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 APPELLEES LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*

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QUESTIONS PRESENTED

1. Whether the district court correctly found that plaintiffs have standing to challenge particular North Carolina congressional districts on partisan vote-dilution grounds because those districts unnecessarily crack or pack plaintiffs?

2. Whether the district-specific test for partisan vote-dilution claims set forth by the district court—requiring (1) the intent to subordinate adherents of one party and entrench a rival party in power; (2) the effect of such subordination and entrenchment; and (3) the lack of a legitimate justification for such subordination and entrenchment—is judicially discernible and manageable?

3. Whether the district court's unanimous decision that particular North Carolina congressional districts are unconstitutional under this test is correct?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the League of Women Voters of North Carolina states that it is a nonprofit corporation that has no parent corporation and issues no stock.

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INTRODUCTION

The League of Women Voters of North Carolina ("League") submits this brief in support of an affirmance of the district court's judgment. As throughout this litigation, the League solely advances a claim of partisan vote dilution under the First and Fourteenth Amendments (while also supporting other plaintiffs' different claims). The League's approach was endorsed by the court below, which ruled that particular districts in North Carolina's current congressional plan ("2016 Plan") deliberately diluted Democrats' votes through cracking and packing. Indeed, these districts' drafters repeatedly *boasted* about their scheme to preserve their ill-gotten political gains by minimizing the influence of disfavored voters. The drafters also achieved their objective: an enormous and unjustified Republican advantage virtually certain to endure in future elections.

This Court decided its most recent partisan vote-dilution case, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), on standing grounds. To be injured in fact, the Court held, a litigant must show that she lives in a cracked or packed district—and could be placed in an *un*cracked or *un*packed district by an alternative map. The Court also provided guidance about other aspects of partisan vote-dilution challenges. These suits should be district-specific, not plan-wide, in scope. The intentional pursuit of partisan gain should be an element of the claim. And if liability is found, the remedy should be the revision of the plaintiff's own district (not the map in its entirety).

In its thorough decision, the district court scrupulously followed these instructions. It held that

certain plaintiffs have standing to allege partisan vote dilution—because they are unnecessarily cracked or packed by particular North Carolina congressional districts—while other plaintiffs lack the requisite injury. The district court also adopted a test for partisan vote dilution that follows directly from this Court's analysis in *Whitford*. This test is district-specific. Under it, each district is examined separately, and rises or falls independently.

The test's *first* element is the one the Court contemplated in *Whitford*: whether the challenged district was drawn with the aim of cracking or packing the opposing party's voters, and thus diluting their electoral influence. Of course, evidence of the defendants' motives in designing the map as a whole may be relevant to whether an individual district was crafted with invidious intent. *Second*, the test asks whether the district at issue, and the plan to which it belongs, are in fact dilutive. A plaintiff must prove that she lives in a district that actually cracks or packs her. But since every map includes districts that dilute some voters, the plaintiff satisfies this prong only if she further shows that the entire plan creates a large and durable advantage for the line-drawing party. And *third*, the test considers whether a legitimate justification exists for the dilution, like a State's political geography or nonpartisan redistricting goals. Alternative maps reveal if a State could have achieved its valid aims without abridging the influence of the opposing party's supporters.

Strikingly, Appellants do not argue that the district court misapplied its test. This is because the court's conclusions are based on overwhelming and irrefutable evidence. Start with the drafters' intent. In

a brazen and unprecedented move, Republican legislators explicitly ratified "Partisan Advantage" as one of their official redistricting criteria. This provision stipulated that "[t]he partisan makeup of [North Carolina's] congressional delegation" would be "10 Republicans and 3 Democrats." J.S.App.20. The co-chair of the redistricting committee added that Republicans would be allotted a ten-seat quota only because it was not "possible to draw a map with 11 Republicans and 2 Democrats." J.S.App.22. These facts amount to an official state policy to maximally degrade the representation of disfavored voters. They support an affirmance even if broader issues about the justiciability of partisan gerrymandering are left unresolved.

Consider, next, the dilutive impact of the 2016 Plan. Its boundaries methodically divide clusters of Democratic voters or else cram them into just three districts. Thanks to this rampant cracking and packing, Republican candidates won ten out of thirteen seats in the 2016 election even though the statewide vote was nearly tied. In 2018—as predicted by Appellees' expert—Republicans again prevailed in ten districts while *Democrats* earned a majority of the statewide vote.[1] A Democratic wave thus failed to breach the gerrymander's defenses. To the contrary, it yielded the single largest Republican advantage in the last half-century of congressional elections.

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[1] After the 2018 election, Republican candidate Mark Harris narrowly led Democratic candidate Dan McCready in District 9. However, the State Board of Elections refused to certify the result and ordered a new election because of evidence of widespread irregularities—specifically, a scheme to alter or destroy large numbers of absentee ballots.

With respect to justification, lastly, the drafts of Appellants' own mapmaker highlight the lack of a valid explanation for this record-breaking bias. Several of his maps were more compliant with traditional criteria than the 2016 Plan, but much less skewed in Republicans' favor. More systematically, Appellees' expert used a computer algorithm to randomly generate thousands of North Carolina congressional maps without even considering partisan data. All these maps matched or beat the 2016 Plan on all its nonpartisan goals. But *none* were as favorable for Republicans, proving that neither the State's political geography nor any neutral objective can account for the Plan's extreme tilt.

Appellants observe that, since this Court's decision in *Whitford*, congressional districts have been invalidated in two States (Maryland and North Carolina) and challenged in two more. But Appellants draw precisely the wrong lessons from these cases. First, the volume of litigation is very low. A handful more redistricting suits (after the hundreds brought earlier in the decade) cannot possibly tax the capacity of the federal courts. Second, the cases target the worst of the worst. They involve the most flagrant line-drawing abuses in the country—by both parties. And third, far from flailing in a sea of standards, the cases have converged on a single test for partisan vote-dilution claims: the *same* test adopted by the district court here. It would be ironic for this Court to hold that no workable approach exists just when the lower courts have finally found one.

With the next redistricting cycle about to begin, moreover, a decision rejecting the emerging consensus would be calamitous. Both parties are poised to wield

unified control of many state governments after the 2020 election. If given a judicial green light, both parties will exploit their authority to gerrymander even more aggressively, using even more potent techniques, than they have to date. Like North Carolina's mapmakers, they will ruthlessly crack and pack the opposing party's voters. They will also program computer algorithms to maximize their partisan advantage and make adjustments throughout the decade to any districts that seem to be slipping from their grasp. Through such machinations, "those who govern," who "should be the *last* people to help decide who *should* govern," will try to extinguish "the political responsiveness at the heart of the democratic process." *McCutcheon v. FEC*, 572 U.S. 185, 192, 227 (2014) (plurality).

But this dismal future is not inevitable. To avoid it, this Court should affirm the decision below and confirm its willingness to thwart the most egregious instances of partisan gerrymandering.

STATEMENT

I. The 2016 Plan Was Enacted with the Official Aim of Diluting the Influence of Democratic Voters.

The 2016 Plan is the second one North Carolina has used this decade. The 2012 and 2014 elections were held under the map enacted in July 2011 ("2011 Plan"). This Court held in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), that two of the 2011 Plan's districts were unconstitutional *racial* gerrymanders, drawn with race as their predominant motive. The district court also found that "invidious partisanship was a

motivating purpose behind the 2011 Plan" as a whole. J.S.App.179.

Abundant evidence supported the district court's finding. For example, the co-chairs of the legislative committee responsible for designing the 2011 Plan, Representative David Lewis and Senator Robert Rucho, stated that their "primary goal" was "to create as many districts as possible in which GOP candidates would be able to successfully compete for office." J.S.App.180. Similarly, the actual drafter of the map, Dr. Thomas Hofeller, wrote in an expert report that "[t]he General Assembly's overarching goal in 2011 was to create as many safe and competitive districts for Republican incumbents or potential candidates as possible." Ex.2035:23.

After the 2011 Plan was invalidated in part, the same actors took the lead in crafting its replacement. Lewis and Rucho were again the co-chairs of the Joint Select Committee on Congressional Redistricting ("Committee"). Hofeller was once more the cartographer. Lewis and Rucho verbally instructed Hofeller to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," with "10 Republicans and 3 Democrats." J.S.App.15. They added that he should exclusively use "political data" in his work: "precinct-level election results from all statewide elections." *Id.*

Following their directions, Hofeller aggregated these election outcomes into a sophisticated multi-year average that, in his expert view, would accurately capture district partisanship "'in every subsequent election.'" J.S.App.16-17. Employing this metric, he systematically cracked and packed Democratic voters throughout North Carolina. Where

possible, that is, he divided clusters of Democrats that could have anchored congressional districts and submerged the fragments within larger masses of Republicans. Where Democratic concentrations were too large to be split, he wedged them into just three districts. These efforts are described in more detail below. *See infra* pp.9-14.

After Hofeller finished drafting the 2016 Plan—alone and in secret—Lewis and Rucho convened a pair of Committee meetings. J.S.App.19. At the first session, the Committee approved, on party-line votes, the criteria that Lewis and Rucho had previously conveyed orally to Hofeller. J.S.App.23. The "Partisan Advantage" criterion stated that "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." J.S.App.20. The "Political Data" criterion added that, other than population counts, "[t]he only data ... to be used to construct congressional districts shall be election results in statewide contests." *Id.* These criteria appear to be unprecedented in American history: the first time a legislative body has officially ratified a district map's pursuit of maximal partisan gain.

Also at the first session, Lewis declared about the 2016 Plan, "I acknowledge freely that this would be a political gerrymander." J.A.308. He further "propose[d] that to the extent possible, the map drawers create a map which is ... likely to elect 10 Republicans and 3 Democrats." *Id.* He explained: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." J.A.310. And he made clear that "to the extent [we] are going to use

political data in drawing this map, it is to gain partisan advantage." J.S.App.22.

At the second Committee meeting (held the next day), Lewis and Rucho unveiled the 2016 Plan to their colleagues. J.S.App.24. Lewis reiterated that it "will produce an opportunity to elect ten Republican members of Congress." *Id.* The Committee subsequently approved the Plan on a party-line vote. *Id.* Two days later, the North Carolina House of Representatives and Senate debated and passed the Plan, again on party-line votes. *Id*. The law went into effect without the governor's signature because North Carolina does not allow congressional maps to be vetoed. North Carolina also permits no popular role in redistricting, via referendum or voter initiative.

Appellants suggest that the Committee's "Partisan Advantage" policy (and Lewis's equally brazen comments) have an innocent explanation: avoiding liability for racial gerrymandering. Br.8-10. But neither Lewis nor anyone else even *mentioned* race during the lengthy debate over the "Partisan Advantage" policy. Ex.1005:47-69. In fact, the only references to race arose when the "Political Data" criterion was discussed. Ex.1005:24-47. That criterion, though, did not endorse one unlawful policy (partisan gerrymandering) to escape liability for another (racial gerrymandering). Instead, it simply forbade "[d]ata identifying the race of individuals" from being "used in the construction or consideration of districts." J.S.App.20.

