IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, v. ROBERT A. RUCHO, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the 2016 Joint Select Committee on Congressional Redistricting, *et al.*, Defendants.	CIVIL ACTION NO. 1:16-CV-1164 THREE-JUDGE COURT

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

At the February 16, 2016 hearing in which the redistricting criteria for North Carolina's current congressional plan (the Current Plan) were revealed, one of the map's architects, State Representative David Lewis, made a startling statement. "I acknowledge freely that this would be a political gerrymander," he said, "which is not against the law." Compl. Ex. B at 48. Representative Lewis was partly right and partly wrong. The Current Plan *is* a partisan gerrymander—a map that intentionally, severely, durably, and unjustifiably benefits Republican candidates and voters and harms Democratic ones. But partisan gerrymandering is *not* legal. In fact, it is hard to think of a practice that is more at odds with the democratic values enshrined in the Constitution. *See, e.g.*, *Ariz. State. Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("'Partisan gerrymanders . . . are incompatible with democratic principles.'" (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

Representative Lewis may have thought that partisan gerrymandering is permissible because of the Supreme Court's decision in *Vieth*, which rejected the standard adopted by the plurality in *Davis v. Bandemer*, 478 U.S. 109 (1986), while also declining to embrace any other test. However, *all nine* Justices in *Vieth* agreed that excessive partisan gerrymandering is unconstitutional. *See* 541 U.S. at 293 (plurality opinion) ("[A]n *excessive* injection of politics is *un*lawful."). A majority also believed that partisan gerrymandering claims are justiciable. *See LULAC v. Perry*, 548 U.S. 399, 414 (2006) ("A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.").

In the absence of a standard ratified by the Supreme Court, partisan gerrymandering plaintiffs have two obligations rather than the usual one. First (and atypically), they must put forward a test for gerrymandering that is judicially *discernible*

and judicially *manageable*. Second (as in all cases), they must establish by a preponderance of the evidence that the test is satisfied. Correspondingly, there are two questions for this Court at the motion-to-dismiss stage. First, is it plausible that plaintiffs' proposed test—amended as the Court sees fit, and accepting all facts in the complaint as true—is discernible and manageable? Second, have the plaintiffs alleged sufficient facts to show that the Current Plan is unconstitutional under the test? The answer to both questions is yes, meaning that the Court should deny defendants' motion to dismiss.

As explained in their complaint, *see* Compl. ¶¶ 76-81, plaintiffs advance a three-prong test for partisan gerrymandering. First, was the district plan enacted with *discriminatory intent*, that is, in order to engage in "intentional discrimination against an identifiable political group"? *Bandemer*, 478 U.S. at 127 (plurality opinion). Second, does the plan have a *discriminatory effect*, in that it exhibits a high and durable level of partisan asymmetry relative to historical norms? And third, can the plan's large and persistent asymmetry be "justified by the State" based on the State's political geography or legitimate redistricting objectives? *Brown v. Thomson*, 462 U.S. 835, 843 (1983).

In ongoing litigation over Wisconsin's state house plan, a three-judge court held that it was plausible that this *exact* test is judicially discernible and manageable. *See Whitford v. Nichol*, 151 F. Supp. 3d 918, 931 (W.D. Wis. 2015) (*Whitford I*) ("plaintiffs have stated a claim for relief that is plausible on its face"). This court subsequently ruled that there were material factual disputes regarding the test's merits, *see Whitford v. Nichol*, 180 F. Supp. 3d 583 (W.D. Wis. 2016) (*Whitford II*), and after a four-day trial, that the test should be applied as a constitutional matter, *see Whitford v. Gill*, ___ F. Supp. 3d ___, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016) (*Whitford III*).

On the merits, each of the test's prongs is indeed judicially discernible and manageable. Starting with the discriminatory intent prong, it is discernible because it

follows from the "basic equal protection principle that the invidious quality of a law . . . must ultimately be traced to a . . . discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). The prong also remains doctrinally available, as the Supreme Court recognized earlier this year. *See Harris v. Indep. Redist. Comm'n*, 136 S. Ct. 1301, 1310 (2016) (suggesting that "partisanship is an illegitimate redistricting factor"). The prong is highly manageable too; it is usually satisfied when a single party has unified control over redistricting, *see Bandemer*, 478 U.S. at 129 (plurality opinion), but not when a plan is designed by a court, a commission, or divided government, *see Vieth*, 541 U.S. at 350 (Souter, J., dissenting).

