NO. 18-422

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

Last Term, while *Gill v. Whitford*, 138 S. Ct. 1916 (2018), was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional districting map as an unconstitutional partisan gerrymander. After resolving *Gill* on Article III standing grounds, this Court vacated the district court's decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the 321-page decision below, the district court largely readopted its previous reasoning and became the first court post-*Gill* to strike down a legislatively enacted map as an unconstitutional partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate generalized partisan preferences, the court concluded that they had standing. The court then purported to discern judicially manageable standards for adjudicating partisan gerrymandering claims in the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clauses of Article I. The court found that the 2016 Map violates each of its newly articulated tests and enjoined the State from using the map after the November 2018 midterm elections.

The questions presented are:

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Common Cause; North Carolina Democratic Party; Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; Morton Lurie; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; Russell G. Walker, Jr.; League of Women Voters of North Carolina; William Collins; Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; Willis Williams

Defendants:

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; Representative David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; A Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of

the North Carolina State Board of Elections; North Carolina State Board of Elections; State of North Carolina

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INTRODUCTION

Fifteen years ago, a majority of this Court declined to wade into the political thicket of refereeing claims that legislatures organized along partisan lines were too partisan in their redistricting. The past two years have confirmed the wisdom of that decision. Since a federal court in Wisconsin became the first court in decades to identify and invalidate an unconstitutional partisan gerrymander (only to have this Court vacate its decision for want of standing), three more maps have been invalidated, at least six more have been challenged, five judges have been threatened with impeachment over a partisan gerrymandering case, and nearly a dozen pleas for intervention in such cases have reached this Court. All of that is in the waning years of the decennial cycle, and without a clear signal from this Court that such claims are justiciable.

Predictably, this onslaught of litigation has done nothing to bring courts any closer to discerning judicially manageable standards to guide legislatures and reviewing courts. Instead, like so many before them, the latest courts to take up that misguided charge cannot even agree on a single test. The decision below is a case in point: A two-judge majority of a three-judge district court in North Carolina laid out *four* separate theories as to how partisan gerrymandering purportedly violates four separate provisions of the Constitution. And not one of those tests provides anything close to a manageable standard for answering the original unanswerable question of how much politics is "too much."

The reason for that failure is not a lack of judicial effort or imagination. Rather, the repeated failures to articulate judicially manageable standards are a direct result of the absence of any constitutional text that limits the partisanship of state legislatures or suggests any judicially administrable line for courts to enforce. To the contrary, the framers textually committed this politically fraught task elsewhere—to politically accountable state legislatures subject to supervision by Congress. That delegation reflected not only the judgment that this inherently political task is appropriate for politically accountable legislatures, but also the view that the task is inappropriate for federal courts that need institutional independence from politics to discharge their core functions. Thus, the failure to discern judicially manageable standards for the claims here is not some judicial failing, but the framers' design.

The decision below is wrong across the board. Indeed, the court did not even get the threshold standing question right. But the decision below also confirms the more fundamental reality that courts simply do not have any business making value-laden judgments about how much politics is too much in a process that will never be free of politics. This Court should declare partisan gerrymandering claims nonjusticiable once and for all and put an end to the effort to reassign the inherently political task of districting to the federal courts.

OPINION BELOW

The district court's decision is reported at 318 F. Supp. 3d 777. JS.App.1-348.

JURISDICTION

The district court issued its decision on August 27, 2018, and appellants timely appealed. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant constitutional provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Historical and Legal Background

"Political gerrymanders are not new to the American scene." *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004) (plurality op.). They are as old as—indeed, older than—the Republic. *See, e.g.*, Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21 (2013). The first documented gerrymander on this side of the Atlantic occurred in the early 1700s in Pennsylvania, where the surrounding counties colluded to suppress the city of Philadelphia's political power. *See* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26-28 (1907) ("Griffith"). A few years later, in 1732, an "occurrence of the gerrymander, of especial interest, appeared … in the colony of North Carolina," where "the governor was engaged in dividing precincts" in an effort to "secur[e] a majority of the members of the lower house or a minority sufficiently strong to block legislation." *Id.* at 28.

Partisan gerrymandering thus was "alive and well (though not yet known by that name) at the time of the framing." *Vieth*, 541 U.S. at 274 (plurality op.). The framers likewise were acquainted with the broader tendency of political legislatures to tailor

electoral regulations to benefit favored candidates or factions. James Madison, for instance, expressly acknowledged that legislatures could "take care so to mould their regulations as to favor the candidates they wished to succeed." 2 *The Records of the Federal Convention of 1787* 241 (M. Farrand ed. 1911) ("*Records*"). Theophilus Parsons, a delegate at the Massachusetts convention, likewise expressed concern that legislatures "might make an unequal and partial division of the states" for political gain. 2 *Debates on the Federal Constitution* 27 (J. Elliot 2d ed. 1836) ("*Debates*").

The framers' response to these concerns was not to assign the delicate task of districting to a less politically accountable body that depended on its independence from partisan politics to discharge its primary function. In other words, the framers did not give either primary responsibility or a secondary policing function over this politically fraught task to the federal judiciary. Instead, the framers responded just as they did in so many other parts of the Constitution: They countered ambition with ambition, with a structural system of checks and balances that attempted to harness the political nature of legislatures, rather than put the judiciary in the impossible position of determining when legislatures acted too much like legislatures. Specifically, the Constitution gave state legislatures the power to prescribe "[t]he times, places and manner of holding elections for Senators and Representatives," but gave Congress the power to "at any time by law make or alter such regulations." U.S. Const. art. I, §4.

Giving the federal legislature a check on a power assigned to state legislatures was by no means uncontroversial—though not because anyone thought the proper repository for the federal supervisory role was the federal courts. South Carolina's delegates to the Constitutional Convention sought to "strike out the federal power," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015), contending that "[t]he States" alone "could & must be relied on," 2 *Records* 240. Madison and others responded that Congress must have "the power to check partisan manipulation of the election process by the States." *Vieth*, 541 U.S. at 275 (plurality op.); *see also* 2 *Debates* 27 (statement of Parsons that, "[w]ithout these powers in Congress, the people can have no remedy" for partisan districting). No one even intimated that the federal courts should provide the check on the States' "partisan manipulation" or that their essential independence could survive the assignment. From the very beginning, then, the Constitution has recognized that any federal remedy for partisan gerrymandering of congressional districts lies with Congress, not with the courts.

Of course, partisan gerrymandering did not end with the ratification of the Constitution. "[T]he notoriously outrageous political districting in Massachusetts that gave the gerrymander its name" occurred in 1812. *Vieth*, 541 U.S. at 274 (plurality op.). And by 1840, gerrymandering had become such a "recognized force in party politics" that it "was generally attempted in all legislation enacted for the formation of election districts." Griffith 123. Congress was not blind to these practices. To the contrary, many of the traditional districting criteria that govern

state districting today trace their roots to federal legislation enacted in the mid-1800s to check partisan gerrymandering.

For instance, in the Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." *See also* Griffith 12 (noting that this law was "an attempt to forbid the practice of the gerrymander"). Congress imposed the same requirement again in the Apportionment Act of 1862, 12 Stat. 572, and in 1872 Congress added the restriction that districts must "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, §2. These enactments on either side of the Reconstruction Amendments underscore that just as no one at the framing thought that the federal courts were the proper entity to police partisan gerrymandering (or that the independence of the Article III courts would long survive the assignment), no one during the debates over the Reconstruction Amendments identified them as reassigning authority over partisan gerrymandering to the federal courts. And while those amendments undeniably limited the consideration of race by state actors, no contemporaneous voice suggested that they identified limits on how much partisan advantage is too much.

Rather than signaling some transfer of authority to federal courts, congressional efforts to limit redistricting abuses continued after Reconstruction. The 1872 Act was followed by the Apportionment Act of 1901, in which Congress imposed a compactness requirement. 31 Stat. 733. The contiguity, compactness, and equal population requirements were

repeated in 1911 legislation, 37 Stat. 13, but were not thereafter continued. Today, at the federal level, only the single-member-district requirement remains. *See* 2 U.S.C. §2c. But contiguity, compactness, and equal population requirements are now commonplace among state constitutions and districting laws. *See Redistricting Criteria*, Nat'l Conference of State Legislatures (Jan. 21, 2019), https://bit.ly/2SyGCgJ.

This Court has repeatedly recognized that partisan gerrymandering remains a reality. And while the Court has never articulated justiciable limits on partisan gerrymandering, it has repeatedly stated that a degree of partisan gerrymandering can be constitutional. For example, in a case involving a racial gerrymandering challenge to a North Carolina congressional district, this Court held that "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie* (*Cromartie I*), 526 U.S. 541 (1999). In a subsequent decision in that same litigation, this Court upheld that same district because "the State ha[d] articulated a legitimate political explanation for its districting decision"—namely, "the creation of a safe Democratic seat." *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 239, 242 (2001). In more recent years, including in cases that presaged this very litigation, members of this Court have reiterated that partisan gerrymandering is constitutional, even if one finds it "distasteful." *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part). In short, this Court has never embraced the proposition that partisan gerrymandering is *malum in se*, or that the Constitution wholly forbids the political

body to which it assigns the drawing of districts from drawing districts to try to achieve political gain.