II. Particular Districts Intentionally and Unnecessarily Crack or Pack Democratic Voters.

Appellants also claim that the 2016 Plan complies with traditional redistricting criteria, particularly respect for county boundaries. Br.10-11. It does no such thing. Rather, the Plan cracks and packs Democratic voters on a massive scale, typically by *dividing* counties so that Democratic clusters are either sliced in half or crammed into a single district. In summarizing this widespread cracking and packing, the League focuses on nine of the Plan's thirteen districts and on the alternative map submitted by the League to help demonstrate its members' standing.[2]

This alternative map, Plan 2-297, is one of 3000 North Carolina congressional maps randomly generated by Appellees' expert, Professor Jowei Chen, without considering any partisan data. J.S.App.49. Professor Chen selected Plan 2-297 from this group because it has the most compact districts, on average, of maps that split fewer counties than the 2016 Plan, pair fewer incumbents, and exhibit no partisan asymmetry. *Id.* Plan 2-297 thus matches or surpasses the 2016 Plan along all nonpartisan dimensions but is balanced in its treatment of the major parties. *Id.*[3]

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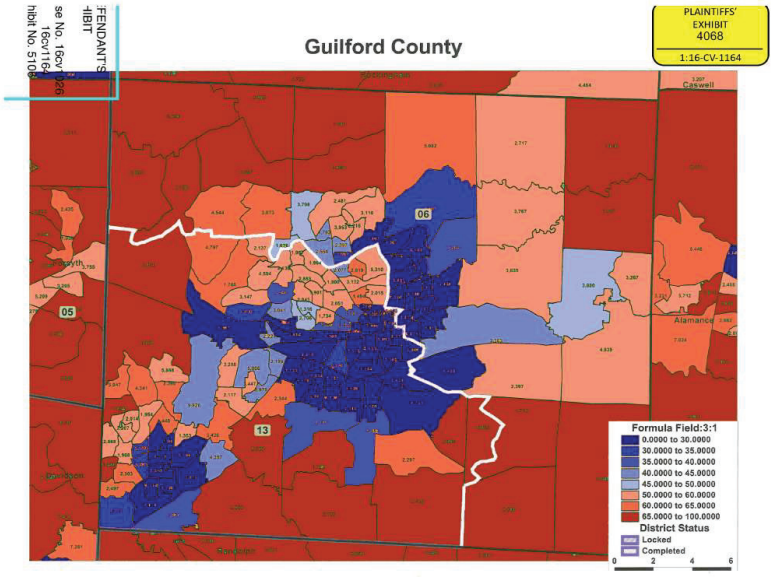
[2] The district court found that District 5 does not *intentionally* crack Democratic voters, J.S.App.242-43, and the League does not contest that finding. The League also does not claim that any of its members from Districts 3, 10, and 11 are *unnecessarily* cracked. No members from these districts, that is, are uncracked by Plan 2-297.

[3] To be clear, Plan 2-297 is far from an "ideal map" for Democratic voters. *Whitford*, 138 S. Ct. at 1924. Professor Chen generated

Cracking. North Carolina's third-most-populous city, Greensboro, offers a dramatic example of the 2016 Plan's cracking of Democratic voters. As shown below, District 6 and District 13 cut Greensboro (and Guilford County) in two, submerging each half within a larger concentration of Republican voters. J.A.298. Thanks to Greensboro's bisection, Hofeller expected District 6 and District 13 each to have Republican vote shares of 54%. Ex.5116:9. In Plan 2-297, on the other hand, League members from District 6 and District 13 are uncracked by being placed in a Democratic-leaning district. J.A.263.[4]

Cracking of Democratic Voters in Greensboro

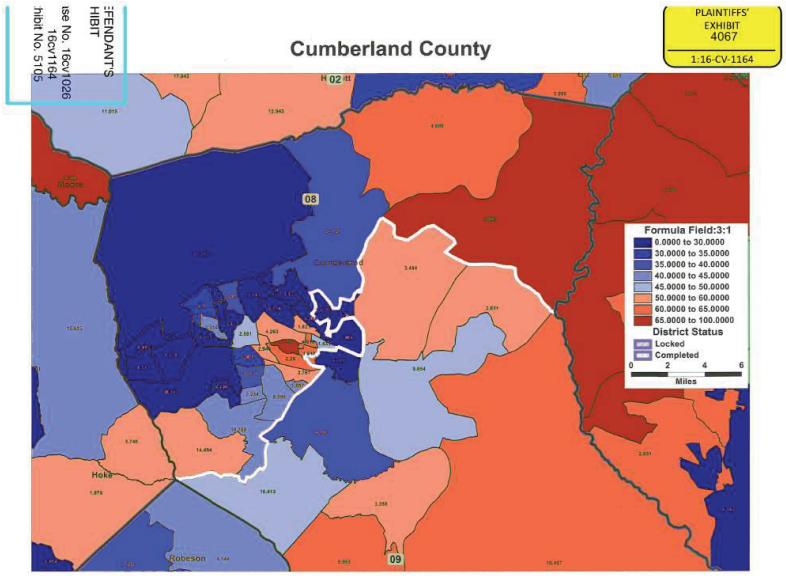


hundreds of maps that are more pro-Democratic than Plan 2-297. Ex.2010.

[4] The League focuses on its own members and plaintiffs. The district court also discussed other plaintiffs, whom the League describes in footnotes. Russell Walker is thus another plaintiff from District 13 who is uncracked by Plan 2-297. J.S.App.62-63.

North Carolina's sixth-most-populous city, Fayetteville, presents another striking instance of cracking. As displayed below, District 8 and District 9 split Fayetteville (and Cumberland County), joining each Democratic fragment with a larger group of Republican voters. J.A.297. Hofeller consequently expected District 8 and District 9 to have Republican vote shares of 55% and 56%, respectively. Ex.5116:9. In Plan 2-297, in contrast, League members from District 8 and District 9 are uncracked by being placed in Democratic-leaning districts. J.A.263.[5]

Cracking of Democratic Voters in Fayetteville



Further cases of cracking abound in the 2016 Plan. District 2 and District 7 partition the cluster of Democratic voters in Johnston County. J.A.299. As a

[5] Coy Brewer and John McNeill are additional plaintiffs from District 8 and District 9, respectively, who are uncracked by Plan 2-297. J.S.App.57-59.

result, Hofeller expected District 2 and District 7 to have Republican vote shares of 56% and 54%, respectively. Ex.5116:9. But in Plan 2-297, League members from District 2 and District 7 are uncracked by being placed in Democratic-leaning districts. J.A.263.[6] Similarly, District 7 and District 9 break up the Democratic cluster in Bladen County. J.A.304. And District 8 and District 13 carve through yet another Democratic cluster in Rowan County. J.A.307.

Packing. Turning to the gerrymanderer's other tool, North Carolina's biggest city, Charlotte, provides a quintessential example of packing. As shown below, literally every Democratic precinct in Mecklenburg County is squeezed into District 12. District 9 enters Mecklenburg County too, but captures only Republican precincts. J.A.300. Hofeller therefore expected District 12 to have a Democratic vote share of 64%. Ex.5116:9. In Plan 2-297, on the other hand, a League member in District 12 is unpacked by being placed in a less heavily Democratic district. J.A.263.[7]

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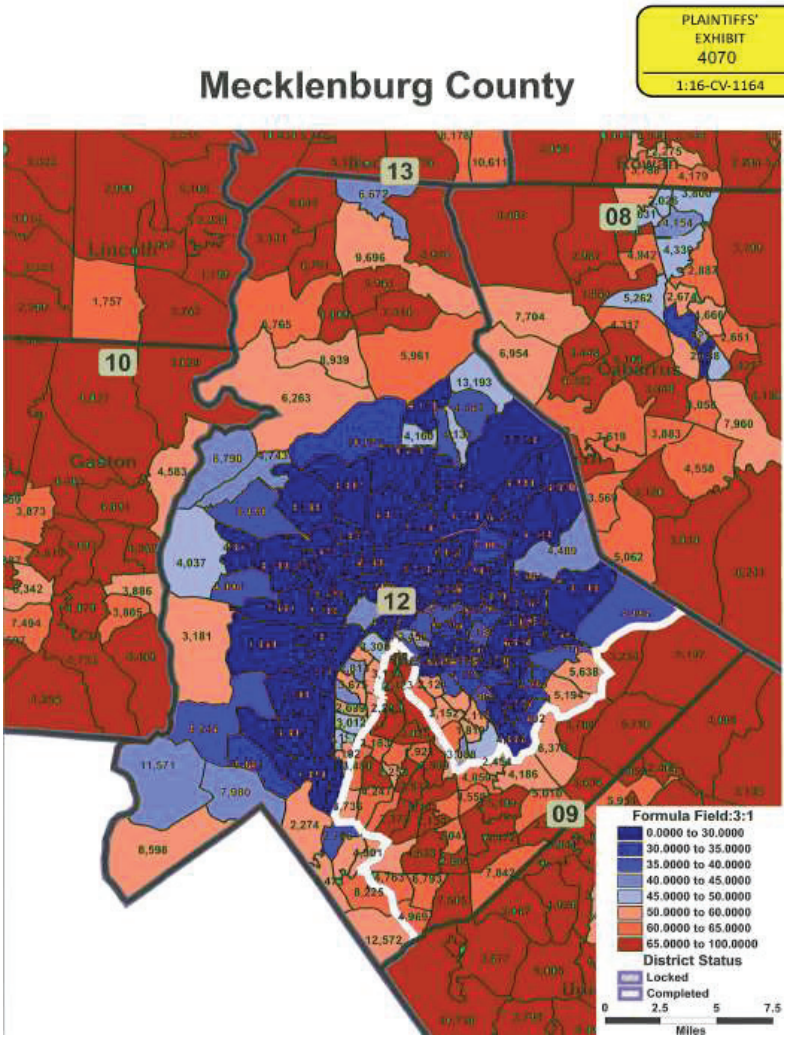
[6] Douglas Berger is another plaintiff from District 2 who is uncracked by Plan 2-297. J.S.App.52-53.

[7] John Gresham is another plaintiff from District 12 who is unpacked by Plan 2-297. J.S.App.62.

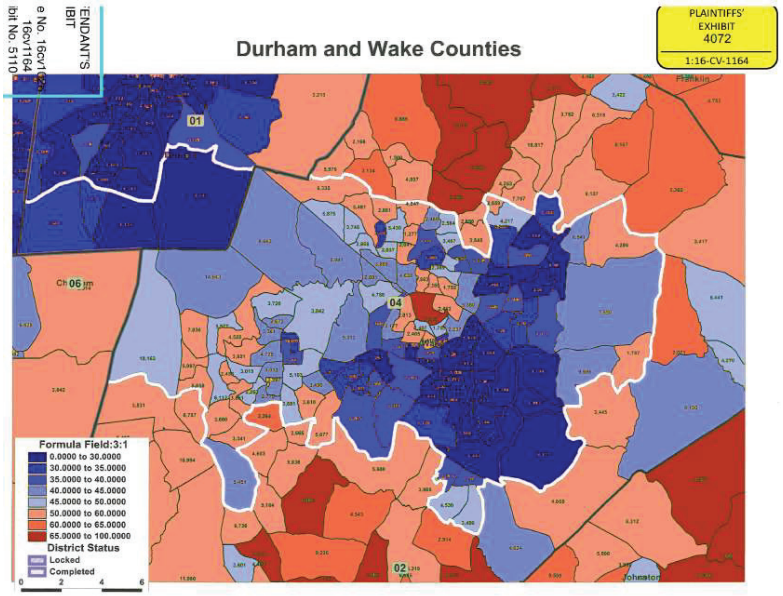
Packing of Democratic Voters in Charlotte



North Carolina's second-largest city, Raleigh, is another model of packing. As displayed below, virtually every Democratic precinct in Wake County is wedged into District 4. District 2's portion of Wake County is composed almost exclusively of Republican precincts. J.A.302. Hofeller thus expected District 4 to

have a Democratic vote share of 63%. Ex.5116:9. In Plan 2-297, in contrast, a League member in District 4 is unpacked by being placed in a less heavily Democratic district. J.A.263.

