STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 19 CVS 12667
REBECCA HARPER, *et al.* *Plaintiffs*, v. REPRESENTATIVE DAVID R. LEWIS , *et al.* *Defendants*.	**LEGISLATIVE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR REVIEW**

INTRODUCTION

The General Assembly recently engaged in an historically transparent and non-partisan congressional redistricting process at the invitation of this Court and its assurance that such a process may eliminate the need for "disruptions to the election process" or "an expedited schedule for summary judgment or trial" regarding congressional districts. (10-28 Order at 17). On November 15, 2019, on its own initiative, the General Assembly enacted an entirely new congressional plan fully replacing the 2016 Plan challenged in this action. The plan was enacted using the most transparent congressional redistricting process in the history of North Carolina redistricting. All mapdrawing occurred on computers managed by nonpartisan staff in an open committee room. Each computer screen was recorded and live-streamed so that the public could view every precinct being moved. Microphones were on in the room and the entire room was itself live-streamed for viewing by anyone with interest and a computer.

It was also the most non-partisan congressional redistricting in history. Political or election data was not available to use in mapdrawing and no such data was provided to or used by Republican mapdrawers. No effort was made by Republican lawmakers to draw districts that

"entrenched" any political party or reached any predetermined result. As was approved by this Court in *Common Cause v. Lewis*, efforts were made to ensure incumbents were not paired, but no partisan data was used. As the Court hoped it would, the General Assembly adopted an "expeditious process" that ensured "full transparency and allow[ed] for bipartisan participation and consensus to create new congressional districts." (*Id*. at 17-18).

The map produced by that effort—the 2019 Plan—is a non-partisan replacement for the 2016 Plan, has the force of law by virtue of the General Assembly's enacting it under the State's constitutionally prescribed method of passing redistricting legislation, and therefore moots this case. It is entitled to the deference that all acts of the General Assembly are accorded as a matter of law. The 2019 Plan is in no way a "remedial" plan. It was enacted by the General Assembly on that body's own volition to avoid further litigation and disruption to the 2020 election process for North Carolina's citizens. Moreover, the 2019 map could not conceivably be a "remedy" where there is no judgment in the case requiring a remedy.

The Court has before it enough information to conclude that the 2019 Plan fully replaces the 2016 Plan and moots this case. First, none of the criteria used to draw the 2016 Plan that this Court criticized in its preliminary injunction order was used to draw the 2019 Plan. The 2019 criteria were *unanimously* adopted by the joint legislative committee engaged to draw the plan and none of those criteria were partisan. Second, the 2019 Plan—unlike alternative plans offered by Democrats—was the only plan that faithfully adhered to all of the unanimously adopted criteria. Third, the 2019 Plan does not continue the 2016 Plan's districts. Indeed, approximately half of the State's residents are in districts with new representatives.

For these reasons, Plaintiffs' request for a briefing schedule and other remedial proceedings is untenable. If they intend to challenge the 2019 Plan, they need to file a new complaint with

plaintiffs residing in the correct districts and who have standing to challenge their districts. Further, if they want any form of relief, they need to establish either the basis for a final judgment or the preliminary-injunction elements. The Court's ruling on the 2016 Plan does not excuse them from these showings because (1) the 2019 districts are new and none of the evidence overlaps and (2) the judgment was not final. Additionally, any challenge to the 2019 Plan would need to undergo new discovery. Plaintiffs' challenge to the 2016 Plan depended on the record in the *Rucho* case, and that record is entirely irrelevant here.

All that aside, even if the Court were capable of reviewing these districts (it is not) it would have no choice but to uphold them. The 2019 Plan is in no way a supposedly "extreme" partisan gerrymander. As discussed, partisanship was not a criterion, and the Court cannot assume it to be without hard evidence; Plaintiffs' speculation smacks of desperation. Moreover, Plaintiffs' description of the 2019 Plan as an "8-5 partisan gerrymander" is incorrect. A neutral analysis by the program PlanScore demonstrates that the 2019 Plan has only six Republican-leaning districts and seven Democratic-leaning districts. In any event, Dr. Chen's analysis here is not inconsistent with a non-partisan map containing eight Republican-leaning districts and five Democratic-leaning districts. Moreover, Dr. Mattingly's analysis from *Common Cause v. Rucho* puts a map with five Democratic-leaning districts squarely in the range of maps that follow "the will of the people."

