No. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al., Petitioners, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Respondents.	From Wake County No. 21 CVS 015426

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
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WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTER; TALIA FERNOS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS

ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH

CAROLINA STATE BOARD OF ELECTIONS,

Defendants

THESE MATTERS came on to be heard before the undersigned three-judge panel on December 3, 2021. Upon considering the pleadings, parties' briefs and submitted materials, arguments, pertinent case law, and the record established thus far, the Court finds and concludes, for the purposes of this Order, as follows:

As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rule of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

In this litigation, the North Carolina League of Conservation Voters, Inc. and individual Plaintiffs in Civil Action 21 CVS 015426 (hereinafter "NCLCV Plaintiffs") have asserted the following causes of action against Defendants:

1. That Defendants' enacted redistricting maps for state legislative and congressional districts (hereinafter referred to as "Enacted Plans") constitute extreme partisan gerrymanders in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution; the Equal Protection

Clause under Article I, Section 19 of the North Carolina Constitution; the Free Speech and Free Assembly Clauses under Article I, Sections 12 and 14 of the North Carolina Constitution; and

2. That the Enacted Plans cause unlawful racial vote dilution in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution and the Equal Protection Clause under Article I, Section 19 of the North Carolina Constitution; and
3. That the Enacted Plans were drawn in violation of the Whole County Provisions of Article II, Sections 3(3) and 5(3) of the North Carolina Constitution, and *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

NCLCV Plaintiffs have moved for a preliminary injunction solely on their partisan gerrymandering-based claims.

NCLCV Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022 primary elections and any subsequent elections for Congress, the North Carolina Senate, or the North Carolina House of Representatives using the Enacted Plans. Plaintiffs further request that to the extent the General Assembly fails to adopt redistricting plans —within two weeks from the date of this Court's entry of a preliminary injunction—that adequately remedy the Enacted Plans, then the 2022 primary elections and 2022 general elections for Congress, North Carolina Senate, and the North Carolina House of Representatives shall be conducted under Plaintiffs' Optimized Maps, as outlined in their Verified Complaint.

The individual Plaintiffs in Civil Action 21 CVS 500085 (hereinafter "Harper Plaintiffs") have asserted the following causes of action against Defendants, claiming that the Enacted Plans for congressional districts are unlawful partisan gerrymanders in violation of: the Free Elections Clause of Article I, Section 10 of the North Carolina

Constitution; the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution; and the Freedom of Speech and Freedom of Assembly Clauses of Article I, Sections 12 and 14 of the North Carolina Constitution.

Harper Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022, primary elections and any subsequent elections for the United State House of Representatives using the Enacted Plans. Harper Plaintiffs further prays this Court set forth a remedial process to create a new plan that complies with the North Carolina Constitution, to include a court-ordered remedial plan if the General Assembly fails to timely enact an adequate remedial plan.

Legislative Defendants (the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the Senate, and the redistricting committees of each respective chamber) have responded to plaintiffs' motions by asserting that Plaintiffs' lack standing, present a political question, and that the Free Elections, Equal Protection, Freedom of Speech and Freedom of Assembly claims have been misapprehended by Plaintiffs.

State Defendants (the State of North Carolina, State Board of Elections, members of the State Board of Elections in their official capacity, and the Director of the State Board of Elections) have taken no position on the merits of Plaintiffs' motions for preliminary injunction but have provided information as to election administration concerns and deadlines.

PROCEDURAL HISTORY

On August 12, 2021, the United States Census Bureau released new census data. North Carolina gained a congressional seat due to population growth pursuant to Article I,

Section 2, Clause 3 of the United States Constitution, and Title 13 of the United States Code. On November 4, 2021, the General Assembly enacted S.L. 2021-173 (North Carolina Senate districts); S.L. 2021-174 (United States House of Representatives districts); S.L. 2021-175 (North Carolina House of Representatives districts). NCLCV Plaintiffs filed their Complaint in this matter on November 16, 2021, contemporaneously with the present Motion for Preliminary Injunction. Harper Plaintiffs filed their Complaint in this matter on November 18, 2021, and the present Motion for Preliminary Injunction on November 30, 2021. The undersigned three-judge panel was assigned to preside over the NCLCV and Harper matters pursuant to N.C.G.S. § 1-267.1 on November 19, 2021, and November 22, 2021, respectively.

POLITICAL QUESTION DOCTRINE

Plaintiffs' claims are not likely to succeed because they are not justiciable. North Carolina courts lack jurisdiction over political questions. *See, e.g., Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). The State Constitution delegates to the General Assembly the power to create congressional districts. Because a constitution cannot be in violation of itself, a delegation of a political task to a political branch of government implies a delegation of political discretion. Because Plaintiffs' claims are not justiciable, they have not shown a likelihood of success on the merits.

STANDING OF PLAINTIFFS

Plaintiffs are unlikely to establish standing. It is clear that a voter is only directly injured by specific concerns with that voter's districts. *Gill v. Whitford*, 138 S. Ct. 1916,

1932 (2018). A plaintiff has standing to challenge the district in which that plaintiff lives, but cannot raise generalized grievances about redistricting plans. Additionally, a "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm. *Id.* Additionally, a district's partisan composition is not a cognizable injury is a similar composition would result "under any plausible circumstance." *Id.* at 1824, 1932.

None of the Harper Plaintiffs reside in six of the challenged congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13). Additionally, though the Harper Plaintiffs claim that Democratic voters are "packed" in CD9 and CD6, they admit that these districts would be "packed" with Democratic voters in any event. This is also true for the "cracking" claimed in CD1, CD7, and CD10. For the remaining districts (CD4 and CD14), the Harper Plaintiffs are presumed to be represented by their designated representatives and it is therefore not self-evident that these individual plaintiffs are harmed.

The NCLCV Plaintiffs reside in only 6 of the congressional districts, 8 of the Senate districts, and 9 of the House districts. The individual plaintiffs do not establish that their own districts would shift from Republican-leaning to Democratic-leaning under a different configuration or that they are prevented from electing their candidates of choice. The organizational plaintiffs have not shown how the redistricting legislation has negatively impacted their ability to complete their organizational mission.

The Plaintiffs are unlikely to prove standing and therefore have not shown a likelihood of success on the merits.

INJUNCTIVE RELIEF

"It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be

plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *City of Asheville v. State*, 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). "An act of the General Assembly will be declared unconstitutional only when 'it [is] plainly and clearly the case,' . . . and its unconstitutionality must be demonstrated beyond a reasonable doubt." *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016).

Plaintiffs have moved for a preliminary injunction pending a resolution of this action on the merits. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Injunctive relief "may be classified as 'prohibitory' and 'mandatory.' The former are preventive in character, and forbid the continuance of a wrongful act or the doing of some threatened or anticipated injury; the latter are affirmative in character, and require positive action involving a change of existing conditions—the doing or undoing of an act." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 399-400, 474 S.E.2d 783, 787 (1996) (citations and quotation omitted).

Status Quo

Plaintiffs have asked that this Court enjoin the 2021 congressional and state legislative district legislation and to move the March 2022 primary schedule. However, this requested relief alters the status quo. Plaintiffs are not asking this Court to restore what has been unlawfully changed, but to create a new condition that has not existed to this point. *See Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 287 N.C. 88, 96, 74 S.E.2d 430, 436 (1953). Plaintiffs here have never voted under a redistricting plan like the one they request and so are asserting rights that have never existed. *Id.*

Likelihood of Success on the Merits

Plaintiffs burden on a motion for preliminary injunction is to show a likelihood of success in proving beyond a reasonable doubt that the enacted congressional and state legislative districts are unconstitutional. This Court finds on these facts that Plaintiffs have failed to carry this burden.

The Supreme Court of North Carolina has ruled that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson v. Bartlett*, 355 N.C. 534, 371, 562 S.E.2d 377, 390 (2002). The North Carolina Constitution "clearly contemplates districting by

political entities" and redistricting is "root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.).

Plaintiff have not shown a likelihood of success on their Free Elections Clause claims. The decision in *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 relied heavily on the evidence of intentionally partisan gerrymandering, stating that they were "designed specifically to ensure that Democrats would not win a majority."

While the decision in *Common Cause v. Lewis* is not binding on this Court, it seems clear that some evidence of intent is required to prove of claim of extreme partisan gerrymandering. Plaintiffs have not claimed intent. In fact, the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent.

Plaintiffs have also not shown a likelihood of success on the merits on their Equal Protection Clause claims. Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51-53, 707 S.E.2d 199, 206 (2011). Additionally, political considerations in redistricting do not impinge on the fundamental right to vote. These considerations do not deny the opportunity to vote nor do they result in the unequal weighing of votes.

Plaintiffs likewise have not shown a likelihood of success on the merits of their Freedom of Speech and Assembly claims. Political considerations in redistricting do not place any restraints on speech and do not discourage those who wish to speak. Additionally, associational rights do not guarantee a favorable outcome, only the ability to participate in the political process. These rights are not infringed by political considerations in redistricting.

Additionally, Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution. However, it is the federal Constitution which

provides the North Carolina General Assembly with the power to establish such districts. In order to address these claims, this Court must derive authority from the federal Constitution. Since claims under the federal Constitution have not been alleged, Plaintiffs have not shown a likelihood of success on the merits.

Irreparable Harm

As discussed above, Plaintiffs have challenged districts in which they do not live, districts that would not likely be meaningfully different under any reasonable maps, and have asserted only abstract harms. They have not alleged that they are unable to obtain representation in Congress or the General Assembly by whomever is ultimately elected. As such, they have not shown that they will suffer irreparable harm should their request be denied.

Weighing of the Equities

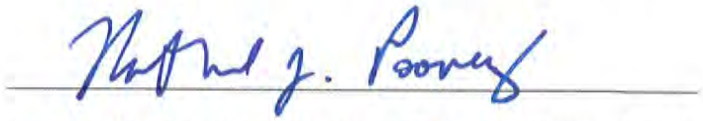
Though Plaintiffs have not shown that they will suffer harm should their request be denied, the State and the public will suffer irreparable harm should the request be granted. It is obvious that any time a statute is enjoined, the State suffers irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 133 (2012). This is particularly true in the area of elections due to the State's indisputably compelling interest in preserving the integrity of the election process. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Additionally, an injunction will cause significant disruption, confusion, and uncertainty in the election process. As such, the equities weigh in favor of denial.

CONCLUSION

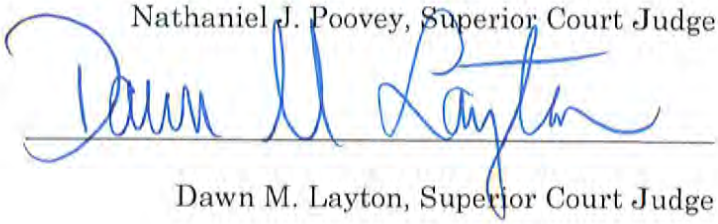
Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall not issue in regard to the 2021 Enacted Plans. To the extent necessary, this Court determines that there is no just reason for delay and certifies this order for immediate appeal pursuant to Rule 54 of the North Carolina Rules of Civil Procedure.

This the 3 day of December, 2021.

A. Graham Shirley, Superior Court Judge



Nathaniel J. Poovey, Superior Court Judge



Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 3rd day of December 2021.

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IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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

Plaintiffs,

v.

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

Defendants.

Wake County
21-CVS-15426

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Wake County
21-CVS-500085

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Friday, December 3, 2021

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December 3, 2021, Civil Session

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

and Dawn M. Layton, Judges Presiding

Plaintiffs' Motion for Preliminary Injunction

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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.
4 MR. CALLAHAN: Sam Callahan from Arnold & Porter
10:05AM 5 for the Harper plaintiffs.
6 MS. THEODORE: Elisabeth Theodore from Arnold &
7 Porter for the Harper plaintiffs.
8 MR. STRACH: Good morning, Your Honor.
9 Phil Strach of Nelson & Mullins for the Legislative
10:05AM 10 Defendants.
11 MS. MCKNIGHT: Good morning, Your Honor. Kate
12 McKnight with Baker Hostetler for the Legislative
13 Defendants.
14 MR. BRANCH: Good morning, Your Honor. John
10:06AM 15 Branch with Nelson Mullins for the Legislative Defendants.
16 MR. BRADEN: Good morning. Mark Braden, Baker &
17 Hostetler, for the Legislative Defendants.
18 MR. STEED: Good morning, Your Honors.
19 Terence Steed for the State Board of Elections and its
10:06AM 20 members.
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
10:06AM 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
10:11AM 10 agree that we bear the burden, and we think that we've
11 carried that burden.
12 JUDGE SHIRLEY: What is that burden?
13 MR. SCHAUF: I think it's a preponderance of the
14 evidence. If you're asking about what we think the
10:11AM 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.
19 And, you know, particularly where, as we've shown
10:11AM 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.
24 JUDGE SHIRLEY: When you talk about traditional
10:11AM 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
10:13AM 10 a not close case.
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
10:13AM 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 --
19 JUDGE SHIRLEY: Well, in fact, didn't Chief
10:14AM 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?
23 MR. SCHAUF: So, what that said is that you may
24 consider politics. And I think there's a very big
10:14AM 25 difference between considering partisan considerations and

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
10:14AM 5 Clause.
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
10:15AM 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.
19 So, perhaps with that, I'll pivot to why we think that
10:15AM 20 the maps here indeed constitute the sort of extreme partisan
21 gerrymanders that were --
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?
4 MR. SCHAUF: They did. But they also made the
10:20AM 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.
3 JUDGE SHIRLEY: Do you believe that there can
4 be -- both sides can take a reasonable position that
10:21AM 5 partisan gerrymandering is allowed in this state under the
6 constitution?
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,
10:21AM 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.
19 JUDGE SHIRLEY: So, reasonable minds can differ
10:22AM 20 as to whether -- well, as to whether you can have partisan
21 gerrymandering in this state?
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
10:22AM 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

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
10:23AM 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
10:24AM 15 extreme, can you have partisan gerrymandering in the state
16 without violating the constitution?
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
10:24AM 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
10:28AM 5 was sufficient in those cases.
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
10:28AM 25 Court emphasized that under the Free Elections Clause, the

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
10:29AM 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
10:30AM 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.
13 And, you know, that's where we get the figures that we
14 provide in our complaint and our motion, showing exactly how
10:30AM 15 thoroughly this election -- these maps entrench one party's
16 advantage. And this --
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
10:30AM 20 project, that the will of the people that voted will not be
21 reflected in the results?
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
10:31AM 25 democratic victory by almost five percentage points. But if

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
10:32AM 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,
10:32AM 25 you know, certainly is sufficient to show an extreme

1 partisan gerrymander, and in the way that is not dictated by
2 North Carolina's political geography or by traditional
3 districting principles.
4 And that, I think, is an important point. This is the
10:32AM 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
10:33AM 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.
18 And that, you know, I think, just goes to so that this
19 is not something that is compelled by North Carolina's
10:33AM 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.
23 JUDGE SHIRLEY: Does a Republican voter have a
24 right to be in a Republican district, to be placed in a
10:33AM 25 Republican district?

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
10:37AM 5 some classic gerrymandering tactics.
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,
10:37AM 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.
10:38AM 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
10:38AM 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.
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
10:38AM 25 and submerges them into a very Republican district that's

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 --
19 THE REPORTER: You need to speak up, please. I
10:41AM 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.
24 JUDGE POOVEY: Maybe you could move the
10:41AM 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
10:51AM 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.)
9 JUDGE SHIRLEY: All right. We will hear from the
11:11AM 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
11:11AM 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 --
19 JUDGE SHIRLEY: Mr. Strach, one of the real
11:12AM 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?
23 MR. STRACH: They do.
24 JUDGE SHIRLEY: And on this past Wednesday, the
11:12AM 25 Wall Street Journal once again ran an article talking about

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.
13 JUDGE SHIRLEY: Well, how -- if probably the one
14 news outlet that is most favorable to Republicans on a
11:13AM 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?
18 MR. STRACH: Your Honor, the Princeton
19 gerrymandering methodology is like a black hole. I don't
11:13AM 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
11:13AM 25 the map, you can make it score the map that way. So, I

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
11:15AM 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.
4 JUDGE LAYTON: Where did the legislators get the
11:17AM 5 base maps they started with in that process?
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.
11:18AM 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
11:18AM 15 how it developed.
16 JUDGE SHIRLEY: Well, I think the complaint,
17 verified complaint, alleges they took -- take notes in.
18 MR. STRACH: I'm not aware of that. I know some
19 Democrats did. I'm not aware of Republicans that did. They
11:18AM 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.
24 And so, what they were not able to do is when
11:19AM 25 Chairman Hall was sitting there on the computer moving VTDs

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
11:19AM 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.
9 So, the other thing that was done this time, that's
11:19AM 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
11:19AM 15 didn't have to explain anything. They just come in there,
16 drop the map, call the vote. It's done.
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
11:20AM 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.
24 JUDGE SHIRLEY: And now it would be, under these
11:20AM 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.
4 JUDGE SHIRLEY: Well, you can certainly determine
11:20AM 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?
9 MR. STRACH: Yeah, they have. People have
11:20AM 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?
14 MR. STRACH: I haven't seen any. No, that's a
11:21AM 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?
19 MR. STRACH: The legislature's position is that
11:21AM 20 Stephenson allows them to redistrict for partisan advantage.
21 JUDGE SHIRLEY: Can they do it for extreme
22 partisan advantage?
23 MR. STRACH: I have no idea what that means,
24 Your Honor. There is no definition of that. I have no
11:21AM 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.
4 What people do is they take data, Your Honor, and they
11:21AM 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
11:22AM 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 --
18 JUDGE SHIRLEY: Yeah, but legislators who face
19 election every two years, when they go sit down at the
11:22AM 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.
24 MR. STRACH: Well, certainly, legislators know
11:22AM 25 their own areas. And the criteria here took that into

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.
4 In lots of areas of the state, there's communities that
11:23AM 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
11:23AM 10 used, but that wasn't a solely partisan thing.
11 And so, yeah, the local -- the local legislators sit
12 down at the computer and mess around with it and draw
13 something.
14 JUDGE SHIRLEY: So, what were the -- what was the
11:23AM 15 criteria given to the legislators that they were required to
16 use?
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
11:23AM 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?
11:25AM 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.
11:26AM 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?
9 MR. STRACH: No, Your Honor, I don't believe you
11:26AM 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.
14 MR. STRACH: -- but it is helpful to understand
11:27AM 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.
19 MR. STRACH: And some would say it's more than a
11:27AM 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
11:27AM 25 say? Well, I didn't get hired because I told you I had

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
11:28AM 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.
14 JUDGE SHIRLEY: That was in certain districts.
11:28AM 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.
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
11:28AM 25 district is not a VRA.

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.

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
11:30AM 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.
19 MR. STRACH: I think that's incorrect. I don't
11:30AM 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
11:35AM 10 all at the feet of a district.
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
11:35AM 15 explanations are provided to the public of why they were
16 drawn the way they were drawn.
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
11:36AM 20 wrong?
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
11:36AM 25 authority this Court can consider, sure. In that sense, it

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
11:37AM 5 plan.
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
11:38AM 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 --
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
11:38AM 25 politicians were bantering back and forth about I want this

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.
4 And even the Common Cause court said, well, that's a
11:39AM 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.
9 But Stephenson says partisan advantage is okay. And if
11:39AM 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
11:39AM 15 counties for political gain, to maintain their majorities.
16 So, the Stephenson court had that before it.
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
11:40AM 20 rules, partisan advantage is okay.
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?
24 MR. STRACH: I think that puts this -- I think
11:40AM 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
11:40AM 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.
11:41AM 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?
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
11:41AM 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
11:41AM 5 jurors.
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
11:42AM 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
11:42AM 15 partisan gerrymandering in this case.
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
11:42AM 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 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.
4 JUDGE SHIRLEY: That actually might be a good
11:43AM 5 idea.
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
11:43AM 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.
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
11:43AM 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.
23 JUDGE SHIRLEY: Well, it's certainly not the
24 plaintiffs' fault, either.
11:44AM 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
11:44AM 10 Street Journal newspapers to think that a map, a properly
11 drawn map, was systematically drawn to entrench one party.
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
11:45AM 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
11:45AM 20 geographical representation system.
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
11:45AM 25 down into districts that are of roughly equal size. And by

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 --
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
11:52AM 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?
14 MS. MCKNIGHT: It's a great question. And, you
11:53AM 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
11:53AM 20 county grouping rule.
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
11:53AM 25 equation, but I'll just say that the end result is the State

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
11:54AM 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
11:54AM 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
11:54AM 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,
11:54AM 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
11:55AM 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.
14 JUDGE SHIRLEY: And yet the legislature made the
11:57AM 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?
18 MS. MCKNIGHT: Correct, Your Honor. Because the
19 legislature believed, and it was correct in believing, that
11:57AM 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
11:57AM 25 prepare a map that could be prepared and ready to be used in

1 time for the primary.
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
11:58AM 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

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
11:59AM 5 as a priority, had that at as criteria, here he lowered it
6 as a priority.
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
11:59AM 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.
14 Now, Dr. Pegden will say it in a different way, but
12:00PM 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

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
12:02PM 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
12:02PM 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
12:02PM 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.
12:03PM 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
12:03PM 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.
4 MS. MCKNIGHT: I-85. Pardon me, Your Honor. I
12:03PM 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
12:04PM 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.
13 And that's just taking plaintiffs' word for it. I
14 don't know that Republicans will get ten districts. They
12:04PM 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.
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
12:05PM 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.
12:06PM 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
12:06PM 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 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.
14 The fact that our country made that decision years ago
12:07PM 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
12:08PM 20 likely and there is an effect on these neutrally drawn maps.
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.
12:08PM 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
12:10PM 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
12:12PM 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.
12:13PM 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
12:15PM 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

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,
12:16PM 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
12:16PM 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
9 Democratic voters into two districts. And so, as a result,
12:19PM 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
12:19PM 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,
12:20PM 20 you can look at Wayne County, which is Figure 13 from our
21 brief. It should be towards the back.
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 --
12:21PM 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 --
14 JUDGE SHIRLEY: But the elections we're talking
12:24PM 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.
24 JUDGE SHIRLEY: Well, if in 2016 you had 76
12:25PM 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?
4 MR. SCHAUF: Well, so, the question sounds like
12:25PM 5 it comes from Mr. Trende's affidavit.
6 JUDGE SHIRLEY: No, the question comes from me.
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
12:25PM 10 an effect as well on election results.
11 JUDGE SHIRLEY: Sure.
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
12:26PM 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
12:26PM 25 can do whatever you want outside the hearing room, and as

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
12:27PM 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
12:28PM 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,
12:31PM 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
12:31PM 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
12:31PM 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 --
12:31PM 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?
12:32PM 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
12:33PM 10 dots are -- and if you go from left to right across the
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
12:33PM 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.
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,
12:33PM 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
23 tenth-most-Republican district, which is CU4, it's just
24 barely to the right, that red dot is just barely to the
12:34PM 25 right of the dotted line. Right? And that's an outcome

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.
4 So, you see that in all of Dr. Chen's maps, if you look
12:34PM 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,
12:34PM 10 the Democrats get at least five seats, and the
11 overwhelmingly majority of the time, they get six seats.
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.
19 And so, that's what shows that this is such an extreme
12:35PM 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,
12:36PM 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?
8 MS. THEODORE: I'm not disputing that if there
9 was a Democratic wave election where the Democrats won 60
12:36PM 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?
18 MS. THEODORE: Our argument is that maps should
19 not be drawn to systematically entrench one party in power.
12:36PM 20 And, you know --
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
12:36PM 25 Stephenson said, as the Court knows, is that you can

1 consider partisan advantage, and there are many ways of
2 doing that that are far short of entrenching a systematic
3 partisan advantage.
4 And one example might be drawing a district to allow
12:37PM 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
12:37PM 10 advantage that don't involve systematically subverting the
11 will of millions of North Carolinians.
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
12:37PM 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.
18 That's what makes this so different than the remedial
19 process that the Common Cause court ordered, because the
12:38PM 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.
24 JUDGE SHIRLEY: So, how many Republicans are on
12:38PM 25 video bringing map -- paper in?

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
12:38PM 5 looking at a map.
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
12:39PM 25 of the code of Dr. Chen and Dr. Pegden during the Common

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
12:39PM 5 Sciences.
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
12:40PM 10 ahead.
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
12:40PM 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 --
18 THE REPORTER: I'm sorry. Can you repeat that?
19 MS. THEODORE: Ms. McKnight said that Dr. Chen
12:40PM 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
12:41PM 25 not split VTDs unless it's necessary, and then they say you

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.
4 Dr. Pegden also considered municipalities, and he
12:41PM 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,
12:41PM 10 and they produced the same results.
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
12:41PM 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.
18 I didn't hear any explanation here as to why the three
19 largest Democratic counties in the State of North Carolina
12:42PM 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 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.
4 Let me see. All right. Let me just say a few other
12:43PM 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
12:44PM 20 Cause court created is not something that will, you know,
21 bar all partisan considerations all the time.
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
12:44PM 25 standard, but Stephenson did not apply that reasonable doubt

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
12:44PM 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

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,
02:34PM 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.
9 We will enter an order as expeditiously as possible,
02:34PM 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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1 CERTIFICATION OF TRANSCRIPT

2

3 This is to certify that the foregoing transcript
4 of proceedings taken the December 3, 2021, Session of Wake
5 County Superior Court is a true and accurate transcript of
6 the proceedings as reported by me and transcribed by me or
7 under my supervision. I further certify that I am not
8 related to any party or attorney, nor do I have any interest
9 whatsoever in the outcome of this action.
10 This, the 4th day of December, 2021.

11

12

13

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

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

v.

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

Defendants.

2021 DEC -3 P 4: 24
WAKE CO., C.S.C.
BY

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiffs hereby give notice of appeal to the North Carolina Court of Appeals from the Order entered on December 3, 2021 in the North Carolina Superior Court for Wake County denying Plaintiffs' Motion for Preliminary Injunction.

Dated: December 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal was served upon each of the parties to this action by electronic mail to counsel at the e-mail addresses indicated below and by First Class U.S. Mail to counsel at the addresses indicated below:

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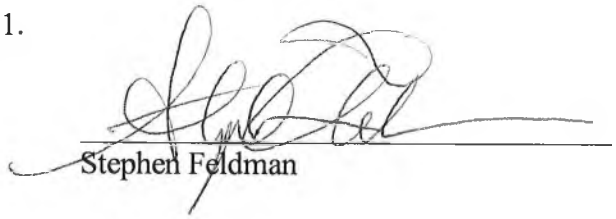
This 3rd day of December, 2021.



Stephen Feldman

21 CV 15726

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CVS __

FILED
2021 NOV 16 P 4:19
WAKE CO. C.S.C.
BY

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

VERIFIED COMPLAINT

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

INTRODUCTION

1. This suit is about harnessing the power of mathematics and computer science to identify and remedy the severe constitutional flaws in the redistricting maps recently enacted by the North Carolina General Assembly—the maps for the U.S. Congress (the "Enacted Congressional Plan," attached as Ex. A to the Feldman Affidavit),[1] the North Carolina Senate (the "Enacted Senate Plan," attached as Ex. B),[2] and the North Carolina House of Representatives (the "Enacted House Plan," attached as Ex. C)[3] (collectively, the "Enacted Plans").

2. Plaintiffs include the North Carolina League of Conservation Voters, which has members all over the State who are harmed by these constitutional flaws, as well as numerous individual voters, including former elected officials, civil rights leaders, and educators who care deeply about ensuring fair representation for all North Carolinians. Plaintiffs also include professors in the fields of mathematics, statistics, and computer science, all of whom are U.S. citizens and registered North Carolina voters. Over the past decade, advances in these areas have yielded a new field known as "computational redistricting"—which applies principles of mathematics, high-performance computing, and spatial demography to the redistricting process. Mathematicians and scientists working in this field have created tools that allow scientists both to *identify* maps that unconstitutionally burden the right to vote and to *remedy* those violations—by using algorithmic techniques that fix the constitutional flaws while adhering to traditional, neutral redistricting principles and state law.

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[1] S.B. 740, S.L. 2021-174, 2021-2022 Sess. (N.C. enacted Nov. 4, 2021). All exhibits referenced in this Complaint refer to the Affidavit of Stephen Feldman, filed with this Complaint.

[2] S.B. 739, S.L. 2021-173, 2021-2022 Sess. (N.C. enacted Nov. 4, 2021).

[3] H.B. 976, S.L. 2021-175, 2021-2022 Sess. (N.C. enacted Nov. 4, 2021).

3. These tools show, distressingly, that the Enacted Plans create (and intentionally create) a severe partisan gerrymander: Although North Carolina is a highly competitive state, the Enacted Plans entrench one party in power—by "packing" some voters of the disfavored party into a relatively small number of districts and "cracking" other voters so they cannot elect their preferred candidates. For example, the Enacted Congressional Plan splinters Democratic strongholds in Wake, Mecklenburg, and Guilford Counties into three districts each, precisely in order to dilute Democratic voting strength. Because of this type of gerrymandering, the favored Republican Party will control North Carolina's congressional delegation, state Senate, and state House for the coming decade under any realistic electoral scenario—even if the state's voters consistently and repeatedly prefer the other party's candidates by substantial margins. In Congress, for example, models show that a nearly tied election, with each party's candidates receiving about half the statewide vote, will deliver *71%* of North Carolina's delegation to Republicans. Democratic candidates, by contrast, cannot hope to obtain even a 7-to-7 split unless they win by a statewide margin of more than seven percentage points.

