

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

Case No. 5:19-cv-452

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.

The State Board Defendants' Response to the Plaintiffs' Motion for Preliminary Injunction

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INTRODUCTION

Earlier this year the North Carolina Superior Court for Wake County ruled, after a lengthy trial involving the state's legislative districts, that partisan gerrymandering violates the Free Elections, Equal Protection, and Freedom of Speech and Assembly Clauses of the North Carolina Constitution. *Common Cause v. Lewis*, No. 18-CVS-014001 (N.C. Sup. Ct. Sept. 3, 2019). The court struck down the legislative districts as violating these provisions of the North Carolina Constitution. The legislative defendants did not appeal that ruling, and proceeded to enact new state legislative districts that they contend are in keeping with the court's ruling. Whether the new districts comply with the court's ruling in *Common Cause* is still being litigated.

This case involves the State's congressional districts. The plaintiffs seek a preliminary injunction against the use of the current congressional districts on the grounds that these districts, like the legislative districts that were struck down earlier this year, are also the result of intentional and extreme partisan gerrymandering in violation of the North Carolina Constitution.

The plaintiffs' motion must be considered against the backdrop of an extensive record of evidence that was presented in connection with a challenge to these same plans under the U.S. Constitution in federal court. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The evidence available, including the record from *Rucho*, strongly suggests as a factual matter that the congressional districts at issue here were created through the intentional use of partisan data to maximize the voting power of voters of a favored political party to the detriment of voters of a disfavored political party. The evidence also strongly suggests that the gerrymandering of the congressional districts at issue achieved the intended partisan effect.

The court's ruling in *Common Cause*, when applied to the known evidence regarding the congressional districts at issue, appears to foreclose a viable argument on the merits that these congressional districts do not violate the North Carolina Constitution's provisions on free elections, equal protection, and freedom of speech. As a result, it appears that proceeding with an election using these districts, in light of the law established in *Common Cause*, would require the Board to administer an election that violates the constitutional rights of North Carolina voters.

If this Court chooses to provide relief, it should do so promptly.¹ Primaries for the 2020 election are scheduled to take place in March 2020. To allow the Board, in addition to every county in North Carolina, enough time to properly administer the 2020 primary elections in March 2020 as scheduled, the Board estimates that it needs finality on the plans by December 2-15 (depending on contingencies), unless this Court orders that the March 2020 primary election be postponed.

Accordingly, it would be appropriate for this Court to issue an injunction that relieves the Board of any duty to administer elections using an unconstitutionally gerrymandered congressional redistricting plan and that orders the development of new plans in time to allow elections to proceed.

FACTUAL BACKGROUND

¹ The plaintiffs filed a motion for preliminary injunction in state court on September 30. Before the legislative defendants removed this case to federal court, the Superior Court for Wake County entered an order requiring responses to the plaintiffs' motion for preliminary injunction by 5 p.m. on October 21. Under 28 U.S.C. § 1450, all "orders, and other proceedings had in [a state court] action prior to removal shall remain in full force and effect unless dissolved or modified by the district court." The Board therefore files this response to the plaintiffs' motion for preliminary injunction. By doing so, however, the Board does not waive the arguments it made in its response to the plaintiffs' motion to remand this case to state court and believes that this Court does not have subject-matter jurisdiction over this case. *See* Dkt. 26.

I. The General Assembly Enacts a Congressional Redistricting Plan With the Apparent Intent to Advantage Voters and Candidates of One Political Party Over Another.

In 2016, the General Assembly was tasked with creating a new congressional redistricting plan because the plans that had been passed in 2011 were struck down as unconstitutional racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). The record indicates that the mapmaker for the 2016 congressional districts (and for the legislative districts struck down in *Common Cause*), Dr. Thomas Hofeller, was instructed by legislative leaders to “create a map that was likely to elect 10 Republicans and 3 Democrats.” Declaration of E. Theodore, Exhibit (Theodore Ex.) A at 175:19-23 (Dkt. 5-1); *see also id.* at 188:19-190:2. In turn, Dr. Hofeller was able to create plans that would consistently elect 10 Republicans and 3 Democrats by “assigning voters to the districts . . . based on their voting history.” *Id.* at 128:22-129:2. He did this by relying on voters’ historic voting data to identify voters who were likely to vote for a Democrat, and crack or pack them as necessary to ensure that Republicans would be able to reliably win 10 seats in every congressional election. *Id.* at 132:14-18, 212:16-215:7.