Finally, while the expeditious process for drawing the 2019 Plan allowed for bipartisan participation and consensus, it turns out that Democrats, both in Congress and in the General Assembly, were interested only in certain partisan political outcomes, not consensus. Prominent legislative and congressional Democrats laid bare their intent in media reports as the legislature was voting on the plans. They insisted on a partisan goal of six or seven Democratic congressional districts, an outcome that would have required the legislature to use partisan data for the express

purpose of ensuring proportional representation (or worse), which this Court rejected in *Common Cause v. Lewis*. This Court should not allow express partisan goals to undermine a non-partisan map drawn under the most transparent process in state history.

STATEMENT OF FACTS

On November 5, 2019, the General Assembly, at this Court's invitation but on its own initiative, began the process of enacting a new congressional plan for the 2020 election cycle when a Joint Committee on Redistricting made up of both Democratic and Republican members of the North Carolina House and Senate convened for the first time. To allow for full participation by the public and all interested parties in the map-drawing process, the Committee opened up rooms and public terminals for legislators to use to draw proposed maps on November 6, 7, 8, 12, 13, 14 and 15. On each of these days, legislators also used these public terminals to draw proposed maps and, if the legislator requested, legislative staff produced stat packs and related reports and documents for any maps drawn.[1] Copies of all maps drawn and any stat packs or other documents that were requested were posted online on the General Assembly's website. Public comments were accepted online and posted on November 7, 18 and 12, and live public comments were taken November 13, 2019. Multiple proposed maps were discussed in the House Elections and Ethics Committee and on the House floor on November 14, 2019, and in the Senate Redistricting and Elections Committee and on the Senate floor on November 15, 2019. This process ended on November 15, 2019, with the enactment of H.B. 1029 which immediately and completely replaced the 2016 Plan enacted in N.C. Session Law 2016-1 with the 2019 Plan. *See* H.B. 1029, 3d Ed. (stating that "G.S. 163-201(a) is rewritten" and that "[t]his act is effective when it becomes law.").

[1] No partisan data was included in the stat packs or loaded into the computer terminals used to draw proposed maps. The data on these computers was identical to that used in the recently concluded legislative process.

ARGUMENT

I. The 2019 Plan Fully Replaces the 2016 Plan and Moots this Case

The 2019 Plan fully replaced the 2016 Plan and this case is therefore moot. If Plaintiffs want to challenge the 2019 Plan they must file a new lawsuit and seek injunctive relief after discovery. The factual record from *Common Cause v. Rucho* is no longer relevant as the 2019 Plan was enacted through a new legislative process under completely different circumstances. The expert witness evidence must also now be changed to account for the new plan. Legislative Defendants are entitled to all of the normal due process protections afforded any litigant whose action is challenged.

In fact, the entitlement to due process is even more pronounced here than in the normal case for two independent reasons.

A. The New Legislation Has the Force of Law and Rises or Falls on Its Own Merits

The new plan is new legislation enacted by the General Assembly, and it merits a strong presumption of constitutionality. The General Assembly cannot be assumed to have acted in bad faith or in violation of the Constitution; Plaintiffs must prove it. Their suspicions are not sufficient. They need hard proof, and they have none.

When the General Assembly "revises a statute in a 'material and substantial' manner with the intent 'to get rid of a law of dubious constitutionality,' the question of the act's constitutionality becomes moot." *Hoke County Bd. of Educ. v. State*, 367 N.C. 156, 159-60, 749 S.E.2d 451, 454-55 (2013) (citing *State v. McCluney*, 280 N.C. 404, 405-07, 185 S.E2d 870, 871-72 (1972)). And, where, as here, a statute is replaced, it is inappropriate for a court to "express" an "opinion of the legislation now in effect" because questions regarding the constitutionality of the new legislation (i.e. the 2020 Congressional Plan) "are not before" the Court in this case. *Id.* In *Stephenson v.*

Bartlett, 358 N.C. 219, 595 S.E. 2d 112 (2004) ("*Stephenson III*"), the North Carolina Supreme Court followed this approach in a redistricting matter when it declared, "[t]he case is over," after the General Assembly enacted a legislative redistricting plan in 2003 following successful challenges by the *Stephenson* plaintiffs to previous plans enacted earlier in the decade. *Id.* at 225-226, 595 S.E.2d at 117. While the *Stephenson* court acknowledged that it was "nevertheless aware that legislative redistricting based upon the 2000 decennial census remains an unresolved matter," it found that if the *Stephenson* plaintiffs wanted to challenge the constitutionality of the 2003 legislative plans, they had to do so in another case. *Id.* at 226, 595 S.E.2d at 117.

