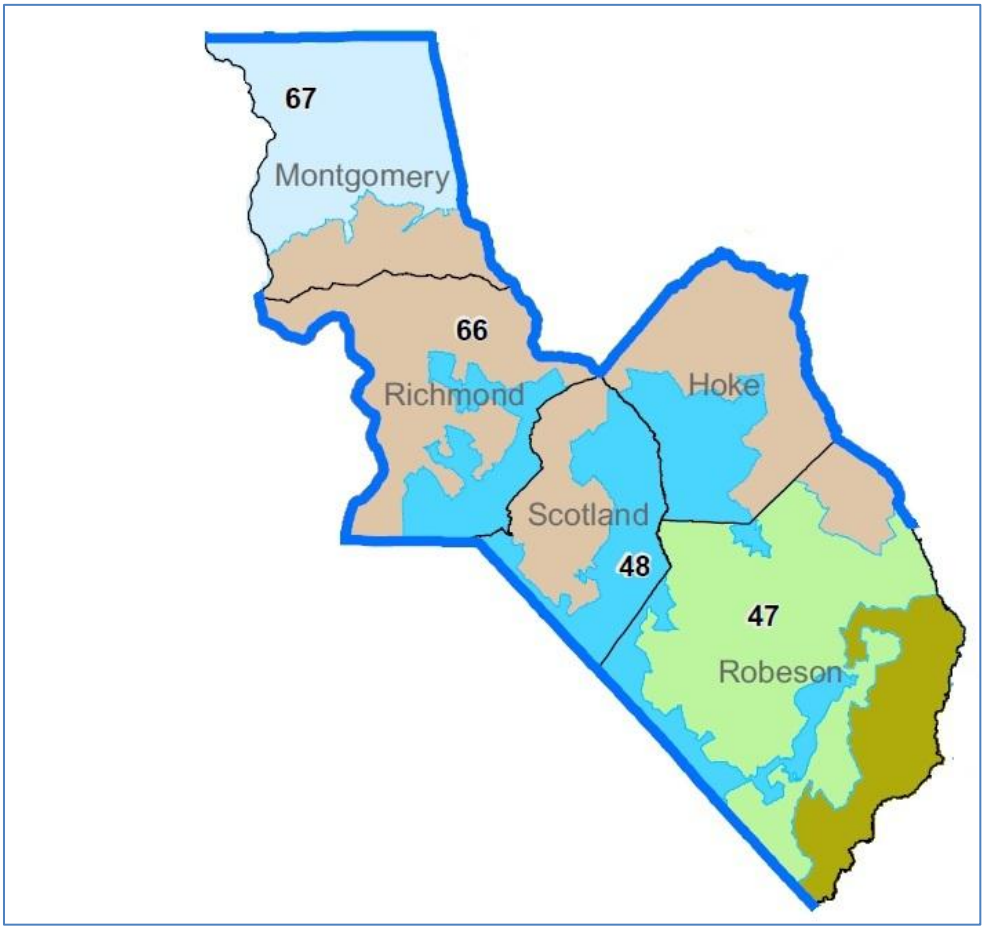
(Footnote Continued)

Representative Lewis testified that Pasquotank was divided "to get a sufficient number of populations to create one of our VRA seats." (Doc. Ex. 2390). By dividing out the African American population in Elizabeth City from the rest of Pasquotank and adding those citizens to neighboring districts, Defendants were able to increase the number of VRA districts in northeastern North Carolina and better achieve their goal of proportionality. Defendants have articulated no valid reason for dividing Pasquotank County in the Enacted House Plan.

(b) Richmond County.

A map of the Enacted House Plan with regard to Richmond County is set forth below:

Camden, Perquimans and Chowan to form House District 1 with a BVAP of 18.62%. See Enacted House Plan District 5 Statistics and Enacted House Plan District 1 Statistics. House districts 7, 23, 24, and 27 are all located in the northeastern part of the State in the Enacted House Plan and have BVAPs of 50.02%, 51.43%, 56.61%, and 53.25%, respectively. See Enacted House Plan District 7 Statistics, Enacted House Plan District 23 Statistics, Enacted House Plan District 24 Statistics, and Enacted House Plan District 27 Statistics.



Like Pasquotank, Richmond County has historically been kept whole and not used to construct a VRA district.[28] The Enacted House Plan assigns 19,048

[28] It was not divided in the House plans enacted in 1992, 2001, 2002, 2003 or 2009 or in Judge Jenkins's 2002 Interim plan. See 1992 House Base Plan 5 Map, 2001 Sutton House Plan 3 Map, 2002 Proposed House Plan – Sutton 5 Map, 2003 House Redistricting Plan Map, 2009 House Redistricting Plan Map, and 2002 Judge Jenkins Interim House Redistricting Plan Map. The BVAP in the districts in which Richmond was included during these years did not exceed 28%. See Combined House Voting Age Population Tables for 1992, 2001, 2002, 2003, 2009, and 2002 Interim Plans. Richmond would also have been kept whole in House Fair and Legal, and would have been joined with parts of Scotland and Moore to form a district in which the BVAP was 26.37%. See House Fair and Legal Map and House Fair and Legal District 51 Statistics. In the Enacted House Plan, Richmond

(Footnote Continued)

Richmond County citizens to District 48 and the remaining 27,591 Richmond citizens to District 66, and it assigns 13,455 Scotland citizens to District 48 and the remaining 22,703 Scotland citizens to District 66. Had 19,408 Richmond citizens been swapped with 19,408 Scotland citizens, Richmond County could have been kept whole. Representative Lewis, however, never asked Hofeller to investigate whether Richmond could be kept whole. (Doc. Ex. 2393).

(c) Greene County.

A map of the Enacted House Plan with regard to Greene County is set forth below:

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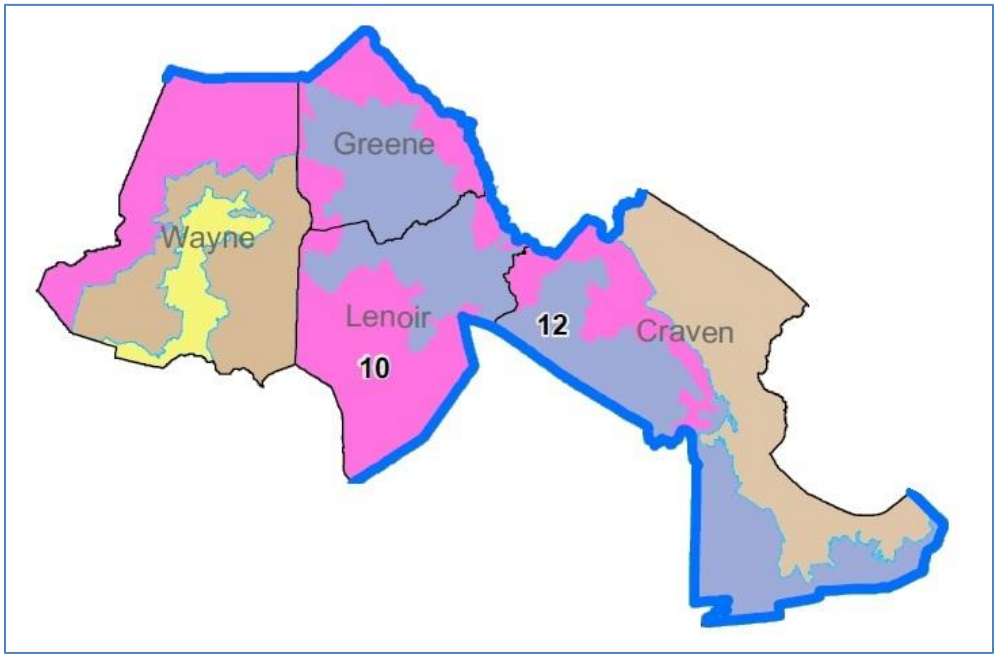
is part of the 20 county cluster that stretches from Dare County to Montgomery County. It is divided in jigsaw puzzle fashion between HD 48 which also includes parts of Scotland, Hoke and Robeson Counties and HD 66 which also divides the citizens of Richmond County and neighboring Scotland equally between Districts 48 and 66.

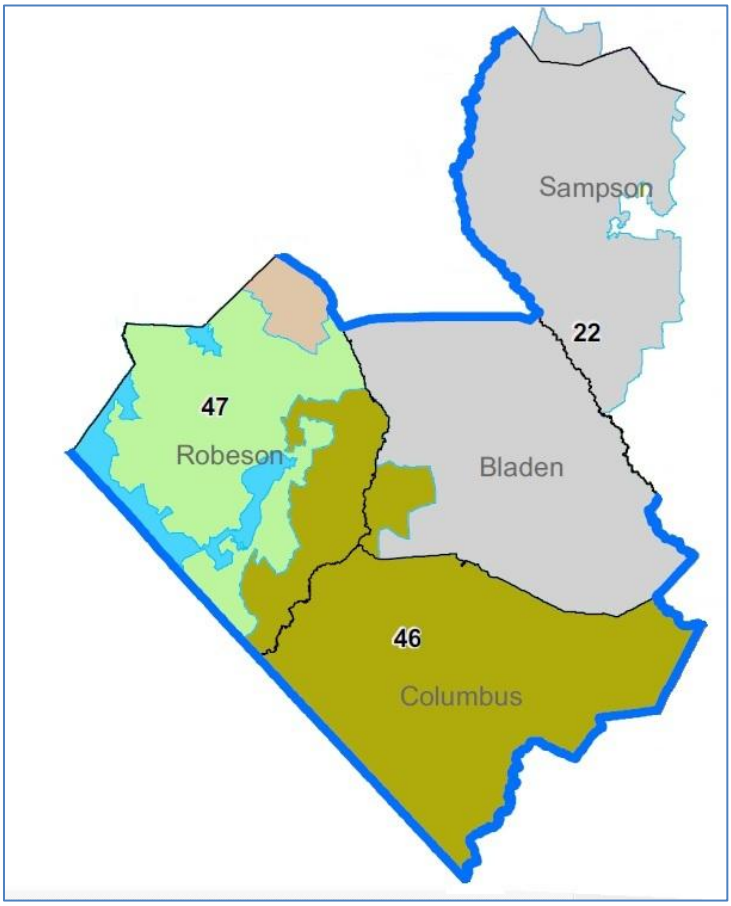


Greene County was not divided in the 2003 or 2009 enacted House plans.[29] In the Enacted House Plan, only 6,297 Greene County citizens are assigned to District 10. Had those 6,297 Greene County citizens been swapped with 6,297 citizens of Wayne County—which has a population of 122,623—or Lenoir County—which has a population of 59,495—Greene County could have been kept whole.

[29] See 2003 House Redistricting Plan Map and 2009 House Redistricting Plan Map. It also would have been kept whole in House Fair and Legal and joined with parts of Lenoir and Craven to form House District 12 as a VRA district in which the BVAP was 45.88% . See House Fair and Legal Map and House Fair and Legal District 12 Statistics. In the Enacted House Plan, Greene is part of the 20 county cluster running from Dare to Montgomery.

(d) Bladen County.

A map of the Enacted House Plan with regard to Bladen County is set forth below:

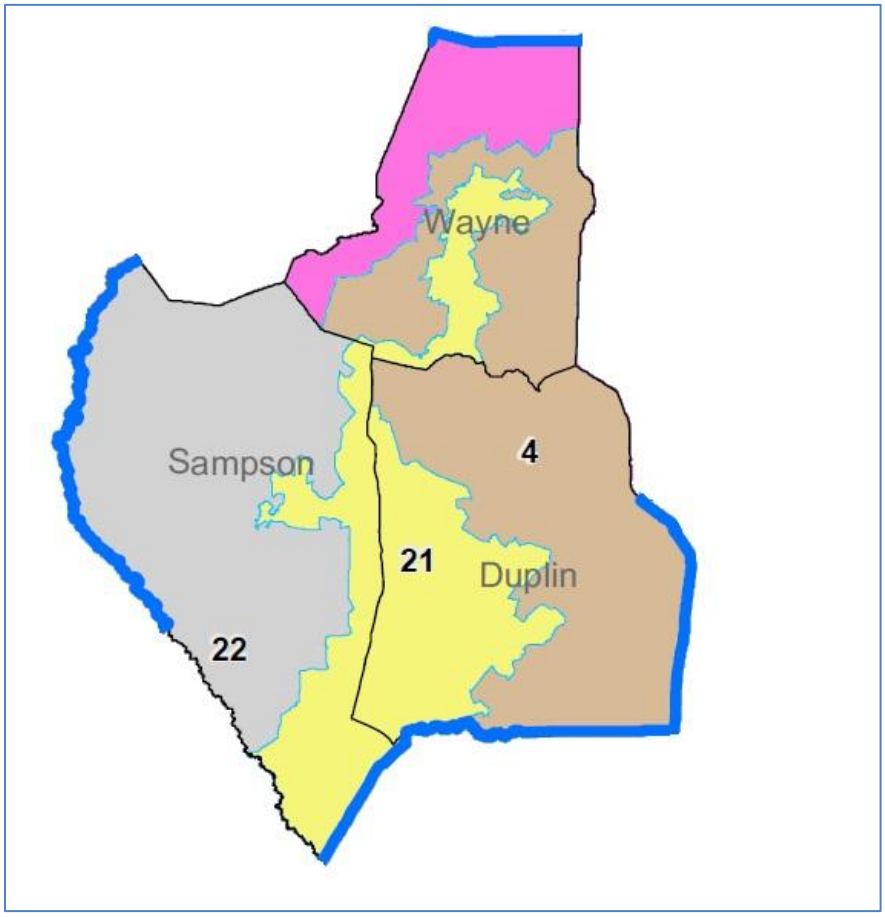


Bladen County has historically been kept whole and not used to construct a VRA district.[30] Only 5,724 Bladen citizens are assigned to District 46 by the Enacted House Plan. Had these 5,724 Bladen citizens simply been swapped for 5,724 citizens from either Robeson—which has a population of 101,469—or Sampson—which has a population of 50,495—Bladen County could have been kept whole.

(e) Duplin County.

A map of the Enacted House Plan with regard to Duplin County is set forth below:

[30] Bladen County was kept whole in the House plans enacted in 1992, 2001, 2002, 2003, 2009 and in Judge Jenkins's 2002 Interim Plan. See 1992 House Base Plan 5 Map, 2001 Sutton House Plan 3 Map, 2002 Proposed House Plan – Sutton 5 Map, 2003 House Redistricting Plan Map, 2009 House Redistricting Plan Map, and 2002 Judge Jenkins Interim House Redistricting Plan Map. The BVAP in the districts in which Bladen was included during these years did not exceed 28%. Bladen also would have been kept whole by House Fair and Legal and joined with parts of Robeson and Cumberland to form House District 50 in which the BVAP would have been 29.05%. See House Fair and Legal Map and House Fair and Legal District 50 Statistics.



Duplin County was not divided in the 2003 or 2009 enacted House plans.[31] The part of the population of Duplin assigned to District 21 in the Enacted House Plan is 21,145. The population of Wayne County is 122,623. Simply by switching the 21,145 Duplin citizens with 21,145 of the 122,623 citizens in Wayne County, Duplin County could have been kept whole.

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[31] See 2003 House Redistricting Plan Map and 2009 House Redistricting Plan Map. It also would have been kept whole by House Fair and Legal and joined with part of Pender to form House District 15 in which the BVAP is 27.33%. See House Fair and Legal Map and House Fair and Legal District 15 Statistics. In the Enacted House Plan, Duplin is part of the 20 county cluster running more than halfway across the state.

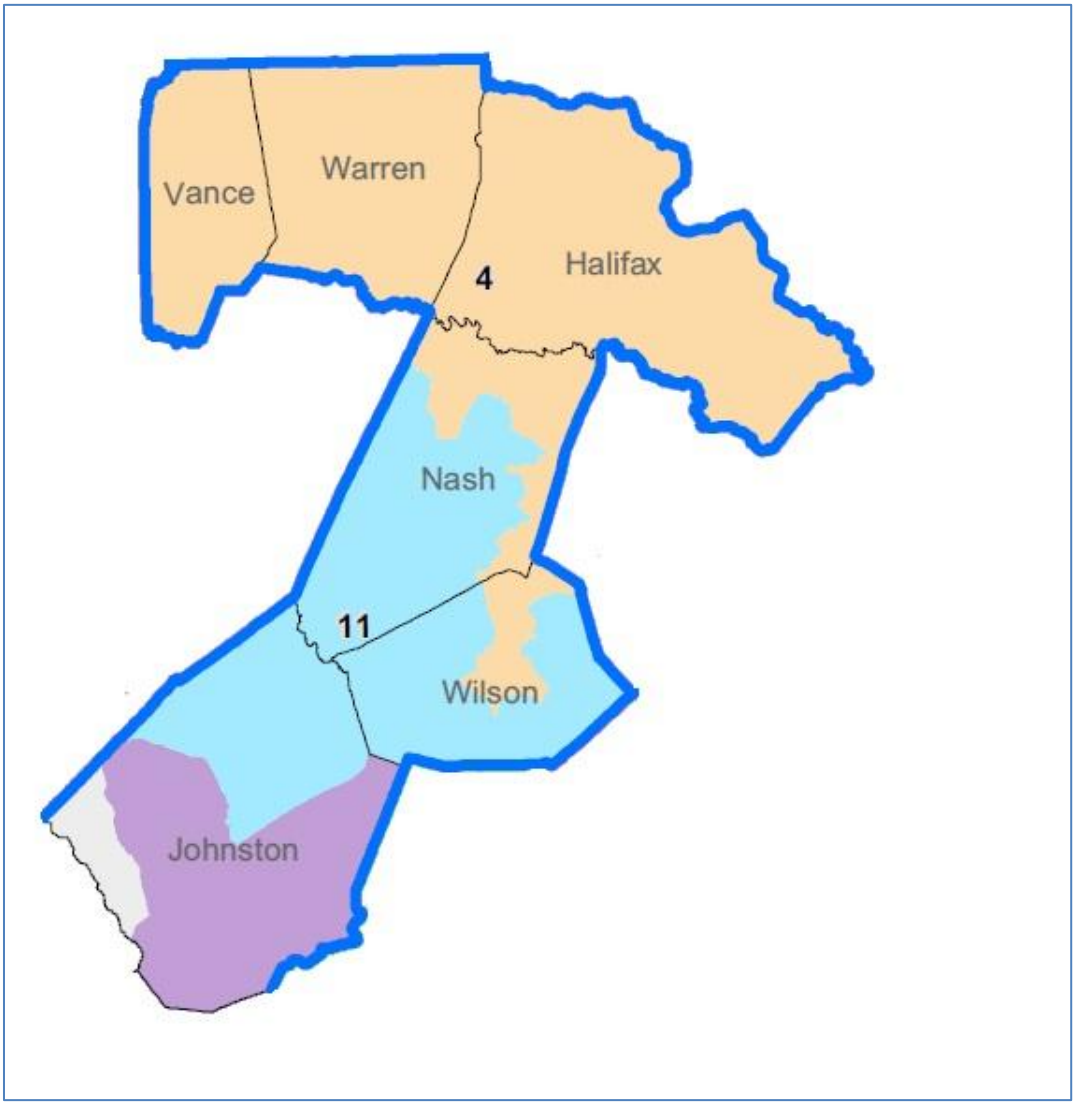
3. There Is No Valid VRA Basis For Splitting Wilson Or Lenoir Counties In The Enacted Senate Plan.

One means by which Defendants achieved their goal of proportionality in the Enacted Senate Plan was by drawing an additional majority-minority district in the northeast so that that area of the State would include for the first time three districts with an African-American population greater than 50%. (Doc. Ex. 1993). Wilson and Lenoir counties were both divided in pursuit of that goal.

The following analysis of these counties, and the districts within which Defendants placed these pieces of counties, is based entirely on Defendants' own documents and data. It demonstrates that these counties were divided by Senator Rucho and Mr. Hofeller in furtherance of their goal of proportionality. Proportionality is not required by the Voting Rights Act and under *Stephenson* a county may be divided only to the extent required by the Voting Rights Act.

(a) Wilson County.

A map of the Enacted Senate Plan with regard to Wilson County is set forth below:



Wilson County was kept whole in the 2002 and 2003 enacted Senate plans and in Judge Jenkins's 2002 Interim Senate plan.[32] There are 190,991 citizens

[32] See 2002 Proposed Senate Plan – Fewer Divided Counties Map, 2003 Senate Redistricting Plan Map, and 2002 Judge Jenkins Interim Senate Redistricting Plan Map. The districts within which Wilson was included in these plans during these years had a BVAP that did not exceed 34%. See Combined Senate Voting Age Population Tables for 2002, 2003, and 2002 Interim Plans. Wilson would also have been kept whole in Senate Fair and Legal and joined with three other whole counties (Edgecombe, Martin and Bertie) to form Senate District 3 which would

(Footnote Continued)

assigned to District 4, of whom 29,190 live in Wilson County. The population of the part of Nash County assigned to District 11 is 55,124. Simply by switching the 29,190 Wilson County citizens assigned to District 4 for 29,190 of the 55,124 Nash County citizens assigned to District 11, Wilson County could have been kept whole. *See* Fifth Affidavit of Christopher D. Ketchie (demonstrating that "[i]t is possible to draw Senate district 4 with a BVAP above 50% and a deviation in between +/-5%, while using the same 10 county grouping and avoiding a split to Wilson County") (Doc. Ex. 6345).

(b) Lenoir County.

A map of the Enacted Senate Plan with regard to Lenoir County is set forth below:

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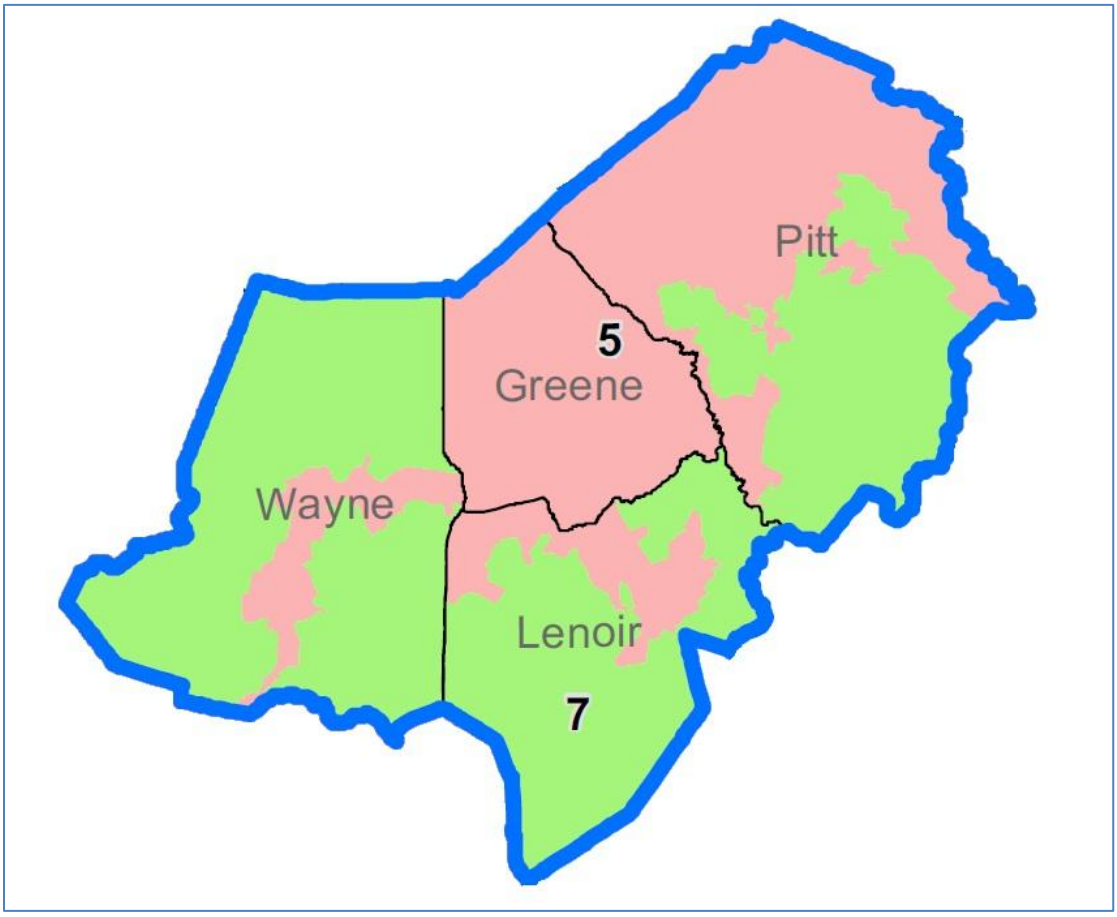
have had a BVAP of 46.53%. See Senate Fair and Legal Map and Senate Fair and Legal District 3 Statistics. Wilson County is included in District 4 in the Enacted Senate Plan. Senate District 4 is a VRA district created by Defendants by joining together all of Vance, Warren, and Halifax counties with an appendage extending southward from Halifax County through part of Nash County and then into part of Wilson County. In effect, the Enacted Senate Plan uses the northern and eastern parts of Nash County as a path to get into part of Wilson County. District 11 adjoins District 4 and includes the parts of Wilson County not included in District 4 as well as part of Johnston County.



Lenoir County was kept whole in the 2002 and 2003 enacted Senate plans and in Judge Jenkins's 2002 Interim Senate plan.[33] In the Enacted Senate Plan, Lenoir is included in Senate District 5, which is a VRA district created by

[33] See 2002 Proposed Senate Plan – Fewer Divided Counties Map, 2003 Senate Redistricting Plan Map, and 2002 Judge Jenkins Interim Senate Redistricting Plan Map. The districts within which Lenoir was included in these plans in these years did not have a BVAP that exceeded 39%. See Combined Senate Voting Age Population Tables for 2002, 2003, and 2002 Interim Senate Plans. Lenoir would also have been kept whole in Senate Fair and Legal and joined with Wayne County, which was also kept whole, to form Senate District 12 in which the BVAP was 33.41%. See Senate Fair and Legal Map and Senate Fair and Legal District 12 Statistics.

Defendants by joining all of Greene County with parts of Wayne, Lenoir and Pitt. In effect, District 5 was created by extending appendages from the core of the district into Lenoir and Wayne counties. There are 181,547 citizens assigned to District 5 of whom 28,640 live in Lenoir County. District 7 adjoins District 5 and includes the parts of Wayne, Lenoir and Pitt counties not included in District 5. The part of the population of Wayne County assigned to District 7 is 76,371. Simply by substituting the 28,640 Lenoir County citizens assigned to District 5 for 28,640 of the 76,371 Wayne County citizens assigned to District 5, Lenoir County would have been kept whole.

D. Conclusion.

For the reasons stated above, the Defendants have failed to strictly comply with the *Stephenson* criteria, and this Court should hold that the Enacted Senate and House Plans are unconstitutional violations of the Whole Counties Provision.

VI. THE TRIAL COURT ERRED IN CONCLUDING THAT THE CONSTITUTION DOES NOT REQUIRE THE GENERAL ASSEMBLY TO DRAW COMPACT DISTRICTS

The trial court held that the constitutional requirement of compactness was not violated on two grounds: (1) compactness is not an independent constitutional requirement (R p 1324); and (2) even if compactness is an independent constitutional requirement, there is no uniformly "adopted judicial standard by

which to measure compliance." (R p 1325). This Court, under *de novo* review, must consider the conclusions of law anew and "freely substitute[] its own judgment for that of the lower tribunal." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). The trial court's holdings are exactly opposite of this Court's holdings in the *Stephenson* decisions. Indeed, upholding the trial court's ruling would result in irregularly-shaped districts that were unconstitutionally non-compact in 2003 becoming constitutional just ten years later.

A. Compactness is a State Constitutional Requirement.

The trial court's rejection of compactness as a constitutional standard is directly contradicted by the analysis of compactness that was central to this Court's evaluation of the constitutionality of districts in the *Stephenson* decisions and in the Court's plain words in those decisions. For all districts not deemed necessary to meet the State's VRA obligations, the Court in *Stephenson I* directed that such districts located within a single county "*shall be* compact" and that "compact districts *shall be* formed" within all multi-county districts. *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 397 (emphasis added). For VRA districts, the Court directed compliance with compactness "to the maximum extent practicable." *Id.* at 382, 562 S.E.2d at 397. For both VRA and non-VRA districts, the Court directed

that "any new redistricting plans . . . shall depart from the legal requirements set forth herein only to the extent necessary to comply with federal law." *Id.* at 384, 562 S.E.2d at 398.

In *Stephenson II*, these compactness directions were labeled "requirements that must be present in any constitutionally valid plan." 357 N.C. at 305, 582 S.E.2d at 250. Notably, the trial court order reviewed and affirmed in *Stephenson II* made the specific finding that "[t]he *Stephenson* criteria include the requirement that districts should be compact and contiguous. If a given district fails to meet either of these requirements, the district is non-compliant with *Stephenson*." *Stephenson v. Bartlett*, No. 01 CVS 2885 (17 April 2003), p. 304 (copy attached hereto as Appendix 10). Further, the findings of non-compact districts were presented under the heading "Failures of Compactness" for the House districts and the heading "Compact and Contiguous" for the Senate districts. *Stephenson II*, 357 N.C. at 305, 582 S.E.2d at 250.

Indeed, compactness is the only explanation for this Court's decision in *Stephenson* that certain districts were invalid. As just one example, the Supreme Court in *Stephenson II* struck down House Districts 76 and 77 (which were non-VRA districts located only in Rowan County) on the ground of compactness; no other ground was cited by the trial court or this Court for their invalidity. In this

case, the trial court's order states that "nothing in *Stephenson II* suggests that, standing alone, without a WCP violation, the failure to achieve compliance with traditional redistricting criteria would be sufficient to defeat a legislatively enacted redistricting plan." (R p 1324). Yet, the striking down of House Districts 76 and 77 in *Stephenson II* reflects exactly that: there were no WCP violations for two districts drawn entirely within Rowan County, and the lack of compactness is the only basis for striking down these districts. The Supreme Court, of course, has no power to strike down legislative districts on any ground other than unconstitutionality (or the violation of a federal statute, which was not at issue in Rowan County).

It is true that the word "compact" does not appear in the Constitution, but as explained in the *Stephenson* decisions, compactness is a constitutional, anti-gerrymandering principle based on the Equal Protection Clause of the State Constitution. The trial court in *Stephenson II*, affirmed by this Court, noted the same: "The 2002 House and Senate plans enacted by the General Assembly contain districts that are not sufficiently compact to meet the *requirements of the equal protection clause*." *Stephenson II*, 357 N.C. at 308, 582 S.E.2d at 251 (emphasis added). When the General Assembly assigns some citizens to compact districts and others to non-compact districts, it unequally burdens the fundamental

right to vote for citizens assigned to non-compact districts. The notion that different forms of districts unequally burden the right to vote was discussed and applied by this Court in *Stephenson I* in analyzing the constitutionality of the use of multi-member districts in redistricting plans. Observing that "it is well settled in this State that the right to vote on equal terms is a fundamental right," which guarantees all citizens "substantially equal voting power," this Court held:

> In our view, use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection clause of the State Constitution unless it is established that the inclusion of multi-member districts advances a compelling state interest.

Stephenson I, 355 N.C. at 378 -79, 393, 562 S.E.2d at 393. Multi-member districts produce "unwieldy, confusing and unreasonably long ballots," as contrasted with single-member districts, and result in "an impermissible distinction among similarly situated citizens based on the population area in which they reside." *Id.* at 377-78, 562 S.E.2d at 393. Multi-member districts also give their voters an unfair advantage over voters in single-member districts because the multi-member voter has more representation. "It is a political reality that legislators are much more inclined to listen to and support a constituent than an outsider with the same problem." *Id.* at 380, 562 S.E.2d at 395 (quoting *Kruidenier v. McCulloch*, 258 Iowa 1121, *cert denied*, 385 U.S. 851 (1966)).

And so it is with citizens assigned to non-compact districts. Ragged and meandering district lines cause confusion among both voters and their representatives. Voters do not know who the candidates for district elections are and do not know who represents them after the election. Representatives do not know who their constituents are and to whom they should be responsive. (Doc. Ex. 3319-36). Sometimes district lines divide single family homes and apartment buildings and complexes into different districts. (Doc. Ex. 3287). As compared to citizens assigned to compact districts, citizens assigned to non-compact districts have an unequal opportunity to "instruct their representatives" and "to apply to the General Assembly for redress of grievances." N.C. Const. Art. I, § 12.

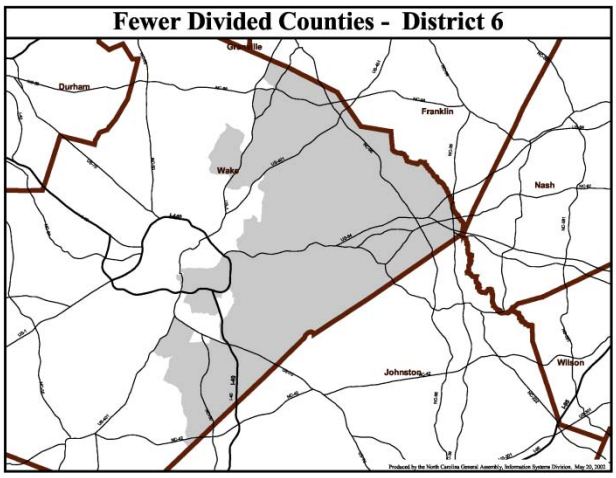
In sum, compactness is a traditional redistricting criteria mandated by North Carolina's Constitution, as evidenced by *Stephenson*, the language of the Constitution, and equal protection principles.

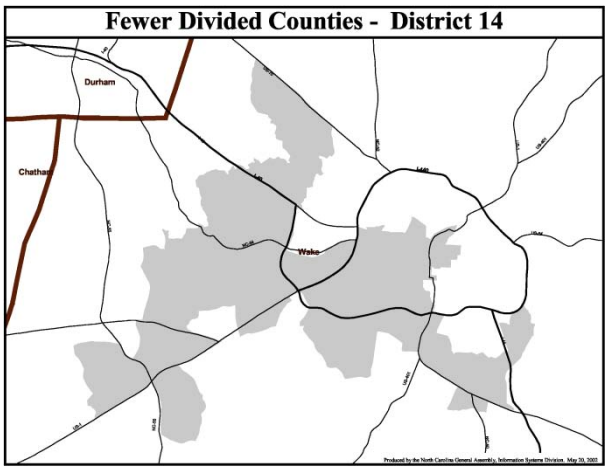
B. This Court Applied Compactness Standards in *Stephenson II*.

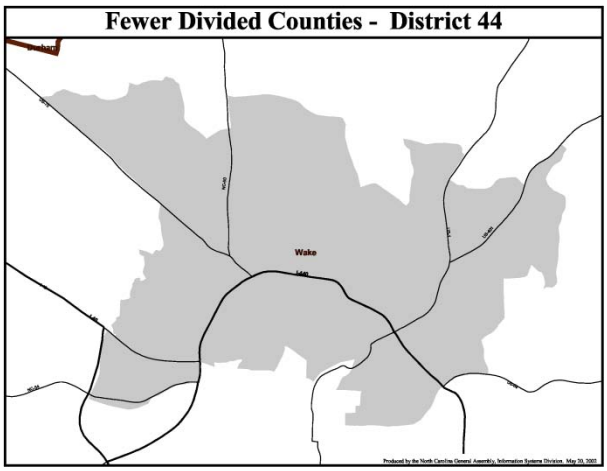
The trial court's conclusion that a compactness claim is not justiciable because there is no uniformly "adopted judicial standard by which to measure compliance" (R p 1325) ignores this Court's decision in *Stephenson II*. There this Court adopted concrete, visual examples of districts failing to meet minimum constitutional compactness standards that the trial court could have, and should

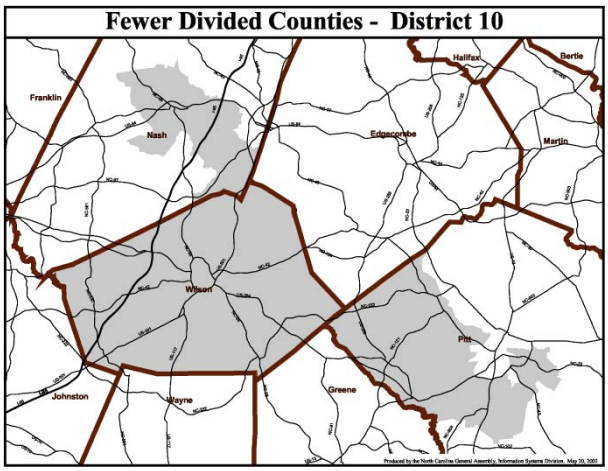
have, applied here. Set out below are maps of six 2002 Senate Districts this Court in *Stephenson II* affirmed "to violate the *Stephenson* mandate that districts shall be compact," 357 N.C. at 310, 582 S.E.2d at 252, and maps of 17 House districts this Court in *Stephenson II* affirmed "are not compact and fail to strictly comply with *Stephenson*." *Id.* at 313, 582 S.E.2d at 254.

Senate Districts Declared Unconstitutionally Non-Compact in *Stephenson II*

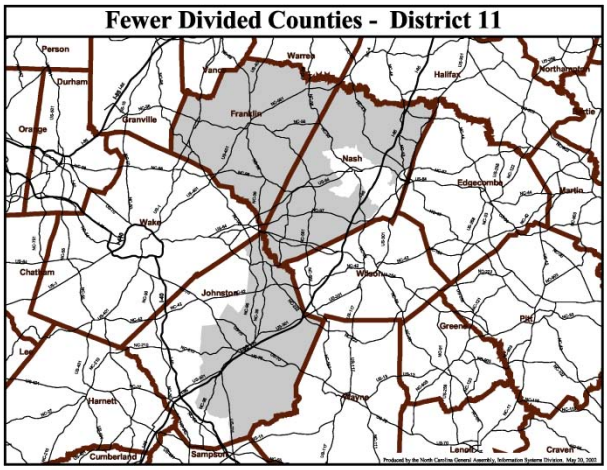


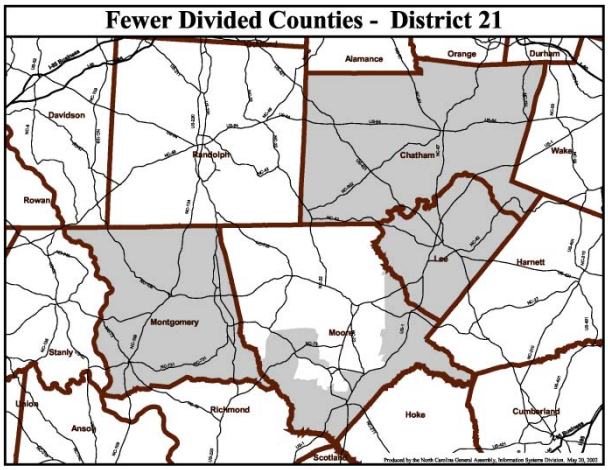


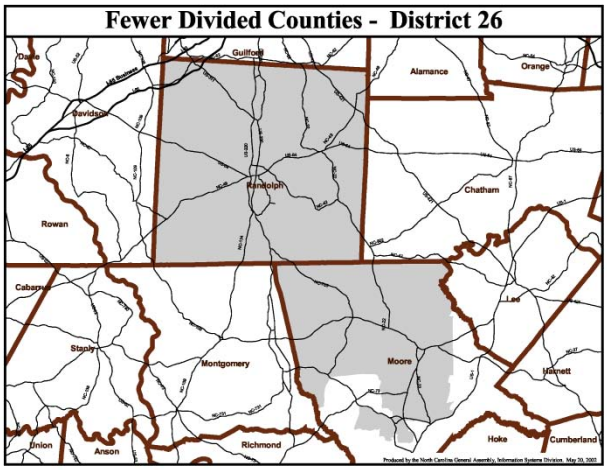




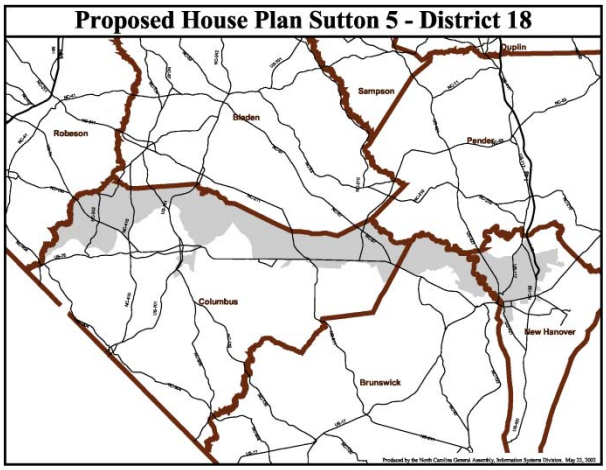
Senate Districts Declared Unconstitutionally Non-Compact in *Stephenson II*

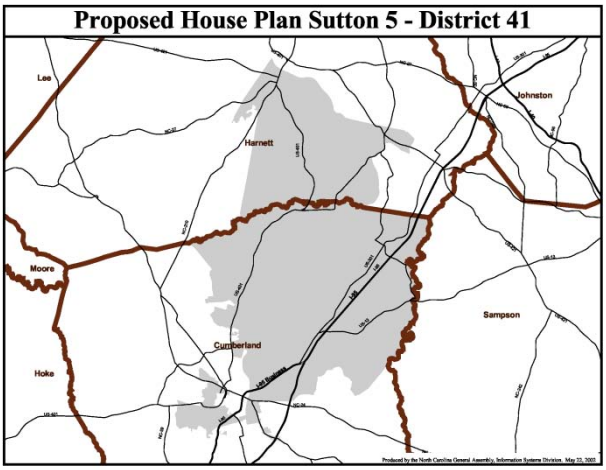


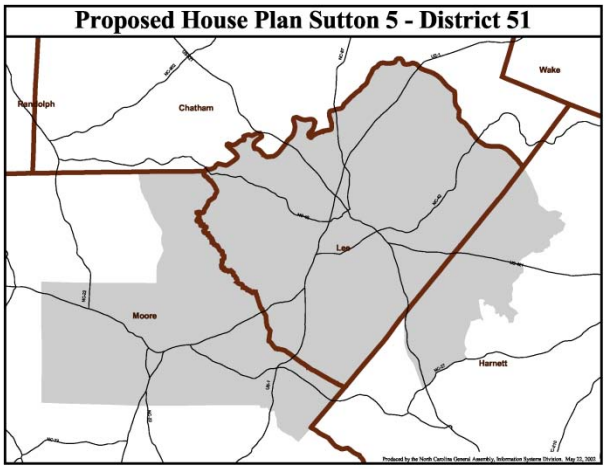


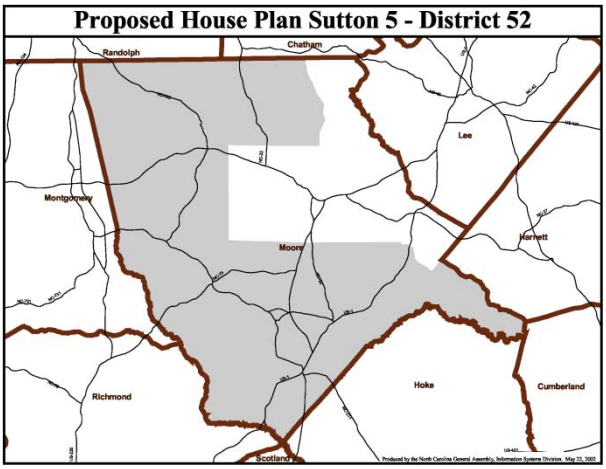


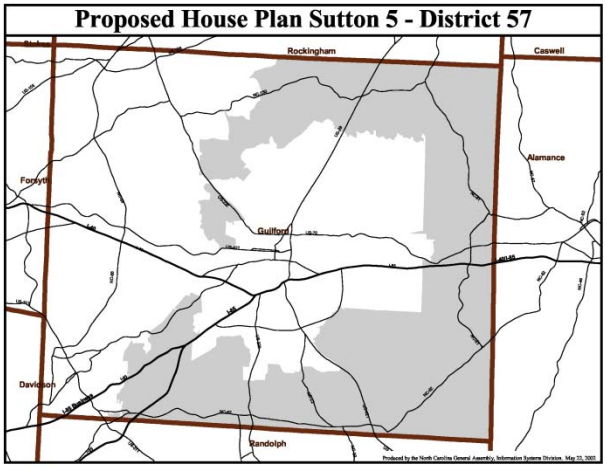
House Districts Declared Unconstitutionally Non-Compact in *Stephenson II*

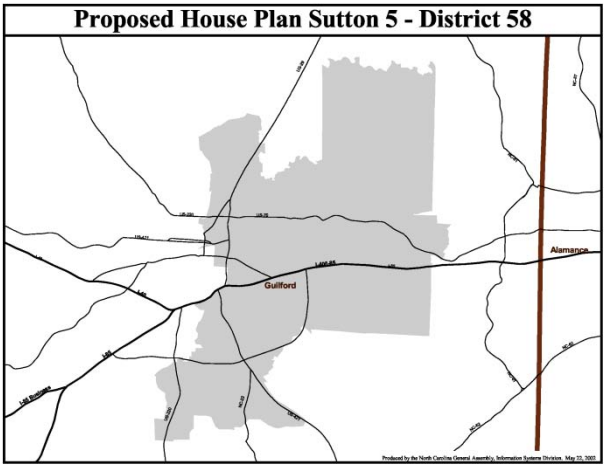






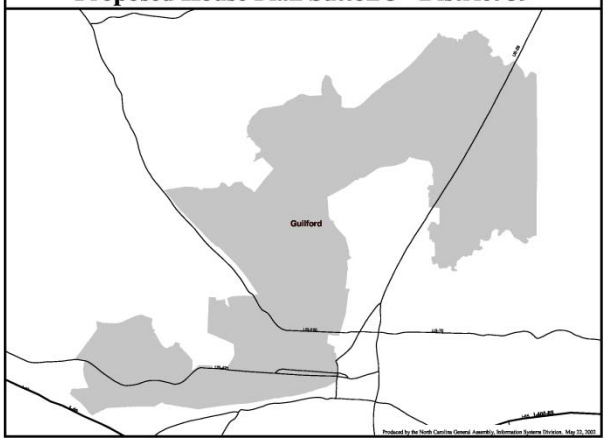




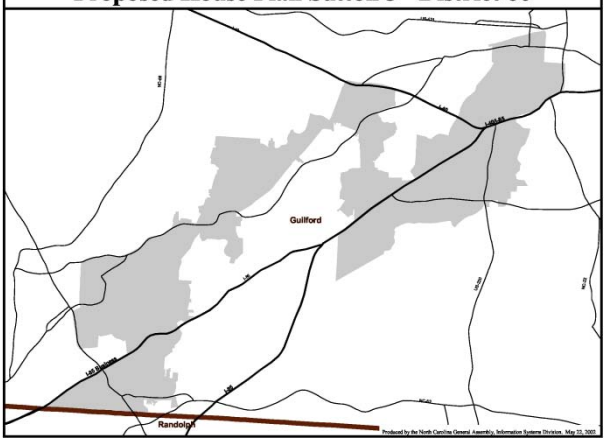


Senate Districts Declared Unconstitutionally Non-Compact in *Stephenson II*

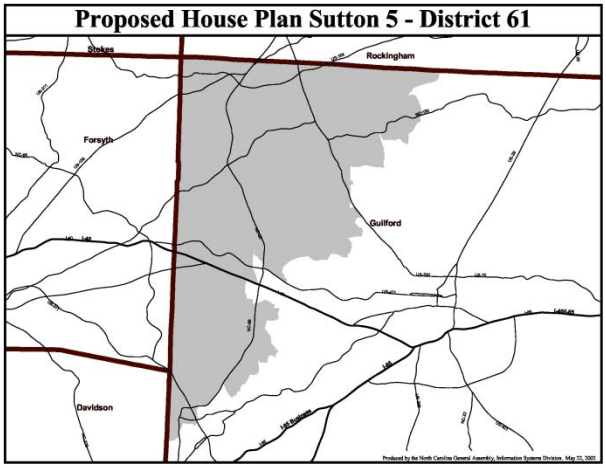
Proposed House Plan Sutton 5 - District 59



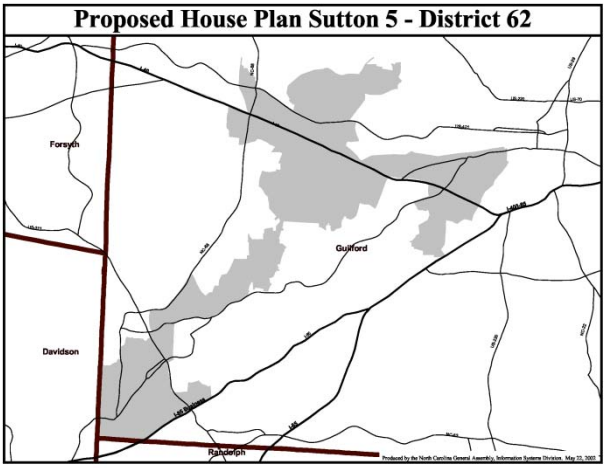
Proposed House Plan Sutton 5 - District 60



Proposed House Plan Sutton 5 - District 61



Proposed House Plan Sutton 5 - District 62



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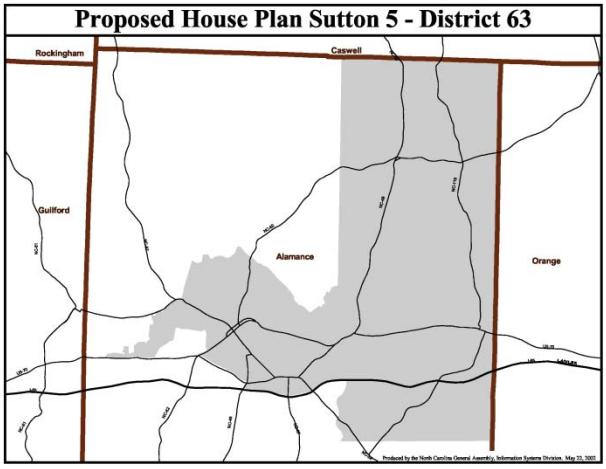
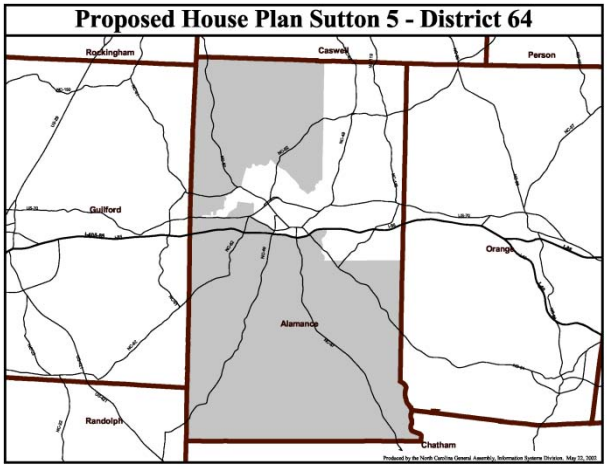
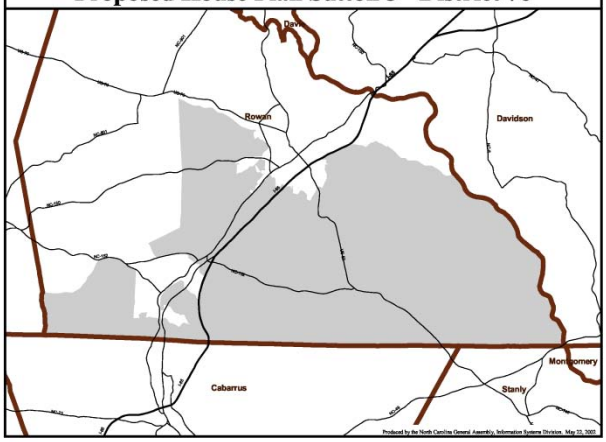


Proposed House Plan Sutton 5 - District 64

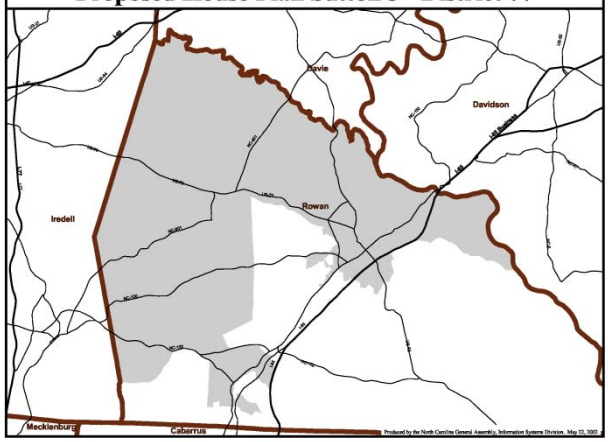


Senate Districts Declared Unconstitutionally Non-Compact in *Stephenson II*

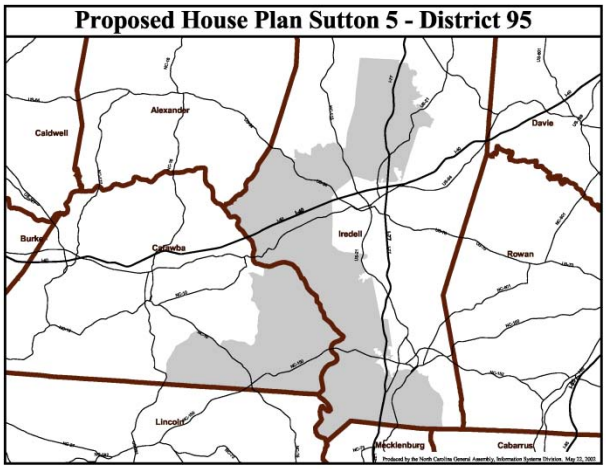
Proposed House Plan Sutton 5 - District 76



Proposed House Plan Sutton 5 - District 77



Proposed House Plan Sutton 5 - District 95



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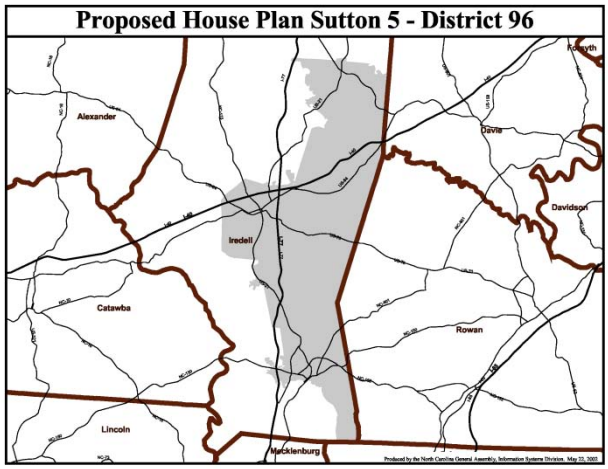
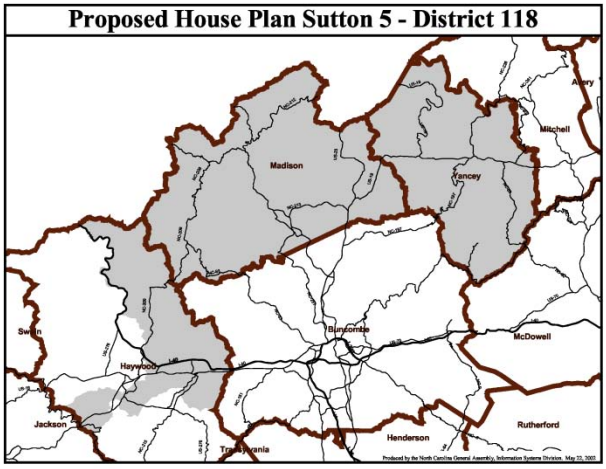


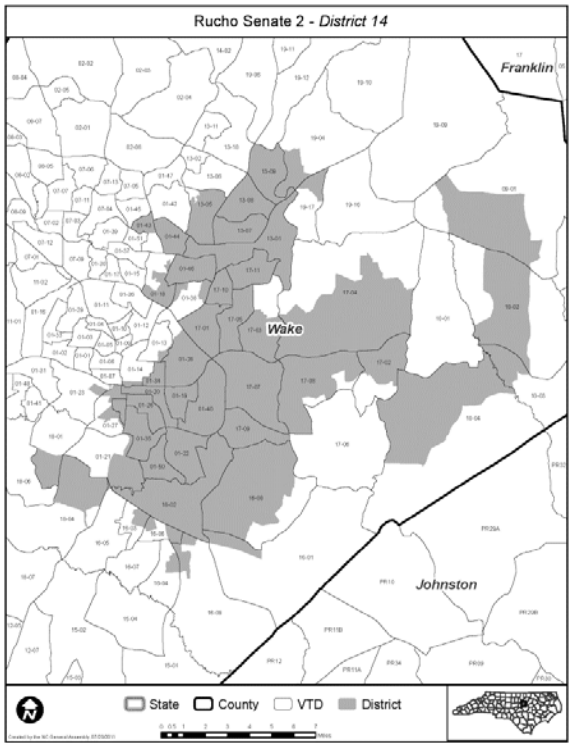
Proposed House Plan Sutton 5 - District 118

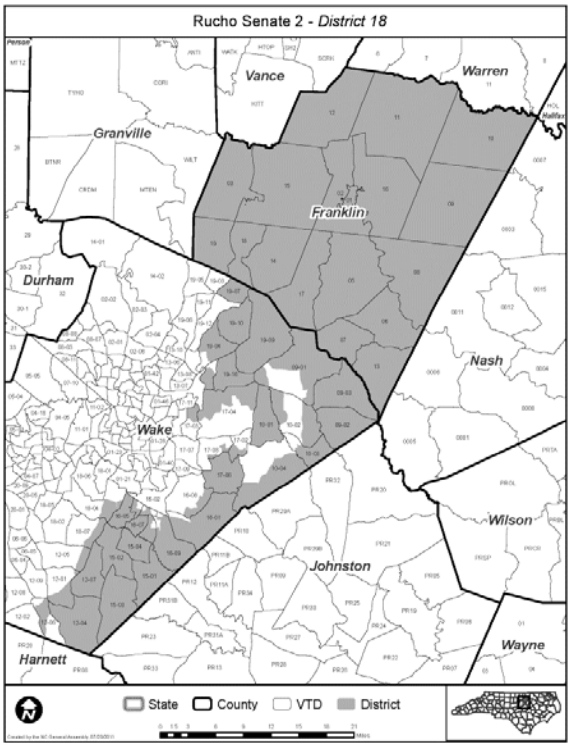


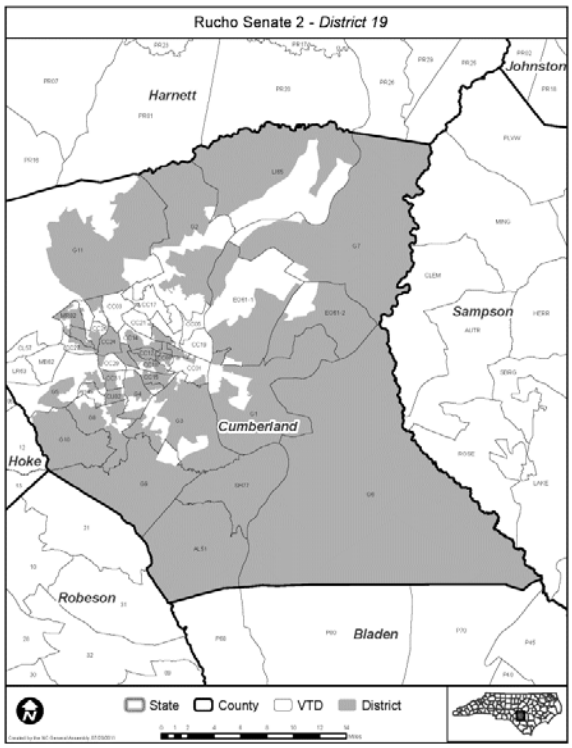
These concrete examples of non-compact, unconstitutional districts plainly refute the trial court's observation that there is "no adopted judicial standard by which to measure compliance" with compactness. (R p 1325).

