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 PANEL

FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED BY THE *COMMON CAUSE* PLAINTIFFS

1573892.1

TABLE OF CONTENTS

FINDINGS OF FACT

I. The 2016 Plan—by its Explicit Design—Reinforces the Partisan Advantage Built into North Carolina's 2011 Congressional Redistricting Plan 2

a. The Relevance of the Defense in *Harris* 3

b. The Effectiveness of the 2011 Plan as a Partisan Gerrymander 6

c. The Mechanics of Dr. Hofeller's Approach as Applied in 2011 7

II. The 2011 Plan Reflected a Broader National Strategy to Determine Congressional Election Outcomes Through Partisan Control of Redistricting 9

III. The 2016 Plan Used Political Data—the Voting History of North Carolina Citizens—to Maintain the Partisan Advantage Wrongfully Procured Under the 2011 Plan 12

A. Senator Rucho and Representative Lewis's Instructions to Dr. Hofeller Regarding the 2016 Plan 12

B. The Legislative Process of Enacting the 2016 Plan 15

C. The Adopted Criteria 17

D. Representative Lewis's Statements 18

E. The Party-Line Approval of the 2016 Plan 19

IV. Results of the 2016 Congressional Elections Confirm the Scheme 20

V. Plaintiffs' Expert Analyses Demonstrate (a) Defendants' Partisan Intent in Enacting the 2016 Map, (b) the Extreme Effect of that Map, and (c) the Absence of Any Legitimate Justification for the Map 21

VI. The Compactness of the 2016 Plan Relative to Prior North Carolina Congressional Plans Cannot Justify the 2016 Plan 26

VII. The Consideration of Compliance with the Voting Rights Acts Cannot Justify the 2016 Plan 29

A. Defendants' Sworn Disavowal of Voting Rights Act Consideration 29

B. The Voting Rights Act Cannot Explain the Partisan Results 30

VIII. Defendants' Attempt to Defend their Partisan Gerrymander by Comparing it to the 2001 Congressional Map Falls Flat 30

IX. The *Common Cause* Plaintiffs Are Injured by Defendants' Unlawful Partisan Gerrymander 32

A. The Harm of Partisan Dominance 35

B. The Harm of Non-Competitive Districts 37

CONCLUSIONS OF LAW

I. Introduction 39

II. The Plaintiffs 41

III. Partisan Gerrymanders Are Undemocratic 41

IV. Partisan Gerrymanders Are Justiciable 42

V. The Constitution Provides Judicially Manageable Standards that are Claim Specific 43

VI. The Plaintiffs Have Standing 44

VII. Plaintiffs' Claims are not Foreclosed by the Results in *Davis v. Bandemer* or *Vieth v. Jubelirer*, or by the Dicta in the Racial Gerrymander Cases 46

VIII. Plaintiffs Provide a Manageable Standard—And Present the Necessary Evidence—To Sustain a Claim of Unconstitutional Partisan Gerrymandering 49

IX. The 2016 Plan Violates the First Amendment 54

A. The Applicability of the First Amendment to Partisan Gerrymandering Claims Remains an Open Question 55

B. The First Amendment Protects the Right to Vote for the Candidate and Political Party of One's Choice 56

C. Partisan Gerrymanders are Subject to Strict Scrutiny Under the First Amendment because they are Content-Based 58

D. The Partisan Gerrymandering of the 2016 Plan is Not Viewpoint Neutral and is Thus a More Egregious and Blatant Violation of the First Amendment 59

E. The Defendants Cannot Carry Their Burden of Proving that the Partisan Gerrymander is Justified by State Interest that is Both Legitimate and Compelling and Narrowly Tailored 62

X. The 2016 Plan also violates the Equal Protection Clause of the Fourteenth Amendment 63

XI. The 2016 Plan Also Violates Article I, Section 2 of the Constitution 67

XII. The 2016 Plan also violates Article I, Section 4 of the Constitution 69

CONCLUSION 72

The facts of this case are largely undisputed. In enacting North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan"), the North Carolina General Assembly expressly required that the districts be drawn to give the Republican Party and its voters a "partisan advantage" over the Democratic Party and its voters. The map drawer followed this express instruction and—armed with the past voting history of North Carolina's citizens—achieved the intended partisan effect: an assembly of districts engineered to maintain the partisan makeup of North Carolina's congressional delegation under the invalidated 2011 Congressional Redistricting Plan (the "2011 Plan").

The plain language of the 2016 Plan's "Adopted Criteria" shows that Defendants intended the plan to be a partisan gerrymander in favor of the Republican Party, Republican candidates, and Republican voters. That is further confirmed by: (1) the public records of the North Carolina General Assembly; (2) Defendants' own statements—in public legislative sessions and during committee hearings approving the Adopted Criteria—regarding the political purpose and intended effect of the 2016 Plan; (3) the sworn testimony of Senator Robert Rucho and Representative David Lewis, who issued the instructions for drawing the 2016 Plan's congressional districts; and (4) the sworn testimony of Dr. Thomas Hofeller, who drew these districts based on those instructions.

The 2016 Plan achieved its intended discriminatory effect of favoring Republicans at the expense of the Democratic Party and Democratic voters. But for the explicit sorting of North Carolina voters on the basis of their past voting history to entrench

partisan advantage, the 2016 Plan would not be composed of 10 districts likely to elect Republican candidates and three districts likely to elect Democratic candidates. Evidence to be presented at trial will show the degree to which the 2016 Plan necessarily deviated from—and in fact subordinated—the traditional redistricting principles that Defendants would now use to mask the outright seizure of the redistricting process for the benefit of a political party. By contrast, Defendants can present no evidence justifying the highly-engineered districts drawn under the 2016 Plan as necessary to any legitimate state purpose.[1]

I. The 2016 Plan—by its Explicit Design—Reinforces the Partisan Advantage Built into North Carolina's 2011 Congressional Redistricting Plan.

On February 5, 2016, a panel of three federal judges held that two districts established by North Carolina's 2011 Congressional Redistricting Plan (the "2011 Plan") constituted racial gerrymanders in violation of the Equal Protection Clause. Dkt. 50 ("Memorandum Opinion") at 4 (citing *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016)). The *Harris* court ordered the drawing of new congressional districts to be used in future elections. *Id.* (citing *Harris*, 159 F. Supp.3d at 627). On May 22,

[1] At best, Defendants' proffered justifications will depend on a convenient fiction: that the 2016 Plan owed deference to the district lines of the 2011 Plan. This is without legal or factual support. As discussed *infra* at 6-7, though the 2011 Plan was properly struck down as an unconstitutional racial gerrymander, its effectiveness as a partisan gerrymander can hardly be overstated. Moreover, the 2011 Plan itself upended the districts of the 2001 Plan it replaced. Evidence Defendants will present regarding incumbents protected or district population cores maintained should be treated skeptically; these principles meant nothing when the partisan goal was to achieve, rather than "maintain," partisan control of North Carolina's congressional delegation.

2017, the Supreme Court affirmed the holding of the *Harris* court. *Cooper v. Harris*, No. 15-1262, 2017 WL 2216930, at *6 (U.S. May 22, 2017).

a. The Relevance of the Defense in *Harris*

This case and *Harris* are inextricably linked. The principal defendants here (Senator Rucho and Representative Lewis) provided detailed instructions to the same map drawer (Dr. Thomas Hofeller) that they instructed five years earlier when designing and implementing the now-invalidated 2011 Plan. The Defendants' arguments in *Harris* best demonstrate for this Court the mechanics of the 2016 Plan's central scheme. In *Harris*, Sen. Rucho, Rep. Lewis and Dr. Hofeller all defended the challenged 2011 districts on the grounds that the 2011 map was an extreme and effective partisan gerrymander. As stated so clearly by counsel for the *Harris* defendants before the Supreme Court: Dr. Hofeller, at the instruction of Sen. Rucho and Rep. Lewis, "was to 'draw maps that were more favorable to Republican candidates' and in particular 'to weaken Democratic strength in Districts 7, 8, and 11 … by concentrating Democratic voting strength in Districts 1, 4, and 12.'" Defendants' Response to Plaintiff's Request for Admission ("Defs.' RFA Resp.") No. 121.

The scheme proved quite successful. Again, as the *Harris* defendants' own counsel recently told the Supreme Court:

> The results of the 2012 election – the first under the new plan – underscored the political motivations in the redrawing of CD12 and the surrounding districts. Republicans turned a 7-6 Democratic advantage into a 9-4 Republican advantage – a majority that included four of the five districts that they designed the 2011 plan to

1573892.1

make more competitive. That trend continued in 2014, when Republicans added the fifth district, CD7, to their ledger.

Defs.' RFA Resp. No. 122.

The arguments presented by counsel to the Supreme Court fit squarely with the testimony of Dr. Hofeller regarding the 2011 Plan. Much as in 2016, in 2011 Dr. Hofeller received verbal instructions as to how to draw the new districts exclusively from Sen. Rucho and Rep. Lewis. The legislators instructed him to draft a plan that would maximize the number of Republican seats and minimize the number of seats held by Democrats. Deposition of Thomas Hofeller ("Hofeller Depo.") 120:17-121:9, 123:1-124:3, 125:7-13. At that time, he believed it was possible "to draw ten districts in which the Republicans would either be most likely to win or would have an opportunity to win." Hofeller Depo. 121:19-22. Though only nine Republican candidates secured election in 2012, CD7 (which a Democratic incumbent held by only hundreds of votes in 2012) became a Republican seat in 2014.

Dr. Hofeller also served as an expert witness in *Harris*. At deposition in this case, Dr. Hofeller affirmed several opinions he earlier offered as an expert. First, Dr. Hofeller affirmed that "[p]olitics was the primary policy determinant in drafting of the [2011] Plan." Hofeller Depo. pp. 115:20-21, 116:5-10, Hoefeller Deposition Exhibits ("Hoefeller Ex."), Ex 16, 16A. Second, Dr. Hofeller affirmed that the new Republican majority in control of both houses of the North Carolina General Assembly in 2011 intentionally gerrymandered North Carolina's congressional districts by packing as many Democratic voters as possible into three districts, thereby also strengthening the

Republican majorities in the remaining districts by removing Democratic voters from those districts.

Specifically, Dr. Hofeller stood by his earlier expert testimony that "[t]he General Assembly's goal [in 2011] was to increase Republican voting strength in New Districts 2, 3, 6, 7 and 13" and that "[t]his could only be accomplished by placing all the strong Democratic [Voter Districts] in either New Districts 1 or 4." Hofeller Depo. 116:19-117:25, Hofeller Ex. 16, 16A; *see also* Hofeller Depo. 126:9-127:12, Hofeller Ex. 16, 16B ("The Republican strategy was to weaken Democratic strength in Districts 7, 8 and 11; and to completely revamp District 13, converting it into a competitive GOP District.").

In sum, and in Dr. Hofeller's own words, "[t]he General Assembly's overarching goal in 2011 was to create as many safe and competitive districts for Republican incumbents or potential candidates as possible." Hofeller Depo. 118:19-119:23. Dr. Hofeller admitted that this not only entailed drawing "districts in which Republicans would have an opportunity to elect Republican candidates" but necessarily also required "minimiz[ing] the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." Hofeller Depo. 127:14-22. He also admitted that the opportunities of Democratic voters that remained in the districts in which he had increased Republican voting strength to elect a Democratic candidate of their choice would be diminished. Hofeller Depo. 128:17-21.

b. The Effectiveness of the 2011 Plan as a Partisan Gerrymander

As counsel for the *Harris* Defendants stated so clearly to the Supreme Court, this strategy had clear and discernible partisan effect. "Republicans turned a 7-6 Democratic advantage into a 9-4 Republican advantage" in 2012 and a 10 to 3 advantage in 2014. Defs.' RFA Resp. No. 122.

Those partisan gains bore little relation to the statewide electoral strength of the Republican Party in the two sets of congressional elections held under the 2011 Plan. Combining the two-party results of all congressional elections in 2012 and 2014, Republican candidates gained 51% of votes to Democratic candidates' 49%. Of the 26 House seats determined by those elections, Republicans took 19 and Democrats took 7.

	North Carolina State-wide Votes in U.S. House Elections				**Representatives Elected to U.S. House for North Carolina**			
Year	Number of Democratic ("DEM") Votes	DEM Votes as % of Total Votes	Number of Republican ("GOP") Votes	GOP Votes as % of Total Votes	Number of DEM Repre-sentatives ("Reps")	DEM Reps. as % of Total Reps.	Number of GOP Reps.	GOP Reps. as % of Total Reps.
2012	2,218,357	51%	2,137,167	49%	4	31%	9	69%
2014	1,361,695	44%	1,596,942	55%	3	23%	10	77%
Total	3,580,052	49%	3,734,109	51%	7	27%	19	73%

First Amended Complaint ("FAC") [Dkt. 12] ¶¶ 6, 8; Defendants' Answer to FAC ("Answer") [Dkt. 49] ¶¶ 6, 8.