The North Carolina Court of Appeals applied the mootness doctrine in *Calabria v. North Carolina State Bd. of Elections*, 198 N.C. App. 550, 680 S.E.2d 738 (2009) where the General Assembly amended the public campaign financing statute at issue in that case before the plaintiff's appeal challenging an interpretation of the statute could be heard by the court. In dismissing the appeal as moot, the Court of Appeals relied upon the North Carolina Supreme Court's admonition in *Pearson v. Martin*, 319 N.C. 449, 355 S.E.2d 496 (1997), that the fact that an "action was brought as a declaratory judgment action does not alter this result" because "[u]nder the Declaratory Judgment Act, jurisdiction does not extend to questions that are altogether moot." 198 N.C. App. at 554-555, 680 S.E2d at 743 (citing *Pearson*, 319 N.C. at 451, 355 S.E.2d at 498).

The application of that rule is simple here. The 2019 Plan is new legislation, supplants the prior legislation, and moots this case. These are not continuations of the prior districts. The General Assembly did not begin with the 2016 Plan as a starting point. The 2019 Plan rises or falls on its own merits, not on the merits of the 2016 Plan. For that reason alone, an entirely new proceeding is required.

B. North Carolina Statute Independently Requires a New Lawsuit

A second reason a new lawsuit is required to challenge the 2019 Plan is that the North Carolina three-judge panel statute provides a new procedure for each new case, and it must be followed here. That statute contemplates that "[a]ny action challenging the validity of" redistricting legislation "shall be filed" in Wake County Superior Court, and the Chief Justice of the State Supreme Court will appoint a three-judge panel "to hear and determine the action." N.C. Gen. Stat. § 1-267.1(a), (b). The language is unmistakably specific to each *"act of the General Assembly*," which requires a unique "complaint," issuance of service, an appointment of a three judge panel. *Id.* (emphasis added). The 2019 Plan presents a new case, and the statute requires a new complaint, issuance of service, and appointment of a three-judge panel. This is, in fact, how the State Supreme Court interpreted these requirements in *Stephenson*. *See* 358 N.C. at 226, 595 S.E.2d at 117 ("[I]f the Stephenson plaintiffs seek to challenge the constitutionality of those plans in terms of our holding in Stephenson I, they must file a motion in the cause in Morgan or file a complaint in Superior Court, Wake County.").

Plaintiffs may not sidestep due process and the three-judge panel act by self-servingly labeling the 2019 Plan a "remedial" plan. It is, of course, no such thing. There can be no "remedy" without a judgment requiring a remedy. In its preliminary injunction order, this Court explained that a final judgment could be avoided if the General Assembly enacted a new plan on its own initiative. The Court went out of its way to avoid a remedial process, which it correctly concluded would likely lead to delayed primaries and significant electoral disruption. The General Assembly took this suggestion to heart, also wanting to avoid voter confusion and reduced turnout, and fully replaced the old map with a new map. As fully explained by legislative defendants in their Motion

for Summary Judgment, and Response to Plaintiffs' Motion for Summary Judgment, these circumstances render this action moot and the 2019 Plan is the current lawful plan.[2]

There can be no doubt that the 2019 Plan fully replaced the 2016 Plan. The law enacting the 2019 Plan completely re-wrote N.C. Gen. Stat. 163-201(a) and provided the act was immediately effective. See Session Law 2019-249, §§ 1, 2. Visually, the 2019 Plan is clearly substantially different from the 2016 Plan. Indeed, the 2019 Plan may be the most visually appealing congressional map ever enacted in the history of North Carolina. See Exhibit 1 (2019, 2016, 2011, 2001, and 1992 Congressional redistricting maps). The 2019 Plan also required the movement of, on average, at least 45% of the population of North Carolina citizens. Exhibit 2, Brunell Report ¶¶ 4-5. Plainly the 2019 plan is a vastly different map from the 2016 plan.[3]

C. Legislative Defendants Are Prejudiced by Plaintiffs' Demand for a Ruling Without Discovery

Due process is not a technicality. Legislative Defendants are prejudiced by Plaintiffs' demand for a breakneck ruling without adversarial proceedings. Plaintiffs filed their motion just

[2] This case is therefore not like *Common Cause v. Lewis*, where the final judgment supported a colorable claim to the Court's continued jurisdiction.

