Nos. 19–1091(L), 19–1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMON CAUSE, et al.,

Plaintiffs–Appellees–Cross-Appellants

v.

DAVID R. LEWIS, et al.;

Defendants–Appellants–Cross-Appellees,

and

THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT et al.,

Defendants.

Appeal from the United States District Court
For the Eastern District of North Carolina
No. 5:18-cv-00589
The Honorable Louise W. Flanagan

Joint Appendix

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U.S. District Court
EASTERN DISTRICT OF NORTH CAROLINA (Western Division)
CIVIL DOCKET FOR CASE #: 5:18-cv-00589-FL

Common Cause et al v. Representative David R. Lewis et al
Assigned to: District Judge Louise Wood Flanagan
Case in other court: Wake County Superior Court, 18cv014001
4CCA, 19-01091
4CCA, 19-01094
Cause: 28:1441 Notice of Removal

Date Filed: 12/14/2018
Date Terminated: 01/17/2019
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

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Plaintiff

Derrick Miller represented by **Abha Khanna**
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Plaintiff

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Plaintiff

Deborah Anderson Smith represented by **Abha Khanna**
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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

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Plaintiff

Carlton E. Campbell, Sr. represented by **Abha Khanna**
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David P. Gersch
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ATTORNEY TO BE NOTICED

V.

Defendant

Representative David R. Lewis
In his official capacity as Senior Chairman of the House Select Committee on Redistricting

represented by **Michael Douglas McKnight**
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ATTORNEY TO BE NOTICED

Defendant

Senator Ralph E. Hise, Jr.
In his official capacity as Chairman of the Senate Committee on Redistricting

represented by **Michael Douglas McKnight**
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LEAD ATTORNEY
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Alyssa Riggins
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ATTORNEY TO BE NOTICED

Phillip J. Strach
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ATTORNEY TO BE NOTICED

Defendant

Speaker of the House Timothy K. Moore

represented by **Michael Douglas McKnight**
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Alyssa Riggins
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Defendant

Andy Penry
Chairman of the North Carolina State Board of Elections and Ethics Enforcement

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Defendant

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Defendant

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Defendant

Stella Anderson
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Defendant

President Pro Tempore of the North Carolina Senate Philip E. Berger

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Alyssa Riggins
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Defendant

The State of North Carolina

represented by **Amar Majmundar**
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Defendant

The North Carolina State Board of Elections and Ethics Enforcement

represented by **Amar Majmundar**
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Defendant

Damon Circosta
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Defendant

Stacy "Four" Eggers, IV
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Defendant

Jay Hemphill
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Defendant

Valerie Johnson
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Defendant

John Lewis
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Defendant

The North Carolina State Board of Elections and Ethics Enforcement

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Defendant

Robert Cordle
Member of the North Carolina State Board of Elections & Ethics Enforcement

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Stephanie Ann Brennan
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Date Filed	#	Docket Text
12/14/2018	1	NOTICE OF REMOVAL by RALPH E HISE, JR., DAVID R LEWIS, Timothy K. Moore from Wake County Superior Court, case number 18-cv-014001. (Filing fee $ 400 receipt number 0417-4759852), filed by RALPH E HISE, JR., DAVID R LEWIS, Timothy K. Moore. (Attachments: # 1 Exhibit 1 - State Court Pleadings, # 2 Exhibit 2 - Notice to State Court, # 3 Exhibit 3 - Civil Cover Sheet) (Strach, Phillip) (Entered: 12/14/2018)
12/14/2018	2	Notice of Appearance filed by Phillip J. Strach on behalf of RALPH E HISE, JR., DAVID R LEWIS, Timothy K. Moore. (Strach, Phillip) (Entered: 12/14/2018)
12/14/2018	3	Notice of Appearance filed by Michael Douglas McKnight on behalf of RALPH E HISE, JR., DAVID R LEWIS, Timothy K. Moore. (McKnight, Michael) (Entered: 12/14/2018)
12/17/2018	4	Notice of Appearance filed by Edwin M. Speas, Jr on behalf of All Plaintiffs. (Speas, Edwin) (Entered: 12/17/2018)
12/17/2018	5	Emergency MOTION to Remand filed by JOHN BALLA, KATHLEEN BARNES, NANCY BRADLEY, VIRGINIA WALTERS BRIEN, DAVID DWIGHT BROWN, JOSHUA BROWN, CARLTON E. CAMPBELL, Sr, PAULA ANN CHAPMAN, COMMON CAUSE, HOWARD DUBOSE, JACKSON THOMAS DUNN, JR, JULIE ANN FREY, JOSEPH THOMAS GATES, GEORGE DAVID GAUCK, REBECCA HARPER, KAREN SUE HOLBROOK, KRISTIN PARKER JACKSON, REBECCA JOHNSON, DWIGHT JORDAN, ALYCE MACHAK, PAMELA MORTON, ANN McCRACKEN, STEPHEN DOUGLAS McGRIGOR, Derrick Miller, JAMES MACKIN NESBIT, North Carolina Democratic Party, AMY CLARE OSEROFF, MARY ANN PEDEN-COVIELLO, ELECTA E. PERSON, MARK S PETERS, LILY NICOLE QUICK, DONALD RUMPH, LEON CHARLES SCHALLER, WILLIAM SERVICE, ROSALYN SLOAN, DEBORAH ANDERSON SMITH, VINOD THOMAS, JOHN MARK TURNER, LESLEY BROOK WISCHMANN, AARON WOLFF. (Attachments: # 1 Text of Proposed Order) (Speas, Edwin) (Entered: 12/17/2018)
12/17/2018	6	*CORRECTED AND REFILED AT 8]* Memorandum in Support regarding 5 Emergency MOTION to Remand filed by JOHN BALLA, KATHLEEN BARNES, NANCY BRADLEY, VIRGINIA WALTERS BRIEN, DAVID DWIGHT BROWN, JOSHUA BROWN, CARLTON E. CAMPBELL, Sr, PAULA ANN CHAPMAN, COMMON CAUSE, HOWARD DUBOSE, JACKSON THOMAS DUNN, JR, JULIE ANN FREY, JOSEPH THOMAS GATES, GEORGE DAVID GAUCK, REBECCA HARPER, KAREN SUE HOLBROOK, KRISTIN PARKER JACKSON, REBECCA JOHNSON, DWIGHT JORDAN, ALYCE MACHAK, PAMELA MORTON, ANN McCRACKEN, STEPHEN DOUGLAS McGRIGOR, Derrick Miller, JAMES MACKIN NESBIT, North Carolina Democratic Party, AMY CLARE OSEROFF, MARY ANN PEDEN-COVIELLO, ELECTA E. PERSON, MARK S PETERS, LILY NICOLE QUICK, DONALD RUMPH, LEON CHARLES SCHALLER, WILLIAM SERVICE, ROSALYN SLOAN, DEBORAH ANDERSON SMITH, VINOD THOMAS, JOHN MARK TURNER, LESLEY BROOK WISCHMANN, AARON WOLFF. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H) (Speas, Edwin) Modified on 12/18/2018 (Tripp, S.). (Entered: 12/17/2018)

12/17/2018		NOTICE OF DEFICIENCY regarding 6 Memorandum in Support - Pursuant to Section V(E) of the court's CM/ECF Policies and Procedures Manual, attachments and exhibits must be identified with a clear and complete description of the document (e.g. 'Exhibit 1' is insufficient. 'Exhibit 1 - Affidavit of Jane Doe' would meet the requirement.) Additionally, each attached document must be separated as a filing party would do when creating a hard copy version of the documents. When filing a document with more than five (5) exhibits or attachments, the first attached document must be an index of all of the subsequently attached documents. Counsel is directed to refile the document with the necessary corrections. (Tripp, S.) (Entered: 12/17/2018)
12/17/2018		NOTICE OF DEFICIENCY regarding 1 Notice of Removal - Counsel has failed to attach the Supplemental Removal Cover Sheet as required by Local Rule 5.3(a). This form can be found on the court's website and can be filed using the event Notice - Other. Counsel should add as attachments any other documents required under Local Rule 5.3(a) that have not already been filed. (Tripp, S.) (Entered: 12/17/2018)
12/18/2018		Notice to Counsel - All Counsel should file a Notice of Appearance pursuant to Local Civil Rule 5.2(a). (Tripp, S.) (Entered: 12/18/2018)
12/18/2018	7	Notice regarding 1 Notice of Removal and requirement to make a Notice of Appearance sent to Plaintiffs' counsel Edwin M. Speas, Jr. and Caroline Mackie at Poyner Spruill LLP, PO Box 1801, Raleigh, NC 27602-1801; R. Stanton Jones, David P. Gersch, Elisabeth S. Theodore, and Daniel F. Jacobson at Arnold & Porter Kaye Scholer LLP, 601 Massachusetts Ave. NW, Washington, DC 20001-3743; Marc E. Elias and Aria C. Branch at Perkins Coie LLP, 700 13th Street NW, Washington, DC 20005-3960; and, Abha Khanna at Perkins Coie LLP, 1201 Third Avenue, Suite 4900, Seattle, WA 98101-3099. Copy also mailed to defendants' counsel James Bernier, Amar Majmundar, and Stephanie A. Brennan at NC Department of Justice, PO Box 629, Raleigh, NC 27602. (Tripp, S.) (Entered: 12/18/2018)
12/18/2018		**TEXT ORDER regarding 5 Emergency MOTION to Remand filed by Jackson Thomas Dunn, Jr., Donald Rumph, George David Gauck, Rebecca Johnson, Julie Ann Frey, Joshua Brown, James Mackin Nesbit, Mark S. Peters, North Carolina Democratic Party, Stephen Douglas McGrigor, Mary Ann Peden-Coviello, Virginia Walters Brien, Deborah Anderson Smith, Rebecca Harper, Lily Nicole Quick, Nancy Bradley, Ann McCracken, John Balla, Amy Clare Oseroff, Common Cause, Paula Ann Chapman, Leon Charles Schaller, Rosalyn Sloan, Joseph Thomas Gates, Kristin Parker Jackson, Aaron Wolff, Lesley Brook Wischmann, Alyce Machak, Derrick Miller, Pamela Morton, David Dwight Brown, Electa E. Person, Karen Sue Holbrook, Carlton E. Campbell, Sr., John Mark Turner, William Service, Dwight Jordan, Howard Dubose, Vinod Thomas, Kathleen Barnes - Any response to motion to the remand shall be filed not later than Friday, December 28, 2018. Signed by District Judge Louise Wood Flanagan on 12/18/2018.** (Tripp, S.) (Entered: 12/18/2018)
12/18/2018	8	Memorandum in Support regarding 5 Emergency MOTION to Remand , 6 Memorandum in Support,,,, Notice of Deficiency,,, filed by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, North Carolina Democratic Party, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Attachments: # 1 Index, # 2 Exhibit A - Plaintiffs' Motion for Expedited Discovery and Trial and for Case Management

		Order (filed Nov. 20, 2018), # 3 Exhibit B - Emails between North Carolina Superior Court and counsel, # 4 Exhibit C - Acceptance of Service by State of North Carolina and State Board of Elections and its Members, # 5 Exhibit D - Legislative Defendants' Notice of Filing 2017 Plans, filed with federal court in Covington v. North Carolina, No. 15-cv-399, ECF No. 184 (M.D.N.C.), # 6 Exhibit E - Statements by Senator Berger on the Senate Floor re: the use of race and the VRA in creating the 2017 Plans, filed in connection with filing the 2017 Plans with the federal court in Covington v. North Carolina, No. 15-cv-399, ECF No. 184-21 (M.D.N.C.), # 7 Exhibit F - Legislative Defendants' brief discussing federal scope of review of 2017 plans, filed as Response to Plaintiffs' Objections to 2017 Plans, with federal court in Covington v. North Carolina, No. 15-cv-399, ECF No. 192 (M.D.N.C.), # 8 Exhibit G - Legislative Defendants' Jurisdictional Statement filed with the United States Supreme Court in North Carolina v. Covington, No. 17-1364 (U.S.) (filed Mar. 26, 2018), # 9 Exhibit H - Legislative Defendants' Brief Opposing Motion to Affirm, filed with the United States Supreme Court in North Carolina v. Covington, No. 17-1364 (U.S.) (filed May 15, 2018)) (Speas, Edwin) (Entered: 12/18/2018)
12/18/2018	9	Notice of Appearance filed by Caroline P. Mackie on behalf of All Plaintiffs. (Mackie, Caroline) (Entered: 12/18/2018)
12/18/2018	10	Financial Disclosure Statement by North Carolina Democratic Party (Mackie, Caroline) (Entered: 12/18/2018)
12/18/2018	11	Notice filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina regarding 1 Notice of Removal, *Supplemental Removal Cover Sheet*. (Strach, Phillip) (Entered: 12/18/2018)
12/18/2018	12	Financial Disclosure Statement by President Pro Tempore of the North Carolina Senate Philip E. Berger (Strach, Phillip) (Entered: 12/18/2018)
12/18/2018	13	Financial Disclosure Statement by Senator Ralph E. Hise, Jr. (Strach, Phillip) (Entered: 12/18/2018)
12/18/2018	14	Financial Disclosure Statement by Representative David R. Lewis (Strach, Phillip) (Entered: 12/18/2018)
12/18/2018	15	Financial Disclosure Statement by Speaker of the House Timothy K. Moore (Strach, Phillip) (Entered: 12/18/2018)
12/18/2018	16	Financial Disclosure Statement by The State of North Carolina (Strach, Phillip) (Entered: 12/18/2018)
12/19/2018	17	Financial Disclosure Statement by Common Cause (Mackie, Caroline) (Entered: 12/19/2018)
12/19/2018	18	Financial Disclosure Statement by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff (Mackie, Caroline) (Entered: 12/19/2018)
12/20/2018	19	Notice of Appearance filed by Stephanie Ann Brennan on behalf of Stella Anderson, Damon Circosta, Robert Cordle, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson,

		John Lewis, Joshua Malcolm, Andy Penry, Ken Raymond, The North Carolina State Board of Elections and Ethics Enforcement, The State of North Carolina. (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	20	Financial Disclosure Statement by The State of North Carolina (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	21	Financial Disclosure Statement by The North Carolina State Board of Elections and Ethics Enforcement (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	22	Financial Disclosure Statement by Joshua Malcolm (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	23	Financial Disclosure Statement by Ken Raymond (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	24	Financial Disclosure Statement by Stella Anderson (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	25	Financial Disclosure Statement by Damon Circosta (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	26	Financial Disclosure Statement by Stacy "Four" Eggers, IV (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	27	Financial Disclosure Statement by Jay Hemphill (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	28	Financial Disclosure Statement by Valerie Johnson (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	29	Financial Disclosure Statement by John Lewis (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	30	Financial Disclosure Statement by Robert Cordle (Brennan, Stephanie) (Entered: 12/20/2018)
12/20/2018	31	Notice of Appearance filed by Amar Majmundar on behalf of Stella Anderson, Damon Circosta, Robert Cordle, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, John Lewis, Joshua Malcolm, Ken Raymond, The North Carolina State Board of Elections and Ethics Enforcement, The State of North Carolina. (Majmundar, Amar) (Entered: 12/20/2018)
12/20/2018	32	Notice filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina regarding 1 Notice of Removal, *Amended Exhibit 1*. (Strach, Phillip) (Entered: 12/20/2018)
12/21/2018	33	Notice filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina *Pursuant to Civil L.R. 5.3(a)(2) state defendants file the attached file stamped state court notice*. (Strach, Phillip) (Entered: 12/21/2018)
12/21/2018	34	MOTION for Extension of Time to File Answer filed by Stella Anderson, Damon Circosta, Robert Cordle, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, John Lewis, Joshua Malcolm, Andy Penry, Ken Raymond, The North Carolina State Board of Elections and Ethics Enforcement, The State of North Carolina. (Attachments: # 1 Text of Proposed Order) (Brennan, Stephanie) (Entered: 12/21/2018)
12/21/2018	35	*State Defendants* ANSWER to Complaint by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr.,

		Speaker of the House Timothy K. Moore, The State of North Carolina. (Strach, Phillip) (Entered: 12/21/2018)
12/26/2018	36	Notice of Special Appearance for non-district by Daniel F. Jacobson on behalf of John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Jacobson, Daniel) (Entered: 12/26/2018)
12/26/2018	37	Notice of Special Appearance for non-district by David P. Gersch on behalf of John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Gersch, David) (Entered: 12/26/2018)
12/28/2018	38	Notice of Special Appearance for non-district by Aria C. Branch on behalf of John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Branch, Aria) (Entered: 12/28/2018)
12/28/2018	39	RESPONSE to Motion regarding 5 Emergency MOTION to Remand filed by Stella Anderson, Damon Circosta, Robert Cordle, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, John Lewis, Joshua Malcolm, Ken Raymond, The North Carolina State Board of Elections and Ethics Enforcement, The State of North Carolina. (Brennan, Stephanie) (Entered: 12/28/2018)
12/28/2018	40	Notice of Special Appearance for non-district by Abha Khanna on behalf of John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Khanna, Abha) (Entered: 12/28/2018)

12/28/2018	41	Notice of Special Appearance for non-district by Robert S. Jones on behalf of John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Jones, Robert) (Entered: 12/28/2018)
12/28/2018	42	RESPONSE in Opposition regarding 5 Emergency MOTION to Remand filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina. (Attachments: # 1 Exhibit 1 - Covington v. NC Lichtman Sur-Rebuttal Report, # 2 Exhibit 2 - Dickson v. Rucho Lichtman First Affidavit, # 3 Exhibit 3 - Dickson v. Rucho Second Affidavit, # 4 Exhibit 4 - Covington Plaintiffs' Response in Opposition to Defendants' Motion to Stay, Defer, or Abstain, # 5 Exhibit 5 - Covington Order Denying Motion for Preliminary Injunction, # 6 Exhibit 6 - Stephenson v. Bartlett Brief in Support of Remand) (Strach, Phillip) (Entered: 12/28/2018)
12/30/2018	43	REPLY to Response to Motion regarding 5 Emergency MOTION to Remand filed by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, North Carolina Democratic Party, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Attachments: # 1 Exhibit Senate Hearing Transcript) (Jones, Robert) (Entered: 12/30/2018)
01/02/2019	44	**ORDER - This matter is before the court on plaintiffs' emergency motion to remand 5 . The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer 34 . Signed by District Judge Louise Wood Flanagan on 1/2/2019.** (Collins, S.) (Entered: 01/02/2019)
01/03/2019	45	MOTION For Order Confirming Applicability of Stay of Judgment under Rule 62(a) filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina. (Attachments: # 1 Text of Proposed Order Proposed order regarding motion) (Strach, Phillip) Modified on 1/3/2019 to clarify docket text. (Collins, S.) (Entered: 01/03/2019)
01/03/2019	46	Memorandum in Support regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a) filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the

		House Timothy K. Moore, The State of North Carolina. (Strach, Phillip) (Entered: 01/03/2019)
01/03/2019		**TEXT ORDER regarding 45 MOTION For Order Confirming Applicability of Stay of Judgment under Rule 62(a). Plaintiffs are DIRECTED to file a response, if any, to the instant motion on or before January 10, 2019. Signed by District Judge Louise Wood Flanagan on 1/3/2019.** (Collins, S.) (Entered: 01/03/2019)
01/04/2019	47	RESPONSE in Opposition regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a) filed by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, North Carolina Democratic Party, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff. (Jones, Robert) (Entered: 01/04/2019)
01/04/2019		Motion Submitted to District Judge Louise Wood Flanagan regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a). (Collins, S.) (Entered: 01/04/2019)
01/07/2019	48	**MEMORANDUM OPINION memorializing the Court's reasoning for decision in Order 44 . Counsel is reminded to read the order in its entirety for critical information. Signed by District Judge Louise Wood Flanagan on 1/7/2019.** (Collins, S.) (Entered: 01/07/2019)
01/11/2019	49	Notice of Appearance filed by Alyssa Riggins on behalf of President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina. (Riggins, Alyssa) (Entered: 01/11/2019)
01/14/2019	50	**CORRECTED AND REFILED AT 51 ** RESPONSE in Support regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a) filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina. (Strach, Phillip) Modified on 1/15/2019 (Collins, S.). (Entered: 01/14/2019)
01/15/2019		NOTICE OF DEFICIENCY regarding 50 Response in Support of Motion. Wrong event used. Counsel shall refile using the event Reply to Response to Motion. (Collins, S.) (Entered: 01/15/2019)
01/15/2019	51	REPLY to Response to Motion regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a) filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina. (Strach, Phillip) (Entered: 01/15/2019)
01/15/2019		Motion Submitted to District Judge Louise Wood Flanagan regarding 45 MOTION Order Confirming Applicability of Stay of Judgment under Rule 62(a). (Collins, S.) (Entered: 01/15/2019)
01/15/2019	52	*Plaintiffs'* Notice *Regarding Status of State Court Proceedings* filed by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua

		Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, North Carolina Democratic Party, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff . (Attachments: # 1 Exhibit Certified Remand Order) (Jones, Robert) Modified on 1/16/2019 to clarify docket text. (Collins, S.). (Entered: 01/15/2019)
01/17/2019	53	**ORDER denying in part and dismissing in part 45 MOTION For Order Confirming Applicability of Stay of Judgment under Rule 62(a). Counsel is reminded to read the order in its entirety for critical information. Signed by District Judge Louise Wood Flanagan on 1/17/2019.** (Collins, S.) (Entered: 01/17/2019)
01/22/2019	54	Notice of Appeal filed by President Pro Tempore of the North Carolina Senate Philip E. Berger, Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, The State of North Carolina as to 44 Order on Motion to Remand,,,, Order on Motion for Extension of Time to Answer,,, 48 Memorandum & Opinion, 53 Order on Motion for Miscellaneous Relief,. Filing fee, receipt number 0417-4798759. (Strach, Phillip) (Entered: 01/22/2019)
01/22/2019	55	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals regarding 54 Notice of Appeal,. (Foell, S.) (Entered: 01/22/2019)
01/23/2019	56	Notice of Cross Appeal filed by John Balla, Kathleen Barnes, Nancy Bradley, Virginia Walters Brien, David Dwight Brown, Joshua Brown, Carlton E. Campbell, Sr, Paula Ann Chapman, Common Cause, Howard Dubose, Jackson Thomas Dunn, Jr, Julie Ann Frey, Joseph Thomas Gates, George David Gauck, Rebecca Harper, Karen Sue Holbrook, Kristin Parker Jackson, Rebecca Johnson, Dwight Jordan, Alyce Machak, Ann McCracken, Stephen Douglas McGrigor, Derrick Miller, Pamela Morton, James Mackin Nesbit, North Carolina Democratic Party, Amy Clare Oseroff, Mary Ann Peden-Coviello, Electa E. Person, Mark S. Peters, Lily Nicole Quick, Donald Rumph, Leon Charles Schaller, William Service, Rosalyn Sloan, Deborah Anderson Smith, Vinod Thomas, John Mark Turner, Lesley Brook Wischmann, Aaron Wolff as to 44 Order on Motion to Remand,,,, Order on Motion for Extension of Time to Answer,,, 48 Memorandum & Opinion,. Filing fee, receipt number 0417-4801411. (Jones, Robert) (Entered: 01/23/2019)
01/23/2019	57	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals regarding 56 Notice of Cross Appeal. (Foell, S.) (Entered: 01/23/2019)
01/24/2019	58	US Court of Appeals Case Number 19-1091 (Michael Radday, Case Manager) as to 54 Notice of Appeal, filed by Speaker of the House Timothy K. Moore, The State of North Carolina, Representative David R. Lewis, President Pro Tempore of the North Carolina Senate Philip E. Berger, Senator Ralph E. Hise, Jr.. (Foell, S.) (Entered: 01/24/2019)
01/24/2019	59	US Court of Appeals Case Number 19-1094 (Michael Radday, Case Manager) as to 56 Notice of Cross Appeal, filed by Jackson Thomas Dunn, Jr., Donald Rumph, George David Gauck, Rebecca Johnson, Julie Ann Frey, Joshua Brown, James Mackin Nesbit, Mark S. Peters, North Carolina Democratic Party, Stephen Douglas McGrigor, Mary Ann Peden-Coviello, Virginia Walters Brien, Deborah Anderson Smith, Rebecca Harper, Lily Nicole Quick, Nancy Bradley, Ann McCracken, John Balla, Amy Clare Oseroff, Common Cause, Paula Ann Chapman, Leon Charles Schaller, Rosalyn Sloan, Joseph Thomas Gates, Kristin Parker Jackson, Aaron Wolff, Lesley Brook Wischmann, Alyce Machak, Derrick Miller, Pamela Morton, David Dwight Brown, Electa E. Person, Karen Sue Holbrook,

		Carlton E. Campbell, Sr., John Mark Turner, William Service, Dwight Jordan, Howard Dubose, Vinod Thomas, Kathleen Barnes. (Foell, S.) (Entered: 01/24/2019)
01/24/2019	60	ORDER of US Court of Appeals consolidating case 19-1094 56 with 19-1091(L) 54 . (Foell, S.) (Entered: 01/24/2019)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-589_____

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.,

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

NOTICE OF REMOVAL
28 U.S.C. §§1441, 143(2) & 1446

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; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker Timothy K. Moore, President Pro Tempore Philip E. Berger, and the State of North Carolina[1] ("State Defendants"), in accordance with the requirements of 28 U.S.C. § 1441, 1443(2), and 1446, hereby give notice and remove to this court the civil action bearing the Case No.: 18-CVS-14001, which is now pending in the General Court of Justice, Superior Court Division, Wake County, North Carolina.

In support of this Notice of Removal, State Defendants show the Court:

1. Plaintiffs initiated this action in the General Court of Justice, Superior Court Division, Wake County, North Carolina, Civil Action No. 18-CVS-14001, on November 13, 2018, by filing the Complaint. Plaintiffs filed an Amended Complaint on December 7, 2018.

2. The State Defendants accepted service of the original Summons and Complaint on November 20, 2018. A complete copy of all process, pleadings, and orders served upon Defendant is attached as **Exhibit 1** to this Notice of Removal. 28 U.S.C. § 1446(a). These documents constitute the pleadings to date.

3. As required by 28 U.S.C. § 1446(b), this Notice of Removal is filed with this Court within thirty (30) days of service of process on the State Defendants.

4. The Complaint purports to allege claims under the North Carolina Constitution.

[1] Pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the "State of North Carolina" in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government.

5. Nevertheless, removal here is appropriate on two separate and independently sufficient bases.

A. Section 1443(2)

6. Removal is appropriate under 28 U.S.C. § 1443(2), which provides for removal of state-court actions against state officials "for refusing to do any act on the ground that would be inconsistent" with "any [federal] law providing for equal rights…."

7. This provision is satisfied, and removal is appropriate, where there is "a colorable conflict between state and federal law." *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980) (quotations omitted). The state official's federal-law defense need not ultimately be meritorious so long as there is a colorable conflict between the official's federal-law duties under equal-rights law and the alleged state-law duties. *See, e.g.*, *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995); *New Haven Firefighters Local 825 v. City of New Haven*, 2004 WL 2381739, at *1 (D. Conn. Sept. 28, 2004).

8. Section 2 of the Voting Rights Act ("VRA") applies to the entire State of North Carolina. VRA § 2 is a federal-law provision providing for equal rights.

9. The Equal Protection Clause of the Fourteenth Amendment applies to the entire State of North Carolina. The Equal Protection Clause is a federal-law provision providing for equal rights.

10. The Fifteenth Amendment's guarantee of racial equality in voting applies to the entire state of North Carolina. The Fifteenth Amendment is a federal-law provision providing for equal rights.

11. A colorable conflict between state constitutional redistricting requirements and the dictates of the Voting Rights Act and Equal Protection Clause supports removal under Section 1443(2). *Cavanagh v. Brock*, 577 F. Supp. 176, 180 (E.D.N.C. 1983).

12. Representative David R. Lewis is a state official covered under Section 1443(2). Representative Lewis is Senior Chairman of the House Select Committee on Redistricting. Representative Lewis has been sued in this matter in his official capacity for violating alleged state-law requirements related to redistricting. But, as described below, Representative Lewis's relevant actions were undertaken pursuant to federal law that protects racial equality in voting.

13. Senator Ralphs E. Hise, Jr. is a state official covered under Section 1443(2). Senator Hise is Chairman of the Senate Committee on Redistricting. Senator Hise has been sued in this matter in his official capacity for violating alleged state-law requirements related to redistricting. But, as described below, Senator Hise's relevant actions were undertaken pursuant to federal law that protects racial equality in voting.

14. Speaker Timothy K. Moore is a state official covered under Section 1443(2). Speaker Moore is Speaker of the House of Representatives. Speaker Moore has been sued in this matter in his official capacity for violating alleged state-law requirements related to redistricting. But, as described below, Speaker Moore's relevant actions were undertaken pursuant to federal law that protects racial equality in voting.

15. President Philip E. Berger is a state official covered under Section 1443(2). President Berger is President Pro Tempore of the Senate. President Berger has been sued in this matter in his official capacity for violating alleged state-law requirements related to

redistricting. But, as described below, President Berger's actions were undertaken pursuant to federal law that protects racial equality in voting.

16. The State Defendants have all been sued in their official capacities for their roles in drawing, enacting, providing for administering, preparing for, and/or moving forward with elections under State House and Senate districts created in districting maps that were enacted by the North Carolina General Assembly in 2017. Plaintiffs claim that the 2017 maps violate provisions of the North Carolina Constitution. The Prayer for Relief asks this Court to enjoin the State Defendants from taking these actions and to require the State Defendants to re-draw the 2017 plans or, alternatively, seize the State Defendants' legislative power and redistrict the state itself.

17. Besides being directly sued and identified as parties to be enjoined against enforcing the 2017 plans and to be enjoined to create new plans dramatically different from the 2017 plans, the State Defendants are identified by state law as officers entitled to defend state law in court challenges, both when the North Carolina House of Representatives or North Carolina Senate are named as parties and as intervenors. N.C. Gen. Stat. § 1-72.2.

18. Both the actions Plaintiffs demand and their theories of relief create direct conflicts with federal law guaranteeing equal protection—namely, the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth Amendment.

1. The Fourteenth Amendment, Fifteenth Amendment, and the Voting Rights Act

19. One conflict arises because many of the legislative districts challenged are performing minority crossover districts, and Plaintiffs demand that the racial composition of these districts be dramatically altered. In particular, Plaintiffs' Amended Complaint identifies multiple districts as containing a high percentage of Democratic Party constituents. They refer to these districts as "packed," without defining that term. But, in North Carolina, there is a strong correlation between racial and political identity, so removing Democratic Party constituents from these districts will necessary reduce the percentage of African American voting-age persons. Accordingly, the asserted state-law duties would require the State Defendants to intentionally dismantle crossover districts.

20. For example, paragraphs 128 and 129 of the Amended Complaint attack House Districts 2 and 32 and claim that House District 32 is an "overwhelmingly Democratic district" and, by consequence, House District 2 is "a Republican-leaning district."

21. But the State Defendants intend to defend this charge, *inter alia*, by presenting evidence demonstrating that House District 32 is a minority "crossover" district.

22. Other districts that likely qualify as crossover (or coalition) districts that are challenged in this case or in county groupings with districts challenged in this case include: House Districts 8, 25, 32, 33, 38, 42, 43, 47, 58, 60, 71, 72, 88, 99, 101, 102, 107 and Senate Districts 14, 28, 32, 38, and 40.

23. Intentionally dismantling crossover or coalition districts would violate the State Defendants' obligations under federal law guaranteeing equal rights for two separate reasons.

24. First, intentionally drawing lines "to destroy otherwise effective crossover districts" violates the Fourteenth and Fifteenth Amendments. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Plaintiffs' demand that the state adjust the Democratic vote share of minority crossover districts necessarily would require intentionally destroying performing crossover districts in direct conflict with these Constitutional provisions.

25. Second, a state may satisfy its obligation under VRA § 2 by demonstrating that crossover districts allow minority groups an equal opportunity to elect their preferred candidates of choice. *Strickland*, 556 U.S. at 24 ("States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.") Although VRA § 2 cannot be used as a sword to require states to create crossover districts, the Supreme Court has made clear that states may create crossover or coalition districts "as a matter of legislative choice or discretion" in order "to choose their own method of complying with the Voting Rights Act." *Id.* at 23. Thus, the existence of performing crossover or coalition districts is a valid *shield* against a Voting Rights Act claim that might otherwise by meritorious. Creating House District 32 (and other crossover districts) was therefore a lawful means of complying with the Voting Rights Act and precluding a valid claim of liability under a law guaranteeing equality.

26. Plaintiffs' theory of state law—which the State Defendants contest—would require the State Defendants to drop the African American voting-age population in House

District 32 (and other crossover districts) and thereby dismantle the district. It would no longer be a crossover district.

27. Importantly, Plaintiffs are *not* contending that these districts should be a majority-minority districts. To the contrary, they demand that African American voting-age population be *removed* from the districts. Plaintiffs demand that minority voting-age population be removed from crossover districts would dismantle crossover districts and place the State Defendants in the position of being required to follow either Plaintiffs' erroneous view of state law or the dictates of the Voting Rights Act.

28. The State Defendants' contention that many districts challenged in this case preserve African American voting strength and, accordingly, equality in voting as guaranteed by the Fourteenth and Fifteenth Amendment and the VRA is a defense to Plaintiffs' state-law challenge. Under Section 1443(2), the defense need not be proved as a factual matter at this time. The defense is colorable and supports removal.

2. The Equal Protection Clause

29. A conflict also arises between Plaintiffs' asserted state-law theories and Defendants' obligations under federal law because affording Plaintiffs the relief they request would require intentionally dismantling districts that were found by a federal court to be necessitated by the Equal Protection Clause of the federal Constitution.

30. The General Assembly enacted the legislative districts challenged in this action in response to a federal court's order requiring new districts to comply with the Equal Protection Clause. The federal litigation challenged 28 House and Senate districts on the theory that they violated the equal-protection guarantee of racial neutrality in voting.

That case alleged that the former districts, drawn in 2011, were drawn with "predominant" racial intent. A United States District Court found liability as to all challenged districts under this theory. It subsequently issued a mandate that the General Assembly redraw districts to comply with the Equal Protection Clause.

31. The General Assembly dutifully complied by passing the 2017 plans that are challenged in this case. Those plans changed dozens of districts in order to comply with the Equal Protection Clause. A small subset of those remedial districts were challenged during the federal remedial phase, and the United States District Court commissioned a special master to address deficiencies as to those districts in response to that challenge.

32. On January 21, 2018, the United States District Court issued an order directing the State of North Carolina and other defendants to implement the state legislative plan adopted by the North Carolina General Assembly in August 2017, as modified by the Special Master retained by the Court in that case, and adopted in full by the Court, for future legislative elections. *Covington v. North Carolina*, 283 F.Supp.3d 410, 458 (M.D.N.C. 2018). The federal court ordered that the *entire* plan, as modified by the Special Master, be used for "future North Carolina legislative elections." *Id.*[2] The State Defendants are bound by this order. The State Defendants complied with that order for the 2018 election and intend to comply with that order for the 2020 election. After the 2020 election, the decennial census will require the redrawing of the legislative plans.

[2] The federal three-judge court's order adopting House districts drawn for Wake County was vacated by the Supreme Court. *North Carolina v. Covington,* 138 S.Ct. 2548 (2018). The Supreme Court found that the federal-three-judge court lacked jurisdiction to redraw portions of the state not implicated in the equal-protection challenge.

33. Plaintiffs' lawsuit is a direct attack on the 2017 plans that the General Assembly enacted under the direction, and with the ultimate approval, of the United States District Court.

34. Plaintiffs' Prayer for Relief demands that the State Defendants cease using the 2017 Plans. That creates a direct conflict with the United States District Court's order *requiring* the State Defendants to use the 2017 Plans, and that order was issued pursuant to the United States District Court's power to enforce the Equal Protection Clause. That is a stark conflict between the State Defendants' federal-law obligations under equal-rights law and Plaintiffs' asserted state-law claims.

35. Plaintiffs ask that districts drawn as equal-protection remedies be dismantled. But intentionally dismantling these districts, besides conflicting with the federal-court order mandating that the General Assembly use all the enacted districts (as modified by the special master) in future elections, would violate the equal-protection prohibition on intentionally "cracking" communities composed of racial minorities. This too is a direct conflict between the alleged state-law duties Plaintiffs assert (wrongly, in the State Defendants' view) and the dictates of a federal law guaranteeing equality. *Strickland*, 556 U.S. at 24 ("And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."); *see also Reno v. Bossier Parish School Bd.*, 520 U. S. 471, 481–482 (1997).

36. Moreover, the State Defendants intend to defend Plaintiffs' charge, *inter alia*, by presenting evidence demonstrating that the challenged districts were created as remedial

districts in response to the United States District Court's order and to avoid the charge that racial intent "predominated" in the redistricting.

37. In this regard, the U.S. Supreme Court has held that, where a state "has articulated a legitimate political explanation for its districting decision," that legitimate political explanation is a defense to an assertion of improper racial motive. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). A "legitimate political explanation" includes the use of traditional redistricting principles such as compactness, contiguity, respect for political subdivisions or communities, incumbency protection, partisan affiliation, and political data in drawing a district. *See generally Id*; *see also Alabama Legislative Black Caucus v. Alabama,* 135 S.Ct. 1257, 1270 (2015).

38. The Amended Complaint in this matter alleges that members of the General Assembly articulated numerous explanations for the districting decisions. The State Defendants intend to respond to this charge by presenting evidence that the need to articulate a political basis for districting decisions was done to avoid the appearance and actuality of racially predominant redistricting. Indeed, the federal-court decision that identified violations of the Equal Protection Clause *criticized* the General Assembly for failing to formally articulate a political basis for the districting decisions and concluded that race "predominated."

39. The State Defendants' contentions that many districts challenged in this case were drawn to cure federal-court identified violations of the Equal Protection Clause, that the districts are currently being implemented by direct command of the United States District Court pursuant to its power to remedy violations of the Equal Protection Clause,

and that the political decisions made to draw the districts were intended to avoid the appearance and actuality of racial predominance are defenses to the asserted state-law duties Plaintiffs have concocted. Under Section 1443(2), these defenses need not be proved as a factual matter at this time. The defenses are colorable and support removal.

B. Section 1441(a)

40. The State Defendants also are entitled to remove this action to this Court because plaintiffs' Complaint raises federal questions "arising under the laws . . . of the United States," so that this Court has original jurisdiction over the claim. 28 U.S.C. § 1441(a). Federal jurisdiction is proper if plaintiff's demand "necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 28 (1983). In service of their claims which would violate the federal civil rights of African American voters, Plaintiffs request the state court in this matter to violate the federal constitutional rights of registered Republicans and voters for Republican candidates under the First and Fourteenth Amendments to the United States Constitution. The relief sought by Plaintiffs has the intent and effect to benefit registered Democrats and voters for Democratic candidates at the expense of registered Republicans and voters for Republican candidates. Plaintiffs seek an interpretation of the North Carolina Constitution that will necessarily result in an unconstitutional burden on the federal First and Fourteenth Amendment rights of North Carolina voters. This Court must resolve the substantial federal issue of whether, in the context of redistricting, the Plaintiffs' complaint will necessarily require the enhancement of the partisan redistricting preferences of one political party's supporters at the expense of the partisan redistricting

preferences of an opposite political party's supporters in violation of the First and Fourteenth Amendments to the United States Constitution.

41. The State Defendants are therefore entitled to remove this action to this Court because plaintiffs' Complaint raises federal questions "arising under the laws . . . of the United States," so that this Court has original jurisdiction over the claim.

42. Moreover, federal law in this area so pervasively regulates the redistricting process that it completely preempts the types of state-law duties Plaintiffs allege to exist. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987). Plaintiffs are seeking enhanced voting rights on the basis of their political affiliation with a major political party. They are claiming a right to force the General Assembly to fine-tune districts to suit their perceived political interests.

43. These rights are entirely inconsistent with the federal-law scheme of voting-rights legislation and interpretive case law as to be completely preempted by that law.

44. In view of the above facts, this is a civil action which may be removed to this Court.

45. Consistent with 28 U.S.C. § 1446(d), the State Defendants are concurrently filing a Notice of Filing of Notice of Removal with the Clerk of Court for the General Court of Justice, Superior Court Division, Wake County, North Carolina, a copy of which is attached hereto as **Exhibit 2**.

46. Venue is proper in this District under 28 U.S.C. § 1441(a) because this District embraces the place where the removed state court action is pending.

47. Consent from the other Defendants in this action who have not (at least as of yet) sought removal is unnecessary because consent is only required when "a civil action is removed *solely* under section 1441(a)." 28 U.S.C. § 1446(b)(2)(A). That is not the case here.

WHEREFORE, the State Defendants give notice that this action has been removed to the United States District Court for the Eastern District of North Carolina.

Respectfully submitted, this the 14th day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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Counsel for the Legislative Defendants
**Notice of Appearance under Local Rule 83.1 forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the forgoing **NOTICE OF REMOVAL** with the Clerk of Court using the CM/ECF system and I hereby certify that I have sent the document to the following Plaintiff via U.S. Mail:

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This the 14th day of December, 2018.

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36711613.1

Exhibit 2

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION.
18-CVS-014001

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.,

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; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

NOTICE OF FILING OF NOTICE OF REMOVAL

TO: The Honorable Jennifer Knox
Clerk of Superior Court of Wake County
316 Fayetteville Street
Raleigh, NC 27601

PLEASE TAKE NOTICE that Defendants have on this 14th day of December, 2018 removed this case to the United States District Court for the Eastern District of North Carolina, and that the state court may proceed no further regarding the above-captioned case. Attached hereto is a true and correct copy of Defendant's Notice of Removal filed in the United States District Court for the Eastern District of North Carolina.

To acknowledge receipt of the filing of this Notice to State Court of Removal and Notice of Removal, please sign and return the enclosed Acknowledgment of Filing.

DATED this the 14th day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: [signature] (By AMM w/ permission)
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Attorneys for Legislative Defendants

CERTIFICATE OF SERVICE

It is hereby certified that on this date the foregoing **Notice of Filing of Notice of Removal** was duly served upon all other parties to this matter by mailing a copy thereof, via First Class mail, postage paid in the United States mail to Plaintiff's counsel of record in accordance with Rule 5 of the North Carolina Rules of Civil Procedure.

DATED this the 14th day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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Counsel for the State of North Carolina, State Board of Elections and Ethics Enforcement and its Members

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION.
18-CVS-014001

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.,

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.)BURGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTION AND ETHICS ENFORCEMENT; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

ACKNOWLEDGEMENT OF FILING

Receipt of Defendants Notice to State Court of Filing of Removal and a copy of the Notice of Removal in the above-entitled action is hereby acknowledged:

This _____ day of_____, 2018.

_____
Clerk/Assistant/Deputy Clerk
Wake County Superior Court

36710014.1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-00589-FL

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.

PLAINTIFFS' EMERGENCY MOTION FOR REMAND
28 U.S.C. § 1447(c)

Plaintiffs Common Cause; the North Carolina Democratic Party; and 38 individual North Carolina voters respectfully move, pursuant to 28 U.S.C. § 1447(c), for remand of this case to the General Court of Justice, Superior Court Division, Wake County, North Carolina.

In support hereof, Plaintiffs state that this Court lacks jurisdiction over this matter raising exclusively state constitutional challenges to a state law, and that there is no basis for removal under 28 U.S.C. § 1443(2) or 28 U.S.C. § 1441(a). The reasons for remand are set out more fully in the supporting memorandum filed contemporaneously herewith.

Thus, Plaintiffs request that the Court:

1. Grant Plaintiffs' Emergency Motion for Remand and remand this case to the General Court of Justice, Superior Court Division, Wake County, North Carolina;
2. Award Plaintiffs the costs of this action and attorneys' fees as allowed by 28 U.S.C. § 1447(c) and any other applicable law; and
3. Grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted this 17th day of December, 2018.

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Counsel for Common Cause and the Individual Plaintiffs

**Pro Hac Vice motions forthcoming.*

CERTIFICATE OF SERVICE

I hereby certify that on this date, December 17, 2018, I caused the foregoing document to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of North Carolina. I further certify that simultaneously with this filing via CM/ECF, I caused the foregoing document to be served by electronic mail on all counsel of record for all Defendants in the Superior Court case.

DATED: December 17, 2018

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-00589-FL

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.

[PROPOSED] ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR REMAND

This matter is before the court on Plaintiffs' Emergency Motion for Remand. The court having fully considered the matter, it is hereby

ORDERED that Plaintiffs' Emergency Motion for Remand is GRANTED. It is further

ORDERED that this case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. And it is further

ORDERED that, pursuant to 28 U.S.C. § 1447(c), Legislative Defendants shall bear the costs and actual expenses, including attorneys' fees, incurred by Plaintiffs as a result of removal.

SO ORDERED, this _____ day of _____, _____.

_____
LOUISE W. FLANAGAN
United States District Judge

Exhibit A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2018 NOV 20 PM 3:13
WAKE COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

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

Defendants.

MOTION FOR EXPEDITED DISCOVERY AND TRIAL AND FOR CASE MANAGEMENT ORDER

(OTHR)

NOW COME Plaintiffs Common Cause, the North Carolina Democratic Party, and 22 North Carolina registered voters, pursuant to Rule 26(d) of the North Carolina Rules of Civil Procedure, and move the Court for leave to conduct expedited discovery, and for the Court to enter a Discovery Scheduling Order and Case Management Order establishing a schedule for expedited discovery, motions practice, and trial. In support thereof, Plaintiffs state as follows:

1. In this action, Plaintiffs challenge the redistricting plans enacted by the North Carolina General Assembly in 2017 for the state House of Representatives and state Senate (the "2017 Plans"). Defendants are the chairmen of the state House and state Senate redistricting committees, the Speaker of the state House, the President Pro Tempore of the state Senate, the State itself, and the State Board of Elections and Ethics Enforcement and its members. Plaintiffs allege that the 2017 Plans constitute illegal partisan gerrymanders in violation of the North Carolina Constitution's Equal Protection Clause, Free Elections Clause, and Freedom of Speech and Freedom of Assembly Clauses. Plaintiffs seek a declaration that the 2017 Plans are unlawful, an injunction barring use of the 2017 Plans in the 2020 primary and general elections,

and the establishment of new plans that comply with the North Carolina Constitution in time for those 2020 elections.

2. It is in the overwhelming interest of both the parties and the public to resolve this case as expeditiously as possible to ensure that, if the 2017 Plans are found unconstitutional, there is sufficient time to establish new, lawful districts for the 2020 primary and general elections. In nearly every state and federal legislative election held in North Carolina this decade, voters have been forced to cast their ballots in districts ruled unconstitutional by the courts. In 2012 and 2014, North Carolinians voted in dozens of racially gerrymandered state House and Senate districts under one the "most widespread racial gerrymanders ever encountered by a federal court." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 943 (M.D.N.C. 2018). Even when a federal court declared these districts unconstitutional in August 2016, there was "insufficient time" to implement new districts for the 2016 elections, so voters again had to vote in these unlawful districts. *Covington v. North Carolina*, 316 F.R.D. 176, 176-77 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017). Similarly, North Carolina's congressional elections in 2012 and 2014 also were conducted under unconstitutional racially gerrymandered districts. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). And the replacement plan that the General Assembly adopted, which governed the 2016 and 2018 congressional elections, has itself been found to be an unconstitutional partisan gerrymander. *Common Cause*, 318 F. Supp. 3d 777.

3. The citizens of North Carolina should not bear the risk of once again being forced to vote in districts that violate their constitutional rights. That is especially true for the 2020 state

legislative elections, since the state representatives elected in 2020 will be the ones who, in 2021, will redraw North Carolina's state legislative and congressional districts for the next decade.

4. Deadlines relating to the 2020 elections are quickly approaching. Indeed, the General Assembly recently moved up the candidate filing period and the primary date. The window for candidates to file for party primary nominations is now scheduled to open on December 2, 2019, and primary elections are now scheduled to be held on March 3, 2020. *See* 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). As a result of these recent changes, North Carolina will have one of the earliest primaries in the country in 2020.

5. To promote a timely resolution of this case and ensure there is sufficient time for a remedial process before the 2020 elections should Plaintiffs prevail, Plaintiffs have effectuated prompt service on Defendants and served written discovery requests with the Complaint. Plaintiffs now propose the following deadlines and procedures relating to pleadings, procedures, discovery, motions practice, and trial:

- All pleadings, motions, briefs, discovery requests, and discovery responses shall be served by e-mail. Depositions may be taken upon 10 days' notice.
- Plaintiffs shall file an amended complaint no later than December 7, 2018. The amended complaint will make limited substantive changes to the original complaint; the primary differences will be to add new voter plaintiffs, update factual information regarding the results of the recent 2018 elections, and add allegations relating to the Wake County state House districts in light of the recent summary judgment decision in *N.C. State Conference of NAACP Branches v. Lewis*, 18 CVS 2322 (N.C. Super.).
- Defendants shall file any motion(s) to dismiss and brief(s) in support no later than December 21, 2018. This affords Defendants more than five weeks from the filing of Plaintiffs' initial complaint and two weeks from the filing of Plaintiffs' amended complaint, which will make only limited changes as described above. Plaintiffs shall file any opposition to any motion(s) to dismiss no later than January 11, 2019, and Defendants shall file any reply(ies) no later than January 25, 2019.
- All document and written discovery shall be completed no later than January 31, 2019. The parties by agreement may continue document or written discovery beyond

this deadline, but the Court will not intervene in this voluntary process except in extraordinary circumstances, and the trial date will not be modified because of information obtained through this voluntary process.

- Expert reports shall be served no later than February 15, 2019. Those reports shall include the information stated in Rule 26(b)(4)(A)(2) of the North Carolina Rules of Civil Procedure. Rebuttal expert reports shall be served no later than March 1, 2019. Reply expert reports shall be served no later than March 8, 2019.

- No later than March 8, 2019, the parties shall file a joint proposal to establish deadlines for the exchange of witness lists, exhibit lists, and deposition designations, and for submitting to the Court a joint pre-trial stipulation of facts. On any deadline where the parties cannot agree, they may each describe their respective positions.

- All discovery shall be completed no later than March 29, 2019, and any discovery-related disputes will be heard on an expedited basis and, to the extent reasonable and appropriate, upon notice of less than five days.

- Plaintiffs do not anticipate that this case will be appropriate for summary judgment. If either party desires to file a motion for summary judgment, however, the motion and brief in support shall be filed no later than April 1, 2019. Any opposition shall be filed no later than April 8, 2019.

- Motions in limine and briefs in support shall be filed no later than April 3, 2019. Any oppositions shall be filed no later than April 10, 2019.

- Trial will begin April 15, 2019.

- Plaintiffs and Defendants shall each file their respective proposed findings of fact and conclusions of law seven days after the close of trial.

6. Plaintiffs propose this schedule in order to enable a final decision by this Court, appellate review, and a remedial process in advance of the 2020 elections. In addition to the time for appellate review, the remedial process likely would involve multiple steps. The General Assembly likely would be afforded time to propose remedial plans, the parties likely would be afforded an opportunity to comment on the proposed remedial plans, and the courts (potentially with the assistance of a special master) would need time to review the proposed remedial plans and any comments on them. If the courts find that any proposed remedial plans do not cure the

and any comments on them. If the courts find that any proposed remedial plans do not cure the constitutional violations, the courts would need time to develop (and receive comments on) new remedial plans to cure those violations. All of these steps would need to be completed sufficiently in advance of the candidate filing period for party primary nominations, which, as stated, is scheduled to begin December 2, 2019. The expedited schedule that Plaintiffs propose here will ensure that this is feasible.

7. Plaintiffs believe that the schedule proposed above is reasonable given that most of the factual evidence in this case will consist of public records generated by Defendants themselves. The proposed schedule is also consistent with the schedule followed in other redistricting cases in North Carolina and elsewhere. The proposed schedule is far less compressed than that adopted in *Stephenson v. Bartlett*, 562 S.E.2d 377, 382 (N.C. 2002), where the Superior Court and then the state Supreme Court struck down the state's legislative districts under the North Carolina Constitution. In *Stephenson*, the plaintiffs filed suit on November 13, 2001, and the trial court granted the plaintiffs' motion for summary judgment following discovery on February 20, 2002, just over three months after the complaint was filed. *Id.* at 382. Here, Plaintiffs seek to have trial conclude more than five months after filing suit, with a decision from this Court shortly thereafter—twice as much time as was allotted in *Stephenson*. Plaintiffs' proposed schedule here also aligns with that in other recent partisan gerrymandering challenges. For instance, in a partisan gerrymandering challenge to Pennsylvania's congressional districts last year, the trial court entered its recommended findings of fact and conclusions of law following trial just over six months after the plaintiffs filed suit. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766-67 (Pa. 2018).

WHEREFORE, Plaintiffs request that the Court enter an order providing for expedited discovery, motions practice, and trial, consistent with the deadlines and procedures set out above.

Respectfully submitted this the 20th day of November, 2018.

POYNER SPRUILL LLP

By: Caroline P. Mackie

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
Caroline P. Mackie
N.C. State Bar No. 41512
P.O. Box 1801
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Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

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Counsel for Common Cause and the Individual Plaintiffs

* *Pro hac vice motions forthcoming*

CERTIFICATE OF SERVICE

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

Alexander Peters
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
apeters@ncdoj.gov
Counsel for the State of North Carolina

Josh Lawson
NC State Board of Elections and Ethics Enforcement
430 N. Salisbury St.
Suite 3128
Raleigh, NC 27603-5918
Joshua.lawson@ncsbe.gov
Counsel for the State Board of Elections and Ethics Enforcement and its members

Phillip J. Strach
Michael McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Counsel for the Legislative Defendants

This the 20th day of November, 2018.

POYNER SPRUILL LLP

Caroline P. Mackie

Caroline P. Mackie

Exhibit B

Theodore, Elisabeth

From: Strach, Phillip J. <phil.strach@ogletree.com>
Sent: Friday, December 14, 2018 9:56 AM
To: Myers, Kellie Z.
Cc: Speas, Edwin M.; joshua.lawson@ncsbe.gov; apeters@ncdoj.gov; Mackie, Caroline P.; Jones, Stanton; melias@perkinscoie.com; zzz.External.AKhanna@perkinscoie.com; McKnight, Michael D.; Cooper, Bettye D.
Subject: Re: Common Cause, et al. v. Lewis (Wake County 18 CVS 14001)

Kellie:

The legislative defendants' current intention is to remove this matter to the United States District Court for the Eastern District of North Carolina today or Monday. Accordingly legislative defendants believe the removal will moot the issues the court has raised regarding further proceedings in this matter. If that intention changes, the legislative defendants will immediately notify the court.

Thank you.

Phil Strach

Sent from my iPhone

On Dec 13, 2018, at 3:23 PM, Myers, Kellie Z. <Kellie.Z.Myers@nccourts.org> wrote:

> Mr. Strach,
>
> Thank you for your email. I will await your responses and then share the responses of all parties with the panel, at one time.

<image001.png>

Kellie Z. Myers
Trial Court Administrator
10th Judicial District
North Carolina Judicial Branch
PO Box 1916, Raleigh, NC 27602
O 919-792-4780
Justice for all

www.nccourts.gov/WakeTCA
Justice for all

From: Strach, Phillip J. [mailto:phil.strach@ogletree.com]
Sent: Thursday, December 13, 2018 3:14 PM
To: Eddie Speas <espeas@poynerspruill.com>; Myers, Kellie Z. <Kellie.Z.Myers@nccourts.org>; joshua.lawson@ncsbe.gov; apeters@ncdoj.gov; Mackie, Caroline P. <CMackie@poynerspruill.com>; stanton.jones@arnoldporter.com; melias@perkinscoie.com; akhanna@perkinscoie.com; McKnight, Michael D. <Michael.McKnight@ogletreedeakins.com>
Cc: Cooper, Bettye D. <Bettye.D.Cooper@nccourts.org>
Subject: RE: Common Cause, et al. v. Lewis (Wake County 18 CVS 14001)

Kellie:

Thank you for the email. We are conferring with our clients on the issues raised and will be getting back to you no later than tomorrow morning.

Phil

Phillip J. Strach | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100 | Raleigh, NC 27609 | Telephone: 919-789-3179 | Fax: 919-783-9412
phil.strach@ogletree.com | www.ogletree.com | Bio

From: Speas, Edwin M. <ESpeas@poynerspruill.com>
Sent: Thursday, December 13, 2018 10:49 AM
To: Myers, Kellie Z. <Kellie.Z.Myers@nccourts.org>; joshua.lawson@ncsbe.gov; apeters@ncdoj.gov; Mackie, Caroline P. <CMackie@poynerspruill.com>; stanton.jones@arnoldporter.com; melias@perkinscoie.com; akhanna@perkinscoie.com; Strach, Phillip J. <Phil.Strach@ogletreedeakins.com>; McKnight, Michael D. <Michael.McKnight@ogletreedeakins.com>
Cc: Cooper, Bettye D. <Bettye.D.Cooper@nccourts.org>
Subject: RE: Common Cause, et al. v. Lewis (Wake County 18 CVS 14001)

Kellie,

Thank you for this information.

In response to your questions:

- Plaintiffs' Counsel believe any dispute about Plaintiffs' motion for expedited discovery and trial and for a case management order can and should be resolved by telephone conference; and
- The *pro hac vice* motions for counsel from Arnold & Porter and Perkins Coie will be filed today or tomorrow.

Best regards,

Eddie

From: Myers, Kellie Z. <Kellie.Z.Myers@nccourts.org>
Sent: Wednesday, December 12, 2018 3:13 PM
To: joshua.lawson@ncsbe.gov; apeters@ncdoj.gov; Speas, Edwin M. <ESpeas@poynerspruill.com>; Mackie, Caroline P. <CMackie@poynerspruill.com>; stanton.jones@arnoldporter.com; melias@perkinscoie.com; akhanna@perkinscoie.com; Strach, Phillip J. <phil.strach@ogletree.com>; McKnight, Michael D. <michael.mcknight@ogletree.com>
Cc: Cooper, Bettye D. <Bettye.D.Cooper@nccourts.org>
Subject: Common Cause, et al. v. Lewis (Wake County 18 CVS 14001)

Good afternoon,

On behalf of Judges Ridgeway, Hinton, and Crosswhite, I am writing to confirm that they have received the following documents:

- 11.13.18 Complaint
- 11.20.18 Motion for Expedited Discovery and Trial and for CMO
- 12.7.18 Amended Complaint

To my knowledge, Defendant has not yet filed a responsive pleading and, thus, the panel has requested that Defendant indicate if he consents to Plaintiff's November 20, 2018 Motion for Expedited Discovery and Trial and for CMO. If counsel for Defendant are in a position at this time to do so, please also indicate if Defendant will be filing an answer, motion to dismiss, or type of other response.

If a hearing will be required on Plaintiff's Motion, all counsel are asked to notify me of their position regarding a telephone hearing on said motion.

Finally, I have not yet received *pro hac vice* motions on behalf of counsel from Arnold & Porter and from Perkins Coie. Please let me know when to expect those motions for review by the panel.

Thank you for your time and I look forward to hearing from you soon. Should you need to reach me and are unable to do so, please contact Davis Cooper, who is copied herein.

Best regards,
Kellie Myers

<image001.png>

Kellie Z. Myers
Trial Court Administrator
10th Judicial District
North Carolina Judicial Branch
PO Box 1916, Raleigh, NC 27602
O 919-792-4780
Justice for all
www.nccourts.gov/WakeTCA
Justice for all

E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

****

This message constitutes a confidential attorney-client communication. If you have received this communication in error, do not read it. It is not intended for transmission to, or receipt by, any unauthorized persons. Please delete it from your system without copying it, and notify the sender by reply email or by calling 919- !"-#$%%, so that our address record can be corrected. Than& you.

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E-mail correspondence to and from this address may be subject to the North Carolina public records laws and if so, may be disclosed.

This transmission is intended only for the proper recipient(s). It is confidential and may contain attorney-client privileged information. If you are not the proper recipient, please notify the sender immediately and delete this message. Any unauthorized review, copying, or use of this message is prohibited.

Exhibit C

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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.

ACCEPTANCE OF SERVICE

Now comes Alexander Peters and says:

1. That Defendant the State of North Carolina is a party to be served with the Civil Summons issued and the Complaint filed in this civil action;

2. That by execution hereof, the undersigned hereby accepts service of the Civil Summons and Complaint on behalf of the State of North Carolina, and acknowledges receipt of a copy of the Civil Summons issued, along with a copy of the Complaint filed in this action; and

3. That this acceptance of service does not waive any defenses that the State of North Carolina may have, except the defenses of insufficiency of process and insufficiency of service of process, and the State of North Carolina reserves the right to assert any other defenses that may apply.

This the 13th day of November, 2018.

By:

Alexander McC. Peters
Chief Deputy Attorney General
N.C. State Bar No. 13654
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Acceptance of Service of Alexander Peters* by U.S. Mail, addressed to the following persons at the following addresses which are the last addresses known to me:

Alexander Peters
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
Counsel for the State of North Carolina

Josh Lawson
NC State Board of Elections and Ethics Enforcement
430 N. Salisbury St.
Suite 3128
Raleigh, NC 27603-5918
Counsel for the State Board of Elections and Ethics Enforcement and its members

This the 19th day of November, 2018.

POYNER SPRUILL LLP

Caroline P. Mackie

Caroline P. Mackie

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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.

ACCEPTANCE OF SERVICE

Now comes James Bernier, Jr and says:

1. That Defendants North Carolina State Board of Elections and Ethics Enforcement, and Andy Penry, Josh Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy Eggers, Jay Hemphill, Valerie Johnson, John Lewis (the "State Defendants") are parties to be served with the Civil Summons issued and the Complaint filed in this civil action;

2. That by execution hereof, the undersigned hereby accepts service as of November 13, 2018 of the Civil Summons and Complaint on behalf of the State Defendants, and acknowledges receipt of a copy of the Civil Summons issued, along with a copy of the Complaint filed in this action; and

3. That this acceptance of service does not waive any defenses that the State Defendants may have, except the defenses of insufficiency of process and insufficiency of service of process, and the State Defendants reserve the right to assert any other defenses that may apply.

This the 3rd day of December, 2018.

By: _____

James Bernier, Jr.
Special Deputy Attorney General
N.C. State Bar No. 45869
jbernier@ncdoj.gov

CERTIFICATE OF SERVICE

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

James Bernier
Amar Majmundar
Stephanie A. Brennan
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
apeters@ncdoj.gov
Counsel for the State of North Carolina and State Board of Elections and Ethics Enforcement and its members

Phillip J. Strach
Michael McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Counsel for the Legislative Defendants

This the 4th day of December, 2018.

POYNER SPRUILL LLP

Caroline P. Mackie

Caroline P. Mackie

Exhibit D

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.

NOTICE OF FILING

PLEASE TAKE NOTICE that, pursuant to the Court's Order of July 31, 2017 (Doc. 180), the North Carolina General Assembly enacted new House and Senate districting plans as of Thursday, August 31, 2017, and hereby provide notice of such enactment and the other information requested in the Court's Order of July 31, 2017 (Doc. 180, pp. 8-9).

I. The 2017 House Redistricting Plan

The new House districting plan was identified as House Bill 927 ("H927") during consideration by the General Assembly and is now identified as Session Law 2017-208 and titled "2017 House Redistricting Plan A2" (hereinafter the "2017 House Redistricting Plan") after final enactment on August 31, 2017.[1] The following documents requested by the Court related to this plan are attached:

[1] A link to the complete history of H927, including all amendments proposed, may be found at the link below:

- A map of the 2017 House Redistricting Plan. (Attached as Ex. 1).[2]

- The Block Assignment File for the 2017 House Redistricting Plan is available at: http://www.ncleg.net/Sessions/2017/h927maps/h927maps.html

- The Shapefile for the 2017 House Redistricting Plan is available at: http://www.ncleg.net/Sessions/2017/h927maps/h927maps.html

- The "stat pack" for the 2017 House Redistricting Plan. (Attached as Ex. 2).

- Additional statistical information requested by members of the General Assembly but not considered by the House Select Committee on Redistricting in drawing the 2017 House Redistricting Plan. (Attached as Ex. 3).

II. The 2017 Senate Redistricting Plan

The new Senate districting plan was identified as Senate Bill 691 ("S691") during consideration by the General Assembly and is now identified as Session Law 2017-207 and titled "2017 Senate Floor Redistricting Plan -4th Ed." (hereinafter the "2017 Senate Redistricting Plan") after final enactment on August 31, 2017.[3] The following documents requested by the Court related to this plan are attached:

- A map of the 2017 Senate Redistricting Plan. (Attached as Ex. 4).[4]

---

http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=H927&submitButton=Go

[2] Maps of previous editions of the adopted 2017 House Redistricting Plan may be found here: http://www.ncleg.net/Sessions/2017/h927maps/h927maps.html

[3] A link to the complete history of S691, including all amendments proposed, may be found at the link below : http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2017&BillID=S691&submitButton=Go

[4] Maps of previous editions of the adopted 2017 Senate Redistricting Plan may be found here: http://www.ncleg.net/Sessions/2017/s691maps/s691maps.html

- The Block Assignment File for the 2017 Senate Redistricting Plan is available at: http://www.ncleg.net/Sessions/2017/s691maps/s691maps.html

- The Shapefile for the 2017 Senate Redistricting Plan is available at: http://www.ncleg.net/Sessions/2017/s691maps/s691maps.html

- The "stat pack" for the 2017 Senate Redistricting Plan. (Attached as Ex. 5).

- Additional statistical information requested by members of the General Assembly but not considered by the Senate Redistricting Committee on Redistricting in drawing the 2017 House Redistricting Plan. (Attached as Ex. 6).

III. Transcripts of Committee Hearings and Floor Debates

Transcripts of all committee hearings and floor debates related to the enactment of these plans are attached and identified as:

- Exhibit 7: 7/26/17 – Joint Redistricting Committee meeting
- Exhibit 8: 8/4/17 – Joint Redistricting Committee meeting
- Exhibit 9: 8/10/17 – Joint Redistricting Committee meeting
- Exhibit 10: 8/22/17 – Public Hearing – Raleigh site
- Exhibit 11: 8/22/17 – Public Hearing – Beaufort site
- Exhibit 12: 8/22/17 – Public Hearing - Charlotte site
- Exhibit 13: 8/22/17 - Public Hearing – Fayetteville site
- Exhibit 14: 8/22/17 – Public Hearing – Hudson site
- Exhibit 15: 8/22/17 – Public Hearing – Jamestown site
- Exhibit 16: 8/22/17 – Public Hearing – Weldon site
- Exhibit: 17: 8/24/17 – Senate Redistricting Committee meeting
- Exhibit: 18: 8/25/17 – House Select Committee on Redistricting meeting
- Exhibit: 19: 8/25/17 – Senate Floor Session
- Exhibit: 20: 8/28/17 – House Floor Session
- Exhibit: 21: 8/28/17 – Senate Floor Session
- Exhibit: 22: 8/29/17 – Senate Redistricting Committee meeting
- Exhibit: 23: 8/29/17 – House Select Committee on Redistricting meeting
- Exhibit: 24: 8/30/17 – Senate Floor Session
- Exhibit: 25: 8/30/17 – House Floor Session

IV. Description of the 2017 Redistricting Process and Identification of Participants Involved

On June 27, 2017, Senate President Pro Tempore Phil Berger and House Speaker Tim Moore approved a contract with Dr. Tom Hofeller as a mapdrawing consultant for Rep. David Lewis and Sen. Ralph Hise, the forthcoming chairs of the 2017 redistricting committees in the House and the Senate. On June 30, 2017, the Senate Redistricting Committee was appointed by Sen. Berger with the following members:

- Sen. Ralph Hise, Chairman
- Sen. Dan Bishop
- Sen. Dan Blue
- Sen. Harry Brown
- Sen. Ben Clark
- Sen. Warren Daniel
- Sen. Kathy Harrington
- Sen. Brent Jackson
- Sen. Michael V. Lee
- Sen. Paul A. Lowe, Jr.
- Sen. Paul Newton
- Sen. Bill Rabon
- Sen. Erica Smith-Ingram
- Sen. Terry Van Duyn
- Sen. Trudy Wade

On June 30, 2017, the House Select Committee on Redistricting was appointed by Rep. Moore with the following members:

- Rep. David Lewis, Senior Chairman
- Rep. Nelson Dollar, Chairman
- Rep. John Bell, Vice Chairman
- Rep. Darren Jackson, Vice Chairman
- Rep. Sarah Stevens, Vice Chairman
- Rep. John Szoka, Vice Chairman
- Rep. Jon Torbett, Vice Chairman
- Rep. Bill Brawley
- Rep. Cecil Brockman

- Rep. Justin Burr
- Rep. Ted Davis
- Rep. Jimmy Dixon
- Rep. Josh Dobson
- Rep. Andy Dulin
- Rep. Jean Farmer-Butterfield
- Rep. Elmer Floyd
- Rep. Terry Garrison
- Rep. Rosa Gill
- Rep. Holly Grange
- Rep. Destin Hall
- Rep. Ed Hanes
- Rep. Jon Hardister
- Rep. Pricey Harrison
- Rep. Kelly Hastings
- Rep. Julia Howard
- Rep. Howard Hunter
- Rep. Pat Hurley
- Rep. Linda Johnson
- Rep. Bert Jones
- Rep. Jonathan Jordan
- Rep. Chris Malone
- Rep. Mickey Michaux
- Rep. Rodney Moore
- Rep. Garland Pierce
- Rep. Robert Reives
- Rep. David Rogers
- Rep. Jason Saine
- Rep. Michael Speciale
- Rep. Shelly Willingham
- Rep. Michael Wray
- Rep. Larry Yarborough

On July 26, 2017, the Senate Redistricting Committee and the House Select Committee on Redistricting met jointly for organizational and informational purposes. At that meeting, committee chairs made available to committee members information regarding 2010 Census population by county, the method of calculating ideal House and

Senate districts for population purposes, maps submitted by Common Cause for House and Senate plans, maps that reflected the county grouping formula that Common Cause used, and the opportunities that would be available for public comment on proposed redistricting plans to be considered by the committee. No votes were taken at the meeting.

On August 4, 2017, the Senate Redistricting Committee and the House Select Committee on Redistricting met jointly to discuss potential criteria to be used by the committees in drawing new House and Senate districts. The meeting included a period of public comment. Sen. Smith-Ingram proposed a list of criteria for the committees to consider. Additionally, information regarding ideal county groupings for House and Senate maps were made available to committee members as well as comparisons of the groupings used in 2011 with those proposed in 2017 for both House and Senate plans. Finally, the committees approved a policy for sharing and posting information on the General Assembly website as well as policies for access to General Assembly staff and computer terminals for the purpose of drawing districts.

On August 10, 2017, the Senate Redistricting Committee and the House Select Committee on Redistricting met jointly to adopt criteria to be used when drawing legislative districts in their respective maps. The committees separately adopted an identical set of nine criteria that would be used to draw new districts in the 2017 House and Senate Redistricting plans. Rep. Jackson, Sen. Blue, and Sen. Clark suggested criteria to be considered by the committee.

On August 11, 2017, Rep. Lewis and Sen. Hise notified Dr. Hofeller of the criteria adopted by the redistricting committees and directed him to utilize those criteria when drawing districts in the 2017 plans.

On August 19, 2017, the proposed 2017 House Redistricting map was released on the General Assembly website. On August 20, 2017, the proposed 2017 Senate Redistricting map was released on the General Assembly website. On August 21, 2017, a series of statistical information and reports were released for the proposed House and Senate Redistricting plans.

On August 22, 2017, public hearings were held in Raleigh, Beaufort, Charlotte, Fayetteville, Hudson, Jamestown, and Weldon to discuss the proposed 2017 House and Senate Redistricting plans.

On August 24, 2017, the Senate Redistricting Committee met and approved the proposed 2017 Senate Redistricting plan. Two amendments were adopted by the committee, one offered by Sen. Clark and one offered by Sen. Blue.

On August 25, 2017, the House Select Committee on Redistricting met and approved the proposed 2017 House Redistricting plan. Four amendments were offered, two by Rep. Jackson, one by Rep. Speciale, and one Rep. Hunter. One of the two amendments from Rep. Jackson, which renumbered districts 25 and 7, was accepted. The other three amendments were defeated by a vote of the committee.

On August 25, 2017, the Senate met to consider S691, the 2017 Senate Redistricting Plan. One amendment offered by Sen. Blue was adopted by the Senate. Additional amendments offered by Sen. Jeff Jackson and Sen. Blue were defeated on the

floor. Sen. Gladys Robinson offered an amendment on the floor but it was withdrawn before a vote was taken. S691 passed second reading. Third reading was objected to by Sen. Hise and the bill was held over to the next legislative day.

On August 28, 2017, the House met to consider H927, the 2017 House Redistricting Plan. An amendment offered by Rep. Larry Pittman was defeated on the floor. An amendment offered by Rep. Lewis passed related to the House districts within Wake County. The bill passed second and third reading and was sent to the Senate.

On August 28, 2017, the Senate met to consider S691 on third reading. Amendments offered by Sen. Clark and Sen. Robinson were defeated on the floor. An amendment offered by Sen. Hise to trade the numbers of Senate District 29 and Senate District 32 passed. During debate on third reading, Sen. McKissick asked for additional statistical reports including racial demographics to be added to the General Assembly website. The bill passed third reading in the Senate and was sent to the House.

On August 29, 2017, Representative Lewis asked for additional statistical information for the House plan, which members of the Democratic Party had apparently already requested and received. The information was posted on the House Select Committee on Redistricting's website. That morning the Senate Redistricting Committee met to consider H927. The committee approved the 2017 House Redistricting Plan.

On August 29, 2017, the House Select Committee on Redistricting met to consider S691. The committee approved the 2017 Senate Redistricting Plan.

On August 30, 2017, the Senate met to consider H927. No amendments were offered to the bill. The bill passed second and third readings and was ordered enrolled.

On August 30, 2017, the House met to consider S691. No amendments were offered to the bill. The bill passed second and third readings and was ordered enrolled.

On August 31, 2017, H927 was ratified in the House and became law. The same day, S691 was ratified in the Senate and became law.

V. Alternative Districting Plans Considered

Information regarding alternative districts or districting plans considered by the House Select Committee on Redistricting or on the floor of the House are attached:

- Rep. Jackson Proposed Map and Reports Considered by House Select Committee on Redistricting (Failed) (Attached as Ex. 28).[5]
- Rep. Speciale Proposed Map and Reports Considered by House Select Committee on Redistricting (Failed) (Attached as Ex. 38).
- Rep. Hunter Proposed Map and Reports Considered by House Select Committee on Redistricting (Failed) (Attached as Ex. 39).
- Amendment 1: Representative Pittman Proposed Map and Reports (Failed) (Attached as Ex. 26).
- Amendment 2: Representative Lewis Proposed Map and Reports (Passed) (Attached as Ex. 27).

Information regarding alternative districts or districting plans considered by the Senate Redistricting Committee or on the floor of the Senate are attached:

- Sen. Clark Proposed Map and Reports Considered by Senate Redistricting Committee (Passed) (Attached as Ex. 29)
- Sen. Blue Proposed Map and Reports Considered by Senate Redistricting Committee (Passed) (Attached as Ex. 30)

[5] In introducing this proposed map, Rep. Jackson stated it was drawn by the Plaintiffs in this matter.

- Amendment 2: Sen. Blue Proposed Map and Reports Considered on Senate Floor (Passed) (Attached as Ex. 31).
- Amendment 3: Sen. Robinson Proposed Map and Reports Considered on Senate Floor (Withdrawn) (Attached as Ex. 32).
- Amendment 4: Sen. Jeff Jackson Proposed Map and Reports Considered on Senate Floor (Failed) (Attached as Ex. 33).
- Amendment 5: Sen. Blue Proposed Map and Reports Considered on Senate Floor (Failed) (Attached as Ex. 34).[6]
- Amendment 8: Sen. Robinson Proposed Map and Reports Considered on Senate Floor (Failed) (Attached as Ex. 35).
- Amendment 9: Sen. Clark Proposed Map and Reports Considered on Senate Floor (Failed) (Attached as Ex. 36).

VI. Criteria Applied in Drawing the 2017 House and Senate Districts

The set of nine criteria for drawing the new districts in the 2017 House and Senate Redistricting plans adopted by both the Senate Redistricting Committee and the House Select Committee on Redistricting on August 10, 2017 are attached as Exhibit 37. Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans. No information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts. To the extent that any district in the 2017 House and Senate redistricting plans exceed

[6] In introducing this proposed map, Sen. Blue stated it was drawn by the Plaintiffs in this matter.

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.

This the 7th day of September, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach
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CERTIFICATE OF SERVICE

I hereby certify that I, Phillip J. Strach, have served the foregoing **NOTICE OF FILING** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This the 7th day of September, 2017.

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31102097.1

Exhibit E

African-American populations of 50 percent. To my knowledge, these were the most complete and exhaustive studies ever entered into the record during a redistricting process.

In the Covington decision striking down the 2011 legislative maps, the court cited those legislative decisions as critical to determining the plan was a racial gerrymander. The court determined the expert reports did not -- did not sufficiently prove racially polarized voting to prove the third Gingles factor was present and justified drawing 50 percent minority districts. Quote, "Contrary to defendant's contentions, the Block and Brunell reports do not establish a strong basis in evidence for Gingles third factor in any potential district."

And in light of the 2014 Alabama Legislative Black Caucus versus Alabama Ruling, the court strongly objected to that legislature's decision to adopt -- I'm sorry -- strongly objected to the legislature's decision to adopt a 50 percent target to draw true minority/ majority districts. Quote, "In light of Alabama, we are mindful that a legislature's policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides particularly strong evidence of racial predominance."

We have carefully considered the court's order in Covington. Given the court's rejection of the 2011 expert reports, we do not believe we can develop a strong enough basis in evidence that the third Gingles factor is present to justify drawing districts on the basis of race. Nor, in spite of repeated requests by the redistricting committees have the public, plaintiffs in the Covington litigation, or members of this body presented evidence that the proposed map should be changed because the third Gingles factor is present and unaddressed.

So I strongly believe we have complied with the courts admonishment with that. Again, in quoting, "If during redistricting the general assembly had followed traditional districting criteria and in doing so, drawn districts that incidentally contained majority black populations, race would not have predominated in drawing those districts," end of quote.

With the information available to them, Senator Hise and the redistricting committee adopted nine criteria to use in drawing this proposed map. Some of the map drawing principles are inviable and must be followed like equal population contiguity and the North Carolina constitutional requirements on county grouping. And because we cannot prove the third Gingles factor,

Exhibit F

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.

LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS

INTRODUCTION

The North Carolina General Assembly scrupulously followed this Court's order to draw new legislative districts that do not use race as the predominant factor. The enacted 2017 House and Senate plans do not rely on race in any respect and instead follow traditional redistricting criteria such as county lines (as dictated by North Carolina state law), equal population, contiguity, keeping precincts whole, and considering municipal boundaries. Those plans also treat incumbents of both major political parties equally by ensuring incumbents can run and have a chance to win a district where otherwise allowed by state law.

Plaintiffs now attack four out of 170 total districts as continuing to be racial gerrymanders because, in plaintiffs' paradoxical view, not using race means using race too much. Yet the districts plaintiffs challenge are more compact, split fewer precincts,

and follow traditional redistricting criteria better than the original districts challenged by plaintiffs. Plaintiffs also advance purely state law challenges against several other districts. Plaintiffs' state law challenges are undermined by their own proposed districting plans which either violate state law requirements on their face or violate the same state law rules they claim the State's maps violate.

Plaintiffs' objections to the 2017 House and Senate plans are nothing more than an invitation to this Court to engage in judicial political gerrymandering by ignoring legitimate state policy choices and adopting districts drawn by plaintiffs which, among other things, pair incumbent legislators for political reasons. Plaintiffs' proposed house and senate districts target numerous Republican members of the legislature in this way, the only reason for which appears to be to punish those members for being Republican.[1] Indeed, even the Democratic members of the House (Representative Darren Jackson) and Senate (Senator Dan Blue) who introduced plaintiffs' plans during the legislative process

[1] Plaintiffs assert, with no evidence, that the legislature's incumbency protection criterion "cemented the harms" from the 2011 plans. (Doc. 187 at 6). The assumption that any current member of the legislature was elected because of the racial composition of an adjoining district is just that – an assumption not supported by the facts. Plaintiffs have never submitted evidence showing that any current legislator won his or her seat because of the composition of a district declared unconstitutional. Plaintiffs did not even attempt to make such a showing at trial and have not provided any factual basis for that claim in their objections. Amicus North Carolina State Conference of the NAACP makes the same leap of logic. (Doc. 188-2 at 10) (redistricting criteria allowed legislature to "lock in the partisan advantage it had secured through racially-gerrymandered maps."). But where is the evidence that "partisan" advantage was secured through the racial make-up of the 2011 maps? None exists. Each election in every district is an individual contest between two or more candidates driven by political dynamics at the time, fundraising, and numerous other factors. To state that these election results were solely the product of the racial composition of certain districts is stunningly speculative.

distanced themselves from those plans, emphasizing that they did not draw the maps and expressing skepticism about various aspects of the plans such as their compliance with traditional redistricting principles. Representative Jackson and Senator Blue could not provide explanations for the political pairings and lack of respect for traditional redistricting criteria such as precincts. (Tr. H. Redist. Comm., Aug. 25, 2017 at 59-89; Doc. 184-18); (Tr. S. Redist. Comm., Aug. 24, 2017 at 112-30; Doc. 184-17). They even discussed and introduced their own versions of many districts which conflicted with the districts drawn by plaintiffs. (Tr. H. Redist. Comm., Aug. 25, 2017 at 65-66; Doc. 184-18); (Tr. S. Redist. Comm., Aug. 24, 2017 at 52, 115, 120; Doc. 184-17).

Plaintiffs' objections must be rejected. First, included with plaintiffs' objections are multiple declarations and other evidence (much of which amounts to expert witness evidence) that neither plaintiffs nor their allies submitted to the legislature during the legislative process. This evidence may not be considered by this Court under established Supreme Court precedent and, in any event, should not be considered. If the Court decides to consider this evidence, out of fairness and respect for due process, it should (1) set a discovery period during which defendants may depose plaintiffs' witnesses and defendants may present expert witnesses of their own; (2) set a new briefing schedule on consideration of plaintiffs' objections following the discovery period and (3) allow the General Assembly to reconvene to consider the information if new districts become necessary.

Second, plaintiffs' racial gerrymandering objections are baseless. It is undisputed that the legislature did not consider racial data in drawing the 2017 districts. It is undisputed that the legislature did not have a racial "target" such as fifty percent plus one for certain districts. It is undisputed that the legislature did not have a rough proportionality goal. It is also undisputed that the legislature drew districts to protect incumbents of both parties. The legislature's adherence to traditional redistricting principles (many consistent with public input), including incumbency protection, dictated the shape of the districts, and plaintiffs' rank speculation does not prove otherwise. It was in fact the plaintiffs and their allies who sought to use race improperly in the drawing of districts without supporting evidence.

Third, plaintiffs advance numerous attacks on the 2017 districts that are based purely on state law. This Court does not have jurisdiction to consider these claims. But even if it did, the claims are meritless. For example, plaintiffs propose that this Court develop out of whole cloth a new state constitutional standard for mid-decade redistricting and impose it here after a court-imposed redrawing of districts. Plaintiffs also request that this Court adopt a novel interpretation of the Whole County Provision ("WCP") of the state constitution that would contravene *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 404 (2016) ("*Dickson II*"). Finally, plaintiffs ask this Court to create a compactness standard under

the state constitution that has already been rejected by the state Supreme Court in *Stephenson* and *Dickson*.

This Court should decline the invitation to usurp the legitimate legislative authority of the elected representatives of the People of North Carolina and draw a map that is more favorable to the plaintiffs' political interests. Plaintiffs' objections should be overruled and this Court should allow elections to proceed under the 2017 House and Senate plans.

BACKGROUND

A. Plaintiffs have only alleged claims for alleged racial gerrymandering and not political gerrymandering or state constitutional claims.

Plaintiffs alleged a single cause of action in their complaint: that race was the predominant factor in the creation of the legislative districts. (Doc. 11 at 91-92). Plaintiffs' claim was based upon the cause of action first recognized in *Shaw v. Reno,* 509 U.S. 630 (1993) ("*Shaw I*"), and later amplified in *Shaw v. Hunt*, 517 U.S. 889 (1996) ("*Shaw II*"), as well as other Supreme Court cases dealing with racial gerrymandering. *See e.g. Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) ("*Alabama*"). Plaintiffs' supported their racial gerrymandering claims by asserting that the districts disregarded traditional redistricting principles. (Doc. 11 at ¶¶ 73-253).

B. The decision by the three-judge court.

The decision by this Court provided the framework used by the General Assembly in enacting the 2017 legislative plans. In that decision, the Court found that the 28 challenged districts were racial gerrymanders. The Court found that race predominated

in the drawing of the districts because of the legislature's belief that the evidence justified drawing Voting Rights Act ("VRA") districts at over 50%; that African Americans should have a number of districts roughly proportional to their population; and because of circumstantial evidence of gerrymandering in the form of violating traditional redistricting principles.

C. Legislative proceedings to comply with the Court's order.

Shortly following this Court's order of July 31, 2017, the legislative leaders, Senator Ralph Hise and Representative David Lewis, met with the map drawing consultant, Dr. Hofeller. Redistricting concepts were discussed with Dr. Hofeller as leaders made plans to comply with the Court's Order. (Tr. Joint Redist. Comm., Aug. 10, 2017 at 2-5; Doc. 184-9). On July 26, 2017, the Senate Redistricting Committee and the House Select Committee on Redistricting met jointly ("Joint Committee") for organizational and informational purposes. (Tr. Joint Redist. Comm., July 26, 2017 at 2-4; Doc. 184-7). At that meeting, committee chairs made available to committee members information regarding 2010 Census population by county, the method of calculating ideal House and Senate districts for population purposes, maps submitted by Common Cause for House and Senate plans, maps that reflected the county grouping formula that Common Cause used, and the opportunities that would be available for public comment on proposed redistricting plans to be considered by the committee. (*Id.* at 5-7). No votes were taken at the meeting.

The Joint Committee then met on August 4, 2017, and received public comment about potential criteria for new maps. (Tr. Joint Redist. Comm., Aug. 4, 2017 at 26-69; Doc. 184-8). Among the recommendations the public made, many called for: compact and contiguous districts, to keep counties whole, to avoid dividing municipalities, and to keep racial data out of the criteria. (*Id.* at 39, 40, 41, 43-46, 53-54).

The General Assembly received this feedback and incorporated it to the extent possible. For instance, public commenter William Smith noted that "Voting precincts should not be divided," (*id*. at 43), and his comment was specifically cited by Representative Lewis in explaining the criteria at a joint meeting on August 10. (Tr. Joint Redist. Comm., Aug. 10, 2017 at 79; Doc. 184-9). Similarly, commenter Dianna Wynn asked the committee to "avoid dividing counties and municipalities where possible." (Tr. Joint Redist. Comm., Aug. 4, 2017 at 46; Doc. 184-8). She was later cited as a basis for the criterion limiting splitting municipalities by Representative Lewis. (Tr. Joint Redist. Comm., Aug. 10, 2017 at 66; Doc. 184-9).

On August 10, 2017, the Joint Committee met to adopt criteria to draw new maps. Input for the criteria was based on review of public comments from August 4, 2017, and through comments submitted through the General Assembly website, as well as proposed criteria submitted in writing by Senators Smith-Ingram, Blue and Clark. (Tr. Joint Redist. Comm., Aug. 10, 2017 at 4-5; Doc. 184-9). During the proceedings, the Joint Committee considered, and then adopted, criteria to be used in drawing new legislative plans. The criteria included:

- "Equal Population." The Joint Committee unanimously adopted this criterion. (*Id.* at 7-13).
- "Contiguity." The Joint Committee adopted this criterion by a vote of 24-14 in the House and a vote of 8-4 in the Senate. (*Id*. at 58-65).
- "County Groupings and Traversals. "The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett,* 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson, I, Stephenson II, Dickson I, and Dickson II*." The Joint Committee unanimously adopted this criterion. (*Id.* at 18-24).
- "Compactness: The Committees shall make reasonable efforts to draw legislative districts… that improve the compactness of the current districts. In doing so, the committees 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. 482 (1993)." (*Id.* at 24-25). The Joint Committee adopted this criterion, called by Representative Dollar, "[t]he most precise guidelines... that the General

Assembly's ever adopted with respect to compactness" (*id.* at 30) by a vote of 24 to 14 in the House and 9-3 in the Senate. (*Id*. at 37-43). When asked by members of the Democratic party why these two methods, Representative Lewis pointed out that "these are the two best-known….best understood…two that the courts have referred to." (*Id.* at 29).

- "Fewer Split Precincts: The committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that split fewer precincts than the current legislative redistricting plans." (*Id*. at 79). The Joint Committee adopted this criterion by a vote of 24-14 in the House, and a vote of 8-4 in the Senate. (*Id.* at 98-104).
- "Municipal Boundaries: The Committees may consider municipal boundaries when drawing legislative districts in the 2017 House and Senate plans." (*Id.* at 105). The Joint Committee passed this criterion by a vote of 24-14 in the House, and a vote of 8-4 in the Senate. (*Id.* at 112-19).
- "Incumbency Protection: Reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in the 2017 House and Senate plans. The Committees may make reasonable efforts to ensure voters have a reasonable opportunity to elect non-paired incumbents of either party to a district in the 2017 House and Senate plans." (*Id.* at 119). The Joint Committee passed this criterion by a vote of 24-14 in the House, and a vote of 8-4 in the Senate. (*Id.* at 125-32).

- "Election data: Political considerations and election results data may be used in the drawing of legislative districts in the 2017 House and Senate plans." (*Id.* at 132). The Joint Committee passed this criterion by a vote of 24-13 in the House, and a vote of 8-4 in the Senate. (*Id.* at 141-48).
- "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." (*Id.* at 148). The Joint Committee passed this criterion by a vote of 24-13 in the House, and a vote of 8-4 in the Senate. (*Id.* at 159-65).

Many of these criteria were very similar to several criteria proposed by Senators Blue and Smith-Ingram. On August 11, 2017, Representative Lewis and Senator Hise notified Dr. Hofeller of the criteria adopted by the redistricting committees and directed him to utilize those criteria when drawing districts in the 2017 plans. The criteria were also placed on legislative websites for the public to view and comment. (*Id.* at 193).

On August 19, 2017, the proposed 2017 House plan was released on the General Assembly website. On August 20, 2017, the proposed 2017 Senate plan was released on the General Assembly website. On August 21, 2017, a series of statistical information and reports were released for the proposed House and Senate plans.

On August 22, 2017 public hearings were held in seven different locations across the state on the proposed plans. (Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh Site) at 8; Doc. 184-10). Input was also received from voters who submitted comments through the General Assembly website. (Tr. Joint Redist. Comm., Aug. 10, 2017 at 4-5; Doc. 184-9).

Many comments asked that districts be based upon whole counties and that the plans do a better job at preventing the division of precincts and municipalities. (*Id.* at 79; Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh Site) at 38-39, Doc. 184-10).

The majority of the feedback from public hearings consisted of political statements by plaintiffs' allied organizations (which provided written talking points to their supporters) or just outright name-calling. The talking points provided by plaintiffs' allies were made a part of the legislative record. (Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh site) at 15-16; Doc. 184-10). A copy of the talking points are attached as Exhibit 1. These points, or a variant of them, were repeated by many if not most of the public commenters. In addition, a large number of commenters engaged in name-calling and ad hominem attacks unrelated to redistricting.[2] (*See, e.g.,* Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh site) at 13-14; Doc. 184-10 (Eva F. Lee: "Don't give the label of racists to your children. … Don't act like Nazis," and later accuses the General Assembly of "white supremacy."); 47 (Kim Eng Koo: the "current party in power" is "racist."); 53-55 (Tony Quarataro: invoking "white supremacy" and stating "Don't be a Tar Heel version of the disgrace who sits in the White House…"); 56 (Melva Fager Okun: "You are the equivalent of white supremacists.")); Tr. Pub. Hearings, Aug. 22, 2017 (Beaufort site) at 8; Doc. 184-11 (Bill Roach: "You're a supremacist. And if you happen to be white, fill in the blank."); Tr. Pub. Hearings, Aug. 22, 2017 (Jamestown site) at 24; Doc. 184-15 (Larry Cormier: "You implement racially-gerrymandered districts, white

[2] Much of these ad hominem attacks appear to have been inspired by the talking points. (See Ex. 1 at 1 (discussing "white supremacy")).

supremists -- supremacists, excuse me."); 37 (Chris Buczynski: "It's bullshit. I know it's bullshit. You know it's bullshit. We know what you're doing. The Supreme Court told you to fix it. So fix it. Don't hire the same asshole that drew the last racist-ass map."); Tr. Pub. Hearings, Aug. 22, 2017 (Weldon site) at 9; Doc. 184-16 (Jennifer Smyth: "There a whole lot of white folks' tip-toe around the fact that this is racist, and I'm not having it."). To the limited extent that public comments actually commented on the shape or locations of districts, those comments came from either plaintiffs or a few individuals aligned with the organizations now supporting plaintiffs. (Tr. Pub. Hearings, Aug. 22, 2017 (Fayetteville site) at 26-27; Doc. 184-13 (O'Linda Watkins, head of Moore County NAACP), 176 (T. Anthony Spearman, NC NAACP)); Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh site) at 144-45; Doc. 184-10 (Rev. Pridgen, Covington plaintiff).

Despite the adopted criterion that race not be used in the drawing of districts, members of the Democratic party repeatedly pushed to draw districts based on race without submitting evidence justifying the use of race in that manner, contrary to this Court's ruling. (*See* Tr. H. Redist. Comm., Aug. 25, 2017 at 50-52, 95-103; Doc. 184-18). When the Senate Redistricting Committee met on August 24, 2017, Senators in the Democratic party such as Senators Blue and Van Duyn advocated for a racial numerical quota during the debate, which the Senate refused to entertain in the absence of evidence of legally sufficient racially polarized voting necessary to justify the use of racial quotas. (Tr. S. Redist. Comm., Aug. 24, 2017 at 67-77, 95-99; Doc. 184-17). Senators also emphasized prioritizing traditional redistricting principles. (*Id.* at 114-115). Thus, when

Senator Lowe advocated for the use of race in districts in Guilford County, Senator Hise explained that the district followed the city limits for Greensboro, thus adhering to a criterion to consider municipal lines in drawing districts. (*Id.* at 36). The Senate maps were approved by the Committee and no racial data was used in the development, drawing, or assignment of voters to districts by a vote of 9-4. (*Id.* at 46, 131).

The Senate met on August 25, 2017 to debate the proposed plan from the Senate Redistricting Committee. Senator Hise explained the criteria used to draw the proposed map. (Tr. S. Floor Session, Aug. 25, 2017 at 5-11; Doc. 184-19). During the debate, Senator Blue brought forth an amendment which adjusted two districts in Wake County. (*Id.* at 11). During debate over the amendment Senator Blue explicitly stated that the districts "are not racially gerrymandering" and that it "cures the gerrymander that the Court found in Wake County. (*Id.* at 13-14). Senator Blue's amendment passed by a unanimous vote. (*Id.* at 17). Similarly, in the prior Senate Redistricting Committee meeting, Senator Clark brought forward an amendment which would change the district lines to include his residence in the district. (Tr. S. Redist. Comm., Aug. 24, 2017 at 49-52; Doc. 184-17). Like Senator Blue, Senator Clark agreed that the district as amended would not be a racial gerrymander. (*Id.*). During this debate, Senator Clark never expressed any concern that the district as a whole was a racial gerrymander or that certain precincts had been included or excluded in the district on the basis of race. (*Id.*).

The number of precinct and municipality splits in the House plan became contentious in the House Redistricting Committee meeting when Representative Jackson

put forth a proposed House plan on behalf of the plaintiffs in this matter. (Tr. H. Redist. Comm., Aug. 25, 2017 at 46, 59; Doc. 184-17). When discussing the plaintiffs' maps, Representative Dollar noted that the plaintiff's maps double-bunked 18 individuals, 12 more than the committee's proposed plan, and appeared "to be quite political and gratuitous." (*Id.* at 61). Representative Stevens also noted that the plaintiffs' plan split at least 43 new precincts, while the committee's plan only split 19 new precincts. (*Id.* 70-73). Representative Brawley objected to the portion of plaintiffs' map in Mecklenburg County that split the cities of Matthews and Mint Hill into three districts. (*Id.* at 93-95). Representative Brawley also noted that the plaintiffs' proposed map in Mecklenburg County would likely "elect 11 Democrats and one Republican" and stated that it looked "like a partisan gerrymander of some of the most blatant type by breaking apart communities which have separate identities and putting them under the dominance of the City of Charlotte." (*Id.*). Representative Lewis went on to state that the map made by the Covington plaintiffs was "clearly [a] Democratic gerrymander." (*Id.* at 102).

The committee's proposed House map was approved by the House Redistricting Committee by a vote of 25-16. (*Id.* at 125). On August 28, 2017, the House met to consider the House plan approved by the House Redistricting committee. Representative Lewis explained the criteria used to draw the proposed map. (Tr. H. Floor Session, August 28, 2017 at 4-8; Doc. 184-20). Representative Lewis was also questioned about the need to redraw districts that did not touch districts which had been declared unconstitutional. (*Id.* at 45). Representative Lewis explained that "[t]he [C]ourt ordered

us to correct racial gerrymanders….freezing districts which do not touch the illegal district would require the core of the racial gerrymander as a starting point, and then we would be accused of racial gerrymandering all over again. Instead, we started with a blank slate….[which] has let us do some good things. It let us split fewer precincts, it let us keep more municipalities whole." (*Id.* at 45-46). Representative Lewis also pointed out that the state constitution does not contemplate court-ordered redistricting. (*Id.*). After debate on the floor, the House passed the plan by a vote of 65-47. (*Id.* at 61).

Both the House and Senate plans met the criteria adopted by the Joint Committee. In terms of compactness, both plans were within both the Reock and Polsby-Popper score ranges. (Tr. H. Redist. Comm. at 11-12; Doc. 184-18); (Tr. S. Redist. Comm. at 14; Doc. 184-17). Both plans adopted the optimum county grouping required by the WCP. As a result, for example, the House plan split only 40 counties. (Tr. H. Redist. Comm. at 11; Doc. 184-17). This compares to 60 split counties in the 2001 plan and 49 in the 2011 plan. (*Id.*). The House plan also had fewer municipal splits than many in prior years, with only 78 splits, compared to 123 in 2009 and 144 in 2011. (*Id.* at 11-12). The House plan also reduced the number of split precincts with 49 total split precincts in the plan, but with 30 of those remaining from untouched districts from the 2011 plan. (*Id.* at 12-13). Comparatively, the 2009 House plan had 285 split precincts, and the 2011 plan had 395 split precincts. (*Id.).* In addition, the Senate plan split only 12 counties. (Tr. S. Redist. Comm. at 6; Doc. 184-17). This compares to 51 split counties in the 2001 plan and 19 in the 2011 plan. (*Id.*). The Senate plan also had fewer municipal splits than many in prior

years, with only 61 splits, compared to 86 in 2011. (*Id.* at 9). The Senate plan also reduced the number of split precincts with 9 total split precincts in the plan. (*Id.* at 8). Comparatively, the 2003 Senate plan had 55 split precincts, and the 2011 plan had 257 split precincts. (*Id.*).

The 2017 plans also complied with the incumbency protection criterion. Except where the WCP required the pairing of incumbents, the 2017 plans provide all incumbents of both parties a district in which that incumbent has a fair chance of being elected. *Alabama*, 135 S. Ct. at 1263, 1270 ("Alabama sought to achieve numerous traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents."); *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (calling incumbency protection "a traditional and constitutionally acceptable districting principle"); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (recognizing incumbency protection as a "legitimate state goal"); *Karcher v. Daggett,* 462 U.S. 725, 740 (1983) (holding that "avoiding contests between incumbent [r]epresentatives" is justified); *White v. Weiser*, 412 U.S. 783, 791 (1973) (stating that where the state chose to consider, as a redistricting criterion, a policy "aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority [of] the members" that the court would "not disparage this interest"); *Burns v. Richardson*, 384 U.S. 73, 89 (1973) (holding that "district boundaries [which] may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness").

On the other hand, the House and Senate plans submitted by the Covington plaintiffs paired numerous Republican incumbents with Democrats in districts that the Democratic candidate would likely win. The Covington House plan paired at least 16 incumbents and the Covington Senate plan paired at least six incumbents. The legislators who introduced these plans as proposed amendments were not able to provide a non-political reason for why the Covington plaintiffs proposed to eliminate those Republican members from the legislature. In targeting Republican incumbents, the Covington plaintiffs sometimes sacrificed other traditional redistricting principles. For example, Covington House District 107 targets a Republican incumbent in Mecklenburg County by using water contiguity through Lake Norman to split the town of Cornelius. The proposed district would have removed a heavily Republican precinct in Cornelius and placed it into a Democratic district while making the district overall less compact. No explanation was offered by the amendment sponsor for this district.

ARGUMENT

A. Evidence submitted by plaintiffs outside of the legislative record should be excluded and not considered by the Court. Moreover, that evidence demonstrates that this case is moot and new claims must be filed.

In support of their objections, plaintiffs submitted five declarations. Three of these declarations are from declarants providing what amounts to expert testimony on various aspects of the enacted plans including compactness, political performance, and alleged racial gerrymandering. None of the information presented by these declarations was submitted to the legislature during the process of enacting redistricting plans. Two

of the declarations are from Democratic state senators who were either on the redistricting committee or present during floor debate on the plans.[3] The state senator declarations provide detailed information about concerns they have with the enacted plans that was not presented by either senator on the Senate floor in debate or in committee.

Under Supreme Court precedent, these declarations must be excluded. In *Shaw II*, the appellants used information that was not presented to the legislature to demonstrate the legislature's motive in a racial gerrymandering case. The Supreme Court rejected such evidence. The Court held that the evidence was not relevant because "[o]bviously these reports….were not before the General Assembly when it enacted Chapter 7. And there is little to suggest that the legislature considered the historical events and social-science data that the reports recount…." *Id.* at 910. Similarly, the declarations described above were not before the General Assembly when it enacted the 2017 plans and should therefore not be considered by this Court in considering plaintiffs' objections.

[3] One of the declarations is from Senator Ben Clark who claims that his district (Senate District 21) continues to be racially gerrymandered. (Doc. 187-8). During the legislative process, Senator Clark introduced an amendment to modify Senate District 21 to include his residence. *See infra* at 38. In his declaration, Senator Clark now suggests that his own amendment contributed to a racial gerrymander. (Doc. 187-8 at ¶ 14). Interestingly, however, Senator Clark has conceded that the legislature "eliminated the racial gerrymandering" in the 2017 plans. See http://www.wral.com/new-legislative-maps-crack-door-for-democrats-or-do-they-/16895968/. In addition, Senator Clark conceded during the legislative process that he believed the amendment to Senate District 21 that he offered was legal saying, "I believe the amendment I'm providing is legal under all legal theories. It just changes the distribution of the population by approximately 300." (Tr. S. Redis. Comm. Aug. 24, 2017 at 51; Doc. 184-17).

In any event, the Court should exclude the declarations out of respect for fairness and the rule of law. The plaintiffs had numerous opportunities during the legislative process to submit these declarations and any others. Indeed, plaintiffs had their legislative allies submit plaintiffs' proposed alternative plans as proposed amendments during the legislative process. Because plaintiffs withheld these declarations, the legislature did not have the benefit of reviewing them and possibly modifying the plans based on the information. If the Court decides to consider the declarations, out of fairness and due process concerns, at a minimum the Court should (1) set a new discovery period during which defendants may depose plaintiffs' witnesses and defendants may present expert witnesses of their own; (2) set a new briefing schedule on consideration of plaintiffs' objections following the discovery period; and (3) allow the General Assembly to reconvene to consider the information if new districts become necessary.

Finally, the fact that plaintiffs can support their new claims only by developing new expert testimony and fact witnesses demonstrates that this matter is moot and that if plaintiffs want to pursue additional claims, they must file a new lawsuit. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)

(quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Here, this Court has enjoined the use of the 2011 legislative plans and those plans will not be used. Moreover, the legislature has now enacted new plans for the 2018 elections. There is therefore nothing left for this Court to do.[4]

Similarly, plaintiffs no longer have a concrete stake in the outcome of the case because they face no realistic threat of injury from the 2011 legislative plans. To maintain a live case or controversy:

> [t]he parties must continue to have a "personal stake in the outcome" of the lawsuit. . . . . This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."

Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477–78 (1990)). For this reason, the doctrine of mootness is often characterized as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its

[4] The so-called "objections" filed by plaintiffs do not change this result. While this Court has the authority ultimately to enjoin some or all of the new 2017 redistricting plans, it may only do so in the context of an actual live case or controversy between the parties, which does not exist absent a new lawsuit. Plaintiffs have not cited any authority for the proposition that filing "objections" to a new redistricting plan may substitute for a live case or controversy created by a new lawsuit. Of course, had this Court taken it upon itself to draw districts itself in the first instance, such authority would have been exercised under the case or controversy that previously existed between the parties. However, now that the legislature has adopted new plans to replace the 2011 plans, the case filed by plaintiffs over those plans is moot. For this same reason, plaintiffs' claim that the burden has shifted to the legislature to prove that the districts are not racial gerrymanders is incorrect (Doc. 187 at 19). None of the cases cited on that point by plaintiffs involve redistricting, and for good reason. Once the legislature enacts a new map, the controversy reflected by the old map dissolves rendering the case moot.

existence (mootness)." *Arizonans for Official English*, 520 U.S. at 68 n.22; *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that Article III standing requires the plaintiff to identify "a concrete and imminent invasion of a legally protected interest that is neither conjectural nor hypothetical"); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation."). Because the claims asserted by all plaintiffs are directed at legislation that has now been repealed and replaced, plaintiffs cannot demonstrate that they are likely to be harmed by the challenged redistricting plans. Plaintiffs' inability to identify any threat of injury deprives them of a concrete stake in the outcome of this case, rendering the case moot and divesting this Court of subject matter jurisdiction.

B. This Court's review of the 2017 plans is at most limited to plaintiffs' racial gerrymandering claims.

Plaintiffs' arguments show that they simply disagree with the policy judgments made by the General Assembly in enacting the 2017 House and Senate plans and want the Court to toss the General Assembly's policy prerogatives aside and replace them with the plaintiffs' political preferences. The Supreme Court has recently instructed district courts to decline such overtures. *See Perry v. Perez*, 565 U.S. 388, 394 (2012) (stating that, in case where court adopted an interim map, a district court cannot "displac[e] legitimate state policy judgments with the court's own preferences" and finding that when "the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of 'the collective

public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas," the court erred."). In *Perez*, the Supreme Court found that the district court overstepped its bounds when it declined to give as much effect as possible to policy judgments made by the Texas legislature in previous districting plans even though the court sought to adopt a map "without regard to political considerations." *Id.* at 396 (explaining that the district court had available to it "the benefit of a recently enacted plan to assist it" and "the court had neither the need nor the license to cast aside that vital aid.").

Similarly, plaintiffs' attack on districts for reasons other than alleged racial gerrymandering is foreclosed by Supreme Court precedent. In *Upham v. Seamon*, 456 U.S. 37 (1982), the Supreme Court considered a three-judge court's rejection and redrawing of a congressional plan enacted by the Texas legislature. There the United States Attorney General objected to two districts and refused to preclear them under Section 5 of the VRA. *Id.* at 38-39. The three-judge court proceeded to draw a remedial plan which resolved the Attorney General's Section 5 objections to those two districts. *Id.* at 39-40. The three-judge court, however, did not stop there. The three-judge court also redrew several other districts which it perceived did not meet the non-retrogression standard of Section 5. *Id.* at 39-40.

This was error. The Supreme Court reiterated the principles for judicial review of redistricting plans:

> From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial

> relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." We have adhered to the view that state legislatures have "primary jurisdiction" over legislative reapportionment . . . . Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'

Id. (citing *White v. Weiser*, 412 U.S. 783, 794–95 (1973) (internal citations and quotations omitted)). *See also Harris v. McCrory*, Case No. 13-949 (Doc. 171 at 4) (citing *Upham* and agreeing that review by a three-judge court of redistricting plan in this context is "limited") (Gregory, J.).

The Court also explained it is error for a lower court to order a remedial plan "that reject[s] state policy choices more than [is] necessary to meet the *specific constitutional violations involved*." *Upham*, 456 U.S. at 39-40 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160–61 (1971)) (emphasis added). Further, an "appropriate reconciliation of these two goals [meeting Constitutional requirements and State political policy] can only be reached if the district court's modifications of a state plan are *limited to those necessary* to cure any constitutional or statutory defect." *Id.* (emphasis added). Under these established principles, it was erroneous for the three-judge court to make changes to districts that were not the subject of the original Section 5 objection.

The Fourth Circuit, in a case cited by plaintiffs, has similarly rejected court-drawn remedial plans that strayed from the original violation. In *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110 (4th Cir. 1998), the court explained:

> Where, however, the legislative body does respond with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights—that is, whether it fails to meet *the same standards applicable to an original challenge of a legislative plan in place.*

Id. at 115-18 (emphasis added). Thus, as in *Upham*, a court may not roam around the new map seeking other districts to "remedy." Instead, the court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions." *Id.*

As in *Upham*, the Fourth Circuit in *McGhee* rejected a remedial plan that went beyond fixing the original violation found by the district court. *Id.* at 120. *McGhee* was a Section 2 vote dilution case where plaintiffs challenged the at-large electoral system for county commissioners in Granville County, North Carolina. *Id.* at 112-113. The county responded to the Section 2 violation by adopting a new plan which increased the number of county commissioners from five to seven, and replaced the at-large system with seven single-member districts. *Id.* at 113. The plaintiffs, however, were not satisfied. They conceded that the single-member districts drawn by the county gave African American

voters the best opportunity to elect representatives of choice that could be given them under a solely single-member districting plan. *Id.* Nonetheless, they requested that the district court impose a unique system of voting called "limited voting," wherein commissioners would continue to be elected at-large, but voters would be allowed only three votes or less if they chose when voting for commissioners. *Id.* at 114. The district court agreed and imposed plaintiffs' remedy on the county. *Id.*

The Fourth Circuit unanimously reversed. It held that the district court's remedy had gone beyond the "specific violation alleged and established" – "'vote dilution' by the 'submergence' of minority voters' potential voting power through the use of an at-large electoral process." *Id.*at 115. Indeed, the plaintiffs' "concession" that the violation had been remedied through redistricting "establish[ed] the plan as a legally adequate one that should have been accepted in deference to the affected local government's primary jurisdiction to ordain its electoral process." *Id*. at 118. The Fourth Circuit also rejected any argument that the possibility that the county's remedial plan might violate Section 2 in other ways should result in a court-imposed plan: "[w]hether other elements of the County's remedial plan may *now or in time cause different forms of cognizable [Section] 2 harm* to these persons as a discrete sub-group of the original plaintiff class *is not before us*. We *only* determine here that as to the class of which they are members in this litigation the County plan adequately remedies the dilution-by-submergence *violation specifically alleged and established* in respect of that entire class." *Id*. at 119 n.10 (emphasis added).

Moreover, this Court lacks jurisdiction as a three-judge court to consider any claims outside of alleged racial gerrymandering. When Congress enacted the current version of 28 U.S.C. § 2284, Congress intended to "reduce sharply the class of cases requiring the convening of a three-judge court." *City of Philadelphia v. Klutznick*, 503 F.Supp. 657, 658 (E.D. Pa. 1980). Three-judge district court panels are statutory in nature with "a limited sphere of operation" whose "technical requirements relating to jurisdiction are to be strictly construed." *Jehovah's Witnesses in State of Wash. v. King County Hospital Unit No. 1 (Harborview)*, 278 F. Supp. 488, 493 (W.D. Wash.1967), aff'd, 390 U.S. 598, rehearing denied, 391 U.S. 961. The policy behind convening a three-judge court is that a single judge should not "be empowered to invalidate a state statute under a federal claim." *Id.* Therefore, the attacked state action must be based on the Constitutionally-challenged statute. *Id.* This requirement also extends to any other claims a plaintiff might bring in the lawsuit.

It is well established that "any rights asserted by the plaintiffs under other federal statutes or Constitutional provisions can be asserted only before the [single district judge]." *Robertson v. Bartles*, 148 F.Supp.2d 443, 461 (D.N.J. 2001) (*quoting Gordon v. Executive Comm. of the Democratic Party of Charleston*, 335, F.Supp. 166, 170 (D.S.C. 1971.) Even if the claims involve issues closely related to those in representation claims, but fall outside the statutory language of 28 U.S.C. § 2284, the Court should dismiss the case for lack of jurisdiction. *Adams v. Clinton*, 90 F.Supp.2d, 35, 38-39 (D.D.C. 2000) (*citing Public Serv. Comm'n v. Brashear Freight Lines*, 312 U.S. 621, 625 (1941)

(holding that a three-judge court should not consider "questions not within the statutory purpose for which the two additional judges ha[ve] been called")).

Separation of claims is especially important when claims arise under state law. In *Robertson,* a three-judge panel properly convened under 28 U.S.C. § 2284, refused to hear a claim brought by the same plaintiffs against defendant alleging that the one-year residency requirement in the New Jersey Constitution was likewise unconstitutional. *Robertson,* 148 F.Supp. at 461. The court refused to hear the case on the grounds that the case belonged either in State court or at the very least before a single district court judge. *Id.* at 459, 461-62. Likewise, in *Perez v. Ledesma,* 401 U.S. 82, 86-87 (1971) the Supreme Court refused to review a portion of the three-judge panel's decision involving a local ordinance, because the Supreme Court found that the panel had no jurisdiction to hear the claim over the local ordinance, only jurisdiction to hear what was conferred in 28 U.S.C. § 2284.

An unconstitutional application of valid state law is likewise improper for a three-judge court to hear, as the statutory purpose of convening a three-judge court is to provide "procedural protection against state wide doom by a federal court of a state's legislative policy." *Keiser v. Bell*, 332 F.Supp. 608,613 (E.D. Pa. 1971) (quoting *Phillips v. United States*, 312 U.S. 246, 251 (1941). In writing for a unanimous court in *Phillips,* Justice Frankfurter made an important clarification, noting that "an attack on lawless exercise of authority is *not* an attack upon the constitutionality of a statute conferring the authority. *Phillips,* 312 U.S. at 252 (emphasis added). Thus, plaintiffs' arguments that the

General Assembly violated various alleged state constitutional provisions in the 2017 plans may not be heard by this court.

C. Plaintiffs' racial gerrymandering objections are politically-motivated and legally baseless.

The constitutional deficiencies identified by this Court have been completely remedied by the 2017 plans. In order to ensure that race was not the predominant motive in the drawing of new districts, the legislature adopted criteria expressly prohibiting the consideration of race in the drawing of new plans. As a result, data regarding the race of voters was not used in the drawing of the districts, and, in fact, was not even loaded into the computer used by the map drawer to construct the districts. When the proposed new map was released, no race data accompanied it. While members of the Democratic party repeatedly tried to inject the improper use of race into the legislative process, those members refused to provide evidence of legally sufficient racially polarized voting that would justify race-based districts. Accordingly, race was not and could not have been the predominate motive for any of the districts, much less the four districts to which plaintiffs now object.

Moreover, in attempting to comply with this Court's Order, the legislature hewed much more closely to traditional redistricting principles such as compactness and following county and precinct lines than prior legislatures in enacting legislative districts. A mere visual review of the new plan demonstrates that fewer counties are divided, a minimal number of precincts were split, and that the overall plan and each district is significantly more compact than prior plans.

1. Plaintiffs cannot show that any district in the 2017 House and Senate plans is a racial gerrymander because the General Assembly followed traditional, race-neutral districting principles in enacting these plans.

In their objections, plaintiffs argue that four districts—House Districts 21 and 57 and Senate Districts 21 and 28—should be rejected by the Court because they continue to be racial gerrymanders. It is undisputed that the legislature did not use racial data in drawing the 2017 plans and plaintiffs have not brought forward evidence that such data was used. Instead, plaintiffs' premise their objections on circumstantial evidence from looking at district lines. But this evidence is insufficient because the district lines are clearly explained by traditional redistricting principles. *See Alabama*, 135 S. Ct. at 1270 (stating that, to prove race predominated in drawing districts, the "plaintiff must prove that the legislature subordinated *traditional race-neutral districting principles* ... to racial considerations.") (citing *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (emphasis in original); *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) ("After all, the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations.") (emphasis in original); *Miller*, 515 U.S. at 916 (stating that, to prove that race was the predominant motivating factor, "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-

neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'") (citations omitted); *Shaw I*, 509 U.S. at 646–48 (stating that following "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are not constitutionally required but "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.").

