

SUPREME COURT OF NORTH CAROLINA

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

 Plaintiffs-Appellants,

 vs.

 REPRESENTATIVE DESTIN HALL, *et al.*,
 Defendants-Appellees.

From Wake County
 No. 21 CVS 015426

REBECCA HARPER, *et al.*,

 Plaintiffs-Appellants,

 vs.

 REPRESENTATIVE DESTIN HALL, *et al.*,
 Defendants-Appellees.

From Wake County
 No. 21 CVS 500085

**BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF
 PLAINTIFFS-APPELLANTS NORTH CAROLINA LEAGUE OF
 CONSERVATION VOTERS**

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REBECCA HARPER, <i>et al.</i> , <p style="text-align: center;">Plaintiffs-Appellants,</p> <p style="text-align: center;">vs.</p> REPRESENTATIVE DESTIN HALL, <i>et al.</i> , Defendants-Appellees.	<u>From Wake County</u> No. 21 CVS 500085
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**BRIEF OF AMICUS CURIAE CAMPAIGN LEGAL CENTER IN SUPPORT OF
 PLAINTIFFS-APPELLANTS NORTH CAROLINA LEAGUE OF
 CONSERVATION VOTERS²**

² No outside persons or entities wrote any part of this brief or contributed any money to support the brief’s preparation. *See* N.C. R. App. P. 28(i)(2).

INTRODUCTION

It is a “core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015) (quoting Mitchell N. Berman, *Managing Gerrymandering*, 83 *Tex. L. Rev.* 781, 781 (2005)). Partisan gerrymandering is anathema to that foundational principle of democratic governance and dramatically distorts the political process.

The North Carolina Constitution recognizes these harms. North Carolina’s Free Elections, Free Speech, Free Assembly, and Equal Protection Clauses bar partisan gerrymanders. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (Pa. 2018) (partisan gerrymandering violates the Free Elections Clause); *see also Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019). Yet in open defiance of the state constitution, the North Carolina legislature’s adopted maps entrench an extreme partisan gerrymander. This Court should reject the distortion of the political process these maps represent and invalidate the Enacted Plans.

BACKGROUND

Campaign Legal Center adopts Plaintiffs-Appellants’ statement of the case and the facts.

ARGUMENT

Partisan gerrymandering is a stain on republican government in North Carolina and around the country. North Carolina has a long tradition of forging alliances between the state’s diverse ideological perspectives. But on both sides of the aisle, politicians anointed by mapmakers rather than by voters are incentivized to reject broadly popular policies in favor of appeasing a small, ideologically extreme subset of their base. This poses an existential threat to representative government in the Tar Heel state. The North Carolina Constitution rightly precludes that result.

I. Partisan gerrymandering is antidemocratic.

Extreme partisan gerrymandering is repugnant to the basic premise of a republican form of government: that it represents the people. The radical promise of American democracy is that the government derives its power from its people—not the other way around. *See* The Declaration of Independence para. 2 (U.S. 1776); *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). To realize this ideal, the people must retain the power not only to choose their representatives, but also to hold those representatives accountable to the popular will. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969). Partisan gerrymandering has no place in such a system.

A partisan gerrymander occurs when one party intentionally neutralizes the effectiveness of the other party’s vote through “‘cracking’ (splitting a party’s supporters between districts so they fall shy of a majority in each one) and ‘packing’ (stuffing remaining supporters in a small number of districts that they win handily).” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851 (2015). Using increasingly sophisticated map-drawing tools and granular datasets, partisan map drawers can effectively predetermine electoral results across a state. The result is elections that reflect the will of the map drawer, not the will of the people.

Federal courts have consistently recognized that “[P]artisan gerrymanders . . . [are incompatible] with democratic principles.” *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 791 (2015) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292, (2004) (plurality opinion); *id.*, at 316 (Kennedy, J., concurring)). And state supreme courts across the country have agreed. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (Pa. 2018);

League of Women Voters of Ohio v. Ohio Redistricting Comm'n, 2022-Ohio-65, 2022 WL 110261 (Ohio Jan. 12, 2022); *Adams v. DeWine*, 2022-Ohio-89, 2022 WL 129092 (Ohio Jan. 14, 2022).