1573892.1

Partisan control of the redistricting process in 2011 enabled Sen. Rucho and Rep. Lewis to instruct Dr. Hofeller to construct a North Carolina congressional map that would reliably elect more Republican candidates to Congress. Dr. Hofeller's own testimony, in *Harris* and in this case, demonstrates how his method of constructing districts based on past voting history ensures such reliable results.

c. The Mechanics of Dr. Hofeller's Approach as Applied in 2011

Dr. Hofeller's approach to building districts is ultimately quite simple. He uses past election results "[t]o determine how areas that are being drawn into new districts or taken out of new districts vote" and then he "tr[ies to] make an estimate of what electoral success may be in [the] newly formed districts . . . ." Hofeller Depo. 14:18-24. Though not entirely perfect, Dr. Hofeller acknowledges that past election results are the "best predictor of how a particular geographical area is likely to vote" and that this would the "most important information" a political party could use to gain "a partisan advantage in the redistricting process." Hofeller Depo. 14:25-15:3, 16:8-12; *see also* Hofeller Depo. 131:22-132:13; *see also* Hofeller Ex. 16A, 18.

With regard to his evaluation of expected political performance in constructing districts in the 2011 Plan, Dr. Hofeller has gone even further. He has testified that he

> didn't draw [the 2011] plan in a vacuum as far as the data [was] concerned. . . . [He knew] from that experience that the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it. . . . So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every subsequent election. The same would be true of Republican precincts. . . . So if you used a

1573892.1

conglomeration of elections, my experience is you'd come up with the same – the same result.

Harris v. McCrory, Trial Transcript 525. (Hofeller Ex 18 (p. 2)).[2]

Dr. Hofeller has also testified as to how he would view these past election results when using commercial software—Maptitude—on his personal computer to draw congressional districts. That software would be loaded with the results of past elections, enabling Dr. Hofeller to view voting history data (for a single election or a set of elections) and to display that data by assigning it a color "thematic" representing—according to various and adjustable metrics determined by Dr. Hofeller—the partisan voting history of a given unit of geographical area, most importantly at the level of a single voter district (VTD). Hofeller Depo. 101:19-107:4.

In 2011, Dr. Hofeller began constructing the congressional map by drawing Congressional District (CD) 1. He evaluated the racial composition of CD1 as he drew it, trying to ensure it would have a Black Voting Age Population of at least 50.1%. Hofeller Depo. 132:22-133:18; 133:24-134:6. But he did not undertake such an analysis for every district. Far from it. Instead, Dr. Hofeller built the remaining districts based on "political voting history" by manipulating district splits within counties at the voter district (VTD) level. Hofeller Depo. 133:19-22; 134:7-13; 135:3-9.

The consideration of Republican partisan advantage took precedence over any consideration of Voting Rights Act compliance in the drafting of all districts except for

---

[2] At deposition in this case, Dr. Hofeller affirmed that this testimony would hold true for his drafting of the 2016 Plan. Hofeller Depo. 153:2-10.

CD1 in the 2011 Plan. Hofeller Depo. 143:12-144:6 (distinguishing CD 12 and all other districts from district one, even though CD 12 also ultimately determined to be a racial gerrymander). That consideration paid off in additional Republican seats.

II. The 2011 Plan Reflected a Broader National Strategy to Determine Congressional Election Outcomes Through Partisan Control of Redistricting.

North Carolina was but one front in a broader push for partisan control over congressional redistricting following the 2010 census. Dr. Hofeller, as "one of the GOP's pre-eminent redistricting experts" and a longtime employee of the Republican National Committee ("RNC"), played a central role in that broader effort. Hofeller Depo. 28:2-30:21; Hofeller Ex. 2. In February of 2010, the Republican State Leadership Committee ("RSLC") announced its REDMAP project "to win[] Republican control of state legislatures that … have the most impact on Congressional redistricting 2011." Hofeller Depo. 56:6-19, Hofeller Ex 6. The goal was explicit: to solidify Republican control of the US House of Representatives for the next decade by "creat[ing] 20 to 25 new Republican congressional districts through the redistricting process over the next five election cycles." Hofeller Depo. 57:14-60:3-24; Hofeller Ex. 6, 6A.

"The rationale" of REDMAP "was straightforward: Controlling the redistricting process in these states would have the greatest impact on determining how . . . congressional district boundaries would be drawn." Hofeller Ex. 21 at 2. And the importance of decennial redistricting for determining those district boundaries over the course of the coming decade was well understood by those involved. "Drawing new district lines . . . presented the opportunity to solidify conservative policymaking at the

1573892.1

state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade." Hofeller Ex. 21 at 2; *see also* Hofeller Depo. 36:6-22 (Hofeller agreeing new maps have "a long-term dimension that would apply to the entire decade: 2012, 2014, 2016, 2018, 2020"); 57:19-21 ("The effect of the redistricting process in general is felt for five following elections, of course, unless there are lawsuits."); 58:2-5 ("[A]ny redistricting effects are felt through the entire period until the next line-drawing process, so that would be 2021 in this case.").

North Carolina was one of the states targeted by REDMAP. The RSLC spent $1.2 million in North Carolina in the 2010 elections. Hofeller Ex. 20, 22. As discussed above, the Republican Party took control of both houses of the North Carolina General Assembly in 2010.

Following the state-level electoral success in North Carolina and elsewhere in 2010, the RSLC—then led by Chris Jankowski—turned its full attention to redistricting. In a letter to "legislative leaders," Jankowski offered to send a "team of seasoned redistricting experts" led by Dr. Hofeller to the states under Republican control to assist them in redrawing congressional and state legislative district lines. Hofeller Depo. 85:15-87:12, Hofeller Ex. 8, 9.[3] Throughout the period in which Dr. Hofeller worked on—and was separately compensated for—drawing the 2011 Plan, Hofeller was also under

---

[3] *See also* Robert Draper, "The League of Dangerous Mapmakers," The Atlantic, (October 2012), available at https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/.

contract to the State Government Leadership Foundation ("SGLF"), an RSLC-related entity used to fund REDMAP. Hofeller Depo. 87:13-88:2.

To whatever extent the details of that arrangement remain obscure, the electoral outcomes in 2012 congressional races nationwide were entirely clear. As best summarized by RSLC's own report:

> President Obama won reelection in 2012 by nearly 3 points nationally, and banked 126 more electoral votes than Governor Mitt Romney. Democratic candidates for the U.S. House won 1.1 million more votes than their Republican opponents. But the Speaker of the U.S. House of Representatives is a Republican and presides over a 33-seat House Republican majority during the 113th Congress.
>
> ***
>
> REDMAP's effect on the 2012 elections is plain when analyzing the results: . . . Nationwide, Republicans won 54 percent of the U.S. House seats… while winning only 8 of 33 U.S. Senate races and carrying only 47.8 percent of the national presidential vote.

Hofeller Ex. 21 at 3, 5. The RSLC ties this success directly to control over state legislatures responsible for redistricting following the 2010 elections. "After Election Day 2010, Republicans held majorities in both legislative chambers in 25 states—and, in most cases, control over redistricting—up from 14." *Id.* at 3 (highlighting importance of redistricting control in the key states of, among other Michigan, Ohio, Pennsylvania, and Wisconsin).[4]

So, too, in North Carolina. As discussed *supra* at 6-7, Republican candidates for Congress in North Carolina captured 49% of the two-party congressional votes in the

[4] *See generally* David Daley, Ratf**ked (2016) (Chapter 3 of which is devoted specifically to the application of REDMAP in North Carolina).

1573892.1

2012 election but took 9 of 13 congressional seats (or 69% of the seats). Democratic candidates, by contrast, captured 51% of the two-party congressional votes, but only 4 seats (31%). In 2014, Sen. Rucho, Rep. Lewis, and Dr. Hofeller's vision of a 10-3 Republican advantage under the 2011 Plan was realized. Republican candidates captured 55% of the two-party congressional vote to take control of 77% (10 of 13) of North Carolina's congressional seats.

III. The 2016 Plan Used Political Data—the Voting History of North Carolina Citizens—to Maintain the Partisan Advantage Wrongfully Procured Under the 2011 Plan.

Holding that CD1 and CD12 violated the Equal Protection Clause of the Fourteenth Amendment, the *Harris* court struck down that plan on February 5, 2016 and ordered that a new map be drawn no later than February 19, 2016.

By the next day, Defendants Sen. Rucho and Rep. Lewis had engaged Dr. Hofeller to draw that new map. Deposition of Representative David Lewis ("Lewis Depo.") 44:2-4. Dr. Hofeller completed a near-final map the following week, and it was entered into the General Assembly's computer on February 16, 2016. Lewis Depo. 77:7-24; 138:15-139:2; Lewis Deposition Exhibit ("Lewis Ex.") 47. That map, with only minor modifications to address the accidental pairing of incumbents in Guilford County, was enacted by the General Assembly on February 19, 2016.

A. Senator Rucho and Representative Lewis's Instructions to Dr. Hofeller Regarding the 2016 Plan

As with the 2011 Plan, Dr. Hofeller drew the map for the 2016 Plan based solely on oral instructions he received from Sen. Rucho and Rep. Lewis. No record of these instructions exists for the period in which Dr. Hofeller was actually drawing the map.[5] Further, the 2016 Plan (again like the 2011 Plan) was drawn by Dr. Hofeller at his home on his personal computer.

Defendants Sen. Rucho and Rep. Lewis have testified, and Dr. Hofeller has affirmed, that the oral map drawing instructions the legislators issued to Hofeller explicitly presented two goals: (1) to cure the racial gerrymander in the 2011 Plan; and (2) to maintain the partisan advantage the Republican Party and Republican candidates had established under the 2011 Plan. Lewis Depo. 38:15-40:4; Deposition of Sen. Robert Rucho ("Rucho Depo.") 33:6-23.

To address the first goal, Sen. Rucho and Rep. Lewis gave a simple but critical oral instruction: the race of voters was not to be considered in drawing districts. Lewis Depo. 53:21-24. From the deposition testimony of the Defendants and Dr. Hofeller, which is the only evidentiary record of the exceptionally secretive process by which the map was drawn, this oral instruction was issued without caveat or condition. The legislators further instructed Dr. Hofeller to dismantle CD 12, the "serpentine" nature of which had been criticized by the *Harris* court, and separately to avoid tell-tell certain possible indicators that race had been somehow considered—as with visually non-compact districts splitting a large number of counties (particularly in the area of CD1) or

---

[5] It is Dr. Hofeller's regular practice to avoid creating email or other written records regarding his redistricting work; he followed that practice here. *See* 73:25-77:23; 80:2-10.

the use of certain elections that could be read as a means of considering race (like the Obama-McCain Presidential election, on which Dr. Hofeller had exclusively relied in 2011). Lewis Depo. 53:25-54:3; 54:8-55:2; Hofeller Depo. 180:17-181:11.

To address the second goal—partisan advantage—Sen. Rucho and Rep. Lewis orally instructed Dr. Hofeller to use political data, specifically election results from a basket of statewide elections, to assign voters to new districts likely to yield a partisan result of ten Republican seats and three Democratic seats. The legislators also instructed Dr. Hofeller that he was to try to avoid the pairing of the incumbents elected in 2014 under the 2011 Plan (ten of whom identified as Republicans). Lewis Depo. 116:8-117:13; 55:7-57:19.

Senator Rucho, Rep. Lewis, and Dr. Hofeller all testified that they believe past election results to be the best predictors of future election results. Lewis Depo. 116:12-117:3: Hofeller Depo. 16:8-12; Rucho Depo. 97:3-6. As discussed above, Dr. Hofeller has testified that "the underlying nature of the precincts in the state does not change no matter what race you use." Hofeller Depo. 149:5-9. Nonetheless, the choice of which precise elections to use in determining the district boundaries was left to Dr. Hofeller. Lewis Depo. 96:19-23; Rucho Depo. 88:2-8.[6] As Dr. Hofeller drew each district, the likely partisan outcome of a given set of district lines would update based on the election results Dr. Hofeller chose to project. As Rep. Lewis stated, the election results were used

[6] Dr. Hofeller in fact considered only seven of the twenty elections identified in the criteria later adopted by the General Assembly. Hofeller Depo. 212:12-213:25; Hofeller Ex. 42.

"for the purpose of trying to comply with the criteria, specifically the one about the partisan advantage." Lewis Depo. 129:18-131:9.

Dr. Hofeller was also orally instructed to minimize the number of counties split under the 2016 Plan. This oral instruction, however, did come with a caveat. Senator Rucho and Rep. Lewis told Dr. Hofeller that counties could be split for three purposes: (1) to ensure equality of population between districts; (2) to protect incumbents; and (3) as necessary to maintain the partisan advantage of the Republican party under the 2011 Plan. Lewis Depo. 136:17-137:14; 158:13-159:3.

