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

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.	)	Case No: 5:19-cv-452

INTRODUCTION

Plaintiffs waited over three years to file this case. Now that they have finally taken the plunge, they abruptly call a state of emergency and claim the right to on-demand judicial relief, which would throw North Carolina's elections machinery into chaos. Their characterization of this request as a modest "prohibitive" injunction which there is "more than enough time" to grant is entirely inaccurate. Their brief expressly demands a new redistricting process and map, and it expressly demands that an interim plan govern the March 2020 primary elections. A new redistricting plan is not the status quo, and the motion should fail for that reason alone. Indeed, redistricting is an enormous task, and a demand for a *provisional* redistricting, and on this time frame, is facially untenable. A redistricting may ultimately prove legally unfounded and unnecessary, but what it *will* be is expensive. Worse, a plan that governs the primaries should also govern the general election, and this case cannot possibly be resolved on the merits before that

happens. Hence, Plaintiffs' motion is nothing short of a demand to win this case outright, today with no depositions, no discovery, no vetting of their work, no trial, no defense—nothing.

North Carolina deserves better. Plaintiffs who do not notice for years that their supposed rights are being violated have no basis to call the "right" to relief "clear." Mem. ISO PI Mot. 31. Nor is warp speed an appropriate pace to resolve the issues here, which are complex, or (if necessary) to conduct a judicial remedial process, which is even more complex.

Besides, executing Plaintiffs' demand is impossible. Their reliance on the current legislative redistricting case, *Common Cause v. Lewis*, as a model for a provisional redistricting here only shows how nonsensical their demand is. Setting aside the distinguishing fact that the legislative redistricting is occurring nearly a year after the case was filed, Plaintiffs ignore that the remedial process is still not concluded nearly seven weeks after final judgment in that case. Thus, even assuming that this provides a paradigmatic model (it does not), the best case scenario would be that a plan could be adopted in mid-December *after the candidate filing period begins*. It is, quite simply, impossible through a judicial remedial process for a new plan to be created, enacted, approved, and implemented before candidate qualification begins, and the campaign season is already underway. And, because the harms to the Defendants (and all congressional candidates and voters, alike) overwhelmingly outweigh the harms to Plaintiffs, the equities alone bar relief.

The Court need not address Plaintiffs' likelihood of success on the merits, but if it does, it has no choice but to confront an issue of federal law. Plaintiffs challenge *congressional* districts, and the *federal* Constitution assigns that responsibility to the General Assembly, not the courts. The Court cannot usurp that role. The people of North Carolina have not, through valid legislative processes, legislated standards to govern cases like this, and without such standards, no role for the courts applying state law exists in light of the federally prescribed balance of power. Plaintiffs

are unlikely to succeed on the merits for this reason and those discussed below. The motion should be denied.

FACTUAL BACKGROUND

A. The Democratic Party-Controlled General Assembly Establishes the Principle That Partisan Gerrymandering Is a "Legitimate" Basis for Drawing Congressional Districts

"North Carolina has an extensive history of problematic redistricting efforts tracing back to the 1730s, which has generated significant litigation." *Dean v. Leake*, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008). From Reconstruction through the 2000 redistricting cycle, the Democratic Party controlled the redistricting process and was responsible for those "problematic redistricting efforts."

1. "After the Reconstruction Era and the rejuvenation of the Democratic Party, the practice of gerrymandering again became a favored tactic in gaining partisan control of the congressional delegation." D. Orr, Jr., The Persistence of the Gerrymander in North Carolina Congressional Redistricting, 9 Southeastern Geographer 29, 43 (1969). The paradigmatic example were the "bacon-strip" districts:

> Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic interests prevail. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats have chosen the dispersal alternative. A few Republican counties are grouped with Democratic counties in the central section of the state. The effect created one-county wide congressional districts that run horizontally across the state, creating what some have called bacon strips.

Leroy C. Hardy, Considering the Gerrymander, 4 Pepp. L. Rev. 243, 258–59 (1976). "One such district extended from Pender County on the coast, westward along the South Carolina line through seven more counties all the way to Mecklenburg, a total distance of approximately 250 miles." Orr, *supra*, at 43.

No equal-population requirement curbed the Party's political aims, and the notion that a partisan-fairness requirement was lurking then and there in the State Constitution was simply preposterous. *See* Orr, *supra*, at 43. The result of "180 years" of Democratic dominance in redistricting was "the rural domination of the state's congressional delegation" and the frustration of "the rising tide of Republicanism" in the State. Orr, *supra*, at 39.

In fact, when a Republican congressional candidate, Charles Jonas, successfully tailored his message to win one of the bacon-strip districts, the Democratic General Assembly promptly redrew the lines to pair him with a Democratic member in a district predominantly composed of Democratic-leaning territory (which could as easily be identified then as now, because vote totals then and now are reported at the precinct level). *Id.* at 44. But voters have free will:

> Amid Republican charges of gerrymandering, Jonas soundly defeated [the Democratic incumbent] in the 1962 election. In addition, when the legislators 'stacked' the Eighth District boundaries so as to include a preponderance of Democratic counties, they simultaneously gave the adjoining Ninth District an increased Republican character, an oversight which allowed another Republican, James T. Broyhill of Caldwell County, also to be elected to Congress.

Id. Rep. Jonas received no assistance from the state courts in winning elections.

In the first redistricting after the Supreme Court announced the one-person, one-vote rule, the Democratic-controlled General Assembly drew districts that "were as distorted as could be found in any state in the country." Orr, *supra*, at 46. A court invalidated that plan for failure to comply with the one-person, one-vote rule, but allowed an election to occur under it because of "the tremendous gulf which existed between the status quo and the constitutional requirements" and the "imminence of the 1966 primaries." *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966). Democrats set right back to work, drawing a district that was publicly described as "a dinosaur or a left-handed monkey wrench" that was "'packed' with a projected vote favorable to

Representative Jonas far in excess of that needed to win." *Id.* at 49. Other districts were "hardly compact and barely contiguous." *Id.* The federal court expressed its disappointment with the obvious gerrymandering, noting "[r]egretfully, we note that tortuous lines still delineate the boundaries of some of the districts" and hoped that, "following the 1970 decennial census," the districts would be drawn to be "reasonabl[y] compact." *Drum v. Seawell*, 271 F. Supp. 193, 195 (M.D.N.C. 1967). Nevertheless, it allowed the districts to be used, allowing the Democratic Party to again achieve the spoils of their electoral victory—which "is a compelling reminder that, indeed, 'elections have consequences.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. July 08, 2013) (Ridgeway, Crosswhite, Hinton, JJ.).

2. The Democratic Party was not done. After the 1980 census, the Democratic-controlled general assembly redrew the congressional lines, and a paramount concern was its "need…to protect its turf and its incumbents." Beeman C. Patterson, The Three Rs Revisited: Redistricting, Race and Representation in North Carolina, 44 Phylon 232, 233 (1983). Among the results of this approach "was the incongruous lines drawn in the Second Congressional District to satisfy the incumbent, L.H. Fountain, who wanted to be sure that urban areas, such as the city of Durham, would be excluded from his district," resulting in an odd shape "called 'Fountain's Fishhook' because of the way it curved around urban areas." *Id.* In creating the district, the General Assembly used race as a proxy for politics, as "white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters." J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 2487 (1999). Indeed, "racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the 'ripple effects' of changes in one district on the shape of another." *Id.*

"The incident shows that in drawing districts for a specific political purpose, 20th Century North Carolina legislators [were] not much different from their counterparts in 19th Century Massachusetts.' 'The Legislature,' [a prominent newspaper] paper noted in another editorial a few days later, 'has given the state districts that are hooked, humped, and generally ungainly – in a word, gerrymandered – to protect incumbents.'" *Id.* at 251.

3. In 1992, the Democratic-controlled General Assembly drew perhaps the most infamous district of all time, known as the freeway district:

> It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"

Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (*Shaw I*) (citations omitted). In fact, the entire redistricting plan was, as one redistricting expert described it, "a contortionist's dream," composed of four of the least compact districts in the nation and districts that "plainly violate the traditional notion of contiguity." Timothy G. O'Roarke, *Shaw v Reno* and the *Hunt* for Double Cross-Overs, 28 Political Science and Politics 36, 37 (March 1995). The plan was drawn in secret by Democratic political consultant John Merritt and "emerged as the result of consultations among aides to incumbent congressmen and members of the redistricting committees"—which, of course, occurred in secret. *See Shaw v. Hunt*, 861 F. Supp. 408, 466 (E.D.N.C. 1994). In short, "the North Carolina legislature threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race." *Id.*

Republican-affiliated redistricting plaintiffs asserted that the plan was an unconstitutional partisan gerrymander, and their claim was promptly dismissed. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 506 U.S. 801, 113 (1992).[1] Another set of plaintiffs challenged the majority-minority districts as racial gerrymanders, and their claim succeeded. *See Shaw I*, 509 U.S. at 657–58 (recognizing a cause of action for racial gerrymandering); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (*Shaw II*) (striking down the district under this cause of action).

