

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA LEAGUE OF CONSERVATION
VOTERS, INC., et al.,

Plaintiffs,
v.

Wake County
21-CVS-15426

REPRESENTATIVE DESTIN HALL, in his official
capacity as Chair of the House Standing
Committee on Redistricting, et al.

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,
v.

Wake County
21-CVS-500085

REPRESENTATIVE DESTIN HALL, in his official
Capacity as Senior Chair of the House
Standing Committee on Redistricting, et al.

TRANSCRIPT, Volume 1 of 1

Pages 1 - 114

Friday, December 3, 2021

December 3, 2021, Civil Session

The Honorables A. Graham Shirley, Nathaniel J. Poovey,

and Dawn M. Layton, Judges Presiding

Plaintiffs' Motion for Preliminary Injunction

Reported by: Dawn M. Dantschisch, RMR, CRR, CRC
Official Court Reporter
Dawn.M.Dantschisch@nccourts.org

APPEARANCES:

Zachary C. Schauf, Esquire
Jenner & Block, LLP
1099 New York Avenue NW, Suite 900
Washington, D.C. 20001
zschauf@jenner.com

Stephen D. Feldman, Esquire
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, North Carolina 27601
sfeldman@robinsonbradhaw.com

Erik R. Zimmerman, Esquire
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, North Carolina 27517
ezimmerman@robinsonbradshaw.com
On behalf of the Plaintiffs North Carolina League of
Conservation Voters, Inc., et al.

Elisabeth S. Theodore, Esquire
Samuel F. Callahan, Esquire
Arnold Porter Kaye Scholer, LLP
601 Massachusetts Avenue NW
Washington, D.C. 20001
elisabeth.theodore@arnoldporter.com
sam.callahan@arnoldporter.com

Graham W. White, Esquire
Elias Law Group, LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
gwhite@elias.law
On behalf of the Plaintiffs Rebecca Harper, et al.

Phillip J. Strach, Esquire
John E. Branch, III, Esquire
Nelson Mullins Riley & Scarborough, LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
phillip.strach@nelsonmullins.com
john.branch@nelsonmullins.com

APPEARANCES CONTINUED:

Katherine L. McKnight, Esquire
Mark Braden, Esquire
Baker Hostetler
1050 Connecticut Avenue NW, Suite 1100
Washington, D.C. 200336
kmcknight@bakerlaw.com
mbraden@bakerlaw.com
On behalf of the Legislative Defendants

Terence Steed, Esquire
North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
tsteed@ncdoj.gov
On behalf of the State Defendants

INDEX

	Page
Argument by Mr. Schauf	7
Argument by Ms. Theodore	31
Response by Mr. Strach	41
Response by Ms. McKnight	67
Argument by Mr. Steed	83
Further Argument by Mr. Schauf	85
Further Argument by Ms. Theodore	99
Further Response by Mr. Strach	110
Further Response by Ms. McKnight	110
Court's Ruling	112
Certification of Transcript	114

1 (Superior Court of Wake County convened civil
2 court session December 3, 2021, before the
3 Honorables A. Graham Shirley, Nathaniel J.
4 Poovey, and Dawn M. Layton. The cases of
5 North Carolina League of Conservation Voters,
6 et al. v. Hall, et al., and Harper, et al. v.
7 Hall, et al., were called for hearing at
8 10:01 a.m.)

9 JUDGE SHIRLEY: Good morning, everyone. We are
10:01AM 10 here in North Carolina League of Conservation Voters, Inc.,
11 et al., v. Representative Destin Hall, et al., and that is
12 File 21-CVS-15426, and in Rebecca Harper, et al., v.
13 Representative Destin Hall, 21-CVS-500085.

14 Let me go ahead and -- it's dangerous when you put me
10:02AM 15 in charge of technology.

16 (Pause in proceedings.)

17 JUDGE SHIRLEY: If counsel could please identify
18 themselves for the record.

19 MR. FELDMAN: Good morning, Your Honor. Stephen
10:05AM 20 Feldman of Robinson Bradshaw for the North Carolina League
21 of Conservation Voters plaintiffs.

22 MR. ZIMMERMAN: Erik Zimmerman also with Robinson
23 Bradshaw for the North Carolina League of Conservation
24 plaintiffs.

10:05AM 25 MR. SCHAUF: Zach Schauf also for the League,

1 from Jenner & Block.

2 MR. WHITE: Graham White for the Elias Law Group
3 for the Harper plaintiffs.

10:05AM

4 MR. CALLAHAN: Sam Callahan from Arnold & Porter
5 for the Harper plaintiffs.

6 MS. THEODORE: Elisabeth Theodore from Arnold &
7 Porter for the Harper plaintiffs.

10:05AM

8 MR. STRACH: Good morning, Your Honor.
9 Phil Strach of Nelson & Mullins for the Legislative
10 Defendants.

11 MS. MCKNIGHT: Good morning, Your Honor. Kate
12 McKnight with Baker Hostetler for the Legislative
13 Defendants.

10:06AM

14 MR. BRANCH: Good morning, Your Honor. John
15 Branch with Nelson Mullins for the Legislative Defendants.

16 MR. BRADEN: Good morning. Mark Braden, Baker &
17 Hostetler, for the Legislative Defendants.

10:06AM

18 MR. STEED: Good morning, Your Honors.
19 Terence Steed for the State Board of Elections and its
20 members.

10:06AM

21 JUDGE SHIRLEY: All right. I have previously
22 signed orders granting pro hac vice for, I think,
23 Ms. McKnight; is that correct? If I have not, I've signed
24 one for Mr. Braden, and I've signed one for -- I think I
25 need to sign one for Mr. White; is that correct?

1 MR. WHITE: Yes.

2 JUDGE SHIRLEY: And Mr. Callahan; is that
3 correct? And I believe -- so, those -- I will sign those.

4 As an administrative matter, the panel has concluded in
10:06AM 5 its discretion that as these two cases involve common issues
6 of law and fact, they will be consolidated for purposes --
7 for all purposes, and the lead case will be the case that
8 was filed first, which was the North Carolina League of
9 Conservation Voters, Inc., case.

10:07AM 10 How long do counsel believe their arguments will take?
11 I'll hear from Plaintiffs first. How long do you believe
12 your argument will take?

13 MR. SCHAUF: I mean, however long the Court finds
14 useful, but perhaps 20, 30 minutes.

10:07AM 15 JUDGE SHIRLEY: Okay.

16 MS. THEODORE: I think about the same. Of
17 course, it will depend on the number of questions from the
18 Court.

19 JUDGE SHIRLEY: Mr. Strach?

10:07AM 20 MR. STRACH: I think part of it will depend on
21 how long their presentation is. Probably, hopefully, no
22 more than 45 minutes or so.

23 JUDGE SHIRLEY: All right.

24 MR. STEED: Your Honor, the State's taking no
10:07AM 25 position on the merits, so to the extent you have questions

1 about the administrative issues, then we have no argument.

2 JUDGE SHIRLEY: All right. With respect to those
3 people -- individuals viewing WebEx, via WebEx, the Court
4 welcomes you. I will remind you your participation via
10:08AM 5 WebEx is just as if you were seated in the gallery.

6 Therefore, if you are -- I would request that you mute your
7 microphones.

8 I noticed pretty much everyone has their cameras off.
9 If your camera is turned on, your actions are visible to the
10:08AM 10 Court, and the Court would expect them to comply with the
11 decorum that would be expected of anyone in the courtroom.

12 Anyone have any additional administrative matters
13 before we hear argument? All right. We'll hear from the
14 North Carolina League of Conservation Voters first. You
10:08AM 15 may -- if you are actively arguing, you may take your -- you
16 may remove your mask. That helps us. It also helps the
17 court reporter.

18 MR. SCHAUF: So, thank you. May it please the
19 Court. Zack Schauf for the plaintiffs in the League of
10:09AM 20 Conservation Voters case. I'm here representing a coalition
21 of plaintiffs, not just the League, but civil rights
22 leaders, individual voters from across the state, and
23 professors of math, computer science, and statistics from
24 UNC, Wake Forest, Davidson, and High Point University, among
10:09AM 25 others. My clients come from different walks of life and

1 have different perspectives on many things, but they share a
2 common view on this matter that's brought them here.

3 First, that elections should be fair and free, which
4 means that, at minimum, the party that wins a majority of
10:09AM 5 seats should have a fair chance of winning a majority of
6 votes, and second -- or that wins the majority of votes
7 should have a fair chance of winning the majority of seats.
8 And, second, the tools of math and computer science should
9 be used to identify plans that depart from those principles.

10:10AM 10 In the Common Cause and Harper cases, Judges Ridgeway,
11 Crosswhite, and Hinton correctly recognized that the North
12 Carolina State Constitution bars partisan gerrymanders.

13 JUDGE SHIRLEY: Now, you would admit, wouldn't
14 you, that that case is only persuasive and not binding on
10:10AM 15 this Court?

16 MR. SCHAUF: So, we have taken the position in a
17 footnote that it could be regarded as binding. I don't
18 think it's clear under North Carolina law, but we think it's
19 persuasive, in any event.

10:10AM 20 JUDGE SHIRLEY: Right. And we have an
21 independent duty of our own to examine the constitutionality
22 of the acts of the legislature, don't we?

23 MR. SCHAUF: Absolutely, you do. You do.

24 JUDGE SHIRLEY: And in determining whether the
10:10AM 25 act of the legislature is constitutional or not, is there

1 any guidance from the North Carolina Supreme Court as to the
2 burden that must be presented to us in order to declare an
3 act of the constitution -- an act of the legislature
4 unconstitutional?

10:11AM

5 MR. SCHAUF: I would agree that we bear the
6 burden as plaintiffs to show that the act is
7 unconstitutional at the preliminary injunction stage. That
8 just means, of course, we need to show a likelihood of
9 success, as with any other preliminary injunction. But I
10 agree that we bear the burden, and we think that we've
11 carried that burden.

10:11AM

12 JUDGE SHIRLEY: What is that burden?

10:11AM

13 MR. SCHAUF: I think it's a preponderance of the
14 evidence. If you're asking about what we think the
15 substantive standard is, you know, I think we think that it
16 is sufficient to show a partisan gerrymander that the map is
17 systematically drawn to entrench one party in power even if
18 voters prefer the other party by a significant margin.

10:11AM

19 And, you know, particularly where, as we've shown
20 through the affidavit of Dr. Moon Duchin, a noted
21 mathematician and redistricting expert, you can draw a map
22 that complies fully with traditional districting principles
23 that does not yield those same skewed effects.

10:11AM

24 JUDGE SHIRLEY: When you talk about traditional
25 districting principles, based upon the complaint and based

1 upon what was said in Harper v. Lewis, it looks like
2 traditional districting principles have involved political
3 gerrymandering back to prior to Colonial times.

4 MR. SCHAUF: Well, so, I think when we refer to
10:12AM 5 traditional districting principles, we mean things like
6 compactness, continuity, respect for political subdivisions,
7 respect for municipalities, where we have presented in our
8 complaint these optimized maps that do better on all of
9 those metrics than the ones the legislature passed.

10:12AM 10 But to directly address your question, I think there is
11 truth in it, but it is also true that going back to Colonial
12 times, there were grossly misapportioned districts, and that
13 did not stop courts from holding that the
14 one-person-one-vote principle requires proportionality. And
10:12AM 15 we think it is the same here.

16 And it's actually, I think, easier here, because you do
17 have the lineage of the Free Elections Clause going back to
18 the 1689 English Bill of Rights where it was put there
19 precisely to address gerrymandering that the king was
10:12AM 20 engaged in to manipulate parliament by manipulating the
21 electors for different seats.

22 And that was a principle that the framers of the North
23 Carolina Constitution took and made part of North Carolina
24 law that they expected would be traditionally enforced, just
10:13AM 25 like the framers of the Pennsylvania Constitution put it

1 into Pennsylvania law, and just like the Supreme Court of
2 Pennsylvania a couple years ago found that that constitution
3 prohibited partisan gerrymandering and that those claims
4 were justiciable.

10:13AM

5 JUDGE SHIRLEY: Your position is there can be no
6 partisan gerrymandering?

7 MR. SCHAUF: So, we agree that there is a
8 threshold showing of sort of substantiality required, but we
9 think, you know, it's more than been shown here, and this is
10 a not close case.

10:13AM

11 JUDGE SHIRLEY: Can there be partisan
12 gerrymandering under the North Carolina Constitution?

13 MR. SCHAUF: It depends, I suppose, what you mean
14 by partisan gerrymandering. I think if you mean fixing
15 elections for political gain, I think the answer is no. I
16 think if it's thinking about political considerations, then,
17 you know, I think sometimes that can be permissible. And
18 the thing that I --

10:13AM

19 JUDGE SHIRLEY: Well, in fact, didn't Chief
20 Justice Lake indicate that that was a proper factor that
21 could be considered by the legislature in the Stephenson v.
22 Bartlett decision?

10:14AM

23 MR. SCHAUF: So, what that said is that you may
24 consider politics. And I think there's a very big
25 difference between considering partisan considerations and

10:14AM

1 partisan gerrymandering. But also that that is limited by
2 other aspects of the North Carolina State Constitution,
3 including the Free Elections Clause, the Equal Protections
4 Clause, the Free Speech Clause, and the Freedom of Assembly
5 Clause.

10:14AM

6 JUDGE SHIRLEY: Why didn't our -- didn't the
7 people specifically, when they addressed how districts were
8 to be formed, set forth the criteria that the legislature
9 was to use?

10:14AM

10 MR. SCHAUF: I mean, I think if you mean the sort
11 of specific districting criteria about population and no
12 mid-decade redistricting, you know, they did. But it's
13 quite clear that those aren't exclusive, because if they
14 were, you couldn't have found an equal protection violation
15 in Stephenson that came from the more general principles of
16 the Equal Protection Clause. And we think the same is true
17 here with the Free Elections Clause and the other provisions
18 that we invoke.

10:15AM

19 So, perhaps with that, I'll pivot to why we think that
20 the maps here indeed constitute the sort of extreme partisan
21 gerrymanders that were --

10:15AM

22 JUDGE SHIRLEY: To constitute extreme partisan
23 gerrymandering, does there have to be intent on the part of
24 the legislature to seek political gain?

10:15AM

25 MR. SCHAUF: So, our view is the answer is no, at

1 least under the Free Elections Clause. We've cited in our
2 brief the Van Bokkelen case from the North Carolina Supreme
3 Court, which says that when you have laws like this that
4 implicate voting rights, it is, quote, the effect and not
10:15AM 5 the intent of a legislature that renders it void. But I
6 also don't think you have to agree with me on that, because
7 there's ample evidence of intent that we've identified here.
8 And I would also say that the bar for showing intent in
9 these cases is going to be low, and the U.S. Supreme Court
10:16AM 10 has explained why it's low. I would point you to the
11 Gaffney case we've cited in our brief where the Supreme
12 Court explains that it is most unlikely when you've got a
13 legislature drawing maps that the partisan effects of the
14 maps they're drawing wouldn't be understood when they passed
10:16AM 15 the maps. And if they understand the partisan effects and
16 they pass them anyway, it is intended.
17 The Supreme Court said much the same thing in the
18 Davis v. Bandemer case; that said, again, it is most likely
19 that whenever a legislature redistricts, those responsible
10:16AM 20 will know the likely partisan consequences of what they do.
21 And when you look at what the maps here do, they
22 entrench a majority in every chamber that is impervious to
23 any plausible electoral outcome in North Carolina. As we've
24 shown through the affidavit of Dr. Duchin, in Congress, it
10:17AM 25 entrenches a 10-4 political majority, 9-5 if Democrats get

1 very lucky. In the Senate, it is -- in even elections will
2 guarantee a six-seat Republican majority in the House. It's
3 16 seats.

4 And, indeed, that -- you can have results where you
10:17AM 5 have Democrats win statewide elections, like they did in
6 2016 for the gubernatorial election and the attorney general
7 election, where if you take those results and transpose them
8 onto the districts that were drawn here, those actually
9 yield Republican supermajorities in every chamber, 30 seats
10:17AM 10 in the Senate, 70 seats in the house.

11 And, you know, I think when we're talking about intent,
12 it is most implausible to think that they drew those maps
13 with those effects and didn't understand what they were
14 doing, and particularly given where, you know, we are here
10:17AM 15 after two cases in 2019 where the maps at issue there, which
16 were passed in 2016, were passed expressly in order to be a
17 partisan gerrymander where the argument is that is
18 consistent with the North Carolina Constitution, and they
19 sort of forthrightly proclaimed that was what they were
10:18AM 20 doing, yielded very similar results where you had elections
21 where Republicans lost the statewide vote, like in 2018, and
22 nonetheless had ten seats in Congress, 65 seats in the
23 House, and 29 seats in the Senate, almost the exact same
24 results you get here.

10:18AM 25 And it's just not plausible to say that, well, you

1 know, they drafted those maps with express partisan intent
2 but got the very same result here while not considering
3 partisanship at all. It's just not plausible. And even
4 more so because this came up during the legislative
10:18AM 5 hearings. People said these are partisan gerrymanders that
6 will skew the election results, and instead of pausing and
7 saying --

8 JUDGE SHIRLEY: So, a Republican said that?

9 MR. SCHAUF: Republicans did not say it. They
10:19AM 10 were Democrats. But instead of saying, that's not what we
11 had in mind, we didn't mean for these to yield unfair
12 results, they pressed ahead and passed the maps on
13 party-line votes. And, you know, I think the natural
14 implication of that is that they intended those results.

