STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 18-CVS-014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative David R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

LEGISLATIVE DEFENDANTS' PRE-TRIAL BRIEF

The North Carolina Democratic Party and its fellow Plaintiffs ask the Court to throw out the duly enacted 2017 redistricting plans to help them secure a partisan advantage they did not achieve at the ballot box. In doing so, Plaintiffs ask this Court to jettison the delicate balance of powers the North Carolina Constitution and settled precedent have set over the highly political task of redistricting. The Court should not accept this invitation to compromise judicial independence and non-partisanship—especially not in this case, which is exceptionally poor on the merits.

North Carolina's judiciary has encountered many redistricting challenges over the decades and has been repeatedly called upon to balance two competing values. On the one hand, "[r]edistricting should be a legislative responsibility for the General Assembly, not a legal process for the courts." *Pender County v. Bartlett*, 649 S.E.2d 364, 373 (N.C. 2007). On the other, some redistricting schemes "implicate[] the fundamental right to vote on equal terms," a proper subject for judicial review. *Stephenson v. Bartlett*, 562 S.E.2d 377, 393 (N.C. 2002).

The North Carolina Constitution navigates these competing values with "bright line rule[s]" to provide the "General Assembly a safe harbor for the redistricting process." *Pender County*, 649 S.E.2d at 373. These rules, including the Whole County Provisions of Article II ("WCP"), set some of the strictest redistricting requirements in the nation. They gracefully balance legislative primacy and individual rights. The rules preserve the latter by curbing legislative discretion, thus prohibiting the General Assembly from "needlessly burden[ing] millions of citizens with unnecessarily complicated and confusing district lines." *Stephenson*, 562 S.E.2d at 392. They preserve the former by establishing discrete, objective, and clear principles so the General Assembly knows with precision the scope of its duties and discretion.

It is therefore settled law that, so long as the General Assembly complies with these strict principles, it "may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Id.* at 390. "Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law." *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013). As the North Carolina Supreme Court recently held, arguments about what redistricting plan is "best for our State as a whole" are "not based upon a justiciable standard." *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014).

Plaintiffs want this Court to change all of that. But there is no good reason for doing so, and this Court lacks the power. It should be common ground that, even if Plaintiffs' claims were justiciable (they are not), "[r]espect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases." *Rucho v. Common Cause*, 588 U.S. ___ (2019) (slip op. at 15)[1] (Kagan, J., dissenting). The trial evidence will show that the

[1] 2019 WL 2619470 at *25 (U.S. June 27, 2019).

current constitutional constraints are robust, prophylactic protections against egregious cases, ensuring they never even arise. Here, the constitutional WCP rule and the bar on mid-decade redistricting locked into place a remarkable 63% of population assignments in the Senate plan. If the courts' role is to micromanage the remaining 37%, then what legislative responsibility remains? The answer, of course, is none. And that is the point of this case.

Plaintiffs' presentation will be elaborate but devoid of common sense. Most of the districts Plaintiffs challenge are held by Democratic members, and Democratic voters have proportional representation or better in county groupings they challenge. The Democratic Party's own partisan data indicate that a comfortable Democratic majority is possible under the 2017 plans. Plaintiffs rely on counter-factual computer simulations to demonstrate some partisan motive, but they fail to establish a meaningful partisan effect. And the simulations do not bear out in reality. For example, one of Plaintiffs' experts concluded that the 2017 House plan is an "outlier" because it contains 42 Democratic seats, whereas his simulated plans created an average of 46 or 47. But Democratic members currently hold 55 House seats, far exceeding both figures. Simulations so far removed from fact are useless.

The "constitutional dangers underlying Plaintiffs' influence theories" are well known. *Dickson*, 2013 WL 3376658, at *21. Plaintiffs want a different process, and they want the Court, in effect, to amend the State Constitution to provide it. This, the Court cannot do. Neither major party needs the courts to become its appendage for partisan gain, and Plaintiffs' demand for precisely that would undermine constitutional order and judicial independence. The Court should decline this invitation and enter judgment against Plaintiffs on every count.

FACTUAL BACKGROUND

I. The *Covington* Litigation

In 2011, new census data required the General Assembly to redraw its House and Senate districts to comply with the Equal Protection Clause's one-person, one-vote principle. In that redistricting, the General Assembly interpreted the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that Section 2 of the Voting Rights Act ("VRA") imposes a "majority-minority" rule, *id.* at 17–19, to require the creation of majority-minority districts with a black voting-age population, or "BVAP," of at least 50%. Accordingly, the General Assembly included 28 majority-minority House and Senate districts in the 2011 plans. The Department of Justice Voting Rights Section precleared the 2011 plans under VRA § 5.

In May 2015, residents of the respective majority-minority districts filed suit in the Middle District of North Carolina, *see Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), alleging that the General Assembly's VRA-compliance goal tainted the redistricting with suspect racial intent. "Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quotations omitted). On the one hand, if racial considerations are "predominant," the redistricting law is subject to strict scrutiny under the Equal Protection Clause. *See Miller v. Johnson*, 515 U.S. 900, 911–17 (1995). On the other, ignoring race may result in districts that "provide[] less opportunity for racial minorities to elect representatives of their choice." *Abbott*, 138 S. Ct. at 2315 (quotations omitted).

The *Covington* plaintiffs alleged that the General Assembly erred in the first respect by drawing 28 majority-minority districts for predominantly racial reasons. They also contended that districts were insufficiently tailored under the VRA to satisfy strict scrutiny because (they claimed)

a 50% BVAP target was not necessary to afford the African American voters in these regions an equal opportunity to elect their preferred candidates.

Because the Supreme Court has held that a "political explanation" for a "districting decision" is a "legitimate" defense to a racial-gerrymandering claim, one question that often arises in racial-gerrymandering cases is whether partisan considerations predominate over racial ones. *Easley v. Cromartie*, 532 U.S. 234, 235 (2001). In an "Analysis of Statewide Evidence," the *Covington* court addressed this issue and found "no evidence" that partisan goals "played a primary role" in 2011. *Covington*, 316 F.R.D. at 129, 139. In fact, the *Covington* court found that "the evidence suggests the opposite." *Id.* at 139. The *Covington* court relied on the statements of the redistricting chairs to conclude that "politics was an afterthought." *Id.* The *Covington* plaintiffs were represented by the lawyers of Plaintiffs in this case, and they urged the *Covington* court towards this conclusion that politics did not predominate in 2011.

The *Covington* court ultimately sided with the *Covington* plaintiffs. It held both that race predominated and that a 50% BVAP target was not justified on the record before the General Assembly in 2011, which did not contain sufficient evidence of legally significant polarized voting to justify the majority-minority target. The *Covington* court found from expert reports that, although voting in North Carolina is racially polarized, the General Assembly did not sufficiently assess in 2011 whether that polarization was "legally significant" by analyzing whether the minority community might be able to elect its preferred candidates in districts below 50% BVAP with the aid of some white "crossover" voters. *Id.* at 167–69.

The *Covington* court made "no finding that the General Assembly acted in bad faith or with discriminatory intent," and it did not "reach the issue of whether majority-minority districts could be drawn in any of the areas covered by the current districts under a proper application of the

law"—i.e., with proof of legally significant polarized voting. *Id.* at 124 n.1. In other words, the State simply erred in navigating the difficult, "competing hazards of liability." *Abbott*, 138 S. Ct. at 2315. The Supreme Court affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).[2]

II. The 2017 Redistricting

The federal injunction against 28 House and Senate districts necessitated new maps. The *Covington* court afforded the General Assembly an opportunity to enact a remedy. To that end, the General Assembly began holding hearings in late July 2017.[3]

A. The County Groupings

Due to the *Covington* ruling on racial predominance, the critical shift of the redistricting was away from racially crafted VRA districts and to a rigid application of the WCP. In *Stephenson*, the North Carolina Supreme Court required that "legislative districts required by the VRA shall be formed prior to the creation of non-VRA districts" and that VRA districts "shall also comply with the legal requirements of the WCP" only to "the maximum extent practicable." 562 S.E.2d at 396–97. *Covington*, however, ruled that this VRA-first approach amounted to racial predominance, triggering strict scrutiny under the Equal Protection Clause. To remedy that violation, the General Assembly chose to subject all districts to the WCP.

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[2] The *Covington* case paralleled State-court challenges also raising racial-gerrymandering claims and state-law claims. The North Carolina Supreme Court rejected all claims. *See Dickson v. Rucho*, 766 S.E.2d 238, 242 (N.C. 2014). Although the U.S. Supreme Court vacated its judgment as to federal-law claims in light of *Covington*, *see* 135 S. Ct. 1843 (2015), the U.S. Supreme Court's ruling is inapplicable to state-law claims.

[3] Plaintiffs will focus their case on maps purportedly found on the personal computer of Dr. Thomas Hofeller. This is a sideshow. The plans challenged are the 2017 plans enacted by the General Assembly. Plans allegedly found on Dr. Hofeller's computer have never governed an election in North Carolina and could not have violated anyone's rights. Plaintiffs have not materially tied the Hofeller plans to the enacted plans.

