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

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| COMMON CAUSE, *et al.*,<br><br>PLAINTIFFS,<br><br>v.<br><br>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.*,<br><br>DEFENDANTS. | CIVIL ACTION<br>NO. 1:16-CV-1026-WO-JEP<br><br>THREE-JUDGE COURT |

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Defendants have moved to dismiss the complaint on only three grounds, arguing that: (1) Supreme Court precedent forecloses this challenge; (2) the 1992 summary affirmance of *Pope v. Blue,* 809 F. Supp. 392 (W.D.N.C. 1992), bars plaintiffs' claims; and (3) the denial of plaintiffs' objections in *Harris v. McCrory*, No. 1:13-CV-949, 2016 WL 3129213 (M.D.N.C. June 2, 2016), precludes this challenge to the same redistricting plan. Because none of these arguments have merit, defendants' motion should be denied.

North Carolina's 2016 Congressional Redistricting Plan (the "2016 Plan") as a whole, and *each* of its thirteen congressional districts, are unconstitutional partisan gerrymanders that violate: (1) the First Amendment; (2) the Equal Protection Clause of the 14th Amendment; and (3) Article I, section 2 of the Constitution of the United States; and that (4) exceed the authority granted by Article I, section 4 of the Constitution.

These claims matter. "[N]o right [is] more basic in our democracy than the right to

participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. __, 134 S. Ct. 1434, 1440 (2014). The right of "constituents [to] support candidates who share their beliefs [is] a central feature of democracy." *Id.* at 1441. Other rights "are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Blatantly partisan gerrymanders like the 2016 Plan threaten this basic right. State legislators "have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring). And there is now widespread agreement among members of the Supreme Court that "[p]artisan gerrymanders are … incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* 576 U.S. __, 135 S. Ct. 2652, 2658 (2015) (Ginsburg, J.) (alterations adopted).

The constitutional standards that govern this case are well established under Supreme Court decisions interpreting the First Amendment, the 14th Amendment, and Article I, sections 2 and 4 of the Constitution. Plaintiffs allege facts sufficient to state a claim under each theory. Because Defendants' motion to dismiss does not address, let alone undermine, plaintiffs' invocation of these well-established standards, the motion to dismiss should be denied. Plaintiffs' should have an opportunity to develop and present a full record of defendants' constitutional violations.

**Factual Background**

This challenge arises from yet another unconstitutional redistricting scheme. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 621 (M.D.N.C. 2016), *appeal docketed,* No. 15-1262 (U.S. Apr. 11, 2016) (finding two congressional districts to be racial gerrymanders

and enjoining the state from conducting 2016 elections under the 2011 Congressional Redistricting Plan). First Amended Complaint ("FAC") ¶ 9.

As a result of *Harris*, the North Carolina General Assembly adopted a new plan, authored by the Joint Select Committee on Redistricting (the "Joint Committee"), co-chaired by defendants Representative David Lewis and Senator Robert Rucho. FAC ¶ 10. The Joint Committee, by party-line vote, adopted written redistricting criteria for the 2016 Plan (the "Adopted Criteria"). FAC ¶¶ 10, 16. Among these criteria, one requirement stands out: the explicit goal of "maintain[ing] the [10 Republican and 3 Democrat] partisan makeup of North Carolina's congressional delegation." FAC ¶ 17, Exhibit A to FAC. This requirement falls under the heading "Partisan Advantage." *Id.*

Defendant Lewis trumpeted this core feature of the 2016 Plan. Rep. Lewis: (1) stated that "the map drawers [would be instructed to] create a map which is perhaps likely to elect ten Republicans and three Democrats"; (2) "acknowledge[d] … that this would be a political gerrymander," which he claimed was "not against the law"; (3) "propose[d] that [the Joint Committee] draw the maps to give a partisan advantage to ten Republicans and three Democrats because [he did] not believe it's possible to draw a map with 11 Republicans and two Democrats"; (4) "ma[de] clear that [the Joint Committee would] … use political data … to gain partisan advantage on the map" and (5) stated that he "want[ed] that criteria to be clearly stated and understood." FAC ¶¶ 12-14.

