STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*,

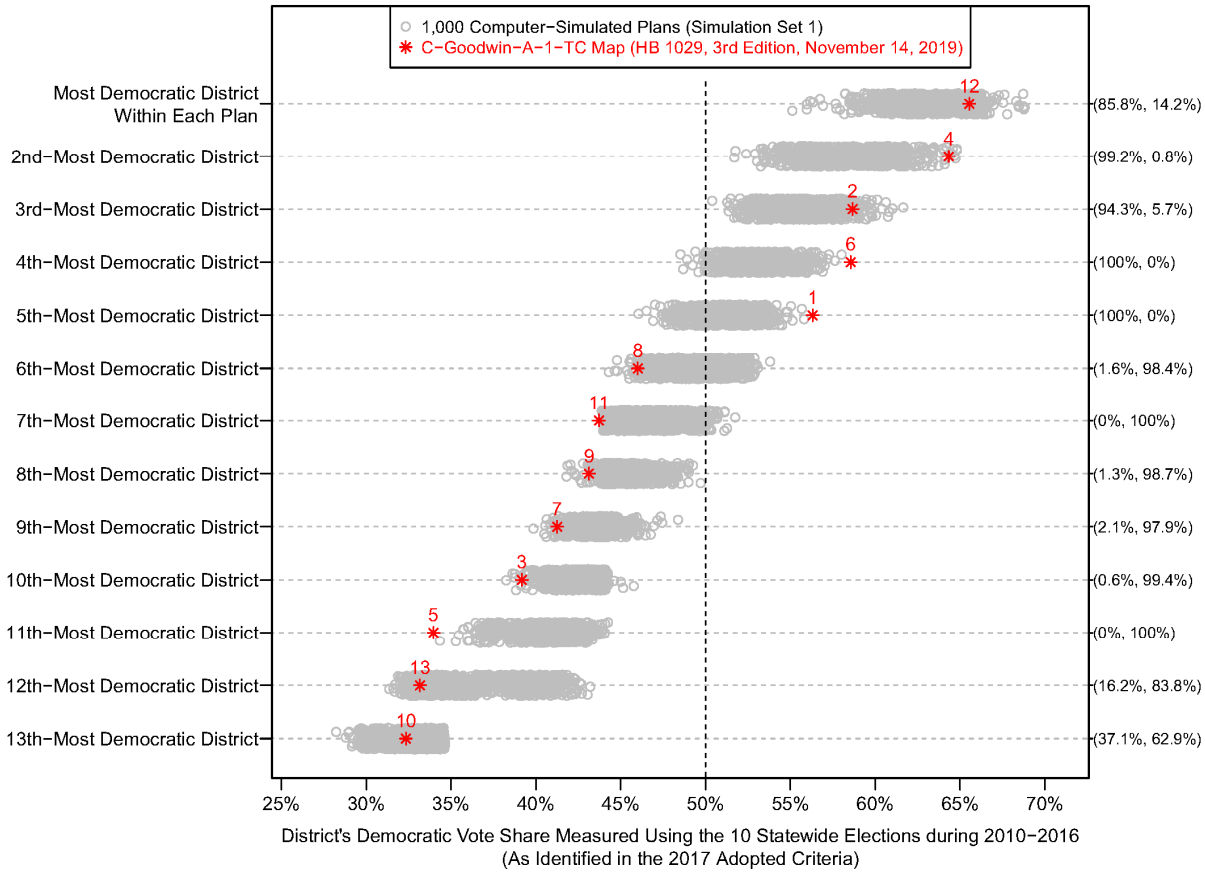
Defendants.

PLAINTIFFS' MOTION TO SET SCHEDULE FOR REVIEW OF REMEDIAL PLAN

Plaintiffs respectfully request that the Court set a schedule for review of the remedial congressional plan adopted by the General Assembly on November 15, 2019 (the "Remedial Plan"). As in *Common Cause v. Lewis*, the review process here should include briefing by the parties and appointment of a Referee to assist the Court. Plaintiffs further request that the Court hear argument on the Remedial Plan at the December 2, 2019 hearing on summary judgment.

