

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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.

BRIEF IN SUPPORT OF MOTION
FOR PRELIMINARY INJUNCTION

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Plaintiffs have moved for a preliminary injunction seeking to enjoin Defendants—who include officials from the State Board of Elections, as well as the General Assembly—from preparing for, administering, or conducting the March 8, 2022, primary election and any subsequent election using the redistricting plans enacted by the General Assembly on November 4, 2021, for U.S. Congress (the “Enacted Congressional Plan,” attached as Ex. A),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”). Plaintiffs hereby provide this brief in support of their preliminary-injunction motion. Plaintiffs’ Verified Complaint and the affidavits of Professor Moon Duchin, Stephen Feldman, and Grace Liberman, filed November 16, 2021—as well as the supplemental affidavit of Stephen Feldman filed November 22, 2021—provide the factual basis for the preliminary injunction.

INTRODUCTION

North Carolina law authorizes special three-judge panels to “hear[] and determine[]” “the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts.” N.C. Gen. Stat. § 1-267.1(a). In 2019, a three-judge panel did just that and held that partisan gerrymandering violates North Carolina’s Free Elections Clause, as well as its Equal Protection, Free Speech, and Free Assembly Clauses. *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *3, 112, 117–18, 124 (N.C. Super. Ct. Sept. 3, 2019).

¹ S.B. 740, S.L. 2021-174, 2021-2022 Sess. (N.C. enacted Nov. 4, 2021). All exhibits referenced in this brief refer to exhibits filed as part of the Affidavit of Stephen Feldman, which was filed in conjunction with Plaintiffs’ Verified Complaint on November 16, 2021.

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).

In a 357-page opinion, the panel found that the General Assembly had gerrymandered districts across the state “to systematically prevent [one party] from obtaining a majority.” *Id.* at *116; *see* Order on Injunctive Relief, *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122, at *7–18 (N.C. Super. Ct. Oct. 28, 2019) (three-judge panel). Such gerrymandering, the Court held, violates the core constitutional and democratic principle that “the will of the people—the majority—legally expressed, must govern.” *Common Cause*, 2019 WL 4569584, at *109 (quoting *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897)). That conclusion, the panel emphasized, “reflected the unanimous and best efforts of the ... judges—each hailing from different geographic regions and each with differing ideological and political outlooks—to apply core constitutional principles to [a] complex and divisive topic.” *Id.* at *1. And that conclusion accorded, too, with the unanimous views of the U.S. Supreme Court, which has spoken with one voice in affirming that partisan gerrymandering violates fundamental democratic principles and that state constitutions can remedy those violations (even as the Court has divided over whether the *federal* Constitution provides such a remedy). The panel thus enjoined the General Assembly’s congressional, Senate, and House maps. *Id.* at *135; *Harper*, 2019 N.C. Super. LEXIS 122, at *22–25.

Here, Plaintiffs seek a preliminary injunction based on the same principles applied in *Common Cause* and *Harper*. As shown by the affidavit of Professor Moon Duchin, a renowned mathematician and districting expert, the plans the General Assembly enacted in 2021 are the same type of partisan gerrymanders invalidated in *Common Cause* and *Harper*. The 2021 plans guarantee that the incumbent party will retain majorities in Congress, the state Senate, and the state House, even if voters reject that party by significant margins. Elections will not “fairly ascertain[]”

the “free will of the People”; rather, “the carefully crafted will of the map drawer ... [will] predominate[.]” *Common Cause*, 2019 WL 4569584, at *3.

The Enacted Plans, moreover, effect this democracy-destroying result via classic gerrymandering tactics. They “pack[] supermajorities of [Democratic] voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail.” *Id.* at *110. Then, the maps “crack[] the rest across many more districts, spreading them so thin that their candidates will not be able to win.” *Id.* Hundreds of thousands of individual Democratic voters are systematically disempowered: “Whether the person is packed or cracked, his vote carries less weight.” *Id.* For example, the Enacted Congressional Plan trisects Wake, Mecklenburg, and Guilford Counties—and only those counties—to pack and crack voters in Democratic strongholds.

The General Assembly tried to avoid accountability for its patent gerrymanders via a paper prohibition on relying on “[p]artisan considerations and election results data.” Ex. N at 2. But as it turned out, this meant only that the ***public map-drawing terminals*** did not contain election data. The General Assembly did not try to limit members from drawing gerrymandered maps elsewhere and then redrawing them on public terminals. To the contrary, they admitted that members could do so. Any claim that the General Assembly locked in Republican majorities across all three maps, without meaning to do so, does not withstand scrutiny. *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.”).

While the methods of gerrymandering have grown more sophisticated over the past decade, so, too, have the tools for identifying and redressing them. The plaintiffs bringing this suit are a coalition including the North Carolina League of Conservation Voters, Inc., civil rights leaders,

and individual voters, as well as professors of mathematics, statistics, and computer science. 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.

These tools confirm that the Enacted Plans will yield severely gerrymandered results. And these tools confirm that this gerrymandering did not happen by accident, or as an artifact of North Carolina’s political geography. By leveraging the tools of computational redistricting, Plaintiffs show that the General Assembly could have drawn maps that avoid the partisan gerrymandering that marks the Enacted Plans, while *improving* on compliance with the laws and policies governing redistricting in North Carolina. Plaintiffs have presented such maps in their Verified Complaint—as the Optimized Congressional Map, Optimized Senate Map, and Optimized House Map (together, the “Optimized Maps”). The reason that the General Assembly did not draw this type of map, Plaintiffs submit, is that it intended the gerrymandered results the Enacted Plans yield.

Plaintiffs now seek, as in *Harper*, an injunction against using the Enacted Plans in the 2022 primary election, as well as (if necessary) a delay in the candidate-filing window and the primary schedule to allow the Court to institute maps that fully remedy the constitutional violations. *See Harper*, 2019 N.C. Super. LEXIS 122, at *24–25 (similar preliminary injunction). The candidate-filing window opens on December 6, 2021 for North Carolina’s March 8, 2022 primaries—and unless this Court acts, millions of North Carolinians will find their right to vote nullified. While North Carolina law presumptively allows the General Assembly two weeks to attempt to fully

remedy unlawful maps, if it fails to timely do so, the Court should order Defendants to conduct the 2022 primary election for Congress, state Senate, and state House under the Optimized Maps.

BACKGROUND

A. The Law Governing Redistricting in North Carolina

After every federal decennial census, the General Assembly must draw new legislative districts. N.C. Const. art. II, §§ 3, 5. The North Carolina State Constitution imposes several limits on that authority, including that (1) each Senator and Representative “shall represent, as nearly as may be, an equal number of inhabitants”; (2) each district “shall at all times consist of contiguous territory”; (3) “[n]o county shall be divided in the formation of a senate district ... [or] a representative district” (the “Whole County Provisions”); and (4) “[w]hen established, the senate [and representative] districts and the apportionment of [legislators] shall remain unaltered until the return of another decennial census.” *Id.*

Redistricting also must comply with other requirements of state law, including North Carolina’s Free Elections Clause, Equal Protection Clause, Free Speech Clause, and Free Assembly Clause. *Common Cause*, 2019 WL 4569584, at *108–24; *Harper*, 2019 N.C. Super. LEXIS 122, at *7–14. Federal law—including the one-person, one-vote requirement and the Voting Rights Act of 1965, as amended (the “VRA”)—imposes additional requirements.

In a line of cases beginning with *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), the Supreme Court set forth a mandatory, nine-step framework that explains how to apply certain aspects of North Carolina redistricting law governing state legislative maps—in particular, the Whole County Provisions—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*). The *Stephenson/Dickson* framework provides that “[f]irst, ‘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. Next, “[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.” *Id.*

Steps three through nine provide detailed instructions about how to implement the Whole County Provisions consistent with other federal and state law requirements. When one county can form exactly one non-VRA district consistent with equal-population requirements, or when one county can be divided into multiple non-VRA districts, all of which comply with equal-population requirements, the framework (in steps three and four) requires forming compact districts that do not traverse these whole counties. *Id.* Where that is *not* possible, the framework (in steps five and six) requires the formation of “clusters” of contiguous counties that, when combined, can be divided into compact districts that all comply with equal-population requirements. *Id.* at 530–31, 781 S.E.2d at 438–39. Within these clusters, the framework requires the General Assembly to minimize unnecessary “traversals” of county lines. *Id.* Steps four, five, seven, and nine of the framework require that the districts be compact. *Id.*

B. *Common Cause and Harper*

Too often, however, these neutral principles have not governed redistricting by the North Carolina General Assembly, which instead has gerrymandered based on party, race, or both. *See generally* J. MICHAEL BITZER, REDISTRICTING AND GERRYMANDERING IN NORTH CAROLINA (2021). On that score, neither party’s hands are clean—though recently, control of the General Assembly has rested with the Republican Party. In the 2011 redistricting cycle, for example, the controlling 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 plans as unconstitutional racial gerrymanders.⁴ But when the General Assembly redrew those maps, it again created “[e]xtreme partisan gerrymander[s].” *Id.* at *125, *135; *see Harper*, 2019 N.C. Super. LEXIS 122, at *16–18. Indeed, one legislative leader “acknowledge[d] freely that” the congressional map “would be a political gerrymander.” *Harper*, 2019 N.C. Super. LEXIS 122, at *17.

In 2019, the three-judge panel carefully considered the argument that incumbent officeholders are “perfectly free” to gerrymander. *Common Cause*, 2019 WL 4569584, at *4. In an exhaustive opinion, the panel unanimously rejected that claim. The Court held that, under “extreme partisan gerrymander[s],” elections do not “fairly ascertain[]” the “free will of the People”; rather, “the carefully crafted will of the map drawer ... predominates.” *Id.* at *3. And that result, the panel held, “violate[s] multiple fundamental rights guaranteed by the North Carolina Constitution.” *Harper*, 2019 N.C. Super. LEXIS 122, at *18. Those include the fundamental rights protected by North Carolina’s Free Elections Clause—which has no counterpart in federal law—as well as the Equal Protection, Free Speech, and Free Assembly Clauses. *Infra* Part I.A (detailing how partisan gerrymandering violates these clauses).

That conclusion, the panel emphasized, “reflected the unanimous and best efforts of the ... judges—each hailing from different geographic regions and each with differing ideological and political outlooks—to apply core constitutional principles to [a] complex and divisive topic.” *Common Cause*, 2019 WL 4569584, at *1. That conclusion, too, accorded with the guidance of the Supreme Court of the United States. *Id.* at *2. In 2004, all nine Justices agreed that “an

⁴ *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (congressional plan), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (legislative plans), *summarily aff’d*, 137 S. Ct. 2211 (2017).

excessive injection of politics” in redistricting is “unlawful.”⁵ And in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), all nine Justices again agreed that partisan gerrymanders are “incompatible with democratic principles.” *Id.* at 2506; *id.* at 2512 (Kagan, J., dissenting). While *Rucho* held that partisan gerrymandering claims are nonjusticiable in federal court, Chief Justice Roberts emphasized that the Court’s opinion did not “condemn complaints” about “excessive partisan gerrymandering” to “echo into a void.” *Id.* at 2506 (majority op.). Instead, state courts can find prohibitions on such gerrymandering in “state constitutions.” *Id.* at 2507; *see Common Cause*, 2019 WL 4569584, at *2. In *Common Cause* and *Harper*, the three-judge panel held that North Carolina’s constitution proscribes partisan gerrymanders. The panel thus enjoined the use of the gerrymandered maps for Congress, the state Senate, and the state House.

C. The 2021 Redistricting Process

When the time came to redistrict following the 2020 census, the General Assembly changed its means but not its ends. Instead of drawing North Carolina’s districts to fairly reflect North Carolinians’ preferences, the General Assembly structured its processes to conceal its aims and, if possible, to shield its gerrymandered maps from scrutiny.

1. The General Assembly did so, first, in the criteria and methods adopted by the committees overseeing the redistricting process. The Senate Committee on Redistricting and Elections (chaired by Defendants Hise, Daniel, and Newton) and the House Committee on Redistricting (chaired by Defendant Hall) issued proposed redistricting criteria on August 9, 2021, and, three days later, adopted them with minimal amendments. Verified Compl. ¶¶ 61–63. The adopted criteria stated that “[p]artisan considerations and election results data ***shall not*** be used in

⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 292–93 (2004) (plurality op. of Scalia, J.); *see id.* at 316 (Kennedy, J., concurring) (noting the plurality’s agreement that severe partisan gerrymandering is unlawful).

the drawing of districts in the 2021 Congressional, House, and Senate plans.” *Id.* ¶ 69. As it turned out, however, this statement meant only that the Committees’ computer terminals did not contain electoral data. *Id.* ¶ 70. Members were free to draw maps outside the hearing rooms, using whatever data they liked, and then redraw them on the public terminals. *Id.* Indeed, Defendant Hall admitted that he had no intention of blocking such maneuvers. *Id.*; Liberman Aff. ¶ 2.

When the map-drawing process was getting started on October 5, 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 to implement the *Stephenson/Dickson* framework. Verified Compl. ¶ 73. The Duke researchers explained that the clusters—16 options for the Senate plan and 8 for the House plan—were “largely algorithmically determined through an optimization procedure outlined by the NC Supreme Court in *Stephenson v. Bartlett*” using the 2020 census data. *Id.*; Ex. O at 1. The Duke researchers cautioned, however, that the “one part of *Stephenson* ... which this analysis does not reflect is compliance with the Voting Rights Act.”⁶ Ex. O at 1. Even so, the Committees did not account for this limitation. Verified Compl. ¶ 74. Indeed, the Committees adopted redistricting criteria providing that “[d]ata identifying the race of individuals or voters shall not be used,” even though it is impossible to assess VRA compliance without considering how racial data intersect with election results. *Id.* ¶¶ 65–69; Ex. N at 2.

2. Meanwhile, the General Assembly established a calendar that would limit scrutiny of its maps. Redistricting depends on data generated by the U.S. Census Bureau. In 2021, however, the COVID-19 pandemic delayed the release of census data for about five months, to August 2021. Verified Compl. ¶ 60; Ex. J at 1. Shortly after the Census Bureau announced that the delay would

⁶ Christopher Cooper et al., *NC General Assembly County Clusterings from the 2020 Census* (Aug. 17, 2021) (Ex. O to the Verified Complaint’s Feldman Affidavit).

extend deep into 2021, the Executive Director of the North Carolina State Board of Elections advised the General Assembly to delay the 2022 congressional and legislative primary by eight weeks—from the original date, March 8, to May 3—with second primaries on July 12. Verified Compl. ¶ 184; Ex. L at 14.

