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

COMMON CAUSE, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1026-WO-JEP THREE-JUDGE COURT
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, PLAINTIFFS, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, DEFENDANTS.	CIVIL ACTION NO. 1:16-CV-1164-WO-JEP THREE JUDGE PANEL

COMMON CAUSE'S PRELIMINARY OUTLINE OF LEGAL STANDARDS

The Common Cause plaintiffs respectfully submit this memorandum in response to the Court's request at the February 6, 2017 status conference that the Common Cause

plaintiffs and the League of Women Voters plaintiffs each provide a brief summary of the legal standards that apply to the claims set forth in their respective complaints.

These cases are in the early stages, discovery has not been completed, the motions to dismiss have not yet been ruled upon, and answers have not been filed by the defendants in either case. For these reasons, the Common Cause plaintiffs' memorandum is, of necessity, only preliminary and is being submitted without prejudice to the right of the plaintiffs to revise or modify their responses once discovery has been completed.

The Common Cause plaintiffs have alleged that the North Carolina General Assembly violated four separate provisions of the Constitution of the United States by using "political data" (the voting histories of citizens) to gerrymander each of the thirteen congressional districts—and thus also the state-wide plan—in the 2016 North Carolina Congressional Redistricting Plan ("the 2016 Plan") to favor likely Republican voters and candidates and penalize or "burden" likely Democratic voters and candidates for the purpose of perpetuating a 10-3 Republican partisan advantage and predetermining the likely outcomes of the 2016 and subsequent congressional elections held under that plan.

COUNT ONE
FIRST AMENDMENT

"[P]olitical belief and association [are] core … First Amendment [rights]." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). The right to vote for the candidate of one's choice and have that vote counted is the quintessential method of "petition[ing] government for a redress of grievances" protected by the First Amendment of the Constitution.

Count One of the Common Cause complaint alleges that the defendants violated the First Amendment rights of the plaintiffs by using "political data" to assign and distribute voters to districts for the purpose and with the effect of enhancing the effectiveness of ballots cast in congressional elections by likely Republican voters and penalizing likely Democratic voters by diluting or nullifying the effectiveness of their ballots, thereby perpetuating a 10-3 Republican advantage in the North Carolina congressional delegation.

The legal standard for proving that a partisan gerrymander violates the First Amendment is set forth in Justice Kennedy's concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 314-16 (2004), and is derived from and supported both by a long line of political patronage cases including *Elrod v. Burns* and *Rutan v. Republican Party of Illinois*, 497 U.S. 1050 (1990), as well as by cases holding content-based regulations of expression invalid under the First Amendment. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Reed v. Town of Gilbert*, 576 U.S. __, 135 S. Ct. 2218 (2015).

To establish a *prima facie* case under the First Amendment, the Common Cause plaintiffs have the burden of proving that the defendants (1) used political classifications to assign citizens to congressional districts and (2) that this use of political data was for "the purpose and [with the] effect of subjecting a group of voters [*i.e.*, likely Democratic voters] or their party [*i.e.*, the Democratic Party of North Carolina] to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314.

"The inquiry" under the First Amendment is, as Justice Kennedy explained in *Vieth*, "whether political classifications were used to burden a group's representational rights. If a court were to find that the State did impose burdens and restrictions on groups [*e.g.*, the N.C. Democratic Party] or persons [*e.g.*, individual Democratic voters] by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315.

The Common Cause plaintiffs intend to prove at trial both the partisan intent of the 2016 Plan and that there are "manageable standard[s available] by which to measure the effect of the apportionment." *Vieth*, 541 U.S. at 315. The legislative record contains an abundance of direct evidence of the partisan intent of the 2016 Plan. The map drawers were instructed to use "political data" to create the most extreme partisan gerrymander in favor of the Republican Party and Republican candidates that was mathematically possible, "draw[ing] the map to give a partisan advantage to ten republicans and three Democrats because [it was not] possible to draw a map with 11 Republicans and two Democrats." *See* Common Cause First Amended Complaint ("FAC") [ECF 12] ¶ 13. The results of the 2016 congressional elections reflect that the defendants succeeded in accomplishing their partisan objective.

