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

COMMON CAUSE, *et al.*, Plaintiffs, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	)	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT
League of Women Voters of North Carolina, *et al.*, Plaintiffs, v. Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	)	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE COURT

LEGISLATIVE DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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LEGISLATIVE DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Legislative Defendants, by and through undersigned counsel, submit the following proposed findings of fact and conclusions of law under Fed. R. Civ. P. 52(a).[1]

I. INTRODUCTION

The Supreme Court has ruled that so-called political gerrymandering claims are not justiciable unless plaintiffs can devise a test conclusively establishing when "too much" partisanship has been injected in redistricting. The plaintiffs here have fallen woefully short. They invite this Court to adopt rules relying on mathematical tests which mandate *judicial sorting* of voters. Moreover, their conflicting legal theories have no support in Supreme Court precedent. The ultimate effect of the vague and unprecedented standards requested by plaintiffs would result in most redistricting done by federal judges. The Court should reject plaintiffs' ambiguous and unprecedented standard.

Accordingly, this Court should adopt legislative defendants' proposed findings of fact and conclusions of law and dismiss plaintiffs' claims in this action.

II. FINDINGS OF FACT

A. Enactment of the 2016 Contingent Congressional Plan

1. On February 5, 2016, a three-judge court for the United States District Court for the Middle District of North Carolina found that the 2011 versions of North Carolina's First and Twelfth Congressional Districts ("CD") were unconstitutional racial gerrymanders. *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016) *aff'd sub nom*

[1] Contemporaneous with the instant filing, Legislative Defendants have filed a Post-Trial Brief, which is incorporated herein by reference.

Cooper v. Harris, 137 S.Ct. 1455 (2017). In its opinion, the district court directed the North Carolina General Assembly to enact plans to remedy these violations no later than February 19, 2016.

2. Following the decision in *Harris*, the main goal of North Carolina's legislative leaders was to pass a new plan that would not violate the judgment entered in *Harris.* Thus, shortly following the decision by the *Harris* court, two of the legislative leaders, Senator Bob Rucho and Representative David Lewis, met with their mapdrawing consultant, Dr. Hofeller. (DX 5001, ¶¶ 4-5) Redistricting concepts were discussed with Dr. Hofeller as leaders made plans to comply with the Court's order. (*Id*.) Dr. Hofeller also drew conceptual maps on his personal computer. (Tr. H. Redist. Comm., Feb. 19, 2016, at 21, 22, 27; Tr. S. Floor Sess., Feb. 18, 2016, at 32, 34-37; JTX 1016, DX 5022)

3. On February 15, 2016, public hearings were held in six different locations. Input was also received from voters who submitted comments through the General Assembly website. Partisan statements were given by persons who supported the districts declared illegal by the Court as well as comments from persons who agreed with the Court's decision. Many persons asked that new districts be based upon whole counties and that precincts not be divided into different districts. Other speakers recommended that the serpentine CD 12 be eliminated from any new plan, and requested that race not be used as a criteria. (Tr. Public Hearing, at 20, 24; 24-26; 37, 40; 41, 42; 46, 49; 49, 50; 79, 81, 82; 91-93; 105, 106; 134, 138; 177, 179-180; 207, 208; 226, 230; JTX 1004)

4. The General Assembly received this feedback and incorporated it to the extent possible in the mapdrawing process in light of the very short amount of time allowed by the district court to enact a new plan. On February 16, 2016, the General Assembly's Joint Select Committee on Redistricting ("Joint Committee") met to consider criteria for a new congressional plan. The Joint Committee consisted of nineteen Senators and nineteen Representatives. During the proceedings, the Joint Committee considered and then adopted criteria to be used in drawing a new congressional plan. The criteria included:

- "Equal Population." (Tr. Joint Committee, Feb. 16, 2016, at 12-18, JTX 1005) The Joint Committee adopted this criterion with only one dissenting vote. (*Id.* at 18)
- "Contiguity." (*Id.* at 18-24) The Joint Committee unanimously adopted this criterion. (*Id.* at 24).
- "Political data: the only data other than population to be used shall be election results in statewide elections since 2008, not including two presidential contests. Data identifying race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting Districts, referred to as VTDs, should be split only when necessary to comply with the zero deviation population requirement set forth above in order to ensure the integrity of political data." (*Id.* at 24-

47) The Joint Committee adopted this criterion by a vote of 23 to 11. (*Id.* at 47)

- "Partisan Advantage: The partisan makeup of the Congressional delegation under the [2011] enacted plan is 10 Republicans and 3 Democrats. The committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's Congressional delegation." (*Id.* at 47-69) The Joint Committee adopted this criterion by a vote of 23 to 11. (*Id.* at 69)
- "12th District: The current General Assembly inherited the configuration of the 12th District from past General Assemblies. The configuration was retained . . . because the district had already been heavily litigated over the past two decades, and ultimately approved by the courts. The *Harris* court has criticized the shape of the 12th District, citing the serpentine nature. In light of this, the Committee shall construct districts in the 2015 [*sic*] Contingent Congressional Plan that eliminate the current configuration of the 12th District." (*Id.* at 70-78) The Joint Committee adopted this criterion by a vote of 33 to 1. (*Id.* at 78)
- "Compactness: In light of the *Harris* court's criticism of the compactness of the 1st and 12th districts, the Committee shall make

reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall be made for reasons of equalizing population, consideration of incumbency, and political impact. Reasonable efforts shall be made not to divide a county into more than two districts." (*Id.* at 79-94) The Joint Committee adopted this criterion by a vote of 27-7. (*Id.* at 94)

- "Incumbency: Candidates for Congress are not required by law to reside in a district they seek to represent; however, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan." (*Id.* at 94-98) The Joint Committee adopted this criterion by a vote of 31-1. (*Id.* at 98)

5. During the discussion over the criteria, the legislative leaders confirmed several important points. In drawing the new plan, Representative Lewis stated that the criteria would not be ranked in order of importance that, "drawing maps is largely a balancing act," and "that making reasonable efforts would not include violating any of

the other criteria . . . ." (*Id*. at 65, 66) On the issue of contiguity, Representative Lewis added that the concept of "point contiguity" would not be used. (*Id.* at 19, 20)[2]

6. During the discussion, members of the minority party objected to the proposed criterion that race not be considered in the constructions of the new maps. (*Id.* at 27-29) Representative Lewis responded by stating that because of the finding by the *Harris* court that there was no basis in evidence showing the existence of racially polarized voting, race "should not be considered." (*Id.* at 26-27, 30)

7. In response to a question by Senator Floyd McKissick, Representative Lewis stated that "racially polarized voting" was "the trigger to draw a VRA district" and that because the court had "found that there was not [*sic*] racially polarized voting," "race should not be a consideration in drawing the maps." (*Id.* at 30-31)

8. Following the conclusion of the Joint Committee's meeting on February 16, 2016, Dr. Hofeller downloaded a concept for a congressional plan from his personal computer to a computer maintained by the General Assembly. Dr. Hofeller then used the state's computer to complete a congressional map that followed the criteria adopted by the Joint Committee. (Tr. H. Redist. Comm., Feb. 19, 2016, at 21; DX 5022)

9. On February 17, 2016, Representative Lewis presented the proposed 2016 congressional map to the Joint Committee. Representative Lewis explained how the proposed map complied with the criteria adopted by the Joint Committee on February 16, 2016. (Tr. Joint Comm., Feb. 17, 2016, at 11-12; DX 5096) Representative Lewis

[2] *See Shaw v. Hunt*, 861 F. Supp. 408, 468 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996) ("*Shaw II*").

stated that race was not considered and that racial statistics were not included in the statistical reports provided to the Joint Committee. (*Id.*) Representative Lewis stated that the map was "a weaker map" for Republicans as compared to the 2011 plan, but that the 2016 plan gave an opportunity to maintain the partisan make-up of the current congressional delegation. (*Id.* at 12) He stated that the map eliminated the serpentine CD 12 and that the map divided only 13 counties and 12 VTDs (or precincts).[3] (*Id.*) Representative Lewis also explained that only two incumbents (Democratic Congressman David Price and Republican Congressman George Holding) were placed in the same district and that all of the other eleven members of Congress were placed in districts by themselves. (*Id.* at 12, 31-32)

10. A member of the minority party, Senator McKissick, requested that staff provide a report showing the registration and racial statistics for all of the proposed new districts. (*Id.* at 14, 15, 36-38, 40, 41) A member of the majority party, Senator Harry Brown, spoke on the issue of competitiveness and noted that in 2008 several Democratic candidates would have won statewide elections in the proposed District 13. (*Id.* at 40) Representative Lewis noted that Wilson, Pitt, and Durham Counties were divided to take into account the residency of incumbents. (*Id.* at 49, 50) Representative Mike Hager, a Republican, observed that the minority party had not offered any alternative maps. (*Id.* at 53, 54)

[3] Of the 13 divided counties, 11 were counties with a population of 100,000 or more. (DX 5010) (showing that, among the 13 counties divided between two districts, only Bladen and Wilson had a population of less than 100,000). Thus, smaller counties with populations under 100,000 were general wholly included in a specific district.

11. Representative Bert Jones, also a Republican, congratulated the redistricting chairs for drawing a new map under "very difficult time limits" that only divided 13 counties and 12 precincts. (*Id.* at 56, 57) Representative Jones also recalled the history of maps drawn for political advantage by Democratic-controlled General Assemblies and he observed that the Democratic candidate for Attorney General in 2008 would have won all 13 of the newly-proposed districts, demonstrating the ability of a strong Democratic candidate to win each of the districts. (*Id.* at 58-59) By a vote of 24 to 11, the Joint Committee adopted a motion to favorably report the 2016 Plan to the General Assembly. (*Id.* at 66-72)

12. On Thursday, February 18, 2016, the proposed 2016 Plan was reviewed and approved by the Senate Redistricting Committee. Senator Rucho began the meeting by confirming that Senator McKissick had received the report he had requested showing the registration and racial statistics for all of the proposed districts. (Tr. S. Redist. Comm., Feb. 18, 2016, at 2, DX 5096) Senator Rucho advised that the plan was being offered to comply with the Court's Order in *Harris*. (*Id.* at 7) Representative Lewis was invited by the Senate to appear before the Committee, and he again explained the criteria used to draw the map. (*Id.* at 9-11) Senator Harry Brown, a Republican, again noted that the Democratic candidate for Attorney General won all 13 proposed districts under the 2008 election results. (*Id.* at 19) Representative Lewis stated that the 2008 presidential race was not used to draw the proposed districts because of criticisms from the Court. (*Id.* at

20) Representative Lewis noted that VTDs or precincts were only split to equalize population. (*Id.* at 40)

13. Kara McCraw, an employee of the Legislative Analysis Division, then reported that the 1992 Congressional Plan divided 44 counties, that the 1997 plan divided 22 counties, that the 1998 plan divided 21 counties, that the 2001 plan divided 28 counties, that the 2011 plan divided 40 counties, and that the 2016 proposed plan divided only 13 counties. (*Id.* at 41-42) McCraw also stated that the 2001 plan divided 22 precincts and that the 2011 plan divided 68 precincts. (*Id.*) McCraw stated that the proposed 2016 plan divided only 12 precincts. (*Id.*) The Committee then approved the 2016 congressional plan by a vote of 12 to 5. (*Id.* at 58-63)

14. Later, on February 18, 2016, the Senate met to consider the 2016 Plan. All the same issues that had been discussed during the meetings of the Joint Committee were raised again during the floor debate. (Tr. S. Floor Sess., Feb. 18, 2016, at 22; DX 5097) The President *Pro Tempore* of the Senate, Senator Phil Berger, concluded the debate by summarizing the position of the majority party. Senator Berger noted that the Court had held "that race should not be used as a factor." (*Id.* at 104-16) Because all of the criteria were kept in balance in drawing the congressional map, it was not drawn to "maximum political advantage." (*Id.* at 107-08)[4] Senator Berger emphasized that the 2016 Plan was drawn to "harmonize" all of the criteria adopted by the Joint Committee and to comply

[4] In fact, Senator Berger noted his view that a congressional plan with 11 Republican-leaning districts could be drawn, but had not. (Tr. S. Floor Sess. Feb. 18, 2016, at 107-08; DX 5097)

with the Court's Order. (*Id.* at 106-07, 109) Senator Berger also stated that because all of the criteria were used, none of the districts constituted a political gerrymander. (*Id.* at 108-09) After Senator Berger concluded his remarks, the Senate voted to approve the plan by a vote of 32-15. (*Id.* at 110)

15. On Friday, February 19, 2016, the House Redistricting Committee met to consider the 2016 Plan. The Committee provided an opportunity for members of the public to speak on the proposed plan, but only one member of the public appeared for this opportunity. (Tr. H. Redist. Comm., Feb. 19, 2016, at 2; DX 5022) Representative Lewis again reviewed the criteria used for drawing the plan. (*Id.* at 11-12) Representative Michaux, a Democrat, asked Representative Lewis if any attention was paid to whether the maps "addressed the problem of vote dilution." (*Id.* at 13) Representative Lewis responded by referring Representative Mickey Michaux to the discussions they had had during the Joint Redistricting Committee and then submitted into the record three expert reports prepared by Dr. Allan J. Lichtman. (*Id.*) Dr. Lichtman has appeared as an expert for plaintiffs in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) and *Covington v. State of North Carolina*, 1:15-cv-399 (M.D.N.C.) (*Id*) [5] Representative Lewis reminded Representative Michaux that race was not considered in drawing the districts because of

[5] Dr. Lichtman opined that in North Carolina a congressional district with a black VAP between 40% to 50% as well as strong Democratic districts in which African Americans constitute a majority of registered Democrats, provide black voters with districts in which they have an equal ability to elect their candidates of choice. (See Affidavit of Allan J. Lichtman (January 18, 2012) at ¶¶ 8-14, Second Affidavit of Allan Lichtman at pp. 3, 4, 8, 9, and Table 4; DX 5017, 5016) Based upon Dr. Lichtman's expert testimony, the 2016 versions of CD 1 and CD 12 constituted ability to elect districts and would therefore serve as a defense to any vote dilution claim that might be brought in the future.

the *Harris* court's decision "that racially polarized voting did not exist," and that racially polarized voting was "one of the triggers that would require race to be used." (*Id.* at 12-13, 15, 16-19) Representative Hager supported Representative Lewis's statements by reading relevant portions of the opinion by the *Harris* court. (*Id.* at 23-26) The House Committee then voted to favorably recommend the 2016 Plan by a vote of 12 to 6. (*Id.* at 51)

16. The House met to consider the 2016 Plan later on February 19, 2016. Representative Lewis again explained the criteria used to draw the proposed plan. (Tr. H. Floor Sess., Feb. 19, 2016, at 3-7; JTX 1016) Representative Lewis and Representative Michaux debated the meaning of the Court's decision in *Harris*. (*Id.* at 7-20) Many of the issues already discussed by the Joint Committee and House Redistricting Committee were again discussed and debated. Representative Lewis noted that the *Harris* opinion "did not find racially polarized voting" and that during the legislative proceedings no member of the House or Senate had offered any evidence of racially polarized voting. (*Id.* at 79) Representative Lewis stated that the maps did not guarantee the election of ten Republicans and again noted that the Democratic candidate for Attorney General would have won all 13 districts in the 2008 General Election. (*Id.* at 79-80) Finally, Representative Lewis stated that all of the criteria for the maps had been approved by the Joint Committee, that all of the criteria were "considered together," and that "every effort had been made to harmonize them." (*Id.*) The House then approved the 2016 Plan by a vote of 65 to 43. (*Id.* at 80-81)

B. Characteristics of the 2016 Plan.

17. A copy of the 2016 Plan, together with the political statistics used to draw the plan, was filed with the *Harris* court on February 19, 2016. (Doc. 149; Doc. 149-1; *see also* Declaration of Dan Frey ("Frey Decl."); DX 5002)

18. The 2016 Plan is based upon whole counties with none of the districts drawn to resemble the 2011 versions of CD 1, CD 4, or CD 12. (DX 5001, ¶¶ 5-7) CDs 1, 3, 5, 7, 10 and 11 remained generally in the same location in the 2016 Plan as they were located in the 2011 plan. The remaining five districts in the middle of the state—CDs 2, 6, 8, 9, and 13—had to be significantly altered due to the reconfiguration of CDs 4 and 12. (*Id*. at ¶¶ 16-30) Maps showing the counties won by Senator Thom Tillis in 2014—a Republican—show that Republican voters are more dispersed throughout the State than Democratic voters, who tend to be concentrated in urban areas and the northeastern part of the State. As a result, congressional districts based upon whole counties naturally result in a larger number of Republican-leaning congressional districts. (Frey Decl. ¶¶ 5, 6, 7; DX 5002, 5005) Thus, based upon past voting patterns, congressional districts based upon whole counties naturally favor voters who vote for Republican congressional candidates.

19. However, despite these past voting patterns, registration data and the results of past elections suggest that almost all of the 2016 districts have the potential for competitive elections depending on whether the Democratic Party nominates candidates with views that might appeal to ticket splitting Democratic or Republican voters and

unaffiliated voters. For instance, based on the 2008 election results, then Attorney General and now Governor Roy Cooper would have won all 13 districts. (Tr. Joint Comm., Feb. 17, 2016, at 58-59; DX 5096) Democrats also enjoy a registration advantage in 12 of 13 districts in the 2016 plan. Democrats are in the majority of registered voters in the 2016 versions of CD 1 and 12 and a plurality of registered voters in CD 2, CD 3, CD 4, CD 6, CD 7, CD 8, CD 9, CD 10, CD 11 and CD 13. Registered Republicans are not a majority in any district and a bare plurality only in CD 5. In all of the districts, registered Democrats and unaffiliated voters constitute a super-majority of all registered voters. (Frey Decl. ¶¶ 50-64, Ex. 13; DX 5002, 5006)

20. While race was not considered in the construction of the 2016 districts, Senator McKissick requested that race statistics be made part of the legislative record. These statistics show that the 2016 version of CD 1 has a black voting age population ("BVAP" or "black VAP") of 44.46% while the 2016 version of CD 12 has a BVAP of 36.20%. Eight other districts have a BVAP of approximately 20% or higher (as compared to a statewide BVAP of approximately 22%): CD 2 (19.69%); CD 3 (21.19%); CD 4 (22.40%); CD 6 (19.86%); CD 7 (20.24%); CD 8 (22.41%); CD 9 (19.63%); and CD 13 (21.18%). (Frey Decl. ¶¶ 50-64, Ex. 16; DX 5009)

21. The expert for the plaintiffs in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) and *Covington v. State of North Carolina*, 1:15-cv-399 (M.D.N.C.), Dr. Allan Lichtman, has testified that in North Carolina strong Democratic districts in which African Americans constitute a majority of registered Democrats are districts that provide

African Americans with an equal opportunity to elect their candidates of choice. (DX 5016, 5017) The 2016 versions of CD 1 and CD 12 fit Dr. Lichtman's definition. Democrats constitute 66.34% of the registered voters in the 2016 version of CD 1 while African Americans constitute 61.85% of the registered Democrats in that district. In the 2016 version of CD 12, Democrats constitute 51.25% of all registered voters while African Americans constitute 62.29% of registered Democrats. (Frey Decl. ¶¶ 78, 79, Ex. 15; DX 5002, 5008)

22. Dr. Lichtman also opined that in North Carolina African Americans sometimes have an opportunity to elect their candidates of choice in districts where the BVAP is "substantially below" 40 percent. (Second Affidavit of Allan Lichtman, pp. 10-12; DX 5016) Dr. Lichtman specifically referenced a state Senate district which included BVAP of only 21.1% as an example of a district won by an African American candidate in two different elections. (*Id.* at 10) Without regard to CD 1 and CD 12, four of the 2016 congressional districts have a BVAP in excess of 21.1%: CD 3, CD 4, CD 8, and CD 13.

C. Facts Regarding Plaintiffs

1. Plaintiffs residing in the First District

a. Plaintiff Annette Love

1. Plaintiff Annette Love ("Ms. Love") has lived in North Carolina's First Congressional District for 14 years. (Doc. 101-1; Dep. Tr. Of Annette Love ("Love Dep") at 8:16-16; 16:9-16) Ms. Love is a member of the North Carolina Democratic Party. (Doc. 101-1; Love Dep. at 12:3-9; 14:22-24; 19:5-18)

2. Although Ms. Love contends that the 2016 Plan "diluted" the value of her vote, she has not been deterred from voting and does not have a suggestion as to how the districts should be changed. (Doc. 101-1; Love Dep. at 15:17-25) Her candidate of choice, G.K. Butterfield, was elected in both the 2014 and 2016 Congressional elections and she believes she is adequately represented. (Doc. 101-1; Love Dep. at 16:2-12) She says her vote has been diluted even though her congressman is a Democrat because only three Democratic representatives were elected versus ten Republicans representatives. (Doc. 101-1; Love Dep. at 12:3-15)

3. Ms. Love believes that North Carolina should divide its congressional districts "fairly," and thinks that should be accomplished by making 50 percent of the districts Republican and 50 percent of the districts Democratic. (Doc. 101-1; Love Dep. at 13:2-19; 14:7-15:6) She did not know how to draw a map that resulted in an even split of representation. (Doc. 101-1; Love Dep. at 14:12-15:6)

b. Plaintiff Larry D. Hall

1. Plaintiff Larry D. Hall ("Secretary Hall") resides in North Carolina's First Congressional District and is a member of the Democratic Party (Doc. 101-2; Dep. Tr. of Larry Hall ("Hall Dep.") at 12:5-9; 17:5-23; 19:6-18; 25:2-4) Secretary Hall currently serves as North Carolina's Secretary of Veteran and Military Affairs. (Doc. 101-2; Hall Dep. at 8:11-14) At the time this suit was filed, Secretary Hall was the leader of the Democratic Caucus in the State House. (Doc. 101-2; Hall Dep. at 19:6-10)

2. In 2016, Secretary Hall voted for Congressman G.K. Butterfield, who won the election and serves as his representative. (Doc. 101-2; Hall Dep. at 12:8-15) From 2002 until 2010, Secretary Hall was represented by Congressman David Price, who was also Secretary Hall's candidate of choice. (Doc. 101-2; Hall Dep. at 12:16-13:1)

3. Secretary Hall does not feel that he was personally targeted or retaliated against in the drawing of the 2016 congressional districts. (Doc. 101-2; Hall Dep. at 17:20-24)

4. Secretary Hall admitted that voting habits in a district can change over time. (Doc. 101-2; Hall Dep. at 29:17-30:16) He further admitted that he voted for Republican candidates before and that it would be a "case-by-case" basis whether he voted for a Republican or a Democrat based on the candidate's values. (Doc. 101-2; Hall Dep. at 31:2-32:22)

5. Secretary Hall believes that fundraising, in addition to party affiliation, affects a candidate's ability to win an election. (Doc. 101-2; Hall Dep. at 16:20-25)

6. Secretary Hall admitted the Democrats did not submit alternative maps during the 2016 redistricting process. (Doc. 101-2; Hall Dep. at 39:15-40:24) He admitted that Democrats could have submitted alternative maps after the court ordered redrawing, but that they elected not to for political reasons because they did not want it to "give the appearance" that they were in agreement with the Republican redistricting plan or "give it legitimacy." (Doc. 101-2; Hall Dep. at 42:14-44:12)

7. Secretary Hall said that gerrymandering could exist if legislators drew district lines to protect incumbents, but admitted there was some value in protecting incumbents during redistricting. (Doc. 101-2; Hall Dep. at 27:10-28:23; 47:19-48:2) He said it would be "hard to say" how to draw district lines sufficient to protect an incumbent because "[y]ou've got a growing number of unaffiliated voters." (Doc. 101-2; Hall Dep. at 28:25-29:15)

c. Plaintiff Gunther Peck

1. Plaintiff Gunther Peck ("Dr. Peck") resides in North Carolina's First Congressional District. (Doc. 101-3; Dep. Tr. of Gunther Peck ("Peck Dep.") at 9:5-9). His residence has been located in the First District since 2012. (Doc. 101-3; Peck Dep. at 61:18-20). Prior to 2012, Dr. Peck's residence was located in North Carolina's Fourth Congressional District and he was represented by Congressman David Price, a Democrat. (Doc. 101-3; Peck Dep. at 42:13-17)

2. Dr. Peck is a member of the North Carolina Democratic Party. (Doc. 101-3; Peck Dep. at 61:12-13) He is represented by Congressman G.K. Butterfield, whom Dr. Peck described as "a good man whose politics I agree with." (Doc. 101-3; Peck Dep. at 26:6-11) Regardless of whether he lived in the First or Fourth Districts, his candidate of choice has won the congressional election every election since 2004. (Doc. 101-3; Peck Dep. at 67:17-22; 68:6-15)

3. Dr. Peck has had no involvement in the redistricting process before this suit. (Doc. 101-3; Peck Dep. at 69:14-16) Dr. Peck does not know the factors legislators used to create the 2016 congressional districts. (Doc. 101-3; Peck Dep. at 70:19-22)

4. Dr. Peck admitted that political affiliations can change over time and that he could vote for a Republican under certain circumstances. (Doc. 101-3; Peck Dep. at 79:5-15; 80:11-81:17) Dr. Peck admits that personal relationships, rather than party affiliation, could affect voting. (Doc. 101-3; Peck Dep. at 55:23-56:2)

5. Dr. Peck admitted he did not know how to "fix" the congressional districts to bring them within his satisfaction. (Doc. 101-3; Peck Dep. at 84:5-12) Dr. Peck said turnout played a large role in the outcome of elections. (Doc. 101-3; Peck Dep. at 33:6-34:20) Dr. Peck alleged that gerrymandering decreased turnout, but admitted he couldn't provide detailed numbers to back up his claim and that the effect, if any, was "correlation, not causation." (Doc. 101-3; Peck Dep. at 45:10-46:15)

d. Plaintiff Faulkner Fox

1. Plaintiff Faulkner Fox ("Ms. Fox") is a registered Democrat who currently resides in the First Congressional District. (Doc. 101-4; Dep. Tr. of Faulkner Fox ("Fox Dep.") at 8:19-20; 9:21-10:2)

2. Ms. Fox admits her candidate of choice won in the 2016 election and, each time before that going back to 2004, when she lived in the Fourth Congressional District. (Doc. 101-4; Fox Dep. at 19:19-20:1; 21:16-21)

3. She testified that the districts should reflect her version of proportional representation and that a fair breakdown would go back and forth between 6 Republicans and 7 Democrats so that it would be competitive. (Doc. 101-4; Fox Dep. at 54:9-55:1)

4. Despite her contention that her congressman, G.K. Butterfield, is in a "safe seat" and "can do whatever he wants," Ms. Fox could not cite an example of how Congressman Butterfield has not been responsive to her needs. (Doc. 101-4; Fox Dep. at 29:13-31:23) Instead, Ms. Fox re-iterated that her concern in this lawsuit is with the partisan breakdown of North Carolina's entire congressional delegation and not with the First District. (*Id.*)

e. Plaintiff William Collins

1. Since 2002, Plaintiff William Collins ("Mr. Collins") has resided in North Carolina's First Congressional District. (Doc. 101-5; Dep. Tr. of William Collins ("Collins Dep.") at 15:2-6; 34:25-35:2)

2. He is a registered Democrat. (Doc. 101-5; Collins Dep. at 10:2-6; 29:5-9).

3. Mr. Collins agreed to be a plaintiff because he thought "the proportion of representatives that … Democrat versus Republican was way out of line." (Doc. 101-5; Collins Dep. at 13:5-14:11) He confirmed that his problem with the current congressional map is the effect it has statewide. (Doc. 101-5; Collins Dep. at 15:11-16:19)

