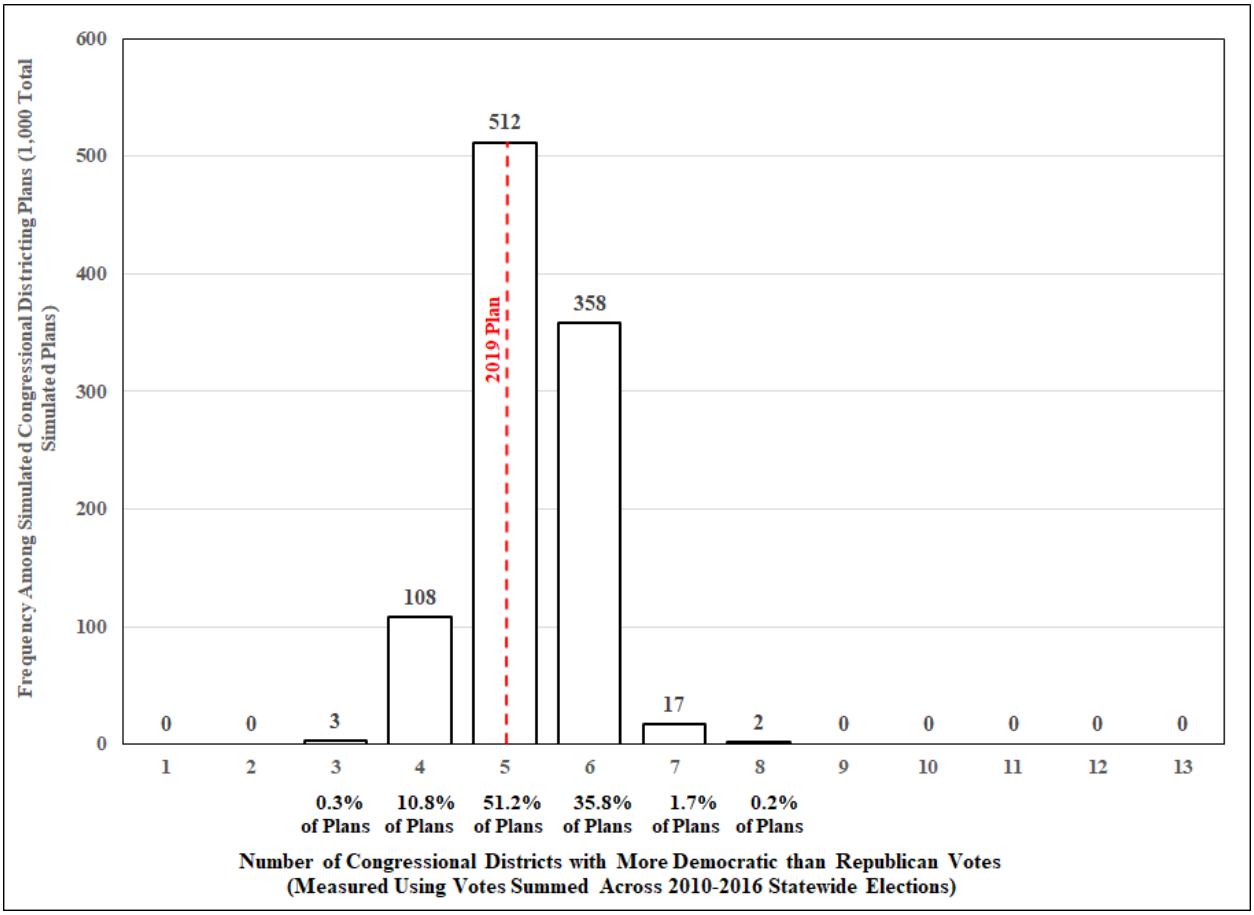
STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 19 CVS 12667
REBECCA HARPER, *et al.* *Plaintiffs*, v. REPRESENTATIVE DAVID R. LEWIS, *et al* *Defendants*.	**LEGISLATIVE DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs' Response to Legislative Defendants' Motion for Summary Judgment demonstrates that this case is moot. None of the cases cited by Plaintiffs are on point, and none involve a redistricting action in which a new plan was enacted prior to final judgment.

