

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE 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. )

**INTERVENOR-DEFENDANTS’  
RESPONSE IN OPPOSITION TO  
PLAINTIFFS’ MOTION IN LIMINE TO  
PRECLUDE LEGISLATIVE  
DEFENDANTS OR INTERVENOR  
DEFENDANTS FROM INTRODUCING  
EXPERT TESTIMONY REGARDING  
ANALYSIS OR OPINIONS NOT  
DISCLOSED IN EXPERT REPORTS**

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NOW COME Defendant-Intervenors Adrain Arnett, Carolyn Elmore, Cathy Fanslau, Connor Groce, Reginald Reid, Aubrey Woodard, and Ben York and, pursuant to Rule 7 of the North Carolina Rules of Civil Procedure and the Case Management Order, file this Response in Opposition to Plaintiffs’ Motion In Limine to Preclude Legislative Defendants or Intervenor Defendants from Introducing Expert Testimony Regarding Analysis or Opinions Not Disclosed in Expert Reports (“Plaintiffs’ Motion”). In support of their Response, Defendant-Intervenors show the Court as follows:

**INTRODUCTION**

While it does not cite to any specific concerns regarding Intervenor-Defendants’ expert, Dr. Michael Barber (“Dr. Barber”), Plaintiffs’ Motion seeks an order preventing Intervenor-Defendants and Legislative Defendants from “offer[ing] expert testimony or other evidence, including from Dr. Thornton, Dr. Johnson, or Dr. Hood, concerning analysis or opinions not disclosed in their experts’ reports.” (Plaintiffs’ Motion p.4). Plaintiffs’ Motion should be denied on two grounds:

- To the extent that Plaintiffs' Motion seeks the exclusion of demonstrative exhibits which were not included in the experts' reports, the motion should be denied because such exhibits are not separate analysis or opinions and North Carolina Courts recognize the validity and helpfulness of demonstrative exhibits in assisting the finder of fact; and
- Plaintiffs' Motion should be denied to the extent that Intervenor-Defendants' (and Legislative Defendants') experts seek to offer testimony about the NCDP Support Scores. Due to the NCDP's refusal to timely produce the NCDP Support Scores, that evidence was not disclosed to Intervenor-Defendants or Legislative Defendants until after their expert reports had been served and their experts had testified at their deposition. The Court should not allow Plaintiffs to use their failure to timely produce NCDP Support Scores as a sword against Intervenor-Defendants' (and Legislative Defendants') ability to have their respective experts review the documents and offer analysis and opinion testimony thereon at trial.

Accordingly, the Court should deny Plaintiffs' Motion outright or, in the alternative, enter an order expressly allowing Intervenor-Defendants (and Legislative Defendants) the ability to (1) use demonstrative exhibits, not disclosed in the experts' reports, during the experts' examinations at trial, and (2) allowing Intervenor-Defendants (and Legislative Defendants') experts to offer analysis and opinion testimony regarding the NCDP Support Scores at trial.

## **ARGUMENT**

### **I. Plaintiffs' Motion Inappropriately Seeks to Exclude Demonstrative Evidence.**

Plaintiffs' Motion seeks to preclude any expert in this matter from using demonstrative exhibits that were not included in her or his respective report at trial, despite the recognition by North Carolina courts that such demonstrative evidence is both allowed and valuable for the

factfinder at trial. See *Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 466, 553 S.E.2d 431, 443 (2001) (upholding trial court decision to allow expert to introduce non-substantive, demonstrative evidence to “assist the jury” in assessing the substance of the expert’s testimony).