The General Assembly duly allowed *municipalities* to delay their municipal primaries. Verified Compl. ¶ 185. But it refused to reschedule primaries for congressional and legislative offices. *Id.*

As a result, North Carolina is an outlier. Forty-eight of the 50 States have 2022 primaries scheduled in May or later. *Id.* ¶ 183. Nineteen States have scheduled 2022 primaries for August or later. *Id.* Only North Carolina and Texas are contemplating a primary as early as March—and Texas’s primary may be postponed based on pending litigation. *Id.*

North Carolina’s artificially compressed redistricting schedule became a tool to limit public and expert scrutiny. During September, the Committees held 13 public hearings—but because no maps had been proposed, those hearings did not provide the public or experts a meaningful opportunity to provide input. *Id.* ¶ 72. On October 6, Committee members began drawing proposed maps in the hearing rooms. *Id.* ¶ 75. On October 21, with little advance notice, the Committees announced that public hearings would be held on October 25 and 26. *Id.* ¶ 76. The Committees did not specify which, if any, of the many maps that had been posted online were final contenders, leaving the public and experts unable to identify the maps that were the Committee leaders’ focus. *Id.* On October 28, the Committees announced legislative hearings on November 1 and 2 to consider proposed congressional and legislative plans. *Id.* After cursory hearings, the Committees passed proposed plans for Congress, the state Senate, and the state House. On

November 4, the General Assembly adopted the Enacted Plans into law, each with no or few amendments and all on party-line votes. *Id.* ¶¶ 78–81.

Now, the General Assembly’s artificially compressed schedule threatens to interfere with the *judiciary’s* ability to scrutinize the gerrymandered plans. Any candidate seeking nomination for a congressional or legislative office currently must file a notice of candidacy between December 6 and 17, 2021. *Id.* ¶ 181. Soon thereafter, the State Board of Elections must begin mailing ballots, with the primary not far behind. Unless this Court acts, the 2022 primary election will proceed under the Enacted Plans *even though* they constitute egregious gerrymanders.

D. This Suit and Plaintiffs’ Motion for a Preliminary Injunction

On November 16, just 12 days after the General Assembly enacted its maps, Plaintiffs filed this suit. The Verified Complaint alleges that the Enacted Plans are unconstitutional partisan gerrymanders that violate North Carolina’s Free Elections Clause (Count I), Equal Protection Clause (Count II), and Free Speech and Free Assembly Clauses (Count III)—the same violations that the three-judge panels found in 2019 in *Common Cause* and *Harper*. The Verified Complaint also alleges that the Enacted Maps unlawfully dilute the voting strength of North Carolina’s black voters in violation of North Carolina’s Free Elections Clause (Count IV) and Equal Protection Clause (Count V), as well as violate the Whole County Provisions as implemented in the *Stephenson/Dickson* framework (Count VI).

Plaintiffs include the North Carolina League of Conservation Voters, Inc. (“NCLCV”), which sues 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.⁷

⁷ In particular, as relevant here, NCLCV’s President has verified that NCLCV has members who are registered Democratic voters in all 14 districts under the Enacted Congressional Plan, all 50

Plaintiffs also include civil-rights legend Mickey Michaux, himself a former member of the General Assembly, as well as Democratic and black voters who reside across the state. And Plaintiffs include noted professors of mathematics, statistics, and computer science, including Dr. Dandrielle Lewis, the Department Chair of Mathematical Sciences at High Point University; Dr. Timothy Chartier, the Joseph R. Morton Professor of Mathematics and Computer Science at Davidson College; Dr. Talia Fernós, Associate Professor of Mathematics at the University of North Carolina at Greensboro; Dr. Katherine Newhall, Associate Professor of Mathematics at the University of North Carolina at Chapel Hill; and Dr. R. Jason Parsley, Associate Professor of Mathematics at Wake Forest University.

Simultaneously, Plaintiffs moved for a preliminary injunction. The motion seeks to enjoin Defendants—who include officials from the State Board of Elections—from preparing for, administering, or conducting the March 8, 2022 primary election and any subsequent election for Congress, the state Senate, or the state House using the Enacted Plans. The motion also seeks ancillary relief detailed further below. *Infra* Part II.C.

Plaintiffs have moved for preliminary relief only on their claims (in Counts I–III) that parallel the successful claims in *Common Cause* and *Harper*. Plaintiffs have also supported their motion with evidence. In addition to their Verified Complaint, Plaintiffs have submitted an affidavit from Professor Duchin—a mathematician specializing in metric geometry and one of the Nation’s leading experts on computational redistricting—demonstrating that the Enacted Plans are extreme, unjustified partisan gerrymanders. Plaintiffs have also submitted voluminous documentary evidence. *See* Exs. A–AI; Liberman Aff. ¶¶ 2–4.

districts under the Enacted Senate Plan, and all 120 districts under the Enacted House Plan. Verified Compl. ¶ 11 & n.4.

LEGAL STANDARD

A preliminary injunction should issue if (1) the plaintiff can “show likelihood of success on the merits of his case,” (2) the plaintiff “is likely to sustain irreparable loss unless the injunction is issued,” and (3) a “balancing of the equities” supports injunctive relief. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).⁸

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

This motion calls for a straightforward application of the same legal principles applied in *Common Cause* and *Harper*. As these cases hold, the North Carolina State Constitution proscribes “extreme partisan gerrymanders.” *Common Cause*, 2019 WL 4569584, at *3. And as Professor Duchin’s affidavit demonstrates, the Enacted Plans constitute just such extreme partisan gerrymanders. Plaintiffs are thus likely to succeed on their claims.⁹ Below, Plaintiffs first detail

⁸ Plaintiffs primarily seek a prohibitory injunction to restrain Defendants from using the Enacted Plans in administering the 2022 primary and general elections. *See Roberts v. Madison Cnty. Realtors Ass’n, Inc.*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) (explaining that a prohibitory injunction is “preventive in character” and “forbid[s] the continuance of a wrongful act or the doing of some threatened or anticipated injury”). Because that relief does not require Defendants to “perform a positive act,” Plaintiffs do not need to satisfy the standard for a mandatory injunction. *Auto Dealer Res., Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972); *see Harper*, 2019 N.C. Super. LEXIS 122, at *11 (granting injunction based on the standard for prohibitory injunctions). And that remains true even though Plaintiffs *also* ask the Court to order that the 2022 elections proceed under lawful maps that remedy the Enacted Plans’ constitutional violations as thoroughly as Plaintiffs’ Optimized Maps. That latter request merely invokes this Court’s independent duty to ensure, after it holds the Enacted Maps unlawful, that elections occur under lawful maps. Regardless, Plaintiffs also satisfy the standard for a mandatory injunction: The harms to Plaintiffs from the Enacted Plans are “immediate, pressing, irreparable, and clearly established.” *Auto Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732.

⁹ North Carolina courts have not determined whether decisions of three-judge courts bind three-judge panels of the same Court. Given that the General Assembly in N.C. Gen. Stat. § 1-267.1(a) *specifically* empowered three-judge panels to resolve constitutional objections to redistricting plans, Plaintiffs maintain that *Common Cause* and *Harper* are properly considered binding precedent. At minimum, however, those decisions—and the careful reasoning that supports them—underscore that, at the preliminary-injunction stage, Plaintiffs are likely to succeed in

the several ways in which, as *Common Cause* and *Harper* recognize, partisan gerrymandering violates the North Carolina State Constitution. Then, Plaintiffs show that each of the Enacted Plans constitutes an unlawful partisan gerrymander.

A. The North Carolina State Constitution Prohibits Partisan Gerrymandering.

1. The Free Elections Clause Forbids Partisan Gerrymandering.

North Carolina’s prohibition on partisan gerrymandering flows, first, from its Free Elections Clause—as *Common Cause* correctly held, based on a scholarly analysis of that clause’s text and history. 2019 WL 4569584, at *2. The Free Elections Clause declares that “[a]ll elections shall be free.” N.C. Const. art. I, § 10. It derives from the 1689 English Bill of Rights and is “one of the clauses that makes the North Carolina Constitution more detailed and specific than the federal Constitution.” *Common Cause*, 2019 WL 4569584, at *109 (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

As *Common Cause* explained, the Free Elections Clause protects the “fundamental role of the will of the people in our democratic government.” *Id.* In particular, it protects the ability of a *majority* of the people to translate votes into governing power: Because “this is a government of the people, ... the will of the people—the majority—legally expressed, must govern.” *Id.* (quoting *Quinn*, 120 N.C. at 428, 26 S.E. at 638). Hence, “the object of all elections” must be “to ascertain, fairly and truthfully, the will of the people—the qualified voters.” *Id.* (quoting *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915)); see *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875) (“Our government is founded on the will of the people,” which is “expressed by the ballot[.]”).

showing that partisan gerrymanders violate the North Carolina State Constitution. *Cf. Order, Haw River Assembly v. Rao*, No. 15-CVS-127 (Super. Ct., Wake Cnty. May 7, 2015) (finding a likelihood of success “[b]ased on the decision of [a] three-judge panel” in a different case).

As *Common Cause* held, partisan gerrymandering thwarts this command. That is because elections under gerrymandered maps do not “ascertain, fairly and truthfully, the will of the people.” *Hill*, 169 N.C. at 415, 86 S.E. at 356. Rather, the government has “interfere[d]” with that will. *Common Cause*, 2019 WL 4569584, at *111 (quoting JOHN V. ORTH & PAUL M. NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 55–57 (2d ed. 2013)). It “is the will of the map drawers,” not the voters, “that prevails.” *Id.* at *110. And that result violates the “core principle of republican government”—“namely, that the voters should choose their representatives, not the other way around.” *Id.* (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015)). Indeed, partisan gerrymandering “represent[s] an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.” *Id.* (quotation marks omitted).

Gerrymandering works, and has always worked, by manipulating district lines for partisan gain. In 17th-century England, the King undertook “to manipulate parliamentary elections, including by changing the electorate in different areas to achieve ‘electoral advantage.’” *Id.* at *111 (quoting J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 148 (1972)). Those abuses “led to a revolution” and, thereafter, a provision in the 1689 English Bill of Rights specifying that “election of members of parliament ought to be free.” *Id.* (quoting Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)). That clause aimed, directly, at the King’s gerrymandering. *Id.* At the Founding, several states adopted free-elections clauses modeled on the 1689 English Bill of Rights, and the framers of the North Carolina Declaration of Rights drew inspiration from these states, including Pennsylvania. *Id.* These states have understood their free-elections clauses to prohibit partisan gerrymandering by protecting each citizen’s right to “an equally effective power to select the

representative of his or her choice” and “bar[ring] the dilution of the people’s power to do so” via gerrymandering. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018).¹⁰

As the three-judge panel in *Common Cause* recognized, in the intervening centuries, North Carolina has only strengthened that protection. Its original 1776 constitution closely paralleled the English Bill of Rights and provided that “elections *ought* to be free.” *Common Cause*, 2019 WL 4569584, at *111 (emphasis added). In 1971, North Carolina amended the clause to specify that “[a]ll elections *shall* be free.” *Id.* (emphasis added by the panel). This amendment “ma[d]e [it] clear” that the Free Elections Clause is a “command[] and not mere admonition[.]” *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639, 286 S.E. 2d 89, 94, 97 (1982). The *Common Cause* panel properly enforced this command and held that partisan gerrymandering is “contrary to the fundamental right[s] of North Carolina citizens” under the Free Elections Clause. 2019 WL 4569584, at *110.

The *Common Cause* panel also held that partisan gerrymanders violate a right that is a close corollary to the Free Elections Clause. The Declaration of Rights provides that “[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held.” N.C. Const. art. I, § 9. This clause, together with the Free Elections Clause, “mandates that elections in North Carolina must be ‘free from interference or intimidation’ by the government, so that all North Carolinians are freely able, through the electoral process, to pursue a ‘redress of grievances and for amending and strengthening the laws.’” *Common Cause*, 2019 WL 4569584, at *111 (quoting ORTH & NEWBY, *supra*, at 56). But when gerrymanders entrench one party in power, and

¹⁰ As early as the 1860s, the Pennsylvania Supreme Court explained “that elections are made equal by ‘laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth.’” *League of Women Voters*, 178 A.3d at 814 (quoting *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)).

prevent the other party from winning elections, voters cannot “meaningfully seek to redress their grievances or amend the laws consistent with their policy preferences”—because these voters are unable to “obtain a majority” of seats, even with a majority of votes. *Id.* at *112.

2. The Equal Protection Clause Prohibits Partisan Gerrymandering.

Common Cause also held, correctly, that the North Carolina State Constitution’s Equal Protection Clause proscribes partisan gerrymandering. As the Supreme Court has explained, “[t]he 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). And in North Carolina, the Equal Protection Clause protects “[t]he right to vote *on equal terms* in representative elections,” *id.* (emphasis added), and the right to “substantially equal voting power,” *Stephenson I*, 355 N.C. at 379, 562 S.E.2d at 394.

Indeed, this is yet another way in which North Carolina’s Equal Protection Clause is “broader” than its federal counterpart. *Common Cause*, 2019 WL 4569584, at *113. For instance, in *Stephenson I*, the North Carolina Supreme Court invalidated the simultaneous use of single-member and multimember districts in a redistricting plan. Such a scheme does not violate the federal Equal Protection Clause—but it burdens the “fundamental right under the State Constitution” to “substantially equal voting power and substantially equal legislative representation.” *Stephenson I*, 355 N.C. at 387, 562 S.E.2d at 396. Similarly, in *Blankenship*, the North Carolina Supreme Court held that North Carolina’s Equal Protection Clause “mandates one-person, one-vote in judicial elections, even though the United States Constitution does not.” *Common Cause*, 2019 WL 4569584, at *114 (citing *Blankenship*, 363 N.C. at 522–24, 681 S.E.2d at 762–64).