This Court's review is urgently needed because the Remedial Plan is another extreme and obvious partisan gerrymander that violates the constitutional rights of North Carolina voters. Working largely in secret, Legislative Defendants packed and cracked Democratic voters, substantially recreating several of the same gerrymandered districts. As the chart below shows, nearly every district is an extreme partisan outlier compared to Dr. Chen's nonpartisan plans:

Figure 3: Simulation Set 1:
Districts' Democratic Vote Share Measured Using the 10 Statewide Elections during 2010–2016
(As Identified in the 2017 Adopted Criteria)



As Plaintiffs will explain in their objections brief, this Remedial Plan clearly violates the North Carolina Constitution under the principles announced by this Court in *Common Cause v. Lewis*. Rather than a 10-3 partisan gerrymander, the Remedial Plan is simply an 8-5 partisan gerrymander. If the Remedial Plan were to be accepted, North Carolina voters would be forced to vote, yet again, in unconstitutional elections that predetermine election outcomes and disregard the will of the people.

Legislative Defendants have indicated they will argue that enactment of the Remedial Plan moots this lawsuit, but it does not. Plaintiffs have not received all of the relief requested in their Verified Complaint, including a declaration that the 2016 Plan violated the North Carolina Constitution and the establishment of "a new congressional districting plan that complies with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new congressional districting plans comporting with the North Carolina Constitution." Two North Carolina redistricting decisions from just last year—this Court's decision in *Dickson* and the U.S. Supreme Court's decision in *Covington*—make clear that this Court retains jurisdiction both to enter the requested declaration concerning the 2016 Plan and to ensure that the Remedial Plan cures the constitutional violations.

Plaintiffs respectfully request that the Court set a briefing schedule on objections, appoint a Referee, and hear argument on these issues at the December 2, 2019 hearing.

BACKGROUND

In their Verified Complaint in this action, Plaintiffs included six requests in the Prayer for Relief:

a. Declare that the 2016 Plan is unconstitutional and invalid because it violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina

Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14;

b. Enjoin Defendants, their agents, officers, and employees from administering, preparing for, or moving forward with the 2020 primary and general elections for Congress using the 2016 Plan;

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

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

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

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

Compl., Prayer for Relief.

On October 28, 2019, this Court granted Plaintiffs' motion for a preliminary injunction, prohibiting use of the 2016 Plan in the 2020 elections. The Court's order noted that the General Assembly had "discretion" to adopt a remedial plan before entry of a final judgment, and "respectfully urge[d] the General Assembly to adopt an expeditious process" that "ensures full

transparency and allows for bipartisan participation and consensus to create new congressional districts" that comply with the North Carolina Constitution. Order on Inj. Relief at 17-18.

On October 30, 2019, Speaker Moore announced that Legislative Defendants would create a joint House and Senate Select Committee to draw a remedial plan (the "Select Committee"). As part of this announcement, Speaker Moore reportedly stated: "My thought is to go ahead and go forward drawing districts . . . *maybe we can moot the lawsuit*."[1]

The process employed by the Select Committee leaders was neither transparent nor bipartisan. At the outset of the very first meeting on November 5, 2019, Republican Senators made clear that they had already decided to use as the "base map" a plan that was drawn at a simulation exercise organized by Common Cause in 2016 (the "Common Cause Map"). The partisanship of every district in the Common Cause Map has been subject to extensive evaluation, including in the federal *Rucho* litigation, where Legislative Defendants themselves commented on the partisan leanings of the map. Moreover, even though the Select Committee adopted criteria that banned any use of racial data in constructing the new districts, the drawers of the Common Cause Map had explicitly used racial data in drawing several of the districts.