Next, the discriminatory effect prong is discernible because it is based on a concept, *partisan symmetry*, that five Justices deemed promising in *LULAC*. Partisan symmetry is the "'require[ment] that the electoral system treat similarly-situated parties equally'" by giving neither major party a systematic advantage over its opponent in the conversion of popular votes into legislative seats. *LULAC*, 548 U.S. at 466 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 420 (opinion of Kennedy, J.) (not "discounting [symmetry's] utility in redistricting planning and litigation"). The prong is also manageable because a plan's asymmetry can be reliably measured through metrics such as the *efficiency gap* and *partisan bias*. These metrics can be used to determine both the magnitude of a plan's asymmetry and how skewed the plan will likely remain over its lifetime. *See id.* at 466 (Stevens, J., concurring in part and dissenting in part) (commenting that "the symmetry standard . . . is undoubtedly 'a reliable standard' for measuring a 'burden on the complainants' representative rights'").

Lastly, the justification prong is discernible because it is borrowed directly from the Court's one-person, one-vote cases, *see, e.g.*, *Brown*, 462 U.S. at 842-43; *Mahan v. Howell*, 410 U.S. 315, 328 (1973), and recognizes that partisan symmetry must be

balanced against both feasibility and other valid redistricting goals. The prong is also manageable because it typically boils down to whether the State could have designed a much more symmetric map that still complies as well with all legal requirements. If so, there are no proper aims left that could account for the plan's asymmetry.

Turning from the test's justiciability to its fulfillment, accepting all facts in the complaint as true, plaintiffs clearly have alleged sufficient facts to establish that the Current Plan is unconstitutional under this test. First, plaintiffs allege specific facts demonstrating that the Plan was motivated by partisan advantage. This evidence includes Representative Lewis's admission—"I acknowledge freely that this would be a political gerrymander"—and much other smoking-gun evidence. *See, e.g.*, Compl. Ex. A at 2 ("The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats."); Compl. Ex. B at 54 ("[T]o the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage.").

Second, plaintiffs allege that the Current Plan was *forecast* to exhibit a staggeringly large partisan asymmetry, *see* Compl. ¶¶ 64-68, and then it *did* exhibit such an asymmetry in the 2016 election. Even though the statewide congressional vote was closely divided, Republican candidates won ten out of thirteen districts, resulting in a pro-Republican efficiency gap of 19% and a pro-Republican partisan bias of 27%. These are colossal figures—at the far edge of the historical distribution, and much worse than anything North Carolina has witnessed prior to the current cycle. *See id.* ¶¶ 61-63. Moreover, these figures are nearly certain to *remain* highly skewed in Republicans' favor as long as the Plan is in effect. *See id.* ¶¶ 69-70. For example, even if Democrats improved on their 2016 performance by six percentage points, Republicans would still win ten out of thirteen districts, and the Plan would still have an efficiency gap and a partisan bias larger than 25%.

And third, defendants neither attempt to, nor could, justify the Current Plan's partisan asymmetry. North Carolina's congressional plan in the 2000s (the 2001 Plan) shows that a map can both comply with all federal and state requirements *and* be almost perfectly symmetric in its partisan consequences. *See id.* ¶ 71. So do hundreds of North Carolina district plans created using a computer algorithm, without any consideration of electoral results. All of these maps are perfectly lawful and have efficiency gaps far smaller than the Current Plan. *See id.* ¶ 72.

Accordingly, this Court should deny defendants' motion to dismiss. Plaintiffs have met their burdens of (1) putting forward a test for partisan gerrymandering that is, at least plausibly, judicially discernible and manageable; and (2) alleging facts establishing that this test is satisfied by the Current Plan.

STATEMENT OF FACTS

As explained in plaintiffs' complaint, the Current Plan was adopted with the explicit aim of benefiting Republican candidates and voters and disadvantaging Democratic ones. *See id.* ¶¶ 38-50. As also described by the complaint, the Plan achieved this goal with aplomb. Using several analytic techniques, the Plan was forecast to exhibit extraordinarily high and durable levels of partisan asymmetry in 2016 and for the rest of the decade. *See id.* ¶¶ 64-70. As further shown by the complaint, the Plan's asymmetry cannot be justified. Both the 2001 Plan and hundreds of computer-drawn plans prove that a map could easily have been designed that was both compliant with all legal requirements *and* electorally fair. *See id.* ¶¶ 71-72.

In their memorandum in support of their motion to dismiss, defendants refer to the results of the 2016 election, which postdate the complaint's filing. *See* Defs' Br. at 14. Plaintiffs agree that the Court can take judicial notice of these results, which are

reproduced below along with calculations revealing the severity and durability of the Current Plan's partisan asymmetry.[1]

District	Dem Votes	Rep Votes	Dem %	Rep %	Dem Wasted	Rep Wasted
1	240,585	101,537	70.3%	29.7%	69,523	101,537
2	169,079	221,482	43.3%	56.7%	169,079	26,201
3	106,350	217,763	32.8%	67.2%	106,350	55,706
4	279,352	130,148	68.2%	31.8%	74,601	130,148
5	147,863	207,593	41.6%	58.4%	147,863	29,864
6	143,150	207,972	40.8%	59.2%	143,150	32,410
7	135,893	211,786	39.1%	60.9%	135,893	37,946
8	133,164	189,833	41.2%	58.8%	133,164	28,334
9	139,040	193,450	41.8%	58.2%	139,040	27,204
10	128,920	220,825	36.9%	63.1%	128,920	45,952
11	129,103	230,403	35.9%	64.1%	129,103	50,649
12	234,115	115,185	67.0%	33.0%	59,464	115,185
13	156,041	199,430	43.9%	56.1%	156,041	21,694
Total	**2,142,655**	**2,447,407**	**46.7%**	**53.3%**	**1,592,191**	**702,827**

