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' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Court should deny Legislative Defendants' motion for summary judgment. Under settled North Carolina law, this case is not moot for multiple reasons. The General Assembly's enactment of a new congressional plan (the "Remedial Plan") does not provide Plaintiffs all of the relief they seek in this action, including a declaration that the 2016 Plan violated the North Carolina Constitution and—critically—the establishment of a new plan that cures the prior gerrymander and comports with the North Carolina Constitution. Far from curing the prior gerrymander, the Remedial Plan is just another extreme and intentional partisan gerrymander that substantially recreates many of the prior districts. A finding of mootness, moreover, could enable the General Assembly to evade judicial review of both the Remedial Plan and any future congressional plan. Under Legislative Defendants' mootness theory, the General Assembly could have openly announced its intention to enact an 8-5 partisan gerrymander, and this case would still be moot so long as the new statute repealed and replaced the 2016 statute. That is not the law. This Court retains jurisdiction to declare that the 2016 Plan violated the North Carolina Constitution, to determine whether the Remedial Plan cures the constitutional infirmities of the 2016 Plan, and if it does not, to establish a new plan that does. The Court should grant summary judgment to Plaintiffs and set a schedule for review of the Remedial Plan.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs filed this action on September 27, 2019, alleging that the General Assembly's partisan gerrymandering of North Carolina's congressional districts violated multiple provisions of the North Carolina Constitution. The Verified Complaint detailed specific ways in which districts under the 2016 congressional plan (the "2016 Plan") had been gerrymandered to pack or crack Democratic voters. In their Prayer for Relief, Plaintiffs asked the Court to "[d]eclare that the 2016 Plan is unconstitutional and invalid" and to "[e]njoin" use of the 2016 Plan in "the 2020

primary and general elections." Compl., Prayer for Relief ¶¶ a, b. In addition, Plaintiffs asked the Court to "[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." *Id.* ¶ c. Plaintiffs also asked the Court to "[e]njoin Defendants . . . 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," and "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." *Id.* ¶¶ d, e.

On October 28, 2019, this Court granted Plaintiffs' motion for a preliminary injunction, barring use of the 2016 Plan in the 2020 elections. The Court held that "there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution[]." Order on Inj. Relief at 14. The Court found that, if the 2020 elections went forward under gerrymandered districts, "the people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 15. The Court "retain[ed] jurisdiction to move the primary date . . . should doing so becomes necessary to provide effective relief in this case"—*i.e.*, to implement new districts that comply with the state constitution. *Id.* As the Court explained, any alleged harms from delaying the primaries "pale in comparison to the voters of our State proceeding to the polls to vote, yet again, in congressional elections administered pursuant to maps drawn in violation of the North Carolina Constitution." *Id.* at 17. The Court

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. *Id.* 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 next day, October 31, 2019, a Republican congressional candidate and several Republican voters filed a lawsuit in federal court arguing that it would violate the U.S. Constitution to conduct the 2020 elections under any plan other than the 2016 Plan. *See Brewster v. Berger*, 2:19-cv-00037-FL, ECF No. 1 (E.D.N.C. Oct. 31 2019). The *Brewster* plaintiffs have moved for a preliminary injunction seeking to force the State Board of Elections to conduct the 2020 elections under the 2016 Plan. *Brewster*, ECF No. 23.

In the General Assembly, the Select Committee met for the first time on November 5, 2019. At the outset of the first meeting, Senators Hise and Newton 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"). Senator Newton, for instance, read from pre-written talking points extolling the purported virtues of the Common Cause Map. 11/5/19 Video at 40:20-42:40.[2] The partisanship of every district in the Common Cause Map had been extensively evaluated previously, including in the federal *Rucho* litigation,

[1] https://twitter.com/ludkmr/status/1189651617970298885 (emphasis added).
[2] *Available at* https://www.ncleg.gov/Video/Redistricting2019.

where Legislative Defendants themselves commented on the partisan leanings of the map. *See* Theodore Decl., Ex. A at 85-90.

At the first hearing, the Select Committee adopted criteria to govern the remedial plan. One of the criteria was: "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2019 Congressional Plan." *See* Theodore Decl., Ex. B.[3] Immediately after passage of the adopted criteria, Democratic Representative Reives asked how the Common Cause Map could be used as a base map given that the drawers of that map had specifically used racial data in constructing the map. 11/5/19 Video at 4:29:20-4:30:30. Legislative Defendants had no real answer. *See id.* at 4:30:45-4:31:30. Later that evening, Bob Phillips of Common Cause emailed the members of the Select Committee confirming that "racial data was examined and then used in the 'Common Cause map' to make substantial changes to the Northeastern district (1) and the Mecklenburg district (13)," and that "those changes resulted in changes to several others districts that border Districts 1 and 13." Theodore Decl., Ex. C. Mr. Phillips objected more broadly to use of the Common Cause Map as a base map for the remedial plan, including because "the partisan attributes of the map have since been extensively studied, including by the General Assembly leadership in prior litigation." *Id.*

Legislative Defendants nevertheless forged ahead in using the Common Cause Map as their base, though they overhauled most of the districts in the final Remedial Plan. On the first day of map-drawing (November 6), Senator Hise amended the base map in periodic increments all following the same pattern: Over and over again, Senator Hise would leave the public hearing room, return a short time later, and upon returning, direct the career staff to make

[3] *Available at* https://www.ncleg.gov/documentsites/committees/BCCI-6740/11-05-19/2019%20Congressional%20Plan%20Criteria.pdf.

specific changes to the map that obviously had been developed outside the hearing room.[4] Senator Hise frequently took multiple copies of the latest draft map with him when he left the hearing room. *See, e.g., id.* at 4:51:34 (Senator Hise asking staff before leaving the room: "Print me 4 copies of that."). At one point, Representative Lewis could be heard saying to Senator Hise, "I'll be honest with you, I'm starting to detect some similarities," apparently referring to "similarities" between Senator Hise's map and the 2016 Plan. 11/6/19 Video at 3:40:00.

The second day of map-drawing (November 7) proceeded much like the first, except now Senator Newton and Brent Woodcox worked with Senator Hise on the map. Mr. Woodcox is a political staff member who was heavily involved in the creation of the unconstitutional 2011 and 2016 congressional plans as well as the unconstitutional 2017 state legislative plans. *See, e.g.*, Theodore 9/30/19 Decl., Ex. A, Hofeller Depo. at 230:2-9; Ex. B, Lewis Depo. at 43:3-7, 70:2-4, 83:2-93:4, 98:7-101:25; Ex. J, Rucho Depo. at 16:1-11, 36:17-21. Hise, Newton, and Woodcox exited and re-entered the hearing room several times during the day, as Hise had done the day before, once again taking multiple copies of the draft map with them when they left. For instance, at one point before heading to the back room, Senator Newton said to Senator Hise: "Can you bring a couple of copies?" 11/7/19 Video at 1:08:20. Senator Hise then asked a career staff member to print seven copies of the latest map, telling the staff member that "[t]hey want to see what Common Cause looks like" with particular changes. *Id.* at 1:08:20-1:09:30.

[4] *See* 11/6/19 Video at 51:00 (Senator Hise leaves the room); 1:04 (Senator Hise returns and directs specific changes); 1:22:30 (Senator Hise leaves the room); 2:06:00 (Senator Hise returns and directs specific changes); 2:19:20 (Senator Hise leaves the room); 2:26:30 (Senator Hise returns and directs specific changes); 3:09:15 (Senator Hise leaves room); 3:18:05 (Senator Hise returns and directs specific changes); 3:35:40 (Senator Hise leaves the room); 3:39:30 (Senator Hise returns); 3:58:30 (Senator Hise leaves the room); 4:02:15 (Senator Hise returns and directs specific changes); 4:55:00 (Senator Hise leaves the room); 5:30:50 (Senator Hise returns and directs specific changes); 5:45:00 (Senator Hise leaves the room): 7:28:50 (Senator Hise returns and directs specific changes); 7:45:20 (Senator Hise leaves the room); 8:02:20 (Senator Hise returns and directs specific changes).

After Senator Hise's repeated entering and exiting of the hearing room received substantial public attention, Senator Newton picked up where Senator Hise left off on the third day of map-drawing (November 8). Mr. Woodcox was by Senator Newton's side throughout the day and could be seen guiding Senator Newton as he made changes. *See generally* 11/8/19 Video. Mr. Woodcox and Senator Newton finalized the map the next morning (November 9). This Hise-Newton map was then introduced by Representatives Lewis and Hall as HB 1029. No Democratic member had any input at all on the Hise-Newton map.

The House Standing Committee on Redistricting met on November 14 to consider the Hise-Newton map. There, Representative Lewis announced that he had made three small changes. First, he made small changes between Districts 5 and 11, splitting Rutherford County instead of McDowell. 11/14/19 Video at 2:30-7:00. Second, at the request of Representative Reives, Representative Lewis shifted a small amount of population between Districts 1 and 4, both of which were already heavily Democratic. *Id.* This change reflected the only input from any Democratic member on the final plan. Third, Representative Lewis amended Districts 7 and 8, now grouping all of Cumberland County with counties far to the west in District 8. *Id.* The House Standing Committee adopted the amended Hise-Newton map on a straight party-line vote. The House Committee rejected alternative maps offered by Democrats, also on party-line votes.

The full House considered HB 1029 on the floor later that same day. Republican Representative Goodwin introduced an amendment to move Perquimans and Chowan Counties from District 1 to District 3. Republican Goodwin stated that the reason for the amendment was "to restore Perquimans and Chowan Counties into the original district it was in," *i.e.*, under the 2016 Plan. 11/14/19 House Chamber Audio at 1:03:15-40.[5] Thus, the amendment's explicit

[5] *Available at* https://www.ncleg.gov/DocumentSites/HouseDocuments/2019-2020%20Session/Audio%20Archives/2019/11-15-2019.mp3.

purpose was to recreate portions of the 2016 Plan. The amendment passed on a party-line vote. Several Democratic members subsequently introduced alternative plans as amendments. These amendments were rejected on party-line votes, with not a single Republican voting in favor of any of them. The House passed the final Remedial Plan, 55-46, once again on a party-line vote.

The Senate Standing Committee on Redistricting took up the Remedial Plan the next day. Democratic members voiced numerous objections to the map, including that it reflects another obvious partisan gerrymander that recreates many of the prior districts. Notwithstanding these concerns, the Senate Committee adopted the Remedial Plan, yet again on a party-line vote.