10:19AM 15 And, indeed, I mean, it would require, you know,
16 legislators, I think, to be almost angelic to, you know, be
17 a set of people who, you know, live and breathe politics
18 every day, and then when they go and do districting to say,
19 we are not going to take partisan considerations into
10:19AM 20 account at all. I understand they have the criteria --

21 JUDGE SHIRLEY: In fact, when we gave our
22 governor the right to veto in 1996, the people of this state
23 decided that he would not be able to veto congressional
24 redistricting or legislative redistricting. They left it
10:19AM 25 with the bodies that seem to be the most overtly political

1 in the state, whether they be controlled by Republicans or
2 Democrats. The people in this state made that choice,
3 didn't they?

10:20AM 4 MR. SCHAUF: They did. But they also made the
5 choice to put in the constitution the Free Elections Clause,
6 the Equal Protection Clause, and the other clauses we rely
7 on. And we think the task here is to put those clauses
8 together and apply them to the maps that are before the
9 Court.

10:20AM 10 And, you know, I think in terms of both the intent and
11 the effect, it is telling that when you look at the brief
12 that came in from the other side last night and the expert
13 report they filed the day before, there's nothing there to
14 dispute the showing we've made about the degree of skew in
10:20AM 15 these maps. That in all three maps, so long as you have
16 results that are within seven points, which in North
17 Carolina, the way it is today, is every election, you are
18 going to have baked-in majorities for the incumbent party in
19 every chamber.

10:20AM 20 And it does that in a way that is, contrary to what
21 we've heard from the other side, not something that flows as
22 some inevitable effect of North Carolina's political
23 geography. And we know that because, again, we've put in
24 maps that show that you can do better with respect to
10:21AM 25 compactness, with respect to keeping counties together and

1 avoiding traversals, with respect to municipalities, and
2 also have results that are fair to both parties.

10:21AM 3 JUDGE SHIRLEY: Do you believe that there can
4 be -- both sides can take a reasonable position that
5 partisan gerrymandering is allowed in this state under the
6 constitution?

10:21AM 7 MR. SCHAUF: If the question is do I think that
8 that is a frivolous argument, I don't think it's a frivolous
9 argument. I think it's a wrong argument. And, you know,
10 we're here to support the position that, in fact, the Free
11 Elections Clause and the other provisions we've invoked do
12 impose a limit. But I understand why my friends on the
13 other side are making the arguments they do. They're
14 respectable arguments.

10:21AM 15 JUDGE SHIRLEY: You don't believe -- you would
16 say they're incorrect, but they're not necessarily
17 unreasonable? I mean, it's not a frivolous argument, is it?

18 MR. SCHAUF: No, no. Absolutely not.

10:22AM 19 JUDGE SHIRLEY: So, reasonable minds can differ
20 as to whether -- well, as to whether you can have partisan
21 gerrymandering in this state?

10:22AM 22 MR. SCHAUF: I mean, look, I think there's some
23 distance between an argument not being frivolous and, you
24 know, it being reasonable. I think, for us, the key point
25 is that we think it is wrong, and we think it is the job of

1 North Carolina courts and this Court to say that it is
2 wrong.

3 JUDGE SHIRLEY: Now, we have to be convinced
4 beyond a reasonable doubt that an act is unconstitutional
10:22AM 5 before we declare it unconstitutional, don't we?

6 MR. SCHAUF: I don't know that you have to be
7 convinced beyond a reasonable doubt. I think our view is
8 the standard is, you know, a preponderance on the merits,
9 and, here, a likelihood of success on the merits.

10:22AM 10 JUDGE SHIRLEY: So, when our Supreme Court has
11 said, "It is well settled in this state that the courts have
12 the power, and it is their duty in proper cases, to declare
13 an act of the General Assembly unconstitutional, but it must
14 be plainly and clearly the case. If there is any reasonable
10:23AM 15 doubt, it will be resolved in favor of the lawful exercise
16 of their powers by the representatives of the people," so
17 that's the Supreme Court telling us that if there's any
18 reasonable doubt, we have to rule in the favor of the acts
19 of the people through their elected representatives.

10:23AM 20 MR. SCHAUF: That simply is not our view. We
21 think it is a preponderance standard, a likelihood of
22 success standard here at the preliminary injunction stage,
23 and we think we have gotten there based on the evidence
24 we've put in.

10:23AM 25 JUDGE SHIRLEY: But when we talk about whether

10:23AM 1 there can be partisan political gerrymandering, that is not
2 a factual question. That is a legal question, isn't it?
3 Whether you can -- whether the constitution prohibits --
4 and, listen, I would dare say that most of us don't like
5 extreme partisan political gerrymandering, but that's --
6 we're not here about our personal preferences. We're here
7 because we have a job that is set, and we have certain
8 restraints placed on us by the North Carolina Constitution
9 and the Supreme Court.

10:24AM 10 And our Supreme Court has told us if we have any
11 reasonable doubt, we have to rule in favor of
12 constitutionality. And it seems to me the threshold
13 question before you get to the facts is can you, as a matter
14 of constitutional law, have extreme partisan -- or not even
15 extreme, can you have partisan gerrymandering in the state
16 without violating the constitution?

10:24AM 17 Because if the question is yes, because you're telling
18 me there's a difference between political and partisan, and
19 I read Harper v. Lewis as saying there's -- you can't have
20 partisan gerrymandering. I would read Common Cause v. Lewis
21 as saying no partisan gerrymandering. Now, in your
22 complaint, you use the term "extreme partisan
23 gerrymandering." What's the difference between partisan
24 gerrymandering and extreme partisan gerrymandering, from a
10:25AM 25 legal standpoint?

1 MR. SCHAUF: Right. So, I mean, I think the
2 reason why Common Cause and Harper used extreme partisan
3 gerrymandering is that that is sufficient to show a
4 violation of the Free Elections Clause and the other
10:25AM 5 provisions. They didn't hold it's necessary.

6 And, you know, we don't necessarily think it's
7 necessary, but I also don't think you need to agree with me
8 with me about that, because, again, what we have shown
9 through the evidence we've put in is that these maps render
10:25AM 10 elections in North Carolina a formality, because anytime you
11 have a statewide vote total within seven percentage points,
12 it bakes in a single result. And, you know, I think that is
13 an extreme partisan gerrymander by any measure, whether or
14 not that is required.

10:25AM 15 JUDGE SHIRLEY: All right. And I just want to
16 make sure, you are not arguing for a preliminary injunction
17 based off of any sort of racial gerrymandering, are you?

18 MR. SCHAUF: We have not. We've got racial
19 gerrymandering claims in our complaint. We have not moved
10:26AM 20 for a preliminary injunction on those claims.

21 JUDGE SHIRLEY: And, so, if we deny this motion
22 for preliminary injunction, when can we expect to see the
23 motion for preliminary injunction based off of racial
24 gerrymandering?

10:26AM 25 MR. SCHAUF: We have no plans right now to

1 file -- to be very precise, it's a claim about racial vote
2 dilution, not racial gerrymandering.

3 JUDGE SHIRLEY: Right.

4 MR. SCHAUF: But we're not filing right now. If
10:26AM 5 you rule against us on this today, we are not going to come
6 in here on Monday and be filing for a preliminary injunction
7 on those other claims. These are our preliminary injunction
8 claims, and we brought these because, you know, they are the
9 same legal theories as were at issue in Harper and Common
10:26AM 10 Cause, and we think we've got nearly the same facts.

11 JUDGE SHIRLEY: There are plenty of cases that
12 deal with the racial dilution claims that you couldn't
13 rely -- could rely on to seek a preliminary injunction,
14 aren't there?

10:26AM 15 MR. SCHAUF: There are in different contexts, but
16 this is the choice we've made in terms of what we are moving
17 on, and we think we've got quite clear evidence that this
18 does constitute all -- across all three maps, the same type
19 of extreme partisan gerrymander that you had in Common Cause
10:27AM 20 and Harper.

21 JUDGE SHIRLEY: And, so, you're asking us to
22 accept the rationale of the court in Common Cause and --
23 Common Cause v. Lewis and Harper v. Lewis as the standard
24 for determining whether political gerrymandering is
10:27AM 25 prohibited or permitted?

1 MR. SCHAUF: So, I think our view is that the
2 standards set forth in those cases is sufficient to show a
3 partisan gerrymandering in violation of the North Carolina
4 Constitution, and we think we have made the showing that it
5 was sufficient in those cases.

10:28AM

6 JUDGE SHIRLEY: Again, you're asking -- and that
7 was a standard never announced before in any appellate court
8 in North Carolina as it relates to partisan gerrymandering;
9 is that correct?

10:28AM

10 MR. SCHAUF: Well, so, I think, you know, that
11 was the partisan gerrymandering case --

12 JUDGE SHIRLEY: Okay.

13 MR. SCHAUF: -- in North Carolina, but it drew on
14 a deep well of North Carolina precedent from --

10:28AM

15 JUDGE SHIRLEY: I've read a lot of the precedent,
16 and there are -- a lot of those cases also have verbiage
17 that would run against you as well.

18 MR. SCHAUF: So, perhaps. I mean, it's hard to
19 say in the abstract, but what I can tell you is --

10:28AM

20 JUDGE SHIRLEY: It wasn't abstract. It's in
21 black and white, isn't it? It's the printed word.

22 MR. SCHAUF: Well, I mean, without knowing sort
23 of which printed words you mean. But what I can point you
24 to is *Quinn v. Lattimore* where the North Carolina Supreme
25 Court emphasized that under the Free Elections Clause, the

10:28AM

1 will of the people, the majority, legally expressed, must
2 govern.

3 JUDGE SHIRLEY: And tell me the factual
4 background of that case.

10:29AM 5 MR. SCHAUF: So, it was not a partisan
6 gerrymandering case. It was about a different issue.

7 JUDGE SHIRLEY: What issue was it about?

8 MR. SCHAUF: It was about, I think,
9 qualifications for particular office. I don't remember the
10 office.

11 JUDGE SHIRLEY: Was that the case where someone
12 was going to have to swear that they would -- that they
13 would have to vote for the member of their party that
14 they're registering for?

10:29AM 15 MR. SCHAUF: I don't recall whether that was that
16 case or whether it was a different case, but it did announce
17 that broad principle, which was reiterated in Hill v.
18 Skinner. The object of all elections must be to ascertain,
19 faithfully and truthfully, the will of the people. And
10:29AM 20 that, we think, is the fundamental thing that is problematic
21 with partisan gerrymandering.

22 When you have a partisan gerrymander, the point of
23 elections isn't to ascertain the will of the people, it's to
24 make the will of the people irrelevant and to entrench one
10:29AM 25 party in power.

1 JUDGE SHIRLEY: When you talk about the will of
2 the people, you're determining the will of the people from
3 how the state votes -- how the state votes on a partisan
4 basis statewide?

10:30AM

5 MR. SCHAUF: I don't think that's quite right,
6 because what we have done is we've taken it down to a
7 district-by-district level by looking at 52 general
8 elections going back over the course of the last decade and
9 then seeing -- you know, if, for example, you took the 2020
10 presidential election, then you attribute the votes there
11 that went to President Trump to the Republican candidate
12 under each district and you see what the outcomes are.

10:30AM

13 And, you know, that's where we get the figures that we
14 provide in our complaint and our motion, showing exactly how
15 thoroughly this election -- these maps entrench one party's
16 advantage. And this --

10:30AM

17 JUDGE SHIRLEY: Again, when we talk about the
18 will of the people, are you telling me if these -- we allow
19 these maps and the vote occurs and it happens as -- as you
20 project, that the will of the people that voted will not be
21 reflected in the results?

10:30AM

22 MR. SCHAUF: That's right. I mean, I think if
23 you have results like -- you know, take the 2020
24 gubernatorial election in North Carolina. Significant
25 democratic victory by almost five percentage points. But if

10:31AM

1 you project that across all three of these maps, it still
2 gives you, I think, ten Republican congressional seats, 26
3 or 27, a majority, of the Senate, and, I think, 62 House
4 seats.

10:31AM

5 And, you know, that, I think, is the archetype of
6 extreme partisan gerrymander, where you can have that be the
7 preference of the people expressed throughout the state and
8 yet have completely the opposite result under these maps.
9 In a way, again, and I think this is important --

10:31AM

10 JUDGE SHIRLEY: So when you look at the election
11 that won, you to look how much the Democrat candidate --
12 what percentage of the vote they received and how much the
13 Republican received?

14 MR. SCHAUF: That's right. So, you take --

10:31AM

15 JUDGE SHIRLEY: But -- but what you're saying --
16 by saying that, you're concluding that people vote based off
17 of the party and not on the individual.

18 MR. SCHAUF: Well, so, that's why we don't do
19 this just looking at a single election and, instead, our
20 expert aggregated 52 elections going back a decade. And you
21 get a really remarkable result. And when you look at all, I
22 think, 38 elections decided by a margin of seven points or
23 less, every single one of those delivers majorities in all
24 the chambers to the incumbent party, which is what we think,
25 you know, certainly is sufficient to show an extreme

10:32AM

1 partisan gerrymander, and in the way that is not dictated by
2 North Carolina's political geography or by traditional
3 districting principles.

10:32AM

4 And that, I think, is an important point. This is the
5 argument that you often hear on the other side and that, you
6 know, we've heard here, that the issue here is not partisan
7 gerrymandering, it's that Republicans are -- tend to be more
8 dispersed, Democrats tend to be more concentrated, and
9 that's why you see the results you see.

10:32AM

10 And, you know, Dr. Duchin's analysis proves that that's
11 not true. Instead, you can draw maps, as we have, that are
12 more compact, traverse fewer counties, break fewer
13 municipalities, and also treat both parties in a more fair
14 fashion, where, in almost every one of those 52 elections, I
15 think, with four exceptions in Congress and six in the
16 legislative maps, you get the party receiving a majority of
17 the votes also receiving a majority of the seats.

10:33AM

18 And that, you know, I think, just goes to so that this
19 is not something that is compelled by North Carolina's
20 political geography. It was a choice that was made, and I
21 think we think it is a choice that is inconsistent with the
22 North Carolina State Constitution.

10:33AM

23 JUDGE SHIRLEY: Does a Republican voter have a
24 right to be in a Republican district, to be placed in a
25 Republican district?

10:33AM

1 MR. SCHAUF: On an individual basis, you
2 obviously are always going to have some voters who are not
3 going to be able to elect the candidates they prefer,
4 because that's how districts work. But our fundamental
10:34AM 5 submission is that when you take the entire state and you
6 systematically structure the map so that the one party is
7 going to remain in control, even if voters reject that party
8 by significant margins, then that is the hallmark, or a
9 hallmark anyway, of a partisan gerrymander that is
10:34AM 10 inconsistent with the North Carolina State Constitution.

11 JUDGE SHIRLEY: Okay.

12 JUDGE POOVEY: Your argument is basically that
13 each party is entitled to proportional representation; is
14 that fair?

10:34AM 15 MR. SCHAUF: That is not correct, Your Honor.
16 Proportional representation means that if your party gets 40
17 percent of the vote, you should get 40 percent of the seats;
18 50 percent, 50 percent; 60 percent, 60 percent, and so on.
19 That is not our argument. We are -- we have no problem with
10:35AM 20 a map where one party maybe gets 55 percent of the votes,
21 they've got a great election, and they end up with 65, 70
22 percent of the seats. That's not our argument here.

23 Our -- the much more modest proposition we're advancing
24 is that when you have maps that systematically ensure one
10:35AM 25 party majority, even when they lose the popular vote by

1 significant margins, that is inconsistent with fundamental
2 democratic principles, particularly, again, when it is done
3 in a way that is not compelled by the state's political
4 geography or any neutral districting principle. And,
10:35AM 5 indeed, you can do better on all of those principles, as
6 we've shown, with a map that is also more fair.

7 Perhaps just as an illustration, I can put up our first
8 figure. And I don't think I'm going to go through nearly
9 all of these, but just to highlight graphically what we're
10:36AM 10 talking about here. These are some of the figures that --
11 one of the figures that our expert has produced. And what
12 you would see in a map that sort of perfectly translated
13 votes into seats is you'd be following one of these trend
14 lines, and, you know, they might be narrow -- shallower,
10:36AM 15 they might be steeper, but you would follow one of them, and
16 you cross at the origin where you'd get a majority of
17 seats -- a majority of votes translating into a majority of
18 seats.

19 But what you see instead in the congressional map is
10:36AM 20 Democratic congressional candidates -- these are the red
21 dots at the bottom -- parked at four seats, maybe five if
22 they get very lucky. And the place where you start to see
23 the possibility of getting a tie is not until you are around
24 54 percent of the two-party vote.

10:36AM 25 That is nearly identical to the map that was enjoined

1 in Harper where, I think, the number was 55 percent. And,
2 again, we think this is -- this is a mark of an extreme
3 partisan gerrymander. But it's not just a matter of what's
4 done in terms of the statewide map, it is effectuated by
5 some classic gerrymandering tactics.

10:37AM

6 Stephen, if you could do the Mecklenburg map. So, this
7 is a classic pack and crack where you have Democratic voters
8 in Charlotte packed into District 9, as many as possible, so
9 that then you can crack the remainder out into District 13,
10 which then stretches far west to accumulate enough
11 Republican areas to overcome their votes. And, basically,
12 the same thing on the east in District 8. And, you know,
13 even more so, I think you can see this in Guilford.
14 Stephen, if you could switch it to Guilford.

