IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:13-cv-00607-BO

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| CALLA WRIGHT, WILLIE J. BETHEL, AMY T. LEE, AMYGALE L. WOMBLE, BARBARA VANDENBERGH, JOHN G. VANDENBERGH, AJAMU G. DILLAHUNT, ELAINE E. DILLAHUNT, LUCINDA H. MACKETHAN, WILLIAM B. CLIFFORD, ANN LONG CAMPBELL, GREG FLYNN, BEVERLY S. CLARK, CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, and the WAKE CITIZENS ASSOCIATION<br><br>Plaintiffs,<br><br>vs.<br><br>THE STATE OF NORTH CAROLINA and THE WAKE COUNTY BOARD OF ELECTIONS<br><br>Defendants. | ) | **DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR RESPECTIVE MOTIONS TO DISMISS** |

NOW COME defendants The State of North Carolina and The Wake County Board of Elections (collectively "defendants"), through undersigned counsel, and hereby respectfully submit this joint memorandum of law in support of their respective Motions to Dismiss Plaintiffs' Complaint filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## NATURE OF THE CASE

Thirteen individual citizens of Wake County, North Carolina and two associations of citizens (collectively "plaintiffs") initiated this action by filing, through counsel, a "Complaint – Equitable Relief Sought" on August 22, 2013. [D.E. 1] Plaintiffs' Complaint purports to assert claims under 42 U.S.C. § 1983 for defendants' alleged violation of plaintiffs' equal protection

rights under both the United States and North Carolina Constitutions resulting from the North Carolina General Assembly's enactment of S.L. 2013-110, a local bill implementing a new redistricting plan for electing members of the Wake County School Board. [D.E. 1, ¶ 2] Plaintiffs' Complaint seeks "relief in the form of a declaratory judgment and a preliminary, mandatory injunction requiring the Defendants to conduct lawful elections for the Wake County Board of Education using an election method and districting system which complies with the requirement of the Fourteenth Amendment to the United States Constitution and Article 1, § 19 of the North Carolina Constitution." [D.E. 1, ¶ 2]

Defendants are filing, contemporaneously with this joint memorandum of law, an Answer and their respective Motions to Dismiss plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the bases for which are fully set forth below. For the sake of brevity and clarity, rather than setting forth in a separate section the facts that pertain to the matter before this Court for ruling, such facts are included where appropriate and germane to defendants' arguments.

## ARGUMENT

### I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED BECAUSE THE POPULATION DEVIATIONS BETWEEN THE CHALLENGED DISTICTS ARE *DE MINIMIS*.

#### A. The Supreme Court Has Established a 10% *De Minimis* Benchmark for Population Deviation in Electoral Districts.

Plaintiffs' Complaint states two claims for relief. First, plaintiffs claim that "[b]y creating an election system that unjustifiably weights the vote of some voters in the county much more heavily than the vote of other voters in the county, S.L. 2013–110 completely and fundamentally violates the one-person, one-vote requirement established by the Fourteenth Amendment." [D.E. 1, ¶ 72] Second, plaintiffs claim that "[b]y creating an election system that

unjustifiably weights the vote of some voters in the county much more heavily than the vote of other voters in the county, S.L. 2013–110 completely and fundamentally violates the demands of the state constitution that each voter be treated equally."[1] [D.E. 1, ¶ 79] These claims must fail as a matter of law, because the population deviations that plaintiffs claim are unconstitutional fall within the limits repeatedly held to be *de minimis* by the federal courts, as well as by the North Carolina Supreme Court.

In *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), and their progeny, the Supreme Court ruled that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that districts for the United States House of Representatives and for state legislatures must achieve "some measure of population equality." *Stephenson v. Bartlett*, 355 N.C. 354, 363, 562 S.E.2d 377, 384 (2002). In *Avery v. Midland County*, 390 U.S. 474, 480-481 (1968), the Supreme Court made clear that the one person, one vote rule also applies to districts of local government.