To accomplish this, the mapmakers were instructed to use *political data* reflecting the partisan voting history of North Carolina voters. FAC ¶ 14. This data captured the electoral performance of the Democratic and Republican parties in each Voter Tabulation

District ("VTD") across North Carolina for certain state-wide elections conducted after January 1, 2008 (and excluding the 2008 and 2012 Presidential elections). FAC ¶ 18.

Using this data, along with population data, it took the mapmakers *one day* to construct the 2016 Plan. FAC ¶¶ 11, 19. In the three days that followed, the Joint Committee, the North Carolina Senate, and the North Carolina House of Representatives each adopted the plan, all by straight party-line vote. FAC ¶¶ 19-21.

The results of the November 2016 general election confirm the effectiveness of the 2016 Plan's purpose and design. Republicans retained 10 of the 13 congressional seats (77%) despite earning only 53% of the statewide congressional vote.[1] Plaintiffs have alleged, and will prove at trial, that such result could not be "the product of chance or the neutral application of legitimate redistricting principles." FAC ¶ 24.

Plaintiffs have alleged specific harms they suffered as a result of the 2016 Plan. The individual Democratic-voter plaintiffs had the effectiveness of their votes diluted or nullified by the 2016 Plan. FAC ¶ 55. By cracking and disbursing these voters among ten individual districts with safe Republican majorities, the Democratic-voter plaintiffs are deprived of the *opportunity* to elect a candidate of their choice. *Id.* The 2016 Plan also injured individual Democratic-voter plaintiffs who have been packed into three districts gerrymandered to contain large Democratic supermajorities, where their votes in excess of the majority required to elect the Democratic candidate of their choice have been and will be largely wasted. *Id.* The 2016 Plan injures the North Carolina Democratic Party

[1] "11/08/2016 Unofficial General Election Results – Statewide," North Carolina State Board of Elections, available at http://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0 (last accessed November 10, 2016).

("NCDP") and Common Cause on both a state-wide basis and in each individual district by harming their members and undermining their institutional purposes. FAC ¶ 2.

**Argument**

In deciding the motion to dismiss, the Court must "assume the truth of the facts as alleged in [the] complaint." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). This "[C]ourt[ ] should 'be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is 'novel' and thus should be 'explored.'" *Wright v. N. Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (quoting 5B Charles Alan Wright et al., *Federal Practice & Procedure* § 1357 (3d ed. 2015)). Because plaintiffs' counts allege facts sufficient to state a claim to relief that is "plausible on its face," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007), defendants' motion should be denied.

**I. Defendants' Arguments For Dismissal Are Without Merit.**

**a. Plaintiffs' Claims Are Not Foreclosed By Supreme Court Precedent.**

Defendants assert that "[p]laintiffs' claims for political gerrymandering are … foreclosed under … the Court's most recent ruling on political gerrymanders." Defendants' Memorandum in Support of Motion to Dismiss ("Defs.' Memo") at 1 (citing *Vieth,* 541 U.S. 267). That argument was rejected by the Supreme Court in *Shapiro v. McManus*, in which the Court reversed the dismissal of a First Amendment challenge to a Democratic congressional gerrymander and held that the First Amendment challenge "include[d] a plea for relief based on a legal theory put forward by a Justice of this Court and *uncontradicted by the majority in any of our cases*." 136 S. Ct. 450, 456 (2015) (emphasis added). On remand, the three-judge district court denied the state's motion to

dismiss, which misread *Vieth* as the defendants do here, and held that the plaintiffs "state[d] a plausible claim for relief." *Shapiro v. McManus*, No. 1:13-CV-03233-JKB, 2016 WL 4445320, at *1 (D. Md. Aug. 24, 2016) [attached hereto as Appendix A]. The November 21, 2016 decision of another three-judge district court further shows the inaccuracy of defendants' description of the law. *See Whitford v. Gill*, No. 15-CV-421, 2016 U.S. Dist. LEXIS 160811, at *112 (W.D. Wis. Nov. 21, 2016) ("[T]he First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.") [attached hereto as Appendix B].[2]