Several points are in order here. First, exactly as the Current Plan's authors intended, Republican candidates won ten out of thirteen districts in 2016 even though the statewide congressional vote was closely divided. Second, Republican candidates' success was attributable to the rampant cracking and packing of Democratic voters. Republican candidates won their ten seats by an average margin of 20.5 percentage points, while Democratic candidates won their three seats by an average margin of *37.0* percentage points.

Third, the Current Plan exhibited a pro-Republican *efficiency gap* of 19.4% in 2016. The efficiency gap captures in a single number the extent to which one party's voters are more cracked and packed than the opposing party's supporters. The measure is defined as the difference between the parties' respective "wasted" votes in an election—where votes are wasted *either* if they are cast for a losing candidate *or* if they are cast for a winning candidate but in excess of what she needed to prevail—divided by the total number of votes cast. *See* Compl. ¶¶ 51-58; *Whitford III*, 2016 WL 6837229, at *50-56. Here, the 19.4% figure is calculated by subtracting Republican wasted votes (702,827)

[1] The results can be found at *11/08/2016 Unofficial General Election Results – Statewide*, N.C. STATE BD. OF ELECTIONS, http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0 (last accessed Dec. 1, 2016). Plaintiffs note that the results are not yet final and may still change slightly. Plaintiffs also note that they intend to file shortly an amended complaint incorporating the results.

from Democratic wasted votes (1,592,191), and then dividing this difference (889,364) by the total number of votes cast (4,590,062). Historically, a 19.4% efficiency gap is exceptionally large, at the tail end of the congressional distribution. *See* Compl. ¶¶ 59-62.

Fourth, the Current Plan exhibited a pro-Republican *partisan bias* of 26.9% in 2016. Partisan bias "'compar[es] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote,'" typically 50%. *LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.); *see also id.* at 466 (Stevens, J., concurring in part and dissenting in part) (same). The measure is computed by determining by how much the *statewide* vote would have to shift to yield a perfectly tied election, then adjusting the outcome in each *district* by this amount, and then finding the difference between each party's resulting seat share and 50%. Here, the statewide vote would have to move by 3.3 percentage points in a Democratic direction to produce a tied election, Republicans would still win ten out of thirteen districts if each district's vote moved by 3.3 percentage points toward Democrats, and the difference between Republicans' resulting seat share (76.9%) and 50% is 26.9%. Historically, a 26.9% partisan bias is also remarkably large, at the edge of the congressional distribution. *See* Compl. ¶ 63.

Lastly, to assess the *resilience* of the Current Plan's partisan asymmetry, the 2016 election results can be adjusted to simulate an *array* of electoral environments (not just a tied election). Since 1992, the Democratic statewide vote share in North Carolina congressional elections has fluctuated between roughly 45% and 55%. As the below table indicates, over this range of conditions, Democrats would *never* win more than five out of thirteen districts—and, indeed, would keep winning just three seats even if voter sentiment swung by up to *six points* in their favor. Unsurprisingly, the Plan's pro-Republican efficiency gap would remain enormous across these scenarios, averaging

22%, peaking at 31%, and never falling below 15%. *See id.* ¶ 69; *Whitford III*, 2016 WL 6837229, at *46-52 (relying on such "swing analyses").

	D-2	D-1	2016	D+1	D+2	D+3	D+4	D+5	D+6	D+7	D+8
Dem Vote %	44.7%	45.7%	46.7%	47.7%	48.7%	49.7%	50.7%	51.7%	52.7%	53.7%	54.7%
Dem Seats	3/13	3/13	3/13	3/13	3/13	3/13	3/13	3/13	3/13	5/13	5/13
Efficiency Gap	-15.4%	-17.4%	-19.4%	-21.4%	-23.4%	-25.4%	-27.4%	-29.4%	-31.4%	-17.1%	-19.1%

STANDARD OF REVIEW

A motion to dismiss must be denied if plaintiffs' complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Another three-judge court has unanimously held that plaintiffs' proposed test for partisan gerrymandering is facially plausible, *see Whitford I*, 151 F. Supp. 3d at 931, and this Court should do the same. *See also Republican Party of N.C. v. Martin*, 980 F.2d 943, 961 (4th Cir. 1992) (reversing a North Carolina district court's dismissal of a partisan vote dilution claim); *Shapiro v. McManus*, ___ F. Supp. 3d ___, 2016 WL 4445320, at *1 (D. Md. Aug. 24, 2016) (denying Maryland's motion to dismiss a partisan gerrymandering claim).