[3] The 2019 Plan is also significantly different from the simulated plan created through a project of Common Cause. See https://www.commoncause.org/north-carolina/press-release/retired-judges-unveil-new/. This plan, known as the "Judges" plan in *Common Cause v. Rucho*, was presented in *Rucho* as an example of a non-partisan map that could be drawn in a process simulating an independent redistricting commission. According to testimony in *Rucho*, the Judges plan did not use racial or partisan data in drawing the districts. A Voting Rights Act analysis was conducted after the districts were drawn but not in drawing the districts themselves. Dr. Mattingly held up the Judges plan as a fair plan that respected the "will of the people." Exhibit 3 at 2 ("election results from the Judges redistricting are quite typical, producing results consistent with what is typically seen"). While Senator Hise intended to use the Judges plan as a base map, after Democratic legislators criticized what had been described in *Rucho* as a fair map, he ended up making substantial alterations to that map. Unlike the "base map" selected from the Chen simulations in the legislative case, Senators Hise and Newton made no attempt to only make "minimal changes" from the base map as in the legislative case. Senators Hise and Newton, and the House members that amended the map, made extensive changes to reach the best map possible under the criteria. The final 2019 map is therefore not similar to the Judges map.

one week ago and stated their intention to lodge "objections" to the 2019 Plans today, Friday, November 22, 2019. The reply briefs on this motion are due in a matter of days.

That is not even remotely ample time for adversarial proceedings on the 2019 Plans. Legislative Defendants' experts have conducted only the most cursory review of the 2019 Plans, and they could not have started earlier because the General Assembly made every effort to avoid any examination of partisanship during the redistricting process. For their part, Plaintiffs have recycled an analysis from the *Rucho* litigation that did not involve the same legislative goals and is therefore entirely irrelevant (*see* below § III). For this reason alone, their motion should be denied.

II. The 2019 Redistricting was the Most Transparent and Non-Partisan Congressional Redistricting in North Carolina History

Plaintiffs cannot dispute that the process culminating in the enactment of the 2019 Plan was the most transparent and non-partisan congressional redistricting in state history. Like the legislative redistricting process recently approved by this Court, all mapdrawing was conducted on live-streamed computer terminals in a room in which all activity was recorded and live-streamed. The video itself is proof of the transparency. The video reflects all redistricting moves being made by legislators and staff in real time, as each precinct was moved from one district to another. All data available to the legislators was simultaneously available to the public. Several large screens in the room also reflected the redistricting activity as it occurred. Individuals in the committee room can be viewed on the video pointing at the screens and commenting on the activity as it was taking place. Never before has the public had such access to the congressional mapping process.

Plaintiffs (at 4-5) grasp at straws when they criticize the fact that Senator Hise occasionally left the room during the drawing process. This is an unremarkable observation. Whenever Senator

Hise, or any other legislator, sat down to draw maps, each redistricting move was displayed for the world to see and criticize in real time. Plaintiffs would apparently require that the General Assembly transform the committee room into a SCIF (Sensitive Compartmented Information Facility) in order to conduct transparent redistricting. The fact is that the video shows many legislators, Democrats and Republicans, entering and leaving the room. The drawing process took place over numerous days which required the General Assembly to close the room and wait for the next day to begin drawing again. The process of drawing a map and equalizing population between thirteen districts across the entire state of North Carolina through moving VTDs of varying sizes and populations is tedious and takes hours, often spread across multiple days. This is particularly true when—at Democrats insistence, many maps were drawn from scratch without the assistance of a "base map," as was the case in the legislative process. Plaintiffs do not seem to question the motive or intent or actions of the many Democratic legislators who left the room and then resumed drawing either the same or next day. They don't question Democratic Senator Clark entering the room with a stack of papers and marking through an apparent pre-prepared checklist as he made changes to a map with staff. The video also shows counsel for the Plaintiffs repeatedly entering and leaving the room, referring to a private computer with unknown data on it in the room, and conferring with redistricting advocates who themselves repeatedly entered and left the room with their own private computers. No one has assumed or accused any of them of secretly huddling with Democrats who later came into the room to draw maps. That's because it is a silly conspiracy theory to do so.

