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.

LEGISLATIVE DEFENDANTS' POST-TRIAL BRIEF

TABLE OF CONTENTS

LEGISLATIVE DEFENDANTS' POST-TRIAL BRIEF

Plaintiffs brought this case not to vindicate democracy but to tear it apart. Democracy depends on the principle that "courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *In re Markham*, 131 S.E.2d 329, 333 (N.C. 1963). But Common Cause brought this case as "a challenge to the process" of redistricting (Tr. 62:17), and "the central part of the challenge" is to "the process by which the map was enacted" (Tr. 65:4–10). Its representative testified that "any map that is drawn the way we do it in North Carolina is unfair" and "therefore unconstitutional." (Tr. 65:14–25.) It does not know what districts it challenges or why and did not make those choices. (Tr. 62:11–14; Tr. 64:6–18.) Instead, Plaintiffs offer the rule that "a bad process creates an unconstitutional map." (Tr. 65:11–13.) In other words, the North Carolina Constitution got redistricting wrong, and it is this Court's job to fix it.

The Court can safely dismiss that anti-democratic view and this case. Common Cause knows full well that the General Assembly, not this Court, is the proper forum for their assertions. The Court heard how Common Cause, whose mission includes "redistricting reform" (Tr. 42:19–21; Tr. 43:12–22), made "efforts" to obtain legislatively what it now seeks through litigation. (Tr. 43:23–44:1.) Each bill Common Cause introduced contained "a prohibition against considering partisan affiliation and voting data." (Tr. 44:18–23; PTX631 § 120–2.3(f); Tr. 46:6–9; PTX633 § 25(7); Tr. 46:16–25; PTX634 § 25(7).) One bill "to establish a nonpartisan redistricting process" *within* the General Assembly passed the House and, like the others, barred politics from redistricting. (Tr. 47:2–17; PTX632 § 120-4.54(h).)

But Common Cause faced bipartisan headwinds. "[N]one of those bills passed the Legislature," and many "failed the legislative process when the Legislature was controlled by Democrats." (Tr. 61:12–20.) Fed up with the democratic process, Common Cause decided that "litigation was the remedy to actually get something done" on its legislative goals. (Tr. 52:10–11.)

This is an admission that Plaintiffs' claims are not supported by existing law. If Common Cause believed the North Carolina Constitution forbade partisan redistricting, it would not have sought to legislate such a prohibition. Plaintiffs pressed this theme of legislation from the bench throughout trial, soliciting witnesses' personal opinions—both by gimmickry (Tr. 2226:1–2227:3 (Barber)) and appeals to personal conviction (Tr. 2355:2–17 (Brunell))—that "partisan gerrymandering" is not "good for American democracy" (Tr. 2228:14–18). But they identify no legal basis for courts to render freewheeling rulings on what is "good" or "bad" for democracy.

Nor does one exist. It is elementary that "the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 399 S.E.2d 311, 315 (N.C. 1991). There is no rule "that this Court can address the problem of partisan gerrymandering because it must." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). The power of "judges to say what the law is, rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Id.* (quotation marks omitted). As Common Cause's actions show, there is no legal claim here, and the ones alleged are barely even pretexts. What is and is not good for democracy is set forth in the North Carolina Constitution, and it reads: "The General Assembly . . . shall revise the senate [and representative] districts." N.C. Const. Art. II §§ 3, 5. The people have spoken, and their word governs.

Plaintiffs' legislative effort here is uniquely odious because Common Cause has teamed up with the North Carolina Democratic Party to advance it. But the Democratic Party's legislative representatives rejected Common Cause's redistricting-reform effort when they had the power to legislate it into being. (Tr. 61:12–19.) Now that a Republican majority has taken *the very same position*, the Democratic Party cries foul and demands judicial assistance to force the Republican

majority to make the very choices the Democratic majority rejected. No rule of law supports the nonsensical view that one set of legislators can force another to make the choices the first set is itself unwilling to make. Worse, the Democratic Party most certainly *still* does not want non-partisan redistricting. The 2017 redistricting process was not fundamentally different from what it was under the Democratic Party control. (Tr. 168:6–20 (Meyer).) The Party transparently litigates to seize back the power to draw the lines for its own benefit in 2020. (*See, e.g.*, Tr. 188:6–17 (Rep. Meyer testifying that he would prefer that "a little bit of Asheville" be split to make districts "easier to win for Democrats"); Tr. 214:5–14 (Plaintiff Miller testifying of goal "to take the State Legislature out of Republican hands"); *see also* Tr. 1265:1–4 (Democratic Party exists to elect Democrats).)

Plaintiffs' claims are, as they should be, non-justiciable. Only the political branches, and the general public, can usher in the redistricting reform they demand. Unless that occurs, redistricting will remain the domain of the General Assembly, a political actor that may "consider partisan advantage and incumbency protection" within the confines of the Constitution's strict redistricting rules. *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002). The General Assembly relied on *Stephenson* in 2011 and 2017, and Plaintiffs' request for an *ex post facto* revision of the law—and for the sake of just one election—is as politically offensive as it is legally untenable.

And it is unnecessary. The evidence shows that the existing rules worked. Two long weeks of soporific expert filibustering showed only that the General Assembly sometimes selected (and sometimes did not) the most Republican-leaning district configurations on a limited and fair menu of options. Dr. Mattingly and Dr. Chen's analyses, taken at face value, showed that this is a fight over (maybe) five of 170 legislative seats. And the 2018 results show that Democratic members already have made up the differential. The Court need only look to the simple fact that Plaintiffs'

presentation ignored 2018, the most recent election year with the most probative data. Given their arsenal of time, funding, and expertise, it is as plain as day that those numbers were run and the results rejected because they did not help Plaintiffs' case.

That Republican legislators might (but might not) have tried to eke out a subtle advantage does not make this case "egregious." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting). It proves only why the judiciary need not concern itself with Plaintiffs' political fortunes. Plaintiffs' goal is to end the General Assembly's role in redistricting. Whether that should occur is a political question for a political forum. There being no *legal* claim of right, Plaintiffs' claims must be dismissed.

I. Plaintiffs' Claims Have No Legal Basis

A. Plaintiffs' Claims Are Non-Justiciable

Plaintiffs' claims fail each disjunctive justiciability element: (1) they raise issues the Constitution commits to a political branch, and (2) no satisfactory or manageable criteria or standards exist to adjudicate them. *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (2004).

First, the State Constitution delegates to the General Assembly, not courts or a commission or the Democratic Party, the power to create legislative districts. Naturally, the fact that a redistricting plan was passed through the constitutionally prescribed process cannot itself mean (as Common Cause contends (Tr. 65:20–25)) that the plan is unconstitutional. *Stephenson v. Bartlett*, 562 S.E.2d 377, 378 (N.C. 2002) ("[A] constitution cannot be in violation of itself."). Far from it, a delegation to a political branch necessarily allows it to "consider partisan advantage and incumbency protection in the application of its discretionary redistricting decision." *Id.* at 390. All parties know this. The Court heard how William Gilkeson, a Democratic attorney with extensive experience advising the General Assembly on election law (Tr. 1705:13–1706:18), drew maps to propose to the *Covington* court (Tr. 1708:16–1709:3). He drew them behind closed doors, in secret.

(Tr. 1712:18–1713:1; *see also* Tr. 1707:12–19.) He met with Democratic—and only Democratic—legislators (Tr. 1713:13–1725:1) about "how they wanted their district[s] drawn" (Tr. 1716:3–5) and "whether they could be elected in the district[s]" he drew (Tr. 1717:1–4; *see also* Tr. 1718:9–1725:1). As of 2017, the Democratic Party knew that no legal problem results from that course of conduct.

The law is the same today. "Our North Carolina Supreme Court has observed that 'we do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506 (2007)). Whether or not the General Assembly's acts are wise, "this court is not capable of controlling the exercise of power on the part of the General Assembly, . . . and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly . . . and erecting a despotism of [judges], which is opposed to the fundamental principles of our government and usage of all times past." *Howell v. Howell*, 66 S.E. 571, 573 (N.C. 1911).

Second, claims asserting that a districting plan is somehow harmful to democracy are "not based upon a justiciable standard." *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014).[1] Because "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), a "partisan gerrymandering" claim could only proceed with some reliable standard for distinguishing good from bad politics. Plaintiffs appear to

[1] Although the U.S. Supreme Court vacated the federal-law conclusions in *Dickson*, *Dickson v. Rucho*, 137 S. Ct. 2186 (2017), the U.S. Supreme Court lacks jurisdiction to overrule the North Carolina Supreme Court's state-law rulings.

assert that *no* consideration of political data is constitutional. *See* Pls' Pre-Trial Br. 14. The State Supreme Court has already rejected that view, *Stephenson*, 562 S.E.2d at 390, and Common Cause's legislative redistricting-reform effort concedes that *existing* law stands against Plaintiffs. Aside from their zero-tolerance argument, however, Plaintiffs' offer *no* test for discerning "at what point" politics "went too far." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). That is because this question simply asks whether a political act is wise or unwise.

It has been settled for over 100 years that these claims are non-justiciable. *Howell* rejected as non-justiciable a claim that lines of a special-tax school district "were so run as to exclude certain parties opposed to the tax and include others favorable to it." 66 S.E. at 572. The Court (1) found that an "attempt to gerrymander" the district "was successfully made," (2) could not "refrain from condemning" that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 574. And yet the Court *still* held that "the courts [are] powerless to interfere and aid the plaintiffs." *Id.* "There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 573. The North Carolina Supreme Court reaffirmed this principle again just five years ago. *Dickson*, 766 S.E.2 at 260. It is a mystery why Plaintiffs think it can be called into question now.

Plaintiffs' justiciability arguments, to the extent they have any, fail.[2] Plaintiffs' analogy to decisions prohibiting racially gerrymandered and unequally populated districts that are founded on the principle that these practices are "bad for American democracy" (Tr. 2226:22–2227:15) is

[2] That Plaintiffs' pretrial brief fails even to mention justiciability is itself telling.

inapt. The judicial rationale is not that these practices are "bad for democracy" but that they violate individual-rights doctrine. The racial-gerrymandering decisions posit that "racial classifications are immediately suspect" because they "threaten to stigmatize individuals by reason of their membership in a racial group." *Shaw v. Reno*, 509 U.S. 630, 642 (1993). As the North Carolina Supreme Court has explained, "challenges which rest upon instances of alleged racial discrimination" are "[t]he sole exception to" non-justiciability in this arena. *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 148 (N.C. 1980). Similarly, the one-person, one-vote rule follows from the principle that, because "all voters, as citizens of a State, stand in the same relation" as others, there is no legitimate basis to draw districts of substantially unequal population. *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964). The decisions do not turn on what courts think is "bad for democracy" but rather on the rights the Constitution guarantees for individuals.

In contrast, Plaintiffs' case "is a case about group political interests, not individual legal rights." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Even if Plaintiffs think their preferences are good for democracy, courts are "not responsible for vindicating" them. *Id.* Plaintiffs do not belong to a suspect class. Nor do they suffer an injury to "a constitutionally protected right to vote, and to have their votes counted." *Reynolds*, 377 U.S. at 554–55 (citations omitted). Instead, they complain of the political impact of district lines that will, in all events, have political consequences. (*See* Tr. 1015:23–1016:2 (Dr. Cooper testifying that "[e]very VTD that is included in or removed from a district has some political consequence" or "partisan consequence").) A "politically mindless approach" is not advisable, and, "in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney*, 412 U.S. at 753. It is impossible *not* to intend political results, except through sheer ignorance. The State Constitution

does not demand ignorance. It assigns weighing the benefits and burdens to the General Assembly, rendering the question political, not legal.

