

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:16-CV-1164

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, WILLIAM COLLINS, ELLIOTT FELDMAN, CAROL FAULKNER FOX, ANNETTE LOVE, MARIA PALMER, GUNTHER PECK, ERSLA PHELPS, JOHN QUINN, III, AARON SARVER, JANIE SMITH SUMPTER, ELIZABETH TORRES EVANS, and WILLIS WILLIAMS,

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,*

DAVID R. LEWIS, *in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting,*

TIMOTHY K. MOORE, *in his official capacity as Speaker of the North Carolina House of Representatives,*

PHILIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate,*

COMPLAINT

EQUITABLE RELIEF SOUGHT

THREE JUDGE PANEL REQUESTED

A. GRANT WHITNEY, JR., *in his official capacity as Chairman and acting on behalf of the North Carolina State Board of Elections,*

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and

THE STATE OF NORTH CAROLINA,

Defendants.

Plaintiffs, complaining of Defendants, allege:

INTRODUCTION

1. Plaintiffs seek a declaratory judgment that the North Carolina Congressional Plan adopted in February 2016 (the “2016 Plan”) violates the First and Fourteenth Amendments of the United States Constitution and an order permanently enjoining the holding of elections under the 2016 Plan. As explained in greater detail below, the Plan is, by any measure, one of the worst partisan gerrymanders in modern American history. Even if Democratic candidates earn a *majority* of the statewide vote, the Plan will enable Republican candidates to win *ten of thirteen* seats. Indeed, even if the largest Democratic wave in a generation occurs, the Plan will *still* produce a Republican supermajority of seats.

2. The 2016 Plan’s dramatic pro-Republican tilt is deliberate. Its designers were instructed to draw a map that was “likely to elect ten Republicans and three Democrats.” One of the Plan’s architects also freely admitted that “this would be a

political gerrymander,” and that he advocated a ten-three seat division only “because [he did] not believe it’s possible to draw a map with 11 Republicans and two Democrats.”

3. The 2016 Plan’s pro-Republican tilt cannot be justified by the State’s political geography or legitimate redistricting objectives. The map used by North Carolina in the 2000s abided by all federal and state legal requirements, but, unlike the 2016 Plan, did not favor either party. Additionally, when hundreds of congressional maps are drawn using a computer algorithm—all at least matching the 2016 Plan in terms of compliance with traditional redistricting criteria—*none* of them are as biased as the 2016 Plan.

4. This kind of partisan gerrymandering is both unconstitutional and profoundly undemocratic. It is unconstitutional because it treats voters unequally, diluting the electoral influence of one party’s supporters in violation of the Equal Protection Clause; and because it burdens voters’ freedom of speech and freedom to associate based on their political beliefs in violation of the First Amendment. Severe partisan gerrymandering is also contrary to core democratic values because it enables a political party to win many more districts—and thus much more legislative power—than is warranted by that party’s popular support. By sharply distorting the relationship between votes and seats, it causes policies to be enacted that do not accurately reflect the public will.

5. The United States Supreme Court has recognized that excessive partisan gerrymandering is unconstitutional. Nevertheless, recent challenges have failed because litigants have been unable to offer a workable standard to distinguish between

permissible political line-drawing and unlawful partisan gerrymandering. In this case, Plaintiffs propose a test that *is* workable, based on the concept of *partisan symmetry*. This is simply the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats, and that neither party should enjoy a systematic advantage in how efficiently its popular support translates into legislative power.

6. One way to measure a district plan's partisan symmetry is to calculate its *efficiency gap*. The efficiency gap captures in a single number all of a plan's *cracking* and *packing*—the two fundamental ways in which partisan gerrymanders are constructed. Cracking means dividing a party's supporters among multiple districts so they fall short of a majority in each one. Packing means concentrating a party's supporters in a few districts so their preferred candidates win by overwhelming margins. Both cracking and packing result in “wasted” votes: votes cast either for a losing candidate (in the case of cracking) or for a winning candidate but in excess of what she needed to prevail (in the case of packing). The efficiency gap is simply the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast.

7. Partisan symmetry forms the backbone of Plaintiffs' proposed three-prong test for partisan gerrymandering. This test's first prong is *discriminatory intent*, that is, whether a district plan was enacted with the purpose of benefiting one party or disadvantaging another party. The test's second prong is *discriminatory effect*, that is, whether the plan exhibits a level of partisan asymmetry that is high and durable relative to historical norms. And the test's third prong is *justification*, that is, whether the State

can justify the plan's asymmetry based on the State's political geography or legitimate redistricting objectives.

