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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' RULE 26(f) REPORT

Plaintiffs, by and through undersigned counsel, respectfully submit this Memorandum contemporaneously with their Rule 26(f) Report to explain the differences between their report and Defendants' report, and the harm that may result if this matter is not tried promptly.

Lines between the Plaintiffs and the Defendants were clearly drawn at the Rule 26(f) preliminary planning conference. The Plaintiffs have requested an early trial date—no later than April of 2017—and they are prepared to proceed sooner if an earlier date better accommodates the Court's schedule. A trial date sufficiently far in advance of the 2018 session of the North Carolina General Assembly is essential to enable any relief granted by the Court to take effect prior to the 2018 primary and general congressional elections. Defendants, by contrast, do not want an early trial date. Defendants want the

commencement of discovery, even as to initial disclosures, delayed for another two months until after the first of the year, and want the trial delayed another nine months until September 2017 at the earliest.

The schedule proposed by Defendants is unreasonable. The primary issues in this case are questions of law and not of fact. The operative facts set forth in the complaint are quoted verbatim from the legislative record and cannot be disputed. *See*, *e.g.*, First Amended Complaint ¶ 12 [ECF 12] (quoting Defendant Representative Lewis publicly proclaiming that "this would be a political gerrymander" and that such action "is not against the law"). The parties do not, therefore, need a lengthy discovery period or a delay in the date of the trial.

Delaying the trial beyond the early spring, much less until September, will make it practically impossible for any relief granted by the Court to take effect in time for the 2018 primary and general elections. A delay of the trial beyond April will virtually guarantee that Plaintiffs will continue to be denied fair and effective representation in Congress for another four years. And any further delay will also allow Defendants to continue to reap the benefits of their unconstitutional partisan gerrymander of North Carolina's congressional districts.

During the Rule 26(f) conference, defense counsel were specifically asked whether, if the trial were delayed until September, they would agree not to seek a stay in the event the Court rules in Plaintiffs' favor. Defense counsel refused, insisting on Defendants' right to seek a stay in the event that the Court declares the 2016 Plan

unconstitutional. A September trial date simply would not allow this Court's decision to be entered and finally reviewed before the Fall of 2018, too late for remedial plans to be in place for the 2018 elections.[1]

The congressional redistricting plan at issue in this matter was enacted on February 19, 2016, supposedly to remedy a racially-gerrymandered plan declared unconstitutional by a three-judge district court in *Harris v. McCrory* on February 5, 2016. This initial, invalid and unconstitutional plan had been enacted by the North Carolina General Assembly on July 28, 2011 and was used for both the 2012 and 2014 congressional elections.

Both the invalid 2011 congressional plan and the substitute plan at issue here were enacted by a legislative body comprised of members elected from 28 Senate and House districts declared invalid racial gerrymanders by a three-judge federal district court on August 11, 2016. *Covington v. North Carolina*, 316 F.R.D. 117, 178 (M.D.N.C. 2016). Those invalid districts had been used for the 2012 and 2014 elections. They were also used for the 2016 elections because the *Covington* court "regrettably conclude[d] that due to the mechanics of state and federal election requirements there is insufficient time, at this late date" for remedial plans to be enacted and put in place in time for the November 2016 elections to cure the "severe constitutional harms" suffered by all North Carolinians "stemming from" the General Assembly's actions. *Id.* at 177.

[1] For comparison purposes, the *Harris* case was tried October 13-15, 2015. It will not even be argued before the U.S. Supreme Court until over a year later—on December 5, 2016.

Absent a prompt trial in this matter, North Carolinians could again find themselves unable to obtain a remedy for "severe constitutional harms."[2] To reduce that possibility, Plaintiffs proposed to Defendants that discovery be conducted in this matter so that a trial could be held as soon after April 1, 2017 as convenient for the Court. Should Plaintiffs prevail on their claims, that trial date would enable Plaintiffs, and all other North Carolinians, to obtain relief for the 2018 elections. An April 1 trial date will allow this Court's decision to be entered and finally reviewed no later than the Spring of 2018 in time for remedial districts to be in place for the 2018 congressional elections.

This case is not factually complex and there is no major difference in the scope of discovery contemplated by the parties' Rule 26 reports. The principal differences between the two reports are the ending dates for discovery and the trial date. The dates proposed by Defendants may well preclude Plaintiffs from obtaining the relief to which they believe they are entitled in time for the 2018 elections. The dates proposed by Plaintiffs provide a reasonable opportunity for timely relief from the severe constitutional harm inflicted on them by Defendants. Plaintiffs respectfully request that the Court provide them that opportunity by adopting their Rule 26(f) report.

[2] Quicker relief in the form of summary judgment seem both an unlikely and unwise vehicle for resolution of the important issues present in this case, and presents the same difficulties regarding Defendants' likely attempt to stay any remedy.

Respectfully submitted, this 10th day of November, 2016.

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Counsel for Plaintiffs

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 10th day of November, 2016.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.