Plaintiffs' argument that the General Assembly "recreated" the 2016 Plan in the 2019 Plan has been proven baseless by their own evidence. Late Friday night, November 22, 2019, Plaintiffs finally produced some of the data relied upon by Dr. Chen in his latest work regarding the 2019 Plan. That data demonstrates that the most typical seat share from Dr. Chen's 2000 simulated maps is *eight* Republicans and *five* Democrats. As the chart below shows from Dr. Chen's Simulation Set 2 (which attempts to respect incumbent residences), a *majority* of the 1000 simulated maps—51.2%—produced just *five* districts with a majority Democratic vote share.

Figure 1—Number of Set 2 Democratic-Favoring Congressional Districts from Dr. Chen's 1,000 Simulated Plans Versus the 2019 Plan (Measured Using 2010-2016 Election Composite)



The 2019 Plan is thus squarely in the range—indeed it is in the middle—of non-partisan maps drawn by Dr. Chen's algorithm. Plaintiffs' hyperbole that the map is a partisan gerrymander is provably false, and by their own expert's data no less.

Tellingly, Plaintiffs here, as in the legislative redistricting case, have failed to produce an alternative plan they claim is not a partisan gerrymander. Plaintiffs are apparently content to play whack-a-mole in which they take endless potshots at legislative congressional plans without disclosing a plan they contend is legal. The only alternative plans available came not from Plaintiffs but from Democratic legislators, and they were all rejected on a bipartisan basis. If

partisan gerrymandering is a riddle and the Plaintiffs have truly discovered the answer to it, then why can't they illustrate their answer with a map? An answer known only to Plaintiffs is no answer at all.

The 2019 Plan was produced after an historically transparent and non-partisan process. The map's possible political outcomes are consistent with computer-drawn maps by Plaintiffs' expert. There is no good reason to delay the 2020 election cycle. Accordingly, the Court should dismiss this case as moot.

I. *Harper* is Moot

Plaintiffs' Response is off the mark on mootness. Most glaringly they ignore state Supreme Court authority in favor of cases from the Court of Appeals. The North Carolina Supreme Court precedent is clear on three things:

- "[C]ourts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), cert. denied, 442 U.S. 929 (1979).
- When the General Assembly "revises a statute in a 'material and substantial' manner with the intent 'to get rid of a law of dubious constitutionality,' the question of the act's constitutionality becomes moot" and it is inappropriate for a court to opine on the constitutionality of new legislation when that legislation is not before the court. *Hoke County Bd. of Educ. v. State*, 367 N.C. 156, 159-60, 749 S.E.2d 451, 454-55 (2013) (citing *State v. McCluney*, 280 N.C. 404, 405-07, 185 S.E2d 870, 871-72 (1972)).
- In the redistricting context, courts need engage in a mootness analysis because "[t]he case is over" when the General Assembly enacts a districting plan even if the

constitutionality of the new plan "remains an unresolved matter." *Stephenson v. Bartlett*, 358 N.C. 219, 224-25, 595 S.E. 2d 112, 117 (2004).

The application of this principle is straightforward. The 2019 Plan is a new statute, and the 2016 Plan has no continued legal operation. An opinion on the 2016 Plan would be advisory, and Plaintiffs' demand for such an opinion (at 10-12) is meritless. Meanwhile, the 2019 Plan rises or falls on its own merits, requiring a new complaint, a new factual record, and (if a challenge is brought) new discovery.

Plaintiffs cite no case law to the contrary. The cases they cite hold that, "[a]s a general proposition, the repeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality." *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 182, 689 S.E.2d 576, 582 (2010) (cited at 9) (quotation and edit marks omitted). This rule cuts *against* Plaintiffs, not *for* them.

The reason the cases Plaintiffs cite did not find mootness was that the old law continued to operate over the claims at issue. In *Bailey*, the repealed statute "included a '*Savings provision*' which expressly provided that" the repeal of the statute "shall not affect any pending litigation." *Id.* at 183, 689 S.E.2d at 582 (emphasis in original, quotation marks omitted). Likewise, *Wilson v. N. Carolina Dep't of Commerce*, 239 N.C. App. 456, 461, 768 S.E.2d 360, 364 (2015), did not challenge a statute at all; the challenge was to a governmental body's refusal to produce information; a statute was amended to render that information "confidential," but (1) the underlying injury (refusal to produce it) remained and (2) the plaintiffs contended that the statute was not retroactive and therefore did not cover the information at issue. Similarly, *Lambeth v. Town of Kure Beach*, 157 N.C. App. 349, 352, 578 S.E.2d 688, 690 (2003), involved a change to a zoning ordinance that occurred mid-litigation, but that change did not impact the plaintiff's right