10:37AM

15 So this, again, is some classic -- the classic tools of
16 partisan gerrymandering, cracking one of the three biggest
17 Democratic strongholds in the state, currently represented
18 by a Democratic congressperson, into three districts where
19 the voters cannot affect any of these elections. So, you
20 see downtown Greensboro in District 11 cracked up. And, you
21 know, we don't have this on the figure, but it stretches all
22 the way far west to the Tennessee border.

10:38AM

10:38AM

23 District 7, the same one we were talking about a minute
24 ago, picks off a few of the Democratic voters on the east
25 and submerges them into a very Republican district that's

10:38AM

1 drawn to have Republican majority. And then last, in
2 District 10, you can see how High Point is split off where
3 you have one of these shapes that, again, is your sort of
4 classic gerrymandering shape. We don't get all of this on
10:39AM 5 this figure, but it sort of snakes off and then takes a
6 90-degree turn south just off the map.

7 And the results of all of this are, you know, what
8 we've talked about, an entrenched Republican majority that
9 is nearly impervious to any plausible electoral outcome that
10:39AM 10 you are going to have in a 50/50 state like North Carolina.

11 Now, I've been up here for a while, and, you know,
12 we've got similar figures we could show for the other maps,
13 but those figures all come from our briefs and from our
14 verified complaint. So, I think I'm inclined to, you know,
10:39AM 15 sort of leave it there unless the panel has further
16 questions that, you know, I can address, and, you know,
17 emphasize that we think that all three of these maps are
18 partisan gerrymanders that violate the North Carolina
19 Constitution and that we have shown a likelihood of success
10:39AM 20 across all three of these maps.

21 JUDGE SHIRLEY: Those maps are congressional
22 maps?

23 MR. SCHAUF: These maps are congressional maps.
24 When I say "all of these maps" --

10:40AM 25 JUDGE SHIRLEY: Okay.

1 MR. SCHAUF: -- I mean Senate and House and
2 Congress. And I am happy to go through sort of blow by blow
3 the other maps, but I'm also respectful of the Court's time
4 and mindful that we have two cases and four sets of lawyers.

10:40AM

5 JUDGE POOVEY: Do you have the map that your
6 experts put forth?

7 MR. SCHAUF: We have it, but we didn't blow it
8 up.

9 JUDGE POOVEY: Sorry?

10:40AM

10 MR. SCHAUF: It's in the record. We have not
11 blown it up. If there's no further questions, I'll let my
12 colleague proceed.

13 JUDGE SHIRLEY: All right.

14 MR. SCHAUF: Thank you.

10:41AM

15 MS. THEODORE: Good morning, Your Honors.

16 JUDGE SHIRLEY: Good morning.

17 MS. THEODORE: I'm Elisabeth Theodore on behalf
18 of the Harper plaintiffs. North Carolina's congressional --

10:41AM

19 THE REPORTER: You need to speak up, please. I
20 can't hear you.

21 JUDGE SHIRLEY: You can take your mask off.

22 MS. THEODORE: Sorry about that. If I sit down,
23 I might be a little closer to the microphone.

10:41AM

24 JUDGE POOVEY: Maybe you could move the
25 microphone up and move it a little closer to you.

1 MS. THEODORE: Is this better?

2 JUDGE POOVEY: Yes.

3 MS. THEODORE: Thank you. North Carolina's
4 congressional plan is an extreme partisan gerrymander that
10:41AM 5 predetermines elections and guarantees ten or sometimes 11
6 seats for Republicans and three or four seats for the
7 Democrats. And in 2016, the Legislative Defendants passed a
8 map that they said was the best they could do. They said it
9 was the most extreme possible gerrymander for North
10:41AM 10 Carolina's congressional districts. It was ten Republican
11 seats and three Democratic seats.

12 After Harper I struck it down, they passed an 8-5 map.
13 And now, after North Carolina gained a 14th seat because of
14 overwhelming population growth in Democratic-leaning areas,
10:42AM 15 it passed another map that guarantees ten seats to the
16 Republicans. Just like in 2016, that is the most extreme
17 possible gerrymander in North Carolina's congressional maps.

18 And they didn't try to hide what they were doing. They
19 cracked the three largest Democratic counties in North
10:42AM 20 Carolina, Wake, Mecklenburg, and Guilford. There's no
21 population-based reason for that. They cracked the Piedmont
22 Triad to cause three districts so that none of these
23 overwhelming Democratic cities have a Democratic
24 representative in Congress.

10:42AM 25 There was no community- and interest-based reason to do

1 this. These cities share an airport. They share a media
2 market. They share a newspaper. They double bunked
3 Representative Manning and Representative Foxx into an
4 overwhelmingly Republican district. And as the red-blue
10:42AM 5 maps that we've included in our preliminary injunction
6 motion show, every district was carefully drawn to crack and
7 pack Democratic voters.

8 And we've put forward overwhelming statistical evidence
9 from Dr. Pegden and Dr. Chen confirming this. Both of their
10:43AM 10 analyses were accepted by the Common Cause court. They were
11 subjected to search and cross-examination by the Legislative
12 Defendants. Dr. Pegden concludes that the enacted map is
13 more carefully crafted to favor Republicans than over 99.99
14 percent of billions of comparison maps that he generated by
10:43AM 15 making tiny random changes to the precincts at the borders
16 of the districts. In other words, you touch the map, and it
17 starts to break down.

18 And to be clear, he was following the same constraints
19 that the legislature offered in its redistricting criteria.
10:43AM 20 No more county splits, no more precinct splits, no more
21 municipality splits than the enacted map did, and it
22 protected the same incumbents in the enacted map.

23 The one thing that he did slightly differently was
24 population because of the way his system works. By swapping
10:44AM 25 precincts, he doesn't get down to person-by-person

1 population, but he verified that the difference between 2
2 percent and 1 percent population deviation, both of which he
3 did, doesn't -- mathematically can't make a difference, and
4 it can't be that the difference between the 1 percent, which
10:44AM 5 was his lowest threshold, and the zero plus or minus one
6 person in the enacted map explains the partisan bias. And
7 as I said, his very similar analysis, identical analysis,
8 was given great weight by a unanimous court in Common Cause.

9 Dr. Chen's analysis confirms the same thing. He's one
10:44AM 10 of the foremost academic experts on using simulations to
11 evaluate maps, and his testimony has been repeatedly
12 accepted, including in Common Cause and in Harper.

13 And, ultimately, the hallmark of an effective
14 gerrymander is that you want to spread your votes across as
10:44AM 15 many districts as possible while still retaining enough
16 edge --

17 THE REPORTER: I'm sorry. Can you slow down?

18 MS. THEODORE: Yes. I said ultimately the
19 hallmark of an effective gerrymander is you want to spread
10:45AM 20 your votes across as many districts as possible while still
21 retaining as much edge to win in all of them. So, you want
22 districts -- as many districts as possible that safely favor
23 your party, but not by overwhelmingly large margins.

24 And so, Dr. Chen looked at the most -- the ten
10:45AM 25 most-Republican districts. He finds that in the enacted

1 plan, they have Republican vote shares using a composite of
2 elections in this narrow range of 52.9 percent to 61.2
3 percent. So, that's the product of packing Democrats in the
4 Democratic districts and then unpacking Republican votes
10:45AM 5 from districts that would be naturally packed Republican
6 districts to enable these ten safe districts.

7 And he finds that this is an extreme statistical
8 outlier. Not a single one of his 1,000 random simulated
9 plans comes close to creating ten districts in this range of
10:46AM 10 safe but not too packed for the Republicans. And virtually
11 all of his plans only create two to six such districts. And
12 that's what makes this gerrymander so extreme.

13 What those ten districts do is it enables the plan to
14 stick with ten Republican districts, essentially, regardless
10:46AM 15 of Democratic performance. And so, if you look at the
16 Governor Cooper election in 2020 where the Democrats had a
17 4.5 percent margin -- and this is at page 62 of his
18 report -- the enacted plan still produces ten Republican
19 districts. And not a single one of his 1,000 simulated
10:46AM 20 plans produces ten. Most produce seven or eight Republican
21 districts and some produce only six.

22 And so, again, precisely in the circumstances where it
23 matters most, in the elections where the Democrats convince
24 a lot of people to vote for them, the map subverts the will
10:47AM 25 of the people. So, those are the facts. We think it's

1 clear beyond any reasonable doubt that this is an extreme
2 partisan gerrymander.

3 On the law, the Court held in Common Cause, which we
4 would ask this Court to follow because we think it's correct
10:47AM 5 and persuasive, that extreme partisan gerrymandering
6 violates the constitution. The U.S. Supreme Court in Rucho
7 said that state courts can apply state constitutions to
8 strike down gerrymander congressional plans, and we think
9 the Court should do that here.

10:47AM 10 JUDGE SHIRLEY: Well, they can use them so long
11 as the state constitutions allow you to strike it down.
12 They weren't just saying we're not going to do it, you do
13 it. You can only do it if your constitution allows you to.

14 MS. THEODORE: Of course, Your Honor. But what
10:47AM 15 the court -- what Chief Justice Roberts said is that
16 partisan gerrymandering claims are not, I think he said,
17 condemned to sound in the void because state constitutions
18 can protect against them. That's what he said.

19 And the court in Common Cause held that it's clear that
10:48AM 20 extreme partisan gerrymandering violates the Free Elections
21 Clause. I don't want to repeat too much what Mr. Schauf
22 said, but, you know, the court said, and this is clearly the
23 purpose of the Free Elections Clause, that when partisan
24 actors are specifically systematically designing,
10:48AM 25 manipulating the contours of election districts for partisan

1 gain to preserve power, that elections aren't free under
2 that circumstance. Elections aren't freely ascertaining the
3 will of the people when, under any natural circumstances,
4 you could have two or three or four more seats for a
10:48AM 5 particular party than you get as a consequence of the
6 manipulation by the legislature.

7 On the Equal Protection Clause, the court held in
8 Common Cause that the right to vote on equal terms is a
9 fundamental right under the North Carolina Equal Protection
10:48AM 10 Clause. The Supreme Court of North Carolina has held the
11 exact same thing. Stephenson held that the Equal Protection
12 Clause requires substantial equal voting power, and it's not
13 enough to say that everyone gets to cast their vote. If it
14 were enough just to say that, Stephenson would not have
10:49AM 15 struck down the districts that had a single member and
16 multimember districts in the same -- in the same district.

17 Multiple North Carolina Supreme Court opinions have
18 held that the Equal Protection Clause is broader in North
19 Carolina than in the U.S. Constitution, including
10:49AM 20 specifically in the context of voting rights.

21 JUDGE SHIRLEY: I do recall in Stephenson,
22 Justice -- then-Justice Orr said, well, that is the case.
23 That was -- Stephenson v. Bartlett is one of the few times
24 that that court had exercised that authority to interpret
10:49AM 25 the North Carolina -- while you can, the North Carolina

1 Equal Protection Clause greater than the U.S. Equal
2 Protection Clause.

3 MS. THEODORE: Well, I don't think -- I don't
4 think it's done it a lot of times, but it's certainly does
10:49AM 5 it several times in important election contexts that are
6 analogous to this context. So, for example, in the context
7 of -- like the case that held that judicial elections in
8 North Carolina have to follow one-person-one-vote even
9 though the U.S. Constitution doesn't require that. And,
10:50AM 10 again, the Stephenson v. Bartlett holding about finding
11 combining multimember and single-member districts.

12 JUDGE SHIRLEY: But most of these were looking at
13 the effects that the then-existing laws had on the ability
14 of African-Americans to vote and to ensure that they had
10:50AM 15 equal representation with other citizens in the state; is
16 that correct?

17 MS. THEODORE: I don't think that's what
18 Stephenson said. I think Stephenson said that, you know,
19 your ability to affect your representative and to have
10:50AM 20 representation, you know, is significantly and unfairly
21 enhanced compared to your fellow citizens if you have
22 several members representing you as opposed to one. It
23 wasn't in the context of racial discrimination.

24 They held that voting is a fundamental right under the
10:51AM 25 Equal Protection Clause, and it wasn't -- it wasn't in the

1 context of saying that it was discriminating against
2 African-Americans.

3 And so, you know, the court from Common Cause adopted
4 a --

5 THE REPORTER: I'm sorry. You have to repeat
6 that.

7 MS. THEODORE: The court from Common Cause
8 adopted a three-part test for finding a violation of the
9 Equal Protection Clause. They said if the predominant
10 purpose is to entrench the party in power by diluting votes
11 and it has the intended effect of substantially diluting
12 votes, then unless the legislature comes forward with a
13 legitimate justification and compelling justification, it's
14 unconstitutional.

10:51AM 15 And here, for the reasons I've explained, we've
16 satisfied, very clearly satisfied, all of those standards.
17 And equally for the reasons in our brief, we've explained
18 why the law violates the free speech and assembly
19 requirements.

10:51AM 20 I'd like to respond based on the proportional
21 representation question. Common Cause addresses this and
22 explains why precisely the same arguments, using the same
23 experts, that we're making in this case don't require
24 proportional representation. And I think you could just
10:52AM 25 look, for example, at Dr. Chen's chart number B2. So, he's

1 showing that the natural non-gerrymandered outcome in North
2 Carolina of an essentially 50/50 election might be eight or
3 nine Republican seats under certain circumstances. He's not
4 saying it has to be seven, but that it's never ten. Or it's
10:52AM 5 almost never ten, when it's 50/50. When it's 50/50.

6 I think the irreparable harm here is clear. The
7 voters, millions of North Carolina voters, will again be
8 forced to vote in districts where they have no meaningful
9 chance to elect a representative. And as Common Cause and
10:52AM 10 as Harper held, that clearly trumps the kinds of interests
11 that the Legislative Defendants have put forward.

12 And, you know, I would also say I think with respect
13 to -- with respect to an injunction, there's clearly time to
14 do it. In the Harris case, the federal district court
10:53AM 15 enjoined the North Carolina congressional primaries one
16 month before the scheduled March primary. In Stephenson,
17 the North Carolina Supreme Court enjoined the state
18 legislative plans two months before the primary. So, this
19 Court clearly has the ability to issue an injunction here
10:53AM 20 protecting constitutional rights.

21 I'd be glad to address some of the Legislative
22 Defendants' arguments about the elections clause or
23 justiciability or any other arguments if the Court likes,
24 or --

10:53AM 25 JUDGE SHIRLEY: You'll have an opportunity after

1 they argue.

2 MS. THEODORE: Thank you, Your Honor.

3 JUDGE SHIRLEY: Why don't we take a ten-minute
4 recess before we hear from the defendants.

10:54AM

5 THE BAILIFF: Court will stand in recess for ten
6 minutes.

7 (A recess was taken from 10:54 a.m. to
8 11:11 a.m.)

11:11AM

9 JUDGE SHIRLEY: All right. We will hear from the
10 Legislative Defendants.

11 MR. STRACH: Your Honor, good morning. Phil
12 Strach. Your Honor, we believe that Stephenson expressly
13 allows partisan advantage in redistricting. But what's
14 remarkable about the redistricting that occurred this time
15 around is that the legislature handcuffed themselves. They
16 realized that they could pursue partisan advantage, but they
17 did multiple things to literally handcuff their ability to
18 pursue partisan advantage. The first thing they did --

11:11AM

19 JUDGE SHIRLEY: Mr. Strach, one of the real
20 ironies is in Stephenson, they quote a Wall Street Journal
21 article talking about how bad redistricting is and
22 gerrymandering is in North Carolina, don't they?

11:12AM

23 MR. STRACH: They do.

24 JUDGE SHIRLEY: And on this past Wednesday, the
25 Wall Street Journal once again ran an article talking about

11:12AM

1 partisanship. And the Wall Street Journal talked about the
2 non-partisan group out of Princeton that looks at district
3 maps, and it talked about four states that were given an F,
4 one of which is North Carolina.

11:12AM

5 And the real irony is the state that the Wall Street
6 Journal holds up as maybe being the beacon of light as to
7 how we should go forward, of all states, is California,
8 saying that California is better -- well, is much better
9 than North Carolina in this process.

11:12AM

10 MR. STRACH: My response to that, Your Honor, is
11 thank God we don't let journalists and academics decide the
12 law in our state.

11:13AM

13 JUDGE SHIRLEY: Well, how -- if probably the one
14 news outlet that is most favorable to Republicans on a
15 national basis talks about North Carolina getting an F, how
16 in the world did that occur when the legislature cuffed
17 their hands going back in to draw the maps?

11:13AM

18 MR. STRACH: Your Honor, the Princeton
19 gerrymandering methodology is like a black hole. I don't
20 think anybody really understands it. We have no idea how
21 they're measuring that. We have no idea what they're using.
22 We don't know what their formula is. And so, it's just like
23 Dr. Chen's materials, these are black box algorithms, and
24 it's garbage in, garbage out. However you want it to score
25 the map, you can make it score the map that way. So, I

11:13AM

1 can't speak to that because I have no idea what they do or
2 how they do it.

3 JUDGE SHIRLEY: What's -- this shows my
4 ignorance. What is the congressional breakdown in North
11:13AM 5 Carolina now in terms of Republican versus Democratic? Is
6 it 8-5?

7 MR. STRACH: It's currently 8-5. Correct. So,
8 but, Your Honor, they did handcuff themselves. There are
9 lots of things they could have done that could have produced
11:14AM 10 a map that was much more partisan than however this maps
11 turns out to be. We don't really know that until we
12 actually hold elections under it. Nobody has a crystal ball
13 and can make accurate predictions about what's going to
14 happen.