These courts have rightly focused on how gerrymandering distorts the relationship between a party's share of statewide votes and its share of statewide seats. When one party cements an asymmetrical advantage in translating votes to seats—for example, as in North Carolina where the Republican legislature's gerrymanders permit Republicans, but not Democrats, to win 10 of the state's 13 congressional seats with 50% of the vote—the subversion of democratic governance is self-evident.

But recent redistricting cycles—and particularly this one—have illustrated that partisan asymmetry is far from the only harm partisan gerrymandering inflicts on democratic governance. Using sophisticated software programs, partisan map drawers are now focusing not only on maximizing their statewide partisan advantage, but also on securing as many safe seats as possible. The current redistricting cycle has been characterized by “a rise in the number of hyper-partisan seats at the expense of competitive ones. So far in completed states, the number of single-digit Biden and Trump seats has declined from 62 to 46 (a 26 percent drop).” David Wasserman, *2022 House Overview: Still a GOP Advantage, but Redistricting Looks Like a Wash*, Cook Pol. Report with Amy Walter, (Jan. 4, 2022), <https://www.cookpolitical.com/analysis/house/house-overview/2022-house-overview-still-gop-advantage-redistricting-looks-wash>.

Just as asymmetric statewide maps subvert democratic values by preventing voters of one political party from translating votes into seats, uncompetitive districts undermine the ability of the median voters within a district to translate their votes into effective representation. In general, political parties favor running more ideologically extreme candidates. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). But competitive

elections temper that instinct by forcing party leadership to recognize that the candidate will have to win median voters to succeed in the election. *Id.* at 628. The more competitive the district, the more likely the candidate will be to represent the median voter—and the political “community as a whole.” *Id.*

The Enacted Plans are both asymmetric and anti-competitive, subverting basic democratic values. Under the Enacted Congressional Plan, if the major-party vote is divided, 50% to 50%, Republicans will win either 64% (9 of 14) or 71% (10 of 14) of North Carolina’s congressional seats. Compl. at 50-51 ¶ 129. When Democrats carry the statewide vote by less than 7% they will win only 4 or 5 of the 14 districts. *Id.* Under the Enacted Senate Plan, if the major-party vote is evenly divided, Republicans will win between 56% and 60% of North Carolina’s Senate seats (28 to 30, out of 50). Compl. at 51 ¶ 130. When Democrats carry the statewide vote by less than 7%, they will win less than half the Senate seats. *Id.* Under the Enacted House Plan, if the major-party vote is evenly divided, Republicans will win between 57% and 58% of North Carolina’s House seats (68 to 70 seats, out of 120). *Id.* at ¶ 131. When Democrats carry the statewide vote by less than 7%, they will win less than half the House seats. *Id.*

To compound the asymmetric problem, the Enacted Plans are also highly anti-competitive. The Enacted Congressional Plan creates 9 always-Republican seats, 4 always-Democratic seats, and 1 swing seat. Aff. of Dr. Moon Duchin at 12. The Enacted Senate Plan creates 24 always-Republican seats, 13 always-Democratic seats, and 13 swing seats. *Id.* The Enacted House Plan creates 57 always-Republican seats, 36 always-Democratic seats, and 27 swing seats. *Id.*

If these maps stand, North Carolina will cast away its “government . . . founded on the will of the people” and replace it with one subverted to the will of its politicians for years to come. *People ex rel. Van Bokkelen*, 73 N.C. at 220.

