STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION No. 18-CVS-014001

COMMON CAUSE, *et al*.,

Plaintiffs,

v.

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

Defendants.

INTERVENOR-DEFENDANTS' POST-TRIAL BRIEF

NOW COME Intervenor-Defendants Adrain Arnett, Carolyn Elmore, Cathy Fanslau, Connor Groce, Reginald Reid, Aubrey Woodard, and Ben York (the "Intervenor-Defendants") and, pursuant to the Court's February 25, 2019 Order adopting the Stipulated Proposed Case Management Order, hereby serve Intervenor-Defendants' Post-Trial Brief.

INTRODUCTION

Article XIII, Section 2 of the North Carolina Constitution states:

> The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, **but in no other way**.

(emphasis added). Plaintiffs' stated goal in bringing this lawsuit is to take politics out of legislative redistricting in North Carolina in order to make the process more "fair." (Am. Compl. ¶ 6; Pls.' Pretrial Mem. 3, 13.) While their professed intention may seem noble, by seeking to accomplish their goal through the judiciary rather than by seeking a constitutional amendment promises to undermine the rule of law in North Carolina and make the judiciary an unnecessary participant in the politics of redistricting. *See* John V. Orth & Paul Martin Newby, *The North Carolina State*

Constitution 201 (2d ed. 2013) ("The second sentence channels the awesome power of constitution making (or re-making) . . . ."). Intervenor-Defendants became involved in this lawsuit because, among other reasons, they were concerned that the judiciary would accept Plaintiffs' invitation to wade deeper into the politics of redistricting. For example, Reginald Reid intervened in this lawsuit because he "see[s] this case as . . . a means, a steppingstone, to take . . . the redistricting process out of the hands of the people in North Carolina[,]" and he wants to "keep [] redistricting in the hands of the people of North Carolina where it belongs." (Pls.' Trial Ex. 784 ("Reid Dep.") 34:24–35:3, 35:8−10.) Similarly, Benjamin York intervened in this lawsuit because he believes "the maps should be drawn by the legislature, that's who's tasked with drawing the maps and that's why I'm an intervenor-defendant in this lawsuit." (10 Tr. 2253:1–6.) The People of North Carolina delegated the legislative apportionment power to the General Assembly in the Constitution; accordingly, the proper avenue for the changes Plaintiffs seek to the redistricting process is not through court order, but via constitutional amendment, constitutional convention, or legislative action. *See generally* Orth & Newby 201–02 (discussing N.C. Const. art. XIII).

The North Carolina Constitution of 1971 was passed by the General Assembly in 1969 and approved by North Carolina voters on November 3, 1970. *Id*. at 32–33 (discussing the Constitution of 1971). The Constitution specifically grants the legislative apportionment power to the General Assembly, subject to listed textual restrictions. N.C. Const. art. II §§ 3, 5. Intervenor Defendants do not dispute that the judiciary can, and should, enforce the enumerated restrictions in Sections 3 and 5. Plaintiffs, however, contend that these restrictions are not enough, and encourage this Court to adopt a new interpretation of Article I, Sections 10, 12, 14, and 19, imposing heretofore unknown requirements on the General Assembly's legislative apportionment power. What is more, the new requirements sought by Plaintiffs remain undefined, untested, and practically unknown

because Plaintiffs refused to provide any intelligible description of the new requirements that they seek. (1 Tr. 53:14–20; 56:6–16; *see also* 5 Tr. 1018:14–20; 6 Tr. 1488:3–4.)

The reality is that no new constitutional limitation on redistricting exists. Even though the Republican-controlled General Assembly took political considerations into account in drawing the legislative district lines starting in 2011, Plaintiffs waited to bring this lawsuit until November 2018, over a year after the 2017 North Carolina House of Representatives and North Carolina Senate legislative maps (the "2017 Plans") were passed and despite numerous opportunities to present these claims in any of many other redistricting lawsuits brought in North Carolina since 2011. Plaintiffs' lawsuit is a transparent attempt to have the North Carolina judiciary create new legislative apportionment rules requiring that the legislative district lines be redrawn again prior to the upcoming 2020 election. None of Plaintiffs' evidence presented at trial, however, would justify the reversal of the Supreme Court of North Carolina's past precedent which expressly acknowledges the legality of considering political factors in legislative apportionment. Likewise, Plaintiffs cannot articulate a judicially discoverable and manageable standard by which the Court can judge this partisan gerrymandering claim, let alone any of the partisan gerrymandering claims that would face this court in future litigation if Plaintiffs' claims are successful.

The legislative apportionment process is naturally a political process, as both North Carolina and federal courts have recognized. *See Gaffney*, 412 U.S. at 753 ("Politics and political considerations are inseparable from districting and apportionment."); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377, 390 (2002) (*Stephenson I*); *see also Rucho v. Common Cause*, 588 U.S. __, __, 139 S.Ct. 2484, 2497 (2019) ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."); *Dickson v. Rucho,* No. 11 CVS 16896, 2013 WL 3376658,

at *2 (N.C. Super. Ct. July 8, 2013) ("Political losses and partisan disadvantage are not the proper subject for judicial review."), *aff'd but criticized by* 367 N.C. 542, 766 S.E.2d 238 (2014), *vacated*, 135 S.Ct. 1843 (2015) (mem.). The People of North Carolina delegated this political process to the General Assembly along with certain textual restrictions, none of which included "removing politics out of the process." (*Compare* N.C. Const. art. I §§ 3, 5 *with* 1 Tr. 43:16–21.) As such, the Court should refuse to usurp the will of the People by allowing Plaintiffs to bypass the constitutional amendment process and create a new limitation on redistricting through judicial fiat.

