IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:16-CV-1026

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.	)	**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' argument is easily summarized: The United States Constitution requires some form of proportional representation for the two major parties in redistricting. They claim that the 2016 Congressional Plan is unconstitutional because, in 2016, while 53% of the voters statewide voted for Republican candidates, Republican candidates were elected in 77% of the congressional districts (10 of 13). Pl. Resp. at 4. Or, stated differently, plaintiffs contend that the 2016 Plan is unconstitutional because, in 2016, while 47% of the voters voted for Democratic candidates, Democratic candidates were elected in only 23% of the congressional districts (3 of 13). Plaintiffs do not explain, nor can they, exactly how many congressional representatives so-called "Republican voters" or so-called "Democratic voters" are constitutionally entitled to

elect, or how a legislature is supposed to determine those numbers during the usual ten-year life cycle for a congressional districting plan.

Likewise, plaintiffs do not explain why the protection they seek under the First or Fourteenth Amendment should not also apply to minor political parties or groups that do not constitute political parties. *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion). In any case, there is no precedent in any Supreme Court decision that supports plaintiffs' amorphous theory of liability. Instead, plaintiffs advocate a new cause of action that would give political gerrymander plaintiffs a less rigorous standard for proving their case, the application of which may vary depending upon the differing senses of equity among three-judge courts throughout the country, than the standard for plaintiffs challenging racial gerrymanders. If plaintiffs' unprecedented and incongruous theory of liability is somehow now cognizable under either the First or Fourteenth Amendment, it should be acknowledged in the first instance by the Supreme Court and not a lower federal trial court.

1. As with racial gerrymandering claims, plaintiffs cannot state a claim for political gerrymandering because a redistricting plan fails to provide proportional representation for a specific political group.

Until the Supreme Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court affirmed several lower court decisions holding that political gerrymandering claims were non-justiciable. *Id*. at 120.[1] In contrast, prior to *Bandemer*,

[1] Plaintiffs criticize defendants for arguing that political gerrymandering may be non-justiciable – calling the argument "a fiction." Pl. Resp. at 6 n.2. In fact, four Justices in *Vieth* joined in the Court's plurality opinion that political gerrymandering claims are non-justiciable. A fifth (Justice Kennedy) stated that political gerrymandering claims may be

the Supreme Court had already recognized that racial minorities can state a claim under the Fourteenth Amendment where a multimember districting plan unfairly dilutes the rights of the minority group. *White v. Register*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971). One element of proof in these cases is whether the minority group resides in a relatively compact area that is submerged in a majority-white multimember district in which the minority group cannot elect their candidate of choice. *White*, 412 U.S. at 7767-69. But even in these cases, the Court rejected the argument that an equal protection claim could be established with evidence that the minority group is unable to elect a number of representatives that is proportionate to their percentage in the electorate. *White*, 412 U.S. at 765-76; *Whitcomb* 403 U.S. at 148-49. When the Court decided *Bandemer*, it relied upon its decisions in *White* and *Whitcomb* to hold that the Fourteenth Amendment did not require legislatures to adopt districts to provide proportional representation to either racial or political groups. *Bandemer*, 478 U.S. at 130.

Nothing has changed in Supreme Court jurisprudence since the decisions in *White*, *Whitcomb*, or *Bandemer* that would now permit this Court to recognize a claim for political gerrymandering by comparing the proportion of voters voting for candidates of a specific political party and the number of districts a state is obligated to enact to ensure that those voters can elect their "fair share" of candidates.[2] In fact, as it relates to claims

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non-justiciable. In contrast, not a single Justice in *Vieth* authored an opinion that supports plaintiffs' theories in this case.

[2] Plaintiffs misstate the significance of the decision in *Shapiro v. McManus*, 136 S.Ct. 450 (2015). *See* Pl. Resp. at 3. The opinion in *Shapiro* was written by Justice Scalia,

of racial vote dilution, Congress has pronounced that states may not be ordered to enact plans that guarantee proportional representation for minority groups. *See* 52 U.S.C. § 10301(b) (2015). Instead, at least in the case of racial vote dilution, and similar to the test articulated in *White*, plaintiffs must prove that their minority group is sufficiently large and compact to constitute a majority in a single-member district. *Thornburg v. Ashcroft*, 478 U.S. 30, 50 (1986). Plaintiffs' theory in this case, relying on statewide proportions, ignores the compactness element required to prove racial vote dilution. In doing so, plaintiffs also ignore the reality that Democratic voters might elect a smaller number of candidates statewide because their residences often are more concentrated in more geographically compact areas. *Vieth*, 541 U.S. at 290 (plurality opinion); *Id*. at 309 (Kennedy, J., concurring).