B. The Legislative Process of Enacting the 2016 Plan

The district map for the 2016 Plan (save for a minor incumbency modification) was complete on either Friday, February 12 or Saturday, February 13. Representative Lewis reviewed the map with Dr. Hofeller at that time. Lewis Depo. 77:7-24. At the time the district lines were set, none of the legislative process outlined herein had even begun.

On February 15, 2016, the General Assembly held public hearings ostensibly for the purpose of receiving the views of citizens about what the values that their congressional map should express. Dr. Hofeller did not attend any of these hearings; and neither Sen. Rucho or Rep. Lewis communicated any information from those hearings to Dr. Hofeller. Lewis Depo. 81:11- 82:19; Rucho Depo. 55:3-56:13; 58:14- 60:5. Nor was the public presented in any manner with the near-final map already drawn by Dr. Hofeller.

In a similar vein, Dr. Hofeller's role in drawing the 2016 map was concealed from other members of the General Assembly, particularly Democrats. Once Dr. Hofeller was belatedly identified as the map drawer, Democratic legislators attempted to have Dr. Hofeller explain his work. That request was rejected. House Committee Transcript ("HCT") 2/19/16 44:23 to 45:15.

On February 16, 2016, Sen. Rucho and Rep. Lewis convened a meeting of the Joint Congressional Redistricting Committee (the "Joint Committee") established by the Speaker and President Pro Tem of the North Carolina Senate. Lewis Depo. 106:13-108:8; Transcript of Joint Congressional Redistricting Committee ["JCRC"] Hearing on 2/16/16 at 3. Republican members outnumbered Democratic members on the Committee by 25 to 12. FAC ¶ 10; Answer ¶ 10.

At this Joint Committee meeting, Rep. Lewis presented and advocated for the adoption of a set of written criteria ostensibly to guide the development of a new map. JCRC 2/16/16, 12:8 *et seq*. Neither Rep. Lewis nor Sen. Rucho informed the Committee that a complete map already existed and in fact had already been loaded onto the legislative computer, that such a map had been drawn according to the oral instructions of Sen. Rucho and Rep. Lewis, or that proposed amendments to the adopted criteria had to be rejected in order to retain the Hofeller-drawn map.

Defendant Rep. Lewis, aided by Sen. Rucho presented seven criteria to the Joint Committee for adoption. JCRC 2/16/16 12-104. These "proposed" criteria mirrored the oral instructions Dr. Hofeller had received from Sen. Rucho and Rep. Lewis before and

as he draw the map. As Sen. Rucho informed the Senate Committee two days later on February 18: "I'll be clear, the criteria that Rep. Lewis has submitted is the criteria that was used to draw the maps, and probably that's as much as we need to know." Senate Committee Transcript 2/18/16 24:1-4.

C. The Adopted Criteria

At least two, and more accurately three, of the seven criteria adopted by the Joint Committee on February 16, 2016 are explicitly partisan: (a) the use of that "political data"— past election results—to determine the population included in a given district; (b) the explicit goal of preserving the 10-3 Republican seat advantage gained under the then-just-invalidated 2011 Plan and (c) the decision to protect avoid pairing incumbents where 77% of the incumbents identify as Republicans.[7]

These three criteria specifically provide:

<u>Political data</u>

> The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests.

<u>Partisan Advantage</u>

> The partisan makeup of the congressional delegation under the 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.

---

[7] Even purportedly non-partisan criteria draw partisan distinctions. Within "Compactness," for example, the map drawer was authorized—and in fact did—split counties for reasons of "political impact." FAC [DKT 12] Exhibit A.

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 construed in the 2016 Contingent Congressional Plan.

FAC, Exhibit A.

D. Representative Lewis's Statements

Perhaps the clearest statements of partisan intent come from Defendant Lewis himself. In response to questions from a Democratic member of the Redistricting Committee at the February 16 Joint Committee meeting, Lewis repeatedly emphasized his intention to use political data to obtain partisan advantage. He said:

> [W]e want to make clear that we to the extent are going to use political data in drawing this map, it is to gain partisan advantage.
> …
> I want that criteria to be clearly stated and understood.
> …
> I'm making clear that our intent is to use … the political data we have to our partisan advantage.

JCRC 2/16/16 at 53:24-54:5; 54:13-15.

Lewis even explained *how* political data would be used—and in fact had already been used—to gain partisan advantage. He said: "[I]f you are trying to give a partisan advantage, you would want to draw the lines so that more of the whole VTDs (voter tabulation districts) voted for the Republican on the ballot than they did the Democrat." JCRC 2/16/16 at 57: 12-16. Perhaps most tellingly, Rep. Lewis stated: "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." JCRC 2/16/16 at 50: 7-10.

When the map came before the full House for final approval on February 19, Rep. Lewis affirmed those earlier statements. Asked if the 2016 Plan was "essentially a political gerrymander," Rep. Lewis responded: "[p]olitical data did play a part in drawing the map. We did seek partisan advantage in drawing the map." House Floor Transcript ("HFT") 2/19/16 at 29:11-13.

He in fact went further. Rep. Lewis also stated that the map drawer "could have been much more aggressive partisan-wise," yielding an 11-2 Republican map, but that "you can't really do that if you simply consider partisanship as a part of the criteria adopted by the committee, which is what we did." HFT 2/19/16 32:16-33:1. In light of the evidence to be presented at trial by plaintiff's experts, this statement may prove to be Rep. Lewis's most risible. Had "partisanship" simply been "part of the criteria" rather than the map drawer's North Star, the 2016 Plan would not have yielded even a 10-3 map.[8]

E. The Party-Line Approval of the 2016 Plan

[8] Though less brazen in comments made at the time, Sen. Rucho's comments similarly establish the partisan intent of the 2016 Plan. In speaking to the full Senate, Sen. Rucho informed the Senate that his goal in drawing the new plan was to preserve the partisan advantage Republicans had obtained through the illegal 2011 plan. Sen Floor Transcript at 81. And at a Senate Committee meeting following that floor session, Rucho told his colleagues that the election data they had been provided was to "build[ ] these districts." Senate Committee Transcript ("SCT") at 10.

On Wednesday, February 17, Dr. Hofeller's map was approved by the Joint Committee. FAC ¶ 19, Answer ¶ 19. Following approval from House and Senate Committees, the 2016 Plan was presented by Sen. Rucho on the floor of the Senate. The map was approved by the Senate on February 18, 2016 a 65-43 vote along party lines and enacted as 2016 SL 1. FAC ¶¶ 20-21, Answer ¶¶ 20-21. The House approved the map on February 19, 2016 in another straight party-line vote. FAC ¶ 21, Answer ¶ 21. Because the North Carolina Governor has no power to veto redistricting legislation, the 2016 Plan became law without any action by the Governor. See NC Const. Art II, Sec 22.

IV. Results of the 2016 Congressional Elections Confirm the Scheme.

The results of the 2016 congressional elections confirm the effectiveness of Dr. Hofeller's use of past election results to assign plaintiffs and other voters to districts based on their voting patterns, and thereby meet his instructions to maintain the 10-3 Republican advantage and protect 10 Republican incumbents.

As planned, ten Republicans and three Democrats were elected to Congress from North Carolina in 2016, even though Republicans received only 53% of the statewide congressional vote and Democrats received 47% of that vote. Had the statewide totals been reversed, Democratic candidates would not have fared so well. The evidence at trial will show, in fact, that had partisan fortunes been reversed (with Democratic candidates taking 53% of the vote), only *one seat* would have shifted from Republican to Democratic control.

1573892.1

The district-level results explain this asymmetry, revealing how Plaintiffs and other voters were effectively assigned to districts by Dr. Hofeller in a manner that would preserve the 10 to 3 Republican advantage gained from the invalid 2011 Plan. Democratic voters were packed into CDs 1, 4 and 12 so that the Democratic candidate won by margins in excess of 29% in each of those districts: 68.62% to 28.96% margin in CD 1; 68.22% to 31.78% margin in CD 4 and 67.02% to 30.58% margin in CD 12. The remaining Democratic voters were dispersed across the other 10 districts so that Republican candidates won by lesser, but still comfortable, margins. The Republican margin of victory in CD 2 was 56.71% to 43.29%; in CD 3 was 67.20 to 32.80%; in CD 5 was 58.10% to 41.60%; in CD 6 was 59.23% to 40.77%; in CD 7 was 60.91 to 39.09%; in CD 8 was 58.77% to 41.23%; in CD 9 was 58.18% to 41.82%; in CD 10 was 63.14% to 36.86%; in CD 11 was 64.09% to 35.91%; and in CD 13 was 56.10% to 43.90%. North Carolina State Board of Elections Congressional Election Results - Election Contest Details, available at http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0 (last accessed 6/5/2017).

V. Plaintiffs' Expert Analyses Demonstrate (a) Defendants' Partisan Intent in Enacting the 2016 Map, (b) the Extreme Effect of that Map, and (c) the Absence of Any Legitimate Justification for the Map.

The *Common Cause* Plaintiffs have retained two experts, one in mathematics and the other in political science, to examine Defendants' intent in drawing the 2016 map, the effect of that map, its justification, or lack of justification, and the means Hofeller used to assign voters to districts. Dr. Jonathan Mattingly received his doctorate in applied

mathematics from Princeton University and has served on the faculties of Stanford University and Duke University. He is currently full Professor and Chair of the Department of Mathematics and Statistical Science at Duke. *See* Exhibit 1 to 3/6/17 Declaration of Dr. Jonathan Mattingly. Dr. Jowei Chen received his doctorate in Political Science from Stanford University and serves on the faculty at the University of Michigan, where he is currently an Associate Professor in the Department of Political Science. *See* Exhibit B to 3/1/17 Expert Disclosures for The Common Cause Plaintiffs.

The analyses conducted by Drs. Mattingly and Chen complement one another. Both used accepted mathematical and computational principles to generate simulated congressional maps that construct districts using traditional, non-partisan redistricting criteria without regard for election results or other partisan data.

Dr. Mattingly—who began his analysis of congressional gerrymandering in North Carolina while the 2011 Plan remained in effect—used the traditional, non-partisan criteria contained in legislation proposed by several Republican members of the General Assembly (HB92) and passed by the House in 2015. Dr. Chen used the traditional, non-partisan criteria—but not the criteria included for partisan advantage—from the written criteria adopted on February 16, 2016, by the Joint Congressional Redistricting Committee (the Adopted Criteria).

Both Dr. Mattingly and Dr. Chen then projected the partisan results that would likely have occurred under each simulated map drawn using traditional, non-partisan criteria. Dr. Mattingly used the results of the 2012 and 2106 congressional elections to

make that partisan projection for each map. For his principal analysis, Dr. Chen used two sets of election data: (1) the set of twenty statewide elections explicitly included in the Adopted Criteria; and (2) the seven-election formula Dr. Hofeller in fact used to draw the map ultimately enacted under the 2016 Plan.

Dr. Mattingly explored one basic question: what is the range of congressional maps—as measured by HB 92's traditional criteria—that potentially would have been available to the General Assembly for enactment in 2016 and what would the partisan results have been under each of those maps. To perform this analysis, Dr. Mattingly generated more than 24,000 simulated maps that would have satisfied the HB 92 criteria and then examined the partisan distribution of congressional seats under each simulated map.

Dr. Chen created three sets of simulations, each of which contain 1000 maps Dr. Chen directed the computer to draw, and then examined the partisan distribution of congressional seats under each simulated map. These three sets of simulations contain slight variations in the constraints imposed on the simulated maps (to account for variations in Defendants' own account of the criteria considered in the enacted map), but each set serves the same purpose: to determine whether, when holding several legitimate redistricting considerations constant, the partisan results of the 2016 Plan could have been the product of something other than partisan bias.

Both experts find that the 2016 Plan creates a partisan distribution of seats falling outside the range of outcomes possible under a non-partisan redistricting process.

Defendants *achieved* the 10 to 3 Republican advantage under the 2011 Plan only by elevating the consideration of partisan advantage over traditional redistricting criteria. Defendants *maintained* that 10 to 3 Republican advantage under the 2016 Plan only by elevating the consideration of partisan advantage over the other criteria listed in the Adopted Criteria and over any instructions Dr. Hofeller received regarding non-partisan criteria to be considered in the construction of the current districts.

Dr. Chen's Results.

The inputs used to generate Dr. Chen's maps have been provided by Defendants themselves: the criteria used by Defendants in drawing and enacting the 2016 Plan. Simulation Set 1 takes the traditional, non-partisan requirements of the Adopted Criteria and imposes these constraints on his computer-drawn districts. Simulations Set 2 imposes an additional constraint—prohibiting the double-pairing of any two incumbents elected in the 2014 Congressional elections. The parties may dispute whether protection of incumbents in this context seeks partisan advantage, but Dr. Chen's analyses under Simulation Set 2 show that, even if not, the protection of incumbents cannot explain the extreme partisan result. Simulation Set 3 in effect relaxes certain constraints imposes in Simulation Sets 1 and 2 to match—rather than outperform—the 2016 Plan on reducing the number of split counties and protecting incumbents.