Rule 26 of the N.C. Rules of Civil Procedure does not, as Plaintiffs’ Motion suggests, preclude the use of demonstrative evidence at trial. Rather, Rule 26 requires only that each party have the opportunity to examine the opposing party’s expert witnesses about that expert’s opinions and the facts and evidence that support them. See, e.g., *Williams v. United Community Bank*, 218 N.C. App. 361, 373, 724 S.E.2d 543, 552 (2012) (affirming trial court’s decision to exclude expert’s testimony due to “[p]laintiff’s failure to afford [the opposing party] a meaningful opportunity to depose [the expert] on his opinions”). With the exception of the DNC support scores, discussed *infra* Section II, Plaintiffs have had a full opportunity to examine Intervenor-Defendants’ expert witness, Dr. Barber, with respect to all opinions to which he will testify at trial and the evidence supporting those opinions. (Deposition of Dr. Michael Barber (“Barber Depo.”) at 255: 15-20 (“Q. ...Beside what we just talked about a moment ago and what is contained in your expert report, do you intend to offer any other opinions in this case? A. Not at this time, no.”)).<sup>1</sup> As such, Plaintiffs can claim no prejudice should Dr. Barber use demonstrative exhibits at trial that was not included in his report.

In fact, Plaintiffs questioned Dr. Barber during his deposition about a demonstrative exhibit, Deposition Exhibit 8, that he had prepared that was not included in his Report. (Barber Dep. at pp. 248–251.) Dr. Barber made clear that Deposition Exhibit 8 did not incorporate any evidence that was not included in his Report. (Barber Dep. at 248:8–10 (“This figure is derived

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<sup>1</sup> Attached hereto as Exhibit A are excerpts from the Deposition of Dr. Barber that are cited within this Motion.

from the data that are in the tables on the following pages...”); 251:4–9 (“Q. Is this data that you already had at the time you wrote your original report? A. Yea, because it – yes, because it’s the data that are used to produce Figure 3.”)). He also made clear that the exhibit did not change any opinions or conclusions he had made about Dr. Cooper’s analysis. (Barber Dep. at 251:10–16 (“Q. Right. Does this--does this additional work, the analysis you have done that we see in Exhibit 8, does that change any of the opinions that you offered in your expert report in any way? A. No. It does not change any of my opinions.”)) Plaintiffs’ counsel made no objection to Deposition Exhibit 8 at Dr. Barber’s deposition and have made no objection to it in their Motion in Limine. Dr. Barber’s use of Deposition Exhibit 8 or any other demonstrative evidence at trial will not prejudice Plaintiffs.

Plaintiffs mistakenly rely on *Williams* to support their overly narrow reading of Rule 26. The reasons cited by the Court for excluding the expert testimony in *Williams* do not match the circumstances here. In *Williams*, the trial court had excluded plaintiff’s expert witness due to numerous deficiencies, including plaintiff’s failure to timely identify the expert, misrepresentations about the expert that had been made to the court, and the expert’s unpreparedness at his deposition. *Williams*, 218 N.C. App. at 372–73, 724 S.E.2d at 551–52. Such is not the case here. Intervenor-Defendants identified Dr. Barber as their expert in a timely fashion, and Dr. Barber submitted his report timely and was fully prepared to discuss his evidence and opinions at his deposition and actually did so. Unlike *Williams*, in which the expert’s analysis and opinions would have been done after his deposition, any demonstrative evidence that Dr. Barber uses at trial would serve only to explain the same evidence and opinions about which Plaintiffs have already had full opportunity to question him. Therefore, Plaintiffs will suffer no disadvantage from the use of demonstrative exhibits at trial and *Williams* provides no other basis for exclusion.

Plaintiffs' Motion should be denied to the extent that it seeks an order prohibiting the use of demonstrative exhibits not included in the experts' reports, in the examination of experts at trial.

**II. Defendants' Experts Should Be Allowed to Testify About the DNC Support Scores.**

By seeking an order prohibiting any expert from testifying about evidence or conclusions not contained within his or her report, Plaintiff's Motion effectively seeks prevent Intervenor-Defendants' and Legislative Defendants' experts from offering any analysis or opinion testimony about the NCDP Support Scores at trial. This Court is, no doubt, familiar with the circumstances surrounding the "DNC support scores" evidence—evidence that this Court not only described in its order on June 21, 2019 as having "heightened relevance to Plaintiff NCDP's claims" and being significant to "the needs of the litigation in light of the importance of the issues at stake," but also specifically provided in the same order the Defendants' experts have the opportunity to review the NCDP Support Scores under the terms of the Protective Order.

