

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS
SENIOR CHAIRMAN OF THE HOUSE SELECT
COMMITTEE ON REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' RESPONSE TO
LEGISLATIVE DEFENDANTS'
REPLY ON REMEDIAL PLANS**

Plaintiffs respectfully submit this response to Legislative Defendants’ October 4 reply brief regarding the General Assembly’s proposed remedial plans, including to correct various misleading or false statements in Legislative Defendants’ brief.

A. The Proposed House Plan Is an Extreme Partisan Outlier Statewide

Dr. Chen’s analysis showed that the Proposed House Plan is an extreme partisan outlier relative to the 2,000 plans in his Simulation Sets 1 and 2. Chen 9/27 Report at 1-4. Legislative Defendants and their expert Dr. Brunell, whose analysis and conclusions the Court previously rejected at the merits stage, attempt to cast doubt on this finding by comparing the distribution of Democratic-leaning seats across Dr. Chen’s simulations—using the 2010-2016 statewide elections—with the number of Democratic-leaning seats in the Proposed House Plan as calculated by a website called PlanScore. Leg. Defs. Reply at 25 n.15; Brunell Aff. ¶ 7. As support for this point, Legislative Defendants and Dr. Brunell cite a blog post, but that blog post itself explicitly notes that this is an apples-to-oranges comparison. Brunell Aff., App’x A. The PlanScore website “relies on a model using 2016/2018 data” that also incorporates incumbency to estimate the number of Democratic-leaning seats. *Id.* Dr. Chen calculated his distribution using a completely different set of elections. The PlanScore estimate thus provides no indication as to how the Proposed House Plan compares to Dr. Chen’s distribution.

Neither Legislative Defendants nor Dr. Brunell dispute that, when performing an apples-to-apples comparison using the same set of elections, the Proposed House Plan is an extreme partisan outlier. Dr. Chen found that, using the 2010-2016 statewide elections that Legislative Defendants used to create the invalidated 2017 plans, the Proposed House Plan has fewer

Democratic-leaning districts than 97.8% of his Simulation Set 2 plans, and fewer Democratic-leaning districts than 94.6% of his Simulation Set 1 plans. Chen 9/27 Report at 1-4.

B. The Five Challenged House County Groupings Should Be Redrawn

Legislative Defendants question Plaintiffs' motives in objecting to five specific House county groupings. They speculate that Plaintiffs must believe "the unchallenged groupings in both plans were a win for the Democratic Party, and that these five groupings might be drawn in a more Democratic-friendly manner by the Referee." Leg. Defs. Reply at 15. That is wrong.

In at least four of the ten House groupings to which Plaintiffs did *not* object, the Proposed House Plan is worse for Democrats than the vast majority of Dr. Chen's simulations (Cumberland, Anson-Union, Duplin-Onslow, and Nash-Franklin). Plaintiffs did not object to these groupings because, unlike the five groupings to which Plaintiffs did object, there were not obvious indications that legislators' changes (or lack of changes) to the base map violated the Court's substantive criteria. As Plaintiffs explained in their objections brief, this Court would have good reason to redraw the entire House map given the irregularities in the House's remedial process—and Plaintiffs would not object if that is how the Court proceeds—but Plaintiffs focused their objections on the five specific groupings for which legislators' revisions to the base map most obviously violated the Court's substantive criteria for the new plans.

Legislative Defendants' responses regarding these five House groupings only highlight how clearly they violate the Court's directives.

Columbus-Pender-Robeson: Legislative Defendants do not deny that, in revising this grouping from the base map, the House cracked Columbus County's Democratic voters across Districts 16 and 46 in the same way as the invalidated 2017 gerrymander. Legislative Defendants do not deny that the revisions to the base map, which involved moving *11* VTDs in total, had significant pro-Republican partisan effects. While Legislative Defendants claim that

they selected the Proposed House Plan for this grouping because it was necessary to comply with traditional districting principles like preserving municipalities, that is simply not true. Dr. Chen's Simulation Set 3 shows that there are many possible configurations of this grouping that do not pair incumbents and comport just as much with traditional districting principles as the Proposed House Plan.

