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
SUMMARY JUDGMENT
AND SUPPORTING
MEMORANDUM OF LAW**

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Statutes, Constitutional Provisions, and Rules

Plaintiffs Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Jackson Thomas Dunn, Jr., Mark S. Peters, Joseph Thomas Gates, Kathleen Barnes, Virginia Walters Brien, and David Dwight Brown respectfully move the Court to enter an order of summary judgment against Defendants, for the reasons stated herein.

INTRODUCTION

This is a straightforward case. There is no genuine dispute as to any material fact, and Plaintiffs are entitled to judgment as a matter of law. On the facts, Legislative Defendants freely admitted during the 2016 redistricting process that the State's 2016 congressional plan (the "2016 Plan") is a "political gerrymander" that seeks to predetermine the outcome of every congressional election in North Carolina through the 2020 cycle. Legislative Defendants adopted "Partisan Advantage" as an official redistricting criterion, directing that the districts be drawn to produce a congressional delegation of "10 Republicans and 3 Democrats." Representative Lewis said that the districts could not be drawn to be more gerrymandered, and that he was drawing the districts this way because he believes the viewpoints of Democratic voters are worse "for the country." 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 here are in the public record and incontrovertible.

On the basis of these indisputable facts, Plaintiffs are entitled to judgment as a matter of law. In *Common Cause v. Lewis*, this Court unanimously 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 violates the North Carolina Constitution as a matter of law under *Common Cause*.

As this Court has acknowledged, while the Court could push back the March 2020 congressional primaries in order to allow more time to develop the new map, it is unnecessary to do so. There is ample time to brief and decide this motion for summary judgment, and review a remedial plan passed by the General Assembly with the assistance of a court-appointed 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 grant summary judgment for Plaintiffs, hold that the 2016 Plan violates the North Carolina Constitution, and order the use of a new, fair plan in the 2020 elections, starting with the March 2020 primaries. As part of the remedial process, the Court should order that no remedial plan passed by the General Assembly, whether passed before or after issuance of summary judgment, may take effect until this Court has reviewed the plan to confirm that it is non-partisan, constitutional, and compliant with the Court's remedial decree.

PROCEDURAL HISTORY

On September 27, 2019, Plaintiffs filed their Verified Complaint challenging the 2016 Plan under North Carolina's Free Elections Clause, art. I, § 10; Equal Protection Clause, art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, art. I, §§ 12 & 14. Verified Compl. ¶¶ 120-44. Plaintiffs are 14 individual registered Democratic voters. Legislative Defendants are six members of the North Carolina Senate and House of Representatives named in their official capacities. The State Board Defendants are the North Carolina State Board of

Elections and its officers and members named in their official capacities. One business day after filing the Verified Complaint, Plaintiffs filed a motion for preliminary injunction and a motion to expedite briefing and decision on the preliminary injunction.

On October 10, 2019, this Court granted the motion to expedite and set a hearing on the preliminary injunction for October 24. Two business days later, Legislative Defendants removed the case to federal court. Plaintiffs filed an emergency motion to remand on October 15, 2019. The federal district court granted Plaintiffs' motion to remand the case a week later, on October 22, 2019. *See Harper v. Lewis*, No. 5:19-CV-452-FL, ECF No. 33 at 2 (E.D.N.C. Oct. 22, 2019).

On October 28, 2019, following briefing and a hearing, the Court granted Plaintiffs' motion for a preliminary injunction. The Court concluded that Plaintiffs' "partisan gerrymandering claims specifically present justiciable issues," and that "Plaintiffs in this case have standing to challenge the congressional districts at issue." *Harper v. Lewis*, 19-CVS-012667, slip op. at 5 (N.C. Super. Ct. Oct. 28, 2019). In assessing the factors bearing on the necessity of injunctive relief, the Court held that there is a "substantial likelihood that Plaintiffs will prevail on the merits of this action" based on the "detailed record of both the partisan intent and the intended partisan effects of the 2016 congressional districts" from the years-long litigation in federal court challenging these same districts. *Id.* at 12-14. This Court further concluded that allowing the 2020 elections to proceed under the 2016 Plan would cause "irreparable loss to [Plaintiffs'] fundamental rights," including the lost "opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 14-16. Accordingly, the Court enjoined Defendants from "preparing for or administering the 2020 primary and general elections" under the 2016

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Plan. *Id.* at 18. The Court stated that it would "upon the forthcoming filing of Plaintiffs' motion for summary judgment, provide for an expedited schedule so that Plaintiffs' dispositive motion may be heard prior to the close of the filing period for the 2020 primary election." *Id.* at 16.

STATEMENT OF UNDISPUTED FACTS

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. Legislative Defendants' Answer ("LD Answer") ¶ 39. 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"). *Id.*; 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. LD Answer ¶ 41; 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-

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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. LD Answer ¶ 46. 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 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 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 Maptitude, 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 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.

As Representative Lewis and Dr. Hofeller admitted, 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. *See* Hofeller Dep. at 175:10-23, 189:20-22; Lewis Dep. at 63:9-64:17,

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77:7-24. 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. However, the Adopted

Criteria made clear that counties could be split for partisan advantage. *See* Adopted Criteria at 2

("Divisions of counties shall only be made for reasons of equalizing population, considerations

of incumbency and political impact.").

The Joint Committee adopted the Political Data and Partisan Advantage criteria on party-

line votes. LD Answer ¶ 63. 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 loaded 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. LD Answer ¶ 69.

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%

In their opposition to Plaintiffs' motion for a preliminary injunction, Legislative Defendants conceded that their "sole focus" in drawing the 2016 Plan was to "create a stronger field for Republicans statewide." LD PI Opp. 9-11. Legislative Defendants asserted that they lost in *Harris v. McCrory* because the "political explanation was not a sufficiently prominent rationale" for the racially gerrymandered 2011 plan, and that they "did all the things" they had been "accused" of failing to in 2011, *e.g.*, they made partisanship their "sole focus." *Id.*

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/2nM2NlS.[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]

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[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 grant summary judgment for Plaintiffs, 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 stiches together the heavily Democratic

areas of Durham, Wilson, and Pitt Counties with a handful of rural Democratic counties in the

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[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. Dr. Mattingly's analysis was especially conservative because his primary ensemble of congressional districting plans intentionally sought to create two districts with BVAPs comparable to the two districts with the highest BVAPs in the 2016 Plan. Mattingly Report at 13. Dr. Mattingly programmed this algorithm before the U.S. Supreme Court held in *Harris* that Legislative Defendants lacked evidence that the VRA requires any racial thresholds for North Carolina's congressional districts. Dr. Mattingly created a separate ensemble of congressional plans that did not consider racial data, and he showed in his report that this ensemble created more Democratic-leaning seats than his primary ensemble that did incorporate racial data. *Id.* at 16-17.

northeastern portion of the State. Dr. Hofeller admitted that he intentionally drew District 1 to be "predominantly Democratic." Hofeller Dep. at 192:7-16.

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]
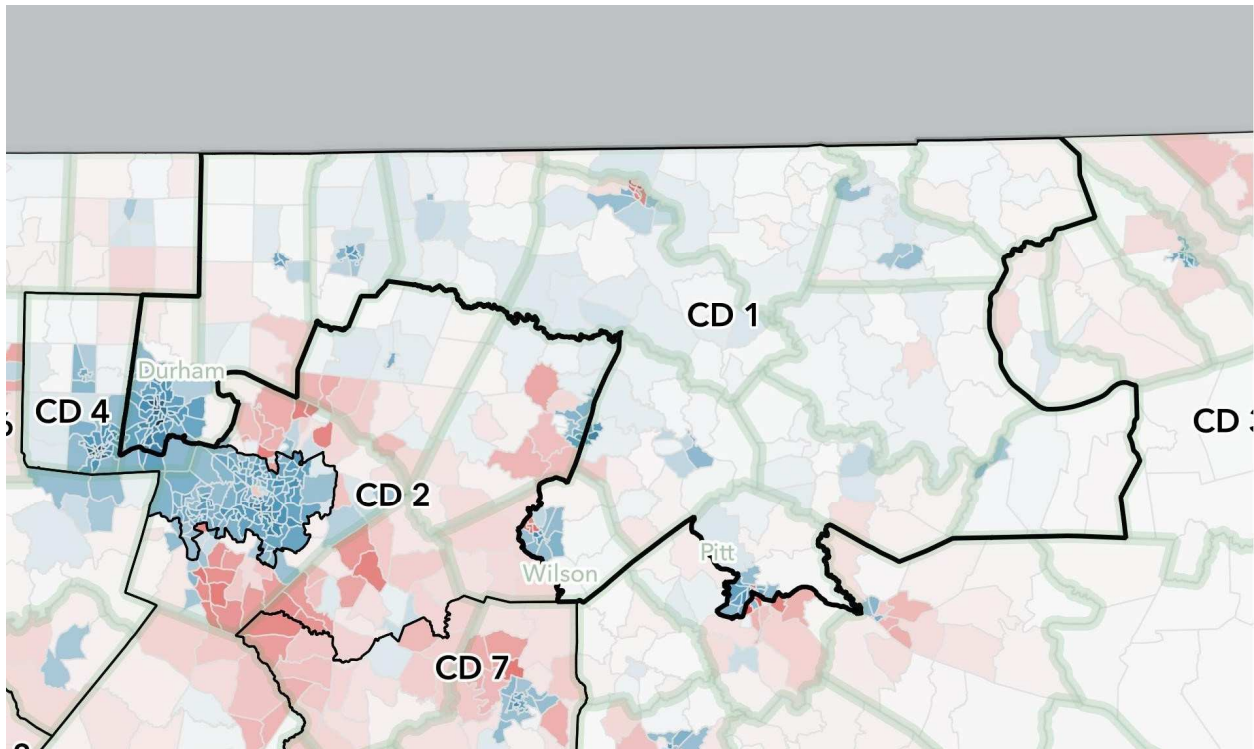
Esselstyn Decl. at 3.