The Supreme Court has been clear, however, that the one person, one vote requirement of the Fourteenth Amendment does not require absolute equality of population between legislative or local governmental districts, holding that

> minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.

[1] By their second claim, which is based on the Article 1, Section 19 of the North Carolina Constitution, plaintiffs appear to invoke this Court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Nowhere in their Complaint, however, do they actually assert 28 U.S.C. § 1367 as a basis for jurisdiction.

*Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (internal quotation marks and citations omitted). *See also Voinovich v. Quilter*, 507 U.S. 146, 161 (1993); *Connor v. Finch*, 431 U.S. 407, 418 (1977). "Maximum deviation" is calculated by first dividing the total population of a political unit (such as Wake County) by the total number of districts into which the unit is divided, yielding the population of an "ideal district."[2] Then, a determination is made as to how much the actual population of each district varies from the population of the ideal district; this deviation is expressed as a percentage of the ideal population. Maximum deviation is the sum of the deviation of the district with the smallest population and that of the district with the largest population. *See Board of Estimate v. Morris*, 489 U.S. 688, 700 & n.7 (1989). This 10% *de minimis* rule remains the benchmark for whether population deviations in electoral districts are so great as to establish a *prima facie* case of violation of the one person, one vote rule.

### B. Plaintiffs' Complaint Establishes On Its Face That the Population Deviations in the Challenged Districts are Within the Supreme Court's 10% *De Minimis* Rule, and That the New Districting Plan is Neither Arbitrary Nor Discriminatory.

In the instant case, the districts created by the challenged law fall into two groups. The first group consists of the seven single-member districts that are numbered 1–7. The second group consists of two single-member districts (designated as "A" and "B") that plaintiffs refer to as "super-districts." [D.E. 1, ¶ 45] By plaintiffs' allegations, the most-populated of the seven "numbered" districts (District 3) has a population deviation of +3.63%, while the least-populated of the seven numbered districts (District 2) has a population deviation of -4.19%. [D.E. 1, ¶¶ 54

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[2] This assumes that districts are, as is the case here, single-member districts.

and 55] Plaintiffs allege this yields a maximum deviation in the numbered districts of 7.11%. [D.E. ¶ 53] This deviation is within the Supreme Court's 10% *de minimis* rule.[3]

Likewise, plaintiffs allege the larger of the two "super-districts" has a population deviation of +4.90%, while the smaller of the two districts has a population deviation of -4.90%. [D.E. 1, ¶ 54] This yields a maximum deviation of 9.8%, which is again within the 10% *de minimis* rule. [D.E. 1, ¶ 53] It is clear, then, that plaintiffs have failed to state a *prima facie* case for violation of the Fourteenth Amendment's one person, one vote requirement.

It is true that the Fourth Circuit has held that

> [t]he 10% *de minimis* threshold recognized in *Brown* does not completely insulate a state's districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person, one vote case. A maximum deviation of greater than 10% automatically establishes a *prima facie* violation of the one person, one vote principle. If the plaintiff establishes this level of disparity in population among the districts, the burden of proof shifts to the state to justify the deviations by showing a rational and legitimate state policy for the districts.
>
> On the other hand, if the maximum deviation is less than 10%, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness. To survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a "taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. [695,] 710 [(1964)]. In other words, for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. at 577. However, this is a rebuttable presumption.

*Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996). This does not help plaintiffs, however.

In their Complaint, plaintiffs allege two reasons why they contend the challenged districts impermissibly violate the one person, one vote rule. First, plaintiffs allege that the Wake County Board of Education had previously adopted new districts with smaller deviations from the ideal

[3] Defendants' calculations yield a 7.68% total deviation for the numbered districts. This, however, is also well within the 10% *de minimis* rule.

population. [D.E. 1, ¶¶ 31-39] The Supreme Court, however, has expressly rejected the argument that the possibility of drafting a "better" plan alone is sufficient to establish a violation of the one person, one vote requirement:

> We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts.

