No. 18-422

In the Supreme Court of the United States

ROBERT 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 OF *AMICI CURIAE* THE AMERICAN CIVIL RIGHTS UNION AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

Earlier this year, while *Gill v. Whitford* was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional redistricting map as a partisan gerrymander. After *Gill* was handed down, this Court vacated that decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the decision below the district court largely adopted its previous reasoning and became the first post-*Gill* court to divine a justiciable test—in fact, four tests—to invalidate a legislatively enacted map as a partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate only generalized partisan preferences, the court concluded they had standing. The court then found justiciable standards for partisan gerrymandering claims under the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clause of Article I. The court found the 2016 map to violate each of those newly articulated tests and enjoined the State from using the map after the 2018 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.

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan, nonprofit legal policy organization formed pursuant to Section 501(c)(3) of the Internal Revenue Code dedicated to educating the public on the importance of constitutional governance and the protection of our constitutional liberties. The ACRU Policy Board sets the policy priorities of the organization and includes some of the most distinguished statesmen in the Nation on matters of free speech and election law. Current Policy Board members include: the 75th Attorney General of the United States, Edwin Meese III; Charles J. Cooper, the former Assistant Attorney General for the Office of Legal Counsel; William Bradford Reynolds, former Assistant Attorney General for the Civil Rights Division; former Federal Election Commissioner Hans von Spakovsky; and J. Kenneth Blackwell, the former U.S. Ambassador to the United Nations Human Rights Commission and Ohio Secretary of State.

The ACRU's mission includes defending the legislative role in redistricting, which the Constitution vests in the States. It carries out that mission by participating in redistricting and other case that present free speech issues in the context of

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[1] All parties consented to the filing of this brief by blanket or individual letter. *See* Sup. R. 37.3(a). Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

elections. These cases include *Turzai v, Brandt*, 139 S. Ct. 445 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (No. 17A790); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018); and *Citizens United v. FEC*, 558 U.S. 310 (2010).

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. Its work extends to cases involving redistricting and is reflected in SLF's filing of *amicus curiae* briefs in cases like *Cooper v. Harris*, 137 S. Ct. 1455 (2017), and *Bethune-Hill v. Va. State Board of Elections*, 137 S. Ct. 788 (2017).

SUMMARY OF ARGUMENT

The Elections Clause of the Constitution, art. I, § 4, "clearly contemplates districting by political entities" which "unsurprisingly . . . turns out to be a root-and-branch matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). Political gerrymandering claims, thus, must necessarily distinguish between acceptable and unacceptable levels of political influence in the redistricting process. Without a clear, generally applicable, politically neutral test that distinguishes between the alternatives, court should not find political gerrymandering claims nonjusticiable.

The court below advanced four legal theories to support striking down North Carolina's 2016 congressional redistricting plan as an unconstitutional political gerrymander. ACRU and SLF will address the district court's reliance on the First Amendment in this brief. That said, it believes that none of those legal theories is viable and leaves it to Appellants, other *amici*, or both to demonstrate that.

Both the Appellees' and the district court's reliance on the First Amendment is fundamentally misplaced. Even as the First Amendment protects political speech and association, it says nothing about voting. It also allows for the exercise of specific rights, but does not guarantee that the exercise of those rights will meet with success. The vindication of those rights should be a means to an end the Constitution and the Voting Rights Act do not recognize, proportional representation.

ARGUMENT

I. Introduction

The text of the First Amendment says nothing about voting. Instead, it expressly protects the freedoms of speech, the press, peaceful assembly, and petition. U.S. Const., amend I. To the extent the Constitution recognizes voting, it does so only in Section 1 of the Fifteenth Amendment, with respect to "sex," in the Nineteenth Amendment, "poll" or other taxes in the Twenty-Fourth Amendment, and

"age" in Section 1 of the Twenty-Sixth Amendment. Even if the First Amendment reaches political expression, it does so in the context of the underlying protected rights, not as a generalized, free roaming remedy for political gerrymandering. Even so, the district court found that the First Amendment provided Appellees with a basis for relief.[2]

In this brief, *Amici* will show that the district court got it wrong: The First Amendment provides no basis for overturning the 2016 North Carolina congressional redistricting plan. As Judge Osteen noted, the majority's application of the First Amendment goes too far because it would, in effect foreclose all partisan considerations in the redistricting process." App. at 343. For these reasons, it is not an appropriate test for identifying unconstitutional political gerrymandering.