**b. Defendants' Reliance On *Pope v. Blue* Is Misplaced.**

Defendants contend that plaintiffs' claims are foreclosed by the Supreme Court's summary affirmance of the three-judge district court opinion in *Pope v. Blue*, 809 F. Supp. 393 (W.D.N.C. 1992), *aff'd* 506 U.S. 801 (1992). Defs.' Memo at 1. As the 2015 *Shapiro* decision describing the First Amendment theory as "uncontradicted" necessarily

[2] Separately, defendants persist in arguing that political gerrymandering claims may be nonjusticiable. Defs.' Memo. at 9. This is a fiction—one the Supreme Court has expressly rejected. *Davis v. Bandemer*, 478 U.S. 109, 118-28 (1986) (plurality opinion); *Vieth*, 541 U.S. at 309-10 (Justice Kennedy concurring with the four dissenters that partisan gerrymander claims are justiciable); *LULAC v. Perry*, 548 U.S. 399, 413-14 (2006) ("We do not revisit the justiciability holding."); *see also N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 226 n.6 (4th Cir. 2016) ("Of course, state legislators also cannot impermissibly dilute or deny the votes of opponent political parties … as this same General Assembly was found to have done earlier this year.") (internal citations omitted) (citing *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016). The justiciability question is settled.

shows, plaintiffs' claims cannot possibly have been foreclosed by the 1992 summary affirmance of *Pope*. Summary affirmance extends "only [to] the *judgment* of the court below," not to the legal reasoning on which the prior judgment was based. *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (emphasis added); *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977).[3] This Court is not bound by *Pope*, nor is its analysis helpful to this Court in light of distinctions between the claims raised.

**c. The Denial Of The *Harris* Objections Did Not Bar—But In Fact Explicitly Provided For—Additional Challenges To The 2016 Plan.**

Defendants' third argument is disingenuous. Defendants maintain that "[s]imilar claims challenging the 2016 Congressional Plan have already been rejected by another North Carolina three-judge court." Defs.' Memo. at 1 (citing *Harris*, 2016 WL 3129213, at *1). To the contrary, the *Harris* panel only denied those plaintiffs' claims "*as presented to [that] Court*," and stated that the denial "*does not* constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan." 2016 WL 3129213, at *1; *see also id.* at *3 (same). Any argument that *this* challenge is barred by *that* order is both misleading and meritless.

## II. Plaintiffs State A Claim For Relief Under The First Amendment.

To state a First Amendment claim, plaintiffs must allege facts sufficient to show that the 2016 Plan assigned voters to districts for the purpose and with the effect of benefiting Republican candidates and voters and penalizing or burdening the voting

[3] The claims in *Pope* were not "identical" to the claims here. Defs.' Memo at 1, 5. The *Pope* plaintiffs attacked the 1992 Plan as "irrational" and focused on visual compactness. Jurisdictional Statement of Appellants, *Pope v. Blue*, 1992 WL 12012092 (U.S.), at *1.

rights of Democratic candidates and voters based on their respective voting histories and expressed political beliefs.

