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

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

LEGISLATIVE DEFENDANTS' POST-TRIAL BRIEF

I. INTRODUCTION

Redistricting is a core sovereign function reserved in North Carolina to the state legislature. Plaintiffs through this action seek to transfer the inherently political process of redistricting from state legislatures to federal courts. If plaintiffs have their way, the federal courts will wander out of the political thicket and into a political lion's den. Plaintiffs thrust federal courts into the middle of a vibrant and ongoing political conversation among competing views and ask judges to pick political winners and losers in what will become judicial gerrymandering.

Plaintiffs ask this Court to take this risky leap not based on evidence explaining how a particular district or its lines have been gerrymandered or are otherwise distorted. Rather, plaintiffs presented a smorgasbord of alleged "social science" theories for the Court to blindly choose from, theories which are unreliable, imprecise, and self-contradictory—hardly the judicially manageable standards sought after by the Supreme Court. Plaintiffs' theories do not—and cannot—answer the elusive question asked by the Supreme Court – how much politics is too much politics in redistricting? Accordingly, their claims should be rejected.[1]

II. The legislature did not seek maximum political advantage in the 2016 Plan.

The centerpiece of plaintiffs' case is the unremarkable fact that one (out of seven) criterion for the creation of the 2016 Congressional Plan (the "2016 Plan") was called

[1] Contemporaneous with the filing of this Post-Trial Brief, Legislative Defendants have also filed Proposed Findings of Fact and Conclusions of Law, which are incorporated by reference herein.

"partisan advantage." It is undisputed that "partisan advantage" and politics in general are appropriate considerations that are a part of the redistricting process in North Carolina regardless of which political party controls the General Assembly. Plaintiffs nonetheless take this single criterion and several out-of-context statements by Rep. David Lewis and ask the Court to infer that the legislature "maximized" partisanship in creating the 2016 Plan. In doing so, plaintiffs maximize the trivial and trivialize reality.

First, 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 that one criterion stated that the "committee shall make *reasonable effort* to construct districts in the 2016 contingent plan to *maintain the current partisan makeup* of North Carolina's Congressional delegation." Despite plaintiffs' hyperbole, defendants did not set out to maximize the number of Republicans elected under the congressional plan or create the strongest possible Republican districts but 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 magnify it to the exclusion of all the others.

As part of their strategy to cover the weaknesses in their case, plaintiffs also exaggerate statements by Rep. Lewis while ignoring their true context. The statements plaintiffs criticize were made during a lengthy debate regarding criteria for the 2016 Plan—a debate which spans 176 pages of the legislative record. All of the statements

plaintiffs focus on were made only when the committee was debating the "partisan advantage" criterion and constitute a fraction of the overall debate (22 of 176 pages of the legislative record).

Rep. Lewis has fully explained these statements during testimony which was admitted in this case. Rep. Lewis explained that when he used the term "political gerrymander" he was doing so to emphasize that *race* was *not* a factor in the 2016 Plan. After all, the legislature was redrawing congressional districts in 2016 in response to a finding that two districts had been racially gerrymandered. Thus, Rep. Lewis was simply acknowledging a political motive over a racial motive.

Put in context, the statements do not reveal an intent to maximize partisan advantage in the 2016 Plan. Rather, they reveal an intent to maintain the political status quo in the State's congressional delegation after court-ordered redistricting. When he stated that "perhaps" ten Republicans and three Democrats could be elected, he was referencing satisfying the current congressional delegation (which was ten Republicans and three Democrats) that the status quo would be maintained (that no one was "out to get them" in the court-ordered redistricting).[2] A nearly identical strategy was adopted by the legislature in 1997 following court-ordered redistricting of the State's congressional plan. Then-Senator and now-Governor Roy Cooper was very explicit about the strategy: "We said from the beginning in the Senate that in 1996 the people made a decision to

[2] To the extent that plaintiffs dislike the fact that the then-current political status quo under the 2011 congressional plan was ten Republicans and three Democrats, neither the plaintiffs nor any other party has ever challenged the 2011 congressional plan as a political gerrymander.

elect six members of Congress from the Democratic Party and six members of Congress from the Republican Party and we should not use court ordered redistricting to alter that result. Therefore, we've come up with the plan that you see before you."

The benefits to our democratic system in this incumbent protection strategy have been repeatedly recognized and approved by the Supreme Court. The Court has recognized that preserving incumbents may "preserve the seniority the members of the State's [congressional] delegation have achieved in the United States House of Representatives." *White v. Weiser*, 412 U.S. 783, 791 (1973). In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), even Justice Breyer in dissent acknowledged that sometimes "pure politics often helps to secure constitutionally important democratic objectives." *Id.* at 355 (Breyer, J., dissenting). He went on to explain that "[t]he use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation." *Id.* at 360 (Breyer, J., dissenting).

