

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, et al.,

REBECCA HARPER, et al.,

Plaintiffs,

vs.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

21 CVS 015426

Consolidated with
21 CVS 500085

**LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
JOINT MOTION TO STRIKE SEAN P. TRENDE AFFIDAVIT**

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Speaker Timothy K. Moore, and Representative Destin Hall (collectively, "Legislative Defendants"), by and through undersigned counsel, and hereby respond in opposition to *Common Cause* and *Harper* Plaintiffs' Joint Motion to Strike Sean P. Trende Affidavit ("Plaintiffs' Joint Motion) as follows:

BACKGROUND

Sean P. Trende is a Senior Elections Analyst with RealClearPolitics and a doctoral candidate in political science at The Ohio State University, who expects to receive his Ph.D in May 2022. Trende has completed his coursework and has passed comprehensive examinations, with coursework including, *inter alia*, classes on G.I.S. systems, spatial statistics, issues in contemporary redistricting, machine learning, non-parametric hypothesis tests, and probability.

Trende is an expert in drawing and analyzing districting maps as evidenced by his recent assignment as special master assigned to draw district maps in Virginia. A full description of Trende’s credentials may be found in his 2 December 2021 Affidavit at the preliminary injunction stage in this now-consolidated matter and in his Affidavit and Rebuttal Report in the merits phase, timely served on Plaintiffs on 28 December 2021.

On 13 December 2021, this Court entered a Scheduling Order providing the following deadlines for expedited discovery in this matter:

Date	Action
12/23/2021	Deadline for parties’ exchange of evidence (in the form of expert witness reports, fact witness affidavits, and exhibit lists).
12/27/2021	Deadline for parties’ exchange of witness lists.
12/28/2021	Deadline for parties’ exchange of rebuttal evidence, including rebuttal expert reports.

Scheduling Order p 5.

Notably, the “12/23/2021” deadline does not include exchange of expert identities or witness lists. On 27 December 2021, Legislative Defendants listed Trende as a witness on their timely exchanged witness list. On the morning of 28 December 2021, counsel for Legislative Defendants conferenced with counsel for Plaintiffs, offering depositions of Trende (and Dr. Lewis) in light of the witness list and forecasted the production of the Trende Affidavit. Trende’s proposed time for deposition was Thursday 30 December 2021. Trende’s deposition has not been noticed.

ARGUMENT

The affidavit submitted by Sean P. Trende (“Trende Affidavit”) in the merits phase of this litigation is an appropriate, timely rebuttal report containing expert analysis that should not be

stricken at this preliminary stage as Plaintiffs will not be prejudiced or suffer harm by the Trende Affidavit. A true and correct copy of the Trende Affidavit is attached hereto as **Exhibit 1**.

A. The Trende Affidavit contains expert analysis and proper rebuttal evidence.

The Trende Affidavit was produced through Trende’s specialized knowledge and will help this court determine key facts at issue. As set forth in the Trende Affidavit, a lay person without the appropriate mapping software could not produce the maps included in Exhibit A(2) of Trende’s rebuttal. Specifically, Trende used “R, a widely utilized statistical programming tool” to upload shapefiles of the enacted 2021 legislative and congressional maps and color code them. Trende Aff., Ex. A ¶ 29. A person without the specialized knowledge of such a statistical programming tool would not know how to recreate the maps—producing Exhibit A(2) requires specialized knowledge.¹

Further, the color-coded maps in Exhibit A(2) rebut Plaintiffs’ experts analyses by highlighting districts that remain unchallenged by any Plaintiff, but that are nonetheless analyzed by certain experts. For example, Trende’s rebuttal maps illustrate the irrelevancy of portions of Dr. Cooper’s analysis of House District 66, as that district was not challenged by any Plaintiff as a political gerrymander. *Compare* Christopher A. Cooper Expert Report, p. 70-72 (“The partisan effects of small decisions are particularly apparent in the spike that juts up from HD-66 into HD-35, keeping the Democratic VTDs in that spike fenced off from the more Republican-leaning

¹ In *Common Cause v. Lewis*, No. 18-cvs-014001 (N.C. Super. Ct. 2019), the court excluded a similar portion of a lay person’s affidavit because he was using “GIS maps” to show VTD splits and that “inherent in the creation of such maps is the application of specialized knowledge that moves beyond a mere report of the facts observed through the senses because it necessarily requires assessing and transmuting technical data. Moreover, expert assistance would be required to properly interpret the maps.” A true and correct copy of the applicable *Common Cause* order is attached hereto as **Exhibit 2**.

VTDs in HD-35.”) *with* Trende Aff., Ex. A(2), p 5. Accordingly, the Trende Affidavit contains proper expert rebuttal material.

B. The Trende Affidavit was timely exchanged.

This Court’s 13 December 2021 Scheduling Order requires the following be completed by 23 December 2021: “Deadline for parties’ exchange of evidence (in the form of expert witness reports, fact witness affidavits, and exhibit lists).” Scheduling Order p 5. The plain language of the Scheduling Order does not require disclosure of identities of all experts or witnesses on that date. Instead, witness lists were timely exchanged under the Scheduling Order on 27 December 2021. Trende was on Legislative Defendants’ witness list. Additionally, the Trende Affidavit, and the rebuttal report contained therein as Exhibit A, was timely exchanged under the Scheduling Order on 28 December 2021. *See* N.C. R. Civ. P. 26(b)(4)(f) (setting default rules of procedure unless otherwise “set by scheduling order”).

C. Plaintiffs will not be prejudiced and their Joint Motion is premature.

Plaintiffs have had ample notice, under these time-constrained conditions, of Trende’s involvement in this case and will not be prejudiced by the inclusion of Trende’s short rebuttal report. Trende first submitted an affidavit in the preliminary injunction stage of this litigation on 2 December 2021. Trende was subsequently listed Legislative Defendants’ 27 December 2021 preliminary witness list. On Tuesday morning, Legislative Defendants offered Plaintiffs the opportunity to depose Trende on Thursday morning—an opportunity Plaintiffs ignored. Trende was available for deposition and will be open to cross-examination at trial should he be called by Legislative Defendants as a witness.

Further, Plaintiffs’ Joint Motion is premature. The Trende Affidavit has not yet been proffered as an exhibit, and thus evidentiary objections under Rules 702, 703, and 705 of the North

Carolina Rules of Evidence are improper. Nonetheless, as previously explained *supra* Part A, Trende's rebuttal maps required specialized knowledge of statistical programming to create and thus could not have been completed by counsel or other lay persons.

CONCLUSION

WHEREFORE, for the reason set forth above, Legislative Defendants respectfully request this court deny Plaintiffs' Joint Motion to Strike in its entirety.

Respectfully submitted, this the 30th day of December, 2021.

/s/ Phillip J. Strach

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CERTIFICATE OF SERVICE

It is hereby certified that on this the 30th day of December, 2021, the foregoing was served on the individuals below by email:

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s/ Phillip J. Strach

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Exhibit 1

STATE OF NORTH CAROLINA

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AFFIDAVIT OF SEAN P. TRENDE

Now comes affiant Sean P. Trende, having been first duly cautioned and sworn, deposes and states as follows:

1. I am over the age of 18 and am competent to testify regarding the matters discussed below.
2. For the purposes of this litigation, I have been asked by counsel for Legislative Defendants to analyze relevant data and provide my expert opinions.
3. To that end, I have personally prepared the rebuttal report attached to this affidavit as Exhibit A, and swear to its authenticity and to the faithfulness of the opinions.

FURTHER THE AFFIANT SAYETH NAUGHT.

Executed on 28 December, 2021.