The sum total of defendants' position with respect to plaintiffs' First Amendment claim is that the First Amendment is "coextensive" with the 14th Amendment and warrants no separate treatment. Defs.' Memo at 5, 7. Justice Kennedy dispensed with this "coextensive" argument and distinguished First from 14th Amendment claims, writing:

> [w]here it is alleged that a gerrymander had the *purpose and effect of imposing burdens on a disfavored party and its voters*, the First Amendment may offer a sounder and more prudential basis for [judicial] intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications…. *The First Amendment analysis concentrates on whether the legislation burdens the representational rights of ... voters for reasons of ideology, beliefs, or political association.*

541 U.S. at 315 (Kennedy, J., concurring) (emphasis added). Defendants' argument ignores the specific allegations of the complaint and the legal theory on which they are based—a "theory put forward by [Justice Kennedy in *Vieth*] and uncontradicted by the majority in any of [the Supreme Court's] cases." *Shapiro*, 136 S. Ct. at 456.[4]

Plaintiffs allege that the 2016 Plan favors voters of the party in power (Republicans) and burdens or penalizes voters of a disfavored party (Democrats) based on the content of those voters' protected political expression. FAC ¶ 29. Defendants used plaintiffs' voting histories and political affiliations to burden plaintiffs' representational

[4] Nor do defendants acknowledge that constitutional scrutiny is "claim specific." *Vieth*, 541 U.S. at 294. "An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim *because the underlying rights, and consequently constitutional harms, are not comparable*." *Id.* (emphasis added).

rights by assigning them to districts where the effectiveness of their votes would be diluted or nullified. FAC ¶ 30; *see Whitford*, 2016 U.S. Dist. LEXIS 160811, at *108-09 (holding that, as a result of a similar design, "[t]he burdened voter simply has a diminished or even no opportunity to effect a legislative majority. That voter is, in essence, an unequal participant in the decisions of the body politic.").

The 2016 Plan in fact burdened the voters it was intended to burden. Despite earning only 53% of votes cast in 2016 North Carolina congressional elections, Republicans captured 10 of 13 congressional seats, a 77% share. Defendants achieved their objective of "maintain[ing] the [10 Republican and 3 Democrat] partisan makeup of North Carolina's congressional delegation" (FAC ¶ 17), using political data to ensure electoral outcomes favoring the party in power and penalizing the disfavored party.[5]

Plaintiffs have alleged that this use of political data in redistricting is brutally effective. FAC ¶ 34-36. Moreover, plaintiffs allege that and intend to present a statistical analysis showing that a 10-3 result can *only* be the product of drawing district maps to benefit the Republican Party and its voters and burden the Democratic Party and its voters. FAC ¶ 24; *see Raleigh Wake Citizens Ass'n*, 827 F.3d at 344 (relying on expert

[5] Plaintiffs do not contend that the NCDP or individual voter-plaintiffs have a right to proportional representation. Their claim is that the voters have a right under the First Amendment not to be penalized based on their affiliation with the Democratic Party or the content of their votes in favor of Democratic candidates in past elections, and that the right is infringed where, on that basis, such voters are placed in districts where the effectiveness of their votes in favor of Democratic candidates will be diluted or nullified. *See Whitford*, 2016 U.S. Dist. LEXIS 160811, at *176 ("To say that the Constitution does not require proportional representation is not to say that highly disproportional representation may not be evidence of a discriminatory effect.").

testimony showing that "challenged plans could [not] have been the product of something other than partisan bias").[6]

Applying the First Amendment to the 2016 Plan's explicitly partisan gerrymander invokes familiar constitutional analysis. Upon a showing that the defendants' purpose and effect was to burden Democrats on a state-wide basis *and in each* of the thirteen congressional districts, the 2016 Plan and each district created by the plan would be subject to strict scrutiny, just as in other First Amendment cases. "The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used *to burden* a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring) (emphasis added); s*ee also Whitford*, 2016 U.S. Dist. LEXIS 160811, at *122 ("[I]ntent to *entrench a political party in power* signals an excessive injection of politics into the redistricting process that *impinges on the representational rights* of those associated with the party out of power." (emphasis added)). "[T]he First Amendment may be the more relevant constitutional provision …. Under general First Amendment principles, those burdens [are subject to strict scrutiny and] … are unconstitutional absent a compelling interest." *Vieth*, 541 U.S. at 314