As a result of Plaintiffs' late disclosure of the documents, Intervenor-Defendants only received the DNC support scores evidence on June 26, 2019—nearly two months after service of Dr. Barber's report and two weeks after his deposition. This delay affected all experts in this case, not just Dr. Barber, and meant that **none** of the experts had any opportunity to analyze this evidence and incorporate any resulting opinions into his or her report within the timeframe permitted for expert discovery. Because experts will not be issuing revised reports prior to trial (*see* Order on Plaintiffs' Motion for Clarification Pursuant to Rule 45 (Wake Co. Sup. Ct. May 1, 2019)), the only opportunity that any expert will have to review this evidence or express any opinions on it, therefore, will be at trial.

Fortunately, this Court acknowledged and provided for this issue. In its order compelling production of the DENC support score evidence, this Court expressly ordered that the evidence

also “be made available to parties’ testifying experts as contemplated by Sub-paragraph 11.c. of the Consent Protective Order.” (Order on Legislative Defendants’ Motion to Compel Production of Documents from Plaintiff North Carolina Democratic Party (Wake Co. Sup. Ct. June 21, 2019)). Beyond just the fact that the order expressly refers to “testifying experts,” the intended effect of an order requiring evidence be given to the experts, given the timing and procedural context of the order, is that the experts have the opportunity to analyze this evidence, draw conclusions about it, and then testify to those conclusions at trial.

Therefore, by requesting that this Court limit expert testimony to analysis and opinions disclosed in their respective reports, Plaintiffs’ Motion effectively seeks to exclude testimony by any expert about the DNC support scores evidence. The Court should not permit this continued gamesmanship, and should deny Plaintiff’s Motion to the extent that it seeks to preclude Defendants’ experts from testifying about the DNC Support Scores.

### CONCLUSION

WHEREFORE, in light of the foregoing, Intervenor-Defendants respectfully request that this Court deny Plaintiffs’ Motion outright or, in the alternative, enter an order expressly allowing Intervenor-Defendants (and Legislative Defendants) the ability to (1) use demonstrative exhibits, not disclosed in the experts’ reports, during the experts’ examinations at trial, and (2) allowing Intervenor-Defendants (and Legislative Defendants’) experts to offer analysis and opinion testimony regarding the NCDP Support Scores at trial.

This the 1st day of July 2019.

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing: INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE LEGISLATIVE DEFENDANTS OR INTERVENOR DEFENDANTS FROM INTRODUCING EXPERT TESTIMONY REGARDING ANALYSIS OR OPINIONS NOT DISCLOSED IN EXPERT REPORTS upon all parties to this matter via email to the last addresses known to me as follows:

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This the 1st day of July 2019.

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Deposition of:  
**Michael Barber**

*June 14, 2019*

In the Matter of:  
**Common Cause v. Lewis, David et al**

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EXHIBIT

tabbles

A

1           A.     Correct.

2           Q.     So can you tell me what additional  
3 work you have done in relation to that figure  
4 since reading Dr. Cooper's rebuttal?

5           A.     Right.  Certainly.  So Dr. Cooper  
6 characterizes some of the differences between  
7 the statewide vote share and the seats won by  
8 the Republican Party in the state and I  
9 disagree with his characterization of those  
10 differences and so I felt as though a table --  
11 a table would help illustrate those differences  
12 because in many ways, this figure is --  
13 sometimes it's hard to exactly gauge the  
14 difference between the two, the two values and  
15 so I thought, well, you know, a table would  
16 help illustrate that.

17                   So I prepared that table.  I have it  
18 here and there is nothing new in it, other than  
19 that it just presents these numbers in tabular  
20 form.

21           Q.     I see.  So it's the same data but a  
22 different presentation of that data?

1           A.     That's correct.

2           Q.     Thank you.  For the record, opposing  
3 counsel has handed me the data that I believe  
4 you are referring to.

5           A.     That's correct.

6           Q.     Why don't we mark this together as  
7 one exhibit just so it's clear.

8                     (Deposition Exhibit 8 was marked for  
9 identification.)