Sean P. Trende



Sean P. Trende

STATE OF FLORIDA

COUNTY OF PINELLAS

Sworn to and subscribed before me by online notarization this 28th day of December, 2021, by SEAN P. TRENDE, who appeared by way of two-way audio/video communication technology, and he provided his Ohio driver's license as identification.

Cynthia D. Glaros



Cynthia D. Glaros
Notary Public, State of Florida
My Commission Expires: 06/30/2022

Cynthia D. Glaros
Notary Public, State of Florida
Commission # GG228737
My Commission Expires June 30, 2022

Exhibit A

EXPERT REBUTTAL REPORT OF SEAN TRENDE

Now comes affiant Sean P. Trende, having been first duly cautioned and sworn, deposes and states as follows:

1. I am over the age of 18 and am competent to testify regarding the matters discussed below.
2. I currently reside at 1146 Elderberry Loop, Delaware, OH 43015. My e-mail is trende.3@buckeyemail.osu.edu.
3. I have been retained in this matter by the Legislative Defendants, and am being compensated at \$400.00 per hour for my work in this case.
4. My *curriculum vitae* is attached to this report as Exhibit 1.

EXPERT CREDENTIALS

5. I am currently enrolled as a doctoral candidate in political science at The Ohio State University. I have completed all of my coursework and have passed comprehensive examinations in both methods and American Politics. My coursework for my Ph.D. and M.A.S. included, among other things, classes on G.I.S. systems, spatial statistics, issues in contemporary redistricting, machine learning, non-parametric hypothesis tests and probability theory. I expect to receive my Ph.D. in May of 2021. My dissertation focuses on applications of spatial statistics to political questions.

6. I joined RealClearPolitics in January of 2009 after practicing law for eight years. I assumed a fulltime position with RealClearPolitics in March of 2010. My title is Senior Elections Analyst. RealClearPolitics is a company of around 40 employees, with offices in Washington D.C. It produces one of the most heavily trafficked political websites in the world, which serves as a one-stop shop for political analysis from all sides of the political spectrum

and is recognized as a pioneer in the field of poll aggregation. It produces original content, including both data analysis and traditional reporting. It is routinely cited by the most influential voices in politics, including David Brooks of *The New York Times*, Brit Hume of *Fox News*, Michael Barone of *The Almanac of American Politics*, Paul Gigot of *The Wall Street Journal*, and Peter Beinart of *The Atlantic*.

7. My main responsibilities with RealClearPolitics consist of tracking, analyzing, and writing about elections. I collaborate in rating the competitiveness of Presidential, Senate, House, and gubernatorial races. As a part of carrying out these responsibilities, I have studied and written extensively about demographic trends in the country, exit poll data at the state and federal level, public opinion polling, and voter turnout and voting behavior.

8. In particular, understanding the way that districts are drawn and how geography and demographics interact is crucial to predicting United States House of Representatives races, so much of my time is dedicated to that task.

9. I am currently a Visiting Scholar at the American Enterprise Institute, where my publications focus on the demographic and coalitional aspects of American Politics. My first paper focused on the efficiency gap, a metric for measuring the fairness of redistricting plans.

10. I am the author of *The Lost Majority: Why the Future of Government is up For Grabs and Who Will Take It*. In this book, I explore realignment theory. It argues that realignments are a poor concept that should be abandoned. As part of this analysis, I conducted a thorough analysis of demographic and political trends beginning in the 1920s and continuing through the modern times, noting the fluidity and fragility of the coalitions built by the major political parties and their candidates.

11. I co-authored the 2014 *Almanac of American Politics*. The Almanac is considered the foundational text for understanding congressional districts and the representatives of those districts, as well as the dynamics in play behind the elections. PBS's Judy Woodruff described the book as "the oxygen of the political world," while NBC's Chuck Todd noted that "[r]eal political junkies get two *Almanacs*: one for the home and one for the office." My focus was researching the history of and writing descriptions for many of the newly-drawn districts, including tracing the history of how and why they were drawn the way that they were drawn.

12. I have spoken on these subjects before audiences from across the political spectrum, including at the Heritage Foundation, the American Enterprise Institute, the CATO Institute, the Bipartisan Policy Center, and the Brookings Institution. In 2012, I was invited to Brussels to speak about American elections to the European External Action Service, which is the European Union's diplomatic corps. I was selected by the United States Embassy in Sweden to discuss the 2016 elections to a series of audiences there, and was selected by the United States Embassy in Spain to fulfil a similar mission in 2018. I was invited to present by the United States Embassy in Italy, but was unable to do so because of my teaching schedule.

13. In the winter of 2018, I taught American Politics and the Mass Media at Ohio Wesleyan University. I taught Introduction to American Politics at The Ohio State University for three semesters from Fall of 2018 to Fall of 2019. In the Springs of 2020 and 2021, I taught Political Participation and Voting Behavior at The Ohio State University. This course spent several weeks covering all facets of redistricting: How maps are drawn, debates over what constitutes a fair map, measures of redistricting quality, and similar topics.

14. It is my policy to appear on any major news outlet that invites me, barring scheduling conflicts. I have appeared on both Fox News and MSNBC to discuss electoral and

demographic trends. I have been cited in major news publications, including *The New York Times*, *The Washington Post*, *The Los Angeles Times*, *The Wall Street Journal*, and *USA Today*.

15. I sit on the advisory panel for the “States of Change: Demographics and Democracy” project. This project is sponsored by the Hewlett Foundation and involves three premier think tanks: The Brookings Institution, the Bipartisan Policy Center, and the Center for American Progress. The group takes a detailed look at trends among eligible voters and the overall population, both nationally and in key states, to explain the impact of these changes on American politics, and to create population projections, which the Census Bureau abandoned in 1995. In 2018, I authored one of the lead papers for the project: “In the Long Run, We’re All Wrong,” available at <https://bipartisanpolicy.org/wp-content/uploads/2018/04/BPC-Democracy-States-of-Change-Demographics-April-2018.pdf>.

16. I previously authored an expert report in *Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super Ct., Wake County), which involved North Carolina’s 2012 General Assembly and Senate maps. Although I was not called to testify, it is my understanding that my expert report was accepted without objection. I also authored an expert report in *Covington v. North Carolina*, Case No. 1:15-CV-00399 (M.D.N.C.), which involved almost identical challenges in a different forum. Due to what I understand to be a procedural quirk, where my largely identical report from *Dickson* had been inadvertently accepted by the plaintiffs into the record when they incorporated parts of the *Dickson* record into the case, I was not called to testify.

17. I authored two expert reports in *NAACP v. McCrory*, No. 1:13CV658 (M.D.N.C.), which involved challenges to multiple changes to North Carolina’s voter laws, including the elimination of a law allowing for the counting of ballots cast in the wrong precinct. I was

admitted as an expert witness and testified at trial. My testimony discussed the “effect” prong of the Voting Rights Act claim. I did not examine the issues relating to intent.

18. I authored reports in *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio), and *Ohio Democratic Party v. Husted*, Case 15-cv-01802 (S.D. Ohio), which dealt with challenges to various Ohio voting laws. I was admitted and testified at trial in the latter case (the former case settled). The judge in the latter case ultimately refused to consider one opinion, where I used an internet map-drawing tool to show precinct locations in the state. Though no challenge to the accuracy of the data was raised, the judge believed I should have done more work to check that the data behind the application was accurate.

19. I served as a consulting expert in *Lee v. Virginia Board of Elections*, No. 3:15-cv-357 (E.D. Va. 2016), a voter identification case. Although I would not normally disclose consulting expert work, I was asked by defense counsel to sit in the courtroom during the case and review testimony. I would therefore consider my work *de facto* disclosed.