4. These computational tools also show that the Enacted Plans egregiously (and intentionally) dilute the voting power of North Carolina's black citizens—again, by packing some black voters and cracking others. For example, even though members of minority groups account for more than 30% of North Carolina's adult citizens, and thus could be expected to win elections in four of the state's 14 districts, the Enacted Congressional Plan deprives them of the ability to win elections in all but two districts. The Enacted Congressional Plan does so by (among other things) breaking apart cohesive and compact black communities like the one centered in Guilford and Forsyth Counties, which the plan divides into four districts dominated by white Republican voters. By contrast, compact districts that comply with North Carolina law and traditional, neutral

districting principles can protect these communities of interest and preserve black voters' opportunity to nominate and elect the candidates of their choice in four districts across the state.

5. The Enacted Plans' partisan gerrymandering and racial vote dilution did not happen by accident. When the General Assembly's redistricting committees drafted the Enacted Plans on computer terminals in hearing rooms, they stated that "[d]ata identifying the race of individuals or voters shall not be used in the construction or consideration of districts," and that "[p]artisan considerations and election results data shall not be used." But legislators have vast knowledge of the racial and partisan characteristics of communities across their state—and indeed, the committees expressly allowed legislators to rely on "local knowledge of the character of communities and connections between communities" in mapmaking. Moreover, the committees did not (and could not) prevent legislators from using racial and political data to draw maps outside the hearing rooms and then simply "re-drawing" those maps inside the hearing rooms.

6. Whether legislators leveraged their own knowledge or relied on racial and partisan data outside the hearing rooms, the conclusion is the same: They drew maps that dilute voting strength by race and that gerrymander by party—and they meant to do exactly that. *Cf. Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[I]t is most unlikely that the political impact of … a [grossly gerrymandered] plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.").

7. Computational tools will also show that it did not have to be this way. Plaintiffs and their counsel have leveraged the tools of computational redistricting to develop maps that approach being "Pareto optimal," which means that they are so strong on each redistricting criterion that improving the map on any one criterion necessarily worsens it on another. As a practical matter, these ideal, or nearly ideal, maps cannot be devised by hand, even with the best

commercial redistricting software and weeks to draw them. But these maps can be discovered through computational redistricting. This approach simply was not available to courts in prior redistricting cycles. But this approach is available now. And here, Plaintiffs provide the Court with the results that this approach can yield. The maps that Plaintiffs present in this Complaint—which this Complaint identifies as the Optimized Congressional Map, the Optimized Senate Map, and the Optimized House Map (collectively, the "Optimized Maps")—avoid the partisan gerrymandering and racial vote dilution that mark the Enacted Plans, while also improving on the Enacted Plans' compliance with the laws and legitimate policies governing redistricting in North Carolina. Any claim that North Carolina's political geography or state law compels the outcomes created by the Enacted Plans thus cannot withstand the scrutiny of math and science.

8. By gerrymandering based on party and by diluting and devaluing North Carolinians' right to vote based on race, the Enacted Plans violate the North Carolina State Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Free Assembly Clauses. The Enacted Senate and House Plans also violate the North Carolina State Constitution's Whole County Provisions, as interpreted in the *Stephenson*/*Dickson* line of cases from the North Carolina Supreme Court—because these plans, to achieve their partisan and racial ends, traverse more county lines than necessary and contain districts that are less compact than they could be in fairer, more neutral maps.

9. Plaintiffs ask this Court to set aside the unlawful Enacted Plans and, as interim relief, to enjoin the use of the Enacted Plans in the 2022 primary and general elections. To the extent that the General Assembly does not timely enact redistricting plans that remedy the violations described in this Complaint as fully as the Optimized Maps, the Court should order

Defendants to prepare for, administer, and conduct the 2022 primary and general elections under the Optimized Maps.

10. Although this suit challenges maps drawn by a legislature controlled by one political party, Plaintiffs do not seek via this suit to favor any political party or incumbent. Rather, Plaintiffs sue to advance the common good by promoting competitive, fair, and free elections for all North Carolina citizens. Plaintiffs support fair maps drawn with advanced science and technology that preserve every North Carolinian's right to vote in free elections on equal terms and that do not discriminate against voters based on race or party.

PARTIES

A. Plaintiffs

11. Plaintiff North Carolina League of Conservation Voters, Inc. ("NCLCV") brings this action on its own behalf and on behalf of thousands of its members who are registered to vote in North Carolina and reside in every congressional, state Senate, and state House district in the state, but will have their votes systematically diluted by the Enacted Plans on the basis of party, race, or both.[4] NCLCV is a nonpartisan nonprofit advocacy organization whose mission is to protect the health and quality of life for all North Carolinians, by fighting to build a world with clean air, clean water, clean energy, and a safe climate, all protected by a just and equitable

[4] In particular, NCLCV has confirmed that it has members who are registered Democratic voters in all 14 districts under the Enacted Congressional Plan, all 50 districts under the Enacted Senate Plan, and all 120 districts under the Enacted House Plan. NCLCV also has confirmed that it has members who are black registered voters in all 14 districts under the Enacted Congressional Plan, at least 48 of the 50 districts under the Enacted Senate Plan, and at least 107 of the 120 districts under the Enacted House Plan, with the only uncertainty involving Senate Districts 46 and 50, and House Districts 1, 22, 36, 70, 85, 86, 93, 95, 110, 117, 118, 119, and 120. NCLCV also counts among its members voters of all political stripes—Democrats, Republicans, and independents—who care about fair redistricting and about fair and effective representation for all North Carolinians

democracy. NCLCV helps elect legislators and statewide candidates who share its values, to build a pro-environment majority across the state of North Carolina. And NCLCV works to hold elected officials accountable for their votes and actions.

12. The Enacted Plans undermine NCLCV's ability to advance its core mission. By effectively predetermining the results of elections and entrenching one party in power—in individual gerrymandered districts, and in North Carolina's congressional delegation and the General Assembly as a whole—the Enacted Plans impair NCLCV's ability to engage in effective advocacy for candidates who will protect the environment, frustrate NCLCV's efforts to build a pro-environment majority, and undermine NCLCV's ability to hold legislators accountable. NCLCV will have to expend additional funds and other resources to counteract the gerrymandering in the Enacted Plans. The Enacted Plans also dilute the votes of NCLCV members and frustrate their ability to express their preferences for sound environmental policy at the ballot box and before their legislators.

13. NCLCV is especially concerned about the Enacted Plans' effects on North Carolina's black voters. Black citizens are often hurt first and worst by pollution and climate change. And historically, redistricting has been used to exclude communities of color from representation. The Enacted Plans continue that unfortunate legacy, dilute the voting power of black North Carolinians, including voters who are members of NCLCV, and undermine NCLCV's efforts to address environmental harms in systematically excluded communities of color.

14. Plaintiff Henry M. "Mickey" Michaux, Jr. is a black voter and a U.S. citizen who resides in Durham, North Carolina, within Congressional District 6, Senate District 20, and House District 29, as set forth in the Enacted Plans. Senator Michaux is a longstanding civil rights leader and one of the most prominent black political leaders in North Carolina. Before the enactment of

the Voting Rights Act, he and future Congressman John Lewis worked to register black voters in North Carolina. In 1956, when Dr. Martin Luther King, Jr., first came to Durham, he stayed at Senator Michaux's house; Dr. King urged Senator Michaux to go into politics, which he eventually did. In 1972, Senator Michaux became Durham County's first black representative in the General Assembly. He held office in the North Carolina House from 1973 until 1977, when President Carter appointed Representative Michaux as a U.S. Attorney—the South's first black U.S. Attorney since Reconstruction. In 1983, Senator Michaux returned to the North Carolina House. He served on the House Redistricting Committee and was active on redistricting matters; he also served on the House Elections Committee, including as its Chair. He retired from the House in 2019. Senator Michaux remains a registered Democrat and has consistently voted for Democratic candidates for the General Assembly and Congress. He remains active in Democratic politics, including by working to elect Democratic candidates. In 2020, Senator Michaux served briefly in the North Carolina Senate—making him both the longest-serving member of the House and the shortest-serving member of the Senate.

15. Plaintiff Dandrielle Lewis is a black voter and a U.S. citizen who resides in Greensboro, North Carolina, within Congressional District 11, Senate District 27, and House District 58, as set forth in the Enacted Plans. Dr. Lewis is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Dr. Lewis is the Department Chair of Mathematical Sciences at High Point University. She teaches applied math modeling for business. Her research interests are in finite group theory, interdisciplinary programs, math education, and women and historically underrepresented groups in STEM. Dr. Lewis holds a Ph.D. in mathematics from State University of New York at Binghamton, an M.S.

in mathematics from the University of Iowa, and a B.S. in mathematics and computer science from Winston-Salem State University.

16. Plaintiff Timothy Chartier is a U.S. citizen who resides in Davidson, North Carolina, within Congressional District 13, Senate District 37, and House District 98, as set forth in the Enacted Plans. Dr. Chartier is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Dr. Chartier is the Joseph R. Morton Professor of Mathematics and Computer Science at Davidson College, where he teaches a course on mathematical modeling that covers topics such as optimization. He has written on elections for the Mathematical Association of America and is the current Chair of Congress for (and former Vice President of) the Mathematical Association of America. Dr. Chartier's professional research interests include data analytics, and he has consulted for organizations including the National Basketball Association and the U.S. Olympic and Paralympic Committee. Dr. Chartier holds a Ph.D. in applied mathematics from the University of Colorado at Boulder and an M.S. in computational mathematics and a B.S., *summa cum laude*, in applied mathematics from Western Michigan University.

17. Plaintiff Talia Fernós is a U.S. citizen who resides in Greensboro, North Carolina, within Congressional District 11, Senate District 27, and House District 61, as set forth in the Enacted Plans. Dr. Fernós is an Associate Professor of Mathematics at the University of North Carolina at Greensboro and teaches courses that range from introductory undergraduate to advanced graduate topics and researches infinite groups by examining their geometric and analytic properties. Dr. Fernós holds a Ph.D. and an M.S. in Mathematics from the University of Illinois at Chicago, as well as a B.S. in mathematics and physics from The Evergreen State College.

18. Plaintiff Katherine Newhall is a U.S. citizen who resides in Carrboro, North Carolina, within Congressional District 6, Senate District 23, and House District 56, as set forth in the Enacted Plans. Dr. Newhall is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. She is an Associate Professor of Mathematics at the University of North Carolina at Chapel Hill, where she teaches at the undergraduate and graduate levels, including courses on differential equations and stochastic processes. Dr. Newhall's research interests include stochastic modeling, analysis, and simulation. She holds a Ph.D. in mathematics, an M.S. in aeronautical engineering, and a B.S. in applied physics and applied math, all from Rensselaer Polytechnic University, and she conducted postdoctoral work at New York University.

19. Plaintiff R. Jason Parsley is a U.S. citizen and registered voter who resides in Winston-Salem, North Carolina, within Congressional District 12, Senate District 32, and House District 72, as set forth in the Enacted Plans. Dr. Parsley is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Dr. Parsley is an Associate Professor of Mathematics at Wake Forest University, where he teaches a variety of courses, including calculus, geometry, multivariable analysis, and complex analysis, as well as a seminar on voting and redistricting. He is also the former North Carolina State Director for the Mathematical Association of America. Dr. Parsley's research interests include knot theory, differential geometry, and geometric analysis. In particular, he studies the geometry of weighted voting, in which different voters, such as stockholders in a corporation, may have different roles or weights. In this work, he has devised a new, geometrically meaningful method for measuring the power of each voter. Dr. Parsley is currently engaged in a project analyzing the results of Arizona's independent redistricting commission for congressional redistricting following the 2010

census. He has completed training as an expert witness in redistricting. In the 2018–2019 academic year, Dr. Parsley taught two courses at Wake Forest University on the mathematics of voting and redistricting. He has also supervised four students conducting mathematics research on redistricting. He holds a Ph.D. and M.A. in mathematics from the University of Pennsylvania as well as a B.S., *summa cum laude*, in mechanical engineering from Duke University.

20. Plaintiff Edna Scott is a black voter and a U.S. citizen who resides in Warrenton, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Ms. Scott is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Ms. Scott is a retired banker, educator, and curator for an African-American museum.

21. Plaintiff Roberta Scott is a black voter and a U.S. citizen who resides in Norlina, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Ms. Scott is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Ms. Scott is a retired educator and member of the Warren County Board of Education.

22. Plaintiff Yvette Roberts is a black voter and a U.S. citizen who resides in Warrenton, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Ms. Roberts is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Ms. Roberts works in personal care service as a home health aide.

23. Plaintiff Dr. Cosmos George is a black voter and a U.S. citizen who resides in Norlina, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Dr. George is a registered Democrat who has consistently voted

for Democratic candidates for the General Assembly and Congress. Dr. George is a retired obstetrician/gynecologist. After retiring, he worked in a free clinic. He has a long history of working actively in his county for civil rights, justice, and equality.

24. Plaintiff Viola Ryals Figueroa is a black voter and a U.S. citizen who resides in Goldsboro, North Carolina, within Congressional District 2, Senate District 4, and House District 10, as set forth in the Enacted Plans. Ms. Figueroa is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Ms. Figueroa is the founder of a nonprofit organization named the Veterans and Military Families Command Center.

25. Plaintiff Jereann King Johnson is a black voter and U.S. citizen who resides in Warrenton, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Ms. Johnson is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. Ms. Johnson works at the North Carolina Conference of United Methodist Churches as a project coordinator for Living the Word.

26. Plaintiff Reverend Reginald Wells is a black voter and a U.S. citizen who resides in Spring Lake, North Carolina, within Congressional District 4, Senate District 12, and House District 6, as set forth in the Enacted Plans. Reverend Wells is a registered Democrat who has consistently voted for Democratic candidates for the General Assembly and Congress. He is active in politics and served three terms as a member of the Duplin County Board of Commissioners.

27. Plaintiff Yarbrough Williams, Jr., is a black voter and a U.S. citizen who resides in Warrenton, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. A retired educator who taught for 33 years as well as a retired farmer who raised hogs for 35 years, Mr. Williams is active in politics. He is a registered Democrat

who has consistently voted for, and worked to promote the election of, Democratic candidates for the General Assembly and Congress. Mr. Williams currently serves as the Chair of the Warren County Democratic Party.

28. Plaintiff Reverend Dr. Deloris L. Jerman is a black voter and U.S. citizen who resides in Norlina, North Carolina, within Congressional District 2, Senate District 2, and House District 27, as set forth in the 2021 Plans. Dr. Jerman is a registered Democrat who is active in community affairs and has consistently voted for Democratic Candidates for the General Assembly and Congress. Dr. Jerman is a retired educator and public school and higher education administrator who currently serves as a pastor at Green Chapel Church in Brodnax, Virginia, which is just across the North Carolina border.

29. This Complaint refers to these individual Plaintiffs—that is, all Plaintiffs except for NCLCV—as the Individual Plaintiffs. The Individual Plaintiffs are harmed by the Enacted Plans' unconstitutional partisan gerrymandering and racial vote dilution. Many Individual Plaintiffs are Democratic and/or black voters who are packed, cracked, and/or deprived of the opportunity to nominate and elect the candidates of their choice in the districts and/or clusters where they reside. Many Individual Plaintiffs are also harmed statewide by the Enacted Plans' dilution of Democratic and black voting power and by the Enacted Plans' burdening of the Individual Plaintiffs' ability to associate with other Democratic voters and to work to elect Democratic candidates. By effectively determining the results of elections for a decade, the Enacted Plans make it more difficult for North Carolinians who are active in politics—including some of the Individual Plaintiffs—to carry out their political activities.

B. Defendants

30. Defendant Destin Hall is a member of the North Carolina House of Representatives. In 2021, Representative Hall serves as Chair of the House Committee on Redistricting that oversaw the creation of the Enacted Plans. Defendant Hall is sued in his official capacity only.

31. Defendant Warren Daniel is a member of the North Carolina Senate. In 2021, Senator Daniel serves as Co-Chair of the Senate Committee on Redistricting and Elections that oversaw the creation of the Enacted Plans. Defendant Daniel is sued in his official capacity only.

32. Defendant Ralph E. Hise, Jr., is a member of the North Carolina Senate. In 2021, Senator Hise serves as Co-Chair of the Senate Committee on Redistricting and Elections that oversaw the creation of the Enacted Plans. Defendant Hise is sued in his official capacity only.

33. Defendant Paul Newton is a member of the North Carolina Senate. In 2021, Senator Newton serves as Co-Chair of the Senate Committee on Redistricting and Elections that oversaw the creation of the Enacted Plans. Defendant Newton is sued in his official capacity only.

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

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

36. Defendant State of North Carolina is one of the 50 States of the United States of America and has its capital in Raleigh, North Carolina.

37. Defendant North Carolina State Board of Elections is the agency of the State of North Carolina responsible for the regulation and administration of elections in North Carolina.

38. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections. Defendant Circosta is sued in his official capacity only.

39. Defendant Stella Anderson is the Secretary of the North Carolina State Board of Elections. Defendant Anderson is sued in her official capacity only.

40. Defendant Jeff Carmon III is a Member of the North Carolina State Board of Elections. Defendant Carmon is sued in his official capacity only.

41. Defendant Stacy Eggers IV is a Member of the North Carolina State Board of Elections. Defendant Eggers is sued in his official capacity only.

42. Defendant Tommy Tucker is a Member of the North Carolina State Board of Elections. Defendant Tucker is sued in his official capacity only.

43. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. Defendant Brinson Bell is sued in her official capacity only.

JURISDICTION AND VENUE

44. This Court has jurisdiction over this action pursuant to Article 26 and Article 26A of Chapter 1 of the North Carolina General Statutes.

45. Under North Carolina General Statutes § 1-81.1, exclusive venue for this action lies with the Wake County Superior Court.

46. Under North Carolina General Statutes § 1-267.1, this action must be heard by a three-judge panel because this action challenges the validity of redistricting plans enacted by the General Assembly.

FACTUAL ALLEGATIONS

I. The Law Governing Redistricting in North Carolina

47. Under Article II, Sections 3 and 5, of the North Carolina State Constitution, "the General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment

of Senators among those districts … [and] the representative districts and the apportionment of Representatives among those districts."

48. The North Carolina State Constitution identifies four express limits on the General Assembly's decennial redistricting authority:

a. Each Senator and Representative "shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each [legislator] represents being determined for this purpose by dividing the population of the district that he represents by the number of [legislators] apportioned to that district";

b. Each district "shall at all times consist of contiguous territory";

c. "No county shall be divided in the formation of a senate district … [or] a representative district" (the "Whole County Provisions"); and

d. "When established, the senate [and representative] districts and the apportionment of [legislators] shall remain unaltered until the return of another decennial census of population taken by order of Congress."

N.C. Const. art. II, §§ 3, 5.

49. Several other provisions of the North Carolina State Constitution also apply to legislative and congressional redistricting, including:

a. The Free Elections Clause, which provides that "[a]ll elections shall be free." N.C. Const. art. I, § 10.

b. The Equal Protection Clause, which provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19.

c. The Free Assembly Clause, which provides that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12.

d. The Free Speech Clause, which provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14.

50. In particular, North Carolina courts have recognized that these clauses prohibit "extreme partisan gerrymandering," and indeed, any measures that unfairly "dilute and devalue votes of some citizens compared to others." *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *110 (N.C. Super. Ct. Sept. 3, 2019); *see id.* at *113–29; *see Harper v. Lewis*, No. 19-CVS-012667, slip op. at 6–14 (N.C. Super. Ct. Oct. 28, 2019).

51. Redistricting in North Carolina also must comply with federal law, including the one-person, one-vote requirement and the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended (the "VRA").

52. In a line of cases beginning with *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), the North Carolina Supreme Court set forth a mandatory, nine-step algorithm explaining how to apply certain aspects of North Carolina redistricting law consistent with federal law. *See id.*; *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*); *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*); *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015) (*Dickson II*). As the North Carolina Supreme Court summarized:

a. First, "legislative districts required by the VRA shall be formed" before non-VRA districts.

b. Second, "[i]n forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent" to ensure "compliance with federal 'one-person, one-vote' requirements."

c. Third, "in counties having a ... population sufficient to support the formation of one non-VRA legislative district," "the physical boundaries" of the non-VRA district shall "not cross or traverse the exterior geographic line of" the county.

d. Fourth, "[w]hen two or more non-VRA legislative districts may be created within a single county," "single-member non-VRA districts shall be formed within" the county, "shall be compact," and "shall not traverse" the county's exterior geographic line.

e. Fifth, for non-VRA counties that "cannot support at least one legislative district," or counties "having a non-VRA population pool" that, "if divided into" legislative "districts, would not comply with" one-person, one-vote requirements, the General Assembly should combine or group "the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." Moreover, "[w]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the 'exterior' line of the multi-county grouping." "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard."

f. Sixth, "only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined."

g. Seventh, "communities of interest should be considered in the formation of compact and contiguous [legislative] districts."

h. Eighth, "multi-member districts shall not be" created "unless it is established that such districts are necessary to advance a compelling governmental interest."

i. Ninth, "any new redistricting plans . . . shall depart from strict compliance with" these criteria "only to the extent necessary to comply with federal law."

Dickson II, 368 N.C. at 530–31, 781 S.E.2d at 490–91 (quoting *Stephenson I*, 355 N.C. at 383–84, 562 S.E.2d at 396–97 (quotation marks omitted) (alterations in original)).

II. Partisan Gerrymandering and Racial Discrimination in North Carolina

53. North Carolina has a long history of partisan gerrymandering its congressional and legislative districts. *See generally* J. Michael Bitzer, *Redistricting and Gerrymandering in North Carolina* (2021). In the 2011 redistricting cycle, for example, the General Assembly's controlling party (the Republican Party) expressly instructed its mapmaker to "ensure Republican majorities," based on claims that the majority was "'perfectly free' to engage in constitutional partisan gerrymandering." *Common Cause*, 2019 WL 4569584, at *4. In 2016, federal courts invalidated the 2011 congressional and legislative maps as unconstitutional racial gerrymanders.[5] But when the General Assembly redrew those maps, it again created "extreme partisan gerrymanders." *Id.* at *125, *135; *see Harper v. Lewis*, No. 19-CVS-012667, slip op. at 13–14 (N.C. Super. Ct. Oct.

[5] *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016).

28, 2019). Indeed, one Republican legislative leader "acknowledge[d] freely that" the congressional map "would be a political gerrymander." *Harper*, slip op. at 13. North Carolina courts ultimately enjoined both the congressional and state legislative maps as partisan gerrymanders that violated the North Carolina State Constitution. *Id.*; *Common Cause*, 2019 WL 4569584, at *125, *135.

54. North Carolina, "[j]ust as with other states in the South," also has "'a long history of race discrimination generally and race-based vote suppression in particular.'" *Holmes v. Moore*, 270 N.C. App. 7, 20–21, 840 S.E.2d 244, 257 (2020) (quoting *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 223 (4th Cir. 2016)). After black North Carolinians gained the right to vote following the Civil War and began to ally politically with white Republicans, white Democrats devised what they called the "white supremacy campaign" to break apart the new multiracial coalition by exploiting and inflaming racial tensions and encouraging whites to vote on racial, rather than economic, lines.[6] When Congress enacted the VRA, it looked to "North Carolina's pre-1965 history of pernicious discrimination" and made "[f]orty North Carolina jurisdictions … covered" jurisdictions under Section 5 of the VRA based on their use of "suspect prerequisites to voting, like literacy tests." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215, 223 (4th Cir. 2016).

55. "[S]tate officials [have] continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." *Holmes*, 270 N.C. App. at 23, 840 S.E.2d at 258. On numerous occasions, "the North Carolina legislature has attempted to suppress and dilute the voting rights of African Americans," and "the Department of Justice or federal courts have determined that the North Carolina General Assembly acted with

[6] Helen G. Edmonds, *The Negro and Fusion Politics in North Carolina, 1894–1901*, at 136 (1951).

discriminatory intent, reveal[ing] a series of official actions taken for invidious purposes." *McCrory*, 831 F.3d at 223 (quotation marks omitted). In 2013 and 2018, for example, the General Assembly enacted restrictive voter-identification laws that state and federal courts struck down as "targeting voters who, based on race, were unlikely to vote" for the party controlling the General Assembly. *Id.* at 215, 223–33; *see Holmes*, 270 N.C. App. at 23, 34, 36. And in just the last decade, courts have repeatedly invalidated North Carolina's congressional and legislative maps as impermissibly discriminating against voters based on race.[7]

56. North Carolina's black voters are targeted by race largely due to the persistence of racially polarized voting. Voting in North Carolina, both historically and today, is racially polarized, which means that "the race of voters correlates with the selection of a certain candidate or candidates." *McCrory*, 831 F.3d at 214. Racial polarization in voting in North Carolina "offers a 'political payoff for legislators who seek to dilute or limit the minority vote.'" *Holmes*, 270 N.C. App. at 22, 840 S.E.2d at 258 (quoting *McCrory*, 831 F.3d at 222). The fact that "race and party are inexorably linked in North Carolina," *McCrory*, 831 F.3d at 225, creates an "incentive for intentional discrimination in the regulations of elections," *id.* at 222.

57. Statistics confirm that racial vote polarization persists in North Carolina. "Ecological inference" tools can measure this racial vote polarization. Ecological inferences

[7] *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (three-judge court), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017) (invalidating two congressional districts based on the impermissible use of race); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (three-judge court) (invalidating legislative districts based on the impermissible use of race), *summarily aff'd*, 137 S. Ct. 2211 (2017); *Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018) (three-judge court) (invalidating legislative districts based on the impermissible use of race), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018); *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam) (affirming district court's conclusion that legislative districts unconstitutionally sorted voters on the basis of race).

enable data scientists to draw conclusions about individual behavior or preferences from aggregate data. Those tools show:

a. During the last two presidential elections, black voters preferred the Democratic candidate by an average margin of 84 percentage points. In the same elections, white voters preferred the Republican candidate by an average margin of 30 percentage points.

b. During the last three U.S. Senate elections, black voters preferred the Democratic candidate by an average margin of 87 percentage points. In the same elections, white voters preferred the Republican candidate by an average margin of 31 percentage points.

c. During the last three gubernatorial elections, black voters preferred the Democratic candidate by an average margin of 87 percentage points. In the same elections, white North Carolinians preferred the Republican candidate by an average margin of 32 percentage points.

d. During the last three elections for Lieutenant Governor, black voters preferred the Democratic candidate by an average margin of 86 percentage points. In the same elections, white North Carolinians preferred the Republican candidate by an average margin of 34 percentage points.

e. Racial vote polarization exists within, as well as between, political parties. For instance, in the 2020 Democratic primary election for U.S. Senate, white primary voters preferred the white candidate over the black candidate by a margin of 49 percentage points. Black primary voters preferred the black candidate over the white candidate by a margin of 27 percentage points.

58. White residents constitute slightly less than 70% of North Carolina's adult citizenry, or "citizen voting-age population" (CVAP), according to the U.S. Census Bureau's American Community Survey, and about 67% of North Carolina's registered voters, according to registration forms completed by the voters themselves. Because white voters form an overwhelming majority of North Carolina's electorate, and because of racially polarized voting, white-preferred candidates usually prevail in North Carolina elections, even when strongly opposed by black voters.

59. Black citizens' ability to attain anything approaching fair representation in the General Assembly and in North Carolina's congressional delegation thus hinges on fair districting—that is, districting that respects the politically cohesive, geographically distinct black communities that exist today in many parts of North Carolina. But at no point in North Carolina's modern history have the state's congressional or legislative districts provided minority voters with fair opportunities to nominate and elect their candidates of choice. Simply put, North Carolina's federal and state legislators have never fully and accurately represented, or resembled, North Carolina's people.

III. Enactment of the Enacted Plans

A. The 2021 Redistricting Process

60. This case concerns the 2021 redistricting cycle. Decennial redistricting depends on data generated by the U.S. Census Bureau. Ordinarily, the census data used for redistricting are released in February or March of the year following the decennial census; in 2021, however, the Census Bureau announced that its release of data would be delayed.[8] The Census Bureau

[8] Press Release, U.S. Census Bureau, *Census Bureau Statement on Redistricting Data Timeline* (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html.

eventually released census data to state redistricting officials on August 12, 2021, about five months later than normal.[9]

61. The General Assembly formed two committees to oversee the redistricting process, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections. Each was tasked with proposing maps for its own chamber and for Congress. This Complaint refers to the two committees collectively as "the Committees."

62. The Senate Redistricting Committee was co-chaired by Defendants Hise, Daniel, and Newton. The House Redistricting Committee was chaired by Defendant Hall.

63. On August 9, 2021, the Committee chairs proposed redistricting criteria to govern the 2021 mapmaking process (the "2021 Redistricting Criteria").[10] The Committee chairs' proposed criteria were adopted on August 12, 2021, with minimal amendments.[11]

64. The 2021 Redistricting Criteria state: "The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*), and *Dickson*

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[9] Press Release, U.S. Census Bureau, *2020 Census Statistics Highlight Local Population Changes and Nation's Ethnic and Racial Diversity* (Aug. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html.

[10] *2021 Joint Redistricting Committee Proposed Criteria*, House Committee on Redistricting & Senate Committee on Redistricting and Elections, N.C. General Assembly, https://www.ncleg.gov/documentsites/committees/House2021-182/2021/08-09-21/2021%20Joint%20Redistricting%20Committee%20Plan%20Proposed%20Criteria.pdf; *see* Travis Fain, *Redistricting Process Starts in N.C.*, WRAL (Aug. 9, 2021) https://www.wral.com/redistricting-process-starts-in-n-c/19818939.

[11] *Criteria Adopted by the Committees*, House Committee on Redistricting & Senate Committee on Redistricting and Elections, N.C. General Assembly (Aug. 12, 2021), https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/08-12-2021/Criteria.adopted.8.12.pdf; *see* Rusty Jacobs, *NC Lawmakers Adopt Criteria for Next Round of Redistricting*, WUNC (Aug. 12, 2021), https://www.wunc.org/politics/2021-08-12/nc-lawmakers-adopt-criteria-for-next-round-of-redistricting.

v. Rucho, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*."

