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

LEAGUE OF WOMEN VOTERS PLAINTIFFS' BRIEF

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INTRODUCTION

In its order dated July 16, 2018, this Court ordered the parties to address the following question: "[W]hether—based on the existing record, the proffered declarations by Dr. Chen and Mr. Salinger, and any additional deposition testimony by Dr. Chen and Mr. Salinger—any, some, or all Plaintiffs have standing to assert a vote dilution claim under the Equal Protection Clause." Dkt. 133:5. This brief, and the evidence cited herein, respond to the Court's question.

First, under the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the test for standing in a partisan vote dilution challenge is quite straightforward. A plaintiff must (1) live in a district in the enacted plan in which she and other supporters of her party are cracked or packed; *and* (2) live in a district in an alternative, illustrative map in which she and her copartisans are uncracked or unpacked. Only districts for which this showing is made may be declared unconstitutional—though other districts may have to be revised to cure the vote dilution in the unlawful districts.

Second, pursuant to this test, individual voter plaintiffs in the suit brought by the League of Women Voters of North Carolina ("League"), and/or League members, have standing to dispute twelve of the thirteen districts in North Carolina's current congressional plan (the "2016 Plan"). In Districts 2, 5, 6, 7, 8, 9, and 13, individual voter plaintiffs and/or League members live in districts won by Republican candidates due to the cracking of Democratic voters; but could have been placed in Democratic districts by a fair map, such as Plan 297 in Professor Jowei Chen's Simulation Set 2 ("Plan 2-297"). In Districts 10 and 11, individual voter plaintiffs and/or League members live in districts

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won by Republican candidates due to the cracking of Democratic voters; but could have been placed in safer Republican districts by a fair map, such as Plan 2-297. (Such safer Republican districts waste fewer Democratic votes and enable adjacent districts to be flipped from Republican to Democratic control.) And in Districts 1, 4, and 12, individual voter plaintiffs and/or League members live in packed Democratic districts; but could have been placed in more competitive Democratic districts by a fair map, such as Plan 2-297. (Such more competitive Democratic districts also waste fewer Democratic votes and enable adjacent districts to be flipped from Republican to Democratic control.) However, no litigant has standing to contest District 3. District 3 was created by cracking Democratic voters, but no individual voter plaintiff or League member living in District 3 is placed in an uncracked district in Plan 2-297.

And *third*, the Court should not only find that individual voter plaintiffs and/or League members have standing to challenge Districts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. It should also find that each of these districts was intentionally drawn to benefit Republican candidates and voters and disadvantage Democratic ones. Under *Whitford*, district-specific evidence of partisan intent is unnecessary to establish standing. *See Whitford*, 138 S. Ct. at 1932. But it may well be relevant to *liability* on a partisan vote dilution theory. *See id.* at 1937 (Kagan, J., concurring).

ARGUMENT

I.   To Prove Standing, Partisan Vote Dilution Plaintiffs Must Show That They Live in Unnecessarily Cracked or Packed Districts.

Beginning with the applicable legal test, the Supreme Court resolved in *Whitford* the ambiguity that had existed as to who has standing to sue on partisan vote dilution grounds. The Court unanimously held that only plaintiffs living in cracked or packed districts—and so *not* all supporters of the victimized party—have standing. As the Court put it, a vote dilution plaintiff must "prove that he or she lives in a cracked or packed district." *Whitford*, 138 S. Ct. at 1932. Or in the words of Justice Kagan's concurrence, "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing." *Id.* at 1934 (Kagan, J., concurring).

