IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SHAUNA WILLIAMS, et al., *Plaintiffs,* v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., *Defendants*.	Civil Action No. 23 CV 1057
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., *Plaintiffs,* v. PHILIP BERGER, in his official capacity as the President Pro Tempore of the North Carolina Senate, et al., *Defendants.*	Civil Action No. 23 CV 1104

NAACP PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

NATURE OF THE MATTER BEFORE THE COURT

NAACP Plaintiffs[1] ("Plaintiffs") challenge North Carolina's 2023 state legislative and Congressional plans as violating their statutory and federal constitutional rights and the rights of their members. In their Motion for Partial Summary Judgment and supporting Memorandum (Doc. 79, hereafter "Mot."), Legislative Defendants ("Defendants") ask this Court to apply a heightened standard for associational standing that has no support in decades of redistricting jurisprudence. They also invite this Court to ignore systematic one-person, one-vote violations that cannot be explained by any legitimate redistricting criteria, and, in doing so, be the first court in the nation to permit the denial of this Equal Protection Clause guarantee for the purpose of partisan advantage. While partisan gerrymandering claims are non-justiciable in federal courts, partisan advantage is not a legitimate state interest sufficient to justify violating the one-person, one-vote guarantee. Defendants' Motion reveals there is no genuine dispute on any material issue of fact or law as to Plaintiffs' standing to bring all counts or on the success of their malapportionment claims (Counts 3 and 7), and thus summary judgment may be granted to Plaintiffs pursuant to Federal Rule of Civil Procedure 56(f)(1).

STATEMENT OF FACTS

Plaintiffs bring statutory and constitutional claims challenging districts within areas of North Carolina's 2023 state Senate, state House, and Congressional Plans. *See* Doc. 1 at

[1] "Plaintiffs" include "Associational Plaintiffs" the North Carolina NAACP and Common Cause, their members who reside in challenged districts ("standing members"), and individuals Calvin Jones, Dawn Daly-Mack, Linda Sutton, Hollis Briggs, Corine Mack, Mitzi Reynolds Turner, and Syene Jasmine.

¶¶ 240–90, No. 1:23-CV-1104 (M.D.N.C. Dec. 19, 2023) (hereafter "Compl."). Plaintiffs seek a declaratory judgment that North Carolina's 2023 Plans violate the Voting Rights Act ("VRA") and the Fourteenth and Fifteenth Amendments, a permanent injunction barring Defendants from holding elections under the 2023 Plans, and an order requiring a remedial redistricting process. Compl. 85–86.

Plaintiffs produced voting records for themselves and standing members proving residence in challenged districts, Exs. 1–5, and expert testimony of racially polarized voting and malapportionment in challenged districts. Ex. 8 (Fairfax Report Excerpts); Ex. 11 (Oskooii Report Excerpts). Plaintiffs also deposed the principal drafters of the 2023 Plans, who testified to utilizing partisan considerations in districts challenged as malapportioned. Ex. 13 (Hise Deposition Excerpts); Ex. 14 (Springhetti Deposition Excerpts).

STATEMENT OF QUESTIONS PRESENTED

1. Is there a genuine dispute as to any material fact regarding whether Plaintiffs have standing for their claims as a matter of law where at least one named Plaintiff or standing member is harmed in each challenged area in each of the challenged plans?
2. Is there a genuine dispute as to any material fact regarding whether Plaintiffs prevail on their malapportionment claims where the evidence shows that no legitimate redistricting criteria explains the population deviations within the challenged clusters in the 2023 state House and Senate Plans?

LEGAL STANDARD

Summary judgment must be denied unless "it is perfectly clear that there is no dispute about either the facts of the controversy or the inferences to be drawn from such facts." *Morrison v. Nissan Co., Ltd.*, 601 F.2d 139, 141 (4th Cir. 1979); Fed. R. Civ. P. 56(a). A court "must usually adopt the nonmovant's version of the facts." *N.C. State Conf. of NAACP v. Hirsch*, 720 F. Supp. 3d 406, 416 (M.D.N.C. 2024) (cleaned up).

A court has discretion, pursuant to Rule 56(f)(1), to "grant summary judgment for a nonmovant" where no genuine dispute exists that they should prevail as a matter of law, and provided that the movant had notice and a reasonable time to respond. *Moore v. Equitrans, L.P.*, 27 F.4th 211, 224 (4th Cir. 2022); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Courts have found that a party moving for summary judgment on particular issues has generally had the opportunity to put their "best foot forward" on those issues and, as such, has been provided adequate notice in the event the court determines, *sua sponte*, that the evidence supports entering summary judgment for the nonmovant on those same issues. *Velasquez v. Salsas & Beer Restaurant, Inc.*, 735 Fed. App'x 807, 810 (4th Cir. 2018) (internal citation omitted).

ARGUMENT

I. Plaintiffs Have Standing for All Counts as a Matter of Law.

Plaintiffs have established standing for all claims asserted in the Complaint through uncontroverted evidence adduced in discovery of individualized harm and a right to relief in each challenged area of the 2023 Plans.

Only one plaintiff needs to establish standing for the Court to consider a claim on its merits. *Murthy v. Missouri*, 144 S. Ct. 1972, 1985 (2024). An organization can maintain associational standing on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). Defendants' Motion does not dispute that Plaintiffs have established the second and third elements above, as demonstrated by declarations on the record and the relief sought here. Doc. 63-6 ¶¶ 7–9 (Maxwell Decl.); Doc. 63-9 ¶¶ 5–7 (Phillips Decl.); *McConchie v. Scholz*, 567 F. Supp. 3d 861, 880, 882 (declaratory/injunctive relief in redistricting challenge does not require individual participation).