In dissent, Justice Stevens observed "that this case reveals the *Shaw* claim to be useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends." *Shaw II*, 517 U.S. at 920 (Stevens, J., dissenting). He observed that Democratic legislators "rejected Republican Party maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans." *Id.* at 937. In other words, the hideous "*Shaw*" districts were, in his view, really partisan gerrymanders.

Justice Stevens anticipated the Democratic Party's next move. The General Assembly enacted a new congressional plan containing a new bizarrely shaped district, which "retains the basic 'snakelike' shape and continues to track Interstate 85." *Hunt v. Cromartie,* 526 U.S. 541, 544 (1999) (*Cromartie I*). This time, the General Assembly asserted that it "drew its district lines with the intent to make District 12 a strong Democratic district." *Id.* at 549.

The Supreme Court accepted this "legitimate political explanation for its districting decision" and rejected the challenge—thereby allowing the Democratic Party to reap the benefit of its control of the General Assembly. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). In fact, the Supreme Court gave the partisanship defense a privileged status in redistricting

[1] The "Blue" in that case was now-Senator Dan Blue, who was responsible for the bizarre districts.

litigation. It emphasized that, where this defense is raised, extra "[c]aution is warranted," given that "race and political affiliation are highly correlated." *Id.* at 242. Most importantly, the Supreme Court imposed an onerous requirement for a redistricting plaintiff, when the partisanship defense is raised, to present "alternative ways" in which "the legislature could have achieved its legitimate political objectives" with a "greater racial balance." *Id.* at 258. Partisanship had been established as the best defense to a claim of racial gerrymandering.[2]

4. Now that partisan gerrymandering had been approved—and became a legally advisable tactic—the Democratic Party plowed into the 2001 redistricting with partisan impunity. The 2001 congressional plan, like all the Democratic Party's plans, "were drawn outside of the General Assembly," in secret. Churchill Dep. 19:11–16. What was *not* secret was the partisan motive. Democratic Representative Wright stated expressly at a Redistricting Committee hearing that the plan was drawn "with the intent of certainly keeping the Democratic advantage." Nov. 14, 2001 House Redistricting Comm. Tr. 25:22–26. He also agreed that District 13, another visible oddity that ran from Wake County to the Virginia border and then south into Guilford county to pick up highly Democratic areas, was "done to make sure that the 13th was a Democratic district" and, in fact, to be "a more stronger Democrat district than" before, and he expressly clarified that Democratic members were "looking at ways to enhance the performance Democratically…." Nov. 14, 2001 House Redistricting Comm. Tr. 36:8–37:21.[3]

[2] Although a state may also defend on the ground that "traditional districting principles," rather than race, predominated, this has proven to be a weak defense. A plaintiff need not show "alternative ways" in which the redistricting plan could have been drawn, and the plaintiff need not show a departure from traditional districting principles at all. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797–800 (2017).

[3] Like the 1992 Congressional Plan, Democrats in 2001 drew their plan that was eventually adopted by the General Assembly "off site" and in secret. *Dickson v. Rucho* Deposition of Erika Churchill pp. 17-19; 156-160, attached hereto as Exhibit 1. The repeated attacks on Legislative

Because this was the legally correct course of action, none of these districts were invalidated. Indeed, no challenge was filed.

B. The Republican Party-Controlled General Assembly Is Denied the Same Partisan-Gerrymandering Defense for Failure To State a Partisan Purpose at the Time of Redistricting

In 2011, the Republican Party controlled both chambers of the General Assembly for the first time since Reconstruction. The Party gained that control by winning seats in House and Senate redistricting plans drawn and passed by a Democratic-controlled legislature.

The General Assembly redistricted the State's congressional districts, and the resulting map contained two districts with a black voting-age population (or "BVAP") of above 50%. *See Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017). Plaintiffs (represented by many of the lawyers representing the challengers in this litigation) challenged both districts as racial gerrymanders. The State defended one of those, District 1, as supported by the compelling state interest of Voting Rights Act compliance. But the other, District 12, was, according to the State, drawn for predominantly political, not racial purposes. *See id.* at 1468–69, 1472–73. That is, the State raised the *Cromartie II* defense as to that district. In the meantime, a substantially identical challenge was rejected in the North Carolina Supreme Court. *See Dickson v. Rucho*, 368 N.C. 481, 500 (2015), *modified on denial of reh'g*, (2016).

In addressing District 12, the district court rejected the *Cromartie II* defense. *Harris v. McCrory*, 159 F. Supp. 3d 600, 618–21 (M.D.N.C. 2016). Central to that ruling was its finding that the political explanation was not a sufficiently prominent rationale to protect District 12 because it "was more of a post-hoc rationalization than an initial aim." *Id.* at 620. The court emphasized that the redistricting chairpersons' contemporaneous public statements "attempted to

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Defendants because a consultant drafted the initial plan in private is hypocritical. Further where a plan is drawn is irrelevant as to whether it violates the Constitution.

downplay" the role of politics and did not, at the time, assert "that their sole focus was to create a stronger field for Republicans statewide." *Id.* If it had, the legislature could have had sufficient justification for the plan. That was the position of the plaintiffs in that case, represented by the lawyers here. Their briefing excoriated the General Assembly for "revisionist history" and for public statements affirming the importance of the Voting Rights Act while omitting any reference to partisanship. Appellees' Br., *McCrory v. Harris*, 2016 WL 5957077, 20 (2016).

The Supreme Court affirmed. *Cooper*, 137 S. Ct. at 1472–81. It concluded that the North Carolina Supreme Court's decision was irrelevant, *id.* at 1467–68, that the district court's findings that the political explanations were post-hoc justifications satisfied the clear-error standard, *id.* at 1472–80, and that *Cromartie II*'s requirement of an alternative redistricting map was inapplicable, *id.* at 1480–81. Those latter two findings drew a four-Justice dissent, complaining that "[a] precedent of this Court [i.e., *Cromartie II*] should not be treated like a disposable household item…to be used once and then tossed in the trash." *Id.* at 1486 (Alito, J., dissenting).

C. Chastened by the Federal Courts for Failing To Articulate a "Legitimate Political Justification" at the Time of Redistricting, the General Assembly Establishes a Satisfactory Record in the 2016 Redistricting

Duly chastened for failing to establish the predicates of the most potent redistricting defense—created by Democrats, for Democrats—the General Assembly set to work redistricting with the Supreme Court's—and Plaintiffs' lawyer's—admonitions in mind. The General Assembly did not consider race in redrawing the congressional lines. But because not considering race was insufficient in *Cooper*—since the courts found that it *did* use race despite its contrary assertions—it was necessary to make a clear record to establish the *Cromartie II* defense.

The General Assembly's leadership instructed the map-drawing consultant to use election data, which the Supreme Court approved. *Cromartie I*, 526 U.S. at 542 ("[A] jurisdiction may engage in constitutional political gerrymandering."). It also clarified the public record, making its

political aims known. The General Assembly's "Partisan Advantage" criteria endorsed "reasonable efforts" to preserve the then-current partisan composition of the delegation. And, in light of the federal courts' reliance on public statements in finding that politics did not predominate, the General Assembly's leadership clarified the public record, representing that politics were considered and that there was an express goal of maintaining the 10–3 Republican–Democrat split in the delegation. The General Assembly did all the things the *Harris* plaintiffs' lawyers accused it of failing to do.

The strategy worked. No one has challenged the districts as racial gerrymanders.

D. Plaintiffs Do Nothing for Three Years and Abruptly Declare a State of Emergency, Demanding an Immediate Redistricting Before This Case Is Even Resolved

Plaintiffs claim to be registered Democrats who have consistently voted for Democratic candidates for the U.S. House of Representatives. *See* Compl. ¶¶ 6–19. If that is accurate, then they have benefited both from the Democratic Party's monopoly over redistricting and from Democratic Party lawyers' successfully rendering Democratic partisanship sacrosanct—as well as from the effects of Democratic Party redistricting dating back to Reconstruction.

Over three years passed from only the second congressional redistricting by Republicans since Reconstruction, and Plaintiffs did nothing. Two primary and two general elections were held under the congressional plan, and at least one special election was held. On June 27, 2019, the Supreme Court upheld the plan from a federal-court challenge alleging "partisan gerrymandering." *See Rucho v. Common Cause*, 139 S. Ct. 2848 (2019). Still, Plaintiffs did nothing.

Then, on September 27, 2019, Plaintiffs filed this case asserting that "partisan gerrymandering" violates the State Constitution. They then filed the instant motion for injunctive relief. Their request for *provisional* injunctive relief seeks "a remedial plan for use in the March 2020 primaries." Mem. ISO PI Mot. 48.

ARGUMENT

I. Preliminary Injunctive Relief Is Categorically Unavailable

"[T]he purpose of an interlocutory injunction is solely to retain the status quo." *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 400, 474 S.E.2d 783, 788 (1996). Because Plaintiffs' motion seeks to upend the status quo, it cannot be granted.