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. *Id.* It does the same to Wilson County. *Id.* In dividing Wilson County, the plan builds a fence between Democratic and Republican voters,

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[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.

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. *Id.*

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.
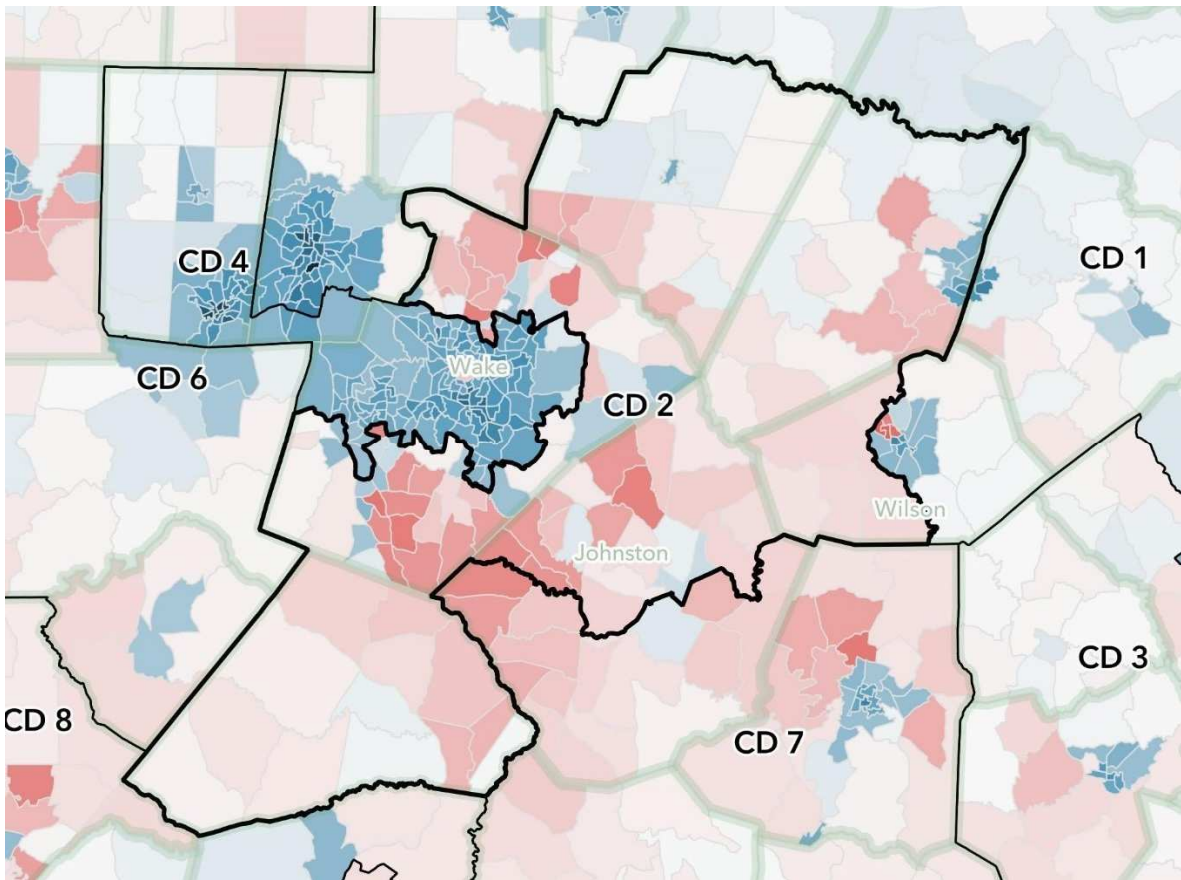
Esselstyn Decl. at 4.

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.
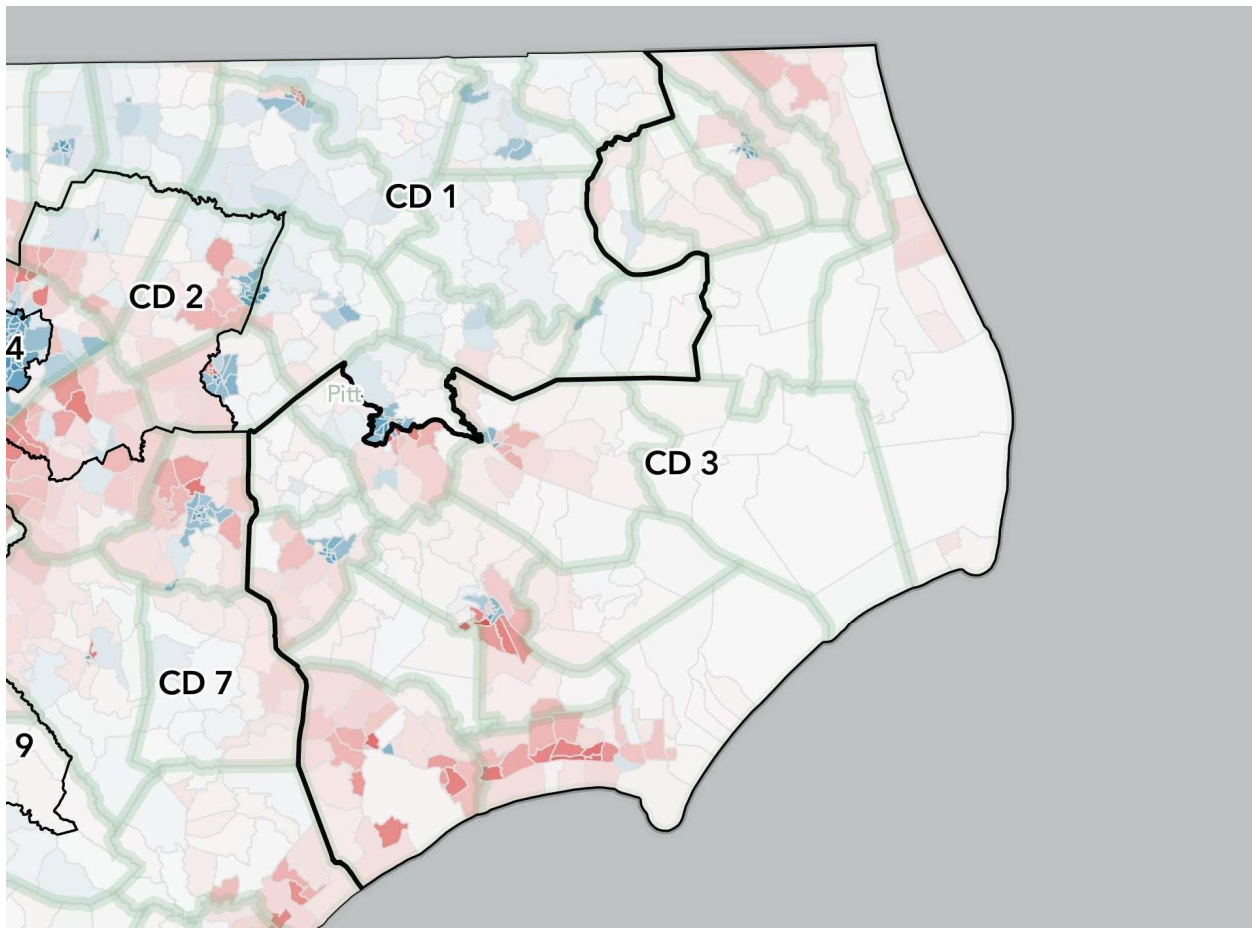
Esselstyn Decl. at 5.