Common Cause thus held that, under North Carolina’s broad Equal Protection Clause, partisan gerrymandering denies individuals “the equal protection of the laws,” N.C. Const. art. I, § 19, as to one of their most cherished rights. It does so, first, “by seeking to diminish the electoral power of supporters of a disfavored party.” *Common Cause*, 2019 WL 4569584, at *113. It thereby “treats individuals who support candidates of one political party less favorably than individuals who support candidates of another” and deprives them of “equal” voting power. *Id.* As *Common Cause* held, there “is nothing ‘equal’ about the ‘voting power’ of Democratic voters when they have a vastly less realistic chance of winning a majority.” *Id.* at *116.

Common Cause also recognized that, as a corollary, partisan gerrymanders unlawfully deprive voters from the disfavored party of “substantially equal legislative representation.” *Id.* That is because “[p]artisan gerrymandering insulates legislators from popular will and renders them unresponsive to portions of their constituencies.” *Id.* In particular, “[w]hen a district is created solely to effectuate the interests of one group, the elected official from that district is ‘more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.’” *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)). Or as the Supreme Court put it in *Stephenson I*, the “political reality” is that “legislators are much more inclined to listen to and support a constituent than an outsider.” 355 N.C. at 380, 562 S.E.2d at 395. And when partisan gerrymandering fixes the results of general elections, legislators may view only those of *their party* as genuine constituents. *Common Cause*, 2019 WL 4569584, at *117 (explaining that “legislators are far more likely to represent the interests and policy preferences of voters of the same party”); *see also* N.C. Const. art. I, § 9.

3. The Free Speech and Free Assembly Clauses Ban Partisan Gerrymandering.

Finally, *Common Cause* held that partisan gerrymanders violate North Carolina’s Free Speech and Free Assembly Clauses. 2019 WL 4569584, at *118–24; *see Harper*, 2019 N.C. Super. LEXIS 122, at *11–14. They do so by targeting votes for the disfavored party—which constitute core political speech—and making them less effective, and by preventing members of the disfavored party from effectively assembling and instructing their representatives.

i. As *Common Cause* explained, partisan gerrymandering violates the Free Speech Clause by targeting speech based on viewpoint. The Free Speech Clause provides that “[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained.” N.C. Const. art. I, § 14. And “[v]oting ... constitutes a form of protected speech.” *Common Cause*, 2019 WL 4569584, at *119. Indeed, there “is no right more basic in our democracy than the right to participate in electing our political leaders—including ... the right to vote.” *Id.* (quoting *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 191 (2014) (plurality op. of Roberts, C.J.)) (internal quotation marks omitted). True, a vote carries a legal effect. But as Justice Alito explained, the “act of voting is not drained of its expressive content when the vote has a legal effect.” *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 134 (2011) (Alito, J., concurring).

Applying decades of North Carolina law, *Common Cause* recognized that a law violates the Free Speech Clause when “it renders disfavored speech *less effective*, even if it does not ban such speech outright”—because the “government may not restrict a citizen’s ‘ability to *effectively* exercise’ their free speech rights.” *Common Cause*, 2019 WL 4569584, at *121 (emphasis added) (quoting *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 451, 253 S.E.2d 473, 486 (1979), *aff’d*, 299 N.C. 399, 263 S.E.2d 726 (1980)); *see McCullen v. Coakley*,

573 U.S. 464, 489–90 (2014) (state law violated First Amendment rights of pro-life protestors, even though “petitioners [could] still be ‘seen and heard,’” because the law “effectively stifled [their] message”); *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 736 (2008) (restrictions on self-financed candidates violated the First Amendment by “diminish[ing] the effectiveness” of speech); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 747 (2011) (scheme violated the First Amendment by rendering “speech ... less effective”).

As *Common Cause* held, partisan gerrymandering does just that by making some votes—votes for the disfavored party—less effective based on viewpoint. It “is ‘axiomatic’ that the government may not infringe on protected activity based on ... viewpoint.” 2019 WL 4569584, at *120 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)). Indeed, “political speech” has “such a high status” that, for such speech, free speech protections have their “fullest and most urgent application.” *Winborne v. Easley*, 136 N.C. App. 191, 198, 523 S.E.2d 149, 154 (1999). Hence, “[v]iewpoint discrimination is *most* insidious where the targeted speech is political.” *Common Cause*, 2019 WL 4569584, at *120. As the U.S. Supreme Court has explained, in “the context of political speech, ... [b]oth history and logic” demonstrate the perils of permitting the government to “identif[y] certain preferred speakers” while burdening “disfavored speakers.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010). The government may not burden the “speech of some [speakers] in order to enhance the relative voice of others.” *McCutcheon*, 572 U.S. at 207. That is what partisan gerrymandering does.¹¹

¹¹ Indeed, that conclusion is especially clear because the “North Carolina Supreme Court has held that the North Carolina Constitution’s Free Speech Clause provides broader rights than does federal law.” *Common Cause*, 2019 WL 4569584, at *118. In *Corum*, for example, the Supreme Court “expressly relied on *the lack* of a federal remedy” and how this gap, if not filled by North Carolina’s Free Speech Clause, would leave the plaintiff with “no other remedy ... for alleged violations of his constitutional freedom of speech rights.” *Common Cause* 2019 WL 4569584, at *118 (quoting *Corum*, 330 N.C. at 783, 413 S.E.2d at 290).

ii. *Common Cause* also held that partisan gerrymandering violates free speech and free assembly rights by preventing voters and supporters of the disfavored party from effectively associating. The Free Assembly Clause specifies that 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.” N.C. Const. art. I, § 12. This guarantee encompasses a “right to freedom of association.” *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (2014). Indeed, North Carolina courts have “recognized the right to associate in order to express one’s views is inseparable from the right to speak freely”—because “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” *Id.* (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 249 (4th Cir. 1999)); *accord Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011).

In particular, *Common Cause* explained that “[j]ust as voting is a form of protected expression, banding together with likeminded citizens in a political party is a form of protected association.” 2019 WL 4569584, at *120. That is because individuals form parties to “express their political beliefs and to assist others in casting votes in alignment with those beliefs.” *Libertarian Party*, 365 N.C. at 49, 707 S.E.2d at 204. Indeed, for “elections to express the popular will, the right to assemble and consult for the common good must be guaranteed.” *Common Cause*, 2019 WL 4569584, at *120 (quoting JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 48 (1995)); *accord* ORTH & NEWBY, *supra*, at 58. By contrast, as *Common Cause* holds, partisan gerrymandering unconstitutionally burdens the right “to associate effectively”—in three ways. 2019 WL 4569584, at *122.

First, partisan gerrymanders burden the ability of voters and supporters of the disfavored party to associate with “their representatives” to “obtain redress ... on issues important to those voters.” *Id.* If partisan gerrymandering precludes these voters and supporters from “obtain[ing] ... majorities,” it thwarts the *whole point* of their protected association. *Id.*

Second, partisan gerrymandering “violate[s] ... associational rights by” weakening the ability of political associations to “carry out [their] core functions and purposes.” *Id.* (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)). Political parties (like the Democratic Party, in which several Plaintiffs are active, Verified Compl. ¶¶ 14, 26) and politically oriented associations (like NCLCV) carry out their missions by “fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office.” *Id.* (quoting *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring)). But when partisan gerrymandering renders elections a charade, such that the disfavored party has no “meaningful opportunity to gain majority control,” *id.*, parties and politically active associations will struggle to persuade citizens that they should invest scarce time and hard-earned money.

Third, partisan gerrymanders violate associational rights by making less effective the resources that parties and associations *do* invest. When parties and associations invest time or money in campaigns, they do so to associate with candidates and others. But partisan gerrymandering makes those investments far less effective and forces parties and associations “to drain and divert resources ... merely to avoid being relegated to a superminority.” *Id.* By “diminish[ing] the effectiveness” of these expenditures, political gerrymanders burden associational rights. *Davis*, 554 U.S. at 736; *see Bennett*, 564 U.S. at 736.

B. Plaintiffs Are Likely to Succeed in Showing That the Enacted Plans Constitute Unlawful Partisan Gerrymanders.

The Enacted Plans are just the type of “extreme partisan gerrymander” that *Common Cause* and *Harper* condemned. *Common Cause*, 2019 WL 4569584, at *3. Plaintiffs first explain the key feature that, under those cases, marks a map as such a partisan gerrymander—namely, that it prevents the disfavored party from receiving a majority of seats, even when that party’s candidates earn a majority of votes statewide, and even when that party would obtain a majority of seats under fair maps. Then, Plaintiffs show that each of the Enacted Plans has this same democracy-destroying feature, supported by Professor Duchin’s expert affidavit. In “[e]very *single* ... close statewide contest,” the Enacted Plans will award the favored Republican Party “an outright ... majority” of seats. Duchin Aff. 15 (emphasis modified). And even if Republican candidates *lose* the statewide vote by seven percentage points, they would *still* receive a majority of seats. *Id.* at 14; Verified Compl. ¶¶ 129–131. That result should not happen. And Plaintiffs’ Optimized Maps show that this result would not happen under fair maps that comply with North Carolina law.

1. As *Common Cause* and *Harper* Recognize, a Key Feature of an Unconstitutional Partisan Gerrymander Is That It Systematically Prevents One Party from Receiving a Majority of Seats Even When It Wins a Majority of Votes.

As *Common Cause* and *Harper* hold, an unconstitutional partisan gerrymander has a hallmark feature: “maps are drawn to systematically prevent [one party] from obtaining a majority” of seats. *Common Cause*, 2019 WL 4569584, at *116.¹² When plans have that feature, they violate

¹² *Accord Common Cause*, 2019 WL 4569584, at *2 (“[T]he effect of these carefully crafted partisan maps is that, in all but the most unusual election scenarios, the Republican party will control a majority of both chambers of the General Assembly.”); *id.* (“[I]n many election environments, it is the carefully crafted maps, and not the will of the voters, that dictate the election outcomes in a significant number of legislative districts and, ultimately, the majority control of the General Assembly.”); *id.* at *116 (“Democratic voters are significantly hindered from meaningfully participating in the decision-making process of government when the maps are drawn to systematically prevent Democrats from obtaining a majority”); *Harper*, 2019 N.C.

the core democratic principle that “the will of the people—the majority—legally expressed, must govern.” *Id.* at *109 (quoting *Quinn*, 120 N.C. at 428, 26 S.E. at 638).

That feature is especially destructive in an evenly balanced state like North Carolina. Over the past decade, across 52 statewide races, Republican candidates have received, on average, 50.9% of the major-party votes, and Democratic candidates have won 49.1%. *Duchin Aff.* 8. Republican candidates have won some important elections (including the 2016 and 2020 Presidential elections and the 2016 and 2020 U.S. Senate elections); Democratic candidates have won others (including the 2016 and 2020 elections for Governor and Attorney General). *Id.* In the last statewide general election, the 2020 Chief Justice race was decided by a mere 401 votes. *Verified Compl.* ¶¶ 82, 91(a). In such a state, fair redistricting maps will provide both parties a realistic opportunity to capture half or more of the districts if their candidates garner half or more of the statewide votes. *Id.* ¶ 157; *Duchin Aff.* 7; *see Common Cause*, 2019 WL 4569584, at *43.

Common Cause applied this principle to examine how the maps at issue performed in competitive elections. The Court analyzed, for example, “electoral environments where Democrats could win a majority of ... seats under a nonpartisan map,” and looked to past elections—like the 2018 election—where “Republican candidates won a minority ... of the two-party statewide vote” and Democrats won a majority. *Common Cause*, 2019 WL 4569584, at *22, *74. The Court found that even in those environments, where any fair map would give Democratic candidates a realistic possibility of winning a majority of seats, the maps were “designed specifically to ensure that Democrats would not win a majority.” *Id.* at *22. In 2018, for example, Republican candidates “still won 29 of 50 [Senate] seats (58%)” and “65 of 120 [House] seats

Super. LEXIS 122, at *17–18 (holding that North Carolina’s congressional plan likely unlawfully advantaged Republicans where it gave a lopsided “[p]artisan [a]dvantage” of “10 Republicans [to] 3 Democrats”).

(54%),” despite losing the statewide vote. *Id.* at *74. “Democrats would have needed to win over 55% of the statewide vote to win a majority.” *Id.* Those features, *Common Cause* held, were “substantial evidence of the intent and effects of [a] partisan gerrymander.” *Id.* at *22.

Below, Plaintiffs show that each of the Enacted Plans has those same unlawful features.

2. The Enacted Congressional Plan Is an Unconstitutional Partisan Gerrymander.

The Enacted Congressional Plan is designed to prevent Democrats from winning a majority of North Carolina’s 14 congressional seats in all likely electoral scenarios. In *any* election decided within a seven-point margin, that plan effectively guarantees the Republican Party at least nine seats (64%), and typically generates at least 10 seats (71%), even if voters prefer Democratic candidates statewide. And it does so via the classic gerrymandering tactics of packing and cracking.

i. Professor Duchin undertook the same analysis that *Common Cause* held was dispositive. She examined voting data from 52 statewide partisan elections in 2012, 2014, 2016, 2018, and 2020 and analyzed how the Enacted Congressional Plan would translate those votes into seats. Duchin Aff. 8, 13–14.

First, Professor Duchin examined elections where voters were almost evenly divided. In the 2016 gubernatorial election, for example, the Democratic candidate won by 0.2 percentage points statewide. Professor Duchin analyzed the results that those same votes would have yielded, had they been cast for congressional candidates under the Enacted Congressional Plan. (In that example, Dr. Duchin found that Republican candidates would have won 10 of 14 congressional seats.) Duchin Aff. 14. Then, to test whether those skewed results reflected an inevitable feature of North Carolina’s political geography, or instead showed partisan gerrymandering, Professor

Duchin analyzed the results of those *same elections* under an alternative map—Plaintiffs’ Optimized Congressional Map (Ex. D).