The status quo is the congressional redistricting plan Plaintiffs challenge. *See Montano v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) ("[A]n injunction in this case will alter the status quo, namely declaring Resolution 402 invalid will force the Legislature to enact a new redistricting plan."). It was enacted in 2016 and has been used in two general elections and at least one special election since. The 2016 plan is scheduled to be used in the upcoming 2020 elections, a fact known years ago. Only by altering the status quo can Plaintiffs obtain relief.

Binding precedent bars Plaintiffs' motion. In *Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963), the State Supreme Court held that movants "asserting rights they have not previously exercised" were "not seeking to preserve the status quo" and therefore were categorically barred from preliminary relief. *See also Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 237 N.C. 88, 96, 74 S.E.2d 430, 436 (1953) (reversing a preliminary injunction because it was "not to restore what has been unlawfully changed, but to create a new condition not theretofore existing; not to prevent a wrong but to obtain opportunity to exercise a right; not to prevent a disruption of existing service, but to create a new service."); *Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 740, 71 S.E.2d 21, 23–24 (1952) (same). This case is no different. The rights asserted are ones Plaintiffs have "never exercised," since they have never voted under a redistricting plan that satisfies their notion of a lawful plan.

Plaintiffs expose this flaw by demanding (at 1, 48) a *new redistricting plan* at the preliminary-injunction stage. By definition, that is not a request to preserve the status quo, since the Court cannot revert elections to some previously existing state of affairs. The 2011 plan cannot be used because it was enjoined by a federal court, and all prior plans are also off limits because they are outdated in light of the 2010 census and violate the one-person, one-vote principal. Further, all prior redistricting plans violate Plaintiffs' notion of partisan fairness, since they were drawn by Democratic Party representatives self-evidently for Democratic Party gain.[4] Only a new plan can afford Plaintiffs the relief they purport to deserve, and this status-quo-altering relief is unavailable as a matter of law.

This form of relief has been repeatedly rejected, even in federal court where injunctions altering the status quo are in some instances tolerable.[5] *See, e.g., Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (taking it as a given that a redistricting plan could not be *created* and *imposed* at the preliminary-injunction stage and thus observed that preliminary injunction could take only the form of delaying an election); *Diaz v. Silver*, 932 F. Supp. 462, 468–69 (E.D.N.Y. 1996) (cataloguing cases rejecting Plaintiffs' demanded relief); *see also Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (denying preliminary

[4] This, then, is not a case where a previously *used* plan that is *lawful* can form the "status quo." *See Georgia State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1349 (N.D. Ga. 2015) (finding remedial plan developed at prior stage of litigation and *used in a prior election* to be the "status quo" under unique circumstances). Nor is it a case involving § 5 of the Voting Rights Act, under which neither a plan presumed to be invalid (per § 5) and one sure to be invalid (due to the decennial census) could claim the right to govern an election. *See Perry v. Perez*, 565 U.S. 388, 392 (2012). Here, the 2016 plan is presumptively constitutional and serves as the status quo.

[5] *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). As illustrated by *League of Women Voters* and *Carroll*, North Carolina and federal law governing preliminary injunctions differ in important respects. North Carolina law does not tolerate altering the status quo at the preliminary-injunction stage.

injunctive relief in redistricting case); *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) (same); *NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 530 (M.D.N.C. 2012) (same); *Perez v. Texas*, No. 2015 WL 6829596, at *4 (W.D. Tex. Nov. 6, 2015); *Valenti v. Dempsey*, 211 F. Supp. 911, 912 (D. Conn. 1962); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 501 (S.D.N.Y. 2004).

Plaintiffs' cases on non-compete agreements and other contractual rights, *see Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 226, 393 S.E.2d 854, 856 (1990); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983), *Auto. Dealer Res., Inc. v. Occidental Life Ins. Co. of N. C.*, 15 N.C. App. 634, 640, 190 S.E.2d 729, 733 (1972), shed no light on the issues here. In those cases, relief was afforded or contemplated that would preserve the status quo by either maintaining or restoring a pre-existing state of affairs. Plaintiffs' demand for a redistricting plan that has never before existed is materially different. Plaintiffs want the Court, not only to adopt their novel merits theory, but also to order a redistricting to govern the 2020 elections on an injunction *without reaching a final judgment*. Plaintiffs, in short, want to win without discovery, trial, or final adjudication.

To make matters worse, Plaintiffs try to hide this fact by asserting (at 30–31) that they only seek to "prevent" the Defendants from implementing the 2016 plan. Not so. Their motion expressly demands a *new* plan. Mem. ISO PI Mot. 1, 48. And that is for good reason. A prohibitive injunction would merely serve to enjoin elections during the pendency of this case. That is no way to vindicate a supposed right to vote.

Ultimately, it does not matter whether the relief is characterized as "prohibitive" or "mandatory" because, in all events, the 2016 plan represents the status quo. *Neither* mandatory *nor* prohibitive relief is available to alter that status quo. As Plaintiffs' lead case explains, *both* forms

of injunctions must be tailored to the status quo. *Auto. Dealer*, 15 N.C. App. at 639, 190 S.E.2d at 732. The difference is that, whereas "prohibitive injunctions seeks to preserve the status quo," a "mandatory injunction is intended to *restore a status quo*" that existed in the past. *Id.* (emphasis added). For example, a mandatory injunction might be tailored to restore the status quo by requiring a party to perform a contract that it had already been performing. *See id.* at 640, 190 S.E.2d at 733 (discussing possible mandatory injunction to prevent "*interruption* by defendant in the performance of its duties under the contract" (emphasis added)); *see also Bd. of Light & Water Comm'rs of City of Concord v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 424, 271 S.E.2d 402, 404 (1980) (discussing possible mandatory injunction to continue payment of water and sewage bills that were previously being paid).

But, as *Carroll* held, neither a mandatory nor prohibitory injunction is appropriate to change the status quo, defined as the exercise of rights the movants "have not previously exercised." That is what Plaintiffs want, and the Court cannot give it.

II. Other Equitable Factors Bar Relief

Other principles of equity bar Plaintiffs' claim for provisional relief. "A preliminary injunction is "an extraordinary remedy and will not be lightly granted." *Travenol Labs., Inc. v. Turne*r, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483 (1976). "The movant bears the burden of establishing the right to a preliminary injunction." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975).

The Court is obligated to "engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). This means both that a movant must establish irreparable harm, *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856, and that "the harm alleged by the plaintiff must satisfy a standard of relative

substantiality as well as irreparability." *Williams*, 36 N.C. App. at 86. That balance here overwhelmingly cuts against an injunction.

A. Harm to the State, Voters, and Election Participants Would Be Severe and Unwarranted

1. On the one hand, the injury to the State, candidates and potential candidates, election officials, and the public is irreparable and severe. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012). This is even truer for statutes relating to elections because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). This is one good reason not to issue an injunction before even resolving the case on the merits.

Another is that Plaintiffs' eleventh-hour request is belated and would inject confusion and uncertainty into the electoral process. The current plan has been in effect since 2016 and governed two general elections and at least one special election, thereby acclimating voters and potential candidates alike to the current lines. Now, as election officials are preparing for the nominating period and candidates are actively seeking congressional office, Plaintiffs demand that an entirely new redistricting plan be created from scratch.

It is well settled that the mere existence of a lawsuit, even one that has *proven* meritorious after a final judgment, does not result in automatic relief intruding in the election process. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) ("The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (same). Even good-intentioned judicial reforms of election laws can be

counter-productive, since the intrusion itself causes harm. Any action must occur "at a time sufficiently early to permit the holding of elections…without great difficulty" or else *no* action should occur. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). That is true both under federal law (which governs congressional elections) and North Carolina law.

In *Pender County v. Bartlett*, 361 N.C. 491, 508, 649 S.E.2d 364, 375 (2007), the State Supreme Court concluded that a decision issued on August 24, 2007, striking down a handful of legislative districts—after full adjudication on the merits—came too late to impact the 2008 elections; thus, the court stayed its decision until the following election. It bears repeating: the *State Supreme Court* reached *a final judgment* concluding that districts were invalid and *still* declined to interfere with elections scheduled to take place over fourteen months later. This case is a far worse candidate for belated injunctive relief. Plaintiffs *did not even file the case* until well after August 24, 2019, and a redistricting plan cannot be created and implemented until much later. There is no final judgment, nor could there reasonably be one for six months or more.

The court in *Dickson v Rucho*, No. 11 CVS 16896, 2012 WL 7475634 (N.C. Super. Jan. 20, 2012), faithfully applied the *Pender County* decision by denying a preliminary-injunction motion filed in early November of 2011, *see Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. July 08, 2013), based on "the proximity of the forthcoming election cycle and the mechanics and complexities of state and federal election law." *Dickson*, 2012 WL 7475634, at *1. The panel emphasized that its ruling did not imply "a lack of merit" and noted that the plaintiffs "have raised serious issues and arguments" in challenging the plan. *Id.* In rejecting that as a sufficient basis for an injunction, the Court emphasized the difficulties involved in administering elections and also noted that the short time frame "leaves little time for meaningful appellate review" or "curative measures by the General Assembly." *Id.*

This is in line with numerous other cases finding belated requests for relief too late to impact an upcoming election:

- Thirteen weeks prior to filing deadline for a primary election too late. *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970).