"Groupings drawn under" the WCP "are primarily generated using a mathematical, formulaic process." PTX602[4] at 5. The process begins with single-county groups, i.e., counties with population matching that of a single House or Senate district within the allowable 5% deviation from the ideal population. *See Id.* "[D]istricts must be drawn within these counties without including expansion into other counties." *Id.* The next step is to create two-county groups; in those groups, "in order to reach the ideal…population," the map-drawer must "combine two counties in order to draw the districts." *Id.* That process repeats as to three-county, four-county, five-county, six-county, seven-county groupings, and so forth as appropriate under the allowable plus-or-minus 5% deviation from the ideal. *Id.* at 5–6. Additionally, counties with population sufficient to support more than one district within the allowable plus-or-minus 5% deviation must be grouped within the county without traversing its boundaries. *See Dickson*, 766 S.E.2d at 258. And counties with sufficient population for more than one district, but not sufficient population to contain a whole number of districts, must be grouped with neighboring counties, and the resulting interior county lines may be crossed or traversed only to the extent necessary to comply with the equal-population rule. *Id.* Because the VRA was held not to require departures from the county-grouping rule, the rule was applied statewide for the first time.

On August 4, 2017, legislative leadership presented the county groupings to the Joint Committee on Redistricting, and Representative Lewis observed that the groupings were "based on math." PTX602 at 7. He also observed that "the county grouping rule is the strongest constitutional requirement anywhere in the country" and "guides us in being able to draw fair districts." *Id.* He advised the bipartisan committee that, "[i]f there are alternative ways to exceed

[4] N.C. Gen. Assemb. 2017 Legis. Session, Joint Comm. on Redistricting Meeting (Aug. 4, 2017). Plaintiffs' trial exhibits are cited as "PTX[exhibit number]," and Legislative Defendants' as "LDTX[exhibit number]."

the county groupings than we have provided here," members should "please submit those so that they can be reviewed before and included in the discussion." *Id.* No other county-grouping scheme was submitted. PTX603[5] at 4:21-22. Plaintiffs do not challenge the county groupings the General Assembly adopted.

A further constraint resided in the State Constitution's bar on mid-decade redistricting. N.C. Const. art. II, §§ 3(4), 5(4). The federal injunction trumped that bar as to districts invalidated, but many county groupings were not affected. On August 4, 2017, legislative leadership presented the Joint Committee on Redistricting with a map of areas "that are unaffected by the court ruling and will not require a remedy." PTX602 at 9. As a result, those areas were not redrawn.

B. The Hearings and Criteria

Once that framework was established, the question became how to divide up the counties that needed to be redrawn within the groupings. PTX602 at 14. For that process, the General Assembly afforded technical support to the Democratic Party and the general public to create maps. *Id.* at 21–25. The General Assembly also hosted public hearings to collect input, both before and after proposed maps were publicized.

In that process, members of one Plaintiff here, Common Cause, urged that an entirely new process "that excludes all partisan and political considerations" be adopted. *Id.* at 50; *see also, e.g.*, *id.* at 58–59 (Common Cause President Bob Phillips recommending that "maps should be drawn by an independent entity, not lawmakers"). Common Cause, however, does not represent all of North Carolina's electorate. Other participants urged continued commitment to "the constitutional role that legislatures have in drafting district lines" and urged "that the courts refrain from changing

[5] N.C. Gen. Assemb. 2017 Legis. Session, Joint Select Comm. on Redistricting Meeting (Aug. 10, 2017).

redistricting laws and standards after the lines have been drawn." PTX608[6] at 2–3; *see also* PTX607[7] at 201–02 (public commenter noting "[i]f the state is moving to become more Republican, it's the responsibility of the Democrats to change that. You surely can't accomplish creating more Democratic districts by how you draw lines."); PTX608 at 29 (public commenter stating "I know some of these people [legislators] personally, and they are honorable, and they have tried to do a good job."); *Id.* at 31 (public commenter stating "It is the legislators' responsibility to determine law…, and I hope [the courts] go back to the Constitution and not their political agenda when they determine the constitutionality of these maps"); *Id.* at 32 (public commenter observing that "non-partisan commissions" can "end up being more partisan in their mapmaking than legislators, so…that's really not a good way to go"); *see also Id.* at 19 (public commenter stating "I don't see gerrymandering on this map, by and large.").

On August 10, 2017, the Joint Committee on Redistricting adopted redistricting criteria. The first was an equal-population criterion, allowing a plus-or-minus 5% deviation from the ideal. LDTX7. The second criterion, called "Contiguity," required that districts "shall be comprised of contiguous territory." *Id.* The third criterion, called "Compactness," required "reasonable efforts to draw legislative districts in 2017 House and Senate plans that improve the compactness of the current districts," as measured by the standard dispersion (Reock) and perimeter (Polsby-Popper) scores. *Id.* The General Assembly's minimum threshold under the dispersion test was .15 and its minimum threshold under the perimeter test was .05. LDTX9[8] at 12. The fourth criterion, called

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[6] N.C. Gen. Assemb. 2017 Legis. Session, Joint Select Comm. on Redistricting Public Hearing – Beaufort Satellite Site (Aug. 22, 2017).

[7] N.C. Gen. Assemb. 2017 Legis. Session, Joint Select Comm. on Redistricting Public Hearing – Raleigh Site (Aug. 22, 2017).

[8] N.C. Gen. Assemb. 2017 Legis. Session, SB 691 (Second Reading) (Aug. 25, 2017).

"Fewer Split Precincts," required "reasonable efforts to draw legislative districts in the 2017 House and Senate plans that split fewer precincts than the current legislative redistricting plans." LDTX7. The fifth criterion, called "Municipal Boundaries," allowed consideration of municipal boundaries. *Id.* The sixth criterion, called "Incumbency Protection," allowed "[r]easonable efforts" to (1) "avoid pairing incumbent members" and (2) "ensure voters have a reasonable opportunity to elect non-paired incumbents of either party...." *Id.* The seventh criterion, called "Election Data," permitted the use of "[p]olitical considerations and election results data." *Id.* The eighth criterion, called "No Consideration of Racial Data," provided that "[d]ata identifying the race of individuals or voters shall not be used in the drawing of legislative districts...." *Id.*

At the public hearing, Rep. Lewis was asked about the incumbency and election-data criteria. When asked whether "the leadership [had] a goal of maintaining the current partisan advantage in the House and the Senate," Rep. Lewis responded: "the leadership has no such goal." PTX603 at 138. The election-data criterion simply reflected "that redistricting in itself is an inherently political process" and "every result...will be an inherently political thing." *Id.* at 139. Likewise, the incumbency criterion reflected "that incumbency is a traditional redistricting criteria" recognized by courts and legislators on both sides of the aisle. *Id.* at 120.

Perhaps the most divisive criterion was the one prohibiting the use of race in drawing the plans. Democratic members urged the Joint Redistricting Committee to use racial data, and some went so far as to recommend that "majority-black districts" be drawn. *Id.* at 156. In the floor debates, similar opinions were lodged. In both the Senate and House, Democratic members objected to the choice against using race. LDTX13[9] at 19:24–20; *Id.* at 20–21: *Id.* at 21–22; *Id.*

[9] N.C. Gen. Assemb. 2017 Legis. Session, H.R. Comm. on Redistricting Meeting (Aug. 25, 2017).

27:22–28:13; LDTX8[10] at 14:15–16:17 (Sen. Blue); *Id.* at 52–53; *Id.* at 56–57. Minority Leader Jackson explained the Democratic Party's viewpoint was that racial data should be used to spread African American voters "in more districts because that could in turn create more democratic districts." LDTX14[11] at 48.

C. The Maps and Their Enactment and Court Approval

Draft House and Senate maps were made public on or about August 21, 2017. Public hearings followed on August 22.[12] On August 24 and 25, the plans were introduced in the Senate and House Redistricting Committees, respectively. The bill sponsors explained how the plans comply with the adopted criteria. *See* LDTX13 at 7–15 ; LDTX8 at 4–11. The bill sponsors also identified amendments to the plans based on requests of members to their regions. *See, e.g.*, LDTX13 at 16–17.

When questioned about the likely partisan composition of the House map, Rep. Lewis stated that he did not target a partisan composition and was unaware of the likely partisan impact of the House map. LDTX13 at 26–27; *see also* LDTX14 at 21–22 ("I had no direct outcome target in mind. I honestly don't know, nor have I seen any numbers that indicate what the partisan results of this map would be."). Similarly, Sen. Hise stated that election data was used simply "to report on all the districts and how they fall in the political makeup." LDTX8 at 26; *see also* LDTX9[13] at 10. To be sure, political data was used. *Id.* ("We did consider political considerations in election data results."). But Republican members vehemently denied that the plans are gerrymanders. *See,*

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[10] N.C. Gen. Assemb. 2017 Legis. Session, Sen. Comm. on Redistricting Meeting (Aug. 24, 2017).

[11] N.C. Gen. Assemb. 2017 Legis. Session, H. Rep. Session (Aug. 28, 2017).

[12] Due to the tight litigation time frame, the more extensive public-comment period the General Assembly would have preferred was unworkable. LDTX13 at 5–6.