11:14AM 15 Political coalitions change. No one would have
16 believed that Robeson County would be a deep red county. No
17 one. If I had stood up and said that eight years ago,
18 they'd have laughed at me. No one would have thought that
19 some of counties in the northeastern part of this state
11:14AM 20 would flip from deep blue to deep red in just eight years.
21 No one would have believed that. So, the political
22 coalitions change. We have no idea how any of these
23 districts are going to perform in 2022 or, certainly, not in
24 2030, down the road.

11:14AM 25 So but what they did to ensure as fair and transparent

1 a process as possible, they did this completely in the open.
2 They literally -- and the Court can go to the legislature's
3 website and see the livestream. They opened up the
4 committee room and had the cameras on. All the computer
11:15AM 5 screens were on the camera. They had open mics in the room
6 to pick up conversations.

7 And let me just tell you this, because I've been
8 working around redistricting stuff for a long time.
9 Legislators of both parties in other states would rather be
10 shot than to have to draw maps in the open like that. They
11 would rather be shot. They would never do it. We may be
12 the only state in the nation that does it that way.

13 And, so, literally, if the Senate redistricting
14 chairman went in there and starting messing around with VTDs
11:15AM 15 and drawing maps, it was all in the public. And you would
16 know that because if you read Twitter, what would happen is
17 they'd start moving VTDs around and it would be popping up
18 on Twitter. People would be commenting on it in real time.
19 People had the ability literally to influence the districts
11:16AM 20 in real time because it was done in the public that way.

21 So, we think North Carolina legislators should be
22 applauded and commended for this, because it was -- it takes
23 a lot of courage in a process which you could keep secret to
24 nonetheless do it in the open. The other thing is they
11:16AM 25 didn't use any election data. There was no election data

1 loaded into the machine.

2 Now, the legislative leadership did not say to all the
3 Republicans, okay, before you sit down in front of that
4 computer terminal, you have to go have a lobotomy and take
11:16AM 5 out all your political knowledge. Nobody expected them to
6 do that, and that wouldn't be fair. But they didn't have
7 any election data.

8 And the reason that's a key difference is because in
9 the past in redistricting, what would happen is you'd have
11:16AM 10 the election data loaded into the computer, and if you --
11 and that election data would allow you to score partisanship
12 down to the VTD level. So as you move VTDs around on the
13 computer screen, you could see how it shifted the
14 partisanship of that district in real time and you could
11:17AM 15 score it.

16 JUDGE SHIRLEY: Well, with respect to the
17 legislature's -- legislators that would go in and sit down
18 at the terminal, how many focused solely on the districts
19 that they knew and how many -- you know, did people from the
11:17AM 20 west go out and look at the east and --

21 MR. STRACH: The tape would tell the tale on
22 that, Your Honor. I don't know. I haven't watched all the
23 video. But I do know that the leaders of the committees
24 would go in there and draw entire maps. So, you could
11:17AM 25 literally see, say, the House redistricting chairman,

1 Representative Hall, you could literally see him sit and
2 draw the map. And I think he drew it in sections. And so,
3 that was live, that was, you know, real time.

11:17AM

4 JUDGE LAYTON: Where did the legislators get the
5 base maps they started with in that process?

11:18AM

6 MR. STRACH: They start off with a clean slate.
7 It was a clean slate. They went in there with an empty map
8 and they went in there and they drew it. Now, they
9 obviously had stuff in their heads, right? They had ideas.
10 They had concepts. Redistricting requires you to kind of go
11 in with sort of at least an overall plan, kind of how are we
12 going to do this, because it's very complicated, but they
13 didn't carry any prior work in there with them. They just
14 started from scratch. And then the public was able to watch
15 how it developed.

11:18AM

16 JUDGE SHIRLEY: Well, I think the complaint,
17 verified complaint, alleges they took -- take notes in.

11:18AM

18 MR. STRACH: I'm not aware of that. I know some
19 Democrats did. I'm not aware of Republicans that did. They
20 certainly didn't bring draft maps in there, that I'm aware
21 of. I'm sure if there was specific video to the contrary,
22 it would have been pointed out. But I'm not aware of that.
23 And so, it was a very transparent process.

11:19AM

24 And so, what they were not able to do is when
25 Chairman Hall was sitting there on the computer moving VTDs

11:19AM 1 around, unlike in the past when we could have seen, oh, wow,
2 this makes it more Republican, this makes it more
3 Democratic, he couldn't see that. He might have a
4 guesstimate in his mind as what the politics would be, but
5 he couldn't use any data to -- as Plaintiffs have said in
6 the past, to engineer the districts, to squeeze every bit of
7 partisanship out of them that you could get. That was not
8 possible to do this time, and it was not done.

11:19AM 9 So, the other thing that was done this time, that's
10 much different than prior years, there were detailed
11 explanations given in public, in committee meetings, on the
12 floor of the Senate, on the floor of the House on why the
13 districts were drawn the way they were. In the past, the
14 leader, the legislative leadership, if they wanted to, they
15 didn't have to explain anything. They just come in there,
16 drop the map, call the vote. It's done.

11:20AM 17 JUDGE SHIRLEY: How did the congressional
18 districts from a Republican versus Democrat standpoint stack
19 up to what was originally proposed that the Harper v. Lewis
20 court struck down?

21 MR. STRACH: The composition of the congressional
22 delegation at the time of the Harper case, I think, was ten
23 Republicans, three Democrats.

11:20AM 24 JUDGE SHIRLEY: And now it would be, under these
25 proposed maps? Or these maps, they're not proposed anymore.

1 MR. STRACH: Well, the plaintiffs claim it's
2 10-4. I have no idea, but we'll see. We'll see what
3 happens in 2022.

11:20AM

4 JUDGE SHIRLEY: Well, you can certainly determine
5 that by running numbers, can't you?

6 MR. STRACH: You could guess. I have no idea.

7 JUDGE SHIRLEY: No -- you're telling me no one's
8 guessed?

11:20AM

9 MR. STRACH: Yeah, they have. People have
10 guessed 9-5, 10-4, 11-3. The guesstimates are all over the
11 board.

12 JUDGE SHIRLEY: Are there any guesstimates in
13 favor of the Democrats?

11:21AM

14 MR. STRACH: I haven't seen any. No, that's a
15 fair point, but I haven't seen it.

16 JUDGE SHIRLEY: I would assume you -- your -- the
17 legislature's position is they can engage in partisan
18 gerrymandering?

11:21AM

19 MR. STRACH: The legislature's position is that
20 Stephenson allows them to redistrict for partisan advantage.

21 JUDGE SHIRLEY: Can they do it for extreme
22 partisan advantage?

11:21AM

23 MR. STRACH: I have no idea what that means,
24 Your Honor. There is no definition of that. I have no
25 idea. The legislature can't answer that. Nobody can answer

1 that. Dr. Chen tries to answer that; Ms. McKnight will tell
2 you why he can't. But no one knows the answer to that
3 question.

11:21AM

4 What people do is they take data, Your Honor, and they
5 plug it into these black box algorithms that they can rig on
6 the front end with the criteria that they use to spit the
7 results out. It's just rigged. It's garbage in, garbage
8 out. You feed it the criteria you want it to feed, and it's
9 going to spit out the results that you want it to give.

11:21AM

10 And when this case goes to trial, the Court will see a
11 lot of evidence on that and why that's the case here. But
12 at the end of the day, people are just guessing. They're
13 just flat-out guessing. And the reason -- and they're not
14 only guessing, but they're often guessing wrong, because the
15 political coalitions shift so much over the course of a
16 decade that the map that you pass in 2021 could be a
17 completely different map in 2030. I would remind you --

11:22AM

18 JUDGE SHIRLEY: Yeah, but legislators who face
19 election every two years, when they go sit down at the
20 terminal, they have a greater understanding what the
21 political realities are in their district at the time they
22 sit down, and I would almost guarantee you weren't relying
23 on what made the data in 2000 or 2010.

11:22AM

24 MR. STRACH: Well, certainly, legislators know
25 their own areas. And the criteria here took that into

11:22AM

1 account. It didn't bar legislators from using their local
2 knowledge about the local areas and the local communities,
3 and not just in a partisan way, but in any way.

11:23AM

4 In lots of areas of the state, there's communities that
5 have typically been grouped together in redistricting, and
6 the local people know that, and they know where the
7 communities are. They know the neighborhoods, and they know
8 where the churches are, and they've got all that local
9 knowledge. That was allowed to be used, and I'm sure it was
10 used, but that wasn't a solely partisan thing.

11:23AM

11 And so, yeah, the local -- the local legislators sit
12 down at the computer and mess around with it and draw
13 something.

11:23AM

14 JUDGE SHIRLEY: So, what were the -- what was the
15 criteria given to the legislators that they were required to
16 use?

11:23AM

17 MR. STRACH: So, those are in the record,
18 Your Honor. They were passed in August. And so, they said
19 no election data. And as to the legislative maps, they had
20 to follow the Stephenson requirements. They had a threshold
21 for compactness.

22 JUDGE SHIRLEY: When you say "follow the
23 Stephenson requirement," you mean creating the VRA districts
24 first and then --

11:24AM

25 MR. STRACH: That would be following the whole

1 county construction rules that Stephenson laid out.

2 JUDGE SHIRLEY: And the first rule is you create
3 your VRA districts first?

4 MR. STRACH: That's -- whether that's a rule or
11:24AM 5 not, I would argue that recognizes the supremacy of federal
6 law.

7 JUDGE SHIRLEY: Well, that's what Chief Justice
8 Lake said, here's the way you're to do it.

9 MR. STRACH: Right. He laid out a series of
11:24AM 10 construction rules for constructing districts. It wasn't
11 necessarily a process, it was basically construction.
12 Because that's what you do with districts, you literally
13 build them VTD by VTD. And that's what -- the court kind of
14 provided a roadmap for how you do that. So, they had to do
11:24AM 15 that.

16 They also had a criteria that strove to keep
17 municipalities whole. If you look at the congressional map
18 in this case, out of 500-and-some municipalities, only two
19 are split. That is remarkable. I can guarantee you that's
11:24AM 20 never been done in the history of North Carolina
21 redistricting. And, Your Honor, the criteria that we're
22 talking about in August is Exhibit 8 to our brief, and
23 they're all laid out there.

24 So, there was an attempt to keep municipalities whole,
11:25AM 25 there was a threshold, sort of a floor, for compactness, and

1 they were allowed to consider incumbency and where members
2 lived. And then they were allowed to use local knowledge.
3 But even that, Your Honor, was subordinate to all the other
4 criteria, because it said so long as a plan complied with
11:25AM 5 all the other criteria, you could use local knowledge of the
6 community.

7 JUDGE SHIRLEY: Going back to Stephenson, I mean,
8 it was a mandate, wasn't it, that VRA districts be
9 required -- created first?

10 MR. STRACH: To the extent, Your Honor, you could
11 read Stephenson to require VRA districts in priority in
12 terms of chronologically, like literally drawing them first,
13 I don't think that's necessarily what Stephenson says.

14 JUDGE SHIRLEY: Well, it says, "On remand, to
11:26AM 15 ensure full compliance with federal law, legislative
16 districts required by the VRA shall be formed prior to
17 creation of non-VRA districts." So, that's temporal. If
18 there are VRA districts that are required to be created,
19 you've got to create those before you do the non-VRA.

20 MR. STRACH: Your Honor, that's a reasonable
21 interpretation. I think it could be interpreted otherwise.
22 In fact, the Covington court didn't know how to interpret
23 it, and they dropped a footnote saying they expressed no
24 opinion about that.

11:26AM 25 I would note, though, it also says that you -- to the

1 extent it is temporal and chronological, it's only -- you
2 only have to do it for the districts that are required by
3 the VRA.

4 JUDGE SHIRLEY: Right.

11:26AM

5 MR. STRACH: And so, obviously, the legislature
6 didn't believe there were any required by the VRA.

7 JUDGE SHIRLEY: Wouldn't you have to look at
8 racial data before you come to that conclusion?

11:26AM

9 MR. STRACH: No, Your Honor, I don't believe you
10 would. And I appreciate the opportunity to address this
11 again. When you look at the racial issue, which I
12 understand are not really at issue in this case --

13 JUDGE SHIRLEY: I understand that.

11:27AM

14 MR. STRACH: -- but it is helpful to understand
15 that, you know, we've briefed the litigation that occurred
16 over the last decade, and there's a tension between the
17 Voting Rights Act and the Equal Protection Clause.

18 JUDGE SHIRLEY: Absolutely.

11:27AM

19 MR. STRACH: And some would say it's more than a
20 tension, it's an outright conflict. And so, if you look at
21 racial data, there's a significant chance that just looking
22 at it -- it's kind of like a discrimination case. Somebody
23 applies for a job, and they tell you, I've got bipolar
24 disorder, then they don't get hired. What are they going to
25 say? Well, I didn't get hired because I told you I had

11:27AM

1 bipolar disorder.

2 If you look at the racial data, then you're
3 automatically accused of violating the Equal Protection
4 Clause. You looked at it, you --

11:27AM

5 JUDGE SHIRLEY: It has to be a predominant
6 factor.

7 MR. STRACH: It has to be a predominant factor.
8 But that's a mushy standard. It's very easy to be accused
9 of that. So, you don't want to look at it unless you really
10 think you have to. And what we learned in the last decade
11 was the courts repeatedly told us, no, you don't need it,
12 because there's not legally significant racially polarized
13 voting.

11:28AM

14 JUDGE SHIRLEY: That was in certain districts.
15 That was in districts where there was alleged to be packing,
16 and they said no, no need to pack, that's using racial data,
17 and because there's no racially polarized voting, you don't
18 meet the third prong of the Gingles test.

11:28AM

19 MR. STRACH: Right.

11:28AM

20 JUDGE SHIRLEY: So that district is not a VRA
21 district.

22 MR. STRACH: Right.

23 JUDGE SHIRLEY: It didn't say there were no VRA
24 districts in the state, it just said that particular
25 district is not a VRA.

11:28AM

1 MR. STRACH: Well, they said that, though,
2 Your Honor, all over the state. They were at least 28 at
3 issue in the Covington case. And then in the Harper and
4 Common Cause litigation, the court did an analysis that
11:28AM 5 looked at districts all over the state. Not 100 percent of
6 the state, to be fair, but all over the state.

7 So, the message was pretty loud and clear. The Gingles
8 factors are not going to be satisfied pretty much anywhere
9 in the state. And so, then we got to this redistricting
11:29AM 10 with the 2020 data, and we had plaintiffs' lawyers, not
11 these plaintiffs' lawyers, other plaintiffs' lawyers,
12 sending us letters where they were admitting, hey,
13 African-Americans are being elected in districts under 50
14 percent.

11:29AM 15 Well, that on its face shows us that the Gingles
16 preconditions are going to be met. So, why would we look at
17 race and run the risk of an equal protection challenge when
18 everything we're being told all along is, hey, you don't
19 need to look at race?

11:29AM 20 JUDGE SHIRLEY: I'm sorry I got us off track with
21 the VRA.

22 MR. STRACH: Thank you. I appreciate you asking
23 that, Your Honor, because I actually -- I didn't think I
24 gave a good enough explanation the other day. So, I
11:29AM 25 appreciate the opportunity to do it today.

11:30AM 1 But the point being, Your Honor, I think -- I say all
2 this to say I think we need to maintain some perspective
3 here. No one does redistricting in North Carolina like we
4 do it here in terms of the transparency, not using election
5 data, and then giving fulsome explanations in public of why
6 the districts look the way they do. And all this
7 information is on the legislature's website. We've cited to
8 it in our briefing. You can go click the link, and you can
9 get a full explanation.

11:30AM 10 And so, when the constitutional standard is beyond a
11 reasonable doubt and you've got the evidence that they did
12 it in the open, no election data, and they gave all these
13 explanations, which the plaintiffs have not engaged with
14 those explanations, they haven't said, oh, those are a
11:30AM 15 lie --

16 JUDGE SHIRLEY: But they argue that we're at a
17 preliminary injunction and beyond a reasonable doubt doesn't
18 apply.

11:30AM 19 MR. STRACH: I think that's incorrect. I don't
20 think the preliminary injunction standard can overrule the
21 standard of proof or the burden of proof that the Supreme
22 Court says applies in these cases.

23 JUDGE SHIRLEY: All right. Once again, unless
24 you're a member of the press, please do not take photographs
11:30AM 25 with your phone. Members of the press may. Go ahead.

1 MR. STRACH: Thank you, Your Honor. So, my
2 presentation initially was just really to try to create that
3 I think we should maintain perspective. It really is done
4 uniquely different in a more transparent and fair way in
11:31AM 5 North Carolina than anywhere in the country, even
6 California.

7 JUDGE SHIRLEY: Then how do you explain what
8 the -- the plaintiffs have said if you look at results of
9 this redistricting, they are substantially similar to what
11:31AM 10 the Harper and Common Cause courts called unconstitutional
11 because of partisan gerrymandering.

12 MR. STRACH: Number one, we obviously disagree
13 with those rulings.

14 JUDGE SHIRLEY: And Common Cause v. Lewis was a
11:31AM 15 final judgment. A final judgment was entered; is that
16 correct?

17 MR. STRACH: That's correct.

18 JUDGE SHIRLEY: And no one appealed that?

19 MR. STRACH: No.

11:31AM 20 JUDGE SHIRLEY: And Harper v. Lewis was an
21 interlocutory order, there's no final judgment?