There are many good reasons that support the Supreme Court's decision to reject proportionality tests for alleged illegal political gerrymandering. North Carolina and the rest of the states follow a "winner-takes-all district system" for the election of members of Congress and state legislatures. *Vieth*, 541 U.S. at 289 (plurality opinion). Political parties do not campaign to obtain the highest statewide voting percentage but instead compete for specific seats. *Id*. (citing Lowenstein & Steinberg, *the Quest For Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59-60 (1985)). Contrary to the assumption underlying plaintiffs' theories, partisan affiliation is not the

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who authored the plurality opinion in *Vieth*, stating that claims for political gerrymandering are non-justiciable. In *Shapiro*, the Court did not agree that plaintiffs had stated a claim but only resolved a more narrow question, holding that a single district court judge could not properly dismiss the complaint before convening a three-judge court required for districting cases under 28 U.S.C. § 2284(a).

only factor determining voting behavior in district elections. *Id*. at 288.[3] Finally, because the outcome of elections depends upon the changing judgments of individual voters, it is impossible to design a redistricting plan that will ensure that the alleged majority party will elect a majority of the seats or even a share of the districts that is no higher than a number that is proportional to its percentage among voters statewide. *Id*. at 289-90.

Thus, it would be strange indeed for this Court to recognize a claim for political gerrymandering based upon plaintiffs' proportional comparisons, especially where the Supreme Court has rejected proportional representation as a viable theory of recovery. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419 (2006) (plurality opinion) (Kennedy, J.) ("To be sure, there is no constitutional requirement of proportional representation…").[4]

2. Plaintiffs are asking this Court to adopt a standard of proof for political gerrymandering that is less rigorous than the proof needed to establish racial gerrymandering.

Plaintiffs are asking this Court to impose politically based redistricting restrictions on the legislature that are greater than the restrictions applicable to racial minorities, a concept that is completely at odds with the Fourteenth Amendment. *Vieth*, 541 U.S. at

[3] For example, plaintiffs cannot dispute that registered Democrats outnumber registered Republicans in almost all the 2016 congressional districts or that thousands of registered Democrats and unaffiliated voters cast ballots for Republican candidates.

[4] Plaintiffs' reliance on *Whitford v. Gill*, No. 15-CV-421, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016) is misplaced. First and foremost, 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. *Bandemer*, 478 U.S. at 135; *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting). Defendants also respectfully suggest that the dissenting opinion in *Whitford* better represents the correct analysis of Supreme Court precedent and that this Court should adopt similar reasoning to dismiss the complaint in this case.

307 (Kennedy, J., concurring) (race is an impermissible classification for districting while politics are always taken into account). Plaintiffs, in cases alleging racial gerrymanders, must meet the "demanding" burden of proving that race was the predominant motive and that traditional redistricting principles were subordinated to race. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2000) ("*Cromartie II*"). Plaintiffs in racial gerrymandering cases can never prove their claims based upon a statewide analysis. *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1265 (2015). Instead, the State can defend a claim for racial gerrymandering when it is able to show that it used traditional redistricting principles in drafting the challenged districts. *Id*., at 1270.

Three of the Justices who dissented in *Vieth* would apply these same evidentiary rules to political gerrymandering claims. *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting); *Id*. at 348 (Souter, Ginsburg, JJ., dissenting). In contrast, under both of their theories of recovery, plaintiffs rely exclusively on comparisons of the number of voters who voted for Democrats versus the number of Democrats that were elected. Because plaintiffs here have not alleged (nor could they) that the State subordinated traditional districting principles to politics in the construction of the 2016 Congressional Plan, plaintiffs' complaint would be dismissed even under the dissenting opinions in *Vieth* by Justices Stevens, Souter, and Ginsburg.

It would be illogical for this Court to create a new gerrymandering claim for straight ticket voters of a major political party that is easier to establish than racial gerrymandering claims. Moreover, because politics plays a role in the enactment of every districting plan, any decision by this Court to adopt plaintiffs' proportionality

standards of liability will "commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Any such unprecedented intrusion into the constitutional responsibilities of state legislatures should not be launched by lower federal courts based upon theories of "fairness" that have never been adopted by the Supreme Court.

3. The decision in *Elrod v. Burns* does not provide a limited or precise standard for adjudicating political gerrymander claims.

In his concurring opinion in *Vieth*, Justice Kennedy stated that he would not "foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Later in his opinion, Justice Kennedy referenced the decision in *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion), a case involving claims by public employees that they were discharged because they were not Democrats. But Justice Kennedy did not say that *Elrod* actually provided the test for claims of political gerrymandering. He instead cautioned that any future use of the First Amendment must be conditioned "on courts having available a manageable standard by which to measure the effect of the apportionment and so conclude that the State did impose a burden or restriction on the rights of the party's voters." *Id*. at 314-15.