4. Mr. Collins says he does not know a fairer way to draw the congressional map. (Doc. 101-5; Collins Dep. at 13:25- 14:5; 24:12-23)

5. His Congressman, G.K. Butterfield, was his representative of choice in the 2016 election. (Doc. 101-5; Collins Dep. at 17:10-18:15; 19:1-13). Congressman Butterfield has been responsive to his needs as a constituent. (Doc. 101-5; Collins Dep. at 33:10-12)

6. Mr. Collins acknowledges that people can and do change their political beliefs over time and that he has personally done so. (Doc. 101-5; Collins Dep. at 19:17-20:20)

f. Plaintiff Willis Williams

1. Plaintiff Willis Williams ("Mr. Williams"), a Democrat, has resided in North Carolina's First Congressional District for at least 40 years. (Doc. 101-6; Dep. Tr. of Willis Williams ("Williams Dep.") at 6:18-21, 8:18-10:13, 34:23-25)

2. Mr. Williams's candidate of choice has won the congressional election in his district every year from 2002 to the present. (Doc. 101-6; Williams Dep. at 35:21-36:4)

3. Mr. Williams believes his current Congressman, G.K. Butterfield, represents him well. (Doc. 101-6; Williams Dep. at 37:13-21)

4. Mr. Williams is not challenging the way his congressional district is drawn in this lawsuit; rather, he is challenging the overall effect that the congressional district map has on Democratic voters statewide. (Doc. 101-6; Williams Dep. at 37:1-12)

5. Mr. Williams believes that the proportion of Republican and Democratic representatives in the State of North Carolina should be roughly "equal," and testified

that the proportion should "at least be[] either 6 or 7, if you're talking about 13 [representatives]." (Doc. 101-6; Williams Dep. at 26:13-27:22)

g. Plaintiff Elizabeth Evans

1. For at least ten years, Plaintiff Elizabeth Evans ("Ms. Evans"), a registered Democrat, has resided in Granville County, which is in the First Congressional District under the 2016 Plan. (Doc. 101-7; Dep. Tr. of Elizabeth Evans ("Evans Dep.") at 8:19-9:1; 10:3-8; 32:8-18)

2. Ms. Evans testified that she believes her vote has been diluted because she understands from "reading the newspaper" that the Democratic Party is the "majority party" in North Carolina, but Democrats currently hold three seats in North Carolina's congressional delegation. (Doc. 101-7; Evans Dep. at 21:14-24:2) Ms. Evans admitted that her lawsuit is a challenge to the statewide map and is not based upon a problem she had with her district. (Doc. 101-7; Evans Dep. at 33:1-17)

3. Ms. Evans acknowledges that people's political affiliations can change over time and testified that her father, a lifelong Republican, switched parties two elections ago. (Doc. 101-7; Evans Dep. at 33:22-36:17)

2. Plaintiffs residing in the Second District

a. Plaintiff Douglas Berger

1. From 1997 to 2010, Plaintiff Douglas Berger ("Mr. Berger") resided in the Second Congressional District. From 2010 to 2014, Mr. Berger resided in the Thirteenth

District. Since then, and for the 2016 election, Mr. Berger resided the Second District. (Doc. 101-8; Berger Dep. at 28:17-29:12)

2. Although he believes North Carolina's districts are not "competitive," he does not know how to define that term. Instead, he testified that it was similar to the Supreme Court's definition of pornography in that he would "know it when he sees it." (Doc. 101-8; Berger Dep. at 9:24-10:21)

3. Likewise, he does not know how to draw districts to ensure they are competitive. (Doc. 101-8; Berger Dep. at 9:24-10:21)

4. Mr. Berger ran for state Senate and was elected in the 2004, 2006, 2008, and 2010 elections in a district he described as a "safe Democratic seat." (Doc. 101-8; Berger Dep. 18:17-19; 21:1-18; 24:18-25, 28:22-24)

5. Mr. Berger admitted that he served in the state Senate in 2011 and supported an alternative congressional map drawn by Senate Democrats that contained "gerrymandered" districts, which he described as districts drawn to gain an advantage for an individual or political party because "any map drawn by human beings that have incumbents or political inclinations, there's going to be some level of gerrymandering." (Doc. 101-8; Berger Dep. at 33:15-37:12; Berger Dep. Ex. 2) He admitted that the 2011 congressional map proposed by Senate Democrats that he supported divided more counties than the 2016 Plan. (Doc. 101-8; Berger Dep. at 90:20-91:17)

6. Mr. Berger admitted he does not know the criteria used for drawing the 2016 map and what was considered in forming the districts. (Doc. 101-8; Berger Dep. at 74:7-24)

7. Mr. Berger admits that political beliefs change over time, that he had experienced that change personally, and that he has voted for a Republican candidate at least once and would do so again if the right candidate came along. (Doc. 101-8; Berger Dep. 65:19-70:17)

b. Plaintiff Ersla M. Phelps

1. Plaintiff Ersla M. Phelps ("Ms. Phelps") resides in North Carolina's Second Congressional District. (Doc. 101-9; Dep. Tr. of Ersla M. Phelps ("Phelps Dep") at 7:9-15; 18:11-13)

2. Ms. Phelps said she felt the 2016 congressional map diluted the strength of her vote because she did not know as many people at her polling place as before and it felt like "a totally different environment." (Doc. 101-9; Phelps Dep. at 12:4-13:20; 14:8-16). Still, Ms. Phelps had no problem casting her vote in 2016. (Doc. 101-9; Phelps Dep. at 15:15-19) Ms. Phelps said she had a lot of neighbors who were Democrats, so she thought she should be represented by a Democrat, but admitted she did not know the breakdown of registered Democrats and Republicans in the Second District. (Doc. 101-9; Phelps Dep. at 17:1-22; 29:11-18)

3. Ms. Phelps does not know how she would have drawn the district so that it would have been fairer. (Doc. 101-9; Phelps Dep. at 22:24-23:2; 31:19-24)

4. Ms. Phelps has never attempted to contact her congressperson to address any problems. (Doc. 101-9; Phelps Dep. at 24:15-17; 37:2-5) Ms. Phelps said she knew unaffiliated voters and that, even if affiliated, a voter could vote for whomever he wanted. (Doc. 101-9; Phelps Dep. at 24:24-25:15) Ms. Phelps admitted that voters might choose a candidate based on their appearance or their television ads rather than their party affiliation. (Doc. 101-9; Phelps Dep. at 26:2-11). Ms. Phelps said she could imagine a circumstance when she would vote for a Republican. (Doc. 101-9; Phelps Dep. at 25:19-21)

3. Plaintiffs residing in the Third District

a. Plaintiff Richard Taft, M.D.

1. Plaintiff Richard Taft, M.D. ("Dr. Taft") is a registered Democrat and has resided at the same address, which is currently in North Carolina's Third Congressional District, since 1976. (Doc. 101-10; Dep. Tr. of Richard Taft, M.D. ("Richard Taft Dep.") at 8:12-15, 14:12-14)

2. Dr. Taft voted in the 2016 Congressional election and the candidate of his choice, Walter Jones, a Republican, won the election in his district. (Doc. 101-10; Richard Taft Dep. at 18:1-25)

3. Dr. Taft believes that Walter Jones has represented the Third Congressional District in North Carolina since the mid-1990s. (Doc. 101-10; Richard Taft Dep. at 19:11-14)

4. Dr. Taft believes that the vote he cast in 2016 was "diluted" because he does not believe that a Democratic candidate can win in his district. (Doc. 101-10; Richard Taft Dep. at 23:21-24:22; 24-23-25:11) He is aware that General Assemblies controlled by Democrats drew the congressional district lines in the 1990s and in the 2000s—during which time Walter Jones was repeatedly re-elected to Congress—but does not believe that the congressional districts were gerrymandered during those times. (Doc. 101-10; Richard Taft Dep. at 26:22-27:6) He believes that North Carolina's congressional districts were "probably pretty fair" in earlier election cycles where the statewide breakdown of "seats were 7-6, 6-7." (Doc. 101-10; Richard Taft Dep. at 27:6-17; 27:20-28:3)

5. When asked what a "fair [districting] map" would look like, Dr. Taft stated, "there are all different kinds of ways to draw maps, I guess, but I'm not an expert in drawing maps, so it's hard for me to say. I just want it to be fair." (Doc. 101-10; Richard Taft Dep. at 29:24-30:11) In Dr. Taft's opinion, "fair" representation generally means that the number of congressional seats held by Democrats and Republicans is roughly equivalent. (Doc. 101-10; Richard Taft Dep. at 31:25-32:5)

6. Dr. Taft also believes that events that occur at a national level can affect the number of Democrats who are elected to Congress each year and the number of Republicans who are elected to Congress each year on a statewide basis. (Doc. 101-10; Richard Taft Dep. at 33:17-23)

7. Dr. Taft further admitted that there could be other factors that may affect whether a Democrat or Republican is elected in a particular district, such as whether a candidate made a mistake that upset voters in his or her district. (Doc. 101-10; Richard Taft Dep. at 33:24-34:6)

8. In addition, Dr. Taft has not spoken with anyone in North Carolina's General Assembly about the redistricting that was done in 2016. (Doc. 101-10; Richard Taft Dep. at 38:19-22)

b. Plaintiff Cheryl Taft

1. Plaintiff Cheryl Taft ("Ms. Taft"), who is married to Plaintiff Richard Taft, M.D., is a registered Democrat and has resided at the same address, which is currently in North Carolina's Third Congressional District, since 1976. (Doc. 101-11; Dep. Tr. of Cheryl Taft ("Cheryl Taft Dep.") at 6:24-7:1, 9:13-16 (referring to Dr. Richard Taft's deposition testimony at 8:12-15), 22:12-15, 28:19-23)

2. Ms. Taft voted in the 2016 North Carolina congressional election and, though she is a Democrat, the candidate of her choice, Republican Congressman Walter Jones, won the election in her district. (Doc. 101-11; Cheryl Taft Dep. at 15:11-22)

3. Even though Ms. Taft and Walter Jones disagree on a "whole lot of issues," (Doc. 101-11; Cheryl Taft Dep. at 16:4-6), Ms. Taft acknowledged that Walter Jones can still adequately represent her in Congress. (Doc. 101-11; Cheryl Taft Dep. at 15:14-18:19)

4. Ms. Taft testified that the influx of retirees and individuals with a military background over the years, which she contends has resulted in a more "pro-Republican" base in the Third Congressional District, has "diluted the Democratic voice" in that district. (Doc. 101-11; Cheryl Taft Dep. at 17:13-18:3)

5. At the same time, however, Ms. Taft also claims that the 2016 Plan "diluted" the value of her vote. (Doc. 101-11; Cheryl Taft Dep. at 25:15-17) Specifically, Ms. Taft claims that if the General Assembly "had drawn that line [for the Third Congressional District] just a little south of us, we would have been in District 1, but by putting us into this majority Republican district, *my vote counts for nothing*…I don't feel like I'm part of the democratic process." (Doc. 101-11; Cheryl Taft Dep. at 26:1-7) (emphasis added). Ms. Taft acknowledged, however, that in 2016 "[her] vote *did count*" even though she believed that it was "still being diluted because of all the other Republican votes," such as her own. (Doc. 101-11; Cheryl Taft Dep. at 30:12-25) (emphasis added)

6. Ms. Taft also acknowledged that when a General Assembly controlled by the Democrats drew the congressional district lines in the 2000s, they also put her in the Third Congressional District. (Doc. 101-11; Cheryl Taft Dep. at 28:9-29:5) When asked if she felt that her vote didn't count when the lines were drawn by a Democratic-controlled legislature and she was placed in the Third District, Ms. Taft responded by stating, "I didn't really think about it until the disparity, and then I – that's when I really started thinking about it," the "disparity" being the total number of Republicans versus

Democrats elected statewide to Congress. (Doc. 101-11; Cheryl Taft Dep. at 28:19-29:22)

4. Plaintiffs residing in the Fourth District

a. Plaintiff Morton Lurie

1. Plaintiff Morton Lurie ("Mr. Lurie") lives in North Carolina's Fourth Congressional District. (Doc. 101-12; Dep. Tr. of Morton Lurie ("Lurie Dep.") at 8:20-22; 19:14-16) Mr. Lurie is a member of the North Carolina Republican Party. (Doc. 101-12; Lurie Dep. at 7:15-8:9; 9:6-20) For most of his time in North Carolina, Mr. Lurie has been represented by David Price, who is not his candidate of choice. (Doc. 101-12; Lurie Dep. at 19:17-20)

2. Mr. Lurie has never been involved in drawing electoral maps and admits it is a difficult, if not impossible, task. (Doc. 101-12; Lurie Dep. at 20:9-21:1)

3. Mr. Lurie is not sure if he has even seen the 2016 North Carolina congressional map. (Doc. 101-12; Lurie Dep. at 21:2-6) Mr. Lurie believes his vote was "diluted" because he does not think a Republican can win in the Fourth District, but he still participates by voting in the congressional election. (Doc. 101-12; Lurie Dep. at 25:8-24) Mr. Lurie said he did not believe his vote was diluted when he was represented by a Republican. (Doc. 101-12; Lurie Dep. at 25:25-26:4)

4. Mr. Lurie agreed that a voter's views could change over time and that his own views changed over time. (Doc. 101-12; Lurie Dep. at 31:3-8) Mr. Lurie said that, while he will generally vote as a party line Republican in down-ballot elections, he

exercises more independent judgment on more important elections. (Doc. 101-12; Lurie Dep. at 29:19-30:13) For example, Mr. Lurie consistently voted Republican until 2016, when he voted for two Democratic candidates during the election: Hillary Clinton and Josh Stein. (Doc. 101-12; Lurie Dep. at 10:3-16)

b. Plaintiff Maria Palmer

1. Since 1996, Plaintiff Maria Palmer ("Ms. Palmer") has resided in North Carolina's Fourth Congressional District. (Doc. 101-13; Dep. Tr. of Maria Palmer ("Palmer Dep.") 9:5-9; 11:15-17) Ms. Palmer is a member of the North Carolina Democratic Party. (Doc. 101-13; Palmer Dep. at 10:6-13; 10:23-11:1; 27:4-18; 60:22-61:1) Her candidate of choice, Congressman David Price, was elected in 2016 and has won every election since 2002. (Doc. 101-13; Palmer Dep. at 18:23-19:20)

2. Ms. Palmer admits that political affiliations can change and voters may cross party lines to vote for a candidate of their choice. (Doc. 101-13; Palmer Dep. at 38:12-19; 39:20-40:3) Ms. Palmer admits that voter preferences in certain areas of the State may result in a candidate of one party winning a district over another and that these results would not be due to gerrymandering. (Doc. 101-13; Palmer Dep. at 46:8-24) Ms. Palmer admitted that she wanted to move to the Chapel Hill area so she could live in an area where people tended to agree with her politically. (Doc. 101-13; Palmer Dep. at 51:5-7)

3. Ms. Palmer admits that most of the people she works with continue to participate in the political process regardless of the congressional district map. (Doc. 101-

13; Palmer Dep. at 57:3-5) Ms. Palmer said some issues of responsiveness by congressional representatives could be solved by running another member of the same party against the unresponsive legislator in a primary. (Doc. 101-13; Palmer Dep. at 46:8-24) Ms. Palmer's representative in Congress, Congressman Price, has been responsive to Ms. Palmer's contacts and questions. (Doc. 101-13; Palmer Dep. at 36:21-37:11)

c. Plaintiff Alice Louise Bordsen

1. From October 1998 until January 2013, Plaintiff Alice Louise Bordsen ("Ms. Bordsen") resided in North Carolina's Sixth Congressional District. (Doc. 101-15; Dep. Tr. of Alice Louise Bordsen ("Bordsen Dep.") at 8:17-20; 9:25-10:3; 13:13-16). From January 2013 through the present, Ms. Bordsen has resided in North Carolina's Fourth Congressional District. (Doc. 101-15; Bordsen Dep. at 8:10-13; 9:25-10:7; 12:20-23)

2. Ms. Bordsen served in the North Carolina House of Representatives from 2003 to 2013. (Doc. 101-15; Bordsen Dep. at 10:19-11:3). She is currently a member of the North Carolina Democratic Party, but "started out [her] political life as a Republican." (Doc. 101-15; Bordsen Dep. at 26:17-25; 27:18-19, 28:12-20, 30:3-6)

3. Ms. Bordsen was not involved in the 2011 redistricting efforts and stated that she "wasn't very …concerned with it at the time." (Doc. 101-15; Bordsen Dep. at 22:11-23)

4. Ms. Bordsen has no first-hand knowledge of the criteria (or the weight given to any of the criteria) regarding the manner in which North Carolina's 2016 Plan

was drawn. (Doc. 101-15; Bordsen Dep. at 20:3-6) In addition, Ms. Bordsen has never been involved in any kind of redistricting efforts. (Doc. 101-15; Bordsen Dep. at 23:9-11)

5. Although Ms. Bordsen contends that the 2016 Plan "diluted" the value of her vote, she has not been deterred from voting and does not have a suggestion as to how the districts should be changed. (Doc. 101-15; Bordsen Dep. at 33:1-6; 34:1-9; 35:23-36:19) Despite Ms. Bordsen's belief that the value of her vote has been "diluted," the candidate of her choice, David Price, was elected in her district in the 2014 and 2016 congressional elections. (Doc. 101-15; Bordsen Dep. at 12:10-13:8)

6. Ms. Bordsen believes that the Fourth Congressional District in North Carolina should be more "competitive," but does not know how that could be accomplished. (Doc. 101-15; Bordsen Dep. at 49:3-17) In addition, Ms. Bordsen was unable to offer any specific ideas regarding what proportion or type of voters should be in a congressional district to make it more competitive or fair. (Doc. 101-15; Bordsen Dep. at 52:8-14)

7. Ms. Bordsen does not know how the districts should be changed. (Doc. 101-15; Bordsen Dep. at 35:23-25) Ms. Bordsen simply stated, "There are better ways. There has to be better ways." (Doc. 101-15; Bordsen Dep. at 36:12-13)

5. Plaintiffs residing in the Fifth District

a. Plaintiff William Halsey Freeman

1. Plaintiff William Halsey Freeman ("Judge Freeman") is a former superior court judge who retired in 2000 and believes he has resided in the Fifth Congressional District his whole life. (Doc. 101-14; Freeman Dep. at 6:24-7:1; 7:8-20; 12:16-19)

2. His candidate of choice has never won in any of the congressional elections he has voted in while living in the Fifth District. (Doc. 101-14; Freeman Dep. at 7:2-7)

3. Judge Freeman had only one contested election, his last, during the 20 years that he served as a superior court judge. (Doc. 101-14; Freeman Dep. at 8:16-9:8) In that election, he ran in a district and defeated a Republican even though his district was heavily Republican and he was a Democrat. (Doc. 101-14; Freeman Dep. at 8:22-10:6)

4. Before the General Assembly adopted districts for superior court judges, Judge Freeman met privately with the other three superior court judges in Forsyth County and drew the districts in which they wanted to run. The General Assembly adopted those districts and Judge Freeman believes they are still in use. (Doc. 101-14; Freeman Dep. at 11:1-12:19)

5. With respect to the 2016 Plan, Judge Freeman did not participate in any part of the process at the General Assembly and did not know what written criteria the General Assembly used in that process. (Doc. 101-14; Freeman Dep. 14:4-7) Judge Freeman contends his vote for Congress has been "diluted" and is "a waste" because there is "no remote chance" of a Democrat winning in the Fifth District. (Doc. 101-14; Freeman Dep. at 17:10-25) He also testified that, around 2010, he considered running for Congress in the Fifth Congressional District but decided against it "after consulting with

a lot of men, who I had a lot of faith in, having political knowledge, they all told me it was a total waste of time, that no Democrat could possibly win that district." (Doc. 101-14; Freeman Dep. at 18:4-10) Judge Freeman acknowledged that when he made the decision to not run because "no Democrat could possibly" win in the Fifth District, the district had been drawn by Democrats. (Doc. 101-14; Freeman Dep. at 18:9-10)

6. Plaintiffs residing in the Sixth District

a. Plaintiff Melzer Adron Morgan, Jr.

1. Since 1969, Melzer Adron Morgan, Jr. ("Judge Morgan") has resided in North Carolina's Sixth Congressional District. (Doc. 101-16; Dep. Tr. of Melzer Adron Morgan, Jr. ("Morgan Dep.") at 5:4-7; 5:11-14) Judge Morgan previously lived in the Thirteenth Congressional District and his residence has also been located in the Fifth Congressional District under previous maps. (Doc. 101-16; Morgan Dep. at 5:15-23)

2. Judge Morgan is a former superior court judge who was appointed to the bench. (Doc. 101-16; Morgan Dep. at 7:25-8:22) During his career as a judge, Judge Morgan participated in the reformation of his judicial district and opposed the redrawing of the district lines. (Doc. 101-16; Morgan Dep. at 10:24-11:20) Judge Morgan never had an opponent in an election for judge. (Doc. 101-16; Morgan Dep. at 11:18-20) Judge Morgan never presided over a redistricting case or any election cases as a judge. (Doc. 101-16; Morgan Dep. at 16:14-19)

3. Judge Morgan is a member of the North Carolina Democratic Party. (Doc. 101-16; Morgan Dep. at 27:12-17) Judge Morgan is represented by Congressman Mark

Walker. (Doc. 101-16; Morgan Dep. at 24:9-11) Judge Morgan's candidate of choice did not win the 2016 election, but did win each election between 2002 and 2010. (Doc. 101-16; Morgan Dep. at 10:11-23)

4. Judge Morgan did not follow the redistricting process closely and did not go to the legislature or participate in the redistricting process. (Doc. 101-16; Morgan Dep. at 11:24-12:7) Judge Morgan does not know the criteria the legislature used to draw its new 2016 congressional districts. (Doc. 101-16; Morgan Dep. at 12:10-14)

5. Judge Morgan became involved in the suit after he received a call from counsel for Common Cause. (Doc. 101-16; Morgan Dep. at 12:25-13:18)

6. Judge Morgan believes his vote was "diluted" because he "doesn't have much voice in speaking to [his] congressman." (Doc. 101-16; Morgan Dep. at 21:2-22:8) Judge Morgan has not conducted any analysis to determine the competitiveness of his district beyond knocking on doors and watching election results. (Doc. 101-16; Morgan Dep. at 23:9-19)

7. Judge Morgan has only attempted to contact his congressman once via postcard regarding the Affordable Care Act and has not requested any other constituent services. (Doc. 101-16; Morgan Dep. at 24:9-20)

8. Judge Morgan conceded that political affiliations can change over time. (Doc. 101-16; Morgan Dep. at 16:8-13) He also admitted voters sometimes cross party lines to vote for a candidate they prefer. (Doc. 101-16; Morgan Dep. at 28:7-12)

7. Plaintiffs residing in the Seventh District

a. **Cynthia Boylan**

1. Since November 2005, Plaintiff Cynthia Boylan ("Ms. Boylan") has resided in the Seventh Congressional District. (Doc. 101-17; Deposition of Cynthia Boylan ("Boylan Dep.") at 14:5-8) Prior to that, she lived in the Fourth Congressional District. (Doc. 101-17; Boylan Dep. at 13:24-14:1)

2 Ms. Boylan testified that if a Democrat won in her congressional district, she wouldn't feel her vote had been diluted. (Doc. 101-17; Boylan Dep. at 20:10-21:3)

3. She admits the only problem with her current Congressman is that he is a Republican and that she has never attempted to contact him or express any of her concerns to him. (Doc. 101-17; Boylan Dep. at 21:4-13)

4. She testified that she does not know how to draw the district lines more fairly. (Doc. 101-17; Boylan Dep. at 21:14-19; 27:7-11)

5. She acknowledges that political opinions can change over a person's life and that voters make decisions on which candidates to vote for based on a variety of reasons beyond the candidate's party affiliation. (Doc. 101-17; Boylan Dep. at 21:20-23:21)

8. Plaintiffs residing in the Eighth District

a. Plaintiff Coy E. Brewer Jr.

