

FILED

STATE OF NORTH CAROLINA

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

COUNTY OF WAKE

2019 JUN 21 P 2:23

COMMON CAUSE, et al.,

WAKE COUNTY S.C.

Plaintiffs,

BY 

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 EXCLUDE  
LIVE TESTIMONY FROM  
MORE THAN ONE  
INTERVENOR-  
DEFENDANT**

## INTRODUCTION

Plaintiffs respectfully move the Court *in limine* for entry of an order barring oral testimony from more than one individual Intervenor-Defendant at trial. Intervenor-Defendants are seven voters who support Republican candidates: Reginald Reid, Carolyn Elmore, Cathy Fanslau, Ben York, Connor Groce, Aubrey Woodard, and Adrain Arnett. Plaintiffs expect these seven individuals to testify in sum and substance that they (i) are registered Republicans who consistently vote for Republicans, (ii) have a preference for electing Republican legislators and a majority-Republican General Assembly, and (iii) support the current North Carolina House and Senate Districts that Plaintiffs are challenging in this case. This proposed testimony could be excluded in its entirety because it is irrelevant to Plaintiffs' legal claims—it has no “tendency to make the existence of any fact that is of consequence to the determination of th[is] action more probable or less probable.” N.C.G.S. § 8C-1, Rule 401. At most, the Court should allow one Intervenor-Defendant to testify live at trial, rather than permitting cumulative testimony from multiple witnesses that would needlessly delay the trial. *Id.* Rule 403.

As the Court is aware, there is an overwhelming public interest in resolving this case as expeditiously as possible. The trial in this matter will already likely last several days, given the number of witnesses that are expected to testify (including twelve expert witnesses) and the complexity of the issues. There is no reason to delay the resolution of the trial even further by allowing irrelevant testimony from multiple Intervenor lay witnesses. Accordingly, the Court should allow at most one Intervenor to testify at trial.<sup>1</sup>

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<sup>1</sup> This motion does not apply to Intervenor's expert witness, Dr. Michael Barber.

## BACKGROUND

Intervenors are seven registered Republicans who support the 2017 Plans. They have claimed an interest in having a representative who “shares their policy preferences.” Mot. to Intervene (“Mot.”) ¶ 3. While certain of the intervenors are Republican Party officials, they have all intervened in their capacity as voters. *Id.* at ¶ 23.

Plaintiffs and Intervenors have conferred regarding Intervenors’ expected testimony at trial and whether that testimony could be presented through affidavits rather than live testimony. Intervenors have agreed to offer affidavits in lieu of testimony for three Intervenors (Fanslau, Woodard, and Arnett), but they have sought to reserve the right to present live testimony from the four other Intervenors (Groce, Reid, Elmore, and York). Those four Intervenors were deposed; Fanslau, Woodard, and Arnett were not deposed pursuant to Intervenors’ agreement not to offer them live at trial.

Intervenors and Plaintiffs have agreed that Fanslau, Woodard, and Arnett’s testimony will come in through affidavits that include basic biographical information, the witness’s voting history, and a description of each Intervenor’s preference for electing Republicans. Plaintiffs have no objection to the remaining four Intervenors presenting this evidence through affidavits containing the substance to which Plaintiffs and Intervenors have agreed—or through deposition designations—but object to live testimony at trial from more than one Intervenor.

## ARGUMENT

### **I. The Intervenors’ Testimony Is Irrelevant, and Only One of Them Should be Permitted to Testify Live at Trial**

The Court should limit Intervenors to one testifying witness under Rule 401 and 403. The testimony of the Intervenors is irrelevant—it has no “tendency to make the existence of any fact that is of consequence to the determination of th[is] action more probable or less probable.”

N.C.G.S. § 8C-1, Rule 401. Plaintiffs have challenged the 2017 Plans on the ground that they violate the North Carolina Constitution’s (i) Equal Protection Clause, (ii) Free Elections Clause, and (iii) Freedom of Speech and Freedom of Assembly Clauses. Plaintiffs’ legal claims turn on whether the General Assembly acted with an impermissible partisan intent in enacting the 2017 Plans and on the consequences of that impermissible partisan intent for Plaintiffs and for Democratic voters across North Carolina. The Parties intend to call a number of expert witnesses who will address questions relating to the partisan intent and effect of the 2017 Plans. Intervenors have indicated that they intend to offer testimony from one expert of their own.

Intervenors themselves, by contrast, can offer no probative testimony on either of those legal questions. Intervenors have no first-hand knowledge of why the General Assembly enacted the 2017 Plans, and can offer no relevant testimony as to the consequences of the map for the Plaintiffs. *See, e.g.*, Ex. A (Reid Dep. 29:23–30:18) (testimony that Mr. Reid had no “personal involvement at all in ... the 2017 redistricting process”); Ex. B (York Dep. 41:12–45:8) (testimony that Mr. York would “have to guess” if asked why “somebody drew the lines the way they did”). Instead, Intervenors assert that they oppose any redrawing of the 2017 Plans because it would impair a purported right to a “representative who shares their policy preferences.” Mot. to Intervene ¶ 3.

