

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' MOTION FOR
A PRELIMINARY
INJUNCTION**

FILED
SEP 30 PM 2:09

TABLE OF CONTENTS

	Page
INTRODUCTION	1
FACTUAL BACKGROUND.....	2
A. Federal Courts Strike Down the 2011 Plan as an Illegal Racial Gerrymander	2
B. Legislative Defendants Create the 2016 Plan with the Explicit Partisan Goal of Guaranteeing a 10-3 Republican Advantage in Congressional Seats.....	4
C. The 2016 Plan Achieves Its Intended Effect of Propelling Ten Republican Congressional Candidates to Electoral Victory Every Two Years.....	11
D. The 2016 Plan Packs and Cracks Democratic Voters in Every District	13
E. The U.S. Supreme Court Holds that Partisan Gerrymandering Claims Are Left to State Courts Applying State Constitutions.....	27
F. A Three-Judge Panel of the Superior Court Strikes Down North Carolina’s State Legislative Maps Under the North Carolina Constitution.....	28
G. The 2016 Plan Harms Plaintiffs and Other Democratic Voters	29
ARGUMENT.....	30
I. Legal Standard.....	30
II. Plaintiffs Are Likely To Succeed on the Merits of their Claims that the 2016 Plan Violates the North Carolina Constitution	32
A. The 2016 Plan Violates North Carolina’s Free Elections Clause.....	32
B. The 2016 Plan Violates North Carolina’s Equal Protection Clause	35
C. The 2016 Plan Violates North Carolina’s Freedom of Speech and Assembly Clauses	38
1. The 2016 Plan Unconstitutionally Discriminates Against Protected Expression and Association	39
2. The 2016 Plan Unconstitutionally Retaliates Against Protected Expression and Association	42
D. All Plaintiffs Have Established a Likelihood of Standing	43
III. Plaintiffs Are Likely To Suffer Irreparable Harm Absent a Preliminary Injunction	46
IV. There Is Adequate Time to Implement a Remedy Before the 2020 Primaries	48
V. The Balance of Equities Strongly Favors a Preliminary Injunction.....	49
CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A.E.P. Indus., Inc. v. McClure</i> , 308 N.C. 393, 302 S.E.2d 754 (1983)	30, 50
<i>Action NC v. Strach</i> , 216 F. Supp. 3d 597 (M.D.N.C. 2016)	44
<i>Anderson v. Town of Waynesville</i> , 203 N.C. 37, 164 S.E. 583 (1932)	30, 31
<i>Auto. Dealer Res., Inc. v. Occidental Life Ins. Co. of N.C.</i> , 15 N.C. App. 634, 190 S.E.2d 729 (1972)	31, 46
<i>Bd. of Light & Water Comm’rs of City of Concord v. Parkwood Sanitary Dist.</i> , 49 N.C. App. 421, 271 S.E.2d 402 (1980)	31
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	40
<i>Common Cause v. Lewis</i> , 358 F. Supp. 3d 505 (E.D.N.C. 2019)	2, 31, 32
<i>Common Cause v. Rucho</i> , 279 F. Supp. 3d 587 (M.D.N.C. 2018)	27
<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017)	47
<i>Council of Alternative Political Parties v. Hooks</i> , 121 F.3d 876 (3d Cir. 1997)	47
<i>Davis v. New Zion Baptist Church</i> , 811 S.E.2d 725 (N.C. Ct. App. 2018)	43, 44
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	46
<i>Erfer v. Commonwealth</i> , 794 A.2d 325 (Pa. 2002)	46
<i>Goldston v. State</i> , 361 N.C. 26, 637 S.E.2d 876 (2006)	43, 44

<i>Harris v. McCrory</i> , 159 F. Supp. 3d 600 (M.D.N.C. 2016).....	3, 5, 47, 50
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	46
<i>Libertarian Party of N.C. v. State</i> , 365 N.C. 41, 707 S.E.2d 199 (2011)	39
<i>Mangum v. Raleigh Bd. of Adjustment</i> , 362 N.C. 640, 669 S.E.2d 279 (2008)	44
<i>McDonald v. Morrow</i> , 119 N.C. 666, 26 S.E. 132 (1896).....	50
<i>Roberts v. Madison Cty. Realtors Ass’n, Inc.</i> , 344 N.C. 394, 474 S.E.2d 783 (1996)	31
<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019)	27, 28, 32, 36
<i>State v. Bishop</i> , 368 N.C. 869, 787 S.E.2d 814 (2016)	39
<i>State v. Petersilie</i> , 334 N.C. 169, 432 S.E.2d 832 (1993)	42, 50
<i>Staton v. Russell</i> , 151 N.C. App. 1, 565 S.E.2d 103 (2002)	50
<i>Stephenson v. Bartlett</i> , 355 N.C. 354, 562 S.E.2d 377 (2002)	35, 49
<i>Triangle Leasing Co. v. McMahon</i> , 327 N.C. 224, 393 S.E.2d 854 (1990)	30, 46
Statutes and Rules	
N.C. Gen. Stat. § 1-485	1
N.C. Gen. Stat. § 163A-742.....	49
N.C. R. Civ. P. 65	1
N.C. R. Civ. P. 65(c)	50
N.C. R. Evid. 201(b)	11

Pursuant N.C. R. Civ. P. 65 and N.C. Gen. Stat. § 1-485, Plaintiffs hereby move for a preliminary injunction (1) barring Defendants from administering, preparing for, or moving forward with the 2020 primary and general elections for the U.S. House of Representatives using the current congressional redistricting plan; and (2) setting forth a remedial process to create a new plan that complies with the North Carolina Constitution, including a court-ordered remedial plan if the North Carolina General Assembly fails timely to enact a new plan comporting with the North Carolina Constitution. In support of this motion, Plaintiffs state as follows:

INTRODUCTION

This is a straightforward case. No discovery or extensive expert analysis is needed for this Court to issue a preliminary injunction. The Court can and should enjoin North Carolina's 2016 congressional redistricting plan (the "2016 Plan") based solely on the official legislative criteria for creation of the plan and the admissions of Legislative Defendants and their mapmaker, Dr. Thomas Hofeller. Legislative Defendants freely admitted during the 2016 redistricting process that they were seeking to predetermine congressional election outcomes. They adopted "Partisan Advantage" as an official criterion, directing that the districts be drawn to produce a congressional delegation of "10 Republicans and 3 Democrats." Representative Lewis said that this was the maximum gerrymander possible, and that he was drawing the districts this way because he believes the viewpoints of Democratic voters are worse "for the country." Sure enough, just as Legislative Defendants and Dr. Hofeller intended, Republicans have won 10 of 13 seats in both elections under the 2016 Plan, including in 2018 when Democratic congressional candidates won a majority of the two-party statewide vote after accounting for an uncontested race. All of the relevant facts in this case are incontrovertible and undisputed.

The law is as clear as the facts. In *Common Cause v. Lewis*, a unanimous three-judge panel of this Court held that “the constitutional rights of North Carolina citizens are infringed when the General Assembly ... draws district maps with a predominant intent to favor voters aligned with one political party at the expense of other voters.” 18-CVS-014001, slip. op. at 6 (N.C. Sup. Ct. Sept. 3, 2019). Irrespective of federal law, partisan gerrymandering violates the North Carolina Constitution’s Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. *Id.* at 9, 307-31. The 2016 Plan is an extreme partisan gerrymander that unquestionably violates the North Carolina Constitution under *Common Cause*.

While this Court could push back the March 2020 congressional primaries, the Court avoid that step by proceeding expeditiously. In particular, the Court can resolve this preliminary injunction motion and, if it is granted, oversee a remedial process that will conclude with the final adoption of a remedial plan in late November, which is adequate time for the State Board of Elections to use the remedial plan in the March 2020 primaries. The General Assembly recently adopted two remedial plans for 77 state House and Senate districts over just an 8-day period. The remedial process in this case will involve just one plan with only 13 districts. There is ample time to brief and decide this motion, allow the General Assembly two weeks to draw a new plan, and review their remedial plan with the assistance of a referee.

North Carolinians have voted in unconstitutional congressional districts in every election this decade. They should not be forced to do so again. This Court should issue a preliminary injunction enjoining the 2016 Plan and ordering a new, fair plan for the 2020 elections.

FACTUAL BACKGROUND

A. Federal Courts Strike Down the 2011 Plan as an Illegal Racial Gerrymander

“In the 2010 elections, as a part of a national Republican effort to flip state legislative chambers in order to gain control of redistricting after the 2010 Census, Republicans won

majorities in the North Carolina House of Representatives and the North Carolina Senate for the first time since 1870.” *Common Cause*, 18-CVS-014001, slip op. FOF ¶ 1. With their newfound control of both chambers of the General Assembly, Republican legislative leaders set out in 2011 to redraw the boundaries of the State’s 13 congressional districts. As senior chairs of the House and Senate Redistricting Committees, Legislative Defendant Representative David Lewis and Senator Robert Rucho oversaw the drawing of the 2011 congressional redistricting plan (the “2011 Plan”). Decl. of Elisabeth S. Theodore (“Theodore Decl.”) Ex. B, Deposition of Representative David Lewis (“Lewis Dep.”) at 14:15-15:24, *Common Cause v. Rucho*, No. 16-cv-1026 (M.D.N.C. Jan. 26, 2017). They engaged Dr. Thomas Hofeller to draw the plan. Theodore Decl. Ex. A, Deposition of Thomas B. Hofeller (“Hofeller Dep.”) at 123:8-23, *Rucho*, No. 16-cv-1026 (M.D.N.C. Jan. 24, 2017).

On February 5, 2016, a three-judge federal district court struck down the 2011 Plan as racially gerrymandered in violation of the Fourteenth Amendment’s Equal Protection Clause. *See Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). In defense of the 2011 Plan, the State contended that, rather being than a racial gerrymander, the 2011 Plan was “‘strictly’ [a] political gerrymander.” *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017). In affirming the three-judge panel’s ruling, the U.S. Supreme Court noted that the State’s “sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics.” *Id.* at 1455 n.7.

North Carolina conducted two congressional elections using the 2011 Plan before it was struck down. The plan’s unconstitutional racial gerrymander resulted in the election of 9 Republicans and 4 Democrats in 2012, and 10 Republican and 3 Democrats in 2014.

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

Following the decision in *Harris*, the General Assembly set out in 2016 to draw a new congressional plan. With Republicans at that time holding supermajority control of both chambers, Representative Lewis and Senator Rucho again took charge of the mapmaking process and again engaged Dr. Hofeller to draw the remedial plan. On February 9, 2016, in a meeting at Dr. Hofeller's home, Representative Lewis and Senator Rucho told Dr. Hofeller to create the new districts using political data, including precinct-level election results from statewide elections dating back to 2008. *See* Hofeller Dep. at 178:14-19, 180:10-181:5; Lewis Dep. at 38:15-40:4, 49:3-7, 52:9-53:5, 55:1-7, 60:1-8; Theodore Decl. Ex. J, Deposition of Senator Robert A. Rucho ("Rucho Dep.") at 31:16-32:13, 33:6-20, 35:16-21, 36:17-37:8, *Rucho*, No. 16-cv-1026 (M.D.N.C. Jan. 25, 2017). Specifically, they instructed Dr. Hofeller "to create a map that was likely to elect 10 Republicans and 3 Democrats." *See* Hofeller Dep. at 175:19-23, 178:14-20, 188:19-190:2.

Dr. Hofeller admitted that he sought to achieve Legislative Defendants' partisan objectives by drawing Districts 1, 4, and 12 to be "predominantly Democratic districts." Hofeller Dep. at 192:10-16. With respect to the 10 remaining districts, Dr. Hofeller "assign[ed] voters to the districts ... based on their voting history" in order to make all 10 of these districts "Republican opportunity-to-elect districts." Hofeller Dep. at 128:22-129:2.

Dr. Hofeller carried out this gerrymandering through a partisanship formula he created that scored the partisan performance of every voting tabulation district (VTD) in North Carolina. His partisanship formula measured the average Democratic and Republican vote share in each VTD across seven statewide elections from 2008 to 2014. Hofeller Dep. at 212:16-215:7; Theodore Decl. Ex. H, Second Deposition of Thomas Hofeller ("Hofeller Dep. II") at 260:18-

267:17, *Rucho*, No. 16-cv-1026 (M.D.N.C. Feb. 10, 2017); *see* Theodore Decl. Ex. G, Hofeller Dep. II Ex. 42 (Dr. Hofeller’s partisanship formula). Dr. Hofeller testified that he used the averaged results from these seven elections “to get a pretty good cross section of what the past vote had been,” Hofeller Dep. at 212:16-213:9, and “[t]o give [him] an indication of the two-party partisan characteristics of VTDs,” Hofeller Dep. II at 266:24-267:6. He believed that the formula would give him useful information regarding the “partisan characteristics” of the VTDs, because individual VTDs “tend to carry the same characteristics through a string of elections” in that they “line up from one end of the ... political spectrum to the other in roughly the same order.” *Id.* at 274:1-16. Dr. Hofeller had previously testified that “he had drawn numerous plans in the state of North Carolina over decades,” and in his experience, “the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it.” Theodore Decl. Ex. L, Trial Testimony of Thomas Hofeller (“Hofeller Testimony”) at 525:6-10, *Harris v. McCrory*, No. 13-cv-949 (M.D.N.C. Oct. 14, 2015), *aff’d by Cooper*, 137 S. Ct. 1455; *see* Hofeller Dep. at 149:5-18. “So once a precinct is found to be a strong Democratic precinct,” Dr. Hofeller explained, “it’s probably going to act as a strong Democratic precinct in every subsequent election. The same would be true for Republican precincts.” Hofeller Testimony at 525:14-17.

Dr. Hofeller testified that he then used this formula reflecting “past voting behavior” to “assign[] VTDs to various congressional districts in drafting the 2016 plan.” Hofeller Dep. at 132:14-18, 212:16-215:7; *see* Hofeller Dep. II at 267:7-17 (Dr. Hofeller testifying that he “used this [partisanship] formula” in deciding “where [he] would put the lines for districts”). More specifically, working in Mapitude, Dr. Hofeller color-coded VTDs based on their partisan performance and assigned VTDs to districts based on this partisan color-coding. Hofeller Dep.

at 212:16-215:7, Hofeller Dep. II at 260:18-267:17. In other words, he “us[ed] this formula to create a [colored] thematic to show a percentage of [the] Republican vote” share in each VTD. Hofeller Dep. II at 271:11-273:3. Dr. Hofeller used a “rainbow” color scheme to display partisanship in Maptitude based on his formula. *Id.* at 270:7-9. He testified that he “satisf[ied] the legislature’s desire to obtain a partisan advantage” by using the “VTD thematic.” *Id.* at 281:7-11. In addition to assigning VTDs to districts based on partisanship, Dr. Hofeller used his partisanship formula to assess the partisan performance of draft plans as a whole. Hofeller Dep. II at 282:1-7.