1. Plaintiff Coy E. Brewer, Jr. ("Mr. Brewer"), a registered Democrat, was assigned to North Carolina's Second Congressional District from 2002 to 2014, but was

assigned to the Eighth Congressional District in 2016. (Doc. 110-8; Dep. Tr. of Coy E. Brewer, Jr. ("Brewer Dep."), at 9:1-6, 11:16-12:2, 42:16-20)

2. Mr. Brewer is an attorney and served as a Superior Court judge in North Carolina from 1975 to 1998. (Doc. 110-8; Brewer Dep. at 5:23-6:12) As a former statewide candidate, he learned which areas of the state were strongly Democratic and which were strongly Republican and had not forgotten that information. (Doc. 110-8; Brewer Dep. at 37:3-16)

3. Mr. Brewer admits that, "[i]n North Carolina, there are very distinct geographic areas of strength between the two parties." (Doc. 110-8; Brewer Dep. at 46:4-6)

4. Mr. Brewer admitted that when Democrats were in control of the General Assembly, they drew districts for partisan advantage but "because the Democrats were required to create, under the Voting Rights Act, a number of majority-minority districts and that had the effect of aggregating Democratic votes into a small number of districts. Once that was done, the capacity for the degree of gerrymandering that exists in the 2016 lines is not as great." (Doc. 110-8; Brewer Dep. 31:8-21)

5. From 2002 to 2010, Mr. Brewer was represented by the congressional representative of his choice. (Doc. 110-8; Brewer Dep. at 12:6-13) However, beginning with the 2010 congressional election, Mr. Brewer has not been represented by the candidate of his choice. (Doc. 110-8; Brewer Dep. at 11:16-12:10) Mr. Brewer voted in

the 2016 congressional election (this time as a member of the Eighth Congressional District), but his candidate of choice did not win. (Doc. 110-8; Brewer Dep. at 11:2-6)

6. Mr. Brewer is concerned with the competitiveness of the districts in the 2016 Plan and believes that a district is competitive when "the historic voting patterns are within a range of 4 to 5 percent," but acknowledged that "it's hard to determine whether a district is truly competitive or not…but a truly competitive district is a district that…has the potential of switching from one party to another either because of the issues in a particular election cycle or because of the quality of particular candidates running in a particular election….Districts that would require an extremely abhorrent political year or extremely weak candidate on one side or strong candidate on the other side would generally be considered non-competitive." (Doc. 110-8; Brewer Dep. at 32:24-33:23)

7. However, Mr. Brewer believes that it is fair to take election results into account when drawing a congressional district map. (Doc. 110-8; Brewer Dep. at 34:10-13) He would like election results to be taken into account in drawing congressional districts, but believes they should be drawn such that there is only a 4 to 5 percent swing or preference for one party over another in any given district. (Doc. 110-8; Brewer Dep. at 34:15-20)

8. Mr. Brewer acknowledged that the residency of incumbent representatives was a legitimate factor to consider in drawing the 2016 Plan. (Doc. 110-8; Brewer Dep. at 27:24-28:15)

9. Mr. Brewer further acknowledged that keeping counties whole (as opposed to breaking counties into multiple congressional districts) is a good thing, and that it played a greater role in the 2016 redistricting process than it had in the past. (Doc. 110-8; Brewer Dep. at 28:16-29:19)

10. Mr. Brewer agreed that the decision to reduce the number of congressional districts in Cumberland County, North Carolina, from three to two during the 2016 redistricting process produced a result that was better than before. (Doc. 110-8; Brewer Dep. at 29:3-17)

9. Plaintiffs residing in the Ninth District

a. Plaintiff John Morrison McNeill

1. Plaintiff John Morrison McNeill ("Mr. McNeill"), who is currently the Mayor of Red Springs, North Carolina, resides in North Carolina's Ninth Congressional District. (Doc. 110-9; Dep. Tr. of John Morrison McNeill ("McNeill Dep.") at 8:10-19, 11:12-19, 42:6-13)

2. Mr. McNeill lived at the same address, but was a part of the Seventh Congressional district from 2000 to 2010. (Doc. 110-9; McNeill Dep. at 28:11-15). At that time, he was represented by Congressman Mike McIntyre. (Doc. 110-9; McNeill Dep. at 28:11-15)

3. Mr. McNeill is currently represented by Congressman Robert Pittenger. (Doc. 110-9; McNeill Dep. at 8:20-21)

4. Mr. McNeill is a member of the North Carolina Democratic Party. (Doc. 110-9; McNeill Dep. at 33:3-4)

5. Mr. McNeill agreed that people can change their political views and party affiliation over time. (Doc. 110-9; McNeill Dep. at 32:15-33:2, 33:5-12, 16-19) Mr. McNeill agreed that people vote for reasons unrelated to political affiliations, including celebrity, appearance, or personal friendship. (Doc. 110-9; McNeill Dep. at 33:20-34:19) Mr. McNeill said he voted Republican in a previous election. (McNeill Dep. at 33:5-7)

6. Mr. McNeill agreed that a congressman does not always have to agree with his constituents to represent them. (Doc. 110-9; McNeill Dep. at 32:10-14)

b. Plaintiff Elliott Feldman

1. Plaintiff Elliott Feldman ("Mr. Feldman") has resided in the Ninth Congressional District for over 10 years. (Doc. 101-20; Dep. Tr. of Elliott Feldman ("Feldman Dep.") at 16:1-6)

2. He is a registered Democrat. (Doc. 101-20; Feldman Dep. at 11:18-20)

3. Mr. Feldman believes his district has been "gerrymandered" since 1992, even under the Democrats' districting plan. (Doc. 101-20; Feldman Dep. at 28:5-30:11)

4. He agreed that his problem with the districts is that he believes the number of Republicans elected to Congress statewide is not proportional to the amount of votes that Republicans receive in statewide elections. (Doc. 101-20; Feldman Dep. at 30:12-31:12)

c. LWV Designee Mary Trotter Klenz

1. In addition to the above plaintiffs, Mary Trotter Klenz, the Rule 30(b)(6) designee for the League of Women Voters, is also a resident of the Ninth Congressional District. She is a registered Democrat and has resided in North Carolina's Ninth Congressional District since at least the early 1990s and cannot remember a time when a Democratic candidate won the district. (Doc. 101-28; Dep. Tr. of League of Women Voters ("LWV Dep.") at 10:8-11, 63:12-13, 64:16-65:6)

2. Ms. Klenz believes that the Ninth Congressional District was "more competitive" in the past than it was in the 2016 election, but acknowledged that a Democratic candidate has never won an election in the district since she has lived there. (Doc. 101-28; LWV Dep. at 65:7-66:20) In other words, Ms. Klenz conceded that even when her district was allegedly "more competitive" under other districting plans, the district did not elect a Democratic member of Congress. (Doc. 101-28; LWV Dep. at 65:7-66:20)

10. Plaintiffs residing in the Tenth District

a. Plaintiff Robert Wolf

1. Since 2010, plaintiff Robert Wolf ("Mr. Wolf") has resided in North Carolina's Tenth Congressional District. (Doc. 101-21; Dep. Tr. of Robert Wolf ("Wolf Dep.") at 7:14-25) His home was previously located in the Eleventh Congressional District. (Doc. 101-21; Wolf Dep. at 8:1-4) Mr. Wolf is a member of the Democratic Party of North Carolina. (Doc. 101-21; Wolf Dep. at 30:4-9)

2. Mr. Wolf said he did not know the criteria the legislature used to draw the 2016 Plan. (Doc. 101-21; Wolf Dep. at 17:13-24)

3. Mr. Wolf acknowledged that it would not be "reasonable or feasible" to draw congressional districts without considering politics. (Doc. 101-21; Wolf Dep. at 15:8-13)

4. Mr. Wolf believes the fair way to divide congressional districts would be to make them 50 percent Republican and 50 percent Democrat based upon his understanding that approximately half of the state's registered voters are Republicans and half are registered Democrats, but he does not know how he would divide the last Thirteenth District fairly between the parties. (Doc. 101-21; Wolf Dep. at 16:11-17:7)

5. Mr. Wolf admitted that he was living in a Republican district both before and after the 2016 redistricting process even though his district was drawn by Democrats prior to 2011. (Doc. 101-21; Wolf Dep. at 23:21-24:10) He said he did not think the 2016 Plan caused any more "egregious" changes to the Tenth District, but that he disliked the new map as a whole. (Doc. 101-21; Wolf Dep. at 24:18-25:19) Mr. Wolf said his problem with his particular district is that he is a Democrat and Republicans have been elected in his district consistently. (Doc. 101-21; Wolf Dep. at 31:11-17)

6. Mr. Wolf admitted that people may choose to vote for a candidate for reasons other than the candidate's political party affiliation. (Doc. 101-21; Wolf Dep. at 33:23-34:2) Mr. Wolf said he could vote Republican under certain situations. (Doc. 101-

21; Wolf Dep. at 34:11-15) Despite his objections the 2016 Plan, Mr. Wolf has continued to participate in the political process and vote. (Doc. 101-21; Wolf Dep. at 25:16-26:1)

b. Plaintiff John J. Quinn

1. Plaintiff John J. Quinn ("Mr. Quinn") has resided in North Carolina's Tenth Congressional District since 2011. (Doc. 101-22; Dep. Tr. of John J. Quinn ("Quinn Dep.") at 8:4-6, 16:12-20, 17:8-10) From 2005 to 2011, Mr. Quinn resided in North Carolina's Eleventh Congressional District. (Doc. 101-22; Quinn Dep. at 17:4-7)

2. Mr. Quinn is a member of the Democratic Party of North Carolina. (Doc. 101-22; Quinn Dep. at 10:23-11:9, 21:24-25, 37:24-25)

3. Mr. Quinn's congressman, Patrick McHenry, has been responsive to Mr. Quinn's emails to his office. (Doc. 101-22; Quinn Dep. at 19:16-20:2) Mr. Quinn's prior representative, Congressman Heath Shuler, was a Democrat and Mr. Quinn felt he represented him well in some areas but not in a number of others. (Doc. 101-22; Quinn Dep. at 20:20-21:5)

4. Mr. Quinn has not reviewed the methodology the legislature used to draw the 2016 Congressional Districts. (Doc. 101-22; Quinn Dep. at 26:4-8)

11. Plaintiffs residing in the Eleventh District

a. Plaintiff Aaron Sarver

1. Plaintiff Aaron Sarver ("Mr. Sarver") has resided in North Carolina's Eleventh Congressional District since August 2016. (Doc. 101-23; Dep. Tr. of Aaron Sarver ("Sarver Dep.") at 7:15-20, 17:9-22). Mr. Sarver resided in the Eleventh District

from August 2009 until 2011, and then resided in the Tenth District, before the 2016 redistricting plan placed him back in the Eleventh District. (Doc. 101-23; Sarver Dep. at 17:9-22)

2. Mr. Sarver is a member of the Democratic Party of North Carolina. (Doc. 101-23; Sarver Dep. at 43:2-18, 45:14-20)

3. Mr. Sarver does not know the particular factors the General Assembly used to conduct the redistricting in 2016. (Doc. 101-23; Sarver Dep. at 45:4-6)

4. Mr. Sarver said he thought his vote was "diluted" by the 2016 redistricting because it divided Asheville into two congressional districts. (Doc. 101-23; Sarver Dep. at 24:19-26:18) Mr. Sarver admitted, however, that people could disagree about whether having two congressional representatives rather than one is a good thing or not and admitted that Republicans might like having Asheville divided between two districts. (Doc. 101-23; Sarver Dep. at 29:12-16)

5. Although Mr. Sarver contends that the Eleventh District is no longer competitive for Democrats, before becoming a plaintiff in this lawsuit, Mr. Sarver admitted writing an editorial in which he encouraged Democrats to vote and described the 2016 Plan as "safe for Republican incumbents" but "slightly more competitive" than the previous districts, and stated that, "If a wave election materializes some Democrats who are long shot candidates when they filed may end up in Washington." (Doc. 101-23; Sarver Dep. at 23:7-21)

c. Plaintiff Jones P. Byrd

1. Plaintiff Jones P. Byrd has resided in the Eleventh District for over 10 years. (Doc. 110-10; Byrd Dep. at 19:22-25; 20:1)

2. Although his primary complaint about the 2016 map is that it divides Buncombe County (Doc. 110-10; Byrd Dep. at 23:9-18), he admits that he did not bring a legal challenge to the 1992 version of the Eleventh District, drawn when Democrats were in charge of the General Assembly that also divided Buncombe County. (Doc. 110-10; Byrd Dep. at 25:10-25)

3. Mr. Byrd stated that the division of Buncombe County into two different congressional districts in the past "would not have created that much of a problem for me" depending on the level of "proportionate representation" in the map, which he defined as the "relationship with the proportion of registered voters by party or other affiliation during that period of time." (Doc. 110-10; Byrd Dep. at 26:1-14)

12. Plaintiffs residing in the Twelfth District

a. Plaintiff John West Gresham

1. Plaintiff John West Gresham ("Mr. Gresham") resides in North Carolina's Twelfth Congressional District. (Doc. 101-25; Dep. Tr. of John West Gresham ("Gresham Dep.") at 7:6-9, 8:16-18). Prior to the 2016 redistricting, Mr. Gresham resided in the Ninth Congressional District. (Doc. 101-25; Gresham Dep. at 10:25-11:3, 14:13-15:2)

2. Mr. Gresham is a registered Democrat. (Doc. 101-25; Gresham Dep. at 8:7-9, 9:16-18). Gresham's candidate of choice won the 2016 congressional election. (Doc.

101-25; Gresham Dep. at 10:17-21). Mr. Gresham's candidate of choice did not win in the 2014 congressional election. (Doc. 101-25; Gresham Dep. at 47:12-16)

3. Mr. Gresham believes that gerrymandering is "in the eye of the beholder." (Doc. 101-25; Gresham Dep. at 25:15-16) He admitted that, in drawing a congressional plan in North Carolina that he would consider as not including political gerrymandering, there would "clearly" be some districts that would likely elect a Republican and some districts that would likely elect a Democrat based upon their location in the state. (Doc. 101-25; Gresham Dep. at 28:18-29:17)

4. Mr. Gresham said would like to see a nonpartisan redistricting commission use voting patterns and a computer program to create "purple districts" in the congressional map. (Doc. 101-25; Gresham Dep. at 31:9-32:17). He does not know specifically how to go about drawing "purple" districts. (Doc. 101-25; Gresham Dep. at 29:4-6)

5. Mr. Gresham admitted that the Twelfth District was "no doubt" more compact under the 2016 map than it was previously. (Doc. 101-25; Gresham Dep. at 34:11-13)

6. Mr. Gresham admitted that the political makeup of Charlotte has changed over time. (Doc. 101-25; Gresham Dep. at 33:13-24) He testified that he could not think of a statewide Democratic candidate who received less than 62 percent of the vote in Mecklenburg County. (Doc. 101-25; Gresham Dep. at 34:17-35:8)

7. Even though he has historically voted for Democrats for Congress, Mr. Gresham said he would consider voting for a Republican "if he were someone of the quality or caliber of former Republican Governor Holshouser." (Doc. 101-25; Gresham Dep. at 37:12-17)

b. Plaintiff Janie S. Sumpter

1. Since approximately 1992, Plaintiff Janie S. Sumpter ("Ms. Sumpter") has resided in North Carolina's Twelfth Congressional District ("Twelfth District"). (Doc. 101-26; Dep. Tr. of Janie S. Sumpter ("Sumpter Dep.") at 11:1-11) She is a member of the Democratic Party and has voted in every congressional election since 2002. (Doc. 101-26; Sumpter Dep. at 12:3-5, 16:21-23)

2. Ms. Sumpter voted in the 2016 congressional election, and the candidate of her choice was elected. (Doc. 101-26; Sumpter Dep. at 11:19-25)

3. Indeed, from 1992 to the present, Ms. Sumpter has been able to elect the candidate of her choice in the Twelfth District. (Doc. 101-26; Sumpter Dep. at 13:16-14:1)

4. Ms. Sumpter alleges she has been harmed by the 2016 congressional district maps "based on what it has done to other North Carolinians because of the redrawing, because of the redistricting." (Doc. 101-26; Sumpter Dep. at 25:20-26:5) She believes that the proper balance of Republicans and Democrats in Congress for the state of North Carolina "needs to be 50-50." (Doc. 101-26; Sumpter Dep. at 33:7-9)

13. Plaintiffs residing in the Thirteenth District

a. Plaintiff Russell Grady Walker, Jr.

1. Plaintiff Russell Grady Walker, Jr. ("Mr. Walker") has resided in North Carolina's Thirteenth Congressional District since early 2015. (Doc. 101-27; Dep. Tr. of Russell Grady Walker, Jr. ("Walker Dep.") at 6:6-11, 12:7-9)

2. Mr. Walker is a member of the Democratic Party of North Carolina; however, he has sometimes voted for Republicans. (Doc. 101-27; Walker Dep. at 29:24-30:4)

3. Mr. Walker's candidate did not win in the 2016 election or prior elections. (Doc. 101-27; Walker Dep. at 12:10-13; 12:20-25)

4. Mr. Walker said he could not provide a clear definition of what he referred to as a "safe" congressional district (i.e., a district in which the non-majority party was willing to come forward and run in an election). (Doc. 101-27; Walker Dep. 31:20-33:14)

14. The Organizational Plaintiffs

a. League of Women Voters

1. The League of Women Voters of North Carolina ("LWV") designated its co-president since 2015, Mary Trotter Klenz, to provide testimony on behalf of the organization. (Doc. 101-28; Dep. Tr. of 30(b)(6) Deposition of League of Women Voters ("LWV Dep.") at 5:12-16, 14:22-23, 15:1-8, 26:6-9)

2. Ms. Klenz is a registered Democrat and has resided in North Carolina's Ninth Congressional District since 1984. (Doc. 101-28; LWV Dep. at 10:8-11, 63:12-13, 64:16-20)

3. The LWV has both Democratic and Republican members but the organization does not know how many members are Democrats versus Republicans. (Doc. 101-28; LWV Dep. at 88:7-21)

4. With respect to the 2016 congressional redistricting, Ms. Klenz summarized the LWV's educational efforts as merely explaining to their members, "this is what happened and this is the outcome." (Doc. 101-28; LWV Dep. at 38:10-19)

5. The LWV did not go to North Carolina's General Assembly to advocate for any particular district maps in 2016 (Doc. 101-28; LWV Dep. at 38:23-39:1), and did not advocate for any particular redistricting criteria to be used in 2016. (Doc. 101-28; LWV Dep. at 39:4-6; 58:13-16) Although the LWV engages in discussions with members of North Carolina's General Assembly on certain matters, it did not have any discussions with the General Assembly regarding the 2016 congressional maps. (Doc. 101-28; LWV Dep. at 57:23-58:12)

6. Ms. Klenz's deposition testimony makes clear that the goal of the LWV in this lawsuit is to achieve proportional representation. For example, Ms. Klenz testified that one of the goals of the LWV is to work for "fair and equal nonpartisan redistricting." (Doc. 101-28; LWV Dep. at 48:14-16) When asked what that means, Ms. Klenz stated, "I guess the proof would be in the pudding, is the process open – but we're talking about

– in this case, we're talking about outcome so you'd have to look at the outcomes [of an election] in equal nonpartisan and see how they reflect the overall population of the state." (Doc. 101-28; LWV Dep. at 48:21-49:3) In other words, the term "fair and equal nonpartisan redistricting" to the LWV requires looking at the outcome of an election to see if it was "representative of the population of the state." (Doc. 101-28; LWV Dep. at 49:20-50:2)

7. When asked how the LWV would then determine if the outcome of an election was "representative of the population of the state," Ms. Klenz stated that they would "rely on a lot of experts" and further stated, "[w]e would probably go look at the outcomes and we would probably go to people and organizations who would have opinions and give some information, some data, and just make a general assessment of does this represent the voting population of North Carolina, the voters." (Doc. 101-28; LWV Dep. at 50:3-12) But the LWV is not able to determine or assess whether the redistricting process in North Carolina was "representative of the population of the state" without obtaining the opinion of an expert. (Doc. 101-28; LWV Dep. at 49:20-50:16)

8. Further evidence of the LWV's proportional representation goal is the fact that the LWV is not aware of (and cannot articulate) any problems with any specific districts in North Carolina following the 2016 redistricting process. (Doc. 101-28; LWV Dep. at 55:12-15) Instead, according to them, the problem lies with the "total statewide outcome" (referring to the total congressional delegation). (Doc. 101-28; LWV Dep. at 55:15-17) The LWV's designated witness testified that the organization does not have a

position on what the partisan breakdown should look like in North Carolina for congressional seats, other than that it should be "representative." (Doc. 101-28; LWV Dep. at 71:8-12)

9. Although the LWV alleges in this action that the 2016 congressional redistricting plan "directly impairs [their] mission of encouraging civic engagement in nonpartisan redistricting reform," their designated witness could not identify a specific instance in which a forum or event sponsored by the LWV had to be canceled, or where someone would not participate in such an event, because of the way the 2016 congressional map was drawn. (Doc. 101-28; LWV Dep. at 59:7-13, 61:23-62:2) The organization also did not budget any additional money as a result of the 2016 congressional districts enacted by the General Assembly. (Doc. 101-28; LWV Dep. at 85:23-86:2)

b. Common Cause

1. Bob Phillips ("Mr. Phillips") is the state director of Common Cause for North Carolina and was designated to provide testimony on behalf of the national Common Cause organization. (Doc. 110-6; Dep. Tr. of Bob Phillips ("Phillips Dep.") at 6:16-20, 9:23-25)

2. Common Cause North Carolina includes 2,000 paying members and 15,000 people involved with the organization in some capacity. (Doc. 110-6; Phillips Dep. at 12:12-13:4)

3. Common Cause includes Democratic, Republican, and unaffiliated voters in its membership. (Doc. 110-6; Phillips Dep. at 14:6-11)

4. Common Cause North Carolina is the state chapter of Common Cause, a national organization, and Common Cause North Carolina is not its own, independent nonprofit. (Doc. 110-6; Phillips Dep. at 9:23-10:12)

5. Mr. Phillips said he and members of the national Common Cause office made a joint decision to file a lawsuit challenging the 2016 redistricting plan. (Doc. 110-6; Phillips Dep. at 10:13-12:2)

6. Common Cause is challenging the 2016 redistricting plan on a statewide basis, not based on individual districts. (Doc. 110-6; Phillips Dep. at 16:24-17:1)

7. Although Common Cause uses the term "nullified" to claim that the 2016 redistricting plan constitutes illegal gerrymandering, Mr. Phillips acknowledged that all votes counted and that each voter would still have a congressional representative to turn to after an election. (Doc. 110-6; Phillips Dep. at 17:5-18:11)

8. Mr. Phillips stated that voters selected candidates for "many different reasons." (Doc. 110-6; Phillips Dep. at 19:9-25)

9. Common Cause assembled retired judges to conduct a redistricting simulation through Duke University using a variety of criteria generally used in the redistricting process. This was called the Beyond Gerrymandering project. (Doc. 110-6; Phillips Dep. at 44:5-46:3; DX 5075-5095)

10. Mr. Phillips was not sure that the simulated maps completed by the judges were any more compact, mathematically, than the 2016 North Carolina congressional map drawn by the legislature. (Doc. 110-6; Phillips Dep. at 47:2-48:18)

11. Mr. Phillips admitted that the number of counties split in the Common Cause simulation and the number of counties split by the actual 2016 map were similar. (Doc. 110-6; Phillips Dep. at 48:19-49:10; 89:21-90:6; DX 5086)

12. Mr. Phillips said he did not discuss the Voting Rights Act criteria with the judges when they made their simulation maps. (Doc. 110-6; Phillips Dep. at 105:8-24; 108:1-19)

13. Mr. Phillips admitted voters vote for candidates for different reasons that may not involve their political party. (Doc. 110-6; Phillips Dep. at 19:9-11; 20:1-19)

14. Common Cause did not consider a challenge to the 2011 redistricting plan. (Doc. 110-6; Phillips Dep. at 11:24-12:2). Common Cause did not challenge gerrymandering done by Democratic-controlled legislatures in North Carolina during the 1990s. (Doc. 110-6; Phillips Dep. at 20:20-21:9)

15. Common Cause did not consult with the Democratic Caucus of the legislature regarding its simulated maps or the actual 2016 map. Common Cause did not initially express its intent to use its simulated map in litigation regarding redistricting. (Doc. 110-6; Phillips Dep. at 66:23-67:5)

16. Mr. Phillips admitted that the 2016 Plan that the legislature created did not contain any districts that would qualify as "strong Republican" under the Common Cause

simulation formula, whereas the simulated map did contain one such district. (Doc. 110-6; Phillips Dep. at 121:19-122:24)

17. Mr. Phillips admitted that some of the judges who made the simulated maps likely had knowledge of traditional Republican and Democratic areas of the state. (Doc. 110-6; Phillips Dep. at 128:6-129:3)

18. Mr. Phillips stated all of the "toss-up" districts in the Common Cause simulation leaned Republican. (Doc. 110-6; Phillips Dep. at 140:6-24) Thus, a congressional plan drawn without political data resulted in nine Republican districts and four Democratic districts. (Doc. 110-6; Phillips Dep. at 140:16-24; DX 5093)

19. Mr. Phillips stated that even small changes to the factors and assumptions used to create the simulated map would skew the breakdown of congressional districts' partisan leanings. (Doc. 110-6; Phillips Dep. at 141:5-142:19)

20. Mr. Phillips alleged Common Cause maintained standing to sue because they were a "statewide organization" that is "an advocate for more open, honest and accountable government and that redistricting reform fits into that." (Doc. 110-6; Phillips Dep. at 149:17-150:22)

c. Democratic Party of North Carolina

1. Wayne Goodwin ("Mr. Goodwin") is the Chairman of the North Carolina Democratic Party ("NCDP") (Doc. 110-7; Dep. Tr. of 30(b)(6) Deposition of North Carolina Democratic Party ("NCDP Dep.") at 13:14-18) and was designated to provide testimony on behalf of that organization. (Doc. 110-7; NCDP Dep. at 6:13-16)

2. Mr. Goodwin admitted that there are differing views within the NCDP, that members did not have to agree with everything in the NCDP platform to be a member of the party, and that individuals elected to Congress as Democrats do not always support or vote in accordance with the Democratic Party platform. (Doc. 110-7; NCDP Dep. at 21:15-23:8) Mr. Goodwin said he believed that members of Congress of both major political parties do not always vote in accordance with their party platforms. (Doc. 110-7; NCDP Dep. at 22:25-23:8)

3. Mr. Goodwin had no conversations with anyone in the General Assembly about how the districts were drawn in the 2016 Plan. He recalled that legislative leaders provided a list of criteria used to draw the districts but admitted that he does not personally know how much weight was given to each of the criteria. (Doc. 110-7; NCDP Dep. at 34:8-35:11)

4. Mr. Goodwin admitted that, when he was a member of the General Assembly, he was involved in drawing a congressional map in 2001 and that he considered political data that included election results in drawing that map. (Doc. 110-7; NCDP Dep. at 68:23-71:16)

5. He admits that the 2016 Plan "may be more compact" than the 2001 Plan adopted when he was in the General Assembly. (Doc. 110-7; NCDP Dep. 81:9-16)

6. Mr. Goodwin admitted that, under the law, partisan considerations can have a role in redistricting but could not say how much of a role it should have. (Doc. 110-7; NCDP Dep. at 116:24-118:7)

7. Mr. Goodwin admitted that when Democrats drew the congressional map in the past, they tried to give a partisan advantage to Democrats. He contends that Republicans were too partisan in drawing the 2016 Plan, but when pressed to say where the line was crossed into "too much partisanship," Mr. Goodwin replied that, "I don't think anyone can have the answer to that. It's one of those things than in reference to another case that was before the United States Supreme Court 'you know it when you see it.'" (Doc. 110-7; NCDP Dep. at 123:7-13)

15. Common Findings of Fact for all plaintiffs

1. With the exception of former State Representative Larry Hall, who was the Democratic Leader in the North Carolina House of Representatives when the 2016 Plan was enacted, no individual or organizational plaintiff attended any public hearing held by, provided any testimony to, or had any conversation with any member of the North Carolina General Assembly regarding the 2016 Plan. (Doc. 101-28; LWV Dep. at 84:11-15); (Doc. 101-23; Sumpter Dep. at 19:7-11; 19:14-23); (Doc. 101-3; Peck Dep. at 78:21-24); (Doc. 101-6; Williams Dep. at 42:23-43:10); (Doc. 101-9; Phelps Dep. at 30:8-15); (Doc. 101-10; Richard Taft Dep. at 38:14-18); (Doc. 101-11; Cheryl Taft Dep. at 40:17-25); (Doc. 101-15; Bordsen Dep. at 10:19-11:3, 19:25-20:2); (Doc. 101-16; Morgan Dep. at 11:24-12:7); (Doc 110-8; Brewer Dep. at 40:18-41:2); (Doc. 110-9; McNeill Dep. at 40:7-24); (Doc. 101-21; Wolf Dep. at 27:6-9); (Doc. 101-22; Quinn Dep. at 28:1-5, 58:3-5); (Doc. 101-23; Sarver Dep. at 44:11-20); (Doc. 101-25; Gresham Dep. at 41:11-16) (noting that Mr. Gresham has not discussed redistricting with any Congressional

candidates); (Doc. 101-27; Walker Dep. at 21:9-26); (Doc. 101-5;Collins Dep. at 23:24-24:2); (Doc. 101-17; Boylan Dep. at 26:6-22); (Doc. 110-10; Byrd Dep. at 44:3-8); (Evans Dep. at 38:22-40:7); (Doc. 110-7; NCDP Dep. at 104:23-106:15)

2. With the exception of Common Cause, none of the individual or organizational plaintiffs involved in this lawsuit are responsible for paying any attorneys' fees or costs that are incurred. (Doc. 101-28; LWV Dep. at 77:3-5); (Doc. 101-23; Sumpter Dep. at 37:3-9); (Doc. 101-2; Hall Dep. at 14:10-20); (Doc. 101-3; Peck Dep. at 72:10-14); (Doc. 101-6; Williams Dep. at 41:17-21); (Doc. 101-9; Phelps Dep. at 29:13-30:1); (Doc. 101-10; Richard Taft Dep. at 22:12-19); (Doc. 101-11; Cheryl Taft Dep. at 23:6-11); (Doc. 101-12; Lurie Dep. at 24:10-21); (Doc. 101-13; Palmer Dep. at 24:13-18); (Doc. 101-15; Bordsen Dep. at 23:13-21); (Doc. 101-16; Morgan Dep. at 12:18-24); (Doc. 110-8; Brewer Dep. at 41:13-18); (Doc. 110-9; McNeill Dep. at 36:13-37:3); (Doc. 101-22; Quinn Dep. at 22:17-20; 59:13-60:4); (Doc. 101-23; Sarver Dep. at 46:21-47:5); (Doc. 101-25; Gresham Dep. at 19:17-20:1); (Doc. 101-27; Walker Dep. at 21:23-22:9); (Doc. 101-5; Collins Dep. at 25:17-23); (Doc. 101-8; Berger Dep. at 45:12-20); (Doc. 101-17; Boylan 25:25-26:5); (Doc. 101-20; Feldman Dep. at 18:12-24); (Doc. 101-6; Evans Dep. at 41:1-13); (NCDP Dep. at 98:1-99:11)

3. Multiple plaintiffs admitted that a member of Congress does not have to agree with the views of his or her constituents in order to be responsive to those constituents or to adequately represent them. (Doc. 101-28; LWV Dep. at 70:23-25); (Doc. 101-15; Bordsen Dep. at 13:13-14:12); (Doc. 110-8; Brewer Dep. at 37:17-38:9)

(acknowledging that a member of Congress could fairly serve the people in his or her district, even if a portion of that population opposed that member during an election).