There is also an abundance of circumstantial evidence from which the partisan effect of the 2016 Plan (and the 2011 plan, the partisan effect of which the 2016 Plan was intended to perpetuate) can be inferred. In the ten years before the 2010 elections—when Republicans gained control of the redistricting process—there had been a direct

correlation between the state-wide popular vote in favor of Democratic or Republican candidates and the number of congressional seats that each of the two parties were able to win in congressional elections. In each of the five congressional elections between 2002 and 2010, the party that received a majority of the state-wide vote in North Carolina always won a majority of the seats. FAC [ECF 12] ¶ 6. The North Carolina delegation was almost evenly divided. Control shifted back and forth between the two parties, with the Republicans having a 7-6 advantage in two election cycles and the Democrats having a 7-6 advantage in two other cycles. In only one year, when the Democrats won the statewide vote 54% to 45%, were the Democrats able to win as many as 8 (62.5%) of the seats. *Id*. This partisan symmetry ended abruptly after the Republicans gained control of the redistricting process after the 2010 elections. Since 2010, there has been no a substantial disparity between the state-wide vote in North Carolina and each party's share of the North Carolina congressional delegation. In 2012, for example, although Democratic candidates received 51% of the state-wide vote, Democratic candidates won only 4 (31%) of the thirteen seats. *Id*. at ¶ 8. Since 2012, it has been impossible for the Democrats to win a majority of the seats by winning a majority of the state-wide vote.

The Common Cause plaintiffs will also prove both partisan purpose and partisan effect through expert testimony. Common Cause will show (a) that the 10-3 Republican partisan advantage was intentional and is not the result of pure chance or the application of traditional redistricting principles, and (b) that that there are several manageable standards by which the partisan effects of the 2016 apportionment can be measured.

Without limiting in any way the scope of the expert testimony which Common Cause intends to offer either in opposition to a motion for summary judgment or at trial, the following is a brief preview of the kind of expert testimony that Common Cause intends to use to prove the partisan purpose and partisan effects of the 2016 Plan: (a) the results of simulated alternative maps, similar to evidence on which the Court relied in *Raleigh Wake Citizens Ass'n. v. Wake County Board of Elections*, 827 F.3d. 333 (4th Cir 2016); (b) expert testimony about the extreme partisan asymmetry of the 2016 Plan as compared to neutral plans (*see LULAC v. Perry*, 548 U.S. 399, 419-20 (2006)); (c) the median-mean test of identifying and measuring partisan bias; and (d) calculation of the 2016 Plan's "efficiency gap," which assesses the votes "wasted" under the enacted plan, and on which the three-judge district court relied in part in *Whitford v. Gill*, __ F. Supp. 3d ___, 2016 WL 6837229, at *9 (W.D. Wisc. Nov. 21, 2016).

Once Common Cause has met its initial burden of proving that the purpose and effect of the 2016 Plan was to subject the Democratic Party and Democratic voters to disfavored treatment based on their voting histories (*Vieth*, 541 U.S. at 314), the burden of proof shifts to the defendants to prove that their use of political data to make it more difficult for Democratic voters to elect Democratic candidates of their choice to Congress was justified by a compelling state interest. *Id*. at 315. This will be an impossible burden for the defendants to carry because "partisan gerrymanders … are incompatible with democratic principles," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. __, 135 S. Ct. 2652, 2658 (2015) (alterations adopted), and a desire on

the part of the party in power to gain a partisan advantage and "harm a politically [weak or] unpopular group" by gerrymandering congressional districts can never be "a legitimate governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis added); *City of Cleburne v. Cleburne Living Ctrs*., 473 U.S. 432, 446-47 (1985).

COUNT TWO
EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

"The Equal Protection Clause … announces a fundamental principle: the State must govern impartially." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979). "When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength … or to disadvantage a politically weak segment … they violate the constitutional guarantee of equal protection." *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring) (citation omitted); *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J. dissenting).

In Count Two of their complaint, the Common Cause plaintiffs have alleged that the 2016 Plan violates the Equal Protection Clause. Defendants intentionally gerrymandered each of the thirteen congressional districts to discriminate against the Democratic Party and likely Democratic voters, for the purpose and with the effect of perpetuating the extreme 10-3 Republican partisan advantage created by the Republican majority under the earlier 2011 congressional redistricting plan after that plan was held to

be unconstitutional in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). The 2016 Plan intentionally packed excessive numbers of Democratic voters from surrounding districts into three districts with large Democratic majorities (the 1st, 4th, and 12th) and disbursed the remaining Democratic voters among the other ten districts with safe Republican majorities. The effect of the discrimination was and is to waste Democratic votes in districts 1, 4 and 12, and to dilute or nullify the effectiveness of the votes cast in favor of Democratic candidates in the other ten districts with safe Republican majorities, thereby depriving Democratic voters of an opportunity to elect Democratic candidates of their choice to Congress.