Besides, Plaintiffs' good-for-democracy narrative purports to describe the development of *federal* constitutional law—since the racial-gerrymandering and equal-population cases are *federal*—and the U.S. Supreme Court recently rejected Plaintiffs' arguments on this (and every other) point. *Rucho*, 139 S. Ct. at 2496–98 (presenting a markedly different historical view from Plaintiffs'). By comparison, North Carolina law is grounded in the explicit text of Article II §§ 3 and 5. The North Carolina Constitution was amended in 1968 to include an express equal-population requirement, *see Stephenson*, 562 S.E.2d at 392 (Orr, J., concurring in part), and those provisions spell out other highly restrictive rules. The existence of explicit redistricting requirements proves that Plaintiffs' additional *non-textual* requirements are unsupported in the document. *See In re Spivey*, 480 S.E.2d 693, 697 (N.C. 1997). This is underscored by the principle that "the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Cooper v. Berger*, 822 S.E.2d 286, 296 (N.C. 2018). There being none, Plaintiffs have no case.

Plaintiffs also say the Court need not reject their claims "just because the U.S. Supreme Court refuses to act."[3] (Tr. 20:3–5.) But a claim held non-justiciable in federal court does not automatically become justiciable in North Carolina. Quite the opposite, a claim deemed unfit for federal court is hardly worthy of this Court. Indeed, North Carolina courts have looked to federal justiciability doctrine for guidance. *See, e.g.*, *Hoke Cty. Bd. of Educ.*, 599 S.E.2d at 391.

[3] They say this as if Chief Justice Roberts's opinion—which relied on the writings of Justice Sandra Day O'Connor, "a Justice with extensive experience in state and local politics," *see Rucho*, 139 S. Ct. at 2498–99—were the product of pigheadedness rather than judicial sobriety.

The Supreme Court's concerns about maintaining judicial impartiality in the face of highly partisan redistricting lawsuits ring as true in state as in federal court. The Court need look no further than the *amici* who, just today, lined up to support Plaintiffs, including the Democratic Governor and Attorney General (despite that his office represents Defendants in this case) and former North Carolina Governors who defended and perpetrated some of the strangest-looking districts in the history of democracy. The participation of Governor Cooper and former Governor Michael Easley is especially rich. Easley is the "Easley" in *Easley v. Cromartie*, 532 U.S. 234, 241 (2001), who persuaded the Supreme Court to rule in favor of a hideous-looking district because politics, rather than Voting Rights Act compliance, explained the contours of the monstrosity. *See id.* at 242. Cooper was the redistricting chairman responsible for that district. As these *amici* would have it, that was then (when Democrats drew the lines) and this is now (since Republicans drew the lines). They do not want a fair process; they want to win. These filings lay bare that this case is a political fight in its purest form, and no legal standard enables this Court to pick a winner. Nor should it try.[4]

A finding of justiciability would open the proverbial floodgates of litigation at every level of government. It would subject legislative will to judicial oversight and invade this discretionary sphere on a highly subjective basis. And each case would tempt the presiding judge or judges to abandon neutral rules of law in favor of partisan preference. Vindicating the arguably justified fear that legislatures might place "too much" weight on partisan considerations would pose the unquestionably unacceptable risk that judges will place *any* weight on such considerations—

[4] Legislative Defendants will respond to the substance of these briefs in due course.

thereby trading partisan redistricting for partisan redistricting *litigation*. There is no reason to open this door.

B. Plaintiffs Lack Standing

Another reason to dismiss these political questions is that Plaintiffs lack standing. No injury results from being represented by a member of the opposing party, many Plaintiffs are already represented by Democratic members, and many others live in Republican neighborhoods and would be represented by Republican members in all events. No judicial relief is available.

1. The Individual Plaintiffs Lack Standing

The elements of standing are (1) injury in fact, (2) causation, and (3) redressability. *Walker v. Hoke Cty.*, 817 S.E.2d 609, 611 (N.C. Ct. App. 2018). Because the right to vote is individual and specific to each person, and any "interest in the composition of 'the legislature as a whole'" is "a collective political interest, not an individual legal interest," the U.S. Supreme Court unanimously held that claims of partisan vote dilution must be asserted as to each individual district.[5] *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1932 (2018). The Court also offered parameters for assessing individualized injury. One is that a "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm; the voter's interest is in the voter's own district, where the voter votes. *Id.* at 1932. Another is that a district's partisan composition is not a cognizable injury if a similar composition would result "under any plausible circumstance." *Id.* at 1924, 1932. A third is that injury must be proven, not merely alleged. *Id.* at 1931–32.

[5] Though not binding, U.S. Supreme Court precedent is "instructive" for interpreting North Carolina standing requirements. *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 660 S.E.2d 217, 223 (N.C. Ct. App. 2008) (quoting *Goldston v. State*, 637 S.E.2d 876, 882 (N.C. 2006)). It is especially instructive here, where the case law is unanimous and directly on point.

One group of Plaintiffs that lacks standing includes those who, by Plaintiffs' own calculus, live in Democratic-leaning districts that would, under any plausible circumstance, remain Democratic-leaning.[6] *Id.* at 1924, 1932. These Plaintiffs both (1) currently elect their preferred candidates and (2) would *continue* to elect their preferred candidates in Plaintiffs' counter-factual scenarios. According to Dr. Chen's simulation charts, these Plaintiffs are, as to House districts, Virginia Walters Brien (HD102), Joshua Perry Brown (HD60), Dwight Jordan (HD25), David Dwight Brown (HD58), and William Service (HD34). (PTX115.) As to Senate districts, these Plaintiffs are Virginia Walters Brien (SD37), Joseph Tomas Gates (SD49), John Mark Turner (SD15) and John Balla (SD16). (PTX117.) Plaintiffs' analysis shows that, although the partisan composition might be different (as shown by the gray dots), the range of possibilities does not cross the 50% line, so the districts would, in all plausible events, be Democratic.

It is equally obvious that Plaintiffs in districts that are not partisan outliers in Plaintiffs' analyses are not injured. Whatever the partisan composition, and whatever it *might* be, the evidence has failed "to prove that he or she lives in a cracked or packed district." *Gill*, 138 S. Ct. at 1932. As to House districts, these Plaintiffs (not listed above)[7] are Rebecca Johnson (SD31), Pamela Morton (HD100), Leon Charles Schaller (HD64), Karen Sue Holbrook (HD17), George David Gauck (HD17), James Makin Nesbit (HD19), Rosalyn Sloan (HD67), Deborah Anderson Smith (HD83), Alyce Machak (HD109), Nancy Bradley (HD35), John Balla (HD34), and Aaron Wolff (HD37). (PTX115.) As to Senate districts, these Plaintiffs (not listed above) are Joshua Perry Brown (SD26) and Kathleen Barnes (SD48). (PTX117.)

---

[6] As described below, Legislative Defendants dispute Plaintiffs' simulation method. They assume its validity here for the sake of argument only, given Plaintiffs' threshold standing burden.

[7] Some Plaintiffs fall in multiple categories and, for the sake of brevity, are not relisted.

Other Plaintiffs live in Republican-leaning districts that would in all events *still* be Republican-leaning. Even if living in a district represented by a member of another party is a cognizable injury (it is not), the Court cannot redress it. The Court could only give these Plaintiffs a somewhat different Republican-leaning district. As to House districts, these Plaintiffs (not listed above) are Julie Ann Frey (HD69), Howard Du Bose Jr. (HD2), Lesley Brook Wischmann (HD15), and Stephen Douglas McGrigor (HD7). (PTX115.) As to Senate districts, these Plaintiffs (not listed above) are Dwight Jordan (SD11), David Dwight Brown (SD27), Karen Sue Holbrook (SD8), James Mackin Nesbit (SD9), George David Gauck (SD8), Derrick Miller (SD8), and Nancy Bradley (SD14). (PTX117.) These Plaintiffs have, at a minimum, failed to prove redressability.

Next are the Plaintiffs who live in Democratic-leaning districts that might be Republican-leaning under other circumstances. Although it is possible that "packing" rendered the districts less competitive than they might otherwise have been, these Plaintiffs *benefit* in their *own* districts. Their claim of injury can only concern the legislature as a whole—the argument being that the Democratic voters in these districts could be spread into other districts for a statewide advantage. This is precisely the alleged "interest in the composition of 'the legislature as a whole'" that is *not* an individualized injury. *Gill*, 138 S. Ct. at 1932. As to House districts, these Plaintiffs (not listed above) are Paula Ann Chapman (HD100), Electa E. Person (HD43), Amy Clare Oseroff (HD8), and Derrick Miller (HD18). (PTX115; *see also* Tr. 212:9–15 (Plaintiff Miller expressing satisfaction with his representative).) On the Senate side, these Plaintiffs (not listed above) are Paula Ann Chapman (SD40) and Pamela Morton (SD37). (PTX117.)

Some Plaintiffs live in districts that Plaintiffs call Republican-leaning districts but are, in fact, represented by Democratic members. Whatever injury Plaintiffs may claim is theoretical. They already have the Democratic representation they want—a point underscored by the fact that

only one election remains under the enacted plans. As to House districts, these Plaintiffs (not listed above) are Vinod Thomas (HD98), Kristin Parker (HD103), Jackson Thomas Dunn, Jr. (HD104), Mark S. Peters (HD116), Joseph Thomas Gates (HD115), and Rebecca Harper (HD36). (PTX115.) As to Senate districts, these Plaintiffs (not listed above) are Vinod Thomas (SD41), Rebecca Harper (SD17), and Aaron Wolff (SD17). (PTX117.)

The remaining Plaintiffs are represented by Republican members in Republican-leaning districts that might (but might not) be Democratic-leaning districts under Plaintiffs' counter-factual analysis. Although their claim to standing is somewhat better than others, it still falls short. American law and democratic tradition presume that a person is represented by the person's designated representative, regardless of descriptive similarity or party affiliation. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). It is therefore not self-evident that these Plaintiffs are injured simply in that they are represented by a Republican or even in that the map places them in a district with constituents who prefer that Republican. (*See* Tr. 206:12–17 (Plaintiff Miller conceding he has no "right" to elect his representative of choice).) A plaintiff "must demonstrate standing"; it cannot be assumed. *Walker*, 817 S.E.2d at 611 (quotation marks omitted); *see also Universal Cab Co. v. City of Charlotte*, 247 N.C. App. 479 (2016) (a plaintiff bears the burden). And the evidence at trial *disproved* any claim to injury. It showed that all legislators provide constituent services regardless of constituents' political affiliations or voting preferences. (Tr. 2000:24–2001:6 (Brown); Tr. 1491:25–1492:17 (Owen); Tr. 1512:22–1520:2 (Owen); LDTX293 at 24; Tr. 1744:9–1745:12 (Bell); Tr. 121:18–122:10; Tr. 123:21–22 (Blue); Tr. 168:23–169:24 (Meyer).) It also showed that "[v]ery few issues" on the legislative agenda "are partisan" (Tr. 2002:5), every bill is a political compromise (Tr. 2003:21–25), and each state senator votes with the majority over 80% of the time (Tr. 2007:4–8;

see also LDTX293 at 23–24)). The General Assembly is more diverse than ever. (LDTX166; LDTX293 at 19–20; LDTX294; LDTX295; Tr. 1524:2–1526:2.) Even if a constituent does not feel represented in the constituent's district, the constituent likely shares "descriptive" similarities with *some* legislator or many, a form of representation viewed as meaningful in political science (LDTX293 at 18–20, Tr. 1489:15–1490:11; Tr. 1491:7–22; Tr. 1533:16–20.)

