IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
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 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs ask this court to subject the State of North Carolina to yet another protracted redistricting lawsuit. This case is based upon an allegedly new legal theory, proposed by "scholars," but never before adopted by the Supreme Court. In fact, this "new" legal theory is nothing more than proportional representation, a theory that has been considered and rejected by the Supreme Court. *Vieth v Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion); *Davis v Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion). Moreover, a three-judge court sitting in the Western District of North Carolina

rejected an identical challenge to North Carolina's 1992 Congressional Plan. *Pope v Blue*, 809 F.Supp. 392 (W. D. N. C.) aff'd, 506 U.S. 801 (1992). Finally, another three-judge court has already rejected claims that the 2016 Congressional Plan presents a justiciable political gerrymander. *Harris v McCrory*, No. 1:13-CV-949, 2016 WL 3129213, at * 1 (M.D. N.C. June 2, 2016).

For these and other reasons, this court should not allow this case to proceed under "new" scholarly theories that in actuality have been rejected by the Supreme Court, and should instead grant Defendants' motion to dismiss plaintiffs' complaint.

PLAINTIFFS' ALLEGATIONS

The plaintiffs in this case include the League of Women Voters ("LWV") and 12 individual plaintiffs who reside in six of North Carolina's existing Congressional Districts (Congressional Districts 1, 2, 4, 10, 11 and 12). Complaint ¶ 6-29.

Plaintiffs correctly allege that two districts included in North Carolina's 2011 Congressional Plan were declared to be illegal racial gerrymanders in *Harris v McCrory*, 159 F. Supp. 3d 600 (M. D. N. C. February 5, 2016), *appeal docketed*, No. 15-1262 (United States Supreme Court April 11, 2016). In its decision, the three-judge court ordered North Carolina to enact a new congressional plan to remedy the defects found by the three judge court no later than February 19, 2016. *Id.* at 627. Accordingly, on February 16, 2016, the General Assembly's Joint Select Redistricting Committee ("Joint Committee"), met to discuss and adopt criteria to be followed in drawing a 2016 Congressional Plan ("2016 Plan"). (Compl. ¶ 43, Ex. A). The criteria adopted by the Joint Committee included:

Equal Population

The Committee will use the 2010 federal decennial census data as the sole basis of population for the establishment of districts in the 2016 Contingent Congressional Plan. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.

Contiguity

Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

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. Voting districts ("VTDs") should be split only when necessary to comply with the zero deviation population requirements set forth above in order to ensure the integrity of political data.

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.

Twelfth District

The current General Assembly inherited the configuration that was retained because the district had already been heavily litigated over the past two decades and ultimately approved by the courts. The *Harris* court has criticized the shape of the Twelfth District citing its "serpentine" nature. In light of this, the Committee shall construct districts in the 2016 Contingent Congressional Plan that eliminate the current configuration of the Twelfth District.

Compactness

> In light of the *Harris* court's criticism of the compactness of the First and Twelfth Districts, the Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan that improve the compactness of the current districts and keep more counties and VTDs whole as compared to the current enacted plan. Division of counties shall only be made for reasons of equalizing population, consideration of incumbency and political impact. Reasonable efforts shall be made not to divide a county into more than two districts.

Incumbency

> Candidates for Congress are not required by law to reside in a district they seek to represent. However, reasonable efforts shall be made to ensure that incumbent members of Congress are not paired with another incumbent in one of the new districts constructed in the 2016 Contingent Congressional Plan.

Id.

Contrary to plaintiffs' allegations, there was bi-partisan support for 5 of the 7 criterion adopted by the Joint Committee. (Compl. ¶ 47, Ex. B at 14-18; 24; 78; 94; 98). The criteria related to political data and partisan advantage were approved by a party line vote. (Compl. Ex. B, at 47, 69). On February 17, 2016, the Joint Committee adopted the proposed 2016 Plan based upon a party line vote. (Compl. ¶ 49). On February 18, 2016, the proposed 2016 plan was passed by the North Carolina Senate on a party line vote. On February 19, 2016, the proposed 2016 Plan was then passed by the North Carolina House on a party line vote. (Compl. ¶¶ 49, 50).