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.
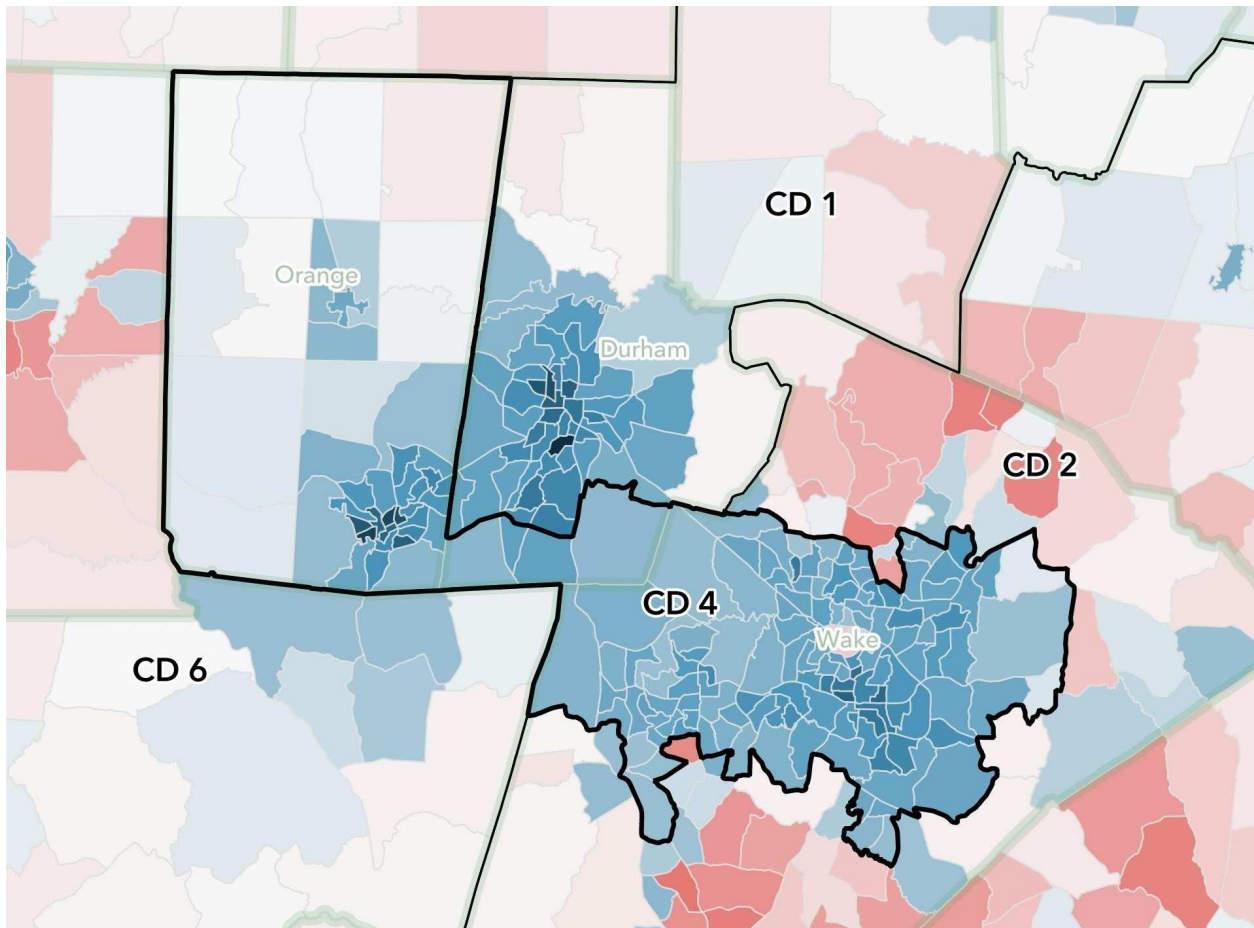
Esselstyn Decl. at 6.

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.
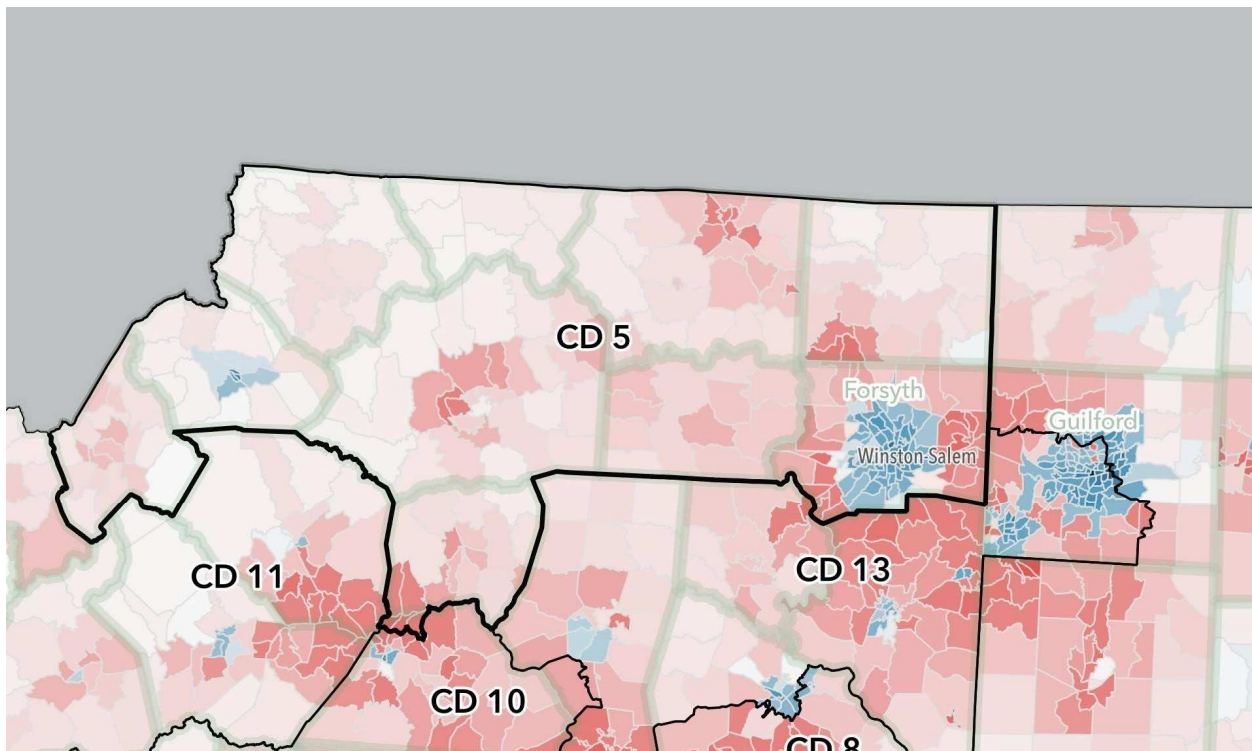
Esselstyn Decl. at 7.

