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

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

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

I. INTRODUCTION

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

Accordingly, this Court should adopt defendants' proposed findings of fact and conclusions of law and dismiss plaintiffs' claims in this action.[1]

II. FINDINGS OF FACT

A. Enactment of the 2016 Contingent Congressional Plan

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

[1] Defendants request an opportunity to update these proposed findings of fact and conclusions of law at the conclusion of the trial in this matter.

Cooper v. Harris, 581 U.S. ___ (2017). In its opinion, the district court directed the North Carolina General Assembly to enact plans to remedy these violations no later than February 19, 2016.

2. Following the decision in *Harris*, the main goal of North Carolina's legislative leaders was to pass a new plan that would not violate the judgment entered in *Harris.* Thus, shortly following the decision by the *Harris* court, two of the legislative leaders, Senator Bob Rucho and Representative David Lewis, met with their mapdrawing consultant, Dr. Hofeller. Redistricting concepts were discussed with Dr. Hofeller as leaders made plans to comply with the Court's order. Dr. Hofeller also drew conceptual maps on his personal computer.

3. On February 15, 2016, public hearings were held in six different locations. Input was also received from voters who submitted comments through the General Assembly website. Partisan statements were given by persons who supported the districts declared illegal by the Court as well as comments from persons who agreed with the Court's decision. Many persons asked that new districts be based upon whole counties and that precincts not be divided into different districts. Other speakers recommended that the serpentine Congressional District ("CD") 12 be eliminated from any new plan and requested that race not be used as a criteria.

4. The General Assembly received this feedback and incorporated it to the extent possible in the mapdrawing process in light of the very short amount of time allowed by the district court to enact a new plan. On February 16, 2016, the General

Assembly's Joint Select Committee on Redistricting ("Joint Committee") met to consider criteria for a new congressional plan. The Joint Committee consisted of nineteen Senators and nineteen Representatives. During the proceedings, the Joint Committee considered and then adopted criteria to be used in drawing a new congressional plan. The criteria included:

- "Equal Population." The Joint Committee adopted this criterion with only one dissenting vote.
- "Contiguity." The Joint Committee unanimously adopted this criterion.
- "Political data: the only data other than population to be used shall be election results in statewide elections since 2008, not including two presidential contests. Data identifying race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan. Voting Districts, referred to as VTDs, should be split only when necessary to comply with the zero deviation population requirement set forth above in order to ensure the integrity of political data." The Joint Committee adopted this criterion by a vote of 23 to 11.
- "Partisan Advantage: The partisan makeup of the Congressional delegation under the [2011] enacted plan is 10 Republicans and 3 Democrats. The committee shall make reasonable efforts to

construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's Congressional delegation." The Joint Committee adopted this criterion by a vote of 23 to 11.

- "12th District: The current General Assembly inherited the configuration of the 12th District from past General Assemblies. The configuration was retained . . . because the district had already been heavily litigated over the past two decades, and ultimately approved by the courts. The *Harris* court has criticized the shape of the 12th District, citing the serpentine nature. In light of this, the Committee shall construct districts in the 2015 [*sic*] Contingent Congressional Plan that eliminate the current configuration of the 12th District." The Joint Committee adopted this criterion by a vote of 33 to 1.
- "Compactness: In light of the *Harris* court's criticism of the compactness of the 1st and 12th districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall be made for reasons of equalizing population, consideration of incumbency, and political impact. Reasonable efforts shall be made not to divide a county into

more than two districts." The Joint Committee adopted this criterion by a vote of 27-7.

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

5. During the discussion over the criteria, the legislative leaders confirmed several important points. In drawing the new plan, Representative Lewis stated that the criteria would not be ranked in order of importance, that "drawing maps is largely a balancing act," and "that making reasonable efforts would not include violating any of the other criteria . . . ." On the issue of contiguity, Representative Lewis added that the concept of "point contiguity" would not be used. [2]

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

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

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

8. Following the conclusion of the Joint Committee's meeting on February 16, 2016, Dr. Hofeller downloaded a concept for a congressional plan from his personal computer to a computer maintained by the General Assembly. Dr. Hofeller then used the state's computer to complete a congressional map that followed the criteria adopted by the Joint Committee.

9. On February 17, 2016, Representative Lewis presented the proposed 2016 congressional map to the Joint Committee. Representative Lewis explained how the proposed map complied with the criteria adopted by the Joint Committee on February 16, 2016. Representative Lewis stated that race was not considered and that racial statistics were not included in the statistical reports provided to the Joint Committee. Representative Lewis stated that the map was "a weaker map" for Republicans as compared to the 2011 plan, but that the 2016 plan gave an opportunity to maintain the partisan make-up of the current congressional delegation. He stated that the map eliminated the serpentine CD 12 and that the map divided only 13 counties and 13 VTDs (or precincts).[3] Representative Lewis also explained that only two incumbents

[3] Of the thirteen divided counties, 11 were counties with a population of 100,000 or more. Thus, smaller counties with populations under 100,000 were general wholly included in a specific district.

(Democratic Congressman David Price and Republican Congressman George Holding) were placed in the same district and that all of the other eleven members of Congress were placed in districts by themselves.

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

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

12. On Thursday, February 18, 2016, the proposed 2016 Plan was reviewed and approved by the Senate Redistricting Committee. Senator Rucho began the meeting by

confirming that Senator McKissick had received the report he had requested showing the registration and racial statistics for all of the proposed districts. Senator Rucho advised that the plan was being offered to comply with the Court's Order in *Harris*. Representative Lewis was invited by the Senate to appear before the Committee, and he again explained the criteria used to draw the map. Senator Harry Brown, a Republican, again noted that the Democratic candidate for Attorney General won all thirteen proposed districts under the 2008 election results. Representative Lewis stated that the 2008 presidential race was not used to draw the proposed districts because of criticisms from the Court. Representative Lewis noted that VTDs or precincts were only split to equalize population.

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

14. Later, on February 18, 2016, the Senate met to consider the 2016 Plan. All the same issues that had been discussed during the meetings of the Joint Committee were raised again during the floor debate. The President *Pro Tempore* of the Senate, Senator

Phil Berger, concluded the debate by summarizing the position of the majority party. Senator Berger noted that the Court had held "that race should not be used as a factor." Because all of the criteria were kept in balance in drawing the congressional map, it was not drawn to "maximum political advantage."[4] Senator Berger emphasized that the 2016 Plan was drawn to "harmonize" all of the criteria adopted by the Joint Committee and to comply with the Court's Order. Senator Berger also stated that because all of the criteria were used, none of the districts constituted a political gerrymander. After Senator Berger concluded his remarks, the Senate voted to approve the plan by a vote of 32-15.

15. On Friday, February 19, 2016, the House Redistricting Committee met to consider the 2016 Plan. The Committee provided an opportunity for members of the public to speak on the proposed plan, but only one member of the public appeared for this opportunity. Representative Lewis again reviewed the criteria used for drawing the plan. Representative Michaux, a Democrat, asked Representative Lewis if any attention was paid to whether the maps "addressed the problem of vote dilution." Representative Lewis responded by referring Representative Mickey Michaux to the discussions they had had during the Joint Redistricting Committee and then submitted into the record three expert reports prepared by Dr. Allan J. Lichtman. Dr. Lichtman has appeared as an expert for Democratic plaintiffs in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) and *Covington v.*

[4] In fact, Senator Berger noted his view that a congressional plan with 11 Republican-leaning districts could be drawn, but had not.

State of North Carolina, 1:15-cv-399 (M.D.N.C.).[5] Representative Lewis reminded Representative Michaux that race was not considered in drawing the districts because of the *Harris* court's decision "that racially polarized voting did not exist," and that racially polarized voting was "one of the triggers that would require race to be used." Representative Hager supported Representative Lewis's statements by reading relevant portions of the opinion by the *Harris* court. The House Committee then voted to favorably recommend the 2016 Plan by a vote of 12 to 6.

16. The House met to consider the 2016 Plan later on February 19, 2016. Representative Lewis again explained the criteria used to draw the proposed plan. Representative Lewis and Representative Michaux debated the meaning of the Court's decision in *Harris*. Many of the issues already discussed by the Joint Committee and House Redistricting Committee were again discussed and debated. Representative Lewis noted that the *Harris* opinion "did not find racially polarized voting" and that during the legislative proceedings no member of the House or Senate had offered any evidence of racially polarized voting. Representative Lewis stated that the maps did not guarantee the election of 10 Republicans and again noted that the Democratic candidate for Attorney General would have won all 13 districts in the 2008 General Election. Finally,

[5] Dr. Lichtman opined that in North Carolina a congressional district with a BVAP between 40% to 50% as well as strong Democratic districts in which African Americans constitute a majority of registered Democrats, provide black voters with districts in which they have an equal ability to elect their candidates of choice. Based upon Dr. Lichtman's expert testimony, the 2016 versions of CD 1 and CD 12 constituted ability to elect districts and would therefore serve as a defense to any vote dilution claim that might be brought in the future.

Representative Lewis stated that all of the criteria for the maps had been approved by the Joint Committee, that all of the criteria were "considered together," and that "every effort had been made to harmonize them." The House then approved the 2016 Plan by a vote of 65 to 43.

B. Characteristics of the 2016 Plan.

17. A copy of the 2016 Plan, together with the political statistics used to draw the plan, was filed with the *Harris* court on February 19, 2016.

18. The 2016 Plan is based upon whole counties with none of the districts drawn to resemble the 2011 version of CD 1 and CD 12. Maps showing the counties won by Senator Richard Burr in 2010, Governor Pat McCrory in 2012, and Senator Thom Tillis in 2014—all three of whom are Republicans—show that Republican voters are more dispersed throughout the State than Democratic voters, who tend to be concentrated in urban areas and the northeastern part of the State. As a result, congressional districts based upon whole counties naturally result in a larger number of Republican-leaning congressional districts. Thus, based upon past voting patterns, congressional districts based upon whole counties naturally favor voters who vote for Republican congressional candidates.

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

unaffiliated voters. For instance, based on the 2008 election results, then Attorney General Roy Cooper would have won all 13 districts. Democrats also enjoy a registration advantage in 12 of 13 districts in the 2016 plan. Democrats are in the majority of registered voters in the 2016 versions of CD 1 and 12 and a plurality of registered voters in CD 2, CD 3, CD 4, CD 6, CD 7, CD 8, CD 9, CD 10, CD 11 and CD 13. Registered Republicans are not a majority in any district and a bare plurality only in CD 5. In all of the districts, registered Democrats and unaffiliated voters constitute a super-majority of all registered voters.

20. While race was not considered in the construction of the 2016 districts, Senator McKissick requested that race statistics be made part of the legislative record. These statistics show that the 2016 version of CD 1 has a BVAP of 44.46% while the 2016 version of CD 12 has a BVAP of 36.20%. Eight other districts have a BVAP of approximately 20% or higher: CD 2 (19.69%); CD 3 (21.19%); CD 4 (22.40%); CD 6 (19.86%); CD 7 (20.24%); CD 8 (22.41%); CD 9 (19.63%); and CD 13 (21.18%).