to use his property because he "was entitled to rely upon the language of the ordinance in effect at the time he applied for the permit." *Id.* Meanwhile, Plaintiffs' lead case, *Kinesis Advert., Inc. v. Hill*, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007), involved "counterclaims for rescission, declaratory judgment, and civil conspiracy," and *Hamilton v. Freeman*, 147 N.C. App. 195, 203, 554 S.E.2d 856, 861 (2001), involved an inmate class action and sought "specific performance of…plea bargains." Neither case involved a statutory amendment or repeal, and thus cast no light on the issues in this case.

In their Response as in their November 15 filing, Plaintiffs contend that this panel's February 11, 2018 order in *Dickson v. Rucho* supports their position that this case is not moot and that the Court retains the authority to review the 2019 Congressional Plan. But this panel's February 2018 ruling in *Dickson* does nothing to support Plaintiffs' arguments here. To the contrary, despite entering a judgment in favor of the *Dickson* and *NAACP* plaintiffs on both the state and federal constitutional claims asserted in their complaints (*Dickson v. Rucho,* Order and Judgment on Remand from the North Carolina Supreme Court, p. 5 (Feb. 11, 2018)), this panel rejected the plaintiffs' request to hold the case in abeyance "so as to be available to aid in the fashioning and enforcement of an appropriate remedy should federal court remedies prove incomplete." The *Dickson* and *NAACP* plaintiffs contended that holding the case in abeyance was necessary because "despite their successes before federal court forums, there may still be state constitutional issues that require resolution in the remedial legislative and congressional plans because the federal courts are only considering federal constitutional challenges." (*Id*. at pp. 5-6) In rejecting this request, this panel wrote:

> Therefore, as to the Plaintiffs' request to continue to hold this matter in abeyance, this three-judge panel concludes that the doctrine of mootness and judicial economy dictate that this litigation be declared to be concluded. The legislative and congressional maps now under consideration in federal courts are not the product

> of the 2011 redistricting legislation considered by this trial court, but rather the product of later acts of the General Assembly (see, See N.C. Sess. Law, 2016-1 (Congressional Plan) and N.C. Sess. Laws 2017-207, 2017-208 (Legislative Plan)) and the scrutiny of the federal courts. The 2011 Redistricting Plans no longer exist. There is no further remedy that the Court can offer with respect to the 2011 Plans. While Plaintiffs are certainly not foreclosed from seeking redress in the General Court of Justice of North Carolina for state constitutional claims that may become apparent in the 2016 and 2017 redistricting plans, those claims ought best be asserted in new litigation.

(*Id*. at pp. 6-7)

Dickson only underscores why this case is also moot. Plaintiffs rely on the portion of *Dickson* ruling that the 2011 plans violated equal-protection principles of the federal and state Constitutions. But the *Dickson* court did this only because the U.S. Supreme Court had already found the plans to violate the federal Equal Protection Clause, and, because the State Constitution "expressly incorporated" the same principles, it necessarily followed that the State Constitution was also violated. (Order at 5) This simply rendered the state court's "judgment consistent with the decisions of the United States Supreme Court"—nothing more. *Id.* The *Dickson* court claimed no free-wheeling license to review all issues raised; it expressly disclaimed that authority, as noted above. Here, there is no U.S. Supreme Court judgment with which any ruling hear need be rendered "consistent" or anything like that. *Dickson* is irrelevant.

In short, none of these decisions—and *no* decision Plaintiffs cite anywhere—holds that courts can issue an advisory opinion regarding a repealed law or that they may proceed to challenge an entirely new law when the old law was repealed on the same complaint and record. Setting all that aside, the Court of Appeals and other cases cited by Plaintiffs in their Response either pre-date these decisions by the Supreme Court establishing the governing principles or are in conflict with them if Plaintiffs' interpretation of these cases is correct.