II. Modern technology is enabling partisan gerrymandering at an unprecedented scale.

Gerrymandering has, undeniably, played a role in American politics since the founding of the republic. See Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26-28 (1907). But “the scale and skew of today’s gerrymandering are unprecedented in modern history.” Stephanopolous, *supra*, at 876. Modern technology permits partisan map-drawers to engineer durable partisan advantage and competitive insulation at an unprecedented scale. So if this case presents novel questions to the Court, it is only because it involves a problem of novel magnitude.

On one level, gerrymandering is old hat in North Carolina. Its roots are overtly racial. Democrats seized power during Reconstruction by nullifying Black voting power through racial gerrymandering. See Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* 3–4 (1981). They then entrenched that power by coupling racial gerrymanders with voter suppression laws and violence. See J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 48 (1974); John V. Orth, *North Carolina Constitutional History, 1759, 1785* (1992). Through these combined tactics, Democrats retained relatively impenetrable power until the 1970’s. See *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff’d*, 506 U.S. 801 (1992). And they maintained control of the state legislature—which has ultimate authority over redistricting in the absence of a gubernatorial veto—until 2010.³

³ *Party Control of North Carolina State Government*, Ballotpedia, (last visited, Jan. 19, 2022), https://ballotpedia.org/Party_control_of_North_Carolina_state_government; see Orth, *supra*, at 1764. Democrats did briefly lose power in 1894 but regained it in 1898. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina’s Redemption Revisited 1870-1905 and 2011-2013*, 33 *Law & Ineq.* 84–86 (2015).

But even in a state all too familiar with the ills of gerrymandering, the last decade remains unprecedented. In the wake of federal courts' policing racial gerrymanders under the Voting Rights Act, *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the Equal Protection Clause of the Fourteenth Amendment, *Shaw v. Reno*, 509 U.S. 630 (1993), map drawers began justifying gerrymanders on partisan grounds, a basis for subverting legitimate redistricting criteria that the Supreme Court has deputized states to police, see *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Recognizing this gap in federal constitutional enforcement, and capitalizing on new technology, map makers now gerrymander at a previously unachievable scale.

Only recently did software replace scrap paper as the redistricting tool of choice. David Daley, *Ratf***ked: The True Story Behind the Secret Plan to Steal America's Democracy* 51-60 (2016). The practice was previously more art than science, with map drawers deploying pen and protractor to design districts based on manual reviews of electoral results and demographic data. *Id.* Today, these crude methods are gone. Manual number crunching has been replaced by a wealth of data, often at the most granular levels, enabling mapmakers to predict district-level outcomes with pinpoint accuracy. And pencil and paper have given way to sophisticated mapping software, complex statistical models, and algorithms. The rapid and iterative creation of millions of potential district plans tailored to particular criteria and desired outcomes is now available at the touch of a keystroke. *Id.*

These technological developments give map-drawers the power to target voters with surgical precision. Mapmakers can now drill down far enough to move specific voters between districts based on their demographics, voting history, and party affiliation. See Royce Crocker, *Congressional Redistricting: An Overview 2*, Cong. Research Serv. (Nov. 21, 2012). In contrast with the blunt instruments of gerrymanders past, redistricting today is a craft defined by precision

scalpels that permit map-drawers to delicately transplant voters from one district to another to maximize political gain.

North Carolina's map-drawers have been pioneers in this new era. The effort was led by Dr. Thomas Hofeller, who sculpted districts with a precision that earned him a reputation as the "Michelangelo of the modern gerrymander." Michael Wines, *Thomas Hofeller, Republican Master of Political Maps, Dies at 75*, N.Y. Times, (Aug. 21, 2018). During the 2010 redistricting cycle, Hofeller engineered, and the Republican-controlled General Assembly passed, maps that imposed an extreme, and potently durable, Republican gerrymander. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 607, 619 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017).

