

STATE OF NORTH CAROLINA

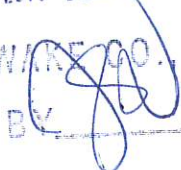
**FILED**

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

18 CVS 014001

COMMON CAUSE, et al.,

2019 JUN 21 P 2:23  
WAKE CO. C.S.C.  
BY 

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR  
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON  
REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' MOTION IN  
LIMINE TO PRECLUDE  
LEGISLATIVE  
DEFENDANTS AND  
INTERVENOR  
DEFENDANTS FROM  
INTRODUCING EXPERT  
TESTIMONY REGARDING  
ANALYSIS OR OPINIONS  
NOT DISCLOSED IN  
EXPERT REPORTS**

Plaintiffs request an order precluding Legislative Defendants and Intervenor Defendants from offering any testimony or evidence from their respective experts regarding any analysis or opinions not disclosed in those experts' reports.

### **BACKGROUND**

Under the Stipulated Case Management Order, Legislative Defendants and Intervenor Defendants' expert reports were originally due April 30, 2019. This Court granted Legislative Defendants an extension of time to submit their expert reports until May 7. On April 30, Legislative Defendants served six expert reports from Janet R. Thornton, Ph.D.; Douglas Johnson, Ph.D.; M.V. Hood III, Ph.D.; Thomas Brunell, Ph.D.; Jeffrey B. Lewis, Ph.D.; and Karen Owen, Ph.D. Also on April 30, Intervenor Defendants served one expert report from Michael Barber, Ph.D. On May 7, Legislative Defendants served three further expert reports: a full report from Dr. Thornton replacing her April 30 report in its entirety, and supplemental reports from Dr. Johnson and Dr. Hood. Plaintiffs deposed all of Legislative Defendants' and Intervenor Defendants' experts from June 5 through June 18.<sup>1</sup>

At her deposition on June 13, Legislative Defendants' expert Dr. Thornton asserted opinions and described analysis not disclosed in her expert report. For example, Dr. Thornton explained that at the time she wrote her report, she had "not fully assessed" the analysis of Plaintiffs' expert, Dr. Wesley Pegden, but that, had she done so, she "would have been able to opine that" his analysis was supposedly flawed given the elections he used to measure the partisanship of the enacted maps and his simulated maps. Thornton Dep. Tr. at 17 (attached as Ex. A). Dr. Thornton admitted, however, that her opinion regarding Dr. Pegden's analysis was

---

<sup>1</sup> While the Stipulated Case Management provided for expert depositions to finish by June 14, the parties agreed that the depositions of Dr. Johnson and Dr. Brunell would be taken on June 17 and June 18 in light of scheduling issues.

“nowhere in [her] report,” nor was “whatever analysis [she] would use to support that opinion.” *Id.* at 18. Instead, her evaluation of Dr. Pegden’s work was “preliminar[y].” *Id.* Later in the deposition, Dr. Thornton referred to newly created exhibits that were not included in her expert reports and that related to an analysis by Plaintiffs’ expert, Jowei Chen, Ph.D. *Id.* at 108-15. When asked why she had not provided “these materials with [her] initial report,” Dr. Thornton responded that she was “still going through [Dr. Chen’s] initial report backup.” *Id.* at 113:13-14.

At his deposition on June 17, Legislative Defendants’ expert Dr. Johnson was asked whether he had conducted any analysis or formed any opinions that he intended to present at trial beyond the analysis and opinions disclosed in his initial and supplemental reports. Johnson Dep. Tr. at 44-45 (attached as Ex. B). In response to these questions, Dr. Johnson testified that he did not have any such undisclosed analysis opinions “at this time,” but he suggested that he may do additional analysis or form additional opinions before trial—“others might come up,” he said. *Id.* When Dr. Johnson was asked whether he had been asked to do any further analysis not disclosed in his reports, Legislative Defendants’ counsel instructed Dr. Johnson not to answer, and he followed the instruction and refused to answer. *Id.* at 45-46.

At his deposition on June 12, Legislative Defendants’ expert Dr. Hood referred to two newly created exhibits that supposedly calculated seat counts and election results for certain large counties. Hood Dep. Tr. at 112-21 (attached as Ex. C). Dr. Hood explained that neither exhibit was included in his expert reports, *id.* at 118, that he prepared them in “late May” “after [he] turned in [his] supplemental report,” *id.* at 117, and that both simply reflected “arithmetic computation” that “sp[oke] for itself,” *id.* at 120.

## ARGUMENT

This Court should order that neither Dr. Thornton, Dr. Johnson, Dr. Hood, nor any of Legislative Defendants' or Intervenor Defendants' experts may testify or otherwise present evidence concerning any analyses or opinions not disclosed in their expert reports.

North Carolina Rule of Civil Procedure 26 provides that if the parties exchange written expert reports in discovery, "the report[s] *must contain* ... [a] *complete statement* of all opinions the witness will express," "the basis and reasons for them," and the "facts or data considered by the witness in forming them." N.C. R. Civ. P. 26(b)(4)(a)(2)(I)-(II) (emphases added). Rule 26 accordingly forbids a party from introducing expert testimony or evidence regarding opinions not disclosed in an expert report, as well as the "basis," "reasons," "facts," or "data" supporting such undisclosed opinions. In *Williams v. United Community Bank*, 218 N.C. App. 361, 724 S.E.2d 541 (2012), the plaintiffs had disclosed their expert and his opinions, including that their expert would review another expert's "appraisals and other evidence ... and opine that [defendants] violated the applicable standard of care." *Id.* at 373, 724 S.E.2d at 552. But at deposition, the plaintiffs' expert "stated that he had not yet reviewed the [defendants'] appraisals." *Id.* The Court of Appeals affirmed exclusion of the expert and all of his testimony, explaining that in light of the expert's failure to review the relevant evidence, the plaintiffs could hardly have "'disclosed' [the expert's] opinions and the basis therefor" as required by Rule 26. *Id.*

