STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *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.

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This is yet the latest in a nearly decade-long series of cases challenging North Carolina's Congressional District maps. After being unsatisfied with the remedial maps achieved in 2016 through federal court litigation alleging racial gerrymandering, the Democratic Party and its allies backed partisan gerrymandering litigation over this very map, losing after two trips to the United States Supreme Court.

The hypocrisy of the Democratic Party and its allies in bringing yet another partisan gerrymandering lawsuit in North Carolina is remarkable. It was maps drawn by the Democratic Party during the nearly 180 years of Democratic partisan control of the North Carolina General Assembly that created some of the greatest exemplars of partisan gerrymandering in the history of the United States. Even so, after it lost control of the General Assembly for the first time in almost two centuries, the Democratic Party and its allies brought lawsuit after lawsuit seeking court orders compelling the General Assembly

to draw district lines which favor their preferred candidates—and which harm Republican candidates—or else have the state's judiciary usurp the legislature's authority and redraw the maps itself.

The relief sought in this lawsuit is even more stunning than those sought in the previous cases. Not content with seeking a court order compelling the General Assembly to redraw the Congressional District lines, Plaintiffs here—because of their own delay in filing the lawsuit, for which there is no explanation other than their own strategic decision to wait until after the three-judge panel's decision in *Common Cause v. Lewis*—contend that the Court must order, ***at the preliminary injunction stage***, that use of the current Congressional District maps be suspended and that the Court draw its own maps for use in the upcoming 2020 elections.

There is simply no precedent for the relief Plaintiffs seek pursuant to their Motion for Preliminary Injunction; rather, it is contrary to statutory and case law. The Democratic Party and its allies are back asking this court – at the last minute – to ignore the direct delegation of authority for drawing Congressional Districts lines from the United States Constitution to the Legislature of North Carolina. *See* U.S. CONST. art. I, § 4. Instead, the Plaintiffs here want this court, on an expedited basis at the preliminary stage, to ignore this constitutional delegation, and impose requirements created out of whole cloth to invalidate the otherwise duly enacted Congressional districting map for the State of North Carolina. As such, Plaintiffs' Motion for Preliminary Injunction should be denied.

FACTUAL BACKGROUND

North Carolina's Congressional districts have been involved in a significant amount of litigation since the 2010 census; rather than recount the history of which the Court is aware, Intervenor-Applicants note that many of the Plaintiffs here were parties in *Common Cause v. Lewis*, Wake County Case No. 18-CVS-14001, filed on November 13, 2018. Like in

that case, they claim to be registered Democrats who have consistently voted for Democratic candidates, this time for the U.S. House of Representatives as opposed to the North Carolina General Assembly. *See generally* Complaint ("Compl."); *see also* Compl. ¶¶ 6–19. This case, brought by many of the same Plaintiffs as *Common Cause v. Lewis* and including the same legal claims, was intentionally brought almost a year thereafter, likely in an effort for the Plaintiffs to see how the *Common Cause v. Lewis* claims fared before filing the lawsuit. Due to Plaintiffs' strategic delays, they now ask the Court to expedite the judicial process and to, by preliminary injunction, develop and impose a "remedial plan" for use by North Carolina voters in the primary election for 2020. This emergency, and unprecedented, relief should be denied, as not only is it contrary to the United States Constitution and state law but the emergency posture of this case is a result of Plaintiffs' own delay.

ARGUMENT

I. PLAINTIFFS LACK STANDING.

For all their bluster, Plaintiffs fail to establish that they have standing to bring their claims. While "the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine," *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (citations omitted), that does not mean that Plaintiffs need not suffer a cognizable injury, *id*, nor does it mean that they need not present some factual matter that there is some possible remedy to Plaintiffs alleged harms, *see Marriott v. Chatham County*, 187 N.C. App. 491, 495, 654 S.E.2d 13, 16–17 (2007). While the requirements to assert standing may be different in North Carolina than in the federal courts, the elements for standing in North Carolina are the same. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. As such, Plaintiffs have the burden of showing (1) injury in fact; (2) traceability; and (3)

redressability. *Id.* Plaintiffs have failed to carry this burden.

A. Plaintiffs Have Not Suffered an Injury in Fact.

It is true in North Carolina State court, just as it is in federal court, that "[o]nly those persons may call into question the validity of a statue who have been *injuriously affected* thereby in their persons, property or constitutional rights." *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882 (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (emphasis added)). Thus, federal standing decisions under Article III are "instructive", *see id.*, especially in the context of gerrymandering claims, which have been argued *ad nauseum* in federal court. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1929–31 (2018) (addressing standing for partisan gerrymandering claims); *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The injury-in-fact requirement exists so that "only one with a genuine grievance, one *personally injured* by a statute, can be trusted to battle the issue." *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (emphasis added) (quoting *Stanley v. Dept. of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Put another way, "the North Carolina Constitution confers standing on those who suffer harm, and that one must have suffered some injury in fact to have standing to sue." *Comm. to Elect Dan Forest v. Emples. Political Action Comm.*, __ N.C. App. __, __, 817 S.E.2d 738, 742 (2018) (internal quotations omitted) (citing *Magnum*, 362 N.C. at 642, 817 S.E.2d at 281; *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993)). In the voting rights context, only persons "who allege facts showing disadvantage to themselves as individuals have standing to sue" because "the right to vote is individual and personal in nature." *Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S. Ct. 691, 704 (1962)). "Standing is not dispensed in gross." *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110,

117, 574 S.E.2d 48, 53 (2002) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6, (1996)). Vote dilution claims—the packing and cracking of voters—are district specific.[1] *Gill*, 138 S. Ct. at 1930. The harm in gerrymandering cases "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight that it would carry in another, hypothetical district." *Id.* at 1930. Importantly, it is Plaintiffs' burden to prove standing exists. *Neuse River Found.,* 155 N.C. App. at 113, 574 S.E.2d at 51 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). However, in the context of a mandatory injunction, Plaintiffs burden is heightened as they must "clearly establish[]" their injury.[2] *See Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963); *Auto. Dealer Res.., Inc. v. Occidental Life Ins. Co. of N.C.,* 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972) (citations omitted).

1. Plaintiffs in the First and Twelfth Congressional Districts have not Suffered an Injury in Fact.

Plaintiffs Oseroff and Brien, from First and Twelfth respectively, have suffered no harm. Plaintiff Oseroff is a registered Democrat who votes for Democratic candidates. Compl. at ¶ 6. Similarly, Plaintiff Brien is a voter who consistently votes for Democratic candidates for Congress. *Id.* at ¶ 18. Importantly, both Plaintiffs have voted for, and are currently represented by, Democrats. Therefore, the only harm that they allege is that Democrats in *other* districts are not being elected at the rate they would prefer. Generalized

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[1] While each of Plaintiffs claims are different in form, they are nearly identical in substance. Each of Plaintiffs' causes of action are vote dilution claims. *Compare* Compl. at ¶ 126 (stating that Free Elections clause claims are vote dilution claims) *with* Compl. at ¶ 135 (stating that Equal Protection clause claims are vote dilution claims) *and with* Compl. at ¶ 143 (stating that claims under the Freedom of Speech and Freedom of Association clauses result from packing and cracking votes, which is the dilutionary harm).

[2] Plaintiffs wish to minimize this burden, *see* Mot. for Prelim. Inj. at 44, which is no surprise as they cannot meet the heightened standard that North Carolina law requires in the mandatory injunction context. *See, e.g., Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. This standard is of specific importance where, as here, a mandatory injunction would function as a *de facto* final judgment.

partisan grievances, and the coordinate desire to transform "the legislature as a whole," is a "collective political interest" which courts cannot, and should not, entertain.[3] *Gill*, 138 S. Ct. at 1929, 1932. As such, Plaintiffs Oseroff and Brien lack standing because they have suffered no injury specific to themselves as voters in their districts.

2. Dr. Chen's Simulations Demonstrate the Remaining Plaintiffs' Lack of Injury.

The remaining Plaintiffs lack standing because, according to their own expert, Plaintiffs have suffered no injury specific to themselves. In other words, Plaintiffs attempts at district specific evidence fails by their own terms. Dr. Chen's simulations purport to show a "district specific analysis" that "strictly adhere to nonpartisan traditional districting criteria." *See* Pls.' Mot. for Prelim. Inj. at 44. Even assuming that statement is true, which it is not,[4] Plaintiffs have not suffered a cognizable injury.

Dr. Chen's simulations purport to show that eight of fourteen Plaintiffs live in districts that "randomly" occur using his "nonpartisan traditional districting criteria." *See* Decl. of Chen, Simulation Set 2 (CDs 3–9, 13). Using Simulation Set 1, the figure rises to nine of fourteen. If the Plaintiffs' enacted district falls within the grey area on the chart, then the Plaintiff lives in a district that could have been created through a so-called non-partisan districting process. *See* Decl. of Chen at ¶ 8, Simulation Set 2. If Plaintiffs live in districts that can occur with no partisan bias, according to Chen's own criteria, then the

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[3] Finding that two Democratic voters have standing because they would prefer that the Congressional delegation on the whole be more Democrats means that *any* voter from *any* state can have standing to challenge *any* district in North Carolina. Creating a system wherein any aggrieved partisan who desires to have more influence on the national legislature when they themselves have suffered no individual harm simply does not comport with established principles of federalism and separation of powers.