It is significant that no other Justice joined Justice Kennedy's opinion that the First Amendment might provide a different guide for political gerrymanders under the Fourteenth Amendment. Another North Carolina three-judge panel has previously ruled that political gerrymandering claims under the First Amendment are coextensive with

claims under the Fourteenth Amendment. *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C.) (citing *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981)), *sum. aff'd*, 506 U.S. 801 (1992). In any case, plaintiffs here have plainly not offered a theory of liability that would fit Justice Kennedy's understanding of a judicially manageable standard.

First, it should be remembered that Justice Kennedy concurred in the judgment in *Vieth*, despite the allegation by the *Vieth* plaintiffs that the challenged Pennsylvania districting allowed a minority of statewide voters to elect a majority of the representatives. *Vieth*, 541 U.S. at 287-88. In contrast, plaintiffs here admit that in 2016 a majority of voters elected a majority of the candidates. If Justice Kennedy agreed that plaintiffs in *Vieth* had not stated a claim by alleging that a minority of the voters had elected a majority of the candidates, it is very unlikely that he would find it illegal for a majority of voters to elect a majority of the candidates.

Second, Justice Kennedy's opinion makes clear that he would not accept the *Elrod* test for public employees as a judicially manageable standard for challenges to districting plans. In *Elrod*, the decisionmaker cannot consider politics at all as it relates to employment decisions concerning public employees who are not policy makers. 427 U.S. at 367; *see also*, *Vieth*, 541 U.S. at 294 (plurality opinion). In contrast, Justice Kennedy acknowledged in *Vieth* that political considerations are always part of the process when a legislature enacts a districting plan. *Vieth*, 541 U.S. at 307.

In short, while Justice Kennedy theorized that political gerrymandering claims might be justiciable under the First Amendment, he did not adopt the test established in

Elrod for public employees, nor did he offer a judicially manageable standard for evaluating redistricting claims under the First Amendment. It is unlikely that he would recognize a First Amendment claim in this case because the plaintiffs in *Vieth* alleged a more severe disproportionate effect on their voting rights than the plaintiffs in this case. Because *Elrod* forbids the consideration of politics in any respect when a public employer makes employment decisions regarding employees who are not policy makers, it is also unlikely that Justice Kennedy would apply the *Elrod* standard to districting cases given his opinion, supported by many other decisions by the Supreme Court, that politics is always a factor in redistricting.[5]

4. The decision in *Pope v. Blue* is entitled to substantial deference.

In *Pope v. Blue*, the three-judge court dismissed a claim for political gerrymandering where the plaintiffs alleged that North Carolina's 1992 Congressional Plan would result in a disproportionate number of Democrats being elected. The court noted that "plaintiffs have relied exclusively on claims of disproportionate representation to advance their equal protection argument." *Pope*, 809 F. Supp. at 396-97. In dismissing plaintiffs' complaint, the *Pope* court relied upon a decision by a three-judge court in *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1985), *aff'd mem.*, 488 U.S. 1024 (1989). The *Pope* court concluded that the *Badham* decision was entitled to

[5] Defendants respectfully disagree with the majority opinion in *Shapiro v. McManus*, No. 1:13-CV-03233-JKB, 2016 WL 4445320 (D. Md. Aug. 24, 2016) that *Elrod* provides a manageable standard for redistricting cases. Regardless, the *Shapiro* majority focused upon a specific Republican-leaning district allegedly cracked by the Maryland legislature. The *Shapiro* majority did not rest its decision on statewide patterns relied upon by the plaintiffs here.

"substantial deference." *Pope*, 809 F. Supp. at 395 n.2. The *Pope* court also noted that it was bound by the judgment in *Badham*, if not the exact reasoning, because the *Badham* court had been summarily affirmed by the Supreme Court. *Id*.

Likewise, this Court must accord precedential effect to the Supreme Court's summary affirmance of the decision by the three-judge court in *Pope*. Regardless of whether this Court is "bound" by the reasoning in *Pope*, the decision by the three-judge court in *Pope* is entitled to "substantial deference." No matter the rationale that might be adopted by this Court to support its reasoning, the fact remains that "the gravamen of the plaintiffs' action [in *Pope*] is that the Plan adopted by the Democratic legislature will result in disproportionately high representation for the Democratic Party in the state's congressional delegation." *Pope*, 809 F. Supp. at 396. Under Supreme Court precedent, this court is bound by the judgment in *Pope*, which resulted in the dismissal of claims identical to those made here.

Respectfully submitted, this the 7th day of December, 2016.

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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:

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