The failure of the First Amendment test is important because, as Justice Scalia pointed to "[e]ighteen years of judicial effort" to identify a standard by which to judge a claim if unconstitutional political gerrymandering "with virtually nothing to show for it." *Vieth*, 541 U.S. at 281 (plurality op.). Without a test that can be applied generally and specifically, claims of political gerrymandering are nonjusticiable.

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[2] The district court also based its grant of relief on the Equal Protection Clause of the Fourteenth Amendment and the Elections Clause of the Constitution of the United States. *Amici* agree with Appellants' contentions that neither of those theories provides the necessary clear, manageable standard to be generally applied to future claims of political gerrymandering.

II. The First Amendment is a poor fit for political gerrymandering claims.

The First Amendment is generally unsuited for application in the political gerrymandering context. It specifically protects several rights that might apply to the political arena, but says nothing about the right to vote. In addition, applying the First Amendment to political gerrymandering claims collides with

Before proceeding, *Amic*i note that any standard must toe the line of determining when "a generally permissible classification has been used for an impermissible purpose." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment). The consideration of political effect in a political process is not illegitimate, but inescapable. This is particularly true when a legislative body is responsible for reapportionment because any new plan will have to garner a legislative majority to become effective. When a commission is responsible, its work remains political even if the commission doesn't have to account to the voters for its work.

More generally, this Court has repeatedly noted that the consideration of political effects in the redistricting process is not unconstitutional. That understanding originated in *Gaffney v. Cummings*, 412 U.S. 735 (1973), when the Court observed, "It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752. It may have reached its apotheosis in *Easley v. Cromartie*, 532 U.S. 234 (2001), when the Court held that politics, not race, explained the shape

of challenged districts. This was true even though, "a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Id*. at 245.

Put simply, any standard found applicable cannot sweep so broadly as to preclude all political considerations from influencing the inherently political process of redistricting.

A. The text of the First Amendment does not support Appellees' claim.

The First Amendment expressly protects the rights of speech, the press, peaceable assembly, and petition. It says nothing about voting, although the Constitution protects both speech and assembly in the context of elections. *See e.g., Minn. Voters' All. v. Mansky*; *Citizens United v. FEC,* 558 U.S. 310. In contrast, the Constitution expressly identifies the right to vote in the Fifteenth, Nineteenth (sex), Twenty-Fourth (poll tax), and Twenty-Sixth (age) Amendments.

The Court has explained that the "validity of [a] claim must . . . be judged by the specific constitutional standard which governs that right, rather than to some . . . generalized standard." *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also United States v. Lanier,* 520 U.S. 259, 272n.7 (2009) ("*Graham* simply requires that if a constitutional claim is governed by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed

under the standard applicable to that specific provision, not under the rubric of substantive due process."). In *Graham*, the claim arose in the context of an investigatory stop, so the governing provision was the Fourth Amendment. Given the specificity of the rights protected by the First Amendment, applying it generally to fight political gerrymandering smacks of applying due process to claims covered by the Fourth Amendment, something this Court declined to do in *Graham*.

Political gerrymandering doesn't involve the denial of the right to vote based on race, gender, or age. Likewise, it imposes no poll tax or other precondition for voting. This Court's inquiry should end because none of the constitutional amendments that specifically address voting have anything to do with political gerrymandering.