The 2019 redistricting process is in sharp contrast to prior redistricting in this state. The 1992 Democratic-controlled General Assembly congressional plan was drawn in secret by Democratic political consultant John Merritt and "emerged as the result of consultations among

aides to incumbent congressmen and members of the redistricting committees"—which, of course, occurred in secret. *See Shaw v. Hunt*, 861 F. Supp. 408, 466 (E.D.N.C. 1994). And there, "the North Carolina legislature threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race." *Id.* Moreover, the 2001 congressional plan, like all the Democratic Party's plans, was "drawn outside of the General Assembly," in secret. Churchill Dep. 19:11–16. What was *not* secret then was the partisan motive. Democratic Representative Wright stated expressly at a Redistricting Committee hearing that the plan was drawn "with the intent of certainly keeping the Democratic advantage." Nov. 14, 2001 House Redistricting Comm. Tr. 25:22–26. He also agreed that District 13, a visible oddity that ran from Wake County to the Virginia border and then south into Guilford county to pick up highly Democratic areas, was "done to make sure that the 13th was a Democratic district" and, in fact, to be "a more stronger Democrat district than" before, and he expressly clarified that Democratic members were "looking at ways to enhance the performance Democratically…." Nov. 14, 2001 House Redistricting Comm. Tr. 36:8–37:21.

Plaintiffs' efforts to nitpick at the 2019 redistricting process fall flat. The 2019 General Assembly has, in large part due to the efforts of this Court, achieved what has been historically regarded as unachievable—mustering the votes to enact redistricting legislation through a completely transparent and non-partisan process.

III. The 2019 Plan is not a Partisan Gerrymander

While this case is moot, and the 2019 is not a "remedial" plan subject to review by the Court outside of a new lawsuit, the information available to the Court demonstrates that the 2019 Plan is not a gerrymander, "extreme" or otherwise. The map itself speaks volumes on its own. It is the most visually appealing redistricting map since North Carolina started drawing single-

member congressional districts and the advent of federal equal population requirements. See Ex. 1.

But more importantly, none of the criteria that this Court found made the 2016 Plan a gerrymander were adopted or used here. In its Order on Injunctive Relief, this Court found the following criteria as pointing to the substantial likelihood that the 2016 Plan was a gerrymander:

- Dr. Hofeller was directed by legislators to use "political data to draw a map that would maintain the existing partisan makeup of the state's congressional delegation, which, as elected under the racially gerrymandered plan, included 10 Republicans and 3 Democrats." (10-28 Order at 13 (citations omitted))
- The redistricting committee approved "several criteria for the map-drawing process, including the use of past election data (i.e., "Political Data") and another labeled "Partisan Advantage" and legislative leaders overseeing the redistricting process "acknowledged freely" the use of this data and its purpose (*Id.*); and
- Dr. Hofeller when drawing the districts used "an aggregate variable he created to predict partisan performance" at the county and VTD level. (*Id.*)

None of these factors were present in the 2019 redistricting process. The criteria used by mapdrawers are attached here as Exhibit 4. These criteria are nearly identical to the criteria adopted by this Court in *Common Cause v. Lewis* for legislative redistricting. The criteria not only do not rely on partisan advantage, they expressly prohibit the use of partisan considerations and election data. And no Republican legislator leading the redistricting effort or drawing maps stated, implied, or even hinted at a partisan motive. To the contrary, the Republican majority took this Court's advice seriously, and set out to adopt a non-partisan map that would ensure no further election disruptions for the people of North Carolina.