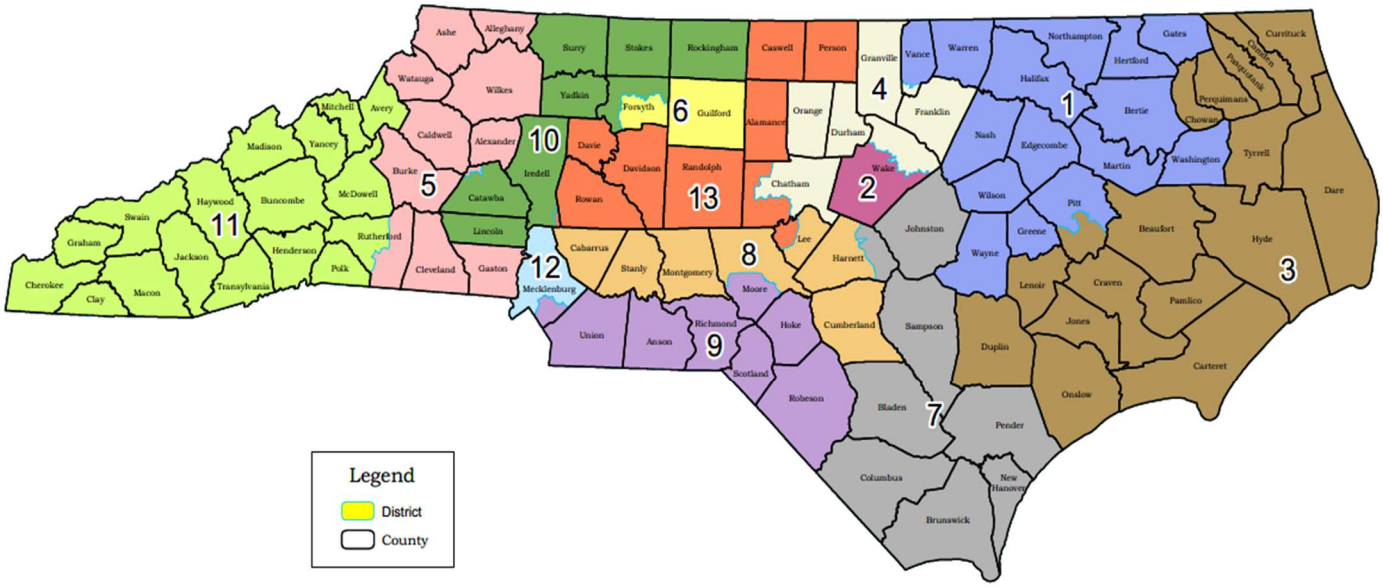
The full Senate debated the Remedial Plan on the floor later that afternoon. In response to criticisms from Democrats that the Remedial Plan is another extreme partisan gerrymander, Republican Senator Tillman acknowledged that they were correct. Senator Tillman stated:

> Evidently you have not read the constitution . . . . It says that in redistricting matters it is the province of the states, and it then becomes the province of the prevailing party. . . . ***It doesn't say anything about being fair. If it belongs to the prevailing party, do you think it should be anything other than partisan? It's set up to be partisan. Do you think we're going to draw Democrat maps?*** Folks, you drew them for 140 years and we sat there and didn't like it, but we took it. . . . ***It is a partisan by design process***. Otherwise it would have said split it between Democrats and Republicans…No, it says it is the prevailing party. . . . My only point is we're doing exactly what you all did for 140 years and it was constitutionally ok. You don't like it. . . . You don't have to like it. . . . ***We don't have to make maps that are non-partisan. This is a partisan process folks, I'm sorry you don't like it. But that's just the way it is.***

11/15/19 Senate Floor Video at 24:10-27:05, *available at* https://www.wral.com/senate-debates-new-congressional-district-map/18769423/ (emphases added).

After rejecting several alternative plans put forward by Democratic members, the Senate adopted the final Remedial Plan, 24-17, once more on a straight party-line vote. Not a single Democrat in either chamber of the General Assembly voted for the Remedial Plan.

Below is an image of the final Remedial Plan:



On November 15, 2019, Legislative Defendants filed the instant motion for summary judgment arguing that this case is moot and that Plaintiffs "must file a new lawsuit" to challenge the Remedial Plan. Leg. Defs. Summ. J. Br. at 5. Yet, a week later, in their November 22 response to the *Brewster* plaintiffs' motion for a preliminary injunction, Legislative Defendants asserted that "it is now too late to implement any congressional plan other than . . . the 2019 Congressional Plan." *Brewster*, ECF No. 39 at 6. Legislative Defendants argued that "the *Purcell* doctrine cited by the *Brewster* plaintiffs should operate to bar any court—including the state court—from making any further last minute changes to North Carolina's congressional districts." *Id.*

ARGUMENT

I. This Case Is Not Moot Because the Remedial Plan Does Not Cure the Partisan Gerrymandering Alleged in the Complaint and Does Not Provide Plaintiffs the Relief Sought in the Complaint

Legislative Defendants' motion fails to address the relevant standards for mootness under North Carolina law. Under controlling precedent, "a matter is rendered moot when (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007) (internal quotation marks omitted). These criteria cannot be met where the defendants' actions do not provide the plaintiffs all of "the relief sought in their complaint." *Hamilton v. Freeman*, 147 N.C. App. 195, 203, 554 S.E.2d 856, 861 (2001). And these rules apply with full force where, as here, plaintiffs challenge a statute and the General Assembly then repeals or amends it during the case. "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) (emphasis added). The Court of Appeals thus has repeatedly refused to find cases moot based on the repeal or amendment of a challenged law. *See, e.g., id.* (case not moot despite repeal and replacement of challenged statute); *Wilson v. N.C. Dep't of Commerce*, 239 N.C. App. 456, 461, 768 S.E.2d 360, 364 (2015) (case not moot because "[t]he statutory amendment does not provide plaintiffs the relief they sought"): *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003) (case not moot despite amendment of challenged ordinance).

Relatedly, the repeal or amendment of a challenged statute does not moot the case if the "general nature of the statutes are unchanged"—*i.e.*, if the "underlying premise of the applicable

statute is still the same." *State v. Chisholm*, 135 N.C. App. 578, 581, 521 S.E.2d 487, 490 (1999); *see also State v. N.C. Auto. Rate Admin. Office*, 293 N.C. 365, 393-94, 239 S.E.2d 48, 66 (1977). Even under the case relied on by Legislative Defendants, a case cannot be moot unless the challenged statute is revised "in a 'material and substantial' manner, with the intent 'to get rid of a law of dubious constitutionality.'" *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 159, 749 S.E.2d 451, 454 (2013) (internal quotation marks omitted).

Moreover, where litigants contend that their voluntary conduct has mooted a case, they bear the "heavy burden" of establishing that the mootness criteria are met. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). Legislative Defendants therefore bear the burden of demonstrating both that "the alleged violation has ceased," and that the "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Kinesis*, 187 N.C. App. at 20, 652 S.E.2d at 298; *see also Lake Pilots Ass'n, Inc. v. U.S. Coast Guard*, 257 F. Supp. 2d 148, 157 (D.D.C. 2003); *Thomas v. N.C. Dep't of Human Res.*, 124 N.C. App. 698, 706, 478 S.E.2d 816, 821, (1996), *aff'd*, 346 N.C. 268, 485 S.E.2d 295 (1997). Here, Legislative Defendants make no effort to show that "the alleged violation has ceased," that the Remedial Plan "completely or irrevocably" cures the partisan gerrymandering in the 2016 Plan, or that the Remedial Plan otherwise provides Plaintiffs the relief sought in the Complaint. It does none of those things.

A. Plaintiffs Are Entitled to a Declaration That the 2016 Plan Violates the North Carolina Constitution

Plaintiffs have requested that this Court "declare that the 2016 Plan is unconstitutional and invalid." Compl., Prayer for Relief ¶ b. No such final declaratory judgment has yet been entered, and conclusively deciding the constitutionality of the 2016 Plan is not an abstract

question of law that will be without practical consequence. Declaring that the 2016 Plan violates the North Carolina Constitution will have concrete consequences in at least three respects.

First, 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. The North Carolina Constitution guarantees that "every person for an injury done . . . shall have remedy by due course of law." N.C. Const. art. I, § 18. Indeed, it is a bedrock principle of the American judicial system that "[o]nce 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). That maxim holds particular force in the redistricting context, since "[r]elief in redistricting cases is fashioned in the light of well-known principles of equity." *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (internal quotation marks omitted). If and when this Court declares that the 2016 Plan violates the North Carolina Constitution, there could be no dispute that the Court has broad authority to ensure that the remedy—*i.e.*, the Remedial Plan or any other new plan—cures the constitutional violations underlying the Court's judgment.

Second, and relatedly, a declaration that the 2016 Plan districts are unconstitutional will bear directly on the legality of the districts in the Remedial Plan. As detailed below, several districts in the Remedial Plan substantially recreate the prior versions of the districts under the 2016 Plan, including specific features of the gerrymandering of those districts alleged in the Complaint. A declaration that the 2016 districts were unconstitutional will be highly probative of whether the similarly constructed districts under the Remedial Plan are also unconstitutional.

Third, independent of this Court's review of the Remedial Plan, a declaratory judgment that the 2016 Plan violates the North Carolina Constitution will have important consequences for

the collateral federal lawsuit brought by allies of Legislative Defendants. The *Brewster* plaintiffs have asked the federal court to reinstate the 2016 Plan and enjoin any changes to it. *Brewster*, No. 2:19-cv-00037-FL, ECF No. 22. Plaintiffs in the instant case, who have been granted intervention as defendants in *Brewster*, have argued that principles of federalism and comity preclude the federal court from reinstating a plan that a state court has found to violate the state constitution. However, if this Court were to dismiss this case without a final judgment declaring that the 2016 Plan violates the state constitution, the *Brewster* plaintiffs will likely cite that fact in support of their request that the federal court reinstate the 2016 Plan. Indeed, the mere existence of the federal *Brewster* lawsuit precludes a finding of mootness here. It cannot be that Plaintiffs' request for a declaration that the 2016 Plan is unconstitutional is moot when litigants in another case are actively seeking to have the 2016 Plan used in the 2020 elections. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (appeal not moot, even though General Assembly had enacted new plan to replace plan at issue, where the legislation enacting the new plan provided for possibility of reverting to the prior plan).

B. Plaintiffs Are Entitled to a New Plan That Cures the Gerrymandering Under the 2016 Plan and Complies with the State Constitution

Independent of Plaintiffs' right to a declaratory judgment, this case is not moot because Plaintiffs seek—and have not obtained—a new congressional plan that cures the partisan gerrymandering under the prior plan and that complies with the North Carolina Constitution. Plaintiffs requested 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." Compl., Prayer for Relief ¶ c. 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 and intentional partisan gerrymander that recreates many features of the 2016 Plan. Accordingly, Plaintiffs' request that this Court "[e]stablish a new congressional districting plan that complies with the North Carolina Constitution" remains very much live. The Remedial Plan "does not provide plaintiffs the relief they sought," *Wilson*, 239 N.C. App. at 460, 768 S.E.2d at 364, and it perpetuates rather than "completely and irrevocably eradicate[s] the effects of the alleged violation." *Kinesis*, 187 N.C. App. at 20, 652 S.E.2d at 298

1. Nearly Every District in the Remedial Plan Is an Extreme Outlier

There is no doubt that the Remedial Plan is another extreme partisan gerrymander. As shown below and detailed in Dr. Chen's attached declaration, nearly every district under the Remedial Plan is an extreme outlier. Dr. Chen finds that, when compared to Simulation Set 1 or Set 2, at least 10 of 13 districts are more extreme in their partisanship than over ***94%*** of their corresponding districts in the simulations. *See* Chen 11/22/19 Decl. at 6-9. Remarkably, seven districts are outliers above the ***98.7%*** level. *See id.* 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. It is an 8-5 partisan gerrymander.