All of the Court of Appeals decisions on which Plaintiffs rely pre-date the *Hoke County* decision cited by Legislative Defendants in their Motion for Summary Judgment and Supporting Memorandum of Law.[1] The *Hoke County* decision is clear that once a statute is replaced, it is inappropriate for a court to "express" an "opinion of the legislation now in effect" because questions regarding the constitutionality of the new legislation "are not before" the Court. 367 N.C. at 159-60, 749 S.E.2d at 454-55. To the extent these cases can be read in a manner that conflicts with the Supreme Court's edict in *Hoke County*, they should be ignored.

Plaintiffs' arguments suffer from a more fundamental problem: they don't account for the fact that no judgment has been entered in this case (and now cannot be because of the enactment of the 2019 Plan). The 2019 Plan fully replaced the 2016 Plan and the General Assembly did not provide for any contingencies—the 2019 Plan was effective the moment it became law. North Carolina has been a hotbed of redistricting litigation for nearly 40 years. In that time, dozens of redistricting plans have been challenged and redrawn. Yet despite that history, Plaintiffs do not cite even one instance where—as here—the General Assembly redrew a congressional plan before a final judgment that the plan was illegal. The General Assembly did so here at the invitation of the Court, which itself seemed to contemplate mootness in stating that enacting a new plan may eliminate the need for "disruptions to the election process" or "an expedited schedule for summary judgment or trial." (10-28 Order at 17)

Nowhere in Plaintiffs' briefing on the mootness issue have they cited a single decision by a North Carolina court stating that a case was not moot where the General Assembly replaced a

[1] Plaintiffs' citation of the Court of Appeals' decision in *Kinesis Advertising, Inc. v. Hill*, 187 N.C. App. 1, 20, 652 S.E.2d 284, 298 (2007) for the "relevant standards for mootness" is particularly useless because *Hill* contains no substantive explanation or applicable of the two "standards for mootness" listed. Nonetheless, based upon their plain language, both elements have been met because the 2016 Plan has been replaced by the 2019 Plan.

statute *before* a judgment was entered by a court invalidating the replaced statute. (That is likely because, to Legislative Defendants' knowledge, there isn't one.) In their Response, Plaintiffs argue that the Supreme Court's directive in *Stephenson* that the "case is over" following the enactment of a new districting plan is inapplicable here because no "final order" existed when N.C. Session Law 2019-249 was adopted and "this case still has not reached 'final disposition.'" (Pls' Resp. at 34) But these distinctions are exactly why the Supreme Court's directive that redistricting litigation end once a new districting plan has been adopted are even more applicable here.

As with the state law cases they cite, none of the federal authorities cited by Plaintiffs save their case from dismissal. In *Perez v. Perry*, 26 F. Supp.3d 612 (W.D. Tex. 2014) the court, applying federal mootness principles, found that claims related to a prior redistricting plan were not moot in part, because of "the presence of Plaintiffs request" for relief under Section 3(c) of the federal Voting Rights Act, a claim that does not exist here. And, as Plaintiffs concede in their Response, the law replacing the challenged redistricting plan at issue in *Hunt v. Cromartie*, 526 U.S. 541 (1999) is distinguishable because the law enacting the new plan "provides that the State will revert to the [challenged plan] upon a favorable decision of this Court." 526 U.S. at 545 n.1. N.C. Session Law 2019-249 contained no such reversion language.

Likewise, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018), turned on "*the remedial posture in which [that] case [was] presented*" (emphasis added). Moreover, even if the case were applicable (it is not), a ruling on federal law does not contravene the State Supreme Court's ruling on these same issues.

Nothing filed by Legislative Defendants in *Brewster v. Berger* is to the contrary. Plaintiffs resort to misrepresenting Legislative Defendants' recent response to a motion for preliminary injunction filed in that case. A copy of the response is attached as Exhibit 1. Legislative

