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, ET AL, Plaintiffs, v. ROBERT A. RUCHO, ET AL. Defendants.	)	**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Arguments that supporters of a major political party are entitled to proportional representation in the number of candidates elected in a statewide districting plan have never been sufficient to establish so-called political gerrymandering claims. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (1996) ("*LULAC*") (plurality opinion) (Kennedy, J.) ("To be sure, there is no constitutional requirement of proportional representation. . . ."); *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion); *Id.* at 338 ((Stevens, J., dissenting in the opinion but concurring that the Constitution does not require proportional representation); *Id.* at 346 (Souter, Ginsberg, J.J., dissenting) (political gerrymandering claims must be district-specific and not based upon statewide patterns) *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion). Plaintiffs do not dispute this principle of law, and argue that their claims are not based upon proportional representation. Instead, they contend that their case is based upon an academic theory called "partisan symmetry." In truth, plaintiffs' symmetry

theory is nothing more than proportional representation with lipstick. Regardless, only two Justices of the Supreme Court have indicated that partisan symmetry may constitute some evidence of political gerrymandering. But not a single Justice has agreed that political gerrymandering may be established solely based upon symmetry. Plaintiffs' complaint must be dismissed because there is no support in any Supreme Court opinion for their theory of liability.

ARGUMENT

1. Plaintiffs' partisan symmetry theory would bind state legislatures to a mechanical formula and improperly prevent state legislatures from basing districting plans on traditional state criteria including political considerations.

Plaintiffs admit that partisan symmetry, if ordered by this Court as a requirement of the Equal Protection Clause or any other provision of the Constitution, would require districting plans that "treat the major parties symmetrically with respect to the conversion of votes to seats" so that neither party will "enjoy a systematic advantage in how efficiently its popular support translates into legislative power." Pl. Compl. ¶ 5. Under plaintiffs' theory, votes are "wasted" when voters are "cracked" into districts where they do not constitute a political majority or when they are "packed" into a district where they constitute a super majority. Pl. Compl. ¶ 56. Plaintiffs then use the total number of "wasted" votes to calculate something they describe as "an efficiency gap." The efficiency gap represents "the difference between the parties' respective wasted votes in an election" (for all 13 congressional districts combined) "divided by the total number of votes cast" in all thirteen congressional districts. Pl. Compl. ¶ 57 (emphasis omitted).

Plaintiffs next calculate each party's "surplus seat share" which represents 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." Pl. Compl. ¶ 58 (emphasis added and in original).

Any legal theory based upon the argument that political parties should be treated equally in that each party should have the same percentages of "wasted votes" is obviously a proportional representation test for determining whether a districting plan constitutes an illegal political gerrymander. Aside from the Supreme Court's consistent rejection of proportional representation, plaintiffs' academic concept has numerous other serious deficiencies.

First, it would be impossible for a legislature to determine partisan symmetry in a prospective plan, as opposed to a prior plan, in a state with a large number of unaffiliated voters as well as voters who cross party lines to cast ballots for candidates from a party other than the party of their registration. *LULAC,* 548 U.S. at 420 (plurality opinion) (political symmetry may depend on conjecture about where possible vote-switchers reside); *Vieth*, 541 U.S. at 288-89 (plurality opinion).

Second, partisan symmetry might be easier to predict in an election system where, for instance, North Carolina voters elected congressional representatives in a multimember district consisting of thirteen members. But, in North Carolina, and in all other states, congressional representatives are elected in single-member districts. Voters only cast one vote for one representative running for election in the district of their residence. They do not vote for any other candidates in any other district nor do they cast

the equivalent of a statewide straight ticket vote for Congress. *Id.* Strong incumbents often face weak opposition in specific districts. This can result in "Republican voters" casting their ballot for a strong Democratic incumbent in their congressional district or not even voting. It can also result in Democratic voters casting a ballot for a strong Republican incumbent in their district or not even voting. District-based elections represent only the choice of voters in that district who chose to vote in that contest. Because political parties do not compete to win the statewide congressional vote, it is plainly incorrect that the aggregate totals from district specific elections represent the statewide voting strength of either party. *Id.*

Third, plaintiffs' theory would require the State to apply a "mechanical formula" in determining how congressional districts must be allocated to each major party. The Supreme Court has ruled that states may not apply mechanical formulas to determine the percentage of black voting age population to include in districts designed to protect a state from liability under the Voting Rights Act. *Alabama Legislative Black Caucus v.+ Alabama*, 135 S. Ct. 1257, 1273 (2015). The Plaintiffs' legal theory is at odds with the Constitution. The Constitution prohibits states from using a mechanical formula to assign black voters to ability-to-elect districts covered by the Voting Rights Act, but Plaintiffs are pressing that the state use a mechanical formula in the assignment of Democratic or Republican voters to different districts.[1]