65. The first step of the *Stephenson*/*Dickson* algorithm provides that "'legislative districts required by the VRA shall be formed' before non-VRA districts." *Dickson II*, 368 N.C. at 530, 781 S.E.2d at 438. Given North Carolina's long history of racially discriminatory voting laws and racially polarized voting, *see supra* Part II, the VRA has often been held to require the drawing of districts that protect black voters' opportunities to nominate and elect their candidates of choice. *E.g.*, *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017) (per curiam).

66. The 2021 Redistricting Criteria, however, did not provide for any analysis of whether the VRA required the formation of particular districts. The 2021 Redistricting Criteria stated that the "Committees will draw districts that comply with the Voting Rights Act"—but also stated that "[d]ata identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans."[12]

67. The Committees did not explain how they could determine whether maps could comply with the VRA without analyzing racial data. And in fact, it is impossible to determine whether maps comply with the VRA or with North Carolina law without analyzing whether voting is racially polarized and, if so, how that racial vote polarization affects election results.

68. The Committees knew that their map-drawing process did not follow the *Stephenson*/*Dickson* framework. For example, Senator Dan Blue, a black Democrat, challenged the Committee chairs on how they could draw VRA-compliant districts without considering racial

[12] *Criteria Adopted by the Committees*, *supra* note 11 (emphasis in the original).

data and observed that there is racially polarized voting in North Carolina. Senator Blue also introduced an amendment that would have prohibited the redistricting of black voters for partisan advantage. That amendment was rejected.[13]

69. The 2021 Redistricting Criteria also stated that "[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans."[14] Again, the Committees did not explain how they could determine whether maps complied with the VRA without analyzing political data. In fact, assessing whether minority voters have an adequate opportunity to nominate and elect their preferred candidates *requires* combining election results and racial data.

70. Nevertheless, the Committees did not impose any meaningful limits on legislators' ability to rely on partisan or racial considerations. Many legislators have vast knowledge of the racial and partisan characteristics of communities across the state; indeed, the Committees expressly permitted reliance on "local knowledge of the character of communities and connections between communities."[15] And although the mapmaking terminals in the hearing rooms did not contain accessible electoral or racial data, Chair Hall at the October 5 hearing admitted that he could not, and would not, prevent legislators from relying on racial or partisan data outside the hearing rooms and then redrawing maps in the hearing rooms.[16]

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[13] *Amendment to Proposed Criteria,* House Committee on Redistricting & Senate Committee on Redistricting and Elections, N.C. General Assembly (Aug. 12, 2021), https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/08-12-2021/Proposed%20Amendments/Voting%20Rights%20Act.Amendment.pdf; *Criteria Adopted by the Committees*, *supra* note 11.

[14] *Criteria Adopted by the Committees*, *supra* note 11 (emphasis in the original).

[15] *Id.*

[16] *See* N.C. General Assembly, *House Redistricting Committee Hearing*, YouTube (Oct. 5, 2021), https://www.youtube.com/watch?v=9UsiS_6rlUA (1:50:45–1:51:25) (exchange between Chair Hall and Representative Harrison), 1:51:44–1:52:39 (same), 1:53:26–1:54:45 (same), 2:05:23–2:08:05 (exchange between Chair Hall and Representative Reives).

71. The Committees also chose not to rank their redistricting criteria and chose to make many of their enumerated criteria permissive. For example, the criteria provided that the "Committees may consider municipal boundaries when drawing districts." This approach left the Committees free to decide when to consider municipal boundaries, depending on whether doing so furthered their other goals.[17]

72. The Committees held 13 public hearings over the course of three weeks in September.[18] But the maps had not yet been either drawn or proposed. As a result, these hearings did not provide the public or experts a meaningful opportunity to address the maps that the Committees would ultimately propose, consider, and enact.

73. On October 5, the Committees began designing proposed maps in the hearing rooms. In designing legislative maps, committee members were instructed to begin by selecting one of the county clusters that had been developed by an academic research group at Duke University. In their report, the Duke researchers explained that the clusters were "largely algorithmically determined through an optimization procedure outlined by the NC Supreme Court in *Stephenson v. Bartlett*" using the 2020 census data.[19] The Duke study yielded 16 county

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[17] *Criteria Adopted by the Committees*, *supra* note 11.

[18] *Joint Public Hearing Schedule,* House Committee on Redistricting & Senate Committee on Redistricting and Elections, N.C. General Assembly (Sept. 13, 2021), https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/General%20Redistricting%20Information/Public%20Hearing%20Schedule%20with%20addresses.pdf.

[19] Christopher Cooper, Blake Esselstyn, Gregory Herschlag, Jonathan Mattingly & Rebecca Tippett, *NC General Assembly County Clusterings from the 2020 Census* (Aug. 17, 2021), https://sites.duke.edu/quantifyinggerrymandering/files/2021/08/countyClusters2020.pdf.

clustering options for the Senate map,[20] and eight county clustering options for the House map.[21] The Duke researchers cautioned that the "one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act."[22]

74. Nevertheless, the Committees did not account for this limitation in the Duke study. At the October 5 hearings, the Committee chairs directed staff to present county cluster options for the Senate and House maps based on the Duke study. The Committee chairs were once again warned that failing to consider racial data and analyze compliance with the VRA would render their maps unlawful, and that the Duke study did not take into account the first step of the *Stephenson*/*Dickson* algorithm. Senator Blue, for instance, questioned how the Committees could determine the proper county clusters without first determining what the VRA requires. The Committee chairs, however, continued to refuse to consider racial data—or, at least, to *publicly* consider racial data—or conduct any study of racially polarized voting in the State.

75. Starting October 6, Committee members were permitted to draw congressional and legislative maps in the hearing rooms. Although the mapmaking terminals in the hearing rooms did not contain electoral or racial data, legislators were free to bring materials into and out of the hearing rooms. Upon information and belief, many of the maps drawn in the hearing rooms had likely been analyzed outside the hearing rooms.

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[20] *Duke Senate Groupings*, Senate Redistricting and Elections Committee, N.C. General Assembly, https://ncleg.gov/documentsites/committees/Senate2021-154/2021/10-05-2021/Duke%20Senate%20Groupings%20Maps%2011x17.pdf.

[21] *Duke House Groupings*, House Redistricting Committee, N.C. General Assembly, https://ncleg.gov/documentsites/committees/House2021-182/2021/10-05-21/Duke%20House%20Groupings%20Maps%2011x17.pdf.

[22] Cooper et al., *supra*, note 19.

76. Midway through the process, on October 21, with almost no advance notice, the Committees announced that public hearings would be held on October 25 and 26 for the public to comment on proposed maps.[23] The Committees did not specify which, if any, of the maps that had been posted online at that point were final contenders, leaving the public unable to identify the maps that were the Committees' focus.

77. On October 28, the Committees announced committee hearings on November 1 and 2 to consider proposed congressional and legislative maps.

B. Enactment of the Final Maps

78. The General Assembly moved quickly to enact the final maps, holding the first Committee hearings on the proposed maps on November 1 and enacting those maps just three days later, on November 4, each on a party-line vote.[24]

79. On November 1, the Senate Redistricting Committee held its first and only hearing to consider proposed congressional maps. The Committee considered one map proposed by Senator Ben Clark, a black Democrat, and one map proposed by Chairs Hise, Daniel, and Newton. The Chairs' map was favorably reported out of the Committee; Senator Clark's map was not. The next day, the full Senate approved the map, as did the House Redistricting Committee and full House in the following two days, without amendment. On November 4, the General Assembly enacted the map as the Enacted Congressional Plan.

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[23] Gary D. Robertson, *NC Redistricting Hearing Speakers Criticize GOP Proposals*, Associated Press (Oct. 25, 2021), https://www.usnews.com/news/best-states/north-carolina/articles/2021-10-25/public-hearings-offer-input-on-nc-redistricting-proposals; Charles Duncan, *First Maps Posted in N.C. Redistricting, Public Hearings Scheduled*, Spectrum News 1 (Oct. 21, 2021), https://spectrumlocalnews.com/nc/charlotte/politics/2021/10/21/first-maps-posted-in-n-c--redistricting--public-hearings-scheduled.

[24] Will Doran, *Take a Closer Look at North Carolina's Approved Political Maps for Congress, Legislature*, Raleigh News & Observer (Nov. 4, 2021), https://www.newsobserver.com/news/politics-government/article255552826.html.

80. Also on November 1, the House Redistricting Committee held a hearing to consider a House map proposed by Chair Hall. The Committee considered no other maps, and the Chair's map passed the House Redistricting Committee, the full House, the Senate Redistricting Committee, and the full Senate in three days, with few amendments. On November 4, the General Assembly enacted the map as the Enacted House Plan.

81. On November 2, the Senate Redistricting Committee held a hearing to consider a Senate map proposed by Chairs Hise, Daniel, and Newton. The Committee considered no other maps, and the Chairs' map passed both redistricting committees and both chambers in three days, with few amendments. On November 4, the General Assembly enacted the map as the Enacted Senate Plan.

IV. Partisan Gerrymandering and Racial Vote Dilution in the Enacted Plans

82. North Carolina elections are highly competitive. Republican candidates win many statewide races; Democratic candidates win many others—and nearly all statewide races are closely divided. For example, in 2016, Republican candidates won the most votes for President (51.9% to 48.1%), U.S. Senator (53.0% to 47.0%), and Lieutenant Governor (53.3% to 46.7%); Democratic candidates won the most votes for Governor (50.1% to 49.9%) and Attorney General (50.3% to 49.7%). In 2020, Republican candidates won the most votes for President (50.7% to 49.3%) and Lieutenant Governor (51.6% to 48.4%); Democratic candidates won the most votes for Governor (52.3% to 47.7%) and Attorney General (50.1% to 49.9%).[25]

83. North Carolina is also a growing state—and one that is growing more and more diverse. Between the 2010 and 2020 Censuses, North Carolina's population increased by 9.5%,

[25] Figures are taken from North Carolina State Board of Elections, *Elections Results Dashboard*, https://er.ncsbe.gov. Figures describe the major-party vote and thus exclude votes cast for third-party, independent, and write-in candidates.

from approximately 9.5 million residents to approximately 10.4 million. As a result, North Carolina has been allocated an additional, fourteenth seat in the U.S. House of Representatives. Nearly two-thirds of all of North Carolina's population growth (63%) has come in Durham, Guilford, Forsyth, Mecklenburg, and Wake Counties. Black, Hispanic, Asian, and multiracial individuals account for nearly all of North Carolina's population growth (87%).[26]

84. Fair districting maps would allow North Carolina's voters—Democratic and Republican, black and white—to translate their voting strength into representation. Where, for example, black voters are geographically concentrated, those voters would be able to elect their preferred candidates. And when one party succeeds in persuading more voters, that party would receive more seats—and a party that received a majority of votes would, more often than not, win at least half the seats. These features are the hallmarks of truly fair, evenhanded districting maps.

85. The Enacted Plans, however, are not fair districting maps. First, these plans are extreme partisan gerrymanders that entrench the political party that currently controls the General Assembly, the Republican Party, in power. Under any plausible electoral scenario, the Republican Party will retain large majorities of seats in Congress, the state Senate, and the state House, even when Democratic candidates receive a significant majority of statewide votes. And second, the Enacted Plans dilute the voting strength of North Carolina's black voters—by depriving black voters of the opportunity to nominate and elect their preferred candidates in many geographic areas where, under fair maps, they would be able to do so. To accomplish these partisan and racial goals, moreover, the maps unnecessarily traverse county boundaries and create noncompact districts.

[26] Figures are taken from U.S. Census, *North Carolina: 2020 Census*, https://www.census.gov/library/stories/state-by-state/north-carolina-population-change-between-census-decade.html.

86. The Enacted Plans' extreme partisan and racial effects do not reflect any inevitable feature of North Carolina's political geography or state law. As detailed in Part V, alternative maps avoid partisan gerrymandering and racial vote dilution while improving on traditional, neutral districting principles set forth in North Carolina law. The partisan gerrymandering and racial vote dilution in the Enacted Plans instead reflect the intentional choices of those who drew those maps.

87. Below, Plaintiffs detail the racial vote dilution and partisan gerrymandering that the Enacted Plans effectuate. Part A addresses partisan gerrymandering in the Enacted Congressional Plan, Enacted Senate Plan, and Enacted House Plan. Part B addresses racial vote dilution in the Enacted Congressional Plan, Enacted Senate Plan, and Enacted House Plan.

A. Extreme Partisan Gerrymandering in the Enacted Plans

88. Statistics-driven analysis shows that the Enacted Plans gerrymander congressional and legislative districts to entrench Republican political power and that the Enacted Plans will not fairly translate the preferences of North Carolina voters into representation in Congress or the General Assembly. The Enacted Plans crack and pack Democratic voters to dilute Democratic voting strength and guarantee that Republicans will control the North Carolina congressional delegation and General Assembly. As a result, the outcomes of congressional and legislative elections are foreordained, and voters lack the power to hold their leaders accountable.

89. The General Assembly intended the extreme partisan gerrymander that the Enacted Plans yield. Not only do legislative map-drawers typically have exhaustive knowledge of the partisan characteristics of areas across the state, but here the Committees and the General Assembly were told about the partisan implications of the Enacted Plans. The Committees and the General Assembly were informed—as publicly available sources disclosed—that the specific

maps they proposed constituted partisan gerrymanders that would not fairly translate voters' preferences into representation.[27] Yet the General Assembly adopted the Enacted Plans anyway, after a rushed process whose putative prohibition on considering "[p]artisan … election results" served only to avoid publicizing the partisan data that would shine a light on the severe gerrymandering in the proposed maps and to avert more searching scrutiny of those maps by the public and experts.

i. The Enacted Congressional Plan

90. Like the 2016 congressional plan that was enjoined as an unlawful partisan gerrymander, the Enacted Congressional Plan effects a partisan gerrymander that dilutes Democrats' voting power and effectively precludes Democrats from winning a majority—or even a tie—in North Carolina's congressional delegation, even if Democrats win a solid majority of votes statewide.

91. One way to illustrate the extent of the gerrymander is to examine the results the Enacted Congressional Plan would have yielded had it applied to recent statewide elections. This analysis shows that the Enacted Congressional Plan would have translated competitive elections,

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[27] *E.g.*, Gary D. Robertson, *NC Congressional Map That Helps GOP Gets Senate Panel's OK*, Associated Press (Nov. 1, 2021), https://apnews.com/article/north-carolina-legislature-voting-rights-redistricting-congress-f11be13a63b159abaa926928c96413a2 ("'It's not coincident that it's only in the urban areas that you subject these counties to that kind of treatment,' Senate Minority Leader Dan Blue of Wake County told Republican colleagues."); *accord* Will Doran & Brian Murphy, *North Carolina Could Have New Political Maps This Week. Here's Where Things Stand*, Raleigh News & Observer (Nov. 3, 2021), https://www.newsobserver.com/news/politics-government/article255506961.html; Gary D. Robertson, *North Carolina GOP Nears Completion of Redistricting Maps*, Associated Press (Nov. 4, 2021), https://www.newsobserver.com/news/state/north-carolina/article255525166.html; Charles Duncan, *Redistricting in N.C.: New Maps Approved, Favoring GOP*, Spectrum News 1 (Nov. 4, 2021), https://spectrumlocalnews.com/nc/charlotte/politics/2021/11/04/redistricting-in-n-c---new-maps-approved--favoring-gop; Will Doran, *NC Lawmakers File Their Official Redistricting Plans, Giving GOP a Solid Edge*, Raleigh News & Observer (Oct. 29, 2021), https://www.newsobserver.com/news/politics-government/article255390786.html.

including elections with statewide Democratic victories, into Republican candidates winning at least 10 of 14 seats in North Carolina's congressional delegation (or 71% of the total). That signals an extreme partisan gerrymander.

a. The 2020 race for Chief Justice of the Supreme Court resulted in a near-tie statewide, with the Republican candidate winning by only 401 votes. But if the votes for the Republican candidate in that election had been cast for Republican congressional candidates under the Enacted Congressional Plan, the Republican candidates would have carried 10 of 14 congressional districts. Republican candidates would thus have won six more districts (10 to 4) than their Democratic opponents despite the effective tie in the statewide vote.

b. In the 2020 race for Attorney General, the Democratic candidate won the major-party vote by 0.3 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican congressional candidates under the Enacted Congressional Plan, the Republican candidates would still have carried 10 of 14 congressional districts.

c. In the 2020 race for President, the Republican candidate won the major-party vote by 1.4 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican congressional candidates under the Enacted Congressional Plan, the Republican candidates would still have carried 10 of 14 congressional districts.

d. In the 2016 election for Governor, the Democratic candidate prevailed by 0.2 percentage points, and in the 2016 election for Insurance Commissioner, the Republican candidate prevailed among major-party voters by 0.8 percentage points.

But if the votes for the Republican candidate in those elections had been cast for Republican congressional candidates under the Enacted Congressional Plan, the Republican candidates would still have carried 10 of 14 congressional districts.[28]

92. The Enacted Congressional Plan effects this extreme partisan gerrymander by "packing" Democratic voters into Congressional Districts 6 and 9 and "cracking" other Democratic voters among 10 districts where they cannot meaningfully impact elections (Congressional Districts 1, 3, 4, 7, 8, 10, 11, 12, 13, and 14). Several examples follow.

93. The Enacted Congressional Plan fractures Mecklenburg County, home to North Carolina's largest concentration of Democratic voters, across three districts. The Enacted Congressional Plan packs Democrats into one Mecklenburg County district (Congressional District 9) and then splits Mecklenburg County's remaining Democratic voters into two districts (Congressional Districts 8 and 13) where they cannot affect election results due to those districts' large Republican majorities. Had the Enacted Congressional Plan *not* cracked Mecklenburg County in this way, the remainder of the county could have been part of a Democratic-leaning district. *Infra* ¶ 158 (Congressional District 10 of the Optimized Congressional Map).

94. The Enacted Congressional Plan also fragments Wake County, home to North Carolina's second-largest concentration of Democratic voters, across three districts to carve out an extra safe Republican seat. One district (Congressional District 5) is housed entirely within Wake County and is majority Democrat. The Enacted Congressional Plan then splits Wake County's remaining voters into two districts. Democrats in Cary are packed into Congressional District 6 with heavily Democratic Durham and Orange Counties, resulting in a second heavily Democratic

[28] These figures are taken from North Carolina State Board of Elections, *Elections Results Dashboard*, https://er.ncsbe.gov. These figures describe the major-party vote and thus exclude votes cast for third-party, independent, and write-in candidates.

district with an expected Democratic vote share of more than 70% (thus "wasting" Democratic votes). The deliberate packing of Congressional District 6 ensures that Wake County's remaining Democratic voters, who are apportioned into the heavily Republican Congressional District 7, cannot affect election results. The overall effect is to dilute Democratic votes: If Wake County were *not* split into three districts in this way, Congressional Districts 5 and 6 would be Democratic, and Congressional District 7 would be highly competitive instead of safely Republican. *Infra* ¶ 158 (Congressional Districts 5, 6, and 7 of the Optimized Congressional Map).

95. The Enacted Congressional Plan cracks Democratic voters in the heavily populated Piedmont Triad, comprising Greensboro, High Point, and Winston-Salem. Voters in the Piedmont Triad—which formed one Democratic congressional district under the prior districting plan—are split into four separate congressional districts:

a. First, Democrats west of downtown Greensboro are cracked into Congressional District 7, which is heavily Republican due to the partisan gerrymandering in Durham, Orange, and Wake Counties to the east. As a result of packing in Congressional District 6, and cracking in Guilford County, Congressional District 7 is far less compact than necessary under a fair map. It has a Polsby-Popper compactness score of only 0.20 (on a scale of 0 to 1, where 1 is the most compact).

b. Second, Democrats in downtown Greensboro and to the north are cracked into a heavily Republican District 11. District 11 is designed to aggregate enough Republican votes to overcome Greensboro's Democratic voters by bending to avoid Forsyth County and stretching far west through Republican-majority counties all the way to the Tennessee border. The result is a Polsby-Popper score of just 0.21.

c. Third, Democratic voters from the High Point area are cracked into a third heavily Republican district, District 10. To overcome the voting strength of these Democratic voters, District 10 cuts west to avoid Democratic populations in central Davidson County and then turns 90 degrees to the south, bringing within its bounds Republican voters as distant as the suburbs of Charlotte. District 10 has a Polsby-Popper score of just 0.20.

a. Fourth, Democratic voters in Winston-Salem are cracked into District 12, which stretches west into the Republican-dominated areas of Yadkin County and veers southwest until it reaches the northern border of Gaston County, which sits on the South Carolina line. The result, again, is a Republican-dominated district that is less compact than necessary under a fair map: Congressional District 12 has a Polsby-Popper score of just 0.24.

96. The three counties with the largest Democratic populations—Mecklenburg, Wake, and Guilford—are the only counties trisected in the Enacted Congressional Plan. Nothing in North Carolina law or federal law, and no traditional redistricting principle, required that result. Guilford County could have been placed entirely into one district. *Infra* ¶ 158 (Congressional District 11 of the Optimized Congressional Map). Mecklenburg and Wake Counties each have only enough population to fill one-and-a-half districts and thus could have been placed in two districts each. *Infra* ¶ 158 (Congressional Districts 5, 7, 9, and 10 of the Optimized Congressional Map).

97. The Enacted Congressional Plan also dilutes Democratic voting strength elsewhere. Congressional District 4 is drawn in a way that splits a large concentration of Democratic voters in southeastern North Carolina by separating Democrats in Cumberland County from Democrats in Hoke and Scotland Counties. This cracking of Democratic votes ensures that District 4 and

District 8 will elect Republican candidates. Under a fair map, these voters would all reside in one district where they could elect their preferred candidates. *Infra* ¶ 158 (Congressional District 4 of Plaintiffs' Optimized Congressional Map).

98. At the November 1 Senate Redistricting Committee hearing, Senator Nickel of Wake County warned that the congressional map's severe partisan tilt and lack of competitive districts constituted an extreme partisan gerrymander.[29] In the November 3 House Redistricting Committee hearing, Representative Pricey Harrison of Guilford County likewise cautioned that the congressional map was an extreme partisan gerrymander.[30] The General Assembly, however, proceeded to enact the Enacted Congressional Plan.

99. Nothing in North Carolina's political geography or state law required the General Assembly to enact a congressional map that effected such a severe partisan gerrymander. Under any plausible electoral scenario, Republican candidates will always win the general election in a majority or supermajority of districts. By contrast, Plaintiffs' Optimized Congressional Map (detailed in Part V.A) shows that it is possible to create a fairer and far less partisan districting plan that complies with state-law requirements and policies, advances traditional and neutral districting principles, and contains more competitive districts. Under the Optimized Congressional

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[29] *See* N.C. General Assembly, *Senate Redistricting Committee Hearing*, YouTube (Nov. 1, 2021) https://www.youtube.com/watch?v=KgSkfFY7r7g (51:39-54:27) ("[T]his map speaks louder than words. You can't argue with the map. And it's right there in front of us: We've heard the public comments. We've heard the outside experts, and you can see in my diagram exactly what's going on. This is a map that robs 10.7 [million] North Carolinians of any real choice at the ballot box. It's a map that guarantees that 10 or 11 Republicans will be elected in our 50-50 state. It doesn't pass the eye test. It doesn't pass the smell test. I wish I could make this committee understand why this is so wrong. Why this is so wrong for every single voter in our state. … [Y]ou can't have a competition at the ballot box for the best ideas when you decide the outcome in advance. This is not a fair fight. We could do 50-50 districts in every part of the state…") (Sen. Nickel).

[30] *See* N.C. General Assembly, *House Redistricting Committee Hearing*, YouTube (Nov. 3, 2021) https://www.youtube.com/watch?v=M53S7TbN6ew (50:50-51:00) ("The partisan analysis shows us it's a possible 11-3 [map] in a 50-50 state and that's just flat wrong.") (Rep. Harrison).

Map, the party that receives more congressional votes statewide will generally receive at least half the state's congressional seats—allowing voters to meaningfully express their preferences at the ballot box and to hold their representatives in Congress to account.

ii. The Enacted Senate Plan

100. Like the 2016 Senate plan that was enjoined as an unlawful partisan gerrymander, the Enacted Senate Plan effects a partisan gerrymander that dilutes Democratic voting power and effectively precludes Democrats from winning a majority—or even a tie—in the Senate, even if Democrats win a solid majority of votes statewide.

101. One way to illustrate the extent of the gerrymander is to examine the results the Enacted Senate Plan would have yielded had it applied to recent statewide elections. This analysis shows that the Enacted Senate Plan would have translated competitive elections, including elections with statewide Democratic victories, into substantial Republican Senate majorities.

a. The 2020 race for Chief Justice of the Supreme Court resulted in a near-tie statewide. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted Senate Plan, the Republican candidates would have carried 28 out of 50 districts, or six more than the Democratic candidates.

b. In the 2020 race for Attorney General, the Democratic candidate won the major-party vote by 0.3 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted Senate Plan, the Republican candidates would have carried 29 of 50 Senate districts, or eight more than the Democratic candidates.

c. In the 2020 race for President, the Republican candidate won the major-party vote by 1.4 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted Senate Plan, the Republican candidates would have carried a veto-proof majority of 30 of 50 Senate districts, or 10 more than the Democratic candidates.

d. In the 2016 election for Governor, the Democratic candidate prevailed by 0.2 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted Senate Plan, the Republican candidates would have carried a veto-proof majority of 30 of 50 Senate districts, or 10 more than the Democratic candidates.

e. In the 2016 election for Insurance Commissioner, the Republican candidate prevailed among major-party voters by 0.8 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted Senate Plan, the Republican candidates would have carried 28 of 50 Senate districts, or six more than the Democratic candidates.

102. The Enacted Senate Plan achieves its extreme partisan gerrymander by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts, where they will be outvoted by larger populations of Republican voters.

103. Sometimes, the Enacted Senate Plan packs and cracks Democratic voters based on its selection of county clusters from the possibilities identified in the Duke study.

104. For example, the Enacted Senate Plan configures the 18 counties in Senate Districts 1 and 2 to crack northeastern North Carolina's Democratic votes.

a. The 18 counties that comprise Senate Districts 1 and 2 can be configured to group in one district Carteret, Chowan, Dare, Hyde, Pamlico, Pasquotank, Perquimans, and Washington Counties; and to group in another district Bertie, Camden, Currituck, Gates, Halifax, Hertford, Martin, Northampton, Tyrrell, and Warren Counties. *Infra* ¶ 165 (Senate Districts 1 and 2 of the Optimized Senate Map). The first district would still favor Republican candidates; the second district would be more competitive and would give Democratic voters an opportunity to elect candidates of their choice.

b. This configuration is preferable under state law for other reasons as well: It minimizes the number of county traversals among the 18 counties (at 23 traversals), consistent with the Whole County Provisions. It also yields more compact districts. The lowest Polsby-Popper compactness score for either district is 0.17.

c. The General Assembly rejected this configuration. Instead, under the Enacted Senate Plan, it grouped Bertie, Camden, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, Perquimans, and Tyrrell Counties into District 1; and Carteret, Chowan, Halifax, Hyde, Martin, Pamlico, Warren, and Washington Counties into District 2. This configuration increases the number of county traversals to 24. It also lowers District 2's Polsby-Popper compactness score to just 0.10. That score indicates a substantially non-compact district. This configuration dilutes Democratic voting power: With Democratic voters divided between districts, both districts will reliably vote for Republican candidates.

105. The Enacted Senate Plan also clusters counties to crack Democratic votes in and around Buncombe County.

a. Buncombe County is home to a substantial Democratic population. The Enacted Senate Plan combines Buncombe County with heavily Republican McDowell and Burke Counties into one cluster that is divided into two districts, a lopsidedly Democratic district (District 49) and a heavily Republican district (District 46).

b. Instead, Buncombe County could be combined into a two-district cluster with Polk and Henderson Counties. Polk and Henderson Counties have larger Democratic vote shares than McDowell and Burke Counties, and clustering them with Buncombe County allows for fairer districts; one district nested in Buncombe County would favor Democrats, but not as lopsidedly as District 49. The other district—spanning Polk, Henderson, and the remainder of Buncombe County—would be competitive, giving both Democratic and Republican voters an opportunity to elect candidates of their choice. *Infra* ¶ 165 (Senate Districts 48 and 49 of the Optimized Senate Map).

c. In its pursuit of Republican partisan advantage, the Enacted Senate Plan unnecessarily traverses county boundaries. Had Buncombe County been grouped with Henderson and Polk Counties to create more competitive districts, Burke, Gaston, and Lincoln Counties would have been grouped in a two-district cluster, and Cleveland, McDowell, and Rutherford Counties would have been grouped in a one-district cluster. This configuration would have resulted in just six traversals.

d. Instead, grouping Buncombe County with Burke and McDowell Counties required grouping Henderson, Polk, and Rutherford together into a one-district cluster and grouping Cleveland, Gaston, and Lincoln Counties into a two-district cluster. This arrangement—which the General Assembly adopted to enhance Republican

partisan advantage—requires at least seven traversals. In fact, the Enacted Senate Plan adds an unnecessary county traversal in the cluster with, Cleveland, Gaston, and Lincoln Counties. That yields eight traversals in the nine-county region, instead of six under the fairer configuration.

106. The Enacted Senate Plan also packs and cracks Democratic voters via how it draws lines within the county clusters identified in the Duke study. Several examples follow.