[4] Intervenors injury-in-fact arguments will assume, *arguendo*, that Dr. Chen's simulations are both methodologically and technically sound. However, there are significant reasons to doubt Dr. Chen's results both methodologically, *see infra* Section I.B.2, and technically, *see, e.g.*, Mot. *in Limine*, *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148 (E.D. Mich. Dec. 4, 2018) (ECF No.

simulations fail as evidence of that same partisan bias because, by Plaintiffs own definition, they have neither been "packed" nor "cracked." The crux of dilatory harm "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight that it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931. Dr. Chen's simulations, at least for these Plaintiffs, merely confirm that they "carry" the same weight as they "would carry in another, hypothetical district." *Id.*

Another three Plaintiffs currently live in, and will continue to live in, a Republican district under any of Chen's 1,000 simulations. *See* Decl. of Chen at Simulation Set 2 (CDs 10, 11). Under these simulations, even if they are as neutral as Dr. Chen claims, each Plaintiff in CD 10-11 will still reside in a district that will be "more favorable to Republican candidates." *See* Compl. at ¶¶ 15, 16, 17. They vote for Democrats now and those Democrats lose. If Chen's simulations are taken as accurate, and they continue to vote for Democrats, those Democrats will also continue to lose. If his simulations are accurate, then Plaintiffs Gates, Barnes, and Brien have suffered no injury.

B. Plaintiffs Have Not Shown a Remedy Is Likely.

The third standing requirement is redressability. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. Redressability requires Plaintiffs to prove that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* Far from having proof that a remedy is "likely", Plaintiffs have failed to show that a remedy is possible.

Plaintiffs time and again plead that it is *feasible* for the Court to fashion a remedy in the *time allotted* before the election. This is a dubious assertion at best. *See infra* Section

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147 at 21–26) (arguing that the evidence is that Dr. Chen's actual computer code for his simulations

III.B.1. However, what Plaintiffs fail to allege anywhere in their complaint is that there may exist some remedial map—some collection of lines comprising thirteen congressional districts—that will remedy the harms to each or any individual Plaintiff. From within the thousands of simulations Dr. Chen has run, the Plaintiffs produce no map they claim remedies the harms of all plaintiffs—even by their own recitation of the alleged facts. Without any such allegation in the complaint, supported by facts or not, Plaintiffs have failed their burden of proving standing. All Plaintiffs have done is assert that the Court has the *means* to fashion a remedy, not that a remedy exists that can, in fact, remedy Plaintiffs' individual harms.[5]

It is of little import that there *could* be a plan drawn with a different overall partisan balance; the proof that Plaintiffs must advance for the purposes of standing is that *each* individual Plaintiffs' harm be remedied. *See Gill*, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). For example, if, based on the political geography of the state and the unique addresses of Plaintiffs, only two remedial districts could be drawn specific to two of the plaintiffs, then the remaining plaintiffs lack standing. That said, it is simply neither the Court's nor the Defendants' duty to provide proof and pleading that such a map is possible. That is Plaintiffs' duty and burden, *Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16, and it is one that they have wholly disregarded.

1. Plaintiffs' Expert Presents No Evidence on Redressability.

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differ from what his stated instructions were).

[5] While it is questionable that the Court has the power to enact a remedy by judicial fiat, *see In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 332–33 (1963), the Court's remedial power is of no import if the Court, due to a failure of pleading and proof by Plaintiffs, has no subject matter jurisdiction in the first instance. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. In fact, N.C. CONST. art. I, § 6 confines state courts much in the same way as Article III confines federal courts. *Compare* N.C. CONST. art. I, § 6 ("the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other") *with Gill*, 138 S. Ct. at 1923 ("the threshold requirement" of standing exists so "'that [the Court] act[s] as judges, and do not

Dr. Chen's simulations are merely an attempt to "invalidate[] a map based on unfair results that would occur in a hypothetical state of affairs." *Rucho*, 139 S. Ct. at 2503 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.)). This presents a severe flaw for standing purposes. Dr. Chen's simulations do nothing to show if the harm to any Plaintiff could be remedied under any constitutional norm. Dr. Chen's simulations present aggregate data and do nothing to show whether each Plaintiff's harm, if any, can be remedied. For instance, if Dr. Chen were to draw a map that remedied that harm for Plaintiff Oseroff in CD 1, could that same map remedy the harm for any, or every, other Plaintiff? It is impossible to know under what Dr. Chen has presented at this stage of the case and, in any event, it is Plaintiffs' burden to provide such pleading and proof. Furthermore, Chen claims simulations do not reflect even a modicum of partisanship, which is fully permissible under both federal and state law. Therefore, Dr. Chen's simulations do not reflect what any remedial map may or may not look like.

2. Plaintiffs' Expert Analysis Is Methodologically Flawed.[6]

Dr. Chen's analysis is flawed for an additional fatal reason. His simulations completely ignore partisanship, which has, prior to 2019, never been a requirement applicable to maps under North Carolina or federal law. In fact, under both federal and North Carolina precedent, partisanship is expected and normal in redistricting. *See, e.g., Dickson v. Rucho*, 368 N.C. 481, 493, 781 S.E.2d 404, 415 (2015) ("Redistricting in North

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engage in policymaking properly left to elected representatives.'" (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)).

[6] It is also of vital importance to mention that Congressional Intervenor's have had no opportunity in here, or in any of the recent litigation over the congressional districts to question Dr. Chen's methods to probe if they actually comport with his declaration. *See Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56 (Sept. 3, 2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018). This issue further highlights why a mandatory injunction is inappropriate here.

Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers.") *vacated* 137 S. Ct. 2186 (2017); *Rucho*, 139 S. Ct. at 2497 (redistricting "is intended to have substantial political consequences") (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). Even assuming Plaintiffs' causes of action are valid, "[t]he 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)). Assuming, *arguendo*, that the North Carolina General Assembly engaged in *excessive* partisanship when engaged in Congressional redistricting, that does not necessarily require that there be *no* partisanship when engaged in Congressional redistricting.[7] Because at least some level of partisanship must be allowed when redistricting. This is even more true in this case because the impetus for drawing the 2016 plan was to absolve any liability arising from the improper use of race under the Fourteenth Amendment of the U.S. Constitution. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017).

"To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho*, 139 S. Ct. at 2497. The "political entities" to which the Framers constitutionally entrusted Congressional redistricting decisions are the state legislatures, in the first instance, and Congress should it wish to intervene. *See* U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time

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[7] *Common Cause v. Lewis* has limited the consideration of political considerations in drawing state legislative maps, but that case has no occasion to address the import of the direct delegation of

by Law make of alter such Regulations . . . ."). It is hardly surprising then that the North Carolina General Assembly implemented purely political criteria into their adopted criteria. *See* Joint Select Committee on Congressional Redistricting.[8] Dr. Chen's simulations wholly ignore the fundamental truth of redistricting, it "inevitably has and is intended to have substantial political consequences." *Rucho*, 139 S. Ct. at 2497 (quoting *Gaffney*, 412 U.S. at 753). Because Dr. Chen's simulations wholly ignore the simple fact that partisanship is permissible and expected—as noted by the United States Supreme Court—when drawing Congressional districts in North Carolina, his simulations are of limited value and are, in fact, evidence of nothing at all.

II. PLAINTIFFS DO NOT MEET THE STANDARDS FOR PRELIMINARY INJUNTIVE RELIEF.

Under Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)"), the Court has discretion to issue a preliminary injunction. *See* N.C. Gen. Stat. § 1A-1, Rule 65(a)–(b) and cmt. "The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and quotation marks omitted). The issuance of a preliminary injunction, "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is appropriate only where "a plaintiff is able to show a likelihood of success on the merits of his case" and "is likely to sustain irreparable loss in the absence of an injunction, or if, in the opinion of the Court,

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authority to the state legislature for drawing Congressional maps in Article I, Section 4 of the United States Constitution.

[8] Available at: https://www.ncleg.gov/documentsites/committees/JointSelectCommitteeonCongressionalRedistricting//2016%20Contingent%20Congressional%20Plan%20Committee%20Adopted%20Criteria%202%2016%2016.pdf.

issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759–60 (emphasis omitted) (citations and quotation marks omitted).

