STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
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.

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Rarely are the facts and law in constitutional litigation so straightforward and undisputed. On the facts, Legislative Defendants do not dispute that they intentionally and effectively gerrymandered the 2016 Plan to entrench a maximum 10-3 Republican advantage in North Carolina's congressional delegation and to predetermine the outcome of each and every congressional election in North Carolina through the upcoming 2020 cycle. On the law, Legislative Defendants do not dispute that, under this Court's decision in *Common Cause v. Lewis*, the 2016 Plan violates the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clause.

Other than urging this Court to disregard its own 357-page decision of last month, Legislative Defendants' only merits argument is that the federal Elections Clause exempts congressional redistricting plans from state constitutional provisions like those at issue here. This theory conflicts with a half dozen U.S. Supreme Court decisions dating back a century. The U.S. Supreme Court has held over and over again that nothing in the Elections Clause alters the requirement that congressional plans comply with all provisions of a state's constitution. Nor does the Elections Clause alter a state court's unreviewable authority to invalidate a congressional plan for violating the state constitution.

This Court has authority to grant a preliminary injunction to ensure that North Carolinians are not forced once again to vote in districts that violate their fundamental rights. The injunction entered by the North Carolina Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), and those entered by numerous other courts in redistricting cases, refute Legislative Defendants' contention that a preliminary injunction is "categorically unavailable" here. LD Opp. 12-15. Plaintiffs seek to return to the status quo that existed immediately before the 2016 Plan was adopted, and even if aspects of the requested injunction

could be construed as altering the status quo, this Court has authority to enter a mandatory preliminary injunction that does just that.

The equities supporting an injunction could hardly be more compelling. Legislative Defendants give short shrift to the irreparable harm that Plaintiffs and millions of other North Carolina voters would suffer if they must vote once more in these unconstitutional congressional districts—districts that have corroded faith in democracy in this State. And there is time to fix this. Indeed, the redistricting process in 2016 that led to the current plan proceeded on a strikingly similar timeline. The federal district court in *Harris v. McCrory* enjoined the 2011 congressional plan in early February 2016, Legislative Defendants adopted the new 2016 Plan two weeks later, and the primaries were held under the new plan three and a half months after that—exactly as would occur here. Not only does this recent precedent belie Legislative Defendants' unsubstantiated concerns, but the submissions from the State Board of Elections confirm that a new congressional map could be implemented in a timely and orderly manner.

Unable to contest the facts or law, Legislative Defendants cynically advocate a political system under which the political parties engage in a perpetual battle for "line-drawing power" so that they can "victim[ize]" each other's voters through back-and-forth discriminatory "tactics." LD Opp. 28. But if this is the "history" of North Carolina elections, it has not "mitigated" or "evened out" the "harms of gerrymandering," but exacerbated them to the breaking point. *Id.* The fact that voters of *both* political parties have suffered the harms of unlawful gerrymandering is more reason to enjoin the practice, not less. Voters are not pawns in a partisan chess game—they are citizens who each have inviolable rights under this state's constitution.

The Court should grant a preliminary injunction barring use of the gerrymandered 2016 Plan and establishing a remedial process to adopt a new plan for use in the 2020 elections.

ARGUMENT

I. This Court Has Authority To Issue the Requested Preliminary Injunction

Legislative Defendants assert that a "preliminary injunction is categorically unavailable" because Plaintiffs purportedly seek to alter the "status quo" by enjoining the 2016 Plan and establishing a remedial process to adopt a new plan that comports with the North Carolina Constitution. LD Opp. 12-15. Legislative Defendants are wrong on multiple levels.

A. Preliminary Injunctions Are Available in Redistricting Cases

Legislative Defendants' position that preliminary injunctions are unavailable in redistricting cases like this is foreclosed by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002). There, the trial court issued judgment for the plaintiffs in February 2002, but "stayed its order," meaning that the challenged plans would have been used in the May 2002 primaries absent injunctive relief from the appellate courts. 355 N.C. at 360, 562 S.E.2d at 382. The North Carolina Supreme Court entered an injunction on March 7, 2002—just two months before the primaries were set to occur—before briefing on the merits even concluded. 355 N.C. 281, 282, 561 S.E.2d 888 (2002). This was not a permanent injunction, but rather was preliminary, *i.e.*, pending final resolution of the merits. The Court ordered that, "[i]n light of the extraordinary nature of this case and the exigency of the circumstances for the legislative candidates and the citizens of this State, Defendants are hereby enjoined from conducting primary elections for the [state Senate and state House], scheduled for 7 May 2002." *Id.* The Court directed: "This injunction shall remain in effect until further order of this Court." *Id.*

Legislative Defendants thus are wrong that a preliminary injunction against use of a redistricting plan is available only if it would revert to an earlier plan that existed before the plan being challenged. *See* LD Opp. 12. The injunction entered by the *Stephenson* Court did not revert to an earlier-in-time plan, but instead enjoined use of the then-current plan pending final

resolution of the merits, and a court-drawn remedial plan was ultimately adopted. The state Supreme Court obviously did not violate state law in issuing such an injunction. Legislative Defendants do not even mention *Stephenson* in their opposition brief, let alone try to reconcile their narrow view of preliminary injunctive relief with the state Supreme Court's decision.

Other courts likewise have issued preliminary injunctions in redistricting cases, including preliminary injunctions ordering adoption of a new, lawful plan. For instance:

- In *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994), the federal district court preliminarily enjoined North Carolina's method of selecting superior court judges via statewide elections, on the grounds that the system likely constituted an unlawful political gerrymander. As part of the preliminary injunction, the court ordered the State Board of Elections to implement a new system for the upcoming election to enable superior court candidates to be chosen from individual districts rather than statewide. *See id.* at 733-34. The Fourth Circuit affirmed the injunction in large part. 27 F.3d 563, 1994 WL 265955 (4th Cir. June 17, 1994). The district court, in granting the preliminary injunction, emphasized that "the public interest requires the furtherance of the constitutional protections that attach to the franchise," and that "[i]f, upon final resolution of the merits of this action, plaintiffs prevail upon their claim of vote dilution yet the court has denied them this prophylactic relief, plaintiffs will find themselves to have been effectively disenfranchised for yet another year of superior court elections." *Id.* at 732. The district court entered its injunction the same day the candidate filing period for judicial primaries was set to begin under the old system. *See id.* at 727.

- In *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, 281 F. Supp. 2d 436 (N.D.N.Y. 2003), a Voting Rights Act case, the court entered a preliminary injunction that not only precluded use of the current redistricting plan, but also required the adoption of a new, lawful plan. Specifically, the court "enjoined [local election officials] from conducting the scheduled 2003 election of Albany County legislators pending adoption by the legislature of a new redistricting plan … determined to be compliant with the Voting Rights Act." *Id.* at 457. The court held that, "despite the imminency of the November 2003 elections, the public interest weighs strongly in favor of granting plaintiffs' request for a preliminary injunction." *Id.* at 456. The court entered the injunction just three months before the general election. *Id.* at 439, 457.

- In *Johnson v. Miller*, 929 F. Supp. 1529 (S.D. Ga. 1996), a three-judge district court preliminarily enjoined further use of Georgia's state legislative maps and, as part of the preliminary injunction, adopted and implemented remedial plans in their stead. The court-ordered remedial plans included provisional districts that the legislature had drafted, plus at least one district that the court itself amended. *See id.* at 1566. The court held that, "[c]onsidering the four factors relevant to the grant of a preliminary injunction, this case is not even a close one. Preliminary injunctive relief is not only appropriate, but

also necessary in order to provide an interim remedy for a serious constitutional violation affecting the electoral process in the State." *Id.* at 1560-61. The court added: "No department of the government … has a legitimate interest in continuing in effect a violation of another citizen's constitutional rights, and thus "the harm Plaintiffs would suffer if we permitted the continued constitutional violation clearly outweighs any harm the injunction may cause other parties." The court entered its preliminary injunction six months before the general election.