Among the three thousand simulated maps generated by Dr. Chen among these three simulation sets, zero result in a partisan distribution of 10 Republican and 3 Democratic seats. Holding constant these other traditional, non-partisan factors built into

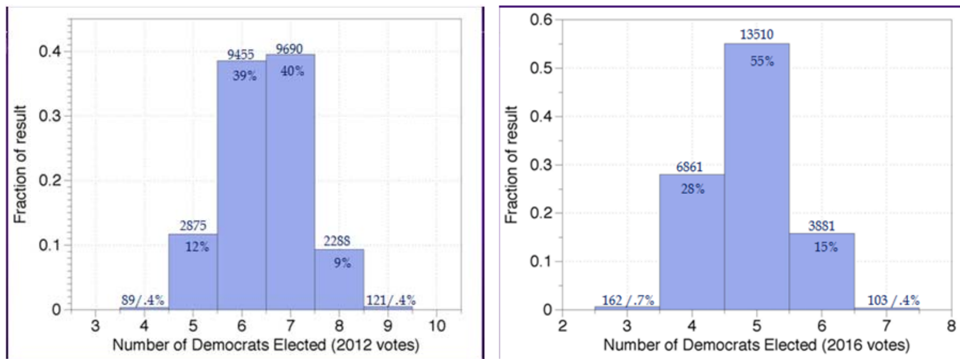
the 2016 Plan, Dr. Chen demonstrates the predominance of partisan purpose in its execution.

Dr. Mattingly's Results.

As noted above, Dr. Mattingly generated more than 24,000 simulated maps (24,518 to be exact) compliant with the five criteria required by HB 92. Those are: equal population; contiguity; compactness; minimization of county splits; and compliance with the Voting Rights Act. Simulated maps that did not meet thresholds for each of these criteria were discarded and were not included among the 24,518 maps evaluated.

Dr. Mattingly then applied the 2012 and 2016 congressional election results to each of those simulated maps to determine the number of Republican and Democratic candidates who would have been elected from the 13 districts in each simulated map, had the votes in each simulated district been consistent with the results of the 2012 and 2106 congressional elections.

As the following charts illustrate, there are essentially no maps among the 24,518 simulated maps generated that would have resulted in a congressional delegation composed of 9 Republicans and 4 Democrats as measured by the actual 2012 statewide congressional results or 10 Republicans and 3 Democrats as measured by the actual 2016 statewide congressional results.



In 2012, Democratic congressional candidates won only 4 of 13 seats even though Democratic candidates received 50.6% of the statewide congressional vote. Under Dr. Mattingly's analysis using actual 2012 statewide congressional results, only 89 of the 24,518 simulated maps resulted in 4 Democratic wins. The remaining 24,429 simulated maps resulted in a range of 5 to 9 Democratic wins.

In 2016, Democratic congressional candidates won only 3 of 13 seats even though Democratic candidates received 44% of the statewide congressional vote. Under Dr. Mattingly's analysis using actual 2016 statewide congressional results, only 162 of the 24,518 simulated maps resulted in 3 Democratic wins and the remaining 24, 356 simulated maps resulted in 4 to 7 Democratic wins.

VI. The Compactness of the 2016 Plan Relative to Prior North Carolina Congressional Plans Cannot Justify the 2016 Plan.

Defendants attempt to defend assigning Plaintiffs and other North Carolina voters to districts based on their expression of their political preferences at the polls by pointing to the "Compactness" criterion appearing within the Adopted Criteria approved by the Joint Committee on February 16. That criterion provides:

Compactness

> In light of the Harris court's criticism of the compactness of the First and Twelfth Districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of the current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall only 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.

FAC Exhibit A. As demonstrated below, this defense is implausible and at odds with several sets of undisputed facts. The criterion expressly subordinates the goal of compactness to the need to preserve political advantage. Thus, this criterion and its implementation provide more proof of the partisan nature of the gerrymander.

In the course of the Joint Committee's proceedings, Democratic Committee members moved to amend the compactness criterion to eliminate the authority to divide counties in order to protect 10 Republican incumbents and maintain a 10 to 3 partisan advantage. Because this amendment on its face would have thwarted Defendants' partisan goals (and perhaps because the districts had already been drawn in secret), the amendment was defeated on a party-line vote. JCRC 2/16/16 at 110-113.

Separately, the Democratic members of the Joint Committee moved to amend the criteria to add preservation of communities of interest as a criterion. This, too, would have thwarted Defendants partisan goals and was defeated on a party line vote. JCRC 2/16/16 at 113-117.

In fact, separating established communities of interest was one means by which Defendants maintained their 10 to 3 partisan advantage. As just one example, Defendants split Buncombe County, the heart of North Carolina's Mountains, from its Mountain Home and added it to a district sprawling hundreds of miles down the Mountains into the Piedmont to Gaston County. Separating this established community from its roots had the effect of converting a highly competitive district CD 11 into a strong Republican district. Over the period between 1980 and 2010, Democratic candidates and Republican candidates in CD 11 alternated victory virtually every election. As the result of separating Buncombe from its Mountain base, the Republican candidate prevailed in 2016 by a margin of 28 points. *See supra* at 22.

Employing a different tactic to achieve the same result, Defendants joined divergent communities of interest into a single district to maintain their 10 to 3 Republican advantage. For example, CD 8 joins the rural, racially-mixed, economically-depressed counties in southeastern North Carolina with affluent, largely-white suburbs of Charlotte in Mecklenburg County and neighboring Union County. This converted another previously competitive area into a strong Republican district where the Republican candidate prevailed in 2016 by a 17 point margin. *See supra* at 22.

The written criteria adopted by the Redistricting Committee on February 16 mirror the oral instructions Lewis and Rucho gave Hofeller a week earlier. Three of those instructions are explicitly partisan-based: (a) use political data (b) to maintain the 10-3 Republican advantage and (c) to protect the 10 Republican incumbents. FAC Exhibit A.

Defendants offer no defense of the compactness of the 2016 Plan relative to any actually-debated alternative to the 2016 Plan.

VII. The Consideration of Compliance with the Voting Rights Acts Cannot Justify the 2016 Plan.

In *Harris*, the Supreme Court rejected the argument that using race "in order to advance other goals, including political ones," is a defense to a racial gerrymander claim. Slip op. FN 1. In this case, Defendants now take the opposite position. They attempt to defend their partisan gerrymander on the grounds that a 10-3 division of North Carolina's congressional delegation is the product of Defendants' compliance with the Voting Rights Act. There are two fatal flaws in this argument.

A. Defendants' Sworn Disavowal of Voting Rights Act Consideration

First, Defendants Lewis and Rucho have repeatedly disavowed that race and VRA compliance were used in drawing the 2016 map. *See supra* at 14. The written criteria they proposed to the Joint Committee on February 16 reflected the oral instructions they had previously relayed to Dr. Hofeller. At that Committee meeting, Defendants Lewis and Rucho informed their fellow legislators and members of the public that as a result of the *Harris* decision "race is not to be a factor in drawing the districts." JCRC 2/16/16 at 26:13-15; *See also id.* 27:11-17; 32:2-7. At the February 18 meeting of the senate Committee, Defendant Lewis explained that the 2008 and 2012 presidential elections results were not used to draw the map because those results could be considered a proxy for race. SCT at 20:7-17. And at his deposition, Defendant Lewis affirmed that he never

1573892.1

discussed compliance with the Voting Rights Act in his instructions to Dr. Hofeller regarding how to draw the map. Lewis Depo. 118:23 to 119:11.

B. The Voting Rights Act Cannot Explain the Partisan Results

Defendants have had months in which to articulate what "VRA Compliance" meant for the purposes of evaluating such compliance under the 2016 Plan. As trial approaches, Defendants still have not articulated any requirement under which they believe they were required to act in formulating the 2016 Plan. The actual record evidence—cited above—shows that at the time they acted as though the VRA imposed no obligation. Whatever new evidence Defendants would now present, it comes too little, too late.

Separately, Voting Rights Act compliance was in fact one of the criteria Dr. Mattingly used in creating his 24,518 simulated maps. He found that VRA compliance did have a *marginal* negative impact on the number of Democrats elected under those simulated maps, but that the impact would not be sufficient to explain either a 9 to 4 result in 2012 or a 10 to 3 result in 2016.

VIII. Defendants' Attempt to Defend their Partisan Gerrymander by Comparing it to the 2001 Congressional Map Falls Flat.

Defendants often assert that their 2011 and 2016 maps should be upheld because they are no less gerrymandered than the congressional map enacted by the General Assembly in 2001 when Democrats controlled both the Senate and House. This kind of

tit-for-tat argument has no place in assessing the constitutionality of 2016 map, but in any event, it is not factually correct.

It is true that on December 5, 2001, following the 2000 Census, the General Assembly was controlled by Democrats and did enact a new congressional redistricting map. Unlike the three congressional redistricting maps enacted during the 1990s that were the subject of decade-long litigation, the 2001 Plan was used without interruption or modification for each of the five congressional elections between 2002 and 2010.

Documents filed by the General Assembly in the United States Department of Justice seeking preclearance of the 2001 Plan establish that the 2001 Plan, unlike the 2011 and 2016 Plans, reflected a bi-partisan effort to draw the 13 districts in that map to seek partisan balance in the state's congressional delegation. *See* Exhibit 2 to Deposition of William Gilkeson ("Gilkeson Ex.") (noting that Republican Edwin McMahan co-chaired the House Congressional Redistricting Committee); Gilkeson Exhibit 5 (noting that an alternative plan proposed by Rep. Art Pope "would likely have resulted in a reversal of the partisan balance of the congressional delegation"); Gilkeson Exhibit 6 (noting adjustments in districts "respecting the partisan compromises"); Gilkeson Exhibit 7 (noting a decision not to push a draft plan because it would "undo the [bi-partisan] compromises.")

And, as the chart below reveals, the 2001 Plan in fact achieved partisan balance rather than partisan dominance. The 50.1% to 49.9% partisan split in the total statewide

congressional vote for Republican and Democratic candidates in the five elections from 2002 through 2010 resulted in the election of 34 Democrats and 31 Republicans.

	North Carolina State-wide Votes in U.S. House Elections				**Representatives Elected to U.S. House for North Carolina**			
Year	Number of Democratic ("DEM") Votes	DEM Votes as % of Total Votes	Number of Republican ("GOP") Votes	GOP Votes as % of Total Votes	Number of DEM Repre-sentatives ("Reps")	DEM Reps. as % of Total Reps.	Number of GOP Reps.	GOP Reps. as % of Total Reps.
2002	970,716	45%	1,209,033	54%	6	46%	7	54%
2004	1,669,864	49%	1,743,131	51%	6	46%	7	54%
2006	1,026,915	53%	913,893	47%	7	54%	6	46%
2008	2,293,971	54%	1,901,517	45%	8	62.5%	5	38.5%
2010	1,204,635	45%	1,440,913	54%	7	54%	6	46%
Total	7,166,101	49.9%	7,208,487	50.1%	34	52%	31	48%

FAC ¶ 6, Answer ¶ 6.

IX. The *Common Cause* Plaintiffs Are Injured by Defendants' Unlawful Partisan Gerrymander.

Plaintiffs are a diverse group. There are two institutional plaintiffs and fourteen individual plaintiffs—fifteen registered Democrats and one registered Republican—who reside from Asheville to Wilmington.

The first institutional plaintiff is Common Cause. Common Cause is a non-partisan 501(c)(3) organization with over 450,000 members in 35 states. It has 2,000 dues paying members in North Carolina and 15,000 members who provide other forms of

support. Dues paying members reside in all 13 congressional districts. Some of the members of Common Cause in North Carolina are Democrats, some are Republicans and others are unaffiliated voters. Deposition of Bob Phillips ("Phillips Depo.") at 13-14. Further, Common Cause opposes (and its organizational mission is harmed by) partisan gerrymandering without respect to the political party engaged in the practice. Common Cause has filed amicus brief in both the United States Supreme Court and the federal district court challenging the Democratic Party-led gerrymander of Maryland's congressional map. *See* Common Cause's Revised Responses to Defendants' First Discovery Requests, Interrogatory Response No. 4.

The other institutional plaintiff is the North Carolina Democratic Party (NCDP). It is "the collective name for the people who call themselves Democrats" 30(b)(6) Deposition of North Carolina Democratic Party ("NCDP Depo.") at 59:8-14 and also a political party as defined by North Carolina law, N.C. Gen. Stat. 163-96. The NCDP is organized on the principle that "it is the right of the people to associate with other people who share similar positions" and organize to advance their common interests. NCDP Depo. 20:15-19. Consistent with this principle, the NCDP has three major purposes: (a) to bring people together to develop public policies and positions favorable to NCDP members and the public generally; (b) to identify candidates who will support and defend these policies and positions; and (c) to persuade voters to cast their ballots for those candidates. FAC ¶ 2(c).