The results are clear and unambiguous: In close statewide elections, the Enacted Congressional Plan *always* guarantees Republicans a supermajority of seats. The Optimized Congressional Map *never* yields such a result, for either party. *See Common Cause*, 2019 WL 4569584, at *112 (emphasizing that the General Assembly’s maps were “gerrymandered to be most resilient in electoral environments where Democrats could win majorities in either chamber under nonpartisan plans”). Table 1 illustrates that point based on five recent close elections:

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

Election (margin)	Enacted Congressional Plan	Optimized Congressional Map
2016 Governor (0.2-pt. D win)	10 R, 4 D	7 R, 7 D
2016 Atty General (0.5-pt. D win)	10 R, 4 D	7 R, 7 D
2016 Super. Pub. Instr. (1.2-pt. R win)	10 R, 4 D	8 R, 6 D
2020 President (1.4 pt.-R win)	10 R, 4 D	6 R, 8 D
2020 Chief Justice (0.0-pt. R win)	10 R, 4 D	6 R, 8 D

Note: Data derived from Duchin Aff., Table 6.

Second, Professor Duchin analyzed elections where Democratic candidates prevailed by significant margins. This analysis shows that under *any* plausible scenario, the Enacted Plan awards Republicans at least 9 of North Carolina’s 14 seats. Duchin Aff. 14. If Democratic candidates prevail statewide by anything less than 7 percentage points, Republican candidates *still* carry 9 or 10 congressional districts. *Id.* And again, Professor Duchin’s analysis confirms that this result cannot be blamed on political geography: As Table 2 shows, a fair and neutral map can translate Democratic statewide victories into Democratic majorities.

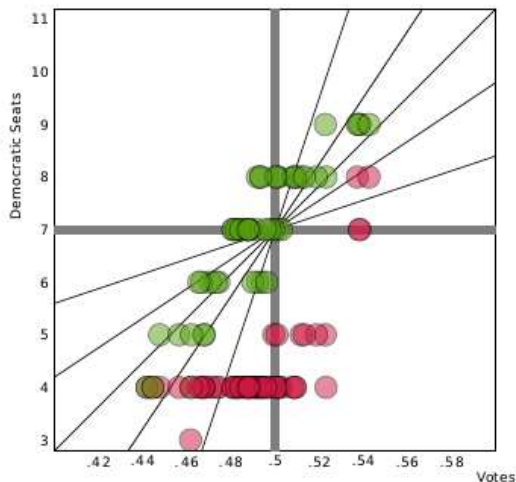
Table 2: Outcomes in 3 Democratic Elections in Enacted & Optimized Congressional Maps

Election (margin)	Enacted Congressional Plan	Optimized Congressional Map
2020 Governor (4.6-pt. D win)	10 R, 4 D	6 R, 8 D
2020 Sec’y of State (2.3-pt. D win)	9 R, 5 D	6 R, 8 D
2020 Auditor (1.8-pt D win)	10 R, 4 D	6 R, 8 D

Note: Data derived from Duchin Aff., Table 6.

Third, Professor Duchin examined *bias*. Figure 1 compares Democratic *vote* share (on the x-axis) with Democratic *seat* share (on the y-axis) across the same 52 elections. A map that responds to voters’ preferences would roughly track one of the black diagonal lines that cross at the “(50, 50)” point, where a 50% vote share generates a 50% seat share.¹³ Along those lines, as either party wins more votes, it wins more seats. And if either party wins a majority of votes, it wins a majority of seats. But as Figure 1 shows, the Enacted Congressional Plan (in red dots) does not come near the diagonal lines or pass through the (50, 50) point.

Figure 1: Vote Shares and Seat Shares in Enacted & Optimized Congressional Maps



Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted Congressional Plan. Green dots denote results under the Optimized Congressional Map in the same 52 elections.

¹³ Different black diagonal lines reflect differing degrees of responsiveness of seat share to shifts in vote share. Steeper lines indicate plans that would reward election winners with a larger “bonus” of seats. Because all the black diagonal lines pass through the (50, 50) point, in a politically even state they all treat Republicans and Democrats equally. By contrast, the Enacted Plans all heavily favor Republicans.

Figure 1 shows that, under the Enacted Congressional Plan, more Democratic votes usually *do not* mean more Democratic seats, reflected in the flat red line near the bottom of the figure. Indeed, the bulk of the red dots are stuck on that line, where Democrats carry only 4 of 14 districts. And in each of the 12 statewide contests where the Democratic candidate won by less than seven percentage points, the winner carried only 4 or 5 of the 14 districts (these are the red dots in the lower-right quadrant, where more than half the votes generated less than half the seats). So a clear majority of Democratic votes does not translate into a majority of seats. By contrast, the Optimized Congressional Map (in green) treats both parties fairly, with seat shares following the diagonal lines, passing right through the (50, 50) point, and almost invariably (with only 4 exceptions out of 52 elections) falling in the upper-right and lower-left quadrants, where a majority of votes (for either party) generates a majority of seats (or a tie).

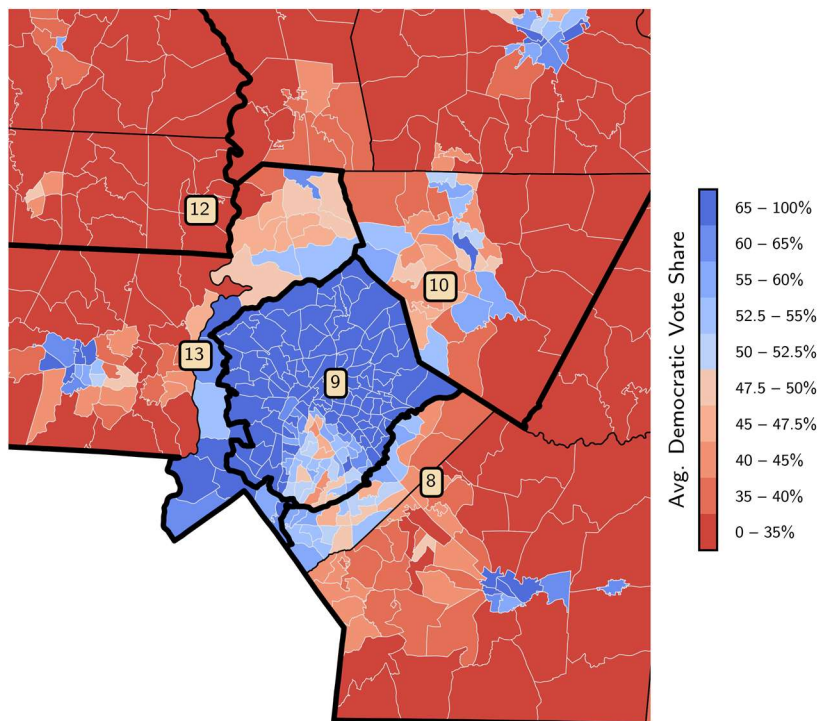
Aggregate data tell the same story. Across all 52 statewide elections, Democratic candidates received 49.1% of major-party votes on average. *Duchin Aff. 8*. But under the Enacted Congressional Plan, Democratic candidates would have received an average of only 31.2% of seats—in contrast to 49.3% under the Optimized Congressional Map. *Id.*

ii. The Enacted Congressional Plan achieves these skewed results via the classic tactics of gerrymandering: It “packs” Democratic voters into some districts (such as Districts 6 and 9), while “cracking” Democratic voters elsewhere. Especially striking, the plan trisects the Democratic strongholds of Mecklenburg, Wake, and Guilford Counties—and *only those counties*—to crack Democratic voters and minimize Democratic voting strength.

First, the Enacted Congressional Plan fractures Mecklenburg County, home to one of North Carolina’s two largest concentration of Democratic voters, across three districts. *Verified Compl. ¶ 93*. As Figure 2 shows, the plan carefully packs Democrats in and around Charlotte into

one heavily Democratic district (District 9). It then splits Mecklenburg County’s remaining Democratic voters between two districts (Districts 8 and 13) with large Republican majorities.

Figure 2: Packing & Cracking in Mecklenburg County.¹⁴



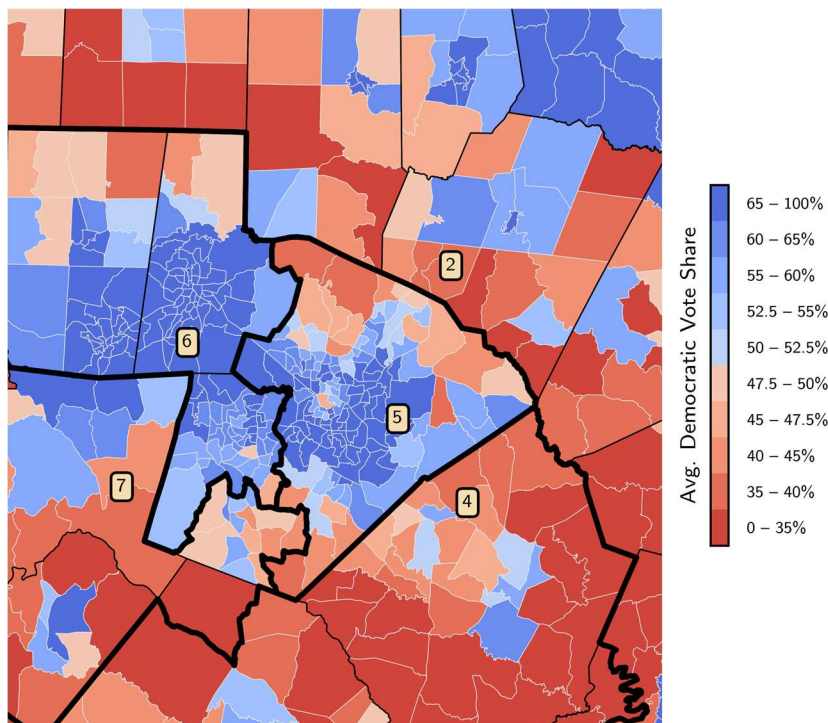
Note: Figure 2 depicts Congressional District 9 and parts of Districts 8 and 13. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

¹⁴ The color maps in this brief are based solely on newly enacted 2021 district lines (described in the block assignment and shape files available at <https://ncleg.gov/BillLookUp/2021/S740>; <https://ncleg.gov/BillLookUp/2021/S739>; and <https://ncleg.gov/BillLookUp/2021/H976>); geographic and demographic data from the U.S. Census Bureau’s 2020 Census (Public Law 94-171) “Redistricting Data Summary Files” and “TIGER/Line Shapefiles” (available at <https://www.census.gov/data/datasets/2020/dec/2020-census-redistricting-summary-file-dataset.html>; and <https://www.census.gov/geographies/mapping-files/time-series/geo/tiger-line-file.html>) and 2020 electoral data from the North Carolina State Board of Elections (available at <https://www.ncsbe.gov/results-data/election-results/historical-election-results-data> (“Precinct Sorted Results”); and <https://www.ncsbe.gov/results-data/voter-history-data> (“Historical Voter History Stats”))—all of which are judicially noticeable under North Carolina law. N.C. Gen. Stat. § 8c-1, Rule 201; see *Anderson Creek Partners, L.P. v. County of Harnett*, 275 N.C. App. 423, 429, 854 S.E.2d 1, 6 (2020) (documents subject to judicial notice include, *inter alia*, “important public documents”); see generally *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457–58 (1998).

Second, the Enacted Congressional Plan fragments Wake County, home to the other one of North Carolina’s two largest concentration of Democratic voters, across three districts. Verified Compl. ¶ 94.

- District 5 encompasses Raleigh’s most heavily Democratic voting districts.
- District 6 packs Democrats in Cary and Durham together, resulting in a second heavily Democratic district with an expected Democratic vote share of more than 70%.
- The plan then creates a third district (District 7) that is heavily Republican and absorbs the region’s remaining Democrats without endangering District 7’s Republican majority.

Figure 3: Packing & Cracking in Wake and Durham Counties.

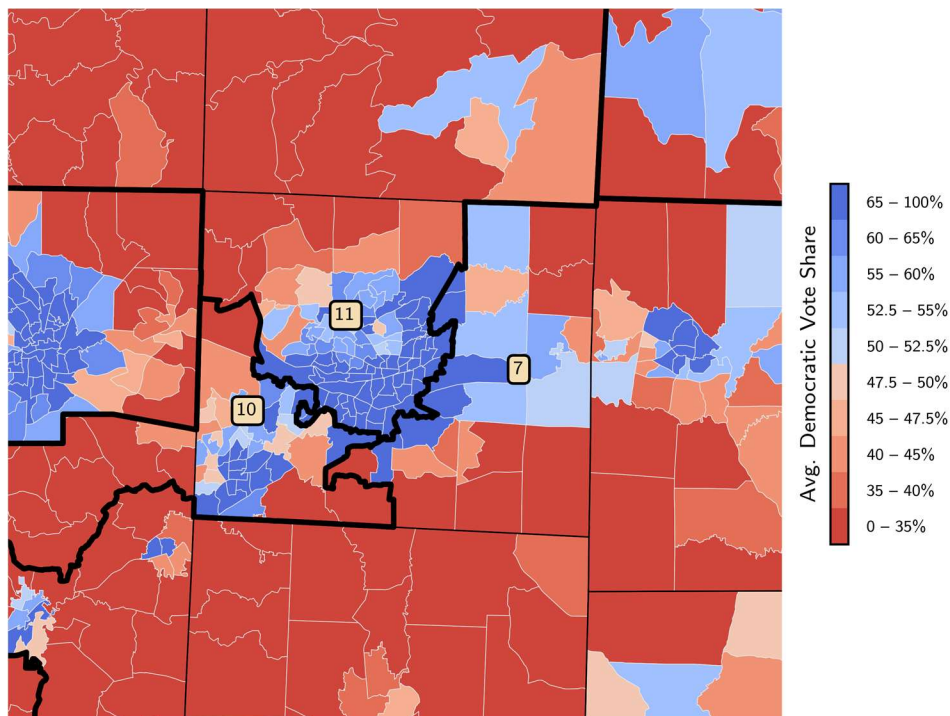


Note: Figure 3 depicts Congressional District 5 and parts of Districts 6 and 7. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

Third, the Enacted Congressional Plan cracks Democratic voters in Guilford County, home to North Carolina’s third largest Democratic population. Verified Compl. ¶ 95. Under the prior districting plan, Guilford County sat within one Democratic-leaning district. It is now split into three separate congressional districts—all guaranteed to elect Republicans:

- Democratic voting districts in eastern Guilford County are cracked into Congressional District 7, which is (as noted) heavily Republican.
- Democrats around downtown Greensboro are cracked into a heavily Republican District 11, which was gerrymandered to avoid Democratic Forsyth County and stretch far west through Republican-majority counties all the way to the Tennessee border.
- Democratic voters from High Point are cracked into heavily Republican District 10. District 10 cuts west to avoid Democratic voting districts in Lexington and turns 90 degrees to the south to pick up Republican voters as far south as the Charlotte suburbs.