[6] Plaintiffs also intend to show the stunning failure of partisan symmetry in the 2016 Plan. Partisan symmetry—the principle that "if a party is able to muster a certain fraction of votes, then it should get the same number of seats as the other party would if that party had received the same voter support"—has been endorsed by a majority of Supreme Court Justices as part of a broader test for resolving partisan gerrymandering claims. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L. J. 1, 8 (2007). Based on the 2016 congressional election results, if the results of the election had been reversed and the Democratic candidates had received 53% of the state-wide vote, Republicans still would have captured a grossly asymmetrical nine of the thirteen seats.

(Kennedy, J., concurring); *see also LULAC*, 548 U.S. at 461-62 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part).

The First Amendment "has its fullest and most urgent application to … campaign[s] for political office." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (internal quotations omitted). It prohibits government from "prescrib[ing] what shall be orthodox in politics," *West Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943), from favoring one political party over another, or from discriminating between voters based on their political beliefs and associations—which "constitute the core of activities protected by the First Amendment" and without which representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion). "The right to vote freely for the candidate of one's choice is [ ] the essence of a democratic society and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). The First Amendment protects the democratic process by requiring governments to *govern impartially* and subjecting to strict scrutiny all forms of *content-based discrimination* on the exercise of those rights.

The Supreme Court explained the connection between the protection of the democratic process and the duty to govern impartially in *Elrod*: "The free functioning of the electoral process … suffers" when government officials violate the duty to govern neutrally and allow partisan considerations to influence decisions to hire, fire, or promote government employees or to award government contracts. 427 U.S. at 365. When government officials base decisions on partisanship, they use the power of government to "prevent[] support of competing political interests[,] ... starve[] political opposition [and]

… tip[] the electoral process in favor of the incumbent party." *Id.* at 356.[7]

The central holding of *Elrod* has been reaffirmed in a long line of cases holding that, subject to limited exceptions, "government … may not base a decision to hire, promote, transfer, recall, discharge or retaliate against an employee, or to terminate a contract [based] on the individual's partisan affiliation or speech." *Vieth*, 541 U.S. at 324-25 (Stevens, J., dissenting) (citing cases); *see also Branti v. Finkel*, 445 U.S. 507 (1980) (firing of assistant public defenders on partisan basis); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (preferential partisan consideration in employment, promotion, or transfer of state employees or job applicants).

The First Amendment forbids the *consideration and use* of an individual's political preferences *for the purpose* and *with the effect* of burdening an individual's expression. "[T]here is *no redistricting exception* to this well-established First Amendment jurisprudence." *Shapiro*, 2016 WL 4445320, at *9–10 (emphasis added). "[T]he fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of … redistricting legislation—a discernable and manageable standard." *Id.* As the patronage and retaliation cases make clear, government is forbidden from "adversely affect[ing]" citizens for their speech or association. *Rutan*, 497 U.S. at 73. "What the First Amendment precludes the

[7] *See also* John Hart Ely, Democracy and Distrust 93-94 (1980) ("The expression-related provisions of the First Amendment ... were centrally intended to help make our governmental processes work"); Burt Neuborne, Madison's Music: On Reading the First Amendment 85 (2015) ("Democracy is all about contestable elections," which are "at the core of Madison's First Amendment.").

government from commanding directly, it also precludes the government from accomplishing indirectly." *Id*. at 77-78.

Under the First Amendment, "[c]ontent-based regulations are presumptively invalid" unless justified by a compelling state interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its … content."). While redistricting statutes are *facially* neutral, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly … rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983). A redistricting statute remains subject to strict scrutiny under the First Amendment if it: (a) is content-based; and (b) burdens or penalizes citizens based on the exercise of their rights to join or support a political party or vote for a chosen candidate.