Later in 2016, the Joint Committee adopted a set of criteria that the Committee would use to create the congressional redistricting plan. Theodore Ex. D at 14:16-98:20. Among the criteria adopted, the Joint Committee adopted “partisan advantage” as an official criterion. This criterion noted that the partisan makeup of the congressional delegation at that time was 10 Republicans and 3 Democrats and that the “Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of [10 Republicans and 3 Democrats in the] North Carolina’s congressional delegation.” Theodore Ex. C. Representative Lewis stated at one of the hearings that the Committee 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,” Theodore Ex. D at 50:6-10, and that “I think electing Republicans is better than electing Democrats,” Theodore Ex. F at 34:21-23.

The Joint Committee also adopted “Political Data” as another official criterion. This criterion specifically stated that 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.” Theodore Ex. C.

The maps drawn by Dr. Hofeller, which placed primary importance on partisanship criteria (both “partisan advantage” and “political data”), were approved by the North Carolina House of Representatives and Senate.

II. The Congressional Redistricting Plan Achieved Partisan Effect.

In the 2016 elections—the first elections that took place under the congressional redistricting plan, Democratic candidates won a combined 47% of the two-party statewide vote, but won only 3 of the 13 seats (23%). *See* State Board of Elections, 11/08/2016 Official General Election Results - Statewide, available at https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0. The results were no different in 2018, even though Democratic candidates won a larger share of the vote. In 2018, it appears that Democrats would have won a majority of the two-party statewide vote throughout all congressional districts, had District 3 been contested, based on results in that district in a special election held earlier this year. *See* State Board of Elections, 11/06/2018 Official General Election Results - Statewide, available at https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=FED&contest=0; State Board of Elections, 09/10/2019 Unofficial General Election Results – Statewide, available at https://er.ncsbe.gov/?election_dt=09/10/2019&county_id=0&office=FED&contest=0. In the three districts won by Democrats, the victor won with between 69% and 75% of the vote.

Meanwhile, in the 10 districts won by Republicans, the victor won with only 51% to 60% of the vote in contested races. Pls' Br. at 12 (aggregating 2018 and 2019 election results from State Board of Elections website).

ARGUMENT

A preliminary injunction is appropriate where: (1) the plaintiffs are likely to succeed on the merits of their claim, (2) the parties are likely to suffer irreparable harm unless the injunction is issued, (3) a balancing of the equities weighs in favor of an injunction, and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

I. Likelihood of Success on the Merits

In light of the evidence in the record here and the state court's ruling in *Common Cause v. Lewis* that extreme partisan gerrymandering violates the North Carolina Constitution, there appears to be no viable defense on the merits against the plaintiffs' claims.

A. The Free Elections Clause

The evidence in the record strongly suggests both that (1) the congressional redistricting plan was drawn with the intent to create partisan bias and to ensure maximum advantage to a preferred political party, and (2) that the intent was effective: In subsequent elections under this map, the chosen party benefited from the gerrymander. The Court held in *Common Cause* that partisan intent coupled with an extreme result violates the Free Elections Clause. Accordingly, there appears to be no viable defense on the merits to the claim that the congressional redistricting plan violates this State's Free Elections Clause.

In *Common Cause*, the court held that "partisan gerrymandering . . . strikes at the heart of the Free Elections Clause." *Common Cause*, slip op. COL ¶ 45. The Free Elections Clause guarantees that elections "be conducted freely and honestly to ascertain, fairly and truthfully, the

will of the people.” *Id.* ¶ 31. When elections are conducted under extreme partisan gerrymanders, the “will of the people” cannot be “fairly and truthfully ascertain[ed].” *Id.* ¶ 36. Therefore, the state court held that extreme partisan gerrymanders violate the State’s Free Elections Clause.

The evidence in the record suggests that the congressional redistricting plan is an extreme partisan gerrymander. The General Assembly created redistricting maps with the explicit intent to maximize advantage for one political party over another. When the General Assembly adopted criteria to be used in creating the plans, the legislature adopted “partisan advantage” and “political data” as official criteria to guide the redistricting process. *Rucho*, 318 F. Supp. 3d at 807. In addition, the legislative defendants explicitly tasked Dr. Hofeller to “make reasonable efforts to construct districts . . . to maintain the current [10-3 in favor of Republicans] partisan makeup of North Carolina’s congressional delegation.” *Id.* As the federal court found in *Rucho*, “the General Assembly’s pursuit of partisan advantage predominated over its non-partisan redistricting objectives.” *Id.* at 883.