Fifteen individual plaintiffs are registered Democrats who regularly express their political and policy preferences by the votes they cast at congressional and other elections. One or more of these individual plaintiffs resides in each of the State's thirteen congressional districts. Three of these fifteen plaintiffs reside in the three congressional districts (1, 4 and 12) drawn by Defendants' to give Democratic candidates a significant electoral advantage. The other 12 Democratic Plaintiffs reside in the ten congressional districts (2, 3, 5, 6, 7, 8, 9, 10, 11 and 13) drawn by Defendants to give Republican candidates a significant electoral advantage. FAC ¶ 2(d)-(q), Answer ¶ 2(d)-(q).

The sixteenth individual plaintiff is a registered Republican who also regularly expresses his political and policy preferences by the votes he casts at congressional and other elections. He resides in CD 4 which, as noted above, was drawn by Defendants to give Democratic candidates a significant electoral advantage.

Defendants' adoption of the 2016 congressional redistricting plan caused two forms of concrete harm to these diverse plaintiffs. The first form of injury resulted from Defendants' deliberate decision to separate voters into congressional districts based on their political and policy preferences for the purpose of obtaining partisan dominance disproportionate to the electoral strength of the Republican Party. The second form of injury resulted from Defendants' deliberate decision to gain partisan dominance by constructing non-competitive congressional districts, ten of which provided Republican voters and candidates a distinct advantage and three of which provide solely Democratic voters and candidates with a distinct advantage.

A. The Harm of Partisan Dominance

The partisan dominance engineered by the 2016 Plan impacted the Plaintiffs in a number of ways, some overlapping and some distinct.

With regard to Common Cause, its central mission of accessible, open, and accountable government can hardly co-exist with districting designed to insulate representatives (of both parties) from true electoral accountability.

With regard to the NCDP, Defendants deliberate decision to draw the districts in a manner to achieve partisan dominance (10 Republicans in a 13 member congressional delegation) greatly disproportionate to the Republicans' electoral strength (typically around 50% of the statewide vote) has effectively thwarted the NCDP's capacity to achieve the very purposes for which it exists. Wayne Goodwin is Chairman of the NCDP. At his deposition he explained that Defendants' decision to "stack [ ] the deck" against Democrats and the NCDP had a "domino effect" successively imperiling each of the major purposes for which the NCDP is organized. NCDP Depo. 29:19-22; 56:16-17. As he explained, when districts are drawn so that there is no reasonable prospect of victory, candidates cannot be recruited to speak for Democrats; funds cannot be raised to persuade voters to endorse the policies and positions favored by members of the NCDP; and voters are discouraged from coming together to develop policies and practices for their common good. NCDP Depo. 42:3-6; 44:17-24; 56:9-57:10; 66:1-8; 97:22-98:9. When "legislative leaders dictate the outcomes before people have even gone to the polls," good candidates will choose not to run and voters will not have viable candidates

who share their policy preferences. NCDP Dep. 41:20-42:20; 60:23-61:16. These are practical and concrete injuries experienced—statewide and in each district in which it would otherwise compete—by the NCDP.

With regard to the 12 individual Democratic plaintiffs residing in the 10 districts where the deck was stacked in favor of Republicans, Defendants' actions dispersed their votes in a Republican sea, effectively nullifying the value of their votes and depriving them of the opportunity to elect a candidate of their choice and responsive to their needs. Plaintiff John McNeill, for example, lives in Red Springs in Robeson County. He has served on the Red Springs Town Council for more than 40 years. Deposition of John McNeill ("McNeill Depo.") at 8:10-19; 11:17-19. Robeson is a Democratic County and, until 2012, Robesonians had the opportunity to elect, and did elect, Democrats to Congress from CD 7 and 8. Under the 2016 map, citizens in Robeson and several other poor and rural counties along the South Carolina border have been artificially grafted onto CD 9 (where they are substantially outnumbered by highly Republican, wealthy, suburban voters in Union and Mecklenburg counties).

When asked how this configuration harmed him, Mr. McNeill responded: "I've lived in Robeson County all my life, a poor county, and, again, my feelings is for my neighbors and other communities as well. So if they suffer, I suffer. So, yes, I've been harmed." McNeill Depo. 26:4-8. Mr. McNeill then gave an example of how the absence of a reasonable opportunity to elect a candidate who shares their policy preferences views harmed him and his neighbors. "I love going to Charlotte, but it has little in common

with Robeson County and what our needs are." McNeill Depo. 26:16-18. CD 9 is represented by a businessman from Charlotte who has no concern for the needs of persons in the poor, rural counties joined with Charlotte. "Robeson county… was one of the lead counties in people signing up for Obama Care" and that opportunity was "very beneficial" to people "[i]n a low-income, rural community." Id. at 26:24-27:8. Congressman Pittenger from Charlotte, however, "voted in favor of doing away with" that important program for Robesonians. Because CD 9 has been engineered to elect a Republican candidate, Congressman Pittenger faces no electoral accountability for that policy position.

Likewise, the vote of the Republican plaintiff Morton Lurie, who resides in CD 4, has been diluted and his opportunity to elect a candidate who shares his policy preferences has been effectively nullified. As part of their scheme, Defendants stacked CD 4 with Democrats. That stacking diluted the value of Mr. Lurie's vote and resulted in his representation in Congress by David Price, with whom he has many policy disagreements. Deposition of Morton Lurie ("Lurie Depo.") at 25:8-24; 12:4-13:14. Because CD 4 has been engineered to elect a Democratic candidate, Congressman Price need not meaningfully consider his policy differences with Republicans like Mr. Lurie who are assigned to that district. Victory in any Democratic primary will be sufficient to ensure election over a Republican challenger.

B. The Harm of Non-Competitive Districts

All parties agree that none of the 13 districts drawn by Defendant in 2016 is competitive. See, e.g., Deposition of Douglas Berger ("Berger Depo.") at 6:18-20 ("[W]e really don't have any competitive [congressional] districts in the state of North Carolina."). Defendants' expert Gimpel agrees. Deposition of James Gimpel 85:23-87:5.

These congressional districts were made non-competitive by defendants' to facilitate their partisan dominance scheme. This caused a different form of harm than the partisan dominance scheme itself, and impacts all plaintiffs and every North Carolinian in the same manner. Plaintiff Coy Brewer, who was assigned by Defendants to CD9, explained this harm at his deposition as follows:

> In [non-competitive] districts, congressmen of both parties are not required to reach out to voters in the other party or even truly independent voters. By truly independent voters, I'm not talking about voters who are registered unaffiliated but who have a voting pattern that is certainly independent."
>
> "The congressmen representing those districts can rely upon their party's partisan advantage in getting elected, and therefore truly independent voters or voters of the other party tend, in my opinion, to be poorly represented because their views and their potential votes are not fairly considered by the congressmen of either party in these highly partisan districts in making decisions."
>
> "It tends to create a legislature that is fiercely partisan. It undermines the process of collaborative legislation. And in each of those districts, whether the partisan pattern is Democratic or Republican, voters of the other districts votes is diluted and does not have a meaningful impact in the electoral process.

Deposition of Coy Brewer ("Brewer Depo.") at 24:8 to 25:6.

All plaintiffs, regardless of the district to which they are assigned or their partisan affiliation, suffer when their representatives in congress can turn a deaf ear to them and ignore their votes.

CONCLUSIONS OF LAW

I. Introduction

The facts of this case are largely undisputed. The 2016 Contingent Congressional Redistricting Plan was drawn by Dr. Thomas Hofeller based on instructions from Defendants Sen. Rucho and Rep. Lewis that matched written criteria adopted by a straight party-line vote of the Joint Committee on Congressional Redistricting (the "Adopted Criteria"). Answer [Dkt 49] ¶ 19 (admitting that "the proposed plan followed all the criteria listed in the adopted criteria."); *see also* Hofeller Depo. 129: 4-15.

The Adopted Criteria required that "the only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests" ("Political Data"). The Adopted Criteria also specified that "data identifying the race of individuals or voters shall not be used in the construction of consideration of districts in the 2016 Contingent Congressional Plan." FAC [Dkt.12] ¶ 16-18, Answer [Dkt 49] ¶ 16-18.

Dr. Hofeller testified in *Harris v. McCrory* and reaffirmed in his deposition in this case that, among experts and social scientists, past election results are the best and most reliable method of predicting how a particular area is likely to vote in future elections and the most important information that can be used to give one party a partisan advantage in

the redistricting process. Hofeller Depo. 14:25-15:3, 16:8-12; *see also* Hofeller Depo. 131:22-132:13; *see also* Hofeller Ex. 16A, 18. Hofeller also testified in *Harris* and reaffirmed in his testimony in this case that,

> I've drawn numerous plans in the State of North Carolina over the decades… I know from experience that the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it. The only way the underlying political demographics … change in a precinct is if the precinct is changed in the nature of the people at are living in the precinct. So once a precinct is found to be a strong Democratic precinct, is probably going to act as a strong Democratic precinct in every subsequent election. The same would be true of republican precincts. So if you used a conglomeration of elections, my experience is you'd come up with the same—same result.

Harris v. McCrory, Trial Transcript 525. (Hofeller Ex 18 (p. 2)).

In drafting the 2016 Plan, Dr. Hofeller used the same strategy that he had used in drafting the 2011 congressional redistricting plan. Dr. Hofeller used the commercial mapping software Maptitude to color code Democratic or Republican voter districts ("VTDs") and counties based on their voting histories and then assigned them to districts that were designed to maintain the Republican Party's 10-3 partisan advantage. Dr. Hofeller packed Democratic counties and VTDs into three districts with large Democratic majorities, and separated the other Democratic VTDs and counties and disbursed them among districts with safe Republican majorities. Dr. Hofeller admits that the opportunity for Democratic voters to elect a candidate of their choice would be diminished in the ten districts in which he had increased Republican voting strength. Hofeller Depo. 128:17-21.

II. The Plaintiffs

Common Cause, the North Carolina Democratic party, thirteen Democratic voters and one Republican voter (hereafter referred to collectively as "Common Cause") have challenged the apportionments of each of North Carolina's thirteen individual congressional districts by the 2016 Contingent Congressional Redistricting Plan (the "2016 Plan") on the ground that each district is the result of an unconstitutional political gerrymander that violates the First Amendment (Count I), the Equal Protection Clause of the Fourteenth Amendment (Count II), and Article 1, § 2 (Count III) of the Constitution, and exceeds the authority granted by Article 1, § 4 (Count IV) of the Constitution.

The North Carolina Democratic Party has also challenged the constitutionality of the 2016 Plan as a whole. The Democratic Party is the primary target of the partisan gerrymander in the 2016 Plan. The purpose and effect of the 2016 Plan is to injure the Democratic Party as a state-wide political party and give the Republican Party a 10-3 state-wide partisan advantage for the remainder of this decade.

III. Partisan Gerrymanders Are Undemocratic.

The Supreme Court has recognized that "[p]artisan gerrymanders … are incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, __U.S. __, 135 S. Ct. 2653, 2658 (2015).

The fundamental objective of redistricting is to "establish 'fair and effective representation for all citizens.' " *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)). Political gerrymanders have the

opposite objective. The purpose of a political gerrymander is to "draw[] … legislative [or congressional] district lines to subordinate adherents of one political party and entrench a rival party in power." *Arizona State Legislature* __U.S. __, 135 S. Ct. at 2658; *see also Shapiro v. McManus*, 203 F. Supp. 3d 579, 592 (D. Md. 2016) (defining political gerrymandering as "'[t]he practice of dividing a geographical area into electoral districts to give one political party an unfair advantage by diluting the opposition's voting strength.' (quoting Black's Law Dictionary)"). Or, as one North Carolina legislator has admitted: "when it comes to apportionment, 'We are in the business of rigging elections.'" *Vieth v. Jubelirer*, 541 U.S. at 317.

Although the Court was divided 5-4 in *Vieth* as to whether partisan gerrymandering claims should be justiciable, even Justice Scalia and the other three Justices who thought that partisan gerrymander claims should not be justiciable conceded that, at a minimum, "severe" or "extreme" partisan gerrymanders are unconstitutional under the Equal Protection Clause. *Compare*: Justice Scalia's plurality opinion in *Vieth* (at 292-93) (stating that "we [the plurality] do not disagree … with the judgment that "severe partisan gerrymanders [are incompatible] with the democratic principles" and conceding "that an excessive injection of politics is unlawful,") with Justice Kennedy's concurring opinion (at 315-16), and with the dissenting opinions of Justices Stevens (at 326), Souter and Ginsburg (at 343) and Breyer (at 355).

