IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-399

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al,*

Defendants.

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' REMEDIAL DISTRICTS AND MEMORANDUM OF LAW

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I. INTRODUCTION

Following an evidentiary hearing on July 27, 2017 on Plaintiffs' motions for additional relief and for a court-ordered timeline for the adoption of new districts to remedy the constitutional violations found in nine senate districts and nineteen house districts, this Court allowed the Defendants until September 1, 2017 to enact new House and Senate districts "remedying the constitutional deficiencies with the Subject Districts", Order 8, July 31, 2017, ECF No. 180. Plaintiffs object to the remedial districts enacted by the General Assembly on two grounds: first, that two of the newly drawn Senate Districts, (SD 28 and SD 21) and two of the newly drawn House Districts (HD 21 and HD 57) fail to cure the racial gerrymandering violations identified by this Court; and second, that one Senate District (SD 41) and seven House Districts (HD 10, 36, 37, 40, 41, 83, and 105) cannot be used as remedial districts because they violate the North Carolina Constitution. The Court has before it all the evidence necessary to make these determinations and should itself remedy these particular constitutional defects in the state's maps.[1] *See Chapman v. Meier,* 420 U.S. 1, 27 (1975) (If the legislative body responds with a legally unacceptable remedy, "the responsibility falls on the District Court."); *White v. Weiser,* 412 U.S. 783, 797 (1973) (District court should "defer to state

[1] Plaintiffs also object to the remedial districts on the grounds that they are an unconstitutional partisan gerrymander, but as explained below, *infra at* 42, acknowledge that the record is not complete on this issue.

policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge.").

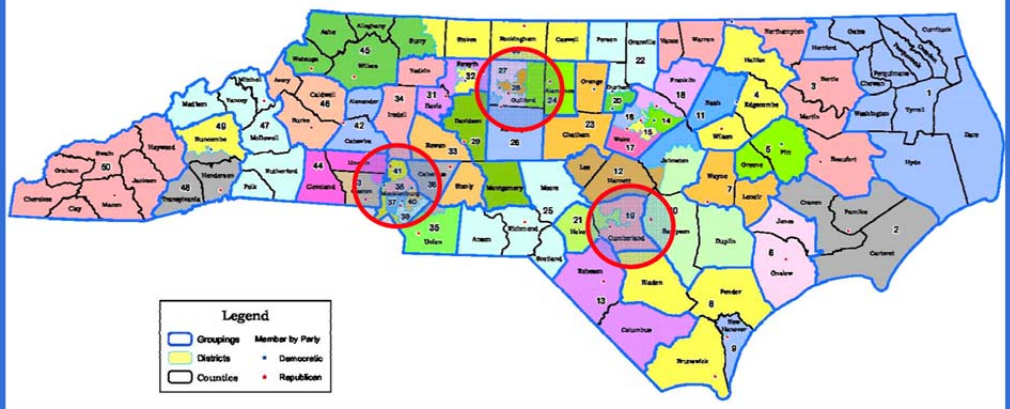
It is this Court's responsibility to fully remedy the constitutional violations suffered by Plaintiffs. *Brown v. Plata*, 563 U.S. 493, 571 (2011) ("Once a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation.") (internal citation omitted). At the same time, "[t]he remedial powers of an equity court must be adequate to the task, but they are not unlimited," *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Therefore Plaintiffs ask this Court to order the use of Plaintiffs' proposed remedial districts only in the areas of the state impacted by the remaining constitutional defects in the Defendants' districts or alternatively to appoint a special master to draw remedial districts in those limited areas where the constitutional violations have not been cured or new constitutional violations exist. *See Personhuballah v. Alcorn,* 155 F. Supp. 3d 552 (E.D. Va. 2016) (three judge court) (implementing redistricting plan drawn by special master to remedy racial gerrymander).

To be clear, this Court originally found constitutional violations in 28 districts. In order to comply with the Court's remedial order to correct those violations and remain consistent with the North Carolina Constitution, the General Assembly altered a total of 116 House and Senate districts. Plaintiffs object to 12 of those newly drawn districts as violating the federal and state constitutional provisions applicable to legislative

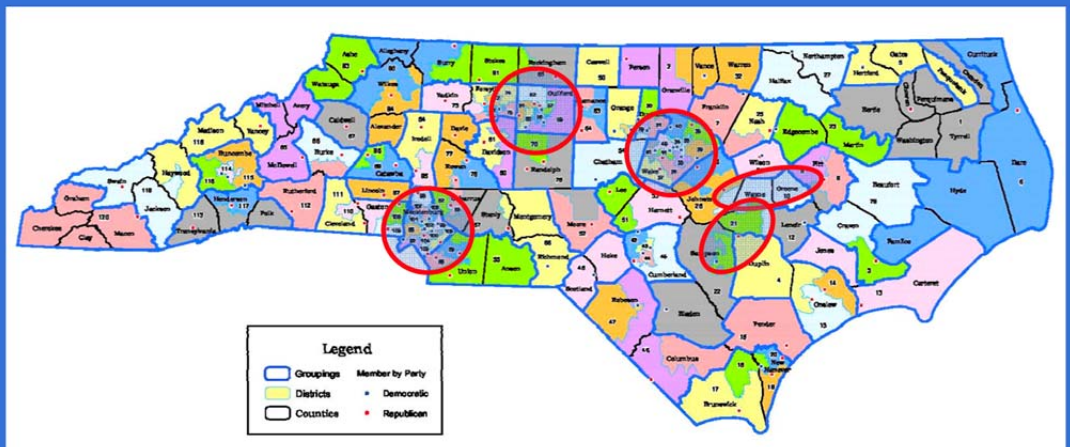
redistricting in North Carolina. Those objections, and alternative maps that cured those problems, were presented to the North Carolina General Assembly by Plaintiff Rev. Julian Pridgen at the public hearing on August 22, 2017 and by a letter to Counsel for Defendants dated August 23, 2017, well before the final remedial districts were adopted on August 31, 2017. *See* Raleigh Public Hr'g Tr. 143:20-145:23, Aug. 22, 2017, ECF No. 184-10; Letter from Anita Earls to Thomas Farr, et al. (Aug. 23, 2017) (attached as Ex. 1). None of the constitutional flaws identified by Plaintiffs were altered in the final enacted districts.

Plaintiffs do not contend that all 116 newly drawn House and Senate districts must be rejected, but only that the 12 unconstitutional districts cannot be used and alternative, constitutionally-compliant districts must be ordered by this Court. The areas impacted by these districts in each plan are illustrated by the red circles on these maps:

2017 Senate Redistricting Plan



2017 House Redistricting Plan A2



II. STATEMENT OF THE CASE

On August 15, 2016, this Court issued a Memorandum Opinion holding that twenty-eight House and Senate districts are racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment, and issued an accompanying order enjoining the state from using those districts in conducting any elections after November 8, 2016. Op., ECF No. 123. In a subsequent remedial order the Court allowed the General Assembly until March 15, 2017 to enact new districts and required the state to hold special primary and general elections using those new districts in 2017. Order, ECF No. 140 (Nov. 29 2016). That Order was stayed by the United States Supreme Court pending review of the merits of Plaintiffs' claims. *North Carolina v. Covington,* 137 S. Ct. 808 (2017) (mem.).

On June 5, 2017, the Supreme Court summarily affirmed this Court's judgment on the merits of the case in favor of Plaintiffs. *North Carolina v. Covington*, No. 16-649 (U.S. 2017). That same day the Court vacated this Court's remedial order and remanded the case for a balancing of the equities and imposition of a remedy. *North Carolina v. Covington*, No. 16-1023, slip op. at 2-3 (U.S. June 5, 2017) (per curiam). On July 31, this Court issued an order allowing the Defendants until September 1, 2017, or up to two weeks longer if requested, to redraw the unconstitutional districts and submit them to the Court for review. Order 8, 10, ECF No. 180. The Defendants did not request an

extension of deadlines, enacted remedial districts on August 31, 2017, and filed the newly enacted plans and related materials with the court on September 7, 2017.