Accordingly, Plaintiffs may prove standing for their claims by identifying at least one Plaintiff or standing member whose vote is diluted by the challenged districts. Doc. 75 at 10–11 (citing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015)). That includes at least one registered voter who self-identifies as Black in a challenged district for each claim. *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 362–65 (E.D. Va. 2009) (VRA and Fourteenth/Fifteenth Amendments); *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (racial gerrymandering); *Goldman v. Brink*, 2022 U.S. Dist. LEXIS 101081, at *22 (E.D. Va. 2022) (malapportionment). As set forth below, this means that Plaintiffs have established an injury-in-fact and entitlement to relief in each of the specific areas of the

state in which Defendants intentionally diluted the voting power of Black North Carolinians, and thus standing for all claims as a matter of law.

A. Defendants Do Not Challenge Standing in Certain Districts.

By listing districts where they contend Plaintiffs *failed* to identify a necessary individual for standing purposes, Mot. 7–8,[2] Defendants tacitly admit that Plaintiffs *have* identified individuals residing in the following districts:

- Senate Districts 1–5, 8, 11, 32, 40, and 41;
- House Districts 5, 7–10, 12, 23–25, 27, 32, 37, 71; and
- Congressional Districts 1, 3, 5–7, 10.

Produced voting records and exhibited declarations substantiate the residence, voter registration, racial self-identification and (for standing members) membership status for individuals in each of these districts. *See* Exs. 1–5. Defendants have not identified any genuine issue of material fact as to Plaintiffs' standing in these districts.

B. Plaintiffs Have Standing for their Section 2 Effects Counts 1 and 6.

Count 1. Produced voting records confirm that Plaintiffs Dawn Daly-Mack and Calvin Jones have standing for this claim as they identify as Black/African American and reside and are registered to vote within Senate Districts 1 (Daly-Mack) and 2 (Jones). Ex. 1 at NAACPPS_0001517, 1509. Both are entitled to relief as they reside within the proposed second Black-opportunity district (District 2) that Plaintiffs allege is required by the VRA. *See id.*; Ex. 8 at 53 (Fairfax Rep.). The North Carolina NAACP also has standing

[2] Citations to Defendants' brief and exhibits are to the paginated (not ECF) number.

because both Daly-Mack and Jones are NAACP members, *see* Doc. 63-2 at 13–14; Ex. 6 at 13:14–16 (Daly-Mack); Ex. 7 at 20:8 (Jones), among other standing members residing in proposed District 2.

Count 6. The below table illustrates that Associational Plaintiffs have disclosed standing members who identify as Black, are registered to vote in House Districts throughout the Black Belt, and who reside in *each* of the majority-Black House Districts in Plaintiffs' demonstrative plans, as well as in House districts in the enacted plan which are dilutive of Black voting strength, evidencing entitlement to full relief in this area of the state.[3]

Plaintiff/Standing Member Bates[4]	*House District*[5]	*Fairfax Demonstrative*[6]
NAACPPS_0001517*	27	Plans A District 5 / Plan B District 23
NAACPPS_0005701**	23	
NAACPPS_0005542***	23	
NAACPPS_0005706**	5	Plans A District 23 / Plan B District 5
NAACPPS_0005715**	5	
NAACPPS_0005665**	5	
NAACPPS_0005674**	5	
NAACPPS_0005571***	5	
NAACPPS_0005678 **	23	Plans A/B District 25
NAACPPS_0005687**	23	
NAACPPS_0005692**	25	
NAACPPS_0001509*	27	Plans A/B District 27
NAACPPS_0005644**	32	
NAACPPS_0005657**	27	
NAACPPS_0005555***	32	
NAACPPS_0005648**	24	Plan A District 24

[3] Plaintiffs can alternatively provide the Court with map demonstratives of this evidence if helpful.
[4] * denotes a voting record in Exhibit 1, ** in Exhibit 2, and *** in Exhibit 3.
[5] *See* Ex. 9 (2023 House Plan).
[6] Majority-Black House demonstrative districts are labeled in red in the Fairfax Report, Ex. 8, at 32 (Plan A), 45 (Plan B).

NAACPPS_0005696**	12	Plan A District 12
NAACPPS_0005710**	12	
NAACPPS_0005670**	10	
NAACPPS_0005682**	12	
NAACPPS_0005562**	10	
NAACPPS_0005621***	8	Plan B District 8
NAACPPS_0005696**	12	Plan B District 24
NAACPPS_0005682**	12	
NAACPPS_0005648**	24	
NAACPPS_0005614***	7	N/A[7]

While not every challenged district (i.e., 4) has an individual who also resides in a demonstrative district, that is not required for showing a Section 2 injury-in-fact where individuals are identified throughout challenged districts in the same area where vote dilution has occurred:

> "If a § 2 violation is proved for a particular *area*, it flows from the fact that individuals in this *area* have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Shaw v. Hunt, 517 U.S. 899, 917 (1996) (emphasis added, citation omitted); *see also Robinson v. Ardoin*, 605 F. Supp. 3d 759, 817-18 (M.D. La. 2022) ("[T]he relevant standing inquiry is not whether Plaintiffs represent every single district in the challenged map but whether Plaintiffs have made supported allegations that they reside in a reasonably compact area that could support additional majority-minority districts." (cleaned up)), *injunction vacated on other grounds*, 86 F.4th 574 (5th Cir. 2023); *Perez v.*

[7] This individual has standing even though not in a demonstrative district because they could be included in another potential reasonably compact district drawn to remedy the vote dilution. *See Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996).