22 MR. STRACH: Right. I'm trying to remember, Your
23 Honor, if they actually enjoined the map. What they did is
24 they entered an injunction. They may have enjoined the
11:32AM 25 filing period or something. I'm trying to remember exact.

1 But in Harper, it is important to note the legislature
2 voluntarily redrew the map. The court said, hey, we're
3 going to have a summary judgment hearing, it's going to be
4 pretty quick, and so, the legislature decided, for the sake
11:32AM 5 of the voters, for the sake of finality, they said, we'll
6 just redraw the map. And that's what they did, and the
7 court approved it.

8 And so, now, I think it's interesting to note that, for
9 the Court, on the legislative districts, the legislative
11:32AM 10 redraw was ultimately approved by the Common Cause court.
11 Okay? We had some litigation over that, and the plaintiffs
12 in that case challenged the redrawn -- a bunch of the
13 redrawn districts, and they didn't challenge others. They
14 challenged some. The Common Cause court approved those.
11:32AM 15 That was not appealed.

16 So, elections were held under the redrawn districts
17 under the Common Cause standard. And in the House, the
18 membership went from 65 Republican to 69 Republican. And in
19 the Senate, they still elected 28 Republicans, almost a
11:33AM 20 supermajority. So, that should tell the Court that that's
21 what happens in North Carolina because of the way
22 Republicans are spread out and Democrats are not. That's
23 what's happened.

24 Under a so-called fair standard, under a so-called fair
11:33AM 25 map approved by a court, Republicans increased their

1 majorities. And, so, this notion that you can somehow just
2 kind of predict what these maps are going to look like, I
3 just -- I want to emphasize it is a baseless notion. It is
4 pie in the sky, black box, math, calculus, whatever you want
11:33AM 5 to call it, but at the end of the day, it is not meaningful.
6 It is not meaningful.

7 The people decide elections. The voters decide
8 elections. The issues decide elections. The political
9 dynamics decide elections. That's what decide elections in
11:34AM 10 North Carolina, not these districts, and not some computer
11 algorithm.

12 JUDGE SHIRLEY: Well, the districts decide who
13 the voters get to decide on.

14 MR. STRACH: The districts decide who gets to
11:34AM 15 run. The voters decide who wins.

16 JUDGE SHIRLEY: But the ultimate outcome, in
17 terms of the political makeup of the legislature, begins at
18 the district level and where the district -- and how the
19 districts are located.

11:34AM 20 MR. STRACH: I don't think so. I think,
21 certainly, they are elected from districts. You have to
22 draw the districts in order for somebody to be elected. The
23 people in those districts decide who wins those elections.
24 And you've got -- you've got Republican-leaning districts
11:34AM 25 that elect Democrats. You've got Democrat-leaning districts

1 that elect Republicans. To say it's a foregone conclusion,
2 you've got -- the national dynamics often will drive
3 elections, so who is running for president, or if there's a
4 presidential election, will often impact what happens.

11:35AM

5 The Sean Trende affidavit that we submitted Wednesday
6 is a stark example of that. When you have a Mitt Romney on
7 the Republican side running in 2012 versus a Donald Trump in
8 '16 and '20, completely scrambles the map. It scrambles
9 political coalitions. And it's just not fair to lay this
10 all at the feet of a district.

11:35AM

11 The district, obviously, has some impact, but it's not
12 fair to lay it all at the feet of the district. And that's
13 particularly true when the districts are drawn
14 transparently, openly, without election data, and full
15 explanations are provided to the public of why they were
16 drawn the way they were drawn.

11:35AM

17 JUDGE SHIRLEY: And so, the plaintiffs' request
18 is based upon what was set forth in Common Cause v. Lewis
19 and Harper v. Lewis. So you're just saying the court was
20 wrong?

11:36AM

21 MR. STRACH: Correct.

22 JUDGE SHIRLEY: And is it persuasive authority
23 for this Court?

24 MR. STRACH: Okay. So, in the sense of is it
25 authority this Court can consider, sure. In that sense, it

11:36AM

1 would be. I think a Court would call it persuasive. In my
2 opinion, it's not actually, in fact, persuasive. I think --

3 JUDGE SHIRLEY: Well, I assumed that's the case,
4 because you really --

11:36AM 5 MR. STRACH: The Court can certainly consider it.
6 We would certainly not say that the Court couldn't consider
7 it. Certainly not binding on this Court and on this panel,
8 but the Court can certainly consider it. And, frankly, I
9 would love for the Court to really read it in depth, and the
11:36AM 10 Court may already have. Because when you read that opinion,
11 it's clear it is not an opinion. There is no standard.
12 It's basically, hey, legislature, just go back and redraw,
13 but we're not going to really tell you how to do it.

14 And I would point out there is a statute in North
11:37AM 15 Carolina that says anytime a map is enjoined, the
16 legislature has to get at least two weeks to redraw it,
17 but --

18 JUDGE SHIRLEY: Enjoined? Enjoined or voided?

19 MR. STRACH: Struck down.

11:37AM 20 JUDGE SHIRLEY: Because if we enjoin it, that
21 map's still there. And while you can redraw congressional
22 maps mid-decade, because there's no constitutional provision
23 against it, as long as there is a map that hasn't been
24 declared unconstitutional, can you, under the mid-decade
11:37AM 25 prohibition in the constitution, redraw maps?

1 MR. STRACH: Well, if the map is enjoined, i.e.,
2 can't be used, then the Court has an obligation to let the
3 legislature try again. And but in doing so, statute's very
4 clear, the Court has to identify the specific defects in the
5 plan.

11:37AM

6 And I bring up that statute to say in the Common Cause
7 opinion, even though that was a final judgment that said
8 you've got to redo this, it did not identify the specific
9 defects. It did not go through district by district and
10 say, legislature, this is what you did wrong, and this is
11 how you fix it. That's what the statute requires. So, for
12 that reason alone, we think Common Cause is of no use to
13 this Court, and we believe it got the legal standard
14 completely wrong.

11:38AM

15 The legal standard is set by Stephenson. It's okay to
16 district for partisan advantage. And until the Supreme
17 Court says otherwise --

11:38AM

18 JUDGE SHIRLEY: Well, I think they said it was
19 okay to district for political advantage.

11:38AM

20 MR. STRACH: Well, Stephenson said partisan
21 advantage, specifically. Those are the two words that
22 Stephenson used. And now, even the Common Cause court, you
23 know, approving the new districts, recognized there was some
24 banter that went on in the redraw process where the
25 politicians were bantering back and forth about I want this

11:38AM

1 area, I'll take this area, and you take this area. And the
2 plaintiffs complained about that. So, that was the partisan
3 or whatever.

11:39AM

4 And even the Common Cause court said, well, that's a
5 political consideration. That's going to happen. That's
6 okay. And so, even the Common Cause court kind of
7 distinguished between so-called political considerations
8 versus just purely partisan considerations.

11:39AM

9 But Stephenson says partisan advantage is okay. And if
10 the Court remembers from Stephenson, there were allegations
11 made by Stephenson -- I happen to know this because I
12 litigated Stephenson, along with my law partners, when I was
13 a baby lawyer. But there were allegations in that case
14 about how Democrat majorities in the past had carved up
15 counties for political gain, to maintain their majorities.
16 So, the Stephenson court had that before it.

11:39AM

17 And so, I mean, in my opinion, this was the Stephenson
18 court saying so long as you follow these rules, you have
19 discretionary decisions that remain once you follow the
20 rules, partisan advantage is okay.

11:40AM

21 JUDGE SHIRLEY: Well, if we find that Common
22 Cause v. Lewis and Harper v. Lewis are authoritative and
23 were correctly decided, what does that do to your argument?

11:40AM

24 MR. STRACH: I think that puts this -- I think
25 that puts this Court's ruling, as well as those two, in

1 conflict with Stephenson.

2 JUDGE SHIRLEY: Well, that's not my question.
3 If -- if Common Cause and Harper were correctly decided,
4 what does that do to your argument?

11:40AM

5 MR. STRACH: Correct. Fair point. We have also
6 argued even if the Court were to follow Common Cause,
7 Harper, these maps don't violate it. The Court will recall
8 that the Common Cause court had an intent element. And the
9 Court -- if the Court reads the Harper opinion where they
10 said, we're inclined to enjoin this map, we'll give you a
11 chance, we urge you to redraw it, they focused on the intent
12 aspect. And they used evidence from 2016 where it was
13 openly said, hey, we're drawing these for partisan
14 advantage, et cetera.

11:40AM

11:41AM

15 JUDGE SHIRLEY: We give -- we give instructions
16 every day in criminal court that intent is seldom
17 determinable by direct evidence and often -- and we tell the
18 juries that, you know, often it's circumstantial evidence
19 that you have to rely on.

11:41AM

20 Are you saying there's no circumstantial evidence of
21 intent that exists?

11:41AM

22 MR. STRACH: Well, point one that I'm making,
23 Your Honor, is there was abundant evidence of intent in that
24 case. So, it was easy for the Court. That evidence is not
25 here at this time. So, I would think you would need

1 overwhelming circumstantial evidence.

2 JUDGE SHIRLEY: The law makes no distinction
3 between the weight to be given to direct evidence or
4 circumstantial evidence. That's another thing we tell
5 jurors.

11:41AM

6 MR. STRACH: Right. So, Your Honor, here it's
7 easy, because, as Ms. McKnight can explain, will explain to
8 the Court, there is no circumstantial evidence. The
9 computer, the black box computer algorithms, et cetera, are
10 not worth the paper they're written on, and we can explain
11 why. But that is not circumstantial evidence of anything
12 other than that you can rig an algorithm to spit out
13 whatever you want it to spit out. That's all that proves.
14 Other than that, there is no evidence of so-called extreme
15 partisan gerrymandering in this case.

11:42AM

11:42AM

16 JUDGE SHIRLEY: I think, generally, people intend
17 the natural and probable consequences of their acts. I
18 think that's a general rule of law I've heard before.

19 MR. STRACH: Sure. When the legislators sat down
20 there and they were drawing districts without election data,
21 they drew what they drew. But you have to understand that
22 because of the way voters -- Republicans are spread out and
23 Democrats are not, it's not surprising at all that you would
24 get a Republican majority map as the way people are.

11:42AM

11:42AM

25 Now, if the Republican Party starts trying to speak to

1 urban voters and get those voters, and if the Democratic
2 Party starts trying to speak to rural voters, it might
3 scramble the map.

11:43AM

4 JUDGE SHIRLEY: That actually might be a good
5 idea.

11:43AM

6 MR. STRACH: It might be a good idea. It might
7 actually be a good idea. I can tell you this, from a
8 redistricting perspective, it would scramble the map. And
9 it would be much harder, it would be much harder to produce
10 a map that favored anybody if political people would start
11 talking to the other side and not just themselves. That's
12 the problem.

11:43AM

13 JUDGE SHIRLEY: But, unfortunately, that's
14 something we can't do in court.

11:43AM

15 MR. STRACH: Exactly. The Court can't do that.
16 I can't fix that. But that doesn't -- because political
17 people aren't speaking to the other sides doesn't give the
18 plaintiffs a claim in this court. And so, just because you
19 can currently sit down and draw a map without election data
20 that may elect Republican majorities, that's a problem this
21 Court can't fix, and that's not the Legislative Defendants'
22 fault.

11:44AM

23 JUDGE SHIRLEY: Well, it's certainly not the
24 plaintiffs' fault, either.

25 MR. STRACH: Just because it's not their fault

1 doesn't mean they have a claim. Your Honor, I'd like
2 Ms. McKnight to address some of the expert testimony so we
3 make sure we've addressed that in proper fashion.

4 JUDGE SHIRLEY: Sure.

11:44AM

5 MS. MCKNIGHT: May it please the Court. Kate
6 McKnight for Legislative Defendants. I would like to start
7 by discussing a piece that is missing from these cases and
8 is often misunderstood. And a misunderstanding of this
9 piece leads very smart people, very well regarded Wall
10 Street Journal newspapers to think that a map, a properly
11 drawn map, was systematically drawn to entrench one party.

11:44AM

12 Redistricting in the United States is a geographic
13 exercise. What does that mean. Right? There are plenty of
14 systems in the world, plenty of systems of ways to elect
15 representatives. You can look to Europe. There's a list
16 system in some countries there, which will support more
17 proportional representation, right, than is here. There are
18 thousands of articles out there. You can go and see them.
19 But, obviously, those aren't the systems here. It is a
20 geographical representation system.

11:45AM

11:45AM

21 So, what does that mean? It means that every ten years
22 when map-drawers are drawing maps, they must start with a
23 map. They are drawing a map. They are not selecting
24 voters. They must divide up their map in a way that breaks
25 down into districts that are of roughly equal size. And by

11:45AM

1 size, that's number of population.

2 So, what does this mean for North Carolina and North
3 Carolina politics? North Carolina is not unlike many of the
4 states in this country where Democratic voters tend to be
11:45AM 5 tightly and highly clustered in urban areas or cities.
6 Republican voters tend to be more spread out, evenly spread
7 out, cities, rural areas, suburban areas. I think as an
8 illustration of this, I'd like to reference the affidavit
9 that we submitted at Exhibit 9 of our brief.

11:46AM 10 This is the affidavit of Sean Trende. And, again, it's
11 Exhibit 9 to our brief. And if you turn to the last two
12 pages, this is Exhibit 2A and 2B. And this is just to
13 illustrate this point of the dispersion of voters and -- of
14 Republican voters and concentration of Democratic voters.

11:46AM 15 JUDGE POOVEY: You don't happen to have an extra
16 copy of that, do you?

17 MS. MCKNIGHT: Yes, we do, Your Honor.

18 JUDGE POOVEY: I've got about 150 e-mails in this
19 case and I'm trying to find the right one.

11:47AM 20 MS. MCKNIGHT: Pardon me, Your Honor. May I
21 approach the bench?

22 JUDGE POOVEY: Yes, ma'am.

23 MS. MCKNIGHT: There you go, Your Honor.

24 JUDGE POOVEY: Thank you.

11:47AM 25 JUDGE SHIRLEY: This was the affidavit that we

1 got earlier this week? Is this the affidavit we got earlier
2 this week?

3 MS. MCKNIGHT: Correct, Your Honor. Now we
4 submitted it twice, to be fair. We served and filed it, I
11:47AM 5 believe, on Wednesday, and then we attached it as Exhibit 9
6 to our brief that we served yesterday.

7 JUDGE SHIRLEY: Okay.

8 MS. MCKNIGHT: Let me just give you an
9 understanding of what you're seeing here. Exhibit 2A,
11:47AM 10 what's been done here is Mr. Trende plotted out all the
11 counties. Here you have North Carolina, the map of North
12 Carolina, divided into its counties. The color-coding in
13 Exhibit 2A correlates to Republican wins and losses, the
14 county-level two-party presidential vote in North Carolina.

11:48AM 15 So, there are three maps. Map Number 1 are election
16 results from the presidential election in 2012, Map Number 2
17 are election results from the presidential election in 2016,
18 and Map Number 3 are those results from 2020. What this is
19 showing you is whether that county voted for the Republican
11:48AM 20 candidate or the Democratic candidate in that election.

21 Now, as you can see, in North Carolina, most of the
22 counties outside of the cities are red, indicating that the
23 Republican candidate won in those counties. Let me show you
24 slightly different maps so you understand just the
11:48AM 25 difference between 2A and 2B. What's been done at 2B is

1 Mr. Trende compared these counties to the national average
2 and determined that there were some counties that, even
3 though they went -- the county voted for the Democratic
4 candidate, it was actually leaning more Republican than the
11:49AM 5 national average. That's how we use the term "lean" in this
6 affidavit and in these counties.

7 As you'll see, there were no counties in North Carolina
8 that trended more Democratic, that went blue. Right? It's
9 not more blue, it stayed red, and, in fact, became more red
11:49AM 10 when you consider nationwide averages.

11 Now, to put this into numbers for you, if you turn to
12 the end of the affidavit, there's a table, Table 1. And I'm
13 sorry to move you around in this affidavit.

14 JUDGE SHIRLEY: Okay. But that's -- okay.

11:49AM 15 MS. MCKNIGHT: This is page 8 of the affidavit.

16 Now, this table correlates to those maps so you can pick
17 what makes more sense to you to look at. But what Table 1
18 shows you is that in 2012, the number of North Carolina
19 counties that voted Republican, it was 70 out of 100.
11:50AM 20 Right? 2016, that number rose to 76. 2020, that number
21 went to 75 out of 100. Right? So, this is showing you out
22 of 100 counties how many voted Republican, how many voted
23 Democratic.

24 Now, this is not related to -- these counties are not
11:50AM 25 gerrymandered. Counties are set political boundaries.

1 Right? And one of the problems, the primary problem with
2 many of the analyses done by plaintiffs' experts is they do
3 not respect the political boundaries that the General
4 Assembly respected in drawing this map. What do I mean by
11:50AM 5 "respect"? What political boundaries am I talking about?
6 This includes counties, this includes some VTDs, this
7 includes municipalities. Right?

8 And now, you don't need to just listen to me, lawyer
9 for the Democrats, telling you that this is an issue that
11:51AM 10 Republicans are spread out in the State of North Carolina
11 and it matters in elections. You can listen to plaintiffs'
12 own experts. Right? This is a known issue in political
13 science. And as plaintiffs' own expert Dr. Chen said at a
14 recent redistricting conference held for plaintiffs' lawyers
11:51AM 15 and plaintiffs' experts -- this was in September, they held
16 a redistricting conference. And I can pass up a paper
17 showing this quote, but let me read it for you first.