Plaintiffs' complaint does not allege that the 2016 Plan fails to follow the five criteria that were adopted by the Joint Committee with bi-partisan support. Thus, there are no allegations in plaintiffs' complaint that any district is not drawn with equal

population, that any district is not contiguous, that prior versions of Congressional District 12 were re-enacted in the 2016 Plan, that any challenged district is not compact or needlessly divides counties or precincts, or that incumbency was not considered when the General Assembly enacted the 2016 Plan.

ARGUMENT

1. Plaintiffs' Amended Complaint must be dismissed based upon the decision by the three-judge court in *Pope v. Blue*.

In *Pope v. Blue*, the three-judge court considered and rejected claims that were nearly identical to the allegations by the plaintiffs in this case. The plaintiffs in *Pope* challenged a congressional plan enacted in 1992 by a Democratic-controlled General Assembly on the grounds that the plan and individual districts constituted illegal political gerrymanders. The *Pope* plaintiffs alleged claims under the First and Fourteenth Amendments. *Id*. at 395, 397-98. In support of their claims, the *Pope* plaintiffs alleged that the 1992 Plan would result in the election of a disproportionate number of Democratic congressmen, that the 1992 Plan unnecessarily divided too many counties to create noncompact districts, and that the configurations of districts in the 1992 Plan were "unusual and egregious." *Id*. at 394-95, 397 n. 4, 399.

In granting the *Pope* defendants' motion to dismiss, the three-judge court held that the *Pope* plaintiffs' claims under the First Amendment were "coextensive" with their equal protection claims. *Id*. at 398 (*citing Washington v. Findley*, 664 F.2d 913, 927-28 (4th Cir. 1980)). More specifically, the court ruled that the First Amendment "offers no protection of voting rights beyond that afforded by the Fourteenth . . . Amendment." *Id*.

The three-judge court then relied upon the Supreme Court's decision in *Davis v. Bandemer*, , to evaluate the plaintiffs' claims under the Equal Protection Clause. The *Pope* court noted that illegal political gerrymandering cannot be established simply because "a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice." *Id*. at 396 (*citing Davis*, 478 U.S. at 131). Instead, plaintiffs must prove that they have "essentially been shut out of the political process." *Id*. (*citing Davis*, 478 U.S. at 139). This requires evidence that an "electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process at a whole." *Id*. (*citing Davis*, 478 U.S. at 132). Plaintiffs are obligated to show state "interference in the 'registration, organizing, voting, fundraising, or campaigning' of the purportedly disadvantaged group." *Id*. at 396 (*citing Badham v. Eu*, 694 F.Supp. 664, 670 (N.D. Cal. 1998), *aff'd mem.*, 488 U.S. 1024 (1989)). Moreover, to the extent election results might be relevant, "the results of a single election [are] insufficient to establish 'politically' discriminatory effect." *Id*.

In dismissing the *Pope* plaintiffs' complaint, the court held that plaintiffs had failed to allege facts showing that the 1992 Plan had caused them to be "shut out of the political process." *Id*. at 397. For example, the *Pope* court found that the Republican plaintiffs could not prove that they were "shut out" of the political process by a Congressional Plan that created a number of "'safe' Republican districts." *Id*. The court also noted that individuals who vote for a losing candidate are "usually deemed to be adequately represented by the winning candidates and to have as much opportunity to

influence that candidate or other voters in the district." *Id*. (*citing Davis*, 478 U.S. at 132). Additionally, the court observed that the *Pope* plaintiffs had not alleged that "anyone has ever interfered with [their] registration, organizing, voting, fund raising, or campaigning." *Id*. (*citing Badham*, 694 F.Supp. at 670). Finally, the court did not credit as relevant allegations by the *Pope* plaintiffs that their political party was excluded from the redistricting process. *Id*. at 397.