However, "[t]he law recognizes a distinction, however, between prohibitory and mandatory injunctions." *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. "A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts." *Id.* (citing *Clinard v. Lambeth*, 234 N.C. 410, 418, 67 S.E.2d 452, 458 (1951)). In contrast, "[a] mandatory injunction is intended to restore a status quo and to that end requires a party to perform a positive act." *Id.* A mandatory injunction "will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established." *Id.* (citing *State Highway & Pub. Works Comm'n. v. Brown*, 238 N.C. 293, 296, 77 S.E.2d 483, 782 (1953)). "[T]he court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear[.]" *Id.* (citation and quotation marks omitted). There is no such clear right or urgency present in this case.

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CLAIMS.

For the reasons set forth below, Plaintiffs are unlikely to succeed on the merits of their claims. They are, therefore, not entitled to a preliminary injunction.

A. This Court Lacks the Authority to Grant the Requested Relief.

To remedy the alleged violations of North Carolina's state constitution, Plaintiffs request that this Court issue an order declaring the 2016 Plan unconstitutional and invalid, enjoining Defendants from preparing for and administering the 2020 U.S. House elections using the 2016 Plan, and affording the General Assembly two weeks to create a remedial plan.

Plaintiffs' requested remedial order violates the federal Constitution in two ways. *First*, Plaintiffs request an order that the General Assembly draw a remedial map that is subjected to criteria specified by the Court. *Second*, Plaintiffs' requested order seeks to grant authority for the Court to appoint a referee to develop a remedial map for the Court if necessary. *See* Compl. at ¶¶ 43–44; Pl. Proposed Order on Mot. for Prelim. Inj.

These two pieces of Plaintiffs' requested remedial order offend the same provision of the U.S. Constitution, because the order siphons power from the legislature to the Court to dictate the times, places, and manner of holding the congressional elections in violation of Article I, Section 4 of the United States Constitution (the "Elections Clause"). By invalidating the North Carolina General Assembly's duly enacted redistricting plan, dictating the substance of a remedial plan, and potentially supplanting the Legislature's plan altogether with its own, this Court would be usurping the redistricting authority exclusively delegated to the General Assembly by the Elections Clause. Accordingly, the Court does not have the authority to grant Plaintiffs the relief they request.

1. The Elections Clause Grants the North Carolina's Legislature Exclusive Authority Over Congressional Redistricting.

The Elections Clause mandates that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the *Legislature* thereof" unless "Congress" should "make or alter such Regulations." U.S. CONST. art. I, § 4 (emphasis added). By its plain terms, the Elections Clause vests authority exclusively in (1) the state "Legislature" and (2) Congress.[9]

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[9] The reference to "Times, Places and Manner" is derived from the "methods of proceeding" as to the "time and place of election" to the House of Commons in English Parliamentary law. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES, 158-59, 170–74. These "methods" were completely under parliamentary control and beyond the reach of "the Common-Law" and "the Judges." Heorge Petyt, Lex Parliamentaria 9, 36–37, 70, 74–75, 80 (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES, 146–47. By delegating the procedures of congressional elections to legislative bodies, the Elections Clause

The Supreme Court views the term "Legislature" in the Elections Clause as "a limitation upon the state in respect to any attempt to circumscribe the legislative power" over federal elections. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (interpreting the substantially similar delegation of authority to the State legislatures in the Electors Clause in U.S. CONST. art. II, § 1, cl. 2). This is because the power to regulate federal elections is not an inherent state power, but rather one that was expressly delegated to the State Legislatures. *See U.S. Term Limits v. Thorton*, 514 U.S. 779, 805 (1995); *Cook v. Gralike*, 531 U.S. 510, 522 (2001). As the Supreme Court noted in *Bush v. Gore*, 531 U.S. 98 (2000), in the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government . . . the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. at 112–13 (2000) (Rehnquist, C.J., concurring). With respect to redistricting specifically, the U.S. Supreme Court has held that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015). Notably, the North Carolina Supreme Court is a not a lawmaking body. *See In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 332–33 (1963); *see also* N.C. CONST. art. I, § 6 ("the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other").

This standard provides some room for flexibility for a state entity other than the state legislative body itself to enacts such a plan, as long as the authority for that deviation

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carried forward that English-law tradition of maintaining legislative control and excluding judicial authority over election rules, none of them proposed that other their authority over election rules, none of them proposed that other branches of the state government may exercise a check on such abuse. Rather, Congress was viewed as the exclusive check on the authority granted to the state. *See* THE FEDERALIST No. 59 (Alexander Hamilton).

must always emanate directly from the legislative body itself. Put more simply, by control over such matters. Though the framers appreciated that state legislatures may abuse their delegating exclusive power to regulate congressional districts in each state to "the Legislature thereof," the Constitution denies that power to other state actors (such as state courts) unless those state actors have a separate and explicit grant of authority. This distinction has played out in a number of matters over the years.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the question was whether subjecting legislation redistricting Minnesota's congressional districts to a Governor's veto violated the Legislature's exclusive jurisdiction under the Elections Clause. The Court reversed the Minnesota Supreme Court's holding that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. *Id.* at 362–63, 375. The Court explained that "Minnesota's legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor." *Arizona State Legislature*, 135 S. Ct. at 2667 *(citing Smiley*, 285 U.S. at 365–66). Thus, the key factor in the Court's ruling was that the Governor's veto *was part of* the state's legislative authority. *Id.* (citing *Smiley*, 285 U.S. at 367).

Similarly, in *Arizona State Legislature*, where the state's use of an independent redistricting commission adopted by voters via a ballot initiative was at issue, the Court held that lawmaking power in Arizona includes the initiative process, and that the Elections Clause permits use of an independent redistricting commission for congressional redistricting in the same way the Commission is used in districting for Arizona's own Legislature. *Id.* at 2660. The Court noted that "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each

instance is called upon to exercise." *Id.* at 2668 (citations omitted)); *but see Arizona State Legislature*, 135 S. Ct. at 2677–2694 (Roberts, C.J., dissenting); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000).

Unlike *Smiley* and *Arizona State Legislature*, here the North Carolina state courts have no separate grant of authority to participate in the legislative redistricting process, and the state court's adjudication of the redistricting process cannot be fairly included in the state's legislative authority. *See Hawke v. Smith*, 253 U.S. 221, 229 (1920) (holding that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word"); *cf. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referendum was part of the legislative authority of the State where it involved the *enactment* of legislation). Therefore, any attempt by a state court to intrude upon the authority of the North Carolina General Assembly to fulfill its role in redistricting must be viewed through a proscriptive lens. Accordingly, this Court cannot grant the remedy Plaintiffs' seek because it would require the Court to develop its own criteria that the legislature did not adopt and order the legislature to adopt the Court's criteria.

In contrast and similar to the facts of this case, is *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (three-judge court). In *Smith*, a federal three-judge panel held that the adoption of a congressional redistricting plan by a Mississippi chancery court was unconstitutional because it violated the Elections Clause. *Id.* at 549. The three-judge panel explained,

> based on our understanding of the constitutional provision, in the light of its plain language and the case authority when considered as a whole, we hold: Article I, § 4 requires a state to adopt a congressional redistricting plan in a manner that comports with legislative authority as defined by state law.

Id. at 556.

> Although the constitutional provision may not require the state legislature itself to enact the congressional redistricting plan, the state authority that produces the redistricting plan must, in order to comply with Article I, Section 4 of the United States Constitution, find the source of its power to redistrict in some act of the legislature.

Id. at 550. Therefore, the term "Legislature is not confined to the state legislature as an institutional body" but state actors that operate outside of the legislative body must derive the authority for their actions from some source of legislative power provided under state law. *Id.* at 552. In reaching its conclusions, the federal three-judge panel in *Smith* discussed and distinguished *Growe v. Emison*, 507 U.S. 25, 33 (1993) in detail.

Growe is often cited to support deference of state-court authority over redistricting, though such reliance is misplaced. In *Growe*, the state court intervened to create a redistricting plan after the legislature failed to redistrict at the beginning of the decade when new census data rendered the existing state district boundaries a violation of the federal Equal Protection Clause. The Supreme Court held that, where a legislature reaches impasse and fails to redistrict at the beginning of a decade, state courts have priority over federal courts in remedying the resulting federal one-person, one-vote violation. *Growe*, 507 U.S. at 33–34 ("[T]he Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."). But the three-judge panel in *Smith* found several materially significant distinctions from the facts of *Growe* that led the three-judge panel hold "we cannot conclude that *Growe* stands for the proposition that we may disregard Article I, Section 4." *Smith*, 189 F. Supp. 2d at 556.

First, *Growe* merely addresses the ability of state courts to implement a redistricting plan when the legislature has failed to do so in violation of *federal* law—*Growe* does not address the state court's ability to remedy violations of *state* law and where the state has

already acted to implement a redistricting plan. *Id.* at 555–56. Because the delegation of authority for the state courts to act in *Growe* arose from the legislature's failure to act (a fact that was not present in *Smith*), the three-judge panel in *Smith* held that *Growe*'s holding was inapplicable to the Mississippi Chancery Courts, because the Courts enjoy no legislatively delegated authority. *See id.* at 556–57; *see also Mauldin v. Branch*, 866 So.2d 429, 433–34 (Miss. 2003) (adopting this view). The *Smith* court concluded that such courts have no remedial authority—even to remedy violations of federal law—and it therefore enjoined a state court-drawn map as a violation of the Elections Clause.