Packing of Democratic Voters in Raleigh



District 1 packs Democratic voters in northeastern North Carolina as well. It divides Pitt and Wilson Counties, in both cases including their more Democratic areas, and incorporates nearly all of the State's fifth-largest city, Durham. J.A.301-03. As a result, Hofeller expected District 1 to have a Democratic vote share of 69%. Ex.5116:9. But in Plan 2-297, a League member in District 1 is unpacked by being placed in a less heavily Democratic district. J.A.263.[8]

[8] Larry Hall is another plaintiff from District 1 who is unpacked by Plan 2-297. J.S.App.51-52.

III. The 2016 Plan Severely and Durably Dilutes the Influence of Democratic Voters.

Unsurprisingly, all this district-specific cracking and packing has added up to a massive plan-wide advantage for Republicans. As noted above, North Carolina's 2012 and 2014 congressional elections were held under the 2011 Plan, while the 2016 and 2018 elections were held under the 2016 Plan. All four of these elections were tight. Democrats earned a slight majority of the statewide congressional vote in 2012 (51%) and 2018 (51%), while Republicans won small majorities in 2014 (54%) and 2016 (53%). J.S.App.188-91, 212-14; *North Carolina 2016 Plan*, PlanScore, https://planscore.org/north_carolina/#!2016-plan-ushouse-eg.[9] Yet Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and ten seats in 2014, 2016, and (based on initial returns) 2018. *Id.* These ten seats, moreover, were exactly the ones Hofeller expected Republicans to win. J.S.App.188.[10]

The League's expert, Professor Simon Jackman, calculated three measures of partisan asymmetry using these election results. (Partisan asymmetry refers to "whether supporters of each of the two parties are able to translate their votes into representation with equal ease." J.S.App.191.) First, the efficiency gap is the difference between the parties' respective "wasted votes" (ballots that do not contribute to a candidate's election), divided by the

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[9] The statewide vote shares incorporate imputations for any uncontested seats. Ex.4002:20-26.

[10] As noted earlier, a new election will be held in District 9. If a Democrat manages to win this district, the partisan asymmetry scores reported here would change only modestly.

total number of votes cast. *See Whitford*, 138 S. Ct. at 1933. Second, partisan bias is the difference between a party's seat share and fifty percent in a hypothetical tied election. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 419-20 (2006) (opinion of Kennedy, J.) (*LULAC*). And third, the mean-median difference subtracts a party's median vote share, across a plan's districts, from its mean vote share. J.S.App.207-08.

As the district court found, all three metrics tell the same story about the 2011 and 2016 Plans: They have benefited Republicans (and handicapped Democrats) to a staggering degree. North Carolina recorded efficiency gaps of -21%, -21%, -19%, and -28% in 2012, 2014, 2016, and 2018 (negative scores being pro-Republican and positive scores pro-Democratic). That is, votes for Republican candidates were wasted at a rate about twenty percentage points lower than votes for Democratic candidates. North Carolina also registered partisan biases of -27%, -27%, -27%, and -27% in 2012, 2014, 2016, and 2018, indicating that in hypothetical tied elections, Republicans would have won 77% of the State's congressional seats. And North Carolina's mean-median differences were -8%, -7%, -5%, and -6% in 2012, 2014, 2016, and 2018, meaning that, throughout this period, the State's median congressional district was much more pro-Republican than the State as a whole. J.S.App.193, 206, 208, 213; Ex.4003:4, 8; *North Carolina 2016 Plan*, *supra*.

To put these scores in historical perspective, Professor Jackman computed the metrics for congressional maps from 1972 to 2016. J.S.App.193-94. As the below chart illustrates, both the 2011 and 2016 Plans are extreme outliers. J.A.285. In fact, the

2011 Plan had the worst average efficiency gap of any map in Professor Jackman's database. Ex.4002:10. Not to be outdone, the 2016 Plan had the worst efficiency gap in the country in 2016—and in the wake of the 2018 election, has overtaken the 2011 Plan as the most asymmetric map of the last half-century. J.S.App.195. The 2011 and 2016 Plans have also exhibited nearly unparalleled scores on other measures. Their partisan biases, for instance, are the second-largest in the modern era. J.S.App.206-07.

The 2016 Plan Is an Extreme Outlier Among Modern Congressional Plans

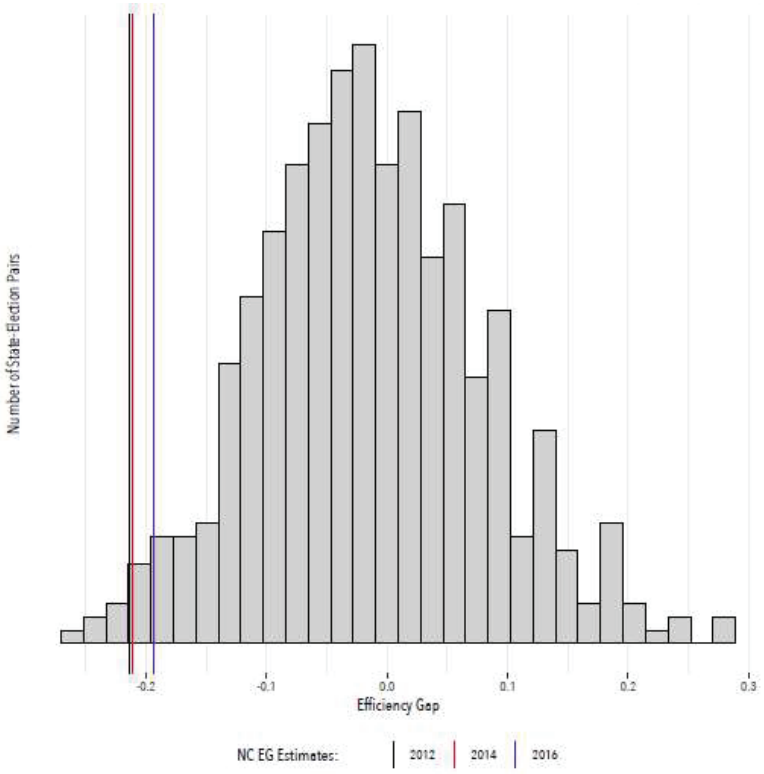


Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

Professor Jackman further testified about the durability of the 2016 Plan's partisan asymmetry. He conducted what is known as sensitivity testing, swinging the 2016 election results by up to ten percentage points in each party's direction and then recalculating the Plan's efficiency gap for each incremental shift. J.S.App.191. This testing indicated that it would take a six-point pro-Democratic swing for Democrats to capture one more seat, thanks to the robust safety margin built into each Republican district. *Id*. For the Plan's asymmetry to disappear, Democrats would have to improve on their 2016 showing by *nine* points—a wave whose only modern precedent is the post-Watergate election of 1974. J.S.App.197.

In 2018, North Carolina's statewide vote shifted by four points in a Democratic direction. *North Carolina 2016 Plan*, *supra*. Given a swing of this magnitude, Professor Jackman's sensitivity testing had predicted a pro-Republican efficiency gap of -27%. J.A.286. This forecast, it turns out, was almost perfectly accurate: The 2016 Plan's efficiency gap was -28% in 2018, just a point away from Professor Jackman's projection.

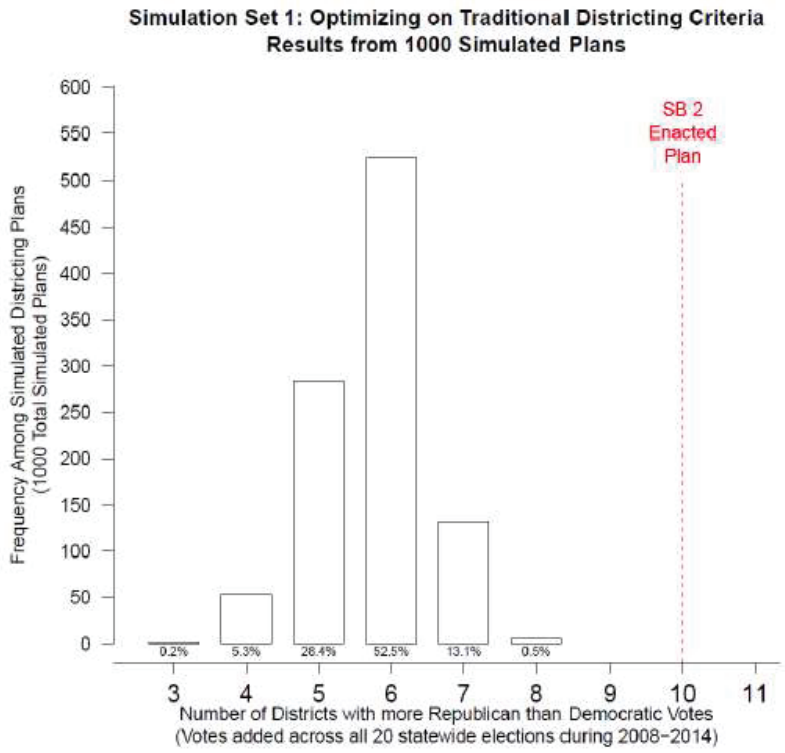
IV. There Is No Legitimate Justification for the 2016 Plan's Dilution.

While Professor Jackman's analysis establishes the size and persistence of the Republican advantage under the 2016 Plan, it does not indicate whether this distortion can be justified by any neutral factor, such as North Carolina's political geography or nonpartisan redistricting criteria. Three sets of district maps demonstrate the lack of any legitimate explanation. *First*, Professor Chen used a computer

simulation technique to randomly generate 3000 different congressional plans for North Carolina. J.S.App.167-71. All these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan criteria adopted by the Committee. The maps' districts were contiguous and equal in population; they split as many or fewer counties; and, on average, they were significantly more compact. *Id.*

Yet *not one* of these 3000 maps ever resulted in a ten-three Republican advantage or an efficiency gap as large as the 2016 Plan's. No matter how Professor Chen analyzed the maps' partisan implications, *all* of them were more symmetric than the Plan. J.S.App.167-71, 210-12. In fact, as the below chart reveals, the randomly generated maps tilted slightly in a Democratic direction, with a median outcome of six Republican seats out of thirteen. J.A.278. Thus, far from justifying the Plan's pro-Republican asymmetry, North Carolina's political geography and the Committee's nonpartisan criteria seem to mildly favor Democrats.

The 2016 Plan Is an Extreme Outlier Among Potential North Carolina Plans



Second, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed about as well as the Plan in terms of traditional criteria but were far less skewed. J.S.App.226. Both of these maps' districts were more compact, on average, than the Plan's districts. J.A.293. The "ST-B" map divided three fewer counties than the Plan; the "17A" map split two more. *Id.* But using Hofeller's own set of twenty prior statewide elections, both maps were expected to yield seven (rather than ten) Republican seats and six (instead of three) Democratic seats. *Id.*

And *third*, during the 2000s, North Carolina used a congressional plan for all five elections that complied with all federal and state requirements and was not even challenged in court. But unlike its successors in the current cycle, the 2000s plan had an average efficiency gap of just 2%, or close to perfect symmetry. Ex.4002:63.

V. On Remand, the District Court Unanimously Invalidated Nine Districts on Partisan Vote-Dilution Grounds.

This case began in August 2016, shortly after the 2016 Plan was enacted. The plaintiffs include individual North Carolina voters in every congressional district in the State. The plaintiffs also include the League, Common Cause, and the North Carolina Democratic Party.