- Three months out from election too late. *Chisom*, 853 F.2d at 1190 (vacating *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. July 7, 1988)).

- Four months out from election too late. *Dean v. Leake*, 550 F. Supp. 2d 594, 606 (E.D.N.C. 2008).

- Five months out from election too late. *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. May 19, 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971).

- Ten months out from election too late. *Kilgarlin v. Martin*, 252 F. Supp. 404, 444 (S.D. Tex. 1966), *aff'd in relevant part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967).

- Four months out from election too late. *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 843 (N.D. Cal. 1992).

- Two months out from election too late. *In re Pennsylvania Cong.Districts in Reapportionment Cases*, 535 F. Supp. 191, 195 (M.D. Pa. 1982).

- Three and a half months out from election too late. *Diaz v. Silver*, 932 F. Supp. 462, 469 (E.D.N.Y. 1996).

- Five months out from election too late. *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1362 (M.D. Ala.1986).

- Three months out from election too late. *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991).

- Two months out from election too late. *Ashe v. Bd. of Elections in City of New York*, 1988 WL 68721, at *1 (E.D.N.Y. June 8, 1988).

In fact, courts have declined to interfere with elections even after finding, after adjudication on the merits, egregious violations of federal constitutional rights. *See, e.g.*, *Vera v. Richards*, 861 F.Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd Bush v. Vera*, 517 U.S. 952 (1996) (declining to issue relief, even after finding egregious racial gerrymanders, either for the 1994 or 1996 elections, even

though the violation was finally adjudicated in September 1994); *Ashe v. Board of Elections in the City of New York*, 1988 WL 68721 (E.D.N.Y. June 8, 1988) (denying preliminary injunction even after finding a likelihood of success on a Voting Rights Act violation due to proximity to election).

Here, the next scheduled election is on March 3, 2020. There is no alternative plan prepared, and there is no final order striking down the 2016 plan. It is too late to engage in court-ordered remedial map-drawing.

2. Plaintiffs' arguments to the contrary (at 48–49) ignore this line of precedent, "considerations specific to election cases," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), and basic principles of equity, *see North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

Plaintiffs erroneously conflate (at 48) the physical possibility of a court-ordered new redistricting plan with the advisability of doing so at this late hour. As discussed below, it would in fact be physically impossible to implement a new plan on the current time frame through a judicial remedial process, but the Court need not reach that issue because, in all events, judicial redistricting now is terrible policy.

Changes in election procedure—particularly late changes—harm election administration, and this in turn is itself a burden on the right to vote. *Purcell*, 549 U.S. at 4–5. Courts therefore weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *Id.* Other relevant factors include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts.

Covington, 137 S. Ct. at 1626. Plaintiffs do not even *mention* these factors, let alone establish that they somehow weigh in favor of relief.

3. The disruption Plaintiffs' demand would inflict is readily apparent from their recognition (at 49) that changing primary election dates is the likely result of the Court's intrusion into the election process. Indeed, there are many inevitable disruptions attendant to an injunction and redistricting at this time.

Congressional primaries are set for March 3, 2020, *see* N.C.G.S.A. § 163A-700(b), and federal law requires that absentee ballots be sent out 45 days prior to that election, *see* 52 U.S.C. § 20302(a)(8).[6] Administering these dates requires substantial lead-in time for geocoding districts, printing ballots, and otherwise administering the election.[7] Moreover, candidates must file to run by noon on Monday, December 2, 2019. *See* N.C.G.S.A. § 163A-974.

Because the Court will, of course, need to take its time to consider the competing positions on this motion, it seems that the earliest an injunction could issue would be the beginning of November. Importantly, "[e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason" a redistricting plan must be accompanied by a detailed decision finding "with specificity all facts supporting that declaration" and must "identify every defect found by the court, both as to the plan as a whole and as to individual districts." N.C.G.S.A. § 120-2.3. The plain language reaches even a provisional injunction, especially one with the consequences of the type requested here. Thus, the Court must take care to address these

[6] This requirement does not apply to state legislative elections, meaning this case presents even more difficulty than in a state legislative case. Plaintiffs' reliance on *Stephenson v. Bartlett*, 355 N.C. 281, 282, 561 S.E.2d 288, 288–89 (2002), ignores this distinction.

[7] The affidavit of Karen Brinson Bell, Executive Director of the North Carolina State Board of Elections, in *Common Cause v. Lewis*, outlines many of these administrative tasks and is attached hereto as Exhibit 2. Notably, the issues described concern only state elections.

issues, which will take time—a point illustrated by the fact that the *Dickson* preliminary-injunction denial occurred three months after the motion was filed.

Even then, an order would be insufficient on its own, because (as noted) Plaintiffs' demand for relief requires a new districting plan. The Court would have to afford the General Assembly "a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law." N.C. Gen. Stat. Ann. § 120-2.4. If the General Assembly were unsuccessful, the Court would be required to conduct a *provisional* remedial process—which might ultimately prove unnecessary—requiring the appointment of a special master, objections to that appointment, proposals and a report by the special master, litigation over that report, and another hearing on the plan. There is no way to accomplish that in the necessarily careful and deliberative manner that will be required to protect the public's right to vote—much less to afford objecting parties the opportunity to seek redress on appeal.

Plaintiffs unpersuasively assert that the General Assembly could redistrict in a matter of days, but conveniently forget that it might not choose to do so. A court redistricting would take longer. More inexcusably, Plaintiffs forget that the mere days they cite excludes the time for Court review and litigation over the resulting plan. Their citation to *Common Cause v. Lewis* is self-defeating in this respect. To this day, the court in that case has not determined whether or not to enjoin that plan and conduct a judicial redistricting. The plaintiffs there (represented by the lawyers representing Plaintiffs here) objected to one of the adopted plans, and the parties needed a period of weeks to brief those issues. Thus, a *final injunction* issued on September 3 has, as of October 21, not seen the finalization of a valid remedial map. It is clear that *seven weeks* would be the *minimum* amount of time to conduct a court-ordered redistricting. This, in turn, means that mid-

December is the *best possible* time for a new plan even to be validated. From there, it must be implemented, which will take longer still, as noted above.

Redistricting in December, at the earliest, would also create a domino effect of problems for candidates, parties, and election participants—a concern that draws even more weight from Plaintiffs' supposed concern for partisan fairness in elections. Congressional candidates and potential candidates are raising money *now* and evaluating whether to run based on the lines currently in place. New lines would render those actions futile and require an entire new fundraising and strategic strategy from scratch and in a near instant. This is true for candidates from all political parties.

For another thing, political parties organize their affairs, in part, by congressional district and take a series of actions in reliance on the lines beginning in January. For example, the North Carolina Republican Party maintains an ascending party organization tied, in large part, to the lines of congressional districts, and the precinct and county level organizations are tied to those lines (whether directly, in the case of a congressional district maintaining whole counties, or on a bifurcated basis, the case of a congressional district splitting one or more counties). *See* North Carolina Republican Party Plan of Organization.[8] The Democratic Party has a similar organizational structure. *See* North Carolina Democratic Party Plan of Organization.[9] Precincts elect delegates to county conventions in February, which in turn elect delegates to congressional-district conventions in March. Lead-in time is required to administer this process.

[8] Available at: https://d3n8a8pro7vhmx.cloudfront.net/ncgop/pages/44/attachments/original/1564507894/2019_Plan_of_Organization_Final.pdf?1564507894.

[9] Available at: https://www.ncdp.org/wp-content/uploads/2019/08/Current-Plan-v3-06-08-2019.pdf.

An eleventh-hour change in district lines would significantly disrupt the allocation of delegates, the administration of party affairs, and even the election of party leadership. Delegates must reside in the congressional district to which they are nominated, so a late change in lines would negate nominations or thwart the reasonably expended time and effort to campaign for one. The same holds true for candidacies to positions of party leadership. Moreover, because 2020 is a presidential-election year, congressional-district boundaries take on additional significance, since delegates to the party conventions will be nominated at those meetings.

In addition to all that, Plaintiffs fail to set forth how the Court should act if, ultimately, their case fails on the merits. Their demand for a new plan for the March 2020 primary would seem to leave no time to revert to the duly enacted plan if they lose—which itself would be a basis to reject their relief. But, worse still, the Court in that event would be confronted with the troubling problem of what map to use for the November election. Apparently, in Plaintiffs' view, the Court should redistrict once and for all with no regard to the ultimate outcome of this case and bar the use of the constitutionally mandated legislatively drawn map in all events. In other words, they are asking to win the case now and to be excused from proving their claims. That is highly inequitable and should be rejected out of hand.