Although the Court has held that the word "Legislature" is not so restrictive as to exclude referendums, a Governor's veto, and an independent redistricting commission passed by ballot initiative, no one contends here that the North Carolina courts participate in North Carolina's "prescriptions for lawmaking" or constitutes the "power that makes laws." *See Arizona State Legislature*, 135 S. Ct. at 2671.

It is different, and offensive to the Elections Clause to identify the lawmaking bodies (the legislature) and processes (e.g. legislation) and then empower entirely different and non-legislative bodies (the courts) and processes (litigation) to override otherwise lawful time, place and manner rules—such an act is not emanating from the institution that the state's constitution has identified as its "Legislature." Here, the North Carolina General Assembly fulfilled its duty to redistrict in compliance with its federal obligations, and the General Assembly complied with the "method which the state has prescribed for legislative enactments" when the North Carolina House and Senate voted on and approved the redistricting plan on February 18 and February 19, 2016, respectively. *Smiley*, 285 U.S. at 367. Therefore, if the North Carolina Superior Court were to grant Plaintiffs' requested remedies, it will unlawfully usurp the General Assembly's federally prescribed role by mandating the substance of a remedial plan, and potentially redistricting North Carolina's

congressional districts itself. Thus, as set forth in precedent addressing courts' remedial redistricting authority, any effort by a state body with *no* lawmaking power, such as the North Carolina state court, to override the duly enacted legislation will run afoul of the Elections Clause because it is "the Legislature" that has been granted the authority to engage in redistricting, and not the courts.

2. State Court Attempts to Enforce State Constitutional Law in the Redistricting Runs Afoul of the Supremacy Clause.

To the extent Supreme Court precedent supports judicial review, it only extends to preventing election rules from abridging "fundamental rights" codified in the federal constitution and statutes (e.g., right to vote, freedom of political assoc.). *Tashjian v. Repub. Party*, 479 U.S. 208, 217 (1986). Judicial review is appropriate in those circumstances because the individual rights in the federal Constitution must be afforded equal dignity with the Elections Clause. In contrast, state constitutions do not enjoy that equal status because they are subject to federal supremacy and are plainly subordinate to the Election Clause's prescribed grant of authority.

Any claim to state-law-created authority, including a state's constitution, conflicts with the Elections Clause's mandate that congressional district lines be drawn by "the Legislature," so this state-law-based authority must yield to federal law. As Justice Rehnquist explained:

> In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. *See* U.S. CONST. art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government.

Bush v. Gore, 531 U.S. at 112–13 (2000) (Rehnquist, C.J., concurring) (in the context of the

appointment of electors in a presidential election).

Even if all state courts have the authority *Growe* described in legislative impasse cases, that case addressed the "concurrent jurisdiction" of state and federal courts "over the same subject matter." *Growe*, 507 U.S. at 32. That "concurrent jurisdiction" references state courts' concurrent jurisdiction with federal courts to enjoin violations of *federal* law, because the alleged violation in *Growe* was a one-person, one-vote violation. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Growe*, 507 U.S. at 27–28. In these circumstances, state courts may exercise this authority because they are "subject also to the laws of the United States," and the authority is therefore derivative of federal law. *See Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 137 (1876).

However, the power to remedy federal-law violations with remedial time, place, or manner rules does not imply the power to establish such rules for state-law violations. Indeed, state substantive constitutional law is not analogous to the individual rights guaranteed under federal law because the state constitution is subordinate to the Elections Clause pursuant to the supremacy clause. Subjecting a legislative plan to a state constitution's substantive law not only frustrates the express delegation of the authority contained in the Elections Clause, but it sets up a conflict between the state constitutional policy and the state legislative policy. In such cases, the Elections Clause mandates that the legislature must win to avoid state constitutional law superseding federal law. As discussed above, Sect. III.A.1 *supra*, in *Smiley* the U.S. Supreme Court held that the function of a state legislature in prescribing the time, place, and manner of holding elections for representatives in Congress under the Elections Clause is a lawmaking function in which the veto power of the state governor participate if, under the state constitution, the governor has that power in the making of state laws. *Smiley,* 285 U.S. at

365.

Furthermore, the Court has severely curtailed the remedial authority of federal courts by holding that it they must implement redistricting plans that "most clearly approximate[] the reapportionment plan of the state legislature," *White v. Weiser*, 412 U.S. 783, 796 (1973), leaving courts no power to create policy, *Upham v. Seamon*, 456 U.S. 37, 41–43 (1982). This doctrine honors the Constitution's delegation of power over time, place, and manner rules to "the Legislature" by ensuring that courts' involvement is narrowly tailored to remedying violations of federal law. U.S. CONST. art. I, § 4. And it expressly disclaims any federal-court authority to establish time, place, or manner rules. It stands to reason then, that this implied federal constitutional basis for such a rule necessitates that state courts be equally bound.

In this case, the Court is not empowered to insert itself into the redistricting process by ordering remedial maps that are drawn with criteria that neither the legislature nor the North Carolina constitution has adopted. Accordingly, this Court cannot grant the remedy Plaintiffs seek.

B. With the 2020 Elections Looming, the Requested Injunction will Substantially Disrupt the Orderly Conduct of Elections, Harming North Carolina's Citizens and Candidates.

To say that the timing of Plaintiffs' requested relief is troublesome would be an understatement, at best. The filing period during which congressional candidates must file their Notice of Candidacy form begins at noon, December 2, 2019 and ends at noon, December 20, 2019. N.C. Gen. Stat. § 163-106.2 (2019). *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020.*[10] Filings submitted before or after this narrow filing period are not accepted. *Id.* The Notice of Candidacy is made

available to potential candidates no more than two weeks prior to the beginning of the filing period. *Id.* Before the end of this filing period, potential candidates must also visit their county board of election in order to receive an affirmation from the chair of the board of elections or the director of elections on the Notice of Candidacy form stating that the candidate has been registered with his or her political party for at least 90 days prior. N.C. Gen. Stat. § 163-106.1. *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020.*[11] In addition to the steps potential candidates must take to file their Notice of Candidacy forms, before this short filing period—which is roughly only one month away—potential candidates must also make the decision to run for office. Those considering running for congress in 2020 must weigh the decision to run, including those involving election chances, finance, and other considerations. The primary elections for congressional candidates in North Carolina are scheduled to take place on March 3, 2020 and early voting is set to begin on February 12, 2020.

1. The Relief Requested Fails to Consider Judicial Intrusions into Elections

In reasonable anticipation of the 2020 election cycle, and in reliance upon the existing congressional maps, congressional candidates in North Carolina have been spending their time, and receiving and expending valuable resources in furtherance of their respective campaigns. *See* **Exhibit 1**, Aff. of Rep. Virginia Foxx; **Exhibit 2**, Aff. of Rep. Richard Hudson; **Exhibit 3**, Aff. of Rep. Ted Budd. Similarly, the citizens of North Carolina have been contributing to and volunteering with congressional campaigns in their current districts. *See* Amicus Brief for George Holding, Walter B. Jones, Jr., Virginia Foxx, Mark

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[10] Available at: https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf.

[11] Available at: https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf.

Walker, David Rouzer, Richard Hudson, Robert Pittenger, Patrick T. McHenry, Mark Meadows, and Ted Budd as Amici Curiae in Support of Applicants, *Rucho v. Common Cause*, 138 S. Ct. 2679 (mem.) (2018) (No. 17A745). These facts counsel against the issuance of a preliminary injunction because such an eleventh-hour change would both confuse and disenfranchise voters and would place unreasonable demands on state election officials.

Further, state and county election officials also require time prior to elections in order to properly administer those elections. For example, election administrators must provide for the distribution of voting systems, ballots, and pollbooks, training election officials, conducting absentee and in-person voting, and tabulation and canvassing of election results. Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, No. 18-14001.[12] Election officials must also geocode voters, assigning them to relevant voting districts—a process that must be audited by the State Board. *Id.* ¶¶ 3–5. The geocoding process would likely take weeks. *Id.* Election officials must also prepare ballots, which can only occur after geocoding is complete and candidate filing closes. *Id.* ¶ 6. Ballot preparation would also likely take weeks, making the total time needed for geocoding and ballot preparation 34 to 42 days. *Id.* ¶ 10.

Pursuant to N.C. Gen. Stat. § 163-227.10(a), the State Board of Elections must begin mailing absentee ballots 50 days prior to the primary election day. N.C. Gen. Stat. § 163-227.10(a) (2019). The federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") also requires that absentee ballots that include elections for federal office be made available by 45 days before a primary election. 52 U.S.C. § 20302(a)(8)(A) (2018). Based on the scheduled primary date of March 3, 2020 for congressional races, 50 days

before the primary election falls on January 12, 2020, and 45 days before the primary election falls on January 18, 2020. *See* Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, No. 18-14001.