Not only were the criteria used strictly non-partisan, none of the alternative maps submitted by Democratic legislators followed all of the criteria. An important example of this is the double-bunking criterion. The legislative committee adopted a policy of not pairing current congressional incumbents in the new map. This criterion was similar if not identical to the non-pairing criterion adopted by this court in *Common Cause v. Lewis*. Significantly, the committee vote to adopt this criterion was *unanimous*. Despite the unanimity on this issue, Democrats who submitted statewide maps for legislative consideration did not follow it. The following Democratic Representatives offered statewide maps for legislative consideration: Rep. Floyd, Rep. Hawkins, Rep. Willingham, and Rep. Farmer-Butterfield. Every one of the statewide maps offered by these Democratic House members paired incumbents, and generally paired Republican incumbents without rhyme or reason—for example extending snake-like tendrils to unpair Reps. Foxx and Meadows while refusing to make simple precinct moves to unpair Reps. Murphy and Butterfield. On the House floor, every single one of these statewide amendments were defeated by *bipartisan* votes. Their amendments can be found at the following links:

- H1029-AND-29 is FloydA-1 (See associated docs here https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/6740#11-12-19\C-FloydA-1-ST)

- H1029-AST-87 is Clark – 8-MT (see associated docs here https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/6740#11-06-19\C-Clark-8-MT)

- H1029-AST-86 is WillinghamA-1-1 (see associated docs here https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/6740#11-07-19\C-Willingham%20A-1-1-ND)

- H1029-ABK-52 is HawkinsA-1, (see associated docs here https://www.ncleg.gov/BillLookUp/2019/h1029, listed as Amendment 2)

- H1029-AST-88 is FarmerButterfield C-1 (See associated docs here https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/6740#11-12-19\C-Farmer-ButterfieldC-1-BK)

In addition, the only Senator to offer a statewide map—Senator McKissick—also paired several Republican incumbents.[4] Senator McKissick's amendment can be accessed here: https://webservices.ncleg.net/ViewBillDocument/2019/6959/0/H1029-ABK-55-V-2 (see associated docs here https://webservices.ncleg.net/ViewBillDocument/2019/6959/1/H1029-BD-NBC-8418). For this reason alone, the 2019 Plan was superior to all offered alternatives and, unlike the Democratic maps which targeted Republican incumbents for partisan reasons, the 2019 Plan treated all incumbents of both parties fairly—but did not give any incumbent a partisan advantage. Notably, every proposed amendment offered by a Democratic Senator, as in the House, was defeated on a *bipartisan* basis.

Next, Plaintiffs' efforts to characterize the 2019 Plan as being partisan are misleading and incorrect. As this Court has explained, no partisan gerrymandering claim can survive unless a party proves a map was drawn with partisan intent—that is with a "predominant purpose" to "entrench" the party in power by "diluting" the votes of the other party. (10-28 Order at 8) There is literally zero evidence of any such intent here. Instead, the evidence is all to the contrary. The legislative leaders set up a transparent and non-partisan process, Republican mapdrawers used no partisan data, and the committee adopted and followed neutral, non-partisan criteria unanimously adopted by Republicans and Democrats.

Nor is there any evidence of a partisan effect. Plaintiffs disparage the 2019 Plan as an alleged "8-5 partisan gerrymander" but fail to disclose that there is substantial evidence undermining their conclusion. First, there is significant evidence that the 2019 Plan actually favors

[4] Senator Blue offered an amendment which did not pair incumbents, but its only proposed change was to revise the map in Wake County for the purpose of allowing Congressman David Price to continue to represent a part of Wake County he has represented for many years. Senator Blue's amendment was defeated on a *bipartisan* basis. H1029-ABK-54[v.1] (see associated docs here: https://webservices.ncleg.net/ViewBillDocument/2019/6960/1/H1029-BD-NBC-8414).

Democrats, not Republicans. An analysis of the 2019 by PlanScore, a neutral analytical tool for assessing redistricting plans, indicates that the 2019 Plan actually contains seven Democratic-leaning districts and only six Republican-leaning districts. Brunell Report ¶ 8. Moreover, under another often-cited metric, the "efficiency gap," the 2019 Plan saw a "massive" change from the 2016 Plan in favor of the Democratic Party.[5] Brunell Report ¶ 6. Second, there is no competent evidence that a North Carolina congressional map with eight Republican-leaning districts is an "extreme" outlier. Dr. Chen's analysis in Plaintiffs' Motion for Review is not to the contrary. Figure 3, the chart reproduced in Plaintiffs' Motion, demonstrates that Dr. Chen's non-partisan simulations generally draw eight Republican-leaning districts and five Democratic-leaning districts. In his chart, the 6th most Democratic district is District 8 and the majority of those simulated districts are Republican leaning. All of the districts from District 8 to the bottom of the chart—*eight* of them—are always or nearly always Republican leaning districts. On the other hand, the 5th most Democratic district is District 1 and the majority of District 1's simulated districts are Democratic leaning. All of the districts from District 1 to the top of the chart—*five* of them—are always or nearly always Democratic leaning. Thus, Dr. Chen's own data demonstrates that an "8-5" map is not unusual using non-partisan criteria. Brunell Report ¶ 2.