Nor is it even obvious that, under a different situation, any of these districts would be meaningfully different politically. Plaintiffs' simulations show that many possible district configurations remain Republican-leaning, and there is no guarantee that a Democratic member would win a Democratic-leaning district. Thus, these Plaintiffs' claims also fail. As to House districts, these Plaintiffs are Rebecca Johnson (HD74), Lily Nicole Quick (HD59), Donald Allan Rumph (HD9), and Carlton E. Campbell Sr. (HD46). (PTX115.) As to Senate districts, these Plaintiffs are Kristin Parker (SD39), Jackson Thomas Dunn, Jr. (SD39), Mark S. Peters (SD48), William Service (SD18), and Stephen Douglas McGrigor (SD18). (PTX117.)

2. The Organizational Plaintiffs Lack Standing

The standing assertion by the two organizations in this case, Common Cause and the North Carolina Democratic Party, fares no better. Neither has standing to press vote-dilution claims in its own right, since neither organization can vote.

Nor do the 2017 plans harm these associations' ability to speak and organize. The North Carolina Democratic Party raised more money after the 2017 plans were adopted than ever before (Tr. 1284:2–5; Tr. 1268:21–23), and the evidence overwhelmingly shows that Democratic constituents are neither deterred nor even slightly discouraged from participating in the political process (Tr. 836:16–837:18). The Party fielded candidates in all but one district, and the evidence shows that it has a robust organization and advocacy effort. (Tr. 1267:24–25; Tr. 1268:19–20; Tr.

1285:16–23; Tr. 75:23–76:8.) Common Cause, meanwhile, does not run candidates and has shown no negative impact on its internal affairs or advocacy even arguably caused by the 2017 plans.

These organizations' claim to assert the rights of their members is also unfounded. An organization has representational standing only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 388 S.E.2d 538, 555 (N.C. 1990) (citation omitted). None of these elements are satisfied.

Neither association satisfies the first element. As shown above (§ I.B.1), no individual plaintiff has standing to challenge any district, and there is no showing that any other individual not joined as a party would succeed where they have failed.

Common Cause, at least, does not satisfy the second element. Common Cause claims to be non-partisan and therefore has no organizational purpose of electing Democratic members. The organization's interest in "fair" elections does not qualify because that is a paradigmatic "generally available grievance about government." *Gill*, 138 S. Ct. at 1923 (quotation marks omitted).

And neither association satisfies the third element. "[A] person's right to vote is 'individual and personal in nature.'" *Id.* at 1929 (quoting *Reynolds*, 377 U.S. at 561). North Carolinians do not vote in their capacity as members of a party but as citizens. There is no nexus between a party's and its voters' interests, and the party cannot assert their voting rights as its own. In fact, the Chairman of the Democratic Party testified that registered Democratic Party members are not reliable Democratic Party voters. (Tr. 1281:21-25; *see also* Tr. 1279:2-8.) The Party itself does not know which voters it can even claim to represent. It cannot meet its burden on such a hazy claim.

C. Plaintiffs' Claims Are Not Cognizable

As shown in Legislative Defendants' pre-trial brief (at 16–25), Plaintiffs' claims are unfounded. Common Cause conceded this when it sought redistricting-reform legislation. It also stands to reason in light of the North Carolina Supreme Court's express endorsement of "partisan" considerations in redistricting, *Stephenson*, 562 S.E.2d at 390, its overt rejection of this cause of action, *Howell*, 66 S.E. at 573, and in the U.S. Supreme Court's decision closing the door on *every* partisan-gerrymandering claim.[8] This Court is bound to reject Plaintiffs' claims.

1. The Equal Protection Clause Does Not Support Plaintiffs' Claims

Plaintiffs' equal-protection argument invokes the principle "that the right to vote on equal terms is a fundamental right." Pls' Pre-Trial Br. 9 (quoting *Stephenson*, 562 S.E.2d at 393). But they fail to explain what is unequal about the "terms" of the *individual* right to vote. *Stephenson* concluded that the "use of both single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution." 562 S.E.2d at 395. It reasoned that single-member-district residents can elect a smaller percentage of the electoral body than multi-member-district residents can elect. *Id.* at 395–98. The other case Plaintiffs cite, *Blankenship v. Bartlett*, 681 S.E.2d 759, 766 (N.C. 2009), was a straightforward equal-population case condemning a scheme where voters in one district "elect one judge for every 32,199 residents" and voters in another "elect one judge per every 140,747 residents, 158,812, and 123,143 residents, respectively." *Id.* That is simple vote dilution.

Nothing like that is present here. All voters have equal sway over elections as compared to other voters in their district and in other districts. The playing field is even. Plaintiffs' objection is

---

[8] Notably, the dissent in *Common Cause v. Rucho* provides precious little explanation on how "gerrymandering" violates any constitutional doctrines, fairly applied. 139 U.S. at 2514–15 (Kagan, J., dissenting) (devoting only two cursory paragraphs to doctrinal discussion).

that some Republican voters are joined with other Republican voters, whereas some Democratic voters are joined with Republicans who can outvote them. That, however, is a complaint about *private* voting choices. If some Republican voters changed their minds and voted with Democratic voters, the "gerrymander" would vanish. Those voters, just like Plaintiffs, are free to make their own choices, which are not challengeable state action. Moreover, for reason stated above (§ I.B.1), no injury results from casting a losing vote because there is no right to win. [9]

Plaintiffs' assertion, in truth, is not one of voting harm—since all votes are equal—but rather a theory of a suspect classification, rendering the government's "intent" and "effect" of placing voters into districts on this basis suspect. Pls' Pre-Trial Br. 11–12. But this is a *non-sequitur*. Placing voters into districts on the basis of race is a constitutional problem because race is a suspect classification. But "political classifications" are "permissible." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). "Inasmuch as racial discrimination is not involved in this action, that exception has no application." *Texfi Indus.*, 269 S.E.2d at 147–48. Membership in—or preference for—a party is not a suspect class. *Libertarian Party of North Carolina v State*, No. 05 CVS 13073, 2008 WL 8105395, at *6 (N.C. Super. Ct. May 27, 2008). This is among the many classifications that do not trigger strict scrutiny, including corporate status, *Texfi Indus.*, 269 S.E.2d at 149, disability, *Layton v. Dep't of State Treasurer*, 827 S.E.2d 345 (N.C. Ct. App. 2019), geographic location, *White v. Pate*, 304 S.E.2d 199, 204 (N.C. 1983), out-of-state residency, *Town of Beech Mountain v. Cty. of Watauga*, 378 S.E.2d 780, 783 (N.C. 1989), employment status, *Pangburn v. Saad*, 326 S.E.2d 365, 368 (N.C. 1985), and property ownership, *Dep't of Transp. v.*

[9] What's more, as discussed above (§ I.B), many Plaintiffs are in districts with likeminded individuals who also vote Democratic and therefore have successfully elected their candidate of choice, and many more would be grouped in Republican-leaning in all plausible circumstances. Standing aside, no cognizable constitutional harm is present.

Rowe, 549 S.E.2d 203, 208 (N.C. 2001). Persons who tend to vote for Democrats have "clearly suffered no oppression or disadvantage meriting particular consideration from the judiciary and display[] none of the traditional indicia of a suspect class." *Town of Beech Mountain*, 378 S.E.2d at 783. The Democratic Party has fared well in North Carolina politics and needs no judicial help to look out for its needs or political fortunes.

2. The Free Elections Clause Does Not Support Plaintiffs' Claims

Plaintiffs' argument that the 2017 plans violate the State Constitution's requirement that "[a]ll elections shall be free," N.C. Const. Art. I § 10, also fails. Plaintiffs interpret the clause to mean "votes should make a difference," Pls' Pre-Trial Br. 11, but all votes currently do.

To be clear: robots are not voting. People are voting. Their votes are counted. Their votes (and nothing else) decide the races. No ballot boxes are being stuffed. No eligible voter is denied a vote. No voter is required to take a loyalty oath.[10] Plaintiffs disagree with the voting choices of their neighbors. Unable to persuade them to vote differently, they want the Court to give them new neighbors (but not too many Democratic ones, lest they be "packed"). This has nothing to do with free elections. There is no evidence—literally, none—showing that votes do not "make a difference." Pls' Pre-Trial Br. 11. What but votes could decide these races? (*See* Schaller Dep. 50:20–24 (Plaintiff testifying that his vote counts); *id.* 62:7–12, 66:19–68:4 (Plaintiff admitting the lines do not discriminate against him).) The only fake votes in this case are the ones Plaintiffs experts analyzed to no end—even as they ignored the 2018 results. (*See* below § II.B.1.d.)

Plaintiffs cite no North Carolina case, history, tradition, or anything else for their odd view of free elections. Their sole authority is *League of Women Voters v. Commonwealth*, 178 A.3d 737

[10] Hence, Plaintiffs' reliance on *Clark v. Meyland*, 134 S.E.2d 168, 170 (N.C. 1964), a loyalty oath case, is unavailing.

(Pa. 2018). Given Plaintiffs' position that the U.S. Supreme Court's decisions are irrelevant (Tr. 20:3–5), they cannot credibly rely on a state decision interpreting a different constitution. In fact, the North Carolina Supreme Court has found the U.S. Supreme Court's decisions "highly persuasive" in this area. *Blankenship*, 681 S.E.2d at 762.

By contrast, Pennsylvania's Constitution is not like North Carolina's. The Pennsylvania Supreme Court determined that the right to "an equal opportunity to translate . . . votes into seats" follows from the latter half of the Pennsylvania Constitution's operative phrase "free *and equal*." *See League of Women Voters*, 178 A.3d at 804 (emphasis added). North Carolina's Free Elections Clause is different, providing only that "[a]ll elections shall be free." N.C. Const. Art. I § 10. Further, the Pennsylvania Supreme Court identified historical events specific to Pennsylvania as the backdrop for interpreting the Pennsylvania's Free and Equal Elections Clause. *League of Women Voters*, 178 A.3d at 804–08. That analysis is unhelpful here.

Another difference is that the principles the Pennsylvania Supreme Court found *implicit* in the Pennsylvania Constitution are already *explicit* in the North Carolina Constitution. The Pennsylvania Supreme Court observed that the Pennsylvania legislature "is largely free from state restrictions, as its task is not subject to explicit, specific, constitutional or statutory requirements," *id.* at 781, and the court read such requirements into the Pennsylvania Constitution's Free and Equal Elections Clause, including a requirement that districts "not divide any county, city, incorporate town, borough, township or ward, except where necessary to ensure equality of population," *id.* at 742. But North Carolina's Constitution *already* includes express redistricting criteria. The State Constitution must be read as a whole, *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989), and Pennsylvania's Constitution is structurally different from North Carolina's.

Finally, the *League of Women Voters* decision is hardly a model of neutral judging. A Republican-controlled legislature had enacted the challenged congressional districts—with Democratic support supplying the votes essential to passage. After judicial elections in 2015 gave control of the Pennsylvania Supreme Court to the Democratic Party, a partisan vote of judges struck down the plan—meaning the judges, not the legislature, acted on partisan lines. Worse, one of the justices had campaigned on the promise to strike the plans down if elected.[11] The decision marked a completely new set of legal principles spun from whole cloth. The lower court found no legal basis for the claims and rejected them. *League of Women Voters*, 178 A.2d at 781–87 (describing the lower court's opinion). The decision comes marinated in partisan politics, and the fact that Plaintiffs' lawyers (who represented the Pennsylvania plaintiffs) have taken this newfangled idea of judge-controlled "democracy" on a traveling road show—and with the funding of powerful national Democratic Party interest groups (Tr. 84:21–85:17)—does nothing to recommend this opinion as *legally* sound.