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.
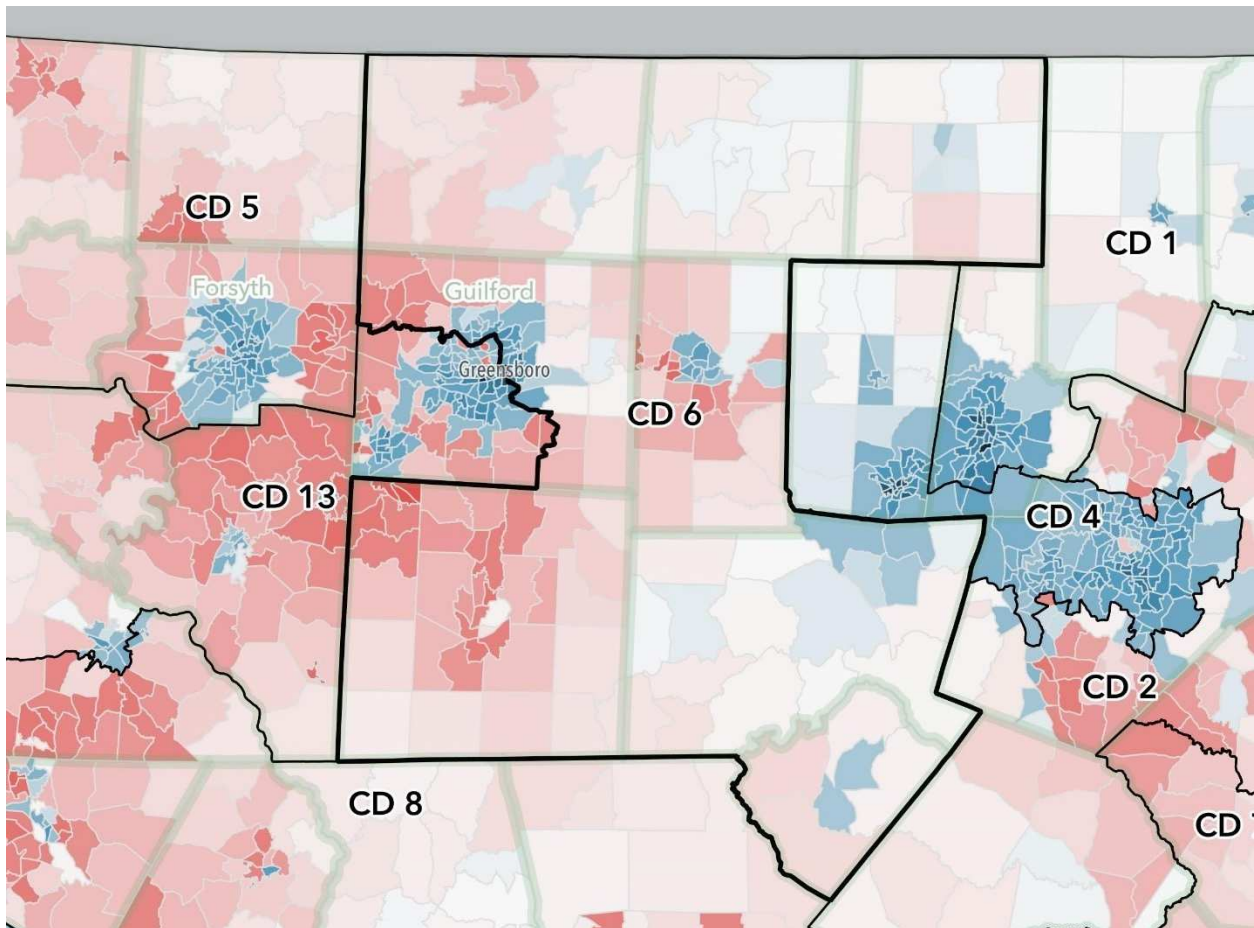
Esselstyn Decl. at 8.

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:
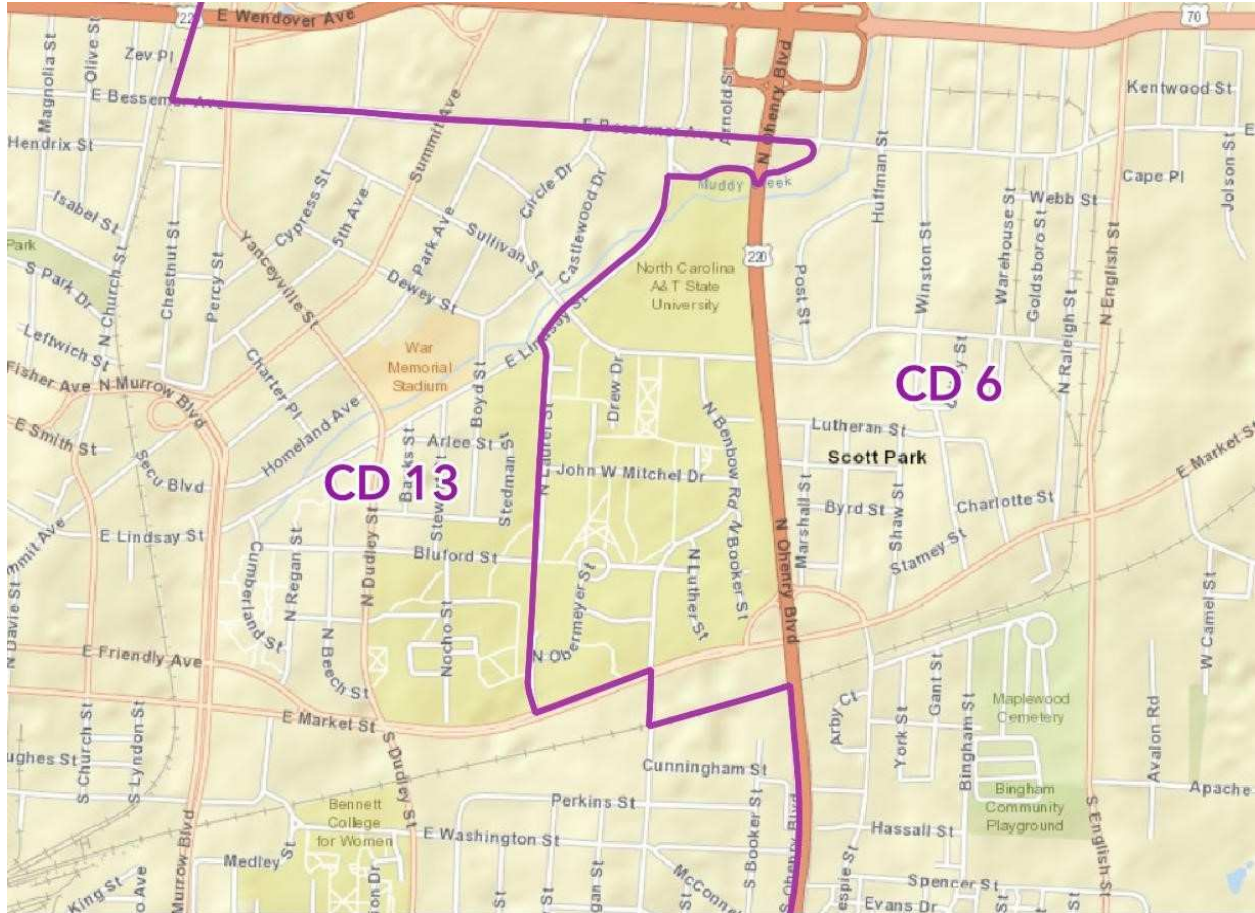
Esselstyn Decl. at 16.

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.
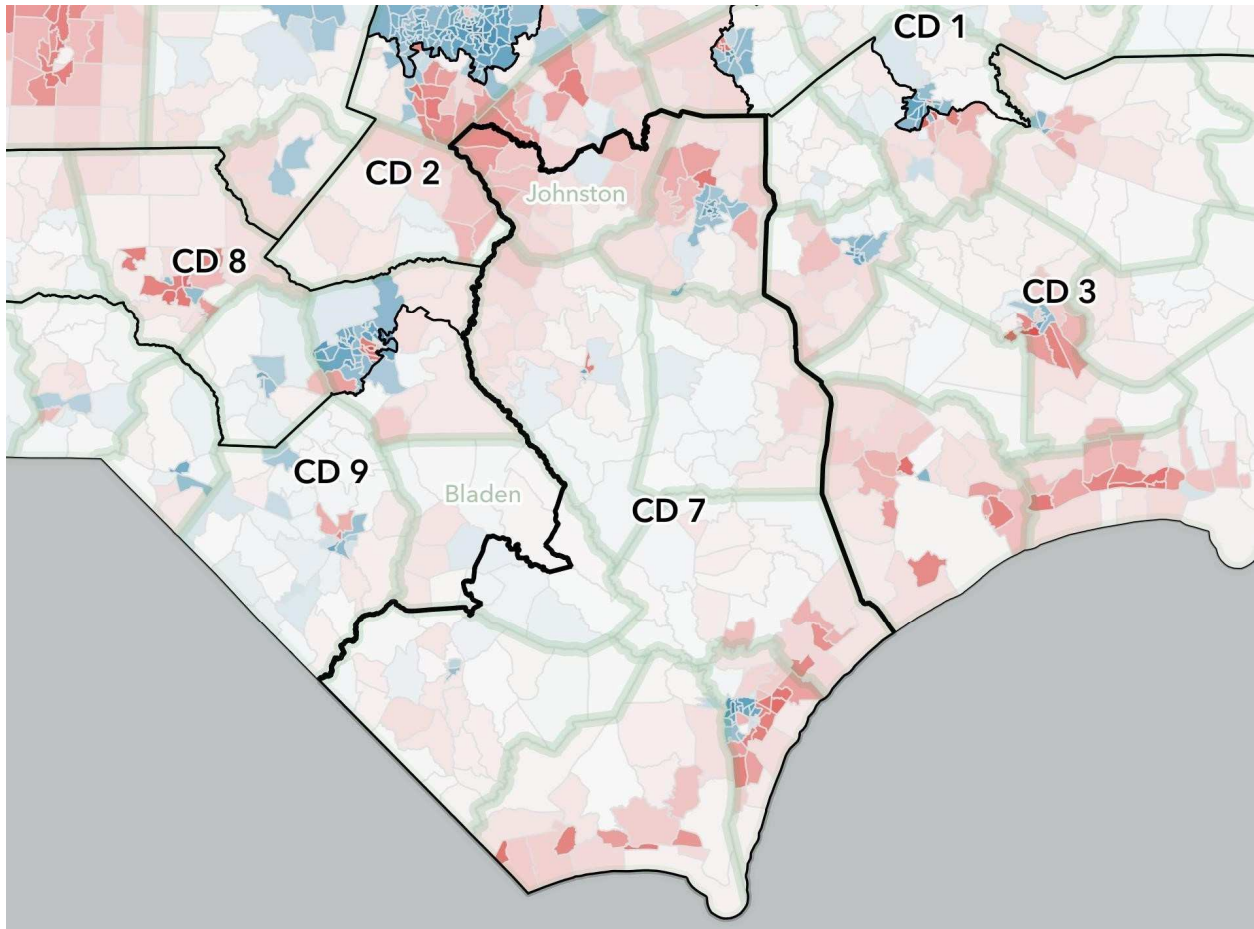
Esselstyn Decl. at 9.