[13] N.C. Gen. Assemb. 2017 Legis. Session, SB 691 (Second Reading) (Aug. 25, 2017).

e.g., LDTX10[14] at 38–48 (remarks of Sen. Berger); LDTX14 at 21 (Rep. Lewis observing that "there are a whole lot" of competitive districts "that tend to vote both ways in terms of one year they may have selected the democratic nominee for governor, the next…they selected the republican").

By comparison, the plans were drawn with *no* reference to racial data. However, Democratic Senator Floyd McKissick requested racial statistics for the proposed Senate Plan, and it was available during the floor proceedings. *See* LDTX9 at 18:2-20:19 (statement of Sen. Robinson regarding her proposed amendment for Senate Districts in Guilford County); *Id.* 32:11-35:10 (statement of Sen. Blue in support of Sen. Robinson's amendment); *Id.* 38:8-17 (remarks of Sen. Blue); *Id.* 43:20-28 (Sen. Blue stating that racial data was requested from staff and made available yesterday); *Id.* 45:17-46:6 (Sen. McKissick discussing his analysis to determine black VAP for proposed districts); *Id.* 52:20-53:9 (Sen. McKissick submitting data on black voting age population); *Id.* 122:21-123:11 (Sen. Blue stating that now the Senate Democrats had produced stat packs showing the racial makeup of the districts that Republicans will have to tell the Court how they addressed discrimination). Based on this data, Senator Berger observed that, although the plans had not been drawn with racial purpose, many districts had black populations around or above the levels Dr. Lichtman identified in *Covington* as sufficient to prevent vote dilution. LDTX10 at 53:6–54:15 (observing that the districts "avoid[] any new potential claims of [vote] dilution under Section 2 of the Voting Rights Act.").

Likewise, although the House plan was drawn with no attention to racial data, Rep. Lewis reviewed the racial data, which were posted on the House Select Committee on Redistricting

[14] N.C. Gen. Assemb. 2017 Legis. Session, Sen. Session (Aug. 28, 2017).

website, and concluded that districts at the levels Dr. Lichtman identified as sufficient would protect the State from VRA vote-dilution claims. LDTX16[15] at 11:14-12:23.

On August 31, 2017, the North Carolina General Assembly enacted the 2017 plans into law.[16] The General Assembly presented the 2017 plans to the *Covington* court, which partially accepted and partially rejected them. *See Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018). The *Covington* court found that four remedial districts were insufficient remedies and adopted special master proposals to replace them. *Id.* at 429–42, 458. The *Covington* court also rejected the changes in Wake and Mecklenburg Counties, even though no objection was lodged against those changes on the ground of their not sufficiently addressing equal-protection violations; instead, the *Covington* court found that these changes violated the North Carolina Constitution's bar on mid-decade redistricting. *Id.* at 442–47. Although this specific finding was reversed by the U.S. Supreme Court, *North Carolina v. Covington*, 138 S. Ct. 2548 (2018), a State court subsequently concluded that changes in Wake County violated the State Constitution's bar on mid-decade redistricting, *N.C. State. Conf. of NAACP Branches v. Lewis*, 18-CVS-002322 (N.C. Super. Ct. Nov. 2, 2018) (order granting plaintiffs' motion for summary judgment).

The *Covington* court then issued a final order, stating: "the Court will approve and adopt the remaining remedial districts in the 2017 Plans for use in future elections in the State." 283 F. Supp. 3d at 458. It also stated: we "approve and adopt the State's 2017 Plans, as modified by the Special Master's Recommended Plans, for use in future North Carolina legislative elections." *Id.*

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[15] N.C. Gen. Assemb. 2017 Legis. Session, H. Rep. Session (Aug. 30, 2017).

[16] Plaintiffs complain that, under the North Carolina Constitution, the North Carolina Governor lacks a veto power over redistricting plans. Am. Compl. ¶ 4. They forget, however, that this provision was ratified when the Democratic Party controlled the government. Their selective view of legislative prerogative and constitutional norms is illuminating as to the purpose of this case.

It further stated: "We direct Defendants to implement the Special Master's Recommended Plans." *Id.* The "Defendants" under that order included the General Assembly's officers. *Id.* at 416.

D. The 2018 Elections

Over a year after the 2017 plans were adopted, the State held House and Senate elections. Plaintiffs did not challenge the 2017 plans before those elections occurred. That might be because the North Carolina Democratic Party's internal data showed that the Party was capable of winning a comfortable majority in both houses. *See* LDTX246, LDTX278 and LDTX279. In the Senate, the Democratic Party's support scores show 31 districts of 50 (or 62%) with a 47% or higher average share of Democratic voters. *See* LDTX246 and LDTX279. In the House, the Democratic Party's support scores show 65 of 120 (or 54%) with a 47% or higher average share of Democratic voters. *See* LDTX246 and LDTX278. The North Carolina Democratic Party raised $15.6 million in 2018 as compared to $4.9 million in 2014. Democratic political groups made strategic decisions—some wise, some unwise—about where to focus their campaign efforts. *See, e.g.*, LDTX278; LDTX279. On election night, Democratic candidates secured a net gain of ten seats in the State House and six in the Senate, breaking Republican supermajorities in both chambers.

Yet, dissatisfied with anything less than a majority, the Party, several of its voters, and a Democratic Party ally, Common Cause, filed this case on November 13, 2018, seven days after the election. They filed an amended complaint on December 7. They challenge 72 House and 23 Senate districts in 17 and 7 county groupings, respectively. They predicate their claims under Article I § 19 (equal protection), Article I, § 5 (free elections), and Article I §§ 12 & 14 (free speech and association) of the North Carolina Constitution.

ARGUMENT

Plaintiffs' claims defy law and common sense. The constitutional starting point is the presumption that any act of the General Assembly is constitutional. *Wayne Cty. Citizens Ass'n for*

Better Tax Control v. Wayne Cty. Bd. of Comm'rs, 399 S.E.2d 311, 315 (N.C. 1991). "The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Id.* (quotation marks omitted). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.*

A corollary principle is that a question is a non-justiciable political question "if it involves a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001) (quotations omitted). "The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." *Person v. Watts*, 115 S.E. 336, 339 (N.C. 1922).

Plaintiffs' goal, however, is to transfer power from the General Assembly to the courts in violation of the express constitutional text. Even if that were somehow proper (it is not), there is no good reason to upset the constitutional order in this way. The State Constitution *already* curbs the General Assembly's discretion through textually explicit redistricting criteria that are among the most restrictive in the nation. Plaintiffs cannot and do not claim that the 2017 plans violate any restrictions provided in Article II of the State Constitution. And the trial evidence will show that these criteria successfully prevented the Republican majority from creating an "egregious" and highly unbalanced map for partisan ends. *Rucho v. Common Cause*, 588 U.S. ___ (2019) (slip op.

at 15)[17] (Kagan, J., dissenting). Even if the Republican leadership wanted to do so (which cannot be shown), the fact is that the State Constitution's strict criteria prevented this.

I. Plaintiffs' Claims Are Non-Justiciable and Non-Cognizable

A. The Claims Are Non-Justiciable

North Carolina courts lack jurisdiction over political questions. *See, e.g.*, *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (N.C. 2004). A political question is one "reserved to the exclusive consideration of a different political tribunal. In such cases the exercise of [judicial] power is usurpation." *In re Alamance Cty. Court Facilities*, 405 S.E.2d 125, 130 (N.C. 1991) (quotations and edit marks omitted).

Plaintiffs' claims raise a paradigmatic political question concerning the proper balance of partisan power in the General Assembly. They posit that the State Constitution demands that the two major political parties must have "an equal opportunity to translate their votes into representation." Am. Compl. ¶ 208; *see also id.* ¶ 210. Thus, like all partisan-gerrymandering claims, those raised here "invariably sound in a desire for proportional representation." *Rucho*, 588 U.S. at ___ (slip op. at 16).[18] And that is a system with no foundation in North Carolina's, or any American, political tradition. *Id.*

The question is political, not legal. The State Constitution does not define a correct partisan balance of the North Carolina General Assembly. Instead, it delegates the power to draw legislative districts to the General Assembly. N.C. Const. art. II, §§ 3, 5. Although the Constitution subjects this discretionary exercise to a series of specific criteria—including that districts be of approximately equal population and that county lines not be unnecessarily crossed—and although

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[17] 2019 WL 2619470 at *25 (U.S. June 27, 2019).

[18] WL 2619470 at *11.

the State courts have correctly asserted the prerogative to enforce these express provisions, *Stephenson v. Bartlett*, 562 S.E.2d 377, 389 (N.C. 2002), this only emphasizes the non-justiciable nature of Plaintiffs' claims. Just as "[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly's execution of the legislative reapportionment process," *id.*, they *could* have chosen to adopt express partisan fairness metrics that would, in turn, be judicially enforceable. The absence of the criteria Plaintiffs propose from the Constitution is proof that the State courts are not free to invent them. Where the lines of legislatively-created districts fall is a paradigmatic non-justiciable question. *See, e.g.*, *Howell v. Howell*, 66 S.E. 571 (N.C. 1909) (rejecting partisan-gerrymandering challenge to a special-tax district); *Norfolk & S.R. Co. v. Washington Cty.*, 70 S.E. 634, 635 (N.C. 1911) (holding the General Assembly's authority to "declare and establish" the "true boundary between…counties…is a political question, and the power to so declare is vested in the General Assembly."); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 74 S.E.2d 310, 317 (N.C. 1953) ("[T]he power to create or establish municipal corporations…is a political function which rests solely in the legislative branch of the government."); *State ex rel. Tillett v. Mustian*, 91 S.E.2d 696, 699 (N.C. 1956) ("The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function."); *Texfi Indus., Inc. v. City of Fayetteville*, 269 S.E.2d 142, 147 (N.C. 1980) ("Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate."); *Raleigh & G.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451 (N.C. 1837) ("The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road….").