Courts applying the analogous Federal Rule of Civil Procedure have likewise foreclosed the introduction of undisclosed expert opinions and bases for those opinions. *See, e.g., Lexington Ins. Co. v. Horace Mann Ins. Co.*, 2015 WL 5174159, at \*10 (N.D. Ill. Aug. 27, 2015) (forbidding supplementation of expert report to include "entirely new opinions" notwithstanding deposition testimony about those opinions); *Ruppert v. Alliant Energy Cash Balance Pension*

*Plan*, 2010 WL 2518853, at \*2 (W.D. Wis. June 18, 2010) (precluding introduction of certain expert testimony at trial as “beyond the scope of the expert report”); *see also Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 725 F.3d 1377, 1382 (Fed. Cir. 2013) (affirming exclusion of trial testimony where expert had “waited until trial to disclose the testing methodology that he claims he actually employed”). If that were not the rule, “it would essentially mean that any topic a party raised during an expert deposition could become part of the expert’s report.” *Lexington Ins. Co.*, 2015 WL 5174159, at \*8.

So too here. Rule 26 forecloses Legislative Defendants and Intervenor Defendants from introducing expert testimony or other evidence that—like Dr. Thornton’s deposition testimony concerning undisclosed analysis and opinions, the potential further work suggested at Dr. Johnson’s deposition, and Dr. Hood’s new calculations of seat counts and election results—concerns analysis or opinions not disclosed in the experts’ reports.

#### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court order that Legislative Defendants and Intervenor Defendants may not offer expert testimony or other evidence, including from Dr. Thornton, Dr. Johnson, or Dr. Hood, concerning analysis or opinions not disclosed in their experts’ reports.

Respectfully submitted this the 21st day of June, 2019

**POYNER SPRUILL LLP**

By: 

Edwin M. Speas, Jr.  
N.C. State Bar No. 4112  
Caroline P. Mackie  
N.C. State Bar No. 41512  
P.O. Box 1801  
Raleigh, NC 27602-1801  
(919) 783-6400  
espeas@poynerspruill.com

*Counsel for Common Cause, the North  
Carolina Democratic Party, and the  
Individual Plaintiffs*

**ARNOLD AND PORTER  
KAYE SCHOLER LLP**

R. Stanton Jones\*  
David P. Gersch\*  
Elisabeth S. Theodore\*  
Daniel F. Jacobson\*  
601 Massachusetts Avenue NW  
Washington, DC 20001-3743  
(202) 954-5000  
stanton.jones@arnoldporter.com

**PERKINS COIE LLP**

Marc E. Elias\*  
Aria C. Branch\*  
700 13th Street NW  
Washington, DC 20005-3960  
(202) 654-6200  
melias@perkinscoie.com

Abha Khanna\*  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
(206) 359-8000  
akhanna@perkinscoie.com

*Counsel for Common Cause and the  
Individual Plaintiffs*

*\*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

Amar Majmundar  
Stephanie A. Brennan  
Paul M. Cox  
NC Department of Justice  
P.O. Box 629  
114 W. Edenton St.  
Raleigh, NC 27602  
amajmundar@ncdoj.gov  
sbrennan@ncdoj.gov  
pcox@ncdoj.gov

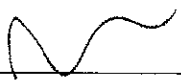
*Counsel for the State Board of Elections and its members*

John E. Branch III  
Nathaniel J. Pencook  
Andrew Brown  
Shanahan Law Group, PLLC  
128 E. Hargett Street, Suite 300  
Raleigh, NC 27601  
jbranch@shanahanlawgroup.com  
npencook@shanahanlawgroup.com  
abrown@shanahanlawgroup.com  
*Counsel for the Defendant-Intervenors*

Phillip J. Strach  
Michael McKnight  
Alyssa Riggins  
Ogletree, Deakins, Nash, Smoak & Stewart,  
P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27609  
Phillip.strach@ogletree.com  
Michael.mcknight@ogletree.com  
Alyssa.riggins@ogletree.com  
*Counsel for the Legislative Defendants*

E. Mark Braden  
Richard B. Raile  
Trevor M. Stanley  
Baker & Hostetler, LLP  
Washington Square, Suite 1100  
1050 Connecticut Ave., N.W.  
Washington, DC 20036-5403  
rraile@bakerlaw.com  
mbraden@bakerlaw.com  
tstanley@bakerlaw.com  
*Counsel for the Legislative Defendants*

This the 21st day of June, 2019.

  
\_\_\_\_\_  
Edwin M. Speas, Jr.