No court, however, has ever recognized such a right, and for good reason. No voter has a right to perpetuate unconstitutional districts simply because he or she would prefer to vote under the current unconstitutional map or because a change might result in fewer seats held by representatives who share the voter’s policy preferences. If that were the case, no relief from unconstitutional districts—including because of unequal population or racial discrimination—would ever be available.

Intervenors contend that they are asserting the “same right” as the Individual Plaintiffs. Mot. to Intervene ¶ 25. Not so. Individual Plaintiffs do not assert a legal “right to . . . representatives who share their own policy and political views.” *Id.* ¶ 2. Rather, Individual Plaintiffs assert, among other things, the right not to have the General Assembly *intentionally discriminate* against them based on their political views, political affiliations, and voting histories. Intervenors do not—and could not—contend that the 2017 Plans discriminate against them in any way, and Plaintiffs do not seek any relief that would result in intentional discrimination against Intervenors. Intervenors’ proposed testimony in support of a claimed right that does not exist is therefore irrelevant.

Plaintiffs therefore ask the Court to limit Intervenors to one testifying witness (not counting their expert witness). Rule 403 provides that the Court may exclude even relevant evidence where its probative value is substantially outweighed by the danger of, among other things, considerations of “undue delay,” “waste of time,” or “needless presentation of cumulative evidence.” N.C.G.S. § 8C-1, Rule 403.

All of these considerations counsel against allowing Intervenors to offer live testimony from multiple individual Republican voters, all of whom are planning to testify to essentially the same facts—that they (i) are registered Republicans who consistently vote for Republicans, (ii) have a preference for electing Republicans, and (iii) support the current 2017 Plans. There is no reason to waste valuable court time with live witnesses testifying to these facts, especially given the public interest in resolving this case as expeditiously as possible. Intervenors can present this evidence through affidavits in the form and substance agreed to by the parties and in fact are planning to do so for three of the seven witnesses. Because all of this evidence is irrelevant in the first place, and because any relevance is certainly outweighed by the undue delay that would

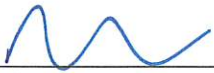
result from cumulative testimony by multiple Intervenors, the Court should permit at most one Intervenor to testify live at trial.

### **CONCLUSION**

For the foregoing reasons, the Court should permit at most one Intervenor to testify live at trial.

Respectfully submitted this the 21st day of June, 2019

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**CERTIFICATE OF SERVICE**

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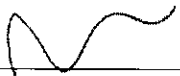
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This the 21st day of June, 2019.

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



# **EXHIBIT A**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

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.         )

DEPOSITION OF  
REGINALD REID

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10:22 A.M.

TUESDAY, MAY 7, 2019

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SHANAHAN LAW GROUP  
7501 FALLS OF NEUSE ROAD, SUITE 200  
RALEIGH, NORTH CAROLINA

BY: LISA A. WHEELER, RPR, CRR

1 say yes or no.

2 A. Yes, sir. Yes, sir.

3 MR. BRANCH: So -- and give him -- like  
4 when he -- give him a second after he  
5 finishes his question because sometimes,  
6 you -- you know, when we've done this I've --

7 THE WITNESS: Okay.

8 MR. BRANCH: -- started and stopped and  
9 started again, so you may want to just give  
10 him a moment.

11 MR. JACOBSON: Thank you.

12 BY MR. JACOBSON:

13 Q. We discussed that you were -- you were  
14 secretary of the Forsyth County Republican  
15 Party in August 2017; is that right?

16 A. Yes, sir.

17 Q. Was the Forsyth County Republican Party  
18 involved at all in the 2017 redistricting  
19 process?

20 MR. BRANCH: Objection. You can answer  
21 if you know.

22 A. I don't believe so.

23 Q. Did the Forsyth Republican -- to your  
24 knowledge, did the Forsyth County Republican  
25 Party communicate at all with the Republican

1           leaders in the General Assembly during the  
2           2017 redistricting process?

3           A.    No.

4                           MR. BRANCH:  Objection.

5           BY MR. JACOBSON:

6           Q.    So you never sat in any meetings related to  
7           redistricting?

8           A.    No, sir.

9           Q.    Did you have any other personal involvement  
10           at all in the process -- the 2017  
11           redistricting process?

12          A.    No, sir.

13          Q.    Did you go to any hearings?

14          A.    No, sir, I did not.

15          Q.    Did you communicate with anyone informally or  
16               formally about the 2017 redistricting at the  
17               time it was happening?

18          A.    I don't believe so, no, sir.

19          Q.    Didn't post anything on social media?

20          A.    Not that I'm -- not that I'm aware.  Not that  
21               I recall.

22          Q.    Prior to the 2017 redistricting process, have  
23               you generally followed redistricting in North  
24               Carolina?

25          A.    Yes, sir.  I mean, that's a political

# **EXHIBIT B**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

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.                    )

DEPOSITION OF  
BENJAMIN YORK

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1:27 P.M.