B. Applying the First Amendment to judge political gerrymandering claims raises significant doctrinal tensions.

The district court's pastiche of case law and doctrines misses the point in another way.[3] When this

[3] For example, the district court drew its definition of political gerrymandering from *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), opining that such a practice "strikes at the heart" of the principal of equal treatment. App. at 4. If so, the outcome in the Arizona case might have been different because partisan considerations played a substantial part in the drawing of that plan. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 3109 (2016) (pointing to the district court's conclusion that "the population deviations were primarily the result of good-faith efforts to comply with the Voting Rights Act . . . even though partisanship

Court decides cases like *Minnesota Voters' Alliance* and *Citizens United*, the remedy is more speech. The same result obtains when governments try to limit campaign expenditures and other political speech to level the political paying field. In 2008, the Court noted, "Our prior decisions . . . provide no support for the proposition that this [i.e., leveling campaign opportunities for candidates of different personal wealth] is a legitimate governmental objective." *Davis v. FEC*, 554 U.S. 724, 741 (2008).

In *Davis*, the Court found the so-called "Millionaires Amendment" unconstitutional. That law increased the amount of individual contributions available to the opponent of a self-funding candidate who exceeded a specified funding limit in an effort to redress the imbalance in candidate resources. The Court explained that "the argument that a candidate's speech may be restricted in order to 'level electoral opportunities' has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates." *Id*. at 742. That conclusion echoes a similar finding in *Buckley v. Valeo*, 424 U.S. 1 (1976), when the Court rejected the government's reliance on an "interest in equalizing the financial resources of

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played some role."). At oral argument, Justice Scalia noted the irony of the claim that a commission had engaged in political shenanigans. *See* Tr. of Oral Argument in *Harris v. Ariz. Indep. Redistricting Comm'n* (Dec. 8, 2015), at 29-30 ("I wish this case had come up before the case we had last term, which . . . approved your commission . . . because this commission was going to end partisanship, get politics out of redistricting. And here the very next term we have this case which .. . . asserts that there has been a lot of partisanship on behalf of . . . this supposedly divine commission.").

candidates" as the basis for limiting campaign expenditures even when a failure to equalize "might serve . . . to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." *Id*. at 56-57.

Political gerrymandering claims are only an attempt to enlist the courts in leveling the political playing field. If Congress cannot do that constitutionally when regulating political speech, then the courts should refrain from doing so as well.

More to the point, the district court's understanding of restriction in the First Amendment context is overbroad. "The First Amendment guarantees the right to participate in the political process; it does not guarantee political success." *Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988). Appellees remain free to speak, spend, associate, and assemble to their hearts' content. Judge Osteen said precisely this in his concurring and dissenting opinion below: Appellees remain free to "run for office, express their political views, endorse and campaign for their favorite candidates, vote, and otherwise influence the political process through their expression." App.at 344 (quoting *Radogno v. Ill. State Bd. of Elections*, No. 11-CV-04884, 2011 WL 5025251 at *7 (N.D. Ill. Oct. 21, 2011)). If what they say is persuasive, they may win elections.

In *New York State Board of Elections v. Torres*, 552 U.S. 196 (2008), this Court reached the same conclusion. Torres complained that the state's method of selecting candidates for judicial office violated the First Amendment because it didn't give them a fair

chance of success. The Court found that a claim seeking "a fair chance of prevailing in their parties' candidate-selection process" found "no support in our precedents." *Id.* at 203. It explained, "None of our cases establishes an individual's right to have a 'fair shot' of winning the party's nomination. *Id.* at 205.

Likewise, neither the Constitution nor the Voting Rights Act gives Appellees the right to proportional representation of their partisan interests in a legislative body. "Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.); *see also Vieth*, 541 U.S. at 288 (plurality op.) ("[T]he Constitution contains no such principle [of proportional representation]. It guarantees equal protection of law to persons, not equal representation in government for equivalently sized groups."). In the same way, the Voting Rights Act provides "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

The First Amendment cannot be applied to political gerrymandering claims unless and until the tensions described are reconciled with its use in that way.

III. The First Amendment in the hands of the district court fails to provide a judicially manageable standard.

The district court held that Appellees had standing to pursue a political gerrymandering claim and that the First Amendment, among other theories, provided a basis for relief. This Court should reject both conclusions.