The United States Supreme Court has repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). These considerations include the fact that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. "As an election draws closer, that risk will increase." *Id.* at 5. Courts must therefore weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.* Other relevant factors that Court must weigh when evaluating whether to grant extraordinary relief affecting impending elections include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

In accordance with this hesitation to intrude into the conduct of elections, the United States Supreme Court has long rejected just the sort of last-minute changes to elections Plaintiffs are requesting here, even when faced with constitutional violations. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming decision of district court permitting election to proceed under map with constitutional infirmities because "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per

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[12] Ms. Bell's Affidavit is attached to Legislative Defendants' Response to Plaintiffs' Motion for

curiam) (affirming district court's action permitting 1966 Texas election to continue under a "constitutionally infirm" plan due to the proximity of the election date). As the United States Supreme Court stated in *Reynolds v. Sims*:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. at 585.

In *Purcell*, the United States Supreme Court vacated an injunction issued by the Ninth Circuit prohibiting Arizona from enforcing its voter identification law. 549 U.S. at 3. The *Purcell* Court held that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, [its] action. . . shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5–6. Through *Purcell* and *Reynolds v. Sims*, the United States Supreme Court has made clear that, even when faced with constitutional violations, eleventh-hour disruptions to elections must be avoided. Even in *Common Cause v. Rucho*, a case that was later overturned by the United States Supreme Court on the merits, the three-judge district court, after finding that North Carolina's 2016 Plan constituted an unconstitutional partisan gerrymander, concluded that there was "insufficient time for [it] to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019." *Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 152428, *3–*4 (M.D.N.C. Sept. 4, 2018) (per curiam). It further found "that imposing a new schedule for North Carolina's

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Preliminary Injunction as Exhibit 2.

congressional elections would, at th[at] late juncture, unduly interfere with the State's electoral machinery and likely confuse voters and depress turnout." *Id.* at *4. Accordingly, that court declined to enjoin use of the 2016 Plan in the November 6, 2018, general election. *Id.*

The North Carolina Supreme Court has adopted the United States Supreme Court's consideration of the proximity of forthcoming elections in withholding immediate relief in cases requiring redistricting. In *Pender Cty. v. Bartlett*, the North Carolina Supreme Court stayed a judicial remedy requiring redistricting, opting to do so only after the following election. 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) *aff'd, Bartlett v. Strickland*, 556 U.S. 1 (2009). In that case, the court held that a portion of North Carolina's legislative plan violated the North Carolina Constitution's Whole County Provision, N.C. CONST. art. II, §§ 3(3), 5(3), in August 2007. *Id.* at 510, 649 S.E.2d at 376. Such a violation necessarily required the redrawing of legislative districts. *Id.* However, despite this infirmity, the North Carolina Supreme Court permitted the plan to remain in place until after the 2008 general election. *Id.* In doing so, the North Carolina Supreme Court adopted the United States Supreme Court's reasoning in *Reynolds v. Sims*, staying its remedy under after the next election. *Id.* (citing *Reynolds*, 377 U.S. at 585). The court recognized that upending the political geography of the state in August of the year prior to elections, would cause disruption to the ongoing election cycle in part because "candidates have been preparing for the . . . election in reliance upon the [current] districts . . .". *Id.; see also Beech Mt. v. Genesis Wildlife Sanctuary*, 247 N.C. App. 444, 459, 786 S.E.2d 335, 346 (2016) (acknowledging that North Carolina courts are first and foremost bound by decisions of the United States Supreme Court) (citing *Pender Cty.*, 361 N.C. at 516, 649 S.E.2d at 380).

It is hard to imagine a greater disruption to an election process than what Plaintiffs

demand in this case. They ask the Court to enjoin the 2016 Plan and order that a completely new districting plan be drawn. If this Court cannot accomplish that in time, Plaintiffs ask that this Court delay the March 2020 primaries. In their fever dream of partisan gerrymandering claims, the Plaintiffs severely simplify the electoral and campaign processes.

Modern Congressional campaigns do not begin on the first day for circulating nomination petitions. They require immeasurable preparation, which almost completely relies upon knowing the boundaries of the district in which they will be running in advance. Congressional candidates have long been campaigning in anticipation of the 2020 election. Many candidates challenging North Carolina incumbents for the 2020 election have already announced their campaigns.[13] In addition, media and opposition campaigns have already been unleashed against congressional incumbents by various political groups and activists. The campaign committees of those running for congress in 2020 have already raised significant sums to win the 2020 elections. Accordingly, each Member has invested substantial time, effort, and/or money running in their respective congressional seats.

Congressional candidates' personal efforts, activities, duties, and stakes in their congressional candidacies are well underway. These activities require knowing with certainty the geographic parameters of congressional districts with sufficient lead time to permit candidates to develop a campaign strategy that is tailored to the needs of the unique voters in their district. The decisions to undertake such investment is based in no small part on the existing boundaries of the Members' respective congressional districts. In fact, the district boundaries were a critical factor in making decisions about each candidacy. A

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[13] *See* Ballotpedia.org, United States House of Representatives elections in North Carolina, 2020, Ballotpedia.org, (accessed October 21, 2019)

change in congressional districts before the 2020 elections, including the primary, could, and likely will, threaten some congressional candidacies because candidates may no longer live in their districts, they may be paired with another incumbent, or a new district could geographically or demographically favor a primary opponent. With congressional terms lasting only two years, the next election cycle does not simply begin with the state filing deadline, but rather begins almost immediately after the previous general election. Congressional candidates in the state have been relying on the existing congressional map for over a year in making campaign and election related decisions regarding the 2020 elections.

Now that the 2020 election cycle is well underway, and the primary elections are only months away, prohibiting the use of the 2016 Plan and forcing elections to be held under an entirely new plan would result in the serious disruption of orderly election processes. Not only will candidates have allocated resources directed toward voters who no longer reside in the same district (and therefore may no longer be potential constituents or supporters), they will have to expend additional resources to reach new voters who now reside in the new districts.

2. The Relief Requested Will Substantially Harm Candidates and the Citizens' Right to Vote for Candidates of Their Choosing.

Further, those candidates with fewer resources will be severely and disproportionately disadvantaged by a mid-stream change in electoral maps. Forcing a profound change in North Carolina's political geography only weeks before the primary filing deadline would force congressional candidates to expend significant funds in order to reach new constituents while simultaneously depriving them of the necessary time to raise

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https://ballotpedia.org/United_States_House_of_Representatives_elections_in_North_Carolina,_2020

those funds. This will clearly harm candidates who possess fewer resources than their opponents.

Moreover, given the time constraints and proximity to filing deadlines, more expensive methods of campaign communication will need to be utilized in order to reach voters who are new to their congressional districts. Grassroots efforts such as community organizing, door knocking, volunteer phone banking, canvassing, and "barnstorming" generally require candidates to expend less money but require much more time. Candidates would be forced to utilize more expensive—and less direct—means of voter outreach such as paid phone-banking and advertisement through television, internet, radio, and print. The lack of direct voter contact from campaigns will not only fundamentally undermine the direct constituent involvement in the political process that the district court seeks to remedy in its order but will also place a much greater strain on cash-strapped campaigns than on campaigns with large resources currently at their disposal.

If this Court grants an injunction, the citizens of North Carolina will also suffer harm. Such a late disruption of the political landscape will undoubtedly create substantial uncertainty among voters as to what new district they are in, which candidates are running in those districts, and where their polling places will be. These are districts that have been in place for nearly four years and two congressional election cycles. Much public outreach would be required in order to attempt to educate voters on these changes, which have no guarantee of achieving any kind of success.

The citizens of North Carolina have also been contributing to and volunteering with Congressional candidates in anticipation of the 2020 elections. These citizens have supported these candidates in reliance on the existing congressional map. Much of this support may not have been pledged if the contributor resided in a different district than the candidate or if a candidate was not likely to be successful in the 2020 elections. The

decisions to undertake this support were based in no small part on the existing boundaries of the congressional districts.

Additionally, a complete upheaval of the regularly scheduled election processes of North Carolina at this late date will certainly have a chilling effect on contributors' willingness to engage in the political process. As the United States Supreme Court stated in *Buckley v. Valeo*, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. 1, 21 (1976). An injunction from this Court is bound to "result in voter [and contributor] confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5 (2006). Thus, in addition to the voter confusion that would undoubtedly take place in the event of an injunction, the citizens of North Carolina who are already involved in the political process through contribution and volunteering will be harmed.