Starting from this base map, Senators Hise and Newton then made substantial revisions, overhauling many of the districts. They did so without input from any Democratic members. Instead, Senators Hise and Newton amended the base map based on secret discussions with unknown individuals outside of the public hearing room. Throughout the revisions process, Senators Hise and Newton repeatedly left the public hearing room to go to a back room, returning 15 or 20 minutes later and directing staff to implement specific changes that had been developed outside of public view. Seemingly every time Senator Hise departed for the back

[1] https://twitter.com/ludkmr/status/1189651617970298885 (emphasis added).

room, he asked for seven hard copies of the latest version of the map to take with him. The identities of the seven people who were in that back room is unknown.

The House and Senate Standing Committees on Redistricting each passed the Hise-Newton map on straight party-line votes on November 14 and 15, 2019. The full House and Senate passed the Remedial Plan as House Bill 2019, on November 14 and 15, 2019, again on straight party-line votes. No Democrat in either chamber voted for the Remedial Plan.

ARGUMENT

I. The Court Should Appoint a Referee and Issue a Schedule for Legislative Defendants to Submit the Remedial Plan and for Objections

This Court should enter an order to govern review of the Remedial Plan similar to the Court's September 13, 2019 order in *Common Cause v. Lewis*. It would have three main parts:

First, the Court should direct Legislative Defendants to submit to the Court, no later than three days from this filing, the block equivalency files, shapefiles, and color maps in .PDF format for the Remedial Plan. The Court should further direct Legislative Defendants to submit to the Court, no later than one week from this filing, the following materials:

- Transcripts of all Select Committee hearings, House and Senate Standing Redistricting Committee hearings, and floor debates;
- The stat pack for the Remedial Plan and relevant prior plans;
- The criteria applied in drawing the Remedial Plan;
- A description of the process for drawing and enacting the Remedial Plan, including the choice of a base map and how the Remedial Plan purportedly complies with each of the adopted criteria;

- The identity of all participants involved in the process of drawing and enacting the Remedial Plan, including the identifies of all persons consulted during the mapdrawing process outside of public view; and
- Any alternative maps considered by the Select Committee, the House and Senate Standing Redistricting Committees, or the General Assembly.

Second, the Court should set a briefing schedule for objections to the Remedial Plan. Plaintiffs respectfully suggest that objections be due ten days from this filing (*i.e.*, on November 25, 2019), and that any responses be due four days after that (*i.e.*, on November 29, 2019). Plaintiffs request that the Court then hear argument on the objections and any related issues at the December 2, 2019 hearing.

Third, the Court should immediately appoint a Referee to (1) assist the Court in reviewing the Remedial Plan; and (2) develop a remedial plan for the Court should the Court determine that the General Assembly's Remedial Plan does not cure the constitutional violations found in this case or is otherwise impermissible. Plaintiffs respectfully submit that the Court should again appoint Dr. Persily to serve as Referee.

II. This Case Is Not Moot

Based on recent public statements, Plaintiffs anticipate that Legislative Defendants will argue this case is now moot because the General Assembly enacted the Remedial Plan to replace the 2016 Plan. But that is not so. Under hornbook mootness principles and directly on-point precedent, the passage of the Remedial Plan does not moot this case, and this Court retains

jurisdiction to ensure the adoption of a remedial plan that cures the constitutional violations alleged in the Complaint.

It is well-settled that actions by defendants subsequent to the filing of a lawsuit do not moot a case unless they "provide plaintiffs the relief they sought" in the complaint. *Wilson v. N.C. Dep't of Commerce*, 239 N.C. App. 456, 460, 768 S.E.2d 360, 364 (2015); *accord Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003). This principle applies with full force where plaintiffs challenge a statute and the General Assembly then repeals or amends the statute. "The repeal of a challenged statute does not have the effect of mooting a claim . . . if the repeal of the challenged statute does not provide the injured party with adequate relief or the injured party's claim remains viable." *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 182, 689 S.E.2d 576, 582 (2010). In other words, a case is not moot if a "statutory amendment does not provide plaintiffs the relief they sought." *Wilson*, 239 N.C. App. at 460, 768 S.E.2d at 364.