8. The 2016 Plan is plainly unconstitutional under this test. First, it was designed pursuant to criteria explicitly labeled "Partisan Advantage" and "Political Data." Its own authors also admit that it was intended to "gain partisan advantage" and be a "political gerrymander" that is "likely to elect ten Republicans and three Democrats."

9. Second, the 2016 Plan's predecessor exhibited pro-Republican efficiency gaps of over **20 percent** in 2012 and 2014, and the State's own data shows that a bias of this magnitude will arise again in 2016. To put these scores in perspective, they mean the 2016 Plan is in roughly the worst **2 percent** of all congressional plans nationwide in the modern era. They also mean the 2016 Plan's asymmetry is virtually certain to endure for the remainder of the decade.

10. Third, the 2016 Plan's bias is entirely unjustifiable. Of the hundreds of computer-drawn district maps of North Carolina, **all of them** treat the major parties more symmetrically while performing at least as well on every other dimension.

11. To be clear, Plaintiffs do not aim to replace a pro-Republican gerrymander with a pro-Democratic one. Rather, Plaintiffs seek the enactment of a balanced map that does not give either side an unfair partisan advantage as a remedy.

JURISDICTION AND VENUE

12. This action is brought pursuant to the United States Constitution and 28 U.S.C. § 2284(a). A three-judge panel should hear this case.

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a).

14. This Court has personal jurisdiction over each Defendant because each is a citizen of North Carolina.

15. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because a substantial portion of the events giving rise to the claims occurred in this district, and each Defendant conducts business in this district.

PARTIES

16. Plaintiff LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA (“LWVNC”) is a nonpartisan community-based organization, formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women’s suffrage. The LWVNC is dedicated to encouraging its members and the people of North Carolina to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. The mission of LWVNC is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The LWVNC impacts public policies, promotes citizen education, and makes democracy work by, among other things, removing unnecessary barriers to full participation in the electoral process. Currently LWVNC has 15 local leagues and over 972 members, each of whom, upon information and belief, is a registered voter in North Carolina. LWVNC is affiliated with the League of Women Voters of the United States, which was also founded in 1920. LWVNC began as an organization focused on the needs of women and training women voters. It has evolved into an organization

concerned with educating, advocating for, and empowering all North Carolinians. With members in almost every county in the State, the LWFNC's local leagues are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. Individual league members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote (GOTV) efforts. LWFNC has developed a Voter Engagement Program that partners with local election boards and schools to encourage young voters to register to vote. LWFNC also devotes substantial time and effort to ensuring that government at every level works as effectively and fairly as possible. This work involves continual attention to and advocacy concerning issues of transparency, a strong and diverse judiciary, fair and equal nonpartisan redistricting, and appropriate government oversight.

17. LWFNC has standing to challenge the 2016 Plan. The Plan discriminates against North Carolina voters who associate with the Democratic Party by diluting their votes for the purpose of maintaining a 10-to-3 Republican advantage in congressional seats. The Plan thus directly impairs LWFNC's mission of encouraging civic engagement and nonpartisan redistricting reform. Additionally, LWFNC is a membership organization, and its members are harmed by the Plan because it dilutes Democratic votes and impairs Democratic voters' ability to elect their preferred congressional candidates. LWFNC's members' right to participate freely and equally in the political process is burdened as well by the Plan, which in many cases denies the ability to cast a meaningful vote altogether.

18. Plaintiff WILLIAM COLLINS is a 66-year-old U.S. Citizen who has been an active Democratic voter in North Carolina since he was 18 years of age. Mr. Collins retired from Domtar Paper Company, LLC approximately 10 years ago. Mr. Collins is a resident of Washington County, and lives in the 1st Congressional District at issue in this case.

19. Plaintiff ELLIOTT FELDMAN is a 74-year-old U.S. citizen who has been an active voter in North Carolina since 1994. In 2003, Mr. Feldman retired from the United States Customs and Border Protection, where he worked for approximately 25 years. Prior to retirement, Mr. Feldman was registered as an independent. However, in 2002, he registered as a Democrat and has registered as such since then. Mr. Feldman is a resident of Mecklenburg County, North Carolina, and lives in the 12th Congressional District at issue in this case.