B. North Carolina's Congressional Map

This case arises from the most recent round of congressional redistricting in North Carolina. In February 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map were unconstitutional racial gerrymanders. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455. In defending those districts, the General Assembly tried to reprise its successful strategy in *Cromartie II* (which involved an earlier iteration of one of the very same districts) by arguing that it was the product of partisan rather than racial considerations. The district court rejected that argument—not because it found a partisan motive no more constitutional than a racial one, but because it deemed the record insufficiently clear that the legislature was actually motivated by politics rather than race. *See id.* at 614-22. The court then gave the General Assembly 14 days to draw a new map. *Id.* at 627.

That two-week deadline made time of the essence. The chairmen of the most recent redistricting committee—Senator Robert Rucho and Representative David Lewis—promptly engaged expert mapmaker Dr. Thomas Hofeller to assist in drawing a new map. JS.App.14-15. They instructed Dr. Hofeller to comply with traditional districting criteria and all state and federal districting requirements and made clear that he should not

consider racial data at all. JS.App.15. In response to the district court's holding that the consideration of politics must be evident in the record, they instructed Dr. Hofeller to consider political data and to endeavor to draw a map that would likely preserve the existing partisan makeup of the congressional delegation. JS.App.15-16.

Meanwhile, the General Assembly appointed a new districting committee, which adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable"; ensuring contiguity and compactness by, among other things, avoiding county splits; and making "reasonable efforts" to avoid pairing incumbents. JS.App.19-20. The committee also adopted two criteria addressing racial and political data. Having just been faulted by the district court with continuing jurisdiction for unduly considering race and not having political considerations evident in the record, the committee endeavored not to make the same mistakes twice. First, the committee adopted a criterion expressly stating: "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan." JS.App.20. Second, the committee adopted a criterion labeled "Partisan Advantage," which provided: "The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation." JS.App.20.

During the committee hearing that preceded the adoption of this criteria, Representative Lewis made sure that it was "clearly stated and understood" that, "to the extent we are going to use political data in drawing this map, it is to gain partisan advantage," and not because of any correlation between political data and race. JA313. He thus "acknowledge[d] freely that this would be a political gerrymander," which he explained "is not against the law." JA308. Unsurprisingly, that candid and accountable expression drew objections from many Democratic members—including "some of the same" members who had drawn the acknowledged Democratic partisan gerrymander that this Court upheld in *Cromartie II*. JA315. When one senator asked why trying to preserve a 10-3 balance was "fair," Representative Lewis joked, "because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." JA310. When another senator urged the committee to try to increase the number of Democratic seats to 5 or 6, Representative Lewis pointed out that trying to achieve a 5-8 or 6-7 split would just be a different partisan gerrymander. JA313.

Ultimately, the committee adopted five of the seven districting criteria nearly unanimously and adopted the two dealing with racial data and partisan advantage on a party-line vote. JS.App.23. The committee approved the map by a party-line vote, and the General Assembly enacted the map ("2016 Map") with minor modifications, on party-line votes. JS.App.24.

As a matter of traditional districting criteria, the 2016 Map compares favorably to every congressional

map North Carolina has used over the past 25 years. The 2016 Map divides only 13 (out of 100) counties and splits only 12 (out of more than 2000) precincts across the entire State. JS.App.25. Moreover, no county is split between more than two districts. By contrast, the 1992 map divided 44 counties (seven of which were trifurcated into three districts) and split 77 precincts. JA326. The 1997 map divided 22 counties, the 1998 plan divided 21, the 2001 map divided 28, and the 2011 map divided 40. JA326. The 2001 map divided 22 precincts, and the 2011 map divided 68. JA326-27. The 2016 Map likewise is more compact "[u]nder several mathematical measures" than the 2011 map, and it paired only two incumbents. JS.App.25.

The *Harris* plaintiffs nonetheless filed objections to the 2016 Map, including a partisan gerrymandering challenge, but the district court rejected them. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 138 S. Ct. 2711 (2018) (mem.). The 2016 Map took effect in June 2016 and has governed the past two election cycles.

C. Pre-*Gill* District Court Proceedings

1. Shortly after the *Harris* district court approved the 2016 Map, two groups of plaintiffs filed the two lawsuits that give rise to this appeal. In August 2016, Common Cause, the North Carolina Democratic Party, and 14 individual voters filed suit against appellants (Senator Rucho, Representative Lewis, and two additional legislators) and various other state defendants alleging that the 2016 Map is an unconstitutional partisan gerrymander. JS.App.26-27. A suit brought by the League of Women Voters

("League") and 12 individual voters followed the next month. JS.App.27.

Both complaints alleged that the map violates the Equal Protection Clause and the First Amendment. JS.App.27. The Common Cause plaintiffs further alleged that the map violates both §2 and §4 of Article I. JS.App.28. Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Map as a whole, and the Common Cause plaintiffs claimed "standing to assert … district-by-district challenges" to every district. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 609 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679 (2018).

The cases were assigned to a three-judge district court. The court consolidated the cases and originally scheduled them for trial in June 2017, but subsequently postponed trial on its own motion. Amidst the pretrial proceedings, this Court agreed to hear *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.). Appellants asked the district court to stay proceedings pending resolution of *Gill*, but the court refused, forging ahead with a four-day bench trial in October 2017. JS.App.29.

2. Three months later, the district court issued a divided opinion authored by Judge Wynn holding that plaintiffs had statewide standing to press their claims and finding the 2016 Map unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. JS.App.33-34. The majority immediately enjoined the State from using the 2016 Map in future elections and again gave the General Assembly a mere two weeks to pass a new congressional map. JS.App.34. After the court

refused to stay its order, appellants filed an emergency stay application with this Court. JS.App.34. This Court granted that application and stayed the order pending the filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.).

On June 18, the Court issued its decision in *Gill*, concluding that the plaintiffs had not demonstrated standing to bring their statewide challenge to Wisconsin's districting map. *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). This Court then vacated the district court's judgment in this case and remanded for further consideration in light of *Gill*. JS.App.34.

D. Post-*Gill* District Court Decision

Two months later, the district court issued a 321-page divided opinion once again invalidating the 2016 Map. The majority opinion, again authored by Judge Wynn, concluded that plaintiffs have standing to press their partisan gerrymandering claims, that such claims are justiciable under the Equal Protection Clause, the First Amendment, and §2 and §4 of Article I, and that the 2016 Map violates all four provisions. JS.App.35-313.

1. Starting with the equal protection claims, the court acknowledged that *Gill* rejected the "statewide" standing theory that plaintiffs had previously asserted. JS.App.41-43. The court further conceded that Common Cause and several individual plaintiffs lacked standing because they failed to claim anything other than a statewide injury. JS.App.65-67 & n.15. Nonetheless, the court concluded that individual "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts" had standing to

press vote-dilution claims under the Equal Protection Clause. JS.App.50.[1]

The court concluded that these "dilutionary injuries" afforded these same plaintiffs standing under the First Amendment. JS.App.69-70. In addition, the court concluded that various individual plaintiffs had standing to press "non-dilutionary" claims under the First Amendment because, for example, they "had difficulty convincing fellow Democrats to 'come out to vote.'" JS.App.69-70.[2] The court reasoned that, "because these injuries are statewide, such Plaintiffs have standing to lodge a First Amendment challenge to the 2016 Plan as a whole." JS.App.74.

Finally, the court concluded that the Common Cause plaintiffs have standing to press their Article I claims. JS.App.74. Those claims, the court posited, are "premised on federalism," and so "do not stop at a single district's lines." JS.App.74-75. Although the court acknowledged that such "structural harm does not absolve litigants from … alleg[ing] particularized injuries," it found that requirement satisfied because at least one plaintiff in each district alleged "dilutionary injuries," and because plaintiffs had proven adequate "non-dilutionary injuries"—*e.g.*, "difficulty encouraging people to vote on account of

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[1] The court concluded that the North Carolina Democratic Party had organizational standing to challenge each district, and that the League, "at a minimum," had organizational standing to challenge one district (CD9). JS.App.64-65 n.14.

[2] The court concluded the North Carolina Democratic Party, the League, and Common Cause suffered non-dilutionary injuries too. JS.App.72-74.

widespread belief that electoral outcomes are foregone conclusions." JS.App.76, 78. "[B]ecause these structural and associational harms have statewide implications," the court continued, they "are sufficient to confer standing on a statewide basis" under the Elections Clauses. JS.App.83.

2. Turning to justiciability, the court deemed itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to conclude that partisan gerrymandering claims are justiciable. JS.App.86-88; *but see Gill*, 138 S. Ct. at 1929 (noting that the justiciability question is "unresolved"). The court independently saw "good reason" to hold such claims justiciable, maintaining that partisan gerrymandering is "contrary to the republican system put in place by the Framers." JS.App.88-89, 92. As for the thorny problem of identifying a judicially manageable standard for determining how much consideration of politics is too much, the court declared that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in … partisan gerrymandering" at all. JS.App.118.