The enactment of the Remedial Plan does not provide Plaintiffs all the relief sought in the Complaint. Of the six requests in Plaintiffs' Prayer for Relief, only the second request, which sought a permanent injunction against use of the 2016 Plan in the 2020 elections, is even arguably moot. The other five requested forms of relief all remain unfulfilled. In particular, the Complaint requested that this Court "declare that the 2016 Plan is unconstitutional and invalid," and that the Court "[e]stablish a new congressional districting plan that complies with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new congressional districting plans comporting with the North Carolina Constitution in a timely manner." Compl., Prayer for Relief ¶¶ a, c. As Plaintiffs will set forth more fully in their objections to the Remedial Plan, the General Assembly has "fail[ed] to enact new congressional districting plans

comporting with the North Carolina Constitution" because the Remedial Plan is another extreme partisan gerrymander. Accordingly, Plaintiffs' request that this Court "[e]stablish a new congressional districting plan that complies with the North Carolina Constitution" remains very much live. Plaintiffs' request for a declaration that the 2016 Plan is unconstitutional also remains live, and once this Court enters that declaration, this Court has the inherent authority to ensure that the constitutional violations it has found are cured.

Two recent redistricting cases in North Carolina are directly on point. First, in *Dickson v. Rucho*, this Court entered a declaratory judgment for the state-court plaintiffs after federal courts struck down the 2011 state legislative plans and remedial plans were adopted. *See* Order and Judgment on Remand from N.C. Supreme Court, *Dickson v. Rucho*, No. 11 CV 16896 (N.C. Super. Feb. 11, 2018). This Court rejected Legislative Defendants' argument that the request for declaratory relief was moot because the 2011 plans had been repealed and replaced by new plans. This Court "conclude[d] that the Plaintiffs [were] entitled to declaratory judgment in their favor" on both their federal and state constitutional claims. *Id.* at 5.

If declaratory relief was warranted in *Dickson*, it is necessarily warranted here as well. In *Dickson*, the General Assembly had repealed the challenged 2011 plans as a result of separate federal litigation, in which the federal courts had already declared the 2011 plans unconstitutional and were ensuring that the remedial plans cured the racial gerrymandering violations found there. Here, the General Assembly replaced the 2016 congressional plan as a result of *this* litigation, and no other court will declare the 2016 Plan unconstitutional or ensure that the Remedial Plan cures the 2016 Plan's constitutional infirmities. Plaintiffs' interests in a declaratory judgment thus are even more compelling than in *Dickson*. Plaintiffs maintain a right to have the 2016 Plan declared unconstitutional by a court, and this Court's entry of a declaratory

judgment will remove any conceivable doubt that this Court has jurisdiction to review whether the Remedial Plan cures the constitutional violations. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); *see also North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) ("Relief in redistricting cases is fashioned in the light of well-known principles of equity.") (internal quotation marks omitted).

In any event, this Court can and must review the Remedial Plan regardless of whether the Court enters a declaratory judgment regarding the 2016 Plan. The U.S. Supreme Court's 2018 decision in *Covington* makes that clear. In *Covington*, after the General Assembly enacted remedial state legislative plans, the plaintiffs submitted objections to the district court. The court sustained some of the objections and had a special master redraw the relevant districts. On appeal, Legislative Defendants argued—exactly as they will argue here—that the "plaintiffs' lawsuit challenged only the 2011 Plan, and those claims became moot when the legislature repealed the law creating the 2011 Plan and replaced it with the 2017 Plan." *North Carolina v. Covington*, Jurisdictional Statement, No. 17-1364, 2018 WL 1532754, at *19 (U.S. Mar. 26, 2018). Legislative Defendants contended that the "plaintiffs had two options: They could either amend their complaint to add challenges to the 2017 law or file a new lawsuit challenging it." *Id.* Legislative Defendants insisted that the plaintiffs had no right to "pursue[] their challenges to the 2017 Plan only through 'objections' pressed in a so-called remedial proceeding." *Id.*