ARGUMENT

As noted above, there are two questions at the motion-to-dismiss stage in partisan gerrymandering cases. First, have plaintiffs articulated a test that is, at least plausibly, judicially discernible "in the sense of being relevant to some constitutional violation," *Vieth*, 541 U.S. at 288 (plurality opinion), and judicially manageable in that it is "principled, rational, and based upon reasoned distinctions," not "inconsistent, illogical, and ad hoc," *id.* at 278? Second, have plaintiffs alleged facts that, taken as true, satisfy this test? Because defendants address only the first of these questions, plaintiffs do not elaborate any further on how their asserted facts show that the Current Plan intentionally, severely, durably, and unjustifiably advantages Republicans and hamstrings Democrats.[2]

[2] This issue is covered in the Introduction, *supra*, and in the Complaint. *See* Compl. ¶¶ 38-50, 59-72, 82-84.

Instead, plaintiffs first explain why each prong of their proposed test is judicially discernible and manageable. Plaintiffs then rebut defendants' cursory arguments to the contrary.[3]

I. The Test's Discriminatory Intent Prong Is Discernible and Manageable.

A partisan gerrymandering test must include an intent prong. *See Bandemer*, 478 U.S. at 127 (plurality opinion) ("We . . . agree . . . that in order to succeed the . . . plaintiffs were required to prove . . . intentional discrimination . . . ."). Plaintiffs advance the precise intent prong that was adopted by the *Bandemer* plurality and that was subsequently used in dozens of cases. This prong asks whether a plan was enacted with discriminatory intent, that is, in order to engage in "intentional discrimination against an identifiable political group." *Id.*

So formulated, the prong is consistent with key First and Fourteenth Amendment tenets, and thus judicially discernible. In the First Amendment context, "political belief and association constitute the core of those activities protected," *Elrod v. Burns*, 427 U.S. 347, 356 (1976), meaning that strict scrutiny applies when the government disadvantages people "on account of their political association," *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996). Similarly, under the Fourteenth Amendment, "[p]roof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

The prong also remains doctrinally available. In *Vieth*, the plurality rejected the appellants' proposal that mapmakers be shown to have "'acted with a *predominant intent* to achieve partisan advantage.'" 541 U.S. at 284 (plurality opinion). In the course of spurning this suggestion, the Court unfavorably assessed it relative to *Bandemer*'s intent

[3] Plaintiffs also note that the burden of devising a judicially discernible and manageable test is not theirs alone. Rather, courts "share[]" with plaintiffs "responsibility for the development of the law" in this area. *Baldus v. Members of Wisc. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 853 (E.D. Wis. 2012).

element. "As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal . . . makes . . . the standard more indeterminate." *Id.* In other words, *Bandemer*'s intent element is preferable to a predominant-intent requirement. Likewise, in *LULAC*, the Court rebuffed the appellants' idea that a plan be deemed invalid if it is "*solely* motivated by partisan objectives." 548 U.S. at 416 (opinion of Kennedy, J.) (emphasis added). *Sole* partisan intent, of course, is distinct from *a* partisan intent.

Plaintiffs' discriminatory intent prong, furthermore, is highly manageable. When a single party has unified control over redistricting, "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129 (plurality opinion); *see also Vieth*, 541 U.S. at 350 (Souter, J., dissenting). On the other hand, discriminatory intent is typically absent when a plan is enacted by a court, a commission, or divided government—all institutions that have no reason to try to favor or disfavor either party. *See Vieth*, 541 U.S. at 350 (Souter, J., dissenting) ("I would . . . treat any showing of intent . . . as too equivocal to count unless the entire legislature were controlled by the governor's party . . . ."); *id.* at 351 ("[A] plaintiff would naturally have a hard time showing requisite intent behind a plan produced by a bipartisan commission.").

That this approach is workable is demonstrated as well by the Court's prior decisions. The *Bandemer* plurality was "confident that . . . th[e] record would support a finding that the discrimination was intentional" when Indiana maps were designed by Republicans in unified control of the state government. 478 U.S. at 127 (plurality opinion); *see also, e.g.*, *Cox v. Larios*, 542 U.S. 947, 947 (2004) (Stevens, J., concurring) (commenting that a Georgia plan crafted by Democrats reflected "'an intentional effort to

allow incumbent Democrats to maintain or increase their delegation'").[4] Conversely, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court concluded that discriminatory intent was *not* present when a Connecticut map was drawn by a bipartisan board. *See id.* at 736-37, 751-54; *see also, e.g.*, *Harris*, 136 S. Ct. at 1309-10 (finding no partisan intent when an Arizona plan was the product of a bipartisan commission). By any reasonable standard, these holdings are a model of judicial predictability.