20. Plaintiff CAROL FAULKNER FOX is a 52-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 17 years. Ms. Fox is a Lecturing Fellow at Duke University. She is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

21. Plaintiff ANNETTE LOVE is a 59-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 28 years. Ms. Love is a retired independent contractor in the real estate and mortgages profession. She is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

22. Plaintiff MARIA PALMER is a 56-year-old U.S. citizen who has been an active Democratic voter in North Carolina for nearly 20 years. Dr. Palmer is an employee

of Carolina Donor Services, an organ procurement organization, and is a Council Member for the Town of Chapel Hill, North Carolina. Dr. Palmer is a resident of Orange County, North Carolina, and lives in the 4th Congressional District at issue in this case.

23. Plaintiff GUNTHER PECK is a 53-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Mr. Peck is an Associate Professor at Duke University. He is a resident of Durham County, and lives in the 1st Congressional District at issue in this case.

24. Plaintiff ERSLA PHELPS is a 43-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Ms. Phelps is a Mortgage Operation Specialist for BB&T Bank. Ms. Phelps is a resident of Wilson County, and lives in the 2nd Congressional District at issue in this case.

25. Plaintiff JOHN QUINN, III is a 64-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for more than 10 years. Mr. Quinn retired from the Federal Deposit Insurance Corporation over 11 years ago. He is a resident of Buncombe County, and lives in the 10th Congressional District at issue in this case.

26. Plaintiff AARON SARVER is a 39-year-old U.S. Citizen who has been an active Democratic voter in North Carolina for nearly seven years. Mr. Sarver is the Communications Director at Campaign for Southern Equality. Mr. Sarver is a resident of Asheville, North Carolina, and lives in the 11th Congressional District at issue in this case.

27. Plaintiff JANIE SMITH SUMPTER is a 70-year-old U.S. citizen who has been an active voter registered as a Democrat in North Carolina since 1987. Mrs.

Sumpter retired from the United States Postal Service in 2008. Mrs. Sumpter has been involved with voter education and registration throughout the State. Mrs. Sumpter is a resident of Mecklenburg County, North Carolina, and lives in the 12th Congressional District at issue in this case.

28. Plaintiff ELIZABETH TORRES EVANS is a 61-year-old U.S. citizen who has been an active voter registered as a Democrat in North Carolina since 2002. Mrs. Torres Evans has been a paralegal for approximately 20 years, and currently works in that capacity. Mrs. Torres Evans is a resident of Granville County, North Carolina, and lives in the 1st Congressional District at issue in this case.

29. Plaintiff WILLIS WILLIAMS is a 74-year-old disabled veteran who has been an active Democratic voter in North Carolina for well over 50 years. Even during his military service, Mr. Williams voted absentee. Mr. Williams is a resident of Martin County, North Carolina, and lives in the 1st Congressional District at issue in this case.

30. The individual Plaintiffs have standing to bring this action. They are all registered voters and Democrats who support the public policies espoused by the Democratic Party and Democratic Party candidates. Along with other Democratic voters across the State, they have been harmed by the 2016 Plan's unconstitutional partisan gerrymandering because the Plan treats Democrats unequally based on their political beliefs and impermissibly burdens their rights of free speech and association. Some of the Plaintiffs have been packed into a handful of districts where Democratic voters make up enormous majorities, while others have been cracked among numerous districts where

Democratic candidates are virtually certain to lose. Either way, the Plan's purpose and effect are to dilute Plaintiffs' electoral influence because of their political views.

31. Defendant ROBERT A. RUCHO is being sued 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.

32. Defendant DAVID R. LEWIS is being sued in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting.

33. Defendant TIMOTHY K. MOORE is being sued in his official capacity as Speaker of the North Carolina House of Representatives.

34. Defendant PHILIP E. BERGER is being sued in his official capacity as President Pro Tempore of the North Carolina Senate.

35. Defendant A. GRANT WHITNEY, JR. is being sued in his official capacity as Chairman of the North Carolina State Board of Elections.

36. Defendant NORTH CAROLINA STATE BOARD OF ELECTIONS is the agency responsible for the administration of the election laws of the State of North Carolina and charged with the duty of "general supervision over the primaries and elections in the State," N.C. Gen. Stat. § 163-22(a), including elections of the thirteen members of the United States House of Representatives from North Carolina.

37. Defendant STATE OF NORTH CAROLINA is a sovereign state in the United States.

STATEMENT OF FACTS

The 2016 Plan Was Enacted with the Intent of Discriminating Against Democrats

38. In 2001, pursuant to the North Carolina State Constitution, Art. II, § 3, the North Carolina General Assembly adopted a congressional district plan (the “2001 Plan”) for the State’s thirteen congressional districts.