Dr. Hofeller testified that he advised Representative Lewis of the projected partisan performance of districts for which the partisan result was not “really obvious.” *Id.* at 290:17-25. Representative Lewis testified that “[n]early every time” he reviewed Dr. Hofeller’s draft plans, he assessed the plans’ partisan performance using the results from North Carolina’s 2014 Senate race, because this election was “in [his] mind the closest political race with equally matched candidates who spent about the same amount of money.” Lewis Dep. at 63:9-64:17.

Representative Lewis and Dr. Hofeller admitted that Dr. Hofeller had nearly finished the final plan before the Joint Redistricting Committee ever met, and that Dr. Hofeller pre-drew the plan with partisan intent. Dr. Hofeller recalled that “the plan was actually brought into a form to be presented to the legislature long before [February] 16th.” Hofeller Dep. at 175:10-18.

From roughly February 10 to 13, 2016, Representative Lewis and Senator Rucho met with Dr. Hofeller to review draft plans. Lewis Dep. at 58:13-61:17, 73:7-74:7. Those draft plans were “near-final versions of the 2016 map” that Representative Lewis intended to submit to the General Assembly for approval. *Id.* at 77:7-20. Dr. Hofeller and Representative Lewis agreed

on a draft plan on February 12 or 13, 2016, *id.*, and that plan was “ultimately adopted with a minor distinction for an incumbency issue.” *Id.* at 77:21-24.

On February 12, 2016, after the 2016 Plan was already nearly finished, the Republican legislative leaders appointed Representative Lewis and Senator Rucho as co-chairs of the newly formed Joint Select Committee on Redistricting (the “Joint Committee”). The Joint Committee consisted of 24 Republicans and 12 Democrats. *See* Theodore Decl. Ex. E, Feb. 17, 2016 Tr. of Proceedings, Joint Comm. on Redistricting (“Feb. 17 Joint Comm. Tr.”), at 3:9-6:17.

At a meeting on February 16, 2016, the Joint Committee adopted a set of criteria (the “Adopted Criteria”) to govern creation of the 2016 Plan. Theodore Decl. Ex. D, Feb. 16, 2016 Tr. of Proceedings, Joint Comm. on Redistricting (“Feb. 16 Joint Comm. Tr.”), at 14:16-98:20. Most notably, the Joint Committee adopted “Partisan Advantage” as an official criterion, explicitly directing that the new plan preserve Republicans’ existing 10-3 advantage in North Carolina’s congressional delegation. *Id.* at 67:2-69:23. This criterion stated:

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

Theodore Decl. Ex. C, Adopted Criteria.

Representative Lewis described the “Partisan Advantage” criterion as requiring the mapmaker “to seek partisan advantage for the Republicans.” Theodore Decl. Ex. F, Feb. 19, 2016 Tr. of Proceedings, N.C. House of Representatives, Floor Session One (“Feb. 19 House Floor Tr.”), at 34:16-18. He told the Committee that he would “draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats *because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats.*” Feb. 16 Joint Comm. Tr. at 50:6-10 (emphasis

added). Representative Lewis “acknowledge[d] freely that *this would be a political gerrymander.*” *Id.* at 48:4-5 (emphasis added).

The Joint Committee adopted “Political Data” as another criterion. Feb. 16 Joint Comm. Tr. at 43:21-47:5. This criterion stated:

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

See Adopted Criteria.

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

The remaining criteria adopted by the Joint Committee were to provide for equal population, to make the districts contiguous, to eliminate the then-current configuration of District 12, to improve the compactness of the existing districts, to keep more counties and VTDs whole than the existing districts, and to avoid pairing incumbents. *See id.* at 14:16-18:3, 21:9-24:18, 91:17-94:17, 95:15-98:20; *see also* Adopted Criteria.

The Joint Committee adopted the Political Data and Partisan Advantage criteria on party-line votes. The other criteria were passed on a bipartisan basis. Representative Lewis told the Committee that “the criteria that will be available to the mapmaker ... will only be the criteria that this ... committee has adopted,” Feb. 16 Joint Comm. Tr. at 140:8-13, despite knowing that the 2016 Plan was “for the most part finished by the time the criteria were formally adopted by

the committee,” Hofeller Dep. at 177:9-14. He later emphasized that “the criteria that this committee debated and adopted ... are the criteria that were used to draw these maps.” Feb. 17 Joint Comm. Tr. at 43:4-14.

Legislative Defendants then formally engaged Dr. Hofeller, who downloaded the 2016 Plan, which he had completed several days earlier, onto a state legislative computer. *See* Lewis Dep. at 138:6-8; Hofeller Dep. at 197:22-198:17. Dr. Hofeller later testified that the 2016 Plan “conformed to the criteria” adopted by the Joint Committee, which included the criteria concerning Partisan Advantage and Political Data. Hofeller Dep. at 178:20; *see id.* at 129:10-15.

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

On February 19, 2016, the full House debated the 2016 Plan. During the debate, Representative Lewis “freely acknowledge[d] that [he] sought partisan advantage.” Feb. 19 House Floor Tr. at 31:14-17. He defended the Partisan Advantage criterion by stating: “I think electing Republicans is better than electing Democrats. So I drew this map in a way to help foster what I think is better for the country.” *Id.* at 34:21-23.

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

Theodore Decl. Ex. K, Defendants' Response to Plaintiffs' First RFAs at No. 25, *Rucho*, No. 16-cv-1026.

Senator Rucho testified that the 2016 Plan "satisfied" "all criteria," including the criteria requiring a 10-3 partisan advantage for Republicans. Rucho Dep. 193:24-194:14. In a sworn declaration submitted in the federal case, Dr. Hofeller calculated the projected partisan performance of all 13 districts under the 2016 Plan using his seven-election partisanship formula. Theodore Decl. Ex. I, Second Decl. of Thomas B. Hofeller ("Hofeller Decl.") at 9, *Rucho*, No. 16-cv-1026 (M.D.N.C. Oct. 26, 2017). He concluded that the 2016 Plan (labeled the "Contingent Plan") would result in three Democratic districts and 10 Republican districts where the Republicans had at least 53% of the vote based on his formula. *Id.* Dr. Hofeller's calculations are displayed below:

Contingent Plan	
Dist.	% Rep.
01	31.20%
02	55.63%
03	55.04%
04	37.02%
05	55.71%
06	54.41%
07	53.68%
08	54.94%
09	55.72%
10	57.95%
11	57.08%
12	36.18%
13	53.51%

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

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

In the 2016 elections, Democratic congressional candidates in North Carolina won a combined 47% of the two-party statewide vote, yet won only 3 of 13 seats (23%). *See* SBOE, Nov. 8, 2016 Available Election-related Files (“2016 Results”), <https://bit.ly/2nM2NIS>.¹

The results were even more striking in 2018. Despite the blue wave that year, Democrats were unable to flip a single seat. In fact, adjusting for a district that a Republican won in an uncontested race in 2018, Democrats won a *majority* of the two-party statewide vote in the 2018 congressional elections, but still won only the same 3 of 13 seats. *See* SBOE, Nov. 6, 2018 Available Election-related Files (“2018 Results”), <https://bit.ly/2mW8CNx>.

The results of the individual races in 2018 reveal how Legislative Defendants achieved this feat. The following table shows each party’s share of the two-party vote in the districts that the party won in 2018:²

¹ All of the prior election results in this brief were calculated using the final election results posted on the State Board of Elections website. This Court can take judicial notice of this information. N.C. R. Evid. 201(b).

² Data for this table was gathered from official North Carolina SBOE election results. *See* 2018 Results. For District 9, this table uses the results of the September 2019 special elections. *See* SBOE, Sep. 10, 2019 Unofficial Local Election Results - Statewide (2019), <http://bit.ly/2nC6LgU>. To adjust for the uncontested race in District 3, this table assigns the Democratic and Republican candidates the share of the two-party vote received by the Democratic and Republican candidates in the special election held in District 3 in September 2019.

District	Democratic Vote Share	Republican Vote Share
1	69.9%	
4	75.1%	
12	73.1%	
2		52.8%
3		100.0%
5		57.0%
6		56.5%
7		56.5%
8		55.3%
9		51.0%
10		59.3%
11		60.4%
13		53.1%
Statewide Vote Share Before Adjusting for Uncontested Race	48.9%	51.1%
Statewide Vote Share After Adjusting for Uncontested Race	50.9%	49.1%
Percentage of Seats Won	23.1%	76.9%

This table illustrates the 2016 Plan's packing and cracking in action. In the three packed districts, Democrats won enormously lopsided victories, with between 69.9% and 75.1% of the vote in each district. By contrast, victorious Republican candidates won their seats by much smaller margins, with between 51.0% and 60.4% of the vote in all contested districts. The 2016 Plan thus guaranteed that Democrats would win three seats by very large margins, while Republicans would win the other ten seats by much smaller, although still comfortable, margins.

While not necessary to resolve this motion, extensive expert analysis conducted for purposes of the federal partisan gerrymandering challenge to the 2016 Plan confirms that the 2016 Plan is an intentional, extreme partisan gerrymander that dilutes Democratic votes and prevents Democratic voters from electing candidates of their choice. Dr. Jowei Chen, a professor of political science at the University of Michigan, generated thousands of nonpartisan simulated maps respecting North Carolina's political geography and traditional redistricting

principles including equal population, contiguity and compactness, and avoiding splitting counties and VTDs. Based on this simulation methodology, Dr. Chen concluded that the 2016 Plan is extraordinarily anomalous and heavily gerrymandered, and that the gerrymander caused a shift of three to five seats in favor of the Republican Party. *See* Expert Report of Jowei Chen, *Rucho*, No. 16-cv-1026 (M.D.N.C. Mar. 1, 2017).³ Dr. Jonathan Mattingly, the chairman of the Duke Mathematics Department, generated over 24,000 nonpartisan simulated maps respecting North Carolina’s political geography and traditional redistricting principles including equal population, contiguity and compactness, and avoiding splitting counties and VTDs. Based on this simulation methodology, Dr. Mattingly likewise concluded that the 2016 Plan is extraordinarily anomalous and heavily gerrymandered, and that the gerrymander caused several seats to shift in favor of the Republican Party. *See* Declaration and Expert Report of Jonathan C. Mattingly, *Rucho*, No. 16-cv-1026 (M.D.N.C. Mar. 6, 2017).⁴

D. The 2016 Plan Packs and Cracks Democratic Voters in Every District

The 2016 Plan meticulously packs and cracks Democratic voters in each and every district—without exception.

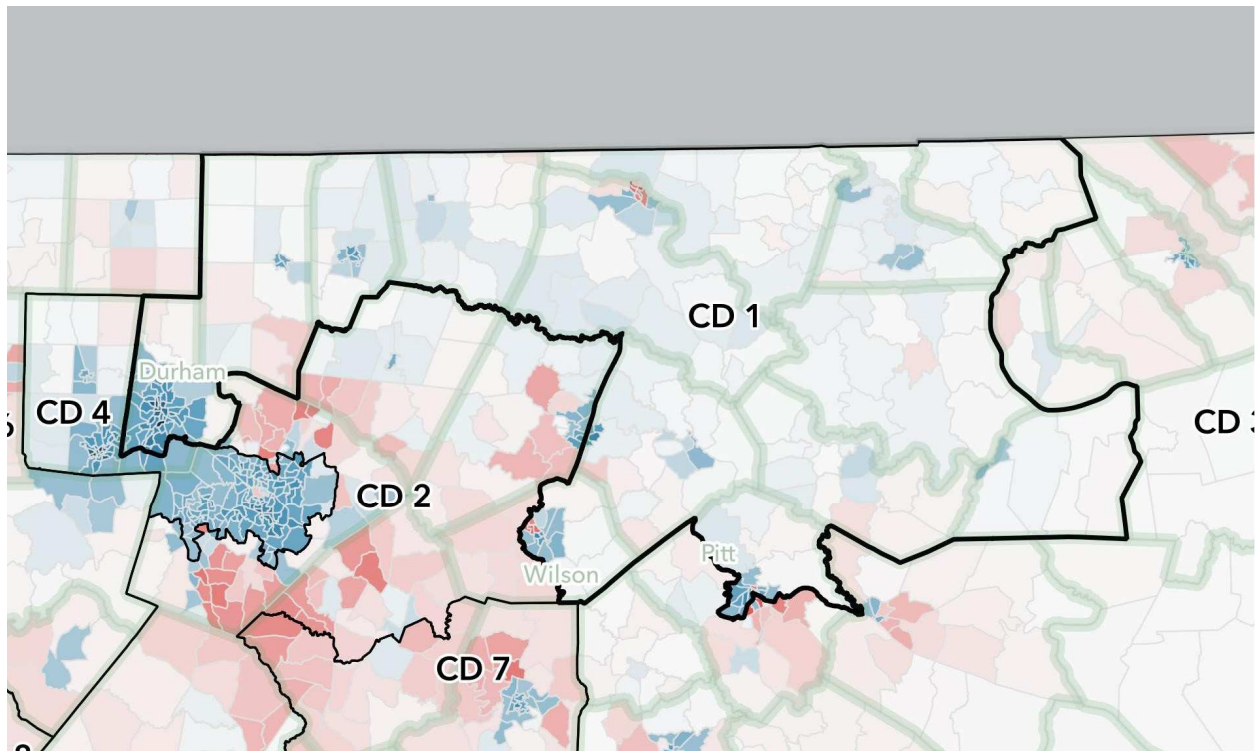
Congressional District 1

District 1 is a packed Democratic district that stitches together the heavily Democratic areas of Durham, Wilson, and Pitt Counties with a handful of rural Democratic counties in the northeastern portion of the State. Dr. Hofeller admitted that he intentionally drew District 1 to be “predominantly Democratic.” Hofeller Dep. at 192:7-16.

³ Submitted as LDTX244 in *Common Cause v. Lewis*.

⁴ <http://s10294.pcdn.co/wp-content/uploads/2016/05/Expert-Report-of-Jonathan-Mattingly.pdf>.

The following image (and others below) shows the district's boundaries and the partisanship of its VTDs using the results of the 2016 North Carolina Attorney General race, with darker blue shading representing larger Democratic vote margins and darker red shading indicating larger Republican vote margins (both normalized by acreage):⁵



Esselstyn Decl. at 3.