The episode proves only that redistricting is political because of what it is, not because of who does it. Recognizing partisan-gerrymandering claims does nothing to remove politics from redistricting; it only brings politics into the courts. As Legislative Defendants' pre-trial brief

---

[11] Eric Holmberg, Forums Put Spotlight on PA Supreme Court Candidates, PUBLICSOURCE (Oct. 22, 2015), www.publicsource.org/forums-put-spotlight-on-pa-supreme-courtcandidates; Media Mobilizing Project, Neighborhood Networks Supreme Court of PA Forum, YouTube (Apr. 25, 2015), at 18:43, https://www.youtube.com/watch?v=713tnbv55mU&feature= youtu.be; Get to Know the Candidates for State Supreme Court, LancasterOnline (Oct. 31, 2015), http://lancasteronline.com/news/local/get-toknow-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html (embedded video for "Judge David Wecht, Democrat from Allegheny County," at 38:23); Scarnati Issues Statement on PA Supreme Court Justices Wecht & Donohue, Senator Joe Scarnati Pennsylvania's 25th District (Feb. 2, 2018), https://www.senatorscarnati.com/2018/02/02/scarnati-issues-statement-pa-supreme-court-justiceswecht-donohue/.

explained (at 22–24), this all *violates*, rather than vindicates, the Free Elections Clause, not to mention the separation-of-powers guarantee of the State Constitution. N.C. Const. Art. I § 6.

3. The Free Speech and Assembly Clauses Do Not Support Plaintiffs' Claims

Nothing about the 2017 plans place "restrictions . . . on the espousal of a particular viewpoint," *State v. Petersilie*, 432 S.E.2d 832, 840 (N.C. 1993), or "would likely chill a person of ordinary firmness from continuing to engage" in expressive activity, *Toomer v. Garrett*, 574 S.E.2d 76, 89 (N.C. 2002). The evidence shows that Common Cause, the North Carolina Democratic Party, and their respective members and supporters experience no prohibition on speaking or associating and fear no reprisal for those activities. (Tr. 1283:15–1284:7; Tr. 836:16–837:18; Tr. 1541:8–14; *see also, e.g.*, Tr. 1543:12–1545:19.) Plaintiffs' cursory treatment of this matter in their pre-trial brief (at 12–13) and evidentiary presentation gives this Court no reason to rule for them on their free-speech and association claims.

II. Plaintiffs' Claims Have No Factual Basis

Even if it were possible and appropriate to craft standards "to resolve partisan gerrymandering claims" that "do not require—indeed, . . . do not permit—courts to rely on their own ideas of electoral fairness" and that "limit courts to correcting only egregious gerrymanders," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting), this would be the wrong case to try them out or find them met. The 2017 plans satisfy every colorable standard.

A. Basic Indicators Demonstrate That These Plans Are Not "Egregious" Gerrymanders

A slew of indicators reveals the 2017 plans to be fair and competitive. As Legislative Defendants' pre-trial brief explained, these include: (1) the Democratic Party's own view of the maps, (2) voter registration data, (3) the current Democratic representation, (4) fair—actually,

preferential—treatment of Democratic incumbents, (5) the success of the Democratic Party in raising money and organizing, and (6) the success of the plans under good-government measures.

1. The Democratic Party's View of the Maps

As Legislative Defendants' pre-trial brief explained (at 27), the North Carolina Democratic Party's internal data, known as "support scores," showed that the 2017 plans are competitive, with roughly equal numbers of Democratic, Republican, and "competitive" districts. (LDTX146; LDTX147.) These support scores show that there are enough "strong Democrat" and "competitive" districts for Democrats to win a supermajority in both the House and the Senate. (Tr. 2071:24–2072:4; Tr. 2072:15–2074:22; LDTX146–147.) Plaintiffs respond that the Party does not use this information to assess districts' partisan performance. That is not credible.

Morgan Jackson, a consultant for the North Carolina Democratic Party, testified that the Party and an organization called Break the Majority used support scores in 2018 to assess whether voters, identified by legislative district, were "[p]ersuadable" in an election (Jackson Dep. 152:16–153:2) and who is likely to vote (*id* at 156:1–6). Aggregated up to the district level—as they were in the form produced to Legislative Defendants (by order of the Court)—this information told the Party in which districts it could compete, since persuading a critical mass of voters is how to win a district. The data is probative because it shows where the Party believed it had the best chance to persuade and was willing to spend money.

Plaintiffs' efforts to prove otherwise are incoherent. Representative Graig Meyer agreed that support scores show "where and how" candidates "should campaign." (Tr. 165:18–21.) Yet he testified that he would not look at support scores to know how "a district within a map will perform politically." (Tr. 166:10–21.) But that is two ways of saying the same thing. The Party does not campaign where it does not expect to compete. (Tr. 177:14–17 (Rep. Meyer conceding this).) Rep. Meyer also testified that "individual support scores can be misleading" because two

persons could have similar scores yet one "could be a guaranteed 100 percent Democratic voter" and the other "a guaranteed 100 percent Republican voter." (Tr. 165:24–166:7.) But Mr. Jackson testified that the support scores identify who is "Democratic" (Jackson Depo. 153:9–21) and the "percent of the time they're going to vote for Democrats" (*id.* 154:8–22).

The scores show who the Party thought would vote Democratic, and Rep. Meyer simply appears not to understand them. They were used "in all of the districts" that were viewed as competitive. (Jackson Depo. 152:16–18.) Rep. Meyer testified that the House Democratic Caucus made "significant" expenditures in "between 20 and 30" districts (Tr. 176:21–23), which neatly matches what the support scores advised (LDTX146 (showing 29 "competitive" House districts under the North Carolina Democratic Party's support scores)).

Besides, the support scores align with an enormous quantity of evidence demonstrating that the Democratic Party can compete under these plans. Rep. Meyer and others consistently argued in fundraising that Democrats could take over the House (Tr. 174:10–175:14) and raised and spent record amounts of money on this representation (Tr. 117:22–25). Mr. Jackson admitted that, in 2018, he believed and told others that the Party could break the Republican majorities in both chambers. (Jackson Dep. 171:24–172:4, 180:1–7, 172:21–173:1, 173:24–174:14, 175:1–178:21; LDTX054; LDTX055.) That is not the behavior of an organization or supporters who believe elections are futile. Nor would it make sense for the Party to spend hard money for information that is useless in winning district-wide elections, which is Plaintiffs' odd position. The support scores show similar results to what partisan electoral indexes show. (PTX646; PTX647; 6 Tr. 1273:9–1274:14; 6 Tr. 1291:24–1292:22.) That the Party itself viewed the plans as competitive—in 2018—is powerful evidence that they are.

Other evidence confirms this. Republicans have won Democratic districts, which, in turn, are vulnerable to future Democratic victories. (Tr. 1992:2–1998:14 (Brown).) Many other districts are winnable by quality candidates from either party. (Tr. 1752:13–1754:18 (Bell).) If a Democratic presidential nominee wins the State, that tide will likely push the Democratic Party to a legislative majority. (Tr. 1748:8–14 (Bell).) Moreover, the Democratic Party frequently saw candidate-quality problems and ran candidates out of tune on *local* issues. (*See, e.g.*, Tr. 1764:7–1772:20 (Bell); Tr. 1540:13–1548:14 (Owen); LDTX293 at 6–17; *see also* Tr. 124:9–16 (Sen. Blue testifying that candidates, not necessarily "good candidates," ran in all districts).) This evidence also cuts against a legal claim.

2. Voter Registration Data

As Legislative Defendants' pre-trial brief explained (at 12), only one legislative district of 170 contains a majority of registered Republican voters compared to 47 districts with Democratic registrant majorities. (6 Tr. 1279:12–18 (Goodwin).) Plaintiffs respond that registration "is not necessarily a reliable indicator of one's actual partisan voting habits." (Tr. 277:22–278:1 (Chen).) But that sidesteps the point: even if not a *guaranteed* supporter, it is hardly plausible that a registered party member is hopelessly unpersuadable. In a vote-dilution case (for example, under the Voting Rights Act), what matters is *opportunity*; the law cannot guarantee electoral success. *See, e.g.*, *Smith v. Brunswick Cty., Va., Bd. of Sup'rs*, 984 F.2d 1393, 1400 (4th Cir. 1993); *Uno v. City of Holyoke*, 72 F.3d 973, 982 (1st Cir. 1995). A registered Democrat represents a winnable vote. The fact that many districts are dominated by registered Democrats and others by independents shows that districts are winnable. The Party's position here is, in essence, that it has no hope of persuading persons who have overtly associated with the Party as supporters and persons who have chosen not to associate with either major party. That is the Party's own problem, and it is not a legal one.

3. Proportionality and Geographic Reality

As Legislative Defendants' pre-trial brief explained (at 27–28), the Democratic Party has better than proportionality in Senate challenged districts and near proportionality in House challenged districts. (LDTX130.) The slight lag in proportionality statewide is the result of districts that are not challenged and that cannot be challenged because they are locked into place.[12]

Plaintiffs contend that the Democratic Party should win majorities, but the Democratic Party's challenge is geography, not gerrymandering. (Tr. 2298:20–2300:5:9 (Brunell).) A party's number of seats rarely matches its statewide vote total because the parties' constituents are rarely dispersed evenly. (Tr. 2146:2–18 (Barber).) Currently, the Democratic Party's appeal is geographically restricted—in particular, to urban areas. (Tr. 2166:10–25; Tr. 2163:19–21; Tr. 2165:2–7; Tr. 2165:12–16; ITX7; ITX9; *see also* Tr. 183:2–13 (Meyer).) Statewide Democratic Party candidates won a small fraction of North Carolina counties (*see* Joint Stipulations ¶¶ 9, 47, 54, 61–65; Tr. 2300:8–2301:3 (Brunell); LDTX118; LDTX119; LDTX120), and removing the most populous counties from the vote counts disproportionately draws down the Democratic vote share (Tr. 2065:12–24; 2066:11–2067:5; LDTX 140-1). There is a natural "packing" of Democratic voters.[13] (LDTX117; LDTX118; Tr. 2300:15–2302:11.) The Party could overcome this by broadening its appeal in rural areas, taking seriously their needs. But the Democratic Party

[12] Although there is no legal right to proportional representation under any legal regime, proportionality is a *defense* in racial vote-dilution cases and, assuming any claim exists, should also be a defense here. *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994).

[13] Dr. Chen recognized this in a scholarly analysis he conducted of Florida redistricting plans. (Tr. 755:9–760:23.) Notably, he did not do the same analysis in this case. Among other things, he did no analysis of plans proposed by the Democratic Party or Common Cause, as he did in the Florida study (Tr. 764:4–10), or examine voting data by a geographic mapping, as he did there (Tr. 756:12–19). His failure to comply with the standards of scholarship he adheres to in his academic work cuts against his analysis in this case.

struggles even to recruit candidates in rural areas (Tr. 183:7–18 (Meyer)), and the point of this lawsuit is to achieve court assistance in winning elections while *ignoring* everything but North Carolina's cities. The Democratic Party can make that choice, but its claim to a right to win while doing so is, to put it charitably, unfounded.

So what is remarkable here is not that the Democratic Party lacks proportionality, but that it is quite close. More importantly, it is closest to (if not at) proportionality in those areas of the map where legislative discretion is available; it lacks proportionality most in areas locked into place—proving further that gerrymandering is not the Party's problem. (LDTX130.) Plaintiffs retort that their expert mapping simulations control for geography (*see, e.g.*, Tr. 304:19–305:7), but their simulations support the status quo. As discussed below (§ II), under a 51% vote share, the simulations show that natural geography would afford them 54 House and 22 Senate seats. (PTX23; PTX42; Tr. 655:19–656:1.) They have 55 House and 21 Senate seats. Besides, their simulations are flawed for reasons set forth below (§ II.B.2).