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.
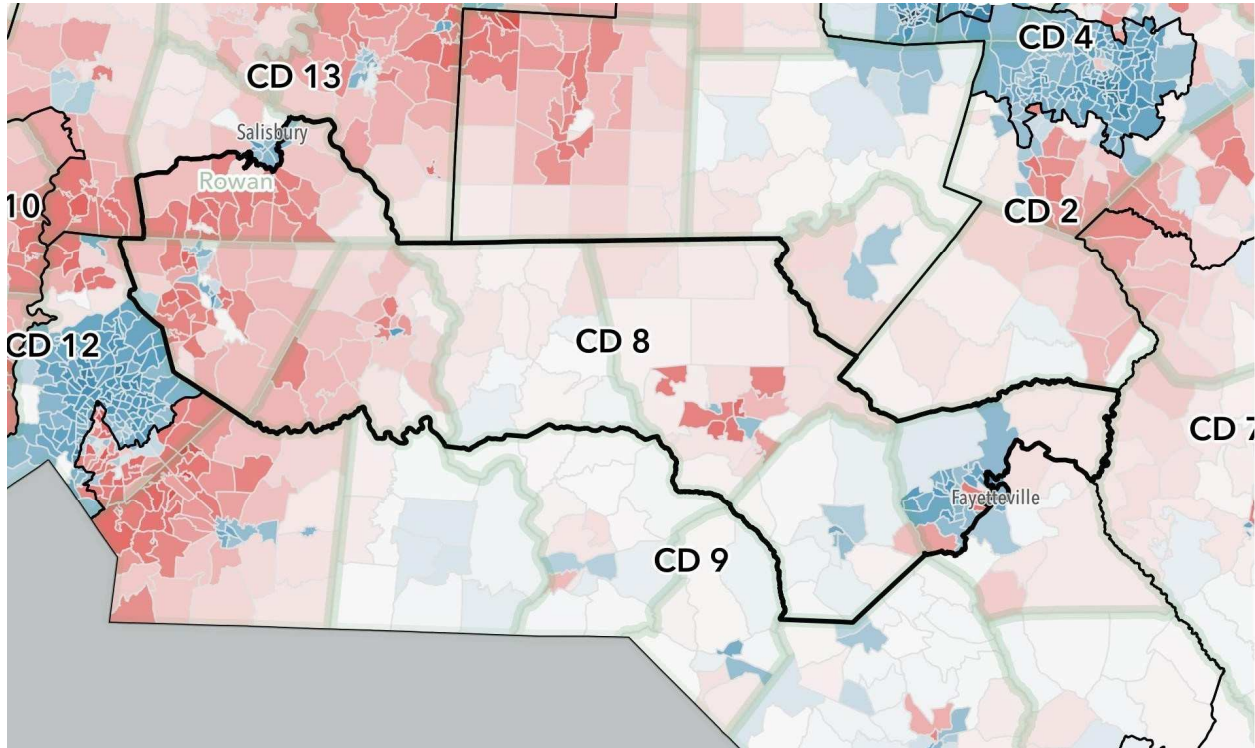
Esselstyn Decl. at 10.

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.
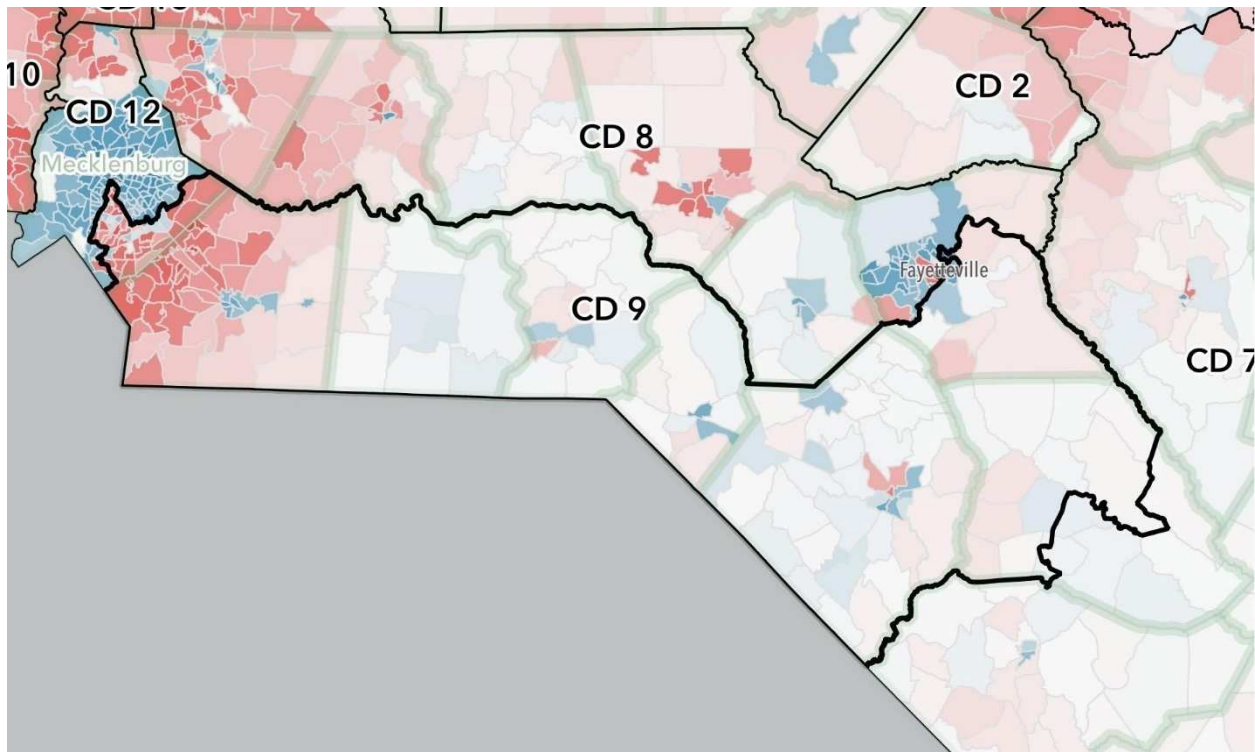
Esselstyn Decl. at 11.

In the elections under the 2016 Plan, District 9 has bent but not broken, remaining a Republican seat. In 2016, the Republican candidate won with 58.2% of the vote. In 2018, District 9's Republican candidate was involved in a high-profile election-fraud scandal, but even that 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.