39. Between 2001 and 2010, five congressional elections were held under the 2001 Plan (in 2002, 2004, 2006, 2008, and 2010). In all of these elections, the more successful party received between 51 and 56 percent of the statewide vote, and in all of the elections except one, the more successful party also won a majority of the Plan’s seats.¹ In 2002, Republicans won 52 percent of votes and seven of thirteen seats. In 2004, Republicans won 51 percent of votes and seven of thirteen seats. In 2006, Democrats won 56 percent of votes and seven of thirteen seats. In 2008, Democrats won 55 percent of votes and eight of thirteen seats. And in 2010, Republicans won 54 percent of votes and six of thirteen seats.

40. In 2011, the North Carolina General Assembly, now newly under unified Republican control, enacted a congressional district plan (the “2011 Plan”) that radically reshaped the State’s districts. As a three-judge panel of this Court eventually held, race was the predominant factor motivating the creation of two of the Plan’s districts: the First

¹ The statewide vote shares reported in this paragraph are adjusted using imputations for uncontested races.

and Twelfth Congressional Districts. *See Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016), *appeal docketed*, No.15-1262 (U.S. Apr. 11, 2016).

41. Under the 2011 Plan, Democratic candidates won 51 percent of the statewide vote in 2012. However, **Republican** candidates won nine of thirteen seats (and nearly won a tenth seat, losing the Seventh Congressional District by just 654 votes). In 2014, Republican candidates won a narrow statewide majority of 53 percent of the vote. But this slim victory translated into a supermajority of ten of thirteen seats.²

42. After the 2011 Plan was invalidated in *Harris*, the Republican leadership in the Legislature appointed a Joint Select Committee on Redistricting (the “Committee”) to draft a new congressional district plan. This Committee, like its predecessor that designed the 2011 Plan, was chaired by Republican Senator Robert Rucho and Republican Representative David Lewis. The Committee was made up of 25 Republican legislators and 12 Democratic legislators.

43. On February 16, 2016, the Committee met to discuss the adoption of written redistricting criteria composed prior to the meeting by Senator Rucho and Representative Lewis. These criteria included “**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 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina’s congressional delegation.” *See* Contingent Congressional Plan Committee Adopted Criteria (attached hereto as Exhibit A).

² Again, the statewide vote shares are adjusted to take into account uncontested races.

44. The criteria also described the use of **“Political Data”**: “The only data other than population data to be used to construct congressional districts shall be **election results** in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan.” *See id.*

45. The “Partisan Advantage” and “Political Data” criteria amount to overt admissions that the 2016 Plan was intended to benefit Republicans and disadvantage Democrats. This conclusion is bolstered by Representative Lewis’s comments at the February 16, 2016 Committee hearing. Discussing the “Partisan Advantage” criterion, he stated that its aim was that, “to the extent possible, the map drawers create a map which is perhaps likely **to elect 10 Republicans and 3 Democrats.**” North Carolina Joint Select Committee on Congressional Redistricting Hearing Transcript at 48 (Feb. 16, 2016) (attached hereto as Exhibit B). He added, “I acknowledge freely that **this would be a political gerrymander**, which is not against the law.” *Id.* He continued, “I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats.” *Id.* at 50.

46. Discussing the “Political Data” criterion, Representative Lewis stated that “to the extent [we] are going to use political data in drawing this map, **it is to gain partisan advantage.**” *Id.* at 54; *see also id.* (“making clear that our intent is to use . . . the political data we have to our partisan advantage”). He also explained the method through

which political data would benefit Republicans. “[Y]ou would want to draw the lines so that more of the whole VTDs [Voter Tabulation Districts] voted for the Republican on the ballot than they did the Democrat.” *Id.* at 57.

47. The Committee was compelled to vote on the adoption of the criteria on February 16, 2016, the very day on which its members (other than Senator Rucho and Representative Lewis) learned about the criteria’s existence. *See* North Carolina Joint Select Committee on Congressional Redistricting Hearing Transcript at 37 (Feb. 17, 2016) (attached hereto as Exhibit C). Unsurprisingly, all Democrats on the Committee voted against the criteria, while all Republicans voted in favor. Ex. B at 69.

48. After the criteria were adopted, the Committee’s members were given only twenty-four hours to design maps based on them. Ex. C at 36. On February 17, 2016, the very next day, the Committee met again to consider a congressional district plan—the 2016 Plan—presented by Senator Rucho and Representative Lewis. The Committee approved the Plan on a straight party-line vote. *Id.* at 72.

49. On February 18, 2016, the 2016 Plan was introduced in and passed by the North Carolina Senate, with all Democrats voting against it and all Republicans voting in favor.