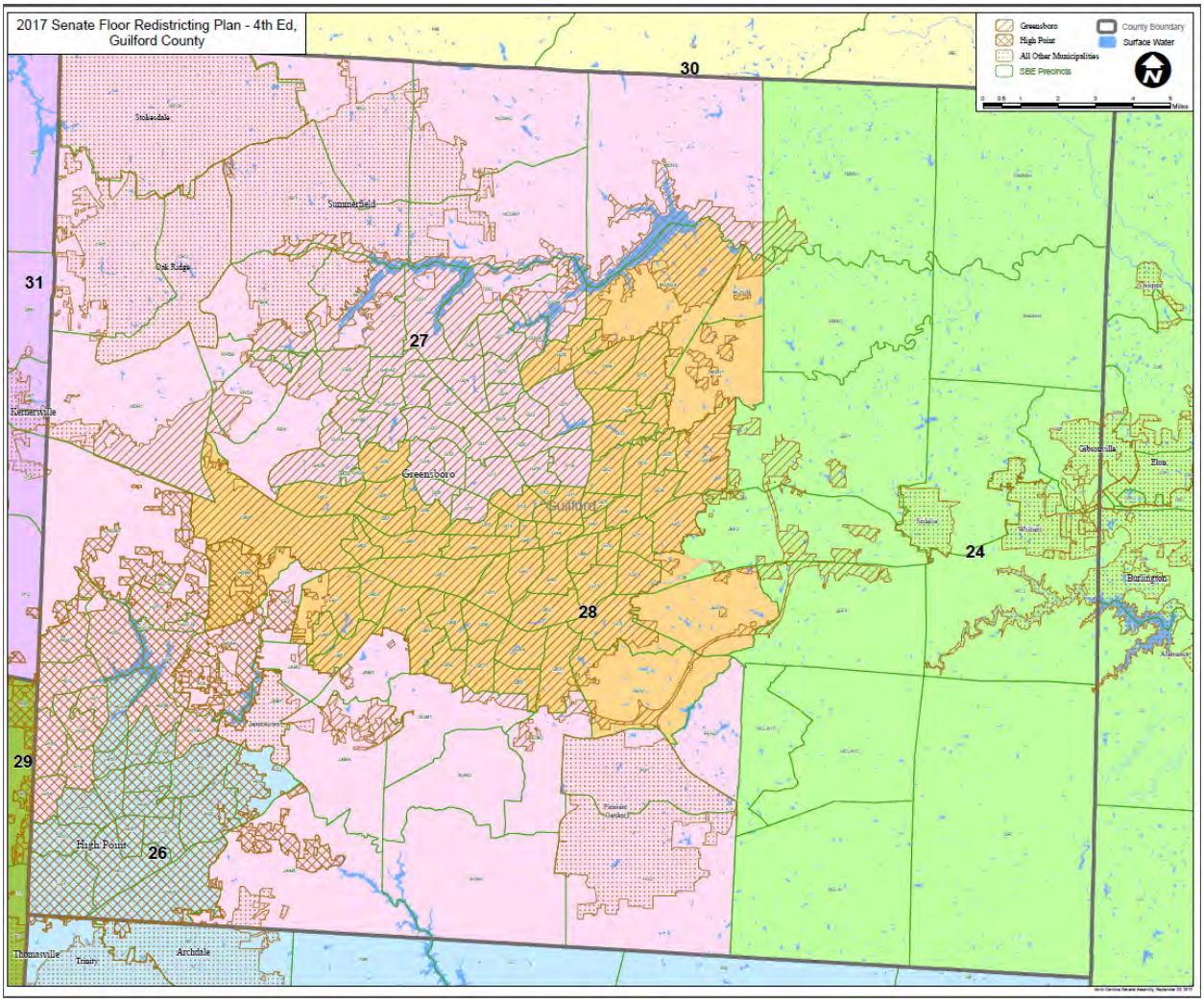
All four of the districts plaintiffs contend are racial gerrymanders—like all of the districts in the 2017 House and Senate plans—were drawn using the traditional redistricting criteria adopted by the Joint Committee with no consideration of racial data regarding the population placed into the districts. (*See* Doc. 184-37). Ironically, in claiming that House Districts 21 and 57 and Senate Districts 21 and 28 continue to be racial gerrymanders, it is plaintiffs and their allies in the General Assembly who repeatedly sought to inject illegal considerations of race into the redistricting process. Though they criticize the General Assembly for not consulting racial data, they have identified no evidence in the legislative record that would have justified drawing districts based on race. A review of plaintiffs' objections to each of these districts demonstrates this is so:

a. Senate District 28

Plaintiffs object to Senate District 28 on the grounds that this district allegedly continues to retain its "core shape" and "follows the contours of the black population of Greensboro while majority-white areas of the city are left out of the district." (Doc. 187

at 25-26). Plaintiffs' objections ignore the legislative record and the map of the district which make clear that the only "contours" followed when drawing Senate District 28 were the Greensboro city boundaries and the then-existing precinct boundaries in Guilford County. (*See* Tr. S. Redis. Comm. Aug. 24, 2017 at 36, 111; Doc. 184-17) (explanation by Senator Hise that Senate District 28 tracked the Greensboro city limits consistent with the criteria adopted by the committee to consider municipal boundaries when drawing the district lines); (Tr. S. Floor. Session, Aug. 25, 2017 at 30; Doc. 184-19) (explaining how precinct boundaries affected the lines of Senate District 28).

A map of District 28 with an overlay of the city and precinct boundaries shows that the district is made up of all whole precincts in the eastern parts of the city of Greensboro, along with precincts containing satellite annexations of Greensboro to the east of those whole precincts. (See attached Exhibit 2).



Accordingly, the BVAP level in District 28 is naturally occurring as it is the result of the population residing in those whole precincts that were included in the district.[5] A review of maps contained in the Declaration of Anthony Fairfax, submitted by plaintiffs in support of their objections, shows that this is the case. The maps in Mr. Fairfax's declaration show that, to draw a district anchored in eastern Greensboro that tracks the

[5] This should be no surprise to plaintiffs as their counsel has conceded that such districts can occur. (Trial Tr., Vol. I, pp. 17, 18; Trial Tr., Vol. V, p. 175; Doc. 181 at 76). It is also consistent with the Supreme Court's statements on this issue in *Bush v. Vera,* 517 U.S. 952, 967 (1996).

city boundaries with a lower BVAP, the General Assembly would be required to engage in a highly race-driven draw of the district using mechanical racial targets, contrary to their adopted criteria. (*See* Doc. 187-6 at 7).

A review of the legislative record and alternative maps offered during the redistricting process demonstrates that this is true. For example, in the August 24, 2017 Senate Redistricting Committee hearing, Senator Van Duyn discussed alternative maps she had drawn with Senator McKissick and outside consultant Kareem Crayton that sought to return Senate District 28 "to the percentage of African-Americans that we had in 2003." (*See* Tr. S. Redis. Comm. Aug. 24, 2017 at 97, 103-04; Doc. 184-17). Senator Van Duyn confirmed that, in drawing an alternative, "we used criteria that included reducing the percentage of African-American voters in the district." (Tr. S. Redis. Comm. Aug. 24, 2017 at 100; Doc. 184-17).

On August 25, 2017, while the 2017 Senate plan was first considered on the Senate floor, Senator Robinson offered an amendment that included alternative versions of the Senate districts in Guilford County, including Senate District 28, that she developed with Senator McKissick and Mr. Crayton, the outside consultant. (Tr. S. Floor Session, Aug. 25, 2017 at 26; Doc. 184-19; Doc. 184-32). Although Senator Robinson's proposed alternative map contains an "L-shaped" version of District 28 just like the enacted version to which plaintiffs now object, her proposal contained several features that the enacted version of Senate District 28 does not.

First, consistent with Senator Van Duyn's testimony the previous day in the Senate Redistricting Committee, Senator Robinson admitted that she drew her version of Senate District 28 with the goal of having a black voting age population of 45 percent.[6] When pressed by Senator Bishop as to where the 45 percent target came from, Senator Robinson responded that she had relied upon her "own experience" in the district. (*Id.* at 26-28). In attempting to explain Senator Robinson's 45 percent target for her district, Senator Blue acknowledged that no study of racially polarized voting had been conducted with respect to District 28 but argued that the map could be approved if it contained a percentage of black voting age population that the members living in the affected districts had agreed to. (*Id.* at 35-36).[7]

Second, in addition to expressly considering race in violation of the adopted criteria, Senator Robinson's proposed map also would have split seven municipalities in Guilford County as opposed to four that were split in the 2011 map and three that were split in the 2017 Senate plan. (*Id.* at 31). Senator Robinson ultimately withdrew her amendment and alternative map before it was considered by the Senate. (*Id.* at 52).

On August 28, 2017, when the Senate met to consider the 2017 Senate plan on third reading, at Senator Hise's invitation, Senator Robinson presented another proposed

[6] According to the data in plaintiffs' objections, the BVAP in the pre-2011 version of Senate District 28 was 44.18%. (Doc. 187 at 18). Thus, the 45 percent BVAP target Senator Robinson acknowledged is consistent with the goal Senator Van Duyn outlined in the Senate Redistricting Committee of returning Senate District 28 to the BVAP level in the district in 2003.

[7] The Legislative Defendants are aware of no Supreme Court cases stating that it is permissible to racially gerrymander districts so long as the legislative members residing in those districts agree to it.

amendment that included alternative versions of the Senate districts in Guilford County which she acknowledged was based on the one she had withdrawn August 25. (Tr. S. Floor Session, Aug. 28, 2017 at 9; Doc. 184-21). Senator Hise pointed out that Senator Robinson's proposal "continue[d] to ignore the committee's criteria" because her map "is still clearly a district drawn on the basis of race." (*Id.* at 10). Senator Hise also pointed out that Senator's Robinson's proposal appeared to be an effort to make neighboring Senate District 27, held by Republican Senator Wade, a district that was easier for Democrats to win and continued to unnecessarily divide municipalities, contrary to the adopted criteria. (*Id.*). Senator Robinson acknowledged that her goal in offering the amendment was to make the Senate districts in Guilford County "more aligned with the 2003" when Democrats controlled the General Assembly. (*Id.* at 11, 13). Senator Robinson's amendment was defeated by a 12-33 vote on the Senate floor. (*Id.* at 18).

Testimony given at the public hearings provided no substantive input for how Senate District 28 should be drawn or any specific suggestions for improving the version of the district released to the public before the hearing. For example, Rev. Julian Pridgen, a plaintiff in this case, testified that because Senate District 28 contained "greater than 50 percent black in voting age population," the General Assembly "failed to remedy the racial gerrymanders the federal court hailed were unconstitutional" but provided no explanation as to how race predominated in the drawing of the district. (Tr. Pub. Hearings, Aug. 22, 2017 (Raleigh site) at 144; Doc. 184-10). Similarly, two individuals testified that Senate District 28 was an example of a district where they

believed that race still predominated but no one provided any explanation or factual support for this contention. (*Id.* at 149, 194). Bob Hall, Executive Director of Democracy NC, told the General Assembly that Senate District 28 was one where "you're packing more African-Americans into the districts." (*Id.* at 166). Yet, data cited by plaintiffs in their objections shows that testimony was false: The BVAP in Senate District 28 declined from 56.49% in 2011 to 50.52% under the 2017 Senate Plan. (Doc. No. 187 at 18).[8]

Because the General Assembly relied upon traditional redistricting criteria, including municipal and precinct boundaries in constructing Senate District 28, plaintiffs cannot show that this district is a racial gerrymander.

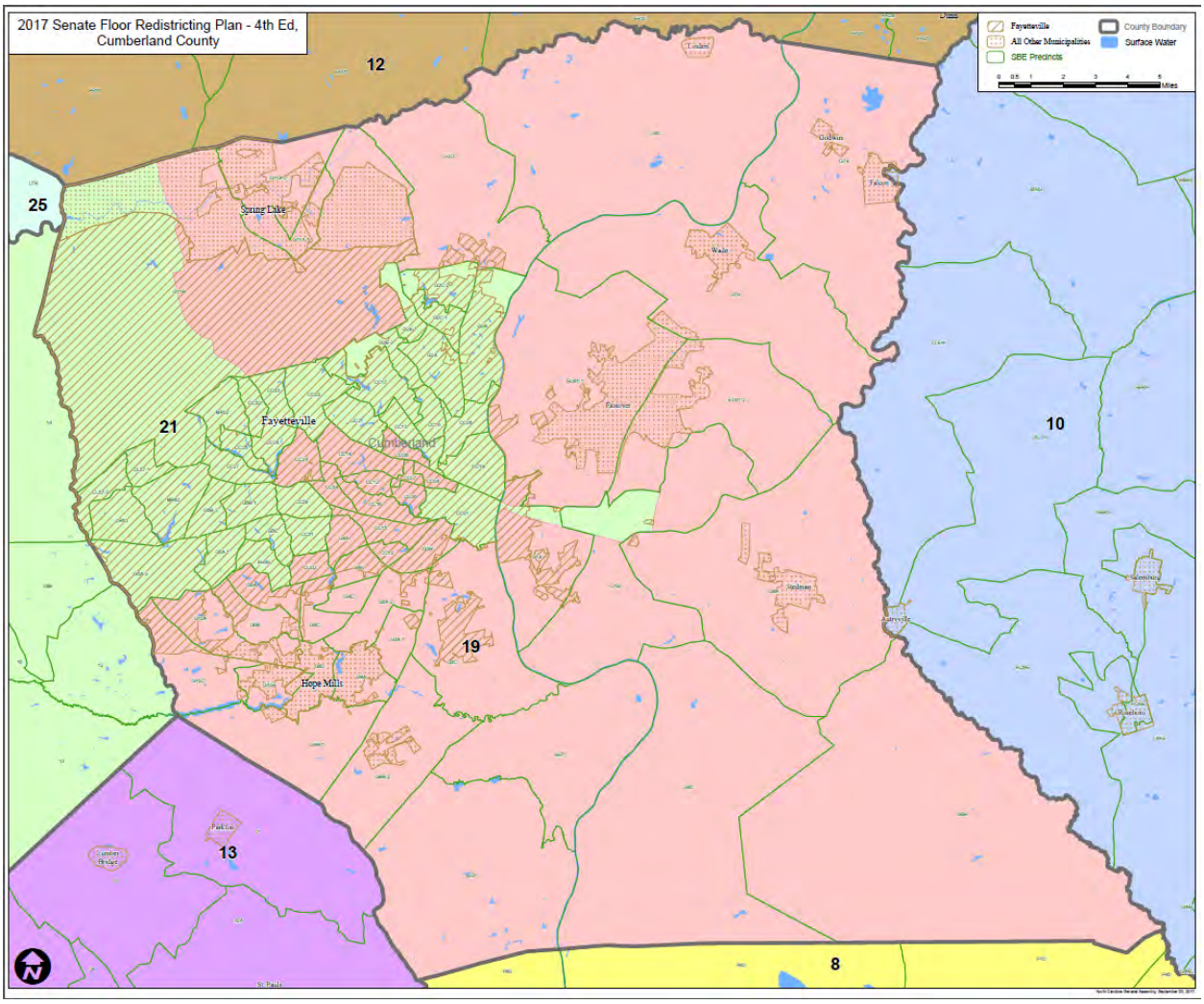
b. Senate District 21

Plaintiffs object to the 2017 version of Senate District 21 because they contend that the General Assembly "made only minimal changes to the district" and because the district "still has a BVAP of 47.51% which is ten percentage points higher than the overall cluster BVAP of 36.86%." (Doc. 187 at 28). Plaintiffs' objection to Senate District 21 boils down to this: if the BVAP of either of the senate districts in the Hoke-Cumberland grouping is over 36% then that makes the district a racial gerrymander. In addition to the fact that this is not the legal standard for defining a racial gerrymander, remedying this objection would require setting a mechanical target in both districts within

[8] Bob Hall made the same erroneous assertion with respect to Senate District 21 where the BVAP also declined from 2011 according to plaintiffs' objections. (Doc. 187 at 19) (stating that the BVAP in Senate District 21 declined from 52.51% under the 2011 plans to 48.46% under the 2017 Senate plan).

the Hoke-Cumberland grouping in violation of *Alabama*. *See* 135 S. Ct. at 1273-74. Drawing districts that contain this type of proportionate representation would require subordinating all traditional redistricting principles to race. This is precisely what the General Assembly did not do.

Instead, by placing some of the most densely populated and urban precincts in Senate District 21, the General Assembly preserved the heart of Fayetteville. A map of District 21 with an overlay of the city and precinct boundaries in Cumberland County shows that the district is composed primarily of whole precincts in the northern and central portions of the City of Fayetteville. (See Exhibit 3).



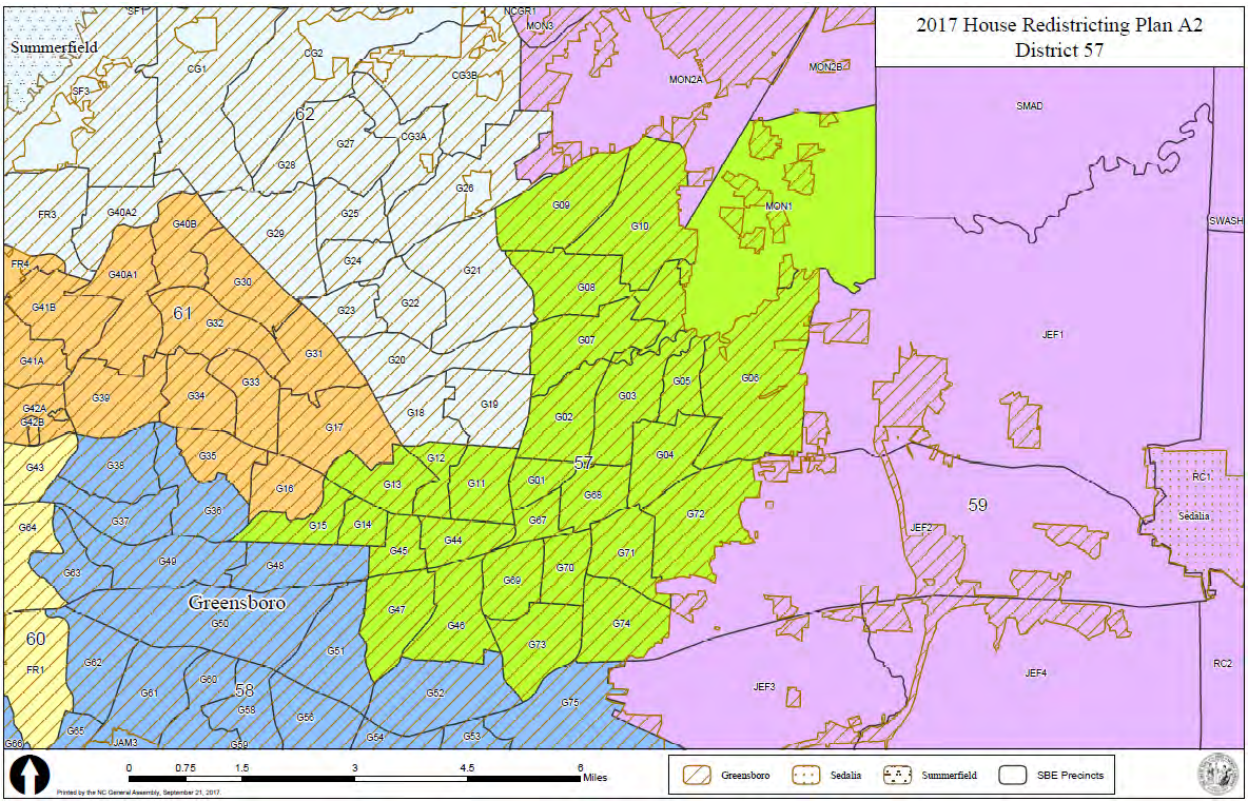
Additionally, the Senate adopted an amendment offered by Senator Clark, the incumbent in District 21, to include additional communities in close proximity to the existing district that Senator Clark stated would benefit from being included in the district. His amendment created the extension of the district seen in Exhibit 3. Including these portions of Cumberland County in Senate District 21 is consistent with the incumbency protection criteria adopted by the redistricting committees: Senator Clark had previously represented the areas of Cumberland County included in the district and had announced his intention to move into the Vander community of Cumberland County

and wanted to continue to serve in the district. (Tr. S. Redis. Comm. Aug. 24, 2017 at 50; Doc. 184-17) (Senator Hise encouraging support for Senator Clark's amendment because it was consistent with the adopted criteria of incumbency protection).

In offering his amendment, Senator Clark stated that the Vander community would be a "more appropriate fit" in Senate District 21. (Tr. S. Redis. Comm. Aug. 24, 2017 at 49; Doc. 184-17). Even though the amendment reduced the compactness of the district, when questioned by Senator Bishop, Senator Clark stated that he believed the amendment to Senate District 21 that he offered was legal saying, "I believe the amendment I'm providing is legal under all legal theories. It just changes the distribution of the population by approximately 300." (*Id.* at 51). Accordingly, plaintiffs cannot demonstrate that Senate District 21 is a racial gerrymander.

c. House District 57

Plaintiffs object to the 2017 version of House District 57 for essentially the same reasons that they object to Senate District 28. (Doc. 187 at 30). But House District 57 is not a racial gerrymander for the same reasons that Senate District 28 was not: it followed the Greensboro city boundaries and the then-existing precinct boundaries in Guilford County. A map of House District 57 with an overlay of the Greensboro city boundaries and precinct lines demonstrates how closely the lines of the district track those boundaries. (See Exhibit 4).



Like Senate District 28, House District 57 is anchored in eastern Greensboro. The district contains 17 whole precincts in eastern Greensboro, one precinct containing eastern satellite annexations of the city of Greensboro, and eight precincts in central Greensboro which contain the home of the Democratic incumbent, Representative Pricey Harrison, and surrounding areas. Residents of Greensboro make up 96.87% of the population of the district, with the remainder being contained in between and around satellite annexations of the city. (*See* Doc. 184-3 at 11).

Contrary to plaintiffs' objections, the BVAP level in District 57 is naturally occurring and is a result of the population residing in those whole precincts that were included in the district and there is no evidence otherwise. As with Senate District 28, a review of maps contained in the Fairfax Declaration show that drawing a House District

57 at a lower BVAP would have required the General Assembly to engage in a highly race-conscious draw that would have required setting a mechanical racial target and ignoring the adopted criteria. (Doc. 187-6 at 9).

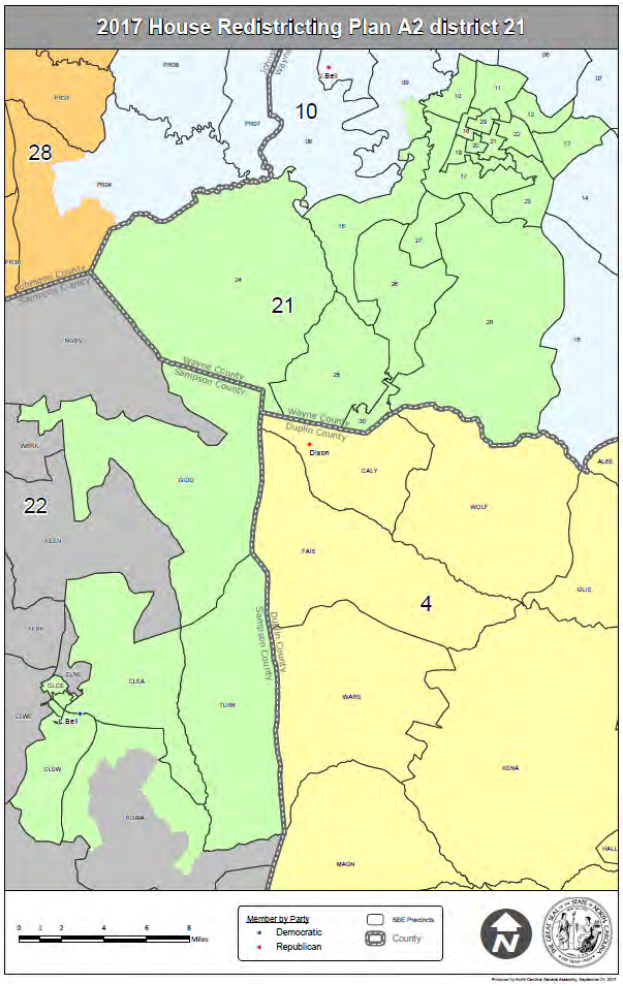
In their objections, plaintiffs complain about the inclusion or exclusion of certain communities from House District 57. Plaintiffs, for example, complain that the district excluded certain precincts in the Irving Park community but this issue was never raised during the public hearings on in any of the legislative debate. In fact, during the House Redistricting Committee Hearing, Representative Pricey Harrison, the incumbent in House District 57, testified that she thought the Midland Park (not Irving Park) neighborhood "could've been included in the district" and that doing so "would've achieved a little bit more racial balance." (Tr. H. Redist. Comm. Aug. 25, 2017 at 119-20; Doc. 184-18). Representative Harrison never offered any amendment to add this neighborhood and, in any event, including or excluding a neighborhood from a district because of the race of its residents was contrary to the adopted criteria. Beyond this race-based suggestion from Representative Harrison, the General Assembly received no other specific input about which communities or precincts should be included in House District 57.

The only alternative map offered involving this district was the statewide House map submitted by Representative Jackson on behalf of the plaintiffs in this case and would have double-bunked Representative Harrison with a Republican incumbent in

violation of the adopted criteria. These facts demonstrate that House District 57 is not a racial gerrymander.

d. House District 21

Plaintiffs contend that House District 21 remains a racial gerrymander due to its "irregular shape" although they acknowledge the BVAP in the district dropped from 51.90% in the 2011 version to 42.34% in the 2017 version. A review of a map of House District 21 shows that any alleged "irregular shape" of the district can be explained by the shape of precincts in Sampson County and the location of the residence of the district's Democratic incumbent, Larry Bell. (See attached Exhibit 5).



This map shows that the district contains a group of compact precincts in Goldsboro and southern Wayne County and contiguous precincts in eastern Sampson County that connect those precincts with those in and around the precinct where Representative Bell resides. A review of the "stat pack" data shows that the district is one that Representative Bell stood a reasonable chance of being re-elected consistent with the adopted incumbency protection criteria. (Doc. 184-2).

The only alternative map containing a different version of House District 21 was a statewide map submitted by the plaintiffs in this matter through Representative Jackson and, under that map, incumbent Representatives William Brisson and Larry Bell were double-bunked in a single district, identified as House District 22, while plaintiffs' version of House District 21 had no incumbent legislator at all.[9] (Doc. 184-28). During a House Redistricting Committee meeting, Representative David Lewis noted that this double-bunking was unnecessary and violated the incumbency protection criteria adopted by the House redistricting committee. (Tr. H. Redist. Comm. Aug. 25, 2017 at 56-57; Doc. 184-18). No alternative map was produced that protected these incumbents as successfully as the 2017 House Plan.

No substantive input was provided at the public hearing as to how House District 21 should be drawn or modified. The only speaker to directly address this district at the public hearing was Tyler Swanson, who identified himself as a speaking on behalf of the North Carolina NAACP. He criticized the shape of the district but provided no specific suggestions for how it should have been drawn in compliance with the adopted criteria. Accordingly, plaintiffs' claims that House District 21 is a racial gerrymander are baseless.

[9] Plaintiffs' selection of Representative Brisson for double-bunking in their map is interesting. Though plaintiffs claim in their objections that "all of the Democratic legislators voted against the 2017 enacted maps on second reading" (Doc. 187 at 17), that is not true. Legislative records show that Representative Brisson, a Democrat, voted for both the adopted House and Senate maps on the second and third reading.

2. None of the alternative maps proposed by Plaintiffs during the legislative process or after the fact in support of their objections show that any of the four districts listed in their objections are racial gerrymanders.

Plaintiffs claim that their proposed alternative House and Senate maps demonstrate that the four districts they now challenge could have been drawn more compactly while "meeting population goals and other race-neutral redistricting criteria." A review of these maps shows this claim is false.

In the Senate, Senator Blue offered a proposed alternative statewide Senate map on behalf of the plaintiffs on August 25, 2017. (Doc. 187-34). Among other things, this map failed to follow the adopted criteria by unnecessarily double-bunking multiple incumbents throughout the state, including Senator Robinson and Senator Wade in Senate District 28. (Tr. S. Floor. Session, Aug. 25, 2017 at 52; Doc. 184-19). Senator Blue distanced himself from the plaintiffs' map and could not explain the plan's significant double-bunking. Contrary to their assertions, plaintiffs' proposed Senate map is not more compact than the adopted 2017 Senate plan under either measure of compactness contained in the adopted criteria. As plaintiffs' own compactness comparison shows, the mean Reock scores for plaintiffs' proposed Senate map and the adopted 2017 Senate plan are exactly the same and there is a difference of only 0.01 between the mean Polsby-Popper scores of the two plans. (Doc. 187-7).

In the House, Representative Darren Jackson offered a proposed alternative House map on behalf of the plaintiffs on August 25, 2017. (Doc. 184-28). Like plaintiffs' proposed Senate maps, contrary to the adopted criteria, plaintiffs' alternative

map unnecessarily double-bunks multiple incumbents, including incumbents in both House Districts 57 and 21. Though plaintiffs claim in the Declaration of Bill Gilkeson that "[t]he Polsby-Popper scores for the House plans show that Plaintiffs' alternative House map is significantly more compact, on average, than the 2017 Enacted House map," (Doc. 187-7), this assertion appears to be due to the fact that Mr. Gilkeson conflated the statistics for the standard deviation and mean Polsby-Popper scores. In reality, the mean Polsby-Popper score for the 2017 enacted House plan is 0.32 compared with a score of 0.33 for the plaintiffs' proposed House plan, a difference of only 0.01. (*Compare* Doc. 187-11 *with* Doc. 184-28). Mr. Gilkeson's declaration correctly shows that there is only a 0.01 difference between the mean Reock scores for the 2017 enacted House plan and the plaintiffs' proposed House plan. (Doc. 187-7).

In addition to the fact that there is no difference between the mean compactness scores of the enacted plans and the plaintiffs' proposed plans and the fact that it is undisputed that plaintiffs unnecessarily double-bunk multiple incumbents in violation of the adopted criteria, plaintiffs also concede that their plans split more municipalities than the adopted plan. (Doc. 187-7 at 6-7). When considered together, these factors, among others, refute plaintiffs' claim that their proposed maps show that the 2017 House and Senate plans could have been drawn in a more compact manner while following other race-neutral redistricting criteria.

Finally, plaintiffs purport to offer what they describe as "Cromartie maps" in Mr. Gilkeson's declaration which he claims show that "it is possible to achieve the same

political outcome without using race as a predominant motive for selecting which voters to include or exclude from the district." (Doc. 187-7 at 20). As an initial matter, these maps should not be considered by the Court as they were not provided to the legislature during the legislative process of enacting the 2017 plans. The other problem with Mr. Gilkeson's claim is that these are not true *Cromartie* demonstrative maps. Instead, Mr. Gilkeson cherry-picked two statewide races in which Republican candidates did extremely well to "prove" that his proposed maps could have achieved the same political outcome as the adopted versions of Senate Districts 21 and 28 and House District 57. In drawing the adopted plans, results from 10 different elections were considered. (Doc. 184-2; 184-5). This point is illustrated by the following charts, which are also attached as Exhibits 6 and 7. Exhibit 6 compares the past political outcomes of the enacted Senate plan, the Covington Senate plan, and Mr. Gilkeson's Senate plan. The highlighted column demonstrates the fallacy of Mr. Gilkeson's analysis and that the Covington plans and Gilkeson plans were motivated primarily by political considerations.

		US Senate 2010		US President 2012		Governor 2012		Lieutenant Gov 2012		US Senate 2014		US President 2016		US Senate 2016		Governor 2016		Lt. Governor 2016		Attorney General 2016		All Contests		Incumbent Drawn out of District
District	TBVAP	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	Total D Wins	Total R Wins	
Plaintiffs																								
SD 19	32.63%	47.06%	51.23%	51.06%	47.64%	49.75%	48.12%	55.41%	44.59%	49.53%	46.87%	49.93%	46.63%	49.25%	47.42%	49.91%	47.90%	49.62%	47.10%	53.58%	46.42%	9	1	NO
SD 21	41.03%	61.32%	37.05%	52.66%	46.41%	63.83%	33.87%	68.90%	31.10%	64.08%	32.70%	62.91%	33.10%	62.20%	34.15%	62.52%	34.93%	62.81%	33.68%	66.20%	33.80%	10	1	NO
Enacted																								
SD 19	25.99%	42.14%	56.03%	47.48%	51.51%	44.61%	53.23%	50.59%	49.41%	44.44%	51.75%	44.48%	51.71%	43.98%	52.49%	45.06%	52.63%	44.29%	52.31%	48.49%	51.51%	1	9	NO
SD 21	47.51%	64.97%	33.51%	70.53%	28.58%	67.25%	30.49%	72.03%	27.97%	67.79%	29.17%	67.07%	29.36%	66.21%	30.37%	66.14%	31.45%	66.83%	29.80%	70.04%	29.96%	10	0	NO
Gilkeson																								
SD 19	31.19%	45.11%	53.14%	50.61%	48.42%	47.72%	50.19%	53.59%	46.61%	47.85%	48.51%	48.11%	48.25%	47.52%	49.16%	48.35%	49.48%	47.82%	49.01%	51.90%	48.10%	3	7	NO
SD 21	42.53%	64.94%	33.49%	70.03%	29.05%	66.72%	30.94%	71.50%	28.50%	67.22%	29.64%	65.62%	30.62%	64.84%	31.50%	64.91%	32.49%	65.54%	30.81%	68.74%	31.26%	10	0	NO
Plaintiffs																								
SD 24	16.95%	34.15%	63.35%	39.25%	59.69%	34.83%	63.07%	39.90%	60.10%	37.90%	58.39%	39.04%	57.26%	37.86%	58.84%	42.70%	55.42%	37.60%	59.53%	42.66%	57.34%	0	10	NO
SD 27	30.45%	50.49%	47.47%	61.88%	36.89%	55.20%	42.16%	61.95%	38.05%	60.32%	37.21%	64.08%	31.51%	62.10%	34.96%	67.23%	30.62%	62.14%	34.74%	66.84%	33.16%	10	0	YES
SD 28	44.66%	59.14%	39.32%	67.24%	31.93%	62.31%	35.87%	67.58%	32.42%	64.82%	32.87%	65.55%	31.17%	64.52%	32.58%	67.55%	30.41%	64.76%	32.50%	68.34%	31.66%	10	0	NO
SD 29 (E26	8.39%	23.19%	74.02%	28.15%	70.64%	24.57%	73.45%	29.35%	70.65%	26.69%	69.31%	26.12%	70.56%	25.83%	70.17%	30.73%	67.01%	25.97%	71.45%	30.46%	69.54%	0	10	NO
Enacted																								
SD 24	18.68%	36.36%	61.16%	41.57%	57.32%	37.22%	60.64%	42.46%	57.54%	40.47%	55.76%	41.03%	55.49%	40.14%	56.54%	44.53%	53.58%	39.90%	57.24%	45.02%	54.98%	0	10	NO
SD 26 (P29	16.66%	30.20%	66.95%	36.90%	62.03%	33.28%	64.79%	37.93%	62.07%	33.77%	62.15%	32.37%	64.64%	32.07%	63.86%	36.36%	61.33%	32.42%	64.97%	36.51%	63.49%	0	10	NO
SD 27	12.71%	33.08%	64.82%	40.21%	58.59%	34.12%	63.74%	40.13%	59.87%	41.56%	55.88%	43.71%	51.72%	41.66%	55.25%	48.05%	49.81%	41.61%	55.63%	46.69%	53.31%	0	10	NO
SD 28	50.52%	71.88%	26.58%	79.28%	19.78%	73.90%	23.73%	79.67%	20.33%	77.44%	20.24%	77.88%	18.66%	76.89%	20.34%	79.38%	18.61%	76.98%	19.91%	80.42%	19.58%	10	0	NO
Gilkeson																								
SD 24	19.45%	37.70%	59.87%	42.84%	56.07%	38.50%	59.38%	43.69%	56.31%	41.92%	54.34%	42.18%	54.36%	41.32%	55.42%	45.65%	52.50%	41.05%	56.11%	46.15%	53.85%	0	10	NO
SD 27	20.78%	37.29%	60.54%	45.97%	52.89%	40.11%	57.67%	45.99%	54.01%	45.35%	52.05%	48.42%	47.22%	46.28%	50.56%	52.19%	45.59%	46.40%	50.74%	51.15%	48.85%	3	7	YES
SD 28	43.27%	62.51%	35.77%	72.63%	26.35%	66.70%	30.92%	72.87%	27.13%	69.96%	27.62%	72.14%	23.95%	70.80%	26.32%	74.21%	23.70%	70.87%	26.00%	74.78%	25.22%	10	0	NO
SD 29 (E26	14.90%	30.38%	67.03%	35.14%	63.78%	31.62%	66.52%	36.33%	63.67%	33.71%	62.49%	31.58%	65.45%	31.52%	64.64%	35.76%	62.08%	31.76%	65.75%	35.90%	64.10%	0	10	NO
Plaintiffs																								
SD 37	28.71%	55.21%	42.81%	62.72%	36.00%	48.74%	49.17%	61.84%	38.16%	62.88%	34.25%	66.60%	27.56%	61.63%	34.73%	67.58%	29.77%	60.92%	35.12%	67.06%	32.94%	9	1	NO
SD 38	46.17%	66.35%	31.90%	73.97%	25.05%	64.52%	33.80%	73.76%	26.24%	72.04%	25.10%	71.28%	24.64%	69.02%	27.16%	71.25%	26.22%	68.63%	27.80%	73.32%	26.68%	10	0	NO
SD 39	16.47%	39.23%	58.78%	48.42%	50.46%	34.87%	63.49%	46.59%	53.41%	47.54%	49.60%	53.01%	41.73%	49.06%	47.25%	53.85%	43.76%	47.64%	49.13%	54.11%	45.89%	4	6	YES
SD 40	30.15%	52.66%	45.60%	60.73%	38.08%	49.70%	48.41%	60.16%	39.84%	60.13%	37.17%	61.63%	33.86%	59.68%	36.64%	62.16%	35.47%	58.83%	37.91%	63.82%	36.18%	10	0	NO
SD 41	30.03%	51.75%	46.57%	58.12%	40.88%	46.87%	51.50%	57.53%	42.47%	58.26%	39.05%	58.98%	36.40%	56.93%	39.39%	61.57%	35.59%	55.97%	40.85%	61.18%	38.82%	9	1	NO
Enacted																								
SD 37	42.73%	70.58%	27.43%	76.14%	22.65%	64.06%	33.76%	75.67%	24.33%	75.58%	21.56%	75.01%	19.75%	71.53%	24.67%	76.04%	21.19%	70.95%	24.91%	75.94%	24.06%	10	0	NO
SD 38	48.46%	71.61%	26.93%	76.92%	22.04%	67.34%	30.94%	76.88%	23.12%	77.33%	20.38%	76.22%	20.08%	74.82%	21.82%	75.88%	21.81%	74.44%	22.41%	78.42%	21.58%	10	0	NO
SD 39	6.62%	31.61%	66.50%	38.03%	60.85%	24.25%	74.31%	36.04%	63.96%	39.77%	57.57%	45.48%	48.86%	40.51%	56.18%	46.40%	51.46%	39.17%	58.01%	45.88%	54.12%	0	10	NO
SD 40	38.88%	64.51%	33.79%	72.56%	26.40%	61.83%	36.32%	72.25%	27.75%	71.45%	25.82%	71.64%	24.20%	69.92%	26.30%	71.54%	26.02%	69.20%	27.27%	74.24%	25.76%	10	0	NO
SD 41	14.25%	38.46%	59.46%	46.53%	52.31%	33.96%	64.21%	45.39%	54.61%	46.66%	49.95%	49.73%	45.06%	46.85%	48.91%	52.95%	43.92%	45.60%	50.76%	51.84%	48.16%	3	7	NO

The same is true for those versions of the House plan (Exhibit 7):

		US Senate 2010		US President 2012		Governor 2012		Lieutenant Gov 2012		US Senate 2014		US President 2016		US Senate 2016		Governor 2016		Lt. Governor 2016		Attorney General 2016		All Contests		Incumbent Drawn out of District
District	TBVAP	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	D Vote	R Vote	Total D Wins	Total R Wins	
Plaintiffs																								
HD 57	22.38%	47.51%	50.24%	58.77%	39.73%	51.56%	45.56%	58.79%	41.21%	58.81%	38.69%	63.00%	31.88%	60.64%	36.40%	66.71%	31.12%	60.54%	36.07%	65.91%	34.09%	9	1	N
HD 58	44.28%	56.69%	41.75%	62.37%	36.80%	58.22%	40.03%	63.09%	36.91%	60.49%	37.12%	59.25%	37.72%	58.68%	38.67%	61.56%	36.61%	59.00%	38.64%	62.44%	37.56%	10	0	N
HD59	44.76%	55.53%	42.72%	64.26%	34.91%	59.66%	38.46%	64.97%	35.03%	60.69%	36.93%	62.93%	33.81%	61.50%	35.83%	64.96%	33.19%	61.86%	35.59%	65.29%	34.71%	10	0	Y
HD 60	42.75%	57.53%	40.86%	67.32%	31.88%	62.75%	35.42%	67.88%	32.12%	64.12%	33.57%	65.86%	31.31%	64.57%	32.36%	67.17%	30.77%	65.11%	32.13%	68.52%	31.48%	10	0	N
HD 61	25.08%	41.55%	56.34%	52.47%	46.37%	46.11%	51.54%	52.59%	47.41%	50.40%	46.69%	53.99%	41.56%	52.71%	43.73%	57.40%	40.17%	52.61%	44.08%	57.48%	42.52%	8	2	N
HD62	15.06%	33.71%	64.17%	42.68%	56.15%	36.37%	61.20%	42.48%	57.52%	41.52%	55.89%	44.96%	50.61%	42.96%	53.92%	49.29%	48.42%	42.74%	54.32%	47.61%	52.39%	1	9	N
Enacted																								
HD 57	60.75%	81.20%	17.39%	86.99%	12.10%	82.21%	15.49%	87.36%	12.64%	85.07%	12.79%	84.62%	12.13%	83.48%	14.07%	85.39%	12.76%	83.59%	13.28%	86.54%	13.46%	10	0	N
HD 58	42.66%	63.92%	34.42%	73.09%	25.92%	67.33%	30.34%	73.49%	26.51%	71.26%	26.29%	72.74%	23.57%	71.78%	25.12%	74.57%	23.25%	71.86%	25.04%	75.69%	24.31%	10	0	N
HD59	22.22%	38.24%	59.87%	42.66%	56.27%	38.35%	59.68%	43.85%	56.15%	43.05%	54.26%	42.24%	54.53%	41.81%	55.15%	45.98%	52.03%	42.01%	55.49%	46.33%	53.67%	0	10	Y
HD 60	40.06%	57.73%	40.31%	67.53%	31.55%	61.82%	36.06%	67.67%	32.33%	64.78%	32.59%	66.17%	30.27%	64.61%	32.03%	68.08%	29.53%	65.01%	31.74%	68.91%	31.09%	10	0	N
HD 61	11.47%	33.66%	64.22%	41.33%	57.44%	35.08%	62.67%	41.30%	58.70%	42.46%	54.92%	45.59%	49.68%	43.68%	53.16%	49.98%	47.80%	43.47%	53.65%	48.67%	51.33%	1	9	N
HD62	13.95%	34.11%	63.68%	41.92%	56.89%	35.57%	62.13%	41.64%	58.36%	43.32%	54.18%	46.02%	49.23%	43.34%	53.72%	50.38%	47.54%	43.48%	53.83%	48.55%	51.45%	1	9	N
Gilkeson																								
HD 57	41.40%	60.47%	37.48%	72.39%	26.39%	66.27%	31.01%	72.81%	27.19%	69.49%	28.10%	72.92%	22.70%	70.88%	26.46%	75.25%	22.72%	70.92%	25.76%	75.31%	24.69%	10	0	N
HD 58	45.57%	65.38%	33.08%	74.19%	24.91%	68.69%	29.14%	74.51%	25.49%	72.41%	25.24%	73.58%	22.82%	72.66%	24.30%	75.32%	22.53%	72.70%	24.19%	76.46%	23.54%	10	0	N
HD59	30.23%	44.29%	54.04%	49.41%	49.60%	45.20%	52.98%	50.45%	49.55%	48.76%	48.69%	47.44%	49.49%	46.91%	50.15%	50.68%	47.39%	47.25%	50.34%	51.21%	48.79%	4	6	Y
HD 60	38.85%	55.38%	42.60%	65.63%	33.45%	59.89%	37.97%	65.73%	34.27%	62.83%	34.48%	64.48%	31.92%	62.89%	33.80%	66.48%	31.19%	63.18%	33.60%	67.26%	32.74%	10	0	N
HD 61	13.76%	34.62%	63.29%	45.43%	53.53%	36.70%	61.05%	42.88%	57.12%	42.95%	54.45%	46.61%	48.76%	44.68%	52.10%	50.87%	46.86%	44.57%	52.53%	49.57%	50.43%	1	9	N
HD62	21.62%	37.70%	60.20%	47.78%	51.02%	39.74%	58.08%	45.47%	54.53%	45.31%	52.19%	47.82%	48.03%	45.83%	51.25%	51.52%	46.47%	45.99%	51.44%	50.39%	49.61%	2	8	N

As a result, plaintiffs' proposed "Cromartie maps" fail to show that the "legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

3. Dr. Hofeller's participation in the 2017 redistricting process does not show that race predominated in drawing the districts.

Plaintiffs contend that failing to look at racial data does not mean that race did not predominate because 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 [sic] from white voters based on their race." (Doc. 187 at 35). In support of this contention, plaintiffs cite deposition testimony from a case involving a challenge to the 2016 Congressional Districts in which they claim Dr. Hofeller "said exactly that." (*Id.*). But Dr. Hofeller didn't say "exactly that." Instead, in answering a question about how he ensured that the 2016 Congressional Plan complied with the VRA, Dr. Hofeller responded that the First Congressional District, located in the northeastern part of the state, was the only district in which that was a concern and because it "was drawn in the general area that District 1 has been in for decades," he knew the "new configuration was going to be acceptable under the Voting Rights Act." (Deposition of Thomas B. Hofeller ("Hofeller Dep."), p. 246) (Doc. 187-12)). Dr. Hofeller added that because racial data regarding the district was available prior to the district's enactment, if his assumption about VRA compliance had been incorrect, someone would have objected. (*Id.*).

Dr. Hofeller's knowledge about the racial demographics of the First Congressional District, which he also testified was the only VRA district in the State's congressional plan since the *Shaw* decision struck down a version of the former Twelfth Congressional District in the early 1990s, (*id.* at 247), does not prove that he had committed to memory

racial data in the four districts plaintiffs challenge here, all of which are located in other areas of the State. In any event, plaintiffs' contentions regarding Dr. Hofeller at best show nothing more than that Dr. Hofeller was conscious of racial demographics in the state, something plaintiffs concede the Supreme Court has said legislatures are *always aware of* when drawing district lines and does *not* mean that race predominated in drawing the district lines. (Doc. 187 at 34-35) (quoting *Shaw I*, 509 U.S. at 646)) ("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.") (emphasis in original); *see also Bush*, 517 U.S. at 958–59 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); *Miller*, 515 U.S. at 915–16 ("The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.") (citations omitted).[10]

[10] Plaintiffs' citation of testimony by Dr. James G. Gimpel in the same case, in which he was also testifying about the 2016 congressional plan, is similarly unavailing and, if anything shows only that the legislature was aware of race which, as discussed above, the Supreme Court has recognized is both true and permissible in any redistricting process. Dr. Gimpel also admitted that his comments about whether the General Assembly considered race when drawing the 2016 congressional map was "speculation" and that he

D. This Court does not have jurisdiction to consider plaintiffs' state constitutional claims. In any event, they are without merit.

Plaintiffs challenge several districts in the 2017 plans on purely state constitutional grounds. While this Court may not consider these claims for the reasons discussed in Section B above, it is also foreclosed from ruling on contested issues of state law. As this Court recently recognized, an "unsettled issue of state law . . .is more appropriately directed to North Carolina courts, the final arbiters of state law." (Doc. 191 at 46-47). Plaintiffs would have this Court rule upon at least three such issues: (1) what districts can be changed by the legislature in drawing new maps after court-ordered redistricting; (2) whether the traversal rule from *Pender County v. Bartlett,* 361 N.C. 491, 649 S.E.2d 364 (2007), aff'd, *Bartlett v. Strickland,* 556 U.S. 1 (2009) ("*Pender County*") in a two-county grouping applies in county groupings larger than three counties, or instead whether it is the number of traversals that determine WCP compliance in those groupings; and (3) the extent to which any state law requirements for compactness exists. While the answers to these issues are easily resolved in favor of how the State drew the 2017 districts affected by these issues, at a minimum this Court must defer to the North Carolina courts on them.

In any event, plaintiffs' state-law objections are invalid. First, plaintiffs claim that the legislature modified certain districts that did not "touch" districts that were declared unconstitutional by this Court. Plaintiffs assert that changing these districts violates the

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had not seen any discussion of this issue. (Deposition of Dr. James G. Gimpel at 167) (Doc. 187-13).

provision of the state constitution stating that districts drawn for one census shall not be altered until the next census. However, nothing in that constitutional provision or in the case law interpreting it addresses changing districts in response to court-ordered redistricting. Read literally, plaintiffs' interpretation would mean a court would be powerless to order the legislature to redistrict in response to a court order. This is obviously not the case. Instead, plaintiffs ask the Court to adopt a new standard under this provision that they have devised out of whole cloth – districts which do not "touch" challenged districts must be frozen in place. No such standard exists under North Carolina law and this Court should decline to create one.

Moreover, adopting such a standard would perpetuate a racial gerrymander by forcing a legislature to use the core of the racially gerrymandered district to draw the new district and those immediately surrounding it. Plaintiffs' objections complain that four of the 2017 districts are again racially gerrymandered in part because the new districts were supposedly formed around the core of the old district. (Doc. 187 at 22, 25, 30). Yet that is precisely what plaintiffs' new constitutional rule would force the legislature to do in county groupings with districts that did not touch districts ruled unconstitutional. The legislature would have to start drawing the new districts using the core of the old districts. Not only would this make the new district more susceptible to being labeled a racial gerrymander, it would also reduce or eliminate the legislature's ability to eliminate the hallmarks of gerrymanders by, for instance, eliminating split precincts, or changing surrounding districts to more closely follow municipal boundaries. Put simply, plaintiffs'

proposed constitutional amendment would have the ironic effect of causing a legislature trying to eliminate a racial gerrymander to draw a new gerrymander instead.

Relatedly, plaintiffs ignore the ripple effect that changing one district has on other districts in the same county grouping. In Wake County, for example, plaintiffs complain that 2011 districts 36, 37, 40, and 41 do not touch invalid 2011 districts 33 and 38 and therefore may not be modified for this court-ordered redistricting. (Doc. No. 187-7 at 14). Plaintiffs ignore, however, that many of the valid 2011 districts are just one or a few precincts away from the invalid districts. (See attached Exhibit 8). Given population equality requirements, when even a small change to one of the invalid districts is made it ripples the population into the bordering district which then ripples into the districts about which plaintiffs complain. Plaintiffs' standard is thus both constitutionally suspect and unrealistic.

Finally, the Covington plaintiffs are not serious about their new constitutional rule as demonstrated by their own proposed plans. The Covington House plan, for example, changes districts in Onslow County even though none of the districts in Onslow in the 2011 House plan were declared unconstitutional by this Court or "touch" unconstitutional districts. (*Compare* Doc. 184-1 (Districts 14, and 15) *and* Doc. 184-28 (same) *with* http://www.ncleg.net/GIS/Download/District_Plans/DB_2011/House/Lewis-Dollar-Dockham_4/Maps/mapGrouping.pdf (same)). This objection is baseless and should be rejected.

Next, plaintiffs claim that a district in Cabarrus County as well as House District 10 violate the WCP because districts are not solely contained within counties in those groupings which have the population to support more than one district. In making this argument, plaintiffs are ignoring the traversal rule from the *Stephenson* and *Dickson* line of cases and misinterpreting *Pender County*. *Pender County* involved a two-county grouping of Pender County and New Hanover County. The North Carolina Supreme Court held that to comply with the WCP in that two-county grouping, Pender County must be kept whole so that the Pender County line is traversed only once when gaining population in New Hanover County.

In a two-county grouping, keeping the county with the smaller population whole inherently minimizes the total number of traversals in the grouping. This is consistent with *Dickson II*, the North Carolina Supreme Court's latest statement on this issue, in which the Court held that the number of traversals must be minimized inside of county groupings once the counties are grouped properly under the WCP. *Dickson II*, at 532 (after the county groupings are properly established, *Stephenson I* requires that "the resulting interior county lines ... may be crossed or traversed ... only to the extent necessary to comply with the ... 'one-person, one-vote' standard") (internal citations omitted) The parties here do not dispute that the 2017 plans adopt the correct county groupings under the WCP. Accordingly, under *Dickson II*, each grouping must contain the fewest number of traversals possible in creating districts which comply with equal population requirements. Nothing in *Dickson II* or prior cases held that the legislature

should sacrifice the traversal rule in favor of plaintiffs' proposed "county spanning" rule (Doc. 187-7 at 18) which finds no support in any of those cases. In fact, in both of the county groupings plaintiffs complain about, the 2017 plans have fewer traversals than the Covington House plan. (*Compare* Doc. 184-28 *with* Doc. 184-1). Thus, the Covington plans do not comply with the WCP, and this objection should be rejected.

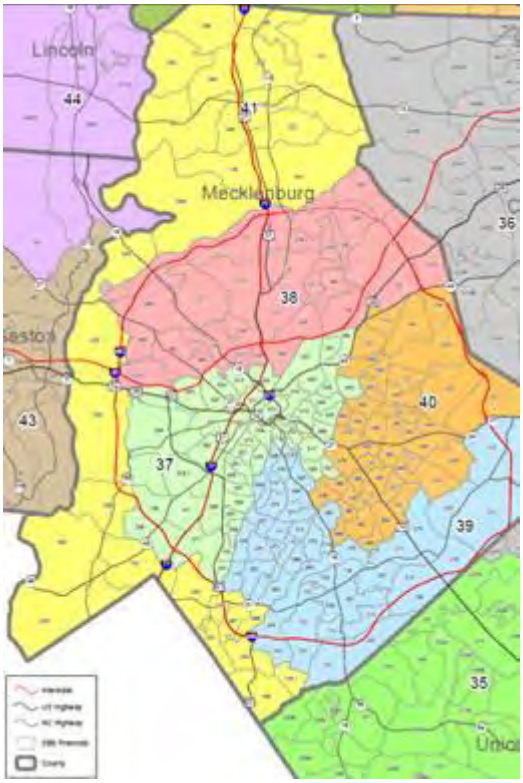
Finally, plaintiffs allege that one Senate district in Mecklenburg County is not compact. Plaintiffs ignore that the district complies with the compactness guidelines adopted by the legislature, guidelines which were based on a respected scholarly article on compactness, and had never been adopted by the North Carolina legislature in the past. In any event, once again *Dickson II* forecloses this claim. The *Dickson* plaintiffs made nearly an identical claim there that plaintiffs here are making. However, the state Supreme Court held:

> Separately, plaintiffs argue that this Court should consider the purported lack of compactness of the districts created by the General Assembly and the harm resulting from splitting precincts. While these may be valid considerations, neither constitutes an independent legal basis for finding a violation, and we are unaware of any justiciable standard by which to measure these local factors. *See Vera,* 517 U.S. at 999, 116 S.Ct. at 1972, 135 L.Ed.2d at 284 (Kennedy, J., concurring) ("Districts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one," so long as "the bizarre shape ... is [not] attributable to race-based districting unjustified by a compelling interest.").

Dickson II, at 533. Finally, plaintiffs also ignore that the 2017 district they challenge (Senate District 41) is nearly identical in shape to the same district that same superior court approved in 2002 (2002 Senate District 40) despite supposedly setting a new standard on compactness, as shown below. (*Compare* Doc. 184-4 (Senate District 41)

with

http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=Interim_Senate_Redistricting_Plan_for_NC_2002_Elections&Body=Senate (Senate District 40)).



Accordingly, this objection is frivolous and should be rejected.

CONCLUSION

Based on the foregoing, the Court should overrule plaintiffs' objections, and allow North Carolina's 2018 legislative elections to proceed under the 2017 House and Senate Plans.

This the 22nd day of September, 2017.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I hereby certify that I, Phillip J. Strach, have served the foregoing **NOTICE OF FILING** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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This the 22nd day of September, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Phillip J. Strach

31255185.1

Exhibit G

No. ___

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,
v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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March 26, 2018

QUESTIONS PRESENTED

After North Carolina's state districting plan was invalidated as a racial gerrymander, the North Carolina General Assembly repealed the plan and enacted into law a new districting plan (the "2017 Plan"). It is undisputed that the General Assembly did not consider race in designing the 2017 Plan. The district court allowed plaintiffs in the original lawsuit to assert new challenges to the 2017 Plan without amending their complaint, and then found that four districts failed to "cure" the racial gerrymandering violation. The district court also adjudicated state-law challenges—even though no plaintiff resides in any of the districts challenged on state-law grounds—and found that five districts violated state constitutional limits on mid-decade redistricting. Instead of allowing the General Assembly to enact a remedial plan, the court imposed a plan designed by a special master who was explicitly encouraged to consider race.

The questions presented are:

1. Whether the district court had jurisdiction to consider challenges to the 2017 Plan.

2. Whether the district court erred by finding that four districts were racially gerrymandered even though the legislature did not consider race.

3. Whether the district court erred by considering and substantiating a state-law challenge to five districts in which no plaintiff resides.

4. Whether the district court erred by refusing to allow the legislature to enact its own remedial plan.

5. Whether the district court erred by imposing a map that improperly considered race.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

James Edward Alston; Marshall Ansin; Valencia Applewhite; Marvin Cornelous Arrington; Susan Sandler Campbell; Sandra Little Covington; Mark R. Englander; Viola Ryals Figueroa; Jamal Trevon Fox; Dedreana Irene Freeman; Claude Dorsey Harris, III; Channelle Darlene James; Crystal Graham Johnson; Catherine Wilson Kimel; Herman Benthle Lewis, Jr.; David Lee Mann; Cynthia C. Martin; Vanessa Vivian Martin; Marcus Walter Mayo; Latanta Denishia McCrimmon; Catherine Orel Medlock-Walton; Antoinette Dennis Mingo; Rosa H. Mustafa; Bryan Olshan Perlmutter; Julian Charles Pridgen, Sr.; Milo Pyne; Juanita Rogers; Ruth E. Sloane; Mary Evelyn Thomas; Gregory Keith Tucker; John Raymond Verdejo

Defendants:

The State of North Carolina; North Carolina State Board of Elections; Rhonda K. Amoroso, in her official capacity; Philip E. Berger, in his official capacity; Paul J. Foley, in his official capacity; Joshua B. Howard, in his official capacity; Maja Kricker, in her official capacity; David R. Lewis, in his official capacity; Joshua D. Malcolm, in his official capacity; Timothy K. Moore, in his official capacity; Robert A. Rucho, in his official capacity

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INTRODUCTION

After North Carolina's legislative districting plan was invalidated as a racial gerrymander, the General Assembly responded in what should have been the surest way to avoid the same result: It enacted a new districting plan without *any* consideration of race. While the General Assembly's decision to be race-neutral still could have permitted a vote-dilution claim, it should have taken any racial gerrymandering challenge off the table. A racial gerrymander occurs only when the legislature's predominant motive is race—and needless to say, a legislature that expressly refuses to take race into account cannot be predominantly motivated by race. The three-judge court quite remarkably held otherwise. Even though the General Assembly did not consider race at all in enacting the 2017 Plan, the court invalidated that plan as a racial gerrymander all the same—not because the legislature's predominant motive was race, but on the novel theory that the legislature failed to adequately remedy the "effects" of the prior racial gerrymandering violation.

That ruling is unprecedented. This Court has never endorsed a test for racial gerrymandering that looks only to the *effects* of a districting plan; to the contrary, this Court has repeatedly emphasized that racial gerrymandering (unlike vote dilution) is an *intent*-based claim. The fact that the three-judge court invalidated an earlier plan enacted by a different legislature does not change that bedrock principle. The question for the court should have been whether the 2017 General Assembly was predominantly motivated by race when enacting the 2017 Plan—and

everyone agrees that it was not. But the district court never even inquired into the legislature's intent. Instead, the court invented a brand-new racial gerrymandering cause of action for second-round plans, under which a legislature that does not consider race at all can still have its plan invalidated if its non-racial criteria produce a map that in some ways resembles a prior map drawn with an illicit motive. In other words, the court concluded that to "cure" a past racial gerrymander, a legislature must take race into account to ensure that its non-racial districting criteria do not produce a map that looks insufficiently different from a prior map. Indeed, the court ultimately purported to "remedy" the racial gerrymandering violation by imposing its own map *that expressly considered race*.

The finding of racial gerrymandering in a map drawn without consideration of race is just the tip of the iceberg when it comes to the flaws in the decision below. The court lacked jurisdiction to consider *any* challenges to the 2017 Plan, as plaintiffs refused to amend their complaint to challenge that new legislation after the 2011 Plan was repealed. To make matters worse, the three-judge court allowed plaintiffs to expand their case to bring state-law challenges that are jurisdictionally invalid three times over: Not only is there no properly pleaded claim challenging the districts attacked on state-law grounds, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law grounds.

The district court's remedial order was just as flawed. The court imposed a map drawn by a special

master who was appointed to draw it before the court even found any violations, with the General Assembly expressly taken out of the process based on a misguided and unprecedented rule that legislatures have only one chance to remedy a racial gerrymander. Even setting aside that the General Assembly's first effort remedied the prior racial gerrymander in the most direct way possible—by redrawing the maps without considering race—the district court's one-bite-at-the-apple theory is profoundly misguided and ignores the bedrock rule that redistricting is the duty and responsibility of the State, not of a federal court. And the district court erred even more fundamentally by directing the special master to consider race in developing a substitute for a race-neutral map.

From the moment this Court remanded this case, the three-judge court misunderstood its role, acting as if it had a permanent receivership over North Carolina's redistricting process. But this is not a case in which the legislature was deadlocked and a federal court had no choice but to impose its own districting plan. The General Assembly repealed the defective law and enacted new districting legislation, and that new legislation is a duly enacted state law entitled to take immediate effect, not just one proposed map among many for a federal court to accept or reject, or to replace with an explicitly race-conscious map. The three-judge court's decision to invalidate duly enacted state legislation without enforcing core Article III prerequisites or identifying a federal constitutional violation is indefensible. This Court should note probable jurisdiction and reverse.

OPINION BELOW

The district court's opinion is available at 2018 WL 505109 and reproduced at App.1-101. The court's order appointing a special master is reproduced at App.102-118.

JURISDICTION

While the decision of the three-judge district court should be vacated for lack of jurisdiction, this Court has jurisdiction over this appeal under 28 U.S.C. §1253. The district court issued its judgment on January 21, 2018. Appellants filed their notice of appeal on January 23, 2018. App.119-20.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause and relevant provisions of the state constitution are reproduced at App.121-122.

STATEMENT OF THE CASE

In 2011, the North Carolina General Assembly enacted a legislative districting plan. Four years later, after the plan had already been used in the 2012 and 2014 elections, plaintiffs filed suit in the U.S. District Court for the Middle District of North Carolina, alleging that 28 districts in the 2011 Plan were unconstitutional racial gerrymanders. *See Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016). Plaintiffs did not assert a vote-dilution claim under Section 2 of the Voting Rights Act ("VRA") or make any allegations based on the effects of the districts on minority voting strength.

The court granted plaintiffs' request for a three-judge district court, *see* 28 U.S.C. §2284, and in August 2016, the three-judge court invalidated the 2011 Plan.

Covington, 316 F.R.D. at 124. The court agreed with plaintiffs that race was the predominant factor in the design of each challenged district, and that the General Assembly's use of race was not "supported by a strong basis in evidence and narrowly tailored to comply with [the VRA]." *Id.* at 176. The court declined to require changes before the 2016 election, but ordered the General Assembly to enact a new districting plan before the next regularly scheduled election in 2018. *Id.* at 176-78. The State appealed to this Court. *See North Carolina v. Covington*, No. 16-649.

Three weeks after the 2016 election, and while the appeal was still pending in this court, the district court entered another remedial order, this time requiring the State to enact a new districting plan by March 15, 2017, and to hold special elections in the fall of 2017 in every modified district. *Covington v. North Carolina*, No. 15-CV-399, 2016 WL 7667298 (M.D.N.C. Nov. 29, 2016). This Court summarily affirmed the district court's original merits ruling, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017), but summarily vacated its later-issued remedial order, *North Carolina v. Covington*, 137 S. Ct. 1624 (2017), explaining that the court failed to undertake the required equitable weighing process, instead "address[ing] the balance of equities in only the most cursory fashion." *Id.* at 1626.

On remand, the district court declined plaintiffs' request to again impose a special election, instead ordering the General Assembly to enact new "districting plans remedying the constitutional deficiencies with the Subject Districts" by September

1, 2017, and to file the newly enacted plan with the court within seven days. Order, ECF 180 at 8. The court ordered the State to file the entire legislative record for the new plan and to provide, "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." *Id.* at 8-9.

The General Assembly complied. On August 28, 2017, the House of Representatives passed HB927, the House redistricting plan, and the Senate passed SB691, the Senate redistricting plan. Each bill was sent to the other chamber, and each chamber passed the other's bill on August 30, 2017. Both bills were ratified the next day, and the 2017 Plan thus officially became the duly enacted law of North Carolina. *See* Notice of Filing, ECF 184 at 1-2.

Appellants notified the court that the 2017 Plan had been enacted and provided all required legislative materials. *See id.* at 1-11. In response to the court's question about districts "with a BVAP greater than 50%," Order, ECF 180 at 9, appellants explained:

> Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans. No information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts.

Notice of Filing, ECF 184 at 10-11.

One week later, without filing an amended complaint or a new lawsuit, plaintiffs filed four sets of "objections" to the 2017 Plan. The first set was the

only one that took issue with any districts that had been challenged and invalidated at previous stages of this litigation—specifically, SD21, SD28, HD21, and HD57. Although plaintiffs acknowledged that the General Assembly did not use any racial data while drawing and enacting the 2017 Plan, Pls.' Objs., ECF 187 at 31, they nonetheless contended that the new versions of those four districts "fail to cure the racial gerrymandering violations." *Id.* at 1.

The rest of plaintiffs' "objections" were brand-new, state-law complaints about districts that had never before been challenged in this litigation. As relevant here, plaintiffs argued that the General Assembly violated the state constitution's prohibition on mid-decade redistricting "by unnecessarily altering … mid-decade" House Districts 36, 37, 40, 41, and 105. *Id.* at 37 (citing N.C. Const. art. II, §5(4)).

Appellants responded, explaining that "[b]ecause the claims asserted by all plaintiffs are directed at legislation that has now been repealed and replaced"—namely, the 2011 Plan—plaintiffs could no longer demonstrate any harm from that now-defunct plan, "rendering the case moot and divesting this Court of subject matter jurisdiction." Resp. to Pls.' Objs., ECF 192 at 21. Appellants further argued that the district court lacked jurisdiction to consider plaintiffs' state-law challenges. *Id.* at 21-27. And appellants explained that plaintiffs' challenges failed on the merits as well. *Id.* at 28-56.

The court held a hearing on plaintiffs' fully briefed objections on October 12, 2017. Later that day, the court directed the parties "to confer and to submit the names of at least three persons the parties agree are

qualified to serve as a special master," in order to "avoid delay should the Court decide that some or all of plaintiffs' objections should be sustained." Order, ECF 200. One week later, the court informed the parties that it was "concerned" that nine of the challenged districts "either fail to remedy the identified constitutional violation or are otherwise legally unacceptable." Order, ECF 202 at 1-2. But rather than definitively resolve that question, the court confirmed its intention "to appoint a Special Master," "[i]n anticipation of the likely possibility" that it would invalidate the 2017 Plan. *Id.* at 2. The court identified Professor Nathaniel Persily as the Special Master it intended to appoint. *Id.* at 3.

Appellants objected, explaining that before appointing a special master to craft a remedy, the court must first find a violation in need of a remedy. Opp. to Appointment, ECF 204 at 2-6. That rule carries particular force, they explained, in the redistricting context, where the legislature must be given an opportunity to enact a new districting plan when its existing one has been found deficient. *Id.* at 7-8. Because there was still time for the General Assembly to enact a new plan if the 2017 Plan were found deficient, appellants implored the court to definitively resolve that question *before* forcing the State to fund a special master's effort to draw provisional remedial maps. *Id.*

The court overruled appellants' objections, appointed Professor Persily as Special Master, and ordered him to "submit a report and proposed plans" by December 1, 2017. Order, ECF 206 at 5. The court reiterated that it "has serious concerns" that four

districts "fail to remedy the identified constitutional violation" in the 2011 Plan, and that the changes to five other districts "exceeded the authorization to redistrict provided in the Court's previous orders." *Id.* at 1-2. But the court still declined appellants' request to definitively rule on the validity of the 2017 Plan, maintaining that "[t]he State is not entitled to multiple opportunities to remedy its unconstitutional districts." *Id.* at 4.

In the meantime, the court authorized the Special Master to "hire research and technical assistants and advisors" and to "buy any specialized software reasonably necessary," and ordered that all salaries and expenses be paid by the State. *Id.* at 9. The court provided guidelines for the Special Master to follow in drawing his remedial maps. In striking contrast to the race-blind policy choice the General Assembly made, the court informed the Special Master that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders and otherwise complies with federal law." *Id.* at 8-9.

The Special Master filed a "Draft Plan" on November 13, 2017, and after making minor changes in response to plaintiffs' suggestions, issued his final recommended plan and report ("Special Master's Plan") on December 1, 2017. As to the four districts (SD21, SD28, HD21, HD57) that the district court suggested "fail[ed] to remedy" the "impermissible use of race that rendered unconstitutional the 2011 districts," *id.* at 1-2, the Special Master's redrawn versions did not differ significantly from the 2017 Plan in terms of traditional districting criteria. *See* Special

Master's Recommended Plan & Report, ECF 220 at 22-29. But the Special Master's Plan did noticeably differ in one respect: It produced four districts with BVAPs falling into a narrow range of 38.4% to 43.6%, as compared to the 42.3% to 60.8% range in the race-blind 2017 Plan. *Id.* at 22. The Special Master's Plan also restored five House districts (HD36, HD37, HD40, HD41, and HD105) to their 2011 Plan form, on the theory that redrawing those districts violated "the provision of the state constitution that prohibits redistricting more than once per decade." *Id.* at 3. The Special Master also changed 15 adjoining districts to account for his modifications, resulting in a total of 24 districts that differed from the 2017 Plan.

Appellants again objected, Resp. to Special Master's Recommended Plan & Report, ECF 224, and then made a final plea for prompt resolution, imploring the court to move up its hearing and rule on plaintiffs' objections before the General Assembly's next session, Br. in Supp. of Mot. to Expedite, ECF 227 at 1. The district court refused. Order, ECF 228. Almost one month later, on January 5, 2018, the court held a hearing on the Special Master's Plan. Two weeks later, on the very last business day before the Board of Elections had to begin assigning voters to districts for the 2018 elections, the court entered an order invalidating the 2017 Plan and requiring the State to implement the Special Master's Plan for the 2018 elections.

Beginning with the jurisdictional issues, the court ruled that plaintiffs' challenges were not moot because "federal courts *must* review a state's proposed remedial districting plan to ensure it completely

remedies the identified constitutional violation and is not otherwise legally unacceptable." App.26. The court then determined that it was empowered to address not just challenges to districts that were invalidated in the 2011 Plan, but also new, state-law challenges to previously unchallenged districts. App.33-37 The court also rejected the argument that it lacks jurisdiction to consider state-law claims, holding that it could exercise pendent jurisdiction in the interest of "judicial economy, convenience, fairness to the litigants, and comity." App.35.

Turning to the merits, the court invalidated nine districts—some as racial gerrymanders and some as state-law violations. In the first category were SD21, SD28, HD28, and HD57. The court made no finding that the General Assembly acted with an illicit motive in designing those districts—nor could it, given the undisputed fact that the General Assembly did not consider race. Instead, the court held that these four districts "fail to remedy the racial gerrymander that served as the basis for invalidating the 2011 version of those districts." App.37. While the court did not find or conclude that the General Assembly actually considered race, it nonetheless concluded that those districts "fail to completely remedy the constitutional violation" because "the General Assembly's efforts to protect incumbents by preserving district cores and through use of political data perpetuated the unconstitutional effects of the four districts that are the subject of Plaintiffs' racial gerrymandering objections." App.46; *see* App.50-66.

The court next ruled that HD36, HD37, HD40, HD41, and HD105 "violate the [state] constitutional

prohibition on mid-decade redistricting." App.67. While the court acknowledged that the North Carolina Supreme Court "has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law," the court determined that the North Carolina Constitution "prohibits the General Assembly from engaging in mid-decade redistricting." App.67-68. Although the General Assembly had engaged in mid-decade districting only because the district court *invalidated* the duly enacted decennial plan, the court reached the topsy-turvy conclusion that because "a *court* may redraw only those districts necessary to remedy the constitutional violation" when "a court must draw remedial districts *itself*," state legislatures must labor under the same constraints when they are ordered to draw remedial maps. App.69 (emphasis added).

The court then adopted the Special Master's proposed maps in full, including all the reconfigurations of other districts that the Special Master deemed "necessitated" by undoing the General Assembly's purportedly "unnecessary" alterations, and ordered that the 2018 elections take place under the court-imposed plan.

Appellants filed an emergency motion to stay the court's order, *see* Emergency Motion, ECF 243, and filed an emergency stay application in this Court, *North Carolina v. Covington*, No. 17A790. The district court denied a stay, but this Court granted the application in part, staying the order "insofar as it directs the revision of House districts in Wake County

and Mecklenburg County"—*i.e.*, the districts invalidated on state-law grounds.

REASONS FOR SUMMARILY REVERSING OR NOTING PROBABLE JURISDICTION

When a federal court invalidates a districting plan, there are two well-trod paths to devising a replacement map. The preferred path is for the State to enact a new districting plan into law through its ordinary legislative process. If it does so, the new law supersedes the old one and moots the prior dispute; any voter with a constitutional objection to the new plan may challenge it in the same manner as any other state law, such as by filing an amended complaint or a new lawsuit. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 544-45 (1999). A different set of rules applies if the State is unable to enact its own remedial plan, because of political "gridlock" or some other factor. In that case, the district court must impose a districting map as a remedial order, and typically does so by choosing among various maps submitted by the parties or proposed by a court-appointed special master, while still using the last legislatively enacted map as a starting point. *See, e.g.*, *Perry v. Perez*, 565 U.S. 388 (2012).

Here, the district court charted an unprecedented and indefensible third course. In compliance with the district court's order, the General Assembly repealed the invalidated plan and enacted the 2017 Plan into law. That new plan was not a mere "proposal" submitted by lawyers, but rather a duly enacted law of North Carolina, entitled to the same deference and presumption of constitutionality accorded to all state legislation. But instead of treating it as such, the

district court treated the 2017 Plan as if it were just a *proposed* remedial plan for violations identified in the earlier litigation that the court was free to accept, modify, reject, or ignore, without regard to the constitutional requirements and substantive standards that would govern a typical challenge to state legislation. In doing so, the court improperly relied on precedents that apply only when the legislature fails to act and the court is forced to take on the "unwelcome obligation" of imposing court-drawn maps. *Connor v. Finch*, 431 U.S. 407, 415 (1977).

The district court's basic misconception of its role lay at the root of its reversible errors. *First*, because the court failed to recognize the 2017 Plan as the duly enacted law of North Carolina, it improperly retained jurisdiction over a moot controversy. Once the General Assembly repealed and replaced the law that plaintiffs challenged in their complaint, the district court lacked power to act unless and until plaintiffs amended their complaint or filed a new one challenging the 2017 Plan (and satisfying the various prerequisites for Article III jurisdiction), which they refused to do.

Second, because the court believed it was "fashioning a remedy" rather than freshly evaluating the constitutionality of a new state law, it invalidated four districts as racial gerrymanders without finding that race was the predominant factor in the 2017 Plan in general or in the invalidated districts in particular. Instead, quite remarkably, the court faulted the General Assembly for *not* considering race, counterintuitively concluding that the legislature's

race-neutral criteria failed to adequately "eliminate the discriminatory effects of the racial gerrymander" that the court found infected the 2011 Plan. Needless to say, a legislature's decision *not* to consider race does not violate the Equal Protection Clause—and thus is no ground for invalidating a duly enacted state law.

Third, the court improperly allowed plaintiffs to expand their claims to include new and novel state-law challenges to five districts that were not challenged in the original complaint. Not only were those claims never properly pleaded, but no plaintiff even lives in those districts, and federal courts have no power to enjoin state districts on state-law claims, especially novel ones. The district court thus lacked jurisdiction over those claims three times over. And in all events, the court's state-law holding rests on a misguided interpretation of the state constitution that has no precedent in state law and puts the state constitution on a collision course with the federal law principle that politically accountable state actors have the predominant role in enacting legislative maps designed to eliminate constitutional problems.

Finally, even if some or all of the district court's merits ruling were to survive, its imposition of the Special Master's Plan still should be reversed. Not only did the district court improperly deprive North Carolina of its sovereign right to draw its own districts; it also inflicted on the State the very race-based districting that the General Assembly chose to eschew. By repeatedly rejecting appellants' pleas to give the General Assembly a chance to draw a new map that remedied whatever problems the court may perceive in the 2017 law, the court committed an

extreme remedial overreach that intruded upon North Carolina's sovereign right to redistrict. And by imposing on the State a remedial plan carefully crafted to achieve a particular racial breakdown, the court effectively forced on the State the very racial gerrymandering that the General Assembly strove to avoid. Thus, at a minimum, the district court's imposition of the Special Master's Plan should be vacated, and the legislature provided an opportunity to correct any constitutional flaws in the 2017 Plan.

In sum, the district court misunderstood its role and the posture of this case. The 2017 Plan is a duly enacted law of North Carolina entitled to the same deference and presumption of constitutionality accorded to all state legislation. The district court did not have the power to subject that legislation to an *ad hoc* "preclearance" process unconstrained by standing, mootness, sovereign immunity, the presumption of good faith, or other bedrock principles of constitutional law. And the district court certainly did not have the power to hold that the General Assembly violated the Equal Protection Clause by following this Court's admonition that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

I. The District Court Lacked Jurisdiction Over Plaintiffs' Challenges To The 2017 Plan.

The first fatal problem with the decision and order below is that the district court lacked jurisdiction to enter them. "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article

III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Where, as here, a lawsuit challenges the validity of a statute, the controversy ceases to be "live" when the statute is repealed. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). If a challenged statute no longer exists, then absent unusual circumstances not present here (like actions capable of repetition yet evading review) there is no live controversy over the repealed law and a case challenging only the validity of the repealed statute must be dismissed as moot. *See, e.g.*, *Burke v. Barnes*, 479 U.S. 361, 363-64 (1987); 13C Wright & Miller, *Fed. Prac. & Proc.* §3533.6 (3d ed. 2017) ("Repeal … moots attacks on a statute.").

That straightforward rule applies equally to redistricting legislation. In *Growe v. Emison*, 507 U.S. 25 (1993), for example, while a federal challenge to a state legislative plan was pending, a state court invalidated that same plan and adopted a new one of its own design. *Id.* at 35. This Court explained that when the "state court's plan became the law of Minnesota," the federal plaintiffs' "claims that the [old] plan violated the Voting Rights Act became moot." *Id.* at 35, 39. At that point, "the federal court was empowered to entertain the [federal] plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged" the new plan. *Id.* at 36. And because plaintiffs had not amended their complaint to challenge that plan, their claims were moot. *Id.*

This Court reiterated the point in *Hunt v. Cromartie*, 526 U.S. 541 (1999). There, the legislature enacted a new districting plan (the 1998 plan) while the district court's order invalidating the prior plan (the 1997 plan) was on appeal to this Court. *Id.* at 546. This Court explained that the legislature's action normally would have mooted the challenge to the 1997 plan, but that the controversy remained live because "the State's 1998 law provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court." *Id.* at 545 n.1. Had the legislature effectuated a non-contingent repeal (as the General Assembly did here), the case would have been moot. *Id.*

Here, 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. At that point, plaintiffs had two options: They could either amend their complaint to add challenges to the 2017 law or file a new lawsuit challenging it. Plaintiffs did neither. Instead, they pursued their challenges to the 2017 Plan only through "objections" pressed in a so-called remedial proceeding. But that is not an option Article III allows. The 2017 Plan is a duly enacted legislative act that replaces the 2011 Plan, and Article III requires that it be separately challenged via a complaint brought by plaintiffs with standing asserting specific claimed defects with the 2017 law.

The district court did not identify any exception to mootness or otherwise explain why the normal Article III rules would not apply. Instead, it relied on inapposite cases, including two from this Court.

App.25-26. In *Chapman v. Meier*, 420 U.S. 1 (1975), the legislature "failed to reapportion" after the 1970 census, *id.* at 10, and its efforts to enact a plan in 1973 were thwarted by a popular referendum, *id.* at 12. Because the legislature never enacted its own remedial plan into law, the mootness issue never arose. Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the legislature did not enact any remedial plan for the upcoming 1962 election; it enacted only two provisional reapportionment plans "for the 1966 elections," neither of which took immediate effect. *Id.* at 543. The controversy over what districting plan would govern in 1962 therefore remained very much alive. *See id.* at 586-87.

The district court cited several lower court cases, App.26-27, but none involved the enactment of new districting plans; instead, they involved municipal maps, and remedial plans that the municipality did not enact into any kind of law, but just proposed directly to the court. *See Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Williams v. City of Texarkana*, 32 F.3d 1265 (8th Cir. 1994); *McGhee v. Granville Cty.*, 860 F.2d 110 (4th Cir. 1988); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984).[1] There is a fundamental difference between a proposal to be considered by a court forced to impose its own remedial map and a redistricting map duly enacted

[1] The district court also cited *Harris v. McCrory*, No. 13-cv-949, 2016 WL 3129213 (M.D.N.C. June 2, 2016), but in that case—as in *Hunt*—the new plan was passed only on a contingent basis. The only potentially relevant case the court cited was *United States v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006), and no party raised the mootness issue there.

through legislation. A duly enacted redistricting map that repeals the earlier statute is a *new law*. Like any other law, it must be challenged in a new lawsuit (or an amended complaint) filed by a plaintiff with standing to challenge the specified aspects of that new legislation as unlawful.

The only conceivable explanation for excusing plaintiffs from having to plead their challenges to the 2017 Plan as new claims is to short-circuit the protections that apply to litigation by traditional methods. And that is precisely what happened here—the district court failed to consider threshold issues like standing, *see infra* Part III, abandoned ordinary rules of discovery and presentation of evidence, *see* Per Curiam Order, ECF 233, and subjected the 2017 Plan to a form of junior-varsity "preclearance" under which the court declared itself empowered to reject the plan without regard to the substantive standards that apply in typical challenges to state legislation, *see infra* Part II. The court's failure to dismiss this case as moot was therefore just part and parcel of the fundamentally flawed manner in which it conducted its entire "remedial" proceeding.

II. The District Court Erred In Concluding That The General Assembly Engaged In Racial Gerrymandering By Declining To Consider Race.

The district court's ruling should also be reversed on the merits, as its conclusion that the General Assembly engaged in racial gerrymandering by declining to consider race is incoherent and unprecedented. Any effort to invalidate duly enacted legislation must begin with the "heavy presumption"

that the law is constitutional and valid. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). That presumption applies with particular force in the redistricting context, as "reapportionment is primarily the duty and responsibility of the State," *Chapman*, 420 U.S. at 27, and "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Racial gerrymandering is an intent-based violation of the Equal Protection Clause. To prevail on a racial gerrymandering claim, a plaintiff must prove that the legislature had a discriminatory intent—*viz.*, that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916. Unlike a vote-dilution claim, which focuses on the *effects* of a districting plan on voting rights, a racial gerrymandering claim focuses on the legislature's *intent*. As this Court recently put it, "the constitutional violation in racial gerrymandering cases *stems from the racial purpose of state action*," and the inevitable "harms that flow from racial sorting." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797-98 (2017) (emphasis added). Accordingly, the irreducible minimum of a racial gerrymandering claim is intentional racial sorting. Indeed, that is not just the irreducible minimum; it is the essence of the claim.

Here, there is no dispute that the General Assembly did *not* consider race *at all* when designing the 2017 Plan—not as a predominant motive, a secondary motive, or otherwise. That undisputed fact

should have been the end of the plaintiffs' racial gerrymandering challenges. To state the obvious, a legislature that declines to consider race is not predominantly motivated by race. The district court accepted plaintiffs' challenges nonetheless by asking the wrong question. Rather than ask whether "race was the predominant factor" in the drawing of the challenged districts (as this Court's cases require), it asked instead whether the new districts "eliminate[d] the discriminatory *effects* of the racial gerrymander" that led to the 2011 Plan being invalidated. App.38-39 (emphasis added).

That novel proposition is fundamentally incoherent. Initially, it bears repeating that the court was not reviewing a "proposed remedial districting plan," App.26; it was reviewing a duly enacted state law. The General Assembly responded to the district court's finding that racial motivation infected the 2011 Plan by repealing that plan and replacing it with new, race-neutral districting legislation. Accordingly, the question for the court should have been not whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, but whether the challenged districts in the new legislation were themselves racially gerrymandered. Yet the district court never even asked—let alone made any findings on—whether "race was the predominant factor" in drawing any of those districts. *Miller*, 515 U.S. at 916.

Instead, the court asked whether the new legislature "eliminated the discriminatory effects" of the *prior* racial gerrymander. But it is the height of incoherence to ask whether the legislature eliminated

the discriminatory *effects* of an *intent*-based violation like racial gerrymandering. It is one thing to ask whether new legislation removes the discriminatory effects of previous legislation that was invalidated for having an improper effect (like in a vote-dilution case), for *effects* may be unwittingly carried over from one version of a law to another. But the only problem with the 2011 Plan that was adjudicated here flowed from the previous legislature's discriminatory *intent*: the stigmatizing "harms that flow from racial sorting." *Bethune-Hill*, 137 S. Ct. at 797. Accordingly, once the legislature enacted a new law with a race-neutral intent, "the discriminatory effects of the racial gerrymander" were, by definition, eliminated, as an individual cannot complain about the stigmatizing injury of being sorted on the basis of race if she was not placed in her district on the basis of race. Discriminatory intent is not indelibly ingrained in statutory text or lines on a map. It is a question of motive that turns on why the legislature enacted the law. If the districts were not drawn on the basis of race (and the court here did not find that they were), then the court had no basis to invalidate them.

In concluding otherwise, the court found fault with the General Assembly's use of certain traditional *non-racial* districting criteria—namely, "preserving district cores and relying on political data" to protect incumbents. App.50. But the court did not find that either of these criteria was used as a pretext or proxy for race. Instead, the court held that these otherwise-permissible criteria are suspect when used to draw a *remedial* map, and that the General Assembly was under an obligation to "ensure that its reliance on those considerations did not serve to perpetuate the

effects of the racial gerrymander." App.50. In other words, the court reached the head-scratching conclusion that to "cure" the past racial gerrymander, the General Assembly cannot ignore race altogether, but instead must examine its non-racial districting criteria to determine what racial impact they would have—*i.e.*, the legislature must once again district on the basis of race.

That is clear from the court's district-by-district analysis of the districts it invalidated, which focused not on whether the General Assembly was motivated by race in drawing those districts, but on whether the General Assembly made affirmative efforts to ensure that each district's BVAP was not "too high," or to move municipalities, precincts, and communities of interest around to ensure that the district's lines did not unintentionally correlate with race. *See, e.g.*, App.50-66. Likewise, when the court instructed the Special Master on how to draw his alternative maps, it specifically instructed that he "may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures the unconstitutional racial gerrymanders." App.111; *see* App.106-18. And the Special Master proceeded to produce new versions of the four challenged districts that all just happened to have BVAPs in a very tight range of 38.4% to 43.6%. *See* Special Master's Recommended Plan & Report, ECF 220 at 22; *cf. Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (holding that VRA does not require creation of a "crossover" district with 39% BVAP). The district court's protests notwithstanding, *see* App.49-50, there is no other way to understand its opinion than as holding that the

General Assembly engaged in racial gerrymandering by failing to consider race.

To state the obvious, declining to consider race is not a cognizable constitutional violation. And unless the court finds that a particular district actually violates the Constitution, the court has "no basis" to invalidate a district—let alone to replace a race-neutral district with a race-conscious one. *Perry v. Perez*, 565 U.S. 388, 398 (2012); *see also Milliken v. Bradley*, 433 U.S. 267, 282 (1977). By replacing duly enacted districts without finding any constitutional violation, the district court exceeded the scope of any remedial authority it had.[2]

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges And Erred On The Merits.

The district court erred just as egregiously by invalidating five House districts on the theory that the General Assembly violated a state-law prohibition on mid-decade districting. *See* App.66-72 (citing N.C. Const. art. II, §5(4)). That ruling is erroneous for four reasons: There is no properly pleaded claim challenging those districts, no plaintiff even lives in those districts, federal courts have no power to enjoin state districts on state-law grounds, and the district court's novel interpretation of state law is wrong and would put state law on a collision course with federal-

[2] This Court may wish to hold this case pending its disposition of *Abbott v. Perez*, Nos. 17-586 & 17-626, which presents the same basic question of what a legislature must do to "remedy" a prior finding of intentional discrimination on the basis of race.

law principles minimizing federal-court interference with state elections.

First, the district court never should have adjudicated plaintiffs' state-law challenges because they were wholly outside the scope of plaintiffs' original challenge to the 2011 Plan. They involved entirely different districts and an entirely new (and novel) theory. Indeed, plaintiffs' state-law legal theory is, by its very nature, inapplicable to the 2011 Plan. While the district court had no basis to consider *any* challenge to the 2017 Plan absent an amended complaint, *see supra* Part I, whatever conceivable basis the court might have had to retain jurisdiction over challenges to districts that were previously invalidated as racial gerrymanders could not extend to never-before-raised state-law challenges to different districts that could not have been included in the original challenge to the 2011 Plan.

Second, because the original complaint did not include such challenges, it is no surprise (but still a fatal defect) that none of these plaintiffs has standing to bring them. This Court has repeatedly held that individuals do not have standing to challenge districts in which they do not reside. *United States v. Hays*, 515 U.S. 737, 744-45 (1995); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The original complaint included plaintiffs from each of the 28 districts challenged therein, but it quite understandably did not include any plaintiffs from the five districts that plaintiffs challenge only in the context of the 2017 Plan. Yet instead of filing an amended complaint adding new claims and new plaintiffs, the same plaintiffs who live in the 28

originally challenged districts brought these entirely different challenges to entirely different districts. Because plaintiffs do not reside in either the 2011 or the 2017 versions of HD36, HD37, HD40, HD41, or HD105, they are not proper parties "to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743.[3]

In opposing appellants' stay application, plaintiffs did not deny that they lack standing. Instead, they made only the implausible argument that there is "no standing issue" because the district court was merely exercising its "independent duty" to assess the legality of the 2017 Plan. Stay.Opp.28 n.6. That argument again confuses judicially imposed districting plans with legislatively enacted ones. While courts forced to impose their *own* plans in the absence of a duly enacted legislative plan obviously have an "independent duty" to ensure those plans do not violate the law, *see Perry*, 565 U.S. at 396, federal courts decidedly do not have any "independent duty" or free-standing power to assess the legality of districting laws (or any other laws) duly enacted by a state legislature. Instead, federal courts are empowered to adjudicate challenges to state laws only if a plaintiff with standing files a lawsuit alleging that the challenged statute is constitutionally infirm. *See, e.g.*, *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947).

This fundamental difference between judicially imposed maps and legislatively enacted maps should

[3] The districts in which plaintiffs reside are available in North Carolina's online voter registration database. *See Voter Search*, North Carolina State Board of Elections, https://vt.ncsbe.gov/RegLkup.

have been particularly clear given the nature of plaintiffs' state-law claims. Plaintiffs, in essence, claim that the legislature may redistrict only once a decade. Thus, plaintiffs' state-law merits theory critically depends on the 2017 Plan's status as a distinct legislative enactment. But the 2017 Plan's status as a distinct legislative enactment is precisely what makes an amended complaint brought by a plaintiff with standing essential. Plaintiffs' argument ultimately collapses on itself—if they were not challenging the districts that the district court invalidated, then nobody was, and the district court's *ad hoc* review of duly enacted state legislation suffers from Article III problems even more glaring than the standing problem plaintiffs strain to avoid.

Third, this insurmountable standing problem is not even the only insurmountable obstacle to plaintiffs' state-law challenges: The Eleventh Amendment forbids federal courts from enjoining state laws on state-law grounds. As to these five districts, the decision below is based *exclusively* on state law. The court did not hold that these districts (or their predecessor versions) were racially gerrymandered; it held only that the state legislature violated the state constitution by altering these districts mid-decade. But as this Court has squarely held, "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). The facts that plaintiffs' *federal* claims were properly in federal court, and that the Fourteenth Amendment abrogates state sovereign immunity as to those federal

claims, does not make any difference, as "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." *Id.* at 121. The district court therefore lacked jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds.

Finally, the district court's interpretation of state law is simply wrong. The North Carolina Constitution says that districts drawn after a decennial census "shall remain unaltered until the return of another decennial census." N.C. Const. art. II, §5(4); App.122. While that rule is clear enough under ordinary circumstances, the provision does not say anything about the General Assembly's power to redistrict mid-decade when a federal court *invalidates* the State's duly enacted map. Everyone agrees that when that happens, the state constitution allows the General Assembly to alter districts to some extent. Everyone likewise agrees that "[t]he Supreme Court of North Carolina has not addressed the scope of the General Assembly's authority to engage in mid-decade redistricting when a decennial districting plan is found to violate the Constitution or federal law." App.68. At a bare minimum, that uncertainty should have sufficed to persuade the district court to decline to exercise jurisdiction over plaintiffs' novel state-law challenges, as it did with respect to plaintiffs' challenges under another provision of state law. App.72-77.

Instead, the district court crafted a rule that the legislature may not make changes to an invalidated map unless they are "necessary to remedy" whatever infirmity the federal court found. App.69. The court

purported to derive that constraint from this Court's admonitions that *federal courts* should avoid "unnecessarily interfer[ing] with state redistricting choices." App.68 (citing *Upham v. Seamon*, 456 U.S. 37 (1982)). But the fact that a federal court may not "substitute[] its own reapportionment preferences for those of the state legislature," *Upham*, 456 U.S. at 40, hardly compels the conclusion that a federal court may prohibit a state legislature from determining how best to effectuate its legitimate districting choices after a federal court has *invalidated* its existing map. After all, the whole point of cases like *Upham* is that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman*, 420 U.S. at 27. Accordingly, a federal court should not read state law to impose constraints on a legislature's ability to respond to a federal-court order unless state law does so in the absolute clearest of terms, which no one could plausibly claim is the case here.

In short, any state-law challenge must be filed in state court, where state judges familiar with the state constitution can address the unsettled question of how N.C. Const. art. II, §5(4) applies when a federal court invalidates a duly enacted map. Sure enough, after this Court granted a partial stay of the judgment below, a group of plaintiffs represented by the same counsel as plaintiffs here filed exactly that lawsuit in state court. *See* Verified Complaint, *North Carolina State Conf. of NAACP Branches v. Lewis*, Case No. 18CVS002322 (N.C. Super. Ct. Feb. 21, 2018). As that state-court lawsuit underscores, the federal court should not have adjudicated state-law claims asserted by plaintiffs without Article III standing.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even if this Court concludes that the district court did not err by invalidating the 2017 Plan, it should still vacate the court's imposition of the Special Master's Plan and allow the General Assembly to enact its own map. The district court repeatedly rejected appellants' pleas for a prompt ruling that would allow the General Assembly to act, instead using a novel one-bite-at-the-remedial-apple rule as an excuse to impose its own districting plan on the State. By doing so, the court intruded upon North Carolina's sovereign right to redistrict, in direct contravention of this Court's precedent.

Decades ago, this Court established a principle of federalism from which it has never wavered: Federal courts must allow States to remedy constitutional infirmities in their districting plans. *Scott v. Germano*, 381 U.S. 407 (1965). If a federal court invalidates a State's districting plan, the State itself must be provided "the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity." *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997). Only when the legislature is unwilling or unable to enact a new map may "a court … take up the state legislature's task." *Perry*, 565 U.S. at 392.

The district court violated that bedrock rule. The court made crystal clear as early as October that it intended to invalidate the 2017 Plan. In fact, the court was so confident that it "likely" would reach that outcome that it took the "exceptional" step of appointing a special master to draw his own substitute

maps, and even ordered the State to foot the bill for his work. Order, ECF 202. At that point, the only option consistent with this Court's precedents and due respect for state sovereignty was to enter an injunction detailing the specific infirmities in the 2017 Plan. The General Assembly would have had time to enact a new districting plan that remedied those defects and to appeal to this Court on a relatively standard timeline. Indeed, appellants repeatedly implored the court to rule as quickly as possible to ensure that the General Assembly would have time to exercise its sovereign right to remedy any potential violation(s) in time for the 2018 elections. Instead, the district court refused to give the General Assembly a chance to enact a new map.

The court did so on the novel theory that States surrender their sovereign right to redistrict if their first attempt at a remedial map is unsuccessful—no matter how willing the State is to try again. In the district court's view, a State simply "is not entitled to multiple opportunities to remedy its unconstitutional districts." App.106; *see* App.77-78 n.10. The district court purported to divine that rule from this Court's decision in *Reynolds*, but *Reynolds* actually *forecloses* the district court's one-chance-only rule: The *Reynolds* Court invalidated the State's first attempt to draw remedial maps, yet made clear that the district court could intervene in future elections only if the "Legislature fail[s] to enact a constitutionally valid, permanent apportionment scheme." *Reynolds*, 377 U.S. at 587.

The district court's interference with the legislature's right to remedy any perceived problems

with the 2017 Plan also contravened this Court's guidance in *Growe*. There, parallel actions challenging Minnesota's congressional districts were filed in state and federal court, and Minnesota quickly conceded that the districts were unconstitutional. Although the State was ready and willing to enact a new plan, the federal court disabled it from doing so by enjoining the parties from "attempting to enforce or implement any order of the ... Minnesota Special Redistricting Panel." *Growe*, 507 U.S. at 30. The federal court then imposed a congressional plan designed by special masters. *Id.* at 31. This Court reversed, holding that the district court erred by wresting control of the redistricting process from the State. Reiterating that "the Constitution leaves with the States primary responsibility" for redistricting, this Court held that "a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34.

The district court's actions here are virtually indistinguishable. The court was well aware—and did not even dispute—that the General Assembly stood ready and willing to promptly carry out its sovereign duty as soon as the 2017 Plan was invalidated. *See* Opp. to Appointment, ECF 204 at 8. It simply refused to give the General Assembly the opportunity to do so. That refusal is impossible to reconcile with this Court's repeated admonishments that "reapportionment is primarily the duty and responsibility of the State." *Chapman*, 420 U.S. at 27. Indeed, the court's one-bite-at-the-remedial-apple rule smacks of a resurrected version of preclearance, essentially tagging any legislature that fails to

successfully navigate the landmines of redistricting law a permanent "bad actor" that forfeits its sovereign prerogative to redistrict.

V. The District Court Inflicted On The State A Map That Improperly Considered Race In Lieu Of A Race-Neutral Legislative Map.

The district court strayed even further afield in empowering the Special Master to craft, and then imposing on the State, a remedial map that was expressly race-conscious. The General Assembly made a deliberate decision *not* to sort voters on the basis of race, and neither the district court nor the Special Master had the power to override that decision. *See Perry*, 565 U.S. at 394. Indeed, the whole reason the district court invalidated the 2011 Plan is because it concluded that the General Assembly lacked "a strong basis in evidence" to believe that it needed to consider race to draw majority-minority districts to remedy a potential Voting Rights Act violation. *Covington*, 316 F.R.D. at 124. Yet the district court then concluded that the remedy for that unnecessary consideration of race was to replace the General Assembly's new race-blind districts with districts that just so happened to all have BVAPs ranging from 38.4% to 43.6%, Special Master's Recommended Plan & Report, ECF 220 at 22—in other words, to replace race-blind districts with crossover districts. *See Strickland*, 556 U.S. at 13.

That is not even an appropriate remedy for a VRA violation, *id.* at 21; *see also LULAC v. Perry*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.), and it is a positively bizarre remedy for a racial gerrymandering violation. Indeed, it is hard to understand the district

court's decision as anything other than an effort to allow plaintiffs to achieve through the back door of a "remedial" proceeding precisely what they could never achieve directly—namely, to compel the State to employ racial quotas of plaintiffs' choosing. Accordingly, even assuming the decision below were right on the merits (and it is not), the court (once again) got the remedy wrong. At a minimum, this Court should correct that remedial overreach and give the General Assembly the right to draw a new constitutionally compliant map.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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March 26, 2018

Exhibit H

No. 17-1364

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OPPOSING MOTION TO AFFIRM

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May 15, 2018

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INTRODUCTION

Plaintiffs cannot explain how the North Carolina General Assembly could have engaged in racial gerrymandering by declining to consider race when enacting the 2017 Plan. Instead, their entire defense of the decision below hinges on the notion that the ordinary procedural and substantive rules of litigation do not apply to their challenges to that duly enacted law because it was evaluated as a part of a "remedial proceeding." According to plaintiffs, courts need not worry about mootness, standing, or sovereign immunity, and courts can invalidate districts as racial gerrymanders even if—or, indeed, precisely because—the legislature did not consider race, so long as they do all of that pursuant to their power to "remedy" an earlier racial gerrymander.

That theory defies law, logic, and the fundamentals of the legislative and judicial processes. While district courts have different obligations when imposing their *own* remedial maps, they do not have some special reservoir of remedial power that allows them to ignore basic Article III requirements or subject duly enacted laws to some ad hoc "preclearance" process in which the normal presumption of constitutionality is reversed. Instead, when a State repeals a judicially invalidated map and replaces it with another duly enacted law, the second law is entitled to the same presumption of constitutionality as any other legislation, and can be invalidated only if a plaintiff with standing proves that it violates the Constitution or the VRA. Whatever else may be said of the complex web of restrictions that those two sources of federal law weave, one thing is for

certain: A legislature cannot engage in racial gerrymandering by declining to district on the basis of race. The district court's contrary conclusion cannot stand.

I. Challenges To Legislatively Enacted "Remedial" Plans Are Not Exempt From The Ordinary Rules Of Adversarial Litigation.

Plaintiffs do not even try to reconcile the district court's decision with the normal procedural and substantive rules that govern challenges to districting legislation. Instead, they argue that those settled rules do not apply here because the court was conducting a "remedial proceeding." *See, e.g.*, Mot.2, 13, 17, 23. In their view, because the district court was reviewing a plan enacted to replace a plan found deficient, the court did not have to abide by racial-gerrymandering jurisprudence, the Eleventh Amendment, or even the constraints of Article III. Plaintiffs are deeply mistaken. They have conflated the judicial role when a federal court must draw districts because the state legislature has failed to act, with the very different judicial role when a state legislature enacts a new plan into law. In the latter circumstance, there is no excuse for deviating from the normal requirements of Article III or the ordinary presumption of constitutionality.

In the rare circumstance when "those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so," the court may be forced to take on the "unwelcome obligation" of designing a districting plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal opinion). And in that circumstance, the court may

treat an unenacted proposal from the legislature as a mere proposal, because that is all it is. In the absence of a timely enacted new law, the court has no choice but to draw its own map and has an independent obligation to ensure that its map complies with applicable law. *See Perry v. Perez*, 565 U.S. 388, 393-94 (2012).

But where, as here, the State enacts a new plan, the district court cannot treat that duly enacted law as a mere proposal. Nor does the court have the power to subject that duly enacted legislation to a kind of "preclearance," freed from the presumption of constitutionality and unconstrained by the rules of adversarial litigation. Instead, the "new legislative plan" takes immediate effect and becomes "the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540. Such a challenge is subject to the ordinary constraints on the Article III process and "the presumption of good faith that must be accorded legislative enactments." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

That is clear from this Court's cases. This Court has explained, for example, that "state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 416 (2006) (Kennedy, J.). If the new plan is challenged, "no presumption of impropriety" attaches to the new plan, and the court's task is the same as in any racial-gerrymandering case: to determine whether the legislature was predominantly motivated by race. *Id.*; *see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541 (1999). Indeed, the rule that courts must "afford a

reasonable opportunity for the legislature to … adopt[] a substitute measure," *Wise*, 437 U.S. at 539, would be meaningless if second-round plans were not entitled to the same presumptions of good faith and constitutionality as first-round plans.

Proving the point, this Court has never approved the application of different rules to challenges to *legislatively* enacted "remedial" plans. Instead, this Court has applied distinct "remedial" principles *only* when a court was (or was likely to be) forced to draw its *own* plan. Indeed, the principal case on which plaintiffs rely (at 22) for their remedial-proceedings-are-different theory is one in which the legislature "could not reach agreement" on a second-round plan. *Abrams v. Johnson*, 521 U.S. 74, 78 (1997). Likewise, while plaintiffs contend that this Court "has regularly approved of the district court's retention of jurisdiction" to review remedial plans, Mot.14, the cases they cite all involve legislative default. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975) (instructing court to retain jurisdiction in case legislature "fails" to act); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (instructing court to retain jurisdiction in case legislative plan "is not timely adopted"); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (commending court for imposing plan after legislature "failed to act").

Plaintiffs also fail to distinguish cases recognizing that the enactment of a new plan moots challenges to the repealed plan. Plaintiffs note (at 16) that *Growe v. Emison*, 507 U.S. 25 (1993), involved "simultaneous state and federal actions," but that quirk has nothing to do with the relevant point: When the new plan "became the law," challenges to the old plan "became

moot." *Id.* at 35, 39. Plaintiffs do not even try to square their theory with *Hunt v. Cromartie*, instead discussing what a district court in a different case did three years earlier, Mot.17. Whatever that court did, this Court made clear in *Cromartie* that a new (and non-contingent) plan moots challenges to the old one. 526 U.S. at 545 n.1; *see Louisiana v. Hays*, 518 U.S. 1014 (1996); *White v. Regester*, 422 U.S. 935 (1975); *Hainsworth v. Martin*, 382 U.S. 109 (1965).

Plaintiffs insist that requiring them to litigate their challenges to the 2017 Plan the same way they must litigate any other constitutional challenge would "dangle relief beyond the[ir] reach." Mot.14. But that just underscores the basic flaw in their position. Plaintiffs have already gotten complete relief for the only claims they ever proved: The legislature repealed the plan they challenged and enacted a new one. Plaintiffs' belief that repeal of the only law they properly challenged is not a "true remedy" is fundamentally incompatible not only with bedrock mootness principles, but with the equally bedrock rule that *all* legislative enactments—even "remedial" ones—are entitled to a strong presumption of constitutionality. Requiring plaintiffs to overcome that presumption and prove their case in the ordinary course does not make the 2017 Plan "immune from review." Mot.2. It just ensures that duly enacted legislation will be invalidated only if it is actually unconstitutional.

II. The District Court Erred By Invalidating Four Districts As Racial Gerrymanders.

A. The District Court Applied the Wrong Legal Standard.

It is little surprise that plaintiffs adamantly refused to litigate their challenges to the 2017 Plan under the ordinary rules: They did not and cannot prove that the 2017 General Assembly engaged in racial gerrymandering. Indeed, while plaintiffs emphasize the district court's factual findings, that court did not make the one finding essential to a racial gerrymandering claim—namely, that race was the legislature's predominant motive.

Instead of looking for (let alone finding) that presumptively improper motive, the district court disapproved the challenged districts because the legislature purportedly did not "eliminate[] the discriminatory *effects* of the racial gerrymander" in the *2011* Plan. JS.App.38-39 (emphasis added). To state that oxymoronic theory is to refute it. Racial gerrymandering is an *intent*-based claim, grounded in impermissible consideration of race. Accordingly, the best way to "eliminate" the 2011 law's "discriminatory effects" is to repeal it, which is just what the legislature did. Of course, the 2017 law could turn out to be a racial gerrymander too—but that intent-based challenge would turn not on effects, but on whether the 2017 legislature acted with an impermissible racial purpose.

Plaintiffs resist this proposition, warning that if invalidation of a second-round plan requires a new finding of racial purpose, "the General Assembly could have cured its constitutional violations by re-enacting

the exact same plans" for a non-discriminatory reason. Mot.23. But that is not an anomaly; it is just how discriminatory-*intent* claims work: "[A] law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). Because the plaintiff's injury flows from the prior legislature's discriminatory intent, the injury is remedied once that law is repealed and a new legislature enacts a new plan without discriminatory intent, as the legislature did here. *See* JS21-23; *Palmer v. Thompson*, 403 U.S. 217, 225 (1971); Br. for United States 32-35, *Abbott v. Perez*, Nos. 17-586 & 17-626 (U.S.).

To be sure, a State cannot "undo the injury of racial gerrymandering simply by *claiming* to ignore racial data while enacting substantially the same plans." Mot.23-24 (emphasis added). A legislature that only *claims* to ignore race, but is predominantly motivated by race, would violate the Constitution if it lacked sufficient justification for using race. But the "ultimate question" in any racial-gerrymandering case—even one challenging a second-round plan—is "whether a discriminatory intent has been proved in [that] given case." *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion). The district court did not even ask that question, let alone find that the General Assembly was predominantly motivated by race. To the contrary, the court acknowledged that the 2017 General Assembly *did not consider race at all*.

That should have ended the matter, as the legislature obviously could not engage in racial gerrymandering by declining to consider race. Yet the court nonetheless faulted the legislature for failing to

examine the racial impact of its *non-racial* districting criteria, JS.App.49-50—in other words, for failing to (re)district on the basis of race. That just highlights the profound dangers of the court's eliminate-the-effects conception of how to cure racial gerrymanders. The district court's "cure" is indistinguishable from the disease. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).[1]

B. There Is No Evidence That the General Assembly Was Motivated by Race.

Instead of meaningfully addressing the fatal *legal* flaws in the district court's analysis, plaintiffs urge this Court to defer to the district court's *factual* findings. But there are no relevant findings, as the district court acknowledged that the legislature did not consider race in drawing the 2017 Plan. In all events, plaintiffs' argument rests on brazen mischaracterizations of the 2017 Plan.

By plaintiffs' telling, the 2017 Plan is a carbon copy of the 2011 Plan, cutting through communities on racial lines and ignoring traditional principles. In reality, the 2017 Plan outscores the 2011 Plan on every districting metric. The four challenged districts in the 2011 Plan divided 88 VTDs and 21 municipal boundaries. Those numbers decreased dramatically in the 2017 Plan to just *seven* VTDs and 14 municipal boundaries. ECF 220 at 24, 29. The Special Master's Plan divides two VTDs and 12 municipal boundaries in those four districts, but "the total number of split

[1] As noted, JS25 n.2, the Court may wish to hold this case pending *Abbott v. Perez*, Nos. 17-586 & 17-626, which also concerns how to remedy intentional discrimination.

precincts in the Special Master's Plan is higher than the Enacted 2017 Plans." *Id.* at 23.

The compactness scores tell a similar story. The challenged districts in the 2011 Plan averaged a 0.29 Reock score and a 0.11 Polsby-Popper score. *Id.* at 26. The 2017 Plan improved those scores materially to 0.37 and 0.21. *See* Richard H. Pildes, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 564 (1993) (defining "low" scores as 0.15 and 0.05). The Special Master's Plan scored marginally higher, at 0.51 and 0.32, but only at the cost of pairing two incumbents in SD28. ECF 220 at 26, 35.[2]

Indeed, the only significant difference between the 2017 Plan and the Special Master's Plan is the BVAP in each challenged district. In the 2017 Plan—drawn *without* consideration of race—the BVAPs range from 42.3% to 60.8%. In the Special Master's Plan—drawn under a court order expressly allowing the use of "data identifying the race of individuals"—the BVAPs fall within the much tighter range of 38.4% to 43.6%. JS24-25, 34-35.[3] That range just so happens

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[2] Plaintiffs assert that the four districts "closely track" the "exemplar" districts, Mot.21, but a comparison of the maps easily disproves that assertion for SD21, HD21, and HD57. *Compare* ECF 33-26 *with* ECF 220. While the 2017 SD28 overlaps with exemplar SD28, so does the Special Master's version, as all three contain "the center of Guilford County." JS.App.55, 92.

[3] Ironically, by rejecting a race-neutral legislative plan in favor of instructing the Special Master to consider race as necessary to "remedy" the "effects" of past gerrymandering, the court virtually ensured that race would be the predominant factor in the 2017 districts without justification, a result this Court's precedents

to be precisely the range favored by the plaintiffs and by prior Democratic-controlled General Assemblies, as it is the range that creates crossover districts in North Carolina. *See Strickland*, 556 U.S. at 13. Thus, it is not "rank speculation," Mot.26, but a simple matter of math that the court replaced the General Assembly's race-neutral plan with one that was meaningfully different only in that it achieved plaintiffs' race-based districting preferences.

III. The District Court Lacked Jurisdiction Over Plaintiffs' State-Law Challenges.

Plaintiffs' defenses of the district court's state-law rulings are meritless. Plaintiffs concede that they do not live in the challenged districts, but assert that standing is irrelevant because "these … are objections made in the course of a remedial proceeding." Mot.33. But as already explained, Article III standing is not a technicality that becomes optional in proceedings deemed "remedial," and the 2017 Plan is a duly enacted law that must be challenged by a plaintiff with standing, just like any other law. If plaintiffs never brought a legal challenge to the 2017 Plan, then the district court exceeded its Article III authority, as federal courts do not have freestanding power to assess the legality of state legislation. *See* JS27. If plaintiffs *did* bring a legal challenge, they concededly lacked standing to bring their state-law claims. Either way, the court's order cannot stand.

As to the Eleventh Amendment, plaintiffs concede that federal courts may not enjoin state laws on state-

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foreclose. *Miller,* 515 U.S. at 912; *Bartlett v. Strickland*, 556 U.S. 1 (2009) (racial quotas suspect even below 50%).

law grounds, Mot.31-32, but argue that the district court "was not adjudicating any state-law claims," and ruled only that "the General Assembly exceeded the scope of the redrawing authorized by the court." Mot.30. That is wrong at every level. The district court had no authority to limit the General Assembly's power; the legislature was entirely free to repeal and replace the invalidated law, and it would be a revolution in federalism to conclude otherwise. And, in all events, the district court itself observed: "[W]e sustain Plaintiffs' *state-law objections*." JS.App.77 (emphasis added). Even more implausibly, plaintiffs argue that the district court "did not issue any injunction." Mot.32. In reality, the court prohibited North Carolina from conducting elections under the 2017 Plan and ordered it to conduct elections under the Special Master's Plan instead. That is a straightforward injunction, and the district court plainly lacked power to enter it.

IV. The District Court Improperly Prevented The State From Enacting A Remedial Map.

Even assuming there were some defect with the 2017 Plan, the district court independently erred by depriving the General Assembly of the chance to remedy it by enacting a new law. Plaintiffs assert that giving the State that chance would "run[] headlong into established precedent," Mot.18, but they identify no such precedent. They cite *Wise* and *Reynolds*, but *Wise* did not address the question (the second-round plan was not invalidated), and *Reynolds* actually forecloses plaintiffs' one-bite-at-the-remedial-apple rule, *see* JS32. Given this Court's repeated admonishments that a State "should be given the

opportunity to make its own redistricting decisions," *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576 (1997), the burden is on plaintiffs to show that this settled principle evaporates after the first replacement plan. They have not met that burden.