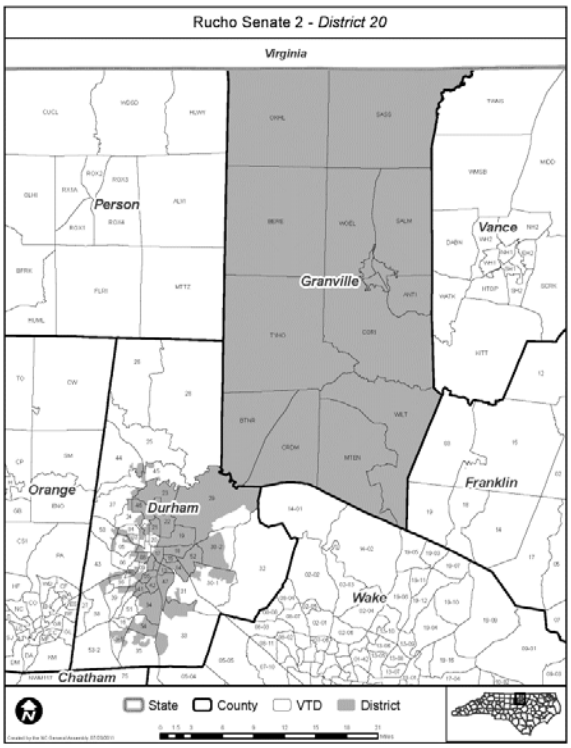
C. By the Concrete Standards Established by this Court in *Stephenson II* At Least Nine 2011 Senate Districts Are Unconstitutionally Non-Compact.

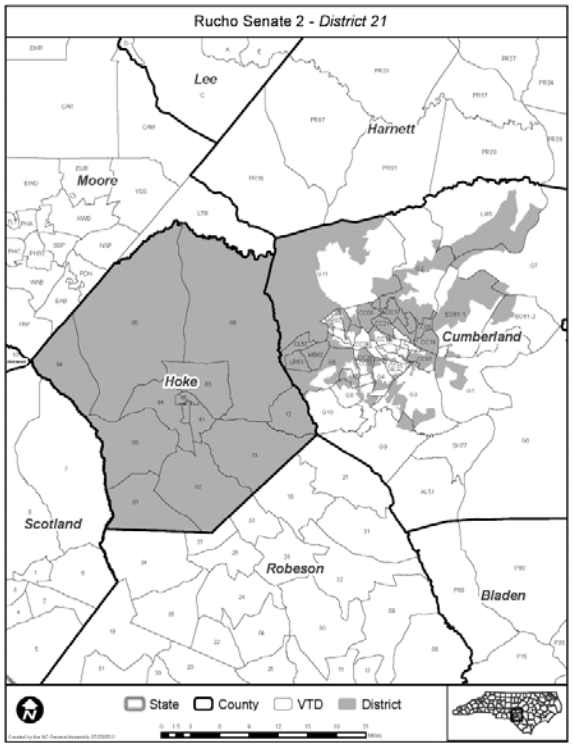
There is no need to remand these cases to the trial court to apply the compactness standards established by the Court in *Stephenson II*. A simple visual comparison of the shape of the Senate districts found unconstitutional in *Stephenson II* and the Senate districts challenged in these cases establishes the merits of Plaintiffs' claims. Maps of these nine challenged districts are set out below.


Rucho Senate 2 - District 14
Franklin
Wake
Johnston
State
County
VTD
District

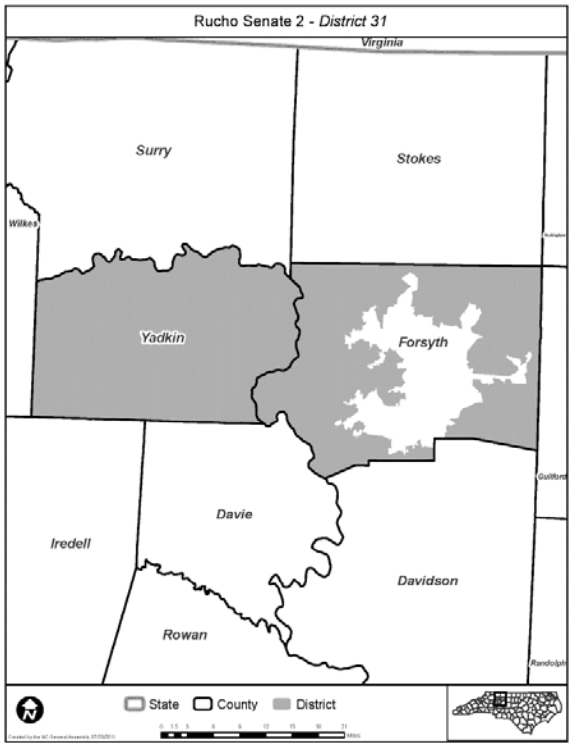

Rucho Senate 2 - District 18
Vance
Warren
Granville
Franklin
Durham
Nash
Wake
Wilson
Johnston
Wayne
Harnett
State
County
VTD
District

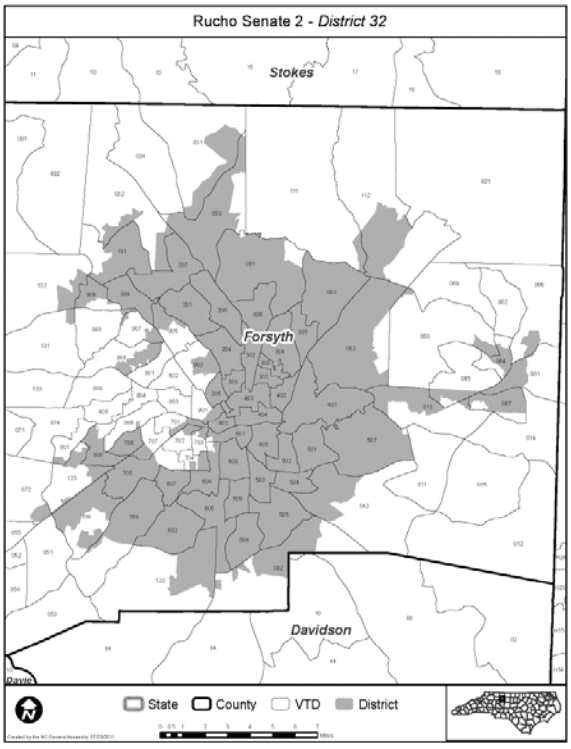

Rucho Senate 2 - District 19
Harnett
Johnston
Sampson
Cumberland
Hoke
Robeson
Bladen
State
County
VTD
District

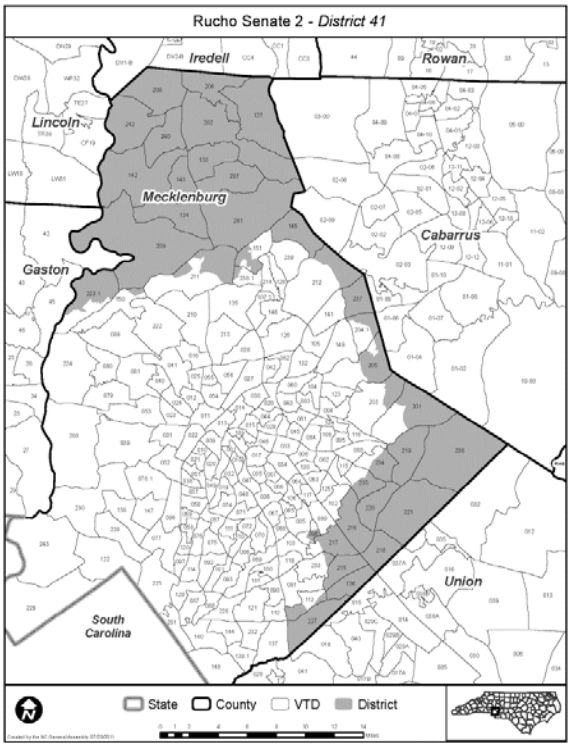

Rucho Senate 2 - District 20
Virginia
Person
Vance
Granville
Orange
Durham
Franklin
Wake
Chatham
State
County
VTD
District


Rucho Senate 2 - District 21
Lee
Harnett
Moore
Cumberland
Hoke
Scotland
Robeson
Bladen
State
County
VTD
District


Rucho Senate 2 - District 22
Virginia
Caswell
Person
Granville
Alamance
Orange
Durham
Wake
Chatham
State
County
District

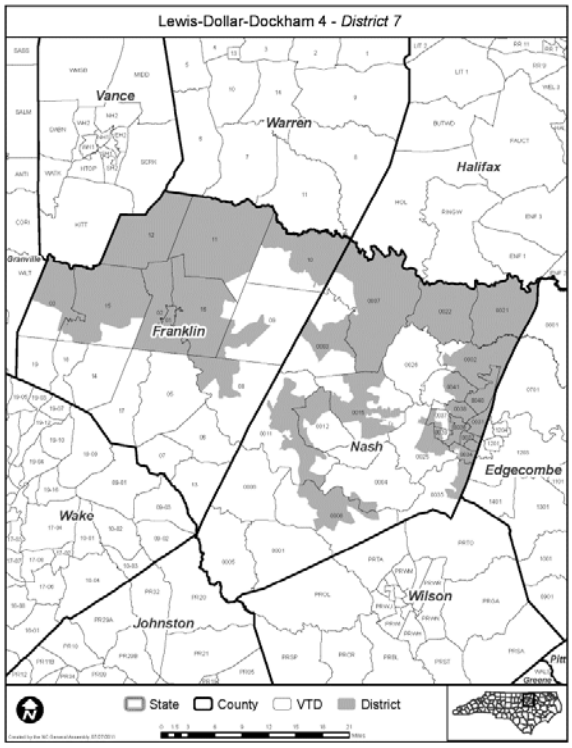

Rucho Senate 2 - District 31
Virginia
Surry
Stokes
Wilkes
Yadkin
Forsyth
Guilford
Davie
Iredell
Davidson
Rowan
Randolph
State
County
District

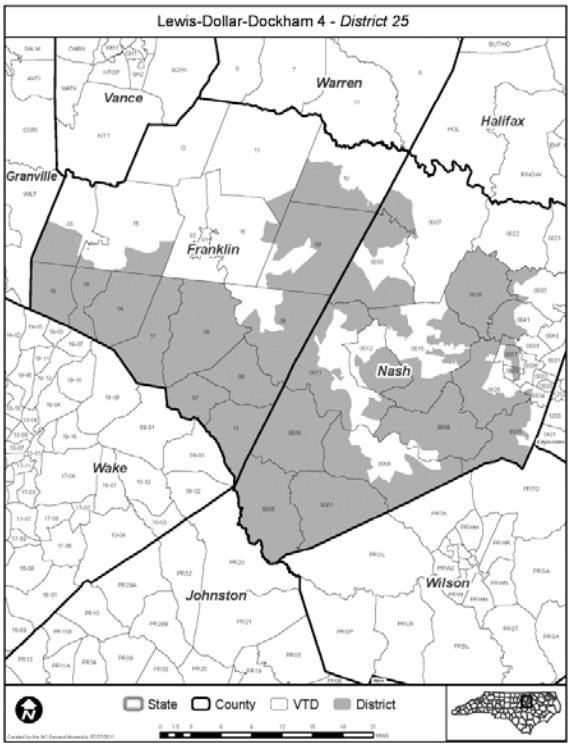

Rucho Senate 2 - District 32
Stokes
Forsyth
Davidson
Davie
State
County
VTD
District



D. By the Concrete Standards Established by this Court in *Stephenson II* at Least Sixteen House Districts are Unconstitutionally Non-Compact.

Just as there is no need to remand these cases to the trial court to apply the compactness standards established by this Court in *Stephenson II* to challenged Senate districts, there is no need for remand to make that determination for House districts. A visual comparison of the shape of the 17 House districts found unconstitutional in *Stephenson II* and the House districts challenged here will establish the merits of Plaintiffs' claims. Maps of the challenged districts in the Enacted House plan are set forth below.


Lewis-Dollar-Dockham 4 - District 7
Vance
Warren
Halifax
Granville
Franklin
Nash
Edgecombe
Wake
Wilson
Johnston
State
County
VTD
District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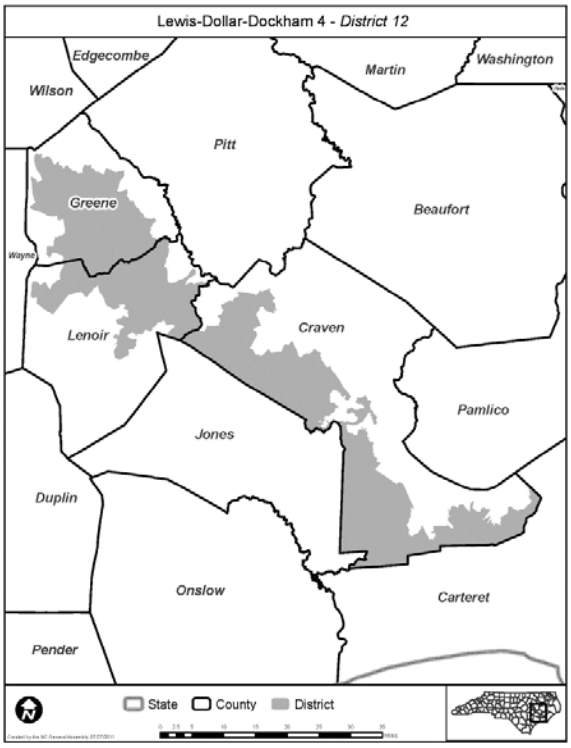
Warren
Halifax
Granville
Franklin
Nash
Wake
Johnston
Wilson
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 10
Franklin
Nash
Edgecombe
Bertie
Wake
Martin
Wilson
Pitt
Johnston
Greene
Beaufort
Wayne
Lenoir
Craven
Jones
Sampson
Duplin
Onslow
Carteret
Pender
State
County
District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Martin
Washington
Wilson
Pitt
Greene
Beaufort
Wayne
Lenoir
Craven
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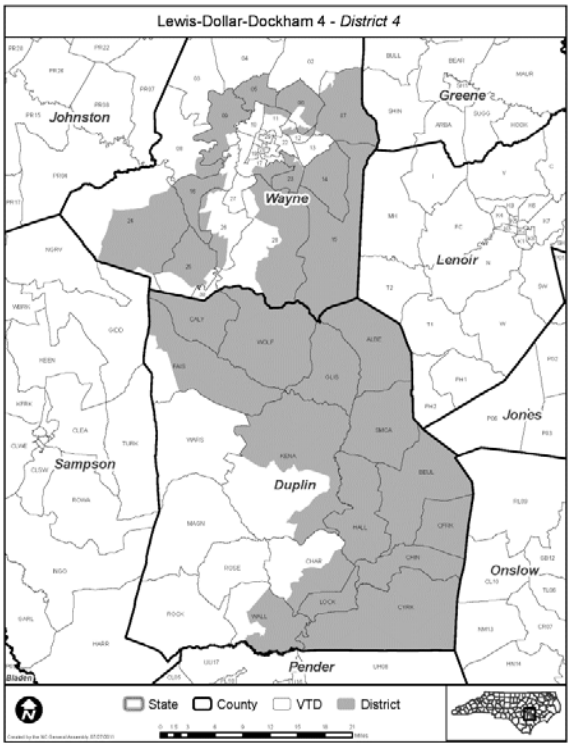
Jones
Duplin
Onslow
Carteret
Pender
State
County
District


Lewis-Dollar-Dockham 4 - District 4
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Greene
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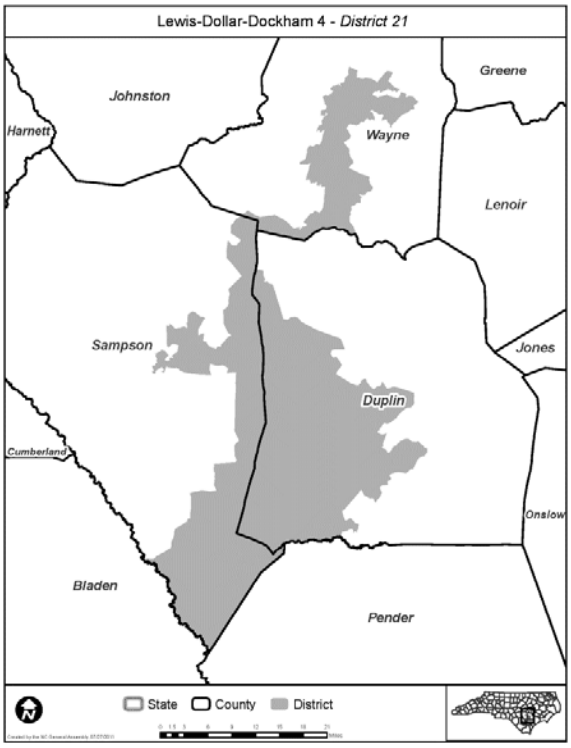
Lenoir
Jones
Sampson
Duplin
Onslow
Pender
Bladen
State
County
VTD
District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Harnett
Wayne
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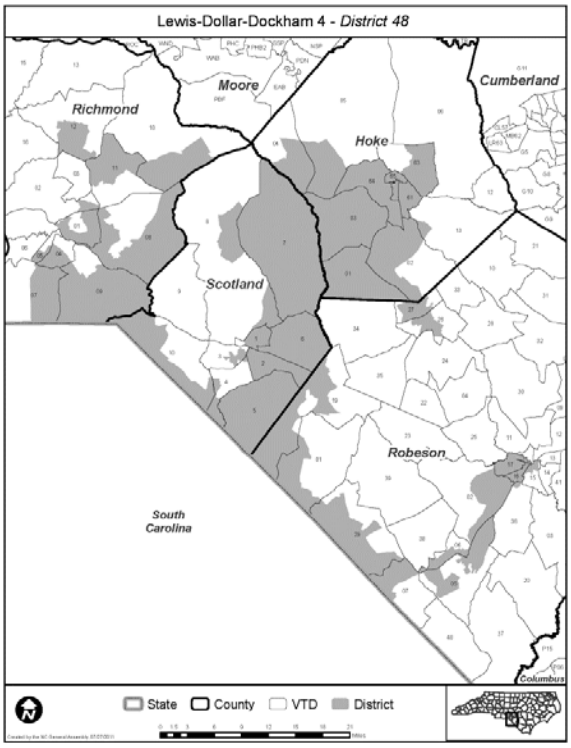
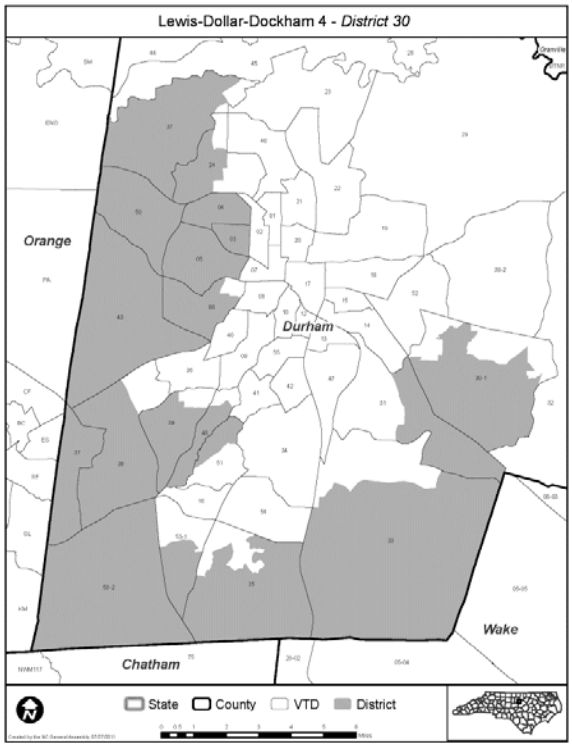
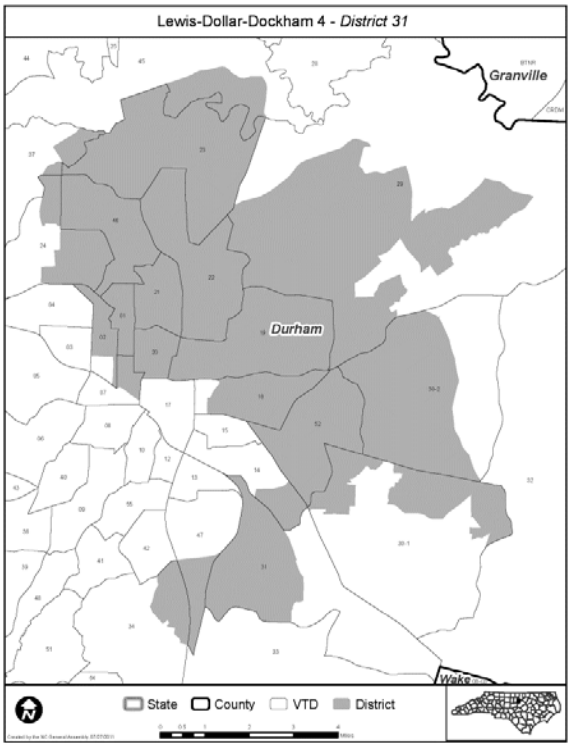
Jones
Duplin
Cumberland
Onslow
Bladen
Pender
State
County
District


Lewis-Dollar-Dockham 4 - District 48
Richmond
Moore
Cumberland
Hoke
Scotland
Robeson
South Carolina
Columbus
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 66
Randolph
Chatham
Lee
Harnett
Stanly
Montgomery
Moore
Richmond
Cumberland
Hoke
Anson
Scotland
Robeson
South Carolina
Columbus
State
County
District


Lewis-Dollar-Dockham 4 - District 30
Orange
Durham
Wake
Chatham
State
County
VTD
District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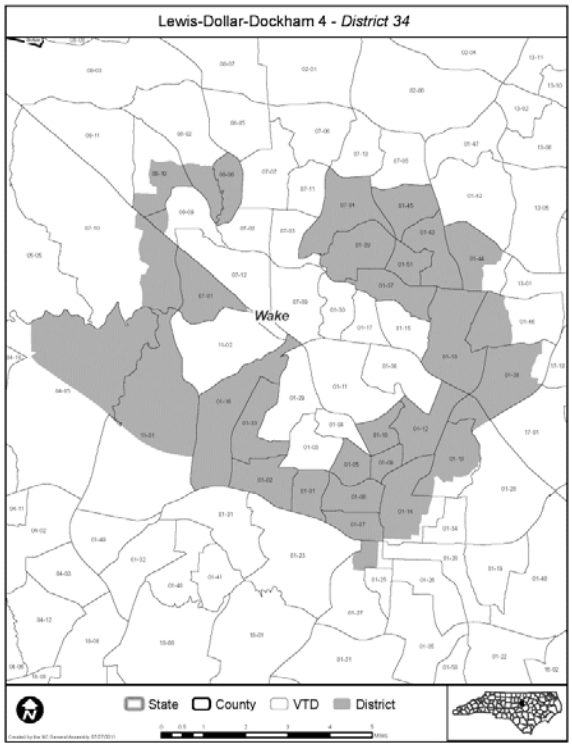
Durham
Wake
State
County
VTD
District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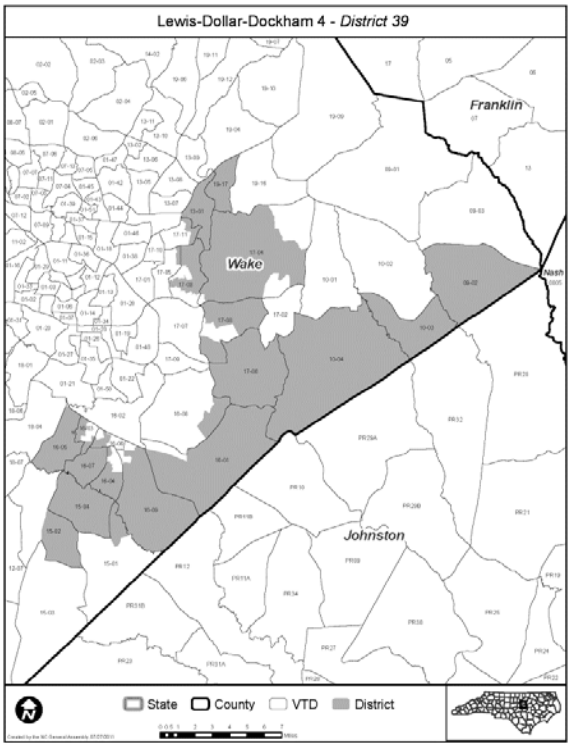
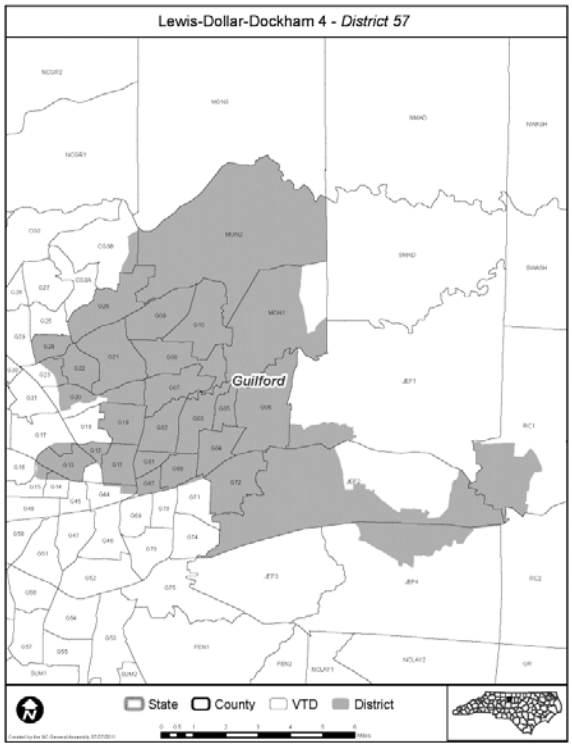
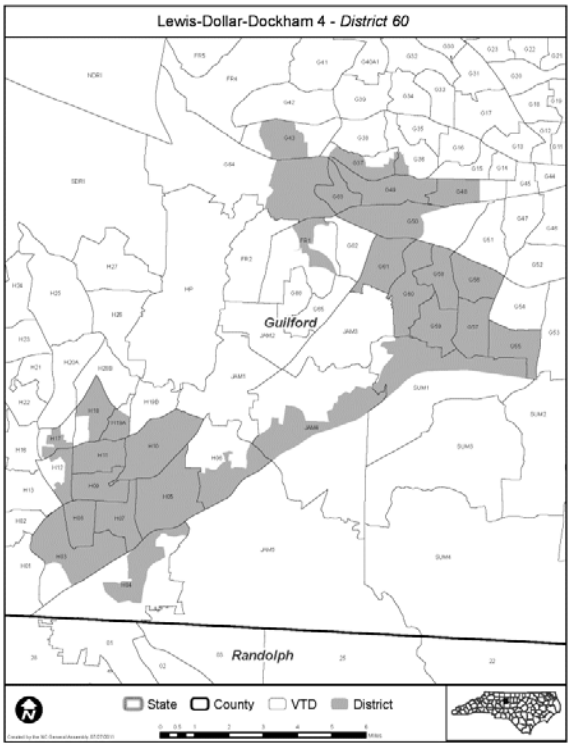
Wake
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 39
Franklin
Wake
Johnston
Nash
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 57
Guilford
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 60
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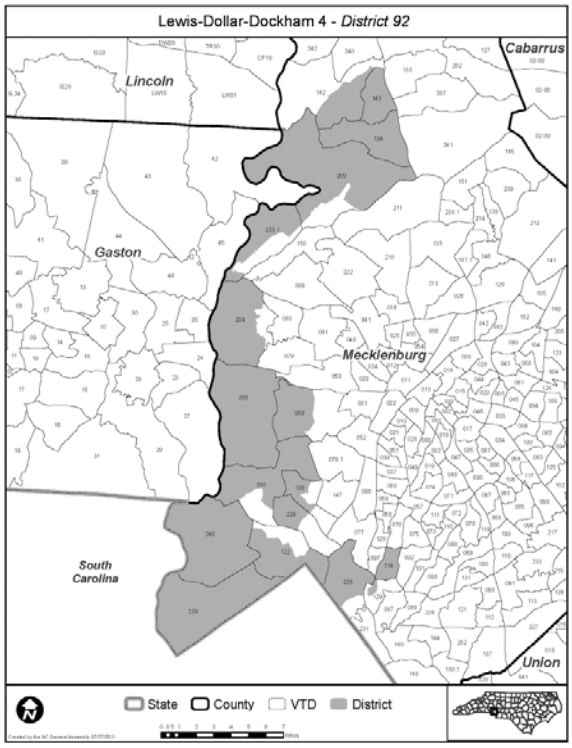
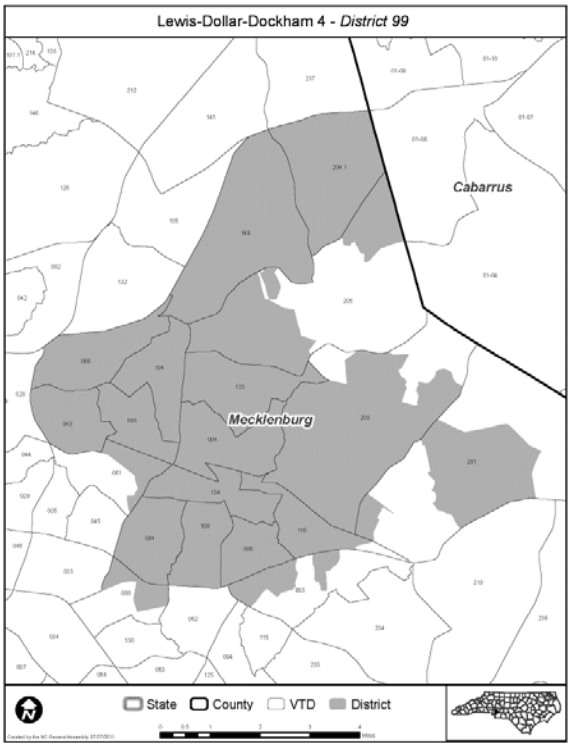
Randolph
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 92
Cabarrus
Lincoln
Gaston
Mecklenburg
South Carolina
Union
State
County
VTD
District


Lewis-Dollar-Dockham 4 - District 99
Cabarrus
Mecklenburg
State
County
VTD
District

E. The Compactness Requirements Established In *Stephenson II* Apply To Congressional Districts As Well As Legislative Districts.

Congress has delegated to the States the power to draw congressional districts. 2 U.S.C. § 1. In exercising that power, the General Assembly is constrained by the provisions of the Equal Protection Clause of the State Constitution. While compactness is not an independent requirement under the federal constitution, it is, as established earlier, a requirement under the Equal Protection Clause of the State Constitution and must also be applied to congressional districts.[34]

The examples of the Senate and House districts declared unconstitutionally non-compact in *Stephenson II* provide an appropriate standard for this Court to adjudicate the non-compactness of the 2011 congressional districts. The twists and turns of district lines joining together citizens who have no other boundaries or communities in common are as evident in the Congressional plan as in the House

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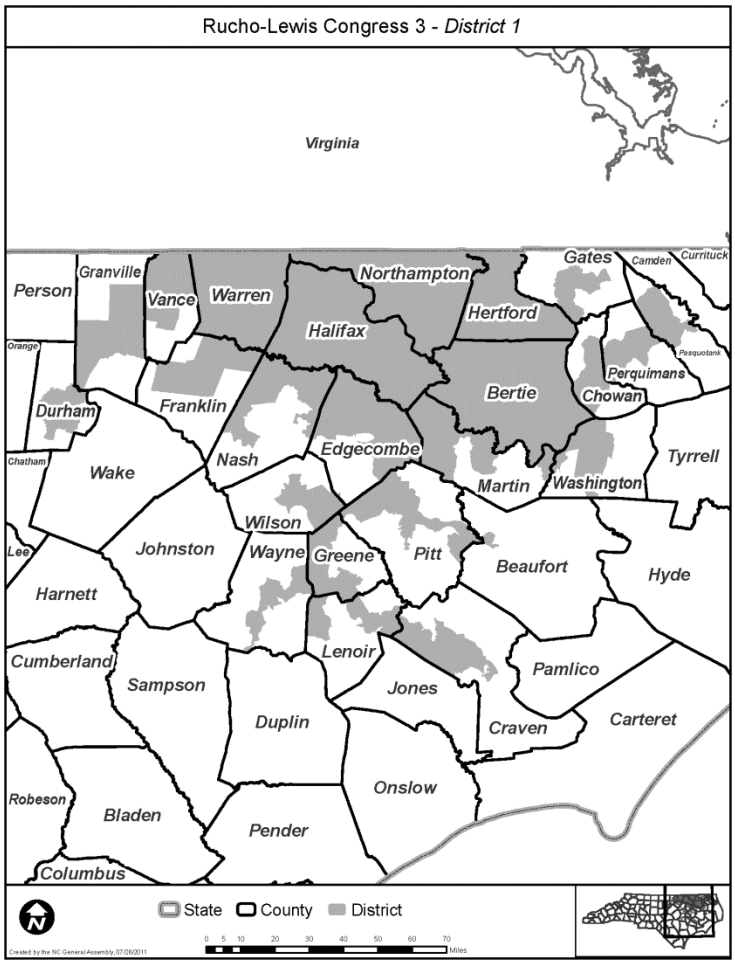
[34] Earlier the Equal Protection Clause of the United States Constitution was also thought to include a compactness requirement. *See Drum v. Seawell*, 271 F. Supp 193, 194 (M.D.N.C. 1967) (three judge court) ("Regretfully, we note that tortuous lines still delineate the boundaries of some of the districts, particularly the Ninth and Tenth Districts. As we previously observed with respect to the two houses of the State Legislature, we assume that when congressional districts are reapportioned following the 1970 decennial census, each congressional district will be so drawn as to not only achieve equal representation for equal numbers of people as nearly as practicable *but will also be reasonably compact*.") (emphasis added).

and Senate plans. The only differences are the scale of the violations and the number of citizens whose rights are violated.

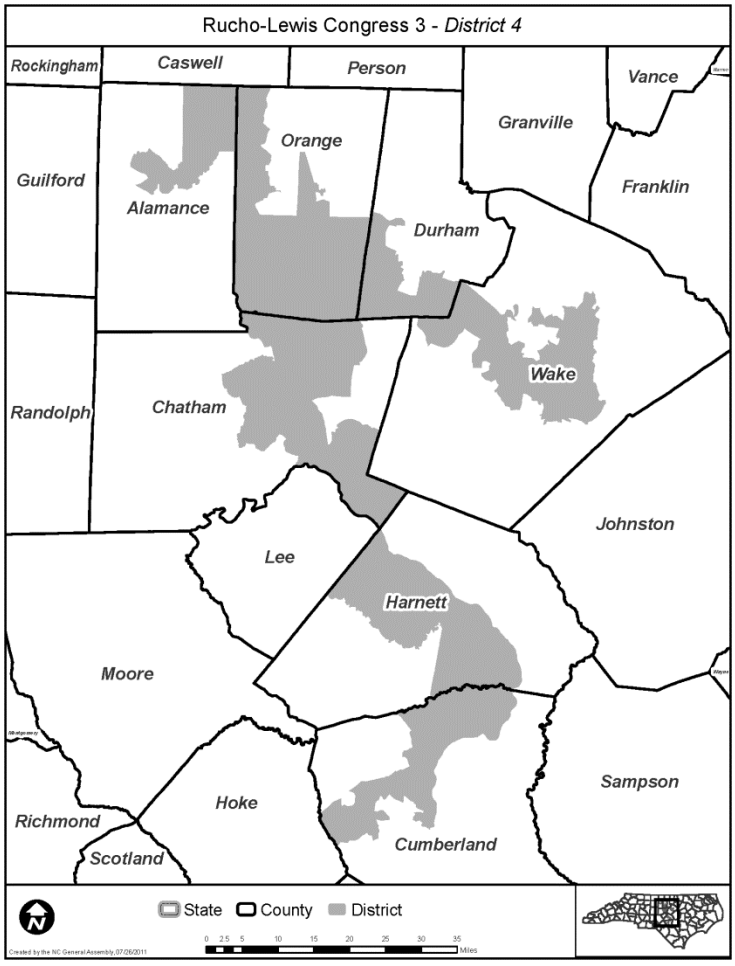
CD 1 is depicted below.



It is formed from 5 whole counties and ragged pieces of 18 counties. The perimeter of the district is 1,319.37 miles long, and the district itself spans almost half the state. Previous versions of this district challenged on federal racial gerrymander grounds, but not state constitutional compactness grounds, were

equally non-compact, but at least embraced an area of the State that was uniformly rural. See *Shaw v. Hunt*, 861 F. Supp. 408, 470 (E.D.N.C. 1994) (three-judge court) (observing that the "distinctively rural" character of CD 1 "is a fact so much within the common knowledge of inhabitants of the state that it probably is subject to judicial notice."). The 2011 version abandons that "distinctively rural" area for Durham which includes approximately one-quarter of the district's population.

CD 4 is depicted below.

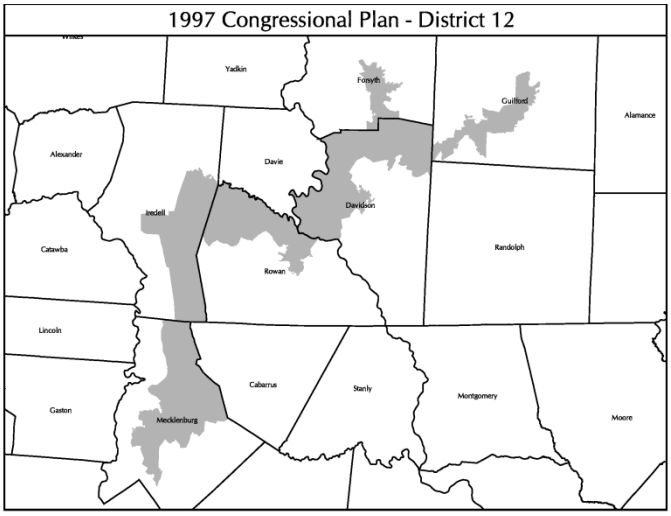


CD 4 bears no resemblance to any congressional district previously established by the General Assembly. No whole county is included in CD 4. It is composed entirely of ragged pieces of 6 counties and completely dissects three counties (Chatham, Harnett and Cumberland).

CD 12 is depicted below.

Like CD 1, CD 12 has been challenged previously on racial gerrymander grounds. The conclusions of the federal courts regarding the compactness of the

district in a racial-gerrymander context are instructive with regard to the lack of compactness of the district in a state equal protection context. In *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (three judge court), the 1997 version of CD 12 was challenged on racial gerrymander grounds. The version of CD 12 challenged there is almost identical in shape to the version of the district challenged here. Large Black populations in Mecklenburg county are joined by a land bridge to large Black populations in Forsyth and Guilford counties. The only differences between the 1997 and 2011 versions are the counties used as the land bridge. The 1997 and 2011 versions of CD 12 are depicted below:



The *Cromartie* district court described the 1997 version of CD 12 as a "racial archipelago" constructed by the General Assembly without any regard for

"traditional districting criteria such as contiguity, geographical integrity, community of interest and compactness." 133 F. Supp. 2d at 420. This part of the district court's order was not disturbed on appeal. That description remains accurate today.

VII. THE TRIAL COURT ERRED IN REJECTING PLAINTIFFS' CLAIM THAT THE UNNECESSARY SPLITTING OF PRECINCTS UNCONSTITUTIONALLY BURDENS THE RIGHT TO VOTE

A. Standard of Review.

"*De novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Libertarian Party v. State*, 365 N.C. 41, 46, 707 S.E.2d 199, 202-203 (2011).

B. Introduction.

Plaintiffs alleged in their complaints that North Carolinians are being deprived of the fundamental right to vote as the result of the Defendants' actions creating two classes of voters: a class assigned to split precincts who are burdened by the problems of split precincts, and a class of voters not assigned to split precincts who are not burdened by the problems of split precincts. (R pp 246-47, 1332). Additionally, the burdens of these splits are disproportionately borne by Black voters in the State, in violation of the state and federal equal protection guarantees.

There is no dispute in the evidence about the scope of precinct-splitting Defendants engaged in when drawing the enacted House and Senate plans. More than a million citizens (1,326,244) reside in the 257 precincts Defendants split in constructing the enacted Senate plan and almost two million citizens (1,878,626) reside in the 395 precincts Defendants split in constructing the House plan. Overall, Defendants assigned more than one-quarter of North Carolina's voters to split precincts (Hall Aff. ¶ 16) (Doc Ex. 423). And that burden is borne differently by race—in the Enacted House Plan, 26.8% of the state's Black voting age population lives in a split VTD, while only 16.6% of the state's white VAP lives in a split VTD. In the Senate Plan, 19.4% of the state's BVAP lives in a split VTD, while only 11.8% of the state's WVAP lives in a split VTD. (Doc. Ex. 1203). There is no precedent for this action either in terms of the number of citizens impacted or the departure from established public policy. Only 55 precincts were split in the 2003 Senate plan and only 198 in the 2003 House plan. (R pp 342, 550-52). Since 1995, the State's public policy, as established by the General Assembly itself, has been to enact redistricting plans "without splitting precincts" except as required to comply with the state or federal constitutions or federal law. 1995 S.L. 423 § 2, amended by 2006 S.L. 264 § 75.5(a). No anomaly in the 2010 Census or change in the configuration of precincts by the counties made the

General Assembly abandon past practices and policy in 2011. A competing 2011 Senate plan would have split 6 precincts instead of 257 precincts and a competing House plan would have divided 129 precincts instead of 395 precincts. (R pp 342, 550-52).

Nor is there any dispute in the evidence that precinct-splitting on the scale employed by Defendants creates substantial burdens on the democratic process and individual voters and candidates for elected office. As the former Executive Director of the State Board of Elections testified, the integrity of the elections process and election results depends on the correct assignment of voters to their electoral districts. (Doc. Ex. 1484). The larger the number of precincts split, the greater the risk to the democratic process, voters and candidates. (Doc. Ex. 1485). The unprecedented number of precincts split by the enacted plans imposed significant burdens on election officials to assure that voters were properly assigned. Despite the herculean effort of election officials, a State Board of Elections post-primary and post 2012 general election audit found that more than 10,000 voters had not yet been assigned to their correct district. (Doc Ex. 6320-21). Voters who are assigned to the incorrect voting district are disenfranchised—they will not be able to cast a vote in elections in which they are legally entitled to vote. More perniciously, a statistical survey taken just before the May 2012

primary established that both Republican and Democratic voters in split precincts are less likely to be able to correctly identify the candidates in their districts than voters in split precincts. When citizens do not know who their representatives are they cannot effectively exercise their basic constitutional right "to instruct their representative and to apply to the General Assembly for the redress of grievances." N.C. Const. Art. I, §12.

These are precisely the results the legislature should have anticipated when they abandoned the integrity of the precinct voting system which "is woven throughout the fabric of our election laws." *James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d. 638, 644 (2005). Further, as a direct consequence of Defendants' focus on separating citizens into districts based on the color of their skin, these harms fell more heavily on African-American citizens. Members of the General Assembly's staff acknowledged that African-American citizens were far more likely to be assigned to split precincts than white citizens. (Doc. Ex. 1203).

In the face of these facts, the trial court concluded that Plaintiffs' claim "must fail as a matter of law" (R p 1333): (1) because there is no authority "providing constitutional relief on a claim of split precincts," *id.*; (2) because "there is no judicially manageable standard for when a redistricting plan splits an excessive number of precincts" (R p 1334); and (3) because in any event the

"General Assembly must be given leeway" "to achieve compelling governmental interests of avoiding § 2 liability and to ensure preclearance under § 5 of the VRA." (R p 1335). Further, in the trial court's view, "Plaintiffs have not proferred any alternative plan that shows that the General Assembly could have achieved its legitimate political and policy objectives in alternate ways with fewer split precincts." (R p 1336). None of these grounds are valid.

Stephenson I refutes the trial court's first two points. "It is well settled in this state that the right to vote on equal terms is a fundamental right." 355 N.C. at 376, 562 S.E.2d at 393. Assigning voters to different forms of districts—single member and multi member districts in *Stephenson*; districts made up of whole precincts and others made up of pieces of precincts here—"implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard." *Id*. Strict scrutiny does not involve the application of any "judicially manageable standard." It simply requires the legislature to come forward and prove that its actions were necessary to meet some compelling interest and that it carefully structured those actions to minimize any impact on the right of citizens to vote on equal terms. Under state constitutional principles, the Defendants, not the Plaintiffs, have that burden. *Id.* at 377, 562 S.E.2d at 393. ("Under strict scrutiny,

a challenged governmental action is unconstitutional if the state cannot establish that it is narrowly tailored to advance a compelling governmental interest.")

Defendants' mapmaker, Hofeller, testified splitting precincts was one of the tools he used to create majority African-American districts. (Hofeller Dep. Ex 513; Doc. Ex. 299). As established earlier, that is not a compelling interest sufficient to justify infringing the right to vote on equal terms, and it certainly does not justify the racial classifications imposed in splitting precincts. As for narrow tailoring, the Court need only consider that the 2003 General Assembly, which faced precisely the same whole county, one-person, one-vote and Section 2 obligations as the 2011 General Assembly, was able to achieve all those obligations with 205 (257-55) fewer split precincts in the Senate plan and 197 (395-198) fewer split precincts in the House plan.

Dividing an unprecedented number of precincts undermines voters' confidence in the election system by turning the system's most basic unit into an administrative labyrinth of district lines, multiple ballot styles and segmented neighborhoods. Where there are multiple points of confusion leading up to the ballot box, a voter cannot have confidence that his ballot will be cast fairly and counted fairly along with the votes of voters in whole precincts. As the North Carolina Court of Appeals has observed:

> Every voter is entitled to place confidence in the election system. Every voter is entitled to assume that every other vote is cast legally. He is entitled to have his vote counted honestly and fairly along with the other votes, which have been cast honestly and counted honestly and fairly. Anything less is a threat to the democratic system which is wholly dependent upon elections conducted fairly and honestly.

In re Judicial Review by Republican Candidates for Election in Clay County, 45 N.C. App. 556, 573, 264 S.E.2d 338, 347 (1980).

VIII. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFFS' CLAIMS THAT DEFENDANTS REDISTRICTING PLANS VIOLATE THE GOOD OF THE WHOLE CLAUSE IN ARTICLE I, SECTION 2 OF THE CONSTITUTION

A. Standard of Review.

"*De novo* review is ordinarily appropriate in cases where constitutional rights are implicated." *Libertarian Party v. State*, 365 N.C. at 46, 707 S.E.2d at 202-203.

B. Introduction.

In their First Amended Complaints, the Plaintiffs allege that one of the limitations imposed by the people on the General Assembly when redrawing legislative and congressional districts is that such legislation must be for "the good of the whole." N.C. Const. art. I, § 2. (R pp 240-43, 316-17). The trial court dismissed that claim on Defendants' Rule 12(b) motion. (R pp 444-45). That was error. The Good of the Whole Clause limits the General Assembly in enacting legislation and congressional redistricting plans.

Article I of the Constitution is entitled "Declaration of Rights." It establishes the "essential principles of liberty and free government" that constrain the General Assembly's power to make the law. The second of those essential principles is:

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

N.C. Const. art. I, § 2. There is nothing ambiguous or uncertain about the meaning of these words. The people of this State approved the Constitution on condition that the General Assembly would exercise its power to make the law for the good of all the people, not just some of the people.

C. The Case Law Clearly Demonstrates that Claims Based on the Good of the Whole Clause of the Constitution are Justiciable and its Provisions Enforceable by the Courts.

Numerous cases demonstrate that the Good of the Whole Clause contained in Article I, Section 2 does place substantive limitations upon the actions of the government. In *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669 (1927), the Supreme Court stated that the Good of the Whole Clause substantively limits the actions of the North Carolina General Assembly. In *Hinton*, the plaintiff challenged the constitutionality of certain bonds issued by the State in order to finance home-loans to World War I veterans. The Supreme Court evaluated the constitutionality

of the bonds under several clauses of the North Carolina Constitution, including the Good of the Whole Clause. The Court stated as follows:

> The second section of Article I of the present Constitution (1868) says: "That all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."
>
> The present act, we think, is … for the good of the whole, and comes clearly within the limitations and restrictions of the Constitution of this State.
>
> […]
>
> What is … for "good of the whole" has given rise to no little judicial interpretation and consideration. Some courts have taken a liberal view, and to a great extent left it to the determination of the Legislature and referendum of popular vote, but we should ever be mindful that the Constitution to a great extent is the rudder to keep the ship of State from off the rocks and reefs.

Hinton, 193 N.C. 496 at 501, 509, 137 S.E. at 672, 676.

Hinton was decided under the North Carolina Constitution of 1868, as amended.[35] When a new North Carolina Constitution was enacted in 1971, the drafters re-emphasized that the provisions of Article I of the Constitution are not mere admonitions. That much is made clear by the report of the drafters of the 1971 Constitution, which stated:

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[35] The Good of the Whole Clause has appeared in its present form unchanged since at least the North Carolina Constitution of 1868.

> In order to make clear that the rights secured by the declaration of rights *are commands and not merely admonitions* to proper conduct on the part of the government, the words "ought" and "should" have been changed to shall throughout the declaration.

Report of the North Carolina State Constitution Study Commission (1968) (emphasis added). Indeed, it is axiomatic that the provisions set forth in the Declaration of Rights provide for justifiable rights; otherwise, those constitutional provisions would be meaningless.[36] "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action." *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers

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[36] Many other provisions in the Declaration of Rights are just as abstract, if not more abstract, than the Good of the Whole Clause, yet North Carolina courts have consistently found justiciable issues arising out of these other provisions. *See, e.g., Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (holding that N.C.G.S. § 24-5 did not violate the Law of the Land Clause of Article I, Section 19); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 515 S.E.2d 675 (1999) (holding that Article I, Section 18 of the North Carolina Constitution, the Open Courts Clause, granted the public a judicially-enforceable, qualified right to attend civil court proceedings); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940) (treating Article I, Section 1, "enjoyment of the fruits of their own labor," as justiciable); *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (treating Article I, Section 15, the "right to the privilege of education," as justiciable). The abstract language of these other provisions in the Declaration of Rights has not precluded North Carolina's Supreme Court from nonetheless treating them as justiciable and judicially-enforceable.

of the State." *Id*. at 783, 413 S.E.2d at 290. "It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people. Its provisions must be observed by all … . It is not in accord with the nature of written constitutions to incorporate nonessential or unimportant details which may be dispensed with." *Advisory Opinion in Re House Bill No. 65*, 227 N.C. 708, 713, 43 S.E.2d 73, 76 (1947). If the Good of the Whole Clause is to mean anything, as it must, then individuals must be able to rely on it when the legislature redraws legislative and congressional districts and institutes a new form of government. And if individuals are entitled to rely on it, the courts must have the power to enforce it.

This Court in *Stephenson I* in fact relied on the Good of the Whole Clause as one source of the anti-gerrymandering limitations imposed on the General Assembly by the people when they approved the Constitution. There the Court affirmed the trial court's holding that several constitutional provisions (including Article I, Section 2) required the courts to "harmonize" the North Carolina Constitution with federal law, in order to avoid invalidating any constitutional provisions, to the extent possible. The trial court had held as follows:

> The Court concludes that Article I, Sections 2, 3, and 5, require that the North Carolina Constitution should be harmonized with any applicable provisions of federal law, so as to avoid any conflict between the North Carolina Constitution and federal law.

> Under a harmonized interpretation of Article I, Sections 2, 3, and 5 and Article II, Sections 3(3) and 5(3), the North Carolina Constitution prohibits the General Assembly from dividing counties into separate Senate and House districts, except to the extent that counties must be divided to comply with federal law.

Stephenson I, 355 N.C. at 359, 562 S.E.2d at 382. The Supreme Court affirmed this portion of the trial court's holding (which was referred to as the "State Constitutional Analysis"). The Supreme Court's holding in *Stephenson I* thus confirms that Article I, Section 2 of the North Carolina Constitution is a source of substantive law.

This Court in *Stephenson I* also emphasized that when courts construe the North Carolina Constitution in the context of redistricting disputes, the courts must consider the public's interest in avoiding "unnecessarily complicated and confusing district lines":

> [O]ur holding accords the fullest effect possible to the stated intentions of the people through their duly adopted State Constitution, the subject provisions of which have remained in place without amendment since 1971. [The] "all-or-nothing" interpretation [which was argued by the appellants, in support of totally invalidating the Whole-Counties Provision] is inordinately mechanical in its application, leaving no room to carry out the spirit or intent of the State Constitution in contravention of time-honored principles of federalism. This construction *needlessly burdens millions of citizens with unnecessarily complicated and confusing district lines*.

Id. at 375, 562 S.E.2d at 392 (emphasis supplied and internal citations omitted). The public interest identified in *Stephenson I* is, of course, the crux of the

Plaintiffs' claims under the Good of the Whole Clause that the challenged legislative and congressional plans are replete with "complicated" and "confusing" district lines to the detriment of the Good of the Whole.

D. The Trial Court Ignored the Special Limitations Imposed on the General Assembly by the Good of the Whole Clause when Drawing New Electoral Districts Following the Census.