107. The Republican advantage in Senate District 26 results from unconstitutional packing.

a. Pursuant to the Duke study's implementation of the *Stephenson*/*Dickson* algorithm, Guilford County must be grouped into a three-district Democratic-leaning county cluster with Rockingham County.

b. The Enacted Senate Plan packs most of the cluster's Democratic voters into two districts—Senate District 27 and Senate District 28, where they generate large Democratic vote margins. In the 2020 elections for Chief Justice, Attorney General, and President, for instance, Senate Districts 27 and 28 had average Democratic vote margins of roughly 23% and 53%, respectively. By wasting these surplus votes, the Enacted Senate Plan ensures that Senate District 26 will reliably vote for Republican candidates: In the same three races, Senate District 26 voted for Republican candidates by an average margin of roughly 24%.

c. This gerrymandering departs from traditional redistricting principles and reduces the compactness of these districts: Senate District 26 has a Polsby-Popper score of 0.30, and Senate District 28 has a Polsby-Popper score of 0.25. Without this degree of packing, these districts can be designed to be more compact and fairer, such that

Senate District 27 and Senate District 28, while still Democratic, are more competitive, and Senate District 26 is a Democratic-leaning swing district. *Infra* ¶ 165 (Senate Districts 26, 27, and 28 of the Optimized Senate Map).

108. The Republican advantage in Senate District 13 also results from unconstitutional packing. Based on the Duke study's implementation of the *Stephenson*/*Dickson* algorithm, the cluster comprising Wake and Granville Counties must contain six Senate districts. Under the Enacted Senate Plan, Wake County's large Democratic population is artificially "packed" into four overwhelmingly Democratic districts—Senate Districts 14, 15, 16, and 18. As a result, a Democratic-leaning swing district in northern Wake County is replaced with Republican-favored Senate District 13 in the Enacted Senate Plan. *Infra* ¶ 165 (Senate District 13 of the Optimized Senate Map).

109. The Enacted Senate Plan also unnecessarily packs Democratic voters in Mecklenburg County into Senate Districts 38, 39, 40, and 42. At the same time, the plan carves out a district (Senate District 41) that carefully joins Republican-leaning areas in and around Clear Creek and Lakeland Hills with Republican-leaning voting districts around the Carmel Country Club, in pursuit of statewide Republican advantage.

110. The Enacted Senate Plan also unnecessarily packs Democratic voters in Forsyth County. Forsyth County, which is home to a large number of Democratic voters, is grouped into a two-district cluster with Stokes County. The Enacted Senate Plan concentrates Forsyth County's Democratic voters into one district—Senate District 32—where Democratic candidates would regularly win by more than 30 percentage points. This district's design ensures that Forsyth County's Democratic voters cannot impact electoral outcomes in Senate District 31, which is safely Republican. Instead, Senate District 32 and Senate District 31 could have been configured

such that Senate District 32 would be more competitive (while still favorable to Democrats), and Senate District 31 would be a swing district. *Infra* ¶ 165 (Senate Districts 31 and 32 of the Optimized Senate Map). The General Assembly rejected this alternative in order to dilute the voting power of Forsyth County's Democratic voters.

111. Moreover, in drawing Districts 31 and 32, the General Assembly created unnecessary county traversals. Based on the clusters identified in the Duke study, Forsyth County could have been grouped with Stokes County or Yadkin County. Grouping Forsyth County with Stokes County requires creating a one-district cluster of Alexander, Surry, Wilkes, and Yadkin Counties. There is a minimum of one traversal in the Forsyth-Stokes cluster, and a minimum of four traversals in the Alexander-Surry-Wilkes-Yadkin cluster, for a total of five. By contrast, grouping Forsyth and Yadkin Counties together reduces the minimum of traversals in the six-county area to four: one in the Forsyth-Yadkin cluster and only three in the Alexander-Stokes-Surry-Wilkes cluster.

112. The General Assembly's effort to maximize partisan (and racial) advantage came at the cost of excess county traversals. The configuration of Senate Districts 1 and 2 creates excess traversals directly attributable to partisan gerrymandering and racial vote dilution (as discussed below), and the configuration of Senate Districts 43, 44, 46, 48, and 49 creates extra traversals directly attributable to partisan gerrymandering. In addition, Senate Districts 47 and 50 are configured to create four extra traversals; it is possible to draw these districts to cross county boundaries only 19 times, instead of 23.

113. Nothing in North Carolina's political geography or state law required the General Assembly to enact a Senate map that effected such a severe partisan gerrymander. Under any plausible electoral scenario, Republican candidates will always win a majority in the Senate—yet

the Enacted Senate Plan effects this result by creating more county traversals than necessary and by creating districts that are less compact than necessary. By contrast, Plaintiffs' Optimized Senate Map is fairer and less partisan, while also complying with state redistricting requirements and policies, advancing traditional and neutral districting principles, and creating more competitive districts. *See infra* ¶¶ 165–72.

iii. The Enacted House Plan

114. Like the 2016 House plan that was enjoined as an unlawful partisan gerrymander, the Enacted House Plan effects a partisan gerrymander that dilutes Democrats' voting power and effectively precludes Democrats from winning a majority—or even a tie—in the House, even if Democrats win a majority of statewide votes.

115. One way to illustrate the extent of the gerrymander is to examine the results the Enacted House Plan would have yielded had it applied to recent statewide elections. This analysis shows that the Enacted House Plan would have translated competitive elections, including elections with statewide Democratic victories, into substantial Republican House majorities.

a. The 2020 race for Chief Justice of the Supreme Court resulted in a near-tie statewide. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted House Plan, the Republican candidates would have carried 68 out of 120 House districts, or 16 more than Democratic candidates.

b. In the 2020 race for Attorney General, the Democratic candidate won the major-party vote by 0.3 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted House

Plan, the Republican candidates would have carried 69 of 120 House districts, or 18 more than the Democratic candidates.

c. In the 2020 race for President, the Republican candidate won the major-party vote by 1.4 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted House Plan, the Republican candidates would have carried 70 of 120 House districts, or 20 more than Democratic candidates.

d. In the 2016 election for Governor, the Democratic candidate prevailed by 0.2 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted House Plan, the Republican candidates would have carried 70 of 120 House districts, or 20 more than Democratic candidates.

e. In the 2016 election for Insurance Commissioner, the Republican candidate prevailed among major-party voters by 0.8 percentage points. But if the votes for the Republican candidate in that election had been cast for Republican candidates under the Enacted House Plan, the Republican candidates would have carried 70 of 120 House districts, or 20 more than Democratic candidates.

116. The Enacted House Plan achieves its extreme partisan gerrymander by packing Democratic voters into a small number of House Districts and then cracking the remaining Democratic voters by splitting them across other districts, where they will be outvoted by larger populations of Republican voters.

117. The Enacted House Plan packs Democratic voters throughout the state.

118. As one example, the four-district county cluster containing New Hanover and Brunswick Counties contains a sizable number of Democratic voters. The General Assembly, however, drew the House district boundaries within the cluster to create three safe Republican districts: House Districts 17, 19, and 20. The Enacted House Plan accomplishes this result by aggregating Wilmington's most Democratic voting districts in one district—House District 18. A fairer map would distribute these voters into two districts, which would have created an additional district in New Hanover and Brunswick Counties where Democratic voters would have a fighting chance to win elections. *Infra* ¶ 173 (House Districts 17 and 18 of the Optimized House Map).

119. In Buncombe County, the House Plan packs Democrats into Districts 114 and 115 to carve out a Republican seat in District 116. District 116 is the least compact district in the Enacted House Plan. It is possible to draw the district in a more compact way that does not entrench Republican partisan advantage. *Infra* ¶ 173 (House District 116 of the Optimized House Map).

120. The General Assembly systematically drew districts to artificially pack Democratic voters into certain districts (thus "wasting" Democratic votes) and thereby create more districts favorable to Republicans elsewhere. In addition to Buncombe, Brunswick, and New Hanover Counties, the Enacted House Plan also "packs" Democrats in Cumberland County (to create House Districts 43 and 45); Guilford County (to create House Districts 59 and 62); Mecklenburg County (to create House Districts 98 and 103); Pitt County (to create House District 9); and Wake County (to create House Districts 35 and 37), all to ensure that Republicans retain a substantial statewide majority of seats even if Democratic candidates receive a substantial statewide majority of votes.

121. The General Assembly also systematically pursued Republican advantage by cracking Democratic voters elsewhere in the state. For example, the Enacted House Plan groups

Duplin and Wayne Counties into a two-district cluster. Wayne County contains a large population of Democratic voters in the city of Goldsboro and southern Wayne County. The General Assembly could have drawn one House district to keep these communities of Democratic voters together, which would have given Democratic voters the opportunity to elect candidates of their choice in one of the cluster's two House seats. *Infra* ¶ 173 (House District 10 of the Optimized House Map). Instead, the Enacted House Plan cracks Wayne County's Democratic voters between House Districts 4 and 10, creating two reliably Republican districts.

122. Onslow County is in a three-district cluster with Pender County. One of the two districts in this cluster could have been based around Jacksonville, such that the district would be competitive and would give the region's Democratic voters an opportunity to elect candidates of their choice. *Infra* ¶ 173 (House District 15 of the Optimized House Map). The General Assembly, however, instead split the Jacksonville area's Democratic voters between two districts—House Districts 14 and 15—in order to create three heavily Republican districts that prevent Onslow County's Democratic voters from electing their candidates of choice.

123. In Alamance County, the General Assembly altered the boundaries of House District 63, which under the prior map had elected a Democrat to the House. The changes make the district more favorable to Republicans, without endangering the Republican majority in surrounding House District 64. Drawing House Districts 63 and 64 such that they are more compact creates districts that more accurately reflect the preferences of Alamance County's voters—by yielding one Democratic House representative and one Republican House representative—and that increases the fairness of the House map as a whole. *Infra* ¶ 173 (House Districts 63 and 64 of the Optimized House Map).

124. The Enacted House Plan creates this Republican advantage by increasing the number of county traversals beyond what is necessary. In particular, House Districts 1 and 79 could have been reconfigured so that the cluster would have three fewer county traversals. *See infra* ¶ 173.

125. Nothing in North Carolina's political geography or state law required the General Assembly to enact a House map that effected such a severe partisan gerrymander. Under any plausible electoral scenario, Republican candidates will always win a majority in the House. The Enacted House Plan effects this result by traversing more county boundaries than necessary and by creating districts that are less compact than necessary. By contrast, Plaintiffs' Optimized House Map is fairer and less partisan, while also complying with state redistricting requirements and policies, advancing traditional districting principles, and creating more competitive districts.

iv. Entrenchment of Partisan Advantage in the Enacted Plans.

126. The Enacted Plans are highly effective in entrenching Republican partisan advantage. The Enacted Plans virtually guarantee Republicans a majority, or even a supermajority, in North Carolina's congressional delegation and state Senate and House even when voters prefer Democratic candidates statewide.

127. In every statewide general election in the last decade where the Democratic candidate won by less than seven percentage points, the Republicans carried an outright majority of the Enacted Plans' congressional, state Senate, and state House districts. That is a remarkably consistent and durable partisan skew.

128. Figures 1, 2, and 3 illustrate the unfair partisan advantage that the Enacted Plans entrench. The x-axes depict the Republican share of the major-party vote in every partisan statewide general election conducted in 2020, 2018, 2016, 2014, and 2012. The y-axes depict the

share of seats that the vote share would be expected to generate under the Enacted Congressional Plan (Figure 1), the Enacted Senate Plan (Figure 2), and the Enacted House Plan (Figure 3).

Figure 1: Vote & Seat Share in Enacted Congressional Plan

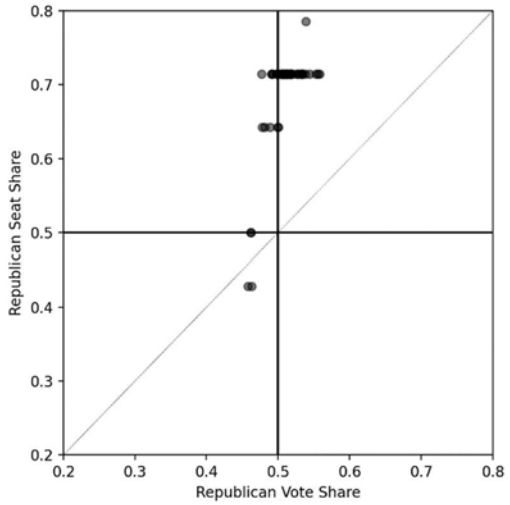


Figure 2: Vote & Seat Share in Enacted Senate Plan

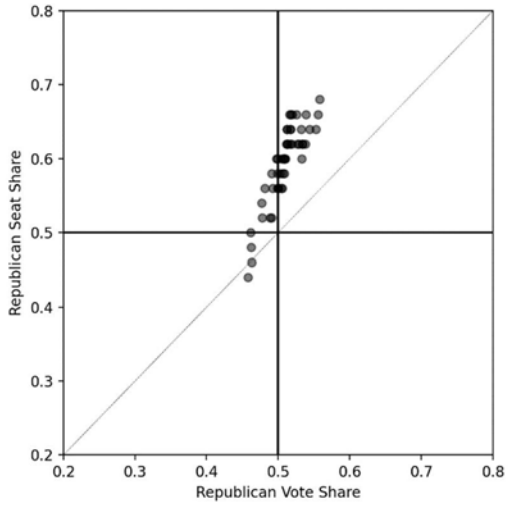
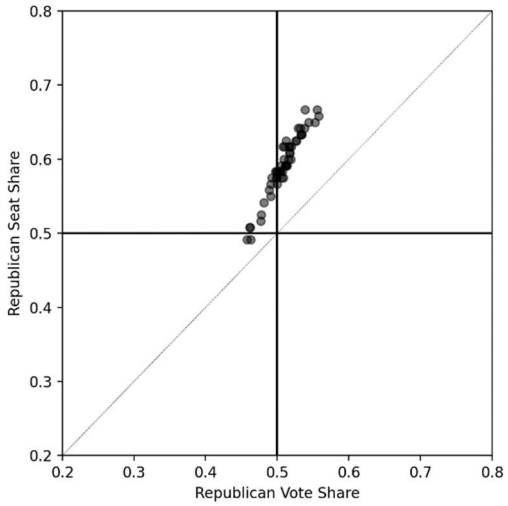


Figure 3: Vote & Seat Share in Enacted House Plan



129. As Figure 1 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Enacted Congressional Plan will likely result in Republicans winning either 64% (9 of 14) or 71% (10 of 14) of North Carolina's congressional seats. And this remains true even if the statewide vote shifts significantly in favor of Democratic candidates. When Democrats carry the statewide

vote by less than about seven percentage points (53.5% to 46.5%), they routinely continue to carry only four or five districts out of 14. The data suggest that Democrats would carry half or more of the congressional districts only if they were to prevail in the statewide vote by a margin of at least seven or eight percentage points.

130. As Figure 2 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Enacted Senate Plan will likely result in Republicans winning between 56% and 60% of North Carolina's Senate seats (28 to 30, out of 50). And this remains true even if the statewide vote shifts significantly in favor of Democratic candidates. When Democrats carry the statewide vote by less than about seven percentage points (53.5% to 46.5%), they routinely continue to carry less than half the Senate seats. The data suggests that Democrats would carry half or more of the Senate districts only if they were to prevail in the statewide vote by a margin of at least seven or eight percentage points.

131. As Figure 3 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Enacted House Plan will likely result in Republicans winning between 57% and 58% of North Carolina's House seats (68 to 70 seats, out of 120). And this remains true even if the statewide vote shifts significantly in favor of Democratic candidates. When Democrats carry the statewide vote by less than about seven percentage points (53.5% to 46.5%), they routinely continue to carry less than half the House seats. The data suggest that Democrats would carry half or more of the House districts only if they were to prevail in the statewide vote by a margin of at least seven or eight percentage points.

B. Racial Vote Dilution in the Enacted Plans

132. The General Assembly in the past has often enacted voting laws that target voters by race. *Supra* Part II. Statistics-driven analysis shows that the Enacted Plans similarly dilute

black voting strength. The Enacted Plans pack black voters in some districts while cracking them across others. And the Enacted Plans deny many black voters the opportunity to nominate and elect their candidates of their choice when, under fair maps that comply with state-law requirements and policies, black voters would have that opportunity.

133. The General Assembly, moreover, intended to target voters by race and engage in racial vote dilution. Not only do legislative map-drawers typically have exhaustive knowledge of the racial and partisan characteristics of areas across the state, but here, the Committees and the General Assembly were told about the racial problems in the Enacted Plans. In particular, they were told that the criteria and methods they adopted would unlawfully dilute the voting strength of black voters.[31] They were also told—as publicly available sources disclosed—that the specific maps they proposed would unlawfully dilute the voting strength of black voters.[32] Yet the General Assembly enacted the Enacted Plans anyway, after a rushed process whose putative prohibition on considering "[d]ata identifying the race of … voters" or "[p]artisan … election results" served only to avoid publicizing the racial and partisan data that would shine a light on just how severely the

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[31] Lucille Sherman, *NC Lawmakers Move to Bar the Use of Racial, Election Data in Drawing Election Districts*, Raleigh News & Observer (Aug. 11, 2021), https://www.newsobserver.com/news/politics-government/article253397675.html; Lucille Sherman, *NC Lawmakers Will Not Use Racial and Election Data from the Census to Draw District Maps*, Raleigh News & Observer (Aug. 13, 2021), https://www.newsobserver.com/news/politics-government/article253434564.html; Yanqi Xu, *Republican Legislators Reject Democrats' Proposal to Include Racial Data in Redistricting*, NC Policy Watch (Aug. 13, 2021), https://www.ncpolicywatch.com/2021/08/13/republican-legislators-reject-democrats-proposal-to-include-racial-data-in-redistricting.

[32] Will Doran & Brian Murphy, *North Carolina Could Have New Political Maps This Week. Here's Where Things Stand*, Raleigh News & Observer, https://www.newsobserver.com/news/politics-government/article255506961.html (Nov. 3, 2021); Gary D. Robertson, *North Carolina GOP Nears Completion of Redistricting Maps*, Associated Press (Nov. 4, 2021), https://www.newsobserver.com/news/state/north-carolina/article255525166.html; Rusty Jacobs, *The General Assembly Has Passed GOP-Drawn Maps, Setting Stage for Likely Legal Challenges*, WFAE (Nov. 4, 2021), https://www.wfae.org/politics/2021-11-04/the-general-assembly-has-passed-gop-drawn-maps-setting-stage-for-likely-legal-challenges.

proposed maps diluted black voting power and to avert more searching scrutiny of the proposed maps by the public and experts. Indeed, the General Assembly refused to even consider amendments "trying to address illegal racial or partisan gerrymanders in certain regions, including Mecklenburg, Wake, and several northeastern counties."[33]

i. The Enacted Congressional Plan

134. The Enacted Congressional Plan dilutes black voting power by dispersing, or "cracking," black voters among districts so that they cannot impact election outcomes.

135. For example, under the districting plan used for the 2020 congressional elections, one district (old Congressional District 6) preserved the cohesive black populations in Greensboro, High Point, and Winston-Salem in Guilford and Forsyth Counties and protected the ability of these voters to nominate and elect candidates of their choice. The Enacted Congressional Plan, by contrast, deprives these voters of that opportunity by splitting Guilford and Forsyth Counties' black communities into a separate district dominated by white, Republican voters.

b. First, black voters who live west of downtown Greensboro are cracked into District 7. The Enacted Congressional Plan draws District 7 to create a substantial Republican advantage. As a result, Congressional District 7 is far less compact than necessary under a fair map: It has a Polsby-Popper compactness score of only 0.20.

c. Second, black voters in downtown Greensboro and to the north are cracked into a heavily Republican District 11. To overcome the voting strength of these black voters, District 11 curves around Democratic-leaning Forsyth County before

[33] Gary D. Robertson, *North Carolina GOP Nears Completion of Redistricting Maps*, Associated Press (Nov. 4, 2021), https://www.newsobserver.com/news/state/north-carolina/article255525166.html.

stretching far west, bringing within its borders Republican-majority regions all the way to the Tennessee border. Again, District 11 is far less compact than necessary under a fair map: It has a Polsby-Popper score of just 0.21.

d. Third, black voters from the High Point area are cracked into a third heavily Republican district, District 10. To overcome the voting strength of these black voters, District 10 cuts west to skirt Democratic populations in Davidson County, then turns 90 degrees to the south to collect white Republican voters all the way to the Charlotte suburbs. Again, District 10 is less compact than necessary under a fair map: It has a Polsby-Popper score of just 0.20.

e. Fourth, black voters in Winston-Salem are cracked into District 12, which stretches west into Republican-dominated areas of Yadkin County and then heads southwest until it reaches the Gaston County border. The result, again, is that District 12 is less compact than necessary under a fair map: It has a Polsby-Popper score of 0.24.

136. The Committee chairs were warned of the Enacted Congressional Plan's racial impact. In the November 3 House Redistricting Committee hearing, Representative Pricey Harrison of Guilford County stated that the map divided the Triad region "very significantly in ways that are splitting up the large African-American populations and communities of interest," in part by extending Congressional District 11 from "downtown Greensboro all the way to the Tennessee border." The General Assembly, however, proceeded to enact a map carving up the Triad's black communities into different districts.[34]

[34] *See also* N.C. General Assembly, *House Redistricting Committee Hearing*, YouTube (Nov. 3, 2021) https://www.youtube.com/watch?v=M53S7TbN6ew ((50:30–50:50) (Representative Harrison observing, "I think that it was a problem for us not to consider, as I said, on the Senate maps and the House maps, the Voting Rights Act implications for this because I think you have a

137. The Enacted Congressional Plan also dilutes black voting strength in Durham County through cracking. The Plan combines Durham County's black population into one heavily Democratic district—Congressional District 6—that is dominated by white Democratic voters. Although Congressional District 6 is likely to vote for a Democratic candidate in the general election, black voters in Durham will not have the opportunity to nominate and elect candidates of their choice because of racially polarized voting in the Democratic primary. This result could have been avoided by combining Durham's black communities with black communities in northeastern North Carolina in Congressional District 2. *Infra* ¶ 158 (Congressional District 2 of the Optimized Congressional Map). The Enacted Congressional Plan, however, places Durham County's black voters in Congressional District 6 to limit their electoral power.

138. The Enacted Congressional Plan splits most of the black population in southeastern North Carolina across three separate districts. The black communities in Bladen, Cumberland, Duplin, Hoke, Richmond, Robeson, Sampson, and Scotland Counties are divided among Congressional Districts 3, 4, and 8. All three districts are likely to elect white-preferred Republican candidates. And because the General Assembly drew these districts to dilute black voting strength, these districts are less compact than they would be under a fair map. These districts could have been drawn to preserve black voters' opportunity to nominate and elect candidates of their choice while improving compactness. *Infra* ¶ 158 (Congressional District 4 of the Optimized Congressional Map).

139. By cracking black North Carolinians and diluting their voting power across the state, the Enacted Congressional Plan provides black voters an opportunity to nominate and elect

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serious violation here with the African American populations in Greensboro that are all divided up. I just don't understand it. I think it's a terrible congressional map.")).

their preferred candidates in only *two* of the state's 14 congressional districts—or about 14% of the districts. That is far less than black citizens' share of North Carolina's voting-age population.

140. Nothing in North Carolina's political geography or state law required the General Assembly to enact a congressional map that dilutes black voting strength. As shown in Plaintiffs' Optimized Congressional Map, it is possible to draw four, rather than two, highly compact congressional districts where black voters can nominate their preferred candidates in Democratic primaries and then elect them in the general elections. *Infra* ¶ 158.

ii. The Enacted Senate Plan

141. The Enacted Senate Plan dilutes black voting power by packing black voters into a small number of districts to reduce their voting power in other districts, and by cracking other black voters across different districts. As explained, the Committees skipped the very first requirement of the *Stephenson/Dickson* algorithm, which provides that "'legislative districts required by the VRA shall be formed' before non-VRA districts" and before identifying county clusters. *Dickson II*, 368 N.C. at 490, 781 S.E.2d at 413 (quoting *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97); *see supra* ¶ 52. But even taking the county clusters that the Duke study identified as a given (without regard to the first step of the *Stephenson/Dickson* algorithm), the Enacted Senate Plan unlawfully dilutes black voting strength.

142. Northeastern North Carolina is home to a significant, historically cohesive community of black voters. The community was one of the earliest targets of racial gerrymandering in North Carolina: After the Civil War, it was packed into the "Black Second" congressional district in order to dilute black voting strength.[35]

[35] Eric Anderson, *Race and Politics in North Carolina 1872–1901: The Black Second* 3–4, 141 (1981).

143. The Enacted Senate Plan dilutes the black community's voting strength by cracking the community across Senate Districts 1 and 2.

144. Pursuant to the Duke study's implementation of the *Stephenson*/*Dickson* algorithm, the 18 counties within Senate Districts 1 and 2 can be clustered into two possible one-district groupings.

a. First, the 18 counties can be configured such that Carteret, Chowan, Dare, Hyde, Pamlico, Pasquotank, Perquimans, and Washington Counties are grouped into one district; and Bertie, Camden, Currituck, Gates, Halifax, Hertford, Martin, Northampton, Tyrrell, and Warren Counties are grouped into a second district. Pursuant to this configuration, the first district would still favor white-preferred Republican candidates, but the second district would maintain much of northeastern North Carolina's black community in one district and preserve these voters' opportunity to nominate and elect candidates of their choice. *Infra* ¶ 165 (Senate Districts 1 and 2 of the Optimized Senate Map).

b. This configuration is preferable under state law for other reasons as well: It minimizes the number of county traversals among the 18 counties to 23 county-border crossings, consistent with the Whole County Provisions. It also yields more compact districts. The lowest Polsby-Popper compactness score for either district is 0.17.

c. The General Assembly, however, rejected this configuration. Instead, the General Assembly split northeastern North Carolina's black community into two districts in which they cannot elect candidates of their choice. And in doing so, the General Assembly unnecessarily increased county traversals and reduced compactness.

d. Under the Enacted Senate Plan, Bertie, Camden, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, Perquimans, and Tyrrell Counties are grouped into District 1; and Carteret, Chowan, Halifax, Hyde, Martin, Pamlico, Warren, and Washington Counties are grouped into District 2. This configuration increases the number of county traversals to 24. It also lowers District 2's Polsby-Popper compactness score to just 0.10. That score indicates a substantially non-compact district.

e. This configuration dilutes black voting power: With black voters divided between districts, both districts will reliably elect the white-preferred Republican candidates.

f. The General Assembly knew that adopting the Enacted Senate Plan's configuration would dilute black voting power. Senator Blue warned, both in committee and on the floor, that adopting this configuration would dilute the voting power of black voters by cracking them between two side-by-side districts, and he offered an amendment to avoid this result by using the first configuration.[36] The amendment was rejected, and the Committees and General Assembly enacted their plan to divide northeastern North Carolina's black community into two districts and deny black voters the opportunity to elect their candidates of choice.

145. The Enacted Senate Plan draws Senate District 14 to pack the large black community in Raleigh, in Wake County, while cracking black voters elsewhere.

a. Drawing compact Senate districts in Wake County would create two districts in which Wake County's black voters have the opportunity to nominate and elect

candidates of their choice, both in the Democratic primary election and in the general election. The Enacted Senate Plan eliminates one of these districts. It does so through a combination of packing and cracking.

b. Under the previous map, the old Senate District 14 provided black voters in Raleigh and eastern Wake County the opportunity to nominate and elect their candidates of choice. The Enacted Senate Plan, however, increases the proportion of Senate District 14's voters who are black by nearly ten percentage points. This packing of black voters helps push the district's Democratic vote share to more than 70%. The Enacted Senate Plan thus "wastes" these additional black votes in District 14 and then splits other black voters into Senate District 18, where black candidates will often be unable to elect candidates of their choice due to racially polarized voting in primary elections. This creates an additional district where the white-preferred candidate will prevail. Nothing in North Carolina's political geography or state law required the packing of black voters into District 14 or the cracking of voters into District 18. To the contrary, a more compact configuration would have yielded two, more compact Senate districts where Wake County's large black population could nominate and elect their candidates of choice. *Infra* ¶ 165 (Senate Districts 14 and 18 of the Optimized Senate Map).

146. The Enacted Senate Plan packs and cracks black voters in Guilford County.

a. In Guilford County, the Enacted Senate Plan again adds thousands of black voters to a district where black voters already had the opportunity to nominate and elect the candidate of their choice, to weaken black voting power in an adjoining district.

b. Under the previous map, old Senate District 28 already allowed black voters to nominate and elect their candidates of choice. The Enacted Senate Plan, however, increases the proportion of the district's voting population that is black by nearly six percentage points. This packing, in turn, cracks the rest of Guilford County's black community into Senate District 27. Although Senate District 27 is heavily Democratic, it is unlikely to nominate a black-preferred candidate due to racially polarized voting in the Democratic primary.

c. Senate District 27 could have been drawn, consistent with North Carolina law, to form a second district where Guilford County's black community would have the opportunity to nominate and elect its candidates of choice. Instead, the General Assembly drew the district to add more white voters and to deprive the black community of the opportunity to elect the candidates of its choice. *Infra* ¶ 165 (Senate Districts 27 and 28 of the Optimized Senate Map).

147. Nothing in North Carolina's political geography or state law required the General Assembly to enact a Senate map that dilutes black voting strength. As shown in Plaintiffs' Optimized Senate Map, it is possible to draw at least three additional Senate districts that comply with North Carolina law, adhere to traditional and neutral districting principles, and preserve the opportunity of North Carolina's black communities to nominate and elect their candidates of choice.

iii. The Enacted House Plan.