Figure 1: Simulation Set 1:
Districts' Democratic Vote Share Measured Using the 10 Statewide Elections during 2010–2016

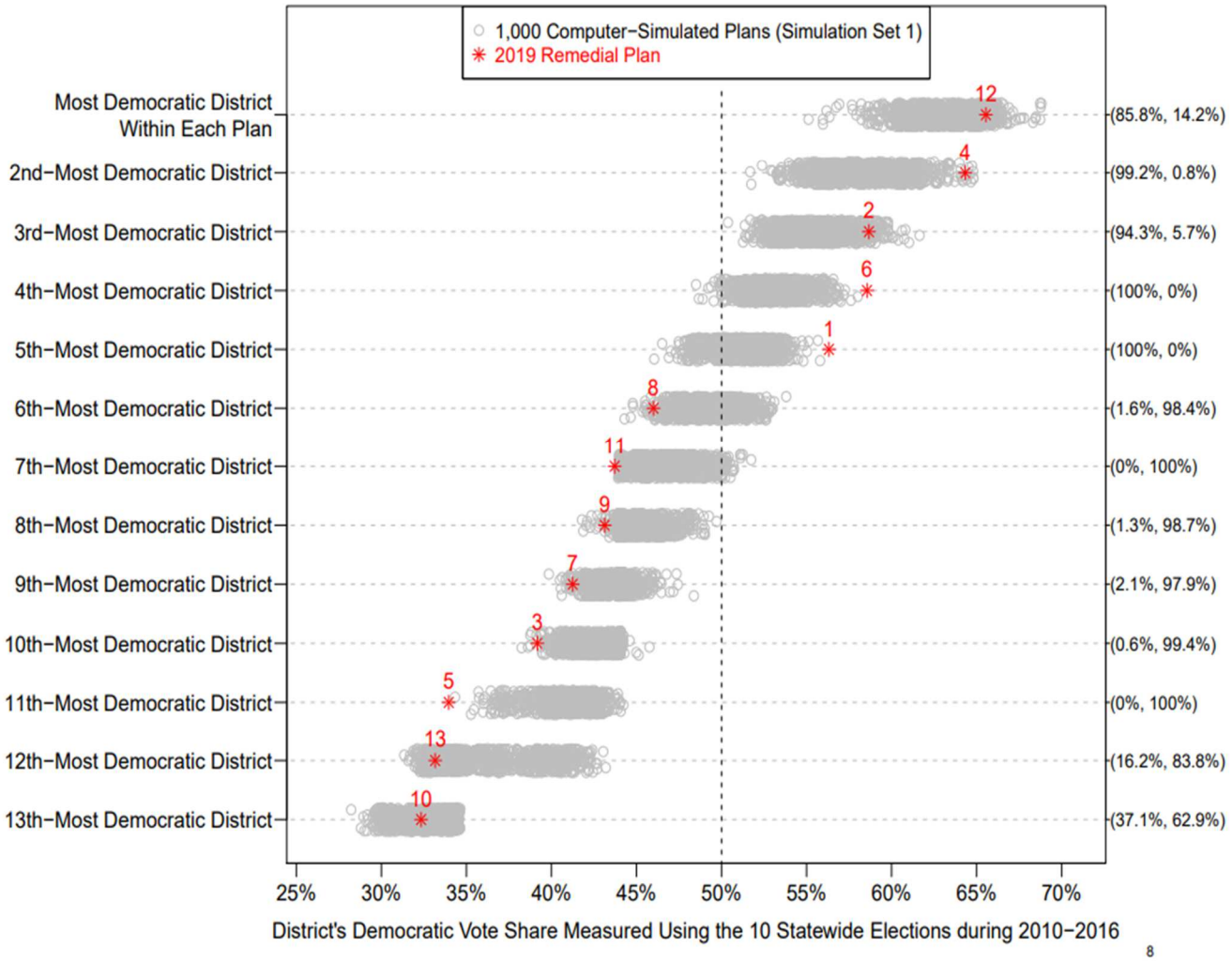
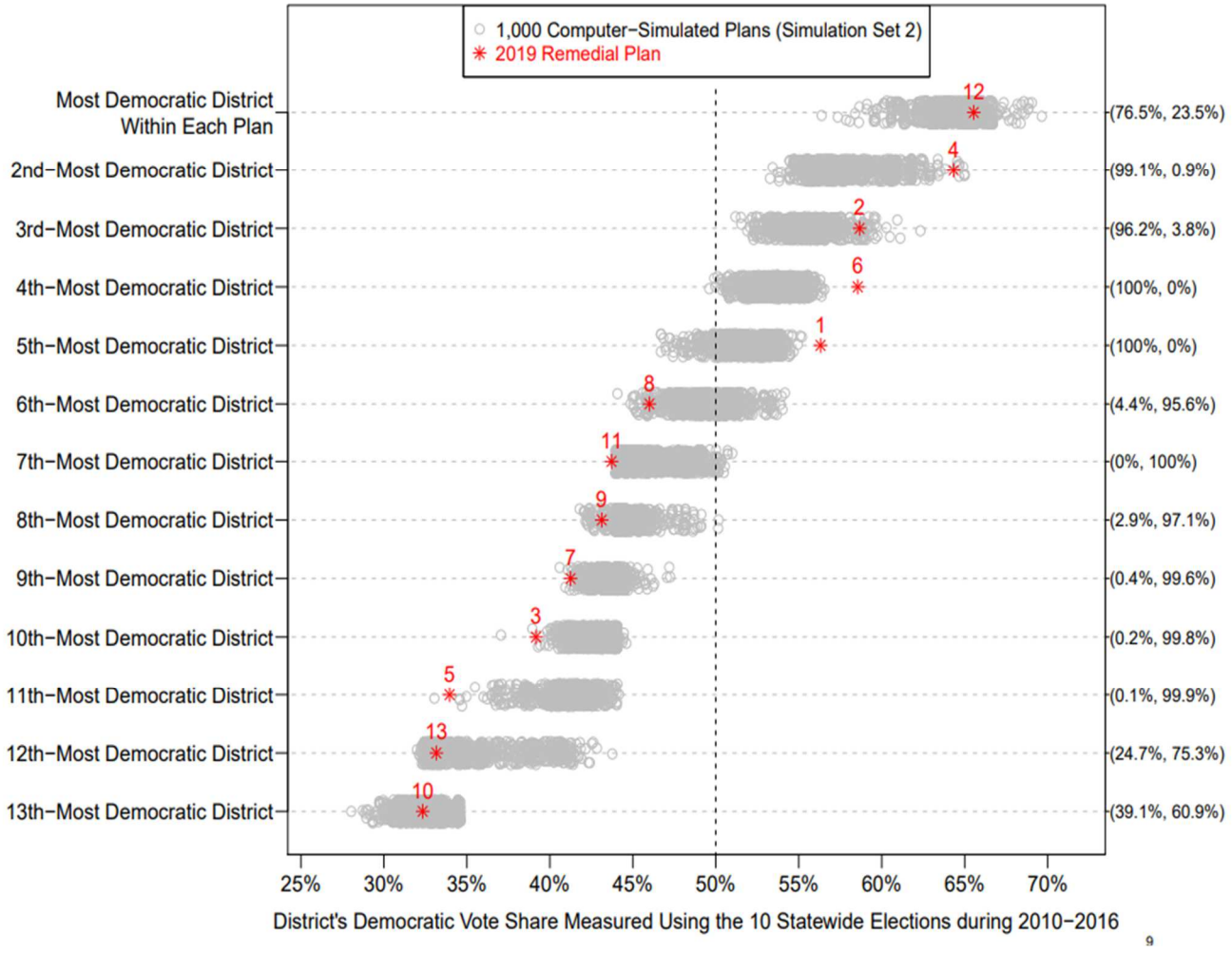


Figure 2: Simulation Set 2:
Districts' Democratic Vote Share Measured Using the 10 Statewide Elections during 2010–2016



Thus, just like the 2016 Plan, the Remedial Plan "seek[s] to predetermine elections outcomes in specific districts." *Common Cause v Lewis*, 2019 WL 4569584, at *112 (N.C. Super. Sep. 03, 2019). The Remedial Plan guarantees an 8-5 Republican advantage under any realistic election environment. Once again, it is the will of the mapmaker, not the will of the people, that will prevail if the 2020 elections go forward under the Remedial Plan.

2. Nearly Every Plaintiff Continues to Live in a District That Is an Extreme Partisan Outlier

Not only does nearly every district continue to be an extreme partisan outlier in the Remedial Plan, but nearly every individual Plaintiff continues to live in a district that is an

extreme outlier compared to the district in which that Plaintiff would live under a nonpartisan plan. This Court has held that individual voters establish a cognizable injury if they "live in . . . districts that are outliers in partisan composition relative to the districts in which they live under Dr. Chen's nonpartisan simulated plans." *Common Cause*, 2019 WL 4569584, at *107. Plaintiffs established in their summary judgment brief that this was the case for all 14 individual Plaintiffs under the 2016 Plan, and Dr. Chen's attached declaration establishes that it continues to be the case for at least 11 of the individual Plaintiffs under the Remedial Plan.

As shown below and in Dr. Chen's declaration, five Plaintiffs (Rumph, Cohen, Gates, Peters, and Barnes) live in districts under the Remedial Plan that are less Democratic than their district in almost all of Dr. Chen's simulations, for both Set 1 and Set 2. Chen 11/22/19 Decl. at 10-14. Plaintiffs Rumph and Cohen in particular—who live in Districts 3 and 7 respectively—would live in districts that would be far more competitive or even Democratic-leaning under a nonpartisan plan, but instead are in safe Republican districts under the Remedial Plan. Six additional Plaintiffs (Oseroff, Brown, Quick, Crews, Brien and Dunn) live in districts under the Remedial Plan that are outliers in the other direction, in that their districts have higher Democratic vote shares than their districts under the simulations. *Id.*