*Gaffney v. Cummings*, 412 U.S. 735, 740-41 (1973). Especially given that the plan previously adopted by the Wake County Board of Education differed in substance from the plan enacted in S.L. 2013–110 in that it consisted of nine districts for which each voter had one vote, rather than seven districts and two "super-districts" for which each voter has two votes, the mere fact that the previous plan had smaller deviations is totally insufficient to even suggest a "taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710.

The second reason plaintiffs give for why they allege the challenged districts are impermissible is essentially that their design was politically motivated. [D.E. 1, ¶¶ 40, 44, 61–66] Assuming, as the Court must for the purposes of a Rule 12(b)(6) motion, that these allegations are true, this essentially presents a question of political gerrymandering. That is a question this Court may not consider.

In *Davis v. Bandemer*, 478 U.S. 109 (1986), Indiana Democrats alleged that 1981 legislative redistricting plans adopted by the Republican-controlled General Assembly constituted illegal political gerrymanders under the Fourteenth Amendment. The main evidence supporting these claims was the results of the 1982 General Election, in which Democratic legislators were elected to office in numbers that were substantially lower than the statewide proportion of the Democratic vote. The plaintiffs alleged that because of the gerrymandered

plans they had "been unconstitutionally denied [their] chance to effectively influence the political process." *Bandemer*, 478 U.S. at 132-33.

The plurality opinion in *Bandemer* found the plaintiffs' claim to be justiciable.[4] However, the Court also ruled that the plaintiffs had failed to carry the heavy burden needed to show an equal protection violation based upon an alleged denial of political influence. The *Bandemer* Court found that plaintiffs alleging the denial of political influence must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127. While the *Bandemer* Court assumed the presence of discriminatory intent,[5] it rejected the plaintiffs' argument that they had established a discriminatory effect. *Id.*

In cases involving the alleged denial of political influence, plaintiffs must show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132. The results or the proposed results of one election are insufficient evidence to show a discriminatory effect. *Id.* at 139. In part, this is because "the power to influence the political process is not limited to winning elections." *Id.* at 132. The *Bandemer* Court noted that "[a]n individual or group of individuals who vote for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have had as much opportunity to influence that candidate as other

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[4] The Supreme Court, in a plurality opinion, subsequently overruled *Davis v. Bandemer* and held that political gerrymandering claims are nonjusticiable because no judicially manageable standards exist for adjudicating such claims. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (discussed more fully *infra*).

[5] Notably for purposes of the instant case, the *Bandemer* Court noted regarding discriminatory intent that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129.

voters in the district." *Id.* At a minimum, plaintiffs alleging an equal protection violation based on an alleged denial of political influence must show "a history" of "disproportionate results" and demonstrate that their group has "essentially been shut out of the political process." *Id.* at 139.

Justice O'Connor filed a concurring opinion in *Bandemer*, which was joined by Chief Justice Rehnquist. Justice O'Connor opined that there were no "judicially manageable standards" for adjudicating claims alleging the denial of political influence. *Bandemer*, 478 U.S. at 155 (O'Connor, J., concurring); *see also Georgia v. Ashcroft*, 539 U.S. 461, 495 (2003) (Souter, J., dissenting) (no judicially manageable standards for measuring "influence" districts). Justice O'Connor also concluded that under the plurality's test, neither of the two major political parties would ever be able to prove that they had been "shut out" of the political process. *Bandemer*, 478 U.S. at 152-53 (O'Connor, J., concurring). Subsequent to *Bandemer*, the Court has been unable to agree on a judicially manageable standard for adjudicating these claims. *See LULAC v. Perry*, 548 U.S. 399, 413-423 (2006) (plurality opinion holding that plaintiffs failed to identify a judicially manageable standard to adjudicate claim of political gerrymandering); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion holding that political gerrymandering claims are nonjusticiable because no judicially discernable standards for adjudicating such claims exist); *Hunt v. Cromartie* , 526 U.S. 541, 551 n.7 (1999) (Court has not agreed on standards to govern claims of political gerrymandering).