Throughout the litigation, the plaintiffs emphasized the 2016 Plan's cracking and packing of Democratic voters in particular areas. At trial, for example, the League introduced a series of screenshots from Hofeller's own redistricting software showing how he split Democratic clusters in Bladen, Buncombe, Cumberland, Guilford, Johnston, and Rowan Counties; and overconcentrated Democrats in Durham, Mecklenburg, Pitt, Wake, and Wilson Counties. Exs.4007-15; J.A.296-307. On remand from this Court, similarly, the League demonstrated that it has members in nine districts who are Democratic voters, who were deliberately cracked or packed by the 2016 Plan, and who would be uncracked or unpacked by Plan 2-297. J.A.260-64, 290-92; J.S.App.44-50.

In its August 2018 decision, the district court diligently followed the guidance this Court provided in *Whitford*. The district court found that at least one plaintiff was needlessly cracked or packed in each district it ultimately invalidated on partisan vote-dilution grounds. J.S.App.51-65. The district court also found that several plaintiffs *lacked* standing under *Whitford* because their alleged injuries did not involve the cracking or packing of their home districts. J.S.App.65-67.

The district court further adopted a partisan vote-dilution test that, like *Whitford*'s standing inquiry, "proceed[s] on a district-by-district basis." J.S.App.139. This test requires a district to be drawn with the intent of diluting votes cast for the opposing party's candidates. J.S.App.139-46. Next, the test insists that both the challenged district and the plan to which it belongs actually be dilutive. J.S.App.146-52. A district dilutes votes by cracking or packing voters. Likewise, a plan is dilutive if its districts' cracking and packing create a large and durable advantage for the line-drawing party. J.S.App.187-214. Lastly, the test provides an affirmative defense if a legitimate justification, like a State's political geography or nonpartisan redistricting goals, exists for the dilution. J.S.App.152-54, 215-22. Applying the test, the district court held that some (but not all) districts unlawfully dilute plaintiffs' votes. J.S.App.223-74.

Judge Osteen concurred as to almost all these points. In particular, he agreed that partisan vote-dilution claims are justiciable, J.S.App.325, that the majority's test for such claims is the right one, J.S.App.326, and that nine districts are unlawful

under this test, J.S.App.326-27. Judge Osteen disagreed, however, that there can be standing (or liability) on partisan vote-dilution grounds when a district is packed (rather than cracked). He would therefore have upheld the three districts that overconcentrate Democratic voters. J.S.App.328-31. Judge Osteen also argued that the mere pursuit of partisan advantage is not constitutionally problematic. He would thus have required a predominant partisan purpose before imposing liability (a heightened intent threshold the majority also applied in the alternative). J.S.App.336-40.

VI. Partisan Gerrymandering Has Become More Extreme, More Persistent, and More Damaging.

Appellants have much to say—much of it misleading—about redistricting in the eighteenth and nineteenth centuries. Br.3-7, 31-36. But they are oddly silent about recent developments across the country, which are deeply troubling for American democracy. Over the last two decades in particular, partisan gerrymandering has become more extreme, more persistent, and more damaging than at any point since the reapportionment revolution of the 1960s.

Starting with congressional plans' skews over time, Professor Jackman calculated the median size of plans' efficiency gaps from 1972 to 2016. This value fell in the 1970s as the last highly malapportioned plans were eliminated. It then rose gradually in the 1980s, 1990s, and 2000s, as mapmakers' efforts became increasingly aggressive. The current cycle, though, is unlike anything that has come before. In 2012, the typical congressional plan had an efficiency

gap *one-third* larger than the previous record. This pattern persisted in 2014 and 2016: respectively, the fifth- and third-most biased election years of the last half-century. Ex.4002:30; Anthony J. McGann *et al.*, *Gerrymandering in America* 4-5, 97-98 (2016).

Professor Jackman also studied the durability of gerrymandering by determining the correlation between plans' initial efficiency gaps and their average efficiency gaps over the rest of their lifetimes. In the 1970s, 1980s, and 1990s, this correlation was only moderate. A plan's asymmetry in its first election, in other words, did merely a passable job predicting the plan's subsequent performance. In the 2000s and 2010s, however, this correlation skyrocketed. Maps that start a decade skewed now almost always end it that way too. Ex.4002:48-49; Eric McGhee, *The Role of Partisan Gerrymandering in U.S. Elections* 11 (Aug. 2017).

Professor Jackman further examined the boost the line-drawing party receives from control of the redistricting process. This boost was quite small in the 1970s, 1980s, and 1990s, statistically indistinguishable from zero. In the 2000s and 2010s, though, the typical Republican-drawn plan had an efficiency gap seven points more pro-Republican than a nonpartisan map, and the typical Democrat-drawn plan had an efficiency gap twelve points more pro-Democratic. While once the parties frequently failed to profit from control of redistricting, they now extract every drop of partisan advantage when they draw the lines unilaterally. Ex.4002:33.

What accounts for these alarming trends? One explanation is technological. Today's gerrymanderers are able to rely not just on redistricting software but

also on a host of other tools that were unavailable to their predecessors. These include regression models of voter behavior, individual-level data from enhanced voter files, sensitivity testing to ensure the persistence of a plan's bias, and computer algorithms to explore the universe of mapping options. These algorithms are especially noteworthy. Like Professor Chen's, they can be instructed to ignore partisanship. But they can also be programmed to *maximize* a party's edge, even while complying with all nonpartisan criteria. *See, e.g.*, *iRedistrict Online*, Zillion Info, http://www.zillioninfo.com/product/iRedistrict.

The other explanation is voters' rising partisanship, which makes their choices at the polls easier for gerrymanderers to anticipate. Through the 1980s, voters often switched their votes from one election to the next, and split their tickets even in the same election. But since then, voters have become increasingly set in their partisan ways. Only about 5% of voters now change their party preferences from one presidential election to another, compared to roughly 15% a generation earlier. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 368 (2017). The frequency of ticket splitting in federal elections has fallen below 10% in the 2010s, compared to at least 25% a few decades before. *See, e.g.*, Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 Pol. Psychol. 505, 513 (2011). And as partisanship has grown more intense, candidate-specific qualities have faded in importance. The advantage enjoyed by congressional incumbents, in particular, has tumbled from nine points in the 1980s to less than three today. *See, e.g.*, Gary C.

Jacobson, *It's Nothing Personal*, 77 J. Pol. 861, 863 (2015).

Voters are not the only ones who have become more partisan. The ideological gap between Democrats and Republicans in Congress is also larger than at any previous point in American history. *See, e.g.*, Jeff Lewis, *Polarization in Congress*, Voteview (March 11, 2018), https://www.voteview.com/articles/party_polarization. This unprecedented polarization exacerbates the effects of gerrymandering. It means the extra Democrats or Republicans elected due to skewed maps are not moderates willing to compromise with the other side. Rather, they are very liberal or very conservative—and very far from the political center. As a consequence, a large bias in a party's favor does not just result in more of the party's candidates winning office. It also distorts the policies enacted by the legislature, pulling them toward the party's preferred pole and away from the preferences of most voters. *See, e.g.*, Devin Caughey *et al.*, *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017).

SUMMARY OF ARGUMENT

In its unanimous decision in *Whitford*, this Court clarified who has standing to bring a partisan vote-dilution claim. A voter must live in a district that is cracked or packed. And an alternative district must be able to uncrack or unpack the voter. Under this standard, it is plain that League members have standing to challenge nine of the 2016 Plan's districts. League members are cracked by Districts 2, 6, 7, 8, 9, and 13. They are packed by Districts 1, 4, and 12. And they are simultaneously uncracked and unpacked by

Plan 2-297, a balanced map that also beats the 2016 Plan on every nonpartisan criterion.

Appellants' arguments that Appellees lack an injury in fact are barely colorable. Appellants cite statements made years before *Whitford* as if they represent Appellees' post-*Whitford* position. Appellants complain that three plaintiffs are not uncracked or unpacked by Plan 2-297 while ignoring the many more who are. Most startlingly, Appellants assert that a voter is unharmed even if she lives in a cracked district and could be uncracked by a different district. That is exactly the opposite of what this Court held in *Whitford*.

Appellees not only have standing to pursue their partisan vote-dilution claims; these claims are also justiciable. On three prior occasions, a majority of this Court has confirmed that such challenges are not political questions. This conclusion follows from the undisputed justiciability of *racial* vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not. Partisan vote dilution is also justiciable because it endangers the responsiveness that is the essence of American democracy. This Court has been vigilant against other threats to responsiveness, especially in the campaign-finance context. It should not let down its guard here.

Appellants contend that the Elections Clause somehow renders partisan gerrymandering nonjusticiable. This argument is so novel it never occurred to them during two years of litigation below. And for good reason. According to almost a century of precedent, the Elections Clause *authorizes* judicial

review of States' regulations of congressional elections. It does not *bar* courts from hearing claims that such regulations offend the First or Fourteenth Amendments. Even if Appellants' stance were not precluded, this Court should not adopt it. The Elections Clause is simply an authority-conferring provision, resembling many others that no one thinks prohibit judicial review. The Clause also makes no distinction between partisan gerrymandering and other electoral laws, and so provides no basis for deeming only gerrymandering a political question.

In any event, this Court need not address the overall justiciability of partisan gerrymandering to decide this case. Unlike any previous map, the 2016 Plan was drafted pursuant to an official state policy to maximally degrade a targeted party's representation. The Plan also achieved its goal, producing the single largest Republican advantage of any congressional plan in the last five decades. *This* map is therefore unlawful even if the status of other plans remains unresolved.

Other plans, however, clearly can be adjudicated using the discernible and manageable test adopted by the district court. The test's intent prong is the one this Court alluded to in *Whitford*: deliberately diluting votes cast for the opposing party's candidates. The test's effect prong also parallels the inquiry in racial vote-dilution cases, asking if particular districts are cracked or packed, and if this cracking and packing create a large and durable advantage for the line-drawing party. The test's justification prong, too, is drawn verbatim from one-person, one-vote cases, where it plays the same role of negating liability if a

legitimate explanation exists for a dilutive district or map.

In combination, these elements drastically curtail the test's reach. Because the test is district-specific, it never invalidates plans in their entirety. The intent prong takes off the table all districts not drawn by a party in full control of the state government. The effect prong further limits exposure to the narrow subset of maps that are severely and durably dilutive. And the justification prong saves plans that are no more biased than expected given States' political geographies and legitimate redistricting goals. In the end, liability is confined to needlessly cracked and packed districts in the small—but unfortunately growing—number of maps that genuinely imperil core democratic values.

Lastly, the district court's conclusion that the 2016 Plan violates several constitutional provisions implies neither the absence of a judicially manageable standard nor a failure by the plaintiffs to forge consensus. Rather, the various sets of litigants took to heart this Court's exhortations to develop a workable test, *see, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 309-10 (2004) (Kennedy, J., concurring), and offered distinct, but complementary, approaches to understanding the constitutional injury. Likewise, the district court analyzed the evidence under each proposed framework and thus fully developed the record for the Court's review. This comprehensive record confirms the availability of manageable standards and may help the Court define the contours of the legal inquiry.