21. The expert for the plaintiffs in *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015) and *Covington v. State of North Carolina*, 1:15-cv-399 (M.D.N.C.), Dr. Allan Lichtman, has testified that in North Carolina strong Democratic districts in which African Americans constitute a majority of registered Democrats are districts that provide African Americans with an equal opportunity to elect their candidates of choice. (*See supra* at 15 n. 2) The 2016 versions of CD 1 and CD 12 fit Dr. Lichtman's definition. Democrats constitute 66.34% of the registered voters in the 2016 version of CD 1 while

African Americans constitute 61.85% of the registered Democrats in that district. In the 2016 version of CD 12, Democrats constitute 51.25% of all registered voters while African Americans constitute 62.29% of registered Democrats.

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

C. Plaintiffs

1. Plaintiffs residing in the First District

a. Plaintiff Annette Love

1. Plaintiff Annette Love ("Ms. Love") has lived in North Carolina's First Congressional District for 14 years. Ms. Love is a member of the North Carolina Democratic Party.

2. Although Ms. Love contends that the 2016 Plan "diluted" the value of her vote, she has not been deterred from voting and does not have a suggestion as to how the districts should be changed. Her candidate of choice, G.K. Butterfield, was elected in both the 2014 and 2016 Congressional elections and she believes she is adequately represented. She says her vote has been diluted even though her congressman is a

Democrat because only three Democratic representatives were elected versus 10 Republicans representatives.

3. Ms. Love believes that North Carolina should divide its congressional districts "fairly," and thinks that should be accomplished by making 50 percent of the districts Republican and 50 percent of the districts Democratic. She did not know how to draw a map that resulted in an even split of representation.

b. Plaintiff Larry D. Hall

1. Plaintiff Larry D. Hall ("Secretary Hall") resides in North Carolina's First Congressional District and is a member of the Democratic Party. Secretary Hall currently serves as North Carolina's Secretary of Veteran and Military Affairs. At the time this suit was filed, Secretary Hall was the leader of the Democratic Caucus in the State House.

2. In 2016, Secretary Hall voted for Congressman G.K. Butterfield, who won the election and serves as his representative. From 2002 until 2010, Secretary Hall was represented by Congressman David Price, who was also Secretary Hall's candidate of choice.

3. Secretary Hall does not feel that he was personally targeted or retaliated against in the drawing of the 2016 congressional districts.

4. Secretary Hall admitted that voting habits in a district can change over time. He further admitted that he voted for Republican candidates before and that it

would be a "case-by-case" basis whether he voted for a Republican or a Democrat based on the candidate's values.

5. Secretary Hall believes that fundraising, in addition to party affiliation, affects a candidate's ability to win an election.

6. Secretary Hall admitted the Democrats did not submit alternative maps during the 2016 redistricting process. He admitted that Democrats could have submitted alternative maps after the court ordered redrawing, but that they elected not to for political reasons because they did not want it to "give the appearance" that they were in agreement with the Republican redistricting plan or "give it legitimacy."

7. Secretary Hall said that gerrymandering could exist if legislators drew district lines to protect incumbents, but admitted there was some value in protecting incumbents during redistricting. He said it would be "hard to say" how to draw district lines sufficient to protect an incumbent because "[y]ou've got a growing number of unaffiliated voters."

c. Plaintiff Gunther Peck

1. Plaintiff Gunther Peck ("Dr. Peck") resides in North Carolina's First Congressional District. His residence has been located in the First District since 2012. Prior to 2012, Dr. Peck's residence was located in North Carolina's Fourth Congressional District and he was represented by Congressman David Price, a Democrat.

2. Dr. Peck is a member of the North Carolina Democratic Party. He is represented by Congressman G.K. Butterfield, whom Dr. Peck described as "a good man

whose politics I agree with." Regardless of whether he lived in the First or Fourth Districts, his candidate of choice has won the congressional election every election since 2004.

3. Dr. Peck has had no involvement in the redistricting process before this suit. Dr. Peck does not know the factors legislators used to create the 2016 congressional districts.

4. Dr. Peck admitted that political affiliations can change over time and that he could vote for a Republican under certain circumstances. Dr. Peck admits that personal relationships, rather than party affiliation, could affect voting.

5. Dr. Peck admitted he did not know how to "fix" the congressional districts to bring them within his satisfaction. Dr. Peck said turnout played a large role in the outcome of elections. Dr. Peck alleged that gerrymandering decreased turnout, but admitted he couldn't provide detailed numbers to back up his claim and that the effect, if any, was "correlation, not causation."

d. Plaintiff Faulkner Fox

1. Plaintiff Faulkner Fox ("Ms. Fox") is a registered Democrat who currently resides in the First Congressional District.

2. Ms. Fox admits her candidate of choice won in the 2016 election and, each time before that going back to 2004, when she lived in the Fourth Congressional District.

3. She testified that the districts should reflect her version of proportional representation and that a fair breakdown would go back and forth between 6 Republicans and 7 Democrats so that it would be competitive.

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

e. Plaintiff William Collins

1. Since 2002, Plaintiff William Collins ("Mr. Collins") has resided in North Carolina's First Congressional District.

2. He is a registered Democrat.

3. Mr. Collins agreed to be a plaintiff because he thought "the proportion of representatives that … Democrat versus Republican was way out of line." He confirmed that his problem with the current congressional map is the effect it has statewide.

4. Mr. Collins says he does not know a fairer way to draw the congressional map.

5. His Congressman, G.K. Butterfield, was his representative of choice in the 2016 election. Congressman Butterfield has been responsive to his needs as a constituent.

6. Mr. Collins acknowledges that people can and do change their political beliefs over time and that he has personally done so.

f. Plaintiff Willis Williams

1. Plaintiff Willis Williams ("Mr. Williams"), a Democrat, has resided in North Carolina's First Congressional District for at least 40 years.

2. Mr. Williams's candidate of choice has won the congressional election in his district every year from 2002 to the present.

3. Mr. Williams believes his current Congressman, G.K. Butterfield, represents him well.

4. Mr. Williams is not challenging the way his congressional district is drawn in this lawsuit; rather, he is challenging the overall effect that the congressional district map has on Democratic voters statewide.

5. Mr. Williams believes that the proportion of Republican and Democratic representatives in the State of North Carolina should be roughly "equal," and testified that the proportion should "at least be[] either 6 or 7, if you're talking about 13 [representatives]."

g. Plaintiff Elizabeth Evans

1. For at least 10 years, Plaintiff Elizabeth Evans ("Ms. Evans"), a registered Democrat, has resided in Granville County, which is in the First Congressional District under the 2016 Plan.

2. Ms. Evans testified that she believes her vote has been diluted because she understands from "reading the newspaper" that the Democratic Party is the "majority party" in North Carolina, but Democrats currently hold three seats in North Carolina's congressional delegation. Ms. Evans admitted that her lawsuit is a challenge to the statewide map and is not based upon a problem she had with her district.

3. Ms. Evans acknowledges that people's political affiliations can change over time and testified that her father, a lifelong Republican, switched parties two elections ago.

2. Plaintiffs residing in the Second District

a. Plaintiff Douglas Berger

1. From 1997 to 2010, Plaintiff Douglas Berger ("Mr. Berger") resided in the Second Congressional District. From 2010 to 2014, Mr. Berger resided in the Thirteenth District. Since then, and for the 2016 election, Mr. Berger resided the Second District.

2. Although he believes North Carolina's districts are not "competitive," he does not know how to define that term. Instead, he testified that it was similar to the Supreme Court's definition of pornography in that he would "know it when he sees it."

3. Likewise, he does not know how to draw districts to ensure they are competitive.

4. Mr. Berger ran for state Senate and was elected in the 2004, 2006, 2008, and 2010 elections in a district he described as a "safe Democratic seat."

5. Mr. Berger admitted that he served in the state Senate in 2011 and supported an alternative congressional map drawn by Senate Democrats that contained "gerrymandered" districts, which he described as districts drawn to gain an advantage for an individual or political party because "any map drawn by human beings that have incumbents or political inclinations, there's going to be some level of gerrymandering." He admitted that the 2011 congressional map proposed by Senate Democrats that he supported divided more counties than the 2016 Plan.

6. Mr. Berger admitted he does not know the criteria used for drawing the 2016 map and what was considered in forming the districts.

7. Mr. Berger admits that political beliefs change over time, that he had experienced that change personally, and that he has voted for a Republican candidate at least once and would do so again if the right candidate came along.

b. Plaintiff Ersla M. Phelps

1. Plaintiff Ersla M. Phelps ("Ms. Phelps") resides in North Carolina's Second Congressional District.

2. Ms. Phelps said she felt the 2016 congressional map diluted the strength of her vote because she did not know as many people at her polling place as before and it felt like "a totally different environment." Still, Ms. Phelps had no problem casting her vote in 2016. Ms. Phelps said she had a lot of neighbors who were Democrats, so she thought she should be represented by a Democrat, but admitted she did not know the breakdown of registered Democrats and Republicans in the Second District.

3. Ms. Phelps does not know how she would have drawn the district so that it would have been fairer.

4. Ms. Phelps has never attempted to contact her congressperson to address any problems. Ms. Phelps said she knew unaffiliated voters and that, even if affiliated, a voter could vote for whomever he wanted. Ms. Phelps admitted that voters might choose a candidate based on their appearance or their television ads rather than their party affiliation. Ms. Phelps said she could imagine a circumstance when she would vote for a Republican.

3. Plaintiffs residing in the Third District

a. Plaintiff Richard Taft, M.D.

1. Plaintiff Richard Taft, M.D. ("Dr. Taft") is a registered Democrat and has resided at the same address, which is currently in North Carolina's Third Congressional District, since 1976.

2. Dr. Taft voted in the 2016 Congressional election and the candidate of his choice, Walter Jones, a Republican, won the election in his district.

3. Dr. Taft believes that Walter Jones has represented the Third Congressional District in North Carolina since the mid-1990s.

4. Dr. Taft believes that the vote he cast in 2016 was "diluted" because he does not believe that a Democratic candidate can win in his district. He is aware that General Assemblies controlled by Democrats drew the congressional district lines in the 1990s and in the 2000s—during which time Walter Jones was repeatedly re-elected to

Congress—but does not believe that the congressional districts were gerrymandered during those times. He believes that North Carolina's congressional districts were "probably pretty fair" in earlier election cycles where the statewide breakdown of "seats were 7-6, 6-7."

5. When asked what a "fair [districting] map" would look like, Dr. Taft stated, "there are all different kinds of ways to draw maps, I guess, but I'm not an expert in drawing maps, so it's hard for me to say. I just want it to be fair." In Dr. Taft's opinion, "fair" representation generally means that the number of congressional seats held by Democrats and Republicans is roughly equivalent.

6. Dr. Taft also believes that events that occur at a national level can affect the number of Democrats who are elected to Congress each year and the number of Republicans who are elected to Congress each year on a statewide basis.

7. Dr. Taft further admitted that there could be other factors that may affect whether a Democrat or Republican is elected in a particular district, such as whether a candidate made a mistake that upset voters in his or her district.

8. In addition, Dr. Taft has not spoken with anyone in North Carolina's General Assembly about the redistricting that was done in 2016.

b. Plaintiff Cheryl Taft

1. Plaintiff Cheryl Taft ("Ms. Taft"), who is married to Plaintiff Richard Taft, M.D., is a registered Democrat and has resided at the same address, which is currently in North Carolina's Third Congressional District, since 1976.

