

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

**COMMON CAUSE, *et al.*,**

**Plaintiffs,**

**v.**

**RUCHO, *et al.*,**

**Defendants.**

**Civil Action No. 1:16-CV-1026-WO-JEP**

**THREE JUDGE PANEL**

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

**Plaintiffs,**

**v.**

**RUCHO, *et al.*,**

**Defendants.**

**Civil Action No. 1:16-CV-1164-WO-JEP**

**THREE JUDGE PANEL**

**REBUTTAL DECLARATION OF M.V. HOOD III**

I, M.V. Hood III, affirm the conclusions I express in this report are provided to a reasonable degree of professional certainty. I reserve the right to update the opinions contained herein prior to trial. In addition, I do hereby declare the following:

## **I. RESPONSE TO PROFESSOR MATTINGLY**

Professor Jonathan C. Mattingly produced an expert report for the plaintiffs in this matter in which he concludes the 2016 congressional districting plan produced “results which are extremely atypical and at odds with *the will of the people*.”<sup>1</sup> The primary result to which Professor Mattingly refers appears to be a perceived partisan imbalance in North Carolina’s congressional delegation.

In reaching his opinion Professor Mattingly relies on computer generated simulations to produce a set of counterfactual redistricting plans. These plans, however, are based a set of faulty premises, thereby making their inferential value highly questionable. Instead of relying on the redistricting criteria actually adopted by the General Assembly for 2016, Professor Mattingly bases his criteria on HB 92. As described in his report, under HB 92 districts are to be contiguous and reasonably compact, contain equal population counts within +/- .1%, contain as few county and VTD splits as possible, and comply with the Voting Rights Act. Further, HB 92 would not allow any political data (party registration or voting results) to be considered in the drawing of North Carolina’s congressional districts.<sup>2</sup>

Relating to the most critical aspect of any congressional redistricting plan, population equalization, Professor Mattingly’s formula allowed for a population deviation between districts of up to 1% deviation.<sup>3</sup> While HB 92 calls for a 0.1% deviation, the actual plan implemented in 2016 had a 0.00% deviation.<sup>4</sup> In fact, on this point his report states, [a]chieving a 0.1% population deviation is the only statute of HB92 that we violate.<sup>5</sup> Given that the actual plan could be classified as a zero deviation plan, this admission is one indication of the manner in which Professor Mattingly’s assumptions do not comport with reality.

Professor Mattingly also purports to consider the Voting Rights Act in his redistricting simulations. For the 2010 redistricting cycle the State of North Carolina was subject to Section 5 of the Voting Rights Act. While two districts in the 2011 plan had African American percentages in excess of fifty percent, only one of these districts was drawn to comply with Sections 2 and 5 of the Voting Rights Act. Due to the district court’s decision in *Harris v. McCrory*, North Carolina’s congressional districts were redrawn prior to the 2016 general election.<sup>6</sup> As a consequence of the *Harris* decision, the provisions of Section 2 were not applicable. The state, therefore, was not required to create congressional districts within a specific range of black VAP.<sup>7</sup> The fact that two districts were created that contained 44.5% and 36.2% black VAP was not a function of the Voting Rights Act, but the result of a confluence of other considerations. This was made clear in the redistricting criteria adopted by the General Assembly. The criteria states, [d]ata identifying the race of individuals or voters shall not be used in the construction or

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<sup>1</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. Page 2.

<sup>2</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. Pages 10-11.

<sup>3</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. Page 15.

<sup>4</sup>North Carolina General Assembly. Redistricting Website ([www.ncleg.net/representation/redistricting.aspx](http://www.ncleg.net/representation/redistricting.aspx)).

<sup>5</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. Page 18.

<sup>6</sup>The district court ruled Districts 1 and 12 to be the result of a racial gerrymander.

<sup>7</sup>Ability to elect districts as defined by Section 2 of the Voting Rights Act contain a majority of the minority group in question. Influence districts (<50%) are not a remedy under Section 2. The present case is not alleging any Section 2 violation.

*consideration of districts in the 2016 Contingent Congressional Plan.*<sup>8</sup> Despite this, Professor Mattingly's simulation specifically builds in one district with a black VAP of at least 40% and a second with a black VAP of 30%.<sup>9</sup>

Professor Mattingly's simulations may also deviate from the 2016 enacted plan in a number of other ways. In my first report on this matter I conducted a detailed examination of the 2016 congressional plan examining a number of traditional considerations that included maintaining communities of interest, VTD splits, core retention levels, incumbent pairings, compactness, and contiguity. I concluded that the enacted 2016 congressional plan closely followed the General Assembly's criteria, which included adherence to traditional districting considerations. Along these lines, gains were made over the 2011 congressional plan in terms of VTD and county splits and the compactness levels of the overall plan.