ARGUMENT

Drawing legislative district lines for political gain is a familiar topic of political debate, having been part of the national, state, and local political landscape since before our country's founding. *Rucho*, 588 U.S. at ___, 139 S.Ct. at 2494. Through this lawsuit, Plaintiffs seek a judicial order purportedly taking the politics out of this inherently political process. (1 Tr. 43:10–22; 70:12–20; 6 Tr. 1268:19–1269:2). The Court should decline to wade into the political waters of Plaintiffs' partisan gerrymandering claims because (1) the North Carolina Constitution specifically reserves the legislative apportionment power to the General Assembly and does not bar political considerations from the process; (2) no judicially discernable and manageable standard exists for judging partisan gerrymandering claims; and (3) the Court should not pick sides in what is essentially a political dispute just because one side cannot garner sufficient political support to pass its desired constitutional amendment. Accordingly, the Court should grant judgment in favor of Defendants, and dismiss Plaintiffs' claims in their entirety.

I. Legal Standard for the Political Question Doctrine in North Carolina.

The political question doctrine is a separation of powers principle that determines whether an issue may be resolved by the judicial branch. *Cooper v. Berger*, 370 N.C. 392, 407−08, 809

S.E.2d 98, 107 (2018) (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). Specifically, the doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854) (internal quotation marks omitted).

To determine if an issue is a political question, courts "necessarily ha[ve] to undertake a separation of powers analysis[.]" *Id.* at 408, 809 S.E.2d at 107. As reflected in Article I, Section 6 of the North Carolina Constitution, "separation of powers is one of the fundamental principles on which state government is constructed." Orth & Newby 50; *see* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State governments shall be forever separate and distinct from each other."). While the North Carolina Constitution mandates the three state branches be separate, they are not equal. *Id.*; *see Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853–54 (2001) (distinguishing North Carolina separation of powers principles from the federal doctrine).

In North Carolina, "the preponderant power has always rested with the legislature." Orth & Newby 50; *see Bacon,* 353 N.C. at 716, 549 S.E.2d at 854 (holding state courts should defer to an individual branch's discretion because "the people have included an *express* separation of powers provision within their State Constitution[]") (alteration in original). For this reason, the Supreme Court of North Carolina gives "great deference . . . to acts of the legislature—the agent of the people for enacting laws." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) (discussing the history of judicial review in North Carolina). The burden of proving any deferential act of the General Assembly of the General Assembly is unconstitutional rests solely on Plaintiffs. *See id.*

A nonjusticiable political question exists when a question "involves a textually demonstrable constitutional commitment of the issue to a coordinate political department" or when "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue."[1] *Cooper*, 370 N.C. at 407−08, 809 S.E.2d at 107 (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854) (internal quotation marks omitted); *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). A "textually demonstrable commitment" is a core constitutional function committed to the sole discretion of the one branch of government. *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (holding that the constitutional commitment of clemency to the "sole discretion of the Governor" precludes judicial review).

Political Questions also arise when there are no satisfactory and manageable criteria or standards to adjudicate a political claim. *See Hoke Cty. Bd. of Educ.*, 358 N.C. at 639, 599 S.E.2d at 391. The reason for this constraint, in the redistricting context, is that "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Rucho*, 588 U.S. at __, 139 S.Ct. at 2498 (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (plurality) (opinion of O'Connor, J.)). Accordingly, "[a]ny standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' " *Id.* (citing *Veith v. Jubelirer*, 541 U.S. 267, 306–08 (2004)).

A standard which would resolve Plaintiffs' claims, and which would both be grounded in a limited and precise rationale and be clear, manageable, and politically neutral, does not exist. Plaintiffs' claims are non-justiciable political questions, and should be dismissed.

[1] North Carolina has not adopted all of the federal political question factors outlined in *Baker v. Carr*, 369 U.S. 186, 217 (1962), but it has recognized the first two. *See Bacon*, 353 N.C. at 717, 549 S.E.2d at 854; *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004); *see also News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 18, 641 S.E.2d 698, 701 (2007).

II. Plaintiffs' Claims Are Nonjusticiable Given the Textually-Demonstrable Commitment of the Legislative Apportionment Power to the General Assembly in the Constitution.

The People of North Carolina expressly commit the legislative apportionment power to the General Assembly in the text of Article II, Sections 3 and 5 of the North Carolina Constitution. N.C. Const. art. II, § 3 ("The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts . . . ."); § 5 ("The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts . . . ."). Notably, while they contain other limitations on the General Assembly's legislative apportionment power, political or partisan considerations are **not** prohibited by Sections 3 and 5. This feature of North Carolina's constitution is unremarkable and consistent with prevailing historical norms of redistricting in the United States. *See id.*; *Rucho*, 588 U.S. at __, 139 S.Ct. at 2494–96 (outlining the history of partisan gerrymandering in the United States); *Stephenson I*, 355 N.C. at 370, 562 S.E.2d at 390. Thus, the North Carolina Constitution contains express an express textually demonstrable commitment of the legislative apportionment power to the General Assembly in the North Carolina Constitution. *See* Orth & Newby 97−98.