III. STATEMENT OF FACTS

A. The legislative process for enactment of S.L. 2017-207 and S.L. 2017-208

Redistricting committees adopted faulty criteria.

At the outset of the redistricting process, the House and Senate redistricting committees adopted map-drawing criteria to be provided to Dr. Thomas Hofeller, whom the General Assembly again hired to draw its 2017 remedial maps. *See* Joint Redistricting Comm. Meeting Tr. 4:23-25, 69:12-16, Aug. 10, 2017, ECF No. 184-9. One of these criteria directly perpetuated the effects of the unconstitutional 2011 districts by requiring that, to the extent possible, the 2017 districts protect the incumbents elected under the 2011 districts. Adopted Criteria for House and Senate Plans, ECF No. 184-37. That is, applying this criterion, the committee cemented the harms created by the state's 2011 unconstitutional actions in districts that were supposed to remedy the earlier maps' unconstitutionality.

The committees expressly forbade any consideration of racial data in drawing district lines. *See id.* ("No Consideration of Racial Data. Data identifying the race of individuals or voters shall not be used in the drawing of legislative districts in the 2017 House and Senate plans." (emphasis in original)). Members of both committees pressed the chairmen for an explanation of how the General Assembly could ensure the racial

gerrymanders in the 2011 maps had been cured if the legislature refused to consider racial data when adopting remedial maps, in some cases reading directly from this Court's July 31 remedial order. *See, e.g.*, Joint Redistricting Comm. Meeting Tr. 151:6-154:17, 155:21-156:12, 177:14-19, Aug. 10, 2017, ECF No. 184-9; House Select Comm. on Redistricting Meeting Tr. 21:22-23:7, Aug. 25, 2017, ECF No. 184-18. Rep. David Lewis, chairman of the House Select Committee on Redistricting, explained the legislative leadership's interpretation of this Court's August 11, 2016 opinion and July 31, 2017 order as follows:

> Despite the voluminous record that was established by the General Assembly during the 2011 redistricting process, the three-judge panel in the Covington case said that this did not constitute substantial evidence that would justify using race to draw districts in compliance with the VRA. Therefore, we do not believe it is appropriate given the Court's order in this case for these committees to consider race when drawing districts.
>
> . . .
>
> We do not believe, in light of the Covington opinion, that there is substantial evidence in the record to justify the use of race in drawing districts. Given the Court's order in this case, we believe the only way to comply with the legal requirements regarding the drawing of districts is not to consider race in that process.

Joint Redistricting Comm. Meeting Tr. 149:4-14, 158:11-18, Aug. 10, 2017, ECF No. 184-9. An amendment to allow for consideration of racial data was rejected by the committees in formal votes along political party lines. *See* Joint Redistricting Comm. Meeting Tr. 174:24-186:14, Aug. 10, 2017, ECF No. 184-9.

While stopping short of explicitly adopting "partisan advantage" as a criterion as the committee did in the 2016 congressional redistricting process, the committees broadly provided for "political considerations" to be taken into account in drawing district lines. *Compare* 2016 Contingent Congressional Plan Committee Adopted Criteria, N.C. General Assembly, http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf *with* Adopted Criteria for House and Senate Plans, ECF No. 184-37.

The proposed criteria were adopted by the redistricting committees within hours of their introduction, without amendment. *See generally* Joint Redistricting Comm. Meeting Tr., Aug. 10, 2017, ECF No. 184-9. The public was afforded no opportunity to comment on the proposed criteria between their introduction and adoption, but members of the public, including Plaintiffs, later formally objected to the criteria and called upon the committees to revise them.[2] *See, e.g.*, Raleigh Public Hr'g Tr. 78:11-80:14, Aug. 22, 2017, ECF No. 184-10 (comments of Plaintiff Channelle James). The committees declined to revise the criteria in response to public input.

[2] A week before the proposed criteria were introduced, the joint redistricting committees held a meeting to receive public input on criteria for drawing maps. Recurring requests from members of the public during this meeting included requests that the General Assembly exclude partisan advantage and incumbency protection as criteria, and consider racial data in a way that ensured the racial gerrymanders identified by this Court were in fact cured. *See, e.g.*, Joint Redistricting Comm. Meeting Tr. 29:19-30:23, 58:20-59:11, Aug. 4, 2017, ECF No. 184-8. Members of the public also repeatedly called for the maps to be drawn by someone other than the consultant who drew the 2011 maps struck down by this Court. *E.g., id.* at 33:25-34:2, 44:4-10, 66:18-67:9.

In adopting criteria, the redistricting committees provided no guidance to Dr. Hofeller as to which of the criteria should take precedence over others, beyond the requirement that the maps must comply with state and federal law. *See* House Select Comm. on Redistricting Meeting Tr. 62:4-6, Aug. 25, 2017, ECF No. 184-18.

Redistricting committees minimized and disregarded public input.

More than a week after redistricting criteria were adopted, the proposed remedial maps for the House and Senate were released over the weekend of August 19-20, 2017, ahead of public hearings scheduled at six sites throughout the state on Tuesday, August 22. However, the block assignment files and statistical data associated with the maps, which were necessary for any meaningful analysis, were not released to legislative committee members or the public until midday Monday, August 21, the day before the public hearings.[3]

The public hearings were held on a weekday afternoon, with six satellite meeting sites teleconferenced into a central meeting site in Raleigh. Several of the satellite sites were filled beyond capacity, in part because they were held in locations that held as few

[3] Plaintiffs' counsel sent an email to Defendants' counsel on Saturday, August 19 explaining that the block assignment files and underlying data were necessary for conducting any meaningful analysis of the maps. Plaintiffs' counsel requested that the block assignment files and underlying data be furnished simultaneously with release of the maps, and further requested an explanation for why that information was not being provided at the time the maps were released. Plaintiffs' counsel received no response to their email.

as 25 people in populous areas.[4] From the start, this arrangement was plagued with technical difficulties, and two and a half hours into the meeting Rep. David Lewis announced a decision to separate the proceedings into seven concurrent meetings.[5] *See* Raleigh Public Hr'g Tr. 111:1-9, Aug. 22, 2017, ECF No. 184-10; *see id.* at 110:11-16 (announcing that more than 200 people remained signed up to speak as of 6:30 p.m.); *see also* House Select Comm. on Redistricting Meeting Tr. 30:10, Aug. 25, 2017, ECF No. 184-18 (acknowledging "technical problems" during the hearings).

Following the public hearings, transcripts of the comments received at the six sites were not timely furnished to members of the redistricting committee for review. House Select Comm. on Redistricting Meeting Tr. 29:4-18, Aug. 25, 2017, ECF No. 184-18. Nor were the more than 4,300 comments submitted in writing via an online portal, and

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[4] For example, the Guilford County site held 25-30 people, and the Mecklenburg County site held 45-55 people. Aug. 22, 2017 Redistricting Public Hr'g Sites, N.C. General Assembly, http://www.ncleg.net/documentsites/committees/house2017-183/8-22-2017/Sites%20for%20Public%20Comment.pdf; *see also* House Select Comm. on Redistricting Meeting Tr. 30:3-8, Aug. 25, 2017, ECF No. 184-18 ("some of the satellite sites weren't as big as perhaps we would have chosen if we could go back and do it again"). By contrast, a satellite site in Caldwell County, in a part of the state where no districts were being redrawn in 2017, was not full. *See* Hudson Public Hr'g Tr. 2:5-11, Aug. 22, 2017, ECF No. 184-14.