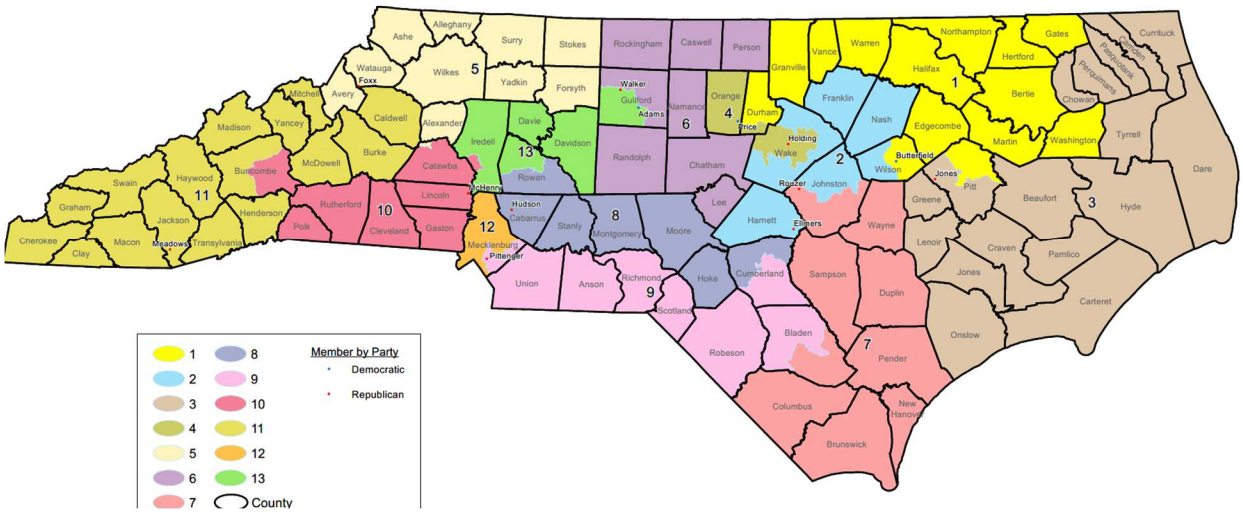
In an 8-1 decision, the U.S. Supreme Court rejected these arguments. The Supreme Court held that Legislative Defendants "misunderstand the nature of the plaintiffs' claims." *North Carolina v. Covington*, 138 S. Ct. 2548, 2552 (2018). As the Court explained, the

Covington plaintiffs' claims "[arose] from the plaintiffs' allegations that they ha[d] been separated into different districts on the basis of race," and "it is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to [such] claims." *Id.* at 2552-53 (alterations omitted). Consequently, "the plaintiffs' claims that they were organized into legislative districts on the basis of their race *did not become moot simply because the General Assembly drew new district lines around them*." *Id.* (emphasis added).

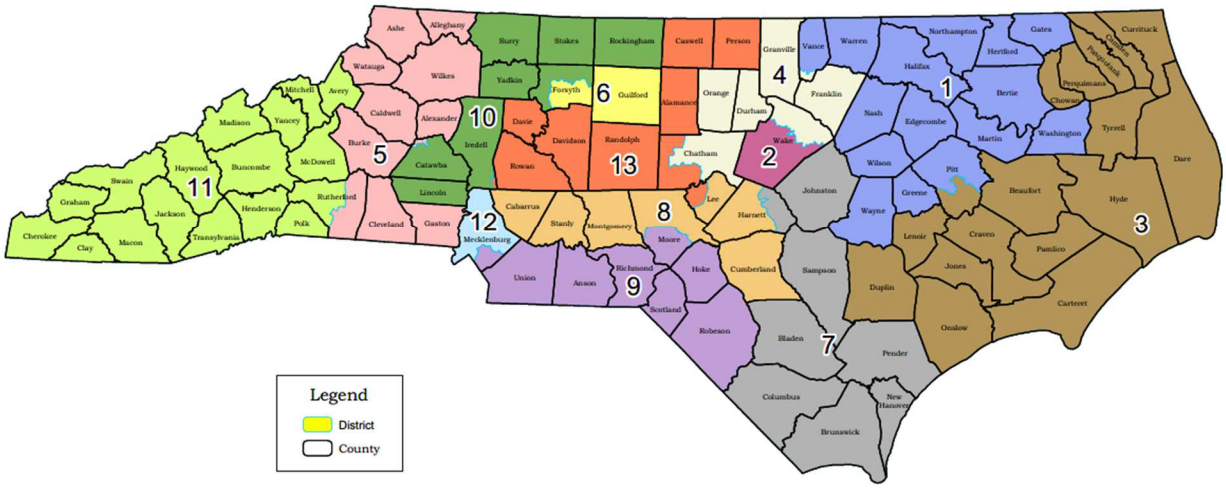
The same is true here with respect to Plaintiffs' partisan gerrymandering claims. The claims in this case "arise from the plaintiffs' allegations that they have been separated into different districts on the basis of [partisanship]." *Id.* at 2552-53 (alterations omitted). "[P]laintiffs' claims that they were organized into legislative districts on the basis of their [partisanship] did not become moot simply because the General Assembly drew new district lines around them" in the Remedial Plan. *Id.* "Because the plaintiffs assert[] that they remain[] segregated on the basis of [partisanship], their claims remain[] the subject of a live dispute," and this Court "properly retain[s] jurisdiction." *Id.*