Plaintiffs suggest there was not enough time for the legislature to enact a new plan, Mot.20, but the only reason the election was "fast-approaching" when the district court ruled was because it refused to act expeditiously based on its misconception that the legislature was "not entitled" to another chance. JS.App.106. In other words, the court *intentionally* obstructed the State from performing "one of the most significant acts a State can perform." *LULAC*, 548 U.S. at 416. At a bare minimum, this Court should vacate the Special Master's Plan and restore North Carolina's sovereign right to draw its own districts.

CONCLUSION

This Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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May 15, 2018

Amended Exhibit 1

18CV014001

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

Docket No. _____

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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,

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 ELECTIONS AND ETHICS ENFORCEMENT; ANDY PENRY, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; JOSHUA MALCOLM, VICE-CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS

FILED
2018 NOV 13 A 10:03
WAKE COUNTY, C.S.C.

COMPLAINT

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

ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

Plaintiffs, complaining of Defendants, say and allege:

INTRODUCTION

1. Partisan gerrymandering is an existential threat to our democracy, and nowhere more so than in North Carolina. Republicans in the North Carolina General Assembly have egregiously rigged the state legislative district lines to guarantee that their party will control both chambers of the General Assembly regardless of how the people of North Carolina vote. This attack on representative democracy and North Carolinians' voting rights is wrong. It violates the North Carolina Constitution. And it needs to stop.

2. In 2011, as part of a national movement by the Republican Party to entrench itself in power through redistricting, North Carolina Republicans' mapmaker manipulated district boundaries with surgical precision to maximize the political advantage of Republican voters and minimize the representational rights of Democratic voters. And it worked. In the 2012, 2014, and 2016 elections, Republicans won veto-proof super-majorities in both chambers of the General Assembly despite winning only narrow majorities of the overall statewide vote.

3. In 2017, after federal courts struck down some of the 2011 districts as illegal racial gerrymanders, Republicans redoubled their efforts to gerrymander the district lines on partisan grounds. They instructed the same Republican mapmaker to use partisan data and prior election results in drawing new districts. The results should outrage anyone who believes in democracy. In both the state House and state Senate elections in 2018, Democratic candidates won a majority of the statewide vote, but Republicans still won a substantial majority of seats in each chamber. The maps are impervious to the will of the voters.

4. It gets worse. Because North Carolina is one of the few states in the country where the Governor lacks power to veto redistricting legislation, the General Assembly alone

will control the next round of redistricting after the 2020 census. Accordingly, as things currently stand, the Republican majorities in the General Assembly elected under the current maps will have free reign to redraw both state legislative and congressional district lines for the next decade. This perpetuates a vicious cycle in which representatives elected under one gerrymander enact new gerrymanders both to maintain their control of the state legislature and to rig congressional elections for ten more years. Only the intervention of the judiciary can break this cycle and protect the constitutional rights of millions of North Carolinians.

5. The North Carolina Constitution prohibits partisan gerrymandering. This State's equal protection guarantees provide more robust protections for voting rights than the federal constitution. Specifically, "[i]t is well settled in this State that the right to vote *on equal terms* is a fundamental right." *Stephenson v. Bartlett*, 562 S.E.2d 377, 394 (N.C. 2002). There is nothing "equal" about the "terms" on which North Carolinians vote for candidates for the General Assembly. North Carolina's Constitution also commands that "all elections shall be free"—a provision that has no counterpart in the federal constitution. Elections to the North Carolina General Assembly are not "free" when the outcomes are predetermined by partisan actors sitting behind a computer. And the North Carolina Constitution's free speech and association guarantees prohibit the General Assembly from burdening the speech and associational rights of voters and organizations because the General Assembly disfavors their political views.

6. No matter how the U.S. Supreme Court resolves longstanding questions about partisan gerrymandering under the federal constitution, North Carolina's Constitution independently secures the rights of North Carolina citizens. This State's courts should not hesitate to enforce North Carolina's unique protections here. This Court should invalidate the 2017 Plans and order that new, fair maps be used for the 2020 elections.

PARTIES

A. Plaintiffs

7. Common Cause brings this action on its own behalf and on behalf of its members who are registered voters in North Carolina whose votes have been diluted or nullified under the districting plans enacted by the General Assembly in 2017 for the North Carolina House of Representatives and North Carolina Senate (the "2017 Plans"). Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nonpartisan democracy organization with over 1.2 million members and local organizations in 35 states, including North Carolina. Common Cause has members in every North Carolina House and Senate district. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform." Jonathan Winburn, The Realities of Redistricting p. 205 (2008). The 2017 Plans frustrate Common Cause's mission to promote participation in democracy and to ensure open, honest, and accountable government. The 2017 Plans burden Common Cause's ability to convince voters in gerrymandered districts to vote in state legislative elections and communicate with legislators. The 2017 Plans also burden Common Cause's ability to communicate effectively with legislators and to influence them to enact laws that promote voting, participatory democracy, public funding of elections, and other measures that encourage accountable government.

8. The North Carolina Democratic Party ("NCDP") brings this action on its own behalf and on behalf of its members who are registered voters in North Carolina whose votes have been diluted or nullified as a result of the gerrymandering of the 2017 Plans. The NCDP is a political party as defined in N.C. Gen. Stat. § 163-96. Its purposes are (i) to bring people

together to develop public policies and positions favorable to NCDP members and the public generally, (ii) to identify candidates who will support and defend those policies and positions, and (iii) to persuade voters to cast their ballots for those candidates. The NCDP has members in every North Carolina House and Senate district. The partisan gerrymanders under the 2017 Plans discriminate against the NCDP's members because of their past votes, their political views, and their party affiliations. The gerrymanders also discriminate against the NCDP itself on the basis of its viewpoints and affiliations, and the plans frustrate and burden NCDP's ability to achieve its essential purposes and to carry out its core functions, including registering voters, attracting volunteers, raising money in gerrymandered districts, campaigning, turning out the vote, and ultimately electing candidates who will pursue policies favorable to NCDP members and the public generally in the North Carolina General Assembly. The NCDP must expend additional funds and other resources than it would otherwise to combat the effects of the partisan gerrymanders under the 2017 Plans, and even then, the 2017 Plans make it impossible for Democrats to win a majority in either chamber of the legislature.

9. Plaintiff Paula Ann Chapman is a retired small business owner residing in Charlotte, North Carolina, within House District 100 and Senate District 40. Ms. Chapman is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 100 and Senate District 40 are both packed Democratic districts. In 2018, the Democratic candidate won these districts with over 70% and 75% of the vote.

10. Plaintiff Howard DuBose is a retired school teacher and Army veteran residing in Hurdle Mills, North Carolina, within House District 2. Mr. DuBose is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. Democratic

voters in House District 2 are cracked from Democratic voters in House District 32. In 2018, the Republican candidate won House District 2 with roughly 55% of the vote.

11. Plaintiff George David Gauck is a retired software engineer residing in Southport, North Carolina, within House District 17 and Senate District 8. Mr. Gauck is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 17 is adjacent to the packed Democratic House District 18. In 2018, the Republican candidate won House District 17 with over 63% of the vote. A heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, Senate District 9 was a near tie, while Republicans won Senate District 8 by a comfortable margin.

12. Plaintiff James Mackin Nesbit is a retired kindergarten teacher residing in Wilmington, North Carolina, within House District 19 and Senate District 9. Mr. Nesbit is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 19 borders the packed Democratic House District 18. The Republican candidate has won every election in House District 19 since the 2011 redistricting, running unopposed in 2014 and 2016. A heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, the election in Senate District 9 was a near tie.

13. Plaintiff Dwight Jordan is a customer support professional residing in Nashville, North Carolina, within House District 25 and Senate District 11. Mr. Jordan is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 25 is a packed Democratic district that was constructed to ensure that neighboring House District 7 would elect a Republican, which occurred in 2018. The county cluster

encompassing Senate District 11 cracks Democratic voters across its three districts (10, 11, and 12). In 2018, the Republican candidate won Senate District 11 with roughly 56% of the vote.

14. Plaintiff Joseph Thomas Gates is a former Colonel in the Air Force and a retired information technology project manager residing in Weaverville, North Carolina, within Senate District 49. Mr. Gates is registered as unaffiliated and has consistently voted for Democratic candidates for the General Assembly. Senate District 49 is a packed Democratic district. In 2018, the Democratic candidate won Senate District 49 with over 63% of the vote.

15. Plaintiff Mark S. Peters is a retired physician assistant residing in Fletcher, North Carolina, within Senate District 48. Mr. Peters is registered as unaffiliated and has consistently voted for Democratic candidates for the General Assembly. Senate District 48 was drawn to avoid the Democratic areas in and around Asheville to ensure that the district would lean Republican. In 2018, the Republican candidate won Senate District 48 by roughly 13 points.

16. Plaintiff Pamela Morton is a retired professional in the financial industry residing in Charlotte, North Carolina, within House District 100 and Senate District 37. Ms. Morton is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 100 and Senate District 37 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 70% and 78% of the vote.

17. Plaintiff Virginia Walters Brien is a sales manager residing in Charlotte, North Carolina, within House District 102 and Senate District 37. Ms. Brien is a registered unaffiliated who has consistently voted for Democratic candidates for the General Assembly. House District 102 and Senate District 37 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 83% and 78% of the vote.

18. Plaintiff John Mark Turner is a Navy veteran and a system administrator residing in Raleigh, North Carolina, within House District 38 and Senate District 15. Mr. Turner is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 38 and Senate District 15 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 81% and 73% of the vote.

19. Plaintiff Leon Charles Schaller is a retired safety and fire protection engineer residing in Burlington, North Carolina, within House District 64. Mr. Schaller is registered as an unaffiliated voter but has consistently voted for Democratic candidates for the General Assembly. The county cluster that contains House Districts 63 and 64 was not changed in the 2017 Plans and retains the same district lines enacted in 2011. In constructing the cluster, the General Assembly cracked Democratic voters in Burlington across the two districts. Republican candidates have won every election in House District 64 since the 2011 redistricting—with over 58% of the vote in 2012 and 2018, and running unopposed in 2014 and 2016.

20. Plaintiff Rebecca Harper is a real estate agent residing in Cary, North Carolina, within House District 36 and Senate District 17. Ms. Harper is registered as a Democrat and has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed several districts surrounding House District 36 with Democratic voters to make House District 36 as Republican as possible. In 2018, the Democratic candidate won House District 36 with barely over 50% of the two-party vote. The General Assembly similarly packed several districts surrounding Senate District 17 to make Senate District 17 as competitive for Republicans as possible. In 2018, the Democratic candidate narrowly won Senate District 17.

21. Plaintiff Lesley Brook Wischmann is a semi-retired writer and historian residing in Holly Ridge, North Carolina, within House District 15. Ms. Wischmann is registered as a

Democrat and has consistently voted for Democratic candidates for the General Assembly. The General Assembly cracked Democratic voters across House Districts 14 and 15. In 2018, the Republican candidate won House District 15 with roughly 66% of the vote.

22. Plaintiff David Dwight Brown is a semi-retired computer systems analyst residing in Greensboro, North Carolina, within House District 58. Mr. Brown is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 58 is a packed Democratic district. In 2018, the Democratic candidate won House District 58 with over 76% of the vote.

23. Plaintiff Amy Clare Oseroff is a teacher residing in Greenville, North Carolina, within House District 8. Ms. Oseroff is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed Greenville's most heavily Democratic areas into House District 8 to create a strongly Democratic district, ensuring that nearby House Districts 9 and 12 would favor Republicans. In 2018, the Democratic candidate won House District 8 with over 64% of the vote.

24. Plaintiff Kristin Parker Jackson is a paralegal residing in Matthews, North Carolina, within House District 103 and Senate District 39. Ms. Jackson is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed Democrats into the districts surrounding House District 103 to make House District 103 as Republican-leaning as possible. In 2018, House District 103 was a virtual tie. Senate District 39 is a Republican-leaning district that borders packed Democratic districts. In 2018, the Republican candidate won Senate District 39 with roughly 53% of the vote.

25. Plaintiff John Balla is a digital marketing strategist residing in Raleigh, North Carolina, within House District 34 and Senate District 16. Mr. Balla is a registered Democrat

who has consistently voted for Democratic candidates for the General Assembly in every election since he moved to North Carolina. House District 34 and Senate District 16 are both packed Democratic districts. In 2018, the Democratic candidates won both districts with over 65% of the vote.

26. Plaintiff Rebecca Johnson is a retired educator residing in Winston-Salem, North Carolina, within House District 74 and Senate District 31. Ms. Johnson is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 74 adjoins two packed Democratic districts, allowing House District 74 to favor Republicans. In 2018, the Republican candidate won House District 74 with more than 54% of the vote. Senate District 31—which cradles Senate District 32, a packed Democratic district—leans Republican. In 2018, the Republican candidate won Senate District 31 with over 61% of the vote.

27. Plaintiff Aaron Wolff is a veterinarian residing in Holly Springs, North Carolina, within House District 37 and Senate District 17. Mr. Wolff is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed as many Democrats as possible into the districts surrounding House District 37 and Senate District 17 to make these districts as favorable to Republicans as possible. In 2018, Democratic candidates won both districts with bare majorities.

28. Plaintiff Mary Ann Peden-Coviello is a writer and editor residing in Winston-Salem, North Carolina, within House District 72 and Senate District 32. Ms. Peden-Coviello is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 72 is a packed Democratic district. In 2018, the Democratic candidate won House District 72 with 79% of the vote. Senate District 32 is a packed Democratic district

that was drawn to ensure that neighboring Senate District 31 would elect a Republican. In 2018, the Democratic candidate won Senate District 32 with 72% of the vote.

29. Plaintiff Kathleen Barnes is the owner of a small publishing company who resides in Brevard, North Carolina, within House District 113 and Senate District 48. Ms. Barnes is a registered Democrat and has consistently voted for Democratic candidates for the North Carolina General Assembly. The Democrats who reside in House District 113, like Ms. Barnes, were strategically placed in a different district from the Democratic voters around Hendersonville to ensure that Republicans were favored in both districts. In the 2018 elections, the Republican candidate won the House District 113 election with over 57% of the vote. Senate District 48 was similarly cracked, splitting the Democratic voters in Brevard from the strong base of Democratic voters in nearby Asheville so that Senate District 48 was Republican-leaning. In 2018, the Republican candidate won Senate District 48 with over 56% of the vote.

30. Karen Sue Holbrook is a retired psychology professor residing in Southport, North Carolina, within House District 17 and Senate District 8. Ms. Holbrook is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. In the county cluster containing House District 17, the General Assembly packed Democratic voters into House District 18 to make House District 17 and the other districts in the cluster lean Republican. In 2018, the Republican candidate won House District 17 with over 63% of the vote. With respect to Senate District 8, a heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, Senate District 9 was a near tie, while Republicans won Senate District 8 with a comfortable margin.

B. Defendants

31. Defendant David R. Lewis is a member of the North Carolina House of Representatives who represents House District 53. In 2017, Representative Lewis served as Senior Chairman of the House Select Committee on Redistricting that oversaw the creation of 2017 Plans. Defendant Lewis is sued in his official capacity only.

32. Defendant Ralph E. Hise, Jr. is a member of the North Carolina Senate, representing Senate District 39. In 2017, Senator Hise served as Chairman of the Senate Committee on Redistricting that oversaw the creation of the 2017 Plans. Defendant Hise is sued in his official capacity only.

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

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

35. Defendant the State of North Carolina has its capital in Raleigh, North Carolina.

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

37. Defendant Andy Penry is the Chairman of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Penry is sued in his official capacity only.

38. Defendant Joshua Malcolm is the Vice Chair of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Malcolm is sued in his official capacity only.

39. Defendant Ken Raymond is the Secretary of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Raymond is sued in his official capacity only.

40. Defendant Stella Anderson is a member of the North Carolina State Board of Elections and Ethics Enforcement. Ms. Anderson is sued in her official capacity only.

41. Defendant Damon Circosta is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Circosta is sued in his official capacity only.

42. Defendant Stacy "Four" Eggers IV is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Eggers is sued in his official capacity only.

43. Defendant Jay Hemphill is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Hemphill is sued in his official capacity only.

44. Defendant Valerie Johnson is a member of the North Carolina State Board of Elections and Ethics Enforcement. Ms. Johnson is sued in her official capacity only.

45. Defendant John Lewis is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Lewis is sued in his official capacity only.

JURISDICTION AND VENUE

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

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

48. Under N.C. Gen. Stat. § 1-267.1, a three-judge court must be convened because this action challenges the validity of redistricting plans enacted by the General Assembly.

FACTUAL ALLEGATIONS

A. National Republican Party Officials Target North Carolina For Partisan Gerrymandering Prior to the 2010 Elections

49. In the years leading up to the 2010 decennial census, national Republican leaders undertook a sophisticated and concerted effort to gain control of state governments in critical

swing states such as North Carolina. The Republican State Leadership Committee (RSLC) codenamed the plan "the REDistricting Majority Project" or "REDMAP." REDMAP's goal was to "control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn" after the 2010 census. The RSLC's REDMAP website explained that fixing these district lines in favor of Republicans would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."

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

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

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

B. Republican Mapmakers Create the 2011 Plans from Party Headquarters

53. After taking control of both chambers of the General Assembly, Republicans set out to redraw district lines to entrench Republicans in power. The RSLC's President and CEO, Chris Jankowski, sent a letter to officials in Republican-controlled states (including North Carolina) offering the RSLC's assistance with the upcoming redistricting. Jankowski explained that the RSLC had "taken the initiative to retain a team of seasoned redistricting experts," and

the RSLC would happily make this team "available to" the Republican state officials. Jankowski noted that RSLC's expert "redistricting team" was "led by Tom Hofeller," who had been the principal redistricting strategist for the Republican Party for decades.

54. Republicans leaders in the North Carolina General Assembly took Jankowski up on his offer. The drawing of the new North Carolina House and Senate plans (the "2011 Plans") was not done by any committee or subcommittee of the General Assembly. Instead, it was primarily done by four Republican Party operatives: (1) Hofeller; (2) John Morgan, another national Republican mapmaker and longtime associate of Hofeller, (3) Dale Oldham, an attorney who served as counsel to the Republican National Committee; and (4) Joel Raupe, a former aide to several Republican representatives in the North Carolina Senate. A newly created shadow organization known as "Fair and Legal Redistricting North Carolina" paid for Morgan's and Raupe's work, while Hofeller was paid with a combination of state funds and money from the RSLC's non-profit arm the State Government Leadership Foundation.

55. Hofeller and his team worked out of the basement of the state Republican Party headquarters on Hillsborough Street in Raleigh. They did not use a government computer to create the new plans. Rather, they created the new plans using computers owned by the Republican National Committee and software licensed by the state Republican Party.

56. The map-making process was shielded from public view. Only a small group of individuals that included Hofeller's team and Republican leaders in the General Assembly saw the first drafts of the maps before they were publicly released in June 2011.

57. One person who was allowed to directly participate in the map-drawing process was mega-donor Art Pope. Despite not being a practicing lawyer, Pope served as "pro bono" counsel to the state legislature and met several times with Hofeller and his team at Republican

Party headquarters while they were working on the new plans. Pope even proposed specific changes to certain districts.

58. Although Republicans drew their maps in secret, their intentions were clear as day. Their goal was to maximize the number of seats Republicans would win in the General Assembly through whatever means necessary.

59. Hofeller later admitted that, in creating the 2011 Plans, his team used past election results in North Carolina to predict the "partisan voting behavior" of the new districts. Republican leaders in the General Assembly likewise later admitted in court filings that "[p]olitical considerations played a significant role in the enacted [2011] plans," and that the plans were "designed to ensure Republican majorities in the House and Senate." *Dickson v. Rucho*, No. 201PA12-3, 2015 WL 4456364, at *16, 55 (N.C. July 13, 2015). The Republican leaders asserted that they were "perfectly free" to engage in partisan gerrymandering, and that they had done just that in constructing the 2011 Plans. *Dickson v. Rucho*, No. 201PA12-2, 2013 WL 6710857, at *60 (N.C. Dec. 9, 2013).

C. Republicans Enact the 2011 Plans To Entrench Their Party's Political Power

60. The General Assembly adopted the Hofeller-drawn plans in July 2011, designated HB 937 and SB 45 respectively. Not a single Democrat in the General Assembly voted for either plan, and only one Republican representative voted against them.

61. Shortly thereafter, legislators learned that certain census blocks were not assigned to any district in the enacted plans. In November 2011, the General Assembly passed curative House and Senate plans, designated HB 776 and SB 282 respectively, to add the previously omitted blocks. No Democrat voted for either curative plan.

D. The 2011 Plans Gave Republicans Super-Majorities That Were Grossly Disproportionate to Republicans' Share of the Statewide Vote

62. The 2011 Plans achieved exactly the effect that Republicans in the General Assembly intended. In the 2012 election, the parties' vote shares for the North Carolina House of Representatives were nearly evenly split across the state, with Democrats receiving 48.4% of the two-party statewide vote. But Democrats won only 43 of 120 seats (36%). In other words, Republicans won a veto-proof majority in the state House—64% of the seats (77 of 120)—despite winning just a bare majority of the statewide vote. Further, because of the rigging of district lines, 53 of the 120 House races were uncontested.

63. In the 2012 Senate elections, Democrats won nearly half of the statewide vote (48.8%), but won only 18 of 50 seats (36%). Republicans thus won a veto-proof majority in the Senate while winning only a tiny majority of the total statewide vote.

64. In 2014, Republican candidates for the House won 54.4% of the statewide vote, and again won a super-majority of seats (74 of 120, or 61.6%). Over half of the House seats, 62 of 120, went uncontested in 2014.

65. In the 2014 Senate elections, Republicans won 54.3% of statewide vote and 68% of the seats (34 of 50). There were 21 uncontested elections in the Senate in 2014, with Republicans winning 12 uncontested districts and Democrats winning 9.

66. In 2016, Republicans again won 74 of 120 House seats, or 62%, this time with 52.6% of the statewide vote. Nearly half of all of the House seats were uncontested (59 of 120).

67. In the 2016 Senate elections, Republicans won 55.9% of the statewide vote and 70% of the seats (35 of 50). Republicans held 12 uncontested seats compared to 6 for Democrats, for a total of 18 uncontested races.

68. The below charts summarizes the election results under the 2011 Plans:

	House		Senate	
Year	Republican Percentage of Statewide Vote	Republican Percentage of Seats Won	Republican Percentage of Statewide Vote	Republican Percentage of Seats Won
2012	51.6%	64.2% (77 of 120)	51.2%	64.0% (32 of 50)
2014	54.4%	61.6% (74 of 120)	54.3%	68.0% (34 of 50)
2016	52.6%	61.6% (74 of 120)	55.9%	70.0% (35 of 50)

E. A Federal Court Strikes Down Many Districts as Racially Gerrymandered

69. The 2011 Plans led to substantial litigation, including the federal lawsuit styled *Covington v. North Carolina*, No. 1:15-CV-00399 (M.D.N.C.). In *Covington*, the plaintiffs challenged 19 districts in the North Carolina House (5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107) and 9 districts in the North Carolina Senate (4, 5, 14, 20, 21, 28, 32, 38, and 40). They alleged that race predominated in the drawing of these districts, in violation of the federal Equal Protection Clause. In August 2016, the federal district court found for the plaintiffs as to all of the challenged districts, but permitted the General Assembly to wait until after the November 2016 elections to enact remedial plans. *Covington v. North Carolina*, 316 F.R.D. 176, 176-78 (M.D.N.C. 2016). The U.S. Supreme Court summarily affirmed this decision. 137 S. Ct. 2211 (2017).

70. In a subsequent order, the district court gave the General Assembly a deadline of September 1, 2017 to enact new House and Senate plans remedying the racial gerrymanders the court had found. *Covington v. North Carolina*, 267 F. Supp. 3d 664 (M.D.N.C. 2017).

F. The General Assembly Enacts the 2017 Plans To Dilute the Voting Power of Democratic Voters and Maximize the Political Advantage of Republicans

71. The General Assembly began developing new House and Senate plans in June 2017. On June 30, 2017, Senator Berger appointed 15 senators—10 Republicans and 5 Democrats—to the Senate Committee on Redistricting. Senator Hise was appointed Chair.

72. Also on June 30, 2017, Representative Moore appointed 41 House members—28 Republicans and 13 Democrats—to the House Select Committee on Redistricting. Representative Lewis was appointed Senior Chair.

73. At a July 26, 2017 joint meeting of the House and Senate Redistricting Committees, Representative Lewis and Senator Hise disclosed that Republican leadership would again employ Dr. Hofeller to draw the new House and Senate plans. When Democratic Senator Terry Van Duyn asked whether Hofeller would "be available to Democrats and maybe even the Black Caucus to consult," Representative Lewis answered "no." Joint Comm. Hr'g, July 26, 2017, at 22-23. Representative Lewis explained that, "with the approval of the Speaker and the President Pro Tem of the Senate," "Dr. Hofeller is working as a consultant to the Chairs," *i.e.*, as a consultant only to Representative Lewis and Senator Hise. *Id.* at 23.

74. In overseeing the 2016 redrawing of North Carolina's congressional districts, Representative Lewis had previously explained that Hofeller is "very fluent in being able to help legislators translate their desires" into the district lines, and that Representative Lewis' "desires" are to elect as many Republicans as possible. Representative Lewis said about the newly created congressional districts: "I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country."

75. On August 4, 2017, at another joint meeting of the House and Senate Redistricting Committees, Representative Lewis and Senator Hise advised Committee members that the *Covington* decision invalidating 28 districts on federal constitutional grounds had rendered a large number of additional districts invalid under the Whole County Provision of the North Carolina Constitution, and those districts would also have to be redrawn.

76. At this meeting, the Committees allowed 31 citizens to speak for two minutes each about the manner in which the House and Senate maps should be redrawn. All speakers urged the members to adopt fair maps free of partisan bias. The Committees ignored them.

77. At another joint meeting on August 10, 2017, the House and Senate Redistricting Committees voted on criteria to purportedly govern the new plans.

78. Representative Lewis proposed as one criterion: "election data[:] political consideration and election results data may be used in drawing up legislative districts in the 2017 House and Senate plans." Joint Comm. Hr'g, Aug. 20, 2017, at 132. Representative Lewis provided no further explanation or justification for this criterion in introducing it, stating only: "I believe this is pretty self-explanatory, and I would urge members to adopt the criteria." *Id.*

79. Democratic members repeatedly pressed Representative Lewis for details on how Hofeller would use the elections data and for what purpose. Senator Clark asked, for instance: "You're going to collect the political data. What specifically would the Committee do with it?" *Id.* at 135. Representative Lewis answered that "the Committee could look at the political data as evidence to how, perhaps, votes have been cast in the past." *Id.* When Senator Clark inquired why the Committees would consider election results if not to predict *future* voting behavior, Representative Lewis offered no substantive answer, stating only that "the consideration of political data in terms of election results is an established districting criteria, and it's one that I propose that this committee use in drawing the map." *Id.* at 141.

80. The House and Senate Committees adopted the "election data" criterion on a party-line vote. *Id.* at 141-48. No Democrat on the Committees voted for the criterion, but all 32 Republican members of the Committees did. *Id.*

81. Representative Lewis disclosed that the specific election results that Hofeller would use were the U.S. Senate election in 2010, the elections for President, Governor, and Lieutenant Governor in 2012, the U.S. Senate election in 2014, and the elections for President, U.S. Senate, Governor, Lieutenant Governor, and Attorney General in 2016. *Id.* at 137-38.

82. Senator Clark proposed an amendment that would prohibit the General Assembly from seeking to maintain or establish a partisan advantage for any party in redrawing the plans. *Id.* at 166-67. Representative Lewis opposed the amendment without explanation, stating only that he "would not advocate for [its] passage." *Id.* at 167. The Committees rejected Senator Clark's proposal on a straight party-line vote. *Id.* at 168-74.

83. As a further criterion, Representative Lewis proposed incumbency protection. Specifically, he proposed that "reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in 2017 House and Senate plans." *Id.* at 119.

84. Representative Darren Jackson objected to protecting incumbents who were elected under the unconstitutional prior maps. *Id.* at 120. Senator Van Duyn likewise stated that new districts "should represent the voters and not elected officials," and therefore she "fundamentally believe[d] that incumbency should not be a criteria." *Id.* at 123.

85. The House and Senate Committees adopted the incumbency-protection criterion on a straight-party line vote. *Id.* at 125-32. All 32 Republican members of the Committees voted in favor, and all 18 Democratic members voted against. *Id.*

86. The Committees also adopted as criteria, along straight party-line votes, that the Committees would make "reasonable efforts" to split fewer precincts than under the 2011 Plans,

and that the Committees "may consider municipal boundaries" in drawing the new districts. *Covington*, *id.* at 66, 79, 98-104, 112-19.

87. As a final criterion, Representative Lewis proposed that the Committees be prohibited from considering racial data in drawing the new House and Senate plans. *Covington*, ECF 184-9 at 148. Representative Lewis and other Republican leaders thus explicitly asserted that no districts would be drawn with the goal of complying with Section 2 of the Voting Rights Act. *See id.* at 157. Republican leaders added in a later court filing 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." *Covington*, ECF No. 184 at 10.

88. The full criteria adopted by the Committees for the 2017 Plans read as follows:

> Equal Population. The Committees shall use the 2010 federal decennial census data as the sole basis of population for drawing legislative districts in the 2017 House and Senate plans. 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).
>
> Contiguity. Legislative districts shall be comprised of contiguous territory. Contiguity by water is sufficient.
>
> County Groupings and Traversals. The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E. 2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.
>
> Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that improve the compactness of the current districts. In doing so, the Committees 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).

> Fewer Split Precincts. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that split fewer precincts than the current legislative redistricting plans.
>
> Municipal Boundaries. The Committees may consider municipal boundaries when drawing legislative districts in the 2017 House and Senate plans.
>
> Incumbency Protection. Reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in the 2017 House and Senate plans. The Committees may make reasonable efforts to ensure voters have a reasonable opportunity to elect non-paired incumbents of either party to a district in the 2017 House and Senate plans.
>
> Election Data. Political considerations and election results data may be used in the drawing of legislative districts in the 2017 House and Senate plans.
>
> 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.

Covington, ECF No. 184-37.

89. Republican leaders in the General Assembly "did not introduce any evidence regarding what additional instructions, if any, Representative Lewis or Senator Hise provided to Dr. Hofeller about the proper use and weighting of the various criteria." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 418 (M.D.N.C. 2018). "Nor did they offer any evidence as to how Dr. Hofeller weighted or ordered the criteria in drawing the proposed remedial maps, either in general or as to any particular district." *Id.*

90. As in 2011, no committee or subcommittee of the General Assembly participated in drawing the new maps. Instead, Hofeller again drew the maps in secret, under the direction of Representative Lewis and Senator Hise. Representative Lewis would admit that he "primarily . . . directed how the [House] map was produced," and that he, Hofeller, and Representative Nelson

Dollar were the only "three people" who had even "seen it prior to its public publication." N.C. House Floor Session Hr'g, Aug. 28, 2017, at 40.

91. And as in 2011, Hofeller did not use a government computer in creating the new districts. On information and belief, he used a personal computer instead.

92. Representative Lewis and Senator Hise released the proposed House and Senate plans on August 21, 2017.

93. At a Senate Redistricting Committee hearing three days later, Senate Van Duyn asked Senator Hise how the prior elections data had been used in drawing the proposed maps. Senator Hise admitted that they "did make partisan considerations when drawing particular districts." Senate Comm. Hr'g, Aug. 24, 2017, at 26.

94. Outside expert analyses confirmed that the proposed maps were gerrymandered to favor Republicans. The Campaign Legal Center calculated the "efficiency gap" of the proposed plans. The efficiency gap measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, defined as the number of votes cast for losing candidates of that party (as a measure of cracked votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election. Using the same elections data that the Committees used to develop the proposed maps, the Campaign Legal Center calculated that the proposed House plan had an efficiency gap of 11.98% in Republicans' favor, and the proposed Senate plan had an efficiency gap of 11.87% in Republicans' favor.

Covington, ECF No. 187-3 at 2. The Campaign Legal Center explained that, "[b]y historical standards, these are extraordinarily large figures, revealing an enormous Republican edge." *Id.*

95. Other statistical analyses found the same. Dr. Gregory Herschlag, a professor of mathematics at Duke University, created tens of thousands of alternative, non-partisan Senate districting configurations within Wake, Mecklenburg, Cumberland, and Guilford Counties. Dr. Herschlag created these simulated districting plans using the traditional districting criteria of equal population, compactness, avoiding splitting precincts, and contiguity. *Covington*, ECF No. 187-3 at 10 ¶ 6. Dr. Herschlag then compared the expected outcomes under these simulated districts with those under the Republican leaders' proposed districts in the same counties. Dr. Herschlag found that, using the votes cast in the 2012 and 2016 Presidential elections, the 2014 and 2016 U.S. Senate elections, the 2012 and 2014 U.S. House of Representatives elections, and the 2016 Governor election to predict partisan outcomes, the Republicans leaders' proposed districts were more favorable to Republicans than 99.9% of the non-partisan simulations. *Id.* ¶ 12. Plaintiffs in this case will show that similar results hold across the state.

96. The extreme partisan bias of the proposed plans was also apparent from the elections data that the House and Senate Redistricting Committees themselves released with the proposals. The Committees provided data on the partisan breakdown of each proposed district using the state and federal elections that the Committees considered in drawing the districts.

97. The chart below shows the number of House districts Republicans would be expected to win under the Committees' House plan when overlaying the results of each election the General Assembly considered. These expected seats approximate the number of seats Republicans actually won under the 2011 House plan (77 in 2012, 74 in 2014, and 74 in 2016).

Election	Expected Republican Seats Under Committees' House Plan
2010 U.S. Senate	82
2012 Lieutenant Governor	74
2012 Governor	72
2012 President	78
2014 U.S. Senate	76
2016 Attorney General	77
2016 Lieutenant Governor	79
2016 Governor	72
2016 U.S. Senate	79
2016 President	76

98. The following chart shows the number of Senate districts Republicans would be expected to win under the Committees' Senate plan when overlaying the results of each of the elections that the General Assembly considered. These expected Republican seats approximate the number of seats Republicans actually won under the 2011 Senate plan (which were 32, 34, and 35 seats in 2012, 2014, and 2016 respectively).

Election	Expected Republican Seats Under Committees' Senate Plan
2010 U.S. Senate	35
2012 Lieutenant Governor	31
2012 Governor	33
2012 President	33
2014 U.S. Senate	33
2016 Attorney General	31
2016 Lieutenant Governor	34
2016 Governor	32
2016 U.S. Senate	34
2016 President	33

99. Thus, for example, overlaying the results of the 2014 U.S. Senate election over the Committees' proposed districts, Republicans would win 76 of the 120 proposed House districts and 33 of the 50 proposed Senate districts. Republicans would win these massive landslides in both chambers even though the 2014 U.S. Senate election was nearly a tie statewide—the Republican candidate won by only 1.5 percentage points.

100. Of the roughly 4,300 public comments received by the General Assembly about the 2017 redistricting process, more than 99% reflected opposition to gerrymandering. For example, the author of the first written comment submitted to the Committees said: "I strongly encourage the North Carolina General Assembly to adopt new maps that are fair and open, that avoid racial or partisan gerrymandering, and that allow voters to pick their political representatives, not the other way around." Other comments made the same plea.

101. But the Committees ignored the will of the people and forged ahead. On August 24, 2017, on a straight party-line vote, the Senate Redistricting Committee adopted the Senate map crafted by Hofeller without modification. The next day, the House Redistricting Committee adopted Hofeller's proposed House plan without modification, also on a straight party-line vote.

102. On August 28, 2017, during a House floor debate on the proposed House map, an amendment modifying some districts in Wake County was approved by a largely party-line vote.

103. On August 31, 2017, the General Assembly passed the House plan (designated HB 927) and the Senate plan (designated SB 691), with a few minor modifications from the versions passed by the Committees. No Democratic Senator voted in favor of either plan. The sole Democratic member of the House who voted for the plans was Representative William Brisson, who switched to become a Republican several months later.

104. The 2017 Plans passed by the General Assembly altered at least 106 of the 170 total House and Senate districts from the 2011 Plans. *Covington*, 283 F. Supp. 3d at 418.

G. The *Covington* Court Appoints a Special Master To Redraw Several Districts in the 2017 Plans That Remained Racially Gerrymandered

105. The *Covington* plaintiffs objected to the new plans, arguing that the plans did not cure the racial gerrymanders in two House districts (21 and 57) and two Senate districts (21 and 28). *Covington*, 283 F. Supp. 3d at 429. The court agreed. *Id.* at 429-42. The court further held

that the General Assembly's changes to five House districts (36, 37, 40, 41, and 105) violated the North Carolina Constitution's prohibition on mid-decade redistricting. *Id.* at 443-45.

106. The *Covington* plaintiffs also stated that the new plans were blatant partisan gerrymanders. But given the remedial stage of the case, the plaintiffs did not "raise any partisan gerrymandering objections," and the court "[did] not address whether the 2017 Plans are unconstitutional partisan gerrymanders." *Covington*, 283 F. Supp. 3d at 429 n.2.

107. The court appointed Dr. Nathaniel Persily as a Special Master to assist in redrawing the districts for which the court had sustained the plaintiffs' objections. To cure the racially gerrymandered districts, the Special Master needed to adjust not only those districts, but also certain districts adjoining them. In his recommended remedial plans submitted to the court on December 1, 2017, the Special Master made material adjustments to House Districts 22, 59, 61, and 62 in redrawing House Districts 21 and 57, and made material adjustments to Senate Districts 19, 24, and 27 in redrawing Senate Districts 21 and 28. *Covington*, ECF No. 220 at 30-55. The court adopted the Special Master's recommended changes to all of these districts.

108. The Special Master also restored the districts that the court had found were redrawn in violation of the ban on mid-decade redistricting to the 2011 versions of those districts. *Covington*, ECF No. 220 at 56-66. The court adopted these changes as well.

109. On June 28, 2018, the U.S. Supreme Court affirmed the lower court's adoption of the Special Master's remedial plans for House Districts 21 and 57 (and the relevant adjoining districts) and Senate Districts 21 and 28 (and the relevant adjoining districts). *North Carolina v. Covington*, 138 S. Ct. 2548, 2553-54 (2018). But the U.S. Supreme Court reversed the district court's adoption of the Special Master's plans for the districts allegedly enacted in violation of the mid-decade redistricting prohibition, finding that the district court had exceeded its remedial

authority in rejecting newly enacted districts on this basis. *Id.* at 2554-55. Plaintiffs do not challenge in this case any district materially redrawn by the Special Master that remains in effect.

110. On February 17, 2018, the North Carolina State Conference of NAACP Branches and other plaintiffs filed a new action in Wake County Superior Court challenging four of the House Districts (36, 37, 40, and 41) allegedly redrawn in violation of the North Carolina Constitution's prohibition on mid-decade redistricting. *N.C. State. Conf. of NAACP Branches v. Lewis*, 18 CVS 2322 (N.C. Super.). On November 2, 2018, the Superior Court granted summary judgment to the plaintiffs and ordered the General Assembly to "remedy the identified defects and enact a new Wake County House District map for use in the 2020 general election."

H. The 2017 Plans Pack and Crack Plaintiffs and Other Democratic Voters To Dilute Their Votes and Maximize the Political Advantage of Republicans

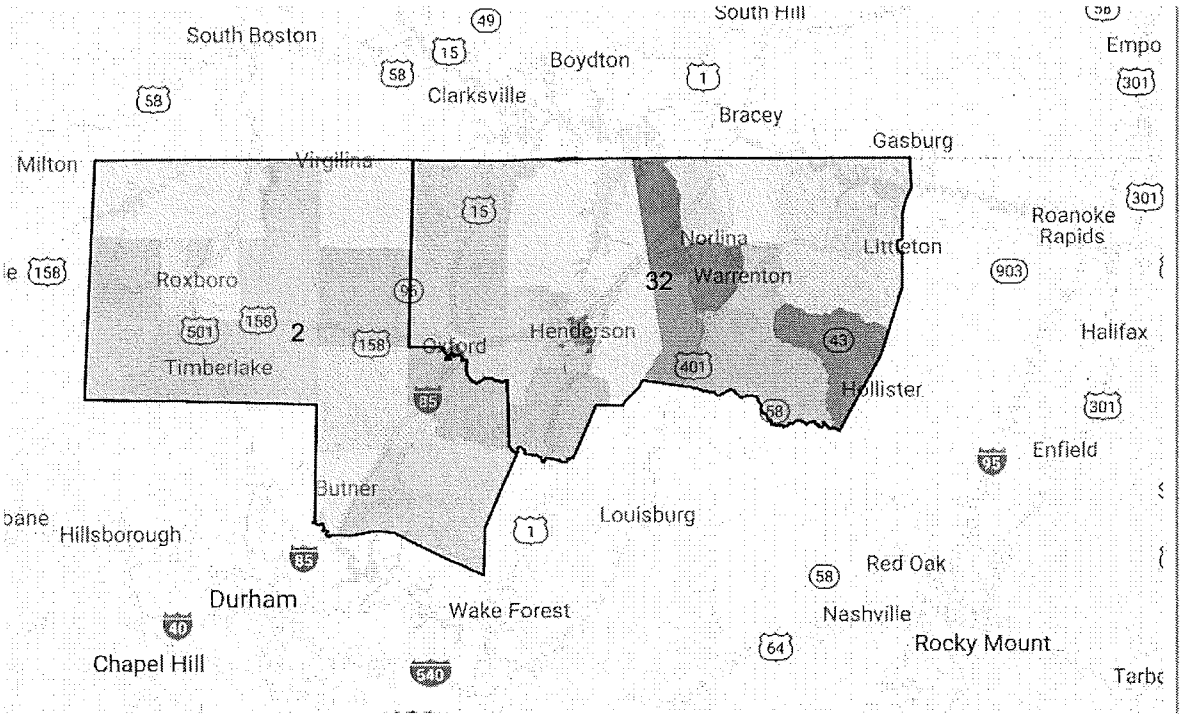
111. To maximize the number of Republican seats in the General Assembly, the 2017 Plans meticulously "pack" and "crack" Democratic voters. Packing and cracking are the two primary means by which mapmakers carry out a partisan gerrymander. "Packing" involves concentrating one party's backers in a few districts that they will win by overwhelming margins to minimize the party's votes elsewhere. "Cracking" involves dividing a party's supporters among multiple districts so that they fall comfortably short of a majority in each district.

112. The sections below set forth some of the examples of packing and cracking of Democratic voters in each of the 2017 Plans.

1. The 2017 House Plan Packs and Cracks Democratic Voters

House Districts 2 and 32

113. House Districts 2 and 32 are within a county cluster of Person, Granville, Vance, and Warren Counties.

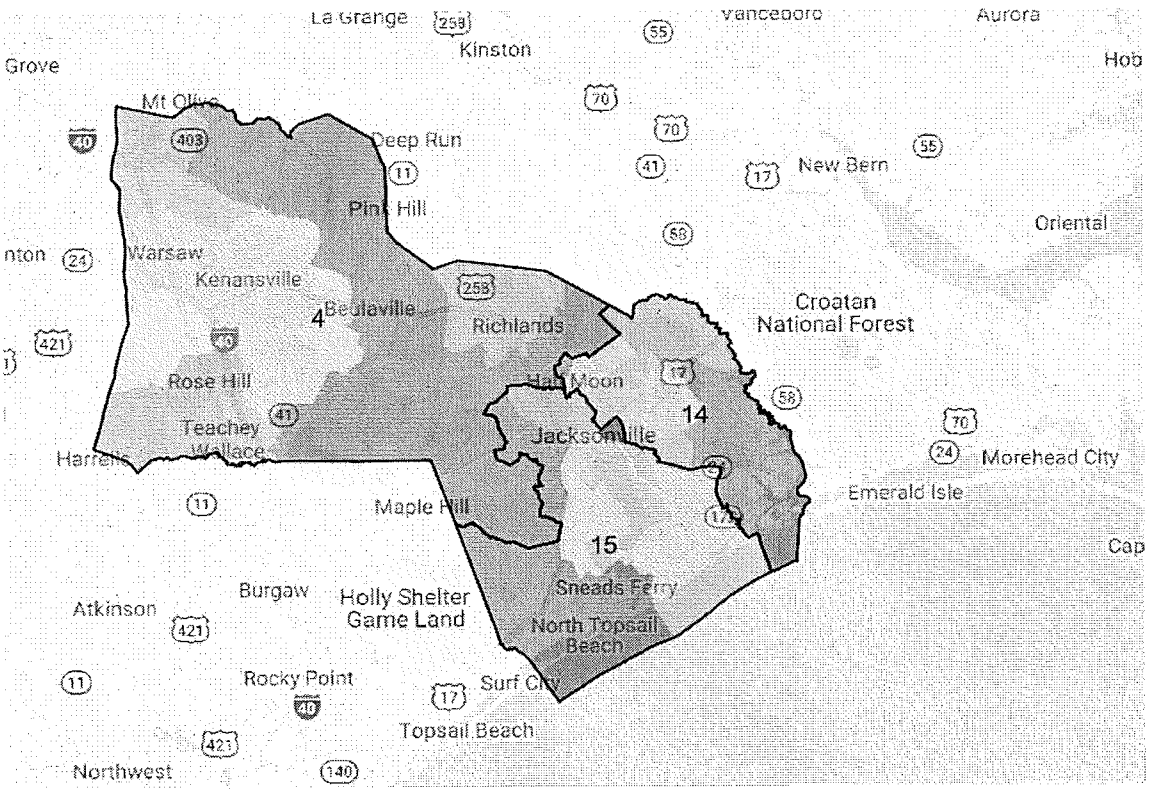


114. As shown in the image above,[1] in drawing the two districts within this cluster, the General Assembly packed the Democratic voters in and around Oxford with the Democratic voters in Henderson and in municipalities east of Henderson such as Warrenton and Norlina. This packing made House District 32 an overwhelmingly Democratic district in order to ensure that House District 2 would be a Republican-leaning district.

House Districts 4, 14, and 15

115. House Districts 4, 14, and 15 are within a county cluster containing Duplin and Onslow Counties.

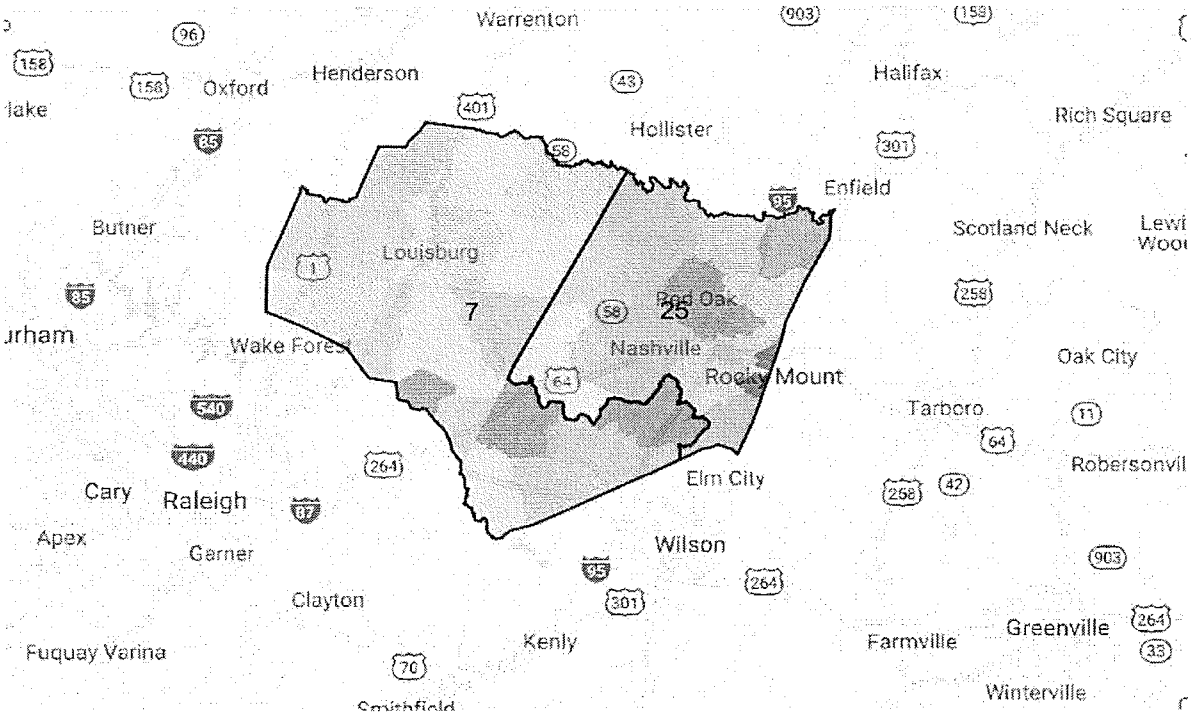
[1] All precinct-level partisanship data in the images that follow are based on the precinct-level election results from the 2014 U.S. Senate election in North Carolina.



116. The General Assembly split Jacksonville across House District 14 and 15, cracking its Democratic voters across the two districts and placing its most Democratic precincts in House District 15 with otherwise heavily Republican areas. The General Assembly also made sure to keep Jacksonville's Democratic voters in separate districts from the Democratic-leaning cities of Warsaw and Kenansville. This cracking allowed all three districts to lean Republican.

House Districts 7 and 25

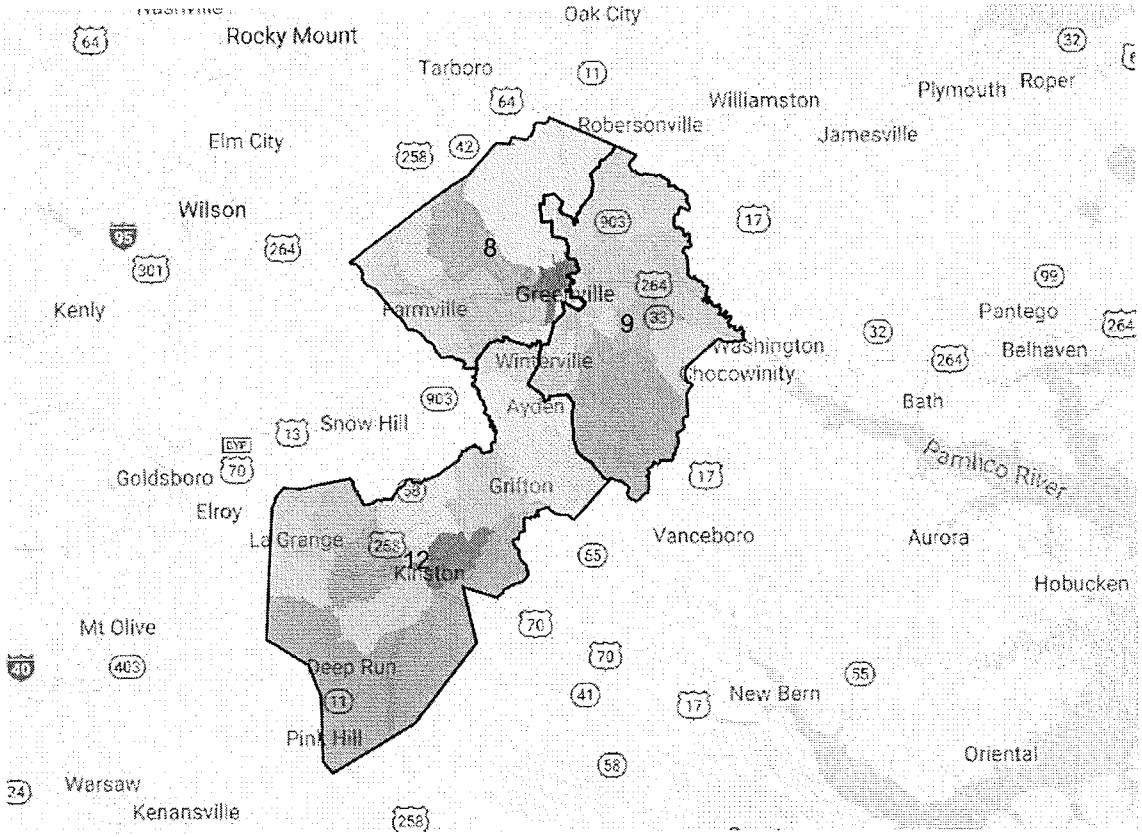
117. House Districts 7 and 25 are within a county cluster of Franklin and Nash Counties.



118. The General Assembly constructed this cluster to make sure that one of the two districts, House District 7, would favor Republicans, rather than risk that both districts could elect Democrats. To accomplish this, the General Assembly caused House District 7 to wrap around the southwestern edge of House District 25, allowing House District 7 to pick up deep red communities in southern Nash County.

House Districts 8, 9 and 12

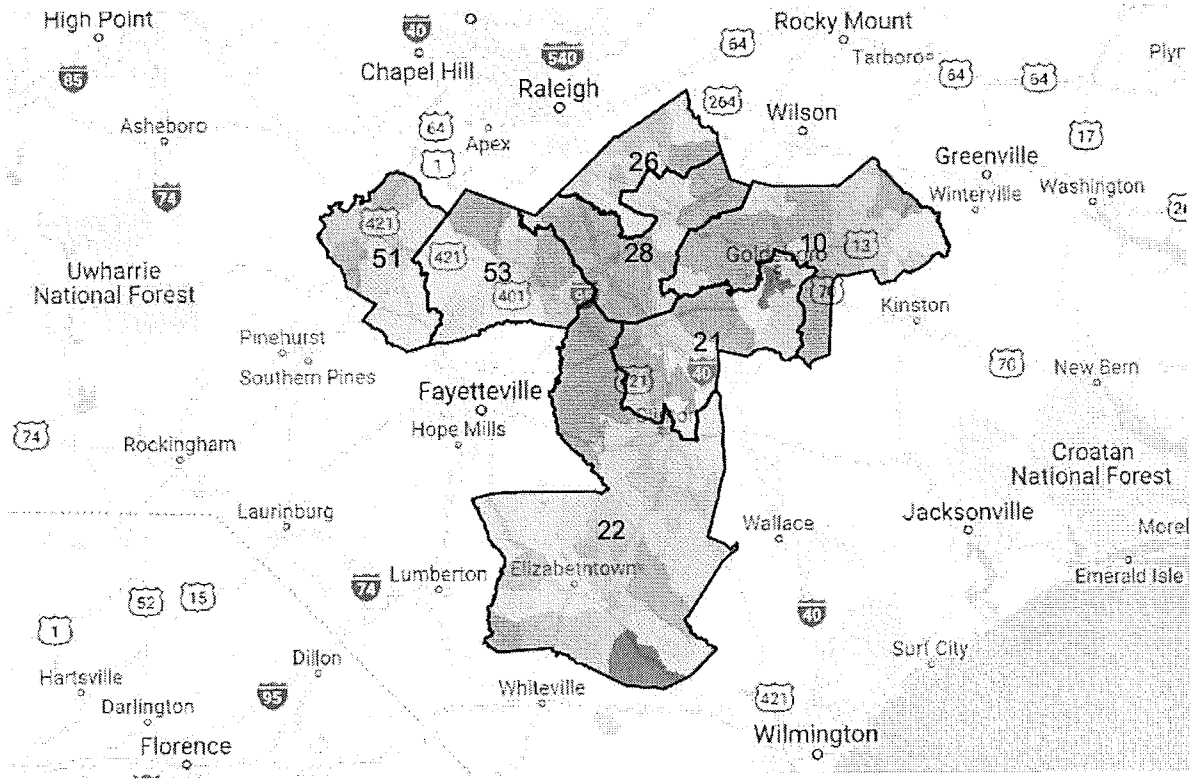
119. House Districts 8, 9, and 12 are within a county cluster consisting of Pitt and Lenoir Counties.



120. The General Assembly split Greenville nearly in half across separate districts in this cluster, even though Greenville is the county seat of Pitt County and has a population that is just slightly more than the target population for a single district. But the General Assembly carefully placed Greenville's most Democratic areas in House District 8, packing these Democratic voters with others in the surrounding areas to create an overwhelmingly Democratic district. The General Assembly placed the more moderate and Republican-leaning areas of Greenville in House District 9 with other Republican areas, ensuring that this district would elect a Republican. The General Assembly similarly constructed House District 12 to favor Republicans by avoiding the Democratic precincts in and around Greenville.

House Districts 10, 26, 28, 51, and 53

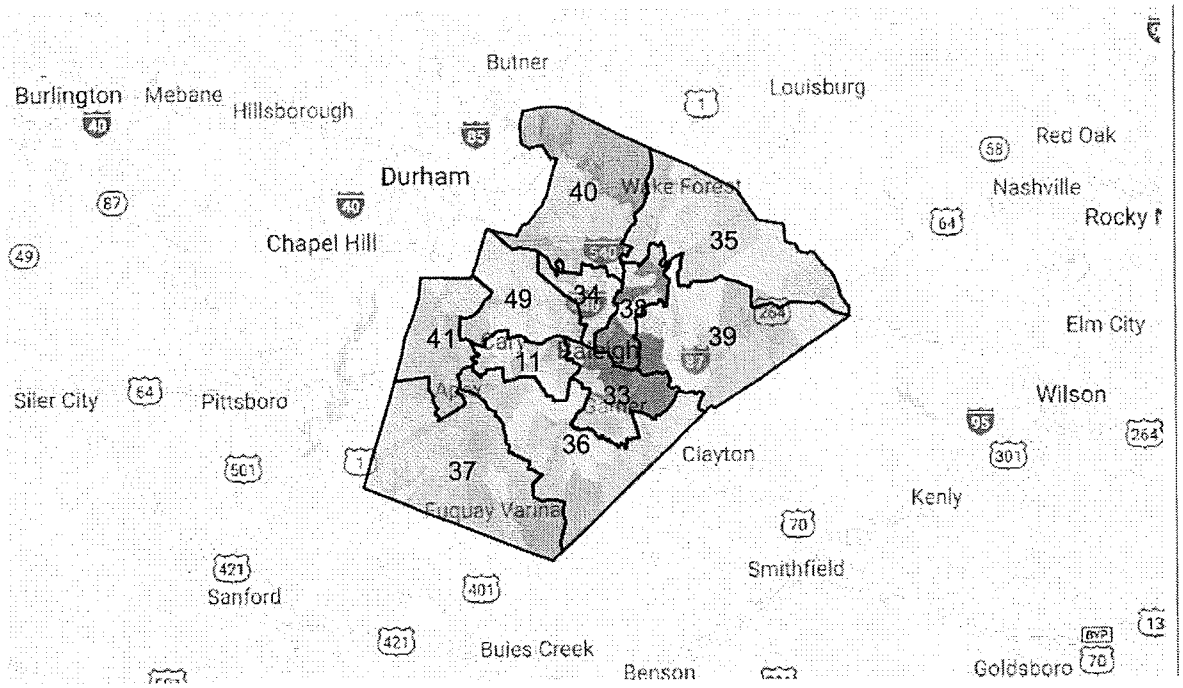
121. House Districts 10, 26, 28, 51, and 53 are part of a seven-county cluster spanning Greene, Wayne, Sampson, Bladen, Johnston, Harnett, and Lee Counties. This cluster also includes House Districts 21 and 22, which were redrawn by the special master in *Covington* and are not challenged in this case.



122. The General Assembly cracked the Democratic pockets of Johnston, Harnett, and Lee Counties into four separate districts (House Districts 26, 28, 53, and 51), so that none of these four districts would lean toward Democrats.

House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49

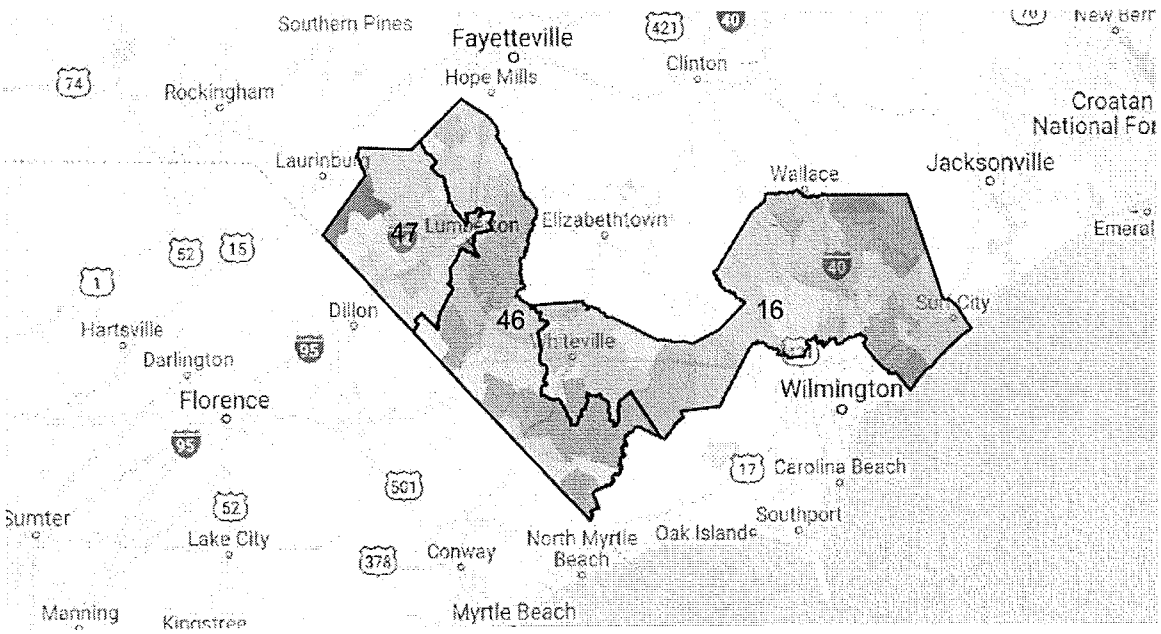
123. House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41,and 49 are all located within Wake County.



124. The General Assembly packed Democrats into House Districts 11, 33, 34, 38, 39, and 49 in order to maximize the number of districts within Wake County that would be competitive for Republicans. Based on the 2014 U.S. Senate results, for example, House Districts 35, 36, 37, and 40 all favor Republicans. Under a non-partisan map, these districts would be more Democratic-leaning.

House Districts 16, 46, and 47

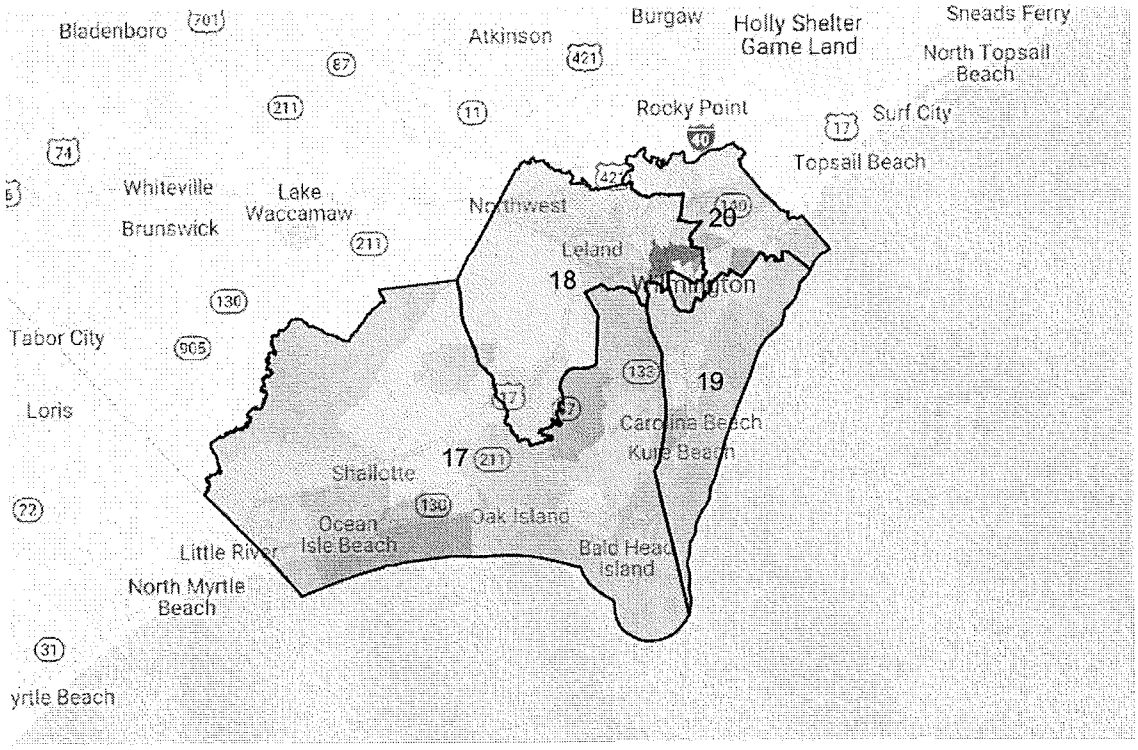
125. House Districts 16, 46, and 47 are within a county cluster of Pender, Columbus, and Robeson Counties.



126. The General Assembly split Lumberton across two separate districts in this cluster. It placed the Democratic areas of Lumberton in House District 47 with other heavily Democratic areas, while placing the more Republican parts of Lumberton into House District 46. The General Assembly then cracked the Democratic voters of Whiteville (in House District 16) from those in and around Chadbourn (just to the west of Whiteville in House District 46). Through these choices, the General Assembly created two districts that moderately favor Republicans using the statewide election results that the General Assembly considered (House District 16 and 46) and one overwhelmingly Democratic district (House District 47).

House Districts 17, 18, 19, and 20

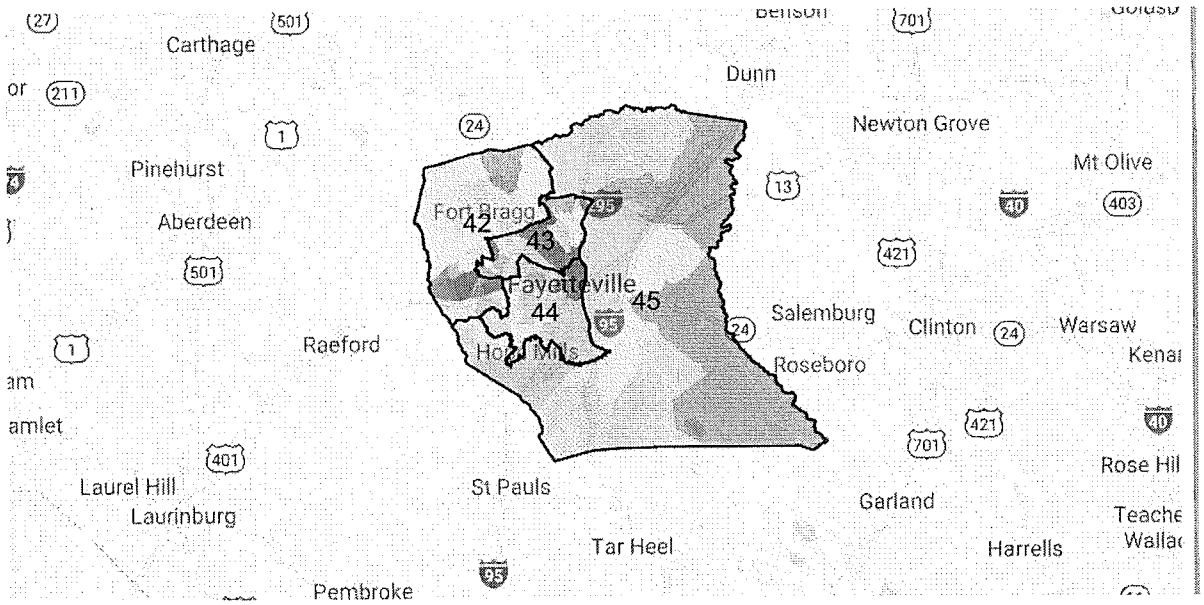
127. House Districts 17, 18, 19, and 20 are within a county cluster of New Hanover and Brunswick Counties.



128. The General Assembly manipulated this county cluster to create one packed Democratic district (House District 18) and three Republican-leaning districts (House Districts 17, 19, 20). The General Assembly split Wilmington across three different districts to accomplish this feat. It placed Wilmington's most Democratic areas in House District 18, where these Democratic voters were joined with the Democratic voters in and around Leland, while Wilmington's more Republican-leaning and swing precincts were placed in House Districts 19 and 20. In 2018, Republican candidates won House Districts 17, 19, and 20 with 64%, 51%, and 53% of the two-party vote respectively.

House Districts 42, 43, 44, and 45

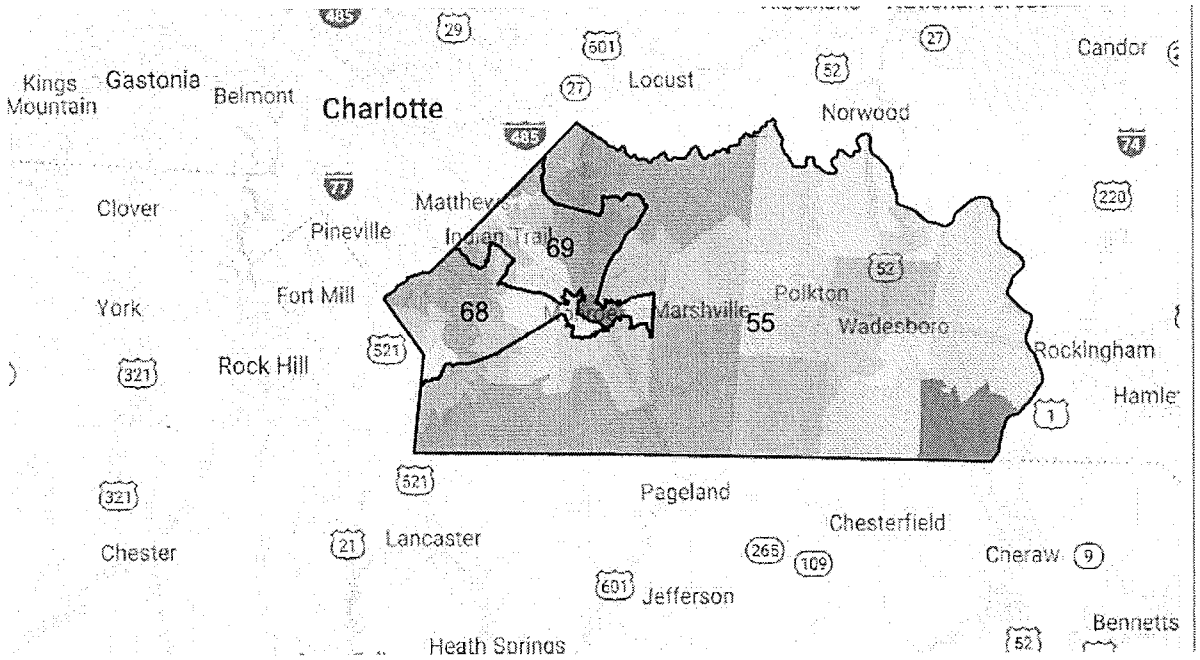
129. House Districts 42, 43, 44, and 45 are all within Cumberland County.



130. The General Assembly placed almost all of the most Democratic areas of Cumberland County into three of the four districts in this cluster, House District 42, 43, and 44. The General Assembly packed these Democratic voters to create a Republican-leaning district in Cumberland County, House District 45. Under a non-partisan map, this district would be more Democratic-leaning.

House Districts 55, 68, and 69

131. House Districts 55, 68, and 69 are within a county cluster of Anson and Union Counties.

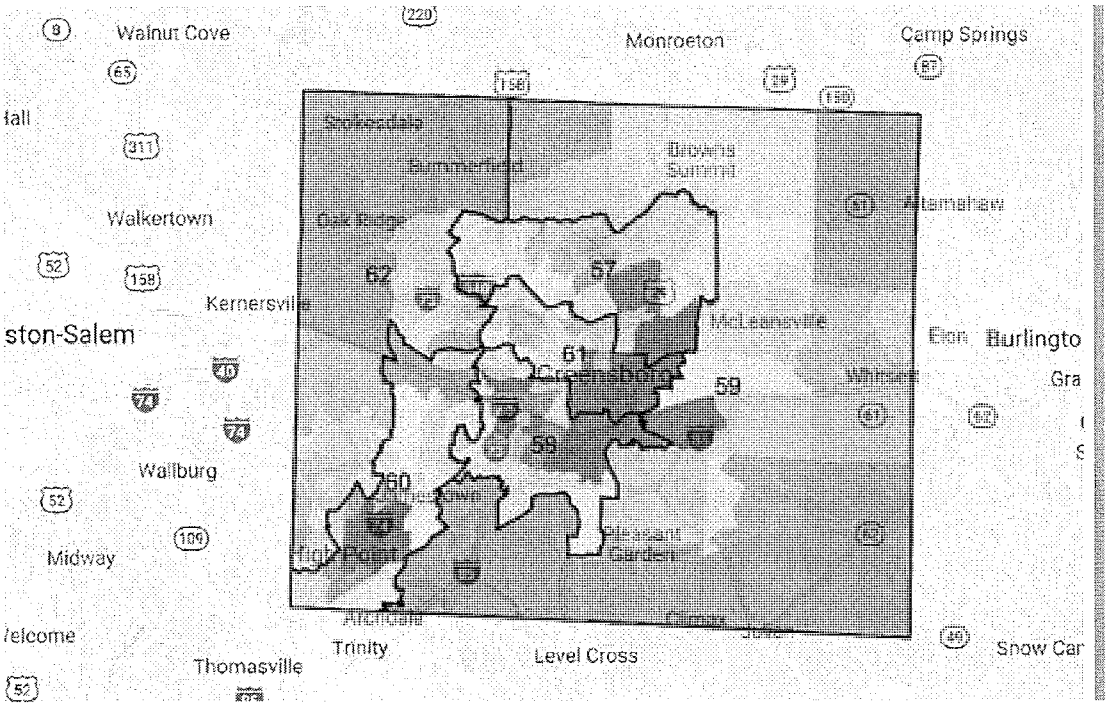


132. The General Assembly cracked the Democratic voters throughout this cluster to ensure that all three districts would favor Republicans. As part of this cracking, the General Assembly split Monroe across the three districts, and split Monroe's most Democratic areas between House Districts 68 and 69.

House Districts 58, 59, and 60

133. House Districts 58, 59 and 60 are three of the six House districts within Guilford County. The other three districts—House Districts 57, 61, and 62—were redrawn by the special master in the federal Covington lawsuit and are not challenged in this case.[2]

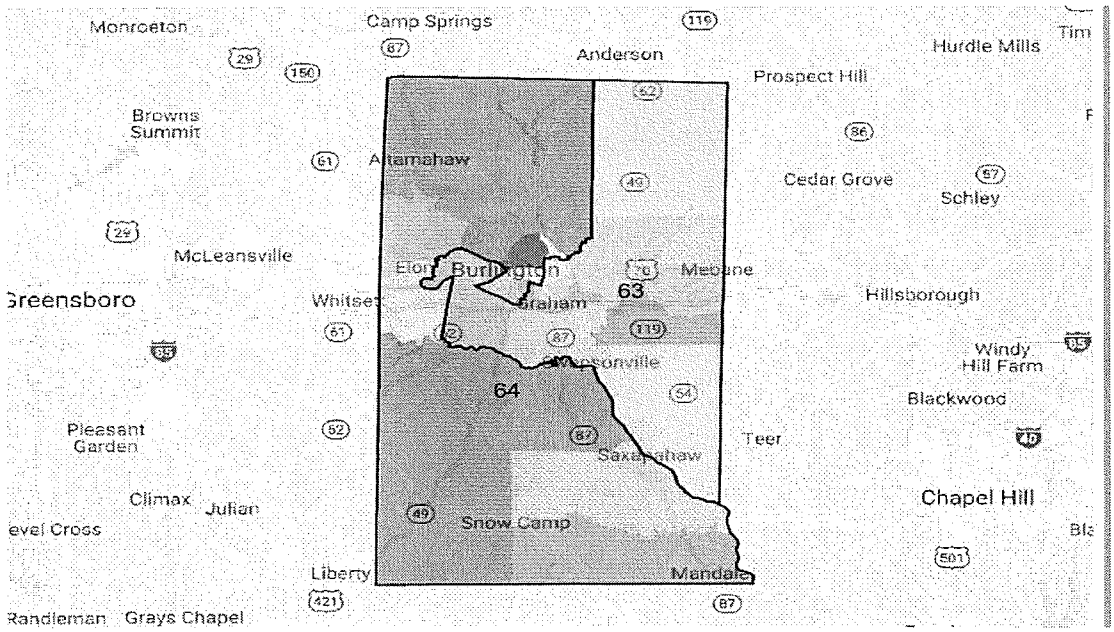
[2] The special master made minor changes to House District 59, but Plaintiffs challenge this district in this case.



134. The General Assembly packed House Districts 58 and 60 with heavily Democratic areas, enabling House District 59 to favor Republicans.

House Districts 63 and 64

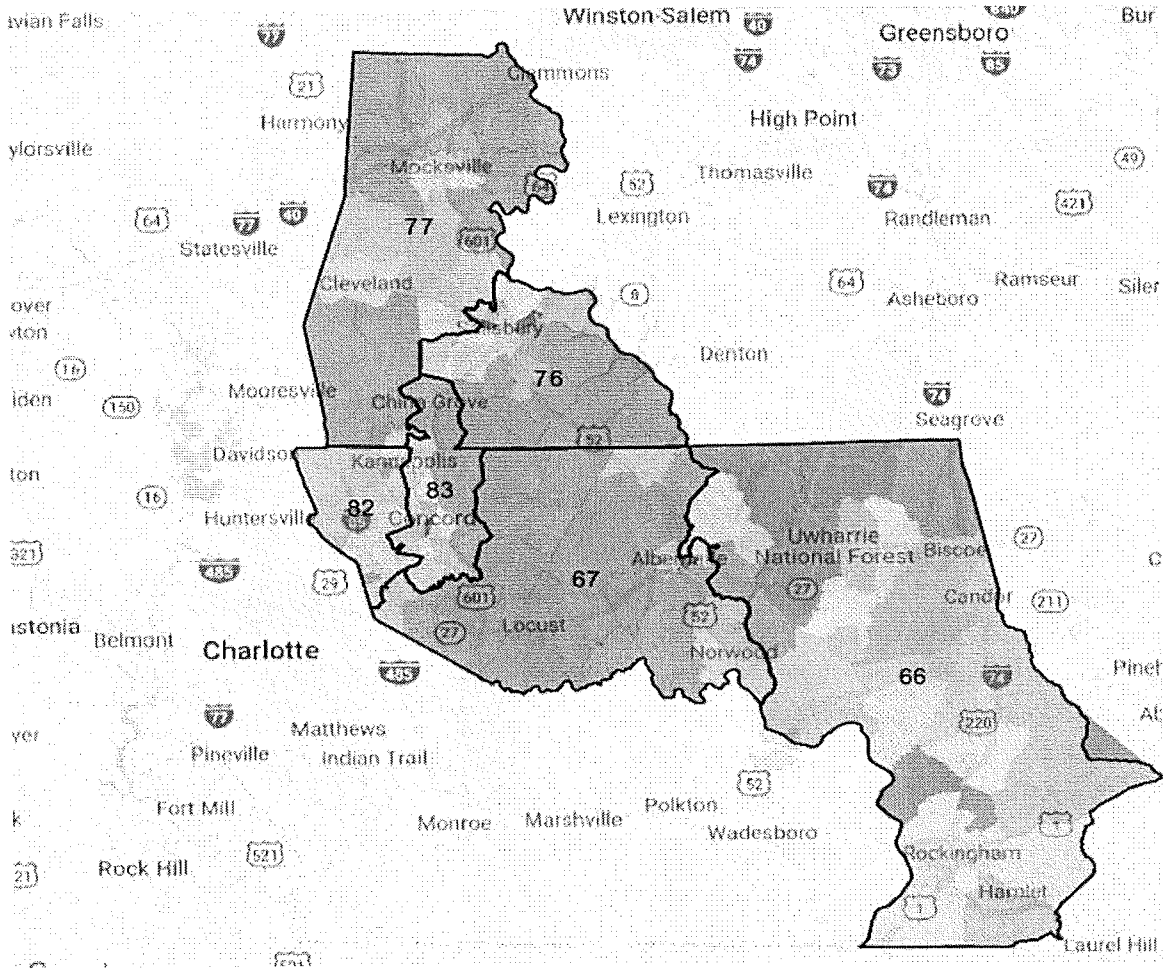
135. House Districts 63 and 64 are both located within Alamance County.



136. The General Assembly caused both House Districts 63 and 64 to favor Republicans by cracking Burlington and its Democratic voters in half across the two districts.

House Districts 66, 67, 76, 77, 82, and 83

137. House Districts 66, 67, 76, 77, 82, and 83 are part of a county cluster that covers Richmond, Montgomery, Stanly, Cabarrus, Rowan, and Davie Counties.

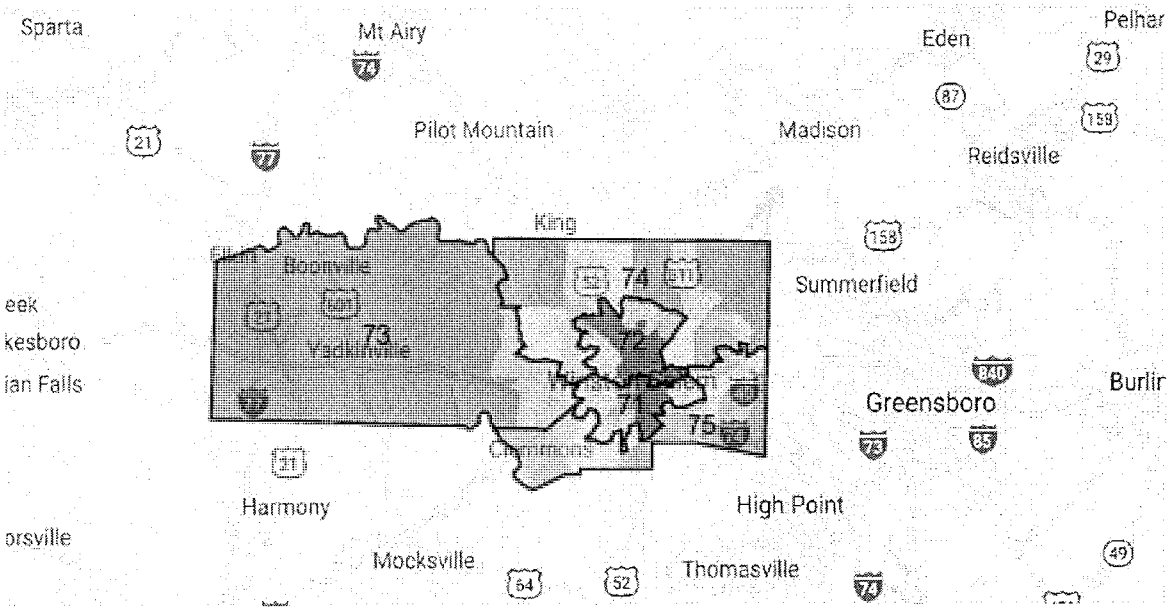


138. The General Assembly meticulously distributed the Democratic voters in these counties across all five districts in the cluster, such that Republicans have majorities in all five districts based on the statewide elections the General Assembly considered. For instance, the General Assembly put Albemarle into House District 67, wasting the votes of Albemarle's

Democratic voters in House District 67 to make House District 66 more competitive for Republicans. The General Assembly wasted Salisbury's Democratic votes in House District 76 by grouping the city with deep red areas. The General Assembly also cracked Concord in half between House Districts 82 and 83, and it splintered Kannapolis and its Democratic voters into three different districts (House Districts 77, 82, and 83).

House Districts 71, 72, 73, 74, and 75

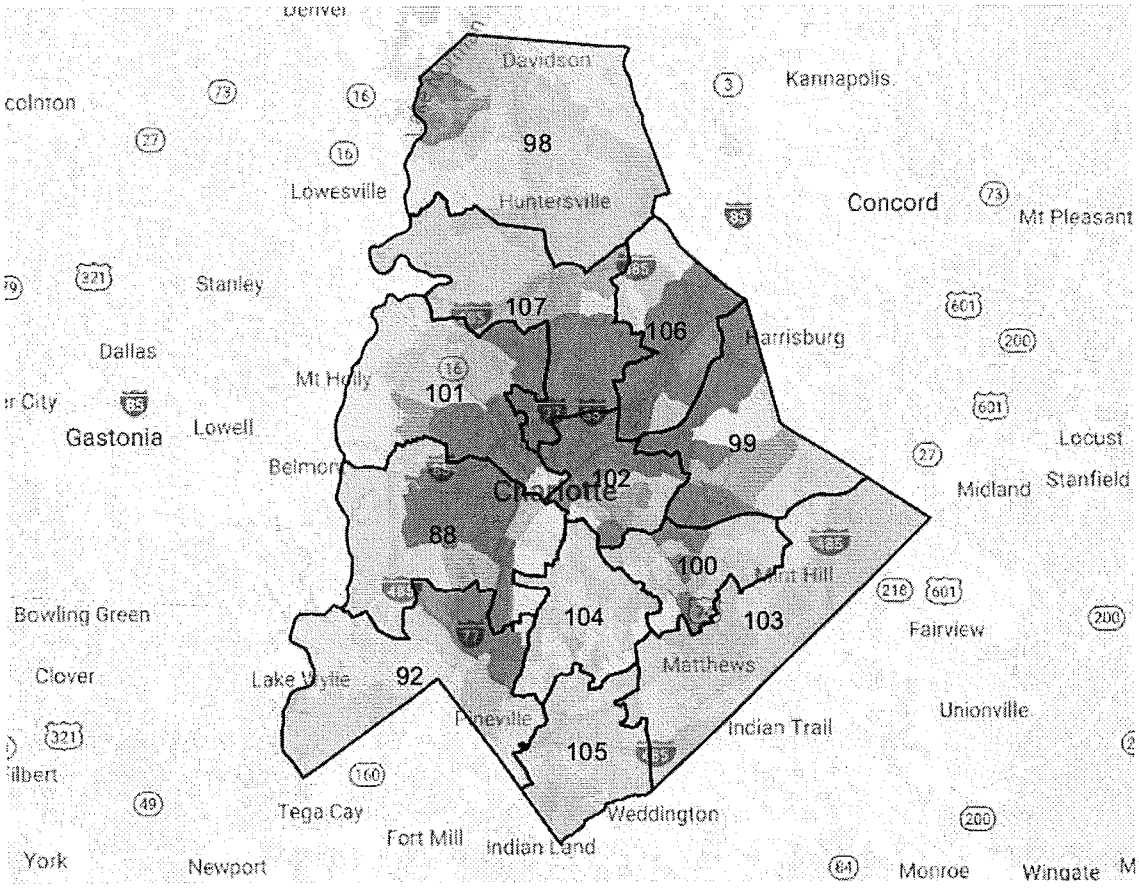
139. House Districts 71, 72, 73, 74, and 75 are within a county cluster of Forsyth and Yadkin Counties.



140. The General Assembly packed Democrats into House Districts 71 and 72 so that the other three districts—House Districts 73, 74, and 75—would all favor Republicans. The General Assembly split the City of Winston-Salem across all five districts in the cluster as part of this scheme, even though Winston-Salem's population could fit within just three districts.

House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107

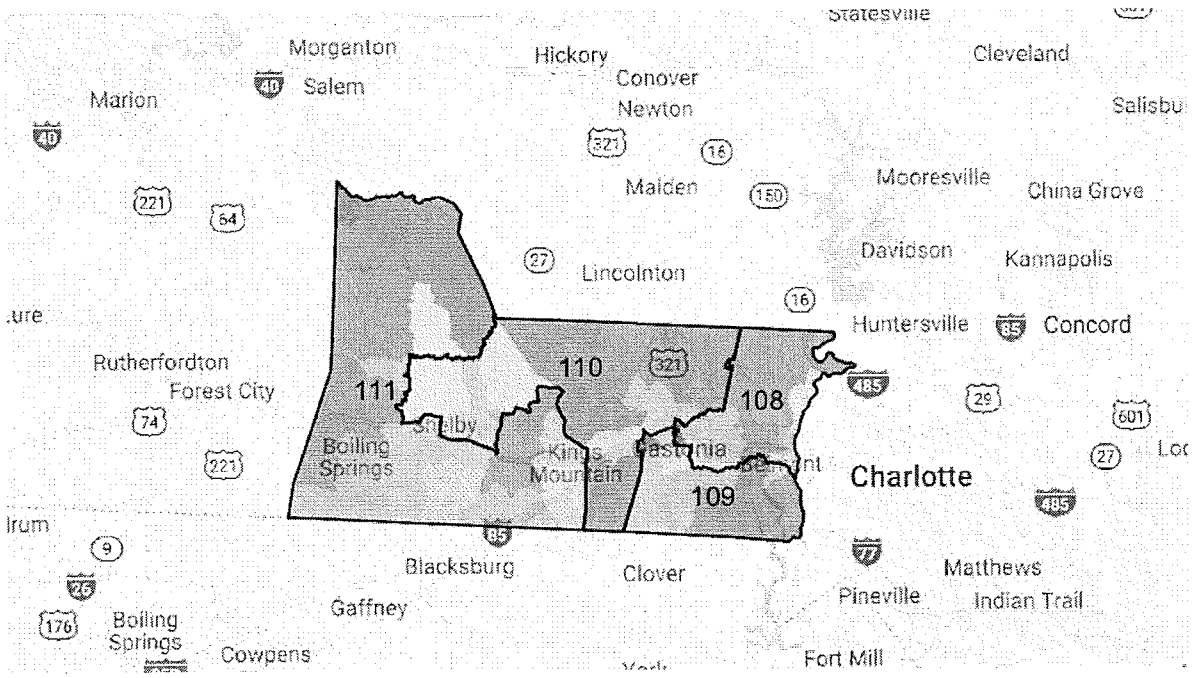
141. House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 are all within Mecklenburg County.



142. Mecklenburg County is the pinnacle of packing. The General Assembly packed as many Democratic voters as possible into seven Mecklenburg County districts (House Districts 88, 92, 99, 100, 101, 106, and 107), in order to create four districts in the county that are competitive for Republicans (House Districts 98, 103, 104, and 105). Under a non-partisan map, these districts would all be more Democratic-leaning.

House Districts 108, 109, 110, and 111

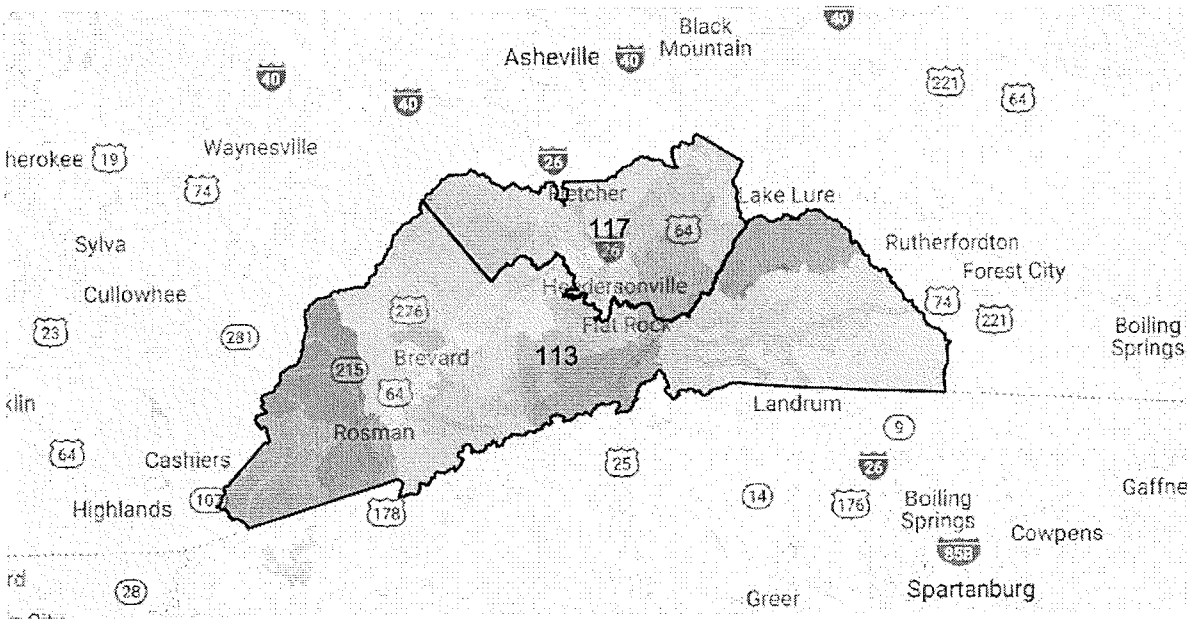
143. House Districts 108, 109, 110, and 111 make up a county cluster of Gaston and Cleveland Counties.



144. The General Assembly split the Democratic stronghold of Gastonia across three different districts (House Districts 108, 109, and 110), and cut the Democratic city of Shelby in half (in House Districts 110 and 111). The General Assembly similarly distributed the Democratic voters north of Shelby across House District 110 and 111. The result of all of this cracking is that all four districts in the cluster have comfortable Republican majorities: the Republican vote share in all four districts is around 60% using the 2014 U.S. Senate results.

House Districts 113 and 117

145. House Districts 113 and 117 are within a county cluster of Transylvania, Henderson, and Polk Counties.

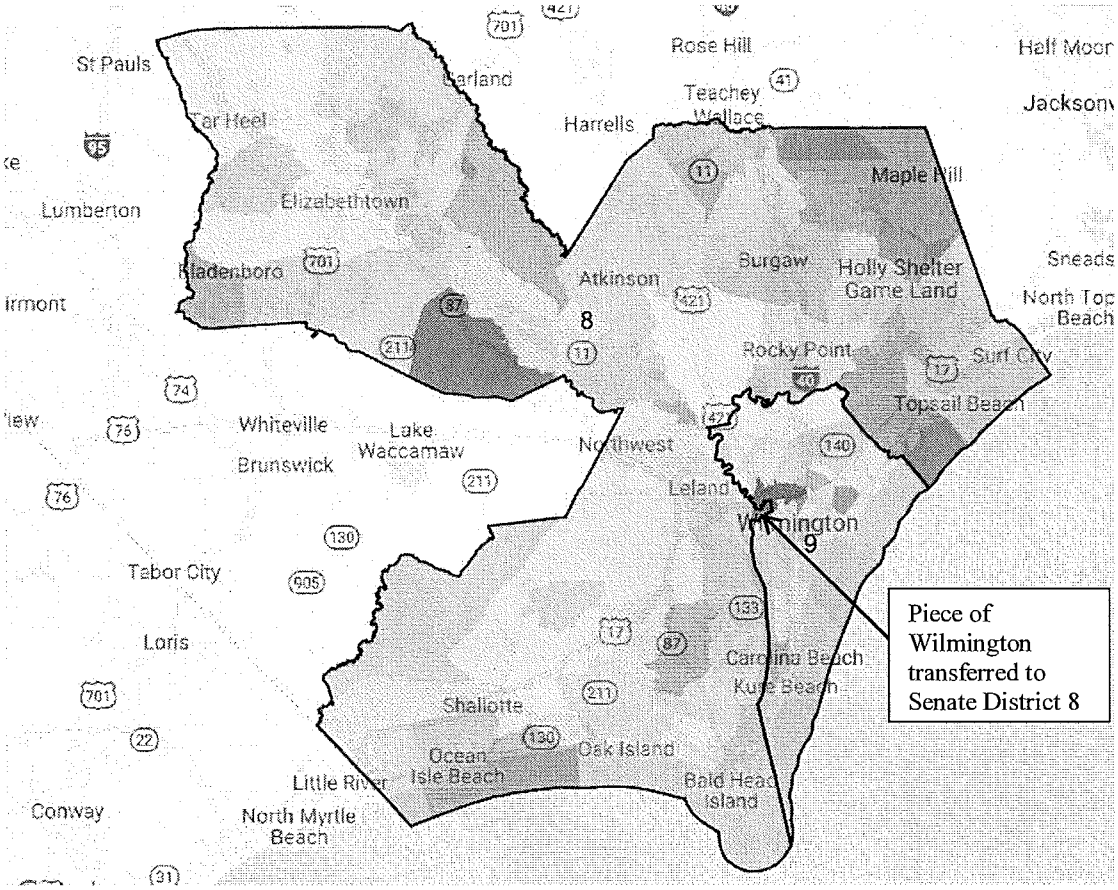


146. The General Assembly cracked the Democratic voters in and around Hendersonville from the Democratic voters in and around Brevard, ensuring that both districts in this cluster would elect Republicans.

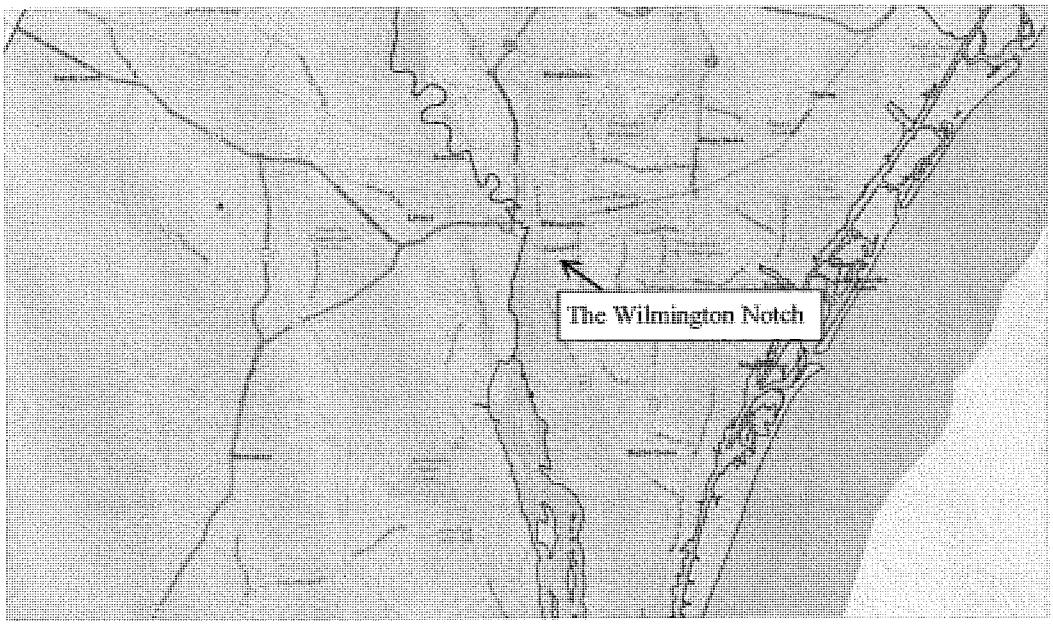
2. The 2017 Senate Plan Packs and Cracks Democratic Voters

Senate Districts 8 and 9

147. Senate Districts 8 and 9 are within a county cluster of Bladen, Pender, Brunswick, and New Hanover Counties.

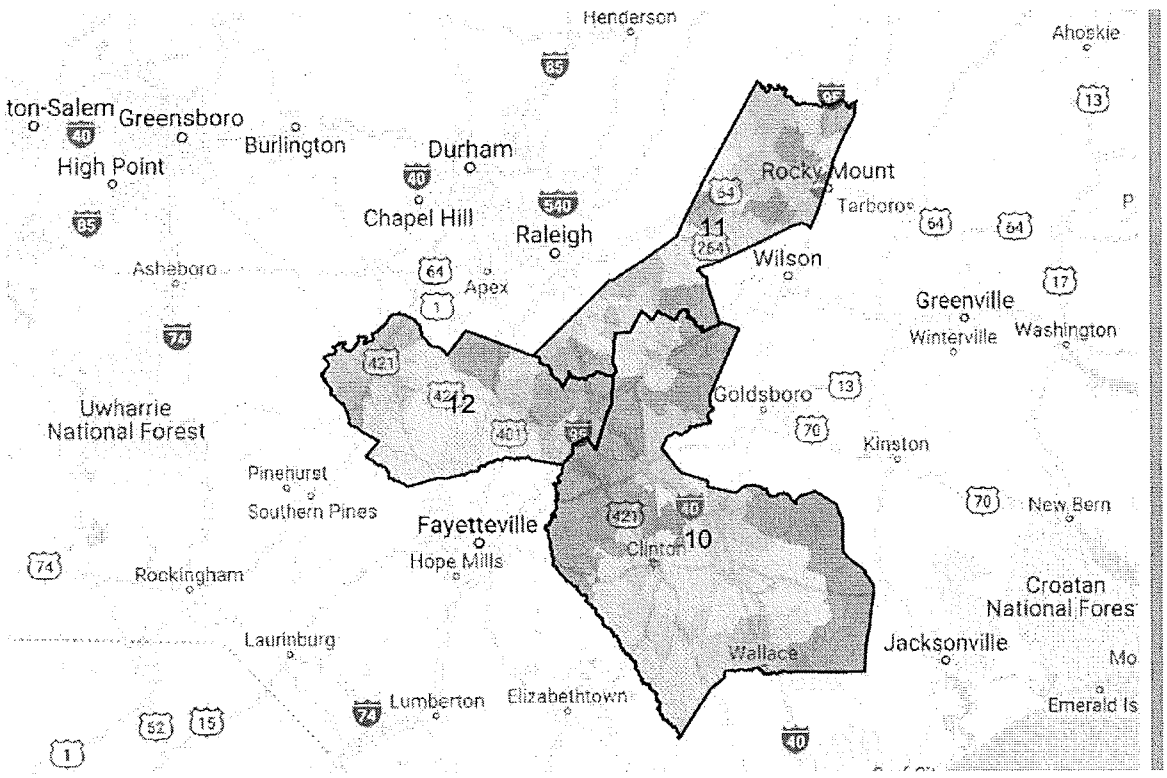


148. Although almost all of New Hanover County falls in Senate District 9, the General Assembly appended a small, heavily Democratic piece of New Hanover County to Senate District 8. Specifically, the General Assembly split off a small portion of Wilmington—the "Wilmington Notch"—transferring thousands of voters in Wilmington's most heavily Democratic area from Senate District 9 to 8. The loss of these Democratic voters causes Senate District 9 to lean Republican rather than Democratic using the 2014 U.S. Senate election results.



Senate Districts 10, 11, and 12

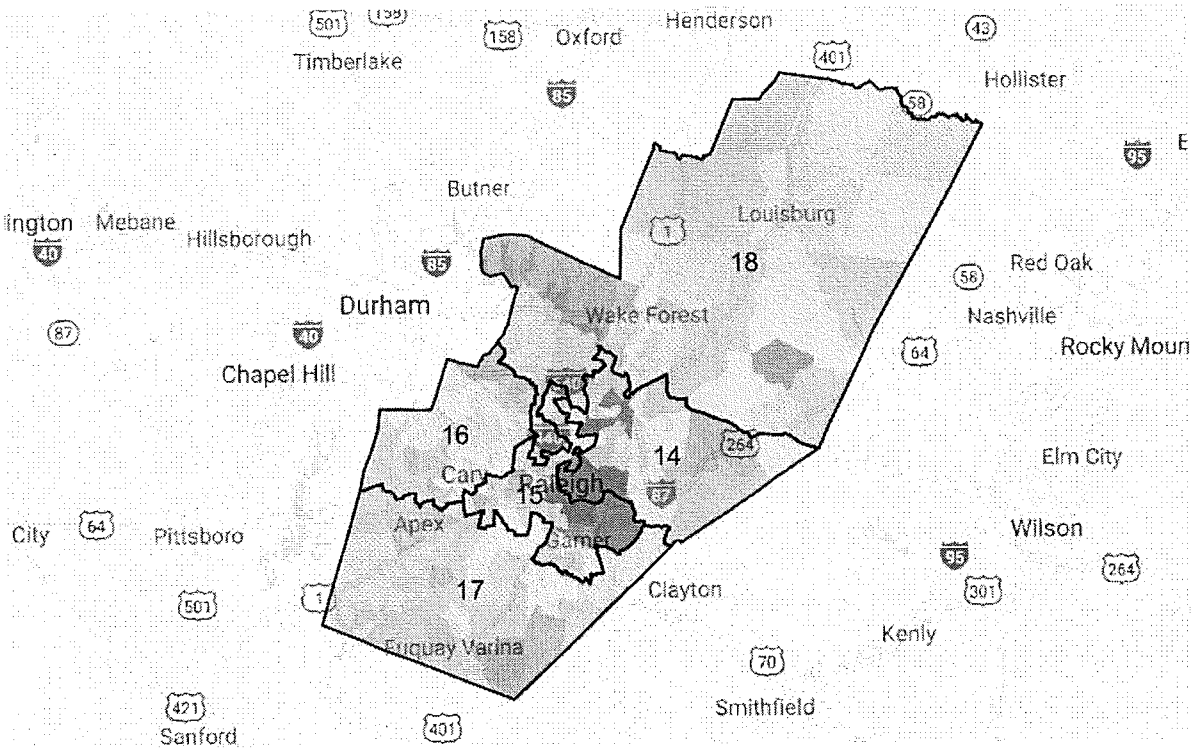
149. Senate Districts 10, 11, and 12 span a six-county cluster of Sampson, Duplin, Johnston, Nash, Lee, and Harnett Counties.



150. The General Assembly cracked the Democratic areas of the six counties in this cluster across the three districts that the cluster contains. For instance, the General Assembly dispersed the Democratic voters in and around Rocky Mount, Clinton, and Sanford across Senate Districts 10, 11, and 12, respectively. As a result, all three districts favor Republicans.

Senate Districts 14, 15, 16, 17, and 18

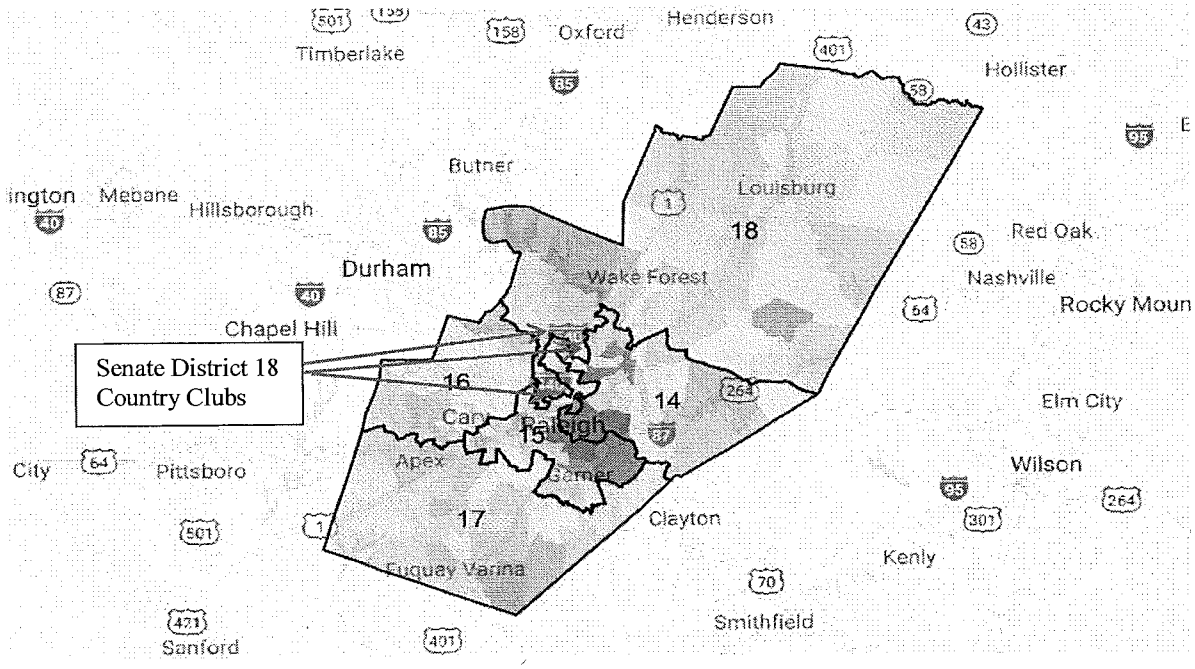
151. Senate Districts 14, 15, 16, 17, and 18 are within a county cluster of Wake and Franklin Counties.

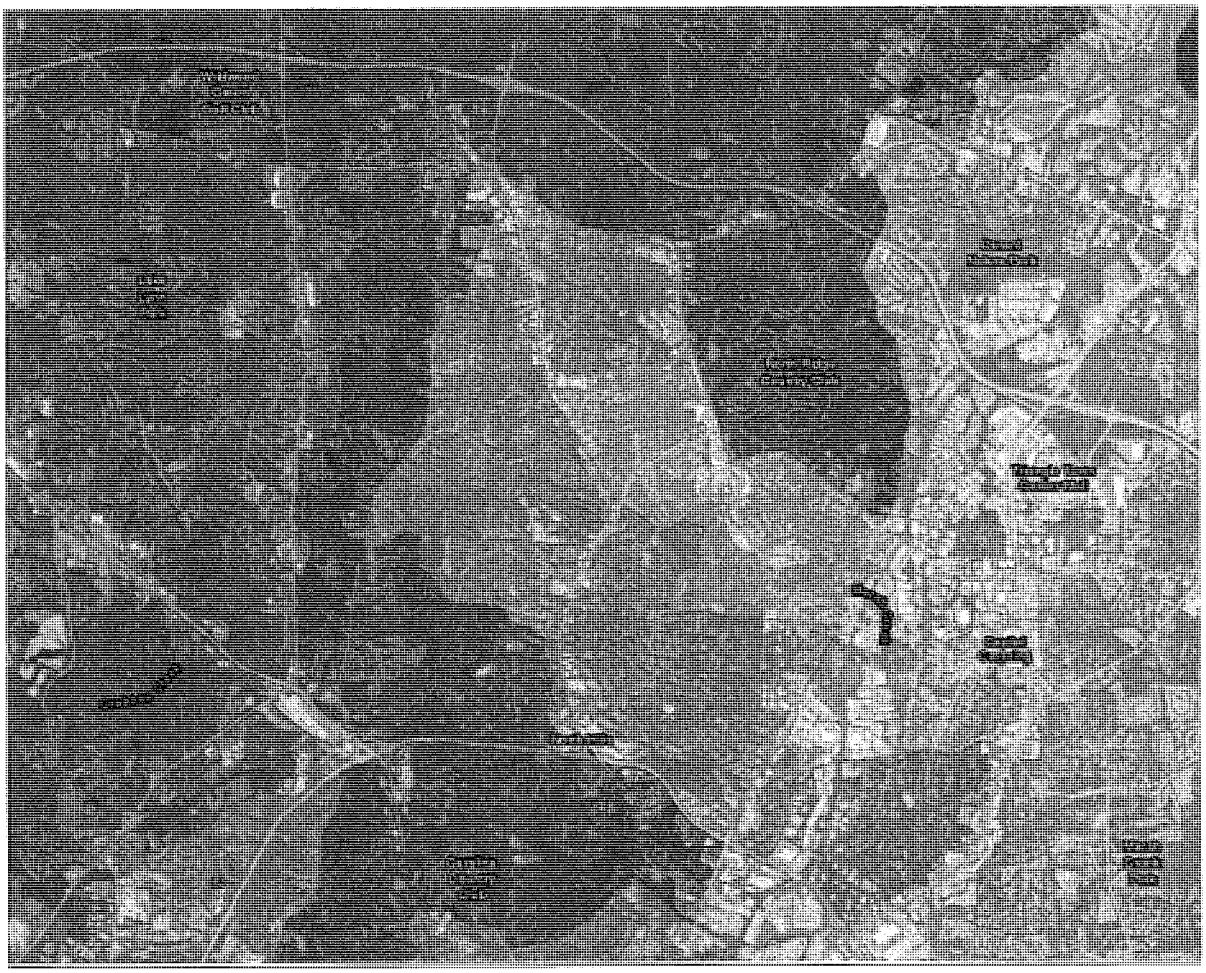


152. The General Assembly packed as many Wake County Democrats as possible into three districts within this cluster (Senate District 14, 15, and 16). This packing was done to make Senate Districts 17 and 18 as Republican-leaning as possible.

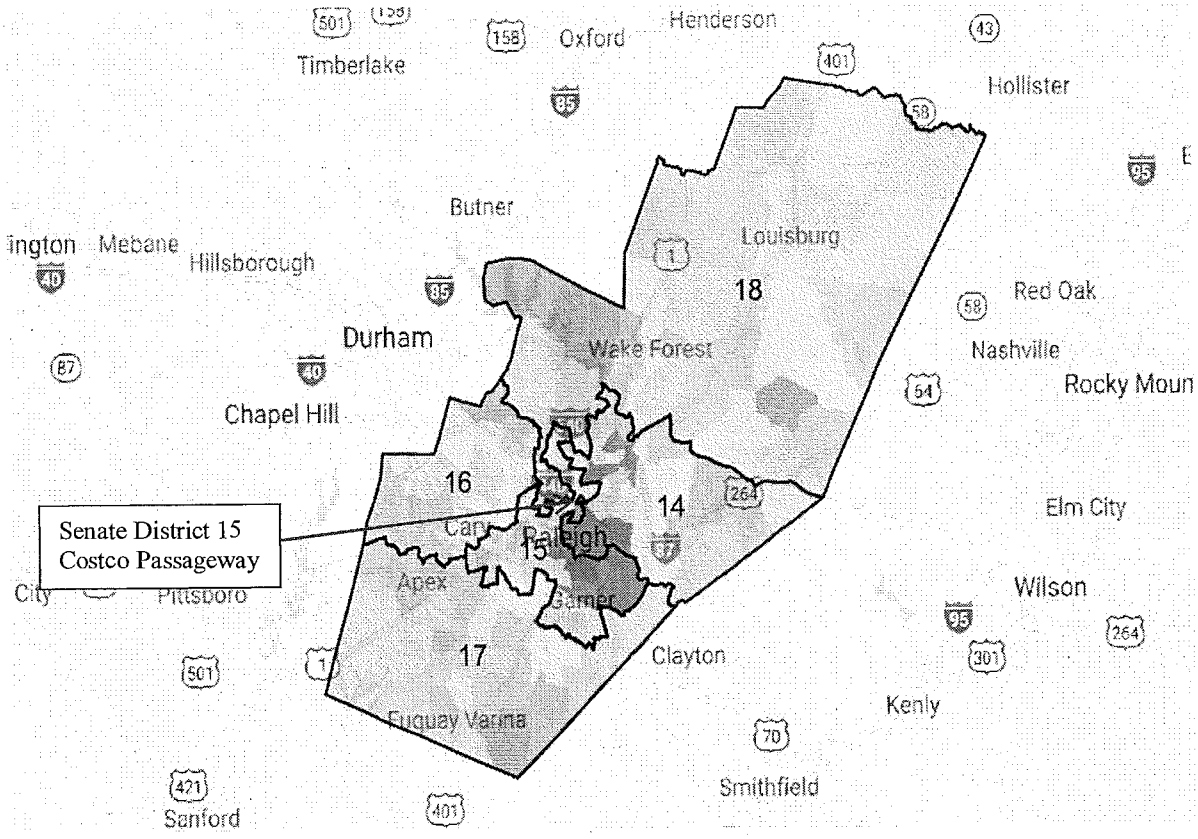
153. To carry out this scheme, the General Assembly split Raleigh across four districts (Senate District 14, 15, 16, and 18), even though Raleigh's population could fit almost entirely within two Senate districts. The General Assembly dissected Raleigh to put its only Republican-

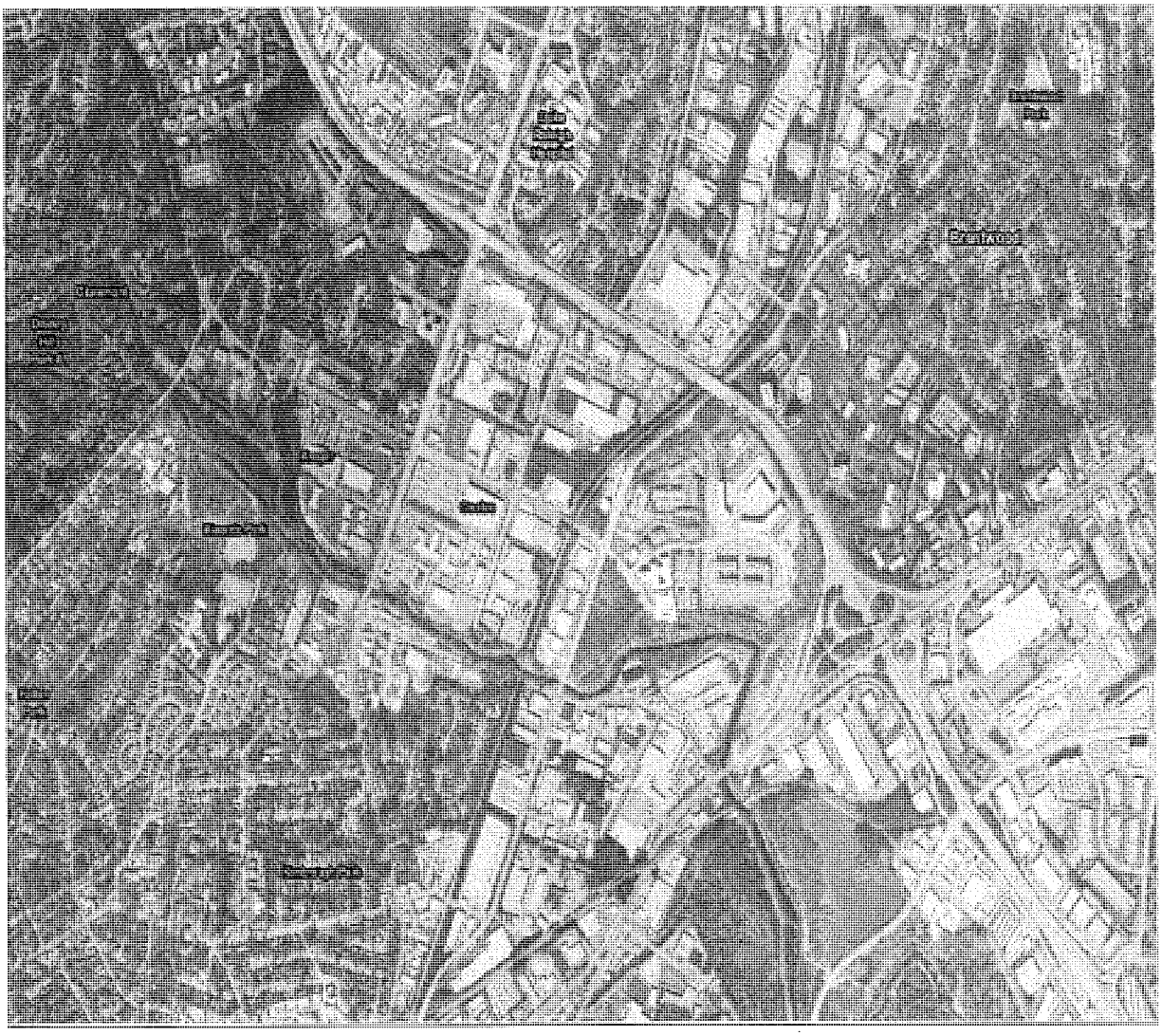
leaning areas, in north and northwest Raleigh, in Senate District 18. Specifically, Senate District 18 grabs the Republican-leaning communities that surround three different Raleigh country clubs—the North Ridge Country Club, the Wildwood Golf Club, and the Carolina Country Club.