50. On February 19, 2016, the 2016 Plan was introduced in and passed by the North Carolina House of Representatives, with all Democrats voting against it and all Republicans voting in favor.

The 2016 Plan Has the Effect of Discriminating Against Democrats

The Efficiency Gap Captures the Extent of Partisan Gerrymandering

51. The Supreme Court has unanimously agreed that partisan gerrymandering can rise to the level of a constitutional violation. *See Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion) (“[A]n *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume.”).

52. In *LULAC v. Perry*, 548 U.S. 399 (2006), a majority of the Justices expressed interest in a test for unconstitutional partisan gerrymandering based on the concept of *partisan symmetry*. Partisan symmetry is a “require[ment] that the electoral system treat similarly-situated parties equally.” *Id.* at 466 (Stevens, J., concurring in part and dissenting in part). In other words, a plan is symmetric when it creates a level playing field, giving neither major party a systematic advantage over its opponent in the conversion of electoral votes into legislative seats.

53. In *LULAC*, the Court considered one particular measure of partisan symmetry, called *partisan bias*. Partisan bias refers to the divergence in the share of seats that each party would win given the same share (typically 50 percent) of the statewide vote. *See id.* at 419-20 (opinion of Kennedy, J.); *id.* at 466 (Stevens, J., concurring in part and dissenting in part).

54. Partisan bias is not the only measure of partisan symmetry. In recent years, political scientists and legal academics have developed a new symmetry metric, called the *efficiency gap*. *See, e.g.*, Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 *Legis. Stud. Q.* 55 (2014); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*,

82 U. Chi. L. Rev. 101 (2015); Expert Report of Prof. Simon D. Jackman in *Whitford v. Nichol*, No. 15-cv-421-bbc (July 7, 2015).

55. The efficiency gap is rooted in the insight that, given the constitutional requirement of equal population, there are only two ways to implement a partisan gerrymander. First, a party's supporters can be *cracked* among a large number of districts so that they fall somewhat short of a majority in each one. These voters' preferred candidates then predictably lose each race. Second, a party's backers can be *packed* into a small number of districts in which they make up enormous majorities. These voters' preferred candidates then prevail by overwhelming margins. All partisan gerrymandering is accomplished through cracking and packing, which enable the party controlling the mapmaking to manipulate vote margins in its favor.

56. Both cracking and packing produce so-called "*wasted*" votes—that is, votes that do not directly contribute to a candidate's election. When voters are cracked, their votes are wasted because they are cast for losing candidates. Similarly, when voters are packed, their votes are wasted to the extent they exceed the 50 percent-plus-one threshold required for victory (in a two-candidate race). Partisan gerrymandering can also be understood as the manipulation of wasted votes in favor of the gerrymandering party, so that it wastes fewer votes than its adversary.

57. The efficiency gap is *the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast*. Suppose, for example, that there are five districts in a plan with 100 voters each. Suppose also that Party A wins three of the districts by a margin of 60 votes to 40, and that Party B wins

two of them by a margin of 80 votes to 20. Then Party A wastes 10 votes in each of the three districts it wins and 20 votes in each of the two districts it loses, adding up to 70 wasted votes. Likewise, Party B wastes 30 votes in each of the two districts it wins and 40 votes in each of the three districts it loses, adding up to 180 wasted votes. The difference between the parties' respective wasted votes is 110, which, when divided by 500 total votes, yields an efficiency gap of 22 percent in favor of Party A.

58. The efficiency gap is *not* based on the principle that parties have a right to proportional representation based on their share of the statewide vote, nor does it measure the deviation from seat-vote proportionality. Instead, by aggregating all of a plan's cracking and packing into a single number, the efficiency gap measures a party's surplus seat share: the proportion of seats a party receives that it would *not* have received under a balanced plan in which both sides had approximately equal wasted votes. In the above example, for instance, the 22 percent efficiency gap in favor of Party A means that it won 22 percent more seats—that is, one more seat out of five—than it would have under a balanced plan.

The 2016 Plan Is an Outlier by State and National Standards

59. Over the 1972-2012 period—since the end of the reapportionment revolution of the 1960s—the distribution of congressional plans' efficiency gaps has been normal and has had a mean and a median close to zero. *See* Stephanopoulos & McGhee, *supra*, at 870. This indicates that neither major party has enjoyed an overall advantage in congressional redistricting during the modern era.