In fact, however, Rep. Lewis explained that the legislature *could have* maximized partisanship in the 2016 Plan but *expressly did not*. For instance, he considered a map that could elect nine Republicans (in stronger districts) and four Democrats but rejected this map because it would have required violating other criteria. Rep. Lewis also confirmed it is in fact possible to draw a congressional plan that could elect 11 Republicans and two Democrats, but only if numerous other criteria were violated, such as keeping more counties whole and splitting fewer precincts. Rep. Lewis testified that

instead of maximizing partisan advantage, they drew a plan that preserved the political status quo and followed all of the other criteria adopted by the legislature.

The lack of maximized partisan advantage is borne out by the map itself. 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. These 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. Rather than accept this fact and spend their resources trying to attract Democratic and unaffiliated voters to vote for Democratic candidates, plaintiffs and their Democratic allies seek through legal action what they have been unable to accomplish politically.

Stripped of hyperbole, there is no evidence of illegal partisan intent here. Instead, this case is nothing more than a successor to *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*"), in which 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 that 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 political considerations were one of many considerations in the creation of the 2016 Plan, it was as a response to a court having found a racial motivation behind the prior plan. And unlike in *Cromartie II*, in which the political motivation was the sole explanation for the district, the use of partisanship to protect incumbents of both parties in the 2016 Plan was only one of numerous criteria which were balanced in creating the new districts. If the Supreme Court has approved the legality of districts *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.

II. The 2016 Plan is not a "gerrymander" of any kind.

If the 2016 Plan is a "gerrymander," then this Court will have to change the definition of gerrymander understood for decades by the Supreme Court. "Gerrymandering" is 'the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.'" *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) (Powell and Stevens, J. J., concurring in part and dissenting in part) (citing *Kilpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortus, J. concurring)); *Vieth*,

541 U.S. at 321 (Stevens, J. dissenting); *see also Shapiro v. McManus*, 203 F.Supp.3d 579, 592 (D. Md. 2016) (three-judge court) (political gerrymandering is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one party an unfair advantage by diluting the opposition's voting strength") (citing *Black's Law Dictionary*, 802, 1346 (10th ed. 2014)). Consistent with this traditional understanding of the term "gerrymander," the Supreme Court cases involving alleged illegal gerrymanders have been based upon allegations of "bizarre," "grotesque," or meandering districts that fail to follow traditional districting principles.

For example, in *Bandemer*, plaintiffs alleged that the legislative districts adopted by the State of Indiana were of "irregular shape" and failed to "adhere consistently to political subdivision boundaries to define communities of interest." 478 U.S. at 116. Similar allegations were made by plaintiffs in the other decisions on political gerrymanders. *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Ca. 1988); *Pope v. Blue*, 809 F. Supp. 392, 394-95 (W.D.N.C. 1992) (three-judge court); *Vieth*, 541 U.S. at 272-72; *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 424 (2006) ("*LULAC*") (plurality opinion), 455, 458 (Stevens, Breyer, J. J.) (concurring in part and dissenting in part).

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 precincts across the entire state. No county is split into more than two congressional districts. It is simply not a gerrymander.

Next, the fact that the 2016 Plan is not a gerrymander is proven by the independent simulation project known as the Beyond Gerrymandering project. There, a panel of former judges evenly divided by political party drew a North Carolina congressional plan that plaintiffs' experts agree would likely elect nine Republicans and four Democrats. The 2016 Plan elected ten Republicans and three Democrats in what was indisputably a very good year for Republican candidates in general. In what world is a plan that elects ten Republicans an unconstitutional political "gerrymander" but a plan that elects nine Republicans not a gerrymander? Neither the plaintiffs nor their experts have provided an answer to this question.

Instead, plaintiffs presented a smorgasbord of "social science" theories as a substitute for a judicially manageable standard. The centerpiece of their "social science" was the efficiency gap. However, plaintiffs' expert's own testimony dooms this measure as a possible standard.

For example, plaintiffs' expert Dr. Jackman admits that for states with seven to 15 congressional seats (such as North Carolina), the efficiency gap as calculated by him can have an error rate as high as 33%. And, by his own admission, that error rate goes "both ways." That is, the efficiency gap "flags" maps as gerrymanders that are not gerrymanders, and it also fails to flag maps as gerrymanders that are in fact gerrymanders. Surely such a flawed standard is not reliable enough to be enshrined in the federal Constitution. Specific examples of this error rate abound, particularly with gerrymanders drawn by Democratic legislatures. For example, under the efficiency gap, the 1992 congressional plan, replete with meandering districts with finger-like

appendages and the notorious serpentine-like CD 12, would not be a political gerrymander. This finding contrasts with the findings by the district court in *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd on other grounds*, 517 U.S. 899 (1996), that the 1992 plan divided 44 counties and a larger number of precincts, placed several counties in three districts, and employed point contiguity to gerrymander at least three districts to protect four white Democratic incumbents.