[5] By this time, many people who had signed up to speak but had not yet been called upon to address the committee had left the meetings. See Raleigh Public Hr'g Tr. 122:13-21, Aug. 22, 2017, ECF No. 184-10 (noting "many individuals have left" and overflow room had been closed as roll calls go unanswered). The meetings nonetheless lasted well into the night, with the Raleigh site adjourning shortly before 10 p.m. See House Select Comm. on Redistricting Meeting Tr. 29:7-8, Aug. 25, 2017, ECF No. 184-18.

the redistricting committees had no plan for reviewing those comments.[6] *See id.* at 30:20-31 ("I don't know that anyone was specifically tasked with looking at them.").

Plaintiffs submitted alternative maps and objections, which were rejected.

Before either redistricting committee convened to consider the proposed maps, Plaintiffs' counsel sent a letter to the redistricting committee chairs identifying districts in the map where the racial gerrymanders identified by this Court had been perpetuated. Letter from Anita Earls to Thomas Farr, et al. (Aug. 23, 2017). This letter also identified several districts that had been drawn in violation of the state constitution. *Id.*; *see also* Raleigh Public Hr'g Tr. 143:20-145:23, Aug. 22, 2017, ECF No. 184-10 (comments of Plaintiff Julian Pridgen). Before either committee debated or voted on the proposed maps, Plaintiffs provided the committees with alternative House and Senate maps illustrating how the constitutional violations they had identified could be corrected. *See* ECF No. 184-28 (Plaintiffs' House plan, introduced after submission as an amendment by Rep. Darren Jackson); ECF No. 184-34 (Plaintiffs' Senate plan, introduced after submission as an amendment by Sen. Dan Blue); *see also* Rev. Julian Pridgen Comments and Maps, Senate Redistricting Comm., http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=357&sFolderName=\08-22-2017\Submitted%20public%20comments\Rev.%20Julian%20Pridgen (last

[6] As of the time of this filing, those written comments had also not been submitted to this Court. They are attached here as Ex. 2.

visited Sept. 15, 2017). The Plaintiffs' House and Senate maps were introduced for consideration in both committees and on the Senate floor, and in each case were rejected by a formal vote along party lines, in part because racial data had been taken into consideration in drawing the district lines. *See* Senate Redistricting Comm. Meeting Tr. 130:18-15, Aug. 24, 2017, ECF No. 184-17; Senate Floor Session Tr. 120:18-20, Aug. 25, 2017, ECF No. 184-19; House Select Comm. on Redistricting Meeting Tr. 112:3-117:7, Aug. 25, 2017, ECF No. 184-18. No changes were ultimately made to the enacted maps in response to any of the Plaintiffs' suggestions. House Select Comm. on Redistricting Meeting Tr. 19:17-21, Aug. 25, 2017, ECF No. 184-18.

Partisan impact of enacted maps was made clear to legislators.

During the legislative process, the nonpartisan Campaign Legal Center conducted an analysis of the political symmetry of the proposed House and Senate plans. That analysis found a nearly 12% efficiency gap in favor of Republicans in both the House and Senate maps, among the largest gap of any state legislative plan in the nation and well beyond the level experts consider presumptively unconstitutional. Memo from Ruth Greenwood to House Select Comm. on Redistricting & Senate Redistricting Comm., Aug. 22, 2017 (attached as Ex. 3) (finding 11.98% efficiency gap in House map and 11.87% efficiency gap in Senate map, and stating that experts consider gaps of 7% presumptively unconstitutional).

Campaign Legal Center formally submitted this analysis to the redistricting chairs for consideration during the legislative process, and legislators and members of the public brought the analysis and other politically asymmetrical aspects of the proposed maps to the committees' attention. *See id.*; Raleigh Public Hr'g Tr. 167:13-168:18, Aug. 22, 2017, ECF No. 184-10 (comments of Bob Hall); Senate Redistricting Comm. Meeting Tr. 26:24-29:12, Aug. 24, 2017, ECF No. 184-17 (Sen. Ben Clark). The partisan bias in the districts was not caused by the need to comply with the Whole County provision as a second analysis comparing the legislature's proposed districts with those submitted by the Plaintiffs showed that it is possible to remedy the constitutional violations with districts that have less than a 2% efficiency gap. *See* Memo from Ruth Greenwood to House Select Comm. on Redistricting & Senate Redistricting Comm., Aug. 24, 2017 (attached as Ex. 4). No changes were ultimately made to the enacted maps to address the partisan asymmetry identified by the Campaign Legal Center and others. *See generally* Senate Redistricting Comm. Meeting Tr., Aug. 24, 2017, ECF No. 184-17; House Select Comm. on Redistricting Meeting Tr., Aug. 25, 2017, ECF No. 184-18.

Changes made during the process were minor and largely protected incumbents.

The few amendments made to the maps during the legislative process were minor and came largely at the request of incumbents with regard to their own districts or other districts within their county groupings. Senate Redistricting Comm. Meeting Tr. 67:15-19, Aug. 24, 2017, ECF No. 184-17 (adjusting boundary between two districts in Wake

County at incumbent's request); *id.* at 52:5-9 (adjusting boundary between two districts in Cumberland and Hoke counties at incumbent's request); House Select Comm. on Redistricting Meeting Tr. 16:2-18, Aug. 25, 2017, ECF No. 184-18 (amending maps at request of members in Surry, Richmond, and Bladen county groupings); *id.* at 16:18-17:2, 36:4-16 (renumbering districts in Mecklenburg, Forsyth, and Nash counties); House Floor Session Tr. 31:19-32:2, Aug. 28, 2017, ECF No. 184-20 (adjusting district boundaries in Wake County at the request of a county delegation member).

Maps were adopted in largely party-line votes.

All of the African-American legislators in both the House and Senate voted against the 2017 enacted maps on second reading, as did all of the Democratic legislators.[7] Aside from a few Republican legislators who voted against one or both enacted maps because of their opposition to particular district lines or county groupings, *e.g.*, Senate Floor Session Tr. 59:5-9, Aug. 25, 2017, ECF No. 184-19, all committee and floor votes to adopt the 2017 enacted maps largely adhered to political party lines.

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[7] *See* H.R. Roll-Call Tr. for 2d Reading of H.B. 927, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=H&RCS=924 (last visited Sept. 15, 2017); S. Roll-Call Tr. for 2d Reading of H.B. 927, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=S&RCS=548; S. Roll-Call Tr. for 2d Reading of S.B. 691, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=S&RCS=542; H.R. Roll-Call Tr. for 2d Reading of S.B. 691, N.C. General Assembly, http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=H&RCS=926.

B. The enacted districts

In response to this Court's July 31 order, ECF No. 180, the General Assembly redrew 79 of its 120 House districts and 36 of its 50 Senate districts. *Compare* 2011 House map *with* Map of 2017 House Redistricting Plan, ECF No. 184-1; 2011 Senate map *with* Map of 2017 Senate Redistricting Plan, ECF No. 184-4.

Three of the redrawn districts are majority black:

District	County	Pre-2011 TBVAP%	2011 TBVAP%	2017 TBVAP%
HD 57	Guilford	21.38%	50.69%	60.75%
HD 101	Mecklenburg	50.60%	51.31%	50.82%
SD 28	Guilford	44.18%	56.49%	50.52%

When asked how they would justify adoption of those three majority-black districts in response to the Court's July 31 order, legislative leaders responded either by saying the Court's order did not permit them to consider race when drawing the maps or vaguely suggesting that the Court had left the door open to drawing majority-black districts that were naturally occurring. Joint Redistricting Comm. Meeting Tr. 151:6-154:17, Aug. 10, 2017, ECF No. 184-9; Senate Redistricting Comm. Meeting Tr. 101:4-18, Aug. 24, 2017, ECF No. 184-17.