II. The Test's Discriminatory Effect Prong Is Discernible and Manageable.

A partisan gerrymandering test must also include an effect prong. *See LULAC*, 548 U.S. at 418 (opinion of Kennedy, J.) ("a successful claim . . . must . . . show a burden . . . on the complainants' representational rights"); *Bandemer*, 478 U.S. at 127 (plurality opinion) ("plaintiffs were required to prove . . . an actual discriminatory effect"). The effect prong that plaintiffs advocate is whether a plan exhibits a high and durable level of partisan asymmetry relative to historical norms. Under this prong, partisan asymmetry can be measured using metrics such as the efficiency gap and partisan bias. (The efficiency gap, again, denotes how much more cracked and packed one party's voters are than the other's, while partisan bias is the difference between a party's seat share and 50% in a tied election.) Durability, in turn, can be assessed using both historical analysis and sensitivity testing—that is, ensuring that a plan would remain asymmetric under a range of electoral conditions.

Five Justices confirmed the discernibility, the doctrinal availability, and the significant promise of an effect prong based on partisan symmetry in *LULAC*. Justice Stevens observed that symmetry is "widely accepted by scholars as providing a measure of fairness in electoral systems," and called it a "helpful (though certainly not talismanic) tool." 548 U.S. at 466, 468 n.9 (Stevens, J., concurring in part and dissenting in part).

[4] In *Whitford*, likewise, the court correctly concluded after a trial that Wisconsin's state house plan, enacted by Republicans in unified control of the state government, "had as one of its objectives entrenching the Republicans' control of the Assembly." *Whitford III*, 2016 WL 6837229 at *46.

Justice Souter (joined by Justice Ginsburg) flagged the "utility of a criterion of symmetry as a test" and urged "further attention [to] be devoted to the administrability of such a criterion at all levels of redistricting and its review." *Id.* at 483-84 (Souter, J., concurring in part and dissenting in part). Justice Breyer commented that asymmetry may cause a plan to "produce a majority of congressional representatives even if the favored party receives only a minority of popular votes." *Id.* at 492 (Breyer, J., concurring in part and dissenting in part).

And Justice Kennedy wrote with respect to partisan symmetry that he did not "discount[] its utility in redistricting planning and litigation." *Id.* at 420 (opinion of Kennedy, J.). Other Justices seized on this language. Justice Stevens "appreciate[d] Justice Kennedy's leaving the door open to the use of the standard in future cases." *Id.* at 468 n.9 (Stevens, J., concurring in part and dissenting in part). Justice Souter remarked that "[i]nterest in exploring this notion is evident." *Id.* at 483 (Souter, J., concurring in part and dissenting in part). Scholars, too, lauded *LULAC*'s "potential sea change in how the Supreme Court adjudicates partisan gerrymandering claims." Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering Claims After* LULAC v. Perry, 6 Election L.J. 2, 4 (2007).

As for the durability component of plaintiffs' discriminatory effect prong, it responds to Justices' comments both in *LULAC* and in earlier cases. The *Bandemer* plurality made persistent disadvantage an explicit element of its test: whether a plan "will *consistently* degrade . . . a group of voters' influence," resulting in the "*continued* frustration of the will . . . of the voters." 478 U.S. at 132-33 (plurality opinion) (emphasis added). Similarly, both Justice Breyer's opinion in *Vieth* and Justice Kennedy's in *LULAC* stressed the harm of a party's entrenchment in the face of countervailing voter sentiment. *See LULAC*, 548 U.S. at 419 (opinion of Kennedy, J.) (criticizing a plan that

"entrenched a party on the verge of minority status"); *Vieth*, 541 U.S. at 360 (Breyer, J., dissenting) (condemning the "use of political factors to entrench a minority in power").

Turning from discernibility to manageability, the case for the prong's workability is quite simple. There exist measures of partisan symmetry, such as the efficiency gap and partisan bias, that capture the extent to which a plan treats the parties' candidates and voters asymmetrically. These measures can be reliably calculated using easily obtained electoral results, as shown by plaintiffs' computations above and in their complaint. *See* Compl. ¶¶ 59-68. Accordingly, to determine if a plan's asymmetry is atypically large, all a court must do is ascertain the map's skew and then compare it to historical norms. This is a straightforward quantitative exercise, akin to finding a plan's total population deviation and then comparing it to the applicable 10% threshold. *See Bandemer*, 478 U.S. at 134 (plurality opinion) (arguing that "[r]eapportionment cases involving the one person, one vote principle" provide a useful template).

The story is much the same with the durability of a plan's partisan asymmetry. Well-established statistical techniques can be used to determine whether a plan is likely to remain asymmetric even if voter sentiment shifts substantially. Judicial intervention is appropriate if a plan's skew would endure under different electoral environments, but not if the map's distortion would evaporate if conditions changed. *See Whitford III*, 2016 WL 6837229 at *47 n.255 (noting "consensus among the experts" "that some type of swing analysis was the accepted method of testing how a particular map would fare under different electoral conditions").