North Carolina appellate courts have consistently held that such a textual commitment precludes judicial oversight in the absence of specific constitutional authorization for such oversight. *See Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (citation and internal quotation marks omitted) (providing that a nonjusticiable political question "involves a textually demonstrable constitutional commitment of the issue to a coordinate political department"); *News & Observer*

Publ'g Co. v. Easley, 182 N.C. App. 14, 641 S.E.2d 698 (2007) (same); *see also Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939) ("The [redistricting] question is a political one, and there is nothing the courts can do about it. They do not cruise in nonjusticiable waters."). The specific constitutional provisions under which judges oversee the redistricting process are the enumerated criteria under Article II, Sections 3 and 5; however, there is no specific constitutional authorization for judicial oversight of political considerations in redistricting.

Plaintiffs seek to have the judicial branch overreach into a matter textually committed to the legislative branch—in direct violation of the political question doctrine and the separation of powers principles expressed in the North Carolina Constitution. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982) ("North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers.").

Courts have long recognized that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753; *see Rucho*, 588 U.S. at __, 139 S.Ct. at 2494 ("Partisan gerrymandering is nothing new. Nor is frustration with it."). Though plaintiffs of both political parties in past partisan gerrymandering cases have suggested that legislatures should not use political considerations when drawing districts, "this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results[.]" *Gaffney*, 412 U.S. at 753.

Further, even though North Carolina permits the use of partisan considerations in redistricting, the process is not a wholly partisan free-for-all, as Plaintiffs claim. Legislators are confined by statutory and constitutional mandates, including equal population, contiguity, county

groupings and traversals, and compactness, as well as federal Voting Rights Acts requirements. *See Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 460 (2015) (*Dickson II*); *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*); *Stephenson I*, 355 N.C. 354, 562 5.8.2d377 (2002). Further, legislators often bind themselves with additional criteria that are neither constitutionally required nor politically motivated, such as minimizing split municipalities or voter tabulation districts. (LDTX 007.) Additionally, all proposed maps are subject to the legislative process itself. (5 Tr. 1203:12–21; 6 Tr. 1404:16–18.) Plaintiffs' experts, however, do not take into account the legislative process or unique considerations of individual state legislators in their analyses. For example, Dr. Mattingly admitted his model does not capture the nuances of legislative negotiations and that he cannot accurately identify the nonpartisan or bipartisan qualities inherent in the legislative process. (5 Tr. 1204:1–1206:4). Similarly, Dr. Pegden never studied the process used by the General Assembly to pass either the 2011 or 2017 Plans. (6 Tr. 1419:19–1420:1).

Regardless, given the textual commitment of the legislative apportionment power to the General Assembly, and the fact that none of Plaintiffs' claims arise under any of the constitutional restrictions placed on the General Assembly in Article I, Sections 3 and 5, Plaintiffs' claims in this case are non-justiciable political questions, and thus should be dismissed in their entirety.

III. Plaintiffs' Claims Are Non-Justiciable Given That No Judicially Discernable or Manageable Standard Exists by Which to Judge Partisan Gerrymandering Claims.

The constitutionality of political considerations in redistricting is cause for concern not only due to separation of powers principles, but also because no judicially discernable or manageable standard exists for determining when such considerations become unconstitutional. Throughout this litigation, neither Plaintiffs nor their experts have suggested any standard by which the Court may judge their partisan gerrymandering claims, likely because Plaintiffs are

aware of the difficulties each of the multitude of partisan gerrymandering theories have encountered. The reality is that Courts have searched for a workable standard for partisan gerrymandering since *Gaffney*, forty years ago; the lack of such a standard appears to have been a reason why the Supreme Court of the United States to accept the futility of this quixotic quest. This Court should do the same.

A. Courts have not found any workable standard for partisan gerrymandering despite over forty years of attempts.

Courts have wrestled with partisan gerrymandering claims for over forty years. *See Rucho*, ___ U.S. at __, 139 S.Ct. at 2497 (2019) ("Partisan gerrymandering claims have proved far more difficult to adjudicate."); *see, e.g., Gaffney*, 412 U.S. at 749 (recognizing the grave institutional pitfalls facing the court if it waded into the realm of adjudicating political gerrymandering claims); *Davis*, 478 U.S. at 185 n.25 (1986) (Powell, J., dissenting) (while challenged plans did not violate the Constitution, acknowledging that there was "no 'Court' for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander"); *Veith*, 541 U.S. at 306–307 (Kennedy, J., concurring) (noting the "lack of comprehensive and neutral principles for drawing electoral boundaries" and "the absence of rules to limit and confine judicial intervention"); *League of Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much.").