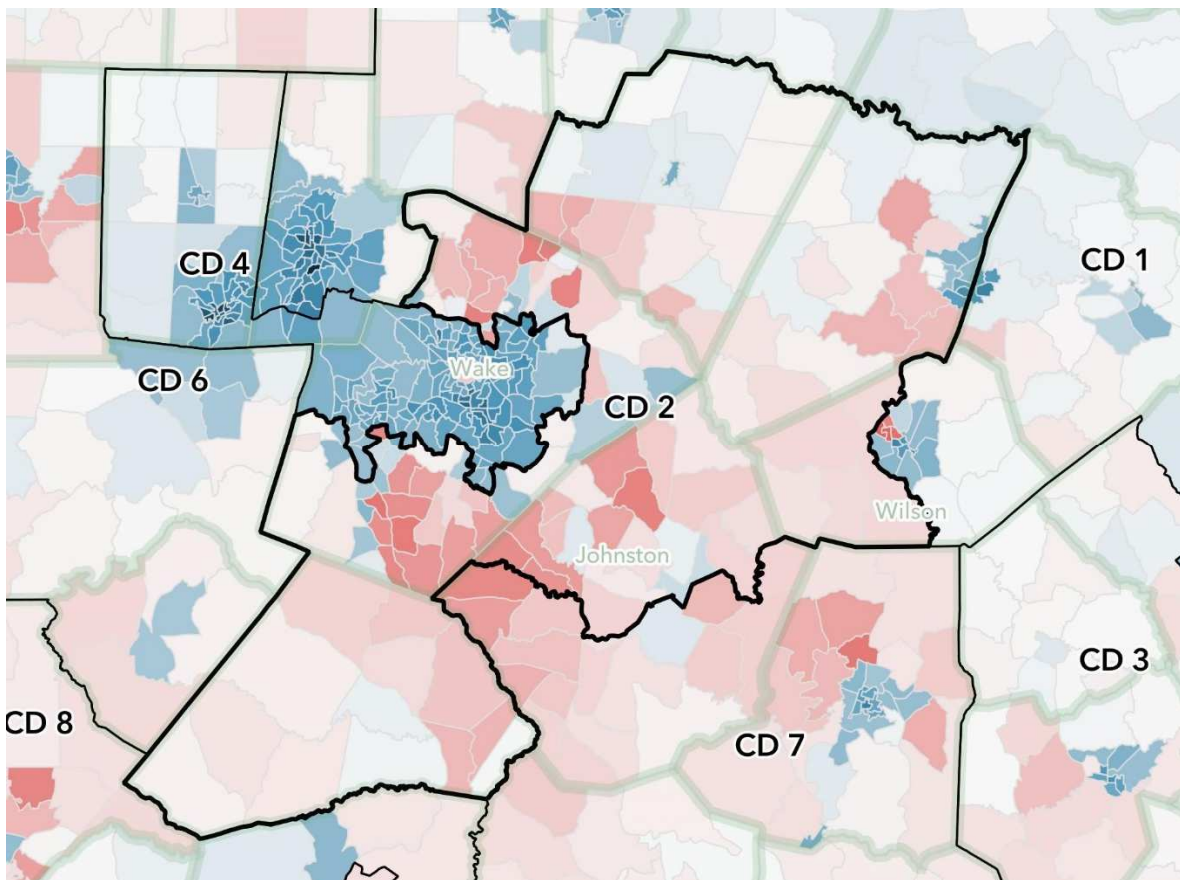
The 2016 Plan divides Pitt County for partisan ends, placing Pitt County's most Democratic VTDs in District 1 to the north, while putting the county's more moderate and Republican VTDs in District 3 to the south. It does the same to Wilson County. In dividing Wilson County, the plan builds a fence between Democratic and Republican voters, nearly straight down the middle of the county, putting the Democratic VTDs in District 1 to the east and the Republican VTDs in District 2 to the west.

⁵ Plaintiffs' expert, Blake Esselstyn, created all of the images in this brief using map data and election results obtained from the North Carolina General Assembly. See Decl. of Blake Esselstyn ("Esselstyn Decl.") ¶ 6.

The 2016 Plan's packing of Democratic voters in District 1 has produced an overwhelmingly Democratic district. In 2016 and 2018, the Democratic candidate won District 1 with 70.3% and 69.9% of the vote, respectively.

Congressional District 2

District 2 cracks Democratic voters. It carefully avoids the most Democratic areas of Wake County and Wilson County, instead picking up only those counties' moderate and Republican-leaning VTDs. The map further cracks the Democratic voters of Johnston County, splitting them between District 2 to the north and District 7 to the south.

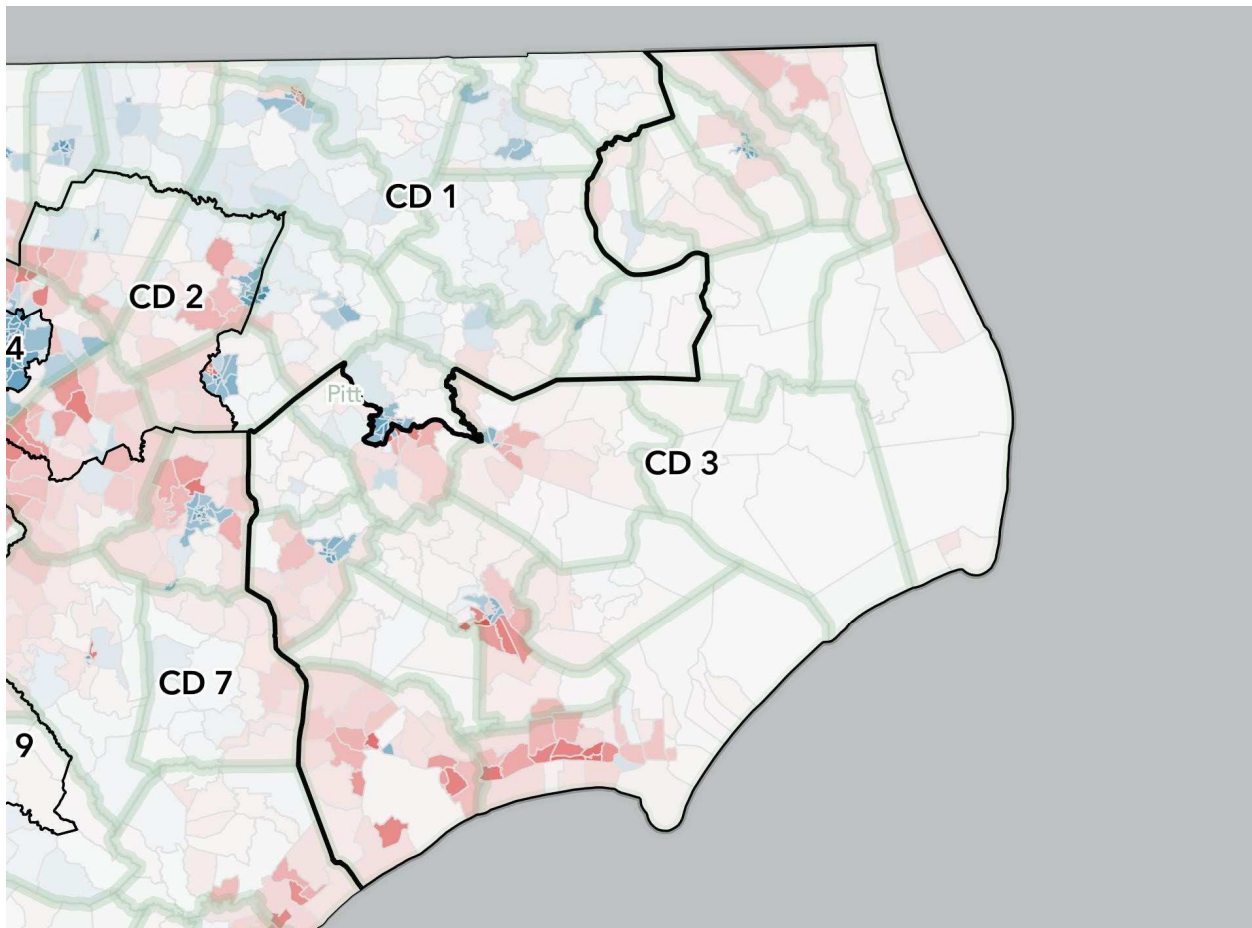


Esselstyn Decl. at 4.

Legislative Defendants' extreme gerrymandering of this district has ensured that it remains a Republican seat. The Republican candidate won District 2 with 56.7% and 52.8% of the vote in 2016 and 2018, respectively.

Congressional District 3

Legislative Defendants likewise engineered District 3 to be a safe Republican seat. Whereas District 1 was the recipient of all of Pitt County's most Democratic VTDs, District 3 contains all of Pitt County's most Republican VTDs. The district further avoids a handful of moderate and Democratic counties in eastern North Carolina.

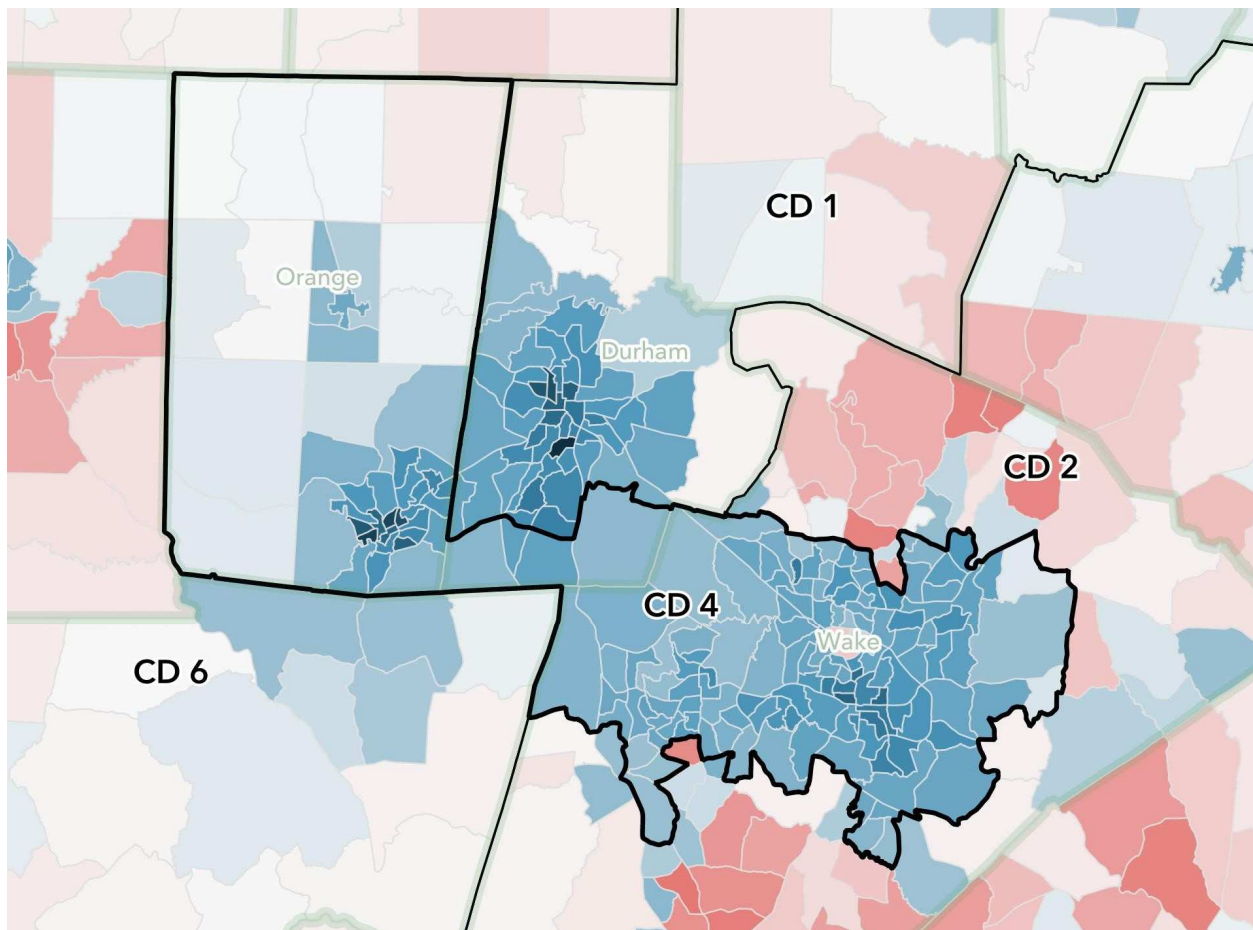


Esselstyn Decl. at 5.

District 3 has performed as designed. The Republican candidate won 67.2% of the vote in 2016, and won uncontested in 2018.

Congressional District 4

District 4 is a clear example of the subordination of traditional districting principles to partisan ends. Dr. Hofeller admitted that he intentionally drew District 4 to be “predominantly Democratic.” Hofeller Dep. at 192:7-16. To achieve maximum packing of Democratic voters, District 4 connects Wake County’s most Democratic VTDs with the extremely Democratic VTDs in southern Durham County as well as the entirety of Democratic-leaning Orange County. This allowed Wake County’s more Republican VTDs to be put into District 2 to ensure a Republican seat.

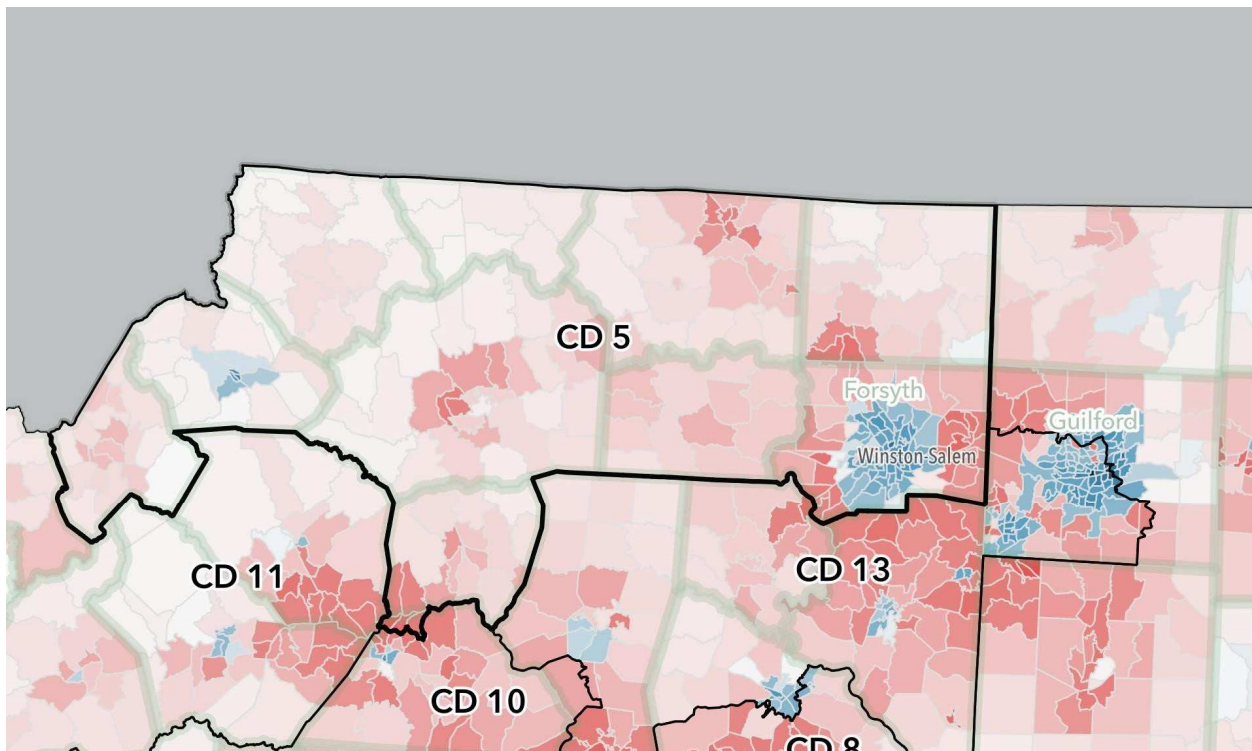


Esselstyn Decl. at 6.