Figure 3:
Plaintiffs' Districts in the Remedial Plan and in Simulation Set 1

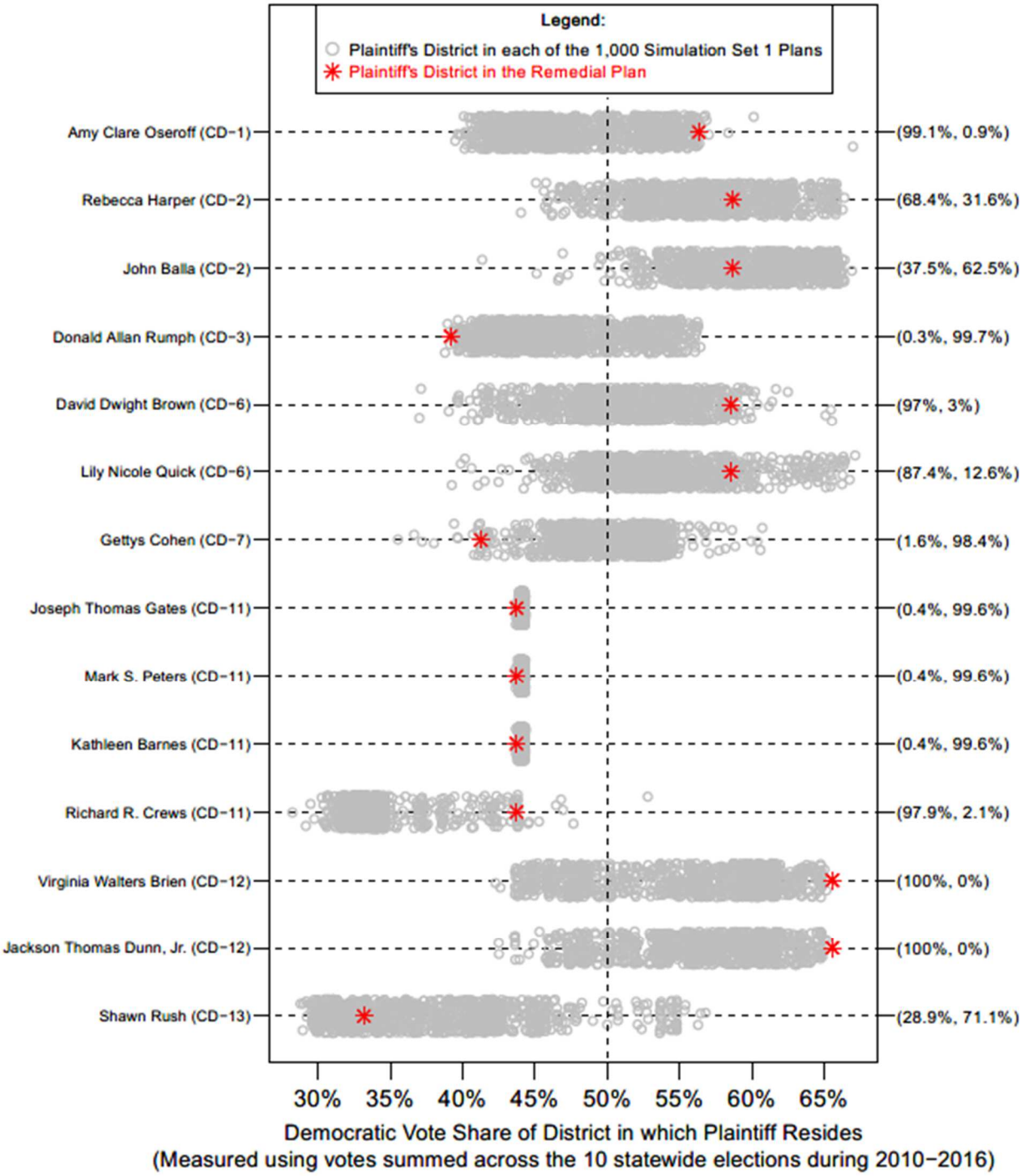


Figure 4:
Plaintiffs' Districts in the Remedial Plan and in Simulation Set 2

Under this Court's holding in *Common Cause*, each of these 11 individual Plaintiffs continues to have "a personal stake in the outcome of the controversy," and continues to suffer "a specific harm directly attributable to the partisan gerrymandering of the district in which they reside." 2019 WL 4569584, at *107. These Plaintiffs continue to live in districts that, "through cracking and packing, . . . dilute the[ir] voting power," *id.*, just like under the 2016 Plan.

It is hornbook law that a case is not moot where the harms underlying Plaintiffs' claims have not "ceased" or been "completely and irrevocably eradicated." *Kinesis*, 187 N.C. App. at 20, 652 S.E.2d at 298; *see also Bailey*, 202 N.C. App. at 182, 689 S.E.2d at 582 (repeal of a statute does not moot claims where the repeal "does not provide the injured party with adequate relief or the injured party's claim remains viable"). Here, the injury that Plaintiffs asserted in the Complaint—the dilution of their voting power through the packing and cracking of Democratic voters in their districts—has not been remedied. This case therefore cannot be moot.

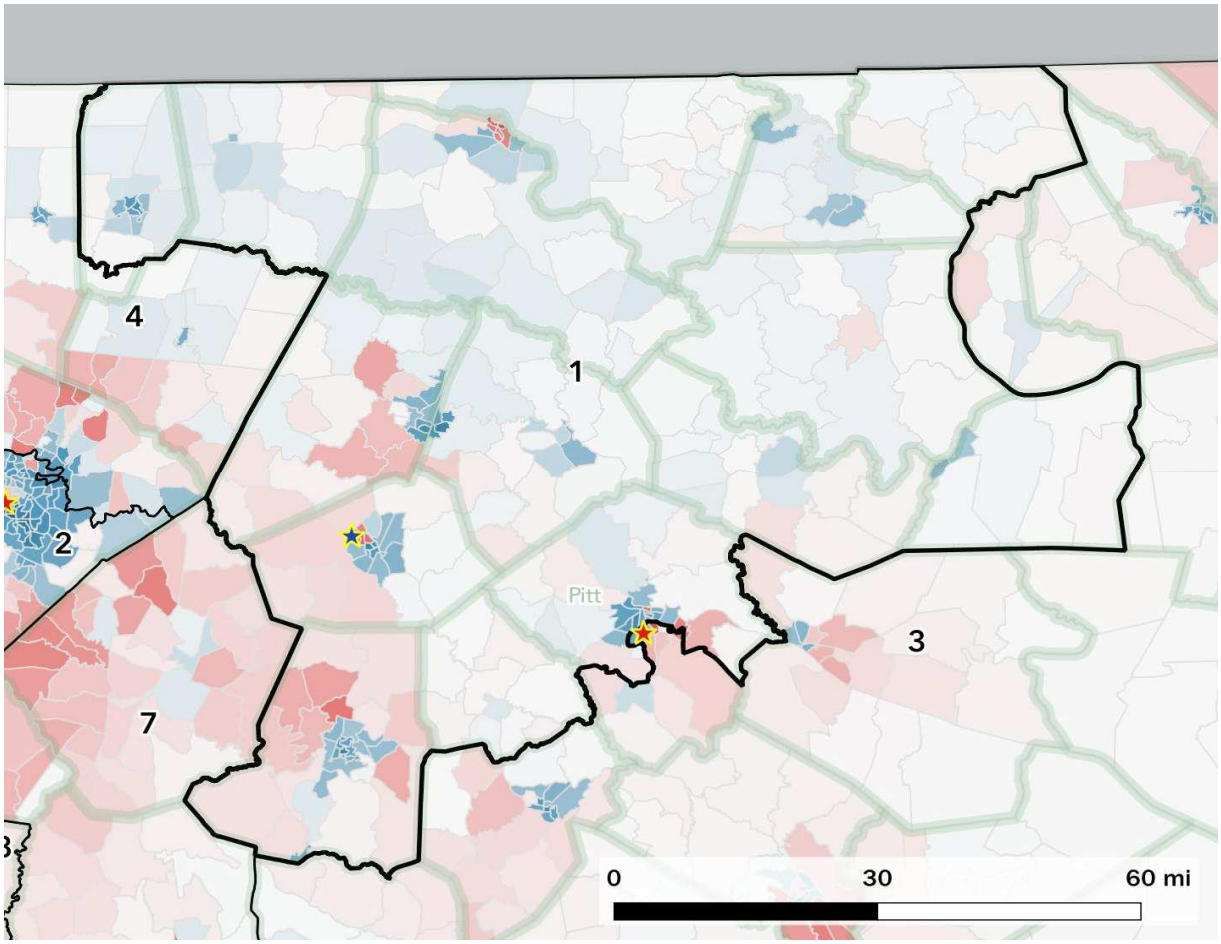
3. The Remedial Plan Substantially Recreates Many of the Districts under the 2016 Plan

Eliminating any conceivable doubt that this case remains very much live, the Remedial Plan substantially recreates many of the districts under the 2016 Plan, including specific gerrymandered features alleged in Plaintiffs' Complaint. Below are the most egregious examples of how the Remedial Plan recreates the gerrymandering under the 2016 Plan.[6]

[6] Other districts not shown individually in this brief are also extremely gerrymandered. The maps presented in Mr. Esselstyn's attached declaration show, for instance, how Districts 4 and 6 are packed with Democratic voters, while District 13 stiches together Republican areas to ensure that District 13 is a safe Republican seat. Plaintiffs focus in this brief regarding mootness, however, on the districts that recreate the specific features of the same district under the 2016 Plan. *See* Esselstyn 11/22/19 Decl. at 6, 8, 15.

Congressional District 1

Plaintiffs alleged in the Complaint that, under the 2016 Plan, District 1 was a packed Democratic district that "divides Pitt County for partisan ends, placing Pitt County's most Democratic VTDs in District 1 to the north, while putting the county's more moderate and Republican VTDs in District 3 to the south." Compl. ¶ 80. All the same is true under the Remedial Plan. District 1 again is a packed Democratic district that splits Pitt County and takes its most heavily Democratic VTDs, pairing them with Democratic counties to the north.

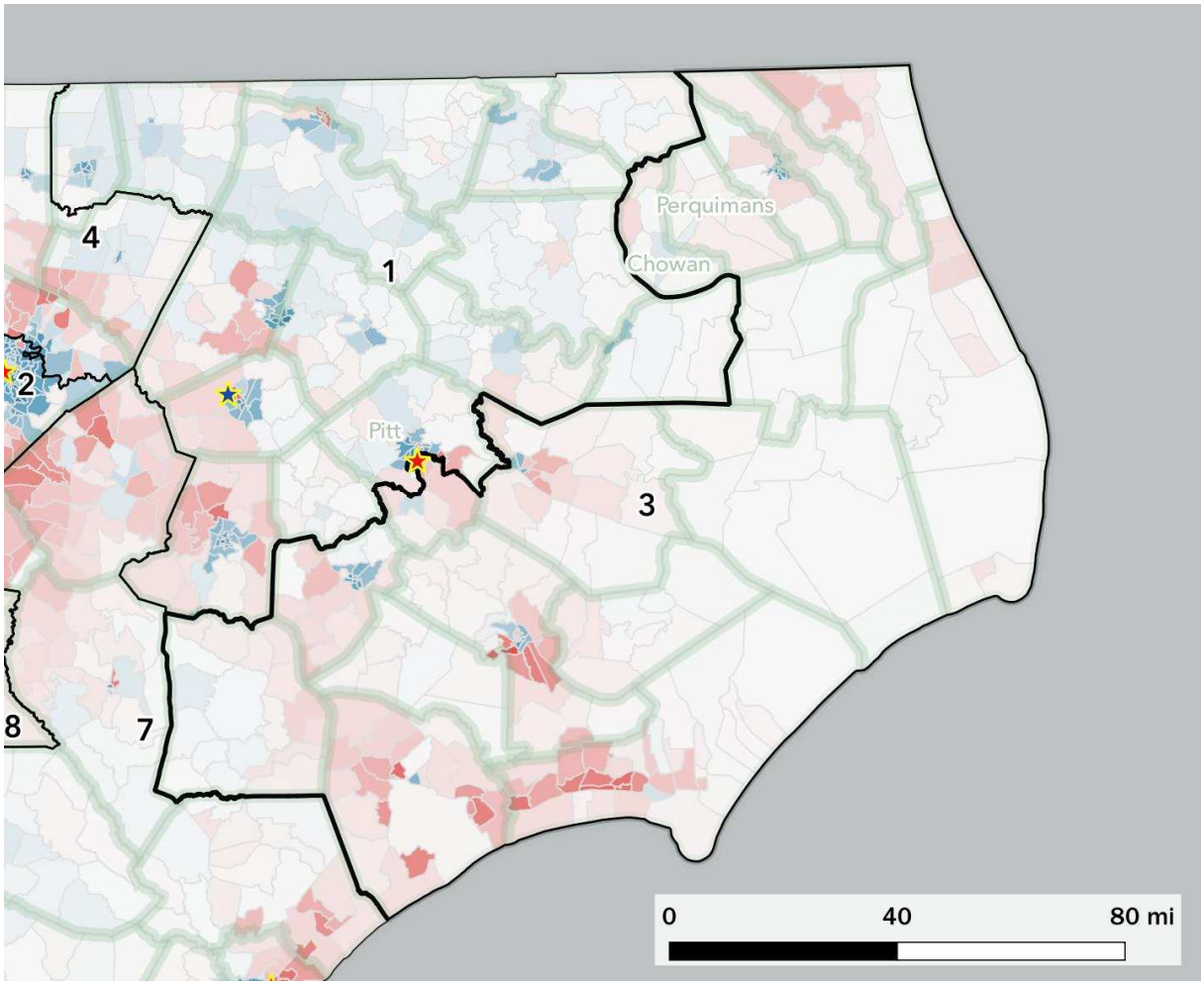


Esselstyn 11/22/19 Decl. at 3.