A. The Appellees' claims of First Amendment injury are too generalized to constitute an injury in fact.

To establish standing, the plaintiff must show an "injury in fact," which involves the "invasion of a legally protected interest" that is "concrete and particularized." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). Simply showing a "generally available grievance about government" does not satisfy that requirement. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

The district court's conclusions on standing rest on shaky ground. To the extent those conclusions rely Justice Kagan's concurring opinion in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the critical point is that she did not speak for a majority of the Court. As Justice Kagan explained, she wanted to help the plaintiffs establish standing and to suggest that they pursue an associational theory of First Amendment injury, which was not "advance[d] . . . with sufficient clarity or completeness to make it a real part of the case. *Id*. at 1934 (Kagan, J., concurring), The Court, however, rejected her argument, stating, "The reasoning of this Court with respect to the disposition

of this case is set forth in *this opinion* [i.e., the Opinion of the Court] and *none other*." *Id.* at 1931 (emphasis added). The district court should not have relied on the "speculative and advisory conclusions" that Judge Kagan drew. *Id.*

More particularly, the district court's reliance on a theory of vote dilution is flawed. It reasoned that the Appellees were complaining about the "purpose[ful]" dilution of their votes resulting from partisan gerrymandering. App. at 68 (quoting *Shapiro v. McManus*, 203 F. Supp. 3d 579, 595 (D. Md. 2016)). That is not a one-person, one-vote theory of dilution, the dilutive effect customarily alleged. Instead, it is available to anyone in a district that elects the candidate of the other party. Thus, a generalized injury that cannot establish standing.

The district court's reliance on associational harm to establish First Amendment standing is also unsound. That injury is a generalized one, extending statewide. As Justice Kagan put it, "[T]he valued association and the injury to it are statewide, [and] so too is the relevant standing requirement." App. at 69 (quoting *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring)). For an injury to be "particularized," the injury must affect the plaintiff "in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct 1540, 1548 (2016). The statewide associational injury is neither personal nor individualized; it is available to people throughout the state.

Finally, the district court's reliance on the difficulty that interested persons and organizations have in generating interest is not an injury to a "legally protected interest." As noted above, the First

Amendment protects specific rights, but it does not guarantee success. Appellees can organize, speak, spend money, and assemble, but they cannot do so successfully. If they get what they want, their success will mean failure to their opponents. Will those opponents be able to claim the same injury and force an endless round of redistricting? Not if the right can be exercised, and the Appellees should live with that same result.

Put simply, none of the injuries the district court pointed to is enough to establish standing to make a First Amendment claim.

B. The district court's First Amendment test for identifying unconstitutional political gerrymandering cannot be generally applied.

As Justice Kennedy explained, any test for identifying unconstitutional political gerrymandering must include "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). That test must also generate consistent results when applied to future cases. *Id*. at 308 ("Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent."). The district court's First Amendment test does not meet those standards.

In its decision, the district court "derive[d] a three-prong test for identifying unconstitutional political gerrymandering. App. at 286. That test looks at (1)

the challenged plan was intended to burden individuals or organizations that support the opposing party or candidate; (2) the plan "burden[s] the political speech or associational right" of those individuals or organizations; and (3) there is a causal relationship between the intent and the burden. *Id*.

That test sweeps too broadly. It provides no way of distinguishing the acceptable consideration of political affiliation from the unconstitutional. In reality, all legislative plans will include the consideration of partisan advantage, and the effect will be to disadvantage those of the opposing party. That effect will encourage defeated parties and candidates to bring political gerrymandering claims.