ARGUMENT

I. Appellees Have Standing to Challenge Particular Districts on Partisan Vote-Dilution Grounds.

1. This Court could not have been clearer in *Whitford* about how an injury in fact must be proved in a partisan vote-dilution case. First, a plaintiff must show that "the particular composition of the voter's own district ... causes his vote [to be] packed or cracked." 138 S. Ct. at 1931; *see also id.* ("[T]hat burden arises through a voter's placement in a 'cracked' or 'packed' district."); *id.* at 1932 (a plaintiff must "prove that he ... lives in a cracked or packed district"). And second, a plaintiff must demonstrate that his vote "carr[ies] less weight than it would carry in another, hypothetical district"—in other words, that he could be *un*cracked or *un*packed by a different set of boundaries. *Id.* at 1931.

Applying this standard, the Court suggested that the lead plaintiff in *Whitford* lacked standing. While he lived in a packed district, he could not be unpacked by any (reasonable) alternative configuration. Since "Democrats are 'naturally' packed [in Madison, Wisconsin] due to their geographic concentration," "even plaintiffs' own demonstration map resulted in a virtually identical district for him." *Id.* at 1933. Conversely, the Court held that four other plaintiffs *would* have standing if they could "prove[] at trial" what they had "alleged at the pleading stage"—namely, that they were subjected to unnecessary "packing or cracking in their legislative districts." *Id.* at 1931. That is why the Court remanded the case to the district court instead of dismissing these plaintiffs' claims. *Id.* at 1933-34.

The Court's focus on needless cracking and packing mirrors its approach in the analogous context of racial vote dilution. In that area as well, the Court has long recognized that cracking and packing are the techniques through which equipopulous, single-member districts dilute the influence of targeted voters. *See, e.g.*, *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.) (a district map may "dilute minority voting power if it packed minority voters in a few districts ... or dispersed them among [many] districts"); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). There, too, the Court requires plaintiffs to prove they could be uncracked or unpacked by a different district map. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality); *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.) ("[A] §2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one."). *Whitford*'s standing analysis thus dovetails with existing vote-dilution precedent.

2. Under *Whitford*, League members plainly have standing to challenge nine of the 2016 Plan's thirteen districts on partisan vote-dilution grounds. League members and other individual plaintiffs who support the Democratic Party live in, and are cracked or packed by, Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13. They are also unnecessarily cracked or packed, because Plan 2-297 simultaneously uncracks or unpacks them all. *See supra* pp.9-14. These League members have therefore proved that "the particular composition of [their] own district[s] ... causes [their] vote[s]—having been packed or cracked—to carry less weight than [they] would carry in [other], hypothetical district[s]." *Whitford*, 138 S. Ct. at 1931. They have proved, that

is, the injury the four plaintiffs the Court discussed in *Whitford* merely alleged.

3. Appellants resist this conclusion, first, by cherry-picking statements from Common Cause's and the League's complaints. Br.25. But these complaints were filed almost two years before this Court explained in *Whitford* that partisan vote-dilution standing is district-specific. Both complaints also anticipated *Whitford*'s holding. Common Cause contended that the vote of each of its plaintiffs "will be diluted or nullified as a result of his placement" in his district. J.A.208-12. Likewise, the League asserted that "[s]ome of [its] Plaintiffs have been packed into a handful of districts," while "others have been cracked among numerous districts where Democratic candidates are virtually certain to lose." J.A.241.

In any event, ever since *Whitford*, Appellees have indisputably framed their injuries as needless and district-specific cracking and packing. As the League put it in its first filing on remand, "only plaintiffs living in cracked or packed districts—and so *not* all supporters of the victimized party—have standing." Dkt.129:2 These plaintiffs also "must show that they could have been uncracked or unpacked by a different map." Dkt.129:3. Appellants mockingly call this "retrofit[ting]." Br.25. What it really is, of course, is following this Court's instructions.

4. Next, Appellants latch onto three of the many individual plaintiffs in this case: Alice Bordsen in District 4, and Richard and Cheryl Taft in District 3. Br.26-27.[11] These plaintiffs are as unrepresentative as

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[11] Appellants also mention Larry Hall from District 1 and John Gresham from District 12. Br.27. These references are

Appellants' quotes from Appellees' complaints, being some of the few litigants who are not uncracked or unpacked by Plan 2-297. The League thus agrees that Bordsen and the Tafts cannot claim standing based on Plan 2-297 (though they certainly can based on other alternative maps, like those cited by Common Cause, or other theories of liability).

Whether or not Bordsen is injured by her placement in District 4, a League member does have standing to challenge it. Consistent with *Whitford*, this member is a Democratic voter who *is* unpacked by Plan 2-297. The below maps show the member's location in Precinct 01-04 of Wake County. The member goes from District 4 in the 2016 Plan (with its 63% Democratic vote share) to District 10 in Plan 2-297 (with a Democratic vote share of 53%). J.A.263; Dkt.129-7:2; Dkt.129-11:1. Moreover, District 10 in Plan 2-297 is not just much less heavily Democratic than District 4 in the 2016 Plan; it is also far more compact. J.A.262; Ex.5048.[12]

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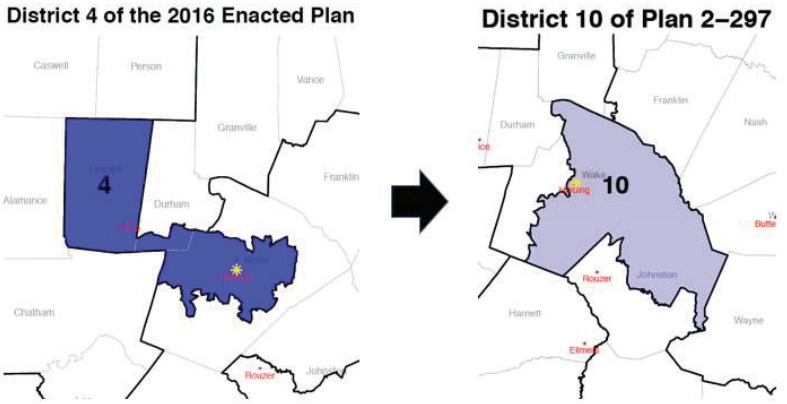
understandably brief. Hall and Gresham plainly are unpacked by Plan 2-297. J.A.275.

[12] Appellants note that some League members assert standing as plaintiffs while the League itself asserts associational standing on behalf of other League members. Br.26 n.4. There is a reason this observation is relegated to a footnote: It is utterly unremarkable. This Court has long held that "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Here, it is undisputed that the League members on whose behalf the League claims associational standing are registered to vote as Democrats, regularly vote in Democratic primaries, and live in particular precincts. J.A.290-92. There is no controversy, that is, over the facts that would entitle these members to standing if they were to sue in their

Plan 2-297's Unpacking of District 4



As for District 3, the League admits that none of its members have standing to dispute it, because none of them are uncracked by Plan 2-297. But this concession is the opposite of damning. Rather, the fact that some of the 2016 Plan's districts may be unlawfully dilutive, while others may not be, refutes Appellants' assertion that Appellees are attacking the Plan as an undifferentiated whole. Br.25. If they were, all of the Plan's districts would rise or fall together—which, on this district-specific theory, they emphatically do not.

5. Lastly, Appellants fall back on the argument that Appellees lack standing *even if* they live in cracked districts that "would have changed hands under their proposed map." Br.28. This is because, in Appellants' view, "[i]f each vote is counted and counted equally," vote dilution simply cannot occur. *Id.* It is worth pausing to appreciate the radicalism of

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own right. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268-70 (2015) (*ALBC*) (reversing a district court's holding that a statewide membership organization lacked associational standing to allege racial gerrymandering).

this position. It defies this Court's unanimous conclusion in *Whitford* that plaintiffs *can* bring "allegations that their votes have been diluted," and *do* have standing if their votes, "having been packed or cracked ... carry less weight than [they] would carry in [other], hypothetical district[s]." 138 S. Ct. at 1930-31.

Appellants' stance is also irreconcilable with the Court's repeated recognitions, in its partisan-gerrymandering and racial vote-dilution cases, that voters' influence can be diluted not just through malapportionment but through cracking and packing as well. In *Vieth*, for instance, the plurality defined partisan gerrymandering as "intentional vote dilution," and explained that it operates by "filling a district with a supermajority of a given group" or "splitting ... a group ... among several districts." 541 U.S. at 286 n.7, 298 (plurality). In *LULAC*, similarly, Chief Justice Roberts pointed out that racial vote dilution, too, works by "pack[ing] minority voters in a few districts" or "dispers[ing] them among [many] districts." 548 U.S. at 495 (opinion of Roberts, C.J.); *see also, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); *Voinovich*, 507 U.S. at 153-54; *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality). All these precedents would have to be revisited under Appellants' theory of standing, because they all acknowledge that malapportionment does not exhaust the set of dilutive mechanisms.

II. The Court Should Adhere to Its Consistent Holdings That Partisan Gerrymandering Is Justiciable.

Not only do Appellees have standing to press their partisan vote-dilution claims; these claims are also

justiciable. Justiciability, of course, is the rule, not the exception, in American constitutional law. Ordinarily, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) ("In general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'"). Nevertheless, Appellants invoke two categories of cases that do constitute unreviewable political questions. The first of these arises when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962). To decide if such a commitment exists, the Court must "first determine what power the Constitution confers"; only then can it "determine to what extent, if any, the exercise of that power is subject to judicial review." *Powell v. McCormack*, 395 U.S. 486, 519 (1969).

The second type of political question (addressed in the next section) stems from "a lack of judicially discoverable and manageable standards for resolving [the case]." *Baker*, 369 U.S. at 217. This exception to justiciability does not apply when "both sides offer detailed legal arguments" that "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 566 U.S. at 197, 201. "Recitation of these arguments" is "enough to establish that [a] case does not 'turn on standards that defy judicial application.'" *Id.* at 201 (quoting *Baker*, 369 U.S. at 211).

A. The Court Has Recognized the Justiciability of Partisan Gerrymandering for More Than Thirty Years.

1. Before turning to the provision that Appellants argue strips the Judiciary of its authority to hear partisan-gerrymandering cases—the Elections Clause of Article I, Section 4—it is important to note that the Court is not writing on a clean slate. To the contrary, the Court has already (and repeatedly) held that partisan-gerrymandering claims are justiciable. In *Bandemer*, six Justices reached the "conclusion that this case is justiciable." 478 U.S. at 125. In doing so, these Justices explicitly rejected Appellants' position that a textual commitment exists to a nonjudicial body: "Disposition of this question does not involve us in a matter more properly decided by a coequal branch of our Government." *Id.* at 123. Again in *Vieth*, "five members of the Court [were] convinced" that "political gerrymandering claims are justiciable." 541 U.S. at 317 (Stevens, J., dissenting). And once more in *LULAC*, after observing that "a majority [in *Vieth*] declined" to deem partisan-gerrymandering suits "nonjusticiable political questions," the Court refused to "revisit [*Vieth*'s] justiciability holding." 548 U.S. at 414.[13]

2. These cases should be followed not just because they are precedents but also because they are right. In particular, partisan vote-dilution claims have the

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[13] There is also no disagreement on the Court that partisan gerrymandering can violate the Constitution. As even the *Vieth* plurality conceded, "an *excessive* injection of politics [into redistricting] is *un*lawful." 541 U.S. at 293 (plurality). "So it is, and so does our opinion assume." *Id.*

same structure as *racial* vote-dilution challenges, which have been justiciable for almost half a century. *See, e.g.*, *White v. Regester*, 412 U.S. 755, 765-70 (1973). In racial (as in partisan) vote-dilution suits under the Constitution, discriminatory intent is a prerequisite for liability. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 617-18 (1982). As noted above, racial and partisan vote dilution both function by cracking and packing disfavored voters. *See supra* pp.30-35. Racial and partisan vote dilution both also depend on voter behavior that is predictable and polarized. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52-74 (1986). And racial and partisan vote dilution both require analyses of individual districts as well as "whether line-drawing in the challenged area as a whole dilutes [a group's] voting strength." *LULAC*, 548 U.S. at 504 (opinion of Roberts, C.J.). These issues cannot be judicially manageable in one context but beyond courts' powers in another.