- In *Georgia State Conference of the NAACP v. Fayette County Board of Commissioners*, 118 F. Supp. 3d 1338, 1340-41 (N.D. Ga. 2015), the court preliminarily enjoined use of an at-large election system for a county board of commissioners, instead ordering a district-based election using a remedial plan adopted by a court in earlier litigation. The court rejected the defendants' arguments that a preliminary injunction should not issue because they had "already expended resources" on the assumption that the election would go forward under the at-large system; "the Court [could not] justify limiting Plaintiffs' right to vote because of the BOC's past expenditures." *Id.* at 1348. The injunction issued three weeks before early voting and one month before election day. *Id.* at 1341.

- In *NAACP-Greensboro Branch v. Guilford County Board of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012), the district court preliminarily enjoined a North Carolina statute that would have left one district in the Guilford County Board of Commissioners without a representative for two years, and the court ordered an election to occur in that district. The court rejected the defendants' arguments that "granting the preliminary injunction is not in the public interest because interrupting an ongoing election may cause voter confusion and low voter turnout, needless expense, and other widespread injuries." *Id.* at 29. The court held that "Defendants' various arguments for why a preliminary injunction would not be in the public interest … simply serve to emphasize why a preliminary injunction during these early stages of the filing period would better serve the public than waiting until the eve of the election." *Id.* The court issued the preliminary injunction even though "Plaintiffs did not file their motion for a preliminary injunction until approximately six days before the filing period for the office of Guilford County Commissioner was scheduled to open." *Id.* at 528. Indeed, the court issued the injunction "one week into the filing period." *Id.* at 528 n.14.

- In *City of Greensboro v. Guilford County Board of Elections*, 120 F. Supp. 3d 479 (M.D.N.C. 2015), the court issued a preliminary injunction precluding enforcement of the General Assembly's redistricting plan for the Greensboro City Council. The court explained that, "[i]n voting cases, restrictions on the right to vote are routinely found to cause irreparable injury." *Id.* at 489. The Court added: "If the Court does not enter an injunction, it would mean that the City Council would be elected in a manner that is likely to be unconstitutional, to the harm of individual voters. If no injunction is entered and the plaintiffs ultimately win, the plaintiffs will have been deprived of their equal protection rights during the 2015 election cycle. That is not a deprivation that can be remedied." *Id.* at 490. The court entered the preliminary injunction three months before the scheduled primaries and four months before the general election. *Id.* at 484.

Individually and collectively, these cases refute Legislative Defendants' "categorical" view that preliminary injunctions are not appropriate in redistricting.

B. Plaintiffs Seek to Restore the Status Quo, and a Mandatory Preliminary Injunction May Alter the Status Quo in Any Event

Beyond ignoring controlling precedent in *Stephenson*, Legislative Defendants mischaracterize North Carolina law and the relief that Plaintiffs seek.

1. Even if North Carolina law limited preliminary injunctions to those that return to the "status quo," as Legislative Defendants incorrectly contend, Plaintiffs seek to return to the status quo here. While "there is no particular magic in the phrase 'status quo,'" *Georgia State Conference of the NAACP*, 118 F. Supp. 3d at 1349 (internal quotation marks omitted), in the injunction context, the term generally means "the last uncontested status between the parties which preceded the controversy," *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (internal quotation marks omitted). The last uncontested status that preceded the controversy here is the state of affairs immediately before the General Assembly enacted the 2016 Plan on February 19, 2016. At that point, because the prior plan had been struck down, there was no plan that the State Board of Elections could lawfully enforce, and thus a lawful plan needed to be adopted. It was Legislative Defendants who impermissibly altered the status quo by instead adopting an unlawful plan, and a preliminary injunction properly bars use of the plan and necessitates a remedial process to establish a new, lawful plan. That is what should occur here.

2. Even if Plaintiffs sought to alter the status quo in some relevant respect, North Carolina courts may alter the status quo through mandatory, as opposed to prohibitory, preliminary injunctions. Legislative Defendants are wrong that "*[n]either* mandatory *nor* prohibitory relief is available to alter the status quo." LD Opp. 14. Legislative Defendants quote

the statement in *Roberts v. Madison County Realtors Association*, 344 N.C. 394, 400, 474 S.E.2d 783, 788 (1996), that in "general," preliminary injunctions are "prohibitory injunction[s]" to "retain the status quo." But in the very next sentence, the Court stated: "However, we note that under circumstances which indicate serious irreparable injury to the petitioner if the injunction is not granted, no substantial injury to the respondent if the injunction is granted, and predictably good chances of success on the final decree by the petitioner, a mandatory interlocutory injunction could properly be issued." *Id.* The North Carolina Supreme Court thus clearly explained in *Roberts* that, although preliminary injunctions typically are prohibitory and preserve the status quo, mandatory injunctions can "properly be issued" to alter the status quo. *Id.*

Legislative Defendants' cramped definition of a mandatory injunction—as one that solely can "restore[] a status quo"—is contrary to precedent and the well-settled meaning of the term. "Mandatory preliminary injunctions do not preserve the status quo." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). Instead, "mandatory injunctions *alter* the status quo." *League of Women Voters of N.C.*, 769 F.3d at 236 (emphasis added). For instance, in *Lloyd v. Babb*, 296 N.C. 416, 430, 251 S.E.2d 843, 853 (1979), the trial court entered a preliminary injunction requiring a county board of elections to take new, specific measures when registering college students to vote. The North Carolina Supreme Court held that "[t]his order amounts to a preliminary mandatory injunction," and "[o]ur courts have power to enter such an order, provided it is supported by the evidence." *Id.* (internal citation omitted); *see also Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 794 S.E.2d 535, 541 n.3 (N.C. Ct. App. 2016) (noting that Superior Court entered mandatory preliminary injunction that "forced a business to segregate its funds … and forced the business to conduct an accounting and provide the results of that accounting to the opposing party").

As Plaintiffs explained in their opening motion, North Carolina courts may enter mandatory preliminary injunctions where plaintiffs' injuries are "immediate, pressing, irreparable and clearly established." *Ingle v. Stubbins*, 240 N.C. 382, 390, 82 S.E.2d 388, 395 (1954). To the extent aspects of Plaintiffs' requested relief are considered mandatory in nature,[1] Plaintiffs meet this standard for the reasons explained in their opening motion.

3. Regardless of whether Plaintiffs' requested relief is considered prohibitory or mandatory, this case also falls under the category of cases outlined in *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983), where a preliminary injunction is necessary to protect the plaintiffs' rights. In *A.E.P.*, the North Carolina Supreme Court held that "where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no 'legal' (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights." 308 N.C. at 410, 302 S.E.2d at 764.

Plaintiffs' requested relief meets all of the criteria. First, "the principal relief sought is a permanent injunction." 308 N.C. at 408, 302 S.E.2d at 763. Plaintiffs principally seek a permanent injunction precluding use of the 2016 Plan in the 2020 elections. Second, "the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff." 308

[1] The only aspect of Plaintiffs' requested relief that conceivably could be considered mandatory is the requirement that the State Board of Elections enforce the new redistricting plan that the Court adopts. While this Court may afford Legislative Defendants the *opportunity* to pass a remedial plan, they will not be compelled to do so, and this Court will adopt a remedial plan if Legislative Defendants are unable or unwilling to adopt a lawful plan. Notably, the State Board supports a preliminary injunction requiring use of a new, lawful plan in the 2020 elections. State Board Resp. 2, 12 (stating that "it would be appropriate for this Court to issue a preliminary injunction" enjoining further use of the 2016 Plan and ordering a remedial plan for the 2020 primary and general elections).