4. Several plaintiffs admitted that, even if a member of Congress of a voter's preferred political party is elected to represent the district the voter lives in, there might be instances where that voter did not agree with the positions taken by that member of Congress. (Doc. 101-28; LWV Dep. at 71:1-4); (Doc. 101-11; Cheryl Taft Dep. at 15:14-18:19)

5. Multiple plaintiffs in this case had no intention or plan to file a lawsuit challenging the 2016 Plan before being contacted by plaintiffs' counsel or a representative of one of the organizational plaintiffs. (Doc. 101-26; Sumpter Dep. at 19:24-20:4; 35:1-4); (Doc. 101-1; Love Dep. at 21:2-25; 22:1-9; 22:20-23); (Doc. 101-3; Peck Dep. at 73:9-25); (Doc. 101-9; Phelps Dep. at 26:23-28:17, 30:2-7); (Doc. 101-10; Richard Taft Dep. at 11:4-12:11, 23:6-20); (Doc. 101-11; Cheryl Taft Dep. at 11:17-23, 23:16-24:1, 24:21-23); (Doc. 101-12; Lurie Dep. at 12:11-17); (Doc. 101-13; Palmer Dep. at 25:15-27:3); (Doc. 101-15; Bordsen Dep. at 24:2-14, 26:4-8); (Doc. 110-8; Brewer Dep. at 30:13-31:2); (Doc. 110-9; McNeill Dep. at 34:20-25, 35:9-23; 37:4-13) (noting that Mr. McNeill had no intention of joining this case until he was contacted by former Congressman Mike McIntyre and counsel for Common Cause); (Doc. 101-21; Wolf Dep. at 24:11-25:11, 28:15-29:23); (Doc. 101-22; Quinn Dep. at 22:21-24:13) (noting that Mr. Quinn did not plan to join this action until he was asked by Plaintiff Aaron Sarver); (Doc. 101-23; Sarver Dep at 19:13-21:3) (noting that Mr. Sarver did not

intend to join this lawsuit until he was contacted by a friend who used to be in the League of Women Voters); (Doc. 101-25; Gresham Dep. at 20:5-8; 21:2-12); (Doc. 101-27; Walker Dep. at 22:10-21); (Doc. 101-6; Williams Dep. at 39:25-41:16); (Doc; 101-20; Feldman Dep. at 18:25-19:24; 25:17-26:1); (NCDP Dep. at 100:8-102:3)

6. With the exception of the Beyond Gerrymandering redistricting project Common Cause facilitated at Duke University, no plaintiff was involved with the creation of any alternative maps to the 2016 Plan. (Doc. 101-28; LWV Dep. at 81:11-14; 82:14-21); (Doc. 101-23; Sumpter Dep. at 14:2-4); (Doc. 101-3; Peck Dep. at 69:8-16); (Doc. 101-6; Williams Dep. at 43:19-24); (Doc. 101-10; Richard Taft Dep. at 21:25-22:11); (Doc. 101-11; Cheryl Taft Dep. at 22:22-23:5); (Doc. 101-12; Lurie Dep. at 20:9-21:1); (Doc. 101-13; Palmer Dep. at 19:21-20:8, 54:15-17); (Doc. 101-15; Bordsen Dep. at 19:13-18); (Doc. 110-8; Brewer Dep. at 13:24-14:1); (Doc. 110-8; McNeill Dep. at 40:25-41:7); (Doc. 101-21; Wolf Dep. at 28:3-10); (Doc. 101-22; Quinn Dep. at 22:13-16; 60:12-14); (Doc. 101-23; Sarver Dep. at 19:6-12); (Doc. 101-25; Gresham Dep. at 17:14-18:3); (Doc. 101-27; Walker Dep. at 20:6-21:8); (Doc. 101- 5; Collins Dep. at 24:7-23); (Doc. 101-17; Boylan Dep. at 26:23-27:3); (Doc. 101-10; Byrd Dep. at 37:20-24); (Doc. 101-7; Evans Dep. at 41:17-25); (Doc. 110-7; NCDP Dep. at 73:25-74:9)

7. Despite alleging that the 2016 Plan diluted their vote and "penalized" them because of their membership in the NCDP, and the votes they had cast in the past, multiple plaintiffs admitted they had not been "singled out" in the 2016 redistricting process based upon these factors. (Doc. 101-15; Bordsen Dep. at 37:12-15); (Doc. 101-

16; Morgan Dep. at 27:18-28:6); (Doc. 101-23; Sarver Dep. at 28:6-13); (Doc. 101-25 Gresham Dep. at 38:19-39:6); (Doc. 101-27; Walker Dep. at 30:12-20)

8. There are 27 individual plaintiffs in both of these cases. Eleven of the plaintiffs reside in 2016 districts that have historically elected Democratic candidates and which elected Democratic candidates in 2016. (2016 CD 1: Annette Love, Larry Hall, Gunther Peck, Faulkner Fox, William Collins, Willis Williams, Elizabeth Evans; 2016 CD 4: Maria Palmer, Alice Borsden; 2016 CD 12: John Gresham and Janie Sumpter). (Doc. 101-1; Love. Dep. at 16:2-12); (Doc. 101-2; Hall Dep. at 12:8-15); (Doc. 101-3; Peck Dep. at 67:17-22); (Doc. 101-4; Fox Dep. at 19:19-21:21); (Doc. 101-5; Collins Dep. at 17:10-18:15, 19:1-13) (Doc. 101-6; Williams Dep. at 35:21-36:4); (Doc. 101-7; Evans Dep. at 33:6-10); (Doc. 101-13; Palmer Dep. at 36:23-25); (Doc. 101-15; Borsden Dep. at 12:10-13:8); (Doc. 101-25; Gresham Dep. at 10:17-21); (Doc. 101-26; Sumpter Dep. at 11:19-25) A twelfth plaintiff resides in the 2016 CD 4 (Morton Lurie). Mr. Lurie is a Republican. (Doc. 101-12; Lurie Dep. 19:17-20) A Democratic candidate has historically been elected in CD 4 and was elected in the 2016 version of CD 4.

9. Plaintiffs Douglas Berger and Ersla Phelps reside in the 2016 version of CD 2 (Doc. 101-8; Berger Dep. at 28:17-29:12); (Doc. 101-9; Phelps Dep. at 7:9-15; 18:11-13) A Republican candidate, Renee Ellmers, won election to Congress in 2010 under a version of CD 2 that was enacted by a Democratic-controlled legislature in 2001.

10. Plaintiffs Richard Taft and Cheryl Taft reside in the 2010 CD 3. A Republican candidate has been elected in this district since at least 2002. (Doc. 110-10; Richard Taft Dep. at 8:12-15, 14:12-14) (Doc. 101-11; Cheryl Taft Dep. at 6:24-7:1)

11. Plaintiffs William Freeman (resident of the 2016 CD 5), and Melzer Morgan (resident of the 2016 CD 6) reside in districts that have elected Republican candidates since at least 2002. (Doc. 101-14; Freeman Dep. at 6:24-7:1; 7:8-20; 12:16-19); (Doc. 101-16; Morgan Dep. at 5:4-7; 5:11-14)

12. Plaintiff Cynthia Boylan currently resides in the 2016 CD 7. (Doc. 101-17; Boylan Dep. at 14:5-8) Prior to moving in 2005, she resided in CD 4 which has historically elected a Democratic candidate and which elected a Democratic candidate in 2016. (Doc. 101-17; Boylan Dep. at 13:24-14:1)

13. Plaintiff Coy E. Brewer is a resident of the 2016 CD 8. From 2002 to 2014, Brewer was a resident of CD 2 which elected a Republican candidate in 2010 under a plan drawn by the Democratic-controlled General Assembly in 2001. (Doc. 110-8; Brewer Dep."), at 9:1-6, 11:16-12:2, 42:16-20)

14. Plaintiff John McNeill is a resident of the 2016 CD 9, a district that has historically elected a Republican candidate. (Doc. 110-9; McNeill Dep. at 8:10-19, 11:12-19, 42:6-13) From 2001 through 2014, he was a resident of CD 7. From 2002 through 2010, a Democratic candidate, Mike McIntyre was elected from this district under a plan enacted by a Democratic-controlled General Assembly. Congressman McIntyre was reelected to the 2011 CD 7 in the 2012 General Election, based upon a plan enacted by a

Republican-controlled General Assembly. Congressman McIntyre did not run for reelection in 2014 and Congressman David Rouzer was elected in 2014.

15. Plaintiff Elliott Feldman and LWV designee Mary Klenz also reside in the 2016 CD 9. A Republican candidate has been elected in this district since at least 2002. (Doc. 101-20; Feldman Dep. at 16:1-6); (Doc. 101-28; LWV Dep. at 10:8-11, 63:12-13, 64:16-65:6)

16. Plaintiffs Robert Wolf and John Quinn reside in the 2016 CD 10. (Doc. 101-21; Wolf Dep.at 7:14-25); (Doc. 101-22; Quinn Dep. at 8:4-6, 16:12-20, 17:8-10) A Republican candidate has been elected from this district since at least 2002.

17. Plaintiffs Aaron Sarver and Jones Byrd reside in the 2016 CD 11. (Doc. 101-23; Sarver Dep. at 7:15-20, 17:9-22); (Doc. 110-10; Byrd Dep. at 19:22-25; 20:1) This district has elected both Republican and Democratic candidates since at least 2002.

18. Plaintiff Russell Walker (Doc. 101-27; Dep. at 6:6-11, 12:7-9) resides in the 2016 version of CD 13 which is located in Davidson, and Davie (whole counties), and Iredell, Rowan and Guildford (split counties). North Carolina was awarded a 13th Congressional district in 2001. The 2001 version of CD 13 was based upon portions of Wake, Granville, Alamance, Rockingham, and Guilford Counties (5 split counties) and all of Person and Caswell Counties (2 whole counties). A Democratic Congressman was elected in the 2001 CD 13 from 2002 through 2010.

19. None of the plaintiffs are long-time residents of congressional districts that always elected Democratic candidates from 2002 through the present except those plaintiffs who reside in the 2016 CDs 1, 4, and 12.

D. Defendants' Experts

a. Sean Trende

1. Mr. Trende offered his opinions regarding practical issues with the efficiency gap theory proposed by Dr. Jackman. (Trial Tr. Vol. III, 31, Oct. 18, 2017) On the surface efficiency gap is a fairly simplistic formula. "Wasted votes" are calculated for each major party. (Trial Tr. Vol. II, 34-36, Oct. 17, 2017) Wasted votes are defined to include all of the votes cast for a losing party's candidate plus the number of votes cast above 50% plus one for the winning party's candidate. (Trial Tr. Vol. II, 34-36, Oct. 17, 2017) Then, the difference between the two parties' wasted votes is divided by the total number of votes. (Trial Tr. Vol. II, 34-36, Oct. 17, 2017) The resulting ratio equals the efficiency gap. (Trial Tr. Vol. II, 34-36, Oct. 17, 2017)

2. Not surprisingly, given the lack of prior judicial guidance, there is no single efficiency gap standard. (DX 5101, pp. 7-9) In the Wisconsin legislative litigation, *Whitford v. Gill*, plaintiffs' expert, Dr. Jackman, argued that constitutional scrutiny should be applied when the absolute value of the efficiency gap was .07. (DX 5101; Trial Tr. Vol. II, 64, Oct. 17, 2017; DX 5101) This contrasted with the .08 threshold recommended by the original authors of the efficiency gap. *See* Nick Stephanopoulos

and Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L.REV. 831, 837 (2015).

3. In this case, Dr. Jackman further complicates the search for a uniform judicially manageable standard. He concedes there is no basis at the present time for applying the efficiency gap to states with six or fewer congressional districts. (DX 5101, p.7; Trial Tr. Vol. II, 86, Oct. 17, 2017; Trial Tr. Vol. III, 32, Oct. 18, 2017) But, for other states, Dr. Jackman argues that constitutional scrutiny is warranted if the efficiency gap exceeds a certain level during the first election under the plan. (DX 5101, p.7; Trial Tr. Vol. II, 96, Oct. 17, 2017) But this standard changes depending upon the number of districts. For states like North Carolina with seven to 15 districts, scrutiny is required if the efficiency gap exceeds .12 in the first election. (DX 5101, p.7; Trial Tr. Vol. II, 96, Oct. 17, 2017) But for states with more seats, scrutiny is required when the efficiency gap exceeds .075 in the first election. (Trial Tr. Vol. II, 67,133, Oct. 17, 2017) Thus, Dr. Jackman proposes no standard for states with six or fewer districts and different standards for states with seven and 15 districts versus states with more than 15 districts. (Trial Tr. Vol. II, 86, Oct. 17, 2017)

4. Further confusion arises because Stephanopoulos and McGee believe that scrutiny is required only if the efficiency gap results in a two seat swing. (DX 5101, p.7; Trial Tr. Vol. II, 94, Oct. 17, 2017; Trial Tr. Vol. III, 68, Oct. 18, 2017) Unlike Dr. Jackman, these experts believe that the efficiency gap should be measured in numbers of seats won or lost rather than percentage points. (Trial Tr. Vol. III, 68-69, Oct. 18, 2017)

5. Even more confusion arises because of the impact of voters who split their ticket or change their votes. Dr. Jackman agrees that an efficiency gap for the 2011 North Carolina congressional plan is higher and more favorable for Republicans than the 2016 Plan. (DX 5101, pp. 8-9; Trial Tr. Vol. II, 90, Oct. 17, 2017) Dr. Jackman also agrees that his calculations of the efficiency gap values are similar to the calculations of McGhee and Stephanopoulos. (Trial Tr. Vol. II, 90, Oct. 17, 2017) But based upon their "sensitivity analysis," McGhee and Stephanopoulos have concluded that the allegedly more extreme 2011 plan would not warrant constitutional scrutiny because of the number of voters who might change their minds and vote for a different party in future elections. (DX 5101, pp. 8-9) Not surprisingly, Dr. Jackman did not perform this type of sensitivity testing in this case for the 2016 Plan, even though the 2011 plan is more heavily gerrymandered in Dr. Jackman's mind than the 2016 Plan at issue. (Trial Tr. Vol. II, 91-92, Oct. 17, 2017)

6. Dr. Jackman's theories about when constitutional scrutiny is warranted are based upon his observation of election results in congressional races for 1972 through the present. (DX 5101; Trial Tr. Vol. II, 53, Oct. 17, 2017) There are numerous problems with this approach. Some of the elections observed by Dr. Jackman were races that did not include an opponent. Thus, Dr. Jackman had to impute voter turnout (and estimated wasted votes) in these unopposed elections. (DX 5101, pp. 19-25; Trial Tr. Vol. III, 63-65, Oct. 18, 2017; Trial Tr. Vol. II, 126-128, Oct. 17, 2017)

7. The efficiency gap is nothing more than a mathematical formula. It does not assess the quality of his candidates (or hypothetical candidates), the amount of money raised, the impact of traditional districting principles on election results, whether Democratic voters are more concentrated than Republican voters, and the impact of wave elections. These flaws are further complicated by Dr. Jackman's failure to isolate efficiency calculations only for Section 5 states to compare these outcomes against non-Section 5 states. (DX 5101, pp. 65-81; Trial Tr. Vol. II, 106, 111-112, Oct. 17, 2017) Thus, neither the efficiency gap nor Dr. Jackman's calculations in this case account for the impact of ability to elect districts located in Section 5 states that have adopted such districts to protect themselves from vote dilution lawsuits.

8. The efficiency gap does not explain how wave elections impact the number of wasted votes in one election cycle versus others. Nor does the efficiency gap account for districting plans or districts that follow traditional districting principles or those that do not, like the 2001 North Carolina CD 13, all prior versions of North Carolina's CD 12, and the entire 1992 congressional plan. (DX 5101, pp. 10, 11, 56-62, 124; Trial Tr. Vol. II, 109, Oct. 17, 2017) Indeed, whether a State completely departs from traditional redistricting principles and divides all of its counties and precincts into different congressional districts, is completely irrelevant to the efficiency gap because the only thing it measures is the comparative rate of wasted votes to total votes. Nor would application of the efficiency gap result in more competitive and "fair" districts. This is because the efficiency gap can be satisfied by drawing highly gerrymandered districts so

that each party is assigned an equal number of non-competitive districts. (DX 5101, pp. 56-62; Trial Tr. Vol. II, 109, Oct. 17, 2017)

9. The efficiency gap test proposed by Dr. Jackman is highly impracticable, if not impossible, for states to implement and for courts to administer. (DX 5101; Trial Tr. Vol. III, 32-43, Oct. 18, 2017) Among other things, fluke elections can dramatically change the efficiency gap score and lead to unintended and counterintuitive results. (Trial Tr. Vol. III, 32-43, Oct. 18, 2017); (see, e.g., DX 5101, pp. 54-55 (describing Washington State independent redistricting commission plan in which in one election the efficiency gap score was in favor of Democrats and then in the very next election the efficiency gap score switched in favor of Republicans) Moreover, under Dr. Jackman's theory, a State must conduct a first election under a new plan to determine whether the plan is subject to constitutional scrutiny. As discussed, in states like North Carolina, if the first year election results in an efficiency gap of higher than .12, then the plan is suspect. (Trial Tr. Vol. II, 96, Oct. 17, 2017) However, this approach does not explain how a legislature is supposed to predict a wave election during the plan's first election cycle that favors one party or the other, such as the 2008 Presidential election, which favored all Democratic candidates, or the 2010 off-year election, which favored all Republican candidates. (Trial Tr. Vol. III, 43, Oct. 18, 2017) Finally, the efficiency gap is a form of proportional representation in that it ties the number of seats a party can get to the number of votes that can be awarded. Rather than a one-to-one proportional

relationship, it is a two-to-one relationship, but nonetheless still proportional. (Trial Tr. Vol. III, 66-67, Oct. 18, 2017)

b. Trey Hood

1. Dr. M.V. Hood, III, prepared a rebuttal report for defendants responding to reports prepared by plaintiffs' experts Dr. Simon Jackman and Dr. Jowei Chen. (DX 5058, 5059; Trial Tr. Vol. IV, 11, Oct. 19, 2017) He was accepted by the Court as an expert in American politics and policy, southern politics, quantitative political analysis, and election administration, including redistricting. (Trial Tr. Vol. IV, 11, Oct. 19, 2017) Dr. Hood's testimony and other related evidence show as follows:

2. Since 1990 through 2016, the percentage of legislative seats won by Republicans has shown a slow and steady increase. (DX 5058, pp. 3-5, Fig. 1) Republicans won a majority of legislative seats in 2010 under districting plans drawn by a Democratic–controlled General Assembly. (*Id*.) These long term developments indicate that a significant political realignment has occurred in North Carolina as compared to the politics of the State prior to 1990. (*Id*.)

3. Incumbents already enjoy an advantage when it comes to winning congressional seats. (Trial Tr. Vol. IV, 13, Oct. 19, 2017) But the 2016 congressional election was held under circumstances that were even more favorable to incumbent candidates. (*Id.* at 14-18) The 2011 congressional plan was found unconstitutional by a district court on February 5, 2016 and the General Assembly enacted the 2016 congressional plan on February 19, 2016. (DX 5058, p. 7) Candidate filing ended on

March 25, 2016 and a primary was held on June 7, 2016. (*Id.*) This left only 36 days—an unusually truncated amount of time—between when the map was adopted by the General Assembly and when candidate filing began. (Trial Tr. Vol. IV, 14, Oct. 19, 2017) Because of the short amount of time available from the enactment of the plan to the deadline for candidate filing, both parties were more handicapped than normal in the efforts to recruit quality candidates, to oppose incumbents, or to have the same amount of time normally experienced in a congressional campaign to raise money and organize an effective campaign staff and campaign. (DX 5058, p. 7; Trial Tr. Vol. IV, 14, Oct. 19, 2017)

4. Not surprisingly, 12 of 13 incumbents were re-elected in 2016. (DX 5058, pp. 5-6, Table 1) The thirteenth incumbent was defeated in a Republican primary for CD 2 against an opponent who had been the incumbent for CD 13 under the 2011 plan. (*Id.* at p. 5) The candidate elected in the only open seat during the 2016 election, a Republican, outspent his opponent by a margin of $500,000 or a margin of eight to one. (DX 5058, p. 6, Table 2; Trial Tr. Vol. IV, 16-17, Oct. 19, 2017)

5. In the 12 races in 2016 involving incumbents, in each case, the incumbent raised and spent substantially more money than his or her opponent. (Trial Tr. Vol. IV, 16-17, Oct. 19, 2017) In two districts where incumbents faced opponents, those opponents had no reportable campaign expenditures. (*Id.* at 17-18) At least nine of the 12 incumbents faced opponents with no political background, which is not surprising given the truncated election schedule followed in 2016. (*Id.* at 15)

6. A review of voting patterns in North Carolina shows that a congressional districting plan based upon whole counties and whole VTDs is likely to benefit Republican candidates. (DX 5058, pp. 7-13, Figures 2 and 3; Trial Tr. Vol. IV, 19-21, Oct. 19, 2017) This is because Democratic voters are more concentrated than Republican voters particularly in urban counties. (*Id.*) In contrast, Republican voters are more dispersed throughout the State. (*Id.*)

7. Taken as a whole, total statewide election results for all congressional elections are not necessarily good indicators of election success in a particular district. Congressional districts often have different partisan makeups than the State as a whole or even surrounding districts. (DX 5058, p. 14) Many other factors influence election results including the quality of the candidates, the length of the election cycle, the presence of an incumbent, fundraising, political experience, messaging and other factors. (Trial Tr. Vol. IV, 52, Oct. 19, 2017)

8. There is a direct relationship between the efficiency gap test used by Dr. Jackman and the number of seats won by a political party's candidates. (Trial Tr. Vol. IV, 22-26, Oct. 19, 2017) The more seats won by one party, the more votes that are wasted by the other party. (*Id*. at 22-24) Thus, the efficiency gap closely tracks the percentage of seats held. (*Id.*) But the efficiency gap does not take into account the impact of other valid considerations, such as the creation of ability-to-elect districts that can be used to defend a State against claims of racial vote dilution. (DX 5058, pp. 16-20, Figure 5)

9. In addition, for his efficiency gap analysis, Dr. Jackman relies in part upon a concept called "uniform swing analysis" which involves estimating the "partisan tilt one way or another within a given election cycle." (Trial Tr. Vol. IV, 22-24, Oct. 19, 2017) This analysis is inaccurately named because the swing vote can vary across congressional districts and among different demographic groups within a given election cycle. (*Id.*) As a result, the efficiency gap is not a reliable tool to use when drawing new districts and reliance upon the results of an efficiency gap analysis from a single election is not a reliable method of assessing the characteristics of a districting plan. (*Id.* at 32-33)

10. The district simulations used by Dr. Mattingly to assess the 2016 congressional plan are also not reliable in several respects. First, in creating his simulated districts, Dr. Mattingly did not follow the same criteria used by the General Assembly. For example, Dr. Mattingly's simulated plans allowed for a population deviation of up to 1 percent across districts while the General Assembly considered only zero deviation plans. (DX 5059, § 1; Trial Tr. Vol. IV, 34, Oct. 19, 2017) Dr. Mattingly also took race into account when drawing his plans while the General Assembly did not. (*Id.*) Dr. Mattingly also did not try to minimize the number of county splits or protect incumbents, including retaining the cores of exiting districts. (*Id.*)

11. Dr. Mattingly's use of the 2014 and 2016 congressional election outcomes to measure the partisanship in the simulated plans he created is not reliable. For example, Dr. Hood testified that if you have a congressional race where an incumbent is facing a very experienced challenger or other national events occurring, those factors will affect

the outcome of a race in a particular district. (DX 5059; Trial Tr. Vol. IV, 34-36, Oct. 19, 2017) The use of these races also ignores the "personal vote" that members of Congress can develop with their constituents over time that can exceed that actual partisan distribution in a district. (*Id*.) In addition, Dr. Mattingly's use of computer simulations ignores the reality that the maps were drawn by real people and computer simulations do not take into account all of the nuances that may be related to the criteria for the districts that considered when the 2016 congressional plan was drawn. (DX 5059; Trial Tr. Vol. IV, 36, Oct. 19, 2017)

11. The 2016 congressional plan followed the criteria established by the General Assembly. (DX 1007; Trial Tr. Vol. IV, 25-26, Oct. 19, 2017) These include equal population, contiguity, protecting incumbents, and making the districts more compact by reducing the number of county and VTD divisions. (DX 1007; Ex. 5058, pp. 20-24, Tables 7-11) Incumbents were protected by the General Assembly's decision to base most of the 2016 districts on the 2011 districts. (DX 5058, pp. 22-23) One district, CD 13, was moved to another part of the State from where it had been established under the 2011 plan. (*Id*.) Of the remaining 12 districts, ten of them include over 50% of the population that had been included in the 2011 versions. (*Id.* at 23, Table 9) By retaining district cores, incumbents were able to benefit from the "personal vote" that they cultivated in their respective districts that transcends partisanship. (Trial Tr. Vol. IV, 27-28, Oct. 19, 2017)

12. At least five of the 2016 congressional districts are competitive to the extent a strong Democratic challenger could win them under a conservative measure of competitiveness used by political scientists that counts seats as competitive if they were won by less than 55 percent. (DX 5058, pp. 24-25; Trial Tr. Vol. IV, 29-31, Oct. 19, 2017, Table 12) Under this measure, three of the 2016 districts are safe Democratic sets, five are safe Republican seats, and all five competitive seats lean Republican. (*Id*.) Under another measure used by political scientists that considers a victory of less than ten percent "marginal," all ten of the Republican-leaning seats would be competitive while the three Democratic-leaning seats would remain safe for Democrats. (DX 5058, p. 24 n. 31; Trial Tr. Vol. IV, 29-31, Oct. 19, 2017)

E. Plaintiffs' Experts

a. Simon Jackman

1. Dr. Jackman developed a test requiring that each party have the same range of "wasted votes" based upon a standard arbitrarily selected by Dr. Jackman during the first election in a ten-year election cycle for a newly enacted plan. Dr. Jackman has never drawn a redistricting plan for a legislature, or a plan submitted to a court, or a plan for a plaintiff in a lawsuit. (Trial Tr. Vol. II, 34, Oct. 17, 2017) He has not drawn any plans for this case.

2. Jackman has never done an efficiency gap ("EG" or "efficiency gap") analysis before an election is held under the plan in question. (Trial Tr. Vol. II, 84, Oct.