More to the point, the district court explained that a plaintiff can base an actionable First Amendment claim on a "chilling effect or adverse impact." App. at 288. And that it would find such a "chilling effect' can even though the plaintiff can run for office, express their political views, assemble with like-minded people, and vote. Again, it is the right, not a guarantee that its exercise will be successful, that is protected.[4]

As Judge Osteen concluded, "[T]he majority's test would in effect foreclose all partisan considerations in the redistricting process." App. at 343. So, too, did the *Vieth* plurality, when, noting the lack of a First Amendment claim in that case, observed, "[A] First

[4] As Judge Osteen observed, "the sense of disillusionment toward the political process" that some Appellees attributed to the 2016 redistricting plan "differs from fear of enforcement due to an 'overly broad statute regulating speech.'" App. at 345 n.4.

Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for all non-policy-level government jobs." *Vieth*, 541 U.S. at 294 (plurality op.). That is, simply, a bridge too far. This Court should reject the district court's First Amendment test.

IV. Judicial recognition of political gerrymandering claims brings with it a host of problems.

The recognition of political gerrymandering claims promises only mischief that could otherwise be avoided.[5]

The first result will be a new and unlimited judicial intrusion into an inherently political thicket. As Justice Kennedy explained, "A decision 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." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). Judicial intrusion would become all the more common: "[T]he fact that partisan districting is a common and lawful practice means that there is almost *always* room for an election impeding lawsuit contending that partisan advantage

[5] *Amici* agree with Justices Thomas and Gorsuch, who concurred in part and concurred in the judgment in *Gill*. If plaintiffs are found to lack standing, the Court should remand this case with instructions to dismiss. *See Gill*, 138 S. Ct. at 1941 (Thomas, J., concurring in part and concurring in the judgment). This case has gone on long enough. It's now 2019, we're on the cusp of another Census, and the districts will be redrawn for 2022.

was the predominant motive; not so for claims of racial gerrymandering." *Id*. at 286 (plurality op.) (emphasis in original).

The surge in political gerrymandering lawsuits will not be good for the courts. The need to distinguish between allowable and unconstitutional political considerations can only embroil the courts in political catfights. The results will lead parties and observers to perceive the courts as political actors. "[I]n the absence of rules to limit and confine judicial intervention . . ., intervening courts—even when proceeding with best intentions— would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id*. at 307.

Finally, there is no guarantee that judicial intervention is necessary. Political gerrymandering may be sticky, but it can be fixed by the voters without resort to the courts. There are limits to the degree that partisan drafters can stretch their voters, and the voters can change. As Justice Scalia explained in *Vieth,* "Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." 541 U.S. at 287 (plurality op.).

Alabama's experience provides a striking example of the fragility of overreaching political gerrymandering. In *Vieth*, the leadership of the Alabama State Senate and House of Representatives, all Democrats at the time, submitted an *amicus* brief in which they urged the Court not to get involved. They explained that the 2001 plans were the result of

cooperation between white and African-American Democratic legislators, who controlled majorities in both houses of the Legislature, and "protect[ed] both to protect reliable Democratic seats with majority-black constituencies and . . . reduce[d] the size of those majorities in order to increase the number of reliable Democratic voters in several seats closely contested between Democrats and Republicans." Brief of *Amici Curiae* Leadership of the Alabama Senate and House of Representatives, *et al.* in Support of Appellees, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580), at 2.[6] They also noted that they successfully defended their "benign" political gerrymandering handiwork in federal court, arguing that political considerations not race were the predominant motive behind the district lines. Their handiwork lasted all the way to 2010, when the Democrats were swamped and gave up a supermajority to the Republicans.[7]

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[6] http://www.votelaw.com/blog/blogdocs /Alabama%20amicus%20brief%20final%20print.pdf.

[7] Perhaps the Alabama Democrats' problem was stretching their partisans too far: "[I]n the 2002 elections, even though Republican candidates polled statewide majorities in Congressional and most statewide office contests, Democrats won 52% of the votes statewide for State Senate seats and 51% of the votes statewide for State House seats. Democrats captured 71% of the 35 Senate seats and 60% of the 105 House seats." Alabama Brief at 2.

CONCLUSION

For the reasons stated in the Appellants' Brief and this *amicus* brief, this Court should reverse the decision of the U.S. District Court for the Middle District of North Carolina.

Respectfully submitted,

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