4. Another harm to the State and the general public is manifest in the fact that a court-ordered redistricting, aside from being provisionally predicated on the ultimate outcome of this case, would be temporary, since the 2020 census will render it defunct. "It is clear…that a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990). The fact that a redistricting now "would be of an interim nature only" cuts further against relief, especially preliminary relief. *Maryland Citizens for A Representative Gen. Assembly*, 429 F.2d at 608. The

"disruption" to the electoral process, coupled with the fact that 2020 "is also the year of a national census which will likely require reapportionment in [North] Carolina, places this case squarely within" precedent rejecting equitable relief at this late hour. *Simkins v. Gressette*, 631 F.2d 287, 296 (4th Cir. 1980).

B. The Comparative Harm To Plaintiffs in Denying Relief Is Minor

1. In contrast to the equitable concerns weighing against a preliminary injunction, Plaintiffs are precluded from establishing irreparable harm because of their own delay in bringing this case. "One significant measure of the need for immediate and irreparable harm is the haste with which the moving party seeks injunctive relief." *Glob. Textile All., Inc. v. TDI Worldwide, LLC*, No. 17 CVS 7304, 2017 WL 5641185, at *11 (N.C. Super. Nov. 21, 2017) (collecting cases); *Am. Air Filter Co., Inc. v. Price*, No. 16 CVS 13610, 2017 WL 485517, at *5 (N.C. Super. Feb. 3, 2017) ("Plaintiff's lack of urgency in seeking injunctive relief counsels against the idea that it is likely to suffer irreparable harm."). This doctrine applies in full force to constitutional cases. *See, e.g.*, *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012).

Although the 2016 plan has been in force for years, Plaintiffs did not file this case until September 27, 2019. They could have filed it in 2016, 2017, 2018, or even in June 2019 and thus provided more time for adjudication in advance of the 2020 elections and mitigated the harms to the State and the public discussed above. Instead, they waited until it was already too late for judicial interference in the elections process. Plaintiffs alone are to blame for the Court's inability to afford relief, and they have no tenable claim to an injunction. Notably, the panel in the *Common Cause v. Lewis* case repeatedly made rulings adverse to the General Assembly, the State, and third parties on the basis that they delayed a few weeks or months before seeking relief. *See, e.g.*, Order on Republican National Committee's Motion To Appear and Protect Its Information, 18 CVS 014001 (Entered Oct. 3, 2019); Order on Plaintiffs' Motion for Direction, 18 CVS 014001 (Entered

July 12, 2019). Here, Plaintiffs waited *years* to assert their purported rights. Plaintiffs' request for a double-standard is striking.[10]

This case is indistinguishable from the U.S. Supreme Court's holding in *Benisek v. Lamone*, 138 S. Ct. 1942 (2018). There, the Court assumed "that plaintiffs were likely to succeed on the merits" of their partisan-gerrymandering claim, but concluded that "the balance of equities and the public interest tilted against their request for a preliminary injunction." *Id.* at 1944. Like Plaintiffs here, the *Benisek* plaintiffs failed to "show reasonable diligence." *Id.* They waited six years and three election cycles to move for relief. Here, Plaintiffs waited over three years and two general elections and one special elections before moving for relief. Importantly, in *Benisek*, "the delay largely arose from a circumstance within Plaintiffs' control: namely, their failure to plead the claim giving rise to their request for preliminary injunctive relief until 2016." *Id.* Here, the delay arose *exclusively* from Plaintiffs' failure to bring *any* claim until the end of September 2019.

2. The similarities do not end there. As in *Benisek*, "a due regard for the public interest in orderly elections" cuts against relief. *Id.* at 1945. As discussed above, changing the rules of the election at this late stage would cause more harm than good. Also as in *Benisek*, "the legal uncertainty surrounding any potential remedy for plaintiffs' asserted injury" weighs further against relief. *Id.* Plaintiffs rely entirely on a superior-court ruling concerning their claims, but the North Carolina Supreme Court has not approved this theory, and its latest word is that they have no merit.

[10] Plaintiffs bear the burden to establish irreparable harm in spite of this delay; the General Assembly need not establish the elements of laches. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("Although a particular period of delay may not rise to the level of laches and thereby bar a permanent injunction, it may still indicate an absence of the kind of irreparable harm required to support a preliminary injunction."). Regardless, Plaintiffs' inexplicable and unjustified delay, combined with the harms of a late-stage redistricting, would easily establish a laches defense. *See White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990) (finding belated challenge to a redistricting plan barred by laches).

See Stephenson v. Bartlett, 562 S.E.2d 377, 378 (N.C. 2002); *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014). Thus, even assuming (as in *Benisek*) a likelihood of success, the uncertainty surrounding Plaintiffs' theory and the need for further review of any legal ruling by the Court counsels further in favor of denying this motion.

3. Relatedly, even assuming a violation of the North Carolina Constitution, the violation is not "severe." *See Covington*, 137 S. Ct. at 1626. In fact, the violation would not have been a violation just a few years ago. *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013) ("Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law.").

Other points of context cut against Plaintiffs' assertion that the violation of their supposed rights is severe enough to justify this eleventh-hour relief. One is that the General Assembly's motive for the redistricting was to avail itself of U.S. Supreme Court precedent allowing it to avoid a racial-gerrymandering claim by "articulat[ing] a legitimate political explanation for its districting decision." *Cromartie II*, 532 U.S. at 242. Plaintiffs' emphasis on statements regarding politics fails to put them in the proper context; the General Assembly was simply doing what it—quite reasonably—believed necessary to avoid the seemingly non-rebuttable allegation of racial gerrymandering. It was not enough simply not to use race, since that is what the General Assembly thought it did in 2011 in drawing District 12. Nor was it enough to allow traditional districting principles to predominate, since that defense is weak and easily defeated in redistricting litigation. *See* note 2, above. The way to proceed was to articulate a political justification. If Plaintiffs do not like that approach, their quarrel is with their own lawyers, who successfully persuaded the U.S. Supreme Court that it should be the law, and the Democratic Party, which successfully persuaded

the U.S. Supreme Court to adopt a partisanship defense as the single most robust redistricting defense in a state's arsenal.

Another point of context is that the U.S. Supreme Court (unsurprisingly, in light of its repeated endorsement of politics in redistricting) upheld the very plan Plaintiffs challenge against a federal-law challenge. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). All of the information Plaintiffs posit as justifying relief here was before the Supreme Court in *Rucho*, yet the *Rucho* plaintiffs were unable to identify standards appropriate even to adjudicate their claims, let alone invalidate the map. If the very same methods and evidence was deemed insufficient in *Rucho*, they can hardly be deemed to show a "severe" violation here justifying the extraordinary relief Plaintiffs demand. *See Maryland Citizens for A Representative Gen. Assembly*, 429 F.2d at 608 (identifying prior decision upholding the challenged plan as cutting against injunctive relief and doubting "whether the courts should ever undertake to readjudicate the constitutionality of a reapportionment plan, judicially determined to have been constitutional, before the results of the next federal census are available").

Another point of context is history. If Plaintiffs' demand for "a revolutionary change in constitutional doctrine," *id.*, could wait out every single decade from Reconstruction through 2001—during which time the Democratic Party controlled the redistricting—it can wait another year to apply to North Carolina's congressional districts. Plaintiffs and their sponsors and attorneys were noticeably uninterested in bringing their claim to challenge the plan drawn in 1997, which was drawn to perfect precision "for obvious political reasons" to benefit Democratic Party interests—a fact the U.S. Supreme Court took to *save* the districts from constitutional attack. *Easley v. Cromartie*, 532 U.S. 234, 247 (2001). Plaintiffs and other supporters of the Democratic

Party benefited from that plan and the ruling that partisan gerrymandering is a *defense* in a redistricting case.

They also benefitted from the prior redistricting plan that contained the infamous freeway district, *Shaw v. Reno*, 509 U.S. 630, 635–36 (1993) (citations omitted), which was unsuccessfully challenged as a partisan gerrymander. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 506 U.S. 801, 113 (1992). Now that, for the first time, the Republican Party controls the process, Plaintiffs want new rules.[11] But their request ignores the way in which history mitigated the harms of gerrymandering: a party with the line-drawing power would lose and become the victim of its own tactics, before eventually becoming the party in power once again. This process evened out the supposed harms and allowed an equilibrium to develop over time. Plaintiffs want out of that equilibrium; they want the Democratic Party to be subject to different rules from those applicable to the Republican Party. Whatever the merits of that dubious position, Plaintiffs cannot waltz into court at the end of the decade just weeks before the candidate-qualifying period and call the supposed violation "severe."

4. The balancing of the equities points in only one direction. An injunction would burden the State, the election participants, and the general public with a costly and confusing redistricting *before* a final judgment on the merits. And Plaintiffs' delay in even filing this case, let alone proposing an alternative plan or moving for provisional relief, precludes any claim to irreparable harm.

[11] Any contention that gerrymandering is somehow worse now than in the past is revisionist. Whatever technological advances may have occurred in recent times, the *underlying data* is the same as it has been throughout American history: election results data at the precinct level. No computer can be more precise than the ingredients of redistricting allow. Moreover, the one-person, one-vote principle significantly restricts what legislatures can do, whereas, before the 1960s, districts could be "cracked" and "packed" with no regard to relative population.