17, 2017) He is not aware of any legislature or independent redistricting commission that has used the EG to draw a congressional plan. (Trial Tr. Vol. II, 85, Oct. 17, 2017)

3. Professor McGhee was the first academic to develop a theory that eventually became known as the efficiency gap. (Trial Tr. Vol II, 88-89, Oct. 17, 2017) The term "efficiency gap" first came into the academic literature in a 2015 article published by Professor McGhee and Professor Stephanopoulos. (DX 5063; Trial Tr. Vol. II, 89, Oct. 17, 2017)

4. The EG is based upon a comparison of "wasted votes" for each political party in all congressional elections within a single state. All votes cast for losing candidates are "wasted" and all votes for the winning candidate above 50% plus one are considered "wasted." For each election, the total of wasted votes for each party are added up for each district and then compared against the number of seats won by each party. To avoid scrutiny under the EG, the wasted votes for each party must fall within a range of proportionality as compared to the number of seats won. By making this comparison, Dr. Jackman can calculate how many seats he expects that each party should win based upon their proportions of wasted votes as compared to seats won. (Trial Tr. Vol. II, 86-88, Oct. 17, 2017)

5. Professor Jackman calculated EG scores for all elections for states with seven or more congressional seats from 1970 through 2014. His EG scores for these elections are very similar to the EG scores calculated by Professors McGhee and

Stephanopoulos as recited in their 2015 article. (DX 5064; Trial Tr. Vol. II, 89-90, Oct. 17, 2017)

6. The EG score calculated by both Dr. Jackman and Professor McGhee and Stephanopoulos for the 2012 general election under the 2011 congressional plan are higher than the EG score calculated by Professor Jackman for the 2016 Plan. (Trial Tr. Vol. II, 90, Oct. 17, 2017) Even though the EG indicates that the 2011 plan was a worse political gerrymander than the 2016 Plan, McGhee and Stephanopoulos concluded in their 2015 article that the 2011 plan should not be scrutinized because of the potential for North Carolina voters to change their minds and vote for different candidates. (DX 5063) Dr. Jackman did not perform a similar analysis to check his calculations as to the 2016 Plan.

7. One reason these academics reached different conclusions regarding the North Carolina congressional plans is the different threshold they use for subjecting a plan to scrutiny. McGhee and Stephanopoulos opined that perfect equality in wasted votes for major parties is not appropriate because the Supreme Court has stated that politics may play a lawful role in districting. (DX 5063) Under their test, a plan would not be subject to scrutiny unless the EG score indicated that the party had won two or more seats than expected. (Trial Tr. Vol. II, 92, Oct. 17, 2017)

8. In contrast, Dr. Jackman believes that all congressional plans should be scrutinized by a court if the EG score shows that one of the parties won more than 0.5 seats than expected. (Trial Tr. Vol II, 95, Oct. 17, 2017) For states with seven to 15

seats, an EG of .08 means that the party won more than .5 seats than expected. According to Dr. Jackman, plans that have an EG score of .12 in the first election are likely to have an EG of at least .08 for the life of the plan. Therefore, under Dr. Jackman's theory, all plans with seven to 15 seats that receive an EG score of .12 in the first election under the plan should be scrutinized by a court. (Trial Tr. Vol. II, 95-96, Oct. 17, 2017)

9. There are several problems with Dr. Jackman's test. First, he admits that the EG cannot be applied to states with six or fewer congressional districts. This means that EG analysis cannot be used for at least 18% of the states in the union. These smaller states would not be subject to the same test for constitutional review that Dr. Jackman would apply to other states. (Trial Tr. Vol II, 123, Oct. 17, 2017)

10. Dr. Jackman also admits that he has changed his opinion on the number of seats a state must have before the EG can be applied. Previously, Dr. Jackman testified in *Whitford* that the EG could not be applied to states with fewer than eight congressional districts. (Trial Tr. Vol II, 101, Oct. 17, 2017) Now, in North Carolina, he has concluded that the appropriate category is fewer than seven districts. (Trial Tr. Vol. II, 101, Oct. 17, 2017) Conveniently, by dropping the lower end of the number of required districts from eight to seven seats, Dr. Jackman has swept into his analysis two states controlled by Republican legislatures (Alabama and South Carolina). (Trial Tr. Vol. II, 102, Oct. 17, 2017) Dr. Jackman provided no acceptable explanation at trial for changing his opinion on the minimum number of seats that must be present before an EG can be applied.

11. Nor, based upon Dr. Jackman's own admission, is his test for states with seven to 15 congressional seats sufficiently reliable to be engrafted into the Constitution. Dr. Jackman testified that from 2000 through 2014, nine of the plans for states with seven to 15 seats experienced an EG score of .12 in the first election. But only six of these states experienced an EG score of .08 or higher during the remainder of the time that the plan was used. Dr. Jackman admitted that this represented a 33% error rate in his projections. (Trial Tr. Vol. II, 99-100, Oct. 17, 2017)

12. Dr. Jackman admits that the EG does not take into account the impact on EG scores of residential patterns for Republican and Democratic voters or the impact of Democratic voters living in more concentrated areas. (Trial Tr. Vol. II, 112, Oct. 17, 2017)

13. Nor does the EG take into account whether EG scores might be impacted by a plan that is based upon traditional districting principles such as whole counties and whole precincts. (Trial Tr. Vol. II, 110-111, Oct. 17, 2017)

14. Nor can the EG be used to determine whether any specific district has been politically gerrymandered. (Trial Tr. Vol. II, 112-113, Oct. 17, 2017)

15. The 1992 North Carolina Congressional Plan divided numerous counties and precincts. Some counties were divided into three congressional districts. (DX 5013, 5014, 5023) In *Shaw v. Hunt*, the district court found that the 1992 CD 1 and CD 12 were not racial gerrymanders because the map had been politically gerrymandered to protect four or more white Democratic incumbents. *Shaw II*, 861 F.Supp. at 418, 448-49,

462, 467, 469. Yet under Dr. Jackman's study, the 1992 congressional plan received an EG score of under .12 in the 1992 general election and would not have been subject to scrutiny. (Trial Tr. Vol. II, 108-109, Oct. 17, 2017; DX 5012)

16. After the Supreme Court ruled in *Shaw II*, the General Assembly enacted a new congressional plan in 1997. At the time, Republicans controlled the state House and Democrats controlled the state Senate. The General Assembly agreed to enact six Republican seats and six Democratic seats. Dr. Jackman agreed that in North Carolina the General Assembly can avoid review under the EG by creating an equal number of seats that entrench incumbents from both major parties. (Trial Tr. Vol. II, 116-117, Oct. 17, 2017) And, in point of fact, the plans enacted by the General Assembly immediately after *Shaw II* did not achieve an EG score of .12 or higher and therefore would not have been subject to review even though the intent of the General Assembly was to gerrymander these plans to protect incumbents. (Trial Tr. Vol. II, 114, Oct. 17, 2017)

17. Finally, the evidence shows that in 2001 the General Assembly intended to create a congressional plan that would create eight Democratic seats and five Republican seats. The Democratic seats included CD 12 which was established as an admitted political gerrymander and a new district, CD 13, that included portions of Wake, Granville, Alamance, Rockingham, and Guilford Counties as well as all of Person and Caswell Counties. This district was drawn by the Democratic Chair of the Senate Redistricting Committee, Brad Miller, who was then elected from this district from 2002 through 2010. Yet, under Dr. Jackman's theory, this plan received an EG score under .12

in 2002 and therefore was not subject to scrutiny. (Trial Tr. Vol. II, 118, Oct. 17, 2017) Thereafter, in a wave Republican election year in 2010, the Plan did receive an EG score of over .12. If the wave election had occurred in 2002 instead of 2010, the 2001 plan would have been subject to scrutiny under Dr. Jackman's theory. (Trial Tr. Vol. II, 119-120, Oct. 17, 2017)

18. Dr. Jackman prefers the EG test to other theories designed to compare the proportion of votes to seats won called partisan bias or partisan symmetry. Dr. Jackman prefers EG because, unlike these other two theories, EG is based upon actual instead of hypothetical election results. (Trial Tr. Vol. II, 124, Oct. 17, 2017)

b. Dr. Jowei Chen

1. Dr. Chen used an algorithm to draw 3000 simulated maps. (Trial Tr. Vol. I, 133, Oct. 16, 2017) Dr. Chen's analysis has little relevance because his algorithm used to draw simulated plans is not based upon the criteria used by the General Assembly in enacting the 2016 Plan. (Trial Tr. Vol. I, 218, Oct. 16, 2017)

2. First, the General Assembly criterion on compactness indicated that it intended that districts should be more compact than the 2011 plan as measured by whole counties and whole precincts. Nothing in the criterion indicated an intent to use a compactness test to draw districts or to maximize compactness under any measure. (Trial Tr. Vol. I, 230-31, Oct. 16, 2017) Dr. Chen's algorithm included a component for drawing maps that maximized the compactness of plans under the Polsby Popper test provided the number of divided counties and precincts was minimized. (Trial Tr. Vol. I,

250, Oct. 16, 2017) Dr. Chen used the Polsby Popper test as part of the algorithm for drawing simulated districts even though that test decreases the compactness score for longer, rectangular shaped districts like 2016 CDs 7, 8, and 11. (Trial Tr. Vol. I, 241-42, Oct. 16, 2017)

3. Next, Dr. Chen did not assess for either his simulated plans or the 2016 Plan whether incumbents had a reasonable chance of winning reelection. (Trial Tr. Vol. I, 217, Oct. 16, 2017) As demonstrated by the very first simulated map produced in his first simulated set, Dr. Chen's simulated plans did not attempt to consider communities of interest or core populations that have historically been used to form the core of many of the 2016 districts and prior districts upon which many of the 2016 districts were based. This is demonstrated by a district in the first simulated map that stretches from Hertford County in eastern North Carolina to Ashe County in western North Carolina. There is no reasonable possibility that any General Assembly would have considered such a map and Dr. Chen made no attempt to study whether it would have any reasonable chance at being enacted into law.

4. In the 2011 congressional plan, the General Assembly adopted a policy, as reflected in the plan itself, that resulted in the division of larger urban counties. The 2016 Plan, as reflected in the plan itself, continued this policy and accordingly 11 of the 13 divided counties in the 2016 Plan are counties with population in excess of 100,000. (DX 5010) Despite the manner in which counties were divided by the 2016 Plan, Dr. Chen

did not limit his county divisions to larger counties nor did his algorithm keep smaller counties whole. (Trial Tr. Vol. I, 225, 226, 227, Oct. 16, 2017)

5. Dr. Chen's methodology has been previously criticized by plaintiffs' expert Simon Jackman on the grounds that Dr. Chen's simulated maps are not legal. More specifically, Dr. Jackman criticized Dr. Chen's methodology because Dr. Chen's simulated maps do not take into account issues involving the Voting Rights Act. This defect in Dr. Chen's methodology is equally present in the 3000 simulated maps Dr. Chen has offered in this case. In the 2016 Plan, CD 1 has a black VAP of 44% and is located completely in eastern North Carolina. CD 12 has a black VAP of 35% and is located wholly in Mecklenburg County. Despite admitting that he conducted his study after the 2016 Plan was enacted, Dr. Chen admits that his algorithm did not require the creation of a district wholly within Mecklenburg County that included the core population from the 2011 CD 12. (Trial Tr. Vol. I, 260, Oct. 16, 2017) Moreover, out of his 3000 simulated maps only 262 have a single district with over 40% black VAP. There is no evidence that any of Chen's simulated districts has a black VAP of at least 44%. And, none of Dr. Chen's simulated plans has a district with over 40% black VAP and a second district with at least 35% black VAP. (DX 5043; Trial Tr. Vol. I, 257-58, 259-60, 261, Oct. 16, 2017)

6. Dr. Chen admits that he has never submitted an expert report based upon 25 simulated districts or less. (Trial Tr. Vol. II, 9, Oct. 17, 2017) Out of the 3000 simulated maps, only six simulated maps have at least one district with a black VAP in excess of

40% and also divide a minimum of 11 larger counties (100,000 population or higher). (DX 5037, 5039; Trial Tr. Vol. II, 12-13, Oct. 17, 2017) None of these six plans have a second district with a black VAP of at least 35%. Dr. Chen did not provide a political analysis of these six maps. But Dr. Chen also agrees that he would never make a statistical comparison based on only six maps. (Trial Tr. Vol. II, 14, Oct. 17, 2017)

7. Dr. Chen's simulated maps do not follow the General Assembly's policy for dividing counties. In the 2016 Plan, a county is divided into separate congressional districts by way of a single traversal of county lines. Both districts within the county are contiguous within the county. In contrast, Dr. Chen's simulated maps divide counties through double traversals of a county line by a district. Where a double traversal is used in Dr. Chen's maps, the district is not contiguous with itself within the county. (Trial Tr. Vol. I, 224-25, Oct. 16, 2017)

8. Dr. Chen admits that his simulated maps did not attempt to draw what Dr. Chen described as a "more extreme Republican gerrymander." (Trial Tr. Vol. I, 238, Oct. 16, 2017) He did not study whether the General Assembly could have drawn "extreme Republican gerrymanders" by dividing more counties. (Trial Tr. Vol. I, 234, Oct. 16, 2017) He agrees that it is possible to draw an "11-2" plan that favors Republicans. (Trial Tr. Vol. I, 239, Oct. 16, 2017) Dr. Chen did not study the voting strength of either Republican or Democratic districts. (Trial Tr. Vol. I, 234, Oct. 16, 2017) He does not know whether the districts in the 2016 Plan are strong Republican districts or weak Republican districts. (Trial Tr. Vol. I, 234-35, Oct. 16, 2017) He never

studied whether incumbents might lose against a well-funded challenger in the 2016 districts. (Trial Tr. Vol. I, 235-36, 256, Oct. 16, 2017)

9. Dr. Chen's simulated districts do not follow the criteria adopted by the General Assembly as evidenced by the 2016 Plan. The only conclusion that can be rationally drawn from Dr. Chen's study is that the General Assembly considered political data, along with all of the other criteria, in adopting the 2016 Plan. Dr. Chen does not report or assess how much political consideration is acceptable and how much is too much. (Trial Tr. Vol. I, 219, Oct. 16, 2017)

c. Dr. Jonathan Mattingly

1. Dr. Mattingly has never previously served as an expert witness in a case. (Trial Tr. Vol. I, 26, Oct. 16, 2017)

2. Dr. Mattingly has no prior redistricting experience and has never drawn a redistricting map using Maptitude software. (Trial Tr. Vol. I, 94, Oct. 16, 2017)

3. Dr. Mattingly's opinions in this case simply described the "likely or unlikely" partisan distribution of redistrictings that would occur if the legislature had followed the redistricting criteria in House Bill 92. (Trial Tr. Vol. I, 29, 34, Oct. 16, 2017) House Bill 92 is a bill that was filed to establish an independent redistricting commission in North Carolina, but it never became law. (Trial Tr. Vol. I, 39, Oct. 16, 2017)

4. Dr. Mattingly did not offer an opinion regarding the point at which an enacted redistricting crosses the line from being more reasonable or representative. (Trial

Tr. Vol. I, 124-25, Oct. 16, 2017) Instead, he simply offered the outcomes of the statistical distribution of randomly drawn redistrictings and asked the court to decide where the line should be. (Trial Tr. Vol. I, 125, Oct. 16, 2017)

5. Dr. Mattingly agrees that it is reasonable for some amount of politics to be considered in redistricting. (Trial Tr. Vol. I, 125, Oct. 16, 2017) He agreed that it would be "contrary to the idea of democracy" not to allow some political considerations to be used in redistricting. (Trial Tr. Vol. I, 125, Oct. 16, 2017) However, rather than study when the use of politics in redistricting would become too much, Dr. Mattingly limited his study to nonpartisan factors. (Trial Tr. Vol. I, 40, Oct. 16, 2017) And when asked where a plan's use of politics went from reasonable to unreasonable, Dr. Mattingly stated: "I don't think I really want to say there's a line." (Trial Tr. Vol. I, 124, Oct. 16, 2017) Instead, "that's a question for the Courts." (Trial Tr. Vol. I, 125, Oct. 16, 2017)

6. Dr. Mattingly's analysis ultimately generated approximately 24,000 different North Carolina congressional redistricting maps. (Trial Tr. Vol. I, 34, Oct. 16, 2017) The 24,000 maps are based on criteria from House Bill 92, not the actual criteria adopted by the legislature in enacting the 2016 Plan. (Trial Tr. Vol. I, 34, Oct. 16, 2017) Dr. Mattingly performed his analysis after the 2016 Plan was enacted and could have done an analysis using criteria observable in the 2016 Plan but chose not to do so. (Trial Tr. Vol. I, 103-04, Oct. 16, 2017) Dr. Mattingly agreed with statements by scholars that not considering the "full set of criteria" in simulated maps analysis made the results "perhaps substantively uninteresting." (Trial Tr. Vol. I, 106, Oct. 16, 2017)

7. The 2016 Plan splits only 13 counties. In Dr. Mattingly's set of 24,000 redistrictings, none split fewer than 14 counties. (Trial Tr. Vol. I, 111, 148-49 Oct. 16, 2017) Dr. Mattingly could have set his algorithm to generate redistricting plans with only 13 split counties but chose not to do so. (Trial Tr. Vol. I, 112-13, Oct. 16, 2017)

8. The 2016 Plan ensures no population deviation among the 13 congressional districts. In Dr. Mattingly's set of 24,000 redistrictings, none have a population deviation that is zero. (Trial Tr. Vol. I, 114, Oct. 16, 2017) Dr. Mattingly's algorithm was unable to generate zero-deviation redistricting plans. (Trial Tr. Vol. I, 114-16, Oct. 16, 2017)

9. The 2016 Plan ensures compliance with the Voting Rights Act with ability-to-elect districts with black VAP at 44.46% and 36.2%. (Trial Tr. Vol. I, 119, Oct. 16, 2017) In Dr. Mattingly's set of 24,000 redistrictings, only 648 have at least one district at 43.81% or above and one district at 35.26% or above. (Trial Tr. Vol. I, 119-120, Oct. 16, 2017) Of those redistrictings, none have such ability-to-elect districts and also split only 13 counties. (Trial Tr. Vol. I, 111,147, Oct. 16, 2017)

10. A visual review of redistrictings in the set of 24,000 redistrictings demonstrates that Dr. Mattingly's simulated maps violate other traditional redistricting principles. (Trial Tr. Vol. I, 118, Oct. 16, 2017) For instance, the maps contain "double traversals," in which a county line is crossed twice by one or more other districts. (Trial Tr. Vol. I, 118-19, 125, Oct. 16, 2017) Dr. Mattingly admitted that the 2016 Plan contains no double traversals. (Trial Tr. Vol. I, 118-19, Oct. 16, 2017) Dr. Mattingly

could have programmed his algorithm to generate redistricting plans without double traversals but chose not to do so. (Trial Tr. Vol. I, 119, Oct. 16, 2017)

11. The legislature's criteria for the 2016 Plan included a directive to eliminate the previously "snake-like" CD 12. (Trial Tr. Vol. I, 116, Oct. 16, 2017) The 2016 Plan contains CD 12 wholly within Mecklenburg County. (Trial Tr. Vol. I, 117, Oct. 16, 2017) Dr. Mattingly could have programmed his algorithm to select redistrictings with one district wholly within Mecklenburg County, but declined to do so. (Trial Tr. Vol. I, 117, Oct. 16, 2017) Similarly, unlike the legislature's criteria, Dr. Mattingly made no attempt to ensure incumbents were not paired, although he could have done so. (Trial Tr. Vol. I, 117-118, 150, Oct. 16, 2017) As a result, it is not possible to know what Dr. Mattingly's conclusions would have been had he done such an analysis. (Trial Tr. Vol. I, 118, Oct. 16, 2017)

12. Dr. Mattingly has reviewed the efficiency gap test proposed by the plaintiffs in *Whitford v. Gill*, and believes it is not "stable," in that the results of the test seem to change when one changes the set of votes used in the test. (DX 5072, pp. 10-11)

13. Under the 2016 Plan, three Democrats were elected. Under Dr. Mattingly's analysis, the simulation map produced by the retired judges in the Beyond Gerrymandering project would elect nine Republicans and four Democrats. (Trial Tr. Vol. I, 64, 122, Oct. 16, 2017) However, under his analysis, more "reasonable" maps would elect at least five Democrats. (Trial Tr. Vol. I, 123, Oct. 16, 2017) The difference between the 2016 Plan result and the Beyond Gerrymandering result was 27%. (Trial Tr.

Vol. I, 123, Oct. 16, 2017) The difference between the Beyond Gerrymandering result of four Democrats and the more "reasonable" result of five Democrats was also 27%. (Trial Tr. Vol. I, 123, Oct. 16, 2017) Thus, under Dr. Mattingly's analysis, the "Judges" map is as "unreasonable" compared to Dr. Mattingly's "reasonable" outcome as the 2016 Plan is to the "Judges" plan.

14. Dr. Mattingly's analysis uses votes from the 2012 and 2016 elections, and changes districts assuming those votes would remain the same for the political parties. (Trial Tr. Vol. I, 57, 95, Oct. 16, 2017) Thus, the premise of Dr. Mattingly's analysis assumes voters vote for the party and not the candidate. (Trial Tr. Vol. I, 95, Oct. 16, 2017) Dr. Mattingly concedes that this is not a valid assumption. The assumption takes the dynamics of each election caused by candidates, political spending, etc. out of the analysis. (Trial Tr. Vol. I, 95, 97, Oct. 16, 2017)

F. The Beyond Gerrymandering Project

1. Plaintiffs rely heavily on a simulation congressional redistricting plan drawn as a joint project of Duke University and Common Cause.

2. The simulation project recruited former North Carolina judges to sit as a simulated independent redistricting commission drawing a simulated congressional redistricting plan. (Trial Tr. Vol. I, 29, Oct. 16, 2017; DX 5075-5095)

3. The simulation exercise was conceived in early 2016 and was concluded by the end of August 2016. The Common Cause lawsuit was initially filed August 5, 2016. (Trial Tr. Vol. I, 29, Oct. 16, 2017)

4. The judges were instructed not to consider partisan criteria in drawing the simulation maps. However, plaintiffs admit that many of the judges understood the political geography of the state based on their residency and political involvement in the state for many years. (*See, e.g.*, Phillips Dep. at 128:6-129:3)

5. The final simulation map adopted by the judges contained nine districts that favored Republicans and four districts that favored Democrats. (Trial Tr. Vol. I, 122, Oct. 16, 2017; DX 5093) It split 12 counties but it did not have a zero population deviation which would have likely required splitting additional precincts and counties. The map did not contain any districts with a black VAP at or above 44.8%. Instead, a consultant hired by the project advised the judges that they could comply with the VRA by having one district just above 40% if African Americans could control the Democratic primary electorate in that district. (DX 5088)

6. The VRA advice was provided by Bill Gilkeson, a long time staff attorney at the North Carolina General Assembly. Mr. Gilkeson was a lead redistricting lawyer for the legislature in the 1990s and 2000s, when the Democrats controlled the legislature. (Doc. 111-1; Gilkeson Dep. at 6:20-23; DX 5079, 5049) Thus, Mr. Gilkeson participated in drawing redistricting plans that Common Cause, the lead plaintiff in one of these actions, claims were partisan gerrymanders. (DX 5050, 5051)

7. Mr. Gilkeson confirmed that the goal of North Carolina Senate Redistricting Chairman Brad Miller in 2001 was to create the new CD 13 as a strong Democratic district. (Doc. 111-1; Gilkeson Dep. at 42:19-43:2) He also confirmed that

the 1997 Congressional Plan was intended to be a compromise that would elect six Democrats and six Republicans. (Doc. 111-1; Gilkeson Dep. at 49:4-17) He also believes that the 2001 Plan was intended to elect eight Democrats and five Republicans. (Doc. 111-1; Gilkeson Dep. 50:11-18)

G. The 2016 Plan

1. On February 5, 2016, a different three-judge panel of this Court held that CD 1 and CD 12 in the 2011 congressional redistricting plan were racial gerrymanders and could no longer be used. The court gave the legislature two weeks to draw new congressional districts and submit them to the court.

2. Legislative leaders immediately began to take steps to comply with the two-week deadline. (DX 5001, ¶¶ 3-10) This included meeting with the mapdrawer, Dr. Tom Hofeller, and developing criteria that would likely be used in developing the new plan. (*Id.*)

3. During the legislative process of enacting the 2016 Plan, the legislature adopted criteria. There were seven criteria. (JTX 1007) Political considerations were among numerous other criteria that Dr. Hofeller was instructed to follow. The selection of counties to be included in each new district was primarily driven by the need to avoid splitting counties and the preservation of common district cores. (DX 5001, ¶ 31) When counties were split, for the most part, the internal boundaries of split counties were drawn using a composite percentage of seven statewide political races. (*Id.*)

4. Dr. Hofeller followed all of the criteria in constructing the 2016 Plan. For instance, he eliminated the former CD 12 and located the entire district within Mecklenburg County. He also eliminated the unusual shape of the 2011 CD 4 in order to draw districts that were more compact than the 2011 plans. These changes among others required substantial changes to the other districts in the plans. (DX 5001, ¶¶ 16-19)

5. Dr. Hofeller also complied with the criteria ensuring maintenance of the status quo politically. He did so by retaining the cores of the 2011 districts to the extent it could be done without violating other criteria[6] and, where possible, not pairing incumbents. (DX 5001, ¶¶ 13, 27, 28, 31)

6. In constructing the 2016 Plan, Dr. Hofeller also followed instructions he received such as avoiding double traversals and not unnecessarily dividing small counties (counties with population under 100,000). (DX 5116, ¶¶ 11, 13) In fact, Dr. Hofeller discarded incomplete alternative districts which did not comply with these preferences. (DX 5116, ¶¶ 11, 13)

7. To assess the possible political characteristics of districts in the 2016 Plan, Dr. Hofeller developed a simple formula averaging the results of certain election contests to produce a percentage for individual VTDs or districts. (DX 5116, ¶ 19) Such formulas have been used in redistricting since the 1970s and do not require much computing power. (DX 5116, ¶ 19) Under Dr. Hofeller's formula, the possible political

[6] Ten of the 13 districts in the 2016 Plan retained at least half of their old cores. (DX 5001, ¶ 13, Table 1)

strength of the districts in the 2016 Plan is generally worse for Republican candidates than under the 2011 Plan. (DX 5116, ¶ 22)

8. During the legislative proceedings leading to enactment of the 2016 Plan, Rep. David Lewis made several statements while debating one of the criteria that have been a focus of plaintiffs in this case. These statements include: (1) "I freely acknowledge that this would be a political gerrymander which is not against the law."; (2) "I would propose that to the extent possible, the map drawers create a map which is perhaps likely to elect 10 Republicans and 3 Democrats."; and (3) "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats."

9. Rep. Lewis made these statements during a lengthy debate regarding criteria for the 2016 Plan—a debate which spans 176 pages of the legislative record. When the specific statements were made, the legislative committee was debating only one of the criteria – the one dubbed "Partisan Advantage," a discussion consisting of only 22 pages of discussion. (JTX 1005, at pp. 47-69)

10. Rep. Lewis explained these statements during testimony which was admitted in this case. Put in context, the statements do not reveal an intent to maximize partisan advantage in the 2016 Plan. Rather, they reveal an intent to maintain the political status quo in the State's congressional delegation after court-ordered redistricting. A similar strategy was adopted by the legislature in 1997 following court-ordered redistricting of the State's congressional plan. (DX 5021, p. 4) ("We said from

the beginning in the Senate that in 1996 the people made a decision to elect six members of Congress from the Democratic Party and six members of Congress from the Republican Party and we should not use court ordered redistricting to alter that result. Therefore, we've come up with the plan that you see before you.")