[1] States can be required to create majority black districts under Section 2 of the Voting Rights Act. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009). In North Carolina, there is a very high correlation between black voters and political support of Democratic candidates. *Hunt v. Cromartie*, 526 U.S. 541, 551-52 (1999). Plaintiffs' theory of liability

Fourth, Article I, Section 2 of the Constitution "leaves with the States primary responsibility for apportionment of their federal congressional districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Drawing lines for congressional districts "is one of the most significant acts a State can perform to ensure citizen participation in republican self-government." *LULAC*, 548 U.S. at 16 (plurality opinion) (Kennedy, J.). In making districting decisions, legislators may rely upon traditional districting principles including compactness, jurisdictional boundaries (such as county or precinct lines), and partisan political considerations. *Alabama*, 135 S. Ct. at 1270. Assigning voters to districts based upon political considerations is "common," "lawful" and "ordinary." *Vieth*, 541 U.S. at 286, 293 (plurality opinion); *Id.* at 307 (Kennedy, J., concurring); *Id.* at 358 (Souter, Ginsberg, J.J.) (dissenting) (citing *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). Yet, plaintiffs' legal theory would elevate a non-traditional districting principle, political symmetry, to the criterion that controls all of the traditional districting principles historically followed by all legislatures. Even more dramatically, it would preclude a state from taking political considerations into account in any respect, a result that is both unprecedented and dangerous. *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring) (decision ordering the correction of all election districts lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process).

---

completely fails to account for the likelihood that in some cases, the lack of alleged symmetry may be the result of a state's efforts to avoid liability under Section 2.

Fifth, plaintiffs' legal theory ignores that using traditional districting principles (such as compactness or jurisdictional boundaries) to draw districts often will result in a greater number of Republican-leaning districts in a statewide delegation because Democratic voters tend to be more compact in their patterns of residence. This is the nature of a system based on geographically-defined single-member districts as opposed to a multimember districting system. *Vieth*, 541 U.S. at 289.90 (plurality opinion); *Id.* at 308-309 (Kennedy, J., concurring). Plaintiffs have not alleged that the 2016 Congressional plan departs from traditional redistricting principles because the plan divides a minimum number of counties and precincts. But, under plaintiffs' theory, Democratic voters residing in the more concentrated areas of the state, such as Mecklenburg, Wake, Durham, or Guilford Counties, would have a constitutional right to be cracked into multiple dispersed districts, as opposed to geographically compact ones, to enhance their group's voting strength. Nothing in the Constitution or any case previously decided by the Supreme Court gives any group of voters the right to be cracked into a larger number of districts in order to maximize their group's voting strength. *Strickland*, 556 U.S. at 14-16.

2. The Supreme Court has already rejected plaintiffs' partisan symmetry theory as the sole basis for evaluating alleged political gerrymanders.

In *LULAC*, the "narrow question" addressed by the Court was whether it was unconstitutional for the Texas legislature to replace a court-drawn districting plan in the middle of a decade "for the sole purpose of maximizing partisan advantage." *LULAC*, at 456 (Stevens and Breyer, J.J., dissenting). Three Justices, including the author of the

plurality opinion (Justice Kennedy, the Chief Justice, and Justice Alito), agreed with the district court that plaintiffs had not offered a judicially manageable standard for judging political gerrymanders. *Id.* at 408, 413-423. Justice Scalia and Thomas concurred in the judgment on the ground that claims for political gerrymandering are non-justiciable. *Id.* at 511-512. The Chief Justice and Justice Alito declined to take a position on whether such claims are justiciable because the parties had not briefed or argued the issue. *Id.* at 492-93.

Thus, plaintiffs' political symmetry theory springs not from an opinion by the Court, but instead from a dissenting opinion in *LULAC* by Justices Stevens and Breyer. *Id.* at 466.[2] Like the allegations of the plaintiffs in this case, Justices Stevens and Breyer concluded that Texas had enacted a new plan with the sole intention of maximizing Republican voting strength. *Id.* at 458. In so opining, these two Justices relied in part upon expert testimony offered by plaintiffs on political symmetry. But, in addition to the testimony by plaintiffs' expert, Justices Stevens and Breyer also relied upon evidence that the Texas plan included "significant departures from neutral districting criteria of compactness and county lines." *Id.* Thus, the opinion authored by Justices Stevens and Breyer in *LULAC* is consistent with the dissenting opinion by Justice Stevens in *Vieth*

[2] Plaintiffs rely too heavily upon a statement by Justice Kennedy in *LULAC* concerning political symmetry. Justice Kennedy does state that symmetry is one method for measuring the partisan bias of a districting plan. *LULAC*, 548 U.S. at 419-20. Despite this statement, Justice Kennedy did not find the symmetry evidence in *LULAC* as proof of anything and further warned that "asymmetry alone is not a reliable measure of unconstitutional partisanship." *Id.* at 420.

that political gerrymander plaintiffs must prove that traditional districting principles were subordinated to politics. *Vieth*, 541 U.S. at 334-36.