In addition to the three majority-black districts, nine of the redrawn districts not composed of whole counties have a total black voting age population of more than 47%:

District	County	Pre-2011 TBVAP%	2011 TBVAP%	2017 TBVAP%
HD 31	Durham	44.71%	51.81%	49.56%
HD 32	Granville, Vance, Warren	36.22%	50.45%	49.12%

HD 38	Wake	31.63%	51.37%	48.30%
HD 43	Cumberland	48.69%	51.45%	49.96%
HD 72	Forsyth	43.40%	45.02%	47.51%
HD 99	Mecklenburg	28.29%	54.65%	49.54%
HD 107	Mecklenburg	50.48%	52.52%	49.39%
SD 21	Cumberland, Hoke	41.00%	51.53%	47.51%
SD 38	Mecklenburg	47.69%	52.51%	48.46%

As with the three majority-black districts, no explanation was provided during the legislative process as to why these nine districts were drawn with greater than 47% total black voting age population. *See generally* ECF No. 184-17 through -25.

In single-county groupings, the General Assembly redrew all of the districts within each single-county group, including districts that had not been held unconstitutional and did not border a district that had been held unconstitutional. *See* Map of 2017 House Redistricting Plan, ECF No. 184-1 (HD 26, 37, 40, 41, 105). Twice in groupings with multiple counties the General Assembly drew districts composed of portions of multiple counties where the district could have satisfied population requirements while traversing fewer county lines. *See id.* (HD 10, 83).

IV. ARGUMENT

Defendants failed to cure the unconstitutional racial gerrymanders in four districts: Senate District 21 in Cumberland and Hoke Counties, Senate District 28 in Guilford County, House District 21 in Wayne and Sampson Counties, and House District 57 in Guilford County. Race predominated in the drawing of these district lines, and Defendants offer no compelling governmental interest to justify those districts.

Nothing in any of the court's orders in this case authorizes or requires the General Assembly to ignore the dictates of the North Carolina Constitution as it specifically relates to redistricting.[8] However, Senate District 41 in Mecklenburg County, and seven House Districts in the 2017 enacted plans violate various provisions of the North Carolina Constitution. Those districts are not legally permissible remedial districts and cannot be an acceptable remedy for the violations that exist in the 2011 districts.

A. The Court Must Consider Whether the Defendants' Remedial Districts are Legally Acceptable

This Court has both the authority and the responsibility to ensure that the General Assembly's 2017 Senate and House redistricting plans are in fact a true and legal remedy. *See Chapman v. Meier,* 420 U.S. 1 (1975) (reversing the lower court's approval of remedial legislative districts that violated the one-person, one-vote requirement). Indeed, "while a court must not overreach when fashioning a remedy of its own, it must determine whether the legislative remedy enacted at its behest is in fact a lawful substitute for the original unconstitutional plan." *Harris v. McCrory,* No. 13-cv-949, 2016 U.S. Dist. LEXIS 71853, at *5 (M.D.N.C. June 2, 2016). The Fourth Circuit's seminal precedent on this question is *McGhee v. Granville County,* 860 F.2d 110 (4th Cir.

[8] Indeed, Defendants acknowledge that when redrawing districts to cure the racial gerrymanders, they needed to change the county grouping configurations in much of the state in order to comply with the Article II, Sections 3(3) and 5(3) of the North Carolina Constitution which state respectively that "[n]o county shall be divided in the formation of a senate district" and "[n]o county shall be divided in the formation of a representative district." *See* Notice of Filing 6, Sept. 7, 2017, Doc. 184 (explaining that ideal county grouping maps were provided to the Senate and House redistricting committees).

1988), where the court held that when reviewing a jurisdiction's proposed remedial districts, a court must consider "whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights." *Id.,* at 115. *See also, Wilson v. Jones,* 130 F. Supp. 2d 1315, 1322 (S.D. Ala. 2000), *aff'd sub nom. Wilson v. Minor,* 220 F. 3d 1297 (11th Cir. 2000) ("When … the districting plan is offered as a replacement for one invalidated by the court and will be implemented solely by virtue of the court's power, the court has an independent duty to assess its constitutionality and cannot ignore substantial evidence of improper racial motivation.").

It is widely understood that a remedial plan which itself fails constitutional muster is afforded no deference. *See, e.g., White v. Weizer,* 412 U.S. 783, 797 (1973) (reviewing court "should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms"). Courts have appropriately refused to implement legislative remedies that are themselves unlawful or fail to remedy the original violation. *See, e.g., Large v. Fremont Cnty,* 670 F.3d 1133, 1135 (10th Cir. 2012) (affirming district court's order rejecting the county's proposed remedial plan because it violates state law); *Harvell v. Blytheville Sch. Dist. No. 5,* 126 F.3d 1038, 1040 (8th Cir. 1997) (affirming district court's rejection of school board's remedial plan because the plan did not completely remedy the violation); *Buchanan v. City of Jackson,* 683 F. Supp. 1537, 1541 (W.D. Tenn. 1988) (rejecting commissioners' remedial plan). Here, in the areas of the state where the General Assembly's remedial districts do not cure the racial gerrymander, and

in other areas where the remedial districts violate the state constitution, those districts cannot be used and the Plaintiffs alternative districts should be substituted as the proper remedy.

B. The Defendants Have the Burden of Proving That the Districts They Drew Fully Cure the Constitutional Violation

Under equal protection jurisprudence, Defendants bear the burden to prove that their proposed remedial districts have fully cured the constitutional violation found in this case. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 26 (1971) (school authorities proposing desegregation plans "have the burden of showing that such school assignments are genuinely nondiscriminatory"); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (school boards have an "affirmative responsibility" to ensure desegregation efforts and a "heavy burden" of showing that their actions "serve important and legitimate ends"); *Vaughns v. Bd. of Education*, 758 F.2d 983, 991 (4th Cir. 1985) (district court erred in placing the burden of "proving the causal connection between the prior unconstitutional condition and the need for ancillary relief" upon plaintiffs); *Everett v. Pitt County Bd. of Educ.*, 678 F.3d 281, 288 (4th Cir. 2012) (it is the inescapable burden of a school board to demonstrate that an assignment plan works toward desegregation, "particularly where [the] plan allegedly causes immediate and substantial adverse effects").

Similarly, this is the case in other contexts as well. *See, e.g., Muhammad v. Giant Food*, 108 Fed. Appx. 757 (4th Cir. 2004) (burden in remedial phase of class action

employment discrimination suit is on employer); *Coleman v. Brown*, 938 F. Supp. 2d 955 (E.D. Cal. 2013) (where defendant prison officials were found to have violated the Eighth Amendment, the burden remained on the defendants to prove constitutional compliance during the remedial proceedings); *Smith v. Bounds*, 813 F.2d 1299 (4th Cir. 1987) (burden of proving compliance with constitutional standards is on department of corrections after court finds systemic constitutional violations). Defendants must show that their proposed 2017 districts fully remedy the unconstitutional use of race that occurred when those districts were initially drawn in 2011.

C. Four Districts are Still Racial Gerrymanders

Plaintiffs object to SD 21, SD 28, HD 21 and HD 57 because they fail to cure the constitutional violation originally found by this court to exist in those districts and in the area of the state where they are located. *See Covington v. N.C.,* 316 F.R.D. 117, 146-48, 155-56, 163 (M.D.N.C. 2016). As a threshold matter, it is important to note that the Court ordered that Defendants explain "as to any district with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the Voting Rights Act obligated it to draw the district at greater than 50% BVAP." Order 9, July 31, 2017, ECF No. 180. The Defendants' only explanation is that "[t]o the extent that any district in the 2017 House and Senate redistricting plans exceed 50% BVAP, such a result was naturally occurring and the General Assembly did not conclude that the Voting Rights Act obligated it to draw any such district." Notice of Filing 10-11, ECF No. 184. Thus, the

only issue is whether Defendants have demonstrated that race did not predominate in the drawing of any of the remedial districts, as Defendants offer no compelling governmental interest to justify these districts.