10                    MR. CELLA:  This will be Exhibit 8.

11                    BY MR. CELLA:

12           Q.     There are four pages to Exhibit 8;  
13 is that correct?

14           A.     That's correct.

15           Q.     So could you just tell me, what am I  
16 looking at on the first page of Exhibit 8 where  
17 it says at the top:  "Republican proportion of  
18 statewide vote."

19           A.     Yeah.  So this is just -- this shows  
20 the proportion of the statewide vote won by  
21 Republican candidates for the state  
22 legislature, for the state house in the solid

1 orange line and the state senate in the dotted  
2 green line.

3 So this is just to illustrate the  
4 kind of typical or the -- more or less how has  
5 the Republican Party, and the inverse being,  
6 how has the Democratic Party fared electorally  
7 over the last 20 or so years.

8 This figure is derived from the data  
9 that are in the tables on the following pages,  
10 the pages that come after that. So it would be  
11 helpful to look at the page where the row, the  
12 second row says: "GOP statewide vote share,  
13 GOP seat share."

14 Q. I'm with you now.

15 A. Okay. So the numbers from the  
16 figure are derived from the second column that  
17 says: "GOP statewide vote share," and the  
18 first column after the vertical line that says:  
19 "GOP statewide vote share," and that just --  
20 the left side is the house and the right side  
21 is the senate.

22 So the figure in the report, Figure

1           3, is simply a scatter plot of the vote share  
2           column and then the column next to it, the seat  
3           share column. The two columns thereafter are  
4           simply the difference between those two things,  
5           and so that's what Dr. Cooper was  
6           characterizing in his rebuttal report, was the  
7           difference between the vote share won statewide  
8           and the seats obtained by that party.

9                         And so this column simply measures  
10           what he is referring to, so you can see in the  
11           first line, there is a .06 and that is simply  
12           the seat share minus the vote share and it  
13           looks like it should say .07 but it's .06  
14           simply because they are rounding. This has  
15           just been -- the numbers have been truncated  
16           after the second digit.

17                         So then the numbers in the column  
18           thereafter are the same numbers but just the  
19           absolute values so negative numbers have been  
20           made positive so that we can measure the  
21           absolute distance or the absolute difference  
22           rather than having negative numbers counter --

1 take away from positive numbers. So this is  
2 simply to illustrate the historical difference  
3 between seat shares and vote shares over the  
4 last 20 or so years.

5 And the page that has just -- the  
6 next page that contains just a very small  
7 number of -- it's a very small table, that just  
8 simply takes the average of that column, so you  
9 can see in the house, the average of that  
10 column of numbers is .05 and the average of  
11 that column in the senate is .10.

12 And then the last column simply  
13 takes the average of those -- of those numbers  
14 but excludes the elections after 2010, simply  
15 to give an indicator of the average distance or  
16 average difference between vote shares and seat  
17 shares prior to the redistricting that was  
18 based on the 2010 census data.

19 So I prepared this mostly so that  
20 the -- any characterization of what those  
21 differences are could be measured and  
22 quantified.

1 Q. Thank you for that explanation.

2 That is helpful.

3 Does this -- the additional data  
4 that you compiled -- well, let me ask you: Is  
5 this data that you already had at the time you  
6 wrote your original report?

7 A. Yeah, because it -- yes, because  
8 it's the data that are used to produce Figure  
9 3.

10 Q. Right. Does this -- does this  
11 additional work, the analysis you have done  
12 that we see in Exhibit 8, does that change any  
13 of the opinions that you offered in your expert  
14 report in any way?

15 A. No. It does not change any of my  
16 opinions. I think it simply provides --  
17 provides information that make adjudicating  
18 between various claims easier to make.

19 Q. Does it allow you -- or do you plan  
20 to make any -- offering any additional opinions  
21 beyond what is already contained in your expert  
22 report when you talk about Dr. Cooper's



1 analysis of this gap between statewide vote  
2 share and the composition of the General  
3 Assembly?