The Common Cause plaintiffs believe that the 2016 Plan is subject to strict scrutiny under the Fourteenth Amendment under either, or both, of two theories: (1) the evidence at trial will show "the predominance of illegitimate reapportionment factors [*i.e.* "partisan advantage"] rather than the 'legitimate considerations'… referred [to] in *Reynolds* and later cases." *Harris v. Arizona Independent Redistricting Comm'n*., 578 U.S. __, 136 S. Ct. 1301, 1307 (2016); *Raleigh Wake Citizens Ass'n*, 827 F.3d at 345 (holding that an "'intentional effort' to create a 'significant partisan advantage'" showed "the predominance of a[n] illegitimate reapportionment factor" (quoting *Larios v. Cox*, 542 U.S. 947, 947-49 (2004) (mem.) (Stevens, J., concurring) and *Harris*, 136 S. Ct. at 1307)); (2) even if the Court were to find that the partisanship was only a purpose but was not the predominant purpose of the 2016 Plan, the 2016 Plan is still subject to heightened scrutiny under the *Anderson-Burdick* "sliding-scale" because the 2016 Plan is

neither "reasonable" nor is it "non-discriminatory." *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992); *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("Nor … can legislatures restrict access to the franchise based on the desire to benefit a certain political party.") (citing *Anderson*, 460 U.S. at 792-93). The 2016 Plan would fail constitutional muster even under "rational basis" review. An apportionment that discriminates between voters and their respective political parties based on their political beliefs, party affiliations, or voting histories has no rational basis. *See Cleburne*, 473 U.S at 452 ("the word 'rational' … include[ed] elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."). Even if defendants could assert some non-discriminatory justification for the "partisan advantage" criterion, this government regulation—bearing on fundamental and constitutionally-protected interests—necessarily warrants closer scrutiny. *See Whole Women's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292, 2309 (2016) (holding that it is "wrong to equate the judicial review applicable to the regulation of a constitutionally protected liberty with the less strict review applicable where … economic legislation is at issue.").

Finally, the demonstration of partisan purpose and effect relevant to proving the Common Clause plaintiffs claim under the First Amendment—including the expert testimony plaintiffs intend to introduce to demonstrate the 2016 Plan's discriminatory effect—will also show that several measurable and administrable standards exist to

evaluate the discriminatory intent and effect of the 2016 Plan under the Fourteenth Amendment.

COUNT THREE
ARTICLE I, SECTION 2 OF THE CONSTITUTION

Unlike Article I, section 3 of the original Constitution, which authorized the legislature of each State to choose the Senators to represent the State (prior to the adoption of the Seventeenth Amendment in 1913), the Framers of the Constitution specified in Article I, § 2 that members of the House of Representatives shall not be chosen by the Legislatures, but "shall be composed of Members chosen every second year by the People" in each State.

The legal standard under Article I, § 2 is simple. The Constitution prohibits the legislature from making the decision for the people of each district whether a Republican or a Democrat should be "chosen" to represent the people in the district in the House of Representatives. The 2016 Plan, like its unconstitutional 2011 predecessor, violates Article 1, § 2 of the Constitution by allowing the North Carolina General Assembly (or more accurately the Republican majority in the General Assembly) to decide that only a Republican candidate should be elected to represent the people living in districts 2, 3, 5, 6, 7, 8, 9, 10, 11, and 13 in the House of Representatives, and that only Democratic candidates will be elected to the House of Representatives to represent the people in districts 1, 4 and 12.

There is nothing particularly difficult or unmanageable about this legal standard, which is well within the competency of the federal courts to interpret and apply.

COUNT FOUR
ARTICLE I, SECTION 4 OF THE CONSTITUTION

Article I, section 4 of the Constitution also sets forth a clear legal standard that is violated by the 2016 congressional reapportionment plan. Article I, § 4 authorizes the Legislature in each State to prescribe the "times, places and manner of holding elections for Senators and Representatives." The Supreme Court has held that this delegation to State Legislatures is a limited one, includes only the authority to adopt procedural rules for the conduct of congressional elections, and does not include the power to dictate or control the outcomes of those elections. *See Cook v. Gralike*, 531 U.S. 510, 523 (2001); *United States Term Limits v. Thornton*, 514 U.S. 779, 808-10 (1995).

The General Assembly exceeded its constitutional authority under Article I, § 4 by adopting a 2016 Plan whose stated purpose and demonstrated effect was and is to dictate the outcomes of general elections for members of the House of Representatives in each of North Carolina's thirteen congressional districts by gerrymandering the district lines to ensure that Republican candidates would be elected in ten of those districts and Democratic candidates would be elected in the other three districts.

Respectfully submitted, this 15th day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This the 15th day of February, 2017.

/s/ Edwin M. Speas, Jr.
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