Abbott, 267 F. Supp. 3d 750, 774 (W.D. Tex. 2017), *rev'd in part on other grounds*, 138 S. Ct. 2305 (2018) (noting harm in a "geographic area").

As shown above, Plaintiffs have identified individuals within *each* of the 2023 House Plan's Black Belt county clusters where Plaintiffs allege there can be six majority-Black reasonably configured districts, Compl. ¶ 268; Ex. 10, as well as in each of those illustrative majority-Black districts, evidencing a harm from vote dilution in the "geographic area" as a whole. Accordingly, there is no genuine dispute as to any material fact in support of finding standing by Plaintiffs for Counts 1 and 6. *Perry-Bey*, 678 F. Supp. 2d at 363–65.

In disputing Plaintiffs' standing, Defendants lobby for a heightened standard for associational standing, asserting that evidence is also required of a standing member's "preferred candidates" for vote dilution claims. Mot. 11. This is not the standard, and the case Defendants rely on—*Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38 (2024)—does not support it. The Supreme Court did not address standing in *Alexander*, but it did remand claims of vote dilution, which the NAACP had standing to pursue based on members residing in diluted districts. *S.C. State Conference of the NAACP v. Alexander*, 649 F. Supp. 3d 177, 187 (D.S.C. 2023), *reversed in part on other grounds in Alexander*, 602 U.S. 1 (2024). Neither the district court, nor the Supreme Court, imposed a requirement to identify "preferred candidates" to establish standing.

Indeed, Defendants fail to cite any case where a court has dismissed vote dilution claims because of a failure to marshal "preferred candidates" evidence, likely because it is unprecedented and not recognized law. *See Holloway v. City of Va. Beach*, 531 F. Supp. 3d

1015, 1028 (E.D. Va. 2021) (no "preferred candidates" showing required for standing in vote dilution claim), *vacated as moot and remanded*, 42 F.4th 266 (4th Cir. 2022); *Perry-Bey*, 678 F. Supp. 2d at 362 (same); *Nairne v. Ardoin*, No. 22-178, 2023 U.S. Dist. LEXIS 203477 (M.D. La. Nov. 14, 2023) (same).

Defendants' proposed heightened standard is also an unworkable moving target. How many specifically named "preferred candidates" must be evidenced? Do past or future preferences suffice? They fail to say, and the latter would be a potentially impossible standard to meet when voting plans are enacted, as it is often unknown which specific candidates will run in a particular district. It would also contravene these non-party standing members' right to a secret ballot. *See Socialist Workers Party v. Hechler*, 890 F.2d 1303, 1308–11 (4th Cir. 1989) (striking down as unconstitutional a West Virginia statute that requires persons wishing to sign nominating certificates to state that they "'desire to vote' for the candidate therein named"). Moreover, Defendants' erroneous standard is unnecessary given the second *Gingles* precondition of minority cohesion around candidates of choice, as required to prove a Section 2 effects violation. *Allen v. Milligan*, 599 U.S. 1, 18 (2023). Here, undisputed expert testimony shows that 95%+ of Black voters coalesce around a single preferred candidate. Ex. 11 (Oskooii Rep. ¶¶ 8, 9, pp. 19–35, 47–67); Ex. 12 at 81:24–82:19 (Alford) (Oskooii Black cohesion analysis undisputed).[8]

[8] Plaintiffs and standing members also have a history of registering as Democrat or voting in Democratic primaries, which correlates with the Black-preferred candidates overall. Ex. 12 at 82:11–14 (Alford); Ex. 13 at 114:1–116:8 (Hise).

At base, Defendants' proposed standard misreads the purpose of the VRA to secure participation on an equal basis and free from conditions that abridge the right to vote on account of race or color, *see* 52 U.S.C. § 10301, not guarantee the right to a particular candidate. *See Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004). Plaintiffs have met the standard set forth by well-established law and thus have established standing for Counts 1 and 6.

C. Plaintiffs Have Standing for their Malapportionment Counts 3 and 7.

For *Count 3*, Plaintiffs Hollis Briggs and Corine Mack are Black voters residing in Districts 8 and 41 of the 2023 Senate Plan, respectively, who have certified they are members of the North Carolina NAACP. Doc. 63-2 at 13–14; Ex. 1 at NAACPPS_0001513, 1520. Plaintiff Common Cause also identified standing members who identify as Black and are registered to vote in Senate District 40. Ex. 3 at NAACPPS_0005601, 5635.

For *Count 7*,[9] Plaintiff Linda Sutton is a Black voter in District 71 of the 2023 House Plan and a member of Associational Plaintiff NAACP. Doc. 63-2 at 14–15; Ex. 1 at NAACPPS_0001525. Associational Plaintiffs have also identified standing members who identify as Black and are registered to vote in House Districts 37 and 71. Ex. 3 at NAACPPS_0005547; Ex. 2 at NAACPPS_0005661.

These individuals all reside within overpopulated districts denying their right to equal voting power under the Equal Protection Clause because the 2023 Senate Plan and

[9] The Court has recognized that paragraph 273 in the Complaint intended to reference "House Districts 11, 21, 33 through 41, 49, and 66" rather than "House Districts 27 through 34." Doc. 57.