III. The Test's Justification Prong Is Discernible and Manageable.

The final prong of plaintiffs' proposed test asks whether a plan's partisan asymmetry can be "justified by the State" based on the State's political geography or legitimate redistricting objectives. *Brown*, 462 U.S. at 843. At this stage in the analysis,

the burden is on the State to justify the plan's asymmetry, not on plaintiffs to prove that the asymmetry is *un*justified. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) (noting that by this point, plaintiffs have already "established a prima facie case of discrimination" by showing discriminatory intent and discriminatory effect). It is also the plan's *asymmetry* that must be explained by the State, not its general layout. Almost every map is underpinned by at least some legitimate considerations. But these factors are irrelevant unless they actually account for the plan's skew. *See id.* And alternative maps are the most probative evidence of justification. If these maps reveal that the challenged plan's asymmetry can be cut significantly without sacrificing the State's legitimate aims, then the asymmetry is unjustified. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1, 25 (1975).

This prong is discernible because it is borrowed verbatim from the Court's state legislative reapportionment decisions. These decisions have sought to balance population equality against other valid State goals, and so are a useful model for weighing partisan symmetry against competing objectives in the partisan gerrymandering context. The prong also has clear analogues in the gerrymandering case law. *See, e.g.*, *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (asking whether "classifications . . . were applied . . . in a way unrelated to any legitimate redistricting objective"); *id.* at 351 (Souter, J., dissenting) ("I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage."); *Bandemer*, 478 U.S. at 141 (plurality opinion) (if plaintiffs set forth a prima facie case, "then the legislation would be examined for valid underpinnings").

Not only is the justification prong grounded in longstanding doctrine, it is also a reasonable way to balance a constitutional imperative against other legitimate interests. If there were no justification prong, then States would be unable to pursue goals like compactness, respect for political subdivisions, and compliance with the Voting Rights

Act to the extent these aims resulted in excessive asymmetry. States would also be placed in an impossible position if their political geography prevented them from enacting a sufficiently symmetric (and otherwise lawful) plan. The justification prong avoids both of these scenarios. It allows States to further the valid interests of their choice as long as they take care in doing so to limit asymmetry to the extent possible. It also recognizes that partisan neutrality cannot be mandated in States where, for geographic reasons, it cannot realistically be attained.

That the justification prong is manageable as well is evident from the half century in which it has been used in reapportionment cases. Courts have shown they can reliably distinguish between plans whose large population deviations are justified by legitimate factors and plans whose malapportionment cannot be explained. Contrast, for example, *Mahan v. Howell*, 410 U.S. 315 (1973), with *Kilgarlin v. Hill*, 386 U.S. 120 (1967). In *Mahan*, Virginia "consistently sought to avoid the fragmentation of subdivisions," and "the legislature's plan . . . 'produce[d] the minimum deviation above and below the norm, keeping intact political boundaries.'" 410 U.S. at 323, 326. In *Kilgarlin*, however, Texas *claimed* it was "respect[ing] county boundaries wherever possible," but "at least two other plans [were] presented to the court, which respected county lines but which produced substantially smaller deviations." 386 U.S. at 123-24. The Court properly held that the malapportionment was justified in *Mahan* but not in *Kilgarlin*.[5]

IV. Defendants Fail to Address Plaintiffs' Legitimate Claim for Relief.

Oddly, defendants make almost no effort to engage with the above analysis. Indeed, the words "discernible" and "manageable" do not even appear in their brief, nor does the concept, "partisan symmetry," that underlies plaintiffs' proposed test. Instead,

[5] In *Whitford*, the court noted that the drafters of Wisconsin's state house plan "produced multiple alternative plans that would have achieved the legislature's valid districting goals while generating a substantially smaller partisan advantage," and therefore held that the plan's "partisan effect cannot be justified by the legitimate state concerns . . . that traditionally bear on the reapportionment process." *Whitford III*, 2016 WL 6837229, at *57.

defendants raise the following objections: (1) that this case is governed by *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992); (2) that plaintiffs' test is flawed because it does not require individual districts to be strangely shaped; (3) that the test compels proportional representation; and (4) that plaintiffs lack standing to challenge the Current Plan. None of these objections has merit.