11. During his testimony in this case, Rep. Lewis explained that when he used the term "political gerrymander" he was doing so to emphasize that race was not a factor in the 2016 Plan. Thus, he was simply acknowledging a political motive over a racial motive. (Doc. 110-3; Lewis Dep. at 125:6-126:17)

12. Rep. Lewis explained that the statement made regarding "perhaps" electing ten Republicans and three Democrats was a reference to satisfying the current congressional delegation (which was ten Republicans and three Democrats) that the status quo would be maintained (that no one was "out to get them" in the court-ordered redistricting). He also explained that he considered a possible map that could elect nine Republicans (in stronger Republican districts) and four Democrats but it would require violating other criteria to adopt that map. (Doc. 110-3; Lewis Dep. at 169:3-21)

13. Rep. Lewis also explained his comment regarding a map that could elect 11 Republicans and two Democrats. Rep. Lewis confirmed it is in fact possible to draw a congressional plan that could elect 11 Republicans and two Democrats, but only if numerous other criteria were violated, such as keeping more counties whole and splitting fewer precincts. Rep. Lewis testified that instead of maximizing partisan advantage, they

drew a plan that preserved the political status quo and followed all of the other criteria adopted by the legislature. (Doc. 110-3; Lewis Dep. at 167:6-169:1)

14. The 2016 Plan complied with all of the criteria adopted by the legislature and follows traditional redistricting criteria better than nearly every prior congressional plan in decades. (DX 5010, 5011, 5012, 5013, 5014, 5015, 5023, 5044, 5045, 5046, 5047, 5048) The 2016 Plan also complied with the Voting Rights Act. (DX 5006, 5007, 5008, 5009, 5016, 5017)

15. The 2016 Plan did not maximize partisanship in favor of Republicans. In fact, in all but one district in the 2016 Plan, registered Democrats outnumber registered Republicans in the district. (DX 5006)

III. CONCLUSIONS OF LAW

A. Plaintiffs' claims are only justiciable in theory.

1. No justiciable standard has been identified by the Supreme Court.

As explained by defendants in their motions to dismiss, the Supreme Court has never identified a workable standard for assessing so-called political gerrymandering claims. (D.E. 29 and 34 in Case No. 16-1026 and D.E. 31, 35, and 46 in Case No. 16-1164); *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Other federal district courts have agreed. *Shapiro v. McManus*, 203 F.Supp.3d 579, 594 (D. Md. 2016) (three-judge court) ("Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the Equal Protection Clause remain justiciable in

theory, it is presently unclear whether an adequate standard to assess such claims will emerge."); *Ala. Legislative Black Caucus v. Ala.*, 988 F.Supp.2d 1285, 1296 (M.D. Ala. 2013) (three-judge court) ("The Black Caucus plaintiffs conceded at the hearing on the pending motions that the standard of adjudication for their claim of partisan gerrymandering is 'unknowable.'").

Without a standard to apply, at least two federal courts have found that the *Vieth* plurality plus Justice Kennedy's concurrence constituted a majority for the proposition that political gerrymandering claims are presently non-justiciable. *LULAC of Texas v. Texas Democratic Party*, 651 F.Supp.2d 700, 712 (W.D. Tex. 2009) (three-judge court) (*Vieth* held that political gerrymandering claims are non-justiciable); *Meza v. Galvin*, 322 F.Supp.2d 52, 58 (D. Mass. 2004) (three-judge court) (noting that *Vieth* held "that political gerrymandering cases are nonjusticiable"). After 30 years of trying, the Supreme Court has failed to establish any workable standard for adjudicating political gerrymandering claims. Absent the emergence of such a test approved by the Supreme Court, political gerrymandering claims may be justiciable in theory, but not in fact.

2. These are issues best left to the political branches.

In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), Justice Kennedy explained that Article I, Section 2 of the Constitution "'leaves with the states primary responsibility for apportionment of their federal congressional districts . . . .'" 548 U.S. at 414 (citations omitted). Justice Kennedy also explained that the Constitution gives express authority to Congress – not the courts – to

"set further requirements . . . ." *Id*. at 415; *see also Vieth*, 541 U.S. at 274-77. And in *Vieth*, Justice Kennedy agreed that, "[a] decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented interaction in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life." *Id*., 517 U.S. 541 U.S. at 306.[7] Clearly, Justice Kennedy is rightfully wary of the courts usurping the legitimate political role of state legislatures and will not support a theory of justiciability that does not place strict limits on the judicial branch.

Further, as explained by Justice O'Connor, "the Framers of the Constitution unquestionably" intended that questions concerning partisan gerrymandering should be left to the legislative branch. *Davis v. Bandemer*, 478 U.S. 109, 144 (1986). There is not "a shred of evidence . . . that the framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed." *Id*. at 145. Moreover:

> The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out –

[7] In *Vieth*, plaintiffs alleged that Pennsylvania had failed to follow traditional districting principles in drawing a gerrymandered plan that favored Republicans. *Id*. at 273. Plaintiffs also alleged that the plan prevented a majority of the voters from electing a majority of the seats. *Id*. at 287. In contrast, the 2016 Plan is based wholly upon traditional districting principles and a majority of the voters in 2016 elected a majority of the seats. Given these facts, Justice Kennedy would have to repudiate his decision in *Vieth* to find that the entire 2016 Plan constitutes a political gerrymander.

> by the very parties that are responsible for the process – present a political question in the truest sense. To turn these matters over to the federal judiciary is to inject courts into the most heated partisan issues.[8]

Id.

Thus, the Supreme Court has counseled the exercise of restraint instead of overruling policy choices of elected representatives, and the responsibility of the people – not the Court – to resolve political disputes. Alleged gerrymandering is a perfect example because so-called gerrymanders often do not work as the politicians intended. North Carolina provides a great example of this. There is no doubt that the 1992 congressional plan was intended to maximize the voting strength of Democratic voters and to dilute the voting strength of Republicans. *Shaw II*, 861 F. Supp. at 418. But in 1994, it backfired and Republicans won seven out of 12 North Carolina congressional districts. *See* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Redistricting on the Partisan Makeup of Southern House Seats in Redistricting in the New Millennium* 193 (Peter F. Galderisi, ed., 2005). In 2001, a Democratic-controlled General Assembly intentionally adopted a 13-seat congressional plan designed to elect eight Democrats and five Republicans, as compared to the six-six

[8] Justice O'Connor also predicted that the "nebulous" standard adopted by the *Bandemer* majority would push courts toward "some form of rough proportional representation for all political groups." *Id*. at 145. The First Amendment test proposed by the plaintiffs here is at best as nebulous as the test adopted by the plurality in *Bandemer* and the efficiency gap theory is nothing more than a disguised attempt at proportional representation as well as the complete rejection of compact single-member congressional districts. As noted by Justice O'Connor, nothing in the Constitution gives unelected judges the authority to make these types of policy decisions overruling the decisions by elected representatives.

division established by the 1997 plan enacted by a divided General Assembly. But despite this intent, the plan did not elect eight Democrats until near the end of the decade. Finally, in 2003, the Democratic-controlled General Assembly adopted state Senate and House plans intended to favor Democratic voters over Republican voters. The plans worked in 2004 through 2008 and significant Democratic majorities were elected in these three elections. But in the 2010 election, Democrats were replaced by the voters with Republican majorities.

These past examples underscore the reasons the Framers intended that political questions should be resolved by the People, not federal judges. Without regard to efficiency gaps, proportional representation, or other academically inspired proposed judicial amendments to the Constitution, the alleged 2016 "gerrymander" could result in electing less Republicans in future elections. Whether Democratic candidates can or should win election in compact districts based upon traditional districting principles is a political question – not a judicial issue. And these political issues should be left to the people—as wisely explained by Chief Justice Burger, Justices O'Connor and Rehnquist, and all members of the plurality opinion in *Vieth*.

3. In any event, plaintiffs have not identified a judicially manageable standard.

Plaintiffs propose political gerrymandering standards under the Equal Protection Clause and the First Amendment. These standards are unworkable.

Under the Equal Protection Clause standards proposed by the LWV plaintiffs, the evidence demonstrates that plaintiffs are not proposing any standard at all or are

proposing what amounts to proportional representation. LWV experts Mattingly and Chen both conceded that they are not proposing a standard that would answer Justice Kennedy's question of "how much politics is too much?"

On the other hand, LWV expert Jackman proposes a standard that amounts to proportional representation and is subject to a remarkably high 33% error rate for states with seven to 15 congressional districts. Since the decision in *Bandemer*, both the Court, any concurring Justice, and even dissenting Justices who have addressed this concept have rejected arguments that plans may be declared illegal based upon an analysis of whether the number of statewide votes shows proportional election results. *Vieth*, 541 U.S. at 288, 308 (no authority for argument that a majority of voters would elect a majority of seats) (Kennedy, J., concurring); *Id*. at 338 (Constitution does not require proportional representation (Stevens, J., dissenting) Yet, this is exactly the argument advanced by plaintiffs in this case, whether it is described as a statewide comparison of percentage of votes to percentage of successful candidates or a statewide comparison of projected or hypothetical so-called "wasted votes" under the efficiency gap theory.

As explained in *Bandemer*, there is no parliamentary system in this country, nor does the Constitution require a test for fairness based upon statewide vote totals. This is because "the typical election for legislative seats in the United States is conducted in described geographic districts, with the candidate receiving the most votes in each district winning the seat allocated to the district." *Bandemer*, 478 U.S. at 130. Even when districts are constructed to be "competitive," "a narrow statewide preference for either

party would produce an overreaching majority for the winning party in the state legislature." *Id*. Under our political traditions and, more importantly, the Constitution, "this consequence . . . is inherent in winner-take-all district based elections" and is not illegal. *Id*. Moreover, the Constitution does not mandate proportional representation because in each election, "voters cast votes for candidates in their districts, not for a statewide slate of [candidates] put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist." *Id*. at 159 (O'Connor, J., concurring). Even Justices who have found that political gerrymandering might be justiciable have rejected proportional representation as a proper standard. *Id*. at 130, 165 (Powell, Stevens, J. J., concurring in part and dissenting in part) (plaintiffs must prove that the boundaries of the voting districts have been distorted deliberately); *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring on judgment), 338 (Steven, J., dissenting); *LULAC*, 548 U.S. at 419 ("[T]here is not constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best.").[9]

Similarly, the Common Cause plaintiffs' First Amendment standard is unworkable. It is clear that the Common Cause plaintiffs believe that legislators cannot

[9] The Court has long held that even winner-take-all elections won by plurality in multimember districts are not unconstitutional "because the supporters of losing candidates have no legislative seat assigned to them." *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971). If the total percentage of votes for all losing candidates in a multimember district cannot form the basis of a constitutional claim, it is hard to see how the percentage of votes compared to seats won or a proportional standard for "wasted votes" can do the opposite in a statewide plan based upon single-member districts.

give *any* consideration of political impact. This is because, according to the Common Cause plaintiffs, the First Amendment is violated whenever legislators consider election results under a theory of "viewpoint" discrimination followed in ballot access cases or cases involving public employees in non-policy making positions. But this interpretation of the First Amendment has been flatly rejected by decisions of the Supreme Court and in concurring and dissenting opinions acknowledging that districting and politics are inseparable.

For example, in *Bandemer*, plaintiffs supported their claims with allegations that the Indiana legislature had drawn bizarre districts and failed to follow traditional districting principles. Thus, unlike this case, the plaintiffs had evidence that the Indiana districts were "gerrymandered" in the true understanding of the term. The *Bandemer* plaintiffs also relied upon statements by a senior leader of the majority party who admitted that he had maintained multi-member districts strictly for "political" reasons and that he wanted to "save as many incumbent Republicans as possible." *Bandemer*, 478 U.S. at 116-17.

But in *Bandemer*, the Court rejected plaintiffs' arguments that direct evidence of partisan intent was enough to invalidate a plan even where plaintiffs also alleged, unlike this case, that the challenged plan failed to follow traditional districting principles. While the plurality of the *Bandemer* Court found political gerrymandering claims to be justiciable, the plurality (and the three *Bandemer* Justices who believed that political gerrymander is non-justiciable) rejected the argument – like the one made here by the

Common Cause plaintiffs – that consideration of political impact or the failure to draw districts without regard to the viewpoint of voters – could alone prove a claim of unconstitutionality. Flatly rejecting the "viewpoint" theory advanced here by Common Cause, the Court noted, "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary." *Id*. at 128. The Constitution gives the authority to draw congressional districts to state legislatures, subject only to statutes that might be enacted by the Congress. *Vieth*, 541 U.S. at 274-77. As noted by Justice Kennedy, the sole Justice to reference the possibility of the First Amendment serving as the basis for political gerrymander cases, "reapportionment is primarily the duty and responsibility of the State." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). And because reapportionment is "a most difficult judgment for legislatures . . . the states must have discretion to exercise the *political judgment* necessary to balance competing interests." *Id*. (*emphasis added*).

Moreover, the *Bandemer* court rejected the same arguments advanced by plaintiffs here about "viewpoint" discrimination because it would be "mindless" to think that districting can ever be a neutral process. As explained by the Court:

> Politics and political consideration are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may determine the political complexion of the area.

> District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic, predominantly Republican, or make a close race likely. Redistricting may put incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.
>
> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equity without regard for political impact. But the *politically mindless* approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any case, 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.

Bandemer, 478 U.S. at 128-29 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973)) (emphasis added).

The self-evident fact that there is no such thing as a politically neutral district line has been repeatedly recognized by the Supreme Court and its Justices. *Id.* at 129 n.10 (‘“The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from putting the line in some other place.’”) (citation omitted); *Vieth*, 541 U.S. at 289-90 (districts drawn solely based upon compactness or contiguity result in “naturally” packed Democratic districts because Democrats tend to live in cities) (plurality opinion); *Id.* at 302-309 (criteria such as contiguity and compactness are not politically neutral because Democrats are more likely to live in high density regions) (Kennedy, J., concurring in judgment) (citations omitted); *Id.* at 343 (“the choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical state with voters of every political identity distributed in an absolutely growing uniformity) (Souter,

Ginsburg, J. J., dissenting); *Id.* at 359 (in a system of single-marker districts the use of traditional districting principles are rarely, if ever, politically neutral because Democrats are often concentrated in cities which Republicans live in the suburbs or rural areas) (Breyer, J., dissenting).

Unsurprisingly, and unlike Common Cause's proposed First Amendment test, judges who have written on the topic have agreed that legislatures may consider politics when drawing district lines. Plaintiffs have based their argument largely on the allegedly illegal decision by Republican members to consider past election results as one of the criteria for the 2016 Plan. But that is exactly what was done by the Democratic-controlled legislature and approved by the Supreme Court in the *Cromartie* cases.

In *Cromartie v. Hunt*, 526 U.S. 541 (1999) ("*Cromartie I*"), all nine Justices agreed that a state could defend a claim of racial gerrymandering if the evidence showed that districts were drawn based upon past election results. Writing for the majority (which included Justice Kennedy), Justice Thomas stated that "our prior decisions have made it clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black voters and even if the state were conscious of that fact." *Id*. at 551 (citation omitted). Four other Justices in *Cromartie*, including current Justices Breyer and Ginsburg, in a concurring opinion, agreed that election results could be lawfully considered by a legislature in drawing a perfectly legal district that was intentionally configured to elect a Democratic candidate. *Id*. at 555-58.

Subsequently, a majority of the Court overturned a finding by the district court that North Carolina's CD 12 was a racial gerrymander based upon admissions by the State that the 1996 General Assembly had sorted voters using past election results to create a safe Democratic Congressional seat. *Easley v. Cromartie,* 532 U.S. 234 (2000) ("*Cromartie II*"). In what world can a constitutional defense to claims under the Fourteenth Amendment simultaneously be a violation of the First Amendment which only applies to the states by virtue of the Fourteenth Amendment. *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) (adoption of the Fourteenth Amendment made the First Amendment applicable to the states).

Nearly every member of the current Supreme Court has opined that it is lawful for legislatures to consider politics and partisan impact when drawing districts.[10] Justice Breyer wrote *Cromartie II* and was joined in his opinion by current Justice Ginsburg. In *Ala. Legislative Black Caucus v. Ala.*, 135 S. Ct. 1257, 1270 (2015), Justice Breyer, in an opinion joined by current Justices Kennedy, Ginsburg, Sotomayor and Kagan, stated that states may defeat claims of racial gerrymanders when they can show that districts are the product of "traditional race-neutral districting principles" including "political subdivisions . . . incumbency protection, and *partisan affiliation*." *Id*. (citing *Bush v. Vera*, 517 U.S. 952, 964, 968 (1996)) (emphasis added).

[10] Nothing written by any of the Justices in *LULAC*, which mainly focused on a mid-decade redistricting by the Texas legislature, indicates that even a single Justice believes that politics may not be considered in redistricting or that they would adopt the standard proposed by the plaintiffs in this case.

Next, in *Harris v. Arizona Independent Redistricting Commission*, 136 S.Ct. 1301, 1309 (2016), Justice Breyer, writing for a unanimous court, rejected plaintiff's claims that the Commission had illegally gerrymandered House District 8 despite evidence that the two Democratic commissioners had directed the commission's districting specialist to change the lines of a district that leaned Republican to one that was "more competitive" and therefore benefitted Democrat voters to the detriment of Republican voters.

Finally, in *Cooper v. Harris*, 137 S.Ct. 1455 (2017), the majority upheld the district court's finding that race and not politics was the predominant motive for the 2011 version of North Carolina's CD 12, but did not overrule the Court's finding in *Cromartie II* that a state can defeat a claim of racial gerrymandering when the challenged district is based upon the use of election results to sort voters. In a dissenting opinion by Justice Alito, the Chief Justice, and Justice Kennedy, these Justices explained that "politics and political considerations are inseparable from districting and apportionment," that "it is well known that state legislative majorities very often attempt to gain an electoral advantage through the process," that "partisan gerrymandering dates back to the founding," and that "our prior decisions have made it clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State was conscious of that fact." *Id*. at 1488 (citations omitted).

Every North Carolina congressional plan in recent times was an illegal political gerrymander under the standard proposed by the plaintiffs here. The 1992 plan divided

many more counties and precincts than the 2016 Plan and was engineered to protect four or more Democratic incumbents. *Shaw II*, 861 F.Supp. at 418, 448-49, 462, 467, 469. The 1996 plan, enacted by the Democratic-controlled Senate and a Republican-controlled House, was engineered to ensure six safe Democratic seats and six safe Republican seats. *Cromartie v. Hunt*, 133 F.Supp.2d 407, 412 (E.D.N.C. 2000), *rev'd on other grounds, Cromartie II*, supra.[11] In 2001, a General Assembly fully controlled by Democrats, intentionally changed an evenly balanced six-six plan to an eight-five Democratic gerrymander. This included the bizarrely shaped version of CD 13, drawn by the chairman of the state Senate redistricting committee so that he could run for Congress in a safe Democratic seat. In all instances, voters were sorted based upon past election results to achieve a political goal shared by the majority in the General Assembly. The reality of more than 200 years of congressional districting is that politics is always considered because it is inseparable from drawing district lines.

Other than *dicta* by Justice Kennedy in his concurring opinion in *Vieth*, there is no support in any Supreme Court decision for a standard of liability in redistricting cases under any provision of the Constitution that is different from any test which might apply under the Fourteenth Amendment. Moreover, it is hard to fathom how a different test might be "found" under the First Amendment since the First Amendment only applies to

[11] As noted by Justice O'Connor in *Bandemer*, a plan gerrymandered politically to protect all incumbents is no different than a plan gerrymandered to favor one party over another. After all, "[a] bipartisan gerrymander employs the same technique, and has the same effect on individual voters, as does a partisan gerrymander. *See Bandemer*, 478 U.S. at 154 (O'Connor, J., concurring). In both instances, the majority in the legislature "sorts" voters by election results to achieve the political goals of the legislature's majority.

the States because it was incorporated into the Fourteenth Amendment. *New York Times*, *supra*. Unsurprisingly, the Fourth Circuit has already held that in districting cases "the First Amendment, like the Thirteenth, offers no protection of voting rights beyond that afforded by the Fourteenth and Fifteenth Amendments." *Washington v. Finley*, 664 F.2d 913, 927-28 (4th Cir. 1981); *see also Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992). Only the most tortured legal reasoning would allow plaintiffs to prevail under the First Amendment if the challenged districts are legal under the Fourteenth Amendment.

This conclusion is fully supported by the decisions issued by the Supreme Court involving districting litigation and alleged claims under the First Amendment. For example, in *Badham v. Eu*, 694 F.Supp. 664, 675 (N.D. Ca. 1988), plaintiffs relied upon *Anderson v. Celebrezze* 460 U.S. 780 (1983) and other ballot access cases, to challenge California's districting plan. These are the same cases relied upon by Judge Neimeyer in his dissent in *Benisek v. Lamone*, 2017 WL 3642928 (D. Md. Aug. 24, 2017) (three-judge court), and the plaintiffs in this case to support their argument regarding "viewpoint discrimination." The *Badham* court rejected these arguments, holding that plaintiffs had not stated a claim under the First Amendment. *Badham*, 694 F. Supp. at 675. This decision by the *Badham* district court was summarily affirmed by the United States Supreme Court. The judgment in *Badham*, holding that plaintiffs had failed to state a claim based upon the very same First Amendment argument advanced by the plaintiffs in this case, represents a judgment by the Supreme Court that is binding on this court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *see also Pope*, 809 F. Supp. at 395 n. 2.

Next, the plaintiffs in *Pope v. Blue*, like the plaintiffs here, and like the plaintiffs in *Badham*, alleged that the highly gerrymandered 1992 congressional plan had a "chilling effect" on their rights under the First Amendment. Relying on the decision by the *Badham* court involving the same First Amendment issues, the *Pope* Court also ruled that plaintiffs had not stated a claim under the First Amendment. *Pope*, 809 F. Supp. at 388. This decision was also summarily affirmed by the Supreme Court. *See Pope v. Blue*, 506 U.S. 801 (1992).

Subsequently, in *Vieth*, the three-judge court held that plaintiffs had failed to state a claim for political gerrymandering under the First Amendment. This judgment was affirmed by five members of the *Vieth* Court including Justice Kennedy. *Vieth v. Commonwealth of Pennsylvania*, 241 F.Supp.2d 478,480, 484-85 (M.D. Pa. 2003) *aff'd*, *Vieth supra*.

In contrast to multiple decisions by the Supreme Court affirming the dismissals of political gerrymander claims based upon the First Amendment, the Common Cause plaintiffs rely on *dicta* by a single Justice in a concurring opinion in *Vieth*. In his concurring opinion, Justice Kennedy speculated that cases governing the discharge of non-policy making public employers such as *Elrod v. Burns*, 427 U.S. 347 (1970), might be the source of some conceivable, judicially manageable standard for political gerrymandering. But, as explained in the plurality opinion in *Vieth*, Justice Kennedy's speculation is unworkable because the standard applicable to public employee discharge cases allows no consideration of partisan affiliation. 541 U.S. at 294. In the same

concurring opinion in which Justice Kennedy mentions the *Elrod* line of cases, he also states that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied." *Id*. at 307. He also states that race is an "impermissible" consideration in redistricting but that "politics is quite a different matter" while citing *Gaffney*, *supra*, for the proposition that it "would be idle" to contend that any political consideration taken into account is sufficient to invalidate a districting plan. *Id.* (citing *Gaffney*, 412 U.S. at 752). Thus, in the same opinion where Justice Kennedy mentioned the possibility that the First Amendment might someday serve as the newly discovered fountainhead for districting cases, he also expressly rejected the argument that a violation can be established simply because the legislature considered politics in drawing district lines.

Moreover, nothing in *Shapiro* supports the application of a First Amendment test to an entire districting plan as opposed to a specific district. Plaintiffs' claims for fairness here depend upon their arguments that the 2016 Plan is unfair – not a specific district – because Democratic representation is less than the percentage of statewide Democratic vote. No opinion by any Supreme Court Justice has endorsed such a test for fairness. Second, even Judge Niemeyer in *Shapiro* agrees that legislatures can examine election results for the "protection of incumbents of all parties," which was one of the criteria used to draw the 2016 Plan. *Shapiro*, 203 F.Supp.3d at 597. In fact, all 2014 incumbents were reelected under the 2016 Plan except for one Republican who lost in a primary to another Republican incumbent. Finally, the *Shapiro* case is based upon district specific

evidence concerning the decision by the Maryland General Assembly to ignore traditional redistricting principles in order to convert a long-time Republican district into a Democratic district. Plaintiffs here have made no similar allegation about any of the 2016 districts.

More specifically, the single district challenged in *Shapiro*, Maryland's CD 6 had elected a Republican candidate for decades. The district lines for CD 6 were almost entirely based upon whole counties. The version of CD 6 challenged in *Shapiro* flipped the politics of this district from Republican to Democratic and did so by failing to follow Maryland's traditional districting principle of using whole counties to draw this district. *Shapiro*, 203 F.Supp.3d at 587-88. None of these facts are present here. Plaintiffs' challenge is based upon a statewide analysis comparing the percentage of votes to number of seats won or the argument that statewide wasted votes must be proportional. Plaintiffs do not challenge the elimination of a specific district that has long performed as a Democratic district before being flipped by the 2016 Plan. Nor do plaintiffs allege that any district in the 2016 Plan fails to follow traditional districting principles.

Further, the standard advanced by *Shapiro* is actually no standard at all. Rather, it grants unfettered discretion for any district court to find almost any district to be illegal based upon the preferences of the district court. If districts or districting plans are subject to court intervention because of amorphous "burdens" allegedly imposed on voters who are "sorted" based upon election results, almost every future redistricting plan will be subject to judicial review. *Shapiro* states that the First Amendment is violated when a

legislature attempts "[t]he practice of purposefully diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views expressed through voting histories and party affiliations that infringes this representational right." *Shapiro*, 203 F.Supp.3d at 595. This test will require judges – not elected officials – to make political decisions related to the location of district lines. But every district line has political consequences that will be well known to whoever draws the district lines. This reality makes it impossible to square this standard with the uncontroverted line of decisions and opinions by the Supreme Court holding that politics and redistricting are inseparable, that every district line has political consequences, and that legislatures not only may consider past election results but in some instances may lawfully do so to defend claims of racial gerrymandering.

Moreover, *Shapiro* does not explain how burdens are to be measured and applied equally to all voters. Are voters in districts lawfully drawn to protect all incumbents burdened in an unconstitutional manner if the incumbent protected happens to be a member of a party opposed by the voter? Are unaffiliated voters burdened if they are placed in an allegedly uncompetitive district and therefore denied the choice of choosing between candidates of different parties? Are Democratic voters sorted to protect a Democratic incumbent unconstitutionally burdened if the Democratic vote in that district is alleged to be higher than what is needed to reelect the incumbent? Who is to determine the exact right percentage of Democratic voters needed to protect the Democratic incumbent? Are Republican voters residing in geographically compact districts that

favor Republicans burdened by a court order fracturing their districts to reduce the number of Republican leaning districts throughout the State while increasing the number of Democratic leaning districts? How are judges to determine the number of Democratic districts or Republican districts that are fair? How are judges to determine how the districts they draw will perform over the next decade? The standard proposed by *Shapiro* would allow federal judges to make these political decisions based upon their preferences and with no consistent rule of law to guide them.[12]

There is simply no basis in Supreme Court precedent for concluding that any of the Justices in these cases would endorse the amorphous First Amendment test proposed by *Shapiro*, particularly where it would effectively transfer policy making authority from elected representatives to unelected federal judges.