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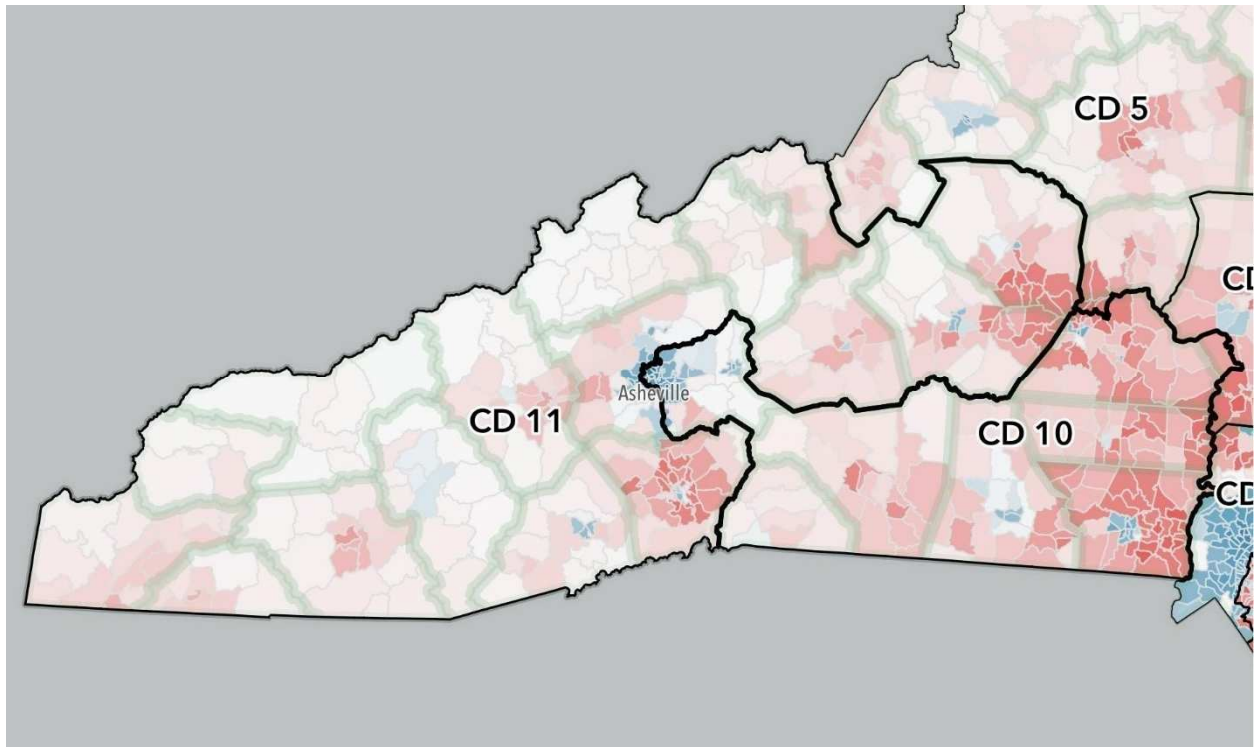
Esselstyn Decl. at 12-13.

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]

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[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.
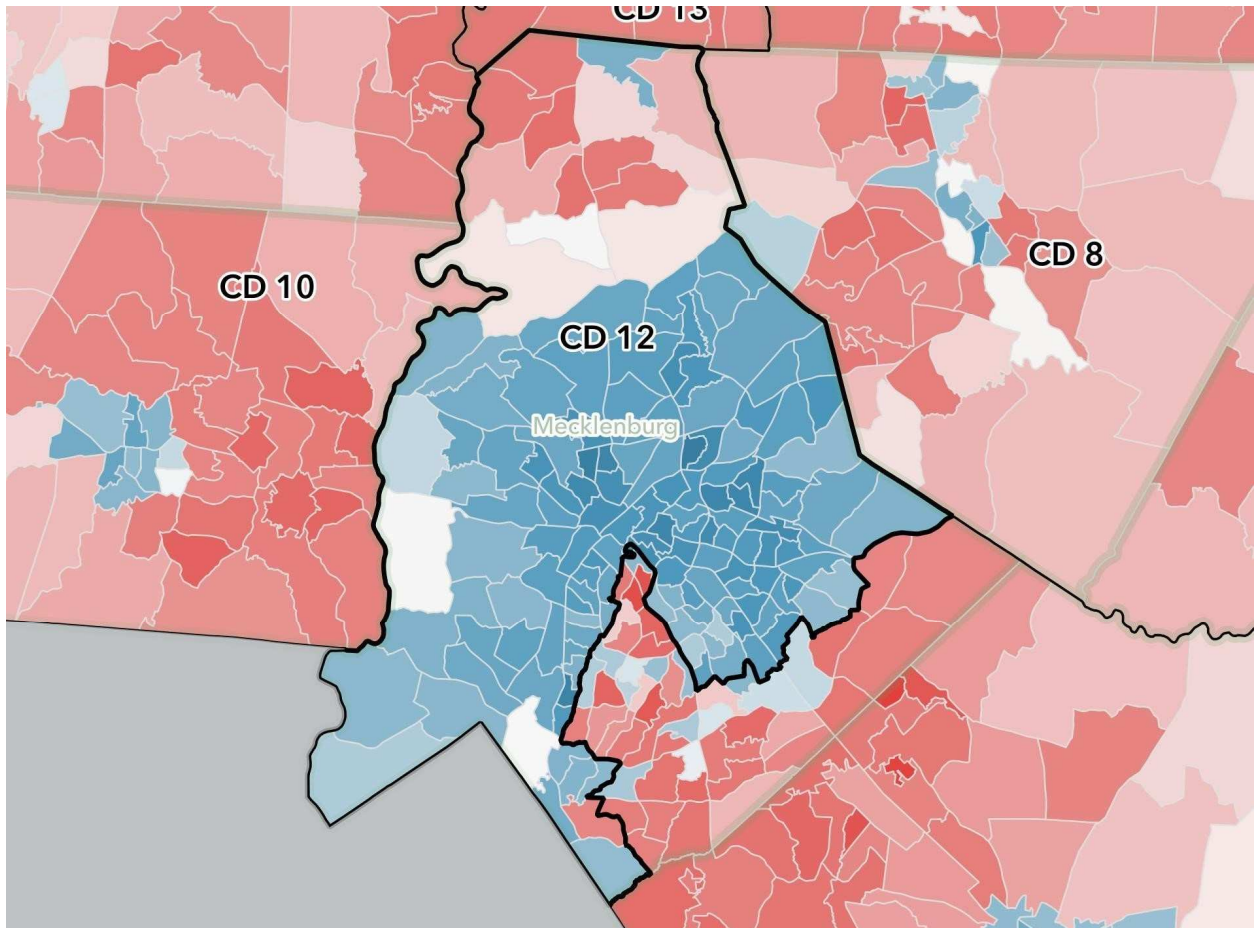
Esselstyn Decl. at 14.

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.
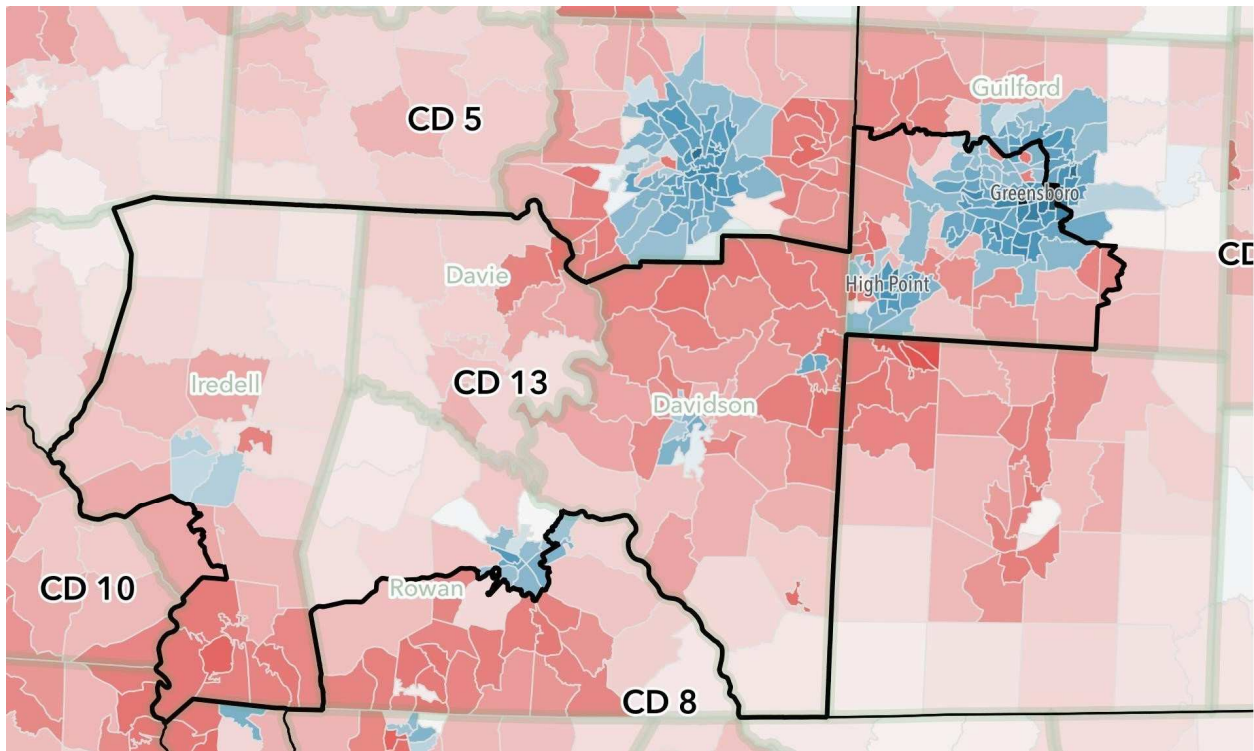
Esselstyn Decl. at 15.