Dr. Hofeller's maps performed perfectly. In 2012, Republicans won 9 of the State's 13 U.S. congressional seats despite winning a minority, only 49%, of the statewide vote. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2510 (2019). In 2014, they won 10 of the 13 seats based on 55% of the statewide vote. *Id.* After the maps were invalidated as racial gerrymanders in 2016, the Republican legislature and Dr. Hofeller went back to the drawing board, careful to be as explicit as possible that the new maps would be based on partisan affiliation alone. To this end, Republican redistricting committee chair David Lewis stated on camera that the redistricting committee was "draw[ing] the maps to give a partisan advantage to 10 Republicans and 3 Democrats because" he did "not believe it[] possible to draw a map with 11 Republicans and 2 Democrats." *See Rucho*, 139 S. Ct. at 2510. He continued, "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." *Id.*

The new maps worked too. In 2016, as predicted, Republicans won 10 of 13 congressional seats with 53% of the statewide vote. *Id.* In 2018, they won 10 of 13 seats with 50% of the statewide

vote.⁴ *Id.* And in 2020 they won 8 of 13 seats despite congressional Republicans’ receiving 30,000 fewer votes than congressional Democrats. *See 11/03/2020 OFFICIAL LOCAL ELECTION RESULTS – STATEWIDE*, North Carolina State Board of Elections, (last visited, Jan. 19, 2022), https://er.ncsbe.gov/?election_dt=11/03/2020&county_id=0&office=FED&contest=0.

Thanks to Dr. Hofeller and others, partisan gerrymandering now persists in more durable and extreme ways than ever before. The Enacted Plans are a product of this new regime. So even without Dr. Hofeller as their architect, they will perform as intended for the next decade. The marginalized party cannot out-organize this gerrymander.

III. Partisan gerrymandering breeds political dysfunction.

Legislative bodies comprised of ideologically extreme and politically unaccountable candidates breed partisan gridlock and rancor. Partisan gerrymandering incentivizes representatives to distance themselves from compromise at all costs—or face a primary challenge from the outside flank. This dynamic renders bipartisanship politically toxic for both sides. Pragmatic solutions on which both parties can agree—and which the median voter favors—become politically untenable in an environment where cooperation is punished, not rewarded. Numerous officeholders have attested to the damage gerrymandering has wrought on North Carolina politics.

U.S. Representative David Price, a North Carolina Democrat, explained that gerrymandering “really affects the way members behave once they come [to Congress]. I’ve heard some guys say they might be more moderate, but they just can’t be. The rule of thumb becomes

⁴ The tenth Republican seat was decided in a special election in 2019 after evidence emerged that the original Republican candidate had orchestrated absentee ballot fraud. Matthew Bloch & Jasmine C. Lee, *North Carolina Special Election Results: Ninth House District*, N.Y. Times (Sept. 10, 2019).

don't let any opposition develop to the right. It all adds up to pretty extreme behavior. The gerrymandering really exacerbated that.” Perry Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate, (Mar. 20, 2017), <https://slate.com/news-and-politics/2017/03/fixing-gerrymandering-affects-who-is-sent-to-office-and-how-they-govern.html>. Price described “Republican colleagues” who “sometimes admit, openly, that fear of a challenge from the right affects the way they vote and how willing they are to compromise.” *Id.* Former North Carolina Republican Congressmen Mark Meadows and Walter Jones echoed this sentiment in their 2017 amicus brief in *Gill v. Whitford*, which reflected their personal experience with partisan gerrymandering. “A cascade of negative results predictably follows: artificially drawn ‘safe’ districts make the general election uncompetitive and give party insiders and a small core of ‘base’ primary voters . . . greater influence than the general electorate; political parties gain influence and obstruct independent, constituent-first representation; compromise with the other side becomes politically impossible even when there are areas of principled agreement . . . and the People grow frustrated with the capacity of the House to govern effectively.” Br. for Bipartisan Group of Current & Former Member of Congress as amici curiae in support of appellees, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