It is clear, then, that any challenge to the districts enacted by S.L. 2013-110 on the basis that their design was politically motivated is either nonjusticiable under *Vieth* or is, at the least, a challenge for which there are no judicially manageable standards. Either way, such a claim cannot overcome plaintiffs' burden of showing that the *de minimis* deviations of the challenged

districts is impermissibly marred by the "taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. Plaintiffs' cause of action arising under the Equal Protection Clause of the Fourteenth Amendment should, therefore, be dismissed for failure to state a claim.

### C. Plaintiffs' Complaint Establishes On Its Face That the Population Deviations In the Challenged Districts are Also Within the *De Minimis* Rule Announced by the North Carolina Supreme Court.

Plaintiffs' second cause of action is similar to their first, but is predicated on the North Carolina Constitution. It is shown *infra* why the Court should decline to exercise supplemental jurisdiction over this claim, but should the Court find it has such jurisdiction, this claim should be dismissed.

The *de minimis* deviation rule announced by the North Carolina Supreme Court differs slightly from that adopted by the United States Supreme Court. In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), the North Carolina Supreme Court adopted a plus or minus 5% deviation requirement. *Stephenson*, 355 N.C. at 383, 562 S.E.2d at 397 ("In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements.") Whether this is intended to restate the federal rule or is intended to announce a rule particular to North Carolina is irrelevant for the purposes of the instant case.

In the instant case, plaintiffs allege that the deviations of the challenged districts are all within plus or minus 5%. Specifically, plaintiffs allege that the deviations are +3.63% and -4.19% for the numbered districts, and +4.90% and -4.90% for the lettered districts. [D.E. 1, ¶¶ 54 and 55] Just as plaintiffs have failed to state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment, then, they have also failed to state a claim for denial of Equal Protection under Article I, section 19, of the North Carolina Constitution.

## II. PLAINTIFFS' COMPLAINT STATES A NONJUSTICIABLE POLITICAL QUESTION AND THUS SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6).

### A. The Complaint's Allegations Expose Plaintiffs' Misguided Attempt To Cast What Is Really A Nonjusticiable "Political Gerrymandering" Claim As A "One Person, One Vote" Case.

Not only have plaintiffs failed to state a claim for which relief can be granted because the population deviations they claim are unconstitutional fall within the limits repeatedly held to be *de minimis* by the federal courts and the North Carolina Supreme Court, plaintiffs' Complaint must also be dismissed on the grounds that it presents this Court with a nonjusticiable political question. Plaintiffs allege that the effect and intent of the challenged law, S.L. 2013-110, is "to disfavor incumbents who are registered Democrats and support progressive education policies." [D.E. 1, § 62] Plaintiffs further allege that, given the new districting plan enacted in S.L. 2013-110, those incumbents favoring "progressive education policies" will find themselves in "Republican-leaning districts" with "conservative incumbents" [D.E. 1, ¶ 62], and "[t]he only goal that the new plan accomplishes is to further Republican interests and advance conservative agenda policies[.]" [D.E. 1, § 66] As a result, plaintiffs contend the Wake County electorate will be harmed based on their allegation that S.L. 2013-110 will place voters in two of the county's nine school board districts on unequal footing with voters in the other seven districts. [D.E. 1, ¶¶ 62-66]

However, the Complaint's allegations concerning the new plan's supposed impact on incumbents who are registered with a certain political party and who support certain education policies over others exposes plaintiffs' misguided attempt to clothe what is really a "political gerrymandering" claim in "one person, one vote" garments. As noted *supra*, plaintiffs' Complaint essentially alleges that the design of the challenged school board districts was

politically motivated. [D.E. 1, ¶¶ 40, 44, 61–66] While this makes for excellent "Get Out The Vote" campaign material urging supporters of "progressive education policies" to head to the polls, this simply does not present this Court with a question it may consider.