2023 House Plan unlawfully manipulate population deviations to dilute their voting strength. Compl. ¶¶ 146–63, 174–88; Doc. 63-2 at 12–15. Defendants again err in implying that Plaintiffs would need to identify individuals in *each* malapportioned district in a particular area to maintain a claim because, by identifying at least one individual experiencing harm in at least one malapportioned district in the same area, they have established a right to relief. *See Baker v. Carr*, 369 U.S. 186, 206 (1962) (Those who "allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage.).

D. Plaintiffs Have Standing for their Intent Counts 2, 4, 5, 8, 9, 10, 11, 12.

Plaintiffs also have standing to assert their discriminatory intent claims under the VRA (Counts 4, 8, 10, 11), racial gerrymandering claim under the Fourteenth Amendment (Count 2), and intentional discrimination claims under the Fourteenth and Fifteenth Amendments (Counts 5, 9, 12).

As an initial matter, Legislative Defendants do not challenge Plaintiffs' standing to assert claims for racial gerrymandering against Senate Districts (Count 2) or intentional vote dilution in Congressional District 1 (Count 10) and the Triad (Count 11). At least one Plaintiff and/or associational standing member resides and is registered to vote in a district challenged under each count:

- *Senate District 8*: Ex. 1 at NAACPPS_0001520.

- *Congressional District 1*:[10] Ex. 1 at NAACPPS_0001509, 1517, 1534; Ex. 2 at NAACPPS_0005644–5660, 5665–5718; Ex. 3 at NAACPPS_0005538–5546, 5555–5589, and 5607–5613, 5621–5629;
- *Triad Congressional Districts 5, 6, 10*: Ex. 1 at NAACPPS_0001525, 1530; Ex. 2 at NAACPPS_0005661; Ex. 3 at NAACPPS_0005590, 5630.

As such, the uncontroverted evidence conclusively establishes standing for these claims.

Plaintiffs' remaining intent claims—Counts 4, 5, 8, 9, and 12—allege intentional discrimination and vote dilution in the same Senate, House, and Congressional districts and areas challenged in the Complaint overall. Not only do these claims incorporate by reference prior, district-specific allegations of the Complaint (Compl. ¶¶ 133–98) and preceding claims (Counts 1–3, 6, 7, 10, and 11), they also identify the specific Plaintiffs living in the areas impacted under the claims. Compl. ¶¶ 260–65, 275–80, 289–90. Plaintiffs' response to Defendants' Interrogatory No. 3, served over five months ago, also expressly identified the specific Senate, House, and Congressional districts relevant to each count. *See* Doc. 63-2 at 9–11. Plaintiffs' specific pleadings and disclosures demonstrate they have standing for Counts 4, 5, 8, 9, and 12 based on the same premise as their other claims, as articulated above. *See* Sections I.A–D, *supra* (confirming standing for Counts 1–3, 6, 7, 10, and 11).

Plaintiffs' allegations and discovery responses thus disprove Defendants' assertion that these claims "rest on 'theory of statewide injury.'" Mot. 5–7. Plaintiffs do not (and

[10] Plaintiff Syene Jasmin and Common Cause members in Ex. 3 at NAACPPS_0005607–5613 and 5621–5629 reside in areas removed from Congressional District 1 in 2023.

need not) rely on a theory of statewide injury to maintain these claims. The detailed allegations in the Complaint, coupled with documentary and testimonial evidence of residency in the impacted districts, render this case completely distinguishable from the case on which Defendants rely, *Gill v. Whitford*, where "not a single plaintiff sought to prove that he or she lives in a cracked or packed district." 585 U.S. 48, 69 (2018).

* * *

There is no merit to Defendants' arguments that whole claims should be dismissed, and this Court should reject Defendants' request for summary judgment dismissing any claim. To the contrary, in the interest of streamlining issues for trial, the Court has a basis to affirmatively find that Plaintiffs have established standing for each claim at this stage, including specific districts in each challenged area of the state where they have identified an individual harmed. *See*, *e.g.*, *Nairne*, 2023 U.S. Dist. LEXIS 203477 at *14 (denying summary judgment, and instead finding "that the Plaintiffs have sufficiently shown standing exists as to the NAACP"); *Greater Birmingham Ministries v. Sec'y of Ala.*, 992 F.3d 1299, 1316–17 (11th Cir. 2021) (on appeal of summary judgment, finding two organizations, including the Alabama NAACP, had associational standing); *Bryant v. Woodall*, 363 F. Supp. 3d 611 (M.D.N.C. 2019) (granting plaintiffs' motion for summary judgment and finding that plaintiffs have standing for claims), *aff'd,* 1 F.4th 280 (4th Cir. 2021), *vacated on other grounds*, 622 F. Supp. 3d 147 (M.D.N.C. 2022).[11]

[11] Should the Court adopt any of Defendants' proposed heightened burdens for standing in this matter, Plaintiffs respectfully request for an opportunity to provide the requisite showing. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015) (instructing district court on remand to "reconsider [associational plaintiff's] standing" by permitting new evidence).

II. Plaintiffs Prevail as a Matter of Law on Their Malapportionment Claims.

The Equal Protection Clause "requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). This objective ensures that "the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579. Divergences from equal population must be "based on *legitimate* considerations incident to the effectuation of a *rational state policy*[.]" *Id.* (emphasis added). The Constitution does *not* permit arbitrary or discriminatory population deviations of any size. *See Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) ("[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent . . . made for any reason whatsoever. The Court properly rejects that invitation.").

