

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

COMMON CAUSE, et al.,
Plaintiffs,

v.

ROBERT A. RUCHO, et al.,
Defendants.

No. 1:16-cv-1026

LEAGUE OF WOMEN VOTERS OF
NORTH CAROLINA, et al.,

Plaintiffs,

v.

ROBERT A. RUCHO, et al.,
Defendants.

No. 1:16-cv-1164

LEAGUE OF WOMEN VOTERS PLAINTIFFS' OPENING STATEMENT

May it please the court, the League of Women Voters and numerous individual voters allege that the congressional district plan enacted by North Carolina in 2016 is an unconstitutional partisan gerrymander. The 2016 Plan subverts basic democratic values by intentionally, severely, durably, and unjustifiably disadvantaging Democratic voters and candidates. The Plan thus contravenes both the freedom of speech protected by the First Amendment and the Fourteenth Amendment's guarantee of equal protection.

The League Plaintiffs' proposed test is essentially the same as that described by Justice Breyer in the *Gill v. Whitford* oral argument. The test has three prongs, all of which must be satisfied in order for a district plan to be unlawful. A plan (1) must be enacted with the discriminatory intent of disadvantaging a particular party; (2) must in fact produce a large and durable discriminatory effect; and (3) must lack any legitimate justification for this effect. The test is discernible because it is rooted in the First Amendment principle that the government should not discriminate against voters because of their political beliefs, as well as the Fourteenth Amendment tenet that voters should not suffer the intentional dilution of their electoral influence. The test is also manageable because it relies on well-established social scientific metrics and methods.

The evidence in this case will show that the 2016 Plan fails the League Plaintiffs' test. Indeed, it is hard to imagine a more blatantly unconstitutional map. The Plan's official criteria required its "partisan makeup" to be "10 Republicans and 3 Democrats." The Plan went on to generate the largest partisan asymmetry in the country in the 2016 election. This asymmetry is not just staggering in size; according to defendants' expert, it would also endure even in the event of a Democratic wave election. And the asymmetry cannot be justified by North Carolina's political geography or valid redistricting goals. In fact, of thousands of simulated maps that do a *better* job than the Plan of achieving these goals, not one is remotely as asymmetric as the Plan.

Starting with the intent prong of this test, partisan advantage need not be a plan's "predominant" or "sole" motivation for liability to arise. These formulations have been rejected by the Supreme Court, meaning that any intention to entrench a party in power suffices to satisfy this prong.

Additionally, as this Court has noted, "Defendants do not dispute that, in adopting the Plan, the General Assembly intended to favor Republican voters and disadvantage voters who voted for non-Republican candidates." Not only did the Plan's criteria explicitly require a 10-3 Republican advantage, but the co-chair of the Assembly's redistricting committee "acknowledge[d] freely

that this would be a political gerrymander." North Carolina is thus experiencing the hypothetical that Justice Kennedy invoked at the *Whitford* oral argument, of a "state statute [that] says all districts shall be designed . . . to conform with traditional districting principles, but the overriding concern is to increase . . . [seats] for party X." Even the State's attorneys admitted that such a law would be invalid.

The second prong of our proposed test is a showing of a large and durable effect. Consistent with Justice Kennedy's concurrence in *Veith v. Jubelirer*, this requirement limits the number of unlawful maps and thus avoids, "commit[ting] federal and state courts to unprecedented intervention in the American political process." The requirement also derives from both the First and Fourteenth Amendments. The former, according to Justice Kennedy, "depends" on courts being able to "measure the effect of the apportionment," and "allows a pragmatic or functional assessment that accords some latitude to the States."

Plaintiffs' effect prong incorporates a general concept, a series of specific metrics, and a method for evaluating the durability of a plan's skew. The general concept (deemed "intuitive" and "attractive" by Justice Kagan in the *Whitford* oral argument) is *partisan symmetry*: the idea that a district map should treat the major parties symmetrically in how their popular support translates into legislative representation. Partisan

asymmetry, of course, is the hallmark of a partisan gerrymander, enabling one party to convert its votes into seats more efficiently than its rival.

The specific metrics that plaintiffs will present at trial, in turn, each capture partisan asymmetry in slightly different ways. The *efficiency gap* compares the parties' respective rates of "wasted" votes that do not contribute to a candidate's election. Wasted votes are produced by the gerrymanderer's two indispensable techniques, "cracking" and "packing." The efficiency gap reveals which party bears the brunt (or reaps the fruit) of this cartographic cleverness. *Partisan bias* asks how different the parties' seat shares would be if they each received the same fraction (typically 50%) of the statewide vote. And the *mean-median difference* subtracts a party's median vote share, across all of a plan's districts, from its mean vote share. All of these metrics are widely used and lead to the same conclusions in competitive states like North Carolina.