As *Stephenson I* illustrates, redistricting is plainly one of those types of cases where the courts' role is "to keep the ship of State from off the rocks and reefs." *Hinton v. Lacy*, 193 N.C. 496 at 501, 509, 137 S.E. at 672, 676. Contained within the concepts reflected in Article I, Section 2 (which was expressly relied upon by the Court in *Stephenson I*) is a specific limitation on the powers of the General Assembly with regard to redistricting: "All government of right … is *instituted* only for the good of the whole." The sole form of legislation enacted by the General Assembly by which the government "is instituted" is the decennial legislation redrawing legislative and congressional districts. That is the plain meaning of "to institute," which has been defined as: "to set up; establish: to institute a government." The Random House Dictionary of the English Language, Unabridged Edition (1981). When the General Assembly enacts ordinary laws to protect the public health, welfare or safety, it does not "institute" laws, but when

the General Assembly redraws legislative and congressional districts every ten years, it "institutes" a new form of government.

Even if the framers of the Constitution conceivably intended to assure that ordinary legislation is for "the good of the whole" only by making legislators accountable to the public at elections held every other year, that check does not exist for redistricting legislation. The Constitution itself provides that once "established," legislative districts "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, §§ 3(4) and 5(4). Imposing heightened limitations on the General Assembly when it institutes a new government through the redrawing of electoral districts is also entirely consistent with the plan of our Constitution. Just as districts must be drawn "solely for the good of the whole," so too the Constitution itself may not be changed merely upon a majority vote of both the Senate and House. That power is expressly reserved to the people, either through a Convention of the People followed by a vote of the People, or through legislation approved by a three-fifths vote of both the House and Senate, followed by a vote of the People. N.C. Const., art. XIII, §§ 2-4.

Thus, even if the Good of the Whole Clause of the Constitution does not provide grounds for challenging most forms of legislation, it does limit the power

of the General Assembly when it institutes new districts once each decade from which the people will elect their representatives to the General Assembly and Congress for the next five election cycles. Plaintiffs therefore respectfully request the Court to reverse the trial court's order dismissing their claims based on the Good of the Whole Clause of the Constitution and declare that the Good of the Whole Clause limits the power of the General Assembly to enact legislative and congressional plans.

CONCLUSION

For all these reasons, Plaintiffs respectfully request this Court to reverse the trial court and declare that the 2011 House, Senate and Congressional redistricting plans enacted by the Defendants violate the United States and North Carolina Constitutions and must be redrawn. Specifically, Plaintiffs ask this Court to:

a) Declare that the 26 VRA House, Senate and Congressional Districts found by the trial court to be racial gerrymanders are unconstitutional and violate the Equal Protection Clause of the United States Constitution, as do Senate District 32 and Congressional District 12.

b) Declare, and reaffirm, that the Whole County Provisions of the North Carolina Constitution must be strictly adhered to and require the General Assembly to keep counties whole except to the extent necessary to comply

with federal law, properly interpreted, and further declare that the 2011 House and Senate plans violate those constitutional principles.

c) Declare, and reaffirm, that the North Carolina Constitution requires that House, Senate and Congressional districts be compact except to the extent necessary to comply with federal law, properly interpreted, and further declare that the 2011 House, Senate and Congressional plans fail to comply with that requirement.

d) Declare that the 2011 House and Senate plans violate the rights to vote and to equal protection guaranteed by the North Carolina Constitution and the right to equal protection guaranteed by the United States Constitution because those plans divide precincts for reasons not required to comply with State or federal law

e) Declare that the Good of the Whole Clause of the North Carolina Constitution applies to the General Assembly, and limits its powers, when drawing House, Senate and Congressional districts for the people, and further declare that the 2011 House, Senate, and Congressional plans violate that constitutional principle.

f) Remand these cases to the trial court with directions to implement new House, Senate and Congressional plans in accordance with the process prescribed by the General Assembly in N.C.G.S. § 120-2.4.

This the 11th day of October, 2013.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this day a copy of the foregoing PLAINTIFF-APPELLANTS' BRIEF has been duly served by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses, which are the last addresses known to me:

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This the 11th day of October, 2013

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

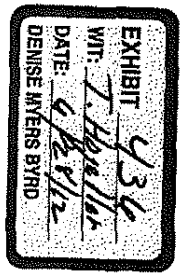
CONTENTS OF APPENDIX

Appendix 1:

Proportionality chart Hofeller prepared for Defendants

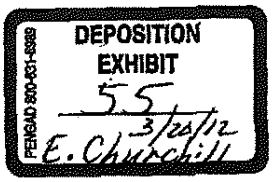
Carolina Proportionality Chart

Chamber	18+ Any Part Black					18+ Black Only (Single Race)			
	Pct.	# Seats	Exact Proportionality	Truncated	Rounded Up	Pct.	Exact Proportionality	Truncated	Rounded Up
Senate Proportionality	0.212	50	10.6	10	11	0.206	10.3	10	11
House Proportionality	0.212	120	25.44	25	26	0.206	24.72	24	25



Appendix 2:

June 17, June 21, July 1 and July 12 Statements of Redistricting Chairs Rucho and Lewis



NORTH CAROLINA GENERAL ASSEMBLY
STATE LEGISLATIVE BUILDING
RALEIGH, NORTH CAROLINA 27603

Joint Statement by Senator Bob Rucho, Chair of the Senate Redistricting Committee, and Representative David Lewis, Chair of the House Redistricting Committee, released on June 17, 2011

The Chairs of the Joint House and Senate Redistricting Committee are committed to proposing fair and legal districts for all citizens of North Carolina, including our minority communities. Therefore, on June 23, 2011, the Joint House and Senate Redistricting Committee will hold a public hearing on Voting Rights Act districts and four other districts proposed by the Chairs for the 2011 State Senate and State House redistricting plans.

Locations for this public hearing include the North Carolina Museum of History in Wake County, Fayetteville Technical Community College, Guilford Technical Community College, UNC Charlotte, UNC Wilmington, East Carolina University, and Roanoke-Chowan Community College. The public hearing will run from 3:00 PM to 9:00 PM. Individuals interested in speaking should call the General Assembly or consult the General Assembly's web site for sign-up procedures.

We have decided to focus this public hearing on proposed legislative Voting Rights Act ("VRA") districts and four other proposed districts. We have chosen this option because of the importance of minority voting rights. Moreover, the decisions by the North Carolina Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354 (2002) ("*Stephenson I*"), and *Stephenson v. Bartlett*, 357 N.C. 301 (2003) ("*Stephenson II*"), require that VRA districts be created before other legislative districts.

The Chairs believe that there is a strong basis in the record to conclude that North Carolina remains obligated by federal and state law to create majority African American districts. Our conclusion is based upon the history surrounding the creation of VRA districts in the State of North Carolina, both as ordered by the federal courts and as adopted by the Legislature, from 1986 through the present. Our conclusion is also supported by evidence and testimony submitted to the Joint Redistricting Committee or received at public hearings.

In creating new majority African American districts, we are obligated to follow the decisions in *Stephenson I* and *II* as well as the decisions by the North Carolina Supreme Court and the United States Supreme Court in *Strickland v. Bartlett*, 361 N.C. 491 (2007), affirmed, *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009). Under the *Strickland* decisions, districts created to comply with section 2 of the Voting Rights Act, must be created with a "Black Voting Age Population" ("BVAP"), as reported by the Census, at the level of at least 50% plus one.[1] Thus, in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one "BVAP." To determine the percentage of "BVAP" in proposed districts, we have used a more specific census category listed in our reports as "Total Black Voting Age Population" ("TBVAP"). This category includes any person 18 years old or older, who self identifies as wholly or partially "any part black." It is our understanding that this Census category is preferred by the United States Department of Justice and the United States Supreme Court. *See Georgia v. Ashcroft*, 539 U.S. 461, 473 n. 1 (2003).

During our proceedings we have asked for advice on the number, shape, and locations of VRA districts that should be included in the Senate and House plans. During our public hearings, members of the public requested that current majority African American districts be retained, where possible, and that additional majority black districts be created, where possible.

[1] The North Carolina Supreme Court described the required majority as Citizen Black Voting Age Population ("CBVAP"). The 2010 Census did not report on this category of information.

Based upon this testimony, along with input we have received from at least one black incumbent House member, the Chairs recommend, where possible, that each plan include a sufficient number of majority African American districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice.

Based upon the statewide TBVAP figures, proportionality for the African American citizens in North Carolina means the creation of 24 majority African American House districts and 10 majority African American Senate districts. Based upon census figures for both 2000 and 2010, the 2003 plans do not satisfy this standard. The 2003 Senate plan, used in elections from 2004 to 2010, contains zero districts in which African Americans constitute a TBVAP majority. The 2003 House plan, as amended for the 2010 General Election, contains nine districts in which African Americans constitute a TBVAP majority based upon 2000 census figures. The 2003 House plan, as amended for the 2010 General Election, contains ten districts in which African Americans constitute a TBVAP majority based upon 2010 census figures.

The Chairs note that under the benchmark 2003 plans, only eighteen African American members are currently serving in the House and only seven African Americans are currently serving in the Senate. The Chairs also note that two incumbent African American senators were defeated in the 2010 General Election. Both of these former African American incumbents (Don Davis in District 5 and Tony Foriest in District 24) were defeated by white candidates in districts with a TBVAP population below 40%.

Unlike the 2003 benchmark plans, the Chairs' proposed 2011 plans will provide substantial proportionality for North Carolina's African American citizens. The 2011 House plan, recommended by Chairman Lewis, consists of 24 majority African American House districts and two additional districts in which the TBVAP percentage exceeds 43%. Moreover, the 2011 Senate plan proposed by Chairman Rucho consists of 9 majority African American

Senate districts. Chairman Rucho has been unable to identify a reasonably compact majority African American population to create a tenth majority African American district.

Increasing the number of majority African American districts will ensure non-retrogressive legislative plans. Thus, adopting plans that increase the number of majority black districts will expedite the preclearance of each plan pursuant to Section 5 of the Voting Rights Act. *See* Federal Register Vol. 76, no. 27 at 7471: Report by the United States House of Representatives, Committee on the Judiciary, 109th Congress, 2d Session, Report 109-478 at 68 – 72 (2006); *Beer v. United States*, 425 U.S. 130 (1976). Substantial proportionality also furthers the State's obligation to comply with Section 2 of the Voting Rights Act. *See Johnson v. DeGrandy,* 512 U.S. 997 (1994).

In creating proposed majority black districts, the Chairs have been guided by testimony and advice received from experts recommended by the Democratic legislative leadership. Based upon this information, the Chairs have rejected the possibility of any districts that would constitute the "cracking" or "packing" of any reasonably compact African American population, as those terms have been defined by the United States Supreme Court. *See Quilter v. Voinovich*, 507 U.S. 146, 153-154 (1993). Nor have the Chairs supported any district that would involve the "stacking" of a minority population. We understand the term "stacking" to mean the submergence of a less affluent, geographically compact, African American population capable of being a majority in a single member district, within a larger, more affluent majority white population.

We wish to point out several features of the proposed VRA districts upon which the Chairs invite public comment.

First, testimony during the public hearing in New Hanover County indicated that the minority community in that area of the State would support the creation of a new majority African American House district to replace the former House District 18. That district was

constructed in the 2003 House plan with an African American voting age population substantially below 50% plus one. In *Strickland v. Bartlett*, both the North Carolina Supreme Court and the Supreme Court of the United States ruled that African American districts needed by the State to comply with Section 2 of the Voting Rights Act must be established with a BVAP of 50% plus one. In response to testimony during the New Hanover public hearing, the plan proposed by Chairman Lewis includes a revised black voting age majority version of District 18 that complies with the *Strickland* decisions.

The Chairs also wish to receive comments regarding the Senate and House districts to be adopted in Forsyth County. Districts in Forsyth County were found to be in violation of Section 2 of the Voting Rights Act in the decision of *Thornburg v. Gingles*, 478 U. S. 30 (1986). This decision has never been vacated or over-ruled and is still binding on the State. Moreover, the historical and legislative records indicate that all of the elements necessary to prove a Section 2 violation in Forsyth County still remain, except as described below.

In 2003, as reported by the 2000 Census, the State created three legislative districts in Forsyth that consisted of a TBVAP in excess of 40%: Senate District 32 – 41.42%; House District 71 – 51.57%; and House District 72 – 43.40%. Pursuant to the 2010 Census, these districts have the following percentage of TBVAP population: Senate District 32 - 42.52%.; House District 71 - 51.09%; and House District 72 - 45.40%. Unfortunately, also under the 2010 Census, all three districts are under-populated for compliance with the constitutional requirement of one person one vote. Because all three districts are under-populated, all three must be adjusted to add additional total population. *See Stephenson I* and *II*. Adding additional total population has the effect of decreasing the percentage of the African American voting age population in each district.

Because House Districts 71 and 72 are both significantly under-populated, Chairman Lewis believes that it is not possible to create two majority African American House districts in

Forsyth. He is concerned that it may not be possible to create one reasonably compact majority black house district in Forsyth County and another district that would keep District 72 at a TBVAP level that reasonably approaches its benchmark level. Based upon the experience in Democratic primaries for Senate District 32, there is also concern that a plurality House district in the 40% range or under may not re-elect the current African American incumbent in House District 72. Therefore, at this time, Chairman Lewis has recommended that both House districts, which currently elect two black incumbents, be created at TBVAP levels above 43%. Thus, under the 2010 Census, proposed House District 71 has a TBVAP population of 47.31%. Proposed District 72 would be established with a TBVAP percentage of 43.33%.

Chairman Rucho believes that it is not possible to create a majority black Senate district in Forsyth. He therefore recommends that proposed Senate District 32 be created at a TBVAP percentage of 39.32%.[2] Chairman Rucho also recommends that the current white incumbent for the Forsyth Senate district not be included in the proposed Senate District 32. The white incumbent has defeated African American candidates in Democratic primaries in 2004 and 2010. The Senate Chair recommends this adjustment in the absence of a tenth reasonably compact majority African American senate population. If adopted by the General Assembly, proposed coalition District 32 will provide African American citizens with a more equal, and tenth opportunity, to elect a candidate of choice.

The Chairs also wish to note their attempts to consider political access and opportunities for the Native American population located in southeastern North Carolina. In recognition of those important interests, the House Chair recommends that House District 47 be retained as a majority Native American District.

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[2] Proposed Senate District 32 also contains a Hispanic population of 12.21%, thus rendering this district as a "majority minority" district. While we have not performed a cohesion analysis involving African Americans and Hispanics, we have been advised by Congressman Watt that, in his opinion, urban African American and Hispanic voters who reside in his congressional district are cohesive.

In the 2003 Senate plan, Robeson County was combined with Hoke County to create a two county, single Senate district (Senate District 13). Chairman Rucho believes that it is not possible to create a majority Native American Senate district that complies with federal and state law. Because it is not possible to create a majority Native American Senate district, the *Stephenson I* and *II* county combination rules prevent the re-establishment of District 13 based upon a combination of Robeson and Hoke Counties. Under the 2010 Census, the combined population of Robeson and Hoke is slightly lower than the maximum negative population deviation range (minus 5%). Thus, unlike the 2003 Senate plan, Robeson County cannot be grouped with Hoke County. As a result, Robeson County has been combined with Columbus County to form a two county senate district. Under this configuration, proposed Senate District 13 will retain a significant and influential percentage of Native American citizens.

The Chairs have solicited redistricting input from North Carolina's Hispanic population. Based upon the 2010 Census, neither Chair was able to identify a reasonably compact Hispanic population that could form the basis for either a majority Hispanic House or Senate District. The Chairs would entertain any proposals for a majority Hispanic House or Senate district that complies with applicable federal and state law.

On March 24, 2011, we announced that the Chairs would recommend legislative redistricting plans that complied with the criteria established in *Stephenson I* and *II* and *Bartlett v. Strickland*. On that date, and on other occasions, including numerous public hearings, the Chairs have solicited members of the General Assembly and the public for any information, comments and advice related to redistricting. On March 24, 2011, every member of the General Assembly received notice of the resources available to them for the preparation of proposed districts and plans. The Chairs also have taken the unprecedented step of providing additional expert staff and technology assistance to the Legislative Black Caucus, requested by the Black Caucus in order to draw their own proposed districts and plans. As of today, we have not

received any proposals for specific legislative districts or proposed state wide legislative plans from the Democratic leadership or the Legislative Black Caucus

Nevertheless, the Chairs remain interested and open to other proposed configurations for majority minority districts as well as non-VRA districts. The Chairs will also consider recommendations regarding legislative districts in Forsyth County and any proposed Senate plan that includes ten majority African American districts, provided any such proposals are based upon ten reasonably compact majority African American populations.

As we stated on March 24, 2011, the Chairs continue to recommend that alternative proposals comply with the requirements of *Stephenson I* and *II* and *Bartlett v. Strickland*. We also recommend that any proposed state-wide plan contain a sufficient number of districts that will bring African American citizens as close as possible to substantial proportionality in the number of majority African American districts.

6.22.11

NORTH CAROLINA GENERAL ASSEMBLY
STATE LEGISLATIVE BUILDING
RALEIGH, NORTH CAROLINA 27603

Statement by Sen. Bob Rucho and Rep. David Lewis Regarding Proposed VRA Districts

In anticipation of the public hearing scheduled for June 23, 2011, we want to correct several erroneous statements that have appeared in the news media regarding our proposed Voting Rights Act ("VRA") districts.

Claim 1: The proposed VRA districts plan includes an illegal "packing" strategy.

"I think they unnecessarily and probably illegally pack minority voters into districts," said Sen. Dan Blue, D-Wake. "I need to analyze them a little bit further, but my initial impression is they're engaged in packing in non-Section 5 Voting Rights Act districts." ("Blue questions legality of draft redistricting maps," SGR Today, 6/20/11)

"How…'packing' may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Voinovich v. Quilter*, 507 U.S. 146, 153-154 (1993).

Senator Dan Blue, among others, has stated that our proposed majority black districts result in illegal "packing" of black voters. There is no factual or legal basis for this argument.

The U.S. Supreme Court has defined the term "packing" to mean the intentional creation of super majority black districts designed to prevent the creation of one or more other majority black districts. *See Voinovich v Quilter,* 507 U.S. 146 (2003). We have not engaged in this practice. Senator Blue is presumably aware of the Supreme Court's definition of packing. If there is another Supreme Court case that supports Senator Blue's definition we request that he provide it to us.

Claim 2: The proposed VRA districts plan includes too many majority-minority districts.

"The new maps include 24 majority-black districts in the N.C. House and 10 in the Senate, according to an attached memo." ("North Carolina redistricting maps may hurt Republican allies William Brisson, Dewey Hill," *Fayetteville Observer*, 6/20/11)

"Any legislative district designated as a Section 2 district under the current redistricting plans, and any future plans, must satisfy either the numerical majority requirement as defined herein, or be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina and with *Stephenson I* requirements." *Strickland v. Bartlett*, 649 S.E.2d 364, 376 (N.C. 2007).

Our proposed Senate plan includes only nine majority black Senate districts. We were unable to identify a tenth reasonably compact majority black population which could be used to create a tenth majority black Senate district. Senate District 32 is not a majority black district because of the absence of sufficient black population in Forsyth County. In proposed Senate District 32, blacks comprise 39.48% of the voting age population. Voting age Hispanics constitute 12.21%.

Congressman Watt has advised us that urban Hispanic populations in his Congressional district tend to vote for the same candidates favored by urban African Americans voters. Thus, our proposed version of Senate District 32 provides the black community with a tenth opportunity to elect a candidate of their choice, provided African American voters in Forsyth County can build a coalition with urban Hispanic voters.

Our proposed Senate District 13 was constructed, as was the predecessor District 13, to have a plurality Native American population (26.49%). The Native American population combines with the black population (25.92%) to establish a majority minority district. However, this district is neither majority Native American nor majority black.

Congressman Watt has advised us that black voters and Native American voters do not tend to vote for the same candidate and are not politically cohesive. The predecessor district to our proposed Senate District 13 has always elected a white candidate. Current Senate District 13 never elected a black or a Native American candidate. The failure of an African American or

Native American to be elected from current Senate District 13 seems to support Congressman Watt's opinion.

There are only twenty four proposed majority black House districts in our proposed plan. Some media outlets have reported that there are twenty seven majority black House districts.

The alleged twenty-fifth district, House District 47, is a majority Native American district and replicates a similar district in the 2003 house plan. It does not count towards giving the black community a proportional and equal opportunity to elect candidates of their choice.

Two other alleged majority black districts, House Districts 71 and 72 in Forsyth County cannot both be drawn with a black voting age population of over 50%. Neither district is therefore a majority black district.

Claim 3: The proposed VRA districts plan is solely an attempt to maintain Republicans' political power.

"Democrats charged that Republicans are trying to pack black Democrats into districts so as to make it easier for the GOP to win the remaining ones… 'They want to make sure they maintain their power,' said Fleming El-Amin, a local activist who sits on the Democratic committee that will review the redistricting recommendations." ("GOP well within rights on redistricting, but Garrou would be heavy loss," *Winston-Salem Journal*, 6/22/11)

The State has an obligation to comply with the Voting Rights Act. In the 2003 plans, rather than comply with the VRA, the previous Legislative leadership engaged in a redistricting technique called "cracking."

Under Supreme Court precedent, one example of "cracking" or "fragmenting" occurs when Legislative leaders remove black population from a majority black district and spread these voters into other adjoining districts that will elect a white candidate but not a black candidate. *See Voinovich v Quilter* 507 US 146, 153 (2003); *Thornburg v Gingles*, 478 U.S. 30, 46 n.11 (1986). Based upon these Supreme Court definitions, in creating the 2003 plans, the former Legislative leaders "cracked" majority black districts in two different ways.

First, in the 2003 plans, populations in several formerly majority black districts were reduced to populations levels of 39% to 49% black. This practice was rejected by the North Carolina and United States Supreme Courts in *Strickland v Bartlett,* 129 S.Ct. 1231 (2009). Where possible, majority black districts drawn to comply with the VRA must be based upon an actual majority of black voters.

Second, the Legislative leaders rejected several majority black districts in locations at which the black community had a right, under the VRA, to a majority black district.

While districts that adjoin majority black districts may become more competitive for Republican candidates because of compliance with the VRA, such competitiveness results from compliance with the VRA. This is the opposite of the prior Legislative leadership intentionally cracking majority black districts required by the VRA to ensure the re-election of white incumbents.

Claim 4: The proposed VRA districts plan dilutes the influence of minority voters.

"It is illegal to arbitrarily pack minorities into the same districts just for the sake of doing it because you dilute the minorities' voting strength in other districts." Senator Dan Blue, D-Wake ("Blue questions legality of draft redistricting maps," SGR Today, 6/20/11)

"[A] minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent the dilution of the votes of that minority group." *Strickland v. Bartlett*, 649 S.E.2d 364, 371 (N.C. 2007).

In 2003, the Legislative leadership pursued a strategy which reduced the number of majority black districts and replaced them with two types of districts.

Districts that were between 40 and 50% black were called "effective" majority districts. The Legislative leaders argued that it was not necessary to create majority black districts under the VRA because black populations over 40% were "good enough" to elect a black candidate.

In 2003, Legislative leaders also supported "influence districts." These were districts with black populations between 30% and 40%. These districts have very rarely elected black

candidates, but the Legislative leaders argued that black voters would be able to "influence" the election of candidates who were "sympathetic" to their point of view.

A Supreme Court case called *Georgia v Ashcroft,* 539 U.S. 461 (2000), provided some legal support for this proposition. However, in a case called *LULAC v Perry,* 548 U.S 399 (2006), the US Supreme Court clarified that "influence" districts were not required by the VRA.

Moreover, *Georgia v Ashcroft* was legislatively over-ruled in 2006 when the Congress re-enacted Section 5 of the VRA. See Federal Register Vol. 76, no. 27 at 7471: Report by the United States House of Representatives, Committee on the Judiciary, Report 109-478 at 68-72.

Finally, in *Strickland v Bartlett,* 361 N.C. 491 (2007), *affirmed by Bartlett v Strickland,* 129 S.Ct. 123 (2009), the North Carolina and U.S. Supreme Courts announced that majority black districts must be drawn with an actual majority black voting age population.

Thus, the current 2003 plans violate the voting rights of black citizens in two ways. Alleged majority black districts were not drawn with a true majority of black voters. And "influence districts" were incorrectly substituted for true majority black districts. Our proposed VRA districts do not repeat these violations.

Claim 5: These districts are a done deal and will be enacted with no input from voters.

We have had an unprecedented number of public hearings. For example, in 2001 Legislative leaders held 26 public hearings including hearings in 13 counties covered by section 5 of the Voting Rights Act. In 2001, Legislative leadership did not produce proposed legislative or congressional plans until the end of the public hearing process. In 2003, we are aware of no public hearings held on proposed plans.

By way of contrast, in 2011, we have already held 36 public hearings including 24 in counties that are covered by section 5 of the Voting Rights Act. Under our current schedule we intend to hold three public hearings. The first will be on June 23 and will focus on proposed

VRA districts and four other districts. On July 7, 2011, we intend to hold an additional public hearing.

We have also provided an unprecedented level of redistricting support to the Black Caucus. This included the hiring of additional staff with special redistricting expertise and technology assistance not provided to other members of the General Assembly.

Starting on March 24, 2011, we have repeatedly asked for input from the Democratic leadership and the Black Caucus on the issue of majority black districts. We understand that the Black Caucus has produced alternative maps, however, they have not been provided to us. Further, while we have received some input from individual members regarding specific districts, to date we have received no suggestions for proposed plans from the Democratic leadership or any of several interest groups to whom we have made requests for recommendations and input.

We are more than willing to entertain specific suggestions related to our proposed plans and specific districts.

Claim 6: The proposed VRA districts plan violates principles of compactness.

"State Sen. Eric Mansfield, a Democrat, said he's disappointed by the shape of his new district. The old district is a compact, somewhat rectangular shape covering the northwest corner of Cumberland County. Mansfield said the new shape resembles a crab." ("North Carolina redistricting maps may hurt Republican allies William Brisson, Dewey Hill," *Fayetteville Observer*, 6/20/11)

This argument misstates the law. Majority black districts must be based upon reasonably compact black populations, not districts.

Congressman Butterfield's First Congressional district has been found by a federal court to be based upon a reasonably compact black population. Using Congressman Butterfield's district as an example, we believe that all of our proposed legislative districts are based upon reasonably compact black populations.

However, we would entertain any specific suggestions from the Black Caucus or others identifying more compact majority black populations to form the core of alternative majority black districts, provided the total districts proposed provide black voters with a substantially proportional state-wide opportunity to elect candidates of their choice. Moreover, any such districts must comply with *Strickland v Bartlett*, and be drawn at a level that constitutes a true majority of black voting age population.

NORTH CAROLINA GENERAL ASSEMBLY
STATE LEGISLATIVE BUILDING
RALEIGH, NORTH CAROLINA 27603

Statement by Senator Bob Rucho and Representative David Lewis Regarding the Proposed 2011 Congressional Plan

July 1, 2011

From the beginning, our goal has remained the same: the development of fair and legal congressional and legislative districts. Our process has included an unprecedented number of public hearings (36) scheduled before the release of any maps. These included an unprecedented number of hearings in (24) counties covered by Section 5 of the Voting Rights Act. In another unprecedented act, we provided the Legislative Black Caucus with staff support and computer technology resulting in costs to the General Assembly in excess of $60,000. We also decided to schedule twenty-five public hearings to give the public an opportunity to comment on legislative and Congressional maps. Consistent with the guidance provided by the North Carolina Supreme Court in *Stephenson v Bartlett* 355 N.C. 354 (2002), our first public hearing was focused on our proposed VRA legislative districts. Our second public hearing, scheduled for July 7, 2011, will give the public an opportunity to comment on our proposed Congressional plan. Finally, our third public hearing, scheduled for July 18, 2011 will solicit feedback on our proposed legislative plans.

Today we are pleased to release our proposed 2011 Congressional Plan. We believe that our proposed Congressional plan fully complies with applicable federal and state law. We also believe that a majority of North Carolinians will agree that our proposed plan will establish Congressional districts that are fair to North Carolina voters.

Unlike state legislative districts, there are very few constitutional criteria that apply to legislative districts. Some of the factors we considered include the following:

1. Use of current Congressional plan as a frame of reference.

The current Congressional plan could not be retained for several reasons. However, we used the current plan as a frame of reference for re-drawing new congressional districts. Thus, our proposed plan and the current Congressional plan (2001: Congress Zero Deviation) are similar in some respects.

2. Compliance with "one person one vote."

Based upon several decisions by the United States Supreme Court, Congressional districts must be drawn at equal population. *See Westberry v Sanders*, 376 U.S. 1 (1964); *Karcher v Daggett*, 466 U.S. 910 (1984). The ideal population for a North Carolina Congressional district under the 2010 census is 733,499. Our proposed districts meet this constitutional requirement.

Re-drawing districts with equal population necessitated significant changes in the boundary lines of the current districts. Revisions were required because six of the current Congressional districts are significantly under-populated below the ideal number. (Districts 1, 5, 6, 8, 10, and 11). In contrast, seven districts are over-populated above the ideal number (2, 3, 4, 7, 9, 12, and 13). The population shift between our thirteen districts is largely the result of more rapid growth in the Mecklenburg/Piedmont and Research Triangle areas of the state as compared to more rural areas located in eastern and western North Carolina.

3. Compliance with the Voting Rights Act.

Our proposed plan, if adopted by the General Assembly, will need to be "precleared" under Section 5 of the Voting Rights Act. States have the option of seeking administrative preclearance by the United States Department of Justice or by filing a lawsuit seeking preclearance by the United States District Court of the District of Columbia. To obtain

preclearance, we are obligated to show that the plan is not retrogressive or purposefully discriminatory. We believe that our plan accomplishes this goal.

(a) Districts Represented by Black Incumbents

Voters in the First and Twelfth Congressional Districts are represented by two African American members of Congress, Congressman G.K. Butterfield and Congressman Mel Watt. As part of our investigation into fair and legal congressional districts, we sought advice from Congressman Butterfield and Congressman Watt. We believed that we could benefit from hearing their views on how their districts should be re-drawn in light of population movement.

The State's First Congressional District was originally drawn in 1992 as a majority black district. It was established by the State to comply with Section 2 of the Voting Rights Act. Under the decision by the United States Supreme Court in *Strickland v. Bartlett*, 129 U.S. 1231 (2009), the State is now obligated to draw majority black districts with true majority black voting age population. Under the 2010 Census, the current version of the First District does not contain a majority black voting age population.

In addition, the current First District is substantially under-populated by over 97,500 people. Thus, in order to comply with "one person one vote," over 97,500 people must be added to create a new First District.

We met with Congressman Butterfield to discuss these issues. Congressman Butterfield acknowledged that the legal deficiencies of the existing First District could be addressed through the addition of either the minority community located in Wake County or the minority community residing in Durham County. Congressman Butterfield believed that including Wake County in his district would give him the opportunity to represent the communities reflected by Shaw University and St. Augustine College. Between these two options, Congressman Butterfield advised us that he preferred the addition to his district of the minority population in Wake County, as opposed to the minority population in Durham County.

We elected to accommodate Congressman Butterfield's preference. By adding population from Wake County, we have brought the First District into compliance with "one person, one vote." Because African Americans represent a high percentage of the population added to the First District from Wake County, we have also been able to re-establish Congressman Butterfield's district as a true majority black district under the *Strickland* case.

In light of the population growth experienced by urban counties and the slower growth experienced by rural population, drawing Congressman Butterfield's district into Wake County accomplished another important goal. It is less likely that the First District will become substantially under-populated during this decade and it is more likely that the First District can be retained in our proposed configuration at the time of the 2020 Census. This will provide stability for the minority community that has not been achieved by prior versions of this district.

Finally, we note that the United States Supreme Court has previously found Section 2 liability in Wake County in a case involving legislative districts. *See Thornburg v Gingles*, 478 U. S. 30 (1986). Thus, with this adjustment to the First District, for the first time in history the black community in Wake County will have the opportunity to be part of a majority black Congressional district.

After we had adopted Congressman Butterfield's preference, and showed a map of our proposal to him, he expressed concern about the withdrawal of his district from Craven and Wayne Counties. Given our decision to add the minority community in Wake County to our proposed First District, the retention of populations in Wayne and Craven would result in the over-population of the First District. We believe that the benefits of adding the black community in Wake County outweighs any negative impacts. Moreover, by replacing these counties with the community in Wake County, we were also able to create a district that was based upon a more compact minority population.

Current District 12, represented by Congressman Watt, is not a Section 2 majority black district. Instead, it was created with the intention of making it a very strong Democratic District. *See Easley v Cromartie* 121 S.Ct. 1452 (2000). However, there is one county in the Twelfth District that is covered by Section 5 of the Voting Rights Act (Guilford).

As with Congressman Butterfield, we sought input from Congressman Watt regarding potential options for revising the Twelfth Congressional district. We have accommodated Congressman Watt's preference by agreeing to model the new Twelfth District after the current Twelfth District.

Following the framework of the district created by the 2001 General Assembly, to the extent practicable and possible, we have again based the Twelfth Congressional District on whole precincts.

Because of the presence of Guilford County in the Twelfth District, we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan.

Finally, we have re-drawn the Twelfth District to reduce some population because 2010 census figures show that it is currently over-populated.

(b) Minority populations in other districts

No district in the 2001 Congressional plan contains a black voting age population in excess of 28.75% except for the First and Twelfth Districts. Our proposed Fourth Congressional District establishes one district with a black voting age population of 29.12%. Our proposed Third Congressional District contains a black voting age population of 23.50%. Our proposed District 8 has a black voting age population of 19.88% and a Native American voting age population of 7.12%. All other proposed districts have been created with a black voting age population of under 18%.

We believe that our proposed plan fully complies with both Section 5 and Section 2 of the Voting Rights Act.

4. Point Contiguity.

In past Congressional plans, prior legislative leadership elected to make a few congressional districts contiguous by a mathematical point. We believe that this past practice is arbitrary and irrational. It is also inconsistent with the standards for contiguity established by the North Carolina Supreme Court for legislative districts. *Stephenson v Bartlett*, 357 N.C. 301 (2003). We have elected to reject this criterion for congressional districts. All of our congressional districts are contiguous in a real and meaningful manner.

5. Incumbents.

We decided to avoid placing incumbents in the same district. All incumbents in our proposed plan are located in a district in which they face no opposition from another sitting member of Congress.

6. Communities of Interest.

Communities of interest are political considerations which will always create some interests that will be recognized and others that will not. The elected representatives are best equipped to determine this balance.

Because all of our districts are largely based in the same areas of the state in which they are located under the 2001 congressional plan, our districts reflect the same communities of regional interests recognized by the 2001 plan.

New District 4 is substantially based upon the current version of District 4. We decided to expand the district from Chatham County through Lee and Harnett County and into Cumberland County. Lee and Harnett Counties share with Chatham County many of the same rural and other communities of interest. Moreover, the interests of those residing within the urban areas of Cumberland County are similar to those who live in the urban areas of Orange and

Durham Counties. Finally, all of the counties in our proposed District 4 are in the same media market which should help reduce the costs of campaigns in this district.

7. Whole counties and whole precincts.

Counties and precincts are two specific examples of communities of interest. Like other interests, they must be balanced. We have attempted to respect county lines and whole precincts when it was logical to do so and consistent with other relevant factors. Our plan includes 65 whole counties. Most of our precinct divisions were prompted by the creation of Congressman Butterfield's majority black First Congressional District or when precincts needed to be divided for compliance with the one person one vote requirement.

8. Urban Counties.

We decided to continue the tradition, as reflected in the 2001 plan that results in the division of urban counties into more than one Congressional district. We agree with the decision of prior legislative leadership that urban counties are best represented by multiple members of Congress. Moreover, creating multiple districts within an urban county makes it less likely that congressional districts in 2020 will experience the significant population shifts that make the 2001 plan unbalanced. We extended this policy to Buncombe County but elected not to divide New Hanover County. We concluded that the population in New Hanover is more isolated in the southeastern corner of North Carolina and was needed to anchor our new proposed Seventh Congressional District.

9. Creating More Competitive Districts.

The federal and state constitutions allow legislatures to consider partisan impacts in making Congressional redistricting decisions. While we have not been ignorant of the partisan impacts of the districts we have created, we have focused on ensuring that the districts will be more competitive than the districts created by the 2001 legislature. Along these lines we wish to highlight several important facts. First, in twelve of our proposed thirteen districts, in the 2008

General Election, more voters voted for Democratic candidate for Attorney General, Roy Cooper than those who voted for the Republican candidate. Second, registered Democrats outnumber registered Republicans in ten of our proposed thirteen districts. Finally, the combination of registered Democrats plus unaffiliated voters constitute very significant majorities in all thirteen districts.

NORTH CAROLINA GENERAL ASSEMBLY
STATE LEGISLATIVE BUILDING
RALEIGH, NORTH CAROLINA 27603

Statement by Senator Bob Rucho and Representative David Lewis Regarding Proposed State Legislative Redistricting Plans

July 12, 2011

Today we are pleased to release our initial proposals for 2011 state legislative redistricting maps.

These maps are available on the General Assembly's website.

We will hold public hearings on these proposed plans on July 18, 2011, from 3:00 P.M. until 9:00 P.M. Locations for these hearings will include: the North Carolina Museum of History in Wake County, Fayetteville Technical Community College, Nash Community College, Roanoke-Chowan Community College, UNC Wilmington, Guilford Technical Community College, Central Piedmont Community College, Western Carolina University, Appalachian State University, and Asheville-Buncombe Technical Community College.

Individuals interested in providing comments should call the General Assembly or consult the General Assembly's web site for sign-up procedures.

North Carolina has been the subject of numerous legal challenges to redistricting plans. Given this history, our primary goal is to propose maps that will survive any possible legal challenge. The first legal requirement is that legislative districts comply with the "one person one vote" standard affirmed in *Stephenson v Bartlett,* 355 N.C. 354 (2002) ("*Stephenson I*") and *Stephenson v Bartlett, 357 N. C. 301* (2003) ("*Stephenson II*"). The second requirement is the creation of plans that will obtain preclearance under Section 5 of the Voting Rights Act

("VRA"), and foreclose the possibility of a successful challenge under Section 2 of the Voting Rights Act. Finally, plans must comply with State constitutional requirements as explained in the *Stephenson* decisions, and the decisions by the North Carolina Supreme Court and the United States Supreme Court in *Strickland v Bartlett*, 361 N.C. 491 (2007), *affirmed, Bartlett v. Strickland*, 129 S.Ct. 1231 (2009).

1. One person, one vote

All of our districts have been constructed with sufficient population so that they are within plus or minus 5% of the ideal population for state senate districts (190,710) and state house districts (79,462).

2. Voting Rights Act districts ("VRA districts")

We have explained our understanding of the Voting Rights Act in our statement issued on June 17, 2011. In our original plans, we proposed nine majority black Senate districts and twenty four majority black House districts. "Majority" means in excess of 50% as required by the *Strickland* decision and affirmed by the US Supreme Court.

Based upon comments we received during the public hearing process, we have made several changes in our proposed VRA districts. For example, in the House plan, we elected to delete a majority black district we had proposed for southeastern North Carolina based upon the strong statements opposing such a district, including from the Southern Coalition for Social Justice ("SCSJ") as part of the broader Alliance for Fair Redistricting and Minority Voting Rights. The remaining 23 districts with a majority of black voting age population ("BVAP") combined with two over 40% BVAP districts, continue to provide black voters with a substantially proportional and equal opportunity to elect candidates of their choice. See *Johnson v DeGrandy*, 512 U.S. 997 (1994). Creating these districts also provides the State with a strong

argument for preclearance of the plans under Section 5 of the Voting Rights Act. Federal Register Vol. 76, no. 27 at 7471; Report by the United States House of Representatives, Committee on the Judiciary, 109th Congress, 2d Session, Report 109-478 at 68-72 (2006); *Beer v. United States*, 425 U.S. 130 (1976).

Consistent with feedback provided at the public hearings or in person and as permitted by law, we have also made other changes in our proposed House VRA districts affecting Rep. Mobley, Rep. Gill, Rep. Earle, and the elimination of the southeastern district described above.

In the Senate, we have made two significant changes. Hoke and Cumberland Counties have been combined to form a majority black district (District 21). In the 2003 Senate plan, minorities in Hoke County were included in District 13 which was a mixed minority district which has elected a white Senator. Under our revised proposal, the black community in Hoke will now be part of a cohesive majority black district which should be able to elect a candidate of the minority community's choice. Both Cumberland and Hoke are covered by Section 5 of the Voting Rights Act.

We have also elected to change our proposed Senate District 32 in Forsyth County to create a district with a percentage of BVAP (42.53%) which exceeds the percentage suggested for that district by the SCSJ.

Several of our critics have incorrectly argued that our plans "pack" African American voters. We have repeatedly asked Democratic leaders and others to provide a legal case which defines "packing" as either a majority black district or creating enough districts to give black voters a substantially equal and proportional opportunity to elect candidates of their choice. To date, we have not received any case citations to this effect from any of our critics. Regardless, in 1982, these same arguments were considered and rejected by Congress when it amended Section 2 of the Voting Rights Act. See *Gingles v Edmisten,* 590 F. Supp. 345, 356-357 (E.D. N.C. 1984) (Phillips, J.), *affirmed, Thornburg v Gingles*, 478 U.S. 30 (1986).

Since March 17, 2011, we have repeatedly requested Democratic leaders and members of the minority community to provide us with proposed redistricting plans. To date, only the SCSJ has submitted alternative plans. In prior testimony, Anita Earls, Executive Director of the SCSJ, advised us that majority black districts are still needed in the State of North Carolina. Consistent with that testimony, the SCSJ has proposed nine senate districts with a BVAP from 40% to over 50%, twenty house districts with a BVAP from 40% to over 50%, and one house district with a BVAP of 37.06%. Even though all of the SCSJ districts have been drawn to achieve a specific level of black population, no one has accused the SCSJ of packing black voters.

There are two major differences between the SCSJ minority districts and our proposed VRA districts.

First, we have complied, as we must, with the holding by the United States Supreme Court and the North Carolina Supreme Court in *Strickland v Bartlett,* 361 N.C. 491 (2007), *affirmed, Bartlett v Strickland,* 129 U.S. 1231 (2009). These decisions require that districts drawn to insulate the State from liability under the Voting Rights Act must be drawn with a black voting age population in excess of 50% plus one.

Five of the nine districts SCSJ contends are "VRA" senate districts are drawn at majority black levels while four are drawn at levels above 40% BVAP. We have proposed ten senate districts with nine of those districts drawn at majority levels. We agree with the SCSJ that our tenth senate district, District 32, cannot be drawn within Forsyth County in excess of 50% plus one.

The SCSJ has also proposed eleven majority black house districts, nine house districts with black populations in excess of 40%, and one house district with black population at 37.5%. We have drawn all of our house districts at levels above 50% except for two districts in Forsyth

County. We again agree with the position of the SCSJ that two majority BVAP districts cannot be drawn in Forsyth County.

Aside from the lack of black population in Forsyth County, which prevents a majority black senate district and two majority black house districts, in light of *Bartlett*, we see no principled legal reason not to draw all VRA districts at the 50% or above level when it is possible to do so. Now that it is apparent that these majority black districts can be drawn, any decision to draw a few selected districts at less than a majority level could be used as evidence of purposeful discrimination or in support of claims against the State filed under Section 2. Thus, in order to best protect the State from costly and unnecessary litigation, we have a legal obligation to draw these districts at true majority levels.

Second, we have a disagreement with the SCSJ regarding the number of majority black districts that should be drawn in each map. SCSJ has proposed nine districts it contends are "VRA" senate districts as compared to the ten districts in our proposed senate plan. In the House, the SCSJ has recommended 21 districts it contends are "VRA" districts as compared to the 25 districts we have suggested. Our proposed plan provides black voters in North Carolina with substantial or rough proportionality in the number of VRA districts in which they have an equal opportunity to elect their preferred candidates of choice. Our plans, therefore, give the State an important defense to any lawsuit that might be filed challenging the plans under Section 2 of the Voting Rights Act. *See Johnson v DeGrandy*, 512 U.S. 997 (1994). The plans proposed by the SCSJ fail to give black voters a proportional and equal opportunity and therefore would not provide the State with this defense.

3. State Constitutional requirements

Our senate and house plans have been drawn in compliance with the State constitutional requirements stated in *Stephenson I* and *II*, along with the decision of the North Carolina

Supreme Court in *Strickland v Bartlett*, 361 N.C. 491 (2007), *affirmed, Bartlett v Strickland*, 109 S.Ct. 1231 (2009). These decisions establish a hierarchy of constitutional rules for drawing districts within a whole county or combinations of counties. We encourage interested members of the public to consult these decisions as well as the *Legislator's Guide to North Carolina Legislative and Congressional Redistricting* published on the General Assembly's website.

We look forward to hearing comments and suggestions related to these proposed legislative maps during the public hearing scheduled for July 18, 2011.

Appendix 3:

June 23, 2011 Testimony of Anita Earls

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SOUTHERN COALITION
for SOCIAL JUSTICE

North Carolina General Assembly
2011 Redistricting Public Hearing
June 23, 2011

Testimony of Anita S. Earls, Esq.
Executive Director, Southern Coalition for Social Justice
On Behalf of AFRAM – the Alliance for Fair Redistricting and Minority Voting Rights

Mr. Chairmen and Members of the North Carolina General Assembly:

Today I am speaking on behalf of the Alliance for Fair Redistricting and Minority Voting Rights, a coalition of non-profit, non-partisan organizations in North Carolina. As a part of that Alliance, my organization, the Southern Coalition for Social Justice, worked with other AFRAM members to involve the community in statewide redistricting. We held redistricting workshops where we invited members of the public to come in and work directly with our demographer to examine redistricting plan options for the State Senate and State House districts. We then posted the draft maps on a website and invited further public comment.

What I am submitting today are the district plans that resulted from that process. To be clear, AFRAM is not advocating for the adoption of these plans at this time. There may be better configurations, additional input and further refinements to these plans before AFRAM formally endorses a particular plan. However, we submit these complete plans for your consideration because these plans comply with the Voting Rights Act, comply with the *Stephenson* criteria, create geographically compact districts, and recognize important communities of interest. More specifically, the plans were drawn following these criteria:

1. Comply with the federal constitutional one-person, one-vote requirement as refined by the *Stephenson* court to require no more than a plus or minus 5% deviation from the ideal district size for each district.
2. Comply with the non-retrogression criteria for districts in counties covered by Section 5 of the Voting Rights Act.
3. Comply with Section 2 of the Voting Rights Act in Mecklenburg, Forsyth and Wake Counties.
4. Comply with the State Constitutional whole county provision as specified in the *Stephenson* opinions.
5. Draw geographically compact and contiguous districts.
6. Recognize communities of interest.
7. Preserve the cores of existing districts.
8. Avoid pairing incumbents to the extent possible.
9. Avoid splitting precincts to the extent possible.

In addition to the district maps and population data, we can provide shapefiles electronically. I am also submitting today reports that show which districts we considered to be Section 2 VRA Districts and which districts are Section 5 VRA districts, with the Black voting age population of each district in the current districts and in our proposed districts. We identify the county cluster groupings mandated by *Stephenson* that we followed in each plan. Finally, we identify the incumbent pairings that were unavoidable given the population shifts reflected in the 2010 census and the need to comply with the other redistricting criteria identified above.

Again, on behalf of AFRAM, we have the following comment on the Voting Rights Act districts that the committee has made public.

It is impossible to analyze fully the impact of these districts on minority voters in North Carolina in isolation. We cannot assess the impact of a partial plan. We need to know the composition of all of the districts in the plan in order to understand the implications of the interests of minority voters.

With that caveat, however, it does appear that these districts go beyond what the Voting Rights Act requires both in terms of the number of majority-minority districts and in terms of the Black population percentages in the Voting Rights Act districts. These districts appear to be premised on at least three fundamental legal errors.

First, the Committee states their central goal is to achieve proportional representation for Black voters. However, Section 2 of the Voting Rights Act explicitly states that it is not a guarantee of proportional representation. The Act states: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (2010). Thus, achieving proportional representation for a protected racial group is not required by the Voting Rights Act.

Second, the theory that the Voting Rights Act requires the drawing of a "max black" plan that creates a majority black district where ever possible was explicitly rejected by the U.S. Supreme Court in the *Miller v. Johnson* case, where the court explained:

> The Justice Department refused to preclear both of Georgia's first two submitted redistricting plans. The District Court found that the Justice Department had adopted a "black-maximization" policy under § 5, and that it was clear from its objection letters that the Department would not grant preclearance until the State ... created a third majority-black district. 864 F. Supp., at 1366, 1380. It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the Act.

Miller v. Johnson, 515 U.S. 900, 921 (1995).

The Supreme Court went on to explain why the Voting Rights Act does not require "maximization" by stating:

> Based on this historical understanding, we recognized in *Beer* that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U. S., at 141. The Justice Department's maximization policy seems quite far removed from this purpose. We are especially reluctant to conclude that § 5 justifies that policy given the serious constitutional concerns it raises.

Id., 515 U.S. at 926.

Indeed, by following a maximization policy, these districts threaten the very principles that the Voting Rights Act exists to promote. The goal of the Act is to ensure a fair opportunity to participate, not a guarantee of racial proportionality. By drawing districts that go far beyond what the Voting Rights Act requires, the General Assembly frustrates the purpose of the Act and creates a threat to its constitutionality.

Third, the purported justification for these districts is based on a crucial legal error: conflating the standards under Section 2 and Section 5 of the Voting Rights Act. The Section 5 non-retrogression requirement prevents the drawing of districts that, compared to the benchmark of existing districts, makes it harder for Black voters to elect their candidates of choice. It does not mean that Section 5 districts must be 50% or greater in Black population. A district that has a Black voting age population of 45% and has been electing the candidate of choice of Black voters, need only be redrawn to meet the benchmark of 45%. Instead, this plan appears to be based on the assumption that the Section 2 standards also apply under Section 5. The Supreme Court explicitly rejected this proposition in the *Bossier Parish* case, and has been very clear on numerous occasions since then that the standards under these two sections of the Act are different. *See Reno v. Bossier Parish,* 520 U.S. 471, 476-480 (1997). Most recently in *Bartlett v. Strickland* the court explained:

> Petitioners claim the majority-minority rule is inconsistent with §5, but we rejected a similar argument in LULAC, 548 U. S. 399, 446 (2006) (opinion of Kennedy, J.). The inquiries under §§2 and 5 are different. Section 2 concerns minority groups' opportunity "to elect representatives of their choice," 42 U. S. C. §1973(b) (2000 ed.), while the more stringent §5 asks whether a change has the purpose or effect of "denying or abridging the right to vote," §1973c.

Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (citing *LULAC v. Perry,* 548 U.S. 399, 446 (2006)).

By conflating the Section 2 and Section 5 standards, the plan exceeds what the Voting Rights Act requires and, in particular, increases the percentage of Black voters in Section 5 districts beyond what is required by the non-retrogression standard.

Finally, this plan is not in the best interests of racial minority voters in North Carolina because it concentrates their voting strength in a smaller number of districts and does not balance the goals of minority representation with the goals of reflecting important communities of interest.

I look forward to having the opportunity to comment on other matters relating to Section 2 and Section 5 compliance once the full districting plans are made public.

Thank you again for the kind invitation to provide this information.

Appendix 4:

Counties in Which Majority Black Districts Were Sited in the State Legislative Plans Used for the 1992-2000 Elections, the 2002 Court-Drawn Plans, the State Legislative Plans Used for the 2004-2010 Elections, and the 2011 Enacted Plans

Counties in Which Majority Black Senate Districts Were Sited in the Senate Plans Used for the 1992-2000 Elections, the 2002 Court-Drawn Plans, the State Legislative Plans Used for the 2004-2010 Elections, and the 2011 Enacted Plans

County	1992	2002	2003	2011
Bertie	1	1	0	1
Gates	1	1	0	0
Halifax	1	1	0	1
Hertford	1	1	0	1
Northhampton	1	1	0	1
Vance	1	1	0	1
Warren	1	1	0	1
Edgecombe	1	1	0	1
Martin	1	1	0	1
Pitt	1	1	0	1
Washington	1	1	0	1
Wilson	1	0	0	1
Mecklenburg	1	1	0	2
Tyrell	0	1	0	1
Chowan	0	0	0	1
Nash	0	0	0	1
Greene	0	0	0	1
Lenoir	0	0	0	1
Wayne	0	0	0	1
Wake	0	0	0	1
Durham	0	0	0	1
Granville	0	0	0	1
Cumberland	0	0	0	1
Hoke	0	0	0	1
Guilford	0	0	0	1

Counties in Which Majority Black House Districts Were Sited in the House Plans Used for the 1992-2000 Elections, the 2002 Court-Drawn Plans, the State Legislative Plans Used for the 2004-2010 Elections, and the 2011 Enacted Plans

County	1992	2002	2003	2009	2011
Bertie	1	1	0	0	1
Gates	1	0	0	0	1
Hertford	1	1	0	0	1
Northhampton	1	1	1	1	1
Edgecombe	3	1	1	1	1
Greene	1	1	0	0	1
Martin	2	1	1	1	1
Pitt	1	1	1	1	1
Halifax	1	1	1	1	1
Nash	2	1	1	1	1
Guilford	2	2	2	2	3
Forsyth	1	1	1	1	0
Mecklenburg	2	1	2	2	5
Wake	1	0	0	0	2
Cumberland	0	0	0	0	2
Granville	1	1	0	0	1
Vance	1	1	1	1	1
Warren	1	1	1	1	1
Craven	1	0	0	0	1
Jones	1	0	0	0	0
Lenoir	1	0	0	0	1
Pamlico	1	0	0	0	0
Brunswick	1	0	0	0	0
Columbus	1	0	0	0	0
New Hanover	1	0	0	0	0
Pender	1	0	0	0	0
Wilson	1	1	1	1	1
Pasquotank	0	0	0	0	1
Franklin	0	0	0	0	1
Duplin	0	0	0	0	1
Sampson	0	0	0	0	1
Wayne	0	0	0	0	1
Durham	0	0	0	0	2
Hoke	0	0	0	0	1

Richmond	0	0	0	0	1
Robeson	0	0	0	0	1
Scotland	0	0	0	0	1

Appendix 5:

Charts Comparing Districts, in Counties Examined by *Gingles* Court, in the 1991, 2003 and 2009 Legislatively-Enacted Redistricting Plans, the 2002 Court-Drawn Plan, and the 2011 Enacted Plans

The following is a chart that shows the enacted BVAP of districts in the counties in 1984, 1991, 2002, and 2003, 2011 in the counties in which the *Gingles* Court conducted its Section 2 analysis

Durham County House Districts[1]

Plan	**District #**	**District BVAP**
1984	23	67.2%
	68	31.0%
	69	10.9%
1991	23	37.39%
	63 (Durham/Wake)	7.11%
	92 (Durham/Wake)	14.87%
2002	29	44.44%
	30	25.74%
	31	44.72%
	32 (Durham/Wake)	27.84%
2003	29	44.12%
	30	21.16%
	31	44.20%
	66 (Durham/Person)	26.49%
2011	29	56.31%
	30	17.75%
	31	50.74%
	50 (Durham/Orange)	17.80%

[1] Except as noted all districts are located entirely within a county.

Notably, neither the General Assembly in 1991 or 2003 or the Courts in 2002 judged that the VRA required any 50% + House District in Durham County. The challenged House Plan included two 50%+ districts in Durham.

Durham County Senate Districts

Plan	**District #**	**District BVAP**
1984[2]	13	32.95%
2002	18 (Person, Granville Part of Durham)	23.31%
	20	46.87%
2003	20	44.58%
	18 (Chatham and Part of Durham)	19.38%
2011	20 (Granville and Part of Durham)	51.64%
	22 (Caswell, Person and Part of Durham)	21.47%

Notably, neither the General Assembly in 1984, 1991 or 2003 or the Courts in 2002 judged that the VRA required any 50% + Senate district in Durham County. The Challenged Senate Plans includes such a district for the first time.