Indeed, like in *Covington*, Plaintiffs will contend that "some of the new districts [are] mere continuations of the old, gerrymandered districts." *Id.* Even a cursory inspection of the Remedial Plan and the 2016 Plan shows that Districts 1, 3, 7, 8, 9, and 12 substantially overlap with the prior versions of those districts in the 2016 Plan:

2016 PLAN



REMEDIAL PLAN



This case would not be moot regardless, but it certainly cannot be moot where the Remedial Plan recreates much of the prior districts, including specific gerrymandered features of the 2016 Plan that Plaintiffs successfully challenged here.

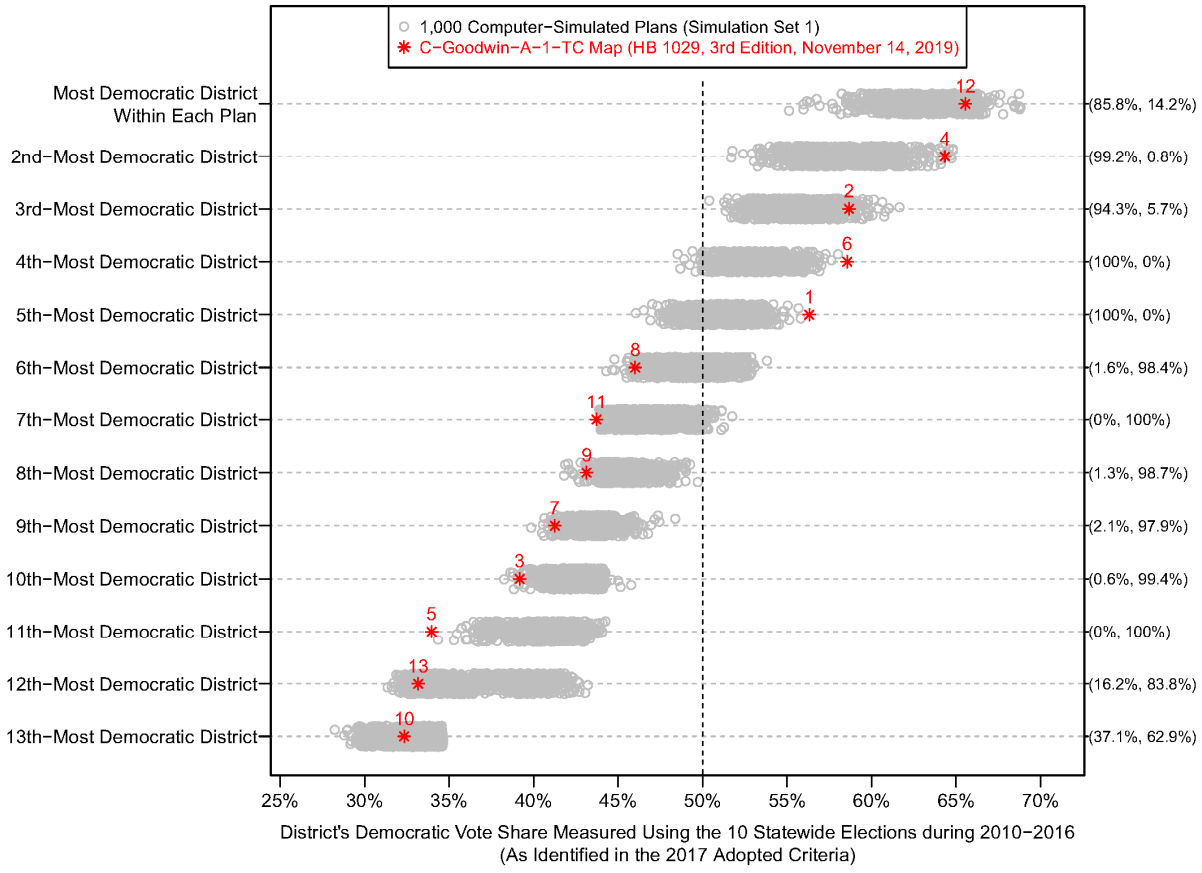
It makes no difference that Legislative Defendants enacted the Remedial Plan voluntarily, prior to final judgment. If anything, the voluntary nature of the Remedial Plan weighs against a finding of mootness. "[T]he standard . . . for determining whether a case has been mooted by the defendant's voluntary conduct is stringent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "[T]he party asserting mootness" maintains a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* Here, there is not merely a risk that the offending conduct will "start up again." *Id.* Plaintiffs will show that it has already reoccurred with the unconstitutional partisan gerrymandering of the Remedial Plan. And because Legislative Defendants have repeated their unconstitutional actions, Plaintiffs have not obtained the relief sought in the Complaint.