3. Strongly supporting justiciability, too, is this Court's general vigilance against electoral regulations that threaten to entrench parties and undermine responsiveness. In *Davis v. FEC*, 554 U.S. 724, 742 (2008), for example, the Court struck down a campaign-finance law "making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election." The Court explained that "it is a dangerous business for [politicians] to use the election laws to influence the voters' choices." *Id.* In *McCutcheon*, similarly, the Court invalidated another campaign-finance provision that "compromis[ed] the political responsiveness at the heart of the democratic process" and "allow[ed] the Government to favor some participants in that process over others." 572 U.S. at

227 (plurality). "[T]hose who govern," the plurality declared, "should be the *last* people to help decide who *should* govern." *Id.* at 192; *see also, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011) (forbidding "intrusion by the government into the debate over who should govern").

These cases' lessons apply squarely to partisan gerrymandering. What is gerrymandering if not "making and implementing judgments about ... the outcome of an election"? *Davis*, 554 U.S. at 742. What do gerrymanderers do if not "favor some participants in [the political] process over others"? *McCutcheon*, 572 U.S. at 227 (plurality). Who are gerrymanderers if not "the *last* people to help decide who *should* govern"? *Id.* at 192. Indeed, the Court's insights are even more penetrating in the gerrymandering context. Regulations of money in politics may influence voters' behavior. But gerrymandering enables parties to entrench themselves directly, without even needing to change voters' minds.

4. That partisan vote-dilution claims are justiciable is evident as well from recent lower-court decisions that have shown just that. In *Vieth*, one of the plurality's reasons for vacating the field was that "lower courts" had not "succeeded in shaping the standard that this Court was initially unable to enunciate." 541 U.S. at 279 (plurality). Over the last few years, however, lower courts have made impressive progress toward the goal that eluded them between *Bandemer* and *Vieth*. Again, the district court here adopted a district-specific test requiring the (1) intentional, (2) effective, and (3) unjustified subordination of the opposing party and entrenchment of the line-drawing party. J.S.App.139-

54. This test built on the standard endorsed by the district court in *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018). And since the decision below, its approach has been borrowed by two more district courts. *See Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357, slip op. at 9-12 (S.D. Ohio Feb. 15, 2019) (*Randolph Inst.*); *League of Women Voters v. Johnson*, 2018 WL 6257476, at *16 (E.D. Mich. Nov. 30, 2018) (*LWVMI*).

What was "fantasy" in *Vieth*—the idea that "lower court jurisprudence has brought forth [justiciable] standards," 541 U.S. at 281 (plurality)—is thus now reality. Lower courts have converged on a single partisan vote-dilution test that exposes only egregious gerrymanders to liability and is highly workable to boot.

B. The Court Should Reject Appellants' Radical Elections Clause Argument.

1. Appellants' response to the encouraging lower-court activity is to try to pull the plug on it. The Elections Clause, they maintain, renders all partisan-gerrymandering claims—and, somehow, *only* partisan-gerrymandering claims—categorically nonjusticiable. Br.30-36. If this argument sounds novel, it should. Appellants never once made it below, referencing the Elections Clause only in response to Common Cause's theory that the provision bans redistricting for partisan gain. Dkt.112:148-52; Dkt.131:6-7. Nor have any Justices contended that the Elections Clause transforms partisan-gerrymandering suits into political questions. *Cf. LULAC*, 548 U.S. at 415-16 (opinion of Kennedy, J.) (discussing the Clause without asserting it is a

textually demonstrable commitment to another branch); *Vieth*, 541 U.S. at 275-77 (plurality) (same).

2. There is a reason why neither Appellants nor any Justices have previously advanced this argument. This Court has never held that the Elections Clause renders *any* claim nonjusticiable: not in the redistricting context nor in any other area of electoral regulation. Rather, the Clause grants state legislatures and Congress the power to "prescribe[]" the "Times, Places and Manner" of congressional elections, so long as they abide by the limits set by the rest of the Constitution, especially the First and Fourteenth Amendments. U.S. Const. art. I, §4. Moreover, far from denying courts their usual role, the Clause actually authorizes judicial review to ensure that laws enacted pursuant to it are procedural instead of substantive.

The Court first rejected the claim that state regulation of congressional elections "present[s] a political and not a judicial question" in *Smiley v. Holm*, 285 U.S. 355, 363 (1932). Deeming justiciable a Minnesota redistricting statute, the Court proceeded to the merits and held that the State's governor had veto power over the legislation. *Id.* at 368. Fourteen years later, Justice Frankfurter argued that a malapportionment challenge to an Illinois district plan was nonjusticiable due to the Elections Clause, *see Colegrove v. Green*, 328 U.S. 549, 554 (1946) (plurality), but a majority of the Court disagreed. "[T]he *Smiley* case rules squarely to the contrary," and means "this Court has power to afford relief" despite "the objection that the issues are not justiciable." *Id.* at 564-65 (Rutledge, J., concurring); *see also id.* at 571-73 (Black, J., dissenting).

Again in *Baker*, the Court observed that *Smiley* "settled the issue in favor of justiciability of questions of congressional redistricting." 369 U.S. at 232. The Court also reaffirmed its past "decisions in favor of justiciability even in light of" the Elections Clause. *Id.* at 234. And when Justice Harlan voiced Appellants' position in *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting)—marking the last time any Justice did so—the view was rebuffed once more. "[N]othing in the language of that article … immunize[s] state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." *Id.* at 6.

Since *Wesberry*, the Court has addressed the Elections Clause in two more lines of cases that are relevant here. In one, the Court has reiterated that state laws passed under the Clause may still be unlawful if they violate other constitutional provisions. *See, e.g.*, *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) ("[T]his authority does not extinguish the State's responsibility to observe the limits established by the First Amendment."); *Storer v. Brown*, 415 U.S. 724, 730 (1974). In another, the Court has held that state regulations may transgress the Elections Clause itself if they seek to "dictate electoral outcomes" rather than set procedures for congressional elections. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 833 (1995); *see also Cook v. Gralike*, 531 U.S. 510, 523-24 (2001). Both of these doctrinal strands are fatal for Appellants' argument. The first confirms that no issues transform into political questions because of the Elections Clause. The second establishes that the Clause is a source of—not a restriction on—judicial review.

3. Even if Appellants' stance were not precluded by almost a century of precedent, there would be no textual reason for this Court to adopt it. The Elections Clause is simply a power-conferring provision. It gives state legislatures the default authority to set the time, place, and manner of congressional elections, and Congress the right to make or alter these regulations as it sees fit. The Clause thus resembles many other constitutional provisions that bestow powers on either state legislatures or Congress. *See, e.g.*, U.S. Const. art. II, §1 (state legislatures); *id.* amend. XVII (same); *id.* art. I, §8 (Congress); *id.* amend. XIV, §5 (same). No one has ever suggested these parts of the Constitution are nonjusticiable because they assign authority to nonjudicial bodies. Indeed, this proposition would turn American constitutional law upside down, making the availability of judicial review the exception rather than the norm.

Critically, the Elections Clause does not confer "*sole* Power" over congressional elections to state legislatures and Congress. The Impeachment Clauses of Article I, Sections 2 and 3 do use this language, and this Court has held that it "indicates that this authority is reposed in [Congress] and nowhere else." *Nixon v. United States*, 506 U.S. 224, 229 (1993). The Elections Clause instead mirrors the Electors Clause of Article II, Section 1, which provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a [certain] Number of Electors." U.S. Const. art. II, §1. Under Appellants' approach to constitutional interpretation, this provision must surely be nonjusticiable. Yet the Court held exactly the opposite in *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), rejecting the view that "the subject-

matter of the controversy is not of judicial cognizance."

One more textual point: Given Appellants' position, one might be forgiven for thinking the Elections Clause refers explicitly to partisan gerrymandering. That, after all, is the only activity they say is rendered nonjusticiable by the Clause. But the Clause does no such thing. Rather, it extends to *all* "Regulations" of the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, §4. Based on the Clause's language, then, there is no way to distinguish between gerrymandering and any other regulation of congressional elections. If gerrymandering is nonjusticiable because of the Clause, then so must be malapportionment, *but see, e.g.*, *Wesberry*, racial vote dilution, *but see, e.g.*, *LULAC*, racial gerrymandering, *but see, e.g.*, *Harris*, campaign-finance laws, *but see, e.g.*, *McCutcheon*, regulations of congressional primaries, *but see, e.g.*, *Tashjian*, and every other aspect of federal elections a plaintiff might wish to challenge.

4. Unable to make a plausible textual argument, Appellants turn to history. No one at the Framing, they assert, thought the federal courts would play any role under the Elections Clause. Br.32-33. This claim also proves too much. If it were accepted, it would eliminate judicial review of all congressional electoral regulation, not just partisan gerrymandering. Furthermore, one must be careful drawing inferences about justiciability from the Framers' discussions of courts' likely activities. Debating the Constitution in an era well before *Marbury*, the Framers said little

about the judicial enforcement of many provisions now deemed justiciable.

Even more problematically for Appellants, John Steele cited court action as a reason not to fear abuse by Congress of its Elections Clause authority. Speaking to the North Carolina ratifying convention, he declared, "If the Congress make laws inconsistent with [the Clause], *independent judges will not uphold them*, nor will the people obey them." 4 *Debates on the Federal Constitution* 71 (J. Elliot 2d ed. 1836) (*Debates*) (emphasis added); *see also Wesberry*, 376 U.S. at 16 (quoting Steele's comment). James Madison similarly explained to the Virginia ratifying convention that the new federal government would provide "sufficient security against abuse" of Congress's Elections Clause power. 3 *Debates* 408. The government would be "subdivided into *three branches*"—the Legislature, the Executive, and the Judiciary—which would be "kept independent of each other," thus "increas[ing] the security of liberty." *Id.* at 408-09 (emphasis added).

5. Next, Appellants contend that, because partisan-gerrymandering cases involve political issues, they "could undermine the Court's reputation" if they are justiciable. Br.34. This claim parrots Justice Frankfurter's dissent in *Baker*, which predicted that "the Court's position" would be "impair[ed]" if it confronted the "political entanglements" of malapportionment disputes. 369 U.S. at 267 (Frankfurter, J., dissenting). The dispositive response to this point is also the same now as it was then. Whatever "the dangers of entering into political thickets" may be, "a denial of constitutionally protected rights demands judicial protection."

Reynolds v. Sims, 377 U.S. 533, 566 (1964). The Court "cannot shirk [its] responsibility merely because [its] decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

Moreover, Justice Frankfurter's prophecy of doom was wrong, and so is Appellants' dire forecast. While politicians who benefited from malapportionment resisted the one-person, one-vote rule, *see* Peyton McCrary, *Bringing Equality to Power*, 5 U. Pa. J. Const. L. 665, 680 (2003), most jurisdictions quickly complied with it, and the bulk of Americans supported the Court's intervention, *see* Joshua Fougere *et al.*, *Partisanship, Public Opinion, and Redistricting*, 9 Election L.J. 325, 325 (2010). Similarly, today's gerrymanderers may strenuously oppose judicial efforts to undo their handiwork. Br.39. But the few court decisions striking down plans because of their partisanship have swiftly yielded fairer maps. *See, e.g.*, *Cox v. Larios*, 542 U.S. 947 (2004). And Americans are eager for gerrymandering to be judicially curbed, even if their preferred parties win fewer seats as a result. *See, e.g.*, ALG Research & GS Strategy Grp., *New Bipartisan Poll on Gerrymandering and the Supreme Court* (Jan. 25, 2019).