# **EXHIBIT A**





1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

Counsel for Common Cause, the NC Democratic Party,  
and the Individual Plaintiffs:

ARNOLD PORTER  
BY: DAVID P. GERSCH, ESQ.  
601 Massachusetts Avenue, NW  
Washington, DC 20001-3743  
(202) 942-5125  
David.Gersch@arnoldporter.com  
POYNER SPRUILL  
BY: STEVE EPSTEIN, ESQ.  
301 Fayetteville Street  
Suite 1900  
Raleigh, NC 27601  
(919) 783-6400  
SEpstein@poynerspruill.com

Counsel for the Legislative Defendants:

OGLETREE DEAKINS NASH SMOAK  
& STEWART  
BY: THOMAS A. FARR, ESQ.  
ALYSSA RIGGINS, ESQ.  
4208 Six Forks Road  
Suite 1100  
Raleigh, NC 27609  
(919) 787-9700  
Thomas.Farr@Ogletree.com  
Alyssa.Riggins@Ogletree.com

The Reporter: Discovery Court Reporters  
and Legal Videographers, LLC  
BY: DENISE MYERS BYRD, CSR 8340  
LUKE TROUBLEFIELD, VIDEO  
4208 Six Forks Road, Suite 1000  
Raleigh, NC 27609  
(919) 424-8242  
(919) 649-9998 Direct  
Denise@DiscoveryDepo.com

--o0o--

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX OF EXAMINATION

Page

By Mr. Gersch.....	5
	113
By Mr. Farr.....	107
	114

--o0o--

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	Page
Thornton		
Exhibit 1	Affidavit of Janet Thornton, Ph.D.	6
Exhibit 2	Corrected Response Report of Jowei Chen, Ph.D., June 7, 2019	60
Exhibit 3	Spreadsheet used to calculate statistical significance	67
Exhibit 4	Rebuttal of Defendant's Expert Reports for Common Cause v Lewis Jonathan C. Mattingly, June 7, 2019	75
Exhibit 5	An Analysis of North Carolina's legislative districtings: Expert Report, Wesley Pegden, April 8, 2019	82
Exhibit 6	An Analysis of North Carolina's legislative districtings: Rebuttal Report, Wesley Pegden, June 7, 2019	85
Exhibit 7	Number of Unique Maps by House County Grouping	108
Exhibit 8	Number of Unique Maps by Senate County Grouping	111

--o0o--

1 Q. He used the additional elections as a check,  
2 that's what he says he's doing, on whether the  
3 results he achieves from the first two elections  
4 make sense, right?

5 A. That's what he states.

6 Q. Okay. When you read -- withdrawn.

7 When you wrote the report, did you  
8 understand that Dr. Pegden had used four  
9 additional elections to confirm that his main  
10 body of work made sense?

11 A. I read his appendix when I wrote my report. The  
12 focus of my report was his major findings. At  
13 the time I wrote my report, I had not fully  
14 assessed that appendix. And based on the way in  
15 which Dr. Pegden is reporting his findings and  
16 having looked at those four elections more  
17 deeply, if I had had the time to do so before I  
18 had to submit my report, I would have been able  
19 to opine that those elections have outcomes that  
20 are different from the Attorney General  
21 election.

22 Q. In what way are they different? Obviously  
23 they're different elections. I assume you think  
24 they're different in some way that should  
25 materially change the way we look at his work;

1 is that right?

2 A. I am opining that -- and I focused on seats,  
3 Democratic seats that the deviation between the  
4 enacted map and the simulations as he estimates  
5 based on using those other elections is either  
6 does not exist or is reduced substantially.

7 Q. The opinion you just gave, that's nowhere in  
8 your report, right?

9 A. That's correct. I'm still assessing his four  
10 elections, but preliminarily that's what I'm  
11 finding.

12 Q. And whatever analysis you would use to support  
13 that opinion is also not in your report.

14 A. That's correct.

15 Q. It's also not in the backup you produced for  
16 your report?

17 A. That's correct. As I testified, I'm still  
18 assessing each of these expert's backup  
19 materials.

20 Q. And you said that your focus was on -- I think  
21 on the seats produced by these elections and  
22 their methodology. That's not what Dr. Pegden  
23 is trying to look at, right?

24 A. Well, Dr. Pegden is looking at where -- from a  
25 probability distribution where the map is

1 forensic expert. I don't know how this  
2 information would have been used one way or  
3 another.

4 Q. All right. I hear you on that. My question is  
5 a little more limited. It's simply: Do you  
6 plan to review the evidence in Dr. Chen's report  
7 suggesting that Dr. Hofeller didn't follow the  
8 legislative criteria?

9 A. At this point I have no reason to.

10 Q. Dr. Thornton, I have no further questions at  
11 this time.

12 A. Okay.

13 MR. FARR: I have a few questions.

14 EXAMINATION

15 BY MR. FARR:

16 Q. Dr. Thornton, you said just a few moments ago  
17 that Dr. Chen's T score drove the maps that he  
18 was simulating.

19 A. Yes.

20 Q. What was the -- what was the result of the  
21 T score driving the maps as it related to  
22 different maps within county groups?

23 A. As a consequence of his optimization using the  
24 T score, in most of the clusters at issue, he  
25 only generated a few unique maps.

1 Q. Okay.

2 (WHEREUPON, Thornton Exhibit 7 was  
3 marked for identification.)

4 BY MR. FARR:

5 Q. Can you tell us, Dr. Thornton, do you know what  
6 Exhibit 7 is.

7 A. Yes. This is a compilation of the information  
8 generated by Dr. Chen for each of his thousand  
9 simulations for each county clusters for his  
10 Set 1 and Set 2. It provides the number of  
11 unique maps compiled from his information.

12 Q. And who prepared this compilation?

13 A. My staff and I did.

14 Q. And from what information did you prepare this  
15 compilation?

16 A. In Dr. Chen's backup, he has generated -- for  
17 each simulation for each county grouping, he  
18 provides a thousand files that show the district  
19 to which his algorithm assigns each geographic  
20 grouping that he's moving around, and so if one  
21 takes all 1,000, one can then -- for each county  
22 grouping, one can determine, by review, how many  
23 actual unique maps are contained in a county  
24 grouping as generated by Dr. Chen.