*The 2016 Plan and its implementation are necessarily content-based.* Unlike redistricting based solely on traditional redistricting principles, the 2016 Plan's explicitly partisan gerrymander distributes political representation and electoral power among voters based on the *content* of the political beliefs, political party affiliation or membership, and the voting history of individual voters in a district.[8] Indeed, the

[8] Defendants incorrectly assume that plaintiffs must allege that the 2016 Plan used *no* traditional redistricting criteria, such as compactness. *See* Defs.' Memo at 4. A challenge need not "show that all districting principles were disregarded" to succeed. *Raleigh Wake Citizens Ass'n,* 827 F.3d at 343 (internal quotation omitted); *see Whitford*, 2016 U.S. Dist. LEXIS 160811, at *125 ("defendants' contention—that, having adhered to traditional districting principles, they have satisfied [constitutional] requirements …—is without merit."). Plaintiffs allege that the 2016 Plan relied on political data to secure and

complaint specifically alleges that the 2016 Plan relies on content-based *political data* about voting patterns at the VTD level in a basket of elections since 2008. FAC ¶ 18.

*The 2016 Plan discriminates against voters based on their exercise of First Amendment rights*. Defendants used political data to discriminate between voters based on their political beliefs and party affiliations. Defendants then drew district lines with the purpose and effect of "burdening or penalizing citizens" by diluting or nullifying the effectiveness of their votes. *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring); *Whitford*, 2016 U.S. Dist. LEXIS 160811, at *108 ("[W]hen the state places an artificial burden on the ability of voters of a certain political persuasion to form a legislative majority, it necessarily diminishes the weight of the vote of each of those voters when compared to the votes of individuals favoring another view.").

A state may no more rig the outcome of elections to disfavor one political view, and to favor another, than to punish or reward a religious view. Each constitutes impermissible viewpoint-based discrimination. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding Ohio ballot restrictions unconstitutional because they unequally burdened the First Amendment rights of voters who supported minor parties).

Viewpoint-based discrimination is anathema to the First Amendment, and the prohibition of such discrimination unites much First Amendment jurisprudence. It supplies the rationale for subjecting content-based regulations to strict scrutiny. *See Reed v. Town of*

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entrench partisan advantage, which was illegitimate even if other criteria were also used. FAC ¶¶ 14-15, 18, 30.

*Gilbert*, 135 S. Ct. 2218, 2229-30 (2015) (subjecting a town's ordinance restricting "temporary directional signs" directing the public to a church or other event to strict judicial scrutiny because the restriction was content-based and thus presented the "danger of censorship"). A First Amendment jurisprudence that would subject a "directional signage" ordinance to strict scrutiny, but would not subject a state apportionment of congressional districts that dilutes the votes of certain individuals *because* of their political views or voting history to *any* scrutiny, has lost the forest for the trees.

As the *Shapiro* three-judge court noted in denying defendants' motion to dismiss:

> While citizens have no right to be assigned to a district that is likely to elect a representative that shares their views, the State also may not *intentionally drown out the voices of certain voters by reason of their views*. And when a State is alleged to have not only intentionally but also successfully burdened "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," by diluting their votes in a manner that has manifested in a concrete way, the allegation supports a justiciable claim under the First Amendment and Article I, § 2.

*Shapiro*, 2016 WL 4445320, at *11–12 (citing *Anderson*, 460 U.S. at 787) (citation omitted from text and emphasis added).

## III. Plaintiffs State A Claim For Relief Under The 14th Amendment.

"The right to vote is 'fundamental,' and once that right 'is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.'" *Raleigh Wake Citizens Ass'n,* 827 F.3d at 337 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). "[T]he right to vote 'can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise." *Id.* (quoting *Bush*, 531 U.S. at 105).