As Justice Scalia stated in *Vieth v. Jubelirer,* "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" *Vieth*, 541 U.S. at 277 (quoting *Marbury v. Madison,* 1 Cranch 137, 177 (1803)). However, Justice Scalia went on to point out that sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Id.* (citations omitted). As Justice Scalia noted, "[s]uch questions are said to be 'nonjusticiable' or 'political questions.'" *Id.*

The Supreme Court set forth six independent tests – the presence of any of which indicates the existence of a nonjusticiable political question – in *Baker v. Carr*, 369 U.S. 186 (1962). Those tests include:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

*Baker*, 369 U.S. at 217. In the instant case, plaintiffs' misguided attempt to cast a political gerrymandering claim as a strictly one person, one vote case implicates the second *Baker v. Carr* "political question" test, revealing "a lack of judicially discoverable and manageable standards

for resolving" plaintiffs' claims – and thus the presence of a nonjusticiable political question in the allegations of plaintiffs' Complaint. *Baker*, 369 U.S. at 217; *Vieth*, 541 U.S. at 281.

### B. The United States Supreme Court Has Held That Political Gerrymandering Claims Are Nonjusticiable For Lack Of A Judicially Manageable Standard To Resolve Such Claims.

The *Vieth* Court, in a plurality opinion, overruled the Supreme Court's earlier decision in *Davis v. Bandemer,* 478 U.S. 109 (1986) (holding that political gerrymandering claims are justiciable, discussed *supra*), and affirmed the District Court's dismissal of the appellants' gerrymandering claims. *Vieth*, 541 U.S. at 281 (holding that "political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.") The Fourth Circuit has cited *Vieth* as authority that political gerrymandering claims are nonjusticiable. *See, Miller v. Cunningham,* 512 F.3d 98, 102 (4th Cir. 2007).

In *Bandemer*, Justice White's plurality opinion attempted to enunciate a standard for finding political gerrymandering cases justiciable by holding such cases are justiciable when there is both: 1) intentional discrimination against an identifiable group, and 2) an actual discriminatory effect on that group. *Bandemer*, 478 U.S. at 127. Satisfying the first prong was not thought to be difficult, assuming redistricting was done by the legislature. *Id.* at 129. The second prong was noted as being significantly harder to meet, requiring a showing that "taking into account a variety of historic factors and projected election results, the group had been 'denied its chance to effectively influence the political process' as a whole, which could be achieved even without electing a candidate." *Id.* at 132-33. Despite the *Bandemer* Court's attempt to clarify the requirements for meeting these two prongs, "the legacy of the plurality's test [wa]s one long record of puzzlement and consternation" among the lower courts. *Vieth,* 541 U.S. at 282.

This lack of clarity prompted the appellants in *Vieth* to attempt to enunciate a more workable standard. *Vieth*, 541 U.S. at 284. The appellants' standard, which retained the two-pronged *Bandemer* framework of "intent" and "effect," was given much attention by the *Vieth* Court because it reflected "the litigant's view as to the best that can be derived from 18 years of experience, but also because it share[d] many features with other proposed standards, so what [wa]s said of it may be said of them as well." *Id.* Application of this standard to plaintiffs' allegations in the instant case must yield the same result as in *Vieth*, and this Court must likewise conclude that plaintiffs' Complaint presents a nonjusticiable political question, as discussed below.

### C. Plaintiffs' Complaint Alleges a Nonjusticiable Claim for Political Gerrymandering, for Which No Judicially Discoverable or Manageable Standards Exist to Adjudicate.

To meet the "intent" prong as enunciated by the *Vieth* appellants, plaintiffs must prove "that the mapmakers acted with a *predominant intent* to achieve partisan advantage." *Vieth*, 541 U.S. at 284 (emphasis in original). To satisfy the "effects" prong, plaintiffs must show (1) "the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of the circumstances' confirms that the map can thwart the plaintiff's ability to translate a majority of votes into a majority of seats." *Id.* at 287. However, as in *Bandemer*, the *Vieth* Court found the two-pronged "intent" and "effect" standard proposed by the appellants "neither discernible nor manageable." *Id.* at 290.