3. Proceeding to the merits, the court began by purporting to discern a judicially manageable standard for adjudicating plaintiffs' equal protection claims. To prove such claims, the court concluded, a plaintiff must demonstrate (1) "discriminatory intent" and (2) "discriminatory effects," at which point the burden shifts to the defendant to prove that (3) those "discriminatory effects are attributable to the state's

political geography or another legitimate redistricting objective." JS.App.138-39. As to intent, although the court had just concluded that *any* amount of districting for partisan advantage is impermissible, it insisted that its equal protection analysis "*does not rest*" on that conclusion. JS.App.119. Instead, the court "assume[d]" for the sake of argument that plaintiffs must show that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power.'" JS.App.145-46. The court then found its "assume[d]" intent standard satisfied in all but one district (CD5) based on a variety of "statewide" and "district-specific" evidence. JS.App.155, 223, 273.

As to discriminatory effects, the court concluded that a plaintiff proves discriminatory effects whenever "the dilution of the votes of supporters of a disfavored party in a particular district … is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." JS.App.152. Based on its review of assorted "partisan symmetry" metrics—including the "efficiency gap," "partisan bias," and the "mean-median difference," JS.App.191-92, 209—the court found "'strong proof' of the 2016 [Map]'s discriminatory effects" based on statewide evidence. JS.App.214. The court also found "district-specific evidence" of discriminatory effects in all but CD5. JS.App.227-74. The court then determined that no legitimate redistricting objective could justify the "dilution of … voters' votes," and so held that "each of those twelve districts constitutes an invidious

partisan gerrymander in violation of the Equal Protection Clause." JS.App.273-74.

As to the First Amendment claim, the court acknowledged (with considerable understatement) that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." JS.App.282. But the court purported to discern a judicially manageable "three-prong test": (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan … burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." JS.App.286.

Discarding its assumption under the Equal Protection Clause, the court concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment. JS.App.287. It further concluded that, under prong two, a plaintiff need only show more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, which could be satisfied by testimony such as "[i]t was really hard to try to galvanize people to participate," as well as evidence that Democrats had trouble "translat[ing] their votes into seats." JS.App.287-88, 290, 294. Finding its novel test satisfied, the court held that the 2016 Map as an undifferentiated whole "violates the First Amendment." JS.App.299-300.

Finally, the court concluded that the 2016 Map violates the Elections Clauses. The court did not (because it could not) cite any decision from any court that had found justiciable partisan gerrymandering standards in the Elections Clauses. Regardless, it concluded that partisan gerrymandering violates §2 of Article I because it deprives "the People" of their right to elect Representatives, JS.App.306, and violates §4 because it "exceeds" the States' "delegated authority" to draw districts, JS.App.303. While the §4 violation was in part derivative of the majority's §2, equal protection, and First Amendment holdings, *see* JS.App.303, the court justified both of its Article I conclusions on the theory that partisan advantage is a categorically unconstitutional motivation for government action, *see* JS.App.303-13.

5. Judge Osteen concurred in part and dissented in part. As to standing, he concluded that plaintiffs who live in "packed" districts and "concede[] election of the candidate of his or her choice" lack standing because they lack an injury that affects them "in a [particular] and individual way." JS.App.327, 330-31. He also "disagree[d]" that plaintiffs "have standing to assert a statewide claim as to the statewide collective effect of any political gerrymandering." JS.App.327-28. He further concluded that the organizational plaintiffs have standing "only to the extent they challenge the districts on the basis of district-specific injury to individual members." JS.App.332-34.

On the merits, Judge Osteen expressed doubt that "there is a constitutional, and judicially manageable, standard" under the Equal Protection Clause "for limiting partisan political consideration by a partisan

legislative body." JS.App.322 n.1. He rejected the suggestion that "the Constitution does [not] permit consideration by a legislative body of both political and partisan interests in the redistricting process." JS.App.337. He expressed similar skepticism regarding the justiciability of plaintiffs' First Amendment claims, and lamented that the majority's test would "foreclose all partisan considerations in the redistricting process." JS.App.322 n.1, 343. Moreover, he disagreed that plaintiffs had shown First Amendment injury, noting that they remain "free under the new [districting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." JS.App.344. Finally, Judge Osteen rejected the notion that the Elections Clause "completely prohibits" States from districting for partisan advantage. JS.App.347.

6. After concluding that the 2016 Map violates every constitutional provision plaintiffs invoked, the majority enjoined the State from using the map in future elections after November 2018 and gave the General Assembly three weeks to draw, consider, debate, and vote on a new congressional map. JS.App.318-19. The court announced that it was open to enjoining use of the 2016 Map in the November 2018 midterm elections. JS.App.314-15. But after plaintiffs agreed with appellants that such a remedy would be inappropriate, and further agreed with appellants that the court should stay remedial proceedings pending this Court's review, the district court entered a stay. JS.App.361.

7. In November 2018, the State conducted the 2018 congressional elections. Republican candidates won seats in nine districts, and Democratic candidates won seats in three districts.[3] The race in one district that the district court held was an unconstitutional pro-Republican gerrymander (CD9), JS.App.259, remains so close that the State has not yet certified a winner.

SUMMARY OF ARGUMENT

While this Court has struggled for decades to find a judicially manageable standard to adjudicate partisan gerrymandering claims, the court below purported to find four different and perfectly administrable tests lurking within four different constitutional provisions. That conclusion is every bit as implausible as it sounds. In reality, plaintiffs do not even have standing to vindicate their partisan preferences in federal court, and their claims suffer from the even more basic flaw that they seek to have the courts adjudicate grievances that the framers wisely delegated elsewhere.

The first problem with plaintiffs' claims is that they lack standing to bring them. The claims here predate *Gill*, and at bottom are complaints about the partisan composition of the statewide congressional delegation. Although plaintiffs did their best to retrofit their claims in light of *Gill*, they still lack standing. The district court found it sufficient that certain plaintiffs' votes purportedly could have carried

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[3] *See* N.C. State Board of Elections & Ethics Enforcement, *11/06/2018 Unofficial Local Elections Results—Statewide*, https://bit.ly/2JD5HjT (last visited Feb. 7, 2019).

more weight in hypothetical, alternative districts—even if their candidates of choice were still projected to lose (or win) in those hypothetical districts. That is precisely the kind of "vote dilution" theory that this Court found lacking in *Gill*. And plaintiffs' purported "non-dilutionary" injuries—things like having a hard time convincing other Democrats to vote—are even less concrete and particularized than the generalized grievances that this Court rejected in *Gill*.

Plaintiffs' partisan gerrymandering claims fail for the more fundamental reason that they are nonjusticiable. This Court has identified two critical factors that render a claim nonjusticiable—a textual commitment to another branch and the lack of judicially discernible and manageable standards. Both factors make clear that partisan gerrymandering claims are not justiciable. First, the framers wisely delegated primary responsibility for the politically fraught task of redistricting to state legislatures subject to congressional oversight. That delegation reflects that this task is appropriate for politically accountable legislatures and affirmatively inappropriate for federal courts that depend on their independence and insulation from politics to discharge their core responsibilities. Second, three decades of judicial efforts have made only one thing clear: A judicially manageable test for adjudicating partisan gerrymandering claims does not exist. Those failed efforts are no accident. The Constitution does not impose affirmative limits on the partisan motivations of legislatures or provide any textual basis for developing administrable tests. Courts have been reduced to testing for an "intent" that is not constitutionally forbidden and for "effects" that look

for deviations from a proportional representation baseline with no grounding in the Constitution.

The absence of judicially manageable standards is borne out by the decision below, which proposed four separate tests grounded in four different constitutional provisions. Each test is more sweeping and less forgiving than the last, and most purport to outlaw politics from districting entirely. Indeed, the district court all but conceded that there is no way to decide how much partisan motivation is "too much" when it announced at the outset that its own view is "any." That, of course, would provide an administrable test at the expense of rewriting the Constitution. The framers expressly delegated districting to the available entity perhaps most liable to influences of party and faction, subject to supervision by the branch of the federal government most susceptible to those same influences. To assert a judicial role to keep partisan politics—whether some or all—out of that process is to substitute contemporary sensibilities for the framers' design.

In all events, even if there were an identifiable constitutional line for extreme partisan gerrymandering, the 2016 Map would not cross it. By design, the 2016 Map fares well when measured by traditional districting criteria. It outperforms any recent North Carolina congressional map in terms of divided counties or split precincts. To be sure, the General Assembly was quite candid about its partisan objectives, but it had just been faulted by a federal court for lacking a clear record of political, rather than racial, motivation. It also had been reassured by this Court that at least some degree of intentional partisan

gerrymandering is permissible. Those reassurances were correct, and the time has come for this Court to make clear that the Constitution does not provide courts with the tools or the responsibility to say how much partisan motivation is too much.

ARGUMENT

I. Plaintiffs Lack Standing To Press Their Partisan Gerrymandering Claims.

1. The first problem with plaintiffs' partisan gerrymandering claims is that they lack standing to bring them. Indeed, plaintiffs' lack of standing reflects their lack of any justiciable constitutional injury, as interests that neither translate to real-world pocketbook-type injuries nor are protected by clear constitutional prohibitions are too abstract to constitute the requisite "concrete and particularized" injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). For example, a plaintiff claiming an injury in the denial of the benefits of a republican form of government, as opposed to a concrete dilution of his vote, has a standing problem as well as a justiciability problem. And unlike plaintiffs bringing one-person-one-vote or racial gerrymandering claims, plaintiffs cannot point to a concrete dilution of their vote or a particularized injury from being sorted on the basis of their race.