The size of the population deviation "serves as the determining point for allocating the burden of proof in a one person, one vote case." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996). Where the plan's maximum deviation is less than ten percent, plaintiffs can successfully demonstrate a one-person, one-vote violation by "show[ing] that the apportionment process had a 'taint of arbitrariness or discrimination.'" *Id.* (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)); *see, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004); *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935, 949 (M.D.N.C. 2017).

The Supreme Court has articulated a set of legitimate criteria that states may rely on to justify population deviations below ten percent, including compactness and contiguity, maintaining the integrity of political subdivisions, maintaining competitive balance between the political parties, and compliance with the VRA. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016) (collecting cases). Partisan advantage is not within this set of legitimate criteria. *Id.* Plaintiffs may prevail in one-person, one-vote cases with population deviations below ten percent upon a "preponderance of the evidence that improper considerations predominate in explaining the deviations." *Raleigh Wake Citizens Ass'n*, 827 F.3d at 342.

The undisputed evidence here proves that deviations within the 2023 House and 2023 Senate Plans were intended to systematically manipulate population between districts and are unjustified by any legitimate redistricting criteria. If any finding on summary judgment is warranted on Plaintiffs' malapportionment claims, it is warranted in favor of Plaintiffs, not Defendants.

A. Plaintiffs Appropriately Allege Deviations Within County Clusters.

The *Stephenson* line of cases, applying the North Carolina Constitution's Whole County Provision, requires North Carolina legislative redistricting plans to minimize county splits to the extent possible "within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements." *Stephenson v. Bartlett*, 355 N.C. 354, 383 (N.C. 2002) (*Stephenson I*). After meeting federal requirements, including VRA compliance, counties are combined into groups ("clusters") that can contain whole districts within plus or minus five percent of the ideal population number for the state as a

whole.[12] In practice, this means districts in different clusters have slightly different equalized, and thus ideal, populations.

While *Stephenson I* produces notable population inequality between the clusters, *see* Ex. 8 at 66–67 (Fairfax Report noting ideal district populations of 206,509 in New Hanover/Brunswick/Columbus Senate Cluster and 217,029 in Mecklenburg Senate Cluster), the North Carolina policy of minimizing county splits is precisely the type of legitimate redistricting criteria that justifies population deviations of less than ten percent between districts. *See Stephenson v. Bartlett*, 357 N.C. 301, 309 (N.C. 2003) (*Stephenson II*). Accordingly, Plaintiffs do not challenge malapportionment *between* clusters, and thus are not required to "present evidence that illegitimate factors predominated *over* the county-grouping rule[,]" as Defendants argue. Mot. 16.

Instead, Plaintiffs appropriately challenge malapportionment *within* clusters, alleging there are deviations between districts within the same grouping that cannot be explained by any legitimate redistricting criteria and are thus unconstitutional. *See, e.g.*, Compl. ¶ 257. This is appropriate because once county groupings are selected for a plan, map-drawers create district lines *within* each grouping. *See* Ex. 13 at 73:25–74:11, 457:9–17 (Hise); Ex. 14 at 96:4–97:22 (Springhetti). Thus, when evaluating the use of illegitimate factors to deny equal voting power to individuals within specific districts, it is appropriate to follow the process utilized by those map-drawers, i.e., evaluate malapportionment on a cluster-specific basis.

[12] For 2023 redistricting, this population was 208,788 for the 50 State Senate districts and 86,995 for the 120 State House districts. Ex. 15; Ex. 16.

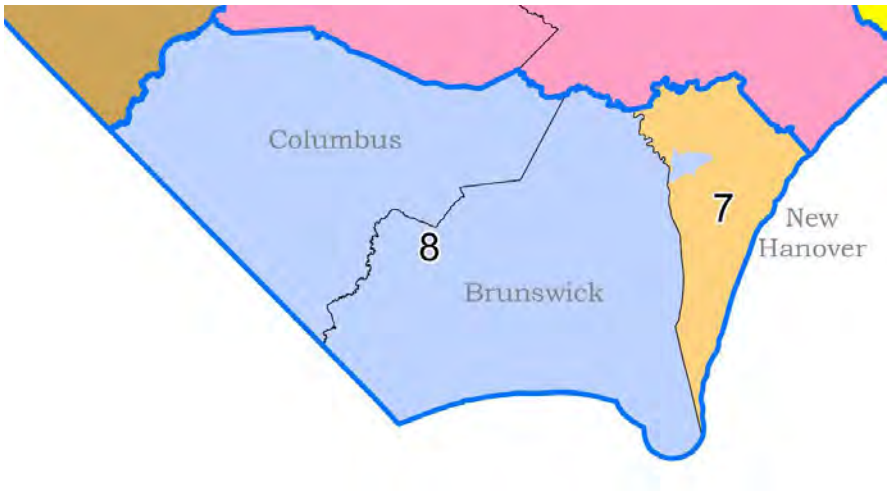
Finally, Plaintiffs' cluster-based approach is appropriate because, as Defendants admit, malapportionment rests on a "doctrine of individualized, district-specific harm." Mot. 6–7 (citing *Gill*, 585 U.S. at 67). Their arguments that the Court must look for illegitimate criteria that predominate overall (and to evaluate all districts in each plan, *see* Mot. 20–26), ignores the "specific, deviation-focused inquiry[,]" which "differs markedly" from a "rational-basis review of whether a rational state policy could explain the redistricting generally." *Raleigh Wake Citizens Ass'n*, 827 F.3d at 342. Defendants' statewide argument thus misapprehends the constitutional injury in a malapportionment claim and should be rejected.