Thus, on the one hand, the irreparable harm to the Defendants comes in the form of the Court's granting the Plaintiffs a complete win without requiring them to prove their claims with competent evidence and vetting and to subject the State to a court-drawn map that may turn out to be wholly unnecessary and a complete waste. On the other hand, the supposed irreparable harm to Plaintiffs in *not* granting them an injunction is to keep the same districts which they voluntarily voted in for two, if not three, elections. One harm is severe, another is no harm at all. That is not a difficult choice.

III. Plaintiffs Are Unlikely To Succeed on the Merits

The Court would be justified in denying Plaintiffs' motion without even reaching the likelihood-of-success element, since (as discussed) the equities bar relief even assuming Plaintiffs can meet this additional prong. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). But if the Court chooses to reach this question, it should re-evaluate Plaintiffs' legal position in light of the unique federal law governing congressional elections and in light of settled North Carolina law cutting against Plaintiffs' claims.[12]

A. Federal Law Bars Plaintiffs' Cause of Action

Plaintiffs' claims are likely to fail as a matter of federal law because the United States Constitution delegates to the General Assembly the very issues Plaintiffs as the courts to resolve.

[12] Plaintiffs rely heavily on *Common Cause v. Lewis*, 18-CVS-014001 (N.C. Sup. Ct. Sep. 3, 2019). Respectfully, that decision was wrongly decided and should be reconsidered for reasons stated here and in the General Assembly's briefing in that case. Importantly, the 357-page decision does not mention *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014), and its treatment of *Stephenson v. Bartlett*, 562 S.E.2d 377, 378 (N.C. 2002), as containing irrelevant "dicta" misreads the import of the relevant passages to the holding in the case, especially in that they describe the structure of constitutional redistricting requirements. Courts applying North Carolina law are "bound by the reasoning" of North Carolina Supreme Court decisions. *See In re N.G.*, 180 N.C. App. 473, 636 S.E.2d 859 (2006); *Jenkins v. Easco Aluminum Corp.*, 142 N.C. App. 71, 79, 541 S.E.2d 510, 515 (2001). Plaintiffs' observation that *Common Cause v. Lewis* was not appealed ignores that this was not a concession or declaration of open season, but an effort to bring years of redistricting litigation to a conclusion—which has yet to occur.

Placing the General Assembly in the position of the defendant for the courts to make the decisions in its stead violates the Constitution's plain text.

1. The elections at issue here are to a federal office. "The Framers addressed the election of Representatives to Congress in the Elections Clause." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019). It provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1.The Elections Clause harbors no ambiguity; the word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Here, it refers undisputedly to the General Assembly, not the North Carolina courts.

Thus, "[t]he only provision in the Constitution that specifically addresses" politics in congressional redistricting plans "assigns [the matter] to the political branches," not to judges. *Rucho*, 139 S. Ct. at 2506. What's more, the Elections Clause is the *sole* source of state authority over congressional elections; regulating elections to federal office is not an inherent state power. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Thus, for a court applying state law to have any authority to address Plaintiffs' claims, it must derive from the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

Because a court applying state law is not "the Legislature" of North Carolina, its authority over this case is highly restricted. The Supreme Court in *Rucho* held that only state constitutional provisions that provide "guidance" on the question of gerrymandering can support partisan-gerrymandering claims. 139 S. Ct. at 2507. The Supreme Court cited Florida's Fair Districts Amendment, which provides "that no districting plan 'shall be drawn with the intent to favor or

disfavor a political party'" as one that "provides…guidance on the question." *Id.* It contrasted the Fair Districts Amendment with the federal Equal Protection Clause and the First Amendment of the U.S. Constitution, which it found do not provide guidance. As it explained, the federal courts cannot entertain partisan-gerrymandering claims precisely because "there is no 'Fair Districts Amendment' to the Federal Constitution." *Id.* at 2507. It necessarily follows that, without an analogous source of authority from a *legislative* body or process, *no* court can entertain these claims.

This is because of the Elections Clause. If "voters" address the problem of partisan-gerrymandering directly through legislation, then they exercise a legislative function that can, as a result, be enforced in judicial proceedings—as the Elections Clause contemplates. *See id.* at 2507 (emphasizing the efforts of "voters" to address partisan gerrymandering); *see also Arizona State Legis. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2666–67 (2015). But, if the courts read prohibitions on partisan gerrymandering into provisions that do not provide "guidance," then they usurp legislative power the Clause grants only to "the Legislature." That is, a court applying state law is no differently situated *vis a vis* the Elections Clause than the Supreme Court in *Rucho*—unless the State Constitution provides more guidance than the federal Constitution. The Elections Clause, which *Rucho* held to foreclose review of a partisan-gerrymandering claim, cannot be circumvented by simply slapping the label "state constitutional law" on the *very same arguments* rejected in *Rucho*.

Plaintiffs do precisely that. And they misread *Rucho*'s statement that "state constitutions can provide standards and guidance for state courts to apply," 139 S. Ct. at 2507, to mean that state constitutions always *do* provide those standards. This is illogical. "Can" and "do" are entirely different. As *Rucho* makes clear, only if the State Constitution's language provides standards like

those present in Florida's Fair Districts Amendment can *Rucho* be distinguished. *Rucho* itself made that clear by citing *only* Florida's Fair Districts Amendment as an example of a valid source of state-court authority over redistricting. The dissenting opinion's footnote addressed in this passage of *Rucho* also cited a Pennsylvania constitutional provision providing "elections shall be free and equal" as a source of state-court authority to adjudicate partisan-gerrymandering claims. *See id.*at 2524 n.6 (Kagan, J., dissenting). The *Rucho* majority, even while addressing that very footnote, *see id.* at 2507, did not endorse the Pennsylvania Supreme Court's decision invalidating congressional districts under that provisions. *See id.* (mentioning only Florida's constitutional provision, not Pennsylvania's).

That is because a provision from the 1770s providing simply that elections shall be "free and equal" does not provide any more "guidance" in partisan-gerrymandering claims than the federal Constitution provides. Moreover, because the delegation to the General Assembly stems from the federal Constitution itself, the meaning of state constitutional provisions is itself a matter of federal law, one reviewable in the U.S. Supreme Court. *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000).

2. The North Carolina Constitution provides no basis for judicial intervention in congressional elections. The provisions Plaintiffs cite are all highly generic provisions that do not materially differ from their federal constitutional counterparts. There is nothing like Florida's Fair Districts Amendment to be found in the State Constitution—nothing that mentions "partisan" intent or "effect" or anything like that. Thus, without guidance provided by North Carolina's legislative organs, the courts could only intervene in congressional redistricting by usurping

federal legislative power. Plaintiffs are hardly shy in asking for legislation from the bench, and the Court should decline that overture.

North Carolina's free-speech and equal-protection clauses mirror their federal analogues in all material respects. *See* N.C. Const., art. I, § 19 ("[n]o person shall be denied the equal protection of laws"); *id.* art. I, § 14 ("[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained."). Plaintiffs emphasize that the North Carolina courts have read these provisions to have "broader" reach than their federal counterparts. *See* Mot ISO PI Mot. 35, 39. But "broader" is beside the point; *Rucho* requires meaningful "guidance" that is lacking in the federal Constitution. These provisions provide no such guidance. They are nothing like Florida's Fair Districts Amendment, which directly addresses (and bars) any "intent" to favor a political party.

The Free Elections Clause is no different. It simply provides that "[a]ll elections shall be free." It provides no guidance at all on the decisive question: "'How much is too much?'" *Rucho,* 139 S. Ct. at 2501. It says nothing of partisan intent or effect or the various measures Plaintiffs proffer in this case.

Plaintiffs own arguments expose the deficiencies in their claims, since they are nothing but the arguments rejected in *Rucho*—which should come as no surprise since *Rucho* addressed *this very redistricting plan*. For example, Plaintiffs' free-speech argument (at 38–42) is anticipated almost to the letter in *Rucho*, 139 S. Ct. at 2504, which rejected them: "there are no restrictions on speech, association or any other First Amendment activities in the districting plans at issue." *Id.* Like the First Amendment, these provisions "offer[] no 'clear' and 'manageable' way of distinguishing permissible from impermissible partisan motive." *Id.* at 2505. Similarly, Plaintiffs' Free Elections Clause and Equal Protection Clause arguments repeat the intent/effect arguments

rejected in *Rucho*, which, in fact, rejected expert simulation analyses materially identical to those Plaintiffs proffer here. *See id.* at 2500. In short, all of the flimsy distinctions rejected in *Rucho* are offered here again, and they fare no better because the North Carolina Constitution does not establish any basis for drawing any of them. Only by legislating such distinctions could the Court address Plaintiffs' claim. The federal Constitution prohibits this.