It is also important to note that Plaintiffs are not objecting to all of the redrawn districts that are close to or greater than 50% black in voting age population. *See supra* at 14-15 (of the redrawn districts that are not composed of whole counties, three are majority-BVAP and nine are greater than 47% in total BVAP). Plaintiffs' objection to these four districts is not based solely on the racial composition of the districts but rather includes circumstantial evidence such as the shapes of the districts and the populations contained within them. While the implications of this data may be contested, the facts themselves, the compactness scores, the district lines and the census data, are not contested.

Additionally, the principles that this Court outlined in its original opinion concerning the relevance and probative value of this evidence to prove that race predominated in the drawing of the districts in 2011 is equally applicable to the 2017 districts. *See Covington v. North Carolina,* 316 F.R.D. 117, 140 (M.D.N.C. 2016) (explaining concepts and categories of evidence relevant to a racial gerrymander claim). Lack of geographic compactness, whether measured mathematically or assessed visually, repeatedly has been relied upon as a "sign of race predominating," as has contiguity. *Id.,* 316 F.R.D. at 141. Similarly, racial demographic data and the race of individuals added

to or subtracted from the benchmark district, "may signify whether 'race was the predominant factor motiving the legislature's decision to place a significant number of voter within or without a particular district.'" *Id.* (*quoting Miller v. Johnson,* 515 U.S. 900, 916 (1995)).

1. Senate District 28

The 2017 enacted version of Senate District 28 is contained wholly within Guilford County, as were the 2011 and 2003 versions of the district. The benchmark version of the district before the 2011 redistricting included 47.20% BVAP, which in 2011 was increased to 56.49% BVAP, in part through the inclusion of an arm that "protrude[d] west, then hook[ed] south" into an area of concentrated black population in the city of High Point. Op. at 71, ECF No. 123. In the 2017 version of SD 28, the High Point arm has been cut off at the shoulder by means of a split precinct where incumbent Sen. Gladys Robinson lives, but the district's core shape and other features of the racially gerrymandered 2011 district that this Court found persuasive in 2016 remain. *See* Map of 2017 Senate Redistricting Plan, ECF No. 184-4; Decl. of Gladys Robinson ¶ 13 (attached as Ex. 5).

The 2017 version of SD 28 has a total BVAP of 50.52%. Additional Statistics on 2017 Senate Redistricting Plan 22, ECF No. 184-6. To achieve that concentration of black voters in SD 28, as in the 2011 plan, the map drawers again "outline[d] areas with a high proportion of African-Americans," Op. at 73, ECF No. 123, continuing to employ a

reverse "L" shape that follows the contours of the black population of Greensboro while majority-white areas of the city are left out of the district. Decl. of Anthony Fairfax ¶ 21 & Figure 2 (attached as Ex. 6). In the 2017 version of SD 28, every majority-black VTD in Greensboro falls within the district's boundaries, *id.* ¶ 20, and as in 2011 the district splits Greensboro along racial lines, Op. at 73, ECF No. 123.

In maintaining SD 28 as a majority-minority district, the General Assembly chose to add whole precincts with significant BVAP levels to the district, while removing whole precincts with lower BVAP levels. *See* Robinson Decl. ¶ 23. In at least one case, the General Assembly departed from its criterion of respecting municipal boundaries to split a precinct that is home to "several pockets of African-American residents." *Id.* ¶ 22. In adding population to SD 28 to offset the lost High Point arm, the General Assembly split longstanding communities of interest in Greensboro. *Id.* ¶¶ 19-20. During the legislative process for the 2017 plan, the Senate rejected alternative maps that would have kept communities of interest in Greensboro together while returning SD 28 to its pre-2011 BVAP levels. *Id.* ¶¶ 28-30.

Even without its High Point arm, the 2017 enacted version of SD 28 scores at the bottom of its class in compactness. Only five of fifty Senate districts have lower Polsby-Popper scores than SD 28's 0.17, which is 50% lower than the 0.34 mean compactness score for the 2017 Senate plan as a whole. Measures of Compactness 6-9, Senate Redistricting Comm.,

http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf. [9] Alternative maps introduced during the legislative process illustrate that SD 28 could have been drawn more compactly while meeting population goals and other race-neutral redistricting criteria. *See* ECF No. 184-34 at 23.

As in 2011, the General Assembly's retention of the core shape of the 2011 version of SD 28, continued use of boundary lines that outline black population and divide Greensboro along racial lines, selection of heavily black precincts for inclusion in the district while more heavily white precincts are excluded from the district, and disregard of communities of interest and municipal boundaries has resulted in a configuration of SD 28 with greater than 50% total BVAP and substandard compactness scores. Taken together, these factors demonstrate that race predominated in the construction of the 2017 enacted version of SD 28.

2. Senate District 21

In both the 2011 and the 2017 redistricting plans, Senate District 21 is one of two districts drawn in a two-county cluster that includes Hoke and Cumberland Counties. *Compare* Tr. Ex. 2116 *with* ECF No. 184-8 at 10, and ECF No. 136-1 at 18. In both plans, SD 21 includes all of Hoke County and must reach in to Fayetteville in Cumberland County to have enough population to satisfy the one person, one vote

[9] Compactness data on the 2017 House and Senate plans is available on the General Assembly's website and was available during the legislative redistricting process but as of the date of this filing had not been submitted to this Court. It and incumbent pairing data also available during the legislative process are attached as Ex. 9 (Senate) and Ex. 11 (House).

requirement. *Compare* Tr. Ex. 2114 *with* ECF No. 184-4 at 2. In the 2011 plan, the BVAP in SD 21 was increased from 44.93% in the 2003 plan to 51.53%. *Covington,* 316 F.R.D. at 146. As a consequence, the 2011 district had a bizarre shape, and contained "multiple appendages, which are so thin and oddly shaped that it is hard to see exactly where the district begins and ends. Some portions of the district are so narrow that the district is nearly non-contiguous." *Id.*

The 2017 version of SD 21 made only minimal changes to the district. The district still has a BVAP of 47.51%, which is ten percentage points higher than the overall cluster BVAP of 36.86%. Decl. of Ben Clark ¶ 11(d) (attached as Ex. 8). A comparison of the areas moved out of the district and those moved into the district shows very little difference between the 2011 and 2017 districts. *See* Clark Decl. at 3, Figure 1. Most significantly, the BVAP in the Cumberland County portions of SD 21 is 51.66% while the BVAP in SD 19 is only 25.99%. Clark Decl. ¶ 11(a). Numerous other demographic facts further illustrate the continued packing of African-American voters into SD 21, including a detailed examination of a notched intersection between the two districts which can only be explained by the sorting of voters on the basis of race. *See* Clark Decl. ¶ 11(e); Gilkeson Decl. ¶¶ 38-40.

Furthermore, the General Assembly's disposition of two proposed amendments to SD 19 and SD 21 in the enacted Senate map illustrates that the racially gerrymandered nature of the district remains. An amendment that did not change the racial composition

of the district was accepted, but an amendment that would have made the district lines much more regular but that would also have reduced the BVAP in SD 21 was rejected. *See* Clark Decl. ¶¶ 13-16.

Examining the racial demographics of the district also illustrates how the district lines were drawn to pack most of the black voters in Cumberland County into SD 21. The district cuts through downtown Fayetteville, picking up only the majority black VTDs as well as almost all of the city's majority-black census blocks.[10] Fairfax Decl. ¶ 17-19, Figure 1 & App. 4.