20. I filed an expert report in *Mecinas v. Hobbs*, No. CV-19-05547-PHX-DJH (D. Ariz. 2020). That case involved a challenge to Arizona’s ballot order statute. Although the judge ultimately did not rule on a motion in limine in rendering her decision, I was allowed to testify at the hearing.

21. I authored two expert reports in *Feldman v. Arizona*, No. CV-16-1065-PHX-DLR (D. Ariz.). Plaintiffs in that case challenged an Arizona law prohibiting the collection of voted ballots by third parties that were not family members or caregivers and the practice of most of the state's counties to require voters to vote in their assigned precinct. My reports and testimony were admitted. Part of my trial testimony was struck in that case for reasons unrelated to the merits of the opinion; counsel for the state elicited it while I was on the

witness stand and it was struck after Plaintiffs were not able to provide a rebuttal to the new evidence.

22. I authored an expert report in *Smith v. Perrera*, No. 55 of 2019 (Belize). In that case I was appointed as the court's expert by the Supreme Court of Belize. In that case I was asked to identify international standards of democracy as they relate to malapportionment claims, to determine whether Belize's electoral divisions (similar to our congressional districts) conformed with those standards, and to draw alternative maps that would remedy any existing malapportionment.

23. I authored expert reports in *A. Philip Randolph Institute v. Smith*, No. 1:18-cv-00357-TSB (S.D. Ohio), *Whitford v. Nichol*, No. 15-cv-421-bbc (W.D. Wisc.), and *Common Cause v. Rucho*, NO. 1:16-CV-1026-WO-JEP (M.D.N.C.), which were efficiency gap-based redistricting cases filed in Ohio, Wisconsin and North Carolina.

24. I also authored an expert report in the cases of *Ohio Organizing Collaborative, et al v. Ohio Redistricting Commission, et al* (No. 2021-1210); *League of Women Voters of Ohio, et al v. Ohio Redistricting Commission, et al* (No. 2021-1192); *Bria Bennett, et al v. Ohio Redistricting Commission, et al* (No. 2021-1198). These cases are pending in original action before the Supreme Court of Ohio.

25. I currently serve as one of two special masters appointed by the Supreme Court of Virginia to redraw the districts that will elect the commonwealth's representatives to the House of Delegates, state Senate, and U.S. Congress.

SUMMARY OF WORK PERFORMED

26. I certify that the images attached as Exhibit 2 are true and correct copies of images that I created and that I describe below.

27. To create these images, I first examined the Complaints filed by plaintiffs in this action. I examined whether districts were challenged as either partisan gerrymanders or districts that diluted minority voting power. If I determined a district was challenged, I coded it as a “1.”

28. I then downloaded shapefiles for the enacted Congressional, State Senate and House of Representatives from the legislative redistricting website, <https://www.ncleg.gov/Redistricting>.

29. Using R, a widely utilized statistical programming tool with which I have extensive familiarity through work and coursework, I color-coded the districts by plaintiff group, based upon who challenged which districts. This produced the accompanying maps.

Exhibit 1

SEAN P. TRENDE
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strende@realclearpolitics.com

EDUCATION

Ph.D., The Ohio State University, Political Science, expected 2022.

M.A.S. (Master of Applied Statistics), The Ohio State University, 2019.

J.D., Duke University School of Law, *cum laude*, 2001; Duke Law Journal, Research Editor.

M.A., Duke University, *cum laude*, Political Science, 2001. Thesis titled *The Making of an Ideological Court: Application of Non-parametric Scaling Techniques to Explain Supreme Court Voting Patterns from 1900-1941*, June 2001.

B.A., Yale University, with distinction, History and Political Science, 1995.

PROFESSIONAL EXPERIENCE

Law Clerk, Hon. Deanell R. Tacha, U.S. Court of Appeals for the Tenth Circuit, 2001-02.

Associate, Kirkland & Ellis, LLP, Washington, DC, 2002-05.

Associate, Hunton & Williams, LLP, Richmond, Virginia, 2005-09.

Associate, David, Kamp & Frank, P.C., Newport News, Virginia, 2009-10.

Senior Elections Analyst, RealClearPolitics, 2009-present.

Columnist, Center for Politics Crystal Ball, 2014-17.

Gerald R. Ford Visiting Scholar, American Enterprise Institute, 2018-present.

BOOKS

Larry J. Sabato, ed., *The Blue Wave*, Ch. 14 (2019).

Larry J. Sabato, ed., *Trumped: The 2016 Election that Broke all the Rules* (2017).

Larry J. Sabato, ed., *The Surge: 2014's Big GOP Win and What It Means for the Next Presidential Election*, Ch. 12 (2015).

Larry J. Sabato, ed., *Barack Obama and the New America*, Ch. 12 (2013).

Barone, Kraushaar, McCutcheon & Trende, *The Almanac of American Politics 2014* (2013).

The Lost Majority: Why the Future of Government is up for Grabs – And Who Will Take It (2012).

PREVIOUS EXPERT TESTIMONY

Dickson v. Rucho, No. 11-CVS-16896 (N.C. Super. Ct., Wake County) (racial gerrymandering).

Covington v. North Carolina, No. 1:15-CV-00399 (M.D.N.C.) (racial gerrymandering).

NAACP v. McCrory, No. 1:13CV658 (M.D.N.C.) (early voting).

NAACP v. Husted, No. 2:14-cv-404 (S.D. Ohio) (early voting).

Ohio Democratic Party v. Husted, Case 15-cv-01802 (S.D. Ohio) (early voting).

Lee v. Virginia Bd. of Elections, No. 3:15-cv-357 (E.D. Va.) (early voting).

Feldman v. Arizona, No. CV-16-1065-PHX-DLR (D. Ariz.) (absentee voting).

A. Philip Randolph Institute v. Smith, No. 1:18-cv-00357-TSB (S.D. Ohio) (political gerrymandering).

Whitford v. Nichol, No. 15-cv-421-bbc (W.D. Wisc.) (political gerrymandering).

Common Cause v. Rucho, No. 1:16-CV-1026-WO-JEP (M.D.N.C.) (political gerrymandering).

Mecinas v. Hobbs, No. CV-19-05547-PHX-DJH (D. Ariz.) (ballot order effect).

Fair Fight Action v. Raffensperger, No. 1:18-cv-05391-SCJ (N.D. Ga.) (statistical analysis).

Pascua Yaqui Tribe v. Rodriguez, No. 4:20-CV-00432-TUC-JAS (D. Ariz.) (early voting).

COURT APPOINTMENTS

Appointed as Voting Rights Act expert by Arizona Independent Redistricting Commission

Appointed redistricting expert by the Supreme Court of Belize in *Smith v. Perrera*, No. 55 of 2019 (one-person-one-vote).

INTERNATIONAL PRESENTATIONS AND EXPERIENCE

Panel Discussion, European External Action Service, Brussels, Belgium, *Likely Outcomes of 2012 American Elections*.

Selected by U.S. Embassies in Sweden, Spain, and Italy to discuss 2016 and 2018 elections to think tanks and universities in area (declined Italy due to teaching responsibilities).

Selected by EEAS to discuss 2018 elections in private session with European Ambassadors.

TEACHING

American Democracy and Mass Media, Ohio Wesleyan University, Spring 2018.

Introduction to American Politics, The Ohio State University, Autumn 2018, 2019, 2020, Spring 2018.