Congressional District 3

District 3 in the Remedial Plan is almost an exact replica of the prior version under the 2016 Plan. That is no accident—Representative Goodwin introduced an amendment that he himself explained was designed "to restore" Chowan and Perquimans Counties to "the original" District 3 from the 2016 Plan. 11/14/19 House Chamber Audio at 1:03:15-40. That amendment passed on a straight party-line vote.

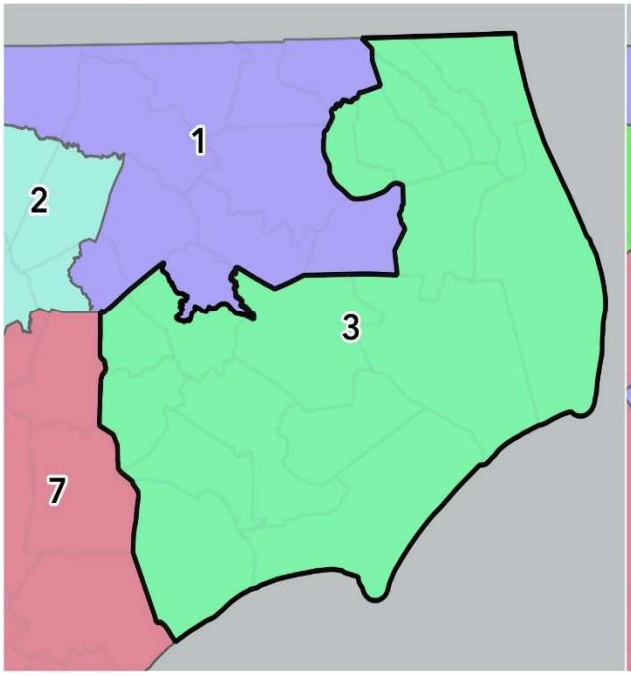
Just like in the 2016 Plan, District 3 again contains almost of all of Pitt County's Republican VTDs, and District 3 once again "avoids a handful of moderate and Democratic counties in eastern North Carolina." Compl. ¶ 85.



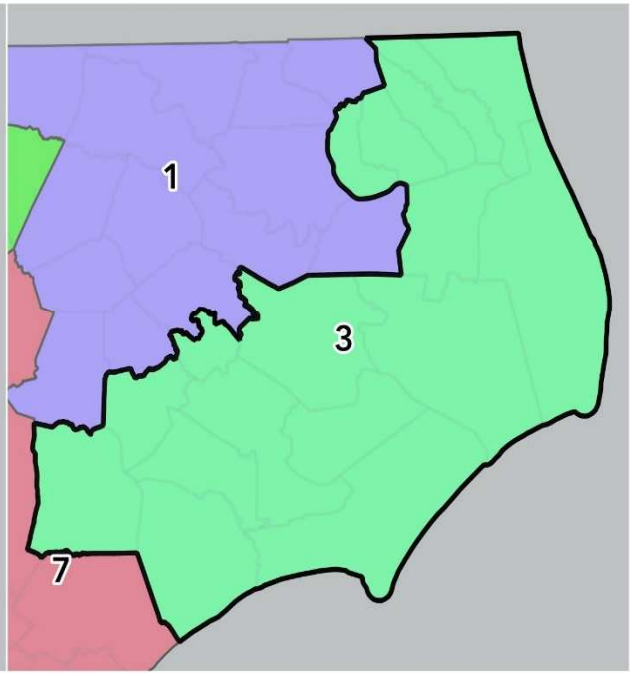
Esselstyn 11/22/19 Decl. at 5.

The following is a side-by-side comparison of the Remedial Plan to the 2016 Plan illustrating the remarkable extent to which the prior version of District 3 has been replicated in the Remedial Plan:

2016 Congressional District 3



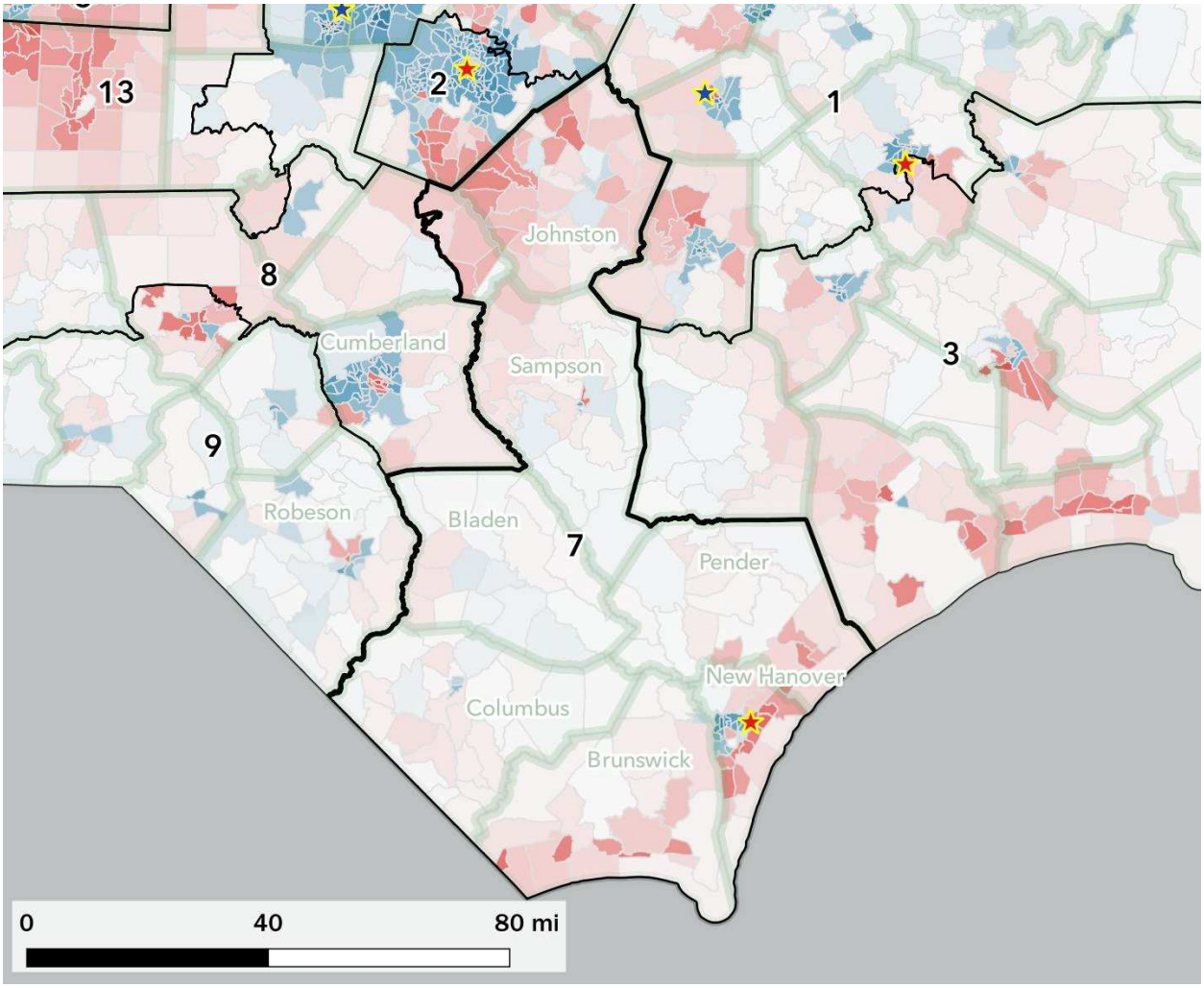
Remedial Congressional District 3



Esselstyn 11/22/19 Decl. at 16.