148. The Enacted House Plan dilutes black voting power by packing black voters into a small number of districts to reduce their voting power in other districts and by cracking other black voters across districts so that they cannot affect election outcomes. As with the Enacted Senate

Plan, the Committees skipped the first requirement of the *Stephenson*/*Dickson* algorithm. *Supra* ¶¶ 65–69. But even taking as a given the county clusters that the Duke study identified (without regard to the first step of the *Stephenson/Dickson* algorithm), the Enacted House Plan unlawfully dilutes black voting strength.

149. Wayne County is home to well-established black communities in Brogden and Goldsboro. Wayne County's two House districts can be drawn to preserve these communities within one district where black voters have an opportunity to nominate and elect candidates of their choice. *Infra* ¶ 173 (House District 10 of the Optimized House Map). Instead, the Enacted House Plan cracks Wayne County's black population into two districts (House Districts 4 and 10) where they have no opportunity to elect their candidates of choice due to opposition from white voters. The line between the two districts severs Goldsboro from Brogden just a few miles to the south.

150. Pitt County must accommodate two House districts. The Enacted House Plan draws the line between these districts to pack Greenville's largest black neighborhoods into House District 8. The Enacted House Plan also carves several largely white neighborhoods southeast of downtown Greenville out of House District 8 and places them in House District 9. This enables white voters to vote as a bloc to defeat black-preferred candidates in House District 9.

151. Cumberland County is also affected by racial vote dilution in the Enacted House Plan. The county's four districts are configured to pack black voters into House District 44. By doing so, the Enacted House Plan deprives black residents in several other parts of the county—including in downtown Fayetteville—the opportunity to nominate and elect candidates of their choice.

152. The Enacted House Plan does the same in Wake County. Wake County can yield five districts where black voters have the opportunity to nominate and elect the candidates of their choice. *Infra* ¶ 173. The Enacted House Plan concentrates black voters into House Districts 38 and then cracks other black voters by splitting them into House Districts 11, 34, and 35 in order to carve out one additional district where white voters can vote as a bloc to defeat the black-preferred candidate.

153. Nothing in North Carolina's political geography or state law required the General Assembly to enact a House map that dilutes black voting strength. As shown in Plaintiffs' Optimized House Map, it is possible to draw at least four additional House districts in Wayne, Wake, Cumberland, and Pitt Counties that comply with North Carolina law, adhere to traditional districting principles, and preserve black voters' opportunity to nominate and elect candidates of their choice. *Infra* ¶ 173.

V. Plaintiffs' Optimized Maps

154. Plaintiffs have harnessed the power of high-performance computers, and employed cutting-edge computational methods and resources, to draw alternative maps that comply with state-law requirements and policies, advance traditional and neutral districting principles, and yield more competitive districts. Indeed, using these cutting-edge tools, Plaintiffs have created maps that approach being "Pareto optimal," which means that the maps are so strong on each redistricting criterion that improving the map on any one criterion necessarily worsens it on another. This Complaint refers to these maps as the "Optimized Maps." Part A describes the Optimized Congressional Map; Part B describes the Optimized Senate Map; and Part C describes the Optimized House Map.

155. Plaintiffs offer their Optimized Maps for two purposes.

156. First, these maps show that if the General Assembly had wanted to create fair maps—ones that avoid partisan gerrymandering and racial vote dilution—it could have done so while adhering to North Carolina law and traditional and neutral districting principles. Indeed, as detailed below, Plaintiffs' Optimized Maps better implement these traditional and neutral districting principles than do the Enacted Plans. Hence, the General Assembly cannot claim that North Carolina's political geography or state law compelled the skewed results the Enacted Plans yield. In fact, in every Senate and House cluster (except the one-district clusters mandated by the *Stephenson/Dickson* algorithm), the Optimized Maps increase partisan fairness, increase black voters' electoral opportunities, reduce the number of county traversals, reduce the number of split municipalities, and/or increase compactness scores—showing that the Enacted Plans' partisan gerrymandering and racial vote dilution affected every Senate and House district (as well as every congressional district) and confirming that relief from those constitutional violations must extend statewide to every district and cluster (except, again, for the one-district clusters mandated by the *Stephenson/Dickson* algorithm).

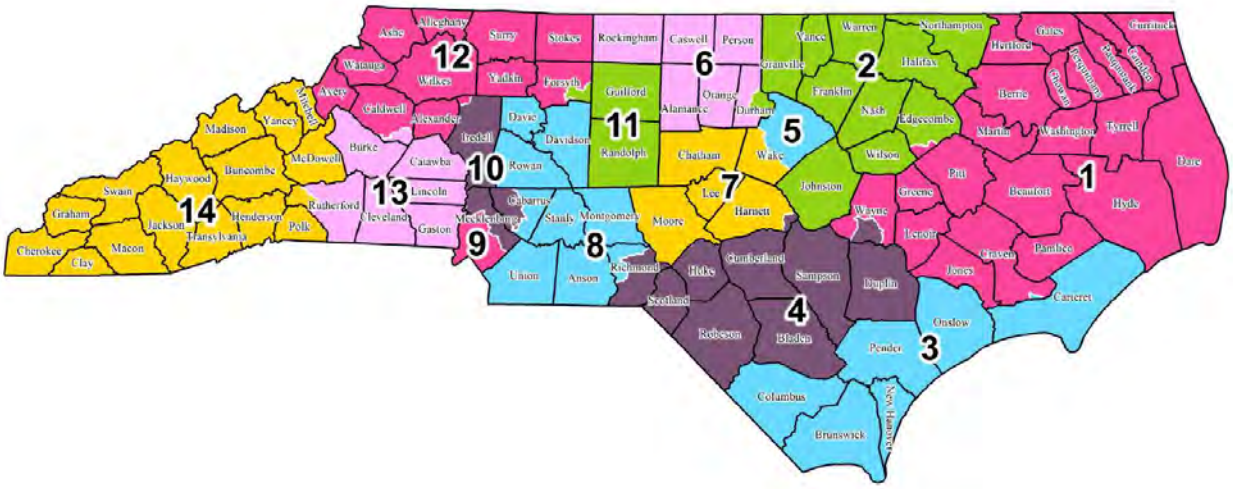
157. Second, Plaintiffs offer their Optimized Maps as remedial maps for the Court's consideration. Although North Carolina law presumptively allows the General Assembly two weeks to enact its own remedial maps, N.C. Gen. Stat. § 120-2.4(a), it is quite possible that the General Assembly will not timely enact remedial maps that fully remedy the Enacted Plans' constitutional violations. Plaintiffs respectfully submit that their Optimized Maps—by showing what is possible, consistent with state law and traditional and neutral districting principles—provide the benchmark against which other remedial plans should be measured. Most tellingly, under each of the three Optimized Maps, both political parties have a realistic opportunity to capture half or more of the districts if their candidates can garner half or more of the votes

statewide—which is precisely the key feature that all of the General Assembly's Enacted Plans lack. To the extent the General Assembly does not timely adopt remedial maps that remedy the constitutional violations in the Enacted Plans as well as the Optimized Maps would, the Court should order that the 2022 elections proceed under the Optimized Maps.

A. Plaintiffs' Optimized Congressional Map.

158. Figure 4 depicts the Optimized Congressional Map. Exhibit D provides a larger version of the Optimized Congressional Map; Exhibit G provides the detailed locational data that the Optimized Congressional Map reflects. *See* Feldman Aff., Exs. D, G.

Figure 4: Optimized Congressional Map



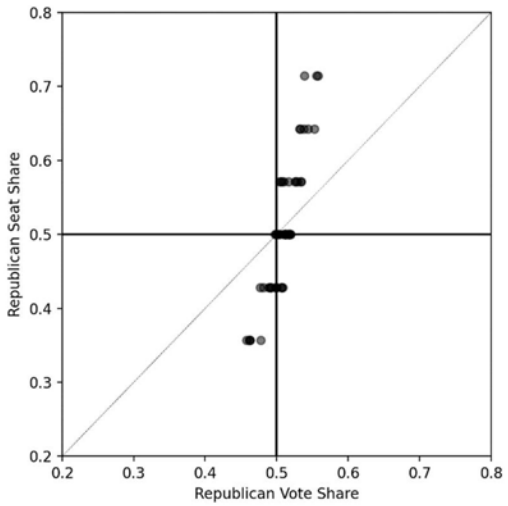
159. In the Optimized Congressional Map, neither party has an entrenched advantage. Instead, the party whose candidates earn the most votes statewide has a fair chance to win the most congressional seats. For example, as Table 1 shows, had the votes in the five close elections described above, *supra* ¶ 91, gone to congressional candidates of the same party, the outcomes under the Optimized Congressional Map would have far better reflected each party's strength in the electorate.

Table 1: Outcomes in 5 Elections in Enacted & Optimized Congressional Maps

Election (margin)	Enacted Congressional Plan	Optimized Congressional Map
2016 Governor (0.2% D win)	10 R, 4 D	7 R, 7 D
2016 Ins. Comm'r (0.8% R win)	10 R, 4 D	8 R, 6 D
2020 President (1.4% R win)	10 R, 4 D	6 R, 8 D
2020 Chief Justice (0.0% R win)	10 R, 4 D	6 R, 8 D
2020 Atty General (0.3% D win)	10 R, 4 D	6 R, 8 D

160. Figure 5 illustrates how the Optimized Congressional Map preserves equal opportunities for both political parties. The x-axis depicts the Republican share of the major-party vote in every partisan statewide general election conducted in 2020, 2018, 2016, 2014, and 2012. The y-axis depicts the share of seats that the vote share would be expected to generate under the Optimized Congressional Map.

Figure 5: Vote Share & Seat Share in Optimized Congressional Map



161. As Figure 5 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Optimized Congressional Map will likely result in a 7-to-7 split of North Carolina's congressional seats, or in one major party winning 43% (6 seats) and the other 57% (8 seats) of North Carolina's congressional seats. If the statewide vote shifts significantly in favor of

Democratic candidates, so that Democratic candidates win by five to seven points, Democrats are likely to win eight or nine (57% or 64%) of North Carolina's congressional seats. If the statewide vote shifts significantly in favor of Republican candidates, so that Republican candidates win by five to seven points, Republicans are likely to win eight or nine (57% or 64%) of North Carolina's congressional seats.

162. The Optimized Congressional Map also creates districts that are more compact than the Enacted Congressional Plan. Compactness is commonly measured in two ways. The Polsby-Popper score—which this Complaint has discussed above—measures a district's jaggedness by comparing its area to the length of its perimeter. A circle gets a perfect Polsby-Popper score of 1.0. The Reock score measures a district's elongation by comparing its area to the area of the smallest circle that could circumscribe the district. Again, a circle gets a perfect Reock score. The average Polsby-Popper score of the 14 districts in the Optimized Congressional Map is 0.38. The same figure for the Enacted Congressional Plan is 0.30. The average Reock score of the 14 districts in the Optimized Congressional Map is 0.47. The same figure for the Enacted Congressional Plan is 0.42.

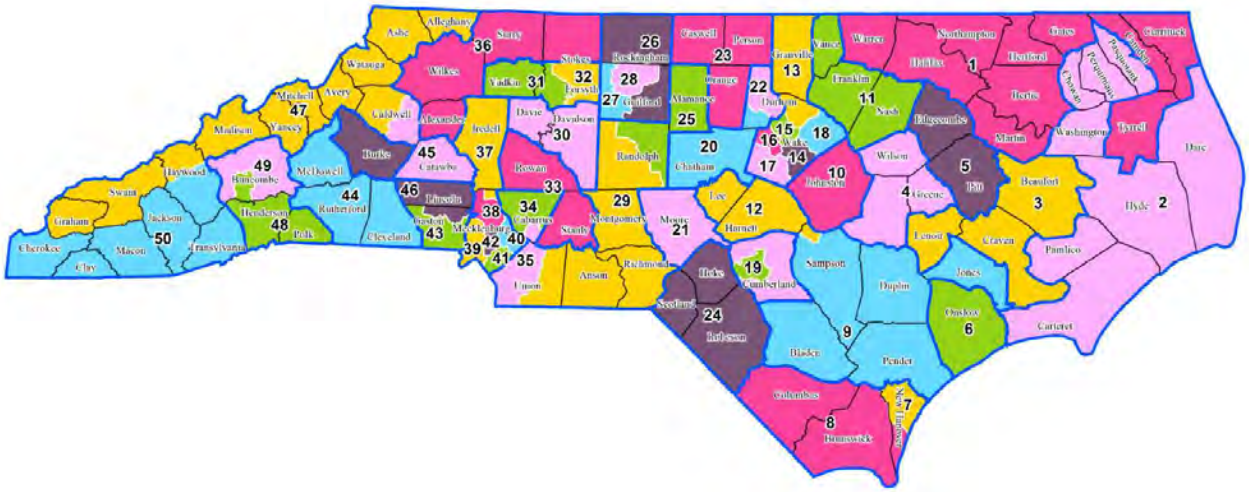
163. The Optimized Congressional Map avoids unnecessary municipal splits. The Optimized Congressional Map splits 27 municipalities into 58 parts. The Enacted Congressional Plan splits 42 municipalities into 90 parts.

164. The Optimized Congressional Map also avoids unlawfully packing and cracking black voters—and thereby depriving black voters an equal opportunity to nominate and elect their preferred candidates. In the Optimized Congressional Map, black voters would have that opportunity in four districts, compared with only two districts in the Enacted Congressional Plan.

B. Plaintiffs' Optimized Senate Map.

165. Figure 6 depicts the Optimized Senate Map. Exhibit E provides a larger version of the Optimized Senate Map; Exhibit H provides the detailed locational data that the Optimized Senate Map reflects. *See* Feldman Aff., Exs. E, H.

Figure 6: Optimized Senate Map



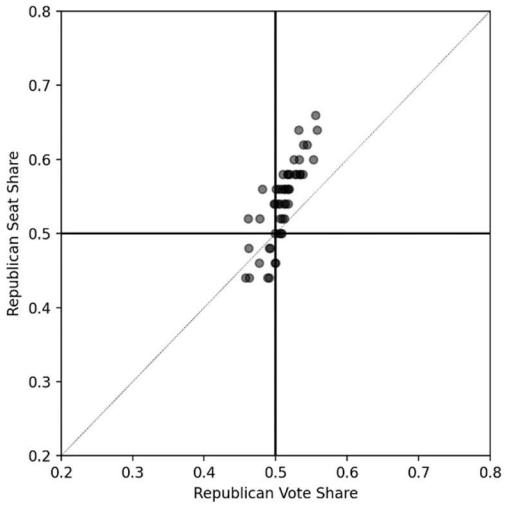
166. In the Optimized Senate Map, neither party has an entrenched advantage. Instead, the party whose candidates earn the most votes statewide has a fair chance to win the most Senate seats. For example, as Table 2 shows, had the votes in the five close elections described above, *supra* ¶ 91, gone to Senate candidates of the same party, the outcomes under the Optimized Senate map would have far better reflected each party's strength in the electorate.

Table 2: Outcomes in 5 Elections in Enacted & Optimized Senate Maps

Election (margin)	Enacted Senate Plan	Optimized Senate Map
2016 Governor (0.2% D win)	30 R, 20 D	23 R, 27 D
2016 Ins. Comm'r (0.8% R win)	28 R, 22 D	28 R, 22 D
2020 President (1.4% R win)	30 R, 20 D	25 R, 25 D
2020 Chief Justice (0.0% R win)	28 R, 22 D	23 R, 27 D
2020 Atty General (0.3% D win)	29 R, 21 D	25 R, 25 D

167. Figure 7 illustrates how the Optimized Senate Map preserves equal opportunity for both political parties. The x-axis depicts the Republican share of the major-party vote in every partisan statewide general election conducted in 2020, 2018, 2016, 2014, and 2012. The y-axis depicts the share of seats that the vote share would be expected to generate under the Optimized Senate Map.

Figure 7: Vote Share & Seat Share in Optimized Senate Map



168. As Figure 7 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Optimized Senate Map will likely result in Democrats winning between 44% (22 seats) and 54% (27 seats) of North Carolina's Senate seats. If the statewide vote shifts significantly in favor of Democratic candidates, so that Democratic candidates win by five to seven points, Democrats are likely to win between 44% (22 seats) and 56% (28 seats) of North Carolina's Senate seats. If the statewide vote shifts significantly in favor of Republican candidates, so that Republican candidates win by five to seven points, Republicans are likely to win between 58% (29 seats) and 64% (32 seats) of North Carolina's Senate seats.

169. The Optimized Senate Map also creates districts that are more compact than the Enacted Senate Plan. The average Polsby-Popper score of the 50 districts in the Optimized Senate Map is 0.37. The same figure for the districts in the Enacted Senate Plan is 0.34. The average Reock score of the 50 districts in the Optimized Senate Map is 0.43. The same figure for the Enacted Senate Plan is 0.42.

170. Similarly, the Optimized Senate Map avoids unnecessary county traversals. The Optimized Senate Map traverses county boundaries only 89 times. The Enacted Senate Plan traverses county boundaries 97 times, creating eight unnecessary county traversals.

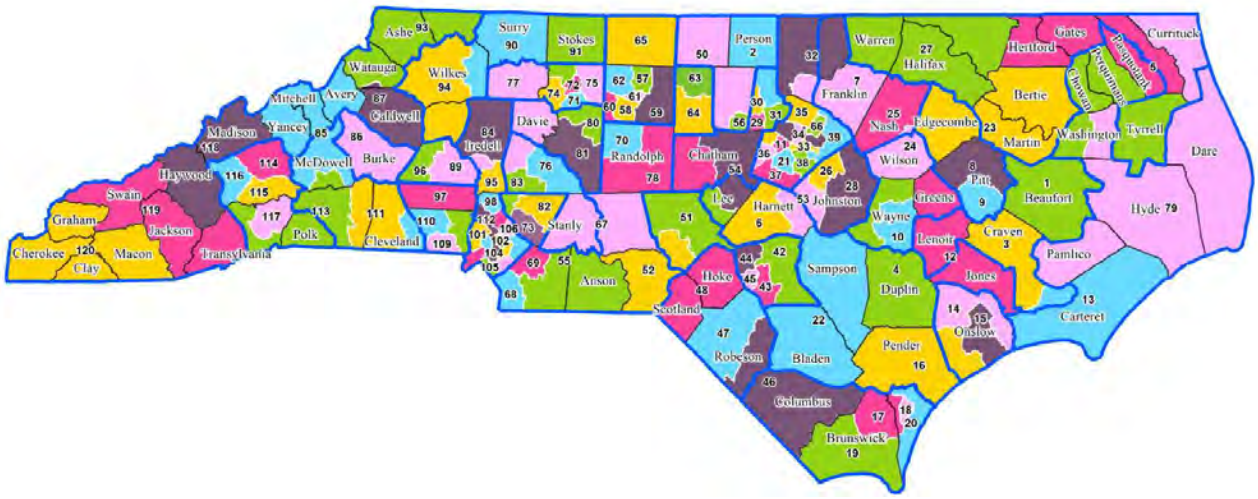
171. The Optimized Senate Map avoids unnecessary municipal splits. The Optimized Senate Map splits 51 municipalities into 125 parts. The Enacted Senate Plan splits 65 municipalities into 152 parts.

172. The Optimized Senate Map also avoids unlawfully packing and cracking black voters. In the Optimized Senate Map, black voters retain the opportunity to nominate and elect their candidates of choice in 13 districts, compared with just 10 in the Enacted Senate Plan.

C. Plaintiffs' Optimized House Map.

173. Figure 8 depicts the Optimized House Map. Exhibit F provides a larger version of the Optimized House Map; Exhibit I provides the detailed locational data that the Optimized House Map reflects. *See* Feldman Aff., Exs. F, I.

Figure 8: Optimized House Map



174. In the Optimized House Map, neither party has an entrenched advantage. Instead, the party whose candidates earn the most votes statewide has a fair chance to win the most House seats. For example, as Table 3 shows, had the votes in the five close elections described above, *supra* ¶ 91, gone to House candidates of the same party, the outcomes under the Optimized House Map would have far better reflected each party's strength in the electorate.

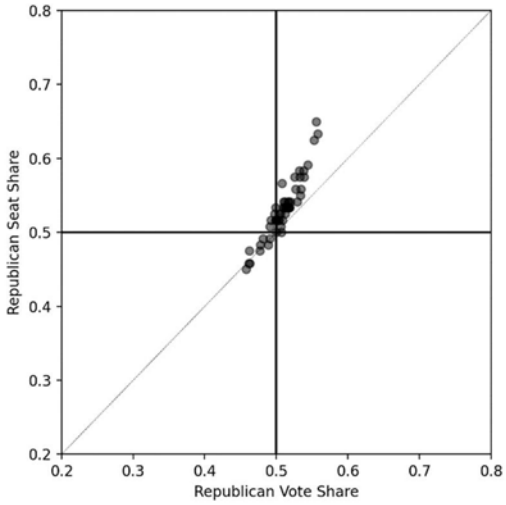
Table 3: Outcomes in 5 Elections in Enacted & Optimized House Maps

Election (margin)	Enacted House Plan	Optimized House Map
2016 Governor (0.2% D win)	70 R, 50 D	62 R, 58 D
2016 Ins. Comm'r (0.8% R win)	70 R, 50 D	63 R, 57 D
2020 President (1.4% R win)	70 R, 50 D	60 R, 60 D
2020 Chief Justice (0.0% R win)	68 R, 52 D	60 R, 60 D
2020 Atty General (0.3% D win)	69 R, 51 D	62 R, 58 D

175. Figure 9 illustrates how the Optimized House Map preserves equal opportunity for both political parties. The x-axis depicts the Republican share of the major-party vote in every partisan statewide general election conducted in 2020, 2018, 2016, 2014, and 2012. The y-axis

depicts the share of seats that the vote share would be expected to generate under the Optimized House Plan.

Figure 9: Vote Share & Seat Share in Optimized House Map



176. As Figure 9 shows, if the major-party vote is almost evenly divided, 50% to 50%, the Optimized House Map will likely result in Democrats winning between 47% (56 seats) and 50% (60 seats) of North Carolina's House seats. If the statewide vote shifts significantly in favor of Democratic candidates, so that Democratic candidates win by five to seven points, Democrats are likely to win between 52% (62 seats) and 54% (65 seats) of North Carolina's House seats. If the statewide vote shifts significantly in favor of Republican candidates, so that Republican candidates win by five to seven points, Republicans are likely to win between 54% (65 seats) and 58% (70 seats) of North Carolina's House seats.

177. The Optimized House Map also creates districts that are more compact than the Enacted House Plan. The average Polsby-Popper score of the 120 districts in the Optimized House Map is 0.41. The same figure for the districts in the Enacted House Plan is 0.35. The average Reock score of the 120 districts in the Optimized House Map is 0.47. The same figure for the Enacted House Plan is 0.44.

178. Similarly, the Optimized House Map avoids unnecessary county traversals. The Optimized House Plan traverses county boundaries only 66 times. The Enacted House Plan traverses county boundaries 69 times—creating three unnecessary county boundary traversals.

179. The Optimized House Map avoids unnecessary municipal splits. The Optimized House Map splits 71 municipalities into 201 parts. The Enacted House Plan splits 112 municipalities into 292 parts.

180. The Optimized House Map also avoids unlawfully "packing" and "cracking" black voters. In the Optimized House Map, black voters retain the opportunity to nominate and elect their candidates of choice in 36 districts (compared with 31 in the Enacted House Plan).

VI. The Court Can and Should Enter Preliminary Relief Necessary to Preserve the Rights of Millions of North Carolinian Voters.

181. North Carolina's primary election for congressional and legislative offices is currently scheduled for March 8, 2022, with second primaries set for April 26 (for North Carolina offices) or May 17, 2022 (for federal offices).[37] Any candidate seeking nomination for a congressional or legislative office currently must file a notice of candidacy between December 6 and December 17, 2021.[38]

182. The North Carolina State Board of Elections administers these elections, and its officials are among the Defendants here.

183. North Carolina is an outlier on the 2022 election calendar. Forty-eight of the 50 States have 2022 primaries scheduled in May or later. Nineteen States have scheduled 2022

[37] *Running for Office*, N.C. State Board of Elections, https://www.ncsbe.gov/candidates/running-office.

[38] *See id.*; *see also* N.C. Gen. Stat. § 163-106.2.

primaries for August or later. Only North Carolina and Texas are contemplating a March primary, and Texas's may well be postponed.

184. The General Assembly's choice to retain a March 2022 primary is particularly striking given how the COVID-19 pandemic delayed the release of the census data required for redistricting. As early as February 24, 2021, North Carolina State Board of Elections Executive Director Karen Brinson Bell advised the General Assembly that it needed to delay the congressional and legislative primaries from March 8 to May 3 and the second primaries to July 12, given that the COVID-19 pandemic was likely to delay the release of census data.[39]

185. The General Assembly, however, declined to reschedule the primaries for congressional and legislative offices despite the census delay—even as it did permit municipalities to delay municipal elections.[40]

186. Ultimately, the census data were not released until August 12, 2021. Nevertheless, the General Assembly declined to delay the congressional and legislative primaries.[41]

187. Given the General Assembly's choice to retain an outlier primary schedule, even while enacting redistricting plans that gerrymander by party and dilute voting strength by race,

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[39] *A Look Back at North Carolina's Historic 2020 Election & Looking Ahead at 2021*, N.C. State Board of Elections (Feb. 24, 2021) https://www.ncleg.gov/documentsites/committees/House2021-21/02-24-21/House%20Elections%20Committee%20Presentation%202-24-2021%20FINALv2.pdf.

[40] S.B. 722, S.L. 2021-56, 2021-2022 Sess. (N.C. 2021); Bryan Anderson, *N Carolina Elections Head: Delay '21 City Races, '22 Primary*, Associated Press (Feb. 23, 2021), https://apnews.com/article/redistricting-municipal-elections-north-carolina-elections-fdc23aca0ba9981944a944923937f46c.

[41] The General Assembly's refusal to delay the primaries persisted into the fall. Representative Zack Hawkins asked Chair Hall at an October 5 hearing whether there was any consideration begin given to moving the March 2022 primary to May 2022 to allow the Committees time to consider public comment and develop the maps; Chair Hall, however, responded that the General Assembly would not consider moving the primaries. *See* N.C. General Assembly, *House Redistricting Committee Hearing*, YouTube (Oct. 5, 2021), https://www.youtube.com/watch?v=9UsiS_6rlUA (1:49:03–1:50:30) (exchange between Representative Hawkins and Chair Hall)).

prompt preliminary relief is necessary to safeguard the voting rights of the millions of North Carolinians harmed by the Enacted Plans. North Carolinians' constitutional rights should not be held hostage to an aberrational election calendar. This Court has the authority to, and should, order the necessary relief.

188. The Court should begin by enjoining Defendants, and anyone associated with them, from preparing for, administering, or conducting any elections (including the 2022 primary and general elections) under the Enacted Congressional Plan, the Enacted Senate Plan, the Enacted House Plan, or any other congressional or legislative redistricting plan that violates the North Carolina State Constitution. *E.g.*, *Stephenson I*, 355 N.C. at 359–60, 562 S.E.2d at 382; *see* N.C. Gen. Stat. § 120-2.3. If the North Carolina State Board of Elections proceeds with the March 2022 primary election as scheduled based on the Enacted Plans, Plaintiffs will be forced to vote under maps that constitute unconstitutional partisan gerrymanders and that dilute their votes based on race.

189. The Court should further order that, to the extent that the General Assembly does not, within two weeks from the date of an order granting such relief, enact redistricting plans that remedy the violations found herein as fully as Plaintiffs' Optimized Maps, then Defendants shall prepare for, administer, and conduct the 2022 primary and general elections under the Optimized Maps. Although North Carolina law presumptively allows the General Assembly two weeks to enact its own remedial maps, N.C. Gen. Stat. § 120-2.4(a), North Carolina courts can—indeed, must—select their own maps to the extent the General Assembly fails to fully remedy constitutional violations that the courts have identified. *E.g.*, *Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398; *Stephenson II*, 357 N.C. at 304, 582 S.E.2d at 249.

190. The Court should also, to the extent it deems necessary, delay the 2022 primary elections. While Plaintiffs believe that the Court can expeditiously hold proceedings on the unlawfulness of the Enacted Plans and on the Optimized Maps, the Court may determine that a modest delay in the primaries is appropriate. One option would be to delay the primaries until May 3, 2022, as the North Carolina State Board of Elections originally recommended. That would still leave North Carolina with the Nation's second-earliest primaries (after only Texas). Because the statewide general election does not occur until November 8, 2022, that delay will not interfere with the administration of the general election. The Court should also delay and/or shorten the candidate filing period for the 2022 congressional and legislative elections for a reasonable time after the adoption of remedial maps.

191. North Carolina courts have previously granted similar relief: When necessary to avoid elections proceeding under unlawful maps, North Carolina courts have both delayed primary elections and deferred candidate filing periods.[42]

192. Particularly given the General Assembly's failure to take reasonable steps to accommodate the 2022 primary schedule to the COVID-19 pandemic, the Court should not

[42] *Harper v. Lewis*, No. 19-CVS-012667, slip op. at 18 (N.C. Super. Ct. Oct. 28, 2019) (preliminarily enjoining legislative defendants and State Board of Elections "from preparing for or administering the 2020 primary and general elections" and retaining jurisdiction "to move the primary date for the congressional elections, or all of the State's 2020 primaries, including for offices other than Congressional Representatives, should doing so become necessary to provide effective relief"); *Harper*, No. 19-CVS-012667, slip op. at 2 (N.C. Super. Ct. Nov. 20, 2019) (enjoining filing period for the 2020 congressional primary elections "until further order" in order to "allow the Court sufficient opportunity" to review the remedial maps recently enacted by the General Assembly); *see also Harper*, No. 19-CVS-012667, slip op. at 1 (N.C. Super. Ct. Dec. 2, 2019) (setting aside the injunction delaying the filing period for the congressional elections and ordering that period to begin by directing the State Board to "immediately accept for filing any notices of candidacy" from congressional candidates).

hesitate to delay the 2022 primary election and/or shorten the candidate filing period to the extent the Court deems doing so necessary.