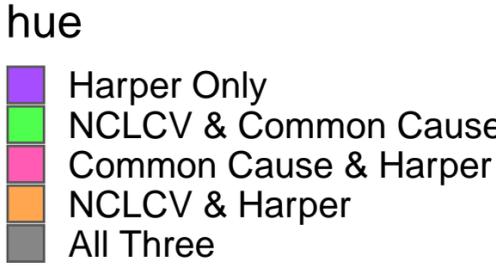
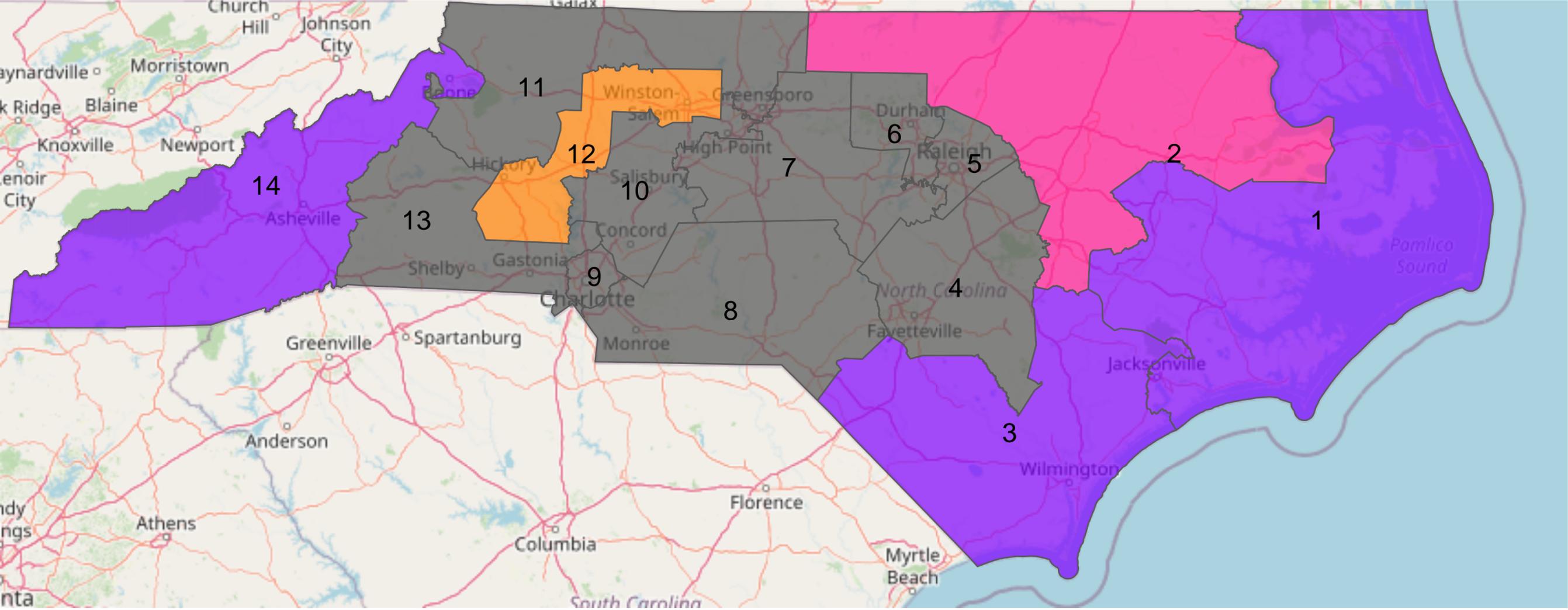
Political Participation and Voting Behavior, Spring 2020, Spring 2021.

REAL CLEAR POLITICS COLUMNS

Full archives available at http://www.realclearpolitics.com/authors/sean_trende/

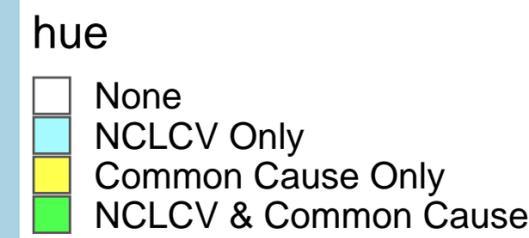
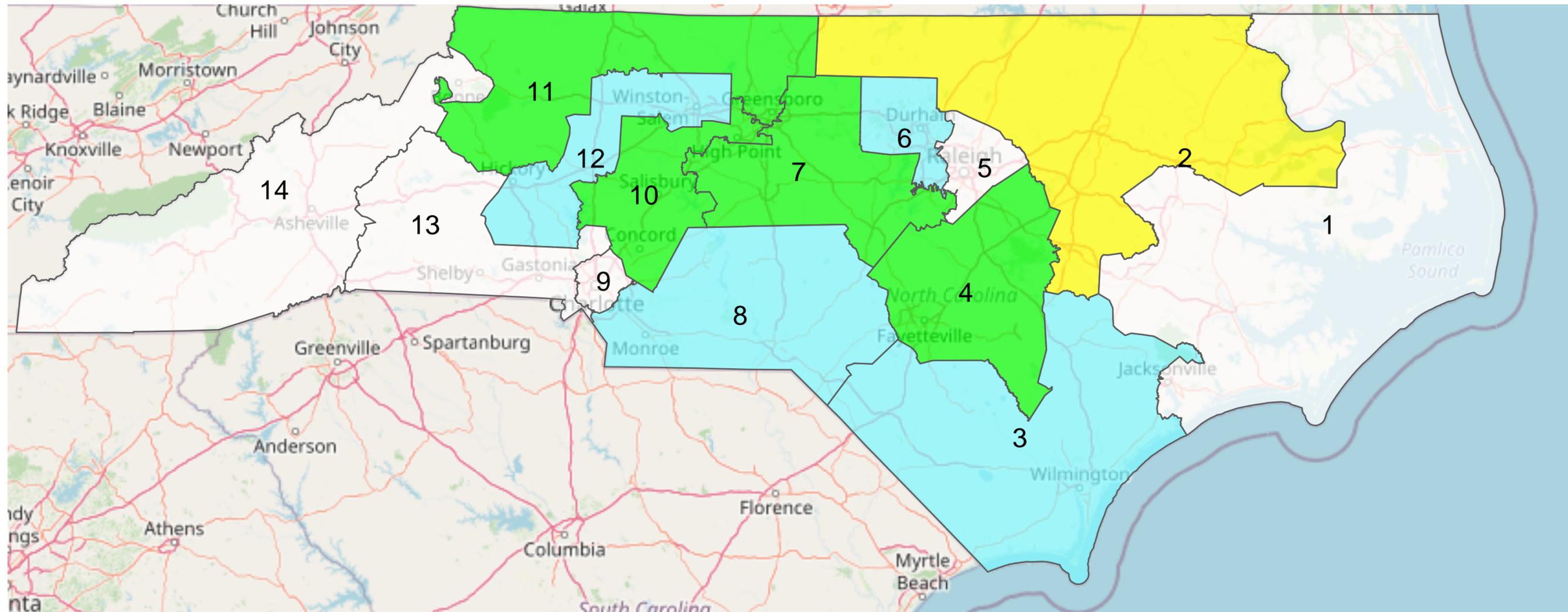
Exhibit 2