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (quoting *Reynolds,* 377 U.S. at 565-66). The 2016 Plan and its individual districts deprive plaintiffs of equal protection of the laws in violation of the 14th Amendment.[9]

"The gravamen of an equal protection claim is that a state has burdened artificially a voter's ballot so that it has less weight than another person's vote." *Whitford*, 2016 U.S. Dist. LEXIS 160811, at *101-02. To state a claim under the 14th Amendment, plaintiffs must show that: (1) the purpose of the 2016 Plan was to entrench Republican partisan advantage, discriminating against the NCDP and Democratic voters by diluting or nullifying the effectiveness of Democratic votes; (2) the 2016 Plan in fact achieved this purpose; and (3) the 2016 Plan was not justified by any legitimate state interest.

Plaintiffs have alleged facts sufficient to show that entrenching Republican partisan advantage by burdening the Democratic Party and Democratic voters was the plainly-stated, predominant objective of the 2016 Plan. As plaintiffs allege:

> The admitted, primary, and predominant objective of the 2016 Plan was to deprive the NCDP and Democratic voters of fair and effective representation and to perpetuate the Republican majority's ten-three (10-3) partisan advantage created by the 2011 Plan (and thereby entrench the Republican Party's majority in the U.S. Congress). The 2016 Plan achieves this objective by drawing congressional districts that discriminate in favor

[9] Defendants incorrectly state that plaintiffs are concerned only with "statewide voting strength." Defs.' Memo at 4. The plain language of the complaint states otherwise. "The 2016 North Carolina Congressional Redistricting Plan as a whole *and each of the thirteen individual districts created by that Plan* violate the First Amendment and the due process clause of the Fourteenth Amendment …." FAC ¶ 26 (emphasis added). Further, the complaint highlights the disparate form of the burden imposed on the plaintiffs. *See*, *e.g.*, FAC ¶ 35 (describing wasted votes of plaintiffs in "packed" districts as compared with a loss of opportunity to affect the election outcome in "cracked" districts).

> of the Republican Party and Republican voters and against the NCDP and Democratic voters by systematically making it more difficult for the NCDP and Democratic voters to elect a candidate of their choice in ten of North Carolina's thirteen congressional districts.

FAC ¶ 44. Defendant Lewis went out of his way to highlight this predominant objective. *See* FAC ¶ 12-14; *see also Covington v. N. Carolina*, 316 F.R.D. 117, 129 (M.D.N.C. 2016) (applying principle, in racial gerrymandering case, that where "race predominate[s] over traditional race-neutral redistricting principles, [courts] apply strict scrutiny").

The 2016 Plan achieved its intended discriminatory effect. Plaintiffs have alleged the 2016 Plan renders Democratic votes less effective; the 2016 general election results confirm this allegation. FAC ¶¶ 24, 34-35; *see* discussion *supra* 9-10. Moreover, plaintiffs will present statistical analyses showing both (1) the extreme entrenchment resulting from the 2016 plan and (2) that a 10-3 result can *only* be the product of drawing district maps to benefit the Republican Party and its voters and burden the Democratic Party and its voters. FAC ¶ 24.

This exercise of state power on behalf of the majority party to "harm a politically [weak or] unpopular group" is not "a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis added); *see also City of Cleburne v. Cleburne Living Ctrs.*, 473 U.S. 432, 446-47 (1985). That basic principle of equal protection applies to the invidious practice of diluting or nullifying the effectiveness of certain votes to gain or enforce partisan advantage. *Whitford*, 2016 U.S. Dist. LEXIS 160811, at *111 ("[T]he Equal Protection Clause protect[s] ... against state discrimination as to the weight of … vote[s] when that discrimination is based on the political preferences of the voter. … [A]pportionment plans that *invidiously minimize[]*

*the voting strength* of political groups may be vulnerable to constitutional challenges ….") (emphasis added); *Raleigh Wake Citizens Ass'n*, 827 F.3d at 345 (holding that an "intentional effort to create a significant ... partisan advantage" "reflect[ed] the predominance of a[n] illegitimate reapportionment factor" (internal quotations omitted)); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) ("assuming, without deciding, that partisanship is an illegitimate redistricting factor.").