In short, all of the allegations made by the plaintiffs in this case track the allegations by the *Pope* plaintiffs, except that, unlike the *Pope* plaintiffs, the LWV plaintiffs do not allege that the 2016 Plan fails to follow traditional redistricting principles. Like the *Pope* plaintiffs, the plaintiffs here admit that the 2016 Plan creates three safe Democratic districts. (Compl. ¶ 45). Also like the *Pope* plaintiffs, the plaintiffs here fail to allege that they are not adequately represented in districts that may be won by Republican candidates. Nor do plaintiffs allege that they have no ability to influence successful Republican candidates. Further, while the plaintiffs here, like the *Pope* plaintiffs, allege that the Republican leadership truncated the legislative process (Compl. ¶¶ 16, 47, 48), there are no allegations that anyone has interfered with plaintiffs' registration, organizing, voting, fund raising, or campaigning. In short, just like in *Pope*, there are no allegations that plaintiffs have been "shut out" of the political process. *Id*. at 397.

The decision by the three-judge court in *Pope* is binding authority on this Court because it was summarily affirmed by the Supreme Court. *Id*. at 395 n. 2. As explained by the *Pope* court, plaintiffs' claims in this case under the First Amendment are

"coextensive" with their claims under the Fourteenth Amendment. Nothing has changed in the Supreme Court's jurisprudence on political gerrymanders since its decision in *Davis* or the three-judge court's decision in *Pope*. This Court should not find cognizable claims made against a Republican-controlled North Carolina General Assembly when the dismissal of identical claims made against a Democratic-controlled General Assembly was summarily affirmed by the Supreme Court.

2. Dismissal of plaintiffs' complaint is also mandated by decisions of the Supreme Court entered after its summary affirmation of the district court's opinion in *Pope v. Blue*.

Since the decision in *Pope*, the Supreme Court has issued two other decisions dismissing claims of political gerrymandering. In one of these decisions, *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), a federal court had adopted a congressional plan for the State of Texas after Texas had been unable to enact a new plan following the 2000 Census. Thereafter, the political balance of the state's legislature changed and Texas enacted a congressional plan to replace the court-ordered plan. The plan enacted by the legislature allegedly unfairly favored members of the Republican Party. The Supreme Court in *LULAC* dismissed plaintiffs' claims for political gerrymandering. However, the decision in *LULAC* has little relevance here because no one is contending that North Carolina has replaced a court-ordered plan for political advantage. *See LULAC*, 548 U.S. at 456 (Stevens, Breyer, J. J., concurring in part and dissenting in part).

However, the second Supreme Court decision on political gerrymanders, *Vieth, supra,* is directly relevant. Like the plaintiffs in this case, the *Vieth* plaintiffs alleged that

a Republican-controlled legislature in Pennsylvania had engaged in illegal political gerrymandering by enacting a plan that allowed Republican voters to elect a disproportionate number of legislative representatives. *Vieth*, 541 U.S. at 286-87. Based upon these allegations, plaintiffs alleged claims under the Fourteenth Amendment and Article I, Section 2, of the Constitution. A plurality of the Court concurred with the district court's opinion that plaintiffs had failed to state a claim and affirmed the lower court's opinion dismissing plaintiffs' complaint. Of equal significance, all four of the dissenting Justices in *Vieth* published opinions which indicate that even the *Vieth* dissenters would vote to dismiss plaintiffs' claims in this case.

The four Justices constituting the *Vieth* plurality found that claims of political gerrymandering are not justiciable under the United States Constitution. *Vieth*, 541 U.S. at 270-306. Justice Kennedy concurred in the result but disagreed with the opinion of the plurality that politically gerrymandering claims were non-justiciable. However, Justice Kennedy did not say that politically gerrymandering claims are justiciable, only that he was not prepared at the time of the *Vieth* decision to agree with the majority's opinion that they are not. *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring in result) ("There are, then, weighty arguments for holding cases like this non-justiciable; and these arguments may prevail in the long run."). Justice Kennedy observed that, at some point, the Court might find that the First Amendment provides a better framework for analyzing claims of political gerrymandering than the Fourteenth Amendment. *Id*. at 314-15. However, he did not offer a standard for applying the First Amendment to districting claims.