The 2017 version of SD 21 is not geographically compact. The overall compactness score for the district is just .25 using the Polsby-Popper measure. *See* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf. Equally damning is the fact that a more compact district can be drawn, as illustrated by the district configuration in Plaintiffs' proposed remedial districts in Cumberland County, in which SD 21 has a Polsby-Popper score of .37. *See* ECF No. 184-34 at 2, 23 (Senator Blue's amendment, which was the Covington Plaintiffs' Senate plan and which was defeated in committee and on the floor of the Senate).

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[10] Additional evidence is that an illustrative district drawn solely for the purpose of testing the hypothesis that racial considerations predominated in the drawing of SD 21, shows that, if it were constitutional to draw districts to achieve a partisan advantage, and Plaintiffs contend it is not, the same partisan outcome could be achieved in the Cumberland/Hoke county grouping without packing black voters into SD 21. Gilkeson Decl. ¶¶ 54-57.

Most telling is an analysis performed by Dr. Gregory Herschlag, a member of the Mathematics Department at Duke University. *See* Decl. of Gregory Herschlag (attached as Ex. 10). He used traditional redistricting criteria and established mathematics principles to generate simulated maps of two senate districts within the Hoke/Cumberland county grouping. He then compared the racial composition of those simulated maps to the racial composition of enacted SD 19 and SD 21. The purpose of his analysis was to test the likelihood that districts drawn within that grouping based on traditional redistricting criteria and not race, would include a district like enacted SD 21 with a BVAP of 47.51% for the district and 51.66% for the portion in Cumberland. Dr. Herschlag generated 78,485 maps for the Hoke/Cumberland grouping that contained two senate districts. Not one of those maps contained a district with BVAP numbers as high as enacted SD 21. Herschlag Decl. ¶ 8 & Figure 1. This finding conclusively establishes that Defendants have failed to cure the racial gerrymander in the Hoke/Cumberland grouping.

Taken together, these facts lead to only one possible conclusion. The Defendants have failed to demonstrate that the minor changes they made to SD 21 cured the unconstitutional use of race in the 2011 version of the district.

3. House District 57

The 2017 enacted version of House District 57 is contained wholly within Guilford County, as were the 2011 and 2003 versions of the district. The district changed

radically between 2009 and 2011, when the General Assembly reconfigured HD 57 to create a third majority-black House district in Guilford County. Op. at 121, ECF No. 123 (noting "almost no discernable overlap" between the 2009 and 2011 versions of HD 57). In 2011, the legislature increased the BVAP of HD 57 from 29.93% to 50.69%. *Id.* at 120, 121. The increased BVAP in 2011 resulted from two changes: (1) relocating the core of the district to Northeast Greensboro, a heavily black community of interest that had not been included in previous iterations of HD 57, and (2) extending "a tail" east into Sedalia, a predominantly black community. *Id.* at 120-21, 123. In the 2017 version of HD 57, the Sedalia tail has been shorn off, but other features of the racially gerrymandered 2011 district remain. *See* Map of 2017 House Redistricting Plan, ECF No. 184-1; Robinson Decl. ¶ 32.

The 2017 version of HD 57 has a total BVAP of 60.75%, the highest total BVAP percentage of any House or Senate district in the state. Additional Statistics on 2017 House Redistricting Plan 30-32, ECF No. 184-3; *see* Additional Statistics on 2017 Senate Redistricting Plan 22, ECF No. 184-6. To achieve that concentration of black voters in HD 57, as in the 2011 plan, the map drawers again drew district boundaries that closely track concentrations of black population. Fairfax Decl. ¶¶ 26-27 & Figure 4. As in 2011, HD 57 splits Greensboro along racial lines. *See id.* at 123.

This continued pattern of racial sorting may be most stark in the Irving Park neighborhood and southeastern Greensboro. In not only maintaining HD 57 as a

majority-minority district but also significantly increasing its total black voting age population beyond the 2011 level, the General Assembly chose to add heavily black precincts in southeastern Greensboro to the district, while removing majority-white precincts in the Irving Park area. *See* Robinson Decl. ¶¶ 39-41. In doing so, the General Assembly severed Irving Park from a community of interest near downtown Greensboro. *Id.* ¶ 40. And in adding southeastern Greensboro to HD 57, the General Assembly displaced without explanation a distinct, historic, civically engaged African-American community, which has never before been a part of HD 57. *See id.* ¶ 41. During the legislative process for the 2017 plan, incumbent Rep. Pricey Harrison of HD 57 pressed the committee chairs for clarification on why the BVAP in her district was being increased after the district had been found unconstitutional at a lower BVAP level. *See* House Select Comm. on Redistricting Meeting Tr. 119:6-15, Aug. 25, 2017, ECF No. 184-18. Her comment received no substantive response. *Id.* at 120:2-6.

Even without the Sedalia tail, the 2017 enacted version of HD 57 scores below the statewide mean Polsby-Popper and Reock compactness scores for the 2017 House plan as a whole, despite the "inherent compactness" the district benefits from as a result of its location in Greensboro. Op. at 121-22, ECF No. 123 (noting that compactness alone does not establish that race did not predominate in drawing district boundaries); *see* Measures of Compactness 8-10, House Redistricting Comm., http://www.ncleg.net/Sessions/2017/h927maps/HB%20927%203rd%20Ed.Combined.pdf

. Plaintiffs' alternative House map introduced during the legislative process illustrates that HD 57 could have been drawn more compactly while meeting population goals and other race-neutral redistricting criteria. *See* ECF No. 184-28 at 9, 12.

In addition, the General Assembly's retention of the core of the 2011 version of HD 57, continued use of boundary lines that outline black population and divide Greensboro along racial lines, selection of heavily black precincts for inclusion in the district while more heavily white precincts are excluded from the district, and disregard of communities of interest has resulted in a configuration of HD 57 with greater than 50% total BVAP and substandard compactness scores. Taken together, these factors demonstrate that race predominated in the construction of the 2017 enacted version of HD 57.

4. House District 21

In finding that the 2011 version of House District 21 was an unconstitutional racial gerrymander, this court noted that at 51.90% BVAP and a Reock score of .19, splitting three counties, and dividing seven municipalities, the district geography indicated that race was the predominant motive for drawing the district lines. *Covington,* 316 F.R.D. at 155-56. The 2017 version of HD 21 is even less compact. Its Reock score is .12, standing alone as the absolute lowest of all 120 house districts. Measures of Compactness 8-10, House Redistricting Comm. http://www.ncleg.net/Sessions/2017/h927maps/HB%20927%203rd%20Ed.Combined.pdf

. On the Polsby-Popper measure the district scores .29, which is in the lowest 10% of all 120 districts.

While the 2017 version is now contained in just two counties, Wayne and Sampson, the irregular shape continues to follow the racial demographics of the region, stretching up to Goldsboro and down to Clinton to pick up the black populations in those areas. Fairfax Decl. ¶¶ 22-25 & Figure 3. This district is one of seven districts that must be drawn in a seven county grouping. *See* ECF No. 136-1 at 21. In contrast to the minimal changes made by the Defendants, the Plaintiffs' proposed map shows that it is completely possible to redraw these districts in a geographically compact manner, where the lowest Reock score for any of the seven districts is just .36 instead of .12. *See* ECF No. 184-28 at 2, 8-10. With a BVAP of 42.34%, this district continues to assign voters on the basis of their race and is not a naturally occurring concentration of black voters. Given this data, the Defendants cannot demonstrate that they have cured the racial gerrymander in HD 21.