2. Ms. Taft voted in the 2016 North Carolina congressional election and, though she is a Democrat, the candidate of her choice, Republican Congressman Walter Jones, won the election in her district.

3. Even though Ms. Taft and Walter Jones disagree on a "whole lot of issues," Ms. Taft acknowledged that Walter Jones can still adequately represent her in Congress.

4. Ms. Taft testified that the influx of retirees and individuals with a military background over the years, which she contends has resulted in a more "pro-Republican" base in the Third Congressional District, has "diluted the Democratic voice" in that district.

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

6. Ms. Taft also acknowledged that when a General Assembly controlled by the Democrats drew the congressional district lines in the 2000s, they also put her in the Third Congressional District. When asked if she felt that her vote didn't count when the lines were drawn by a Democratic-controlled legislature and she was placed in the Third

District, Ms. Taft responded by stating, "I didn't really think about it until the disparity, and then I – that's when I really started thinking about it," the "disparity" being the total number of Republicans versus Democrats elected statewide to Congress.

4. Plaintiffs residing in the Fourth District

a. Plaintiff Morton Lurie

1. Plaintiff Morton Lurie ("Mr. Lurie") lives in North Carolina's Fourth Congressional District. Mr. Lurie is a member of the North Carolina Republican Party. For most of his time in North Carolina, Mr. Lurie has been represented by David Price, who is not his candidate of choice.

2. Mr. Lurie has never been involved in drawing electoral maps and admits it is a difficult, if not impossible, task.

3. Mr. Lurie is not sure if he has even seen the 2016 North Carolina congressional map. Mr. Lurie believes his vote was "diluted" because he does not think a Republican can win in the Fourth District, but he still participates by voting in the congressional election. Mr. Lurie said he did not believe his vote was diluted when he was represented by a Republican.

4. Mr. Lurie agreed that a voter's views could change over time and that his own views changed over time. Mr. Lurie said that, while he will generally vote as a party line Republican in down-ballot elections, he exercises more independent judgment on more important elections. For example, Mr. Lurie consistently voted Republican until

2016, when he voted for two Democratic candidates during the election: Hillary Clinton and Josh Stein.

b. Plaintiff Maria Palmer

1. Since 1996, Plaintiff Maria Palmer ("Ms. Palmer") has resided in North Carolina's Fourth Congressional District. Ms. Palmer is a member of the North Carolina Democratic Party. Her candidate of choice, Congressman David Price, was elected in 2016 and has won every election since 2002.

2. Ms. Palmer admits that political affiliations can change and voters may cross party lines to vote for a candidate of their choice. Ms. Palmer admits that voter preferences in certain areas of the State may result in a candidate of one party winning a district over another and that these results would not be due to gerrymandering. Ms. Palmer admitted that she wanted to move to the Chapel Hill area so she could live in an area where people tended to agree with her politically.

3. Ms. Palmer admits that most of the people she works with continue to participate in the political process regardless of the congressional district map. Ms. Palmer said some issues of responsiveness by congressional representatives could be solved by running another member of the same party against the unresponsive legislator in a primary. Ms. Palmer's representative in Congress, Congressman Price, has been responsive to Ms. Palmer's contacts and questions.

5. Plaintiffs residing in the Fifth District

a. Plaintiff William Halsey Freeman

1. Plaintiff William Halsey Freeman ("Judge Freeman") is a former superior court judge who retired in 2000 and believes he has resided in the Fifth Congressional District his whole life.

2. His candidate of choice has never won in any of the congressional elections he has voted in while living in the Fifth District.

3. Judge Freeman had only one contested election, his last, during the 20 years that he served as a superior court judge. In that election, he ran in a district and defeated a Republican even though his district was heavily Republican and he was a Democrat.

4. Before the General Assembly adopted districts for superior court judges, Judge Freeman met privately with the other three superior court judges in Forsyth County and drew the districts in which they wanted to run. The General Assembly adopted those districts and Judge Freeman believes they are still in use.

5. With respect to the 2016 Plan, Judge Freeman did not participate in any part of the process at the General Assembly and did not know what written criteria the General Assembly used in that process. Judge Freeman contends his vote for Congress has been "diluted" and is "a waste" because there is "no remote chance" of a Democrat winning in the Fifth District. He also testified that, around 2010, he considered running for Congress in the Fifth Congressional District but decided against it "after consulting with a lot of men, who I had a lot of faith in, having political knowledge, they all told me

it was a total waste of time, that no Democrat could possibly win that district." Judge Freeman acknowledged that when he made the decision to not run because "no Democrat could possibly" win in the Fifth District, the district had been drawn by Democrats.

6. Plaintiffs residing in the Sixth District

a. Plaintiff Alice Louise Bordsen

1. From October 1998 until January 2013, Plaintiff Alice Louise Bordsen ("Ms. Bordsen") resided in North Carolina's Sixth Congressional District. From January 2013 through the present, Ms. Bordsen has resided in North Carolina's Fourth Congressional District.

2. Ms. Bordsen served in the North Carolina House of Representatives from 2003 to 2013. She is currently a member of the North Carolina Democratic Party, but "started out [her] political life as a Republican."

3. Ms. Bordsen was not involved in the 2011 redistricting efforts and stated that she "wasn't very …concerned with it at the time."

4. Ms. Bordsen has no first-hand knowledge of the criteria (or the weight given to any of the criteria) regarding the manner in which North Carolina's 2016 Plan was drawn. In addition, Ms. Bordsen has never been involved in any kind of redistricting efforts.

5. Although Ms. Bordsen contends that the 2016 Plan "diluted" the value of her vote, she has not been deterred from voting and does not have a suggestion as to how the districts should be changed. Despite Ms. Bordsen's belief that the value of her vote

has been "diluted," the candidate of her choice, David Price, was elected in her district in the 2014 and 2016 congressional elections.

6. Ms. Bordsen believes that the Fourth Congressional District in North Carolina should be more "competitive," but does not know how that could be accomplished. In addition, Ms. Bordsen was unable to offer any specific ideas regarding what proportion or type of voters should be in a congressional district to make it more competitive or fair.

7. Ms. Bordsen does not know how the districts should be changed. Ms. Bordsen feels that her opinion on this issue doesn't matter much, and simply stated, "There are better ways. There has to be better ways."

b. Plaintiff Melzer Adron Morgan, Jr.

1. Since 1969, Melzer Adron Morgan, Jr. ("Judge Morgan") has resided in North Carolina's Sixth Congressional District. Judge Morgan previously lived in the Thirteenth Congressional District and his residence has also been located in the Fifth Congressional District under previous maps.

2. Judge Morgan is a former superior court judge who was appointed to the bench. During his career as a judge, Judge Morgan participated in the reformation of his judicial district and opposed the redrawing of the district lines. Judge Morgan never had an opponent in an election for judge. Judge Morgan never presided over a redistricting case or any election cases as a judge.

3. Judge Morgan is a member of the North Carolina Democratic Party. Judge Morgan is represented by Congressman Mark Walker. Judge Morgan's candidate of choice did not win the 2016 election, but did win each election between 2002 and 2010.

4. Judge Morgan did not follow the redistricting process closely and did not go to the legislature or participate in the redistricting process. Judge Morgan does not know the criteria the legislature used to draw its new 2016 congressional districts.

5. Judge Morgan became involved in the suit after he received a call from counsel for Common Cause.

6. Judge Morgan believes his vote was "diluted" because he "doesn't have much voice in speaking to [his] congressman." Judge Morgan has not conducted any analysis to determine the competitiveness of his district beyond knocking on doors and watching election results.

7. Judge Morgan has only attempted to contact his congressman once via postcard regarding the Affordable Care Act and has not requested any other constituent services.

8. Judge Morgan conceded that political affiliations can change over time. He also admitted voters sometimes cross party lines to vote for a candidate they prefer.

7. Plaintiffs residing in the Seventh District

a. **Cynthia Boylan**

1. Since November 2005, Plaintiff Cynthia Boylan ("Ms. Boylan") has resided in the Seventh Congressional District. Prior to that, she lived in the Fourth Congressional District.

2 Ms. Boylan testified that if a Democrat won in her congressional district, she wouldn't feel her vote had been diluted.

3. She admits the only problem with her current Congressman is that he is a Republican and that she has never attempted to contact him or express any of her concerns to him.

4. She testified that she does not know how to draw the district lines more fairly.

5. She acknowledges that political opinions can change over a person's life and that voters make decisions on which candidates to vote for based on a variety of reasons beyond the candidate's party affiliation.

8. Plaintiffs residing in the Eighth District

a. Plaintiff Coy E. Brewer Jr.

1. Plaintiff Coy E. Brewer, Jr. ("Mr. Brewer"), a registered Democrat, was assigned to North Carolina's Second Congressional District from 2002 to 2014, but was assigned to the Eighth Congressional District in 2016.

2. Mr. Brewer is an attorney and served as a Superior Court judge in North Carolina from 1975 to 1998. As a former statewide candidate, he learned which areas of the state were strongly Democratic and which were strongly Republican and had not forgotten that information.

3. Mr. Brewer admits that, "[i]n North Carolina, there are very distinct geographic areas of strength between the two parties."

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

5. From 2002 to 2010, Mr. Brewer was represented by the congressional representative of his choice. However, beginning with the 2010 congressional election, Mr. Brewer has not been represented by the candidate of his choice. Mr. Brewer voted in the 2016 congressional election (this time as a member of the Eighth Congressional District), but his candidate of choice did not win.

6. Mr. Brewer is concerned with the competitiveness of the districts in the 2016 Plan and believes that a district is competitive when "the historic voting patterns are within a range of 4 to 5 percent," but acknowledged that "it's hard to determine whether a district is truly competitive or not…but a truly competitive district is a district that…has

the potential of switching from one party to another either because of the issues in a particular election cycle or because of the quality of particular candidates running in a particular election….Districts that would require an extremely abhorrent political year or extremely weak candidate on one side or strong candidate on the other side would generally be considered non-competitive."

7. However, Mr. Brewer believes that it is fair to take election results into account when drawing a congressional district map. He would like election results to be taken into account in drawing congressional districts, but believes they should be drawn such that there is only a 4 to 5 percent swing or preference for one party over another in any given district.

8. Mr. Brewer acknowledged that the residency of incumbent representatives was a legitimate factor to consider in drawing the 2016 Plan.

9. Mr. Brewer further acknowledged that keeping counties whole (as opposed to breaking counties into multiple congressional districts) is a good thing, and that it played a greater role in the 2016 redistricting process than it had in the past.

10. Mr. Brewer agreed that the decision to reduce the number of congressional districts in Cumberland County, North Carolina, from three to two during the 2016 redistricting process produced a result that was better than before.

9. Plaintiffs residing in the Ninth district

a. Plaintiff John Morrison McNeill

1. Plaintiff John Morrison McNeill ("Mr. McNeill"), who is currently the Mayor of Red Springs, North Carolina, resides in North Carolina's Ninth Congressional District.

2. Mr. McNeill lived at the same address, but was a part of the Seventh Congressional district from 2000 to 2010. At that time, he was represented by Congressman Mike McIntyre.