Both the Court and Justice Kagan also insisted on proof of cracking or packing *relative to another district configuration*. Plaintiffs living in cracked or packed districts, in other words, must show that they could have been uncracked or unpacked by a different map. The Court explained that the "harm" of vote dilution arises when a plaintiff's vote, "having been packed or cracked . . . carr[ies] less weight than it would carry in another, hypothetical district." *Id.* at 1931. Justice Kagan elaborated that, to "prov[e] packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Id.* at 1936 (Kagan, J., concurring). "For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district." *Id.* "Or conversely, a Democratic plaintiff

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residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50-50 district." *Id.*

This test for standing raises a number of subsidiary issues, which the Court and Justice Kagan addressed at well. *First*, what exactly does it mean for a district to be "cracked" or "packed"? "'Cracking,'" according to the Court, "'means dividing a party's supporters among multiple districts so that they fall short of a majority in each one.'" *Id.* at 1924; *see also id.* at 1935 (Kagan, J., concurring) (cracking is "spreading [voters] sufficiently thin to prevent them from electing their preferred candidates"). A district that a party expects to win by roughly a 55%-to-45% margin is thus a quintessential example of cracking; it is safe for the prevailing party (except perhaps in a wave election), but not so safe that many of the party's supporters are inefficiently wasting their votes. "'Packing,'" in turn, "'means concentrating one party's backers in a few districts that they win by overwhelming margins.'" *Id.* at 1924; *see also id.* at 1935 (Kagan, J., concurring) (packing is creating "supermajorities of [a party's] voters—well beyond the number needed for [their] candidate to prevail"). A district expected to be won by around a 65%-to-35% (if not an even larger) margin is thus a classic case of packing; it is so safe for the prevailing party that it effectively cannot be lost (even in a wave election), and many of the votes of the party's adherents are inefficiently wasted.

Second, how should plaintiffs show that they are unnecessarily cracked or packed? Both the Court and Justice Kagan stressed "hypothetical," *id.* at 1931, or "alternative," *id.* at 1936 (Kagan, J., concurring), district maps. Justice Kagan added that these maps should be "comparably consistent with traditional districting principles" and "drawn

without a focus on partisan advantage." *Id.* Maps that rely on bizarrely shaped districts to gerrymander in favor of the claimants' party would therefore be unacceptable as baselines for comparison. Beyond these points, though, plaintiffs appear to have significant flexibility in the evidence they present. They could offer a single hypothetical map or a "set of alternative maps." *Id.* These maps could be drawn by hand or through "computer simulation techniques for devising alternative maps." *Id.* And "other ways of proving cracking or cracking" might exist too. *Id.*

Third, how may a hypothetical map uncrack or unpack plaintiffs? It may do so in three ways, each corresponding to one of the techniques used by line-drawers to dilute plaintiffs' votes. The first of these dilutive techniques is cracking the opposing party's voters so that a district that would have favored that party, had the boundaries been designed neutrally, is instead won by the line-drawing party. An alternative map undoes such cracking by flipping the district in question from the line-drawing party to the opposing party. *See id.* (commenting that "a Democratic plaintiff residing in a [Republican] district" should submit a "map putting her in a [Democratic] district").

The next dilutive method is also a form of cracking: converting a district that would have overwhelmingly favored the line-drawing party, under a neutral redistricting process, into a district that this party wins by a smaller (but still safe) margin. In this way, voters backing the line-drawing party become available to be placed in adjacent districts, where they may contribute to additional victories for that party. An alternative map negates such cracking by making the district at issue safer for the line-drawing party: that is, by reversing the line-drawing party's unpacking of its voters. This effect, of course, is

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a byproduct of remedying the first kind of dilutive cracking. When districts originally won by the line-drawing party are flipped to the opposing party, *other* nearby districts, already won by the line-drawing party, end up with larger majorities of the line-drawing party's voters. *See id.* (noting the range of ways in which a "plaintiff can show, through drawing alternative district lines, that partisan-based . . . cracking diluted her vote").[1]

The last dilutive tactic is packing, or reshaping what would have been a competitive district favoring the opposing party into an uncompetitive district that still favors that party—but by an enormous margin. In this way, opposing party voters that *could* have enabled that party to prevail in adjacent districts are instead crammed into the overly safe district. An alternative map unpacks a packed district by reducing the concentration of the opposing party's voters: in other words, by making the district somewhat less safe without actually flipping it. This effect, too, is a byproduct of fixing the first type of dilution. When districts originally won by the line-drawing party are flipped to the opposing party, other nearby districts, already won by the opposing party, end up with smaller majorities of the opposing party's voters. *See id.* (observing that "a

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[1] To give a concrete example, if Democratic voters are cracked between two districts, as seen in many instances in this case, a fair plan will remedy this by making Democratic voters a majority in one district (the first category of remedial districts discussed herein), but a smaller percentage of the electorate in an adjacent district (that is, a more strongly Republican performing district, and the instant category of remedial districts). Both remedial districts are necessary to correct the cracking of, in this example, Democratic voters.