The result of this packing is that the Democratic candidate has won District 4 by lopsided margins, with 68.2% and 75.1% of the vote in 2016 and 2018, respectively.

Congressional District 5

Legislative Defendants constructed District 5 to minimize the voting power of Democratic voters in Forsyth County. The 2016 Plan connects Winston-Salem's predominantly Democratic voters with far-flung rural communities to the west.



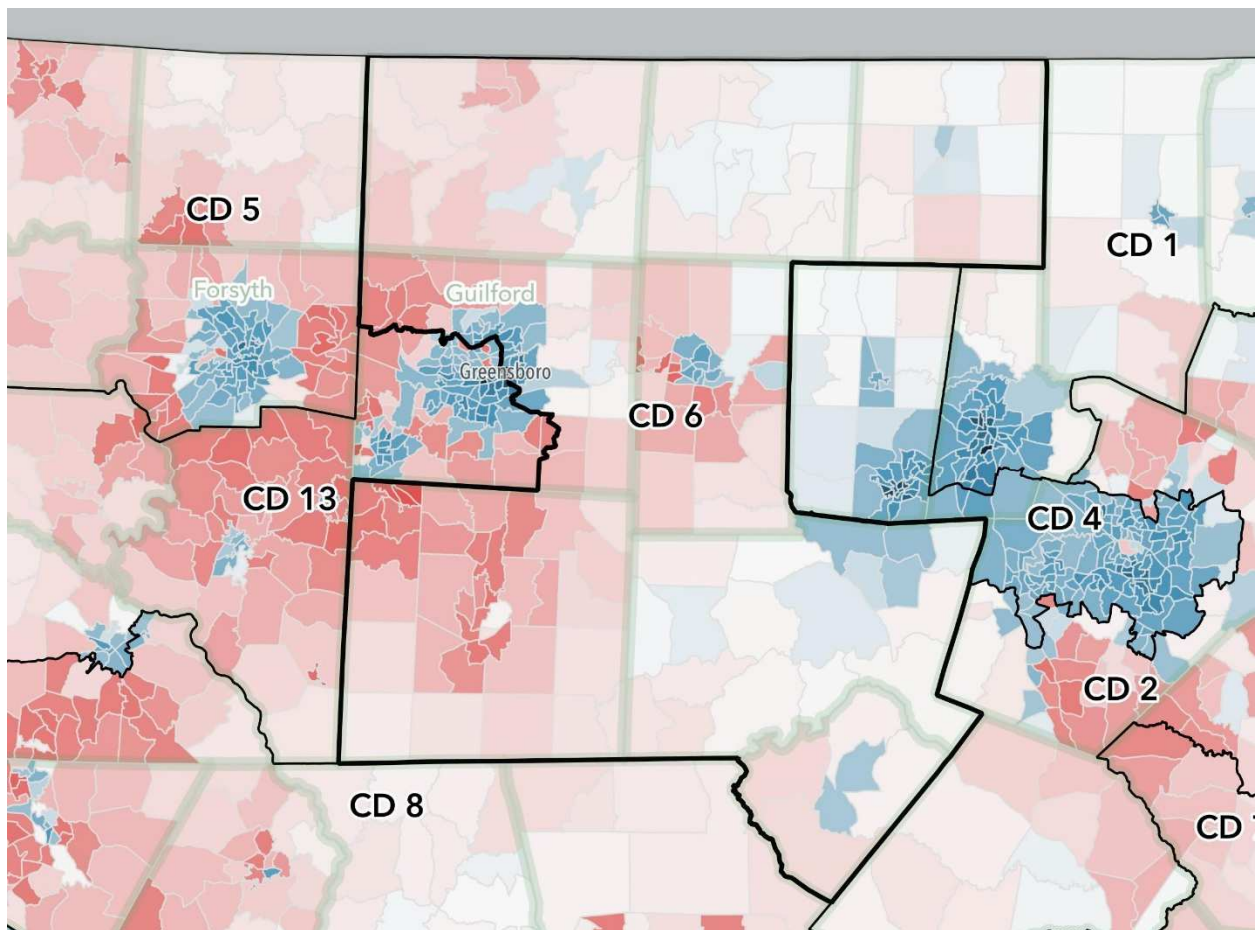
Esselstyn Decl. at 7.

Legislative Defendants succeeded in wasting the votes of the Democratic voters of Forsyth County. District 5 elected a Republican by comfortable margins in the 2016 and 2018 elections, with 58.4% and 57.3% of the vote, respectively.

Congressional District 6

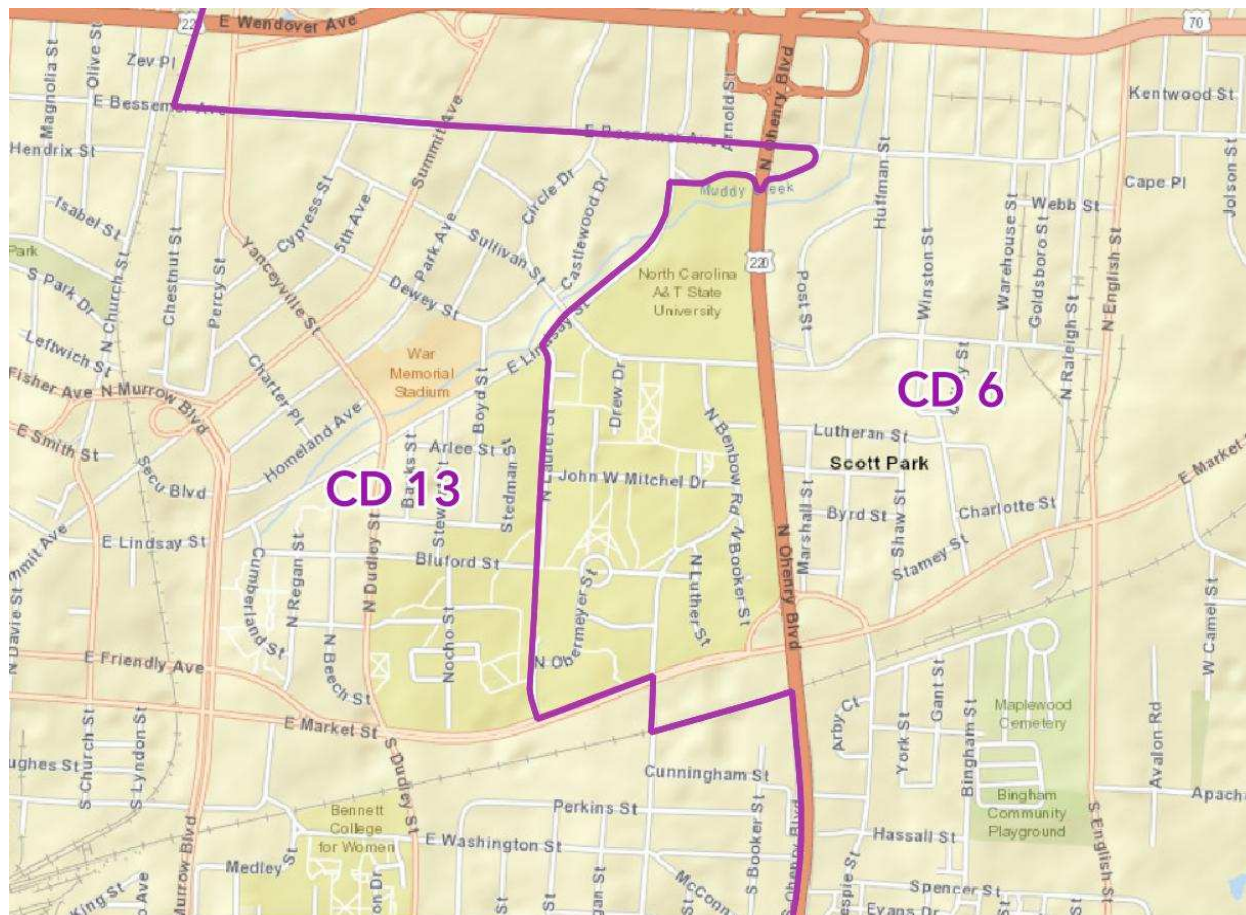
Greensboro is the third-largest city in North Carolina and home to one of the largest concentrations of Democratic voters in the State. It also fell victim to one of the most egregious examples of cracking in the 2016 Plan.

As shown in the image below, the 2016 Plan splits Greensboro—and Guilford County—and subsumes each half within a much larger concentration of Republican voters. The southwestern half of Guilford County is now part of District 13 and the other half belongs to District 6, cracking that causes both districts to be safe Republican seats. As noted previously, the map also separates the Democratic voters in both of these districts from Forsyth County's Democratic voters in District 5.



Esselstyn Decl. at 8.

In cracking Greensboro's Democratic voters, Legislative Defendants split the campus of North Carolina A&T State University, which is the largest historically black university in the country. The district boundary cuts straight through the campus, placing the west side of campus in District 13 and the east side of campus in District 6, as shown below:



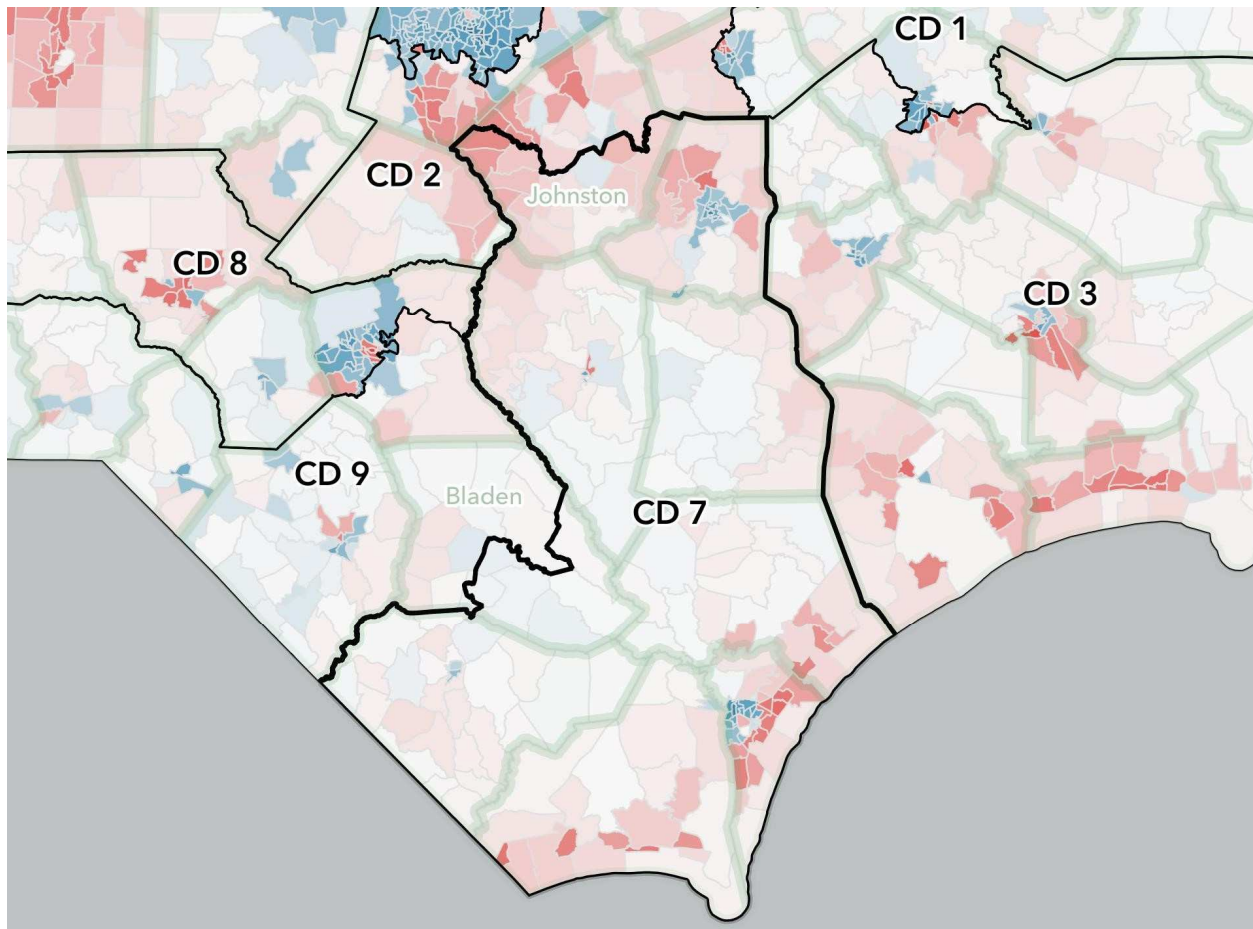
Esselstyn Decl. at 16.

As a result of this cracking, the Republican candidate has won District 6 by comfortable margins, with 59.2% and 56.5% of the vote in 2016 and 2018, respectively.

Congressional District 7

The 2016 Plan cracks Democratic voters in District 7. As already explained, at the north end of District 7, the map cracks Johnston County's Democratic voters between Districts 7 and

2. Likewise, on the west side of District 7, the map cracks Democratic voters in Bladen County, splitting the most heavily Democratic VTDs between Districts 7 and 9.



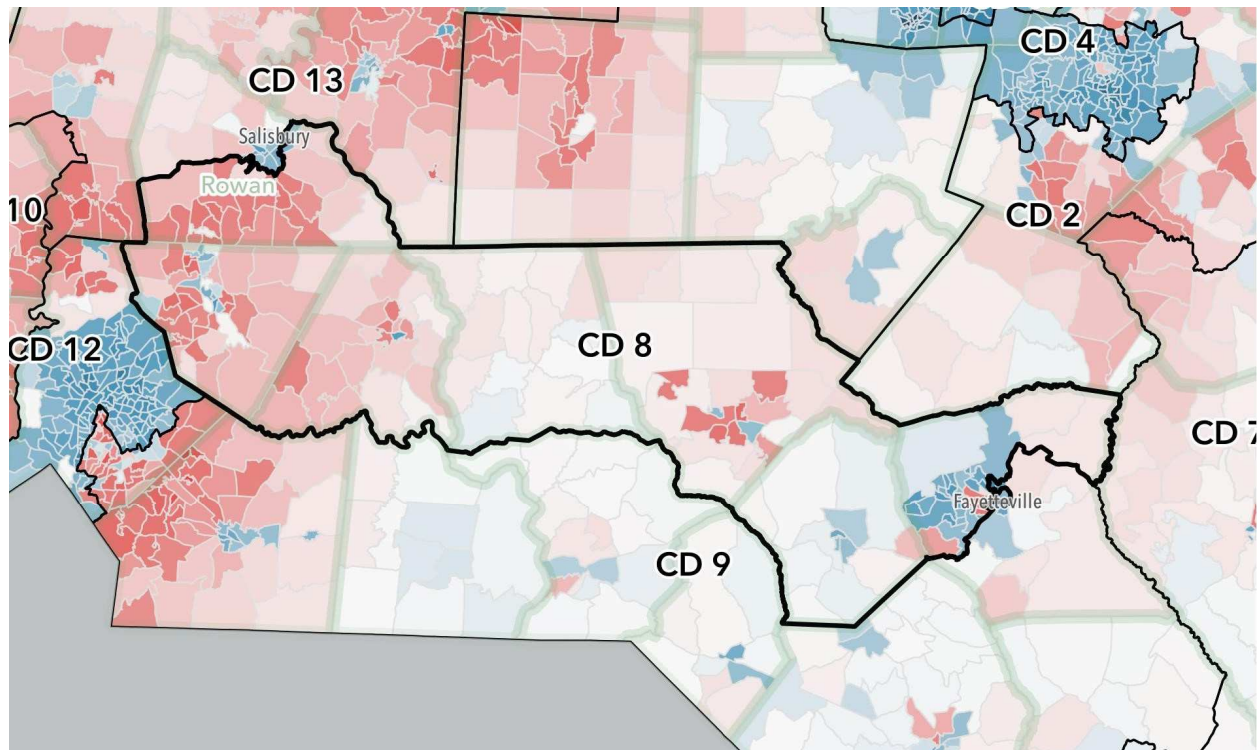
Esselstyn Decl. at 9.