This is equally true in the statehouse. Senator Jeff Jackson, a Democrat from Charlotte, characterized partisan gerrymandering as installing an ideological “filter” on state politics. “The 10 percent of the state that votes in the GOP primary has become the filter for all our legislation—to the point where they might as well be the entire electorate. It’s skewing the agenda.” *Id.* This is precisely the “estrang[ement]” of median voters partisan gerrymandering is engineered to produce. See Issacharoff, *supra*, at 628. Democratic State House Representative Deb. Butler explained the same dynamic. “I really believe that gerrymandering is at the root of the partisan bickering we find

in Raleigh and, and nationally . . . Democrats, have to take a hard step to the left, and my Republican colleagues have to take a hard step to the right and I think it creates a divide that's not necessary." *Lawmakers From The Cape Fear Region Discuss The Upcoming General Assembly*, WHQR, (Jan. 24, 2019), <https://www.whqr.org/local/2019-01-24/lawmakers-from-the-cape-fear-region-discuss-the-upcoming-general-assembly>. And the consensus is bipartisan. Republican House Representative Ted Davis took an unprecedented step to help combat partisan gerrymandering. "I don't normally sign pledges," the Representative admitted, "but I did last session to support the creation of an independent board to look at doing the districts." *Id.*

Increasing partisan polarization in Congress and the General Assembly has caused a slew of longtime North Carolina officeholders to retire from their posts. Representative Price announced his retirement last year after 30 years in Congress, citing "growing polarization . . . and growing dysfunction" in Congress. David Crabtree & Matthew Burns, *Longtime Congressman David Price to retire*, WRAL, (Oct. 28, 2021), <https://www.wral.com/longtime-congressman-david-price-to-retire/19931554/>. G.K. Butterfield, another Democratic Congressmen and a former North Carolina Supreme Court Justice, attributed his retirement after nearly 20 years in Congress to similar reasons. Ethan Cohen, Daniella Diaz & Veronica Stracqualursi, *G.K. Butterfield latest Democrat to announce he will not seek reelection*, (Nov. 18, 2021), <https://www.cnn.com/2021/11/18/politics/butterfield-retirement-announcement/index.html>. He expressed in a statement, "terribl[e] disappoint[ment] with the Republican majority legislature for again gerrymandering our state's congressional districts and putting their party politics over the best interests of North Carolinians." The trend holds in the General Assembly. Democratic House Representative Verla Insko announced her retirement after 13 terms, citing partisan dysfunction as "one of the things that finally discouraged me." Meagan Bergstrom, *After 26 years of service*,

Rep. Verla Insko announces her retirement, Daily Tar Heel (Sept. 26, 2021), <https://www.dailytarheel.com/article/2021/09/city-verla-insko-no-reelection-run>.

These testimonials illustrate how partisan gerrymandering degrades the political process. Extreme partisan gerrymanders produce partisan gridlock at best, party warfare at worst, as politicians are forced to move to the poles or surrender their seats. North Carolina has the battle scars to prove it. Under the Enacted Plans, another decade of political dysfunction will follow.

CONCLUSION

Partisan gerrymandering neuters the voting power of the electorate and entrenches control in a single-party, ideologically extreme cohort of legislators notwithstanding the more moderate and diverse political preferences of voters. North Carolina's mapmakers designed the Enacted Plans with modern technology that ensures their partisan gerrymander will remain both extreme and durable even if political preferences shift in significant ways. The North Carolina Constitution, founded to vindicate "the will of the people" above all else, guards its citizens against such a result. *People ex rel. Van Bokkelen*, 73 N.C. at 220. For the foregoing reasons, amicus curiae Campaign Legal Center urges this Court to declare the Enacted Plans invalid as violations of North Carolina's Free Elections Clause, Free Speech Clause, Free Assembly Clause and Equal Protection Clause.

Respectfully submitted this 21st day of January, 2022.

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N.C. R. App. P. 33(b) Certification:

I certify that all of the attorneys listed
have authorized me to list their names on
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WORD COUNT CERTIFICATION

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indices, table of authorities, certificates of service, and this certificate of compliance) as reported by the word processing software.

Respectfully submitted this 21st day of January, 2022.

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Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel:

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