Wake County House Districts

[2] The *Gingles* Order did not require redrawing Senate Districts in Durham, Forsyth or Wake Counties

Plan	**District #**	**District BVAP**
1984	HD 21	63.4%
	HD 61	6.5%
	HD 62	21.3%
	HD 63	9.5%
	HD 64	12.1%
	HD 65	18.1%
1991	HD 15	13.75%
	HD 21	54.13%
	HD 61	9.49%
	HD 62	12.91%
	HD 63 (Wake/Durham)	14.87%
	HD 64	23.21%
	HD 65	18.84%
	HD 92 (Wake/Durham)	7.11%
2002	HD 33	49.27%
	HD 34	12.76%
	HD 35	10.99%
	HD 36	5.60%
	HD 37	14.96%
	HD 38	31.63%
	HD 39	27.07%
	HD 40	8.49%
	HD 41	8.54%
2003	HD 33	49.97%
	HD 34	12.76%
	HD 35	10.33%
	HD 36	5.60%
	HD 37	14.96%
	HD 38	31.63%
	HD 39	27.07%
	HD 40	8.49%
	HD 41	8.54%
2011	HD 11	14.04%

	HD 33	50.36%
	HD 34	16.26%
	HD 35	16.87%
	HD 36	7.43%
	HD 37	13.32%
	HD 38	50.68%
	HD 39	26.69%
	HD 40	9.26%
	HD 41	6.98%

Notably, neither the General Assembly in 2003 or the Courts in 2002 judged that the VRA required a 50%+ House district in Wake. The 2011 General Assembly included 2 such districts in Wake.

Wake County Senate Districts

Plan	**District #**	**District BVAP**
1991	13 (Granville, Durham and Part of Wake)	32.95%
	14 (Wake and Part of Johnston)	25.24%
	36	8.45%
2002	14	43.16%
	15	16.14%
	16	16.80%
	17	11.68%
2003	14	41.0%
	15	10.36%
	16	14.70%
	17	11.44%
2011	14	51.78%

	15	10.07%
	16	15.03%
	17	9.48%
	18 (Franklin and Part of Wake)	17.96%

Notably, neither the 1991 or 2003 sessions of the General Assembly, or the Courts in 1992, judged the VRA required a 50%+ Senate District in Wake. The 2011 General Assembly included such a district.

Forsyth County House Districts

Plan	**District #**	**District BVAP**
1984	39 (3 members)	4.4%
	66	56.1%
	67	55.4%
1991	39	5.53%
	66	51.77%
	67	45.71%
	73 (Forsyth/Rockingham)	14.43%
	84 (Forsyth/Guilford)	6.52%
	88	5.44%
2002	71	50.35%
	72	41.56%
	91 (part) (Surry/Forsyth/Stoke)s	4.74%
	92 (part) Yadkin/Forsyth	4.50%
	93	9.33%
	94	7.84%
2003	71	51.57%

	72	43.40%
	73	5.70%
	74	7.99%
	75	8.35%
2011	71	45.49%
	72	45.02%
	74	16.77%
	75	11.84%
	79 (part) (Davie/Forsyth)	8.06%

Forsyth County Senate Districts

Plan	**District #**	**District BVAP**
1991	20	
	38 (Part of Forsyth, Davidson, Rowan and Davie)	
2002	31	6.99%
	32	40.47%
2003	31	6.23%
	32	40.74%
2011	31 (Yadkin and Part of Forsyth)	6.42%
	32	42.53%

Mecklenburg County House Districts

Plan	**District #**	**District BVAP**
1984	36	4.5%

	54	16.9%
	55	12.1%
	56	18.0%
	57	2.1%
	58	28.2%
	59	63.1%
	60	66.3%
1991	36	17.60%
	54	26.41%
	55	5.77%
	56	31.28%
	57	4.33%
	58	26.87%
	59	51.55%
	60	53.60%
	69	4.46%
	76	8.42%
	93	7.86%
2002	98	9.02%
	99	27.42%
	100	30.18%
	101	47.70%
	102	46.05%
	103	7.2%
	104	5.09%
	105	5.17%
	106	26.16%
	107	54.36%
2003	98	9.46%
	99	28.29%
	100	30.97%
	101	50.60%
	102	46.11%
	103	13.03%
	104	4.22%
	105	4.48%
	106	25.50%
	107	50.48%

2011	88	7.5%
	92	17.46%
	98	10.74%
	99	53.23%
	100	30.97%
	101	50.26%
	102	52.49%
	103	12.58%
	104	7.69%
	105	9.01%
	106	51.12%
	107	51.49%

Notably, the 1984, 1991 and 2003 sessions of the General Assembly, and the Courts in 2002, judged that no more than two 50%+ House districts were required in Mecklenburg, but the 2011 sessions judged that five such districts were necessary.

Mecklenburg County Senate Districts

Plan	**District #**	**District BVAP**
1984	22 (Mecklenburg and Cabarrus)	11.1%
	33	66.0%
	34	14.4%
	35	5.8%
1991	33	55.28%
	34 (Part of Lincoln and Mecklenburg)	20.59%
	35	3.43%

	40	18.77%
2002	35	9.67%
	37	41.91%
	38	56.67%
	39	7.59%
	40	9.32
2003	35	10.93%
	37	24.99%
	38	47.69%
	39	5.18%
	40	31.11%
RS2	37	26.34%
	38	52.51%
	39	6.99%
	40	51.84%
	41	13.15%

Notably, prior to 2011 neither the General Assembly nor the Courts had judged that the VRA required more than one 50% districts in Mecklenburg. The 2011 Session of the General Assembly judged two such districts necessary.

Wilson, Nash and Edgecombe Districts

Plan	**District #**	**District BVAP**
1984	8	29.6%
	70	69.1%
1991	20 (Parts of Nash, Franklin and Johnston)	18.37%
	70 (Parts of Nash,	61.09%

	Edgecombe and Wilson)	
	71 (Parts of Nash, Edgecombe and Wilson)	29.18%
	72 (Parts of Nash and Wilson)	16.06%
2002	7 (Halifax and Parts of Nash)	58.45%
	23 (Parts of Wilson and Edgecombe)	29.84%
	24 (Parts of Wilson and Edgecombe)	58.8%
	25 (Part of Nash)	25.05
2003	7 (Halifax and Part of Nash	59.77%
	23 (Parts of Wilson and Edgecombe)	36.54%
	24 (Parts of Wilson and Edgecombe)	58.47%
	25 (Nash Only)	27.26%

2011	7 (Parts of Nash and Franklin)	52.49%
	28 (Parts of Nash and Franklin)	16.94%
	8 (Parts of Wilson and Pitt)	29.90%
	24 (Parts of Wilson and Pitt)	60.01%
	23 (Edgecombe, Martin)	53.80%

Notably, prior to 2011 neither the General Assembly nor Courts had judged that the VRA required more than two 50% House districts in those counties. The 2011 General Assembly includes three such districts in those counties.

Appendix 6:

Racially Contested State Legislative District Elections 2006-2011 (with District Demographic Data)

Recent Elections of African-American Officials from Non-Majority Black Districts

Year	District	Representative	Race	Racially Contested Election?	District BVAP%	Winner % of Vote	Record Citation
2008	HD 5	Annie Mobley	Black	N	48.76%	-	Churchill Depo. Ex. 83, p. 22
2010	HD 5	Annie Mobley	Black	Y	48.76%	58.99%	Churchill Depo. Ex. 83, p. 43
2006	HD 12	William Wainwright	Black	Y	47.09%	66.28%	Churchill Depo. Ex. 83, p. 5
2008	HD 12	William Wainwright	Black	Y	47.09%	69.14%	Churchill Depo. Ex. 83, p. 25
2010	HD 12	William Wainwright	Black	Y	47.09%	60.21%	Churchill Depo. Ex. 83, p. 47
2006	HD 18	Thomas Wright	Black	Y (prim)	39.09%	67.84%	Churchill Depo. Ex. 83, p. 6
2008	HD 18	Sandra Hughes	Black	Y	39.09%	67.18%	Churchill Depo. Ex. 83, p. 26
2006	HD 21	Larry Bell	Black	N	47.94%	-	Churchill Depo. Ex. 83, p. 7
2008	HD 21	Larry Bell	Black	N	47.94%	-	Churchill Depo. Ex. 83, p. 27
2006	HD 29	Larry Hall	Black	Y (prim)	44.12%	55.47%	Churchill Depo. Ex. 83, p. 10
2008	HD 29	Larry Hall	Black	Y	44.12%	90.73%	Churchill Depo. Ex. 83, p. 29
2010	HD 29	Larry Hall	Black	N	44.12%	-	Churchill Depo. Ex. 83, p. 49
2006	HD 31	Mickey Michaux	Black	N	44.20%	-	Churchill Depo. Ex. 83, p. 11

2008	HD 31	Mickey Michaux	Black	N	44.20%	-	Churchill Depo. Ex. 83, p. 30
2010	HD 31	Mickey Michaux	Black	Y	44.20%	75.50%	Churchill Depo. Ex. 83, p. 50
2006	HD 33	Bernard Allen	Black	N	49.19%	-	Churchill Depo. Ex. 83, p. 12
2008	HD 33	Dan Blue	Black	Y	49.19%	81.85%	Churchill Depo. Ex. 83, p. 31
2010	HD 33	Rosa Gill	Black	Y	49.19%	77.79%	Churchill Depo. Ex. 83, p. 51
2006	HD 39	Linda Coleman	Black	Y	26.70%	58.73%	Churchill Depo. Ex. 83, p. 66
2008	HD 39	Linda Coleman	Black	Y	26.70%	64.24%	Churchill Depo. Ex. 83, p. 68
2006	HD 41	Ty Harrell	Black	Y	8.30%	51.64%	Churchill Depo. Ex. 83, p. 79
2008	HD 41	Ty Harrell	Black	Y	8.30%	53.77%	Churchill Depo. Ex. 83, p. 81
2006	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 13
2008	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 32
2010	HD 42	Marvin Lucas	Black	N	43.94%	-	Churchill Depo. Ex. 83, p. 53
2006	HD 43	Mary McAllister	Black	N	47.75%	-	Churchill Depo. Ex. 83, p. 15
2008	HD 43	Elmer Floyd	Black	N	47.75%	93.31%	Churchill Depo. Ex. 83, p. 33
2006	HD 48	Garland Pierce	Black	N	45.24%	-	Churchill Depo. Ex. 83, p. 16
2008	HD 48	Garland Pierce	Black	N	45.24%	-	Churchill

							Depo. Ex. 83, p. 36
2010	HD 48	Garland Pierce	Black	Y	45.24%	74.80%	Churchill Depo. Ex. 83, p. 55
2006	HD 72	Earline Parmon	Black	N	42.93%	-	Churchill Depo. Ex. 83, p. 20
2008	HD 72	Earline Parmon	Black	N	42.93%	-	Churchill Depo. Ex. 83, p. 40
2010	HD 72	Earline Parmon	Black	Y	42.93%	69.48%	Churchill Depo. Ex. 83, p. 59
2008	HD 99	Nick Mackey	Black	Y (prim)	27.74%	65.32%	Churchill Depo. Ex. 83, p. 70
2010	HD 99	Rodney Moore	Black	Y	27.74%	72.01%	Churchill Depo. Ex. 83, p. 74
2006	SD 4	Robert Holloman	Black	Y	49.14%	69.67%	Churchill Depo. Ex. 82, p. 4
2008	SD 4	Edward Jones	Black	N	49.14%	-	Churchill Depo. Ex. 82, p. 11
2008	SD 5	Don Davis	Black	Y	30.14%	52.90%	Churchill Depo. Ex. 82, p. 29
2008	SD 14	Vernon Malone	Black	Y	41.01%	69.45%	Churchill Depo. Ex. 82, p. 13
2010	SD 14	Dan Blue	Black	Y	41.01%	65.92%	Churchill Depo. Ex. 82, p. 21
2006	SD 20	Jeanne Lucas	Black	N	44.58%	-	Churchill Depo. Ex. 82, p. 6
2008	SD 20	Floyd McKissick	Black	Y	44.58%	73.58%	Churchill Depo. Ex. 82, p. 14
2010	SD 20	Floyd McKissick	Black	Y	44.58%	73.11%	Churchill Depo. Ex. 82, p. 22
2008	SD 21	Larry Shaw	Black	N	41.00%	-	Churchill Depo. Ex. 82,

							p. 15
2010	SD 21	Eric Mansfield	Black	Y	41.00%	67.61%	Churchill Depo. Ex. 82, p. 23
2006	SD 24	Tony Foriest	Black	Y (prim)	20.79%	70.06%	Churchill Depo. Ex. 82, p. 36
2008	SD 24	Tony Foriest	Black	Y	20.79%	52.51%	Churchill Depo. Ex. 82, p. 39
2006	SD 28	Katie Dorsett	Black	N	44.18%	-	Churchill Depo. Ex. 82, p. 8
2008	SD 28	Katie Dorsett	Black	N	44.18%	-	Churchill Depo. Ex. 82, p. 16
2010	SD 28	Gladys Robinson	Black	Y	44.18%	47.38% [black (I) candidate received 13.47%]	Churchill Depo. Ex. 82, p. 24
2006	SD 38	Charlie Dannelly	Black	N	47.69%	-	Churchill Depo. Ex. 82, p. 9
2008	SD 38	Charlie Dannelly	Black	Y	47.69%	73.33%	Churchill Depo. Ex. 82, p. 17
2010	SD 38	Charlie Dannelly	Black	N	47.69%	-	Churchill Depo. Ex. 82, p. 26
2006	SD 40	Malcolm Graham	Black	Y	31.11%	61.48%	Churchill Depo. Ex. 82, p. 28
2008	SD 40	Malcolm Graham	Black	Y	31.11%	66.96%	Churchill Depo. Ex. 82, p. 31
2010	SD 40	Malcolm Graham	Black	Y	31.11%	58.16%	Churchill Depo. Ex. 82, p. 34
1998	CD 1	Eva Clayton	Black	Y	46.54%	62.24%	Churchill Depo. Ex. 81, p. 10
2000	CD 1	Eva Clayton	Black	Y	46.54%	66%	Churchill Depo. Ex. 81, p. 12
2002	CD 1	Frank Ballance	Black	Y	47.76%	63.73%	Churchill

							Depo. Ex. 81, p. 15
2004	CD 1	G.K. Butterfield	Black	Y	47.76%	63.97%	Churchill Depo. Ex. 81, p. 17
2006	CD 1	G.K. Butterfield	Black	N	47.76%	-	Churchill Depo. Ex. 81, p. 20
2008	CD 1	G.K. Butterfield	Black	Y	47.76%	70.28%	Churchill Depo. Ex. 81, p. 24
2010	CD 1	G.K. Butterfield	Black	Y	47.76%	59.31%	Churchill Depo. Ex. 81, p. 26
1998	CD 12	Mel Watt	Black	Y	32.56%	55.95%	Churchill Depo. Ex. 81, p. 11
2000	CD 12	Mel Watt	Black	Y	43.36%	65%	Churchill Depo. Ex. 81, p. 14
2002	CD 12	Mel Watt	Black	Y	42.31%	65.34%	Churchill Depo. Ex. 81, p. 16
2004	CD 12	Mel Watt	Black	Y (prim)	42.31%	66.82%	Churchill Depo. Ex. 81, p. 19
2006	CD 12	Mel Watt	Black	N	42.31%	-	Churchill Depo. Ex. 81, p. 22
2008	CD 12	Mel Watt	Black	Y	42.31%	71.55%	Churchill Depo. Ex. 81, p. 25
2010	CD 12	Mel Watt	Black	Y	42.31%	63.88%	Churchill Depo. Ex. 81, p. 29

Recent Elections of African-American Officials from Majority White Districts

Year	District	Representative	Race	Racially Contested Election?	District WVAP%	Record Citation
2006	HD 18	Thomas Wright	Black	Y (prim)	57.73%	Churchill Depo. Ex. 83, p. 6
2008	HD 18	Sandra Hughes	Black	Y	57.73%	Churchill Depo. Ex. 83, p. 26
2006	HD 39	Linda Coleman	Black	Y	67.68%	Churchill Depo. Ex. 83, p. 66
2008	HD 39	Linda Coleman	Black	Y	67.68%	Churchill Depo. Ex. 83, p. 68
2006	HD 41	Ty Harrell	Black	Y	82.85%	Churchill Depo. Ex. 83, p. 79
2008	HD 41	Ty Harrell	Black	Y	82.85%	Churchill Depo. Ex. 83, p. 81
2006	HD 72	Earline Parmon	Black	N	51.33%	Churchill Depo. Ex. 83, p. 20
2008	HD 72	Earline Parmon	Black	N	51.33%	Churchill Depo. Ex. 83, p. 40
2010	HD 72	Earline Parmon	Black	Y	51.33%	Churchill Depo. Ex. 83, p. 59
2008	HD 99	Nick Mackey	Black	Y (prim)	62.20%	Churchill Depo. Ex. 83, p. 70
2010	HD 99	Rodney Moore	Black	Y	62.20%	Churchill Depo. Ex. 83, p. 74
2008	SD 14	Vernon Malone	Black	Y	51.84%	Churchill Depo. Ex. 82, p. 13
2010	SD 14	Dan Blue	Black	Y	51.84%	Churchill Depo. Ex. 82, p. 21
2006	SD 24	Tony Foriest	Black	Y (prim)	75.17%	Churchill Depo. Ex. 82, p. 36
2008	SD 24	Tony Foriest	Black	Y	75.17%	Churchill Depo. Ex. 82, p. 39
2006	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 28
2008	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 31
2010	SD 40	Malcolm Graham	Black	Y	59.89%	Churchill Depo. Ex. 82, p. 34
2008	SD 5	Don Davis	Black	Y	65.13%	Churchill Depo. Ex. 82, p. 29
2006	SD 28	Katie Dorsett	Black	N	50.74%	Churchill Depo. Ex. 82, p. 8

2008	SD 28	Katie Dorsett	Black	N	50.74%	Churchill Depo. Ex. 82, p. 16
2010	SD 28	Gladys Robinson	Black	Y	50.74%	Churchill Depo. Ex. 82, p. 24
1998	CD 1	Eva Clayton	Black	Y	52.42%	Churchill Depo. Ex. 81, p. 10
2000	CD 1	Eva Clayton	Black	Y	52.42%	Churchill Depo. Ex. 81, p. 12
1998	CD 12	Mel Watt	Black	Y	65.85%	Churchill Depo. Ex. 81, p. 11
2000	CD 12	Mel Watt	Black	Y	55.05%	Churchill Depo. Ex. 81, p. 14
2002	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 16
2004	CD 12	Mel Watt	Black	Y (prim)	50.57%	Churchill Depo. Ex. 81, p. 19
2006	CD 12	Mel Watt	Black	N	50.57%	Churchill Depo. Ex. 81, p. 22
2008	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 25
2010	CD 12	Mel Watt	Black	Y	50.57%	Churchill Depo. Ex. 81, p. 29

Appendix 7:

District-by-District Information Available to the General Assembly

Senate District 4

Senate District 4 is comprised of Vance, Warren and Halifax counties, and pieces of Nash and Wilson counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 4 from 49.70% in 2010 to 52.75% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters won the general election in 2010 with 62.55% of the vote, when the district had 49.70% TBVAP. (Doc. Ex. 6211). The candidate of choice of black voters also won the general election in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

Senate District 5

Senate District 5 is comprised of Greene County and pieces of Wayne, Lenoir and Pitt counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 5 from 31% in 2010 to 51.97% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters won the election in 2008 when the district had only 31% TBVAP. (Doc. Ex. 1309).

Senate District 14

Senate District 14 is located wholly within Wake County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199).

Defendants increased the TBVAP for Senate District 14 from 42.62% in 2010 to 51.28% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters won the general election in 2010 with 65.92% of the vote, when the district had 42.62% TBVAP. (Doc. Ex. 6211). In the 2004 general election, the Black candidate (Vernon Malone) defeated the White candidate by 64.1% to 35.9%. In the 2006 general election, Senator Malone defeated the White candidate by 65.9% to 34.1%. In the 2008 general election, Senator Malone defeated the White candidate 69.45% to 30.55%. In the 2010 general election, the Black candidate (Dan Blue) defeated the White candidate 65.9% to 34.1%. (R p 283; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

Senate District 20

Senate District 20 is comprised of Granville County and a piece of Durham County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 20 from 44.64% in 2010 to 51.04% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters won the general election in 2010 with 73.11% of the vote, when the district had 44.64% TBVAP. (Doc. Ex. 6211). In the 2004 general election, the Black candidate, Senator Lucas, defeated the White candidate 90.2% to 9.8%. In the 2006 general election, Senator Lucas was not

opposed. In the 2008 general elections, the Black candidate defeated White opponents, by 73.58% to 22.55%. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82; R p 285). Senator Jeanne Lucas was elected to office at least 7 times prior to the election of Senator McKissick. (T p 110).

Senate District 21

Senate District 21 is comprised of Hoke County and pieces of Cumberland County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 21 from 44.93% in 2010 to 51.53% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters, Eric Mansfield, won the general election in 2010 with 67.61% of the vote, when the district had 44.93% TBVAP. (Doc. Ex. 6211). In the 2004 general election, the Black candidate, Larry Shaw, received 61.21% of the vote, the White candidate received 36.09% of the vote, and a third party candidate received 2.69% of the votes. In the 2006 general election, Senator Shaw defeated the White candidate by 61.6% to 38.4%. In the 2008 general election, Senator Shaw was unopposed. (R p 286; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

Prior to Senator Shaw's election, Senate District 21 was represented by another African-American senator, C.R. Edwards. (T p 57). Senate District 21 has

been represented by four different African-American candidates in recent years, and in none of those districts were black voters a majority of the electorate. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82; Doc. Ex. 6211). Then-Senator Mansfield spoke out against the configuration of Senate District 21 in the enacted plan and spoke personally with Senator Rucho, explaining that an increase in the black voting age population in the district was not necessary and that it sent the message that white voters in the district would only vote for a white candidate when that was clearly not the case. (T pp 65-66).

Senate District 28

Senate District 28 is located wholly within Guilford County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 28 from 47.20% in 2010 to 56.49% under the 2011 plan. (R p 660; Doc. Ex. 6211). Senator Robinson won the general election in 2010 in a three-candidate race with 47.84% of the vote, when the district had 47.20% TBVAP. (Doc. Ex. 6211). In that general election, there were two black candidates and one white candidate. (T pp 144-45; Doc. Ex. 6760). SD 28 has been represented by three black senators, Bill Martin, Katie Dorsett and Gladys Robinson. (Doc. Ex. 6760). In the 2004 and 2006 general elections, the Black candidate, Katie Dorsett, was not opposed. In the 2008 general

election, Senator Dorsett was not opposed. (R p 288; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

Senate District 38

Senate District 38 is located wholly within Mecklenburg County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 38 from 46.97% in 2010 to 52.51% under the 2011 plan. (R p 660; Doc. Ex. 6211). The candidate of choice of black voters won in 2010 with 68.67% of the vote when the district had 46.97% TBVAP. (Doc. Ex. 6211). In the 2004 and 2006 general elections, the Black candidate, Charlie Dannelly, was unopposed. In the 2008 general election, Senator Dannelly defeated his White opponent by wide margins—73.33% to 23.87%. (R p 290; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

Senate District 40

Senate District 40 is located wholly within Mecklenburg County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Rucho Deposition, Exhibits 199-218, NAACP-199). Defendants increased the TBVAP for Senate District 40 from 35.43% in 2010 to 51.84% under the 2011 plan. (R p 660; Doc. Ex. 6211). Sen. Graham won in 2010 with 58.16% of the vote when the district had 35.43% TBVAP. (Doc. Ex. 6211). In the 2004 general election, Sen. Graham defeated his opponent by

57.88% to 42.11%. In the 2006 general election, Senator Graham was reelected by 61.47% to 38.52%; in the 2008 general election, he was re-elected by 66.96% to 33.04%. (R p 291; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 82).

House District 5

House District 5 is comprised of Gates, Hertford, Bertie and a piece of Pasquotank County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 5 from 48.87% in 2010 to 54.17% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won with 58.99% of the vote in 2010, when the district had 48.87% TBVAP. (Doc. Ex. 6209). The candidate of choice of black voters also won in 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 7

House District 7 is comprised of pieces of Halifax and Nash counties. Lewis Dep. Ex. 189. Defendants increased the TBVAP for House District 7 from 48.87% in 2010 to 51.67% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 in an uncontested race, when the district had 48.87% TBVAP. (Doc. Ex. 6209). The candidate of choice of black voters also

won in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 12

House District 12 is comprised of pieces of Greene, Lenoir, and Craven counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 12 from 46.45% in 2010 to 50.6% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters, African-American state representative William Wainwright, won in 2010 with 60.21% of the vote when the district had 46.45 TBVAP. (Doc. Ex. 6209). Representative Wainwright prevailed in the 2004, 2006, and 2008 general elections, respectively, by 64.49% to 35.50%, 66.27% to 33.72%, and 69.13% to 30.86%. (R p 297; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 21

House District 21 is comprised of pieces of Sampson, Duplin, and Wayne counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 21 from 46.25% in 2010 to 51.9% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 with 65.59% of the vote when the district had 46.25% TBVAP. (Doc. Ex. 6209). The candidate of

choice of black voters also won in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

In floor debates, Representative Bell stated that he found the removal of white and Native American voters from his district offensive and unnecessary, because he knew those populations in his district supported him. (Doc. Ex. 6864-66).

House District 24

House District 24 is comprised of pieces of Wilson and Pitt counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 24 from 56.07% in 2010 to 57.33% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 with 64.84% of the vote when the district had 56.07% TBVAP. (Doc. Ex. 6209). The candidate of choice of black voters also won in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 29

House District 29 is located wholly within Durham County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 29 from 46.25% in 2010 to 51.34% under the 2011 plan. (R p 659; Doc. Ex. 6209). Rep. Hall won in

an uncontested general election in 2010 when the district had 46.25% TBVAP. (Doc. Ex. 6209) Rep. Hall first won in the district in 2006, when he ran against two other African-American candidates and two white candidates in the primary elections. (T p 91). In 2008, Representative Hall defeated his opponent 90.73% to 9.27%. (R p 300; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83). In his first election to the State House of Representatives, Rep. Hall had the endorsements of groups such as the People's Alliance and the Police Benevolent Association—organizations with predominantly white memberships. (T p 103). The representative who preceded Representative Hall in serving in House District 29 was another African-American state representative, Paul Miller, who was elected and served three terms. (T p 91).

House District 31

House District 31 is located wholly within Durham County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 31 from 47.23% in 2010 to 51.84% under the 2011 plan. (R p 659; Doc. Ex. 6209). Rep. Michaux won in 2010 with 75.5% of the vote when the district had 47.23% TBVAP. (Doc. Ex. 6209). At the 2006 and 2008 general elections, Rep. Michaux did not have an opponent. At the 2004 general election, Rep. Michaux defeated his opponent by 85.97% to 14.02%. (R p 301; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill

Deposition, Ex 44-94, Churchill 83). The voters in House District 31 have elected an African-American representative, Rep. Michaux, to 17 consecutive terms in office. (T p 101).

House District 32

House District 32 is comprised of Warren, Vance, and Granville Counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP in House District 32 from 35.88% in 2010 to 50.45% under the 2011 plan. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189; R p 659; Doc. Ex. 6209). The prior version of House District 32 was located only in Granville and Vance counties. (R p 658). The candidate of choice of black voters, African-American state representative Nathan Baskerville, won in that district with 70.78% of the vote in the 2012 general election. (Doc. Ex. 6209).

House District 33

House District 33 is located wholly within Wake County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). House District 33 was drawn at 51.42% TBVAP. (R p 659). The candidate of choice of black voters won in 2010 with 77.79% of the vote when the district had 51.74% TBVAP. (Doc. Ex. 6209). The candidate of choice of black voters,

then-state representative Dan Blue, also won in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 38

House District 38 is located wholly within Wake County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 38 from 27.96% in 2010 to 51.37% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won the general election in 2010 with 65.63% of the vote when the district had 27.96% TBVAP. (Doc. Ex. 6209)

House District 42

House District 42 is located wholly within Cumberland County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 42 from 47.94% in 2010 to 52.56% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won the uncontested general election in 2010 when the district had 47.94% TBVAP. (Doc. Ex. 6209) The candidate of choice of black voters also won in 2006 and 2008. (Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 48

House District 48 is comprised of pieces of Richmond, Scotland, Hoke, and Robeson counties. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 48 from 45.56% in 2010 to 51.27% under the 2011 plan. (R p 659; Doc. Ex. 6209). Rep. Pierce won the general election in 2010 with 74.80% of the vote when the district had 45.56% TBVAP. (Doc. Ex. 6209). In the 2004, 2006, and 2008 general elections, Rep. Pierce did not have an opponent. (R p 306).

House District 57

House District 57 is located wholly within Guilford County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the BVAP for House District 57 from 29.93% in 2010 to 50.69% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 with 55.69% of the vote when the district had 29.93% TBVAP. (Doc. Ex. 6209).

House District 99

House District 99 is located entirely within Mecklenburg County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 99 from 41.26% in 2010 to 54.65% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 with 72.01% of the vote, when the

district had 41.26% TBVAP. (Doc. Ex. 6209). The candidate of choice of black voters also won in 2006 and 2008. (R p 310; Doc. Ex. 7726, CDs, PS83, Depositions, Churchill Deposition, Ex 44-94, Churchill 83).

House District 106

House District 106 is located entirely within Mecklenburg County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP for House District 106 from 28.16% in 2010 to 51.12% under the 2011 plan. (R p 659; Doc. Ex. 6209). The candidate of choice of black voters won in 2010 with 59.50% of the vote, when the district had 28.16% TBVAP. (Doc. Ex. 6209). After the unnecessary increase in TBVAP, the candidate of choice of black voters, African-American state representative Carla Cunningham, won an uncontested general election in 2012. (Doc. Ex. 6209).

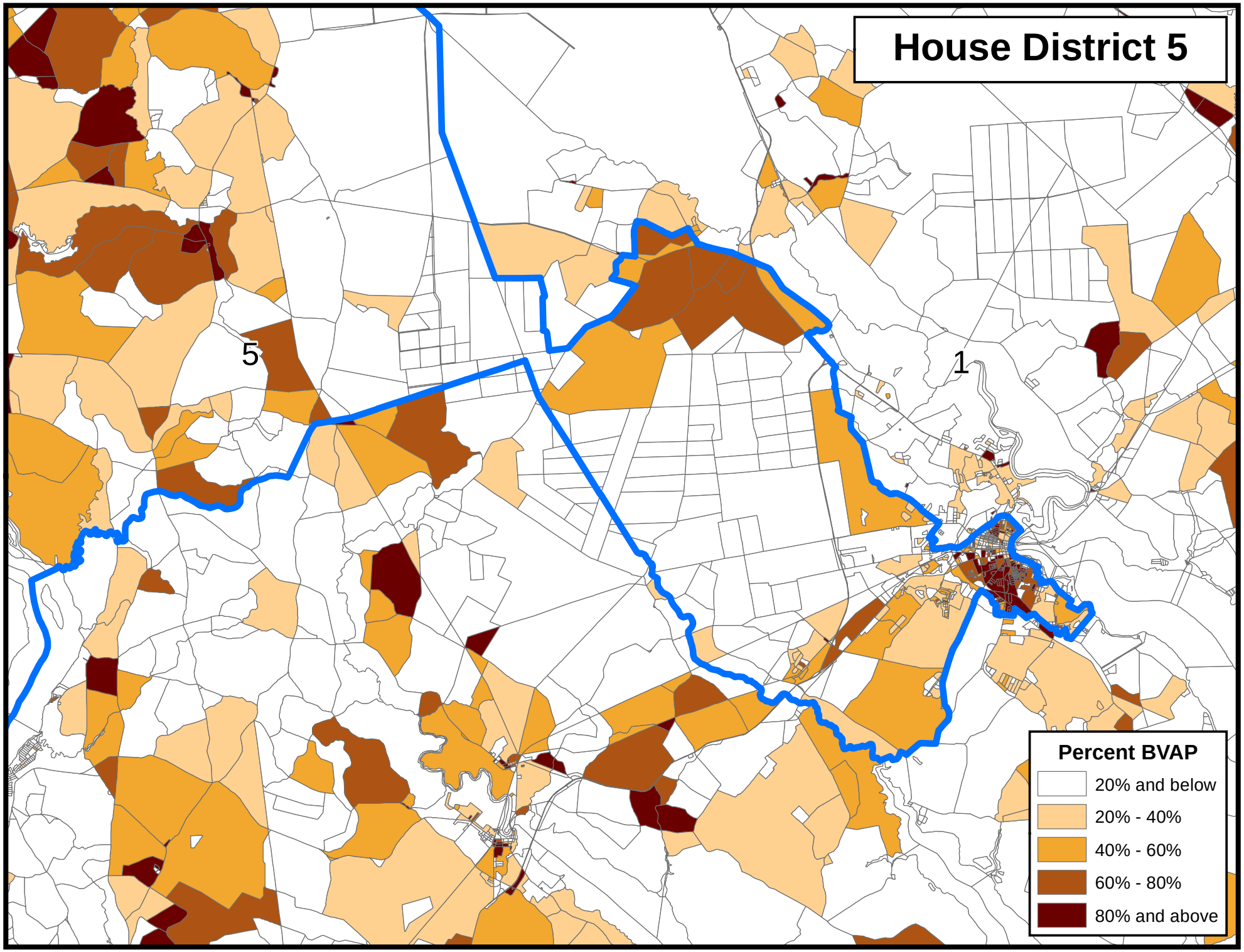
House District 107

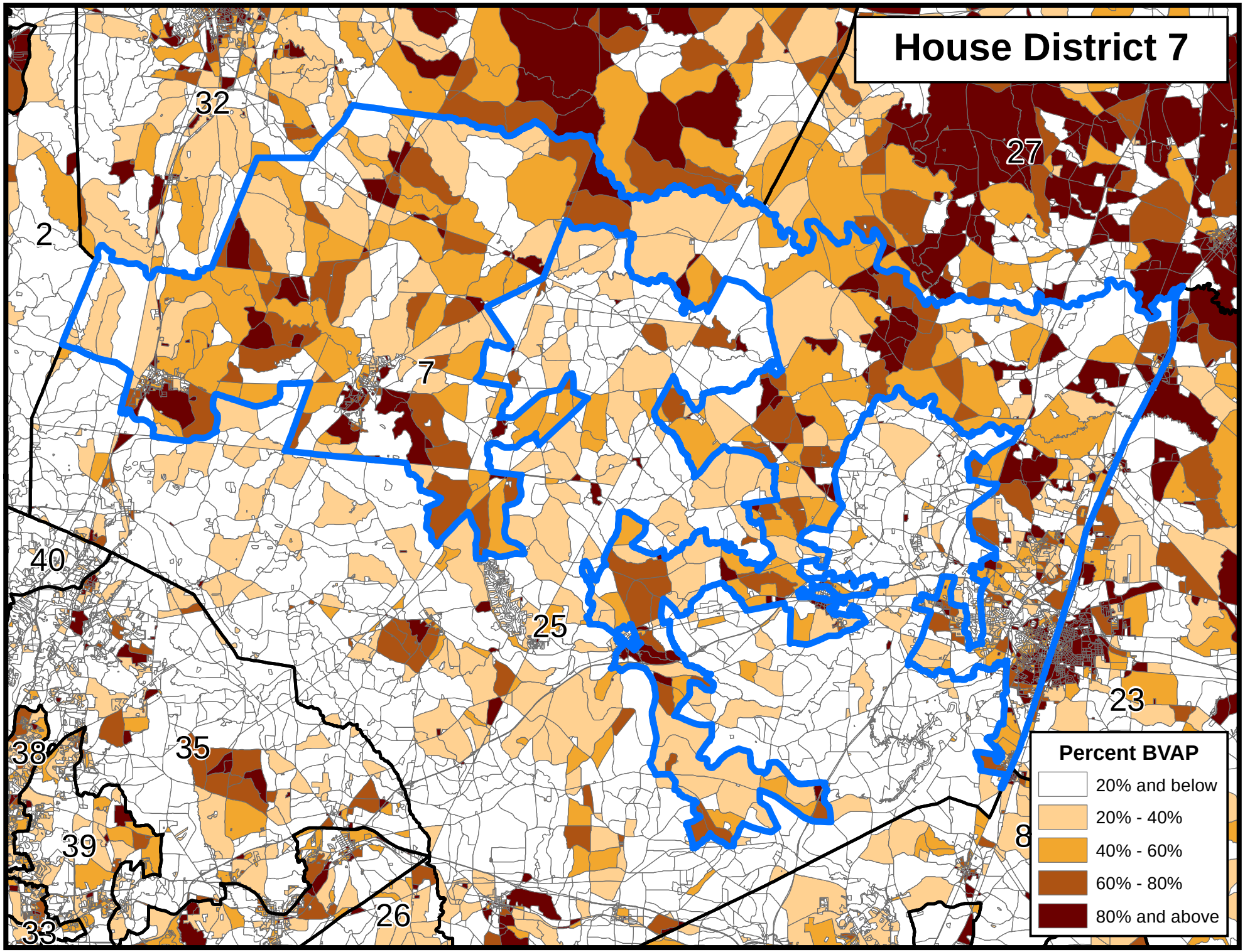
House District 107 is located entirely within Mecklenburg County. (Doc. Ex. 7726, CDs, PS 83, Depositions, Lewis Deposition, NAACP Exhibits 179-198, NAACP-189). Defendants increased the TBVAP in House District 107 from 47.14% in 2010 to 52.52% under the 2011 plan. (R p 659; Doc. Ex. 6209). In the 2004 general election, the Black candidate, Pete Cunningham, defeated his opponent 68.2% to 31.8%. In the 2006 general election, Representative

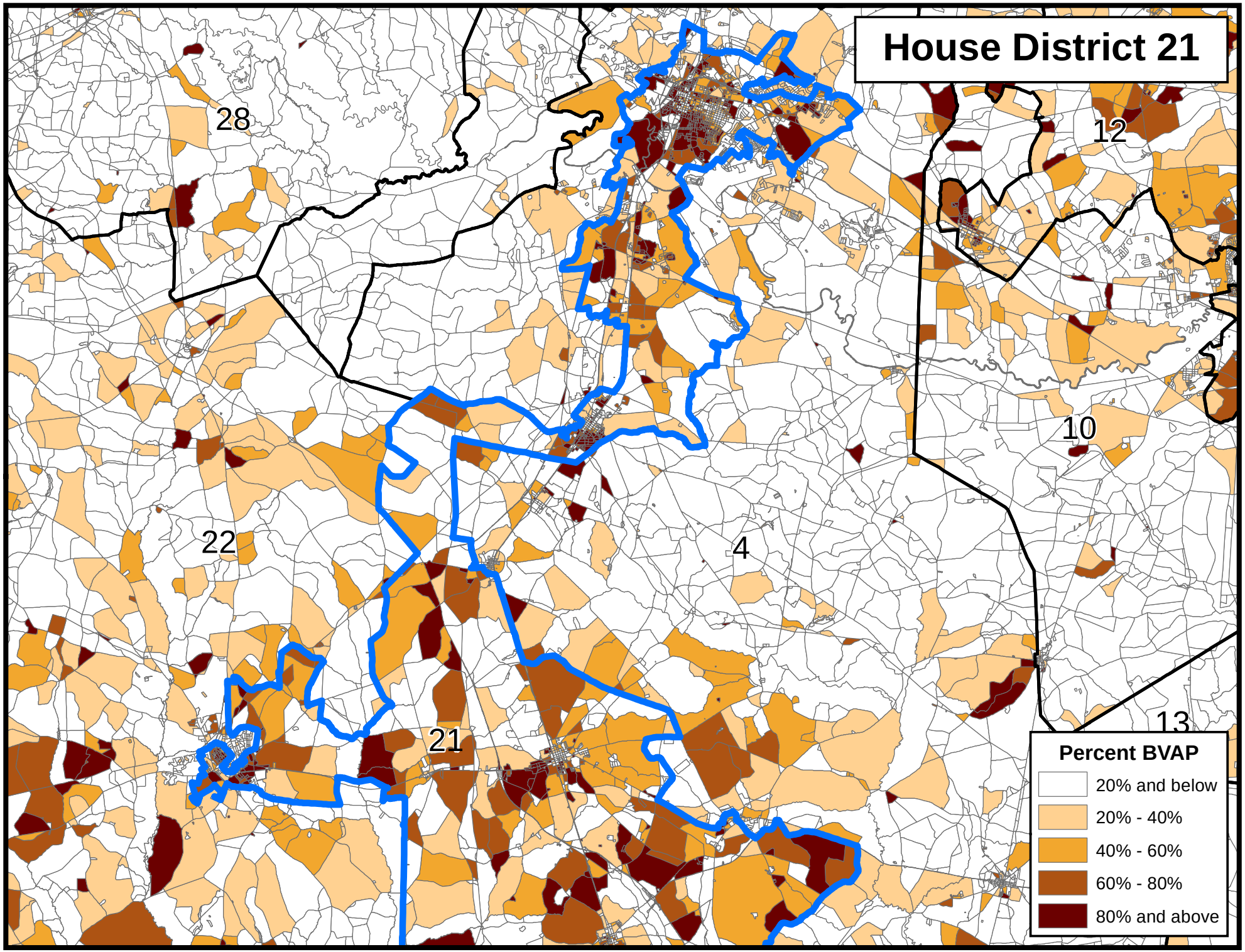
Cunningham did not have an opponent. In the 2008 and 2010 elections, the Black candidate, Kelly Alexander, defeated his opponent 75.26% to 24.74% and 67.26% to 32.74%. (R p 311).

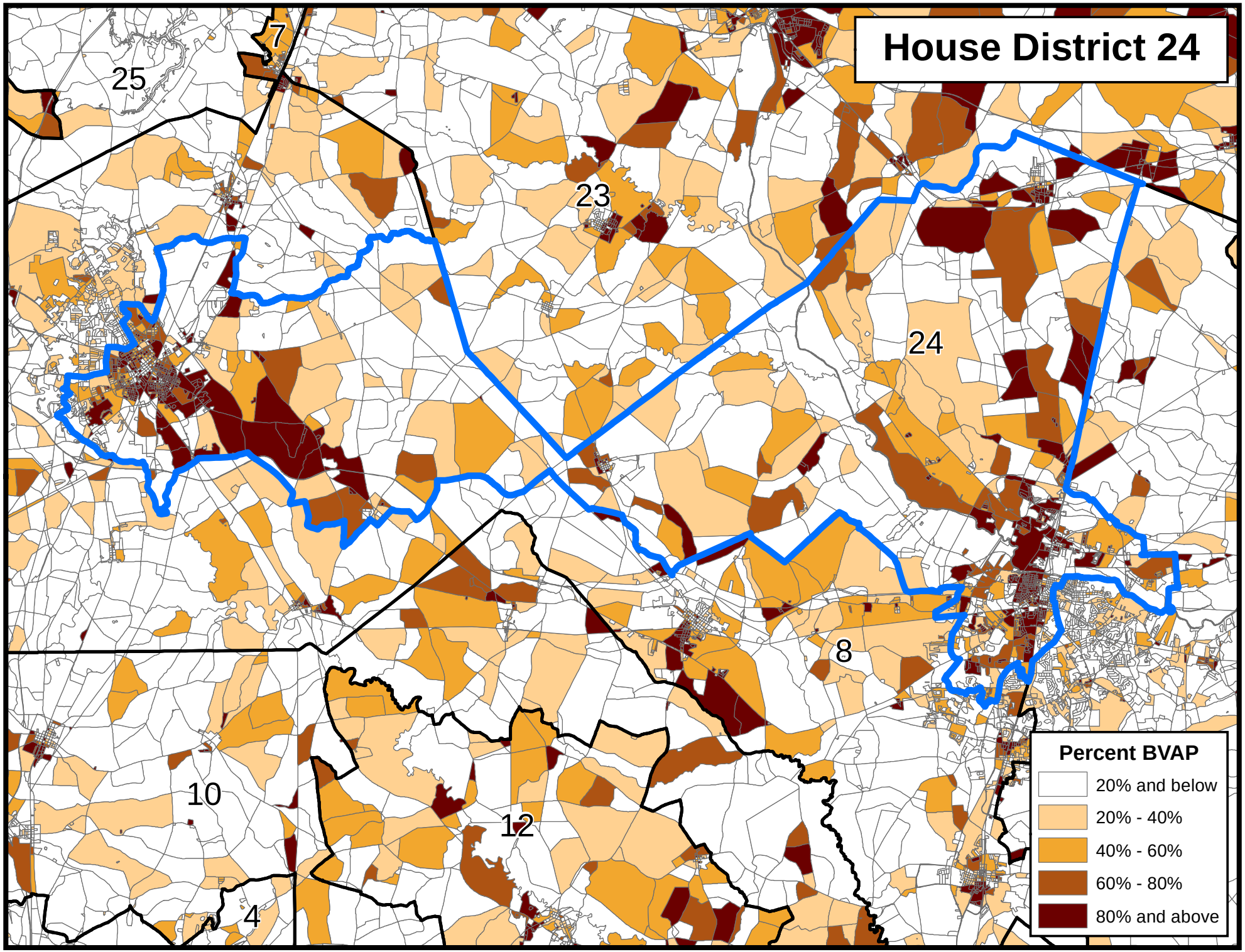
Appendix 8:

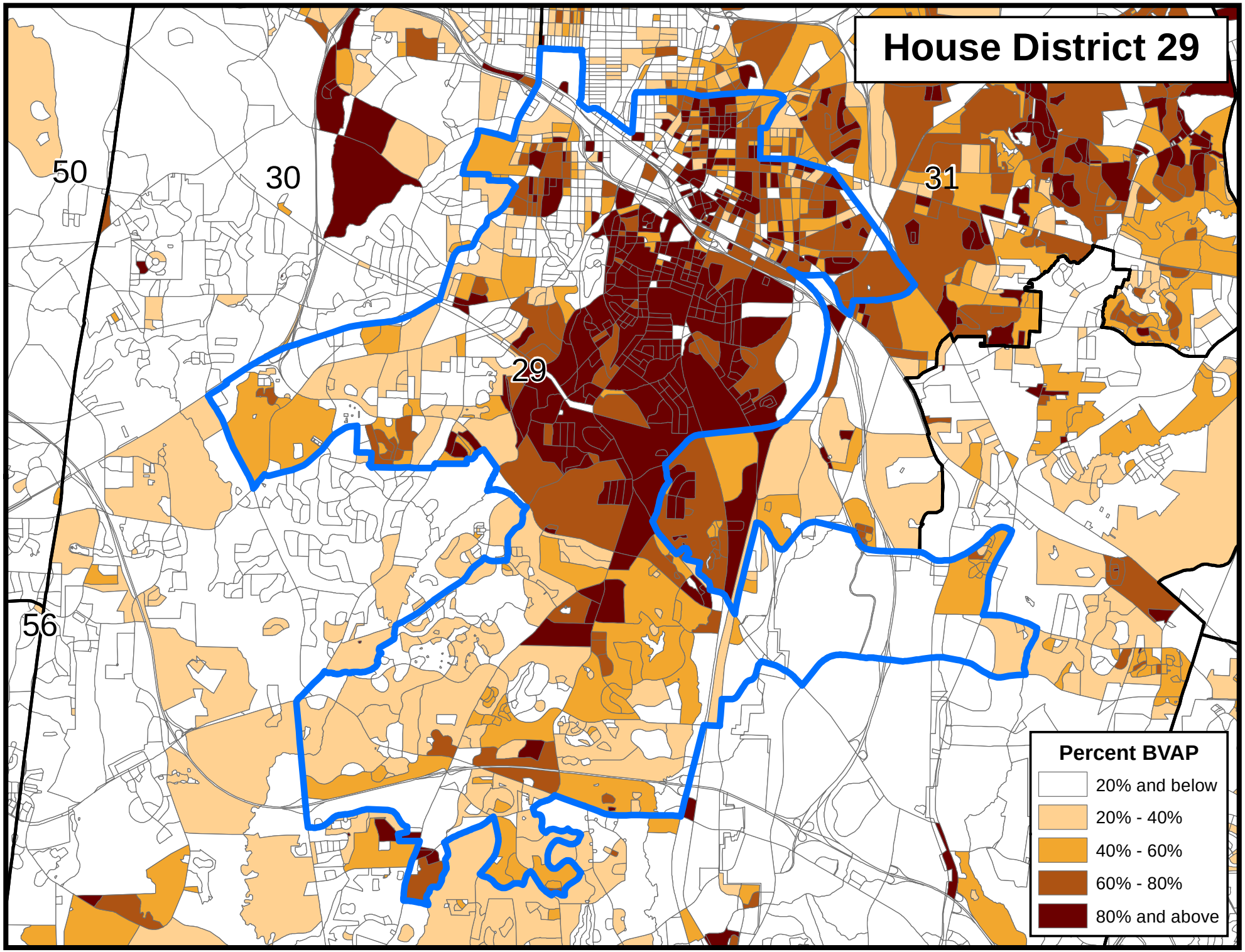
Lines of Challenged Districts Superimposed over Census Block Data by Race

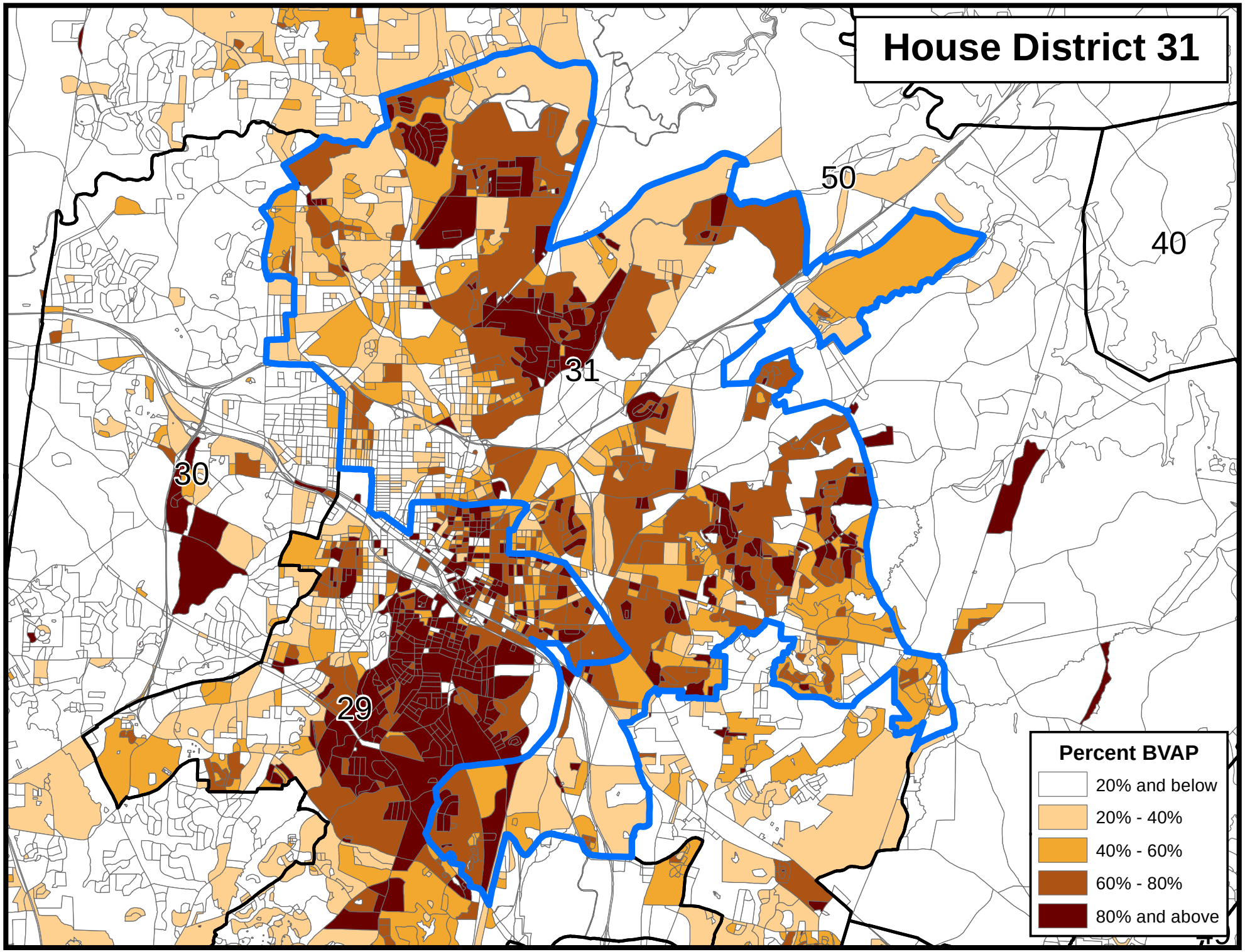

House District 5
5
1
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

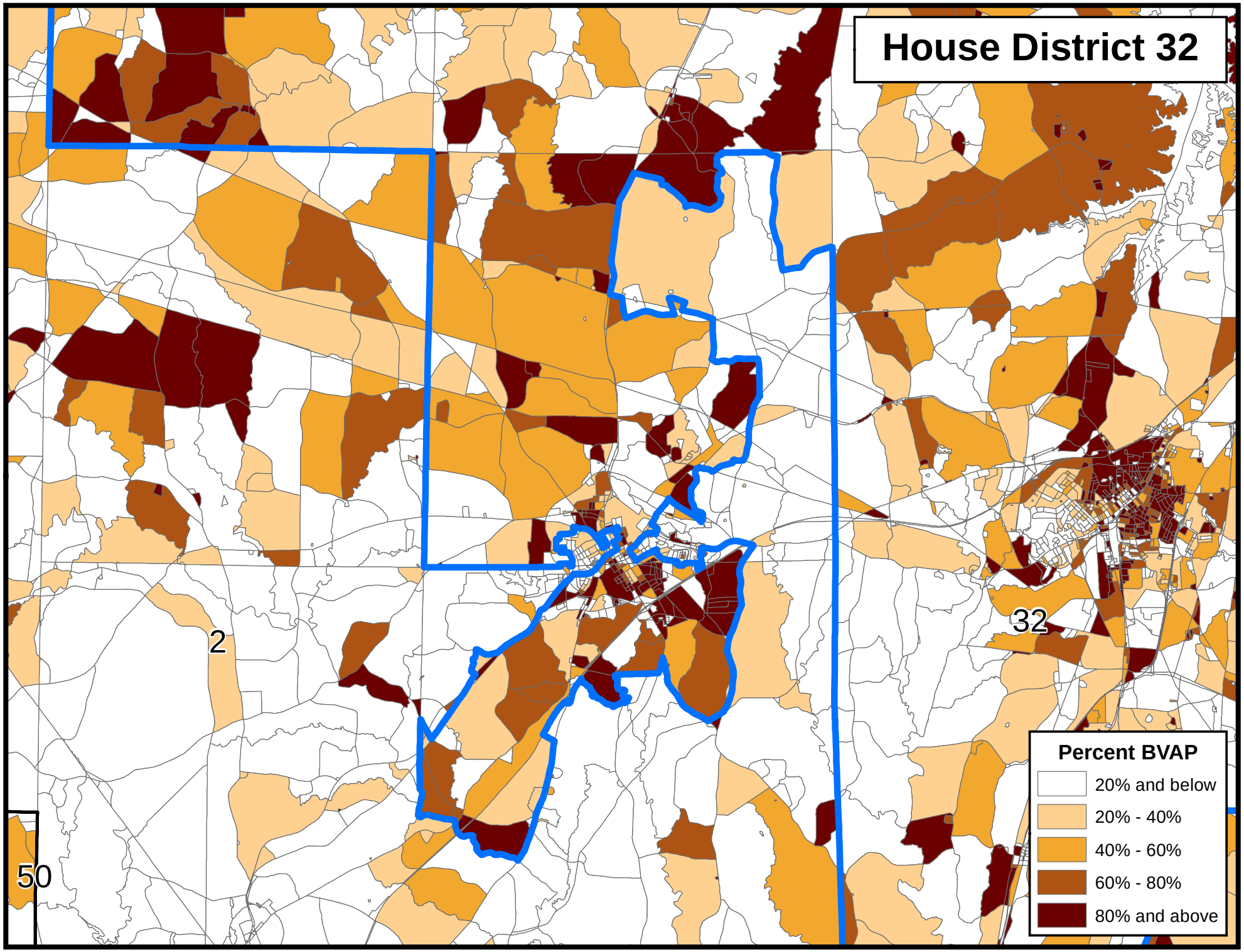

House District 7
32
27
2
7
40
25
23
38
35
39
26
33
8
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