Plaintiffs' proposed partisan-fairness standards are not like the standards the North Carolina Supreme Court has previously enforced. The WCP and equal-population requirements are objective standards that can be applied neutrally in a judicial proceeding. By contrast, Plaintiffs ask this Court to engage directly in politics by attempting to discern at what point "political gerrymandering has gone too far." *Rucho*, 588 U.S. at ___ (slip op. at 12-13)[19] (quoting *Vieth v. Jubelirer*, 541 U. S. 267, 296 (2004) (plurality opinion). There is no such standard, and the quest for one is quixotic and would cause more harm than good. Some facts of life, such as that legislators are politicians, must be accepted as such. To state the obvious: the Democratic Party brought this case for political reasons and to obtain political gain. There is no basis to believe that the Democratic Party's motive here is somehow better than Republican legislators' motive in drawing the districts—or Democratic legislators' motive in drawing districts in prior decades. The difference is that the legislative process is supposed to be political. The judicial process is not.

The claims here are no different from the claim the North Carolina Supreme Court rejected in *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014),[20] under the "Good of the Whole" clause found in Article I, Section 2. The Court held that an argument that plans favorable to one political party were not enacted for the "best" interests of "our State as a whole" is "not based upon a justiciable standard." *Id.* Although styled under different provisions, Plaintiffs' claims are no different in substance or in terms of justiciability. This Court is thus bound to follow this precedent as written. *Cannon v. Miller*, 327 S.E.2d 888, 888 (N.C. 1985) (finding lower court "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina"); *Respess v. Respess*, 754 S.E.2d 691, 701 (N.C. Ct. App. 2014).

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[19] 2019 WL 2619470 at *9.

[20] *cert. granted, judgment vacated on other grounds*, 135 S. Ct. 1843 (2015).

What's more, *Dickson* affirmed the decision of this Court in the same case, which elaborated in more detail the reasons partisan-gerrymandering claims are beyond the North Carolina courts' jurisdiction. As the Court explained, redistricting "is an inherently political and intensely partisan process that results in political winners and, of course, political losers." *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. Ct. July 08, 2013). Although reasonable minds may disagree as to whether subjecting redistricting to the political process is wise, the partisan nature of redistricting "is ultimately the product of democratic elections" and political losers, whoever they may be, "cannot seek a remedy from courts of law." *Id.* at *1–2. Under the doctrine of *stare decisis*, this decision, too, should be followed. *Dunn v. Pate*, 415 S.E.2d 102, 104 (N.C. Ct. App. 1992) ("[T]he determination of a point of law by a court will generally be followed by a court of the *same* or lower rank." (quotations omitted) (emphasis added));[21] *State v. Miller*, 702 S.E.2d 239 (N.C. Ct. App. 2010) (table) (quoting and following same).

B. Plaintiffs Lack Standing

For similar reasons, Plaintiffs cannot even show standing to bring their claims. A plaintiff bears the burden to establish the following elements of standing:

> (1) injury in fact—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Walker v. Hoke Cty., 817 S.E.2d 609, 611 (N.C. Ct. App.) (denying standing because plaintiff had "not asserted a traceable, concrete, and particularized injury"), *review denied,* 818 S.E.2d 280 (N.C. 2018); *see also McDaniel v. Saintsing*, 817 S.E.2d 912, 914–15 (N.C. Ct. App. 2018) (same); *Arnold v. Univ. of N. Carolina at Chapel Hill*, 798 S.E.2d 442, 443 (N.C. Ct. App.) (same), *review*

[21] *Rev'd, on other grounds*, 431 S.E.2d 178 (N.C. 1993).

denied, 370 N.C. 69, 803 S.E.2d 387 (2017). Most Plaintiffs will not testify and will instead rely on affidavits that they reside in the districts they challenge. That is insufficient. Each Plaintiff must also show that they "have been injuriously affected…in their persons, property or constitutional rights," *Dunn v. Pate*, 431 S.E.2d 178, 180 (N.C. 1993), and a "personal stake" in the controversy, *Goldston v. State*, 637 S.E.2d 876, 879 (N.C. 2006).

As shown below, most of the districts challenged here are represented by Democratic members, so Plaintiffs alleging a harm in not electing Democrats have no injury. Nor is there a viable theory of statewide "cracking" and "packing" because (1) it is not predicated on a theory of individual rights, *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018), and (2) the WCP limits the possible configuration of districts to county groupings, thereby ensuring that the effect on statewide vote totals is severely muted. Moreover, those voters in districts represented by Republican members cannot, without more, show an injury in fact from being represented by a member of the other party.

C. Plaintiffs' Claims Are Not Cognizable

Justiciability aside, the rights Plaintiffs claim do not fall within the scope of the constitutional provisions they cite. All of these provisions guarantee distinct individual rights, not the group rights to partisan fairness that form the basis of Plaintiffs' claims.

Equal Protection. Plaintiffs' equal-protection claim is not predicated on a "classification" that "operates to the disadvantage of a suspect class or if a classification impermissibly interferes with the exercise of a fundamental right." *Northampton Cty. Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 355 (N.C. 1990). Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 707 S.E.2d 199, 206 (N.C. 2011); *Libertarian Party of North Carolina v State*, No. 05 CVS 13073, 2008 WL 8105395, at *6 (N.C. Super. Ct. May 27, 2008). Members of a major political party cannot seriously expect, as a class, to receive enhanced

scrutiny where discrimination claims by the mentally disabled fall under rational-basis review. *Layton v. Dep't of State Treasurer*, 827 S.E.2d 345, 2019 WL 2189095, at *2 n.1 (N.C. Ct. App. 2019) ("Disabled persons are not a suspect or quasi-suspect class, and therefore not subject to intermediate or strict scrutiny.").

And, although the right to vote is a fundamental right, political considerations in redistricting do not "impinge" that right in any way, much less to a degree warranting strict scrutiny. *Town of Beech Mountain v. Cty. of Watauga*, 378 S.E.2d 780, 783 (N.C. 1989) (applying rational basis scrutiny when restrictions "impinge[d] to some limited extent on" the exercise of a fundamental right and expressly declining to apply strict scrutiny). There is nothing in the 2017 plans that operates to "totally den[y]…the opportunity to vote." *Dunn v. Blumstein*, 405 U.S. 330, 334–35 (1972) (cited approvingly by *Town of Beech Mountain*, 378 S.E.2d at 783). Nor is there an unequal weighting of votes as occurs when districts are of markedly unequal population or where districts have different numbers of representatives. *See Stephenson*, 562 S.E.2d at 394 (finding unequal weighting where voters in some districts elected five representatives and voters in others elected one or two). Here, all individual votes are counted and equally weighted. Plaintiffs' contention is that voters of each major party do not have an equal opportunity to prevail, but equal-protection principles do not protect the right to win. In fact, there "is not a fundamental right" even to have "the party of a voter's choice appear on the ballot." *Libertarian Party of North Carolina*, 2008 WL 8105395, at *7, *aff'd*, 707 S.E.2d at 202. If the law were otherwise, the *Stephenson* Court would not have endorsed "consider[ation] [of] partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 562 S.E.2d at 390. Thus, rational-basis review applies, and any plan that complies with the equal-

population rule and other legal requirement is amply supported by a rational basis. The 2017 plans easily pass muster under this lenient test.

Free Elections. Plaintiffs' claim under the Free Elections Clause runs directly counter to that Clause's plain text and purpose to preserve elections from the very inter-branch intermeddling Plaintiffs advocate. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, The North Carolina State Constitution ("Orth") 56 (2d ed. 2013). The free elections clause simply bars any act that would deny a voter the ability to freely cast a vote or seek candidacy. *See Clark v. Meyland*, 134 S.E.2d 168, 170 (N.C. 1964). Plaintiffs will present no evidence that any voter is prohibited from voting or faces intimidation likely to deter the exercise of this right. The right to win or assistance in winning is not encompassed by this provision. *Royal v. State*, 570 S.E.2d 738, 741 (N.C. Ct. App. 2002) (ruling the free elections clause does not require public financing of campaigns).

Reading the Free Elections Clause to contain such rights would be ahistorical and counter-productive to free elections. *See Stephenson*, 562 S.E.2d at 389 (looking to "history of the questioned provision and its antecedents" in interpreting the State Constitution). The Free Elections Clause derives from the English Declaration of Rights of 1689, which provided that "election of members of Parliament ought to be free." Orth 56.[22] No one thought that this contained a prohibition against "partisan gerrymandering." Elections to the English Parliament were often conducted in so-called rotten boroughs—districts far and away more gerrymandered than anything possible now because they could be created with only a handful of constituents. Rotten boroughs

[22] *See also* English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown ("English Declaration of Rights"), Yale Law School: The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp (last visited July 7, 2019).

were not eliminated in England until the Reform Act of 1832, so the notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable.