4. Favorable Treatment of Democratic Incumbents

As Legislative Defendants' pre-trial brief explained (at 29), the 2017 plans paired no Democratic incumbents and several sets of Republican incumbents (LDTX125; LDTX25 ¶¶ 7–8; Tr. 2045:14–21), and Democratic incumbents fared better than Republican incumbents under them in 2018 (LTDX134; Tr. 2070:18–2071:5). Plaintiffs do not, and cannot, explain how *preferential* treatment for Democratic incumbents is consistent with a plan to impair that Party's electoral fortunes. Their sole rejoinder is that not all Republican incumbents paired had intended to seek reelection. (Tr. 2089:23–2090:12.) But some *did* and were paired because they had to be. (LDTX014 at 28:9–30:6.) North Carolina law required this, forcing the Republican majority to cut out its own incumbents. No action was taken against Democratic incumbents. Intended or not, this is yet another sign of objectively fair districting.

5. The Democratic Party's Vibrancy and Comparative Success

The trial evidence proved that the Democratic Party is active and competitive and that, with the right candidates, has a fair chance to win. Senator Blue testified that "we spent more money than we had ever spent because we were able to raise more money than we had ever raised." (Tr. 117:22–25.) It raised $15.6 million in 2018 compared to $10 million by the North Carolina Republican Party in 2018 and $4.9 million by the North Carolina Democratic Party in 2014. In fact, the North Carolina Democratic Party's 2018 fundraising was its best ever. Every legislative seat save one was contested. More than 20% of elections were within a margin of 10 percentage points and were, as understood in political science, competitive. (Tr. 1532:12–1533:4; Tr. 1537:2–13 (Owen); LDTX293 at 9, 13–14.) Eleven races were decided by a margin of less than 2% and five by less than 1%. (LDTX293 at 9, 13–14.) The Democratic Party flipped 10 House and six Senate seats. Republican successes were often due to a candidate-quality advantage. That is not the mark of non-competitive races or predetermined results.

Plaintiffs' response that they should have won a majority because they "had more money than Republicans, a blue moon election, better candidate recruitment, enthusiasm generated by the actions of the Republican supermajorities" and so on (Tr. 21:8–17) confuses a legal right to win (which is absurd) with a legal right to opportunity (which, though incorrect, is less absurd). All of these things are evidence of a fair map—or else the Party would not have "more money," "better candidate recruitment," "enthusiasm" and so forth. There is no tenable claim to a majority. "[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm." *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality opinion).

Moreover, the assertion that a "wave" election of 51% of the statewide vote in 2018 should have given the Democratic Party a majority fails to appreciate how tepid of a "wave" that is: the

Republican wave of 2010 gave the Republican Party 59% of the statewide vote and the majority—under a Democratic-drawn map. (Tr. 1286:12–17.) The Democratic Party cannot seriously demand identical results with 8% less of the statewide vote. What matters, rather, is that the Democratic Party is not cut out of the political process; it is a major player with a strong voice that can be and is heard. It simply has slightly less power than it wants. That is no court's concern.

6. Compliance With Neutral Criteria

There is no colorable dispute that the 2017 plans pass the only non-partisan criteria offered in this case—the simple metrics the General Assembly adopted before the redistricting. The plans satisfy the equal-population rule and the strict county-grouping and transversal rules of Article II of the State Constitution. The districts were far more compact than in 2011 or prior years; they split fewer VTDs than in 2011 or prior years; they (as noted) minimized incumbency pairings; and they preserved core constituency-incumbent relationships. (*See* Second Stipulations ¶ 2; Tr. 2046:10–25 (Hood).) All of that is non-partisan, all is good, and all was achieved.

Nor is there any direct evidence of "gerrymandering." Partisan data was *considered*; there was no "no direct outcome target in mind." (LDTX14 at 21:8–11; PTX603 at 138:15–21.) While Plaintiffs' make much (quite nonsensically (*see* below § III)) of the "Hofeller files," the only meaningful fact is that no dog in them barked. Even though Plaintiffs are in possession millions of files and emails of this long-time Republican consultant, they have not identified *a single* document showing direct evidence of legislative partisan intent (much less, effect). There is no email from any legislator to Dr. Hofeller saying "rig this district," "cut out those voters," "gerrymander that region"—nothing like that. The generalized consideration of partisan data is neither remarkable nor unconstitutional.

B. Plaintiffs' Evidentiary Presentation Fails

Unable to identify a single item of evidence that might convince a person of ordinary reason, temperament, or common sense that the 2017 plans are politically unfair, Plaintiffs resorted to an industrial factory of information—churning out more simulated maps than there are "atoms . . . in the known universe" (Tr. 1090:11–14)—that makes up in convolution what it lacks in relevance. Like the Wizard of Oz, Plaintiffs' experts confront the Court with smoke, fire, noise, and—above all—the plea: pay no attention to the man behind the curtain (or, here, the 2018 election results). The Court should not be duped by the pizzazz—the trillions of maps, the supposed statistical certainty, the many "nines," the bewildering math. Taken at face value, Plaintiffs' evidentiary presentation shows that the Republican-controlled legislature sometimes chose (and often did not) the most Republican of a set of *fair* plans. Taken at true worth, Plaintiffs' presentation shows nothing at all. The Wizard is not the whizzbang he seems.

1. Taken At Face Value, Plaintiffs Presentation Fails To Prove a Colorable Claim

The cornerstone of Plaintiffs' case is simulated-mapping exercises. Assuming their value, they show only a subtle Republican advantage. Dr. Mattingly predicted that his ensemble of simulated Senate maps would, on average, elect fewer than two more Democratic senators than the enacted Senate plan. (Tr. 1214:4–1215:20; PTX359 at 7.) He predicted that his ensemble of simulated House maps would, on average, elect just over three more Democratic representatives than the enacted House plan.[14] (Tr. 1215:21–1216:12; PTX359 at 11.) Dr. Chen's analysis is not meaningfully different. In the Senate, his supposed "baseline" shows between 19 and 21 Democratic seats as compared to 18 in the enacted plan—for a difference of one to four seats (most

[14] Although Dr. Mattingly expressed a preference for election-by-election analysis, rather than averages, the election-by-election results are not far from the average.

likely two). (PTX26.) In the House, his supposed "baseline" shows between 43 and 51 Democratic seats as compared to 42 in the enacted plan—for a difference of one to nine seats (most likely four). (PTX07.) Dr. Pegden, for his part, could not predict a baseline number of seats and therefore had nothing to say on this question. (Tr. 1410:2–9; *see also* Tr. 1614:5–13 (Thornton).)

Thus, out of 170 legislative districts, Plaintiffs' simulations suggest that five, maybe six, would be flipped from Republican to Democratic under their simulated plans. That on its face is not egregious, especially where "partisan advantage" is allowed. *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002). And welcome to the real world: there are *already* more Democratic representatives in both chambers under the enacted plans than Plaintiffs' models predict. The contested five seats have *already* been flipped. Democratic members hold 55 House and 21 Senate seats; both chambers are at or above the average levels these models predicted. So the goals of this lawsuit—insofar any goal pertains to real elections and districts—have been achieved through the democratic process. It is not worth destroying judicial independence and neutrality over five seats that have been flipped.

So, again, Plaintiffs have no choice but to search for complexity where the simple facts are against them. These efforts, too, fail.

a. Statistical Significance Versus Real-World Effect

First, Plaintiffs argue that the seat differential is "statistically significant." Maybe, maybe not.[15] But statistical significance does not connote real-world meaning.

[15] Dr. Thornton, Dr. Pegden, and Plaintiffs' counsel argued in circles about whether these differences are, in fact, statistically significant. Legislative Defendants' proposed findings and conclusions of law address Plaintiffs' errors on this. But the Court can sidestep this argument because it does not matter.

Statistics may inform, but not replace, good judgment. The term "outlier" is a fancy word for a data point that does not appear among other data points—nothing more, nothing less. Although its connotation in common parlance is something that should interest, alarm, or amaze, it need not be any of those things. It takes common sense and good judgment to interpret the data. A statistical analysis could tell us that Mozart was an "outlier" among composers; a statistical analysis could just as easily tell us that a piano teacher is an outlier among his three-dozen elementary-school students. Each analysis could be equally sound as a matter of statistics, and the term "outlier" could be employed correctly in each case. But only good judgment tells us what to do with that information. Math does not tell us that Mozart was a genius and the elementary-school piano teacher is not; we know this from common sense and good judgment. (*See also* Tr. 2280:17–2281:5 (same can be said of human IQ compared to chickens).)

Here, common sense should override the ill-advised use of the term "outlier." A difference of five of 170 seats, in a political process, is not meaningful. Dr. Chen and Dr. Mattingly can in no way detract from that simple conclusion. They can confuse the matter; they can try to distract; they can filibuster on cross-examination. But they cannot turn an ordinary piano teacher into Mozart. That would be magic, not math—much less common sense.

b. The Most Republican Plan on the Menu Versus a Truly Republican Plan

Next, Plaintiffs argue that their evidence proves that the General Assembly repeatedly chose the most Republican-friendly districting configurations available. This, again, is not uniformly supported by the evidence. (*See, e.g.*, Tr. 1151:10–19 (Dr. Mattingly admitting that county grouping is not an "outlier") Tr. 1153:17–1154:16 (other examples of same).) But, no matter, this too misses the point. To know whether the most Republican-friendly districting configurations are meaningful, one needs to evaluate, not simply the *choice* itself, but the

possibilities. A customer might choose the spiciest dish on a restaurant menu, and it might be an "outlier" compared to other menu items. But if no dishes on the menu have Carolina reapers, ghost peppers, habaneros, Hatch chilis, or even jalapenos, this means little. Anaheim or bell peppers or even table pepper would be "outliers" even though they offend only the most sensitive mouths.

The evidence shows that this happened here. That Plaintiffs' experts' call a difference of five or six of 170 seats an "outlier" scenario shows only that their analyses are highly sensitive, not that the enacted plans are "egregious." Recall that existing rules already limit gerrymandering for reasons that Plaintiffs' counsel explained at trial. Without an equal-population rule, a legislature could, as Plaintiffs' counsel explained, "take each of the 49 most Republican VTDs in the state and . . . break each of those" into "one district out of each of those VTDs" and then "put the remainder of the State into the 50th District." (Tr. 1897:10–18.) This would allow a legislature to draw 49 Republican-friendly district and only one Democratic-friendly district or vice versa. That would be "egregious." *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting).[16] But that is not *this* case because the choice was not on the menu.

Likewise, the North Carolina county-grouping and traversal rules substantially curtain the opportunity to draw districts for partisan advantage. Dr. Johnson, in fact, showed that, without the county-grouping rule, the General Assembly could have drawn 36 safe Republican and only 14 safe Democratic Senate seats. (LDTX287:7–10.) This shows that egregious cases might arise in theory but did not and cannot arise here.

---

[16] The fact that, at the time the North Carolina Free Elections Clause was ratified this hypothetical was perfectly legal proves beyond cavil that Plaintiffs' theories have no relation whatever to that Clause. *Drum v. Seawell*, 249 F. Supp. 877, 880 (M.D.N.C. 1965), *aff'd* 383 U.S. 831 (1966) (finding federal equal-population rule to trump state law, even though "this formula has been in the Constitution since 1836").