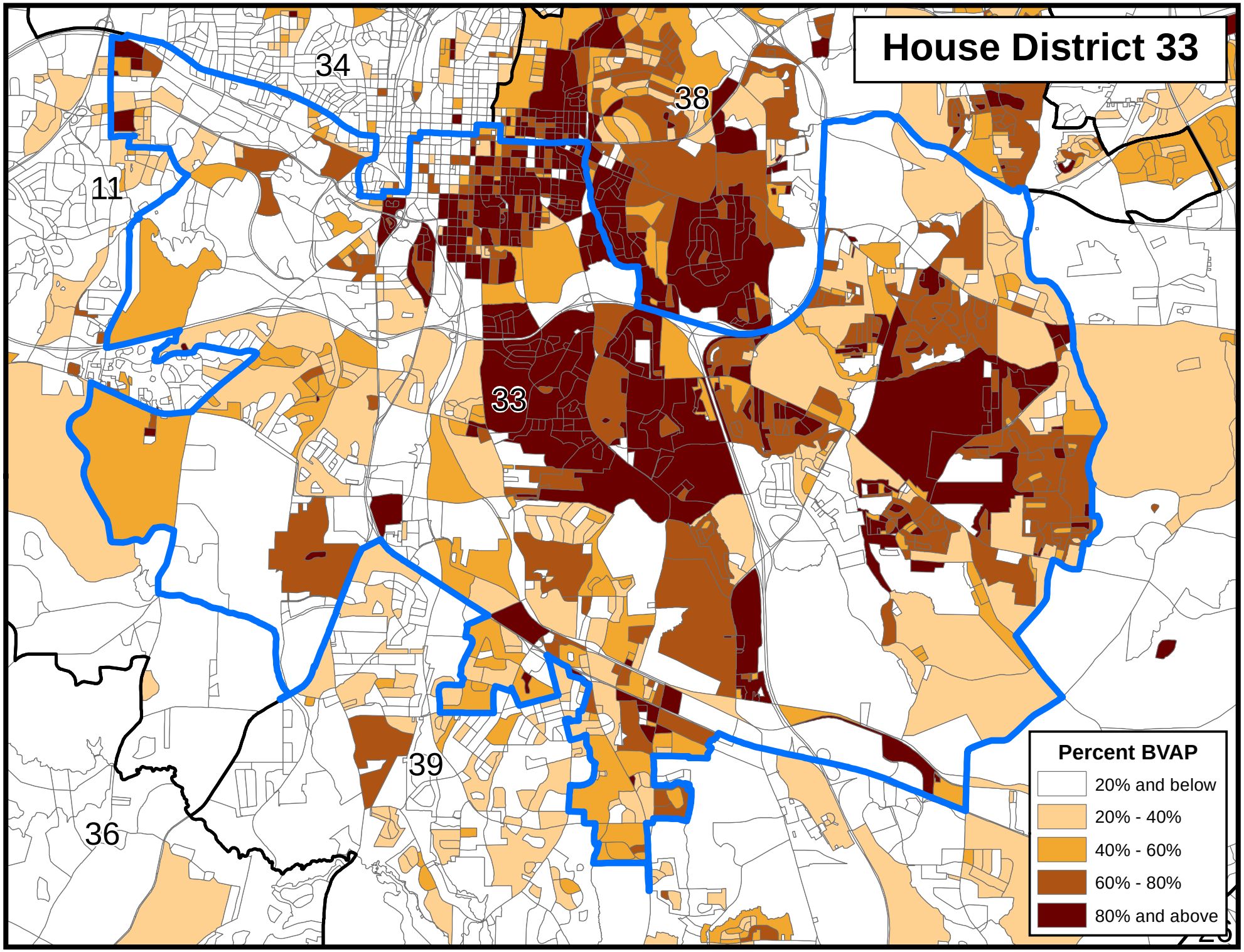

House District 21
28
12
10
22
4
21
13
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

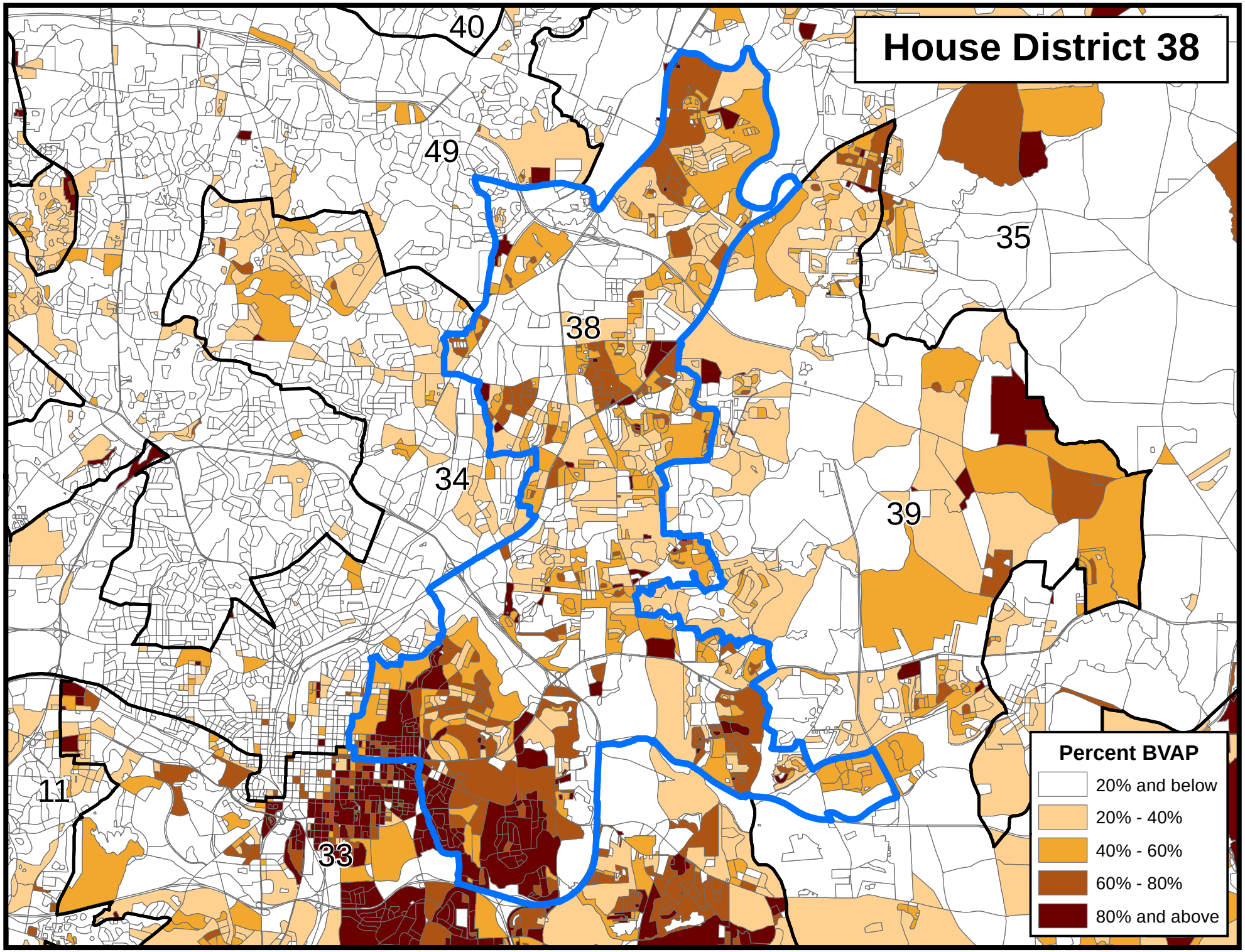

House District 24
25
7
23
24
8
10
12
4
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


House District 29
50
30
31
29
56
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


House District 31
50
40
31
30
29
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


House District 32
2
32
50
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


House District 33
34
38
11
33
39
36
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


House District 38
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49
35
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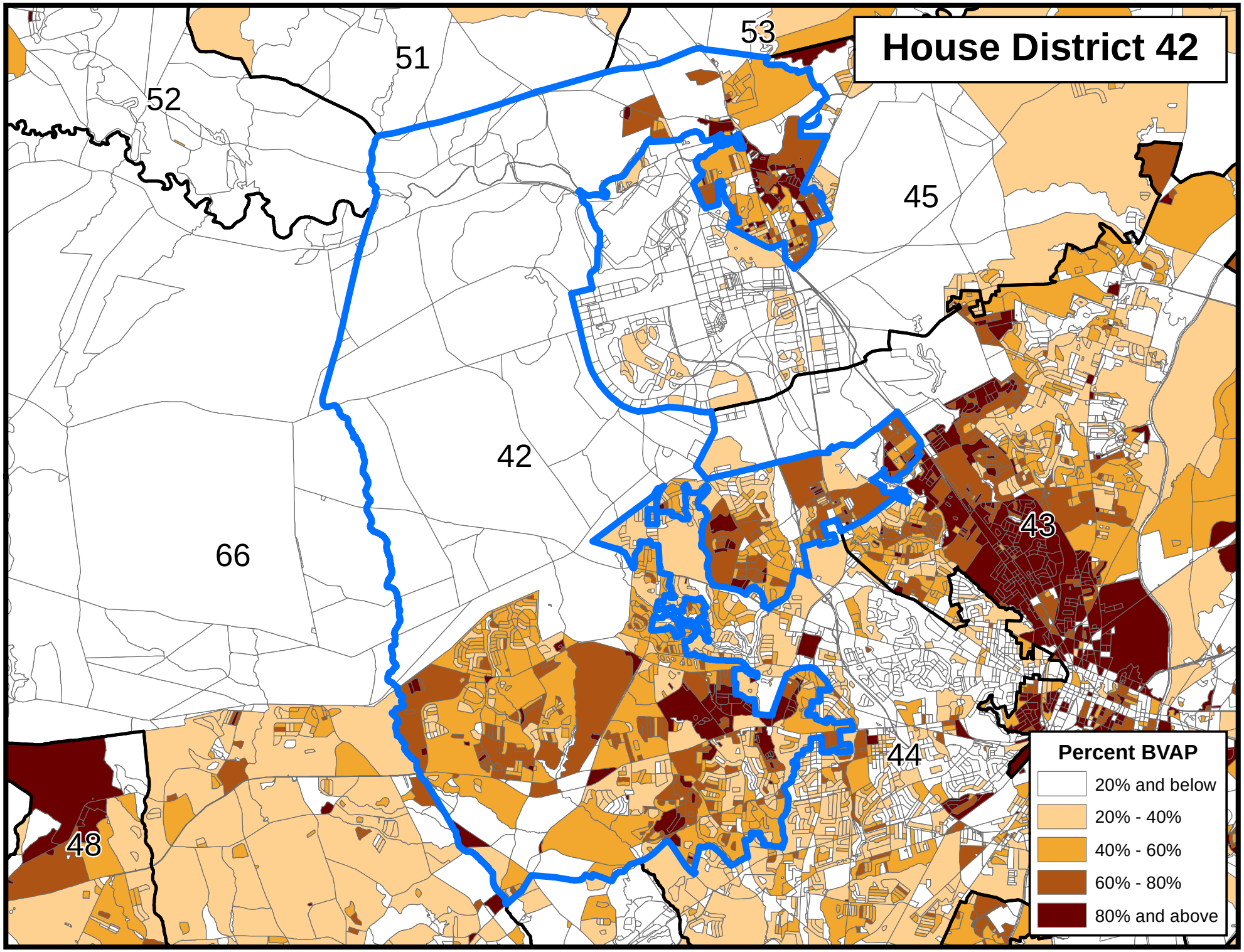
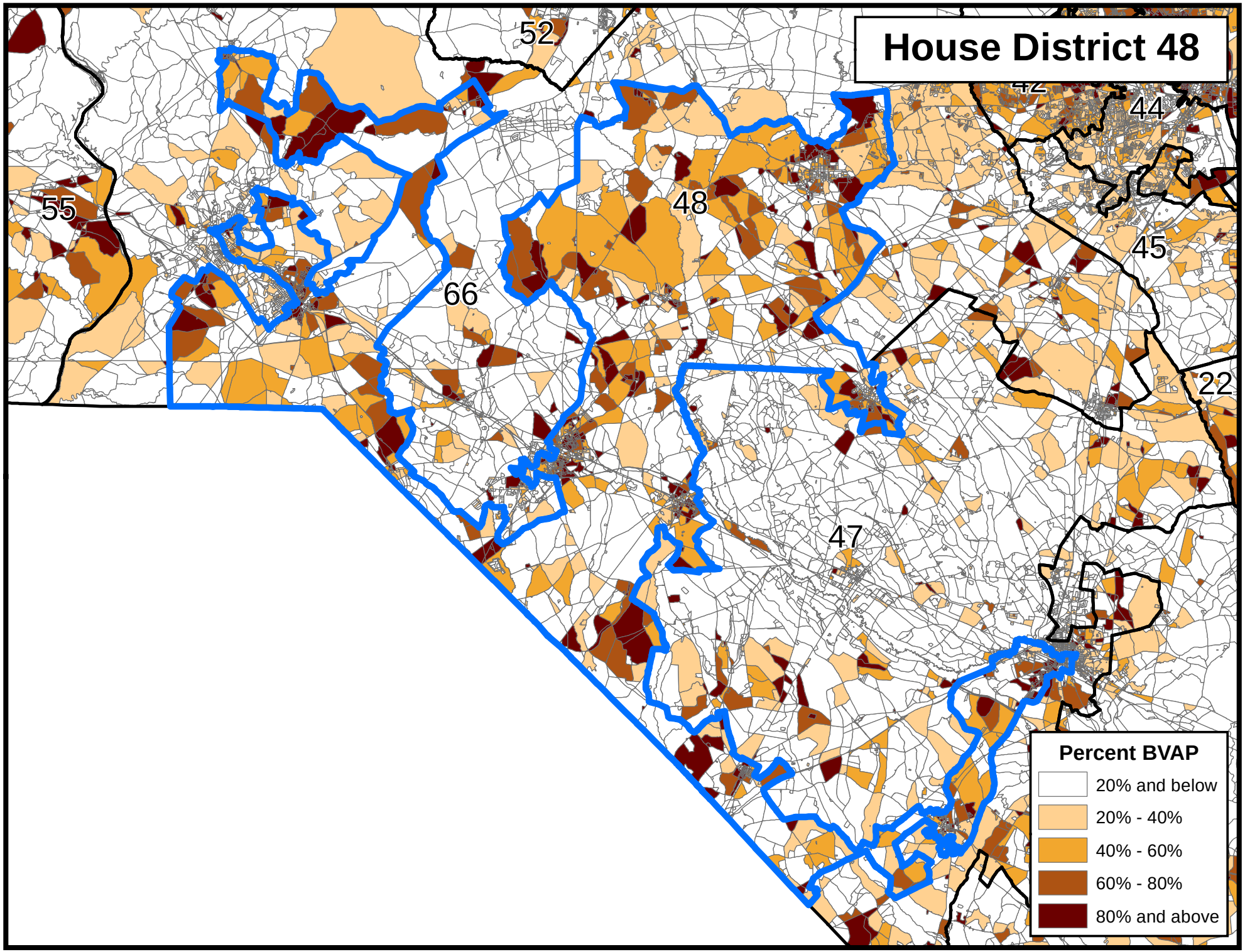
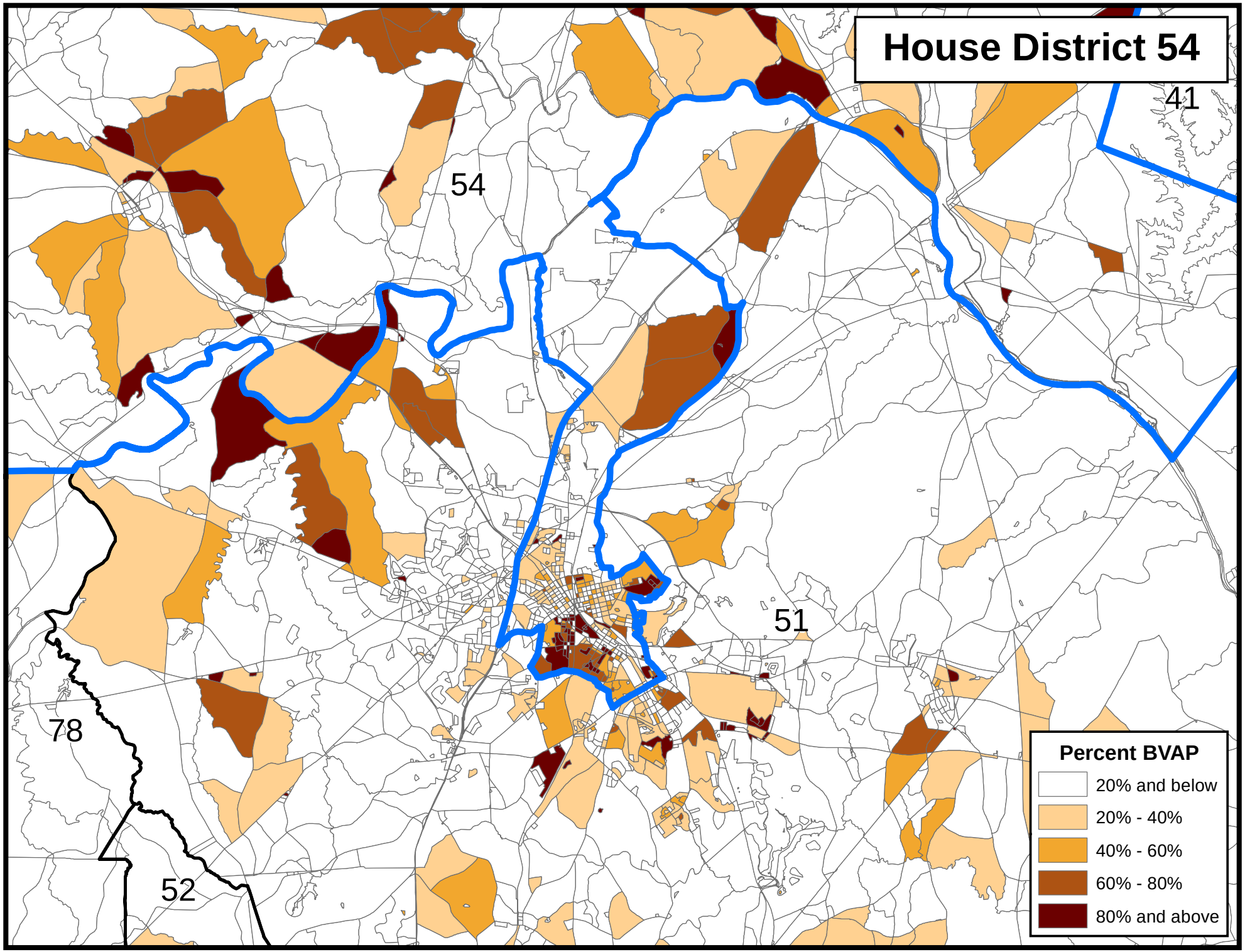
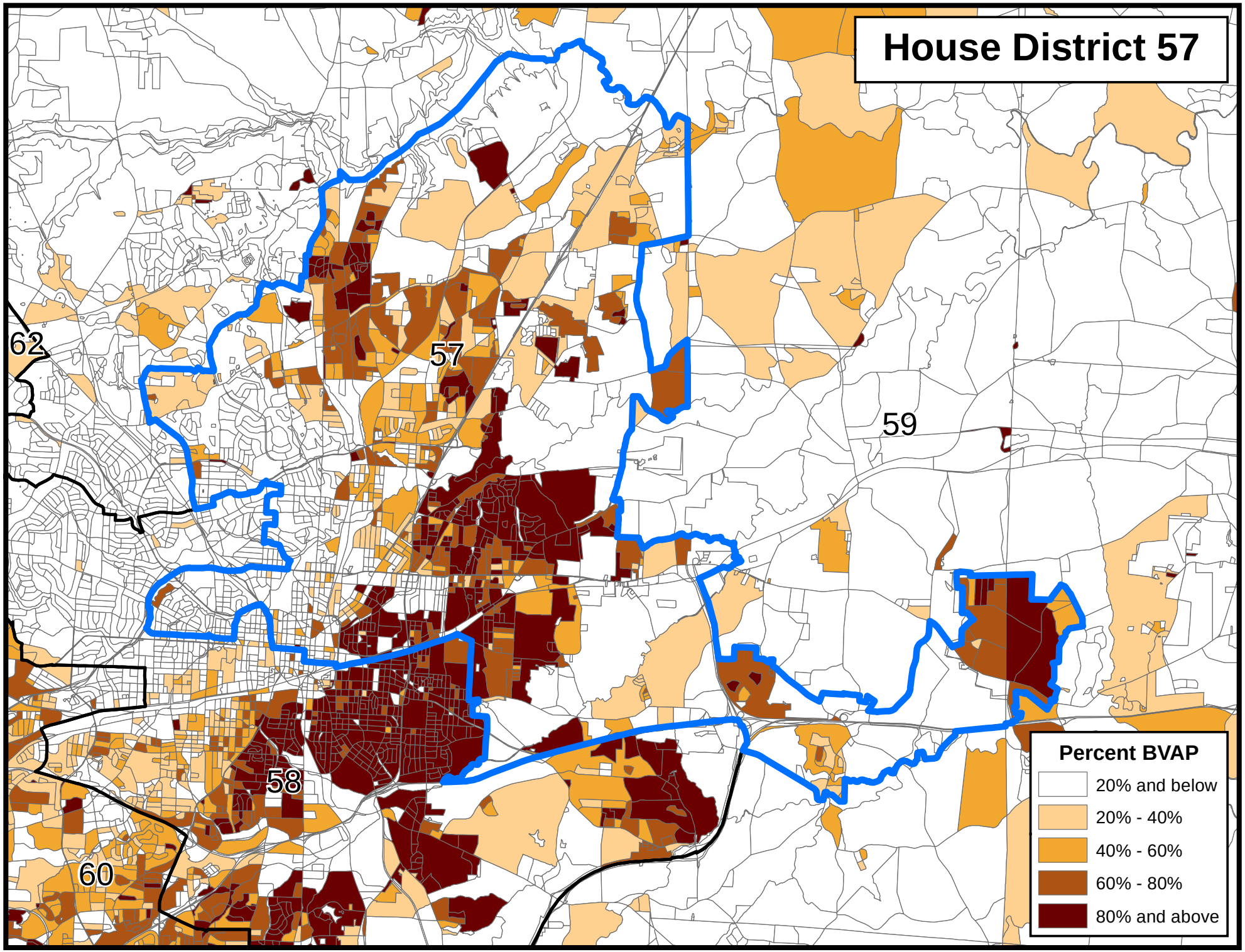
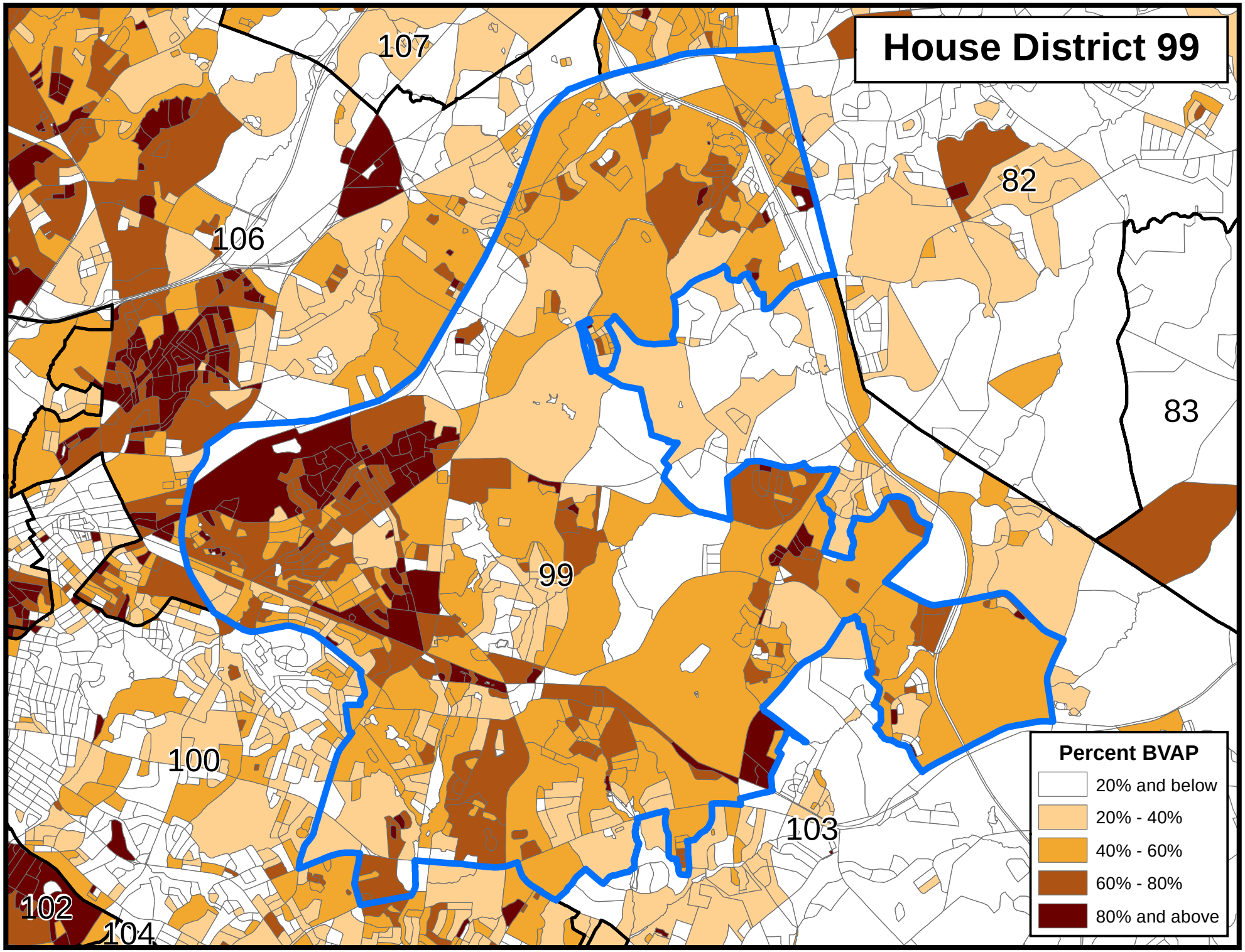
34
39
11
33
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

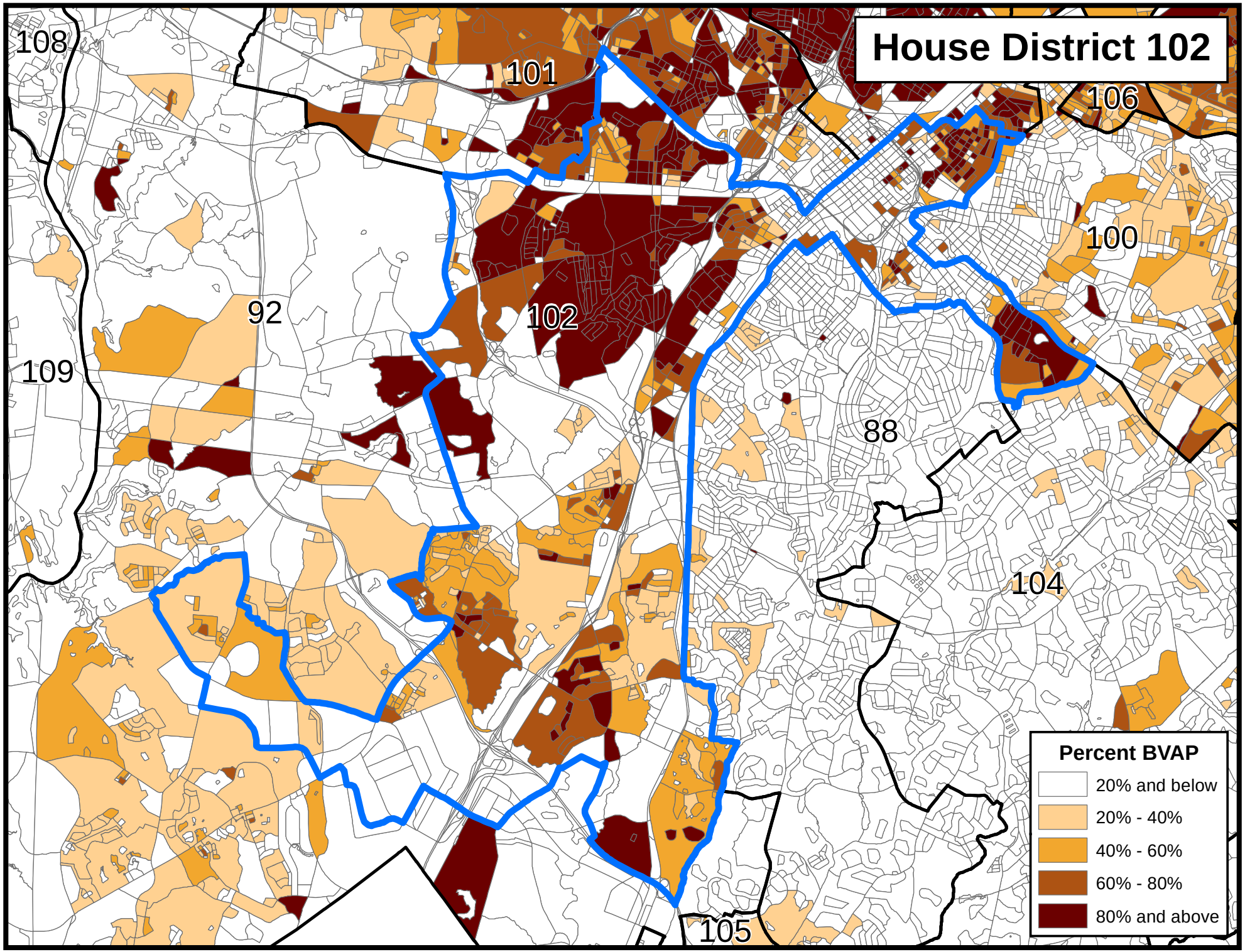

House District 42
51
53
52
45
42
66
43
44
48
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

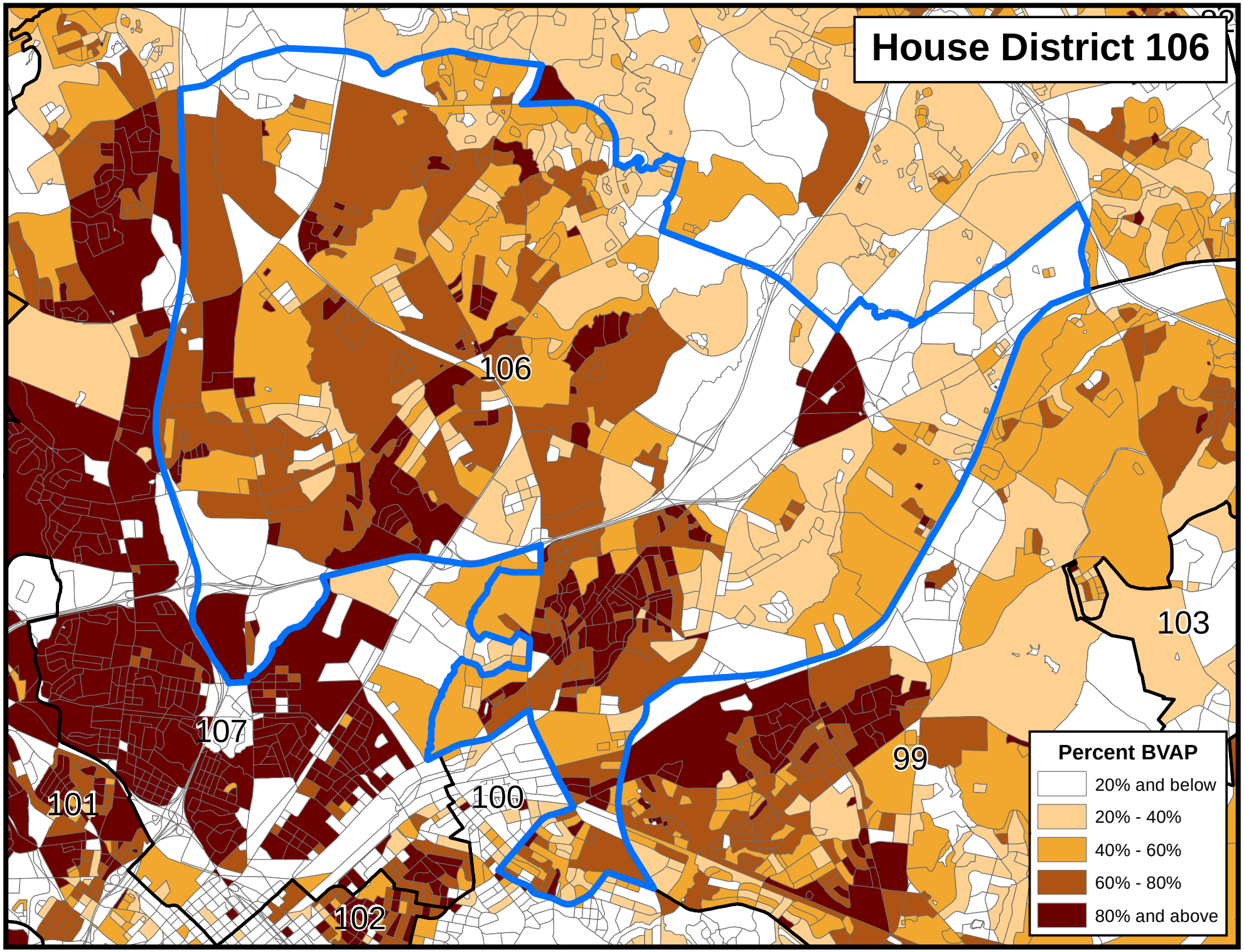

House District 48
52
55
48
66
44
45
22
47
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

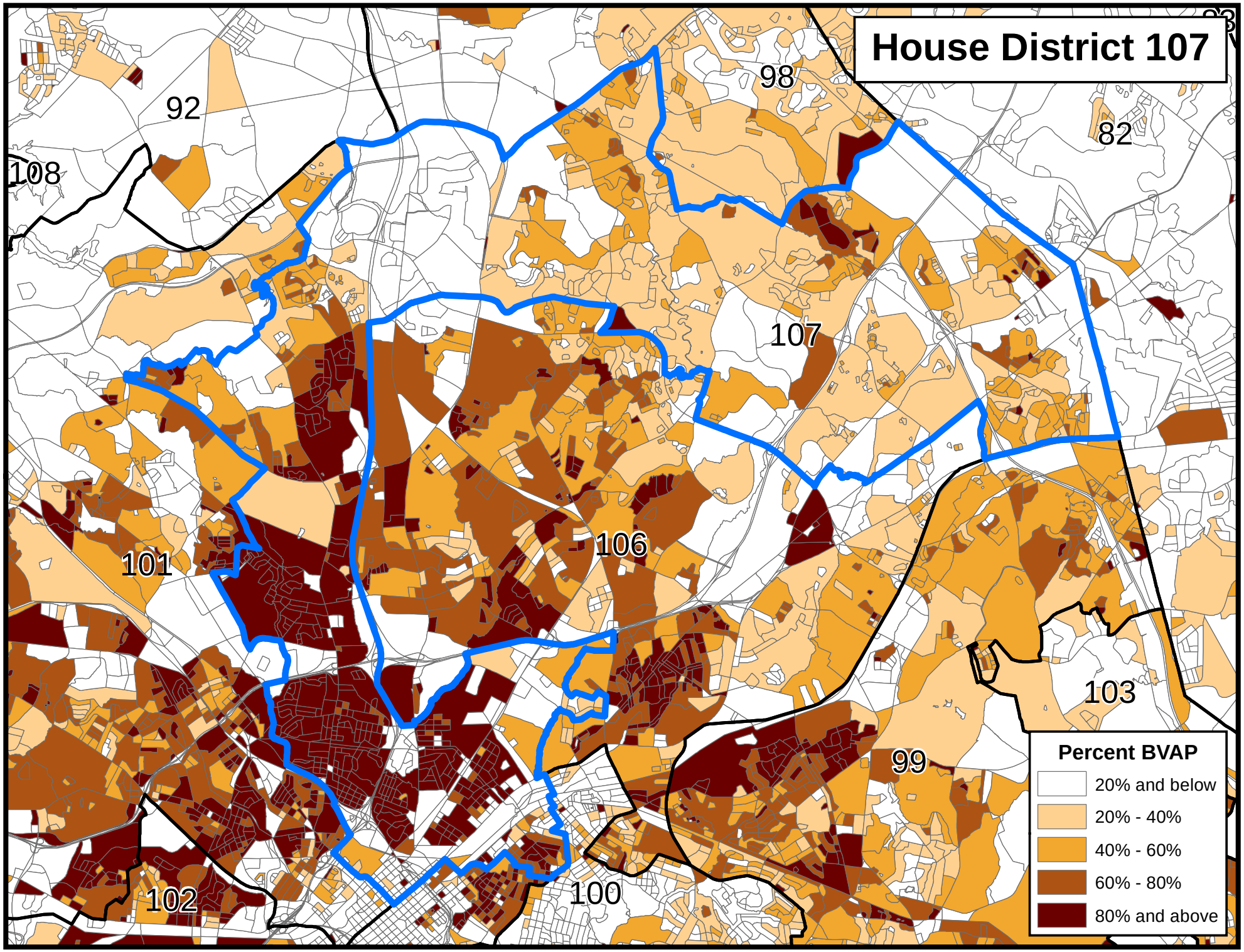

House District 54
41
54
51
78
52
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

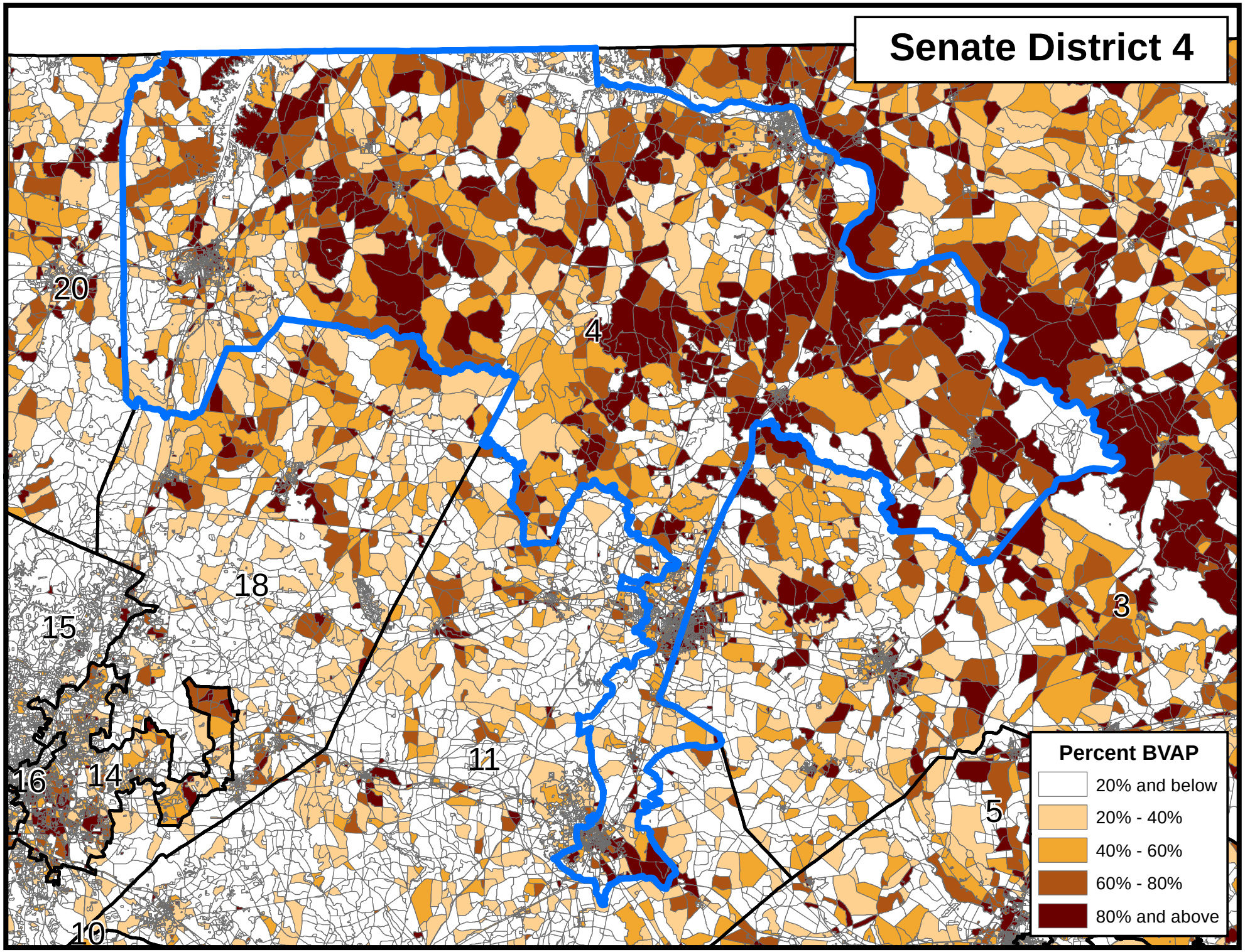

House District 57
62
57
59
58
60
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

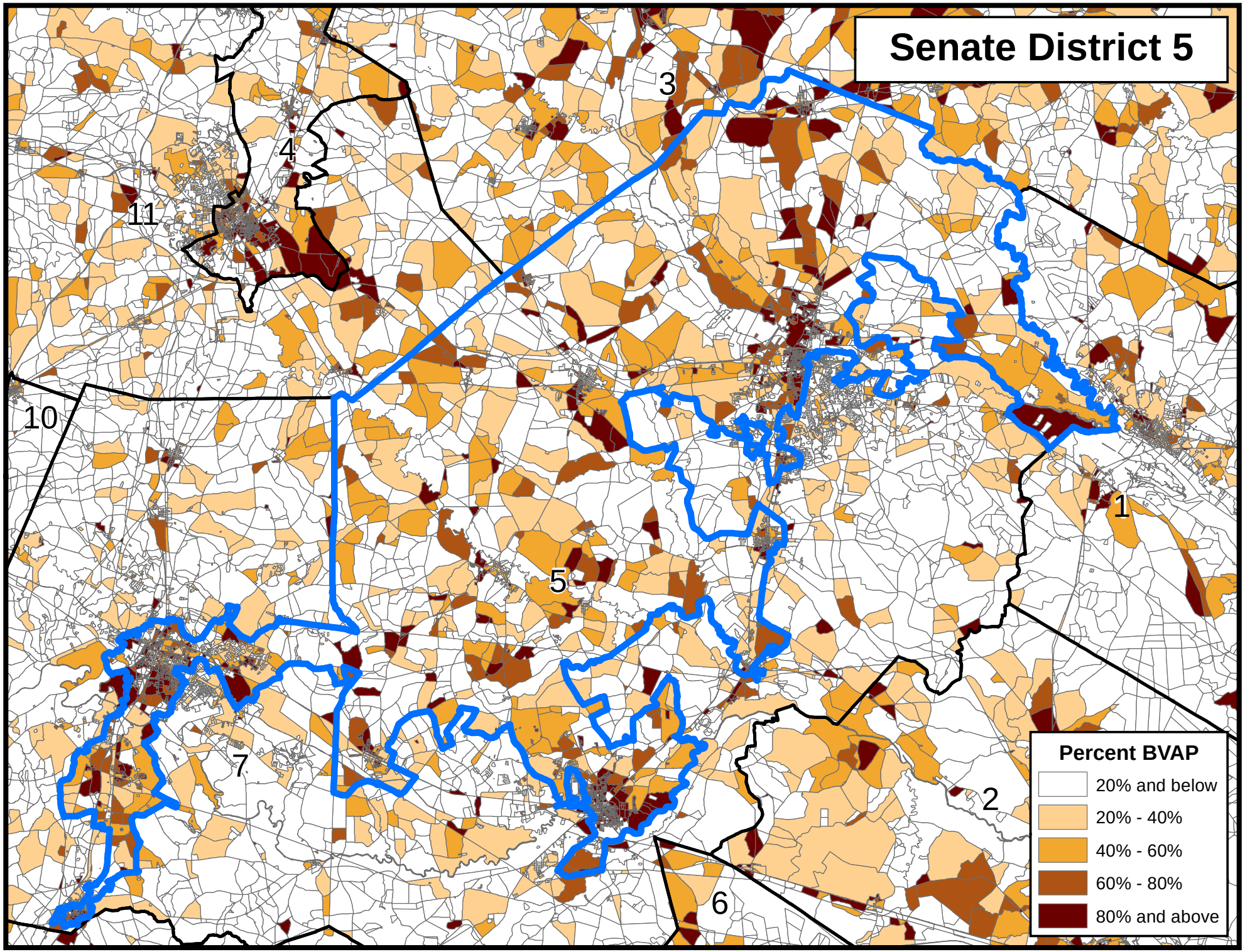

House District 99
107
106
82
83
99
100
103
102
104
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

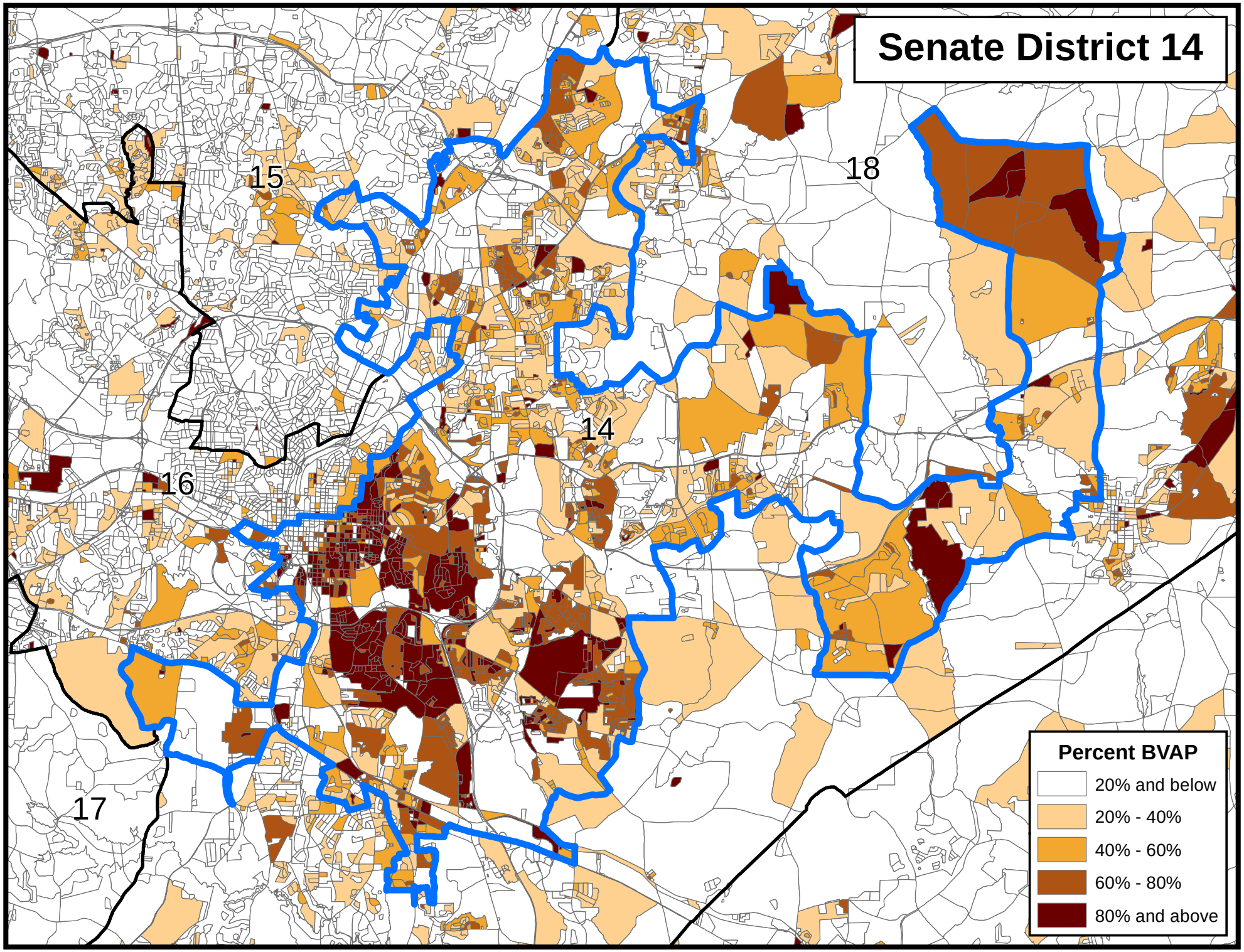

House District 102
108
101
106
100
92
102
109
88
104
105
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

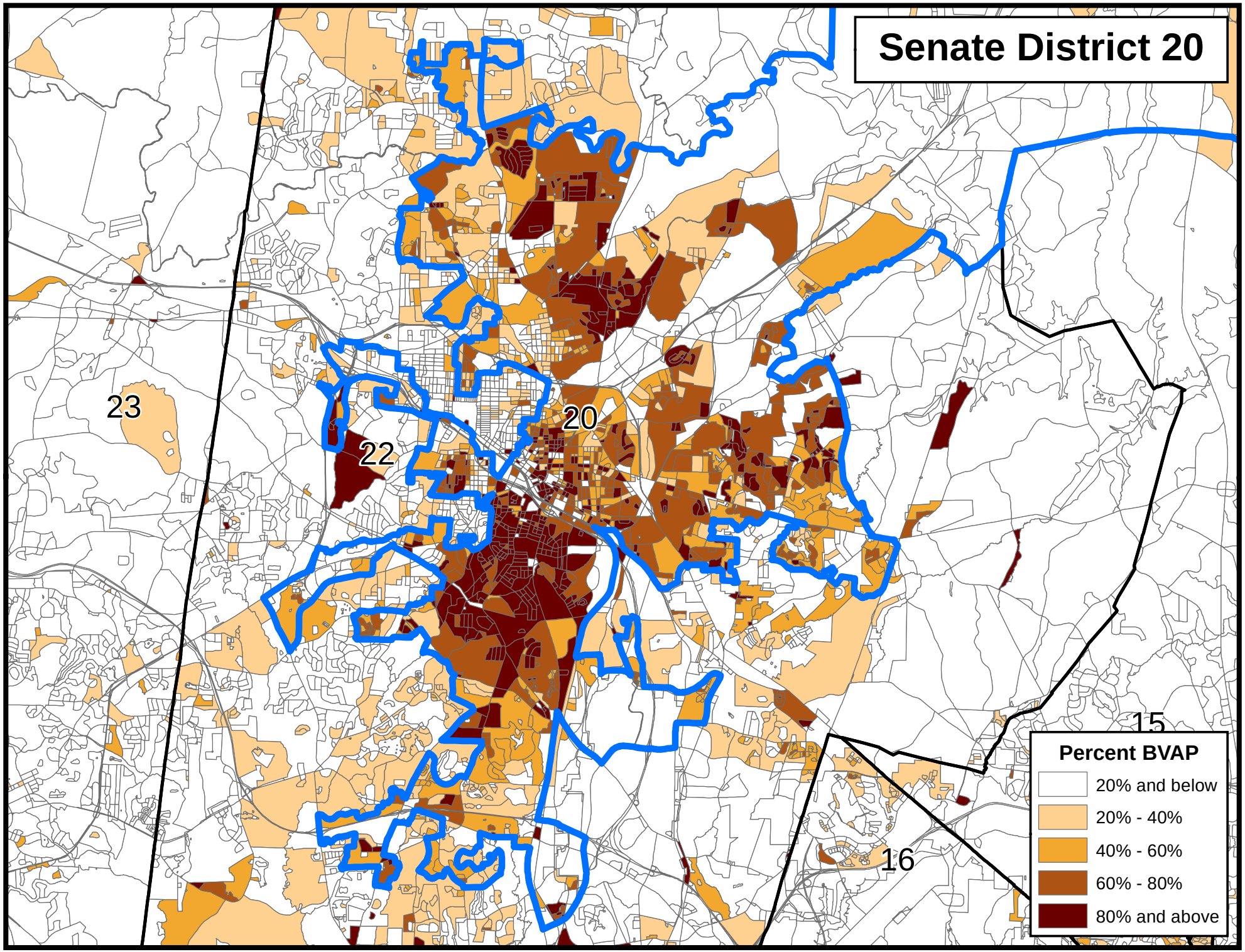

House District 106
106
107
101
100
102
99
103
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

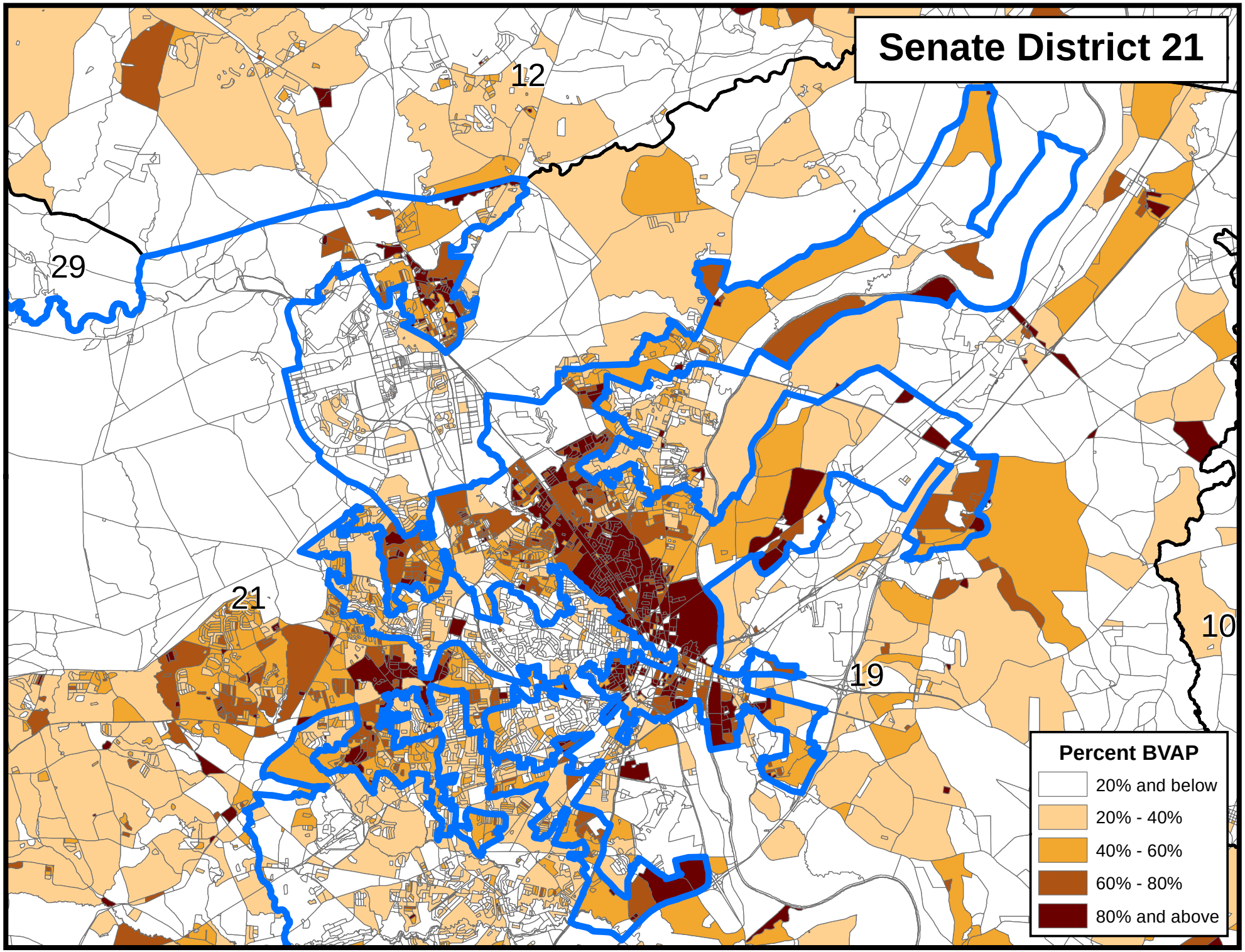

House District 107
92
98
82
108
107
106
101
103
99
102
100
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