25 Q. And what do you mean by unique maps?



1 A. So to illustrate, hypothetically, I'll make it  
2 very simple. Suppose you had three districts  
3 and make it very simple and say there are only  
4 two geographic areas within a district each, and  
5 you look and he has in these files one for  
6 District 1, two for District 2, let's say three  
7 for District 3. If you look at the various  
8 combinations of the ones and the twos and the  
9 threes, for each of the county grouping you can  
10 see, okay, in this map these two, let's say,  
11 were assigned to District 1 and these two to  
12 District 2 and these two to District 3, and when  
13 you look out of all of these 1,000, you'll see  
14 that many of them are absolutely identical, or  
15 it could be that these are always two, these are  
16 always three and these are always one; in other  
17 words, it's the same combination of geographic  
18 areas being assigned to the same district  
19 geographically.

20 And so that's what we did. We looked  
21 at all of the unique combinations of the ones,  
22 the twos and the threes and determined from --  
23 compiled from his backup the number of unique  
24 maps.

25 Q. So let's just make sure we understand what this

1 chart is. The first column on the extreme left,  
2 it says Dr. Chen's County Grouping Number. Can  
3 you tell us what that means.

4 A. Yes. In Dr. Chen's report, he identifies -- he  
5 assigns a county grouping number, and then in  
6 his backup, G1 is for Group 1, G2 is Group 2,  
7 et cetera, and then the set is whether or not it  
8 is from the 1,000 simulations without incumbency  
9 protection as he measured it and Set 2 is  
10 accounting for incumbency protection as he  
11 measured it.

12 Q. So in Dr. Chen's data in the House county  
13 grouping numeration, Group 1 is always Alamance  
14 County?

15 A. Yes.

16 Q. And to do a multiple county example, looking at  
17 Group 9, is that always New Hanover and  
18 Brunswick county?

19 A. Yes.

20 Q. And is that the same for all these other county  
21 groups that you have on Exhibit 7?

22 A. Yes.

23 Q. And you say Set 1 or Set 2. Could you explain  
24 what that column represents.

25 A. Yes. Set 1 is what he refers to as his

1 simulations that do not control for his measure  
2 of incumbency protection, and Set 2 are his  
3 simulations that control for his measure of  
4 incumbency protection.

5 Q. Okay. And so then you have -- the next column  
6 says House District county grouping name, and  
7 that just names the counties associated with  
8 each of Dr. Chen's grouping numerations?

9 A. Yes.

10 Q. And then the column that says Number of Unique  
11 Maps, can you explain what that is.

12 A. Yes. So if we take, for example, Alamance  
13 County Grouping Set 1, among his 1,000  
14 simulations there are 52 unique maps.

15 Q. Okay. All right.

16 (WHEREUPON, Thornton Exhibit 8 was  
17 marked for identification.)

18 BY MR. FARR:

19 Q. Dr. Thornton, you've been handed Exhibit 8. Can  
20 you tell us what Exhibit 8 is.

21 A. Eight is the same set of columns but for the  
22 Senate county groupings. So it provides --  
23 again, it's a compilation of Dr. Chen's Senate  
24 simulations for each of these Senate district  
25 groupings and identifies the number of actual

1 unique maps contained in his information.

2 Q. And who prepared Exhibit 8?

3 A. My staff and I did.

4 Q. And what data did you rely upon to prepare  
5 Exhibit 8?

6 A. Similar to the House county groupings within  
7 Dr. Chen's information, he generated a file for  
8 each simulation for each of the Senate district  
9 groupings that he generated simulations for, and  
10 there is a file, and similar to what I described  
11 for the House, there is an assignment of ones  
12 and twos and threes, et cetera, depending on the  
13 number of districts within a county district and  
14 the assignment of that district to each  
15 geographic area.

16 Q. So, Dr. Thornton, I noticed on the column on the  
17 extreme left it says Dr. Chen's House County  
18 Grouping Number; is that correct?

19 A. That should be Senate. I apologize.

20 Q. Okay. Are the headings in the columns for  
21 Exhibit 8, do they correspond to the same  
22 columns that we find in Exhibit 7 for the House  
23 compilation?

24 A. Yes.

25 MR. FARR: All right. No further

1 questions.

2 FURTHER EXAMINATION

3 BY MR. GERSCH:

4 Q. Dr. Thornton, you said you made these charts  
5 based on data in Dr. Chen's backup; is that  
6 right?

7 A. Yes.

8 Q. This is backup you got in connection with his  
9 initial report; is that right?

10 A. Yes.

11 Q. Okay. Is there a reason you didn't provide  
12 these materials with your initial report?

13 A. Certainly. I'm still going through his initial  
14 report backup.

15 Q. All right. And you may have said this and I may  
16 have misunderstood it, but taking a look at  
17 Exhibit 8, Number of Unique Maps by Senate  
18 County Grouping, so on the left-hand column you  
19 have Dr. Chen's we'll call it Senate county  
20 grouping number starting off with Grouping  
21 Number 1. Is there a Grouping Number 2?

22 A. Yes, but I included here the ones that are -- my  
23 understanding are at issue.

24 Q. Okay. So are the only omissions in terms of  
25 county grouping numbers on Exhibit 7 and 8, are

1 the only omissions what you'd call county  
2 groupings that are not at issue?

3 A. Yes.

4 Q. And when you say not at issue, what do you mean?

5 A. The ones that have been identified by I believe  
6 the plaintiffs as having -- I'd have to have the  
7 complaint in front of me, but the complaint, as  
8 I recall, is particular groupings.

9 Q. Okay. And so all of the groupings that you say  
10 are at issue should be on Exhibit 7 and 8; isn't  
11 that right?