B. No Legitimate Criteria Justifies the Malapportionment.

As set forth below, there is no genuine dispute that arbitrary manipulations of population in the challenged county groupings, unmoored from legitimate criteria, have denied individuals equal voting power in challenged districts.

New Hanover-Brunswick-Columbus Senate Cluster (Claim 3). The ideal population for the two Senate districts within the New Hanover-Brunswick-Columbus Counties grouping is 206,509 people, or about -1.09% deviation from the statewide ideal district population. Ex. 8 at 67. Instead of equalizing population, Districts 7 and 8 in this grouping vary 2.76% to -4.94% from the ideal statewide population, respectively. *Id.*; *see also* Ex. 15 at 1. This deviation is caused by a sharp "notch" drawn across the county line between New Hanover and Brunswick Counties, which dips into the city of Wilmington, the largest municipality in the grouping, pairing the core of the high-density downtown precincts of

the city with the much more rural areas Brunswick and Columbus Counties in the now-overpopulated District 8. Ex. 15 at 96 (23.5% of Wilmington in District 8).

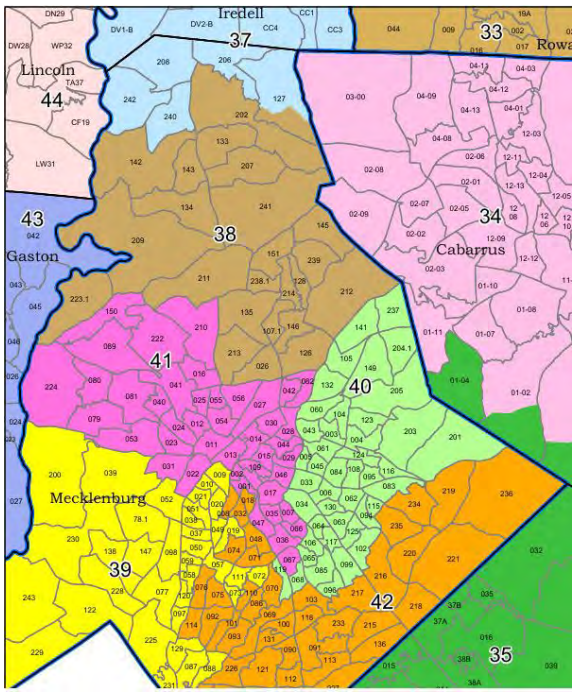


Excerpt of Ex. 17 (2023 Senate Plan)

In addition to its deviation, this configuration violates other traditional criteria by rendering the districts significantly less compact than is necessary to equalize population, Ex. 8 at 66, and unnecessarily splitting Wilmington and divorcing its downtown from the rest of New Hanover County, Ex. 17; Ex. 15 at 96. This split is not justified by maintaining any other community of interest. Ex. 8 at 66.

Mecklenburg-Iredell Senate Grouping (Count 3). The ideal population for the six Senate districts in the Iredell-Mecklenburg Counties grouping is 217,029 people, a 3.95% deviation from the ideal statewide Senate population of 208,788. Ex. 8 at 67–68. But instead of equalizing population, Senate District 42 is significantly underpopulated at just 0.28% above the state ideal, while all other districts (including Plaintiff Mack's District 41 and Common Cause standing members' District 40), are significantly overpopulated,

ranging from 4.26% to 4.99% above the ideal statewide population. Ex. 15 at 1 (Districts 37 through 42).

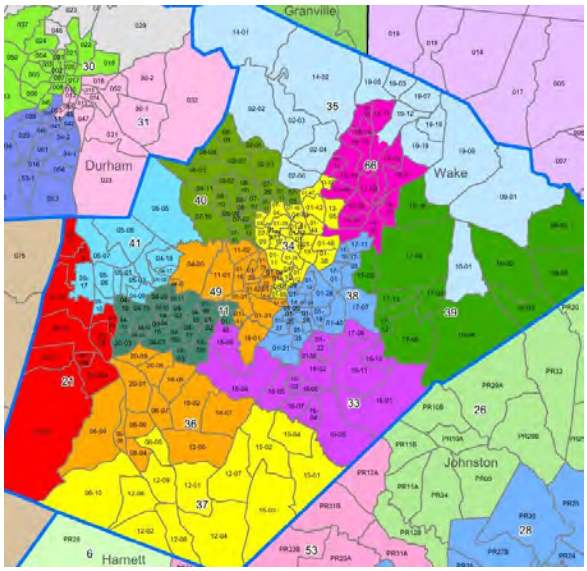


Excerpt of Ex. 17 (2023 Senate Plan)

The deviations in this grouping are not justified by any legitimate criteria. Instead, District 42's sprawl throughout southern Mecklenburg County disregards traditional criteria, rendering the district extremely non-compact, and does not preserve any municipalities or identifiable communities of interest. Ex. 8 at 68.

Wake House Grouping (Count 7). The ideal population for the thirteen House districts in the Wake County grouping is 86,878, a -0.13% deviation from the statewide ideal. Ex. 8 at 64–65. But instead of equalizing population, these districts have deviations ranging from 3.81% to -4.48% from the ideal statewide population. *Id.*; *see also* Ex. 16 at 1–2 (Districts 11, 21, 33–41, 49, 66). This deviation is not explained by any legitimate redistricting criteria, but rather the disregard of all legitimate redistricting criteria to under-

populate House District 35, the least populated district in the grouping. The district sprawls across the entirety of northern Wake County, arbitrarily jutting south at both ends in a way that renders the district even less compact.