Finally, the daunting challenges candidates face will be further exacerbated by the strictures of federal campaign finance law and the application thereof to Congressional elections. Under the Federal Election Campaign Act, limits on contributions to candidates apply on a per-election basis. 52 U.S.C. § 30116(a)(1)(A) (2018). As noted above, several candidates have already expended substantial portions of the primary election funds they have raised for the primary election. If Plaintiffs' requested relief is granted, these candidates will need to recalibrate their campaigns and begin reaching out to entirely new populations of potential voters utilizing that same pool of primary election funds. They will do so with severely diminished resources and limited opportunities to replenish them because, notwithstanding that their election environment has been radically altered by a new map, they will not have refreshed contribution limits under federal law. So, existing

candidates who are cash-strapped will be severely disadvantaged relative to candidates who get into the race later and enjoy fresh contribution limits.

The Federal Election Commission has in the past permitted candidates running in newly redrawn congressional districts to raise additional contributions subject to new limits—but only if special elections have been ordered in those districts. *See, e.g.*, Fed. Election Comm'n, Advisory Ops. 2016-09 (Martins for Congress) & 2016-03 (Holding for Congress). But such relief would be unavailable to current congressional candidates running in newly drawn districts in North Carolina because not even these Plaintiffs are bold enough to request a special election at so late a date. Therefore, there is no new election for the purpose of providing a new contribution limit under FECA. In short, the federal campaign finance-related hardships imposed on candidates militate in favor of denying a preliminary injunction in this case.

Accordingly, the precedent of the United States Supreme Court and the Supreme Court of North Carolina make Plaintiffs' claims unlikely to succeed on the merits at such a late junction and simultaneously counsel against granting a preliminary injunction prohibiting the use of the 2016 Plan in the 2020 elections.

C. Laches Bars the Plaintiffs' Claims

Because Plaintiffs waited nearly four years and two congressional election cycles, and until mere months before the 2020 Election filing deadlines, to bring their claims they are barred by the equitable doctrine of laches. Even if the 2016 Plan is an impermissible partisan gerrymander—which it is not—Plaintiffs could have, and should have, brought their claims much earlier than they did. Plaintiffs' unreasonable delay has significantly prejudiced the parties and therefore will not be permitted to proceed under the doctrine of laches.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88–89, 712 S.E.2d 221, 230 (2011) (internal citation and quotation marks omitted).

> To establish the affirmative defense of laches, [North Carolina] case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

Farley v. Holler, 185 N.C. App. 130, 132–33, 647 S.E.2d 675, 678 (2007) (citation omitted).

Plaintiffs here have delayed as much as possible, likely with the purpose of hampering any defense of the 2016 Plan. They have waited until the absolute last minute, demanding *preliminary injunctive* relief for only the last election cycle to be held under the 2016 Plan. The only explanation for this inexcusable delay is that Plaintiffs waited as long as possible in hopes that evidence and witnesses favorable to the defense is lost to time or, just as likely, lost to the exigencies of their supposed "preliminary" relief. *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is true in election law cases as elsewhere. (internal citation omitted)). Tellingly, they offer no explanation as to why they waited this long to bring these claims.

The Plaintiffs' delay encompasses more than a mere passage of time. They have delayed through two full election cycles since the 2016 map was adopted and bring this action in the middle of a third. *See supra* Section III.B.1. This delay clearly works to the

injury and prejudice of Defendants. As discussed *supra*, voters, candidates, and state elections officials have acted in reliance on the North Carolina's existing congressional districts as they currently stand. *Id.* Delaying for years and multiple election cycles, and until the current 2020 election cycle is well underway, only acts to further concrete that reliance on the 2016 Plan. The prejudice not only extends to the consequences of remedial action but to the process of justice itself. Granting a preliminary mandatory injunction at this late hour will completely circumvent Defendant's rights to a trial on the merits, including all the protections afforded therein. This, in and of itself, is extremely prejudicial.

Finally, Plaintiffs here clearly knew or should have known about the grounds for their claims. Indeed, Plaintiffs indicate that they believe the alleged partisan gerrymander present in the 2016 Plan worked in the very first year it was used—2016. Therefore, by their very words, Plaintiffs knew the full extent of their alleged harm nearly three years ago. Still, they waited years and for yet another congressional election to bring their claims.

Plaintiffs have unreasonably delayed in bringing their claims, prejudicing the other parties in this suit. Accordingly, Plaintiffs claims are barred by laches and therefore not likely to succeed.

D. The 2016 Plan Does Not Violate North Carolina's Free Elections Clause.

Plaintiffs first claim that the 2016 Plan violates the Free Elections Clause of the North Carolina Constitution because it "'unlawfully seek[s] to predetermine election outcomes in specific districts' and across the state as a whole." Compl. at ¶ 127 (citing *Common Cause*, 18-CVS-14001, slip. op. at 305). In making this claim, Plaintiffs cite only to *Common Cause v. Lewis*, the recent decision by a three-judge panel of this Court invalidating North Carolina's state legislative maps. *Common Cause*, however, fails to adequately support its novel interpretation of the Free Elections Clause, nor does Lewis

address the implication of Article I, Section IV of the U.S. Constitution on Congressional districting lines – something that this Court is obligated to address.

Prior to *Common Cause*, judicial interpretations of North Carolina's Free Elections Clause were limited and dealt with issues of electoral procedure rather than substantive issues like redistricting. *See e.g., Swaringen v. Poplin*, 211 N.C. 700, 700, 191 S.E. 746, 747 (1937) (plaintiff stated sufficient facts to constitute a cause of action under the Free Elections Clause where county board of elections fraudulently registered underage voters to vote against him in county commissioner election). In *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), the only substantive case cited by this Court to support its decision in *Common Cause*, the alleged Free Elections violation involved a statute requiring voters seeking to change their party affiliation and vote in the new party's primary to take an oath supporting the party's nominees in all future elections. *Id.* at 141–42, 134 S.E.2d at 169–70. In holding that the oath violated North Carolina's Free Elections clause, the North Carolina Supreme Court focused on the free choice of the voter, explaining that the oath "would certainly be sufficient to operate as a deterrent to his exercising a free choice among available candidates." *Id.* at 142, 134 S.E.2d at 170. The Court continued "[t]he oath to support a future candidate violates the principle of freedom of conscience. It denies a free ballot, one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary." *Id.* at 143, 134 S.E.2d at 170. *Common Cause*— and no earlier state court case we have been able to locate—addresses U.S. Constitutional issues that are implicated and inherent in Congressional districting.

In *Common Cause*, this Court relied exclusively on *Clark* to support its conclusion

that North Carolina's state redistricting plan violated the North Carolina Elections Clause. *Clark,* this Court said, was an example of "laws that interfere with voters' ability to freely choose their representatives." *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 304. While this characterization focuses on the ultimate outcome of elections, the Court in *Clark* does not actually focus on, or even mention, the outcome of the election in its analysis; rather, it focuses on the individual voter's ability to freely cast his vote for the candidate of his choice. As a result, *Clark* is not at all analogous to the allegations at issue in this matter.

Here, unlike *Clark*, Plaintiffs' claims are based entirely on election outcomes rather than individual votes. As noted above, Plaintiffs allege that the 2016 Plan "'unlawfully seek[s] to predetermine election outcomes in specific districts' and across the state as a whole." Compl. at ¶ 127 (citing *Common Cause,* 18-CVS-014001, slip op. at 305). In determining whether the North Carolina Election Clause was violated, the appropriate inquiry is whether Plaintiffs were denied a "free ballot", i.e., "one that is cast according to the dictates of the voter's judgment." *Clark* at 143, 134 S.E.2d at 170. None of the Individual Plaintiffs had his or her "free choice" or "freedom of conscience" to vote for the candidate of their own choosing hampered or limited in any way. By each of the Plaintiffs' own admission, they voted for their candidates of choice in the elections held under the 2016 Congressional map without any constraints. As set forth in the Complaint, each of the 14 individual Plaintiffs "has consistently voted for Democratic candidates for the U.S. House of Representatives." Compl. ¶¶ 6–19. Moreover, Plaintiffs Amy Clare Osseroff, John Balla, and Virginia Walters Brien live in congressional districts where the Democratic candidate won their district. *See* Compl. ¶¶ 1, 9, and 18. Thus, Plaintiffs have shown no evidence that any of the individual Plaintiffs' ability to vote for the candidate of their own

choosing was impacted by the 2016 Plan. Plaintiffs' Free Elections Clause claim, therefore, has no likelihood of success on the merits.

E. The 2016 Plan Does Not Violate North Carolina's Equal Protection Clause.

Plaintiffs assert that the Equal Protection Clause of the North Carolina Constitution "protects the right to 'substantially equal voting power;' and that the right to vote on equal terms is a fundamental right." Compl. ¶ 132 (citing *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002)). Plaintiffs, citing *Common Cause*, assert that partisan gerrymandering violates North Carolina's Equal Protection Clause as it "runs afoul of the State's obligation to provide all persons with equal protection of law because ... a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who supports candidates of another party." Compl. ¶ 133, (citing *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 307).