What the free-elections provision of the English Declaration of Rights *did* do was prohibit other branches of government from meddling with elections to Parliament. King James II had worked to control the composition of Parliament through executive interference with parliamentary elections, the goal being to pack Parliament with sympathetic members. Steven C. A. Pincus, 1688: The First Modern Revolution 156–62 (2009). The idea was not new. "[T]he Tudor sovereigns systematically pursued the policy of creating insignificant boroughs…for the express purpose of corruptly supporting the influence of the Crown in the House of Commons." Thomas Pitt Taswell-Langmead, English Constitutional History 565–66 (Philip A. Ashworth ed., 6th ed. 1905). This was viewed as an affront to legislative control over internal affairs, so the "House of Commons took the issue of writs into its own hands" after the English Civil War. *Id.*; *see also* Rudolf Gneist, The English Parliament in Its Transformations Through a Thousand Years 241 (R. Jenery Shee trans., 1886) ("Now," at the reign of Charles II, "the right of the Crown to create new boroughs disappears.").

The declaration that elections would be "free" vindicated these separation-of-powers concerns. Going forward, Parliament controlled the "methods of proceeding" as to the "time and place of election" to Parliament. 1 William Blackstone, Commentaries 163, 177–179 (George Tucker ed., 1803); 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797). Neither house would "permit the subordinate courts of law to examine the merits" of an election dispute, and the House of Commons denied "any right" of any officer outside that body "to interfere in the election of commoners" or "intermeddle in elections." 1 William Blackstone, Commentaries 163, 179 (George Tucker ed., 1803); *see also id.* at 179 (stating that to the house of commons "alone

belongs the power of determining contested elections"); George Philips, Lex Parliamentaria 9, 36–37, 70–80 (1689). The House of Commons was not shy to protect its exclusive jurisdiction in this domain. It, for example, declared a quo warranto writ from "any Court" that sent burgesses to parliament based on time, place, and manner adjudications to be "illegal and void," and it further opined that the "Occasioners, Procurers, and Judges in such Quo Warranto's" may be punished for jurisdictional usurpation. George Philips, *supra* at 80.

What Plaintiffs want should sound eerily familiar. The North Carolina Democratic Party does not want "fair" elections now any more than when Democratic legislators drew some of the most partisan (and visibly irregular) districts since the advent of the one-person, one-vote principal. The Democratic Party wants its perceived allies on the North Carolina courts to tamper with the political composition of the General Assembly. This is an attack on, not a vindication of, free elections. As history shows, commitment to separation of powers preserves free elections. The Court should reject this invitation to violate separation-of-power principles at the expense of constitutional order.

Free Speech. Plaintiffs' free-speech and association claims fare no better. North Carolina courts interpret the rights to speech and assembly in alignment with federal case law under the First Amendment. *Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014); *State v. Petersilie*, 432 S.E.2d 832, 841 (N.C. 1993); *State v. Shackelford*, 825 S.E.2d 689, 696 (N.C. Ct. App. 2019). "[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 588 U.S. at ___ (slip op. at 26).[23] Under the State Constitution, then, there is no claim. The right to free speech is impinged when

[23] 2019 WL 2619470, at *15.

"restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 432 S.E.2d at 840, or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 574 S.E.2d 76, 89 (N.C. Ct. App. 2002) (explaining that the test for a retaliation claim requires a showing that "plaintiff...suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities); *see Evans v. Cowan*, 510 S.E.2d 170, 177 (N.C. Ct. App. 1999). There are no restraints on speech, and redistricting cannot fairly be characterized as retaliation. District lines do not deter speech or association, the evidence will show that the Democratic Party raised copious funding and its candidates engaged in speech fearlessly, and no person of reasonable firmness would cease speaking or association out of fear that they might be placed in one voting district over another.

II. There Is No Good Reason for Judicial Improvisation

There is no compelling reason to invent from whole cloth the standards necessary to rule in Plaintiffs' favor. Redistricting is supposed to be a political process. To preserve "the redistricting responsibility of the General Assembly," the North Carolina Supreme Court has limited the judicial role to articulating bright-line rules that are easily identifiable *prior* to redistricting and enforceable on a non-partisan basis by the independent judiciary. *Pender County*, 649 S.E.2d at 374. And there is already an abundance of those rules in existence. *See id.* at 374 (describing some of them). Indeed, in *Stephenson*, the State Supreme Court was well aware that "legislative districts have been increasingly gerrymandered"—by the Democratic Party—"to a degree inviting widespread contempt and ridicule." 562 S.E.2d at 392. In fact, the Democratic majorities of past decades have been gerrymandering masterminds. *See* LDTX10 at 38–55 (discussing recent history of Democratic Party gerrymandering). Rather than impose a non-administrable partisan-fairness rule, the Court applied the objective WCP, which it concluded

avoids redistricting that "needlessly burdens millions of citizens with unnecessarily complicated and confusing district lines." *Id.* The parties agree that the 2017 plans comply with those rules.

Plaintiffs therefore want this Court to *expand* on that already lengthy list. There is no precedent for this. And allowing Plaintiffs' claims would open the floodgates for future claims based on the highly indeterminate and malleable standards Plaintiffs propose. The North Carolina courts would be transformed into full-time redistricting overseers, and the General Assembly's role in the process would, for all intents and purposes, come to an end.

Aside from being contrary to law, that is a plain bad idea—and wholly unnecessary. The trial evidence will show that the current rules have successfully curbed partisanship in redistricting to avert the egregious cases that might otherwise arise. It will also show that adding amorphous partisan-fairness standards would be destructive to constitutional order and judicial economy (a point that should, in addition, be apparent directly from Plaintiffs' byzantine presentation and distracting discovery and the tortured process of this case). There is no reason to add unwritten rules to the North Carolina Constitution to prevent "egregious gerrymanders," *Rucho*, 588 U.S. at ___ (slip op. at 2)[24] (Kagan, J., dissenting), when the current rules already prevent them.

A. The 2017 Plans Are Fair and Competitive

Even assuming that the Republican majority sought to maximize partisan advantage within the existing framework, some very simple facts make it clear that the framework prevented them from going "too far"—whatever that means. *Rucho*, 588 U.S. at ___ (slip op. at 13)[25] (quoting *Vieth*, 541 U.S. at 296 (plurality opinion)).

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[24] 2019 WL 2619470 at *20.

[25] 2019 WL 2619470 at *9.

First, a basic review of election data shows that the 2017 plans are competitive. As Dr. Trey Hood will show, 46 House districts are "strong" Democratic districts, 46 are "strong" Republican districts, and the remaining 29 are "competitive." LDTX146. Similarly, 16 Senate districts are "strong" Democratic districts, 17 are "strong" Republican districts, and the remaining 17 are "competitive." LDTX147. The Democratic Party's own support scores show that comfortable Democratic majorities are possible. The House plan includes 65 of 120 (or 54.2%) districts with 47% or higher average Democratic support. LDTX246; *see also* LDTX278. The Senate plan includes 31 of 50 (or 62%) districts with 47% or higher average Democratic support. LDTX246; *see also* LDTX279.

In terms of voter registration numbers, the Senate plan contains 12 districts with a majority or more Democratic registered voters and zero districts with a majority or more of Republican registered voters. LDTX24 ¶ 4. The House plan contains 35 districts with a majority or more Democratic registered voters and one district with a majority or more of Republican registered voters. LDTX24 ¶ 4. In other words, it is possible to win 169 out of 170 districts without any votes of registered Republicans. Likewise, in both plans, there are more districts having a majority of Democratic and unaffiliated voters than districts having a majority of Republican and unaffiliated voters. LDTX24 ¶ 6.

Second, the relative fairness of these plans is even more evident through a brief look at the districts challenged in this case. In the Senate, the Republican Party has *lower* than proportional representation in the challenged districts, and, in the House, the Republican Party has only slightly better than proportional representation. LDTX130. Although the Republican Party has modestly better than proportional representation in both the House and Senate, this is primarily attributable to the lack of proportionality in districts *not challenged in this case*. LDTX130 (showing

Republican control of 66.7% of non-challenged seats on 54% of the vote in the House and 70.4% of the seats on 54.7% of the vote in the Senate). These non-challenged districts are, to a large extent, locked into place by the WCP and other rules or were drawn by the *Covington* special master. Yet the Republican Party does better in these districts than in districts enacted by the Republican-controlled legislature. The trial evidence will show that this modest lack of proportionality is caused by the constitutional formulas and the Democratic Party's limited appeal outside of concentrated urban areas. *See* LDTX131; LDTX132.