It is not surprising, then, that this Court concluded that the plaintiffs in *Gill*—who identified themselves as "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates"—failed to establish standing to challenge Wisconsin's entire districting map as a partisan gerrymander. 138 S. Ct. at 1923. In reaching

that conclusion, the Court first rejected the argument that injuries based on a "statewide harm to [the plaintiffs'] interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking'" satisfy Article III. *Id.* at 1931. As the Court explained, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative." *Id.* An "abstract interest in policies adopted by the legislature," by contrast, is "a nonjusticiable 'general interest common to all members of the public." *Id.* "To the extent" the plaintiffs claimed injuries through "the dilution of their votes," the Court continued, "that injury is district specific" and does not entitle a plaintiff to bring a statewide challenge. *Id.* at 1930.

Second, the Court concluded that the plaintiffs had not proven that they actually suffered any district-specific injuries. The lead plaintiff, for example, lived in a district that, "under any plausible circumstances, [was] a heavily Democratic district," *id.* at 1924, so the alleged gerrymander "ha[d] not affected [his] individual vote for his Assembly representative," *id.* at 1933. And while some plaintiffs had alleged district-specific harms, they had not "meaningfully pursue[d]" those allegations, but "instead rested their case … on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1932. That underscored "the fundamental problem" with *Gill*: The case was about "group political interests" and "generalized partisan preferences" that this Court has no "responsib[ility]" to "vindicate." *Id.* at 1933.

2. This case suffers from the same basic flaws. The case was brought long before this Court's guidance in *Gill* and has always been a statewide complaint about the partisan nature of the North Carolina congressional map and the partisan composition of the congressional delegation. As the Common Cause plaintiffs explained in their complaint, their claimed injury arises from their belief that the 2016 Map "has made it more difficult[] … for a Democratic candidate to be elected in the general election to the House of Representatives." JA229. The League plaintiffs—who, like the *Gill* plaintiffs, self-identified as "Democrats who support the public policies espoused by the Democratic Party and Democratic Party candidates"—similarly alleged that they and "other Democratic voters across the State" have standing to challenge the 2016 Map because it purportedly "impairs" their "ability to elect their preferred congressional candidates"—*i.e.*, more Democrats. JA238, 241; *see also* JA233 (complaining that the 2016 Map "dilut[es] the electoral influence of one party's supporters").

To be sure, plaintiffs attempted to retrofit their complaints to the teaching of *Gill*. But neither of the two theories on which the district court found that they have standing survives scrutiny. The court first found that certain individual Common Cause plaintiffs suffered district-specific "dilutionary" injuries because their votes could "carry more weight" in districts under their "hypothetical" proposed plans, including Plan 2-297. JS.App.49-50 & n.10, 63

(alteration omitted).[4] In the court's view, these "dilutionary" injuries entitled plaintiffs to press all four of their constitutional claims. JS.App.63, 68-69, 77-78. In reality, however, most of these purported "dilutionary" injuries suffer from the same flaw this Court identified in *Gill*: Plaintiffs failed to prove that any alleged partisan gerrymandering "affected" their "ability to vote for and elect a Democrat in [their] district[s]." *Gill*, 138 S. Ct. at 1925.

Consider plaintiff Alice Bordsen, who resided in CD4 and was among the majority's leading examples of someone suffering "dilutionary" injury. JS.App.54. In both the 2014 and 2016 elections—the only two elections she lived in CD4[5]—Bordsen's candidate of choice *prevailed*. Dkt.101-15:12-13. And by plaintiffs' own expert's telling, in hypothetical elections conducted under their proposed "neutral" plan, the Democratic candidate would win even more of the two-party vote—63.22%—than the 62.32% won under the 2016 Map. JA275. Thus, like the lead plaintiff in *Gill*, Bordsen's district would have been "heavily Democratic" "under any plausible circumstances." 138 S. Ct. at 1924. Bordsen is not alone in this regard.

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[4] After this Court vacated the district court's decision in light of *Gill*, the League plaintiffs claimed standing in 12 districts, either through "individual voter plaintiffs and/or League members." Dkt.139:14-17. But with the exception of two of those districts, the League never provided any specific information about the identities of these individuals, or what they believed their injuries to be. Meanwhile, the district court concluded that numerous individual voter plaintiffs named in the League's complaint lacked standing. JS.App.66-67.

[5] Bordsen moved to the heavily Democratic area of Chapel Hill in 2013. Dkt.101-15:9-14.

The district court found that other plaintiffs living in Democratic districts had standing on a "dilutionary" theory even though their districts would remain majority-Democratic under their own proposed maps. *See* JS.App.51-52, 61-62 (plaintiffs Larry Hall and John Gresham in CD1 and CD12); JA275. Such plaintiffs suffer no cognizable injury, dilutive or otherwise, under *Gill* or any other viable theory.

The district court also committed the same error in reverse. For instance, Richard and Cheryl Taft—residents of CD3—live in a Republican-leaning district. Under the 2016 Map, the Republican candidate in their district was projected to win 54.92% of the two-party vote share and ultimately prevailed. JS.App.237; JA275. Under plaintiffs' proposed plan, the "expected Republican vote share" in the Tafts' district was 54.43%. JS.App.238; JA275. Thus, regardless of the supposed "gerrymander," the Tafts would live in a Republican district represented by the same Republican Congressman who has represented CD3 for nearly 25 years. Underscoring the absence of any concrete and particularized injury, the Tafts themselves voted to re-elect the incumbent. Dkt.101-10:18; Dkt.101-11:15.

Tellingly, the League plaintiffs have agreed that the Tafts suffered no "dilutionary" injury, and they concede, contrary to the district court's conclusions, that *no* plaintiff has standing to challenge CD3. Mot.24. They likewise concede that no plaintiff has standing to challenge CD10 and CD11, Mot.9, districts that (along with CD3, CD6, and CD7) were projected to remain majority-Republican districts under plaintiffs' proposed plan. JA275. Indeed, of the 13

districts that the district court invalidated as partisan gerrymanders, there are only three that plaintiffs claim would have changed hands under their proposed map. JS.App.48 n.10.

Even as to those, plaintiffs lack a legally cognizable injury. After all, plaintiffs are not complaining that their votes *actually* carry less weight, as is the case in a malapportionment claim. Nor are they complaining that they were placed in their districts on the basis of an impermissible consideration like race. They are just complaining that they want to live in districts that make it easier to elect their preferred candidates. But every voter would like to live in a district that produces the voter's ideal candidate in election after election, and no one does. Partisan identity is just one of the many aspects of a candidate that pleases or frustrates any particular voter, and voters do not have a legally protected interest in being able to vote for candidates they like. If each vote is counted and counted equally, and no one is sorted by race or another invidious basis, then individual voters lack an Article III injury. This Court has never embraced "the extraordinary proposition that voters have a legally protected and judicially cognizable interest in the particular political composition of their districts." Br. for United States as *Amicus Curiae* 16, *Wittman v. Personhuballah*, No. 14-1504 (U.S. Feb. 3, 2016).

3. The district court's alternative holding—that plaintiffs have suffered "non-dilutionary" injuries that allow them to challenge the *entire* map under the First Amendment and the Elections Clauses—is even more deeply flawed and inconsistent with *Gill*, as it would

give essentially every voter in the State the right to challenge every district in the State. Take League plaintiff Elizabeth Evans, a resident of heavily Democratic CD1. The district court found that Evans *lacked* standing to raise an equal protection challenge because she expressly disclaimed any district-specific injury. *See* JS.App.66-67 ("I have a problem with the plan statewide[.]"). The court nonetheless concluded that Evans *did* have standing on a "non-dilutionary" theory because she testified that, in "the most recent election, a lot of people did not come out to vote" "[d]espite my calling them." Dkt.101-7:16; JS.App.70. The court further concluded that these "non-dilutionary" injuries "do not stop at a single district's lines," but rather empowered Evans to challenge the map "as a whole." JS.App.74.

The League plaintiffs have declined to defend this radical theory, and rightly so. *See* Mot.21-25 (asserting only a "dilutionary" theory). As Judge Osteen explained, these kinds of exceedingly generic injuries implicate nothing more than a general "interest 'in the[] collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Gill*, 138 S. Ct. at 1931. Calling that a First Amendment injury (or, worse still, an Elections Clause injury) does not change the fact that it is a "'general interest common to all members of the public.'" *Id.*

Indeed, recognizing such an abstract interest as a sufficient basis for a federal lawsuit may be even more dangerous than opening up federal courts to partisan gerrymandering claims. The latter claims are at least limited to relatively rare districting legislation, while

all manner of ordinary legislation could be said to make it marginally harder to rally fellow citizens to vote, organize, or take to the street. The answer to all that legislation is more constitutionally protected speech, petitioning, and other effort, not a lawsuit based on nothing more than a grievance that a Republican-controlled legislature that could have drawn a map with six Democratic-leaning districts drew one with only three. That does not give rise to a concrete and particularized injury, let alone violate any cognizable constitutional protection.

II. Partisan Gerrymandering Claims Are Not Justiciable.

Plaintiffs' claims suffer the deeper defect that they are nonjusticiable. Indeed, much of the difficulty that plaintiffs here and in *Gill* have had in identifying a concrete and particularized injury stems from the lack of a justiciable underlying claim. For most of the history of the Republic, the notion that the answer to partisan gerrymandering would lie in the federal courts would have been quite remarkable. And, in contrast to one-person-one-vote and racial discrimination claims, this Court has never been able to settle on an administrable standard for adjudicating such claims.

