

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

OPENING STATEMENT
ON BEHALF OF THE COMMON CAUSE PLAINTIFFS

May it please the Court.

There is no real dispute between the parties over the essential facts of this case. Those undisputed facts are set out in public statements of Representative David Lewis and Senator Robert Rucho and in the elections data collected and maintained by the State. The principal dispute between the parties involves a single legal issue: Does the U.S. Constitution prohibit gerrymandering congressional districts for partisan advantage?

This issue is one of paramount national importance that goes to the heart of the democratic process and representative government. The United States Supreme Court has defined partisan gerrymandering as "the drawing of ... district lines to subordinate adherents of one political party and entrench a rival party in power." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n.*, 135 S.Ct. 2652, 2658 (2015).

As this Court is aware, the Supreme Court recently heard oral argument in *Gill v. Whitford*, a challenge to Wisconsin's legislative districts. An exchange between Justice Kennedy and counsel for the Wisconsin Senate defending that map highlights the single legal issue here disputed:

Justice Kennedy: If the state has a law or constitutional amendment that's saying all legitimate factors must be used **in a way to favor party X or party Y**, is that lawful? ... Is there an equal protection violation or First Amendment violation?

Ms. Murphy: Yes, **It would be ... unconstitutional**, if it was on the face of it,... I think that would be better thought of *probably as an equal protection violation, but if you could think of it just as well,... as a First Amendment violation in the sense that it is viewpoint discrimination against the individuals who the legislation is saying you have to specifically draw the map in a way to injure...*"

Tr. pp. 26-27 (Oct 3, 2017).

That is this case. The 2016 North Carolina Contingent Congressional Plan is, by design, an extreme partisan gerrymander of North Carolina's 13 congressional districts. The partisan purpose of the 2016 Plan is expressly stated in the Adopted Criteria by which the plan was drawn (JX 1007) and in the statements of Representative Lewis and Senator Rucho, the two co-chairs of the Joint Committee responsible for the drafting of the 2016 Plan and who also oversaw the since-invalidated 2011 congressional redistricting plan. The defendants have also admitted in their Answer to the Common Cause Complaint that the "proposed plan" drawn by the RNC's leading redistricting expert, Dr. Thomas Hofeller, "followed all the criteria listed in the adopted criteria." Dkt. 49 ¶ 19.

The Adopted Criteria were drafted by Representative Lewis and approved by a straight party-line vote of the Joint Committee. These criteria expressly required the use of "political data" - the election results from 20 statewide contests - to "construct districts" for Republican "Partisan

Advantage." JX 1007. Indeed, the "Partisan Advantage" criterion defines the precise results Defendants sought:

Partisan Advantage

The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. **The Committee shall make reasonable efforts to construct districts in the 2016 Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.**

Representative Lewis explained to the Joint Committee that he was "propos[ing] that *to the extent possible*, the map drawers create a map which is ... likely to elect 10 Republicans and 3 Democrats." JX 1005, 47:23 - 48:6. Lewis further "*acknowledge[d] freely that this would be a political gerrymander*, which is not against the law." *Id.* Lewis emphasized to the Joint Committee that "we want to make clear" in the Adopted Criteria "that *...we are going to use political data in drawing this map ... to gain a partisan advantage... I want that criteria to be clearly stated and understood.*" JX 1005, 53:24 - 54:4 (emphasis added).

Defendants intended to maximize Republican partisan advantage under the 2016 Plan - to construct the most extreme possible partisan gerrymander of North Carolina's congressional districts. Representative Lewis told the Joint Committee that he and Senator Rucho were proposing "that we draw the maps to give a partisan advantage of 10 Republicans and 3 Democrats *because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats.*" JX 1005, 50:6-10. The Court will hear

testimony from Senator Dan Blue, a member of that Joint Committee, who will describe the hurried and undemocratic process that led to the enactment of a map built to maintain the 10-3 Republican advantage achieved under the 2011 plan.

Defendants' primary argument is that the Constitution provides no "judicially manageable standards" that enable this Court to determine whether a partisan gerrymander - no matter how brazen - violates any provision of the Constitution. If that argument were correct, which it is not, it would place the entire subject of partisan redistricting off-limits and immune from judicial review. Such a ruling would be tantamount to judicial endorsement of the legality of partisan gerrymandering and a green light for legislators to engage in ever more extreme practices. The result would be a lawless political free-fire zone in which anything goes, and victims of even the most vicious partisan gerrymanders would be left without a remedy.

But the Constitution itself provides all of the judicially manageable standards required to enable a court to determine whether its terms have been violated. This Court has already referenced the application of these standards - under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, Article I, § 2, and Article I, §4 of the Constitution - in its opinion denying the legislative defendants' stay motion. Dkt. 87, pp. 10-12. These standards are deeply embedded

in the language of the Constitution, supported by existing case law, and easily followed by legislators and enforced by courts.