Figure 4: Cracking in Guilford County.



Note: Figure 4 depicts parts of Congressional Districts 7, 10, and 11. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

By trisecting Guilford County, the General Assembly converted the previously Democratic District 6 into three districts that will *never* elect a candidate nominated by the party that Guilford County’s voters prefer.

Tellingly, when the Enacted Congressional Plan cracked and packed Democratic voters, it subordinated traditional, neutral redistricting principles, including compactness and respect for political subdivisions. *Harris v. McCrory*, 159 F. Supp. 3d 600, 614 (M.D.N.C. 2016). In

particular, the Enacted Congressional Plan’s districts are significantly less compact than the Optimized Congressional Map’s. One measure of compactness, which the *Common Cause* Court relied upon and which the General Assembly’s 2021 redistricting principles endorse, is the “Polsby-Popper score.”¹⁵ *Common Cause*, 2019 WL 4569584, at *19; Ex. N. The Enacted Congressional Plan’s score is only 0.30 (where 1.0 is perfect). Duchin Aff. 5. The Optimized Congressional Map scores 0.38. *Id.* A second measure, the “Reock” score¹⁶—which, again, the General Assembly endorsed, Feldman Aff. Ex. N at 1—tells the same story: The Enacted Congressional Plan’s average score is 0.38, compared with 0.44 in the Optimized Congressional Map. Duchin Aff. 5.

Traditional redistricting principles in North Carolina also favor municipal integrity. *North Carolina v. Covington*, 138 S. Ct. 2548, 2551 (2018). But in pursuit of its partisan gerrymander, the Enacted Congressional Plan splits more municipalities than necessary, more often than necessary. The Enacted Congressional Plan splits 42 municipalities into 90 parts. Duchin Aff. 6. The Optimized Congressional Map splits only 27 municipalities into only 58 parts. *Id.*

3. The Enacted Senate Plan Is an Unconstitutional Partisan Gerrymander.

The Enacted Senate Plan is also gerrymandered to entrench Republican political power and to prevent Democrats from winning a Senate majority for the next decade. Through cracking and packing, the Enacted Senate Plan guarantees Republicans a majority of Senate seats, and quite possibly a supermajority, even when voters clearly prefer Democratic candidates statewide.

¹⁵ The Polsby-Popper score measures a district’s jaggedness by comparing its area to the square of the length of its perimeter. Duchin Aff. 5. A circle would score a perfect 1.0. *Id.*

¹⁶ The Reock score measures a district’s elongation by comparing its area to the area of its circumcircle—defined as the smallest circle the district can fit in. Duchin Aff. 5. Again, a circular district would score a perfect 1.0. *Id.*

i. Professor Duchin’s analysis of the Enacted Senate Plan shows that it, like the General Assembly’s congressional plan, will yield extremely skewed results. **First**, Table 3 shows that in close elections, the Enacted Senate Plan again guarantees Republicans a substantial majority of seats, even when they lose the vote statewide. Duchin Aff. 10, 14. Indeed, with a voting pattern like the 2020 gubernatorial election, the plan could produce a veto-proof Republican supermajority even when **Democrats** win statewide, just like the Senate plan invalidated in *Common Cause. Id.*; see *Common Cause*, 2019 WL 4569584, at *30. And again, that is unlike the Optimized Senate Map, under which close elections yield competitive outcomes.

Table 3: Outcomes in 5 Close Elections in Enacted & Optimized Senate Maps

Election (margin)	Enacted Senate Plan	Optimized Senate Map
2016 Governor (0.2-pt. D win)	30 R, 20 D	23 R, 27 D
2016 Att’y General (0.5-pt. D win)	30 R, 20 D	27 R, 23 D
2016 Super. Pub. Instr. (1.2-pt. R win)	28 R, 22 D	27 R, 23 D
2020 President (1.4-pt. R win)	30 R, 20 D	25 R, 25 D
2020 Chief Justice (0.0-pt. R win)	28 R, 22 D	23 R, 27 D

Note: Data derived from Duchin Aff., Table 6.

Second, the Enacted Senate Plan again locks in Republican majorities even when Democratic candidates win statewide by significant margins. Under any plausible scenario, the Enacted Senate Plan awards Republicans at least 26 of North Carolina’s 50 Senate seats, and typically at least 28. Duchin Aff. 14. Democrats cannot break this majority until they secure a statewide margin of more than 7 percentage points, which would be highly unusual in North Carolina. *Id.* And again, Professor Duchin’s analysis confirms that this result cannot be attributed to political geography: As Table 4 shows, a fair and neutral map translates Democratic statewide victories into Senate majorities.

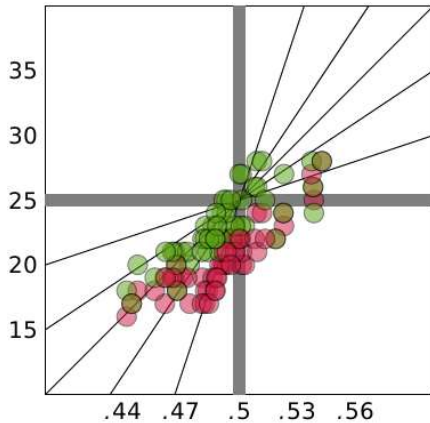
Table 4: Outcomes in 3 Democratic Elections in Enacted & Optimized Senate Maps

Election (margin)	Enacted Senate Plan	Optimized Senate Map
2020 Governor (4.6-pt. D win)	27 R, 23 D	23 R, 27 D
2020 Sec’y of State (2.3-pt. D win)	26 R, 24 D	22 R, 28 D
2020 Auditor (1.8-pt D win)	26 R, 24 D	22 R, 28 D

Note: Data derived from Duchin Aff., Table 6.

Third, Professor Duchin’s analysis confirms that the Enacted Senate Plan, like the Enacted Congressional Plan, is severely biased. For every vote share across 52 recent general elections, the Enacted Senate Plan manufactures a pro-Republican bias. And in each of the 12 statewide contests where the Democratic candidate won the vote by less than seven percentage points, the winning candidate carried only 20 to 24 of the 50 districts in the Enacted Senate Plan (these are the red dots in Figure 5’s lower-right quadrant). So a clear majority of Democratic votes does not translate into a majority of seats. By contrast, the Optimized Senate Map (shown in green dots) treats both parties fairly, with seat shares following the diagonal lines, passing right through the (50, 50) point, and almost invariably (with only 6 exceptions out of 52 elections) falling in the upper-right and lower-left quadrants, where a majority of votes (for either party) generates a majority of seats (or a tie).

Figure 5: Vote Shares and Seat Shares in Enacted & Optimized Senate Maps



Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted Senate Plan. Green dots denote results under the Optimized Senate Map in the same 52 elections.

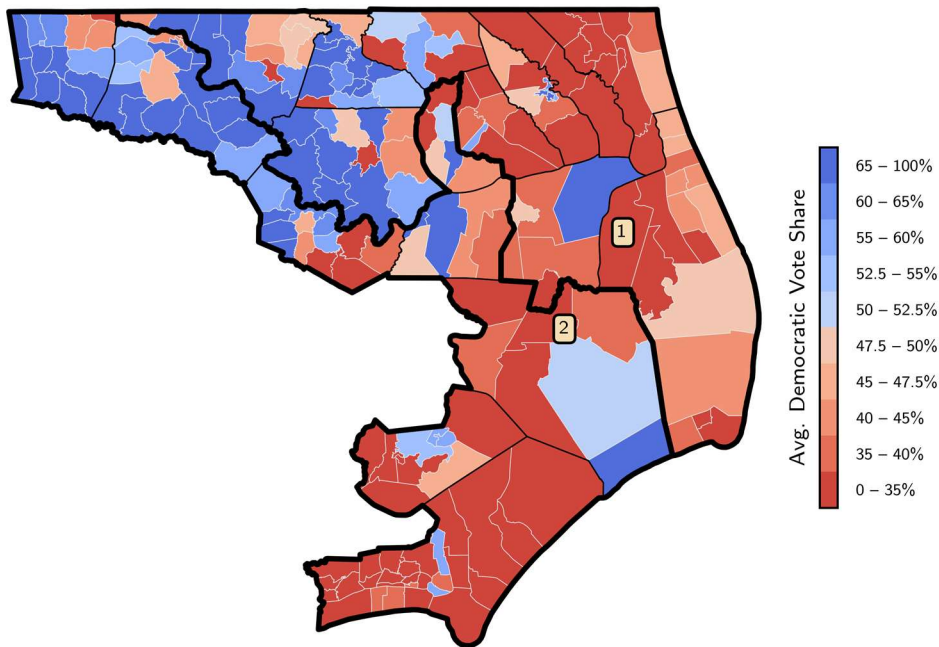
Aggregate data again tell the same story. Across all 52 statewide general elections Professor Duchin analyzed, Democratic candidates received 49.1% of major-party votes on average. Duchin Aff. 8. But under the Enacted Senate Plan, Democratic candidates receive only 40.7% of seats on average, compared with 45.9% under the Optimized Senate Map—better tracking the statewide vote share.¹⁷ *Id.*

ii. Like the Enacted Congressional Plan, the Enacted Senate Plan achieves these skewed results by cracking and packing Democratic voters. Figure 6 depicts northeastern North Carolina, which is home to large Democratic-voting populations that form substantial majorities in Bertie, Halifax, Hertford, Northampton, and Warren Counties. These counties could have been placed in the same district, creating one district where Democrats have an opportunity to elect candidates to

¹⁷ The difference between these data and those for the congressional maps is likely due to the Whole County Provisions. On the one hand, those provisions—which apply to Senate and House, but not congressional, districts—imposed a ceiling on how thoroughly the General Assembly could gerrymander the Senate and House districts. On the other hand, those provisions also constrained the Optimized Senate Map from reaching perfectly unbiased, responsive results. For present purposes, however, the critical point is that the Optimized Senate Plan shows that nothing in North Carolina’s political geography compelled the *magnitude* of skew that exists in the Enacted Senate Plan. The same is true of the Enacted House Plan. *See infra* pp. 41–42.

the Senate, and another district that Republicans will win. There was every reason to do so: It would have reduced the number of county traversals and improved compactness, consistent with the *Stephenson/Dickson* framework. See *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397; Verified Compl. ¶ 104(b). Instead, the Enacted Senate Plan splits these majority-Democratic counties between two districts—Senate Districts 1 and 2—to crack Democratic voters. The result is two Senate seats that will reliably vote Republican, at the cost of violating the *Stephenson/Dickson* framework. *Id.* ¶ 104(c).

Figure 6: Cracking in Northeastern North Carolina.

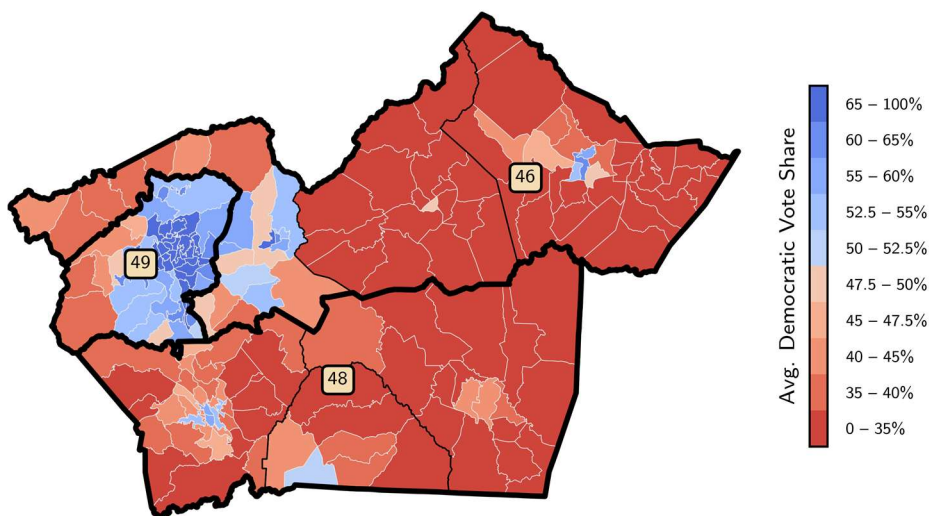


Note: Figure 6 depicts Senate Districts 1 and 2. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

Similarly, the Enacted Senate Plan cracks (and packs) the Democratic vote in southwestern North Carolina. Buncombe, Henderson, and Polk Counties all have Democratic populations. In a map drawn to reduce county traversals, these counties would be grouped together into a two-district cluster and would host one Democratic district and one competitive swing district. Verified Compl. ¶ 105(b). Instead, the Enacted Senate Plan “cracks” southwestern North Carolina’s

Democrats by clustering Buncombe County with heavily Republican McDowell and Burke Counties. The clustering decision, which increases traversals, splits Buncombe County’s Democrats from Democratic voters in Henderson and Polk Counties. This—along with the General Assembly’s decision to group all of Asheville’s most heavily Democratic voting districts in one Senate district—converts what would otherwise be a swing district into a safely Republican District 46. *Id.* ¶ 105(b)–(d).

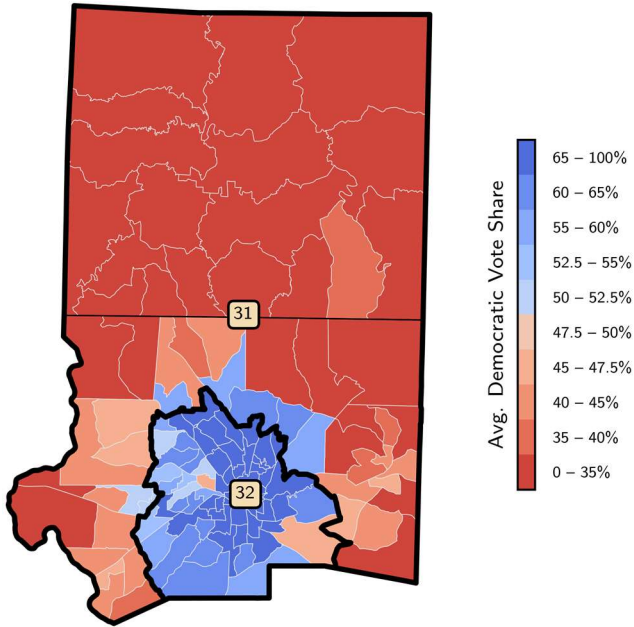
Figure 7: Cracking and Packing in Buncombe, Henderson, and Polk Counties.