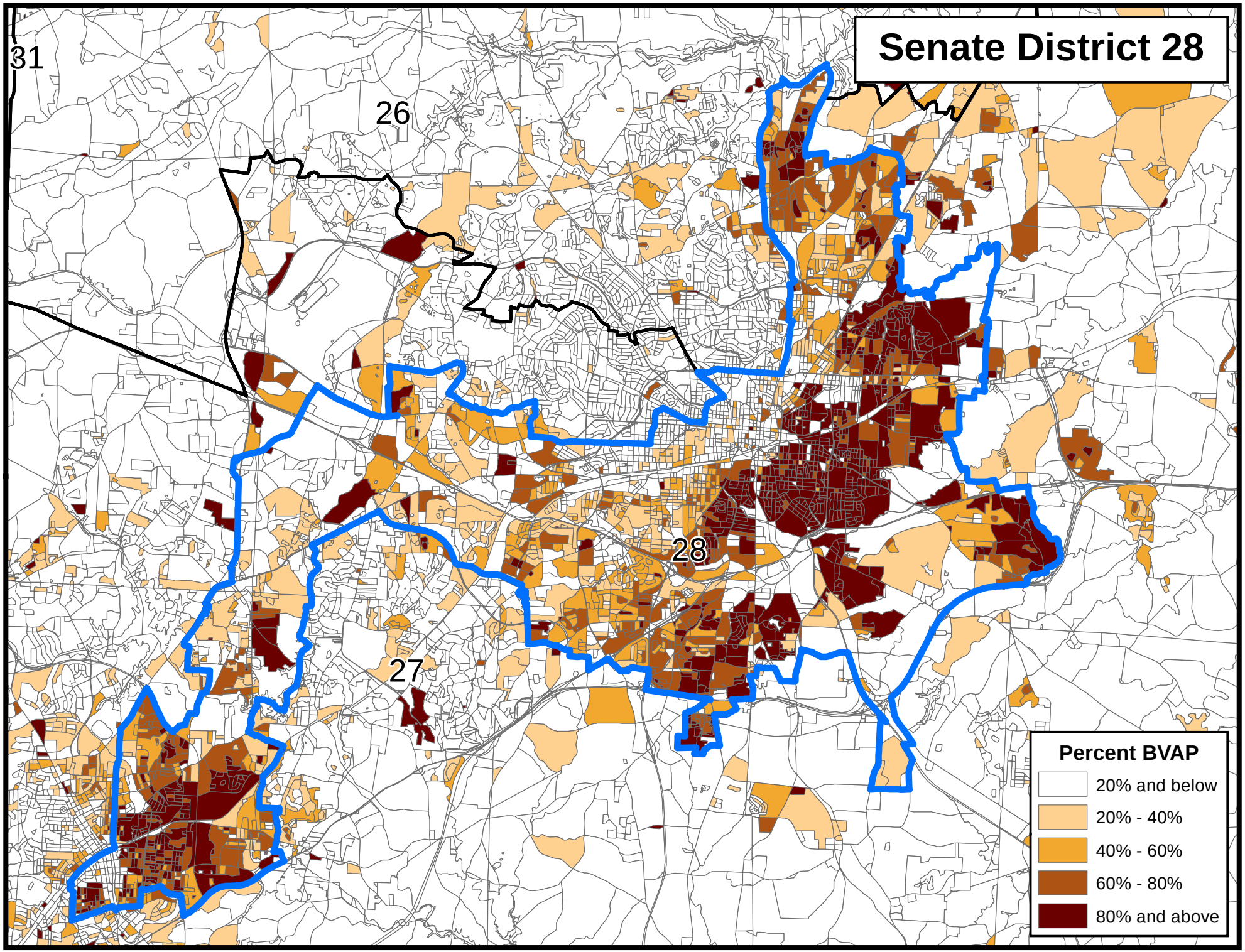

Senate District 4
20
4
18
15
3
16
14
11
5
10
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

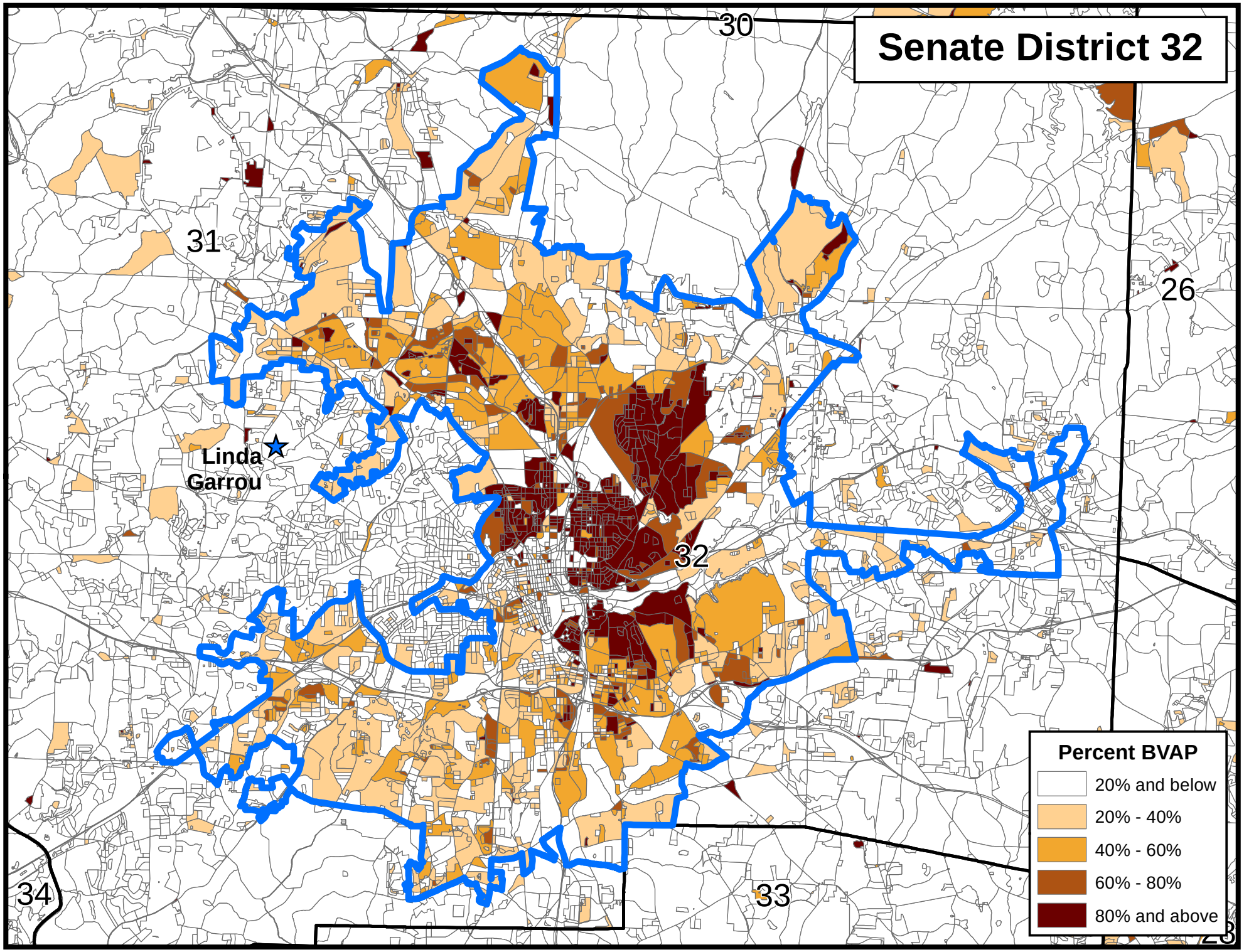

Senate District 5
3
4
11
10
1
5
7
2
6
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

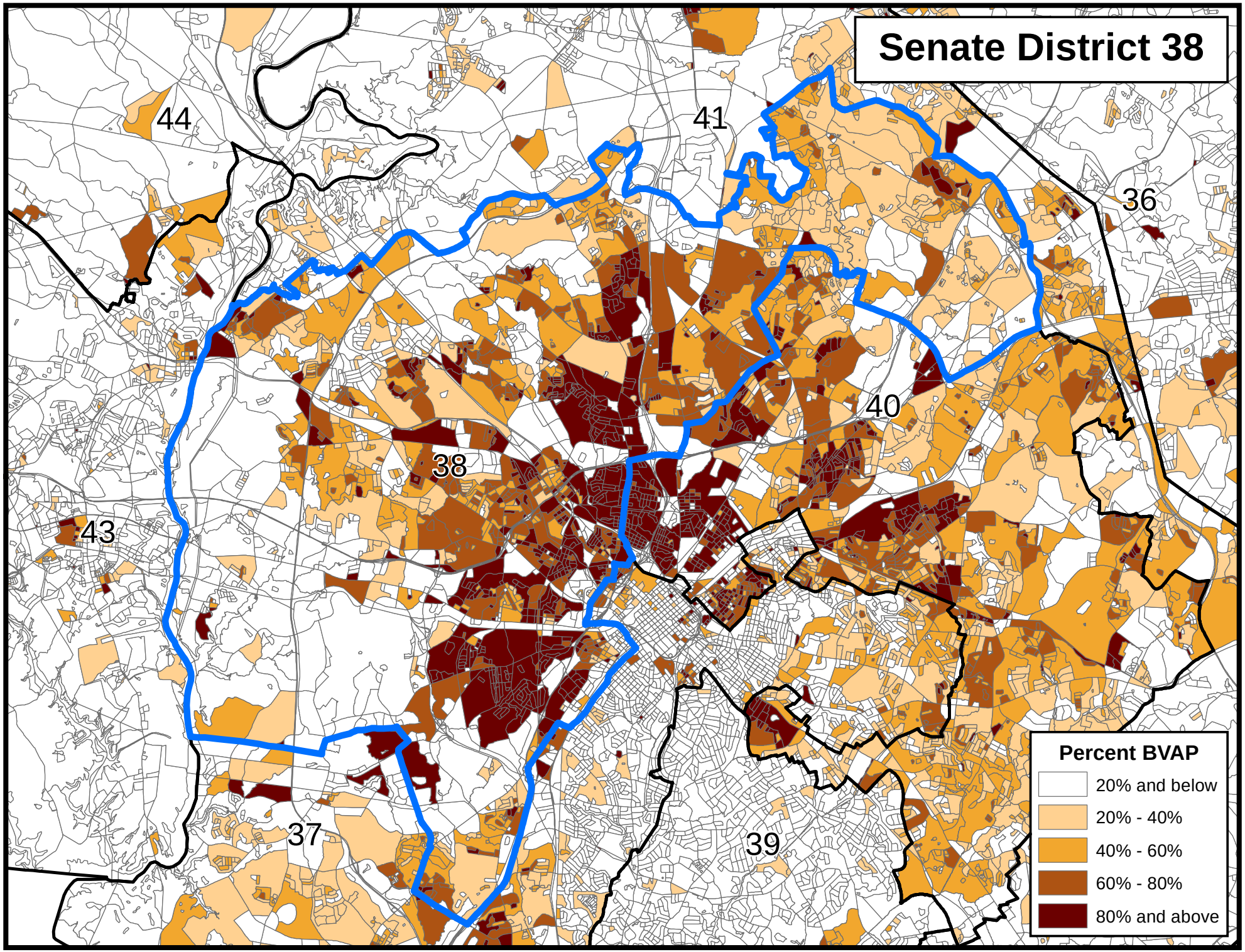

Senate District 14
15
18
14
16
17
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

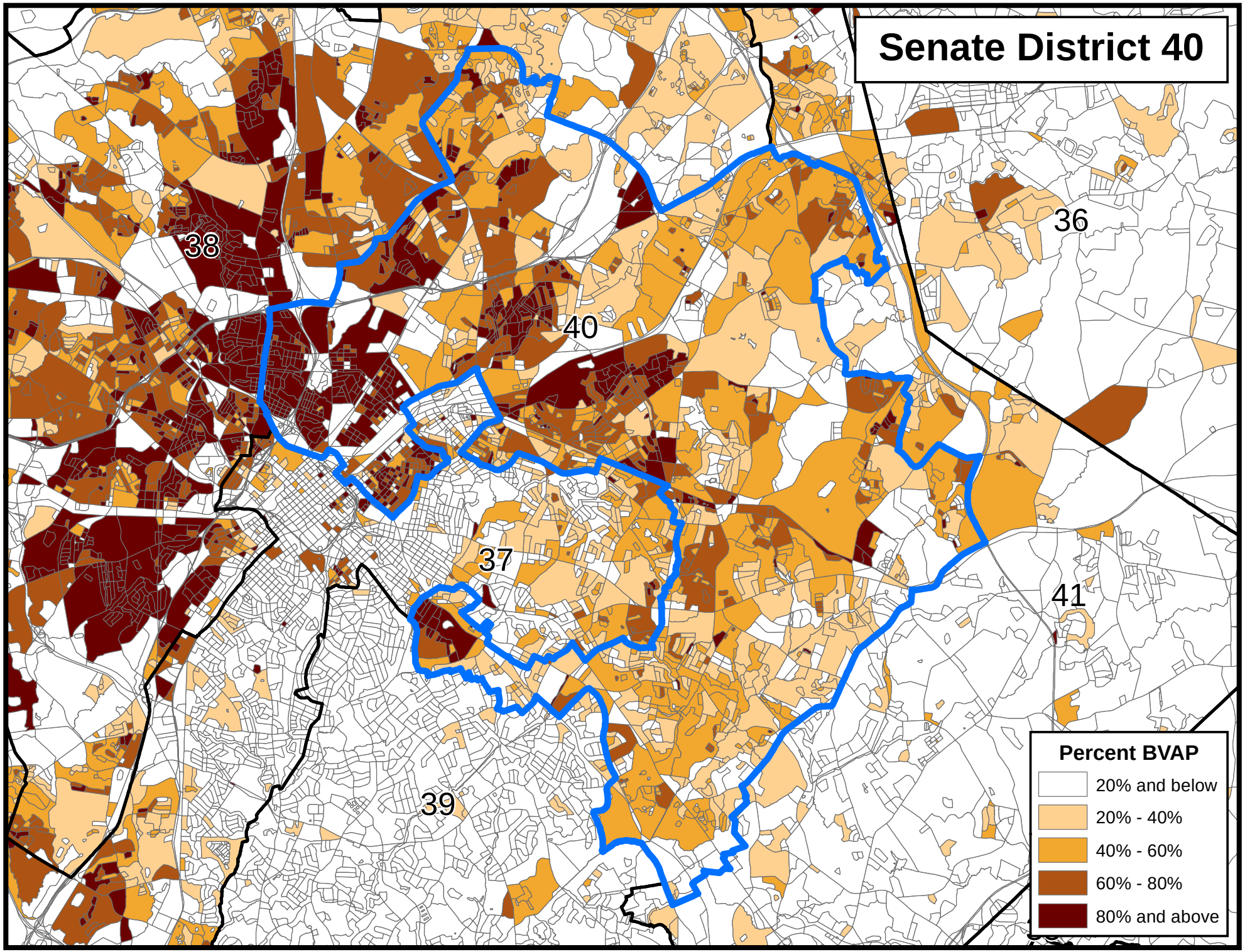

Senate District 20
23
22
20
15
16
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


Senate District 21
12
29
21
19
10
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


Senate District 28
31
26
28
27
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


Senate District 32
30
31
26
32
33
34
Linda Garrou
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


Senate District 38
44
41
36
40
38
43
37
39
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above


Senate District 40
38
40
36
37
41
39
Percent BVAP
20% and below
20% - 40%
40% - 60%
60% - 80%
80% and above

Appendix 9:

Characteristics of Past Congressional Plans Precleared by the USDOJ and Not Challenged on Section 2 Grounds Compared to the Characteristics of CD 1 and 12

Characteristics of Past Congressional Plans Precleared by the USDOJ and Not Challenged on Section 2 Grounds Compared to the Characteristics of CD 1 and 12

The following chart compares CD 1 as enacted in 2011 with CD 1 in all plans enacted since 1992 or used for any election since 1992. Those plans are:

a. The 1992 plan used for the 1992, 1994 and 1996 elections in CD 1. CD 1 in the plan was declared unconstitutional in Cromartie v. Hunt, 133 F.Supp 407 (2000) (Cromartie II)

b. The 1997 plan. CD 1 in that plan was declared constitutional in Cromartie II.

c. The 1998 plan; identical to the 1997 plan and used for the 1998 elections in CD 1.

d. The 2001 Plan used for the 2002-2010 elections in CD 1.

e. Senator Stein's 2011 alternative plan.

f. The 2011 enacted plan used for 2012 election.

Plan	BVAP	Partial Counties	Whole Counties
1992	53.40	18	9
1997	46.54	10	10
1998	50.27	10	10
2001	47.46	12	10
2011 (Stein)	47.82	13	11
2011	52.65	19[1]	5

The following chart compares CD 12 as enacted in 2011 with CD 12 in all other plans enacted or used for any election since 1992. Those plans are:

[1] 9 of these 19 counties are severed

1. The 1992 plan used for the 1992, 1994 and 1996 elections. CD 12 in that plan was declared unconstitutional on June 28, 1996, in Shaw v. Hunt because it was not narrowly tailored to serve a compelling interest.

2. The 1997 plan. CD 12 in that plan was declared unconstitutional on April 3, 1998 in Cromartie v. Hunt I.

3. The 1998 plan used for the 1998 election.

4. The 2001 plan used for the 2002-2010 elections.

5. Senator Stein's 2011 alternative plans.

6. The enacted 2011 plan

Plan	**BVAP**	**Partial Counties**	**Whole Counties**
1992	53.34	10	0
1997	43.36	6	0
1998	35.38	4	1
2000	43.36	6	0
2001	42.31	6	0
2011 (Stein)	41.95	5	0
2011 (Enacted)	50.66	6	0

The following chart compares the BVAP in CD 1 and 12 with the margin of victory for the African-American candidates in those districts each election since 1992.

Elections	**CD 1 BVAP**	**% of Vote**	**CD 12 BVAP**	**% of Vote**
1992	53.40	66.99	53.34	70.37
1994	53.40	61.06	53.34	65.80
1996	53.40	65.90	53.34	71.48
1998	46.54	62.24	32.56	55.95

Elections	**CD 1 BVAP**	**% of Vote**	**CD 12 BVAP**	**% of Vote**
2000	46.54	66.00	43.36	65.60
2002	47.76	63.73	42.31	65.34
2004	47.74	63.97	42.31	66.82
2006	47.76	100	42.31	67.00
2008	47.76	70.28	42.31	71.55
2010	47.72	59.31	42.31	63.88
2012	52.65	75.32	50.61	79.63

Appendix 10:

Stephenson v. Bartlett, No. 01 CVS 2885 (April 17, 2003)

NORTH CAROLINA
JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 01 CvS 2885

ASHLEY STEPHENSON, et al,
PLAINTIFFS

vs.

GARY O. BARTLETT, et al,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having been certified to the undersigned Senior Resident Superior Court Judge, Johnston County, for additional Findings of Fact regarding the trial court's May 31, 2002 determination that the General Assembly's 2002 redistricting plans ("House Plan-Sutton 5" and "Senate Plan-Fewer Divided Counties") are unconstitutional.

By Order dated March 18, 2003 the Court requested proposed Findings of Fact from the parties. On March 28, 2003 Plaintiffs submitted Proposed Additional Findings of Fact, which were considered by the Court. On March 28, 2003, the Defendants replied that "We have not proposed any Findings of Fact." The Defendants attached a document entitled "Defendants' response to order of March 18, 2003" which was considered by the Court.

CONTEXT OF FINDINGS

On April 30, 2002, the Supreme Court of North Carolina issued its decision in *Stephenson v. Bartlett*. The Supreme Court directed the General Assembly to develop revised constitutional redistricting plans in accord with specific criteria set

forth in *Stephenson* and further directed the Superior Court, on remand, to review and judge whether such House and Senate redistricting plans as prepared by the General Assembly strictly complied with the *Stephenson* criteria. If the Superior Court found that such redistricting plans were defective, the Court should take those actions necessary to bring those plans into compliance with the *Stephenson* decision or the Superior Court could prepare its own interim redistricting plans solely for the 2002 elections.

On May 18, 2002, in response to the order of the Superior Court on May 8, 2002, the Defendants delivered proposed House and Senate redistricting plans to the Court. On that date, the Plaintiffs also provided alternative proposals for House and Senate redistricting plans to the Superior Court.

On May 22 - 23, 2002, the Superior Court heard testimony on these proposed House and Senate redistricting plans, including graphic and statistical data, to support the suggested constitutionality or defects of the alternative districting proposals.

During the eight days following these hearings, the Superior Court – with technical assistance from its expert witnesses – conducted a review to judge whether the plans proposed by the General Assembly were in strict compliance with the *Stephenson* criteria, the Voting Rights Act and traditional redistricting principles. The Court also expended a weeklong effort in an attempt to redesign the Sutton 5 county cluster system, with the aim of establishing a more flexible design and exploring ways to create additional minority districts. The Court had accepted an *amicus* brief submitted by the National Association for the Advancement of Colored

People (NAACP) requesting additional majority-minority districts in Mecklenburg and Guilford Counties. The Court was of the opinion that the request was meritorious. It became apparent to the Court that the time required to accomplish these tasks would further delay the schedule for the 2002 primaries and the general elections.

The Superior Court took note of the fact that the *Stephenson* ruling recognized the delays in the North Carolina elections process and that House and Senate redistricting plans, once completed, would still be subject to pre-clearance review by the U.S. Department of Justice for compliance with the Voting Rights Act of 1965 (as amended), a process that could require up to sixty days or more.[1]

On May 31, 2002, the Superior Court issued the results of its review of the redistricting plans presented by Defendants and Plaintiffs at the May 22-23, 2002 hearing. In its May 31, 2002 order, the Superior Court found that portions of the General Assembly's Sutton 5 plan did not meet the constitutional requirements mandated by *Stephenson*. Because these portions failed the *Stephenson* criteria, the Court found the Sutton 5 plan unconstitutional. The Superior Court points out that the exigencies of the tightly compressed timetable for the statewide general elections led the Court to go forward with modifications to the submitted redistricting plans and designate them as "Interim Plans", applying solely to the 2002 election cycle, consistent with the authority granted the Superior Court in the *Stephenson* decision.

[1] The U.S. Department of Justice may take up to 60 days to conduct its "pre-clearance" process under Section 5 of the 1965 Voting Rights Act (as amended), and, if the Department requests additional data from the state, the 60-day "clock" begins anew when the requested information is received by the Justice Department.

STANDARD OF REVIEW

The Court examined the statute to determine its constitutionality. In making this determination, the Court reviewed the statute using the following legal standards as set forth in *Stephenson I.* The Constitution restricts the General Assembly's discretion to draw legislative districts, according to the following criteria.

(a) The State Constitution specifically enumerates four limitations upon the redistricting and reapportionment authority of the General Assembly, summarized as follows:

(i) Each Senate and Representative district shall represent, as nearly as possible, an equal number of inhabitants.

(ii) Each Senate and Representative district shall at all times consist of contiguous territory.

(iii) No county shall be divided in the formation of a Senate or Representative district.

(iv) Once established, the Senate and Representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress;

(b) "[T]o ensure full compliance with federal law, legislative districts required by the VRA (i.e., Section 5 or Section 2) should be formed prior to the creation of non-VRA districts...In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no

retrogressive effect on minority voters. To the maximum extent practicable, VRA districts shall comply with the WCP, as defined below;"

(c) To comply with one-person, one-vote, any deviation from the ideal population for a legislative district "shall be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote requirements;'"

(d) In counties having a 2000 census population "sufficient to support the formation of one non-VRA legislative district..., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of such county;"

(e) "When two or more non-VRA legislative districts may be created within a single county..., single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county;"

(f) "In counties having a non-VRA population pool which cannot support at least one legislative district...or alternatively, counties having a non-VRA population pool, which, if divided into districts, would not comply [with the one-person, one-vote standard], the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary [to create districts within the grouping that] comply with the 'one-person, one-vote' standard." "Within any such contiguous, multi-county grouping," [districts must be compact, the boundary lines of each district shall not cross or traverse the "exterior" line of the multi-county grouping, and the resulting interior county lines may be traversed only to comply with the one-person, one-vote standard];

(g) The "intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to create a population pool necessary to draw one or more districts that meet the one-person, one-vote standard shall be combined;"

(h) "[C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts" within single counties or multi-county groupings;

(i) Absent a compelling state interest, multi-member districts are prohibited;

(j) Any new redistricting plans, including any proposed on remand, "shall depart from 'strict compliance' with the legal requirements set forth herein only to the extent necessary to comply with federal law." *Stephenson I*, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (emphasis added).

Although not a constitutional standard, the Court has reviewed the plans with the following legislative policy in mind. Maintaining the residences of the incumbents who serve those core constituents within the district is also a districting principle that historically has been observed in North Carolina. Although this is usually referred to as "incumbency-protection," this Court views the principle as more accurately protecting the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust. Provided it does not conflict with other nonpolitical considerations such as communities of interest and compactness, this Court considered it a principle worthy of consideration.

FINDINGS FOR HOUSE PLAN

The Superior Court identified certain defects in the General Assembly's Sutton 5 House Plan and instituted remedies that are described below:

District 14: The shape of this Sutton 5 district contained a narrow "arm" that protruded north, and other protrusions to the south and south-southeast, leaving the district without compactness. This Court modified District 14's boundary to make it compact and consistent with the *Stephenson* criteria.

District 18: This district was altered to increase its African American population from 44.00 % to 46.99 % to make it a more effective minority district.

Districts 33-40, 50: In Wake County, the Superior Court observed that the Defendant's Sutton 5 plan for the House of Representatives contained only one majority-minority district (District 33) and no "effective minority" districts despite a sufficiently large African American population in the county. This could lead to potential litigation against the state.

The Court's examination of Sutton 5's District 33 in Wake County also revealed that its shape lacked compactness. Specifically, a narrow "arm" extended to the north, northeast and a pair of "arms" meandered south and southeast in a horseshoe manner around a portion of District 34.

To remedy both these situations and to protect the state from potential legal challenges (e.g., Section 2 of the Voting Rights Act), the Court chose to substitute the districts from Plaintiff's "VRA Review 01" plan for the Sutton 5 districts in Wake County. This action resulted in 2 effective minority districts in Wake County and increased district compactness.

District 52: Sutton 5 had been drawn to remove Carthage, the seat of Moore County government, and place it in District 51. To better preserve "communities of interest", District 52, which is anchored in Moore County, was redrawn by the Court to include the city of Carthage, the county seat.

Districts 57, 60-62: Sutton 5 divided the City of High Point among four districts (57, 60, 61 and 62). The Court modified the area's districts in order to reduce the number of splits of this city from 4 to 3 to better respect the local government boundaries. If timing of the elections process had permitted the Court to redesign the county clusters, it might have been possible to further reduce the splitting of the High Point community.

Districts 95 and 96: These Sutton 5 districts split the communities of Mooresville and Statesville; the Court modified Districts 95 and 96 to run east-west and eliminate the splits of these boundaries in keeping with the preservation of local governments as communities of interest.

District 113: Testimony at the hearing on March 22-23, 2002, had included witness statements about the communities of new residents (moving to western North Carolina from other states) clustered along the southern portions of Transylvania, Polk and Henderson counties. Accordingly, the Court redrew the boundaries of District 113 to reflect these communities of interest.

Subsequent to the Court's adoption of these modifications to Sutton 5, the resulting Interim House Redistricting Plan for North Carolina 2002 Elections was reviewed by the U.S. Department of Justice for compliance with Section 5 of the Voting Rights Act of 1965 (as amended) and approved for the 2002 elections in

North Carolina. (This Court's Interim Senate Redistricting Plan for North Carolina 2002 Elections was also reviewed and approved by the U.S. Department of Justice, under Section 5 of the Voting Rights Act.)

While the Court deemed the above-described modifications of Sutton 5 to conform to the *Stephenson* criteria, the Court observed other unconstitutional defects in Sutton 5 that it would have tried to remedy, or ordered the legislature to correct, if the timetable for holding statewide elections had not been at stake.

SUTTON 5 DEFECTS NOT CORRECTABLE IN LIMITED TIMEFRAME

Below the Superior Court offers descriptions of other observed defects and possible ways to remedy these features that do not strictly comply with the *Stephenson* criteria.

SPLITS OF COUNTY BOUDARIES

The Sutton 5 districts in these counties were drawn in a manner that divides the county boundary in multiple locations. Comparisons of the Sutton 5 plan with the Plaintiff's alternative plan for the House of Representatives (Plaintiff's Remedial House Plan, hereafter referred to as "Plaintiff's House Plan") reveals potential ways in which these county boundary splits could be reduced in number and bring the plan into strict conformance with the *Stephenson* constitutional criteria.

A. In Forsyth County, Sutton 5 crosses the county boundary in three places, but the Plaintiff's House Plan groups counties so that Forsyth County is cut only once.

B. In Harnett County, the Sutton 5 plan splits this county line in three locations, as compared with only one crossing of the Harnett line in Plaintiff's House Plan.

C. In Sutton 5, Haywood County's line is cut in two locations, as compared with only one such cut in the Plaintiff's House Plan.

D. In New Hanover County, the Sutton 5 plan cuts the county boundary three times; Plaintiff's House Plan crosses New Hanover's county line only one time.

Specifically, the Court finds that the Sutton 5 House Plan fails to minimize the number of times county lines are traversed in the following respects:

1. The Sutton 5 House Plan contains District 119, which consists of all of Jackson and Swain Counties, and parts of Macon and Haywood County. House District 119 traverses the interior county lines on the Haywood and Jackson County border twice, rather than only once in order to comply with the one-person one-vote standard. District 119 traverses the Haywood County lines once in the north, and a second time in the south, with the northern and southern portion being separated by District 118, which extends from Madison County, through Haywood County, to the Jackson County line.

2. The Sutton 5 House Plan has Forsyth County as part of a seven-county cluster. Rather than traverse the Forsyth County line once to comply with one-person, one-vote, the Sutton 5 House Plan unnecessarily traverses Forsyth County lines three times, in House District 92 with Yadkin County, House District 91 with Stokes County, and House District 66 with Rockingham County, (to the

extent the Defendants maintain Rockingham and Forsyth Counties are contiguous). Plaintiffs' VRA 1 House Plan demonstrates that Forsyth and Davidson County could be grouped in a two-county cluster, and traverses the interior county line once, with a single district shared between the two counties for one-person, one-vote purposes.

3. The Sutton 5 House Plan places New Hanover in a four-county cluster, and traverses the New Hanover county line three times, in District 20 which contains parts of Columbus and Bladen County, and District 16 with Pender County, as well as with the District 18, with parts of New Hanover, Brunswick and Columbus Counties. Overall, the Sutton 5 House Plan divides New Hanover County into four districts, with only one district within the county lines, and the other three districts traversing the New Hanover County line. This is not necessary to comply with the one-person, one-vote standard, or the Voting Rights Act. This is demonstrated by Plaintiffs' VRA 1 Plan, which divides New Hanover County into two districts wholly within the county (House Districts 13 and 16) and only traverses the New Hanover County line once for District 19, to comply with the one-person, one-vote standard, or the Voting Rights Act.

4. The Sutton 5 House Plan combines Harnett and Cumberland Counties into a four-county cluster. The Sutton 5 House Plan unnecessarily traverses the Harnett County line three times, in House District 41 with Cumberland County, in House District 42 a second time with Cumberland County, and in House District 51 with Lee County. Overall, the Sutton 5 House Plan divides Harnett County into four districts, with three districts traversing the Harnett

County line, and only one district (District 53) wholly within Harnett County. This is not necessary to comply with the one-person, one-vote standard, or the Voting Rights Act. This is demonstrated by Plaintiffs' VRA 1 House Plan which groups Harnett and Cumberland County in a two-county cluster, and traverses the Harnett County line only once in District 41 in order to comply with the one-person, one-vote standard. Furthermore, under Plaintiffs' VRA 1 House Plan, House District 41 is compact, consisting of adjoining precincts in northeast Cumberland County and southeast Harnett County.

Overall, within multi-county groupings, Sutton 5 cuts county lines 48 times, as compared to the 43 county line traverses in Plaintiffs' House Plan.

The Court holds that these defects could be modified for strict compliance with *Stephenson* criteria. The Court was unable to address these defects of county-line traverses in Sutton 5, for the Court's interim house plan without further adverse impact on the statewide schedule of elections.

COMPACTNESS AND CONTIGUITY

The *Stephenson* criteria include the requirement that districts should be compact and contiguous. If a given district fails to meet either element of this requirement, the district is non-compliant with *Stephenson*.

FAILURES OF COMPACTNESS

In addition to the Sutton 5 districts that were altered by this Court to achieve compactness and bring the Interim House Redistricting Plan for North Carolina 2002 Elections into compliance with *Stephenson*, the Court also takes note of other districts in Sutton 5 that lacked compactness. The existence of the irregular shapes

of these districts leaves them non-compliant with *Stephenson* and opens the possibility of future legal challenges.[2]

A. Alamance County – District 63 features an "arm" that that extends from the main north-south portion of the district and cuts the county in an east-west direction that almost bisects District 64.

B. Cleveland County – District 110 runs from the northwest along the eastern boundary of the county in a southeasterly direction, but makes a sharp turn to the south, resulting in an appendage pointing toward South Carolina.

C. Rowan County – The common boundary between Districts 76 and 77 has a sharply irregular shape. The district line meanders from the east in a westerly direction, then southward, turns next to the north, then abruptly goes south almost touching the Cabarrus County line, then west for a short distance, turns north again and then finally to the south, touching against the boundary with Iredell County.

D. Stanly County – The general shape of District 70 has the look of a lobster claw extending northward through the central and northeastern portion of Union County with the "pincers" of the claw encompassing the portion of Stanly County that stretches southward from midway on the western border along the southern boundary and up into the north central portion of the county.

E. Yancey County – District 118 stretches from Yancey County in the northeast through Madison County and includes a portion of Haywood County. The district extends an "arm" from the eastern edge of Haywood County and meanders from the northeast to southeast in a manner that divides that county.

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[2] In some instances, compliance with federal law may necessitate districts that could otherwise be drawn more compactly.

In addition to these four examples (Items A-E above) of non-compactness, Sutton 5 contained various other districts that failed to meet the compactness standard of *Stephenson*. This Court finds that Sutton 5 Districts 18, 41, 51, 52, 57 58 59, 60, 61, 62, 63, 64, 76, 77, 95, 96 and 118 are not compact and fail to strictly comply with *Stephenson*. More specifically, the Court finds that the Sutton 5 House Plan includes the following districts which are not compact and do not respect communities of interest, as follows:

1. The Sutton 5 House Plan, in Iredell County, contains House Districts 95 and 96, which both split the town of Mooresville in southern Iredell, and Statesville in northern Iredell, when these two districts could easily be drawn so that the community of Statesville is intact in a northern district, and the community of Mooresville is intact in a southern district.

2. The Sutton 5 House Plan, in Moore County, contains District 52, located wholly within Moore County, but which district is shaped like a "C," rather than being compact, and leaves out the county seat, Carthage.

3. The Sutton 5 House Plan, in Guilford County, divides the City of High Point into four districts (57, 60, 61 and 62), when it is possible to divide the city only three times while complying with the one-person, one-vote standard and the Voting Rights Act.

4. The Sutton 5 House Plan, in Cabarrus County, divided Cabarrus County into two districts which lack compactness, on a ragged line from the northwest toward the southeast, with District 74 almost bisecting House District 75, and splitting the communities of Concord and Kannapolis within the county. It is

possible to draw more compact districts in Cabarrus County, which better respect the communities, as demonstrated by Plaintiffs' House Plan.

5. The Sutton 5 House Plan, in Wake County has one less VRA district and uses irregularly shaped non-VRA districts. The Sutton 5 House Plan Districts 34, 35, 36, 37, and 38 are all non-VRA districts, but have irregular shapes with "fingers" sticking out into other districts. It is possible to establish two, rather than just one VRA district in Wake County, and make the adjoining non-VRA districts more compact, as demonstrated by the configuration of districts in Wake County in Plaintiffs' House Plan.

6. The Sutton 5 House Plan divided Rowan using a very irregular line, with House District 77 almost bisecting House District 66.

7. The Sutton 5 House Plan contains Districts 63 and 64 in Alamance County, with District 63 shaped as a peculiar reverse "L" almost bisecting House District 64. Plaintiffs' House Plan shows that in Alamance County a compact District 74 can be created in the northeast corner of the county.

8. The Sutton 5 House Plan places McDowell and Burke Counties in a six-county cluster. In this six-county cluster, House District 85 lacks compactness, as it stretches to include small parts of Caldwell County in the east, as well as parts of Burke County and McDowell County in the west. Furthermore, Sutton 5 House Plan District 86 almost bisects House District 85. It is possible to draw more compact districts, and to traverse interior county lines fewer times, as demonstrated in Plaintiffs' House Plan which places McDowell and Burke Counties in a two-county cluster, and only traverses the Burke County line once (District 114) in order

to comply with one-person, one-vote. Furthermore, Plaintiffs' House Plan District 114 is compact, consisting of all of McDowell and the adjoining precincts of western Burke County.

The Court finds that the irregular shapes of districts such as those above could be redrawn to be compact and comply with the strict criteria of *Stephenson.*

FAILURES OF CONTIGUITY

This Court finds that a district whose parts are "held together" by the mathematical concept of "point contiguity" does not meet the *Stephenson* criteria for contiguity. A single district cannot be "contiguous with itself". This Court holds that the term "contiguity", as used in *Stephenson,* means that two districts must share a common boundary that touches for a non-trivial distance. As Herbert notes in *Redistricting in the Post-2000 Era*, "...a contiguous district is not divided into two or more discrete pieces."[3] Iowa and Minnesota, for example, prohibit the use of "point" contiguity to joint disparate parts of districts.[4]

District 68 in Sutton 5 is alleged by Defendants to be contiguous, but that assertion rests solely on the use of the academic concept of "point contiguity". The northwest and southeast parts of District 68 are discrete land areas dependant on such "mathematical touching" to claim contiguity.

District 68, along with District 69, illustrates the concept of "double point" and "crisscross" contiguity. In the same way that Sutton 5's District 68 is severed

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[3] Hebert, J. Gerald, *Redistricting in the Post-2000 Era,* 8 Geo. Mason Law Review, 431, 451 (2000).
[4] Minnesota adopted redistricting standards noting, "...point contiguity should be prohibited..." Districts "...that consist of two areas contiguous at only a single point...would create too great an opportunity for gerrymandering." December 2001, Order Stating Redistricting Principles and Requirements for Plan Submissions; Iowa also prohibits point contiguity for legislative districts; Iowa Code, Section 42.4.

into two distinguishable land areas (like a "bowtie"), District 68 crisscrosses with District 69 at the same theoretical point in space and is divided into two pieces.

These two districts fail to be contiguous and the Court finds that they violate the North Carolina's Constitution's equal protection clause which requires that legislative districts be single member districts unless there is a compelling governmental interest. While one of these two crossing districts might be argued to be contiguous under a minimal interpretation of "contiguity", the other district could not logically connect itself through the other district at the same point. Hence, at least one or both of such crisscrossing districts cannot qualify as single-member districts, and, therefore, both districts fail to comply with the North Carolina Constitution's equal protection clause.

Further, this Court finds that the use of the "point" and "double point" constructs and "crisscrosses" can result in bizarre shapes that are not compact. Hence, Districts 68 and 69 fail not only to be contiguous but also their resulting shapes are not compact.

Another example of such point contiguity and double-point contiguity is District 11 in Sutton 5. The western portion of the district is linked to its eastern portion by a mathematical point that divides the district into two discrete pieces. In doing so, District 11 also involves itself in a "double point" attachment and crisscrosses with Sutton 5 District 21. Neither district, as a result, meets standards for contiguity and compactness and both fail to meet that strict standard of *Stephenson*.

This Court also finds that the General Assembly's Sutton 5 House plan contained additional districts that were divided into discrete pieces that render it impossible to travel from one part of a particular district to the other part of the same district without crossing the boundaries of the district at a sole point where the disparate pieces meet. Specific instances of this include Sutton 5 Districts 11, 21, 22, 26, 66, 68, 69, 95 and 96. These districts do not meet the contiguity requirement of *Stephenson*. Further, these particular nine districts use the concept of double-point attachment and, thereby, fail the constitutional test for contiguity on those grounds as well.

As noted earlier, the Court was unable, in the available time, to remedy these additional defects in Sutton 5 without disrupting the 2002 general elections.

The appellant's brief filed in the Supreme Court contains the writer's false impression that this Court was improving upon the enacted plan to make it "more constitutional." The writer further states that "*a plan is either constitutional or not.*" (emphasis added) The latter statement is obviously correct. ("Page 67, Footnote 26.")

FINDINGS FOR SENATE PLAN

Following its review and comparison of the General Assembly's "Proposed Senate Plan Fewer Divided Counties" (hereafter referred to as "Fewer Divided Counties") and Plaintiff's "Constitutional VRA Senate 1" plan (hereafter referred to as "VRA Senate 1"), the Court adopted, as a base interim Senate plan for the 2002 elections, the VRA Senate 1 plan as it was judged to meet the *Stephenson* criteria.

Below the Court outlines the defects identified in the Defendants' Fewer Divided Counties plan that caused this plan to fail to meet the constitutional mandates required by *Stephenson* and traditional redistricting principles.

COUNTY BOUNDARIES

The Fewer Divided Counties senate plans cuts across interior county boundaries in 28 locations. In contrast, Plaintiff's VRA Senate 1 plan, modified to eliminate those districts that are wholly within a particular county crosses county lines only 23 times. Thus, the Fewer Divided Counties senate plan fails to strictly comply with *Stephenson's* WCP requirement.

COMPACT AND CONTIGUOUS

As noted earlier in discussing the House Plan, the *Stephenson* mandate sets out these standards. Individual districts must comply by being both "compact" and "contiguous".

A. Fewer Divided Counties has a District 14 in Wake County that is not compact. It is distinguished by 4 major appendages. Beginning in the northern tip, it moves southeast with jutting points that end in a downward facing cul-de-sac that embraces a portion of this plan's District 36. The boundary of District 14 then meanders toward the northeast turns to the southeast and extends a curved "arm" that carves out a "bay" in the side of District 6.

B. District 11 in Fewer Divided Counties is not compact. Its eastern boundary has been drawn in such a manner that it runs southward, then swings to the northwest, then gives curves around a portion of Nash County to District 10, before continuing to the south and cutting through Johnston County and severing

communities of interest in that area. This design also results in there being a point, interior to District 11, where Johnston and Franklin counties meet.

C. Neither District 21 or 26 in Fewer Divided Counties is compact. District 21 stretches from the western boundary of Montgomery County then moves east across the boundary of Moore County in a jagged line that moves first east, then north, then east again, turns south, makes a right turn west, then again south, before moving north to close the district where Moore meets Chatham and Randolph counties.

The complementary effect of this district's boundary is that it results in adjacent District 26 having a southward arm and an appendage, thereby failing to be compact.

These are three examples (Items A-C above) of compactness failures that render the Fewer Divided Counties senate plan unconstitutional.

In addition to these three illustrative cases, this Court finds overall that senate districts 6, 10, 11, 14, 16, 36, 44 in Johnston, Nash and Wake counties of the General Assembly's Fewer Divided Counties plan are not compact, particularly as compared to the way in which they might have been drawn as demonstrated by Plaintiff's VRA Senate 1.

Further, this Court finds that Districts 21 and 26 of the Fewer Divided Counties Plan are not compact. The General Assembly's ability to create these two meandering districts in the Fewer Divided Counties Senate Plan was possible only because the General Assembly rejected two different two-county groupings found in both Plaintiffs' VRA Senate 1 Plan and the Superior Court's Interim Plan (grouping

Randolph with Montgomery County to create on single-member Senate District 29 and grouping Orange County with Chatham County to create one single-member Senate District 23).

COUNTY CLUSTERING SYSTEMS USED BY DEFENDANTS

As this Court noted in its May 31, 2002 order, there was not sufficient time following the May 18, 2002 submission of the General Assembly's redistricting plans for the Court to devise potential new systems for clustering (or grouping) counties as required under *Stephenson*. This constraint limited the actions that the Court could take to ensure strict compliance with the *Stephenson* criteria.

The Court calls attention to the manner in which the Defendants grouped counties. *Stephenson* states: " In counties having a non-VRA population pool which cannot support at least one legislative district... or alternatively, counties having a non-VRA population pool, which, if divided into districts, would not comply [with the one-person, one-vote standard], the requirements of the WCP are met by combining or grouping the minimum number of *whole, contiguous counties* [to create districts within the grouping that] comply with the one-person, one-vote standard" (emphasis added by italics).

This provision of *Stephenson* notwithstanding, Defendants contend that this decision allows the grouping of *portions* of counties to structure individual county groups. For example, Defendants count their Sutton 5 grouping of Bladen and Sampson Counties as a two-county cluster, with one District 22. However, this cluster contains only a portion of Sampson County, rather than the whole county. The remainder of Sampson County lies in District 21, which is outside this cluster.

Similarly, Defendants have one county cluster that comprises Johnston and Wayne Counties. Defendants count this as a two-county cluster, but it contains only a portion of Wayne County. The remainder of Wayne County is in District 21, which is not part of this cluster. These are but two examples of Defendants' apparent misunderstanding and/or misapplication of the *Stephenson* requirement for grouping counties.

Using this concept, Defendants made erroneous comparisons between their redistricting plans and those of Plaintiff's with regard to whose plan creates the larger (est) numbers of groups with minimal numbers of whole counties. For example, Defendants argued that their May 2002 Fewer Divided Counties Senate Plan has four "single county groups" as compared with only three such 1-county groups in Plaintiff's VRA Senate 1 Plan and this Court's Interim Senate Plan. However, Defendants' claim is possible only because a portion of Durham County contains a sufficient population to constitute one senate district, even though the other part of Durham County is combined with Granville County to create another district. Thus, Defendants falsely contend that a portion of Durham County is equivalent to the single whole-county senate groupings of New Hanover, Wake and Forsyth counties.

Defendants also claim that the General Assembly's Sutton 5 House Plan contains 11 "groupings" of counties, each made up of single counties, as opposed to only 10 single-county groupings in Plaintiff's Remedial House Plan. Like their senate district in Durham County (as described earlier above), the Defendants' claim appears to be based on House District 25, which is located exclusively in Nash

County. However, only part of Nash County was combined with Halifax County to create proposed Sutton House District 7.

Because the Defendants' county-group comparisons are based on the Defendants' misinterpretation or incorrect application of *Stephenson's* WCP principle for grouping counties, this Court finds the Defendants' county-group comparisons between the specified plans of Plaintiffs and Defendants to be moot.

CONCLUSIONS

The Superior Court submits these conclusions regarding the factual basis for its May 31, 2002 decision that the "House Plan- Sutton 5" and "Senate Fewer Divided Counties" plans did not meet the constitutional requirements mandated by *Stephenson*, the Voting Rights Act and traditional redistricting principles.

1. The Court presumed that acts of the General Assembly are constitutional. *See Stephenson I,* 355 N.C. at 362, 562 S.E.2d at 384.

2. The Court understood and applied the Doctrine of Separation of Powers as found in the North Carolina Constitution.

3. The Court required the Plaintiffs to meet the requisite burden of proving an act of the General Assembly unconstitutional.

4. The Court reviewed the General Assembly's plans using the "strict compliance" standard required in *Stephenson I.*

5. In this Court's May 31, 2002 order, the Court erred in using the term "constitutional" to describe its Interim House and Interim Senate Redistricting Plans for the N.C. 2002 Elections. While the Court has found that the General Assembly's 2002 House and Senate Plans are unconstitutional, the Court used the

2002 House Plan (Sutton 5) as the base plan for its Interim House Plan. The Court made certain specified changes in the 2002 House Plan (Sutton 5) when adopting its Interim House Plan to bring the Interim House Plan into closer compliance with the WCP. Time constraints, and the need to establish a plan that could be pre-cleared in time for the 2002 elections, prevented the Court from correcting all the constitutional flaws in the 2002 House Plan (Sutton 5). Thus, it was constitutional to use the 2002 Interim House Plan as an emergency remedial plan despite its constitutional flaws. *See Ely v. Klahr,* 403 U.S. 108, 113, 91 S. Ct. 1803, 1806, 29 L.Ed.2d 352(1971); *Kilgarlin v. Hill,* 386 U.S. 120, 121, 87 S. Ct. 820, 821, 17L.Ed.2d 771(1967); *Silver v. Jordan,* 320 F.Supp. 1169, 1173-74(C.D. Cal.1970); *Drum,* 250 F.Supp. at 925. There did not exist sufficient time for the General Assembly to enact new redistricting statutes and conduct orderly elections in time for pre-clearance and the elections of 2002 after the May 22-23 hearing.

6. The Court finds that the 2002 (Sutton 5) House and Senate Fewer Divided Counties Plans did not create VRA districts consistent with Section 2 of the Voting Rights Act in Wake County in the House and Wake, Forsyth and Mecklenburg Counties in the Senate.

7. The Court finds that in Wake, Mecklenburg and Forsyth Counties, there has previously been established a finding of Section 2 liability under federal law (*see Thornburg v Gingles,* 478 U.S. 30, 335 n.2, 77-80, 106 S.Ct 2752, 2758 n. 2, 2780-83, 92 L.Ed2d 25(1986) and due to demographic changes in population there exists the required *Gingles* preconditions by which a second VRA House District

should be drawn in Wake County and more "effective" VRA Senate districts drawn in Wake, Mecklenburg and Forsyth Counties.

8. The General Assembly's May 2002 Fewer Divided Counties Senate and Sutton 5 House Plans fail to comply with the requirement that in forming districts, only the smallest number of counties necessary to comply with the one-person, one-vote requirement should be combined in forming multi-county groupings.

9. The General Assembly's failure to create the maximum number of two-county groupings in the May 2002 House Plan violates *Stephenson I. See Stephenson I,* 355 N.C. at 384, 562, S.E.2d at 397.

10. The 2002 House and Senate plans enacted by the General Assembly contain districts that are not sufficiently compact to meet the requirements of the equal protection clause in that the requirements of keeping local governmental subdivisions or geographically based communities of interest were not consistently applied throughout the General Assembly's plan producing districts which were a crazy quilt of districts unrelated to a legitimate governmental interest.

11. Plaintiffs have shown that it is possible to draft Senate and House redistricting plans, which do not violate any federal or state law and harmonize requirements of the state law with federal law. In submission of these plans, the Plaintiffs have successfully rebutted the presumption of constitutionality due to state legislative enactments.

12. The Defendants failed to offer any evidence that a compelling governmental interest-such as the requirements imposed by federal law or

impossibility-required them to violate the requirements of the North Carolina Constitution in enacting the statute.

13. The plans enacted by the General Assembly are unconstitutional.

14. There did not exist sufficient time for the General Assembly to enact new redistricting statutes and conduct orderly elections in time for pre-clearance and the elections of 2002 after the May 22-23 hearing.

15. The House and Senate plans enacted by the General Assembly violate the WCP, as defined by *Stephenson I.*

16. The House and Senate plans enacted by the General Assembly violate Article II, Section 5 in that they contain districts that are not contiguous.

The foregoing Findings of Fact and Conclusions of Law are hereby certified to the Supreme Court of North Carolina.

This the 17 day of April, 2003.

HONORABLE KNOX V. JENKINS, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE
DISTRICT 11-B

Exhibit 5

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 014001

COMMON CAUSE, *et al.*
Plaintiffs,

v.

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

ORDER

This matter comes before the undersigned three-judge panel for review of Remedial Redistricting Maps (hereinafter "Remedial Maps") enacted by the North Carolina General Assembly on September 17, 2019, N.C. Sess. Laws. 2019-219 (Senate Bill 692) and 2019-220 (House Bill 1020), to apportion the legislative districts within North Carolina. The Remedial Maps were enacted following entry of the September 3, 2019, Judgment of this Court wherein the Court held that certain districts in the 2017 House and Senate plans (hereinafter "2017 Enacted Maps") were unconstitutional partisan gerrymanders. The Court ordered that twenty-one Senate districts contained within seven county groupings and fifty-six House districts contained within fourteen county groupings be redrawn in conformance with the mandate of its Judgment.

Following the enactment of the Remedial Maps, Plaintiffs submitted objections to the new maps. Plaintiffs raised no specific objections to the twenty-one new districts drawn in the Remedial Senate Maps. Plaintiffs raised no specific objection to thirty-seven House Districts contained within nine county groupings in the Remedial House Map, but did raise specific objections to nineteen House Districts contained within five county groupings. *See,*

generally, Plaintiffs' Objections to the Remedial Plans (Sept. 27, 2019). The county groupings and House Districts that are the subject of the Plaintiffs' objections are:

a. Columbus-Pender-Robeson (HD-16, -46, & -47);

b. Forsyth-Yadkin (HD-71, -72, -73, -74, & -75);

c. Gaston-Cleveland (HD-108, -109, -110, & -111);

d. Brunswick-New Hanover (HD-17, -18, -19, & -20); and

e. Guilford (HD-58, -59, & -60).

All parties have had a full opportunity to submit memoranda supporting or opposing the Remedial Maps. The Court has examined each of the seventy-seven newly-drawn Senate and House districts in the Remedial Maps, and in particular the nineteen districts objected to by Plaintiffs, as well as the transcripts, video and written record of the General Assembly proceedings, and the arguments of counsel. The findings and conclusions of the Court are set out below.

In this Court's September 3, 2019, Judgment, the Court required that remedial maps conform to specific criteria. Certain of the Court's criteria governed the *process* required of the General Assembly if it chose to enact remedial maps, while other criteria set out *substantive requirements* for any remedial maps enacted.

I. Compliance with the Procedural Requirements of the September 3, 2019, Judgment of the Court.

With respect to the process that the Court required of the General Assembly, the following criteria were set out in the Court's Judgment:

> a. Legislative Defendants and their agents shall conduct the entire remedial process in full public view. At a minimum, this requires all map drawing to occur at public hearings, with any relevant computer screen visible to legislators and public observers. Legislative Defendants and their agents shall not undertake any steps to draw or revise the new districts outside of public view.

b. In redrawing the relevant districts in the Remedial Maps, the invalidated 2017 districts may not be used as a starting point for drawing new districts, and no effort may be made to preserve the cores of invalidated 2017 districts.

c. Election Data. Partisan considerations and election results data shall not be used in the drawing of legislative districts in the Remedial Maps.

d. To the extent that Legislative Defendants wish to retain one or more individuals who are not current legislative employees to assist in the map-drawing process, Legislative Defendants must seek and obtain prior approval from the Court to engage any such individuals.

In reviewing the actions of the General Assembly that led to the enactment of the Remedial Maps, the Court is satisfied that the process chosen and implemented by both the House and Senate of the General Assembly comported with the procedural requirements of the Court's Judgment. Several aspects of the General Assembly's process, and several of the Plaintiffs' objections thereto, merit further discussion.

a. Requirement that the remedial redistricting process be conducted in full public view.

In contrast to the unconstitutional 2017 Enacted Maps, the remedial redistricting process was conducted in full public view, as ordered by the Court. To comply with the Court's mandate, both the Senate and the House conducted the vast majority of the remedial redistricting process in public hearings, broadcast by audio and video livestream, so that Plaintiffs and interested public could view the process in its entirety. A record of the entire proceedings has been made and preserved and is available not only to the Court, but to the public for inspection and scrutiny.

Plaintiffs, in their *Objections to the Remedial Plans,* make note of some apparent lapses in transparency that predictably and justifiably give rise to suspicion. These lapses are detailed in *Plaintiffs' Objections to the Remedial Plans* on pages 2-7. For example, Plaintiffs suspect that Rep. David Lewis, chair of the House Redistricting Committee,

conferred with Republican redistricting strategists to determine which dataset of simulated maps created by Plaintiffs' expert Dr. Jowei Chen, Set 1 or Set 2, ought to be used as the base map in the remedial process. Rep. Lewis denies taking such action, but if Rep. Lewis had consulted in private regarding the partisan consequences of choosing either Set 1 or Set 2, the Court does not accept Legislative Defendants' rationalization that such a consultation would not be "'map drawing' but 'map *picking*'" and therefore not in violation of the Court's mandate that the "entire remedial process" be conducted in "full public view." *Leg. Defs' Memorandum Regarding House and Senate Remedial Maps (hereinafter "Leg. Defs' Memorandum"), p. 12 (Sept. 23, 2019) (emphasis original).* On the other hand, the Court notes that the House Redistricting Committee's ultimate choice to use Set 1 as the starting point for the remedial process was made with unanimous and bipartisan approval by the House Redistricting Committee after thorough debate in public. *Tr. H. Redistricting Comm., Sept. 11, 2019 at 17:3-22.*

The Court is satisfied, despite the lapses identified by Plaintiffs, that the efforts made by the General Assembly to ensure that the remedial process was conducted in public view were reasonable and complied with the Court's mandate. It is noteworthy to the Court that both Legislative Defendants and ranking Democratic members of the General Assembly concur that "the level of public access provided to the committee process was unprecedented in the history of the General Assembly, regardless of the type of committee or subject matter involve." *Leg. Defs' Memorandum at 10.* Democratic Minority Leader Senator Dan Blue, during Senate floor debate on the Senate's remedial plan, stated that "[f]or this process, the rules that have been applied have been evenly administered. It is a transparent, open, process, more transparent than anything I've seen in this legislature, especially with redistricting" and "[o]ne of the mainstays of a democratic government is transparency and that's why I think this process worked so well." *Senate Floor Debate*

Transcript, Sept. 16, 2019, at 20:7-12; 22:15-17. As such, the Court overrules the objections of Plaintiffs to the extent the objections challenge the General Assembly's compliance with the mandate of the Court that the remedial process be conducted in full public view.

b. Requirement that invalidated 2017 districts not be used as a starting point for drawing new districts and there be no effort to preserve the cores of invalidated districts.