5. Defendants' Assertions of Colorblindness Are Not Persuasive Evidence that Racial Considerations Did Not Predominate in These Four Districts

The Defendants' insistence that race could not predominate if racial data was not used by Dr. Hofeller or looked at by the committees is false. Indeed, the Supreme Court has taken it as a given that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is

aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S. Ct. 2816, 2826 (1993). But even more obviously, Dr. Hofeller does not need access to racial data to know that if he draws a district in approximately the same way the racially gerrymandered district was drawn, it would achieve the same effect, illegally separating black voter from white voters based on their race. And he has said exactly that. Under oath in a deposition earlier this year, testifying regarding his drawing of North Carolina's 2016 Congressional Districts where again, racial data allegedly was not "used" to draw the districts, Dr. Hofeller was asked "how did you go about ensuring Voting Rights Act compliance in drawing the 2016 congressional plan." Dep. of Thomas Hofeller 246:10-12, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Jan. 24, 2017) (attached in excerpted format as Ex. 12). His response was that since it was drawn in the same general area as it had been before, and based on his past experience, he did not have to actually look at the racial data to know that the district would comply with the Voting Rights Act. *Id.* at 246:13-247:7. Indeed, here, the district lines themselves reveal that race predominated.

In the same case, the Defendants' identified an expert witness, Dr. James G. Gimpel, who, when asked whether he thought that the General Assembly considered race data when drawing the 2016 Congressional districts, testified as follows:

> You don't have to consider race data. You don't have to consider race data, okay. There's no need to go to race data, you know, to know, okay – especially given the knowledge that a lot of these folks have of what's going on in this state and how long they've been around, you don't need race data to consider race data in order to draw maps that ensure the representation of African Americans in the state of North Carolina. And, you know, one of the ways that you can do that, by the way, and not consider race data is by falling back on districts that look in many ways like the districts from previous elections.

Dep. of James Gimpel 165:25-166:14, *League of Women Voters of N.C. v. Rucho*, No. 1:16-cv-1164 (M.D.N.C. Apr. 27 ,2017) (attached in excerpted format as Ex. 13). Dr. Gimpel explains here why claiming to be colorblind by not looking at race data is no proof that race did not predominate in the drawing of a legislative district, particularly when that district is drawn by Dr. Hofeller, who has decades of experience with North Carolina redistricting.

D. Certain House and Senate Districts Violate the North Carolina Constitution

The state's proposed remedial maps also contain several violations of the state constitution and, as such, cannot and should not be approved as an appropriate remedy by this Court. This is the case because "where [a jurisdiction's] remedial plan contravenes state laws that have not been remedially abrogated by the Supremacy Clause," remedial plans offered by a legislative body must still respect the policy choices that sovereign state constitutional law demands. *Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Bodker v. Taylor*, Civ. A. No. 1:02-cv-999ODE, 2002 U.S. Dist. LEXIS 27447, at *5 (N.D. Ga. 2002) (court would not order a jurisdiction's preferred redistricting plan when

ordering implementation of that plan would contravene state law). *See also Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) ("[I]f a violation of federal law necessitates a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs."). Here, the General Assembly is not authorized to disregard the state policies inherent in, and commanded by, the state constitution and cannot disregard those commands unless specifically abrogated by this court's order identifying a violation of federal law.

In *Fremont*, the Tenth Circuit upheld a district court's rejection of a county's proposed plan to remedy violations of Section 2 of the Voting Rights Act. The district court correctly concluded that the county, a subordinate legislative body in Wyoming, could not override state law in crafting a remedy if it was not necessary to do so. 670 F.3d at 1148-49. There, state law prohibited the use of multi-member districts in county elections, but the county's proposed remedial plan would utilize both single-member and multi-member districts. *Id*. at 1136. The court concluded that it was possible to remedy the Section 2 violation using only single-member districts and thus comply with state law. *Id*. at 136-37. Just as the county was subordinate to and controlled by state law, the General Assembly here is subordinate to and controlled by state constitutional law. Where, by alternate maps, Plaintiffs can demonstrate that it is not necessary to abrogate compliance with the state constitution to remedy the federal constitutional violations

identified in this case, this Court should not allow a remedial plan that unnecessarily disregards that ultimate designation of state policy choice—the North Carolina Constitution.

Article II, Sections 3 and 5 of the North Carolina Constitution lay out the restrictions imposed upon the General Assembly when engaging in state legislative redistricting. Sections 3(3) and 5(3), collectively, establish the state's Whole County Provision ("WCP") and Sections 3(4) and 5(4) explicitly prohibit the legislature from redrawing state legislative districts, once enacted, until after the next decennial census. N.C. CONST. Article II, Sections 3(3-4) and 5(3-4). As discussed below, the 2017 Enacted Plans violate these provisions, going far beyond the necessary abrogation of the state constitution by this Court's August 11, 2016 order (ECF No. 123), and must thus be rejected.

1. *The General Assembly Exceeded the Authority Granted it by this Court's Orders and Redrew Districts in Violation of the State Constitutional Prohibition on Mid-Decade Redistricting*

On August 11, 2016, this Court "ordere[ed] the North Carolina General Assembly to draw remedial districts…to correct the constitutional deficiencies in the Enacted Plans." ECF No. 123. That order, however, did not, and could not, authorize the General Assembly to redraw districts not required to be redrawn to correct those federal constitutional deficiencies in violation of the state constitutional prohibition on mid-decade redistricting.

The plain language of the state constitution prohibits mid-decade redistricting. N.C. CONST. Article II, Sections 3(4) and 5(4) (i.e., "When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress."). This state law prohibition controls unless a district has been invalidated by a court. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The plain language of the state constitution on this matter invites no serious dispute over its interpretation and in the only case where the North Carolina Supreme Court has interpreted this constitutional provision, the court went to great lengths to avoid violating the prohibition on mid-decade redistricting. *Comm'rs of Granville Co. v. Ballard*, 69 N.C. 18 (1873). Plaintiffs in that case challenged a state statute that changed the boundaries between Franklin and Granville Counties, arguing that the statute violated Article II, Section 5, because it would have the effect of transferring part of Granville County from SD 21 to SD 7. *Id*. at 19. The Supreme Court said that violation of the mid-decade redistricting prohibition could be avoided by interpreting the statute to mean that while Granville residents would now be residents in Franklin County, they would continue to vote in SD 21. The plaintiffs had urged against such a construction, arguing that it would then violate Article II, Section 5(3), which requires whole counties be used in the construction of Senate districts. *Id*. at 20. But in rejecting the plaintiffs' arguments, the Supreme Court

established the supremacy of that prohibition against mid-decade redistricting, *id.*, and this Court can and should respect that unambiguous state constitutional rule.

Here, in both Wake and Mecklenburg Counties, the General Assembly has violated Art. II, Sections 3(4) and 5(4) by unnecessarily altering districts mid-decade. House Districts 36, 37, 40 and 41 in Wake County were not declared unconstitutional, and they do not touch a district that was ruled unconstitutional. The same is true for House District 105 in Mecklenburg County. These districts are modified in the enacted remedial House plan in those counties, but it is not necessary to alter those districts in order to correct the two districts in Wake County (33 and 38) and the three districts in Mecklenburg County (99, 102 and 107) that were declared unconstitutional. Gilkeson Decl. ¶ 42-49. Plaintiffs have demonstrated that with their proposed alternative map introduced at the public hearing on August 22, 2017.