Congressional District 7

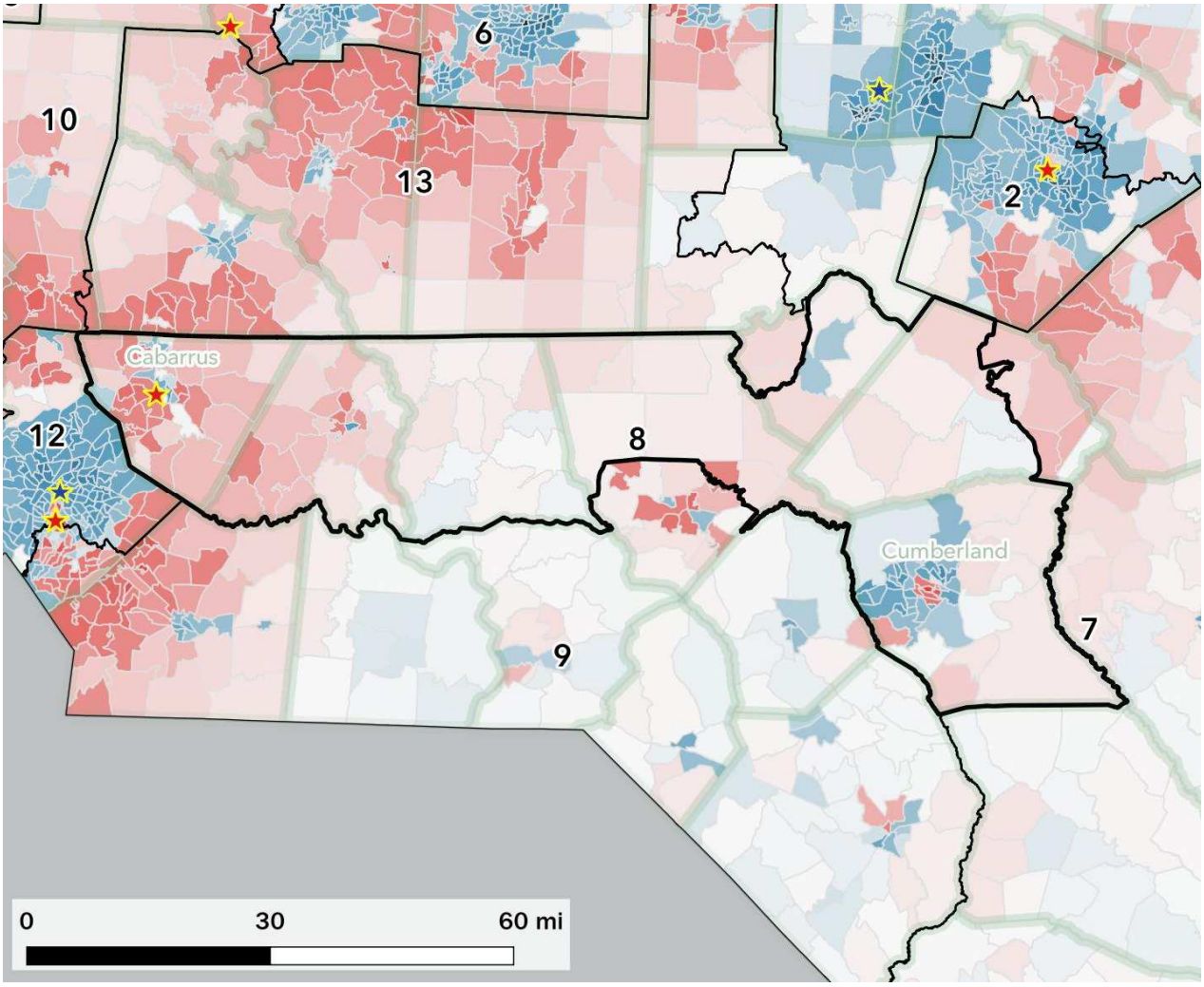
District 7 substantially recreates the prior version of the district to keep this a safe Republican seat. District 7 again joins New Hanover, Brunswick, Columbus, Pender, Sampson, Bladen, and Johnston Counties, and again avoids combining New Hanover County's Democratic voters with the Democratic voters of Cumberland or Robeson Counties. *Compare* Compl. ¶ 95.



Esselstyn 11/22/19 Decl. at 9.

Congressional District 8

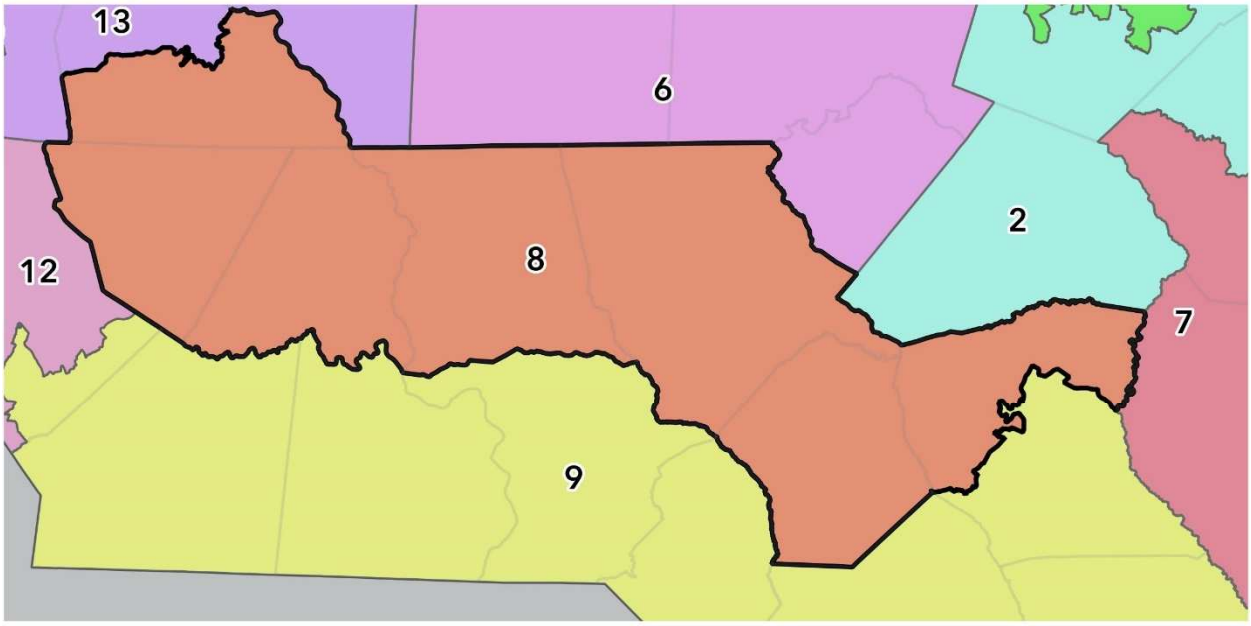
District 8, along with Districts 9 and 12, may be the most flagrant examples of extreme gerrymandering that recreates key features of the 2016 Plan. Once again, District 8 starts in Cumberland County and "then slices to the west, picking up Republican voters in county after county." Compl. ¶ 97. District 8 thus again stretches over 120 miles from Cabarrus County to Cumberland County, all in an effort to waste the votes of Cumberland's Democratic voters.



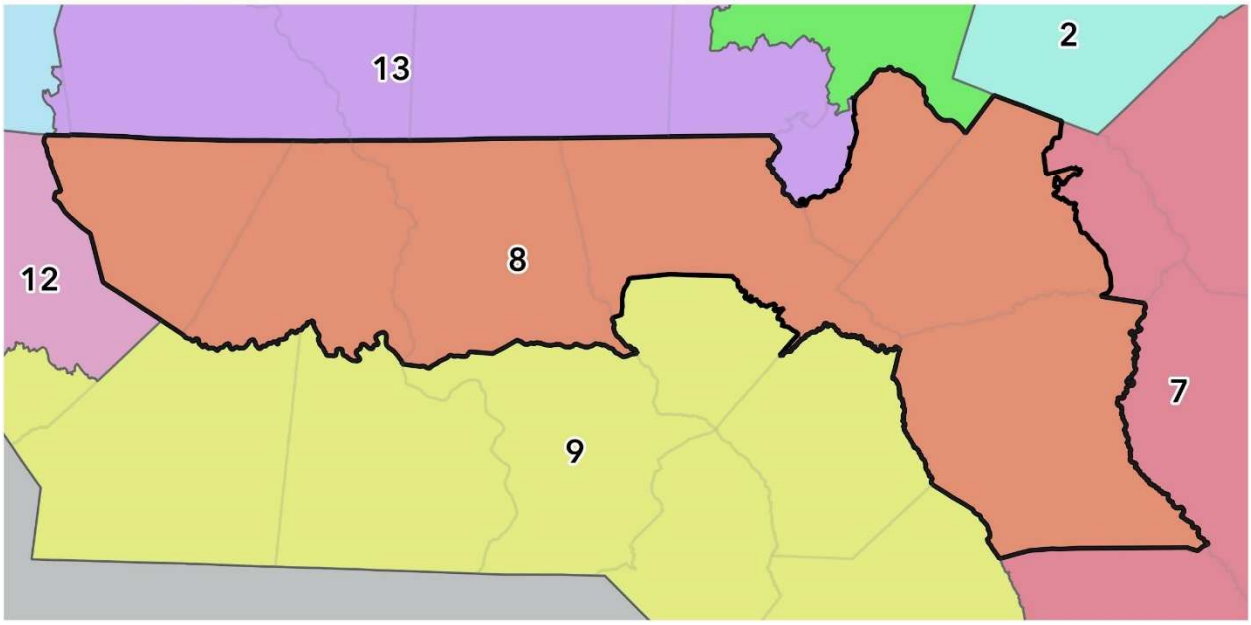
Esselstyn 11/22/19 Decl. at 10.

The maps below show the materially identical structures of the versions of District 8 under the 2016 Plan and the Remedial Plan.

2016 Congressional District 8



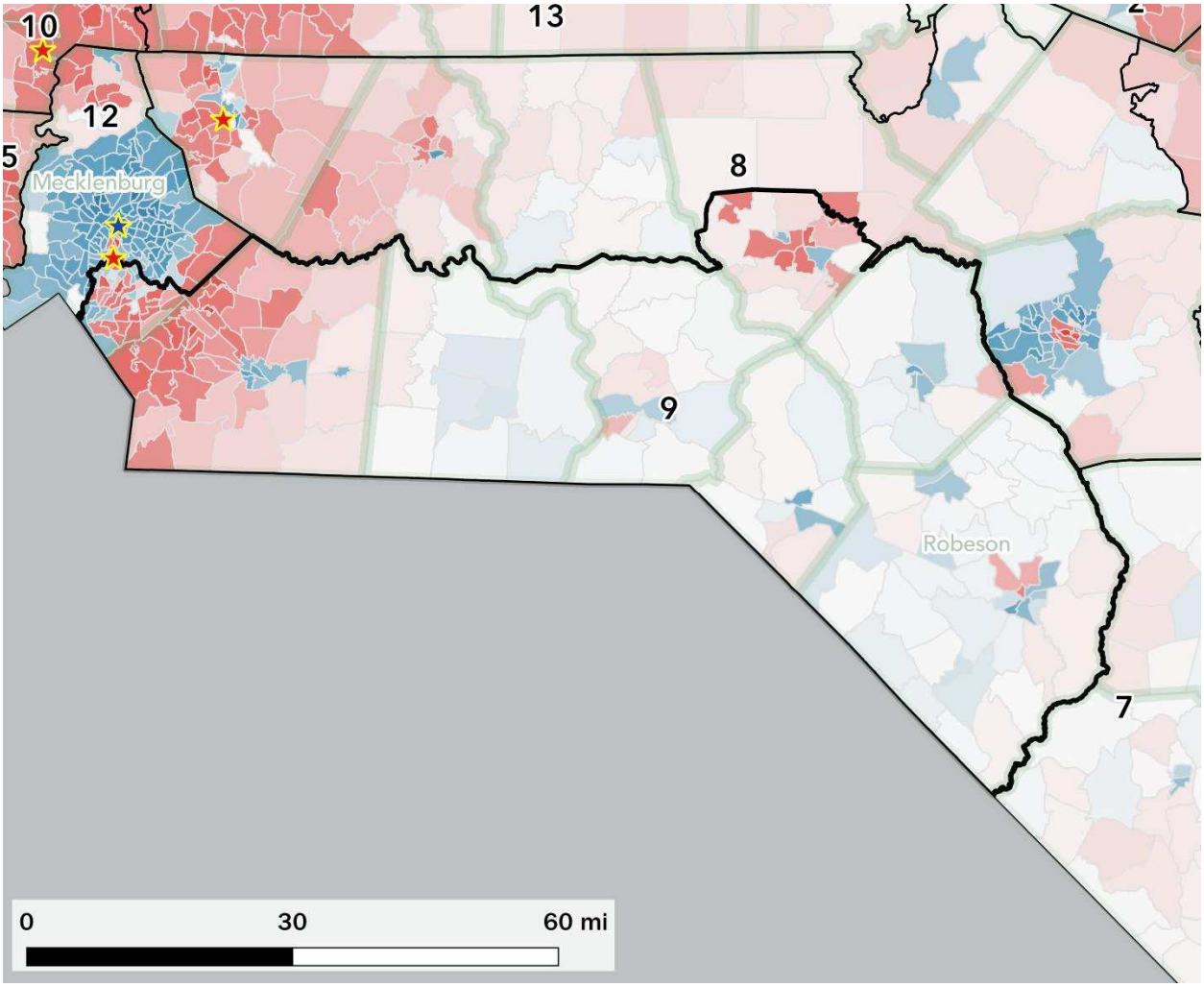
Remedial Congressional District 8



Esselstyn 11/22/19 Decl. at 17.