Forsyth-Yadkin: Legislative Defendants do not dispute that, in revising this grouping from the base map, the House perfectly divided Democratic and Republican voters in eastern Forsyth County, made House District 75 much more Republican-leaning, split two additional municipalities, and substantially lowered the compactness of the grouping as a whole. Legislative Defendants curiously assert that "there was no correct or incorrect methodology" for revising the base map to unpair the incumbents in this grouping. Leg. Defs. Reply at 31. The "correct methodology" was one that did not violate nearly every substantive requirement and prohibition in the Court's Decree. As for Representative Lambeth's statements caught on tape that he wanted to regain areas he has represented in the past, it is difficult to imagine more direct evidence of an improper core-retention motivation that resulted in a partisan gerrymander.

Cleveland-Gaston: Legislative Defendants assert that they have little "incentive . . . to gerrymander" this grouping, Leg. Defs. Reply at 30, but this Court already disagreed, finding at the merits stage that Legislative Defendants intentionally gerrymandered this grouping in the invalidated 2017 House plan. And the House's re-gerrymandering of this grouping under the Proposed House Plan is obvious. In revising the base map, the House split Gastonia across three districts yet again in order to make House District 108 *nearly 6 percentage points* more Republican than it was under the base map. That is no happenstance.

Brunswick-New Hanover: Legislative Defendants provide a demonstrably false story of what occurred in this grouping, and the fact that they do so is powerful evidence of the improper partisan motivations behind the Proposed House Plan for this grouping.

In Legislative Defendants' telling, Representative Grange initially sought to unpair herself from Representative Davis only because she entered the committee room after Representative Lewis announced that incumbents running for another office were ineligible for unpairing. According to Legislative Defendants, "once the criteria was explained to her, Rep. Grange withdrew her request to be unpaired." Leg. Defs. Reply at 22-23. None of this is true.

First, Representative Lewis never said that incumbents who have announced a candidacy for another office could not seek to be unpaired. To the contrary, in direct reference to Representative Grange, Republican Representative Szoka expressed the view that "announcing candidacy is . . . different than a filing [for office]," and Representative Lewis "thank[ed] the gentleman for that point" and said that his "intent [was] to treat all of the incumbents the same" by leaving it up to "each individual one" to decide whether they wanted to be unpaired. 9/12/19 House Comm. Tr. at 11:24-12:10. When Representative Lewis later asked Representative Grange whether she wanted to be unpaired, she said that she did, and Representative Lewis agreed that this was the proper course of action:

REP. GRANGE: Thank you, Mr. Chair. Although I have announced I'm going to running for another office; I do think that's a political consideration, also. . . I think it should remain the present incumbency, because, frankly, nobody has filed for any election yet.

CHAIRMAN LEWIS: Sure. So, if you or The Chair would like to invite Representatives Davis and Grange to meet with Ms. Churchill and Ms. Sammons and Representative Reives, again, you're welcome to appoint someone to join in. *And, let's take a moment to see if we can un-pair these incumbents, which has been our intent from -- from the start here.*

Id. at 37:10-23 (emphasis added).

Thus, while Legislative Defendants now say that “[t]here was no point in seeking to protect Rep. Grange after she chose to pursue higher office,” and that “under the committee’s criteria” this grouping “could not have been redrawn at all,” Leg. Defs. Reply at 20, 22, that was not Representative Lewis’ view of the “committee criteria” at the time. His stated “intent” during the redraw was to unpair Representatives Grange and Davis, despite knowing that Representative Grange had announced a candidacy for Governor.