So, given the limited menu, the differences Plaintiffs call stark are minor. This was most striking in the testimony of Dr. Cooper. He identified only "small decisions" (Tr. 1018:19) that he believed move "the needle . . . in very small ways" (Tr. 1046:13–14). Again and again, he identified "small decisions" (Tr. 904:5–6), like "a small split" that is "probably not a significant one" (Tr. 920:5–6) another that "is not very big" (Tr. 920:7) another "small split" (Tr. 927:19) a decision that (he subjectively believed) "move[d] the scales slightly towards the Republican Party" (Tr. 990:13n14) and so forth. This described how a Republican mapmaker chose the most Republican item on the menu, not that the item was meaningfully Republican.

Also consider Dr. Chen's treatment of compactness. His simulations show a range of average House Reock compactness scores of .444 to 0.474 and Polsby-Popper scores of between .348 to .384, and he calls the enacted House plan's respective scores of .412 and .321 "outliers." (PTX07.) But the real-world difference is, again, empty. A .412 Reock score is only .032 (or 3.2%) less than .444. A .321 Polsby-Popper score is only .027 (or 2.7%) less than .348.[17] Like the single-digit percentage seat differential, the raw numbers show a single-digit percentage difference. That Dr. Chen has called these miniscule differences "outliers" says more about his sensitivity than the House plan. All of this can equally be said of the Senate plan. (*See* PTX26 (showing similarly subtle differences in compactness scores).) The only thing remarkable about all this is that the differences are so small when Dr. Chen's algorithm maximized compactness and the General Assembly did not, as discussed below (§ II.B.2).

---

[17] The percentages are calculated by dividing (in the case of Reock scores) the area of a shape by the smallest circle circumscribing it and (in the case of Polsby-Popper) the area of a shape by a circle of the same perimeter. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 415 & nn. 4, 5 (E.D.N.C. 2000) (citing Pildes & Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election–District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 571–573, table 6 (1993)).

Another example of the experts' myopic focus on subtleties is the reported split VTDs in Dr. Chen's Senate simulations. He shows zero to three; the enacted plan has five. (PTX26.) Again, Dr. Chen calls this an "outlier." And, again, the difference is tiny. There are over 2,600 VTDs in North Carolina. A difference of two is nothing (.00007%), as is a difference of 30 on the House side (1.1%). (PTX07.) What's more, most of these splits carried over from the 2011 plans in areas that were not redrawn. (LDTX13 at 13:1–15.) The 2009 House plan split 285 VTDs and the 2011 plan split 395, as compared to 49 in the 2017 House plan; the 2003 Senate plan split 55 VTDs and 2011 plan split 257, as compared to 5 in the 2017 Senate plan. (LDTX08, at 8:4-22; PTX26; Second Set of Stipulations ¶ 2.) Dr. Chen's label "outlier" does not make the differences big.

One striking example of the constraint the county-grouping rules impose is found in the numerous groupings in which Dr. Chen and Dr. Mattingly could simulate only a handful of possible districts and Dr. Pegden could simulate none. (*See, e.g.*, Tr. 1457:25–1458:9; Tr. 1458:10–17; Tr. 1594:1–5; 1598:14–1599:13; *see also* PTX359 at 93–94 (Dr. Mattingly's report showing limited number of maps in many county groupings).) The line drawing in multiple county groupings is so restricted that as few as two different simulated maps could be drawn, notwithstanding Dr. Chen's sophisticated computer programs and algorithms. Dr. Chen concluded that, because the other options he simulated were less Republican-friendly than what the General Assembly enacted, it had chosen an extreme outlier. For example, Dr. Chen concluded that SD8 and SD9 are "outliers" because of how the General Assembly brought SD8 into New Hanover County, as it had to do in order to comply with the equal-population and county-grouping rules. It chose a tiny "squiggle" shape to bring SD8 into New Hanover County. (Tr. 751:21–753:18.) But to Dr. Chen, a slightly different scoop-shaped crossover into New Hanover County would not be an outlier. This game of inches cannot prove "egregious" gerrymandering.

Dr. Pegden's entire analysis is like this. His "sensitivity analysis" tests only the margins of the districts with tiny changes and concludes that the changes all render the districts (except for the many he finds are not outliers) more Democratic. (Tr. 1304:1–13.) But Dr. Pegden conceded that his analysis cannot speak to the magnitude of the alleged bias caused by these alleged partisan fine-tuned changes. (Tr. 1410:2–9 (calling this inability a "real weakness").) Dr. Pegden cannot say whether the partisan bias he claims to have measured flipped one seat, or four, or none, rendering it irrelevant in assessing the impact of the supposed intent to "gerrymander." (Tr. 1614:5–13 (Thornton); Tr. 1615:5–10.) Calling a fight over nothing an "outlier" does not make it a fight over something. Nor does it justify upending the State's constitutional order to resolve.

c. Intent Versus Effect

Failing to show a meaningful real-world effect, Plaintiffs repeatedly fell back on the argument that their simulations showed that the General Assembly *intended* to draw an extreme partisan gerrymander. But this assumes there is something inherently suspect about political motive absent an "egregious" impact. That a restaurant customer picks the spiciest meal on the menu may prove something of intent—that the customer likes spicy food. But, as noted, it does not prove that the food chosen is spicy in any sense that is remarkable, notable, or concerning. Only if the menu offered very spicy options would the customer even be capable of choosing one that might call for a sip of cooling lemonade. Otherwise, the menu constrains the customer's options, limiting the customer to the spiciest of a bland set of dishes—i.e., a bland dish.

In a partisan-gerrymandering case, intent is uninteresting. "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality opinion). The interesting question is whether any meaningful impact resulted. By confining their evidence to intent, and largely ignoring effect, Plaintiffs spent an enormous amount in expert fees on showing something

that has been admitted from day one: the General Assembly considered partisanship. Dr. Pegden, for example, testified that "the point of my analysis is really to get at the intent of the legislature when drawing these maps." (Tr. 1322:25–1323:2.) Likewise, Dr. Chen conceded that his analysis is "not at all making a prediction" of partisan impact (Tr. 660:2–3), but rather "I was trying to evaluate the partisan intent of the General Assembly as a map drawer" (Tr. 661:8–9). Plaintiffs wasted their money and the Court's time on a minor point.

d. Election Modeling Versus Real-World Results

Undeterred, Plaintiffs spun a narrative about a Republican "sea wall" that prevents the Democratic Party from obtaining a majority. This is fiction. For starters, the sea wall supposedly prevented the Democratic Party from breaking into the Republican supermajority. That obviously failed. Whatever sea wall might have been intended is no match for a real Democratic wave—like the 2010 Republican wave of 59% of the statewide vote. (That this has not occurred recently for the Democratic Party is the people's choice.)

Next, the narrative depends on a set of circumstances that Plaintiffs claim will never occur. Both Dr. Mattingly and Dr. Chen assert that, to obtain a majority under a his simulated plans, the Democratic Party would likely need over 52%, if not 53% or 54%, of the statewide vote totals. (PTX23 (Chen House chart showing 52.4% as rendering majority somewhat likely); PTX42 (Chen Senate chart showing 54.2% as rendering majority somewhat likely); PTX359 at 6, 10.) Yet Plaintiffs' counsel represented that 2018, when Democratic candidates won 51% of the statewide vote, "was about the most favorable election environment you can imagine for Democrats." (Tr. 21:10–11.) There is no reason for the Court to worry that, under some hypothetical circumstance unlikely to occur, its garnering 52% of the vote might not get the majority it calls its legal right.

Anyway, Plaintiffs' experts' modeling is not far from reality. Dr. Chen's modeling shows that 51.42% of the vote would give Democrats 54 House seats under his simulations (PTX23),

and, in fact, a statewide total of 51.2% gave them 55 House seats. Dr. Chen's modeling shows that 51.42% of the statewide vote would give Democrats 22 Senate seats under his simulations (PTX42), and, in fact, a statewide total of 51.2% gave them 21 Senate seats. Dr. Mattingly's charts show similar results, including 55 House seats on 51.81% of the vote (PTX359 at 10), and 23 Senate seats on 51.7% of the vote (PTX359 at 6).

Besides all that, Plaintiffs' modelling is not reliable at the level of granularity needed for their conclusions. None of Plaintiffs' mapping-simulation experts looked at legislative elections—or *any* data from 2018. They superimpose statewide elections from prior years—before the 2017 plans were adopted—onto legislative districts. But the most probative information on who can and cannot win legislative races in 2020, the only election left under the 2017 plans, is who won in 2018. There is, for example, no reason to be concerned with Dr. Chen's prediction that Democratic candidates can only win 42 seats and *should* win 46 when *they won 55* in 2018. (PTX23; PTX42.) Ignoring this information was either gross negligence or cherry-picking.

Dr. Chen, Dr. Pegden, and (for part of his analysis) Dr. Mattingly take the speculation a step further by running a uniform-swing analysis, which means adding and subtracting uniform vote percentages to those statewide totals. This does not measure what actually happens in any races. Dr. Chen admitted that he has never assessed whether North Carolina election differences tend to be uniform (nor would that be likely to occur). (Tr. 676:24–677:4.) Dr. Pegden candidly admitted that this is all hypothetical, explaining: "Like this is not a real concept, right, this idea of like take some historical voting data, which isn't legislative elections, it's just some data that we're using as some sort of estimate of historical voting patterns and then simply counting up seats. That's not a real measure of anything; right? There's no guarantee that any election will ever perform like that, right?" (Tr. 1410:19–1411:1.) He further conceded that "I can't predict the result

of a future election." (Tr. 1411:3–4.) Even if these measures have some use, they are blunt and cannot achieve the accuracy needed for Plaintiffs' supposed pin-point conclusions.

Common sense should again intervene. Dr. Mattingly's analysis shows that, in many elections he tested, the results *are not outliers*, and the results sometimes *favor Democratic interests*. (Tr. 1217:7–9; Tr. 1110:2–6; Tr. 1122:23–1123:4.) Grasping at straws, he resorted to the preposterous claim that the gerrymander is only sometimes a gerrymander, i.e., when it is "needed." The Court can safely ignore this view. Dr. Mattingly's analysis is too many steps removed from the real world to say something so precise. The election results are not real, the simulations are not real, the graphs are not real, the outcomes are not real. Even if there is some relevance to all this, a conclusion to that level of pin-point accuracy about when a gerrymander needs to be a gerrymander is nonsense. What actually happened is that the results did not suit Dr. Mattingly's fancy so he compensated with science fiction.

Further, redistricting in North Carolina occurs at the county-grouping levels, and Dr. Mattingly only analyzed 23 of 70 county groupings—looking only at what Plaintiffs' counsel cherrypicked. (Tr. 1201:14–1202:16.) And, even with that rigged approach, Dr. Mattingly found that the enacted versions of six of those groupings are not outliers. (Tr. 1153:17–1154:16; Tr. 1155:8–1156:21.) Dr. Chen, too, found only 15 of 41 House and seven of 29 Senate groupings to be outliers. (Tr. 580:10–583:20.) And even in Plaintiffs' cherry-picked county groupings, the Democrats are doing better than they should. Dr. Mattingly analyzed seven groupings in the Senate and there are 23 districts in those groupings. In 2018, the Democrats won 13 of the 23 seats, or 56.52%, while only obtaining 55.95% of the two-party vote in those districts. In other words, the Democratic Party has a higher percentage of seats than votes in these challenged districts in both chambers. Plaintiffs requested Dr. Mattingly analyze 16 of the groupings, which contained 73 total

districts, although three districts are unchallenged. In the remaining 70 challenged districts, the Democrats in 2018 won 39 of the 70 seats, or 55.7%, with only 54.91% of the two-party vote. This only underscores how weak Plaintiffs' case is on the facts.