The Court finds and concludes that the General Assembly's use of Set 2 (Senate) and Set 1 (House) of the simulated maps created by Dr. Chen as the datasets from which to select the base Remedial Senate and House Maps comports with the mandate of the Court that invalidated 2017 districts not be used as a starting point for drawing new districts. The Court has previously found, in its September 3, 2019, Judgment, that these simulated maps – both Set 1 and Set 2 – were created by an algorithm designed by Dr. Chen to maximize traditional redistricting criteria and to disregard partisan criteria and the cores of the 2017 districts. *See Judgment, ¶ 83-86, 113-114.* The Court accorded Dr. Chen's testimony and methodology great weight in the liability phase of this litigation and again does so here.

The Court further concludes that the methodology adopted by the General Assembly to select the ultimate House and Senate base remedial maps, through a random process from among the various simulated maps contained in Dr. Chen's datasets, was reasonable. The methodology utilized by the General Assembly rank-ordered the simulated maps for each county grouping by optimizing traditional, nonpartisan redistricting criteria computed by Dr. Chen, and then selected a map, through a random drawing, from the top five rank-ordered maps to serve as the base district maps for that grouping. The process was overseen by nonpartisan staff and conducted in public view. Notably, the base map selection process received broad bipartisan support in both the House and Senate Redistricting Committees. The Court recognizes that other methodologies might have been

chosen that could have resulted in maps that more reliably optimized traditional and nonpartisan redistricting criteria. For example, the decision to randomly draw a base map from county groupings where Dr. Chen's simulation showed that only a few unique maps could possibly be drawn within the group raises the possibility that the "optimal" map was supplanted by a map significantly less optimal through the random drawing process.[1] Nonetheless, despite these possible shortcomings in the chosen methodology, the decision to consistently employ and abide by random choice to choose among simulated maps created through a nonpartisan algorithm was reasonable. As such, the Court overrules the objections of Plaintiffs to the extent the objections challenge the General Assembly's compliance with the mandate of the Court that invalidated 2017 districts not be used as a starting point for drawing new districts and there be no effort to preserve the cores of invalidated districts.

c. Requirement that no partisan consideration or election results data be used in the drawing of legislative districts in the Remedial Maps.

The Court is satisfied that significant and reasonable efforts were taken by the General Assembly to attempt to limit partisan consideration and election results data from being used in the remedial redistricting process. The Court finds and concludes that to the degree that this mandate could be achieved, it was significantly aided by public and media scrutiny and the transparency of the remedial process.

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[1] For example, in the simulations produced by Dr. Chen for the Franklin-Nash House county grouping, due to the relatively small number of VTDs and municipalities in that grouping, only five unique maps could possibly be drawn while comporting with traditional and legal redistricting criteria. *See, Testimony of Dr. Chen, Trial Tr. 357:10-358:15.* As such, the random choice of one of those five possible simulated maps for this House grouping might (with a 1:5 chance) have resulted in choosing the fifth-most optimal choice – i.e. the "worst" choice – rather than the more optimal first choice.

Plaintiffs, in their *Objections to the Remedial Plans,* raise a serious concern regarding the use of election data or partisan data. Specifically, Plaintiffs have provided evidence to the Court that shortly after the House and Senate Redistricting Committees announced that Dr. Chen's simulated maps would be used to select the base map, counsel for the Legislative Defendants, responding to a request from legislative staff for shapefiles and block assignments for those maps, sent an email containing a link to Dr. Chen's backup files to dozens of recipients, including all members of the House and Senate Redistricting Committees. Dr. Chen's backup files contained extensive partisanship data on every district in every one of Dr. Chen's simulated maps. With these files, any recipient could look up the partisan composition of any district in any of Dr. Chen's simulated maps. The link was emailed by Legislative Defendants' counsel at 4:21 p.m. on September 9, 2019; Plaintiffs counsel objected to the distribution of the data shortly thereafter at 4:45 p.m., and the link was disabled at or about 7:09 p.m.

Legislative Defendants, in their *Reply Brief*, report that no central staff member completed the download of the partisan dataset, and that of the members of the House Redistricting Committee,[2] only two, one Republican member and one Democratic member, had, through their staff, downloaded the data at issue. Legislative Defendants further report that as to the data downloaded by the Republican member's staff, the zip file containing the partisan data was never accessed; with respect to the Democratic member's data, counsel argues there is no evidence that the Democratic member or her office used the data or sought to inject partisan changes into the maps. Legislative Defendants' counsel

[2] Legislative Defendants only report the potential use of data by members of the House and House staff members because "Plaintiffs only attack the House" and are not raising objections to the Senate Remedial Maps. *Reply Brief at 14.*

also note the complexity of the partisan data, asserting that it is "entirely unusable for a non-expert in political data analysis." *Reply Brief at 14.*

The Court finds and concludes that the distribution of partisan data by email to legislative staff and members of the Redistricting Committees by counsel for Legislative Defendants is a serious breach of this Court's mandate. However, the Court further finds that the distribution was inadvertent, and the potential damage was mitigated by public scrutiny and the vigilance of Plaintiffs' counsel and their prompt objection. As such, the Court concludes that this breach alone is not sufficient to invalidate the remedial map drawing process. The Court overrules the objections of Plaintiffs to the extent the objections challenge the General Assembly's compliance with the mandate of the Court that no partisan consideration or election results data be used in drawing the remedial maps.

d. Requirement that Legislative Defendants obtain prior approval of the Court to retain individuals who are not current legislative employees to assist in the map-drawing process.

Plaintiffs, in their *Objections to the Remedial Plans,* establish that Legislative Defendants, without seeking prior approval of the Court, utilized the services of Clark Bensen, who operates a political consulting firm known as "POLIDATA," during the remedial map drawing process. Plaintiffs note that Mr. Bensen is an attorney by training, and according to his resume, has been involved in "redistricting and census issues throughout the previous three reapportionment cycles and has developed political and census datasets for every state in the nation" and that "development of election datasets for every level of geography has been a specialty since 1974." *Id. at 5.* Mr. Bensen previously served as director of "Political Analysis" for the Republican National Committee where his duties were to "undertake the collection, compilation, systemization and analysis of

politically related data." *Id.* In 2011, Legislative Defendants relied upon Mr. Bensen to provide political data for them in drawing the 2011 plans. *Id.*

Legislative Defendants, by way of affidavit of Mr. Bensen, confirm that Mr. Bensen was contacted by email on September 9, 2019, inquiring about his availability to "analyze 1,000 districting plans" in a short period of time. *Bensen Affidavit,* ¶ *7.* He responded that he had limited availability, and he was then requested to "simply compare the two sets of 1,000 plans with two of the sets of 1,000 plans that Dr. Chen had provided during the liability stage, for the purposes of verifying that the plans submitted by Dr. Chen during the remedial stage appeared to be the same plans that had been submitted previously.'" *Id.*, ¶¶ *7-8.* Mr. Bensen further reports that he conducted this comparison on September 10, 2019, and by 2:30 p.m. that same day, he reported to counsel for Legislative Defendants that "it appeared to [him] 'like almost all of the old plans are included." *Id.*, ¶ *16.* He states that "he had neither the time nor the instructions to undertake" any other review associated with the remedial maps and that comparison of datasets was the sole task he performed. *Id.*, ¶ *17.* Mr. Bensen denies that he conducted any partisan analysis of any simulated districts in the data provided and did not provide any information to counsel or anyone else about partisan performance of the simulated districts. *Id.*, ¶ *18.*

Plaintiffs also object to the utilization of Dr. Janet R. Thornton during the remedial map drawing process without prior authorization of the Court. Dr. Thornton testified as an expert on behalf of the Legislative Defendants during the liability phase of this litigation. Like Mr. Bensen, Dr. Thornton has provided an affidavit stating that her role, at all times prior to the enactment of the Remedial House and Senate Maps, was limited to the single task, on September 10, 2019, of verifying that the datasets provided to the General Assembly were in fact the same datasets that Dr. Chen had produced for the purposes of

the litigation. *Thornton Affidavit, ¶¶ 3-6.* She further states that between September 3, 2019, and September 29, 2019, she did not "review the partisan make-up or review political information for the county groupings for the remedial plan." *Id., ¶ 7.*

Legislative Defendants respond to Plaintiffs' objection by stating, in summary, that the fact that outside personnel would be verifying that the data received by the General Assembly were identical to the data Dr. Chen had utilized during the liability phase of the litigation was discussed in public redistricting committee meetings (*see, e.g. Tr. S. Redistricting Comm., Sept. 10, 2019, at 50:10-15).* Moreover, Legislative Defendants argue, the authentication of data is not "assistance in the map-drawing process." *Reply Brief at 10.* The Court agrees. There is no direct evidence contradicting the affidavits of Mr. Bensen and Dr. Thornton, and taking their sworn testimony as true, the Court concludes that their assistance in authenticating and verifying data does not violate the specific mandate of the Court. As such, the Court overrules the objections of Plaintiffs to the extent the objections challenge the General Assembly's compliance with the mandate of the Court that Legislative Defendants obtain prior approval of the Court to retain outside individuals to assist with the remedial process.

II. Compliance with the Substantive Requirements of the September 3, 2019, Judgment of the Court.

The Court, in its Judgment of September 3, 2019, required that any remedial maps enacted by the General Assembly comport with a number of substantive criteria. The criteria are as follows:

> a. Equal Population. The mapmakers shall use the 2010 federal decennial census data as the sole basis of population for drawing legislative districts in the Remedial Maps. The number of persons in each legislative district shall comply with the +/- 5 percent population deviation standard established by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E. 2d 377 (2002).

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

c. County Groupings and Traversals. The mapmakers shall draw legislative districts in the Remedial Maps 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*. The county groupings utilized in the 2017 House and Senate Maps shall be utilized in the Remedial Maps.

d. Compactness. The mapmakers shall make reasonable efforts to draw legislative districts in the Remedial Maps that improve the compactness of the districts when compared to districts in place prior to the 2017 Enacted Legislative Maps. In doing so, the mapmaker 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).

e. Fewer Split Precincts. The mapmakers shall make reasonable efforts to draw legislative districts in the Remedial Maps that split fewer precincts when compared to districts in place prior to the 2017 Enacted Legislative Maps.

f. Municipal Boundaries. The mapmakers may consider municipal boundaries when drawing legislative districts in the Remedial Maps.

g. Voting Rights Act. Any Remedial Maps must comply with the VRA and other federal requirements concerning the racial composition of districts.

h. Incumbency Protection. The mapmakers may take reasonable efforts to not pair incumbents unduly in the same election district.

With respect to each criteria (a) through (f), as to the maps as a whole, there is no evidence that the General Assembly did not comply, and Plaintiffs do not object to the Remedial Maps as a whole on these grounds. As such, the Court finds and concludes that the Remedial House and Senate Maps, as a whole, comport with the legal requirements of

equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of compactness, fewer split precincts, and consideration of municipal boundaries when compared to the districts in place prior to the 2017 Enacted Maps.

a. Mandate that the Remedial Maps comply with the VRA and other federal requirements concerning the racial composition of districts.

The Court further finds and concludes that the Remedial Maps comply with criterion (g) above, namely that the Remedial Maps comply with the Voting Rights Act and other federal requirements concerning the racial composition of districts. In the Court's Judgment of September 3, 2019, the Court stated that any parties "may submit briefing, which may attach expert analysis, on whether the *Gingles* factors are met in particular counties and county groupings and/or the minimum BVAP needed in particular counties and county groupings for African Americans to be able to elect candidates of their choice to the General Assembly." Plaintiffs submitted such a brief, including expert analysis of Jowei Chen, Ph.D. (report dated September 17, 2019) and Lisa Handley, Ph.D. (report dated September 17, 2019). No other parties submitted briefs or expert analysis on this issue within the time allowed by the Court. The Court finds the analysis performed by Dr. Chen and Dr. Handley to be credible and adopts their conclusions. A separate Order shall be issued by this Court detailing the findings of fact that support these conclusions.

b. Mandate that the General Assembly may take reasonable efforts to not pair incumbents unduly in the same election district.

In its September 3, 2019, Judgment, the Court adopted the criterion that the General Assembly "may take reasonable efforts to not pair incumbents unduly in the same election district." The Court recognizes that this criterion permits a degree of legislative discretion to enter into the remedial process and, indeed, a degree of political discretion. It

is not surprising, therefore, that each of Plaintiffs' challenges to the enacted House Remedial Maps – namely, their objections to five of fourteen House county groups redrawn pursuant to the Court's Judgment – arise largely as a result of the exercise of this legislative discretion to unpair incumbent legislators who had been paired by Dr. Chen's simulated maps.

In applying this criterion, the Court finds noteworthy and appropriate that the House Redistricting Committee recognized that changes made to base maps to unpair incumbents ought to be "extremely narrow, tailored, precise, and thoughtful." *Video record of House Redistricting Committee, Sept. 12, 2019, 3:24:19-3:26.* Accordingly, the Committee adopted the following directives: (1) no changes would be made to the House base maps derived from Dr. Chen's dataset where no incumbent members were paired; (2) where incumbent members were paired in a single district, the paired district and the corresponding empty district would be the sole districts altered to unpair the paired members, and those alterations should be as few as possible; and, (3) a legislator who informed the Committee that he or she did not intend to run for re-election would not be treated as an incumbent for the purposes of unpairing. *See, Legislative Defendants' Memo Re House and Senate Remedial Maps, at 16 and n. 3; Video record, Sept. 12, 2019, 3:07:00-3:09:44; 3:22:48; 3:24:19-3:29:00.* These directives were applied uniformly by the House Redistricting Committee to all county groupings under its consideration. The Court finds and concludes that these directives reflect a reasonable effort by members of the Committee to preserve the nonpartisan and traditional redistricting criteria optimized in Dr. Chen's maps and are therefore consistent with the Court's mandate.

In its September 3, 2019, Judgment, the Court observed that "[a]t 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). With this in mind, the Court finds it significant that the House Redistricting Committee voted unanimously to adopt twelve of the fourteen remedial county groupings under its consideration and one other grouping received only one "no" vote. Only one county grouping, the Robeson-Columbus-Pender county grouping, provoked disagreement among the Committee members. The House Redistricting Committee is comprised of seventeen members – seven Democrats and ten Republicans. The Speaker Pro Tempore, a Republican, participated as an *ex officio* voting member as well. The Court finds and concludes that unanimous or nearly unanimous consensus across party lines within the Committee for thirteen of fourteen remedial county groupings is significant evidence that, for at least those thirteen groupings, partisan gerrymandering has been significantly abated.

Plaintiffs, in their *Objections to the Remedial Maps*, challenge five county groupings in the House Remedial Maps. Four of the groupings challenged were altered from Dr. Chen's base map to unpair incumbents. One county grouping, Brunswick – New Hanover, is challenged by Plaintiffs because the General Assembly did *not* unpair incumbents. The Court considers each of Plaintiffs' objections to these five county groupings in the House Remedial Map.

i. Brunswick-New Hanover County Grouping (HD-17, HD-18, HD-19, and HD-20)

The base map for this county grouping, which was selected in accordance with the methodology described above from Dr. Chen's simulated maps, paired two Republican incumbents in House District 20: Representative Holly Grange and Representative Ted Davis. The base map had the highest Reock score (*i.e.*, most compact) of all possible simulations, split no VTDs, and split the lowest number of municipalities (one). The

simulated map created three Republican districts and one Democratic district, as did every other simulated map generated by Dr. Chen's Set 1 algorithm for that county grouping except one, which created four Republican districts.

Plaintiffs object to adoption of this county grouping map because the General Assembly did not unpair Rep. Grange and Rep. Davis in HD-20. Plaintiffs do not propose an alternative map that unpairs the incumbents in HD-20, but suggest that had Rep. Grange and Rep. Davis been unpaired, Democratic voters might have been distributed more efficiently in HD-18, -19 and -20, presumably making one of the three Republican districts more competitive for a Democratic candidate. By failing to unpair Rep. Grange and Rep. Davis, Plaintiffs contend, Legislative Defendants perpetuated a partisan gerrymander in this county grouping.

Rep. Grange, however, announced her intention to run for Governor in 2020 several months prior to the drafting of the Remedial Map. Although Rep. Grange initially asked the House Redistricting Committee that she be unpaired from Rep. Davis, she later withdrew her request. *Tr. House Floor, Sept. 13, 2019, Vol. II at 560:15-561:5.* Because a person cannot file for both a House seat and the Office of Governor, it was reasonable for the General Assembly to disregard Rep. Grange's incumbency and treat the county grouping as one with no paired incumbents. Therefore, consistent with the directives adopted by the House Redistricting Committee, no changes were made to the simulated base map for this county grouping. The base map for Brunswick-New Hanover, with no alterations, was unanimously adopted by the bipartisan House Redistricting Committee.

In weighing all of these factors, the Court finds and concludes that the Brunswick-New Hanover remedial districts were not adopted in violation of the Court's mandate because: (1) the remedial map for the Brunswick-New Hanover county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably

comply with its mandate; (2) the districts within the county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of compactness, fewer split precincts, and consideration of municipal boundaries; (3) the decision not to alter the base map was consistent with a self-imposed limitation on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied; (4) no alternative map that better achieved these objectives was offered by Plaintiffs; and, (5) the remedial county grouping map was adopted unanimously by the House Redistricting Committee. Therefore, the objection of Plaintiffs to this county grouping is denied.

ii. Guilford County Grouping (HD-58, HD-59 and HD-60)

The Guilford County grouping contains six total House districts, but three of these districts (HD-57, HD-61, and HD-62) are frozen in both the computer-simulated plans as well as in the enacted House Remedial Map pursuant to the Court's September 3, 2019, Judgment. The base map for this county group, which was selected from Dr. Chen's simulated maps in accordance with the methodology described above, paired two incumbents in House District 59. To unpair these two incumbents, one VTD from HD-59 was moved in HD-58. No other changes were required. The House Redistricting Committee unanimously adopted the Guilford County remedial map.

Plaintiffs object to the Guilford County remedial map adopted by the General Assembly because, they contend, in the name of unpairing incumbents, the House substantially recreated one of the invalidated 2017 districts in this grouping (HD-58), rendering this grouping a statistical outlier with respect to compactness. Plaintiffs do not contend that the alteration to the base map rendered the county grouping a statistical outlier with respect to partisanship, and the change had no effect on the number of split

VTDs (0) or split municipalities (0). Plaintiffs do not propose an alternative map that unpairs the incumbents in HD-59.

In weighing all of these factors, the Court finds and concludes that the Guilford county remedial districts were not adopted in violation of the Court's mandate because: (1) the remedial map for the Guilford county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably comply with its mandate; (2) the districts within the county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of fewer split precincts, and consideration of municipal boundaries; (3) the decision to unpair the incumbents in HD-59 was achieved by as few alterations as possible (in this case, one VTD), which was consistent with a self-imposed limitation on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied; (4) the modest reduction in compactness of HD-58 and HD-59 to achieve unpairing of incumbents was not unreasonable; (5) no alternative map that better achieved these objectives was offered by Plaintiffs; and, (6) the remedial county grouping map was adopted unanimously by the House Redistricting Committee. Therefore, the objection of Plaintiffs to this county grouping is denied.

iii. Cleveland-Gaston County Grouping (HD-108, HD-109, HD-110 and HD-111)

The base map for the Cleveland-Gaston county grouping, which was selected from Dr. Chen's simulated maps in accordance with the methodology described above, paired two incumbents in House District 111. To unpair these two incumbents, a total of thirteen VTDs were moved from the base plan and one VTD was split. Every simulated map created by Dr. Chen's algorithm for this county grouping results in four Republican districts, three of which have more than 60% Republican vote share and the fourth has more than 55%

Republican vote share in all but a handful of the 1000 maps simulated by Dr. Chen. The House Redistricting Committee unanimously adopted the Cleveland-Gaston county grouping remedial map.

Plaintiffs object to the Cleveland-Gaston county grouping remedial map adopted by the General Assembly because, they contend, the alterations made to unpair incumbents return this county grouping to the prior gerrymander by cracking the municipality of Gastonia into three districts. Plaintiffs point out that the net partisan effect is a swing downward in Democratic vote share in HD-108 from 41.24% to 35.62%, and a swing upward in Democratic vote share in HD-111 from 26.63% to 31.10%. Plaintiffs also establish the districts in the county grouping are made less compact by the alterations made to the base map. Plaintiffs do not propose an alternative map that unpairs the incumbents in HD-111.

Legislative Defendants contend the choices made by the House Redistricting Committee to alter the map to unpair incumbents required a policy decision to either split Gastonia into three districts or to split many other smaller municipalities in northern and western Gaston County. Ultimately, by altering the base map as enacted, no other municipalities were split to achieve the unpairing of the incumbents in HD-111. Legislative Defendants further note that there is no incentive to engage in partisan gerrymandering in this county grouping because of the heavy Republican concentration throughout the entire grouping.

In weighing all of these factors, the Court finds and concludes that the Cleveland-Gaston county grouping remedial districts were not adopted in violation of the Court's mandate because: (1) the remedial map for the Cleveland-Gaston county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably comply with its mandate; (2) the districts within the county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county

grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of fewer split precincts, and consideration of municipal boundaries; (3) the decision to unpair the incumbents in HD-111 was achieved by alterations only to the district with the paired incumbents (HD-111) and to the district with no incumbent (HD-108), which was consistent with a self-imposed limitation on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied; (4) the division of Gastonia so as to avoid the division of other municipalities to achieve unpairing of incumbents was not unreasonable; (5) no alternative map that better achieved these objectives was offered by Plaintiffs; (6) no motive to disadvantage Democratic voters can be discerned in the alterations made; and, (7) the remedial county grouping map was adopted unanimously by the House Redistricting Committee. Therefore, the objection of Plaintiffs to this county grouping is denied.

iv. Forsyth-Yadkin County Grouping (HD-71, HD-72, HD-73, HD-74 and HD-75)

The base map for the Forsyth-Yadkin county grouping, which was selected from Dr. Chen's simulated maps in accordance with the methodology described above, paired two incumbents in House District 75 (one Democrat and one Republican) and two incumbents in House District 72 (one Democrat and one Republican).[3] In HD-75, the incumbents each resided two VTDs away from the nearest border of the base district. In order to attempt to unpair the four incumbents, the bipartisan Forsyth-Yadkin House delegation proposed to alter the base map by moving four VTDs in HD-75, and one VTD in HD-72. During the course of the discussions amongst the members of the delegation at the mapmaking terminal, which was carried out in full public view, Representative Donny Lambeth, the

[3] The House Districts were renumbered in the enacted Remedial House Maps: HD-71 to HD-72, HD-72 to HD-74, HD-74 to HD-75 and HD-75 to HD-71. For consistency, the Court uses the original district numbers in this discussion.

Republican incumbent paired in HD-75, asked to "take the 75th out to Kernersville because I've represented it in the past." *Video Record of House Redistricting Committee, Sept. 12, 2019, 7:12:00-10.* Rep. Lambeth's request was implemented by an alteration to the base map. As a result, two VTDs were removed from HD-75 and added to HD-74 (which includes Kernersville) and, to balance the population between the two districts, two VTDs from HD-74 were moved to HD-75. The base map for the Forsyth-Yadkin county grouping, as altered to unpair four incumbents, was unanimously adopted by the House Redistricting Committee.

Plaintiffs object to the Forsyth-Yadkin county grouping remedial map adopted by the General Assembly because, they contend, the alterations made to unpair incumbents were the result of partisan gerrymandering and resulted in districts that preserved cores of House districts that were declared unconstitutional. Plaintiffs show that as a result of altering four VTDs to unpair the incumbents in HD-75, the Democratic vote share in HD-75 increased from 69.09% to 71.37%, while in HD-74, the Democratic vote share decreased from 39.72% to 36.24%. This, Plaintiffs contend, is evidence of packing and cracking condemned by the Court in its September 3, 2019, Judgment. The alterations further had the effect of decreasing compactness, as compared to the base county grouping map, and split two more municipalities than the base map. Plaintiffs do not propose an alternative map that unpairs the incumbents in HD-75 and HD-72.

While there is no evidence that election result data was used by the Forsyth-Yadkin legislative delegation as they decided how to propose to unpair the incumbents in HD-75, it is reasonable to assume that the incumbents paired in HD-75, Rep. Lambeth (Republican) and Rep. Evelyn Terry (Democrat), both of whom have served in the House for four terms, knew from their extensive political experience that the two VTDs that were moved to place Rep. Lambeth into the Republican leaning HD-74 were two Republican-leaning VTDs, and

conversely, the two VTDs moved from HD-74 into HD-75 to rebalance the population were two Democratic-leaning VTDs. It is also reasonable to assume that Rep. Lambeth and Rep. Terry knew that the alternative means by which they could be unpaired would be to place Rep. Terry, the Democrat, into a safe Republican district, and to leave Rep. Lambeth, the Republican, in a safe Democratic district.

The Court concurs that the decision to alter HD-74 and HD-75 so as to place Rep. Lambeth in HD-74 and leave Rep. Terry in HD-75 was one that was likely made with partisan considerations in mind, although not with past election data on hand. The Court further recognizes that this is an example of where the Court's mandate that allows "reasonable efforts to not pair incumbents unduly in the same election district" permits, as noted above, a degree of legislative discretion to enter into the remedial process and, indeed, a degree of political discretion. And the Court concurs that traditional redistricting criteria of compactness and preserving municipal boundaries were subordinated to unpairing incumbents.

However, the constitutional defect at issue in this litigation is extreme partisan gerrymandering which, as the United States Supreme Court has said is, "[a]t its most basic level . . . the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature,* 135 S. Ct. at 2658. Here, the Court cannot conclude that the choice of how to unpair Rep. Lambeth and Rep. Terry was done to subordinate Democrats or entrench the Republican party in power. The fact that the alterations inured to the mutual benefit of both Democrats and Republicans in a plan that was proposed to the House Redistricting Committee by the bipartisan Forsyth-Yadkin House delegation, and that the plan was unanimously adopted by the full bipartisan Committee, shows that these alterations were not the result of extreme partisan gerrymandering.

In weighing all of these factors, the Court finds and concludes that the Forsyth-Yadkin county grouping remedial districts were not adopted in violation of the Court's mandate because: (1) the remedial map for the Forsyth-Yadkin county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably comply with its mandate; (2) the districts within the county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of fewer split precincts, and consideration of municipal boundaries; (3) the decision to unpair the incumbents in HD-71, HD-72, HD-74, and HD-75 was achieved by alterations only to the districts with the paired incumbents (HD-75 and HD-72) and the districts with no incumbent (HD-74 and HD-71), and by making the fewest alterations possible, which were consistent with self-imposed limitations on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied; (4) the decision to place Rep. Lambeth in HD-74 and leave Rep. Terry in HD-75 was not unreasonable; (5) no alternative map that better achieved these objectives was offered by Plaintiffs; (6) no motive to disadvantage Democratic voters can be discerned in the alterations made; and, (7) the remedial county grouping map was adopted unanimously by the House Redistricting Committee. Therefore, the objection of Plaintiffs to this county grouping is denied.

v. Columbus-Pender-Robeson County Grouping (HD-16, HD-46 and HD-47)

The base map for the Columbus-Pender-Robeson county grouping, which was selected from Dr. Chen's simulated maps in accordance with the methodology described above, paired two incumbents in HD-16. To unpair these two incumbents, eleven VTDs were altered from the base plan. Of the simulated maps created by Dr. Chen's algorithm for this county grouping, 99.5% of those simulated maps result in two Democratic districts

and one Republican district, and both the base map and enacted Remedial Map for this county grouping have this same ratio.

Plaintiffs object to the Columbus-Pender-Robeson county grouping remedial map adopted by the General Assembly because, they contend, the alterations made to unpair incumbents was an attempt to dilute Democratic voters in HD-46 by moving the Town of Whiteville VTDs into HD-16, thereby making HD-46 more competitive for Republicans. Plaintiffs show that the alterations to the base map resulted in a decrease of the Democratic vote share in HD-46 from 53.30% to 51.37% and an increase in the Democratic vote share in HD-16 from 39.44% to 40.64%.

This county grouping was the subject of extensive negotiation among the members of the House Redistricting Committee, and extensive discussion on the House Floor. Several amendments were offered by Representative Darren Jackson (D-Wake), which failed. The Columbus-Pender-Robeson county grouping remedial map was adopted by the House Redistricting Committee by a divided vote. Plaintiffs have not proposed an alternative map to the Court.

Legislative Defendants contend each possible alternative for unpairing the incumbents in HD-46 and HD-16 would have resulted in municipal splits and VTD splits. They contend that the policy decision of the Committee to preserve traditional redistricting criteria was a sound decision and should not be altered by the Court. The remedial maps proposed by Rep. Jackson would divide one municipality, Tabor City, or, alternatively, divide two VTDs. The enacted Remedial Map for the Columbus-Pender-Robeson county grouping splits no municipalities and splits no VTDs. The compactness scores, when comparing the base map to the enacted Remedial Map, are essentially the same.

In weighing all of these factors, the Court finds and concludes that the Columbus-Pender-Robeson county grouping remedial districts were not adopted in violation of the Court's mandate because: (1) the remedial map for the Columbus-Pender-Robeson county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably comply with its mandate; (2) the districts within the county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of compactness, fewer split precincts, and consideration of municipal boundaries; (3) the decision unpair the incumbents in HD-16 was achieved by alterations only to the district with the paired incumbents (HD-16) and the district with no incumbent (HD-46), which were consistent with a self-imposed limitation on the Redistricting Committee's discretion that the Court has found to be appropriate and uniformly applied; (4) the decision to place the Town of Whiteville in one district, and the Town of Chadbourn in another was not an unreasonable exercise of the discretion in the General Assembly's efforts to unpair incumbents while respecting traditional redistricting criteria; and, (5) no alternative map that better achieved these objectives was offered by Plaintiffs. Therefore, the objection of Plaintiffs to this county grouping is denied.

III. Senate Remedial Maps

Despite receiving no objections from Plaintiffs to the enacted Senate Remedial Maps, the Court has examined the seven county groupings and twenty-one Senate districts that were redrawn in the Senate remedial process. After reviewing the record of the Senate proceedings, the Court finds and concludes that each Senate district redrawn and enacted in the Remedial Maps comports with the Court's mandate because: (1) the Remedial Map for each Senate county grouping was chosen from Dr. Chen's simulated maps through a process that the Court has found to reasonably comply with its mandate; (2) the districts

within each county grouping comport with the legal requirements of equal population, contiguity, and the *Stephenson* county grouping and traversal requirements, and reasonably optimize the traditional redistricting criteria of compactness, fewer split precincts, and consideration of municipal boundaries; (3) all decisions to alter the base maps were narrow, reasonable, and received broad bipartisan support; (4) the entire process was conducted in full public view; and, (5) the Senate Remedial Maps were adopted by the Senate with broad bipartisan support.

BASED UPON THE FOREGOING findings and conclusions, the Court ORDERS that the House redistricting plan, N.C. Sess. Laws 2019-220 (House Bill 1020) enacted into law on September 17, 2019, and the Senate redistricting plan, N.C. Sess. Laws 2019-219 (Senate Bill 692) enacted into law on September 17, 2019, are hereby APPROVED by the Court.

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 persons indicated below by emailing a copy thereof to the address below, in accordance with the March 13, 2019 Case Management Order:

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This the 28th day of October, 2019.

Kellie Z. Myers
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Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:15-cv-00399-TDS-JEP

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	**PLAINTIFFS' RESPONSE TO MOTION TO QUASH**

NOW COME SANDRA LITTLE COVINGTON, *et al.,* Plaintiffs herein, and respond to the Legislative Defendants' Motion to Quash or Modify Subpoena as follows:

1. This Court invited the parties to address four specific issues in connection with Plaintiffs' motions a) to establish a timeline for the adoption of remedial districts and b) to order special elections in the affected districts. Notice 3-4 (Doc. 153, June 9, 2017). Of particular relevance here, those issues included:

- Describing what steps, if any, the State of North Carolina has taken to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order; and
- If the State has failed to take any meaningful steps to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order, addressing whether the State is entitled to any additional time to comply with the Court's August 15, 2016, Memorandum Opinion and Order.

Id. at 4.

2. The Legislative Defendants ignored the Court's request in June, and instead opposed Plaintiffs' request to the U.S. Supreme Court to expedite the issuance of a certified copy of its opinion and judgment, asserting that they needed the full twenty-five days accorded by the Supreme Court Rules to determine if they intended to file a motion for reconsideration of the Court's unanimous summary affirmance of the trial court's judgment in this case. *See* Response to Application for Issuance of Mandate Forthwith, at 8, North Carolina v. Covington, No. 16A1202, 16A1203 (Doc. 156-1, June 13, 2017). No such motion for reconsideration was filed. Defendants' opposition was intended only to delay this Court resuming jurisdiction and to thereby further delay consideration of Plaintiffs' motions for additional relief.

3. In their statement filed on July 6, 2017, the Legislative Defendants indicate that they have appointed new redistricting committees and envision "completing the redistricting process no later than November 15, 2017." Leg. Defs. Position Statement 2 (Doc. 161). However, there is evidence in the record in this case to suggest that the Legislative Defendants have already drawn remedial districts and are using the ability to delay making those districts public to obtain a political advantage.

4. On October 28, 2016, a Declaration of Thomas B. Hofeller, Ph.D. [hereinafter "Hofeller Decl."was filed with the Court, containing a "Map 3 Comparison of 2011 Enacted to Optimum Senate County Groups" and a "Map 6 Comparison of 2011 Enacted to Optimum House County Groups". Hofeller Decl. 18, 21 (Doc. 136-1, Oct. 28, 2016). (Copies attached hereto as Exhibit 1). Map 3 shows the whole county groupings "which must be used to conform to the Optimum WCG structure" divided into three

classes: those colored green "will remain unchanged", those colored yellow "will also remain unchanged but the districts within them must be redrafted" and those colored white are changed groupings "requiring that all the districts within them must be redrafted". Hofeller Decl. 6-7. In short, according to Dr. Hofeller, these are the county groupings that must be used in order to comply with the Whole County Provisions of the North Carolina Constitution. All that remains to be done is to subdivide those counties and groupings that contain more than one district.

5. Plaintiffs subpoenaed Representative Lewis to ask him to describe the 2016 redistricting process for drawing remedial congressional districts that was completed in two weeks, and to inform the court, based on his personal knowledge, about the extent to which Dr. Hofeller has already subdivided the county groupings containing multiple districts in the two maps that Defendants submitted to this court last October. The answers to those questions are relevant to both of the issues referenced above from the Court's Notice. That is, if Dr. Hofeller has already drawn the remedial districts in the multi-district groupings shown in Map 3 and Map 6, it indicates what steps have been taken to comply with the Defendants' remedial obligations and it is relevant to determining what additional time is needed to comply with a remedial order. Representative Lewis and the other legislative leaders in control of the redistricting process are, to the best of Plaintiffs' knowledge, the only people who have this information.

6. Rather than a "blatant fishing expedition" designed to "chill the policymaking rights of Rep. Lewis and other legislators", Plaintiffs sought information relevant to the issues currently before the court that only those legislators would know.

7. Plaintiffs' most recent brief includes the legal authority for their contention that Representative Lewis cannot waive his legislative privilege concerning this matter in order to offer evidence defending the districts drawn by the legislature but then assert it when issues regarding an appropriate remedy arise. *See* Pls. Supplemental Br. on Remedy 8-9 (Doc. 173, July 21, 2017). Alternatively, these are circumstances in which the privilege should give way to the court's need for the information. *Id.*

8. Given that Representative Lewis has asserted legislative privilege regarding what steps the legislature has taken to date and whether new districts have, in fact, already been drawn by Dr. Hofeller, thus denying this Court information relevant to the balancing test it is charged with performing, the court should draw the inference that completing those maps in two weeks is entirely possible. Indeed, given the fact that Map 3 and Map 6 demonstrate that the clusters for the remedial maps are already drawn, it would also be a reasonable inference to draw that the remedial maps are already completely drawn. Even if the Court grants the motion to quash, the Court is entitled to make any necessary inferences on the issue in question in favor of the party seeking disclosure. "[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Dist. 65, Distributive Workers of Am. v.*

NLRB, 593 F.2d 1155, 1163-64, 1164 n.21 (D.C. Cir. 1978) (affirming an adverse inference against an employer alleged to have committed discriminatory discharge where the employer failed to put on testimony of the discharged employees' supervisors to bolster its defense that the discharges were the result of non-discriminatory performance issues). "[P]rivilege cannot be used both as a sword and as a shield." *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009) (citation omitted); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997); *see also United States v. Rylander*, 460 U.S. 752, 758 (1983). This rule derives from concerns for fundamental fairness and just judicial outcomes.

9. The assertion of privilege to shield information from discovery "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." *United States v. 4003-4005 5th Ave, Brooklyn NY*, 55 F.3d 78, 82 (2d Cir. 1995) (quoting *SEC v. Greystone Nash. Inc.*, 25 F.3d 187, 190 (3d Cir. 1994)). Thus, because privilege assertions hinder courts' truth-seeking goal, courts have prevented litigants from using privilege assertions as "a tool for selective disclosure"—that is, allowing in evidence from a resisting party that may be "helpful to his cause" but then allowing that resisting party to assert "privilege as a shield" to prevent meaningful inquiry on the subject matter in question to assess the truthfulness of the party's limited public explanations. *Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982).

10. While not required to do so, a court can properly draw an adverse inference against a party claiming a privilege to resist producing relevant evidence. For instance,

an inference will be drawn against a party to a civil suit that invokes the Fifth Amendment privilege against self-incrimination. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976); *see also Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 497 (5th Cir. 2003). Thus, the Court here would be well within its discretion to draw an adverse inference from Rep. Lewis' invocation of legislative privilege, particularly where it impedes this Court's investigation of any potential burden on the state relating to special elections.

11. While Plaintiffs' subpoena is well-grounded in the facts and seeks highly relevant information, this Court still has ample evidence in the record before it that the legislature would not be unduly burdened by being required to produce remedial maps promptly.

Respectfully submitted this the 26th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' RESPONSE TO MOTION TO QUASH** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 26th day of July, 2017.

/s/ Anita S. Earls
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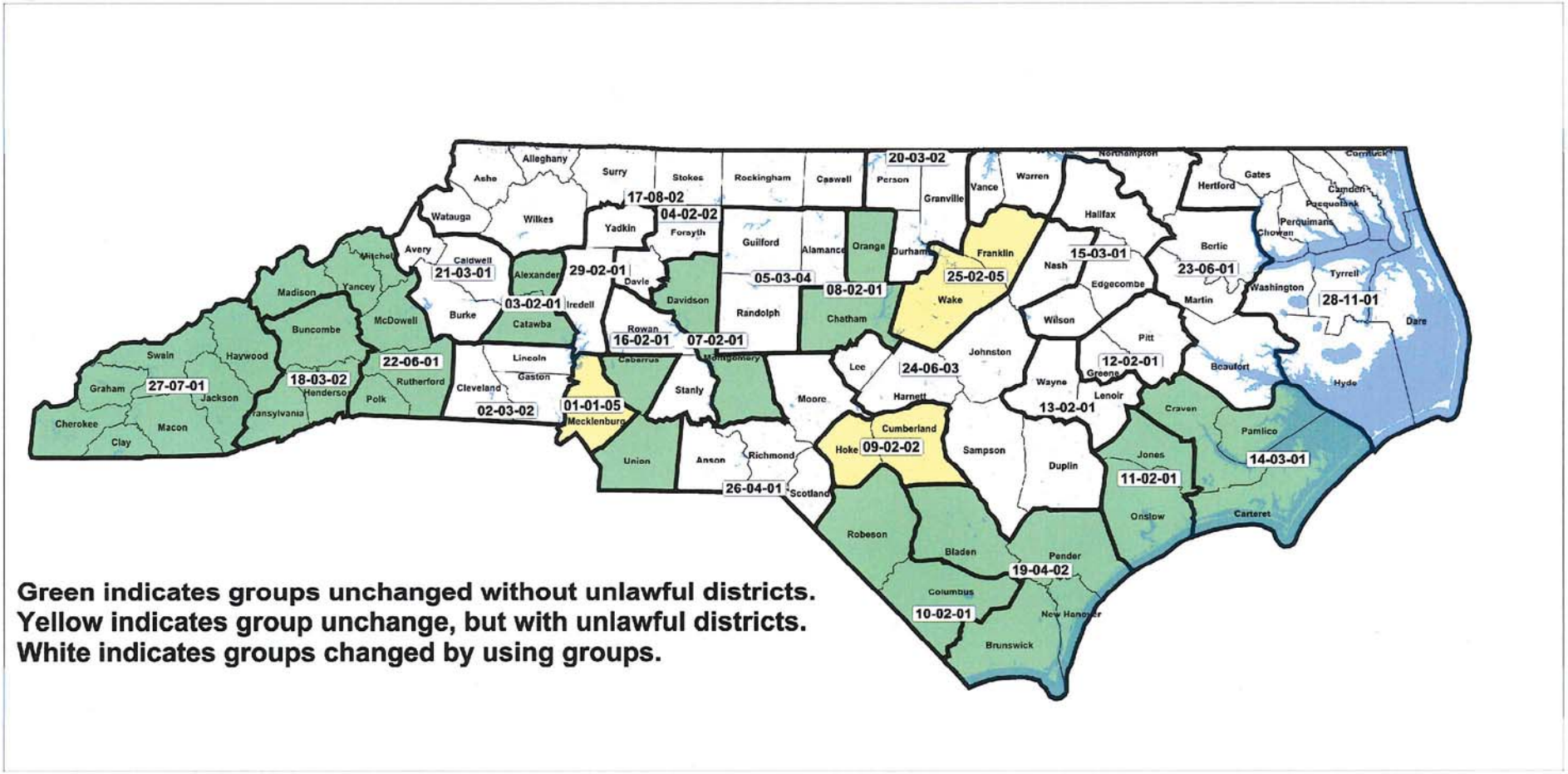
EXHIBIT 1

MAP 3

Comparison of 2011 Enacted to Optimum Senate County Groups



Green indicates groups unchanged without unlawful districts.
Yellow indicates group unchange, but with unlawful districts.
White indicates groups changed by using groups.

MAP 6

Comparison of 2011 Enacted to Optimum House County Groups

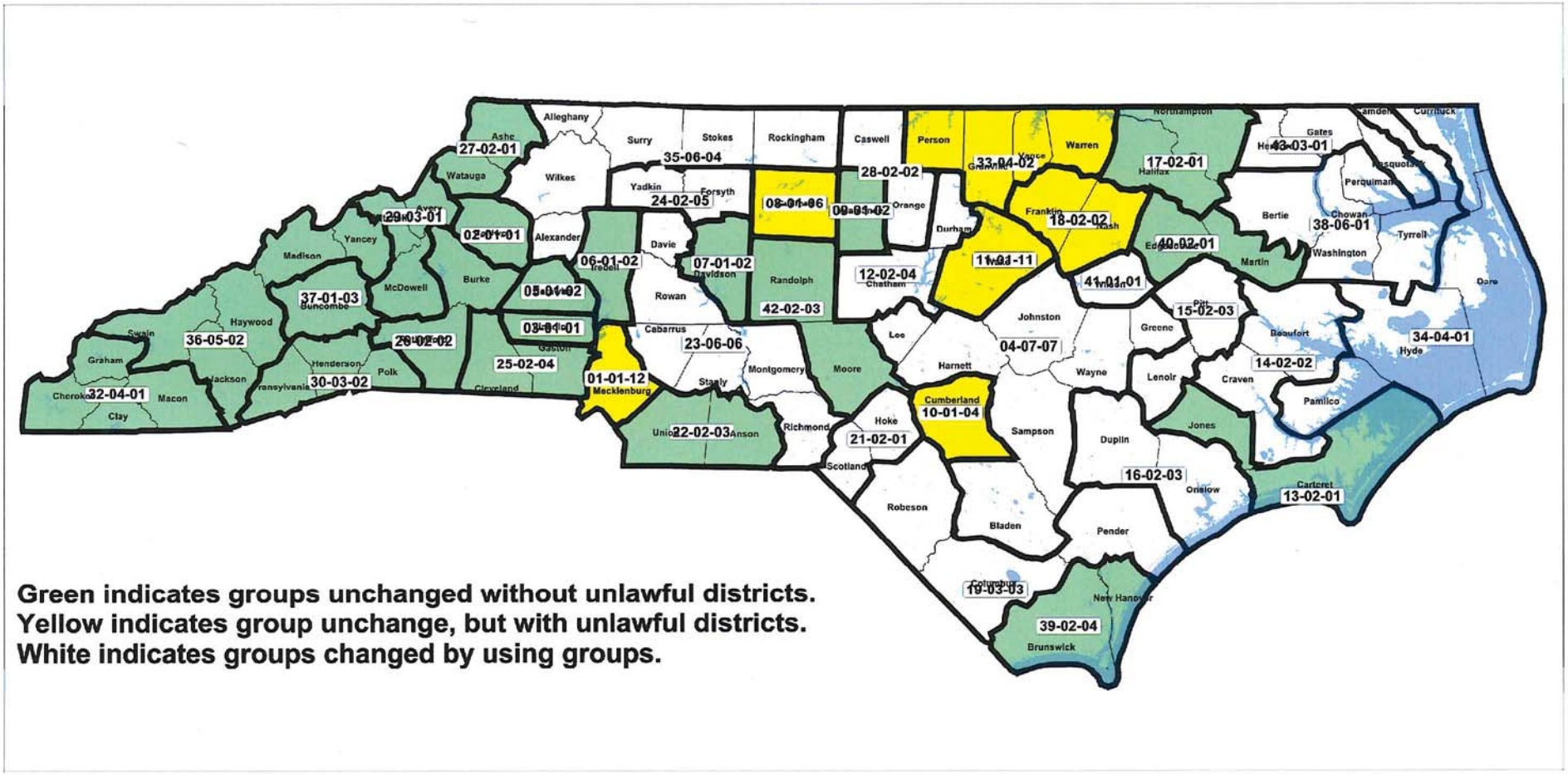


Exhibit 7

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. STATE OF NORTH CAROLINA, *et al.* Defendants.	**PLAINTIFFS AND LEGISLATIVE DEFENDANTS' JOINT STIPULATION ON WITHDRAWAL OF SUBPOENA AND MOTION TO QUASH OR MODIFY SUBPOENA**

Plaintiffs and the legislative defendants enter into the following stipulation:

1. On July 20, 2017, plaintiffs issued a subpoena to Representative David Lewis ("Rep. Lewis") directing Rep. Lewis to appear as a witness at the hearing scheduled for July 27, 2017 (the "Subpoena").

2. On July 25, 2017, the legislative defendants filed a Motion to Quash or Modify the Subpoena ("Motion").

3. On July 26, 2017 the plaintiffs filed a Response to the Motion to Quash.

4. Through this joint stipulation, plaintiffs agree to withdraw the Subpoena and the legislative defendants agree to withdraw the Motion.

5. The legislative defendants stipulate that (1) between February 5, 2016 and February 19, 2016, Dr. Tom Hofeller was retained to redraw the North Carolina congressional map (consisting of 13 congressional districts), a redistricting committee was appointed, public hearings held, written criteria adopted and a new map enacted; and (2) Dr. Hofeller has been retained by the legislative leadership to consult on the

legislative remedial maps; Rep. Lewis has not assigned Dr. Hofeller to fill in the House and Senate grouping maps filed with the Court on October 31, 2016 (D.E. 137-1) with district lines, nor has he seen or approved such a map and does not know if Dr. Hofeller has drawn such a map. Neither Rep. Lewis nor any other legislative defendant waives legislative privilege with regard to the remedial redistricting process for the state legislative districts and does not do so by or through this stipulation.

This the 26th day of July, 2017.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **PLAINTIFFS' AND LEGISLATIVE DEFENDANTS' JOINT STIPULATION OF WITHDRAWAL OF SUBPOENA AND MOTION TO QUASH OR MODIFY SUBPOENA** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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30659408.1

Exhibit 8

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	CIVIL ACTION NO. 1:16-CV-1164 THREE-JUDGE COURT

LEAGUE OF WOMEN VOTERS PLAINTIFFS' POST-TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

INTRODUCTION

At trial, all of Plaintiffs' claims about North Carolina's current Congressional plan (the "2016 Plan") were borne out. The evidence confirmed what Defendants had already conceded: that "in adopting the Plan, the General Assembly *intended* to favor Republican voters and disadvantage voters who voted for non-Republican candidates." Dkt. 50:7 (emphasis added). The evidence also thoroughly documented the Plan's discriminatory *effect*: an extraordinarily large and durable pro-Republican partisan asymmetry. The evidence showed as well that this asymmetry cannot be *justified* by North Carolina's political geography or legitimate redistricting objectives. As for Defendants' counterarguments, they were unable to survive scrutiny.

Starting with discriminatory intent, there is no dispute that under the Adopted Criteria for the 2016 Plan, the "Partisan Advantage" factor required a congressional delegation with "10 Republicans and 3 Democrats." PFOF 68. Nor is there any disagreement about the boast of Rep. David Lewis, the Co-Chair of the 2016 Joint Select Committee on Congressional Redistricting (the "Committee"), that "this would be a political gerrymander." PFOF 73. At trial, Defendants' only response to these damning facts was that Plaintiffs are "blowing them up" and "ignoring all the other criteria." Tr.IV 169:5-9.[1] But admissions that a law was enacted to disadvantage a particular party—not

[1] The Roman numeral in citations to the trial transcript indicates the day of trial.

to promote the public welfare—*should* be highlighted. They should also be condemned by the courts.

Next, with respect to discriminatory effect, Professor Simon Jackman testified that social scientists use several metrics to assess the partisan asymmetry of a district map. All of these metrics agree that the 2016 Plan exhibited a nearly unprecedented asymmetry in the 2016 election. Its efficiency gap was the largest in the country in 2016, and its partisan bias was the second-largest *since 1972*. Prof. Jackman also explained that social scientists use sensitivity testing to evaluate the durability of a map's asymmetry. This testing shows that the Plan's asymmetry would persist under all plausible electoral conditions. At trial, Defendants did not criticize any of these analyses. Their only riposte was that the efficiency gap allegedly has limitations in states other than North Carolina—a claim that is both irrelevant and wrong.

Lastly, with respect to justification, Professor Jowei Chen testified about his thousands of district map simulations. All of these simulations were based on the spatial patterns of North Carolina's voters. All of the simulations also used as criteria the very factors (other than partisan advantage) relied on by the 2016 Plan's authors. Yet *not one* of Prof. Chen's simulated maps had an efficiency gap as large as the Plan, and the typical simulated map had an efficiency gap of *zero*. At trial, Defendants did not challenge any of Prof. Chen's methods. Instead, they concocted a series of additional criteria that, in their view, Prof. Chen should have used. Missing from this post hoc list, though, was any

evidence that the newly devised factors could possibly have led to the Plan's enormous asymmetry.

The Court should therefore hold that Plaintiffs' proposed test—requiring (1) discriminatory intent, (2) a large and durable discriminatory effect, and (3) a lack of a legitimate justification for this effect—is justiciable under the First and Fourteenth Amendments. The Court should also hold that the 2016 Plan is unconstitutional under this test.

I. STANDING

Before discussing the three prongs of Plaintiffs' test, it is necessary to establish Plaintiffs' standing. In a partisan gerrymandering challenge to a statewide district plan, voters who support the candidates and policies of the disadvantaged party have standing. These voters' electoral influence is intentionally diluted because of their political beliefs. As a result, they are not "able to translate their votes into seats as effectively" as the favored party's supporters, and they "suffer[] a personal injury . . . that is both concrete and particularized." *Whitford v. Gill*, 218 F. Supp. 3d 837, 928 (W.D. Wis. 2016) (*Whitford II*). Moreover, "there can be no dispute that a causal connection exists between [the plan] and the plaintiffs' inability to translate their votes into seats as efficiently," and that if a symmetric plan were adopted, it "would redress the constitutional violation." *Id.*

Under this approach, standing works the same way in partisan gerrymandering cases as it does in other vote dilution proceedings. In a one-person, one-vote suit, for example, the constitutional injury is the vote dilution caused by district overpopulation.

Accordingly, "any underrepresented plaintiff may challenge *in its entirety* the redistricting plan that generated his harm." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1209 (N.D. Ga. 2003). In a suit under Section 2 of the Voting Rights Act, similarly, the usual injury is that minority voters in a certain region have been denied an equal opportunity to elect the representatives of their choice. Thus, minority voters who "reside in a[n] . . . area that could support additional [majority-minority districts]" have standing to sue. *Pope v. Cty. of Albany*, No. 11-cv-0736, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014).

It is true that standing in partisan gerrymandering cases does not work the same way as in racial gerrymandering cases. But partisan and racial gerrymandering have nothing in common except an evocative word. Partisan gerrymandering is "intentional vote dilution," *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (plurality opinion)—a "burden[] . . . on the representational rights of voters and parties," *id.* at 313 (Kennedy, J., concurring in the judgment). In contrast, racial gerrymandering is the "racial classification" of voters, regardless of whether their votes are diluted or even enhanced. *United States v. Hays*, 515 U.S. 737, 744 (1995). This is why "[t]he rationale and holding of *Hays* have no application here." *Whitford II*, 218 F. Supp. 3d at 929. Vote dilution is simply unrelated to racial classification.

In any event, Plaintiffs have standing here on any theory. Individual Plaintiffs like Carol Faulkner-Fox and Aaron Sarver are committed Democrats who support, and work toward, the election of Democratic candidates throughout North Carolina. PFOF 2, 5-6,

17. The League of Women Voters of North Carolina is a statewide organization whose pursuit of civic engagement and nonpartisan redistricting reform is handicapped by the 2016 Plan. PFOF 3-4, 18-19. And even if an individual plaintiff is needed in each congressional district, the parties have stipulated that the League "has individual members who are registered Democrats living in each of North Carolina's thirteen congressional districts." PFOF 4. "Each of those registered Democrats support and vote for Democratic candidates and have an interest in furthering policies at the national level that are consistent with the Democratic Party Platform." *Id.*

II. DISCRIMINATORY INTENT

A. "Predominant" or "Sole" Partisan Intent Is Not Required.

Turning to the merits of Plaintiffs' proposed test, its first prong is *discriminatory intent*: the enactment of a district plan with the aim of disadvantaging one party's (and favoring the other party's) voters and candidates. Several legal points about this prong are worth noting. *First*, the prong is derived from foundational First and Fourteenth Amendment principles. The First Amendment prohibits "burdening or penalizing citizens because of . . . their voting history [or] their association with a political party." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). Likewise, under the Fourteenth Amendment, "[p]roof of discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

Second, Supreme Court precedent bars formulations that call for "predominant" or "sole" partisan intent to be shown. In *Vieth*, both the appellants and Justice Stevens advocated a predominance requirement. The plurality (joined here by Justice Kennedy) explicitly rejected this idea, observing that a "'predominant motivation' test" is too "[v]ague" and "indeterminate." *Vieth*, 541 U.S. at 284-85 (plurality opinion). In *LULAC v. Perry*, the appellants argued that a district plan "solely motivated by partisan objectives" is unlawful. 548 U.S. 399, 416 (2006) (opinion of Kennedy, J.). This proposal fared no better, because "affixing a single label" to "acts arising out of mixed motives" is a "complex" and "daunting" task. *Id.* at 418.

Third, only one kind of political motivation—the pursuit of partisan advantage—fails Plaintiffs' discriminatory intent prong. The prong is *not* violated when a state government uses electoral data "fairly to allocate political power to the parties." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). Nor is the prong necessarily offended when mapmakers' aim is "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, [or] avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). "As long as the criteria are nondiscriminatory," they are permissible. *Id.*

And *fourth*, control of the redistricting process is highly probative evidence of discriminatory intent. When a single party draws the lines, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality opinion). Conversely, "a plaintiff

would naturally have a hard time showing requisite intent" when a plan is designed by a court, a commission, or a divided state government. *Vieth*, 541 U.S. at 351 (Souter, J., dissenting). Since 1972, about *half* of all congressional maps have been crafted by an institution other than a unified state government. PFOF 241. Plaintiffs' discriminatory intent prong therefore does "meaningful" work because it insulates the bulk of these plans from liability. Tr.II 145:15-18 (Osteen, J.).