B. State Law Bars Plaintiffs' Cause of Action

Federal law aside, Plaintiffs are unlikely to succeed even under the State Constitution because their claims are non-justiciable and non-viable. Try as Plaintiffs might to persuade the Court to conclude that the 2016 congressional plan is "even more flagrantly" unconstitutional than the 2017 state legislative plans, Mem. ISO PI Mot. 33, the Court is bound to presume that the plan is constitutional. *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 399 S.E.2d 311, 315 (N.C. 1991). "The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Id.* (quotation marks omitted). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.*

A corollary principle is that a question is a non-justiciable political question "if it involves a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001) (quotations omitted). "The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." *Person v. Watts*, 115 S.E. 336, 339 (N.C. 1922).

Plaintiffs are unlikely to rebut the presumption of constitutionality or even to establish that their claims are justiciable.

1. Plaintiffs' Claims Present Non-Justiciable Political Questions

North Carolina courts lack jurisdiction over political questions. *See, e.g.*, *Bacon v. Lee*, 549 S.E.2d 840, 854 (N.C. 2001); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (N.C. 2004). A political question is one "reserved to the exclusive consideration of a different political tribunal. In such cases the exercise of [judicial] power is usurpation." *In re Alamance Cty. Court Facilities*, 405 S.E.2d 125, 130 (N.C. 1991) (quotations and edit marks omitted). Plaintiffs' claims fail each disjunctive justiciability element: (1) they raise issues the Constitution commits to a political branch, and (2) no satisfactory or manageable criteria or standards exist to adjudicate them. *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (2004).

First, the State Constitution delegates to the General Assembly, not courts or a commission or the Democratic Party, the power to create congressional districts. Because "a constitution cannot be in violation of itself," *Stephenson v. Bartlett*, 562 S.E.2d 377, 378 (N.C. 2002), a delegation of a political task to a political branch of government implies a delegation of political discretion. *See id.* at 390.

"Our North Carolina Supreme Court has observed that 'we do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506 (2007)). Whether or not the General Assembly's acts are wise, "this court is not capable of controlling the exercise of power on the part of the General Assembly, . . . and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly . . . and erecting a despotism of

[judges], which is opposed to the fundamental principles of our government and usage of all times past." *Howell v. Howell*, 66 S.E. 571, 573 (N.C. 1911).

Second, claims asserting that a districting plan is somehow harmful to democracy are "not based upon a justiciable standard." *Dickson v. Rucho*, 766 S.E.2d 238, 260 (N.C. 2014). Because "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), a "partisan gerrymandering" claim could only proceed with some reliable standard for distinguishing good from bad politics. Plaintiffs do not offer a standard, and the arguments they advance are no different from those found wanting in *Rucho*. The State Supreme Court has already rejected the view that politics are barred from redistricting by the State Constitution, *Stephenson*, 562 S.E.2d at 390, and Plaintiffs offer *no* test for discerning "at what point" politics "went too far." *Rucho*, 139 S. Ct. at 2501. That is because this question simply asks whether a political act is wise or unwise.

It has been settled for over 100 years that these claims are non-justiciable. *Howell* rejected as non-justiciable a claim that lines of a special-tax school district "were so run as to exclude certain parties opposed to the tax and include others favorable to it." 66 S.E. at 572. The Court (1) found that an "attempt to gerrymander" the district "was successfully made," (2) could not "refrain from condemning" that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 574. And yet the Court *still* held that "the courts [are] powerless to interfere and aid the plaintiffs." *Id.* "There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.*

at 573. The North Carolina Supreme Court reaffirmed this principle again just five years ago. *Dickson*, 766 S.E.2 at 260. They cannot be called into question now.

2. Plaintiffs Lack Standing

Plaintiffs are also unlikely to establish standing, a prerequisite to their claims. No injury results from being represented by a member of the opposing party, many Plaintiffs are already represented by Democratic members, and many others live in Republican neighborhoods and would be represented by Republican members in all events. No judicial relief is available.

The elements of standing are (1) injury in fact, (2) causation, and (3) redressability. *Walker v. Hoke Cty.*, 817 S.E.2d 609, 611 (N.C. Ct. App. 2018). Because the right to vote is individual and specific to each person, and any "interest in the composition of 'the legislature as a whole'" is "a collective political interest, not an individual legal interest," the U.S. Supreme Court unanimously held that claims of partisan vote dilution must be asserted as to each individual district.[13] *Gill v. Whitford*, 138 S. Ct. 1916, 1930, 1932 (2018). The Court also offered parameters for assessing individualized injury. One is that a "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm; the voter's interest is in the voter's own district, where the voter votes. *Id.* at 1932. Another is that a district's partisan composition is not a cognizable injury if a similar composition would result "under any plausible circumstance." *Id.* at 1924, 1932. A third is that injury must be proven, not merely alleged. *Id.* at 1931–32.

Each Plaintiff lacks standing.

[13] Though not binding, U.S. Supreme Court precedent is "instructive" for interpreting North Carolina standing requirements. *Wake Cares, Inc. v. Wake Cty. Bd. of Educ.*, 660 S.E.2d 217, 223 (N.C. Ct. App. 2008) (quoting *Goldston v. State*, 637 S.E.2d 876, 882 (N.C. 2006)). It is especially instructive here, where the case law is unanimous and directly on point.

To begin, John Balla has no cognizable challenge to district 4, since (according to Plaintiffs' expert Dr. Chen) that district is heavily Democratic and would in virtually simulated sets lean Democratic.[14] Thus, Mr. Balla (1) currently elects his preferred candidates and (2) would *continue* to elect his preferred candidates in Plaintiffs' numerous counter-factual scenarios. Mr. Balla has not suffered any harm, nor could the Court redress any harm he might have suffered, since it can only give him a different Democratic district.

Similarly, five Plaintiffs (Richard R. Crews, Mark S. Peters, Joseph Thomas Gates, Kathleen Barnes, and Shawn Rush) live in Republican leaning districts that would, in Plaintiffs' numerous counter-factual scenarios, likely remain Republican-leaning districts. Even if living in a district represented by a member of another party is a cognizable injury (it is not), the Court cannot redress it. The Court could only give these Plaintiffs a somewhat different Republican-leaning district. Moreover, two of these Plaintiffs (Messrs. Rush and Crews) live in districts that are not partisan outliers, and they are unlikely to establish standing for this reason as well.[15]

Two other Plaintiffs (Amy Clare Oseroff and Virginia Walters Brien) live in Democratic-leaning districts that might be Republican-leaning under other circumstances. Although it is possible that "packing" rendered the districts less competitive than they might otherwise have been, these Plaintiffs *benefit* in their *own* districts. Their claim of injury can only concern the legislature as a whole—the argument being that the Democratic voters in these districts could be spread into other districts for a statewide advantage. This is precisely the alleged "interest in the

[14] This section relies on the chart of Dr. Chen at Plaintiffs' motion, exhibit 1, page 8. The analysis under Dr. Chen's other simulation sets is similar, though may vary slightly among Plaintiffs. The General Assembly does not concede the validity of Dr. Chen's approach but assumes its validity for the sake of argument only.

[15] Both of these situations are illuminating for the additional reason that the General Assembly could have drawn more Republican-leaning districts, at least under Dr. Chen's showing, and chose not to do so.

composition of 'the legislature as a whole'" that is *not* an individualized injury. *Gill*, 138 S. Ct. at 1932.

That leaves six Plaintiffs (Rebecca Harper, Donald Allan Rumph, Lily Nicole Quick, Gettys Cohen, Jackson Thomas Dunn, and David Dwight Brown) who live in Republican-leaning districts that might (but might not) be Democratic-leaning in other circumstances. Even then, Mr. Brown lives in a district (13) that is not a partisan outlier. In all events, these Plaintiffs' claims fall short as well. American law and democratic tradition presume that a person is represented by the person's designated representative, regardless of descriptive similarity or party affiliation. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). It is therefore not self-evident that these Plaintiffs are injured simply in that they are represented by a Republican or even in that the map places them in a district with constituents who prefer that Republican. A plaintiff "must demonstrate standing"; it cannot be assumed. *Walker*, 817 S.E.2d at 611 (quotation marks omitted); *see also Universal Cab Co. v. City of Charlotte*, 247 N.C. App. 479 (2016) (a plaintiff bears the burden).

Nor is it even obvious that, under a different situation, any of these districts would be meaningfully different politically. Plaintiffs' simulations show that many possible district configurations remain Republican-leaning, and there is no guarantee that a Democratic member would win a Democratic-leaning district. Thus, these Plaintiffs' claims also are likely to fail.

C. Plaintiffs' Claims Are Not Cognizable

Justiciability and standing aside, Plaintiffs' claims are unfounded. The State Supreme Court has endorsed the use of politics in redistricting, *Stephenson*, 562 S.E.2d at 390, and rejected Plaintiffs' cause of action, *Howell*, 66 S.E. at 573.

It is implausible—and, to boot, highly inequitable—that the Democratic Party could draw contorted lines with self-evident partisan intent and effect for over 180 years and then turn around

and successfully argue that the same action by a Republican Party-controlled General Assembly violates constitutional provisions that existed all along. Setting aside the fact that the original intent and public meaning of these constitutional provisions could not possibly contain a curb on political considerations in redistricting, "the longstanding practice of government can inform [courts'] determination of what the law is." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (cleaned up). And the longstanding practice here is that "[p]olitical losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law, but they must find relief from courts of public opinion in future elections." *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. July 08, 2013). The Democratic Party for over a century was the sole beneficiary of this principle.