N.C. at 410, 302 S.E.2d at 764. If this Court does not issue a preliminary injunction and the 2020 primaries go forward under the unconstitutional 2016 Plan, this Court will not be able to afford "adequate relief" to Plaintiffs. Third, there is no legal remedy that will suffice to remedy the injuries Plaintiffs will suffer absent an injunction. And fourth, particularly given that the relevant facts and law in this case are uncontested, this Court's resolution of the preliminary injunction will in effect result in a determination on the merits. Because Plaintiffs meet of each of the criteria set forth in *A.E.P.*, "the issuance of a preliminary injunction is necessary." *Id.*

4. Ultimately, Legislative Defendants' position elevates form over substance, ignoring the maxim that a preliminary injunction is "equitable in nature." *A.E.P.*, 308 N.C. at 406, 302 S.E.2d at 762. Courts have "discretion" to grant preliminary injunctive relief and fashion an appropriate remedy as the equities warrant. *Wallace Butts Ins. Agency, Inc. v. Runge*, 68 N.C. App. 196, 198, 314 S.E.2d 293, 295 (1984). In deciding whether to issue a preliminary injunction, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978). "If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury." *Id.* (internal citations omitted).

Injunctive relief is necessary here to prevent irreparable injury to Plaintiffs and millions of other North Carolinians. There is no genuine factual or legal dispute that, absent relief, North Carolinians will be forced to vote in congressional districts that violate their constitutional rights. That is not a tolerable outcome.

C. The Court Could Also Expedite Summary Judgment or Delay the Primaries

While this Court can issue the preliminary injunction requested by Plaintiffs without further action, the Court has additional options as well. First, the Court can order expedited briefing on summary judgment to occur in parallel with the development of a remedial plan pursuant to a preliminary injunction. Plaintiffs intend to move for summary judgment promptly, potentially as soon as October 28, 2019, which is the earliest date allowed under North Carolina Rule of Civil Procedure 56(a). Under expedited briefing, the Court could issue its summary judgment decision before December 15, which is the deadline provided by the State Board of Elections to finalize a remedial plan without moving the primaries. In short, the Court can (1) grant a preliminary injunction enjoining use of the 2016 Plan and establishing a remedial process to begin in November; and (2) decide summary judgment before December 15, only adopting a final remedial plan if the Court grants summary judgment to Plaintiffs.

Although Plaintiffs do not believe that this expedited-summary-judgment approach is necessary in light of the Court's clear authority to issue the requested preliminary injunction in full, it would address all of Legislative Defendants' professed concerns about the supposed risk that this Court would rule against Plaintiffs on the merits after previously granting a preliminary injunction against use of the 2016 Plan in the primaries. *See* LD Opp. 1-2, 23. And contrary to Legislative Defendants' repeated statements that this case "cannot possibly be resolved" before the 2020 general elections, *id.*, summary judgment can be decided promptly. There are no genuine disputes of material fact, and the official criteria for the 2016 Plan and Legislative Defendants' own public admissions establish that the plan violates the state constitution as a matter of law under *Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019). Tellingly, while Legislative Defendants say that they will need to take "depositions" and "discovery," LD Opp. 2, they have not served a single discovery request since this case was filed

last month. Nor do Legislative Defendants identify a single issue of material fact that is disputed and that they purportedly need extensive discovery to resolve. There are none.

As another alternative, this Court can simply grant a prohibitory injunction against use of the 2016 Plan in the 2020 primaries, and nothing more at this time. The North Carolina Supreme Court entered such an injunction in *Stephenson*, 355 N.C. 281, 561 S.E.2d 888, and this Court can issue such an injunction even under Legislative Defendants' erroneous view of the law of preliminary injunctions. Under this approach, the case would proceed expeditiously through a final judgment on the merits and the primaries would then occur after that date, likely on the "Second Primary" date that the State Board reserves for other elections so as to minimize costs. As this Court held in *Common Cause*, "the Court retains authority and discretion to move the primary date" for any office "should doing so become necessary to provide effective relief in the case." 2019 WL 4569584, at *135. There are at least two recent precedents for moving primaries in North Carolina—including congressional primaries—to resolve a constitutional challenge to a redistricting plan or to develop remedial plans. *See* N.C. Sess. Law 2016-2 § 1(b) (moving 2016 congressional primaries due to federal court's decision in *Harris v. McCrory*); *Stephenson v. Bartlett*, 357 N.C. 301, 303, 582 S.E.2d 247, 249 (2003) (describing postponement of all of the State's primaries in 2002). Again, Plaintiffs do not believe that this approach is necessary, as legal authority and sufficient time exists to develop a remedial plan for use in the March 2020 primaries. But this alternative path would obviate virtually all of Legislative Defendants' arguments against a preliminary injunction.

II. Plaintiffs Are Likely To Succeed on the Merits

Legislative Defendants do not dispute that, under the legal principles announced by this Court last month in *Common Cause v. Lewis*, the 2016 Plan violates North Carolina's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses.

Instead, they argue that (1) *Common Cause*'s interpretation of the state constitution was wrong; (2) the Elections Clause of the federal constitution bars this Court from invalidating the State's congressional redistricting plan under the state constitution; and (3) Plaintiffs lack standing. Each of those arguments fails for multiple reasons.

A. Legislative Defendants Do Not Dispute That the 2016 Plan Violates the North Carolina Constitution Under *Common Cause v. Lewis*

Legislative Defendants do not dispute that, unless this Court casts aside its decision in *Common Cause*, Plaintiffs will succeed on the merits of their claims that the 2016 Plan is an unconstitutional partisan gerrymander under multiple provisions of the state constitution.

Legislative Defendants do not deny that the 2016 Plan sought "to predetermine election outcomes" and was "specifically and systematically design[ed] … for partisan purposes and a desire to preserve power," "to the greatest extent possible." *Common Cause*, 2019 WL 4569584, at *112. They do not deny that the 2016 Plan makes it "nearly impossible for the will of the people—should that will be contrary to the will of the partisan actors drawing the map[]—to be expressed through their votes." *Id.* at *112. They do not deny that the 2016 Plan is a meticulous and intentional "classification of voters based on partisanship in order to pack and crack them into districts" with the goal of "denying equal voting power." *Id.* at *115. They do not deny that their "predominant purpose" in drawing the 2016 Plan was to "entrench their party in power by diluting the votes of citizens favoring their rival," and that the "lines drawn in fact have the intended effect by substantially diluting their votes." *Id.* at *114 (alterations and internal quotation marks omitted).

Legislative Defendants do not deny that they "analyzed the voting histories of every VTD in North Carolina, identified VTDs that favor Democratic candidates, and then singled out the voters in those VTDs for disfavored treatment by packing and cracking them into districts with

the aim of diluting their votes and, in the case of cracked districts, ensuring that these voters are significantly less likely, in comparison to Republican voters, to be able to elect a candidate who shares their views." *See id.* at *120. They do not deny that the 2016 Plan has made the votes of Plaintiffs and other Democratic voters "less effective" and has restricted "the ability of like-minded people across the State to affiliate in a political party and carry out [their] activities and objects." *See id.* at *122 (alterations and internal quotation marks omitted). And they do not deny that under the 2016 Plan, "[i]n *relative* terms, Democratic voters … are far less able to succeed in electing candidates of their choice than they would be under plans that were not so carefully crafted," that the 2016 Plan was crafted with the intent to "target[] Democratic voters based on their voting histories," and that this partisan intent "caused" Democratic voters to have less success at the polls. *Id.* at *123-24.

Legislative Defendants do not deny any of this because it is undeniable. And these undisputed facts conclusively establish that the 2016 Plan violates the state constitution under *Common Cause*.

Indeed, not only do Legislative Defendants fail to *deny* that the 2016 Plan violates the North Carolina Constitution as interpreted in *Common Cause*, they openly concede in their opposition brief that partisanship "predominate[d]" in drawing the 2016 Plan, and explain that they made sure the "public record" reflected its predominance. LD Opp. 11. In fact, Legislative Defendants acknowledge that "their sole focus" in drawing the 2016 Plan was "to create a stronger field for Republicans statewide." *Id.* at 10-11.