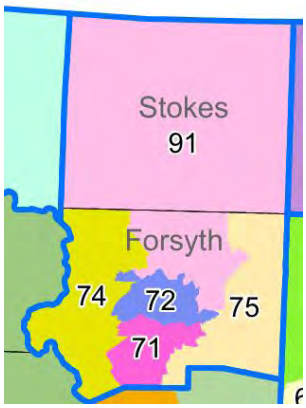


Excerpt of Ex. 9 (2023 House Plan)

This configuration serves no traditional redistricting criteria, Ex. 8 at 65, instead splitting the municipality of Wake Forest, a natural anchor for a northern Wake County district, nearly in half. *See* Ex. 16 at 139. This population deviation is exacerbated by a split VTD near Wake Forest, which runs directly counter to the House redistricting priorities that Blake Springhetti, who drew initial drafts of the 2023 House plan, testified he implemented throughout his drafting. Ex. 14 at 92:6–20, 195:11–17.

Forsyth-Stokes Grouping (Count 7). The ideal population for the five House districts in the Forsyth-Stokes Counties grouping is 85,422 people, a -1.81% deviation from the ideal statewide House population of 86,995. Ex. 8 at 65–66. But instead of equalizing population, the districts have deviations ranging from 2.10% above the ideal statewide

population to -4.68% below the ideal statewide population. *Id.*; *see also* Ex. 16 at 2–3 (Districts 71, 72, 74, 75, 91).



Excerpt of Ex. 9 (2023 House Plan)

This deviation is not explained by any legitimate redistricting criteria and is instead produced by the underpopulated House District 91 at -4.68% below the ideal statewide population. Ex. 8 at 66. This district disregards legitimate redistricting criteria: It is less compact than necessary, splits the municipality of Walkertown, and unnecessarily dips into Winston-Salem, ensuring that all five districts in the cluster contain part of the city, despite being unnecessary for pure population reasons. *Id.*; Ex. 16 at 139, 140. In turn, this cluster's configuration ensures that the districts anchored in Winston-Salem, House Districts 71 and 72, contain a much higher average population than the average of districts surrounding Winston-Salem. Ex. 8 at 66.

Defendants' witnesses concede no legitimate criteria explain deviations. It is inconsequential that Mr. Fairfax "offers no opinion concerning what factors predominated" in the construction of the challenged clusters (Mot. 17): He did not have to, because Defendants' own witnesses concede that no legitimate criteria explain those deviations.

Senator Ralph Hise, who drew the 2023 Senate Plan with fellow Chairs of the Senate Redistricting Committee, testified that he never tried to equalize populations beyond plus or minus five percent. Ex. 13 at 339:11–340:6. He testified that they chose to draw the Senate Plan in 2023 because new 2022 election data could be implemented for political considerations, *id.* at 455:9–24, and these political considerations drove Senate Districts 7 and 8's split of Wilmington, *id.* at 471:1–16, and the unusual border between Senate Districts 39 and 42 in Mecklenburg County. *Id.* at 474:14–475:8. Blake Springhetti testified that the draft map was configured and adjusted based on partisan performance, including in Wake and Forsyth Counties. Ex. 14 at 141:16–143:4, 145:19–146:15. This testimony belies Defendants' argument that "only numbers" exist to substantiate these claims. Mot. 17–18. Expert analysis supports that the underpopulated districts in these groupings causing significant deviations do so to create a partisan advantage. *See* Ex. 18 (Fairfax Reply at 7–8).

This testimony renders irrelevant Defendants' arguments that Plaintiffs must show an overall correlation between partisanship and challenged deviations (Mot. 18–20, 26). Such circumstantial evidence may be a valid way to prove that illegitimate considerations caused the malapportionment, but it is unnecessary when direct evidence of illegitimate criteria is in the record, as it is here.

C. Partisan Advantage Cannot Justify Denial of One-Person, One-Vote.

Defendants cannot justify violating the one-person, one-vote guarantee of the Equal Protection Clause with an intent to gain partisan advantage in a particular district. Although the Supreme Court has held that partisan gerrymandering, in some circumstances, presents

political questions beyond the reach of the federal courts, *Rucho v. Common Cause*, 588 U.S. 684 (2019), malapportionment arising from the intentional manipulation of district lines to gain partisan advantage is not a *legitimate state interest* sufficient to overcome the constitutional protection afforded by the Equal Protection Clause's one-person, one-vote guarantee. No district court has ever applied *Rucho* as Defendants urge here.

The Supreme Court's summary affirmance in *Larios* illustrates the point. In *Larios*, the district court held that the legislature lacked a legitimate state policy when it intentionally underpopulated districts in urban (Democratic) areas of the state at the expense of overpopulating suburban (Republican) areas. 300 F. Supp. 2d 1320, 1338 (2004). Importantly, the district court contrasted this illegitimate objective with the "consistently applied legislative policies" recognized by the Supreme Court that "might justify some variance," i.e., "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent" representatives. *Id.* at 1331 (internal quotations omitted). Although "legitimate state concerns may justify slight deviations, 'problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.'" *Id.* at 1354 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969)).