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. *Common Cause v. Rucho*, No. 16-cv-1026, ECF No. 1 (M.D.N.C. Aug. 5, 2016); *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019). A month later, the League of Women Voters of North Carolina and twelve individual voters filed a separate action alleging that the 2016 Plan violated the federal constitution. *League of Women Voters of N.C. v. Rucho*, No. 16-cv-1164, ECF No. 1 (M.D.N.C. Sept. 22, 2016).

The two cases were consolidated, and the federal three-judge panel presided over extensive discovery and other pretrial proceedings. In fact discovery, the plaintiffs deposed Dr. Hofeller twice and also deposed Representative Lewis and Senator Rucho. The plaintiffs submitted reports from three experts (Dr. Chen, Dr. Mattingly, and Dr. Simon Jackman), and Legislative Defendants submitted reports from three experts (Dr. Hood, Dr. James Gimpel, and Sean Trende). Legislative Defendants deposed the plaintiffs' experts, including two separate depositions of Dr. Chen.

The three-judge panel presided over a four-day bench trial beginning on October 16, 2017. The plaintiffs' experts all testified at trial and were subject to extensive cross-examination. After the trial, the 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, following a two-week trial, 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 Voters

The 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,

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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 for Summary Judgment

Summary judgment is appropriate if "there is no genuine issue as to any material fact and [the movant] is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 3 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 7, 83, 530 S.E.2d 829, 835 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible evidence." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002).

There is no genuine dispute as to any material fact here. Indeed, the material facts are all a matter of public record: they are established from the official written criteria for the 2016 Plan, from Legislative Defendants' own public statements and sworn testimony, and from the sworn testimony of their agent Dr. Hofeller. The only question remaining is one of law: whether an admitted maximal partisan gerrymander violates the North Carolina Constitution. In prior cases, North Carolina courts have granted summary judgment holding that redistricting plans violate the North Carolina Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (deciding at summary judgment that North Carolina's state legislative districts violate the North Carolina Constitution); *Pender Cty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (same). This Court should do the same here.

II. The 2016 Plan Violates the North Carolina Constitution as a Matter of Law

Partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Harper v. Lewis*, 19-CVS-012667, slip op at 5 (N.C. Super. Ct. Oct. 28, 2019) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2016)). Under the legal principles announced in *Common Cause v. Lewis* and reiterated by this Court in granting a preliminary injunction in this case, "[e]xtreme partisan gerrymandering violates . . . the North Carolina Constitution['s]" Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. *Id.* at 6. Because there is no genuine dispute that the 2016 Plan is an extreme partisan gerrymander, Plaintiffs are entitled to judgment as a matter of law.

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. And 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).

The North Carolina Supreme Court "has long recognized the fundamental role of the will of the people in our democratic government." *Harper*, slip op. at 6. "Our government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van*

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Bokkelen v. Canaday, 73 N.C. 198, 220 (1875). Thus, in interpreting provisions of the North

Carolina Constitution, courts "should keep in mind that this is a government of the people, in

which the will of the people--the majority--legally expressed, must govern." *State ex rel. Quinn

v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897). "[F]air and honest elections are to

prevail in this state." *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896). And

"because elections should express the will of the people, it follows that 'all acts providing for

elections, should be liberally construed, that tend to promote a fair election or expression of this

popular will." *Harper*, slip op. at 6 (quoting *Lattimore*, 120 N.C. at 428, 26 S.E. at 638). The

meaning of the Free Elections Clause, then, "is that elections must be conducted freely and

honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 7; *see also Common

Cause*, slip op. COL ¶ 31 (same).

Partisan gerrymandering is incompatible with the Free Elections Clause. It 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." *Harper*, slip op at 7. Indeed,

"partisan gerrymandering ... strikes at the heart of the Free Elections Clause." *Common Cause*,

slip op. COL ¶ 45. "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.

There is no genuine dispute that the 2016 Plan is a partisan gerrymander that violates 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. This

Court can grant summary judgment based on the official written criteria for the 2016 Plan alone.

But there is even more. Legislative Defendants and Dr. Hofeller confirmed—on the

record in legislative hearings and in sworn deposition and trial 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. *Common Cause*, slip op. COL

¶ 47. 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 Legislative Defendants left no room for doubt that, as with

the invalidated 2017 state legislative plans, they were seeking partisan advantage "to the greatest

extent possible." *Common Cause*, slip op. COL ¶ 46. They admitted that the 2016 Plan was the

most extreme partisan gerrymander possible. 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 similarly 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

significant 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. 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 genuine dispute that the 2016 Plan is an extreme partisan gerrymander. 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. *Harper*, slip op. at 7; *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 Cty.*, 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. As this Court has explained, "partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party." *Harper*, slip op. at 8 (citing *Lehr v. Robinson*, 463 U.S. 248, 265 (1983)) ("The concept of equal justice under law requires the State to govern impartially."). As such, extreme partisan gerrymandering "runs afoul of the North Carolina Constitution's guarantee that no person shall be denied the equal protection of the laws." *Id.* Thus, in *Common Cause*, this Court held that extreme partisan gerrymandering violates the North Carolina Equal Protection Clause 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." *Common Cause*, slip op. COL ¶¶ 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. *Harper*, slip op. at 8. "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. There can be no genuine dispute here. 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 plaintiff-specific analysis 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 adopted criteria *permitted* the subversion of neutral criteria for partisan ends.

In short, there is no genuine dispute 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. The resulting map is indisputably an extreme partisan gerrymander that deprives Plaintiffs and other Democratic voters of substantially equally voting power, which this Court has recognized "runs afoul of the North Carolina Constitution's guarantee that no person shall be denied the equal protection of the laws." *Harper*, slip op. at 8.

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 here just as they did in the context of state legislative elections in *Common Cause*.

It is "axiomatic that the government may not infringe on protected activity based on the individual's viewpoint." *Harper*, slip op. at 9 (internal quotation marks omitted). The guarantee of free expression "stands against attempts to disfavor certain subjects or viewpoints." *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)). Viewpoint discrimination "is *most* insidious where the targeted speech is political," as "both history and logic demonstrate the perils of permitting the government to identify certain preferred speakers while burdening the speech of disfavored speakers." *Id.* (emphasis by Court) (quotation marks omitted). The Free Speech and Assembly Clauses in the North Carolina Constitution thus require courts to "carefully guard against" such efforts "by the party in power." *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

"When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g., Republican voters) while targeting certain disfavored speakers (e.g., Democratic voters) because of disagreement with the views they express when they vote." *Id.* In a partisan gerrymander, "disfavored speakers" are packed and cracked into districts, which ensures that these voters "are significantly less likely, in comparison to favored voters, to be able to elect a candidate who shares their views." *Id.* And by burdening the associational rights of disfavored voters, partisan gerrymandering also burdens these voters' constitutional right to "instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* (quoting N.C. Const. art. I, § 12). "As such, extreme partisan gerrymandering runs afoul of these important guarantees in the North Carolina Constitution of the freedom of speech and the

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right of the people of our State to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

      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. *See Common Cause*, slip op COL ¶ 86. There is no genuine dispute that Legislative Defendants did this in enacting the 2016 Plan. While a law "need not explicitly mention any particular viewpoint to be impermissibly discriminatory," *Common Cause*, slip op. COL ¶ 99, the 2016 Plan is the rare case where the legislature did explicitly announce an intent to disfavor a particular viewpoint. Legislative Defendants adopted an explicit written criterion that the 2016 Plan would seek "Partisan Advantage" to favor one political viewpoint. *See* Adopted Criteria. The Adopted Criteria are viewpoint discriminatory on their face.

      Representative Lewis left no room for doubt 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 was crafted in the exact same manner 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). Again, this is undisputed: the Adopted Criteria made clear that "Political Data" involving prior "elections results" would be used to seek "Partisan Advantage," *see* Adopted Criteria, and Dr. Hofeller specifically admitted that he used VTD-level election results in drawing the 2016 Plan to maximize Republicans' advantage, 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.