Democratic plaintiff living in a [heavily] Democratic district" should present a map "that would place her in a [less heavily] Democratic district").[2]

It is true that in the latter two scenarios, the party affiliation of the candidate who is elected does not change between a given plaintiff's district in the enacted plan and this plaintiff's district in the hypothetical map. But that does not mean that undoing these maneuvers fails to contribute to the creation of a fairer plan. As both the Court and Justice Kagan recognized, vote dilution does not operate exclusively by preventing certain voters from electing their preferred candidates. Rather, it also does its damage by placing some of the line-drawing party's voters in artificially competitive districts, where their ballots will be more efficiently cast (scenario two); and by consigning some of the opposing party's voters to artificially safe districts, where their ballots will be squandered in large numbers (scenario three). These stratagems work hand in glove with the outright flipping of districts (scenario one), either by supplying more of the line-drawing party's voters to the districts to be flipped, or by siphoning away the opposing party's voters from these districts. All of the techniques thus cause the opposing party's votes to "carry less weight than [they] would carry in another, hypothetical district," *id.* at 1931—to "ha[ve] less consequence[] than [they] would under a neutrally drawn map," *id.* at 1936 (Kagan, J., concurring).

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[2] To give another example, if Democratic voters are packed in one district (thus making the adjacent district Republican), a fair plan will remedy this situation by unpacking the packed district (and thus flipping the adjacent district). The unpacking of the packed district is necessary to flip the neighboring district; that is where the additional Democratic voters are found.

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And *fourth*, in how many of a State's districts would plaintiffs typically be able to establish standing? "It all depends on how much . . . packing and cracking . . . the mapmakers have done." *Id.* at 1937. If the degree of vote dilution is minor, then only plaintiffs in a few districts may have been unnecessarily cracked or packed. But "[s]uppose that mapmakers pack or crack a critical mass of . . . districts all across the State to elect as many [of the line-drawing party's] politicians as possible." *Id.* Then plaintiffs could "join[] together" and "attack[] all the packed and cracked districts in a statewide gerrymander," resulting in "a wholesale restructuring of the State's districting plan." *Id.*; *see also id.* at 1931 (observing that plaintiffs could establish standing in enough areas to "require restructuring all of the State's legislative districts").

It should be emphasized, however, that not all of the districts in which plaintiffs prove standing (and liability) must be flipped to the opposing party in a remedial map. For one thing, some of these districts may fall into scenario two (artificial unpacking of the line-drawing party's voters) or scenario three (artificial packing of the opposing party's voters). For these districts (and the litigants residing in them), undoing the vote dilution does not require changing the identity of the prevailing party. Moreover, even for the artificially flipped districts in scenario one, only some of them need to be restored to the opposing party to yield a fair map. A fair map—one that treats the two parties symmetrically—is all that plaintiffs can ask for. They cannot insist on relief that amounts to a gerrymander in *their* favor. *Cf. Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."). At the

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remedial stage, therefore, defendants would have some discretion about where and how to fix the various features of the map that have formed the basis of the standing and liability findings.

II.   Individual Voter Plaintiffs and/or League Members Have Standing in Districts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

Under these principles, individual voter plaintiffs and/or League members have standing to challenge Districts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 (but not District 3) on partisan vote dilution grounds. Plaintiffs first explain that *all* of the 2016 Plan's districts (including District 3) crack or pack Democratic voters. Plaintiffs then describe the alternative map on which they rely—Professor Chen's Plan 2-297—to demonstrate that much of this cracking and packing is unnecessary. Lastly, plaintiffs show that individual voter plaintiffs and/or League members living in twelve of the 2016 Plan's districts are uncracked or unpacked in Plan 2-297.