I note that Professor Mattingly indicates his simulations do take into account district compactness and county splits. To my knowledge, the exact combinations of counties that are split were not recorded in Professor Mattingly's report. I am, therefore, unsure as to the number of unique county-split combinations that were produced. Stated otherwise, do these simulations produce 1,000 unique county-split combinations or are these simulations based on the same county combinations, simply rendered (split) in a slightly different manner? Additionally, I do not see where Professor Mattingly reports summary statistics for these measures (e.g. compactness) which one could use to compare to the actual 2016 congressional plan. We do know that the simulations presented do not make use of political data.<sup>10</sup> As such, a key factor outlined in the criteria for the 2016 congressional plan, minimizing incumbent pairings, is not modeled in Professor Mattingly's simulations. Closely connected to incumbency protection, the simulations also fail to take into account core retention levels for districts.

In his simulations Professor Mattingly also makes another assumption: that candidates do not matter in elections.<sup>11</sup> Instead of attempting to create a partisan index based on a number of election contests to describe the underlying partisan nature of a given geographic area, Professor Mattingly makes the assumption that one can simply take the 2016 and 2014 congressional vote as it occurred at the VTD-level and reaggregate these into a new set of districts. From this, one would need to assume that such a rendering would be representative of voting patterns in a set of hypothetical districts. Such an assumption, in my opinion, is extremely tenuous. Congressional votes are very much based on the candidates available to voters. An extremely voluminous literature on congressional elections readily recognizes that candidates and campaigns do matter to election outcomes.<sup>12</sup>

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<sup>8</sup>See "2016 Contingent Congressional Plan Committee Adopted Criteria."

([http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16\\_Adopted\\_Criteria.pdf](http://www.ncleg.net/GIS/Download/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf)).

<sup>9</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. See Section 2.1.4 on page 13 and Section 3 on page 16.

<sup>10</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. See Section 2 on page 10.

<sup>11</sup>Expert Report of Professor Jonathan C. Mattingly. *Common Cause v. Rucho*. March 6, 2017. See Section 7 on page 23.

<sup>12</sup>For example see Gary C. Jacobson and Jamie L. Carson. 2016. *The Politics of Congressional Elections*, 9<sup>th</sup> ed. Lanham, MD: Rowman and Littlefield.

My initial report in this matter makes the case that candidates and campaigns specifically mattered for the 2016 congressional elections in North Carolina. The fact that twelve of thirteen races featured an incumbent certainly affected the outcomes in these elections. Over time, certain advantages accrue to incumbent office holders such as increased familiarity with their constituents. In this sense, incumbents are able to cultivate a *personal* vote that typically exceeds what the partisan balance of the district alone would yield in terms of their vote share. This fact has been well documented by published work in political science.<sup>13</sup> As a consequence, Professor Mattingly's use of the actual congressional vote in his redistricting simulations is problematic. It is not clear that this measure is an appropriate proxy from which to draw inferences concerning the manner in which a hypothetical district might perform.

In summary, failing to adhere to the provisions of the redistricting criteria adopted by the General Assembly for 2016 draw makes the conclusions drawn by Professor Mattingly's simulations untenable. One could also ask had Professor Mattingly had attempted to adhere to the adopted criteria in setting up his redistricting simulations would my conclusion have differed? The short answer is no as I explain below.

The North Carolina Constitution of 1971 clearly grants the General Assembly the right to draw district boundary lines for the state Senate, House of Representatives, and the state's congressional delegation.<sup>14</sup> Is it possible to create a congressional districting plan for the State of North Carolina where the districts have a different partisan composition compared to the districts enacted under the 2016 plan? The answer is, without a doubt, yes. On the other hand, I do not believe it is possible for a hypothetical redistricting plan (or plans) to simultaneously take into account all of the criteria the General Assembly may have considered. It is the General Assembly's job to create districts that are constitutionally (federal and state) valid while balancing the host of other traditional criteria that are a part of any redistricting plan (e.g. population distribution, compactness, contiguity, incumbency, and maintaining communities of interest). Absent detailed interactions with legislators, it is simply not possible for an outsider, such as the proponent of a hypothetical plan, to be able to discern the will of the General Assembly as to the exact application of all factors that may have been considered.<sup>15</sup>

The people of North Carolina directly elect members to the two legislative chambers of the General Assembly and this entity, in turn, is charged with drawing legislative district boundaries. Given this, I respectfully disagree with the inference that Professor Mattingly's draws in his report concerning the *will of the people*. In my opinion, in carrying out its constitutional prerogative, the General Assembly was executing the *will of the people*.

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<sup>13</sup>See again Gary C. Jacobson and Jamie L. Carson. 2016. *The Politics of Congressional Elections*, 9<sup>th</sup> ed. Lanham, MD: Rowman and Littlefield.

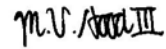
<sup>14</sup>See Sections 3, 4, and 22 of Article II.

<sup>15</sup>Professor Mattingly's report does not include any interviews with legislators nor any examination of the legislative record regarding the 2016 congressional redistricting in North Carolina.

## **II. DECLARATION**

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Executed on April 5, 2017.



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