3. Mr. McNeill is currently represented by Congressman Robert Pittenger.

4. Mr. McNeill is a member of the North Carolina Democratic Party.

5. Mr. McNeill agreed that people can change their political views and party affiliation over time. Mr. McNeill agreed that people vote for reasons unrelated to political affiliations, including celebrity, appearance or personal friendship. Mr. McNeill said he voted Republican in a previous election.

6. Mr. McNeill agreed that a congressman does not always have to agree with his constituents to represent them.

b. Plaintiff Elliott Feldman

1. Plaintiff Elliott Feldman ("Mr. Feldman") has resided in the Ninth Congressional District for over 10 years.

2. He is a registered Democrat.

3. Mr. Feldman believes his district has been "gerrymandered" since 1992, even under the Democrats' districting plan.

4. He agreed that his problem with the districts is that he believes the number of Republicans elected to Congress statewide is not proportional to the amount of votes that Republicans receive in statewide elections.

c. LWV Designee Mary Trotter Klenz

1. In addition to the above plaintiffs, Mary Trotter Klenz, the Rule 30(b)(6) designee for the League of Women Voters, is also a resident of the Ninth Congressional District. She is a registered Democrat and has resided in North Carolina's Ninth Congressional District since at least the early 1990s and cannot remember a time when a Democratic candidate won the district.

2. Ms. Klenz believes that the Ninth Congressional District was "more competitive" in the past than it was in the 2016 election but acknowledged that a Democratic candidate has never won an election in the district since she has lived there. In other words, Ms. Klenz conceded that even when her district was allegedly "more competitive" under other districting plans, the district did not elect a Democratic member of Congress.

10. Plaintiffs residing in the Tenth District

a. Plaintiff Robert Wolf

1. Since 2010, plaintiff Robert Wolf ("Mr. Wolf") has resided in North Carolina's Tenth Congressional District. His home was previously located in the

Eleventh Congressional District. Mr. Wolf is a member of the Democratic Party of North Carolina.

2. Mr. Wolf said he did not know the criteria the legislature used to draw the 2016 Plan.

3. Mr. Wolf acknowledged that it would not be "reasonable or feasible" to draw congressional districts without considering politics.

4. Mr. Wolf believes the fair way to divide congressional districts would be to make them 50 percent Republican and 50 percent Democrat based upon his understanding that approximately half of the state's registered voters are Republicans and half are registered Democrats, but he does not know how he would divide the Thirteenth Congressional District.

5. Mr. Wolf admitted that he was living in a Republican district both before and after the 2016 redistricting process even though his district was drawn by Democrats prior to 2011. He said he did not think the 2016 plan caused any more "egregious" changes to the Tenth District, but that he disliked the new map as a whole. Mr. Wolf said his problem with his particular district is that he is a Democrat and Republicans have been elected in his district consistently.

6. Mr. Wolf admitted that people may choose to vote for a candidate for reasons other than the candidate's political party affiliation. Mr. Wolf said he could vote Republican under certain situations. Despite his objections the 2016 Plan, Mr. Wolf has continued to participate in the political process and vote.

b. Plaintiff John J. Quinn

1. Plaintiff John J. Quinn ("Mr. Quinn") has resided in North Carolina's Tenth Congressional District since 2011. From 2005 to 2011, Mr. Quinn resided in North Carolina's Eleventh Congressional District.

2. Mr. Quinn is a member of the Democratic Party of North Carolina.

3. Mr. Quinn's congressman, Patrick McHenry, has been responsive to Mr. Quinn's emails to his office. Mr. Quinn's prior representative, Congressman Heath Shuler, was a Democrat and Mr. Quinn felt he represented him well in some areas but not in a number of others.

4. Mr. Quinn has not reviewed the methodology the legislature used to draw the 2016 Congressional Districts.

11. Plaintiffs residing in the Eleventh District

a. Plaintiff Aaron Sarver

1. Plaintiff Aaron Sarver ("Mr. Sarver") has resided in North Carolina's Eleventh Congressional District since August 2016. Mr. Sarver resided in the Eleventh District from August 2009 until 2011, and then resided in the Tenth District, before the 2016 redistricting plan placed him back in the Eleventh District.

2. Mr. Sarver is a member of the Democratic Party of North Carolina.

3. Mr. Sarver does not know the particular factors the General Assembly used to conduct the redistricting in 2016.

4. Mr. Sarver said he thought his vote was "diluted" by the 2016 redistricting because it divided Asheville into two congressional districts. Mr. Sarver admitted, however, that people could disagree about whether having two congressional representatives rather than one is a good thing or not and admitted that Republicans might like having Asheville divided between two districts.

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

c. Plaintiff Jones P. Byrd

1. Plaintiff Jones P. Byrd has resided in the Eleventh District for over 10 years.

2. Although his primary complaint about the 2016 map is that it divides Buncombe County he admits that he did not bring a legal challenge the 1992 version of the Eleventh District, drawn when Democrats were in charge of the General Assembly that also divided Buncombe County.

3. Mr. Byrd stated that the division of Buncombe County into two different congressional districts in the past "would not have created that much of a problem for me" depending on the level of "proportionate representation" in the map, which he

defined as the "relationship with the proportion of registered voters by party or other affiliation during that period of time."

12. Plaintiffs residing in the Twelfth District

a. Plaintiff John West Gresham

1. Plaintiff John West Gresham ("Mr. Gresham") resides in North Carolina's Twelfth Congressional District. Prior to the 2016 redistricting, Mr. Gresham resided in the Ninth Congressional District.

2. Mr. Gresham is a registered Democrat. Gresham's candidate of choice won the 2016 congressional election. Mr. Gresham's candidate of choice did not win in the 2014 congressional election.

3. Mr. Gresham believes that gerrymandering is "in the eye of the beholder." He admitted that, in drawing a congressional plan in North Carolina that he would not consider to have involved gerrymandering, there would "clearly" be some districts that would likely elect a Republican and some districts that would likely elect a Democrat based upon their location in the state.

4. Mr. Gresham said would like to see a nonpartisan redistricting commission use voting patterns and a computer program to create "purple districts" in the congressional map. He does not know specifically how to go about drawing "purple" districts.

5. Mr. Gresham admitted that the Twelfth District was "no doubt" more compact under the 2016 map than it was previously.

6. Mr. Gresham admitted that the political makeup of Charlotte has changed over time. He testified that he could not think of a statewide Democratic candidate who received less than 62 percent of the vote in Mecklenburg County.

7. Even though he has historically voted for Democrats for Congress, Mr. Gresham said he would consider voting for a Republican "if he were someone of the quality or caliber of former Republican Governor Holshouser."

b. Plaintiff Janie S. Sumpter

1. Since approximately 1992, Plaintiff Janie S. Sumpter ("Ms. Sumpter") has resided in North Carolina's Twelfth Congressional District ("Twelfth District"). She is a member of the Democratic Party and has voted in every congressional election since 2002.

2. Ms. Sumpter voted in the 2016 congressional election, and the candidate of her choice was elected.

3. Indeed, from 1992 to the present, Ms. Sumpter has been able to elect the candidate of her choice in the Twelfth District.

4. Ms. Sumpter alleges she has been harmed by the 2016 congressional district maps "based on what it has done to other North Carolinians because of the redrawing, because of the redistricting." She believes that the proper balance of Republicans and Democrats in Congress for the state of North Carolina "needs to be 50-50."

13. Plaintiffs residing in the Thirteenth District

a. Plaintiff Russell Grady Walker, Jr.

1. Plaintiff Russell Grady Walker, Jr. ("Mr. Walker") has resided in North Carolina's Thirteenth Congressional District since early 2015.

2. Mr. Walker is a member of the Democratic Party of North Carolina; however, he has sometimes voted for Republicans.

3. Mr. Walker's candidate did not win during the 2016 election or during prior elections.

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

14. The Organizational Plaintiffs

a. League of Women Voters

1. The League of Women Voters of North Carolina ("LWV") designated its co-president since 2015, Mary Trotter Klenz, to provide testimony on behalf of the organization.

2. Ms. Klenz is a registered Democrat and has resided in North Carolina's Ninth Congressional District since 1984.

3. The LWV has both Democratic and Republican members but the organization does not know how many members are Democrats versus Republicans.

4. With respect to the 2016 congressional redistricting, Ms. Klenz summarized the LWV's educational efforts as merely explaining to their members, "this is what happened and this is the outcome."

5. The LWV did not go to North Carolina's General Assembly to advocate for any particular district maps in 2016, and did not advocate for any particular redistricting criteria to be used in 2016. Although the LWV engages in discussions with members of North Carolina's General Assembly on certain matters, it did not have any discussions with the General Assembly regarding the 2016 congressional maps.

6. Ms. Klenz's deposition testimony makes clear that the goal of the LWV in this lawsuit is to achieve proportional representation. For example, Ms. Klenz testified that one of the goals of the LWV is to work for "fair and equal nonpartisan redistricting." When asked what that means, Ms. Klenz stated, "I guess the proof would be in the pudding, is the process open – but we're talking about – in this case, we're talking about outcome so you'd have to look at the outcomes [of an election] in equal nonpartisan and see how they reflect the overall population of the state." In other words, the term "fair and equal nonpartisan redistricting" to the LWV requires looking at the outcome of an election to see if it was "representative of the population of the state."

7. When asked how the LWV would then determine if the outcome of an election was "representative of the population of the state," Ms. Klenz stated that they would "rely on a lot of experts" and further stated, "[w]e would probably go look at the outcomes and we would probably go to people and organizations who would have

opinions and give some information, some data, and just make a general assessment of does this represent the voting population of North Carolina, the voters." But the LWV is not able to determine or assess whether the redistricting process in North Carolina was "representative of the population of the state" without obtaining the opinion of an expert.

8. Further evidence of the LWV's proportional representation goal is the fact that the LWV is not aware of (and cannot articulate) any problems with any specific districts in North Carolina following the 2016 redistricting process. Instead, according to them, the problem lies with the "total statewide outcome" (referring to the total congressional delegation). The LWV's designated witness testified that the organization does not have a position on what the partisan breakdown should look like in North Carolina for congressional seats, other than that it should be "representative."

9. Although the LWV alleges in this action that the 2016 congressional redistricting plan "directly impairs [their] mission of encouraging civic engagement in nonpartisan redistricting reform," their designated witness could not identify a specific instance in which a forum or event sponsored by the LWV had to be canceled, or where someone would not participate in such an event, because of the way the 2016 congressional map was drawn. The organization also did not budget any additional money as a result of the 2016 congressional districts enacted by the General Assembly.

b. Common Cause

1. Bob Phillips ("Mr. Phillips") is the state director of Common Cause for North Carolina and was designated to provide testimony on behalf of the national Common Cause organization.

2. Common Cause North Carolina includes 2,000 paying members and 15,000 people involved with the organization in some capacity.

3. Common Cause includes Democratic, Republican and unaffiliated voters in its membership.

4. Common Cause North Carolina is the state chapter of Common Cause, a national organization, and Common Cause North Carolina is not its own, independent nonprofit.

5. Mr. Phillips said he and members of the national Common Cause office made a joint decision to file a lawsuit challenging the 2016 redistricting plan.