The "equal terms" language used by Plaintiffs and relied on in *Common Cause* is from *Stephenson*, 355 N.C. at 378–81, 562 S.E.2d at 393–95. *Stephenson* did not involve partisan gerrymandering and did not involve Congressional elections; it involved the constitutionality of having "both single member and multi-member districts in legislative districting plans. *Stephenson* applied the principle of one-person one-vote, i.e. voting on "equal terms." *Id.* at 378-79, 562 S.E.2d at 394. The only mention the Court made of partisanship in *Stephenson* was to recognize that partisan advantage and incumbency protection are lawful considerations in legislative redistricting. *Id.* at 371, 562 S.E.2d at 390 (allowing Legislature to "consider partisan advantage" when redrawing maps, so long as it complies with the State Constitution's Whole County Provisions, N.C. CONST. art. II, §§ 3(3), 5(3)). Accordingly, *Stephenson* actually undercuts Plaintiffs' Equal Protection Claim, and does not address the U.S. Constitutional issues inherent in Congressional

districting.

In *Common Cause*, this Court applied a strict scrutiny standard to the Equal Protection Claim related to the state redistricting plan, including three parts (1) intent, i.e., a predominant purpose to "entrench [their party] in power" by diluting the votes of citizens favoring their rival"; (2) effects, i.e., the lines in fact have the intended effect by substantially diluting their votes; and (3) causation, i.e., the impermissible intent caused the effect. *Common Cause,* 18-CVS-014001, slip op. at 309 (citing *Arizona State Legislature,* 135 S. Ct. at 2658; *Rucho*, 318 F. Supp. 3d at 861; *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). Plaintiffs in this matter attempt to show that these elements are met by alleging that "Republican leaders ... used 'partisan advantage' and 'political data' as criteria in drawing the congressional district lines," and that "the 2016 Adopted Criteria *required* drawing congressional district lines to give Republicans control of 10 of the 13 congressional seats." *Id.* at ¶ 134. Plaintiffs further allege that the "packing and cracking of Democratic voters under the 2016 Plan burdens the representational rights of Democratic voters individually and as a group and discriminates against Democratic candidates and organizations individually and as a group." *Id.* at ¶ 135.

As discussed above, however, Plaintiffs' characterization of the redistricting process is hyperbolic and inaccurate. Though partisan advantage was one criterion, it was balanced among six other criteria including compactness, contiguity, and equal population. Contrary to Plaintiffs' claims, the 2016 Plan effectively utilizes traditional redistricting criteria in developing the congressional district maps. For example, among 87 whole counties, it splits only 12 precincts, which is a lower number than any previous plan. Further, the number of registered Democrats exceeds the number of registered Republicans in all but one of the districts in the 2016 Plan. The "partisan advantage" criteria that Plaintiffs focus on merely states that the Committee "would make reasonable effort to

construct districts in the 2016 contingent plan to maintain the current partisan makeup of North Carolina's congressional delegation." *See* 2016 Contingent Congressional Plan Committee Adopted Criteria, *available at* https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf. As noted above, such criteria have been consistently found lawful by courts, and this case is no different. *See, e.g., Dickson*, 368 N.C. at 499, 529, 781 S.E.2d at 418, 437 (2015) (affirming partisanship as defense to racial gerrymander claims), *modified on denial of reh'g*, (2016). Thus, contrary to Plaintiffs' claims that the 2016 Plan was designed to maximize partisanship and arrange for pre-determined outcomes that advantaged Republicans, there was never any such overriding or overwhelming intent because of the impact of the other criteria. To the contrary, each of the seven criteria were followed and balanced in the 2016 Plan. Without having shown the necessary intent, the Equal Protection Claim fails.

Nor do Plaintiffs present evidence that the 2016 Plan ultimately had the effect of substantially diluting their votes. Under the 2016 Plan, Republicans won 10 of the Congressional districts. But based on the composition of registered voters by district, in order to accomplish this the Republicans had to win the votes of thousands of registered Democrats or unaffiliated votes. Moreover, the election data shows that the districts in the 2016 Plan are weaker for Republican candidates than under the 2011 plan. Using 2008 election data, most of the districts in the 2016 Plan result in the share of votes for Republican candidates decreasing as compared to prior plans. For these reasons, the Plaintiffs are not likely to succeed on their Equal Protection Claim.

F. The 2016 Plan Does Not Violate North Carolina's Freedom of Speech and Assembly Clauses.

Finally, Plaintiffs claim that their rights to free speech and association are violated by the General Assembly's consideration of politics in the redistricting process because

"[v]oting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression protected by the North Carolina Constitution's Freedom of Speech and Freedom of Assembly Clauses." Compl. ¶ 140, citing *Common Cause*, 18-CVS-14001, slip. op. at 320–21; *see generally* Compl. ¶¶ 136–143 (citations omitted). Plaintiffs again rely primarily on *Common Cause* to support their claim and note that North Carolina's "Free Speech Clause provides broader rights than does federal law." *Id.* at ¶139, citing *Common Cause*, 18-CVS-14001, slip. op. at 318.

Though the North Carolina Constitution does provide a direct cause of action for damages against government officers in their official capacity for speech violations and federal law does not, North Carolina's free speech law on these types of claims is substantively the same as federal First Amendment law. *Corum v. University of North Carolina,* 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992); *Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575 (1996), *aff'd*, 345 N.C. 177, 477 S.E.2d 926 (1996). In *Evans v. Cowan*, the North Carolina Court of Appeals held that a federal court judgment on First Amendment claims were not *res judicata* as to free speech and association claims under the North Carolina Constitution; however, when the case returned to the North Carolina Court of Appeals, that court engaged in the *same analysis as the federal analysis. Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175–76 (1999) (applying federal *Connick* standard to free speech retaliation claim under North Carolina Constitution); *McLaughlin v. Bailey,* 240 N.C. App. 159, 771 S.E.2d 570 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

Applying the appropriate standard, Plaintiffs' Freedom of Speech and Assembly claims must fail. The U.S. Supreme Court has specifically found that legislative maps do not burden speech or association. *Rucho*, 139 S. Ct. at 2504 ("[T]here are no restrictions on

speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan maybe on their district."). The Court also found that partisan gerrymandering claims are no more justiciable under the First Amendment than they are under any other constitutional provision, because " 'a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,' contrary to our established precedent." *Id.* at 2505 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. at 294).

Even if not binding on this Court, this opinion should be given "great weight" in its interpretation of the analogous First Amendment. *Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841 (quoting *State v. Hicks*, 333 N.C. 467, 484, 423 S.E.2d 167, 176 (1993)). Moreover, even if the North Carolina standards that Plaintiffs cite are somehow different from federal standards, Plaintiffs' claims still fail. The 2016 Congressional plans do not prevent individuals from voting, and therefore are not a content-based restriction on whatever expression the individual Plaintiff make when casting their votes. The First Amendment does not provide an appropriate or justiciable claim for partisan gerrymandering; neither do the analogous free speech and association provisions contained in Article I, Sections 12 and 14 of the North Carolina Constitution. Though Plaintiffs attempt to argue that the North Carolina Constitution provides broader protections than the United States Constitution, as explained above, those broader protections are merely procedural in nature and do not affect the proper substantive analysis. Therefore, Plaintiffs' Free Speech and Association claims lack merit. In addition, no prior case has addressed the impact of Article I, Section IV's impact on these types of claims in the context of Congressional districting.

IV. PAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

A preliminary injunction is appropriate only when a plaintiff "is likely to sustain

irreparable loss in the absence of an injunction, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759–60 (emphasis omitted) (citations and quotation marks omitted). Because Plaintiffs seek a mandatory preliminary injunction, they must also prove "the injury is immediate, pressing, irreparable, and clearly established." *Auto. Dealer Res..*, 15 N.C. App. at 639, 190 S.E.2d at 732. Plaintiffs' argument fails because, as discussed above, they have suffered no harm and are, therefore, not entitled to the relief they seek.

Plaintiffs are also unlikely to "sustain irreparable loss." *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856–57 (1990). Although Plaintiffs claim that if this court fails to issue a preliminary injunction, they will be "forced to vote in 2020 in unlawful districts that violate multiple fundamental rights," this claim is not supported by the allegations in this case or the law. *See supra* Section III. Plaintiffs do not allege that the 2016 Plan prevented them from voting. Plaintiffs do not allege that the 2016 Plan prevented them from engaging in other political activities such as donating to campaigns, volunteering with campaigns, or protesting. Fundamentally, the gravamen of Plaintiffs complaint is that their candidate of choice did not win.