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; *see also Harper*, slip op. at 10

("The government also may not retaliate based on protected speech and expression."). 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." *Common Cause*, slip op. ¶ 112.

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 Standing

All fourteen Plaintiffs have 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.*

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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.'" *Harper*, slip op. at 5 (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 at727-28.

This Court already correctly recognized that "Plaintiffs in this case have standing to challenge the congressional districts at issue." *Harper*, slip op. at 5. With respect to redressability, the issuance of the preliminary injunction here and the remedial process in *Common Cause* demonstrate that this Court is fully capable of remedying partisan gerrymandering. And as injury-in-fact, all fourteen Plaintiffs have suffered legally cognizable

injuries in the drawing of their individual districts. This Court held in *Common Cause* 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. Plaintiffs have

introduced such evidence here through Dr. Chen's declaration.

Dr. Chen has performed precisely the same district-specific analysis in this case that he

performed in *Common Cause*. Specifically, Dr. Chen created computer simulations for North

Carolina's congressional districts in *Rucho* that 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 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.   **The Court Should Adopt a Non-Partisan, Non-Discriminatory Remedial Plan**

Consistent with N.C.G.S. § 120-2.4, the Court should afford the General Assembly two

weeks to adopt a remedial plan. As in *Common Cause*, this Court should require that Legislative

Defendants and their agents conduct the entire remedial process in full public view, which at a

minimum requires that all map drawing occur at public hearings, with any relevant computer

screen visible to legislators and public observers. *See Common Cause*, slip op. Decree ¶ 8. The

Court should also again require that, if Legislative Defendants wish to retain one or more

individuals who are not current legislative employees to assist in the map-drawing process,

Legislative Defendants must obtain approval from the Court to engage any such individuals. *Id.* ¶ 9. In addition, the Court should direct Legislative Defendants to make available shapefiles and block equivalency files for proposed plans and amendments under consideration during the legislative process. These transparency requirements are more than warranted based on this Court's finding in *Common Cause* that Legislative Defendants and their attorneys misled a federal court in 2017 during the remedial process for redrawing the 2017 state legislative plans. *Id.* at FOF ¶ 704; *see also id.* at COL ¶ 174 (requiring Legislative Defendants to conduct the "entire remedial process in full public view" given "what transpired in 2017").

This Court should also immediately appoint Dr. Nathaniel Persily to serve as a Referee to (1) assist the Court in reviewing any Remedial Maps enacted by the General Assembly; and (2) develop remedial maps for the Court should the General Assembly fail to enact lawful Remedial Maps within the time allowed. And as in *Common Cause*, the Court should also deny any stay of the remedial process pending any appeal of this Court's grant of summary judgment. *Common Cause*, slip op. Decree ¶ 10.

The Court should direct that the remedial plan comply with the following nonpartisan elements of the 2016 Adopted Criteria:

- Equal Population: Legislative Defendants shall use the 2010 federal decennial census data as the sole basis of population for the establishment of districts. The number of persons in each congressional district shall be as nearly equal as practicable, as determined under the most recent federal decennial census.

- Contiguity: Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

- <u>Racial Data</u>: Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts.

- <u>Splitting VTDs</u>: Voting districts ("VTDs") should be split only when necessary to comply with the zero deviation population requirements set forth above.

- <u>Twelfth District</u>: Legislative Defendants shall construct districts that eliminate the configuration of the Twelfth District that existed prior to the 2016 Plan.

- <u>Compactness and the Division of Counties</u>: Legislative Defendants shall make reasonable efforts to construct districts that improve the compactness of the districts in existence prior to the 2016 Plan and keep more counties and VTDs whole as compared to the district in existence prior to the 2016 Plan. Division of counties shall only be made for reasons of equalizing population. Reasonable efforts shall be made not to divide a county into more than two districts.

See Adopted Criteria (modified to eliminate partisan considerations).

This Court should not permit incumbency protection to be a criterion for the remedial plan. Unlike with state legislative plans, candidates for Congress are not required to reside in the district they seek to represent, and thus there is no compelling interest in permitting incumbency protection. Moreover, the remedial process in *Common Cause* demonstrates that incumbency protection efforts can be used for partisan ends and can subordinate traditional districting principles. If this Court does allow for incumbency protection, the Court should provide that incumbency protection can only be considered to avoid pairing incumbents in the same district, and that it may not be carried out for any political reasons, including to benefit an incumbent of either party. *Common Cause*, slip op. COL ¶ 168. The Court should further direct, as it did in *Common Cause*, that "the invalidated [2016] districts may not be used as a starting point for

drawing new districts, and no effort may be made to preserve the cores of invalidated [2016] districts." *Id.*, Decree ¶ 6.

The Court should hold that Legislative Defendants are judicially estopped from asserting that the Voting Rights Act (VRA) requires or justifies drawing districts to have a particular African American voting age population (BVAP). In *Cooper v. Harris*, 137 S. Ct. 1455 (2017), the U.S. Supreme Court held that Legislative Defendants had put forward "no evidence that . . . the third *Gingles* prerequisite" was met in the former Congressional District 1, given the high rates at which whites in the area voted for African Americans' candidate of choice. *Id.* at 1470. In drawing the 2016 Plan during the *Harris* remedial process, Legislative Defendants asserted that the third *Gingles* factor was not met in Congressional District 1 or any other congressional district, and stated that "the *Harris* opinion found that there was not racially polarized voting in the state, and therefore, the race of the voters should not be considered." Feb. 16 Joint Comm. Tr. at 27:11-14. Because Legislative Defendants concluded that "racially polarized voting did not exist," *Harris*, No. 13-cv-949, ECF No. 159 at 16; *see also id.* at 9, 12, 16, 19, 25-27, they adopted the following as a formal criterion for the 2016 Plan: "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts." Adopted Criteria.

Given Legislative Defendants' prior assertions in *Harris* that the VRA did not impose requirements for North Carolina's congressional districts, they are judicially estopped from now asserting that the VRA requires certain districts to meet certain BVAP thresholds. First, Legislative Defendants would necessarily have to take a position that is "clearly inconsistent with its earlier position." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 30, 591 S.E.2d 870, 889 (2004). Legislative Defendants would need to establish that there is sufficient evidence of

racial bloc voting to satisfy the third *Gingles* factor, but that would flatly contradict their position

during the *Harris* remedial phase that the third *Gingles* factor is not satisfied. Second, in

allowing implementation of the 2016 Plan, the *Harris* court relied on Legislative Defendants'

statements that they had ignored racial considerations entirely in creating the Plans. *See Harris*

v. McCrory, 2016 WL 3129213 (M.D.N.C. June 2, 2016). Allowing them to reverse course and

adopt a different position before this Court could therefore lead to "inconsistent court

determinations" and the perception that the *Harris* court "was misled." *Withacre P'ship*, 358

N.C. at 29, 591 S.E.2d at 889. And third, it would be an abuse of the "judicial machinery" for

Legislative Defendants to justify remedial districts on the grounds that the VRA imposed

particular requirements when they repeatedly told a federal court that they did not believe the

VRA applied. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)).

If this Court does not apply judicial estoppel at this phase, then like it did in *Common*

Cause, the Court should direct that, "if Legislative Defendants assert that the *Gingles* factors are

met as to any [congressional district], they shall not only provide evidentiary support for that

assertion, but shall also show good cause why they did not compile such evidence during the

[2016] redistricting process and shall show good cause why they should not be held judicially

estopped from arguing that the *Gingles* factors are met given their repeated representations to the

[*Harris*] court in 2016 that the third *Gingles* factor was not met anywhere in the State." *Common*

Cause, slip op. Decree ¶ 7(a).

This Court also should direct that any remedial plan passed by the General Assembly—

either before or after this Court's grant of summary judgment—must be reviewed and approved

by the Court to take effect. Even if the General Assembly adopts a new plan prior to this Court's

entry of summary judgment, such a plan would be a response to the Court's preliminary

injunction decision and necessarily would be adopted to remedy the constitutional infirmities of the existing plan at issue in this case. The Court thus would retain jurisdiction to review such a plan to ensure that it cures the 2016 Plan's infirmities. Relatedly, the Court should make clear that all aspects of its remedial order, including the ban on retaining the cores of the invalidated districts and the ban on considering partisanship, apply to any remedial map drawn following issuance of the preliminary injunction but before issuance of a summary judgment order.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and issue a final judgment granting the declaratory and injunctive relief set forth in the Proposed Order filed contemporaneously with this motion.

Respectfully submitted this the 31st day of October, 2019

PATTERSON HARKAVY LLP

[signature]

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This the 31st day of October, 2019.

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