B. Plaintiffs lack standing.

1. All plaintiffs lack standing to challenge the statewide 2016 Plan on a statewide basis.

A political gerrymandering challenge to a statewide congressional redistricting plan, such as that lodged by the organizational plaintiffs here, is foreclosed by *Vieth*. In *Vieth*, five Justices concluded that a statewide challenge on partisan gerrymandering grounds was nonjusticiable, with Justice Kennedy basing his conclusion to that effect on standing grounds. *Vieth*, at 292. Accordingly, federal courts lack authority to entertain statewide challenges.

[12] Justice Kennedy, upon whom plaintiffs principally rely, has written that federal judges are particularly ill-equipped to make these types of political decisions. *Bartlett v. Strickland*, 556 U.S. 1, 22-23 (2009).

This rule is reinforced by the Supreme Court's approach in racial gerrymandering claims. In the racial gerrymandering context, a plaintiff must establish that "race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265. This is so because of the nature of the injury in such a case, which includes (1) "being personally subjected to a racial classification" and (2) being "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Id.* The Supreme Court has found that "where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has been personally subjected to a racial classification would not be justified absent specific evidence tending to support that inference." *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

These same representational harms apply similarly in the political gerrymandering context, namely that a plaintiff is being personally subjected to a partisan classification, and may be represented by a legislator who believes his primary loyalty is to a particular political party. *See Ala. Legislative Black Caucus v. Ala.*, Nos. 2:12-cv-691, 2:12-cv-1081, 2017 WL 4563868, at *4 (M.D. Ala. Oct. 12, 2017) (finding that "the Supreme Court reasoned that alleged victims of racial gerrymandering could establish individual harm either by living in an effected district or by proving that they had been personally classified on the basis of race" and that "[a]ssuming that partisan classifications are also constitutionally suspect, an alleged victim of partisan gerrymandering must make the

same showing of residency or individual harm.") (citing *Hays*, 515 U.S. at 745). It would be strange to permit political-gerrymandering plaintiffs to assert a statewide challenge but require racial-gerrymandering plaintiffs to proceed on a district by district basis. Race-based claims allege a more serious violation of the Constitution than do partisan-based claims. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). It follows that a legislature must have more discretion to consider politics than it does to consider race and that judges should defer to policy choices inherent in the drawing of districts made by elected representatives.

A statewide challenge on political gerrymandering claims is also particularly inappropriate in the context of the congressional redistricting plan at issue here. In *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wisc. 2016) the court allowed a statewide challenge to a legislative redistricting plan to go forward because, "given Wisconsin's caucus system, the efficacy of [the plaintiffs'] vote in securing a political voice depends on the efficacy of the votes of Democrats statewide." *Whitford*, 218 F.Supp.3d at 930. Under these circumstances, the "concern" in a challenge to Wisconsin's legislative map was "the effect of a statewide districting map on the ability of Democrats to translate their votes into seats" and thus have an opportunity to control the majority caucus. *Id.* In this case, no such "concern" is present because even if Democratic candidates won all 13 of North Carolina's congressional seats, it would not guarantee that Democrats would control the United States House of Representatives. Accordingly, a statewide challenge is inappropriate even under the flawed reasoning of the *Whitford* majority.

But even if such a concern existed here, it must be rejected. In *Alabama*, a three-judge panel recently rejected the theory adopted by the *Whitford* court and found that the plaintiffs lacked standing to challenge remedial redistricting plans enacted by State of Alabama as political gerrymanders in districts in which they did not reside. The *Alabama* court explained its disagreement with *Whitford* and its decision to deny standing as follows:

> The *Whitford* court distinguished the inherent harm an individual suffers when he is categorized on the basis of race from the universal injury all Wisconsin Democrats suffered when the redistricting plan hindered their efforts to "translate their votes into seats." According to the court, the first kind of harm affects only the residents of a race-based district, while the latter injury has statewide repercussions. This reasoning would be persuasive if the only harm *Hays* addressed was the stigma of racial classification. But the *Hays* court also found that racial gerrymandering creates the "special representational harm[ ]" of a district's "elected officials [being] more likely to believe that their primary obligation is to represent only the members of that [racial] group." *Hays* specifically tied racial classifications to the political injuries that emerge when members of a group lack influence within their district. And when "a plaintiff does not live in such a district, he or she does not suffer those special harms" absent specific evidence that the plaintiff personally has been the subject of an unconstitutional classification. Under this analysis, the Black Caucus plaintiffs lack standing to challenge districts in which they do not live because they cannot establish an individual constitutional injury.

Ala. Legislative Black Caucus, 2017 WL 4563868, at *5 (internal citation omitted).

The same logic applies here. The designees of all of the organization plaintiffs and multiple individual plaintiffs admitted that their concern with the 2016 Plan is not with any individual district but instead with the partisan consequences of the plan as a whole. There is no credible evidence to show that, as a result of the 2016 Plan, any

member of North Carolina's congressional delegation believes that his or her only obligation is to represent only members of his or her political party. And, for the reasons outlined below, none of the individual plaintiffs have standing to challenge the districts in which they reside. As such, plaintiffs' statewide challenge to the 2016 Plan fails.

2. In any event, plaintiffs lack standing.

The "irreducible constitutional minimum of standing" has three requirements which the plaintiff must prove: (1) that he has suffered a "concrete and particularized injury" that (2) is "fairly traceable to the challenged conduct" and (3) is likely to be redressed by a favorable decision by the Courts. *Lujan v Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). An organization has standing to sue on behalf of its members where (1) its members would otherwise have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *see also Ala. Legislative Black Caucus,* 135 S.Ct. at 1268. An organization must also show that its members will be *personally* injured by the challenged action. *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)(*emphasis added).* Here, Plaintiffs lack standing because they cannot establish the requisite causation between the 2016 Plan and any resulting harm. Nearly all of the individual plaintiffs testified that factors other than the redistricting could influence a voter to choose one

candidate over another. In addition, a single election is insufficient to establish that plaintiffs' votes were diluted as a result of the 2016 Plan**.**

a. The individual plaintiffs lack standing.

The individual plaintiffs lack standing to pursue their claims in this action because there is no evidence that they suffered a "concrete and particularized injury" arising from the 2016 Plan. First, multiple individual plaintiffs admitted they were able to elect their candidate of choice under the 2016 Plan, including the following: Annette Love, Gunther Peck, Falkner Fox, William Collins, and Larry Hall in the First District; Richard Taft and Chery Taft in the Third District; Maria Palmer and Alice Bordsen in the Fourth District; and Janie Sumpter and John Gresham in the Twelfth District. (Doc. 101-1; Love Dep. at 16:2-12); (Doc. 101-3; Peck Dep. at 67:17-68:15); (Doc. 101-4; Fox Dep. at 19:19-21:21); (Doc. 101-5; Collins Dep. at 17:10-18:15, 19:1-13); (Doc. 101-13; Palmer Dep. at 18:23-19:20); (Doc. 101-23; Sumpter Dep. at 11:19-25); (Doc. 101-2; Hall Dep. at 12:8-15); (Doc. 101-10; Richard Taft Dep. at 18:1-25); (Doc. 101-11; Cheryl Taft Dep. at 15:11-22); (Doc. 101-15; Bordsen Dep. at 12:10-18:8); (Doc. 101-25) (Gresham Dep. at 10:17-21); (Doc. 101-26; Sumpter Dep. at 11:19-25) These plaintiffs have plainly suffered no injury and do not have standing to sue in their own right. *Lujan*, 504 U.S.at 560.

Another subset of the individual plaintiffs reside in districts that, since the 2002 election cycle, have elected a member of Congress from the same political party regardless of which party in the General Assembly adopted the congressional plan. This

includes all of the individual plaintiffs who reside in the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Twelfth Congressional Districts. (JTX 1018-30); *see also* (Doc. 101-3; Peck Dep. at 25:13-19); (Doc. 101-4; Fox Dep. at 20:9-17); (Doc. 101-12; Lurie Dep. at 19:17-20); (Doc. 10-14; Freeman Dep. at 18:1-10); (Doc. 101-28; League of Women Voters Dep. at 65:7-66:20); (Doc. 101-21; Wolf Dep. at 22:22-24:2) (plaintiffs admitting that the First, Fourth, Fifth, Ninth, and Tenth Districts had historically elected a member of Congress from the same political party prior to the adoption of the 2016 Plan). These plaintiffs cannot show that the harm they allegedly suffered is "fairly traceable to the challenged conduct" *Lujan*, 504 U.S. at 560-61, because the districts in which they reside were not "competitive" for more than a decade before the 2016 Plan was adopted and under plans drawn by both Republican and Democrat controlled General Assemblies. As a result, these plaintiffs do not have standing to sue in the own right and should be dismissed.

Finally, the individual plaintiffs who reside in the remaining five congressional districts—Districts 2, 7, 8, 11, and 13—also lack standing because (1) all of these districts had an incumbent Republican member of Congress at the time the 2016 Plan was adopted and (2) since at least 2002, all of these districts historically elected a members of Congress of both parties.

In the Second District, Congresswoman Renee Ellmers, a Republican, defeated Democratic incumbent Bob Etheridge in 2010 under a map drawn by a Democratic General Assembly. (JTX 1029) After the district was re-drawn by a Republican General

Assembly in 2011, she was re-elected until 2016 when, following adoption of the 2016 Plan, she lost in a Republican primary to Congressman George Holding. Under the 2016 Plan, the Second District was significantly re-configured and included more of Congressman Holding's constituents (56.64%) than those of Congresswoman Ellmers. (DX 5001) (Doc. 109-2, p. 10) (table of 2011 common cores within 2016 districts). In any event, neither Douglas Berger nor Ersla Phelps, the plaintiffs in the Second District can credibly claim to be harmed as Democratic voters because they were represented by a Republican member of Congress both before and after the adoption of the 2016 Plan.

Similarly, the plaintiffs in the Seventh, Eighth, Eleventh, and Thirteenth Congressional Districts, cannot show that they were harmed in their capacities as a Democratic voter because each district was represented by a Republican prior to the adoption of the 2016 Plan:

- In the Seventh District, Republican David Rouzer was first elected in 2014 and won re-election in 2016 under the 2016 Plan.
- In the Eighth District, Republican Richard Hudson was first elected in 2012, re-elected in 2014, and re-elected again in 2016 under the 2016 Plan.
- In the Eleventh District, Republican Mark Meadows was elected in 2012, re-elected in 2014, and re-elected again in 2016 under the 2016 Plan.
- In the Thirteenth District, Republican Ted Budd was elected for the first time in 2016 under the 2016 Plan. It is undisputed that the Thirteenth District was located in a new area of the state under the 2016 Plan. In any event, the previous version

of the Thirteen District was represented by Republican Congressman George Holding who was first elected to that district in 2012.

(JTX 1018-30) (election results from the 2002 through 2016 election cycles)

Because the plaintiffs in these districts were represented by a Republican member of Congress both before and after the adoption of the 2016 Plan, they cannot show any harm as a result of its adoption. In addition, to the extent they existed in their current forms, since at least 2001, each of these districts have alternated between being represented by Republicans and Democrats and, given this history, a single election is insufficient to establish that plaintiffs' votes were "diluted" as a result of the 2016 Plan**.**

b. The organizational plaintiffs lack standing.

Because none of the individual plaintiffs have standing in the own right for the reasons outlined above, the organizational plaintiffs cannot rely upon the individual plaintiffs for standing in this action. In addition, for the reasons set forth below, the organization plaintiffs have failed to otherwise show that they or their members have standing to proceed as plaintiffs in these matters.

The LWV lacks standing to proceed as a plaintiff in this lawsuit because it cannot identify a concrete and particularized injury in fact caused by the 2016 Plan. To the contrary, it has failed to allege much less prove that it has expended and diverted resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015). The organization's

generalized goal of achieving proportional representation in North Carolina's congressional delegation is wholly insufficient to satisfy the particularized, concrete injury in fact standard required by the constitution and has already been rejected by the U.S. Supreme Court. As a result, the LWV should be dismissed as a plaintiff in this action.

Moreover, to the extent the LWV is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members are Republican voters who are represented by the candidate of their choice and whose interests in electing Republican candidates would potentially be harmed by the relief the Plaintiffs seek in the instant litigation. Thus, although the LWV assert in a stipulation that they have "individual members who are registered Democrats living in each of North Carolina's thirteen congressional districts" and that "those registered Democrats support and vote for Democratic candidates and have an interest in furthering policies at the national level that are consistent with the Democratic Party Platform," these statements are not sufficient to confer standing on the LWV. There is no evidence that the LWV members who are registered Democrats *always* have and *always* will vote for the Democratic candidate for Congress in their districts regardless of who the candidate is or that residing in a district that is represented by a Republican member of Congress is inconsistent with "furthering policies at the national level that are consistent with the Democratic Party Platform." Thus, conferring standing on the LWV would be improper. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services*

(TOC) Inc., 528 U.S. 167, 181 (2000); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

Common Cause lacks standing to proceed as a plaintiff in this lawsuit because it cannot identify a concrete and particularized injury in fact that is actual or imminent caused by the 2016 Plan. To the contrary, it has failed to allege—much less prove—that it has expended and diverted resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp*, 455 U.S. at 363; *Nat'l Council of La Raza*, 800 F.3d at 1032. Its stated generalized goals of creating a more open, honest and accountable government and ensuring that elections are fair and neutral is wholly insufficient to satisfy the particularized, concrete injury in fact standard required by the constitution. As a result, Common Cause must be dismissed as a plaintiff in this action.

Moreover, to the extent Common Cause is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members are Republican voters who are represented by the candidate of their choice and whose interests in electing Republican candidates would potentially be harmed by the relief the plaintiffs seek in the instant litigation. Thus, conferring standing on Common Cause would be improper. *See Friends of the Earth, Inc.*, 528 U.S. at 181; *Hunt*, 432 U.S. at 333.

The NCDP lacks standing to proceed as a plaintiff in this lawsuit because it cannot identify a concrete and particularized injury in fact that is actual or imminent caused by

the 2016 Plan. To the contrary, it has failed to allege much less prove that it has expended or diverted additional resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp*, 455 U.S. at 363; *Nat'l Council of La Raza*, 800 F.3d at 1032. As a result, the NCDP must be dismissed as a plaintiff in this action.

Moreover, to the extent the NCDP is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members have in fact voted for Republican candidates and are represented by the candidate of their choice, and whose interests in electing Republican candidates would potentially be harmed by the relief the plaintiffs seek in the instant litigation. Thus, conferring standing on the NCDP would be improper. *See Friends of the Earth, Inc.*, 528 U.S. at 181; *Hunt*, 432 U.S. at 333.

C. Plaintiffs' claims are foreclosed by *Cromartie II*.

Plaintiffs' attack on the 2016 Plan as a so-called political gerrymander ignores the unique procedural context of that Plan. The 2016 Plan was enacted solely in response to the *Harris* court order finding that CD 1 and CD 12 in the originally enacted congressional plan were racial gerrymanders. Legislative leaders made it clear during the legislative proceedings on the 2016 Plan that they wanted to ensure that the *Harris* court would approve the new plan. To do so, the legislature strictly avoided the use of race in enacting the plan and focused on numerous other redistricting criteria, including but not limited to the use of political data.

In addition to its use of redistricting criteria other than race to ensure the new plan would be approved, the legislature made the 2016 Plan contingent on the ultimate outcome of the *Harris* case, including any appeals to the Supreme Court. As a contingent plan, the congressional districts could have reverted back to the originally enacted plan at any time depending on the *Harris* legal proceedings. To ensure as minimal disruption as possible in the congressional delegation in the event of this potential flip-flopping of districts, the legislature expressly adopted criteria that would promote the consistency of the then-existing congressional delegation, both as to the individual incumbents, and the overall partisan make-up of the delegation. The consideration of the partisan make-up of the congressional delegation was just one of many other criteria, all of which were balanced against each other to produce the 2016 Plan.

The use of politics to draw a remedial redistricting plan after a finding of a racial gerrymander has been expressly approved by the Supreme Court. In *Shaw II*, the Supreme Court found that North Carolina's 1992 CD 12 constituted an illegal racial gerrymander under the Fourteenth Amendment. *See Shaw II*, 517 U.S. 899. The Court held that race was the predominant motive for the 1992 CD 12 and that the State had not shown a strong basis in evidence to support the district. *Id.* at 906. Following the decision, in 1997, the North Carolina General Assembly enacted a new version of CD12. The State's two primary goals were to cure the constitutional defect found in *Shaw II* and to preserve the existing "partisan balance" in the State's 1992 Congressional plan. In 1996, under the 1992 plan, six members of Congress were Democrats and six were

Republicans. The decision to keep a 6-6 plan in the 1997 congressional plan resulted from the Democratic Party's control of the State Senate and the Republican Party's control of the State House.

In *Cromartie v. Hunt*, 133 F.Supp.2d 407 *rev'd sub nom Cromartie II*, 532 U.S. 234, the Supreme Court reversed the district court's ruling that the 1997 CD 12 constituted a racial gerrymander. The Court found instead that politics was the predominant motive for the district. This was because North Carolina's sole justification for the 1997 CD 12 was that it was drawn to collect Democrats and ensure the election of a Democratic member of Congress from the district. The State went so far as to submit expert testimony demonstrating that the political decision to create a strong Democratic district was the primary motivation behind the district. The Supreme Court not only did not criticize this use of political motivation in response to the racial gerrymandering judgment, it expressly approved the 1997 CD 12 on that basis.

Here, to the extent that a political motivation was one of many considerations in drawing the 2016 Plan, it was as a response to a court having found a racial motivation behind the prior plan. And unlike in *Cromartie II*, in which the political motivation was the sole explanation for the district, the use of partisanship to protect incumbents of both parties in the 2016 Plan was only one of numerous criteria which were balanced in creating the new districts. If the Supreme Court has approved the legality of a district *solely* motivated by politics in response to a racial gerrymandering judgment, then it is

surely legal to enact a plan to remedy a racial gerrymander where partisanship is only a *partial* motivation for the plan.

D. None of plaintiffs' claims propose a judicially manageable standard for political gerrymandering claims.

All of plaintiffs' claims suffer from a fatal defect – they cannot reliably and consistently answer the question the Supreme Court has said must be answered for political gerrymandering claims to be justiciable: "how much [partisanship in redistricting] is too much." *Vieth*, 541 U.S. at 298-99 (plurality opinion). It is well established that partisan intent in redistricting is lawful. *Vieth*, 541 U.S. at 286 ("partisan districting is a lawful and common practice"), *Id.* at 307 (Kennedy, J., concurring) (a "determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied"); *Cromartie II*; *Gaffney*, 412 U.S. at 752. The LWV plaintiffs do not take the position that all partisan considerations are or should be illegal in redistricting. And nor should they – the Supreme Court has long held that state legislatures are legitimate entities to draw a state's political districts. It would be strange indeed to force an inherently political body to ignore politics when engaging in its most inherently political task. But when do partisan considerations become "excessive"? Plaintiffs' experts and theories do not answer this question.

1. Plaintiffs' experts Chen and Mattingly do not even attempt to answer the relevant question.

Plaintiffs' experts Chen and Mattingly generated randomly drawn redistricting maps based on certain criteria. Dr. Chen produced 3,000 maps while Dr. Mattingly produced over 24,000 maps.

Despite generating thousands of randomly drawn redistricting plans, neither Dr. Chen nor Dr. Mattingly offer a standard by which a court could determine that an enacted redistricting plan had the intent or effect of using "too much" partisanship. Dr. Mattingly repeatedly denied that he would give any such opinion. Instead, Dr. Mattingly would only say whether any given redistricting would be "likely or unlikely" based on the randomly sampled redistricting maps produced by his algorithm. Dr. Mattingly did not offer any opinion about the point at which a "likely" or "unlikely" outcome indicates the excessive use of partisanship. Dr. Chen simply draws the unremarkable and undisputed conclusion that the legislature considered politics in developing the 2016 Plan. He makes no attempt to articulate any standard for when the consideration of politics in the 2016 Plan became "too much."

Moreover, even if Drs. Chen or Mattingly had attempted to answer the correct question, neither of them performed an analysis using the legislature's criteria from the 2016 Plan. As described above in the Findings of Fact, Dr. Mattingly used criteria from a house bill that never became law and was not used by the legislature in constructing the 2016 Plan. Dr. Chen willfully misread the 2016 Plan criteria to construct districts based on criteria he wanted to follow. And though both Dr. Mattingly and Dr. Chen performed

their analyses after the adoption of the 2016 Plan, both ignored criteria clearly observable from the 2016 Plan itself.

2. Plaintiffs' tests require at least one election before a legislature knows whether the plan is an unlawful partisan gerrymander. This alone renders them unworkable and likely unconstitutional.

The mathematical analyses proposed by all of plaintiffs' experts have one thing in common: they cannot identify a partisan gerrymander at the time the alleged gerrymander is drawn.[13] Each method requires at least one set of election results under the alleged gerrymandered plan before any partisanship analysis can even be performed. Thus, when a legislature draws a new redistricting plan, it would not know whether it violated any standard plaintiffs are proposing until after the first election conducted under the new plan. Had plaintiffs' standards been the law in 2016, when the General Assembly drew the 2016 Plan, it would not have known whether its plan violated those standards. Defendants are aware of no legal standard, much less one that applies in redistricting, in which it is impossible to know the conduct to be avoided until after the conduct occurs. This flaw in plaintiffs' theories renders them unworkable for many reasons.

First, imposing a redistricting standard on a State in which the standard cannot be known in advance of the State drawing a new plan offends all notions of due process and fairness. The touchstone of due process is notice in advance of prohibited conduct so that conduct can be avoided. This is particularly true when it involves a federally-mandated

[13] While Dr. Jackman contended at trial that EG scores could be calculated prior to a map being enacted, he admitted that he had never done so. (Trial Tr. Vol. II, 84-5, 131, Oct. 17, 2017)

restriction on redistricting, a function undisputedly primarily reserved to the states. In our system of federalism, it would be untenable for federal courts to impose a standard on a State that it cannot comply with in advance unless it happens to guess right.

Second, plaintiffs' theories virtually guarantee that every redistricting plan enacted by the State will be subjected to litigation after the first election is held. The only way a State could avoid litigation would be to correctly guess the redistricting plan that would not trigger scrutiny or, as explained below, mandate a policy of proportionate representation in its redistricting plans. But the Supreme Court has held that redistricting is primarily the prerogative of the states. *Bandemer*, 478 U.S. at 143. Plaintiffs' theories would place states essentially under federal court supervision after the first election cycle under each plan. *Cf. Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (courts engaging in "the correction of all election district lines drawn for partisan reasons" would "commit federal and state courts to unprecedented intervention in the American political process"). If the Supreme Court's cases acknowledging state supremacy in redistricting are to have any meaning at all, plaintiffs' theories must be rejected.

Next, the only way to avoid guaranteed litigation over redistricting plans would be for states to adopt a policy of mandatory proportionate representation in redistricting. In *Gaffney*, Connecticut created a redistricting plan for the express purpose of achieving roughly proportionate representation between Republicans and Democrats in its legislature based on statewide vote totals. 412 U.S. at 752. The Supreme Court held that

such a "political fairness plan" could be adopted as a matter of state policy without running afoul of the Constitution. 412 U.S. at 752-53. Without knowing in advance how to comply with plaintiffs' standard of liability, states would be forced to draw "roughly proportional" redistricting plans as it is undisputed that redistricting plans which provide proportionate representation will satisfy the efficiency gap and partisan bias tests plaintiffs propose. (Trial Tr. Vol. II, 117, Oct. 17, 2017) This would transform "political fairness plans" from a policy *choice*, as in *Gaffney*, to an effective policy *mandate*, and would violate the Supreme Court's admonition that states cannot be forced to enact proportionate representation redistricting plans. *Bandemer*, 478 U.S. at 132 (plurality). And, ironically, in order to draw roughly proportionate redistricting plans, states would be required to engage in gerrymandering to draw noncompetitive districts, as North Carolina did in 1997 when it drew a congressional plan designed to elect six Democrats and six Republicans.

3. Plaintiffs' theories fail to identify the "politically identifiable group" they purport to protect from alleged partisan gerrymandering.

To the extent that partisan gerrymandering claims may be recognized at all, it is not disputed that those challenging the alleged gerrymander must identify the "political group" whose votes are allegedly being minimized or diluted by virtue of a redistricting plan. *Gaffney*, 412 U.S. at 754; *Bandemer*, 478 U.S. at 124. To the extent that the Constitution protects discrimination against a citizen based on the weight of his vote, outside of the equal population context, it would have to be grounded in the "political

preferences" expressed by that citizen. *Cf. Whitford*, 284 F.Supp.3d at 883. In the context of racial minorities, the Constitution and federal law only protect identifiable groups that are politically cohesive. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). In racial gerrymandering and vote dilution cases, the minority group is easy to identify as race is an immutable characteristic. In this case, however, plaintiffs have not identified any political group, particularly one that is politically cohesive in its "political preferences."

None of the political groups that the court might consider for such protection would qualify here. For example, is the protected political group registered Democrats? If so, it is undisputed that all but one of the congressional districts in the 2016 Plan have more registered Democrats than registered Republicans. Registered Democrats, if cohesive, are therefore more able to elect the candidate of their choice in those districts than Republicans. The fact that Republican candidates won ten out of thirteen elections under the 2016 Plan demonstrates that the majority registered Democrats were not cohesive and were not voting as a bloc for the Democratic candidate.

Is the protected politically identifiable group voters who vote for Democratic candidates? Again, plaintiffs have not identified a discrete group of citizens who only vote for the Democratic candidate in every congressional election. The testimony of the plaintiffs themselves demonstrates that finding such a group in North Carolina would be impossible. Nearly all of the plaintiffs admitted that they either have voted for Republican candidates, or would do so if the right Republican candidate was running in

the election. Plaintiffs have offered no evidence, statistical or otherwise, establishing that Democratic voters, or any particular group of Democratic voters, are being thwarted from electing the candidate of their choice in any given election. This is not surprising because it is well established in the political science literature that candidates matter more than political party for voter preference. Even plaintiffs' own expert, Dr. Mattingly, conceded that it is erroneous to assume that voters vote only for the political party, not the candidate, when voting in congressional elections.

Indeed, there is only one context where the Supreme Court has been willing to equate a group's failure "to elect candidates of [its] choice" with its "opportunity to participate in the political process," and that is under Section 2 of the Voting Rights Act. That cause of action differs from the one proposed by plaintiffs here in that (1) it is based on a statute, not in the federal constitution, and (2) depends yet again on the existence of a group with an immutable characteristic: race or color. *Thornburg*, 478 U.S. at 48–80.

It is telling that plaintiffs' purported vote-dilution claim would fail even the *Gingles* standard. *Gingles* requires a showing that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id*. at 48–49. Plaintiffs would be unable to claim that Democratic candidates are *usually* defeated at the polls when they control nearly 40% of the legislature. Such a claim would also fail for lack of a "politically cohesive unit." *Id.* at 56. The group claimed to have been disproportionally burdened is apparently comprised of anyone who has cast a vote for Democratic candidates in recent memory, but membership

in and support for the Democratic Party (and the Republican Party) is fluid. For the same reason, plaintiffs would be unable to show polarized voting. *Id.* at 52. In their own telling, North Carolina is a "purple state" whose voters backed the Democratic candidate for President in 2008 and the Republican candidate in 2012 and 2016. Clearly, Democratic and Republican voters cross party lines regularly in given elections, and there is no doubt a healthy contingency of independent voters who will back the candidates of either party depending on those candidates' on *their individual respective merits*. Additionally, plaintiffs' "wasted vote" theory does not turn on whether such a community is "geographically compact," *Id.* at 50, and would allow—indeed, it may often *require*—states to draw bizarre districts.