Congressional Districts Challenged As Political Gerrymanders, By Plaintiff Group

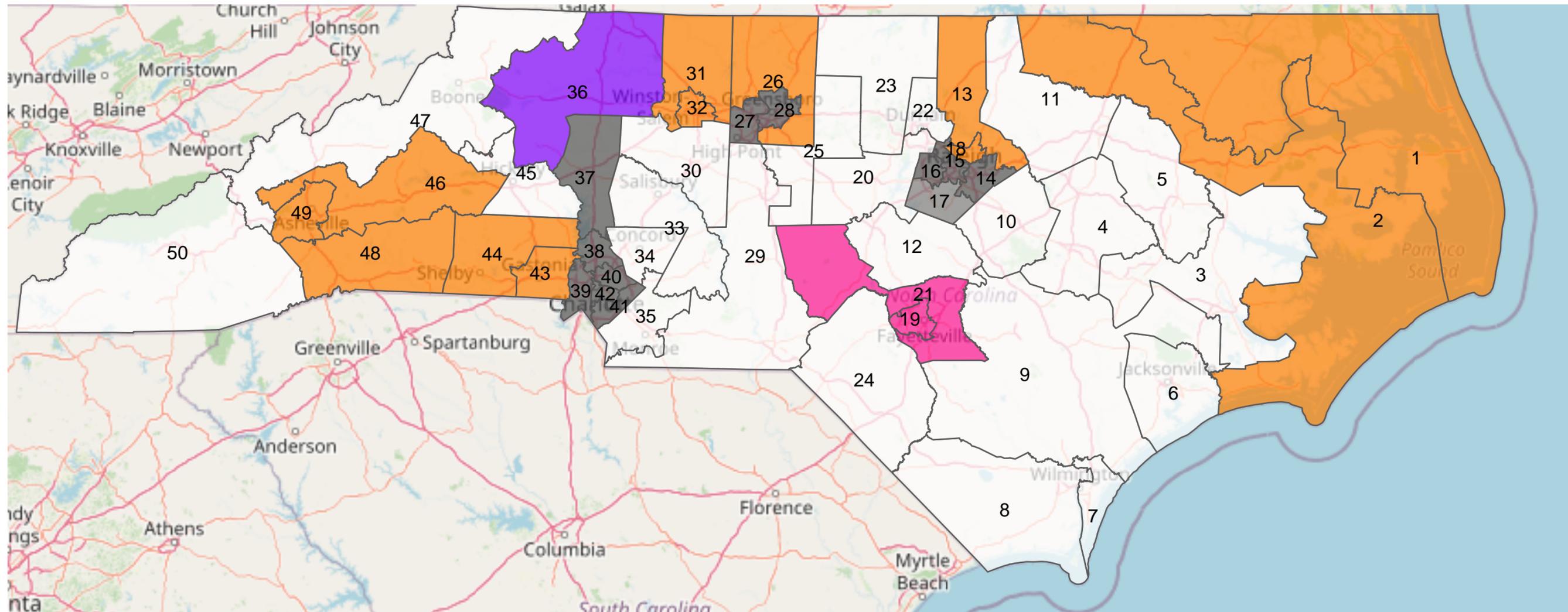


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Congressional Districts Challenged In Racial Vote Dilution Claim, By Plaintiff Group

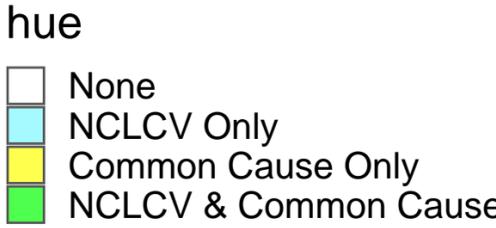
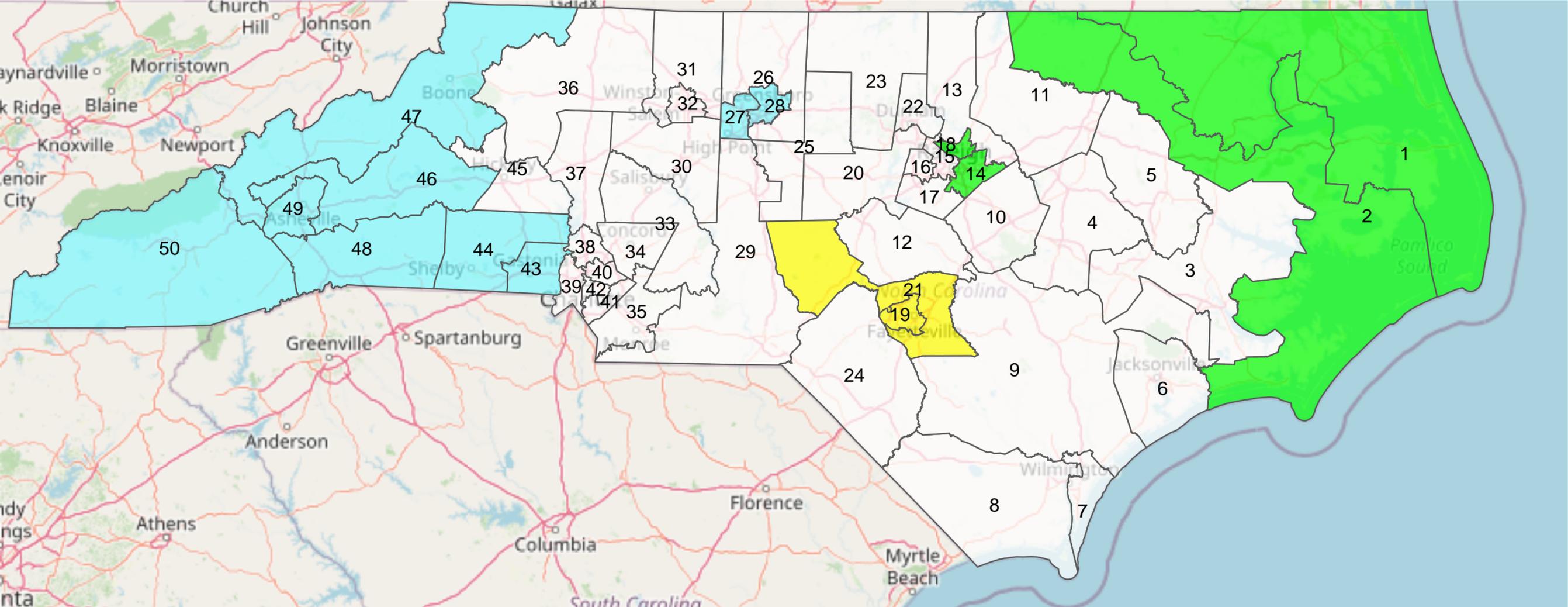


State Senate Districts Challenged As Political Gerrymanders, By Plaintiff Group



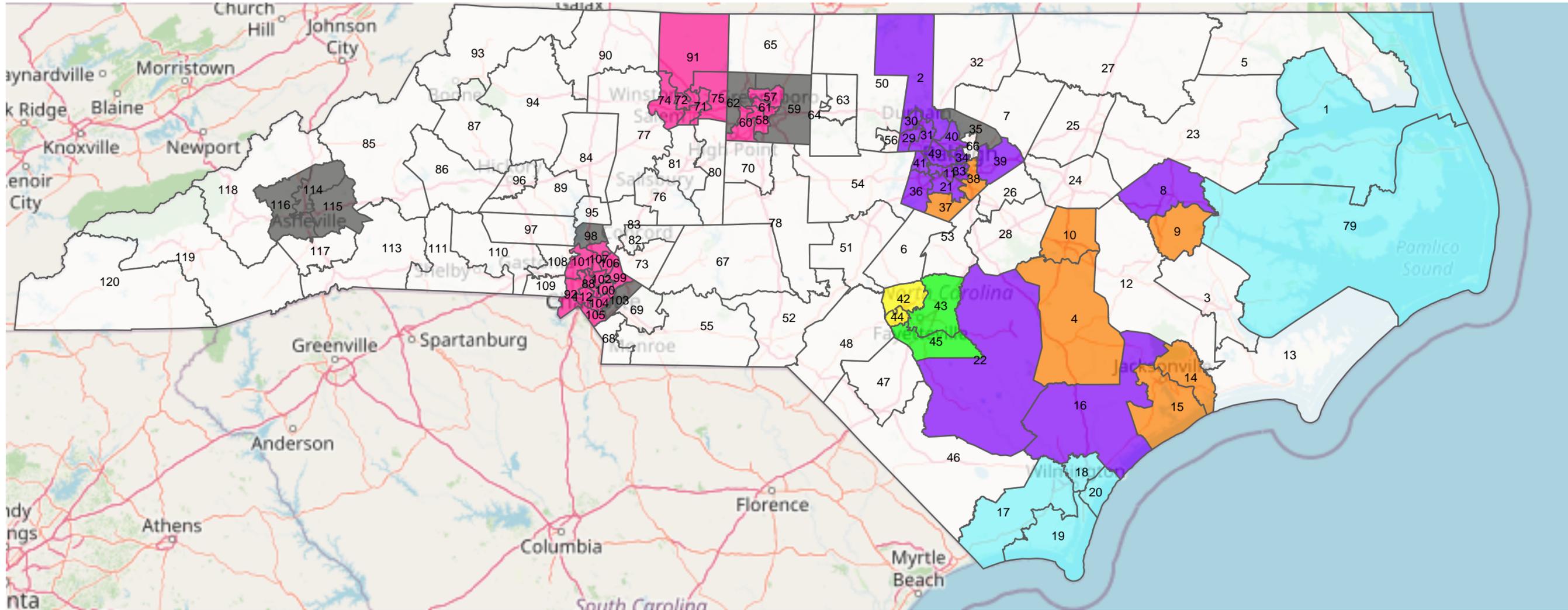
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State Senate Districts Challenged In Racial Vote Dilution Claim, By Plaintiff Group