This court's order invalidating only certain house districts in Wake and Mecklenburg County does not mandate or allow abrogation of the state constitutional prohibition against mid-decade redistrict except insofar as absolutely necessary to remedy the violation. Moreover, partisan goals cannot trump state constitutional compliance. *Compare* ECF No. 184-28 at 40-51 *with* Stat Pack for 2017 House Redistricting Plan 4-15, ECF No. 184-2 (HD 40, currently represented by a Democrat, is altered to become Republican-performing district). The General Assembly has already redrawn HD 40 and the other identified districts once this decade—its 2011 unconstitutional acts cannot now

justify a complete disregard of the state constitution's prohibition on mid-decade redistricting. Thus, because Plaintiffs' proposed maps in these counties remedy the racial gerrymandering violation without affecting House Districts 36, 37, 40, 41 and 105, it is clear that the enacted Wake and Mecklenburg County House district configurations violate the state constitutional prohibition on mid-decade redistricting and cannot be enacted or approved by this Court.

2. *Remedial House Districts Violate the State Constitutional Whole County Provision*

The state's remedial house plan also runs afoul of the North Carolina Constitution's Whole County Provision ("WCP"). N.C. Const. Article II, Sections 3(3) and 5(3). The North Carolina Supreme Court first established nine criteria for validly-constructed state legislative districts in *Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-97 (N.C. 2002) ("*Stephenson I).* Importantly here, the court instructed: (a) "[w]ithin any [] contiguous multi-county grouping…the 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"; and (b) "[t]he intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined." *Id.* at 383-84, 562 S.E.2d at 397

In 2007, the Supreme Court further fleshed out these instructions, invalidating a state house district in Pender and New Hanover Counties for failure to comply with the WCP. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (N.C. 2007). There, at that time, Pender County did not have the population to warrant an entire state house district, and New Hanover County had the population to warrant more than two state house districts, but not three. *Id.* at 494, 649 S.E.2d at 366. The two counties grouped together were assigned three state house districts. *Id.* The legislature drew a house district between Pender and New Hanover counties that did not keep either county whole (HD 18). *Id*. Because there was not Voting Rights Act justification for this drawing of HD 18, the Court held that the Pender County boundaries should be respected and "a voting district that includes Pender County must add population across a county line, but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 509, 649 S.E.2d at 376 (internal quotations omitted).

There are two instances where the General Assembly violated this rule in the 2017 plan. Cabarrus County has the population to justify more than two house districts. As such, two whole districts must be drawn in the county, with only enough population in a neighboring county added to the remainder of the Cabarrus County population to bring it to within plus or minus five percent of the ideal district population. Instead, in the enacted map, there is only one district, HD 82, wholly within Cabarrus County, and HD

83 traverses the county line to include a portion of Rowan County with Cabarrus County. Where, as here, it is possible to draw both HD 82 and HD 83 entirely within Cabarrus County (as Plaintiffs' map demonstrates), the failure to draw two districts entirely within Cabarrus County violates the Supreme Court's instructions from *Stephenson I* on maximum compliance with the WCP.

Likewise, House District 10 also does not comply with the North Carolina Supreme Court's instructions from *Stephenson I*. House District 10 is at one end of a seven-county cluster. Greene County, where that district is based in the proposed remedial plan, does not have enough population to support a House District on its own. Enough population could be added from the adjacent and larger county, Wayne County, to satisfy the equal population requirement with only one county traverse. That construction would be consistent with the state constitutional commands as defined by the North Carolina Supreme Court and as Dr. Hofeller explained in sworn testimony. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397 ("only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined'); *see also* Hofeller Testimony, *Covington* Trial Tr. Vol V, at 10:18-23 (Apr. 15, 2016) ("Also, if you have, for instance, a two-county group, the smaller county with the smallest population should be left intact, and the larger county should make up the share that the smaller county needs to bring it to the proper population."). Instead of simply adding the population from Wayne County necessary to

bring a Greene County-based district up to within plus or minus five percent of the ideal population, House District 10 traverses two counties—Wayne County and then stretches into Johnston County. Because Plaintiffs' House map demonstrates that it is possible to draw this cluster with the same number of traverses and the maximally compliant version of HD 10 (Greene and Wayne Counties only), the enacted district violates the WCP.

3. *A Remedial Senate District Violates the State Constitutional Compactness Requirement*

Finally, SD 41 in Mecklenburg County also violates the WCP because it is grossly non-compact. In *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II"*), the North Carolina Supreme Court upheld a trial court's rejection of the legislature's remedial redistricting plans because the trial court found that districts in the remedial map demonstrated "substantial failures in compactness." *Id*. at 309, 582 S.E.2d at 252. The trial court found that districts were not sufficiently compact, within a county, when they were drawn "in a horseshoe manner," combined northern parts of the county with southern parts of the county, and "jut[ted]" and "meander[ed]" throughout the county. *Id*. at 310-11, 582 S.E.2d at 253. The trial court additionally emphasized that the challenged districts were "not compact, particularly as compared to the way in which they might have been drawn as demonstrated by plaintiffs' [proposed Senate Plan]." *Id*. at 311, 582 S.E.2d at 253.

Likewise, in the instant case, SD 41 exhibits these very same traits: the district is a horseshoe shape, starting in the northern part of the county before meandering along the

county's western boundary, at times narrowing dramatically, before jutting down to capture the county's southern-most point. SD 41 has the absolute lowest compactness score of any senate district in the entire plan on the Reock measure. At .19, there is not another district that comes anywhere close to that number, *see* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf, and it is well below the mean of .42 for all senate districts in the same plan. *See* Gilkeson Decl. ¶ 12. The district is also at the bottom of the scale on the Polsby-Popper measure of compactness, at .13. *See* Measures of Compactness 6-9, Senate Redistricting Comm., http://www.ncleg.net/Sessions/2017/s691maps/S691%204th%20Ed.Combined.pdf.

Plaintiffs' alternative map draws that district in a substantially more compact manner. Gilkeson Decl. Ex. B. Thus, following the North Carolina Supreme Court's straightforward rejection of remedial districts that do just the same, this Court should reject SD 41 as violating the state constitutional compactness requirement.

E. Partisan Gerrymander Objection Reserved

Plaintiffs contend that both the House and Senate plans are unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments. However, as noted by the trial court in *Harris v. McCrory,* at this stage of the proceedings, without even a limited opportunity for discovery by the parties, the Court does not have the record before it to resolve this question. *See Harris v. McCrory*, No. 1:13-cv-949, 2016

U.S. Dist. LEXIS 71853, at *8 (M.D.N.C. June 2, 2016) ('[I]t does not seem, at this stage, that the Court can resolve this question based on the record before it."). Unlike Plaintiffs' other objections, which are based on prior findings of fact, and undisputed facts in the record, addressing whether these districts are partisan gerrymanders requires more evidence.

Plaintiffs therefore ask this Court to make clear that whatever disposition it makes with regard to Plaintiffs other objections does not constitute, or imply, a finding that these maps are not partisan gerrymanders, or foreclose any additional challenges to the 2017 House and Senate plans on those grounds. *See id.,* ("The Court reiterates that the denial of the plaintiffs' objections does not constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan.").

V. CONCLUSION

Plaintiffs respectfully request that this court sustain their objections to Senate Districts 21, 28 and 41; and House Districts 10, 21, 36, 37, 40, 41, 57, 83, 105 on the grounds identified herein, and Order the Defendants to conduct the 2018 legislative elections using their 2017 Senate Districts with the Plaintiffs' proposed districts in the 1) Guilford, 2) Mecklenburg and 3) Cumberland county groupings; and their 2017 House Districts with the Plaintiffs' proposed districts in the following county groupings: 1) Guilford, 2) Wake, 3) Mecklenburg, 4) Rowan, Cabarrus, Stanly, and 5) Lee, Harnett, Johnston, Wayne, Greene, Sampson and Bladen. In the alternative, Plaintiffs request that

the Court sustain their objections and order a special master to redraw the districts in these limited county groupings.

Respectfully submitted this 15th day of September, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will provide electronic notification of the same to the following:

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