Perhaps more significantly, Dr. Jackman's version of the efficiency gap cannot be used as a standard in almost 20% of the entire United States because it cannot be applied in states with six or fewer congressional districts. It would be untenable for a court to impose a constitutional standard on one state that literally cannot be imposed or applied in all other states.

In addition, under both efficiency gap and partisan bias, a legislature could escape violating either standard by enacting an equal number (or close to an equal number such as seven to six) of completely noncompetitive districts that would ensure the election of the candidate for the party that is dominant in each district. In other words, both theories encourage legislators to gerrymander districts so that none of them are competitive. This is demonstrated by North Carolina's 1997 and 1998 congressional plans, both of which were enacted to elect six Democratic candidates and six Republican candidates. Neither of these plans violates the efficiency gap despite being intentionally gerrymandered to create 12 noncompetitive districts.

Plaintiffs' simulated map theories are equally flawed. These theories rely on hypothetical election results in which it is assumed that all voters vote for the party, and

not for individual candidates. That baseless assumption alone is enough to reject this as a possible amendment to the constitution.

Moreover, the simulated map theories as presented by Dr. Chen and Dr. Mattingly suffer another fundamental defect: they engage in an apples-to-oranges comparison of their simulated maps to the 2016 Plan. Both experts omit multiple criteria that were adopted by the legislature or that are plainly observable in the 2016 map itself. As other experts in this field have opined, studies relying on simulated maps must use all observable criteria in the enacted maps in order to produce meaningful results. The evidence at trial demonstrated that Dr. Chen and Dr. Mattingly fell woefully short of this goal.

At most, Dr. Mattingly and Dr. Chen were able to "prove" that partisan factors played some part in the construction of the 2016 Plan. Neither could say exactly how much because their simulations focused solely on nonpartisan criteria. (In the case of Dr. Chen, he claimed to "protect incumbents" but did so only by not putting them in the same districts but ignored political data that the legislature used to ensure incumbents could actually have a shot at winning the district). Most significantly, neither expert could tell the Court where a line could be drawn such that a redistricting plan went from "reasonable" to "unreasonable" and became an "outlier." Thus, plaintiff's experts have simply left this Court back at square one with no judicially manageable standard for identifying "excessive" partisanship in redistricting.

III. The plaintiffs' lack of standing highlights the unworkability of a political gerrymandering standard.

All of the individual plaintiffs in this case lack standing. The reasons for their lack of standing highlight the unworkability of relying on the "social science" methods plaintiffs' propose as a substitute for a judicially manageable standard.

First, multiple individual plaintiffs admitted they were able to elect their candidate of choice under the 2016 Plan, including plaintiffs in CDs 1, 3, 4, and 12. These plaintiffs are thus asking the Court to impose a new constitutional rule on the State for districts that produced the political outcome they wanted.

Another subset of the individual plaintiffs reside in districts that, since at least 2002, have elected a member of Congress from the same political party regardless of which party in the General Assembly adopted the congressional plan. Since at least 2002, CDs 1, 4, and 12 have always elected Democrats. During that same time, CDs 3, 5, 6, 9, and 10 have always elected Republicans. Thus, the districts in which these plaintiffs reside were not "competitive" for more than a decade before the 2016 Plan was adopted and under plans drawn by both Republican and Democratic legislatures.

Finally, the individual plaintiffs who reside in the remaining five congressional districts—CDs 2, 7, 8, 11, and 13—also lack standing because all of these districts had an incumbent Republican member of Congress at the time the 2016 Plan was adopted. Thus, these plaintiffs are asking the Court to strike down a congressional plan that could not possibly have been the source of any "harm" to them.

Instead, what plaintiffs are asking the Court to do is *sub silentio* eliminate district-based congressional redistricting in North Carolina. As shown above, none of the plaintiffs have a legitimate concern with so-called political gerrymandering in their individual districts. Plaintiffs are actually complaining that the overall 2016 election result of ten Republicans and three Democrats based on statewide data is not "fair" to them, notwithstanding the result in each individual district. If plaintiffs' "social science" theories were constitutionalized, however, the legislature would have to consider votes cast for candidates around the state in designing new congressional plans. This means that the preference of voters in eastern North Carolina would have to be taken into account when drawing a district in western North Carolina—hundreds of miles away. The practical import of plaintiffs' "social science" theories is that strong performance by the candidate of one political party in, for example, CD 1, could require modifications to the shape and make-up of, for example, CD 11, to the detriment of a candidate of another political party at the opposite end the State in order to minimize the number of "wasted" votes or to reach what plaintiffs' would consider a "fair" result statewide..