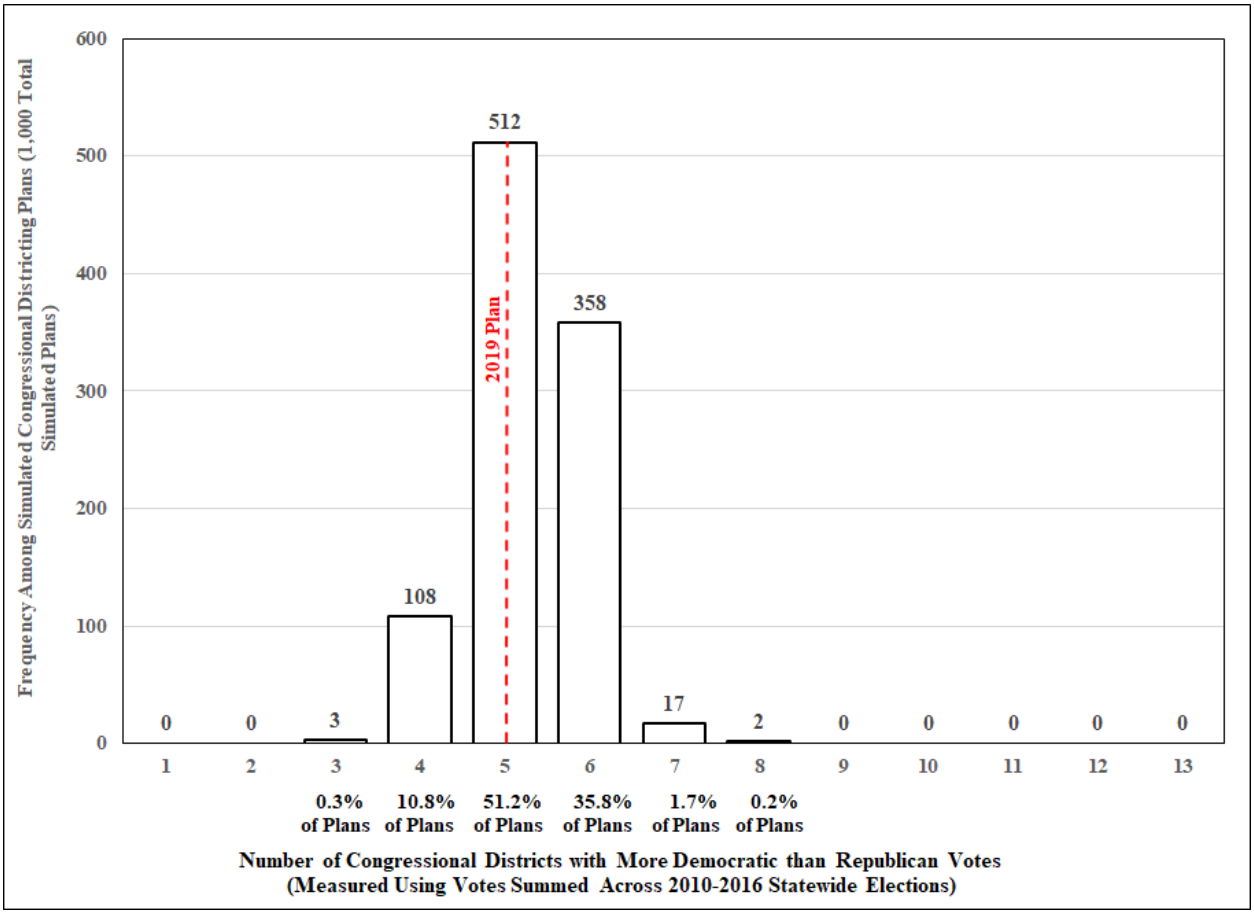
Defendants' argument was clear: "This Case is Moot." (Ex. 1 at 4) The first sentence of Legislative Defendants' first argument made it plain as day: "Due to the enactment of the 2019 Congressional Plan, both the *Harper* case and this case [*Brewster*] are moot and both cases should be dismissed." (*Id.*) If the federal court in *Brewster* agrees that the case is moot, then this case will be completely unaffected by *Brewster*. If, however, the *Brewster* court believes that voters' federal constitutional rights are being violated by the *Harper* plaintiffs' last-minute maneuvering over the state's congressional districts, then no action by this Court—including entering a judgment against the now-moot 2016 Plan—will prevent the federal court from protecting the federal constitutional rights of the *Brewster* plaintiffs. *Brewster* is therefore irrelevant to the mootness issues in this case.

II. Plaintiffs' Expert Proves the 2019 Plan is not a Gerrymander

Plaintiffs contend that the 2019 Plan is an "8-5 partisan gerrymander." Plaintiffs rely solely on analysis by Dr. Chen for that assertion even though other evidence—such as PlanScore's analysis—concludes that the map is much more competitive for Democrats. But even if Plaintiffs' contention that the 2019 Plan is an "8-5" map is true, then is an 8-5 map a partisan gerrymander? Dr. Chen's evidence says no.