60. Recently, however, the average absolute efficiency gap (that is, the mean of the absolute values of all plans' efficiency gaps in a given year) has increased sharply. This metric stayed roughly constant from 1972 to 2010. But in the current cycle, fueled by rising partisanship and greater technological sophistication, it has spiked to the highest level recorded in the modern era. *See* Stephanopoulos & McGhee, *supra*, at 873. This means that the severity of today's partisan gerrymandering is historically unprecedented.

61. Between 1972 and the present, the partisan fairness of North Carolina's congressional plans went through three distinct phases. In the 1970s and 1980s, the plans substantially favored Democrats, with average efficiency gaps around 8 percent. In the 1990s and 2000s, the plans were almost perfectly balanced, with average efficiency gaps around 2 percent. And in the current cycle, the 2011 Plan massively advantaged Republicans in 2012 and 2014. In both of these elections, the Plan exhibited efficiency gaps larger than **20 percent**—by far the worst scores observed in North Carolina's modern history.

62. To place these scores in a national context, they can be compared to the entire distribution of congressional plans' efficiency gaps in the modern era. The 2011 Plan's efficiency gaps in 2012 and 2014 are in roughly the worst **2 percent** of this distribution, well over **two standard deviations** from the historical mean.

63. This conclusion is confirmed by partisan bias, the measure of partisan symmetry considered by the Supreme Court in *LULAC*. From the 1970s to the 2000s, North Carolina's congressional plans had average partisan biases that either modestly favored Democrats or were almost perfectly balanced. But in 2012 and 2014, the 2011

Plan exhibited pro-Republican partisan biases larger than *25 percent*—again, by far the worst in North Carolina’s modern history and at the far edge of the nationwide distribution.

64. When the Legislature enacted the 2016 Plan, it made available *earlier* election results aggregated by the Plan’s new congressional districts. *See* 2016 Contingent Congressional Plan, Corrected, http://www.ncleg.net/representation/Content/Plans/PlanPage_DB_2016.asp?Plan=2016_Contingent_Congressional_Plan_-_Corrected&Body=Congress. These earlier results can be used to estimate the Plan’s partisan fairness in a future election that resembles a prior race.

65. For example, using the 2008 presidential election results (a good choice because the race was exceptionally close, with Barack Obama winning 50.1 percent of the two-party vote), the 2016 Plan would have a pro-Republican efficiency gap and partisan bias of over *25 percent*. Similarly, using the 2014 senatorial election results (another good choice because the race was also very close, with Thom Tillis winning 50.8 percent of the two-party vote), the Plan again would have a pro-Republican efficiency gap and partisan bias of over *25 percent*.

66. A more sophisticated projection of the 2016 Plan’s performance is possible using election results from the most recent year, 2012, in which both a presidential and a congressional election took place. A precinct-level model can be constructed with congressional election results as the dependent variable, and presidential election results, demographic data, and incumbency status as the independent variables.

67. Using this more advanced method, and taking into account the incumbency status of the 2016 congressional candidates, the 2016 Plan is forecast to have a pro-Republican efficiency gap and partisan bias of over **25 percent**. These scores are virtually identical to those generated using the simpler method—as well as to those actually exhibited by the 2011 Plan in the 2012 and 2014 elections. Together, these projections confirm that, as intended by its authors, the 2016 Plan is extraordinarily tilted in Republicans’ favor.

68. The more advanced method also highlights **how** this extreme level of partisan unfairness was achieved: namely, the rampant cracking and packing of North Carolina’s Democratic voters, resulting in their votes being disproportionately wasted. Among “cracked” districts in which the prevailing candidate receives less than 60 percent of the vote, Republican candidates are forecast to win **all ten** of them (Districts 2, 3, 5, 6, 7, 8, 9, 10, 11, and 13), while Democratic candidates are not forecast to win **any**. Conversely, among “packed” districts in which the prevailing candidate receives more than 70 percent of the vote, Democratic candidates are forecast to win **both** of them (Districts 1 and 12), while Republican candidates are not forecast to win **any**.

The 2016 Plan’s Partisan Asymmetry Is Highly Durable

69. The more advanced method can be used as well to estimate how the 2016 Plan would perform under electoral conditions **different** from those in 2012, by shifting the conditions up and down and then recalculating the Plan’s asymmetry. This “sensitivity testing” confirms that the Plan will continue to favor Republicans under all plausible electoral conditions. In the event of a 2006-style Democratic wave election, the

Plan's pro-Republican efficiency gap would actually *increase* to almost **30 percent**. In this scenario, Democratic candidates would win 56 percent of the statewide vote—but would still win just four of thirteen congressional districts. Likewise, if a Republican wave occurred, similar in scale to that of 1994, the Plan would exhibit a pro-Republican efficiency gap of about 15 percent. More systematically, adjusting the 2012 electoral environment by a percentage point at a time, up and down to the parties' best and worst performances over the last generation, the Plan would have an average pro-Republican efficiency gap of almost **25 percent**. This is perhaps the best guide to the Plan's likely future performance, and it further corroborates its remarkably large and resilient bias.