A.   The Existing Record Proves That All of the 2016 Plan's Districts Crack or Pack Democratic Voters.

Starting with the evidence of the 2016 Plan's cracking and packing, it is voluminous in the existing record and so requires no supplementation. *First*, Dr. Thomas Hofeller's own declaration specifies the Democratic and Republican vote shares he anticipated for each district he drew. Ex. 5116:9. Based on his seven-election average, Dr. Hofeller predicted that the Plan's ten Republican districts would have Republican vote shares from 54% to 58%. *Id.* He also predicted that the Plan's three Democratic districts would have Democratic vote shares from 63% to 69%. *Id.* As discussed above, these percentages are the telltale sign of cracking and packing. *Every* Republican district

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is safe but not too safe: virtually certain to be won by a Republican candidate by a comfortable, but not huge, margin, thus wasting few Republican votes. And *every* Democratic district is overwhelmingly and inefficiently Democratic, thus wasting many Democratic votes. This is the precise pattern that systematic cracking and packing produce.

Second, a series of maps illustrate in vivid detail how the 2016 Plan's cracking and packing were achieved. Exs. 4007-4015, 4066-4077. Each of these maps zooms in on a different part of North Carolina and is color-coded by precinct based on Dr. Hofeller's seven-election average. *Id.* Together, the maps show that the Plan methodically splits clusters of Democratic voters: Greensboro (divided between Districts 6 and 13), Fayetteville (divided between Districts 8 and 9), Asheville (divided between Districts 10 and 11), etc. The maps also depict how other Democratic clusters are submerged within larger masses of Republican voters: Winston-Salem (in District 5), Wilmington (in District 7), etc. The maps illuminate the cramming of the State's largest Democratic concentrations into a handful of heavily Democratic districts as well: District 1 (containing most of northeastern North Carolina's Democrats), District 4 (containing most of Raleigh-Durham), and District 12 (containing most of Charlotte-Mecklenburg).

And *third*, the 2016 election results prove that not only did the 2016 Plan aim to crack and pack Democratic voters throughout North Carolina; it also accomplished its objective. Ex. 1018. Every district that Dr. Hofeller predicted would be won by a Republican candidate was, in fact, won by a Republican. *Id.* Likewise, every district he predicted would be won by a Democratic candidate was indeed won by a Democrat. *Id.*

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Moreover, exactly as expected with a strategy of cracking and packing, the average margin of victory in Democratic districts was far larger than in Republican districts. The average margin in the former was 37 percentage points, compared to 21 percentage points in the latter. *Id.*

It is worth adding here that the 2016 Plan is exceptionally aggressive in its cracking and packing of Democratic voters. Most dilutive maps create at least *some* districts that the opposing party wins by smaller, more efficient margins, or that the line-drawing party wins by larger, less efficient margins. The 2016 Plan, though, features no such districts. There is not a competitive Democratic district or an over-concentrated Republican district to be found. That is why the 2016 Plan exhibited the country's largest partisan asymmetry in the 2016 election. *See Common Cause v. Rucho*, 279 F. Supp. 3d 587, 660 (M.D.N.C. 2016), *vacated and remanded*, ___ S. Ct. ___, 2018 WL 1335403 (U.S. June 25, 2018). That is also why all (not just a subset) of the 2016 Plan's districts are in fact cracked or packed.

B.   Plan 2-297 Is a Suitable Alternative Map Because It Is "Comparably Consistent with Traditional Districting Principles" and "Drawn Without a Focus on Partisan Advantage."

Turning from the fact of the 2016 Plan's cracking and packing to their lack of necessity, plaintiffs focus here on a single alternative map: Professor Chen's Plan 2-297. As noted earlier, several types of evidence may be used at this stage of the inquiry, including the data about thousands of simulated maps presented by the Common Cause plaintiffs. Dkt. 130-2. In the League plaintiffs' view, a single alternative map is a simple and intuitive way to show that a challenged plan's cracking and packing could have been

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avoided. A single alternative map also has the nice property of demonstrating that

supporters of the opposing party could be *simultaneously* uncracked and unpacked—

within one particular plan rather than an array of alternatives.

As required by Justice Kagan's concurrence, Plan 2-297 was "drawn without a

focus on partisan advantage." *Whitford*, 138 S. Ct. at 1936 (Kagan, J., concurring).