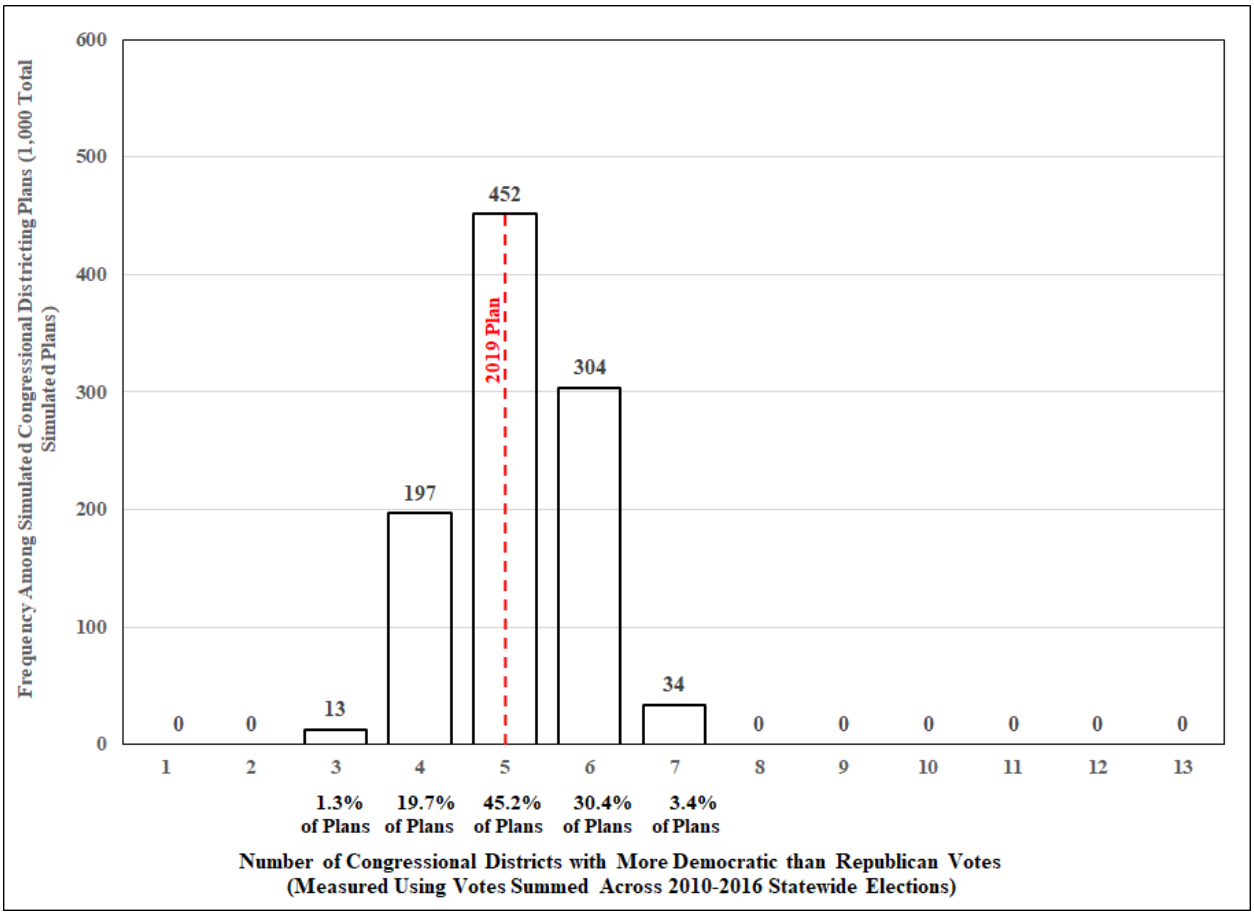
Data produced by Dr. Chen late Friday night, November 22, 2019, shows that *the most likely outcome* for North Carolina's congressional districts when drawn with non-partisan criteria using Dr. Chen's algorithm is an 8-5 map. See Expert Report of Janet Thornton, attached as Exhibit 2. The chart below shows that in Dr. Chen's Simulation Set 2 (which attempts to respect incumbent residences), a *majority* of the 1000 simulated maps—51.2%--produced *five* districts with a majority Democratic vote share.