Thus, plaintiffs' claims would fail even the most *generous* vote-dilution standard ever applied in a federal court, and the only legal standard in existence where failure to elect a preferred candidate has been equated with a burden on participation, independent of an inherently suspect classification. That supporters of the Democratic Party are asking this court to afford the Democratic Party a more lenient vote-dilution standard than exists for racial minorities demonstrates just how far afield plaintiffs' case is from workable standards.

Finally, because voters' preferences often change over time, mapdrawers who use political data do so at their own political peril. But plaintiffs' efficiency gap and partisan bias theories assume that the political party a voter votes for in the first election after a redistricting plan is enacted will not change over the life of a plan. These theories

therefore use political "scoring" as a judicial standard, even as the plaintiffs criticize the State for using political data in drawing the 2016 Plan. If the court were to impose these standards on the State for redistricting, it would amount to mandating judicial sorting of voters based upon how those voters voted in the first election after a plan was adopted. This would be akin to what the Supreme Court has criticized as "judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportionment cycles and likely beyond." *Strickland*, 556 U.S. at 22-23. The Court should decline to mandate a redistricting standard, as a matter of law, that is grounded in a judicial prediction, or misprediction, about the shifting political judgments of individual citizens.

4. Plaintiffs' partisan bias and efficiency gap measures are unworkable and unreliable and amount to a disguised proportional representation mandate.

All of the problems that make proportional representation an inappropriate test for illegal partisan gerrymandering of single member districts apply with equal force to partisan bias and efficacy gap.

Under the partisan bias theory, each party must be able to elect the same number of candidates if they receive the same percentage of statewide votes based upon hypothetical election results. The efficiency gap test requires that each party have the same range of "wasted votes" based upon a range arbitrarily selected by plaintiffs' expert during the first election in a ten year election cycle for a newly enacted plan. While these theories do not explicitly require that each party elect a number of seats that is directly

proportional to their percentage of votes in a given election, both theories demand rough proportionality of statewide vote totals as compared to the number of districts won by each party. Partisan bias demands that the proportion of seats won by each party be the same when either party wins a certain percentage of votes. Efficiency gap requires that each party have the same proportions of wasted votes within a certain range. Different experts on efficiency gap differ on how this range should be calculated. Moreover, there is not even any uniform theory for how the efficiency gap applies to states with different numbers of districts. Plaintiffs' expert in this case concedes that there currently is no acceptable range to apply the efficiency gap to states with six congressional seats or less, and that the accepted range of wasted votes for states with seven to 15 seats is different from states with over 15 seats.

Further, neither partisan bias nor efficiency gap take into account issues such as the geographic concentration of Democratic voters as compared to Republican voters, the impact of traditional districting principles in drawing single member districts, the quality of competing candidates, the amount of money raise by competing candidates, national wave elections that favor one party over the other such as the 2008 presidential election or the 2010 off-year election, the possibility that voters may change their vote in different elections because candidates in the same party may have different ideologies, the areas of residence for split ticket voters, or the impact of ability-to-elect districts on the proportional statewide measures used to establish partisan bias or violations of the efficiency gap.

These measures are also arbitrary and extremely inconsistent. Plaintiffs' expert Dr. Jackman admits that in predicting when a party will elect more seats than "expected" over the life of the plan, the efficiency gap as calculated by him can has an error rate of 33% for states with seven to 15 congressional seats. And, by his own admission, that error rate goes "both ways." (Trial Tr. Vol. II, 100-01, Oct. 17, 2017) That is, the efficiency gap "flags" maps as gerrymanders that are not gerrymanders, and it also fails to flag maps as gerrymanders that are in fact gerrymanders. Surely such a flawed standard is not reliable enough to be enshrined in the federal Constitution.

Specific examples of this error rate abound. (DX 5101, at 29-62) For example, under the efficiency gap, the 1992 plan could not be a political gerrymander. This finding contrasts with the findings by the district court in *Shaw v. Hunt*, that the 1992 plan divided 44 counties and a larger number of VTDs, placed several counties in three districts, and employed point contiguity to gerrymander at least three districts to protect four white Democratic incumbents. Under plaintiffs' efficiency gap theory, plaintiffs cannot challenge specific districts as political gerrymanders. (Trial Tr. Vol. II, 113, Oct. 17, 2017) Instead, whether voters in a particular district are the victim of overt political gerrymandering is irrelevant, so long as the statewide proportions required under the test falls within the range deemed acceptable by plaintiffs' experts.

Next, under both efficiency gap and partisan bias, a legislature could escape violating either standard by enacting an equal number (or close to an equal number such as seven to six) of completely noncompetitive districts that would ensure the election of

the candidate for the party that is dominant in each district. In other words, both theories encourage legislators to gerrymander districts so that none of them are competitive. This is demonstrated by North Carolina's 1997 and 1998 plans, both of which were enacted to elect six Democratic candidates and six Republican candidates.[14] Neither of these plans violates the efficiency gap without regard to how many counties or VTDs are divided in order to make 12 noncompetitive districts.

Finally, the efficiency gap is arbitrary because it does not take into account wave elections. This is demonstrated by North Carolina's 2001 congressional plan. This plan contained two ability-to-elect districts (CD 1 and CD 12) which elected two African American Congressman from 2002 through 2010. The plan was enacted by a General Assembly under the complete control of the Democratic Party which decided to change the six-six 1997 plan into an eight-five plan that favored Democratic candidates. This plan included the infamous CD 13 drawn by the chair of the senate redistricting committee. The 2001 CD 13 is an obvious political gerrymander and it resulted in the Senate Chair's election to Congress from 2002 through 2010. But under the efficiency gap theory, the 2001 plan was not a political gerrymander because it did not fall outside Dr. Jackman's acceptable range for wasted votes in the 2002 election.

[14] The 1997, 1998, and 2001 congressional plans all included the infamous CD 12, upheld by the Supreme Court in *Cromartie II* because it was established as an intentional political gerrymander. The fact that the serpentine CD 12 divided six counties to create an intentional political gerrymander is irrelevant under the partisan bias and efficiency gap theories.

But then, in 2010, during a wave election that favored Republicans, the statewide election results show that the 2001 plan violated plaintiffs' trigger for scrutiny under the efficiency gap. Had the 2010 election taken place in 2002, the plan would have been constitutionally suspect. But, because the Republican wave election did not take place until 2010, the intentionally gerrymandered plan designed to elect eight Democrats would have escaped all scrutiny.

These facts all demonstrate that partisan bias and efficiency gap do nothing more than measure proportions of statewide vote totals in any single election. Neither test is particularly good or consistent at identifying whether a plan or, more importantly, an individual district, has been politically gerrymandered. Nor does either concept provide judicially manageable standards that could be used by a legislature when it draws a plan to be used in the future or by a court when it reviews a plan prior to a first election.[15]

5. Plaintiffs' First Amendment theory is unworkable and suffers the same defects as plaintiffs' other theories.

Plaintiffs offer a theory that would strike down a redistricting plan under the First Amendment where "political data" was used to "penalize" voters who voted for Democratic candidates. This theory suffers numerous defects.

[15] Moreover, Dr. Jackman's use of swing analysis, and his incorrect assumption that vote swings are almost always demographically uniform, would cause a conflict between the efficiency gap and the VRA. As demonstrated by Dr. Hood, the efficiency gap can mis-label a plan as not gerrymandered where a political party has the consistent support of one demographic segment. The political party which enjoys that support can "crack" these voters into various districts and replace them with consistent supporters of another party. The efficiency gap does not effectively capture such a gerrymandering strategy. (DX 5058, at 16-20)

First, as described above, this theory, if applied as plaintiffs allege, would not permit the use of "political data" at all in redistricting. The theory relies on an employment-discrimination like model of liability in which consideration of a person's political views is prohibited when making employment decisions about that person. *See Elrod*, 427 U.S. 347. However, as explained above, this model is completely inconsistent with the long line of Supreme Court cases expressly allowing legislatures to take partisanship into consideration when redistricting. *Gaffney*; *Cromartie II*; *Vieth*. Accordingly, it is not appropriate.

Second, if plaintiffs' theory would in fact allow the use of "political data," but just not "too much", then the theory suffers from all of the same problems as plaintiffs' other theories. As Justice Kennedy argued in speculating about such a standard in *Vieth*, the "inquiry is not whether political classifications were used [but instead] whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315. However, this standard would still pose the question that has vexed the Supreme Court: how much use of political classifications constitutes a "burden" and where does the court draw the line between a permissible and impermissible burden? As demonstrated above, plaintiffs have failed to describe a workable and constitutional line in the context of their other claims, and that failure dooms their First Amendment claim as well.

Moreover, First Amendment standards condemn classification on grounds of expression or association only to "the extent [they] compel[] or restrain[] belief and

association…." *Elrod*, 427 U.S. at 357; *see also Vieth*, 541 U.S. at 314–15 (Kennedy, J.) ("The [First Amendment] inquiry…is whether political classifications were used to burden a group's representational rights."). That is, the First Amendment condemns "restraints" on expressive and associational rights, *see, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and more subversive forms of retaliation that "would deter a person of ordinary firmness from exercising his First Amendment rights," *see, e.g.*, *Bridges v. Gilbert*, 557 F.3d 541, 552 (7th Cir. 2009). For political parties, this involves a threshold showing of a burden on associational rights, such as compelled association, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 573 (2000), or non-association, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–17 (1986).

Nothing like that is present here. There is no serious contention that North Carolina has placed any restraint on the speech of the Democratic Party or its members or supporters. No speech or association is even "arguably prohibited." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979).

Nor would a person of "ordinary firmness" be deterred from engaging in political speech or association out of fear that the North Carolina General Assembly would retaliate by means of a political gerrymander. "Political gerrymanders are not new to the American scene," *Vieth*, 541 U.S. at 274 (plurality op.), so if they had a deterrent effect on speech or association, someone would have noticed that by now. Political gerrymandering is not similar to a "prolonged and organized campaign of harassment" by law enforcement officers, *see, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir.

2005), police "intimidation tactics," *see, e.g.*, *Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002), criminal prosecution, *see Bruner v. Baker*, 506 F.3d 1021, 1030 (10th Cir. 2007), or adverse employment action, *see, e.g.*, *Hill v. City of Pine Bluff, Ark.*, 696 F.3d 709, 715 (8th Cir. 2012). The targets of these deprivations know when they occur and have good reason to fear them. The effect, if any, of political gerrymandering is *de minimis* since it does not deter the speech alleged and therefore does not arise to the level of a First Amendment deprivation. *See Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006) (finding no deprivation of First Amendment rights where university professor was denied "emeritus" status because the "benefits of such status…carry little or no value and their deprivation therefore may be classified as de minimis"); *Mezibov v. Allen*, 411 F.3d 712, 721–23 (6th Cir. 2005) (finding no First Amendment deprivation where allegedly defamatory statements by prosecutor would not deter a "defense attorney of ordinary firmness" from continuing to defend his client).

Likewise, this case involves no burden on associational rights in the form of regulation on "parties' internal processes." *Jones*, 530 U.S. at 573. The North Carolina redistricting plan has no effect on "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574. There is neither forced association of any party with individuals or candidates with whom the party would prefer not to associate, *Id.* at 577, nor prevented association of any party with individuals or candidates with whom the party wishes to associate, *Tashjian*, 479 U.S. at 214.

The Supreme Court has regularly denied relief where no such burden on association is present, including where a primary ballot contained no party information, did not "choose parties' nominees," and therefore did not affect the process by which "parties may…nominate candidates." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 (2008). There being no impact on the internal affairs of private organizations, no First Amendment burden was imposed. Similarly, the Supreme Court denied relief in a challenge to a closed-caucus system where plaintiffs were not political parties, but potential candidates asserting the right to be endorsed by political parties; the Court observed "[n]one of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination." *N.Y. State Bd. of Elections v. Lopez Toress*, 552 U.S. 196, 205–06 (2008). Indeed, "[w]hat constitutes a 'fair shot'" is "hardly a manageable constitutional question for judges," especially where "traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a 'fair shot' at party nomination." *Id.* at 206.

So too here, plaintiffs are claiming a right that does not exist, under standards that are not remotely manageable, for an alleged harm that does not in any way impact the internal affairs of any political party. They are not claiming the right to associate with like-minded individuals for the purpose of espousing shared views, but the right to control the government by electing their preferred candidates. That right finds no basis in familiar First Amendment standards, much less manageable ones.

E. In any event, the 2016 Plan is not a "political gerrymander."

Plaintiffs' arguments regarding the General Assembly's consideration of partisan advantage as one redistricting criterion in enacting the 2016 Plan are meritless.

First, the 2016 Plan is not a "gerrymander" at all. "Gerrymandering" is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.'" *Bandemer*, 478 U.S. at 164 (Powell and Stevens, J. J., concurring in part and dissenting in part) (citing *Kilpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortus, J. concurring)); *Vieth*, 541 U.S. at 321 (Stevens, J. dissenting); *see also Shapiro*, 203 F.Supp.3d at 592 (political gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one party an unfair advantage by diluting the opposition's voting strength") (citing *Black's Law Dictionary*, 802, 1346 (10th ed. 2014)). Consistent with this traditional understanding of the term "gerrymander," the Supreme Court cases involving alleged illegal gerrymanders have been based upon allegations of "bizarre," "grotesque," or meandering districts that fail to follow traditional districting principles.

For example, in *Bandemer*, plaintiffs alleged that the legislative districts adopted by the State of Indiana were of "irregular shape" and failed to "adhere consistently to political subdivision boundaries to define communities of interest" 478 U.S. at 116. Similar allegations were made by plaintiffs in the Supreme Court's other decisions on political gerrymanders. *Badham*, 694 F.Supp. at 670; *Pope*, 809 F.Supp. at 394-95;

Vieth, 541 U.S. at 272-72; *LULAC*, 548 U.S. at 424 (plurality opinion), 455, 458 (Stevens, Breyer, J. J.) (concurring in part and dissenting in part).

Similarly, all cases involving alleged racial gerrymanders have been based upon claims that the challenged districts were irregular or bizarre in appearance or failed to follow traditional districting principles. *See e.g. Shaw v. Reno*, 509 U.S. 630, 635-36 (1993) ("*Shaw I*"); *Miller*, 515 U.S. at 908-909; *Ala. Legislative Black Caucus*, 135 S.Ct. at 1267, 1271-72; *Cooper*, 137 S.Ct. at 1469, 1474-75.

It is beyond dispute, however, that the 2016 Plan follows traditional redistricting criteria better than any congressional map in North Carolina for at least the past 25 years. The 2016 Plan contains 87 (out of 100) whole counties and splits only 12 (out of well over 2000) precincts across the entire State. (Tr. Joint Comm., Feb. 17, 2016, at 41-42; DX 5096) No county is split into more than two congressional districts. The extent to which the 2016 Plan follows traditional redistricting criteria is all the more striking when compared to the 1992 congressional plan. The 1992 plan was when the North Carolina General Assembly, then controlled by Democrats, unveiled the "serpentine" version of CD 12 that has been roundly criticized. The 1992 plan divided 44 counties, seven of which were split into three congressional districts, and split at least 77 VTDs. (*Id*.)

The 1992 congressional plan was drawn by John Merritt, an aide to white Democratic Congressman Charlie Rose, and endorsed by the National Committee for an Effective Congress. *Shaw II*, 861 F.Supp. at 466 *rev'd*, 517 U.S. 399. However, the plan was introduced into a public hearing by the Executive Director of the NC NAACP, not

Mr. Merritt. *Id.* The odd shapes and locations of districts were the result of the legislature's intent to protect at least four incumbent white Democratic Congressmen. *Id.* at 465, 467-68. The Democratic legislature also accomplished its goal by packing Republican voters into a small number of districts, thereby decreasing the influence of Republican voters in other districts. *Pope*, 809 F. Supp. at 394. The General Assembly departed from traditional redistricting principles to achieve these goals and instead created the most non-compact congressional districts in the history of North Carolina. *Shaw II*, 861 F.Supp. at 469.

The plan also employed the novel concept of "point contiguity." Both CD 1 and CD 3 were contiguous by a "point" or an area of the map with no geographic space and consisting solely of a mathematical point. This allowed CD 1 to cut through CD 3 (represented by white incumbent Democrat Martin Lancaster) "without destroying the technical contiguity of either district." *Id.* at 468. Similarly, a review of the 1992 map shows that the 1992 version of CD 12 completely dissects the 1992 version of CD 6 running through Forsyth, Guilford, and Alamance Counties. To achieve "contiguity" for CD 6, the General Assembly used "several 'point contiguities' and 'double crossovers' that exist in the district's design." *Id.* at 469. These facts, and a review of the map itself, show the extreme steps taken to draw a congressional plan that strongly favored Democratic congressman.

Significantly, this plan survived a political gerrymandering challenge in one of the seminal cases on this issue in this circuit – *Pope, supra,* and was summarily affirmed by

the Supreme Court. *See Pope*, 506 U.S. 801. In *Pope*, the three-judge court recognized that even under *Bandemer*, a redistricting plan is not unconstitutional merely because it "makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Pope*, 809 F. Supp. at 396 (quoting *Bandemer*, 478 U.S. at 131).[16] While the Supreme Court has never agreed or decided on what evidence, if any, could possibly establish such a claim, it is clear that at a minimum it would take the results of more than one election under the challenged redistricting plan. *Id*. Moreover, "the power to influence the political process is not limited to winning elections." *Id*. at 397 (quoting *Bandemer*, 478 U.S. at 132). Individuals who vote for a losing candidate are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id*. Thus, there is simply no basis for a political gerrymandering claim here.

Moreover, the criteria adopted by defendants to comply with the *Harris* court's order have been mischaracterized. The criterion called "partisan advantage" was only one of seven criteria. The language of the criterion stated that the "committee shall make *reasonable effort* to construct districts in the 2016 contingent plan to maintain the current partisan makeup of North Carolina's Congressional delegation." Despite plaintiffs' hyperbole, defendants did not set out to maximize the number of Republicans elected under the congressional plan or create the strongest possible Republican districts but

[16] While this court has found that *Bandemer* has essentially been reversed (D.E. 50 in Case No. 16-1026), the *Whitford* court relied on *Bandemer* to find that the Wisconsin legislative districts were gerrymandered on a partisan basis.

instead to make reasonable efforts to maintain the existing partisan balance in North Carolina's congressional delegation. Moreover, this criterion was balanced against the other criteria such as compactness, contiguity, and equal population. A cursory review of the 2016 Plan shows that the legislature followed all of the criteria, including this one. Plaintiffs instead seize upon the one criterion and magnify it to the exclusion of all the others.

Second, plaintiffs ignore the actual statistical facts regarding the political implications of the districts in the 2016 Plan. For example, the number of registered Democrats exceeds the number of registered Republicans in all but one of the districts in the 2016 Plan. Moreover, based on election data the districts in the 2016 Plan are weaker for Republican candidates than under the 2011 plan. Using 2008 election data, most of the districts in the 2016 Plan result in the share of votes for Republican candidates decreasing as compared to prior plans.

Finally, the statistical facts conclusively demonstrate that the legislature did not target Democrats in the 2016 Plan. It is statistically impossible for Republican candidates to win ten of the districts in the 2016 Plan with votes only from registered Republicans. The fact that Republican candidates won ten of the districts in 2016 simply proves that thousands of Democrats and unaffiliated voters voted for Republicans. Why do droves of voters registered as Democrats vote for Republican congressional candidates? The answer to that question involves a "sea of imponderables" that the Equal Protection clause does not address and that judges are ill-equipped to decide. *Vieth*, 541 U.S. at

290.[17] Accordingly, plaintiffs' partisan gerrymandering claims regarding the 2016 Plan are without merit.

F. Plaintiffs' other constitutional claims are without merit.

The Common Cause plaintiffs also raise claims under Article I, § 2 of the United States Constitution and Article I, § 4 of the United States Constitution. These claims are baseless.

Plaintiffs' Article I, § 2 claim is foreclosed at a minimum by *Pope*, 809 F. Supp. at 397-98. That court had the following to say about the *Pope* plaintiffs' identical claim:

> The plaintiffs' second contention is that the Plan violates Article I, Section 2 of the Constitution, which states that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Under prior Supreme Court cases, the plaintiffs' claim is without basis, because:
>
> > [T]he Court has made it clear that Article I, Section 2 only proscribes districts of unequal population. Claims regarding the political makeup of those districts must be judged by the more rigorous standards of the Fourteenth Amendment, as outlined in *Davis v. Bandemer*.
>
> *Badham*, 694 F.Supp. at 674–75. There is no Article I, Section 2 violation here. The Plan creates seven districts with an equal population (552,386) and five districts that vary by only one person (552,387). Greater population equality among the districts is impossible.
>
> In their complaint, the plaintiffs argue that the General Assembly could

[17] Nor does the Constitution "answer the question whether it is better for Democratic voters to have their State's congressional delegation include ten wishy-washy Democrats (because Democratic voters are "effectively" distributed so as to constitute bare majorities in many districts), or five hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former "dilutes" the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute." *Vieth*, 541 U.S. at 288 n.9.

> program a computer to create several redistricting plans that had equipopulous districts, complied with the Voting Rights Act, and in addition formed compact, contiguous districts. While this may be true, the Constitution does not require it. The Supreme Court has often recognized that redistricting is an inherently political process. *See, e.g., Bandemer*, 478 U.S. at 128, 106 S.Ct. at 2808 ("[p]olitics and political considerations are inseparable from districting and apportionment") (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 2331, 37 L.Ed.2d 298 (1973)). While requiring the General Assembly to adopt non-partisan, computer-generated districts might be a good idea, it clearly goes beyond what the Constitution mandates.

Pope, 809 F. Supp. at 397-98. Similarly, it is undisputed that the districts in the 2016 Plan contain equal population. Nothing further is required by Article I, § 2, which requires the dismissal of this claim.

Plaintiffs' Article I, § 4 claim fares no better. It appears to be predicated on an assumption states' authority to create electoral maps under the Elections Clause must be performed neutrally or in a non-partisan manner. (Doc. 12 at ¶¶ 50-54) The very same claim was raised in *Vieth*, albeit "fleetingly," and summarily rejected by a plurality of the Justices. *See Vieth*, 541 U.S. at 306 (expressly rejecting the plaintiffs' attempt to invoke the Elections Clause as a basis to prohibit partisan gerrymandering). Plaintiffs' claim must be rejected, too, because it: (a) is inconsistent with the plain language and structure of the Elections Clause, and (b) ignores the Clause's purpose and history.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

U.S. Const. art. I, § 4. Thus, on its face, the Elections clause says nothing about "neutrality" in the drawing of district lines. To the contrary, the Elections Clause quite clearly delegates broad authority to state legislatures (where the Founding Fathers were aware that members would be members of various political parties) with the only limitation being Congress's ability to create a statute limiting that authority.

As Justice Scalia explained in his plurality opinion in *Vieth*, "[p]olitical gerrymanders are not new to the American scene." *Vieth*, 541 U.S. at 274. The plurality in *Vieth* traced gerrymandering all the way back to 1732, when the Governor of North Carolina, "divide[d] old Precincts established by Law…to get a Majority of his creatures in the Lower House or to disrupt the assembly's proceedings." *Id*. (citing 3 Colonial Records of North Carolina 380–381 (W. Saunders ed. 1886)). The Framers knew that by delegating authority to oversee elections to state legislatures, the redistricting process would be inherently political, and they recognized the need to limit that authority. *Id*. However, the Framers never intended that state legislatures would perform their duties under the Elections Clause in a "neutral" manner. *Id*. Rather, the Framers included a check on the state legislatures by specifically allowing Congress to prescribe laws to limit a state legislature's authority. *Id.* ("It is significant that the Framers provided a remedy for such practices in the [Elections Clause], while leaving in state legislatures the initial

power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").[18]

Acting under the broad authority of the Elections Clause, state legislatures have *always* engaged in political gerrymandering. As the plurality opinion in *Vieth* explained:

> The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress… And in 1812, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble. *By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength.*

Id. at 274-75 (internal citations omitted; emphasis added). Since the founding of this Nation, therefore, partisan gerrymandering under the Elections Clause has been expected, accepted, and legally permissible. *See, e.g.*, *Gaffney*, 412 U.S. at 753; *Vieth*, 541 U.S. at 285 (plurality op.); *see Id*. at 358, 360 (Breyer, J., dissenting) (noting that the "legislature's use of political boundary drawing considerations ordinarily does *not* violate the Constitution's Equal Protection Clause," and acknowledging that "political

[18] In fact, not only does Congress have the power to enact legislation to limit state legislatures' power under the Elections Clause, it has done so previously. *See, e.g.*, 2 U.S.C. § 2c (mandating all Members of the House of Representatives be elected from single-member districts); *see also id*. § 7 (mandating that the first Tuesday after the first Monday in November as Election Day for congressional elections).

considerations will likely play an important, and proper, role in the drawing of district boundaries.").

Nonetheless, plaintiffs argue that the Elections Clause requires state legislatures to act in a non-partisan matter. Plaintiffs' position appears to be based solely on a misreading of *Cook v. Gralike*, 531 U.S. 510, 527 (2010). (*See* Doc. 12 at ¶ 52) The narrow issue in *Gralike* was whether the State of Missouri could legally require congressional candidates to either support term limits or appear on the ballot with an asterisk indicating that the candidate opposes term limits. 531 U.S. at 527. In arguing that the statute should be struck, Justice Kennedy stated:

> Whether a State's concern is with the proposed enactment of a constitutional amendment or an ordinary federal statute it simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections pursuant to Article I, §4.

See id.

In context, Justice Kennedy's statement cannot possibly be read to question decades of accepted Elections Clause practice. Rather, Justice Kennedy was simply acknowledging that Missouri did not have the power to coerce its congressional delegation into supporting term limits. *See id*. at 528 ("Freedom is therefore 'most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office.'"). Indeed, Justice Kennedy has regularly recognized that partisan gerrymanders have existed since the founding, remain permissible, are inevitable, and in the face of a racial gerrymandering claim, can serve as

a viable defense. *See, e.g.*, *Cooper*, 137 S.Ct. at 1488 (Alito, J., dissenting joined by Roberts, C.J., and Kennedy, J.) (citing *Gaffney*, 412 U.S. at 753; *Bandemer*, 478 U.S. at 129; *Vieth*, 541 U.S. at 274-76; *Cromartie I*, 526 U.S. at 551).

In short, the plain language, legislative history of redistricting in this Country, and a long line of judicial precedents make abundantly clear that the Elections Clause cannot be invoked to prevent partisan gerrymandering. *See Vieth*, 541 U.S. at 306 (expressly rejecting plaintiffs' "fleeting" attempt to invoke the Elections Clause as a basis to prohibit political gerrymandering). To the extent that clause has any application whatsoever in this context, it would at most be duplicative of whatever standards may exist for these claims under the First or Fourteenth Amendments and should be dismissed.

Respectfully submitted, this the 6th day of November, 2017.

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** have been electronically filed with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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