Legislative Defendants argue at length that *Common Cause* erred in holding that partisan gerrymandering violates the specified provisions of the North Carolina Constitution, LD Opp. 39-45, but they provide no reason for this Court to reverse course from its carefully considered

357-page opinion issued last month. Legislative Defendants also argue that Plaintiffs' claims present non-justiciable political questions under state law. *Id.* at 35. But this Court considered and rejected the same argument in *Common Cause*, 2019 WL 4569584, at *126.[2]

B. The Federal Elections Clause Does Not Bar Relief

The U.S. Supreme Court has definitively held in a series of cases dating back nearly a century that nothing in the federal Elections Clause, U.S. Const. art. I, § 4, alters a state court's unreviewable authority to invalidate a congressional map for violating the state constitution. The U.S. Supreme Court has repeatedly explained that congressional redistricting plans must comply with all aspects of state law, and that federal law not only authorizes but encourages state courts to supervise congressional districting. This line of cases forecloses Legislative Defendants' Elections Clause defense. Just last year, the Supreme Court twice declined to stay the Pennsylvania Supreme Court's holding that Pennsylvania's congressional map violated the state constitution's free and equal elections clause, rejecting the same Elections Clause arguments advanced here. *See* No. 17A909 (Mar. 19, 2018); No. 17A795 (Feb. 5, 2018); *see also* No. 17-1700 (Oct. 29, 2018) (denying certiorari). The Elections Clause argument has only gotten weaker since, given *Rucho*'s holding that "state courts" can address whether congressional plans

[2] Legislative Defendants' attempt to deviate from the legal principles announced in *Common Cause* runs headlong into the doctrine of collateral estoppel. Although the Court need not reach the issue for purposes of this motion, Legislative Defendants are collaterally estopped from challenging the legal rules articulated in *Common Cause*. Collateral estoppel, or issue preclusion, "applies when the first suit and the second suit involve different causes of action, but involve some of the same factual or legal issues." *Barrow v. D.A.N. Joint Venture Props. of N.C., LLC*, 232 N.C. App. 528, 531, 755 S.E.2d 641, 645 (2014) (emphasis omitted). "In this situation, issue preclusion prevents relitigation, in the second suit, of the legal and factual issues actually and necessarily decided in the first suit." *Id.*; *accord Doyle v. Doyle*, 176 N.C. App. 547, 549, 626 S.E.2d 845, 849 (2006) ("The issues resolved in a prior action may be either factual issues or legal issues."). All the elements of collateral estoppel are met here. The doctrine fully applies against government actors, *see, e.g.*, *State v. Summers*, 351 N.C. 620, 626, 528 S.E.2d 17, 22 (2000), and the fact that Legislative Defendants declined their opportunity to appeal the judgment in *Common Cause* is irrelevant, *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986).

violate "state constitution[al]" prohibitions on partisan gerrymandering. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

The U.S. Supreme Court first squarely addressed the issue in *Smiley v. Holm*, 285 U.S. 355 (1932), holding that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws." *Id.* at 365. The clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368. In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans for violating "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932). Those decisions also expressly affirmed state courts' authority to implement a remedial congressional plan where the prior plan violated the state constitution. *Carroll*, 285 U.S. at 381-82; *Koenig*, 285 U.S. at 379.

More recently, in *Growe v. Emison*, 507 U.S. 25 (1993), the Supreme Court held that state courts not only have authority to review and remedy congressional plans, but that federal courts must not interfere with state courts in this arena. After a Minnesota state court invalidated the state's prior congressional map under the state and federal constitutions, the state court "adopted final criteria for congressional plans and provided a format for submission of plans in the event the legislature failed to enact a constitutionally valid congressional apportionment plan." *Cotlow v. Growe*, C8-91-985 (Minn. Special Redistricting Panel Apr. 15, 1992). Two months later, a federal court enjoined the state court from adopting any new plan and adopted its own remedial plan. *Growe*, 507 U.S. at 30-31. The state court subsequently released a

provisional remedial plan, subject to the federal injunction. *Cotlow*, C8-91-985, *supra*. But the federal injunction blocked the state court's plan from taking effect.

The Supreme Court reversed the federal court's injunction. Writing for a unanimous Court, Justice Scalia explained that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's … federal congressional districts." *Growe*, 507 U.S. at 42. The Court stated over and over again that federal law authorizes state courts to supervise state legislatures in drawing congressional maps:

- "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." 507 U.S. at 33 (internal quotation marks omitted).

- "In the reapportionment context, the 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." *Id.* (emphasis in original).

- "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court. Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34 (citations and internal quotation marks omitted; emphasis added).

- "[T]he District Court's December injunction of state-court proceedings … was clear error. *It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts.* Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state judicial redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as 'interfering' in the reapportionment process. But the doctrine of *Germano* prefers both state branches to federal courts as agents of apportionment." *Id.* (emphasis added).

- "The Minnesota [court's] issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.*

Following the U.S. Supreme Court's decision in *Growe*, the state court's remedial plan governed Minnesota's 1994 congressional elections. *See Minnesota Redistricting Cases: the 1990s*, https://www.senate.mn/departments/scr/REDIST/Redsum/mnsum.htm.

Just four years ago, the U.S. Supreme Court held again: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affirmed that redistricting must be "performed in accordance with the State's prescriptions for lawmaking." *Id.* at 2668. And the Court *rejected* the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (internal quotation marks and alterations omitted).

There is more. The second part of the Elections Clause allows Congress "at any time" to make its own regulations related to congressional redistricting, U.S. Const. art. I, § 4, and Congress has codified the principle that congressional districting plans are not valid unless they are adopted "in the manner provided by [state] law." 2 U.S.C. § 2a(c). In *Arizona State Legislature*, the Supreme Court explained that congressional plans are valid under § 2a(c) where they are "established … in whatever way [states] may have provided by their constitution and by their statutes." 135 S. Ct. at 2669. Conversely, a plan is invalid under § 2a(c) where it does not comply with state law, however the state defines it. *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273-76 (2003) (plurality op.).

In short, it is well-settled under the Elections Clause and federal statutes that all of a state's "prescriptions for lawmaking" govern the validity of congressional plans. *Ariz. State*

Legislature, 135 S. Ct. at 2668. In North Carolina, one of the prescriptions for lawmaking is compliance with the North Carolina Constitution, as interpreted by North Carolina's courts. *Glenn v. Bd. of Educ.*, 210 N.C. 525, 187 S.E. 781 (1936); *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 689-90, 249 S.E.2d 402, 406 (1978).

Recognizing that the U.S. Supreme Court has interpreted the Elections Clause to permit state courts to overturn congressional maps based on violations of the state constitution, Legislative Defendants offer a series of unpersuasive arguments attempting to exempt partisan gerrymandering claims from that clear rule.

Legislative Defendants first contend that this Court's "authority over this case is highly restricted" under the Elections Clause because this Court is "not 'the Legislature.'" LD Opp. 30. But the U.S. Supreme Court cases just cited definitively reject that proposition. So do basic principles of separation of powers. The fact that a constitutional provision, state or federal, authorizes a political branch to act does not mean that a court's authority to decide the constitutionality of that act is "highly restricted." Legislative Defendants rely on *Smiley* to argue that the word "Legislature" in the Elections Clause "refers undisputedly to the General Assembly," LD Opp. 30, but as explained, *Smiley* held just the opposite. It rejected the lower court's holding that the word "Legislature" in the Elections Clause referred solely to the "legislative body" of the state, and explained that that the word refers instead to the "method which the state has prescribed for legislative enactments," including the "check[s] in the legislative process" imposed by the state constitution. *Smiley*, 285 U.S. 365, 367-68. Judicial review of state laws for compliance with the state constitution is one such check in North Carolina.