The results of elections since these maps were enacted show that the legislative defendants’ efforts were effective. As the state court noted, the state legislative plans, using nearly the same criteria as the congressional redistricting plan at issue here, “achieved their intended partisan effect.” *Id.* ¶ 18. Republicans won 10 out of the 13 congressional seats in both 2016 and 2018, despite the fact that Democrats received nearly half of the two-party statewide vote. *See* State Board of, 11/08/2016 Official General Election Results - Statewide, available at https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0; State Board of Elections, 11/06/2018 Official General Election Results - Statewide, available at https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&

office=FED&contest=0; State Board of Elections, 09/10/2019 Unofficial General Election Results – Statewide, available at https://er.ncsbe.gov/?election_dt=09/10/2019&county_id=0&office=FED&contest=0. The court held in *Common Cause* that redistricting plans that do not allow the voters the free opportunity to choose their representatives are extreme partisan gerrymanders. *Common Cause*, slip op. COL ¶ 46. Similarly, the congressional redistricting map was effectively designed to—and did—maintain its 10-3 partisan advantage despite expressions of voter will. Accordingly, it appears that, pursuant to the *Common Cause* ruling, the congressional redistricting plan is an extreme partisan gerrymanders that violate the State’s Free Elections Clause.

B. The Equal Protection Clause

The available evidence appears to show that the legislative defendants intentionally classified voters based on partisanship to pack and crack them into districts so that they would be denied equal voting power based on partisanship. The court in *Common Cause* has held that such intentional classification is impermissible and violates the State’s Equal Protection Clause. *Id.* ¶ 63.

In *Common Cause*, the state court held that a redistricting plan violates North Carolina’s Equal Protection Clause if: (1) the “state officials’ predominant purpose in drawing district lines was to entrench their party in power by diluting the votes of citizens favoring their rival,” (2) “the lines drawn in fact have the intended effect by substantially diluting their votes,” and (3) the State does not have a “legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map.” *Id.* ¶ 58. The redistricting plans here meets all three requirements.

As described above, the legislative defendants seem to have created the congressional redistricting plan to maintain partisan advantage. *See supra* pp. 4-6. The General Assembly

adopted criteria that would create partisan advantage and the legislative defendants instructed their mapmaker to favor partisan advantage over other criteria. *Rucho*, 318 F. Supp. 3d at 807.

And, as described above, the available evidence appears to demonstrate that their actions did, in fact, lead to dilution of certain voters' voting power. In both the 2016 and 2018 elections, candidates of one party won 10 out of the 13 available seats. The margins of victory in each of these districts show that the lines drawn substantially diluted the vote strength of voters who cast ballots for the disfavored candidate. The Democratic candidates won their three districts with approximately 69-75% of the vote, while the Republican candidates won their districts with no more than 60% of the vote. Pls' Br. at 12 (aggregating 2018 and 2019 election results from State Board of Elections website). By packing voters likely to vote for Democratic candidates into three districts, the congressional redistricting plan spreads the other voters likely to vote for Democratic candidates across the other ten districts so that they could not elect the candidate of their choice. This is evidence of vote dilution, which, according to the *Common Cause* decision "diminishes the voting power of Democratic voters." *Common Cause*, slip op. COL ¶ 70.

Finally, the state court found that the legislative defendants' stated justifications for the legislative maps failed to explain the legislative maps' partisan bias. *Id.* ¶ 76. As for the congressional redistricting plan, the legislative defendants have offered no new nonpartisan explanation for the redistricting plan's bias. *See Rucho*, 218 F. Supp. 3d at 896-99 (rejecting the legislative defendants' stated nonpartisan explanations for the redistricting plan's bias). As a result, the legislative defendants would be unable to show a nonpartisan justification for the bias shown in the congressional redistricting maps.

Accordingly, it appears that the congressional redistricting plan is an extreme partisan gerrymander that violates the State's Equal Protection Clause.

C. The Freedom of Speech and Assembly Clauses

The available evidence also tends to show that the congressional redistricting plan retaliates against voters based on their previous votes and ensures that their votes are less effective, both of which burden the voters' free-speech and assembly rights.

In *Common Cause*, the court held that a redistricting plan retaliates against voters based on their prior speech if it “take[s] adverse action against” voters “with an intent to retaliate against their protected speech or conduct” that would not have been taken “but for that retaliatory intent.” *Id.* ¶ 113. In that case, the court held that the legislative maps violated voters' free-speech rights because voters supporting disfavored candidates were less able to succeed in electing candidates of their choice, the legislative defendants admitted to using partisan criteria based on historical voting behavior, and the vote dilution that resulted would not have occurred but for the legislative defendants' cracking and packing of disfavored voters. *Id.* ¶¶ 114-16.

The available evidence here appears to suggest that the congressional redistricting plan retaliates against disfavored voters in the same way. The election results in 2016 and 2018 show that voters favoring candidates of one party were less able to succeed in electing candidates of their choice, the legislative defendants admitted to using partisan criteria based on historical voting behavior to draw these plans, and the legislative defendants provided no nonpartisan justification for the cracking and packing of disfavored voters. *See supra* pp. 6-7.