12 A. They should be, unless I misunderstood what is  
13 at issue.

14 Q. Okay.

15 MR. FARR: I have a clarification.

16 MR. GERSCH: I have no further  
17 questions until after Mr. Farr.

18 Go ahead.

19 FURTHER EXAMINATION

20 BY MR. FARR:

21 Q. Dr. Thornton, the groups you selected, do you  
22 recall the -- I don't have his report here with  
23 me, Dr. Chen's first report, but do you recall  
24 that he has a series of maps for county groups?

25 A. Yes, and I believe that that's what this is

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

reflected in.

Q. So do Exhibits 7 and 8, do they reflect your analysis of the actual county group maps in Dr. Chen's report or do they reflect what's in the complaint?

A. His report. I apologize.

MR. FARR: That's it.

MR. GERSCH: I appreciate the clarification. I have no further questions.

Dr. Thornton, you're free to go.

THE VIDEOGRAPHER: This concludes the deposition. The time is 2:27 p.m.

[SIGNATURE RESERVED]

[DEPOSITION CONCLUDED AT 2:27 P.M.]





1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A C K N O W L E D G E M E N T O F D E P O N E N T

I, JANET THORNTON, Ph.D., declare under the penalties of perjury under the State of North Carolina that I have read the foregoing pages, which contain a correct transcription of answers made by me to the questions therein recorded, with the exception(s) and/or addition(s) reflected on the correction sheet attached hereto, if any.

Signed this the            day of            , 2019.

JANET THORNTON, Ph.D.

# **EXHIBIT B**



## A P P E A R A N C E S

Counsel for Common Cause, the NC Democratic Party,  
and the Individual Plaintiffs:

ARNOLD PORTER

BY: R. STANTON JONES, ESQ.  
601 Massachusetts Avenue, NW  
Washington, DC 20001-3743  
(202) 942-5563  
Stanton.Jones@arnoldporter.com

POYNER SPRUILL

BY: CAROLINE MACKIE, ESQ.  
301 Fayetteville Street  
Suite 1900  
Raleigh, NC 27601  
(919) 783-6400  
CMackie@poynerspruill.com

Counsel for the Legislative Defendants:

OGLETREE DEAKINS NASH SMOAK  
& STEWART

BY: THOMAS A. FARR, ESQ.  
4208 Six Forks Road  
Suite 1100  
Raleigh, NC 27609  
(919) 787-9700  
Thomas.Farr@Ogletree.com

Counsel for the State Board of Elections and Ethics  
Enforcement and its members:

NC DEPARTMENT OF JUSTICE  
BY: PAUL COX, ESQ.  
114 W. Edenton Street  
Raleigh, NC 27603  
(919) 716-6900  
PCox@ncdoj.gov

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

The Reporter: Discovery Court Reporters  
and Legal Videographers, LLC  
BY: DENISE MYERS BYRD, CSR 8340  
LUKE TROUBLEFIELD, VIDEO  
4208 Six Forks Road, Suite 1000  
Raleigh, NC 27609  
(919) 424-8242  
(919) 649-9998 Direct  
Denise@DiscoveryDepo.com

--o0o--

INDEX OF EXAMINATION

Page

By Mr. Jones..... 5

--o0o--

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	Page
	Johnson	
Exhibit 1	Expert Report of Douglas Johnson, Ph.D.	43
Exhibit 2	Expert Supplemental Report of Douglas Johnson, Ph.D.	43
Exhibit 3	An analysis of NC's legislative districtings: Expert Report Wesley Pegden, April 8, 2019	127
Exhibit 4	Corrected Response Report of Jowei Chen, Ph.D., June 7, 2019	133
Exhibit 5	Expert Report on North Carolina's General Assembly Districts Christopher A. Cooper, April 8, 2019	151
Exhibit 6	Responses to Drs. Barber, Brunell, Hood, Lewis, Johnson and Owen Christopher A. Cooper, June 7, 2019	166

--o0o--

1 minute to page through it. My question is just  
2 going to be do you recognize this as a copy of  
3 your first report in this case dated April 30,  
4 2019.

5 A. Yes.

6 Q. And if you take a look at Exhibit 2, do you  
7 recognize that document as your supplemental  
8 report in this case dated May 7th, about a week  
9 later?

10 A. Yes.

11 Q. Do these two reports contain all of the opinions  
12 you intend to express at trial in this case?

13 MR. FARR: Objection.

14 THE WITNESS: At this time.

15 BY MR. JONES:

16 Q. Do these two reports contain all the analysis  
17 that you intend to present at trial?

18 A. Again, as it stands at this time, yes. The only  
19 reason I say that is we just got all these  
20 rebuttal reports and I don't know if I'll be  
21 asked to do anything out of those.

22 Q. Have you been asked to do any analysis -- any  
23 further analysis responsive to what is in the  
24 plaintiffs' rebuttal expert reports?

25 A. No, I haven't had a chance to look at them in

1           enough detail for that yet.

2       Q.    Other than what's in the two reports, Exhibit 1  
3           and 2, have you done any other analysis that you  
4           intend to present at trial in this case?

5       A.    No.

6       Q.    Other than what's reflected in those two  
7           reports, have you reached any other opinions or  
8           conclusions that you intend to express at trial  
9           in this case?

10      A.    No.  Again, others might come up, but, no, not  
11           at this time.

12      Q.    Do you have any plans sitting here today to do  
13           any additional analysis for presenting at trial  
14           in this case?