Note: Figure 7 depicts Senate Districts 46, 48, and 49. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

The Enacted Senate Plan “packs” Democrats elsewhere as well. In Forsyth County, it packs Democratic voters in and around Winston-Salem into District 32, where they generate significant Democratic vote margins. *Id.* ¶ 110. By “wasting” these votes, the plan ensures that Senate District 31—instead of being competitive—will always elect the Republican candidate.

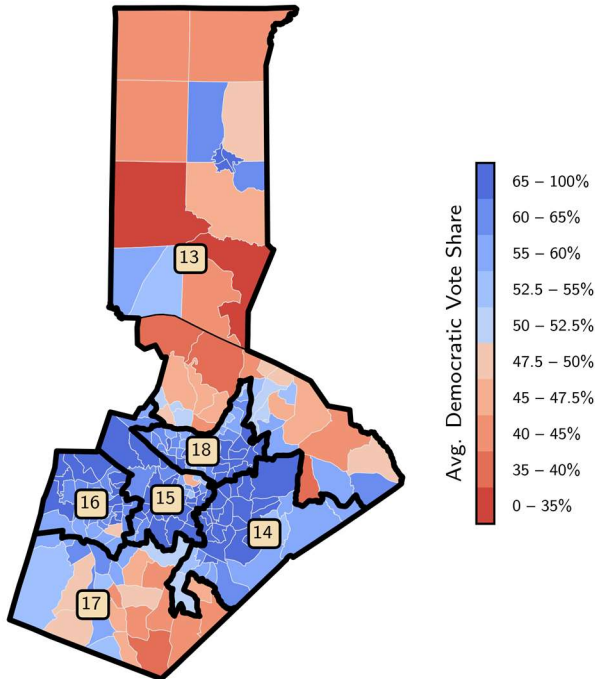
Figure 8: Packing in Forsyth County.



Note: Figure 8 depicts Senate Districts 31 and 32. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

The General Assembly did the same in Wake County. The Enacted Senate Plan packs Democrats into four districts—Districts 14, 15, 16, and 18—where they generate huge Democratic majorities. Verified Compl. ¶ 108. This assures that Republicans win District 13, which is drawn to avoid Democratic voting districts in Raleigh’s northern suburbs.

Figure 9: Packing in Wake County.



Note: Figure 9 depicts Senate Districts 13, 14, 15, 16, 17, and 18. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

The General Assembly was relentless in its pursuit of Republican advantage. *Every time* the General Assembly could have drawn an extra Republican seat, or deprived Democrats of an opportunity, it did so. Municipal boundaries and communities of interest were respected when doing so would help Republicans—and when not, not. The General Assembly made such choices across the state, from Henderson County in the southwest to Hertford County in the northeast, as detailed further in Plaintiffs’ Verified Complaint. Verified Compl. ¶¶ 103–111. And it did so to effect the aggregate result that the Enacted Senate Plan yields: Republicans will retain majority control in the Senate, no matter what voters prefer.

Illustrating the point is how, again, the General Assembly subordinated traditional districting principles. The *Stephenson/Dickson* framework emphasizes minimizing county traversals. See *Dickson II*, 368 N.C. at 490, 781 S.E.2d at 413 (“[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.”). The Enacted Senate Plan, however, traverses county lines 97 times—eight more traversals than in the Optimized Senate Map. Duchin Aff. 6. North Carolina law also requires pursuing compact districts—as set forth in each of steps four, five, seven, and nine of the *Stephenson/Dickson* framework. *Dickson II*, 368 N.C. at 490–91, 781 S.E.2d at 413. The Enacted Senate Plan’s average Polsby-Popper score, however, is only 0.34—lower than the Optimized Senate Map’s score of 0.37. Duchin Aff. 5. And the Enacted Senate Plan’s average Reock score is 0.40, compared with 0.42 in the Optimized Senate Map. Duchin Aff. 5. Finally, North Carolina law favors keeping municipalities intact. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397. Yet the Enacted Senate Plan unnecessarily splits 65 municipalities into 152 parts—in contrast to the Optimized Senate Map, which splits only 51 municipalities into only 125 parts. Duchin Aff. 6; Verified Compl. ¶ 171.

4. The Enacted House Plan Is an Unconstitutional Partisan Gerrymander.

The Enacted House Plan is also engineered to entrench Republican political power. In any realistic scenario, even when Democrats win a sizable majority of votes, the Enacted House Plan will consistently generate Republican majorities and sometimes supermajorities in the House. Duchin Aff. 14.

i. The Enacted House Plan locks in a Republican advantage similar to that of the other two plans. *First*, in close elections, the Enacted House Plan creates a “firewall” that guarantees Republicans a safe majority of at least 16 seats (a 68-to-52 majority). *Common Cause*, 2019 WL 4569584, at *32; Duchin Aff. 10, 14. Table 5 shows how the Enacted House Plan translates competitive elections into large Republican majorities (unlike the Optimized House Map):

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

Election (margin)	Enacted House Plan	Optimized House Map
2016 Governor (0.2-pt. D win)	70 R, 50 D	62 R, 58 D
2016 Atty General (0.5-pt. D win)	70 R, 50 D	63 R, 57 D
2016 Super. Pub. Instr. (1.2-pt. R win)	71 R, 49 D	63 R, 57 D
2020 President (1.4-pt. R win)	70 R, 50 D	60 R, 60 D
2020 Chief Justice (0.0-pt. R win)	68 R, 52 D	60 R, 60 D

Note: Data derived from Duchin Aff., Table 6.

Second, even when Democratic candidates win the statewide vote by significant margins, the Enacted House Plan guarantees a Republican majority. As Professor Duchin’s analysis shows, under *any* plausible scenario, the map awards Republicans at least 62 House seats, and typically at least 66. Duchin Aff. 14. Democrats again cannot break this majority until they secure a statewide margin of more than 7 percentage points—unlike under the Optimized House Map, which shows that the General Assembly could have drawn a fair map consistent with state law.

Table 6: Outcomes in 3 Democratic Elections in Enacted & Optimized House Maps

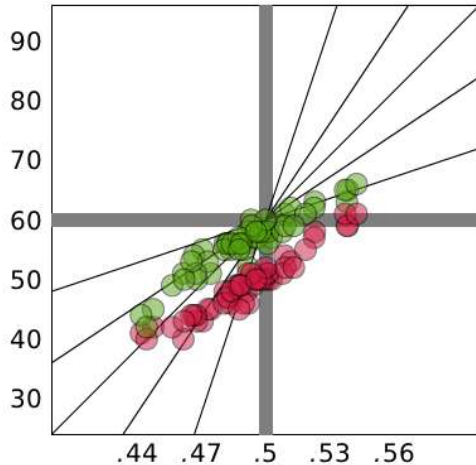
Election (margin)	Enacted House Plan	Optimized House Map
2020 Governor (4.6-pt. D win)	62 R, 58 D	57 R, 63 D
2020 Sec’y of State (2.3-pt. D win)	67 R, 53 D	58 R, 62 D
2020 Auditor (1.8-pt D win)	66 R, 54 D	59 R, 61 D

Note: Data derived from Duchin Aff., Table 6.

Third, the Enacted House Plan again does not respond to voters’ preferences. For every vote share across 52 recent general elections, the Enacted House Plan manufactures a pro-Republican bias. And in each of the 12 statewide contests where the Democratic candidate won the vote by less than seven percentage points, the winning candidate carried only 50 to 58 of the 120 districts in the Enacted House Plan (these are the red dots in Figure 9’s lower-right quadrant). So a clear majority of Democratic votes does not translate into a majority of seats. By contrast, the Optimized House Map (shown in green dots) treats both parties fairly, with seat shares following the diagonal lines, passing right through the (50, 50) point, and almost invariably (with

only 6 exceptions out of 52 elections) falling in the upper-right and lower-left quadrants, where a majority of votes (for either party) generates a majority of seats (or a tie).

Figure 10: Vote Shares and Seat Shares in Enacted & Optimized House Maps

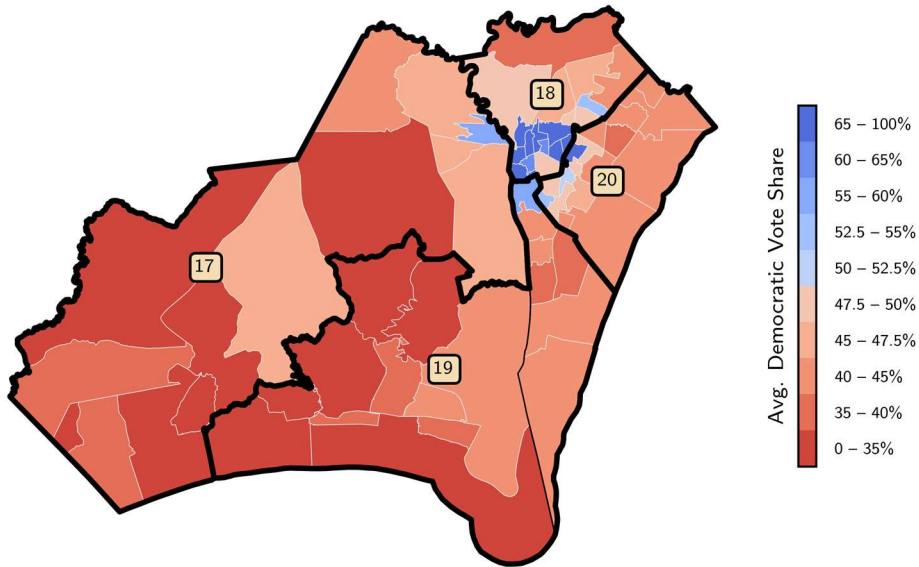


Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted House Plan. Green dots denote results under the Optimized House Map in the same 52 elections.

Across all 52 elections that Professor Duchin analyzed, Democratic candidates received 49.1% of the major-party votes on average. Duchin Aff. 8. Under the Enacted House Plan, Democratic candidates would have received only 40.8% of House seats. *Id.* Under the Optimized House Map, by contrast, Democratic candidates would have won 46.8% of seats—better tracking the statewide vote share.

ii. The Enacted House Plan’s skewed results again result from the General Assembly’s cracking and packing. As one example, the four-district county cluster containing New Hanover and Brunswick Counties contains a sizable proportion of Democratic voters. Verified Compl. ¶ 118. The General Assembly, however, drew district boundaries to create three safe Republican districts: House Districts 17, 19, and 20. It did so by slicing Wilmington so that its most Democratic precincts are all packed into District 18. The cluster’s remaining Democratic precincts are safely divided up among three other districts, where they will not impact election results.

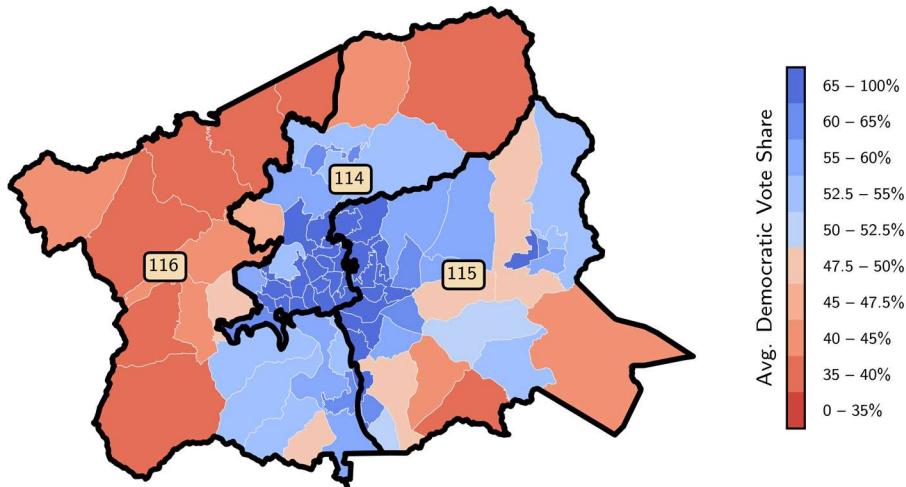
Figure 11: Packing in New Hanover County.



Note: Figure 11 depicts House Districts 17, 18, 19, and 20. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

In Buncombe County, the House Plan packs Democrats into Districts 114 and 115 to carve out a safe Republican seat in District 116. District 116, which incorporates part of Asheville but carefully avoids its most Democratic precincts, is the least compact district in the map. Verified Compl. ¶ 119. More compact districts would not entrench Republican partisan advantage. *Id.*

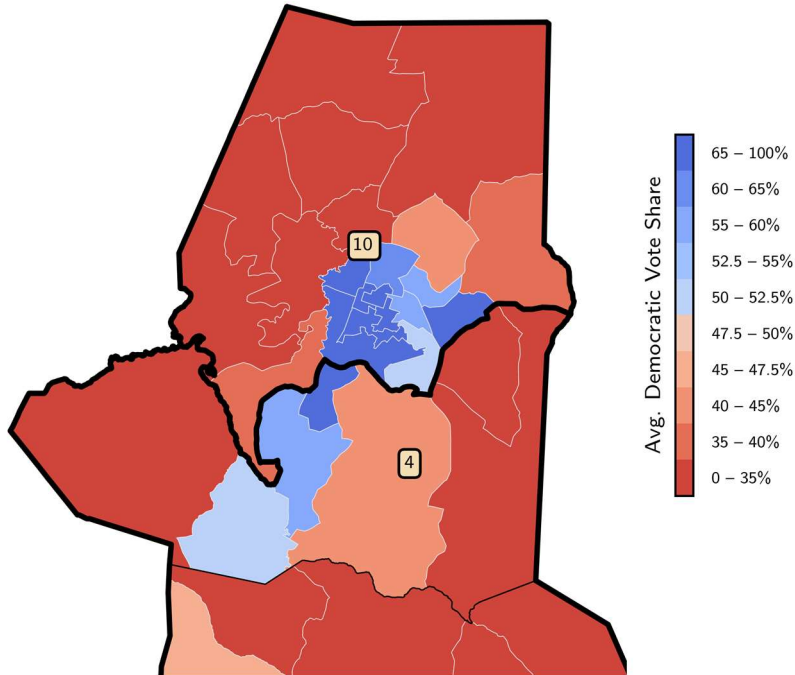
Figure 12: Packing in Buncombe County.