Indeed, Professor Chen generated all three thousand of his maps without considering any

election results (or other partisan data) whatsoever. *See Common Cause*, 279 F. Supp. 3d

at 645-47. As also required by Justice Kagan, Plan 2-297 is "comparably consistent with

traditional districting principles." *Whitford*, 138 S. Ct. at 1936 (Kagan, J., concurring). In

fact, it matches or beats the 2016 Plan on every nonpartisan criterion used to design the

Plan:

- *Equal population:* Both plans' districts are equal in population to within one

  person. Dkt. 129-2:4.

- *Subdivision splits:* Plan 2-297 splits fewer counties (12) than the 2016 Plan (13).

  Id. Both plans split the same number of VTDs (12). *Id.*

- *Compactness:* Plan 2-297 has a better average Reock compactness score (0.464)

  than the 2016 Plan (0.337). *Id.* Plan 2-297 has a better average Polsby-Popper

  compactness score (0.301) than the 2016 Plan (0.242). *Id.*

- *Incumbent pairing:* Plan 2-297 does not pair any incumbents, while the 2016 Plan

  paired two incumbents. *Id.*

Using Dr. Hofeller's seven-election average, Plan 2-297 also has six Democratic

districts and seven Republican districts. *Id.* In marked contrast to the 2016 Plan—one of

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the most asymmetric plans in modern American history—Plan 2-297 is thus almost

perfectly balanced, with an efficiency gap of nearly zero. *Id.*

C.   Plan 2-297 Uncracks or Unpacks Individual Voter Plaintiffs and/or League Members in Twelve of the 2016 Plan's Districts.

The last step of the standing analysis is to show that individual voter plaintiffs

and/or League members who live in cracked or packed districts in the 2016 Plan are

placed in *un*cracked or *un*packed districts in Plan 2-297. In making this showing below,

plaintiffs categorize the 2016 Plan's districts by the means through which they are

uncracked or unpacked: (1) uncracking Democratic voters by flipping districts from

Republican to Democratic; (2) uncracking Democratic voters by making districts adjacent

to the flipped districts more safely Republican (and so contributing to the flipping of

district control in category 1); and (3) unpacking Democratic voters by making districts

adjacent to the flipped districts less safely Democratic (and also contributing to the

flipping in category 1). Plaintiffs also only summarize the evidence that is described at

greater length in Professor Chen's declaration, Dkt. 129-2, Mr. Salinger's declaration,

Dkt. 129-1, and plaintiffs' additional proposed findings of fact and conclusions of law,

Dkt. 129-16.[3]

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[3] Plaintiffs further note that the League, like any organizational plaintiff, has standing wherever "its members, or any one of them, are suffering immediate threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *see also, e.g.*, *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1269 (2015) ("[I]t seems highly likely that a 'statewide' organization with members in 'almost every county' . . . will have members in each [challenged] district."); *League of Women Voters of Michigan v. Johnson*, No. 2:17-cv-14148-ELC-DPH-GJQ, slip op. at 15 (E.D. Mich. May 16, 2018) (holding in another partisan gerrymandering case that the League has standing in "each

i.   Districts 2, 5, 6, 7, 8, 9, and 13:

First, Districts 2, 5, 6, 7, 8, 9, and 13 in the 2016 Plan are Republican districts created by cracking Democratic voters: in particular, by converting districts that would have favored Democrats, under a neutral map, to districts won by Republicans. Individual voter plaintiffs and/or League members living in each of these districts are placed in Democratic districts in Plan 2-297 and thus have standing.