Also contrary to Legislative Defendants’ suggestions, Representative Grange did not quickly “withdr[aw] her request to be unpaired . . . [o]nce the criteria was explained to her.” Leg. Defs. Reply at 23. During deliberations caught on the hearing room’s microphone, Representative Grange insisted that “nobody is officially running for office” yet—*i.e.*, she was not officially running for Governor yet—and that the same incumbency-protection criteria being applied to the other groupings should apply to the Brunswick-New Hanover grouping. 9/12/19 House Comm. Hr’g Video at 5:28:30-50; *see also id.* at 5:34:20-33. Notably, although Legislative Defendants point out that Representative Grange is a lawyer, they do not deny that Legislative Defendants’ counsel, either directly or through an intermediary, supplied the reference that Representative Grange later made to a *footnote* from one of the *Covington* orders.

Legislative Defendants attack a straw man in proclaiming how “preposterous” it is to allege that they “told a sitting legislator to retire” and “she obeyed.” Leg. Defs. Reply at 21. Plaintiffs alleged no such thing. What Plaintiffs allege is that the House decided not to unpair the incumbents in this grouping—unlike every other grouping and in violation of the House’s stated criteria—after coming to realize that applying their incumbency protection criterion in this particular grouping would have negative partisan consequences for Republicans and potentially cost Representative Davis the core of his prior district.

This is not a matter of speculation—there is direct evidence. When Representative Grange and Representative Davis set about to unpair themselves at the computer with the assistance of nonpartisan staff, Ms. Churchill proposed a change that would have unpaired them. Representative Davis rejected that proposal because it would cause him to “lose” particular communities he had “been representing for eight years.” 9/12/19 House Comm. Hr’g Video at 5:30:08-5:34:12. Representative Grange and Representative Davis ultimately disappeared from the hearing room to have private conversations, and about an hour later, Representative Lewis announced that the House would no longer try to unpair these two incumbents after all.

The bottom line is that Legislative Defendants cannot unpair incumbents when doing so advantages Republicans, while keeping incumbents paired when doing *that* advantages Republicans. That is partisan, and it is clearly what occurred in Brunswick-New Hanover.

Guilford: Legislative Defendants do not deny that the proposed version of House District 58 is extremely similar to the invalidated 2017 version, and it can hardly be contested that the House’s revision from the base map substantially increased this overlap. Legislative Defendants insist that this Court cannot reject this grouping because they changed only one VTD from the base map, but Legislative Defendants misapprehend the posture of the case. The “remedial posture impacts the nature of [this Court’s] review.” *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018). “In the remedial posture, courts must ensure that a proposed remedial districting plan completely corrects—rather than perpetuates—the defects that rendered the original districts unconstitutional or unlawful.” *Id.* The proposed new House District 58 does not cure the infirmities of the invalidated 2017 version. Rather, it perpetuates the very features that this Court cited as objectionable, including the boot-like appendage that the House added to District 58 in amending the base map.

Legislative Defendants also contend that the drop in compactness from the base map is “miniscule.” Leg. Defs. Reply at 26. Dr. Brunell asserts that the drop in compactness is “truly trivial” and he “would be stunned” if anyone could notice it. Brunell Aff. ¶ 6. But Dr. Chen demonstrated that the drop in compactness in both District 58 individually and the grouping as a whole was substantial, and the subordination of compactness is clear to anyone looking at the proposed new District 58.

C. Dr. Thornton’s Seat Analysis Is Misleading and Erroneous

Legislative Defendants’ expert Dr. Thornton, whose analysis and conclusions the Court previously rejected at the merits stage, presents a new analysis intended to show that, in the five challenged House groupings, the number of Democratic seats in the Proposed House Plan is similar to that under the simulated plans in Dr. Chen’s Set 3. But this analysis is highly misleading. As Dr. Chen and Dr. Mattingly emphasized in their trial testimony, especially at the micro-level of analyzing a grouping with only a few districts, it is the vote shares and margins that are particularly important, not just whether the Democratic vote share is above or below 50% when using a particular set of historical elections (in this case, the 2010-2016 statewide elections, which have an aggregate Democratic vote share of 47.92%). Under Dr. Thornton’s analysis, it would make no difference whether the three districts in a grouping had Democratic votes shares of 40%, 40%, and 70% versus vote shares of 49%, 49%, and 51%. In both scenarios, Dr. Thornton would report that there is one Democratic district.