Finally, Plaintiffs' election modeling invites manipulation. Dr. Mattingly and Dr. Pegden used elections with high Democratic vote shares, which necessarily result in a higher Democratic performance than exists under the enacted plans. (*See* Tr. 1580:10–16 (Thornton); Tr. 1583:8–11.) Their simulations will, by definition, differ from the enacted plans in terms of Democratic wins. (Tr. 1580:10-1582:21; 1591:4-19 (Thornton); LDTX303, LDTX304, LDTX305, LDTX306.) The error resulting from superimposing other elections onto legislative districts is compounded when the analyses are rigged. (*See, e.g.*, Tr. 1580:10–1583:5; Tr. 1604:21-1605:7; LDTX091; Tr. 1592:11–1593:1 (Thornton); *see also* Tr. 1593:2–25 (discussing biases in Dr. Chen's work).)

2. There Is No Value to Plaintiffs' Simulations Because They Draw an Inappropriate Comparison

The more fundamental problem with Plaintiffs' analyses is that they do not draw an appropriate comparison with the enacted plan. As discussed, statistics can only supplement, not replace, good judgment. One necessary judgment call is how to draw a point of comparison. Even if a very large number of data points (like simulated maps) is selected, an infinite number of points of comparison is excluded.

This is what Dr. Janet Thornton meant when she said Dr. Mattingly, Dr. Chen, and Dr. Pegden are looking for lost car keys in too narrow a space. (Tr. 1602:11–24.) The searcher may run a trillion passes through the bedroom, taking slightly different paths each time, like snowflakes falling to earth. Based on those trillion slightly different paths, the searcher may conclude with complete certainty that the keys simply do not exist. But, because the keys may as easily be in the living room or the garage, this is illogical. The searcher has chosen the wrong search restrictions.

It is, again, common sense, not math, that tells us that the keys might plausibly be in the bedroom or the garage (but not Timbuktu). In this respect, it is notable that Dr. Pegden, Dr. Chen, and Dr. Mattingly, for all their math credentials, have no meaningful redistricting experience.

The Court has no choice but to step back, look at the big picture, and assess whether good judgment is at work, or whether this is a "garbage in, garbage out" analysis. (Tr. 1593:1; *see also* Tr. 1186:25-1187:5 (Mattingly conceding that an apples-to-oranges comparison would doom his entirely analysis).) It is just that. Tellingly, Plaintiffs experts *admit* that their goal was "not to generate good plans for the North Carolina House and Senate" (Tr. 1404:11–12) and they "would not recommend that anyone enact the[] maps" generated by his algorithm (Tr. 1330:2–3 (Pegden) (Tr. 754:6–8 (Chen)). That is no basis to strike down what the legislature *did* enact based on its view of what *are* good maps. *Compare Dickson*, 766 S.E.2d at 575 ("We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole.").

Worse still, the simulations do not match the General Assembly's criteria. Only if the simulations track "a State's *own* criteria" do they provide an even arguably appropriate "baseline." *Rucho*, 129 S. Ct. at 2516 (Kagan, J., dissenting). Failing at that, the simulations are useless.

Compactness/VTD Splits. This is most obvious as to the compactness and VTD-split criteria. Dr. Chen's simulations were run so that "all else being equal, districts that are more compact" or split fewer VTDs or municipalities "are favored over districts with less compactness" or more VTD or municipality splits. (Tr. 257:15–18 (Chen's compactness criterion); (Tr. 257:23–258:2 (Chen VTD splits) Tr. 258:19–259:1 (municipal boundary criterion); *see also* Tr. 604:11–

13 (same).) That is completely different from the General Assembly's goal. The General Assembly sought improvements from the prior plan in terms of compactness and VTD splits. (LDTX155 (2017 Senate and House plans criteria); Tr. 610:13–612:11; Tr. 132:17–133:22 (Blue).) It is one thing to apply a criterion that, say, only candidates over age 18 can qualify; it is altogether different to continue to favor older persons over younger persons even above that minimum. Under the former criterion, a 25-year-old and a 30-year-old both equally satisfy the age criterion (as is the case in implementing the right to vote). Under the latter, a 30-year-old beats the 25-year-old, and the latter is excluded, even though both are over 18.

The General Assembly's criterion was the former type. The General Assembly's compactness criterion would not pick a dog in the fight between two districts that each exceeded the threshold. Some *other* criterion would have to settle that contest—even if one were more compact than the other—since each district would satisfy the compactness (or VTD) criterion. By contrast, Dr. Chen's compactness criterion continued to pick winners and losers even in excess of those thresholds. In turn, the Chen's compactness criterion excluded a range of possible maps that the General Assembly's criteria treated as within bounds. By applying a more restrictive compactness test than the General Assembly applied (Tr. 673:10–16; Tr. 611:12–612:7; Tr. 612:21–613:8), Dr. Chen rigged the analysis so that more outliers were likely. The narrower the range, the greater the number of outliers and vice versa. (LDTX291 at 6–7; Tr. 2294:25–2295:18.)

Dr. Chen's response that "I don't know of any jurisdiction in the country that says we want less compact districts and that's better than drawing more compact districts" (Tr. 603:9-11) attacks a straw man. It conflates a goal of purposefully creating less compact districts (which is not the General Assembly's criterion) with a *tolerance* for districts that fall short of some abstract notion of perfection (to which the General Assembly did not aspire). The criterion that all districts

improve is not a goal of purposefully rendering districts as non-compact as possible while remaining slightly above the threshold; it is rather a criterion of indifference to compactness once the threshold is met. Just because there are no bonus points for exceeding the target does not mean there is a goal of hitting the low end. There are many reasons a district may be less compact than is possible, including preserving communities of interests, placing a member's business or mother-in-law or donors in the member's district, keeping a park whole and so forth—the list is endless.

And Dr. Chen knows nothing of redistricting criteria. The General Assembly's approach is how compactness criteria are normally applied, *see Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 753 (Va. 2018); *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1242 (Pa. 2013), except where they contain language such as "[e]ach district shall be as compact in area as possible" or "to the extent practicable," *Vesilind*, 813 S.E.2d at 750 n.9 (quoting Colorado and Arizona criteria). The General Assembly's criteria do not contain such language.

A similar problem inheres in Dr. Pegden's analysis, which utilized a 5% reciprocal-average measure with no resemblance at all to the General Assembly's threshold approach. (Tr. 1420:25–1421:10; Tr. 1421:23–1422:7.) Plaintiffs' experts *could* have implemented the General Assembly's approach simply by setting their algorithms to the minimum compactness and VTD-split thresholds, thereby allowing the entire range of allowable maps. By setting, instead, more *restrictive* criteria (Tr. 1433:4–11 (Pegden)), they rigged the analyses to a predetermined result.

Qualitative Goals. Moreover, the General Assembly had many redistricting goals that were qualitative, not quantitative. Because redistricting is a political process, necessarily involving nuanced legislative negotiation, goals do not come neatly packaged for mathematicians. One criterion was a permissible consideration of municipal boundaries. Plaintiffs' experts read that to mean "that, all else being equal, the [criterion] favored districts that split fewer municipalities

rather than boundaries that split more municipalities." (Tr. 258:22–259:1; *see also* Tr. 605:10–18.) That is not what the criterion said; the goal is qualitative. Some lines would be followed, others would not, and for idiosyncratic reasons. Many municipal lines in North Carolina are irregular, so that no one would want to track them. (*See, e.g.*, PTX312; PTX325.) Some city residents or leaders would rather their cities be split to give the city more representation through more legislative members. Some incumbents prefer that cities be split to keep intact their core constituencies or bases of support. That is why the criterion *permitted* consideration of city lines, but did not prefer fewer splits over more in a mathematical sense. Plaintiffs' algorithms did not, and could not, match this. (LDTX291 at 7–8; Tr. 2295:19–2296:3.)

The same is true on incumbency protection. The General Assembly's goal was both to minimize pairings and maintain constituency relationships. (LDTX155; LDTX013 at 14:1–6; *see also* Tr. 152:2–14 (Senator Blue testifying about decisions made to preserve the "territory" of incumbents).) Plaintiffs' experts (sometimes) accounted for the former and ignored the latter. Dr. Chen, for example, only sought to avoid pairings (Tr. 260:19–261:5; Tr. 308:24–309:11; *see* Tr. 654:20–21), even though he had previously written that protecting incumbents entails much more (Tr. 763:12–764:3; *see also* Tr. 655:3–13). And they did this even though it was possible to at least approximate a more holistic incumbency-protection goal by seeking to maximize similarity to the prior districts, maintaining district "cores."

Nor did the simulations mimic the various choices made for local political reasons. The Court heard how Senator Blue offered an amendment, which was passed, that united a set of communities that Senator Blue believed were working together on policy issues. (Tr. 1191:5–16.) Not only were Plaintiffs' simulations unable to match that goal, but they also concluded that these districts are extreme partisan outliers—a facially nonsensical conclusion where Senator Blue

testified that his changes "cured the foundation on which one would bring a political gerrymander claim." (Tr. 145:2–6.) Plaintiffs erroneously believed that a "choke point" or "Costco passageway" is evidence of extreme gerrymandering, when Senator Blue chose those lines to remedy what he believed was the injury of racial gerrymandering. (Tr. 147:18–149:15.)

Plaintiffs' simulations count as partisan any redistricting factors they fail to explain, and there are many such factors. (*See, e.g.,* PTX603 at 67–68 (explaining that communities of interest would be considered); *id.* at 69:9–11 (same).) Thus, Plaintiffs' experts are registering non-partisan (or bi-partisan) decisions as partisan. This is painfully obvious in that Plaintiffs' experts concluded that districts "essentially identical" to districts proposed by Common Cause, (Tr. 66:15–67:9), (Phillips)) are extreme outliers. The Court cannot rely on these analyses.

Politics. Another problem is that Plaintiffs' defined *any* level of partisanship as unacceptable, concluding that even "using election data or using political consideration is kind of a definition of drawing a partisan map." (Tr. 260:3–5.) This is just another respect in which their analyses are too sensitive.

Redistricting in North Carolina is a partisan *political* process, as it is in most states. When a state constitution delegates a legislature the power to legislate districts, it inevitably considers election data and partisan political factors. (Tr. 2278:17–2279:2.) The General Assembly was transparent about its use of election results and political data in the process. Accordingly, only simulations with a comparison to other partisan plans could address whether the 2017 plans are outliers. (Tr. 2295:10–2296:3; Tr. 2280:4–16.) *Some* degree of political intent *must* be acceptable because the North Carolina Supreme Court said it is.

Plaintiffs' experts' simulations are designed to be non-partisan, which means no partisan metric is included in the algorithms. But courts have recognized that political goals are

"inseparable" from redistricting, *Gaffney*, 412 U.S. at 753, so it should come as no surprise that, compared to politics-blind plans, the 2017 plans are deemed "outliers." These comparisons are unhelpful to the relevant question of whether politics has gone "too far." *Rucho*, 139 S. Ct. at 2501. The necessary comparison is whether, compared to partisan maps, the enacted plan is an outlier. (LDTX291 at 2–3.) Moreover, Plaintiffs' simulated maps are unhelpful insofar as no effort was made to ensure that the maps might be enacted in the General Assembly. For example, for all Dr. Mattingly knew, his simulations draw Sen. Blue into a Republican-leaning district, ensuring outraged *Democratic* members. (Tr. 1210:15–1211:2; Tr. 1212:15–19.)