18 What Dr. Chen said there is, "Democrats are
19 concentrated in urban areas, and that's part of the
11:51AM 20 political geography. Any time, any time you produce maps
21 that are just following county boundaries, following
22 municipal boundaries, just following geographic compactness,
23 there is going to be a partisan effect."

24 His meaning there is when you comply with these
11:52AM 25 political boundaries, when you comply with geographic

1 compactness, you are going to have an effect that appears to
2 be partisan, but it's baked in. It is a natural effect of
3 having Republican voters spread out more across the state
4 than the highly concentrated Democratic votes in cities.

11:52AM

5 Would it help for me to pass up the article that
6 quoted --

11:52AM

7 JUDGE SHIRLEY: That's fine. Are compactness and
8 following boundaries political -- when I say "political,"
9 county boundaries, municipal boundaries, one of the things
10 that you would look at, especially in racial gerrymandering?

11 Well, let me put it this way. Are those traditional
12 principles of redistricting, following those type
13 boundaries?

11:53AM

14 MS. MCKNIGHT: It's a great question. And, you
15 know, the term that's used in these cases is "traditional
16 districting criteria." And following political boundaries,
17 like counties, municipalities, VTDs, that is considered a
18 neutral traditional districting criteria. And let me go one
19 step further, because North Carolina is unique with its
20 county grouping rule.

11:53AM

21 As Your Honor is familiar with from your review of
22 Stephenson, there is a whole county rule in North Carolina
23 for the legislative and Senate districts, which requires
24 that they stay whole. Now, it's a little bit of a complex
25 equation, but I'll just say that the end result is the State

11:53AM

11:54AM 1 Constitution puts primacy on keeping counties whole as much
2 as possible. Right? There's a recognition that you may
3 need to split some counties when they're too large, there
4 are too many people for one-person-one-vote and Voting
5 Rights Act.

6 So, I think your question had to do with whether the
7 whole county provision played into --

8 JUDGE SHIRLEY: Well, just -- the question was
9 do -- does compactness and following traditional boundaries
10 say -- not just the counties, but municipalities, are
11 those -- whatever you call them -- traditional districting
12 criteria or principles?

13 MS. MCKNIGHT: So, yes, Your Honor, they are
14 traditional districting criteria, in general. In North
15 Carolina, not only is the whole county rule codified and
16 part of a special North Carolina rule, but these were also
17 put in the criteria that the map-drawers used.

18 This is Exhibit 8 to our brief. This is the criteria
19 adopted by the committees. And you'll see there counties,
20 groupings, and traversals. That is in the criteria. You
21 have VTDs should only be split when necessary, and there's
22 municipal boundaries here.

23 JUDGE SHIRLEY: And you've got to pardon my
24 ignorance. Traversal is when you cross a line; is that
25 correct?

1 MS. MCKNIGHT: That's correct, when you cross.
2 Correct.

3 So, now, understanding this effect, and I think it
4 bears noting that, you know, I heard from plaintiffs'
11:55AM 5 counsel this notion that a partisan advantage has been baked
6 in. They use the term "baked in" to this map by the General
7 Assembly. And I would urge the Court to consider the
8 political geography and the spread of voters in North
9 Carolina when they consider whether that is something the
11:55AM 10 General Assembly did or whether those were the ingredients
11 given to the General Assembly that those were the only
12 ingredients they had to work with in drawing this map.

13 So, now I would like to turn to how did plaintiffs'
14 experts handle this issue in their analyses. And now I must
11:56AM 15 for a moment state that we received these briefs and this
16 analysis Tuesday afternoon for this Friday morning hearing.

17 JUDGE SHIRLEY: I understand. But let's be
18 honest, we are on this compressed scheduled, being required
19 to make a determination five hours and four minutes before
11:56AM 20 the next business -- five hour and four business minutes
21 from the date that the filings begin because the legislature
22 wouldn't move back the filing period or the primaries for
23 the congressional and legislative districts while they
24 were -- did that or at least gave that possibility to
11:56AM 25 municipals (sic).

1 So, you know, I understand that, and most times I would
2 be sympathetic, I think the Court would be, but here we're
3 all here because there is apparently a sense of urgency in
4 part created by the legislature.

11:57AM

5 MS. MCKNIGHT: Well, Your Honor, I appreciate
6 that point. We're all under pressure because of the census
7 delay, and I believe that the General Assembly --

8 JUDGE SHIRLEY: When does the census normally
9 come out?

11:57AM

10 MS. MCKNIGHT: Usually comes out in the spring.
11 So, for 2020, it would have come out by February, March.

12 JUDGE SHIRLEY: And it came out in August?

13 MS. MCKNIGHT: August. That's correct.

11:57AM

14 JUDGE SHIRLEY: And yet the legislature made the
15 decision, based off of that, even though it was a half year,
16 February to August, even though it was a six-month delay,
17 not to delay at least the statewide races or state races?

11:57AM

18 MS. MCKNIGHT: Correct, Your Honor. Because the
19 legislature believed, and it was correct in believing, that
20 it could handle and it could put forth one of the most
21 transparent processes in map-drawing history in North
22 Carolina, maybe in this country, and set forth criteria that
23 protect -- that handcuffed it from so-called extreme
24 partisan gerrymandering and protected it and was able to
25 prepare a map that could be prepared and ready to be used in

11:57AM

1 time for the primary.

11:58AM 2 JUDGE SHIRLEY: Listening to both sides, I feel
3 like there are two streams from two different courtrooms,
4 because what they contend and what you contend happen are
5 two diametrically opposed. I mean, wouldn't you agree?

6 MS. MCKNIGHT: I would agree, Your Honor. Yes.
7 And I think, for now, I think it is -- it is useful for me
8 to briefly touch on, and I won't belabor the point, but just
9 if this case goes forward, we look forward --

11:58AM 10 JUDGE SHIRLEY: We're not disposing of the case
11 today one way or another. So the case is going forward.
12 There's no motion to dismiss here.

13 MS. MCKNIGHT: Pardon me, Your Honor, I didn't
14 mean to interrupt you. We look forward to a chance to --
11:58AM 15 deposing these experts, cross-examining them, preparing
16 rebuttal reports. We believe those would be very useful for
17 the Court in understanding these reports and their extreme
18 limitations.

19 I just want to give you some flavor of some of those
11:58AM 20 limitations. Number one, they did not respect those
21 political boundaries. They each did it in their own
22 different way. Right? I fully expect plaintiffs' counsel
23 to stand up and say, well, Dr. Chen did this in this way and
24 Dr. Pegden did it in this way, but let me tell you, when you
11:59AM 25 look at their reports, you'll see Dr. Chen, after

11:59AM 1 acknowledging, right, acknowledging that protecting
2 municipal boundaries creates a map that is likely to be more
3 Republican, what did he do here? And understanding -- not
4 only that, understanding that the General Assembly had that
5 as a priority, had that at as criteria, here he lowered it
6 as a priority.

11:59AM 7 All he writes in his report is that I lowered municipal
8 boundaries as a criteria. What does that mean? We don't
9 know. I take him at his word that he did not prioritize it
10 the way the General Assembly did. There are 500 -- around
11 500 municipalities in North Carolina. The General Assembly
12 split two. We don't know how many Chen split or where in
13 his algorithm, we just know that he lowered that priority.

12:00PM 14 Now, Dr. Pegden will say it in a different way, but
15 both -- the problems are in Dr. Pegden's analysis as well.
16 And, here, I think it's important. I heard Your Honor ask a
17 question of how do you define extreme partisan
18 gerrymandering. I'd like to refer to a comment made by
19 plaintiffs' counsel about Dr. Chen's analysis.

12:00PM 20 And you can also look at Dr. Chen's report at page 32,
21 Table 7, to support what plaintiffs' counsel said, which was
22 "Dr. Chen showed that, on average, in his simulations, nine
23 Republican congressional districts could be expected."
24 Okay? That's what Chen is saying, that in a perfectly fair
12:00PM 25 world, and I'm taking his argument -- we respectfully

1 disagree with what his analysis shows, but even if you take
2 his analysis in whole, all he's telling you is that nine
3 congressional districts should be expected to be Republican.
4 And then in the same brief, they're telling you, well, you
12:01PM 5 know, this is an extreme partisan gerrymander because it
6 might get Republicans ten.

7 Your Honors, I submit to you that that one seat is not
8 the definition of extreme partisan gerrymandering. We may
9 yet have years to go before we get to a definition of
12:01PM 10 extreme partisan gerrymandering, but I offer that this is
11 not that case.

12 JUDGE POOVEY: Is it allowed?

13 MS. MCKNIGHT: Is what allowed?

14 JUDGE POOVEY: Extreme partisan gerrymandering.
12:01PM 15 Assuming we don't take the prior panel's ruling, is it
16 constitutional to have extreme partisan gerrymandering? I
17 understand the nebulous definition and all that sort of
18 thing, but assuming without deciding that this is or isn't,
19 what's your argument?

12:01PM 20 MS. MCKNIGHT: Your Honor, I beg your pardon, I'm
21 about to give you an answer that is a little longer than I
22 think you want, if you could bear with me for a moment.

23 JUDGE SHIRLEY: That's what attorneys do.

24 MS. MCKNIGHT: As a lawyer who has practiced in
12:02PM 25 these cases and in the area of redistricting and has had

12:02PM 1 many a Thanksgiving-meal discussion with family members from
2 all sides of the political divide, I can tell you there is a
3 fundamental and deep misunderstanding in the public media
4 and in the public about what is a gerrymander, what does
5 that mean.

6 I hear people use the terms "pack" and "crack" very
7 casually, very loosely. Now, that's fine outside of a
8 courtroom. You can talk however you'd like. But when you
9 come into a courtroom, all of those terms, "packing" and
10 "cracking," those have legal meaning. There is a way to
11 define those terms. And that's not what we have here.
12 Plaintiffs would not be able to support that case here of
13 packing and cracking.

14 So, when you talk about extreme partisan
15 gerrymandering, I would say what has happened is here you
16 have redistricting where partisanship was not considered, it
17 was not in the criteria. To the extent it was in any of the
18 minds of the map-drawers when they were drawing the plan,
19 that is allowed. Stephenson guides us that that is allowed.
20 To the extent there is any consideration or sense of what
21 the politics are of a case, that's permitted.

22 Now, do I think -- so, that leads me to the point of
23 saying, I don't even know what I believe my definition of an
24 extreme partisan gerrymander is. That might be that I-95
25 district that was drawn by Democrats, and briefed in our

1 brief, a number of years ago where, you know, you could open
2 the car doors and hit both sides of the districts.

3 JUDGE POOVEY: I-85.

12:03PM

4 MS. MCKNIGHT: I-85. Pardon me, Your Honor. I
5 would say that would probably pass the extreme partisan
6 gerrymandering test. But when I look at these districts,
7 where you have compliance with written criteria, you have
8 compactness, you don't have any of these snaking districts,
9 you don't have any of these so-called bacon strips out of a
10 city, you have compact districts, you have -- if you look at
11 the county voting, you have almost exact precision; 70 out
12 of 100, ten out of 14.

12:04PM

13 And that's just taking plaintiffs' word for it. I
14 don't know that Republicans will get ten districts. They
15 may get nine. They may get eight. We don't know. But what
16 you're seeing here in this case is not it.

12:04PM

17 JUDGE POOVEY: I understood you to argue that is
18 not it. My question was a little different, which is,
19 assuming you have it, is it unconstitutional?

12:04PM

20 MS. MCKNIGHT: Your Honor, I'd argue that the
21 constitution here is clear, what's allowed and what's not
22 allowed. And I don't think in -- I don't mean to quibble
23 with you, Your Honor, but I don't fall on a clear
24 understanding of what extreme partisan gerrymandering is.

12:05PM

25 JUDGE POOVEY: Okay.

1 MS. MCKNIGHT: I would say there are other flaws
2 with the expert reports. Dr. Pegden uses a 2 percent
3 deviation, for example. That's not appropriate. You need
4 to get down lower, to a lower deviation.

12:05PM

5 Dr. Moon Duchin's report where you have the
6 different -- the optimization plans, the problem with that
7 is there's no requirement that the General Assembly optimize
8 its redistricting plan. Right? And Moon Duchin's analysis
9 is almost even worse than Chen and Pegden where they admit
10 they're not using the criteria. There's a real black box
11 problem with her optimization. So, not only are you
12 optimizing, but we don't understand what's in it. If
13 there's an algorithm being used, we'd like to see it, we'd
14 like to understand how it works.

12:05PM

12:06PM

15 Your Honor, I'd like to try to wind down, answer any
16 questions you'd like, but I'd like to finish by drawing your
17 attention back to the Trende maps, these maps showing the
18 spread of Republican voters. And I'd posit to you that
19 doing what plaintiffs ask you to do in this case, which is
20 to go in and tweak and redraw maps to encourage greater
21 electoral results for Democrats, would violate these neutral
22 provisions of redistricting, because what it would require
23 us to do is exactly what they -- they're blaming us for
24 doing.

12:06PM

12:06PM

25 We would need to go in, consider politics, sort voters

1 based on their political affiliation, and break rules of
2 municipal boundaries, county boundaries, VTDs, you name it,
3 to create more districts just because these voters have
4 voted Republican or Democratic in another election.

12:07PM

5 As you know, this is an inherently political process.
6 Democratic candidates should go out to these suburban and
7 rural areas and campaign and adjust their message. There is
8 such a thing as a conservative Democrat, and that candidate
9 could be very successful in some of these districts.

12:07PM

10 Now, our country made a decision a long time ago to
11 have geographical representation. And what that means is it
12 decided a long time ago to not let highly concentrated
13 cities overcome and subsume more spread-out rural areas.

12:07PM

14 The fact that our country made that decision years ago
15 should not be laid blame on the General Assembly's floor for
16 drawing a map that responded to these neutral districting
17 criteria, did not consider political election results, and
18 shows exactly what plaintiffs' experts tell you it will
19 show, which is that Republicans are spread out, there is
20 likely and there is an effect on these neutrally drawn maps.

12:08PM

21 So unless there are any other questions, I'm happy to
22 defer to the Court.

23 JUDGE SHIRLEY: Judge Poovey, do you have
24 anything?

12:08PM

25 JUDGE POOVEY: I don't.

1 JUDGE SHIRLEY: All right. We'll hear from the
2 plaintiffs.

3 JUDGE LAYTON: Sorry, not a question, but the
4 maps -- and I don't know that they're in Harper, but the
12:08PM 5 maps that you all called the optimized maps, where are they
6 at in your packets?

7 MR. SCHAUF: So, they are in the Feldman
8 affidavit that we filed on the 16th of November. They're
9 Exhibits D, E, and F.

10 JUDGE LAYTON: D through F?

11 MR. SCHAUF: That's right.

12 JUDGE LAYTON: Thank you. I'm sorry.

13 JUDGE POOVEY: I didn't know if Mr. Steed had
14 anything to say.

12:09PM 15 JUDGE SHIRLEY: Oh, I'm sorry.

16 MR. STEED: Thank you, Judge Poovey. I did not
17 intend to stand up, but I had a minor point of
18 clarification, Your Honors. The filing period opens at noon
19 on Monday, so you have four additional business hours. I
12:09PM 20 just wanted to make sure the Court was aware of that.

21 JUDGE POOVEY: Let me ask you a question. From
22 the State Board of Elections perspective, the -- what is the
23 last date that the filing period could be open and the
24 election still occur, the primary election still occur in
12:09PM 25 March as currently scheduled? Is that the end date now?

1 You may not know that. I don't know.

2 MR. STEED: I'm convinced that that's a union
3 question, and these are complicated, as you can see from the
4 affidavit we put forward. I believe the safe answer right
12:09PM 5 now would be December 17th. But there's issues with the
6 geocoding. If it changes, that's a whole new amount of work
7 for them. It takes a certain amount of time, as explained
8 in the affidavits. And if there's a specific question
9 you're looking for, I'd be able to get you that answer as
10 quickly as I could.

11 JUDGE POOVEY: When do the absentee ballots go
12 out?

13 MR. STEED: Fifty --

14 JUDGE POOVEY: In other words, I forget what day
12:10PM 15 the primary is in March.

16 MR. STEED: March 8th.

17 JUDGE POOVEY: March 8th. So how many days
18 before that do you have to have the ballots go out? And I
19 know it takes time to get those ballots ready and all that
12:10PM 20 sort of thing.

21 MR. STEED: The statute requires 50 days.

22 JUDGE POOVEY: Fifty?

23 MR. STEED: Fifty days is when they're supposed
24 to go out. The state board has authority to shorten that,
12:10PM 25 but only to 45 days. So, it's not allowed without a court

1 intervention to change that.

2 JUDGE POOVEY: Okay. Thank you.

3 JUDGE SHIRLEY: I guess it's true that there are
4 a whole slew of races that will be decided in November that
12:10PM 5 are unaffected by anything we hear -- we do today.

6 MR. STEED: Absolutely. Yes, Your Honor.

7 JUDGE SHIRLEY: Judges, district attorneys,
8 clerks of court, municipal elections --

9 MR. STEED: Pretty much everything else. Yes,
12:11PM 10 Your Honor.

11 JUDGE SHIRLEY: -- conservation district
12 elections, things like that.

13 JUDGE POOVEY: Let me give you back this
14 affidavit that you handed up. Thank you. I did find it
12:11PM 15 after that.