In *Rucho*, the Court identified the "central problem" in addressing political gerrymandering claims as "determining when political gerrymandering has gone too far." *Id.* at __, 139 S.Ct. at 2488, 2497 (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)). Over the years, plaintiffs complaining of partisan gerrymandering presented courts with a variety of tests that attempt to quantify this question. None of them withstood judicial scrutiny or the test of time. For example,

in *Gill v. Whitford*, plaintiffs proposed using a measure known as "the efficiency gap," which measures votes "cast for a losing candidate or winning candidate in excess of what that candidate needs to win." 138 S.Ct. 1916, 1924 (2018). The Court dismissed this test because it was wholly untethered to individual rights. *Id.* at 1933. In *Rucho*, the Court considered the "neutral baseline" test advanced in this case by Drs. Chen and Mattingly, whereby the partisan effects of a challenged map are measured against a set of computer-simulated maps drawn using only the "neutral" district criteria identified by the map drawer. 139 S.Ct. at 2505. The Court dispensed with this test too, describing it as "indeterminate and arbitrary," criticizing it for tying constitutional standards to "criteria that will vary from State to State and year to year," and pointing out a key vulnerability, namely that it relies on "what the mapmakers [say] they set out to do." *Id.*

Four decades of fruitless efforts to discern a justiciable standard contributed to the Supreme Court's decision in *Rucho* to put to rest the justiciability question for federal partisan gerrymandering claims. *Rucho*, 588 U.S. at __, 139 S.Ct. at 2502 (noting that none of the aforementioned standards "provide[] a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties"). Likely also important was the threat that embedding an unmoored, untested standard into the constitutional lexicon could pose "to the status and integrity of the decisions of this Court in the eyes of the country." *See* Transcript of Oral Argument at 37:1–38:6, *Gill v. Whitford*, 138 S.Ct. 1916 (2018) [No. 16-1161], available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_ bpm1. pdf.

North Carolina courts have not had the same opportunities to address the question of justiciability to the same extent as federal courts. However, the conclusions drawn by the federal courts are appropriate in North Carolina because *Rucho*'s conclusions in this respect rely not on the applicable law (i.e., the federal constitution versus the state constitution), but with the mere

impossibility of the proposed task itself: developing a measure for isolating partisan effect and predicting future political behavior. That task simply defies objective, manageable standards and risks the stability of constitutional precedent and the legitimacy of the court's role in the process.

B. Plaintiffs and their experts have not proposed any standard by which to judge their claims.

Plaintiffs offer no solution to this decades-old byproduct of the political process. Over the course of this litigation, they emphasized a desire for the redistricting process to be "fair." (Am. Compl. ¶ 6; Pls.' Pretrial Mem. pp. 3, 8, 13.) They did not, however, at any point, offer any sort of measurement to define what "fair" means or a way to quantify the point at which a map's alleged partisan effects cross the threshold of becoming "unfair." (1 Tr. 74:15–22; 5 Tr. 1018:14–20; 6 Tr. 1447:18–21; 10 Tr. 2281:9–12). As far as the North Carolina Constitution is concerned, merely alleging something to be "unfair" does not a discernable standard make. *See Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (holding that the trial court erroneously "interfere[red] with the province of the General Assembly" when it established a "proper age for school children" without a "satisfactory or manageable criteria that would justify modifying legislative efforts."); *see also Rucho*, 588 U.S at __, 139 S.Ct. at 2499−500 (discussing how "fairness" is not a clear or manageable standard). And the exercise of determining what is "fair" "poses basic questions that are political, not legal." *Rucho*, 139 S.Ct. at 2500. The burden is on Plaintiffs to show that the 2017 Plans are unconstitutional; not only have they failed to meet that burden, they failed to even articulate what that burden is. As such, Plaintiffs' claims should be dismissed in their entirety.

C. Courts cannot set a standard for partisan gerrymandering because, in order to do so, they must be able to predict the outcome of future elections to determine whether a plaintiff's alleged harm actually exists.

Further complicating matters for the very courts that Plaintiffs seek to make responsible for policing partisan gerrymandering is that adjudicating such claims will require accurate prediction of future elections. This is because, at their core, partisan gerrymandering claims concern future alleged harms. While this aspect of partisan gerrymandering claims is often overshadowed by the emphasis that plaintiffs place on past legislative behavior, it remains stubbornly true that the remedy sought in these cases is always prospective in nature since granting the remedy necessarily requires a court to make findings regarding future elections in which the alleged harms will become manifest.

Plaintiffs' claims here are no different. They expressly contend that it is impossible for Democrats to win enough elections in the future to achieve a majority in either house of the General Assembly under the 2017 Plans. (Pls.' Am. Compl. ¶ 1.) This, they claim, constitutes a constitutional harm and is the basis for a judicial remedy that will prevent this purported harm from occurring in the future. (Pls.' Am. Compl. ¶¶ 5, 6.) Although their experts vehemently deny that their algorithms and simulations have any predictive value, (3 Tr. 658:23-659:17, 675:4–9; 6 Tr. 1411:3–4.) the conclusions that Plaintiffs would have this Court draw from those analyses are certainly forward-looking in nature. The question that the Court here must answer is whether it wants to be in the business of political prognostication. If the past is prologue, the Court should be quite wary.