- *District 2:* The League has at least one member (and registered Democratic voter) who lives in Precinct 20-11 in Wake County. Dkt. 129-1 ¶ 6a. This precinct is in District 2 in the 2016 Plan, which has a Republican vote share of 56.2% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 11 in Plan 2-297, which has a Republican vote share of 36.8%. *Id.*

- *District 5:* The League has at least one member (and registered Democratic voter) who lives in Precinct 074 in Forsyth County. Dkt. 129-1 ¶ 6c. This precinct is in District 5 in the 2016 Plan, which has a Republican vote share of 56.2% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 6 in Plan 2-297, which has a Republican vote share of 49.3%. *Id.*

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individual district . . . where its members reside"). With respect to the League's members, defendants have stipulated that certain of them "support and vote for Democratic candidates and have an interest in furthering policies at the national level that are consistent with the Democratic Party Platform." Ex. 4080. Mr. Salinger also testified at his deposition that, at present, the League's "policies and positions tend to align with the current Democratic Party platform." *See* App. 1, Excerpts from Salinger Dep. 29:5-7. It is therefore "reasonable to infer" that "people [who] have joined the [L]eague because they support the [L]eague's position" are also "likely in support of the Democratic Party platform." Salinger Dep. 29:10-13.

- *District 6:* The League has at least one member (and registered Democratic voter) who lives in Precinct NCGR2 in Guilford County. Dkt. 129-1 ¶ 6d. This precinct is in District 6 in the 2016 Plan, which has a Republican vote share of 54.5% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 6 in Plan 2-297, which has a Republican vote share of 49.3%. *Id.*

- *District 7:* The League has at least one member (and registered Democratic voter) who lives in Precinct 13 in Wayne County. Dkt. 129-1 ¶ 6e. This precinct is in District 7 in the 2016 Plan, which has a Republican vote share of 53.4% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 12 in Plan 2-297, which has a Republican vote share of 40.8%. *Id.*

- *District 8:* The League has at least one member (and registered Democratic voter) who lives in Precinct Eureka/Whispering Pines in Moore County. Dkt. 129-1 ¶ 6f. This precinct is in District 8 in the 2016 Plan, which has a Republican vote share of 55.1% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 8 in Plan 2-297, which has a Republican vote share of 46.4%. *Id.*

- *District 9:* Individual voter plaintiff (and registered Democratic voter) Elliot Feldman lives in Precinct 86 in Mecklenburg County. Ex. 4055. This precinct is in District 9 in the 2016 Plan, which has a Republican vote share of 56.0% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 3 in Plan 2-297, which has a Republican vote share of 45.8%. *Id.*

- *District 13:* The League has at least one member (and registered Democratic voter) who lives in Precinct G31 in Guilford County. Dkt. 129-1 ¶ 6j. This

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precinct is in District 13 in the 2016 Plan, which has a Republican vote share of 53.7% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 6 in Plan 2-297, which has a Republican vote share of 49.3%. *Id.*

ii.   Districts 10 and 11:

Second, Districts 10 and 11 in the 2016 Plan are Republican districts created by unpacking Republican voters and thus cracking Democratic voters: in particular, by converting districts that would have favored Republicans by very large margins, under a neutral map, to districts won by Republicans by narrower margins. Individual voter plaintiffs and/or League members living in each of these districts are placed in more safely Republican districts in Plan 2-297, thereby enabling the flipping of other, adjacent districts from Republican to Democratic control. These voters thus have standing.

- *District 10:* The League has at least one member (and registered Democratic voter) who lives in Precinct West Newton in Catawba County. Dkt. 129-1 ¶ 6g. This precinct is in District 10 in the 2016 Plan, which has a Republican vote share of 58.2% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 2 in Plan 2-297, which has a Republican vote share of 63.6%. *Id.*

- *District 11:* The League has at least one member (and registered Democratic voter) who lives in Precinct Drexel 01 in Burke County. Dkt. 129-1 ¶ 6h. This precinct is in District 11 in the 2016 Plan, which has a Republican vote share of 57.1% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 2 in Plan 2-297, which has a Republican vote share of 63.6%. *Id.*

iii.   Districts 1, 4, and 12:

And *third*, Districts 1, 4, and 12 in the 2016 Plan are packed Democratic districts: districts that would have favored Democrats by narrower margins, under a neutral map, that instead are won by Democrats by very large margins. Individual voter plaintiffs and/or League members living in each of these districts are placed in more competitive Democratic districts in Plan 2-297, thereby enabling the flipping of other, adjacent districts from Republican to Democratic control. These voters thus have standing.