Note: Figure 12 depicts House Districts 114, 115, and 116. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

Elsewhere, the Enacted House Plan cracks Democratic voters—for example, in the two-district cluster of Duplin and Wayne Counties. Wayne County contains many Democratic voters in Goldsboro and the communities of Spring Home and Brogden just to the south. Verified Compl. ¶ 121. But instead of keeping them together, the Enacted House Plan cracks Wayne County’s Democrats between House Districts 4 and 10 to create two reliably Republican districts. *Id.*

Figure 13: Cracking in Wayne County.



Note: Figure 13 depicts House Districts 4 and 10. Colors indicate average Democratic vote share by voting district across all statewide non-judicial races in the 2020 general election.

Again, the General Assembly pursued this cracking and packing statewide, from Onslow to Alamance and beyond, as detailed further in Plaintiffs’ Verified Complaint. Verified Compl.

¶¶ 117–123. And again, to do so, General Assembly subordinated traditional districting principles:

- The Enacted House Plan traverses county lines 69 times—three more than the 66 traversals in the Optimized House Map. Duchin Aff. 6.
- The Enacted House Plan’s average Polsby-Popper score is only 0.35. *Id.* at 5. The Optimized House Map scores 0.41. *Id.*
- The average Reock score in the Enacted House Plan is 0.42, compared with 0.46 in the Optimized House Map. Duchin Aff. 5.
- The Enacted House Plan splits 112 municipalities into 292 parts, compared with—in the Optimized House Map—splitting just 71 municipalities into only 201 parts. Duchin Aff. 6; Verified Compl. ¶ 179.

C. Plaintiffs Are Likely to Succeed in Showing That the Enacted Plans’ Partisan Gerrymanders Violate the North Carolina State Constitution.

Plaintiffs are likely to succeed in showing that this partisan gerrymandering yields the same violations of the Free Elections, Equal Protection, and Free Speech and Free Assembly Clauses that Judges Ridgeway, Crosswhite, and Hinton unanimously found in *Common Cause* and *Harper*.

1. Plaintiffs Are Likely to Succeed in Showing a Violation of the Free Elections Clause.

The Enacted Plans do the same thing as the maps that *Common Cause* invalidated as violating the Free Elections Clause. They were “designed, specifically and systematically, to maintain Republican majorities” in Congress and the General Assembly. *Common Cause*, 2019 WL 4569584, at *112. And they are “gerrymandered to be most resilient in electoral environments where Democrats could win majorities ... under nonpartisan plans.” *Id.* To summarize:

- In closely divided elections, the Enacted Plans guarantee Republican candidates a 6-seat advantage in the congressional delegation, a 6-seat advantage in the Senate, and a 16-seat advantage in the House. *Supra* pp. 26, 33, 41.
- Even when Democratic candidates win the statewide vote by significant margins, the Enacted Plans guarantee Republican candidates 9 seats in Congress, 26 Senate seats, and 62 House seats. *Supra* pp. 27, 34, 41.
- Democrats cannot obtain majorities unless they win the statewide vote by at least 7 percentage points, which is highly unlikely. *Supra* pp. 26–27, 33, 35, 41–42.

In short, as in *Common Cause* and *Harper*, the majority party has “manipulated district boundaries, to the greatest extent possible, to control the outcomes of individual races so as to best ensure [its] continued control.” *Common Cause*, 2019 WL 4569584, at *112; *Harper*, 2019 N.C. Super. LEXIS 122, at *8–9, *16–18. Because of the Enacted Plans, it is now “nearly impossible for the will of the people—should that will be contrary to the will of the partisan actors drawing the maps—to be expressed through their votes.” *Common Cause*, 2019 WL 4569584, at *112.

No more is needed to violate the Free Elections Clause. 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. True, the *Common Cause* panel found that the General Assembly acted intentionally in drawing the maps there. *E.g.*, 2019 WL 4569584, at *129. But it did not hold that intent is *necessary* to violate the Free Elections Clause, and for good reason: If the General Assembly violates the bedrock command that “elections shall be free,” *id.* at *3, it is no answer to insist that the General Assembly did not *mean* to prevent the “will of the people” from governing, *id.* at *112.

Regardless, Plaintiffs are likely to succeed in showing that the General Assembly intended to manufacture the unconstitutional gerrymander the Enacted Plans yield. Intent “may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one [group] than another.” *Holmes v. Moore*, 270 N.C. App. 7, 17, 840 S.E.2d 244, 255 (2020) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)); see *Common Cause*, 2019 WL 4569584, at *114. Here, though no discovery has occurred, already the “circumstantial ... evidence of intent” is overwhelming. *Holmes*, 270 N.C. App. at 16, 840 S.E.2d at 254.

Plaintiffs expect the General Assembly to insist that it did not intend the biased results of the Enacted Plans and to point to the redistricting criterion stating that “[p]artisan considerations and election results data shall not be used.” *Supra* pp. 8–9; see Ex. N at 2. That story, however, does not withstand scrutiny. Accepting it would require believing all of the following:

1. That the General Assembly drew a congressional map that yields 10 Republican and 4 Democratic seats, even in close elections in which Democrats win a majority of the statewide vote—*by accident*. *Supra* p. 26; *cf. Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (“disproportionate impact” is circumstantial evidence of intent).
2. That the General Assembly baked in a 6-seat Republican Senate majority and a 16-seat House majority, even when Democratic candidates win a majority of the statewide vote—*without realizing it*. *Supra* pp. 33, 41.

3. That the General Assembly prevented Democratic candidates from winning majorities in the congressional delegation, the state Senate, or the state House unless they perform the rare feat of winning the statewide vote by more than 7 points—*by happenstance*. *Supra* pp. 27, 35, 42.
4. That when, to take just one example, the General Assembly split the three counties with the largest numbers of Democratic voters in the state—and only those three counties—three ways each, it was *coincidence*. *Supra* pp. 28–31.¹⁸
5. That even though the General Assembly adopted the Enacted Plans after being repeatedly told that the maps constituted partisan gerrymanders, *see* Verified Compl. ¶ 89 & n.27; Liberman Aff. ¶¶ 3–4; Feldman Aff. Exs. AA–AB, Defendants did not *mean* to gerrymander. *Cf. Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (“legislative history” can provide circumstantial evidence of intent).
6. That after *Common Cause* and *Harper* in 2019 found that the General Assembly engaged in “intentional ... and systematic gerrymandering,” *Common Cause*, 2019 WL 4569584, at *129—and after courts had invalidated other maps as unconstitutional racial gerrymanders, *supra* pp. 6–7—Defendants in 2021 just *stumbled upon* equally skewed maps. *Cf. Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (“historical background of the [challenged] decision” can provide circumstantial evidence of intent).
7. That when the General Assembly did not act after being told that its paper ban on “[p]artisan considerations and election results” was sure to be violated, Verified Compl. ¶ 70; Liberman Aff. ¶ 2, that had *nothing to do* with the General Assembly’s understanding that its mapmakers would rely on partisan considerations outside the hearing rooms. *Cf. State v. Bogle*, 324 N.C. 190, 194, 376 S.E.2d 745, 747 (1989) (“The willful blindness doctrine permits a jury to find that a defendant has knowledge of the material facts because he has deliberately chosen to remain ignorant of illegal activity that would have been disclosed by further investigation.”).¹⁹

¹⁸ The list can, and does, go on. For example, when the General Assembly drew its least compact Senate and House districts (Senate District 2 and House District 116), those districts replaced a more compact Democratic district with a less compact Republican one. Verified Compl. ¶¶ 104(c), 119. That is not a coincidence. Nor is it a coincidence that the Enacted House and Enacted Senate Plans traverse county boundaries more often than necessary, lower compactness more than necessary, and split more municipalities than necessary and more times than necessary. Duchin Aff. 5–6.

¹⁹ Indeed, the last round of court-ordered redistricting in 2019 showed exactly what will happen, even when the redistricting criteria on paper prohibit consideration of partisan data: Repeatedly, Republican mapmakers were observed leaving the committee hearing room, amending the map, and then returning and amending maps on the computers in the committee hearing rooms. *Harper v. Lewis*, No. 19-CVS-012667, Plaintiffs’ Opposition to Legislative Defendants’ Motion for Summary Judgment 4–6 & n.4 (N.C. Super. Ct. Nov. 22, 2019) (describing “Senator Hise’s

8. That even though the General Assembly was warned by legislators in both chambers that the maps were unconstitutional partisan gerrymanders, it had *no idea* that the maps it enacted would have this effect. Verified Compl. ¶ 98; Liberman Aff. ¶ 3; *see also* Verified Compl. ¶ 89.
9. That when the General Assembly adopted a rushed process that limited public and expert scrutiny of its proposed maps before their enactment, *supra* pp. 9–11, that choice again had *nothing to do* with the gerrymandered results the General Assembly knew such scrutiny would spotlight. *Cf. Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (“[d]epartures from normal procedural sequence” are relevant evidence of intent).

The reality is that the General Assembly enacted extreme partisan gerrymanders because it *wanted* to do so. And the General Assembly declined to enact fair and neutral maps like the Optimized Maps because it *did not want* fair maps. Indeed, nearly 50 years ago, the U.S. Supreme Court gave the short answer to similarly incredible claims that map-drawers did not intend their actions’ foreseeable consequences: “[I]t is most unlikely that the political impact” of a gerrymander “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.” *Gaffney*, 412 U.S. at 753. The same is true here, and Defendants cannot dodge liability for their partisan gerrymanders by claiming that they did not know what they were doing.

2. Plaintiffs Are Likely to Succeed in Showing a Violation of the Equal Protection Clause.

Plaintiffs are also likely to succeed in showing that the Enacted Plans violate the North Carolina State Constitution’s Equal Protection Clause. As *Common Cause* held, a partisan gerrymander violates that clause when (1) a “predominant purpose” of the map drawers was to “entrench [their party] in power”; and (2) the maps “have the intended effect” and “substantially dilute [the disfavored party’s] votes.” *Common Cause*, 2019 WL 4569584, at *114 (quoting *Ariz.*

repeated entering and exiting of the hearing room” while map-drawing, which “received substantial public attention”).

State Legis., 135 S. Ct. at 2658). Here, the Enacted Plans do both those things, for reasons already explained: They are “carefully crafted to favor Republicans” and “intentionally and systematically pack and crack Democratic voters,” *id.* at *115—so that the incumbent Republican Party will retain majorities in the congressional delegation, the Senate, and the House for a decade even if voters prefer the other party by significant margins.

Nor can Defendants “provide a legitimate, non-partisan justification” for the Enacted Plans’ partisan gerrymanders. *Id.* at *114. As the Optimized Plans show, the General Assembly could have drawn maps that comply with state law and traditional, neutral redistricting principles while avoiding an unconstitutional gerrymander. *Supra* pp. 26–28, 31–35, 39–42, 45. And as just explained, the General Assembly’s Republican majority declined to enact such maps precisely because it *desired* to entrench itself. “Advantaging a particular political party or discriminating against voters based on how they vote for the purposes of entrenching a political party’s power is not a compelling government interest.” *Common Cause*, 2019 WL 4569584, at *117.

3. Plaintiffs Are Likely to Succeed in Showing a Violation of the Free Speech and Free Assembly Clauses.

Finally, Plaintiffs are likely to succeed in showing that the Enacted Plans violate the Free Speech and Free Assembly Clauses.

First, the Enacted Plans constitute “viewpoint discrimination” (as well as retaliation) against certain voters and dilute their votes, based on the viewpoints they express—namely, that they favor the Democratic Party, which the Enacted Plans seek to exclude from power. *Common Cause*, 2019 WL 4569584, at *121, *123. A law “need not explicitly mention any particular viewpoint to be impermissibly discriminatory.” *Id.* at *121 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)). Instead, as under the Equal Protection Clause, discriminatory intent may be inferred from circumstantial evidence, including the “impulse behind [a law], or the lack

of any plausible [alternative] explanation.” *Id.* (quoting *State v. Bishop*, 368 N.C. 869, 875, 787 S.E.2d 814, 819 (2016)). Here, that evidence compels the same conclusion as above: The Enacted Plans intended to target, and retaliate against, supporters of the disfavored party.

Second, the Enacted Plans violate associational rights in all the ways explained above. *Supra* pp. 46–50. They prevent “Democratic voters who live in cracked districts [from] instruct[ing] their representatives or obtain[ing] redress from their representatives”; they make it harder for the disfavored parties and for politically oriented associations to “carry out [their] core functions and purposes”; and they force these organizations “to drain and divert resources ... merely to avoid being relegated to a superminority.” *Common Cause*, 2019 WL 4569584, at *122–23. And the Enacted Plans do so because of the viewpoints that these organizations, through these activities, express.

Such burdens on core political rights trigger “strict scrutiny.” *Bishop*, 368 N.C. at 875, 787 S.E.2d at 819; *accord Common Cause*, 2019 WL 4569584, at *121. But again, Defendants have offered “no credible justification for their partisan discrimination.” *Common Cause*, 2019 WL 4569584, at *123. “Nor could they have,” as the *Common Cause* three-judge panel observed: “Discriminating against citizens based on their political beliefs does not serve any legitimate government interest.” *Id.*

D. Plaintiffs Have Standing to Assert All Their Claims.

Plaintiffs also have standing to assert all their claims. The North Carolina State Constitution provides that “[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18. “[B]ecause North Carolina courts are not constrained by the ‘case or controversy’ requirement of Article III of the United States Constitution, our State’s standing jurisprudence is broader than federal law.” *Davis*

v. New Zion Baptist Church, 258 N.C. App. 223, 225, 811 S.E.2d 725, 727 (2018). In North Carolina, plaintiffs need show only “(1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury.” *Id.* Here, for two reasons, Plaintiffs can easily make that showing, just like the similar plaintiffs in *Common Cause* and *Harper*.