Congressional District 9

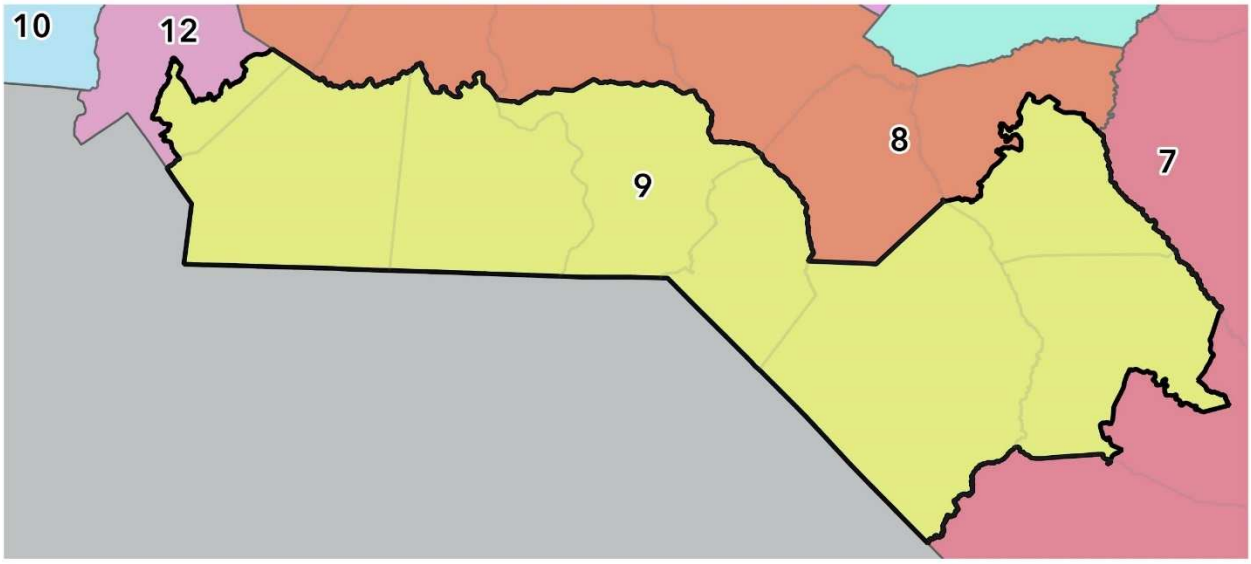
Just like in the 2016 Plan, "District 9 is a near mirror image of District 8." Compl. ¶ 99. Once more, District 9 begins in the southeast in Robeson County "and then, like District 8, stretches west to pick up Republican voters." *Id.* As before, District 9 ultimately "reaches into Mecklenburg County and picks up the 'pizza slice' in Mecklenburg County[,] . . . carefully exclud[ing] virtually all of Mecklenburg County's Democratic VTDs, which instead are packed into District 12." *Id.*



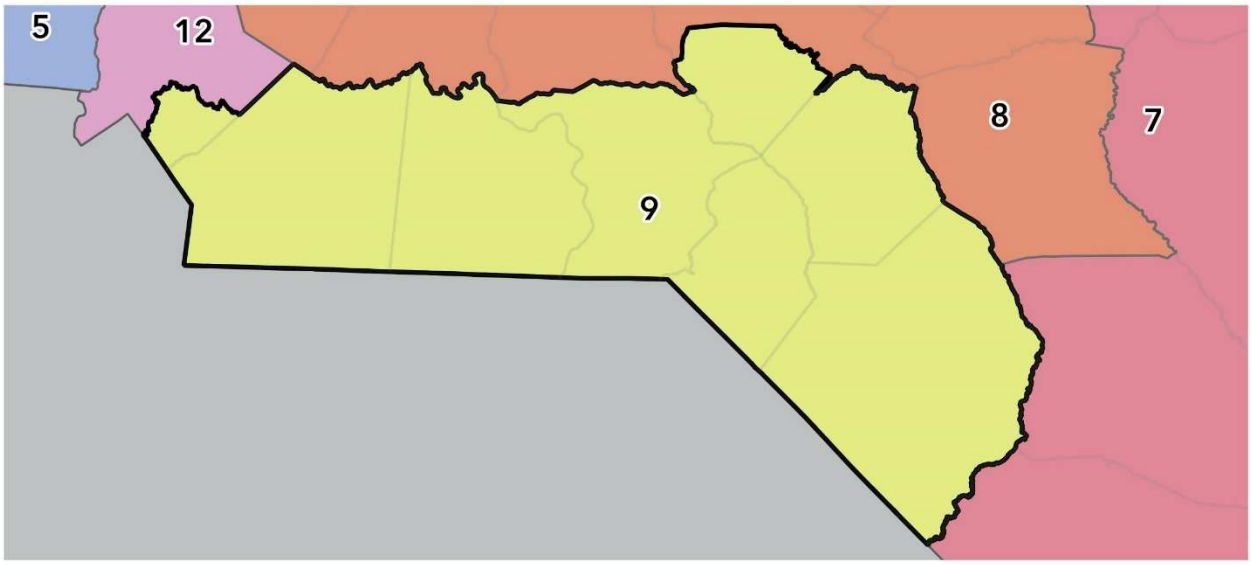
Esselstyn 11/22/19 Decl. at 11.

The maps below illustrate how District 9 was constructed in the Remedial Plan to replicate the core features of the prior version under the 2016 Plan.

2016 Congressional District 9



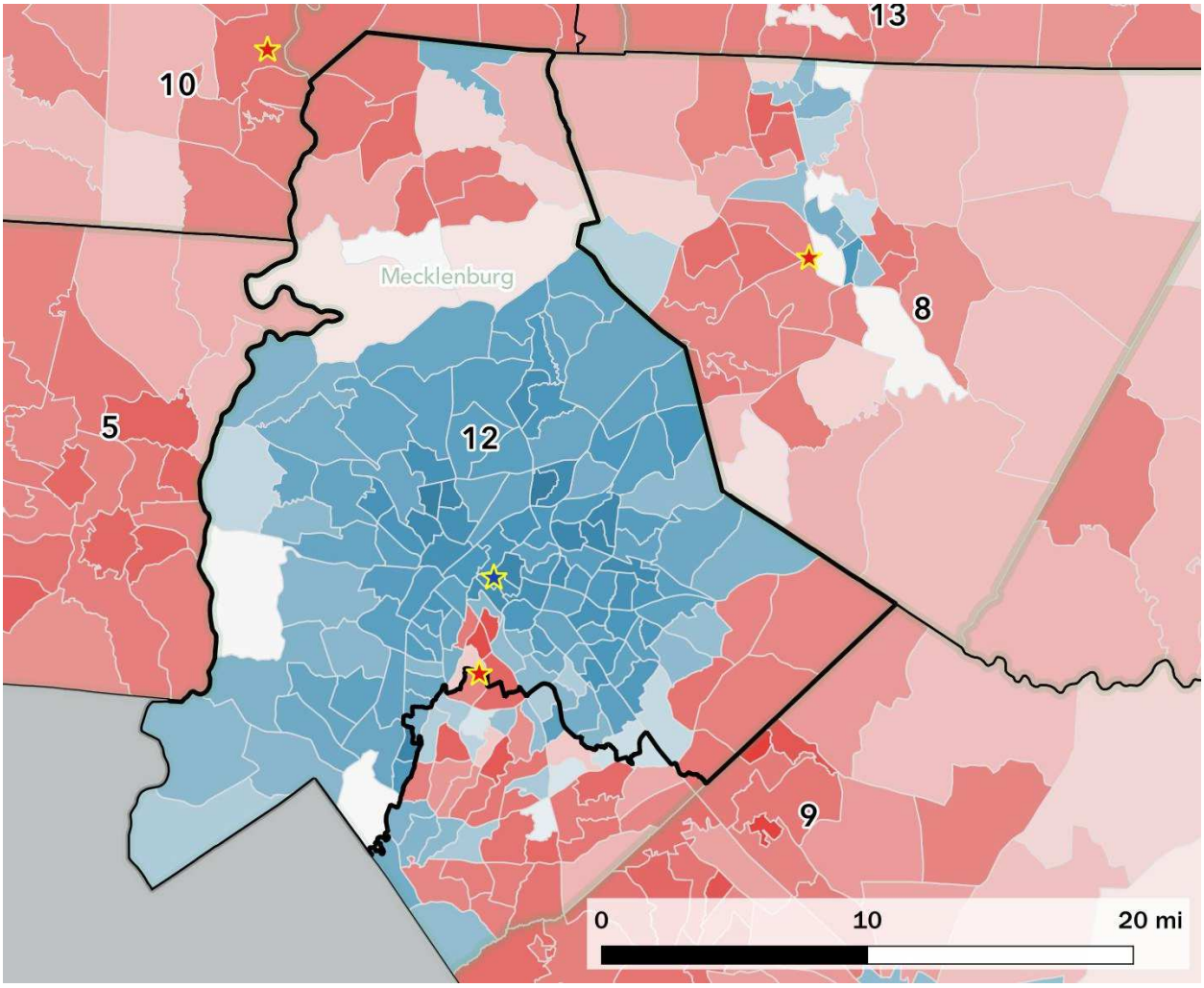
Remedial Congressional District 9



Esselstyn 11/22/19 Decl. at 18.

Congressional District 12

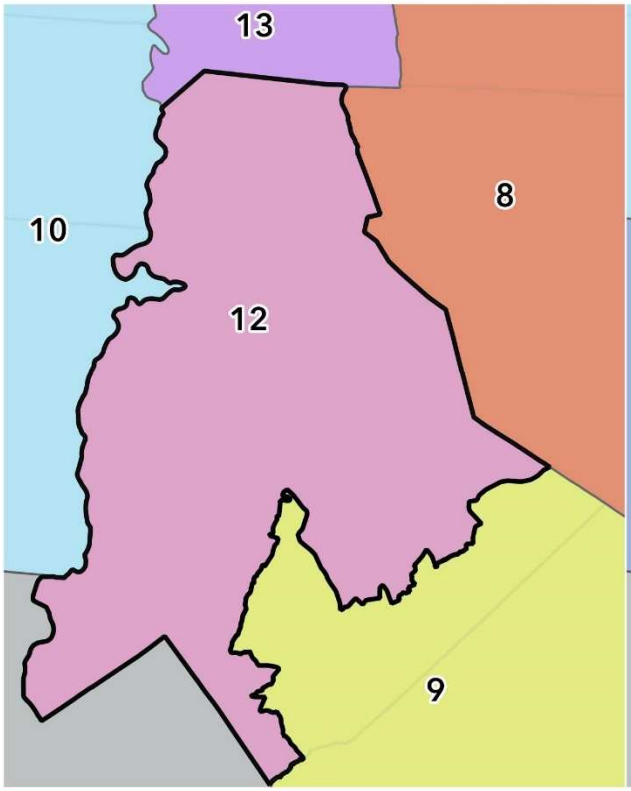
District 12 remains a packed Democratic district. Plaintiffs alleged in the Complaint that, under the 2016 Plan, District 12 packed "Mecklenburg County's most Democratic VTDs, carefully excluding the Republican-leaning 'pizza slice' in the southern part of Mecklenburg County to ensure that District 12 is an overwhelmingly Democratic district." Compl. ¶ 104. District 12 under the Remedial Plan remains no different.