Plaintiffs' sole rejoinder is that Dr. Brunell, in a 2011 Nevada case, did not compare a proposed map "to any other potential partisan maps." (Tr. 2337:5–12; Tr. 2343:11–25.) Plaintiffs are confused. The 2011 Nevada case was an "impasse" case; the legislature failed to redistrict after the 2010 census, so a court was required to draw the map. (Tr. 2357:17–2358:11.) Unlike in a legislative redistricting—where politics is permissible—court redistricting plans cannot be political. *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Peterson v. Borst*, 789 N.E.2d 460, 463 (Ind. 2003); *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002); *Corbett v. Sullivan*, 202 F. Supp. 2d 972, 973–74 (E.D. Mo. 2002); *Below v. Gardner*, 963 A.2d 785, 793 (N.H. 2002). So it made perfect sense in the Nevada case for Dr. Brunell to assume a non-partisan baseline. Here, the General Assembly was not operating as a court, it was allowed to consider politics, and a political baseline is essential.

3. Plaintiffs' Other Evidence Fails To Prove Any Colorable Claim

Plaintiffs other witnesses cannot establish gerrymandering. Aside from simulation experts, Plaintiffs' only other expert witness was Dr. Cooper. As discussed, he identified only "small decisions" (Tr. 1018:19) that he believed move "the needle . . . in very small ways" (Tr. 1046:13–14). If anything, this evidence cuts against Plaintiffs' claims of "extreme" gerrymandering.

Besides, Dr. Cooper's analysis is a severe case of confirmation bias, the error of interpreting information to match pre-existing beliefs and giving information that supports those beliefs priority over information that cuts against them. Dr. Cooper took the Court through color-coded maps—which he did not create—and looked for the lines that supported his theory and ignored the others. Worse still, on cross-examination, Dr. Cooper conceded away the entire premise of his analysis, observing (correctly) that he "can't speculate" about why any territory is in one district over another without knowing "what else is happening" between and among districts. (Tr. 1052:22–1053:3; *see also* Tr. 1048:21–1049:5.) Because Dr. Cooper "did not draw alternative lines" to identify other configurations (Tr. 1029:1–2) he had no idea which lines reflected partisan intent and which reflected other goals and constraints. Nor did Dr. Cooper confer with Plaintiffs' map-simulation experts to understand whether the configurations he identified as problematic appeared in alternative "non-partisan" simulated maps. (Tr. 1057:13–14.) That set his analysis out to sea with no rudder or even a paddle. The Court should ignore it.

Dr. Cooper's analysis is especially dubious because it contradicted Dr. Cooper's prior published opinion that gerrymandering is a "scapegoat" for "many of the biggest problems in American politics—most notably political polarization" (LDTX150 at 1; Tr. 1022:13–18) with comparatively small impact on election results or polarization. (Tr. 1021:17–1025:7; LDTX150.) Dr. Cooper's article observed that the U.S. Senate is as polarized as the House, presenting incontrovertible evidence that "redistricting reform . . . is unlikely to cure the ills of polarization." (LDTX150 at 1.) The results of elections "can be blamed as much (if not more) on the way we have settled and migrated than on the redistricting process." (LDTX150 at 1.) Dr. Cooper was not paid to write his article. (Tr. 1026:6–10.) He was paid to testify here. (PTX253 at 2.)

Dr. Cooper's opinion that the North Carolina General Assembly is "out of step" with the populace has even less use. First, it lacks an appropriate comparison. Dr. Cooper did not analyze whether statewide officeholders—like the Governor or Supreme Court Justices—are moderates, so his view that the General Assembly's members should be moderates is founded on nothing but election results (*See, e.g.*, PTX255, PTX256, PTX253 at 5–6), which Dr. Cooper wrongly believes imply moderation. Dr. Cooper used methods that "create[] 'artificial moderation'" by aggregating voters' ideologies and thus ignoring their positions on issues. (ITX99 at 7.)

Second, although Dr. Cooper purports to show that the North Carolina General Assembly is further to the right of the North Carolina citizenry than other state legislatures are to theirs (*compare* PTX261 *with* PTX258), this comparison is unreliable and irrelevant. Other states see shifts between Dr. Cooper's two charts. California's citizenry is, according to Dr. Cooper, ninth from the most progressive, but California has far and away the most progressive legislature. (*Compare* PTX261 *with* PTX258.) Similarly, Colorado's citizenry appears on Dr. Cooper's chart as having almost an identical ideological composition as North Carolina's. (PTX258.) But Colorado's legislature is the fifth most progressive in the nation. (PTX261.) Both states' redistricting plans were drawn by independent commissions.

III. Plaintiffs' Reliance on Dr. Hofeller's Files Proves Their Desperation, Nothing Else

With no law or facts to pound, Plaintiffs pound the table. As Legislative Defendants warned in their opening statement, each and every reference to Dr. Hofeller at trial was a distraction from the merits of this case, proving only that Plaintiffs' claims have none.

Step back for a moment. Proving that a legislature composed of politicians "intended" the "political consequences of the reapportionment" is "not very difficult." *Bandemer*, 478 U.S. at 129 (plurality opinion). What *is* difficult—some might say impossible, *see Rucho v. Common Cause*,

139 S. Ct. 2484, 2501 (2019)—is proving that the *effect* is unacceptable by some reliable measure. Dr. Hofeller's files add nothing to that inquiry because only the enacted plans can have any effect.

The express uses to which Plaintiffs put this evidence are all sideshows at best. Their contention that the evidence shows Dr. Hofeller used racial data is irrelevant because this is not a racial-gerrymandering case. Nor would the evidence be relevant to that type of claim because Plaintiffs have no evidence "that Dr. Hofeller was trying to draw districts to hit a specific racial target." (Tr. 557:25–558:3.) Their contention that Dr. Hofeller used political data (*see, e.g.*, Tr. 962:15–25) adds nothing here, where the use of political data was disclosed in the criteria. Plaintiffs' contention that Rep. Lewis or the lawyers in the *Covington* litigation made misrepresentations is both emphatically wrong, *see* Legislative Defendants' Opp. to Motion for Direction, and irrelevant. None of those issues are even before this Court.

There is not enough information from Dr. Hofeller's files to make any reliable conclusions on *anything*. Plaintiffs' lawyers cherry-picked the files their experts reviewed, tainting the analyses. (Tr. 1067:15–1068:6.) Plaintiffs' experts could only review "what was on Dr. Hofeller's screen when he [last] saved those files and . . . the date that he saved those files" (Tr. 1068:10–12), rendering all conclusions about the map-drawing process unreliable and speculative. In fact, some files did not display partisan color coding on the territory displayed on the mapping screen. (*See, e.g.*, PTX566; PTX563; PTX568; PTX571.) These were copied into other files—and then more files. No one knows how the files worked, why they were copied, or when the *real* work occurred or with what data. No one even knows at what point Dr. Hofeller looked at partisan data.

Predictably, Plaintiffs' presentation devolved into a circus. Dr. Cooper invented a comparison to traffic lights because, "like, if you are a Republican mapmaker, you're trying to draw a map to benefit one party at the expense of the other, the red is sort of saying stop. The green

is saying go, the yellow is saying stop and consider." (Tr. 941:5–10.) This was Dr. Cooper's idea, not Dr. Hofeller's or anyone else's. Even though Dr. Cooper's traffic-light explanation has nothing to do with anything, he testified about the traffic-light colors at length and on prompting of counsel as if the traffic-light explanation were in evidence. (*See, e.g.*, Tr. 944:8; Tr. 946:12–15; Tr. 964:19.) This shows only the extent to which Plaintiffs would to go to fabricate information to create vague impressions, such as that, "when you get into the red VTDs of Winston-Salem," the election data says "stop." (Tr. 977:8–11; *see also* Tr. 941:11–13 (similar testimony).) This is just plain silly.

Indeed, no one knows when the files were created, and there is powerful evidence that it was years ago: the principal maps Dr. Cooper analyzed contain no election data from 2016 and only one election from 2014. (Tr. 1074:7–1075:8.) It is highly unlikely that a map-drawer would draw maps in 2017 without election data from 2016. The districts are not meaningfully similar to the enacted districts, as Dr. Chen's own charts show. (*See* Proposed Findings ¶¶ 497–501.)[18] Nor would any similarity be relevant to the claims before the Court.

IV. Plaintiffs Have Left This Court Unable To Grant Relief

Plaintiffs' claims fail for the additional reason that they have left the Court unable to afford relief, for two separate reasons. First, North Carolina law requires that "[e]very order or judgment declaring unconstitutional or otherwise invalid" any redistricting plan must "identify every defect found by the court, both as to the plan as a whole and as to individual districts." N.C. Gen. Stat. § 120-2.3. Plaintiffs provide no basis for the Court to do this. They cannot identify how any district

[18] Simply because Dr. Johnson's analysis was not admitted does not mean Plaintiffs' arguments are correct. Dr. Chen's exhibits show significant differences between the enacted districts and Dr. Hofeller's draft districts where discretion is allowed by the rules, as Legislative Defendants' proposed findings of fact explain.

should be drawn and principally challenge legislative *motive* and hypothetical, simulated results that cannot and will not occur. They do not show "defect[s]" in actual districts.

Instead of providing the Court with a legal standard to satisfy these legal rules, Plaintiffs ask the Court to make political, not legal, judgments about whether districts should lean Democratic or Republican or be "competitive" by some imprecise, highly speculative metric. Even if there were somehow a legal entitlement to this, the Court would be incapable of complying with its statutory duty to tell the General Assembly what specifically to do to fix the supposed problems Plaintiffs claim (but cannot prove) exist. Their failure to guide in this department dooms their claims for yet another reason.

Second, Plaintiffs' delay in filing the case has left the Court unable to grant relief before the 2020 elections. 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 came too late to impact the 2008 elections. A final appellate decision in this case cannot come meaningful before that date in this election cycle. And more districts are at issue here than in *Pender County*. Accordingly, it is too late to afford meaningful relief to Plaintiffs. They can blame only themselves. The plans were enacted in 2017, and many districts are no different from what they were in 2011. Plaintiffs' delay is their own fault.

CONCLUSION

The Court should enter final judgment against Plaintiffs claims and dismiss them.

This 7th day of August, 2019
BAKER & HOSTETLER, LLP

E. Mark Braden*
(DC Bar #419915)
Katherine L. McKnight*
(DC Bar #994456)
Trevor M. Stanley*
(VA Bar # 77351)
Richard B. Raile*
(VA Bar # 84340)
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
tstanley@bakerlaw.com
rraile@bakerlaw.com
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Patrick T. Lewis*
(OH Bar # 0078314)
127 Public Square, Suite 2000
plewise@bakerlaw.com
Cleveland, OH 44114-1214
Telephone: (216) 621-0200
Facsimile: (216) 696-0740

Robert J. Tucker*
(OH Bar # 0082205)
Erika Dackin Prouty
(OH Bar # 0095821)
rtucker@bakerlaw.com
eprouty@bakerlaw.com
200 Civic Center Drive, Suite 1200
Columbus, OH 43215-4138
Telephone: (614) 228-1541
Facsimile (614) 462-2616

* Admitted *pro hac vice*

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456
Thomas A. Farr
N.C. State Bar No. 10871
Michael McKnight
N.C. State Bar No. 36932
Alyssa M. Riggins
N.C. State Bar No. 52366
phil.strach@ogletreedeakins.com
tom.farr@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
alyssa.riggins@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412

Counsel for the Legislative Defendants

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
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

John E. Branch, III
Nate Pencook
128 E. Hargett St, Suite 300
Raleigh, NC 27601
(919)856-9494
jbranch@shanahanlawgroup.com

Counsel for the Intervenor-Defendants

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
601 Massachusetts Ave. NW
Washington, DC 20001-3761
(202) 942-5000
Stanton.jones@arnoldporter. Com

Marc E. Elias
Aria C. Branch
700 13 th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna
1201 Third A venue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

Counsel for Common and the Individual Plaintiffs

This 7th day of August, 2019.

By: /s/ Phillip J. Strach
Phillip J. Strach, N.C. State Bar No. 29456