154. To place these Republican areas in Senate District 18 while avoiding north Raleigh's Democratic areas, the General Assembly created a tentacle for Senate District 15 that grabs north Raleigh's Democratic voters. The General Assembly created this tentacle in Senate District 15 via a narrow passageway containing no more than a Costco.

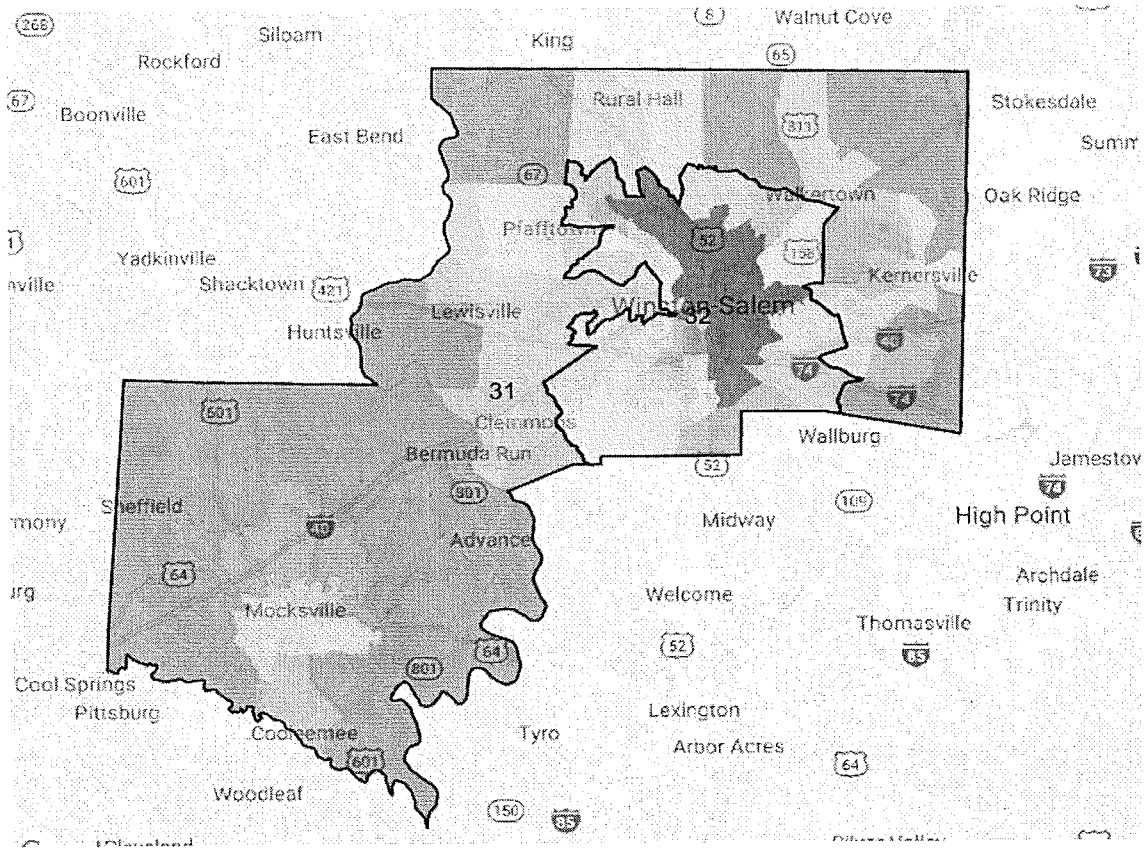

Timberlake
Oxford
Henderson
Hollister
Butner
Louisburg
Mebane
Hillsborough
18
Red Oak
Durham
Wake Forest
Nashville
Chapel Hill
Rocky Moun
16
14
Elm City
Senate District 15
Costco Passageway
Cary
Raleigh
15
Apex
Garner
Wilson
Pittsboro
17
Clayton
Fuquay Varina
Kenly
Smithfield
Sanford



155. Senate District 18, the "Country Club District," performed as the General Assembly hoped in the 2018 election: Republicans held onto it by a few percentage points. Republicans managed to win a Wake County seat in the Senate despite the fact that Democrats won every county-wide election in Wake County in 2018 by overwhelming majorities.

Senate Districts 31 and 32

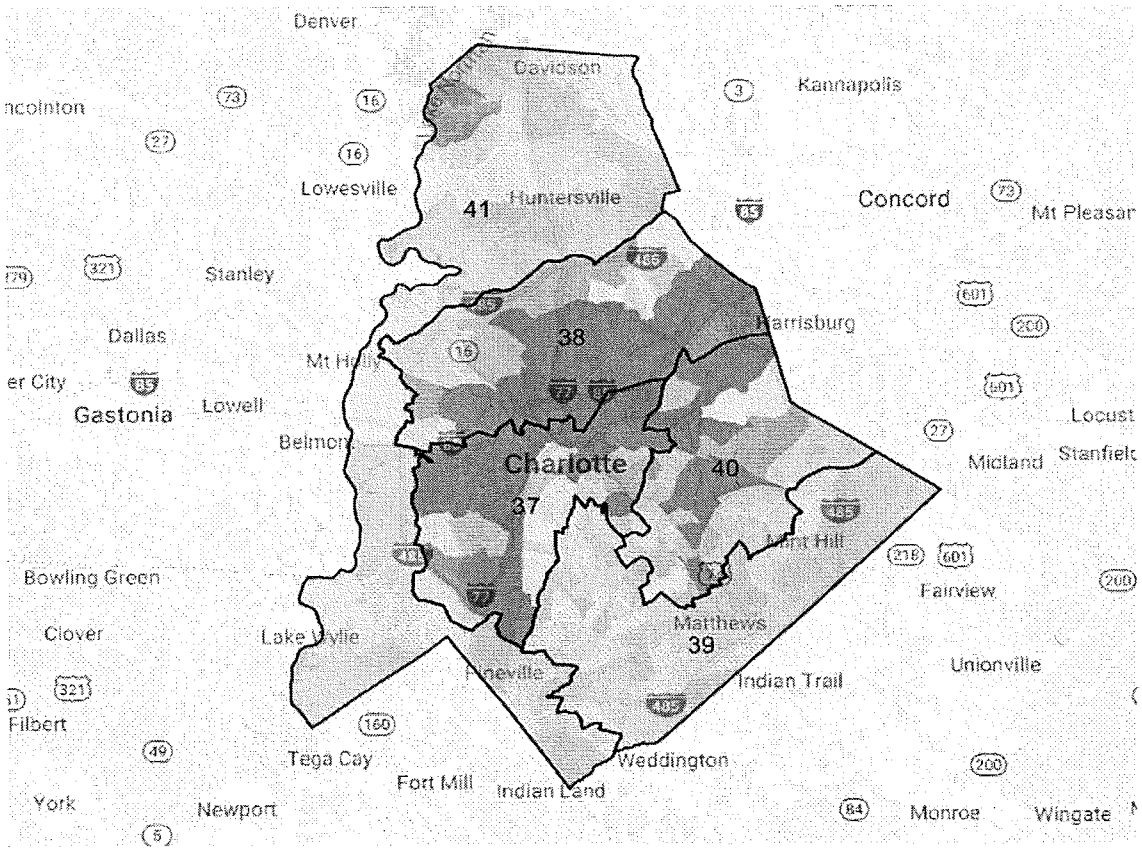
156. Senate Districts 31 and 32 are within a county cluster of Davie and Forsythe Counties.



157. The General Assembly packed all of the most Democratic areas in and around Winston-Salem into Senate District 32, so that Senate District 31 would favor Republicans.

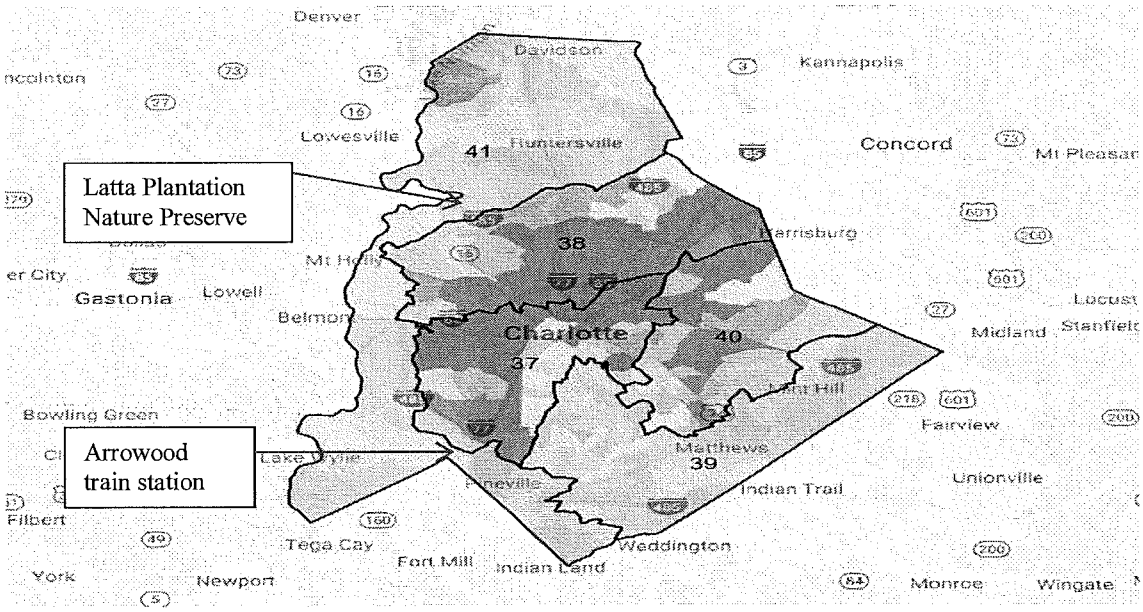
Senate Districts 37, 38, 39, 40, and 41

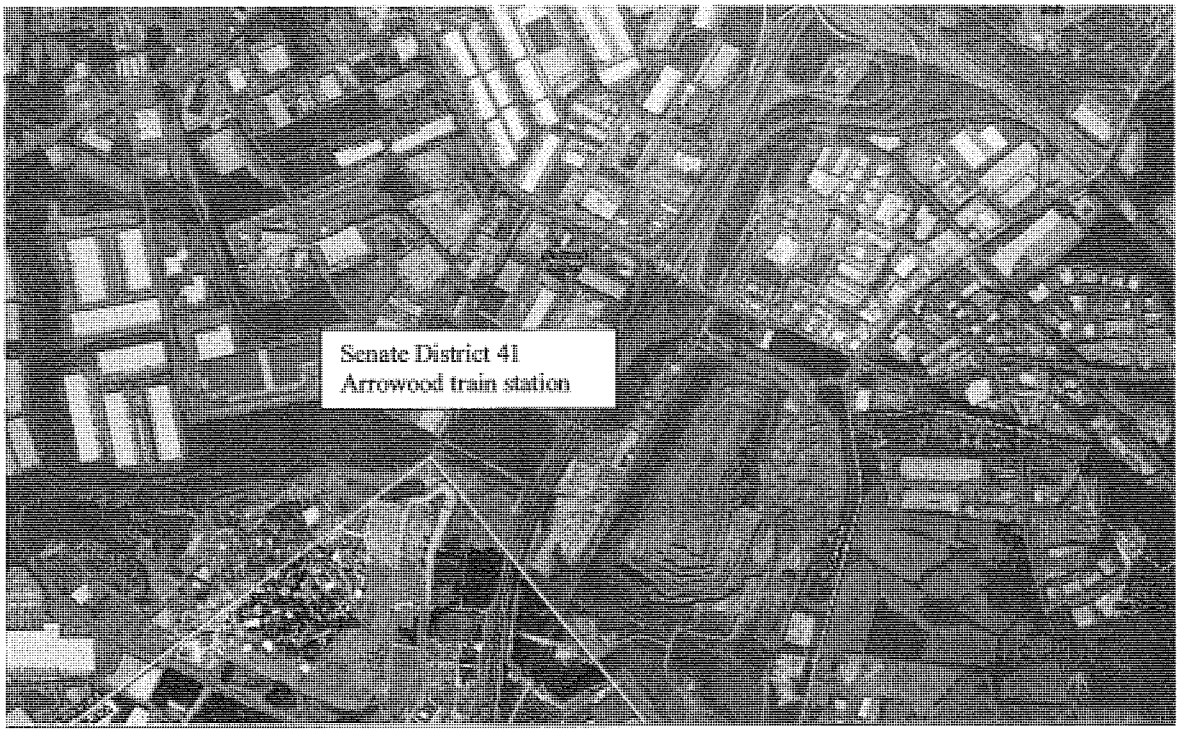
158. Senate Districts 37, 38, 39, 40, and 41 are all located within Mecklenburg County.

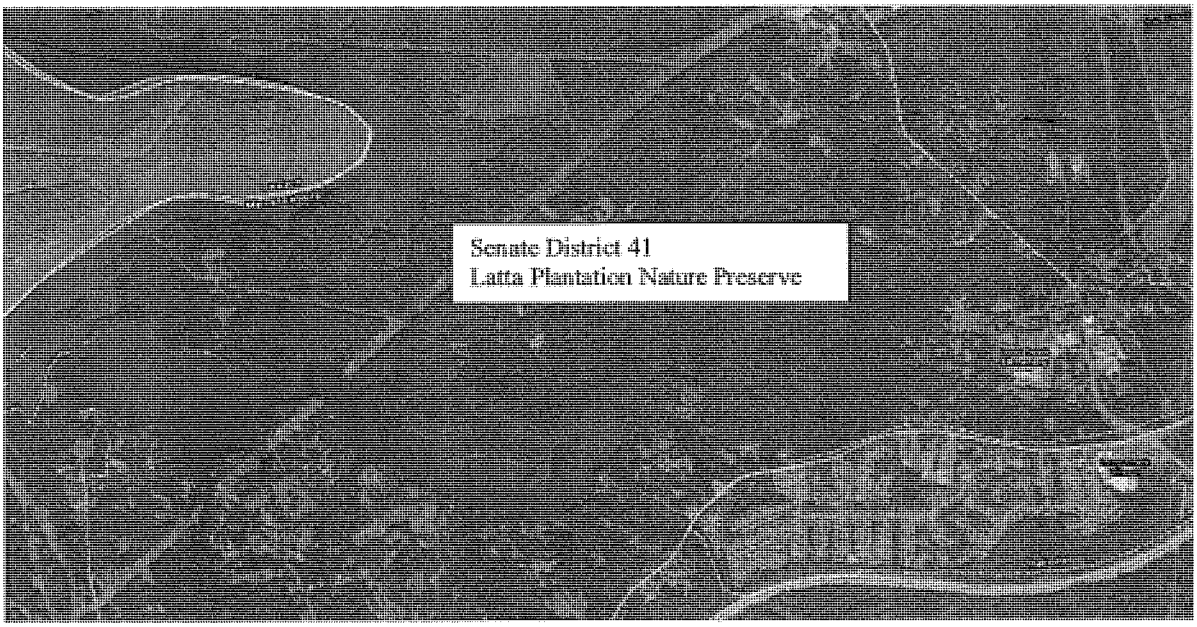


159. The General Assembly packed as many Democrats as possible into Senate Districts 37, 38, and 40, so as to create two Mecklenburg County districts—Senate Districts 39 and 41—that lean Republican based on the statewide elections the General Assembly considered.

160. The General Assembly had to go to particularly great lengths to make Senate District 41 competitive for Republicans. The district begins north of Charlotte, then slices through a thin stretch of land west of Charlotte, before curling back around to pick up Republican-leaning areas south of Charlotte. To stitch together these disparate areas, Senate District 41 at one point connects through a nature preserve and at another point the district is held together only by the Arrowood train station.


Latta Plantation
Nature Preserve
Arrowood
train station
Denver
Davidson
Kannapolis
Lowesville
41
Huntersville
Concord
Mt Pleasant
Harrisburg
38
Mt Holly
Gastonia
Lowell
Belmont
Charlotte
37
40
Midland
Stanfield
Bowling Green
Matthews
39
Fairview
Indian Trail
Unionville
Filbert
Tega Cay
Fort Mill
Weddington
York
Newport
Monroe
Wingate

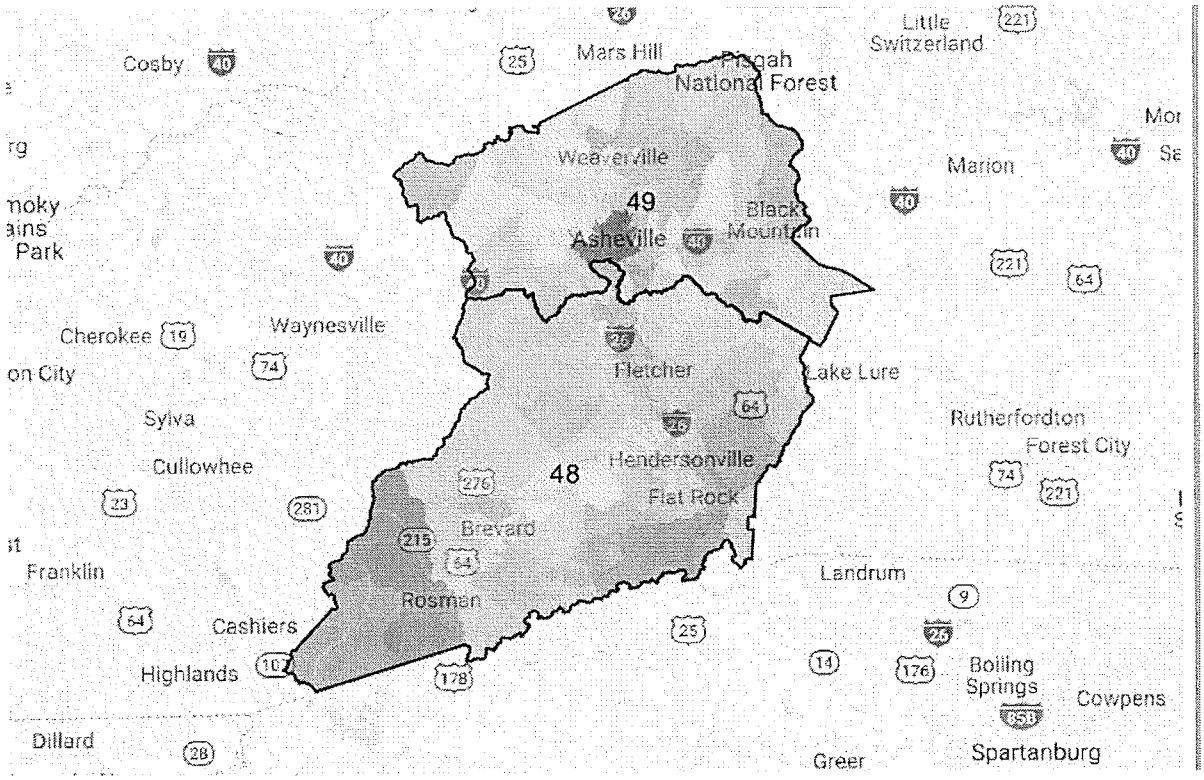

Senate District 41
Arrowood train station



161. The General Assembly manipulated Senate District 39 to be favorable to Republicans. Despite the enormous Democratic wave in Mecklenburg County in 2018—with Democrats winning every county-wide election by huge margins and sweeping the Mecklenburg County Board of Commissioners races—Republicans managed to hold onto Senate District 39.

Senate Districts 48 and 49

162. Senate Districts 48 and 49 are within a county cluster of Transylvania, Henderson, and Buncombe Counties.



163. The General Assembly packed Democratic voters in and around Asheville into Senate District 49. This packing ensured that Senate District 48 would elect a Republican.

3. The 2017 Plans Achieved Their Goal in the 2018 Election

164. The 2017 Plans' cracking and packing of Democratic voters worked with remarkable success in the 2018 elections. While the Democratic wave did flip some seats, it could not overcome plans that were designed to guarantee Republicans majorities.

165. In the 2018 House elections, Democratic candidates won 51.1% of the two-party statewide vote, but won only 54 of 120 seats (45%).[3]

166. In the 2018 Senate elections, Democratic candidates won 50.4% of the two-party statewide vote, but won only 21 of 50 seats (42%).

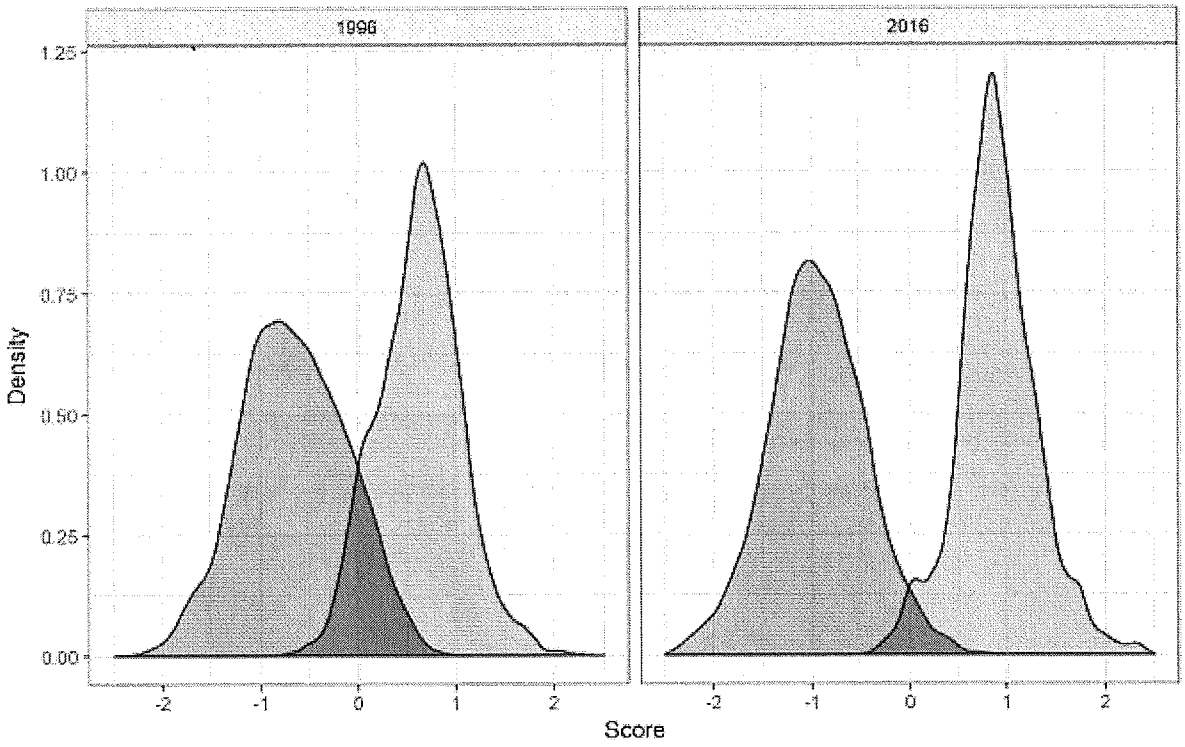
[3] These statistics are based on the results posted on the North Carolina Board of Election's website as of November 12, 2018.

I. The Partisan Gerrymandering of the 2017 Plans Causes Plaintiffs and Other Democratic Voters To Be Entirely Shut Out of the Political Process

167. The effects of the gerrymander go beyond election results. In today's state legislatures—and particularly in North Carolina—Republican representatives are simply not responsive to the views and interests of Democratic voters. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When Democratic voters lose the ability to elect representatives of their party as a result of partisan gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because Republican representatives pay no heed to these voters' views and interests once in office.

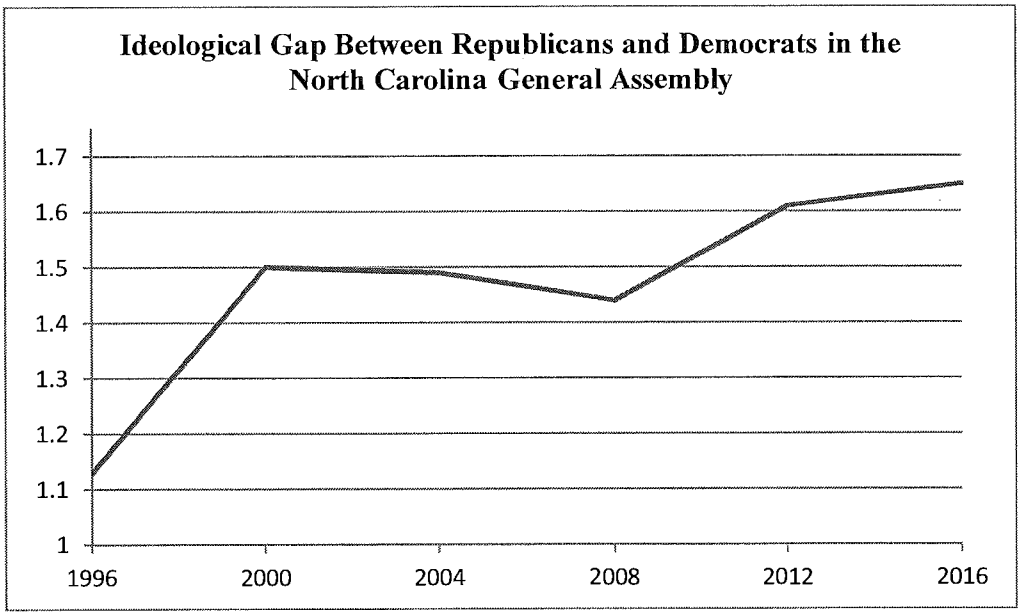
168. There is substantial evidence documenting the increasing polarization of state legislatures, including ideological scores assigned to every state legislator in the country by political scientists Drs. Nolan McCarty and Boris Shor. The chart below depicts the ideological distribution of state legislators nationwide in 1996 and in 2016. Red reflects Republican legislators and blue reflects Democratic legislators, with negative scores on the left of the x-axis indicating a more liberal ideology and positive scores on the right on the x-axis indicating a more conservative ideology.[4] The chart shows that today there are barely any state legislators across the country who overlap ideologically—*i.e.*, barely any Democratic and Republican legislators who overlap in ideological score—and far less than in 1996. Instead, legislators from the parties have grown farther apart, and Republicans legislators in particular have become much more homogenous in ideology, coalescing around an ideological score of +1.

[4] *See* State Polarization, 1996-2016, https://americanlegislatures.com/2017/07/20/state-polarization-1996-2016/.

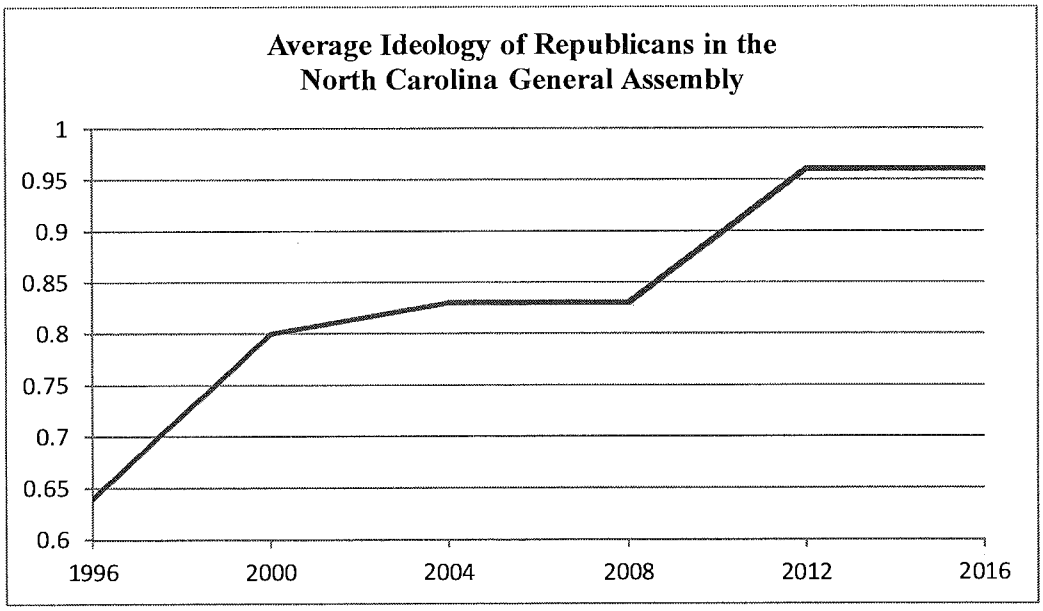


169. The North Carolina General Assembly is no exception to this trend. Political scientists McCarty and Shor have developed ideological scores for every state legislator in the country based on each legislator's roll call voting behavior. These ideological scores range from negative -3 to +3, with negative scores indicating more liberal ideological and positive scores a more conservative one. The below chart shows the gap between the average ideological scores of Republicans and Democrats in the North Carolina General Assembly. It shows that gap has grown dramatically—increasing by more than 50%—over the last 20 years.[5]

[5] *See* Boris Shor & Nolan McCarty, *Measuring American Legislatures*, https://americanlegislatures.com/category/polarization/.



170. This increasing ideological gap reflects the fact that Republican legislators in the North Carolina General Assembly have grown more and more conservative. The below chart shows the average ideological scores of Republicans in the General Assembly over the last 20 years. It demonstrates how Republicans in the General Assembly vote in an increasingly more conservative fashion, and thus are less likely to reflect the views of Democratic voters.



171. The extreme polarization of Republicans in the General Assembly is further evidenced by their near-uniform bloc voting behavior.

172. In the 2017-2018 Session, Republicans in the state Senate almost always voted with a majority of other Republicans and virtually never crossed over to vote with the minority. Every Republican Senator voted with a majority of Republicans over 95% of the time, and the median Republican Senator voted with the Republican majority a stunning 99.2% of the time.[6]

173. Likewise in the House, in the 2017-2018 Session, nearly every Republican in the state House of Representatives voted with the Republican majority over 90% of the time, and the median Republican in the House voted with the Republican majority 96.70% of the time.[7]

174. These statistics all illustrate that Republicans in the General Assembly do not represent the views and interests of their Democratic constituents and almost never engage in cross-over voting. Thus, when gerrymandering denies Democratic voters the ability to elect representatives of their party, they also lose any chance of influencing legislative outcomes.

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

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

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

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[6] *See Senate Member Vote Statistics*, 2017-2018 Session, https://www.ncleg.net/gascripts/voteHistory/MemberVoteStatistics.pl?sSession=2017&sChamber=S.

[7] *See House Member Vote Statistics*, 2017-2018 Session, https://www.ncleg.net/gascripts/voteHistory/MemberVoteStatistics.pl?sSession=2017&sChamber=H.

177. North Carolina's Equal Protection Clause affords broader protections to its citizens in the voting rights context than the U.S. Constitution's equal protection provisions. *See Stephenson v. Bartlett*, 562 S.E.2d 377, 393-95 & n.6 (N.C. 2002); *Blankenship v. Bartlett*, 681 S.E.2d 759, 763 (N.C. 2009).

178. Irrespective of its federal counterpart, North Carolina's Equal Protection Clause protects the right to "substantially equal voting power." *Stephenson*, 562 S.E.2d at 394. "It is well settled in this State that the right to vote on equal terms is a fundamental right." *Id.* at 393 (internal quotation marks omitted).

179. The 2017 Plans intentionally and impermissibly classify voters into districts on the basis of their political affiliations and viewpoints. The intent and effect of these classifications is to dilute the voting power of Democratic voters, to make it more difficult for Democratic candidates to be elected across the state, and to render it virtually impossible for the Democratic Party to achieve a majority of either chamber of the General Assembly. Defendants can advance no compelling or even legitimate state interest to justify this discrimination.

180. The 2017 Plans' intentional classification of, and discrimination against, Democratic voters is plain. The Republican leaders of the House and Senate Redistricting Committees explicitly used "political considerations and election results data" as a criterion in creating the 2017 Plans, drew the maps in secret with a Republican mapmaker, and admitted that they "did make partisan considerations when drawing particular districts." *Covington*, ECF No. 184-17 at 26. The partisan composition of the districts based on recent results demonstrates that the map was designed to ensure overwhelming Republican majorities in both chambers. The General Assembly's intent is also laid bare by the packing and cracking of individual Democratic

communities, as well as a host of statistical analyses and measures that will confirm the 2017 Plans necessarily reflect an intentional effort to disadvantage Democratic voters.

181. These efforts have produced discriminatory effects for Plaintiffs other Democratic voters, including members of Common Cause and the NCDP. On a statewide basis, Democrats receive far fewer state House and Senate seats than they would absent the gerrymanders. The grossly disproportionate number of seats that Republicans have won and will continue to win in the General Assembly relative to their share of the statewide vote cannot be explained or justified by North Carolina's geography or any legitimate redistricting criteria. Moreover, because the gerrymanders guarantee that Republicans will hold a majority in the House and Senate, Plaintiffs and other Democratic voters are unable to elect a legislature that will pass legislation that reflects Democratic voters' positions or policies. The 2017 Plans burden the representational rights of Democratic voters individually and as a group and discriminate against Democratic candidates and organizations individually and as a group.

182. Individual voters also experience discriminatory effects at the district level. For those Plaintiffs and other Democratic voters who live in cracked communities and districts, their voting power is diluted, and it is more difficult than it would be but-for the gerrymander for these voters to elect candidates of their choice. And given the extreme partisanship of Republican representatives in the General Assembly, these voters have no meaningful opportunity to influence legislative outcomes when Republican candidates win their districts, because the Republican representatives simply do not weigh their Democratic constituents' interests and policy preferences in deciding how to act. For those Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, who live in packed Democratic districts, the weight of their votes has been substantially diluted. Their votes have no marginal impact on

election outcomes, and representatives will be less responsive to their individual interests or policy preferences. Accordingly, for all Plaintiffs and others Democratic voters whose votes are diluted under the 2017 Plans, the 2017 Plans impermissibly deny these voters their fundamental right to "vote on equal terms" with "equal voting power." *Stephenson*, 562 S.E.2d at 393-94.

COUNT II
Violation of the North Constitution's
Free Elections Clause, Art. I, § 5

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

184. Article I, Section 10 of the North Carolina Constitution, which has no counterpart in the U.S. Constitution, provides that "All elections shall be free" (the "Free Elections Clause").

185. North Carolina's Free Elections Clause traces its roots to the 1689 English Bill of Rights, which declared that "Elections of members of Parliament ought to be free."

186. Numerous other states have constitutional provisions that trace to the same provision of the 1689 English Bill of Rights, including Pennsylvania, which has a constitutional provision requiring that all "elections shall be free and equal." *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 793 (Pa. 2018). On February 7, 2018, the Pennsylvania Supreme Court held that the partisan gerrymander of Pennsylvania's congressional districts violated this clause. The state high court held that Pennsylvania's Free and Equal Elections Clause requires that all voters "have an equal opportunity to translate their votes into representation," and that this requirement is violated where traditional districting criteria such as preserving political subdivisions and compactness are "subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage." *Id.* at 814, 817.

187. North Carolina's Free Elections Clause protects the rights of voters to at least the same extent as Pennsylvania's analogous provision.

188. The 2017 Plans violate the Free Elections Clause by denying Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, an equal opportunity to translate their votes into representation, and by providing an unfair partisan advantage to the Republican Party and its candidates as a whole over the Democratic Party and its candidates as a whole. The General Assembly's violation of the Free Election Clause is evidenced by, *inter alia*, its subordination of traditional districting criteria to illicit partisan motivations.

189. Elections under the 2017 Plans are anything but "free." They are rigged to predetermine electoral outcomes and guarantee one party control of the legislature, in violation of Article I, § 5 of the North Carolina Constitution.

COUNT III
Violation of the North Constitution's
Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14

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

191. Article I, § 12 of the North Carolina Constitution provides in relevant part: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

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

193. North Carolina courts have recognized that Article I, Sections 12 and 14 may afford broader protections than the federal First Amendment. *Evans v. Cowan*, 468 S.E.2d 575, 578, *aff'd*, 477 S.E.2d 926 (1996).

194. Article I, Sections 12 and 14 protect the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to

cast a vote. Voting for a candidate of one's choice is core political speech and/or expressive conduct protected by the North Carolina Constitution. Contributing money to, or spending money in support of, a preferred candidate is core political speech and/or expressive conduct as well. And leading, promoting, or affiliating with a political party to pursue certain policy objectives is core political association protected by the North Carolina Constitution.

195. Irrespective of the U.S. Constitution, the 2017 Plans violate Article 1, Sections 12 and 14 of the North Carolina Constitution by intentionally burdening the protected speech and/or expressive conduct of Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, based on their identity, their viewpoints, and the content of their speech. The 2017 Plans burden the speech and/or expressive conduct of Plaintiffs and other Democratic voters by making their speech and/or expressive conduct—*i.e.*, their votes—less effective. For those Plaintiffs and other Democratic voters who live in cracked districts, the 2017 Plans artificially make it more difficult (if not impossible) for their speech and/or expressive conduct to succeed. And because of the polarization of Republicans in the General Assembly, these voters will be unable to influence the legislative process, resulting in the complete suppression of their political views. For those Plaintiffs and other Democratic voters who live in packed districts, the 2017 Plans artificially dilute the weight and impact of their speech and/or expressive conduct. The General Assembly intentionally created these burdens because of disfavor for Plaintiffs and other Democratic voters, their political views, and their party affiliations.

196. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the protected speech and/or expressive conduct of the NCDP. Because of the gerrymanders, the money the NCDP contributes to or spends on Democratic candidates—and the messages conveyed through the

contributions and expenditures—are less effective and less able to succeed. The General Assembly intentionally rendered the NCDP's contributions and expenditures less effective because of disagreement with the political viewpoints expressed through those contributions and expenditures and disfavor for the candidates that the NCDP supports.

197. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the associational rights of Plaintiffs. The 2017 Plans burden the ability of Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, as well as the NCDP as an organization, to affiliate and join together in a political party, to carry out the party's activities, and to implement the party's policy preferences through legislative action. The 2017 Plans burden these associational rights by, *inter alia*, making it more difficult for Plaintiffs and other Democratic voters, as well as the NCDP, to register voters, attract volunteers, raise money in gerrymandered districts, campaign, and turn out the vote, by reducing the total representation of the Democratic Party in the General Assembly, and by making it virtually impossible for Democrats to constitute a majority of either chamber of the General Assembly.

198. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the protected speech, expressive conduct, and associational rights of Common Cause. The 2017 Plans burden Common Cause's ability to convince voters in gerrymandered districts to vote in state legislative elections and to communicate with legislators. And because the 2017 Plans allow the General Assembly to disregard the will of the public, the 2017 Plans' burden Common Cause's ability to communicate effectively with legislators, to influence them to enact that promote voting, participatory democracy, public funding of elections, and other measures that encourage

accountable government. The 2017 Plans similarly burden the associational rights of Common Cause by frustrating its mission to promote participation in democracy and to ensure open, honest, and accountable government.

199. Irrespective of the U.S. Constitution, the 2017 Plans also violate the North Carolina Constitution's prohibition against retaliation against individuals who exercise their rights under Article I, Sections 12 and 14. *See Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. App. 2014). The General Assembly expressly considered the prior protected conduct of Plaintiffs and other Democratic voters, including members of Common Cause and NCDP, by considering their voting histories and political party affiliations when placing these voters into districts. The General Assembly did this to disadvantage individual Plaintiffs and other Democratic voters because of their prior protected conduct, and this retaliation has diluted these individuals' votes in a way that would not have occurred but-for the retaliation. *Id.* Indeed, many Plaintiffs and other Democratic voters who currently live in Republican state House or Senate districts would live in districts that would be more likely to have, or would almost definitely have, a Democratic representative but for the gerrymander. Moreover, but-for the gerrymander, Plaintiffs and other Democratic voters would have an opportunity to elect a majority of the state House and Senate, which would afford an opportunity to influence legislation. The retaliation has also impermissibly burdened the associational rights of Plaintiffs and the NCDP by making it more difficult for Democrats to register voters, recruit candidates, attract volunteers, raise money, campaign, and turn out the vote, by reducing the total representation of the Democratic Party in the General Assembly, and by making it virtually impossible for Democrats to constitute a majority of either chamber of the General Assembly.

200. There is no legitimate state interest in discriminating and retaliating against Plaintiffs because of their political viewpoints, voting histories, and affiliations. Nor can the 2017 Plans be explained or justified by North Carolina's geography or any legitimate redistricting criteria.

PRAYER FOR RELIEF

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

a. Declare that each of the 2017 Plans is unconstitutional and invalid because each violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Equal Protection Clause, Art. I, § 19; Free Elections Clause, Art. I, § 5; 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 the North Carolina General Assembly using the 2017 Plans;

c. Establish new state House and state Senate districting plans that comply with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new state House and state Senate districting plans comporting with the North Carolina Constitution in a timely manner;

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

Dated: November 13, 2018

Respectfully submitted,

POYNER SPRUILL LLP

By: _____

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
Caroline P. Mackie
N.C. State Bar No. 41512
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP

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PERKINS COIE LLP

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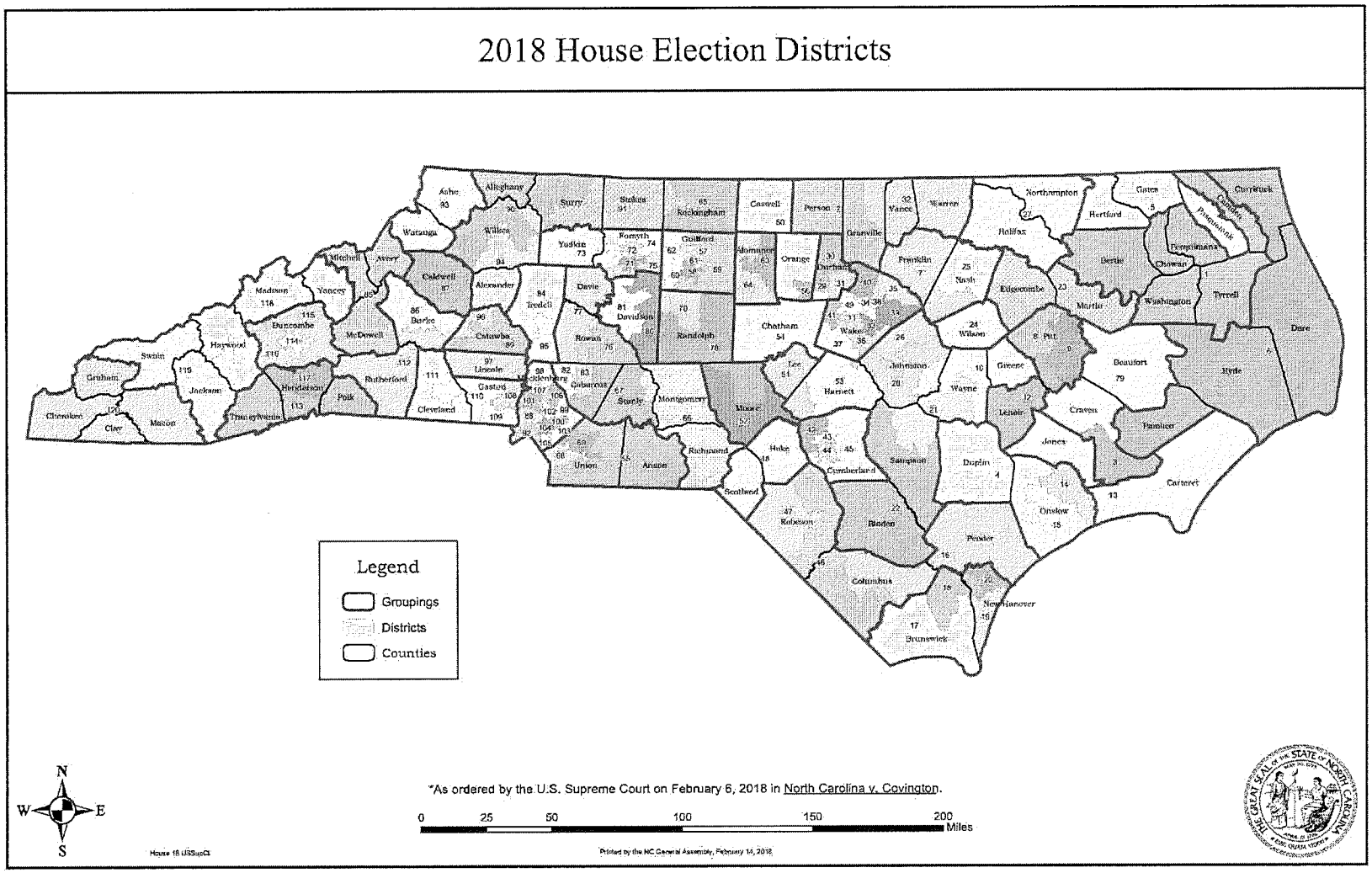
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Common Cause and the Individual Plaintiffs

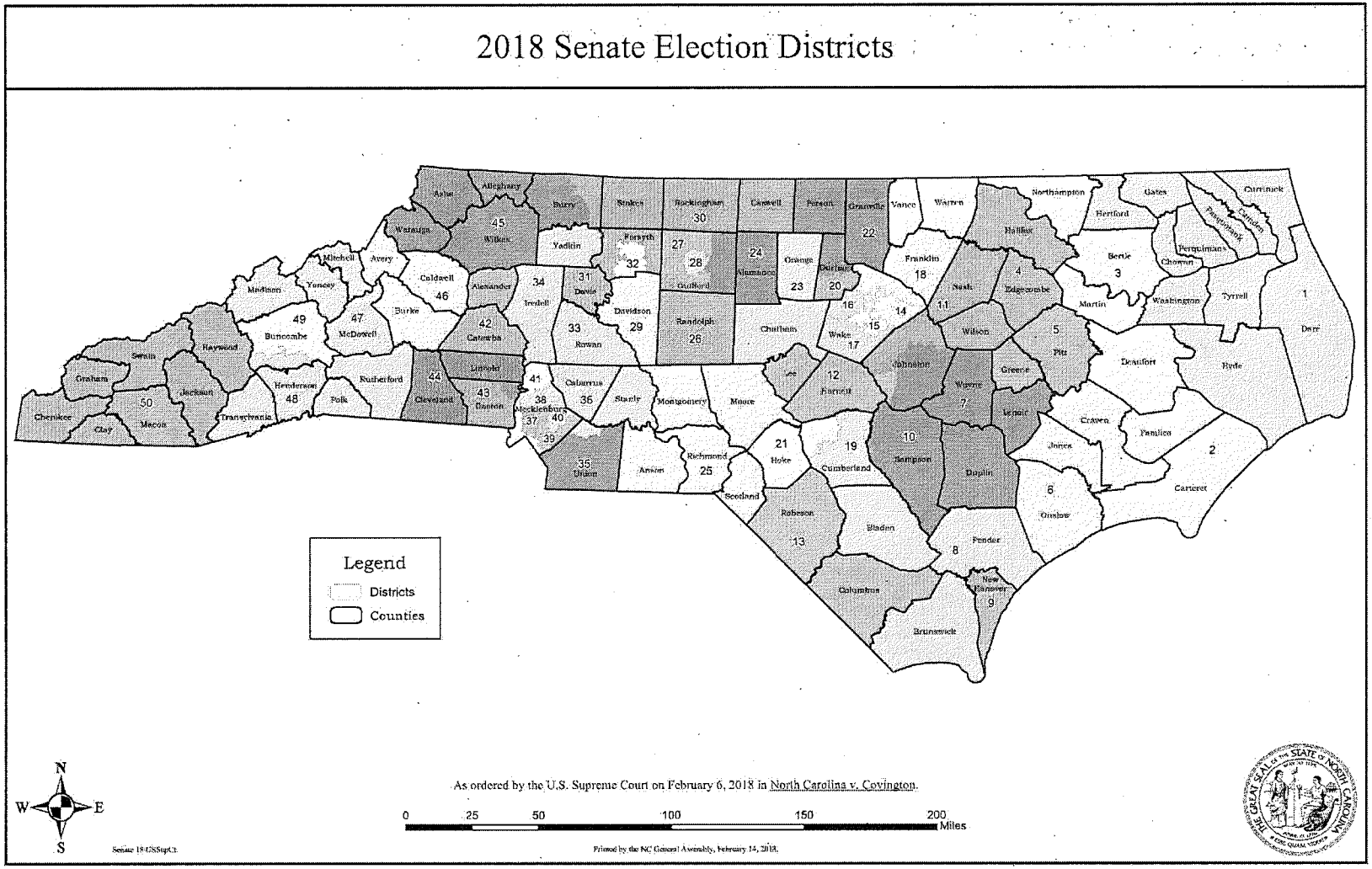
* *Pro hac vice motions forthcoming*

Appendix

Appendix A: North Carolina House of Representatives Districts



Appendix B: North Carolina Senate Districts



STATE OF NORTH CAROLINA

COUNTY OF WAKE

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, in his official capacity as Senior Chairman of the Senate Select Committee on Redistricting, *et al.*,

Defendants.

FILED
2018 DEC -7 PM 3:13
WAKE COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-14001

NOTICE OF APPEARANCE

Michael D. McKnight of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. enters his Notice of Appearance as counsel on behalf of all Defendants. Mr. McKnight is a member in good standing with the bar of the state of North Carolina.

Respectfully submitted this 7th day of December, 2018.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ SAT

Michael D. McKnight
N.C. State Bar No. 36932
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Attorneys for Defendants

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Notice of Appearance** by Michael McKnight was served via United States Mail, first-class, postage prepaid, upon the following:

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
Caroline P. Mackie
N.C. State Bar No. 41512
POYNER SPRUILL LLP
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(919) 783-6400
espeas@poynerspruill.com
Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
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Marc E. Elias
Aria C. Branch
PERKINS COIE LLP
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melias@perkinscoie.com

Abha Khanna
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Seattle, WA 98101-3099
(206) 359-9000
akhanna@perkinscoie.com

This, the 7th day of December, 2018

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

/s/ JAT

Michael D. McKnight
N.C. State Bar No. 36932
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Attorneys for Defendants

36608989.1

STATE OF NORTH CAROLINA

File No. 18CV014001

Wake County

In The General Court Of Justice
☐ District ☑ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Common Cause et al.	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
Address: 907 Glenwood Avenue	G.S. 1A-1, Rules 3 and 4
City, State, Zip: Raleigh, NC 27605	
VERSUS	
Name Of Defendant(s): Representative David R. Lewis, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.	Date Original Summons Issued: 11/13/2018
	Date(s) Subsequent Summons(es) Issued:

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Sen. Ralph E. Hise, in his official capacity N.C. Senate 300 N Salisbury Street, Room 312 Raleigh, NC 27603 c/o Alexander Peters Senior Deputy Attorney General North Carolina Department of Justice PO Box 629 Raleigh, NC 27602	

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (If none, Address Of Plaintiff)	Date Issued	Time
Edwin Speas Poyner Spruill LLP P.O. Box 1801 Raleigh, NC 27602-1801	11-13-18	10 ☑ AM ☐ PM
	Signature: [signature]	
	☑ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

AOC-CV-100, Rev. 4/18

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	Ralph E. Hise

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	Signature Of Deputy Sheriff Making Return
$	
Date Received	*Name Of Sheriff (type or print)*
Date Of Return	*County Of Sheriff*

AOC-CV-100, Side Two, Rev. 4/18

STATE OF NORTH CAROLINA

File No. 18CV014001

Wake County

In The General Court Of Justice
☐ District ☑ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Common Cause et al.	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
Address: 907 Glenwood Avenue	
City, State, Zip: Raleigh, NC 27605	G.S. 1A-1, Rules 3 and 4
VERSUS	
Name Of Defendant(s): Representative David R. Lewis, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.	Date Original Summons Issued: 11/13/2018
	Date(s) Subsequent Summons(es) Issued:

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Sen. Philip E. Berger, in his official capacity N.C. Senate 16 W Jones Street, Room 2007 Raleigh, NC 27601 Sen. Philip E. Berger, in his official capacity c/o Alexander Peters Senior Deputy Attorney General North Carolina Department of Justice PO Box 629 Raleigh, NC 27602	

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued	Time	
Edwin Speas Poyner Spruill LLP P.O. Box 1801 Raleigh, NC 27602-1801	11-13-18	10	☑ AM ☐ PM
	Signature: MC		
	☑ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		

☐ ENDORSEMENT (ASSESS FEE) This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.	Date Of Endorsement	Time ☐ AM ☐ PM
	Signature	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

AOC-CV-100, Rev. 4/18

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	Philip E. Berger

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	Signature Of Deputy Sheriff Making Return
$	
Date Received	Name Of Sheriff (type or print)
Date Of Return	County Of Sheriff

AOC-CV-100, Side Two, Rev. 4/18

STATE OF NORTH CAROLINA

File No. 18CV014001

Wake County

In The General Court Of Justice
☐ District ☑ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Common Cause et al.	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
Address: 907 Glenwood Avenue	
City, State, Zip: Raleigh, NC 27605	G.S. 1A-1, Rules 3 and 4
VERSUS	
Name Of Defendant(s): Representative David R. Lewis, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.	Date Original Summons Issued: 11/13/2018
	Date(s) Subsequent Summons(es) Issued:

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Stacy Eggers IV, in his official capacity as member, North Carolina State Board of Elections and Ethics Enforcement c/o Josh Lawson, General Counsel 430 N. Salisbury St, Suite 3128 Raleigh, NC 276023	

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued: 11-13-18	Time: 10 ☑ AM ☐ PM
Edwin Speas Poyner Spruill LLP P.O. Box 1801 Raleigh, NC 27602-1801	Signature: [signature]	
	☑ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time: ☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

AOC-CV-100, Rev. 4/18

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	Stacy Eggers IV

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	Signature Of Deputy Sheriff Making Return
$	
Date Received	*Name Of Sheriff (type or print)*
Date Of Return	*County Of Sheriff*

AOC-CV-100, Side Two, Rev. 4/18

STATE OF NORTH CAROLINA

File No. 18CV014001

Wake County

In The General Court Of Justice
☐ District ☑ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
Common Cause et al.	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
Address: 907 Glenwood Avenue	
City, State, Zip: Raleigh, NC 27605	G.S. 1A-1, Rules 3 and 4
VERSUS	
Name Of Defendant(s): Representative David R. Lewis, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.	Date Original Summons Issued: 11/13/2018
	Date(s) Subsequent Summons(es) Issued:

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Rep. Timothy Moore, in his official capacity	Name And Address Of Defendant 2
Rep. Timothy Moore, in his official capacity N.C. House of Representatives 16 W Jones Street, Room 2304 Raleigh, NC 27601	c/o Alexander Peters Senior Deputy Attorney General North Carolina Department of Justice PO Box 629 Raleigh, NC 27602	

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued	Time
Edwin Speas Poyner Spruill LLP P.O. Box 1801 Raleigh, NC 27602-1801	11-13-18	10:06 ☑ AM ☐ PM
	Signature	
	☑ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have **MANDATORY ARBITRATION** programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	Timothy Moore

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	Signature Of Deputy Sheriff Making Return
$	
Date Received	Name Of Sheriff (type or print)
Date Of Return	County Of Sheriff

AOC-CV-100, Side Two, Rev. 4/18

Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
CHIEF JUSTICE MARK D. MARTIN

BOX 1841
ZIP CODE 27602
TEL. (919) 831-5712

Office of the
Chief Justice of the Supreme Court
of North Carolina

ORDER

To the Honorables **Paul C. Ridgeway, Jr., Alma L. Hinton, and Joseph N. Crosswhite,** Judges of the Superior Court of North Carolina, Greetings:

As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina, the Rules of the Supreme Court, and specifically Chapter 1, Article 26A of the General Statutes of North Carolina, I hereby assign you to serve on a Three-Judge Panel for Redistricting Challenges, as defined in N.C.G.S. § 1-267.1, to hear and determine the following action challenging the validity of an act of the General Assembly that redistricts State legislative districts:

> Common Cause, et al. v. David R. Lewis, in his official capacity as Senior Chairman of the North Carolina House of Representatives Select Committee on Redistricting, et al., 18-CVS-14001 (Wake County)

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, November 27, 2018.

Mark Martin

Mark Martin, Chief Justice
Supreme Court of North Carolina

STATE OF NORTH CAROLINA

COUNTY OF WAKE

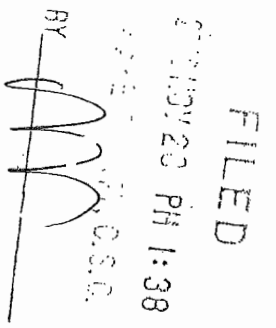
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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,

Plaintiffs,

v.

REPRESENTATIVE DAVID 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 PHILLIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDY PENRY, Chairman of The North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM, Vice-Chair of The North Carolina State Board of Elections and Ethics Enforcement; KEN RAYMOND, Secretary of the North Carolina State Board of Elections and Ethics Enforcement; STELLA ANDERSON, Member of The North Carolina State Board of Elections and Ethics Enforcement; DAMON



NOTICE OF APPEARANCE

CIRCOSTA, Member of the North Carolina State Board of Elections and Ethics Enforcement; STACY "FOUR" EGGERS, IV, Member of the North Carolina State Board of Elections and Ethics Enforcement; JAY HEMPHILL, Member of the North Carolina State Board of Elections and Ethics Enforcement; VALERIE JOHNSON, Member of the North Carolina State Board of Elections and Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections and Ethics Enforcement;,

Defendants.

PLEASE TAKE NOTICE that Stephanie A. Brennan, Special Deputy Attorney General, enters her Notice of Appearance on behalf of Defendants, The State of North Carolina, The North Carolina State Board of Elections, Andy Penry, Joshua Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, and John Lewis. By this Notice of Appearance, the undersigned requests that she receive all notices from the Court and all papers served by the parties hereto.

This the 28th day of November, 2018.

JOSHUA H. STEIN
Attorney General

for

Stephanie A. Brennan
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing NOTICE OF APPEARANCE in the above titled action upon all parties to this cause by depositing a copy in the United States Mail, postage prepaid to:

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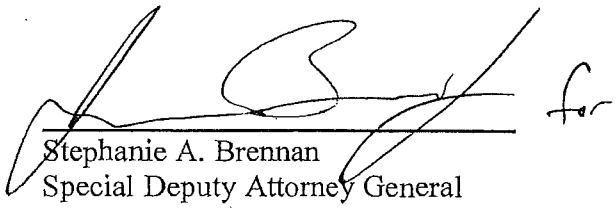
Counsel for Common Cause and the Individual Plaintiffs

This the 28th day of November, 2018.



Stephanie A. Brennan
Special Deputy Attorney General

STATE OF NORTH CAROLINA

COUNTY OF WAKE

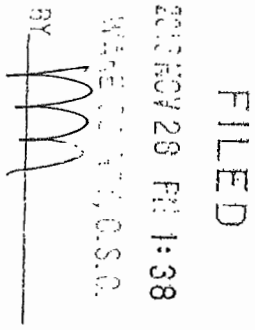
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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,

Plaintiffs,

v.

REPRESENTATIVE DAVID 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 PHILLIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDY PENRY, Chairman of The North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM, Vice-Chair of The North Carolina State Board of Elections and Ethics Enforcement; KEN RAYMOND, Secretary of the North Carolina State Board of Elections and Ethics Enforcement; STELLA ANDERSON, Member of The North Carolina State Board of Elections and Ethics Enforcement; DAMON



NOTICE OF APPEARANCE

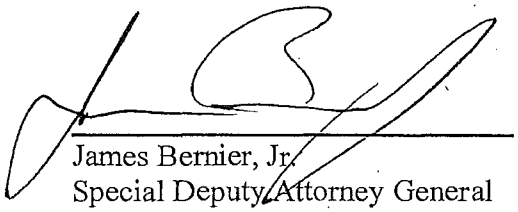
CIRCOSTA, Member of the North Carolina State Board of Elections and Ethics Enforcement; STACY "FOUR" EGGERS, IV, Member of the North Carolina State Board of Elections and Ethics Enforcement; JAY HEMPHILL, Member of the North Carolina State Board of Elections and Ethics Enforcement; VALERIE JOHNSON, Member of the North Carolina State Board of Elections and Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections and Ethics Enforcement;,

Defendants.

PLEASE TAKE NOTICE that James Bernier, Jr., Special Deputy Attorney General, enters his Notice of Appearance on behalf of Defendants, The State of North Carolina, The North Carolina State Board of Elections, Andy Penry, Joshua Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, and John Lewis. By this Notice of Appearance, the undersigned requests that he receive all notices from the Court and all papers served by the parties hereto.

This the 28th day of November, 2018.

JOSHUA H. STEIN
Attorney General



James Bernier, Jr.
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Tele No.: (919)-716-6900
Fax No.: (919)-716-6763

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing NOTICE OF APPEARANCE in the above titled action upon all parties to this cause by depositing a copy in the United States Mail, postage prepaid to:

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akhanna@percinscoie.com
Counsel for Common Cause and the Individual Plaintiffs

This the 28th day of November, 2018.

James Bernier, Jr.
Special Deputy Attorney General

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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,

Plaintiffs,

v.

REPRESENTATIVE DAVID 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 PHILLIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDY PENRY, Chairman of The North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM, Vice-Chair of The North Carolina State Board of Elections and Ethics Enforcement; KEN RAYMOND, Secretary of the North Carolina State Board of Elections and Ethics Enforcement; STELLA ANDERSON, Member of The North Carolina State Board of Elections and Ethics Enforcement; DAMON

FILED
28 PM 1:39

NOTICE OF APPEARANCE

CIRCOSTA, Member of the North Carolina State Board of Elections and Ethics Enforcement; STACY "FOUR" EGGERS, IV, Member of the North Carolina State Board of Elections and Ethics Enforcement; JAY HEMPHILL, Member of the North Carolina State Board of Elections and Ethics Enforcement; VALERIE JOHNSON, Member of the North Carolina State Board of Elections and Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections and Ethics Enforcement;,

Defendants.

PLEASE TAKE NOTICE that Amar Majmundar, Senior Deputy Attorney General, enters his Notice of Appearance on behalf of Defendants, The State of North Carolina, The North Carolina State Board of Elections, Andy Penry, Joshua Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, and John Lewis. By this Notice of Appearance, the undersigned requests that he receive all notices from the Court and all papers served by the parties hereto.

This the 28th day of November, 2018.

JOSHUA H. STEIN
Attorney General

Amar Majmundar
Senior Deputy Attorney General
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Fax No.: (919)-716-6763

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing NOTICE OF APPEARANCE in the above titled action upon all parties to this cause by depositing a copy in the United States Mail, postage prepaid to:

Edwin M. Speas, Jr.
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Counsel for Common Cause and the Individual Plaintiffs

This the 28th day of November, 2018.

Amar Majmundar
Senior Deputy Attorney General

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
2018 DEC -7 PM 4:54
WAKE COUNTY, C.S.C.
BY

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.

ACCEPTANCE OF SERVICE

Now comes Phillip J. Strach and says:

1. That Defendants Phillip E. Berger, in his official capacity, Senator Ralph E. Hise, in his official capacity, Representative David R. Lewis, in his official capacity, and Timothy Moore, in his official capacity (the "Legislative Defendants") are parties to be served with the Civil Summons issued and the Complaint filed in this civil action;

2. That by execution hereof, the undersigned accepted service on November 20, 2018 of the Civil Summons and Complaint on behalf of the Legislative Defendants, and acknowledges receipt of a copy of the Civil Summons issued, along with a copy of the Complaint filed in this action; and

3. That this acceptance of service does not waive any defenses that the Legislative Defendants may have, except the defenses of insufficiency of process and insufficiency of service of process, and the Legislative Defendants reserve the right to assert any other defenses that may apply.

This the 27th day of November, 2018.

By: _____

Phillip J. Strach
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Forks Road, Suite 1100,
Raleigh, NC, 27609

CERTIFICATE OF SERVICE

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

James Bernier
Amar Majmundar
Stephanie A. Brennan
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Counsel for the State of North Carolina and State Board of Elections and Ethics Enforcement and its members

Phillip J. Strach
Michael McKnight
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Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Counsel for the Legislative Defendants

This the 7th day of December, 2018.

POYNER SPRUILL LLP

Caroline P. Mackie

STATE OF NORTH CAROLINA

COUNTY OF WAKE

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, in his official capacity as Senior Chairman of the Senate Select Committee on Redistricting, *et al.*,

Defendants.

FILED
2018 DEC -7 PM 3:13
WAKE COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-14001

NOTICE OF APPEARANCE

Phillip J. Strach of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. enters his Notice of Appearance as co-counsel on behalf of all Defendants. Mr. Strach is a member in good standing with the bar of the state of North Carolina.

Respectfully submitted this 7th day of December, 2018.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ By SAT

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Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Notice of Appearance** by Phillip Strach was served via United States Mail, first-class, postage prepaid, upon the following:

Edwin M. Speas, Jr.
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Caroline P. Mackie
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Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

R. Stanton Jones
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Abha Khanna
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This, the 7th day of December, 2018.

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

/s/ SAT

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36608944.1

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2018 DEC -7 PM 3:13
WAKE COUNTY C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-14001

COMMON CAUSE, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, in his official capacity as Senior Chairman of the Senate Select Committee on Redistricting, *et al.*,

Defendants.

NOTICE OF APPEARANCE

Michael D. McKnight of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. enters his Notice of Appearance as counsel on behalf of all Defendants. Mr. McKnight is a member in good standing with the bar of the state of North Carolina.

Respectfully submitted this 7th day of December, 2018.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ FAT

Michael D. McKnight
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Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Attorneys for Defendants

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Notice of Appearance** by Michael McKnight was served via United States Mail, first-class, postage prepaid, upon the following:

Edwin M. Speas, Jr.
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Elisabeth S. Theodore
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Abha Khanna
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(206) 359-9000
akhanna@perkinscoie.com

This, the 7th day of December, 2018

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

by JAT

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Attorneys for Defendants

36608989.1

STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED

2018 DEC -7 P 4:46

WAKE CO., C.S.C.

BY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

Docket No. 18 CVS 014001

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DU BOSE 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; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; CARLTON E. CAMPBELL SR.,

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 ELECTIONS AND ETHICS ENFORCEMENT; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA

AMENDED COMPLAINT

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

STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

Plaintiffs, complaining of Defendants, say and allege:

INTRODUCTION

1. Partisan gerrymandering is an existential threat to our democracy, and nowhere more so than in North Carolina. Republicans in the North Carolina General Assembly have egregiously rigged the state legislative district lines to guarantee that their party will control both chambers of the General Assembly regardless of how the people of North Carolina vote. This attack on representative democracy and North Carolinians' voting rights is wrong. It violates the North Carolina Constitution. And it needs to stop.

2. In 2011, as part of a national movement by the Republican Party to entrench itself in power through redistricting, North Carolina Republicans' mapmaker manipulated district boundaries with surgical precision to maximize the political advantage of Republican voters and minimize the representational rights of Democratic voters. And it worked. In the 2012, 2014, and 2016 elections, Republicans won veto-proof super-majorities in both chambers of the General Assembly despite winning only narrow majorities of the overall statewide vote.

3. In 2017, after federal courts struck down some of the 2011 districts as illegal racial gerrymanders, Republicans redoubled their efforts to gerrymander the district lines on partisan grounds. They instructed the same Republican mapmaker to use partisan data and prior election results in drawing new districts. The results should outrage anyone who believes in democracy. In both the state House and state Senate elections in 2018, Democratic candidates won a majority of the statewide vote, but Republicans still won a substantial majority of seats in each chamber. The maps are impervious to the will of the voters.

4. It gets worse. Because North Carolina is one of the few states in the country where the Governor lacks power to veto redistricting legislation, the General Assembly alone

will control the next round of redistricting after the 2020 census. Accordingly, as things currently stand, the Republican majorities in the General Assembly elected under the current maps will have free reign to redraw both state legislative and congressional district lines for the next decade. This perpetuates a vicious cycle in which representatives elected under one gerrymander enact new gerrymanders both to maintain their control of the state legislature and to rig congressional elections for ten more years. Only the intervention of the judiciary can break this cycle and protect the constitutional rights of millions of North Carolinians.

5. The North Carolina Constitution prohibits partisan gerrymandering. This State's equal protection guarantees provide more robust protections for voting rights than the federal constitution. Specifically, "[i]t is well settled in this State that the right to vote *on equal terms* is a fundamental right." *Stephenson v. Bartlett*, 562 S.E.2d 377, 394 (N.C. 2002). There is nothing "equal" about the "terms" on which North Carolinians vote for candidates for the General Assembly. North Carolina's Constitution also commands that "all elections shall be free"—a provision that has no counterpart in the federal constitution. Elections to the North Carolina General Assembly are not "free" when the outcomes are predetermined by partisan actors sitting behind a computer. And the North Carolina Constitution's free speech and association guarantees prohibit the General Assembly from burdening the speech and associational rights of voters and organizations because the General Assembly disfavors their political views.

6. No matter how the U.S. Supreme Court resolves longstanding questions about partisan gerrymandering under the federal constitution, North Carolina's Constitution independently secures the rights of North Carolina citizens. This State's courts should not hesitate to enforce North Carolina's unique protections here. This Court should invalidate the 2017 Plans and order that new, fair maps be used for the 2020 elections.

PARTIES

A. Plaintiffs

7. Common Cause brings this action on its own behalf and on behalf of its members who are registered voters in North Carolina whose votes have been diluted or nullified under the districting plans enacted by the General Assembly in 2017 for the North Carolina House of Representatives and North Carolina Senate (the "2017 Plans"). Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nonpartisan democracy organization with over 1.2 million members and local organizations in 35 states, including North Carolina. Common Cause has members in every North Carolina House and Senate district, and has members who have suffered injury in every district that is gerrymandered under 2017 Plans. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform." Jonathan Winburn, The Realities of Redistricting p. 205 (2008). The 2017 Plans frustrate Common Cause's mission to promote participation in democracy and to ensure open, honest, and accountable government. The 2017 Plans burden Common Cause's ability to convince voters in gerrymandered districts to vote in state legislative elections and communicate with legislators. The 2017 Plans also burden Common Cause's ability to communicate effectively with legislators and to influence them to enact laws that promote voting, participatory democracy, public funding of elections, and other measures that encourage accountable government.

8. The North Carolina Democratic Party ("NCDP") brings this action on its own behalf and on behalf of its members who are registered voters in North Carolina whose votes have been diluted or nullified as a result of the gerrymandering of the 2017 Plans. The NCDP is

a political party as defined in N.C. Gen. Stat. § 163-96. Its purposes are (i) to bring people together to develop public policies and positions favorable to NCDP members and the public generally, (ii) to identify candidates who will support and defend those policies and positions, and (iii) to persuade voters to cast their ballots for those candidates. The NCDP has members in every North Carolina House and Senate district, and has members who have suffered injury in every district that is gerrymandered under 2017 Plans. The partisan gerrymanders under the 2017 Plans discriminate against the NCDP's members because of their past votes, their political views, and their party affiliations. The gerrymanders also discriminate against the NCDP itself on the basis of its viewpoints and affiliations, and the plans frustrate and burden NCDP's ability to achieve its essential purposes and to carry out its core functions, including registering voters, attracting volunteers, raising money in gerrymandered districts, campaigning, turning out the vote, and ultimately electing candidates who will pursue policies favorable to NCDP members and the public generally in the North Carolina General Assembly. The NCDP must expend additional funds and other resources than it would otherwise to combat the effects of the partisan gerrymanders under the 2017 Plans, and even then, the 2017 Plans make it impossible for Democrats to win a majority in either chamber of the legislature.

9. Plaintiff Paula Ann Chapman is a retired small business owner residing in Charlotte, North Carolina, within House District 100 and Senate District 40. Ms. Chapman is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 100 and Senate District 40 are both packed Democratic districts. In 2018, the Democratic candidate won these districts with over 70% and 75% of the vote.

10. Plaintiff Howard Du Bose Jr. is a retired school teacher and Army veteran residing in Hurdle Mills, North Carolina, within House District 2. Mr. Du Bose is a registered

Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed House District 32, which adjoins House District 2, to ensure that House District 2 would elect a Republican. In 2018, the Republican candidate won House District 2 with roughly 55% of the vote.

11. Plaintiff George David Gauck is a retired software engineer residing in Southport, North Carolina, within House District 17 and Senate District 8. Mr. Gauck is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 17 is adjacent to the packed Democratic House District 18. In 2018, the Republican candidate won House District 17 with over 63% of the vote. With respect to Senate District 8, a heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, Senate District 9 was a near tie, while Republicans won Senate District 8 by a comfortable margin.

12. Plaintiff James Mackin Nesbit is a retired kindergarten teacher residing in Wilmington, North Carolina, within House District 19 and Senate District 9. Mr. Nesbit is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 19 borders the packed Democratic House District 18. The Republican candidate has won every election in House District 19 since the 2011 redistricting, running unopposed in 2014 and 2016. With respect to Senate District 9, a heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, the election in Senate District 9 was a near tie.

13. Plaintiff Dwight Jordan is a customer support professional residing in Nashville, North Carolina, within House District 25 and Senate District 11. Mr. Jordan is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 25 is a packed Democratic district that was constructed to ensure that neighboring House District 7 would elect a Republican, which occurred in 2018. The county cluster encompassing Senate District 11 cracks Democratic voters across its three districts (10, 11, and 12). In 2018, the Republican candidate won Senate District 11 with roughly 56% of the vote.

14. Plaintiff Joseph Thomas Gates is a former Colonel in the Air Force and a retired information technology project manager residing in Weaverville, North Carolina, within House District 115 and Senate District 49. Mr. Gates is a registered unaffiliated voter who has consistently voted for Democratic candidates for the General Assembly. The General Assembly made House District 115 as competitive as possible for Republicans by packing the adjoining House District 114 with Democratic voters. Senate District 49 is a packed Democratic district that the Democratic candidate won in 2018 with Senate District 49 with over 63% of the vote.

15. Plaintiff Mark S. Peters is a retired physician assistant residing in Fletcher, North Carolina, within House District 116 and Senate District 48. Mr. Peters is a registered unaffiliated voter who has consistently voted for Democratic candidates for the General Assembly. The General Assembly made House District 116 as competitive as possible for Republicans by packing the adjoining House District 114 with Democratic voters. Senate District 48 was drawn to avoid the Democratic areas in and around Asheville to ensure that the district would lean Republican. In 2018, the Republican candidate won Senate District 48 by roughly 13 points.

16. Plaintiff Pamela Morton is a retired professional in the financial industry residing in Charlotte, North Carolina, within House District 100 and Senate District 37. Ms. Morton is a

registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 100 and Senate District 37 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 70% and 78% of the vote.

17. Plaintiff Virginia Walters Brien is a sales manager residing in Charlotte, North Carolina, within House District 102 and Senate District 37. Ms. Brien is a registered unaffiliated who has consistently voted for Democratic candidates for the General Assembly. House District 102 and Senate District 37 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 83% and 78% of the vote.

18. Plaintiff John Mark Turner is a Navy veteran and a system administrator residing in Raleigh, North Carolina, within House District 38 and Senate District 15. Mr. Turner is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 38 and Senate District 15 are both packed Democratic districts. In 2018, the Democratic candidates won these districts with over 81% and 73% of the vote.

19. Plaintiff Leon Charles Schaller is a retired safety and fire protection engineer residing in Burlington, North Carolina, within House District 64. Mr. Schaller is a registered unaffiliated voter who has consistently voted for Democratic candidates for the General Assembly. The county cluster that contains House Districts 63 and 64 was not changed in the 2017 Plans and retains the same district lines enacted in 2011. In constructing the cluster, the General Assembly cracked Democratic voters in Burlington across the two districts. Republican candidates have won every election in House District 64 since the 2011 redistricting—with over 58% of the vote in 2012 and 2018, and running unopposed in 2014 and 2016.

20. Plaintiff Rebecca Harper is a real estate agent residing in Cary, North Carolina, within House District 36 and Senate District 17. Ms. Harper is a registered Democrat who has

consistently voted for Democratic candidates for the General Assembly. The General Assembly packed several districts surrounding House District 36 with Democratic voters to make House District 36 as Republican as possible. In 2018, the Democratic candidate won House District 36 with barely over 50% of the two-party vote. The General Assembly similarly packed several districts surrounding Senate District 17 to make Senate District 17 as competitive for Republicans as possible. In 2018, the Democratic candidate narrowly won Senate District 17.

21. Plaintiff Lesley Brook Wischmann is a semi-retired writer and historian residing in Holly Ridge, North Carolina, within House District 15. Ms. Wischmann is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly cracked Democratic voters across House Districts 14 and 15. In 2018, the Republican candidate won House District 15 with roughly 66% of the vote.

22. Plaintiff David Dwight Brown is a retired computer systems analyst residing in Greensboro, North Carolina, within House District 58. Mr. Brown is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 58 is a packed Democratic district. In 2018, the Democratic candidate won House District 58 with over 76% of the vote.

23. Plaintiff Amy Clare Oseroff is a teacher residing in Greenville, North Carolina, within House District 8. Ms. Oseroff is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed Greenville's most heavily Democratic areas into House District 8 to create a strongly Democratic district, ensuring that nearby House Districts 9 and 12 would favor Republicans. In 2018, the Democratic candidate won House District 8 with over 64% of the vote.

24. Plaintiff Kristin Parker Jackson is a paralegal residing in Matthews, North Carolina, within House District 103 and Senate District 39. Ms. Jackson is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. The General Assembly packed Democrats into the districts surrounding House District 103 to make House District 103 as Republican-leaning as possible. In 2018, House District 103 was a virtual tie. The General Assembly made Senate District 39 a Republican-leaning district by packing its neighboring districts with Democratic voters. In 2018, the Republican candidate won Senate District 39 with roughly 53% of the vote.

25. Plaintiff John Balla is a digital marketing strategist residing in Raleigh, North Carolina, within House District 34 and Senate District 16. Mr. Balla is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly in every election since he moved to North Carolina. House District 34 and Senate District 16 are both packed Democratic districts. In 2018, the Democratic candidates won both districts with over 65% of the vote.

26. Plaintiff Rebecca Johnson is a retired educator residing in Winston-Salem, North Carolina, within House District 74 and Senate District 31. Ms. Johnson is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 74 adjoins two packed Democratic districts, allowing House District 74 to favor Republicans. In 2018, the Republican candidate won House District 74 with more than 54% of the vote. Senate District 31—which cradles Senate District 32, a packed Democratic district—leans Republican. In 2018, the Republican candidate won Senate District 31 with over 61% of the vote.

27. Plaintiff Aaron Wolff is a veterinarian residing in Holly Springs, North Carolina, within House District 37 and Senate District 17. Mr. Wolff is a registered Democrat who has

consistently voted for Democratic candidates for the General Assembly. The General Assembly packed as many Democrats as possible into the districts surrounding House District 37 and Senate District 17 to make these districts as favorable to Republicans as possible. In 2018, Democratic candidates won both districts with bare majorities.

28. Plaintiff Mary Ann Peden-Coviello is a writer and editor residing in Winston-Salem, North Carolina, within House District 72 and Senate District 32. Ms. Peden-Coviello is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly. House District 72 is a packed Democratic district. In 2018, the Democratic candidate won House District 72 with 79% of the vote. Senate District 32 is a packed Democratic district that was drawn to ensure that neighboring Senate District 31 would elect a Republican. In 2018, the Democratic candidate won Senate District 32 with 72% of the vote.

29. Plaintiff Kathleen Barnes is the owner of a small publishing company residing in Brevard, North Carolina, within House District 113 and Senate District 48. Ms. Barnes is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. The Democrats who reside in House District 113, like Ms. Barnes, were strategically placed in a different district from the Democratic voters around Hendersonville to ensure that Republicans were favored in both districts. In the 2018 elections, the Republican candidate won House District 113 with over 57% of the vote. Senate District 48 was similarly cracked, splitting the Democratic voters in Brevard from the strong base of Democratic voters in nearby Asheville so that Senate District 48 would be Republican-leaning. In 2018, the Republican candidate won Senate District 48 with over 56% of the vote.

30. Plaintiff Karen Sue Holbrook is a retired psychology professor residing in Southport, North Carolina, within House District 17 and Senate District 8. Dr. Holbrook is a

registered Democrat who has consistently voted for Democratic candidates for the General Assembly. In the county cluster containing House District 17, the General Assembly packed Democratic voters into House District 18 to make House District 17 and the other districts in the cluster lean Republican. In 2018, the Republican candidate won House District 17 with over 63% of the vote. With respect to Senate District 8, a heavily Democratic area in Wilmington is extracted from Senate District 9 and placed in Senate District 8 to make Senate District 9 as competitive as possible for Republicans. As a result, in 2018, Senate District 9 was a near tie, while Republicans won Senate District 8 with a comfortable margin.

31. Plaintiff Ann McCracken is a retired English instructor residing in Sanford, North Carolina, within House District 51 and Senate District 12. Ms. McCracken is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 51 and Senate District 12 are both cracked districts favoring Republicans, with the Republican candidates having won 53% and 60% of the vote in 2018.

32. Plaintiff Jackson Thomas Dunn, Jr. is a retired attorney and law professor residing in Charlotte, North Carolina, within House District 104 and Senate District 39. Mr. Dunn is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. The General Assembly manipulated House District 104 to be as competitive as possible for Republicans, with the Democratic candidate winning by just a few points in 2018. The General Assembly made Senate District 39 a Republican-leaning district by packing its neighboring districts with Democratic voters. In 2018, the Republican candidate won Senate District 39 with roughly 53% of the vote.

33. Plaintiff Alyce Machak is an app programmer residing in Gastonia, North Carolina, within House District 109. Ms. Machak is a registered Democrat who has consistently

voted for Democratic candidates for the North Carolina General Assembly. The county cluster containing House District 109 cracks the Democratic stronghold of Gastonia across House Districts 108, 109, and 110, ensuring that Democrats do not win any of those districts. In 2018, the Republican candidate won House District 109 with 59% of the vote.

34. Plaintiff William Service is a semi-retired environmental consultant residing in Raleigh, North Carolina, within House District 34 and Senate District 18. Mr. Service is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 34 is a packed Democratic district, with the Democratic candidate having won over 65% of the vote in 2018. Senate District 18 adjoins several packed Democratic districts, and the General Assembly manipulated the district lines of Senate District 18 to squeeze in as many Republican voters as possible. The Republican candidate won Senate District 18 by less than three percentage points in 2018.

35. Plaintiff Donald Rumph is an Army and Air Force combat veteran and retired registered nurse residing in Greenville, North Carolina, within House District 9. Mr. Rumph is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 9 is a Republican district because the General Assembly packed Democratic voters into the adjoining House District 8. In 2018, the Republican candidate won House District 9 with nearly 60% of the vote.

36. Plaintiff Stephen Douglas McGrigor is employed in the emergency power supply system industry and resides in Youngsville, North Carolina, within House District 7 and Senate District 18. Mr. McGrigor is a registered unaffiliated voter who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 7 was carefully constructed to be a Republican district. In 2018, the Republican candidate won House District 7

with 58% of the vote. Senate District 18 adjoins several packed Democratic districts, and the General Assembly manipulated the district lines of Senate District 18 to squeeze in as many Republican voters as possible. The Republican candidate won Senate District 18 by less than three percentage points in 2018.

37. Plaintiff Nancy Bradley is a state government benefits eligibility official residing in Raleigh, North Carolina, within House District 35 and Senate District 14. Ms. Bradley is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 35 was constructed to be as competitive for Republicans as possible, with the Democratic candidate having won a narrow victory in 2018. Senate District 14 is a packed Democratic district that the Democratic candidate won with over 71% of the vote in 2018.

38. Plaintiff Vinod Thomas is a teacher at the Davidson Center for Learning and Academic Planning residing in Cornelius, North Carolina, within House District 98 and Senate District 41. Mr. Thomas is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. The General Assembly made both House District 98 and Senate District 41 as competitive for Republicans as possible by packing their adjoining districts with Democratic voters.

39. Plaintiff Derrick Miller is a professor residing in Wilmington, North Carolina, within House District 18 and Senate District 8. Dr. Miller is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 18 is a packed Democratic district that the Democratic candidate won in 2018 with over 62% of the vote. With respect to Senate District 8, a heavily Democratic area in Wilmington—where Dr. Miller resides—is extracted from Senate District 9 and placed in Senate District 8 to

waste the votes of these Democratic votes in Senate District 8 and make Senate District 9 as competitive as possible for Republicans. In 2018, the Republican candidate won Senate District 8 with over 58% of the vote.

40. Plaintiff Electa E. Person is a retired NASA management analyst and Air Force veteran residing in Fayetteville, North Carolina, within House District 43. Ms. Person is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 43 is a packed Democratic district that the Democratic candidate won with over 74% of the vote in 2018.

41. Plaintiff Deborah Anderson Smith is an Army veteran and retired educator residing in Kannapolis, North Carolina, within House District 83. Ms. Smith is a registered unaffiliated voter who has consistently voted for Democratic candidates for the North Carolina General Assembly. Kannapolis and its Democratic voters are cracked across House Districts 77, 82, and 83, ensuring that Republicans win each seat. In 2018, the Republican candidate won House District 83 by just five percentage points.

42. Plaintiff Rosalyn Sloan is a registered nurse residing in New London, North Carolina, within House District 67. Ms. Sloan is a registered unaffiliated voter who has consistently voted for Democratic candidates for the North Carolina General Assembly. The General Assembly constructed House Districts 66 and 67 to make House District 66 as competitive for Republicans as possible while keeping House 67 a safe Republican seat. In 2018, the Republican candidate won House District 67 with over 72% of the vote.

43. Plaintiff Julie Ann Frey is a retired bank employee residing in Monroe, North Carolina, within House District 69. Ms. Frey is a registered unaffiliated voter who has consistently voted for Democratic candidates for the North Carolina General Assembly. Monroe

and its Democratic voters are cracked between House Districts 68 and 69, ensuring that Republicans win both districts. In 2018, the Republican candidate won House District 69 with roughly 60% of the vote.

44. Plaintiff Lily Nicole Quick is a homemaker residing in Greensboro, North Carolina, within House District 59. Ms. Quick is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. The General Assembly packed House Districts 58 and 60 to ensure that Republicans win House District 59. In 2018, the Republican candidate won House District 59 with over 56% of the vote.

45. Plaintiff Joshua Brown is a water quality technician residing in High Point, North Carolina, within House District 60 and Senate District 26. Mr. Brown is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. House District 60 is a packed Democratic district that the Democratic candidate won with over 69% of the vote in 2018. Senate District 26 grabs the heavily Democratic areas in and around High Point, wasting the votes of these Democratic voters (such as Mr. Brown) in an overwhelmingly Republican district. In 2018, the Republican candidate won Senate District 26 with nearly 65% of the vote.

46. Plaintiff Carlton E. Campbell Sr. is a retired teacher residing in Whiteville, North Carolina, within House District 46. Mr. Campbell is a registered Democrat who has consistently voted for Democratic candidates for the North Carolina General Assembly. The General Assembly cracked Democratic voters across House Districts 46 and 16, and packed Democratic voters in the neighboring House District 47, ensuring that House District 46 would elect a Republican. In 2018, the Republican candidate won House District 46 with over 63% of the vote.

B. Defendants

47. Defendant David R. Lewis is a member of the North Carolina House of Representatives, representing House District 53, and the Senior Chairman of the House Select Committee on Redistricting. Defendant Lewis is sued in his official capacity only.

48. Defendant Ralph E. Hise, Jr. is a member of the North Carolina Senate, representing Senate District 39, and the Chairman of the Senate Standing Committee on Redistricting. Defendant Hise is sued in his official capacity only.

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

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

51. Defendant the State of North Carolina has its capital in Raleigh, North Carolina.

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

53. Defendant Joshua Malcolm is the Chairman of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Malcolm is sued in his official capacity only.

54. Defendant Ken Raymond is the Secretary of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Raymond is sued in his official capacity only.

55. Defendant Stella Anderson is a member of the North Carolina State Board of Elections and Ethics Enforcement. Ms. Anderson is sued in her official capacity only.

56. Defendant Damon Circosta is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Circosta is sued in his official capacity only.

57. Defendant Stacy "Four" Eggers IV is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Eggers is sued in his official capacity only.

58. Defendant Jay Hemphill is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Hemphill is sued in his official capacity only.

59. Defendant Valerie Johnson is a member of the North Carolina State Board of Elections and Ethics Enforcement. Ms. Johnson is sued in her official capacity only.

60. Defendant John Lewis is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Lewis is sued in his official capacity only.

61. Defendant Robert Cordle is a member of the North Carolina State Board of Elections and Ethics Enforcement. Mr. Cordle is sued in his official capacity only.

JURISDICTION AND VENUE

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

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

64. Under N.C. Gen. Stat. § 1-267.1, a three-judge court must be convened because this action challenges the validity of redistricting plans enacted by the General Assembly.

FACTUAL ALLEGATIONS

A. National Republican Party Officials Target North Carolina For Partisan Gerrymandering Prior to the 2010 Elections

65. In the years leading up to the 2010 decennial census, national Republican leaders undertook a sophisticated and concerted effort to gain control of state governments in critical swing states such as North Carolina. The Republican State Leadership Committee (RSLC) codenamed the plan "the REDistricting Majority Project" or "REDMAP." REDMAP's goal was

to "control[] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn" after the 2010 census. The RSLC's REDMAP website explained that fixing these district lines in favor of Republicans would "solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."

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

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

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

B. Republican Mapmakers Create the 2011 Plans from Party Headquarters

69. After taking control of both chambers of the General Assembly, Republicans set out to redraw district lines to entrench Republicans in power. The RSLC's President and CEO, Chris Jankowski, sent a letter to officials in Republican-controlled states (including North Carolina) offering the RSLC's assistance with the upcoming redistricting. Jankowski explained that the RSLC had "taken the initiative to retain a team of seasoned redistricting experts," and the RSLC would happily make this team "available to" the Republican state officials.

Jankowski noted that RSLC's expert "redistricting team" was "led by Tom Hofeller," who had been the principal redistricting strategist for the Republican Party for decades.

70. Republicans leaders in the North Carolina General Assembly took Jankowski up on his offer. The drawing of the new North Carolina House and Senate plans (the "2011 Plans") was not done by any committee or subcommittee of the General Assembly. Instead, it was primarily done by four Republican Party operatives: (1) Hofeller; (2) John Morgan, another national Republican mapmaker and longtime associate of Hofeller, (3) Dale Oldham, an attorney who served as counsel to the Republican National Committee; and (4) Joel Raupe, a former aide to several Republican representatives in the North Carolina Senate. A newly created shadow organization known as "Fair and Legal Redistricting North Carolina" paid for Morgan's and Raupe's work, while Hofeller was paid with a combination of state funds and money from the RSLC's non-profit arm the State Government Leadership Foundation.

71. Hofeller and his team worked out of the basement of the state Republican Party headquarters on Hillsborough Street in Raleigh. They did not use a government computer to create the new plans. Rather, they created the new plans using computers owned by the Republican National Committee and software licensed by the state Republican Party.

72. The map-making process was shielded from public view. Only a small group of individuals that included Hofeller's team and Republican leaders in the General Assembly saw the first drafts of the maps before they were publicly released in June 2011.

73. One person who was allowed to directly participate in the map-drawing process was mega-donor Art Pope. Despite not being a practicing lawyer, Pope served as "pro bono" counsel to the state legislature and met several times with Hofeller and his team at Republican

Party headquarters while they were working on the new plans. Pope even proposed specific changes to certain districts.

74. Although Republicans drew their maps in secret, their intentions were clear as day. Their goal was to maximize the number of seats Republicans would win in the General Assembly through whatever means necessary.

75. Hofeller later admitted that, in creating the 2011 Plans, his team used past election results in North Carolina to predict the "partisan voting behavior" of the new districts. Republican leaders in the General Assembly likewise later admitted in court filings that "[p]olitical considerations played a significant role in the enacted [2011] plans," and that the plans were "designed to ensure Republican majorities in the House and Senate." *Dickson v. Rucho*, No. 201PA12-3, 2015 WL 4456364, at *16, 55 (N.C. July 13, 2015). The Republican leaders asserted that they were "perfectly free" to engage in partisan gerrymandering, and that they had done just that in constructing the 2011 Plans. *Dickson v. Rucho*, No. 201PA12-2, 2013 WL 6710857, at *60 (N.C. Dec. 9, 2013).

C. Republicans Enact the 2011 Plans To Entrench Their Party's Political Power

76. The General Assembly adopted the Hofeller-drawn plans in July 2011, designated HB 937 and SB 45 respectively. Not a single Democrat in the General Assembly voted for either plan, and only one Republican representative voted against them.

77. Shortly thereafter, legislators learned that certain census blocks were not assigned to any district in the enacted plans. In November 2011, the General Assembly passed curative House and Senate plans, designated HB 776 and SB 282 respectively, to add the previously omitted blocks. No Democrat voted for either curative plan.

D. The 2011 Plans Gave Republicans Super-Majorities That Were Grossly Disproportionate to Republicans' Share of the Statewide Vote

78. The 2011 Plans achieved exactly the effect that Republicans in the General Assembly intended. In the 2012 election, the parties' vote shares for the North Carolina House of Representatives were nearly evenly split across the state, with Democrats receiving 48.4% of the two-party statewide vote. But Democrats won only 43 of 120 seats (36%). In other words, Republicans won a veto-proof majority in the state House—64% of the seats (77 of 120)—despite winning just a bare majority of the statewide vote. Further, because of the rigging of district lines, 53 of the 120 House races were uncontested.

79. In the 2012 Senate elections, Democrats won nearly half of the statewide vote (48.8%), but won only 18 of 50 seats (36%). Republicans thus won a veto-proof majority in the Senate while winning only a tiny majority of the total statewide vote.

80. In 2014, Republican candidates for the House won 54.4% of the statewide vote, and again won a super-majority of seats (74 of 120, or 61.6%). Over half of the House seats, 62 of 120, went uncontested in 2014.

81. In the 2014 Senate elections, Republicans won 54.3% of statewide vote and 68% of the seats (34 of 50). There were 21 uncontested elections in the Senate in 2014, with Republicans winning 12 uncontested districts and Democrats winning 9.

82. In 2016, Republicans again won 74 of 120 House seats, or 62%, this time with 52.6% of the statewide vote. Nearly half of all of the House seats were uncontested (59 of 120).

83. In the 2016 Senate elections, Republicans won 55.9% of the statewide vote and 70% of the seats (35 of 50). Republicans held 12 uncontested seats compared to 6 for Democrats, for a total of 18 uncontested races.

84. The below charts summarizes the election results under the 2011 Plans:

	House		Senate	
Year	Republican Percentage of Statewide Vote	Republican Percentage of Seats Won	Republican Percentage of Statewide Vote	Republican Percentage of Seats Won
2012	51.6%	64.2% (77 of 120)	51.2%	64.0% (32 of 50)
2014	54.4%	61.6% (74 of 120)	54.3%	68.0% (34 of 50)
2016	52.6%	61.6% (74 of 120)	55.9%	70.0% (35 of 50)

E. A Federal Court Strikes Down Many Districts as Racially Gerrymandered

85. The 2011 Plans led to substantial litigation, including the federal lawsuit styled *Covington v. North Carolina*, No. 1:15-CV-00399 (M.D.N.C.). In *Covington*, the plaintiffs challenged 19 districts in the North Carolina House (5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107) and 9 districts in the North Carolina Senate (4, 5, 14, 20, 21, 28, 32, 38, and 40). They alleged that race predominated in the drawing of these districts, in violation of the federal Equal Protection Clause. In August 2016, the federal district court found for the plaintiffs as to all of the challenged districts, but permitted the General Assembly to wait until after the November 2016 elections to enact remedial plans. *Covington v. North Carolina*, 316 F.R.D. 176, 176-78 (M.D.N.C. 2016). The U.S. Supreme Court summarily affirmed this decision. 137 S. Ct. 2211 (2017).

86. In a subsequent order, the district court gave the General Assembly a deadline of September 1, 2017 to enact new House and Senate plans remedying the racial gerrymanders the court had found. *Covington v. North Carolina*, 267 F. Supp. 3d 664 (M.D.N.C. 2017).

F. The General Assembly Enacts the 2017 Plans To Dilute the Voting Power of Democratic Voters and Maximize the Political Advantage of Republicans

87. The General Assembly began developing new House and Senate plans in June 2017. On June 30, 2017, Senator Berger appointed 15 senators—10 Republicans and 5 Democrats—to the Senate Committee on Redistricting. Senator Hise was appointed Chair.

88. Also on June 30, 2017, Representative Moore appointed 41 House members—28 Republicans and 13 Democrats—to the House Select Committee on Redistricting. Representative Lewis was appointed Senior Chair.

89. At a July 26, 2017 joint meeting of the House and Senate Redistricting Committees, Representative Lewis and Senator Hise disclosed that Republican leadership would again employ Dr. Hofeller to draw the new House and Senate plans. When Democratic Senator Terry Van Duyn asked whether Hofeller would "be available to Democrats and maybe even the Black Caucus to consult," Representative Lewis answered "no." Joint Comm. Hr'g, July 26, 2017, at 22-23. Representative Lewis explained that, "with the approval of the Speaker and the President Pro Tem of the Senate," "Dr. Hofeller is working as a consultant to the Chairs," *i.e.*, as a consultant only to Representative Lewis and Senator Hise. *Id.* at 23.

90. In overseeing the 2016 redrawing of North Carolina's congressional districts, Representative Lewis had previously explained that Hofeller is "very fluent in being able to help legislators translate their desires" into the district lines, and that Representative Lewis' "desires" are to elect as many Republicans as possible. Representative Lewis said about the newly created congressional districts: "I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country."

91. On August 4, 2017, at another joint meeting of the House and Senate Redistricting Committees, Representative Lewis and Senator Hise advised Committee members that the *Covington* decision invalidating 28 districts on federal constitutional grounds had rendered a large number of additional districts invalid under the Whole County Provision of the North Carolina Constitution, and those districts would also have to be redrawn.

92. At this meeting, the Committees allowed 31 citizens to speak for two minutes each about the manner in which the House and Senate maps should be redrawn. All speakers urged the members to adopt fair maps free of partisan bias. The Committees ignored them.

93. At another joint meeting on August 10, 2017, the House and Senate Redistricting Committees voted on criteria to purportedly govern the new plans.

94. Representative Lewis proposed as one criterion: "election data[:] political consideration and election results data may be used in drawing up legislative districts in the 2017 House and Senate plans." Joint Comm. Hr'g, Aug. 10, 2017, at 132. Representative Lewis provided no further explanation or justification for this criterion in introducing it, stating only: "I believe this is pretty self-explanatory, and I would urge members to adopt the criteria." *Id.*

95. Democratic members repeatedly pressed Representative Lewis for details on how Hofeller would use the elections data and for what purpose. Senator Clark asked, for instance: "You're going to collect the political data. What specifically would the Committee do with it?" *Id.* at 135. Representative Lewis answered that "the Committee could look at the political data as evidence to how, perhaps, votes have been cast in the past." *Id.* When Senator Clark inquired why the Committees would consider election results if not to predict *future* voting behavior, Representative Lewis offered no substantive answer, stating only that "the consideration of political data in terms of election results is an established districting criteria, and it's one that I propose that this committee use in drawing the map." *Id.* at 141.

96. The House and Senate Committees adopted the "election data" criterion on a party-line vote. *Id.* at 141-48. No Democrat on the Committees voted for the criterion, but all 32 Republican members of the Committees did. *Id.*

97. Representative Lewis disclosed that the specific election results that Hofeller would use were the U.S. Senate election in 2010, the elections for President, Governor, and Lieutenant Governor in 2012, the U.S. Senate election in 2014, and the elections for President, U.S. Senate, Governor, Lieutenant Governor, and Attorney General in 2016. *Id.* at 137-38.

98. Senator Clark proposed an amendment that would prohibit the General Assembly from seeking to maintain or establish a partisan advantage for any party in redrawing the plans. *Id.* at 166-67. Representative Lewis opposed the amendment without explanation, stating only that he "would not advocate for [its] passage." *Id.* at 167. The Committees rejected Senator Clark's proposal on a straight party-line vote. *Id.* at 168-74.

99. As a further criterion, Representative Lewis proposed incumbency protection. Specifically, he proposed that "reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in [the] 2017 House and Senate plans." *Id.* at 119.

100. Representative Darren Jackson objected to protecting incumbents who were elected under the unconstitutional prior maps. *Id.* at 120. Senator Van Duyn likewise stated that new districts "should represent the voters and not elected officials," and therefore she "fundamentally believe[d] that incumbency should not be a criteria." *Id.* at 123.

101. The House and Senate Committees adopted the incumbency-protection criterion on a straight-party line vote. *Id.* at 125-32. All 32 Republican members of the Committees voted in favor, and all 18 Democratic members voted against. *Id.*

102. The Committees also adopted as criteria, along straight party-line votes, that the Committees would make "reasonable efforts" to split fewer precincts than under the 2011 Plans,

and that the Committees "may consider municipal boundaries" in drawing the new districts. *Covington*, *id.* at 66, 79, 98-104, 112-19.

103. As a final criterion, Representative Lewis proposed that the Committees be prohibited from considering racial data in drawing the new House and Senate plans. *Covington*, ECF 184-9 at 148. Representative Lewis and other Republican leaders thus explicitly asserted that no districts would be drawn with the goal of complying with Section 2 of the Voting Rights Act. *See id.* at 157. Republican leaders added in a later court filing 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." *Covington*, ECF No. 184 at 10.

104. The full criteria adopted by the Committees for the 2017 Plans read as follows:

> Equal Population. The Committees shall use the 2010 federal decennial census data as the sole basis of population for drawing legislative districts in the 2017 House and Senate plans. 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).
>
> Contiguity. Legislative districts shall be comprised of contiguous territory. Contiguity by water is sufficient.
>
> County Groupings and Traversals. The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E. 2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.
>
> Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that improve the compactness of the current districts. In doing so, the Committees 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).

> Fewer Split Precincts. The Committees shall make reasonable efforts to draw legislative districts in the 2017 House and Senate plans that split fewer precincts than the current legislative redistricting plans.
>
> Municipal Boundaries. The Committees may consider municipal boundaries when drawing legislative districts in the 2017 House and Senate plans.
>
> Incumbency Protection. Reasonable efforts and political considerations may be used to avoid pairing incumbent members of the House or Senate with another incumbent in legislative districts drawn in the 2017 House and Senate plans. The Committees may make reasonable efforts to ensure voters have a reasonable opportunity to elect non-paired incumbents of either party to a district in the 2017 House and Senate plans.
>
> Election Data. Political considerations and election results data may be used in the drawing of legislative districts in the 2017 House and Senate plans.
>
> 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.

Covington, ECF No. 184-37.

105. Republican leaders in the General Assembly "did not introduce any evidence regarding what additional instructions, if any, Representative Lewis or Senator Hise provided to Dr. Hofeller about the proper use and weighting of the various criteria." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 418 (M.D.N.C. 2018). "Nor did they offer any evidence as to how Dr. Hofeller weighted or ordered the criteria in drawing the proposed remedial maps, either in general or as to any particular district." *Id.*

106. As in 2011, no committee or subcommittee of the General Assembly participated in drawing the new maps. Instead, Hofeller again drew the maps in secret, under the direction of Representative Lewis and Senator Hise. Representative Lewis would admit that he "primarily . . . directed how the [House] map was produced," and that he, Hofeller, and Representative Nelson

Dollar were the only "three people" who had even "seen it prior to its public publication." N.C. House Floor Session Hr'g, Aug. 28, 2017, at 40.

107. And as in 2011, Hofeller did not use a government computer in creating the new districts. On information and belief, he used a personal computer instead.

108. Representative Lewis and Senator Hise released the proposed House and Senate plans on August 21, 2017.

109. At a Senate Redistricting Committee hearing three days later, Senate Van Duyn asked Senator Hise how the prior elections data had been used in drawing the proposed maps. Senator Hise admitted that they "did make partisan considerations when drawing particular districts." Senate Comm. Hr'g, Aug. 24, 2017, at 26.

110. Outside expert analyses confirmed that the proposed maps were gerrymandered to favor Republicans. The Campaign Legal Center calculated the "efficiency gap" of the proposed plans. The efficiency gap measures how efficiently a party's voters are distributed across districts. For each party, the efficiency gap calculates that party's number of "wasted" votes, defined as the number of votes cast for losing candidates of that party (as a measure of cracked votes) plus the number of votes cast for winning candidates in excess of 50% (as a measure of packed votes). The lower each of these numbers, the fewer wasted votes and the more likely a party is to win additional seats. The efficiency gap equals the difference in the total wasted votes between the two parties, divided by the total number of votes cast in the election. Using the same elections data that the Committees used to develop the proposed maps, the Campaign Legal Center calculated that the proposed House plan had an efficiency gap of 11.98% in Republicans' favor, and the proposed Senate plan had an efficiency gap of 11.87% in Republicans' favor.

Covington, ECF No. 187-3 at 2. The Campaign Legal Center explained that, "[b]y historical standards, these are extraordinarily large figures, revealing an enormous Republican edge." *Id.*

111. Other statistical analyses found the same. Dr. Gregory Herschlag, a professor of mathematics at Duke University, created tens of thousands of alternative, non-partisan Senate districting configurations within Wake, Mecklenburg, Cumberland, and Guilford Counties. Dr. Herschlag created these simulated districting plans using the traditional districting criteria of equal population, compactness, avoiding splitting precincts, and contiguity. *Covington*, ECF No. 187-3 at 10 ¶ 6. Dr. Herschlag then compared the expected outcomes under these simulated districts with those under the Republican leaders' proposed districts in the same counties. Dr. Herschlag found that, using the votes cast in the 2012 and 2016 Presidential elections, the 2014 and 2016 U.S. Senate elections, the 2012 and 2014 U.S. House of Representatives elections, and the 2016 Governor election to predict partisan outcomes, the Republicans leaders' proposed districts were more favorable to Republicans than 99.9% of the non-partisan simulations. *Id.* ¶ 12. Plaintiffs in this case will show that similar results hold across the state.

112. The extreme partisan bias of the proposed plans was also apparent from the elections data that the House and Senate Redistricting Committees themselves released with the proposals. The Committees provided data on the partisan breakdown of each proposed district using the state and federal elections that the Committees considered in drawing the districts.

113. The chart below shows the number of House districts Republicans would be expected to win under the Committees' House plan when overlaying the results of each election the General Assembly considered. These expected seats approximate the number of seats Republicans actually won under the 2011 House plan (77 in 2012, 74 in 2014, and 74 in 2016).

Election	Expected Republican Seats Under Committees' House Plan
2010 U.S. Senate	82
2012 Lieutenant Governor	74
2012 Governor	72
2012 President	78
2014 U.S. Senate	76
2016 Attorney General	77
2016 Lieutenant Governor	79
2016 Governor	72
2016 U.S. Senate	79
2016 President	76

114. The following chart shows the number of Senate districts Republicans would be expected to win under the Committees' Senate plan when overlaying the results of each of the elections that the General Assembly considered. These expected Republican seats approximate the number of seats Republicans actually won under the 2011 Senate plan (which were 32, 34, and 35 seats in 2012, 2014, and 2016 respectively).

Election	Expected Republican Seats Under Committees' Senate Plan
2010 U.S. Senate	35
2012 Lieutenant Governor	31
2012 Governor	33
2012 President	33
2014 U.S. Senate	33
2016 Attorney General	31
2016 Lieutenant Governor	34
2016 Governor	32
2016 U.S. Senate	34
2016 President	33

115. Thus, for example, overlaying the results of the 2014 U.S. Senate election over the Committees' proposed districts, Republicans would win 76 of the 120 proposed House districts and 33 of the 50 proposed Senate districts. Republicans would win these massive landslides in both chambers even though the 2014 U.S. Senate election was nearly a tie statewide—the Republican candidate won by only 1.5 percentage points.

116. Of the roughly 4,300 public comments received by the General Assembly about the 2017 redistricting process, more than 99% reflected opposition to gerrymandering. For example, the author of the first written comment submitted to the Committees said: "I strongly encourage the North Carolina General Assembly to adopt new maps that are fair and open, that avoid racial or partisan gerrymandering, and that allow voters to pick their political representatives, not the other way around." Other comments made the same plea.

117. But the Committees ignored the will of the people and forged ahead. On August 24, 2017, on a straight party-line vote, the Senate Redistricting Committee adopted the Senate map crafted by Hofeller without modification. The next day, the House Redistricting Committee adopted Hofeller's proposed House plan without modification, also on a straight party-line vote.

118. On August 28, 2017, during a House floor debate on the proposed House map, an amendment modifying some districts in Wake County was approved by a largely party-line vote.

119. On August 31, 2017, the General Assembly passed the House plan (designated HB 927) and the Senate plan (designated SB 691), with a few minor modifications from the versions passed by the Committees. No Democratic Senator voted in favor of either plan. The sole Democratic member of the House who voted for the plans was Representative William Brisson, who switched to become a Republican several months later.

120. The 2017 Plans passed by the General Assembly altered at least 106 of the 170 total House and Senate districts from the 2011 Plans. *Covington*, 283 F. Supp. 3d at 418.

G. The *Covington* Court Appoints a Special Master To Redraw Several Districts in the 2017 Plans That Remained Racially Gerrymandered

121. The *Covington* plaintiffs objected to the new plans, arguing that the plans did not cure the racial gerrymanders in two House districts (21 and 57) and two Senate districts (21 and 28). *Covington*, 283 F. Supp. 3d at 429. The court agreed. *Id.* at 429-42. The court further held

that the General Assembly's changes to five House districts (36, 37, 40, 41, and 105) violated the North Carolina Constitution's prohibition on mid-decade redistricting. *Id.* at 443-45.

122. The *Covington* plaintiffs also stated that the new plans were blatant partisan gerrymanders. But given the remedial stage of the case, the plaintiffs did not "raise any partisan gerrymandering objections," and the court "[did] not address whether the 2017 Plans are unconstitutional partisan gerrymanders." *Covington*, 283 F. Supp. 3d at 429 n.2.

123. The court appointed Dr. Nathaniel Persily as a Special Master to assist in redrawing the districts for which the court had sustained the plaintiffs' objections. To cure the racially gerrymandered districts, the Special Master needed to adjust not only those districts, but also certain districts adjoining them. In his recommended remedial plans submitted to the court on December 1, 2017, the Special Master made material adjustments to House Districts 22, 59, 61, and 62 in redrawing House Districts 21 and 57, and made material adjustments to Senate Districts 19, 24, and 27 in redrawing Senate Districts 21 and 28. *Covington*, ECF No. 220 at 30-55. The court adopted the Special Master's recommended changes to all of these districts.

124. The Special Master also restored the districts that the court had found were redrawn in violation of the ban on mid-decade redistricting to the 2011 versions of those districts. *Covington*, ECF No. 220 at 56-66. The court adopted these changes as well.

125. On June 28, 2018, the U.S. Supreme Court affirmed the lower court's adoption of the Special Master's remedial plans for House Districts 21 and 57 (and the relevant adjoining districts) and Senate Districts 21 and 28 (and the relevant adjoining districts). *North Carolina v. Covington*, 138 S. Ct. 2548, 2553-54 (2018). But the U.S. Supreme Court reversed the district court's adoption of the Special Master's plans for the districts allegedly enacted in violation of the mid-decade redistricting prohibition, finding that the district court had exceeded its remedial

authority in rejecting newly enacted districts on this basis. *Id.* at 2554-55. Plaintiffs do not challenge in this case any district materially redrawn by the Special Master that remains in effect.

H. The 2017 Plans Pack and Crack Plaintiffs and Other Democratic Voters To Dilute Their Votes and Maximize the Political Advantage of Republicans

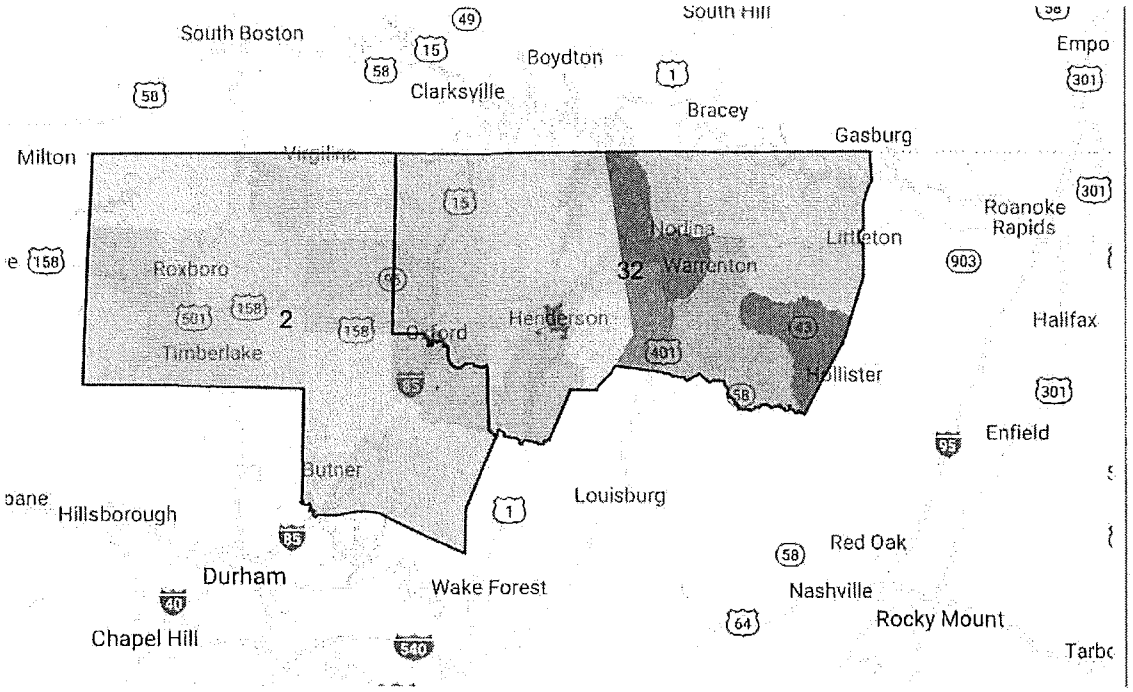
126. To maximize the number of Republican seats in the General Assembly, the 2017 Plans meticulously "pack" and "crack" Democratic voters. Packing and cracking are the two primary means by which mapmakers carry out a partisan gerrymander. "Packing" involves concentrating one party's backers in a few districts that they will win by overwhelming margins to minimize the party's votes elsewhere. "Cracking" involves dividing a party's supporters among multiple districts so that they fall comfortably short of a majority in each district.