4 A. I think that I would want to respond  
5 to the way in which he characterizes that  
6 difference. I think he creates the impression  
7 in his rebuttal report that that difference in  
8 2018, in particular, was especially large. I  
9 think he actually uses the word "gross" in how  
10 -- and what that difference looks like, and you  
11 can -- you could respond to that  
12 characterization using Figure 3 although I  
13 think these tables make it easier to respond to  
14 that characterization.

15 It's my opinion that that is an  
16 incorrect characterization of the results of  
17 the 2018 election because I think the numbers  
18 here show that the difference between vote  
19 shares statewide and the proportion of the  
20 seats won by the Republican Party and by the  
21 Democratic Party is not out of line with what  
22 has historically occurred in the state.

1 Q. Could I just -- to make sure I  
2 understand, could I just ask you about -- if  
3 you flip one page back to the chart of the GOP  
4 statewide vote share compared to seat share?

5 A. Yes.

6 Q. So on that page for the 2012  
7 election, the GOP statewide vote share was 52  
8 percent approximately according to this. Am I  
9 reading that correctly?

10 A. In the house.

11 Q. Yes, I'm sorry, I'm on the house  
12 side.

13 A. Yes, that looks correct.

14 Q. And the GOP seat share in the house,  
15 the North Carolina House was approximately 64  
16 percent?

17 A. That's correct.

18 Q. So the difference between the GOP  
19 seat share and the GOP statewide vote share was  
20 a difference of 13 percent, right?

21 A. With rounding, it ends up being  
22 about 13. I don't know that I would

1 characterize it as a percentage point. Because  
2 we're -- I mean, this is getting into kind of  
3 pedantic statistics, but we are comparing two  
4 different units, seats versus votes, but the  
5 difference is .13.

6 Q. So the difference is .13 and  
7 the absolute value of that is 6.13.

8 A. Correct.

9 Q. And, in fact, that's the largest, if  
10 you look at the absolute difference column,  
11 that's the largest of all of the different  
12 measurements that you have for the house for  
13 GOP statewide vote share compared to GOP seat  
14 share; is that right?

15 A. It is the largest for the house.  
16 It's not the largest for the senate but it is  
17 the largest for the house.

18 Q. If you go over to the senate side  
19 for that same year, 2012, the difference is  
20 .11?

21 A. Yes, that's correct.

22 Q. And that's an increase of .08 from

1 the difference in the 2010 election cycle that  
2 happened immediately preceding that?

3 A. That's correct.

4 Q. And then after 2012, in the North  
5 Carolina State Senate, the actual difference  
6 goes up from .11 to .14 in 2014 and 2016?

7 A. Correct.

8 Q. So it actually goes up after 2012?

9 A. It does, until 2018.

10 Q. Okay. Is there anything else about  
11 what is now marked as Exhibit 8 that you  
12 haven't talked about but you think is important  
13 to any of the opinions you intend to offer?

14 A. Not that I can think of.

15 Q. So we just talked about Exhibit 8.

16 Beside what we just talked about a  
17 moment ago and what is contained in your expert  
18 report, do you intend to offer any other  
19 opinions in this case?

20 A. Not at this time, no.

21 Q. And your report, as well as Exhibit  
22 8, are responses to Dr. Cooper's analysis in

1 the case; is that right?

2 A. That's correct.

3 Q. Not to any of the other plaintiffs'  
4 experts?

5 A. No.

6 Q. So your report, it's a response to  
7 Dr. Cooper's, but to be clear, you are not  
8 responding to any of Dr. Cooper's analysis on  
9 the specific district clusters that he talks  
10 about in the back three quarters of his report;  
11 is that right?

12 MR. BRANCH: Objection.

13 THE WITNESS: My report was designed  
14 more to respond to statewide trends and  
15 patterns and so the report focuses on statewide  
16 variables, rather than looking at the  
17 particular county clusters that Dr. Cooper  
18 includes in his analysis.

19 BY MR. CELLA:

20 Q. I read your report as responding to  
21 the front section of Dr. Cooper's report before  
22 he goes into specific district clusters, and am