Four Justices filed dissenting opinions in *Vieth*. Three of the dissenting Justices opined that claims of political gerrymandering must be based on specific districts and that the Constitution does not recognize a claim based upon allegations that an entire plan constitutes an illegal gerrymander. *Vieth*, 541 U.S. at 327-28 (Stevens, J., dissenting); *Vieth* 541 U.S. at 346-47 (Souter, Ginsburg, J.J., dissenting).[1] At least one of the dissenting Justices expressly noted that claims of political gerrymandering cannot be based upon allegations that a districting plan results in the election of a disproportionate number of candidates from one political party or another. *Vieth*, 541 U.S. at 338 (Stevens, J., dissenting). Justice Stevens also opined that a claim for political gerrymandering can survive a motion to dismiss only where there is "no neutral criterion" that can be identified "to justify the lines" and "if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength . . . ." *Id*. at 339. Similarly, Justices Souter and Ginsburg also rejected the concept that state-wide plans may be challenged as an illegal political gerrymander. Instead, Justices Souter and Ginsburg would consider claims for political gerrymanders only where plaintiffs can show for the district of their residence that the legislature "paid little or no heed to those traditional districting principles whose disregard can be shown straight forwardly; contiguity, compactness, respect for political subdivisions, and conformity with

[1] Requiring plaintiffs to focus on a specific district to prove a claim of political gerrymanders is consistent with the Supreme Court's test for racial gerrymanders which also requires district specific proof. *Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015) ("*Alabama*").

geographic features like rivers and mountains." *Vieth*, 541 U.S. at 347-48 (Souter, Ginsburg, J.J., dissenting).

Justice Breyer entered a dissenting opinion in *Vieth*. Justice Breyer is the author of two decisions by the Supreme Court finding that partisan advantage is a legitimate and traditional districting principle: *Alabama*, 135 S. Ct. at 1270 and *Easley v. Cromartie*, 532 U.S. 234 (2000) ("*Cromartie II*"). Notwithstanding his opinion in *Alabama* and *Cromartie II*, in *Vieth*, Justice Breyer opined that a claim for political gerrymandering might be recognized even where a legislature has followed traditional districting principles. In such a case, Justice Breyer opined that plaintiffs would be required to prove that a majority of the voters for Congressional elections had failed to elect a majority of the representatives in at least two general elections. *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting).[2]

Regardless of how plaintiffs may attempt to cobble together all of the opinions in *Vieth*, it is clear that none of the Justices who participated in *Veith* would agree that plaintiffs' allegations should survive a motion to dismiss. Four Justices believed that political gerrymandering claims are non-justiciable. While Justice Kennedy did not join in the plurality opinion, he also did not go so far as to suggest that it was time for the Court to reverse *Davis* and find political gerrymandering claims non-justiciable, nor did he provide a standard for actually adjudicating any such claims. Clearly Justice Kennedy

[2] In his *Vieth* dissent, Justice Breyer appears to have not anticipated the position taken by the Court in an opinion written by him that plaintiffs must prove racial gerrymanders on a district basis. *Alabama, supra*. In light of his opinion in *Alabama*, it is questionable whether Justice Breyer would now allow a statewide political gerrymandering claim given his contrary views on racial gerrymandering.

would not find plaintiffs' claims here justiciable because they are based upon the same allegations made by the *Vieth* plaintiffs, *i.e.*, that the 2016 Plan would result in the election of Republican candidates at a level that is disproportionate with the number of Republican voters. *Vieth*, 541 U.S. at 708 (there is no authority for the precept that a majority of the voters should be able to elect a majority of the Congressional delegation).

Three of the dissenting Justices in *Vieth* would not allow claims based upon statewide allegations but instead would require allegations showing how specific districts depart from traditional districting principles. Even if the opinions by these three dissenting Justices were to be adopted by the Court, plaintiffs' claims in this case would still fail to state a claim. The plaintiffs here focus on the alleged unfairness of Republican voters electing more than their proportionate share of representatives based upon the projected statewide totals for all Republican and Democratic voters in all congressional elections. There is not a single allegation in the complaint explaining how any specific district violates traditional districting principles, such as failing to follow county lines, dividing an exorbitant number of precincts, or being drawn in a manner that is not compact. These omissions in plaintiffs' complaint are fatal to their political gerrymandering claims even under the dissenting opinions authored by Justices Stevens, Souter, and Ginsburg.