Starting with defendants' most bizarre claim, they seem to believe that *Pope*, a case decided in 1992, barred all future partisan gerrymandering suits in North Carolina.[6] *See* Defs' Br. at 5-8. There are several reasons why this cannot possibly be right. First, *Pope* involved a challenge to the State's original congressional plan in the 1990s. *See* 809 F. Supp. at 394-95. But plaintiffs do not dispute that plan; rather, they allege that the *Current Plan*, enacted in *2016*, is unconstitutional. Second, the standard advanced by the *Pope* plaintiffs was (unsurprisingly) the one adopted six years earlier by the *Bandemer* plurality. *See id.* at 396. But plaintiffs here do *not* put forward that test; rather, they recommend the three-prong framework described above. And third, not only did *Pope* consider a standard different from plaintiffs' proposal, but that standard—the *Bandemer* plurality's test—was rejected by five Justices in *Vieth*. *See* 541 U.S. at 281-84 (plurality opinion). A great deal, then, not "[n]othing," "has changed in the Supreme Court's jurisprudence on political gerrymanders since its decision in *Davis*." Defs' Br. at 8.[7]

Even if the *Bandemer* plurality's test were still good law, moreover, plaintiffs would be able to meet it. Challengers typically lost under that test because they could not show that their political influence would be "*consistently* degraded" (over a range of electoral conditions) with respect to "the political process *as a whole*" (including voting

[6] Defendants also hint that this case may be governed by *Harris v. McCrory*, 2016 WL 3129213 (M.D.N.C. June 2, 2016). But the *Harris* plaintiffs articulated no test at all for partisan gerrymandering—let alone "one that is clear and manageable." *Id.* at *2. The court thus denied their objections while reiterating that its ruling "*does not* constitute or imply an endorsement of, or foreclose any additional challenges to," the Current Plan. *Id.* at *3.

[7] Another thing that has changed since *Bandemer* (and *Vieth*) is a court's *endorsement* of plaintiffs' proposed test and *invalidation* of a district plan pursuant to it. *See Whitford III*, 2016 WL 6837229, at *1-71.

and registering to vote). 478 U.S. at 132 (plurality opinion) (emphasis added). Plaintiffs' sensitivity testing, though, establishes that the Current Plan would remain highly asymmetric under any plausible electoral environment. *See* Compl. ¶¶ 69-70. In recent years, North Carolina has also reduced the political influence of Democratic and minority voters not just through gerrymandering but through strict photo ID requirements for voting, cutbacks to early voting, and the elimination of same-day registration as well. *See N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (holding that these policies were racially motivated and so unconstitutional).

Next, defendants fault plaintiffs for not embracing the district-specific tests advocated by Justice Stevens and Justice Souter in *Vieth*—tests that focused on individual districts' noncompliance with traditional districting principles. *See* Defs' Br. at 10-14. Plaintiffs do not endorse these tests, first, because they are precluded by binding precedent. Five Justices in *Vieth* explicitly rejected both Justice Stevens's and Justice Souter's proposals. *See* 541 U.S. at 292-98 (plurality opinion); *id.* at 308 (Kennedy, J., concurring in the judgment). The *Bandemer* plurality also spurned Justice Powell's suggestion that the "most important" factors should be "the shapes of voting districts and adherence to established political subdivision boundaries." 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part). The plurality observed that these factors do "not show any actual disadvantage beyond that shown by the election results." *Id.* at 139-40 (plurality opinion). Plaintiffs are sure that if they *had* offered Justice Stevens's or Justice Souter's tests, defendants would have—rightly—cited these passages in rebuttal.

An approach based on noncompliance with traditional districting principles is also flawed because it would not accurately target partisan gerrymanders. Districts can violate these principles for many reasons other than a desire for partisan gain, for instance because *race* was the "predominant, overriding factor" for districts' construction. *Miller*

v. Johnson, 515 U.S. 900, 910 (1995). Conversely (and as shown by the Current Plan), "[h]ighly sophisticated mapping software now allows lawmakers to pursue partisan advantage without sacrificing compliance with traditional districting criteria." *Whitford III*, 2016 WL 6837229, at *39. Turning these criteria into the test for partisan gerrymandering would thus be both overinclusive and underinclusive, generating an inordinate number of false positives and false negatives.

In any event, plaintiffs' proposed test *does* include an appropriate role for traditional districting principles. As in the racial gerrymandering context, noncompliance with them may be probative evidence of discriminatory intent. *See, e.g.*, *Miller*, 515 U.S. at 913. Additionally, respect for traditional criteria is the most likely justification a State may offer for a highly and durably asymmetric plan. *See, e.g.*, *Brown*, 462 U.S. at 844; *Mahan*, 410 U.S. at 326. If the asymmetry is, in fact, explained by the State's effort to abide by these criteria, then the plan would not be invalid under plaintiffs' test.