Figure 2—Number of Set 2 Democratic-Favoring Congressional Districts from Dr. Chen's 1,000 Simulated Plans Versus the 2019 Plan (Measured Using 2010-2016 Election Composite)



In Dr. Chen's Simulation Set 1 the most likely outcome once again is five Democratic districts:

Figure 3—Number of Set 1 Democratic-Favoring Congressional Districts from Dr. Chen's 1,000 Simulated Plans Versus the 2019 Plan (Measured Using 2010-2016 Election Composite)



The Chen data obliterates Plaintiffs' claims that the General Assembly "recreated" the 2016 Plan in the 2019 Plan. As a matter of math that assertion makes no sense anyhow because nearly 45% of the state's population was moved to different districts from the 2016 Plan to the 2019 Plan. To the extent Plaintiffs rely on Dr. Chen's analysis on this point, it is telling that when Dr. Chen ran his analysis on the 2019 Plan, he did not (and could not) account for nearly half of the current incumbents' addresses. Dr. Chen's Simulation Set 2 accounts for the incumbents in office at the time of the 2016 redistricting. He claims that "almost all" of the 2016 incumbents

"are in office today" but that is not close to being true. Instead, at least six out of thirteen 2016 incumbents are no longer serving (and have been replaced by incumbents with different residence addresses) or are residing in different counties. For instance, Rep. Budd was not in office in 2016 and no 2016 incumbent resided in Davie County, his county of residence. The same is true for 2016 incumbent Rep. Ellmers, whose county of residence was Harnett County. Rep. Alma Adams was an incumbent in 2016 but now lives in Mecklenburg County, not Guilford County. Rep. Rouzer was also an incumbent but now resides in New Hanover County, not Johnston County. When adding Reps. Bishop and Murphy, both new to Congress in 2019, nearly half of the state's Congressional delegation is different or resides in different counties. Dr. Chen's analysis failed to account for this significant change.

Moreover, the criteria governing the 2016 Plan, which was purportedly used by Dr. Chen in his analysis, is significantly different from the 2019 criteria. First, and most obviously, partisan considerations and election data were not part of the 2019 criteria but were expressly part of the 2016 criteria. In addition, the 2019 criteria do not require "maximizing" compactness, but simply that districts maintain or improve compactness. These flaws are in addition to the fact that the legislature made clear policy decisions to draw an entire district within Wake and Mecklenburg Counties and to keep Cumberland and Guilford Counties whole. Dr. Chen could have taken these significant factors into account by simulating new plans based on the 2019 Plan's actual characteristics, but did not do so. Dr. Chen's analysis in no way supports any notion that the 2019 Plan is a "recreation" of the 2016 Plan.[2]

[2] In another move that smacks of desperation, Plaintiffs quote remarks by Senator Tillman. Plaintiffs do not disclose that Senator Tillman admitted that he was not on the redistricting committee and did not participate in any way in the redistricting that produced the 2019 Plan. N.C. Senate Floor Session, 11-15-19, Tr. p. 46 ("I wasn't even invited to draw our map."). He did not draw any maps or otherwise provide any input on them, a fact that was independently confirmed

in the record on the Senate floor by Senator Newton, who was on the redistricting committee. *Id.* at Tr. p. 60 ("I just want to clarify for folks that Senator Tillman, as he said, was not involved in the committee process, he was not involved in establishing the process that we used to try to develop a fair process, a nonpartisan process without political consideration."). Senator Tillman's comments obviously neither speak for the entire body of the legislature, nor the statute itself. Moreover, the comments were plainly directed at Democratic members' demand that the General Assembly use partisan data for Democratic gain and expressed frustration of Democrats' insistence on using the label "fairness" to refer to a map drawn to intentionally overcome the inherent Democratic geographic disadvantage in geographic-based districting schemes. In short, Senator Tillman was, albeit not in the most artful way, explaining why there is no affirmative obligation to achieve proportional representation. This Court has held as much, and that proposition is not in dispute here.