193. Further, given the General Assembly's failure to take reasonable steps to ensure that the 2022 elections take place under lawful and fair maps, the Court should order that, if any citizen has established his or her residence in a Senate or House district modified by any remedial redistricting plan approved by this Court, then that citizen shall be qualified to serve if elected to that office, notwithstanding the requirements of Sections 6 and 7 of Article II of the North Carolina State Constitution providing that each Senator and Representative, at the time of their election, shall have resided "in the district for which he is chosen for one year immediately preceding his election." *See, e.g.*, *Covington v. North Carolina*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017) (entering similar order). Such relief is necessary to ensure that candidates from both parties are not unfairly disadvantaged by the need to implement remedial maps to remedy the constitutional defects in the Enacted Plans.

COUNT I[43]
Unlawful Partisan Gerrymandering in Violation of the North Carolina State Constitution's Free Elections Clause, Article I, Section 5

194. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

195. Article I, Section 10, of the North Carolina State Constitution provides that "[a]ll elections shall be free." This clause is known as the Free Elections Clause.

196. The North Carolina Supreme Court gives the North Carolina State Constitution "a liberal interpretation in favor of its citizens with respect to those provisions which were designed

[43] As to each Count, Plaintiffs pursue claims exclusively under the North Carolina State Constitution and state law, irrespective of protections that federal law might independently provide.

to safeguard the liberty and security of the citizens." *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Thus, the North Carolina Supreme Court has "recognized a direct action under the State Constitution against state officials for violations of rights guaranteed by the Declaration of Rights." *Id.*

197. In particular, the Free Elections Clause "guarantees that all elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People and that this is a fundamental right of North Carolina citizens, a compelling governmental interest, and a cornerstone of our democratic form of government." *Common Cause*, 2019 WL 4569584, at *2.

198. The Free Elections Clause dates to the North Carolina Declaration of Rights of 1776 and is "one of the clauses that makes the North Carolina State Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Common Cause*, 2019 WL 4569584, at *109 (citing *Corum*, 330 N.C. at 783, 413 S.E.2d at 290). "The federal Constitution contains no similar counterpart to this declaration, although several other states' constitutions do." *Id.* In other states, parallel constitutional provisions modeled on the English Bill of Rights have been broadly construed to protect the right to "an equally effective power to select the [candidate] of [one's] choice." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 793, 814 (Pa. 2018).

199. Fair districting maps implement the Free Elections Clause's guarantee by allowing each major political party—Republican and Democratic—to fairly translate its voting strength into representation. By contrast, "extreme partisan gerrymandering … is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *110. That is because such gerrymanders do "not fairly and truthfully ascertain the will of the people": "Voters

are not freely choosing their representatives. Rather, representatives are choosing their voters"—and "it is the will of the map drawers," not the voters, "that prevails." *Id.*

200. A redistricting plan violates the Free Elections Clause when it "specifically and systematically design[s] the contours of the election districts" in a way that makes it "nearly impossible for the will of the people … to be expressed through their votes." *Common Cause*, 2019 WL 4569584, at *112. When a law implicates the Free Elections Clause, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 225–26 (1875); *see Common Cause*, 2019 WL 4569584, at *112–13. Here, moreover, the General Assembly knew about and intended the partisan gerrymandering that the Enacted Plans yield.

201. The Enacted Plans constitute an extreme partisan gerrymander and thereby violate the Free Elections Clause. The Enacted Plans crack some groups of Democratic voters, while packing others. And even when the Democratic Party's candidates earn more votes, those votes will not reliably translate into more seats. Under any likely election scenario, even if Democratic candidates win a substantial majority of statewide votes, they will not win more than 4 Congressional seats (of 14), more than 23 state Senate seats (of 50), or more than 58 state House seats (of 120). Meanwhile, few seats are competitive; most seats are "safe" Republican seats, while a smaller number are "safe" Democratic seats. Map-drawers, not voters, have determined the results of elections in North Carolina for the next decade.

202. No compelling or legitimate state interest justifies the extreme partisan gerrymandering reflected in the Enacted Plans.

203. These violations of the Free Elections Clause harm NCLCV and its members in the manner described above. *Supra* ¶¶ 11–13. These violations also harm many Individual Plaintiffs,

as well as NCLCV members, in the districts and/or clusters where they reside (by packing or cracking Democratic voters and/or preventing them from electing their candidates of choice) and statewide (by unfairly preventing Democratic voters across North Carolina from translating their votes into representation in Congress and the General Assembly).

COUNT II
Unlawful Partisan Gerrymandering in Violation of the North Carolina State Constitution's Equal Protection Clause, Article I, Section 19

204. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

205. Article I, Section 19, of the North Carolina State Constitution provides in relevant part that "[n]o person shall be denied the equal protection of the laws" and that no person "shall … be subjected to discrimination by the State because of race, color, religion, or national origin." This clause is known as the Equal Protection Clause.

206. North Carolina's Equal Protection Clause affords broader protections for voting rights than the U.S. Constitution's equal protection provision. *See Common Cause*, 2019 WL 4569584, at *113 (citing *Stephenson I*, 355 N.C. at 377–81 & n.6, 562 S.E.2d at 393–96 & n.6; *Blankenship v. Bartlett*, 363 N.C. 518, 522–28, 681 S.E.2d 759, 762–66 (2009)); *Evans v. Cowan*, 122 N.C. App. 181, 184, 468 S.E.2d 575, 557–78, *aff'd*, 345 N.C. 177, 477 S.E.2d 926 (1996).

207. "The right to vote is one of the most cherished rights in our system of government." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). Hence, North Carolina's Equal Protection Clause protects "[t]he right to vote on equal terms in representative elections," *id.*, as well as the right to "substantially equal voting power." *Stephenson I*, 355 N.C. at 379, 562 S.E.2d at 394.

208. "Generally, partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of the law," because "a partisan gerrymander treats individuals

who support candidates of one political party less favorably than individuals who support candidates of another party." *Common Cause*, 2019 WL 4569584, at *113.

209. A plaintiff may prevail on a partisan-gerrymandering claim under North Carolina's Equal Protection Clause by showing that a predominant purpose of state officials in drawing district maps was to entrench their party in power and that resulting plans in fact substantially dilute the votes of voters favoring rival parties. *Common Cause*, 2019 WL 4569584, at *114. If plaintiffs make such a showing, the State must provide a "legitimate, non-partisan justification" for its map. *Id.* A "discriminatory purpose may often be inferred from the totality of the relevant facts," even when no discriminatory purpose is "express or appear[s] on the face of the statute." *Common Cause*, 2019 WL 4569584, at *114 (quotation marks omitted).

210. The Enacted Plans violate the Equal Protection Clause by intentionally entrenching in power the political party favored by the map-drawers (the Republican Party) while diluting the votes of voters favoring the rival party (the Democratic Party) and preventing voters of the rival party from translating their votes into representation in Congress and the General Assembly.

211. No compelling or legitimate nonpartisan interest justifies the extreme partisan gerrymandering in the Enacted Plans.

212. These violations of the Equal Protection Clause harm NCLCV and its members in the manner described above. *Supra* ¶¶ 11–13. These violations also harm many Individual Plaintiffs, as well as NCLCV members, in the districts and/or clusters where they reside (by packing or cracking Democratic voters and/or preventing them from electing their candidates of choice) and statewide (by unfairly preventing Democratic voters across North Carolina from translating their votes into representation in Congress and the General Assembly).

COUNT III
Unlawful Partisan Gerrymandering in Violation of the North Carolina State Constitution's Free Speech and Free Assembly Clauses, Article I, Sections 12 and 14

213. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

214. Article I, Section 12, of the North Carolina State Constitution provides in relevant part: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." This clause is known as the Free Assembly Clause.

215. Article I, Section 14, of the North Carolina State Constitution provides in relevant part: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." This clause is known as the Free Speech Clause.

216. North Carolina's Free Assembly and Free Speech Clauses afford broader protections than the federal First Amendment. *Evans*, 122 N.C. App. at 184, 468 S.E.2d at 577; *Common Cause*, 2019 WL 4569584, at *118.

217. The Free Assembly and Free Speech Clauses protect the right of voters to participate in the political process in order to further the common good, to express political views, to affiliate with or support a political party, and to cast a vote. Voting for a candidate of one's choice is core political speech protected by the Free Assembly and Free Speech Clauses. *Common Cause*, 2019 WL 4569584, at *119.

218. "The government unconstitutionally burdens speech where it renders disfavored speech *less effective*, even if it does not ban such speech outright. The government may not restrict citizens' 'ability to effectively exercise' their free speech rights." *Common Cause*, 2019 WL 4569584, at *121 (quoting *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 451, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980)).

219. A law that discriminates between individuals' speech based on its content or viewpoint without adequate justification impermissibly burdens protected expression. *State v. Bishop*, 368 N.C. 869, 875, 787 S.E.2d 814, 818–19 (2016). Discrimination may be evident from "the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message." *Common Cause*, 2019 WL 4569584, at *121 (quotation marks omitted). A districting plan "need not explicitly mention any particular viewpoint to be impermissibly discriminatory." *Id.*

220. "Just as voting is a form of protected expression, banding together with likeminded citizens" to participate in politics "is a form of protected association." *Id.* "[F]or elections to express the popular will, the right to assemble and consult for the common good must be guaranteed." *Id.* (quoting John V. Orth, *The North Carolina State Constitution* 48 (1995)).

221. The Enacted Plans violate the Free Assembly and Free Speech Clauses by diluting the voting power of voters who seek to vote for and associate with the disfavored political party and by impairing the effectiveness of political speech and expression because of the partisan content of that speech. Moreover, voters who seek to speak in favor of and associate with the disfavored political party—by working to elect that party's candidates—cannot effectively do so because of the extreme partisan gerrymanders reflected in the Enacted Plans. And voters' engagement with, and interest in, North Carolina's elections will decline—because mapmakers have effectively determined the results.

222. No compelling or legitimate state interest justifies the extreme partisan gerrymandering reflected in the Enacted Plans.

223. These violations of the Free Assembly and Free Speech Clauses harm NCLCV and its members in the manner described above. *Supra* ¶¶ 11–13. These violations also harm many

Individual Plaintiffs, as well as NCLCV members, by diluting their voting power in the districts and/or clusters where they reside (by packing or cracking Democratic voters and/or preventing them from electing their candidates of choice) and statewide (by diluting the voting power of Democratic voters with whom many Individual Plaintiffs seek to associate, by burdening many Individual Plaintiffs' ability to associate with other Democratic voters and to work to elect Democratic candidates, and by undermining many Individual Plaintiffs' efforts to engage other voters on matters of public concern in order to further the common good).

COUNT IV
Unlawful Racial Vote Dilution in Violation of the
North Carolina State Constitution's Free Elections Clause,
Article I, Section 5

224. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

225. The Free Elections Clause "guarantees that all elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People and that this is a fundamental right of North Carolina citizens, a compelling governmental interest, and a cornerstone of our democratic form of government." *Common Cause*, 2019 WL 4569584, at *2.

226. A redistricting plan violates the Free Elections Clause when it "specifically and systematically design[s] the contours of the election districts" in a way that makes it "nearly impossible for the will of the people … to be expressed through their votes." *Common Cause*, 2019 WL 4569584, at *112.

227. In particular, a redistricting plan violates the Free Elections Clause when it unnecessarily dilutes the voting power of North Carolina citizens on account of race—that is, when the plan provides voters from one racial group with less opportunity than other members of the electorate to nominate and elect representatives of their choice. *See Common Cause*, 2019 WL 4569584, at *115 ("A state may not dilute the strength of a person's vote to give weight to other

interests." (quoting *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980)).

228. When a law implicates the Free Elections Clause, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *Van Bokkelen*, 73 N.C. at 225–26; *see Common Cause*, 2019 WL 4569584, at *112–13. Here, moreover, the General Assembly knew about and intended the racial vote dilution that the Enacted Plans yield.

229. The Enacted Plans violate the Free Elections Clause by establishing district boundaries that pack and crack black voters into certain districts and make it more difficult for black voters to nominate and elect the candidates of their choice.

230. Alternative redistricting plans exist that would have avoided the racial vote dilution that the Enacted Plans yield while also complying with the other redistricting requirements set forth in the North Carolina State Constitution.

231. No compelling or legitimate state interest justifies the racial vote dilution reflected in the Enacted Plans.

232. These violations of the Free Elections Clause harm NCLCV and its members in the manner described above. *Supra* ¶¶ 11–13. These violations also harm many Individual Plaintiffs, as well as NCLCV members, in the districts and/or clusters where they reside (by packing or cracking black voters and/or preventing them from nominating and electing their candidates of choice) and statewide (by diluting the voting power of black voters across North Carolina).

COUNT V
Unlawful Racial Vote Dilution in Violation of the North Carolina State Constitution's Equal Protection Clause, Article I, Section 19

233. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

234. North Carolina's Equal Protection Clause provides that "[n]o person shall be denied the equal protection of the laws" and that no person "shall … be subjected to discrimination by the State because of race, color, religion, or national origin."

235. "The right to vote is one of the most cherished rights in our system of government," and North Carolina's Equal Protection Clause protects "[t]he right to vote on equal terms in representative elections." *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762. "The right to vote on equal terms in representative elections—a one-person, one-vote standard—is a fundamental right." *Id.*

236. A "discriminatory purpose may often be inferred from the totality of the relevant facts," even when no discriminatory purpose is "express or appear[s] on the face of the statute." *Common Cause*, 2019 WL 4569584, at *114 (quotation marks omitted). "[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose," even absent "any evidence of race-based hatred." *McCrory*, 831 F.3d at 222–23. It is not necessary to show that "any member of the General Assembly harbored racial hatred or animosity toward any minority group." *Id.* at 233.

237. The Enacted Plans violate the Equal Protection Clause because they were designed to dilute the voting power of North Carolina citizens on account of race—that is, they pack and crack voters from one racial group and provide voters from one racial group with less opportunity than other members of the electorate to nominate and elect candidates of their choice.

238. Alternative redistricting plans exist that would have avoided the racial vote dilution that the Enacted Plans yield while also complying with the other redistricting requirements set forth in the North Carolina State Constitution.

239. The General Assembly acted intentionally in diluting the voting power of black voters by race.

240. No compelling or legitimate state interest justifies the racial vote dilution reflected in the Enacted Plans.

241. These violations of the Equal Protection Clause harm NCLCV and its members in the manner described above. *Supra* ¶¶ 11–13. These violations also harm many Individual Plaintiffs, as well as NCLCV members, in the districts and/or clusters where they reside (by packing or cracking black voters and/or preventing them from nominating and electing their candidates of choice) and statewide (by diluting the voting power of black voters across North Carolina).

COUNT VI
Violation of the North Carolina State Constitution's Whole County Provisions, Article II, Sections 3(3) and 5(3), *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*

242. Plaintiffs incorporate paragraphs 1–193 as if fully set forth herein.

243. Article II, Section 3(3), of the North Carolina State Constitution provides: "No county shall be divided in the formation of a senate district." Article II, Section 5(3), of the North Carolina State Constitution provides: "No county shall be divided in the formation of a representative district." These clauses are known as the Whole County Provisions.

244. In *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*, the North Carolina Supreme Court interpreted the Whole County Provisions to harmonize them with other provisions of federal and state law and required adherence to a specific nine-step algorithm for drawing boundaries for state Senate and House districts. *Stephenson I*, 355 N.C. at 383–84, 562 S.E.2d at 397–98; *see Dickson II*, 368 N.C. at 489–91, 781 S.E.2d at 412–13. Adherence to this algorithm

is mandatory. *See Pender County v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

245. The Enacted Senate Plan and Enacted House Plan violate the mandatory *Stephenson/Dickson* algorithm and thereby violate the Whole County Provisions of the North Carolina State Constitution.

246. The *Stephenson*/*Dickson* algorithm requires the General Assembly to "'combin[e] or group[] the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard.'" *Dickson II*, 368 N.C. at 490, 781 S.E.2d at 413 (quoting *Stephenson*, 355 N.C. at 383). "'[W]ithin any such contiguous multi-county grouping, compact districts shall be formed, consistent with the [one-person, one-vote] standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping.'" *Id.* (quoting *Stephenson I*, 355 N.C. at 383–84, 562 S.E.2d at 397 (alteration in original)). "'[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.'" *Id.* (quoting *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397). The *Stephenson*/*Dickson* algorithm also requires that districts be compact. Indeed, steps four, five, seven, and nine of the nine-step algorithm consider whether districts are compact. *Id.* at 490–91, 781 S.E.2d at 413.

247. In order to dilute the voting strength of black voters, and to gerrymander in favor of the incumbent Republican Party, the Enacted Plans violate the *Stephenson*/*Dickson* algorithm, and the Whole County Provisions, by unnecessarily traversing county boundaries and by forming

districts that, because they are drawn to favor Republican interests, are less compact than they could be under a fair map.

248. These violations of the Whole County Provisions and the *Stephenson/Dickson* algorithm harm Plaintiffs by contributing to the unconstitutional partisan gerrymandering and racial vote dilution described above, which harms Plaintiffs in the manner described in Counts I–V.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants, and:

a. Declare that the Enacted Congressional Plan is unconstitutional and invalid because it violates the rights of Plaintiffs and other North Carolina voters under North Carolina's Free Elections Clause, Equal Protection Clause, Free Speech Clause, and Free Assembly Clause and that all of its districts are affected by unconstitutional partisan gerrymandering, racial vote dilution, or both.

b. Declare that the Enacted Senate Plan is unconstitutional and invalid because it violates the rights of Plaintiffs and other North Carolina voters under North Carolina's Free Elections Clause, Equal Protection Clause, Free Speech Clause, and Free Assembly Clause and that all of its districts are affected by unconstitutional partisan gerrymandering, racial vote dilution, or both.

c. Declare that the Enacted House Plan is unconstitutional and invalid because it violates the rights of Plaintiffs and other North Carolina voters under North Carolina's Free Elections Clause, Equal Protection Clause, Free Speech Clause, and Free Assembly Clause and that

all of its districts are affected by unconstitutional partisan gerrymandering, racial vote dilution, or both.

d. Declare that the Enacted Senate Plan and Enacted House Plan are unconstitutional and invalid because they violate the Whole County Provisions of the North Carolina State Constitution (Article II, Sections 3(3) & 5(3)), as interpreted in the *Stephenson*/*Dickson* cases, by unnecessarily traversing county lines and by forming districts that are less compact than they could be under a fair map.

e. Enjoin Defendants, their officers, agents, servants, employees, attorneys, successors in office, and all persons in active concert or participation with them, from preparing for, administering, or conducting any election (including the 2022 primary and general elections) under the Enacted Congressional Plan, the Enacted Senate Plan, or the Enacted House Plan, or any other congressional or legislative redistricting plan that violates the North Carolina State Constitution.

f. Order that, to the extent that the General Assembly does not, within two weeks after the date of an order from this Court, enact redistricting plans that remedy the constitutional violations found in any of the Enacted Plans as fully as would Plaintiffs' Optimized Maps, then Defendants, their officers, agents, servants, employees, attorneys, successors in office, and all persons in active concert or participation with them shall prepare for, administer, and conduct the 2022 primary and general elections under Plaintiffs' Optimized Maps.

g. Order that, to the extent that the Court determines that it would otherwise be infeasible to conduct the 2022 primary election as scheduled on March 8, 2022, the Court retains jurisdiction to—in its discretion—delay the 2022 primary election, shorten or eliminate the

two-week period described in Subparagraph (f) above, or order such other relief as the Court deems just and equitable.

h. Order Defendants, their officers, agents, servants, employees, attorneys, successors in office, and all persons in active concert or participation with them to delay or shorten the candidate-filing period for the 2022 congressional and legislative elections for such time as this Court, by further order, shall direct, and to make such other adjustments to the 2022 election calendar as the Court deems just and equitable.

i. Declare that any citizen having established his or her residence in a Senate or House district modified by any remedial redistricting plan approved by this Court, as of the closing day of the candidate filing period for the 2022 election in that district, shall be qualified to serve as Senator or Representative if elected to that office, notwithstanding the requirements of Sections 6 or 7 of Article II of the North Carolina State Constitution, which provide that each Senator and Representative, at the time of his or her election, shall have resided "in the district for which he is chosen for one year immediately preceding his election."

j. Grant Plaintiffs such other and further relief, including attorney fees and costs, as the Court deems just and equitable.

Dated: November 16, 2021

Respectfully submitted,

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Counsel for Plaintiffs

* *Pro hac vice motion forthcoming*

VERIFICATION

I, Elizabeth Redenbaugh, serve as President of the North Carolina League of Conservation Voters Inc. (NCLCV) and hereby state that my organization, NCLCV, is a Plaintiff in the above-titled action, that I have read the contents of the foregoing Verified Complaint, and that the contents therein are true and accurate as they pertain to the NCLCV and the other Plaintiffs (whose party registration, racial, and district information I have reviewed), except to those matters stated on information and belief, which I believe to be true.

Elizabeth S. Redenbaugh
Elizabeth Redenbaugh

Sworn and subscribed before me
this the 16th of November, 2021

C M. C
Notary Public

CHRISTINA M CARTER
NOTARY PUBLIC
NEW HANOVER COUNTY
STATE OF NORTH CAROLINA
MY COMMISSION EXPIRES 04-12-2023

Name: Christina M. Carter

My commission expires: April 12, 2023

21 CV 015426

FILED

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
__ CVS ____

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

AFFIDAVIT OF DR. MOON DUCHIN

I, Dr. Moon, Duchin, having been duly sworn by an officer authorized to administer oaths, depose and state as follows:

1. I am over 18 years of age, legally competent to give this Affidavit, and have personal knowledge of the facts set forth in this Affidavit.

2. All of the quantitative work described in this Affidavit was performed by myself with the support of research assistants working under my direct supervision.

Background and qualifications

3. I hold a Ph.D. and an M.S in Mathematics from the University of Chicago as well as an A.B. in Mathematics and Women's Studies from Harvard University.

4. I am a Professor of Mathematics and a Senior Fellow in the Jonathan M. Tisch College of Civic Life at Tufts University.

5. My general research areas are geometry, topology, dynamics, and applications of mathematics and computing to the study of elections and voting. My redistricting-related work has been published in venues such as the Election Law Journal, Political Analysis, Foundations of Data Science, the Notices of the American Mathematical Society, Statistics and Public Policy, the Virginia Policy Review, the Harvard Data Science Review, Foundations of Responsible Computing, and the Yale Law Journal Forum.

6. My research has had continuous grant support from the National Science Foundation since 2009, including a CAREER grant from 2013–2018. I am currently on the editorial board of the journals Advances in Mathematics and the Harvard Data Science Review. I was elected a Fellow of the American Mathematical Society in 2017 and was named a Radcliffe Fellow and a Guggenheim Fellow in 2018.

7. A current copy of my full CV is attached to this report.

8. I am compensated at the rate of $400 per hour.

Analysis of 2021 enacted redistricting plans in North Carolina

Moon Duchin
Professor of Mathematics, Tufts University
Senior Fellow, Tisch College of Civic Life

November 16, 2021

1 Introduction

On November 4, 2021, the North Carolina General Assembly enacted three districting plans: maps of 14 U.S. Congressional districts, 50 state Senate districts, and 120 state House districts. This affidavit contains a brief summary of my evaluation of the properties of these plans. My focus will be on the egregious partisan imbalance in the enacted plans, following a brief review of the traditional districting principles.

Because redistricting inevitably involves complex interactions of rules, which can create intricate tradeoffs, it will be useful to employ a direct comparison to an alternative set of plans. These demonstrative plans illustrate that it is possible to *simultaneously maintain or improve* metrics for all of the most important redistricting principles that are operative in North Carolina's constitution and state and federal law. Crucially, this shows that nothing about the state's political geography compels us to draw a plan with a massive and entrenched partisan skew.

To this end, I will be comparing the following plans: the enacted plans SL-174, SL-173, and SL-175 and a corresponding set of alternative plans labeled NCLCV-Cong, NCLCV-Sen, and NCLCV-House (proposed by plaintiffs who include the North Carolina League of Conservation Voters).

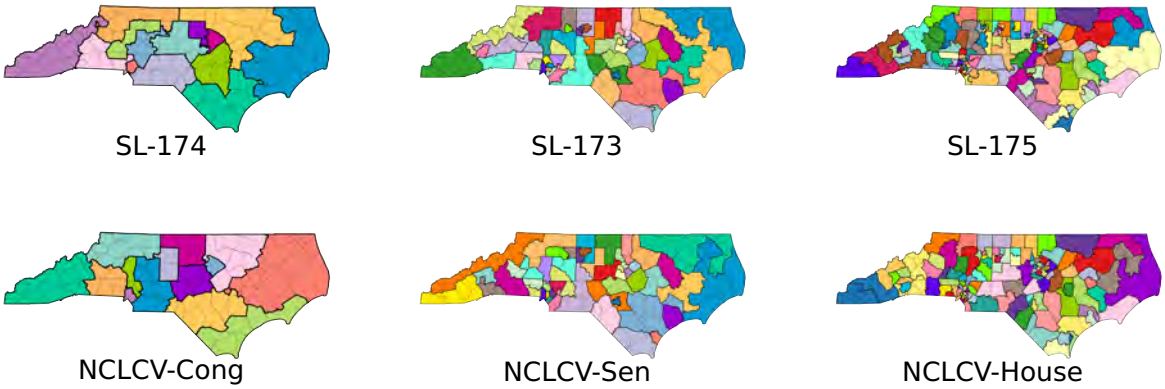

Figure 1: The six plans under discussion in this affidavit.

2 Traditional districting principles

Principles that are relevant to North Carolina redistricting include the following.

- **Population balance.** The standard interpretation of *One Person, One Vote* for Congressional districts is that districts should be fine-tuned so that their total Census population deviates by no more than one person from any district to any other.

  There is more latitude with legislative districts; they typically vary top-to-bottom by no more than 10% of ideal district size. In North Carolina, the Whole County Provisions make it very explicit that 5% deviation must be tolerated if it means preserving more counties intact.

  All six plans have acceptable population balance.

Population deviation

	Max Positive Deviation	District	Max Negative Deviation	District
SL-174	0	(eight districts)	−1	(six districts)
NCLCV-Cong	0	(eight districts)	−1	(six districts)
SL-173	10,355 (4.960%)	5	−10,434 (4.997%)	13,18
NCLCV-Sen	10,355 (4.960%)	5	−10,427 (4.994%)	15
SL-175	4250 (4.885%)	18	−4189 (4.815%)	112
NCLCV-House	4341 (4.990%)	82	−4323 (4.969%)	87

Table 1: Deviations are calculated with respect to the rounded ideal district populations of 745,671 for Congress, 208,788 for Senate, and 86,995 for House.

- **Minority electoral opportunity.** Minority groups' opportunity to elect candidates of choice is protected by both state and federal law. A detailed assessment of opportunity must hinge not on the demographics of the districts but on electoral history and an assessment of polarization patterns. That is not the focus of the current affidavit. Instead we make the brief note that it is important to avoid the conflation of *majority-minority districts* with *effective districts* for a minority group. An involved analysis of voting patterns—necessarily incorporating both primary and general elections to ensure that candidates of choice can be successfully nominated and elected—will frequently reveal that districts can be effective at demographic levels well below 50% of voting-age population or citizen voting-age population (VAP and CVAP, respectively). For instance, in [3], my co-authors and I drew an illustrative plan for Texas congressional districting in which some parts of the state had districts that were shown to reliably elect Black candidates of choice with BCVAP as low as 28.6%; by contrast, there are other parts of Texas where a 40% BCVAP district is less consistently effective. In a Louisiana case study, we found somewhat different patterns of human and political geography, producing numerous examples of Congressional-sized districts with 55% BCVAP in some parts of the state that are nonetheless marginal in terms of opportunity for Black voters to elect candidates of choice.

  In North Carolina, taking the crossover voting patterns of White, Latino, and Asian voters into account, I note that a district with BCVAP in the low to mid 30s can often be effective for Black voters—but there is no demographic shortcut to a full examination of primary and general election history.

- **Contiguity.** All six plans are contiguous; for each district, it is possible to transit from any part of the district to any other part through a sequence of census blocks that share boundary segments of positive length. As is traditional in North Carolina, contiguity through water is accepted.

- **Compactness.** The two compactness metrics most commonly appearing in litigation are the *Polsby-Popper score* and the *Reock score*. Polsby-Popper is the name given in redistricting to a metric from ancient mathematics: the isoperimetric ratio comparing a region's area to its perimeter via the formula $4\pi A/P^2$. Higher scores are considered more compact, with circles uniquely achieving the optimum score of 1. Reock is a different measurement of how much a shape differs from a circle: it is computed as the ratio of a region's area to that of its circumcircle, defined as the smallest circle in which the region can be circumscribed. From this definition, it is clear that it too is optimized at a value of 1, which is achieved only by circles.

  These scores depend on the contours of a district and have been criticized as being too dependent on map projections or on cartographic resolution [1, 2]. Recently, some mathematicians have argued for using discrete compactness scores, taking into account the units of Census geography from which the district is built. The most commonly cited discrete score for districts is the *cut edges score*, which counts how many adjacent pairs of geographical units receive different district assignments. In other words, cut edges measures the "scissors complexity" of the districting plan: how much work would have to be done to separate the districts from each other? Plans with a very intricate boundary would require many separations. This score improves on the contour-based scores by better controlling for factors like coastline and other natural boundaries, and by focusing on the units actually available to redistricters rather than treating districts like free-form Rorschach blots.

  The alternative plans are significantly more compact than the enacted plans in all three compactness metrics.