Of course, those engaged in partisan gerrymandering know that it is enormously consequential whether a district is competitive and could flip with modest swings in the vote. Here, Dr. Chen’s Simulation Set 3 reveals that, compared to the outcomes that would occur under the nonpartisan maps in Set 3, the gerrymandering of the challenged House groupings could cause differences in the number of seats won with swings in the vote in either direction.

Even putting aside that her approach is misleading, Dr. Thornton's numbers are wrong. For the Guilford grouping, she incorrectly calculates that "the majority of Dr. Chen's 1,000 simulations estimate one Democratic seat while the [Proposed House Plan] estimates two Democratic seats." Thornton Aff. ¶ 11. In fact, as Dr. Chen explains in the attached declaration, 82.6% of Dr. Chen's Set 3 plans produce two Democratic seats (out of the three non-frozen districts) and 17.4% of the Set 3 plans produce three Democratic seats using the 2010-2016 statewide elections. Chen Decl. ¶¶ 3-4. Dr. Thornton mistakenly missed one Democratic seat in her calculations.

D. Legislative Defendants Violated this Court's Decree By Employing Dr. Thornton and Mr. Bensen During the Remedial Process

Legislative Defendants assert that Plaintiffs' counsel "approved" of Legislative Defendants' use of Dr. Thornton and Mr. Bensen; they state that "Plaintiffs' Counsel represented to multiple [unspecified] Senators in the Senate Committee room that Legislative Defendants could use their outside experts for the limited purpose of verifying the authenticity of the Chen Data." Leg. Defs. Reply at 2, 8.

This is false. No attorney for Plaintiffs advised any Senator (or anyone else) that Legislative Defendants could involve their outside experts in the remedial process. And Plaintiffs' counsel obviously lacked authority to authorize Legislative Defendants to violate this Court's Decree. Legislative Defendants plainly violated Paragraphs 8 and 9 of the Decree.

Legislative Defendants' justification for this violation does not withstand scrutiny. They assert that they could "not rely[], without independent vetting, on the representations" of Dr. Chen that the simulated maps he turned over were the same ones he presented at trial, given that he was an "adverse . . . expert." Leg. Defs. Reply at 8; *see also id.* at 16. It was Legislative Defendants who chose to use Dr. Chen's maps. Nobody forced them to do so. Legislative

Defendants cannot choose to use Dr. Chen's work and then invoke his supposed adversity as a justification for bringing in outside partisan experts, in violation of the Court's mandate.

Legislative Defendants' story of what occurred during the House's two-day delay after Dr. Chen provided his maps and data does not add up. Plaintiffs' counsel transmitted Dr. Chen's maps and Excel spreadsheet at 2:32 a.m. and 7:02 a.m., respectively, on the morning of September 10. Both Mr. Benson and Dr. Thornton report that they completed their purported reviews of Dr. Chen's data later the same day: Mr. Bensen says he finished at 2:30 p.m., and Dr. Thornton states that she finished at 5:33 p.m. on September 10. Bensen Aff. ¶ 16; Thornton Aff. ¶ 6. But the House Committee did not move forward with picking a base map until more than a full day later. The House Committee's hearing on September 10 lasted until 6:40 p.m., and Representative Lewis never indicated that Legislative Defendants' counsel had completed their review. At the end of that September 10 hearing, Representative Lewis stated that the Committee would reconvene at 10:00 a.m. the next morning. 9/10/19 House Comm. Tr. at 80:10-11. But the next day, the House Committee repeatedly pushed back the start time of its hearing, and ultimately did not reconvene until after 4:00 p.m. When the House Committee finally reconvened, Representative Lewis announced that he had changed his mind and wanted to use Set 1 instead of Set 2. 9/11/19 House Comm. Tr. at 3:12-18. Legislative Defendants have provided no explanation for the 24-hour delay between when their outside experts purportedly finished "authenticating" Dr. Chen's data and when the House Committee reconvened.