Fifteen years ago, a plurality of this Court concluded that this is because judicially discernible and manageable standards for resolving partisan gerrymandering claims do not exist. *See Vieth*, 541 U.S. at 281-82 (plurality op.). That conclusion was correct then, and it is even more obviously correct today. The framers, in their wisdom, delegated the sensitive task of federal oversight of state-enacted

congressional districting legislation to Congress, not the federal courts. In part because of that delegation, there are no judicially manageable standards to discover. The many "years of judicial effort with virtually nothing to show for it," both before and after *Vieth*, confirm "that the judicial department has no business entertaining" partisan gerrymandering claims. *Id.* at 277, 281.

A. The Framers Delegated the Delicate Task of Federal Oversight of State Regulations Concerning Congressional Elections to Congress, Not Federal Courts.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), this Court identified six factors relevant to determining whether a claim is nonjusticiable. More recent cases have focused on the first two of those factors—textual commitment to a coordinate branch and lack of judicially manageable standards—as the most salient. *See, e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012); *Nixon v. United States*, 506 U.S. 224, 228 (1993). In *Zivotofsky*, for example, the Court limited its analysis to these two factors, and the plurality in *Vieth* observed that the *Baker* factors "are probably listed in descending order of both importance and certainty." 541 U.S. at 278. Here, the first two factors both point in the same direction: Claims that congressional districting maps constitute unconstitutional partisan gerrymanders are not justiciable.

The framers hotly debated whether some part of the newly formed federal government should have a supervisory authority over state laws regulating the

times, places, and manner of congressional elections. Some wanted to give the exclusive authority to regulate congressional elections to the newly created federal Congress, while others wanted to give plenary authority to state legislatures with no possibility of a federal override. That debate took place in terms familiar to contemporary debates over partisan gerrymandering. The framers understood that the composition of the new federal Congress would differ from that of the state legislature in ways that might favor one faction over another. *See, e.g.*, 2 *Debates* 26-27.

The framers ultimately reached a compromise reflected in the Elections Clause of Article I, §4, Clause 1, in which state legislatures would have primary authority to set the regulations for the "times, places, and manner" of congressional elections, including district lines, but "Congress may at any time by law make or alter such regulations." In reaching that compromise, it was not lost on the framers that state legislatures might try, as colonial legislatures did before them, "to mould their regulations as to favor the candidates they wished to succeed." 2 *Records* 241. But the framers countered ambition with ambition, giving state legislatures the power to draw congressional districts, and textually committing the power to override their districting laws to Congress.

Three aspects of this textual delegation to Congress are notable. Each underscores that partisan gerrymandering claims are not justiciable.

First, it is telling that at no point during this debate did it occur to anyone that the federal courts were the proper entity to oversee election regulations

to ensure they did not give undue advantage to any one party or faction. To be sure, the principal axis for the discussion was a vertical debate about federalism, not a horizontal debate about which branch of the federal government would perform the supervision. But that is the point. It was obvious to the framing generation that the whole business of regulating the times, places, and manner of congressional elections was so inherently political and so fraught with temptations for partisan manipulation that the only branch suitable for a supervisory role was the federal Congress. As the plurality put the point in *Vieth*, "[t]he 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." 541 U.S. at 285. The idea that federal courts should be dragged into the business of refereeing disputes about whether election regulations were too nakedly political recommended itself to no one.[6]

Second, the framers' decision to delegate this supervisory authority to Congress reflected not only that such a role was appropriate for a legislative body, but also that the role was wholly antithetical to the

[6] To be sure, the textual delegation to Congress in the Elections Clause is limited to congressional elections. But that does not suggest that partisan gerrymandering claims concerning the districts drawn for state and local elections are any more justiciable. To the contrary, the primary debate over the Elections Clause was a federalism debate, and a justification for federal intrusion into state and local elections, as opposed to congressional elections, did not even occur to the framers. Instead, the framers left that authority with the States and did not *sub silentio* transfer it to the federal courts. *Cf.* U.S. Const. amend. X.

independence necessary for the Article III courts to discharge their core function. Needless to say, since the idea of giving the new federal courts a partial office in supervising election regulations never occurred to anyone in the framing generation, there is no direct discussion of why doing so would be a bad idea. That said, the framers did give passing thought to assigning other politically fraught tasks to the new federal courts, and they rejected such assignments in an effort to preserve the necessary independence of the Article III courts.

Take, for example, the debate over where to locate the power to try impeachments, which this Court surveyed in *Nixon*. The framers struggled with where to lodge that awesome power and briefly considered assigning it to this Court. But beyond the presiding role of the Chief Justice in presidential impeachment trials, the framers rejected a judicial role for a host of reasons, including that judicial involvement in such a politically fraught task was inconsistent with the core judicial role, the composition of the Court, and the independence of Article III courts. *See Nixon*, 506 U.S. at 233-36. In particular, the framers thought this politically charged role should be discharged by a more numerous body that was politically accountable, and worried that judicial involvement in impeachment would compromise the ability of courts to consider any related criminal proceedings impartially. *Id.* More broadly, the framers were concerned that involvement in such a politically divisive task could undermine the Court's reputation in ways that prohibited it from discharging its core functions. All of those same concerns would apply in spades to judicial oversight designed to ensure that election regulations are not

unduly partisan or do not favor one party over another too much.

Third, Congress has exercised its authority and continues to actively debate measures to address concerns with partisan gerrymandering. As noted, *see* pp.6-7, *supra*, Congress has long employed its Election Clause authority to dictate how States undertake congressional districting. For many decades, Congress imposed requirements of compactness and contiguousness. *See* Apportionment Act of 1842, 5 Stat. 491; Apportionment Act of 1911, 37 Stat. 13. In addition, Congress has always possessed, and sometimes exercised, *see* 55 Stat. 761, 762 (1941), the power to essentially moot issues of partisan congressional districting by providing for statewide elections, rather than single-member districts.

The power to address partisan gerrymandering has not been lost on more recent Congresses. During the last Congress, legislators introduced numerous bills and resolutions seeking to do just that. *See* S. 3123, 115th Cong. (2018); H. Res. 364, 115th Cong. (2017); H. Res. 343, 115th Cong. (2017); H. Res. 283, 115th Cong. (2017). And the very first bill introduced by the House of Representatives in the current Congress seeks to do the same. *See* H.R. 1, 116th Cong. §2400 *et seq*. (2019). The League plaintiffs' own counsel has professed confidence that this bill "*is* going to be passed by the House," and that, "[i]f Democrats win unified control of Washington in 2020, it's also likely that some or all of H.R. 1 will become law." Nicholas Stephanopoulos, *H.R. 1 and Redistricting Commissions*, Election Law Blog (Jan. 9, 2019), https://bit.ly/2RSEj86.

The ultimate success or failure of such initiatives will depend on the decisions of politically accountable legislators, which is precisely what the framers intended. The idea that similar limits should be imposed by designedly independent judges who would be forced into the political thicket time and again pursuant to mandatory appellate jurisdiction should be a non-starter. The framers delegated this delicate and politically fraught task to Congress for good and sufficient reasons, and this Court should decline the invitation to reassign the authority to itself.

Finally, it bears emphasis that nothing in the Reconstruction Amendments suggests a revisiting of the original allocation of authority to Congress. Those amendments plainly altered the federal-state balance in important respects, and even more obviously made clear beyond cavil that the use of race by state actors stands on a different footing from the consideration of all other matters, including partisan politics. But nothing in those amendments revisits the Election Clause or suggests that federal courts should become involved in the dangerous business of trying to determine how much partisan motivation is too much when it comes to districting or other election regulations.[7]

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[7] In light of the Reconstruction Amendments, the textual commitment to Congress in the Elections Clause does not mean that all claims concerning congressional districting, including one-person-one-vote or racial gerrymandering claims, are nonjusticiable. To the contrary, the central lesson of *Baker* is that whether a claim is justiciable turns on the precise nature of the claim and the constitutional provision invoked. *See* 369 U.S. at 208-37 (finding one-person-one-vote claim justiciable under

B. There Are No Judicially Discernible or Manageable Standards for Adjudicating Partisan Gerrymandering Claims.

Partisan gerrymandering claims plainly flunk the second critical test for justiciability. Time has proven that there are no judicially manageable standards waiting to be found.

1. While partisan gerrymandering is as old as the Republic, this Court's history with such claims is unproductive, revealing, and short. For most of the Nation's history, it did not even occur to anyone that a distinct judicial remedy for this inherently political problem existed. While litigants might assail partisan motivations as part of their rhetoric in bringing claims under state constitutions or the Guarantee Clause, claims that a gerrymander was unconstitutional simply because it was too partisan were unheard of. This absence of "partisan gerrymandering" claims was not for lack of partisan gerrymandering. To the contrary, some of the most egregious partisan gerrymanders in our history, including the redistricting that lent its name to the practice, took place in the early years of the Republic. What is more, the scope for partisan gerrymandering was even greater before this Court began policing equal population requirements. Nonetheless, for roughly 150 years, filing a lawsuit complaining that a partisan gerrymander was unconstitutional because it was too partisan was seen as a *non sequitur*.