In addition, the evidence tends to demonstrate that the congressional redistricting plan also discriminates against the viewpoint of certain disfavored voters because the plan makes those disfavored voters' votes less effective. In *Common Cause*, the court held that the “sorting of Plaintiffs and other Democratic voters based on disfavor for their political views [that] burdened their speech by making their votes less effective” violated the State's guarantee to free

speech. *Common Cause*, slip op. COL ¶ 102. The same appears to be the case here for the congressional redistricting plan. The evidence in the record seems to show that the congressional redistricting plan cracked and packed disfavored voters into congressional districts based on their past voting behavior. Theodore Ex. I at 9.

Separately, the congressional redistricting plan appears to violate the voter's right to assemble. In *Common Cause*, the court held that the legislative maps restricted the ability of disfavored voters to "affiliate in a political party and carry out [their] activities and objects" by cracking and packing disfavored voters. *Common Cause*, slip op. COL ¶ 107. The same is true for the congressional redistricting plan. Based on the evidence, these plans appear to crack and pack disfavored voters so as to minimize their ability to elect a candidate of their choice, restricting their ability to affiliate in a political party. *See supra* p. 7.

For all of these reasons, there appears to be no viable defense against the plaintiffs' claims that the congressional redistricting plan violates the State's Free Elections, Equal Protection, and Freedom of Speech and Assembly Clauses.

II. Irreparable Harm

The parties face the prospect of imminent irreparable harm. In addition to the harms the plaintiffs recite in their motion (Pls. Br. at 46-48), the Board faces distinct harm if the enforcement of the congressional redistricting plan is not enjoined. Being forced to implement an unconstitutional enactment can justify an injunction to prevent that result. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 380-81 (1992).

Here, the Board faces a choice between violating the General Assembly's enactment of the congressional redistricting plan and possibly violating North Carolina voters' rights to free elections, equal protection, and free speech, as interpreted in *Common Cause*.

Furthermore, as of now, the date of the primaries is set for March 2020. To properly administer the primary election on the date on which it is now scheduled, the Board expects that it would need finality on the redistricting maps between now and December 2-10, 2019. Decl. of K. Brinson Bell ¶ 10 (attached as Exhibit 1).² The Board can, however, authorize by majority vote, an extension of the deadline to distribute absentee ballots by five days. *Id.* ¶ 9; *see also* N.C. Gen. Stat. § 1163-227.10(a). If the Board were to authorize an extension of the deadline—or if this Court were to order the Board to extend the deadline—the Board would need finality on the redistricting plans between now and December 7-15, 2019. Bell Aff. ¶ 10.

If, however, the Court were to order that the administration of the March primaries be postponed to a later date, the Board estimates that it would need approximately 63 to 71 days to prepare before early voting in that primary. *Id.* ¶ 17. In addition, the State may incur additional costs to hold separate primaries at a different time. These costs counsel in favor of an immediate remedy, so the March primaries can go forward as scheduled. But if the primary needs to be postponed to afford a remedy in time for the next election cycle, this remedy would be appropriate to ensure the integrity of elections in North Carolina and to afford every one of its citizens a full and fair opportunity to vote.

III. The Balance of the Equities

In addition to the voter interests raised by the plaintiffs, the Board has separate interests that counsel in favor of swift resolution of the plaintiffs' motion. In having to choose between failing to enforce an enactment of the General Assembly and violating, pursuant to the decision

² This declaration was submitted as part of the remedial proceedings in *Common Cause v. Lewis*, No. 18 CVS 14001 (Sup. Ct. Wake Cty.). The information about the timing and administration of elections in 2020 applies to congressional districts in the same way as it does to legislative districts.

in *Common Cause*, the rights of North Carolina voters weighs in favor of preliminary relief. *See supra* pp. 9-10.

IV. The Public Interest

The Board's interest and the public interest align. In weighing the public interest, the Court should consider the importance of maintaining the public's confidence in election administration through fair and free elections.

CONCLUSION

Under the circumstances, it would be appropriate for this Court to issue a preliminary injunction that, during the pendency of this litigation, enjoins the administration of and preparation for the 2020 primary and general elections for the U.S. House of Representatives using the current congressional redistricting plan. Because of the urgent administrative obligations of the Board in preparing for the 2020 primary and general elections, the Board respectfully requests that any remedial process ordered by the Court allow for timely enactment of a new plan that comports with the North Carolina Constitution.

Respectfully submitted this 21st day of October, 2019.

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Certificate of Service

I certify that today, I filed and served the forgoing document on all counsel of record using the CM/ECF filing system.

This 21st day of October, 2019.

/s/ Paul M. Cox
Paul M. Cox
Special Deputy Attorney General