In practice, no one—courts and plaintiffs included—can accurately predict the winners of elections. Indeed, one need look no further than some of the seminal redistricting cases to see this fact. In *Davis v. Bandemer*, 603 F. Supp. 1479 (S.D. Ind. 1984), vacated, 478 U.S. 109 (1986),

Indiana Democrats filed suit following the 1981 redistricting of state legislative districts conducted by Republicans. The Federal District Court indicated that the plan sought to "insulate [Republicans] from risk of losing [their] control of the General Assembly" and would result in a "predestined outcome[,]" held that the maps in dispute violated the Equal Protection Clause, and enjoined the future use of the maps. *Id.* at 1488, 1492. After the Supreme Court vacated the District Court's ruling and reinstated the 1981 maps, *see Davis v. Bandemer*, 478 U.S. 109 (1986), and months later "Democrats increased their share of House seats in the 1986 elections." *Rucho*, 139 S.Ct. at 2503. The "predestined outcome" was not, actually, predestined.

In *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992) (mem.), the North Carolina Republican Party and a group of voters filed suit alleging illegal partisan gerrymandering with respect to North Carolina's congressional maps following the 1991 redistricting cycle. Although the court dismissed the case, it stated in doing so "that the plaintiffs could, theoretically, prove that the [congressional maps] would establish a 'projected history' of disproportionate results." *Id.* at 396–97. As in *Bandemer*, voters thwarted the Plaintiffs' predictions; the North Carolina congressional delegation went from 8-4 Democratic after the 1992 election cycle to 8-4 Republican in 1994, 6-6 split in 1996, and 7-5 Republican splits in both 1998 and 2000. *See, e.g.*, United States Congressional Delegations from North Carolina; Wikipedia, https://en.wikipedia.org/wiki/United_States_congressional_delegations_from_North_Carolina (last accessed August 7, 2019).

Following the 2001 redistricting cycle, Democratic voters in Pennsylvania challenged the state's congressional map as an illegal partisan gerrymander. *Veith v. Jubelirer*, 541 U.S. 267 (2004). Like in *Bandemer* and *Pope*, the challenge was unsuccessful, leaving the original map in place. *Id.* Also similar to *Bandemer* and *Pope*, Pennsylvania voters in subsequent elections defied

plaintiffs' predictions—shifting from a 12-7 Republican advantage following the 2004 elections to an 11-8 Democrat advantage in 2006 and a 12-7 Democrat advantage in 2008. United States Congressional Delegations from Pennsylvania, Wikipedia, https://en.wikipedia.org/wiki/United_States_ congressional_delegations_from_Pennsylvania.

The failed predictions of *Bandemer*, *Pope*, and *Veith* are not outliers. In this decade, similar trends have been observed in (1) Wisconsin, where Democrats experienced notable gains in the state's congressional, state senate, and state house delegations despite maps described in court opinions as heavily favoring Republicans, *see Gill*, 138 S.Ct. at 1923–24; Tara Golshan, Democrats Just Won a Wisconsin Special Election Scott Walker Didn't Want to Have, VOX (June 13, 2018), https://www.vox.com/2018/6/12/17455922/wisconsin-special-elections-results-june (describing a Democrat victory as "the third Wisconsin state election [in 2018] that has Republicans sounding alarm bells"); (2) Pennsylvania, where a Democrat won the state's 18th congressional seat in 2018 upon the retirement of a popular Republican incumbent even though Pennsylvania Supreme Court had deemed the district lines as "nearly impossible" for Democrats to overcome and that they denied Democrats "any realistic opportunity to elect representatives of their choice[,]" *see League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Penn. 2019); Nate Cohn, Josh Katz, Sarah Almukhtar, and Matthew Block, Pennsylvania Special Election Results: Lamb Wins 18th Congressional District, New York Times (April 26, 2018) https://www.nytimes.com/ interactive/2018/03/13/us/elections/results-pennsylvania-house-special-election.html ("Conor Lamb, a Democrat, pulled of a narrow but major upset by winning a special House election in the heart of Pennsylvania Trump country); and (3) Michigan, where Democrats have made notable gains in the state's congressional, state senate, and state house delegations in 2018 despite maps alleged to be "durable and severe gerrymander[s]" designed to

"preserve and enhance the controlling party's power," *see* Complaint at ¶¶ 1–2, *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, No. 2:17cv14148, 2017 WL 11113484 (E.D. Mich. Dec. 22, 2017); 2018 Michigan Elections, Wikipedia, https://en.wikipedia.org/wiki/2018_Michigan_elections.

Collectively, plaintiffs in partisan gerrymandering cases, and the courts that have gone along with them, have failed over and over again to predict the future partisan performance of various maps in different states, at different times, and in different political climates. Despite the algorithms and mathematical expertise offered by plaintiffs' experts, voters remain complicated, partisan affiliation is not immutable, and countless factors ranging from candidate strength to current events influence elections. (*See*, *e.g.*, 6 Tr. 1475:7–1467:8, 1472:13–21 (Intervenor Connor Groce describing voting for Democratic candidate when he believed it to be in best interest of his community); 10 Tr. 2246:9–19, 2244:5–2245:17 (Intervenor Ben York describing perceived effect of candidate quality on electoral outcomes in Alamance County)). Judges are not meant to be fortune tellers any more than they are meant to be political scientists, statisticians, or mathematical probabilists. *See Rucho*, 588 U.S. at ___, 139 S.Ct. at 2503–04 ("[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). Hitching constitutional standards to the practice of judicial political prognostication has significant ramifications for judicial legitimacy as well— especially on an issue as consequential and inherently political as redistricting. *See Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring) ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence."). As such, this Court should deflect Plaintiffs'

invitation to take on the speculative, political project of predicting future election outcomes and dismiss Plaintiffs' claims.