6. Common Cause is challenging the 2016 redistricting plan on a statewide basis, not based on individual districts.

7. Although Common Cause uses the term "nullified" to claim that the 2016 redistricting plan constitutes illegal gerrymandering, Mr. Phillips acknowledged that all votes counted and that each voter would still have a congressional representative to turn to after an election.

8. Mr. Phillips stated that voters selected candidates for "many different reasons."

9. Common Cause assembled retired judges to conduct a redistricting simulation through Duke University using a variety of criteria generally used in the redistricting process. This was called the Beyond Gerrymandering project.

10. Mr. Phillips was not sure that the simulated maps completed by the judges were any more compact, mathematically, than the 2016 North Carolina congressional map drawn by the legislature.

11. Mr. Phillips admitted that the number of counties split in the Common Cause simulation and the number of counties split by the actual 2016 map were similar.

12. Mr. Phillips said he did not discuss the Voting Rights Act criteria with the judges when they made their simulation maps.

13. Mr. Phillips admitted voters vote for candidates for different reasons that may not involve their political party.

14. Common Cause did not consider a challenge to the 2011 redistricting plan. Common Cause did not challenge gerrymandering done by Democratic-controlled legislatures in North Carolina during the 1990s.

15. Common Cause did not consult with the Democratic Caucus of the legislature regarding its simulated maps or the actual 2016 map. Common Cause did not initially express its intent to use its simulated map in litigation regarding redistricting.

16. Mr. Phillips admitted that the 2016 plan that the legislature created did not contain any districts that would qualify as "strong Republican" under the Common Cause simulation formula, whereas the simulated map did contain one such district.

17. Mr. Phillips admitted that some of the judges who made the simulated maps likely had knowledge of traditional Republican and Democratic areas of the state.

18. Mr. Phillips stated all of the "toss-up" districts in the Common Cause simulation leaned Republican. Thus, a congressional plan drawn without political data resulted in nine Republican districts and four Democratic districts.

19. Mr. Phillips stated that even small changes to the factors and assumptions used to create the simulated map would skew the breakdown of congressional districts' partisan leanings.

20. Mr. Phillips alleged Common Cause maintained standing to sue because they were a "statewide organization" that is "an advocate for more open, honest and accountable government and that redistricting reform fits into that."

c. Democratic Party of North Carolina

1. Wayne Goodwin ("Mr. Goodwin") is the Chairman of the North Carolina Democratic Party ("NCDP") and was designated to provide testimony on behalf of that organization.

2. Mr. Goodwin admitted that there are differing views within the NCDP, that members did not have to agree with everything in the NCDP platform to be a member of the party, and that individuals elected to Congress as Democrats do not always support or vote in accordance with the Democratic Party platform. Mr. Goodwin said he believed that members of Congress of both major political parties do not always vote in accordance with their party platforms.

3. Mr. Goodwin had no conversations with anyone in the General Assembly about how the districts were drawn in the 2016 Plan. He recalled that legislative leaders provided a list of criteria used to drawn the districts but admitted that he does not personally know how much weight was given to each of the criteria.

4. Mr. Goodwin admitted that, when he was a member of the General Assembly, he was involved in drawing a congressional map in 2001 and that he considered political data that included election results in drawing that map.

5. He admits that the 2016 Plan "may be more compact" than the 2001 Plan adopted when he was in the General Assembly.

6. Mr. Goodwin admitted that, under the law, partisan considerations can have a role in redistricting but could not say how much of a role it should have.

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

15. Common Findings of Fact across plaintiffs

1. With the exception of former State Representative Larry Hall, who was the Democratic Leader in the North Carolina House of Representatives when the 2016 Plan

was enacted, no individual or organizational plaintiff attended any public hearing held by, provided any testimony to, or had any conversation with any member of the North Carolina General Assembly regarding the 2016 Plan.

2. With the exception of Common Cause, none of the individual or organizational plaintiffs involved in this lawsuit are responsible for paying any attorneys' fees or costs that are incurred.

3. Multiple plaintiffs admitted that a member of Congress does not have to agree with the views of his or her constituents in order to be responsive to those constituents or to adequately represent them.

4. Several plaintiffs admitted that, even if a member of Congress of a voter's preferred political party is elected to represent the district the voter lives in, there might be instances where that voter did not agree with the positions taken by that member of Congress.

5. Multiple plaintiffs in this case had no intention or plan to file a lawsuit challenging the 2016 Plan before being contacted by plaintiffs' counsel or a representative of one of the organizational plaintiffs.

6. With the exception of the redistricting project Common Cause facilitated at Duke University, no plaintiff was involved with the creation of any alternative maps to the 2016 Plan.

7. Despite alleging that the 2016 Plan diluted their vote and "penalized" them because of their membership in the NCDP and the votes they had cast in the past,

multiple plaintiffs admitted they had not been "singled out" in the 2016 redistricting process based upon these factors.

D. Defendants' Experts

a. Sean Trende

1. Mr. Trende offered his opinions regarding the efficiency gap theory proposed by Dr. Jackman. On the surface efficiency gap is a fairly simplistic formula. "Wasted votes" are calculated for each major party. Wasted votes are defined to include all of the votes cast for a losing party's candidate plus the number of votes cast above 50% plus one for the winning party's candidate. Then, the difference between the two parties' wasted votes is divided by the total number of votes. The resulting ratio equals the efficiency gap.

2. Not surprisingly, given the lack of prior judicial guidance, there is no single efficiency gap standard. In the Wisconsin legislative litigation, *Whitford v. Gill*, plaintiffs' expert, Dr. Jackman, argued that constitutional scrutiny should be applied when the absolute value of the efficiency gap was .07. This contrasted with the .08 threshold recommended by the original authors of the efficiency gap. *See* Nick Stephanopoulos and Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chicago L.R. 831, 837 (2015).

3. In this case, Dr. Jackman further complicates the search for a uniform judicially manageable standard. He concedes there is no basis at the present time for applying the efficiency gap to states with six or fewer congressional districts. But, for

other states, Dr. Jackman argues that constitutional scrutiny is warranted if the efficiency gap exceeds a certain level during the first election under the plan. But this standard changes depending upon the number of districts. For states like North Carolina with 7 to 15 districts, scrutiny is required if the efficiency gap exceeds .12 in the first election. But for states with more seats, scrutiny is required when the efficiency gap exceeds .075 in the first election. Thus, Dr. Jackman proposes no standard for states with six or fewer districts and different standards for states with 7 and 15 districts versus states with more than 15 districts.

4. Further confusion arises because Stephanopoulos and McGee believe that scrutiny is required only if the efficiency gap results in a two seat swing. Unlike Dr. Jackman, these experts believe that the efficiency gap should be measured in numbers of seats won or lost rather than percentage points.

5. Even more confusion arrives because of the impact of voters who split their ticket or change their votes. Dr. Jackman agrees that an efficiency gap for the 2011 North Carolina congressional plan is higher and more favorable for Republicans than the 2016 Plan. Dr. Jackman also agrees that his calculations of the efficiency gap values are similar to the calculations of McGhee and Stephanopoulos. But based upon their "sensitivity analysis," McGhee and Stephanopoulos have concluded that the allegedly more extreme 2011 Plan would not warrant constitutional scrutiny because of the number of voters who might change their minds and vote for a different party in future elections. Not surprisingly, Dr. Jackman did not perform this type of sensitivity testing in this case

for the 2016 Plan, even though the 2011 Plan is more heavily gerrymandered in Dr. Jackman's mind than the 2016 Plan at issue.

6. Dr. Jackman's theories about when constitutional scrutiny is warranted are based upon his observation of election results in congressional races for 1972 through the present. There are numerous problems with this approach. Some of the elections observed by Dr. Jackman were races that did not include an opponent. Thus, Dr. Jackman had to impute voter turnout (and estimated wasted votes) in these unopposed elections. This is not an easy matter to determine.

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

8. The efficiency gap does not explain how wave elections impact the number of wasted votes in one election cycle versus others. Nor does the efficiency gap account for districting plans or districts that follow traditional districting principles or those that do not, like the 2001 North Carolina CD 13, all prior versions of North Carolina's CD 12,

and the entire 1992 congressional plan. Indeed, whether a State completely departs from traditional redistricting principles and divides all of its counties and precincts into different congressional districts, is completely irrelevant to the efficiency gap because the only thing it measures is the comparative rate of wasted votes to total votes. Nor would application of the efficiency gap result in more competitive and "fair" districts. This is because the efficiency gap can be satisfied by drawing highly gerrymandered districts so that each party is assigned an equal number of non-competitive districts.

9. The efficiency gap test proposed by Dr. Jackman is highly impracticable, if not impossible, for states to implement and for courts to administer. Under Dr. Jackman's theory, a State must conduct a first election under a new plan to determine whether the plan is subject to constitutional scrutiny. As discussed, in states like North Carolina, if the first year election results in an efficiency gap of higher than .12, then the plan is suspect. However, this approach does not explain how a legislature is supposed to predict a wave election during the plan's first election cycle that favors one party or the other, such as the 2008 Presidential election, which favored all Democratic candidates, or the 2010 off-year election, which favored all Republican candidates.

b. Trey Hood

1. Dr. M.V. Hood, III, prepared a rebuttal report for defendants responding to reports prepared by plaintiffs' experts Dr. Simon Jackman and Dr. Jowei Chen. Dr. Hood's testimony and other related evidence show as follows:

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

3. Incumbents already enjoy an advantage when it comes to winning congressional seats. But the 2016 congressional election was held under circumstances that were even more favorable to incumbent candidates. The 2011 congressional plan was found unconstitutional by a district court on February 5, 2016. The General Assembly enacted the 2016 congressional plan on February 19, 2016. Candidate filing ended on March 25, 2016 and a primary was held on June 7, 2016. Because of the short amount of time available from the enactment of the plan to the deadline for candidate filing, both parties were more handicapped than normal in the efforts to recruit quality candidates, to oppose incumbents, or to have the same amount of time normally experienced in a congressional campaign to raise money and organize an effective campaign staff and campaign.

4. Not surprisingly, 12 of 13 incumbents were re-elected in 2016. The thirteenth incumbent was defeated in a Republican primary for CD 2 against an opponent who had been the incumbent for CD 13 under the 2011 Plan. The thirteenth successful candidate was elected in an open seat and did not face opposition from an incumbent.

5. In the 12 races in 2016 involving incumbents, in each case the incumbent raised and spent substantially more money than his or her opponent. Ten of the 12 incumbents faced opponents with no political background, which is not surprising given the truncated election schedule followed in 2016. Two incumbents faced opponents with minimal political experience.

6. It is clear from any review of voting patterns in North Carolina that a congressional districting plan based upon whole counties and whole VTDs is likely to benefit Republican candidates. This is because Democratic voters are more concentrated than Republican voters particularly in urban counties. In contrast, Republican voters are more dispersed throughout the State. This is demonstrated by voting patterns in recent statewide elections such as Governor or United States Senate, where the Republican candidates always win a higher number of North Carolina's 100 counties than the Democratic candidate.

7. Taken as a whole, total statewide election results for all congressional elections are not necessarily good indicators of election success in a particular district. Congressional districts often have different partisan makeups than the State as a whole or even surrounding districts. Many other factors influence election results including the quality of the candidates, the length of the election cycle, the presence of an incumbent, fundraising, political experience, messaging and other factors.