These geographic problems require the Democratic Party to lodge legal challenges against districts and county groupings where it has proportional representation or better. Thirteen of 23 challenged Senate districts and 39 of 77 challenged House districts are held by Democratic legislators. LDTX127. So most districts challenged are already held by Democrats. Of those, 36 districts are "strong" Democratic districts, and 26 more are "competitive." LDTX128; LDTX129. For example, Plaintiffs challenge all House districts in Wake and Mecklenburg Counties even though Democratic representatives hold each seat in those groupings. Although over one third of votes in those counties go to Republican candidates, Republicans hold *no* seats. LDTX140. Yet Plaintiffs claim these groupings are gerrymandering *against Democrats*. That makes no sense. Democratic candidates cannot win any more seats in the groupings than they already have. Nor can the Democratic vote share in either of these counties be distributed into neighboring counties because such traversals of county lines would violate the WCP. The Democratic Party's geographic limitations, not gerrymandering, account for its statewide vote share, which drops off markedly once the most urban counties are removed from the analysis.[26] *See also* LDTX140

[26] Plaintiffs' plea for judicial relief in the Wake and Mecklenburg Senate groupings hardly fares better. Over one third of votes went to Republican candidates in 2018, but Republicans hold only

(showing that the percentage of the vote Democratic candidates for the House received drops from 51.2% to 43.1% and from 50.6% to 42.3% for the Senate in 2018 when the vote share in six of the largest urban counties are omitted).

Third, the 2017 plans were more favorable to Democratic incumbents than to Republican incumbents. The 2017 plans paired four sets of Republican incumbents, requiring them to run against each other to a certain loss of a Republican incumbent, and *no pairs* of Democratic incumbents. LDTX125; LDTX25 ¶¶ 7–8; *see also* PTX608 at 31 (public commenter observing "it appears as though some of these actually have two very strong conservatives in the same district"). Democratic incumbents fared better than Republican incumbents in the 2018 elections. In the Senate, 100% of Democratic incumbents were reelected as compared to 75% of Republican incumbents; in the House it was 94% to 88% in favor of Democratic incumbents. LDTX135; LDTX134.

Fourth, the trial evidence will show that the Democratic Party is vibrant and active in the political process and that elections are competitive. The Democratic Party's assertion that the 2017 plans prevent it from raising money is baseless. As Dr. Karen Owen will testify, it raised $15.6 million in 2018 compared to $10 million by the North Carolina Republican Party in 2018 and $4.9 million by the North Carolina Democratic Party in 2014. In fact, the North Carolina Democratic Party's fundraising haul in the 2018 cycle was greater than any other mid-term election cycle in its history. Every legislative seat save one was contested in 2018. More than 20% of elections were within a margin of 10 percentage points and were, as understood in political science, competitive. Eleven races were decided by a margin of less than 2% and five by less than 1%. The Democratic

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1 of 5 seats in each grouping, or 20%. Plaintiffs' asserted right not to fairness, but to dominance, is indefensible.

Party succeeded in flipping 10 House and six Senate seats. In contests where Republican candidates were successful, there was frequently a candidate-quality advantage—e.g., an advantage in experience or incumbency.

Plaintiffs' assertion that Democratic voters and interests are "entirely shut out of the political process," Am. Compl. "Factual Allegations" § I, p. 64, is gross hyperbole. Members of the Democratic Party control North Carolina's executive offices and the Supreme Court. Although they do not control the majority of the General Assembly, they have a substantial voice. Moreover, it would be entirely undemocratic for the Court to presume that Democratic voters can receive representation only from Democratic representatives. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). And it is contrary to fact. Like the general public, the General Assembly's members are diverse—more now than ever. And, like the general public, the General Assembly's members are more united than divided. The most recent legislature passed 425 measures, and 360 bills became laws. Over 69% of them passed with strong bi-partisan support. The notion that the General Assembly is somehow unhealthy and needs fixing from the two other branches of government is wrong and insulting.

Fifth, the 2017 plans score well using objective good-government measures. There is, of course, no dispute that they comply with the WCP, and there is no challenge to the county groupings. Further, because the 2017 redistricting was limited in scope, many districts were not changed at all. The evidence will show that about 63% of the population assignments were required by law, and only 37% were the result of discretionary legislative choices. Plaintiffs' suggestion that partisan motive somehow overrode objective good-government goals is self-evidently false from that statistic alone. The General Assembly achieved its other criteria as well. The evidence will show that the 2017 plans created more compact districts than existed under the 2011 plans

and split fewer voting districts (or "VTDs") than did the 2011 plans. LDTX121; LDTX122; LDTX123. All the districts are contiguous. And the General Assembly minimized incumbency pairings and made efforts to preserve existing constituency-representative relationships—a goal that benefited Democratic incumbents more than Republican incumbents, as noted above.

Nor is there any meaningful evidence of extreme gerrymandering on the legislative record. Plaintiffs emphasize that the criteria allowed for the use of "election data," but courts should "assume that those who redistrict and reapportion work with both political and census data." *Gaffney v. Cummings*, 412 U.S. 735, 753–54 (1973). The State Supreme Court has affirmed that the "General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 562 S.E.2d at 390. Stating as much in the criteria is transparency, not malfeasance. The redistricting criteria did *not* set a "Partisan Advantage" criterion. *Contrast Rucho*, 588 U.S. at ___ (slip op. at 4)[27] (Kagan, J., dissenting). And the bill sponsors made clear that "no such goal" was set, PTX603 at 138, and that there was "no direct outcome target in mind," LDTX14 at 21 (remarks of Rep. Lewis). As shown above, that fact is born out in the maps themselves, which are highly competitive. Nor are Plaintiffs credible in contending that partisan motive from 2011 was carried forward into the 2017 plans; a federal court looked at the 2011 maps on a statewide basis and concluded that "politics was an afterthought." *Covington v. North Carolina*, 316 F.R.D. 117, 139 (M.D.N.C. 2016).

In short, even if the North Carolina courts were inclined to police partisan considerations—despite the North Carolina Supreme Court's express approval of them—this would not be the case. It should be common ground that "[r]espect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases." *Rucho*, 588 U.S. at

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[27] 2019 WL 2619470 at *20.

___ (slip op. at 15)[28] (Kagan, J., dissenting). This case is not egregious. Either the Republican majority did not prioritize partisan advantage or else their efforts to do so were thwarted by the law. Either way, judicial intervention is unwarranted.

B. Plaintiffs' Case Snatches Complexity From the Jaws of Simplicity

Undeterred by the simple fact that the 2017 plans are far more fair than what Democratic-controlled legislatures produced during decades of Democratic dominance, Plaintiffs will predicate their case on Rube Goldberg-style approaches to redistricting and red herrings that play well in the news but have no relevance in law. Plaintiffs' experts *might* be able to show that Republican legislators acted with political motive; they cannot, however, show that the motive made much meaningful difference. They are upset at the process, but the results were fair. Hence, Plaintiffs turn their focus to the computer of a dead man and inflammatory and erroneous allegations that do nothing to prove the claims in their complaint. None of this is persuasive.

1. Plaintiffs' Map-Simulation Presentations Are Flawed

The core of Plaintiffs' case is the work of three experts working through a map-simulation method. Although there are subtle (irrelevant) differences among them, the basic premise is that these simulations purport to show a large possible set of non-partisan maps by which to compare the 2017 plans and to prove that the 2017 plans are "outliers." The flaws in these methods will be brought out more fully at trial, but even a quick glance shows that there must be something wrong here. Plaintiffs' lead expert, Dr. Chen, will opine that the 2017 plans create only 42 Democratic House seats whereas his simulations create 46 or 47. Of course, there are currently 55 Democratic House members. Similarly, Chen predicts only 18 to 19 Democratic Senate seats, assuming a 50% statewide vote share; Democrats won 21 seats in 2018. So whatever Plaintiffs think these

[28] 2019 WL 2619470 at *25.

simulations show, they have nothing to do with reality. Several thematic problems plaguing the work of all Plaintiffs' experts are described here.

First, Plaintiffs' experts did not utilize the criteria the General Assembly adopted. To be of any good (and whether this analysis can ever be useful is doubtful, *see Rucho*, 588 U.S. at ___ (slip op. at 27-30)[29]), the simulations must incorporate "a State's *own* criteria." *Rucho*, 588 U.S. at ___ (slip op. at 15)[30] (Kagan, J., dissenting). But Plaintiffs' experts utilized *their* own criteria, not the General Assembly's. Dr. Chen is an example. His computer algorithm over weights the compactness and VTD-split criteria by using a metric called a "T-score" that attempts to *maximize* compactness and *minimize* VTD splits. The General Assembly did not take that approach; it simply identified a mathematical threshold target: beating the 2011 plans' VTD splits and hitting defined compactness targets. The goal was not to maximize the scores against all other possibilities. *See* LDTX7. That is a meaningful difference because Dr. Chen's algorithm sought more and more compact districts and fewer and fewer VTD splits with no threshold ending. Similarly, Dr. Chen's algorithm attempted to minimize city splits, the General Assembly's criteria simply allowed it to consider city lines as one criterion among many. The result of these differing criteria is an apples-to-oranges comparison. The General Assembly's failure to meet Dr. Chen's goal is not evidence of partisanship.

By comparison, Dr. Chen's algorithm *underweights* the incumbency criterion, finding the criterion met simply by the avoiding of pairings. But the General Assembly sought both to avoid pairings *and* to maximize retention of constituency-incumbent relationships—i.e., to avoid (as

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[29] 2019 WL 2619470 at *16–17.

[30] 2019 WL 2619470 at *25.

much as possible) carving up incumbents' core territory. LDTX7. None of Plaintiffs' experts utilized that criterion in their analyses.