Finding this case moot would allow the General Assembly "to avoid meaningful review" in this case and future redistricting cases. *Thomas v. N.C Dep't of Human Res.*, 124 N.C. App. 698, 706, 478 S.E.2d 816, 821 (1996). It would mean that the General Assembly could pass any unlawful congressional plan, and then, when voters sue, replace it with another unlawful plan before the Court rules. This cycle could repeat over and over, in a game of legal whack-a-mole, until the next election is near and Legislative Defendants claim it is too late to change their most recent plan. The North Carolina Constitution does not permit citizens' rights to be endlessly violated in such a manner. It guarantees that "every person for an injury done . . . shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. This Court's review of the Remedial Plan is necessary to abide by that guarantee here for Plaintiffs and millions of North Carolina voters.

The Court's review of the Remedial Plan is especially urgent given both the upcoming election schedule and the extremeness of the partisan gerrymander under the Remedial Plan.

Plaintiffs will establish that the Remedial Plan could not have been the product of anything other than partisan intent. For instance, the chart below (which is the same as that presented in the introduction) compares each district under the Remedial Plan to its corresponding district in Dr. Chen's Simulation Set 1 plans, using the 2010-2016 statewide elections as a measure of partisanship. The chart reveals that at least 10 of 13 districts are extreme partisan outliers—they are more extreme in partisanship than their corresponding district in over 94% of the simulations. And remarkably, 9 of 13 districts are outliers above the 97.9% level. The Remedial Plan packs Democratic voters into five districts that are overwhelmingly Democratic, in order to ensure that the remaining eight districts are neither competitive nor Democratic-leaning.

Figure 3: Simulation Set 1:
Districts' Democratic Vote Share Measured Using the 10 Statewide Elections during 2010–2016
(As Identified in the 2017 Adopted Criteria)



Plaintiffs will establish that the Remedial Plan was intentionally designed to predetermine an 8-5 Republican advantage in North Carolina's congressional delegation, in violation of the North Carolina Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order setting the requested briefing schedule on objections to the Remedial Plan, appointing Dr. Persily as Referee to assist the Court in its review of the Remedial Plan, and setting argument on these issues for December 2, 2019 at the existing hearing on summary judgment.

Respectfully submitted this the 15th day of November, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 15th day of November, 2019.

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