Compactness

	block cut edges (lower is better)	average Polsby-Popper (higher is better)	average Reock (higher is better)
SL-174	5194	0.303	0.381
NCLCV-Cong	4124	0.383	0.444
SL-173	9702	0.342	0.402
NCLCV-Sen	9249	0.369	0.423
SL-175	16,182	0.351	0.419
NCLCV-House	13,963	0.414	0.456

Table 2: Comparing compactness scores via one discrete and two contour-based metrics.

- **Respect for political subdivisions.** For legislative redistricting, North Carolina has one of the strongest requirements for county consideration of any state in the nation. In my understanding, courts have interpreted the Whole County Provisions as follows.

  - First, if any county is divisible into a whole number of districts that will be within ±5% of ideal population, then it must be subdivided accordingly without districts crossing into other counties.
  - Next, seek any contiguous grouping of two counties that is similarly divisible into a whole number of districts.
  - Repeat for groupings of three, and so on, until all counties are accounted for.

  A complete set of solutions is described in detail in the white paper of Mattingly et al.—though with the important caveat that the work "does not reflect... compliance with the Voting Rights Act" [4]. Absent a VRA conflict, the 2020 Decennial Census population data dictates that the North Carolina Senate plan must be decomposed into ten single-district fixed clusters and seven multi-district fixed clusters (comprising 2, 2, 3, 3, 4, 6, and 6

districts, respectively). It has four more areas in which there is a choice of groupings. In all, there are sixteen different possible clusterings for Senate, each comprising 26 county clusters. The House likewise has 11 single-district fixed clusters and 22 multi-district fixed clusters (with two to thirteen districts per cluster), together with three more areas with a choice of groupings. In all, the House has only eight acceptable clusterings, each comprising 40 county clusters. Again, it is important to note that VRA compliance may present a compelling reason to select some clusterings and reject others.

Once clusters have been formed, there are more rules about respecting county lines within clusters. The legal language is again explicit: "[T]he resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary" to meet the ±5% population standard for districts. To address this, I have counted the *county traversals* in each plan, i.e., the number of times a district crosses between adjacent counties within a grouping.

Table 3 reflects the county integrity metric that is most relevant at each level: the enacted congressional plan splits 11 counties into 25 pieces while the alternative plan splits 13, but splits no county three ways. (The enacted plans unnecessarily split three counties into three pieces.) In the legislative plans, the law specifies traversals as the fundamental integrity statistic.

The alternative plans are comparable to the enacted plans, or sometimes far superior, in each of these key metrics regarding preservation of political boundaries.

County and municipality preservation

	# county pieces
SL-174	25
NCLCV-Cong	26

	# traversals
SL-173	97
NCLCV-Sen	89
SL-175	69
NCLCV-House	66

	# municipal pieces
SL-174	90
NCLCV-Cong	58
SL-173	152
NCLCV-Sen	125
SL-175	292
NCLCV-House	201

Table 3: Comparing the plans' conformance to political boundaries.

I will briefly mention several additional redistricting principles.

- **Communities of interest.** In North Carolina, there was no sustained effort by the state or by community groups to formally collect community of interest (COI) maps, to my knowledge. Without this, it is difficult to produce a suitable metric.
- **Cores of prior districts.** In some states, there is statutory guidance to seek districting plans that preserve the cores of prior districts. In North Carolina, this is not a factor in the constitution, in statute, or in case law. In addition, attention to core preservation would be prohibitively difficult in the Senate and House because of the primacy of the Whole County Provisions, which forces major changes to the districts simply as a consequence of fresh population numbers.

- **Incumbent pairing.** In 2017, the North Carolina legislative redistricting committee listed "incumbency protection" as a goal in their itemization of principles. In 2021, this was softened to the statement that "Member residence may be considered" in the drawing of districts. I have counted the districts in each plan that contain more than one incumbent address; these are sometimes colorfully called "double-bunked" districts. For this statistic, it is not entirely clear whether a high or low number is preferable. When a plan remediates a gerrymandered predecessor, we should not be surprised if it ends up pairing numerous incumbents.

Double-bunking

	# districts pairing incumbents
SL-174	3
NCLCV-Cong	1
SL-173	6
NCLCV-Sen	9
SL-175	7
NCLCV-House	15

Table 4: For Congress and Senate, the enacted and alternative plans are comparable; at the House level, the alternative plan has more double-bunking. *Note: These numbers were calculated using the most accurate incumbent addresses that have been provided to me.*

3 Partisan fairness

3.1 Abstract partisan fairness

There are many notions of partisan fairness that can be found in the scholarly literature and in redistricting practitioner guides and software. Most of them are numerical, in the sense that they address *how a certain share of the vote should be translated to a share of the seats* in a state legislature or Congressional delegation.

The numerical notions of partisan fairness all tend to agree on one central point: an electoral climate with a 50-50 split in partisan preference should produce a roughly 50-50 representational split. North Carolina voting has displayed a partisan split staying consistently close to even between the two major parties over the last ten years, but the plans released by the General Assembly after the 2010 census were very far from realizing the ideal of converting even voting to even representation. This time, with a 14th seat added to North Carolina's apportionment, an exactly even seat outcome is possible. But the new enacted plans, like the plans from ten years ago, are not conducive to even representation.

3.2 Geography and fairness

However, some scholars have argued that this ideal (that even vote preferences should translate to even representation) ignores the crucial *political geography*—the location of votes for each party, and not just the aggregate preferences, has a major impact on redistricting outcomes. In [5], my co-authors and I gave a vivid demonstration of the impacts of political geography in Massachusetts: we showed that for a ten-year span of observed voting patterns, even though Republicans tended to get over one-third of the statewide vote, it was impossible to draw a single Congressional district with a Republican majority. That is, the geography of Massachusetts Republicans locked them out of Congressional representation. It is therefore not reasonable to charge the Massachusetts legislature with gerrymandering for having produced maps which yielded all-Democratic delegations; they could not have done otherwise.

In North Carolina, this is not the case. The alternative plans demonstrate that it is possible to produce maps that give the two major parties a roughly equal opportunity to elect their candidates. These plans are just examples among many thousands of plausible maps that convert voter preferences to far more even representation by party. In Congressional redistricting, the geography is easily conducive to a seat share squarely in line with the vote share. In Senate and House plans, even following the strict detail of the Whole County Provisions, there are likewise many alternatives giving a seat share for each party that falls, in aggregate, within a few percentage points of the vote share across a large set of elections.

The clear conclusion is that the political geography of North Carolina today does not obstruct the selection of a map that treats the parties equally and fairly.

3.3 Translating votes to seats

The enacted plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates. We can examine this effect without invoking assumptions like "uniform partisan swing" that impose counterfactual voting conditions; instead, we will use the rich observed dataset of 52 statewide party-ID general elections in North Carolina in the last ten years. 29 of these are elections for Council of State (ten offices elected three times, with the Attorney General race uncontested in 2012), three presidential races, three for U.S. Senate, and 17 judicial races since mid-decade, when those became partisan contests. See Table 6 for more detail on the election dataset.

I will sometimes focus on the smaller set of better-known "up-ballot" races: in order, the first five to appear on the ballot are the contests for President, U.S. Senator, Governor, Lieutenant Governor, and Attorney General. Together these occurred 14 times in the last Census cycle.

	Up-ballot generals (14)		**All generals (52)**	
	D vote share	D seat share	D vote share	D seat share
SL-174	.4883	.2908	.4911	.3118
NCLCV-Cong		.4796		.4931
SL-173	.4883	.3957	.4911	.4065
NCLCV-Sen		.4557		.4592
SL-175	.4883	.3994	.4911	.4080
NCLCV-House		.4649		.4684

Table 5: Comparing overall fidelity of representation to the voting preferences of the electorate. Vote shares are reported with respect to the major-party vote total.

To understand how the enacted plans create major shortfalls for Democratic representation, we will overlay the plans with voting patterns from individual elections in the past Census cycle. As we will see, the enacted Congressional plan (SL-174) shows a remarkable lack of responsiveness, giving 10–4 partisan outcomes across a wide range of recent electoral conditions, meaning that 10 Republicans and only 4 Democrats would represent North Carolina in Congress. The alternative plan (NCLCV-Cong) is far more faithful to the vote share, far more responsive, and tends to award more seats to the party with more votes.

The top of Figure 2 shows this dynamic in the three Presidential contests in the last Census cycle, with a Democratic vote share (pink box) between 48% and 50% of the major-party total each time. For a contest that is so evenly divided, we would expect a fair map to have 6, 7, or 8 out of 14 districts favoring each party. The alternative Congressional map NCLCV-Cong does just that, while the enacted plan SL-174 has just 4 out of 14 Democratic-majority districts each time (green and maroon circles). The alternative plan is far more successful at reflecting the even split of voter preferences. Below the initial explainer, simplified versions of the same type of graphic are presented for all five up-ballot races. Figure 3 compares legislative maps in the same fashion. Next, Figure 4 returns to the full 52-election dataset to give the big picture of entrenched partisan advantage in the enacted plans.

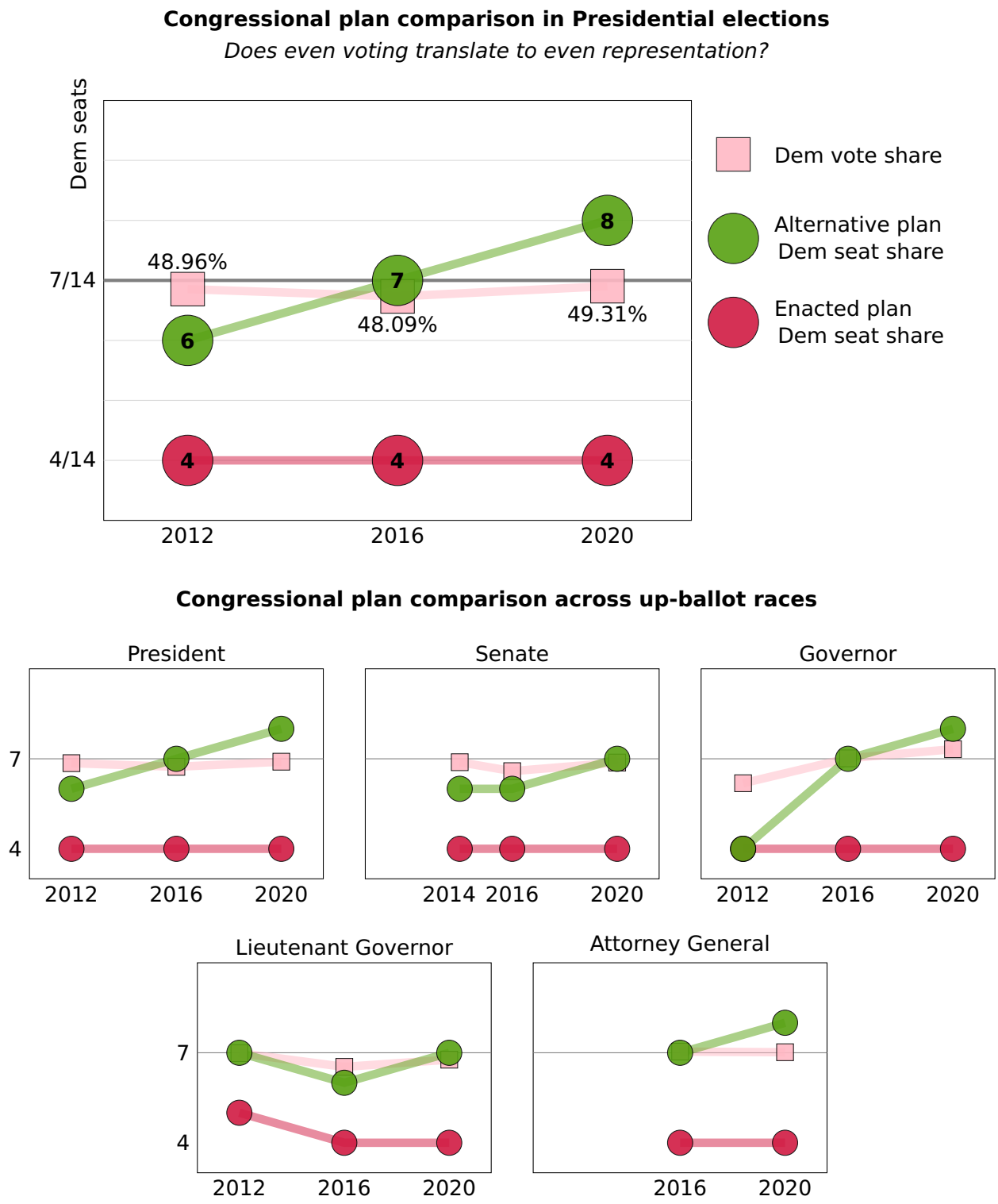

Figure 2: For up-ballot general election contests across the previous Census cycle, we can compare the seat share under the enacted Congressional plan SL-174 (maroon) and the seat share under the alternative Congressional plan NCLCV-Cong (green) to the vote share (pink) for Democratic candidates. At top is a detailed look at the presidential contests; this is repeated below, alongside the other four up-ballot offices. The 50% line is marked each time.

Figure 3: Legislative plans tested against voting patterns from up-ballot elections. The enacted plans SL-173 and SL-175 are shown in maroon. The alternative plans NCLCV-Sen and NCLCV-House, in green, have seat shares tracking much closer to the nearly even voting preferences.

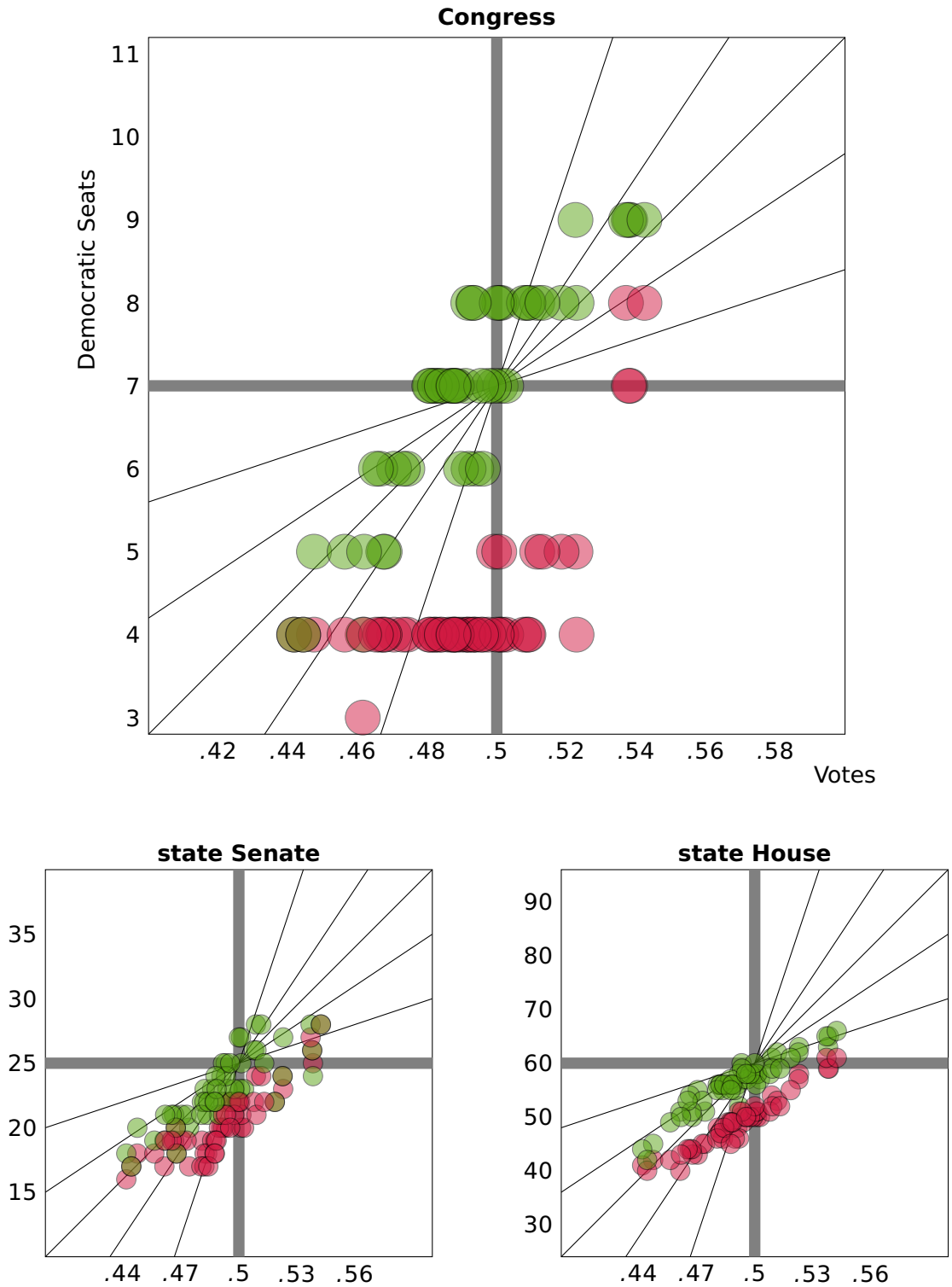

Figure 4: On a seats-vs.-votes plot, the election results for the six maps are shown for 52 general election contests in the last decade; each colored dot is plotted as the coordinate pair (vote share, seat share). The diagonals show various lines of *responsiveness* that pivot around the central point of fairness: half of the votes securing half of the seats. The Congressional comparison is at top, followed by Senate and House. The enacted plans are shown in maroon and the alternative plans in green.

3.4 Swing districts and competitive contests

Another way to understand the electoral properties of districting plans is to investigate how many districts always give the same partisan result over a suite of observed electoral conditions, and how many districts can "swing" between the parties. Figure 5 compares the six plans across the up-ballot elections. The enacted plans lock in large numbers of always-Republican seats. In the Senate and House, nearly half the seats are locked down for Republicans. In the Congressional plan, it's well *over* half. This provides another view from which the NCLCV plans provide attractive alternatives.

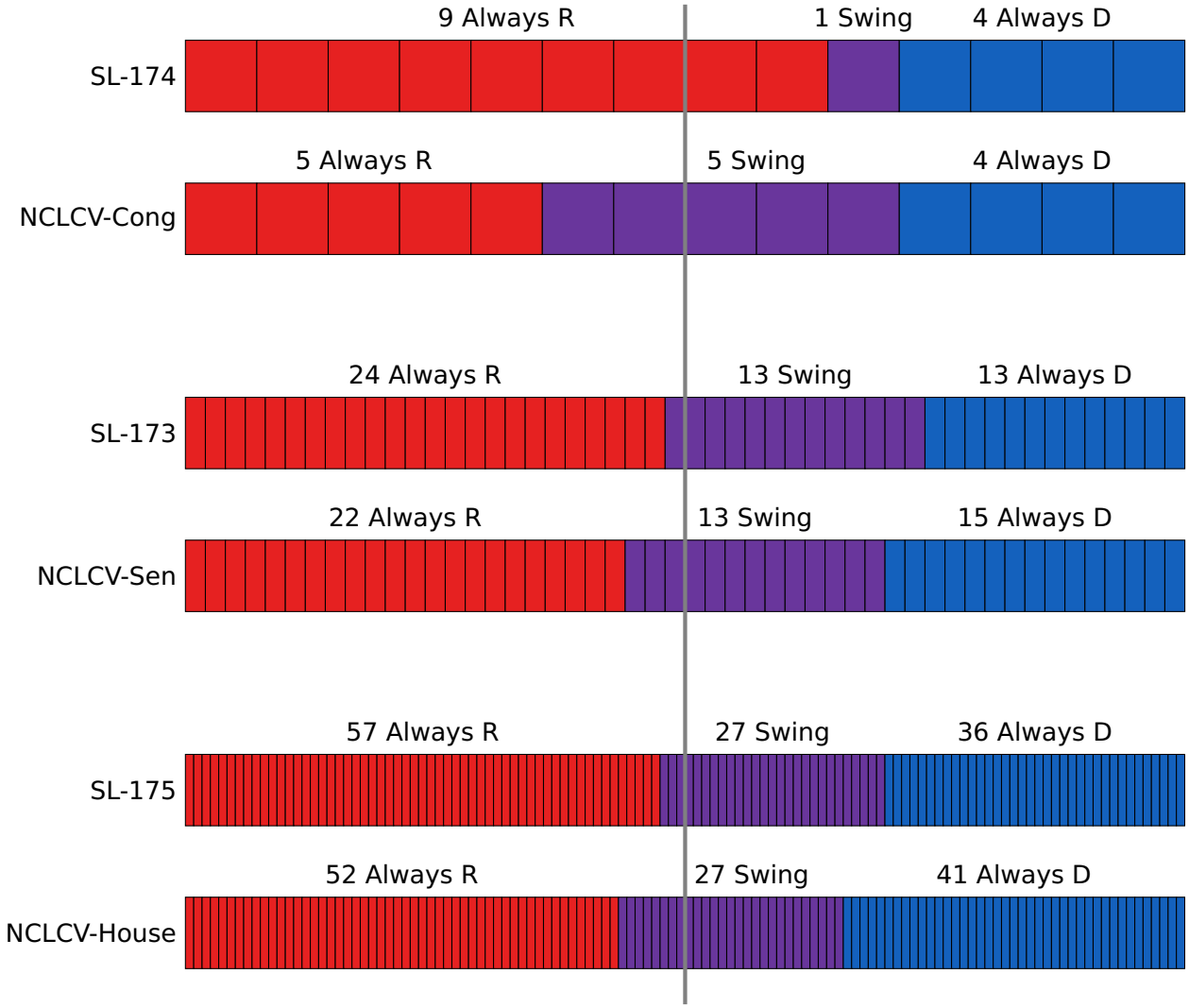

Figure 5: These visuals show the breakdown of seats that always have a Republican winner, always have a Democratic winner, or are sometimes led by each party across the 14 up-ballot elections over the previous Census cycle. The 50-50 split is marked.

One more measure of partisan fairness, frequently referenced in the public discourse, is the tendency of a districting plan to promote close or competitive contests. We close with a comparison of the enacted and alternative plans that displays the number of times across the full dataset of 52 elections that a contest had a partisan margin of closer than 10 points, 6 points, or 2 points, respectively. This can occur up to $14 \cdot 52 = 728$ times in Congressional maps, $50 \cdot 52 = 2600$ times in state Senate maps, and $120 \cdot 52 = 6240$ times in state House

maps. The figures below show horizontal rules at every 10% interval of the total number of possible competitive contests; we can see, for instance, that the alternative Congressional plan has contests within a 10-point margin more than 40% of the time.

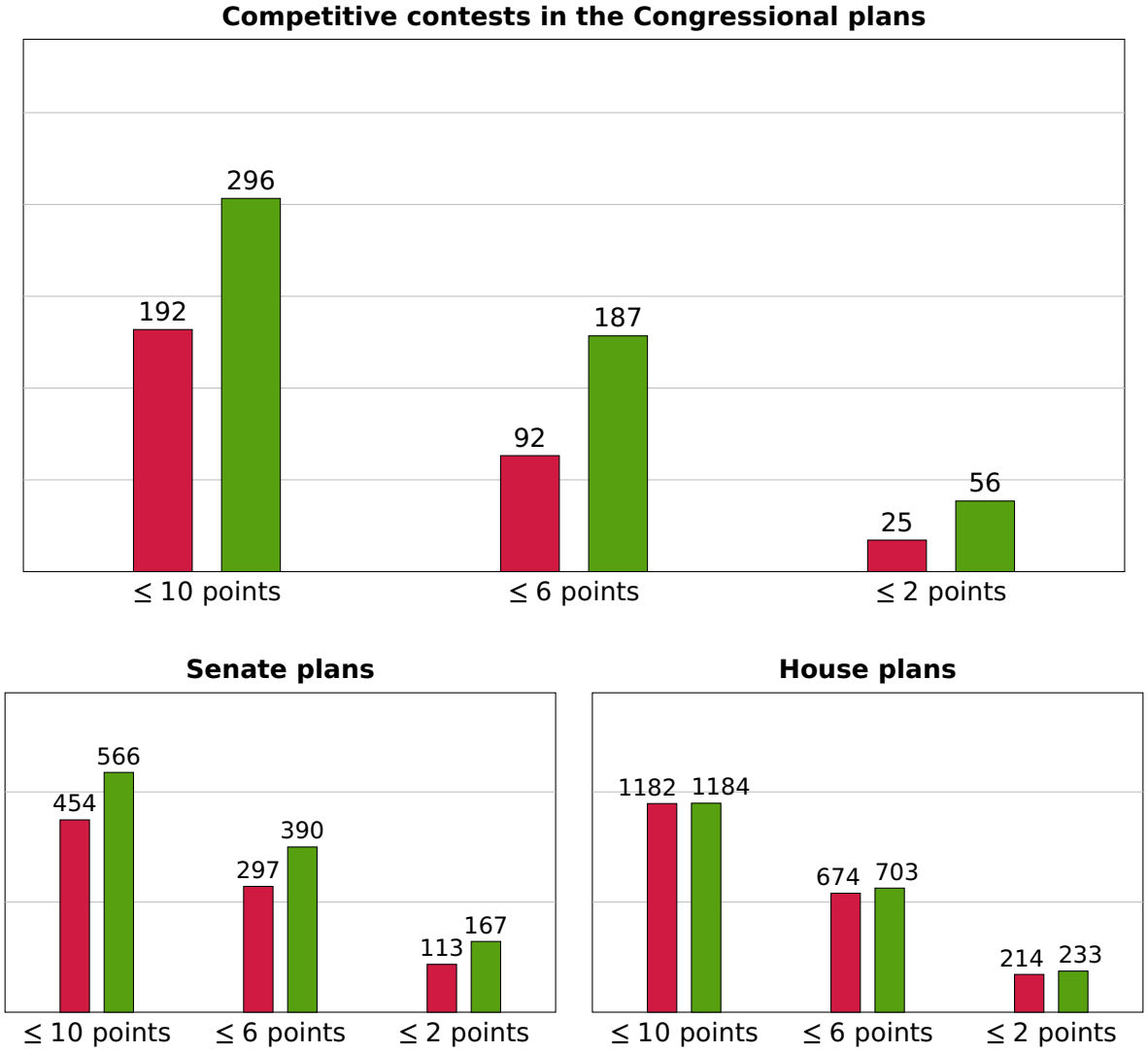

Figure 6: These bar graphs show the number of competitive contests for the enacted plans (maroon) and the alternative plans (green). In each plot, we consider increasingly restrictive definitions of "competitive" from left to right, counting districts in which the major-party vote split is closer than 45-55, 47-53, and 49-51, respectively.

4 Conclusion

North Carolina is a very "purple" state. In 38 out of the 52 contests in our dataset, the statewide partisan outcome is within a 6-point margin: 47-53 or closer. We can make a striking observation by laying our six plans over the vote patterns.

	D Vote Share	SL-174	NCLCV-Cong	SL-173	NCLCV-Sen	SL-175	NCLCV-House
GOV12	0.4418	4	4	16	18	41	44
AGC16	0.4444	4	4	17	17	40	42
LAC16	0.4475	4	5	18	20	42	45
JHU16	0.4563	4	5	18	19	42	49
AGC20	0.4615	3	4	17	19	40	51
JZA16	0.4619	4	5	19	21	43	50
JDI16	0.4653	4	6	19	21	44	53
LTG16	0.4665	4	6	19	21	44	54
LAC12	0.4674	4	5	20	20	44	51
AGC12	0.4678	4	5	18	18	43	50
SEN16	0.4705	4	6	19	21	43	55
TRS16	0.4730	4	6	19	21	45	53
TRS20	0.4743	4	6	17	20	45	51
JA620	0.4806	4	7	17	21	46	55
PRS16	0.4809	4	7	19	22	48	56
JA420	0.4822	4	7	17	22	47	56
INC20	0.4823	4	7	18	23	47	56
LTG20	0.4836	4	7	18	21	46	55
JA720	0.4842	4	7	17	22	48	56
SUP20	0.4862	4	7	19	23	49	56
JA520	0.4874	4	7	18	22	49	57
JA218	0.4876	4	7	18	22	45	55
JS420	0.4879	4	7	19	24	49	56
J1320	0.4885	4	7	19	23	49	56
PRS12	0.4897	4	6	20	21	46	55
SEN20	0.4910	4	7	20	24	48	56
LAC20	0.4918	4	8	21	25	51	58
SEN14	0.4919	4	6	20	22	46	52
PRS20	0.4932	4	8	20	25	50	60
JS220	0.4934	4	8	21	24	51	59
SUP16	0.4941	4	6	22	23	49	57
JS118	0.4955	4	7	20	25	50	58
INC16	0.4960	4	6	22	22	50	57
JST16	0.4976	4	7	21	23	50	58
LTG12	0.4992	5	7	22	22	50	58
JS120	0.5000	4	8	22	27	52	60
AUD16	0.5007	5	8	22	23	51	56
GOV16	0.5011	4	7	20	27	50	58
ATG20	0.5013	4	8	21	25	51	58
ATG16	0.5027	4	7	20	23	50	57
JA118	0.5078	4	8	22	26	51	58
AUD20	0.5088	4	8	24	28	54	61
JA318	0.5091	4	8	21	26	52	59
SOS20	0.5116	5	8	24	28	53	62
JGE16	0.5131	5	8	22	25	52	59
INC12	0.5186	5	8	22	22	55	61
SOS16	0.5226	5	9	24	24	57	62
GOV20	0.5229	4	8	23	27	58	63
AUD12	0.5371	8	9	27	28	61	65
SOS12	0.5379	7	9	26	26	59	63
TRS12	0.5383	7	9	25	24	59	65
SUP12	0.5424	8	9	28	28	61	66

Table 6: 52 general elections, sorted from lowest to highest Democratic share. Election codes have a three-character prefix and a two-digit suffix designating the office and the election year, respectively. AGC = Agriculture Commissioner; ATG = Attorney General; AUD = Auditor; GOV = Governor; INC = Insurance Commissioner; LAC = Labor Commissioner; PRS = President; SEN = Senator; SOS = Secretary of State; SUP = Superintendent of Schools; TRS -=Treasurer. The prefix JA* refers to judicial elections to the Court of Appeals (so that, for instance, JA118 is the election to the Seat 1 on the Court of Appeals in 2018), those beginning with JS* refer to elections to the state Supreme Court. All other J* prefixes refer to an election to replace a specific judge on the Court of Appeals.