Because the complaint adequately alleges discriminatory purpose and effect on an individual district and state-wide basis, and because the burden imposed on the representational rights of the Democratic Party and Democratic voters lacks any legitimate justification, plaintiffs have stated a claim for relief under the 14th Amendment.

## IV. Plaintiffs State A Claim For Relief Under Article I, Section 2.

Article I, section 2 of the Constitution confers the power to choose members of Congress on the people—not on state legislators. U.S. Const. Art I, § 2, cl. 1; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (It is a "fundamental principle of our representative democracy, … that the people should choose who[ ] ... govern[s] them.") (internal quotation omitted); *Ariz. State Legislature*, 135 S. Ct. 2652, 2674–75 (2015) ("The genius of republican liberty seems to demand … not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." (quoting THE FEDERALIST NO. 37 (James Madison))).

The First and 14th Amendment claims illustrate the factual basis for the Article I, section 2 claim. With the 2016 Plan, legislators not only picked their voters, they picked *which voters count*. "[W]hen a State draws the boundaries of its electoral districts so as to

dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." *Shapiro*, 2016 WL 4445320, at *9 (quoting *Reynolds*, 377 U.S. at 565).

A state can dilute the value of a person's vote "by placing him in a particular district because he will be outnumbered there by those who have affiliated with a rival political party. In [that] case, the weight of the viewpoint communicated by his vote is debased." *Shapiro*, 2016 WL 4445320, at *9 (internal quotation omitted). Because "the devaluation of a citizen's vote by dilution implicates the representational right protected by … Article I, [section] 2," plaintiffs have stated a plausible claim for relief. *Id.*

**V. Plaintiffs State A Claim For Relief Under Article I, Section 4.**

The 2016 Plan is a naked attempt by the majority party to dictate and control the outcome of the general election by drawing district lines to virtually guarantee the election of that party's candidates in ten of thirteen congressional districts. The 2016 Plan makes it more difficult, if not impossible, for Democratic candidates to be elected from those districts and, separately, limits the number of Democrats elected to Congress by putting supermajorities of Democratic voters in three remaining districts (the First, Fourth, and Twelfth Districts). That is not the constitutional design.

Although Article I, section 4 of the Constitution grants to the state legislatures the power to determine the "times, places and manner of elections" of members of the House of Representatives, the Constitution does not authorize state legislators to determine the *outcomes* of congressional elections by gerrymandering the districts. *Term Limits*, 514 U.S. at 783; *Cook v. Gralike,* 531 U.S. 510, 523 (2001).

State legislatures may not skew or supplant the people's choice of their representatives in the national government. *See Cook*, 531 U.S. at 523 (finding that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (internal quotations omitted)); *Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring) (finding "beyond dispute, that … the National Government is, and must be, controlled by the people without collateral interference by the States"); *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. at 402-03 (D. Md. 1991) (Niemeyer, J., dissenting) ("[N]o classification of the people can be made to advance the state legislature's preference for one class to the detriment of another, and clearly the state may not attempt to dictate the outcome of congressional elections.").

Moreover, defendants offer no argument for the dismissal of plaintiffs' Article I, section 4 claim. Defendants argue only that, under *Pope*, this claim is "coextensive" with the 14th Amendment claim. Defs.' Memo at 7. That is flatly wrong. *Pope* at *no point* mentions Article I, section 4.[10]

**Conclusion**

For these reasons, defendants' motion to dismiss should be denied and this case should proceed to trial.

Respectfully submitted, this 23rd day of November, 2016.

[10] *Pope* also never says Article I, section 2 claims are "coextensive" with the 14th Amendment. In fact, the only claim *Pope* says is coextensive with the 14th Amendment is a freedom of association claim plaintiffs are not here advancing. 809 F. Supp. at 398.

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