6. Lastly, Appellants echo another argument of the one-person, one-vote dissenters: that this Court need not act because Congress may do so instead. Br.35-36; *see, e.g.*, *Wesberry*, 376 U.S. at 30 (Harlan, J., dissenting). And again, that era's decisions provide the definitive rebuttals. "[T]he fact that a nonjudicial, political remedy may be available" has "no significance" since "individual constitutional rights

cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964). Additionally, even if "there is recourse in Congress," "from a practical standpoint this is without substance." *Baker*, 369 U.S. at 259 (Clark, J., concurring). "To date Congress has never undertaken such a task in any State." *Id.*

Reviewing the same record of congressional action (and inaction) as Justice Clark, Appellants come to the opposite conclusion about its efficacy. But it is undisputable that Congress has never directly confronted the problem of partisan gerrymandering. The requirements it has imposed, most importantly the use of single-member districts, do virtually nothing to stop the cracking and packing of the opposing party's voters. Congressional activity has also been exceedingly infrequent. Indeed, Congress has not enacted a single new redistricting criterion in more than a century. *See* Apportionment Act of 1911, 37 Stat. 13. And even when Congress has legislated, its motivation has not been the high-minded restraint of state-level abuses suggested by Appellants. Rather, it has been a congressional majority's pursuit of partisan advantage. *See, e.g.*, Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 43-44 (2013) (describing how the Whigs banned at-large congressional elections in 1842 to avoid losing every seat in Democratic-leaning States).

The reason for this pattern is a development the Framers did not anticipate (and would have opposed): the "rise of the party system." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson,

J., concurring). National parties combining federal, state, and local politicians under the same banner emerged early in American history. These vertically integrated entities had no incentive to use the Elections Clause to curb state-level factionalism because the national parties were largely coextensive with the state parties. Ambition thus did not counter ambition, as Appellants assert. Br.32. Rather, federal ambition *complemented* state ambition, making vigorous congressional action against partisan gerrymandering nearly impossible.

C. The Court May Decide This Case Without Addressing the General Justiciability of Partisan Gerrymandering.

1. In any event, given the particular facts of this case, this Court should affirm the judgment below even if it chooses not to specify a single standard for adjudicating partisan-gerrymandering claims. Appellees alleged, and the district court found, that the 2016 Plan was enacted with the naked desire to undermine the political voice of Democratic voters in North Carolina. Indeed, for the first time in American history, this raw partisan motive was ratified as an official state policy to maximally degrade the representation of a disfavored political group. *See supra* pp.5-8. The law challenged here thus cannot survive even the most deferential review under the First and Fourteenth Amendments because of the openly discriminatory intent with which it was passed. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute

a legitimate governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *see also Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down a provision that "seems inexplicable by anything but animus toward the class it affects"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (same).

This Court's redistricting precedents support the 2016 Plan's invalidation even absent a broader justiciability holding. Consider the Court's first racial-gerrymandering case, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), decided in an era when line-drawing challenges were still nonjusticiable and decades before the Court adopted a standard for racial-gerrymandering claims. The Court nevertheless held that when Alabama transformed a square municipal boundary into "an uncouth twenty-eight-sided figure" excising every African-American neighborhood, "the conclusion [was] irresistible, tantamount for all practical purposes to a mathematical demonstration," that the Fifteenth Amendment had been violated. *Id.* at 340-41. So too here: In an evenly divided State like North Carolina, a redistricting statute that facially intends to—and in fact does—produce a congressional delegation with ten Republicans and three Democrats can only be understood as a means for discriminating against Democratic voters.

In *Vieth*, similarly, Justice Kennedy addressed what he thought was an outlandish hypothetical: "an enactment that declared" that district lines "'shall be drawn so as most to burden Party X's rights to fair and effective representation.'" 541 U.S. at 312 (Kennedy, J., concurring). In Justice Kennedy's view, the Court "would surely conclude the Constitution had been

violated" by such a law. *Id.* The 2016 Plan, of course, *is* this counterfactual: a statute that officially sets "[t]he partisan makeup of the congressional delegation" at "10 Republicans and 3 Democrats," J.S.App.20, because it is not "possible to draw a map with 11 Republicans and 2 Democrats," J.S.App.22. The 2016 Plan therefore can and should be struck down even if the status of other maps remains unresolved.

2. Appellants contend that the 2016 Plan's overt partisanship should be overlooked because the Plan supposedly has a nonpartisan aim too: compliance with traditional redistricting criteria. Br.57-60. But as explained earlier, this purported compliance is a charade. In fact, the Plan systematically *divides* cities and counties to crack smaller Democratic clusters and pack larger ones. The Plan respects political subdivisions only where doing so is compatible with its overriding goal of benefiting Republicans and handicapping Democrats. *See supra* pp.9-14. Moreover, this Court has long recognized that "adherence to traditional districting factors" does not "negate[] any possibility of intentional vote dilution." *Vieth*, 541 U.S. at 298 (plurality). Aesthetically pleasing districts "cannot promise political neutrality" and, indeed, may "have significant political effect" when they are simply a ploy to disguise a gerrymander. *Id.* at 308-09 (Kennedy, J., concurring).

III. The District Court's Test for Partisan Vote Dilution Is Discernible and Manageable.

Appellants' other rationale for nonjusticiability is "a lack of judicially discoverable and manageable standards" for deciding partisan-gerrymandering claims. *Baker*, 369 U.S. at 217. For the first time in its

history, Appellants maintain, this Court should deem an entire cause of action a political question on this basis. But each prong of the district-specific test the district court adopted for partisan vote-dilution challenges is plainly discernible and manageable. Moreover, this test captures not just equal protection violations but also the First Amendment injury of intentional viewpoint discrimination. A district that fails the test indisputably "has the purpose and effect of subjecting a group of voters … to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

A. The District Court's Intent Prong Is Limited and Precise.

1. The district court derived its intent prong from this Court's own definition of partisan gerrymandering. The prong asks whether a particular district was drawn with the "intent to 'subordinate adherents of one political party and entrench a rival party in power.'" J.S.App.142 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)); *see also Randolph Inst.*, slip op. at 10 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 890 (same). The prong also follows from the Court's analysis of partisan motivation in *Whitford*. The Court cited a variety of material, some district-specific and other plan-wide, showing Wisconsin mapmakers' aim of durably diluting Democratic votes. 138 S. Ct. at 1932. "That evidence," the Court continued, "may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims." *Id.*

Consistent with *Whitford*, the district court held that district-specific partisan intent may be established using both district-specific and plan-wide material. Probative district-specific evidence includes (1) drafters' statements about particular districts; (2) drafters' data showing how they expected particular districts to perform; (3) how particular districts disperse or overconcentrate the opposing party's voters; and (4) how else particular districts could have been drawn so as not to crack or pack these voters. J.S.App.223-27. Likewise, plan-wide evidence may illuminate mapmakers' overall goals and corroborate inferences drawn from district-specific material. *See, e.g.*, *ALBC*, 135 S. Ct. at 1265 ("Voters, of course, can present statewide *evidence* in order to prove [a discriminatory purpose] in a particular district.").

2. All by itself, the district court's intent prong significantly shrinks the pool of districts potentially subject to liability. Only parties with unified control of state governments (or legislative supermajorities) are able to craft districts with the objective of subordinating opposing-party voters and entrenching themselves in power. According to Professor Jackman's dataset of congressional plans, ten of the twenty-four current maps with at least seven seats were designed by a commission, a court, or a divided state government. Ex.4002:32. Over the entire period since 1972, this proportion was 59 out of 136. *Id.* Almost *half* of all congressional plans would thus be virtually *immunized* by the district court's intent prong alone. Challenges to these maps' districts could not get off the ground due to the lack of a sufficient partisan motive.

Even in plans enacted by a single party, only a subset of their districts would be legally vulnerable. Some of these maps' districts would unavoidably crack or pack the opposing party's voters—due to States' political geographies and legitimate redistricting criteria—and so could not be said to dilute these voters deliberately. Here, for instance, the League only alleges that nine of the 2016 Plan's districts are unlawful. In the ongoing Michigan case, similarly, just 36 of 110 state house districts and 6 of 38 state senate districts are under attack. *LWVMI*, 2018 WL 6257476, at *8 n.14.

3. Appellants object to the district court's intent prong because they think there is nothing wrong with a party trying to subordinate the opposition and entrench itself in office. Br.40-42. But Appellants make no effort to reconcile their position with this Court's statement in *Arizona State Legislature* that this aim is the essence of unconstitutional partisan gerrymandering. Nor do Appellants have anything to say about the Court's analysis in *Whitford*. If a dilutive purpose is entirely acceptable, then how could its presence be "pertinent with respect to any ultimate determination whether the plaintiffs may prevail"? 138 S. Ct. at 1932. And nor do Appellants so much as mention the Court's recent unanimous assumption that "partisanship is an illegitimate redistricting factor." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016). Again, this assumption would be inexplicable if mapmaking really were the one area where the government could seek to harm a disfavored political group.

Indeed, Appellants cite only a single opinion supporting their view that raw partisan advantage is

a permissible—as opposed to merely a common—motivation. But that opinion, in *Vieth*, was by a plurality, and its reasoning was explicitly disavowed by the rest of the Court. In his controlling concurrence, Justice Kennedy wrote that "a gerrymander violates the law" if it applies "political classifications" "in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J., concurring). Likewise, Justice Stevens observed that, before *Vieth*, "there ha[d] not been the slightest intimation in any opinion" that "a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Id.* at 336-37 (Stevens, J., dissenting); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 354 (2017) (identifying "*Vieth* as the puzzling aberration from the general norm against government nonpartisanship").

4. Appellants also complain about the district court's use in the alternative of a heightened intent threshold, requiring partisan gain to predominate over other redistricting goals. Br.48-49. But while a plurality in *Vieth* was unwilling to adopt a predominance standard, a unanimous Court did exactly that in *Harris*. Under *Harris*, a one-person, one-vote plaintiff challenging a plan with a total population "deviation of less than 10%" must show that the variance "reflects the *predominance* of illegitimate reapportionment factors," such as "partisanship." 136 S. Ct. at 1307, 1310 (emphasis added). Relying on this standard, every Justice concluded that the Arizona state-legislative map at issue was lawful, because its "deviations *predominantly* reflected Commission efforts to

achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party." *Id.* at 1307 (emphasis added). Every Justice, that is, did what Appellants say cannot be done: apply a predominant partisan-intent requirement.

B. The District Court's Effect Prong Is Limited and Precise.

1. Next, the district court's effect prong asks whether the challenged district, and the plan to which it belongs, are actually dilutive. "[T]he lines of a particular district have the effect of discriminating against—or subordinating—voters who support candidates of a disfavored party, if the district dilutes such voters' votes by virtue of cracking or packing." J.S.App.151. Similarly, a map is dilutive if its districts' cracking and packing create a large and durable advantage for the line-drawing party. J.S.App.188. The magnitude of a party's advantage may be demonstrated through election results as well as measures of partisan asymmetry such as the efficiency gap, partisan bias, and the mean-median difference. J.S.App.188-209. In turn, the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions. J.S.App.190-91; *see also Randolph Inst.*, slip op. at 10-11 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 910 (same).