Legislative Defendants also assert that, under the Elections Clause, only certain types of state constitutional provisions may restrict congressional redistricting plans. Specifically, they contend that a state constitutional provision must provide sufficiently explicit "guidance" to state courts, that not all state constitutional provisions provide such guidance, and that "read[ing] prohibitions on partisan gerrymandering into provisions that do not provide 'guidance'" violates the Elections Clause. LD Opp. 31. This is nonsense. State laws must comply with *all* provisions of the state constitution, full stop. And as the Supreme Court cases cited above make clear, nothing in the Elections Clause creates an exception to this rule for legislation creating congressional districts. The Elections Clause does not authorize a state's congressional plan to violate certain state constitutional provisions but not others, based on some purported assessment of the provisions' specificity.

And nothing in the federal Elections Clause upends the rule that state courts are in charge of interpreting state constitutions and in deciding whether partisan gerrymandering violates the state constitution. *See Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that the Elections Clause did not render "valid and operative" a congressional map that was contrary to "the Constitution and laws of the state," and that the state court's "decision below is conclusive on th[e] subject" of whether the congressional map violated state law). The two decisions Legislative Defendants cite (LD Opp. 32) involving the 2000 presidential election did not even mention the Elections Clause. So they certainly did not *sub silentio* overrule longstanding Supreme Court precedent declaring it "fundamental that state courts be left free and unfettered by [the U.S. Supreme Court] in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940).

Legislative Defendants argue that *Rucho* supports their theory that only sufficiently explicit state constitutional provisions can limit partisan gerrymandering of congressional districts. LD Opp. 30. But *Rucho* does no such thing. To the contrary, it confirms that applying "state constitutions" is the job of "state courts." 139 S. Ct. at 2507. Its reference to "guidance" from state constitutions was not an effort to impose some new federal law standard, but rather a recognition that state courts would interpret state constitutions. And *Rucho*'s citation to Florida's Fair Districts Amendment (LD Opp. 32) in no way suggests by negative implication that other state constitutional provisions are nonjusticiable or otherwise cannot restrict partisan gerrymandering.[3]

Legislative Defendants also puzzlingly argue that, under the Elections Clause, state courts may only enforce state constitutional provisions that come from a "source of authority from a *legislative* body or process" that is analogous to Florida's Fair Districts Amendment. LD Opp. 30-31 (emphasis in original). Florida's Fair Districts Amendment was not "legislation," *id.* at 31; it was a state constitutional provision ratified by Florida voters, *see Brown v. Secretary of State of Florida*, 668 F.3d 1271, 1272 (11th Cir. 2012), just like North Carolina voters ratified each constitutional provision at issue in this case when they approved the 1971 Constitution.

Legislative Defendants alternatively argue that, in holding partisan gerrymandering claims nonjusticiable under the federal First and Fourteenth Amendments, *Rucho* implicitly held that state equal protection and free speech and assembly provisions likewise provide no "guidance" as to partisan gerrymandering and are nonjusticiable. LD Opp. 31. These arguments

[3] Legislative Defendants also wrongly argue that *Rucho* interpreted the "Elections Clause … to foreclose review of a partisan-gerrymandering claim." LD Opp. 31. *Rucho* expressly rejected that argument: "Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues *such as the one before us* as questions that only Congress can resolve. *We do not agree*." 139 S. Ct. at 2495 (emphasis added; citation omitted).

are just disguised challenges to the merits of Plaintiffs' state-law claims, and have nothing to do with the federal Elections Clause. *Common Cause* resolved in the affirmative the question whether the "State Constitution provides more guidance than the federal Constitution" on partisan gerrymandering. LD Opp. 31. This Court held that "the North Carolina Constitution provides the 'standards and guidance' necessary to address extreme partisan gerrymandering." *Common Cause*, 2019 WL 4569584, at *2 (quoting *Rucho*, 139 S. Ct. at 2507). In particular, moreover, the Court held that the Free Elections Clause is "one of the clauses that makes the North Carolina Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Common Cause*, 2019 WL 4569584, at *109. This is evident from the history of the Free Elections Clause. As this Court explained, the Free Elections Clause is based on a similar provision in the English Bill of Rights that specifically prohibits the "manipulat[ion]" of elections, "including by changing the electorate in different areas to achieve 'electoral advantage.'" *Id.* at *111 (quoting J.R. Jones *The Revolution of 1688 in England* 148 (1972)).

Nor *could* the Supreme Court have held in *Rucho* that certain state constitutional provisions provide "guidance" and thus are justiciable in state court, but that others are not. *Rucho* was a case about the limitations of Article III of the federal constitution. 139 S. Ct. at 2493-94. But "the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). Application of justiciability rules in state court "is entirely a matter of state law." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003).

Intervenor-Applicants also contend that the Elections Clause bars relief in this case.[4] Not only are their Elections Clause claims meritless for the reasons just stated, they cannot raise an Elections Clause defense because they are not the "Legislature." Intervenor-Applicants also misconstrue the caselaw on which they rely. *See* Intervenor-Appls. Opp. 13-19. Perhaps most egregiously, they do not disclose that the Elections Clause analysis in *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), was vacated by the U.S. Supreme Court. *Smith* had enjoined a state-court redistricting plan on the ground that it violated (1) the VRA; and (2) the Elections Clause. The Supreme Court affirmed the VRA holding but "vacate[d]" the "alternative holding that the [state court] redistricting plan was unconstitutional" under the Elections Clause, and explained that it was "not to be regarded as … binding" should the state court impose a new plan that complied with the VRA. *Branch*, 538 U.S. at 265-66 (majority op.).

C. All Plaintiffs Have Standing

In *Common Cause*, this Court held that individual voters have standing to bring partisan gerrymandering claims if they "live in … districts that are outliers in partisan composition relative to the districts in which they live under Dr. Chen's nonpartisan simulated plans." 2019 WL 4569584, at *107. For purposes of North Carolina standing law, such plaintiffs have a "personal stake in the outcome of the controversy and a specific harm directly attributable to the partisan gerrymandering of the district in which they reside. *Id.* Such plaintiffs had standing to challenge their individual districts as well as their entire county groupings, the Court held, "because the manner in which one district is drawn within a county grouping is tied to the drawing of some, and possibly all, of the other districts within that same grouping." *Id.* at *108.

[4] As explained in Plaintiffs' October 22 motion to strike and separate opposition to the intervention motion, the Court should deny intervention and disregard Intervenor-Applicants' opposition for multiple reasons.

Applying this standard here, all fourteen Plaintiffs here have demonstrated a likelihood of standing to challenge their individual districts and the 2016 Plan as a whole. All fourteen Plaintiffs live in districts that are "outliers in partisan composition relative to the districts in which they live under Dr. Chen's nonpartisan simulated plans," *Common Cause*, 2019 WL 4569584, at *107, and the manner in which one congressional district is drawn necessarily affects the drawing of all twelve other districts. For standing purposes, a single congressional plan is functionally equivalent to a county grouping in a state House or Senate plan.

Legislative Defendants (and Intervenor-Applicants) simply ignore this Court's holding in *Common Cause*, presenting arguments that this Court squarely rejected. Legislative Defendants divide Plaintiffs into four categories, but their standing arguments as to each group fall flat. First, Legislative Defendants recognize that six Plaintiffs (Harper, Rumph, Quick, Cohen, Dunn, and Brown) live in Republican-leaning districts under the 2016 Plan but would live in Democratic-leaning districts under the vast majority of Dr. Chen's simulations. LD Opp. 39; *see* Chen 9/30/19 Decl. at 8. Legislative Defendants contend that these Plaintiffs lack standing because "American law and democratic tradition presume that a person is represented by the person's designated representative." LD Opp. 39. This Court obviously rejected such an argument in finding standing in *Common Cause*. Indeed, Legislative Defendants' position would mean that no voter ever has standing to bring any redistricting-related challenge. Legislative Defendants' assertion that one of these six Plaintiffs, David Dwight Brown, lives in a district that is "not a partisan outlier," *id.*, is false. Brown's district is a 91.7% outlier, *see* Chen 9/30/19 Decl. at 8, which this Court found sufficient in *Common Cause* in holding that Kathleen Barnes had standing to challenge her state Senate district and grouping. *See* 2019 WL 4569584, at *79

(showing Barnes to be a 91.4% outlier). All six Plaintiffs have demonstrated a strong likelihood of establishing standing due to the cracking of Democratic voters in their districts.