The analysis above is consistent with analysis by Dr. Jonathan Mattingly in *Common Cause v. Rucho*. As the Court knows, Dr. Mattingly was a key witness for plaintiffs in *Common Cause v. Lewis.* In *Rucho,* Dr. Mattingly submitted a report similar to the one he submitted in *Lewis*. A copy of that report is attached as Exhibit 3. Figure 1 on page 4 of that report shows the number of Democrats elected in Dr. Mattingly's simulated districts using 2016 election results. As the chart

[5] Any continued supposed "bias" in favor of the Republican Party is impossible to avoid without intentional efforts to assist the Democratic Party because Democratic constituents are naturally "packed" in North Carolina. Brunell Report ¶ 10.

shows, the vast majority of his simulations produced plans that would elect *five* Democrats, the same number that Plaintiffs here now complain about. Thus, according to Dr. Mattingly's analysis, *five* Democrats elected to Congress in North Carolina is fully consistent with "the will of the people." Ex. 3 at 2.

And even though Dr. Chen's analysis here is fully consistent with the non-partisan 2019 Plan, his analysis is, in any event, flawed. The Chen analysis uses the same maps Chen presented in the *Common Cause v. Rucho* case challenging the 2016 congressional districts. But the 2019 districts were drawn to achieve different goals, and Chen's *Rucho* simulations do not (because they cannot) account for those goals. One goal, reflected extensively on the legislative record, was to create a district wholly within Wake County. Another goal, proposed by Democratic members, was to keep Cumberland County whole. Chen's algorithm did not account for these non-partisan goals and therefore did not keep these counties whole. His algorithm therefore does not provide an appropriate measure of partisanship in light of the General Assembly's non-partisan goals. Brunell Report ¶ 3 ("[A]ny simulations done for comparative purposes must include these two new restrictions"—i.e., in Wake and Cumberland Counties—"otherwise the results are not comparable to the enacted map.") As in the *Common Cause v. Lewis* remedial proceeding, "no alternative map that better achieved these objections was offered by Plaintiffs."

Finally, while Plaintiffs may point to the party-line votes that resulted in the enactment of the 2019 Plan, the Court should take into account the motives of the minority party members who denied their votes to a plan that is by all measures a fair map. Contemporaneous media reports suggest that Democratic leaders in the legislature and Congress were holding out on their support unless a plan was drawn that ensured proportional representation or better for Democrats. The Washington Post reported that "Democrats are asking for more, saying that the map should reflect

the state's partisan makeup—even though a Democratic-affiliated group backed the lawsuit seeking to declare that practice unconstitutional." *Democrats would likely gain two seats under new congressional map approved by North Carolina legislature*. (Washington Post November 15, 2019), available at https://www.washingtonpost.com/politics/two-nc-republicans-could-lose-their-districts-under-new-gop-drawn-congressional-map/2019/11/15/26c47ad4-071e-11ea-8292-c46ee8cb3dce_story.html. Congressman G.K. Butterfield was more explicit about partisan motive: "We really need to have a fair map, we need a 6-7 map or a 7-6 map or a 6-6-1 map." According to him, a "5-8 map [doesn't] quite get us where we need to go." Senator Dan Blue, the Democratic leader in the State Senate, agreed with Congressman Butterfield's assessment. (*Id*.) Indeed, Senator Blue advocated using partisan data after the map was drawn to ensure the final map achieved the partisan target sought by the Democrats. (*Id.*)

The perverseness of these motives is not only that they prevented the 2019 Plan from having bipartisan support but that if Republicans had agreed to these demands they would have had to have used partisan election data extensively to accomplish them. Instead, Republicans refused to use partisan data and otherwise set partisan quotas. These comments reflect a reality that Democrats in the legislature did not want non-partisan maps—it was after all non-partisan mapdrawing that produced the 2019 map—but they wanted "fair" maps, with "fair" defined as a partisan quota of Democrats who could run in a district that might elect them to Congress. That not only goes against the letter and spirit of this Court's preliminary injunction order, it expressly violates the admonition of this court in *Common Cause v. Lewis* that it was not ordering "proportional representation."