Put another way, the geography of a district would be subordinate to the statewide voter results, and federal law requiring that members of Congress be elected from single-member districts would be *de facto* transformed into an at-large, statewide apportionment scheme. *See* 2 U.S.C. § 2c (mandating that all Members of the House of Representatives be elected from single-member districts with "no district to elect more than one representative"). If such a drastic change to the way members of Congress are to be

elected is to be made, it should be Congress—not the federal judiciary—which should make this call.

IV. Plaintiffs' First Amendment claims are as unworkable as their other claims.

Plaintiffs' First Amendment claims must be dismissed because, unlike the district challenged in *Shapiro*, plaintiffs have failed to allege how any of the 2016 districts "divid[e] a geographical area into electoral districts, often of highly irregular shape, to give one party an unfair advantage by diluting the opposition's voting strength." *Shapiro*, 203 F.Supp.3d at 592.

Moreover, in this case, plaintiffs' First Amendment theory would ban the use of "political data" in redistricting. But this interpretation of the First Amendment has been flatly rejected by decisions of the Supreme Court and in concurring and dissenting opinions acknowledging that districting and politics are inseparable. For example, in *Bandemer*, the Court rejected plaintiffs' arguments that direct evidence of partisan intent was enough to invalidate a plan even where plaintiffs also alleged, unlike this case, that the challenged plan failed to follow traditional districting principles. While a plurality of the *Bandemer* Court found political gerrymandering claims to be justiciable, the plurality (and the three *Bandemer* Justices who believed that political gerrymandering is non-justiciable) rejected the argument – like the one made here by the Common Cause plaintiffs – that consideration of political impact or the failure to draw districts without regard to the viewpoint of voters – could alone prove a claim of unconstitutionality. Flatly rejecting the "viewpoint" theory advanced here by Common Cause, the Court

noted, "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary." *Bandemer*, 478 U.S. at 128. The Supreme Court's statements on this issue have not changed since *Bandemer*. The Common Cause plaintiffs' argument is unworkable because it simply does not square with decades of Supreme Court precedent.

Next, even if plaintiffs' theory would in fact allow the use of "political data," but just not "too much," then their theory suffers from all of the same problems as plaintiffs' other theories. As Justice Kennedy argued in speculating about such a standard in *Vieth*, the "inquiry is not whether political classifications were used [but instead] whether political classifications were used to burden a group's representational rights." *Vieth*, 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.

It is clear that, unlike normal First Amendment cases, plaintiffs here are not seeking equal *participation* in the electoral process. Rather, they are seeking electoral *success* through the use of statewide data in constructing new congressional districts. At bottom, plaintiffs are claiming a right that does not exist, under standards that are not remotely manageable, for an alleged harm that does not in any way impact the internal

affairs of any political party. They are not claiming the right to associate with like-minded individuals for the purpose of espousing shared views, but the right to control the government by electing their preferred candidates. That right finds no basis in familiar First Amendment standards, much less manageable ones.

V. Until the Supreme Court identifies a political gerrymandering standard, this issue is best left to the political branches of our democracy.

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

Further, as explained by Justice O'Connor, "the Framers of the Constitution unquestionably" intended that questions concerning partisan gerrymandering should be left to the legislative branch. *Bandemer*, 478 U.S. at 144. There is not "a shred of evidence . . . that the framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed." *Id*. at 145. Thus, the Supreme Court has counseled the exercise of restraint instead of overruling policy choices of elected representatives, and the responsibility of the people – not the Court – to resolve political disputes.

Alleged gerrymandering is a perfect example because so-called gerrymanders often do not work as the politicians intended. North Carolina provides a great example of this. The 1992 congressional plan, 2001 congressional plan, and 2003 state legislative plans were all drawn by Democratic legislatures to elect Democratic majorities. But they all eventually backfired. These examples underscore the reasons the Framers intended that political questions should be resolved by the people, not federal judges. Without regard to efficiency gaps, proportional representation, or other academically inspired proposed judicial amendments to the Constitution, the alleged 2016 "gerrymander" could result in electing fewer Republicans in future elections. Whether Democratic candidates can or should win election in compact districts based upon traditional districting principles is a political question – not a judicial issue. The results of the 1994 election and other examples of failed attempts at so-called political gerrymanders provide a cautionary tale for this Court. This Court should avoid entangling itself in the highly partisan, hotly disputed and inherently political process of redistricting. Instead, as has been the norm for centuries, it should be left to the people of the state of North Carolina to decide at the ballot box whether to elect Republicans or Democrats in single-member, geographically-based districts that follow traditional redistricting principles.

This, the 6th day of November, 2017.

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

/s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Counsel for Legislative Defendants