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

COMMON CAUSE, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.,* PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.,* DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE PANEL

BRIEF OF COMMON CAUSE PLAINTIFFS IN SUPPORT OF THE LEAGUE OF WOMEN VOTERS' MOTION TO BIFURCATE THE TESTIMONY OF DR. JOWEI CHEN

Common Cause and the League of Women Voters are both good government organizations with a long history of alignment and cooperation of achieving their common goals of protecting and improving our democracy. Although Dr. Chen was retained by the Plaintiffs in Case No. 1:16-cv-1026 (hereinafter the "*Common Cause* Plaintiffs") to testify as an expert witness in that case before Case No 1:16-cv-1164 was filed by a separate group of plaintiffs (hereinafter the "*League* Plaintiffs"), and there are differences in the legal theories advanced in the two cases, the objective of the two cases is the same: to end partisan gerrymandering, a practice that everyone agrees is "incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, __U.S. __, 135 S. Ct. 2653, 2658 (2015) (alteration adopted). The *Common Cause* Plaintiffs, therefore, do not oppose the motion of the *League* Plaintiffs to bifurcate the testimony of Dr. Chen.

The *League* Plaintiffs are absolutely correct in stating that the *Common Cause* Plaintiffs do not believe that proof of either the durability or severity of the partisan gerrymander of North Carolina's congressional districts is required to establish that the 2016 Congressional Redistricting Plan violates: (1) the First Amendment prohibition against viewpoint discrimination (*Reed v. Town of Gilbert,* 576 U.S. __, 135 S. Ct. 2218, 2218 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)); *Matal v. Tam*, __U.S. __, 137 S. Ct. 1744 (2017); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the

removal of all books written by or in favor of Republicans, few would doubt that the order violated" the First Amendment.)); (2) the fundamental duty of government under the Equal Protection Clause to govern impartially (*Romer v. Evans*, 517 U.S. 620, 633 (1996)); *Karcher v. Daggett,* 462 U.S. 725, 748 (1983) (Stevens, J. concurring)); (3) Article 1, §2 of the Constitution that requires that members of the House of Representatives be chosen by "the people" and not by the majority party in the North Carolina General Assembly (*Wesberry v. Sanders*, 376 U.S. 1 (1964)); and (4) the Elections Clause in Article 1, § 4 of the Constitution, which prohibits States from drawing congressional district lines for the purpose of "dictat[ing] electoral outcomes, [] favor[ing] or disfavor[ing] a class of candidates, or [] evad[ing] other important constitutional restraints." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits v. Thornton,* 514 U.S. 779, 833-34 (1995)).

The Supreme Court has never held that a little bit of viewpoint discrimination is OK as long as it is not "durable" and does not go on too far or for too long; nor has the Court ever held that a State may violate the fundamental duty of government to govern impartially, as long as the violation is only temporary and lasts for only one election. *See, e.g*., *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (holding that the policy of the Republican Governor of Illinois giving preference to Republicans during a temporary hiring freeze violated the First Amendment). There is also nothing that suggests a plaintiff in a racial gerrymander case must prove that an intentional racial gerrymander

was durable or affected the outcome of multiple elections in order to establish a violation of the Equal Protection Clause.

In addition, the Supreme Court has also held in a series of cases that the unconstitutional denial of a one-time opportunity is an injury-in-fact that is sufficient to give a plaintiff standing.

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the [disadvantaged] group … need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case [or a First Amendment case] … is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain a benefit.

Ne. Fla. Chapter of AGC of Amer. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998).

Even if the *Common Cause* Plaintiffs are mistaken in their view of the law, there is (or soon will be) an abundance of evidence in the record of the durability of the 2016 partisan gerrymander over successive elections. For example, Dr. Hofeller, the RNC's leading redistricting expert who drew both the 2011 and the 2016 plans, has testified and reaffirmed in his testimony in this case that,

> I've drawn numerous plans in the State of North Carolina over decades… I know from experience that the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it. The only way the underlying political demographics … change in a precinct is if the precinct is changed in the nature of the people that are living in the precinct. So once a precinct is found to be a strong Democratic precinct, it's probably going to act as a strong Democratic precinct in every subsequent election. The same would be true of Republican precincts. So if you used a

> conglomeration of elections, my experience is you'd come up with the same—same result.

Harris v. McCrory, Trial Transcript 525. (Hofeller Dep. pp. 147-153 Ex. 18 (p. 2); *see also* Hofeller Dep. p. 36 (Hofeller agreed that the 2011 redistricting would have "a long-term dimension that would apply for the entire decade: 2012, 2014, 2016, 2018, 2020."); pp. 57-58 ("[t]he effect of the redistricting process in general is felt for five following elections, of course, unless there are lawsuits."); p. 58 ("[A]ny redistricting's effects are felt through the entire period until the next line-drawing process, so that would be 2021 in this case."); and *see* the REDMAP documents summarized in the *Common Cause* Plaintiffs' Proposed Findings. (Dkt. 65 at 13-14).

CONCLUSION

This case is the perfect test case of the constitutionality of partisan gerrymandering of congressional districts. Although there are differences in the legal theories advanced by the *Common Cause* Plaintiffs and those advanced by the *League* Plaintiffs, we submit that the theories in both cases have merit. For that reason, the *Common Cause* Plaintiffs support the *League* Plaintiffs' motion to bifurcate Dr. Chen's testimony and to allow the *League* Plaintiffs to call Dr. Chen to testify in their case.

Respectfully submitted, this 11th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 11th day of October, 2017.

/s/ Emmet J. Bondurant
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CERTIFICATE OF WORD COUNT

I certify that the foregoing Brief of Common Cause Plaintiffs in Support of the League of Women Voters' Motion to Bifurcate the Testimony of Dr. Jowei Chen contains 1126 words as counted by the word count feature of Microsoft Word 2010, and thereby complies with Local Rule 7.3(d)(1).

This the 11th day of October, 2017.

/s/ Emmet J. Bondurant
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