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the Fourteenth Amendment without overruling cases finding comparable claims under Guarantee Clause nonjusticiable).

This Court's decision in *Baker v. Carr* provided the impetus for litigation attacking partisan gerrymandering, but it was not until 1986 that a majority of the Court declared itself not "persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided." *Bandemer*, 478 U.S. at 110. Nonetheless, that same majority failed to agree on what those judicially discernible and manageable standards might be, and subsequent efforts by lower courts and this Court have proven no more successful. In *Vieth*, for example, the plurality surveyed the efforts of the lower federal courts in the wake of *Bandemer* and found "[e]ighteen years of judicial effort with virtually nothing to show for it." 541 U.S. at 281. Moreover, in *Vieth* itself, the four Justices who would have held partisan gerrymandering claims justiciable "c[a]me up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed" by the challengers there. *Id.* at 292.

The search for a judicially administrable standard has proven no more successful in the years since *Vieth*. The first court to perceive that it had identified the elusive standard had its efforts vacated by this Court for the lack of standing. *See Gill*, 138 S. Ct. at 1933. In the wake of *Gill*, partisan gerrymandering claims have proliferated, but what has become crystal clear is not an administrable standard but the institutional costs of this litigation to the integrity and independence of the courts. Since *Gill*, maps in three States (North Carolina, Pennsylvania, Maryland) have been invalidated in whole or in part, and partisan gerrymandering claims remain pending in

Ohio, Michigan, Wisconsin, and North Carolina (now challenging the state map). Predictably, these claims target States where voters are closely divided and politically motivated challengers have the most to gain from a victory in the courts. Predictably, these inherently political cases tax the federal courts' reputation for independence; indeed, one of the state court decisions promptly produced threats to impeach the judges involved. Predictably, every single one of these cases has already found its way to this Court at least once, and such cases would continue to pile up on this Court's mandatory appellate docket if they are given this Court's imprimatur. Yet what all of these cases have still failed to produce is any consensus on how to resolve them.

2. The courts' persistent inability to discern any manageable standards for adjudicating partisan gerrymandering claims is no accident. The difficulty is not the failure to perceive a judicially manageable test that lies just beyond the judicial grasp. The problem is far more fundamental: Partisan gerrymandering is simply not amenable to a judicial solution. The framers understood the political nature of this issue and attempted to address it structurally by imposing Congress as a check on state legislatures. But nothing in the Elections Clause or any constitutional amendment since gives the courts the tools to address this problem or the text from which to derive an administrable test. In the absence of such text, the courts are simply being invited to invent a test for determining when political branches organized along partisan lines and deliberately assigned an inherently political task engage in "too much" partisan activity. The Constitution provides no

basis for a judicial answer to that question, and forging ahead nonetheless threatens to undermine the independence and integrity on which the Article III courts depend in adjudicating questions where the Constitution provides clear but unpopular answers.

The fundamental absence of judicially administrable standards is well illustrated by the shortcomings in the elements of the tests commonly proposed. Ever since *Bandemer*, tests for undue partisan gerrymandering typically have combined three elements: intent, effects, and some effort to measure the extent of partisan advantage or distortion. Each of those elements is misguided and exposes the more fundamental problems with identifying a judicially manageable standard.

Intent. Intent tests are a standard feature of constitutional law, but they are generally employed because government action taken with a certain intent is constitutionally forbidden. The most obvious example is racial discrimination. This Court's cases focus on discriminatory intent precisely because intentional discrimination on the basis of race is verboten in all but the narrowest of circumstances. But while intentionally dividing voters on the basis of race is constitutionally suspect, it is not open to this Court to say that "the purpose of segregating voters on the basis of [politics] is not a lawful one" under the Constitution. *Vieth*, 541 U.S. at 286 (plurality op.). "[P]artisan districting is a lawful and common practice." *Id.* Thus, from the beginning of its efforts to police partisan gerrymandering, this Court has acknowledged that a degree of partisan motivation is

inevitable, understandable, and constitutionally acceptable.

Bandemer, for example, acknowledged that "[p]olitics and political considerations are inseparable from districting and apportionment." 478 U.S. at 128 (plurality op.). It could hardly be otherwise. It would be quixotic to believe that a motivation that is inherent in political bodies organized along partisan lines is somehow constitutionally suspect. If it were, all manner of legislation, not just or even especially redistricting legislation, would be imperiled. To take just the most recent example, it is hard to understand the various legislative and executive actions that contributed to the extended government shutdown as free from partisan motivation. That may make the actions frustrating, but that hardly makes them unconstitutional.

But if some partisan intent is permissible, then the real question is "the original unanswerable question": "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 296-97 (plurality op.). An intent test that is satisfied by any degree of partisan motivation does nothing to answer that question. As the *Bandemer* plurality candidly admitted, "[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." 478 U.S. at 129. And as the *Vieth* plurality recognized, an inquiry into partisan intent that will always be satisfied does nothing to advance the ball. Simply identifying some degree of intent does not even raise a yellow flag, let

alone reveal what degree of intent crosses a constitutional line.

Effects. In most areas of constitutional law, an effects test is embraced because a constitutionally forbidden motivation is difficult to prove. For example, race-based government action is both a constitutional anathema and difficult to prove, and so the Constitution sometimes invalidates laws with discriminatory effects even when concrete proof of discriminatory intent is lacking. *See Vill. of Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252, 266 (1977). In partisan gerrymandering cases, the effects test serves almost the opposite function. Partisan intent or motivation is so easy to prove that an effects prong is desperately needed to reduce the universe of false positives to respectable numbers. But, of course, attempting to identify the impermissible effects of a sometimes-benign motive is a fool's errand. Thus, the best that can be said for an effects test is that, like the intent inquiry, it elides the critical question of how much partisan effect is too much—a question on which the Constitution is utterly silent.

The effects inquiry suffers a deeper flaw. To be coherent, an effects inquiry needs a baseline, and that baseline needs to be grounded in constitutional law. Racially discriminatory effects can be measured against a baseline of race-neutrality. Population inequality can be measured against a one-person-one-vote baseline. There is no comparable constitutionally grounded baseline in partisan gerrymandering cases. Instead, nearly every effects test implicitly or expressly assumes a baseline of "some form of rough proportional representation." *Bandemer*, 478 U.S. at

145 (O'Connor, J., concurring). A congressional map has an impermissibly partisan effect because partisan results under the map deviate too much from the overall partisan makeup of the State. But this Court's cases "clearly foreclose any claim that the Constitution requires proportional representation." *Id.* at 130 (plurality op.). It is, after all, "inherent in winner-take-all, district-based elections" that the distribution of seats may vary wildly from statewide vote totals. *Id.* Indeed, under a highly competitive map, "even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Id.*

Measuring Distortions. Efforts to measure the extent of partisan distortion suffer from the twin problems that they assume without constitutional grounding that some extent is too much and that deviations from proportional representation tend to evidence the problem. But even beyond those basic flaws, efforts to measure the problem underscore that this whole undertaking is not a judicially manageable task. Take, for instance, the vaunted "efficiency gap." The efficiency gap looks back at actual elections and treats every vote cast for a winning candidate "in excess of what the candidate needed to win," and every vote cast for a losing candidate, as a "wasted" vote. JS.App.192. At the outset, that fundamentally misunderstands how politics works. Votes cast for the losing candidate may entice the winner to "adopt more moderate, centrist positions," while a landslide may give the winner a mandate to seek more sweeping policy changes. *Whitford v. Gill*, 218 F. Supp. 3d 837, 954 (W.D. Wis. 2016) (Griesbach, J., dissenting).

But the efficiency gap suffers from even more serious problems, as it routinely identifies "bipartisan districting plans or districting plans drawn by courts or nonpartisan commissions" as egregious partisan gerrymanders. JS.App.203. That is no small embarrassment. Proponents of the test dismiss those false positives and suggest hopefully that commissions and judges would never engage in intentionally partisan gerrymandering. But that is no answer to the false positives produced by the test, which are particularly problematic given that the same intent test that proponents would use to weed out the judicially drawn maps will be automatically satisfied any time a legislature—the constitutionally preferred agent—draws the map.

In truth, the false positives produced by the efficiency gap and comparable tests reflect the reality that, in many States, Democratic voters are concentrated in or near urban areas while Republican voters are more evenly distributed. As a result, the pre-existing political geography of the State will tend to produce more "wasted" Democratic votes than Republican votes as long as the mapdrawer follows traditional districting principles like compactness, contiguity, and preserving communities of interest. The first prerequisite for any judicially administrable test in this area is partisan neutrality. Yet the efficiency gap test has a built-in bias that causes it to condemn Republican gerrymanders as impermissible more readily than Democratic gerrymanders.

Despite its many flaws, the efficiency gap analysis at least has the virtue of analyzing actual elections. The "partisan bias" and "mean-median difference"

metrics, by contrast, require "calculat[ing] the number of seats each party would win" in a hypothetical election under a hypothetical map. JS.App.206-07; *see* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of A Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1510 (2018) (noting that "hypothetical election[s]" are "explicit in partisan bias and implicit in the mean-median difference"). This Court has long been "wary" of any test that would "invalidate[] a map based on unfair results that would occur in a hypothetical state of affairs." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.). For good reason, as neither courts nor social scientists have proven particularly adept at predicting the results of hypothetical elections.