IV. Plaintiffs' Legal Claims Have Are Not Recognized in North Carolina.

Plaintiffs claim that considering political factors in redistricting violates the Equal Protection Clause, the Free Elections Clause, and the Freedom of Speech and Association clauses of the North Carolina Constitution. (Am. Compl. ¶¶ 197–222.) This, however, is not a case about conflicting constitutional provisions. The rights Plaintiffs are claiming have never been recognized in North Carolina, and the North Carolina Constitution does not, explicitly or implicitly, prohibit the General Assembly from considering political factors in the legislative apportionment process.

A. Plaintiffs' Equal Protection Clause Claim Fails.

Plaintiffs first claim that the Equal Protection Clause of the North Carolina Constitution guarantees the right to "vote on equal terms" and is violated when the General Assembly engages in partisan gerrymandering. (Am. Compl. ¶¶ 5, 200–04). Plaintiffs presented no evidence at trial that their ability to cast a ballot was affected; rather, they contend that the Equal Protection Clause requires that all voters must be able to vote on "equal terms" and that the 2017 Plan prevents them from being able to vote on "equal terms." (Am. Compl. ⁋ 5; Pls. Pretrial Mem. 2, 20; Tr. 49:10-19). However, the "equal terms" language Plaintiffs use is from *Stephenson v. Bartlett*, 355 N.C. 354, 378–81, 562 S.E.2d 377, 393–95 (2002) (*Stephenson I*), a case not involving partisan gerrymandering but rather the constitutionality of having "both single member and multi-member districts in legislative districting plans." Unlike here, where Plaintiffs have suggested no standard by which the Court is to judge what voting on "equal terms" means, *Stephenson I* turned on the application of the clear and manageable one-person one-vote principle, i.e. voting on "equal

terms." *Id*. at 379, 567 S.E.2d at 394. Furthermore, the only mention the Court made of partisanship in *Stephenson I* was to recognize that partisan advantage and incumbency protection are lawful considerations in legislative redistricting. *Id.* at 371, 562 S.E.2d at 390. Accordingly, *Stephenson I* actually undercuts Plaintiffs' Equal Protection Claim, and it should be dismissed.

B. Plaintiffs' Free Elections Clause Fails.

Plaintiffs next claim that the Free Elections Clause of the North Carolina Constitution prohibits political considerations in legislative apportionment because the "packing" and "cracking" of voters "nullif[ies] the power of the vote." (1 Tr. 49:13–18.) Plaintiffs cite no North Carolina case law supporting this interpretation of the North Carolina Free Elections Clause. Instead, they cite a recent Pennsylvania Supreme Court case—*League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). (Am. Compl. ¶¶ 208−209; Pls.' Pretrial Mem. pp. 2, 10–11.) That case is not only non-binding on this court; it is inapposite because the holding there relies both on a materially different constitutional provision and on the absence of enumerated constitutional limitations on redistricting. *Compare* N.C. Const. art. 1, § 10 ("All elections shall be free.") *with* Pa. Const. art. 1, § 5 ("Elections shall be free *and equal* . . . ." (emphasis added)).

Setting aside the historical background of North Carolina's Free Elections Clause (*see* Legislative Defs.' Pre-Trial Br. 22–24), jurisprudence regarding North Carolina's Free Elections Clause is limited to procedural aspects of elections, such as "[a] free ballot and a fair count" and enforcing the voting age. *See Swaringen v. Poplin*, 211 N.C. 700, 700, 191 S.E. 746, 747 (1937) (holding plaintiff properly stated a claim under the Free Elections Clause that the county board of elections fraudulently registered underage voters); Orth & Newby 56 ("The meaning is plain: free from interference or intimidation."). Tellingly, in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964)—the only North Carolina case actually discussing the Free Elections Clause that

Plaintiffs cite—the constitutional violation at issue involved a statute that literally compelled plaintiffs to swear an oath of loyalty to a political party in order to qualify to vote in partisan primaries. *Id.* at 141–42, 134 S.E.2d at 169–70. Maps that merely incorporate political factors as one of many considerations, and which do not involve loyalty oaths in order to vote in elections, are in no way analogous to *Clark*. No North Carolina case law supports Plaintiffs' Free Election Clause vote nullification argument and, again, Plaintiffs fail to advance a standard by which the Court could judge whether a violation has occurred.

The Individual Plaintiffs' testimony shows that each voted for their candidates of choice in the last elections without any constraints. Plaintiff Joshua Perry Brown voted for the Democratic candidates of his choice in 2018, and his preferred candidate won his state house district. (Tr. 845:15–17, 830:19–20, 846:14–16.) Plaintiff Rebecca Kay Johnson voted for her candidates of choice over the last twenty years, and testified that her votes always count. (LDTX 324 ("Johnson Dep.") 53:22–54:6; PLTX 708 ¶ 4.) Plaintiff Derrick Miller voted for, and is represented by, his candidate of choice in his state house district. (Tr. 207:13– 208:1.) Plaintiff Lily Nicole Quick voted for her candidates of choice in the last election. (LDTX 322 ("Quick Dep.") 32:13–33:7.) And Plaintiff Leon Schaller is registered unaffiliated, and has voted for his Democratic candidates of choice since 2004. (LDTX 326 ("Schaller Dep.") 17:9-16; PLTX 700 ¶ 4.)