15      A.    Not as I sit here today.  There may be things  
16           again that come up out of the recent reports.

17      Q.    And I asked I think part of this question  
18           earlier, but I'll ask it more broadly.

19                    Sitting here today, have you been asked  
20           to do any additional analysis for purposes of  
21           presentation at trial that's not reflected in  
22           your two reports that are Exhibits 1 and 2?

23                    MR. FARR:  I'll object to that and  
24           instruct him not to answer on the grounds of  
25           attorney-client privilege and work product.



1 BY MR. JONES:

2 Q. Are you going to follow your counsel's  
3 instruction not to answer?

4 A. Yes.

5 Q. Did anyone else at -- anyone at NDC or elsewhere  
6 assist you in preparing these reports?

7 A. No. I got data from the state, from the legal  
8 team, but this is all my work. No one else at  
9 NDC worked on it.

10 Q. If you flip to page 4 of your April 30th report,  
11 which is Exhibit 1, under the heading Task  
12 Description, you identify three issues that you  
13 address in the report, correct?

14 A. Yes.

15 Q. And the first issue you were asked to address  
16 was to review the 2017 legislative district maps  
17 and whether they maximize Republican political  
18 power in the legislature, right?

19 A. Yes.

20 Q. Okay. And for that issue you conclude that the  
21 2017 adopted maps do not maximize Republican  
22 political power because without the county  
23 groupings rule and other traditional districting  
24 criteria you believe that you can draw an even  
25 more pro-Republican map, right?

# **EXHIBIT C**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
18 CVS 014001

COMMON CAUSE, et al.,                    )  
  )  
                                  Plaintiffs,                    )  
  )  
                                  vs.                                )  
  )  
DAVID LEWIS, IN HIS OFFICIAL            )  
CAPACITY AS SENIOR CHAIRMAN OF        )  
THE HOUSE SELECT COMMITTEE ON         )  
REDISTRICTING, et al.,                 )  
  )  
                                  Defendants.                    )  
  )

VIDEO DEPOSITION OF  
M.V. (TREY) HOOD III, Ph.D.

---

9:25 A.M.

Wednesday, June 12, 2019

---

POYNER SPRUILL  
301 FAYETTEVILLE STREET  
SUITE 1900  
RALEIGH, NORTH CAROLINA

By: Denise Myers Byrd, CSR 8340, RPR

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S

Counsel for Common Cause, the NC Democratic Party,  
and the Individual Plaintiffs:

ARNOLD PORTER  
BY: DAVID P. GERSCH, ESQ.  
601 Massachusetts Avenue, NW  
Washington, DC 20001-3743  
(202) 942-5125  
David.Gersch@arnoldporter.com

POYNER SPRUILL  
BY: CAROLINE MACKIE, ESQ.  
301 Fayetteville Street  
Suite 1900  
Raleigh, NC 27601  
(919) 783-6400  
CMackie@poynerspruill.com

Counsel for the Legislative Defendants:

OGLETREE DEAKINS NASH SMOAK  
& STEWART  
BY: MICHAEL McKNIGHT, ESQ.  
4208 Six Forks Road  
Suite 1100  
Raleigh, NC 27609  
(919) 787-9700  
Michael.McKnight@Ogletree.com

Counsel for the State Board of Elections and Ethics  
Enforcement and its members:

NC DEPARTMENT OF JUSTICE  
BY: STEPHANIE BRENNAN, ESQ.  
114 W. Edenton Street  
Raleigh, NC 27603  
(919) 716-6900  
SBrennan@ncdoj.gov

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Counsel for Defendant-Intervenors:

SHANAHAN McDOUGAL (telephonically)  
BY: NATE PENCOOK, ESQ.  
128 E. Hargett Street  
Suite 300  
Raleigh, NC 27601  
(919) 856-9494  
NPencook@shanahanlawgroup.com

Also Present: Jared Medrano,  
Ogletree summer intern

The Reporter: Discovery Court Reporters  
and Legal Videographers, LLC  
BY: DENISE MYERS BYRD, CSR 8340  
LUKE TROUBLEFIELD, VIDEO  
4208 Six Forks Road, Suite 1000  
Raleigh, NC 27609  
(919) 424-8242  
(919) 649-9998 Direct  
Denise@DiscoveryDepo.com

--o0o--

INDEX OF EXAMINATION

	Page
By Mr. Gersch.....	5
	117
By Mr. McKnight.....	108

--o0o--

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

INDEX OF EXHIBITS

EXHIBIT NO.	DESCRIPTION	Page
	Hood	
Exhibit 1	Notice of Deposition	6
Exhibit 2	Expert Report of Dr. M.V. Hood III	8
Exhibit 3	Supplemental Expert Report of Dr. M.V. Hood III	8
Exhibit 4	Corrected Response Report of Jowei Chen, Ph.D., June 7, 2019	35
Exhibit 5	Expert Report of Jowei Chen, Ph.D. April 8, 2019	52
Exhibit 6	Urban county groupings - large	111
Exhibit 7	House and Senate vote from the 2018 elections aggregated in different ways geographically	113

--o0o--

1 plan?

2 A. 21.

3 Q. Okay. And based upon where that falls in  
4 Dr. Chen's chart here, what does that result say  
5 about the accuracy of Dr. Chen's chart in  
6 predicting election results?

7 MR. GERSCH: Objection to form.

8 THE WITNESS: Most of Dr. Chen's  
9 simulations, from looking at Figure 20, would  
10 have predicted a lower seat outcome for  
11 Democrats at 19 or 20 as opposed to 21 which  
12 actually happened.

13 BY MR. McKNIGHT:

14 Q. Now, you were asked some questions earlier about  
15 whether more densely populated urban areas would  
16 yield more districts, or words to that effect.  
17 Do you remember those questions?