Moreover, Republicans made certain changes to the map upon the request of Democrats, even though those Democrats would not agree to break with their party leadership and vote in

favor of the map as a whole. For example, Deputy Minority Leader Rep. Reives suggested to Rep. Lewis that the original bill as filed should have left Vance and Warren Counties with the small cities and rural communities of District 1 instead of the Triangle-area District 4. Rep. Lewis took that suggestion and adopted that drawing of the map exactly as Rep. Reives suggested. Other changes included the desire to keep Cumberland County whole, which was a request of both Democratic members and public speakers. Chairman Lewis presented this option to the House committee, which adopted this plan, even though it required splitting his own home county of Harnett. Thus, for the first time since the 1980s redistricting cycle, the General Assembly has enacted a plan that keeps Cumberland County together in the same congressional district. The same is true for Guilford County.

IV. The Court Should Avoid Harm to the State, Voters, and Election Participants by Acknowledging the Case is Moot and the 2019 Plan Should be Implemented

This Court should not countenance further delay of the election cycle in light of the enactment of the 2019 Plan. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). This is even truer for statutes relating to elections because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989).

Plaintiffs' original action was already eleventh-hour and their request to now hold up the 2019 Plan is especially belated and would inject confusion and uncertainty into the electoral process. Even good-intentioned judicial reforms of election laws can be counter-productive, since the intrusion itself causes harm. Any action must occur "at a time sufficiently early to permit the holding of elections…without great difficulty" or else *no* action should occur. *Reynolds v. Sims*,

377 U.S. 533, 586 (1964). That is true both under federal law (which governs congressional elections) and North Carolina law.

In *Pender County v. Bartlett*, 361 N.C. 491, 508, 649 S.E.2d 364, 375 (2007), the State Supreme Court concluded that a decision issued on August 24, 2007, striking down a handful of legislative districts—after full adjudication on the merits—came too late to impact the 2008 elections; thus, the court stayed its decision until the following election. It bears repeating: the *State Supreme Court* reached *a final judgment* concluding that districts were invalid and *still* declined to interfere with elections scheduled to take place over fourteen months later. This case is a far worse candidate for belated injunctive relief. Plaintiffs *did not even file the case* until well after August 24, 2019, and a redistricting plan at this Court's invitation has just been enacted.

This panel faithfully applied the *Pender County* decision in *Dickson v Rucho*, No. 11 CVS 16896, 2012 WL 7475634 (N.C. Super. Jan. 20, 2012), by denying a preliminary-injunction motion filed in early November of 2011, *see Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. July 08, 2013), based on "the proximity of the forthcoming election cycle and the mechanics and complexities of state and federal election law." *Dickson*, 2012 WL 7475634, at *1. The panel emphasized that its ruling did not imply "a lack of merit" and noted that the plaintiffs "have raised serious issues and arguments" in challenging the plan. *Id.* In rejecting that as a sufficient basis for an injunction, the Court emphasized the difficulties involved in administering elections and also noted that the short time frame "leaves little time for meaningful appellate review" or "curative measures by the General Assembly." *Id.*

Changes in election procedure—particularly late changes—harm election administration, and this in turn is itself a burden on the right to vote. *Purcell*, 549 U.S. at 4–5. Courts therefore weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the

proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *Id.* Other relevant factors include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *Covington*, 137 S. Ct. at 1626.

Redistricting yet again now in December, at the earliest, would create a domino effect of problems for candidates, parties, and election participants—a concern that draws even more weight from Plaintiffs' supposed concern for partisan fairness in elections. Congressional candidates and potential candidates are raising money *now* and evaluating whether to run based on the lines currently in place. New lines would render those actions futile and require an entire new fundraising and strategic strategy from scratch and in a near instant. This is true for candidates from all political parties. The bottom line is that the harm to the public in drawing a new plan at this point or delaying primaries is much too great in light of the transparent and fair process that led to the 2019 Plan—the current lawful plan which can be implemented without any further disruption to the election process.

CONCLUSION

The motion should be denied.

Respectfully submitted this the 22nd day of November, 2019.

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