No North Carolina Court has ever recognized Plaintiffs' Free Elections Clause theory. Plaintiffs have shown no evidence that any Plaintiffs' ability to vote was impacted by the 2017 Plans. Plaintiffs' Free Elections Clause claim should be dismissed.

C. Plaintiffs' Free Speech and Association Claim Fails.

Finally, Plaintiffs claim that their rights to free speech and association are violated by the General Assembly's consideration of politics in the redistricting process. (Am. Compl. ¶¶ 216–

222). Plaintiffs halfheartedly argue this point in their pre-trial brief, where they hollowly echo their clarion call to the Court to "afford broader protection to the rights of free speech and association than their federal counterparts." (Pls. Pretrial Mem. 12–13). Perhaps this is because Plaintiffs recognize that their free speech and association arguments are based on theories wholly unsupported by the North Carolina Constitution and case law.

Plaintiffs claim that their free speech and association rights are violated "under either a discrimination theory or retaliation theory." (Pls. Pretrial Mem. 12). North Carolina's free speech law on these types of claims is substantively the same as federal First Amendment law. Helpfully, the three cases cited by Plaintiffs on these claims in their Pretrial Brief illustrate this point:

- *Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575 (1996), *aff'd*, 345 N.C. 177, 477 S.E.2d 926 (1996): The North Carolina Court of Appeals held that a federal court judgment on First Amendment claims were not *res judicata* as to free speech and association claims under the North Carolina Constitution; however, when the case returned to the North Carolina Court of Appeals, that court engaged in the *same analysis as the federal analysis*. *See Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175–76 (1999) (applying federal *Connick* standard to free speech retaliation claim under North Carolina Constitution).

- *McLaughlin v. Bailey,* 240 N.C. App. 159, 771 S.E.2d 570 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016): The North Carolina Court of Appeals noted that North Carolina courts adopted the federal standard for free speech retaliation claims. *See id.* at 173-74, 771 S.E.2d at 580–81.

- *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993): Though not noted in Plaintiffs' Pretrial Brief, Plaintiffs cite the dissenting opinion of Justice Mitchell in support of their claim. Earlier, in the majority opinion, the Supreme Court of North Carolina adopted federal First Amendment jurisprudence "for the purpose of applying our State Constitution's Free Speech Clause." *Id.* at 184, 432 S.E.2d at 841.

Knowing that the analysis of the North Carolina free speech claims alleged by Plaintiffs does not depart in any meaningful way from federal First Amendment jurisprudence, the appropriateness of dismissal of Plaintiffs' claims becomes apparent. The Supreme Court of the United States, the final arbiter of First Amendment jurisprudence, does not find that legislative maps burden speech or association. *Rucho*, 588 U.S. at __, 139 S.Ct. at 2504 ("[T]here are no

restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district."). The Court also found that partisan gerrymandering claims are no more justiciable under the First Amendment than they are under any other constitutional provision, because " 'a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,' contrary to our established precedent." *Id.* at 2505 (2019) (quoting *Vieth*, 541 U.S. at 294). Even if not binding on this Court, this opinion should be given "great weight" in its interpretation of the analogous First Amendment. *Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841 (quoting *State v. Hicks*, 333 N.C. 467, 484, 423 S.E.2d 167, 176 (1993)).

Moreover, even if the North Carolina standards that Plaintiffs cite are somehow different from federal standards, Plaintiffs' claims still fail. The 2017 Plans do not prevent individuals from voting, and therefore are not a content-based restriction on whatever expression the individual Plaintiff make when casting their votes. Crucially, the individual Plaintiffs have not experienced such an effect from the maps. The individual Plaintiffs who were deposed or testified at trial admitted that they have not been chilled from exercising their rights to free speech and association—in many instances, their dissatisfaction with the legislative maps have actually emboldened them to exercise those rights. For example, Plaintiff Rebecca Johnson testified that the 2017 maps have actually increased her political involvement by making it more likely for her to participate in Common Cause's activities, and admitted the way her districts are drawn does not affect her decision to vote. (Johnson Dep. 89:24–90:6, 120:8–11.) Likewise, Plaintiff Leon Schaller also admitted that the challenged maps do not burden his freedom of association or his ability to express himself. (Schaller Dep. 58:1–15.) Further illustrating the positive effect that the maps have had on Plaintiffs' political involvement, testimony from the North Carolina Democratic

Party Chairman Wayne Goodwin illustrates how dissatisfaction emboldened Democrats in recent years. Goodwin testified that the 2018 election cycle had a "tremendous palpable level of enthusiasm[,] . . . candidates running in every race[,] . . . the most funds raised for a mid-term election that we've seen in North Carolina for the Democratic Party and outraising the Republican Party for the legislative races." (6 Tr. 1263:19–23, 1268:19–23).