16 MS. MCKNIGHT: After the fact. Thank you,
17 Your Honor.

18 JUDGE SHIRLEY: All right. We'll go ahead and
19 hear from the plaintiffs.

12:11PM 20 MR. SCHAUF: So, thank you, Your Honor. Good to
21 be back up. I wanted to start just by clarifying something
22 that I said at the outset. So, we had a colloquy about what
23 the standard is and whether it was beyond a reasonable
24 doubt. And I just want to be very clear that we think that
12:11PM 25 if the standard is reasonable doubt, we have met that

1 standard. We've carried it with the evidence that we've
2 talked about.

3 Going to what we've heard from my friends on the other
4 side, starting on the partisan effects of this map, I think
12:12PM 5 we have heard basically no argument that the standard set
6 forth in Harper and Common Cause, if that standard --

7 JUDGE SHIRLEY: What is the standard? Because
8 I'm trying to decide, okay, it seems that Stephenson clearly
9 says you can take partisan -- you can consider partisan
10 advantage. So, we've got that. And we've got extreme
11 partisan gerrymandering.

12 First of all, it seems like we're going back to the
13 Supreme Court's old pornography days, we can't define it,
14 but we know it when we see it, which is not a very good
12:12PM 15 standard for -- for -- to give to a legislature to draft
16 maps by. We can't tell you how to do it, but we're going
17 to -- we know it's bad when we see it.

18 So, what is the standard?

19 MR. SCHAUF: So, I think the standard that Common
12:13PM 20 Cause holds is sufficient. I would point to the passage
21 where it says that the maps have been drawn systematically
22 to prevent one party from obtaining a majority of seats even
23 when they get a majority of votes. And I think we could add
24 to that when it's permissible -- or, rather, when it's
12:13PM 25 possible to not do that and still respect traditional

1 districting criteria and North Carolina's political
2 geography.

3 And I want to address the argument that we've heard
4 from the other side that was all about political geography.
12:13PM 5 But that, I think, is a clear administrable standard that
6 the Court can apply just like the Common Cause court did.
7 But, from the other side, aside from these justiciability
8 arguments, they barely engage with the partisan effects that
9 we've shown in the map.

10 There's no evidence to -- that's been put in to counter
11 Dr. Duchin's affidavit, which, by the way, was not served on
12 Tuesday. We filed it on, I believe, the 16th of November,
13 which was 12 days after the maps were enacted. My friends
14 on the other side had, I think, 17 days between that point
12:14PM 15 when we filed and now, and the only thing we received is
16 this very vague affidavit from Mr. Trende. And so, they
17 simply haven't engaged with the expert analysis we've put
18 forward.

19 JUDGE SHIRLEY: You would agree that we -- our
12:14PM 20 elections are based off of geography?

21 MR. SCHAUF: That is right. That is right. So,
22 let's talk about --

23 JUDGE SHIRLEY: Stephenson talked about the
24 importance of counties and why we -- why there was a whole
12:14PM 25 county provision of the constitution.

1 MR. SCHAUF: Right. So, I think the argument
2 we've heard from the other side is that, you know, this is
3 basically about the dispersion of Republicans and the
4 concentration of Democrats, but what we have put in evidence
12:14PM 5 on this very point, as have the Harper plaintiffs, one of
6 the things that our optimized maps show is that you can draw
7 maps that do better in terms of compactness, that traverse
8 fewer boundaries.

9 JUDGE SHIRLEY: How many city boundaries are
10 traversed in your maps?

11 MR. SCHAUF: So, this is in -- two points on
12 that. One, it's clear the people are measuring things in a
13 different way, but what we've got is we've got Table 2 from
14 Dr. Duchin's affidavit where she goes through and shows that
12:15PM 15 the enacted maps for Congress break municipalities into 90
16 different pieces compared with -- and that's a little
17 different from how many municipalities you break, it's the
18 number of pieces you get if you put them together. But 90
19 in their map compared to 58 in ours. In the Senate maps,
12:15PM 20 it's 152 in their map compared to 125 in ours. In the
21 House, it's 292 compared in 201 in ours.

22 Now, my friend on the other side has said they split
23 only two municipalities in the congressional map. And it's
24 hard to square with what they have put -- "they" meaning the
12:16PM 25 legislature has put in the stat pack that's available on

12:16PM 1 their website. I don't actually have it to hand around,
2 because the brief came in yesterday. Not complaining about
3 that, but just don't have it. It lists splits in the
4 following cities, at least: Cary, Charlotte, Davidson,
5 Durham, and Greensboro.

6 You know, the Greensboro one is particularly telling
7 because that's the one that I put up on the board earlier
8 today that sort of illustrates this classic gerrymandering
9 of lopping off the north side of the city in order to
10 combine it with this district that stretches all the way
11 west to the Tennessee border.

12 JUDGE POOVEY: Do you have a written copy of the
13 maps you say are right?

14 MR. SCHAUF: Well, so --

12:16PM 15 JUDGE POOVEY: You said the Feldman affidavit
16 Exhibits D, E, and F?

17 MR. SCHAUF: So, I don't have extra copies of
18 that one with me. I'm sorry about that. They are -- they
19 are filed, and if we end up coming back after a break, I
12:17PM 20 can --

21 JUDGE POOVEY: Feldman, spell that for me.

22 MR. SCHAUF: F-e-l-d-m-a-n. Did I get that
23 right?

24 JUDGE POOVEY: Okay. Thank you. That's what I
12:17PM 25 thought it was.

1 MR. SCHAUF: Just to be very clear on the
2 purposes we offered those maps, there's two. One is we
3 think these are maps that, after the existing maps are
4 struck down, could and should be adopted, but they really go
12:17PM 5 straight to my colleague's argument that this is compelled
6 by political geography. They show, again, that you can be
7 more compact and split fewer municipalities, have fewer
8 county crossings, and still have maps that don't have this
9 degree of partisan gerrymandering.

12:17PM 10 And, you know, again, it's sort of telling that they
11 haven't put in any evidence to address that at all. And on
12 this general point about this being a geographic exercise, I
13 mean, it being a geographic exercise doesn't explain why
14 Mecklenburg and Wake and Guilford and only those three
12:18PM 15 counties in the Senate map are trisected three times. It
16 doesn't explain why you have parts of Greensboro in the same
17 district with counties bordering Tennessee.

18 And, indeed, if you look at that set of congressional
19 maps or congressional districts around Guilford County, what
12:18PM 20 you'll see is they all have what's called a Polsby-Popper
21 score -- this is one of the metrics of compactness, like how
22 funny are the lines, that was relied on in Common Cause --
23 that are around 0.2, which means very not compact. And the
24 reason for that is they were drawn to pursue partisan
12:18PM 25 advantage. And it's not just those.

1 Stephen, would you be able to put up Figure 6 from our
2 briefs? This is northeastern North Carolina. So, this is
3 in the enacted Senate plan. It's Districts 1 and 2, and --

4 JUDGE SHIRLEY: Do we have this?

12:19PM

5 MR. SCHAUF: Yeah. So, this is Figure 6 in our
6 preliminary injunction brief, just blown up real big. And
7 what you'll see here is the legislature drew the map this
8 way in order to just bisect this big population of

12:19PM

9 Democratic voters into two districts. And so, as a result,
10 even though you have this very large Democratic population,
11 you end up in this area with two solidly Republican seats.

12 And it's not just that. These districts are less
13 compact than a fair amount would be, and we show in our
14 papers that you can draw a map that is more compact that
15 complies with Stephenson. And by doing it this way, this
16 map also traverses more county boundaries than our
17 alternative does, which, again, I think shows that it's just
18 not right to say, you know, the only thing going on here is
19 geography and dispersion. And for another example of that,
20 you can look at Wayne County, which is Figure 13 from our
21 brief. It should be towards the back.

12:20PM

22 JUDGE SHIRLEY: We're not here arguing about
23 whole county provision or anything like this, this is
24 clearly partisan?

12:20PM

25 MR. SCHAUF: I mean, we've got a Stephenson

1 violation.

2 JUDGE SHIRLEY: I'm talking about for the
3 preliminary injunction.

4 MR. SCHAUF: Not directly, but I think it's
12:20PM 5 telling that there are excess county traversals in these
6 maps in three places that we've identified.

7 JUDGE SHIRLEY: But that's not the basis for your
8 motion for preliminary injunction?

9 MR. SCHAUF: But there are also places where
12:20PM 10 doing the maps the way the legislature has done them result
11 in a partisan advantage for the Republican Party. So,
12 they've subordinated the imperative to minimize traversals.
13 And this is actually not an example of that. This is a
14 different point.

12:20PM 15 But in northeastern North Carolina, the map that was
16 just up there, you get an extra traversal from the way the
17 legislature has drawn their maps. Around Buncombe County,
18 the way they arrange the counties there, you end up with, I
19 think, two extra traversals there, as we show in our briefs.
12:21PM 20 And then around Forsyth County and Stokes, you get extra
21 traversals there, again, due to partisan advantage.

22 JUDGE SHIRLEY: And that's for partisan
23 advantage?

24 MR. SCHAUF: That's right. That's right. So,
12:21PM 25 they traversed more counties specifically in order to pursue

1 partisan advantage. And this is another just illustration
2 that what we're talking about here isn't geography. This is
3 Wayne County, and what you see is the city of Goldsboro,
4 lots of Democratic voters there, is divided from the
12:21PM 5 communities of Brogden and Spring Hill just to the south.
6 So instead of getting what you would probably expect in an
7 area like this, one Republican district and one Democratic
8 district, or maybe two toss-up districts where you could
9 have competitive elections -- what a thing that would be --
10 instead, you get, just like in the Senate map that was up
11 there a minute ago, two solidly Republican districts.

12 JUDGE SHIRLEY: So, when Stephenson said you
13 could pursue -- use partisan advantage as a criteria, what
14 did they mean?

12:22PM 15 MR. SCHAUF: So, I don't know. I mean, I don't
16 think they said -- I think pursuing partisan advantage or
17 making partisan considerations is a long way off from what
18 we see in these maps --

19 JUDGE SHIRLEY: Well, but --

12:22PM 20 MR. SCHAUF: -- which is --

21 JUDGE SHIRLEY: -- you're asking us for a
22 standard, so we need to understand what Stephenson was
23 allowing. So, when Stephenson says you can pursue partisan
24 advantage -- I'm trying to find the exact quote -- what did
12:22PM 25 they mean, or how should we define that?

1 MR. SCHAUF: Well, so, I guess the first thing I
2 would say is I wouldn't read Stephenson to necessarily bless
3 any degree of what we would call partisan gerrymandering,
4 because it also says that that is limited by other
12:22PM 5 provisions in the constitution, including the Free Elections
6 Clause. And so, I just don't think they address this issue.

7 JUDGE SHIRLEY: But they are saying -- the
8 Supreme Court's statement in Stephenson that you can -- may
9 consider partisan advantage and incumbency protection in the
12:23PM 10 application of its discretionary redistricting decisions,
11 but it must do so in conformity with the state constitution,
12 that is explicitly recognizing that those are things you can
13 consider. They're not saying you can't consider those.

14 So, they're not saying that the state constitution --
12:23PM 15 or they're not leaving it up to say okay that you can do it,
16 but subject to the state constitution. They may be saying
17 there are constitutional limitations. So, where is -- where
18 does that begin? What is permissible under Stephenson and
19 what's not?

12:23PM 20 MR. SCHAUF: I think what is on the other side of
21 the line is, you know, the standard that Common Cause found
22 was sufficient, which is when you have a map that is
23 systematically drawn to entrench one party in power even
24 when voters prefer the other party by significant margins,
12:24PM 25 and even when it's clear that that is not dictated by -- I'm

1 sorry.

2 JUDGE SHIRLEY: When we vote -- the elections
3 that they're going on, that a lot of this -- the voters will
4 come from are statewide elections; is that right?

12:24PM

5 MR. SCHAUF: Sorry. Can you repeat the question
6 again?

7 JUDGE SHIRLEY: When we talk about -- we're
8 looking at statewide elections to determine what the voters'
9 will is, the will of the voters; is that right?

12:24PM

10 MR. SCHAUF: So, the method, you know, Dr. Duchin
11 for example, has used to assess the likely effects of these
12 elections is to look at a set of 52 statewide elections and
13 then --

12:24PM

14 JUDGE SHIRLEY: But the elections we're talking
15 about are broken up by geographical boundaries; is that
16 correct?

17 MR. SCHAUF: That's correct.

18 JUDGE SHIRLEY: And, in fact, they're required
19 to -- required to be as a matter of law?

12:24PM

20 MR. SCHAUF: That's right. They are broken up.
21 And Dr. Duchin accounts for that by looking at what effects
22 the boundaries have on -- when they're applied to, you know,
23 those statewide elections, taking a sample of 52.

12:25PM

24 JUDGE SHIRLEY: Well, if in 2016 you had 76
25 percent of the counties voting Republican, and in 2020 you

1 had 75 percent voting Republican, wouldn't that --
2 regardless of what the overall state elections are, wouldn't
3 that influence election outcomes dependent upon geography?

12:25PM

4 MR. SCHAUF: Well, so, the question sounds like
5 it comes from Mr. Trende's affidavit.

6 JUDGE SHIRLEY: No, the question comes from me.

12:25PM

7 MR. SCHAUF: Well, so wherever it comes from, I
8 think part of the answer is that one thing that ignores is
9 that North Carolina has cities, has urban areas, that have
10 an effect as well on election results.

11 JUDGE SHIRLEY: Sure.

12:26PM

12 MR. SCHAUF: And, you know, that analysis ignores
13 that fact. And it also ignores again, you know, we've got
14 evidence in the record that shows you can have all the
15 county integrity that you want, better county integrity than
16 is in the enacted plans, and not have that degree of skew.
17 And this sort of goes back to the intent point, that when
18 you nonetheless get the skew that we see in these maps, it's
19 because the General Assembly intended to put it there.

12:26PM

20 Now, I think I heard my friend on the other side say
21 that it was fine for the legislators to use partisan
22 considerations in drawing these maps so long as they sort of
23 brought them in in their heads. But, you know, that I think
24 sort of gives the game away. I mean, that concedes that you
25 can do whatever you want outside the hearing room, and as

12:26PM

1 long as you can come in the hearing room and reproduce it,
2 then that's all fine.

3 And, you know, that, I think -- you know, the sort of
4 proof is in the pudding. We see the effects of that sort of
12:26PM 5 approach, and I think to -- for the Legislative Defendants
6 to say that, you know, they never analyzed and apparently
7 still haven't analyzed the partisan effects of the maps they
8 passed, I just don't think, you know, would stand scrutiny.

9 JUDGE SHIRLEY: What percentage of the maps drawn
10 show -- that your experts have drawn show a nine-to-five
11 advantage?

12 MR. SCHAUF: Our expert didn't do the same that
13 sort of undertaking. So, what she did was look at the
14 advantage that the enacted plans created and then used what
12:27PM 15 we've identified as the optimized maps to address whether
16 that was something that was compelled by political
17 geography, as you've heard from the other side, and she
18 found that it wasn't.

19 JUDGE POOVEY: You think the only way these maps
12:27PM 20 can be drawn is by computer? I mean, that's what you've
21 said, basically, right? By using a computer and algorithms
22 and the technology that we have today, why do we leave this
23 up to humans, why don't we just do this like we're doing
24 everything else, automated --

12:28PM 25 MR. SCHAUF: Well --

1 JUDGE POOVEY: -- and, you know, insert
2 artificial intelligence into it and let it -- you know, let
3 it do it for us?

4 MR. SCHAUF: -- Your Honor, I'm not here to tell
12:28PM 5 you that our maps were drawn without human intervention or
6 that you should do that. Our position is that the best way
7 to draw maps is, indeed, to leverage the tremendous power
8 that computers give us to do all sorts of good things,
9 including making more compact districts, split fewer
10 municipalities, fewer counties, all of those things. But I
11 don't think you need to agree with that proposition to
12 invalidate the maps that we have here, because what shows,
13 you know, that they are unlawful is the degree of partisan
14 bias they bake in.

12:28PM 15 And, you know, we can have a separate conversation
16 about what the remedial maps would be. And in that
17 conversation, like we intend to vigorously defend the maps
18 that we've put forward. But that very much is I think a
19 separate conversation.

12:29PM 20 If there's no further questions, I think that's all
21 I've got.

22 JUDGE SHIRLEY: All right. We'll hear from the
23 Harper plaintiffs.

24 MS. THEODORE: Thank you, Your Honor. If I could
12:29PM 25 just start by addressing, I think, the question that you

1 just asked about sort of why we use statewide elections to
2 address partisanship, as opposed to using the results of
3 local elections. That's a very standard approach in
4 political science. And the reason is because if you were to
12:29PM 5 take the votes in a particular district, then the lines of
6 the district would affect the results; that is, if you're in
7 a particular congressional district where it's gerrymandered
8 for one party or another, you might expect that voters of
9 the party that's going to lose might not come out as much.

12:30PM 10 So, it's not an accurate way of assessing the
11 underlying partisanship. And that's why, for example, the
12 Legislative Defendants in 2016 and 2017, when they admitted
13 that they were gerrymandering, they said also that they were
14 using a lot of different statewide elections in North
12:30PM 15 Carolina, like governor and president and attorney general,
16 and those statewide elections were how you assess the
17 underlying partisanship. So, that's the answer to that
18 question.