As a result of this cracking, District 7 has remained a safe Republican seat. The Republican candidate won District 7 with 60.9% and 56.5% of the vote in 2016 and 2018, respectively.

Congressional District 8

Fayetteville is North Carolina's sixth most-populous city and is heavily Democratic. The 2016 Plan cracks Fayetteville's Democratic voters nearly down the middle, placing one group in District 8 and the other in District 9. District 8 then slices to the west, picking up Republican

voters in county after county until stopping halfway through Rowan County, right before the district would hit the Democratic voters of Salisbury, who are carefully excluded from District 8 and placed into District 13 instead.



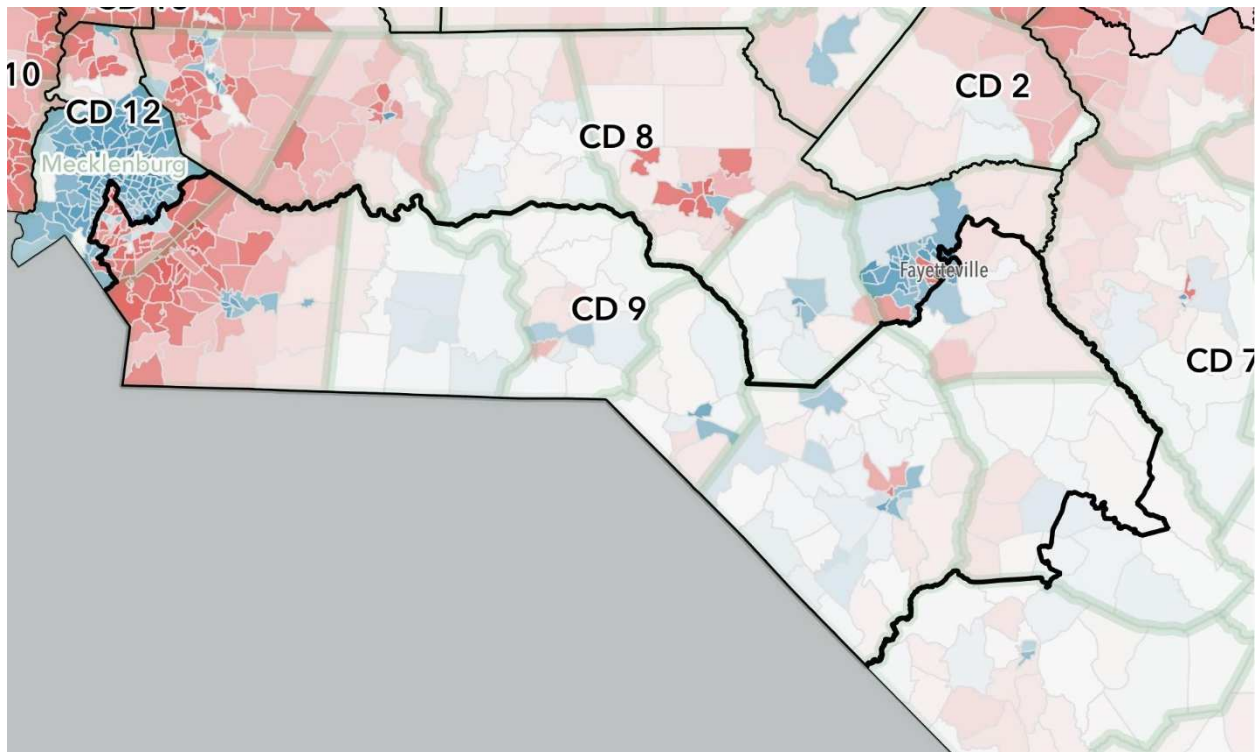
Esselstyn Decl. at 10.

As a result of this cracking, District 8 has remained a safe Republican seat. The Republican candidate won District 8 with 58.8% and 55.3% of the vote in 2016 and 2018, respectively.

Congressional District 9

District 9 is a near mirror image of District 8. District 9 contains the other half of Fayetteville’s Democratic voters and then, like District 8, stretches west to pick up Republican voters. District 9 reaches into Mecklenburg County and picks up the “pizza slice” in Mecklenburg County that contains the county’s most Republican-leaning VTDs. District 9’s

boundaries carefully exclude virtually all of Mecklenburg County's Democratic VTDs, which instead are packed into District 12.

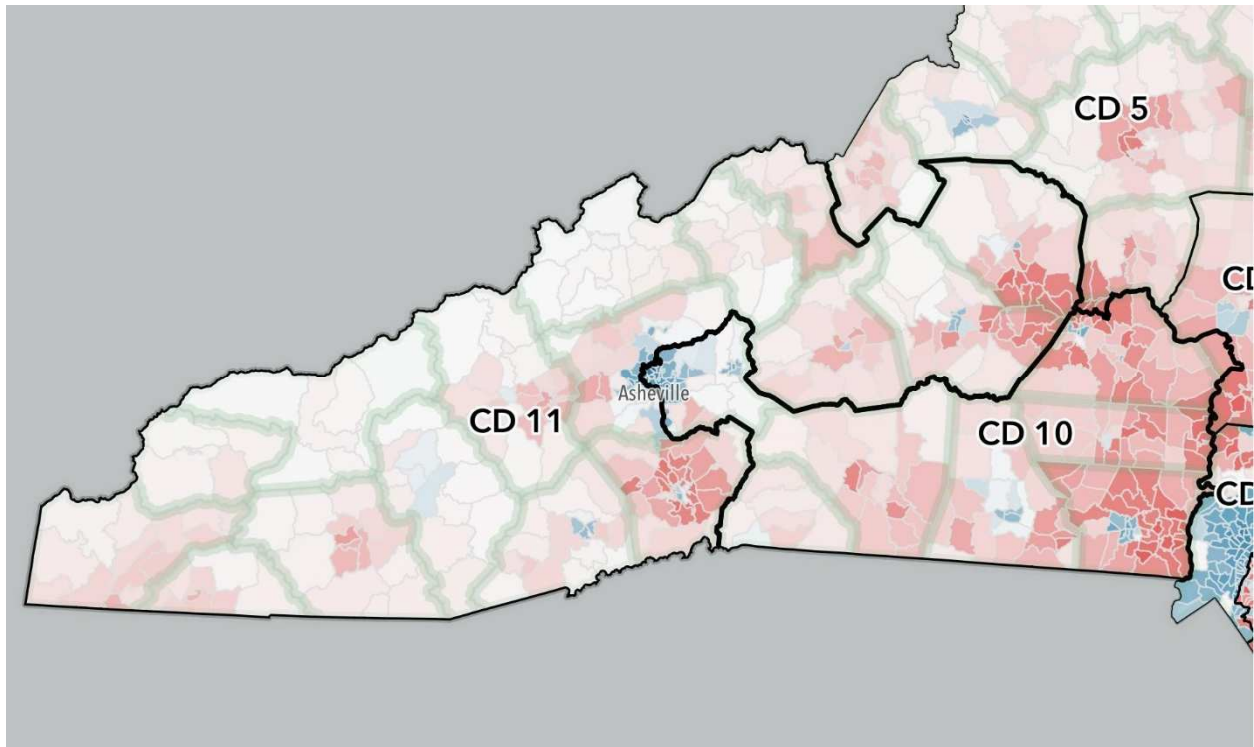


Esselstyn Decl. at 11.

In the elections under the 2016 Plan, District 9 has bent but not broken, remaining a Republican seat. Even the fact that District 9's 2018 Republican candidate was involved in a high-profile election-fraud scandal that resulted in the invalidation of the 2018 election results for the district could not counterbalance the extreme gerrymander. The Republican candidate won the September 2019 special election in District 9 with 51% of the vote.

Congressional Districts 10 and 11

The 2016 Plan egregiously cracks Asheville's Democratic voters between Districts 10 and 11 to create two safe Republican seats. This cracking dilutes the voting power of Asheville's Democratic voters and ensures that they cannot elect a candidate of their choice.



Esselstyn Decl. at 12-13.

The boundary between Districts 10 and 11 splits the campus of UNC Asheville in two, even going so far as to place students living on different sides of the same residential dormitory into different congressional districts, as shown in the image below:⁶



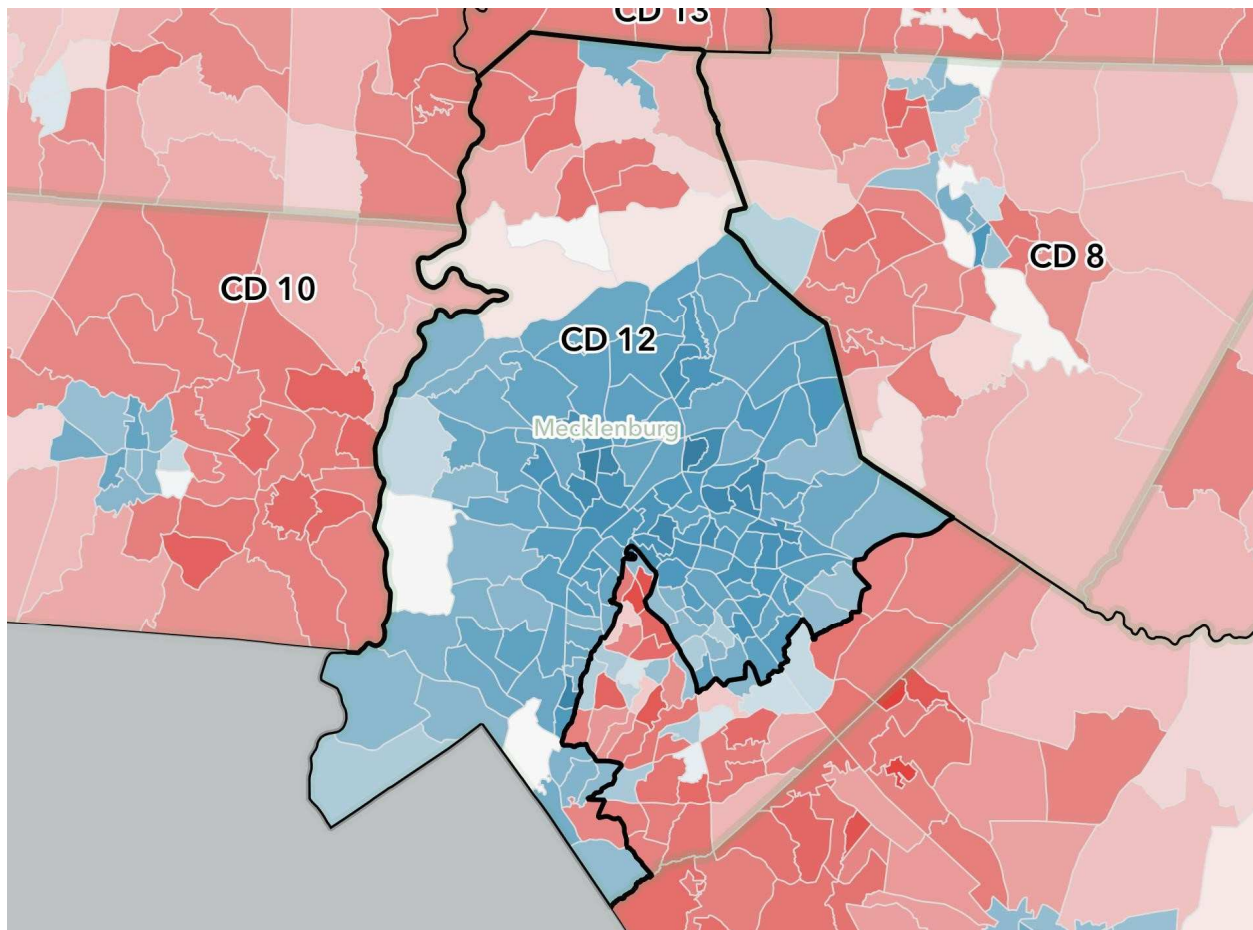
⁶ See *Two UNC Asheville Dorms Are Bisected by Gerrymandered District Boundaries*, Districks (Oct. 26, 2018), <https://blog.districks.com/2018/10/26/two-unc-asheville-dorms-are-bisected-by-gerrymandered-district-lines/>.

Esselstyn Decl. at 17.

The cracking of Asheville's Democratic voters has been successful. The Republican candidates in Districts 10 and 11 won both seats with between 58% and 63% of the vote in the 2016 and 2018 elections.

Congressional District 12

District 12 is another packed Democratic district. Dr. Hofeller admitted in sworn testimony that he intentionally drew District 12 to be "predominantly Democratic." Hofeller Dep. 192:7-16. District 12 packs all of Mecklenburg County's most Democratic VTDs, carefully excluding the Republican-leaning "pizza slice" in the southern part of Mecklenburg County to ensure that District 12 is an overwhelmingly Democratic district.