Assuming Justice Breyer continues to believe, following the decision in *Alabama*, that plaintiffs may bring statewide claims for political gerrymandering, the reasoning of Justice Breyer's dissent also requires the dismissal of plaintiffs' complaint. Even under Justice Breyer's opinion, plans that follow traditional districting principles cannot be

found unlawful until there are at least two elections under the challenged plan where a majority of all voters for congressional races fail to elect a majority of the candidates.[3] Plaintiffs cannot make allegations along these lines because only one election has held under the 2016 Plan.

Thus, there is simply no basis for this court to predict whether even a single Supreme Court Justice might agree that plaintiffs' complaint alleges claims upon which relief can be granted. In fact, plaintiffs can cite to no plurality opinion, no concurring opinion, or even a single dissenting opinion that provides a valid legal theory to support their allegations. Significantly, none of the plaintiffs reside in Congressional Districts 3, 5, 6, 7, 8, 9 or 13. Plaintiffs' claims that these districts constitute political gerrymanders must be dismissed for lack of standing. *Vieth*, 541 U.S. at 327-28 (Stevens, J. dissenting), (*citing United States v. Hays*, 515 U.S. 737, 745 (1995)) (plaintiffs in redistricting cases have standing only to challenge the district of their residence); *Id*. at 346-47 (Souter, Ginsburg, J.J., dissenting) (redistricting claims should be based upon "individual districts instead of state-wide patterns.") Thus, eight of the nine Justices who issued opinions in *Vieth* would vote to dismiss plaintiffs' claims either because they are non-justiciable, because they are based upon a new theory of proportional representation, because plaintiffs lack standing to challenge seven of the thirteen districts, because they are based upon state-wide patterns, or because plaintiffs fail to allege that North Carolina ignored

[3] As already explained, eight of the nine Justices involved in the *Vieth* decision rejected the idea, expressed by Justice Breyer, that a statewide plan may be challenged for gerrymandering by comparing the percentage of voters who favor candidates from a specific political party versus the number of candidates from that party who were elected statewide.

traditional redistricting principles. Only the dissenting opinion of Justice Breyer in *Vieth* provides potential modest support for plaintiffs' claims.

But even under Justice Breyer's dissent in *Vieth*, plaintiffs must prove that, in two elections under the 2016 Plan, a majority of the voters for North Carolina congressional seats failed to elect a majority of the representatives. There has been only one election under the 2016 Plan. *Bandemer*, 478 U.S. at 135 (results of a single election are insufficient to prove unconstitutional discrimination) The court can take judicial notice that, during the 2016 General Election a majority of the voters cast their ballots for Republican candidates (See http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0) (listing General Election results for all federal races in North Carolina). Thus, under either the Supreme Court's holding in *Bandemer* or Justice Breyer's dissent in *Vieth*, plaintiffs cannot state a claim upon which relief can be granted.[4]

In light of the Supreme Court's precedent on political gerrymanders, this court itself will have to invent a new legal theory for plaintiffs' claims to survive. If such a claim under any new theory does in fact exist, it should be first recognized by the Supreme Court, which has consistently rejected the theory of liability alleged by the plaintiffs here, and not by a lower court.

[4] The State Board of Elections website lists 2016 election results for each congressional district. It does not list cumulative vote totals. But by our count, for all thirteen congressional races, 2,440,543 persons voted for Republican candidates and 2,134,946 persons voted for Democratic candidates.

CONCLUSION

For the foregoing reasons, plaintiffs' claims should be dismissed, pursuant to Fed. R. Civ. P. Rule 12(b)(6).

This 28th day of November, 2016.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Defendants' Memorandum in Support of Motion to Dismiss** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 28th day of November, 2016.

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