The First Amendment does not provide an appropriate or justiciable claim for partisan gerrymandering; neither do the analogous free speech and association provisions contained in Article I, Sections 12 and 14 of the North Carolina Constitution. Furthermore, contrary to Plaintiffs' claims in their Complaint and Pretrial Brief, Plaintiffs' free speech and association rights were emboldened by the 2017 Plans—not chilled. Plaintiffs' Free Speech and Association claims have no legal or factual merit, and should be dismissed.

V. The Court Lacks the Power to Grant the Relief Sought by Plaintiffs.

Plaintiffs have made clear that the goal of this lawsuit is to remove "politics" from redistricting. Bob Phillips, Executive Director of Common Cause North Carolina, testified that Plaintiffs filed this lawsuit in order to "remove politics out of the [redistricting] process." (1 Tr. 40:14−41:16, 43:10−22.) Mr. Phillips believes that if Plaintiffs are successful in this litigation, then the Court would promulgate "some new standards and rules regarding no longer us[ing] [sic] politics in the process." (1 Tr. 70:12−20.) Similarly, Wayne Goodwin, Chairman of the North Carolina Democratic Party, testified that redistricting "should be done in a way that is not partisan." (6 Tr. 1262:11−18, 1268:19−1269:2.)

This lawsuit is the wrong forum for Plaintiffs to accomplish this goal. The legislative apportionment authority is vested in the General Assembly by the North Carolina Constitution, and the appropriate remedy for Plaintiffs' attempts to restrict the General Assembly's redistricting

power by taking politics out of redistricting is either for the legislature to change the map-drawing criteria to remove partisan considerations, or through a constitutional amendment. *See generally* N.C. Const. art. XIII; Orth & Newby, *supra*, at 201-02 (discussing N.C. Const. art. XIII). Plaintiffs recognize this, as this lawsuit was filed only after Plaintiffs were unable to obtain the support necessary for passage of a constitutional amendment prohibiting consideration of politics in the redistricting process. (1 Tr. 69:16–18; 71:25–72:5; 86:5–87:11). Indeed, states such as Florida, Colorado, and Michigan have state constitutional amendments designed specifically to restrict partisan considerations in the redistricting process. *Rucho*, 139 S.Ct. at 2507–08. That Plaintiffs have been unable to garner sufficient support for passage of such a constitutional amendment does not mean that the remedy they seek should instead be granted by Court order. The Constitution mandates that Plaintiffs follow the constitutional amendment process in order to place any restrictions on the legislative apportionment process not already contained in the Constitution. Since the Constitution does not prohibit the General Assembly from taking political considerations into account in legislative redistricting, Plaintiffs' claims should be dismissed with prejudice.

CONCLUSION

For these reasons, the Court should dismiss all Plaintiffs' claims with prejudice and judgment for Defendants on all claims contained in the Amended Complaint.

This, the 7th day of August, 2019

Respectfully submitted,

SHANAHAN LAW GROUP, PLLC

By: _____

John E. Branch III, NCSB # 32598
Nathaniel J. Pencook, NCSB # 52339
Andrew D. Brown, NCSB #45898
128 E. Hargett Street, Suite 300
Raleigh, North Carolina 27601
Telephone: (919) 856-9494
Facsimile: (919) 856-9499
jbranch@shanahanlawgroup.com
npencook@shanahanlawgroup.com
abrown@shanahanlawgroup.com

Attorneys for Defendant-Intervenors

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by email transmittal to the following:

Edwin M. Speas, Jr.
Caroline P. Mackie
POYNER SPRUILL LLP
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com
cmackie@poynerspruill.com
Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
ARNOLD AND PORTER KAYE SCHOLER
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
stanton.jones@amoldporter.com
david.gersch@arnoldporter.com
Elisabeth.Theodore@arnoldporter.com
Daniel.jacobson@arnoldporter.com
Counsel for Common Cause and the Individual Plaintiffs

Marc E. Elias
Aria C. Branch
PERKINS COIE LLP
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com
abranch@perkinscoie.com
Counsel for Common Cause and the Individual Plaintiffs

Abha Khanna
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com
Counsel for Common Cause and the Individual Plaintiffs

Stephanie A. Brennan
Amar Majmundar
NC DEPARTMENT OF JUSTICE
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
sbrennan@ncdoj.gov
amajmundar@ncdoj.gov
Counsel for the State of North Carolina and State Board of Elections and Ethics Enforcement and its members

Phillip J. Strach
Michael McKnight
Alyssa Riggins
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com
Counsel for the Legislative Defendants

Mark E. Braden
Richard Raile
Trevor Stanley
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
Counsel for Legislative Defendants

This the 7th day of August, 2019.

SHANAHAN LAW GROUP, PLLC

By: _____

John E. Branch III, NCSB # 32598
Nathaniel J. Pencook, NCSB # 52339
Andrew D. Brown, NCSB #45898
128 E. Hargett Street, Suite 300
Raleigh, North Carolina 27601
Telephone: (919) 856-9494
Facsimile: (919) 856-9499
jbranch@shanahanlawgroup.com
npencook@shanahanlawgroup.com
abrown@shanahanlawgroup.com
Attorneys for Defendant-Intervenors