127. The sections below set forth some of the examples of packing and cracking of Democratic voters in each of the 2017 Plans.

1. The 2017 House Plan Packs and Cracks Democratic Voters

House Districts 2 and 32

128. House Districts 2 and 32 are within a county cluster of Person, Granville, Vance, and Warren Counties.

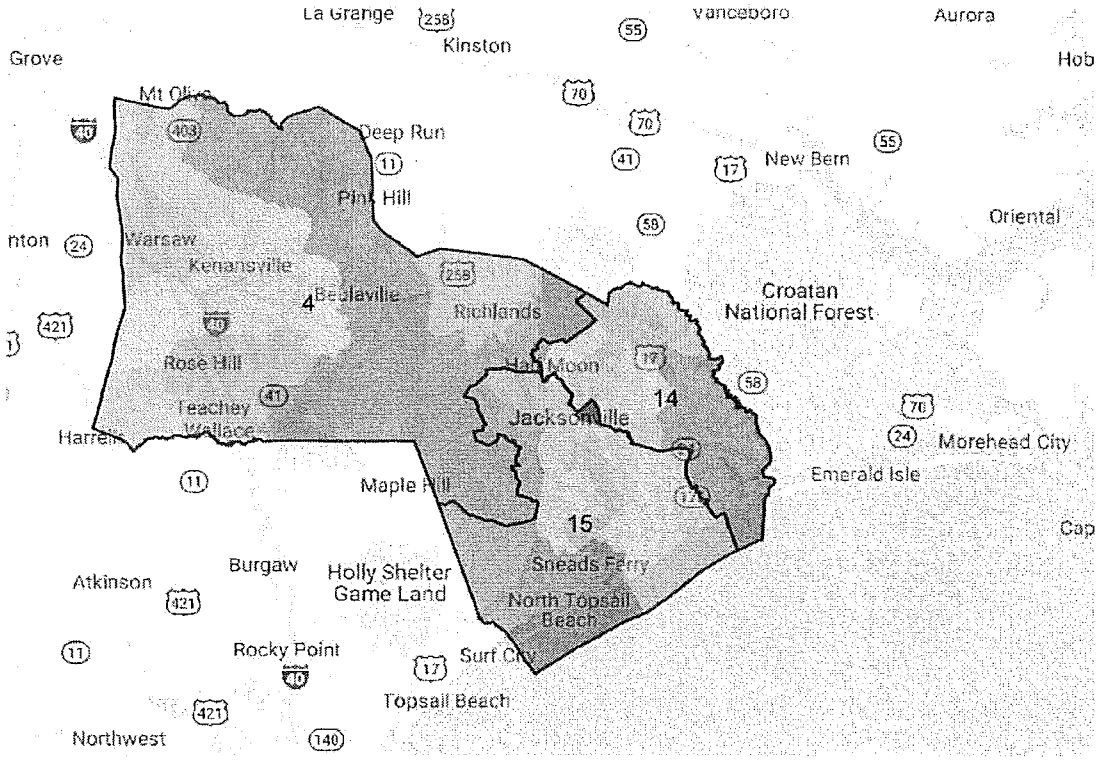


129. As shown in the image above,[1] in drawing the two districts within this cluster, the General Assembly packed the Democratic voters in and around Oxford with the Democratic voters in Henderson and in municipalities east of Henderson such as Warrenton and Norlina. This packing made House District 32 an overwhelmingly Democratic district in order to ensure that House District 2 would be a Republican-leaning district.

House Districts 4, 14, and 15

130. House Districts 4, 14, and 15 are within a county cluster containing Duplin and Onslow Counties.

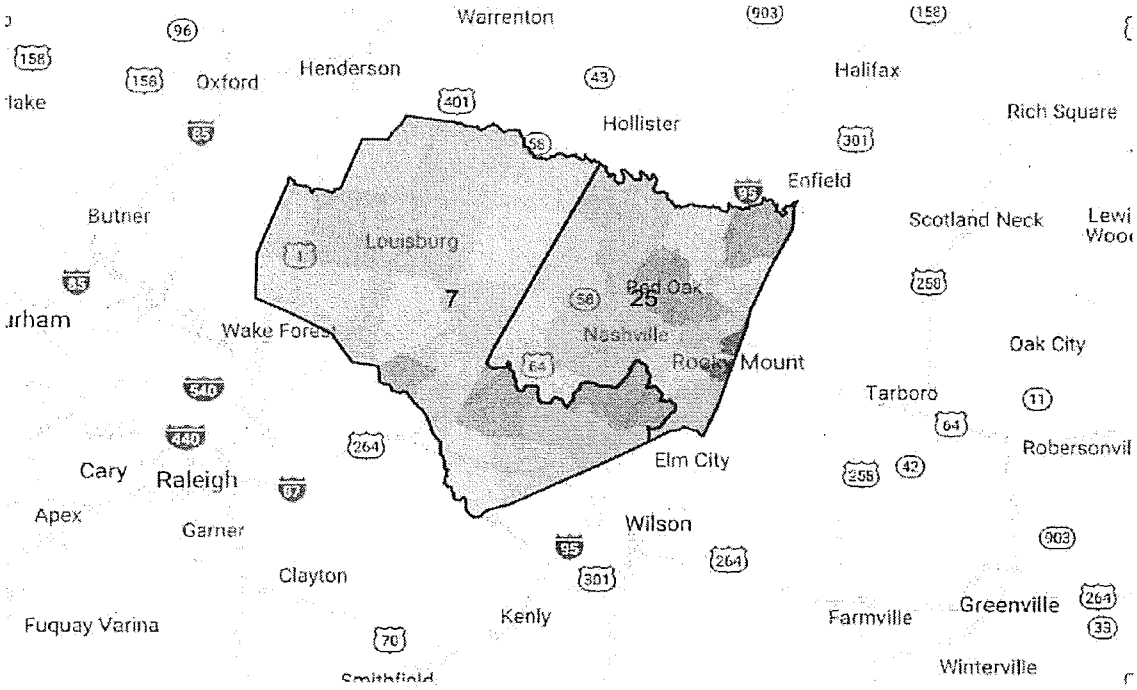
[1] All precinct-level partisanship data in the images that follow are based on the precinct-level election results from the 2014 U.S. Senate election in North Carolina.



131. The General Assembly split Jacksonville across House District 14 and 15, cracking its Democratic voters across the two districts and placing its most Democratic precincts in House District 15 with otherwise heavily Republican areas. The General Assembly also made sure to keep Jacksonville's Democratic voters in separate districts from the Democratic-leaning cities of Warsaw and Kenansville. This cracking allowed all three districts to lean Republican.

House Districts 7 and 25

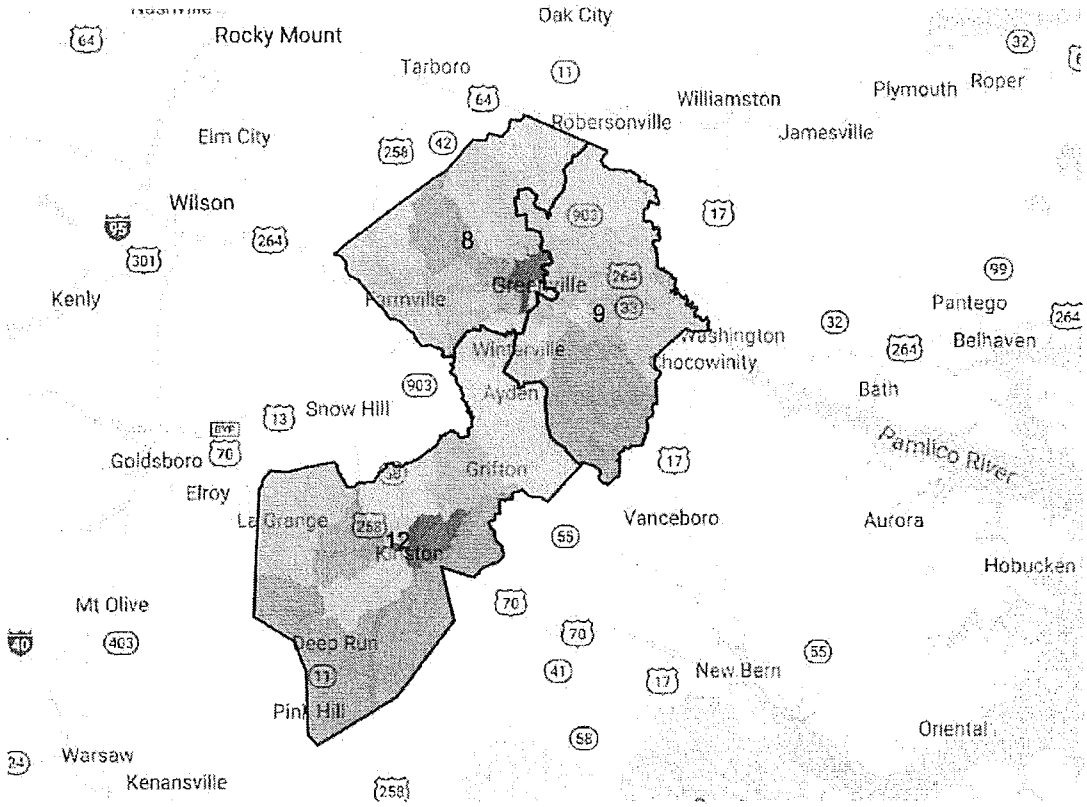
132. House Districts 7 and 25 are within a county cluster of Franklin and Nash Counties.



133. The General Assembly constructed this cluster to make sure that one of the two districts, House District 7, would favor Republicans, rather than risk that both districts could elect Democrats. To accomplish this, the General Assembly caused House District 7 to wrap around the southwestern edge of House District 25, allowing House District 7 to pick up deep red communities in southern Nash County.

House Districts 8, 9 and 12

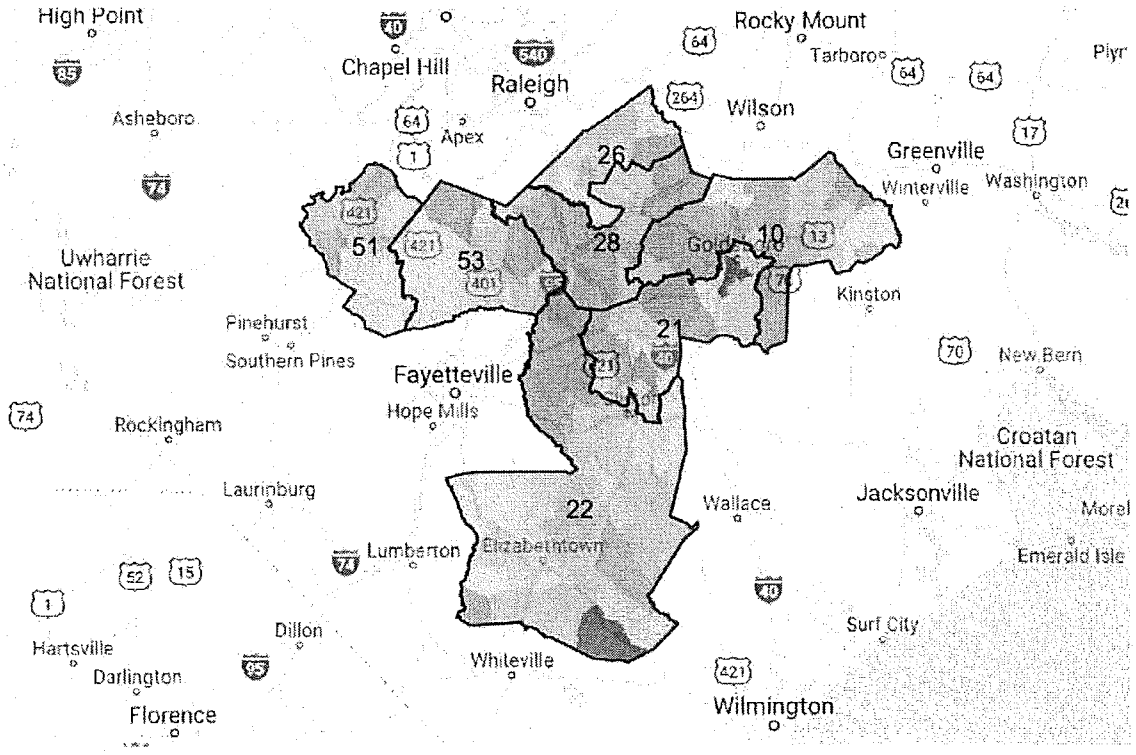
134. House Districts 8, 9, and 12 are within a county cluster consisting of Pitt and Lenoir Counties.



135. The General Assembly split Greenville nearly in half across separate districts in this cluster, even though Greenville is the county seat of Pitt County and has a population that is just slightly more than the target population for a single district. But the General Assembly carefully placed Greenville's most Democratic areas in House District 8, packing these Democratic voters with others in the surrounding areas to create an overwhelmingly Democratic district. The General Assembly placed the more moderate and Republican-leaning areas of Greenville in House District 9 with other Republican areas, ensuring that this district would elect a Republican. The General Assembly similarly constructed House District 12 to favor Republicans by avoiding the Democratic precincts in and around Greenville.

House Districts 10, 26, 28, 51, and 53

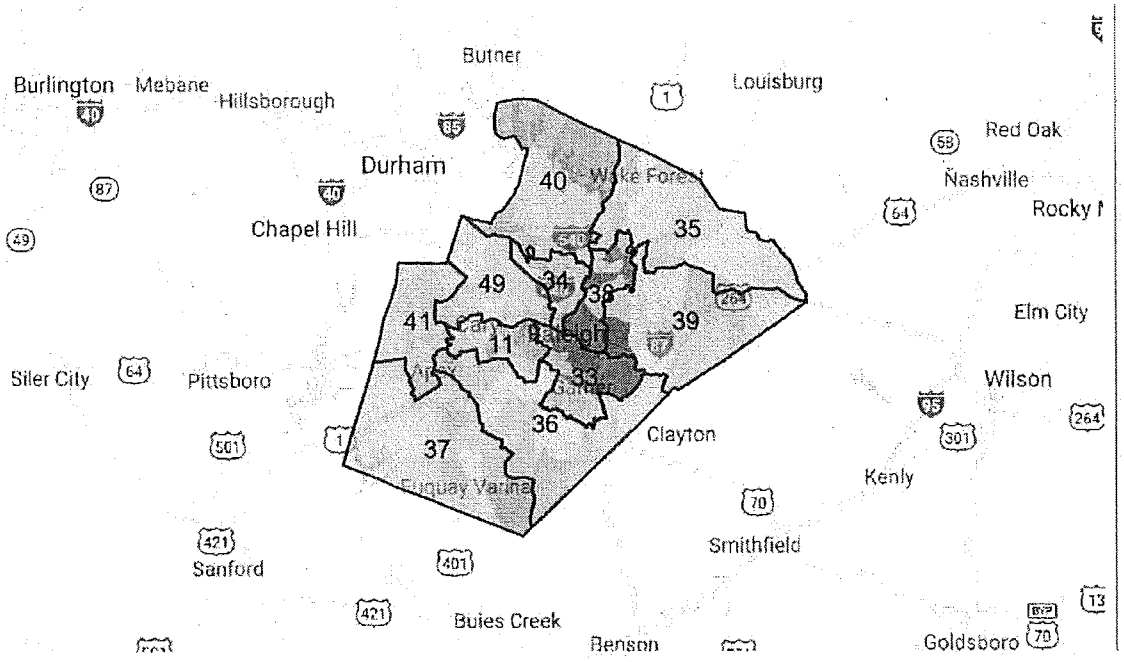
136. House Districts 10, 26, 28, 51, and 53 are part of a seven-county cluster spanning Greene, Wayne, Sampson, Bladen, Johnston, Harnett, and Lee Counties. This cluster also includes House Districts 21 and 22, which were redrawn by the special master in *Covington* and are not challenged in this case.



137. The General Assembly cracked the Democratic pockets of Johnston, Harnett, and Lee Counties into four separate districts (House Districts 26, 28, 53, and 51), so that none of these four districts would lean toward Democrats.

House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49

138. House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41,and 49 are all located within Wake County.



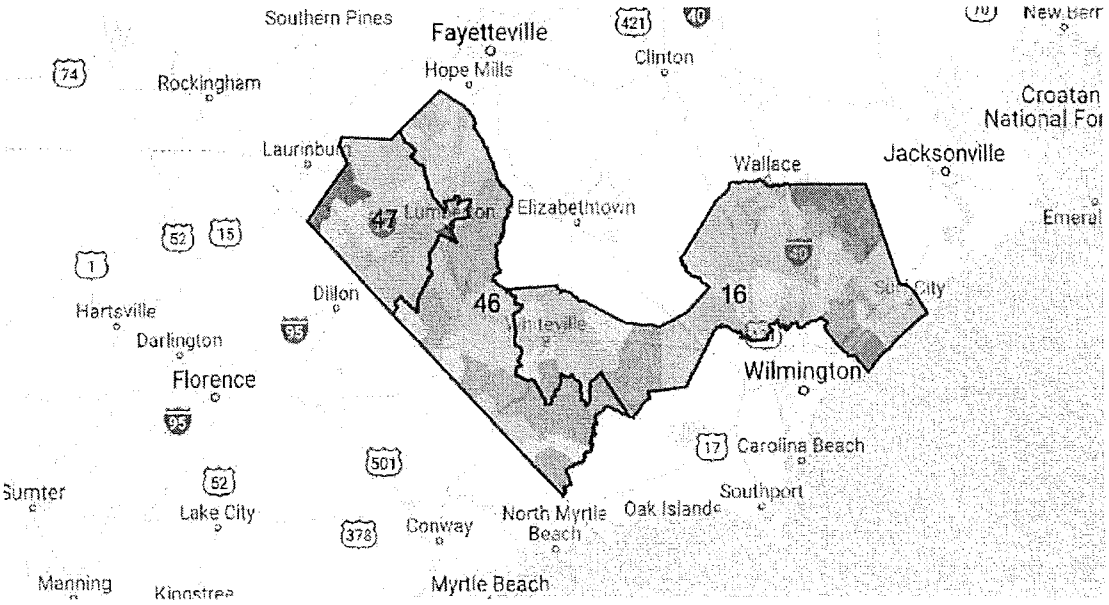
139. The General Assembly packed Democrats into House Districts 11, 33, 34, 38, 39, and 49 in order to maximize the number of districts within Wake County that would be competitive for Republicans. Based on the 2014 U.S. Senate results, for example, House Districts 35, 36, 37, and 40 all favor Republicans. Under a non-partisan map, these districts would be more Democratic-leaning. Indeed, although all four districts elected Democratic candidates by narrow margins in 2018, the NCDP had to spend far more money and other resources to win these districts than it would have under a non-partisan map.

140. On February 17, 2018, the North Carolina State Conference of NAACP Branches and other plaintiffs filed an action alleging that four of the House Districts in Wake County (36, 37, 40, and 41) were redrawn in 2017 violation of the North Carolina Constitution's prohibition on mid-decade redistricting. *N.C. State. Conf. of NAACP Branches v. Lewis*, 18 CVS 2322 (N.C. Super.). On November 2, 2018, the Superior Court granted summary judgment to the plaintiffs and ordered the General Assembly to "remedy the identified defects and enact a new Wake County House District map for use in the 2020 general election." House Districts 36, 37, 40,

and 41 therefore will revert to the 2011 versions of those districts or to districts closely resembling the 2011 versions. The 2011 versions of House Districts 36, 37, 40, and 41 were all gerrymandered to favor Republicans.

House Districts 16, 46, and 47

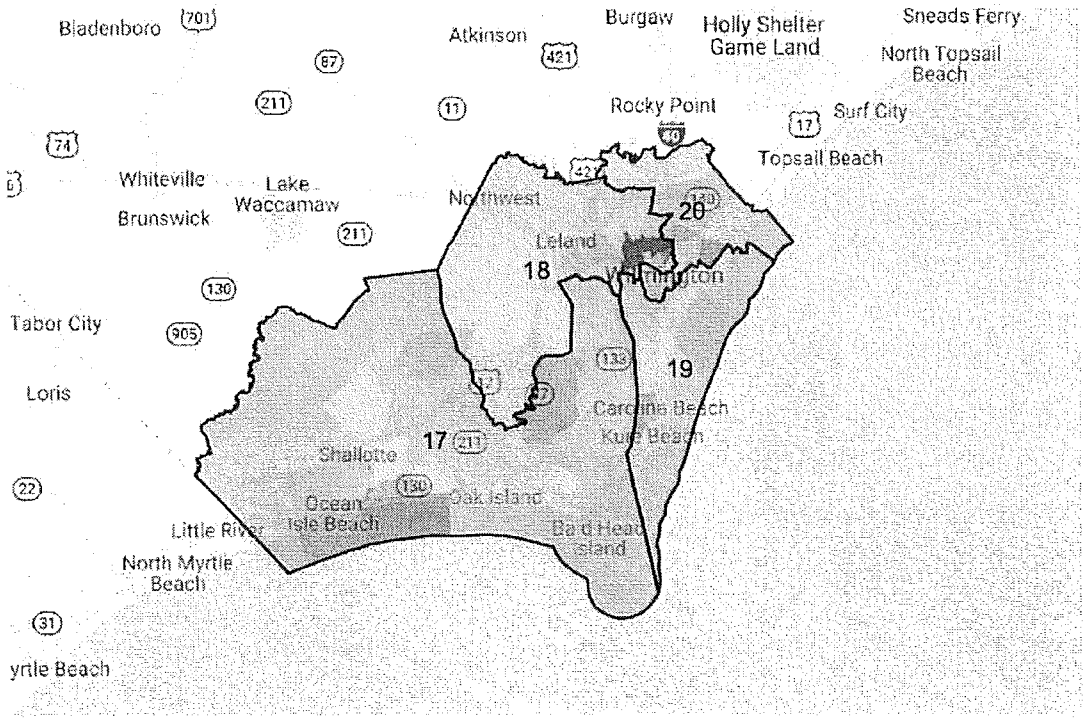
141. House Districts 16, 46, and 47 are within a county cluster of Pender, Columbus, and Robeson Counties.



142. The General Assembly split Lumberton across two separate districts in this cluster. It placed the Democratic areas of Lumberton in House District 47 with other heavily Democratic areas, while placing the more Republican parts of Lumberton into House District 46. The General Assembly then cracked the Democratic voters of Whiteville (in House District 16) from those in and around Chadbourn (just to the west of Whiteville in House District 46). Through these choices, the General Assembly created two districts that moderately favor Republicans using the statewide election results that the General Assembly considered (House District 16 and 46) and one overwhelmingly Democratic district (House District 47).

House Districts 17, 18, 19, and 20

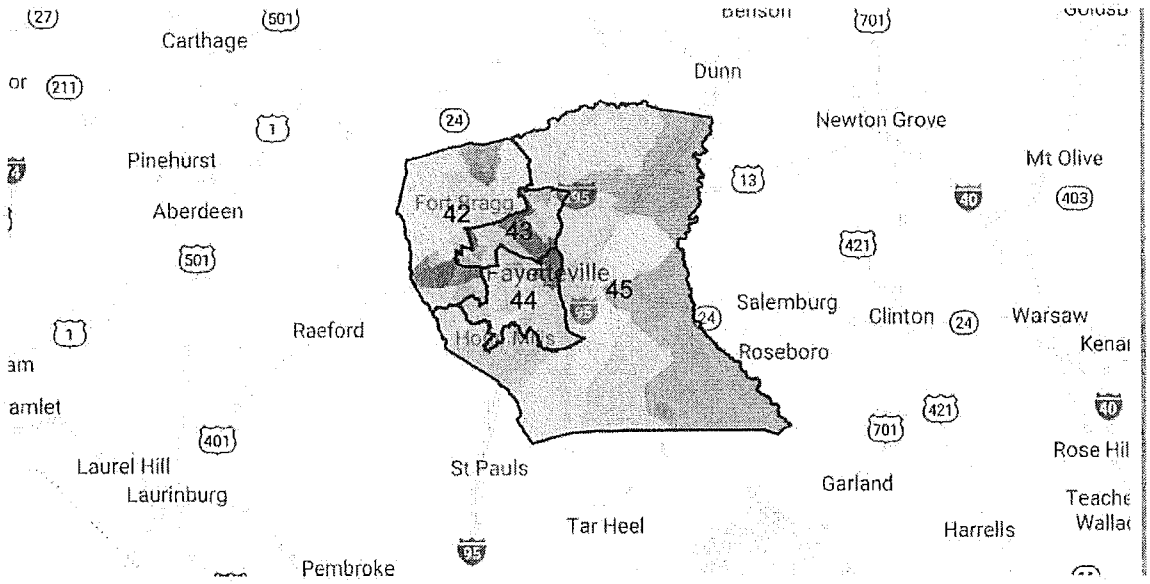
143. House Districts 17, 18, 19, and 20 are within a county cluster of New Hanover and Brunswick Counties.



144. The General Assembly manipulated this county cluster to create one packed Democratic district (House District 18) and three Republican-leaning districts (House Districts 17, 19, 20). The General Assembly split Wilmington across three different districts to accomplish this feat. It placed Wilmington's most Democratic areas in House District 18, where these Democratic voters were joined with the Democratic voters in and around Leland, while Wilmington's more Republican-leaning and swing precincts were placed in House Districts 19 and 20. In 2018, Republican candidates won House Districts 17, 19, and 20 with 63%, 51%, and 53% of the two-party vote respectively.

House Districts 42, 43, 44, and 45

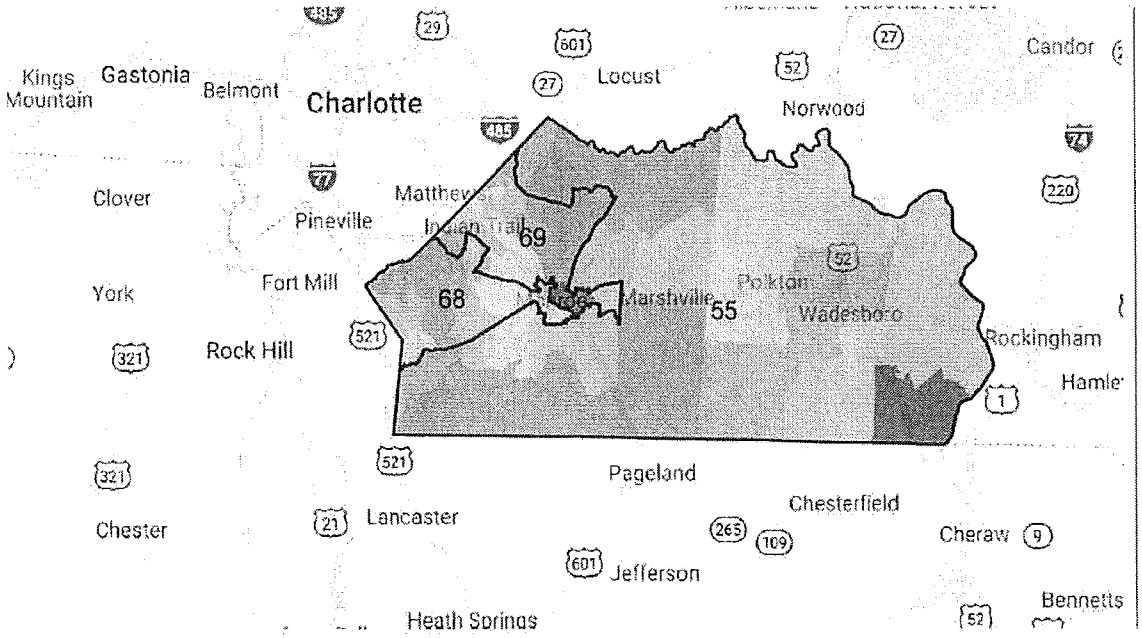
145. House Districts 42, 43, 44, and 45 are all within Cumberland County.



146. The General Assembly placed almost all of the most Democratic areas of Cumberland County into three of the four districts in this cluster, House District 42, 43, and 44. The General Assembly packed these Democratic voters to create a Republican-leaning district in Cumberland County, House District 45. Under a non-partisan map, this district would be more Democratic-leaning.

House Districts 55, 68, and 69

147. House Districts 55, 68, and 69 are within a county cluster of Anson and Union Counties.

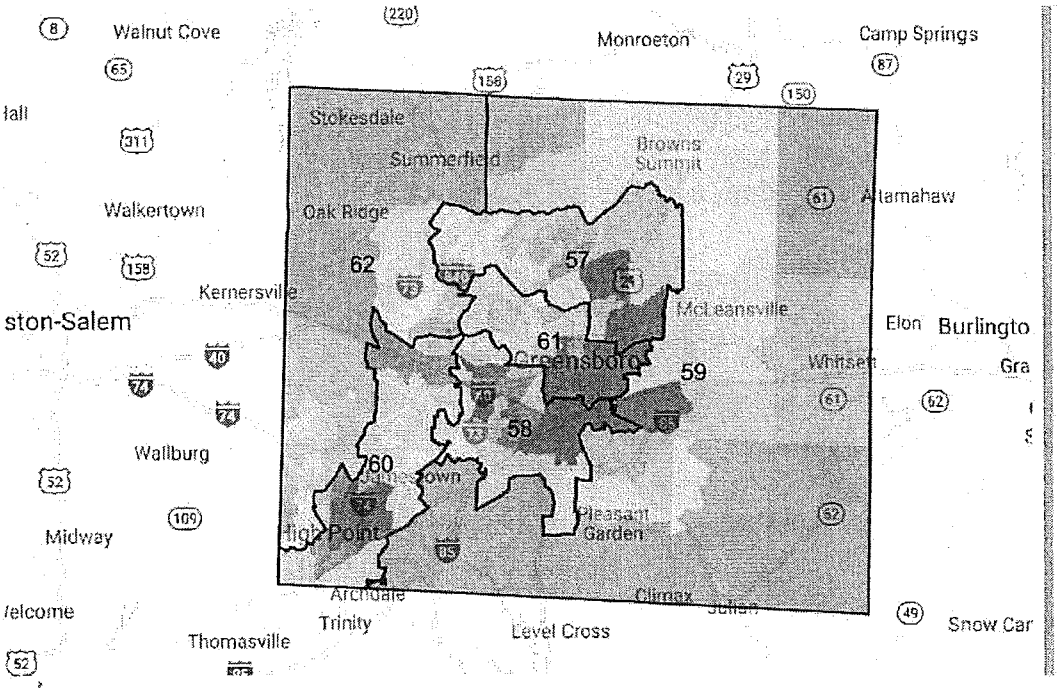


148. The General Assembly cracked the Democratic voters throughout this cluster to ensure that all three districts would favor Republicans. As part of this cracking, the General Assembly split Monroe across the three districts, and split Monroe's most Democratic areas between House Districts 68 and 69.

House Districts 58, 59, and 60

149. House Districts 58, 59 and 60 are three of the six House districts within Guilford County. The other three districts—House Districts 57, 61, and 62—were redrawn by the special master in the federal Covington lawsuit and are not challenged in this case.[2]

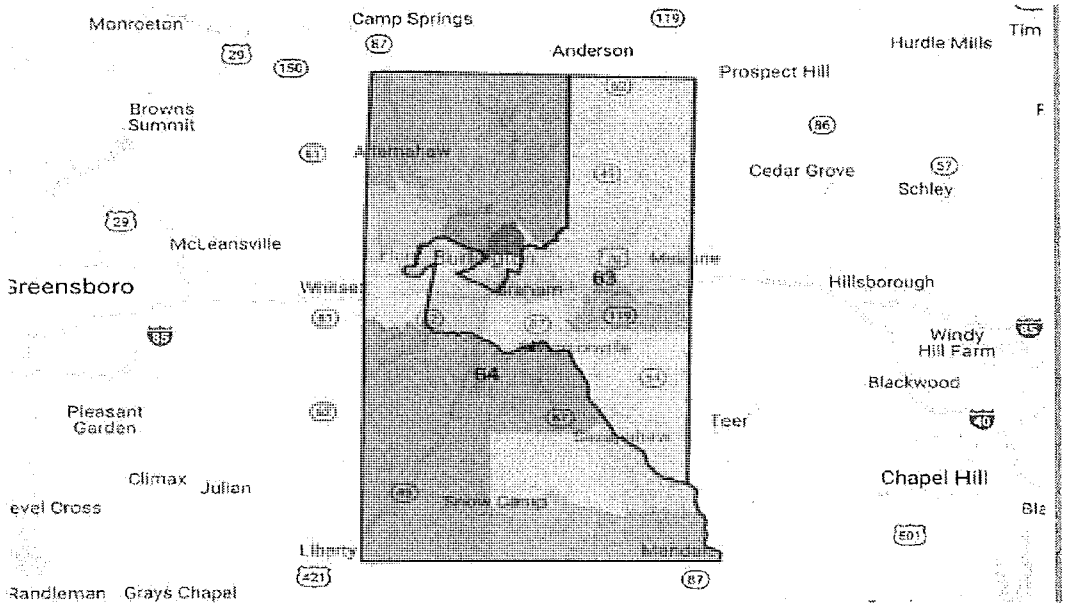
[2] The special master made minor changes to House District 59, but Plaintiffs challenge this district in this case.



150. The General Assembly packed House Districts 58 and 60 with heavily Democratic areas. This packing, *inter alia*, enabled House District 59 to favor Republicans.

House Districts 63 and 64

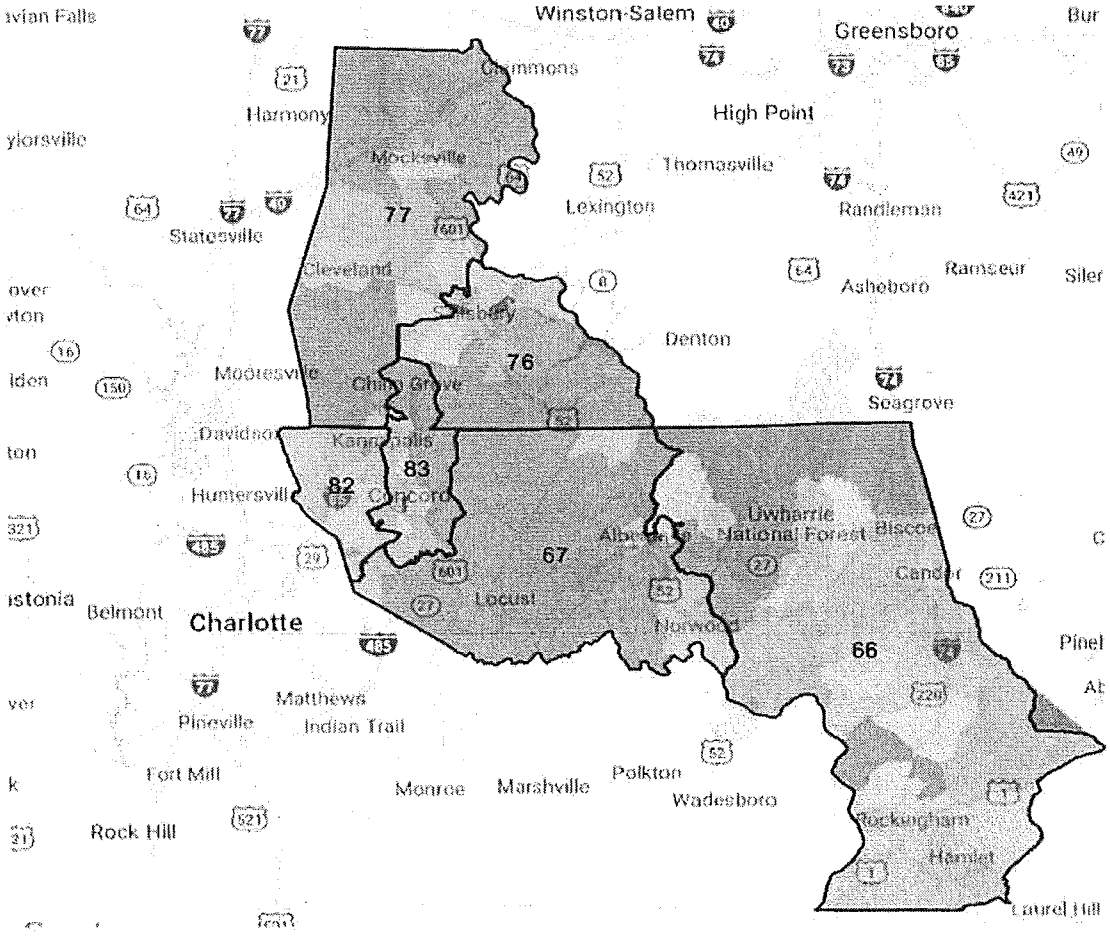
151. House Districts 63 and 64 are both located within Alamance County.



152. The General Assembly caused both House Districts 63 and 64 to favor Republicans by cracking Burlington and its Democratic voters in half across the two districts.

House Districts 66, 67, 76, 77, 82, and 83

153. House Districts 66, 67, 76, 77, 82, and 83 are part of a county cluster that covers Richmond, Montgomery, Stanly, Cabarrus, Rowan, and Davie Counties.

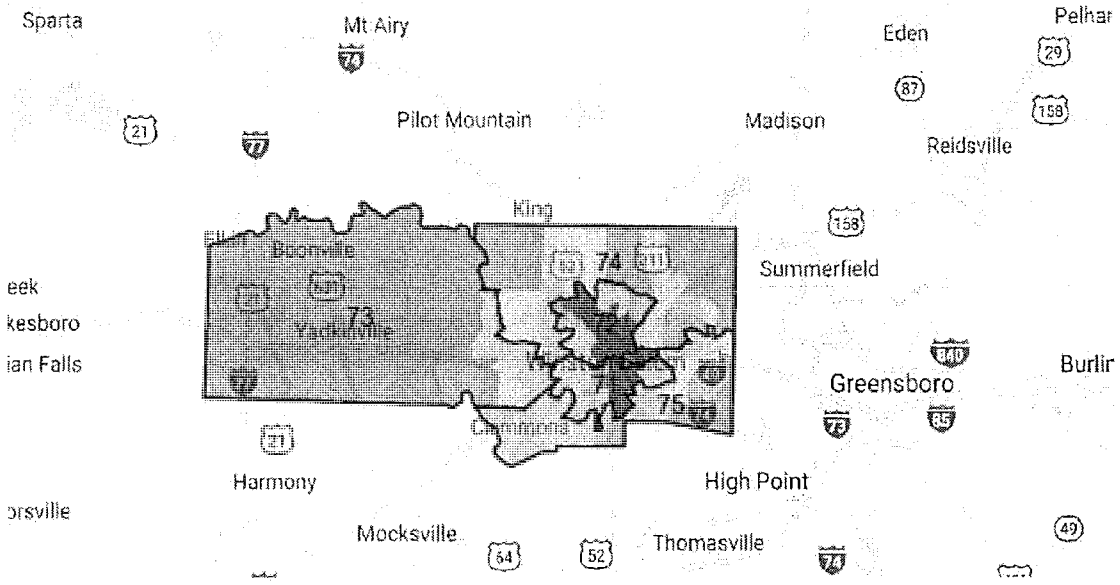


154. The General Assembly meticulously distributed the Democratic voters in these counties across all five districts in the cluster, such that Republicans have majorities in all five districts based on the statewide elections the General Assembly considered. For instance, the General Assembly put Albemarle into House District 67, wasting the votes of Albemarle's

Democratic voters in House District 67 to make House District 66 more competitive for Republicans. Although the Democratic candidate won House District 66 in 2018, the NCDP had to spend far more money and other resources to win this district than it would have under a non-partisan map. The General Assembly also wasted Salisbury's Democratic votes in House District 76 by grouping the city with deep red areas. And the General Assembly cracked Concord in half between House Districts 82 and 83, and it splintered Kannapolis and its Democratic voters into three different districts (House Districts 77, 82, and 83).

House Districts 71, 72, 73, 74, and 75

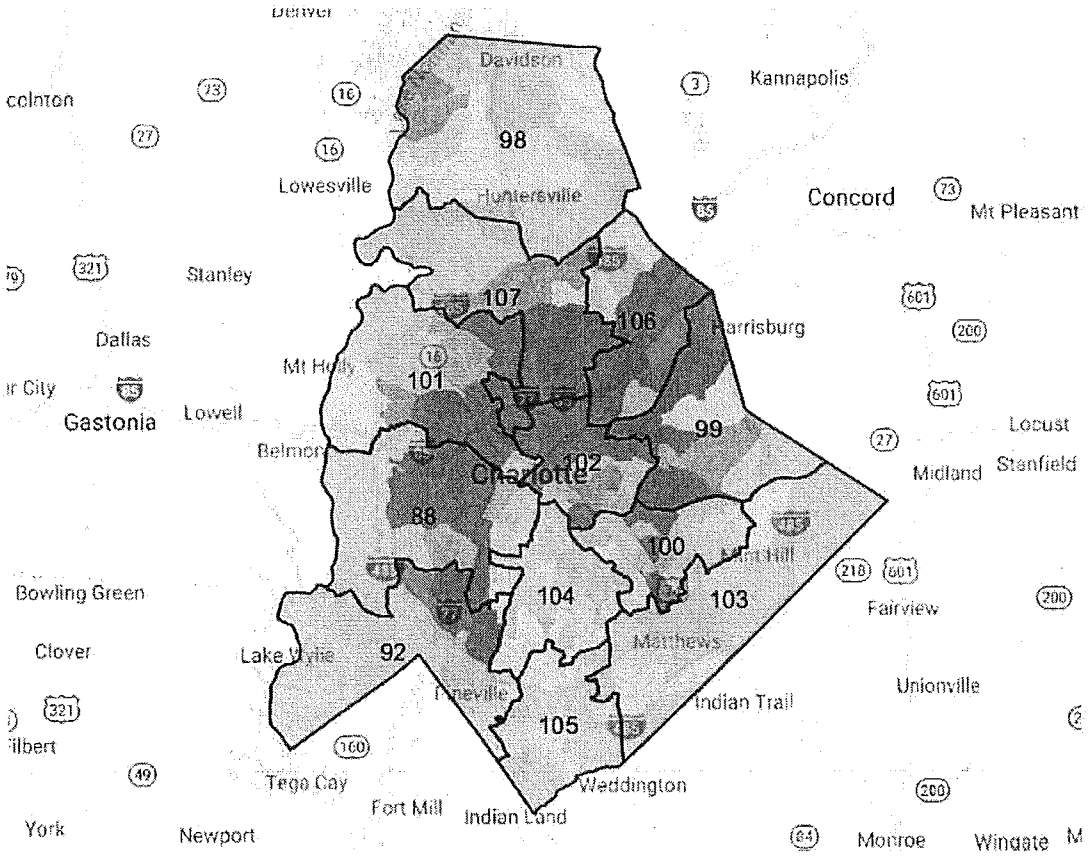
155. House Districts 71, 72, 73, 74, and 75 are within a county cluster of Forsyth and Yadkin Counties.



156. The General Assembly packed Democrats into House Districts 71 and 72 so that the other three districts—House Districts 73, 74, and 75—would all favor Republicans. The General Assembly split the City of Winston-Salem across all five districts in the cluster as part of this scheme, even though Winston-Salem's population could fit within just three districts.

House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107

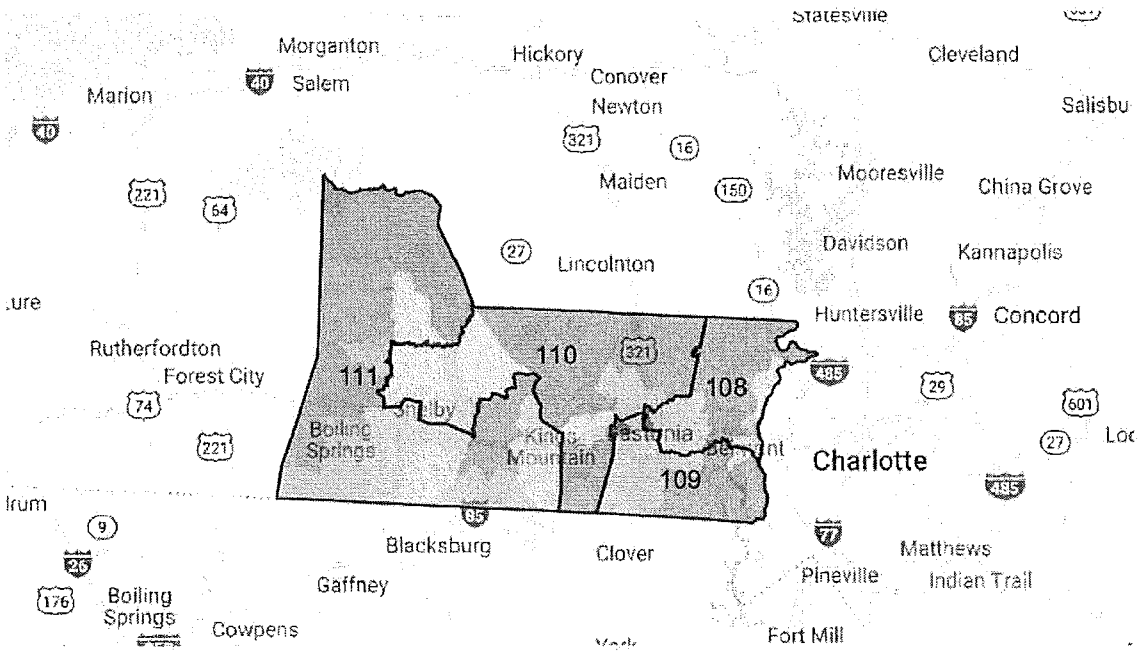
157. House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 are all within Mecklenburg County.



158. Mecklenburg County is the pinnacle of packing. The General Assembly packed as many Democratic voters as possible into seven Mecklenburg County districts (House Districts 88, 92, 99, 100, 101, 106, and 107), in order to create four districts in the county that are competitive for Republicans (House Districts 98, 103, 104, and 105). Under a non-partisan map, these latter four districts would all be more Democratic-leaning. Indeed, although all four districts elected Democratic candidates by narrow margins in 2018, the NCDP had to spend far more money and other resources to win these districts than it would have under a non-partisan map.

House Districts 108, 109, 110, and 111

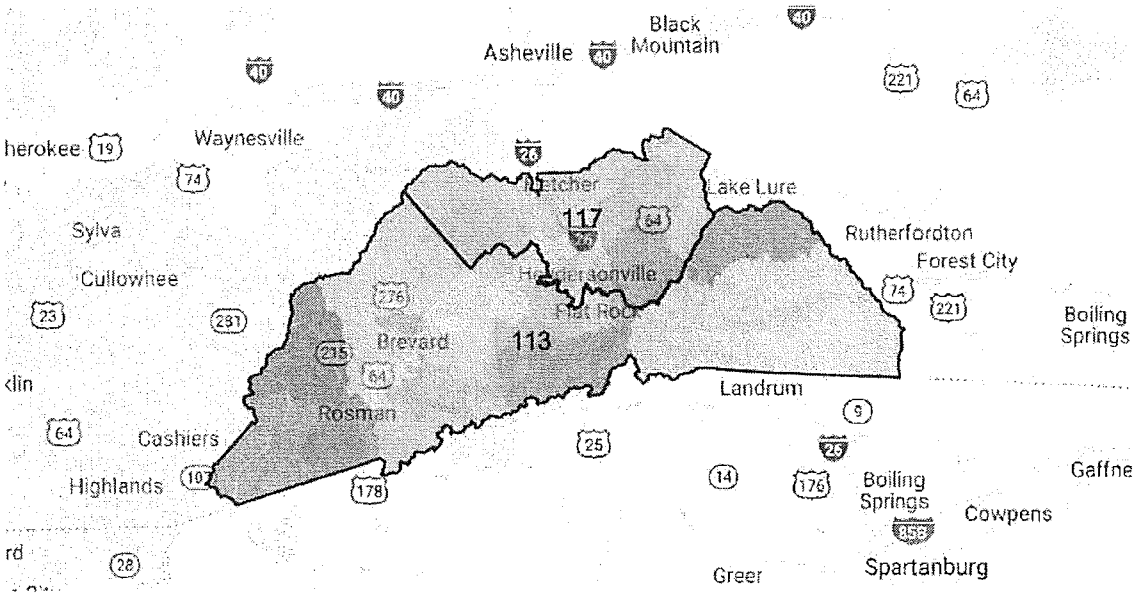
159. House Districts 108, 109, 110, and 111 make up a county cluster of Gaston and Cleveland Counties.



160. The General Assembly split the Democratic stronghold of Gastonia across three different districts (House Districts 108, 109, and 110), and cut the Democratic city of Shelby in half (in House Districts 110 and 111). The General Assembly similarly distributed the Democratic voters north of Shelby across House District 110 and 111. The result of all of this cracking is that all four districts in the cluster have comfortable Republican majorities: the Republican vote share in all four districts is around 60% using the 2014 U.S. Senate results.

House Districts 113 and 117

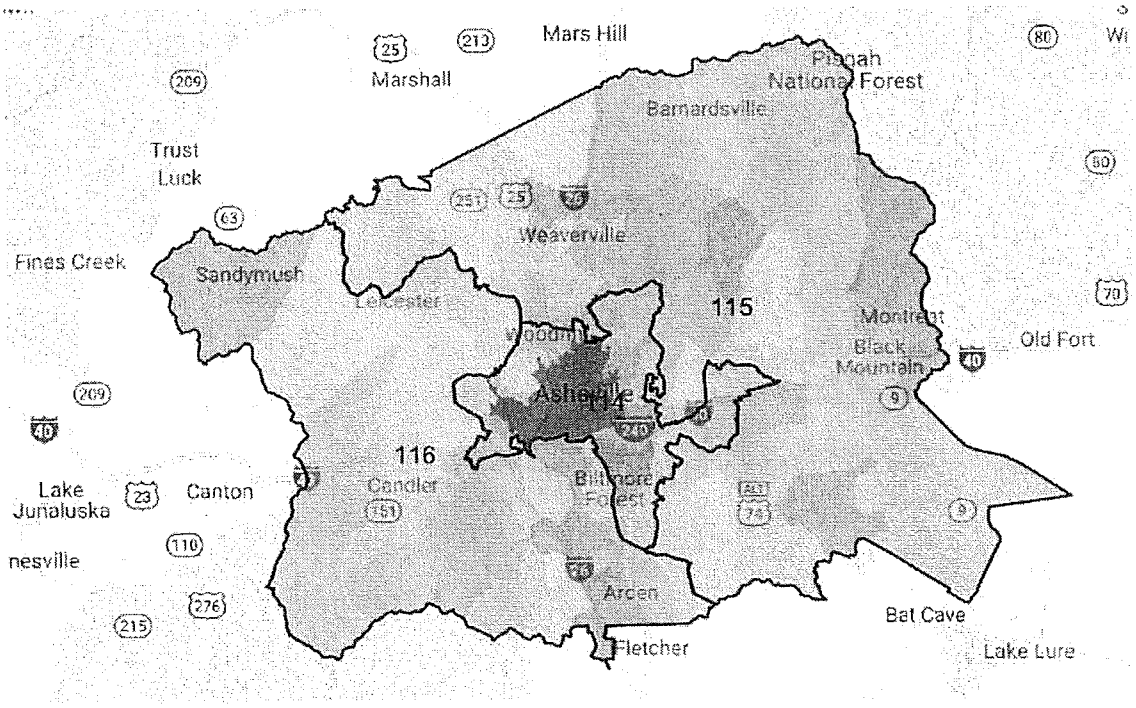
161. House Districts 113 and 117 are within a county cluster of Transylvania, Henderson, and Polk Counties.



162. The General Assembly cracked the Democratic voters in and around Hendersonville from the Democratic voters in and around Brevard, ensuring that both districts in this cluster would elect Republicans.

House District 114, 115, and 116

163. House Districts 114, 115, and 116 are all within Buncombe County.

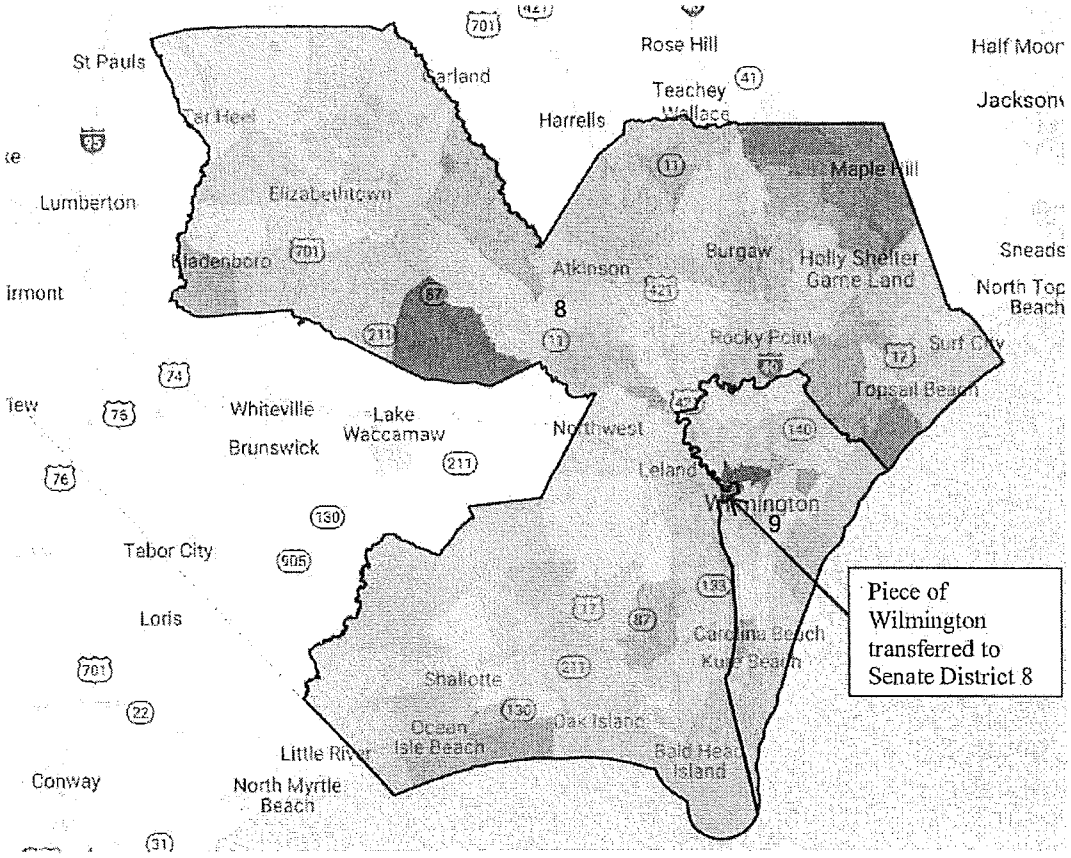


164. The General Assembly packed Democratic voters into House District 114 to make House Districts 115 and 116 as favorable to Republicans as possible. Republicans are favored to win House Districts 115 and 116 using the statewide election results from 2010-2016. And although Democrats have won both districts in some both not all election cycles since the districts were enacted in 2011, the NCDP has had to spend more money and other resources to win these districts than it would have under a non-partisan map.

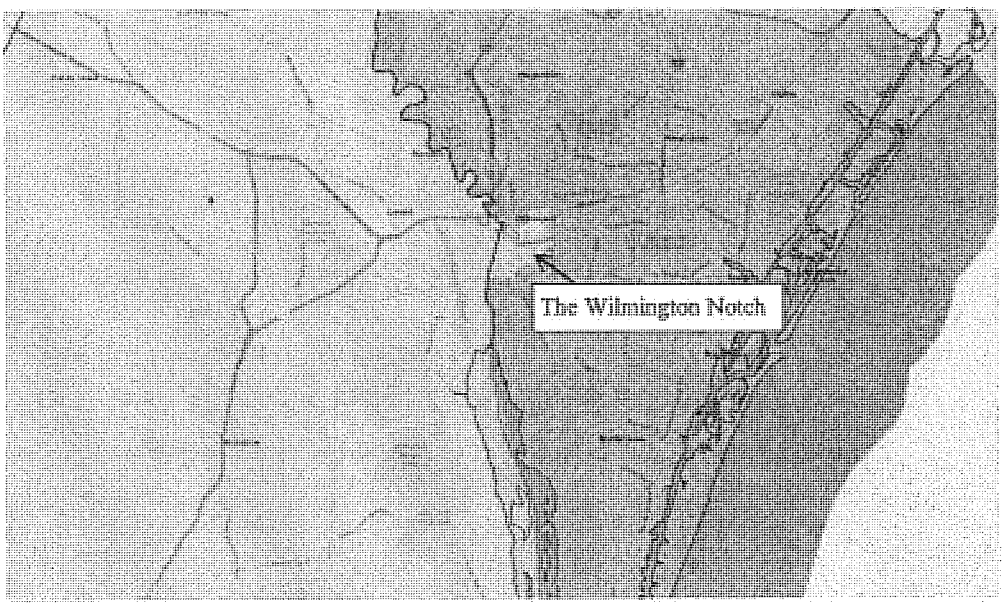
2. The 2017 Senate Plan Packs and Cracks Democratic Voters

Senate Districts 8 and 9

165. Senate Districts 8 and 9 are within a county cluster of Bladen, Pender, Brunswick, and New Hanover Counties.

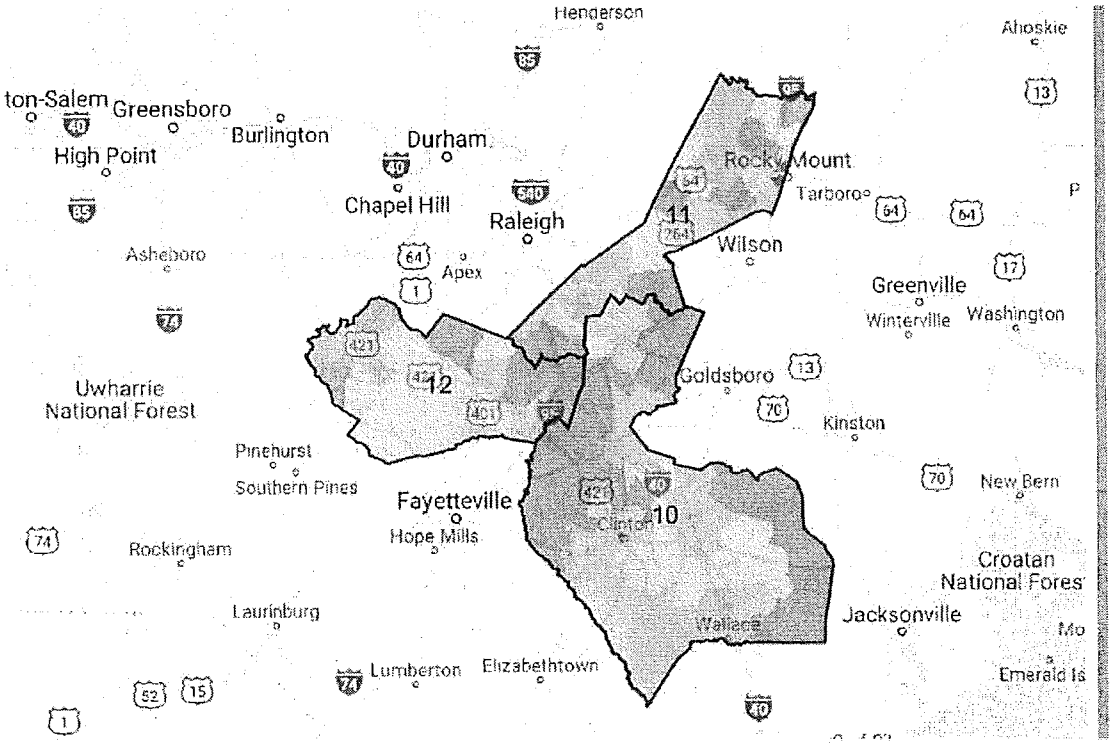


166. Because the population of New Hanover County is slightly too large to fit into one Senate district, the General Assembly had to include a small portion of New Hanover County in Senate District 8 rather than Senate District 9. The General Assembly chose the most heavily Democratic piece of New Hanover County to move to Senate District 8 in order to make Senate District 9 as favorable to Republicans as possible. Specifically, the General Assembly split off a small portion of Wilmington—the "Wilmington Notch"—transferring thousands of Democratic voters from Senate District 9 to 8. The loss of these Democratic voters causes Senate District 9 to lean Republican rather than Democratic using the 2014 U.S. Senate election results. And although Senate District 9 elected a Democrat by less than a percentage point in 2018, the NCDP had to spend far more money and other resources to win this district than it would have under a non-partisan map.



Senate Districts 10, 11, and 12

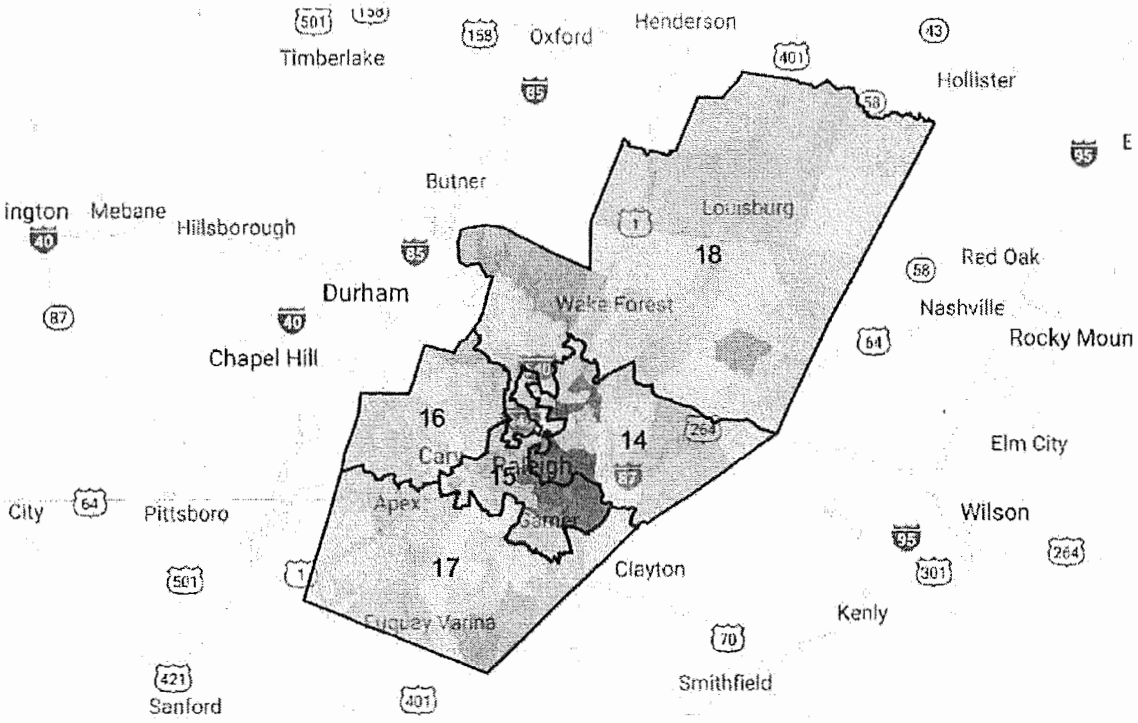
167. Senate Districts 10, 11, and 12 span a six-county cluster of Sampson, Duplin, Johnston, Nash, Lee, and Harnett Counties.



168. The General Assembly cracked the Democratic areas of the six counties in this cluster across the three districts that the cluster contains. For instance, the General Assembly dispersed the Democratic voters in and around Rocky Mount, Clinton, and Sanford across Senate Districts 10, 11, and 12, respectively. As a result, all three districts favor Republicans.

Senate Districts 14, 15, 16, 17, and 18

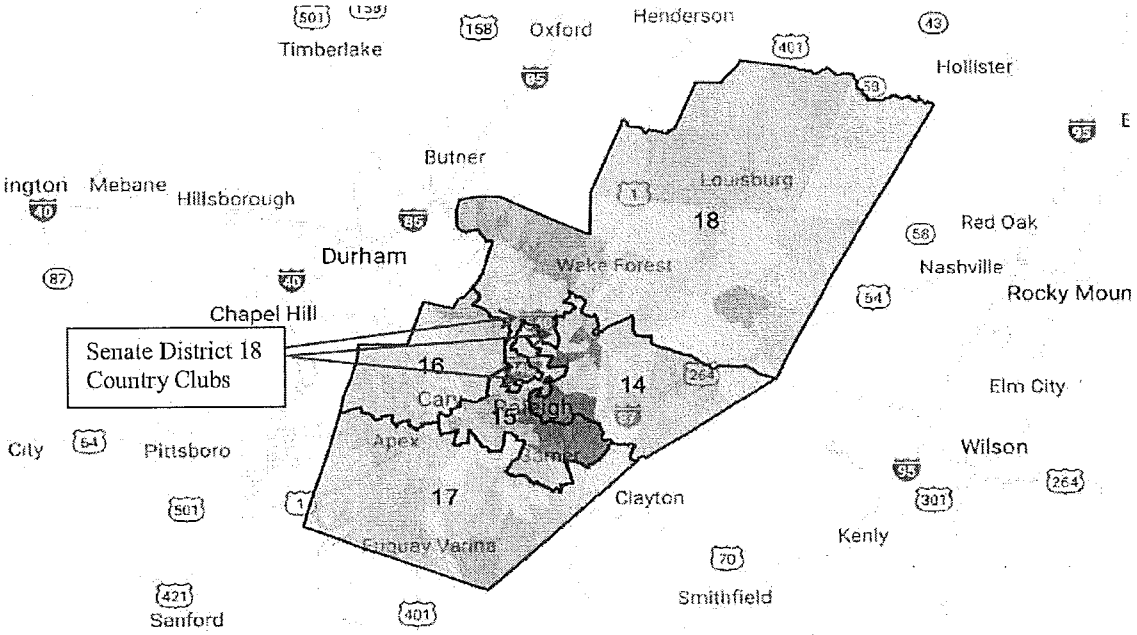
169. Senate Districts 14, 15, 16, 17, and 18 are within a county cluster of Wake and Franklin Counties.

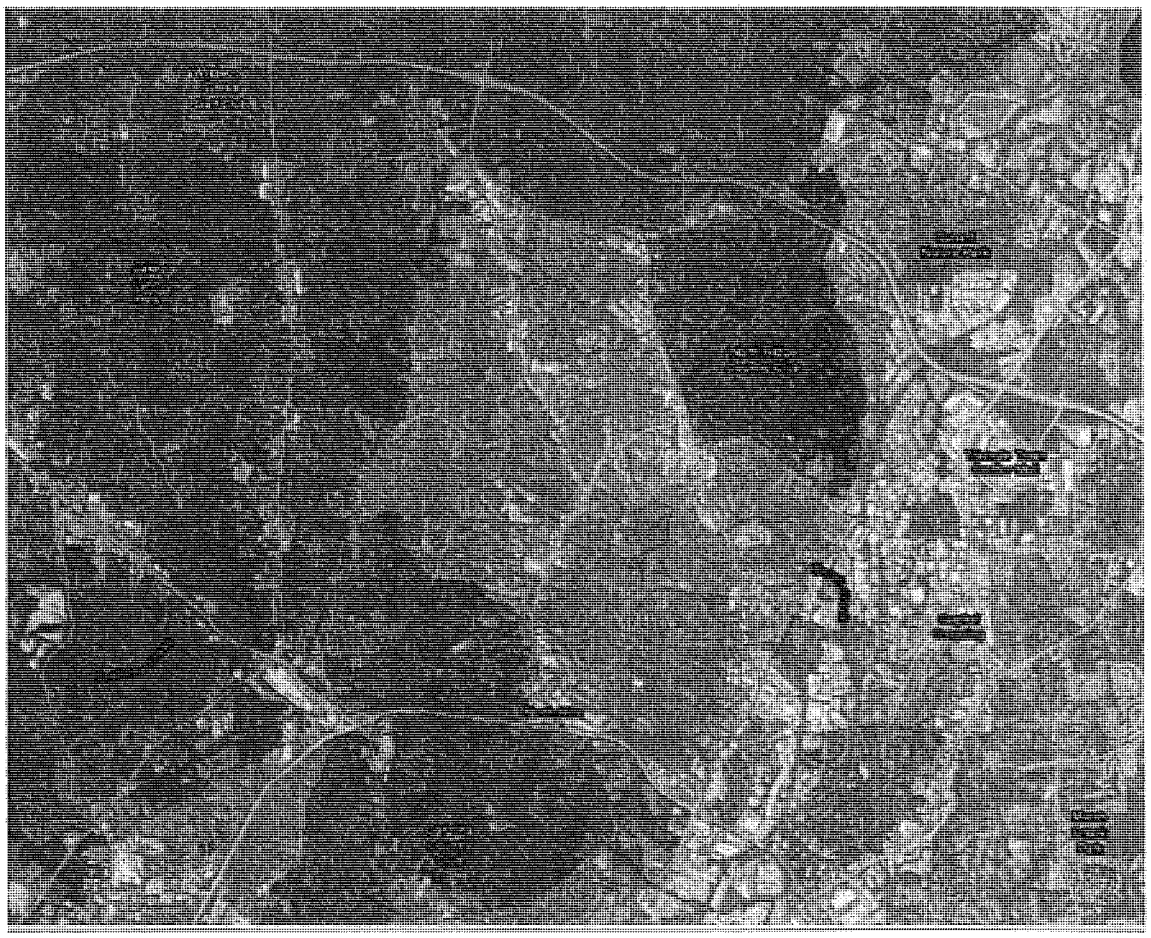


170. The General Assembly packed as many Wake County Democrats as possible into three districts within this cluster (Senate District 14, 15, and 16). This packing was done to make Senate Districts 17 and 18 as Republican-leaning as possible.

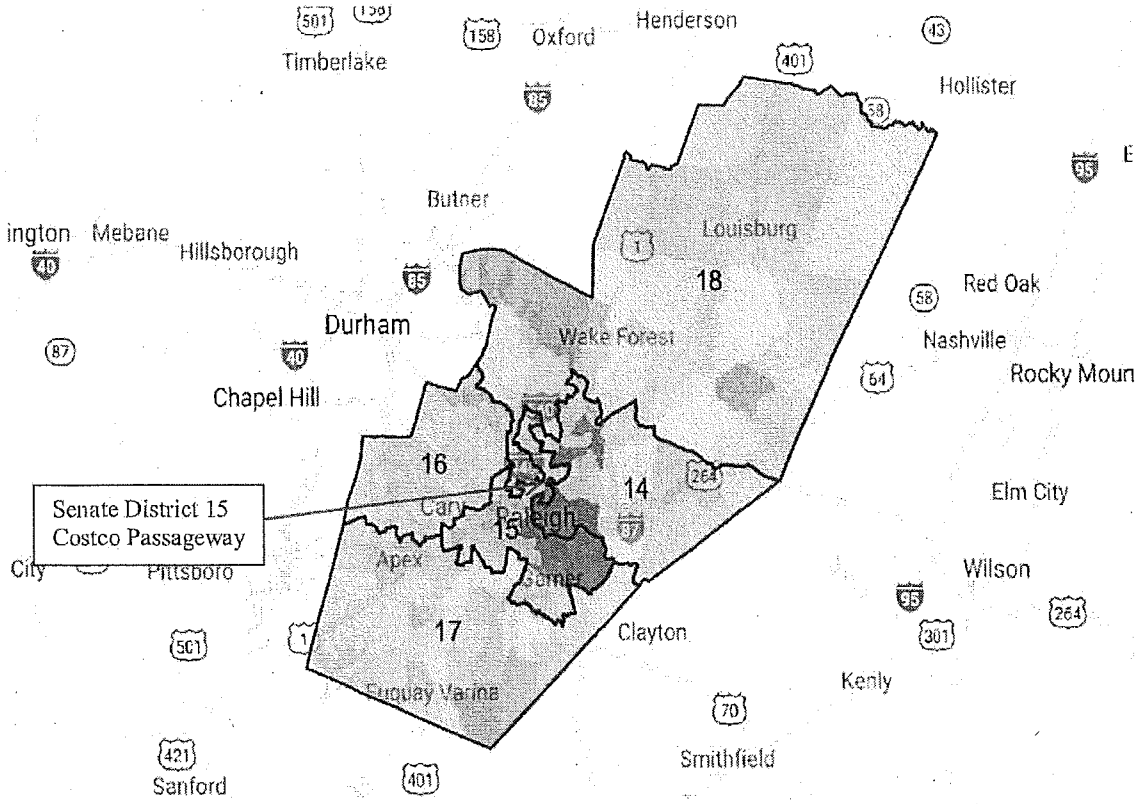
171. To carry out this scheme, the General Assembly split Raleigh across four districts (Senate District 14, 15, 16, and 18), even though Raleigh's population could fit almost entirely within two Senate districts. The General Assembly dissected Raleigh to put its only Republican-

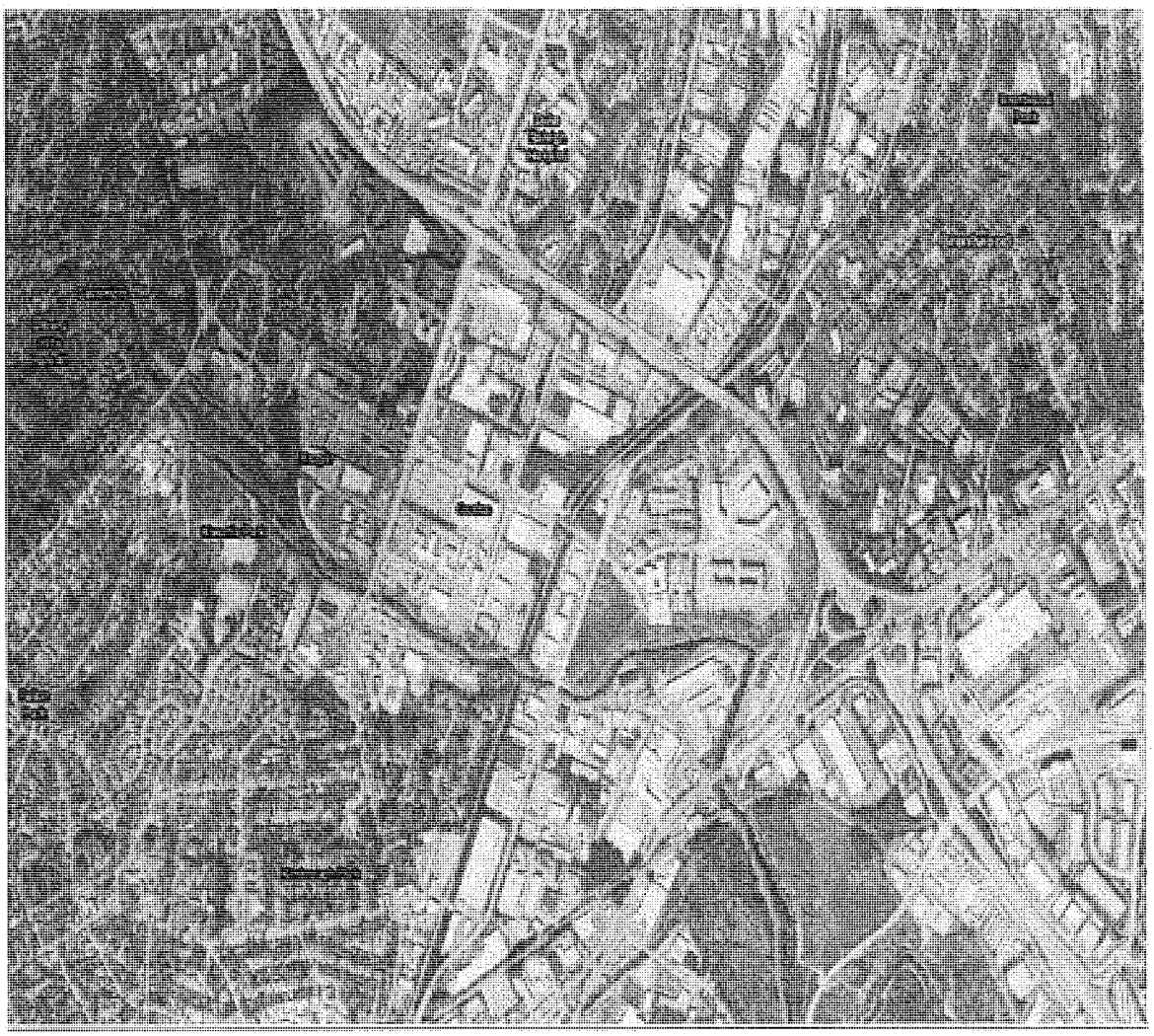
leaning areas, in north and northwest Raleigh, in Senate District 18. Specifically, Senate District 18 grabs the Republican-leaning communities that surround three different Raleigh country clubs—the North Ridge Country Club, the Wildwood Golf Club, and the Carolina Country Club.





172. To place these Republican areas in Senate District 18 while avoiding north Raleigh's Democratic areas, the General Assembly created a tentacle for Senate District 15 that grabs north Raleigh's Democratic voters. The General Assembly created this tentacle in Senate District 15 via a narrow passageway containing no more than a Costco.

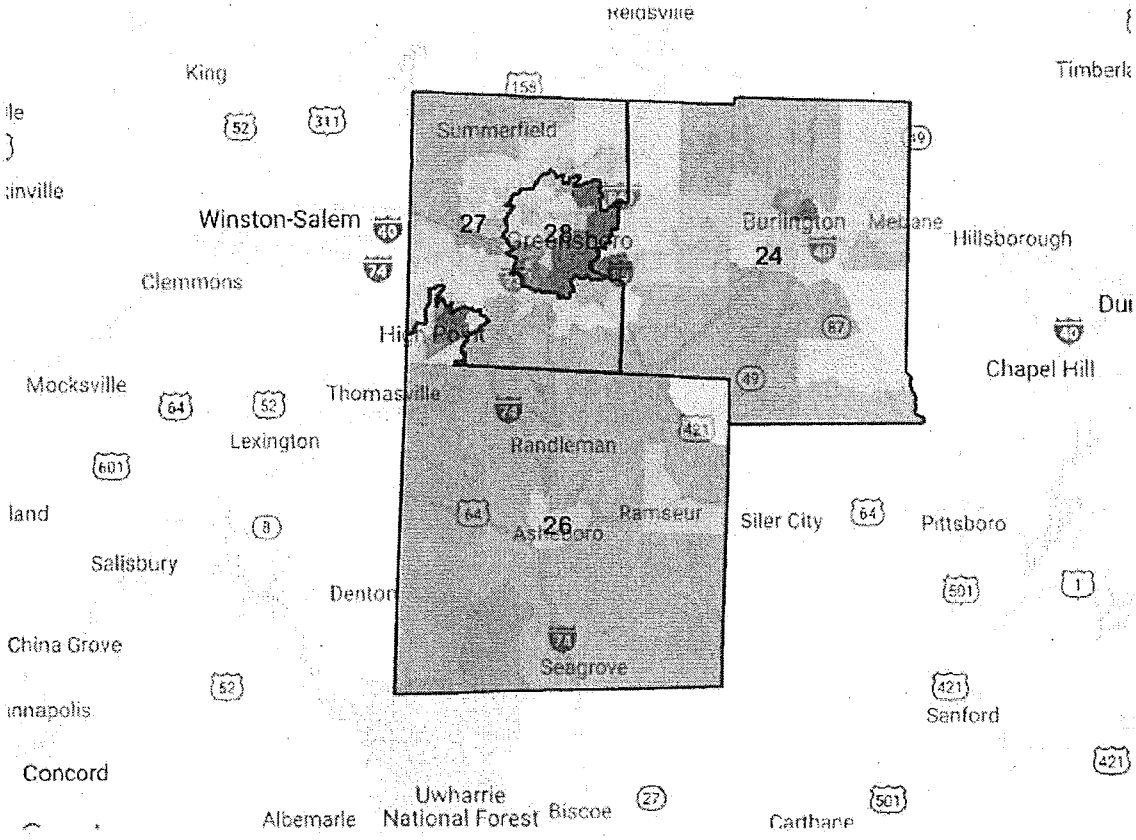

Timberlake
Oxford
Henderson
Hollister
Butner
Louisburg
18
Hillsborough
Durham
Wake Forest
Red Oak
Nashville
Rocky Moun
Chapel Hill
16
14
Senate District 15
Costco Passageway
Cary
Raleigh
15
Elm City
Apex
Pittsboro
Wilson
17
Clayton
Kenly
Fuquay Varina
Smithfield
Sanford



173. Senate District 18, the "Country Club District," performed as the General Assembly hoped in the 2018 election: Republicans held onto it by a few percentage points. Republicans managed to win a Wake County seat in the Senate despite the fact that Democrats won every county-wide election in Wake County in 2018 by overwhelming majorities. And although the Democratic won Senate District 17 by a narrow margin, the NCDP had to spend far more money and other resources to win this district than it would have under a non-partisan map.

Senate Districts 24, 26, 27, and 28

174. Senate Districts 24, 26, 27, and 28 are in a county cluster containing Randolph, Guilford, and Alamance Counties.

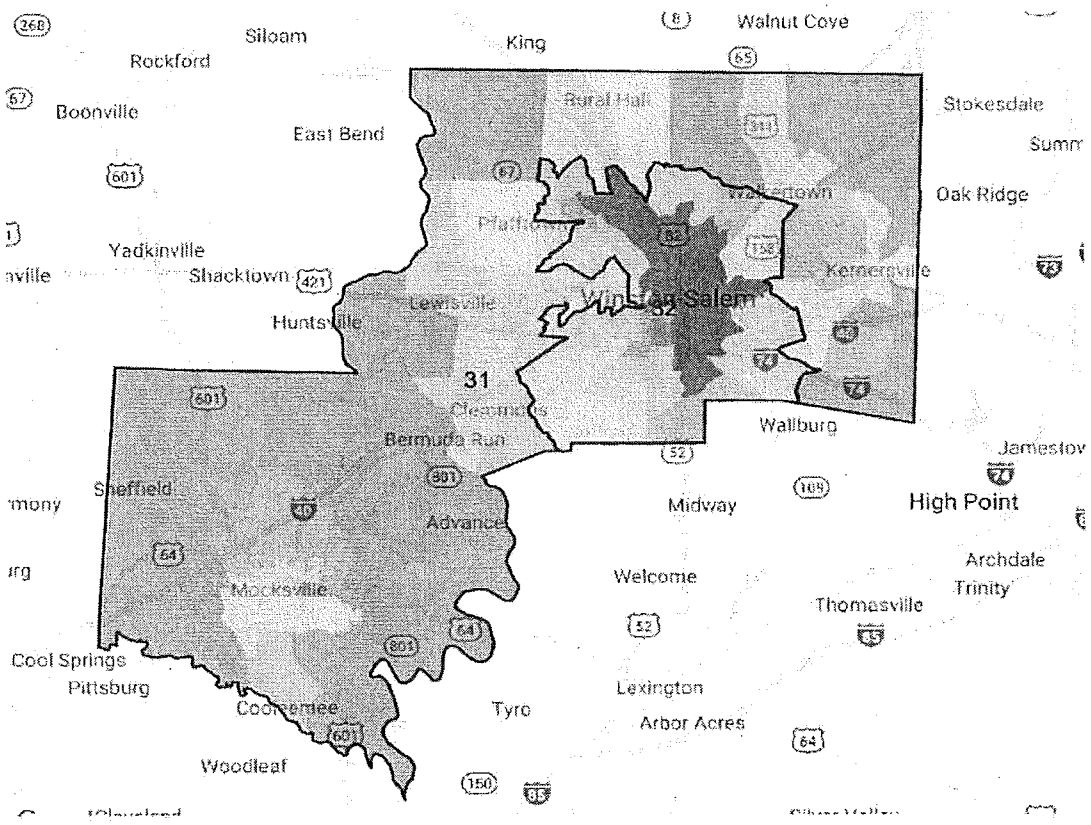


175. Senate District 28 is one of the districts that the *Covington* court found to be racially gerrymandered and that the special master redrew. The special master also made certain changes to Senate Districts 24 and 27 in redrawing Senate District 28. But the special master did not alter Senate District 26 from the version enacted by the General Assembly in 2017.

176. In creating Senate District 26, the General Assembly appended to Randolph County the most heavily Democratic area of Guilford County that could be appended, in and around High Point. The General Assembly moved these Democratic voters into Senate District 26 in order to waste their votes in an otherwise extremely Republican district.

Senate Districts 31 and 32

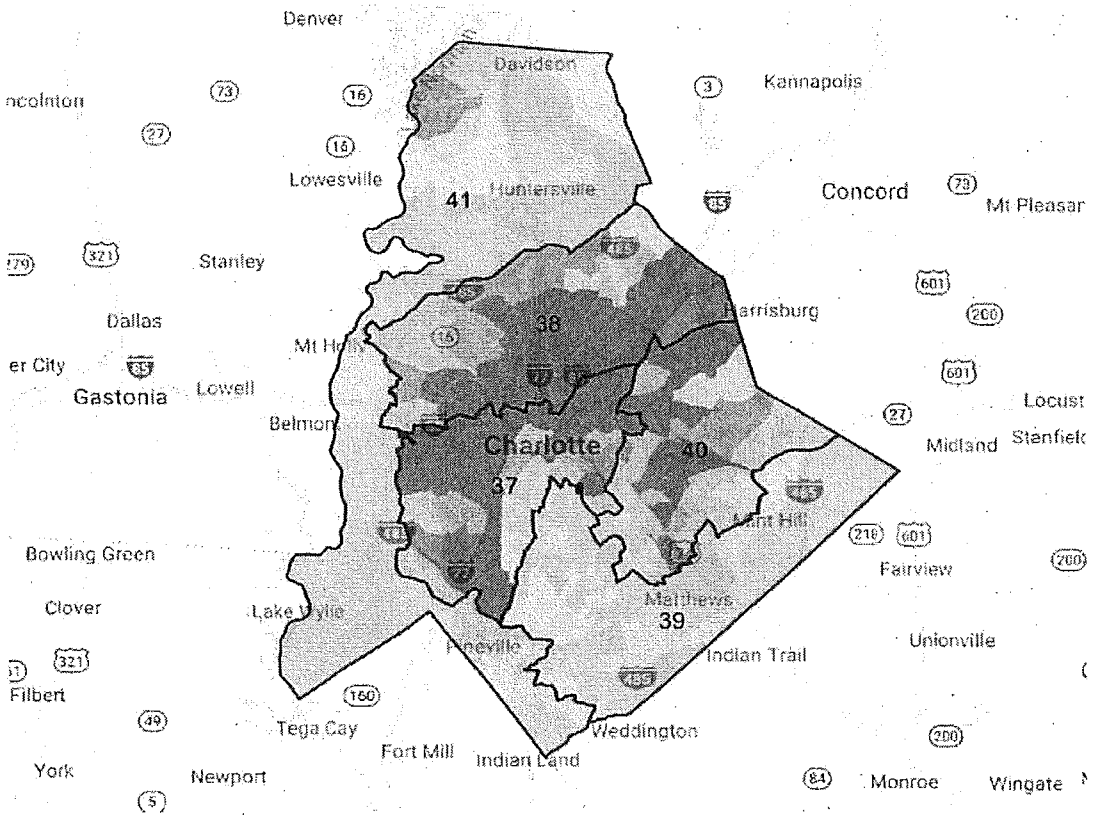
177. Senate Districts 31 and 32 are within a county cluster of Davie and Forsythe Counties.



178. The General Assembly packed all of the most Democratic areas in and around Winston-Salem into Senate District 32, so that Senate District 31 would favor Republicans.

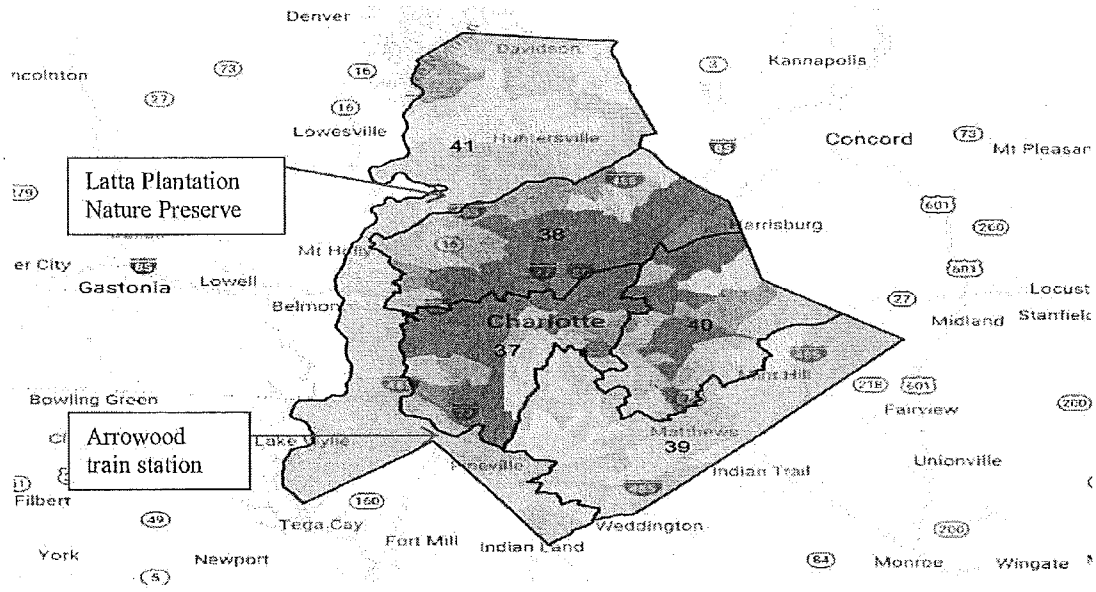
Senate Districts 37, 38, 39, 40, and 41

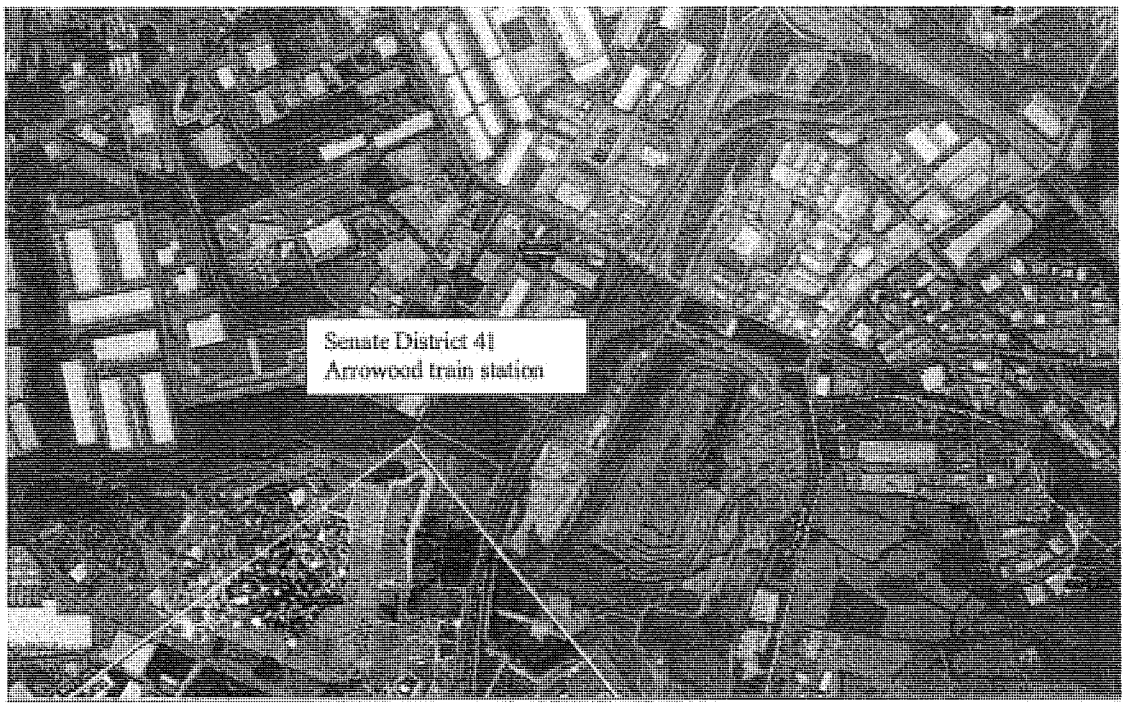
179. Senate Districts 37, 38, 39, 40, and 41 are all located within Mecklenburg County.

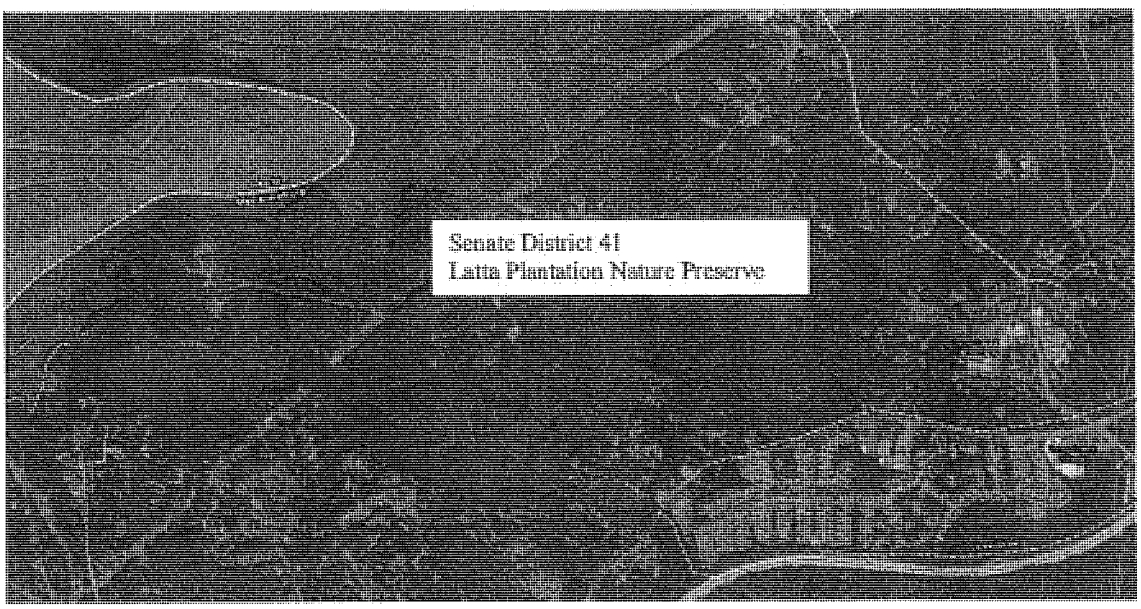


180. The General Assembly packed as many Democrats as possible into Senate Districts 37, 38, and 40, so as to create two Mecklenburg County districts—Senate Districts 39 and 41—that lean Republican based on the statewide elections the General Assembly considered.

181. The General Assembly had to go to particularly great lengths to make Senate District 41 competitive for Republicans. The district begins north of Charlotte, then slices through a thin stretch of land west of Charlotte, before curling back around to pick up Republican-leaning areas south of Charlotte. To stitch together these disparate areas, Senate District 41 at one point connects through a nature preserve and at another point the district is held together only by the Arrowood train station.


Denver
Davidson
Kannapolis
Lowesville
41
Huntersville
Concord
Mt Pleasant
Latta Plantation
Nature Preserve
Harrisburg
38
Mt Holly
Gastonia
Lowell
Belmont
Charlotte
37
40
Midland
Locust
Stanfield
Bowling Green
Arrowood
train station
Fairview
Matthews
39
Indian Trail
Unionville
Filbert
Tega Cay
Fort Mill
Indian Land
Weddington
York
Newport
Monroe
Wingate

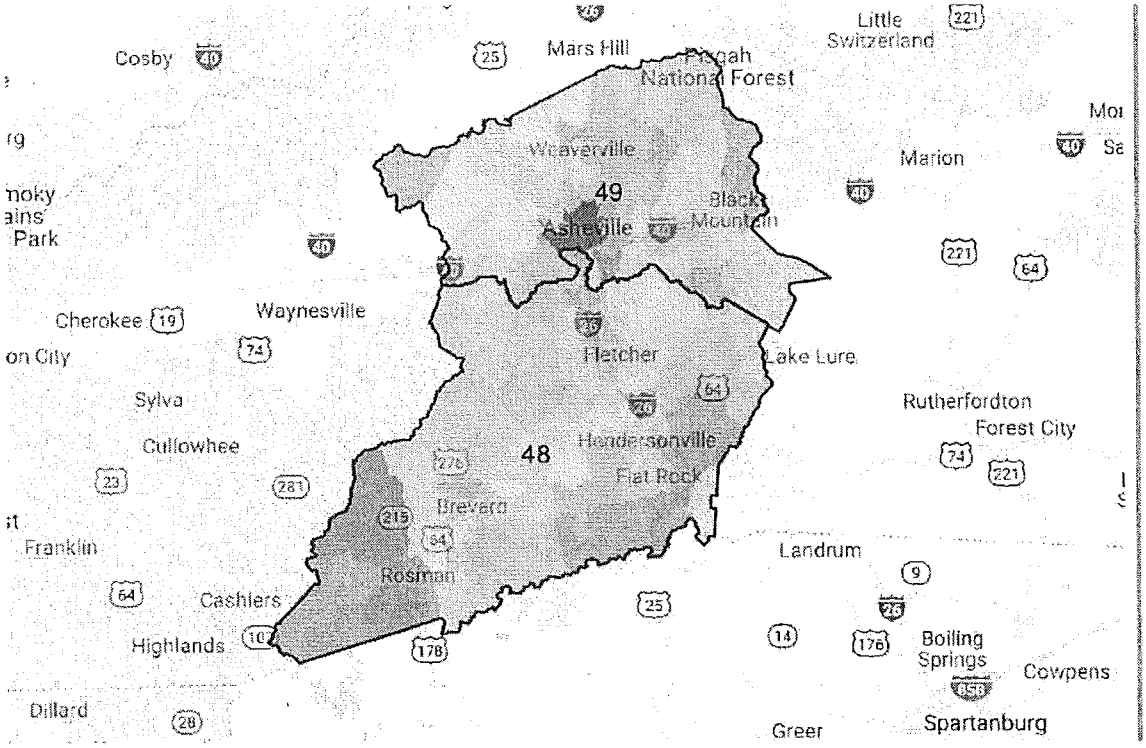

Senate District 41
Arrowood train station



182. The General Assembly manipulated Senate District 39 to be favorable to Republicans. Despite the enormous Democratic wave in Mecklenburg County in 2018—with Democrats winning every county-wide election by huge margins and sweeping the Mecklenburg County Board of Commissioners races—Republicans managed to hold onto Senate District 39. And although the Democratic candidate won Senate District 41 in 2018, the NCDP had to spend far more money and other resources to win this district than it would have under a non-partisan map.

Senate Districts 48 and 49

183. Senate Districts 48 and 49 are within a county cluster of Transylvania, Henderson, and Buncombe Counties.



184. The General Assembly packed Democratic voters in and around Asheville into Senate District 49. This packing ensured that Senate District 48 would elect a Republican.

3. The 2017 Plans Achieved Their Goal in the 2018 Election

185. The 2017 Plans' cracking and packing of Democratic voters worked with remarkable success in the 2018 elections. While the Democratic wave did flip some seats, it could not overcome plans that were designed to guarantee Republicans majorities.

186. In the 2018 House elections, Democratic candidates won 51.2% of the two-party statewide vote, but won only 55 of 120 seats (46%).

187. In the 2018 Senate elections, Democratic candidates won 50.5% of the two-party statewide vote, but won only 21 of 50 seats (42%).

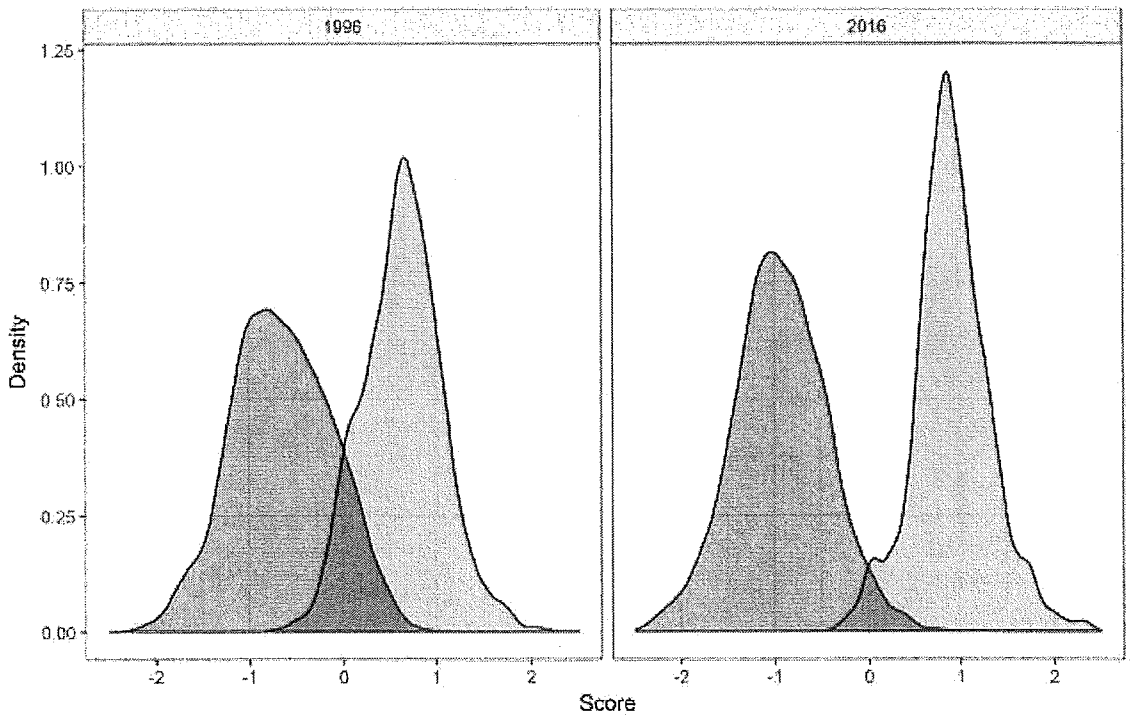
188. Democrats would have won more seats in the House and Senate in 2018—and potentially a majority in either or both chambers—under non-partisan maps.

I. The Partisan Gerrymandering of the 2017 Plans Causes Plaintiffs and Other Democratic Voters To Be Entirely Shut Out of the Political Process

189. The effects of the gerrymander go beyond election results. In today's state legislatures—and particularly in North Carolina—Republican representatives are simply not responsive to the views and interests of Democratic voters. Regardless of whether gerrymandering has *caused* this increased partisanship, such extreme partisanship magnifies the *effects* of partisan gerrymandering. When Democratic voters lose the ability to elect representatives of their party as a result of partisan gerrymandering, those voters lose not only electoral power, but also the ability to influence legislative outcomes—because Republican representatives pay no heed to these voters' views and interests once in office.

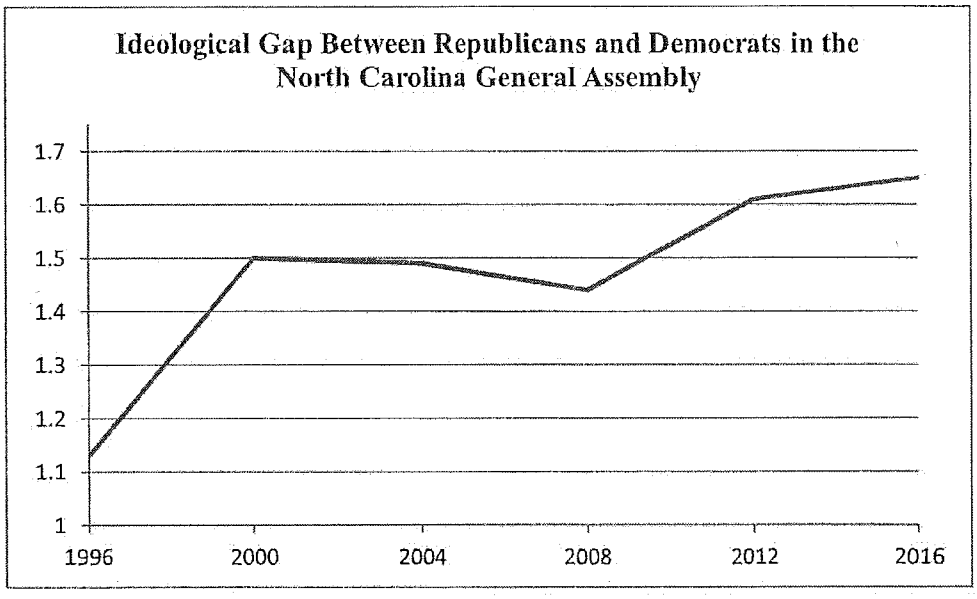
190. There is substantial evidence documenting the increasing polarization of state legislatures, including ideological scores assigned to every state legislator in the country by political scientists Drs. Nolan McCarty and Boris Shor. The chart below depicts the ideological distribution of state legislators nationwide in 1996 and in 2016. Red reflects Republican legislators and blue reflects Democratic legislators, with negative scores on the left of the x-axis indicating a more liberal ideology and positive scores on the right on the x-axis indicating a more conservative ideology.[3] The chart shows that today there are barely any state legislators across the country who overlap ideologically—*i.e.*, barely any Democratic and Republican legislators who overlap in ideological score—and far less than in 1996. Instead, legislators from the parties have grown farther apart, and Republicans legislators in particular have become much more homogenous in ideology, coalescing around an ideological score of +1.

[3] *See* State Polarization, 1996-2016, https://americanlegislatures.com/2017/07/20/state-polarization-1996-2016/.

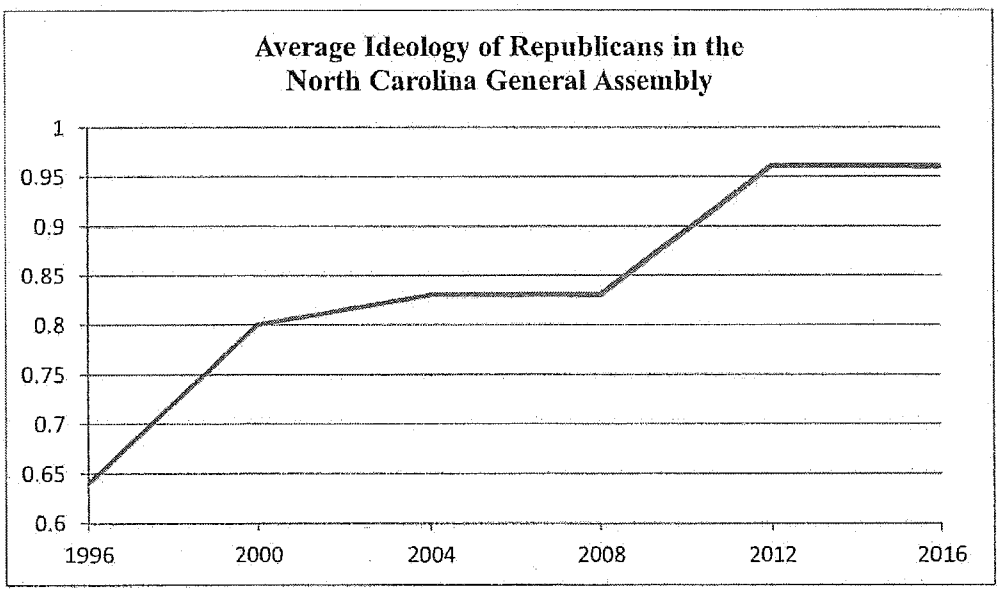


191. The North Carolina General Assembly is no exception to this trend. Political scientists McCarty and Shor have developed ideological scores for every state legislator in the country based on each legislator's roll call voting behavior. These ideological scores range from negative -3 to +3, with negative scores indicating more liberal ideological and positive scores a more conservative one. The below chart shows the gap between the average ideological scores of Republicans and Democrats in the North Carolina General Assembly. It shows that gap has grown dramatically—increasing by more than 50%—over the last 20 years.[4]

[4] *See* Boris Shor & Nolan McCarty, *Measuring American Legislatures*, https://americanlegislatures.com/category/polarization/.



192. This increasing ideological gap reflects the fact that Republican legislators in the North Carolina General Assembly have grown more and more conservative. The below chart shows the average ideological scores of Republicans in the General Assembly over the last 20 years. It demonstrates how Republicans in the General Assembly vote in an increasingly more conservative fashion, and thus are less likely to reflect the views of Democratic voters.



193. The extreme polarization of Republicans in the General Assembly is further evidenced by their near-uniform bloc voting behavior.

194. In the 2017-2018 Session, Republicans in the state Senate almost always voted with a majority of other Republicans and virtually never crossed over to vote with the minority. Every Republican Senator voted with a majority of Republicans over 95% of the time, and the median Republican Senator voted with the Republican majority a stunning 99.2% of the time.[5]

195. Likewise in the House, in the 2017-2018 Session, nearly every Republican in the state House of Representatives voted with the Republican majority over 90% of the time, and the median Republican in the House voted with the Republican majority 96.70% of the time.[6]

196. These statistics all illustrate that Republicans in the General Assembly do not represent the views and interests of their Democratic constituents and almost never engage in cross-over voting. Thus, when gerrymandering denies Democratic voters the ability to elect representatives of their party, they also lose any chance of influencing legislative outcomes.

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

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

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

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[5] *See Senate Member Vote Statistics*, 2017-2018 Session, https://www.ncleg.net/gascripts/voteHistory/MemberVoteStatistics.pl?sSession=2017&sChamber=S.

[6] *See House Member Vote Statistics*, 2017-2018 Session, https://www.ncleg.net/gascripts/voteHistory/MemberVoteStatistics.pl?sSession=2017&sChamber=H.

199. North Carolina's Equal Protection Clause affords broader protections to its citizens in the voting rights context than the U.S. Constitution's equal protection provisions. *See Stephenson v. Bartlett*, 562 S.E.2d 377, 393-95 & n.6 (N.C. 2002); *Blankenship v. Bartlett*, 681 S.E.2d 759, 763 (N.C. 2009).

200. Irrespective of its federal counterpart, North Carolina's Equal Protection Clause protects the right to "substantially equal voting power." *Stephenson*, 562 S.E.2d at 394. "It is well settled in this State that the right to vote on equal terms is a fundamental right." *Id.* at 393 (internal quotation marks omitted).

201. The 2017 Plans intentionally and impermissibly classify voters into districts on the basis of their political affiliations and viewpoints. The intent and effect of these classifications is to dilute the voting power of Democratic voters, to make it more difficult for Democratic candidates to be elected across the state, and to render it virtually impossible for the Democratic Party to achieve a majority of either chamber of the General Assembly. Defendants can advance no compelling or even legitimate state interest to justify this discrimination.

202. The 2017 Plans' intentional classification of, and discrimination against, Democratic voters is plain. The Republican leaders of the House and Senate Redistricting Committees explicitly used "political considerations and election results data" as a criterion in creating the 2017 Plans, drew the maps in secret with a Republican mapmaker, and admitted that they "did make partisan considerations when drawing particular districts." *Covington*, ECF No. 184-17 at 26. The partisan composition of the districts based on recent results demonstrates that the map was designed to ensure overwhelming Republican majorities in both chambers. The General Assembly's intent is also laid bare by the packing and cracking of individual Democratic

communities, as well as a host of statistical analyses and measures that will confirm the 2017 Plans necessarily reflect an intentional effort to disadvantage Democratic voters.

203. These efforts have produced discriminatory effects for Plaintiffs other Democratic voters, including members of Common Cause and the NCDP. On a statewide basis, Democrats receive far fewer state House and Senate seats than they would absent the gerrymanders. The grossly disproportionate number of seats that Republicans have won and will continue to win in the General Assembly relative to their share of the statewide vote cannot be explained or justified by North Carolina's geography or any legitimate redistricting criteria. Moreover, because the gerrymanders guarantee that Republicans will hold a majority in the House and Senate, Plaintiffs and other Democratic voters are unable to elect a legislature that will pass legislation that reflects Democratic voters' positions or policies. The 2017 Plans burden the representational rights of Democratic voters individually and as a group and discriminate against Democratic candidates and organizations individually and as a group.

204. Individual voters also experience discriminatory effects at the district level. For those Plaintiffs and other Democratic voters who live in cracked communities and districts, their voting power is diluted, and it is more difficult than it would be but-for the gerrymander for these voters to elect candidates of their choice. And given the extreme partisanship of Republican representatives in the General Assembly, these voters have no meaningful opportunity to influence legislative outcomes when Republican candidates win their districts, because the Republican representatives simply do not weigh their Democratic constituents' interests and policy preferences in deciding how to act. For those Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, who live in packed Democratic districts, the weight of their votes has been substantially diluted. Their votes have no marginal impact on

election outcomes, and representatives will be less responsive to their individual interests or policy preferences. Accordingly, for all Plaintiffs and others Democratic voters whose votes are diluted under the 2017 Plans, the 2017 Plans impermissibly deny these voters their fundamental right to "vote on equal terms" with "equal voting power." *Stephenson*, 562 S.E.2d at 393-94.

COUNT II
Violation of the North Constitution's
Free Elections Clause, Art. I, § 5

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

206. Article I, Section 10 of the North Carolina Constitution, which has no counterpart in the U.S. Constitution, provides that "All elections shall be free" (the "Free Elections Clause").

207. North Carolina's Free Elections Clause traces its roots to the 1689 English Bill of Rights, which declared that "Elections of members of Parliament ought to be free."

208. Numerous other states have constitutional provisions that trace to the same provision of the 1689 English Bill of Rights, including Pennsylvania, which has a constitutional provision requiring that all "elections shall be free and equal." *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 793 (Pa. 2018). On February 7, 2018, the Pennsylvania Supreme Court held that the partisan gerrymander of Pennsylvania's congressional districts violated this clause. The state high court held that Pennsylvania's Free and Equal Elections Clause requires that all voters "have an equal opportunity to translate their votes into representation," and that this requirement is violated where traditional districting criteria such as preserving political subdivisions and compactness are "subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage." *Id.* at 814, 817.

209. North Carolina's Free Elections Clause protects the rights of voters to at least the same extent as Pennsylvania's analogous provision.

210. The 2017 Plans violate the Free Elections Clause by denying Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, an equal opportunity to translate their votes into representation, and by providing an unfair partisan advantage to the Republican Party and its candidates as a whole over the Democratic Party and its candidates as a whole. The General Assembly's violation of the Free Election Clause is evidenced by, *inter alia*, its subordination of traditional districting criteria to illicit partisan motivations.

211. Elections under the 2017 Plans are anything but "free." They are rigged to predetermine electoral outcomes and guarantee one party control of the legislature, in violation of Article I, § 5 of the North Carolina Constitution.

COUNT III
Violation of the North Constitution's
Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14

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

213. Article I, § 12 of the North Carolina Constitution provides in relevant part: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

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

215. North Carolina courts have recognized that Article I, Sections 12 and 14 may afford broader protections than the federal First Amendment. *Evans v. Cowan*, 468 S.E.2d 575, 578, *aff'd*, 477 S.E.2d 926 (1996).

216. Article I, Sections 12 and 14 protect the right of voters to participate in the political process, to express political views, to affiliate with or support a political party, and to

cast a vote. Voting for a candidate of one's choice is core political speech and/or expressive conduct protected by the North Carolina Constitution. Contributing money to, or spending money in support of, a preferred candidate is core political speech and/or expressive conduct as well. And leading, promoting, or affiliating with a political party to pursue certain policy objectives is core political association protected by the North Carolina Constitution.

217. Irrespective of the U.S. Constitution, the 2017 Plans violate Article 1, Sections 12 and 14 of the North Carolina Constitution by intentionally burdening the protected speech and/or expressive conduct of Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, based on their identity, their viewpoints, and the content of their speech. The 2017 Plans burden the speech and/or expressive conduct of Plaintiffs and other Democratic voters by making their speech and/or expressive conduct—*i.e.*, their votes—less effective. For those Plaintiffs and other Democratic voters who live in cracked districts, the 2017 Plans artificially make it more difficult (if not impossible) for their speech and/or expressive conduct to succeed. And because of the polarization of Republicans in the General Assembly, these voters will be unable to influence the legislative process, resulting in the complete suppression of their political views. For those Plaintiffs and other Democratic voters who live in packed districts, the 2017 Plans artificially dilute the weight and impact of their speech and/or expressive conduct. The General Assembly intentionally created these burdens because of disfavor for Plaintiffs and other Democratic voters, their political views, and their party affiliations.

218. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the protected speech and/or expressive conduct of the NCDP. Because of the gerrymanders, the money the NCDP contributes to or spends on Democratic candidates—and the messages conveyed through the

contributions and expenditures—are less effective and less able to succeed. The General Assembly intentionally rendered the NCDP's contributions and expenditures less effective because of disagreement with the political viewpoints expressed through those contributions and expenditures and disfavor for the candidates that the NCDP supports.

219. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the associational rights of Plaintiffs. The 2017 Plans burden the ability of Plaintiffs and other Democratic voters, including members of Common Cause and the NCDP, as well as the NCDP as an organization, to affiliate and join together in a political party, to carry out the party's activities, and to implement the party's policy preferences through legislative action. The 2017 Plans burden these associational rights by, *inter alia*, making it more difficult for Plaintiffs and other Democratic voters, as well as the NCDP, to register voters, attract volunteers, raise money in gerrymandered districts, campaign, and turn out the vote, by reducing the total representation of the Democratic Party in the General Assembly, and by making it virtually impossible for Democrats to constitute a majority of either chamber of the General Assembly.

220. Irrespective of the U.S. Constitution, the 2017 Plans also violate Article 1, Sections 12 and 14 of the North Carolina Constitution by burdening the protected speech, expressive conduct, and associational rights of Common Cause. The 2017 Plans burden Common Cause's ability to convince voters in gerrymandered districts to vote in state legislative elections and to communicate with legislators. And because the 2017 Plans allow the General Assembly to disregard the will of the public, the 2017 Plans' burden Common Cause's ability to communicate effectively with legislators, to influence them to enact legislation that promote voting, participatory democracy, public funding of elections, and other measures that encourage

accountable government. The 2017 Plans similarly burden the associational rights of Common Cause by frustrating its mission to promote participation in democracy and to ensure open, honest, and accountable government.

221. Irrespective of the U.S. Constitution, the 2017 Plans also violate the North Carolina Constitution's prohibition against retaliation against individuals who exercise their rights under Article I, Sections 12 and 14. *See Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. App. 2014). The General Assembly expressly considered the prior protected conduct of Plaintiffs and other Democratic voters, including members of Common Cause and NCDP, by considering their voting histories and political party affiliations when placing these voters into districts. The General Assembly did this to disadvantage individual Plaintiffs and other Democratic voters because of their prior protected conduct, and this retaliation has diluted these individuals' votes in a way that would not have occurred but-for the retaliation. *Id.* Indeed, many Plaintiffs and other Democratic voters who currently live in Republican state House or Senate districts would live in districts that would be more likely to have, or would almost definitely have, a Democratic representative but for the gerrymander. Moreover, but-for the gerrymander, Plaintiffs and other Democratic voters would have an opportunity to elect a majority of the state House and Senate, which would afford an opportunity to influence legislation. The retaliation has also impermissibly burdened the associational rights of Plaintiffs and the NCDP by making it more difficult for Democrats to register voters, recruit candidates, attract volunteers, raise money, campaign, and turn out the vote, by reducing the total representation of the Democratic Party in the General Assembly, and by making it virtually impossible for Democrats to constitute a majority of either chamber of the General Assembly.

222. There is no legitimate state interest in discriminating and retaliating against Plaintiffs because of their political viewpoints, voting histories, and affiliations. Nor can the 2017 Plans be explained or justified by North Carolina's geography or any legitimate redistricting criteria.

PRAYER FOR RELIEF

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

a. Declare that each of the 2017 Plans is unconstitutional and invalid because each violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Equal Protection Clause, Art. I, § 19; Free Elections Clause, Art. I, § 5; 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 the North Carolina General Assembly using the 2017 Plans;

c. Establish new state House and state Senate districting plans that comply with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new state House and state Senate districting plans comporting with the North Carolina Constitution in a timely manner;

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

Dated: December 7, 2018

Respectfully submitted,

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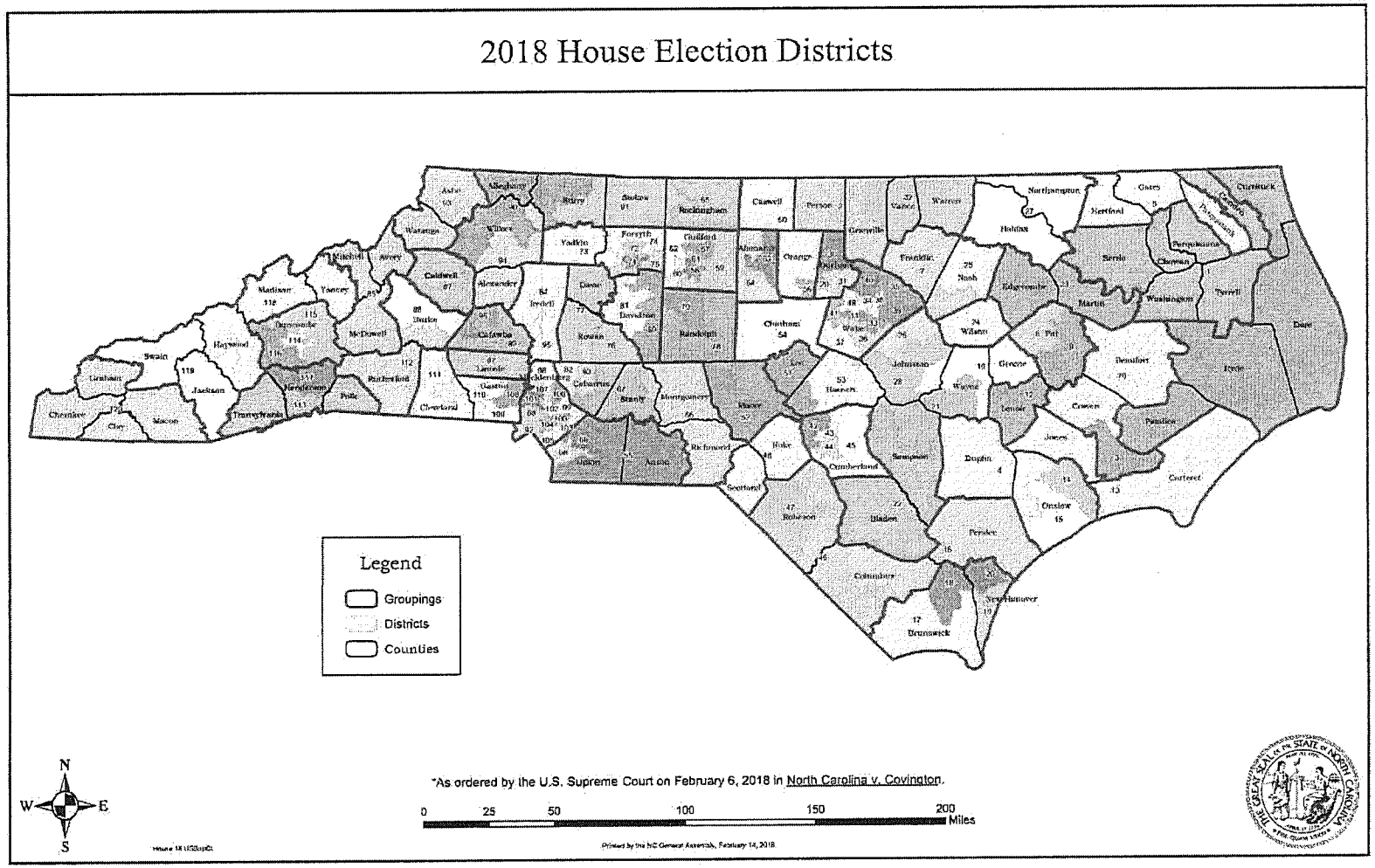
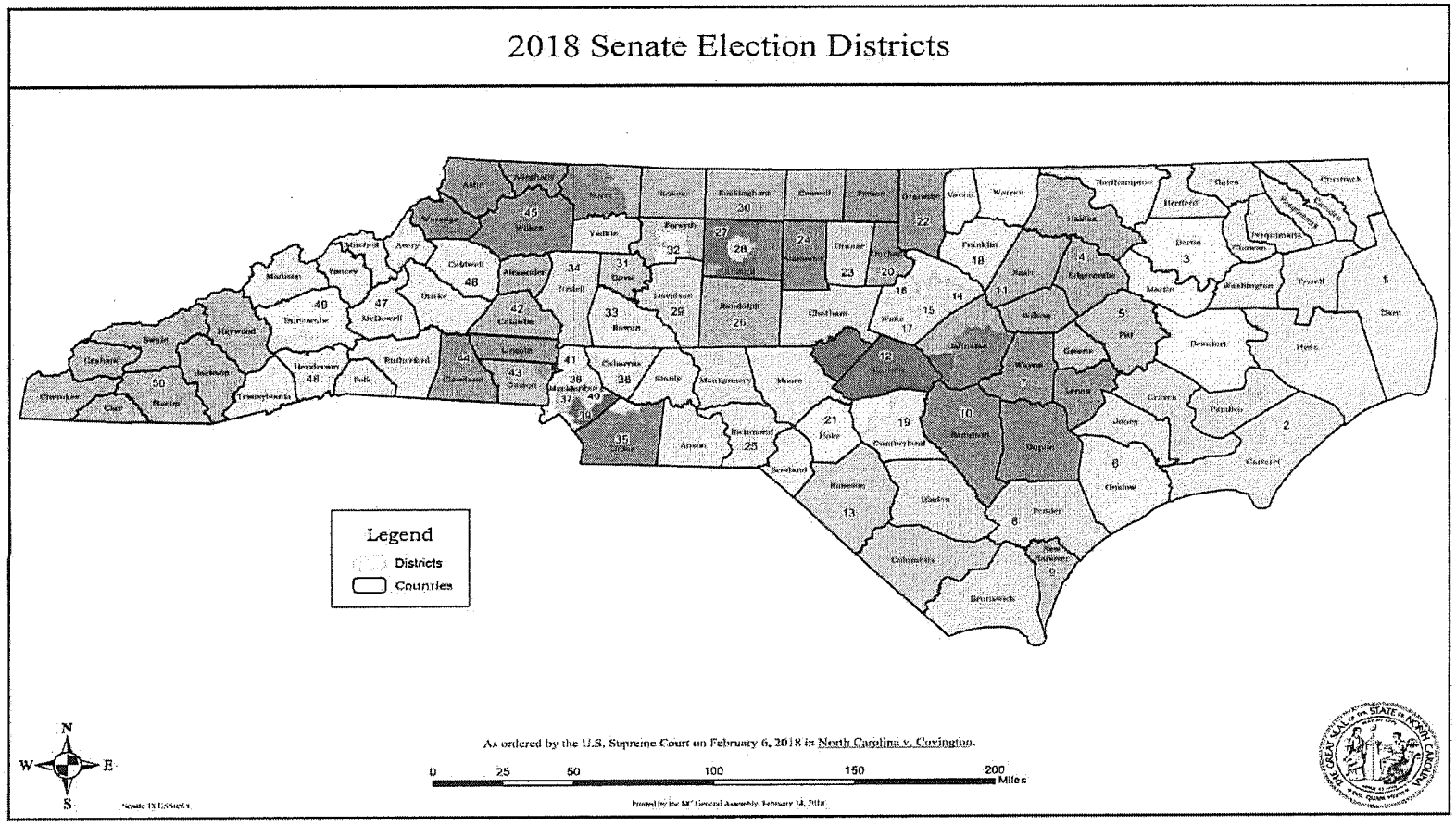
Appendix

Appendix A: North Carolina House of Representatives Districts



Appendix B: North Carolina Senate Districts



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This the 7th day of December, 2018.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
2018 DEC 12 P 3:41
WAKE CO., C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

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

Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY AND TRIAL AND FOR CASE MANAGEMENT ORDER

(OTHR)

Plaintiffs Common Cause, the North Carolina Democratic Party, and 38 North Carolina registered voters respectfully file this supplemental brief in support of their Motion for Expedited Discovery and Trial and for Case Management Order. A new development in the General Assembly underscores the critical need to resolve this matter as expeditiously as possible.

1. Plaintiffs filed their initial complaint in this action on November 13, 2018. On November 20, 2018, Plaintiff filed a motion for leave to conduct expedited discovery, and for entry of a Discovery Scheduling Order and Case Management Order establishing a schedule for expedited discovery, motions practice, and trial. Through this motion, Plaintitffs seek to ensure that, if the challenged districting plans for the state House of Representatives and state Senate (the "2017 Plans") are found unconstitutional in this case, there will be sufficient time to establish new, lawful districts for the 2020 primary and general elections. On December 7, 2018, Plaintiffs filed an amended complaint as contemplated by the schedule that Plaintiffs requested in the Motion to Expedite.

2. Last night, on December 11, 2018, leaders in the General Assembly unveiled a bill that, among other things, would attempt to significantly extend the time that the General

Assembly must be afforded to develop remedial districtings plans should the current plans be found unconstitutional. The bill would amend N.C. Gen. Stat. § 120-2.4(a)—which currently affords the General Assembly at least two weeks to establish remedial plans—to read as follows, with the underlined language reflecting the proposed changes:

> If the General Assembly enacts a plan apportioning or redistricting State legislative or congressional districts, in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law. That period of time shall not be less than two ~~weeks~~ weeks, provided, however, that if the General Assembly is scheduled to convene legislative session within 45 days of the date of the court order that period of time shall not be less than two weeks from the convening of that legislative session.

HB 1029, § 4.7.

3. The House voted to approve this revision today, December 12, 2018, just a day after the proposal was first unveiled. The Senate is set to vote on the bill in the days ahead.

4. If enacted, the revised provision could purport to require that the General Assembly be given up to *59 days* to enact remedial districting plans, depending on when the General Assembly schedules its next legislative session. The provision would revise N.C. Gen. Stat. § 120-2.4 even though the current requirement of two weeks to enact remedial plans has never been an impediment to the General Assembly carrying out this task, and no compelling reason has been advanced for changing the statute.

5. The proposed revisions are a transparent attempt to interfere with this already filed litigation by making it more difficult to complete a remedial process in time for the 2020 elections. Before they have even begun defending the challenged plans in this case, leaders in the General Assembly already are trying to create unnecessary delay in hopes of running out the clock.

6. While Plaintiffs do not believe that the proposed new requirement could be lawfully applied to this pending lawsuit (or at all, if a shorter remedial timeline were necessary to cure a constitutional violation), the prospect that the General Assembly will enact the proposed language provides all the more reason to grant Plaintiffs' Motion to Expedite. Resolving this matter as expeditiously as possible will reduce the chances that the courts will have to rule on the constitutionality of the new provision, and it will ensure that the 2017 Plans, if found unconstitutional, will be remedied in time for the next election. Above all else, it is essential that North Carolonians not be forced yet again to vote in unconstitutional districts should Plantiffs prevail in this case. To that end, Plaintiffs respectfully request that the Court adopt their proposed expedited schedule.

Respectfully submitted this the 12th day of December, 2018.

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This the 12th day of December, 2018.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
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WAKE COUNTY, C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

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

Defendants.

MOTION FOR EXPEDITED DISCOVERY AND TRIAL AND FOR CASE MANAGEMENT ORDER

(OTHR)

NOW COME Plaintiffs Common Cause, the North Carolina Democratic Party, and 22 North Carolina registered voters, pursuant to Rule 26(d) of the North Carolina Rules of Civil Procedure, and move the Court for leave to conduct expedited discovery, and for the Court to enter a Discovery Scheduling Order and Case Management Order establishing a schedule for expedited discovery, motions practice, and trial. In support thereof, Plaintiffs state as follows:

1. In this action, Plaintiffs challenge the redistricting plans enacted by the North Carolina General Assembly in 2017 for the state House of Representatives and state Senate (the "2017 Plans"). Defendants are the chairmen of the state House and state Senate redistricting committees, the Speaker of the state House, the President Pro Tempore of the state Senate, the State itself, and the State Board of Elections and Ethics Enforcement and its members. Plaintiffs allege that the 2017 Plans constitute illegal partisan gerrymanders in violation of the North Carolina Constitution's Equal Protection Clause, Free Elections Clause, and Freedom of Speech and Freedom of Assembly Clauses. Plaintiffs seek a declaration that the 2017 Plans are unlawful, an injunction barring use of the 2017 Plans in the 2020 primary and general elections,

and the establishment of new plans that comply with the North Carolina Constitution in time for those 2020 elections.

2. It is in the overwhelming interest of both the parties and the public to resolve this case as expeditiously as possible to ensure that, if the 2017 Plans are found unconstitutional, there is sufficient time to establish new, lawful districts for the 2020 primary and general elections. In nearly every state and federal legislative election held in North Carolina this decade, voters have been forced to cast their ballots in districts ruled unconstitutional by the courts. In 2012 and 2014, North Carolinians voted in dozens of racially gerrymandered state House and Senate districts under one the "most widespread racial gerrymanders ever encountered by a federal court." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 943 (M.D.N.C. 2018). Even when a federal court declared these districts unconstitutional in August 2016, there was "insufficient time" to implement new districts for the 2016 elections, so voters again had to vote in these unlawful districts. *Covington v. North Carolina*, 316 F.R.D. 176, 176-77 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017). Similarly, North Carolina's congressional elections in 2012 and 2014 also were conducted under unconstitutional racially gerrymandered districts. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). And the replacement plan that the General Assembly adopted, which governed the 2016 and 2018 congressional elections, has itself been found to be an unconstitutional partisan gerrymander. *Common Cause*, 318 F. Supp. 3d 777.

3. The citizens of North Carolina should not bear the risk of once again being forced to vote in districts that violate their constitutional rights. That is especially true for the 2020 state

legislative elections, since the state representatives elected in 2020 will be the ones who, in 2021, will redraw North Carolina's state legislative and congressional districts for the next decade.

4. Deadlines relating to the 2020 elections are quickly approaching. Indeed, the General Assembly recently moved up the candidate filing period and the primary date. The window for candidates to file for party primary nominations is now scheduled to open on December 2, 2019, and primary elections are now scheduled to be held on March 3, 2020. *See* 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). As a result of these recent changes, North Carolina will have one of the earliest primaries in the country in 2020.

5. To promote a timely resolution of this case and ensure there is sufficient time for a remedial process before the 2020 elections should Plaintiffs prevail, Plaintiffs have effectuated prompt service on Defendants and served written discovery requests with the Complaint. Plaintiffs now propose the following deadlines and procedures relating to pleadings, procedures, discovery, motions practice, and trial:

- All pleadings, motions, briefs, discovery requests, and discovery responses shall be served by e-mail. Depositions may be taken upon 10 days' notice.

- Plaintiffs shall file an amended complaint no later than December 7, 2018. The amended complaint will make limited substantive changes to the original complaint; the primary differences will be to add new voter plaintiffs, update factual information regarding the results of the recent 2018 elections, and add allegations relating to the Wake County state House districts in light of the recent summary judgment decision in *N.C. State Conference of NAACP Branches v. Lewis*, 18 CVS 2322 (N.C. Super.).

- Defendants shall file any motion(s) to dismiss and brief(s) in support no later than December 21, 2018. This affords Defendants more than five weeks from the filing of Plaintiffs' initial complaint and two weeks from the filing of Plaintiffs' amended complaint, which will make only limited changes as described above. Plaintiffs shall file any opposition to any motion(s) to dismiss no later than January 11, 2019, and Defendants shall file any reply(ies) no later than January 25, 2019.

- All document and written discovery shall be completed no later than January 31, 2019. The parties by agreement may continue document or written discovery beyond

this deadline, but the Court will not intervene in this voluntary process except in extraordinary circumstances, and the trial date will not be modified because of information obtained through this voluntary process.

- Expert reports shall be served no later than February 15, 2019. Those reports shall include the information stated in Rule 26(b)(4)(A)(2) of the North Carolina Rules of Civil Procedure. Rebuttal expert reports shall be served no later than March 1, 2019. Reply expert reports shall be served no later than March 8, 2019.

- No later than March 8, 2019, the parties shall file a joint proposal to establish deadlines for the exchange of witness lists, exhibit lists, and deposition designations, and for submitting to the Court a joint pre-trial stipulation of facts. On any deadline where the parties cannot agree, they may each describe their respective positions.

- All discovery shall be completed no later than March 29, 2019, and any discovery-related disputes will be heard on an expedited basis and, to the extent reasonable and appropriate, upon notice of less than five days.

- Plaintiffs do not anticipate that this case will be appropriate for summary judgment. If either party desires to file a motion for summary judgment, however, the motion and brief in support shall be filed no later than April 1, 2019. Any opposition shall be filed no later than April 8, 2019.

- Motions in limine and briefs in support shall be filed no later than April 3, 2019. Any oppositions shall be filed no later than April 10, 2019.

- Trial will begin April 15, 2019.

- Plaintiffs and Defendants shall each file their respective proposed findings of fact and conclusions of law seven days after the close of trial.

6. Plaintiffs propose this schedule in order to enable a final decision by this Court, appellate review, and a remedial process in advance of the 2020 elections. In addition to the time for appellate review, the remedial process likely would involve multiple steps. The General Assembly likely would be afforded time to propose remedial plans, the parties likely would be afforded an opportunity to comment on the proposed remedial plans, and the courts (potentially with the assistance of a special master) would need time to review the proposed remedial plans and any comments on them. If the courts find that any proposed remedial plans do not cure the

and any comments on them. If the courts find that any proposed remedial plans do not cure the constitutional violations, the courts would need time to develop (and receive comments on) new remedial plans to cure those violations. All of these steps would need to be completed sufficiently in advance of the candidate filing period for party primary nominations, which, as stated, is scheduled to begin December 2, 2019. The expedited schedule that Plaintiffs propose here will ensure that this is feasible.

7. Plaintiffs believe that the schedule proposed above is reasonable given that most of the factual evidence in this case will consist of public records generated by Defendants themselves. The proposed schedule is also consistent with the schedule followed in other redistricting cases in North Carolina and elsewhere. The proposed schedule is far less compressed than that adopted in *Stephenson v. Bartlett*, 562 S.E.2d 377, 382 (N.C. 2002), where the Superior Court and then the state Supreme Court struck down the state's legislative districts under the North Carolina Constitution. In *Stephenson*, the plaintiffs filed suit on November 13, 2001, and the trial court granted the plaintiffs' motion for summary judgment following discovery on February 20, 2002, just over three months after the complaint was filed. *Id.* at 382. Here, Plaintiffs seek to have trial conclude more than five months after filing suit, with a decision from this Court shortly thereafter—twice as much time as was allotted in *Stephenson*. Plaintiffs' proposed schedule here also aligns with that in other recent partisan gerrymandering challenges. For instance, in a partisan gerrymandering challenge to Pennsylvania's congressional districts last year, the trial court entered its recommended findings of fact and conclusions of law following trial just over six months after the plaintiffs filed suit. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766-67 (Pa. 2018).

WHEREFORE, Plaintiffs request that the Court enter an order providing for expedited discovery, motions practice, and trial, consistent with the deadlines and procedures set out above.

Respectfully submitted this the 20th day of November, 2018.

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CERTIFICATE OF SERVICE

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

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This the 20th day of November, 2018.

POYNER SPRUILL LLP

Caroline P. Mackie

Caroline P. Mackie

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-589

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.,

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

ANSWER OF LEGISLATIVE DEFENDANTS AND THE STATE OF NORTH CAROLINA TO AMENDED COMPLAINT

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; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

ANSWER OF LEGISLATIVE DEFENDANTS AND THE STATE OF NORTH CAROLINA TO AMENDED COMPLAINT

Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the North Carolina House Timothy R. Moore, and President Pro Tem of the North Carolina Senate,

Philip E. Berger ("Legislative Defendants") and the State of North Carolina[1] (collectively referred to in the Answer as "Defendants") answer plaintiffs' amended complaint as follows:

INTRODUCTION

The location of every district line has political consequences. Where a line is drawn inevitably advantages some voters and disadvantages others. Redistricting is an inherently political process.

For over 200 years, the People of the State of North Carolina have reserved to the General Assembly the constitutional authority to make the inherently political choices regarding the drawing of district lines. For most of our State's history, and until 2011, this constitutional authority was exercised by the Democratic members of the General Assembly.

In 2010, for the first time in North Carolina modern history, voters for Republican candidates—which includes voters registered as Republicans, Democrats, unaffiliated, and with other minor parties—exercised their First Amendment rights to elect a Republican-controlled General Assembly. But only after the Democratic Party obtained a majority on the North Carolina Supreme Court, did Democratic plaintiffs bring a case challenging the General Assembly's constitutional authority to determine the location of district lines. Plaintiffs offer no criteria for how districts must be drawn. Instead, they contend that political decisions regarding the location of district lines must be made by the courts unless the General Assembly draws plans that maximize the political influence of Democratic candidates at the expense of African-American voters and Republicans.

[1] As stated in the Notice of Removal filed on December 14, 2018 (D.E. 1), pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the "State of North Carolina" in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government.

Plaintiffs' standardless, politically-biased theories will result in districting plans that will subject the state to liability under a standing order by a federal court, the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs' theories, if adopted, will also violate the rights of the Legislative Defendants, Republican voters, and Republican candidates under the First and Fourteenth Amendments. Plaintiffs' claims must be rejected.

FIRST DEFENSE

Defendants will necessarily violate the federal court order entered by the United States District Court for the Middle District of North Carolina in *Covington v. North Carolina* if this Court grants the relief requested by plaintiffs.

SECOND DEFENSE

Defendants will necessarily violate the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution if the Court grants the relief requested by plaintiffs.

THIRD DEFENSE

Plaintiffs are asking this Court to punish the Legislative Defendants, voters for Republican candidates, and Republican candidates in the same way plaintiffs contend that the General Assembly has treated Democrats in the challenged plans. They do so by asking this Court to "crack" Republican voters out of districts that currently elect Republican candidates in order to submerge them in a district in which plaintiffs believe it will be more difficult to elect a Republican candidate. Should this Court adopt plaintiffs' standardless and politically-biased theory of liability, it will violate the rights of the Legislative Defendants, Republican voters, and Republican candidates under the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

FOURTH DEFENSE

Plaintiffs are asking this Court to punish the Legislative Defendants, voters for Republican candidates, and Republican candidates in the same way plaintiffs contend that the General Assembly has punished Democrats. They do so by asking this Court to create districts that elect Democratic candidates by removing Republican voters from districts where those voters currently elect a Republican candidate and "packing" them in other districts that already elect Republican candidates. Under plaintiffs' standardless and politically-biased theory of liability, doing so will violate the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

FIFTH DEFENSE

Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to favor their preferred political party at the expense of their non-preferred political party. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution.

SIXTH DEFENSE

Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to maximize the political influence of the organizational and individual Democratic plaintiffs at the expense of the Legislative Defendants, voters for Republican candidates, and Republican candidates. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

SEVENTH DEFENSE

The North Carolina Constitution allows the General Assembly to consider partisan advantage and incumbency protection in the application of its discretionary redistricting

decisions. *Stephenson v. Bartlett*, 355 N.C. 35, 562 SE.2d 377, 390 (N.C. 2002) ("*Stephenson I*"). There is no such thing as a "nonpartisan" districting plan and there is no basis whatsoever for plaintiffs' contention that the General Assembly must draw "non-partisan plans." Any court order prohibiting the Legislative Defendants from considering partisan advantage and incumbency protection would violate the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

EIGHTH DEFENSE

Under the theory of liability described by plaintiffs, a district is always "cracked" whenever the Democratic candidate loses the district (but not when a Republican candidate loses the district). Further, districts in which Democratic voters elect a Democratic candidate are "packed" regardless of the percentage of the Democratic voters in the district (but not so with districts in which voters for Republican candidates elect a Republican candidate). Accordingly, to remedy these supposed violations, the defendants must necessarily adopt districting plans that elect only Democratic candidates where such candidates are not currently being elected, at the expense of the Legislative Defendants, voters for Republican candidates, and Republican candidates, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

NINTH DEFENSE

Defendants and the People of North Carolina have been severely prejudiced by Plaintiffs' unreasonable delay in bringing these claims challenging the constitutional authority of the General Assembly to consider partisan affiliation and incumbency in making the inherently political decisions regarding the location of district lines. Plaintiffs' claims are thereby barred by the doctrine of laches.

TENTH DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

ELEVENTH DEFENSE

Plaintiffs have failed to identify any constitutional criteria that the legislature could follow or alternative districting maps that they contend satisfy any such constitutional criteria. Plaintiffs' failure to either identify any such criteria or produce districting maps that comply with their alleged criteria, entitle Defendants to judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P.

TWELFTH DEFENSE

Plaintiffs' standardless, politically-biased theory of liability, if adopted by this Court, will operate as an illegal judicial amendment of the North Carolina Constitution in violation of Article XIII of the North Carolina Constitution.

THIRTEENTH DEFENSE

The constitutional authority to draw state senate and state house districts has been reserved by the People to the General Assembly, subject to the express limitations found only in Article II, Secs. 2, 3, 4, and 5 of the North Carolina Constitution. The 2017 legislative redistricting plans fully comply with these provisions of the State Constitution.

FOURTEENTH DEFENSE

In order to achieve political gain, plaintiffs are asking this Court to usurp the constitutional authority of the General Assembly to draw legislative districts in violation of the separation of powers doctrine, adopted by the People in Article I, Sec. 6 of the North Carolina Constitution.

FIFTEENTH DEFENSE

Plaintiffs' politically-biased, standardless theory of liability, is non-justiciable under any provision of the North Carolina Constitution, including Article I, Sec. 19, Article I, Sec. 10, and Article I, Secs. 12 and 14.

SIXTEENTH DEFENSE

Unlike the provision of the Pennsylvania Constitution cited by the plaintiffs, nothing in the North Carolina Constitution states that elections must be "equal." Reading any such term into the North Carolina Constitution would amount to an illegal judicial amendment of the Constitution in violation of Article XIII of the North Carolina Constitution. For this and other reasons, Plaintiffs' claim that the 2017 legislative redistricting plans violate Article I, Sec. 10 of the North Carolina Constitution is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

SEVENTEENTH DEFENSE

Neither the Organizational nor the Individual Plaintiffs have standing to bring this action.

EIGHTEENTH DEFENSE

Plaintiffs' are requesting that the Court "punish" and "burden" the Legislative Defendants, Republican candidates, and Republican voters in the same way plaintiffs contend that the General Assembly has "punished" or "burdened" Democratic voters. Plaintiffs' request for equitable relief should therefore be denied because plaintiffs have unclean hands.

NINETEENTH DEFENSE

Plaintiffs' complaint should be dismissed because of their failure to provide a judicially manageable standard or definition for the terms "packed," "cracked," or "non-partisan."

TWENTIETH DEFENSE

Defendants answer the individual allegations of Plaintiffs' Complaint as follows:

"INTRODUCTION"

1. Defendants deny the allegations of paragraph 1.

2. Defendants deny the allegations of paragraph 2.

3. Defendants deny the allegations of paragraph 3.

4. Defendants admit that the Governor lacks the constitutional authority to veto districting bills. In all other respects, Defendants deny the allegations of paragraph 4.

5. Defendants admit that the decision in *Stephenson I* speaks for itself and that the 2017 legislative plans fully and completely comply with the constitutional standards stated therein. In all other respects, Defendants deny the allegations of paragraph 5.

6. Defendants deny the allegations of paragraph 6.

"PARTIES

A. Plaintiffs"

7. Defendants deny that the 2017 Legislative Plans "burden" the ability of Common Cause in any respect and that Common Cause or its members have standing to bring this action. In all other respects, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 7.

8. Defendants admit that the North Carolina Democratic Party ("NCDP") is a political party as defined under N.C. Gen. Stat. § 163-96, and that registered Democratic voters reside in every legislative district. In all other respects, Defendants deny the allegations of paragraph 8.

9. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Chapman. Defendants admit that election results in House District 100 and Senate District 40 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 9.

10. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff DuBose. Defendants admit that election results in House District 2 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 10.

11. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Gauck. Defendants admit that the district lines for House Districts 17 and 18 and Senate Districts 8 and 9 and the election results in those districts speak for themselves. In all other respects, Defendants deny the allegations of paragraph 11.

12. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Nesbit. Defendants admit that the election results for House District 19 and Senate District 9 speak for themselves. In all other respects Defendants deny the allegations of paragraph 12.

13. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Jordan. Defendants admit that the election results for Senate District 11 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 13.

14. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Gates. Defendants admit that the election results for Senate District 49 speak for themselves. In all other respects Defendants deny the allegations of paragraph 14.

15. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Peters. Defendants admit that the district lines for

Senate District 48 and the election results for that district speak for themselves. In all other respects, Defendants deny the allegations of paragraph 15.

16. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Morton. Defendants admit that the election results for House District 100 and Senate District 37 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 16.

17. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brien. Defendants admit that the election results for House District 102 and Senate District 37 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 17.

18. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Turner. Defendants admit that the election results for House District 38 and Senate District 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 18.

19. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Schaller. Defendants admit that the 2011 versions of House Districts 63 and 64 were not changed in the 2017 House Plan and that election results in House District 64 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 19.

20. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Harper. Defendants admit that the election results for House District 36 and Senate District 17 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 20.

21. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Wischmann. Defendants admit that the election results in House District 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 21.

22. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brown. Defendants admit that the election results in House District 58 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 22.

23. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Oseroff. Defendants admit that the election results for House District 8 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 23.

24. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Jackson. Defendants admit that the election results in House District 103 and Senate District 29 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 24.

25. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Balla. Defendants admit that the election results in House District 34 and Senate District 16 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 25.

26. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Johnson. Defendants admit that the election results for

House District 74 and Senate District 31 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 26.

27. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Wolff. Defendants admit that the election results in House District 37 and Senate District 17 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 27.

28. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Peden-Coviello. Defendants admit that the election results in House District 72 and Senate District 32 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 28.

29. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Barnes. Defendants admit that the election results for House District 113 and Senate District 48 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 29.

30. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Holbrook. Defendants admit that the district lines for House Districts 17 and 18 and Senate Districts 8 and 9 and that the election results in these districts speak for themselves. In all other respects, Defendants deny the allegations of paragraph 30.

31. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff McCracken. Defendants admit that the election results for House District 51 and Senate District 12 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 31.

32. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Dunn. Defendants admit that the election results for House District 104 and Senate District 39 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 32.

33. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Machak. Defendants admit that the election results for House District 109 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 33.

34. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Service. Defendants admit that the election results in House District 34 and Senate District 18 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 34.

35. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Rumph. Defendants admit that the election results for House District 9 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 35.

36. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff McGrigor. Defendants admit that the election results for House District 7 and Senate District 18 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 36.

37. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Bradley. Defendants admit that the election results in

House District 35 and Senate District 14 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 37.

38. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Thomas. In all other respects, Defendants deny the allegations of paragraph 38.

39. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Miller. Defendants admit that the election results for House District 18 and Senate District 8 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 39.

40. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Person. Defendants admit that the election results for House District 43 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 40.

41. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Smith. Defendants admit that the election results for House District 83 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 41.

42. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Sloan. Defendants admit that the election results for House District 67 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 42.

43. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Frey. Defendants admit that the election results in

House District 69 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 43.

44. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Quick. Defendants admit that the election results in House District 59 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 44.

45. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brown. Defendants admit that the election results for Senate District 26 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 45.

46. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Campbell. Defendants admit that the election results in House District 46 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 46.

"B. Defendants"

47. Defendants admit the allegations of paragraph 47.

48. Defendants admit the allegations of paragraph 48.

49. Defendants admit the allegations of paragraph 49.

50. Defendants admit the allegations of paragraph 50.

51. Defendants admit the allegations of paragraph 51.

52. Defendants admit that the power and authority of the North Carolina State Board of Elections and Ethics Enforcement are established by statutes that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 52.

53. Defendants admit the allegations of paragraph 53.

54. Defendants admit the allegations of paragraph 54.

55. Defendants admit the allegations of paragraph 55.

56. Defendants admit the allegations of paragraph 56.

57. Defendants admit the allegations of paragraph 57.

58. Defendants admit the allegations of paragraph 58.

59. Defendants admit the allegations of paragraph 59.

60. Defendants admit the allegations of paragraph 60.

61. Defendants admit the allegations of paragraph 61.

"JURISDICTION AND VENUE"

62. Defendants deny the allegations of paragraph 62.

63. Defendants admit the allegations of paragraph 63.

64. Defendants admit the allegations of paragraph 64.

"FACTUAL ALLEGATIONS

A. National Republican Party Officials Target North Carolina for Partisan Gerrymandering Prior to 2010 Election"

65. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 65.

66. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 66.

67. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 67.

68. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 68.

"B. Republican Mapmakers Create 2011 Plan from Party Headquarters"

69. Defendants deny that Republicans set out to "entrench" Republicans in power. In all other respects, Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 69.

70. Defendants admit that Tom Hofeller, John Morgan, Dale Oldham and Joel Raupe advised Republican Chairs during the 2011 redistricting process and that Fair and Legal Redistricting may have paid Morgan, Raupe and Hofeller. In all other respects, Defendants deny the allegations of paragraph 70.

71. Defendants admit that like all legislation and prior districting plans drawn by both political parties the 2011 plans were initially drawn in private and that work was done at political party facilities. In all other respects, Defendants deny the allegations of paragraph 71.

72. Defendants admit that like all legislation and prior districting plans drawn by both political parties the 2011 plans were initially drawn in private and that work was done at political party facilities; and that draft plans were reviewed by the Redistricting Chairs and some of the Republican members before proposed maps were released to the public. In all other respects, Defendants deny the allegations of paragraph 72.

73. Defendants admit that Art Pope provided legal advice to the Redistricting Chairs. In all other respects, Defendants deny the allegations of paragraph 73.

74. Defendants deny the allegations of paragraph 74.

75. Defendants admit that the citations from the *Dickson* case speak for themselves. In all other respects, Defendants deny the allegations of paragraph 75.

"C. Republicans Enact 2011 Plans to Increase Their Party's Power"

76. Defendants admit that the identity of members of the legislature who voted for the 2011 legislative districting plans are a matter of public record. In all other respects, Defendants denies the allegations of paragraph 76.

77. Defendants admit the allegations of paragraph 77.

"D. The 2011 Plan Gave Republican Super Majorities that were Grossly Disproportionate to Republicans' Share of the Statewide Vote."

78. Defendants admit that the election results in 2012 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 78

79. Defendants admit that the election results in 2012 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 79.

80. Defendants admit that the election results in 2014 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 80.

81. Defendants admit that the election results in 2014 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 81.

82. Defendants admit that the election results in 2016 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 82.

83. Defendants admit that the election results in 2016 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 83.

84. The Defendants admit that the election results for the 2012, 2014 and 2016 general election speak for themselves. In all other respects, Defendants deny the allegations of paragraph 84.

"E. A Federal Court Strikes Down Many Districts as Racially Gerrymandered"

85. Defendants admit that the decisions in *Covington v. North Carolina* speak for themselves. In all other respects, Defendants deny the allegations of paragraph 85.

86. Defendants admit that the decision in *Covington v. North Carolina* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 86.

"F. The General Assembly Enacted the 2017 Plans to Dilute the Voting Power of Democratic Voters and Maximize the Political Advantage of Republicans"

87. Defendants deny the allegations of paragraph 87.

88. Defendants deny the allegations of paragraph 88.

89. Defendants admit that General Assembly staff regularly prepare proposed legislation in "secret" for Democratic or Republican members, that the practice followed by the Redistricting Chairs was consistent with this practice to the extent Dr. Hofeller was hired as a consultant to the chairs, and that Democratic controlled General Assemblies had in the past used their consultants to prepare districting plans in "secret." Defendants admit that the cited transcript speaks for itself. In all other respects, Defendants deny the allegations of paragraph 89.

90. Defendants admit that the statements attributed to Representative Lewis are taken completely out of context, apply to congressional redistricting and not legislative redistricting, and speak for themselves. In all other respects, Defendants deny the allegations of paragraph 90.

91. Defendants admit that the statements transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 91.

92. Defendants admit that the statements transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 92.

93. Defendants admit that the statements and votes transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 93.

94. Defendants admit that the statements of Representatives Lewis and Hise transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 94.

95. Defendants admit that the statements of Representative Lewis transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 95.

96. Defendants admit that various criteria were adopted by the House and Senate Committees and that the record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 96.

97. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 97.

98. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 98.

99. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 99.

100. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 100.

101. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 101.

102. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 102.

103. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 103.

104. Defendants admit that paragraph 104 lists the criteria adopted by the Committees and that "election data" is the 8th criterion listed. In all other respects, Defendants deny the allegations of paragraph 104.

105. Defendants admit that the decision in *Covington* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 105.

106. Defendants admit that like all legislation, including redistricting legislation passed by Democratic-controlled General Assemblies, the initial draft of the 2017 House Districting Plan was done in a confidential manner and protected by legislative privilege until it was released for public review and comments by the committee chairs. Defendants admit that the hearing transcript speaks for itself. In all other respects, Defendants denies the allegations of paragraph 106.

107. Defendants deny the allegations of paragraph 107.

108. Defendants admit that the proposed House redistricting plan was released on August 21, 2017. Defendants deny that the proposed Senate redistricting plan was released on August 21, 2017, because it was released on August 20, 2017. In all other respects, Defendants deny the allegations of paragraph of paragraph 108.

109. Defendants admit that the statement by Senator Hise cited in paragraph 109 is taken completely out of context and speaks for itself. In all other respects, Defendants deny the allegations of paragraph 109.

110. Defendants deny the allegations of paragraph 110.

111. Defendants deny the allegations of paragraph 111.

112. Defendants deny the allegations of paragraph 112.

113. Defendants deny the allegations of paragraph 113.

114. Defendants deny the allegations of paragraph 114.

115. Defendants deny the allegations of paragraph 115.

116. Defendant admit that any public comments speak for themselves. In all other respects, Defendants deny the allegations of paragraph 116.

117. Defendants admit that the committee votes are a matter of public record and speak for themselves. In all other respects, Defendants deny the allegations of paragraph 117.

118. Defendants admit that the proceedings before the House are a matter of public record that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 118.

119. Defendants admit that the proceedings before the General Assembly are a matter of public record that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 119.

120. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 120.

"G. The *Covington* Court Appoints a Special Master to Redraw Several Districts in the 2017 Plans that Remained Racially Gerrymandered"

121. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 121.

122. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 122.

123. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 123.

124. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 124.

125. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 125.

"H. The 2017 Plans Pack or Crack Plaintiffs and Other Democratic Voters to Dilute Their Votes and Maximize the Political Advantage of Republicans"

126. Defendants deny the allegations of paragraph 126.

127. Defendants deny the allegations of paragraph 127.

"1. The 2017 House Plan Packs and Cracks Democratic Voters"

128. Defendants admit that House Districts 2 and 32 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in the *Covington* case and that Person, Granville, Vance, and Warren Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 128.

129. Defendants deny the allegations of paragraph 129.

"House Districts 4, 14, and 15"

130. Defendants admit that House Districts 4, 14, and 15 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Duplin and Onslow Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 130.

131. Defendants admit that the district lines for House Districts 14 and 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 131.

"House Districts 7 and 25"

132. Defendants admit that House Districts 7 and 25 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs'

counsel in *Covington* and that Franklin and Nash Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 132.

133. Defendants admit that the lines for House Districts 7 and 25 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 133.

"House Districts 8, 9, and 12"

134. Defendants admit that House Districts 8, 9 and 12 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Pitt and Lenoir Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 134.

135. Defendants admit that the district lines for House Districts 8, 9, and 12 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 135.

"House Districts 10, 26, 51, and 53"

136. Defendants admit that House Districts 10, 26, 51, and 53 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Greene, Wayne, Sampson, Bladen, Johnston, Harnett and Lee Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 136.

137. Defendants deny the allegations of paragraph 137.

"House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49"

138. Defendants admit that House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Wake County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 138.

139. Defendants admit that Plaintiffs want the Court to judicially gerrymander all House Districts in Wake County to try and prevent a Republican candidate from winning any of them. In all other respects, Defendants deny the allegations of paragraph 139.

140. Defendants admit that the decision in *N.C. State Conf. of NAACP Branches v. Lewis* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 140.

"House Districts 16, 46, and 47"

141. Defendants admit that House Districts 16, 46, and 47 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Pender, Columbus and Robeson Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 141.

142. Defendants deny the allegations of paragraph 142.

"House Districts 17, 18, 19, and 20"

143. Defendants admit that House Districts 17, 18, 19, and 20 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that New Hanover and Brunswick Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 143.

144. Defendants admit that the election results in House Districts 17, 19, and 20 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 144.

"House Districts 42, 43, 44, and 45"

145. Defendants admit that House Districts 42, 43, 44, and 45 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and

plaintiffs' counsel in *Covington* and that Cumberland County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 145.

146. Defendants deny the allegations of paragraph 146.

"House Districts 55, 68, and 69"

147. Defendants admit that House Districts 55, 68, and 69 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Anson and Union Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 147.

148. Defendants deny the allegations of paragraph 148.

"House Districts 58, 59, and 60"

149. Defendants admit that House Districts 58, 59, and 60 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Anson and Union Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 149.

150. Defendants deny the allegations of paragraph 150.

"House Districts 63 and 64"

151. Defendants admit that House Districts 63 and 64 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Alamance County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 151.

152. Defendants deny the allegations of paragraph 152.

"House Districts 66, 67, 76, 77, 82, and 83"

153. Defendants admit that House Districts 66, 67, 76, 77, 82, and 83 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Richmond, Montgomery, Stanly, Cabarrus, Rowan, and Davie Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 153.

154. Defendants deny the allegations of paragraph 154.

"House Districts 71, 72, 73, 74, and 75"

155. Defendants admit that House Districts 71, 72, 73, 74, and 75 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Forsyth and Yadkin Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 155.

156. Defendants admit that the district lines in House District 71, 72, 73, 74, and 75 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 156.

"House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107"

157. Defendants admit that House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 157.

158. Defendants deny the allegations of paragraph 158.

"House Districts 108, 109, 110, and 111"

159. Defendants admit that House Districts 108, 109, 110, and 111 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 159.

160. Defendants admit that the district lines for House Districts 108, 109, 110, and 11 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 160.

"House Districts 113 and 117"

161. Defendants admit that House Districts 113 and 117 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Transylvania, Henderson and Polk Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 161.

162. Defendants deny the allegations of paragraph 162.

"House Districts 114, 115, and 116"

163. Defendants admit that House Districts 114, 115, and 116 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Buncombe County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 163.

164. Defendants deny the allegations of paragraph 164.

"2. The 2017 Senate Plan Packs and Cracks Democratic Voters"

"Senate Districts 8 and 9"

165. Defendants admit that Senate Districts 8 and 9 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Bladen, Pender, Brunswick and New Hanover Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 165.

166. Defendants deny the allegations of paragraph 166.

"Senate Districts 10, 11, and 12"

167 Defendants admit that Senate Districts 10, 11, and 12 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Sampson, Duplin, Johnston, Nash, Lee and Harnett Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 167.

168. Defendants deny the allegations of paragraph 168.

"Senate Districts 14, 15, 16, 17, and 18"

169. Defendants admit that Senate Districts 14, 15, 16, 17, and 18 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Wake and Franklin Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 169.

170. Defendants deny the allegations of paragraph 170.

171. Defendants deny the allegations of paragraph 171.

172. Defendants deny the allegations of paragraph 172.

173. Defendants deny the allegations of paragraph 173.

"Senate Districts 24, 26, 27, and 28"

174. Defendants admit that Senate Districts 24, 26, 27, and 28 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Randolph, Guilford, and Alamance Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 174.

175. Defendants deny the allegations of paragraph 175.

176. Defendants deny the allegations of paragraph 176.

177. Defendants deny the allegations of paragraph 177.

178. Defendants deny the allegations of paragraph 178.

"Senate Districts 37, 38, 39, 40, and 41"

179. Defendants admit that Senate Districts 37, 38, 39, 40, and 41 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 179.

180. Defendants deny the allegations of paragraph 180.

181. Defendants deny the allegations of paragraph 181.

182. Defendants deny the allegations of paragraph 182.

"Senate Districts 48 and 49"

183. Defendants admit that Senate Districts 48 and 49 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Transylvania, Henderson and Buncombe Counties are located in

the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 183.

184. Defendants deny the allegations of paragraph 184.

"3. The 2017 Plan Achieved Their Goal in the 2018 Election"

185. Defendants deny the allegations of paragraph 185.

186. Defendants admit that the election results for 2018 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 186.

187. Defendants admit that the election results for 2018 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 187.

188. Defendants deny the allegations of paragraph 188.

"I. The Partisan Gerrymandering of the 2017 Plans Causes Plaintiffs and Other Democratic Voters to be Entirely Shut Out of the Political Process"

189. Defendants deny the allegations of paragraph 189.

190. Defendants deny the allegations of paragraph 190.

191. Defendants deny the allegations of paragraph 191.

192. Defendants deny the allegations of paragraph 192.

193. Defendants deny the allegations of paragraph 193.

194. Defendants deny the allegations of paragraph 194.

195. Defendants deny the allegations of paragraph 195.

196. Defendants deny the allegations of paragraph 196.

"COUNT I

Violation of North Carolina Constitution's Equal Protection Clause, Art. I §19"

197. Defendants incorporate by reference their responses to paragraphs 1 through 196.

198. Defendants admit that Article I, Section 19 of the North Carolina Constitution speaks for itself. In all other respects, Defendants deny the allegations of paragraph 198.

199. Defendants admit that the cited cases speak for themselves. In all other respects, Defendants deny the allegations of paragraph 199.

200. Defendants admit that the cited case speaks for itself. In all other respects, Defendants deny the allegations of paragraph 200.

201. Defendants deny the allegations of paragraph 201.

202. Defendants deny the allegations of paragraph 202.

203. Defendants deny the allegations of paragraph 203.

204. Defendants deny the allegations of paragraph 204.

"COUNT II

Violation of North [sic] Constitution's Free Election Clause, Art. I §5"

205. Defendants incorporate by reference their responses to paragraphs 1 through 204.

206. Defendants admit that Article I, Section 5 speaks for itself. In all other respects, Defendants deny the allegations of paragraph 206.

207. Defendants deny the allegations of paragraph 207.

208. Defendants admit that the decision cited speaks for itself. In all other respects, Defendants deny the allegations of paragraph 208.

209. Defendants deny the allegations of paragraph 209.

210. Defendants deny the allegations of paragraph 210.

211. Defendants deny the allegations of paragraph 211.

"COUNT III

Violation of North [sic] Constitution's Freedom of Assembly, Art. I §§ 12 & 14"

212. Defendants incorporate by reference their responses to paragraphs 1-211.

213. Defendants deny the allegations of paragraph 213.

214. Defendants deny the allegations of paragraph 214.

215. Defendants admit that the cited case speaks for itself. In all other respects, Defendants deny the allegations of paragraph 215.

216. Defendants deny the allegations of paragraph 216.

217. Defendants deny the allegations of paragraph 217.

218. Defendants deny the allegations of paragraph 218.

219. Defendants deny the allegations of paragraph 219.

220. Defendants deny the allegations of paragraph 220.

221. Defendants deny the allegations of paragraph 221.

222. Defendants deny the allegations of paragraph 222.

PRAYER FOR RELIEF

Wherefore, Defendants respectfully request that the Court enter an order and final judgment.

1. dismissing all of Plaintiffs' claims with prejudice;

2. awarding Defendants their costs and attorneys' fees; and

3. providing Defendants with such other and further relief as may be equitable and proper.

Respectfully submitted this 21st day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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Attorneys for Legislative Defendants and the State of North Carolina
**Notice of Appearance under Local Rule 83.1 forthcoming*

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing **Answer** to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of North Carolina.

Dated this the 21st day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 5:18-cv-589

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.	STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO REMAND

NOW COME the State of North Carolina, the North Carolina State Board of Elections, Joshua Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, John Lewis, and Robert Cordle (collectively "State Defendants"),[1] by and through undersigned counsel, and hereby respond to Plaintiffs' Emergency Motion for Remand. As set forth below, the State Defendants agree that this case should be remanded to the Superior Court of Wake County.

PROCEDURAL BACKGROUND

Plaintiffs filed this matter in a North Carolina state court on November 13, 2018. The State Defendants, represented by the North Carolina Department of Justice, accepted service of the Summons and Complaint the same day. Plaintiffs filed an Amended Complaint on December 7, 2018 to revise the caption to accommodate changes of membership in the North Carolina State Board of Elections, while also adding additional plaintiffs.

[1] By order of a North Carolina three-judge panel entered December 27 in *Cooper v. Berger*, No. 18-CVS-3348, the current composition and membership of the State Board of Elections will no longer be in effect as of noon today. However, the change in composition of the State Board does not impact the position of the State Defendants on Plaintiffs' motion to remand.

Both complaints feature Plaintiffs' challenges to the districting plans for the North Carolina House and Senate passed by the North Carolina General Assembly in 2017 ("2017 Plans"). Plaintiffs asserted that the 2017 Plans constitute unlawful partisan gerrymander in violation of sections 10, 12, 14, and 19 of Article I of the North Carolina Constitution, which guarantee Free Elections; Freedom of Assembly; Freedom of Speech; and, Equal Protection to all North Carolinians, respectively. Plaintiffs did not challenge the 2017 Plans under the United States Constitution or any federal law. In short, Plaintiffs contend that the 2017 Plans unlawfully discriminate against voters who have voted for Democratic candidates.

On December 14, 2018, Defendants 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; and President Pro Tempore of the North Carolina Senate Phillip E. Berger (collectively "Legislative Defendants") filed a Notice of Removal, removing this matter to Federal District Court.[2] The Legislative Defendants contend that removal is appropriate pursuant to 28 U.S.C. §§ 1443(2) and 1441(a). Specifically, the Legislative Defendants contend that the remedy sought by Plaintiffs would violate the Voting Rights Act ("VRA"), and the Equal Protection Clause of the United States Constitution, by

[2] The Legislative Defendants' Notice of Removal purports to be on behalf of the State of North Carolina (although counsel for Legislative Defendants have not entered appearances on behalf of the State). However, the State, through this Response, objects to the removal and joins in Plaintiff's Motion to Remand. In claiming to act for the State, the Legislative Defendants rely on recent amendments to N.C. Gen. Stat. § 1-72.2. The Attorney General reserves the right to challenge, in an appropriate setting, the interpretation of § 1-72.2 that the Legislative Defendants appear to be advancing, as well as the validity of the relied-upon portions of § 1-72.2 under the North Carolina Constitution and other relevant law. But the Court need not address those unsettled state-law issues to rule on Plaintiffs' Motion to Remand. The remand motion presents multiple grounds for remand that do not depend on who represents the State in a lawsuit like this one.

requiring the Legislative Defendants to redistrict in a manner to that intentionally discriminates against African-American North Carolinians.

ARGUMENT

The State Defendants do not believe that removal was appropriate under applicable legal standards. Therefore, the State Defendants agree that this matter should be remanded.

A. Standard of Review

This Court has previously adhered to "the general proposition that 'removal statutes are to be strictly construed against removal, with any doubt in a particular case to be resolved against removal.'" *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 784 (E.D.N.C. 2001) (quoting, *Storr Office Supply v. Radar Business Systems*, 832 F. Supp. 154, 156 (E.D.N.C. 1993)), *see also Korzinski v. Jackson*, 326 F. Supp. 2d 704, 706 (E.D.N.C. 2004) (providing that the court must "resolve all doubts in favor of remand."). Strict construction against removal is required "[b]ecause removal jurisdiction raises significant federalism concerns" *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (citation omitted).

The emphasis upon the application of a strict construction standard while considering removal is further heightened in the redistricting context. As this Court has noted, "the redistricting process is primarily the province of the states." *Stephenson*, 180 F. Supp. 2d at 782. "The Constitution leaves with the States the primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993).

B. 28 U.S.C. § 1443(2) does not support removal in this matter.

28 U.S.C. § 1443(2), commonly referred to as the "refusal clause," provides that a state court claim against a state officer may be removed to federal court if the officer is "refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]." Removal under the refusal clause is available to "state officers who *refused* to enforce discriminatory state laws in conflict with [equal rights law] and who were prosecuted in the state courts because of their refusal to enforce state law." *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir. 1966) (emphasis added); *accord City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). Thus, viable application of the refusal clause is available only when the state officer has refused to enforce a state law that is in actual conflict with federal equal rights. Neither of those circumstances exists here.

With *Stephenson*, this Court addressed a removal that was remarkably similar to the removal in this action, and found that 28 U.S.C. § 1443(2) did not support removal. The plaintiffs in *Stephenson* sued in State court contending that the North Carolina House and Senate plans violated the North Carolina Constitution. Those Defendants, who included various State agencies and officers, removed the matter to this Court under 28 U.S.C. § 1443(2), and contended that "the plaintiffs seek to compel defendants . . . to act in a manner inconsistent with or in violation of the Voting Rights Act and the equal protection principles of the Constitution of the United States." *Stephenson*, 180 F. Supp. 2d at 785. The Plaintiffs moved for remand.

In remanding the case, this Court observed that the refusal clause is meant to provide a federal forum where state officers are sued for enforcing "equal protection in the face of strong public disapproval," but noted that, in the situation before the court, "it is not entirely clear what the [removing] defendants refuse to do, except fail to comply with state constitutional mandates."

Stephenson, 180 F. Supp. 2d at 785. This Court concluded that those plaintiffs were "merely 'seeking an alternative apportionment plan which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law.'" *Id.* at 785 (citations omitted).

Similarly, the Plaintiffs in this matter have exclusively asserted state law claims. Neither the State Defendants nor the Legislative Defendants have refused to do any related act on the grounds that it would be inconsistent with any law providing for equal rights. Likewise, Plaintiffs' claims do not conflict with either the VRA or the Equal Protection clause of the U.S. Constitution.

Rather, as in *Stephenson*, Plaintiffs allege that the current legislative districts do not fully comply with state law, and their complaint seeks the establishment of legislatives districts that comply with state law, as well as with federal law. Similar to the contentions made in *Stephenson*, the Legislative Defendants' assertion that they cannot effectively comply with the State constitution because of its impact upon the voting rights of specified constituent groups might raise a possible defense to the claim, but fails to authorize removal to this Court. *See Stephenson*, 180 F. Supp. 2d at 786; *see also Barbour v. Int'l Union*, 594 F.3d 315, 328 (4th Cir. 2010) ("[i]t is now settled law that a case may not be removed to federal court on the basis of a federal defense") (internal quotation omitted). Stated alternatively, the Legislative Defendants "cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987).

C. 28 U.S.C. § 1441(a) does not support removal in this matter.

As removal under 28 U.S.C. § 1443(2) is unavailable, the sole remaining basis for removal asserted by the Legislative Defendants is pursuant to 28 U.S.C. § 1441(a). However, it appears that the Legislative Defendants have failed to comply with that statute.

Where removal occurs "solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A) As the Fourth Circuit Court of Appeals has held, "all defendants must consent to removal" under § 1441(a). *Mayo v. Bd. of Educ. of Prince George's Cty.*, 713 F.3d 735, 741 (4th Cir. 2013). The State Defendants — i.e., the State of North Carolina, the State Board of Elections, and the members of the State Board of Elections —do not consent to removal of this matter.

Furthermore, removal under section 1441(a) requires that the federal court have original jurisdiction over the case. 28 U.S.C. § 1441(a); *see also Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331 (4th Cir. 2008). Here, Plaintiffs' claims arise only under state law. Plaintiffs do not assert any claims implicating federal law over which this Court may have original jurisdiction. Removal under section 1441(a) is therefore improper.

CONCLUSION

For the foregoing reasons, the State Defendants agree that this matter should be remanded to state court.

This the 28th day of December, 2018.

/s/ Amar Majmundar
Amar Majmundar
N.C. State Bar No. 24668
Senior Deputy Attorney General

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CERTIFICATE OF SERVICE

This is to certify that the undersigned caused the foregoing STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION TO REMAND to be filed and served on all counsel of record using the CM/ECF filing system

This the 28th day of December, 2018.

/s/ Stephanie A. Brennan
Stephanie A. Brennan
Special Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

COMMON CAUSE, et al. Plaintiffs v. REPRESENTATIVE DAVID R. LEWIS, et al., Defendants.	Civil Action No. 18-CV-589

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO REMAND

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Table of Contents

INTRODUCTION

Plaintiffs' motion to remand is remarkable in how far it goes to run from the state-law theory Plaintiffs posit in the underlying case. There, they contend that the North Carolina General Assembly's 2017 legislative redistricting plans "crack" and "pack" Democratic Party voters by placing too many Democratic voters in some districts and too few in others. They read several state constitutional provisions to prohibit this and mandate districting maps that afford them "an equal opportunity to translate their votes into representation." Amended Compl. ¶ 186 (quotations omitted). In practical terms, this theory means the 2017 plans' "packed" districts must have fewer Democratic Party voters (but not *too* few, lest they become "cracked"), and the "cracked" districts must have more Democratic Party voters (but not *too* many, lest they become "packed"). That type of partisan fine-tuning is no easy feat.

The State Defendants—House and Senate leaders who represent the General Assembly and, per statute, the State itself—refuse to implement Plaintiffs' proposed redistricting regime. There are many grounds for this, but the relevant one here is that the regime conflicts with the State's obligation to its minority voters under federal law. Because of the strong correlation between race and party affiliation in North Carolina, to take Democratic Party voters out of "packed" districts is to remove African American voters from functioning minority crossover districts. Dismantling these districts on purpose would likely violate the Civil War Amendments; dismantling them even unintentionally would likely violate the Voting Rights Act (VRA).

Removal is therefore appropriate under two separate federal statutes. First, 28 U.S.C. § 1443(2) allows state officials to remove state cases seeking to enforce state-law theories "inconsistent" with federal law "providing for equal rights." The statute's elements are met here. The State Defendants are refusing to dismantle crossover districts on the ground that doing so would create a colorable conflict with the Fourteenth and Fifteenth Amendments and the VRA.

Second, 28 U.S.C. § 1441(a) allows removal where a state-law claim necessarily turns on resolution of a federal question, which is the scenario here because, as a requirement of *state* law, Plaintiffs must prove that their proposed redistricting scheme is consistent with federal law. Moreover, federal-court adjudication of this case does no violence to federalism because federal courts have been adjudicating challenges to North Carolina redistricting plans for the better part of 40 years. Nor does removal violate sovereign immunity where the State Defendants are statutorily defined as the State and are authorized to waive immunity.

Plaintiffs' arguments on all these points ignore their own theory of what state law requires, their arguments on estoppel grossly misconstrue the history of litigation over North Carolina's legislative plans, and their demand for attorneys' fees is itself frivolous. The Court should deny Plaintiffs' motion in full and set this case for discovery and trial.

FACTUAL BACKGROUND

Understanding this case requires understanding this decade's labyrinthian litigation over North Carolina redistricting plans. Here is a *Reader's Digest* overview:

In 2011, new census data required the General Assembly to redraw its House and Senate districts to comply with the Equal Protection Clause's one-person, one-vote principle. In that redistricting, the General Assembly interpreted the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that VRA § 2 imposes a "majority-minority" rule, *id.* at 17, to require the creation of majority-minority districts with a black voting-age population, or "BVAP," of at least 50%. Accordingly, the General Assembly included 28 majority-minority House and Senate districts in the 2011 plans. The Department of Justice Voting Rights Section precleared the 2011 plans under VRA § 5.

In May 2015, residents of the respective majority-minority districts filed suit in the Middle District of North Carolina, *see Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C.

2016), alleging that the General Assembly's majority-minority goal rendered race the "predominant" redistricting criterion and thereby triggered strict scrutiny. *See Miller v. Johnson*, 515 U.S. 900, 911–17 (1995) (discussing the predominance test). They also contended that drawing 28 majority-minority districts was insufficiently tailored under the VRA to satisfy strict scrutiny because (they claimed) a 50% BVAP target was not necessary to afford the African American communities in these regions an equal opportunity to elect their preferred candidates. The *Covington* plaintiffs, represented by a law firm that represents Plaintiffs in this case, presented an expert report by political-science professor Dr. Allen Lichtman opining that African American voters in North Carolina are able to elect "candidates of their choice in districts that are 40 percent or more African American…in their voting age population." *See* Ex. 1 (*Covington v. North Carolina* Sur-Rebuttal Report of Dr. Lichtman) at 2.

The *Covington* case was nearly identical to a North Carolina state-court challenge filed in November 2011, which also alleged a theory of racial predominance. The plaintiffs in that case, as in *Covington*, introduced reports by Dr. Lichtman opining that 40% BVAP districts enabled minority communities to elect their preferred candidates. *See* Ex. 2 (First Affidavit of Allan J. Lichtman, *Dickson v. Rucho*); Ex. 3 (Second Affidavit of Allan J. Lichtman, *Dickson v. Rucho*). The State prevailed in North Carolina court in that case. *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404, 410–11 (2015).

The federal case, however, proceeded parallel to the state case at the demand of the *Covington* plaintiffs whose counsel—at the time—believed federal courts have "primary responsibility" for "deciding matters involving the federal Constitution." Ex. 4 (Pls.' Opp'n to Defs.' Mot. to Stay, Defer, or Abstain) at 7. The Middle District of North Carolina agreed and

denied the State's motion to stay or abstain pending the state-court proceeding. Ex. 5 (Order Denying Abstention and Preliminary Injunction, *Covington v. North Carolina*) at 2–7.

On the merits, the Middle District of North Carolina ultimately sided with the *Covington* plaintiffs. It held both that race predominated and that a 50% BVAP target was not justified on the record before the General Assembly in 2011, which did not contain sufficient evidence of legally significant polarized voting. The court found from expert reports that, although voting in North Carolina *is* racially polarized, it is not "legally significant" because of "crossover" voting that empowers the minority community in districts below 50% BVAP to elect its preferred candidates with the aid of some white voters. 316 F.R.D. at 167–69. The Middle District of North Carolina, however, made "no finding that the General Assembly acted in bad faith or with discriminatory intent," and it did not "reach the issue of whether majority-minority districts could be drawn in any of the areas covered by the current districts under a proper application of the law"—i.e., with proof of legally significant polarized voting. *Id.* at 124 n.1. The Supreme Court affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

The injunction against 28 House and Senate districts necessitated new maps.[1] The Middle District of North Carolina afforded the General Assembly an opportunity to enact remedial maps, and the General Assembly did so. Because "[n]o information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts," the General Assembly did not consider race in the process. Mem. in Supp. of Pls.' Emergency Mot. to Remand ("Pls.' Mem.") Ex. D, ECF No. 6-4, at 10. But, as a result of

[1] The case made an intermediate pit stop in the Supreme Court after the Middle District of North Carolina issued an order scheduling special elections and changing term lengths of North Carolina legislators, which the Supreme Court summarily vacated. *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017).

the General Assembly's race-neutral goals, approximately two dozen House and Senate districts in regions with high concentrations of African American residents were drawn at BVAP levels near or above 40%, the range Dr. Lichtman identified as sufficient to afford African Americans an equal opportunity to elect their preferred candidates. *See* Notice of Removal, ECF No. 1 ¶ 22 (identifying these districts).[2] The General Assembly was aware of Dr. Lichtman's findings and introduced his reports into the legislative record in support of the 2017 plans.[3]

In addition to redrawing the 28 invalidated districts and many adjacent districts, the 2017 plans also adjusted districts in Wake and Mecklenburg Counties.

The General Assembly presented the 2017 plans to the Middle District of North Carolina, which partially accepted and partially rejected them. *See Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018). The court rejected four remedial districts to which the *Covington* plaintiffs objected because it found them insufficiently altered from their 2011 forms to serve as effective remedial districts. *Id.* at 429–42. The court also rejected the changes in Wake and Mecklenburg Counties, even though no objection was lodged against those changes on the ground of their not sufficiently addressing equal-protection violations; instead, the Middle District of North Carolina found that these changes violated the North Carolina Constitution. *Id.* at 442–47. The Middle District of North Carolina adopted districts drawn by a special master insofar as it was dissatisfied with the General Assembly's remedial maps, but it adopted the remaining remedial legislatively drawn districts and issued a final order requiring North Carolina to use "the 2017 Plans for use in future elections in the State." *Id.* at 458.

[2] In addition to districts identified in the removal notice, HD12 and HD21 also qualify as minority crossover districts.

[3] *See* North Carolina General Assembly, Senate Bill 691, 2017 Senate Floor Redistricting Plan, https://www.ncleg.net/Sessions/2017/s691maps/s691maps.html

The Supreme Court affirmed in part and reversed in part. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018). It held that the Middle District of North Carolina properly exercised authority to review the remedial legislative plans (rather than require the *Covington* plaintiffs to plead and prove a new claim) and that its rejection of four remedial districts as insufficiently altered from their 2011 configurations was not clearly erroneous. *Id.* at 2554. But the Supreme Court held that the Middle District of North Carolina committed clear error in rejecting the changes in Wake and Mecklenburg Counties because this rejection had "nothing to do with" the plaintiffs' claim that "they had been placed in their legislative districts on the basis of race." *Id.* at 2554. The Supreme Court therefore reversed the order as to Wake and Mecklenburg Counties and affirmed as to all other regions.

On November 19, 2018, Plaintiffs filed this case in the North Carolina Superior Court. They challenge the 2017 plans under North Carolina's Equal Protection, Free Elections, and Free Speech and Assembly Clauses. They contend the 2017 plans "crack" and "pack" Democratic Party voters and thereby concentrate their votes in some districts and minimize their voting strength in others. They assert a state constitutional right to "an equal opportunity to translate their votes into representation." Amended Compl. ¶ 186 (quotations omitted).

Plaintiffs filed an Amended Complaint on December 7. One week later, the State Defendants removed the case to this Court. On December 21, the State Defendants filed an Answer to the Amended Complaint. ECF No. 35. Plaintiffs now seek a remand.

THE LEGAL STANDARD

Removal is proper under the "refusal" clause of 28 U.S.C. § 1443(2) if a state official is shown to be subject to a civil action "for refusing to do any act on the ground that it would be inconsistent with" a federal "law providing for equal rights." Removal is proper under 28 U.S.C. § 1441(a) where, *inter alia*, a "state-law claim necessarily raise[s] a stated federal issue, actually

disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (quotations omitted).

ARGUMENT

I. Removal Is Proper Under the "Refusal" Clause of Section 1443(2)

A state official may invoke the "removal clause" of Section 1443(2) by identifying a "colorable conflict between state and federal law leading to the removing defendant's refusal to follow plaintiff's interpretation of state law because of a good faith belief that to do so would violate federal law." *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980) (quotations omitted). That is precisely the situation here. Plaintiffs interpret the North Carolina Constitution to require the State Defendants to remove Democratic Party voters from "packed" Democratic districts. The State Defendants refuse both to implement Plaintiffs' interpretation of those provisions and to redraw any part of the 2017 plans. One basis for refusal is that, given the "inextricable link between race and politics in North Carolina," *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *id*. at 225.[4] "Unpacking" the Democratic-leaning districts would require the State Defendants to dismantle minority crossover districts. Intentionally dismantling these districts would likely violate the Fourteenth and Fifteenth Amendments; even unintentionally dismantling them would likely violate the VRA. Moreover, the districts Plaintiffs contend should be "unpacked" were created under federal-court supervision and are in current use at its express command. A state-court order that they be dismantled would contradict a federal-court order that, in turn, enforces the Equal Protection Clause. These conflicts support removal.

[4] *Cert. denied sub nom. North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

A. The State Defendants' Choice Not To Implement Plaintiffs' Interpretation of State Law Amounts to a "Refusal" Under Section 1443(2)

The State Defendants refuse to implement Plaintiffs' interpretation of state law in a new redistricting plan that Plaintiffs sued the State Defendants to obtain. Plaintiffs contend that the North Carolina Constitution requires the State Defendants to remove Democratic Party voters from "packed" districts. The State Defendants refuse to do this, and they refuse to replace the 2017 plans with any new legislation. They are, then, "refusing to do an[] act" within the meaning of the "refusal" clause of Section 1443(2).

Plaintiffs are flat wrong (at 9) that the State Defendants "simply ignore the refusal clause's 'refusal' requirement." The type of refusal at issue here qualifies, as precedent makes clear. In *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995), plaintiffs brought a state-law challenge to a city's 5-3-1 school-board districting plan; the city refused to adopt "some other system" compliant with the plaintiffs' state-law theory. *Id.* The city's basis for refusal was that a federal-court consent decree in VRA litigation ratified the 5-3-1 system and departing from it would violate the consent decree. The Fifth Circuit concluded that this rejection of plaintiffs' state-law arguments was a "refusal" and affirmed Section 1443(2) removal. The refusal here to implement Plaintiffs' view of state law into a redistricting plan is no different.

This Court reached an identical holding in *Cavanaugh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). The state-court plaintiffs there asserted that numerous districts in North Carolina's 1980-cycle redistricting plans violated the state Constitution's whole county provision (WCP). The State defended on the ground that implementing the WCP would require the State to violate the VRA. This was a "refusal," so this Court denied the motion to remand. Similarly, one of Plaintiffs' lead cases, *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), though it

granted remand, treated the choice not to implement the plaintiffs' view of state law into a redistricting plan as a refusal—which is why it called the case "a close call." *Id.* at 785.

Plaintiffs appear to believe that, because they challenge the affirmative *act* of passing the 2017 plans, this case involves no *omission*, no "refusal" to act. But they concede (at 9 n.2) that *Cavanaugh* is at odds with their position. So are *Alonzo* and *Stephenson*. In fact, if Plaintiffs were right, then a state-law challenge to a school-desegregation plan would also be unremovable as a challenge to an *act*, the adoption of the desegregation plan, not an omission. Yet such challenges are paradigmatic removable cases under the refusal clause. *See, e.g.*, *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 437 F.2d 1143, 1144 (7th Cir. 1971); *Linker v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 344 F. Supp. 1187, 1195 (D. Kan. 1972); *Mills v. Birmingham Bd. of Ed.*, 449 F.2d 902, 905 (5th Cir. 1971); *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691, 694 (W.D.N.Y. 1979).

The desegregation cases illustrate Plaintiffs' error. They fail to appreciate that plaintiffs in these cases want a *new* regime, not merely invalidation of the status quo. Refusal to implement that regime is an omission, not an affirmative act. Thus, just as state officials who "refuse to undo their actual and contemplated transfer of teachers" satisfy the refusal element, *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 312 (S.D. Ind. 1969), the State Defendants also engage in an omission by refusing to adopt new plans, which Plaintiffs' prayer for relief expressly demands, and undo the minority crossover districts that Plaintiffs' Amended Complaint identifies as unlawfully "packed." *See also Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 722 (D. Conn. 1976) (reading "the phrase 'any act'…literally, without limitation" to reach a refusal to undo an appointment of officials and make new appointments).

Though long on citations, Plaintiffs' contrary argument lacks substance. Their cases involve, respectively, a challenge to a city's implementation of a promotional eligibility list, *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567 (6th Cir. 1979), a defamation case involving statements made before the EEOC, *Thornton v. Holloway*, 70 F.3d 522, 523 (8th Cir. 1995), a state civil-service commission's order requiring reinstatement of a public official, *City and County of San Francisco v. Civil Service Comm'n of City and County of San Francisco*, 2002 WL 1677711 (N.D. Cal. July 24, 2002), an executive order granting racial preferences, *Massachusetts Council of Const. Emp., Inc. v. White*, 495 F. Supp. 220, 221 (D. Mass. 1980), termination of public employees, *McQueary v. Jefferson Cty.*, Ky., 819 F.2d 1142 (6th Cir. 1987), prosecutions for trespass and resisting arrest, *People v. State of N.Y.*, 424 F.2d 697, 699 (2d Cir. 1970), and a case where private individuals tried to remove a case under Section 1443(2) that did not reach the issue of what constitutes a "refusal," *Baines v. City of Danville, Va.*, 357 F.2d 756, 772 (4th Cir. 1966). These factual scenarios have nothing to do with this case. By contrast, *Alonzo*, *Cavanaugh*, *Linker*, *Burns*, and *Stephenson* are directly on point.

Plaintiffs' only other argument is that the State Defendants "have no authority to 'refuse' to enforce state laws at all—they are legislators." Pls.' Mem. at 14. But Plaintiffs chose to name the State Defendants, and—unless this was for harassment—they did so expecting relief.[5] Presumably, that contemplated relief is a new redistricting plan compliant with Plaintiffs' rendition of the North Carolina Constitution, which is what their Amended Complaint demands. The State Defendants, as a matter of simple logic, can and do "refuse" to comply.

[5] If Plaintiffs sued the State Defendants knowing that they could not properly be named, that would be sanctionable. *See, e.g.*, *Collins v. Daniels*, 2018 WL 1671599, at *6 (D.N.M. Jan. 4, 2018) (sanctioning lawyers under Rule 11 for naming parties they subjectively knew were immune from suit).

Indeed, Plaintiffs forget that the "state laws" the State Defendants refuse to enforce are the state constitutional provisions (actually, Plaintiffs' rendition of them) that govern redistricting. Legislators most certainly can "refuse" to implement them in redistricting. Not only is this refusal something the legislature can logically accomplish, but it is in fact the *primary* state actor to accomplish it—since the executive branch does not enact a redistricting plan. Amended Compl. ¶ 4 (complaining about the absence of the executive's role in redistricting). That is why state legislative actors, such as school boards and city councils, are allowed to remove cases (or at least to try) challenging their refusal to implement state law in their legislation. *See, e.g.*, *Buffalo Teachers Fed'n*, 477 F. Supp. at 694; *Bridgeport Ed. Ass'n*, 415 F. Supp. at 720; *Burns*, 302 F. Supp. at 311–12.

Moreover, to the extent Plaintiffs believe the State Defendants are not "state officers" under Section 1443(2), they ignore that North Carolina is "able to designate agents to represent it in federal court." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). It has expressly identified the State Defendants as such, both by defining the "Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State*" and by providing that, "when the State of North Carolina is named as a defendant…, both the General Assembly and the Governor constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(b) (emphasis added). That statutorily defined role defeats Plaintiffs' notion that the State Defendants are not capable of refusing to enforce state law. *See, e.g.*, *Bridgeport Ed. Ass'n*, 415 F. Supp. at 721 (finding school-board members qualified for Section 1443(2) removal because they "are properly considered state officials under state law"). They can and have refused. The first element is met.

B. There Is a Direct Conflict Between Plaintiffs' Interpretation of State Law and Federal Law Providing for Equal Rights

This case also presents a "colorable conflict between state and federal law leading to the removing defendant's refusal to follow plaintiff's interpretation of state law…." *White*, 627 F.2d at 587. Plaintiffs' Amended Complaint accuses the General Assembly of creating two types of districts: those "packed" with Democratic constituents at high percentages and those that "crack" Democratic constituents across several districts at low percentages. *See, e.g.*, Am. Compl. ¶¶ 9, 14, 16, 17, 18, 20, 22 (identifying various districts as "packed"), *see also id.* ¶¶ 10, 11, 12, 13, 15, 19, 21 (identifying various districts as "cracked"); *see also id.* at 28 ("The 2017 Plan Packs and Cracks Democratic Voters"). The "packed" districts, in Plaintiffs' view, have too many Democratic voters; the "cracked" districts have too few. Their assertion is that the North Carolina Constitution requires a more balanced share of Democratic voters so that the two major political parties have "substantially equal voting power," *id.* ¶ 178 (quotations omitted), or, in other words, so that "all voters have an equal opportunity to translate their votes into representation," *id.* ¶ 186 (quotations omitted).

But, remarkably, this assertion of what state law requires, so prominent in Plaintiffs' Amended Complaint, goes unmentioned in their motion to remand. That apparently is because it refutes Plaintiffs' assertion that "there are trillions of possible maps that" would comply with both their asserted state-law rights and federal law. Pls.' Mem. at 10. That is nonsense. Under their view, a plan that placed as many as, or more, Democratic Party voters in the districts they consider "packed" would not comply with state law. Nor would a plan that removed too many Democratic voters from those districts, such that they became "cracked." In Plaintiffs' view, both state law and the remedial plan they demand from the State Defendants must drop the Democratic vote share in the "packed" districts just enough to spread Democratic voting strength

in neighboring districts but not too much so as to dilute Democratic voting strength in the source districts. Few, if any, maps meet that standard of partisan fine-tuning.

More importantly, the range of possible maps that meets that standard *and* complies with federal law amounts to a null set. In North Carolina, racial identity and partisan affiliation correspond to a high degree, and the Democratic Party consists largely of racial and ethnic minorities. *N.C. Carolina State Conference of NAACP*, 831 F.3d at 225. As a result, "unpacking" the "packed" Democratic districts means removing African Americans from these districts. But because (1) BVAP in these districts is near or above 40% and (2) voting patterns reflected in Dr. Lichtman's reports enable African American-preferred candidates to win in districts near or above 40% BVAP, they qualify as performing minority "crossover" districts. Plaintiffs do not explain how Democratic constituents can be removed without drawing down BVAP. Nor would any such explanation make sense when tampering with Democratic vote share necessarily means tampering with the minority community's electoral prospects. Plaintiffs' theory means BVAP can only go down in these districts.

That raises profound federal-law problems, which are detailed below.[6] At the outset, it bears emphasizing that, if harmonizing Plaintiffs' state-law theory and federal law were easy, Plaintiffs would have no problem demonstrating this with an alternative map showing just one of the "trillions" of ways it can be done. That is what the plaintiffs did in *Stephenson v. Bartlett*, 180 F. Supp. 2d 799 (E.D.N.C. 2001)—a case Plaintiffs say (at 11) is "strikingly similar to this one." In opposing Section 1443(2) removal under the VRA, the *Stephenson* plaintiffs presented

[6] The State Defendants are not required to admit that the proffered state-law theory would conflict with federal law; it is sufficient that there is a colorable conflict. *Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989). Thus, the State Defendants need not and do not concede at this time that any such action actually would violate federal law. The existence of a colorable conflict suffices for removal.

"proposed redistricting plans that adopt the proposed minority districts enacted by the General Assembly in the 2001 House Plan and the 2001 Senate Plan" and that changed only surrounding districts. *See* Ex. 6 (Pls.' Mem. ISO Remand, *Stephenson v. Bartlett*) at 15. This, the *Stephenson* plaintiffs argued, proved consistency between their state-law theory and federal law. Plaintiffs' failure to do this exposes their arguments as empty rhetoric.

1. Intentional Vote Dilution

A crossover district is one in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). As discussed below (§ I.B.3), these districts need not be created on purpose; like any type of district, they can occur naturally by operation of non-racial criteria. However they are formed, the Supreme Court has warned that "a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts…, would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24. That is because an intentional state decision to dilute minority voting strength falls among the core prohibitions of the Civil War Amendments. *See Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481–482 (1997). *Bartlett* warns that this prohibition applies to the deliberate choice to dismantle a performing crossover district just as it does to the deliberate choice to dismantle a performing majority-minority district. Hence, in demanding that the State Defendants dismantle crossover districts, Plaintiffs demand a violation of Fourteenth and Fifteenth Amendments.

Plaintiffs' principal response, that enacting a remedial plan under state-court supervision would not be "intentional" discrimination, is remarkable. Pls.' Mem., at 16. Most of the districts Plaintiffs challenge here were drawn under federal-court supervision, and Plaintiffs allege in this very case that they were drawn with improper intent. Obviously, the premise of their case is that

court involvement does not immunize a plan from such a claim. In fact, Plaintiffs' sole authority expressly states that a redistricting plan drawn under court supervision can occur with discriminatory intent. *Abbot v. Perez*, 138 S. Ct. 2305, 2327 (2018) ("[W]e do not suggest either that the intent of the 2011 Legislature is irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court."). Unless Plaintiffs are willing to concede that any act a legislature undertakes at a court's direction is devoid of intentional discrimination, this argument must fail.

Plaintiffs also suggest (at 16) that it is possible to redistrict North Carolina under their state-law theory without intentionally engaging in vote dilution. But that is hardly plausible when they demand a one-way ratchet dropping Democratic vote share (and BVAP) in the crossover districts. Removing African American voters simply must be done on purpose, and this would likely constitute legally actionable discriminatory intent under Fourth Circuit law, which holds that a racial vote-dilution plaintiff need not show "any evidence of race-based hatred." *N.C. State Conference of NAACP*, 831 F.3d at 222. A motivation to impact one party's political power, where race and politics correlate, qualifies under Circuit precedent.[7] *Id.*

On all points, Plaintiffs' authorities are distinguishable because the asserted conflict they address was amorphous. *Stephenson* involved the alleged conflict between North Carolina's WCP and the VRA. Although it was a "close call," 180 F. Supp. 2d at 785, the court found no conflict because the WCP did not directly correlate with racial percentages, leaving the possibility of conflict "uncertain"—especially where (as noted) the *Stephenson* plaintiffs

[7] To be sure, the State Defendants disagree with the Fourth Circuit's interpretation of the intent element, but the decision stands as written. Although the Supreme Court may someday clarify the intent standard, the conflict is more than colorable under current law.

presented an alternative map harmonizing state and federal law. *Id.* Whereas that was a borderline case, this case involves a direct correlation between racial and partisan percentages.

Plaintiffs' reliance on *Sexson v. Servaas*, 33 F.3d 799, 803 (7th Cir. 1994), fares even worse. In that case, the state defendants *successfully removed* by asserting a VRA defense against a redistricting challenge; remand was only required because, at trial, the state defendants "essentially abandoned their affirmative defense." *Id.* at 803. The Seventh Circuit stated:

> We have not been asked to review the district court's decision to allow removal in the first place. Therefore, we make no statement whether the affirmative defense presented a sufficient "colorable claim" to warrant removal, and do not comment on the court's subsequent exercise of jurisdiction. We have been asked only to review the propriety of the remand.

Id. at 803 n.2. That holding is irrelevant here. Besides, that case, like *Stephenson* and *Senators v. Gardner*, 2002 WL 1072305, at *1 (D.N.H. May 29, 2002), and *Brown v. Florida*, 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002), involved state redistricting criteria that might or might not impact minority voting strength, so the conflict was speculative. By contrast, dropping BVAP unquestionably impacts minority opportunity to elect in crossover districts.

Plaintiffs also complain (at 17) that "it is Plaintiffs, not Legislative Defendants, who seek relief from intentional discrimination in this case." But this reflects only the misguided view that what is good for Democratic Party vote share is good for the world. That is not so. To enhance Democratic voting strength, the State Defendants must diminish that of other groups. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). One of those is the minority community. Creating two new seats where white Democrats can win means taking away an existing seat where an African American-preferred candidate can win. Federal law imposes a prohibition on that tradeoff, which trumps Plaintiffs' asserted state-law rights and supports removal.

2. The Federal-Court Order Enforcing the Equal Protection Clause

A separate and independent basis for removal lies in the Middle District of North Carolina's *Covington* final judgment, which ordered the State Defendants to use in future elections many of the districts challenged in this case. In *Covington*, 28 districts were invalidated because race (i.e., the goal of creating majority-minority districts) predominated and the State Defendants did not collect sufficient data to justify BVAP of 50% or more. At the remedial stage, the Middle District of North Carolina supervised the State Defendants' enactment of the 2017 plans (challenged here), which redrew 116 districts, and the Court supplemented a handful of those districts with districts drawn by a special master. The Court ordered the state to use "the 2017 Plans for use in future elections in the State." *Covington*, 283 F. Supp. 3d at 458.

A conflict between state law and a federal-court order enforcing equal-protection law qualifies as a conflict under Section 1443(2). *See, e.g.*, *Buffalo Teachers Fed'n*, 477 F. Supp. at 694. For example, in *Alonzo*, the court found a conflict between a federal consent decree requiring a city's use of one districting map and the plaintiffs' advocacy for "some other system" because "*[a]ny challenge* of the City's use of this system in its elections necessarily implicates the rights of all voters…and could change the balance of rights that the federal court found required the 5-3-1 system." 68 F.3d at 946 (emphasis added). The conflict here is equally plain: the *Covington* court ordered use of the 2017 Plans as an equal-protection remedy, and now Plaintiffs demand that the State Defendants use some other yet-to-be-created plans.[8]

Plaintiffs respond by mischaracterizing the *Covington* litigation. First, they claim (at 17) that the *Covington* court did *not* order that the 2017 Plans be used in their entirety, apparently on

[8] Although the *Covington* order may not immunize the 2017 Plans from attack, *cf. Abbot*, 138 S. Ct. at 2327, it at least creates a colorable conflict for purposes of removal. If any court is to order North Carolina to depart from plans a federal court ordered it to use, it should be a federal court.

the belief that only the special-master-drawn remedial districts are mandated by that order. That argument flunks the plain-language test: "Therefore, the Court will approve and adopt the remaining remedial districts in the 2017 Plans for use in future elections in the State." *Covington*, 283 F. Supp. 3d at 458. The "remaining" districts are the *legislatively* enacted "remedial" districts, not the special-master-drawn districts.

Second, Plaintiffs contend (at 17–19) that the Supreme Court in *Covington* held that the district court lacked power to apply state law in a remedial plan and that state law must be applied only in North Carolina court, not in federal court. That is false. It held only that the Middle District of North Carolina committed clear error in addressing portions of the state it did not need to address to remedy the equal-protection violations the *Covington* plaintiffs pleaded and proved. Plaintiffs fail to distinguish between the legislative remedial districts and the *non*-remedial districts in Wake and Mecklenburg Counties. Most districts redrawn in the 2017 plans were remedies to the equal-protection violation identified in *Covington*; a handful of districts in Wake and Mecklenburg Counties were also redrawn out of legislative discretion. The Supreme Court found clear error in the Middle District of North Carolina's rejection of the districts in "Wake and Mecklenburg Counties," which the Supreme Court held "had nothing to do" with the invalidated districts. *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018). As to *those* districts—and only those districts—the district court's remedial order was reversed. But that ruling had no bearing on the legislatively drawn remedial districts that are challenged here.

The Supreme Court did *not* prohibit federal courts from imposing state law as to districts actually required to be remedied under the equal-protection liability ruling. And a holding of that

nature would have been odd because it would have allowed, e.g., the state to unnecessarily violate the WCP in drawing remedial districts. *Covington* did not adopt such a position.[9]

Third, Plaintiffs assert that the state court may order a violation of the *Covington* final judgment because of state courts' role in "'supervision of redistricting.'" Pls.' Mem., ECF No. 6, at 25 (quoting *Growe v. Emison*, 507 U.S. at 34). But state courts' role in no way eviscerates removal under Section 1443(2), and Plaintiffs cite no precedent for their view that a state court may order a violation of a federal-court order. The *Covington* court did not order the State Defendants to use "infinite variations" of possible districts, Pls.' Mem., ECF No. 6, at 19; it ordered them to use the 2017 remedial plans. But Plaintiffs demand that those plans *not* be used. That is a square conflict between state and federal law providing for equal rights.

3. The Voting Rights Act

Plaintiffs' demand that the State Defendants dismantle "packed" Democratic districts creates yet further conflict with federal law because many of these districts enable the minority community to elect its preferred candidates. As a result, even unintentionally dismantling them—were that even possible—would create a conflict under VRA § 2. Although no Section 2 plaintiff could force the state to create crossover districts, *see Strickland*, 556 U.S. at 19–20, the Supreme Court in *Strickland* made clear that a state can cite crossover districts in its plan as a *defense* to a VRA § 2 claim seeking a majority-minority district. *Id.* at 24 ("States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.").

These districts are therefore critical under Section 2. That is especially so since separate federal-court rulings have squeezed North Carolina into a tight corner. On the one hand, the

[9] For the same reason, estoppel does not apply. *See* below (§ III).

Covington court found that the state erred in creating majority-minority districts without sufficient evidence of legally significant racially polarized voting to justify 50% BVAP districts. On the other hand, the Fourth Circuit in 2016 found "that racially polarized voting between African Americans and whites remains prevalent in North Carolina." *N.C. State Conference of NAACP*, 831 F.3d at 255. These holdings place the state between the proverbial rock and hard place: Section 2 plaintiffs can cite the Fourth Circuit's finding of severe polarized voting and, presumably, mount evidence to support that finding, and racial-gerrymandering plaintiffs can cite *Covington*'s finding that North Carolina lacks sufficient evidence of legally significant polarized voting to justify 50% BVAP districts.[10] These rulings expose the state to "the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) (quotations omitted).

The 2017 plans, however, navigate the tension between *Covington* and *NAACP* by maintaining approximately two dozen crossover districts of near or above 40% BVAP. These districts are a shield to VRA § 2 claims by affording the equal opportunity the statute guarantees. They also are a shield to racial-gerrymandering claims because (1) the General Assembly did not use racial data to create them and (2) they maintain BVAP levels identified by Dr. Lichtman's reports as appropriate to afford racial equality in voting at current levels of polarized and crossover voting. But Plaintiffs' demand that the State Defendants drop BVAP in these districts because they are (in Plaintiffs' view) "packed" with Democrats undermines this proper exercise of "legislative choice or discretion," *Strickland*, 556 U.S. at 23, and exposes the State to a VRA § 2 claim by any plaintiff willing and able to prove legally significant polarized voting.

[10] The problem is exacerbated insofar as "[c]ourts are split on the question of whether…the use of nonmutual offensive collateral estoppel [is available] against state or municipal governments." *DeCastro v. City of New York*, 278 F. Supp. 3d 753, 764 n.13 (S.D.N.Y. 2017).

Plaintiffs' sole response is that the State Defendants did not use race in constructing the crossover districts. Pls.' Mem., at 20. So what? There is no rule that intentionally drawn minority performing districts are protected but unintentionally drawn ones are unprotected. To the contrary, legislative intent plays no role whatsoever in the "effects" inquiry under VRA § 2. *See, e.g.*, *Strickland*, 556 U.S at 10; *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986).

Plaintiffs' counsel should know this better than anyone because they have gone on the litigation circuit this cycle urging the federal courts to hold that states should ordinarily, if not exclusively, satisfy the VRA without intending to do so. That is exactly what Plaintiffs' counsel told the Supreme Court in challenging North Carolina's congressional districts:

> To be sure, there can be circumstances where a state draws a majority-minority district without triggering strict scrutiny. For example, a state might draw such a district as a natural result of complying with traditional redistricting principles.

Mot. to Affirm, *McCrory v. Harris* (U.S.) (No. 1501262), at 24. Crossover districts too can occur naturally as a result of non-racial criteria, and that occurred here. That North Carolina created them unintentionally should come as welcome news to Plaintiffs' lawyers, who have for years advocated this reform. The suggestion that a naturally occurring district loses VRA § 2 protection because race did *not* predominate is inexplicable, if not disingenuous.

Besides, Plaintiffs' argument ignores the legislative record. Although the General Assembly set no racial targets in crafting the crossover districts at the map-drawing stage, it considered racial demographics and Dr. Lichtman's polarized voting analyses at the deliberation and enactment stages. Dr. Lichtman's reports were entered into the legislative record as evidence that the naturally occurring crossover districts would likely perform.

II. REMOVAL IS PROPER UNDER SECTION 1441(a)

Besides Section 1443(2), removal is also proper under Section 1441(a) because the federal-law issues described above simply must be resolved for Plaintiffs to have a valid state-law claim, and that is so as a matter of *state* law. "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). All of these elements are met here.

First, the federal issues are "necessarily raised" because demonstrating that federal law permits the demanded redistricting plan is an *affirmative* element of Plaintiffs' claim. A federal issue is necessarily raised where a state-law *prima facie* claim requires resolution of a federal issue, such as a "case within a case" where a federal-law element is a predicate of liability. *Id.* at 1065–66. That is so here because the North Carolina Constitution expressly provides that "no law or ordinance of the State in contravention or subversion" of federal law "can have any binding force," N.C. Const. Art. I, § 5, and the North Carolina Supreme Court interpreted this provision to mean "that compliance with federal law is not an implied, but rather an express condition to the enforceability of *every* provision in the State Constitution," *Stephenson v. Bartlett*, 355 N.C. 354, 375, 562 S.E.2d 377, 392 (2002). To prove that the North Carolina Constitution requires a districting scheme, Plaintiffs must first prove it compliant with *federal* law. *See id.* at 381–82, 562 S.E.2d at 396. That requires a case-within-a-case assessment of what the Equal Protection Clause, the Fifteenth Amendment, and the VRA require.[11] *See North*

[11] It also requires assessment of First Amendment dictates, given some lower courts' view that it prohibits redistricting "that disfavors supporters of a particular set of political beliefs[.]" *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 927 (M.D.N.C. 2018). What Plaintiffs seek here is nothing less than a state-law requirement that the General Assembly use minority and Republican voters as pawns for Democratic Party gain.

Carolina by & through N. Carolina Dep't of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 146 (4th Cir. 2017), *as amended* (Apr. 18, 2017) (finding this element met where predicate to showing state-law property right was proving it consistent with federal property rights); *Coventry Health Care, Inc. v. Caremark, Inc.*, 705 F. Supp. 2d 921, 928 (M.D. Tenn. 2010) (denying remand because substantial federal question existed based on, *inter alia*, Plaintiff's burden to prove "compliance with federal statute").[12]

Second, the applicability of the Equal Protection Clause, Fifteenth Amendment, and VRA are "actually disputed," as evidence by the parties' contrary positions in this very briefing. Plaintiffs remarkably contend (at 23) that it is not actually disputed because, they say, the State Defendants *agree* that Plaintiffs' hoped-for remedial plan can be consistent with federal law. If nothing else, this brief should put that inexplicable view to rest. Federal law and Plaintiffs' reading of state law require diametrically opposing courses of action.

Third, the federal issues are "substantial" in their "importance…to the federal system as a whole." *Gunn*, 568 U.S. at 260. It is difficult to imagine an issue more substantial to the federal system than a conflict over how the Civil War Amendments and VRA apply to voting procedures. *Cf. Ortiz v. Univ. of Med. & Dentistry of New Jersey*, 2009 WL 737046, at *8 (D.N.J. Mar. 18, 2009) ("An alleged violation of the United States Constitution is by definition substantial."). The conflict over whether the IRS "had failed to comply with certain federally imposed notice requirements" that the Supreme Court found to justify federal jurisdiction in *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), can hardly claim a greater status in the federal system than can these issues. *Gunn*, 568 U.S. at 1066 (discussing

[12] Plaintiffs' cases are not on point. For example, *Hall v. Levinson*, 2016 WL 6238518, at *1 (E.D.N.C. Oct. 25, 2016), involved state-law claims "all arising from the alleged mismanagement and unlawful operation of" a charter school. That is irrelevant here.

Grable). And this is not a "hypothetical," "backward-looking case." *Id.* at 1066–67. It will determine whether voting districts approved by a federal court are compatible with a state theory the Plaintiffs only now belatedly raise.

Fourth, the Court can adjudicate this case without disrupting the appropriate balance of federal and state judicial power. Federal courts routinely adjudicate redistricting plans, and litigation over North Carolina's legislative plans has been ongoing in federal court for the better part of this decade—in fact, for the better part of 40 years. Moreover, that Section 1443(2) has justified removing redistricting litigation demonstrates that Congress did not anticipate that colorable conflicts between state and federal law would be adjudicated in state court.

Plaintiffs cite *Growe v. Emison*, 507 U.S. 25, 33 (1993), as requiring remand, but *Growe* said nothing on the subject. Plaintiffs' attorneys know this. They themselves argued in *Covington* that *Growe* does not require federal-court deference to a state court "that is merely reviewing the validity of a current map, as opposed to actually redrawing a map that has already been deemed valid." Ex. 4 at 5 (emphasis in original). The Middle District of North Carolina agreed with this argument. Ex. 5 at 4 (finding *Growe* irrelevant where "the state court proceeding has not even determined that any remediation is required"). Due to these arguments by their own lawyers, Plaintiffs' view that federal litigation cannot go forward if state court is an option was repudiated in North Carolina federal court this very cycle, as litigation in state and federal court proceeded on virtually identical claims on which North Carolina won in state court and lost in federal court. The Supreme Court held that the federal-court litigation in no way was required to yield to the state-court litigation. *Cooper v. Harris*, 137 S. Ct. 1455, 1467–68 (2017). The same lawyers who represent Plaintiffs here represented the federal-court litigants in all these cases, and they were not then of the view that federal litigation cannot proceed if state court is available.

Finally, Plaintiffs' position that consent of the other defendants is required for removal fails under the statute's plain-as-day text: "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(a). Here, Section 1441(a) is not the sole basis; Section 1443(2) also supports removal. *See Brown*, 208 F. Supp. 2d at 1349. As stated above, Plaintiffs are wrong that Section 1443(2) does not apply. And, regardless, their argument that a ruling against removal under Section 1443(2) would require consent under Section 1441(a) renders the statutory text superfluous. Cases in which Section 1441(a) is joined with a separate, valid basis render removal under Section 1441(a) superfluous, as that separate basis would alone be sufficient for removal. The statute only makes sense where Section 1441(a) and other colorable bases are cite in the alternative and the other bases prove unsuccessful.

III. Judicial Estoppel Does Not Apply

Plaintiffs' judicial estoppel position is meritless. The elements of judicial estoppel are: (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation," and that position "must be one of fact as opposed to one of law or legal theory," (2) "the prior inconsistent position must have been accepted by the court," and (3) "the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage." *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007) (quotations omitted). Plaintiffs fail to establish any of these elements.

Applicability of State Law. Plaintiffs first cite (at 24–25) the State Defendants' assertions that a state-law challenge to districts redrawn in 2017 would be viable only in state court as contradicting "[t]heir demand now for a federal forum." But the argument is facially defective because those are statements "of law or legal theory"; estoppel requires a statement "of fact." *Zinkand*, 478 F.3d at 638. The position fails for this reason alone.

Besides, there is no inconsistency. The *Covington* statements concern the *Covington* plaintiffs' "state-law complaints about districts that had never before been challenged in [the *Covington*] litigation," Mem. in Supp. of Pls.' Emergency Mot. to Remand ("Pls.' Mem."), Ex. G, ECF No. 6-7, at 7, in other words, districts in Wake and Mecklenburg Counties that the *Covington* Court did not "hold…were racially gerrymandered," *id.* at 28. Properly understood, the State Defendants' *Covington* position was *not* that the *remedial* districts were immune from state-law objection in federal court, but that the Wake and Mecklenburg County alterations were outside the *Covington* court's purview.

More importantly, the State Defendants did not even hint that any remedial districts could be challenged under state-law principles directly conflicting with federal law or that, if faced with a conflict between federal equal-rights law and a proposed interpretation of state law, they would waive their right to removal. All of that was outside the dispute in *Covington*.[13]

What's more, the Supreme Court did *not* adopt the argument Plaintiffs attribute to the State Defendants. It held, applying a clear-error standard, only that "[o]nce the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end." *Covington*, 138 S. Ct. at 2555. It did not reach sovereign immunity or the federal courts' power to apply state law to remedial districts. It held only that the Wake and Mecklenburg County alterations, which it viewed as unrelated to the remedial efforts, were outside the Middle District of North Carolina's remedial role.

[13] For that reason, there could have been no intent to mislead in *Covington* about the State Defendants' intentions on defending the districts beyond Wake and Mecklenburg Counties because no such defense was contemplated at the time.

VRA Compliance and Evidence of Polarized Voting. Plaintiffs also claim the State Defendants are estopped from asserting that the crossover districts are necessary or even appropriate or that voting is racially polarized in North Carolina. This position too is meritless.

As shown above, the State Defendants did not assert to the *Covington* Court that polarized voting does not exist, and Plaintiffs themselves admit it may exist. Pls.' Mem., at 21. The State Defendants in *Covington* made an assertion about the record before the legislature, observing that "[n]o information regarding legally sufficient racially polarized voting *was provided to the redistricting committees* to justify the use of race in drawing districts." Pls.' Mem. Ex. D, at 10 (emphasis added). That assertion was addressed to the *Covington* court's prior holding that a 50% BVAP target is unjustifiable without evidence before the General Assembly showing legally significant racially polarized voting. The State Defendants represented that no such evidence was presented to the General Assembly as of the 2017 remedial redistricting.

That is both true and irrelevant. The State's vulnerability under VRA § 2 turns, not on what was before the General Assembly in drafting the plans, but on what evidence can be presented in court in litigation. Similarly, the State's ability to defend a VRA § 2 claim depends, not on a showing of racial intent at the time of redistricting, but on objective evidence regarding voting patterns. Showing inconsistency requires showing no possibility of consistency. *Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000) (denying estoppel because "it could be argued" that allegedly inconsistent statements were "not necessarily co-extensive"); *Franco v. Selective Ins. Co.*, 184 F.3d 4, 8-9 (1st Cir. 1999); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1343-45 (1st Cir. 1991). These statements are inconsistent only to someone desperate for an argument.

IV. This Case Is Not Barred by Sovereign Immunity

Plaintiffs claim sovereign immunity prevents this case from proceeding in federal court and then promptly admit that removal waives sovereign immunity. Pls' Mem. at 25–26. Their

argument is that "private counsel for Legislative Defendants does not represent the State, cannot remove on behalf of the State and cannot waive the State's sovereign immunity." *Id.* at 26. But state law is to the contrary. It provides:

> [I]n any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina.

N.C. Gen. Stat § 1-72.2(a). It further provides that, "as agents of the state," the State Defendants may hire "private counsel" to represent them in that role. *Id.* 1-72.2(b).

It necessarily follows that they can waive sovereign immunity, as *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002), shows. Plaintiffs read *Lapides* to mean that only "the Attorney General has the power to waive sovereign immunity," Pls.' Mem., at 26, but *Lapides* held, not that only attorneys general in all 50 states may waive immunity, but that the attorney general of Georgia had power to waive immunity because a statute authorized him to represent the state in court. *See* 535 U.S. at 622. That is also true here. A state statute defines the State Defendants as the State and authorizes them to represent the State and hire counsel to that end. That settles the matter. *See City of Greensboro v. Guilford County Board of Elections*, 2018 WL 276688 at *6 (M.D.N.C. Jan 3, 2018) (finding that the North Carolina General Assembly and the Attorney General can act independently to waive sovereign immunity.)

Undeterred, Plaintiffs assert that, under N.C. Gen. Stat § 114-2(1) and (2), the North Carolina Attorney General is authorized to waive sovereign immunity. That may be so, but who cares? There is no rule that only one state actor may waive sovereign immunity. States may

divvy up their power as they wish. Here, both the Attorney General and the State Defendants are empowered to represent the state in litigation, and that authorization is sufficient.[14]

V. Plaintiffs' Demand for Attorneys' Fees Is Itself Frivolous

An award of attorney fees is appropriate only where removal is unsupported by "an objectively reasonable basis." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The only assertion lacking an objectively reasonable basis is Plaintiffs' demand for attorneys' fees. *Cf. Smith v. Psychiatric Sols., Inc.*, 750 F.3d 1253, 1260 (11th Cir. 2014) (noting the well-established rule that a frivolous motion for sanctions is itself sanctionable).

Plaintiffs' counsel Edwin M. Speas knows this. He was the lawyer who attempted removal in *Stephenson*. Plaintiffs' purported amazement at the State Defendants' removal here is clearly theatrical. This is the third time in four redistricting cycles removal has been sought in a case like this. It succeeded in *Cavanaugh*. Although it failed in *Stephenson*, the Court called the case a "close call." 180 F. Supp. 2d at 785. It was entirely predictable and reasonable that this avenue, regarded as colorable by Plaintiffs' own lawyer, would be tested again here.

Indeed, Plaintiffs admit (at 9 n.2) that their remand motion conflicts with precedent of this Court, stated in *Cavanaugh*. Even if the Court chooses to disregard it (it should not), the State Defendants' reliance is no less reasonable simply because Plaintiffs disagree with that case. Nor does the *Stephenson* case defeat the objectively reasonable basis for removal when it referred to the question as "close" and when the asserted conflict between state and federal law here is far more direct than the vague allegation by Mr. Speas in *Stephenson*—in the face of the

[14] *Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015), is inapposite because (1) the case involved a suit against legislative leaders who did not waive immunity and (2) was issued prior to the enactment of relevant portions of N.C. Gen. Stat § 1-72.2.

Stephenson plaintiffs' presentation of an alternative map harmonizing state and federal law. Plaintiffs call *Stephenson* "strikingly similar," and *Stephenson* was a "close call."

In fact, Plaintiffs fail to cite a single analogous case where attorneys' fees were awarded. Their reliance on *League of Women Voters of Pennsylvania v. Pennsylvania*, 2018 WL 1787211, at *1 (E.D. Pa. Apr. 13, 2018), could not be further off base. The case did not involve the VRA, any racial issues, or Section 1443(2), and the removing party acted solely under Section 1441(a) without obtaining consent from other defendants. The only resemblance between that case and this is that it involved redistricting. Plaintiffs' other precedents deny attorneys' fees. *See, e.g.*, *Civil Serv. Comm'n*, 2002 WL 1677711, at *7; *Brown*, 208 F. Supp. at 1344.

Plaintiffs do practically nothing to explain why an objective basis is absent. They instead speculate (at 29) about motive, contending that the State Defendants intended to delay the case. First of all, the test is *objective*, not subjective. Secondly, the State Defendants removed the case only one week after Plaintiffs filed their Amended Complaint. By contrast, Plaintiffs waited over one year from the 2017 plans' enactment to file their case. Their delay is neither this Court's nor North Carolina's emergency. Moreover, the Federal Rules allow time for parties to decide whether to remove. The State Defendants were justified in using that time to assess their options, including by ensuring that removal was supported by precedent. As shown above, it is.

CONCLUSION

Plaintiffs' motion should be denied in full. Moreover, in light of Plaintiffs' representation that "trillions" of maps could satisfy both their state-law theory and federal law, this Court in considering Plaintiffs' remand motion should direct Plaintiffs to file at least one of the "trillion" legislative districting plans for both the House and Senate that demonstrate compliance with Plaintiffs' state-law theory and federal law. In connection with that filing, the Court should direct Plaintiffs to file supporting documents and data sufficient to prove compliance with federal law.

This 28th day of December, 2018.

OGLETREE, DEAKINS, NASH,
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CERTIFICATE OF SERVICE

I hereby certify that, on this day, I electronically filed the forgoing **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION TO REMAND** with the Clerk of Court using the CM/ECF system which will cause a copy of the same to be served on counsel of record for all parties in this matter.

This the 28th day of December, 2018.

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Exhibit 1

January 29, 2016

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 1:15-cv-00399

Sur-Rebuttal Report of Dr. Allan J. Lichtman to Reports Submitted by Expert for Defendants

Distinguished Professor of History
American University
Washington, DC

Allan J. Lichtman

I. SUMMARY OF OPINIONS

In this report I respond to the report submitted by the expert for defendants, M. V. Hood (henceforth Hood Report) that addresses my prior two affidavits. After examining the Hood report I conclude that his report does not refute my quantitative empirical findings regarding the ability of African-American voters in North Carolina to elect African-American candidates or in rare instances white candidates of their choice in districts that are 40 percent or more African American but less than 50 percent African American in their voting age population. I also find that the Hood report contains no new original analysis and is marked by consequential omissions and errors in its efforts to reanalyze my findings regarding African-American opportunity districts in North Carolina.

II. 40%-49.9% OPPORTUNITY DISTRICTS FOR AFRICAN AMERICAN VOTERS IN NORTH CAROLINA

Contrary to what Dr. Hood indicates in his report there is nothing talismanic about 50%+ African-American voting age population (BVAP) districts in North Carolina.[1] To the contrary, my analysis of the actual results of elections demonstrated that not only do black candidates or in the rare instance a white candidate of choice of African-American voters usually prevail in North Carolina legislative districts that are 40 percent or more BVAP, they almost invariably prevail in such districts. As indicated by Tables 1 to 3 in my first affidavit, for the primary and general elections of 2008 and 2010 in such 40%+ BVAP districts American-American candidates or white candidates of choice of African-American voters prevailed in all elections (both primary and general) in 19 of 21 State House districts for a win rate of 90 percent, in all elections in 7 of 8 State Senate districts for win rate of 88 percent, and in all elections in 2 of 2 Congressional districts for a win rate of 100 percent. Combining results for all three types of districts, African-American candidates or candidates of choice of African-American voters prevailed in all elections in 28 of 31 40%+ black voting age population districts studied for a win rate of 90 percent.[2]

In response to Dr. Hood's report that African-American opportunity districts must be drawn at 50%+ BVAP, the following analysis distinguishes between elections held in 40% to 49.9% BVAP legislative districts and elections held in 50%+ BVAP legislative districts. State House districts, which are also the focus of Dr. Hood's report, provide a test of the effectiveness of legislative districts for African-American voters, given that there are about an equal number 40% to 49.9% BVAP House districts and 50%+ BVAP House districts in

[1] Dr. Bernard Grofman, the expert witness for prevailing plaintiffs in the landmark U. S. Supreme Court case, *Thornburg v. Gingles*, states that, "there is no "magic percentage" in terms of minority population to determine when a district offers minorities a realistic opportunity to elect candidates of choice." Bernard Grofman, "Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control," March 13, 2006, p. 14, https://www.princeton.edu/csdp/events/Grofman040606/Grofman040606.pdf. .

[2] First affidavit of Professor Allan J. Lichtman. *Dickson v. Rucho* (11 CVS 16896), Tables 1-3. Contrary to Dr. Hood's criticism that I did not analyze so-called exogenous elections (elections for offices other than state legislature) in my affidavits I did include in my affidavits the most relevant and comparable exogenous elections: that is, elections for Congress in legislative districts. I do so in this report as well. These results take into account all elements of the elections in these districts including black cohesion – the black vote for candidates of their choice, the white bloc vote against the candidates and the racial composition of the turnout in primary and general elections.

the benchmark plan. The results of the analysis reported in Table 1 and Summary Table 2 confirm the finding that 50%+ districts *are not necessary* to provide African-American voters the opportunity to elect candidates of their choice to state legislative positions in North Carolina.[3]

As indicated in Summary Table 2 the actual outcomes of legislative elections in North Carolina State House districts are on balance slightly more favorable for African-American candidates and white candidates of choice of African-American voters in 40%-49.9% BVAP districts than in 50%+ BVAP districts. As indicated in Table 2, African-American candidates or candidates of choice of African American voters prevailed in all elections in 90 percent of 40%-49.9% BVAP districts, 1 percentage point less than the comparable 91 percent tally for 50%+ BVAP districts.

For individual election results within the State House districts (there are two primary and two general elections in each district). Table 2 indicates that African-American candidates or candidates of choice of African-American voters prevailed in 98 percent of elections held in 40%-49.9% BVAP House districts, 3 percentage points higher than the comparable win rate of 95 percent win rate for 50%+ BVAP House districts. African-American candidates were also more successful in gaining election in 40%-49.9% BVAP House districts than in 50%+ BVAP districts. As indicated in Table 2, African-American candidates prevailed in 90 percent of all elections in 40%-49.9% BVAP House districts, which is 8 percentage points higher than the comparable 82 percent win rate for African-American candidates in 50%+ BVAP House districts.

In addition to the election of candidates of choice who in rare instances have been white, the election of African-American candidates is also relevant to assessing voting rights issues. A report that accompanied the 1982 renewal of the Voting Rights Act by the Senate Committee on the Judiciary, listed the so-called "Senate Factors" which are part of to a "totality of the circumstances" analysis under Section 2 of the Voting Rights Act. Factor 7 is "the extent to which members of the minority group have been elected to public office in the jurisdiction."[4]

[3] In the interest of caution, I have included House District 43 among the 50%+ districts. It was initially crafted as a district in the 40% to 49.9% BVAP range but later became a 50%+ BVAP district under the 2010 Census. This district elected an African-American candidate in all elections. Its omission or inclusion as a 40%-49.9% BVAP district would add to the finding of the relative effectiveness of such districts. All of the information on State House districts presented in this report and my initial affidavit as well as information on State Senate and Congressional districts in my affidavit was readily available to members of the State Legislature and their staffs well before the post-2010 redistricting. The analyses of these districts require no advanced statistical techniques, but only simple sorting, counting, and the computation of percentages.

[4] *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (quoting S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07).