70. The durability of the 2016 Plan's partisan imbalance can also be demonstrated through historical analysis. Based on the relationship between congressional maps' *initial* and *lifetime average* efficiency gaps over the last half-century, the Plan is virtually certain to exhibit a very large pro-Republican average efficiency gap over the period it is in effect. In fact, based on historical data, there is close to a **zero percent** chance that the Plan will, on average, favor Democratic candidates over its lifetime.

The 2016 Plan's Partisan Asymmetry Cannot Be Justified

71. Not only is the 2016 Plan an extreme and durable pro-Republican gerrymander, but these features cannot be justified by North Carolina's political geography or legitimate redistricting objectives. The congressional plan in effect during the 2000s (the 2001 Plan) is proof. It complied with all federal and state legal

requirements, but had an average efficiency gap of only *2 percent*, or roughly *20 percentage points* less than the 2011 Plan and the 2016 Plan.

72. Similar evidence that the 2016 Plan's partisan asymmetry is unjustifiable comes from hundreds of North Carolina congressional district plans created through a computer algorithm. These maps were designed using traditional redistricting criteria, and comply with federal and state legal requirements. *All* of the maps also have much smaller efficiency gaps than the 2016 Plan. In fact, the vast majority of the maps have efficiency gaps close to *zero*.

FIRST CLAIM FOR RELIEF

(Denial of Equal Protection under the Fourteenth Amendment of the U.S. Constitution

Pursuant to 42 U.S.C. § 1983)

73. Plaintiffs rely upon and incorporate the facts alleged in paragraphs 1-72 of this Complaint.

74. The 2016 Plan is a partisan gerrymander so extreme that it violates Plaintiffs' Fourteenth Amendment right to equal protection of the laws. The Plan intentionally, severely, and unjustifiably cracks and packs Democratic voters, thus disproportionately wasting their votes and diluting their electoral influence. Accordingly, the Plan deprives Plaintiffs of their civil rights under color of state law in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

75. In *LULAC*, a majority of the Justices expressed interest in a partisan gerrymandering test based on the concept of partisan symmetry. *See, e.g.*, 548 U.S. at 420 (opinion of Kennedy, J.) (not "discounting its utility in redistricting planning and

litigation”); *id.* at 466 (Stevens, J., concurring in part and dissenting in part) (symmetry “is widely accepted by scholars as providing a measure of partisan fairness in electoral systems”); *id.* at 483 (Souter, J., concurring in part and dissenting in part) (noting “the utility of a criterion of symmetry as a test”). Lower courts have recently confirmed the doctrinal availability—and significant promise—of such an approach. *See, e.g., Whitford v. Nichol*, 151 F. Supp. 3d 918, 930-31 (W.D. Wis. 2015).

76. Plaintiffs propose a three-prong test for partisan gerrymandering that is rooted both in the concept of partisan symmetry and in well-established equal protection doctrine. The test’s first prong asks whether a district plan was enacted with ***discriminatory intent***, that is, in order to engage in “intentional discrimination against an identifiable political group.” *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (plurality opinion). This element is satisfied when a purpose motivating a map is benefiting one party or disadvantaging another party.

77. The test’s second prong is whether a district plan has a ***discriminatory effect***, that is, whether it exhibits a high and durable level of partisan asymmetry relative to historical norms. This is the prong that takes advantage of the doctrinal opening created by the Court in *LULAC*. The element also parallels the core inquiry in one-person, one-vote cases: whether the total population deviation of a plan’s districts exceeds a reasonable threshold, such as 10 percent for state legislative plans. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

78. Several measures of partisan symmetry exist, including the efficiency gap and partisan bias. The efficiency gap may be used in all electoral settings, while partisan

bias is applicable only in competitive States. *See* Stephanopoulos & McGhee, *supra*, at 855-62.

79. The durability of a district plan's asymmetry may be assessed through sensitivity testing, that is, by shifting electoral conditions in both parties' directions and then recalculating the plan's asymmetry. If a plan's partisan imbalance would disappear given plausible electoral shifts, then the plan is not a resilient gerrymander. *See Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986) (plurality opinion).