Given the history between the major political parties in North Carolina it is difficult to see the plea for judicial intervention as anything other than an effort to extend Democratic partisan dominance of district lines, rather than ending political redistricting (were that even constitutionally tenable).[16] In jumping into the political fray in support of the Democratic Party, the Court cannot help but take sides in this unseemly war that is best left to the political theater. Plaintiffs' claims are unlikely to succeed to final judgment and through appeal.

Equal Protection. Plaintiffs' equal-protection claim is not predicated on a "classification" that "operates to the disadvantage of a suspect class or if a classification impermissibly interferes

[16] It cannot be ignored that the newspaper with the largest national circulation has interpreted the statement in *Common Cause v. Lewis* that the opinion "need not decide that the legal standards governing Plaintiffs' claims would apply in all future cases" to mean that "the judges are reserving the power to reject future gerrymander challenges by Republicans." The Editorial Board, Eric Holder's Redistricting Coup, The Wall Street Journal (Sept. 4, 2019), https://www.wsj.com/articles/eric-holders-redistricting-coup-11567638869.

with the exercise of a fundamental right." *Northampton Cty. Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 355 (N.C. 1990). Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 707 S.E.2d 199, 206 (N.C. 2011); *Libertarian Party of North Carolina v State*, No. 05 CVS 13073, 2008 WL 8105395, at *6 (N.C. Super. Ct. May 27, 2008). Members of a major political party cannot seriously expect, as a class, to receive enhanced scrutiny where discrimination claims by the mentally disabled fall under rational-basis review. *Layton v. Dep't of State Treasurer*, 827 S.E.2d 345, 2019 WL 2189095, at *2 n.1 (N.C. Ct. App. 2019) ("Disabled persons are not a suspect or quasi-suspect class, and therefore not subject to intermediate or strict scrutiny.").

And, although the right to vote is a fundamental right, political considerations in redistricting do not "impinge" that right in any way, much less to a degree warranting strict scrutiny. *Town of Beech Mountain v. Cty. of Watauga*, 378 S.E.2d 780, 783 (N.C. 1989) (applying rational basis scrutiny when restrictions "impinge[d] to some limited extent on" the exercise of a fundamental right and expressly declining to apply strict scrutiny). There is nothing in the 2017 plans that operates to "totally den[y]…the opportunity to vote." *Dunn v. Blumstein*, 405 U.S. 330, 334–35 (1972) (cited approvingly by *Town of Beech Mountain*, 378 S.E.2d at 783). Nor is there an unequal weighting of votes as occurs when districts are of markedly unequal population or where districts have different numbers of representatives. *See Stephenson*, 562 S.E.2d at 394 (finding unequal weighting where voters in some districts elected five representatives and voters in others elected one or two). Here, all individual votes are counted and equally weighted. Plaintiffs' contention is that voters of each major party do not have an equal opportunity to prevail, but equal-protection principles do not protect the right to win. In fact, there "is not a fundamental right" even to have "the party of a voter's choice appear on the ballot." *Libertarian Party of North*

Carolina, 2008 WL 8105395, at *7, *aff'd*, 707 S.E.2d at 202. If the law were otherwise, the *Stephenson* Court would not have endorsed "consider[ation] [of] partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 562 S.E.2d at 390. Thus, rational-basis review applies, and any plan that complies with the equal-population rule and other legal requirement is amply supported by a rational basis. The 2016 plan easily satisfies this lenient test.

Free Elections. Plaintiffs' claim under the Free Elections Clause runs directly counter to that Clause's plain text and purpose to preserve elections from the very inter-branch intermeddling Plaintiffs advocate. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, The North Carolina State Constitution ("Orth") 56 (2d ed. 2013). The free elections clause simply bars any act that would deny a voter the ability to freely cast a vote or seek candidacy. *See Clark v. Meyland*, 134 S.E.2d 168, 170 (N.C. 1964). Plaintiffs will present no evidence that any voter is prohibited from voting or faces intimidation likely to deter the exercise of this right. The right to win or assistance in winning is not encompassed by this provision. *Royal v. State*, 570 S.E.2d 738, 741 (N.C. Ct. App. 2002) (ruling the free elections clause does not require public financing of campaigns).

Reading the Free Elections Clause to contain such rights would be ahistorical and counter-productive to free elections. *See Stephenson*, 562 S.E.2d at 389 (looking to "history of the questioned provision and its antecedents" in interpreting the State Constitution). The Free Elections Clause derives from the English Declaration of Rights of 1689, which provided that "election of members of Parliament ought to be free." Orth 56.[17] No one thought that this contained

[17] *See also* English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown ("English Declaration of Rights"), Yale Law School:

a prohibition against "partisan gerrymandering." Elections to the English Parliament were often conducted in so-called rotten boroughs—districts far and away more gerrymandered than anything possible now because they could be created with only a handful of constituents. Rotten boroughs were not eliminated in England until the Reform Act of 1832, so the notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable.

What the free-elections provision of the English Declaration of Rights *did* do was prohibit other branches of government from meddling with elections to Parliament. King James II had worked to control the composition of Parliament through executive interference with parliamentary elections, the goal being to pack Parliament with sympathetic members. Steven C. A. Pincus, 1688: The First Modern Revolution 156–62 (2009). The idea was not new. "[T]he Tudor sovereigns systematically pursued the policy of creating insignificant boroughs…for the express purpose of corruptly supporting the influence of the Crown in the House of Commons." Thomas Pitt Taswell-Langmead, English Constitutional History 565–66 (Philip A. Ashworth ed., 6th ed. 1905). This was viewed as an affront to legislative control over internal affairs, so the "House of Commons took the issue of writs into its own hands" after the English Civil War. *Id.*; *see also* Rudolf Gneist, The English Parliament in Its Transformations Through a Thousand Years 241 (R. Jenery Shee trans., 1886) ("Now," at the reign of Charles II, "the right of the Crown to create new boroughs disappears.").

The declaration that elections would be "free" vindicated these separation-of-powers concerns. Going forward, Parliament controlled the "methods of proceeding" as to the "time and place of election" to Parliament. 1 William Blackstone, Commentaries 163, 177–179 (George

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The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp (last visited July 7, 2019).

Tucker ed., 1803); 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797). Neither house would "permit the subordinate courts of law to examine the merits" of an election dispute, and the House of Commons denied "any right" of any officer outside that body "to interfere in the election of commoners" or "intermeddle in elections." 1 William Blackstone, Commentaries 163, 179 (George Tucker ed., 1803); *see also id.* at 179 (stating that to the house of commons "alone belongs the power of determining contested elections"); George Philips, Lex Parliamentaria 9, 36–37, 70–80 (1689). The House of Commons was not shy to protect its exclusive jurisdiction in this domain. It, for example, declared a quo warranto writ from "any Court" that sent burgesses to parliament based on time, place, and manner adjudications to be "illegal and void," and it further opined that the "Occasioners, Procurers, and Judges in such Quo Warranto's" may be punished for jurisdictional usurpation. George Philips, *supra* at 80.

What Plaintiffs want should sound eerily familiar. Plaintiffs are avowed supporters of the Democratic Party and do not want "fair" elections now any more than when Democratic legislators drew some of the most partisan (and visibly irregular) districts since the advent of the one-person, one-vote principal. They want their perceived allies on the North Carolina courts to tamper with the political composition of the congressional delegation. This is an attack on, not a vindication of, free elections. As history shows, commitment to separation of powers preserves free elections. The Court should reject this invitation to violate separation-of-power principles at the expense of constitutional order.

Free Speech. Plaintiffs' free-speech and association claims fare no better. North Carolina courts interpret the rights to speech and assembly in alignment with federal case law under the First Amendment. *Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014); *State v. Petersilie*, 432 S.E.2d 832, 841 (N.C. 1993); *State v. Shackelford*, 825 S.E.2d 689, 696 (N.C. Ct.

App. 2019). "[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. Under the State Constitution, then, there is no claim. The right to free speech is impinged when "restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 432 S.E.2d at 840, or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 574 S.E.2d 76, 89 (N.C. Ct. App. 2002) (explaining that the test for a retaliation claim requires a showing that "plaintiff…suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities); *see Evans v. Cowan*, 510 S.E.2d 170, 177 (N.C. Ct. App. 1999). There are no restraints on speech, and redistricting cannot fairly be characterized as retaliation.[18]

CONCLUSION

The motion should be denied.

[18] The court's imposition of the standard-less test adopted in *Common Cause v. Lewis* will unduly burden the associational rights, and the right to vote, of Legislative Defendants and their supporters in violation of the First and Fourteenth Amendments to the United States Constitution. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bush v. Gore*, 531 U.S. 98, 112 (2000).

Respectfully submitted this the 21st day of October, 2019.

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CERTIFICATE OF SERVICE

It is hereby certified that on this date the foregoing document was duly served upon all other parties to this matter via the Court's ECF System:

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