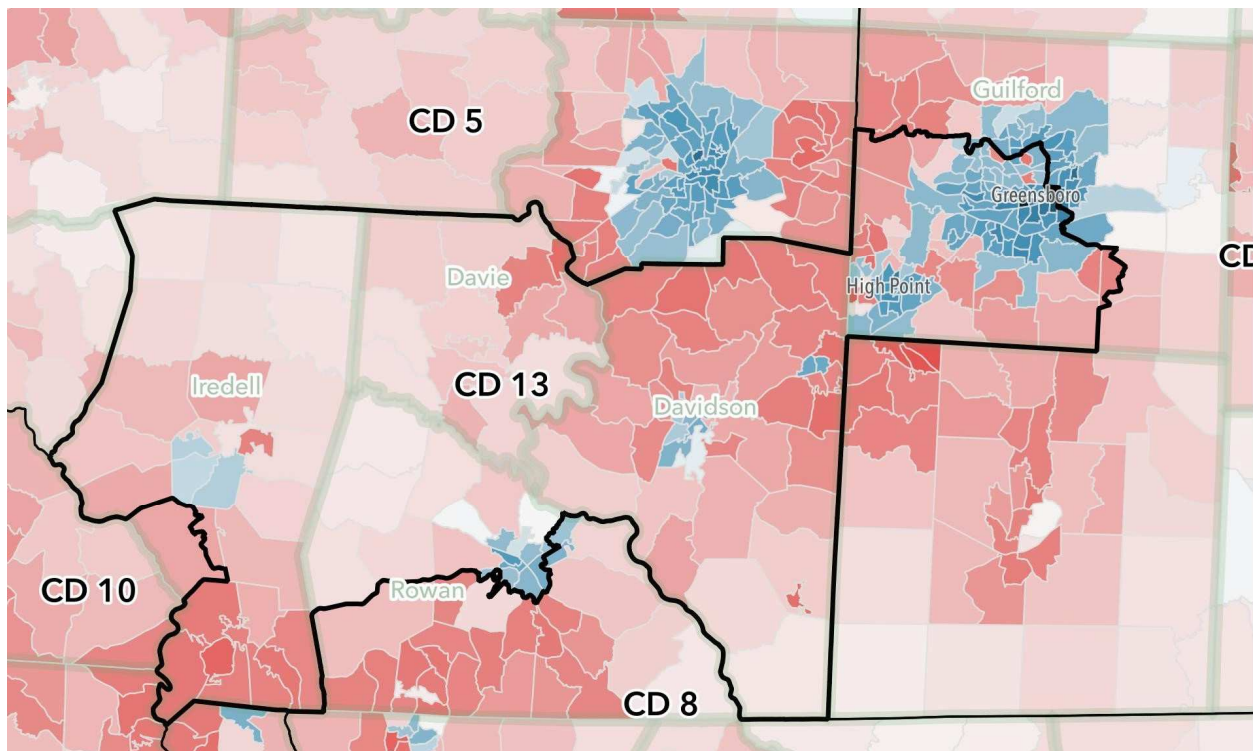


Esselstyn Decl. at 14.

As a result of this packing, the Democratic candidate won District 12 with 67.0% and 73.1% of the vote in 2016 and 2018, respectively.

Congressional District 13

District 13 contains the other cracked half of Guilford County. District 13 is a dog-shaped district that groups Guilford County's heavily Democratic voters in and around Greensboro and High Point with overwhelmingly Republican areas in Davidson, Davie, Rowan, and Iredell Counties, ensuring that Guilford County's Democratic voters cannot elect a Democrat.



Esselstyn Decl. at 15.

The Republican candidate won District 13 in 2016 and 2018 with 56.1% and 53.1% of the vote, respectively.

E. The U.S. Supreme Court Holds that Partisan Gerrymandering Claims Are Left to State Courts Applying State Constitutions

In August 2016, the North Carolina Democratic Party, Common Cause, and more than a dozen individual North Carolina voters sued Representative Lewis, Senator Rucho, and other state defendants in federal court, asserting that the 2016 Plan was a partisan gerrymander in violation of the *federal* constitution. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019).

After a four-day trial, a three-judge federal district court unanimously concluded that the General Assembly “drew and enacted the 2016 Plan with intent to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina’s congressional delegation.” *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 672 (M.D.N.C. 2018). The court further found that “the 2016 Plan achieved the General Assembly’s discriminatory partisan objective.” *Id.* The court therefore held the 2016 Plan violated the Fourteenth Amendment’s Equal Protection Clause and Article I of the U.S. Constitution. The court further held, with one dissenter, that the 2016 Plan also violated the First Amendment. *Id.* at 683.

The U.S. Supreme Court reversed, holding that partisan gerrymandering claims are not justiciable under the *federal* constitution. *Rucho*, 139 S. Ct. at 2506-07. Nonetheless, the Court observed that partisan gerrymanders like the 2016 Plan are “incompatible with democratic principles.” *Id.* And, of particular relevance here, the Court recognized that the 2016 Plan is “highly partisan, by any measure,” and a “blatant example[] of partisanship driving districting decisions.” *Id.* at 2491, 2505. Despite holding that “partisan gerrymandering claims present political questions beyond the reach of the *federal* courts,” the Court made clear that it “does not condone excessive partisan gerrymandering[,] [n]or does [its] conclusion condemn complaints about districting to echo into a void.” *Id.* at 2507 (emphasis added).

Instead, the U.S. Supreme Court noted that “[t]he States ... are actively addressing the issue on a number of fronts” under state constitutional provisions. *See id.* The Court made clear that “[p]rovisions in state statutes and *state constitutions* can provide standards and guidance for *state courts* to apply.” *Id.* (emphases added).

F. A Three-Judge Panel of the Superior Court Strikes Down North Carolina’s State Legislative Maps Under the North Carolina Constitution

On September 3, 2019, a three-judge panel of this Court unanimously invalidated North Carolina’s 2017 state House and Senate plans under the North Carolina Constitution. *See Common Cause*, slip op. at 10. The Court found that the 2017 state legislative plans “do not permit voters to freely choose their representative, but rather representatives are choosing voters based upon sophisticated partisan sorting.” *Id.*

The Court determined that the plaintiffs had standing to challenge the state legislative maps, and that their challenges were justiciable under the North Carolina Constitution. *Id.* at 292-98, 331-41. And, on the merits, the Court held that the state legislative maps were partisan gerrymanders that violated the North Carolina Constitution’s Free Elections Clause, art. I, § 10, Equal Protection Clause, art. I, § 19, and Freedom of Speech and Assembly Clauses, art. I, §§ 12, 14. *See Common Cause*, slip op. at 7-10.

The *Common Cause* Court explained that North Carolina’s 2017 state legislative plans and the 2016 Congressional Plan “arose in remarkably similar circumstances.” *Id.* at COL ¶ 18. “[B]oth the 2016 Congressional map and the 2017 legislative maps were required after a federal court declared existing maps unconstitutional; both were drawn under the direction of many of the same actors working on behalf of the Republican-controlled General Assembly; both were drawn by Dr. Thomas Hofeller; both were drawn in large part before the General Assembly’s redistricting committee met and approved redistricting criteria; and *both ... were drawn with the*

intent to maximize partisan advantage and, in fact, achieved their intended partisan effects.” Id. (emphasis added).

G. The 2016 Plan Harms Plaintiffs and Other Democratic Voters

Plaintiffs in this action are North Carolina voters from each of the State’s 13 congressional districts. Each Plaintiff consistently votes for Democratic congressional candidates. *See* Verified Compl. ¶¶ 6-19. The 2016 Plan harms Plaintiffs and other Democratic voters in North Carolina by packing and cracking them to reduce their electoral influence.

Plaintiffs Amy Clare Oseroff, John Balla, and Virginia Walters Brien reside in Districts 1, 4, and 12, respectively. *See* Verified Compl. ¶¶ 6, 9, 18. The 2016 Plan dilutes the voting power of these Plaintiffs and other Democratic voters by packing Democratic voters into these three districts. *See* Hofeller Dep. at 126:14-25, 127:1-3, 127:23-25, 128:1-6, 128:17-129:2, 192:7-16. The 2016 Plan places the remaining Plaintiffs—Rebecca Harper, Donald Rumph, Richard R. Crews, Lily Nicole Quick, Gettys Cohen, Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S. Peters, Joseph Thomas Gates, Kathleen Barnes, and David Dwight Brown—into ten cracked districts. *See* Verified Compl. ¶¶ 6-19. The 2016 Plan fractures Democratic voters across those ten districts to ensure that each district will remain reliably Republican. *See* Hofeller Dep. at 126:14-25, 127:1-3, 128:1-6, 128:17-129:2, 192:7-16.

Expert analysis by Plaintiffs’ expert Dr. Jowei Chen illustrates the harm to each Plaintiff. Dr. Chen created computer simulations for North Carolina’s congressional districts in *Rucho* that, like the simulations he created in *Common Cause*, strictly adhere to the nonpartisan traditional redistricting criteria within the 2016 Adopted Criteria. *See* Decl. of Dr. Jowei Chen (“Chen Decl.”) ¶¶ 7-10. As in *Common Cause*, Dr. Chen created one congressional simulation set that ignores incumbency and another set that avoids pairing the incumbents in office in 2016 when the 2016 Plan was drawn. *Id.* Using these simulations, which were previously produced to

Legislative Defendants in the federal partisan gerrymandering case, Dr. Chen has identified the extent to which each Plaintiff in the instant case lives in a congressional district that is a partisan outlier relative to the district in which he or she would live under neutral maps. Dr. Chen has conducted this analysis using two different partisanship measures: and (1) the elections specified in the 2016 Adopted Criteria, which are all statewide elections from 2008 to 2014 except for the two presidential elections; and (2) Dr. Hofeller’s seven-elections formula. *Id.* ¶¶ 12-14.

Dr. Chen finds that nine Plaintiffs who currently live in Republican-leaning districts would live in a more Democratic district in at least 91% of the 1,000 Simulation Set 1 plans (Cohen, Quick, Rumph, Dunn, Barnes, Peters, Gates, Brown, and Harper). *See* Chen Decl. ¶ 17, Figures 1-2. Dr. Chen finds that the remaining five Plaintiffs would live in a less Democratic district in at least 86% of his Simulation Set 1 plans (Rush, Balla, Brien, Oseroff, Crews), and three of these five Plaintiffs are extreme outliers above the 98% level. *Id.* Dr. Chen finds largely similar results using his Simulation Set 2. *Id.* ¶ 17, Figures 3-4.

ARGUMENT

I. Legal Standard

A preliminary injunction should issue if (1) the plaintiff can “show likelihood of success on the merits of his case,” (2) the plaintiff “is likely to sustain irreparable loss unless the injunction is issued,” and (3) a “balancing of the equities” supports injunctive relief. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983).

These standards apply because Plaintiffs seek a prohibitory preliminary injunction, namely “to restrain the defendant[s]” from using the 2016 Plan in administering the 2020 congressional elections. *Anderson v. Town of Waynesville*, 203 N.C. 37, 164 S.E. 583, 588 (1932). Plaintiffs seek to prevent Defendants from “permitting [the 2016 Plan] to operate.” *Id.*

In remanding *Common Cause v. Lewis* to state court, the federal district court confirmed that suits seeking to bar use of unconstitutional redistricting plans do not call for “an injunction compelling the Legislative Defendants to act.” *Common Cause v. Lewis*, 358 F. Supp. 3d 505, 511 (E.D.N.C. 2019). Instead, such complaints seek to enjoin defendants *from* acting. *Id.*

Plaintiffs thus do not seek to require Defendants to “perform a positive act,” the trigger for a “mandatory” preliminary injunction. *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972); *see also Bd. of Light & Water Comm’rs of Concord v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 424, 271 S.E.2d 402, 404 (1980) (similar). But even if the heightened standard for mandatory injunctions applied, it is satisfied here because Plaintiffs’ injuries are “immediate, pressing, irreparable, and clearly established.” *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. “[T]here is no doubt that the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; and, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory.” *Id.* (quotation marks omitted); *see also Roberts v. Madison Cty. Realtors Ass’n, Inc.*, 344 N.C. 394, 400, 474 S.E.2d 783, 788 (1996) (recognizing availability of mandatory preliminary injunctions).

The relevant facts are admitted by Legislative Defendants and are already a matter of public record. This Court confirmed the governing legal principles just weeks ago in *Common Cause v. Lewis*, which Defendants have not appealed. And administrative deadlines for the 2020 elections are fast approaching. If ever there were an instance where “the case is urgent and the right is clear,” *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732, it is this one.

II. Plaintiffs Are Likely To Succeed on the Merits of their Claims that the 2016 Plan Violates the North Carolina Constitution

Plaintiffs are all but certain to succeed on their claims in this case. Under the principles announced in *Common Cause v. Lewis*, the 2016 Plan plainly violates the North Carolina Constitution’s Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. And all Plaintiffs have standing to sue.

A. The 2016 Plan Violates North Carolina’s Free Elections Clause

The Free Elections Clause of the North Carolina Constitution declares that “[a]ll elections shall be free.” N.C. Const., art. I, § 10. “The Free Elections Clause, Article I, § 10, is one of the clauses that makes the North Carolina Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens.” *Common Cause*, slip op. COL ¶ 24. “The federal Constitution contains no similar counterpart.” *Id.*; see *Rucho*, 139 S. Ct. at 2507.

Since its original adoption in 1776, North Carolina has twice “broadened and strengthened” the Free Elections Clause, first to expand its reach from state legislative elections to all elections, and second to add mandatory language to “make it clear that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights are commands and not mere admonition.” *Common Cause*, slip op. COL ¶ 43 (internal quotation marks omitted).

In *Common Cause*, this Court held that “the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* ¶ 31. “This ... is a fundamental right of the citizens enshrined in our Constitution’s Declaration of Rights, a compelling governmental interest, and a cornerstone of our democratic form of government.” *Id.*

As the *Common Cause* Court held, “partisan gerrymandering ... strikes at the heart of the Free Elections Clause.” *Id.* ¶ 45. “[E]xtreme partisan gerrymandering,” the Court explained, “is

contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Id.* ¶ 36. “Extreme partisan gerrymandering does not fairly and truthfully ascertain the will of the people” because “[v]oters are not freely choosing their representatives.” *Id.* ¶ 36. “Rather, representatives are choosing their voters.” *Id.* “It is not the will of the people that is fairly ascertained through extreme partisan gerrymandering” but instead “the will of the map drawer that prevails.” *Id.* ¶ 37. Applying these principles, the Court struck down the 2017 state House and Senate plans as partisan gerrymanders that violated the Free Elections Clause.

The 2016 Congressional Plan violates the Free Elections Clause even more flagrantly than the invalidated 2017 state legislative plans. The 2016 Adopted Criteria on their face violate the Free Elections Clause. The General Assembly adopted “Partisan Advantage” and “Political Data” as official criteria for the creation of the 2016 Plan, explicitly instructing the mapmaker, Dr. Hofeller, to “make reasonable efforts to construct districts in the [2016 Plan] to maintain the current [10-3] partisan makeup of North Carolina’s congressional delegation.” Adopted Criteria. Thus, the 2016 Plan explicitly and unambiguously sought “to predetermine election outcomes” across the state as a whole and in “specific districts.” *Common Cause*, slip op. COL ¶ 47.

Legislative Defendants and Dr. Hofeller confirmed—on the record in legislative hearings and in sworn deposition testimony—that the 2016 Plan was “specifically and systematically design[ed] ... for partisan purposes and a desire to preserve power,” which this Court held violates the Free Elections Clause. *Id.* Representative Lewis “acknowledge[d] freely” that the 2016 Plan “would be a political gerrymander.” Feb. 16 Joint Comm. Tr. at 48:4-5. He stated: “I want to make clear that to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage on the map.” *Id.* at 53:24-54:4. And he left no room for doubt that, as

with the invalidated 2017 state legislative plans, Legislative Defendants were seeking partisan advantage “to the greatest extent possible.” *Common Cause*, slip op. COL ¶ 46. Representative Lewis said that the 2016 Plan sought a 10-3 Republican advantage only because he “did not believe it would be possible to draw a map with 11 Republicans and 2 Democrats.” Feb. 16 Joint Comm. Tr. at 50:6-10. Senator Rucho agreed that the map was drawn to be 10-3 because 10-3 “was doable” but 11-2 “is not.” Rucho Dep. at 121:10-122:2.