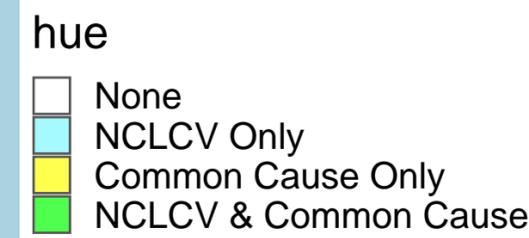
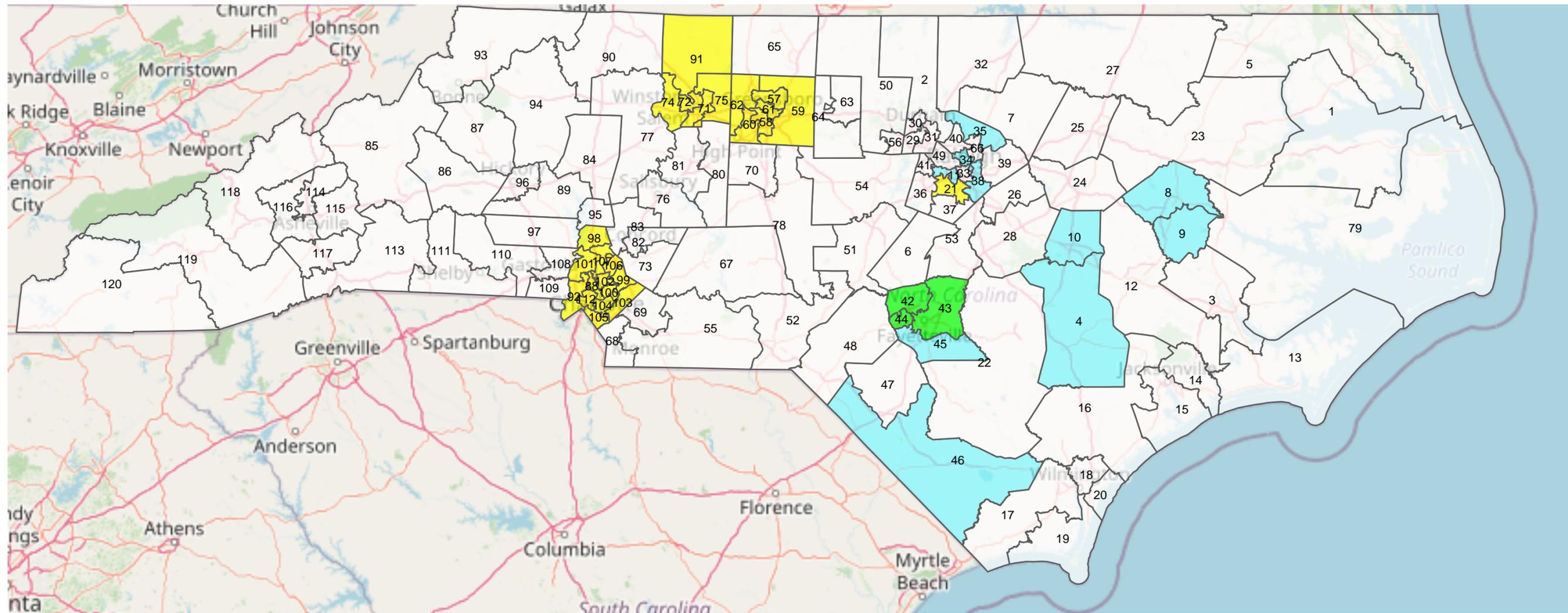
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State House Districts Challenged As Political Gerrymanders, By Plaintiff Group

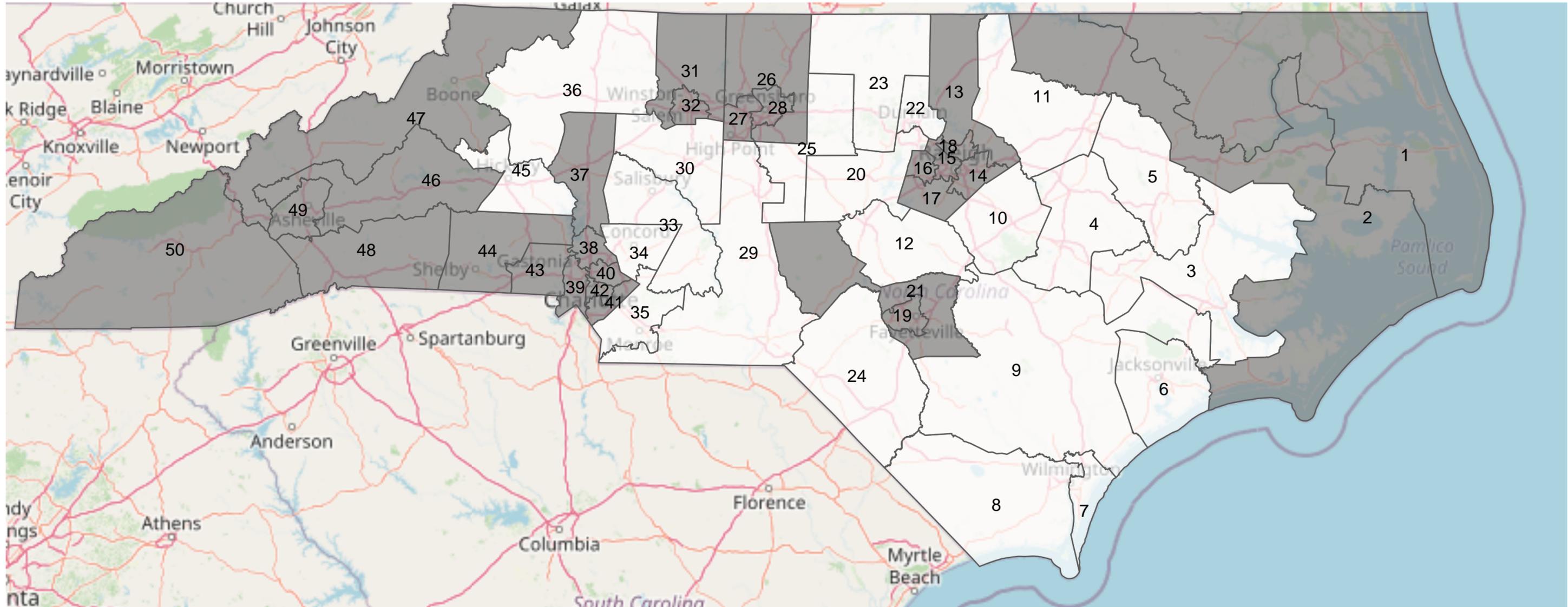


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State House Districts Challenged In Racial Vote Dilution Claim, By Plaintiff Group