Second, the map simulations purport to identify "outliers" as compared to the distribution of simulated maps but fail doubly in doing so. For starters, Dr. Janet Thornton will testify that the difference between the 2017 plans and the simulations is not statistically significant. So, in fact, the analyses prove that the 2017 plans are *not* outliers; they are within a predictable deviation. Perhaps more fundamentally, whether the 2017 plans are outliers is not relevant because Plaintiffs' experts are only measuring subtleties. It may be that one flea is an outlier in that the flea is abnormally larger than thousands of others, but, if the flea can be as easily squished by a thumb as the others, who cares? Plaintiffs' experts are operating—as they must—from *within* the current redistricting framework, so they are measuring the degree of partisanship possible *given* those strict rules. And, in fact, they have trouble showing a meaningful difference in seats won and lost by members of either party. The 2017 plans might be more partisan than other possible maps, but it is highly doubtful that, under those other maps, there would be a difference in either body of more than a small handful of seats—and maybe even none. (As noted, Dr. Chen claims a Democratic entitlement to 46 or 47 House seats—when Democrats already have 55.) Plaintiffs cannot identify a single redistricting decision—not a split political subdivision, a VTD, or any squiggle—as flipping a legislative seat from Republican to Democratic. If the goal is to smoke out "only egregious gerrymanders," *Rucho*, 588 U.S. at ___ (slip op. at 2)[31] (Kagan, J., dissenting), this evidence cuts against Plaintiffs.

Third, Plaintiffs' experts Dr. Mattingly and Dr. Pegden systematically use election data from years in which Democratic performance was strong and Republican performance was weak.

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[31] 2019 WL 2619470 at *20.

This creates a false sense of entitlement to a number of winnable districts that cannot hold up in all years. It also illustrates a conceptual problem with the method: the numbers will be different depending on which elections are used, creating an opportunity to rig results in favor of a desired outcome. Political science is not a "hard" experimentally verifiable science because voters are not fixed elements.

Fourth, Plaintiffs' simulation methods run up against practical constraints under the WCP. To be useful, the method must operate from a very large number of simulated maps, but, in many county groupings, only a few possibilities exist. Dr. Chen, for example, will testify that his simulated maps involve "1,000 unique" maps. But, in truth, most of his county groups have far fewer than 1,000 unique maps, and some have as few as two to five. He merges the groupings together into 1,000 maps utilizing the same two to five possibilities over and over again to achieve statewide totals. But this is no measure of gerrymandering in many or most of the groupings, given the small sample size. A partisan-gerrymandering challenge must be brought on a district-by-district basis. *Gill*, 138 S. Ct. at 1931. But Plaintiffs' simulation methods cannot establish a claim against any specific district. Nor can they identify any specific districting move that should be different.

Finally, despite their Herculean efforts to try to build a colorable case, none of Plaintiffs' experts "can even begin to answer the determinative question: 'How much [politics] is too much?'" *Rucho*, 588 U.S. at ___ (slip op. at 19).[32] Because partisanship is a permissible consideration, *Stephenson*, 562 S.E.2d at 390, Plaintiffs bear the burden to establish the justiciability of their claim by identifying a metric the Court can use to judge when political considerations were excessive. Plaintiffs' experts will offer the Court no assistance in identifying that line in a neutral,

[32] 2019 WL 2619470 at *12.

non-partisan fashion. As a result, they will offer no aid for future redistricting by the General Assembly. Merely labeling the 2017 plans "outliers" tells this Court nothing of the magnitude of the alleged partisan bias, the effect on seat share. And it obscures the many variables that can go into defining this status—and, hence, the many ways the metrics can be rigged. As noted, Plaintiffs' definition of "outlier" actually measures minor subtleties. And, even then, Plaintiffs' claims are unsupported. For instance, Dr. Pegden will admit that some county groupings he evaluated are not partisan outliers, even by his made-for-this-case metrics.

2. Plaintiffs' Focus on the Hofeller Files Smacks of Desperation

Plaintiffs' obsessive focus on documents they allegedly uncovered from the private computer of Dr. Thomas Hofeller is itself evidence that their claims are specious. If Plaintiffs thought their claims against the 2017 plans were so robust, they would have no reason to spend so much time focusing on maps that have never governed an election.

The Hofeller maps show very little. For reasons already explained, the evidence should not even be admitted. Defs' Opp'n To Pls' Mot. *In Limine* To Admit Certain Files (July 1, 2019). Regardless, they have nothing to add to this case. Plaintiffs cannot connect Dr. Hofeller's motive to the General Assembly's. Even if they could, Plaintiffs cannot prove, as they intend to, that Dr. Hofeller was focusing "single mindedly" on politics. For one thing, Dr. Hofeller could not possibly have been focusing "single mindedly" on politics when he was required to follow county-grouping and equal-population requirements.

For another, partisan *motive* is not the crux of this or any so-called partisan-gerrymandering claim. "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality opinion). Going to Dr. Hofeller's computer for that purpose is entirely superfluous. The important question is whether, under some manageable standard, the political considerations

went so far as to burden individual rights in a measurable way. Since the plans on Dr. Hofeller's computer have never been, and never will be, used in an election, they never have, and never will, burden individual rights. They are irrelevant.

Moreover, Plaintiffs are incapable of proving what they (for some reason) want to prove: that Dr. Hofeller had a preoccupation with politics when he drew lines. Neither Dr. Chen nor Dr. Cooper nor anyone else knows what Dr. Hofeller had on his screen when he was in the process of drawing district lines on the maps on his computer. They purport to show what was on the screen at the moment the pertinent files were last saved, but it is not unusual for people working in redistricting to draw maps with one set of information and then check the maps at the end of the map-drawing against other data. It is impossible to know what Dr. Hofeller was looking at during his use of his personal computer. Nor is that relevant.

3. Plaintiffs' Other Evidence Amounts To Subjective Opinion on Politics

As is typical in so-called partisan-gerrymandering cases, Plaintiffs can be expected to fill hours on end of the Court's time with political gripes and subjective opinions on redistricting. This only underscores that the case is brought to try political, not legal, matters.

Their final expert, Dr. Christopher Cooper, will criticize districts as violating his notion of good-government principles. But, because "[t]raditional districting principles…are numerous and malleable," *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), criticisms purportedly based on traditional districting principles are as numerous and as malleable. It does not follow from the fact that an expert thinks a hypothetical district could be tidier that the enacted district is "egregious." *Rucho*, 588 U.S. at ___ (slip op. at 15)[33] (Kagan, J., dissenting). Dr. Cooper does not show anything egregious about the 2017 plans, and his contention that "packing" and

[33] 2019 WL 2619470, at *25.

"cracking" has a meaningful effect on statewide vote totals does little to account for the fact that the WCP limits the damage of that practice to individual groupings.[34] Despite attaching the label "gerrymander" to certain districts within individual county groupings, Dr. Cooper does not offer any alternative maps. Nor does he explain how any of these so-called gerrymanders could be remedied. He also provides no metric the Court could use to determine when a district has been gerrymandered to such a degree that it violates the North Carolina Constitution.

And Dr. Douglas Johnson will show the Court a map that *does* maximize Republican Party gain, proving that more significantly partisan options were possible—and not chosen. If this was an attempted gerrymander, then the Republican majority is lousy at gerrymandering—especially when compared to the ruthless gerrymanders that Democratic majorities drew in this State for decades.

Plaintiffs' fact-witness presentation, which will feature the testimony of Democratic Senator Dan Blue, will consist of complaints about the political process and Republican legislators. The Court will learn that Democratic voters would rather be represented by Democrats than Republicans and that Democratic legislators would rather that they, not the Republicans, had the chance to draw district lines as in the good old days. The Court, however, need only use a little imagination to see how irrelevant all this is. There are over 10 million residents in North Carolina, and many have gripes about politics. This is not the proper use of a judicial process, and Plaintiffs do not enjoy elevated status in North Carolina's constitutional order.

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[34] For example, as noted, Plaintiffs cannot credibly contend that "packing" in the House plan for Wake and Mecklenburg Counties diminishes statewide vote totals. The county lines could not have been crossed if the General Assembly wanted to, and Democrats won all seats in those counties.

Plaintiffs' goal here is to change the process. The Democratic Party wants a process controlled by Democrats. Common Cause wants an independent commission. The courts are not the right forum for this effort. The right forum for political change is the political process.

III. Plaintiffs' Requests Conflict with Federal Law

Plaintiffs' requests must also be rejected because they conflict with federal law. This is so in several respects.

A. The *Covington* Order

Departing from the 2017 plans would conflict with the final order in *Covington*, which contained an express command that the 2017 plans be used in future elections. A state-law obligation cannot trump a federal-court order. The *Covington* court's final judgment ordered North Carolina to use in future elections many of the districts challenged in this case. After 28 districts were invalidated because race (i.e., the goal of creating majority-minority districts) predominated and the General Assembly did not collect sufficient data to justify the majority-minority goal, the *Covington* court supervised the General Assembly's enactment of the very districts challenged here. The *Covington* court supplemented a handful of those districts with districts drawn by a special master. That package—the legislatively drawn and special-master-supplemented districts—was adopted by the Covington court for future elections. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018). Plaintiffs are asking for widespread departure from these maps, creating a conflict with federal law.