In *Vieth,* the appellants' "intent" prong was borrowed from racial gerrymandering cases, and thus the appellants contended "predominant intent to achieve partisan advantage" must be discernible and manageable so as to qualify as being justiciable. *Id.* at 284. The *Vieth* Court,

however, described the appellants' "intent" prong as being "vague" and concluded that it was misapplied in the context of political gerrymandering. *Id.* at 285.

In the instant case, plaintiffs allege that the intent of the redistricting plan is clear: "to disfavor incumbents who are registered Democrats and support progressive education policies." [D.E. 1, § 62] Plaintiffs' Complaint thus alleges the existence of a "predominant intent" by the legislature to disadvantage the plaintiffs' political group, similar to the argument proffered by the appellants in *Vieth*. However, "the [United States] Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth* at 285 (citing *Miller v. Johnson,* 515 U.S. 900, 914 (1995)). "Redistricting in most cases will implicate a political calculus in which various interests compete for recognition." *Miller*, 515 U.S. at 914. As Justice White stated in his dissent in *Shaw v. Reno,* "districting inevitably is the expression of interest group politics." *Shaw v. Reno*, 509 U.S. 630, 662 (1993). "The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973). Given that the *Vieth* Court characterized the "predominant intent to achieve partisan advantage" standard as vague and misapplied in the political gerrymandering context, and the *Vieth* Court's recognition of the inevitability of political interests affecting the districting process, plaintiffs' allegation that S.L. 2013- 110 unconstitutionally denies them equal protection because the "intent" of S.L. 2013-110 is to disfavor a certain political group must fail as a matter of law.

Plaintiffs further allege that "[t]he only goal that the new plan accomplishes is to further Republican interests and advance conservative agenda policies—over the wishes of the Wake County electorate," and contends that, under federal jurisprudence, this goal is not a "legitimate state interest" lending justification to the deviation in population. [D.E.1, § 66] However, these

allegations are conclusory, and as such they are not entitled to an assumption of truth and may be ignored by this Court. *Ashcroft v. Iqbal,* 556 U.S. 662, 677-79 (2009).

The *Vieth* Court also appropriately pointed out flaws with the "effects" prong of the appellants' standard. The *Vieth* Court noted that unlike a person's race, a person's political affiliation is not an "immutable characteristic," but one that may shift from election to election and perhaps even within an election. *Vieth*, 541 U.S. at 287. Consequently, "it [is] impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy." *Id.* (quoting *Bandemer*, 478 U.S. at 156). The *Vieth* Court further noted that even if such effects can be determined

> [T]his standard rests upon the principle that groups (or at least political action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalist or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

*Id.*at 287.

The plaintiffs in the instant case appear to be making a similar argument by alleging that those Wake County voters favoring "progressive education policies" must be accorded political strength proportionate to their numbers, with the school board districts being drawn accordingly. [D.E. 1, §§ 62-67] Plaintiffs allege that they "will suffer immediate harm from having to participate on an unequal footing in an election system that deprives them of equal representation on the Board of Education." [D.E. 1, § 67]

As discussed above, because political affiliation can change within and between elections, the effects of political gerrymandering are nearly impossible to determine. *Vieth*, 541 U.S. at 287. In a winner-take-all district system, there are no guarantees no matter how the lines

are drawn. Furthermore, "[w]hether by reason of partisan districting or not, party constituents may always wind up 'packed' in some districts and 'cracked' throughout others." *Vieth*, 541 U.S.at 289. In addition,

> [T]o say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equal to its numbers.

*Id.*at 290.