Indeed, "[f]or all the confidence political experts may have in their predictions of future election results, *Vieth* itself stands as a stark reminder that they can be wrong." *Gill*, 218 F. Supp. 3d at 937 (Griesbach, J., dissenting). While the plaintiffs in *Vieth* insisted Pennsylvania's congressional map was "rigged to guarantee that thirteen of Pennsylvania's nineteen congressional representatives will be Republican," Democrats proceeded to win a majority of the seats under that map in the next two elections. *Id.* Likewise, two years after *Bandemer*, the supposedly disadvantaged Indiana Democrats won half the seats under the challenged map, and they won a majority the following election.[8] And in the lone case to find a partisan gerrymander before *Gill*, a district

[8] *See Election History for Indiana*, Polidata.org, https://bit.ly/2SfIR9n (last visited Feb. 7, 2019).

court "concluded that North Carolina's system of electing superior court judges on a statewide basis" would wholly exclude Republican candidates for years to come—only to see every single Republican on the ballot prevail in an election held a mere five days later. *See Republican Party of North Carolina v. Hunt,* No. 94-2410, 1996 WL 60439 (4th Cir. Feb. 12, 1996) (per curiam).

These predictive failings reflect the realities that real elections turn on the qualities and foibles of real candidates, and "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next." *Vieth*, 541 U.S. at 287 (plurality op.). The broader failure to identify an adequate test is not the product of insufficiently advanced political science, but of the "'more fundamental[]'" problem that partisan gerrymandering simply does not map onto "'any cognizable constitutional claim.'" *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring) (quoting *Baker*, 369 U.S. at 337 (Harlan, J., dissenting)). As the *Vieth* plurality explained, "[b]efore considering whether [a] particular standard is judicially manageable," courts must determine "whether [the standard] is judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 287-88. After all, "[n]o test … can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. And "[t]his Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." *Id.* at 295. The search for a judicial manageable test for identifying partisan gerrymandering claims has failed for the most basic reason of all: The claims do not implicate any discernible constitutional right.

III. The District Court's Tests Are The Antithesis Of Judicially Discernible And Manageable Standards.

The conclusion that partisan gerrymandering claims are nonjusticiable is only reinforced by the amorphous tests that the district court adopted. Indeed, "the mere fact" that the court "c[a]me up with [four] different standards"—each more sweeping and less forgiving than the last—"goes a long way to establishing that there is no constitutionally discernible standard." *Id.* at 292.

1. Equal Protection Clause

The district court began where most efforts to discern a judicially manageable test have begun, concluding that a districting plan violates the Equal Protection Clause whenever (1) it was passed with "discriminatory intent" and (2) produces "discriminatory effects" (3) that cannot be attributed to "another legitimate redistricting objective." JS.App.138-39. That test possesses all the flaws identified above and then some.

The district court began by positing that *any* amount of districting for partisan advantage violates the Equal Protection Clause. Thus, rather than immediately attempting to answer the unanswerable question of how much is too much, the district court asserted that any amount will do, disclaiming the need to "distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." JS.App.118. That proposition is flatly at odds with decades of decisions from this Court concluding that not all partisan gerrymandering violates the Constitution. *See, e.g., Cromartie I*, 526

U.S. at 551 (a "jurisdiction may engage in constitutional political gerrymandering"); JS.App.339 (Osteen, J.) (collecting cases). Indeed, even Justices who have found partisan gerrymandering claims *justiciable* have readily acknowledged that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *see also id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164-65 (1986) (Powell, J., concurring in part and dissenting in part). Simply put, the Constitution cannot be read to foreclose something that it plainly contemplates.

Perhaps recognizing that this extreme theory is a nonstarter in this Court, the district court alternatively "assume[d]" that, to satisfy the intent prong, a plaintiff must prove that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power.'" JS.App.145-46. But a majority of this Court has already rejected a predominant intent test as both "dubious and severely unmanageable." *Vieth*, 541 U.S. at 286 (plurality op.); *see also id.* at 306-07 (Kennedy, J., concurring).

The predominant intent standard sounds comfortingly familiar because it is borrowed from the racial gerrymandering context. But there, it plays a very different role. In the race context, the predominant intent standard allows a generally prohibited intent—government action based on race—to escape strict scrutiny if that racial intent does not predominate. *See Miller v. Johnson*, 515 U.S. 900 (1995). Here, by contrast, the district court would take

a generally permissible intent—partisan advantage—and subject it to demanding consideration because it predominated. But that begs the questions why a motivation that is permissible in small doses becomes unconstitutional in larger doses, and what dosage makes partisan intent predominant.

The district court embraced an equally untenable "discriminatory effects" test, requiring a plaintiff to "show that the dilution of the votes of supporters of a disfavored party … is likely to persist in subsequent elections such that an elected representative from the favored party … will not feel a need to be responsive to constituents who support the disfavored party." JS.App.152. That test purports to protect "that minimal degree of representation" to which a voter "is constitutionally entitled," *Vieth*, 541 U.S. at 297 (plurality op.)—*viz.*, the representative must not be so partisan that she will not "feel a need" to respond to the voter.

At the outset, this Court does not share the district court's apparent view that a sufficiently "safely" elected candidate will not be responsive to constituents who supported her opponent(s). Instead, "[a]n individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district"—"even in a safe district where the losing group loses election after election." *Bandemer*, 478 U.S. at 132 (plurality op.). Nor does "[t]he Constitution … share" the district court's "alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives." *Vieth*, 541

U.S. at 288 n.9 (plurality op.). "[W]hether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are 'effectively' distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts)" is a dispute in which "[n]either Article I, §2, nor the Equal Protection Clause takes sides." *Id.*[9]

But even accepting the district court's dubious premises, the court failed to identify any judicially manageable standard for "show[ing] that the dilution of the votes of supporters of a disfavored party … is likely to persist in subsequent elections." JS.App.152. *How much* dilution must occur to trigger constitutional scrutiny? *How likely* must the dilutive effect be to persist, and *for how long*? *What evidence* suffices to prove any of this? "[T]he devil lurks precisely in such detail." *Vieth*, 541 U.S. at 296 (plurality op.). Yet rather than answer those critical questions, the court announced that plaintiffs may rely on all manner of social-science metrics—district-specific or statewide, including metrics that measure deviations from proportional representation—to try to prove a "discriminatory effect" under "that test most beloved by a court unwilling to be held to rules (and

[9] Moreover, if anything, partisan gerrymandering would seem to ameliorate the district court's non-responsiveness concern. Presumably "non-responsiveness" would be most acute in districts where majority-party voters outnumber minority-party voters by large numbers. Partisan gerrymandering, however, tends to avoid the concentration of majority-party voters in a small number of districts. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

most feared by litigants who want to know what to expect)," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting): a nebulous totality-of-the-circumstances approach. JS.App.214. The district court should not be able to hide its utter failure to identify the circumstances that actually matter by saying the outcome turns on the totality of them.

Moreover, the court's test's focus on the persistence of partisan advantage in future elections necessarily rests on the kind of predictions about what election "results … would occur in a hypothetical state of affairs," *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.), that this Court has questioned and experience has proven unreliable. This Court need only look at CD9 to see that this problem persists. Just two months after the district court invalidated CD9 as a purportedly entrenched pro-Republican gerrymander, JS.App.259, the Democratic and Republican candidates were locked in such a tight race—139,246 votes to 138,341 votes—that a winner *still* has not been certified. *See supra* n.3. Even if the Republican prevails, it is fanciful to suggest he will not "feel a need" to respond to voters of the opposing party. *See Gill*, 218 F. Supp. 3d at 954 (Griesbach, J., dissenting) (legislators "will of necessity be more responsive to the 49% of the electorate that did not vote for them").

Finally, the "justification" prong of the district court's test does nothing to solve the problems with the first two prongs; instead, it simply reverses the normal burden of proof for establishing a constitutional violation. Indeed, a test that combines an intent prong that is essentially satisfied as long as the mapdrawer

is a legislature with an effects prong that turns on the totality of barely adumbrated circumstances and a third prong that is an affirmative defense might as well require the legislature to come to court and justify itself. That test may make the plaintiffs' burden eminently manageable, but it hardly amounts to a judicially manageable standard for determining how much partisan advantage is too much.

2. First Amendment

The district court's First Amendment test is even more problematic, as it would essentially ban consideration of *any* political data in redistricting. According to the majority, to prove a First Amendment violation, a plaintiff must show: (1) "the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party," (2) "the districting plan burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." JS.App.286. That is not so much a test for identifying partisan gerrymandering as it is an effort to eradicate all consideration of politics from districting.

After all, any map drawn with any partisan considerations in mind (which is to say, virtually any map drawn, as the Constitution contemplates, by a legislature) is "intended to favor or disfavor individuals or entities that support a particular candidate or political party" in some sense. Take the map this Court upheld in *Gaffney v. Cummings*, 412 U.S. 735 (1973). The legislature "'wiggle[d] and

joggle[d]' boundary lines" to try to ensure that candidates associated with particular political parties would win. *Id.* at 752 n.18. The district court's test would view that map as fundamentally flawed, yet this Court unanimously upheld it. The time-honored practice of protecting incumbents likewise is invariably intended to ensure that some voters in a district "will lose any chance to elect a representative who belongs to their party." *Bandemer*, 478 U.S. at 154 (O'Connor, J., concurring). In short, *every* map favors or disfavors someone, and "it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.* at 129 (plurality op.).