2. The plan-wide piece of this inquiry has analogues in both other kinds of vote-dilution cases. As in those doctrines, it ensures that no liability attaches unless a dilutive district is part of a map that is itself dilutive. In a malapportionment challenge, for

example, it is not enough for a plaintiff to prove that her own district is overpopulated. To prevail, she must also establish that the total population deviation between the entire plan's most and least populous districts exceeds ten percent (in a state-legislative suit). *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Likewise, a racial vote-dilution plaintiff is not done after showing that she has been cracked or packed—or even that she could have been placed in "an *additional* majority-minority district." *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.). Rather, a court must also consider "whether 'minority voters form effective voting majorities in a number of districts roughly proportional to [their] shares in the voting-age population.'" *Id.* at 508 (quoting *De Grandy*, 512 U.S. at 1000). "A finding of proportionality under this standard can defeat §2 liability even if a clear [district-specific] violation has been made out." *Id.*[14]

Professor Jackman's dataset confirms what these doctrinal analogies suggest: that only a few congressional maps would be vulnerable under the district court's effect prong. According to the dataset, fourteen of the twenty-four current congressional plans with at least seven seats either were not enacted by a single party or are forecast to have a lifetime average partisan asymmetry of less than one seat. Ex.4002:51. Over the entire period since 1972, this fraction increases to 107 out of 136. *Id.* Suits against

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[14] The district court's effect prong is also rooted in this Court's partisan-gerrymandering cases. Several Justices have noted "'the utility of a criterion of symmetry.'" *Whitford*, 138 S. Ct. at 1929. Similarly, the durability of a plan's skew—whether it "consistently degrade[s] … a group of voters' influence"—was the crux of the *Bandemer* plurality's test. 478 U.S. at 132 (plurality).

the vast majority of congressional maps would therefore be futile under the district court's framework. Most plans, it turns out, either do not exhibit the requisite intent or do not actually dilute a party's votes.[15]

3. Appellants respond with a grab bag of criticisms, most of them unmoored from the record and oblivious to the rebuttals already supplied by the district court. For instance, Appellants assert that measures of partisan asymmetry are tantamount to "deviations from proportional representation." Br.43. As the district court explained, this is simply incorrect. The metrics do *not* necessarily flag "a districting plan that awards the party that obtains a bare majority of the statewide vote a larger proportion of the seats in the state's congressional delegation." J.S.App.199. This is because the metrics are based not on proportionality but rather on the quite different principle of symmetry: "the notion that the magnitude of the winner's bonus should be approximately the same for both parties." *Id.*[16]

Appellants also claim the metrics "misunderstand[] how politics works" because they do not distinguish between more and less safe seats won by a given party. Br.43. In fact, it is Appellants who fail to grasp the implications of today's hyperpolarized

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[15] Moreover, Professor Jackman's dataset does not take into account sensitivity testing. Even more congressional plans are not intentionally, severely, *and durably* asymmetric.

[16] Take the efficiency gap. If it were a measure of disproportionality, it would be calculated by comparing a party's statewide seat and vote shares. But that is not how the metric is computed. Rather, it tallies the votes each party wastes due to cracking and packing, district by district, and then compares the resulting totals. *See Whitford*, 138 S. Ct. at 1933.

Congress. Since almost every House member is staunchly liberal or conservative, competitive districts cannot be electing many moderate Representatives. If they were, Congress would not be nearly devoid of centrists. Take Appellants' example of North Carolina's Ninth Congressional District, with its tight 2018 race. Br.51. If House members from competitive seats "respond to voters of the opposing party," *id.*, then District 9 should be a hotbed of moderation. But actually, its only Representative this decade has been a conservative Republican far from the ideological center. *See Robert Pittenger*, Voteview, https://voteview.com/person/21347/robert-pittenger.

Appellants further observe that bipartisan and nonpartisan plans are sometimes asymmetric. Br.44. That is true, but irrelevant. As the district court noted, if a plaintiff were ever to challenge such a map, she would be "unable to establish that it was drawn with discriminatory intent, and therefore the plan [would] pass constitutional muster." J.S.App.203. Moreover, as mapmakers have honed their skills in recent years, mismatches between intent and effect have become rarer. In the current cycle, almost every plan designed by Democrats skews in their direction, nearly every Republican-drawn map tilts the other way, and most bipartisan and nonpartisan plans are balanced. Ex.4002:34.

Appellants contend as well that measures of partisan asymmetry have a "built-in bias" against Republicans. Br.44. If this were correct, these metrics should yield more pro-Republican than pro-Democratic scores. But that does not happen. As the district court found, the historical distribution of efficiency gaps is "normal with its mean and median

centered on zero, meaning that, on average, the districting plans ... did not tend to favor either party." J.S.App.194-95. Even in a State whose "pre-existing political geography" did advantage Republicans, Br.44, the district court's test would not produce anomalous results. As discussed below, the whole point of the test's justification prong is to avoid liability when a State's map is no more skewed than expected given the State's nonpartisan redistricting criteria and its voters' spatial patterns. *See infra* pp.60-63.

Appellants point out, too, that voters' preferences can change from one election to the next. Br.45-46. Of course they can. Sometimes, a plan's asymmetry would evaporate given plausible electoral shifts—and in that case, the district court's effect prong would not be satisfied. Other maps, however, are carefully crafted to continue benefiting the line-drawing party for the entire decade, even if public opinion turns sharply against it. The 2016 Plan, for example, just set the record for pro-Republican bias despite a Democratic wave election in 2018. The degree of voter volatility also should not be overstated. Hofeller himself testified that "'the underlying political nature of the precincts ... does not change no matter what race you use to analyze it.'" J.S.App.16. Professor Chen confirmed Hofeller's testimony by demonstrating that North Carolina's voters behave nearly identically in contests at different electoral levels. Ex.2010:38.

Lastly, Appellants fault the district court for not specifying an asymmetry threshold for all future cases. Br.50-51. It would certainly have been odd if the court had made such a grand pronouncement. To

resolve the dispute in front of it, it was enough for the court to find that the 2016 Plan's skew is exceptionally severe, and thus well above any conceivable bar. Notably, this Court took exactly the same approach in its early one-person, one-vote decisions. In *Baker*, *Reynolds*, and all the rest of the malapportionment cases of the 1960s, the Court never indicated at what point a map's total population deviation becomes presumptively unlawful. Instead, the Court reasoned that "[d]eveloping a body of doctrine on a case-by-case basis" is "the most satisfactory means of arriving at detailed constitutional requirements." *Reynolds*, 377 U.S. at 578.[17]

C. The District Court's Justification Prong Is Limited and Precise.

1. The third and final prong of the district court's test is justification: whether "the defendant [can] prove that a district's or districts' discriminatory effects are attributable to a legitimate state interest or other neutral explanation." J.S.App.154. If the dilutive impact of a district or plan *is* accounted for by a State's political geography or valid nonpartisan redistricting objectives, then the plaintiff's challenge fails. *Id.* Alternative district maps are the most probative evidence at this stage of the analysis. Thanks to technological advances, they can be generated randomly and in large numbers, without considering partisan data and matching or beating

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[17] Eventually, of course, the Court did settle on a population deviation threshold—ten percent—for state-legislative maps. *See Connor v. Finch*, 431 U.S. 407, 418 (1977). Here, likewise, Professor Jackman suggested as a cutoff an average partisan asymmetry, over a plan's ten-year lifetime, of at least one congressional seat. Ex.4002:51-54.

the enacted plan on all legitimate nonpartisan criteria. J.S.App.217-22. If these alternative maps are about as skewed as the enacted plan, then its bias is justified and it is exempt from liability. But if most or all of the alternative maps are less tilted, then no valid justification exists for the enacted plan's asymmetry. *Id.*; *see also Randolph Inst.*, slip op. at 10-12 (embracing a similar approach); *LWVMI*, 2018 WL 6257476, at *16 (same); *Whitford*, 218 F. Supp. 3d at 911 (same).[18]

2. This Court contemplated an inquiry of this kind in *Whitford*. A test for partisan vote dilution, the Court suggested, should distinguish between voters who are "'naturally' packed due to their geographic concentration" and voters who have been "deliberately cracked." 138 S. Ct. at 1933. Randomly generated alternative maps make exactly this distinction. They reveal in which areas cracking and packing occur on their own—and in which areas they are very much the product of the mapmaker's efforts. *See also Harris*, 137 S. Ct. at 1479 (describing "alternative districting plan[s]" as "key evidence"). The district court's justification prong is rooted in this Court's malapportionment cases too, which employ an identical framework. "A plan with larger disparities in population … creates a prima facie case of discrimination and therefore must be justified by the

[18] As the district court held, randomly generated alternative maps are also relevant to its test's intent and effect prongs. A dilutive purpose may be inferred when an enacted plan is more skewed than most or all alternative maps. J.S.App.159-79. And alternative maps provide a legally attractive "baseline," Br.42—the outcome of a redistricting process that does *not* pursue partisan advantage—to which the enacted plan's asymmetry may be compared. J.S.App.209-12.

State." *Brown*, 462 U.S. at 842-43. If "the maximum total deviation from ideal district size exceed[s] 10%," defendants are "required to justify the deviation." *Voinovich*, 507 U.S. at 161.

As in the one-person, one-vote context, the justification prong makes it harder for plaintiffs to prevail. Even if they show both discriminatory intent and discriminatory effect, they still lose if the dilutive impact can be justified—which it often can be. At the congressional level, many of the plans currently in effect are about as asymmetric as the typical randomly generated map for the State. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering*, 44 Electoral Stud. 329, 337 (2016). At the state-legislative level, the same was true for many state house and state senate plans in the 1990s and 2000s. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering*, 8 Q.J. Pol. Sci. 239, 263 (2013). All such plans would avoid liability due to the justification prong. Even if they are highly skewed, they are no *more* skewed than expected given their States' political geographies and legitimate redistricting aims.[19]

3. Appellants' sole objection to the justification prong is that it puts the burden of proof on the defendant rather than the plaintiff. Br.51-52. This complaint is entirely new, having never been voiced below. J.S.App.153-54 n.25. It is also tangential, as

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[19] That the district court's test is so limited in its reach, of course, does not mean it is ineffectual. It *would* still invalidate needlessly cracked and packed districts in the few (but multiplying) maps as egregious as the 2016 Plan. It would also deter mapmakers from pursuing partisan advantage so aggressively.

the district court found that "even if the burden lies with Plaintiffs, Plaintiffs have propounded sufficient evidence of the 2016 Plan's lack of justification." *Id.* Appellants' view contradicts this Court's malapportionment cases as well, which allocate the burden to the State because of its greater familiarity with its "consistently applied legislative policies" and superior ability "to show with some specificity that a particular objective required the [dilutive impact of] its plan." *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983).

CONCLUSION

By the standards of the past, North Carolina's current congressional plan is exceptional. It is the first map in American history to ratify the pursuit of maximal partisan advantage and to have its architect boast, on the record, about his desire to harm his political opponents. It is the single most pro-Republican congressional map of the last half-century. And it has set this record even though the State's political geography mildly favors Democrats. If this Court holds that partisan-gerrymandering claims are nonjusticiable, however, the 2016 Plan will be the wave of the future. In the 2020 cycle and beyond, both parties will emulate—or exceed—its abuses, openly entrenching themselves in power using the full array of modern mapmaking technologies. This is not a future a Court that values "the political responsiveness at the heart of the democratic process" should countenance. *McCutcheon*, 572 U.S. at 227 (plurality). The Court should therefore affirm the judgment below.

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