Like the appellants in *Vieth,* plaintiffs' "intent" and """effects" allegations regarding the new districting plan enacted by S.L. 2013-10 are neither judicially discernible nor manageable. *Id.* at 290. Plaintiffs' Complaint thus reveals on its face "a lack of judicially discoverable and manageable standards for resolving" the claims contained therein – and thus the presence of a nonjusticiable political question in its allegations. *Baker*, 369 U.S. at 217; *Vieth*, 541 U.S. at 281; *Miller*, 512 F.3d at 102 (4th Cir. 2007). Plaintiffs' attempt to dress a political gerrymandering claim in one person, one vote clothing thus fails to state a claim for which this Court may grant relief, particularly in light of *Vieth.* As a result, defendants respectfully ask this Court to dismiss plaintiffs' Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

## III. THE COURT LACKS JURISCITION OVER THE STATE OF NORTH CAROLINA AND IT MUST BE DISMISSED AS A DEFENDANT.

Plaintiffs, North Carolina citizens or associations of North Carolina citizens who allege violation of their Fourteenth Amendment rights, have brought this case pursuant to 42 U.S.C. § 1983 and have named the State of North Carolina as a defendant. [D.E. 1] The Court, however, lacks jurisdiction over the State of North Carolina in this case.

It is firmly established in Supreme Court precedent that "a State may not be sued in federal court by one of its own citizens." *California v. Deep Sea Research*, 523 U.S. 491, 501, (1998). *See also*, *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261 (1997); *Hans v. Louisiana*, 134 U.S. 1 (1890). It is true that "when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). However, such a waiver by Congress pursuant to its Fourteenth Amendment authority requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984), quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979). The Supreme Court has made clear that a State is not a "person" within the meaning of § 1983 and that "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance in that respect." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

For these reasons, the Court lacks jurisdiction over the State of North Carolina in this action and must dismiss it as a defendant.[6]

**CONCLUSION**

For the foregoing reasons and authorities, defendants, the State of North Carolina and the Wake County Board of Elections, respectfully request that this honorable Court grant their respective Motions to Dismiss, with prejudice, all plaintiffs' claims against them, and each of them. In the alternative, should this case not be dismissed in its entirety, the Attorney General of

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[6] Defendants, as indicated by the other arguments of this motion, believe that this case should be dismissed in its entirety. In the event that it is not dismissed in its entirety, however, the Attorney General of North Carolina intends to move to intervene in this action pursuant to 28 U.S.C. § 2403(b), N.C. GEN. STAT. § 114-2 and Rule 24(a) of the Federal Rules of Civil Procedure.

North Carolina requests that this honorable Court allow its motion to intervene filed contemporaneously herewith, pursuant to 28 U.S.C. § 2403(b), N.C. GEN. STAT. § 114-2 and Rule 24(a) of the Federal Rules of Civil Procedure.

Respectfully submitted this the 4th day of November, 2013.

***FOR THE STATE OF NORTH CAROLINA***

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***FOR WAKE COUNTY BOARD OF ELECTIONS***

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
5:13-cv-00607-BO

CALLA WRIGHT, WILLIE J. BETHEL, AMY T. LEE, AMYGALE L. WOMBLE, BARBARA VANDENBERGH, JOHN G. VANDENBERGH, AJAMU G. DILLAHUNT, ELAINE E. DILLAHUNT, LUCINDA H. MACKETHAN, WILLIAM B. CLIFFORD, ANN LONG CAMPBELL, GREG FLYNN, BEVERLY S. CLARK, CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, and the WAKE CITIZENS ASSOCIATION

Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA and THE WAKE COUNTY BOARD OF ELECTIONS

Defendants.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 4th , 2013, I electronically filed the foregoing DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR RESPECTIVE MOTIONS TO DISMISS, and, I hereby further certify that pursuant to Local Civil Rule 5.1(b) counsel for all other parties are being served as registered users of CM/ECF as provided for in Local Civil Rule 5.1(e).

Anita S. Earls
Allison Riggs
Clare R. Barnett
Southern Coalition for Social Justice
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This the 4th day of November 2013.

*/s/ Roger A. Askew*
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