B. Federal Civil Rights Law

Plaintiffs' theories would require the State to dismantle performing minority crossover districts in violation of the federal Constitution and the Voting Rights Act. The Democratic Party's goal in the redistricting was to spread African American voters thin "because that could in turn create more democratic districts." LDTX14 at 48 (remarks by Rep. Jackson). Now, they are asking

the Court to do that work for them. Plaintiffs complain that the current map contains two types of districts, neither of which suits their state-law propositions: there are districts "packed" with Democratic constituents at high percentages, and there are districts that "crack" Democratic constituents across several districts at low percentages. Their assertion is that the North Carolina Constitution requires a more balanced share of Democratic voters so that the two major political parties have "substantially equal voting power," Am. Compl. ¶ 200 (quotations omitted), or, in other words, so that "Plaintiffs and other Democratic voters…[have] an equal opportunity to translate their votes into representation," *id.* ¶ 210.

But the request for intentional unpacking of the Democratic districts for partisan gain is not different from the request to crack the African American vote. There is an "inextricable link between race and politics in North Carolina." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). African American voters vote overwhelmingly Democratic. The General Assembly has no way of remedying the supposed violation in the manner suggested by Plaintiffs' pleadings (which, again, bear little resemblance to their remand filings) without drawing down black voting-age population, or "BVAP." Or else, drawing down Democratic vote share while maintaining current BVAP levels would require astonishing racial precision—requiring the General Assembly to keep black voters in the districts and segregate the white Democratic constituents out.

The civil-rights implications of enacting and enforcing this remedy are profound. The supposedly packed districts are ones that currently empower North Carolina's black communities to elect their preferred candidates, a central guarantee of the VRA and (in a more limited way) the Fourteenth and Fifteenth Amendments. Because (1) BVAP in these districts is near or above 40% and (2) voting patterns reflected in Dr. Lichtman's reports enable African American-preferred

candidates to win in districts near or above 40% BVAP, they qualify as performing minority "crossover" districts. Plaintiffs do not explain how Democratic constituents can be removed without drawing down BVAP. Nor would any such explanation make sense when tampering with Democratic vote share necessarily means tampering with the minority community's electoral prospects. Plaintiffs' theory means BVAP can only go down in these districts.

This raises conflicts with federal law.

1. Dismantling a cross-over district would be inconsistent with the Fourteenth and Fifteenth Amendments

A crossover district is one in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). These districts need not be created on purpose; like any type of district, they can occur naturally by operation of non-racial criteria. However they are formed, the Supreme Court has warned that "a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts…would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24. That is because an intentional state decision to enact legislation with the effect of "minimizing, cancelling out or diluting the voting strength of racial elements in the voting population" violates the Fourteenth and Fifteenth Amendments. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481–482 (1997). *Bartlett* warns that this prohibition applies to the deliberate choice to dismantle a performing crossover district just as it does to the deliberate choice to dismantle a performing majority-minority district.

The intent element of this constitutional violation would be met under these circumstances. That element does not require "any evidence of race-based hatred." *N.C. State Conference of*

NAACP, 831 F.3d at 222. Under federal court precedent, a motive to impact one party's political power, where race and politics correlate—as it does in North Carolina— qualifies as racial intent. *Id.* Nor would the compulsory order of the state court immunize the resulting redistricting legislation from an intent-based claim. *See Abbot v. Perez*, 138 S. Ct. 2305, 2327 (2018).

Thus, if the General Assembly enacted legislation deliberately "unpacking" the "packed" Democratic Party districts, it would very likely violate these provisions. It would act under a substantial motivating factor to dismantle minority crossover districts and thereby dilute minority voting strength.

2. Dismantling a cross-over district would be inconsistent with the Voting Rights Act

Many of the districts the Plaintiffs challenge as "packed" with Democratic constituents enable the minority community to elect its preferred candidates. As a result, even unintentionally dismantling them—were that even possible—would create a conflict under VRA § 2. Although no Section 2 plaintiff could force the state to create crossover districts, *see Strickland*, 556 U.S. at 19–20, the Supreme Court in *Strickland* made clear that a state can cite crossover districts in its plan as a defense to a VRA § 2 claim seeking a majority-minority district. *Id.* at 24 ("States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.").

These districts are therefore critical under Section 2. That is especially so since separate federal-court rulings have squeezed North Carolina into a tight corner. On the one hand, the *Covington* court found that the State erred in creating majority-minority districts without sufficient evidence of legally significant racially polarized voting to justify 50% BVAP districts. On the other hand, *N.C. State Conference of NAACP v. McCrory* ("NAACP"), 831 F.3d 204 (4th Cir. 2016) found "that racially polarized voting between African Americans and whites remains

prevalent in North Carolina." *Id.* at 225. These holdings place the state between the proverbial rock and hard place: Section 2 plaintiffs can cite *NAACP's* finding of severe polarized voting and, presumably, mount evidence to support that finding, and Equal Protection Clause plaintiffs can cite *Covington's* finding that North Carolina lacks sufficient evidence of legally significant polarized voting to justify 50% BVAP districts. These rulings expose the state to "the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill*, 137 S. Ct. at 802 (quotations omitted).

The 2017 plans, however, navigate the tension between *Covington* and *NAACP* by maintaining approximately two dozen crossover districts of near or above 40% BVAP. These districts are a shield to VRA § 2 claims by affording the equal opportunity the statute guarantees. They also are a shield to racial-gerrymandering claims because (1) the General Assembly did not use racial data to create them and (2) they maintain BVAP levels identified by Dr. Lichtman's reports as appropriate to afford racial equality in voting at current levels of polarized and crossover voting. But Plaintiffs' demand that the General Assembly drop BVAP in these districts because they are (in Plaintiffs' view) "packed" with Democratic constituents undermines this proper exercise of "legislative choice or discretion," *Strickland*, 556 U.S. at 23, and exposes the State to a VRA § 2 claim by any plaintiff willing and able to prove legally significant polarized voting. Or else, it exposes the State to an equal-protection claim if the General Assembly uses racial data to target only white voters for removal from these districts.

To be sure, the General Assembly did not use racial data during the line-drawing process, but that is irrelevant. VRA protection turns on the actual opportunity a district affords minority voters, not on legislative intent in line-drawing. *See, e.g.*, *Strickland*, 556 U.S at 10; *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986). Indeed, considering racial data during line-drawing creates the

very problem necessitating the 2017 redistricting in the first instance: an equal-protection violation. What matters, then, is that the districts currently exist as minority crossover districts, and they cannot continue to exist as such under Plaintiffs' demand for reduced Democratic vote share.

Moreover, after the lines were drawn, the General Assembly did consider race; the General Assembly entered Dr. Lichtman's reports into the legislative record and concluded that the VRA was satisfied because of the many districts with BVAP in the range Dr. Lichtman identified as necessary to preserve minority electoral opportunity. That is the correct way of navigating the "competing hazards" of VRA and equal-protection requirements. *Abbott*, 138 S. Ct. at 2315.

C. The Fundamental Right To Vote

Plaintiffs' proffered theories of North Carolina law and demanded relief also conflict with the fundamental right to vote. The Fourteenth Amendment forbids "arbitrary and disparate treatment of the members of [the] electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). Here, for more than 200 years, the North Carolina Constitution has delegated to a political entity—the North Carolina General Assembly—the exclusive right to draw legislative districts. That prerogative was exercised by Democratic-controlled legislatures for most of that history. During that time period, the North Carolina Supreme Court held that political considerations are appropriate so long as the express guidelines of Article II of the State Constitution are met. *Stephenson*, 562 S.E.2d at 390. But now that, for the first time in history, voters of the Republican Party succeeded in electing a majority, Plaintiffs' position is that those Republican voters' votes should not count on equal terms. The courts should seize the redistricting authority for themselves on political grounds and with a blatantly political effect and for political reasons. Now that Republicans control the majority, the courts should draw the lines and under rules favoring the Democratic Party. The right to vote for Democrats and Republicans is, in Plaintiffs' view, to be treated differently. This, in

turn, burdens the rights of voters who prefer Republican candidates to associate for the purpose of electing a Republican majority in the General Assembly.

Worse, Plaintiffs contend that the Court must "unpack" and "uncrack" Democratic voters by packing and cracking Republicans. It must impose proportional representation in some county groupings, but deprive Republican voters of *any* representation in other groups, where they lack proportional representation. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05. Plaintiffs ask for a rule of law requiring express disparate treatment under the State Constitution for similarly situated voters.

Unlike the criteria under Article II of the State Constitution (e.g., the WCP), Plaintiffs' propose an amorphous and inherently political standard encouraging usurpation of political decisions from elected officials. The requirement that judicial regulation of districting decisions must be based on judicially manageable standards—that apply to all voters and not just those of the favored party—conforms to the narrow-tailoring requirements for any court decision that infringes on the rights of the people to exercise freedom of association. The Democratic Party's insistence that it is a favored political entity has no place in federal or North Carolina law.

CONCLUSION

The Court should enter judgment against the Plaintiffs and dismiss their amended complaint.

This 8th day of July, 2019

Respectfully submitted,

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