TUESDAY, MAY 7, 2019

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SHANAHAN LAW GROUP  
7501 FALLS OF NEUSE ROAD, SUITE 200  
RALEIGH, NORTH CAROLINA

BY: LISA A. WHEELER, RPR, CRR

1 A. I don't recall.

2 Q. Did Representative Riddell express any views  
3 about this case?

4 A. I don't recall.

5 Q. No views whatsoever?

6 A. I don't recall if it -- what he said. The  
7 particular conversation involved other  
8 subject matter that might not have been  
9 related to redistricting, so it was not the  
10 specific reason that I spoke to him that day,  
11 so I don't remember what we said.

12 Q. You were the chair of the Alamance County  
13 Republican Party in August 2017; is that  
14 correct?

15 A. Yes.

16 Q. And in August 2017 the General Assembly  
17 redrew the state House and state Senate  
18 districts; is that right?

19 A. Yes, I think. I don't remember the month  
20 that it happened. I just remember it  
21 happened that year.

22 Q. Was the Alamance County Republican Party --  
23 Republican Party involved in the 2017  
24 redistricting process in any way?

25 A. No.

1 Q. Did anyone -- to your knowledge, did you or  
2 anyone else from the Alamance County  
3 Republican Party communicate with anyone in  
4 the General Assembly about how the lines  
5 should be drawn in the 2017 redistricting?

6 A. I mean, I never -- I have not -- I don't  
7 remember -- I wouldn't know what other people  
8 would have said or not said. I can tell you  
9 that I -- I -- I don't recall or remember at  
10 all saying anything to anyone in the General  
11 Assembly about how the redrawn maps should  
12 come out.

13 Q. So you were not personally in communication  
14 directly or indirectly with anyone in the  
15 General Assembly about how the lines should  
16 be drawn?

17 A. Well, when you say indirectly, I'm going  
18 to -- you know, being a member of the  
19 executive committee and being involved in the  
20 party like I am, I'm going to be on big  
21 e-mail lists where they send out blasts about  
22 things or might send out a notice that a  
23 committee hearing's going to happen, you  
24 know, that kind of thing, but as far as  
25 sitting down having a conversation with



1           somebody or calling on the phone and saying,  
2           here's how I think the lines ought to be,  
3           I -- I haven't done that.

4           Q.    So were you involved in -- in any kind of  
5           back-and-forth communication as opposed to  
6           just a blast notice communication about --  
7           about how the lines should be redrawn?

8                       MR. PENCOOK:  Objection.  Answer.

9                       THE WITNESS:  Okay.

10          BY MR. PERDUE:

11          Q.    You can answer.

12          A.    Not that I recall.

13          Q.    And to the best of your knowledge, no one  
14                else in the Alamance County Republican Party  
15                was involved in any back-and-forth  
16                communication with anyone in the -- in the  
17                General Assembly about how the lines should  
18                be redrawn?

19                       MR. PENCOOK:  Objection.

20          A.    Yeah, I mean, I can only talk about what I've  
21                done.  I don't know what individual people  
22                have done.  That's a -- you said the county  
23                party.  That's a broad group so, I mean, I  
24                have no idea what other people did.

25          Q.    Well, as the chair of the -- of the Alamance

1 County Republican Party, you have some  
2 responsibility for that -- for that  
3 organization, do you not?

4 A. Yes.

5 Q. And so in general, if people are doing  
6 something on behalf of that organization or  
7 in that organization's name, you would  
8 have -- you -- you would have reason to know  
9 about it?

10 MR. PENCOOK: Objection.

11 A. I -- I would say I -- I can see where I may  
12 have knowledge of things that would -- that  
13 could happen, but I do not know of or recall  
14 any action that the party took or someone  
15 took on our behalf related to redistricting  
16 in 2017.

17 Q. So do you have any knowledge about why any  
18 particular line in the 2017 redistricting was  
19 placed where it was?

20 MR. PENCOOK: Objection.

21 A. I -- no.

22 Q. You have no idea?

23 A. Well, no, I wouldn't say I wouldn't have an  
24 idea per se as far as somebody guessing or  
25 something, but I don't -- I don't know why

1           somebody drew the lines the way they did.  
2           You'd have to ask the people that drew the  
3           lines.

4       Q.    So if you were to -- if you were to give a  
5           reason, you would be guessing or surmising;  
6           you wouldn't actually know?

7       A.    Yeah, I'd have to guess and I -- I don't know  
8           why somebody drew it the way they did.

9       Q.    So can you remind me when you became the  
10           chair of the Alamance County Republican  
11           Party?

12      A.    In 2015.

13      Q.    Were you involved in that organization in  
14           some other capacity in 2011?

15      A.    Yes.

16      Q.    To your knowledge, was the Alamance County  
17           Republican Party involved in the 2011  
18           redistricting process in any way?

19      A.    Not to my knowledge.

20      Q.    And you personally were not involved in  
21           that -- in that redistricting process in any  
22           way?

23      A.    No.

24      Q.    You were not part of any back-and-forth  
25           communication about where the lines were or