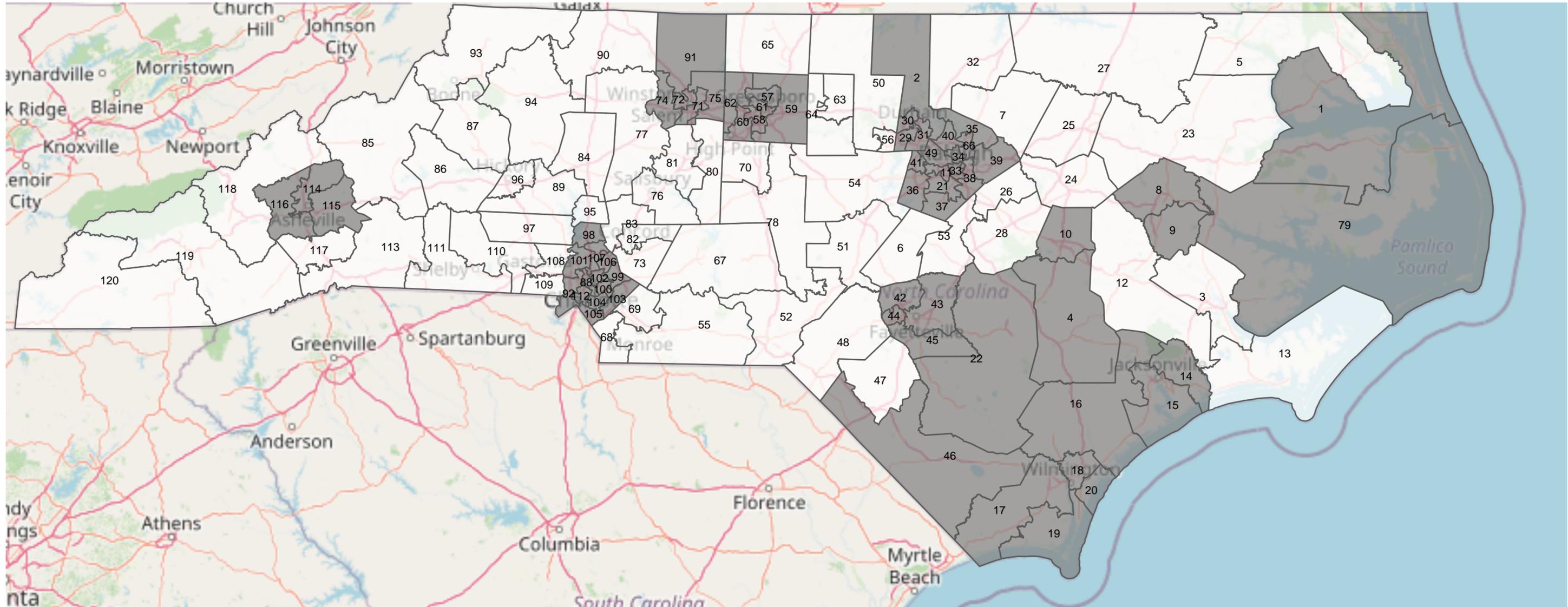


All State Senate Districts Challenged, By Plaintiff Group



hue
■ Challenged
□ Unchallenged

All State House Districts Challenged, By Plaintiff Group



hue
■ Challenged
□ Unchallenged

Exhibit 2

STATE OF NORTH CAROLINA
WAKE COUNTY

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

2019 JUL 17 AM 8:22

WAKE CO., C.S.C.

COMMON CAUSE, *et al.*)
Plaintiffs,)

v.)

ORDER ON OUTSTANDING
PRE-TRIAL MOTIONS

Representative DAVID R. LEWIS,)
in his official capacity as Senior)
Chairman of the House Select)
Committee on Redistricting, *et al.*,)
Defendants.)

THIS MATTER comes before the undersigned three-judge panel upon the parties' outstanding pre-trial motions.

A hearing on outstanding pre-trial motions was held on July 10, 2019, and the matters were taken under advisement. After considering the motions and the parties' briefs, submissions, and arguments, and having reviewed the record proper, the Court, in its discretion, rules upon each motion as follows:

I. *Plaintiffs' Motion in Limine to Preclude Legislative Defendants from Offering Evidence Related to the Voting Rights Act*

Plaintiffs' motion seeks to preclude, pursuant to the equitable doctrine of judicial estoppel, Legislative Defendants from offering evidence or argument relating to the Voting Rights Act based on Legislative Defendants' prior assertions in *Covington v. North Carolina*, No. 1:15-CV-00399 (M.D.N.C.). Legislative Defendants filed a response arguing that judicial estoppel does not apply because Legislative Defendants do not intend to change their position in this litigation from that expressed to the federal court in *Covington*.

The Court, in its discretion, denies Plaintiffs' request at this time; however, Plaintiffs may reassert this objection to evidence or testimony relating to the Voting Rights Act at the time such evidence or testimony, if any, is proffered at trial.

II. Plaintiffs' Motion in Limine to Preclude Legislative Defendants and Intervenor Defendants from Introducing Expert Analysis Not Disclosed in Expert Reports

Plaintiffs' motion seeks to preclude, pursuant to Rule 26 of the North Carolina Rules of Civil Procedure, any Legislative Defendants' or Intervenor Defendants' experts from testifying or presenting evidence concerning any analyses or opinions not disclosed in their expert reports. On July 8, 2019, Plaintiffs filed a supplemental brief in support of their motion after the parties exchanged trial exhibit lists. In their supplemental brief, Plaintiffs argue that Legislative Defendants' exhibit list includes new, undisclosed expert analysis. Specifically, Plaintiffs ask the Court to exclude: 1) testimony from two legislative staffers, R. Erika Churchill and Raleigh Myers, who were never identified by Legislative Defendants as experts in this case; 2) four exhibits identified as figures created by Legislative Defendants' expert Dr. Trey Hood; 3) two exhibits created by Legislative Defendants' expert Dr. Janet Thornton; and, 4) any other exhibits or testimony relating to undisclosed expert analysis or opinions. Legislative Defendants argue in response that the information Plaintiffs seek to exclude does not constitute expert analysis.

A lay witness may testify to facts within their personal knowledge that “can be perceived by the senses.” *State v. Broyhill*, __ N.C. App. __, __, 803 S.E.2d 832, 838-39 (2017) (quoting N.C.G.S. § 8C-1, Rule 602 cmt.). Lay witnesses may state “instantaneous conclusions of the mind as to the appearance, condition . . . or physical state of . . . things, *derived from observation of a variety of facts presented to the senses at one and the same time.*” *Id.* (quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (emphasis in original)). In contrast, North Carolina’s Rule of Evidence 702 provides that an expert may give an opinion “[i]f . . . technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” and if the other requirements of Rule 702 apply. N.C.G.S. § 8C-1, Rule 702(a). Thus, an expert renders an expert opinion when he “moves beyond reporting what he saw or experienced through his senses, and turns to interpretation or assessment ‘to assist’ the jury based on his ‘specialized knowledge.’” *Broyhill*, __ N.C. App. at __, 803 S.E.2d at 839 (quoting *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016)).