The same is true for Plaintiffs Crews, Peters, Gates, Barnes, and Rush. Legislative Defendants contend that these Plaintiffs who live in Republican-leaning districts lack standing because, under the specific statewide elections that Dr. Chen used, they would still live in Republican-leaning districts under Dr. Chen's maps. LD Opp. 38. But three of these Plaintiffs (Peters, Gates, and Barnes) would live in districts that are far more competitive under Dr. Chen's maps, and all five Plaintiffs would live in districts that would have markedly different partisan compositions but-for the intentional cracking of Democratic voters in their districts to dilute their voting power. *See* Chen 9/30/19 Decl. at 8. This Court's holding in *Common Cause* again is dispositive; the Court found that Rosalyn Sloan and Stephen Douglas McGrigor had standing in *Common Cause*, and the composition of those individuals' districts relative to Dr. Chen's maps was materially identical to that of these five Plaintiffs. *See* 2019 WL 4569584, at *79 (showing McGrigor's results comparable to Peters, Gates, and Barnes here, and Sloan's results comparable to Crews and Rush here). Legislative Defendants also contend that Rush and Crews live in districts that are not "partisan outliers," LD Opp. 38, but Crews lives in a district that is a 93.5% outlier in Set 1 and a 98.9% outlier in Set 2, and Rush lives in a district that is an 86% and 90.4% outlier in Set 1 and 2. Both are sufficient to establish standing under this Court's holding in *Common Cause* with respect to Kathleen Barnes. *See* 2019 WL 4569584, at *79.

As for the Plaintiffs who live in packed Democratic districts, Legislative Defendants argue that Plaintiff Balla has "suffered no harm" because he would still live in a Democratic-leaning district under Dr. Chen's plans, albeit a much less lopsided one. LD Opp. 38; *see* Chen 9/30/19 Decl. at 8. This Court rejected any such argument in *Common Cause* in holding that

Joshua Perry Brown and David Dwight Brown had standing to challenge their packed state House districts. *See* 2019 WL 4569584, at *79. And *Common Cause* aside, Legislative Defendants fundamentally misapprehend the nature of the injury suffered by Plaintiffs who live in packed districts. Plaintiffs such as Balla suffer injury because Legislative Defendants have intentionally diluted their votes by placing them in districts with overwhelming Democratic majorities, causing their vote "to carry less weight than it would carry in another, hypothetical district." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). This Court can redress this injury by undoing the intentional vote dilution, regardless of whether Balla's resulting district is Democratic- or Republican-leaning.

For that same reason, the remaining two Plaintiffs who live in packed districts (Oseroff and Brien) have demonstrated a strong likelihood of standing. Legislative Defendants assert that "[t]heir claim of injury can only concern the legislature as a whole," LD Opp. 38, but that is not so—these Plaintiffs suffer injury from being packed with other Democratic voters in their individual districts. Legislative Defendants also contend that these Plaintiffs lack standing because they would live in Republican-leaning districts in some of Dr. Chen's simulations, but that argument ignores the nature of injury and is foreclosed by *Common Cause*, which found that identically situated individuals such as Paula Chapman, Electa Person, and Derrick Miller had standing to challenge their state House districts and groupings. *Compare* 2019 WL 4569584, at *79 *with* Chen 9/30/19 Decl. at 8.

III. The Equities Support a Preliminary Injunction

Absent a preliminary injunction, Plaintiffs and other Democratic voters will suffer severe irreparable harm by being forced once again to vote in unconstitutional election districts. This harm to millions of North Carolina voters outweighs any conceivable interest of politicians, candidates, and political parties in preserving the current gerrymandered districts. Contrary to

Legislative Defendants' unsubstantiated concerns about "chaos" and "confusion," the record shows that the 2020 elections can be properly administered under a remedial map without moving the March 2020 primaries, and alternatively the Court can move the March 2020 primaries. Contrary to the accusations of delay, Plaintiffs reasonably brought this action barely three months after the U.S. Supreme Court resolved the federal litigation challenging the 2016 Plan, and less than a month after this Court in *Common Cause v. Lewis* held that extreme partisan gerrymandering violates the North Carolina Constitution. The equities are with the voters, not the politicians.

A. Plaintiffs Face Severe Irreparable Harm Absent a Preliminary Injunction

Legislative Defendants do not dispute that violating the fundamental rights of voters under the North Carolina Constitution causes "immediate, pressing, [and] irreparable" harm, sufficient to support both a prohibitory and mandatory injunction. *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. Nor do Legislative Defendants dispute that, under the Court's decision in *Common Cause*, conducting the 2020 elections under the gerrymandered 2016 Plan would violate the fundamental rights of millions of North Carolina voters to cast their ballots in free and fair elections. *See* Mot. 46. Legislative Defendants also do not dispute that "[t]he risk of harm is particularly acute where Plaintiffs and other North Carolina voters have already cast their ballots under unconstitutional district plans in every election this decade." *Common Cause*, 2019 WL 4569584, at *134 (internal quotation marks omitted). The equities strongly support a preliminary injunction for these reasons alone.

Legislative Defendants' cavalier assertion that the harm here is "not severe," LD Opp. 26 (internal quotation marks omitted), ignores the gravity of the constitutional rights at stake. As the Court explained in *Common Cause*, the "constitutional guarantee" that "all elections must be conducted freely and honestly" is "a fundamental right of North Carolina citizens, a compelling

governmental interest, and a cornerstone of our democratic form of government." 2019 WL 4569584, at *2, *110. Partisan gerrymandering, the Court stated, "unconstitutionally deprive[s] every citizen of the right to elections … conducted freely and honestly to ascertain, fairly and truthfully, the will of the People." *Id.* at *3. And, as Plaintiffs have explained, the 2016 Plan may be the most brazen and extreme partisan gerrymander in American history. Never before have state legislators so candidly admitted that they sought to predetermine the outcome of elections to maximize their own party's advantage. *See* Mot. 4-10. This Court has already noted that the 2016 Plan was "drawn with the intent to maximize partisan advantage and, in fact, achieved [its] intended partisan effects." *Common Cause*, 2019 WL 4569584, at *108. Both the partisan intent and partisan effects of the 2016 Plan on voters are severe in the extreme.

In a further attempt to minimize the harm here, Legislative Defendants assert that Plaintiffs "*voluntarily* voted in [the current districts] for two, if not three, elections." LD Opp. 29 (emphasis added). That dismissive statement barely warrants a response. Plaintiffs have voted in every recent congressional election because they are citizens who care deeply about the future of this country and the issues of the day. But there was nothing "voluntary" about Plaintiffs' voting in districts that were manipulated to dilute their votes. And there is no requirement that a voter sit out an election in order to object to a gerrymandered redistricting plan or other unconstitutional election law.

Legislatively Defendants simply refuse to grapple with the serious harm that Plaintiffs and other voters would suffer if the 2020 elections proceed under the unconstitutional 2016 Plan. "Preliminary injunctive relief is not only appropriate, but also necessary in order to provide an interim remedy for a serious constitutional violation affecting the electoral process in the State." *Johnson*, 929 F. Supp. at 1560-61. "If the Court does not enter an injunction, it would mean that

the [Members of Congress] would be elected in a manner that is likely to be unconstitutional," *City of Greensboro*, 120 F. Supp. 3d at 490, and "plaintiffs will find themselves to have been effectively disenfranchised for yet another year of [congressional] elections." *Hunt*, 841 F. Supp. at 732. "That is not a deprivation that can be remedied." *Id.* And here, it is not just "likely" that running the election under the 2016 Plan will violate voters' constitutional rights; it is a near-guarantee given Legislative Defendants' effective concession that the plan violates the North Carolina Constitution under *Common Cause*.