Dr. Hofeller admitted that he followed the Adopted Criteria’s directive and drew the district lines to predetermine a 10-3 Republican advantage. Hofeller Dep. at 175:19-23, 178:14-20, 188:19-190:2. Specifically, he packed Democratic voters into Districts 1, 4, and 12, and cracked the remaining Democratic voters across the other 10 districts. *See* Hofeller Dep. at 127:14-129:2, 192:10-16. He did this by color-coding every VTD on the basis of partisanship and assigning VTDs to districts based on their partisan performance. *See* Hofeller Dep. at 132:14-18, 212:16-215:7; Hofeller Dep. II at 260:18-267:17, 269:7-9, 271:11-273:3, 274:1-16, 281:7-11, 282:1-7. His formula predicted a 10-3 Republican advantage. Hofeller Decl. at 9.

Legislative Defendants have successfully “predetermine[d] election outcomes,” just as they intended. *Common Cause*, slip op. COL ¶ 47. Even though the 2016 and 2018 elections were very different electoral environments, Republicans won 10 of 13 seats in both elections. Republicans won 10 of 13 seats in the blue wave year of 2018 even though Democrats received a *majority* of the two-party statewide vote after adjusting for the one uncontested race. *See* 2016 Results; 2018 Results. The district-level results from 2018 show how the 2016 Plan withstood this blue wave; Republicans had enough cushion in the ten cracked districts to withstand a swing in the Democrats’ direction, while Democrats only added to their already huge majorities in the three packed districts. *See id.* Just like the invalidated 2017 state legislative plans, the 2016

Congressional Plan makes it “nearly impossible for the will of the people—should that will be contrary to the will of the partisan actors drawing the maps—to be expressed through their votes.” *Common Cause*, slip op. COL ¶ 46.

While Dr. Chen and Dr. Mattingly presented copious expert analysis in *Rucho* demonstrating that the 2016 Plan is an extreme outlier that has cost Democrats several seats, this Court need not rely on such expert analysis to reach the same conclusion here. There is certainly no need for such expert analysis in order to conclude that Plaintiffs are *likely* to prevail on the merits, the standard for a preliminary injunction. Given the official legislative criteria mandating a 10-3 “Partisan Advantage” through the use of “Political Data,” as well as Legislative Defendants’ and Dr. Hofeller’s admissions and the 2016 and 2018 election outcomes, there is no conceivable factual or legal defense of the 2016 Plan. It manipulates North Carolina’s congressional elections for partisan gain, in violation of the Free Elections Clause.

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

The North Carolina Constitution’s Equal Protection Clause declares that “[n]o person shall be denied the equal protection of the laws.” N.C. Const., art. I, § 19. This clause provides greater protection for voting rights than its federal counterpart. *Common Cause*, slip op. COL ¶¶ 52-57. Specifically, North Carolina’s Equal Protection Clause protects “the fundamental right of each North Carolinian to substantially equal voting power.” *Stephenson v. Bartlett*, 355 N.C. 354, 3379, 562 S.E.2d 377, 394 (2002). “It is well settled in this State that ‘the right to vote on equal terms is a fundamental right.’” *Id.* at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty.*, 326 N.C. at 747, 392 S.E.2d at 356). “These principles apply with full force in the redistricting context.” *Common Cause*, slip op. COL ¶ 53. In *Common Cause*, this Court held that extreme partisan gerrymandering infringes upon this “fundamental right,” because “the intentional classification of voters’ based on partisanship in order to pack and crack them into districts is an

impermissible distinction among similarly situated citizens aimed at denying equal voting power.” *Id.* ¶¶ 53, 63 (internal quotation marks omitted).

In evaluating whether an alleged partisan gerrymander violates North Carolina’s Equal Protection Clause, this Court applies a three-part test. *Id.* ¶ 58. “First, the plaintiffs challenging a districting plan must prove that state officials’ predominant purpose in drawing district lines was to entrench their party in power by diluting the votes of citizens favoring their rival.” *Id.* (quotation marks and brackets omitted). “Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by substantially diluting their votes.” *Id.* (quotation marks omitted). “Finally, if the plaintiffs make those showings, the State must provide a legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map.” *Id.* The 2016 Plan easily satisfies each prong.

First, entrenching Republicans in power was not just the General Assembly’s “predominant purpose” in drawing the 2016 Plan—it was the express, overriding goal. The U.S. Supreme Court described the 2016 Plan as a “blatant example[] of partisanship driving districting decisions.” *Rucho*, 139 S. Ct. at 2505. As set forth extensively above, the official written criteria as well as the admissions by Dr. Hofeller and Legislative Defendants conclusively establish that Legislative Defendants’ predominant purpose was to gerrymander the 2016 Plan to entrench Republicans’ 10-3 advantage. The Adopted Criteria expressly subordinated traditional nonpartisan redistricting criteria to “political impact,” meaning Republican partisan advantage. *See* Adopted Criteria. And Dr. Hofeller did not even calculate the compactness of the 2016 Plan before it was enacted. Hofeller Dep. at 216:8-21.

Second, the 2016 Plan has had its “intended effect” of diluting the votes of Plaintiffs and other Democratic voters, depriving them of substantially equal voting power and the right to vote

on equal terms. *Common Cause*, slip op. COL ¶ 58. The *Common Cause* Court noted that the 2016 Plan, like the invalidated 2017 state legislative plans, was “drawn with the intent to maximize partisan advantage and, in fact, *achieved [its] intended partisan effects.*” *Id.* ¶ 18 (emphasis added). As detailed above, the 2016 and 2018 election results confirm that Legislative Defendants succeeded in their goal of creating a 10-3 map. *See* 2016 Results; 2018 Results. The 2016 Plan achieves this result by “packing and cracking Democratic voters” across the 13 districts, just like the 2017 state legislative plans struck down under the Equal Protection Clause in *Common Cause*. *See Common Cause*, slip op. COL ¶ 70. As under those 2017 state legislative plans, the margins of victory under the 2016 Plan—and not just the seat counts—confirm the vote dilution. Democrats won their three districts with between 69.9% and 75.1% of the vote, while Republicans never exceeded 60.4% in the then Republican districts. “This packing and cracking diminishes the ‘voting power’ of Democratic voters” in all 13 of these districts. *Common Cause*, slip op. COL ¶ 70. The votes of Democratic voters in the three packed districts “are substantially less likely to ultimately matter in deciding the election results” when compared to Republican voters in the ten cracked districts. *Id.*

The 2016 Plan “not only deprive[s] Democratic voters of equal voting power in terms of electoral outcomes, but also deprive[s] them of substantially equal legislative representation.” *Common Cause*, slip op. COL ¶ 71. “When a district is created solely to effectuate the interests of one group”—as Legislative Defendants have admitted the districts in the 2016 Plan are—“the elected official from that district is more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.” *Id.* (internal quotation marks omitted).

Dr. Chen’s analysis in this case independently confirms that the 2016 Plan deprives Plaintiffs of substantially equal voting power and the right to vote on equal terms. Dr. Chen concluded that nine Plaintiffs who are currently in Republican districts would be in Democratic leaning or more competitive districts under a map that was not drawn to maximize Republican advantage, but instead was drawn using traditional nonpartisan criteria. Chen Decl. ¶ 17.

Finally, there is no legitimate, nonpartisan justification for the 2016 Plan’s extreme partisan bias. In *Common Cause*, Legislative Defendants offered only “limited neutral justifications for the enacted [state legislative] maps,” arguing that those maps satisfied certain traditional redistricting criteria, such as equal population, county grouping and traversal rules, compactness, minimizing VTD splits, and protecting incumbents. *Common Cause*, slip op. COL ¶ 74. But Legislative Defendants failed to show that these neutral criteria rather than predominantly partisan intent could actually explain the maps’ “discriminatory effects.” *Id.* ¶ 76. Here, given Legislative Defendants’ and Dr. Hofeller’s admissions about the 2016 congressional redistricting process, Legislative Defendants cannot conceivably show that the 2016 Plan is narrowly tailored to achieve a compelling government interest. Indeed, Legislative Defendants’ own criteria *permitted* the subversion of neutral criteria for partisan ends.

In short, it is clear that, in drawing the 2016 Plan, Legislative Defendants engaged in the “intentional ‘classification of voters’ based on partisanship in order to pack and crack them into districts” and to “deprive [them] of the right to vote on equal terms.” *Common Cause*, slip op. COL ¶¶ 63, 66. Plaintiffs are likely to succeed on their Equal Protection Clause claim.

C. The 2016 Plan Violates North Carolina’s Freedom of Speech and Assembly Clauses

The 2016 Plan burdens protected expression and association by making Democratic votes less effective and by preventing Democratic voters from assembling together and instructing

their representatives. Because Defendants cannot establish that the 2016 Plan was narrowly tailored to achieve a compelling government interest, it fails strict scrutiny.

1. The 2016 Plan Unconstitutionally Discriminates Against Protected Expression and Association

The North Carolina Constitution’s Freedom of Speech Clause provides that “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained.” N.C. Const., art. I, § 14. The Freedom of Assembly Clause provides in relevant part that “[t]he people have a right to assemble together for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances.” *Id.* § 12. These clauses provide greater protection for speech and association than their federal counterparts. *Common Cause*, slip op. COL ¶¶ 82-85.

In *Common Cause*, this Court held that “[v]oting for the candidate of one’s choice and associating with the political party of one’s choice are core means of political expression protected by” these clauses. *Id.* ¶ 86. “Voting provides citizens a direct means of expressing support for a candidate and his views,” and “is no less protected ‘merely because it involved the act’ of casting a ballot.” *Id.* ¶¶ 87-88 (quoting *State v. Bishop*, 368 N.C. 869, 874, 787 S.E.2d 814, 818 (2016)). Similarly, “[c]itizens form political parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs.” *Id.* ¶ 90 (quoting *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204-05 (2011)). “[B]anding together with likeminded citizens in a political party” thus “is a form of protected association.” *Id.* Both of those holdings apply in the context of congressional elections just as they did in the context of state legislative elections in *Common Cause*.

a. A districting plan is subject to strict scrutiny where it burdens protected expression based on viewpoint by discriminatorily making the votes cast for one party’s

candidates less effective. “The guarantee of free expression ‘stands against attempts to disfavor certain subjects or viewpoints.’” *Id.* ¶ 93 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Here, Representative Lewis freely admitted that the 2016 Plan was drawn to disfavor the viewpoints of Democratic voters. According to Representative Lewis himself, the district lines were drawn to advantage Republicans *because* Representative Lewis “think[s] electing Republicans is better” “for the country” “than electing Democrats.” Feb. 19 House Floor Tr. at 34:21-23.

The 2016 Plan has exactly the same features that led the *Common Cause* Court to conclude that the 2017 state legislative plans violated the Freedom of Speech Clause. Here too, the mapmaker “analyzed the voting histories of every VTD in North Carolina, identified VTDs that favor Democratic candidates, and then singled out the voters in those VTDs for disfavored treatment by packing and cracking them into districts with the aim of diluting their votes and, in the case of cracked districts, ensuring that these voters are significantly less likely, in comparison to Republican voters, to be able to elect a candidate who shares their views.” *Common Cause*, slip op. COL ¶ 95; *see also* ¶ 101 (similar). Dr. Hofeller admitted that he did exactly this in drawing the 2016 Plan, at Legislative Defendants’ direction. Hofeller Dep. at 127:14-129:2, 132:14-18, 175:19-23, 178:14-20, 188:19-190:2, 192:10-16, 212:16-215:7; Hofeller Dep. II at 260:18-267:17, 269:7-9, 271:11-273:3, 274:1-16, 281:7-11, 282:1-7.

While a plan “need not explicitly mention any particular viewpoint to be impermissibly discriminatory,” *Common Cause*, slip op. COL ¶ 99, the 2016 Plan does explicitly announce an intent to burden a particular viewpoint. Legislative Defendants adopted an explicit written policy of seeking “Partisan Advantage” to favor one political viewpoint. *See Adopted Criteria.*

As in *Common Cause*, it “changes nothing” that “Democratic voters can still cast ballots under gerrymandered maps.” *Common Cause*, slip op. COL ¶ 96. “The government unconstitutionally burdens speech where it renders disfavored speech *less effective*, even if it does not ban such speech outright.” *Id.* Like the invalidated 2017 state legislative plans, the 2016 Plan’s “sorting of Plaintiffs and other Democratic voters based on disfavor for their political views has burdened their speech by making their votes less effective.” *Id.* ¶ 102. “Plaintiffs and other Democratic voters live in districts where their votes are guaranteed to be less effective—either because the districts are packed such that Democratic candidates will win by astronomical margins or because the Democratic voters are cracked into seats that are safely Republican.” *Id.* Dr. Hofeller’s own analysis of projected vote margins under the 2016 Plan using his partisanship formula shows this to be true. *See* Hofeller Decl. at 9 (concluding that 2016 Plan has three packed Democratic districts where Democrats have at least 63% of the vote, and ten districts that Republicans win with 53% to 58% of the vote).

b. The 2016 Plan independently violates Article I, § 12 by burdening the ability of Democratic voters to associate effectively. The *Common Cause* Court held that a districting plan is subject to strict scrutiny where it burdens disfavored association by restricting “the ability of like-minded people across the State to affiliate in a political party and carry out [their] activities and objects.” *Common Cause*, slip op. COL ¶ 107 (internal quotation marks omitted). The Court concluded that under the 2017 state legislative plans, “Democratic voters who live in cracked districts have little to no ability to instruct their representatives or obtain redress from their representatives on issues important to those voters.” *Id.* The same is true under the 2016 Plan. The 2016 Plan places Democrats in ten cracked districts that diminish their voting strength. The Democratic voters in these cracked districts have virtually no chance of

successfully banding together to elect a candidate of their choice, and their Republican representatives have little incentive to consider the views of Democratic constituents.

c. The 2016 Plan fails strict scrutiny—and indeed any scrutiny. “Discriminating against citizens based on their political beliefs does not serve any legitimate government interest.” *Common Cause*, slip op. COL ¶ 111. “Blatant examples of partisanship driving districting decisions are unrelated to any legitimate legislative objective.” *Id.* ¶ 61 (internal quotation marks omitted). *Id.* ¶ 61. “[P]artisan gerrymanders are incompatible with democratic principles” and are “contrary to the compelling governmental interests established by the North Carolina Constitution ‘in having fair, honest elections,’ where the ‘will of the people’ is ascertained ‘fairly and truthfully.’” *Id.* ¶¶ 61-68 (quoting *Petersilie*, 334 N.C. at 182, 432 S.E.2d at 840, and *Skinner*, 169 N.C. at 415, 86 S.E.2d at 356)).