Table 1
Electoral Analysis of 2008 and 2010 Elections State House Districts With 40%-49.9% BVAP Compared to Districts with 50%+ BVAP

STATE HOUSE DISTRICTS 40%-49.9% BVAP						
District	% Black VAP 2000 Census	% Black VAP 2010 Census	2008 Democratic Primary	2008 General Election	2010 Democratic Primary	2010 General Election
HD 5:	49.0%	48.9%	BLACK	BLACK	NONE: BLACK	BLACK
HD 12	47.5%	46.5%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 21	48.4%	46.3%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 29	44.7%	40.0%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 31	44.7%	47.2%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 42	45.1%	47.9%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 48	45.5%	45.6%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 72	43.4%	45.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 99	28.3%	41.3%	BLACK	BLACK	BLACK	BLACK
HD 102	46.1%	42.7%	NONE: WHITE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE CHOICE

STATE HOUSE DISTRICTS 50%+ BVAP						
District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
HD 7	56.0%	60.8%	BLACK	BLACK	NONE: BLACK	BLACK
HD 8	50.4%	50.2%	WHITE: NOT CHOICE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
HD 24	54.8%	56.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 27 *	52.9%	54.0%	NONE: WHITE	NONE: WHITE	NONE: WHITE	NONE: WHITE
HD 33	50.0%	51.7%	NONE: BLACK	BLACK	BLACK	BLACK
HD 43	48.7%	54.7%	BLACK	BLACK	BLACK	BLACK
HD 60	50.6%	54.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 58	53.4%	53.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 71	51.6%	51.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 101	50.6%	55.7%	NONE: BLACK	BLACK	BLACK	BLACK
HD 107	50.5%	47.1%	BLACK	BLACK	NONE: BLACK	BLACK

* This analysis presumes that white candidate Michael Wray was the candidate of choice of black voters in 2008 and 2010. He was elected without primary or general election opposition in HD 27 in 2008 and 2010. In 2006, he was the candidate of choice of black voters in a primary election victory against black opponents. Without this presumption the comparison would be more favorable for 40% to 49.9% BVAP House districts as compared to 50%+ BVAP House districts.

Table 2
Summary of Results From Table 1, State House Districts With 40%-49.9% BVAP Compared to Districts with 50%+ BVAP

PRIMARY AND GENERAL ELECTIONS						
# OF 40%-49.9% BVAP HOUSE DISTRICTS	# OF DISTRICTS WON BY BLACK CANDIDATES OR WHITE CANDIDATES OF CHOICE IN ALL ELECTIONS	WIN RATE	# OF 50%+ BVAP HOUSE DISTRICTS	# OF DISTRICTS WON BY BLACK CANDIDATES OR WHITE CANDIDATES OF CHOICE IN ALL ELECTIONS	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
10	9	**90%**	11	10	**91%**	**-1%**
# OF ELECTIONS IN 40%-49.9% BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	# OF ELECTIONS IN 50%+ BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
40	39	**98%**	44	42	**95%**	**+3%**
# OF ELECTIONS IN 40%-49.9% BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES	WIN RATE	# OF ELECTIONS IN 50%+ BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
40	36	**90%**	44	36	**82%**	**+8%**
PRIMARY ELECTIONS ONLY						
# OF PRIMARY ELECTIONS IN 40%-49.9% BVAP HOUSE DISTRICTS	# OF PRIMARY ELECTIONS WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	# OF PRIMARY ELECTIONS IN 50%+ BVAP HOUSE DISTRICTS	# OF PRIMARY ELECTIONS WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
20	19	**95%**	220	20	**91%**	**+4%**
# OF PRIMARY ELECTIONS IN 40%-49.9% BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES	WIN RATE	# OF PRIMARY ELECTIONS IN 50%+ BVAP HOUSE DISTRICTS	# OF ELECTIONS WON BY BLACK CANDIDATES	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
20	18	**90%**	22	18	**82%**	**+8%**

With respect to Democratic primary elections, highlighted in the Hood report, Table 2 indicates that African-American candidates or candidates of choice of African-American voters prevailed in 95 percent of primary elections held in 40%-49.9% House districts, 4 percentage points higher than the comparable 91 percent win rate for African-American candidates in 50%+ BVAP House districts. African-American candidates were also successful in winning primary elections in 40%-49.9% BVAP House districts than in 50%+ BVAP House districts. African-American candidates prevailed in 90 percent of primary elections in 40%-49.9% BVAP House districts, 8 percentage points higher than the comparable 82 percent win rate for African-American primary candidates in 50%+ BVAP House districts.

In his report Dr. Hood provides only a single analytic table referencing actual electoral results in North Carolina legislative elections (Hood Report, Table 3). This Table, which is reproduced below examines only State House elections and does not consider elections in State Senate or Congressional Districts, which are analyzed in my first and second affidavits (and additionally analyzed below) and which include districts that are only in the 40%-49.9% BVAP range, with none at 50%+ BVAP. Nonetheless, an appropriate unpacking of this complex table demonstrates that it confirms rather than contradicts the conclusion that legislative districts in the range of 40% to 49.9% BVAP provide African-American voters a realistic opportunity to elect African-American candidates or in the rare instance a white candidate of choice of African-American voters.

First, Dr. Hood, in this table and in his commentary, incorrectly discounts uncontested elections. Although these elections do not provide information on polarized voting between blacks and whites, they provide important information on the effectiveness of legislative districts for African-American voters, the central point of controversy in this litigation. The occurrence of uncontested elections in a district is a powerful indicator that a district is effective in providing minority voters the opportunity to elect African-American candidates or in the rare instance white candidates of their choice, to office. General elections in legislative districts are typically contested and Democratic candidates prevailed in all general elections held in State House as well as State Senate and Congressional districts in the range of 40% to 49.9% BVAP. All but one uncontested Democratic primary elections in these 40%-49.9% BVAP districts produced an African-American nominee. Two uncontested elections produced white nominees in the 2008 and 2010 Democratic primaries in a 50%+ BVAP House district: HD 27, which is 52.9% BVAP under the 2000 Census and 54.0% BVAP under the 2010 Census.

The absence of any challenger to African-American Democratic primary candidates in a district typically demonstrates that the district is sufficiently effective for African-American voters that white candidates declined to complete, even though as indicated above (see also, Section IV of this report) the Democratic Party nomination was a virtually sure route to victory in general election in districts with 40%-49.9% BVAP. An uncontested primary election involving a black nominee would hardly be expected in districts that did not provide African-American voters the ability to elect candidates of their choice in primary elections.

Hood Report, p. 8

Table 3. State House Races Analyzed by Professor Lichtman, 2008-2010

	All	Primary	General
Contested	41.7% [35]	35.7% [15]	47.6% [20]
Uncontested	58.3% [49]	64.3% [27]	52.4% [22]
N	84	42	42
Contested Races Only:			
Black Candidate of Choice Defeated[16]	8.6% [3]	20.0% [3]	0.0% [0]
Black Candidate of Choice Wins	91.4% [32]	80.0% [12]	100.0% [20]
District ≥ 50% Black VAP	45.7% [16]	46.7% [7]	45.0% [9]
District 40.0-49.9% Black VAP	45.7% [16]	33.3% [5]	55.0% [11]
N	35	15	20

When uncontested and contested elections in Dr. Hood's Table 3 are both considered, there are 42 Democratic primary elections in total. These include elections in 40%-49.9% BVAP House districts and elections in 50%+ BVAP House districts, which are co-mingled indistinguishably in Dr. Hood's Table. In only 3 of these 42 primary elections according to Dr. Hood's Table 3 was the African-American candidate of choice defeated, for a win rate of 93 percent (39 of 42). In addition, Dr. Hood provides summary statistics only with no information on elections in specific House Districts. Yet an examination of my Table 1 above discloses that *two of these three losses* by candidates of choice of African American voters occurred in the 2008 and 2010 primary elections *in a 50%+ BVAP House district*: HD 8, which was 50.4 BVAP under the 2000 Census and 50.2 percent BVAP under the 2010 Census. Only one of the three losses occurred in a 40% to 49.9% BVAP State House district, in the 2010 primary in HD 102.

Even considering only contested Democratic primary elections in State House elections, African-American candidates and candidates of choice fare well in 40%-49.9% BVAP districts. As indicated in my Table 3 below there were 5 contested Democratic primary elections in 40%-49.9% BVAP House districts. African-American candidates or candidates of choice of African American voters prevailed in 4 of 5 elections, for a win rate of 80 percent. There were 10 contested Democratic primary elections in 50%+ BVAP House districts. African-American candidates or candidates of choice prevailed in 8 of 10 elections, for the same win rate of 80 percent African-American candidates had a win rate of 80 percent in contested Democratic State House primaries in 40%-49.9% BVAP districts, again equal to the win rate for African-American candidates in 50%+ BVAP districts.

With respect to general elections, Dr. Hood's Table 3 reports a 100 percent win rate for African-American candidates or African-American candidates of choice. Thus, as indicated above, victory in the Democratic primary in these districts is tantamount to victory in the general election for every State House district (and every State Senate or Congressional district) at or above 40 percent BVAP. Dr. Hood does not challenge my finding that the candidates emerging from the primaries in these districts and winning the general election were the candidates of choice of African-American voters.

Dr. Hood does criticize my report for allegedly failing to report in most cases the degrees of polarized voting between blacks and whites in district elections. The critical point, however, is that regardless of polarized voting patterns in North Carolina, African-American candidates of choice almost invariably prevailed in Democratic primaries and invariably prevailed in general elections in districts greater than or equal to 40 percent BVAP but less than 50 percent BVAP. What follows below is an examination of polarized voting and of the electoral mechanisms that explain the overwhelming success of African American candidate of choice in North Carolina legislative districts in the range of 40% to 49.9% BVAP.[5]

[5] Dr. Hood also criticizes my report for not examining elections earlier in the cycle than 2008 and 2010. However, not only are these the most recent elections under the prior redistricting plan, but they include a general election and a midterm election year and a good Democratic year (2008) and a good Republican year (2010). Moreover, Dr. Hood does not independently analyze any elections that would cast doubt on the 2008 and 2010 results.

Table 3
State House Districts With 40%-49.9% BVAP Compared to Districts with 50%+ BVAP: Contested Democratic Primary Elections Only

PRIMARY AND GENERAL ELECTIONS						
# OF CONTESTED DEMOCRATIC PRIMARIES IN 40%-49.9% BVAP HOUSE DISTRICTS	# WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	# OF CONTESTED DEMOCRATIC PRIMARIES IN 50%+ BVAP HOUSE DISTRICTS	# WON BY BLACK CANDIDATES OR BLACK VOTER CANDIDATES OF CHOICE	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
5	4	**80%**	10	8	**80%**	**0%**
# OF CONTESTED DEMOCRATIC PRIMARIES IN 40%-49.9% BVAP HOUSE DISTRICTS	# WON BY BLACK CANDIDATES	WIN RATE	# OF CONTESTED DEMOCRATIC PRIMARIES IN 50% BVAP HOUSE DISTRICTS	# WON BY BLACK CANDIDATES	WIN RATE	DIFFERENCE 40%-49.9% DISTRICTS WITH 50%+ BVAP DISTRICTS
5	4	**80%**	10	8	**80%**	**0%**

III. Polarized Voting in North Carolina

Dr. Hood correctly indicates that voting is polarized between African-Americans and whites in both primary and general elections in North Carolina. However, he fails to note that such polarization is essentially universal across the United States and that the existence of polarized voting does not imply that majority-African-American districts are necessary for African-American voters to have the ability to elect candidates of their choice to legislative office.

Dr. Hood chose to highlight for his analysis of polarized voting in North Carolina, exit polls for the 2008 Democratic primary between Barack Obama and Hillary Clinton and the 2008 general election between Obama and John McCain, both black versus white contests. Considering first the primary election, exit poll results reported in Table 4 demonstrate that racial polarization in North Carolina is similar to polarization nationwide in the in 2008 primaries and to racial polarization in other primaries held within a month of North Carolina's May 6, 2008 contest.

Although North Carolina's racial polarization in the 2008 Democratic primary slightly exceeds the national average, this distinction does not work to the detriment of African-American Democratic primary candidates in the state. Dr. Hood's report fails to analyze the two distinct components of racial polarization and their implications for black candidate success in Democratic primary elections. Both analyses by social scientists and the guidelines of the U. S. Supreme Court in its three-prong "*Gingles* Test," recognize that racial polarization consists of both minority (in this case African American) cohesion behind candidates of their choice (*Gingles* prong 2) and white bloc voting against these candidates (*Gingles* prong 3). For African-Americans, vote dilution in a jurisdiction or district occurs when white bloc voting is usually sufficient to defeat the candidates of choice of a cohesive African-American electorate. In mathematically equivalent terms, this means that the combination of African American cohesion and white crossover voting is not sufficient to elect African-American candidates of choice.[6]

Thus, the higher the level of African-American cohesion and the higher the level of white crossover voting, the better the prospects for African-American candidates. In North Carolina, the Democratic primary exit poll cited by Dr. Hood shows that the African-American cohesion level of 91 percent behind candidate Obama is much higher than the white bloc vote of 63 percent against Obama, which is equivalent to a white crossover level of 37 percent. To illustrate the implications of these results for African-American electoral success, consider hypothetically a district in which African-Americans comprised 40 percent of Democratic primary voters. Based on the exit poll cohesion and crossover results for North Carolina the African American candidate would garner 91% of the vote from the 40 percent of voters that are African American and 37 percent from the 60 percent of voters that are white. Based on these results, the expected Democratic primary vote for the African

[6] *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). See also, Mary J. Kosterlitz, "Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution," *Catholic University Law Review* 36(2) (1987), http://scholarship.law.edu/cgi/viewcontent.cgi?article=1961&context=lawreview.

Table 4
Exit Poll Results for Blacks and Whites 2008 Democratic Presidential Primary Nation, North Carolina, Proximate Primaries

JURISDICTION	% BLACK VOTERS FOR OBAMA	% WHITE VOTERS FOR OBAMA
NATION*	82%	39%
NORTH CAROLINA	91%	37%
PENNSYLVANIA	90%	37%
INDIANA	89%	40%
KENTUCKY	90%	23%

Source: ABC News 2008 Democratic Primary Exit Poll Results - Key Groups, http://abcnews.go.com/images/PollingUnit/08DemPrimaryKeyGroups.pdf. * Did not include states without exit polls in 2008.

-American candidate in this district is 58.6%.[7] As will be demonstrated below, however, the expected African-American component of the Democratic primary vote in North Carolina legislative districts in the range of 40%-49.9% BVAP is almost always far higher than 50 percent.

Exit poll results for the 2008 general election reported in Table 5 also demonstrates similar racial polarization in North Carolina and the nation overall. The exit poll results for the state additionally indicate that in a district in which African Americans comprised 40 percent of all general election voters, the African-American candidate would garner 95% of the vote from the 40 percent of voters that are African-American and 35 percent from the 60 percent of voters that are white. Based on these results, the expected general election vote for the African-American candidate in this district is 59.0%.[8]

IV. The Dynamics of Partisan Legislative Elections for African-American Voters.

Dr. Hood's focus on polarized voting overlooks the actual racial dynamics of partisan legislative elections in North Carolina. For a district to perform effectively for African-American voters in North Carolina, it need not be majority African American. If African-Americans also have a majority in Democratic primary elections, such districts will provide African-American voters a realistic opportunity to elect candidates of their choice. This dynamic for African-American voters in North Carolina, analyzed below, explains why African-American candidates or in the rare instance a white candidate of choice of African American voters have almost invariably prevailed in North Carolina legislative districts with a 40% to 49.9% BVAP.[9]

The analysis first examines African-American turnout in Democratic primary elections. This analysis begins with findings of the 2008 Democratic primary exit poll between Obama and Clinton cited by Dr. Hood. It then provides a district-specific analysis of the actual African-American percentage of both Democratic registrants and Democratic primary voters in 2008 and 2010 in all 40%-49.9% BVAP State House, State Senate, and Congressional Districts in North Carolina.

In focusing on polarized voting results in the 2008 Democratic presidential primary exit polls for North Carolina, Dr. Hood passes over an important finding of this poll: the white and black percentages of the Democratic primary electorate. This Democratic primary exit poll indicates that the percentage of African Americans in the voting age population of a

[7] (.4*91% + .6*37% = 58.6%). For an explication of minority cohesion and white bloc voting and how these voting patterns affect the prospects for minority candidates in a district, see Allan J. Lichtman and J. Gerald Hebert, "A General Theory of Vote Dilution," *Berkeley La Raza Law Journal*, 6(1) (1993), 1-25.

[8] (.4*95% + .6*35% = 58.6%).

[9] Professor Grofman states in his 2006 article, "On the other hand, districts where minorities are less than a majority of the overall electorate may nonetheless afford minorities a realistic opportunity to elect candidates of choice if the minority constitutes a majority of the electorate in the primary of the party most closely associated with the interests of that minority, and if there is also sufficient reliable white cross-over voting in the general election for the victor in that primary to win the general election with near certainty." Grofman, "Operationalizing the Section 5 Retrogression Standard," p. 15.

district will not be a reliable guide to the African-American percentage of voters in a Democratic primary. Rather the African-American primary percentage is likely to be substantially higher than the voting age population.

Data from the 2008 Democratic primary exit poll, reported in Table 5, indicates that African Americans comprised 34 percent of the state's Democratic primary electorate in 2008, 63 percent higher than the 20.9 African-American percentage of the state's voting age population. In turn, the white and the Hispanic and other component of the Democratic primary electorate is substantially lower than each group's percentage of the state's the voting age population.

It is also feasible to directly measure the racial component of the 2008 Democratic primary electorate because the state maintains registration and turnout data by race. These results, reported in Table 6 indicate that the exit poll slightly underestimates the African-American percentage of the 2008 Democratic primary electorate. According to results reported in Table 6, African Americans comprised 37 percent of the state's Democratic primary electorate in 2008, 77 percent higher than the 20.9 African-American percentage of the state's voting age population. In turn, the white, Hispanic and other component of the Democratic primary electorate is again substantially lower than each group's percentage of the state's the voting age population.[10]

These two sets of results for the 2008 Democratic primary indicate that a state legislative district in North Carolina with a BVAP in the range of 40% to 49.9% will have a much higher African-American percentage of the Democratic primary electorate, likely well in excess of a 50 percent majority.

Analysis of the 2010 statewide primary in North Carolina confirms these findings, even for a midterm year when African-American turnout is especially reduced relative to presidential years and also a good year for Republicans in North Carolina. The data reported in Table 6, indicates that African Americans comprised 33 percent of the state's Democratic primary electorate in 2010, 58 percent higher than the 20.9 African American percentage of the state's voting age population. In turn, the white, Hispanic and other component of the Democratic primary electorate is substantially lower than each group's percentage of the state's the voting age population.

Thus multiple analyses from the 2008 and 2010 Democratic primaries statewide indicate the legislative districts in the 40% to 49.9% BVAP range should typically have African-American majorities in Democratic primary elections that are well in excess of 50

[10] Compilations of turnout by race statewide and in legislative districts as well as compilations of statewide general election results in legislative were prepared under my instruction by David Ely of Compass Demographics, who also prepared data under my instruction for the North Carolina litigation of the state's VIVA legislation.

Table 5
Exit Poll Results for Blacks and Whites 2008 General Election
Nation, North Carolina,

JURISDICTION	% BLACK VOTERS FOR OBAMA	% WHITE VOTERS FOR OBAMA
NATIONAL	95%	43%
NORTH CAROLINA	95%	35%

Source: http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#NCDEM.

Table 6
Turnout by Blacks, Whites and Others 2008 and 2010 Democratic Primary Election, North Carolina,

2008 EXIT POLL BY RACE				
RACE	PERCENTAGE OF DEMOCRATIC PRIMARY VOTERS	PERCENTAGE OF VOTING AGE POPULATION (VAP)	PERCENTAGE POINT DIFFERENCE: PRIMARY VOTERS AND VAP	PERCENT DIFFERENCE: PRIMARY VOTERS AND VAP
WHITE	**62%**	**68.4%**	**-6.4 POINTS**	**-9%**
BLACK	**34%**	**20.9%**	**+13.1 POINTS**	**+63%**
HISPANIC & OTHERS	**4%**	**10.7%**	**-6.7 POINTS**	**-63%**
2008 STATE TURNOUT DATA BY RACE				
RACE	PERCENTAGE OF DEMOCRATIC PRIMARY VOTERS	PERCENTAGE OF VOTING AGE POPULATION (VAP)	PERCENTAGE POINT DIFFERENCE: PRIMARY VOTERS AND VAP	PERCENT DIFFERENCE: PRIMARY VOTERS AND VAP
WHITE	**60%**	**68.4%**	**-8.4 POINTS**	**-12%**
BLACK	**37%**	**20.9%**	**+16.1 POINTS**	**+77%**
HISPANIC & OTHERS	**4%**	**10.7%**	**-6.7 POINTS**	**-63%**
2010 STATE TURNOUT DATA BY RACE				
RACE	PERCENTAGE OF DEMOCRATIC PRIMARY VOTERS	PERCENTAGE OF VOTING AGE POPULATION (VAP)	PERCENTAGE POINT DIFFERENCE: PRIMARY VOTERS AND VAP	PERCENT DIFFERENCE: PRIMARY VOTERS AND VAP
WHITE	**64%**	**68.4%**	**-4.4 POINTS**	**-6%**
BLACK	**33%**	**20.9%**	**+12.1 POINTS**	**+58%**
HISPANIC & OTHERS	**3%**	**10.7%**	**-7.7 POINTS**	**-72%**

Source: http://www.cnn.com/ELECTION/2008/primaries/results/epolls/#NCDEM; 2010 Census of Population; voter_history_20140127 and voter_snapshot_20081104 and voter_snapshot_20100504 in the State's SEIMS data.

percent. This expectation is borne out by a district-specific analysis that looks at the actual African-American percentages of both the Democratic registration and the Democratic electorate in the 2008 and 2010 Democratic primaries in all State House, State Senate and Congressional districts in the 40% to 49.9% BVAP range.

Tables 7 to 9 report the actual African-American and white percentages of the Democratic registration and the Democratic turnout in the 2008 and 2010 primaries for State House, State Senate, and Congressional districts respectively in the 40% to 49.9% BVAP range. To be clear, these statistics are not the turnout rates of African Americans and whites, but the percentages of African Americans and whites among the registered Democrats and among the actual primary voters in each district. Table 10 summarizes the detailed results for Tables 7 to 9.

The results reported in Tables 7-9 and summarized in Table 10 for Democratic registration and turnout in the 2008 and 2010 primaries in 40%-49.9% BVAP legislative districts in North Carolina discloses that for Democratic primaries these districts are neither coalition nor crossover districts. Rather they are what Dr. Grofman terms African-American "control districts," which are districts "where minorities, themselves alone, can constitute a majority of the actual electorate."[11] In these districts African Americans almost invariably comprise a substantial majority of Democratic registrants and Democratic primary voters. In both the 2008 and 2010 primaries Table 10 discloses that with but a single exception (Democratic primary turnout in HD 29 in the 2010 election) African Americans comprise at least a rounded 54 percent of both Democratic registrants and Democratic primary voters.

In most instances these African-American Democratic registrants and primary voters comprise well more than a 55 percent majority. For Democratic registrants in the 2008 primary African Americans comprised more than a 60 percent majority in 85 percent of all 40%-49.9% BVAP legislative districts in North Carolina. In 2008, African Americans also comprised more than a 60 percent majority of Democratic primary voters in 90 percent of all 40%-49.9% BVAP legislative districts. For Democratic registrants in the 2010 primary African Americans comprised more than a 60 percent majority in 95 percent of all 40%-49.9% BVAP legislative districts. In 2010, African Americans also comprised more than a 60 percent majority of Democratic primary voters in 55 percent of all 40%-49.9% BVAP legislative districts.

Dr. Hood in his report does not provide a systematic analysis of the African-American component of Democratic registration and Democratic primary turnout in 40%-49.9% BVAP legislative districts in North Carolina. Instead, citing the work of Dr. Brunell Dr. Hood focuses on the African-American share of the Democratic primary turnout on only

[11] Grofman, "Operationalizing the Section 5 Retrogression Standard," p. 11.

Table 7
African-American & Non-Hispanic White Percentage of Democratic Party Registration and Turnout, State House Districts With 40%-49.9% BVAP, 2008 & 2010 Democratic Primary Elections

			2008 Democratic Primary		2010 Democratic Primary	
District	% Black VAP 2000 Census	% Black VAP 2010 Census	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout
HD 5:	49.0	48.9%	60.6%	60.6%	62.7%	56.1%
HD 12	47.5	46.5%	72.6%	73.7%	73.7%	65.3%
HD 21	48.4	46.3%	70.1%	71.0%	71.8%	55.2%
HD 29	44.7	40.0%	55.0%	54.0%	57.0%	47.8%
HD 31	44.7	47.2%	68.6%	72.6%	69.5%	71.5%
HD 42	45.1	47.9%	76.6%	83.7%	77.4%	85.2%
HD 48	45.5	45.6%	59.5%	64.1%	60.6%	57.9%
HD 72	43.4	45.4%	71.9%	75.9%	72.6%	72.5%
HD 99	28.3	41.3%	66.6%	75.7%	67.1%	72.7%
HD 102	46.1	42.7%	65.1%	64.2%	65.4%	56.5%
Source: voter_history_20140127 and voter_snapshot_20081104 and voter_snapshot_20100504 in the State's SEIMS data.						

Table 8
African-American & Non-Hispanic White Percentages of Democratic Party Registration and Turnout, State Senate Districts With 40%-49.9% BVAP, 2008 Democratic Primary

			2008 Democratic Primary		2010 Democratic Primary	
District	% Black VAP 2000 Census	% Black VAP 2010 Census	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout
SD 3:	47.0	46.9	63.8%	63.3%	66.4%	55.3%
SD 4	49.1	49.7	59.7%	59.8%	62.4%	56.1%
SD 14	41.0	42.6	67.0%	70.5%	68.0%	69.7%
SD 20	44.6	44.6	62.5%	64.1%	64.1%	56.1%
SD 21	41.0	44.9	70.9%	75.1%	73.1%	73.7%
SD 28	44.2	47.2	71.7%	75.0%	73.3%	76.0%
SD 32	41.4	42.5	68.1%	71.8%	69.4%	68.1%
SD 38	47.7	47.0	73.3%	78.5%	73.3%	74.8%
Source: voter_history_20140127 and voter_snapshot_20081104 and voter_snapshot_20100504 in the State's SEIMS data.						

Table 9
African-American & Non-Hispanic White Percentage of Democratic Party Registration and Turnout, U. S. Congress Districts With 40%-49.9% BVAP, 2008 Democratic Primary

			2008 Democratic Primary		2010 Democratic Primary	
District	% Black VAP 2000 Census	% Black VAP 2010 Census	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout	Black Percentage Of Democratic Registration	Black Percentage Of Democratic Turnout
CD 1:	48.1	48.6	63.7%	63.7%	66.2%	57.3%
CD 12	42.8	43.8	70.1%	74.1%	71.1%	67.8%
Source: voter_history_20140127 and voter_snapshot_20081104 and voter_snapshot_20100504 in the State's SEIMS data.						

Table 10
Summary of Democratic Registration and Primary Turnout 2008 & 2010 In 20 40%-49.9% BVAP Legislative Districts, From Tables 6-8

	BLACK PERCENTAGE OF DEMOCRATIC REGISTERED VOTERS 2008 PRIMARY	BLACK PERCENTAGE OF DEMOCRATIC ELECTORATE 2008 PRIMARY	BLACK PERCENTAGE OF DEMOCRATIC REGISTERED VOTERS 2010 PRIMARY	BLACK PERCENTAGE OF DEMOCRATIC ELECTORATE 2010 PRIMARY
LESS THAN 55%	0	1 (5%) (HD 29 54.0%)	0	1 (5%) (HD 29: 47.8% BVAP)
55% - 60%	3 (15%)	1 (5%)	1 (5%)	8 (40%)
60% - 65%	4 (20%)	6 (30%)	4(20%)	0
65%-70%	5 (25%)	0	7 (35%)	4 (20%)
MORE THAN 70%	8 (40%)	12 (60%)	8 (40%)	7 (35%)
SUMMARY: MORE THAN 60%	17 (85%)	18 (90%)	19 (95%)	11 (55%)

two elections in two districts: the 2010 primary elections in SD 3 and HD 102. These primary elections are the only contests out of 40 primary elections held in 40%-49.9% BVAP legislative districts in which African Americans failed to elect candidates of their choice. Dr. Hood's analyses of turnout in these two districts is critical to Dr. Hood's report, because they constitute the only specific analyses that purport to show that the defeat of black candidates can be attributed to the failure to draw districts at or above the 50% BVAP level. Yet even for these two exceptional cases, Dr. Hood's analysis fails to withstand scrutiny.

For SD 3 Dr. Hood claims that African Americans comprised only 46.4 percent of the 2010 primary turnout. He does not cite a specific source for this finding, but only generally refers in his footnote to the North Carolina State Board of Elections. Dr. Hood makes this alleged less-than-majority black turnout a central point of his report saying that it accounted for his additional finding that the two black candidates in the 2010 SD 3 primary taken together received only a minority of the vote that "equated to 46.2%." (Hood Report, p. 10). The critical bottom line for Dr. Hood is that for these black candidates to have gained even a mere combined majority of the vote it would have required a majority black turnout in SD 3 for which he says "the creation of a majority-black [VAP] district would most likely be required." (Hood Report, p. 11)

These claims by Dr. Hood, including his assertion that a black majority turnout in SD 3 would have required the creation of a majority-black VAP district cannot withstand scrutiny. In fact, although SD 3 had a BVAP 46.9 percent under the 2010 Census, based on actual registration and turnout by race as indicated in Table 8, African Americans actually comprised 66.4 percent of 2010 Democratic registrants and 55.3 percent of Democratic voters in the SD 3 2010 primary election. The inaccuracy of Dr. Hood's turnout estimates for the 2010 Democratic primary is additionally demonstrated by his erroneous reporting of the vote share received by the two African-American candidates competing in SD 3 in that primary. The official election results for the 2010 Democratic primary in SD 3 as reported by the North Carolina State Board of Elections and reproduced from the Board's website in Table 11, demonstrate that the two black candidates Bordeaux and Armstrong garnered 9,414 votes or *50.26 percent of the vote (not 46.2 percent)* to 9,313 or 49.73 percent of the vote for white incumbent candidate Jenkins. Thus, against a white incumbent, the African-American candidates actually garnered a slight majority of the Democratic primary vote. As I previously noted in my analysis of this election in my Second Affidavit, "Jenkins prevailed because of a split in the African-American vote."[12]

With respect to House District 102, Dr. Hood reports that "In 2010 House District 102 was 42.7% black VAP." (Hood Report, p. 10) He fails to note, however, that as in SD 3, African Americans in HD 102 comprised a much higher 56.5 percent of the 2010 Democratic primary turnout, thus establishing effective control over the primary election. As in SD 3 the white candidate prevailed not because of any defect in the district but because in a very low turnout election African Americans were barely cohesive, providing only 53.6 percent of their vote for

[12] Second affidavit of Professor Allan J. Lichtman. *Dickson v. Rucho* (11 CVS 16896). Page 17.

Table 11
Official Results of the 2010 Democratic Primary Election in Senate District 3

NC STATE SENATE DISTRICT 3 - DEM (Vote For 1)

3 of 3 Counties Reporting

	Percent	Votes
Clark Jenkins	49.73%	9,313
Frankie L. Bordeaux	38.01%	7,119
Florence Arnold Armstrong	12.26%	2,295

Source: http://results.enr.clarityelections.com/NC/15705/29325/en/summary.html.

the African-American candidate. I also previously presented this analysis in my Second Affidavit.[13]

Thus Democrats controlled the primary elections in the virtually every instance in the 20 legislative districts that are 40% to 49.9% black in voting age population legislative districts in North Carolina in the benchmark plan. In turn, the Democratic nominees in these 20 districts have without exception prevailed in general elections, creating a clear two-step path for African-American voters to nominate and then elect candidates of their choice. The overwhelming Democratic composition of these districts that makes party nomination tantamount to election is confirmed by examining the results of four 2008 and 2010 statewide general elections within the precincts of each district.

Results of these statewide general elections for 40%-49.9% legislative districts in North Carolina are presented in Tables 12-14 and summarized in Table 15. These results demonstrate overwhelming support for general election Democratic candidates in all 20 state legislative districts with a BVAP in the range of 40% to 49.9%. Table 12 for State House Districts indicates that the mean vote for Democratic candidates in the four general elections exceeded 60 percent in every district and exceeded 70 percent in 7 of 10 districts. Table 13 for State Senate Districts indicates that the mean vote for Democratic candidates in the four general elections exceeded 60 percent in every district and exceeded two-thirds (67 percent) percent in 6 of 8 districts. Table 14 for Congressional districts indicates that the mean vote for Democratic candidates in the four general elections was a rounded 65 percent or more in both districts. Summary Table 14 indicates that for all 80 general elections with the boundaries of 40%-49.9% North Carolina legislative districts the win rate for Democratic candidates was 100%. Summary Table 15 additionally indicates that the two-party vote for Democratic candidates exceeded 60 percent in 93 percent of these elections and exceeded 65 percent in 76 percent of these elections.

[13] *Ibid.*, pp. 17-18.

Table 12
2008 and 2010 General Election Results for 40%-49.9% State House Districts, Democratic Percentage of Two Party Vote

District	% Black VAP 2000 Census	% Black VAP 2010 Census	2008 Governor	2008 US President	2008 US Senate	2010 US Senate	Mean Four Elections
HD 5:	49.0%	48.9%	70.4%	60.5%	62.6%	55.9%	62.3%
HD 12	47.5%	46.5%	70.3%	60.5%	62.2%	54.3%	61.8%
HD 21	48.4%	46.3%	67.9%	63.1%	66.6%	58.6%	64.1%
HD 29	44.7%	40.0%	78.1%	82.4%	81.2%	78.2%	80.0%
HD 31	44.7%	47.2%	76.7%	78.7%	78.6%	76.5%	77.6%
HD 42	45.1%	47.9%	75.2%	74.0%	74.8%	71.7%	73.9%
HD 48	45.5%	45.6%	78.1%	70.4%	72.5%	67.4%	72.1%
HD 72	43.4%	45.4%	75.8%	75.3%	76.7%	67.1%	73.7%
HD 99	28.3%	41.3%	66.4%	75.5%	76.1%	72.7%	72.7%
HD 102	46.1%	42.7%	67.9%	80.3%	80.2%	74.3%	75.7%
Source: http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=House_Redistricting_Plan&Body=House; http://www.ncleg.net/representation/Content/BaseData/BD2011.aspx							

Table 13
2008 and 2010 General Election Results for 40%-49.9% State Senate Districts, Democratic Percentage of Two Party Vote

District	% Black VAP 2000 Census	% Black VAP 2010 Census	2008 Governor	2008 US President	2008 US Senate	2010 US Senate	Mean Four Elections
SD 3:	47.0	46.9	69.2%	60.6%	64.4%	57.2%	62.9%
SD 4	49.1	49.7	70.6%	61.3%	64.6%	57.4%	63.5%
SD 14	41.0	42.6	67.5%	69.3%	70.0%	64.3%	67.8%
SD 20	44.6	44.6	75.2%	76.7%	76.9%	73.3%	75.5%
SD 21	41.0	44.9	71.5%	69.7%	71.1%	65.5%	69.5%
SD 28	44.2	47.2	69.3%	69.5%	72.1%	61.2%	68.0%
SD 32	41.4	42.5	72.6%	72.0%	73.7%	62.5%	70.2%
SD 38	47.7	47.0	66.5%	74.4%	75.4%	69.1%	71.4%

Source: ;
http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2003.asp?Plan=2003_Senate_Redistricting_Plan&Body=Senate;
http://www.ncleg.net/representation/Content/BaseData/BD2011.aspx

Table 14
2008 and 2010 General Election Results for 40%-49.9% Congressional Districts, Democratic Percentage of Two Party Vote

District	% Black VAP 2000 Census	% Black VAP 2010 Census	2008 Governor	2008 US President	2008 US Senate	2010 US Senate	Mean Four Elections
CD 1:	48.1	48.6	71.0%	63.0%	66.1%	59.2%	64.8%
CD 12	42.8	43.8	67.9%	70.7%	72.6%	63.6%	68.7%

Source:
http://www.ncleg.net/Representation/Content/Plans/PlanPage_DB_2003.asp?Plan=Congress_ZeroDeviation&Body=Congress;
http://www.ncleg.net/representation/Content/BaseData/BD2011.aspx

Table 15
Summary of General Election Results 2008 & 2010 In 20 40%-49.9% BVAP Legislative Districts, From Tables 11-13

	# OF ELECTIONS IN WHICH VOTE FOR DEMOCRATIC CANDIDATE EXCEEDED 50%	# OF ELECTIONS IN WHICH VOTE FOR DEMOCRATIC CANDIDATE EXCEEDED 60%	# OF ELECTIONS IN WHICH VOTE FOR DEMOCRATIC CANDIDATE EXCEEDED 65%
80 ELECTIONS IN ALL DISTRICTS	80 (100%)	74 (93%)	61 (76%)

V. Dr. Hood's Interpretation of *Bartlett v. Strickland*.

Dr. Hood states in his report that the Supreme Court has also stipulated in *Bartlett v. Strickland* that the appropriate remedy for vote dilution, when conditions dictate, involves the creation of single-member majority-minority districts. He additionally states that, "majority-minority districts to be the proper remedy in avoiding a potential Section 2 vote dilution claim." (Hood Report, p. 8). It is unclear what Dr. Hood means by "remedy" in this sentence. Absent a finding of a voting rights violation, there is no need for a state or locality to fashion a "remedy." It is this slippage the between the latitude according states in deciding how to provide minority electoral opportunities in a redistricting plan and the requirements for a successful voting rights challenge that in my view leads Dr. Hood to misinterpret the guidance *Bartlett* provides to state and local jurisdictions and their expert advisers.

As a redistricting advisor to governmental bodies and independent groups, I am aware of the guidance provided by Supreme Court decisions including *Gingles*, *Johnson v. De Grandy* (in which I was an expert witness for the U. S. Department of Justice), *Bartlett v. Strickland, LULAC v. Perry* (in which I was an expert witness for plaintiffs), and *Alabama Legislative Black Caucus v. Alabama* (in which I was an expert witness for plaintiffs).[14] As construed in *Bartlett* the satisfaction of "prong one" of the *Gingles* test requires a showing that the minority group at issue constitutes at least 50 percent of the voting age population in an additional district. However, the *Bartlett* opinion does not impose 50 percent single race VAP requirement upon jurisdictions. Rather in the words of the majority opinion, "*§2 allows States to choose their own method of complying with the Voting Rights Act.*" (emphasis added). In detail the opinion states:

> "Our holding that §2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more. And as the Court has noted in the context of §5 of the Voting Rights Act, "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts." Ashcroft, 539 U. S., at 482. Much like §5, §2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts."

Following Supreme Court guidance and my own decades of experience as a social scientist analyzing hundreds of redistricting plans, my advice has been that a voting rights district need not conform to any pre-conceived or mechanical minority voting age population. Rather, the district should provide minority voters a realistic opportunity to elect candidates of

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[14] *Johnson v. De Grandy* 512 U.S. 997 (1994); *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009); *League Of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 (2006), *Alabama Legislative Black Caucus v. Alabama* (Slip Opinion), No. 13–895 (March 2015).

their choice. For African-American districts, depending on location, given their different turnout and voting behavior such districts may often be drawn at well below 50 percent of the African-American voting age population. African-American opportunity districts drawn at well below 50 percent BVAP at my recommendation have withstood judicial scrutiny or not been subject to litigation challenge. See, for example, *Campuzano v. Illinois State Board of Elections*, 200 F. Supp. 2d 905 (N. D. Ill, 2002) and *League of Women Voters v. Detzner*, The Second Judicial Circuit in and for Leon County Florida, CASENo.:2012-CA-2842, 30 December 2015.

In testimony before the Illinois State Senate by a staunch advocate of voting rights for African Americans, Kristen Clarke, former Co-Director of the Political Participation Group of the NAACP Legal Defense and Education Fund, commonly known as LDF explained why both legally and substantively states need not draw African-American opportunity districts at or above the 50% BVAP level:

> "Moreover, state legislatures throughout the country remain free to create affirmative opportunities for minorities to elect a candidate of choice even if a substantial minority population does not meet the 50 percent threshold. This is particularly true in those areas of the country that have experienced a significant increase in their minority population over recent time. In fact, *Bartlett* acknowledges that legislatures have the option of creating minority opportunity districts (when other redistricting factors are considered) even if a substantial minority population does not meet the 50 percent threshold. In that way, *Bartlett* does not bar the voluntary creation of a district where a minority group less than the 50 percent threshold can have the opportunity to elect a representative of choice."[15]

VI. Conclusions

None of the analyses in Dr. Hood's report or in Dr. Brunell's earlier report contradict the finding in my first two affidavits that North Carolina state legislative districts in the range of 40% to 49.9% BVAP provide African-American voters a realistic opportunity to elect candidates of their choice. Additional analyses presented in this report strengthen that finding.

The comparison of State House districts in the range of 40% to 49.9% BVAP with 50%+ BVAP State House districts demonstrates that districts in the former category at least as effective or even more effective for African-American voters than districts in the majority black category. This finding holds for the analysis of all State House elections held in these districts, as well as in the analysis of primary elections only. For primary elections, analysis of the racial composition of the electorate from the 2008 statewide exit poll demonstrates that black cohesion well exceeds white bloc voting against the black candidate of choice, creating favorable circumstances for the nomination of a black candidate. Turnout estimates from the exit polls as well as actual primary turnout in the 2008 and 2010 primaries indicate that the black percentage

[15] Testimony of Kristen Clarke Before the Illinois Senate Redistricting Committee, "Hearing onThe Voting Rights Act and Other Legal Requirements in Redistricting," December 8, 2009, p. 3, http://ilga.gov/senate/Committees/Redistricting/Testimony%20of%20Kristen%20Clarke%20-%20NAACP%20Legal%20Defense%20and%20Educational%20Fund.pdf.

of the primary electorate should far exceed the black percentage of the voting age population.

This expectation is confirmed by a district specific analysis of the actual black percentage of registered voters and the primary electorate in the 2008 and 2010 Democratic primaries. The results of this analysis demonstrates that in North Carolina in the 2008 and 2010 primaries African Americans almost invariably comprise very substantial majorities of Democratic registrants and Democratic primary voters in 40% to 49.9% BVAP State House, State Senate, and Congressional districts. Thus in the critical Democratic primaries these are not "coalition districts" as Dr. Hood claims. Rather African Americans control the primaries in these districts and are not dependent on votes from other racial groups. Analysis also demonstrates that for these 40% to 49.9% BVAP legislative districts, nomination in the Democratic primary is tantamount to victory in the general election.

Scrutiny of Dr. Hood's analyses of exit polls (Hood Report, Tables 1 and 2), and election results in State House districts (Hood Report, Table 3) only confirms these findings. In addition, Dr. Hood misanalyses the exceptional elections in SD 3 and HD 102 and misinterprets the guidance provided to state jurisdictions in *Bartlett v. Strickland*.

Exhibit 2

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION
11 CVS 16896
11 CVS 16940

MARGARET DICKSON, *et al.*,

Plaintiffs,

v.

ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee, *et al.*,

Defendants.

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP *et al.*,

Plaintiffs,

v.

STATE OF NORTH CAROLINA *et al.*,

Defendants.

Consolidated Cases

AFFIDAVIT OF ALLAN J. LICHTMAN, Ph.D.

I, Allan J. Lichtman, being first duly sworn, depose and say:

1. I am over 18 years of age, legally competent to give this affidavit and have personal knowledge of the facts set forth in this affidavit.

2. I am a Distinguished Professor of History at American University in Washington, DC and formerly Associate Dean of the College of Arts and Sciences and Chair of the Department of

History. I received my BA in History from Brandeis University in 1967 and my Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, electoral analysis, and historical and quantitative methodology. I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as Political Methodology, Journal of Interdisciplinary History, International Journal of Forecasting, and Social Science History. In addition, I have coauthored Ecological Inference with Dr. Laura Langbein, a standard text on the analysis of social science data, including political information. I have published articles on the application of social science analysis to civil rights issues. This work includes articles in such journals as Journal of Law and Politics, La Raza Law Journal, Evaluation Review, Journal of Legal Studies, and National Law Journal. My scholarship also includes the use of quantitative and qualitative techniques to conduct contemporary and historical studies, published in such academic journals as The Proceedings of the National Academy of Sciences, The American Historical Review, Forecast, and The Journal of Social History. Quantitative and historical analyses also ground my books, Prejudice and the Old Politics: The Presidential Election of 1928, The Thirteen Keys to the Presidency (co-authored with Ken DeCell), The Keys to the White House, and White Protestant Nation: The Rise of the American Conservative Movement. My most recent book, White Protestant Nation, was one of five finalists for the National Book Critics Circle Award for the best general nonfiction book published in America.

3. I have worked as a consultant or expert witness for both plaintiffs and defendants in some eighty voting and civil rights cases. These include several cases in the state of North Carolina. In late 2011, I was the expert witness in Illinois for the prevailing state parties in

separate litigation challenging both the adopted state plan for the State House and for Congress.[1] My work includes more than a dozen cases for the United States Department of Justice and cases for many civil rights organizations. I have also worked as a consultant or expert witness in defending enacted plans from voting rights challenges. A copy of my resume and a table of cases are attached as Appendix I of this report.

4. I have been asked to consider the African-American voting age population needed for State House, State Senate, and Congressional Districts in North Carolina that provide African Americans the ability to elect candidates of their choice. In particular I have been asked to consider whether it is necessary to create such districts that are 50 percent or more African American in their voting age population.

5. My expected fee in this matter is $400 per hour. I have enclosed an updated CV and a table of cases in which I have provided written or oral testimony.

Data and Methods

6. The voting analysis in this report relies on standard data utilized in social science: precinct by precinct election returns for each candidate in election studied, with candidates identified by race and precinct by precinct breakdowns of voting age African Americans and whites, which includes a small number of Asians and members of other races. The election and demographic data and the racial identification of candidates were obtained from the NC State Board of Elections via counsel. To estimate the voting of African Americans and whites, the analysis utilizes the standard methodology of ecological regression that I have employed in some

1 The State House litigation in Illinois was *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5025251, *8 (N.D. Ill. Oct. 21, 2011) and the Congressional litigation was *Committee For A Fair and Balanced Map, et al., v. Illinois State Board of Elections* 2011 U.S. Dist. LEXIS 144302, (N. D. Ill. December 15, 2011).

80 previous cases and applied to the analysis of many thousands of elections and the study of numerous redistricting plans. The ecological regression procedure estimates the voting behavior of demographic groups such as African Americans and whites by comparing the racial composition of voting precincts to the division of the vote among competing candidates in each precinct. It produces an equation that estimates both the turnout and voting for each candidate by each voter group. The procedure was accepted by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by the Court to single-member districts plans in *Quilter v. Voinovich*, 113 S. Ct 1149 (1993). My analysis based on these methods was cited authoritatively several times by the United States Supreme Court in the Congressional redistricting case, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).[2]

7. This report also follows standard practice in the field by using the results of past elections and voting patterns by minority and white voters to assess prospects for minority voters in newly crafted districts. This method is utilized on a standard basis when there is population growth and shifts in population that require the redrawing of districts in which the electorate will not be precisely the same as in previous districts. In this case, moreover, the analysis is highly reliable in that it covers a large number of districts that will include most of the electorate included in newly drawn districts. The electoral analysis is also specific to State House, State Senate, and Congressional elections.

Results of Analysis

2 For a scholarly analysis of ecological regression and why it works well in the context of analyzing the voting of racial groups, see, Allan J. Lichtman, "Passing the Test: Ecological Regression in the *Garza* Case and Beyond," *Evaluation Review* 15 (1991). Bernard Grofman, the expert witness in the *Gingles* case, and myself were co-originators of the specific statistical methodology used here, see, Bernard Grofman, Lisa Handley, Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992), pp. 102, 146.

8. The results of analysis apply to the two most recent elections years of 2008 and 2010 and cover all existing State House, State Senate, and Congressional Districts that are 40 percent or more African-American in their voting age populations, either as created under the 2000 Census or as currently constituted under the 2010 Census. The study examined Democratic primary elections, given that African Americans are overwhelmingly Democratic in North Carolina and general elections.

9. With respect first to State House Districts, the results of analysis demonstrate that of twenty-one 40%+ black voting age population districts studied, African-American candidates prevailed in all elections in 18 districts and a white candidate of choice of African-American voters prevailed in one election in another district (HD 27). There were only two exceptions to this near universal pattern. In House District 8 a white candidate who was not the primary election candidate of choice of African-American voters was elected in 2008 and 2010. However, House District 8 is a 50%+ black voting age population district and the white candidate won with more than 60 percent of the vote. The white candidate would have won even if this district were 60 percent black in voting age population. The only other 40%+ black voting age population State House district in which a white candidate who was not the candidate of choice of African-American voters prevailed was in House District 102. In one election, the 2010 Democratic primary contest, the white incumbent Becky Carney, who was not the candidate of choice of African-American voters prevailed. This was also a very low turnout election in which less than 5 percent of whites or blacks of voting age participated. Thus, in 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 all elections in 19 out of 21 districts, for a win rate of 90 percent.

10. With respect to State Senate Districts, the results of analyzing 40%+ black voting age population districts demonstrate that of eight districts studied, African-American candidates prevailed in all elections in six districts and a white candidate of choice of African-American voters prevailed in all elections in another district. The lone exception to this pattern is Senate District 3 in which a white candidate who was not the candidate of choice of African-American voters was elected in 2008 and 2010. Thus, in 40%+ black voting age population 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, for a win rate of 88 percent.

11. With respect to Congressional Districts, the results of analysis demonstrate that of two districts studied, African-American candidates prevailed in all elections in both districts. Thus, in 40%+ congressional districts, candidates or the candidates of choice of African-American voters prevailed in all elections in 2 of 2 districts, for a win rate of 100 percent.

12. The results of combining the analysis of elections for State House, State Senate, and Congress in relevant parts of the state demonstrate that either African-American candidates or candidates of choice of African-American voters prevailed in all elections in 28 of 31 40%+ black voting age population districts studied for a win rate of 90 percent. Thus, it is not necessary in North Carolina to create effective African-American opportunity districts with African-American voting age populations of 50 percent or more. The result of creating such districts is to waste African-American votes that could expand the ability of African Americans to influence the political process in other districts.

13. Tables 4 to 5, show the results of creating 50%+ African-American districts for State House and State Senate districts. As compared to the benchmark existing plan, the state-passed

proposed plan for State House needlessly packs African Americans into Districts greater than 50 percent black in their voting age population. The result is to diminish substantially the influence of African-American voters in other House districts. As indicated in Table 4, the existing benchmark State House plan has 32 districts that are 30% or more black in their voting age population, compared to 26 in the state-passed proposed State House plan. As indicated in Table 5, the existing benchmark State Senate plan has 15 districts that are 30% or more black in their voting age population, compared to 10 in the state-passed proposed State Senate plan.

14. In sum, Analysis of recent elections in North Carolina demonstrates that it is not necessary to create African-American opportunity districts with African-American voting age populations greater than 50 percent. Rather the result of creating such districts is to unnecessarily pack African Americans in districts with the result that in other districts the influence of African Americans in North Carolina elections is diminished. These opinions are consistent with the findings of Dr. Theodore Arrington who wrote the following in his affidavit:

> These statistics indicate that a primary purpose of precinct splitting was to segregate the races into separate districts. Black voters were placed in packed districts with far higher concentrations than are necessary to give them a reasonable opportunity to elect representatives of their choice or their ability to elect such representatives. I know that these concentrations are excessive based on my extensive study of voting in North Carolina including work on Section 5 preclearance for the Department of Justice and various voting rights cases beginning with my work on the Gingles case.[3]

3 Affidavit of Theodore S. Arrington, p. 11-12.

Table 1
Electoral Analysis of Current State House Districts With 40%+ Black Voting Age Population *

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
HD 5:	49.0%	48.9%	BLACK	BLACK	NONE: BLACK	BLACK
HD 7	56.0%	60.8%	BLACK	BLACK	NONE: BLACK	BLACK
HD 8	50.4%	50.2%	WHITE: NOT CHOICE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
HD 12	47.5%	46.5%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 21	48.4%	46.3%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 24	54.8%	56.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 27**	52.9%	54.0%	NONE: WHITE	NONE: WHITE	NONE: WHITE	NONE: WHITE
HD 29	44.7%	40.0%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 31	44.7%	47.2%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 33	50.0%	51.7%	NONE: BLACK	BLACK	BLACK	BLACK
HD 42	45.1%	47.9%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 43	48.7%	54.7%	BLACK	BLACK	BLACK	BLACK
HD 48	45.5%	45.6%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 58	53.4%	53.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 60	50.6%	54.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 71	51.6%	51.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 72	43.4%	45.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 99	28.3%	41.3%	BLACK	BLACK	BLACK	BLACK
HD 101	50.6%	55.7%	NONE: BLACK	BLACK	BLACK	BLACK
HD 102	46.1%	42.7%	NONE: WHITE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
HD 107	50.5%	47.1%	BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of precinct-level data.
** White candidate Michael Wray was elected without primary or general election opposition in HD 27 in 2008 and 2010. In 2006, he was the candidate of choice of black voters in a primary election victory against black opponents.

Table 2
Electoral Analysis of Current State Senate Districts With 40%+ Black Voting Age Population *

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
SD 3:	47.0%	46.9%	WHITE: NOT CHOICE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
SD 4	49.1%	49.7%	NONE: BLACK	BLACK	BLACK	BLACK
SD 14	41.0%	42.6%	BLACK	BLACK	NONE: BLACK	BLACK
SD 20	44.6%	44.6%	BLACK	BLACK	NONE: BLACK	BLACK
SD 21	41.0%	44.9%	BLACK	BLACK	BLACK	BLACK
SD 28	44.2%	47.2%	BLACK	BLACK	BLACK	BLACK
SD 32	41.4%	42.5%	NONE: WHITE	WHITE: CHOICE	WHITE: CHOICE	WHITE: CHOICE
SD 38	47.7%	47.0%	NONE: BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of precinct-level data.

Table 3
Electoral Analysis of Current Congressional Districts With 40%+ Black Voting Age Population *

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
CD 1:	48.1%	48.6%	NONE: BLACK	BLACK	BLACK	BLACK
CD 12	42.8%	43.8%	NONE: BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of precinct-level data.

Table 4
Comparison of State House Districts 30%+ Black Voting Age Population, Existing Districts and State Proposed Districts

Count	Existing Distriet	% Black VAP 2010 Census	State Proposed District	% Black VAP 2010 Census
1	7	60.77%	24	57.33%
2	24	56.07%	99	54.65%
3	101	55.73%	5	54.17%
4	43	54.69%	27	53.71%
5	60	54.36%	102	53.53%
6	27	53.95%	42	52.56%
7	58	53.43%	107	52.52%
8	33	51.74%	21	51.90%
9	71	51.09%	23	51.83%
10	8	50.23%	31	51.81%
11	5	48.87%	43	51.45%
12	42	47.94%	33	51.42%
13	31	47.23%	38	51.37%
14	107	47.14%	60	51.36%
15	12	46.45%	29	51.34%
16	21	46.25%	101	51.31%
17	48	45.56%	48	51.27%
18	72	45.40%	106	51.12%
19	102	42.74%	58	51.11%
20	99	41.26%	57	50.69%
21	29	39.99%	7	50.67%
22	100	37.39%	12	50.60%
23	23	36.90%	32	50.45%
24	32	35.88%	71	45.49%
25	39	34.91%	72	45.02%
26	55	32.98%	100	32.01%
27	44	32.57%		
28	69	31.74%		
29	63	30.66%		
30	45	30.40%		
31	25	30.30%		
32	59	30.15%		

Table 5
Comparison of State Senate Districts 30%+ Black Voting Age Population, Existing Districts and State Proposed Districts

Count	Existing District	% Black VAP 2010 Census	State Proposed District	% Black VAP 2010 Census
1	4	49.70%	28	56.49%
2	28	47.20%	4	52.75%
3	38	46.97%	38	52.51%
4	3	46.93%	3	52.43%
5	21	44.93%	5	51.97%
6	20	44.64%	40	51.84%
7	14	42.62%	21	51.53%
8	32	42.52%	14	51.28%
9	7	37.36%	20	51.04%
10	11	37.27%	32	42.53%
11	40	35.43%		
12	27	31.11%		
13	10	31.09%		
14	5	30.99%		
15	37	30.18%		

- Doc. Ex. 969 -

Allan J. Lichtman Allan J. Lichtman

[name of AFFIANT]

STATE OF District of Columbia

COUNTY OF _____

District of Columbia: ss
Subscribed and sworn to before me,
this 18 day of January, 2012
Notary Public, D.C.
My commission expires 5/14/16

I, Lindsay B. Michaud, a Notary Public of the County and State aforesaid, hereby certify that Allan J Lichtman personally known to me to be the affiant in the foregoing affidavit, personally appeared before me this day and having been by me duly sworn deposes and says that the facts set forth in the above affidavit are true and correct.

Witness my hand and official seal this the 18th day of January, 2012.

LINDSAY B. MICHAUD NOTARY PUBLIC DISTRICT OF COLUMBIA EXP 5-14-2016 (SEAL)

Notary Public

My commission expires:
5/14/2016.

LINDSAY B. MICHAUD
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires May 14, 2016

- Doc. Ex. 970 -

CV and Table of Cases

1

Curriculum Vitae

Allan J. Lichtman
9219 Villa Dr.
Bethesda, MD 20817

(301) 530-8262 h
(202) 885-2411 o

Jan. 2012

EDUCATION

BA, Brandeis University, Phi Beta Kappa, Magna Cum Laude, 1967

PhD, Harvard University, Graduate Prize Fellow, 1973

PROFESSIONAL EXPERIENCE

Teaching Fellow, American History, Harvard University, 1969-73

Instructor, Brandeis University, 1970, quantitative history.

Assistant Professor of History, American University, 1973-1977

Associate Professor of History, American University, 1977-1978

Professor of History, American University, 1979 –

Distinguished Professor of History, American University, 2011 -

Expert witness in more than 75 redistricting, voting rights and civil rights cases (see Table of Cases attached)

Associate Dean for Faculty and Curricular Development, College of Arts & Sciences, The American University 1985-1987

Chair, Department of History, American University, 1997- 2001

Regular political analyst for CNN Headline News, 2003-2006

HONORS AND AWARDS

Outstanding Teacher, College of Arts and Sciences, 1975-76

Outstanding Scholar, College of Arts and Sciences, 1978-79

Outstanding Scholar, The American University, 1982-83

Outstanding Scholar/Teacher, The American University, 1992-93 (Highest University faculty award)

Sherman Fairchild Distinguished Visiting Scholar, California Institute of Technology, 1980-81

American University summer research grant, 1978 & 1982

Chamber of Commerce, Outstanding Young Men of America 1979-80

Graduate Student Council, American University, Faculty Award, 1982

Top Speaker Award, National Convention of the International Platform Association, 1983, 1984, 1987

National Age Group Champion (30-34) 3000 meter steeplechase 1979

Eastern Region Age Group Champion (30-34) 1500 meter run 1979

Defeated twenty opponents on nationally syndicated quiz show, TIC TAC DOUGH, 1981

Listing in Marquis, WHO'S WHO IN THE AMERICA AND WHO'S WHO IN THE WORLD

McDonnell Foundation, Prediction of Complex Systems ($50,000, three years), 2003-2005

Organization of American Historians, Distinguished Lecturer, 2004 -

Selected by the Teaching Company as one of America's Super Star Teachers."

Associate Editor, International Journal of Operations Research and Information Systems, 2008 -

Keynote Speaker, International Forecasting Summit, 2007 and 2008

Cited authoritatively by United States Supreme Court in statewide Texas Congressional redistricting case *LULAC v. Perry* (2006)

Finalist for the 2008 National Book Critics Circle Award in general nonfiction for WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT. Interviews nominated by the Associated Press for the Edward R. Murrow Award for broadcasting excellence.

Elected Member, PEN American Center, 2009

SCHOLARSHIP

A. Books

PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928 (Chapel Hill: University of North Carolina Press, 1979)

PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928 (Lanham, MD: Lexington Books, 2000), reprint of 1979 edition with new introduction.

HISTORIANS AND THE LIVING PAST: THE THEORY AND PRACTICE OF HISTORICAL STUDY (Arlington Heights, Ill.: Harlan Davidson, Inc., 1978, with Valeric French)

ECOLOGICAL INFERENCE (Sage Series in Quantitative Applications in the Social Sciences, 1978, with Laura Irwin Langbein)

YOUR FAMILY HISTORY: HOW TO USE ORAL HISTORY, PERSONAL FAMILY ARCHIVES, AND PUBLIC DOCUMENTS TO DISCOVER YOUR HERITAGE (New York: Random House, 1978)

KIN AND COMMUNITIES: FAMILIES IN AMERICA (edited, Washington, D. C.: Smithsonian Press, 1979, , with Joan Challinor)

THE THIRTEEN KEYS TO THE PRESIDENCY (Lanham: Madison Books, 1990, with Ken DeCell)

THE KEYS TO THE WHITE HOUSE, 1996 EDITION (Lanham: Madison Books, 1996)

THE KEYS TO THE WHITE HOUSE, (Lanham: Lexington Books Edition, 2000)

THE KEYS TO THE WHITE HOUSE, POST-2004 EDITION (Lanham: Lexington Books Edition, 2005)

THE KEYS TO THE WHITE HOUSE, 2008 EDITION (Lanham: Rowman & Littlefield, 2008)

THE KEYS TO THE WHITE HOUSE, 2012 EDITION (Lanham: Rowman & Littlefield, 2012)

WHITE PROTESTANT NATION: THE RISE OF THE AMERICAN CONSERVATIVE MOVEMENT (New York: Grove/Atlantic Press, 2008)

FDR AND THE JEWS, Accepted for publication, Harvard University Press, with Richard Breitman.

THE KEYS TO THE WHITE HOUSE, 2012 EDITION (Forthcoming, in press, Lanham:

Rowman & Littlefield)

Monograph:

"Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida," and "Supplemental Report," in VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, United States Commission on Civil Rights, June 2001

B. Scholarly Articles

"The Federal Assault Against Voting Discrimination in the Deep South, 1957-1967," JOURNAL OF NEGRO HISTORY (Oct. 1969) REF

"Executive Enforcement of Voting Rights, 1957-60," in Terrence Goggin and John Seidel, eds., POLITICS AMERICAN STYLE (1971)

"Correlation, Regression, and the Ecological Fallacy: A Critique," JOURNAL OF INTERDISCIPLINARY HISTORY (Winter 1974) REF

"Critical Election Theory and the Reality of American Presidential Politics, 1916-1940," AMERICAN HISTORICAL REVIEW (April 1976) REF

"Across the Great Divide: Inferring Individual Behavior From Aggregate Data," POLITICAL METHODOLOGY (with Laura Irwin, Fall 1976) REF

"Regression vs. Homogenous Units: A Specification Analysis," SOCIAL SCIENCE HISTORY (Winter 1978) REF

"Language Games, Social Science, and Public Policy: The Case of the Family," in Harold Wallach, ed., APPROACHES TO CHILD AND FAMILY POLICY (Washington, D. C.: American Association for the Advancement of Science, 1981)

"Pattern Recognition Applied to Presidential Elections in the United States, 1860-1980: The Role of Integral Social, Economic, and Political Traits," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE (with V. I. Keilis-Borok, November 1981) REF

"The End of Realignment Theory? Toward a New Research Program for American Political History," HISTORICAL METHODS (Fall 1982)

"Kinship and Family in American History," in National Council for Social Studies Bulletin, UNITED STATES HISTORY IN THE 1980s (1982)

"Modeling the Past: The Specification of Functional Form," JOURNAL OF

INTERDISCIPLINARY HISTORY (with Ivy Broder, Winter 1983) REF

"Political Realignment and `Ethnocultural` Voting in Late Nineteenth Century America," JOURNAL OF SOCIAL HISTORY (March 1983) REF

"The `New Political History:`Some Statistical Questions Answered," SOCIAL SCIENCE HISTORY (with J. Morgan Kousser, August 1983) REF

"Personal Family History: A Bridge to the Past," PROLOGUE (Spring 1984)

"Geography as Destiny," REVIEWS IN AMERICAN HISTORY (September 1985)

"Civil Rights Law: High Court Decision on Voting Act Helps to Remove Minority Barriers," NATIONAL LAW JOURNAL (with Gerald Hebert, November 10, 1986).

"Tommy The Cork: The Secret World of Washington's First Modern Lobbyist," WASHINGTON MONTHLY (February 1987).

"Discriminatory Election Systems and the Political Cohesion Doctrine," NATIONAL LAW JOURNAL (with Gerald Hebert, Oct. 5, 1987)

"Aggregate-Level Analysis of American Midterm Senatorial Election Results, 1974-1986," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Dec. 1989, with Volodia Keilis-Borok) REF

"Black/White Voter Registration Disparities in Mississippi: Legal and Methodological Issues in Challenging Bureau of Census Data," JOURNAL OF LAW AND POLITICS (Spring, 1991, with Samuel Issacharoff) REF

"Adjusting Census Data for Reapportionment: The Independent Role of the States," NATIONAL BLACK LAW JOURNAL (1991)

"Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," EVALUATION REVIEW (December 1991) REF

Understanding and Prediction of Large Unstable Systems in the Absence of Basic Equations," PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON CONCEPTUAL TOOLS FOR UNDERSTANDING NATURE (with V. I. Keilis-Borok, Trieste, Italy, 1991).

"The Self-Organization of American Society in Presidential and Senatorial Elections," in Yu. Krautsov, ed., THE LIMITS OF PREDICTABILITY (with V.I. Keilis-Borok, Nauka, Moscow, 1992).

"'They Endured:' The Democratic Party in the 1920s," in Ira Foreman, ed., DEMOCRATS AND THE AMERICAN IDEA: A BICENTENNIAL APPRAISAL (1992).

"A General Theory of Vote Dilution," LA RAZA (with Gerald Hebert) 6 (1993). REF

"Adjusting Census Data for Reapportionment: The Independent Role of the States," JOURNAL OF LITIGATION (December 1993, with Samuel Issacharoff)

"The Keys to the White House: Who Will be the Next American President?," SOCIAL EDUCATION 60 (1996)

"The Rise of Big Government: Not As Simple As It Seems," REVIEWS IN AMERICAN HISTORY 26 (1998)

"The Keys to Election 2000," SOCIAL EDUCATION (Nov/Dec. 1999)

"The Keys to the White House 2000," NATIONAL FORUM (Winter 2000)

"Report on the Implications for Minority Voter Opportunities if Corrected census Data Had Been Used for the Post-1990 Redistricting: States With The Largest Numerical Undercount," UNITED STATES CENSUS MONITORING BOARD, January 2001

"What Really Happened in Florida's 2000 Presidential Election," JOURNAL OF LEGAL STUDIES (January 2003) REF

"The Keys to Election 2004," SOCIAL EDUCATION (January 2004)

"History: Social Science Applications," ENCYCLOPEDIA OF SOCIAL MEASUREMENT (Elsevier, 2006)

"The Keys to the White House: Forecast for 2008," SPECIAL FEATURE, *FORESIGHT:* THE INTERNATIONAL JOURNAL OF APPLIED FORECASTING 3 (February 2006), 5-9 with response: J. Scott Armstrong and Alfred G. Cuzan, "Index Methods for Forecasting: An Application to the American Presidential Elections."

"The Keys to the White House: Updated Forecast for 2008," *FORESIGHT;* THE INTERNATIONAL JOURNAL OF APPLIED FORECASTING 7 (Fall 2007)

"The Keys to the White House: Prediction for 2008," SOCIAL EDUCATION (January 2008)

"The Keys to the White House: An Index Forecast for 2008," INTERNATIONAL JOURNAL OF FORECASTING 4 (April-June 2008) REF

"The Updated Version of the Keys," SOCIAL EDUCATION (October 2008)

"Extreme Events in Socio-Economic and Political Complex Systems, Predictability of," ENCYCLOPEDIA OF COMPLEXITY AND SYSTEMS SCIENCE (Springer, 2009, with

Vladimir Keilis-Borok & Alexandre Soloviev)

"The Keys to the White House: A Preliminary Forecast for 2012" INTERNATIONAL JOURNAL OF INFORMATION SYSTEMS & SOCIAL CHANGE (Jan.-March 2010) REF

"The Keys to the White House: Forecast for 2012," FORESIGHT: THE INTERNATIONAL JOURNAL OF APPLIED FORECASTING (Summer 2010)

"The Alternative-Justification Affirmative: A New Case Form," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Charles Garvin and Jeromo Corsi, Fall 1973) REF

"The Alternative-Justification Case Revisited: A Critique of Goodnight, Balthrop and Parsons, 'The Substance of Inherency,'" JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Jerome Corsi, Spring 1975) REF

"A General Theory of the Counterplan," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1975) REF

"The Logic of Policy Dispute," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Spring 1980) REF

"Policy Dispute and Paradigm Evaluation," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1982) REF

"New Paradigms For Academic Debate," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Fall 1985) REF

"Competing Models of the Debate Process," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Winter 1986) REF

"The Role of the Criteria Case in the Conceptual Framework of Academic Debate," in Donald Terry, ed., MODERN DEBATE CASE TECHNIQUES (with Daniel Rohrer, 1970)

"Decision Rules for Policy Debate," and "Debate as a Comparison of Policy Systems," in Robert 2, ed., THE NEW DEBATE: READINGS IN CONTEMPORARY DEBATE THEORY (with Daniel Rohrer, 1975)

"A Systems Approach to Presumption and Burden of Proof;" "The Role of Empirical Evidence in Debate;" and "A General Theory of the Counterplan," in David Thomas, ed., ADVANCED DEBATE: READINGS IN THEORY, PRACTICE, AND TEACHING (with Daniel Rohrer, 1975)

"Decision Rules in Policy Debate;" "The Debate Resolution;" "Affirmative Case Approaches;"

"A General Theory of the Counterplan;" "The Role of Empirical Evidence in Debate;" and "Policy Systems Analysis in Debate," in David Thomas, ed., ADVANCED DEBATE (revised edition, with Daniel Rohrer and Jerome Corsi, 1979)

C. Selected Popular Articles

"Presidency By The Book," POLITICS TODAY (November 1979) Reprinted: LOS ANGELES TIMES

"The Grand Old Ploys," NEW YORK TIMES Op Ed (July 18, 1980)

"The New Prohibitionism," THE CHRISTIAN CENTURY (October 29, 1980)

"Which Party Really Wants to `Get Government Off Our Backs`?" CHRISTIAN SCIENCE MONITOR Opinion Page (December 2, 1980)

"Do Americans Really Want `Coolidge Prosperity` Again?" CHRISTIAN SCIENCE MONITOR Opinion Page (August 19, 1981)

"Chipping Away at Civil Rights," CHRISTIAN SCIENCE MONITOR Opinion Page (February 17, 1982)

"How to Bet in 1984. A Presidential Election Guide," WASHINGTONIAN MAGAZINE (April 1982) Reprinted: THE CHICAGO TRIBUNE

"The Mirage of Efficiency," CHRISTIAN SCIENCE MONITOR Opinion Page (October 6, 1982)

"For RIFs, It Should Be RIP," LOS ANGELES TIMES Opinion Page (January 25, 1983)

"The Patronage Monster, Con't." WASHINGTON POST Free For All Page (March 16, 1983)

"A Strong Rights Unit," NEW YORK TIMES Op Ed Page (June 19, 1983)

"Abusing the Public Till," LOS ANGELES TIMES Opinion Page (July 26, 1983)

The First Gender Gap," CHRISTIAN SCIENCE MONITOR Opinion Page (August 16, 1983)

"Is Reagan A Sure Thing?" FT. LAUDERDALE NEWS Outlook Section (February 5, 1984)

"The Keys to the American Presidency: Predicting the Next Election," TALENT (Summer 1984)

"GOP: Winning the Political Battle for `88," CHRISTIAN SCIENCE MONITOR, Opinion Page, (December 27, 1984)

"The Return of `Benign Neglect`," WASHINGTON POST, Free For All, (May 25, 1985)

"Selma Revisited: A Quiet Revolution," CHRISTIAN SCIENCE MONITOR, Opinion Page, (April 1, 1986)

"Democrats Take Over the Senate" THE WASHINGTONIAN (November 1986; article by Ken DeCell on Lichtman's advance predictions that the Democrats would recapture the Senate in 1986)

"Welcome War?" THE BALTIMORE EVENING SUN, Opinion Page, (July 15, 1987)

"How to Bet in 1988," WASHINGTONIAN (May 1988; advance prediction of George Bush's 1988 victory)

"President Bill?," WASHINGTONIAN (October 1992; advance prediction of Bill Clinton's 1992 victory)

"Don't be Talked Out of Boldness," CHRISTIAN SCIENCE MONITOR, Opinion Page (with Jesse Jackson, November 9, 1992)

"Defending the Second Reconstruction," CHRISTIAN SCIENCE MONITOR, Opinion Page (April 8, 1994)

"Quotas Aren't The Issue," NEW YORK TIMES, Op Ed Page (December 7, 1994)

"History According to Newt," WASHINGTON MONTHLY (May, 1995)

"A Ballot on Democracy," WASHINGTON POST Op Ed (November 1, 1998)

"The Theory of Counting Heads vs. One, Two, Three," CHRISTIAN SCIENCE MONITOR Op Ed (June 22, 1999)

"Race Was Big Factor in Ballot Rejection, BALTIMORE SUN Op Ed (March 5, 2002)

"Why is George Bush President?" NATIONAL CATHOLIC REPORTER (Dec. 19, 2003)

"In Plain Sight: With the Public Distracted, George W. Bush is Building a Big Government of the Right," NEWSDAY, (August 7, 2005)

"Why Obama is Colorblind and McCain is Ageless," JEWISH DAILY FORWARD (June 26,

2008)

"Splintered Conservatives McCain," POLITICO (June 24, 2008)

"Will Obama be a Smith or a Kennedy," NATIONAL CATHOLIC REPOTER (October 17, 2008)

"What Obama Should Do Now," POLITICO (Jan. 22, 2010)

Bi-weekly column, THE MONTGOMERY JOURNAL, GAZETTE 1990 - present

Election-year column, REUTERS NEWS SERVICE 1996 & 2000

D. Video Publication

"Great American Presidents," The Teaching Company, 2000.

TEACHING

Ongoing Courses

The History of the U. S. I & II, The Emergence of Modern America, The U. S. in the Twentieth Century, United States Economic History, Historiography, Major Seminar in History, Graduate Research Seminar, Colloquium in U. S. History Since 1865, The American Dream, The Urban-Technological Era, Senior Seminar in American Studies, Seminar in Human Communication.

New Courses: Taught for the first time at The American University

Quantification in History, Women in Twentieth Century American Politics, Women in Twentieth Century America, Historians and the Living Past (a course designed to introduce students to the excitement and relevance of historical study), **Historians and the Living Past for Honors Students,** How to Think: Critical Analysis in the Social Sciences, Pivotal Years of American Politics, **Government and the Citizen (Honors Program),** Introduction to Historical Quantification, Public Policy in U. S. History, **Honors Seminar in U.S. Presidential Elections,** America's Presidential Elections, What Is America?, **Honors Seminar on FDR, Jews, and the Holocaust.**

TELEVISION APPEARANCES

More than 1,000 instances of political commentary on NBC, CBS, ABC, CNN, C-SPAN, FOX,

MSNBC, BBC, CBC, CTV, NPR, VOA, and numerous other broadcasting outlets internationally, including Japanese, Russian, Chinese, German, French, Irish, Austrian, Australian, Russian, Swedish, Danish, Dutch, and Middle Eastern television.

Regular political commentary for NBC News Nightside.

Regular political commentary for Voice of America and USIA.

Regular political commentary for America's Talking Cable Network.

Regular political commentary for the Canadian Broadcasting System.

Regular political commentary for CNN, Headline News

Consultant and on-air commentator for NBC special productions video project on the history of the American presidency.

CBS New Consultant, 1998 and 1999

Featured appearances on several History Channel specials including *The Nuclear Football* and *The President's Book of Secrets*.

RADIO SHOWS

I have participated in more than 2000 radio interview and talk shows broadcast nationwide, in foreign nations, and in cities such as Washington, D. C., New York, Atlanta, Chicago, Los Angeles and Detroit. My appearances include the Voice of America, National Public Radio, and well as all major commercial radio networks.

PRESS CITATIONS

I have been cited many hundreds of times on public affairs in the leading newspapers and magazines worldwide. These include, among many others,

New York Times, Washington Post, USA Today, Los Angeles Times, Wall Street Journal, Miami Herald, Washington Times, St. Louis Post Dispatch, Christian Science Monitor, Philadelphia Inquirer, Time, Newsweek, Business Week, Le Monde, Globe and Mail, Yomuiri Shimbun, Die Welt, El Mundo, and South China Post, among others.

SELECTED CONFERENCES, PRESENTATIONS, & LECTURES: UNITED STATES

Invited participant and speaker, Bostick Conference on Fogel and Engerman's TIME ON THE CROSS, University of South Carolina, November 1-2, 1974

"Critical Election Theory and the Presidential Election of 1928," Annual Meeting of the American Historical Association, December 1974

"A Psychological Model of American Nativism," Bloomsberg State Historical Conference, April 1975

"Methodology for Aggregating Data in Education Research," National Institute of Education, Symposium on Methodology, July 1975, with Laura Irwin

Featured Speaker, The Joint Washington State Bicentennial Conference on Family History, October 1975

Featured Speaker, The Santa Barbara Conference on Family History, May 1976

Chair, The Smithsonian Institution and the American University Conference on Techniques for Studying Historical and Contemporary Families, June 1976

Panel Chair, Sixth International Smithsonian Symposium on Kin and Communities in America, June 1977

"The uses of History for Policy Analysis," invited lecture, Federal Interagency Panel on Early Childhood Research, October 1977

Invited participant, Conference on "Child Development within the Family - Evolving New Research Approaches," Interagency Panel of the Federal Government for Research and Development on Adolescence, June 1978

Commentator on papers in argumentation, Annual Meeting of the Speech Communication Association, November 1978

Commentator on papers on family policy, Annual Meeting of the American Association for the Advancement of Science, Jan. 1979

"Phenomenology, History, and Social Science," Graduate Colloquium of the Department of Philosophy," The American University, March 1979

"Comparing Tests for Aggregation Bias: Party Realignments of the 1930's," Annual Meeting of the Midwest Political Science Association March 1979, with Laura Irwin Langbein

"Party Loyalty and Progressive Politics: Quantitative Analysis of the Vote for President in 1912," Annual Meeting of the Organization of American Historians, April 1979, with Jack Lord II

"Policy Systems Debate: A Reaffirmation," Annual Meeting of the Speech Communication

Association, November 1979

"Personal Family History: Toward a Unified Approach," Invited Paper, World Conference on Records, Salt Lake City, August 1980

"Crisis at the Archives: The Acquisition, Preservation, and Dissemination of Public Documents," Annual Meeting of the Speech Communication Association, November 1980

"Recruitment, Conversion, and Political Realignment in America: 1888- 1940," Social Science Seminar, California Institute of Technology, April 1980

"Toward a Situational Logic of American Presidential Elections," Annual Meeting of the Speech Communication Association, November 1981

"Political Realignment in American History," Annual Meeting of the Social Science History Association, October 1981

"Critical Elections in Historical Perspective: the 1890s and the 1930s," Annual Meeting of the Social Science History Association, November 1982

Commentator for Papers on the use of Census data for historical research, Annual Meeting of the Organization of American Historians, April 1983

"Thirteen Keys to the Presidency: How to Predict the Next Election," Featured Presentation, Annual Conference of the International Platform Association, August 1983, Received a Top Speaker Award

"Paradigms for Academic Debate," Annual Meeting of the Speech Communication Association, November 1983

Local Arrangements Chair, Annual Convention of the Social Science History Association, October 1983

"Forecasting the Next Election," Featured Speaker, Annual Convention of the American Feed Manufacturers Association, May 1984

Featured Speaker, "The Ferraro Nomination," Annual Convention of The International Platform Association, August 1984, Top Speaker Award

"Forecasting the 1984 Election," Annual Convention of the Social Science History Association Oct. 1984,

Featured Speaker, "The Keys to the Presidency," Meeting of Women in Government Relations October 1984

Featured Speaker, "The Presidential Election of 1988," Convention of the American Association of Political Consultants, December 1986

Featured Speaker, "The Presidential Election of 1988," Convention of the Senior Executive Service of the United States, July 1987

Commentary on Papers on Voting Rights, Annual Meeting of the American Political Science Association, September 1987.

Commentary on Papers on Ecological Inference, Annual Meeting of the Social Science History Association, November 1987.

Featured Speaker: "Expert Witnesses in Federal Voting Rights Cases," National Conference on Voting Rights, November 1987.

Featured Speaker: "The Quantitative Analysis of Electoral Data," NAACP National Conference on Voting Rights and School Desegregation, July 1988.

Panel Chair, "Quantitative Analysis of the New Deal Realignment," Annual Meeting of the Social Science History Association, Nov. 1989.

Keynote Speaker, Convocation of Lake Forest College, Nov. 1989.

Featured Speaker, The American University-Smithsonian Institution Conference on the Voting Rights Act, April 1990

Panel Speaker, Voting Rights Conference of the Lawyer's Committee for Civil Rights Under Law, April 1990

Panel Speaker, Voting Rights Conference of the NAACP, July 1990

Panel Speaker, Voting Rights Conference of Stetson University, April 1991

Panel Chair, Annual Meeting of the Organization of American Historians, April, 1992

Panel Speaker, Symposium on "Lessons from 200 Years of Democratic Party History, Center for National Policy, May 1992

Olin Memorial Lecture, U.S. Naval Academy, October 1992

Commentator, Annual Meeting of the Organization of American Historians, April, 1993

Panel presentation, Conference on Indian Law, National Bar Association, April 1993

Feature Presentation, Black Political Science Association, Norfolk State University, June 1993

Feature Presentation, Southern Regional Council Conference, Atlanta Georgia, November, 1994

Master of Ceremonies and Speaker, State of the County Brunch, Montgomery County, February, 1996

Feature Presentation, Predicting The Next Presidential Election, Freedom's Foundation Seminar on the American Presidency, August 1996

Feature Presentation, Predicting The Next Presidential Election, Salisbury State College, October 1996

Feature Presentation on the Keys to the White House, Dirksen Center, Peoria, Illinois, August, 2000

Feature Presentation on American Political History, Regional Conference of the Organization of American Historians, August 2000

Testimony Presented Before the United States Commission on Civil Rights Regarding Voting Systems and Voting Rights, January 2001

Testimony Presented Before the United States House of Representatives, Judiciary Committee, Subcommittee on the Constitution, February 2001

Testimony Presented Before the United States Senate, Government Operations Committee, Regarding Racial Differentials in Ballot Rejection Rates in the Florida Presidential Election, June 2001

Testimony Presented Before the Texas State Senate Redistricting Committee, Congressional Redistricting, July 2003

Testimony Presented Before the Texas State House Redistricting Committee, Congressional Redistricting, July 2003

American University Honors Program Tea Talk on the Election, September 2004

Feature Presentation, The Keys to the White House, International Symposium on Forecasting, June 2006.

Feature Presentation, The Keys to the White House, International Symposium on Forecasting, New York, June 2007.

Keynote Speaker, Hubert Humphrey Fellows, Arlington, Virginia, 2007-2008

Feature Presentation, Forecasting 2008, Annual Meeting of the American Political Science Association, Chicago, August 2007

Keynote Speaker, International Forecasting Summit, Orlando, Florida, February 2008.

Feature Presentation on the Keys to the White House, Senior Executive's Service, Washington, DC, June 2008

Feature Presentation, American Political History, Rockford Illinois School District, July 2008

American University Honors Program Tea Talk on the Election, September 2008

Featured Lecture, Keys to the White House, American Association for the Advancement of Science, Washington, DC, September 2008

Keynote Speaker, International Forecasting Summit, Boston, September 2008

Keynote Lecture, Hubert Humphrey Fellows, Arlington, Virginia October 2008

Featured Lectures, Keys to the White, Oklahoma Central and East Central Universities, October 2008

Bishop C. C. McCabe Lecture, "Seven Days until Tomorrow" American University, October 28, 2008

Featured Lecture, WHITE PROTESTANT NATION, Eisenhower Institute, December 2008

American University Faculty on the Road Lecture, "Election 2008: What Happened and Why?" Boston, February 2009

Critic Meets Author Session on WHITE PROTESTANT NATION, Social Science History Association, November 2009

American University Faculty on the Road Lecture, "The Keys for 2012" Chicago, April 2010

Keynote Speaker, Hubert Humphrey Fellows, Arlington, Virginia October, 2010

Panel Participant, Search for Common Ground, Washington, DC, April 2011

SELECTED CONFERENCES, PRESENTATIONS, & LECTURES: INTERNATIONAL

Featured Speaker, World Conference on Disarmament, Moscow, Russia, November 1986

Delegation Head, Delegation of Washington Area Scholars to Taiwan, Presented Paper on the

promotion of democracy based on the American experience, July 1993

Lecture Series, American History, Doshisha University, Kyoto, Japan, December 2000

Lectures and Political Consultation, Nairobi, Kenya, for RFK Memorial Institute, October 2002

Featured Lectures, US Department of State, Scotland and England, including Oxford University, University of Edinburg, and Chatham House, June 2004

Keynote Speech, American University in Cairo, October 2004

Feature Presentation on the Keys to the White House, University of Munich, June 2008

Featured Lectures, US Department of State, Russia, Ukraine, Slovenia, Austria, and Romania, 2008-2010

Paper Presentation, Fourth International Conference on Interdisciplinary Social Science, Athens, Greece, July 2009

DEPARTMENTAL AND UNIVERSITY SERVICE

Department of History Council 1973 -

Undergraduate Committee, Department of History 1973-1977

Chair Undergraduate Committee, Department of History 1984-1985

Graduate Committee, Department of History, 1978-1984

Freshman Advisor, 1973-1979

First Year Module in Human Communications, 1977-1979

University Committee on Fellowships and Awards 1976-1978

University Senate 1978-1979, 1984-1985

University Senate Parliamentarian and Executive Board 1978-1979

Founding Director, American University Honors Program, 1977-1979

Chair, College of Arts and Sciences Budget Committee 1977-1978, 1982-1984

University Grievance Committee, 1984-1985

Member, University Honors Committee 1981-1982

College of Arts and Sciences Curriculum Committee 1981-1982

Jewish Studies Advisory Board, 1982-1984

Mellon Grant Executive Board, College of Arts & Sciences, 1982-1983

Chair, College of Arts and Sciences Faculty Colloquium, 1983

Chair, College of Arts and Sciences Task Force on the Department of Performing Arts, 1984-1985

Local Arrangements Chair, National Convention of the Social Science History Association, 1983

Chair, Rank & Tenure Committee of the Department of History, 1981-1982, 1984-1985

Board Member, Center for Congressional and Presidential Studies, The American University, 1988-1989

Chair, Graduate Committee, Department of History, 1989 - 1991

Chair, Distinguished Professor Search Committee 1991

Member, College of Arts & Sciences Associate Dean Search Committee, 1991

Board Member, The American University Press, 1991-1995

Chair, Subcommittee on Demographic Change, The American University Committee on Middle States Accreditation Review 1992-1994

Member, Dean's Committee on Curriculum Change, College of Arts and Sciences 1992-1993

Member, Dean's Committee on Teaching, College of Arts and Sciences 1992

Co-Chair, Department of History Graduate Committee, 1994-1995

Vice-Chair, College of Arts & Sciences Educational Policy Committee, 1994-1995

Elected Member, University Provost Search Committee, 1995-1996

Chair, Search Committee for British and European Historian, Department of History, 1996

Department Chair, 1999-2001

CAS Research Committee, 2006-2007

University Budget and Benefits Committee, 2008

Chair, Personnel Committee, Department of History, 2010-

Chair, Term Faculty Search Committee, Department of History, 2011-

OTHER POSITIONS

Director of Forensics, Brandeis University, 1968-71

Director of Forensics, Harvard University, 1971-72

Chair, New York-New England Debate Committee, 1970-71

Historical consultant to the Kin and Communities Program of the Smithsonian Institution 1974-1979

Along with general advisory duties, this position has involved the following activities:

1. directing a national conference on techniques for studying historical and contemporary families held at the Smithsonian in June 1976.
2. chairing a public session at the Smithsonian on how to do the history of one's own family.
3. helping to direct the Sixth International Smithsonian Symposium on Kin and Communities in America (June 1977).
4. editing the volume of essays from the symposium.

Consultant to John Anderson campaign for president, 1980.

I researched and wrote a study on "Restrictive Ballot Laws and Third-Force Presidential Candidates." This document was a major component of Anderson's legal arguments against restrictive ballot laws that ultimately prevailed in the Supreme Court (Anderson v. Celebrezze 1983). According to Anderson's attorney: "the basis for the majority's decision echoes the themes you incorporated in your original historical piece we filed in the District Court."

Statistical Consultant to the George Washington University Program of Policy Studies in Science and Technology, 1983

I advised researchers at the Policy Studies Program on the application of pattern recognition techniques to their work on the recovery of communities from the effects of such natural disasters as earthquakes and floods.

- Doc. Ex. 990 -

Consultant to the New York City Charter Revision Commission, 2000-2006

I analyzed the implications of non-partisan elections for voting rights issues for the Charter Revision Commissions appointed by mayors Rudy Giuliani and Michael Bloomberg.

- Doc. Ex. 991 -

ALLAN J. LICHTMAN, CASES (DATES APPROXIMATE)
DEPOSITION, AFFIDAVIT, OR ORAL TESTIMONY

Committee for a Fair and Balanced Map v. Illinois State Bd. (U. S. District Court, Illinois) 2011

Radogno v. Illinois State Bd. of Elections (U. S. District Court, Illinois) 2011

Perez, et al. v. Perry, et al. (U. S. District Court, Texas) 2011

United States vs. Demario James Atwater (U. S. District Court, North Carolina) 2010

Boddie v. Cleveland School Board, Mississippi (U.S. District Court, Mississippi) 2010

Esther V. Madera Unified School District (Superior Court, California) 2008

Negron v. Bethlehem Area School District (U.S. District Court, Pennsylvania) 2008

Farley v. City of Hattiesburg (U.S. District Court, Mississippi) 2008

Jamison v. City of Tupelo (U.S. District Court, Mississippi) 2005

Session v. Perry (U.S. District Court, Texas) 2003

Rodriguez v. Pataki (U.S. District Court, New York) 2003

Boddie v. Cleveland, Mississippi (U.S. District Court, Mississippi) 2003

Levy v. Miami-Dade County (U.S. District Court, Florida) 2002

Martinez v. Bush (U.S. District Court, Florida) 2002

Curry v. Glendening (Maryland, State Court) 2002

O'Lear v. Miller (U.S. District Court, Michigan) 2002

Campuzano v. Illinois Board of Election (U.S. District Court, Illinois) 2002

Vieth v. Commonwealth of Pennsylvania (U.S. District Court, Pennsylvania) 2002

Leroux v. Miller (Michigan, State Supreme Court) 2002

Balderas v. State of Texas (U.S. District Court, Texas) 2001

Del Rio v. Perry (Texas, State Court) 2001

Page V. Bartels (U.S. District Court, New Jersey) 2001

West v. Gilmore (Virginia, State Court), 2001

U.S. v. City of Santa Paula (California, U.S. District Court) 2001

NAACP v. Fordice (Mississippi, U.S. District Court) 2000

Voting Integrity Project v. Marc Fleisher (Arizona, U.S. District Court) 2000

Packingham v. Metropolitan Dade County (U.S. District Court, Florida) 1999

Houston v. Lafayette County (U.S. District Court, Northern District of Mississippi, Western District) 1991, 1998

Citizens to Establish a Reform Party in Arkansas v. Sharon Priest (U.S. District Court, Eastern District of Arkansas) 1996

National Coalition v. Glendening (U.S. District Court, Maryland) 1996

Vecinos de Barrio Uno v. Holyoke (U.S. District Court, Massachusetts), 1996

Scott v. Florida Senate (U.S. District Court, Middle District of Florida) 1995

King v. Board of Elections (U.S. District Court, Northern District of Illinois) 1995

Vera v. Richards (U.S. District Court, Southern District of Texas) 1994

United States v. Jones (U.S. District Court, Southern District of Alabama) 1994

Johnson v. Miller (U.S. District Court, Southern District of Georgia, Augusta Division) 1994

Hays v. Louisiana (U.S. District Court, Western District of Louisiana, Shreveport Division) 1993

People Who Care v. Rockford Board of Education (U.S. District Court, Northern District of Illinois, Eastern Division) 1993

Republican Party of North Carolina v. Hunt (U.S. District Court, Eastern District of North Carolina, Raleigh District) 1993

Shaw v. Hunt (U.S. District Court, Eastern District of North Carolina, Raleigh District) 1993

Neff v. Austin (State of Michigan, Supreme Court) 1992

Terrazas v. Slagle (U.S. District Court, Western District of Texas, Austin Division) 1992

Gonzalez v. Monterey County (U.S. District Court, Northern District of California) 1992

DeGrandy v. Wetherell (U.S. District Court, Northern District of Florida, Tallahassee Division) 1992

NAACP v. Austin (U.S. District Court, Eastern District of Michigan, Eastern Division) 1992

Good v. Austin (U.S. District Court, Eastern District of Michigan, Southern Division) 1992

Ortiz v. City of Philadelphia (U.S. District Court, Eastern District of Pennsylvania) 1991-1993

FAIR v. Weprin (U.S. District Court, Northern District, of New York) 1992

Davis v. Chiles (U.S. District Court, Northern District of Florida) 1991

McDaniels v. Mehfoud (U.S. District Court, Eastern District of Virginia) 1991

Rollins v. Dallas County Commission (U.S. District Court, Southern District of Alabama) 1991-1992

Ward v. Columbus County (U.S. District Court, Eastern District of North Carolina) 1991

Republican Party State Committee v. Michael J. Connolly (U.S. District Court, Massachusetts) 1991

Jenkins v. Red Clay Consolidated School District (U.S. District Court, District of Delaware) 1991

Watkins v. Mabus (U.S. District Court, Southern District of Mississippi) 1991

Mena v. Richards (Hidalgo County Texas District Court) 1991

Republican Party of Virginia v. Wilder (U.S. District Court, Western District of Virginia) 1991

Nipper v. Chiles (U.S. District Court, Middle District of Florida) 1991-1994

Smith v. Board of Superivsors of Brunswick County (U.S. District Court, Eastern District of Virginia) 1991-1992

New Alliance Party v. Hand (U.S. District Court, Alabama) 1990

Concerned Citizens v. Hardee County (U.S. District Court, Florida) 1990

United Parents Association v. NYC Board of Elections (U.S. District Court, New York) 1990

Garza v. County of Los Angeles (U.S. District Court, California) 1990

Person v. Moore County (U.S. District Court, Middle District of North Carolina, Rockingham Division) 1989

Ewing v. Monroe County (U.S. District Court, Northern District of Mississippi) 1989

White v. Daniel (U.S. District Court, Eastern District of Virginia) 1989

Gunn v. Chickasaw County (U.S. District Court, Mississippi) 1989

SCLC v. State of Alabama (U.S. District Court, Middle District of Alabama, Northern Division) 1989-1995

Bradford County NAACP v. City of Starke (U.S. District Court, Middle District of Florida) 1988

PUSH v. Allain (U.S. District Court, Mississippi) 1988

Baltimore Neighborhoods, Inc. v. C.F. Sauers (U.S. District Court, Maryland) 1988

United States v. Wicomico County (U.S. District Court, Maryland) 1988

Metropolitan Pittsburgh Crusade v. City of Pittsburgh (U.S. District Court, Western District of Pennsylvania) 1987

McNeil v. City of Springfield (U.S. District Court, Central District of Illinois) 1987

Harper v. City of Chicago Heights (U.S. District Court, Northern District of Illinois) 1987-1993

Robinson v. City of Cleveland (U.S. District Court, Delta District of Mississippi) 1987

Martin v. Allain (U.S. District Court, Southern District of Mississippi) 1987

Smith v. Clinton (U.S. District Court, Eastern District of Arkansas) 1987

Burrell v. Allain (U.S. District Court, Southern District, of Mississippi) 1986

United States v. Dallas County (U.S. District Court, Southern District of Alabama) 1986

United States v. Marengo County (U.S. District Court, Southern District of Alabama) 1986

Jordan v. City of Greenwood (U.S. District Court, Mississippi) 1984

- Doc. Ex. 995 -

Johnson v. Halifax County (U.S. District Court, Eastern District of North Carolina) 1984

Anderson v. Celebreeze (U.S. District Court, Ohio) 1980

Exhibit 3

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 11 CVS 16896 11 CVS 16940
MARGARET DICKSON, *et al.*, Plaintiffs, v. ROBERT RUCHO, in his official capacity only as the Chairman of the North Carolina Senate Redistricting Committee, *et al.*, Defendants. NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP *et al.*, Plaintiffs, v. STATE OF NORTH CAROLINA *et al.*, Defendants.	*Consolidated Cases*

SECOND AFFIDAVIT OF ALLAN J. LICHTMAN

I, Allan J. Lichtman, being first duly sworn, depose and say:

1. I am over 18 years of age, legally competent to give this affidavit and have personal knowledge of the facts set forth in this affidavit.

2. I am a Distinguished Professor of History at American University in Washington, DC and formerly Associate Dean of the College of Arts and Sciences and Chair of the Department of

History. I received my BA in History from Brandeis University in 1967 and my Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, electoral analysis, and historical and quantitative methodology. I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as Political Methodology, Journal of Interdisciplinary History, International Journal of Forecasting, and Social Science History. In addition, I have coauthored Ecological Inference with Dr. Laura Langbein, a standard text on the analysis of social science data, including political information. I have published articles on the application of social science analysis to civil rights issues. This work includes articles in such journals as Journal of Law and Politics, La Raza Law Journal, Evaluation Review, Journal of Legal Studies, and National Law Journal. My scholarship also includes the use of quantitative and qualitative techniques to conduct contemporary and historical studies, published in such academic journals as The Proceedings of the National Academy of Sciences, The American Historical Review, Forecast, and The Journal of Social History. Quantitative and historical analyses also ground my books, Prejudice and the Old Politics: The Presidential Election of 1928, The Thirteen Keys to the Presidency (co-authored with Ken DeCell), The Keys to the White House, and White Protestant Nation: The Rise of the American Conservative Movement. My most recent book, White Protestant Nation, was one of five finalists for the National Book Critics Circle Award for the best general nonfiction book published in America.

3. I have worked as a consultant or expert witness for both plaintiffs and defendants in some eighty voting and civil rights cases. These include several cases in the state of North Carolina. In late 2011, I was the expert witness in Illinois for the prevailing state parties in

separate litigation challenging both the adopted state plan for the State House and for Congress.[1] My work includes more than a dozen cases for the United States Department of Justice and cases for many civil rights organizations. I have also worked as a consultant or expert witness in defending enacted plans from voting rights challenges. A copy of my resume and a table of cases are attached as Appendix I of this report.

4. I have been asked to consider the African-American voting age population (VAP) needed for State House, State Senate, and Congressional Districts in North Carolina that provide African Americans the ability to elect candidates of their choice. In particular I have been asked to consider whether it is necessary to create such districts that are 50 percent or more African-American in their voting age population.

5. My expected fee in this matter is $400 per hour. I have enclosed an updated CV and a table of cases in which I have provided written or oral testimony.

Summary of Opinions

- **Districts that are between 40% and 49%+ African-American in their voting age populations provide African-American voters an excellent ability to elect candidates of their choice to legislative positions.**
- **The win rate for African-American candidates and white candidates of choice of African-American voters in such districts is 90 percent.**

1 The State House litigation in Illinois was *Radogno v. Illinois State Bd. of Elections*, 2011 WL 5025251, *8 (N.D. Ill. Oct. 21, 2011) and the Congressional litigation was *Committee For A Fair and Balanced Map, et al., v. Illinois State Board of Elections* 2011 U.S. Dist. LEXIS 144302, (N. D. Ill. December 15, 2011).

- **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 more than 50% African-American in their voting age populations.**
- **The insistence on creating African-American ability districts that are 50 percent or more African-American in their voting age population needlessly wastes African-American votes and diminishes the opportunity for African-American voters to influence the political process across the state of North Carolina.**
- **Such diminished opportunities are demonstrated by a comparison of previous state legislative districts with current legislative districts enacted by the North Carolina General Assembly.**
- **The report of state's expert Dr. Thomas L. Brunell exhibits numerous serious problems and cannot by itself be relied upon to assess the African-American percentage needed to create African-American ability districts for state legislature in North Carolina.**
- **Notwithstanding these problems, a close reanalysis of Dr. Brunell's findings demonstrates that they sustain the opinions numerated above.**

Data and Methods

6. The voting analysis in this report relies on standard data utilized in social science: VTD by VTD (Voter Tabulation District) election returns for each candidate per election studied, with candidates identified by race and VTD by VTD breakdowns of voting age African Americans and whites, which includes a small number of Asians and members of other races. The election and demographic data and the racial identification of candidates were obtained from the NC State Board of Elections via counsel. To estimate the voting of African Americans and

whites, the analysis utilizes the standard methodology of ecological regression that I have employed in some 80 previous cases and applied to the analysis of many thousands of elections and the study of numerous redistricting plans. The ecological regression procedure estimates the voting behavior of demographic groups such as African Americans and whites by comparing the racial composition of VTDs to the division of the vote among competing candidates in each VTD. It produces an equation that estimates both the turnout and voting for each candidate by each voter group. The procedure was accepted by the Supreme Court in *Thornburg v. Gingles,* 478 U.S. 30 (1986), and applied by the Court to single-member districts plans in *Quilter v. Voinovich,* 113 S. Ct 1149 (1993). My analysis based on these methods was cited authoritatively several times by the United States Supreme Court in the Congressional redistricting case, *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006).[2]

7. This report also follows standard practice in the field by using the results of past elections and voting patterns by minority and white voters to assess prospects for minority voters in newly crafted districts. This method is utilized on a standard basis when there is population growth and shifts in population that require the redrawing of districts in which the electorate will not be precisely the same as in previous districts. In this case, moreover, the analysis is highly reliable in that it covers a large number of districts that will include most of the electorate included in newly drawn districts. The electoral analysis is also specific to State House, State Senate, and Congressional elections.

Results of Analysis: 40%+ African-American Voting Age Population Districts

2 For a scholarly analysis of ecological regression and why it works well in the context of analyzing the voting of racial groups, see, Allan J. Lichtman, "Passing the Test: Ecological Regression in the *Garza* Case and Beyond," *Evaluation Review* 15 (1991). Bernard Grofman, the expert witness in the *Gingles* case, and myself were co-originators of the specific statistical methodology used here, see, Bernard Grofman, Lisa Handley, Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992), pp. 102, 146.

8. The results of analysis apply to the two most recent elections years of 2008 and 2010 and cover all previous State House, State Senate, and Congressional Districts. It focuses on districts with African-American candidates (contested and uncontested) that are 40 percent or more African-American in their voting age populations, either as created under the 2000 Census or as previously constituted under the 2010 Census. It also considers some districts that are less than 40 percent African-American in their voting age populations, but in which African-American candidates prevailed. The study examined Democratic primary elections, given that African Americans are overwhelmingly Democratic in North Carolina and general elections. It covers not only the two most recent years, but also provides balance by including one good Democratic year in North Carolina – 2008 – and one good Republican year in North Carolina – 2010.

9. Previous State House Districts offer an excellent opportunity to test scientifically, the proposition that the provision of districts with the ability of African-American voters to elect candidates of their choice requires the creation of districts that are 50 percent or greater in their African-American voting age population. This is because there are 11 previous State House districts that are between 40% and 49%+ African-American VAP according to the 2010 census and 10 previous State House districts that are 50 percent or more African-American VAP. The results of analyzing these two sets of districts, presented below, clearly **reject the need to create 50%+ African-American VAP districts. These results show that African-American voters in districts between 40 percent and 49%+ African-American VAP have at least an equal**

ability to elect candidates of their choice as African-American voters in districts that are 50 percent or more African-American VAP.[3]

10. Table 1 reports the results of analyzing the 11 State House districts that are between 40% and 49%+ African-American VAP. These results indicate that of the 11 districts studied, African-American candidates prevailed in all elections in 10 districts, and a white candidate who was not the candidate of choice of African-American voters prevailed in one election. **Thus the win rate for African-American candidates in districts that are 40%+ African-American VAP, but also below 50% African-American VAP is 91 percent, demonstrating that African-American voters in these districts have a powerful ability to elect an African American to the state legislature.** The only exception to this near universal pattern was House District 102, where the white incumbent, Becky Carney, was not the candidate of choice of African-American voters in the 2010 Democratic primary contest and went on to win in the general election that year. Ecological regression analysis also discloses that this was also a very low turnout election in which less than 5 percent of whites or blacks of voting age participated.

11. Table 2 reports the results of analyzing the 10 State House districts that are 50%+ African-American VAP. African-American candidates prevailed in 8 of these 10 districts. Thus the win rate for African-American candidates in these districts is 80 percent, below that of the districts between 40% and 49%+ African-American VAP. In another district, House District 27, a white candidate of choice of African-American voters prevailed. Thus the win rate for African-American candidates and candidates of choice of African-American voters was 90

3 HD 43 is 54.7% African-American VAP according to the 2010 census and 48.7 percent African-American VAP according to the 2000 census. HD 107 is 47.1% African-American VAP according to the 2010 census and 50.5 percent African-American VAP according to the 2000 census. The classification of these two districts into separate categories according to the 2010 data does not affect the results of analysis given that both districts elected black candidates in 2008 and 2010.

percent in these districts, about equal to that of the districts between 40% and 49%+ African-American VAP. The only exception to this near universal pattern occurred in House District 8. According to ecological regression analysis, the white incumbent for House District 8, Edith Warren, was not the candidate of choice of African-American voters in either the 2008 or 2010 Democratic primary contest and prevailed in both general elections. However, the white candidate won with more than 60 percent of the vote and would have won even if this district were 60 percent African-American VAP.

12. With respect to State Senate Districts, the results of analysis sustain the finding that districts that are between 40% and 49%+ African American VAP provide African-American voters the clear ability to elect candidates of their choice to the state legislature. The State Senate does not include any previous districts that are 50%+ African-American VAP. Table 3 reports the results of analyzing the eight State House districts that are between 40% and 49%+ African-American VAP. These results indicate that of the eight districts studied, African-American candidates prevailed in all elections in six districts, and according to ecological regression analysis, a white candidate of choice of African-American voters prevailed in all elections in another district. The lone exception to this pattern, according to ecological regression analysis, is in Senate District 3, where a white candidate who was not the Democratic primary candidate of choice of African-American voters was elected in 2008 and 2010. Thus, in 40%+ black voting age population districts, African-American candidates or the candidates of choice of African-American voters prevailed in all elections in 7 of 8 districts, for a win rate of 88 percent.

13. With respect to Congressional Districts, there are two districts that are above 40% African American VAP, but below 50% African American VAP. There are no districts that are 50%+ African American VAP. The results of analysis reported in Table 4 demonstrate that of

two districts studied, African-American candidates prevailed in all elections in both districts. Thus, in 40%+ congressional districts, candidates or the candidates of choice of African-American voters prevailed in all elections in 2 of 2 districts, for a win rate of 100 percent.

14. **The results of combining the analyses of elections for State House, State Senate, and Congress demonstrate that either African-American candidates or candidates of choice of African-American voters prevailed in all elections in 19 of 21 districts that are 40%+ African-American VAP, but below 50% African-American, for a win rate of win rate of 90 percent. This win rate is the same as the win rate of 90 percent in 50%+ African-American districts.** Thus, the results of analysis clearly demonstrate it is not necessary in North Carolina to create effective African-American ability districts with African-American voting age populations of 50 percent or more. To the contrary, the result of creating such districts is to waste African-American votes that could expand the ability of African Americans to influence the political process in other districts.

15. Tables 5 and 6 show the results of creating unnecessary 50%+ African-American districts for State House and State Senate. As compared to the previous benchmark plans, the enacted plans needlessly pack African Americans into districts greater than 50 percent African-American voting age population, which substantially diminishes the influence of African-American voters in other House and Senate districts. As indicated in Table 5, the previous benchmark State House plan has 32 districts that are 30% or more African American voting age population, compared to only 26 in the enacted State House plan. As indicated in Table 6, the previous benchmark State Senate plan has 15 districts that are 30% or more African American voting age population, compared to only 10 in the enacted State Senate plan.

African-American Voter Opportunity in Districts Less Than 40 Percent African American Voting Age Population

16. The results of past elections also demonstrate that African-American voters have an opportunity to elect candidates of their choice in legislative districts that are substantially below 40 percent African-American voting age population. The analysis will consider first Senate Districts and then House Districts that are below 40 percent African-American voting age population in which African Americans have won elections to the state legislature.

17. Senate District 5 is only 31 percent African-American VAP, however African-American voters were able to elect an African-American candidate of choice in this district in the 2008 general election. As indicated in Table 7, ecological regression analysis demonstrates that 97 percent of African-American voters voted for Don Davis, the African-American Democratic candidate. In turn, 30 percent of white voters crossed over to vote for Davis. This combination of near unanimous African-American support for Davis combined with the white crossover vote was sufficient for Davis to prevail in the election. As also indicated in Table 7, in 2010, African-American cohesion remained constant with 97 percent of African-American voters backing Davis. However, white crossover voting declined to 21 percent, with the result that Davis's white Republican opponent Louis Pate won the election. Thus in SD 5, the African-American candidate prevailed in the good Democratic year of 2008, but lost in the good Republican year of 2010. These results demonstrate that depending on political circumstance, African-American voters have an opportunity to elect a candidate of their choice even in a district that is only about 31 percent African-American VAP.

18. Similar results prevail in Senate District 24, which is only 21.1 percent African-American VAP. As in SD 5, African-American voters were able to elect an African-American

candidate of their choice in this district in the 2008 general election. As indicated in Table 8, ecological regression analysis demonstrates that 99 percent of African-American voters voted for Tony Foriest, the African-American Democratic candidate. In turn, 38 percent of white voters crossed over to vote for Foriest. This combination of near unanimous African-American support for Foriest combined with the white crossover vote was sufficient for Foriest to prevail in the election. As also indicated in Table 8, in 2010, African-American cohesion remained roughly constant with 97 percent of African-American voters backing Foriest in a three-way contest against white Republican Gunn and white Libertarian Coe. However, white crossover voting declined to 27 percent, with the result that Foriest's white Republican opponent Gunn won the election. Thus in SD 24, the African-American candidate prevailed in the good Democratic year of 2008, but lost in the good Republican year of 2010. These results demonstrate that depending on political circumstance, African-American voters have an opportunity to elect a candidate of their choice even in a district that is only about 21 percent African-American VAP.[4]

19. House District 39 is only 34.9 percent African-American VAP population. However, African-American voters were able to nominate and elect an African-American candidate of their choice, Linda Coleman, in this district in the 2004, 2006, and 2008 elections. In 2009, Coleman resigned her seat and a white Democrat defeated a white Republican in the 2010 general election. The elections from 2004 through 2008 demonstrate that African-American voters have an opportunity to elect a candidate of their choice even in a district that is only about 35 percent African-American VAP.

20. House District 41 is only 12.1 African American VAP. However, African-American voters were able to nominate and elect an African-American candidate of their choice, Ty

4 It is also worth noting that according to sign-in results, African-American turnout in both SD 5 and SD 24 was higher than white turnout in 2008. African-American turnout declined relative to white turnout in 2010, but was still very slighter higher in both districts.

Harrell, in this district in both the 2006 and the 2008 general elections. In 2009, Harrell resigned his seat and a white Democrat lost to a white Republican in the general election. The elections from 2006 and 2008 demonstrate that African-American voters have an opportunity to elect a candidate of their choice even in a district that is only about 12 percent African-American VAP.

Analysis of the Report of State's Expert Thomas L. Brunell

21. The Brunell report exhibits five significant problems. First, it is highly selective in its choice of elections. Second, it is also highly selective in that it sometimes reports the results of its ecological regression analysis and sometime reports only the results of its homogeneous VTD analysis. Third, it relies only on an analysis of racially polarized voting. As the analysis above indicates, the presence of racially polarized voting by itself does not mean that it is necessary to create 50% African-American VAP districts to provide African-American candidates the ability to elect candidates of their choice. Fourth, Dr. Brunell does not report the actual results of the elections he analyzes, an essential element in analyzing the effectiveness of districts for African-American voters. Fifth, Dr. Brunell does not report turnout in any of his electoral analyses, another important element of an effectiveness analysis. In fact, close analysis of the Brunell report demonstrates why African-American candidates have been overwhelmingly successful in winning elections in State House and Senate districts that are greater than 40 percent but less than 50 percent African-American VAP.

22. The Brunell results, presuming their accuracy, demonstrate that African Americans vote overwhelmingly for African-American Democratic candidates (the African-American candidates in such districts are Democrats), whereas there is considerable white crossover voting for African-American Democratic candidates. It is the combination of such high levels of African-American cohesion, combined with sufficient white crossover voting that enables

African Americans to nearly always prevail in districts that are 40% African-American VAP, but less than African-American majority VAP in general elections. Likewise, as will be additionally demonstrated below, African Americans typically dominate the primary elections in such districts given their overwhelmingly Democratic proclivities, compared to the predominantly Republican proclivities of whites in North Carolina.[5]

23. These favorable circumstances for African-American candidates are demonstrated first in Dr. Brunell's statewide analysis of the 2008 general election for president in which the African-American Democratic candidate Barack Obama competed against the white Republican candidate John McCain. Dr. Brunell conducted a homogeneous VTD analysis and an ecological regression analysis for 51 of what he calls "counties of interest" in this election. He does not report his ecological regression results for the 51 counties statewide that he studied, but does report his homogeneous VTD results for numerous VTDs across the 51 counties. His homogeneous VTD analysis demonstrates that Obama averaged 97.8 percent of the vote in 64 VTDs that are 90%+ African-American in their voters and 39.7 percent of the vote in 358 VTDs with less than 10% African-American voters (Brunell Report, p. 8). Given the large numbers of homogeneous VTDs, these results should be consistent with ecological regression results. If we apply these homogeneous VTD results to a VTD that is 40 percent African-American voting age population, the expected vote for an African-American Democrat under the presumption of equal turnout is 62.94 percent (.4 * .978 + .6 * .397 = .6294). Thus, even if white turnout was much higher than African-American turnout (which is not generally the case in North Carolina general elections), African-American candidates would still be presumptive winners in a 40% African-American voting age population district.

5 As indicated above, Dr. Brunell does not report turnout in any of his electoral analyses.

24. Similar results are obtained from Dr. Brunell's only other statewide analysis of a general election. This is the 2004 general election for State Auditor in which the African-American Democratic candidate Ralph Campbell competed against the white Republican candidate Leslie Merritt. Dr. Brunell again conducted a homogeneous VTD analysis and an ecological regression analysis his 51 "counties of interest" in this election. Again, he does not report his ecological regression results for all counties, but does report his homogeneous VTD results for numerous VTDs across the 51 counties. His homogeneous VTD analysis includes a larger number of VTDs than for the presidential contests. These results demonstrate that Campbell averaged 96.3 percent of the vote in 70 VTDs that are 90%+ African-American in their voters and 39.3 percent of the vote in 407 VTDs with less than 10% African-American voters. (p. 11). If we apply these homogeneous VTD results to a VTD that is 40 percent African-American voting age population, the expected vote for an African-American Democrat under the presumption of equal turnout is 62.1 percent (.4 * .963 + .6 * .393 = .6210). These results are nearly identical to those for the 2008 presidential general election. Once again, even if white turnout was much higher than African-American turnout, African-American candidates would still be presumptive winners in a 40% African-American voting age population district.

25. The results for these two statewide elections also demonstrate why African-American candidates have been able to prevail overwhelmingly in Democratic primaries in districts that are greater than 40 percent but less than 50 percent African-American VAP. Dr. Brunell's results indicate that African Americans are near unanimous in their Democratic loyalties, whereas about 60 percent of whites are loyal to Republicans in general elections. The average African-American vote for the Democratic candidate in the two statewide general elections studied by Dr. Brunell is 97.1 percent, whereas the average white vote for the Democratic candidate is 39.5

percent. If we apply these results to the potential African-American and white vote in a Democratic primary, the results show that the potential African-American percentage of voters in a 40 percent black voting age population district is 62.1 percent (.4 * .971/(.4 * .971+ .6 * .395) = .621). Thus, even if white Democrats turned out at higher rates than African-American Democrats, which is not generally the case in North Carolina, African Americans would still dominate the Democratic primary.