B. The Rights of Voters Trump the Interests of Politicians and Political Parties

In comparison to the severe irreparable harm to millions of voters, Legislative Defendants express concern that implementing a remedial map for the 2020 elections will cause "problems for candidates, parties, and election participants." LD Opp. 22. They say that a new map may require adjustments to candidates' "fundraising" and "strategic strategy." and the various "affairs" of "political parties" such as assigning delegates and choosing leaders. *Id.* at 22-23. But it is well established that no politician, candidate, or political party has any cognizable interest, much less an enforceable legal right, in preserving gerrymandered districts.

The unanimous three-judge panel opinion in *Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018), is instructive. There, a group of Republican congressmen filed a lawsuit in federal court challenging Pennsylvania's implementation of a new congressional plan after the state supreme court struck down the prior plan as a partisan gerrymander in violation of the state constitution. In holding that the congressmen lacked standing to bring the case, the panel held that "a legislator has no legally cognizable interest in the composition of the district he or she represents." *Id.* at 569. Citing prior precedent and the "'core principle of republican government … that the voters should choose their representatives, not the other way around,'" the court explained that "elected officials suffer no cognizable injury when their district boundaries are

adjusted." *Id.* at 569-70 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2677). The U.S. Supreme Court recently applied this same principle in holding that the Virginia House of Delegates lacked standing to appeal court-ordered changes to the state's legislative districts. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019). The Supreme Court rejected the argument that the House suffered a cognizable injury from potential changes in the composition of its membership, because the House is "a representative body composed of members chosen by the people." *Id.* at 1955; *see also Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) ("In my view no officers of the United States . . . exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.").

Likewise here, no politician, candidate, or political party has any "right" to maintain districts that were gerrymandered to predetermine the outcome of North Carolina's congressional elections. Nor do these actors have a cognizable interest because they have expended resources tied to the unconstitutional 2016 Plan. And even if these actors did have a legitimate interest in protecting those financial expenditures, "the Court cannot justify limiting Plaintiffs' right to vote because of the [political actors'] past expenditures." *Georgia State Conf. of NAACP*, 118 F. Supp. 3d at 1341. Finally, any conceivable interest of candidates and parties in having more advance notice of the district lines is heavily outweighed by the fundamental constitutional rights of voters to cast their ballots in free and fair elections.

C. Relief Can Be Granted and a New Map Implemented for the 2020 Elections

Legislative Defendants claim that it is "too late" to implement a new, fair map for the 2020 elections, and that such a "late change[]" would cause "chaos" and "confusion" in those elections. LD Opp. 1, 16-22 (citing, *inter alia*, *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). According to Legislative Defendants, this Court has no choice but to force North Carolina voters

once again to vote in unconstitutional districts. That is wrong both factually and legally. The March 2020 primaries are still four-and-a-half months away, which leaves ample time to decide Plaintiffs' preliminary injunction motion and, if it is granted, conduct a remedial process.

Importantly, Legislative Defendants' unsubstantiated concerns about "chaos" and "confusion" are not shared by the State Board of Elections and its members, *i.e.*, the state officials actually empowered and entrusted to administer the State's elections. The State Board Defendants, rather, submitted a brief *supporting* Plaintiffs' motion for a preliminary injunction. They stated that "it *would be appropriate* for this Court to issue a preliminary injunction" enjoining further use of the 2016 Plan and ordering a remedial plan for the 2020 primary and general elections. *See* State Board Resp. 2, 12 (emphasis added). As the State Board Defendants explained, with a five-day adjustment to the deadline for distributing absentee ballots that either the State Board or the Court can order, the State Board can "properly administer the 2020 primary elections in March 2020 as scheduled" so long as a remedial plan is finalized by December 15, 2019. *Id.* at 2; *see also id.* at 11.

The sworn affidavit of the State Board's Executive Director comprehensively refutes Legislative Defendants' specific objections to proceeding on this schedule. *See* Aff. of Karen Brinson Bell ("Bell Aff.").[5] Legislative Defendants note the need for "lead-in time for geocoding districts, printing ballots, and otherwise administering the election," LD Opp. 20, but the affidavit addresses "geocoding," "ballot preparation," and other required steps, Bell Aff. ¶¶ 3-9. After considering all of these issues, the State Board's Executive Director concludes that

[5] Legislative Defendants note that the Executive Director's affidavit was submitted in *Common Cause v. Lewis* and "concern[ed] only state elections." LD Opp. 20 n.7. But the State Board Defendants have explained that "[t]he information about the timing and administration of elections in 2020 applies to congressional districts in the same way as it does to state legislative districts." State Board Resp. 11 n.2.

the March 2020 elections can be properly administered, without delay, so long as the remedial map is complete by December 15. *Id.* ¶ 10.

Legislative Defendants assert, incorrectly, that "candidates must file to run *by* noon on Monday, December 2, 2019." LD Opp. 20 (citing N.C. Gen. Stat. § 163A-974) (emphasis added). This misstates the deadline. As the State Board's Executive Director attested, "[f]or the 2020 primary elections, candidate filing … occurs between noon on December 2, 2019, and noon on December 20, 2019." Bell Aff. ¶ 6 (citing N.C. Gen. Stat. § 163.106.2(a)). In other words, candidate filing *begins* on December 2, and it does not *end* until December 20. Further, the Court could adjust the December 20 deadline to allow more time for candidate filing, since candidate filing can occur concurrently with geocoding. *See id.* ¶ 7.

Indeed, the State Board Defendants indicate that it is the *denial* of a preliminary injunction that would harm the orderly administration of elections by injecting confusion and uncertainty. As the State Board Defendants explain, absent expeditious relief from the Court, the State Board will be put to a Hobson's choice "between violating the General Assembly's enactment of the congressional districting plan and possibly violating North Carolina voters' rights to free elections, equal protection, and free speech, as interpreted in *Common Cause*." State Board Resp. 10; *see also id.* at 11-12.

The State Board's deadline of December 15 for a remedial map is still seven-and-a-half weeks away. Legislative Defendants do not contest that the General Assembly could create and enact a remedial map "in a matter of days," LD Opp. 21, and the recent remedial redistricting in *Common Cause* proves that it could. Legislative Defendants curiously assert, without elaboration, that they "might choose not to do so." *Id.* It is not apparent why Legislative Defendants would forego an opportunity to redistrict themselves. But if the General Assembly

does decline to adopt a new plan, then this Court will have more time to develop its own remedial plan with the assistance of a court-appointed referee.

The timeline under which the 2016 Plan itself was adopted squarely rebuts Legislative Defendants' contention that it is "too late" to implement a remedial plan for the 2020 elections. In *Harris v. McCrory*, the district court enjoined North Carolina's 2011 congressional plan on February 5, 2016, just seven weeks before the eventual March 20 candidate filing deadline and barely four months before the eventual June 7 primaries. The General Assembly then enacted the 2016 Plan on February 19, just two weeks after the court's decision invalidating the prior plan and three and a half months before the primaries were held. This timeline for a decision and remedial redistricting process is materially indistinguishable from the schedule Plaintiffs seek here. If the Court issues an injunction and a remedial plan is approved by the end of November, there will likewise be over three months until the primaries.

Similarly, in *Stephenson v. Bartlett*, the trial court adopted remedial state house and state senate plans on May 31, 2002, just over three months before the eventual September 10, 2002 primaries. And in *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, 178 A.3d 737, 741 (Pa. 2018), after invalidating the state's congressional map as an unconstitutional partisan gerrymander, the Pennsylvania Supreme Court adopted its own remedial map just three months before the congressional primaries were held.