8. There is a direct relationship between the efficiency gap test used by Dr. Jackman and the number of seats won by a political party's candidates. The more seats

won by one party, the more votes that are wasted by the other party. Thus, the efficiency gap closely tracks the percentage of seats held. But the efficiency gap does not take into account the impact of other valid considerations, such as the creation of ability-to-elect districts that can be used to defend a State against claims of racial vote dilution.

9. The 2016 congressional plan followed the criteria established by the General Assembly. These include equal population, contiguity, and making the districts more compact by reducing the number of county and VTD divisions.

10. Incumbents were protected by the General Assembly's decision to base most of the 2016 districts on the 2011 districts. One district, CD 13, was moved to another part of the State from where it had been established under the 2011 plan. Of the remaining 12 districts, ten of them include over 50% of the population that had been included in the 2011 versions.

11. 2016 was a successful year for congressional incumbents in the general election and a successful year for Republican candidates generally in the State of North Carolina. Despite these facts, five of the 2016 congressional districts are competitive to the extent a strong Democratic challenger could win them. Three of the 2016 districts are safe Democratic sets and five of the 2016 districts are safe Republican seats. The five competitive districts all lean Republican.

E. Plaintiffs' Experts

a. Simon Jackman

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

2. The efficiency gap requires that each party have the same proportions of wasted votes within a certain range. Different experts on efficiency gap differ on how this range should be calculated.

3. There is no uniform theory for how to apply the efficiency gap to states regardless of the numbers of districts in a given state. Dr. Jackman concedes that there currently is no acceptable range to apply the efficiency gap to states with six congressional seats or less, and that the accepted range of wasted votes for states with 7 to 15 seats is different from states with over 15 seats.

4. The efficiency gap test does not take into account issues such as the concentration of Democratic voters as compared to Republican voters, the impact of traditional districting principles in drawing single member districts, the quality of competing candidates, the amount of money raise by competing candidates, national wave elections that favor one party over the other, such as the 2008 Presidential election or the 2010 off-year election, the possibility that voters may change their vote in different

elections because candidates in the same party may have different ideologies, the areas of residence for split ticker voters, or the impact of ability-to-elect districts on the proportional statewide measures used to establish partisan bias or violations of the efficiency gap.

5. Under Dr. Jackman's standard, a constitutional violation based upon the efficiency gap is identified if the efficiency gap following the first election under a new plan falls outside of the permissible range established by Dr. Jackman.

6. Under Dr. Jackman's standard, North Carolina's 1992 congressional plan could not be considered a political gerrymander even though it divided 44 counties and a larger number of VTDs, placed several counties in three districts, and used point contiguity to advance partisan advantage and protect four white Democratic congressmen in three districts.

7. Neither North Carolina's 1997 congressional plan nor its 1998 congressional plan, both of which were enacted to elect six Democratic candidates and six Republican candidates, violate the efficiency gap without regard to how many counties were divided in order to make 12 noncompetitive districts.

8. The efficiency gap test does not take into account "wave" elections. This is demonstrated by North Carolina's 2001 congressional plan. This plan contained two ability to elect districts (CD 1 and CD 12), each of which elected two African American Congressmen from 2002 through 2010. In adopting the 2001 plan, the Democratic-controlled General Assembly transformed the 6-6 1997 plan into an 8-5 plan that favored

Democratic candidates. This plan included the infamous 13th district drawn by the chair of the senate redistricting committee to elect a Democrat to Congress from 2002 through 2010. Nonetheless, under the efficiency gap test, the 2001 plan did not fall outside the acceptable range for wasted votes in the 2002 election. In 2010, during a wave election that favored Republicans, the statewide election results show that the 2002 plan violated Dr. Jackman's trigger for scrutiny under the efficiency gap. Had the 2010 election taken place in 2002, the plan would have been constitutionally suspect under Dr. Jackman's theory. But, because the Republican wave election did not take place until 2010, the 2001 plan, drawn with the intent of partisan advantage, would have escaped all scrutiny.

b. Dr. Jowei Chen

1. Dr. Chen used an algorithm to draw 3000 simulated maps. Dr. Chen's algorithm is not based upon the criteria used by the General Assembly in enacting the 2016 Plan.

2. The General Assembly criterion on compactness indicated that it intended that districts should be more compact than the 2011 plan as measured by whole counties and whole precincts. Nothing in the criterion indicated an intent to maximize compactness under any measure. Dr. Chen's algorithm, however, included a factor for drawing maps that maximized the compactness of plans under the Polsby Popper test.

3. None of Dr. Chen's districts include a district with a black VAP that matches the black VAP found in the 2016 version of CD 1 and there is no evidence of a

second district in any of Dr. Chen's plans that is a very strong Democratic district and in which African Americans are a majority of registered Democrats.

4. Dr. Chen's primary conclusion is that his simulated maps show that the General Assembly considered partisan impact in drawing the 2016 Plan. This is not surprising since the General Assembly Joint Redistricting Committee adopted political impact and incumbency protection as criteria.

c. Dr. Jonathan Mattingly

1. Dr. Mattingly has never served as an expert witness in a case and does not know which area of expertise he will be tendered as an expert in this case.

2. Dr. Mattingly has no prior redistricting experience and has never drawn a redistricting map using Maptitude software.

3. Dr. Mattingly's opinions in this case will simply describe the "likely or unlikely" partisan distribution of redistrictings that would occur if the legislature had followed the redistricting criteria in House Bill 92. House Bill 92 is a bill that was filed to establish an independent redistricting commission in North Carolina, but it never became law.

4. Dr. Mattingly will not offer an opinion regarding the point at which an enacted redistricting crosses the line from being more reasonable or representative. Instead, he will simply offer the outcomes of the statistical distribution of randomly drawn redistrictings and ask the court to decide where the line should be.

5. Dr. Mattingly agrees that it is reasonable for some amount of politics to be considered in redistricting. He states that it would be "contrary to the idea of democracy" not to allow some political considerations to be used in redistricting. However, he will not offer a criterion or criteria for a court to decide when political considerations in redistricting are no longer "representative" of the "will of the people."

6. Dr. Mattingly's analysis ultimately generated approximately 24,000 different North Carolina congressional redistricting maps. The 24,000 maps are based on criteria from House Bill 92, not the actual criteria adopted by the legislature in enacting the 2016 Plan.

7. The 2016 Plan splits only 13 counties. In Dr. Mattingly's set of 24,000 redistrictings, none split fewer than 14 counties.

8. The 2016 Plan ensures no population deviation among the 13 congressional districts. In Dr. Mattingly's set of 24,000 redistrictings, none have a population deviation that is zero.

9. The 2016 Plan ensures compliance with the Voting Rights Act with ability-to-elect districts at 44.46% and 36.2%. In Dr. Mattingly's set of 24,000 redistrictings, only 648 have at least one district at 43.81% or above and one district at 35.26% or above. Of those redistrictings, none have such ability-to-elect districts and also split only 13 counties.

10. A visual review of the first 16 redistrictings of the set of 24,000 redistrictings demonstrates that Dr. Mattingly's simulated maps violate other traditional

redistricting principles. For instance, many of the 16 maps contain "double traversals", in which a county line is crossed twice by one or more other districts.

11. The legislature's criteria for the 2016 Plan included a directive to eliminate the previously "snake-like" CD 12. The 2016 Plan contains CD 12 wholly within Mecklenburg County. Dr. Mattingly could have programmed his algorithm to select redistrictings with one district wholly within Mecklenburg County, but declined to do so. Similarly, unlike the legislature's criteria, Dr. Mattingly made no attempt to ensure incumbents were not paired, although he could have done so.

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

13. Under the 2016 Plan, three Democrats were elected. Under Dr. Mattingly's analysis, the simulation map produced by the retired judges in the Beyond Gerrymandering project would elect nine Republicans and four Democrats. However, under his analysis, more "reasonable" maps would elect at least five Democrats. The difference between the 2016 Plan result and the Beyond Gerrymandering result was 27%. The difference between the Beyond Gerrymandering result of four Democrats and the more "reasonable" result of five Democrats was also 27%. Thus, under Dr. Mattingly's analysis, the "Judges" map is as "unreasonable" compared to Dr. Mattingly's "reasonable" outcome as the 2016 Plan is to the "Judges" plan.

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

15. Dr. Mattingly agrees that because African Americans vote at a high percentage for Democratic candidates, assessing the Voting Rights Act implications of a map amounts to the use of partisanship in the redistricting. He also agrees that the more a redistricter complies with the VRA, the more likely Republican outcomes will be. And the less a redistricter considers the VRA, the better the map will be for Democratic outcomes.

F. The Beyond Gerrymandering Project

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

2. The simulation project recruited former North Carolina judges to sit as a simulated independent redistricting commission drawing a simulated congressional redistricting plan.

3. The simulation exercise was conceived in early 2016 and was concluded by the end of August 2016. The Common Cause lawsuit was initially filed August 5, 2016.

4. The judges were instructed not to consider partisan criteria in drawing the simulation maps. However, plaintiffs admit that many of the judges understood the political geography of the state based on their residency and political involvement in the state for many years.

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

6. The VRA advice was provided by Bill Gilkeson, a long time staff attorney at the North Carolina General Assembly. Mr. Gilkeson was a lead redistricting lawyer for the legislator in the 1990s and 2000s, when the Democrats controlled the legislature. Mr. Gilkeson participated in drawing redistricting plans that Common Cause, the lead plaintiff in one of these actions, claim were partisan gerrymanders.

7. Mr. Gilkeson confirmed that the goal of North Carolina Senate Redistricting Chairman Brad Miller in 2001 was to create the new CD 13 as a strong Democratic district. He also confirmed that the 1997 Congressional Plan was intended to be a compromise that would elect six Democrats and six Republicans. He also believes that the 2001 Plan was intended to elect eight Democrats and five Republicans.

III. CONCLUSIONS OF LAW

A. Plaintiffs' claims are nonjusticiable as a matter of law.

For the reasons stated in defendants' motions to dismiss, the Supreme Court, not this court, should be the first to determine whether plaintiffs' allegations are sufficient to state a claim for partisan gerrymandering. Defendants incorporate by reference their arguments and briefing on the motions to dismiss. (D.E. 29 and 34 in Case No. 16-1026 and D.E. 31, 35, and 46 in Case No. 16-1164)

B. Plaintiffs lack standing.

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

A partisan gerrymandering challenge to a statewide congressional redistricting plan, such as that lodged by the organizational plaintiffs here, is foreclosed by *Vieth v. Jubelirer*, 541 U.S. 267 (2004). In *Vieth*, five Justices concluded that a statewide challenge on partisan gerrymandering grounds was nonjusticiable, with Justice Kennedy basing his conclusion to that effect on standing grounds. *Vieth*, at 292. Accordingly, federal courts lack authority to entertain statewide challenges.