The three enacted plans combine with those 38 relatively even vote patterns to produce 114 outcomes. Every single pairing of an enacted plan with a close statewide contest—a complete sweep of 114 opportunities—gives an *outright Republican majority* of seats. All three enacted plans will lock in an extreme, resilient, and unnecessary advantage for one party.

By every measure considered above that corresponds to a clear legal or good-government redistricting goal or value, the alternative plans meet or exceed the performance of the enacted plans. It is therefore demonstrated to be possible, without any cost to the redistricting principles in play, to select maps that are far fairer to the voters of North Carolina.

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https://sites.duke.edu/quantifyinggerrymandering/files/2021/08/countyClusters2020.pdf

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November, 2021.

Moon Duchin

Sworn and subscribed before me

this the 16 of November, 2021.

Notary Public

Name:

GREGORY J. AGNEW
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
June 28, 2024

My Commission Expires:

Scanned with CamScanner

Moon Duchin

moon.duchin@tufts.edu - mduchin.math.tufts.edu
Mathematics · STS · Tisch College of Civic Life | Tufts University

Education

University of Chicago MS 1999, PhD 2005
Mathematics
Advisor: Alex Eskin Dissertation: *Geodesics track random walks in Teichmüller space*

Harvard University BA 1998
Mathematics and Women's Studies

Appointments

Tufts University
Professor of Mathematics 2021—
Assistant Professor, Associate Professor 2011–2021

Director | Program in Science, Technology, & Society 2015–2021
(on leave 2018–2019)

Principal Investigator | MGGG Redistricting Lab 2017—

Senior Fellow | Tisch College of Civic Life 2017—

University of Michigan
Assistant Professor (postdoctoral) 2008–2011

University of California, Davis
NSF VIGRE Postdoctoral Fellow 2005–2008

Research Interests

Data science for civil rights, computation and governance, elections, geometry and redistricting.
Science, technology, and society, science policy, technology and law.
Random walks and Markov chains, random groups, random constructions in geometry.
Large-scale geometry, metric geometry, isoperimetric inequalities.
Geometric group theory, growth of groups, nilpotent groups, dynamics of group actions.
Geometric topology, hyperbolicity, Teichmüller theory.

Awards & Distinctions

Research Professor - MSRI Program in Analysis and Geometry of Random Spaces Spring 2022
Guggenheim Fellow 2018
Radcliffe Fellow - Evelyn Green Davis Fellowship 2018–2019
Fellow of the American Mathematical Society elected 2017
NSF C-ACCEL (PI) - Harnessing the Data Revolution: Network science of Census data 2019–2020
NSF grants (PI) - CAREER grant and three standard Topology grants 2009–2022
Professor of the Year, Tufts Math Society 2012–2013
AAUW Dissertation Fellowship 2004–2005
NSF Graduate Fellowship 1998–2002
Lawrence and Josephine Graves Prize for Excellence in Teaching (U Chicago) 2002
Robert Fletcher Rogers Prize (Harvard Mathematics) 1995–1996

Mathematics Publications & Preprints

The (homological) persistence of gerrymandering
Foundations of Data Science, online first. (with Thomas Needham and Thomas Weighill)

You can hear the shape of a billiard table: Symbolic dynamics and rigidity for flat surfaces
Commentarii Mathematici Helvetici, to appear. arXiv:1804.05690
(with Viveka Erlandsson, Christopher Leininger, and Chandrika Sadanand)

Conjugation curvature for Cayley graphs
Journal of Topology and Analysis, online first. (with Assaf Bar-Natan and Robert Kropholler)

A reversible recombination chain for graph partitions
Preprint. (with Sarah Cannon, Dana Randall, and Parker Rule)

Recombination: A family of Markov chains for redistricting
Harvard Data Science Review. Issue 3.1, Winter 2021. online. (with Daryl DeFord and Justin Solomon)

Census TopDown: The impact of differential privacy on redistricting
2nd Symposium on Foundations of Responsible Computing (FORC 2021), 5:1–5:22. online.
(with Aloni Cohen, JN Matthews, and Bhushan Suwal)

Stars at infinity in Teichmüller space
Geometriae Dedicata, Volume 213, 531–545 (2021). (with Nate Fisher) arXiv:2004.04321

Random walks and redistricting: New applications of Markov chain Monte Carlo
(with Daryl DeFord) For edited volume, Political Geometry. Under contract with Birkhäuser.

Mathematics of nested districts: The case of Alaska
Statistics and Public Policy. Vol 7, No 1 (2020), 39–51. (w/ Sophia Caldera, Daryl DeFord, Sam Gutekunst, & Cara Nix)

A computational approach to measuring vote elasticity and competitiveness
Statistics and Public Policy. Vol 7, No 1 (2020), 69–86. (with Daryl DeFord and Justin Solomon)

The Heisenberg group is pan-rational
Advances in Mathematics **346** (2019), 219–263. (with Michael Shapiro)

Random nilpotent groups I
IMRN, Vol 2018, Issue 7 (2018), 1921–1953. (with Matthew Cordes, Yen Duong, Meng-Che Ho, and Ayla Sánchez)

Hyperbolic groups
chapter in *Office Hours with a Geometric Group Theorist*, eds. M.Clay,D.Margalit, Princeton U Press (2017), 177–203.

Counting in groups: Fine asymptotic geometry
Notices of the American Mathematical Society **63**, No. 8 (2016), 871–874.

A sharper threshold for random groups at density one-half
Groups, Geometry, and Dynamics **10**, No. 3 (2016), 985–1005.
(with Katarzyna Jankiewicz, Shelby Kilmer, Samuel Lelièvre, John M. Mackay, and Ayla Sánchez)

Equations in nilpotent groups
Proceedings of the American Mathematical Society **143** (2015), 4723–4731. (with Hao Liang and Michael Shapiro)

Statistical hyperbolicity in Teichmüller space
Geometric and Functional Analysis, Volume 24, Issue 3 (2014), 748–795. (with Howard Masur and Spencer Dowdall)

Fine asymptotic geometry of the Heisenberg group
Indiana University Mathematics Journal 63 No. 3 (2014), 885–916. (with Christopher Mooney)

Pushing fillings in right-angled Artin groups
Journal of the LMS, Vol 87, Issue 3 (2013), 663–688. (with Aaron Abrams, Noel Brady, Pallavi Dani, and Robert Young)

Spheres in the curve complex
In the Tradition of Ahlfors and Bers VI, Contemp. Math. **590** (2013), 1–8. (with Howard Masur and Spencer Dowdall)

The sprawl conjecture for convex bodies
Experimental Mathematics, Volume 22, Issue 2 (2013), 113–122. (with Samuel Lelièvre and Christopher Mooney)

Filling loops at infinity in the mapping class group
Michigan Math. J., Vol 61, Issue 4 (2012), 867–874. (with Aaron Abrams, Noel Brady, Pallavi Dani, and Robert Young)

The geometry of spheres in free abelian groups
Geometriae Dedicata, Volume 161, Issue 1 (2012), 169–187. (with Samuel Lelièvre and Christopher Mooney)

Statistical hyperbolicity in groups
Algebraic and Geometric Topology **12** (2012) 1–18. (with Samuel Lelièvre and Christopher Mooney)

Length spectra and degeneration of flat metrics
Inventiones Mathematicae, Volume 182, Issue 2 (2010), 231–277. (with Christopher Leininger and Kasra Rafi)

Divergence of geodesics in Teichmüller space and the mapping class group
Geometric and Functional Analysis, Volume 19, Issue 3 (2009), 722–742. (with Kasra Rafi)

Curvature, stretchiness, and dynamics
In the Tradition of Ahlfors and Bers IV, Contemp. Math. **432** (2007), 19–30.

Geodesics track random walks in Teichmüller space
PhD Dissertation, University of Chicago 2005.

Science, Technology, Law, and Policy Publications & Preprints

Models, Race, and the Law
Yale Law Journal Forum, Vol. 130 (March 2021). Available online. (with Doug Spencer)

Computational Redistricting and the Voting Rights Act
Election Law Journal, Available online. (with Amariah Becker, Dara Gold, and Sam Hirsch)

Discrete geometry for electoral geography
Preprint. (with Bridget Eileen Tenner) arXiv:1808.05860

Implementing partisan symmetry: Problems and paradoxes
Political Analysis, to appear. (with Daryl DeFord, Natasha Dhamankar, Mackenzie McPike, Gabe Schoenbach, and Ki-Wan Sim) arXiv:2008:06930

Clustering propensity: A mathematical framework for measuring segregation
Preprint. (with Emilia Alvarez, Everett Meike, and Marshall Mueller; appendix by Tyler Piazza)

Locating the representational baseline: Republicans in Massachusetts
Election Law Journal, Volume 18, Number 4, 2019, 388–401.
(with Taissa Gladkova, Eugene Henninger-Voss, Ben Klingensmith, Heather Newman, and Hannah Wheelen)

Redistricting reform in Virginia: Districting criteria in context
Virginia Policy Review, Volume XII, Issue II, Spring 2019, 120–146. (with Daryl DeFord)

Geometry v. Gerrymandering
The Best Writing on Mathematics 2019, ed. Mircea Pitici. Princeton University Press.
reprinted from Scientific American, November 2018, 48–53.

Gerrymandering metrics: How to measure? What's the baseline?
Bulletin of the American Academy for Arts and Sciences, Vol. LXII, No. 2 (Winter 2018), 54–58.

Rebooting the mathematics of gerrymandering: How can geometry track with our political values?
The Conversation (online magazine), October 2017. (with Peter Levine)

A formula goes to court: Partisan gerrymandering and the efficiency gap
Notices of the American Mathematical Society **64** No. 9 (2017), 1020–1024. (with Mira Bernstein)

International mobility and U.S. mathematics
Notices of the American Mathematical Society **64**, No. 7 (2017), 682–683.

Graduate Advising in Mathematics

Nate Fisher (PhD 2021), Sunrose Shrestha (PhD 2020), Ayla Sánchez (PhD 2017), Kevin Buckles (PhD 2015), Mai Mansouri (MS 2014)

Outside committee member for Chris Coscia (PhD 2020), Dartmouth College

Postdoctoral Advising in Mathematics

Principal supervisor Thomas Weighill (2019–2020)

Co-supervisor Daryl DeFord (MIT 2018–2020), Rob Kropholler (2017–2020), Hao Liang (2013–2016)

Teaching

Courses Developed or Customized

Mathematics of Social Choice | sites.tufts.edu/socialchoice
Voting theory, impossibility theorems, redistricting, theory of representative democracy, metrics of fairness.

History of Mathematics | sites.tufts.edu/histmath
Social history of mathematics, organized around episodes from antiquity to present. Themes include materials and technologies of creation and dissemination, axioms, authority, credibility, and professionalization. In-depth treatment of mathematical content from numeration to cardinal arithmetic to Galois theory.

Reading Lab: Mathematical Models in Social Context | sites.tufts.edu/models
One hr/wk discussion seminar of short but close reading on topics in mathematical modeling, including history of psychometrics; algorithmic bias; philosophy of statistics; problems of model explanation and interpretation.

Geometric Literacy
Module-based graduate topics course. Modules have included: p-adic numbers, hyperbolic geometry, nilpotent geometry, Lie groups, convex geometry and analysis, the complex of curves, ergodic theory, the Gauss circle problem.

Markov Chains (graduate topics course)
Teichmüller Theory (graduate topics course)
Fuchsian Groups (graduate topics course)
Continued Fractions and Geometric Coding (undergraduate topics course)
Mathematics for Elementary School Teachers

Standard Courses

Discrete Mathematics, Calculus I-II-III, Intro to Proofs, Linear Algebra, Complex Analysis, Differential Geometry, Abstract Algebra, Graduate Real Analysis, Mathematical Modeling and Computation

Weekly Seminars Organized

- Geometric Group Theory and Topology
- Science, Technology, and Society Lunch Seminar

Selected Talks and Lectures

Distinguished Plenary Lecture — June 2021
75th Anniversary Meeting of Canadian Mathematical Society, Ottawa, Ontario — *online (COVID)*

BMC/BAMC Public Lecture — April 2021
Joint British Mathematics/Applied Mathematics Colloquium, Glasgow, Scotland — *online (COVID)*

AMS Einstein Public Lecture in Mathematics — [March 2020]
Southeastern Sectional Meeting of the AMS, Charlottesville, VA — *postponed*

Gerald and Judith Porter Public Lecture
AMS-MAA-SIAM, Joint Mathematics Meetings, San Diego, CA — January 2018

Mathematical Association of America Distinguished Lecture
MAA Carriage House, Washington, DC — October 2016

American Mathematical Society Invited Address
AMS Eastern Sectional Meeting, Brunswick, ME — September 2016

Named University Lectures

- Parsons Lecture | UNC Asheville — October 2020
- Loeb Lectures in Mathematics | Washington University in St. Louis — [March 2020]
- Math, Stats, CS, and Society | Macalester College — October 2019
- MRC Public Lecture | Stanford University — May 2019
- Freedman Memorial Colloquium | Boston University — March 2019
- Julian Clancy Frazier Colloquium Lecture | U.S. Naval Academy — January 2019
- Barnett Lecture | University of Cincinnati — October 2018
- School of Science Colloquium Series | The College of New Jersey — March 2018
- Kieval Lecture | Cornell University — February 2018
- G. Milton Wing Lectures | University of Rochester — October 2017
- Norman Johnson Lecture | Wheaton College — September 2017
- Dan E. Christie Lecture | Bowdoin College — September 2017

Math/Computer Science Department Colloquia

- Reed College — Dec 2020
- Georgetown (CS) — Sept 2020
- Santa Fe Institute — July 2020
- UC Berkeley — Sept 2018
- Brandeis-Harvard-MIT-NEU — Mar 2018
- Northwestern University — Oct 2017
- University of Illinois — Sept 2017
- University of Utah — Aug 2017
- Wesleyan — Dec 2016
- Worcester Polytechnic Inst. — Dec 2016
- Université de Neuchâtel — Jun 2016
- Brandeis University — Mar 2016
- Swarthmore College — Oct 2015
- Bowling Green — May 2015
- City College of New York — Feb 2015
- Indiana University — Nov 2014
- the Technion — Oct 2014
- Wisconsin–Madison — Sept 2014
- Stony Brook — March 2013

Minicourses

- Integer programming and combinatorial optimization (two talks) | Georgia Tech — May 2021
- Workshop in geometric topology (main speaker, three talks) | Provo, UT — June 2017
- Growth in groups (two talks) | MSRI, Berkeley, CA — August 2016
- Hyperbolicity in Teichmüller space (three talks) | Université de Grenoble — May 2016
- Counting and growth (four talks) | IAS Women's Program, Princeton — May 2016
- Nilpotent groups (three talks) | Seoul National University — October 2014
- Sub-Finsler geometry of nilpotent groups (five talks) | Galatasaray Univ., Istanbul — April 2014

Science, Technology, and Society

- The Mathematics of Accountability | Sawyer Seminar, Anthropology, Johns Hopkins — February 2020
- STS Circle | Harvard Kennedy School of Government — September 2019
- Data, Classification, and Everyday Life Symposium | Rutgers Center for Cultural Analysis — January 2019
- Science Studies Colloquium | UC San Diego — January 2019
- Arthur Miller Lecture on Science and Ethics | MIT Program in Science, Tech, and Society — November 2018

Data Science, Computer Science, Quantitative Social Science

- Data Science for Social Good Workshop (DS4SG) | Georgia Tech (virtual) — November 2020
- Privacy Tools Project Retreat | Harvard (virtual) — May 2020
- Women in Data Science Conference | Microsoft Research New England — March 2020
- Quantitative Research Methods Workshop | Yale Center for the Study of American Politics — February 2020
- Societal Concerns in Algorithms and Data Analysis | Weizmann Institute — December 2018
- Quantitative Collaborative | University of Virginia — March 2018
- Quantitative Social Science | Dartmouth College — September 2017
- Data for Black Lives Conference | MIT — November 2017

Political Science, Geography, Law, Democracy, Fairness

- The Long 19th Amendment: Women, Voting, and American Democracy | Radcliffe Institute — Nov–Dec 2020
- "The New Math" for Civil Rights | Social Justice Speaker Series, Davidson College — November 2020
- Math, Law, and Racial Fairness | Justice Speaker Series, University of South Carolina — November 2020
- Voting Rights Conference | Northeastern Public Interest Law Program — September 2020
- Political Analysis Workshop | Indiana University — November 2019
- Program in Public Law Panel | Duke Law School — October 2019
- Redistricting 2021 Seminar | University of Chicago Institute of Politics — May 2019
- Geography of Redistricting Conference Keynote | Harvard Center for Geographic Analysis — May 2019
- Political Analytics Conference | Harvard University — November 2018
- Cyber Security, Law, and Society Alliance | Boston University — September 2018
- Clough Center for the Study of Constitutional Democracy | Boston College — November 2017
- Tech/Law Colloquium Series | Cornell Tech — November 2017
- Constitution Day Lecture | Rockefeller Center for Public Policy, Dartmouth College — September 2017

Editorial Boards

Harvard Data Science Review
Associate Editor — since 2019

Advances in Mathematics
Member, Editorial Board — since 2018

Selected Professional and Public Service

Amicus Brief of Mathematicians, Law Professors, and Students 2019
principal co-authors: Guy-Uriel Charles and Moon Duchin
Supreme Court of the United States, in Rucho v. Common Cause - cited in dissent

Committee on Science Policy 2020–2023
American Mathematical Society

Program Committee 2020–2021
Symposium on Foundations of Responsible Computing

Presenter on Public Mapping, Statistical Modeling 2019, 2020
National Conference of State Legislatures

Committee on the Human Rights of Mathematicians 2016–2019
American Mathematical Society

Committee on The Future of Voting: Accessible, Reliable, Verifiable Technology 2017–2018
National Academies of Science, Engineering, and Medicine

Visiting Positions and Residential Fellowships

Visiting Professor Department of Mathematics Fall 2021
Boston College | Chestnut Hill, MA

Fellow Radcliffe Institute for Advanced Study 2018–19
Harvard University | Cambridge, MA

Member Center of Mathematical Sciences and Applications 2018–19
Harvard University | Cambridge, MA

Visitor Microsoft Research Lab 2018–19
MSR New England | Cambridge, MA

Research Member Geometric Group Theory program Fall 2016
Mathematical Sciences Research Institute | Berkeley, CA

Research Member Random Walks and Asymptotic Geometry of Groups program Spring 2014
Institut Henri Poincaré | Paris, France

Research Member Low-dimensional Topology, Geometry, and Dynamics program Fall 2013
Institute for Computational and Experimental Research in Mathematics | Providence, RI

Research Member Geometric and Analytic Aspects of Group Theory program May 2012
Institut Mittag-Leffler | Stockholm, Sweden

Research Member Quantitative Geometry program Fall 2011
Mathematical Sciences Research Institute | Berkeley, CA

Postdoctoral Fellow Teichmüller "project blanc" Spring 2009
Agence Nationale de la Recherche (Collège de France) | Paris, France

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FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2021 NOV 16 P 4:29

__ CVS ____

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

AFFIDAVIT OF GRACE LIBERMAN

I, Grace Liberman, having been duly sworn by an officer authorized to administer oaths, depose and state as follows:

1. I am a Paralegal at Jenner & Block LLP, counsel for Plaintiffs in this matter. On November 15 and 16, 2021, I watched the recordings of the public hearings conducted in the North Carolina General Assembly during the 2021 redistricting process. I submit this affidavit to attest to the legitimacy of the quotes from those hearings, referenced herein and in Plaintiffs' Verified Complaint, in support of Plaintiffs' Verified Complaint and Motion for Preliminary Injunction.
2. On October 5, 2021, the House Redistricting Committee held a hearing. A recording of that meeting was posted by the North Carolina General Assembly (NCGA) Redistricting account and can be found at https://www.youtube.com/watch?v=9UsiS_6rlUA. In the recording, Representative Hawkins and Chair Hall had the following exchange from 1:49:03 to 1:50:31.

> Rep. Hawkins: "My birthday's in May, so I was always used to having a May primary. And I understood you know why we moved it to March to play in the presidential, but this is a midterm. And so is there any appetite, potentially, to move the primary back to May in the midterm versus the way we do it in presidential years—to give us the ample amount of time to work on these maps and have the potential public comment and have the fun that we did last go round on this project?"
>
> Chair Hall: "You know, I'll answer that question by saying, you know, I haven't seen that appetite from the body, you know, I chair Redistricting and Rules, and I will, I will leave it at that, that I, you know, I don't anticipate us moving that deadline back. I think for a number of reasons, but one of the best reasons, I think, is you know folks who folks have planned for that for some time now, and I certainly understand the gentleman's argument that perhaps it gives us more time to get it done but at the same, on the same token, you have got folks who have been running for may be statewide offices, and you've got folks who have planned to run at given times, and so at this point in the game, I anticipate keeping our filing deadlines as is."

> Rep. Hawkins: "Sure, well, I would just argue, Mr. Chairman, that it gives those people—North Carolina has 10.5 million people, and it's a pretty big state—so that would give the statewide folks a lot of time to get to know people of North Carolina."

In the same hearing, as recorded in the NCGA video linked above, Representative Harrison and Chair Hall had the following exchange from 1:50:45 to 1:51:24:

> Rep. Harrison: "When you were talking about us being bound by the criteria of not using race or partisan data, so any individual can any member of the House can draw a district—will they be bound by the same criteria?"
>
> Chair Hall: "Yes, so to be clear, only a map that's drawn in this room is going to be considered by this Committee. And on these computers in this room, you essentially are bound by that criteria because there is no racial data or election data that's loaded into these computers."

In the same hearing, as recorded in the NCGA video linked above, Representative Harrison and Chair Hall had the following exchange from 1:51:44 to 1:52:39:

> Rep. Harrison: "But it seems like if you come in and you might have the material with you, it might not be actually loaded in the software, but you might actually have—I just didn't know if there was some way to enforce that, or how do you plan to do that?"
>
> Chair Hall: "Well, you know, I don't plan to search every member who comes into this committee room, nor do I want to do that. I don't want to know what some of y'all have in there, but you know, it's one of those things, where at the end of the day, the members of this committee are elected representatives. You're elected by your constituents to come up here and do a job, and you know, I'm not going to, I always try not to question people's motives when they do something, and I think this falls in that same vein, so you know, members can, are free to handle those issues as they see fit, but they will follow the criteria in the sense that that data is not in these computers, but I'm not going to, I'm not going to search their bags when they walk in."

In the same hearing, as recorded in the NCGA video linked above, Representative Harrison and Chair Hall had the following exchange from 1:53:24 to 1:54:44:

> Rep. Harrison: "I don't want to belabor the point, but in the last meeting we had, on August 18th, I, several of us had had gotten together, and advocates had

> proposed a public participation process and a transparency process. We also all received a letter from Caroline Frye (sp) on Friday that came from a large group of advocates asking for procedures to be followed by this committee. One of those is transparency related to third party participation, disclosure of that. Is there any plan to, to the extent that folks are consulting with counsel or data people, or is there any plan for disclosure of that sort of issue?"
>
> Chair Hall: "You know in the same vein of as Chair of this Committee, I'm not going to make it a practice to search people's folders or their bags when they come into this room, I'm also not going to inquire into everybody that they're talking to one way or the other. Again, we're all elected here, you've got a duty to your constituents, and you've got a decision to make as to how you want to carry out that duty. But I as the Chair of this Committee, I'm not going to police who folks are talking to."

In the same hearing, as recorded in the NCGA video linked above, Representative Reives and Chair Hall had the following exchange from 2:05:22 to 2:08:05:

> Rep. Reives: "My concern is similar to Representative Harrison's concern, because here here seems to be the problem that you run into—so let's say somebody, I mean, and I'll use somebody who would never do this, I'll use Representative Bell – So, let's say Representative Bell comes in and he's gone and he's talked to you know non-member Billy Richardson and Billy has said oh man this would be a great map for you John Bell, because you know, you put all the Democrats over here, you put all the Republicans here, and then you got all the black people here and white people here and all that stuff—obviously using racial and partisan data that we're not using. And so, then he says here's my map, so you don't have to worry about drawing it. Well, if Representative Bell, under what I'm hearing, brings that map in, sits it down in front of him at the terminal and just draws it on the computer, then he at that time has been allowed to draw a map that's been drawn on a computer, so it can be used, but it's still using racial and partisan data, and and I'm just like Representative Harrison, I'm definitely not asking anybody police anyone. But do we have anything in place that would kind of help prevent that, because to me that seems an easy get around in a legal sense, around the criteria that we've set up."
>
> Chair Hall: "Well, you know, I would initially say, that the problem that you face at the end of the day, as the gentleman already knows, and as I've said, I don't think I have the ability to police members of this committee, nor do I want to try to do that. I don't think it can effectively be done. The committees of this, the members of this committee have an elective duty to do things, I think in the right way. And we have a set of criteria that we have used in here. I know I'm not going to bring in a map and sit down and draw it. But the reality is we're elected officials and people talk to us and they call us all the time and throughout this process many members of the committee and the body are going to be told by

folks, whether in their district or in the halls out here, what they think they should do and in fact, as many of the questions today have shown us the members of this committee really want the public's comment, and you know those members of the public may say, Representative Reives, I want you to draw the district this way and I want you to do this precinct and that's up for you, that's up to you to determine how you want to handle doing that but at the end of the day, I think we've done all that we can in the sense of we're only putting the data that's allowed to be used in the computers in this room and we've got a live audio feed and a live video feed. I'm not sure that we can do a whole lot else humanly to prevent any sort of noise, so to speak, from coming in other than doing those things."

3. On November 1, 2021, the Senate Redistricting Committee held a hearing. A recording that meeting was uploaded by the NCGA Redistricting account and can be found at https://www.youtube.com/watch?v=KgSkfFY7r7g. In the recording, Senator Nickel made the following statement from 51:39 to 54:27.

> Sen. Nickel: "This is what this map is—it's a 10-11, or, sorry, a 10-4 or an 11-3 depending on that one area where G.K. [Butterfield] is. And we've been through decades of litigation on this.
>
> Ten years ago, David Lewis was the lead Republican author when we drew maps. He's now a convicted felon. At the time he said, I think electing Republicans is better than electing Democrats, so I drew this map to help foster what I think is better for the country. He then said, I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats, because I don't believe it would be possible to draw an 11-2 map.
>
> Now, Mr. Chairman, I know you are too smart to say something like that. And I'm not going to try to play gotcha here, because I know you're briefed and you're not going to say something as as as bad as that. But I do recall on the floor the last go-around when Senator Tillman was talking, I thought you were going to have a heart attack, when he started talking about how Republicans were going to draw Republican maps and he made his position very clear about that. And you know, it'd be great if we could have an honest debate about this, but this is what we see here.
>
> And you don't need to say anything, because this map speaks louder than words. You can't argue with the math. And it's right there in front of us: We've heard the public comments. We've heard the outside experts, and you can see in my diagram exactly what's going on. This is a map that robs 10.7 North Carolinians of any real choice at the ballot box. It's a map that guarantees that 10 or 11 Republicans will be elected in our 50-50 state. It doesn't pass the eye

> test. It doesn't pass the smell test. I wish I cou- I wish I could make this committee understand why this is so wrong. Why this is so wrong for every single voter in our state.
>
> And I wish we could sit down and have a private conversation about this with folks who would truly listen and truly find a compromise on this. And I wish we could have a competition at the ballot box for for the best ideas. But you can't have a competition at the ballot box for the best ideas when you decide the outcome in advance. This is not a fair fight. You know we could do 50-50 districts in every part of the state. And I think the most important question is very simple. With this whole process, you know in this committee and on the floor of the senate is how greedy are you going to be with these maps. If you pass an 11-3 or a 10-4 map, I think you can guarantee action by the state Supreme Court on state constitutional grounds. We have heard what they said the last go-around and we fixed our maps. We came back and drew an 8-5 map. Now you're taking seats to make an 11-3 map or a 10-4. Control of the next Congress will be decided by just a few seats and just by drawing the lines we can decide who is going to be in control of the next Congress. So, this is a big deal for my constituents, for all of our folks."

4. On November 3, 2021, the House Redistricting Committee held a hearing. A recording of that meeting was uploaded by the NCGA Redistricting account and can be found here: https://www.youtube.com/watch?v=M53S7TbN6ew. In the recording, Representative Harrison made the following comment from 50:30 to 50:59:

> Rep. Harrison: "I think that it was a problem for us not to consider, as I said, on the Senate maps and the House maps, the Voting Rights Act implications for this because I think you have a serious violation here with the African American populations in Greensboro that are all divided up. I - I just don't understand it. I think it's a terrible congressional map. The the partisan analysis shows this as a possible 11-3 in a 50-50 state, and that's just flat wrong."

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Signed this the 16th day of November.

Grace Liberman

District of Columbia
Signed and sworn to (or affirmed) before me on
November 2021 by Grace Liberman

Cheryl L. Olson, Notary Public

My commission expires October 31, 2024.

Seal

CHERYL L. OLSON
NOTARY PUBLIC
MY COMMISSION EXPIRES 10/31/2024
DISTRICT OF COLUMBIA