Legislative Defendants' reliance on *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), is misplaced. There, the North Carolina Supreme Court declined to order a remedial redraw of *one* challenged state House district because the General Assembly was then "in recess and [was] not scheduled to reconvene until 13 May 2008, after the closing of the period for filing for elective office in 2008." 361 N.C. at 511, 649 S.E.2d at 376. In addition, the Court noted

that the underlying constitutional violation was based on the General Assembly's good-faith but mistaken understanding of the Voting Rights Act. By contrast here, Legislative Defendants brazenly gerrymandered the 2016 Plan to maximize Republican advantage, and the General Assembly is in session to commence a remedial redistricting process immediately.

The other cases cited by Legislative Defendants are inapposite for a multitude of reasons. *See* LD Opp. 18. In one case, the district court did not issue its preliminary injunction decision until just two weeks before the commencement of candidate filing, and in any event the court found that the plaintiffs had not established a sufficient likelihood of success on the merits. *Dean v. Leake*, 550 F. Supp. 2d 594, 605 (E.D.N.C. 2008). In another case, the Fifth Circuit reversed a *federal* preliminary injunction against use of Louisiana's redistricting scheme for a judicial election based on principles of federalism—a "staunch admonition" by the Fifth Circuit against "intervention by the federal courts in state elections." *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). In *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), the federal courts rejected a challenge to a Maryland redistricting plan in large part because the plan "had been upheld [four years earlier] by the highest Maryland court"; "the continued validity of that decision had not been questioned in court prior to the adjournment of the last session of the legislature"; and the plaintiffs' claims "turn[ed] on legal questions, the answers to which [were] not clearly or determinatively established." *Id.* at 609-10. This case is wholly different: Legislative Defendants have been on constant notice that the 2016 Plan is an unconstitutional partisan gerrymander; the General Assembly is in session now to enact a proposed remedial map if it so chooses; and this Court's decision in *Common Cause v. Lewis* conclusively answers the legal questions in this case.

Notably, in several of the cases Legislative Defendants cite, courts withheld more intrusive judicial relief because the state legislature at issue had demonstrated good-faith efforts to establish lawful redistricting plans. The Fourth Circuit in *Maryland Citizens* highlighted the state legislature's "demonstrated purpose to achieve a constitutional apportionment," concluding that these pure intentions deserved "immunity" from a legal challenge in close proximity to the next election. *Id.* at 610. The district court in *Klahr v. Williams*, 313 F. Supp. 148, 152-53 (D. Ariz. 1970), denied a preliminary injunction where "the failure to have presently for Arizona a valid and effective plan for redistricting and reapportionment is [not] the result of obduracy on the part of the present Legislature," but rather factors outside of its control. And in *Kilgarlin v. Martin*, 252 F. Supp. 404, 446 (S.D. Tex. 1966), the court denied relief based on "demonstrated Legislative willingness to enact a valid legislative apportionment law for the State of Texas."

Legislative Defendants have demonstrated no similar "purpose" or even "willingness" to draw lawful election districts. To the contrary, Legislative Defendants have gerrymandered North Carolina's congressional and state legislative maps over and over again this decade, without apparent remorse.

D. Plaintiffs Did Not Delay in Bringing This Case

Legislative Defendants assert that Plaintiffs' supposed "delay in bringing this case" precludes preliminary injunctive relief. LD Opp. 24; *see id.* at 1, 2. But Plaintiffs reasonably brought this case barely three months after the conclusion of the *Rucho* case, and less than one month after this Court's decision in *Common Cause v. Lewis*. As Legislative Defendants know, for nearly three years following enactment of the 2016 Plan, other plaintiffs were actively challenging the plan as an unconstitutional partisan gerrymander in federal court. *See Rucho*, 139 S. Ct. at 2491-92. For nearly half of this period—from January 2018 through June 2019—the 2016 Plan was on-again-off-again, as the case ping-ponged between the federal district court

and the U.S. Supreme Court through a series of injunctions, stays, and vacaturs. *See id.* at 2492-93. Nothing required Plaintiffs to challenge the 2016 Plan in state court during this period. Indeed, if Plaintiffs had challenged the 2016 Plan in state court before the *Rucho* case concluded on June 27, 2019, Legislative Defendants almost certainly would have moved to stay the state-court proceedings based on the ongoing federal litigation, and such a stay might well have been granted. For this reason, Plaintiffs could not challenge the 2016 Plan in their November 13, 2018 complaint in *Common Cause v. Lewis*. Doing so would have risked a stay of the entire case, and almost surely would have resulted in a stay of the challenge to the congressional plan. Plaintiffs thus could not have brought this case "in 2016, 2017, [or] 2018." LD Opp. 24.

Legislative Defendants further contend that Plaintiffs could have brought this case "in June 2019," apparently within one business day after the *Rucho* decision was issued on June 27. Even if that were so, it would not have made sense for Plaintiffs to bring a state constitutional challenge to the 2016 Congressional Plan before—or in the midst of—the trial in *Common Cause v. Lewis*. Again, Legislative Defendants surely would have sought a stay of a newly filed lawsuit raising the same legal questions that this Court was then considering in *Common Cause*. In these circumstances, it was entirely reasonable for Plaintiffs to bring this case promptly after this Court issued its judgment in *Common Cause* and Legislative Defendants announced they would not appeal. At that point, the relevant legal principles were established, and no other litigation was ongoing that would impede prompt resolution of the claims here.

In *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), cited by Legislative Defendants (at 25), the U.S. Supreme Court rejected a preliminary injunction because the plaintiffs "did not move for a preliminary injunction … until *six years*, and three general elections, after [Maryland's] 2011 map was adopted, and *over three years after the plaintiffs' first complaint was filed*." *Id.* at

1944 (emphases added). By contrast, here, Plaintiffs moved for a preliminary injunction *one business day* after filing their Verified Complaint. Nor does *Benisek*'s reliance on "orderly elections" or "legal uncertainty" undercut the basis for a preliminary injunction here. 138 S. Ct. at 1945; *see* LD Opp. 25. As discussed above, the State Board of Elections has confirmed that the March 2020 primaries can be administered properly, without any need for delay, so long as the State Board receives the final new map by December 15, 2019. And this Court's decision in *Common Cause v. Lewis* eliminates any conceivable legal "uncertainty" about partisan gerrymandering generally in North Carolina or the 2016 Plan specifically—the 2016 Plan violates the North Carolina Constitution under *Common Cause*. Legislative Defendants note that "the North Carolina Supreme Court has not approved this theory," Opp. 25, but that is solely because Legislative Defendants themselves declined to appeal this Court's judgment.

Legislative Defendants suggest that the Court should not bother ordering a fair map now because North Carolina will redraw its congressional districts after the 2020 census anyway. LD Opp. 23-24. This is a dim view of the voting rights of the citizens whom Legislative Defendants were elected to represent, and this Court should not accept such cynicism. Any unconstitutional election that infringes on voting rights is one too many. And, although there is only one more election cycle before the next redistricting in 2021, much remains at stake. The 117th United States Congress, which will be elected in November 2020, will decide issues of extraordinary importance to every North Carolinian and indeed every American.

Lastly, Legislative Defendants' assertion that gerrymandering the 2016 Plan for partisan gain was "necessary" to avoid allegations of racial gerrymandering, *see* LD Opp. 10-11, 26-27, is a non sequitur. After the prior 2011 plan was invalidated as an unconstitutional racial gerrymander, Legislative Defendants could and should have drawn a remedial plan that did not

discriminate against either African American voters or Democratic voters. If Legislative Defendants wanted to avoid allegations that they were discriminating against African American voters, they could have simply not discriminated against African American voters. They did not need to discriminate against Democrats to accomplish this goal. Even more absurd is Legislative Defendants' suggestion that Plaintiffs' "own lawyers" somehow encouraged Legislative Defendants to gerrymander the 2016 Plan for Republican gain by bringing racial gerrymandering lawsuits. LD Opp. 26. Legislative Defendants' actions were theirs and theirs alone.

CONCLUSION

For the reasons stated above and in Plaintiffs' opening memorandum of law, the Court should enter the requested Preliminary Injunction.

Respectfully submitted this the 23rd day of October, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

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