There is nothing unmanageable about the First Amendment standard that applies strict scrutiny to, and regularly invalidates, laws that are content-based or that discriminate based on political viewpoint. There is nothing unmanageable about the standard under the Equal Protection Clause of the Fourteenth Amendment that imposes on States a duty to govern impartially. There is nothing unmanageable about applying the clear ruling in *Wesberry v. Sanders* to restrain partisan gerrymandering. And there is most certainly nothing difficult or unmanageable about prohibiting States from exceeding their authority under the Elections Clause in Article 1, § 4 by attempting to “dictate the outcomes” of federal elections or by “favor[ing] or disfavor[ing] a class of candidates” when constructing congressional districts.

Defendants also contend that partisan gerrymandering is constitutional if the districts appear to be consistent with traditional redistricting principles - that they are reasonably compact, contiguous, and divide fewer counties than previous plans. Not only has the Supreme Court rejected this defense, Defendants here could not avail themselves of it in any event.

The Court will hear from two experts with similar, and complementary, approaches to analyzing and measuring the extent

of partisan gerrymandering in the legislature's 2016 plan. They will demonstrate that the 2016 map is an extreme outlier in terms of partisan impact among the tens of thousands of maps the General Assembly could have enacted that met its non-partisan goals. Dr. Jonathan Mattingly, Chair of Duke's math department and North Carolina native, will describe how he used non-partisan redistricting criteria to create thousands of computer simulated maps. Fewer than one percent of those maps resulted in a 10-3 Republican split, illustrating how extreme an outlier the 2016 Plan is. Similarly, Dr. Jowei Chen, a University of Michigan political scientist, will describe how he also created several sets of 1,000 simulated maps incorporating all of the *non-partisan* criteria actually adopted by the legislature in 2016. Dr. Chen finds that a 10-3 map *never occurs* in any of the 3,000 computer-simulated plans. These experts' findings are uncontradicted by the defendants. Such a partisan distribution of seats would not arise from the application of traditional redistricting principles alone. It arises solely because the legislature engineered the map to achieve this precise result.

Such engineering is inconsistent with the fundamental objective of all redistricting, to "establish fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964); *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004). As the Supreme Court has recognized, these "partisan

gerrymanders ... are incompatible with democratic principles.”
Arizona Ind. Redistricting Comm’n, 135 S.Ct. at 2658.

The harms of this anti-democratic practice are plain. Partisan gerrymandering enables the party in power to dictate the outcomes of congressional elections by rendering general elections non-competitive. Non-competitive districts reduce voter turnout and participation. Worse still, partisan gerrymandering makes members of Congress responsive principally to primary voters within their party and to the party leadership that gerrymandered the district in their favor. The Court will hear firsthand how the 2016 gerrymander has harmed North Carolina voters and our democracy in testimony from Wayne Goodwin, Chair of the North Carolina Democratic Party, and Bob Phillips, Executive Director of Common Cause North Carolina.

“[T]hose who govern should be the *last* people to help decide who *should* govern.” *McCutcheon v. FEC*, 572 U.S. ___, 134 S.Ct. 1434 (2014). State legislators and members of Congress will not address this harm so long as they can benefit from it. The same was true in the malapportionment cases. In states like North Carolina, where no initiative process allows voters to pry the apportionment power away from the party-dominated General Assembly, the voters’ only remedy – just as it was in the malapportionment cases – is through the federal courts.

Respectfully submitted, this the 13th day of October, 2017.

/s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.
North Carolina Bar No. 4112
Steven B. Epstein
North Carolina Bar No. 17396
Caroline P. Mackie
North Carolina Bar No. 41512
POYNER SPRUILL LLP
301 Fayetteville Street
Suite 1900
Raleigh, NC 27601
Telephone: 919-783-6400
Facsimile: 919-783-1075
espeas@poynerspruill.com
sepstein@poynerspruill.com
cmackie@poynerspruill.com

/s/ Emmet J. Bondurant

Emmet J. Bondurant
Georgia Bar No. 066900
Jason J. Carter
Georgia Bar No. 141669
Benjamin W. Thorpe
Georgia Bar No. 874911
BONDURANT, MIXSON
& ELMORE, LLP
1201 W. Peachtree Street, NW
Suite 3900
Atlanta, GA 30309
Telephone (404) 881-4100
Facsimile (404) 881-4111
bondurant@bmelaw.com
carter@bmelaw.com
bthorpe@bmelaw.com

/s/ Gregory L. Diskant

Gregory L. Diskant
New York Bar No. 1047240
Peter A. Nelson
New York Bar No. 4575684
PATTERSON BELKNAP WEBB & TYLER
LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Facsimile: (212) 336-2222
gldiskant@pbwt.com
pnelson@pbwt.com

COUNSEL FOR PLAINTIFFS IN
COMMON CAUSE V. RUCHO, NO.
1:16-CV-1026

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 13th day of October, 2017.

s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.