IV. Partisan Gerrymanders Are Justiciable.

Plaintiffs' claims arise under the Constitution and are subject to the jurisdiction of the federal courts under 28 U.S.C. §1331. The Supreme Court has also held that claims that partisan gerrymanders violate the Constitution are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-28 (1986); *Vieth*, 541 U.S. at 309-10 (concurring opinion of Justice Kennedy, and those of the four dissenting justices); *LULAC v. Perry*, 548 U.S. 399, 413-14 (2006) ("We do not revisit the justiciability holding."); *Shapiro v. McManus* __ U.S. __, 136 S. Ct. 450, 456 (2015) (reversing the dismissal for want of jurisdiction a claim that a Democratic gerrymander of the Sixth Congressional District in Maryland violates the First Amendment); on remand, *Shapiro v. McManus*, 203 F. Supp. 3d 579, 592-94 (D. Md. 2016); *Whitford v. Gill*, __ F. Supp. 3d __, 2016 WL 6837229, at *25 (W.D. Wis. 2016); *see also Wright v. North Carolina*, 787 F.3d 256, 268-69 (4th Cir. 2015).

V. The Constitution Provides Judicially Manageable Standards that are Claim Specific.

The Constitution provides judicially manageable standards for the adjudication of partisan gerrymandering cases, just as in other cases in which violations of the Constitution are alleged. *Baker v. Carr,* 369 U.S. 186, 226 (1962); *INS v. Chadha*, 462 U.S. 919 (1983). These standards are claim-specific.

Political gerrymanders violate the First Amendment because they are content-based, discriminate between political parties, candidates, and voters based on their political viewpoints, and "'restrict [political] expression because of its message, its ideas, its subject matter or its content.'" *Reed v. Town of Gilbert,* 576 U.S. __, 135 S. Ct. 2218, 2218 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Political gerrymanders also violate the fundamental duty of government under the Equal Protection Clause of the Fourteenth Amendment to govern impartially. *New York City Transit Auth. v. Beazer,* 440 U.S. 568, 587 (1979); *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Political gerrymanders of congressional districts also violate Article I, § 2 of the Constitution because they give the legislature the power to dictate whether a Democrat or a Republican will be elected in an individual district, and deprive the people of the district the right to make that choice for themselves.

Last, but by no means least, political gerrymanders of congressional districts exceed the power delegated to state legislatures by the Elections Clause in Article I, § 4 of the Constitution to prescribe the "times, places, and manner of holding elections" of members of Congress. The Supreme Court has held that the Elections Clause is only "a grant of authority to issue *procedural regulations*" for the conduct of congressional elections, and is "*not [] a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints*." *Cook v. Gralike*, 531 U.S. 510, 523-25 (2001) (quoting *U.S. Term Limits v. Thornton,* 514 U.S. 779, 833-34 (1995)) (emphasis added).

VI. The Plaintiffs Have Standing.

Common Cause has standing to sue on behalf of its Democratic members who are registered to vote, whose votes have been effectively diluted or nullified and who have effectively been denied the opportunity to elect a Democratic candidate of their choice to

represent them in Congress as a direct result of their having been "cracked" by the 2016 Plan, sorted based on their political views and voting histories, and scattered and disbursed among the ten districts with safe Republican majorities. *See Friends of the Earth Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Common Cause also has standing to sue on behalf of its Republican members whose votes have likewise been effectively diluted or nullified and denied the opportunity to elect a Republican candidate of their choice to represent them in Congress as a result of their having been separated from other Republican voters by the 2016 Plan and isolated in Districts 1, 4 and 12 with large Democratic majorities.

The North Carolina Democratic Party has standing to sue on its own behalf for the injury to itself as a political party. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The North Carolina Democratic Party also has standing to sue on behalf of its Democratic members whose votes have been effectively diluted or nullified and who have been denied the opportunity to elect a Democratic candidate of their choice to represent them in Congress as a result of their having been "cracked" by the 2016 Plan, sorted based on their political views and voting histories and scattered and disbursed among the ten districts with safe Republican majorities.

The Democratic voters who are registered to vote as Democrats and who were "cracked," sorted, and disbursed by the 2016 Plan—based on their political views and voting histories—among one of the ten districts with safe Republican majorities have

standing to challenge the gerrymander of their individual congressional districts by the 2016 Plan, which dilutes or nullifies the effectiveness of their votes and deprives them of the opportunity to elect a Democratic candidate of their choice to represent them and their district.

Morton Lurie, who is a registered Republican voter who lives in Raleigh, also has standing because the effectiveness of his vote has been diluted or nullified and he has been denied the opportunity to elect a Republican candidate of his choice to Congress as a result of his having been placed in the Fourth Congressional District, which has been "packed" with Democratic voters where Mr. Lurie is certain to be outvoted.

VII. Plaintiffs' Claims are Not Foreclosed by the Results in *Davis v. Bandemer* or *Vieth v. Jubelirer*, or by the Dicta in the Racial Gerrymandering Cases.

Davis v. Bandemer and *Vieth v. Jubelirer* were challenges by individual voters to state-wide apportionment plans as a whole and were decided solely under the Equal Protection Clause. In neither case did the voters challenge the gerrymander of their individual districts, nor were the decisions in either case based on First Amendment claims or on Article I, §§ 2 or 4 of the Constitution. In both cases, the voters alleged that the state-wide reapportionment plans violated the Equal Protection Clause by depriving them and other Democratic voters of a fair share of representation in the Indiana legislature (*Davis*) or in Pennsylvania's congressional delegation (*Vieth*). In both cases, a majority of the Supreme Court ruled that the plaintiffs' partisan gerrymandering claims were justiciable, but rejected the plaintiffs' claims under the Equal Protection Clause on

the ground that individual voters have no right under the Constitution to proportional representation in the state legislature or in Congress.

In *Vieth*, Justice Kennedy cast the critical fifth vote in support of the decision to affirm the dismissal of the plaintiffs' Equal Protection challenge to the state-wide plans on the merits. Justice Kennedy, however, refused to agree with the plurality that partisan gerrymander claims are nonjusticiable and that *Davis v. Bandemer* should be overruled.

In so doing, Justice Kennedy suggested that—instead of the Equal Protection Clause—"[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering." He explained that allegations of partisan gerrymandering,

> involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party or their expression of political views …. Under general First Amendment principles those burdens … are unconstitutional absent a compelling government interest. … As these [First Amendment] precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering that means that First Amendment concerns arise where an apportionment has a purpose and effect of burdening a group of voters' representational rights.

541 U.S. at 314.

Justice Kennedy further stated that,

> The inquiry [under the First Amendment] is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there

> would likely be a First Amendment violation, unless the State shows some compelling interest.

Id.

And Justice Kennedy went on to explain that "The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining [political] party's voters for reasons of ideology, beliefs or political association … [and is] a pragmatic or functional assessment." *Id*. at 314-16; *see also* Justice Stevens's dissenting opinion in *Vieth, id*. at 324-25, to the same effect.

When Justice Kennedy said in *Vieth* that "all this depends on courts' having available a manageable standard by which to measure the effect of [an] apportionment," he was not referring to the need for a manageable *legal* standard by which to judge the constitutionality of a political gerrymander. *Id*. at 315. The First Amendment, the Equal Protection Clause, Article I, § 2, and Article I, § 4 each provide a separate "claim specific" legal standard for the adjudication of partisan gerrymandering claims. *See e.g*., *Baker v. Carr*, 369 U.S. 186, 226 (1962), and *INS v. Chadha*, 462 U.S. 919, 941-42 (1983). The legal standards under each provision are established by the Constitution itself, are well known, and have been applied by the federal courts for decades.

Thus, a majority of justices to consider the issue have concluded that partisan gerrymandering claims are justiciable. Furthermore, almost all essentially agree that, to succeed on a partisan gerrymandering claim, plaintiffs must prove both "intentional discrimination" against a particular political group and an actual "discriminatory effect" on that group. *See Bandemer*, 478 U.S. at 10. But to date, the Court has been unable to

agree on a "manageable" standard for assessing partisan gerrymandering claims and, in particular, how to identify and measure the discriminatory "effect" of a districting plan. *See Vieth*, 541 U.S. at 306-307 (Kennedy, J., concurring). As this court noted in its order denying Defendants' motion to dismiss, Justice Kennedy has identified two primary obstacles to establishing a consistent framework for adjudicating partisan gerrymandering claims: (1) the need to identify a fair "baseline" districting plan against which to assess the effects of a partisan gerrymander; and (2) the need to establish the requisite "deviation" from that baseline that would render a partisan gerrymander unconstitutional. *See Common Cause v. Rucho*, No. 1:16-CV-1026, 2017 U.S. Dist. LEXIS 30242, at *24-25 (M.D.N.C. Mar. 3, 2017) (citing *Vieth*, 541 U.S. at 306-308 (Kennedy, J., concurring)).

VIII. Plaintiffs Provide a Manageable Standard—And Present the Necessary Evidence—To Sustain a Claim of Unconstitutional Partisan Gerrymandering.

Justice Kennedy left open the possibility that lower courts, with the help of time and technological advances, would be able to fashion workable standards by which to identify an appropriate baseline and the degree of deviation that would render a map unconstitutional and warrant judicial intervention. In particular, Justice Kennedy noted that "the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities," and "may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the

1573892.1

burdens, with judicial intervention limited by the derived standards." *Vieth*, 541 U.S. at 312-13 (Kennedy, J., concurring).

Relying on such advances, plaintiffs here present concrete evidence that renders resolution of this case readily manageable. In neither *Bandemer* nor *Vieth* did the Court have the benefit of alternative maps generated pursuant to traditional districting principles, i.e., legitimate legislative objectives, that could serve as a fair "baseline" against which to measure the effects of the challenged plan. At the same time, in the racial gerrymandering context, the Court has highlighted the value of alternative maps as potentially "key evidence" in proving that the legislature engaged in an unconstitutional racial gerrymander. *See Cooper v. Harris*, 197 L.Ed.2d 837, 864 (U.S. 2017); *id.* at 875-87 (Alito, J., dissenting); *Easley v. Cromartie*, 532 U.S. 234, 252, 258 (2001).

Here, unlike the prior partisan gerrymandering cases in the Supreme Court, plaintiffs present evidence—sets of alternative reasonable maps—that overcomes the two hurdles identified by Justice Kennedy in *Vieth* in establishing a manageable standard for identifying an unconstitutional effect from partisan gerrymandering. Plaintiffs' experts have generated sets of alternative maps drawn using traditional districting, while excluding partisan considerations. These alternative maps establish a fair and reasonable baseline against which the 2016 Plan can be compared and demonstrate to a high degree of statistical certainty that the 2016 Plan is a sufficiently dramatic deviation from the reasonable baseline that it must constitute a constitutional violation.

Dr. Jowei Chen, a political scientist, has generated three sets of 1,000 alternative redistricting simulations using all of the traditional redistricting criteria reflected in the General Assembly's Adopted Criteria, but excluding partisan considerations. In one set, Dr. Chen generated maps that matched or exceeded the 2016 Plan on all criteria excluding consideration of partisan data and protection of incumbents. In a second set, Dr. Chen did the same thing except that he ensured that incumbents were protected in the maps (more effectively than the 2016 Plan did, by ensuring that none of the 13 incumbents was paired with another incumbent). In a third set, Dr. Chen once again excluded partisan data and protected incumbents, but rather than exceeding the 2016 Plan's performance, these maps only matched its performance by pairing 2 of the 13 incumbents and including 13 county splits (instead of 12). In each of his three sets of 1,000 maps, using the same past election data used by the General Assembly and prescribed by the Adopted Criteria, not a single alternative map resulted in a 10-3 Republican seat advantage. This analysis shows that it is a virtual statistical impossibility to end up with a map that generates a 10-3 Republican advantage using traditional redistricting criteria. In other words, the deviation between the 2016 Plan and the baseline established by Dr. Chen's maps cannot be explained without partisan considerations.

Professor Jonathan Mattingly, Professor of Mathematics and Statistical Science at Duke University, has independently developed his own methodology for generating a range of random redistrictings using traditional criteria and assessing what the partisan

outcomes would have been under each of those maps. As with Dr. Chen's analysis, Dr. Mattingly's set of randomly-generated redistrictings establish a baseline against which the actual 2016 Plan can be compared. Dr. Mattingly has generated more than 24,500 alternative redistrictings based on traditional redistricting criteria that are similar to the Adopted Criteria, but excluding partisan considerations and including compliance with the Voting Rights Act (by ensuring that at least two districts meet or exceed the Black Voting Age Population of the two districts in the 2016 Plan with the highest Black Voting Age Populations). His analysis shows, like Dr. Chen's results, that there are essentially no maps among the more than 24,500 simulated maps Dr. Mattingly generated that would have resulted in a congressional delegation composed of 10 Republicans and 3 Democrats.