Defendants further criticize the test on the ground that it supposedly requires proportional representation. *See* Defs' Br. at 1, 9-10, 12-13. It does not, first, because both of the measures of partisan symmetry that plaintiffs advance, the efficiency gap and partisan bias, do not entail "equal representation in government [for] equivalently sized groups." *Vieth*, 541 U.S. at 288 (plurality opinion). The efficiency gap is not even calculated by comparing parties' statewide vote and seat shares. Rather, it is the difference between the parties' respective wasted votes—tallied district by district—divided by the total number of votes cast. *See* Compl. ¶¶ 54-58. Analogously, a plan can have a partisan bias of zero even if a party's seats are highly disproportionate to its votes, as long as the *other* party's seats would be as disproportionate to *its* votes if the parties' performances flipped. *See Whitford I*, 151 F. Supp. 3d at 929-30 ("[A]n election's results may have a small efficiency gap without being proportional or they may be proportional

and still have a large efficiency gap."); Grofman & King, *supra*, at 8 ("Measuring symmetry and partisan bias does *not* require proportional representation . . . .").

Another problem with defendants' equation of partisan symmetry with proportional representation is that, even if it were correct, it entirely overlooks the *other* two prongs of plaintiffs' proposed test. A severely disproportionate plan would be perfectly valid under the test if it were enacted without discriminatory intent—for example, because it was designed by a court, a commission, or divided government. Likewise, a severely disproportionate plan that was passed *with* discriminatory intent would *still* be lawful if its disproportionality was justified by the State's political geography or legitimate redistricting objectives.

Nor can defendants' proportional representation argument be rescued by broadening its scope to cover all metrics that are "based upon state-wide patterns." Defs' Br. at 13. The efficiency gap, again, is *not* based on statewide vote and seat shares. But even if it were, the Court has never shut its eyes to statewide data. In *Bandemer*, the plurality observed that Democrats won 52% of the vote but only 43% of the seats in Indiana's 1982 state house election. This evidence was insufficient to *doom* the plan, due to lack of proof of a durable disadvantage, but it was hardly *irrelevant* in the plurality's view. *See* 478 U.S. at 134-35 (plurality opinion). In *LULAC*, similarly, Justice Kennedy noted the outcome of Texas's 2004 congressional election, in which "Republicans won 21 seats to the Democrats' 11, while also obtaining 58% of the vote in statewide races." 548 U.S. at 413 (opinion of Kennedy, J.). Far from ignoring this information, he argued that it supported his conclusion that Texas's plan was valid. "Plan 1374C can be seen as making the party balance more congruent to statewide party power." *Id.* at 419.

Finally, defendants contend that plaintiffs have standing to challenge only the districts in which they reside—not the Current Plan in its entirety. *See* Defs' Br. at 13.

This argument, to begin with, is foreclosed by Supreme Court precedent. In *Bandemer*, *Vieth*, and *LULAC*, plaintiffs claimed that *statewide* district plans were unconstitutional *as a whole*. In none of these cases did a majority (or plurality) of the Court hold (or suggest) that plaintiffs lacked standing to bring such a suit. *See, e.g.*, *Bandemer*, 478 U.S. at 132 (plurality opinion) ("unconstitutional vote dilution" may be "alleged in the form of statewide political gerrymandering").

Defendants support their idiosyncratic view of standing by citing *United States v. Hays*, 515 U.S. 745 (1995). *See* Defs' Br. at 13. *Hays*, however, is a *racial* gerrymandering case in which the essence of the cause of action is that a *particular* district has been drawn with race as the "predominant, overriding factor." *Miller*, 515 U.S. at 910. *Hays* thus has no applicability to the very different domain of *partisan* gerrymandering, where the crux of the complaint is that a plan *in its entirety* discriminates against a party's candidates and voters. *See Whitford III*, 2016 WL 6837229, at *70 ("The rationale and holding of *Hays* have no application here.").

Indeed, if any redistricting cases outside the partisan gerrymandering context are relevant here, it is the Court's one-person, one-vote decisions. Those decisions recognize a claim that districts throughout a State have been malapportioned, thus overrepresenting certain voters and underrepresenting others. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). Those decisions also hold that *any* voter in *any* overpopulated district has standing to dispute the entire statewide plan. *See, e.g.*, *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1209 (N.D. Ga. 2003). The same result must follow here, enabling supporters of a disadvantaged party to attack the whole statewide plan that is responsible for their injury.

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion to dismiss.

Respectfully submitted this 19th day of December, 2016.

/s/ Anita S. Earls
Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Emily Seawell (State Bar # 50207)
Southern Coalition for Social Justice
anitaearls@southerncoalition.org
allisonriggs@southerncoalition.org
emilyseawell@southerncoalition.org
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380 ext. 115
Facsimile: 919-323-3942
Counsel for All Plaintiffs

/s/ J. Gerald Hebert
J. Gerald Hebert
Ruth Greenwood
Annabelle Harless
Danielle Lang
Campaign Legal Center
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org
rgreenwood@campaignlegalcenter.org
aharless@campaignlegalcenter.org
dlang@campaignlegalcenter.org

/s/ Nicholas O. Stephanopoulos
Nicholas O. Stephanopoulos
University of Chicago Law School
1111 E 60th St.
Chicago, IL 60637
(773) 702-4226
nsteph@uchicago.edu