18 A. Yes.

19 Q. Okay. I want to show you a document here that  
20 I'm going to mark as Exhibit 6.

21 (WHEREUPON, Hood Exhibit 6 was marked  
22 for identification.)

23 BY MR. McKNIGHT:

24 Q. And, Dr. Hood, have you looked at the number of  
25 seats that are available or number of districts

1           that are available in North Carolina's urban  
2           counties?

3       A.    Yes, I certainly have.

4       Q.    And this Exhibit 6, can you explain what it is.

5       A.    Well, these aren't all necessarily the urban  
6           county groupings, but these are some of the  
7           larger ones and so these would show you the  
8           county group and the vote percentage aggregated  
9           by the county group and the number of Republican  
10          seats won, the percentage of Republican seats  
11          out of the total and the total number of seats.  
12          So, for instance, in the House in Wake, there  
13          are 11 total House seats.

14       Q.    Okay. And looking at the House -- the counties  
15           listed here under the heading House, what  
16           counties are these in terms of how large they  
17           are within the state?

18       A.    These are certainly in the top six, I believe,  
19           all these counties.

20       Q.    Do you know if these are the top four counties  
21           or --

22       A.    I think Cumberland is actually six from what --  
23           and again, this is from my memory so it may be  
24           slightly off. Of course, Wake and Mecklenburg  
25           are the two biggest counties in North Carolina.



1 Q. Okay. And it appears to me, in looking at the  
2 number of seats that you listed here, there are  
3 a total of 33 House seats that are discussed  
4 here within these four counties; is that right?

5 A. That's correct.

6 Q. So that means there would be -- if there's 120  
7 House seats, there would be 97 House seats that  
8 are outside of those four counties; is that  
9 right?

10 A. Correct.

11 Q. And then for the Senate you also looked at three  
12 sets of county groupings; is that right?

13 A. Yes.

14 Q. There's a total of 14 seats in those county  
15 groupings; is that right?

16 A. Correct.

17 Q. So that means there would be 36 seats outside of  
18 those particular county groupings if there are  
19 50 Senate seats; is that right?

20 A. Correct.

21 Q. So I want to hand you another document, then,  
22 that I'm going to mark as Exhibit 7.

23 (WHEREUPON, Hood Exhibit 7 was marked  
24 for identification.)

25 BY MR. McKNIGHT:

1 Q. All right. And can you describe what Exhibit 7  
2 shows.

3 A. So this is just the vote -- the House and Senate  
4 vote from the 2018 elections aggregated in  
5 different ways geographically. So we're using  
6 counties here, not necessarily using county  
7 groups at this point. The other document were  
8 county groups.

9 So it starts out with what the  
10 statewide aggregated vote -- two-party vote  
11 would be for the Democrats and the Republicans,  
12 and then it begins to subtract out certain  
13 counties and then reaggregates the vote total  
14 minus those counties.

15 Q. Okay. And which counties are these under the  
16 State Senate heading in terms of size?

17 A. Well, I think these are -- I've got Mecklenburg,  
18 Wake, Forsyth, Guilford, Durham and Cumberland.

19 Q. That's six counties, right?

20 A. Correct.

21 Q. In terms of their size relative to other  
22 counties in the state, what is your -- do you  
23 have an opinion on that?

24 A. My understanding is that these are the six  
25 largest counties by population.

1 Q. Okay. And what does this chart show that  
2 without those six counties, what the -- what --  
3 well, let me back up for a minute.

4 What are the percentages in the  
5 right-hand side of this document?

6 A. Okay. So again, these are the State Senate and  
7 State House votes aggregated different ways  
8 geographically, two-party vote, just Republican,  
9 Democrat.

10 Q. And this is from which election cycle?

11 A. The 2018 election cycle.

12 Q. And so if I'm reading this correctly, the  
13 statewide two-party vote for Democrats in the  
14 Senate is 50.6 percent is what you calculated;  
15 is that right?

16 A. Correct.

17 Q. And the statewide two-party vote for Republican  
18 is 49.4?

19 A. Correct.

20 Q. But if you take out the top six counties, the  
21 percentage of Democratic votes statewide is  
22 42.3 percent; is that right?

23 A. Yeah, minus those counties, reaggregateing the  
24 state vote for the other 94 counties in  
25 North Carolina.

1 Q. All right. And then if you take out those six  
2 counties, then the rest of the state has a  
3 statewide vote of 57.7 percent for Republicans;  
4 is that right?

5 A. Correct.

6 Q. And then looking at the State House, the chart  
7 is set up the same way; is that right?

8 A. Correct.

9 Q. And taking out the six largest counties from the  
10 State House, that shows that the statewide vote  
11 for Democrats was 43.1 percent; is that right?

12 A. Correct.

13 Q. And the statewide vote for Republicans is  
14 56.9 percent; is that right?

15 A. Correct.

16 Q. What does that say, Dr. Hood, about the  
17 distribution of partisans in the state?

18 A. Well, it's similar to some of the geographic  
19 analysis I produced that, again, outside of  
20 urban counties especially there are more  
21 Republican votes than Democratic votes.

22 MR. McKNIGHT: Dr. Hood, I don't  
23 believe I have any further questions for you at  
24 this time.

25 MS. BRENNAN: No questions for me.

## 1 FURTHER EXAMINATION

2 BY MR. GERSCH:

3 Q. Dr. Hood, I have a few follow-up questions.

4 Exhibit 6, who prepared that?

5 A. I did.

6 Q. Okay. And who selected the counties?

7 A. I was asked by counsel to look at these specific  
8 counties.

9 Q. Exhibit 7, who prepared that?

10 A. I did.

11 Q. And who selected those counties?

12 A. Counsel asked me to look at those particular  
13 counties.14 Q. So counsel for both of these Exhibits 6 and 7,  
15 counsel asked you to do some computations for  
16 some counties and you did the math -- the  
17 arithmetic computations; is that right?18 A. I think that's fair. Yes, I did all the  
19 calculations.