This type of analysis has been received favorably by the 4th Circuit in other recent redistricting challenges. In *Raleigh Wake Citizens Ass'n v. Wake County Board of Elections*, 827 F.3d 333 (4th Cir. 2016), the Court described Dr. Chen's analysis as follows:

> Dr. Chen's computer simulations are based on the logic that if a computer randomly draws five hundred redistricting plans following traditional redistricting criteria, and the actual enacted plans fall completely outside the range of what the computer has drawn, one can conclude that the traditional criteria do not explain that enacted plan. . . . The computer simulations led Dr. Chen to just that conclusion: that the "enacted districting plans create a partisan distribution of seats falling completely outside the range of outcomes that are possible under a non-partisan districting process that creates equally populated districts while maximizing compactness and preserving precinct and municipal boundaries." Dr. Chen thus concluded "with extremely high statistical certainty, beyond any sort

> of doubt here" that "the only way to draw districts as extreme in partisanship as the legislature's B and A districts is to use population deviations" that are high. In other words, Dr. Chen testified that he could conclude with certainty from his simulations that the deviations at issue here are the result of using partisanship in apportioning the districts. . . . The point is not that the simulated plans are legally required, but rather that they help demonstrate what might explain the population deviations in the enacted plan. . . . The import of Dr. Chen's simulations was not to produce better plans, but rather to hold several legitimate apportionment considerations constant so that Dr. Chen could assess whether the population deviations in the challenged plans could have been the product of something other than partisan bias. He concluded "with extremely high statistical certainty, beyond any sort of doubt here" that they could not have.

Id. at 344 (internal citations omitted). Prof. Chen's analysis has been accepted recently in other courts as well. *See, e.g.*, Romo v. Detzner, Fla. 2d Judicial Cir. Leon Cnty. 2013; The League of Women Voters of Florida v. Detzner, Fla. 2d Judicial Cir. Leon Cnty. 2012; Brown v. Detzner (N.D. Fla. 2015).

The maps that plaintiffs' experts will present at trial address all three prongs of any constitutional analysis: (1) an intent to gerrymander; (2) the effects of the gerrymander; and (3) the lack of any justification for the gerrymander.

As to intent, in this case there is ample direct evidence that the General Assembly intended to give Republicans an advantage—it is an express criterion in their Adopted Criteria and the drafters of the 2016 Plan have admitted as much in public statements and court filings. This overwhelming evidence of their intent to create a partisan gerrymander is nonetheless buttressed by the plaintiffs' experts' analyses, which show

that the 2016 Plan could not have been drawn without intentionally prioritizing partisan considerations.

The plaintiffs' experts' alternative maps also demonstrate that the 2016 Plan had the effect of disadvantaging and burdening Democrats, because the actual map that was generated to preserve a 10-3 Republican advantage (and did in fact preserve that advantage) was far outside of the range of reasonable maps that could have been drawn without partisan considerations. In other words, the alternative maps demonstrate that the General Assembly's prioritization of partisan advantage had the effect of generating a map that disadvantages Democrats in a way that could not have been achieved but for those partisan considerations.

Finally, the experts' maps provide evidence that the 2016 Plan cannot have been justified by a legitimate governmental interest in adhering to any traditional districting criteria—because all of the alternative maps that adhere to traditional districting criteria but exclude partisan considerations yield a less favorable share of seats for Republicans. So the only justification for the 2016 Plan is the desire to give a Republicans a partisan advantage, which is not a legitimate justification.

As Justice Kennedy foresaw in *Vieth*, the advent of new technology has brought forward a process for generating fair maps to use as a baseline and to establish the degree of deviation that renders a partisan gerrymander unconstitutional. The maps generated by Drs. Chen and Mattingly do just that.

IX. The 2016 Plan Violates the First Amendment.

A. The Applicability of the First Amendment to Partisan Gerrymandering Claims Remains an Open Question.

In *Shapiro v. McManus*, __ U.S. __136 S. Ct. 450, 456 (2015), the Supreme Court unanimously reversed the dismissal for want of jurisdiction of a *pro se* complaint that challenged a Democratic gerrymander of one of two congressional districts in Maryland under the First Amendment "along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." If the constitutionality of partisan gerrymandering had been foreclosed by the decisions in *Davis* and *Vieth* — or by the references to partisan gerrymandering as a defense to a showing of predominance in racial gerrymandering cases — the Supreme Court would have affirmed, rather than reversed the decision of the lower courts in *Shapiro*.

On remand, the three-judge district court denied the State's motion to dismiss the plaintiffs' First Amendment claims. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595-97 (D. Md. 2016). The court held that "when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them. . . . The 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 they have expressed through their voting histories and party affiliations infringes this representational right."; and *see Whitford v. Gill*, __ F. Supp. 3d __, 2016 WL 6837229 (W.D. Wis. 2016) (holding the partisan gerrymander of the Wisconsin

legislature to be unconstitutional under the Equal Protection Clause and First Amendment).

B. The First Amendment Protects the Right to Vote for the Candidate and Political Party of One's Choice.

The primary purpose of the "First Amendment was … to protect a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern" (*Elrod v. Burns*, 427 U.S. 347, 372 (1976)) and "has its fullest and most urgent application [] to … campaigns for political office." *McCutcheon v. FEC*, 572 U.S. __, 134 S. Ct. 1434, 1441 (2014).

"[P]olitical belief and association constitute the core of … those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. at 356. "The right to vote freely for the candidate of one's choice is [] the essence of a democratic society and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

"[No] right [is] more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon,* 134 S. Ct. at 1434. The right of "constituents [to] support candidates who share their beliefs [is] a central feature of democracy" and is protected by the First Amendment. *Id*. at 1441. Other constitutional rights, even the most basic, "are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The First Amendment guarantees political speech. The right to vote is the ultimate form of political speech and is the primary means of communication between the vast

majority of the American people and their elected representatives in Congress. Americans also have as much right under the First Amendment to petition government for "redress of grievances" through the ballot box, as they have to sign on-line petitions, or participate in marches or other demonstrations. The right to join a political party and to support candidates of one's choice without fear of penalty or retaliation are also protected by the right to "peaceably assemble" in the First Amendment and are also "core … activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. at 356.

The First Amendment prohibits the party in power from "prescrib[ing] what shall be orthodox in politics" (*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); from rewarding its political supporters or retaliating against supporters of the opposing party or parties in hiring, firing or promotions, on in awarding government contracts. *Elrod v. Burns*, 427 U.S. at 356; *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Bd. of Cty. Comm'rs of Wabaunsee Cty, Kan. v. Umbehr*, 518 U.S. 668 (1996).

The First Amendment also prohibits the party in power from adopting ballot access laws that make it more difficult for opposition parties to gain access to the ballot, or other election laws or regulations that are designed to give the party in power a partisan advantage. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Am. Party of Tex. v. White,* 415 U.S. 767, 785 (1974); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Political gerrymanders are fundamentally at odds with all of these basic First Amendment principles.

C. Partisan Gerrymanders are Subject to Strict Scrutiny Under the First Amendment Because They are Content-Based.

"Government," including the North Carolina legislature, "has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Reed v. Town of Gilbert*, 576 U.S.__, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

"Content-based laws … that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. at 2226 (citing *RAV v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991)); *see also United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537, 2543-44 (2012); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980).

The 2016 Plan is content-based. The 2016 Plan assigns voters to districts based on "political data" reflecting the contents of votes cast in past elections in individual VTDs in favor of Democratic or Republican candidates. Dr. Hofeller testified in both *Harris* and in this case that past voting behavior is the best predictor of whether the voters in those VTDs were likely to vote for Democratic or Republican candidates in future elections for the remainder of the decade. Dr. Hofeller used this political data to identify and sort Democratic-leaning and Republican-leaning VTDs and counties into districts,

and stacked the political deck to preserve the Republicans' 10-3 partisan advantage. Dr. Hofeller packed as many Democratic VTDs and counties into three districts that contain counties with large concentrations of Democratic voters (District 1, 4 and 12). He cracked, sprinkled, and disbursed the remaining Democratic VTDs and counties among ten districts with safe Republican majorities. The 2016 Plan worked precisely as Sen. Rucho, Rep. Lewis, and DR. Hofeller intended. It resulted in the election of 10 Republicans and only 3 Democrats to Congress in the 2016 general election.

D. The Partisan Gerrymandering of the 2016 Plan is Not Viewpoint Neutral and is Thus a More Egregious and Blatant Violation of the First Amendment.

The 2016 Plan is an even more egregious and blatant violation of the First Amendment because it is not viewpoint neutral. The intended purpose and the effect of the 2016 Plan is to discriminate against and penalize the Democratic party, Democratic candidates, and Democratic voters based on their political beliefs, political party affiliations, and voting histories—all in order to place the Democrats at a political disadvantage *vis-à-vis* the Republican Party, Republican candidates for Congress, and Republican voters in those districts, and to "burden" the Democrats by making it more difficult for them to elect candidates of their choice in each of those districts.

> *When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant*. (citation omitted). *Viewpoint discrimination is thus an egregious form of content discrimination*. The government must abstain from regulating speech when the specific motivating ideology, or the opinion or perspective of the speaker is the rationale for the restriction.

1573892.1

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (emphasis added); *Reed v. Town of Gilbert*, 575 U.S. __, 135 S. Ct. 2218, 2230 (2015) ("[D]iscrimination among viewpoints —or the regulation of speech based on 'the specific motivating ideology or opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'").

These were well-established First Amendment principles on which Justices Kennedy and Stevens relied in their concurring and dissenting opinions in *Vieth.* 541 U.S. at 314-16, 324.

In *Vieth*, Justice Kennedy rejected the assertion in Justice Scalia's opinion that only "excessive" partisan gerrymanders are unconstitutional under the Equal Protection Clause. Justice Kennedy warned that "courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined." 541 U.S. at 316. Justice Kennedy illustrated his point with two examples. "Consider" he said, "these apportionment schemes: In one State, Party X controls the apportionment process and draws lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process [but] is not so blatant and egregious, but proceeds by a more subtle effort, capturing less than all of the seats in each State," but enough seats to give Party Y a majority. In my view … each is culpable." *Vieth, id*. at 316.

The debate between Justices Kennedy and Scalia over the severity or extreme nature of a political gerrymander was in the context of the Equal Protection Clause, and

has no application to plaintiffs' claims under the First Amendment, under Article I, § 2 or Article I, § 4 of the Constitution. Strict scrutiny under the First Amendment does not depend on whether the burden on First Amendment rights is "severe" or "extreme." "[T]he First Amendment … protects state employees not only from patronage dismissals but 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee … when intended to punish her for exercising her free speech rights.'" *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990). A little bit of content-based viewpoint discrimination is not OK under the First Amendment. Statutes that are content-based or that discriminate between voters of political parties based on their political viewpoints are subject to strict scrutiny under the First Amendment and are presumed to be unconstitutional unless the state can show that they are justified by a compelling state interest that is both legitimate and narrowly tailored.

In *Reed v. Town of Gilbert*, for example, the small town's sign ordinance was viewpoint neutral in that church directional signs were not treated any differently from other directional signs. The Court did not ask whether the limitation on the size or duration of directional signs *vis-à-vis* other signs imposed a severe or extreme burden on the Good News Community Church or on its pastor, Reverend Reed. There is nothing in the opinion that indicates that anyone was prevented from finding or attending services at the little church, or that church attendance or revenues had declined. Even though the ordinance was viewpoint neutral, the Court held that the ordinance was subject to strict

scrutiny under the First Amendment because it was content-based, and declared the ordinance unconstitutional because it was not justified by a compelling state interest.

The Court does not have to resolve this issue in this case because there is abundant evidence in this case that the 2016 Plan imposes a "severe" and "extreme" burden on the representational rights of the Democratic party, Democratic candidates for Congress and on likely Democratic voters in 10 of North Carolina's congressional districts by denying them the opportunity to elect Democratic candidates of their choice to Congress from each of the ten districts.

E. Defendants Cannot Carry Their Burden of Proving that the Partisan Gerrymander is Justified by State Interest that is both Legitimate and Compelling and is Narrowly Tailored.

The defendants cannot carry their burden of proving that the 2016 Plan was intended to further a *legitimate* state interest, much less a state interest that is also compelling and "narrowly tailored" which is required to survive strict scrutiny under the First or Fourteenth Amendments.

The desire on the part of the majority party in the North Carolina legislature to preserve its 10-3 partisan advantage and "to harm a politically [weak or] unpopular group cannot constitute a *legitimate* governmental interest." *Romer v. Evans,* 517 U.S. 620, 634 (1996) (emphasis in the original) (quoting *United State Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973)); *see also City of Cleburne v. Cleburne Living Ctrs., Inc*., 473 U.S. 432, 446-47 (1985).

In the closely analogous context of the one-person-one vote cases, courts have held that partisanship is not a legitimate state interest that will justify an otherwise permissible ± 5% departure within from the requirement in *Reynolds v. Sims* that state legislative and local commission and school board districts contain populations that are as nearly equal as possible. In *Cox v. Larios*, 542 U.S. 947 (2004), for example, the Supreme Court summarily affirmed a ruling by a three-judge district court that had held that a partisan desire on the part of the Democratic majority of the Georgia legislature to give Democratic incumbents and Democratic voters a partisan advantage was not a "legitimate reapportionment factor" and could not justify its systematic under-population of Democratic districts and overpopulation of Republican districts. *See also Harris v. Arizona Independent Redistricting Comm'n*, 578 U.S. __, 136 S. Ct. 1301, 1310 (2016), in which the Supreme Court assumed "that partisanship is an illegitimate factor" that could not be used to justify a population deviation of less than 10%; *Wright v. North Carolina*, 787 F.3d 256, 267 (4th. Cir. 2015), and *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 341 (4th Cir. 2016) (both applying *Cox*).