B. Plaintiffs Presented Overwhelming Evidence of Discriminatory Intent.

The evidence of discriminatory intent in the record is overwhelming and uncontested. Plaintiffs thus summarize it quickly before responding to Defendants' counterarguments. With respect to the North Carolina congressional plan adopted in July 2011 (the "2011 Plan"), its architect, Dr. Thomas Hofeller, wrote in an expert report that "[p]olitics was the primary policy determinant in the drafting of the . . . Plan." PFOF 32. He added that "[t]he General Assembly's overarching goal in 2011 was to create as many safe [or] competitive districts for Republican candidates or potential candidates as possible." PFOF 33-34.

With respect to the 2016 Plan, its "Partisan Advantage" criterion expressly required "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." PFOF 68. Its "Political Data" criterion elaborated that, "other than population data," only "election results in statewide contests" would "be used to construct congressional districts." PFOF 67. These criteria were approved by the Committee on party-line votes. PFOF 69. The General Assembly subsequently did not

"add" to, or subtract from, these criteria or any others. Tr.II 155:9-12 (Wynn, J.). To the contrary, the *only* change made to the Plan after the Adopted Criteria's adoption was a tweak to a single district boundary to avoid an incumbent pairing. PFOF 58, 89.

At each meeting of the Committee, Lewis confirmed that the 2016 Plan sought a Republican advantage. He "acknowledge[d] freely that this would be a political gerrymander." PFOF 73. He "propose[d] that we 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." PFOF 75. And he "ma[d]e clear that we to the extent are going to use political data in drawing the map, it is to gain partisan advantage." PFOF 77. Lewis's deposition testimony, like that of Hofeller and of the Committee's other co-chair, Sen. Bob Rucho, was consistent with Lewis's public statements. PFOF 242.

The Committee approved the 2016 Plan on a party-line vote on February 17, 2016. PFOF 85. Votes by the full House and Senate followed on February 19, in which every Democrat opposed the Plan and every Republican (but one) supported it. PFOF 99.

C. Defendants' Objections Are Meritless.

Defendants do not deny that the 2016 Plan was enacted with discriminatory intent. Instead, they contend that partisan advantage did not *predominate* over other redistricting goals. Tr.I 17:18-14. Even if this were true, it is legally irrelevant. As discussed above, five Justices rejected a predominance requirement in *Vieth*, deeming it judicially

unmanageable. It thus suffices for purposes of Plaintiffs' first prong if partisan gain was *a* motivation for the Plan. It need not be compared to, or weighed against, any other aim.

Defendants also assert that the 2016 Plan is immune from scrutiny because its authors intended to comply with traditional redistricting criteria. Tr.II 25:15-29:7. Again, even if this claim were accurate, it is legally immaterial. In *Vieth*, Justice Souter proposed a test requiring a plaintiff to show that districts "paid little or no heed to . . . traditional districting principles." 541 U.S. at 348 (Souter, J., dissenting). A majority of the Supreme Court rebuffed this suggestion. The plurality asked, "*How much* disregard of traditional districting principles," *id.* at 296 (plurality opinion), while Justice Kennedy observed that these criteria are not "sound as independent judicial standards" because "[t]hey cannot promise political neutrality," *id.* at 308 (Kennedy, J., concurring in the judgment).

Vieth is consistent with the Court's earlier decision in *Bandemer*, where Justice Powell emphasized "the shapes of voting districts and adherence to established political subdivision boundaries." 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part). The plurality "disagree[d] with [Justice Powell's] conception of a constitutional violation" because noncompliance with traditional criteria does "not show any actual disadvantage beyond that shown by the election results." *Id.* at 138-40 (plurality opinion). *Vieth* is also consistent with the Court's racial gerrymandering cases, which have made clear that "inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Under all of these precedents, "compliance with traditional districting

principles" is simply not a "'safe harbor' for state legislatures." *Whitford II*, 218 F. Supp. 3d at 888.

Lastly, defendants invoke *Easley v. Cromartie*, 532 U.S. 234 (2001), where the Court concluded that politics, not race, was the predominant motivation for an earlier iteration of North Carolina's Twelfth District. Tr.II 114:19-115:1. Defendants' reliance on *Cromartie* is odd because it did not involve a partisan gerrymandering challenge. That the Twelfth District was not an unconstitutional *racial* gerrymander says nothing about whether it (or the map to which it belonged) may have been an unlawful *partisan* gerrymander.

III. DISCRIMINATORY EFFECT

A. Supreme Court Precedent Requires a Large and Durable Partisan Asymmetry.

The second prong of Plaintiffs' proposed test is *discriminatory effect*: whether a district plan exhibits a large and durable partisan asymmetry. Five Justices expressed interest in partisan symmetry—the symmetric treatment of the parties' voters, allowing their ballots to translate into representation with equal ease—in *LULAC*. Justice Stevens, for instance, noted that symmetry is "widely accepted by scholars as providing a measure of fairness in electoral systems." 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part). Justice Kennedy, similarly, did not "discount[] its utility in redistricting planning and litigation." *Id.* at 420 (opinion of Kennedy, J.).

A discriminatory effect prong is required under both the First and Fourteenth Amendments. Under the First Amendment, "a successful claim . . . must do what [an

intent-only] theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.* at 418; *see also Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) ("The [First Amendment] inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights."). Likewise, "in order to establish a partisan gerrymandering claim under the Equal Protection Clause, a plaintiff must show both (a) discriminatory intent and (b) discriminatory effects." Dkt. 50:21.

The doctrinal consensus that a discriminatory effect prong is necessary has a good practical explanation. A ruling that "all election district lines drawn for partisan reasons" are unconstitutional "would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). After all, parties in full control of redistricting typically use electoral data and seek partisan advantage. If all of these efforts are unlawful, this would "throw into doubt the vast majority of the Nation's 435 congressional districts." *Miller v Johnson*, 515 U.S. 900 at 928 (O'Connor, J., concurring).

The doctrinal consensus extends not just to the size of a plan's discriminatory effect but also to its persistence. The *Bandemer* plurality made a durable disadvantage an explicit element of its test: whether a plan "will *consistently* degrade . . . a group of voters' influence," resulting in the "*continued* frustration of the will . . . of the voters." 478 U.S. at 132-33 (plurality opinion) (emphasis added). Analogously, both Justice

Breyer's opinion in *Vieth* and Justice Kennedy's in *LULAC* stressed the harm of entrenchment. *See LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) (criticizing a plan that "entrenched a party on the verge of minority status"); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (condemning the "use of political factors to entrench a minority").

B. Plaintiffs Presented Overwhelming Evidence of Discriminatory Effect.

At trial, Prof. Jackman testified that social scientists use several metrics to assess the partisan asymmetry of a district plan. The *efficiency gap* is the difference between the parties' respective "wasted votes" (ballots that do not contribute to a candidate's election), divided by the total number of votes cast. PFOF 139. *Partisan bias* is the difference between a party's seat share and 50% in a hypothetical tied election. PFOF 141. And the *mean-median difference* subtracts a party's median vote share, across a plan's districts, from its mean vote share. PFOF 143. All of these metrics generally point in the same direction in competitive states like North Carolina. PFOF 157, 182. But in uncompetitive states, where one party is much more popular, partisan bias and the mean-median difference are unreliable and should not be used. PFOF 158.

Prof. Jackman also testified that both the 2011 Plan and the 2016 Plan exhibited enormous, nearly unprecedented, pro-Republican partisan asymmetries. North Carolina recorded efficiency gaps of -21%, -21%, and -19% in 2012, 2014, and 2016. PFOF 185-186. The 2011 Plan had the largest average efficiency gap of *any* of the 136 maps, spanning the 1972-2016 period, in Prof. Jackman's database. PFOF 188. The 2016 Plan had the largest efficiency gap in the country in the 2016 election. PFOF 189. As the

below chart indicates, both maps are stark outliers, with efficiency gaps far above Prof. Jackman's suggested 12% threshold. PFOF 187.

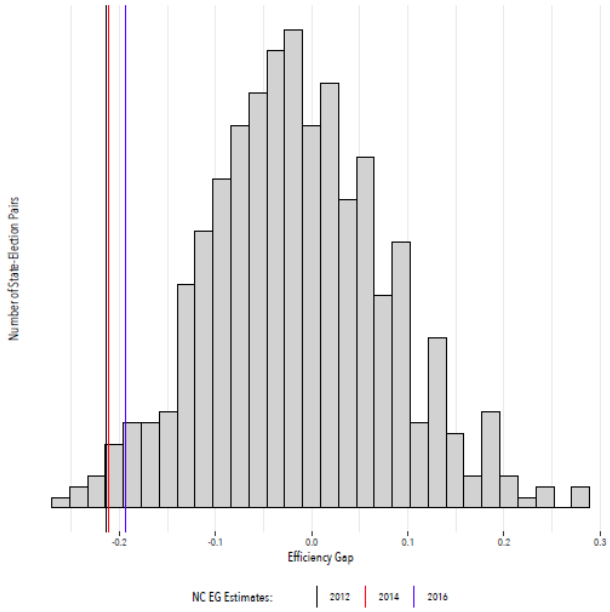
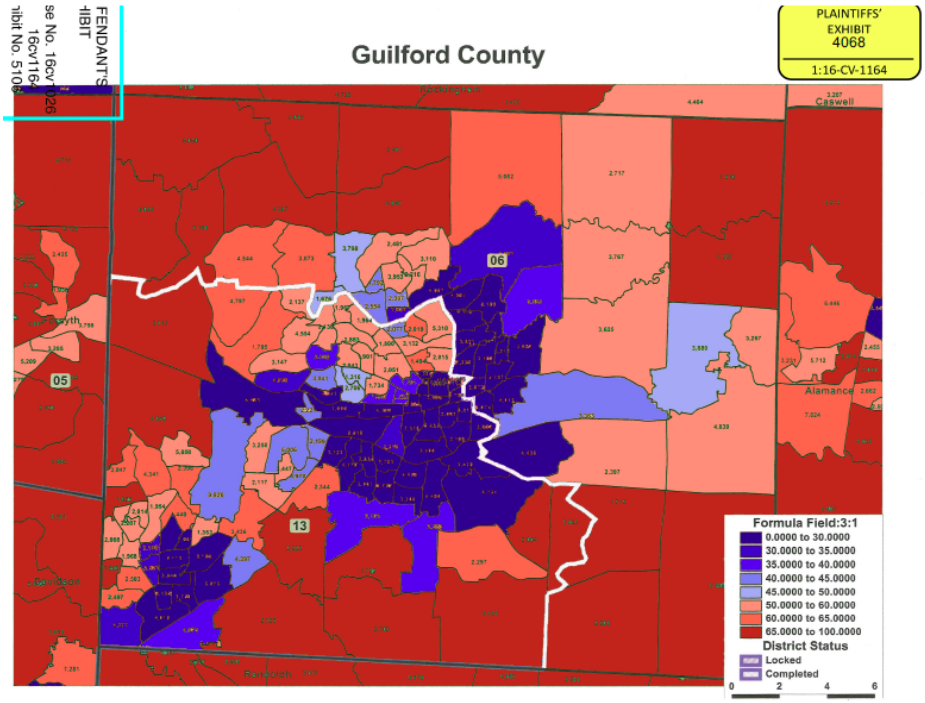


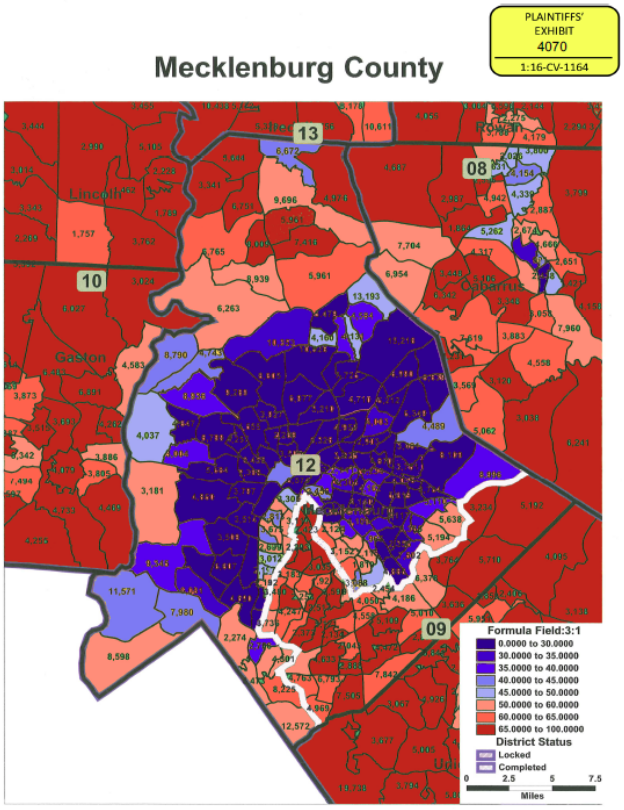
Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

North Carolina also registered partisan biases of -27%, -27%, and -27%, and mean-median differences of -8%, -7%, and -5%, in 2012, 2014, and 2016. PFOF 185-186. These scores too are extraordinarily severe. The partisan biases, for example, are the second-largest since 1972, roughly three standard deviations from the historical mean. PFOF 190. Thus no matter how they are evaluated, the 2011 Plan and the 2016 Plan are extremely, almost uniquely, asymmetric.

Record evidence reveals how this huge Republican advantage was achieved. Throughout North Carolina, clusters of Democratic voters were either sliced in two or enclosed within a single district. Democrats, that is, were systematically cracked and packed while Republicans were allocated more efficiently across the State's districts. The

first map below shows the fate of Greensboro under the 2016 Plan. A Democratic cluster large enough to anchor a district is split down the middle, and each half of the city is submerged in a safely Republican district. PFOF 128. The second map below depicts the Charlotte metropolitan area. A Democratic cluster that could yield two Democratic districts is instead circumscribed in one highly uncompetitive district. PFOF 129; *see also* PFOF 127 (cracking of Asheville); PFOF 131 (cracking of Fayetteville); PFOF 130 (packing of Raleigh).





Prof. Jackman further testified about the durability of large efficiency gaps, both specifically as to the 2016 Plan and generally based on his database of congressional maps. For the Plan, he conducted rigorous sensitivity testing, swinging the 2016 election results by up to ten points in each party's direction and then recalculating the Plan's efficiency gap for each incremental shift. PFOF 193-194. As illustrated below, this testing indicated that it would take a six-point pro-Democratic swing for Democrats to capture just one more seat. For the Plan's efficiency gap to disappear, Democrats would have to improve on their 2016 showing by *nine* points—a wave whose only precedent is the Watergate election of 1974. PFOF 195-196. The Plan's pro-Republican asymmetry is

thus nearly impervious to any effort by voters "to vote the rascals out at the next election." Tr.II 108:16-17 (Osteen, J.).

For his entire database, Prof. Jackman examined how maps' *initial* efficiency gaps are related to their *average* efficiency gaps over the rest of their lifetimes. This link is quite strong, meaning that a plan that is highly asymmetric in its first election can be expected to remain asymmetric in the future. PFOF 167. Prof. Jackman also carried out a series of prognostic tests for the efficiency gap. Notably, the rate of "false positives"—maps with large initial efficiency gaps but small remainder-of-plan average efficiency gaps—approaches zero near his suggested 12% threshold. PFOF 168-169. And Prof. Jackman performed sensitivity testing for all plans used in this redistricting cycle. This testing confirms that maps with large efficiency gaps would remain skewed even if the electoral environment changed substantially. PFOF 170-172.

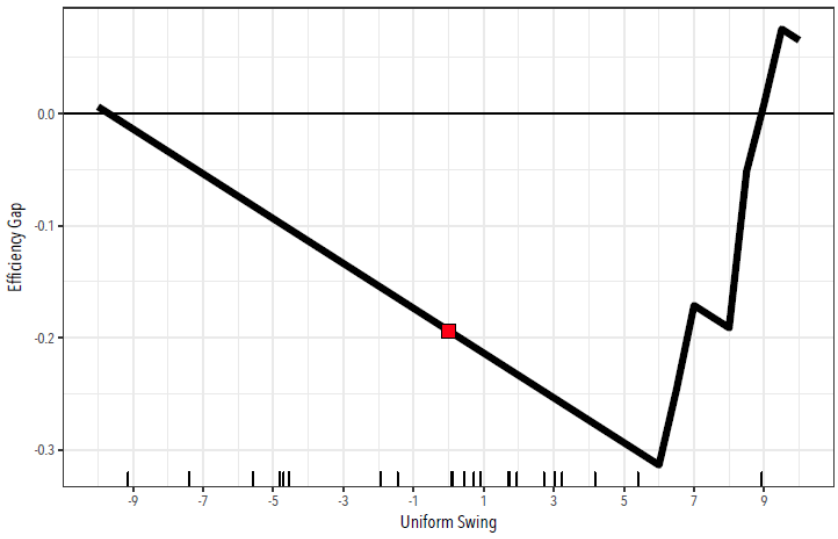


Figure 21: North Carolina efficiency gap scores generated by perturbing the actual 2016 result by varying degrees of uniform swing. The red square indicates the observed efficiency gap for North Carolina in 2016. Tick marks on the horizontal axis indicate swings in North Carolina Congressional elections 1972-2016.

C. Defendants' Objections Are Meritless.

Defendants' experts do not dispute the accuracy of Prof. Jackman's calculations or analyses. They concede, in other words, that the 2016 Plan exhibited an exceptionally large partisan asymmetry in the 2016 election, and that based on sensitivity testing, this asymmetry will likely endure for the rest of the decade. Ex. 5101 at 80. These admissions confirm that the Plan fails the discriminatory effect prong of Plaintiffs' test.

Instead of contesting whether the prong is satisfied, Defendants offer a scattershot series of counterarguments. Plaintiffs group these claims into three categories, involving: (1) the foreseeability of elections; (2) assertions that apply to all measures of partisan asymmetry; and (3) points relevant to the efficiency gap alone. Defendants' main contention in the first category is that the partisan implications of the 2016 Plan are unknowable. The Plan may have produced a 10-3 Republican advantage in 2016, but past performance does not guarantee future results. Tr.IV 181:13-18.

This assertion ignores Prof. Jackman's sensitivity testing, which establishes that the 2016 Plan's skew would persist under all plausible electoral conditions. PFOF 195-196. Defendants' agnosticism is also at odds with every analysis of the Plan in the record. Whether the Plan is assessed using congressional election results, Hofeller's sets of seven and twenty prior elections, Prof. M.V. Hood III's set of ten prior elections, or Prof. Chen's predictive regression model, the outcome is always the same: a 10-3 Republican edge. PFOF 180. Nor is Defendants' doubt shared by Hofeller, the Plan's own author. He

testified that "past election results are the best . . . indicator of what future results may be." PFOF 112.

Turning to the second category, Defendants argue that measures of partisan asymmetry are tantamount to requirements of proportional representation. Tr.III 66:18-67:15; Tr.II 33:10-18. As Defendants' own experts conceded, they are not. PFOF 146. Indeed, the metrics were created in the first place to quantify partisan unfairness in single-member-district systems that do *not* typically produce "equal representation in government [for] equivalently sized groups." *Vieth*, 541 U.S. at 288 (plurality opinion). The efficiency gap, for instance, compares the parties' respective wasted votes in an election. It does not compare their statewide seat and vote shares, meaning that "an election's results may have a small efficiency gap without being proportional or they may be proportional and still have a large efficiency gap." *Whitford v. Nichol*, 151 F. Supp. 3d 918, 929-30 (W.D. Wis. 2015) (*Whitford I*). Similarly, a low partisan bias score arises when both parties would win about the same share of seats if they each received the same fraction of the statewide vote. A party's seats can thus be highly disproportionate to its votes—as long as the *other* party's seats would be as disproportionate to *its* votes if the parties' performances flipped. PFOF 147.

Defendants also claim that measures of partisan asymmetry can yield counterintuitive conclusions. Defendants' leading examples are North Carolina's congressional plans in the 1990s and 2000s, which allegedly aimed to benefit Democrats and featured highly noncompact districts, yet were not particularly asymmetric. Tr.II

108:11-120:11; Tr.II 177:3-10. But these cases are not actually troubling. If discriminatory effect is a distinct prong of the analysis (as Supreme Court precedent requires), then it is obviously possible for discriminatory *intent* to be shown but for liability not to follow due to the lack of a large and durable partisan asymmetry. This result is not odd at all; in fact, it is what transpired in *Bandemer* itself, where the Court "assumed that there was discriminatory intent," but nevertheless "found that there was insufficient discriminatory effect." 478 U.S. at 141-42 (plurality opinion); *see also Whitford II*, 218 F. Supp. 3d at 908 ("[A] challenge to a map enacted with egregious partisan intent but demonstrating a low [asymmetry] also will fail because the plaintiffs cannot demonstrate the required discriminatory effect.").

Defendants further contend that measures of partisan asymmetry cannot be calculated prospectively. Tr.II 84:20-85:9. As Prof. Jackman explained, of course they can be. *Expected* election results just have to be used for the computation instead of *actual* tallies. PFOF 178. That this analysis is feasible is evidenced by Sen. Robert Clark, who recently worked out efficiency gaps himself, without any expert assistance, for North Carolina's new state legislative plans. *Id.* What Sen. Clark did on his own can also be done by a map's drafters, so that "the outcome is known . . . before the election takes place." Tr.II 173:18-19 (Osteen, J.).

Defendants assert as well that measures of partisan asymmetry do not reflect candidate quality, fundraising, electoral waves, or many other factors. Tr.II 83:21-84:19. Prof. Jackman pointed out why this argument is wrong too. All of his asymmetry scores

are based on actual congressional election results—in fact, on 512 elections in 25 states over 44 years. PFOF 165. These actual results are the product of "the rich tapestry of American politics [from] 1972 to 2016," including "incumbents getting into trouble," "well-funded challenges," "[t]he Watergate wave election," "[t]he '94 wave," and so on. *Id.* This entire tapestry is captured by the asymmetry scores.

This leaves only the claims in the third category, involving the efficiency gap alone.[2] Defendants state that the metric has an "error rate" of 33%. Tr.II 168:1. But there are no mistakes in the efficiency gap's calculation. What this figure refers to is the share of district plans that exhibit efficiency gaps above Prof. Jackman's suggested thresholds in their first elections, but that go on to produce average efficiency gaps below his cutoffs over the rest of their lifetimes. Ex. 4002 at 54. Even for this analysis, the correct proportion, for all of the relevant maps rather than a subset, is 18%. *Id.* Put another way, of the seventeen plans that *initially* exhibited large efficiency gaps, fourteen *continued* to do so, on average, as long as they were in effect. *Id.* As for the three maps that did not, their volatility would have been flagged in advance by sensitivity testing. Tr.II 134:9-19.

Defendants also note that Prof. Jackman did not analyze (and so did not recommend efficiency gap thresholds for) congressional maps with six or fewer seats. Tr.II 176:16-19. With its thirteen seats, of course, North Carolina is not part of this group.

[2] Two of Defendants' arguments in this category can be addressed summarily: A plan can have a low efficiency gap but be uncompetitive, Tr.II 116:13-117:5, because partisan symmetry and competitiveness are simply different concepts, Tr.II 132:4-20. And if a plan's large initial efficiency gap disappeared in its second election, Tr.II 96:24-97:4, this possibility would have been noted ahead of time by sensitivity testing, Tr.II:134:9-19.

The group also makes up a small proportion (less than 20%) of the House of Representatives. And that Prof. Jackman did not study these delegations here does not mean they cannot be studied. As he explained, in a future case, he could easily focus on small states, tailoring his analysis to their circumstances. Tr.II 56:5-24.

Lastly, Defendants observe that Prof. Jackman's methods differ in some respects from those of earlier scholars who calculated efficiency gaps. Tr.II 92:9-94:23; Tr.II 175:15-21. But these differences are substantively trivial. There is a *98%* correlation between Prof. Jackman's scores and those of the other academics. Ex. 4003 at 17. Additionally, the whole point of social science is that it does not stand still. Unlike the earlier scholars, Prof. Jackman used the more rigorous "full method" to compute his efficiency gaps, included more states in his database, and incorporated durability into his suggested thresholds. Ex. 4003 at 16-17; Tr.II 62:13-67:25, 134:20-135:22. These are technical advances that should be welcomed by the courts.

IV. JUSTIFICATION

A. Supreme Court Precedent Requires a Justification Inquiry.

The final prong of Plaintiffs' proposed test is *justification*: whether the State can justify a district plan's asymmetry based on the State's political geography or valid redistricting goals. This prong has two doctrinal bases. One is reapportionment law, which relies on an identical inquiry to determine when "larger disparities in population" can be "justified by the State." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Justices' opinions in partisan gerrymandering cases are the other source. They have stressed that

"political classifications" are unlawful only if they are "unrelated to any legitimate legislative objective," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment), and that defendants should have a chance "to justify their decision by reference to objectives other than naked partisan advantage," *id.* at 351 (Souter, J., dissenting).

Importantly, the burden of justification is on the State under this approach. This is because, by the time the justification prong is reached, plaintiffs have already "established a prima facie case of discrimination" by proving discriminatory intent and effect. *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). This burden allocation also reflects the State's greater familiarity with its "consistently applied legislative policies" and greater ability "to show with some specificity that a particular objective required the specific [asymmetry] in its plan." *Karcher*, 462 U.S. at 741.

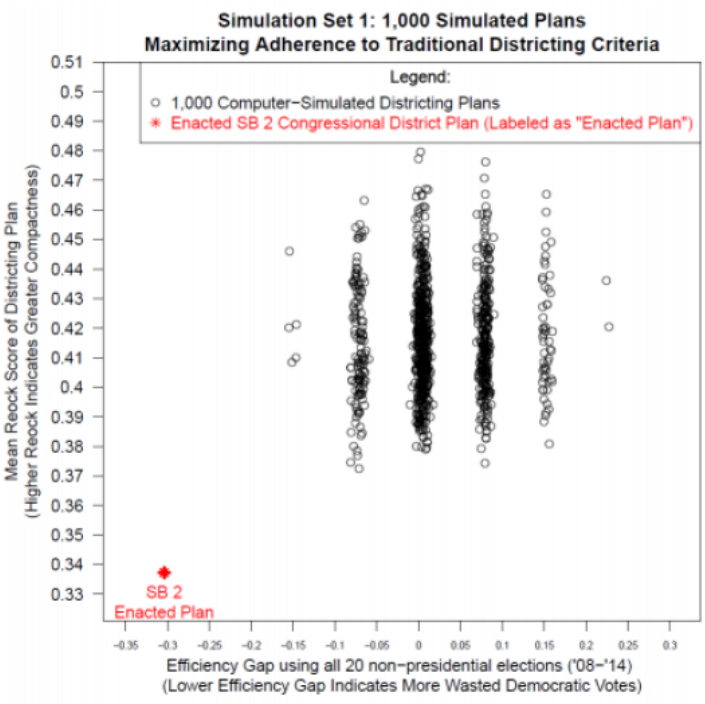
Importantly as well, it is the map's *asymmetry* that must be justified by the State, not its overall layout. Almost every plan is underpinned by at least some legitimate considerations. But these factors do not save the map unless they actually explain its asymmetry. This is why the Supreme Court's reapportionment cases have referred over and over to the "deviations" or "variations" for which the State must account. *See, e.g.*, *Voinovich*, 507 U.S. at 161-62; *Brown*, 462 U.S. at 842-43; *Karcher*, 462 U.S. at 740-41.

B. Plaintiffs Presented Overwhelming Evidence of Unjustifiability.

Even though it was their burden to justify the 2016 Plan's asymmetry, Defendants made no effort to do so. Plaintiffs, though, presented three kinds of evidence showing that no legitimate factor can explain the Plan's enormous skew. *First*, Prof. Chen used a

simulation technique on which the Fourth Circuit has previously relied, *see Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016), to produce three thousand different congressional plans for North Carolina. PFOF 200. All of these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan Adopted Criteria. Their districts were "as equal as practicable" in population, "comprised of contiguous territory," and generated without "[d]ata identifying the race of individuals." PFOF 203. Their districts also did at least as good a job "improv[ing] the compactness" and "keep[ing] more counties and VTDs whole." *Id.*

Yet *not one* of the three thousand maps ever resulted in a 10-3 Republican advantage or an efficiency gap as large as the 2016 Plan's. Whether Prof. Chen analyzed the maps' partisan implications using Hofeller's full set of twenty prior elections, Hofeller's seven-election subset, or a predictive regression model, *all* of the maps were more symmetric than the Plan. PFOF 207. In fact, as the below chart illustrates, the maps tilted slightly in a Democratic direction. PFOF 208. Thus far from justifying the Plan's pro-Republican asymmetry, North Carolina's political geography and the nonpartisan Adopted Criteria seem mildly to favor Democrats.



Second, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed as well as the Plan in terms of traditional criteria but were far less skewed. Both of these drafts were more compact, on average, than the Plan. PFOF 235. The "ST-B" map divided three fewer counties than the Plan; the "17A" map divided two more. *Id.* But using Hofeller's own set of twenty prior elections, both drafts yielded seven Republican seats and six Democratic seats. *Id.*

And *third*, during the 2000s, North Carolina's congressional plan had an average efficiency gap of just 2%, or very close to perfect symmetry. PFOF 236. This plan also complied with all federal and state requirements. Indeed, it was so plainly compliant that it was not even challenged in court.

C. Defendants' Objections Are Meritless.

Defendants' response to this evidence is to invent a series of additional criteria that, in their view, Prof. Chen should have used in his simulations. He should have matched the 2016 Plan's compactness. Tr.I 250:9-12. He should have taken race into account. Tr.I 259:1-10. He should have ensured that all incumbents would win their new districts. Tr.I 235:12-25. He should have kept Mecklenburg County whole. Tr.I 260:16-25. He should have split large rather than small counties. Tr.I 227:8-230:6. And so on.

This ever-shifting list of requirements demonstrates why the burden of justification is (and should be) on the State. Otherwise plaintiffs are put in an impossible position as the State announces another condition every time they analyze the parameters the State previously specified. Defendants also do not even try to provide cites to the legislative record for their late-discovered criteria. And for good reason. The new criteria were never even *mentioned* by the Committee, let alone adopted by it or the full House and Senate.

Factually as well, there is no reason to think the additional requirements could possibly justify the 2016 Plan's massive skew. Take matching the Plan's "reasonable" level of compactness. Tr.II 158:7-9 (Osteen, J.). The compactness of Prof. Chen's simulated maps is *completely uncorrelated* with the maps' efficiency gaps. PFOF 205. There is thus no basis for hypothesizing that had the maps been merely as compact as the Plan (rather than more compact), they would have become drastically more asymmetric.

Or consider the racial makeup of North Carolina's districts. The Adopted Criteria explicitly barred racial data from being used. PFOF 105. Hofeller, Lewis, and Rucho also could not have been clearer that, in their view, "the *Harris* opinion found that there was not racially polarized voting in the state, and therefore, the race of the voters should not be considered." PFOF 108-109. Nevertheless, in an abundance of caution, Prof. Chen identified all of his maps that contained one district with a black voting-age population of at least 40%. (According to Defendants, "a congressional district with a BVAP between 40% and 50%" gives black voters "an equal ability to elect their candidates of choice." Dkt. 61:10). These 262 maps were *indistinguishable* from the full array of 3,000 in their partisan implications. Again, not a single one had ten Republican seats, and again, the modal map using Hofeller's twenty-election set had seven Democratic seats. PFOF 237.

Lastly, "avoiding contests between incumbent Representatives" is a valid goal only if it is pursued in a "nondiscriminatory" manner. *Karcher*, 462 U.S. at 740. Here, preventing incumbent pairings is inherently discriminatory because the incumbents won their offices under the 2011 Plan, the most extreme partisan gerrymander of the last half-century. PFOF 188. Even so, Prof. Chen matched the 2016 Plan's incumbent pairings in one simulation set, bettered its performance in another, and conducted robustness tests that incorporated the incumbency advantage into a predictive regression model. Once

more, none of the resulting maps were remotely as asymmetric as the 2016 Plan, and most were neutral or slightly tilted in a Democratic direction. PFOF 207-208.[3]

CONCLUSION

For the foregoing reasons, the Court should hold that Plaintiffs' proposed test—requiring (1) discriminatory intent, (2) a large and durable discriminatory effect, and (3) a lack of a legitimate justification for this effect—is justiciable. The Court should also make clear that this test vindicates *both* voters' First Amendment right not to be discriminated against because of their political beliefs *and* their Fourteenth Amendment right not to be subjected to intentional vote dilution. The Court should further hold that the 2016 Plan is unconstitutional under the test.

However, to avoid "commit[ting] federal and state courts to unprecedented intervention," the Court should not recognize an intent-only standard under any constitutional provision. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). Nor should the Court announce that any particular measure of partisan asymmetry, or any particular asymmetry threshold, must be used. These are technical issues that should be "ironed out over time," Tr.II 180:4-7 (Osteen, J.)—not in the first partisan gerrymandering case involving a congressional plan ever to go to trial.

[3] As for core retention: It is mentioned neither by the Adopted Criteria nor by the legislative record. It is discriminatory since it would preserve the layout of the gerrymandered 2011 Plan. And it was violated anyway by the 2016 Plan, several of whose districts failed to retain their prior cores (yet were still won by Republicans). PFOF 240.

Respectfully submitted this 6th day of November, 2017.

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Exhibit 9

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

NORTH CAROLINA RIGHT TO LIFE, INC., *et al.*,

Plaintiffs,

v.

LARRY LEAKE, *et al.*,

Defendants.

No. 5:99-CV-798-BO(3)

MEMORANDUM OF THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS AMICI CURIAE IN SUPPORT OF DEFENDANTS

The Campaign Legal Center and Democracy 21 respectfully submit this brief limited to the issue of whether contribution limits imposed on independent expenditure political committees (hereafter "IEPC's") are constitutional. For the reasons set forth below, we urge this Court to reject plaintiffs' constitutional challenge to those limits.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff, North Carolina Right to Life, Inc., ("NCRL") brought this action in November 1999 challenging the constitutionality under the First Amendment of several North Carolina General Statutes: N.C. GEN. STAT. §§ 163-278.6(14) (defines the term "political committee"), 163-278.13 (limits contributions to candidates and political committees to $4,000 per primary or general election), and 163-278.14A(a)(2) (establishes means of proving that a communication constituted electoral advocacy

triggering disclosure and other requirements). More specifically, NCRL challenged North Carolina's definition of political committee on the ground that it unconstitutionally presumed that an entity has as a major purpose to support or oppose a candidate when an entity contributes or expends more than $3,000.00 during an election cycle. NCRL also challenged the $4,000 contribution limit to independent expenditure political committees on the ground that such contributions do not present the risk of *quid pro quo* corruption or its appearance.

This Court rendered its decision on October 24, 2001, granting summary judgment to Plaintiffs and determining that N.C. GEN. STAT. § 163-278.14A(a)(2) was unconstitutionally overbroad because it impermissibly broadened the scope of express advocacy as defined in *Buckley v. Valeo*, 424 U.S. 1 (1976). Specifically, this Court held that § 163-278.14A(a)(2) was unconstitutional because it "does not limit the scope of 'express advocacy to communications that literally include words that, in an of themselves, advocate the election or defeat of a candidate, as was required in *Buckley*." Order of October 24, 2001. This Court also held, in an amended Order of August 8, 2002, that N.C. GEN.STAT.§ 163-278.14A(a)(2) was severable from the remainder of N.C. GEN. STAT. § 163-278.14 (which had incorporated 163.278.14A(a)(2)). The Court's amended Order then went on to hold that the remainder of 163.278.6(14) was constitutional, including the provision that created a presumption of political committee status based on an entity's expenditures. Thus, this Court's amended decision rejected NCRL's position that Section 163-278.6(14)'s presumption of political committee status based on an entity's expenditures violated the First Amendment.

Both sides appealed. The court of appeals affirmed in part and reversed in part. It first concluded that N.C. GEN. STAT. § 163-278.14A(a)(2) was unconstitutionally vague and overbroad under "a bright-line test for determining whether communications may constitutionally be regulated as electoral advocacy." 344 F.3d at 424 (citing *Buckley v. Valeo,* 424 U.S. 1, 43 (1976)).[1] The court of appeals also reversed this Court's judgment on what it characterized as a "close question," concluding that the statutory rebuttable presumption used in determining whether a major purpose of an entity may be to support or oppose candidates in N.C. GEN. STAT. § 163-278.6(14) was vague and overbroad under the First Amendment. 344 F.3d at 429. It also concluded that the contribution limit of $4,000 per election that may be made to IEPCs was substantially overbroad and could not be constitutionally applied to a political committee, such as the one formed by NCRL, which had the stated intent to make only independent expenditures.344 F.3d at 434.

The defendants herein petitioned the Supreme Court to issue a writ of *certiorari.* On April 26, 2004, the Court granted the petition, vacated the court of appeals' decision and remanded the case to the Fourth Circuit for reconsideration in light of the Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003). Thereafter, on September 7, 2004, the United States Court of Appeals for the Fourth Circuit remanded the case to this Court for further consideration.

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[1] Judge Michael dissented, reasoning that the first sentence of the statute should be upheld as "an explicative definition of express advocacy that passes muster under *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (MCFL) and *Buckley v.* Valeo, 424 U.S. 1 (1976), but agreeing that the second sentence of the statute should be stricken. 344 F.3d at 436-37 (Michael, J. dissenting).

FACTS[2]

Plaintiff North Carolina Right to Life, Inc., is a non-profit membership corporation incorporated under North Carolina law, and North Carolina Right to Life Political Action Committee (NCRLPAC) is a longstanding political committee registered in North Carolina as a state political committee for which NCRL serves as the parent entity pursuant to N.C. GEN. STAT. § 163-278.19(b) (2003). In 1999, NCRL resolved "to form a separate segregated fund of [NCRL] to be known as North Carolina Right to Life Committee Fund for Independent Political Expenditures (hereafter "NCRLC-FIPE") for the sole purpose of making independent expenditures in North Carolina state elections in order to further the goals and purposes of North Carolina Right to Life, Inc." See Complaint, at Exhibit E. North Carolina law does *not* distinguish among political committees that make only contributions, those that make only independent expenditures, and those that make both. Nevertheless, NCRLC-FIPE has represented that it intends only to make independent expenditures.

In North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 708-09 (4th Cir.1999), *cert. denied,* 528 U.S. 1153, 120 S. Ct. 1156 (2000) (NCRL *1),* the Fourth Circuit described the activities of NCRL and NCRLPAC. The corporation maintained in that case that it wished to make contributions and independent expenditures in support of political candidates directly from its corporate treasury without going through its political action committee. The Fourth Circuit held that North Carolina's prohibition against corporate contributions and expenditures in political campaigns could not be applied to

[2] Nearly all of the facts set forth in this Memorandum were obtained either from this Court's October 24, 2001 decision, or from the 2003 decision of the United States Court of Appeals for the Fourth Circuit. See *North Carolina Right to Life v. Leake,* 344 F.3rd 418 (4th Cir. 2003).

NCRL under its interpretation of the decision in *MCFL*. Thereafter, North Carolina amended its statutes to conform to the Fourth Circuit's opinion in 1999, and now has an exception that allows NCRL-type entities to make both contributions and expenditures in support of political candidates directly from its corporate treasury. *See* N.C. GEN. STAT. § 163-278.19(0 (2003). North Carolina has taken no action to change its statutes since the Supreme Court ruled that Congress may prohibit NCRL and similar non-profit corporations from making corporate contributions to federal campaigns. *Federal Election Comm 'n v. Beaumont,* 539 U.S. 146 (2003).

Based on the results of the *NCRL v. Bartlett* litigation, and according to its representations in this case, NCRL has made contributions and independent expenditures directly from its corporate funds in political campaigns for state offices and wishes to continue doing so. (Complaint pp. 31-32). NCRL may not make contributions to campaigns for federal offices from its corporate treasury, but may make independent expenditures. *Beaumont,* 539 U.S. at 151, n.2. In the past, it has had both state and federal political committees that can and do make contributions to either state or federal political campaigns. In addition, NCRL has formed a third political committee that it intends will make only independent expenditures. All of NCRL's entities have a history of the same PAC Directors, overlapping treasurers, the same president, and the same membership base.

ARGUMENT

This brief is limited to one issue raised in this case: whether North Carolina may constitutionally limit contributions to political committees which would use those contributions solely for independent expenditures. We submit that the State may do so.

I. *McConnell* Held that Contributions Made for Independent Expenditures May Be Regulated

In its earlier decision in this case addressing the constitutionality of contribution limits imposed on IEPC's, this Court relied on the Supreme Court's decision in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)(*CalMed*). In *CalMed*, *supra*, the Supreme Court upheld FECA's $5,000 limit on contributions to multicandidate political committees. Initially this Court, and later the court of appeals, reasoned that the decision in *CalMed* could not be read as authorizing limits on contributions to entities that would use them solely for independent expenditures.

This issue has now been put to rest by the Supreme Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). In *McConnell*, the Supreme Court made clear that in its earlier *CalMed* decision, the Court had actually upheld limits on contributions to independent expenditure political committees:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 ... limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, *but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures*.

540 U.S. at 151-152 n. 48 (emphasis added). As the last sentence makes unmistakably clear, *CalMed* held that Congress could limit contributions to entities that would use them solely for independent expenditures.

Moreover, the decision in *McConnell* continues by noting that *Buckley* and *CalMed* could not have upheld FECA's broad limit on contributions to party and multicandidate committees without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell* itself, the Court wrote in the very next sentence after the passage quoted above:

> If indeed the First Amendment prohibited Congress from regulating contributions to fund [express advocacy and numerous other noncoordinated expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id. at 152 note 48. In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called "pass-through" corruption and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed such pass-through corruption concerns. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if contributions to IEPCs were sacrosanct. *McConnell*, then, makes clear that *CalMed* necessarily stands for two propositions previously rejected by the court of appeals: (i) that contributions can corrupt even when they are only used as independent expenditures (i.e., independently of their ultimate use); and (ii) a state may limit contributions to political committees that eventually will be used to make independent expenditures.

McConnell's own treatment of FECA's soft money provisions reinforces both of these *CalMed* holdings. If contributions that were eventually used as independent

expenditures in federal elections posed no corruptive potential—if they were always and necessarily sacrosanct—then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*, particularly § 323(a), the "core" soft money provision. *Id.*, at 142. Section 323(a) subjects all funds raised by the national parties to the same contribution limits ***regardless of their ultimate use*** – whether for independent expenditures or even advertising that does not mention a candidate at all. Section 323(b) analogously imposes contribution limits on state and local party committees where funds are used to help finance "Federal election activity," 2 U.S.C.A. § 441i(b) (Supp. 2003), including voter registration, voter identification, and public communications promoting or opposing a clearly identified federal candidate, even if done independently of a candidate. *See McConnell*, 540 U.S. at 162.

It is true, of course, that independent expenditures have been afforded greater First Amendment protection than coordinated expenditures and direct candidate contributions. *See FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 442, 457-60 (2001)(*Colorado II*); *cf. Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996)(*Colorado I*)(opinion of Breyer, J.).[3] Nevertheless, *McConnell* holds that contributions to political parties may be regulated whether ultimately used in coordination with, or independently of, candidates' campaigns. As an initial matter, *McConnell* applies deferential review because limits on contributions – including those ultimately used for independent expenditures – do not substantially infringe First Amendment rights of speech and association. *See McConnell*, 540 U.S. at 138 ("like the contribution limits we upheld in Buckley, § 323's restrictions

[3] In *Colorado I, supra*, it is significant to note that while the Court held that political parties could make unlimited independent expenditures, the Court nevertheless upheld the requirement that political parties use funds subject to contribution limits to make those expenditures. 518 U.S. at 61.

have only a marginal impact on the ability of contributors, candidates, officeholders and parties to engage in effective political speech").

More fundamentally, the contribution's ultimate use was not the basis for identifying its corruptive potential. Rather, the potential for corruption stemmed from the ability of donors to gain access and influence over candidates as a result of their contributions to a political party. See *McConnell, supra*, 540 U.S. at 146-148 (influence), 149-150 (access and influence), and 151 (access). In upholding FECA's central soft money provision, then, *McConnell* necessarily found that contributions to party political committees can corrupt, even when used for independent expenditures.

The same analysis applies to *McConnell*'s treatment of FECA's restriction on the use of soft money contributions by state and local party committees for federal election activities. Section 323(b) restricts the use of nonfederal funds by state and local party committees to help finance "Federal election activity." 2 U.S.C. § 441i(b)(1) (Supp. 2003). As the Court noted in *McConnell*,

> [t]he term "Federal election activity" encompasses four distinct categories of electioneering: (1) voter registration activity during the 120 days preceding a regularly scheduled federal election; (2) voter identification, get-out-the-vote (GOTV), and generic campaign activity that is "conducted in connection with an election in which a candidate for federal office appears on the ballot"; (3) any "public communication" that "refers to a clearly identified candidate for Federal office" and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (4) the services provided by a state committee employee who dedicates more than 25% of his or her time to "activities in connection with a Federal election." §§ 431(20)(A)(i)-(iv).

540 U.S. at 162. Significantly, none of these four categories necessarily involves contributions to candidates and categories 1, 2, and 3 necessarily do *not* unless there is coordination. Thus, if Congress could restrict the use of only those contributions to state

and local party committees that the committees in turn contribute to candidates, § 323(b), just like § 323(a), would have necessarily been overbroad and unconstitutional. *McConnell* held, however, that Congress could restrict the use of *all* nonfederal contributions by state party committees "for the purpose of influencing federal elections." *Id.* at 167. The reason was clear. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees. As the Court explained:

> Congress ... made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to §323(a)[, the national party committee ban,] by scrambling to find another way to purchase influence. It was neither novel nor implausible for Congress to conclude that political parties would react to §323(a) by directing soft-money contributions to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. ... Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Id. at 165-166 (internal citations and quotation marks omitted). Section 323(b) is premised on the simple "judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat of corruption or the appearance of corruption." *Id.* at 167.

Contributions to non-party political committees are equally capable of putting a candidate "in the debt of the contributor", and that is true whether the political committee operates at the federal or state level, and whether the political committee actually uses the contributions for direct candidate contributions, coordinated expenditures, or independent expenditures. Contributions to political committees will be used to benefit candidates, and thus can create gratitude and debt to the donors. Moreover, those who make

contributions to a political committee, whose chief aim is to nominate or elect candidates, often do so in an attempt to purchase influence. Candidates know where large contributions come from, particularly those that benefit them or harm their opponent, even those made to so-called independent political committees. For the same reason that *federal* limits on contributions to political committees are constitutional, North Carolina's attempt to impose reasonable limits on such contributions to state political committees in order to safeguard the integrity of the political process is constitutional because its limits are "'closely drawn' to match a 'sufficiently important interest.'" *McConnell*, 540 U.S. at 136 (quoting *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (quoting *Shrink Missouri*, 528 U.S. at 387-88)).

II. ***McConnell* Requires Reconsideration of Evidence Erroneously Rejected by this Court**

McConnell undercuts this Court's earlier holding on IEPCs in yet another way. This Court initially held that North Carolina's limit on contributions to IEPCs was unconstitutional because the State had failed to proffer sufficiently compelling evidence which showed a danger of corruption due to the presence of unchecked contributions to IEPCs. The State, however, had actually proffered such evidence to this Court in its summary judgment papers. See this Court's Order of October 24, 2001 at 25-26. The State, for example, produced evidence that, among other things, an advocacy group "threatened the legislative leadership that it would run advertisements [in] retaliation for votes against the hog industry in North Carolina." *Id.* at 25.

This Court rejected this evidence, however. Specifically, this Court reasoned:

> Defendants claim that this [evidence] supports a finding that allowing unlimited contributions to committees that will run such advertisements will encourage "corruption." However, in *Perry v. Bartlett*, the Fourth

> Circuit determined that the Farmers for Fairness group engaged solely in "issue advocacy," which is speech that is afforded the "broadest protection" under the First Amendment. *Perry v. Bartlett*, 231 F.3d 155, 158-59 (4th Cir. 2000)("While Farmers does make expenditures that may incidentally influence ... an election, it does not in explicit words ... advocate the election or defeat of a candidate."). Therefore, the Fourth Circuit held that the actions of Farmers for Fairness were not "corruptive," but, rather, constituted protected speech under the First Amendment.

Id. at 25-26. In other words, this Court, following the Fourth Circuit's decision in *Perry*, rejected the proferred evidence because it believed "explicit words ... advocat[ing] the election or defeat of a candidate" were necessary to constitute an expenditure and thus implicate the concerns of corruption that are within the reach of campaign finance laws.

McConnell forcefully and unequivocally rejected this view. In upholding the "electioneering communication" provisions of the Bipartisan Campaign Reform Act of 2002, the Supreme Court made clear that no "explicit words" were necessary:

> [T]he unmistakable lesson ... is that [the] magic-words requirement is functionally meaningless. Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. [The] express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system."

540 U.S. at 193-194. We respectfully submit that this Court wrongly rejected the State's evidence on the grounds that "magic words" were not present.

III. Independent Expenditure Political Committees Play A Significant and Effective Role in Influencing Elections

The State defendants in this case will offer facts in their summary judgment papers on the impact that IEPCs , such as plaintiff North Carolina Right to Life, play in

elections in North Carolina, and the justification for upholding limits on the amount of money that may be contributed to them by individuals and other groups.

We believe that further support for limiting contributions to state political committees such as NCRL can be gleaned from an examination of the role that 527 organizations have played in federal elections.[4] As this Court is no doubt aware, 527 organizations are organized for the purpose of making independent expenditures, and thus function essentially the same as IEPC's, although they have avoided registering as federal political committees. While 527's organizations purport to be independent of the major political parties, the evidence is strongly to the contrary. Indeed, the major political parties have played a significant role in the formation of a number of 527 groups.

Two major 527's, the Media Fund (aligned with Democrats) and the Progress for America (aligned with Republicans), demonstrate the close ties between these supposedly "independent" 527's and the national parties.

The Media Fund was organized to aid the Democratic presidential nominee through political advertising. It was formed from a BCRA task force that had been established by the then-Chairman of the Democratic National Committee, Terry McAuliffe. This Task Force was comprised of Democratic Party operatives: Harold Ickes, who had served as Deputy Chief of Staff to former President Clinton, and a paid advisor to Chairman McAuliffe, and a Member of the DNC's Executive Committee; Minyon Moore, DNC Chief Operating Officer; Josh Wachs, DNC Chief of Staff, Joseph

[4] The term "527's" or "527 organizations" refers to the provision of the Internal Revenue Tax Code that governs the tax treatment of political organizations. These are defined by the IRS as entities "organized and operated primarily" for the purpose of influencing the selection of candidates to elective or appointive office.

Sandler, DNC's legal counsel, and former White House officials John Podesta and Doug Sosnik. Mann Declaration at 3.[5]

Two years before the 2004 election cycle, DNC Chairman McAuliffe had discussed with Democratic Party donors the plans to establish the Media Fund, which Ickes later was named to head. *Id.* Ickes' leadership of the Media Fund, given his extensive ties to the Democratic Party and national leaders in the Party such as President Clinton, established a reliable connection between the Media Fund and the Democratic Party in the eyes of many donors. Even President Clinton encouraged donors to contribute to the Media Fund. Attachment 2, page 8 to Mann Declaration.

For his part, Ickes' fundraising activities fueled the link between the Media Fund and the national party. During the Democratic National Convention, Ickes served as a DNC delegate and visibly made the rounds at the convention soliciting party donors for the Media Fund and circulating with party officials. He even ran the Media Fund's Convention activities from an office in the Four Seasons Hotel in Boston, just down the hall from the DNC's finance division, which focused on large Democratic donors. Though nominally independent from the DNC, the Media Fund was very much aligned with the DNC, and these ties would have been especially obvious to potential large donors. Mann Declaration at 4.

There was a similar alignment between the Republican Party and Progress for America (PFA), another supposedly independent 527 group. Although Republicans started their 527 effort later than Democrats, they too proved themselves to be adept at using this vehicle. As detailed in the Weissman-Hassan study appended to Dr. Mann's Declaration, PFA was initially formed pursuant to Section 501(c)(4) of the tax code and,

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[5] The Declaration of Thomas Mann is attached to the defendants' summary judgment papers.

from its inception, it had close ties with the Republican National Committee, the Bush Administration, and well-known Republican political consultants. Mann Declaration at 4-5.

For example, the founder of PFA was Tony Feather, a partner at Feather, Larson and Synhorst-DCI (FLS-DCI), which had ties to the RNC. Feather picked the former director of the National Republican Senatorial Committee (Chris LaCivita) to be PFA's President. *Id.* While President, LaCivita was paid as a contractor by a consultant group called DCI, which shared a partner (Tom Synhorst) with Feather's group, FLS-DCI. Synhorst too has strong Bush-Cheney campaign ties, having advised the campaign in 2000 and held important roles at the Republican conventions in 1996 and 2000.

When the FEC decided not to regulate 527's in May 2004, PFA reorganized as a pro-Bush 527 organization. Its hub was Synhorst, who played a role with PFA similar to the one Ickes played with the Media Fund and the DNC. Synhorst was a strategic advisor and leading fundraiser for PFA, both before and after its conversion from a 501(c)(4) to a 527 organization. He was also a partner at FLS-DCI, which received $19 million for telemarketing and message phone calling for the RNC and the Bush campaign. Like Ickes, Synhorst's efforts "were certainly visible to his firm's political clients and his political relationships were presumably known to many donors." Ex. 2, page 9 attached to Mann Declaration.

The RNC initially took the position that the Federal Election Commission should regulate 527 groups. But when, in May, 2004, the FEC refused to do so, Republican Party leaders sent an unmistakable message to Republican donors to give to 527 groups like PFA. Both the chairman of the Bush-Cheney '04 campaign (Marc Racicot) and the

RNC Chairman (Ed Gillespie) declared that FEC inaction on the issue "had given a green light to all non-federal 527's to forge full steam ahead in their efforts to affect this year's Federal elections, and in particular, the Presidential race[.]" *Id.*, at 8. And that is precisely what PFA did in the 2004 election cycle.

The close connections between the party committees and these 527 groups raise concerns that 527 groups have provided and, unless regulated, will continue to provide a means for circumventing the soft money ban on the national parties. Donors who previously gave large soft money donations to the national parties have now shifted their giving to 527 groups that operate in close alignment with the parties.

For example, a recent study showed that total contributions to 527's rose from $151 million in 2002 to over $400 million—an increase of roughly 168%.[6] Moreover, donations from wealthy individuals to 527's also have sharply risen. Between 2002 and 2004, for example, the number of contributors who gave more than $100,000 to 527's grew from 66 to 265—an increase of over 300 percent. The number of 'superrich donors' grew even more, from no donors of more than $2 million in 2002, to 24 such donors in 2004.

Many of these large individual donors to 527 groups had previously given large amounts of soft money to the political parties before BCRA banned such practices. As noted in the Mann Declaration, of the 113 individuals who contributed at least $250,000 to 527 groups in the 2004 cycle, 73 (over 64 percent) had been active soft money donors to the political parties, giving a total of over $49 million dollars of soft money in the previous two election cycles. Mann Declaration at 2. What appears to have happened is

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[6] This Study, "BCRA and the 527 Groups" by Steve Weissman and Ruth Hassan, is appended as Exhibit 2 to the Report of Dr. Thomas E. Mann, which is attached to the defendants' summary judgment papers.

that donors who had previously given soft money to the national political parties have now shifted a significant amount of their giving to 527 groups in the wake of BCRA's ban on party soft money fundraising. These supposedly independent groups are thus being used as vehicles for circumvention of the limits imposed by BCRA.

And because the candidates who are benefited by the spending of the 527 groups are fully aware of who these large donors are, unlimited contributions to 527 groups can be used as a means of buying access and influence to candidates and officeholders, just as similar soft money contributions to parties previously did.

Finally, there is no reason to believe that this potential for the circumvention of meaningful contribution limits on candidates and parties by the use of supposedly independent committees is a problem that is limited to federal elections. We submit that the experience at the federal level has potential to take place at the state level as well. If supposedly independent political committees are allowed to receive unlimited contributions, donors will use those contributions to buy access to and influence with those candidates aided by the committee. Such unlimited contributions, even if given to supposedly independent committees, create the potential for the same kind of corruption that was at the heart of the Supreme Court's analysis in *McConnell* upholding restrictions on donations to party committees. This danger of real or potential corruption arising from unlimited donations to political committees is sufficient to justify the contribution limits imposed on such gifts.

CONCLUSION

For the reasons set forth above, this Court should reject plaintiff's constitutional challenge to North Carolina's contribution limits to independent expenditure political committees.

Respectfully submitted this 28th day of February, 2005.

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CERTIFICATE OF SERVICE

This is to certify that on February 28, 2005, a copy of the foregoing Motion for Leave to Participate as *Amici Curiae*, Memorandum, and proposed Order were served on the following counsel of record, by placing a true copy of the same in the United States mail, first-class, postage prepaid:

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