19 JUDGE SHIRLEY: So, it's a nine-to-five split.
12:30PM 20 Do you consider that extreme partisan gerrymandering?

21 MS. THEODORE: I think -- it's not a question you
22 can answer without asking the question of nine-to-five split
23 under what electoral circumstances. Right? So, if you look
24 at --

12:30PM 25 JUDGE SHIRLEY: Well, as they exist today. I

1 mean --

2 MS. THEODORE: But that's what I'm saying,
3 Dr. Chen's histograms, the bar charts that he shows, they're
4 all saying here's what would happen under the enacted map,
5 as opposed to my simulated maps, if the Democrats won 48
6 percent or if the Democrats won 53 percent.

7 JUDGE SHIRLEY: Statewide.

8 MS. THEODORE: Statewide. And so, you get very
9 different numbers. And that's why Ms. McKnight's comment
10 about Dr. Chen's -- I think it was Figure 7 where she says
11 it's nine districts and it's not extreme because, you know,
12 a lot of -- a lot of the simulated maps in Figure 7 show
13 nine districts, that's why that's very misleading, because
14 that's -- that Figure 7 is under a composite where the
15 Republicans win 50.8 percent of the vote.

16 JUDGE SHIRLEY: The question, again, is nine to
17 five extreme -- a result of extreme partisan gerrymandering
18 with these maps that have been enacted?

19 MS. THEODORE: It can be. And what I'm saying --
20 let me -- can I point you to page 62 of Dr. Chen's report?
21 And we have copies if that would be helpful.

22 JUDGE POOVEY: Probably would be helpful to me.

23 MS. THEODORE: Okay.

24 JUDGE SHIRLEY: What page?

25 MS. THEODORE: If you look at page 62. And let

1 me just explain what this -- what this is. This is
2 Figure A7. And so, what he's doing here -- is everyone
3 there?

4 JUDGE SHIRLEY: Yes.

12:32PM

5 MS. THEODORE: Okay. So, what Dr. Chen is doing
6 here is you see at the bottom he's using the 2020 governor
7 election results. And that's an election where the
8 Republican -- where the Democrats did pretty well. The
9 Republicans get 47.7 percent of the vote. And so, the red
10 dots are -- and if you go from left to right across the

12:33PM

11 horizontal axis, you're showing increasing Republican vote
12 share. And then that dotted vertical line is that
13 50-percent mark that shows whether the Republicans win a
14 district. And then the gray dots -- the gray circles are a
15 thousand computer-simulated plans that respect the
16 legislature's other districting principles. And I'll get to
17 that a little bit later.

12:33PM

18 But, so, what you can see here is that if you had an
19 election where the Democrats did as well as they did here,
20 where they get, you know, 52 percent, 52.3 percent of the
21 vote, in the enacted plan, the Republicans still win ten
22 seats. And you can see that because that

12:33PM

23 tenth-most-Republican district, which is CU4, it's just
24 barely to the right, that red dot is just barely to the
25 right of the dotted line. Right? And that's an outcome

12:34PM

1 that never happens. Not a single one of Dr. Chen's
2 simulated maps produces ten Republican seats. And, in fact,
3 not a single one of his maps produces nine Republican seats.

12:34PM

4 So, you see that in all of Dr. Chen's maps, if you look
5 at the bottom five gray -- the bottom five rows of gray
6 dots, every single dot on those bottom five rows is to the
7 left of the vertical dotted line. What that's signaling,
8 again, is that every single one of his simulated maps in a
9 scenario where the Democrats get 52 percent of the votes,
10 the Democrats get at least five seats, and the
11 overwhelmingly majority of the time, they get six seats.

12:34PM

12 You can see that because that ninth-most-Republican-district
13 line shows that the overwhelming majority of that gray
14 conglomeration of dots is to the left of the vertical line.

12:35PM

15 And they often get -- they often get seven seats, and
16 you can see that because three quarters or so of that gray
17 conglomerate of dots on the line that says
18 eighth-most-Republican district is to the left of the line.

12:35PM

19 And so, that's what shows that this is such an extreme
20 partisan gerrymander, is because it's a gerrymander that
21 sticks with ten Republican seats regardless of how well the
22 Democrats do in the election. It entrenches ten Republican
23 seats, no matter what the popular will says.

24 And if you sort of look at how the --

12:35PM

25 JUDGE SHIRLEY: Are you saying every -- that

1 those seats are always going to go Republican, those ten,
2 and they won't be affected by issues of the day? I mean,
3 because if you -- what happened in Virginia where we
4 haven't (sic) had a Democratic governor in years and years,
5 and all of a sudden out of the blue you have a Republican
6 governor? I mean, issues affect elections just as much as
7 people do, the candidates, don't they?

12:36PM

8 MS. THEODORE: I'm not disputing that if there
9 was a Democratic wave election where the Democrats won 60
10 percent of the statewide vote that this map might not hold
11 up to ten seats. But, of course, if that were true, a
12 non-partisan map that wasn't drawn to entrench partisan
13 advantage would probably give a lot more than six Democratic
14 seats.

12:36PM

15 JUDGE SHIRLEY: So, you want -- your argument is
16 that maps should not be drawn for partisan advantage,
17 period?

12:36PM

18 MS. THEODORE: Our argument is that maps should
19 not be drawn to systematically entrench one party in power.
20 And, you know --

12:36PM

21 JUDGE SHIRLEY: So, they can be drawn for
22 partisan advantage?

23 MS. THEODORE: Well, let me address the colloquy
24 that you had about Stephenson earlier. I think what
25 Stephenson said, as the Court knows, is that you can

12:36PM

1 consider partisan advantage, and there are many ways of
2 doing that that are far short of entrenching a systematic
3 partisan advantage.

12:37PM

4 And one example might be drawing a district to allow
5 the Speaker of the House to run in that district. That's a
6 consideration of partisan advantage. And that might have
7 been one of the things that Stephenson talked about. We
8 don't know, because it was dicta and none of this was raised
9 in Stephenson. But there are many ways to consider partisan
10 advantage that don't involve systematically subverting the
11 will of millions of North Carolinians.

12:37PM

12 Let me address a few of the points that Mr. Strach and
13 Ms. McKnight raised. So, with respect to the handcuffs, the
14 argument that the Legislative Defendants handcuffed
15 themselves, you know, it is very clear that the people who
16 were drawing maps were allowed to bring whatever they wanted
17 into the room. People did bring paper into the room.

12:37PM

18 That's what makes this so different than the remedial
19 process that the Common Cause court ordered, because the
20 remedial process that the Common Cause court ordered forbade
21 legislators from drawing maps at the stations based on paper
22 that they brought in from outside. So, that's the
23 difference here.

12:38PM

24 JUDGE SHIRLEY: So, how many Republicans are on
25 video bringing map -- paper in?

12:38PM

1 MS. THEODORE: The video doesn't allow you to see
2 with that level of granularity. Like, the video doesn't --
3 you can see the people have paper, but it doesn't allow you
4 to look and see, like, is the person at the map station
5 looking at a map.

12:38PM

6 JUDGE SHIRLEY: That's not what I asked. What --
7 what does -- how many Republican legislators actually
8 brought paper in? It could have been the -- you know, their
9 shopping list. Do we know?

12:38PM

10 MS. THEODORE: I don't know. I don't know. But
11 I will say that the -- as Your Honor alluded to, the expert
12 reports that we have overwhelmingly show that there is no
13 possible way that this map could have been produced without
14 consideration of partisan advantage.

12:39PM

15 JUDGE LAYTON: Are you saying none of the
16 Democrats did that? Did they not use any partisan
17 information?

18 MS. THEODORE: They may have. I don't know. I'm
19 not saying anything one way or the other about it. Yeah.

12:39PM

20 So, I want to talk a little bit about some of the
21 criticisms of our experts. And I want to state that
22 Mr. Strach, I think, said these experts were a black box.
23 That's not true. The Legislative Defendants, including my
24 colleagues, these lawyers right here, had full access to all
25 of the code of Dr. Chen and Dr. Pegden during the Common

12:39PM

1 Cause case. They had every opportunity to cross-examine
2 those experts. These are -- Dr. Pegden's theorems and his
3 analysis has been published in multiple peer-reviewed
4 journals, such as the Proceedings of the National Academy of
5 Sciences.

12:39PM

6 Dr. Chen's analysis has also been published in multiple
7 peer-reviewed journals. So, it's just not true that this is
8 a black box and that people don't know what they're doing.

9 JUDGE SHIRLEY: I'm not sure that -- okay. Go
10 ahead.

12:40PM

11 MS. THEODORE: So, then I think -- so on
12 natural -- on geography. Our experts very, very clear
13 accounted for that. The Common Cause court explained why
14 every single one of our experts base in geography. And I
15 think Ms. McKnight said that Dr. Chen was doing something
16 different than what the legislators suggested because he
17 prioritizes municipalities lower than --

12:40PM

18 THE REPORTER: I'm sorry. Can you repeat that?

19 MS. THEODORE: Ms. McKnight said that Dr. Chen
20 gave a lower priority to municipalities than to VTD splits
21 and counties, but that's because that's what the enacted
22 criteria do, too. They say you shall not split counties
23 except for a couple reasons, I think, like equal --
24 population equality and one other, and they say you shall
25 not split VTDs unless it's necessary, and then they say you

12:41PM

1 may consider municipalities. So, that's why he did it the
2 way he did it. He was just following exactly what they
3 said.

12:41PM

4 Dr. Pegden also considered municipalities, and he
5 constrained his algorithm so that it was just as good as the
6 enacted map with respect to the number of split VTDs, the
7 number of split counties, and the number of split
8 municipalities. He did a bunch of different runs, but some
9 of his runs constrained with respect to all of those things,
10 and they produced the same results.

12:41PM

11 And just more generally with respect to political
12 geography, again, that's the whole magic of this method is
13 it takes into account the political geography. And then, of
14 course, you know, taking a step back, the notion that the
15 congressional map here was aimed at preserving counties and
16 the political geography of North Carolina just naturally, it
17 just doesn't pass the smell test.

12:41PM

18 I didn't hear any explanation here as to why the three
19 largest Democratic counties in the State of North Carolina
20 were split three times even though there was absolutely no
21 population-based reason to do that, and even though the
22 enacted criteria on their face forbade splitting those
23 counties three times when it wasn't necessary. So, again,
24 this isn't about the political geography.

12:42PM

12:42PM

25 And I should say that the random maps that Dr. Chen

1 drew split far fewer counties. 100 percent of all of his
2 random maps are significantly more compact than the actual
3 enacted map that the legislature drew.

12:43PM

4 Let me see. All right. Let me just say a few other
5 things. Just a few factual points. In Harper, just to be
6 clear, because I think Mr. Strach said he didn't remember,
7 they did issue an injunction prohibiting the Legislative
8 Defendants from going forward under the 2016 congressional
9 map.

12:43PM

10 I would say that their notion, their argument that this
11 is sort of unbounded and that what the Common Cause and
12 Harper courts did in barring extreme partisan gerrymanders
13 are unbounded are -- is rebutted by the very remedial
14 schemes that the Harper and the Common Cause court allowed.

12:43PM

15 As Mr. Strach noted, we objected in Common Cause to the
16 remedial maps and said they were partisan gerrymanders. And
17 the Common Cause court rejected it and said it didn't meet
18 the test for being an extreme partisan gerrymander. So, I
19 think that itself establishes that the test that the Common
20 Cause court created is not something that will, you know,
21 bar all partisan considerations all the time.

12:44PM

22 I would also note that in Stephenson, which, of course,
23 as you know, enjoined maps, they didn't apply a reasonable
24 doubt standard. We think we meet the reasonable doubt
25 standard, but Stephenson did not apply that reasonable doubt

12:44PM

1 standard in issuing its injunction. In fact, the defendant
2 criticized it for not applying it, but it didn't apply it.

3 I think, you know, going back to the figure from
4 Dr. Chen that I walked through, I think the thing to keep in
12:44PM 5 mind with respect to knowing whether something is a partisan
6 gerrymander is not necessarily the seat count in any
7 particular situation, but it's the margins of victory. And
8 that's what the -- that's what the Dr. Chen report talks
9 about, like, how all of these ten Republican districts are
10 constrained in this range where they're essentially
11 impervious to the will of the voters.

12 And then, finally, in terms of the remedy, I just want
13 to say that we, the Harper plaintiffs, are not advocating
14 those particular optimized maps that the NCLCV plaintiffs
12:45PM 15 are advocating. Our view is that the Court should issue an
16 injunction, suspend the filing period, give the legislators
17 the opportunity, the 14 days that are required by statute,
18 to issue new maps, and then create a remedial process, you
19 know, either following that or in conjunction with that in
12:45PM 20 case they don't issue constitutional remedial maps, and we
21 would want the opportunity to put in our own proposed
22 remedial map.

23 JUDGE SHIRLEY: Anything else?

24 MS. THEODORE: Unless the Court has questions.

12:45PM 25 JUDGE SHIRLEY: Would you all like one last word?

1 MR. STRACH: Just to make a brief technical point
2 on the whole municipal split issue, I wanted to make it
3 clear. So, the congressional map splits two out of
4 500-and-some municipalities. That's -- the way the
12:46PM 5 legislature counted that, which was explained by Senator
6 Hise, is if a municipality is split by a county boundary,
7 that doesn't count as a municipal split, because it's the
8 county boundary splitting the municipality, it's not the
9 legislature.

12:46PM 10 And then there were some municipal splits that had zero
11 population, so it didn't affect any voters or anybody in
12 particular, because there was just zero population in that
13 little block or whatever. They didn't count that as a
14 split.

12:46PM 15 We don't know how Dr. Duchin counted municipal splits,
16 because she doesn't say in her report. But that's -- there
17 could be a difference in how they were -- how she's defining
18 it versus how the legislature was defining it. So, just
19 wanted to make that point.

12:46PM 20 JUDGE SHIRLEY: Ms. McKnight, anything?

21 MS. MCKNIGHT: Your Honor, very briefly just to
22 pick up on the last point that counsel for the Harper
23 plaintiffs mentioned. She said that those plaintiffs are
24 not putting forward the simulation map by Dr. Duchin. I
12:46PM 25 think there's a good reason for that, Your Honor.

1 Dr. Duchin's optimized map would likely fail Chen's
2 simulation. I think you see the problem when you start to
3 suggest simulated maps and algorithms should replace human
4 map-drawing, you get into this issue with maps going back
12:47PM 5 and forth that have no relation to the criteria at hand.
6 Thank you.
7 JUDGE SHIRLEY: All right.
8 JUDGE LAYTON: The Feldman exhibits, I'm trying
9 to download, it's going to take quite a while. Do you have
12:48PM 10 those in paper form?
11 MR. SCHAUF: I think I may have one copy.
12 JUDGE LAYTON: Okay. That's fine. We can look
13 at them together.
14 MR. SCHAUF: Let me just double check.
12:48PM 15 JUDGE SHIRLEY: We're going to be in recess until
16 2:00 p.m.
17 THE BAILIFF: Court stands in recess until
18 2:00 p.m.
19 (A recess was taken from 12:49 p.m. to
01:14PM 20 2:28 p.m.)
21 JUDGE SHIRLEY: Good afternoon.
22 (Pause in proceedings.)
23 JUDGE POOVEY: I'll just say while he's waiting
24 on that, I commend you all for the excellent job that you
02:30PM 25 did on behalf of your respective clients. You may -- all of

1 you made very excellent arguments, and I appreciate your
2 candor to the Court.

3 And your respective clients should be proud of the job
4 that you did for them. Part of the reason it took us a
02:30PM 5 little while is because your arguments were so good, it's
6 hard to decide. It's a tough case. So, we appreciate you
7 putting in the effort.

8 (Pause in proceedings.)

9 JUDGE SHIRLEY: All right. I'd like to echo
02:33PM 10 Judge Poovey's comments. This is not a decision we take
11 lightly. It is clear to us that the framers of our state
12 constitution left the decision on districting, or
13 redistricting, to a political party. It is, in many
14 respects, a political question which the Supreme Court of
02:33PM 15 the United States has often recognized. It results in an
16 ill that has affected this country and state since Colonial
17 days. The people of this state have had an opportunity on
18 numerous occasions, both through revision in total of the
19 constitution or through amendments, to correct this ill, but
02:33PM 20 have chosen not to do so.

21 Stephenson makes clear that partisan advantage can be
22 taken into account in redistricting. Given the inherent
23 political nature of districting, or redistricting, we cannot
24 read that permission by Stephenson as narrowly as the
02:34PM 25 plaintiffs would have us do so. To the extent the

02:34PM

1 plaintiffs have proven extreme partisan gerrymandering, our
2 ruling should not be construed as condoning such, only that
3 we have a reasonable doubt on these facts as to whether
4 these acts of the General Assembly are unconstitutional,
5 and, therefore, find that the plaintiffs have failed to
6 demonstrate a substantial likelihood of success on the
7 merits. Therefore, the motions for preliminary injunction
8 are denied.

02:34PM

9 We will enter an order as expeditiously as possible,
10 and we will certify the same for immediate appeal should the
11 parties choose to do so.

12 Thank you all for your attention, and we will be at
13 recess sine die. Court is adjourned sine die.

14 (Proceedings concluded at 2:35 p.m.)

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CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken the December 3, 2021, Session of Wake County Superior Court is a true and accurate transcript of the proceedings as reported by me and transcribed by me or under my supervision. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This, the 4th day of December, 2021.



Dawn M. Dantschisch, RMR, CRR, CRC
Official Court Reporter
Tenth Judicial District
(919) 792-5202
Dawn.M.Dantschisch@nccourts.org