2. The 2016 Plan Unconstitutionally Retaliates Against Protected Expression and Association

The 2016 Plan independently violates the Freedom of Speech and Assembly Clauses by retaliating against voters based on their protected speech and association. “In addition to forbidding discrimination,” North Carolina’s Freedom of Speech and Assembly Clauses “also bar *retaliation* based on protected speech” or conduct. *Id.* ¶ 112. To prevail on a retaliation theory, a plaintiff must show that “(1) the [challenged plan] take[s] adverse action against them, (2) the [plan] w[as] created with an intent to retaliate against their protected speech or conduct, and (3) the [plan] would not have taken the adverse action but for that retaliatory intent.” *Id.*

Like the 2017 state legislative plans invalidated in *Common Cause*, the 2016 Plan satisfies all three of these requirements. As to adverse action, “[i]n *relative* terms, Democratic voters under the [2016 Plan] are far less able to succeed in electing candidates of their choice than they would be under plans that were not so carefully crafted to dilute their votes. And in

absolute terms, Plaintiffs are significantly foreclosed from succeeding in electing preferred candidates.” *Common Cause*, slip op. COL ¶ 114. As to intent, Dr. Hofeller and Legislative Defendants have acknowledged—and the Adopted Criteria required—that the 2016 Plan “intentionally targeted Democratic voters based on their voting histories.” *Common Cause*, slip op. COL ¶ 115. And as to causation, “[t]he adverse effects described above would not have occurred if Legislative Defendants had not cracked and packed Democratic voters and thereby diluted their votes.” *Common Cause*, slip op. COL ¶ 116. As he did in *Common Cause*, Dr. Chen “compared the districts in which the Individual Plaintiffs currently reside under the enacted plan[] with districts in which they would have resided under each of his simulated plans,” and all “of the Individual Plaintiffs’ actual districts are extreme partisan outliers when compared with their districts under the simulated plans.” *Id.*; see Chen Decl. ¶ 17.

D. All Plaintiffs Have Established a Likelihood of Standing

All fourteen Plaintiffs have established a likelihood of standing to sue in this case. “[B]ecause North Carolina courts are not constrained by the ‘case or controversy’ requirement of Article III of the United States Constitution, our State’s standing jurisprudence is broader than federal law.” *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (internal quotation marks omitted); accord *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (“While federal standing doctrine can be instructive as to general principles ... , the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.”). “At a minimum, a plaintiff in a North Carolina court has standing to sue when it would have standing to sue in federal court.” *Common Cause*, slip op. COL ¶ 2.

“The North Carolina Supreme Court has broadly interpreted Article I, § 18 to mean that ‘[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm.’” *Common Cause*, slip op. COL ¶ 3 (quoting *Mangum v. Raleigh Bd. of Adjustment*, 362

N.C. 640, 642, 669 S.E.2d 279, 281 (2008)). The “gist” of standing under North Carolina law involves “whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (quotation marks omitted). Although the North Carolina Supreme Court “has declined to set out specific criteria necessary to show standing in every case, the Supreme Court has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury.” *Davis*, 811 S.E.2d at 727-28. Moreover, to obtain a preliminary injunction, a plaintiff need only show “a likelihood that plaintiff has standing.” *Action NC v. Strach*, 216 F. Supp. 3d 597, 630 (M.D.N.C. 2016) (internal quotation marks omitted).

Here, as to the second factor, the ongoing remedial process in *Common Cause* demonstrates that this Court is fully capable of remedying partisan gerrymandering. And as to the first, all fourteen Plaintiffs have suffered legally cognizable injuries in the drawing of their individual districts. In *Common Cause*, this Court held that the plaintiffs had standing where they had introduced “district-specific evidence that [they] live in ... districts that are outliers in partisan composition relative to the districts in which they live under Dr. Chen’s nonpartisan simulated plans.” *Common Cause*, slip op. COL ¶ 14.

Here, Dr. Chen has performed precisely the same district-specific analysis that he performed in *Common Cause*. Dr. Chen created computer simulations for North Carolina’s congressional districts in *Rucho* that, like the simulations he created in *Common Cause*, strictly adhere to the nonpartisan traditional redistricting criteria within the 2016 Adopted Criteria. Chen Decl. ¶¶ 7-10. As in *Common Cause*, Dr. Chen created one congressional simulation set that

ignores incumbency and another set that avoids pairing the incumbents in office when the 2016 Plan was drawn. *See id.* Using these simulations, which were produced to Legislative Defendants in *Rucho*, Dr. Chen has identified the extent to which each Plaintiff here lives in a congressional district that is a partisan outlier relative to the district in which he or she would live under neutral maps. Dr. Chen does this analysis using two different partisanship measures: (1) Dr. Hofeller’s seven-statewide-election formula; and (2) the elections specified in the 2016 Adopted Criteria, which are all statewide elections from 2008 to 2014 except for the two presidential elections. *Id.* ¶¶ 12-14.

Dr. Chen finds that all fourteen Plaintiffs live in congressional districts that are partisan outliers relative to their districts under his simulations. *See* Chen Decl. ¶ 17, Figures 1-4. Dr. Chen finds that nine Plaintiffs currently in Republican-leaning districts would live in a more Democratic district in at least 91% of the 1,000 Simulation Set 1 plans. *Id.* ¶ 17, Figures 1-2. He finds that the remaining five Plaintiffs would live in a less Democratic district in at least 86% of his Simulation Set 1 plans, and three of these five Plaintiffs are extreme outliers above the 98% level. *Id.* Dr. Chen finds largely similar results using his Simulation Set 2. *Id.* ¶ 17, Figures 3-4.

As evidenced by Dr. Chen’s analysis, all fourteen Plaintiffs have established a likelihood of standing to challenge both their own districts and the 2016 Plan as a whole. In *Common Cause*, this Court held that a plaintiff with standing to challenge his or her individual district necessarily had standing to challenge his or her entire county grouping “because the manner in which one district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that grouping.” *Common Cause*, slip op. COL ¶ 15. But congressional districts in North Carolina are not drawn in county groupings—the entire statewide map is a single grouping. The drawing of *every* congressional district therefore “is tied to the

drawing of some, and possibly all, of the other” districts. *See also Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002), *abrogated on other grounds by League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (holding that individual voters have standing to challenge entire congressional plan, because a congressional plan “acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole”). Plaintiffs with standing to challenge their individual congressional districts thus have standing to challenge the entire 2016 Plan.

III. Plaintiffs Are Likely To Suffer Irreparable Harm Absent a Preliminary Injunction

Absent a preliminary injunction, Plaintiffs are “likely to sustain irreparable loss.” *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856-57. Even if the standard for mandatory injunctions applied, Plaintiffs satisfy that standard because their injuries are “immediate, pressing, [and] irreparable.” *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732.

If this Court does not issue an injunction, Plaintiffs will be forced to vote in 2020 in unlawful districts that violate multiple fundamental rights guaranteed by the North Carolina Constitution. That alone is an irreparable injury. “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). The loss of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and an infringement of “voting and associational rights ... cannot be alleviated after the election.” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997).

Courts have applied these principles in redistricting cases in North Carolina. In *Harris v. McCrory*, which enjoined two districts in the 2011 congressional plan on the ground that they constituted unconstitutional racial gerrymanders, the court found it “clear ... that the deprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal

Protection Clause, constitutes irreparable harm.” 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016) (internal citations and quotation marks omitted); *see also Harris*, 2016 WL 6920368, at *1 (“To force the plaintiffs to vote again under the unconstitutional plan constitutes irreparable harm to them, and to the other voters in [those districts].”). The federal district court in *Covington v. North Carolina*, which invalidated numerous 2011 state legislative districts as unconstitutional gerrymanders, said the same thing. 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018). And this Court applied these same principles in *Common Cause* in enjoining use of the 2017 state legislative districts. This Court, on its own motion, denied a stay pending appeal because failing to enjoin the plans immediately would cause substantial prejudice to the Individual Plaintiffs and other voters. *Common Cause*, slip op. COL ¶ 179. The Court recognized that “[t]he risk of harm is particularly acute where Plaintiffs and other North Carolina voters have already cast their ballots under unconstitutional district plans in every election this decade.” *Id.* (quoting *Covington*, 2018 WL 604732, at *6).

North Carolinians have been forced to vote in invalid, unlawful districts in every congressional election so far since the 2010 decennial census. The 2011 congressional plan used in the 2012 and 2014 elections was an unconstitutional racial gerrymander. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). And the 2016 Plan used in the 2016 and 2018 elections is an extreme unconstitutional partisan gerrymander. Absent an injunction, Plaintiffs and other North Carolina voters will have gone a full ten years without voting in valid, lawful congressional districts. The harm to the named Plaintiffs here is concrete. Not only does Dr. Chen demonstrate that all fourteen Plaintiffs would live in markedly different districts if a nonpartisan remedial plan were put into place, only a nonpartisan remedial plan can ensure that all fourteen Plaintiffs no longer live in districts that were not the product of intentional discrimination by

their government. The same is true for millions of other North Carolinians. It is difficult to imagine a more immediate, pressing, and irreparable injury.

IV. There Is Adequate Time to Implement a Remedy Before the 2020 Primaries

There is more than enough time to establish a remedial plan for use in the March 2020 primaries. This is not a matter of speculation—the remedial process in *Common Cause* proves it. In *Common Cause*, this Court gave Legislative Defendants two weeks to adopt remedial state House and state Senate plans. *Common Cause*, slip op. Decree ¶ 4. The General Assembly adopted remedial plans in that time frame; in fact, the General Assembly passed both the state House and state Senate plans within 8 days of the first legislative hearings, which were on September 9, 2019.

Common Cause, moreover, involved *more than five times* as many districts than are at issue here. This Court invalidated a total of 77 districts across 21 different county groupings in two different legislative bodies. This case involves just one statewide map consisting of 13 districts, and does not require application of the complicated Whole County Provision that applies to state legislative districts. If the General Assembly could remedy 77 state legislative districts in just eight days (in part by using one of Dr. Chen’s simulated maps as a base), it certainly can draw a new congressional plan in two weeks.

While sufficient time remains to implement a remedial plan on the current election schedule, the schedule can be adjusted if necessary to provide effective relief. The State Board of Elections has authority “to make reasonable interim rules and regulations” to move administrative deadlines in the event that any North Carolina election law “is held unconstitutional or invalid by a State or federal court.” N.C. Gen. Stat. § 163A-742. And this Court has remedial authority to move the 2020 congressional primary elections, if necessary. *See Common Cause*, slip op. COL ¶¶ 181-82. The Court could move the primaries under one of

two approaches. First, the Court could move all of the State's 2020 primaries, including for offices other than the U.S. House. Alternatively, the Court could move the primaries for only the U.S. House, while keeping the primaries for other offices on the currently scheduled date of March 3, 2020. One possibility would be to move the congressional primaries to the "Second Primary" date that has taken place in every recent election cycle for primary run-offs.

There is precedent for both approaches. In 2002, the North Carolina Supreme Court in *Stephenson v. Bartlett* enjoined the primaries for the state House and state Senate from occurring on the originally scheduled date, 355 N.C. 281, 282, 561 S.E.2d 288, 288-289 (2002), causing all of the State's primaries to move to a different date, 357 N.C. 301, 303, 582 S.E.2d 247, 249 (2003). And in 2016, after a federal court enjoined the State's congressional plan as an unconstitutional racial gerrymander, the General Assembly moved *only* the congressional primaries, while leaving other primaries (including the presidential primary) on the originally scheduled date. See N.C. Sess. Law 2016-2 § 1(b). Such changes are not necessary at this stage, however, as sufficient time remains for the Court to receive briefing and argument, issue a preliminary injunction, and oversee a remedial process under the current election schedule.

V. The Balance of Equities Strongly Favors a Preliminary Injunction

Finally, "a careful balancing of the equities," *A.E.P. Indus.*, 308 N.C. at 400, 302 S.E.2d at 759, weighs decidedly in favor of an injunction. Plaintiffs seek to vindicate interests of the highest order. "Fair and honest elections are to prevail in this state." *Common Cause*, slip op. COL ¶ 28 (quoting *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896)). The North Carolina Supreme Court "has elevated this principle to the highest legal standard, noting that it is a 'compelling interest' of the State 'in having fair, honest elections.'" *Id.* (quoting *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 840 (1993)). Plaintiffs' claims implicate

“fundamental right[s] ... enshrined in our Constitution’s Declaration of Rights, a compelling governmental interest, and a cornerstone of our democratic form of government.” *Id.* ¶ 31.

This case is about the rights not just of Plaintiffs, but of *all* North Carolina citizens to vote in lawful districts that will reveal, “fairly and truthfully, the will of the people.” *Id.* ¶ 32. Moreover, Plaintiffs and their fellow citizens have been forced to cast their ballots in invalid, unconstitutional congressional districts in *every* election so far this decade. It would be inequitable in the extreme to force them do so yet again—and in “a presidential election year,” no less, “when voter turnout is highest.” *Harris*, 2016 WL 6920368, at *1.⁷

CONCLUSION

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

⁷ This Court should not require Plaintiffs to post a bond. North Carolina Rule of Civil Procedure 65(c) provides that “[n]o ... preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined.” But it is well settled that there are “some instances when it is proper for no security to be required of a party seeking injunctive relief.” *Staton v. Russell*, 151 N.C. App. 1, 12, 565 S.E.2d 103, 110 (2002) (quotation marks omitted). This is just such an instance. There is no prospect that any party to this case will be “wrongfully enjoined” or incur any recoverable “costs or damages” therefrom. And no security is required where, as here, “one purpose of the ... injunction is to preserve the court’s jurisdiction.” 151 N.C. App. at 13, 565 S.E.2d at 110.

Respectfully submitted this the 30th day of September, 2019

PATTERSON HARKAVY LLP


Burton Craige, NC Bar No. 9180
Narendra K. Ghosh, NC Bar No. 37649
Paul E. Smith, NC Bar No. 45014
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Plaintiffs

**ARNOLD AND PORTER
KAYE SCHOLER LLP**

R. Stanton Jones*
Elisabeth S. Theodore*
Daniel F. Jacobson*
William C. Perdue*
Sara Murphy D'Amico*
Graham W. White*
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
stanton.jones@arnoldporter.com

PERKINS COIE LLP

Marc E. Elias*
Aria C. Branch*
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna*
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Plaintiffs

**Pro Hac Vice Application Forthcoming*

CERTIFICATE OF SERVICE

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

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

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

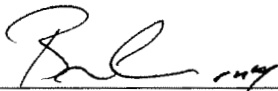
David R. Lewis
16 West Jones Street
Rm. 2301
Raleigh, N.C. 27601

Ralph E. Hise
300 N. Salisbury St.
Rm. 300-A
Raleigh, N.C. 27603

Timothy K. Moore
16 West Jones Street
Rm. 2304
Raleigh, N.C. 27601

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

This the 30th day of September, 2019.


Burton Craige, NC Bar No. 9180