Furthermore, courts "are not at liberty to accept the understanding of any individual as to the legislative intent" of any statute. *See D&W, Inc v. City of Charlotte,* 268 N.C. 577, 581-82 121 S.E.2d 241, 244 (1966) (quoting *State v. Partlow,* 91 N.C. 550, 552 *(*1884)). *See also Abernethy v. Board of Comrs of Pitt County,* 169 N.C. 631, 86 S.E. 577, 581-82 (1915) ("In order to exclude an inference that may possibly be drawn from the opinion in regard to the statements of the senator and representatives, on the one side… we will add that we have not considered them at all as it is not within our province or jurisdiction to construe statutes by such extraneous matter.") This is because "[t]he meaning of a statute and the intention of the legislature which passed it, cannot be shown by the testimony of a member of the legislature; it must be drawn from the construction of the act itself." *Id.* (citing *Goins v. Trustees Indian Training School,* 169 N.C. 736, 789, 86 S.E. 629, 631 (1915)). This rule on interpretation of intent represents the fact that statutes are "an act of the legislature as an organized body" and expresses the will of that body. Therefore it only makes sense that the statute must "speak for and be construed by itself" otherwise "each individual might attribute to it a different meaning…" *Id.* (quoting *State v. Partlow,* 91 N.C. 550, 552 *(*1884)). More recently, North Carolina courts have held that not even *sworn* testimony of a member of the legislature is sufficient to show intent of the legislature. *See Bell Arthur Water Corp. v. North Carolina Dept. of Transp.* 101 N.C. App. 305, 310 399 S.E.2d 353, 356 (1991) (holding that the trial court correctly refused to allow the affidavit of a legislator into evidence as "the intention of the legislature cannot be shown by the testimony of a member." (quoting *Styers v. Phillips,* 277 N.C. 460, 472, 178 S.E.2d 583, 590 (1971)). Plaintiffs would fare no better under federal law, as the United States Supreme Court has routinely held that remarks of one member of a legislative body are not controlling or even properly considered when determining statutory intent. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *U.S. v. Monsanto,* 491 U.S. 600, 610 (1989) (finding the reliance on comments made by several legislators "unavailing" as such statements "form a hazardous basis for inferring the intent behind a statute" (quoting in part *United States v. Price,* 361 U.S. 304, 313 (1960)).

III. Plaintiffs' Failure to Produce An Alternative Plan Should be Dispositive

Plaintiffs have failed to produce an alternative plan they claim is not a partisan gerrymander. The only alternative plans available came not from Plaintiffs but from Democratic legislators, and they all went down in bipartisan flames. If the "right" map is so easy to find, then why haven't Plaintiffs produced it? Plaintiffs' failure to produce a map acceptable to them is particularly perplexing since it is their own expert witness who is providing the purported evidence of every map so far developed by the legislature being an "outlier." Surely Plaintiffs and their expert have devised or can devise a map in which all of the red stars on Chen's Figures 1, 2, 3, and 4 align in the exact "right" spot. But rather than produce such a map, Plaintiffs have not even hinted at where the red stars should be in order for a map not to be an outlier. Perhaps even Plaintiffs don't know what a fair map looks like and are afraid to stick their necks out like the legislature and actually draw a map that is subject to the same scrutiny they apply to the 2016 and 2019 Plans.

It appears instead that Plaintiffs are content to play whack-a-mole in which they take endless potshots at congressional plans not drawn by them without disclosing a plan they contend is legal. Perhaps they assess that if they whack at enough legislatively-drawn maps, then the Court will take over the map-drawing process and draw a map in a black box process that Plaintiffs presume will be better for their political interests. The problem is that because Plaintiffs haven't even tried to draw an acceptable map, or pinpoint the spot on Dr. Chen's charts where the red stars align perfectly (for Plaintiffs), then it is entirely possible that the Court will also guess wrong in drawing a map. Perhaps even then Dr. Chen will once again produce a chart with red stars that don't line up to Plaintiffs' liking and they will appeal to a higher court. With the benefit of this Court's ruling in *Common Cause v. Lewis*, the Plaintiffs no longer have an excuse for endless

complaining about maps without producing one that is acceptable. Their failure to do so highlights the lack of merit in their current position. This Court should decline to upend the electoral calendar and system on this basis alone.

CONCLUSION

The Court should dismiss this action as moot.

Respectfully submitted this the 26th day of November, 2019.

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CERTIFICATE OF SERVICE

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