80. As in the one-person, one-vote context, the courts may eventually set an asymmetry threshold, above which the effect prong is satisfied and below which it is not. But this threshold need not be set in the present case. *See Whitford v. Nichol*, 2016 WL 1390040, at *11, ___ F. Supp. 3d ___ (W.D. Wis. Apr. 7, 2016).

81. Finally, the test's *justification* prong asks whether a district plan's large and durable asymmetry can be "justified by the State" based on the State's political geography or legitimate redistricting objectives. *Brown*, 462 U.S. at 843. Under this element, the burden of justification is on the State, it is the plan's *asymmetry* (not its general contours) that must be justified, and alternative maps are the most probative evidence. *See id.*

82. The 2016 Plan is plainly unconstitutional under Plaintiffs' proposed three-prong test for partisan gerrymandering. *First*, the legislative leaders who proposed and enacted the Plan admit that it was intended to be a "political gerrymander" "likely to elect ten Republicans and three Democrats." The written criteria for the Plan's design confirm

that “[t]he partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats.”

83. *Second*, the 2016 Plan’s partisan asymmetry is virtually certain to be both extremely large and extremely durable. The Plan’s predecessor exhibited pro-Republican efficiency gaps and partisan biases above 20 percent in both 2012 and 2014—by far the worst scores in North Carolina’s modern history, and in roughly the worst 2 percent of the entire historical distribution. A variety of analyses indicate that the Plan will be just as imbalanced as its antecedent. These analyses also reveal that the Plan will remain heavily tilted in Republicans’ favor even if Democratic or Republican waves (or any electoral outcomes less extreme than such waves) occur.

84. *Third*, the State cannot justify the 2016 Plan’s extreme and durable asymmetry based on the State’s political geography or legitimate redistricting objectives. The highly balanced 2001 Plan shows that the State’s geography and redistricting criteria are perfectly compatible with a high level of partisan symmetry. This conclusion is bolstered by the hundreds of computer-drawn maps, all of which at least match the 2016 Plan in terms of federal and state legal requirements—and all of which exhibit far smaller efficiency gaps.

SECOND CLAIM FOR RELIEF

(Violation of the First Amendment Right to Freedom of Speech and Association Pursuant to 42 U.S.C. § 1983)

85. Plaintiffs rely upon and incorporate the facts alleged in paragraphs 1-84 of this Complaint.

86. Under the First Amendment, Plaintiffs have the right to express their political views, to associate with and advocate for the political party of their choice, and to participate in the political process. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 356 (1976) (“[P]olitical belief and association constitute the core of those activities protected.”). Also under the First Amendment, “burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views” is highly disfavored, *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment), and is subject to strict scrutiny, *see, e.g., O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996).

87. The 2016 Plan severely “burden[s] or penalize[es]” Democratic voters because of their political beliefs and association with the Democratic party by systematically cracking and packing them, and thus disproportionately wasting their votes and diluting their electoral influence. The Plan employs data about Democratic voters’ political expression to retaliate against them and to prevent them from meaningfully participating in the political process. This burden or penalty, moreover, is entirely intentional; in fact, its imposition was a central objective of the Plan’s authors. The Plan’s infringement of core First Amendment rights also cannot survive strict scrutiny because it does not advance *any* legitimate governmental interest, much less a *compelling* one.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Declare that the 2016 Plan is unconstitutional because it violates the rights of Plaintiffs, and all Democratic voters in North Carolina, under the First and Fourteenth Amendments of the United States Constitution;
2. Declare that the rights of Plaintiffs, and all Democratic voters in North Carolina, will be irreparably harmed without the intervention of this Court to secure those rights for the exercise thereof in a timely and meaningful manner;
3. Preliminarily and permanently enjoin Defendants, their agents, officers and employees, including clerks in all 100 North Carolina counties, from administering, preparing for, or moving forward with any future elections of North Carolina's congressional members using the 2016 Plan;
4. Establish a congressional district plan that complies with the United States Constitution and all federal and state legal requirements, if the North Carolina General Assembly and/or Governor fail to enact a new plan in a timely manner;
5. Make any and all orders that are just, necessary, and proper to preserve Plaintiffs' constitutional rights to equally participate in elections of congressional seats;
6. Award Plaintiffs their costs, disbursements and reasonable attorneys' fees incurred in bringing this action pursuant to 42 U.S.C. §§ 1988, 1973l(e); and

7. Grant any and all other relief this Court deems just and proper.

This the 22nd day of September, 2016.

/s/ Anita S. Earls

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