If partisan political advantage is not a legitimate state interest that can justify otherwise permissible departures within ± 5% from the one-person-one-vote rule, partisanship cannot be a legitimate state interest, much less a narrowly tailored and compelling state interest, that will justify a partisan gerrymander that violates the First Amendment, or other provisions of the Constitution.

X. The 2016 Plan Also Violates the Equal Protection Clause of the Fourteenth Amendment.

Political gerrymanders violate a fundamental principle established by the "Equal Protection Clause … [that] *the State must govern impartially.*" *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (emphasis added); *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government … remain open on *impartial terms* …") (emphasis added).

> When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interest of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, or political—that may occupy a position of strength … or to disadvantage a politically weak segment … they violate the constitutional guarantee of equal protection.

Karcher v. Daggett, 462 U.S. 725, 748 (1983) (Stevens, J. concurring); *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell J. dissenting).

There can be no doubt that the 2016 Plan violates the State's duty imposed by the Equal Protection Clause to govern impartially. The 2016 Plan is also a textbook example of a law that is intended to make it "more difficult for one group of citizens"—Democrats—"than … others"—Republicans- "to seek aid from the government is itself a denial of equal protection … in the most literal sense." *Romer v. Evans,* 517 U.S. at 633.

The 2016 Plan is subject to strict scrutiny under the Equal Protection Clause because it impinges on the personal rights as citizens in a free and democratic society to run for office and elect candidates of their choice without partisan interference by state government or state actors. *City of Cleburne v. Cleburne Living Ctrs., Inc.,* 473 U.S. at

440 (strict scrutiny "is due when state laws impinge on personal rights protected by the Constitution."); *see also Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292, 2309 (2016) (holding that it is "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where … economic legislation is at issue.").

The Supreme Court has also rejected the view in racial gerrymander cases "that strict scrutiny does not apply where a State respects or complies with traditional redistricting principles." *Bethune-Hill v. Virginia State Board of Elections*, 580 US__, __S.Ct. __(2017) (internal punctuation omitted). Nor is "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order … to establish a claim of racial gerrymandering" under the Equal Protection Clause, *Bethune-Hill,* 580 US __, __S.Ct. at __. Nor should it be in a political gerrymandering case.

Assuming that proof of "predominance" is required to invoke strict scrutiny of the 2016 Plan under the Equal Protection Clause, the evidence is more than sufficient to prove that "partisan advantage" predominated over the neutral redistricting criteria — compactness, keeping counties whole and protecting incumbents from having to run against each other ("double bunking") — specified in the Adopted Criteria. *See e.g. Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Alabama Black Legislative Caucus v. Alabama*, 575 U.S. __, 135 S. Ct. 1257 (2015); and *Harris v. Arizona Independent Redistricting Comm'n*, 578 U.S. __, 136 S. Ct. at 1307 (requiring proof of the

predominance of illegitimate reapportionment factors rather than the "'legitimate considerations' … referred [to] in *Reynolds* and later cases."); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections,* 827 F.3d at 345 (holding that an "'intentional effort' to create a 'significant partisan advantage'" showed "the predominance of a[n] illegitimate reapportionment factor" (quoting *Larios v. Cox*, 542 U.S. 947, 947-49 (2004)); *see also*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("Nor … can legislatures restrict access to the franchise based on the desire to benefit a certain political party.") (citing *Anderson*, 460 U.S. at 792-93).

Even if partisan advantage is only one of the purposes of the 2016 Plan, but is not the predominant purpose of the 2016 Plan, the 2016 Plan is still subject to the highest level of scrutiny under the *Anderson-Burdick* "sliding-scale." *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). "Sliding-scale" scrutiny applies only to election regulations that are both "reasonable" and "non-discriminatory." The purpose of political gerrymanders in general, and the 2016 Plan in particular, is to *discriminate* for "partisan advantage" between political parties and voters and cannot qualify for sliding scale review under *Anderson-Burdick*, but instead remain subject to strict scrutiny.

The Court need not decide whether the 2016 Plan is subject to strict scrutiny or sliding-scale scrutiny under the Equal Protection Clause, however, because the 2016 Plan fails constitutional muster even under "rational basis" review. "The word 'rational' … includes elements of legitimacy and neutrality that must always characterize the

performance of the sovereign's duty to govern impartially." *City of Cleburne v. Cleburne Living Ctrs., Inc.*, 473 U.S. at 452. A law that violates the duty of government to govern impartially (*New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979)) or is motivated by a desire on the part of the party in power "'to harm a politically [weak or] unpopular group cannot constitute a *legitimate* governmental interest.'" *Romer v. Evans*. 517 U.S. at 634-35 (1996) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

XI. The 2016 Plan Also Violates Article I, Section 2 of the Constitution.

The 2016 Plan violates Article I, § 2 of the Constitution, which requires that the "House of Representatives shall be composed of Members *chosen … by the People*" of each State. Article I, § 2 is the source of the one-person-one-vote rule in *Wesberry v. Sanders*, 376 U.S. 1 (1964), and is an "important constitutional restraint" on the power of state legislatures to apportion congressional districts.

The House of Representatives was intended by the Framers of the Constitution to be "the people's House," unlike the Senate whose members were not (prior to the adoption of the Seventeenth Amendment more than 125 years later in 1913) chosen by the people in each state, but were required by Article I § 4 of the Constitution to be chosen "by the Legislature thereof."

The decision whether to allow the people of each state to elect members of the House of Representatives or to vest that power in the legislatures of each state in the

same manner as Senators were chosen, was one of the most hotly contested issues at the Constitutional Convention and was resolved as a part of the Great Compromise.

The Framers of the Constitution did not intend to allow the legislatures in each state to use the power delegated to them by the Elections Clause (Article I, § 4) to prescribe "the times, places and manner of elections" of members of the House and Senate, to evade the requirement in Article I § 2 that members of the House of Representatives be chosen by the people; nor did the Framers intend to give the State legislatures the power to "dictate electoral outcomes" in Congressional elections, or to choose Representatives *for* the people in their states. *U.S. Term Limits v. Thornton*, 514 U.S. 799, 833-34 (1995); *Cook v. Gralike*, 531 U.S. 510, 526 (2001).

To the contrary, "[T]he Framers understood the Elections Clause as a grant of authority to [state legislatures] to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates or to evade important constitutional restraints." *U.S. Term Limits v. Thornton*, 514 U.S. at 833-34; *Cook v. Gralike*, 531 U.S. at 527.

The 2016 Plan violates Article I, § 2 of the Constitution by allowing the North Carolina General Assembly (or more accurately the Republican majority in the General Assembly) to dictate that the only candidates that have a reasonable opportunity of being elected to represent the people in Districts 2, 3, 5, 6, 7, 8, 9, 10, 11, and 13 in the House of Representatives are Republicans, and that only candidates who will have a reasonable

opportunity to be elected to represent the people in Districts 1, 4 and 12 will be Democrats.

XII. The 2016 Plan Also Violates Article I, Section 4 of the Constitution.

Even if the 2016 Plan did not violate any of the other provisions of the Constitution, the 2016 Plan clearly violates the limitations imposed by the Elections Clause in Article I § 4 of the Constitution on the Legislature's power to redistrict the State into congressional districts.

The Elections Clause provides that "the times, places and manner of holding elections of Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I § 4.

In *United States Term Limits v. Thornton*, 514 U.S. 779, 805 (1995), the Supreme Court held and reaffirmed again in *Cook v. Gralike*, 531 U.S. 510, 522 (2001), that State legislatures have no reserved powers to regulate federal elections of Senators or Representatives and have only the powers delegated to them by the Elections Clause. *Cook v. Gralike*, 531 U.S. at 522 ("The federal offices at stake arise from the Constitution itself [citation omitted]. Because any state authority to regulate the election to those offices could not precede their very creation by the Constitution, such power had to be delegated to [the States], rather than reserved by, the States.") (internal punctuation omitted).

The Supreme Court also held in both cases that: "[t]he Framers understood the Elections Clause as a grant of authority to issue *procedural regulations*, and not a source

1573892.1

of power *to dictate electoral outcomes, to favor or disfavor a class of candidates*, or to evade important constitutional restraints." *US Term Limits v. Thornton*, 514 U.S. at 833-34; *Cook v. Gralike*, 531 U.S. at 524 (emphasis added).

In *Cook v. Gralike*, the Court held invalid, under the Elections Clause, Article VIII of the Missouri constitution which was adopted by a popular referendum of the voters. Article VIII required the Missouri Secretary of State to print on the primary and general election ballots by the name of each candidate running for election to the U.S. Senate or House of Representatives, *truthful information* about each candidate's position on a "term limits" amendment to the U.S. Constitution.

The Court recognized that "Article VIII furthers the State's interest in adding a term limits amendment to the Federal Constitution [and] … encourages the election of representatives who favor such an amendment." 531 U.S. at 518. Even though Article VIII had been adopted by a referendum of the people of Missouri, the Supreme Court held that Article VIII exceeded the power delegated to the States by the Elections Clause to adopt procedural regulations for the conduct of federal elections. The Court held that, "Article VIII [was] plainly designed to favor candidates who are willing to support the … term limits amendment … and to disfavor those who either oppose term limits entirely or would prefer a different proposal …." [T]he adverse labels handicap candidates "at the most crucial stage in the election process …" [and] surely place their targets at a political disadvantage … [and is intended] to "dictate electoral outcomes." 531 U.S. at 524-26.

Justice Kennedy emphasized in a concurring opinion that States "simply lack[] the power" under the Elections Clause "to impose any conditions on the election of Senators or Representatives, *save neutral provisions* as to the time, place and manner of elections pursuant to Article I, § 4." 531 U.S. at 527 (emphasis added).[9]

The 2016 Plan is the trifecta of violations of the Elections Clause that are far more serious and offensive to the Constitution and democratic values than those in Article VIII of the Missouri constitution. The 2016 Plan (1) "dictates electoral outcomes" by gerrymandering the districts to ensure that a Republican will be elected in each of ten districts and a Democrat will be elected in the other three districts; (2) favors one class of candidates (Republicans in ten districts and Democrats in the other three districts—and disfavors a class of candidates—Democrats in ten districts and Republicans in three districts; and (3) attempts to "evade [other] important constraints," including those imposed by the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the requirement in Article I, § 2 that Representatives be chosen "*by* the people," and not chosen *fo*r the people by the legislature.

Cook v. Gralike and *U.S. Term Limits v. Thornton* are controlling and require not only that the 2016 Plan be declared invalid under the Elections Clause, but that the State of North Carolina and the General Assembly be permanently enjoined from violating the Elections Clause in the future by gerrymandering or attempting to gerrymander congressional districts for partisan political purposes.

[9] The other two members of the Court (Chief Justice Rehnquist and Justice O'Connor) would have declared Article VIII invalid under the First Amendment.

CONCLUSION

The Court should declare the 2016 Plan to be an unconstitutional political gerrymander and issue a permanent injunction prohibiting the State of North Carolina not only from conducting any future primary or general elections for members of the United States House of Representatives under the 2016 Plan, but also prohibiting the State and its General Assembly from adopting any future congressional redistricting plans that are not politically neutral or which violate the First Amendment, the Fourteenth Amendment, Article I, § 2, or the limitations imposed by the Elections Clause of the Constitution.

Respectfully submitted, this 5th day of June, 2017.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.
North Carolina Bar No. 4112
Steven B. Epstein
North Carolina Bar No. 17396
Caroline P. Mackie
North Carolina Bar No. 41512
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 1900
Raleigh, North Carolina 27601
espeas@poynerspruill.com
sepstein@poynerspruill.com
cmackie@poynerspruill.com

/s/ Emmet J. Bondurant
Emmet J. Bondurant
Georgia Bar No. 066900
Jason J. Carter
Georgia Bar No. 141669
Benjamin W. Thorpe

Georgia Bar No. 874911
BONDURANT, MIXSON & ELMORE, LLP
1201 W. Peachtree Street, NW, Suite 3900
Atlanta, Georgia 30309
Telephone (404) 881-4100
Facsimile (404) 881-4111
bondurant@bmelaw.com
carter@bmelaw.com
bthorpe@bmelaw.com

/s/ Gregory L. Diskant
Gregory L. Diskant
New York Bar No. 1047240
Peter A. Nelson
New York Bar No. 4575684
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Facsimile: (212) 336-2222
gldiskant@pbwt.com
pnelson@pbwt.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 5th day of June, 2017.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.

1573892.1