The problems do not end there. The majority overcame the considerable hurdle that congressional districting enactments look nothing like a law abridging free speech by concluding that First Amendment rights are "in fact" burdened whenever the legislature's political considerations have anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. JS.App.288. The court then underscored how truly *de minimis* that standard is by finding it satisfied by testimony that, *e.g.*, "a lot of people did not come out to vote"; "[i]t was really hard to try to galvanize people to participate"; and people "believed they could not have a democratic—small 'D'—democratic impact." JS.App.290. The court proceeded to conclude that a districting map can "adversely affect … voters' First Amendment rights" "even if the speech of voters who support [purportedly disfavored] candidates [is] not *in fact* chilled." JS.App.294. Instead, it is enough that a map "makes it easier for supporters of [one party's]

candidates to translate their votes into seats." JS.App.294.

That is exactly "the kind of undifferentiated, generalized grievance about the conduct of government that [this Court] ha[s] refused to countenance in the past." *Gill*, 138 S. Ct. at 1931. Indeed, the district court did not tether this novel test to any district-specific injury; it instead concluded that these "non-dilutive" First Amendment "injuries" can be suffered statewide. Moreover, once the district court's minimal intent and effects prongs are satisfied, there is no real way for a legislature to avoid liability, as the court's circular "causation" prong asks only whether the impacts of the legislature's intent to favor or disfavor some voters can be explained by something other than its intent to favor or disfavor some voters. JS.App.299.

"Perhaps the most telling indication of the severe constitutional problem with" the district court's First Amendment theory "is the lack of historical precedent" for it. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010). Partisan gerrymandering is as old as the Republic, yet it has never been treated as a First Amendment problem. And with good reason, as the majority's boundless test proves the wisdom of the *Vieth* plurality's observation "that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294. If all legislating for partisan advantage is a species of viewpoint discrimination, then all legislative mapdrawing will be suspect. And why stop there? Legislative redistricting is hardly the only kind of

lawmaking motivated by partisan interests and resulting in *de minimis* impact on First Amendment values. A test "ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." *Id.* at 306 (Kennedy, J., concurring).

3. Sections 2 and 4 of Article I

Not content with an equal protection test that would leave courts with unfettered discretion and a First Amendment test that would eradicate all political considerations from districting, the district court ended with the extraordinary conclusion that partisan gerrymandering violates not one, but two, of the Constitution's Elections Clauses—one of which expressly grants authority over districting to legislatures. That is the *ne plus ultra* of doctrinal incoherence.

Section 2 of Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, §2, and §4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," *id.* §4. In the district court's view, partisan gerrymandering violates §2 because it deprives "the People" of their right to elect Representatives, JS.App.306-07, and it violates §4 because, *inter alia*, §4 does "not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts," JS.App.303. No court has ever reached such conclusions, and it is little wonder

why. As the *Vieth* plurality explained (without objection from any Justice), "neither Article I, §2, nor … Article I, §4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. at 305.

Undeterred, the district court held that *any* amount of districting for partisan advantage violates §2 because such districting transgresses a "core principle of republican government"—*viz.*, "that voters should choose their representatives, not the other way around." JS.App.309. There is, of course, a clause of the Constitution that speaks directly to preserving a "republican government," and it is not the Elections Clause. It is the Guarantee Clause, and this Court has consistently found claims under that Clause nonjusticiable. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912). Reprising such claims under a provision that at best indirectly safeguards such principles does not make them any more justiciable.

The district court's §4 analysis fares no better. Much of its reasoning makes §4 claims entirely derivative of Equal Protection Clause and First Amendment claims, and so adds nothing to the analysis. JS.App.303. The balance simply advances highly debatable theorems—*e.g.*, that §4 does not "empower" legislatures to "disfavor the interests of supporters of a particular candidate or party in drawing congressional districts"—and then suggests that any degree of legislative intent to disfavor the opposing party is constitutionally suspect. That preference for entirely non-partisan mapdrawing and

legislating may be au courrant in certain circles, but it was not en vogue in Philadelphia in the summer of 1787. Rather than view the influence of faction as something that could be rooted out by federal judges, the framers viewed it as inevitable and something that could be effectively harnessed and controlled only through structural checks and balances.

That preference for structural checks is manifest throughout the Constitution, including the very clause the district court would use to empower the judiciary. Far from deeming any partisan motivation off limits, the framers delegated responsibility for regulating the times, places, and manner of election to the body most susceptible to partisan influences, subject to supervision by the federal entity most liable to partisan influence. One can question that judgment, but one cannot seriously think that the font for the long-elusive judicially manageable standards for partisan gerrymandering lies in a clause textually delegating responsibility for districting to the political branches.

IV. The 2016 Map Is Not An Unconstitutional Partisan Gerrymander.

Even if this Court were inclined to wade into this "political thicket," *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring), this would hardly be the case in which to declare for the first time ever an unconstitutional partisan gerrymander. This is not a case in which the legislature drew a map "in a way unrelated to any legitimate legislative objective," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), or "subverted" "all traditional districting criteria" to blind pursuit of maximum partisan advantage, *id.* at

318 (Stevens, J., dissenting), or "paid little or no heed to … traditional districting principles," *id.* at 348 (Souter, J., dissenting). To the contrary, in crafting the 2016 Map, the General Assembly's redistricting committee adopted and carefully adhered to traditional districting principles designed to preserve communities of interest, including "[c]ontinguity," "[c]ompactness," and "[e]qual [p]opulation." JS.App.19-21.

Indeed, plaintiffs never alleged that the 2016 Map ignored any of these principles. *But cf. Vieth*, 541 U.S. at 272-73 (plurality op.) ("[T]he complaint alleged that the districts created by Act 1 were 'meandering and irregular,' and 'ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage.'"). Nor could they, as the 2016 Map more closely conformed to traditional districting principles than any congressional map North Carolina has seen in the past quarter-century. As the district court recounted, the 2016 Map divided only 13 (out of 100) counties and split only 12 (out of more than 2000) precincts across the entire State, and no county was split between more than two districts. JS.App.25. Those statistics stand in stark contrast to maps from the 1990s and 2000s. For example, the 1992 map divided more than three times the number of counties and more than five times the number of precincts. JA326. The 2001 map—which the League plaintiffs have touted as an exemplar of one that purportedly

"did not favor either party,"[10] JA233—divided 28 counties and 22 precincts. And the 2011 map divided 40 counties and 68 precincts. JA326. Furthermore, the 2016 Map is more compact "[u]nder several mathematical measures" than the map that immediately preceded it, and it paired only two incumbents. JS.App.25.

Those results are no accident. The redistricting committee adopted contiguity, compactness, and equal population metrics that themselves acted as constraints on partisan gerrymandering. JS.App.19-21. To be sure, the committee was perfectly candid that one of its criteria was "[p]artisan [a]dvantage," and that it would "make reasonable efforts … to maintain the current partisan makeup of North Carolina's congressional delegation" while still complying with traditional districting criteria. JS.App.20. But the reason for that candor is perfectly plain. The General Assembly had just been faulted in its effort to defend its 2011 Map as a product of politics, not race, because its political motivations were insufficiently clear in the record. Given that experience and this Court's repeated reassurance that a "jurisdiction may engage in constitutional political gerrymandering," *Cromartie I*, 526 U.S. at 551, there is nothing sinister in the General Assembly's candor.

Moreover, the committee plainly did not set out to pursue partisan advantage at all costs. It sought only

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[10] In the 2010 congressional elections held under the 2001 map, "Republicans won 54 percent of votes statewide" but secured less than half of the State's 13 seats. JS.App.9.

to "make reasonable efforts … to maintain *the current* partisan makeup of North Carolina's congressional delegation." JS.App.20 (emphasis added). Plaintiffs object to that criteria because the partisan makeup of North Carolina's congressional delegation in 2016 was heavily Republican. But the bare fact that the map *could* be drawn in a manner more favorable to candidates from their preferred political party does not give them a right to insist that the map be politically gerrymandered more to their liking. If it did, then "the reapportionment task [would] recurringly [be] removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs." *Gaffney*, 412 U.S. at 749. That result simply cannot be reconciled with the reality that the Constitution assigns the inherently policy-laden task of redistricting to state legislatures.

* * *

This case exemplifies all the problems with partisan gerrymandering cases. Plaintiffs have not suffered any constitutionally cognizable injury, let alone one that courts could actually identify and remedy. Instead, their grievance is a fundamentally political one that the framers delegated to the political branches and that Article III courts lack the power or the competence to vindicate. If this Court nonetheless wades into such disputes unarmed with administrable tests grounded in constitutional text but saddled with appellate jurisdiction, it will be exceedingly difficult to extricate itself. The costs will be measured not just in frustration in being unable to answer an

unanswerable question, but in the public's inability to understand the judicial role as distinct and apolitical. The framers wisely insulated this Court from all that by delegating this politically fraught responsibility elsewhere. This Court should resist the invitation to reassign that responsibility to the Article III courts.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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APPENDIX

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U.S. Const. art. I, §2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

….

U.S. Const. art. I, §4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

….

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.