26. These findings for primary elections are validated by the statewide results of the 2008 Democratic primary for president, which Dr. Brunell analyzes. Although Dr. Brunell found racially polarized voting in this primary, the African-American candidate Barack Obama still easily prevailed statewide against white opponents with 56.1 percent of the vote, even though the statewide African-American voting age population is only 21 percent according to the 2010 Census. An application of Dr. Brunell's results to a 40 percent African-American district would demonstrate a substantially higher percentage vote for the African-American candidate. According to Dr. Brunell's homogeneous VTD analysis across his 51 "counties of interest," Obama averaged 92.0 percent of the vote in 97 VTDs that are 90%+ African-American in their voters and 43.8 percent of the vote in 161 VTDs with less than 10% African-American voters. (p. 5). If we apply these homogeneous VTD results to a VTD that is 40 percent African-American voting age population, the expected vote for an African-American Democrat under the presumption of equal turnout is 63.1 percent (.4 * .92+ .6 * .438 = .631).

27. Dr. Brunell also provides some highly selected analyses of African-American versus white elections in State House and Senate districts. Dr. Brunell's results, supplemented by additional analyses of the districts he examines, again show why African-American candidates overwhelmingly prevail in districts that are greater than 40 percent but less than 50 percent

African-American VAP. The State House and State Senate districts that Dr. Brunell considers are analyzed below. Dr. Brunell does not analyze any of the African-American vs. white contests that took place in U. S. Congressional Districts (see Table 4 below).

28. State Senate District 20 (Durham County). This district is 44.6 percent African-American voting age population according to the 2010 Census. Dr. Brunell analyzes only the 2010 general election in this district in which the African-American Democrat Floyd McKissick, Jr. competed against the white Republican John Tarantino. Although Dr. Brunell finds racially polarized voting in this election, (p. 15) he fails to note that the African-American candidate McKissick, Jr. overwhelmingly prevailed in 2010 with 73.1 percent of the vote. Dr. Brunell also fails to consider the 2008 general election in Senate District 20, in which the African-American Democrat McKissick, Jr. prevailed with 73.6 percent of the vote.

29. State Senate District 5 (Greene, Pitt, and Wayne Counties). This district is 31 percent African-American voting age population according to the 2010 Census. Once again, Dr. Brunell analyzes only the 2010 general election in this district in which the African-American Democrat Don Davis lost to the white Republican Louis Pate (p. 18). He fails to analyze the 2008 general election in Senate District 5, in which Davis prevailed over Pate, despite racially polarized voting. Thus, as indicated in the analysis of Senate District 5 presented above, African-American candidates have the ability to prevail in districts that are well below 40 percent African-American voting age population.

30. State Senate District 13 (Hoke and Robeson Counties). This district is 27.2 percent African-American voting age population according to the 2010 Census. For this district, Dr. Brunell analyzes the 2008 Democratic primary election in which the African-American

candidate Benjamin Clark lost to the white candidate David Weinstein. Dr. Brunell reports that he found racially polarized voting in this contest, but fails to note the low percentage of African-American voting age population in this district (p. 22).

31. State Senate District 3 (Edgecombe, Martin, and Pitt Counties). This district is 46.9 percent African-American voting age population according to the 2010 Census. For this district, Dr. Brunell analyzes the 2010 Democratic primary election in this district in which white candidate Clark Jenkins prevailed against two African-American candidates: Florence Armstrong and Frankie Bourdeaux. Dr. Brunell reports that he found racially polarized voting in this contest and that white candidate Jenkins prevailed (p. 23). However, he fails to note Jenkins prevailed because of a split in the African-American vote. Taken together, the two African-American candidates received a majority of 50.3 percent of the votes cast in this election.

32. State House District 60 (Guilford County). This district is 54.4 percent African-American voting age population according to the 2010 Census. For this district, Dr. Brunell analyzes the 2006 general election in which the African-American Democrat Earl Jones competed against the white Republican Bill Wright. Dr. Brunell reports that he found racially polarized voting in this contest (p. 20). However, he fails to note that the African-American candidate overwhelmingly prevailed in this district with 60 percent of the vote. He also fails to note that African-American candidates continued to prevail in the district in the subsequent general elections of 2008, which was uncontested, and 2010, where the African-American Democrat won 70 percent of the vote.

33. State House District 102 (Mecklenburg County). This district is 42.7 percent African-American voting age population according to the 2010 Census. For this district, Dr. Brunell

analyzes the 2010 general election in which the African-American candidate competed against the white candidates Becky Carney and Ken Davies. Carney prevailed in this election and Dr. Brunell reports that he found racially polarized voting. However, he fails to note that this was an extremely low turnout election as previously indicated. Moreover, Dr. Brunell's results also show that this was a barely polarized election with very low African-American cohesion. According to Dr. Brunell's ecological regression results, only 53.6 percent of African-American voters voted for the African American candidate (4.1% + 49.5% = 53.6%, p. 21).

34. In addition to omitting considerable information, including the results of additional African-American vs. white elections in those districts, Dr. Brunell also omits from his analyses numerous other State House, State Senate, and Congressional districts in which African-American candidates prevailed with African-American voting age populations of less than 50 percent. These districts are enumerated in Tables 1 to 4 below.

35. **In sum, the results of both the independent analysis presented above and the reanalysis of Dr. Brunell's report demonstrate that the only result of an insistence on creating 50%+ African-American state legislative districts is to waste African-American votes and diminish the ability of African-American voters to influence the political process across the state of North Carolina.** As demonstrated by the comparative analysis of 40%+ to 49%+ African-American districts with 50%+ African-American districts, it is not necessary to create African-American ability districts with African-American voting age populations greater than 50 percent. For both sets of districts, the win rate for electing African Americans and candidates of choice of African-American voters is an overwhelming 90 percent. Examination of the Brunell report shows that despite its many problems, the report's results sustain these

findings. The findings of this report are also consistent with the findings of Dr. Theodore Arrington who wrote the following in his affidavit:

> These statistics indicate that a primary purpose of precinct splitting was to segregate the races into separate districts. Black voters were placed in packed districts with far higher concentrations than are necessary to give them a reasonable opportunity to elect representatives of their choice or their ability to elect such representatives. I know that these concentrations are excessive based on my extensive study of voting in North Carolina including work on Section 5 preclearance for the Department of Justice and various voting rights cases beginning with my work on the Gingles case.[6]

In addition, the results of analyzing elections in Senate District 5, Senate District 24, House District 39, and House District 41 also demonstrate that African Americans in North Carolina have opportunities to elect African-American candidates of their choice in legislative districts that are considerably below 40 percent in African-American voting age population.

6 First Affidavit of Theodore S. Arrington, p. 11-12.

Table 1
Electoral Analysis of Previous State House Districts With Black Voting Age Population Greater Than or Equal to 40% & Below 50%,*

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
HD 5	49.0%	48.9%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 12	47.5%	46.5%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 21	48.4%	46.3%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 29	44.7%	40.0%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 31	44.7%	47.2%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 42	45.1%	47.9%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 48	45.5%	45.6%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 72	43.4%	45.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 99	28.3%	41.3%	BLACK	BLACK	BLACK	BLACK
HD 102	46.1%	42.7%	NONE: WHITE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
HD 107	50.5%	47.1%	BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of VTD-level data.

Table 2
Electoral Analysis of Previous State House Districts With 50%+ Black Voting Age Population*

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
HD 7	56.0%	60.8%	BLACK	BLACK	NONE: BLACK	BLACK
HD 8	50.4%	50.2%	WHITE: NOT CHOICE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
HD 24	54.8%	56.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 27**	52.9%	54.0%	NONE: WHITE	NONE: WHITE	NONE: WHITE	NONE: WHITE
HD 33	50.0%	51.7%	NONE: BLACK	BLACK	BLACK	BLACK
HD 43	48.7%	54.7%	BLACK	BLACK	BLACK	BLACK
HD 58	53.4%	53.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 60	50.6%	54.4%	NONE: BLACK	BLACK	BLACK	BLACK
HD 71	51.6%	51.1%	NONE: BLACK	BLACK	NONE: BLACK	BLACK
HD 101	50.6%	55.7%	NONE: BLACK	BLACK	BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of VTD-level data.
** White candidate Michael Wray was elected without primary or general election opposition in HD 27 in 2008 and 2010. In 2006, he was the candidate of choice of black voters in a primary election victory against black opponents.

Table 3
Electoral Analysis of Previous State Senate Districts With 40%+ Black Voting Age Population*

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
SD 3	47.0%	46.9%	WHITE: NOT CHOICE	WHITE: CHOICE	WHITE: NOT CHOICE	WHITE: CHOICE
SD 4	49.1%	49.7%	NONE: BLACK	BLACK	BLACK	BLACK
SD 14	41.0%	42.6%	BLACK	BLACK	NONE: BLACK	BLACK
SD 20	44.6%	44.6%	BLACK	BLACK	NONE: BLACK	BLACK
SD 21	41.0%	44.9%	BLACK	BLACK	BLACK	BLACK
SD 28	44.2%	47.2%	BLACK	BLACK	BLACK	BLACK
SD 32	41.4%	42.5%	NONE: WHITE	WHITE: CHOICE	WHITE: CHOICE	WHITE: CHOICE
SD 38	47.7%	47.0%	NONE: BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of VTD-level data.

Table 4
Electoral Analysis of Previous Congressional Districts With 40%+ Black Voting Age Population*

District	% Black VAP 2000 Census	% Black VAP 2010 Census	Result: 2008 Democratic Primary	Result: 2008 General Election	Result: 2010 Democratic Primary	Result: 2010 General Election
CD 1:	48.1%	48.6%	NONE: BLACK	BLACK	BLACK	BLACK
CD 12	42.8%	43.8%	NONE: BLACK	BLACK	NONE: BLACK	BLACK

* Analysis of contested elections conducted through ecological regression analysis of VTD-level data.

Table 5
Comparison of State House Districts 30%+ Black Voting Age Population, Previous Districts and Enacted Districts

Count	Previous District	% Black VAP 2010 Census	Enacted District	% Black VAP 2010 Census
1	7	60.77%	24	57.33%
2	24	56.07%	99	54.65%
3	101	55.73%	5	54.17%
4	43	54.69%	27	53.71%
5	60	54.36%	102	53.53%
6	27	53.95%	42	52.56%
7	58	53.43%	107	52.52%
8	33	51.74%	21	51.90%
9	71	51.09%	23	51.83%
10	8	50.23%	31	51.81%
11	5	48.87%	43	51.45%
12	42	47.94%	33	51.42%
13	31	47.23%	38	51.37%
14	107	47.14%	60	51.36%
15	12	46.45%	29	51.34%
16	21	46.25%	101	51.31%
17	48	45.56%	48	51.27%
18	72	45.40%	106	51.12%
19	102	42.74%	58	51.11%
20	99	41.26%	57	50.69%
21	29	39.99%	7	50.67%
22	100	37.39%	12	50.60%
23	23	36.90%	32	50.45%
24	32	35.88%	71	45.49%
25	39	34.91%	72	45.02%
26	55	32.98%	100	32.01%
27	44	32.57%		
28	69	31.74%		
29	63	30.66%		
30	45	30.40%		
31	25	30.30%		
32	59	30.15%		

Table 6
Comparison of State Senate Districts 30%+ Black Voting Age Population, Previous Districts and Enacted Districts

Count	Previous District	% Black VAP 2010 Census	Enacted District	% Black VAP 2010 Census
1	4	49.70%	28	56.49%
2	28	47.20%	4	52.75%
3	38	46.97%	38	52.51%
4	3	46.93%	3	52.43%
5	21	44.93%	5	51.97%
6	20	44.64%	40	51.84%
7	14	42.62%	21	51.53%
8	32	42.52%	14	51.28%
9	7	37.36%	20	51.04%
10	11	37.27%	32	42.53%
11	40	35.43%		
12	27	31.11%		
13	10	31.09%		
14	5	30.99%		
15	37	30.18%		

Table 7
Ecological Regression Results for Previous Senate District 5, 2008 and 2010 General Elections

ELECTION	% OF BLACK VOTERS VOTING FOR BLACK DEMOCRAT	% OF WHITE VOTERS VOTING FOR BLACK DEMOCRAT
2008 GENERAL	97%	30%
2010 GENERAL	97%	21%

Table 8
Ecological Regression Results for Previous Senate District 24, 2008 and 2010 General Elections

ELECTION	% OF BLACK VOTERS VOTING FOR BLACK DEMOCRAT	% OF WHITE VOTERS VOTING FOR BLACK DEMOCRAT
2008 GENERAL	99%	38%
2010 GENERAL	97%	27%

Exhibit 4

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.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, DEFER, OR ABSTAIN

Defendants are asking this Court to abandon its responsibility to enforce Plaintiffs' rights protected by the United States Constitution simply because a similar lawsuit by different plaintiffs is pending in state court. For all of the reasons that follow, Defendants' Motion should be denied.

STATEMENT OF THE FACTS

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of State Senate and House districts enacted by the North Carolina General Assembly in 2011. None of the Plaintiffs in this case are parties to the previously-filed state case, which is currently pending at the North Carolina Supreme Court. *Dickson v. Rucho*, No. 201PA 12-3, 11-cvs-16896, 11-cvs-16940 (N.C.). Each individual plaintiff in this case asserts that his or personal right to equal protection under the laws is violated by assignment to a segregated election district.

A. Status of the State Court Proceeding

In November 2011, two sets of entirely different plaintiffs filed lawsuits in state court, challenging some of the same state legislative districts and several congressional districts that were challenged in this case. In 2013, after the 2012 elections, the trial court found that all but one legislative district challenged as a racial gerrymander in both *Dickson* and this case were subject to strict scrutiny but, as a matter of law, those gerrymandered districts survived strict scrutiny. The plaintiffs appealed, and eleven months after oral argument, and after the 2014 elections, the North Carolina Supreme Court assumed strict scrutiny applied and affirmed that the challenged districts passed strict scrutiny. The *Dickson* plaintiffs filed a petition for writ of certiorari to the United States Supreme Court seeking review.

On March 25, 2015, the United States Supreme Court issued its opinion in *Alabama Legislative Black Caucus v. Alabama*, ordering reconsideration of the plaintiffs' challenge to legislative districts that the Alabama legislature had drawn using "mechanical racial targets." 135 S. Ct. 1257, 1267. Rather than employing "a particular numerical minority percentage," the Court held legislators must consider "a minority's ability to elect a preferred candidate of choice." *Id.* at 1272. Thereafter, on April 20, 2015, the United States Supreme Court granted certiorari in the *Dickson* case, vacated the North Carolina Supreme Court's decision, and remanded for further proceedings in light of the Alabama case. The North Carolina Supreme Court heard arguments on remand on

August 31, 2015, and a decision is pending. The next potential opinion release date for the North Carolina Supreme Court is December 18, 2015.

B. Factual Basis of Plaintiffs' Claims in this Case

In response to the Supreme Court's ruling in *Alabama*, Plaintiffs in this case filed their Complaint in May 2015, alleging that Defendants here, as in *Alabama,* employed mechanical racial targets in creating the challenged districts in violation of the Constitution and gave no consideration to minority voters' demonstrated ability to elect their preferred candidates of choice in those districts. The challenged maps were drawn by Dr. Thomas Hofeller, an out-of-state consultant hired by the law firm for the legislature. (D.E. # 23-2, Ex A at 1896, 1903.). The chairs of the House and Senate redistricting committees orally gave their instructions to Dr. Hofeller, but the substance of those instructions was later reduced to writing in the form of public statements released by the chairs. (D.E. # 23-2, Ex. A at 1921-22; D.E. #23-3, Ex. B at 3078-79, 3184-85; D.E. #23-4, Ex. C at 2306.). Dr. Hofeller was instructed to draw House and Senate plans that would provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." (D.E. #23-5, Ex. D at 1216; D.E. #23-4, Ex. C, at 2363-64; D.E. # 23-3, Ex. B at 3087-89, 3167.) In order to meet this goal, the redistricting chairs told Dr. Hofeller to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so" and to draw the majority black districts in numbers proportional to the number of African-

American citizens in the state. (D.E. #23-4, Ex. C at 2451; D.E. # 23-3, Ex. B at 3087-89, 3167).

Partial maps containing what were described as "VRA districts" were drawn and released to the public first. Citizens from around the state testified at public redistricting hearings that the proposed VRA districts went beyond what was required by the Voting Rights Act. (D.E. # 23-18, Ex. Q). However, the districts remained mostly unchanged. No African-American Senator or Representative voted in favor of the plans that were eventually enacted by the General Assembly. On July 27, 2011 the General Assembly passed the State Senate Redistricting Plan, 2011 S.L. 404, and on July 28, 2011, the General Assembly passed the State House Redistricting Plan, 2011 S.L. 402.

On September 24, 2015, with litigation pending in state and federal court, the General Assembly enacted 2015 N.C. Sess. Laws 258, which moved up the primary elections for state legislative districts from May to March 15, 2015, and the opening of filing for those offices to December 1, 2015. The Governor signed this bill on September 30, 2015.

ARGUMENT

I. THIS COURT SHOULD NOT STAY FURTHER PROCEEDINGS

A. A three-judge panel in a similar redistricting case has already rejected Defendants' arguments.

Defendants have unsuccessfully made these exact arguments in a similar case pending in this district. *Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C.), is a redistricting case involving Congressional Districts 1 and 12 that, like this case, was filed

after the state court case had been filed. Defendants twice filed the same motion to stay, defer, or abstain in that case, and they made the same arguments in support. The three-judge panel twice rejected their arguments and denied Defendants' motions. *See Harris* docket, 1:13-cv-949, at entries 43, 65, 105, and Minute Entry for 10/09/2015. In denying Defendants' first motion, the *Harris* panel observed that, ordinarily, federal courts should not refrain from exercising jurisdiction. (Order at *Harris* Dkt. 65 p. 8 (citing *Scott v. Germano*, 381 U.S. 407 (1965) and *Growe v. Emison*, 507 U.S. 25 (1993)) (copy attached as Appendix 1). The court found no requirement that a federal court "defer to a pending state court case that is merely reviewing the validity of a current map, as opposed to actually redrawing a map that has already been deemed invalid." *Id.* (emphasis in original). At the end of the day, the court remained unconvinced that the federal court's exercise of its jurisdiction to enforce federal rights should be put on hold while the North Carolina Supreme Court litigation was underway. *Id.* Later, Defendants' renewed motion was summarily denied by the *Harris* court without a written decision. (Copy of portion of *Harris* docket attached as Appendix 2). Because Defendants' arguments are identical to those in the *Harris* case, this Court should likewise deny Defendants' motion.

B. *Germano* and its progeny do not require this Court to stay, defer, or abstain from hearing this matter.

Defendants have presented the Court with no authority that requires this Court to abstain. None of the cases relied upon by Defendants require a Court to abstain simply because a parallel state case is proceeding. *Germano* and its progeny expressly recognize that "[o]f course federal courts and state courts often find themselves exercising

concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.*, dismiss the case before it) nor defer to the state proceedings (*i.e.*, withhold action until the state proceedings have concluded)." *Growe v. Emison*, 507 U.S. 25, 32 (1993). In *Growe*, the federal court actively prevented the state court from issuing a final remedy by enjoining enforcement of the state court's orders. In contrast, Plaintiffs have not asked this Court to enjoin the state courts from deciding *Dickson*.

In fact, as the *Harris* court recognized, the limitations of the *Germano* cases only apply when a state court is itself drawing and enforcing a redistricting plan. *Growe* and *Germano* only require a federal court to defer when a state court is "actually drawing up and selecting a redistricting plan," not when a state court is merely reviewing the same plan the federal court is reviewing. *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1180 (D. Colo. 2004) (interpreting *Growe*). "Once a plan has been duly adopted by state mechanisms, federal courts have authority equal to that of the state courts in evaluating that plan's conformity with federal statutory and constitutional requirements[.]" *Id.* Similarly, the court in *Brown v. Kentucky*, Nos. 13-cv-68, 13-cv-25, 2013 U.S. Dist. LEXIS 90401, 2013 WL 3280003, at *12 (E.D. Ky. June 27, 2013) (copy attached as Appendix 3), held that "Supreme Court precedent…clearly permits the simultaneous operation of [state and federal] procedures to ensure constitutional legislative districts are in place in time for an election." In *Brown*, while the Kentucky legislature struggled to enact a state legislative redistricting plan, a group of plaintiffs in federal court challenged

the state's legislative districts. *Id*. at *8-9. Concluding that deferral was not warranted, the court expressly distinguished *Growe*, noting that there the federal court adopted plans and permanently enjoined state interference with those plans, even though the state court had adopted its own map. *Id*. at *13. But in *Brown*, as here, there would be "no parallel state court proceeding that [the federal court] [was] taking affirmative steps to enjoin and overrule." *Id*. at *15.

Defendants' reliance on *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997) is misplaced. There, the court dismissed the case "[b]ecause the State court [had] adjudicated the merits of [the same plaintiffs'] claims," so "both res judicata and the *Rooker-Feldman* doctrine preclude this court's review of that decision." *Id*. at 1440. Here, as discussed below, res judicata does not apply, and Defendants have advanced no argument under the *Rooker-Feldman* doctrine. Thus, Defendants have presented no authority requiring this Court to defer or abstain from determining this matter.

C. This Court has an obligation to decide matters involving Constitutional rights and voting rights.

This Court has an important role in deciding matters involving the federal Constitution. A primary responsibility of federal courts is to protect federal constitutional rights. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995); *United States v. Jefferson County Bd. of Education*, 372 F.2d 836, 873 (5th Cir. 1966). This case involves the protection of Plaintiffs' federal constitutional right to not be assigned to electoral districts based on the color of their skin. Abstention is the exception, not the rule. *See Badham v. United States Dist. Ct. for the Northern Dist. of Calif.*, 721 F.2d 1170, 1173

(9th Cir. 1983) ("The dangers posed by an abstention order are particularly evident in voting cases. . . . In a redistricting case such as this, for example, the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective."). Given the important issues at stake, Defendants have shown no basis for this Court to defer or abstain.

II. YOUNGER ABSTENTION DOES NOT APPLY

Younger abstention would be inappropriate in this case. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that a federal court should abstain from exercising jurisdiction and interfering with a state *criminal* proceeding where three elements are met: (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; (2) that implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges. *Id.* at 51; *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). *Younger* generally applies to challenges that seek to interfere with state criminal or quasi-criminal proceedings but does not apply to federal judicial review of state legislative action. As the Supreme Court explained:

> Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions [*e.g.*, a] civil contempt order, it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action.

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 367-68 (1989) (internal citations omitted).

The Supreme Court recently reiterated the limitations of *Younger*, saying that it applies only "in three types of proceedings . . . criminal prosecutions . . . civil enforcement proceedings . . ." and cases "that implicate a State's interest in enforcing the orders and judgments of its courts." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588, 591 (2013). "Divorced from [a] quasi-criminal context" the Court warned that *Younger* would extend to "virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest. That result is irreconcilable with our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Id.* at 593 (quoting *Hawaii Housing Authority v. Midkiff*, , 467 U.S. 229, 236 (1984)). In fact, the three-judge panel in *Harris* agreed, holding that "Defendants' alternative arguments for abstention under *Younger*, which ordinarily only applies in the criminal context…have been considered and are deemed meritless." (Order at *Harris* Dkt. 65 p. 10). In this case, the state redistricting lawsuit is not criminal, quasi-criminal, or one dealing with the judiciary's attempts to enforce its own power. Rather, it is precisely the kind of "proceeding reviewing legislative . . . action" that the Supreme Court warned was inappropriate for *Younger*. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368. Accordingly, this Court should not abstain from deciding this case under *Younger*.

III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

Defendants unabashedly argue this Court should defer proceeding in this case because one or more of the Plaintiffs "*may* be bound by the judgment in *Dickson* under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion)." (Defs' Br. 12). First, Defendants are wrong that res judicata or claim preclusion applies to this case. Notably, Defendants do not list the elements of either doctrine. Under North Carolina law, collateral estoppel applies where in an earlier suit there was 1) a final judgment; 2) on the merits; 3) the issue in question was identical to an issue in the earlier suit; 4) that issue was actually and necessarily litigated; and 5) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier litigation. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552 (1986); *Sartin v. Macik*, 535 F.3d 284, 287-88 (4th Cir. 2008) (citing *McInnis*). Similarly, res judicata applies where a party can show 1) a final judgment; 2) on the merits; 3) the same cause of action is involved in both suits; and 4) the party against whom res judicata is asserted was a party, or was in privity with a party, to the earlier suit. *Id.*

Here, the parties are not the same as those in the *Dickson* case. Defendants argue without authority that if some Plaintiffs are members of organizations that were plaintiffs in *Dickson*, they may be bound. Importantly, they have offered no evidence of this alleged tenuous connection. Even if this Court could assume without factual basis that some Plaintiffs are members of organizations that were plaintiffs in *Dickson,* there is no

evidence in the record that the Plaintiffs here had any knowledge of, leadership role regarding, control over, or decision-making role in the state court litigation.

Under North Carolina law, "privity" does not mean, as Defendants apparently would have it, merely that one party's interests are "align[ed] with and represented by," a party to a separate litigation. (Defs' Br. 13). "Privity is not established . . . from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts." *State ex rel Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996); *see also Cnty. of Rutherford By & Through Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 394 S.E.2d 263, 266 (N.C. Ct. App. 1990) (no privity despite parties "interested in proving the same state of facts"). Thus, even if collateral estoppel or res judicata could apply, the elements would not be met in this case.

Second, Defendants cite no authority to support their contention that a court should defer considering a matter over which it has jurisdiction because one of these doctrines could *possibly* apply. Defendants have not shown that res judicata or collateral estoppel *does* apply; thus they have not made a sufficient showing that the case should be stayed. Third, even the potential application of one of these doctrines as to one or more plaintiffs in no way warrants deferral of the entire case. At most, assuming without conceding the applicability of res judicata or collateral estoppel, these doctrines would only affect those specific plaintiffs and the districts in which they live. Defendants have no grounds to argue the entire case should be stayed because res judicata or collateral

estoppel might apply to some plaintiffs. Indeed, Defendants have shown no basis whatsoever for this case to be stayed.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Stay, Defer, or Abstain with prejudice.

Respectfully submitted, this the 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, DEFER, OR ABSTAIN**, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 17th day of November, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SANDRA LITTLE COVINGTON, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	1:15CV399
	)	
THE STATE OF NORTH CAROLINA, et al.,	)	
	)	
Defendants.	)	

ORDER

With this lawsuit, filed in May 2015, Plaintiffs, individual North Carolina citizens, challenge the constitutionality of nine state Senate districts and nineteen state House of Representatives districts "as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." First Am. Compl. ¶ 1, ECF No. 11. Plaintiffs contend that the challenged districts, hatched as part of a 2011 redistricting effort, were the product of "race-based policies adopted by leaders of the General Assembly" and that "traditional districting principles were plainly subjugated to race, resulting in bizarrely shaped and highly non-compact districts." Id. ¶¶ 3, 6.

The challenged districts have been used in two previous election cycles. The primary election for the impending 2016 statewide election is scheduled for March 15, 2016, with the

candidate filing period set to open on December 1, 2015. 2015 N.C. Sess. Laws 258, § 2(a), (b).

On October 7, 2015, Plaintiffs moved for a preliminary injunction, seeking to enjoin all election proceedings in twenty-five of the challenged districts. Plaintiffs then hope to secure a final decision permanently enjoining the use of the 2011 redistricting plan and forcing the North Carolina legislature to redraw the districts in accordance with the United States Constitution.

On November 9, 2015, Defendants moved "this Court to [s]tay, [d]efer, or [a]bstain from further proceedings in this action because parallel litigation involving the same claims and issues raised in Plaintiffs' First Amended Complaint is currently pending before the North Carolina Supreme Court." Defs.' Mot. Abstain 1, ECF No. 31.

On November 23, 2015, this three-judge panel heard argument on Plaintiffs' motion for a preliminary injunction and on Defendants' motion to stay, defer, or abstain. For the reasons explained below, we deny both motions.

I. Abstention

Two groups of plaintiffs filed lawsuits in state court in November 2011 challenging the constitutionality of specific districts in then-new redistricting plans. Those suits challenged many of the legislative districts challenged in this

case. The two state court cases were consolidated and heard by a three-judge state trial court panel that deemed the redistricting plan constitutional. See Dickson v. Rucho, 766 S.E.2d 238, 243-44 (N.C. 2014), cert. granted and judgment vacated, 135 S. Ct. 1843 (2015). The matter was appealed, and the Supreme Court of North Carolina affirmed. Id. at 242. The United States Supreme Court vacated that affirmance in April 2015 and remanded for reconsideration in light of Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015). Dickson v. Rucho, 135 S. Ct. 1843 (2015) (mem.). Currently, the matter is pending before the Supreme Court of North Carolina.

With their motion to stay, defer, or abstain, Defendants ask this Court to stay out of the fray due to the "parallel" Dickson litigation in state court.

Generally, federal courts have a duty to decide cases over which they have jurisdiction, regardless of whether parallel state proceedings exist: "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.' Parallel state-court proceedings do not detract from that obligation." Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 590-91 (2013) (citations omitted).

Nevertheless, the Supreme Court has endorsed staying redistricting cases under certain circumstances. Defendants argue that two such cases, Scott v. Germano, 381 U.S. 407 (1965) (per curiam), and Growe v. Emison, 507 U.S. 25 (1993), support our refraining from adjudicating this case in favor of the state court litigation. Those cases, however, do not further Defendants' cause.

In Germano and Growe, the states were actively working to remedy what had been determined to be unlawful redistricting plans. Germano, 381 U.S. at 408; Growe, 507 U.S. at 29–31. Indeed, those cases make clear that deferral is not appropriate to the extent it appears that "the[] state branches will fail timely to perform [their] duty" to "adopt a constitutional plan 'within ample time . . . to be utilized in the upcoming election.'" Growe, 507 U.S. at 34–35 (citing Germano, 381 U.S. at 409). In such cases, "the District Court would [be] justified in adopting its own plan." Id. at 36.

Here, by contrast, the state court proceeding has not even determined that any remediation is required. Rather, the state court rulings in Dickson thus far have upheld the redistricting plan that Plaintiffs claim is unconstitutional. Further, the Dickson cases have been litigated for several years, and to this day they remain unresolved, with the Supreme Court of North Carolina's prior opinion having been vacated by the United

States Supreme Court. Under these circumstances, we see nothing in either Germano or Growe that inclines us to stay our hand in favor of Dickson.

Defendants also contend that "one or more of the Plaintiffs in this action may be bound by the judgment in Dickson under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion)." Defs.' Mem. Supp. Mot. Abstain 12, ECF No. 32. For this reason, too, Defendants argue this Court should stay its hand until the Dickson litigation is resolved. Here again, Defendants' arguments are unconvincing.

"Fundamentally, under both res judicata and collateral estoppel, a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit **between the same parties or their privies**." 47 Am. Jur. 2d Judgments § 464 (emphasis added); see also Aliff v. Joy Mfg. Co., 914 F.2d 39, 42 (4th Cir. 1990); Parker v. United States, 114 F.2d 330, 333 (4th Cir. 1940). The reasoning behind these doctrines "is straightforward: Once a court has decided an issue, it is forever settled as **between the parties**, thereby protecting against the expense and vexation attending multiple lawsuits, conserving judicial resources, and fostering reliance on judicial action by minimizing the possibility of inconsistent verdicts. In short, a losing litigant deserves no rematch after

a defeat fairly suffered." B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1302-03 (2015) (quotation marks, citations, and brackets omitted) (emphasis added).

Defendants claim only that they "may be able to show, following discovery, that the interests of the plaintiffs in this litigation were aligned with and represented by the plaintiffs in Dickson, particularly if any of the Plaintiffs here are members of any of [the] organizations that are plaintiffs in Dickson." Defs.' Mem. Supp. Mot. Abstain 13. Yet they are unable to say today that a ruling in Dickson would have preclusive effect against any Plaintiff in this case. Their preclusion argument thus provides no basis for staying or abstaining here.

Finally, Defendants contend that Younger v. Harris, 401 U.S. 37 (1971), applies and provides a vehicle for this Court to stay out of the fray. However we fail to see how Younger applies here.

The Supreme Court recently made plain that Younger's scope is limited to precluding three "exceptional categories" of lawsuits: 1) "federal intrusion into ongoing state criminal prosecutions;" 2) "certain civil enforcement proceedings;" and 3) "interfering with pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." Sprint Commc'ns,

Inc., 134 S. Ct. at 591 (quotation marks, citations, and brackets omitted) (emphasis added).

This case implicates nothing that is criminal or quasi-criminal, nor does it deal with the state judiciary's enforcement of its own power. Rather, it is a garden variety case of the judiciary reviewing legislative action (redistricting), a category of cases to which Younger has never applied and does not apply. Id.; see also New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 368 (1989) (noting that "it has never been suggested that Younger requires abstention in deference to a state judicial proceeding reviewing legislative or executive action").

Defendants have provided no basis for this Court to stray from its "virtually unflagging" duty to adjudicate the case before it. Sprint Commc'ns, Inc., 134 S. Ct. at 591. Their motion to stay, defer, or abstain is therefore denied.

II. Preliminary Injunction

Plaintiffs have moved for a preliminary injunction seeking to enjoin election proceedings for nine North Carolina Senate Districts and sixteen North Carolina House districts until a final determination on the merits in this case.

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Nat. Res. Def. Council,

Inc., 555 U.S. 7, 22 (2008). To prevail in their preliminary injunction motion, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of equities weighs in their favor; and (4) the injunction is in the public interest. Id. at 20. When it is clear that the balance of the equities and public interest do not tip in favor of granting preliminary relief, the injunction cannot issue and it is "not necessary" to reach the merits. Id. at 23–24, 31.

In assessing the equities, "courts must balance the competing claims of injury" and "the effect on each party of the granting or withholding of the requested relief." Id. at 24 (quotation marks omitted). And in weighing the public interest, we must consider "the public consequences in employing the extraordinary remedy of injunction." Id. (quotation marks omitted). In the context of redistricting, the Supreme Court has advised that the "proximity of a forthcoming election and the mechanics and complexities of state election laws" are particularly relevant when determining whether to grant injunctive relief. Reynolds v. Sims, 377 U.S. 533, 585 (1964).

Here, Plaintiffs request preliminary relief that would cause an extraordinary disruption to North Carolina's 2016 election cycle. Candidate filing for the North Carolina House and Senate contests opens on December 1, 2015, and primary

elections are scheduled for March 15, 2016. See 2015 N.C. Sess. Laws. 258, § 2(a), (b). Given that trial in this case is scheduled for April 2016, enjoining election proceedings until after trial and a final decision on the merits, as Plaintiffs request, would make it impossible for the state to hold its primary elections as scheduled. Further, while Plaintiffs challenge the constitutionality of a few dozen districts, the 2016 election cycle includes contests for 170 Senate and House seats. Defs.' Resp. to Mot. Prelim. Inj. Ex. 23, Strach Decl. ¶ 4, ECF No. 33-30. And Plaintiffs concede that, for all practical purposes, enjoining filing for the challenged districts would have the collateral effect of delaying the election cycle for all Senate and House seats and likely result in primaries in July 2016 at the earliest.

Plaintiffs counter that any disruption to the state's election cycle is far outweighed by the constitutional injury caused by districts that are the product of impermissible racial gerrymandering. While the Court takes seriously the constitutional injury Plaintiffs stand to suffer if they ultimately succeed in proving their claim, "a federal court cannot lightly interfere with or enjoin a state election" either. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). At this preliminary stage, before we have reached a final decision on

the merits, we therefore do not find Plaintiffs' requested relief to be in the public interest.

Moreover, although Plaintiffs filed their initial complaint in May 2015, Plaintiffs waited until October 2015, nearly five months later, to move for a preliminary injunction. Plaintiffs admit that this was a strategic decision. Now, less than a week from the opening of candidate filing, their decision will exacerbate the disruption to the election cycle that a preliminary injunction would cause. See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 79-80 (4th Cir. 1989) (explaining that plaintiff's own delay is relevant in balancing the potential harms caused by preliminary injunction).

For these reasons, we conclude that Plaintiffs have failed to demonstrate that they are entitled to a preliminary injunction. Accordingly, we need not reach the merits of their claim. We nevertheless underscore that, while denying Plaintiffs relief at this time, we do not suggest that Plaintiffs will not succeed in proving their case at trial. We hold only that the balance of the equities and the public interest do not tip in their favor for the granting of a preliminary injunction at this juncture. Thus, Plaintiffs' motion for preliminary injunction is hereby denied.

SO ORDERED.

For the Court:

/s/ James A. Wynn, Jr.
United States Circuit Judge

/s/ Thomas D. Schroeder
United States District Judge

/s/ Catherine C. Eagles
United States District Judge

Exhibit 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
CASE NO.: 4:01-CV-171-H(4)

Ashley Stephenson, individually, and as a resident and registered voter of Beaufort County, North Carolina; Leo Daughtry, individually, and as Representative for the 95th District, North Carolina House of Representatives; Patrick Ballantine, individually, and as Senator for the 4th District, North Carolina Senate; Art Pope, individually, and as Representative for the 61st District, North Carolina House of Representatives, and Bill Cobey, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated;

Plaintiffs,

v.

Gary Bartlett, as Executive Director of the State Board of Elections; Larry Leake, Rose Vaughn Williams, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree, as members of the State Board of Elections; James B. Black, as Speaker of the North Carolina House of Representatives; Marc Basnight, as President Pro Tempore of the North Carolina Senate; Michael Easley, as Governor of the State of North Carolina; and Roy Cooper, as Attorney General of the State of North Carolina;

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DENY THE REQUEST FOR A THREE-JUDGE COURT, TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION, TO AWARD PLAINTIFFS' THEIR ATTORNEY'S FEES, AND TO GRANT THEIR MOTION FOR EXPEDITED CONSIDERATION

Federalism is at the heart of our constitutional system. A component of our federal system is that a state Supreme Court has the responsibility for construing its own Constitution.

Amazingly, in this case, the North Carolina Attorney General has removed a state court action to federal court in order to preclude the North Carolina courts -- including ultimately the North Carolina Supreme Court -- from interpreting the North Carolina Constitution's provisions concerning redistricting as applied to the November 2001 House and 2001 Senate redistricting plans enacted by the General Assembly. N.C. Const., Art. I, §§ 2, 3, 5; Art. II, §§ 3, 5 (1971). Plaintiffs have filed a state court action that only raises state law issues. Unless and until those state law issues are resolved, there is no basis for this federal court to act. Because state apportionment is primarily the duty of the State -- through its legislature and courts -- and because there is no basis for removal, this court should deny defendants' request for a three-judge court, remand this matter to state court, and award plaintiffs their attorney's fees.

FACTUAL BACKGROUND

On November 13, 2001, plaintiffs filed this action in Johnston County Superior Court against the defendants. The plaintiffs' verified complaint (plus 13 exhibits) seeks a declaration that the 2001 redistricting plans for the North Carolina House of Representatives ("2001 House Plan") and Senate ("2001 Senate Plan") violate the North Carolina Constitution. The action also seeks a declaratory judgment and definitive interpretation of certain North Carolina constitutional provisions related to redistricting of the North Carolina House and Senate. *See* N.C. Const., Art. I, §§ 2, 3, 5; Art. II, §§ 3, 5 (1971). In fact, given the importance of redistricting to all North Carolina citizens and voters and the profound state constitutional law issues involved, plaintiffs ultimately expect the North Carolina Supreme Court to provide a definitive interpretation of the North Carolina constitutional provisions at issue.

Plaintiffs are various registered Republican voters, office holders, and officials. Plaintiffs' First Amended Verified Complaint ¶¶ 3-9. Defendants are various state officials being sued in their official capacities. *Id.* ¶¶ 10-14.

Plaintiffs' complaint contains no claims under federal law. Rather, plaintiffs' complaint asserts four causes of action under North Carolina law:

1. The currently existing House and Senate redistricting plans violate Article I, Sections 2, 3, and 5; Article II, Sections 3 and 5 of the North Carolina Constitution in that each Senator and Representative does not represent "as nearly as may be, an equal number of inhabitants," and counties are divided in the creation of House and Senate districts for reasons other than compliance with federal law. Plaintiffs' First Amended Verified Complaint ¶¶ 59-61.

2. The 2001 Senate Plan and the 2001 House Plan divide numerous counties for reasons other than compliance with federal law and thereby violate Article I, Sections 2, 3, and 5 and Article II, Sections 3 and 5 of the North Carolina Constitution. Plaintiffs' First Amended Verified Complaint ¶¶ 62-64.

3. The 2001 Senate Plan and the 2001 House Plans dilute the votes of Republican voters by systematically packing them into districts in excess of the average number of voters who should be represented by a Senator or Representative and maximizes the votes of Democrat voters by systematically reducing the number of Democrat voters in "safe" Democrat districts. The populations disparities between "safe" Republican districts and "safe" Democrat districts are not the result of any state constitutional criteria, such as respecting county lines, but instead are the result of a willful and calculated plan to manipulate district lines through the use of advanced computer technology in order to protect or increase Democrat majorities in both the Senate and House while guaranteeing the reelection of incumbents. In this respect, the 2001 Senate Plan and

2001 House Plan violate the requirement that Senators and House members must represent, as nearly as may be, an equal number of inhabitants contrary to Article I, Sections 2, 3, and 5, and Article II, Sections 3 and 5 of the North Carolina Constitution. Plaintiffs' First Amended Verified Complaint ¶¶ 65-68.

4. To the extent elections are held under either the 2001 Senate Plan or the 2001 House Plan, the General Assembly will have usurped all political power from the people in violation of Article I, Sections 2 and 19 of the North Carolina Constitution. Plaintiffs' First Amended Verified Complaint ¶¶ 69-74.

PROCEDURAL HISTORY

On November 13, 2001, the Johnston County Superior Court reviewed the verified complaint (including 13 exhibits) and issued a temporary restraining order ("TRO") against the defendants. *See* Ex. 19.[1] In that order, the court stated:

> This case raises extremely serious constitutional questions strictly under the North Carolina Constitution of any redistricting plan for the State Senate or State House that has either been enacted by the General Assembly, or might be enacted for the 2002 General Elections. Plaintiffs' complaint does not allege any violations of federal law or the United States Constitution. Plaintiffs also do not appear to make any allegations concerning defendants' conduct to which defendants might validly raise defenses that are based on federal law or the United States Constitution.
>
> Plaintiff has shown a likelihood of success on the merits and that irreparable injury will result to plaintiffs and voters and candidates plaintiffs seek to represent if a restraining order is not granted; and that in comparison, defendants will suffer little if any injury upon the granting of this Order.

Ex. 19. Accordingly, the Johnston County Superior Court issued the following order:

[1] Plaintiffs have designated their exhibits in this court beginning with Exhibit 19. Citations to Exhibits 1-13 refer to the exhibits filed with the first amended verified complaint. Exhibits 14-18 are attached to the affidavit of Joel Raupe being filed today.

> NOW THEREFORE, it is ORDERED that pursuant to Rule 65, N.C. R. Civ. P., defendants are restrained, enjoined and forbidden from opening the filing period or otherwise commencing the election process, or holding elections pursuant to N.C. Gen. Stat. §§ 120-1 and 120-2; or the Senate redistricting plan passed by both the Senate and House during this legislative session and designated in plaintiffs' complaint as the 2001 Senate Plan; or the House redistricting plan passed by the House during their legislative session and designated in plaintiffs' complaint as the 2001 House Plan; or any other redistricting plan enacted by the General Assembly which divides counties into legislative districts except when such divisions are required by federal law; or any redistricting plan enacted by the General Assembly in which population deviations caused by the division of counties are the result of a systematic and purposeful plan to protect a political majority or guarantee the reelection of incumbents; or any redistricting plan enacted by the General Assembly which violates the sovereignty of the people and otherwise violates Articles I, Sections 2, 3 5, and 19 and Article II, Sections 3 and 5 of the North Carolina Constitution.

Ex. 19.

The court set a preliminary injunction hearing for November 23, 2001, and ordered that the parties file briefs concerning the plaintiffs' motion for preliminary injunction not later than November 20, 2001. *Id.* The superior court also notified the Chief Justice of the North Carolina Supreme Court that this case should be designated as an "exceptional" case under Rule 2.1 of the North Carolina General Rules of Practice. Ex. 20.[2]

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[2] Rule 2.1 is entitled "Designation of Exceptional Civil Cases and Complex Business Cases" and provides:

> (a) The Chief Justice may designate any case or group of cases as (a) exceptional or (b) "complex business." A senior resident superior court judge, chief district court judge, or presiding superior court judge may *ex mero motu*, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional or complex business.
>
> (b) Such recommendation for exceptional cases may include special areas of expertise needed by the judge to be assigned and may include a list of recommended judges. Every complex business case shall be assigned to a special superior court judge for complex business cases, designated by the Chief Justice under Rule 2.2, who shall issue a written opinion upon final disposition of the case.

On November 16, 2001, plaintiffs filed a first amended verified complaint (including 13 exhibits). On November 16, 2001, the superior court extended the temporary restraining order through November 26, 2001, and rescheduled the preliminary injunction hearing to November 26, 2001. Ex. 21. On November 16, 2001, the Chief Justice of the North Carolina Supreme Court designated this case an "exceptional" case under Rule 2.1 and designated Judge Jenkins of the Johnston County Superior Court to hear all matters concerning the action. Ex. 22.

On November 19, 2001, defendants filed a notice of removal and alleged that this action raises "at least" three substantial federal questions:

a. were post-1964 amendments re-writing North Carolina constitutional provisions on legislative districting which prohibit the division of counties in the formation of legislative districts unambiguously submitted to and subsequently precleared by the United States Attorney General as required by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c;

b. when 40 of the State's 100 counties are covered jurisdictions subject to the preclearance requirements of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and the United States Attorney General objected to post-1964 State constitutional amendments prohibiting the division of counties in the formation of legislative districts, does the Voting Rights Act prevent the amendments from having any force and effect in all 100 counties, regardless of whether they are covered jurisdictions; and

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(c) Such recommendation shall be communicated to the Chief Justice through the Administrative Office of the Courts.

(d) Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

c. when 40 of the State's 100 counties are subject to the preclearance requirements of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and the United States Attorney General objected to post-1964 State constitutional amendments prohibiting the division of counties in the formation of legislative districts, can the State and its officers be compelled to apply the unprecleared constitutional amendments in the counties which are not covered jurisdictions under the Voting Rights Act in a manner inconsistent with or in violation of the equal protection principles of the Constitution of the United States?

Defendants' Notice of Removal ¶ 6. Defendants then assert that plaintiffs' complaint raises federal questions under the laws of the United States so that this court has original jurisdiction over the claims under 28 U.S.C. § 1331. Thus, defendants removed the action to this court under 28 U.S.C. §§ 1441(a) and (b). *See* Defendants' Notice of Removal ¶ 7. Defendants also rely on 28 U.S.C. § 1443(2) as a basis for removal and have filed a separate motion for apportionment of a three-judge court pursuant to 28 U.S.C. § 2284(a) and 42 U.S.C. § 1973, *et seq.*

ARGUMENT

I. THE COURT SHOULD DENY DEFENDANTS' REQUEST FOR A THREE-JUDGE COURT.

Under 28 U.S.C. § 2284, a three-judge court must be convened "when an action is filed challenging the constitutionality of the apportionment of… any statewide legislative body." The district judge initially assigned the case must decide whether a three-judge court is required by this statute. 22 *Moore's Federal Practice* § 404.02(2); *Simkins v. Gressette*, 495 F. Supp. 1075, 1082 (D.S.C.), *aff'd*, 631 F.2d 287 (4th Cir. 1980). In ruling on an application for a three-judge court, the district judge is confined to the allegations in the complaint. *Moore's, supra; Armour v. Ohio*, 925 F.2d 987, 989 (6th Cir. 1991). Thus, where a complaint does not allege a

substantial federal claim, the district judge should deny the application for a three-judge court. *Simkins*, 631 F.2d at 295.

A three-judge court should not be convened in this case under 28 U.S.C. § 2284 or 42 U.S.C. § 1973c because plaintiffs' complaint only challenges the redistricting plans enacted by the General Assembly under the North Carolina Constitution. As stated in plaintiffs' first amended verified complaint, and as specifically found by the Superior Court Judge in his temporary restraining order, plaintiffs are not seeking any relief under federal law and instead are merely asking for declaratory and injunctive relief under the North Carolina Constitution. Ex. 19. This is insufficient grounds for a three-judge court because a three-judge court's "jurisdiction" in a case challenging a state redistricting plan "is limited to federal constitutional claims." *Moore, supra* § 404.03[2]; Wright & Miller, *Federal Practice and Procedure: Jurisdiction* 2d § 4235 n. 12; *Cavanagh v. Brock*, 577 F. Supp. 176, 180 n. 3 (E.D.N.C. 1983) (discussing both 28 U.S.C. § 2284 and 42 U.S.C. § 1973c); *Sullivan v. Crowell*, 444 F. Supp. 606, 612 (W.D. Tenn. 1978). Therefore, a three-judge court should not be convened in this action to decide whether a redistricting plan violates the North Carolina Constitution. *Id.*

II. THIS COURT DOES NOT HAVE ORIGINAL JURISDICTION OVER PLAINTIFFS' CLAIMS AND SHOULD REMAND THIS ACTION.

In an effort to avoid having the North Carolina state courts interpret the North Carolina Constitution, defendants have improperly removed this action, and seek to transform plaintiffs' claims under state law into a federal claim under 28 U.S.C. § 1331, subject to federal court jurisdiction. As the parties seeking removal, defendants bear the burden of establishing federal jurisdiction. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). Because removal jurisdiction raises significant federalism concerns, it must be strictly construed.

Id.; *Griffin v. Holmes*, 843 F. Supp. 81, 84 (E.D.N.C. 1993). If federal jurisdiction is doubtful, a remand is necessary. *Mulcahey*, 29 F.3d at 151; *BJT, Inc. v. Molson Breweries USA, Inc.*, 848 F. Supp. 54, 57 (E.D.N.C. 1994).

The right to remove a case from state to federal court derives from 28 U.S.C. § 1441. That statute provides in relevant part:

> (a) . . . [A]ny civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) . . . [A]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

The propriety of removal under 28 U.S.C. § 1441(a)-(b) depends on whether the case falls within the provisions of 28 U.S.C. § 1331: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Mulcahey*, 29 F.3d at 151.

The presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); *Owen v. Carpenters' Dist. Council*, 161 F.3d 767, 772 (4th Cir. 1998). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc.*, 482 U.S. at 392, 107 S. Ct. at 2429.

Plaintiffs' claims all arise under the North Carolina Constitution. Plaintiffs' verified complaint and first amended verified complaint contain no claims under federal law. In fact, the superior court expressly stated in its temporary restraining order that this "case raises extremely serious constitutional questions strictly under the North Carolina Constitution of any redistricting plan for the State Senate or State House that has either been enacted by the General Assembly, or might be enacted for the 2002 General Elections. Plaintiffs' complaint does not allege any violations of federal law or the United States Constitution. Plaintiffs also do not appear to make any allegations concerning defendants' conduct to which defendants might validly raise defenses that are based on federal law or the United States Constitution." Ex. 19. Federal jurisdiction depends on what the plaintiffs allege in the complaint, not what they could have alleged. *Caterpillar, Inc.*, 482 U.S. at 399, 107 S. Ct. at 2433, 96 L.Ed.2d 318 ("the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court").

This court has frequently addressed the propriety of removal. The court has made clear that the plaintiff is the master of his claim. *See Griffin*, 843 F. Supp. at 88. If plaintiff chooses not to assert a federal claim, a defendant will not be able to remove the case merely because federal law somehow might touch the case. *See Eure v. NVF Co.*, 481 F. Supp. 639, 644 (E.D.N.C. 1979). "Comity considerations" in the context of removal should not be "easily discarded" where "dual compliance" with state and federal law is possible. *Id.*

In its removal notice, defendants suggest that federal jurisdiction exists for three reasons. *See* Notice of Removal ¶ 6. None of these purported reasons create federal question jurisdiction.

Before addressing the defendants' three reasons, we note a serious flaw in the premise of defendants' removal petition: the assumption that the North Carolina courts have no role in the redistricting process and no role in interpreting the North Carolina Constitution as it relates to

redistricting. Reapportionment of a State legislature is, however, "primarily the duty and responsibility of the State through its legislative or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34, 113 S. Ct. 1075, 1081, 122 L.Ed.2d 388 (1993) (quoting *Chapman v. Meir*, 420 U.S. 1, 27, 95 S. Ct. 751, 766, 42 L.Ed.2d 766 (1975)). "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate actions by the States in such cases has been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1527, 14 L.Ed.2d 477 (1965) (per curiam). Thus, State courts and State legislatures are the preferred entities for reapportionment in our federal system. *Growe*, 507 U.S. at 34, 113 S. Ct. at 1081. "Absent evidence that these state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.*, 113 S. Ct. at 1081.

Moreover, at the risk of stating the obvious, the North Carolina courts (especially its Supreme Court) are the entities that can definitively construe the North Carolina Constitution. *Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) ("[I]ssues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can be answered with finality by this Court. Further, it must be remembered that in construing and applying our laws and the Constitution of North Carolina, this Court is not bound by decisions of federal courts . . . .") (citations omitted). Indeed, the North Carolina Supreme Court recognized its role of judicial review concerning the North Carolina Constitution even before the U.S. Supreme Court established its role of judicial review in *Marbury v. Madison*. *See Bayard v. Singleton*, 1 N.C. 5 (1787); John V. Orth, *The North Carolina State Constitution: A*

Reference Guide, 7 (1993) (describing *Bayard* and stating that the Supreme Court in *Bayard* "preferred the constitution over the statute").

The only two cases that plaintiffs have located interpreting Article II, Sections 3 and 5 of the North Carolina Constitution are the federal court's guess as to its meaning in *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), and the Supreme Court's discussion six years later in *Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473 (1989) ("Our Constitution *specifically requires* that county boundaries be followed in creating legislative districts.") (citing N.C. Const., Art. II, §§ 3, 5). The plaintiffs' action seeks a definitive interpretation of the North Carolina Constitution from the North Carolina courts.

As for the defendants' three purported "federal questions", first defendants ask whether the post-1964 amendments to the North Carolina Constitution on legislative districting were "unambiguously submitted to and subsequently precleared by the United States Attorney General as required by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c"? Exhibit 7 to plaintiffs' verified complaint certainly appears to preclear the 1971 Constitution except for Article VI, Section 4. Ex. 7. In any event, however, the North Carolina courts need not address the issue of preclearance before interpreting the 1971 North Carolina Constitution. If, as plaintiffs contend, the North Carolina courts can and should harmonize the requirements of Article II, Sections 3 and 5 of the 1971 North Carolina Constitution by interpreting the Constitution to mean that counties cannot be divided except when necessary to comply with federal law (including the Voting Rights Act), the North Carolina courts can adopt that interpretation, direct that the General Assembly create a redistricting plan consistent with that interpretation, and then direct that the defendants seek preclearance of any such plan. If the plan based on that interpretation of the North Carolina Constitution is precleared, then the defendants' purported federal question

concerning preclearance of the 1971 plan will be moot. Because the conclusion of the state court case might moot the purported federal question and because the state constitutional issues are unresolved and bear on important matters of state policy, this court should abstain and remand the case to state court. *Growe*, 507 U.S. at 32, 113 S. Ct. at 1080.

Notably, at least three other State Supreme Courts have adopted the interpretation advanced by plaintiffs in this case and harmonized the mandate of a State constitutional provision barring the division of counties with the mandate of complying with federal law. *See Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771 (Ky. 1997); *Fischer v. State Bd. of Elections*, 879 S.W.2d 475, 477 (Ky. 1994); *Lockert v. Crowell*, 631 S.W.2d 702, 708-10 (Tenn. 1982); *Clements v. Valles*, 620 S.W.2d 112, 114-15 (Tex. 1981); *Smith v. Craddick*, 471 S.W.2d 375, 379 (Tex. 1971). Likewise, the Idaho Supreme Court has interpreted Idaho's constitutional prohibition against dividing counties in creating senatorial or representative districts in a way that harmonizes the Idaho constitutional requirement and the requirement of "one-person, one-vote" under the U.S. Constitution. *Hellar v. Cenarrusa,* 682 P.2d 524 (Idaho 1984).[3] Similarly, the Colorado Supreme Court harmonizes its constitutional requirements concerning redistricting with the requirements of the U.S. Constitution and the Voting Rights Act. *See In re Reapportionment of the Colorado General Assembly*, 828 P.2d 185, 190 (Colo. 1992). Like these other Supreme Courts, the North Carolina Supreme Court should have the opportunity to construe the North Carolina Constitution in this case -- a case that the Chief Justice of the North

[3] *Accord In re Legislative Districting of the General Assembly of the State of Iowa,* 193 N.W.2d 784, 790 (Iowa 1972) (harmonizing Iowa constitutional requirement of "compactness" with federal law by holding that "compactness must be construed to mean as compact as practicable, having proper regard for equality of population between the several districts"), *supplemented*, 196 N.W.2d 209 (Iowa 1972), *amended*, 199 N.W.2d 614 (Iowa 1972); *see also Schrage v. State Bd. of Elections*, 430 N.E.2d 483, 488-89 (Ill. 1981) (harmonizing Illinois constitutional requirement of "compactness" with federal law; "the constitutional requirement of compactness is not to be ignored both because it is a constitutional requirement and because it has traditionally been used as a safeguard against the creation of gerrymandered districts").

Carolina Supreme Court already has designated as "exceptional" under North Carolina law. Ex. 22.

Second, defendants ask if 40 of the State's 100 counties are covered jurisdictions subject to the preclearance requirements of Section 5 of the Voting Rights Act, and the U.S. Attorney General objected to 1968 constitutional amendments prohibiting the division of counties in forming legislative districts, then does the Voting Rights Act prevent the 1968 constitutional amendments from having any force or effect in all 100 counties, regardless of whether they are covered jurisdictions? Notice of Removal ¶ 6. Again, however, **if** the State court interprets the 1971 North Carolina Constitution as plaintiffs suggest, and **if** it adopts a plan pursuant to the plaintiffs' proposed interpretation, and **if** such a plan is precleared, then defendants' purported federal question is moot. As with defendants' first question, this court should abstain from addressing it. *Growe*, 507 U.S. at 32, 113 S. Ct. at 1080.

Third, plaintiffs ask if 40 of the State's 100 counties are subject to Section 5 preclearance requirements and if the U.S. Attorney General objected in 1981 to the 1968 amendments to the North Carolina Constitution prohibiting the division of counties, can the State and its officers be compelled to apply the North Carolina Constitution in the 60 non-covered counties in a manner inconsistent with the U.S. Constitution's "equal protection principles"? Notice of Removal ¶ 6. As with the first two questions, this court should abstain because the plaintiffs' proposed interpretation of the North Carolina Constitution and proposed remedy will moot the question. *See Growe*, 507 U.S. at 32, 113 S. Ct. at 1080. Specifically, the plaintiffs' proposed interpretation of the North Carolina courts does not seek to have the North Carolina courts interpret the North Carolina Constitution in a manner inconsistent with the U.S. Equal Protection

Clause. Rather, the plaintiffs seek an interpretation that harmonizes the North Carolina Constitution with federal law. *See* First Amended Verified Complaint ¶¶ 56; Exs. 11 & 12.

Consistent with that goal, plaintiffs' first amended verified complaint contains proposed redistricting plans that adopt the proposed minority districts enacted by the General Assembly in the 2001 House Plan and the 2001 Senate Plan and adopt the one-person, one-vote principles used by the General Assembly, and **then** creates whole county districts. *See* First Amended Verified Complaint ¶¶ 42-45; *compare* Exs. 1 & 2 *with* Exs. 11 & 12. The plaintiffs' proposed remedial plans (Exs. 11 & 12) help to illustrate the ability to harmonize the North Carolina Constitution and federal law. In fact, the plaintiffs' proposed interpretation of the North Carolina Constitution is consistent with the U.S. Attorney General's 1981 objection letter.[4]

If the North Carolina courts interpret North Carolina law in this way, the defendants will not be "compelled to apply the North Carolina Constitution" in a manner violative of the Equal Protection Clause. Moreover, **if** the North Carolina courts adopt the plaintiffs' proposed interpretation of the North Carolina Constitution, and **if** the state court adopts a remedial plan, then the plan will be subject to preclearance. *See Hathorn v. Lovorn*, 457 U.S. 255, 265 n.16, 102 S. Ct. 2421, 2428 n.16, 72 L.Ed.2d 824 (1982). Likewise, any such plan could then be challenged as violative of the Equal Protection Clause. Unless and until these profound,

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[4] In 1981, the U.S. Department of Justice considered the 1968 amendment to the North Carolina Constitution which provided, in part, that no county shall be divided in the formation of a House or Senate district. The U.S. Department of Justice refused to preclear the 1968 amendment insofar as it affected the 40 counties in North Carolina subject to Section 5 of the Voting Rights Act. Ex. 8. The U.S. Department of Justice added, however:

> This determination with respect to the jurisdictions covered by Section 5 of the Voting Rights Act should in no way be regarded as precluding the State from following a policy of preserving county lines whenever feasible in formulating its new districts. Indeed, this is the policy in many states, subject only to the preclearance requirements of Section 5, where applicable.

Ex. 8.

underlying issues of North Carolina law are addressed and resolved in the North Carolina courts, however, "principles of federalism and comity" dictate that this court abstain and dismiss this case. *Growe*, 507 U.S. at 32, 113 S. Ct. at 1080.

III. THIS CASE IS NOT REMOVABLE UNDER 28 U.S.C. § 1443(2).

Defendants also assert that they are entitled to remove this action "because the plaintiffs seek to compel defendants . . . to act in a manner inconsistent with or in violation of the Voting Rights Act and the equal protection principles of the Constitution of the United States." Notice of Removal ¶ 7 (citing 28 U.S.C. § 1441 and 1143(2)). Plaintiffs have addressed defendants' erroneous reliance on 28 U.S.C. § 1441 as a basis for removal. As for defendants' reliance on 28 U.S.C. § 1443(2), defendants' argument stands logic on its head.

Section 1443(2) provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: . . .
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

Generally, section 1443(2) "is only available to federal officers and to persons assisting such officers in the performance of their official duties." *State of North Carolina v. Grant*, 452 F.2d 780, 782 (4th Cir. 1972) (per curiam) (quotation omitted). State officers, however, can rely on section 1443(2) if they can establish that removal is necessary based upon their refusal to enforce state laws discriminating on the basis of race or color. *City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22, 86 S. Ct. 1800, 1810 n.22, 16 L.Ed.2d 944 (1965).

To the extent that defendants are arguing that plaintiffs seek to compel them to enforce a law discriminating on the basis of race or color, the argument is frivolous. Plaintiffs' complaint makes clear that they are seeking an interpretation of the North Carolina Constitution that harmonizes the North Carolina Constitution with federal law, including the Voting Rights Act and Fourteenth Amendment. First Amended Verified Complaint ¶¶ 42-45, 56. In fact, plaintiffs have incorporated the State's minority districts from the 2001 House Plan and the 2001 Senate Plan in the plaintiffs' "whole county" alternative plan. *Id.* It is preposterous for the State to argue that seeking to use the minority districts that the State itself enacted is an attempt to compel the State to discriminate on the basis of race or color.

The plaintiffs' first amended verified complaint makes clear that they are merely "seeking an alternative apportionment plan which also complies with federal law but varie[s] from the defendants' plan only in its interpretation of state law." *Sexson v. Servass*, 33 F.3d 799, 804 (7th Cir. 1994). Thus, as a matter of law, remand is appropriate.

To the extent that defendants are arguing that the plaintiffs seek to compel them to violate the one-person, one-vote principle in the Fourteenth Amendment, the argument does not provide a basis for removal under Section 1443(2). "The Fourteenth Amendment principle of one-man, one-vote . . . seeks to ensure equal representation on the basis of population, it is not a race equality concept within the meaning of 1443(2)." *Folts v. City of Richmond*, 480 F. Supp. 621, 626 (E.D. Va. 1979). Likewise, to the extent that the State attempts to "create" an Equal Protection claim arising out of the "different" treatment of the 60 non-covered counties vis-a-vis the 40 covered counties that claim also would not involve a race equality concept within the meaning of section 1443(2).

In any event, even if section 1443(2) reached one-person, one-vote issues or the "different" treatment of counties, plaintiffs' equal protection argument is frivolous. Plaintiffs' first amended verified complaint makes clear that they used the same population deviations of the State in creating their proposed remedial plans. *See* First Amended Verified Complaint ¶¶ 42-45; Exs. 11 & 12.[5] Plaintiffs merely seek as interpretation of the North Carolina Constitution that harmonizes the North Carolina Constitution and federal law.

In summary, as both the first amended verified complaint and this motion to remand make clear, the plaintiffs seek an interpretation of the North Carolina Constitution that harmonizes compliance with Article I, Sections 2, 3, and 5 and Article II, Sections 3 and 5 of the North Carolina Constitution and federal law. Cases from other state supreme courts support the plaintiffs' proposed interpretation of the North Carolina Constitution. A superior court judge has concluded that plaintiffs are likely to succeed on the merits, and the Chief Justice of the North Carolina Supreme Court has designated this an "exceptional" case under North Carolina law. Exs. 19 & 22. The North Carolina courts should be able to review plaintiffs' proposed interpretation and decide whether to adopt it.

IV. THE COURT SHOULD REMAND THE CASE TO STATE COURT AND AWARD COSTS AND ATTORNEY'S FEES.

Lacking subject matter jurisdiction, this court must remand the case to state court. 28 U.S.C. § 1447(c). The court should exercise its discretion to "require payment of just costs and

[5] For a discussion of one-person, one-vote principles, see *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L.Ed.2d 320 (1973). In *Mahan*, the Virginia legislature adopted an apportionment plan for state legislative districts that resulted in a total deviation of 16.4% with respect to state house districts. The justification that Virginia offered was a redistricting policy preference for preserving political subdivisions in creating house districts. Although the policy preference was not grounded in the Virginia Constitution, the Supreme Court held that the 16.4% deviation did not violate the U.S. Constitution. *Id.* at 329, 93 S. Ct. at 987. Although the *Mahan* court approved the 16.4% deviation, plaintiffs' alternative plans have adhered to the General Assembly's proposed deviation of 10%. *See* First Amended Verified Complaint ¶¶ 42-45.

any actual expenses, including attorney fees, incurred as a result of the removal." *Id.*; *see, generally* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722 at 478-88 (1998).

In deciding whether to award costs under § 1447(c), the key factor is the propriety of defendants' removal. *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 3189 322 (10th Cir. 1997). An award of costs and fees does not require a finding that the removal was in bad faith. *Tenner v. Zurek*, 168 F.3d 328, 329 (7th Cir. 1999); *Excell*, 106 F.3d at 322; *Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996) (upholding fee award after improper removal of state employment discrimination claims). The removal of this case -- arising exclusively under state law -- was clearly improper. In accordance with section 1447(c), the court should award plaintiffs the costs and attorney's fees they incurred as a result of the removal.

V. THE COURT SHOULD GRANT PLAINTIFFS' REQUEST FOR EXPEDITED CONSIDERATION.

This action raises profound issues of North Carolina state law that will impact the 2002 North Carolina election cycle. The Chief Justice of the North Carolina Supreme Court has designated this an "exceptional" case under Rule 2.1 of the North Carolina Rules of Practice. *See* Ex. 16. A TRO is in place and remains in force notwithstanding removal to this court. *See Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439-40, 94 S. Ct. 1113, 1124, 39 L.Ed.2d 435 (1974).

The Superior Court scheduled a preliminary injunction hearing for November 26, 2000. *See* Ex. 15. Given that the existing TRO and proposed preliminary injunction relate to the 2002 North Carolina election cycle and the TRO will expire by its terms on November 26, it is critical that the motion for preliminary injunction be heard as soon as possible, preferably as the court

scheduled it on November 26, 2001. Given the profound public interest in conducting the elections for the State House and Senate in 2002 under plans that comply with the North Carolina Constitution and the patently legitimate role that the North Carolina courts have in interpreting North Carolina's Constitution, plaintiffs request that this court treat this motion on an expedited basis.

CONCLUSION

The United States Supreme Court has made clear that states -- through their legislatures and courts -- have primary responsibility for apportionment of their State legislative districts. *Growe*, 507 U.S. at 34, 113 S. Ct. at 1081. Consistent with that principle and in light of the profound issues of North Carolina law raised in this "exceptional" case, this court should reject the defendants' attempt to use federal litigation to obstruct and impede the underlying state court action. Accordingly, this court should deny the appointment of a three-judge court, remand this action to State court, and award attorney's fees.

This the 20th day of November, 2001.

MAUPIN TAYLOR & ELLIS, P.A.

BY: _____
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_____
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CERTIFICATE OF SERVICE

I, James C. Dever, III, do hereby certify that the foregoing pleading was served upon all parties of record by hand-delivering a copy thereof to their counsel of record at the addresses indicated below with the proper postage attached and deposited in an official depository under the exclusive care and custody of the United States Postal Service in Raleigh, North Carolina, on the 21st day of November, 2001.

MAUPIN TAYLOR & ELLIS, P.A.

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SERVED VIA HAND-DELIVERY:

Ms. Tiare B. Smiley
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North Carolina Department of Justice
Raleigh, North Carolina 27602

NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

Civil Action No. 01 CVS 2885

Ashley Stephenson, individually, and as a resident and registered voter of Beaufort County, North Carolina; Leo Daughtry, individually, and as Representative for the 95th District, North Carolina House of Representatives; Patrick Ballentine, individually, and as Senator for the 4th District, North Carolina Senate; Art Pope, individually, and as Representative for the 61st District, North Carolina House of Representatives, and Bill Cobey, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated;

Plaintiffs,

v.

Gary Bartlett, as Executive Director of the State Board of Elections; Larry Leake, Rose Vaughn Williams, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree, as members of the State Board of Elections; James B. Black, as Speaker of the North Carolina House of Representatives; Marc Basnight, as President Pro Tempore of the North Carolina Senate; Michael Easley, as Governor of the State of North Carolina; and Roy Cooper, as Attorney General of the State of North Carolina;

Defendants.

TEMPORARY RESTRAINING ORDER AND SCHEDULING ORDER

RALEIGH\314224_1

THIS CAUSE, coming on to be heard before the undersigned Honorable Knox V. Jenkins, Jr., Senior Resident Superior Court Judge, Judicial District 11B, upon plaintiffs' motion for a Temporary Restraining Order; and the Court having considered Plaintiffs' Verified Complaint and attached exhibits, affidavit, and the arguments of Plaintiffs' counsel, the Court finds as follows:

1. This case raises extremely serious constitutional questions strictly under the North Carolina Constitution of any redistricting plan for the State Senate or State House that has either been enacted by the General Assembly, or might be enacted for the 2002 General Elections. Plaintiffs' complaint does not allege any violations of federal law or the United States Constitution. Plaintiffs also do not appear to make any allegations concerning defendants' conduct to which defendants might validly raise defenses that are based on federal law or the United States Constitution.

2. Plaintiff has shown a likelihood of success on the merits and that irreparable injury will result to plaintiffs and voters and candidates plaintiffs seek to represent if a restraining order is not granted; and that in comparison, defendants will suffer little if any injury upon the granting of this Order;

3. The restraining order may be granted without notice in that further delay by the General Assembly to enact and then obtain preclearance under Section 5 of the Voting Rights Act by the United States Attorney General ("USAG") of redistricting plans that comply with the North Carolina Constitution, will continue to cause irreparable injury to the constitutional rights of plaintiffs and voters and candidates plaintiffs seek to represent before a hearing can be heard thereon.

NOW THEREFORE, it is ORDERED that pursuant to Rule 65, N.C. R. Civ. P., defendants are restrained, enjoined and forbidden from opening the filing period or otherwise commencing the election process, or holding elections pursuant to N.C. Gen. Stat. §§ 120-1 and 120-2; or the Senate redistricting plan passed by both the Senate and House during this legislative session and designated in plaintiffs' complaint as the 2001 Senate Plan; or the House redistricting plan passed by the House during their legislative session and designated in plaintiffs' complaint as the 2001 House Plan; or any other redistricting plan enacted by the General Assembly which divides counties into legislative districts except when such divisions are required by federal law; or any redistricting plan enacted by the General Assembly in which population deviations caused by the division of counties are the result of a systematic and purposeful plan to protect a political majority or guarantee the reelection of incumbents; or any redistricting plan enacted by the General Assembly which violates the sovereignty of the people and otherwise violates Articles I, Sections 2, 3 5, and 19 and Article II, Sections 3 and 5 of the North Carolina Constitution.

AND IT IS FURTHER ORDERED that defendants, through counsel, appear before the Honorable Knox V. Jenkins, Jr., on the 23 day of November, 2001 at 10:00 o'clock a m., or as soon thereafter as counsel may be heard to show cause, if any, and to argue why this restraining order should not be continued as a preliminary injunction to the final adjudication of this case on its merits as well as to why this court should not promptly set a timetable at which time redistricting plans for the Senate and House shall be submitted to the court for purposes of ordering an interim remedy for the 2002 General Election in the form of court-ordered redistricting plans, or until such time as the General Assembly enacts redistricting plans for the Senate and House that comply with the North Carolina Constitution.

AND IT IS FURTHER ORDERED that both parties file briefs in support of or in opposition to plaintiffs' motion for preliminary injunctive relief on or before the 20 day of November, 2001, and serve such briefs by hand on the other parties on the same day that such briefs are filed.

AND IT IS FURTHER ORDERED that plaintiffs give security in the amount of $ NONE, for purpose of such costs and charges as may be incurred or suffered by any party who is found to be wrongfully restrained by this Order.

AND IT IS FURTHER ORDERED that service of a copy of this Order be made upon defendants in the same manner as the summons and complaint in this action, that plaintiffs' counsel are directed to immediately deliver this Order and all copies of any summonses and complaints to the Sheriff of Wake County for service by his office, and that the Sheriff of Wake County exercise all reasonable efforts to immediately serve all summonses, given the important issues raised by this action. Actual notice of this Order to the Defendants shall be constructive notice to the agents and representatives of Defendants.

Issued at Smithfield, North Carolina, this the 13 day of November, 2001, at 10:25 a.m.

Superior Court Judge

NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 01 CvS 2885

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES, AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED;

PLAINTIFFS,

Vs.

GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROSE VAUGHN WILLIAMS, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA;

DEFENDANTS.

TO: HONORABLE ROBERT H. HOBGOOD
DIRECTOR, ADMINISTRATIVE OFFICE OF THE COURTS
RALEIGH, NORTH CAROLINA

PLAINTIFF'S EXHIBIT 20

NOW COMES the undersigned Senior Resident Superior Court Judge, District 11-B, and recommends, "ex mero motu", that the Chief Justice of the Supreme Court designate the above-captioned case an exceptional case pursuant to Superior Court Rule 2.1.

Factors considered in making this recommendation include:

(1) the number and diverse interest of the parties;
(2) the amount and nature of anticipated pretrial discovery and motions;
(3) the complexity of the evidentiary matters and legal issues involved; and
(4) the fact that it will promote the efficient administration of justice.

After considering affidavits, the verified complaint, briefs and statements of counsel for the plaintiffs, the undersigned concluded that irreparable injury would result if the court did not grant a temporary restraining order pursuant to Rule 65(b). Said order was granted on November 13, 2001, and a copy is attached hereto. A copy of the pleadings are attached for consideration in support of this recommendation.

Submitted this 13th day of November, 2001.

Knox V. Jenkins, Jr.
Senior Resident Superior Court Judge

pldg. 6998-004

COPY

NORTH CAROLINA

JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 01 CVS 2885

FILED
01 NOV 15 P 4:16
JOHNSTON COUNTY, C.S.C.
BY

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 95TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 4TH DISTRICT, NORTH CAROLINA SENATE; ART POPE, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 61ST DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES, AND BILL COBEY, INDIVIDUALLY, AND AS CHAIRMAN OF THE NORTH CAROLINA REPUBLICAN PARTY AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED;

PLAINTIFFS,

Vs.

AMENDED TEMPORARY RESTRAINING ORDER AND SCHEDULING ORDER

GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; LARRY LEAKE, ROSE VAUGHN WILLIAMS, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA;

DEFENDANTS.

NOW COMES the undersigned Senior Resident Superior Court Judge, District 11-B, *ex mero motu*; and

Post-it® Fax Note 7671 | Date 11/15/01 | # of pages 2
To Thomas A Farr | From Barbara Johnson
Co./Dept. Atty | Co. 11-B
Phone # 981-4000 | Phone # 934-0957
Fax # 981-4300 | Fax # 934-1740

PLAINTIFF'S EXHIBIT 21

IT APPEARING that the "Temporary Restraining Order and Scheduling Order" entered herein on the 13th day of November, 2001, ordered that the defendants, through counsel, appear before the undersigned on the 23rd day of November, 2001, to show cause, if any, and to argue why the restraining order issued therein should not be continued as a preliminary injunction.

AND IT APPEARING that the 23rd day of November, 2001, is a legal holiday as defined by Rule 6, Rules of Civil Procedure, and that the next day which is not a Saturday, Sunday or legal holiday is the 26th day of November, 2001.

IT IS, THEREFORE, ORDERED that the Order issued herein on the 13th day of November, 2001, be amended to provide that the defendants, through counsel, appear before the undersigned on the 26th day of November, 2001, at 10:00 a.m.

AND IT IS FURTHER ORDERED that except as amended, the order issued herein on the 13th day of November, 2001, shall remain in full force and effect.

Issued at Smithfield, North Carolina, this the 15th day of November, at 4:20 p.m.

HONORABLE KNOX V. JENKINS, JR.

OFFICE OF THE
CHIEF JUSTICE OF THE SUPREME COURT
OF THE
STATE OF NORTH CAROLINA

ORDER

Re: ***Ashley Stephenson, individually, and as a resident and registered voter of Beaufort County, North Carolina; Leo Daughtry, individually, and as Representative for the 95th District, North Carolina House of Representatives; Patrick Ballantine, individually, and as Senator for the 4th District, North Carolina Senate; Art Pope, individually, and as Representative for the 61st District, North Carolina House of Representatives, and Bill Cobey, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated***

v.

Gary Bartlett, as Executive Director of the State Board of Elections; Larry Leake, Rose Vaughn Williams, Genevieve C. Sims, Lorraine G. Shinn, and Charles Winfree, as members of the State Board of Elections; James B. Black, as Speaker of the North Carolina House of Representatives; Marc Basnight, as President Pro Tempore of the North Carolina Senate; Michael Easley, as Governor of the State of North Carolina; and Roy Cooper, as Attorney General of the State of North Carolina

Johnston** County File Number: **01-CVS-2885

*To The Honorable **Knox V. Jenkins**, one of the **Senior Regular Resident** Judges of the Superior Court of North Carolina, Greeting:*

*As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina, the rules of the Supreme Court and, specifically, **Rule 2.1** of the General Rules of Practice for the Superior and District Courts, I hereby designate the above-styled case(s) as **exceptional**. Therefore, I hereby assign The Honorable **Knox V. Jenkins**, one of the **Regular** Judges of the Superior Court of North Carolina, to hold such sessions of court as may be set and to attend to such in-chambers matters and other business as may be necessary and proper for the orderly disposition of the case(s) until otherwise ordered.*

PLAINTIFF'S EXHIBIT 22

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, November 16, 2001.

Chief Justice of the Supreme Court of North Carolina

David F. Hoke

Administrative Assistant to the Chief Justice

EXHIBIT 1 TO PLAINTIFFS' REPLY BRIEF

NORTH CAROLINA GENERAL ASSEMBLY
SENATE COMMITTEE ON REDISTRICTING

TRANSCRIPT OF THE PROCEEDINGS
AUGUST 24, 2017 SESSION

In Raleigh, North Carolina
Thursday, August 24, 2017
Reported by Rebecca P. Scott

Worley Reporting
P.O. Box 99169
Raleigh, NC 27624
919-870-8070

SEN. VAN DUYN: Here's what I would say, okay? So we have -- we have a district that is shaped very similarly to what it was in the unconstitutional maps, and that clearly we cannot demonstrate, then, that we are in compliance with the Courts if we do not at least verify that those are no longer racially gerrymandered districts. So we used the criteria that included reducing the percentage of African-American voters in the district.

SEN. BROWN: Senator Blue?

SEN. BLUE: I'd like to ask Senator Hise a question, and he probably has anticipated what it is. But specifically in the court order, they say you've got to explain to them why you went over 50 percent in this district. What do you plan to tell them?

SEN. HISE: I would think as we go through this entire process -- I would even say that the Plaintiffs' attorneys clearly stated even to the Courts that when districts are created by other criteria that there may be naturally occurring districts that exceed 50 percent, but that the predominant criteria in drawing that map was not racing and could not have been race. There

were no criteria in drawing the map or assigning voters in which we used race in order to place individuals.

As a result of using the criteria we have, there may be -- and I still don't know what the numbers -- this is the first I've been told on this district -- there may be naturally occurring areas that have that -- a percentage of 50 percent, a percentage of 40 percent or 42 percent. Individuals group themselves into communities, particularly in urban areas that are compact in those, and naturally occurring districts may come out.

And I think any numbers that you find, which I'm willing to look at, are a result of naturally occurring districts that we did not assign any voters on the basis of race or move any voters to districts on the basis of race.

SEN. BROWN: Senator Blue?

SEN. BLUE: So, as I understand it, with a straight face, you're going to ask the legislative lawyers to stand in front of these three federal judges and say the same guy who drew the district in 2011 knew all of these statistics, he knew what the map looked like, he redrew the

districts in 2017, and he does not remember what the map looked like, he does not remember why he put 50 percent or greater in that district, and it just coincidentally happens that it looks like the same district, it's got over 50 percent, which is what he sought out to achieve in 2011, but we didn't know that was going to happen. That just naturally occurred. Is that going to be the answer?

SEN. HISE: I think no different than you would say that when you drew the maps, you used Maptitude and somehow guessing it has some long-term memory because it was the same software used or may happen to have been the same chair individuals were sitting in. Dr. Hofeller was given the criteria of this Committee, which was significantly different from the criteria of the previous committee as a result the court rulings, and from the criteria, drew maps that did not include race. Race was not part of the database. It could not be calculated on the system that is done.

I wasn't drawing. It was Rucho there that was drawing then versus me there now, but I can tell you that there is no consideration of race

in the drawing of these maps, hidden or otherwise, nor is there is there sorting of individuals on the basis of race in the districts in the maps as they exist, quite counter to the amendments that you have been proposing.

SEN. BROWN: Senator Bishop?

SEN. BISHOP: Thank you, Mr. Chairman. I have a couple of other questions for Senator Van Duyn. Senator Van Duyn, I didn't get the -- or didn't retain the last name of the consultant that Senator Blue identified, but did the same gentleman -- his first name was Kareem -- did he draw your proposed amendment to Guilford?

SEN. VAN DUYN: Senator Bishop, with the Chair's permission, I worked with Senator McKissick on this. I can't answer that honestly because I don't know who he consulted with. Can I ask Senator McKissick that question?

SEN. BLUE: I'll allow that. You may need to identify yourself for the---

SEN. McKISSICK: Sure. This is Senator Floyd McKissick, Senator District 20. There is a gentleman who was used by the name of Mr. Kareem Crayton, C-r-a-y-t-o-n, who worked closely with this in looking at potential alternative plans for

the Guilford County as well as for Mecklenburg County, with the goal of trying to see what alternative configurations might be put forth for those particular clusters that would present an alternative for this Committee and for this body to consider as you move forward.

SEN. BROWN: Senator Bishop?

SEN. BISHOP: Senator Van Duyn, what does Dr. Crayton have against Senator Wade?

SEN. VAN DUYN: I don't believe he has anything against Senator Wade.

SEN. BISHOP: If you see on the map in your amendment, the little red dot there underneath the green District 28 and it's just in 27. I think that's Senator Wade's home, and that's in Senator Dr. Robinson's district, as I understand it. Is that correct?

SEN. VAN DUYN: No one's been double-bunked in this.

SEN. BISHOP: Do you know whether that district is favorable to Senator Wade's prospects for reelection or not?

SEN. VAN DUYN: I'm sorry. I honestly do not know.

SEN. BISHOP: And did not give that

any -- do you know whether Dr. Crayton gave any consideration to that in drawing the map?

SEN. VAN DUYN: We believe it would be favorable to Senator Wade. I think, if you look at the statistics that are attached, you can see that that, in fact, is the case.

SEN. BROWN: Senator Clark, I'm going to let you take off, and I'm going to let Senator Bishop think about that for just a second. I think he's got another question, but go ahead.

SEN. CLARK: Thank you, Mr. Chairman. I think, Mr. Hise, when you were addressing Senator Blue regarding what you would tell the Courts, you would tell them that maybe we had exceeded the 50 percent mark as the result of a naturally occurring district. I find that sort of puzzling because one of our members Senator Erica Smith-Ingram did submit criteria to this particular Committee which said that we would recognize naturally occurring districts. However, that was voted down. So are we saying that is now an acceptable criteria?

SEN. HISE: That is the statement of your Plaintiffs -- I'm sorry -- of the Plaintiffs in the case.

SEN. CLARK: Follow-up.

SEN. BROWN: Follow-up.

SEN. CLARK: Since you did mention the idea of a naturally occurring district, I even admitted at the time when one the members -- fellow members set it forth, I really didn't what the heck that meant anyway. So since you've considered that as appropriate, what is a naturally occurring district anyhow?

SEN. HISE: I simply stated with what you have with the reference. You can refer to their counsel as to what they meant when they referenced that, but districts come in at various percentages based on the way individuals group together and the way those are followed in without an intent or without a specific purpose of the General Assembly in drawing those maps.

SEN. BROWN: Senator Bishop, are you ready now?

SEN. BISHOP: I think so. Thank you, Mr. Chairman. Senator Van Duyn, do you know how many municipalities you split in your proposed amendment?

SEN. VAN DUYN: I believe we have minimized the splitting of municipalities with this map.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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; EDWIN M. SPEAS, JR.; 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; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	ORDER

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

SO ORDERED, this the 2nd day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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; EDWIN M. SPEAS, JR.; 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; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	MEMORANDUM OPINION

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

This matter came before the court on plaintiffs' emergency motion for remand (DE 5). On January 2, 2019, the court granted the motion, remanded the matter to state court, and denied plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c).[1] The court memorializes herein its reasoning for this decision.

STATEMENT OF THE CASE

Plaintiffs commenced this action in Superior Court of Wake County on November 13, 2018, and filed amended complaint on December 7, 2018, asserting that districting plans enacted by the North Carolina General Assembly in 2017 for the North Carolina House of Representatives and Senate (the "2017 Plans") are unconstitutional and invalid under the North Carolina Constitution. Plaintiffs seek the following relief from the state court, sitting as a three-judge panel:

a. Declare that each of the 2017 Plans is unconstitutional and invalid because each violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Equal Protection Clause, Art. I, § 19; Free Elections Clause, Art. I, § 5; 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 the North Carolina General Assembly using the 2017 Plans;

c. Establish new state House and state Senate districting plans that comply with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new state House and state Senate districting plans comporting with the North Carolina Constitution in a timely manner;

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

[1] Also now pending before the court is a Motion For Order Confirming Applicability of Stay of Judgment under Rule 62(a) (DE 45), which the court will address by separate order.

(Am. Compl. p.75).[2]

Plaintiffs are Common Cause, the North Carolina Democratic Party, and 38 individual registered Democrat voters. Defendants Representative David R. Lewis; Senator Ralph E. Hise, Jr.; Speaker of the House Timothy K. Moore; and President Pro Tempore of the North Carolina Senate Philip E. Berger, are members of the North Carolina Senate and House named in their official capacities (collectively, the "Legislative Defendants"). Additional defendants are the State of North Carolina, the North Carolina State Board of Elections and Ethics Enforcement, and individual officers and members of the North Carolina State Board of Elections and Ethics Enforcement (collectively, the "State Defendants").[3]

On December 14, 2018, the Legislative Defendants filed a notice of removal in this court. The notice of removal states that it is filed also on behalf of the State of North Carolina in the following respect: "Pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the 'State of North Carolina' in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government." (Notice of Removal (DE 1) at 3 n. 1).[4] The notice of removal is signed by counsel who has entered an appearance on behalf of the Legislative Defendants. (Id. at 16; Notices of Appearance (DE 2,

[2] A copy of plaintiffs' amended complaint is filed at docket entries 1 and 32 (DE 1, 32). For ease of reference, page numbers in citations to documents in the record specify the page number showing on the face of the underlying document rather than the page number specified in the court's electronic case filing (ECF) system.

[3] In their response to the motion to remand, the State Defendants note prior changes and ongoing uncertainty in the composition and membership of the North Carolina State Board of Elections and Ethics Enforcement. Because these changes do not impact the analysis herein, the court adheres to individual State Defendants' names as referenced in the original complaint, and as reflected in the court's docket, in the caption of this order, for ease of reference.

[4] All subsequent filings by the Legislative Defendants in this court have been made also on behalf of the State of North Carolina in this manner, such that references in this opinion to filings or arguments made by the Legislative Defendants are to be understood as including the specification that they are made also on behalf of the State of North Carolina in the respect quoted above in the text.

3)). Attached to the notice of removal are copies of the state court pleadings and certain documents filed in state court,[5] as well as the Legislative Defendants' state court notice of filing of notice of removal.

Plaintiffs filed an emergency motion to remand on December 17, 2018. In support of the motion, plaintiffs filed a memorandum attaching the following documents: 1) acceptance of service filed in state court on November 19, 2018, on behalf of the State Defendants; 2) plaintiffs' motion filed in state court on November 20, 2018, for expedited discovery and trial and for case management order; 3) emails between state trial court administrator and counsel; and 4) certain district court and Supreme Court filings made in Covington v. North Carolina, No. 15-CV-399 (M.D.N.C.) ("Covington").

On December 18, 2018, the court set a December 28, 2018, deadline for any responses to the motion to remand. The Legislative Defendants filed an answer to the complaint on December 21, 2018. On the same date, the State Defendants moved for extension of time to answer.

On December 28, 2018, the State Defendants responded to the motion to remand, stating that they agree the matter should be remanded.[6] That same date, the Legislative Defendants filed a response in opposition to remand, attaching documents filed in Covington, and two other cases: 1) Dickson v. Rucho, 11 CVS 16896 (Superior Court of Wake County), and 2) Stephenson v. Bartlett, 4:01-CV-171-H (E.D.N.C.). Plaintiffs replied in support of remand on December 30, 2018, relying

[5] Legislative Defendants filed on December 20, 2018, an amended Exhibit 1 to their notice removal that includes an additional document filed in state court on November 20, 2018, comprising a motion by plaintiffs' for expedited discovery and trial and for case management order.

[6] The State of North Carolina, through its response, also "objects to the removal" where it "purports to be on behalf of the State of North Carolina," noting that "[t]he Attorney General reserves the right to challenge, in an appropriate setting, the interpretation of [N.C. Gen. Stat.] § 1-72.2 that the Legislative Defendants appear to be advancing . . . . [b]ut the Court need not address those unsettled state-law issues to rule on Plaintiffs' Motion to Remand." (State Defendants' Resp. (DE 39) at 2 n. 2)

upon a North Carolina Senate hearing transcript.

On January 2, 2019, the court granted plaintiffs' motion to remand, stating:

> This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

(Order (DE 44) at 3).

COURT'S DISCUSSION

A. Standard of Review

In any case removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). "The burden of establishing federal jurisdiction is placed upon the party seeking removal." Mulcahey v. Columbia Organic Chemicals Co., 29 F.3d 148, 151 (4th Cir. 1994). "Because removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction." Id. "If federal jurisdiction is doubtful, a remand is necessary." Id.; see Palisades Collections LLC v. Shorts, 552 F.3d 327, 336 (4th Cir. 2008) (recognizing the court's "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand").

B. Analysis

The Legislative Defendants rely upon two independent statutory provisions as a basis for removal, which the court will address in turn below.

1. 28 U.S.C. § 1443(2)

The Legislative Defendants assert that removal is appropriate under a subsection of 28 U.S.C. § 1443 that provides for removal of state-court actions against a defendant "for refusing to do any act on the ground that it would be inconsistent with" any "law providing for equal rights." (Notice of Removal ¶ 6).

Section 1443 provides in its entirety as follows:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (emphasis added).

This "statute . . . has been described as a text of exquisite obscurity." Baines v. City of Danville, Va., 357 F.2d 756, 759 (4th Cir. 1966) (en banc) (internal quotations omitted). The Supreme Court and the Fourth Circuit both interpreted the meaning of the provisions of § 1443 in separate cases in 1966, where each court observed, with respect to the quoted text emphasized above:

> The refusal language was added by amendment in the House with the explanation that it was intended to enable state officers who refused to enforce discriminatory state laws in conflict with Section 1 of the Civil Rights Act of 1866 and who were prosecuted in the state courts because of their refusal to enforce state law, to remove their proceedings to the federal court.

Id. at 772; see City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 824 n.22 (1966). Since that

time, it appears that neither the Supreme Court nor the Fourth Circuit has interpreted the "refusing" clause in subsection (2).

In Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983), a three-judge panel of this court held that a state court action "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans as precleared on April 30, 1982, by the Attorney General," was properly removed to this court under the "refusal" clause of § 1443. Id. at 179-180. By contrast, in Stephenson v. Bartlett, 180 F. Supp. 2d 779 (E.D.N.C. 2001), this court held that a state court action "challenging the redistrict plans proposed by the North Carolina General Assembly" was not properly removed to this court under the "refusal" clause of § 1443. Id. at 781, 785-786. Two other federal district courts have held that state court actions challenging legislative district plans were not properly removed under the "refusal" clause of § 1443. See Brown v. Fla., 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002); Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992).

Against this legal background, applicability of § 1443 to plaintiffs' action is doubtful for several reasons. First, plaintiffs' state court action is not brought against the Legislative Defendants "for refusing to do" anything. 28 U.S.C. § 1443(2). Rather, plaintiffs challenge an action already completed, in the form of the 2017 Plans, as "unconstitutional and invalid." (Am. Compl. p. 75). Legislative Defendants are "necessary parties" in any such suit where "the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action." N.C. Gen. Stat. § 120-32.6; see N.C. R. Civ. P. 19(d). Plaintiffs' prayer for injunctive relief further reinforces this point, where they seek to enjoin defendants from "administering, preparing for, or moving forward with the 2020 primary and

general elections . . . using the 2017 plans," which not a legislative activity. (Am. Compl. ¶ 75). Finally, they do not seek an injunction compelling the Legislative Defendants to act, but rather call upon the state court to establish new plans "if the North Carolina General Assembly fails to" do so. (Id.) (emphasis added). In such circumstances, as this court already has observed, "it is not entirely clear what the defendants refuse to do." Stephenson, 180 F. Supp. 2d at 785.

Second, plaintiffs' action is not removable by the Legislative Defendants because they have only a legislative role, rather than a law enforcement role. The Supreme Court, the Fourth Circuit en banc, and other federal courts have recognized that the "refusal" clause of § 1443 was intended to apply to "state officers who refused to enforce" state laws. Baines, 357 F.2d at 759 (emphasis added); see Peacock, 384 U.S. at 824 n.22 (noting clause was "intended to enable State officers . . . . refusing to enforce" state laws in reference to federal equal protection laws). Indeed, one federal court has stated that "the privilege of removal is conferred . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 302 F. Supp. 309, 311-12 (S.D. Ind. 1969) (emphasis added); see also Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992) ("It is untenable to argue . . . that Congress intended that the statute could or should be used by legislators sued solely because of their refusals to cast votes in a certain way."). While such interpretations have been expressed in dicta, they raise sufficient doubt regarding applicability of § 1443 to state legislators to preclude removal jurisdiction here.

Third, as this court found in Stephenson, here also "it is unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law," and "any implication of the refusal clause is speculative." 180 F. Supp. 2d at 785. Thus, as in

Stephenson, "plaintiffs are merely 'seeking an alternative apportionment plan which also fully complie[s] with federal law but varie[s] from the defendants' plan only in its interpretation of state law.'" 180 F. Supp. 2d at 785 (quoting Sexson v. Servaas, 33 F.3d 799, 804 (7th Cir. 1994)) (brackets in original).

In sum, it is doubtful that § 1443 applies to confer removal jurisdiction in this case. Arguments raised by the Legislative Defendants in favor of removal under § 1443 are insufficient to overcome this doubt. At the outset, the court notes that the Legislative Defendants cite no case in which state legislators were permitted to remove to federal court under the refusal clause in a suit challenging enactment of state redistricting law. Cases cited by the Legislative Defendants are all inapposite on the basis of one or several factors set forth above.

For example, the Legislative Defendants cite to Cavanagh, where this court permitted removal of a state court suit challenging enactment of North Carolina redistricting law. But, Cavanagh does not discuss removal by state legislators; rather, it describes the action as "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans." 557 F. Supp. at 176 (emphasis added). Nor does Cavanagh mention the enforcement limitation described in Peacock and Baines. See, e.g., Wolpoff, 792 F.Supp. at 968 (distinguishing Cavanagh on this basis in remanding legislator's removal of state suit challenging districting plan).

The Legislative Defendants also rely upon Alonzo v. City of Corpus Christi, 68 F.3d 944 (5th Cir. 1995), where the court affirmed removal of a state suit challenging a city's method of electing city council members, where the city alleged a colorable conflict between a prior federal consent decree and the relief sought in state court. Legislative Defendants argue that they are in an

analogous position to the defendants in Alonzo. But, Alonzo is distinguishable on multiple critical fronts. In Alonzo, the plaintiffs' suit was described as a challenge "of the City's use of [the existing] system in its elections," and thus the City properly removed under the refusal clause. 68 F.3d at 946. Alonzo did not discuss the "refusal" element as it applies to legislators in contrast to officials who enforce or implement state law. Alonzo would only be analogous to the instant case if the State Defendants in addition to the Legislative Defendants had sought removal under § 1443, but here the State Defendants oppose removal. Furthermore, the federal consent decree in Alonzo, "mandate[d]" a specific existing "5-3-1 system" in elections, whereas the federal law applicable here does not mandate the specific existing apportionment to the exclusion of no others. See North Carolina v. Covington, 138 S.Ct. 2548, 2555 (2018) ("Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end.").

The Legislative Defendants similarly rely upon a series of federal cases from the 1970s in which school boards were permitted to remove state-law challenges to school desegregation plans. None of these, however, were removed by legislators or state actors who did not enforce or implement legislation. Indeed, the first of these, Burns, opined that the "refusal" clause of § 1443 conferred the "privilege of removal . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." 302 F.Supp. at 311-12. In Burns, defendant state officials and school board members were "threatened with punishment for contempt if they disobey the order of a state court and refuse to undo their actual and contemplated transfer of teachers on the

ground that to do so would be inconsistent with such federal law." Id. at 312 (emphasis added).[7] Comparison to the instant case is inapt, on both fronts, where plaintiffs do not seek to enjoin Legislative Defendants directly, and where Legislative Defendants are not charged with implementing or enforcing their own legislation. See Wright v. North Carolina, 787 F.3d 256, 262-63 (4th Cir. 2015).

The Legislative Defendants cite several cases for the proposition that removal is appropriate where there is a "colorable conflict between state and federal law." White v. Wellington, 627 F.2d 582, 587 (2d Cir. 1980); e.g., Alonzo, 68 F.3d at 946; New Haven Firefighters Local 825 v. City of New Haven, No. CIV.3:04CV1169(MRK), 2004 WL 2381739, at *1 (D. Conn. Sept. 28, 2004). As an initial matter, this statement of the type of conflict required is a stretch of the language of the removal statute, which references in its text inconsistency only between the act being refused and federal equal protection law. See 28 U.S.C. § 1443(2) (permitting removal of a state civil action "for refusing to do any act on the ground that it would be inconsistent with such [federal equal protection] law") (emphasis added). This distinction is important in the instant context, where it is doubtful there has been a refusal to act within the application of this removal provision on the part of the Legislative Defendants. Where a refusal to act is itself doubtful and uncertain, any conflict

[7] Other school board cases cited by defendants are similar. See, e.g., Mills v. Birmingham Bd. of Ed., 449 F.2d 902, 904 (5th Cir. 1971) (plaintiff teacher sought "to enjoin the Board from transferring her" and obtained the requested injunction from state court prior to removal by defendants); Linker v. Unified Sch. Dist. No. 259, Wichita, Kan., 344 F. Supp. 1187, 1189 (D. Kan. 1972) (plaintiffs sought to enjoin defendant school district from "operating under" and "implement[ing]" a desegregation plan); Bridgeport Ed. Ass'n v. Zinner, 415 F. Supp. 715, 717 (D. Conn. 1976) (plaintiff teachers and association claimed that alleged that three appointments were made by defendant school board and officials in violation of municipal law and contract); Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo, 477 F. Supp. 691, 692 (W.D.N.Y. 1979) (plaintiff teachers sought and obtained state court order "restraining the Board from taking any action" in carrying out teacher hiring and promotions).

between such refusal and federal law also is uncertain. See Stephenson, 180 F.Supp. 2d at 785.

In any event, the cases cited by the Legislative Defendants illustrating a "colorable conflict between state and federal law" are inapposite, because they do not involve a purported conflict between a state constitution and the federal constitution,[8] much less in a state where, as here, the state supreme court has already pronounced that "compliance with federal law is . . . an express condition to the enforceability of every provision in the State Constitution." Stephenson v. Bartlett, 355 N.C. 354 , 375 (2002). In such circumstances, the court adheres to its earlier analysis in Stephenson, finding the purported conflict uncertain and speculative. The court recognizes the detailed arguments on the merits advanced by both the Legislative Defendants and plaintiffs' regarding whether plaintiffs' "view" or "interpretation" of state law can be reconciled with federal law and Covington. (Leg. Defs' Opp. (DE 42) at 14). For purposes of the present jurisdictional determination, however, under which doubts must be resolved in favor of remand, and where it is already doubtful that § 1443(2) applies at all to Legislative Defendants, it suffices that it is uncertain and speculative whether the ultimate relief sought in plaintiffs' complaint in the form of new plans "comporting with the North Carolina Constitution" would conflict with federal law. (Am. Compl. p. 75); see Stephenson, 180 F.Supp.2d at 785.

For all the reasons stated above separately and in combination, Legislative Defendants have

[8] See, e.g., White, 627 F.2d at 585 (plaintiffs asserted violations of a "city charter and civil service rules and regulations, all having the force of state law"); Alonzo, 68 F.3d at 945 (plaintiffs asserted violations of Texas Equal Rights Amendment and Voting Rights Act); Greenberg v. Veteran, 889 F.2d 418, 420 (2d Cir. 1989) (plaintiffs asserted violation of "Village Law," state statute, and First Amendment, against city official); New Haven Firefighters Local 825, 2004 WL 2381739 at *1 (plaintiffs asserted violations of the "Charter of the City of New Haven and New Haven's Civil Service Rules and Regulations"); Buffalo Teachers Fed'n, 477 F. Supp. at 692 (plaintiffs asserted claims, and state court entered injunction, pursuant to "the New York State Education Law" and "the terms of [a] collective bargaining agreement").

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not demonstrated that removal under 28 U.S.C. § 1443 is proper under the circumstances of this case.

2. 28 U.S.C. § 1441(a)

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court." 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Under the "well-pleaded complaint rule," "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California, 463 U.S. 1, 10 (1983). "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Plaintiffs' action falls squarely within this jurisdictional limitation. Plaintiffs assert solely state law claims under the North Carolina Constitution. Although defendants have asserted a conflict with federal law as a defense to plaintiffs' claims, "it is now settled law that a case may not be removed to federal court on the basis of a federal defense." Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). Indeed, in both Cavanagh and Stephenson, this court determined that state constitutional redistricting challenges did not arise under federal law, despite defendants' assertion of a conflict with federal law. Cavanagh, 577 F. Supp. at 180; Stephenson, 180 F. Supp. 2d 783-784. In light of this law, removal jurisdiction under § 1441(a) is doubtful.

The Legislative Defendants, nonetheless, contend that federal law is "necessarily raised" here because demonstrating compliance with federal law is an "affirmative element" plaintiffs' claim

or a "prima facie" claim under the North Carolina constitution. "[E]ven where a claim finds its origins in state rather than federal law," the Supreme Court has "identified a special and small category of cases in which arising under jurisdiction still lies." Gunn v. Minton, 568 U.S. 251, 258 (2013). "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Id.

The premise of Legislative Defendants' argument is flawed, however, because federal law is not an "affirmative element" of plaintiffs' claim or a prima facie case under the North Carolina Constitution. Legislative Defendants rely upon the North Carolina Supreme Court's statement in Stephenson that "compliance with federal law is not an implied, but rather an express condition to the enforceability of every provision in the State Constitution." 355 N.C. at 375. But, a reference to an "express condition to enforceability" is not the same as an element of a claim or prima facie case, and Stephenson says nothing about the elements of a claim or prima facie case under the State Constitution. Moreover, as this court suggested in Stephenson, interpreting all state constitutional redistricting claims in this manner as arising under federal law would result without limitation in "perpetual federal intrusion" in an area where federal-state balance has been carefully crafted by Congress and the Supreme Court. See, e.g., Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.").

Defendants also rely upon N. Carolina by & through N. Carolina Dep't of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 147 (4th Cir. 2017), as an example of a state law claim removable because of a necessary federal question. That case, however, is instructively

distinguishable, where it involved a claim of "state ownership of navigable waters." Id. at 147. In finding jurisdiction, applying a body of Supreme Court precedent in that area of law, the court recognized that "navigability for title" was "governed by federal law" Id. (citing United States v. Utah, 283 U.S. 64 (1931); PPL Montana, LLC v. Montana, 565 U.S. 576 (2012)). "[T]he question of navigability was thus determinative of the controversy, and that is a federal question." Id. (quoting Utah, 283 U.S. at 75). Here, there is no comparable body of Supreme Court precedent stating that the redistricting claims raised by plaintiffs necessarily must be resolved only by reference to federal law.

Therefore, the Legislative Defendants have not met their burden of demonstrating removal jurisdiction under 28 U.S.C. § 1441(a). In sum, where the court lacks jurisdiction under both grounds asserted by the Legislative Defendants, remand is required.[9]

3. Costs and Expenses

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

> Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c).

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). Plaintiffs have not demonstrated that

[9] Because the court finds jurisdiction lacking under the removal provisions asserted by the Legislative Defendants, the court does not reach additional arguments plaintiffs raise in support of remand, including procedural defect in removal under § 1441(a); sovereign immunity under Penhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); and judicial estoppel.

they are entitled to costs and expenses, including attorney fees, under the circumstances of this case. The Legislative Defendants did not lack an objectively reasonable basis for seeking removal. Their removal petition sets forth in detail their grounds for removal and they have comprehensively briefed the issues arising from their removal, including with reference to a wide range of case law.

Plaintiffs suggest that an award of fees is warranted because Legislative Defendants' timed their removal to cause "maximum delay and disruption." (Pls' Mem. at 29). However, Legislative Defendants' did not act outside of the time limits set forth in the removal statute. They exercised their rights under that law to assert grounds for removal to this court, and they followed this court's order for expedited briefing on plaintiffs' motion to remand.

In sum, the court declines in its discretion to award costs and expenses in light of both the substance and timing of the removal petition.

CONCLUSION

Based on the foregoing reasons, the court granted plaintiffs motion to remand and denied plaintiffs' request for costs and expenses.

SO NOTICED, this the 7th day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; 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; EDWIN M. SPEAS, JR.; 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; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	ORDER

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

This matter is before the court on motion (DE 45) by the Legislative Defendants[1] for an order confirming applicability of stay of judgment under Rule 62(a). Plaintiffs responded in opposition, and the Legislative Defendants replied. In this posture, the issues raised are ripe for ruling. For the following reasons, the motion is denied in part and dismissed in part for lack of jurisdiction.

BACKGROUND

Plaintiffs commenced this action in Superior Court of Wake County on November 13, 2018. The Legislative Defendants filed a notice of removal in this court, on December 14, 2018, on the basis of 28 U.S.C. §§ 1441(a) and 1443(2). Plaintiffs filed an emergency motion to remand on December 17, 2018; the Legislative Defendants responded in opposition on December 28, 2018; and plaintiffs replied in support of remand on December 30, 2018. On January 2, 2019, the court granted plaintiffs' motion to remand, stating:

> This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

(Order (DE 44) at 3). The court entered a memorandum opinion memorializing the court's reasoning for its decision on January 7, 2019.

In the meantime, on January 3, 2019, the Legislative Defendants filed the instant motion, in which they seek "an order affirming that the 30-day post-judgment stay period of Rule 62(a) applies

[1] The court adopts and incorporates herein by reference the definition of the term "Legislative Defendants" as explained at page four of the court's January 7, 2019, Memorandum Opinion, and the court maintains the caption also as explained at footnote three therein.

to the Court's remand order and ensuring that the Clerk of Court does not mail the remand order pursuant to 28 U.S.C. § 1447(d) to the clerk of the North Carolina Superior Court during that 30-day window, i.e., at the earliest, February 4, 2019." (Mot. (DE 45) at 1). The Legislative Defendants filed a proposed order and a memorandum in support thereof.

The court ordered response to the instant motion on or before January 10, 2019. Plaintiffs responded in opposition on January 4, 2019. The Legislative Defendants replied on January 14, 2019. Plaintiffs filed a notice regarding status of state court proceedings on January 15, 2019, including a copy of the court's certified copy of remand order transmitted to the state court.

COURT'S DISCUSSION

The Legislative Defendants seek two forms of relief in their motion, which the court addresses in turn below.

A. Mailing of Remand Order

One form of relief sought in the motion is an order "ensuring that the Clerk of Court does not mail the remand order pursuant to 28 U.S.C. § 1447(d) to the clerk of the North Carolina Superior Court" until February 4, 2019, at the latest. (Id.). In their memorandum in support of the motion, defendants similarly seek to have the court "instruct the Clerk of Court not to transmit the remand order to the North Carolina state court under 28 U.S.C. § 1447(d) until, at earliest, February 4, 2019." (Mem. (DE 46) at 5) (emphasis added).

This part of the instant motion is denied as moot, because the clerk of court has informed the undersigned that it mailed a certified copy of the court's January 2, 2019, remand order to the Wake County Superior Court on January 2, 2019. (See also Notice, Exhibit (DE 52-1) at 3). In any event, the court denies the Legislative Defendants' request to "ensure" or "instruct" that the court's January

2, 2019, remand order not be mailed before February 4, 2019. (Mot. (DE 45) at 1; Mem. (DE 46) at 5). The controlling statute, 28 U.S.C. § 1447(c) provides, in pertinent part:

> If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1447(c) (emphasis added). The remand in this instance proceeded in accordance with the plain language of the statute, and there is no basis in the statute for ensuring or instructing the clerk to delay mailing of the remand order.

The Legislative Defendants suggest that the court has the authority and the obligation to ensure that the remand order is not mailed until the 30-day "Automatic Stay" period set forth in Federal Rule of Civil Procedure 62(a) has expired. The Legislative Defendants' interpretation of Rule 62(a) in these circumstances, however, is at odds with the plain language of § 1447(c), which requires the court to remand the case as soon as it appears the court lacks subject matter jurisdiction and requires the clerk to mail the remand order, without qualification.

The Legislative Defendants' interpretation of Rule 62(a) also is in conflict with Fourth Circuit case law, in which the Fourth Circuit has stated: "A remand is effective when the district court mails a certified copy of the remand order to the state court, see 28 U.S.C. § 1447(c), or, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered." Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n. 1 (4th Cir. 2007) (citing In re Lowe, 102 F.3d 731, 734-36 (4th Cir.1996)) (emphasis added).

Legislative Defendants suggest nonetheless that the court's remand order was not an "effective remand order" because it was automatically stayed under Rule 62(a), citing the case Eisenman v. Cont'l Airlines, Inc., 974 F. Supp. 425, 429 (D.N.J. 1997). Eisenman, however, is

inapposite in addition to lacking any precedential value in this circuit. As an initial matter, Eisenman did not apply Rule 62(a). There, a magistrate judge entered a remand order that itself expressly stayed the order until disposition of an appeal thereof in the district court, further extending and reconfirming the stay in subsequent orders spanning a five month period of time. See id. The instant case involves neither a magistrate judge remand order nor any order expressly staying the remand pending appeal. Moreover, the court's reasoning in Eisenman conflicts with the Fourth Circuit rule that a remand order is effective upon entry when based upon a lack of subject matter jurisdiction. See Bryan, 492 F.3d at 235 n. 1; In re Lowe, 102 F.3d at 734-36.

In sum, that part of the instant motion seeking an order "ensuring that the Clerk of Court does not mail the remand order" until February 4, 2019, is denied as moot and for lack of merit.

B. Confirming 30-Day Stay

The Legislative Defendants also seek in the instant motion an order "confirming" or "affirming that the 30-day post-judgment stay period of Rule 62(a) applies to the Court's remand order." (Mot. (DE 45) at 1). The court does not have jurisdiction to grant the relief sought by defendants in this part of the motion, as presented here, because doing so would amount to an advisory opinion. See Ostergren v. Cuccinelli, 615 F.3d 263, 287 (4th Cir. 2010). Where the Legislative Defendants assert that an "Automatic Stay" applies to this court's remand order under Rule 62(a), an order by this court "confirming" or "affirming" that legal interpretation of Rule 62(a) does not alter whether such automatic stay applies or does not apply in this instance, nor would it accomplish any result in the instant matter.

Apparently in the alternative, the Legislative Defendants suggest in their proposed order that they have moved "for a stay of judgment under Rule 62(a)." (Proposed Order (DE 45-1) at 1). In

this respect the instant motion may be construed, in part, as a motion under Rule 62(a) for the court to enter an order staying its January 2, 2019, remand order, or to modify the January 2, 2019, remand order so that it expressly includes a stay of its effect until February 4, 2019, at the earliest. For the reasons stated in section A., above, the court denies this apparent alternative request for stay of the court's January 2, 2019, remand order. In so holding, the court expresses no opinion whether, under Rule 62(a) or otherwise, the court in its January 2, 2019, order could have imposed at that time a stay of the effect and transmittal of the remand order, because that issue is not presently before the court.

In sum, that part of the instant motion seeking an order "confirming" or "affirming that the 30-day post-judgment stay period of Rule 62(a) applies to the Court's remand order," (Mot. (DE 45) at 1), is dismissed in part for lack of subject matter jurisdiction and denied in alternative part on the merits.

CONCLUSION

Based on the foregoing, Legislative Defendants' motion (DE 45) for an order confirming applicability of stay of judgment under Rule 62(a), is DENIED IN PART and DISMISSED IN PART for lack of jurisdiction.

SO ORDERED, this the 17th day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-589

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.	)

NOTICE OF APPEAL

Notice is hereby given that the State of North Carolina, Speaker of the North Carolina House of Representatives Timothy K. Moore, President Pro Tempore of the North Carolina Senate Philip E. Berger, Senator Ralph E. Hise, Jr., and Representative David R. Lewis, defendants in the above-captioned case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Court's order and judgment granting Plaintiffs' motion to remand entered in this action on the 2nd day of January, 2019, ECF No. 44; from all related orders and opinions, including the Court's memorandum opinion memorializing the Court's reasoning for its order granting Plaintiffs' motion to remand entered in this action on the 7th day of January, 2019, ECF No. 48; from the Court's order denying the motion for an order confirming applicability of stay of judgment under Rule 62(a) entered on the 17th day of January 2019, ECF No. 53; and from all related orders and opinions.

Respectfully submitted this 22nd day of January, 2019

OGLETREE, DEAKINS, NASH,
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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record for all parties in this matter.

This the 22nd day of January, 2019.

By: /s/ Phillip J. Strach
Phillip J. Strach

37105183.1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DU BOSE 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; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; CARLTON E. CAMPBELL SR.,

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 ELECTIONS AND ETHICS ENFORCEMENT; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND,

Civil Action No. 5:18-CV-00589

SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,

Defendants.

NOTICE OF CROSS-APPEAL

Notice is hereby given that all Plaintiffs hereby cross-appeal to the United States Court of Appeals for the Fourth Circuit from the Court's order and judgment insofar as it denied Plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c), entered in this action on the 2nd day of January, 2019, ECF No. 44; and from all related orders and opinions, including the Court's memorandum opinion memorializing the Court's reasoning for its order denying Plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c) in this action on the 7th day of January, 2019, ECF No. 48.

DATED: January 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, January 23, 2019, I caused the foregoing document to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of North Carolina.

DATED: January 23, 2019

/s/ R. Stanton Jones
R. Stanton Jones

CERTIFICATE OF SERVICE

I certify that on February 19, 2019, the foregoing was served on all parties or their counsel of record through the CM/ECF system. I further certify that I will cause one paper copy of this brief to be filed with the Court. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Date: February 19, 2019

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