20 Q. When did you do this?

21 A. After -- after I turned in my supplemental  
22 report. So I'm just guessing, probably late  
23 May, I believe.24 Q. Okay. Do you recall at the beginning of your  
25 testimony I asked you if your initial and your

1           rebuttal report were the complete report for you  
2           and you said yes?

3       A.    Yes.

4       Q.    What is this?  What is Exhibit 6 and what is  
5           Exhibit 7?

6       A.    I understand these as demonstratives for my  
7           testimony.

8       Q.    They're not in your report, are they?

9       A.    No, sir.

10      Q.    Is there any reason they couldn't have been  
11           provided to us before the deposition?

12      A.    Not that I know of.

13      Q.    How does Exhibit 6 relate to your opinions in  
14           this case?

15      A.    Well, again, I've done a lot of computations in  
16           the report about votes and seats won, et cetera,  
17           et cetera.  It's just more detail.

18      Q.    Well, Dr. Hood, forgive me, this was not in your  
19           report and so I'm asking you how does it relate  
20           to your opinions in this case.  Tell me exactly  
21           what you plan to tell the Court about Exhibit 6.

22      A.    Okay.  I'm going to tell the Court -- I mean,  
23           I'm not going to go outside of what the charge  
24           or the exhibit says.  I'm going to say in these  
25           particular county groupings, which are urban

1 county groupings, these were the results for the  
2 elections, these were the number of seats that  
3 were available, and these were the number of  
4 seats that were won.

5 Q. And that's it?

6 A. Well, I mean, the only other point is it does  
7 relate to the geography section that I wrote.

8 Q. You're not going to try and tie Exhibit 6 to  
9 your opinions that the map -- the enacted map  
10 wasn't gerrymandered?

11 A. Well, I'm going to point out what the election  
12 results were in those counties.

13 Q. All right.

14 A. I mean -- I mean, that's what the exhibit is.

15 Q. Dr. Hood, if the parties stipulate as to what  
16 the election results are in those counties, we  
17 don't need your testimony on that; is that  
18 right? You have nothing further to add on this  
19 point?

20 A. Well, again, I do discuss that in my initial  
21 report.

22 Q. I'm not sure what you mean by "I do discuss  
23 that." Exhibit 6 isn't in your report.

24 A. Election results is what I'm saying. I do -- I  
25 do discuss that in my initial --

1 Q. Dr. Hood, I'm going to ask this one more time.

2 If the parties are able to stipulate  
3 that Exhibit 6 is arithmetically correct, we  
4 don't need your testimony in any respect about  
5 it, right? You have nothing further to say  
6 other than that these are the arithmetic results  
7 for those counties?

8 A. Well, to a certain extent the chart speaks for  
9 itself.

10 Q. That's what I'm getting at.

11 Do you have anything else to say about  
12 Exhibit 6 other than you performed an arithmetic  
13 computation and these are the results?

14 A. No. That's -- that's the long and short of it  
15 to say.

16 Q. Good.

17 Exhibit 7, do you have anything else to  
18 say to the Court other than that these are the  
19 arithmetic results of certain computations that  
20 you were asked to make by legislative  
21 defendants's counsel?

22 A. No, besides the fact that this does get to --  
23 let's see, which one is this. Well, this does  
24 sort of get to the geography issue again.

25 Q. What is it you plan to tell the Court about



1 Exhibit 7 other than the computations that you  
2 have made?

3 A. Okay. The only other thing I would plan to tell  
4 the Court is that this is evidence -- or  
5 demonstrates, I would say, that there are many  
6 Democratic voters in North Carolina located in  
7 these urban counties, period.

8 Q. And that's it, right?

9 A. Well, besides the calculations, yes.

10 MR. GERSCH: I have no further  
11 questions.

12 MR. McKNIGHT: I have no further  
13 questions either.

14 THE VIDEOGRAPHER: This concludes the  
15 deposition. The time is 12:40 p.m.

16 [SIGNATURE RESERVED]

17 [DEPOSITION CONCLUDED AT 12:40 P.M.]

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

STATE OF NORTH CAROLINA            )  
  )    C E R T I F I C A T E  
COUNTY OF WAKE                    )

I, DENISE MYERS BYRD, Court Reporter and Notary Public, the officer before whom the foregoing proceeding was conducted, do hereby certify that the testimony of said witness was taken down by me via stenotype to the best of my ability and thereafter transcribed under my supervision; and that the foregoing pages, inclusive, constitute a true and accurate transcription of the testimony of the witness.

I do further certify that I am neither counsel for, related to, nor employed by any of the parties to this action, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereof, nor financially or otherwise interested in the outcome of said action.

This the 16th day of June 2019.

Denise Myers Byrd  
CSR 8340, RPR, CLR-102409-02

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A C K N O W L E D G E M E N T O F D E P O N E N T

I, M.V. (TREY) HOOD III, Ph.D., declare under the penalties of perjury under the State of North Carolina that I have read the foregoing pages, which contain a correct transcription of answers made by me to the questions therein recorded, with the exception(s) and/or addition(s) reflected on the correction sheet attached hereto, if any.

Signed this the            day of            , 2019.

M.V. (TREY) HOOD III, Ph.D.