This rule is reinforced by the Supreme Court's approach in racial gerrymandering claims. In the racial gerrymandering context, a plaintiff must establish that "race was improperly used in the drawing of the boundaries of one or more specific electoral districts." *Alabama Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). This is so because of the nature of the injury in such a case, which includes (1) "being personally subjected to a racial classification" and (2) being "represented by a legislator

who believes his primary obligation is to represent only the members of a particular racial group." *Id.* These same representational harms apply similarly in the partisan gerrymandering context, namely that a plaintiff is being personally subjected to a partisan classification, and may be represented by a legislator who believes his primary loyalty is to a particular political party. It would be strange to permit partisan-gerrymandering plaintiffs to assert a statewide challenge but require racial-gerrymandering plaintiffs to proceed on a district by district basis. Race-based claims allege a more serious violation of the Constitution than do partisan-based claims. *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). It would seem to follow that partisan gerrymandering claims should be subject to a greater standard for when broad-based challenges are permitted.

A statewide challenge on partisan gerrymandering claims is also particularly inappropriate in the context of a congressional redistricting plan. In *Whitford v. Gill*, 218 F.Supp.3d 837 (W.D. Wisc. 2016) the court allowed a statewide challenge to a legislative redistricting plan to go forward because, "given Wisconsin's caucus system, the efficacy of [the plaintiffs'] vote in securing a political voice depends on the efficacy of the votes of Democrats statewide." *Whitford*, 218 F.Supp.3d at 930. Under these circumstances, the "concern" in a challenge to Wisconsin's legislative map was "the effect of a statewide districting map on the ability of Democrats to translate their votes into seats" and thus have an opportunity to control the majority caucus. *Id.* In this case, no such "concern" is present because even if Democratic candidates won all 13 of North Carolina's

congressional seats, it would not guarantee that Democrats would control the United States House of Representatives. Accordingly, a statewide challenge is inappropriate even under the flawed reasoning of the *Whitford* majority.

2. In any event, plaintiffs lack standing.

Plaintiffs lack standing because they cannot establish the requisite causation between the 2016 Plan and any resulting harm. Nearly all of the individual plaintiffs testified that factors other than the redistricting could influence a voter to choose one candidate over another. In addition, a single election is insufficient to establish that plaintiffs' votes were diluted as a result of the 2016 Plan**.**

Neither of the plaintiffs residing in CD 3, Dr. Richard Taft and his wife, Cheryl Taft, has standing to challenge CD 3 because they admitted that their candidate of choice, Republican Congressman Walter Jones, was elected in the 2016 election, the only election held under the 2016 Plan. The testimony of Dr. and Ms. Taft further demonstrates that a member of Congress who is a member of a different political party from a voter can adequately represent that voter and in some instances be the voter's candidate of choice.

Judge Freeman's testimony demonstrates neither he—nor the plaintiffs in this case—have standing to challenge CD 5 in the 2016 Plan because he cannot show any injury by the way the district was drawn. At no time since he has lived in the district has he been able to elect a candidate of his choice. To the extent plaintiffs contend CD 5, as currently drawn, is not competitive for Democrats because a Democrat has "no chance"

of winning in the district, Judge Freeman's testimony demonstrates that this was true since at least 2002 under plans drawn by both Democratic and Republican-controlled General Assemblies.

The LWV lacks standing to proceed as a plaintiff in this lawsuit because it cannot identify a concrete and particularized injury in fact caused by the 2016 Plan. To the contrary, it has failed to allege much less prove that it has expended and diverted resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015). The organization's generalized goal of achieving proportional representation in North Carolina's congressional delegation is wholly insufficient to satisfy the particularized, concrete injury in fact standard required by the constitution and has already been rejected by the U.S. Supreme Court. As a result, the LWV should be dismissed as a plaintiff in this action.

Moreover, to the extent the LWV is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members are Republican voters who are represented by the candidate of their choice and whose interests in electing Republican candidates would potentially be harmed by the relief the Plaintiffs seek in the instant litigation. Thus, conferring standing on the LWV would be improper. *See Friends of the Earth, Inc. v. Laidlaw Environmental*

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

Common Cause lacks standing to proceed as a plaintiff in this lawsuit because it cannot identify a concrete and particularized injury in fact that is actual or imminent caused by the 2016 Plan. To the contrary, it has failed to allege much less prove that it has expended and diverted resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp*, 455 U.S. 363 (1982); *Nat'l Council of La Raza*, 800 F.3d 1032 (9th Cir. 2015). Its stated generalized goal of creating a more open, honest and accountable government and ensuring that elections are fair and neutral is wholly insufficient to satisfy the particularized, concrete injury in fact standard required by the constitution. As a result, Common Cause must be dismissed as a plaintiff in this action.

Moreover, to the extent Common Cause is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members are Republican voters who are represented by the candidate of their choice and whose interests in electing Republican candidates would potentially be harmed by the relief the plaintiffs seek in the instant litigation. Thus, conferring standing on Common Cause would be improper. *See Friends of the Earth, Inc.*, 528 U.S. 167, 181 (2000); *Hunt*, 432 U.S. 333 (1977).

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

the 2016 Plan. To the contrary, it has failed to allege much less prove that it has expended or diverted additional resources it would not have otherwise expended, but for the 2016 Congressional redistricting. *See e.g.*, *Havens Realty Corp*, 455 U.S. 363 (1982); *Nat'l Council of La Raza*, 800 F.3d 1032 (9th Cir. 2015). As a result, the NCDP must be dismissed as a plaintiff in this action.

Moreover, to the extent the NCDP is relying on the standing of its individual members to establish its own standing in this lawsuit, the undisputed facts show that some of its members have in fact voted for Republican candidates and are represented by the candidate of their choice, and whose interests in electing Republican candidates would potentially be harmed by the relief the plaintiffs seek in the instant litigation. Thus, conferring standing on the NCDP would be improper. *See Friends of the Earth, Inc.*, 528 U.S. 167, 181 (2000); *Hunt*, 432 U.S. 333 (1977).

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

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

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

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

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

In *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000) (three-judge court) *rev'd sub nom Easley v. Cromartie*, 532 U.S. 234 (2001) ("*Cromartie II*"), the Supreme Court reversed the district court's ruling that the 1997 CD 12 constituted a racial gerrymander. The Court found instead that politics was the predominant motive for the district. This was because North Carolina's sole justification for the 1997 CD 12 was that it was drawn to collect Democrats and ensure the election of a Democratic member of Congress from the district. The State went so far as to submit expert testimony demonstrating that the political decision to create a strong Democratic district was the primary motivation behind the district. The Supreme Court not only did not criticize this use of political motivation in response to the racial gerrymandering judgment, it expressly approved the 1997 CD 12 on that basis.

Here, to the extent that a political motivation lurks in part behind the 2016 Plan, it was as a response to a court having found a racial motivation behind the prior plan. And unlike in *Cromartie II*, in which the political motivation was the sole explanation for the district, the use of partisanship in the 2016 Plan was only one of numerous criteria which were balanced in creating the new districts. If the Supreme Court has approved the legality of a district *solely* motivated by politics in response to a racial gerrymandering judgment, then it is surely legal to enact a plan to remedy a racial gerrymander where partisanship is only a *partial* motivation for the plan.

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

All of plaintiffs' claims suffer from a fatal defect – they cannot reliably and consistently answer the question the Supreme Court has said must be answered for political gerrymandering claims to be justiciable: "how much [partisanship in redistricting] is too much." *Vieth*, 541 U.S. at 298-99 (plurality opinion). It is well established that partisan intent in redistricting is lawful. *Vieth*, 541 U.S. at 286 ("partisan districting is a lawful and common practice"); *id*. at 307 (Kennedy, J., concurring) (a "determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied"); *Cromartie II*; *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973). None of the plaintiffs take the position that all partisan considerations are or should be illegal in redistricting. And nor should they – the Supreme Court has long held that state legislatures are legitimate entities to draw a state's political districts. It would be strange indeed to force an inherently political body to ignore politics when engaging in its most inherently political task. But when do partisan considerations become "excessive"? Plaintiffs' experts and theories do not answer this question.

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

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

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

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

The mathematical analyses proposed by all of plaintiffs' experts have one thing in common – they cannot identify a partisan gerrymander at the time the alleged gerrymander is drawn. Each method requires at least one set of election results under the alleged gerrymandered plan before any partisanship analysis can even be performed. Thus, when a legislature draws a new redistricting plan, it would not know whether it violated any standard plaintiffs are proposing until after the first election conducted under the new plan. Had plaintiffs' standards been the law in 2016, when the General Assembly drew the 2016 Plan, it would not have known whether its plan violated those

standards. Defendants are aware of no legal standard, much less one that applies in redistricting, in which it is impossible to know the conduct to be avoided until after the conduct occurs. This flaw in plaintiffs' theories renders them unworkable for many reasons.

First, imposing a redistricting standard on a State in which the standard cannot be known in advance of the State drawing a new plan offends all notions of due process and fairness. The touchstone of due process is notice in advance of prohibited conduct so that conduct can be avoided. This is particularly true when it involves a federally-mandated restriction on redistricting, a function undisputedly primarily reserved to the states. In our system of federalism, it would be untenable for federal courts to impose a standard on a State that it cannot comply with in advance unless it happens to guess right.

Second, plaintiffs' theories virtually guarantee that every redistricting plan enacted by the State will be subjected to litigation after the first election is held. The only way a State could avoid litigation would be to correctly guess the redistricting plan that would not trigger scrutiny or, as explained below, mandate a policy of proportionate representation in its redistricting plans. But the Supreme Court has held that redistricting is primarily the prerogative of the states. *Davis v. Bandemer*, 478 U.S. 109, 143 (1986). Plaintiffs' theories would place states essentially under federal court supervision after the first election cycle under each plan. *Cf. Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment) (courts engaging in "the correction of all election district lines drawn for partisan reasons" would "commit federal and state courts to unprecedented intervention

in the American political process"). If the Supreme Court's cases acknowledging state supremacy in redistricting are to have any meaning at all, plaintiffs' theories must be rejected.

Next, the only way to avoid guaranteed litigation over redistricting plans would be for states to adopt a policy of mandatory proportionate representation in redistricting. In *Gaffney*, Connecticut created a redistricting plan for the express purpose of achieving roughly proportionate representation between Republicans and Democrats in its legislature based on statewide vote totals. 412 U.S. at 752. The Supreme Court held that such a "political fairness plan" could be adopted as a matter of state policy without running afoul of the Constitution. 412 U.S. at 752-53. Without knowing in advance how to comply with plaintiffs' standard of liability, states would be forced to draw "roughly proportional" redistricting plans as it is undisputed that redistricting plans which provide proportionate representation will always satisfy the efficiency gap and partisan bias tests plaintiffs propose. This would transform "political fairness plans" from a policy *choice*, as in *Gaffney*, to an effective policy *mandate*, and would violate the Supreme Court's admonition that states cannot be forced to enact proportionate representation redistricting plans. *Bandemer*, 478 U.S. at 132 (plurality). And, ironically, in order to draw roughly proportionate redistricting plans, states would be required to engage in gerrymandering to draw noncompetitive districts, as North Carolina did in 1997 when it drew a congressional plan designed to elect six Democrats and six Republicans.