Lastly, *sensitivity testing* is the method for assessing the persistence of a plan's partisan asymmetry, examining changes in the observed asymmetry if the statewide vote were to swing several points in each party's direction and thus determining whether the plan's partisan skew would endure, or disappear, under different electoral conditions.

Expert testimony from Dr. Simon Jackman will show that, according to every measure of partisan asymmetry, the 2016 Plan is off the charts. In the 2016 election, it exhibited an efficiency gap of -19% (the worst score in the country), a partisan bias of -27% (one of the ten worst scores of the last fifty years), and a mean-median difference of -5%. Both sides' sensitivity testing also confirms that this pro-Republican tilt is extremely durable. It would take a nine-point pro-Democratic swing (the largest Democratic wave in thirty years) for the Plan's asymmetry to evaporate.

The League Plaintiffs' asymmetry metrics are not equivalent to a plan's deviation from proportional representation. To the contrary, they recognize that single-member-district systems typically produce a "winner's bonus": a seat share for the majority party that is larger than its vote share. The metrics can also be calculated just as easily before an election (using predicted results) as afterwards (using actual ones). That is why Plaintiffs could file their complaint, including expected asymmetry scores for the 2016 Plan, prior to the 2016 election. And the metrics do just one thing: gauge a map's partisan asymmetry. The *other* parts of Plaintiffs' test establish whether an asymmetry is intentional, durable, and unjustified.

Individual plaintiffs will testify about how the durable and severe discriminatory effect of the 2016 Plan interferes with

their participation in the political process. One effect of the gerrymandered Plan is that the Plaintiffs, all supporters of Democratic candidates and policies, are represented by a congressional delegation that unfairly silences their viewpoint, and their efforts to engage their fellow citizens and elected representatives are thwarted by the Plan's extreme bias. Their interests in freedom of association, in an election structure that is viewpoint neutral, and in their vote counting equally to that of all other voters are all severely harmed.

This test's final element, a lack of a valid justification, further limits the applicability of the test to only truly unfair maps, recognizing that courts need to be able to ascertain where asymmetry may be attributable to a legitimate goal and avoid penalizing legislatures for pursuing permissible considerations.

Abundant evidence here demonstrates that no legitimate goal caused the observed asymmetry. While several sets of alternative plans are relevant at the justification stage, the most probative are those created through a computer algorithm by plaintiffs' expert, Professor Jowei Chen. He randomly generated 3000 separate congressional maps for North Carolina. All of these maps matched or surpassed the 2016 Plan's performance in terms of district compactness, county splits, and VTD splits -- the very criteria allegedly used to craft the Plan. Two thousand maps also paired

at least as few incumbents as the Plan. And, like the Plan, about 300 maps contained a district with a black population above 40%.

Yet *not one* of Professor Chen's maps yielded a 10-3 Republican advantage or an efficiency gap as large as the 2016 Plan's. No matter which parameters he used, every single map was more symmetric than the Plan. Indeed, the typical map had seven *Democratic* seats and an efficiency gap of almost exactly zero.

These results mean that the 2016 Plan's extreme asymmetry cannot be justified by North Carolina's political geography. If the spatial patterns of the State's voters favored Republicans, this edge would have been -- but was not -- evident in the simulated maps. The same conclusion holds for both the Plan's actual criteria and the aim of Voting Rights Act compliance that defendants may (inaccurately) assert at trial. These goals cannot justify the Plan's massive skew because all of the simulated maps that achieved them as well or better than the 2016 Plan were far less politically skewed.

At the conclusion of trial, the Court should therefore hold that League Plaintiffs' test is judicially discernible and manageable, and that, under it, the 2016 Plan violates the First and Fourteenth Amendments. The Court should enjoin further use of these districts and offer the General Assembly an opportunity to correct this grave constitutional violation.

Respectfully submitted this 13th day of October, 2017.

/s/ Anita S. Earls

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CERTIFICATE OF SERVICE

I certify that I have this day filed the foregoing **League of Women Voters Plaintiffs' Opening Statement** with the Clerk of Court using the CM/ECF system, which will automatically send an electronic copy to all attorneys of record.

This 13th day of October, 2017.

/s/ Anita S. Earls _____

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