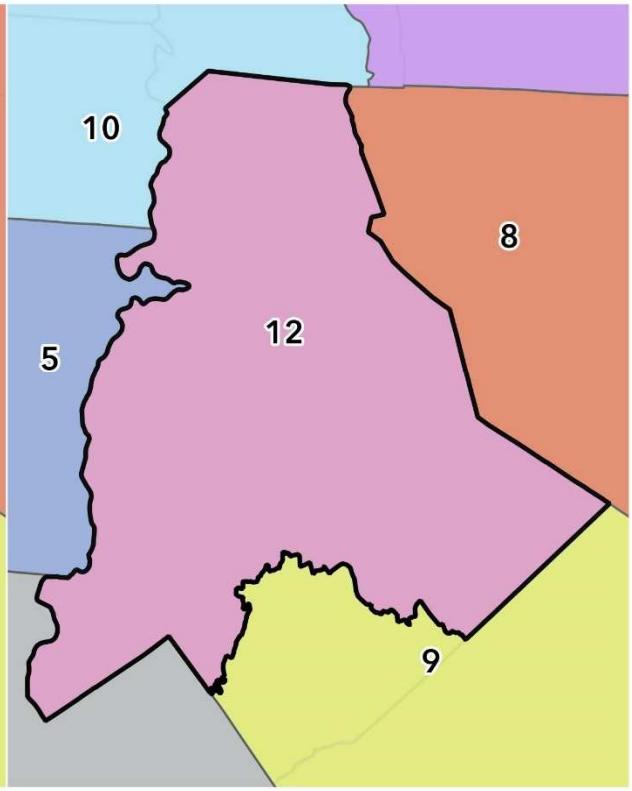
Esselstyn 11/22/19 Decl. at 14.

As illustrated by the maps below, the replication of the old District 12 is unmistakable.

2016 Congressional District 12



Remedial Congressional District 12



Esselstyn 11/22/19 Decl. at 19.

This case would not be moot regardless, but it certainly cannot be moot where the General Assembly has so clearly recreated aspects of the 2016 Plan that formed the basis for Plaintiffs' Complaint and this Court's preliminary injunction. Legislative Defendants cannot be permitted to evade this Court's preliminary injunction by going forward with elections under districts that are materially identical to the ones this Court has already enjoined.

* * *

In sum, Legislative Defendants have now shown, and cannot show, that "the alleged violation has ceased" and that the Remedial Plan "completely and irrevocably eradicated the

effects of the alleged violation." *Kinesis*, 187 N.C. App. at 20, 652 S.E.2d at 298. The violation of plaintiffs' constitutional rights continues, and the case is not moot.

II. Prior Redistricting Cases in North Carolina Confirm That this Case Is Not Moot

Prior redistricting cases, including two recent cases in North Carolina, confirm that the General Assembly's adoption of a new plan does not moot this case. 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 underlying the 2016 Plan.

Even more on point is the U.S. Supreme Court's 2018 decision in *Covington*. That decision makes clear that this Court can and must review the Remedial Plan regardless of whether it enters a declaratory judgment regarding the 2016 Plan. 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 like they do 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, just like they do here, 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.; see* Leg. Defs. Summ. J. Br. at 5 (arguing that Plaintiffs in the instant case "must file a new lawsuit" to challenge the Remedial Plan).

In an 8-1 decision, the U.S. Supreme Court rejected Legislative Defendants' position. 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).

That is exactly the case here with 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." *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 contend that "some of the new districts [are] mere continuations of the old, gerrymandered districts." *Id.* Other courts have recognized that redistricting challenges do not become moot with the enactment of a new plan in such circumstances. For instance, in *Perez v. Abbott*, the federal court held that the plaintiffs' lawsuit was not moot where "numerous alleged infirmities from the [old] plans remained in the [new] plans that Plaintiffs contended were continuing to injure them." 253 F. Supp. 3d 864, 875 (W.D. Tex. 2017). "[M]any asserted VRA and constitutional infirmities were not remedied in the interim plans, and thus the injuries were alleged to persist in the [new] plans." *Id.* "Thus, there was not only a possibility that Defendants would continue to engage in conduct that Plaintiffs claimed violated the VRA or the Constitution, Defendants were continuing to engage in exactly such conduct when they adopted the [new] plans." *Id.* The court also noted that the legislature had adopted the new plans "in an attempt to end this particular litigation, not because it conceded the any of its actions were wrongful." *Perez v. Perry*, 26 F. Supp. 3d 612, 622 (W.D. Tex.

2014). The same is true here. Legislative Defendants have adopted the Remedial Plan in an effort to moot this litigation, and nothing more. Legislative Defendants have never conceded that the 2016 Plan was unconstitutional; to the contrary, they have vocally maintained their position that the 2016 Plan was lawful, and they have now recreated many of that plan's districts.

The sole redistricting case that Legislative Defendants cite as support for their mootness argument is *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004), but that case is eminently distinguishable. It did not even involve a question of mootness. In the original *Stephenson* action, the plaintiffs alleged that the 2001 state legislative plans violated the Whole County Provision. 358 N.C. at 222-23, 595 S.E.2d at 114-15. After the North Carolina Supreme Court held that the 2001 plans did violate that provision, the General Assembly enacted the 2002 plans and submitted them to the Superior Court in Johnston County for "judicial review." *Id.* The Superior Court held that the 2002 plans failed to cure the constitutional violations of the prior plans, and the court adopted its own "interim plans" to be used in the 2002 elections. *Id.* The state Supreme Court affirmed. *Id.* Once these "final orders" had been issued and the "2002 elections had been held" under the lawful, court-ordered remedial plans, the "case was over." 358 N.C. at 226, 595 S.E.2d at 117. It was *after* this point, in November 2003, that the General Assembly enacted new 2003 plans and a separate statute that made Wake County the exclusive venue for redistricting challenges. 358 N.C. at 222-23, 595 S.E.2d at 117. The *Stephenson* plaintiffs then filed a "motion" with the Johnston County Superior Court seeking to have the exclusive venue provision declared invalid for purportedly depriving them, retroactively, of the ability to challenge the new 2003 plans in Johnston County. The North Carolina Supreme Court held that the exclusive venue provision did not have improper retroactive effect because the case

was already "over" at the time the statute was passed. 358 N.C. at 225-26, 595 S.E.2d at 117. The concept of "mootness" was not mentioned anywhere in the decision.

Here, in contrast to *Stephenson*, no "final order" existed when the Remedial Plan was adopted, and the case still has not reached "final disposition." *Id.* And whereas the Superior Court in *Stephenson* had ensured that the 2002 elections were held under a plan that cured the constitutional infirmities of the 2001 plans, this Court has not ensured that the 2020 elections go forward under a plan that cures the constitutional infirmities of the 2016 Plan. Indeed, Plaintiffs' claims from the outset of the case have focused on the 2020 elections and ensuring that those elections are held under a lawful plan. This Court's review of the Remedial Plan is necessary to prevent the 2020 elections from occurring under unconstitutional districts, just like every prior congressional election in North Carolina this decade.

III. Finding this Case Moot Would Allow the General Assembly to Avoid Judicial Review of Congressional Redistricting Plans in Every Case

The consequences of accepting Legislative Defendants' position on mootness are stark. Under their theory, the General Assembly could have enacted *any* new congressional plan and this case would be moot. Legislative Defendants could have openly announced that they were intentionally creating an 8-5 Republican gerrymander, and this case purportedly would still be moot because the General Assembly would have "replaced . . . N.C. Session Law 2016-1[] with an entirely new law and new congressional plan for the 2020 election cycle." Leg. Defs. Summ. J. Br. at 5. Under Legislative Defendants' logic, this case would be moot even if the new plan merely changed a single VTD in each district from the 2016 Plan, so long as this "new law and new congressional plan" replaced the statute creating the 2016 Plan. *Id.*

Consider what will happen next if this case is dismissed as moot and Plaintiffs "file a new lawsuit" challenging the Remedial Plan, as Legislative Defendants suggest. *Id.* Legislative

Defendants would surely argue that there is not enough time to adjudicate a new challenge to the new plan before the 2020 primaries. This is not a matter of speculation—Legislative Defendants have already asserted in the federal *Brewster* case that "it is now too late to implement any congressional plan other than the . . . the 2019 Congressional Plan." *Brewster*, ECF No. 6 at 39. Thus, Legislative Defendants' position will be that it does not matter whether the Remedial Plan is an intentional partisan gerrymander that violates the North Carolina Constitution, because it is purportedly "too late" for any judicial review of the Remedial Plan. And even if this timing argument failed in any new lawsuit, Legislative Defendants could just enact another congressional plan to replace the Remedial Plan, before this Court could resolve the new lawsuit challenging the Remedial Plan. This cycle could repeat over and over in perpetuity.

Mootness doctrine does not permit litigants to manipulate the jurisdiction of the courts to insulate their unlawful actions from constitutional scrutiny. To the contrary, North Carolina's mootness doctrine emphasizes that equitable factors must be considered, and that a case should not be found moot where it would undermine the interests of justice. For instance, courts should not find a case moot where the relevant issues are "capable of repetition, yet evading review," or where the "question involved is a matter of public interest." *Thomas*, 124 N.C. App. at 706, 478 S.E.2d at 821. The North Carolina Court of Appeals has in fact held that courts have a "duty" to resolve matters of "public interest," mootness questions notwithstanding. *Matthews v. N.C. Dep't of Transp.*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978). There could hardly be a matter of greater "public interest" than ensuring that the constitutional violations that millions of North Carolina voters have long suffered are cured, rather than repeated. If the 2020 elections go forward under the Remedial Plan, the voters of this State will be forced to "proceed[] to the polls to vote, yet again, in congressional elections administered pursuant to maps drawn in violation of

the North Carolina Constitution." Order on Inj. Relief at 17. And this dispute perfectly demonstrates how partisan gerrymandering is "capable of repetition" but could "evad[e] review" if Legislative Defendants' mootness arguments were accepted. Legislative Defendants' entire goal is to prevent *any* judicial review of the Remedial Plan before the next election. North Carolina's mootness doctrine does not require this perverse result.

CONCLUSION

For the foregoing reasons, this case is not moot. Legislative Defendants' motion for summary judgment should be denied.

Respectfully submitted this the 22nd day of November, 2019.

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