Indeed, Plaintiffs sat on their hands for more than three years and two congressional election cycles before bringing their claims. If their harm in the 2016 Plan is truly so immediate and irreparable, one would think that they would have brought their claims in 2016, 2017, 2018, or even earlier this year. Furthermore, the 2020 election is the last election under the 2016 plan that can be held under both state and federal law. U.S. CONST. art. I, § 2. Any harm that Plaintiffs may experience, will be completely illuminated by the 2022 elections in any event. Plaintiffs sitting on their hands and waiting until Defendants have no time to mount a proper defense, must certainly demonstrate to this

Court that Plaintiffs will not suffer irreparable harm if they vote under the 2016 Plan in the 2020 primary elections and General Election.

V. THE BALANCE OF THE EQUITIES STRONGLY WEIGHS AGAINST A PRELIMINARY INJUNCTION.

Through this preliminary injunction, Plaintiffs attempt an end run around this Court's full review on the merits. They seek to completely disrupt the 2020 election cycle through a lesser standard of review—that of preliminary injunction. Granting Plaintiffs' requested relief would not only significantly harm the parties and the voters of North Carolina, but that harm would far outweigh any negligible harm Plaintiffs might possibly suffer by voting under the 2016 Plan for a third and final time.

When presented with requests for injunctive relief, the United States Supreme Court and the North Carolina Supreme Court have acknowledged that court orders affecting election processes, especially those sought in close proximity to an impending election, can result in a significant degree of voter confusion, *see Purcell*, 549 U.S. at 4–5, and disruption of the election process. *Reynolds*, 377 U.S. at 585. *See also Pender Cty.*, 361 N.C. at 510, 649 S.E.2d at 376 (accord). Such orders often have the effect of placing unreasonable demands on the State in adjusting to the new requirements, or of confusing voters to the extent that they opt to stay away from the polls. *See Purcell*, 549 U.S. at 5; *Reynolds*, 377 U.S. at 585; *Pender Cty.*, 361 N.C. at 510, 361 S.E.2d at 376; *see also supra* Section III.B.1.

As discussed *supra*, granting Plaintiffs' preliminary injunction would irreparably harm the members of congress representing North Carolina by changing—or at least calling into question—the composition and boundaries of their districts in the middle of an election cycle. This would occur after their campaigns spent significant funds and after delicate decisions have been made regarding the campaigns. They would be forced to

undertake more expensive and haphazard campaign methods in order to reach new constituencies in time for the primary and general elections. This campaign shift would have to be done quicker and with less money, if it is even possible. This would burden candidates with less cash on hand more than those with large war chests and would therefore have a desperate effect on the ability to campaign.

Further, as discussed *supra*, North Carolina voters would suffer significant harm through confusion. They have been voting under the 2016 Plan and their current congressional districts for more than three years and have surely become familiar with the 2020 candidates since the 2020 election cycle has been underway for roughly a year. To remove these voters from districts they are familiar with only to throw them into an uncertain environment, will certainly cause confusion. *See supra* Section III.B.1. What is worse is this confusion will make many voters stay away from the polls on election day. *Id.*

Moreover, also as discussed supra, election administrators will be forced to expend significant time and resources in order to change North Carolina's districting plan mid-stream. *See id.* They will also need to undertake voter education which will be costly and will likely not address voter confusion completely. *Id.*

All these harms, which would occur if this Court grants Plaintiffs' proposed injunction, would occur regardless of whether this Court finds in Plaintiffs' favor on the merits. If a preliminary injunction is granted, the Court would throw North Carolina's congressional elections into chaos and would cause irreparable harm, even if it eventually finds for Defendants. The uncertainty added costs and efforts, and voter dissuasion would occur not matter what, in the presence of a preliminary injunction. These harms are broad and deep, affecting nearly all aspect of and participants in North Carolina's congressional elections. These harms surely outweigh any minor harms Plaintiffs' may suffer, especially given Plaintiffs' past willingness to tolerate the 2016 Plan for years and multiple elections.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for a preliminary injunction should be denied.

This the 22nd day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction** upon all parties to this matter by email as follows:

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *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.

AFFIDAVIT OF REP. VIRGINIA FOXX

NOW COMES Representative Virginia Foxx and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Fifth Congressional District.

3. I have represented North Carolina's Fifth Congressional District since 2005.

4. For the past 14 years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.

5. I therefore know what I must do as a congresswoman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly,

EXHIBIT
1

developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Fifth Congressional District. I have therefore relied on the contours of this district for the past 14 years, and have relied on the contours of this district for developing my campaign strategy for the 2020 election campaign. Although the district's lines have changed some since I was first elected, its base remains the northwest corner of North Carolina.

6. In serving the constituents of North Carolina's Fifth Congressional District for the past fourteen years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on April 12, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $2,892,872.62 cash on hand. I have spent nearly $ 322,475.11 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Five were a critical factor in my decision to run for congress in that district. While the lines have changed multiple times since I was first elected to the House of Representatives in 2004, District Five has always contained Watauga County (my home county), Ashe County, Alleghany County, Wilkes County, Yadkin County, Alexander County and part or all of Forsyth County. While its eastern and southern boundaries have changed somewhat over the years, District Five has also often included Surry County and Stokes County.

10. Plaintiffs' requested injunction would require me to devclop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs

and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds both to learn the contours of my new district as well as to develop relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be voting in new districts for the 2020 election. They will be confused as to which office seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my constituents in many other ways. Constituents may mistakenly believe that I am no longer the congressional candidate for their district. My office and I actually saw and heard directly from people in 2016 when the district lines changed while the primary was in operation that voters missed voting in the primary that really counted because they had voted in the first primary, assumed that their vote counted and did not vote in the "real" primary established after district lines were

redrawn. I personally had to talk to people multiple times to get them to vote in the "real" primary.

14. Generally, when constituents contact a Congressional office for assistance, it is a true plea for help. The staff in my offices have been with me for very long periods of time and have developed relationships with officials and constituents in the district that help facilitate the serving of the constituents. Forcing constituents to have to build trust with another office and work to get their problems solved would be a burden on them.

15. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts. Approximately 59 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. These individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent constituents and allows any competitor of mine to start with a fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

16. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: Virginia Foxx
Rep. Virginia Foxx

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

NGUYET PALICH
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *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.

AFFIDAVIT OF REP. RICHARD HUDSON

NOW COMES Representative Richard Hudson and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Eighth Congressional District.

3. I have represented North Carolina's Eighth Congressional District since 2013. While the boundaries changed in 2016, both sets of district lines contained all or parts of Rowan, Cabarus, Stanley, and Montgomery Counties.

4. For the past six years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.

5. I therefore know what I must do as a congressman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly, developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Eighth Congressional District. I have therefore relied on the contours of this district for the past six years, and have relied on the contours of this district as drawn in 2016 for developing my campaign strategy for the 2020 election campaign.

6. In serving the constituents of North Carolina's Eighth Congressional District for the past six years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on June 26, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $1,096,422.64 cash on hand. I have spent $584,598.27 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Eight were a critical factor in my decision to run for congress in that district.

10. Plaintiffs' requested injunction would require me to develop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds to both learn the

contours of my new district as well as developing relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence, to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be moved into new districts for the 2020 election. They will be confused as to which office to seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my supporters. My supporters may mistakenly believe that I am no longer the congressional candidate for their district. They will volunteer on other campaigns. The reverse is also a risk. My supporters may volunteer on my campaign despite their district lines changing and residing in a new district.

14. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts and the voters living in those districts. Approximately 80 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. Many of these individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent these individuals, and allows any competitor of mine to start with a

fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

15. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: _____
Rep. Richard Hudson

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

NGUYET PALICH
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
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FILE NO.: 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

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

Defendants.

AFFIDAVIT OF REP. TED BUDD

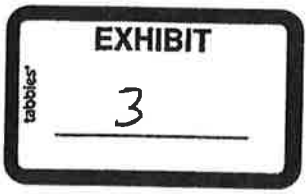
NOW COMES Representative Ted Budd and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Thirteenth Congressional District.

3. I have represented North Carolina's Thirteenth Congressional District since 2017.

4. For the past two years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.



5. I therefore know what I must do as a congressman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly, developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Thirteenth Congressional District. I have therefore relied on the contours of this district for the past two years, and have relied on the contours of this district for developing my campaign strategy for the 2020 election campaign.

6. In serving the constituents of North Carolina's Thirteenth Congressional District for the past two years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on April 15, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $664,695.20 cash on hand. I have spent nearly $441,106.25 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Thirteen were a critical factor in my decision to run for congress in that district.

10. Plaintiffs' requested injunction would require me to develop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds to both learn the

contours of my new district as well as developing relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence, to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be moved into new districts for the 2020 election. They will be confused as to which office to seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my supporters. My supporters may mistakenly believe that I am no longer the congressional candidate for their district. They will volunteer on other campaigns. The reverse is also a risk. My supporters may volunteer on my campaign despite their district lines changing and residing in a new district.

14. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts and the voters living in those districts. Approximately 81 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. Many of these individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent these individuals, and allows any competitor of mine to start with a

fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

15. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: _____
Rep. Ted Budd

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

_____
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024