While not squarely deciding whether partisan advantage alone could justify deviations (referring, instead, to "regionalism and incumbent protection," *id.* at 1351–52), the *Larios* Court clearly distinguished a one-person, one-vote violation from partisan gerrymandering: One-person, one-vote is an "individualized and personal" matter in which individuals' right to vote is unconstitutionally impaired whereas partisan gerrymandering

considers whether a plan "makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Id.* at 1351–52 (internal citations omitted). Partisan gerrymandering does not provide a safe harbor against a claim of malapportionment, even when population deviations are below ten percent. *See Cox*, 542 U.S. at 949–50 (Stevens, J., concurring).

The Supreme Court's decision in *Rucho v. Common Cause* likewise distinguished claims of partisan gerrymandering from individualized malapportionment claims: "Partisan gerrymandering claims rest on an instinct that *groups* with a certain level of political support should enjoy a commensurate level of political power and influence" requiring consideration on issues of "fairness" that "pose[] basic questions that are political" with "no legal standards discernible in the Constitution." 588 U.S. at 704–07 (emphasis added). By contrast, "the one-person, one-vote rule is relatively easy to administer as a matter of math" and "refers to the idea that *each vote* must carry equal weight." *Id.* at 708–09 (emphasis added). Accordingly, while holding partisan gerrymandering claims are generally nonjusticiable when looking at where district boundaries are drawn, *Rucho* acknowledged that the Supreme Court had recognized "a role for the courts" in protecting the right to one-person, one-vote. *Id.* at 698–99.

Importantly, the *Rucho* Court made clear that while partisan gerrymandering claims are nonjusticiable, *id.* at 710, intentionally manipulating district boundaries to gain partisan advantage is nevertheless "'incompatible with democratic principles'" and "leads to results that reasonably seem unjust." *Id.* at 718 (quoting *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). The issue barring consideration of

partisan gerrymandering claims was the inability to discern a legally manageable standard, not the legitimacy of partisan gerrymandering as a democratic practice. The Court did "not condone excessive partisan gerrymandering," *Rucho*, 588 U.S. at 719, and thus did not legitimize its practice as justifying a constitutional deprivation of one-person, one-vote as Defendants' erroneously contend.[13]

This is confirmed by the Supreme Court's decision, post-*Rucho*, not to include partisan advantage with the traditional redistricting criteria that are relevant in evaluating whether a district is reasonably configured. *See Allen v. Milligan*, 599 U.S. 1, 18, 20, 34 (2023) (describing "traditional districting criteria"); *id.* at 108 (Alito, J., dissenting) (same). This is because a policy of favoring one set of voters over the other cannot be a legitimate state objective where a state legislature has a "fundamental duty to govern impartially." *Larios*, 542 U.S. 947, 951 (Stevens, J., concurring) (internal quotations omitted).[14]

North Carolinians have a constitutional right to one-person, one-vote, and Defendants cannot show any legitimate state objective in redistricting (as opposed to their personal desires) to justify the malapportionment violations in the state legislative districts. The Court may thus affirmatively find that Plaintiffs prevail as a matter of law as to their claims of malapportionment. *See* Fed. R. Civ. P. 56(f)(1).

[13] While maintaining political *fairness* may be a legitimate consideration, *see Harris*, 578 U.S. at 258, there is no contention (or evidence) that Defendants malapportioned to ensure partisan fairness here.
[14] Moreover, unlike the whole county provision, partisan advantage is not among the express redistricting objectives in the State Constitution. *See* N.C. Const. art. II §§ 3, 5.

CONCLUSIONS

Defendants' Motion for Summary Judgment should be denied. Defendants have failed to meet their burden, and, in fact, there is no genuine dispute that Plaintiffs have established standing for all claims and can prevail as a matter of law on their malapportionment claims pursuant to Federal Rule of Civil Procedure 56(f)(1).

Dated: January 7, 2025

Respectfully submitted,

/s/ Hilary Harris Klein
Hilary Harris Klein

HOGAN LOVELLS US LLP

J. Tom Boer*
Olivia Molodanof*
Madeleine Bech*
4 Embarcadero Center, Suite 3500
San Francisco, CA 94111
Telephone: 415-374-2300
Facsimile: 415-374-2499
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com

Jessica L. Ellsworth*
Misty Howell*
Odunayo Durojaye*
555 Thirteenth Street, NW
Washington, DC 20004
Telephone: 202-637-5600
Facsimile: 202-637-5910
jessica.ellsworth@hoganlovells.com

Harmony Gbe*
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: 310-785-4600
Facsimile: 310-785-4601
harmony.gbe@hoganlovells.com

SOUTHERN COALITION FOR SOCIAL JUSTICE

Jeffrey Loperfido (State Bar #52939)
Hilary Harris Klein (State Bar #53711)
Christopher Shenton (State Bar #60442)
Mitchell D. Brown (State Bar #56122)
Lily Talerman (State Bar #61131)
5517 Durham Chapel Hill Blvd.
Durham, NC 27707
Telephone: 919-794-4213
Facsimile: 919-908-1525
hilaryhklein@scsj.org
jeffloperfido@scsj.org
chrisshenton@scsj.org
mitchellbrown@scsj.org
lily@scsj.org

*Appearing in this matter by Special
Appearance pursuant to L-R 83.1(d)

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 6,241 words as counted by the word count feature of Microsoft Word.

/s/ Hilary Harris Klein
Hilary Harris Klein

CERTIFICATE OF SERVICE

I certify that on January 7, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Hilary Harris Klein
Hilary Harris Klein