Based on the foregoing, the Court, in its discretion, grants in part and denies in part Plaintiffs’ motion, as follows:

- a. Plaintiffs’ motion is denied as to Legislative Defendants’ Trial Exhibits 024-1 through 024-13 (Affidavit of R. Erika Churchill and accompanying Exhibits). The exhibits and testimony presented by Ms. Churchill are a straightforward recitation of facts that are neither derived from specialized knowledge nor the product of assessment or interpretation, and therefore do not constitute expert analysis or opinion.
- b. For similar reasons, Plaintiffs’ motion is denied as to Legislative Defendants’ Trial Exhibits 025-8 through 025-79 (Exhibits 1-15 accompanying the Affidavit of Raleigh Myers).

- c. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 025-81 through 025-397 (Exhibits 16-174 accompanying the Affidavit of Raleigh Myers). These exhibits display certain Geographic Information Systems "GIS" maps purporting to demonstrate, for example, instances where district boundaries dividing a voting district follow a precinct line. Inherent in the creation of such maps is the application of specialized knowledge that moves beyond a mere report of facts observed through the senses because it necessarily requires assessing and transmuting technical data. Moreover, expert assistance would be required to properly interpret the maps. Consequently, these exhibits constitute expert analysis or opinion.
- d. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 141 through 144 (exhibits created by Dr. Trey Hood). These exhibits were not timely disclosed in Dr. Hood's initial expert report dated April 30, 2019, or in his supplemental report dated May 7, 2019, and are therefore excluded for failure to comply with N.C.G.S. § 1A-1, Rule 26(b)(4)(a)(2).
- e. For the same reasons, Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 170 and 171 (exhibits created by Dr. Janet Thornton) because these exhibits were not disclosed in Dr. Thornton's initial expert report or in her rebuttal report dated May 7, 2019.

III. Plaintiffs' Motion in Limine to Preclude Legislative Defendants from Introducing Evidence Under the Sword and Shield Doctrine

The Court entered an order on March 25, 2019, granting Legislative Defendants' February 5, 2019, motion for a protective order as to twelve legislators' and legislative staffers' claim of legislative privilege while also concluding that Legislative Defendants were estopped from withdrawing their prior assertions of legislative privilege for Defendants Lewis and Hise. In that same order, the Court noted that Plaintiffs could seek to be heard prior to trial on related evidentiary matters should Legislative Defendants offer 1) testimony from any of the twelve individuals who had asserted privilege, 2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or 3) evidence or

testimony that otherwise seeks to explain the legislature’s intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data. Plaintiffs’ motion seeks to preclude Legislative Defendants from offering such evidence and testimony.

A party cannot use a privilege both as a “shield” to prevent discovery and a “sword” to present evidence or claims that relate to the privileged information. *See, e.g. State v. Buckner*, 351 N.C. 401, 410 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558 (1996). The Court, in its discretion, grants Plaintiffs’ requested relief in this motion as to the twelve legislators and legislative staff encompassed by the Court’s March 25, 2019, order. Legislative Defendants, however, are not precluded from offering evidence or testimony from legislators or legislative staff who have not previously asserted a claim of legislative privilege and will waive such privilege at trial, provided that Legislative Defendants do not offer: 1) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege; or, 2) evidence or testimony that otherwise seeks to explain the General Assembly’s intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

IV. Plaintiffs’ Motion in Limine to Exclude Live Testimony from More Than One Intervenor-Defendant

Intervenor-Defendants intend to present testimony through affidavits for three of the Intervenors and through live testimony for the remaining four Intervenors. Plaintiffs’ motion seeks, pursuant to Rules 401 and 403 of the North

Carolina Rules of Evidence, to limit live testimony to at most only one individual Intervenor on the grounds that additional testimony will be irrelevant, likely duplicitous, and will likely cause undue delay.

Under Rule 611 of the North Carolina Rules of Evidence, the Court “shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time.” N.C.G.S. § 8C-1, Rule 611. The Court, in its discretion, denies Plaintiffs’ motion; however, Intervenor Defendants are cautioned that the Court will, if necessary, exercise its authority under Rule 611 to limit live testimony from Intervenors to make the presentation of evidence effective for the ascertainment of truth and avoid needless consumption of time.

V. *Intervenor-Defendants’ Motion in Limine to Exclude Evidence of Dismissed Criminal Charges*

Intervenor Defendants’ motion seeks to exclude any and all evidence, references to evidence, testimony, or argument relating to Intervenor Reginald Reid’s dismissed criminal charges. Plaintiffs have responded that Plaintiffs will not offer evidence relating to Intervenor Reid’s dismissed criminal charges at trial. Accordingly, the Court, in its discretion, grants Intervenor Defendants’ motion.

VI. *Plaintiffs’ Emergency Motion to Compel Legislative Defendants to Produce Revised Calculations of Dr. Jeffrey Lewis*

Plaintiffs’ emergency motion seeks to compel revised calculations of Dr. Jeffrey Lewis that Plaintiffs requested from Legislative Defendants immediately

following Dr. Lewis's deposition on June 11, 2019. The Court, in its discretion, grants Plaintiffs' request to compel Legislative Defendants to produce to Plaintiffs the revised calculations of Dr. Lewis without delay.

Plaintiffs also request fees and costs, pursuant to Rule 37(a) of the North Carolina Rules of Civil Procedure, incurred in obtaining an order compelling Legislative Defendants to produce the revised calculations sought in their emergency motion to compel. The Court, in its discretion, declines to award Plaintiffs fees and costs in connection with this motion.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:

1. Plaintiffs' motion *in limine* to preclude Legislative Defendants from offering evidence or argument relating to the Voting Rights Act is DENIED in accordance with the terms of this Order.
2. Plaintiffs' motion *in limine* to preclude Legislative and Intervenor Defendants from introducing expert testimony regarding analysis or opinions not disclosed in expert reports is DENIED in part and GRANTED in part, as follows and in accordance with the terms of this Order:
 - a. Plaintiffs' motion is denied as to Legislative Defendants' Trial Exhibits 024-1 through 024-13.
 - b. Plaintiffs' motion is denied as to Legislative Defendants' Trial Exhibits 025-8 through 025-79 and granted as to Legislative Defendants' Trial Exhibits 025-81 through 025-397.
 - c. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 141-144.
 - d. Plaintiffs' motion is granted as to Legislative Defendants' Trial Exhibits 170 and 171.

3. Plaintiffs' motion *in limine* to preclude Legislative Defendants from introducing evidence or testimony under the sword and shield doctrine is GRANTED; however, Legislative Defendants are not precluded from offering evidence or testimony from legislators who have not asserted legislative privilege, provided such evidence and testimony is in accordance with the terms of this Order.
4. Plaintiffs' motion *in limine* to limit Intervenor Defendants to live testimony from only one Intervenor is DENIED in accordance with the terms of this Order.
5. Intervenor Defendants' motion *in limine* to exclude evidence of Intervenor Reid's dismissed criminal charges is GRANTED.
6. Plaintiffs' emergency motion to compel is GRANTED in part, as follows:
 - a. Legislative Defendants shall produce to Plaintiffs by 10:00 a.m. on July 15, 2019, the revised calculations of Dr. Jeffrey Lewis.
 - b. Plaintiffs' request for fees and costs is denied.

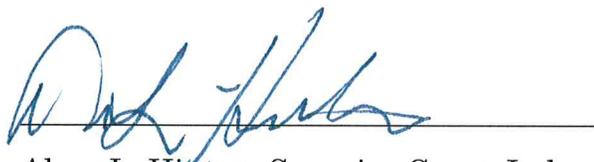
So ORDERED, this the 16 day of July, 2019.



Paul C. Ridgeway, Superior Court Judge



Joseph N. Crosswhite, Superior Court Judge



Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

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This the 18th day of July, 2019.



Kellie Z. Myers
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