Notably, the remaining two dissenting Justices in *LULAC* did not join the opinion authored by Justice Stevens. Instead, Justices Souter and Ginsburg concurred in the opinion of the Court that Texas did not engage in illegal gerrymandering simply because its legislature replaced a court-drawn plan mid-decade. *LULAC*, 548 U.S. at 483. In all other respects, Justices Souter and Ginsburg dissented based upon the dissenting opinion authored by them in *Vieth*. There, Justices Souter and Ginsburg, like Justice Stevens in his *Vieth* dissent, opined that plaintiffs in political gerrymander cases cannot succeed absent proof that a state subordinated traditional districting principles to politics in drawing a specific challenged district. *Vieth*, 541 U.S. at 347-48.

As the opinions in *LULAC* make clear, seven of nine Justices rejected political symmetry as a standard for evaluating political gerrymanders. The two Justices who fully dissented from the Court's reasoning in *LULAC* relied upon political symmetry as one piece of evidence that might be used to prove an illegal political gerrymander. But even these two Justices (Stevens and Breyer) also relied upon evidence that Texas had departed from traditional districting principles in drawing the challenged districts. Thus, not a single Justice has endorsed plaintiffs' theory of liability in this case, i.e., that this court could find that North Carolina engaged in illegal gerrymandering solely based upon an alleged lack of symmetry.

3. The recent decisions by the three-judge courts in *Whitford* and *Shapiro* do not support plaintiffs' claims here.

Plaintiffs rely upon two recent three-judge court decisions to support their symmetry claims. Defendants respectfully suggest that these cases were wrongfully decided and that the dissenting opinions in both of these decisions represent the correct interpretation of Supreme Court precedent. In any case, both of these decisions are easily distinguished.

Plaintiffs' reliance on *Whitford v. Gill*, No. 15-CV-421, 2016 WL 6837229, at *1 (W.D. Wis. Nov. 21, 2016) is misplaced for several reasons. First, the *Whitford* court did not adopt partisan symmetry as a test for proving illegal political gerrymandering without regard to whether the state followed traditional districting principles. Second, the *Whitford* court relied upon election results from two elections, consistent with the plurality opinion in *Bandemer* and Justice Breyer's dissenting opinion in *Vieth*, that the results of one election are insufficient to prove political gerrymandering. Here, plaintiffs can only rely upon the totals for one statewide election for Congress in which a majority of North Carolina voters cast ballots for Republican candidates for Congress. There is no case that has found an illegal gerrymander under these circumstances.

Defendants also respectfully suggest that plaintiffs' reliance upon the majority opinion in *Shapiro v. McManus*, No. 1:13-CV-03233-JKB, 2016 WL 4445320, at *1 (D. Md. Aug. 24, 2016) is equally misguided. There, the majority denied the state's motion to dismiss plaintiffs' complaint alleging that a specific district constituted an illegal political gerrymander. The *Shapiro* plaintiffs did not challenge a statewide plan under

any alleged theory including symmetry. Moreover, the decision by the *Shapiro* majority is wrong because it relies upon the Court's plurality opinion in *Elrod v. Burns*, 427 U.S. 347 (1976). The decision in *Elrod* prohibits state employers from giving politics *an*y consideration when making employment decisions about non-policy making state employees. *Vieth*, 541 U.S. at 294 (plurality opinion). This obviously cannot be the test for political gerrymandering because every Justice of the Supreme Court has acknowledged that politics is a traditional districting principle that is legally and commonly considered in almost every districting decision.

CONCLUSION

For the foregoing reasons and those stated in defendants' opening memorandum, plaintiffs' claims should be dismissed.

Respectfully submitted this 3rd day of January, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
Michael D. McKnight
N.C. State Bar No. 36932
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Defendants' Reply Brief 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:

Emily E. Seawell
Anita S. Earls
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. HWY. 54, STE. 101
DURHAM, NC 27707
Email: emily@southerncoalition.org
Email: anita@southerncoalition.org

Danielle M. Lang
CAMPAIGN LEGAL CENTER
1411 K STREET NW
SUITE 1400
WASHINGTON, DC 20005
202-736-2200
Fax: 202-736-2222
Email: dlang@campaignlegalcenter.org

Annabelle E. Harless
Ruth M. Greenwood
CAMPAIGN LEGAL CENTER
73 W. MONROE ST., STE. 322
CHICAGO, IL 60603
312-561-5508
Fax: 202-736-2222
Email: aharless@campaignlegalcenter.org
Attorneys for Plaintiffs

Nicholas O. Stephanopoulos
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E 60TH STREET
CHICAGO, IL 60637
773-702-4226
Email: nsteph@uchicago.edu\

Alexander McC. Peters
James Bernier, Jr.
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
JBernier@ncdoj.gov
Counsel for Defendants

This the 3rd day of January, 2017.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

28194779.1