- *District 1:* Individual voter plaintiffs (and registered Democratic voters) William Collins and Willis Williams live in Precinct Plymouth 1 in Washington County and Precinct Jamesville in Martin County, respectively. Exs. 4054, 4060. These precincts are in District 1 in the 2016 Plan, which has a Republican vote share of 31.2% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. These precincts are in District 12 in Plan 2-297, which has a Republican vote share of 40.8%. *Id.*

- *District 4:* The League has at least one member (and registered Democratic voter) who lives in Precinct 01-04 in Wake County. Dkt. 129-1 ¶ 6b. This precinct is in District 4 in the 2016 Plan, which has a Republican vote share of 37.7% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 10 in Plan 2-297, which has a Republican vote share of 47.4%. *Id.*

- *District 12:* The League has at least one member (and registered Democratic voter) who lives in Precinct 20 in Mecklenburg County. Dkt. 129-1 ¶ 6i. This precinct is in District 12 in the 2016 Plan, which has a Republican vote share of 36.6% using Dr. Hofeller's seven-election average. Dkt. 129-2:6. This precinct is in District 3 in Plan 2-297, which has a Republican vote share of 45.8%. *Id.*

III. The Court Should Clarify that the Record Supports a District-Specific Finding of Partisan Intent for Each District in Which Individual Voter Plaintiffs and/or League Members Have Standing.

Finally, it is clear from *Whitford* that district-specific evidence of partisan intent is unnecessary to prove *standing*. "[W]hether the plaintiffs have established injury in fact. . . . turns on effect, not intent . . . ." 138 S. Ct. at 1932. However, Justice Kagan hinted in her concurrence that such evidence might be relevant to *liability* on a partisan vote dilution theory. She pointed out that "evidence about the mapmakers' goals in formulating the entire statewide map . . . would predictably carry down to individual districting decisions." *Id.* at 1937 (Kagan, J., concurring). She also observed that, in the racial gerrymandering context, "statewide evidence" may "show[] that mapmakers had an invidious 'motive' in drawing the lines of 'multiple districts in the State.'" *Id.* (quoting *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)).

In light of these comments in *Whitford*, the Court should clarify that, based on the record in this case, each district in which individual voter plaintiffs and/or League members have standing was intentionally drawn to benefit Republican candidates and voters and disadvantage Democratic ones. This clarification may be based on the evidence described above: (1) Dr. Hofeller's expectations regarding how the 2016 Plan's districts would perform, Ex. 5116:9; (2) the maps highlighting the districts' rampant cracking and packing of Democratic voters, Exs. 4007-4015, 4066-4077; (3) the 2016 election results confirming that the districts performed as expected, Ex. 1018; and (4) Professor Chen's Plan 2-297 showing that the districts' cracking and packing could have been avoided, Dkt. 129-2. The clarification may also be grounded in all of the *statewide*

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evidence of partisan intent already analyzed by the Court. *See Common Cause*, 279 F.

Supp. 3d at 640-53. Again, this evidence "predictably carr[ies] down to [the] individual

districting decisions" about each of the 2016 Plan's districts. *Whitford*, 138 S. Ct. at 1937

(Kagan, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should find that individual voter plaintiffs

and/or League members have standing to challenge Districts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11,

12, and 13 on partisan vote dilution grounds. The Court should also find that each of

these districts was intentionally drawn to benefit Republican candidates and voters and

disadvantage Democratic ones. The Court should further reenter all of its findings of fact

and conclusions of law—with respect to both plaintiffs' vote dilution and all other

claims—none of which were disturbed by *Whitford*. And the Court should issue its final

judgment on remand as quickly as possible (in September if possible), so that the

Supreme Court may consider the case during its 2018 term and a remedy may be imposed

in time for the 2020 election.

Respectfully submitted this 7th day of August, 2018.

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this brief complies with L.R. 7.3(d) because the total word count for the body of the brief including headings and footnotes is 5,359.

This 7th day of August, 2018.

/s/ Allison J. Riggs
Allison J. Riggs

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing BRIEF with

the Clerk of Court using the CM/ECF system, which will send electronic notification of

such filing to all counsel and parties of record.

This 7th day of August, 2018.

/s/ Allison J. Riggs
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