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

To the extent that partisan gerrymandering claims may be recognized at all, it is not disputed that those challenging the alleged gerrymander must identify the "political group" whose votes are allegedly being minimized or diluted by virtue of a redistricting plan. *Gaffney*, 412 U.S. at 754; *Bandemer*, 478 U.S. at 124. To the extent that the Constitution protects discrimination against a citizen based on the weight of his vote, outside of the equal population context, it would have to be grounded in the "political preferences" expressed by that citizen. *Cf. Whitford*, 284 F.Supp.3d at 883. In the context of racial minorities, the Constitution and federal law only protect identifiable groups that are politically cohesive. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). In racial gerrymandering and vote dilution cases, the minority group is easy to identify as race is an immutable characteristic. In this case, however, plaintiffs have not identified any political group, particularly one that is politically cohesive in its "political preferences."

None of the political groups that the court might consider for such protection would qualify here. For example, is the protected political group registered Democrats? If so, it is undisputed that all but one of the congressional districts in the 2016 Plan have more registered Democrats than registered Republicans. Registered Democrats, if cohesive, are therefore more able to elect the candidate of their choice in those districts than Republicans. The fact that Republican candidates won ten out of thirteen elections

under the 2016 Plan demonstrates that the majority registered Democrats were not cohesive and were not voting as a bloc for the Democratic candidate.

Is the protected politically identifiable group voters who vote for Democratic candidates? Again, plaintiffs have not identified a discrete group of citizens who only vote for the Democratic candidate in every congressional election. The testimony of the plaintiffs themselves demonstrates that finding such a group in North Carolina would be impossible. Nearly all of the plaintiffs admitted that they either have voted for Republican candidates, or would do so if the right Republican candidate was running in the election. Plaintiffs have offered no evidence, statistical or otherwise, establishing that Democratic voters, or any particular group of Democratic voters, are being thwarted from electing the candidate of their choice in any given election. This is not surprising because it is well established in the political science literature that candidates matter more than political party for voter preference. Even plaintiffs' own expert, Dr. Mattingly, conceded that it is erroneous to assume that voters vote only for the political party, not the candidate, when voting in congressional elections.

Because voters' preferences often change over time, mapdrawers who use political data do so at their own political peril. But plaintiffs' efficiency gap and partisan bias theories assume that the political party a voter votes for in the first election after a redistricting plan is enacted will not change over the life of a plan. These theories therefore use political "scoring" as a judicial standard, even as the plaintiffs criticize the State for using political data in drawing the 2016 Plan. If the court were to impose these

standards on the State for redistricting, it would amount to mandating judicial sorting of voters based upon how those voters voted in the first election after a plan was adopted. This would be akin to what the Supreme Court has criticized as "judicial predictions, as a matter of law, that race and party would hold together as an effective majority over time—at least for the decennial apportionment cycles and likely beyond." *Bartlett v. Strickland*, 556 U.S. 1, 22-23 (2009). The Court declines to mandate a redistricting standard as a matter of law that is grounded in a judicial prediction, or misprediction, about the shifting political judgments of individual citizens.

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

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

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

each party. Partisan bias demands that the proportion of seats won by each party be the same when either party wins a certain percentage of votes. Efficiency gap requires that each party have the same proportions of wasted votes within a certain range. Different experts on efficiency gap differ on how this range should be calculated. Moreover, there is not even any uniform theory for how the efficiency gap applies to states with different numbers of districts. Plaintiffs' expert in this case concedes that there currently is no acceptable range to apply the efficiency gap to states with six congressional seats or less, and that the accepted range of wasted votes for states with 7 to 15 seats is different from states with over 15 seats.

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

These measures are also arbitrary and extremely inconsistent. For example, under the efficiency gap, the 1992 congressional plan could not be a political gerrymander.

This finding contrasts with the findings by the district court in *Shaw v. Hunt* that the 1992 plan divided 44 counties and a larger number of VTDs, placed several counties in three districts, and employed point contiguity to gerrymander at least three districts to protect four white Democratic incumbents. Under plaintiffs' efficiency gap theory, plaintiffs cannot challenge specific districts as political gerrymanders. Instead, whether voters in a particular district are the victim of overt political gerrymandering is irrelevant, so long as the statewide proportions required under the test falls within the range deemed acceptable by plaintiffs' experts.

Next, under both efficiency gap and partisan bias, a legislature could escape violating either standard by enacting an equal number (or close to an equal number such as 7 to 6) of completely noncompetitive districts that would ensure the election of the candidate for the party that is dominant in each district. In other words, both theories encourage legislators to gerrymander districts so that none of them are competitive. This is demonstrated by North Carolina's 1997 and 1998 plans, both of which were enacted to elect six Democratic candidates and six Republican candidates.[6] Neither of these plans violates the efficiency gap without regard to have many counties or VTDs are divided in order to make 12 noncompetitive districts.

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

Finally, the efficiency gap is arbitrary because it does not take into account wave elections. This is demonstrated by North Carolina's 2001 congressional plan. This plan contained two ability-to-elect districts (CD 1 and CD 12) which elected two African American Congressman from 2002 through 2010. The plan was enacted by a General Assembly under the complete control of the Democratic Party which decided to change the 6-6 1997 plan into an 8-5 plan that favored Democratic candidates. This plan included the infamous 13th district drawn by the chair of the senate redistricting committee. The 2001 CD 13 is an obvious political gerrymander and it resulted in the Senate Chair's election to Congress from 2002 through 2010. But under the efficiency gap theory, the 2001 plan was not a political gerrymander because it did not fall outside the acceptable range for wasted votes in the 2002 election.

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

These facts all demonstrate that partisan bias and efficiency gap do nothing more than measure proportions of statewide vote totals in any single election. Neither test is particularly good or consistent at identifying whether a plan or, more importantly, an individual district, has been politically gerrymandered. Nor does either concept provide

judicially manageable standards that could be used by a legislature when it draws a plan to be used in the future or by a court when it reviews a plan prior to a first election.

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

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

First, this theory, if applied as plaintiffs allege, would not permit the use of "political data" at all in redistricting. The theory relies on an employment-discrimination like model of liability in which consideration of a person's political views is prohibited when making employment decisions about that person. *See Elrod v. Burns*, 427 U.S. 347 (1976). However, this model is completely inconsistent with the long line of Supreme Court cases expressly allowing legislatures to take partisanship into consideration when redistricting. *Gaffney*; *Cromartie II*; *Vieth*. Accordingly, it is not appropriate.

Second, if plaintiffs' theory would in fact allow the use of "political data," but just not "too much", then the theory suffers from all of the same problems as plaintiffs' math-based theories. As Justice Kennedy argued in proposing such a standard in *Vieth*, the "inquiry is not whether political classifications were used [but instead] whether political classifications were used to burden a group's representational rights." *Vieth*, at 315. However, this standard would still pose the question that has vexed the Supreme Court: how much use of political classifications constitutes a "burden" and where does the court draw the line between a permissible and impermissible burden? As demonstrated above,

plaintiffs have failed to describe a workable and constitutional line in the context of their other claims, and that failure dooms their First Amendment claim as well.

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

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

First, the 2016 Plan is not a "gerrymander" at all. The hallmark of a gerrymander is the subordination of traditional redistricting criteria to some other goal. *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993) ("*Shaw I*"). It is beyond dispute, however, that the 2016 Plan follows traditional redistricting criteria better than any congressional map in North Carolina for at least the past 25 years. The 2016 Plan contains 87 whole counties and splits only 12 VTDs across the entire state. No county is split into more than two congressional districts.

The extent to which the 2016 Plan follows traditional redistricting criteria is all the more striking when compared to the 1992 congressional plan. The 1992 plan was when the North Carolina General Assembly, then controlled by Democrats, unveiled the "serpentine" version of CD 12 that has been roundly criticized. The 1992 plan divided 44 counties, seven of which were split into three congressional districts, and split at least 77 VTDs.

The 1992 congressional plan was drawn by John Merritt, an aide to white Democratic Congressman Charlie Rose, and endorsed by the National Committee for an Effective Congress. *Shaw v. Hunt*, 861 F.Supp. 408, 466 (E.D.N.C. 1994) *rev'd* 517 U.S.

399 (1996). However, the plan was introduced into a public hearing by the Executive Director of the NC NAACP, not Mr. Merritt. *Id.* The odd shapes and locations of districts were the result of the legislature's intent to protect at least four incumbent white Democratic Congressmen. *Id.* at 465, 467-68. The Democratic legislature also accomplished its goal by packing Republican voters into a small number of districts, thereby decreasing the influence of Republican voters in other districts. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) (three-judge court). The General Assembly departed from traditional redistricting principles to achieve these goals and instead created the most non-compact congressional districts in the history of North Carolina. *Shaw*, at 469.

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

Significantly, this plan survived a political gerrymandering challenge in one of the seminal cases on this issue in this circuit – *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court). *Pope* was summarily affirmed by the Supreme Court. 506 U.S. 801 (1992).

In *Pope*, the three-judge court recognized that even under *Bandemer*, a redistricting plan is not unconstitutional merely because it "makes it more difficult for a particular group in a particular district to elect the representatives of its choice." *Pope*, at 396 (quoting *Bandemer*, 478 U.S. at 131).[7] While the Supreme Court has never agreed or decided on what evidence, if any, could possibly establish such a claim, it is clear that at a minimum it would take the results of more than one election under the challenged redistricting plan. *Pope*, at 396. Moreover, "the power to influence the political process is not limited to winning elections." *Id*. at 397 (quoting *Bandemer*, 478 U.S. at 132). Individuals who vote for a losing candidate are "deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *Id*. Thus, there is simply no basis for a political gerrymandering claim here.

Moreover, the criteria adopted by defendants to comply with the *Harris* court's order have been mischaracterized. The criterion called "partisan advantage" was only one of seven criteria. The language of the criterion stated that the "committee shall make

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

reasonable effort to construct districts in the 2016 contingent plan to maintain the current partisan makeup of North Carolina's Congressional delegation." Despite plaintiffs' hyperbole, defendants did not set out to maximize the number of Republicans elected under the congressional plan or create the strongest possible Republican districts but instead to make reasonable efforts to maintain the existing partisan balance in North Carolina's congressional delegation. Moreover, this criterion was balanced against the other criteria such as compactness, contiguity, and equal population. A cursory review of the 2016 Plan shows that the legislature followed all of the criteria, including this one. Plaintiffs instead seize upon the one criterion and magnify it to the exclusion of all the others.

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

Finally, the statistical facts conclusively demonstrate that the legislature did not target Democrats in the 2016 Plan. It is statistically impossible for Republican candidates to win ten of the districts in the 2016 Plan with votes only from registered Republicans. The fact that Republican candidates won ten of the districts in 2016 simply proves that

thousands of Democrats and unaffiliated voters voted for Republicans. Why do droves of voters registered as Democrats vote for Republican congressional candidates? The answer to that question involves a "sea of imponderables" that the Equal Protection clause does not address and that judges are ill-equipped to decide. *Vieth*, 541 U.S. at 290.[8] Accordingly, plaintiffs' partisan gerrymandering claims regarding the 2016 Plan are without merit.

[8] Nor does the Constitution "answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are "effectively" distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former "dilutes" the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, § 2, nor the Equal Protection Clause takes sides in this dispute." *Vieth*, 541 U.S. at 288 n.9.

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

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CERTIFICATE OF SERVICE

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

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This the 5th day of June, 2017.

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