First, plaintiffs have standing to challenge gerrymandering in districts and clusters where they reside—or for an association like NCLCV, districts or clusters where its members reside. Courts applying federal standing law have found that gerrymandering plaintiffs claiming vote dilution have standing to “challenge ... their own districts on partisan gerrymandering grounds.” *Common Cause*, 2019 WL 4569584, at *108. And as *Common Cause* observed, “in light of the less stringent standing requirements in our State, and because the manner in which one district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that same grouping,” North Carolina partisan gerrymandering plaintiffs also have standing to “challenge ... the entire county grouping.” *Id.*

Here, those principles provide standing to challenge every unlawful aspect of the Enacted Plans. The Individual Plaintiffs hale from many congressional districts and Senate and House clusters from across the State.²⁰ But more to the point, NCLCV “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.” Verified Compl. ¶ 11 n.4. Hence, just like the North Carolina Democratic Party in *Common Cause*, NCLCV has standing because its members include “registered Democratic voters located in every state House and state Senate District across our State.” 2019 WL 4569584, at *107.

²⁰ The Individual Plaintiffs reside in enacted Congressional Districts 2, 4, 6, 11, 12, 13; enacted Senate Districts 2, 4, 12, 20, 23, 27, 32, 37; and enacted House Districts 6, 10, 27, 29, 56, 58, 61, 72, 98.

An association, like NCLCV, has standing “to bring suit 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.” *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990). Here, first, NCLCV’s members would have standing to challenge their districts and clusters in their own right, as just explained. Second, the interests NCLCV seeks to vindicate here are “germane to [its] purpose.” *Id.* NCLCV seeks to “elect legislators and statewide candidates who share its values,” to “build a pro-environment majority across ... North Carolina,” and to “hold elected officials accountable for their votes and actions.” Verified Compl. ¶ 11. Challenging the Enacted Plans’ partisan gerrymanders—which will thwart this pro-environment majority and make it impossible to hold officials to account—is “germane” to these purposes. Finally, just as in *Common Cause*, the “declaratory and injunctive relief” sought here does not “require[] the participation of individual ... members in this lawsuit.” 2019 WL 4569584, at *107.

Second, NCLCV and the Individual Plaintiffs have standing to seek redress for the *statewide* harms that the Enacted Plans inflict on their ability to pursue their goals, to associate with candidates and other concerned citizens, and to further the public good. Verified Compl. ¶ 223. In *Common Cause*, the association Common Cause had standing “to sue on its own behalf” to redress similar harms. 2019 WL 4569584, at *107. That was so because “one of [its] central missions ... is to ... hold their [legislators] accountable”—and when partisan gerrymandering renders “legislative seats ... preordained,” it “impede[s] [that] mission.” *Id.* at *77. The same is true of NCLCV, which similarly “works to hold elected officials accountable” and suffers the same sort of harm when partisan gerrymanders predetermine election results. Verified Compl. ¶ 12.

More than that, the Enacted Plans impair NCLCV’s ability to engage in effective advocacy for candidates and will force NCLCV to expend additional funds and other resources to counteract their gerrymandered effects. *Id.* Case after case has recognized such “non-dilutionary” harms as sufficient to support statewide standing for organizations like NCLCV (including the North Carolina League of Women Voters and Common Cause), including in many cases cited with approval in *Common Cause*.²¹

Many of the Individual Plaintiffs suffer similar harms. Many consistently vote for Democratic candidates, Verified Compl. ¶¶ 14–16, 18–28, and several are active in Democratic politics, work to elect Democratic candidates, and support Democratic causes. *Id.* ¶¶ 14, 27. When gerrymandering “infring[es] on ‘the ability of like-minded people across the State to affiliate in a political party and carry out that organization’s activities and objects,’” such individuals have standing to challenge it.²²

²¹ *E.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 829 (M.D.N.C. 2018) (three-judge panel) (recognizing that partisan gerrymandering inflicts “injuries ... such as infringing on ‘the ability of like-minded people across the State to affiliate in a political party and carry out that organization’s activities and objects’” and that such harms have “‘nothing to do with the packing or cracking of any single district’s lines’” and instead “‘the injury [is] statewide.’” (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring))), *vacated and remanded on other grounds*, 139 S. Ct. 2484 (2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1076 (S.D. Ohio) (three-judge panel) (Ohio A. Philip Randolph Institute and the League of Women Voters of Ohio had standing because gerrymandered map “negative[ly] impact[ed] ... their ability effectively to associate to advance their belief in active and informed voter participation in the democratic process”), *vacated and remanded on other grounds*, 140 S. Ct. 101 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 802 (E.D. Mich. 2018) (three-judge panel) (League of Women Voters of Michigan had standing because gerrymandered maps “made [the League’s] mission of education and engagement much harder in a variety of ways.”), *rev’d and remanded on other grounds*, No. 18-2383, 2018 WL 10096237 (6th Cir. Dec. 20, 2018).

²² *Common Cause*, 318 F. Supp. 3d at 829; *accord League of Women Voters of Mich.*, 352 F. Supp. 3d at 801; *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1075.

II. The Court Should Enjoin Defendants from Using the Enacted Plans in the 2022 Primary Election, as Well as Grant Certain Ancillary Relief.

Because the Enacted Plans are unconstitutional partisan gerrymanders, the Court should grant the preliminary relief Plaintiffs have sought and enjoin Defendants from preparing for, administering, or conducting the 2022 primary election under any of the Enacted Plans. A preliminary injunction requires that the plaintiffs be “likely to sustain irreparable loss unless the injunction is issued” or that “issuance [be] necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759–60. North Carolina courts “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.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

A. Absent a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm.

The irreparable harm that Plaintiffs will suffer, absent preliminary relief, is clear and obvious: Millions of North Carolinians—including the Individual Plaintiffs and many NCLCV members—will vote under unlawful maps that drain their voting rights of all meaning, and Plaintiffs will be unable to effectively speak for and associate with the political candidates of their choice. The loss of constitutional rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In particular, “[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). That is because an infringement of “voting and associational rights ... cannot be alleviated after the election.” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883 (3d Cir. 1997).

North Carolina courts have repeatedly applied these principles to enjoin unlawful redistricting maps. In *Harris v. McCrory*, the court enjoined maps that were racial gerrymanders

because “[t]o force the plaintiffs to vote ... under the unconstitutional plan ... constitutes irreparable harm.” No. 1:13CV949, 2016 WL 6920368, at *1 (M.D.N.C. Feb. 9, 2016). In *Covington v. North Carolina*, the court enjoined another gerrymander because the court would not “forc[e] North Carolina voters to cast ballots under unconstitutional maps.” No. 1:15CV399, 2018 WL 604732, at *6 (M.D.N.C. Jan. 26, 2018) (three-judge panel). And in *Harper*, the Court enjoined an unconstitutional partisan gerrymander because “[t]he loss to Plaintiffs’ fundamental rights guaranteed by the North Carolina constitution will undoubtedly be irreparable if ... elections” are allowed to proceed under unlawful maps. *Harper*, 2019 N.C. Super. LEXIS 122, at *14. Indeed, in *Common Cause*, the Court *sua sponte* declined to grant a stay pending appeal because such a stay would force “Plaintiffs and other North Carolina voters” to “cast their ballots under unconstitutional district plans.” 2019 WL 4569584, at *134.

B. The Balance of Equities Also Favors Injunctive Relief.

The “balancing of the equities” here, *A.E.P. Indus.*, 308 N.C. at 400, 302 S.E.2d at 759, is not close. On the one side, Plaintiffs’ claims concern “fundamental right[s] ... enshrined in our Constitution’s Declaration of Rights, a compelling governmental interest, and a cornerstone of our democratic form of government.” *Common Cause*, 2019 WL 4569584, at *110. The Supreme Court has thus mandated that “fair and honest elections are to prevail in this state.” *Id.* at *128 (quoting *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896)). That can occur *only* if the Court enjoins the use of the unlawful Enacted Plans. As in *Harper*, “if the injunction is not granted,” the “people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” *Harper*, 2019 N.C. Super. LEXIS 122, at *20.

On the other side, granting an injunction will not impose any harm at all. Defendants, as representatives and officers of the People, share—or should share—the same interest in free and

fair elections. Nor will granting an injunction yield any substantial disruption. The 2022 primary remains more than three months away, and preparations cannot start in earnest until the close of the candidate-filing period, which is currently scheduled to run from December 6 to December 17. At most, preliminary relief may require a modest delay in the primary. But while the General Assembly might “prefer not to move elections or otherwise change the current schedule,” it has “acknowledge[d] that the election schedule can be changed if necessary.” *Id.* Indeed, when necessary, North Carolina primary elections have been delayed, and candidate-filing periods have been deferred.²³

Here, any delay-based concerns are especially trivial: The primary is currently set for March only because the General Assembly refused to move it even after the State Board of Elections *told it* that doing so was necessary to accommodate census delays. Moreover, even if the primary is delayed until May 3—as Plaintiffs have identified as an option, Verified Compl. ¶ 190—that still leaves North Carolina with the Nation’s *second-earliest* 2022 congressional primary, after only Texas. *Supra* p. 10. A May primary will not burden, at all, North Carolina’s

²³ *Harper*, 2019 N.C. Super. LEXIS 122, at *24–25 (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”); Order at 2, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Nov. 20, 2019) (available at <https://www.brennancenter.org/sites/default/files/2019-11/2019-11-20-Harper%20v.%20Lewis-Order.pdf>) (enjoining filing period for the 2020 congressional primary elections “until further order,” to “allow the Court sufficient opportunity” to review the remedial maps recently enacted by the General Assembly); *see also* Order at 1, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Dec. 2, 2019) (available at <https://www.brennancenter.org/sites/default/files/2019-12/2019-12-02-Order%20on%20Prior%20Injunction%20and%20BOE%20filing.pdf>) (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); Affidavit of Gary Bartlett ¶ 11, *N.C. State Conf. of NAACP v. Berger*, No. 21-CVS-014476 (Super. Ct., Wake Cnty. Nov. 5, 2021) (describing “delayed primaries in the 1990s, in 2002, and in 2004”).

ability to complete its primary process well in advance of the November 2022 general election. And to the extent that modest delay counts as a cost at all, it is a small price to pay to safeguard the constitutional voting rights of millions of North Carolinians.

C. The Court Should Grant Certain Ancillary Relief.

The Court can further guard against any disruption by granting the ancillary relief Plaintiffs have sought in their Motion.

First, 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), the Court should prepare for the possibility that the General Assembly does not timely enact remedial maps that fully remedy the Enacted Plans’ constitutional violations. Immediately upon issuing an order enjoining the use of the Enacted Plans, the Court should commence remedial proceedings simultaneously with that two-week period—just as the three-judge panel did in *Common Cause*. *See Common Cause*, 2019 WL 4569584, at *134 (“Notwithstanding the General Assembly having the opportunity to draw Remedial Maps in the first instance, the Court will still immediately appoint a Referee to (1) assist the Court in reviewing any Remedial Maps enacted by the General Assembly; and (2) to develop remedial maps for the Court should the General Assembly fail to enact lawful Remedial Maps within the time allowed.”).

Plaintiffs respectfully submit that these remedial proceedings should focus on Plaintiffs’ Optimized Maps. Those maps show what is possible, consistent with state law and traditional, neutral districting principles, and should provide the benchmark against which other remedial plans—including any enacted by the General Assembly—should be measured. And Plaintiffs respectfully submit that unless the General Assembly timely adopts districting plans that remedy the constitutional violations found in the Enacted Plans as fully as would the Optimized Maps,

then the Optimized Maps should *become* the maps for the 2022 elections for Congress, the state Senate, and the state House. The Court should commence proceedings aimed at that contingency.²⁴

Second, to the extent the Court deems a delay in the 2022 primary necessary, it should order Defendants to delay the candidate-filing period until a reasonable time after the Court’s approval of lawful maps, as North Carolina courts have done before. Mot. 2; *supra* p. 57 n.23.

Third, the Court should order relief to address the requirement in 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.” That date—November 8, 2021—has already passed. The only maps enacted by that date, however, are the unlawful Enacted Plans. And candidates, obviously, may not have yet established residency in their desired districts under the lawful remedial maps that this Court ultimately approves. Hence, this Court should issue the same relief that the *Covington* court provided and 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 that Sections 6 and 7 of Article II of the North Carolina State Constitution would

²⁴ Depending on when this Court issues a preliminary injunction and where that date falls with respect to the primary election, the Court should also retain discretion to shorten or eliminate the two-week period that North Carolina law presumptively provides for the General Assembly to enact remedial maps. That is because the Court may face a choice of which of two state laws it must set aside (in addition to the Enacted Plans). State law establishes the primary date, N.C. Gen. Stat. § 163-1(b), and also presumptively gives the General Assembly two weeks to enact remedial maps, *id.* § 120-2.4(a). The Court may find that it can adhere—or can adhere more closely—to the designated election date only by shortening or eliminating the two-week period. In those circumstances, where the Court cannot fully comply with both statutes, the Court has discretion to shorten or eliminate the two-week period.

otherwise impose. *See Covington v. North Carolina*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017) (three-judge panel) (entering similar order).²⁵

²⁵ The Court should not require Plaintiffs to post a bond. North Carolina Rule of Civil Procedure 65(c) requires the applicant for an injunction to provide a security “in such a sum *as the judge deems proper*” (emphasis added) and thereby affords the court the authority to “to dispense with” the security requirement in appropriate circumstances. *Keith v. Day*, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983). Here, “the restraint will do the defendant ‘no material damage,’” “there ‘has been no proof of likelihood of harm,’” and there is no likelihood that any party will incur any recoverable “costs and damages” for which a bond would be necessary. *Id.* Therefore, this is an “instance[] when it is proper for no security to be required of a party seeking injunctive relief.” *Id.* If a bond is required, it should be in an amount not exceeding \$1,000, as in *Harper*. *See Harper*, 2019 N.C. Super. LEXIS 122, at *25.

CONCLUSION

Plaintiffs respectfully request that the Court grant the relief sought in Plaintiffs' motion.

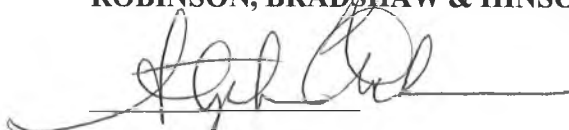
Dated: December 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This the 1st day of December, 2021.



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