Indeed, Dr. Thornton's affidavit confirms that, by the afternoon of September 10, she had matched up the map numbers in Dr. Chen's September 10 Excel spreadsheet with the map numbers in the backup data that Dr. Chen turned over back in April. Thornton Aff. ¶ 6. With that information, Legislative Defendants' counsel could have easily looked up the partisanship

data in Dr. Chen’s April backup data for the top 5 maps that Dr. Chen had listed for each grouping in the Excel spreadsheet. And they could have easily looked up the partisanship data for the base map that was selected in each grouping through the lottery process.

E. Legislative Defendants Violated this Court’s Decree by Transmitting Partisanship Data to House and Senate Members and Staff

Legislative Defendants’ transmission of Dr. Chen’s backup files containing partisanship data about his simulated plans violated the Court’s Decree for the reasons explained in Plaintiffs’ objections brief, and Legislative Defendants’ new explanations for why their counsel sent this data make little sense. *See* Leg. Defs. Reply at 12-13. But most notably, Legislative Defendants dodge the key question of who downloaded the data their counsel sent. In a carefully worded sentence, Legislative Defendants assert that, “[b]ecause the Plaintiffs attack only the House, it is worth noting that only the offices for two House Members completed the download.” *Id.* at 14. Legislative Defendants thus limit their disclosure to which “offices [of] House Members” downloaded the data. They do not disclose who else downloaded the data—*e.g.*, Senate or House members, other recipients of the email, or anyone else to whom the email was forwarded. Legislative Defendants have now admitted that they know who downloaded the data, and yet they conspicuously have failed to disclose the full list of individuals to the Court.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs’ objections, Plaintiffs request that the Court reject the General Assembly’s Proposed House Plan in the Columbus-Pender-Robeson, Forsyth-Yadkin, Cleveland-Gaston, Brunswick-New Hanover, and Guilford groupings, and direct the Referee to draw new remedial districts in these groupings.

Respectfully submitted this the 7th day of October, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 7th day of October, 2019.

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EXHIBIT A

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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COMMON CAUSE, *et al.*,

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DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR
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Defendants.

**DECLARATION OF DR.
JOWEI CHEN**

I, Dr. Jowei Chen, upon my oath, declare and say as follows:

1. In connection with my September 27, 2019 expert report, I turned over data files describing the district-level partisanship, measured using the 2010-2016 Statewide Election Composite, of every computer-simulated district in House Simulation Set 3. For the Guilford County grouping, the relevant data files for the 1,000 simulated plans in House Simulation Set 3 are located at: “NC3/base/Final_G30/1.dta”, “NC3/base/Final_G30/2.dta”, “NC3/base/Final_G30/3.dta”, and so on.

2. Using these data files, one can count up the number of Democratic-leaning districts in the Guilford County grouping across the 1,000 simulated plans in House Simulation Set 3, as measured using the 2010-2016 Statewide Election Composite.

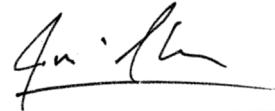
3. In Guilford County, there are three computer-simulated districts and three frozen districts drawn by the Covington Special Master (HD-57, HD-61, and HD-62) in each computer-simulated plan. Among these three computer-simulated districts, the number of Democratic-leaning districts (as measured using the 2010-2016 Statewide Election Composite) in the 1,000 simulated plans in House Simulation Set 3 is as follows: 826 plans (82.6%) contain two

Democratic districts, and 174 plans (17.4%) contain three Democratic districts (out of three computer-simulated districts).

4. In her report of October 4, 2019, Dr. Janet Thornton miscalculated these numbers. Figure 5, contained on the final page of Dr. Thornton's report, incorrectly states that 82.6% of the simulated plans in Guilford County contain only one Democratic district, and 17.4% contain two Democratic districts (using the 2010-2016 Statewide Election Composite).

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

This 7th day of October, 2019.



Dr. Jowei Chen