No. _____

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

JURISDICTIONAL STATEMENT

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October 1, 2018

QUESTIONS PRESENTED

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

The questions presented are:

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

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

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

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

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

Defendants:

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

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

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INTRODUCTION

Earlier this year, while *Gill v. Whitford* was pending before this Court, the three-judge district court in this case became just the second federal court since *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to invalidate a districting map as a partisan gerrymander. Although the search for a justiciable test for such claims "has confounded th[is] Court for decades," *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018), the district court here purported to divine *four separate* tests—one in the Equal Protection Clause, one in the First Amendment, and, for the first time ever, two in the Elections Clauses of Article I. Each test was more sweeping and less forgiving than the last, culminating in the conclusion that the Elections Clauses prohibit districting for partisan advantage *entirely* because it deprives "the People" of their ability to elect their representatives, and because state legislatures were never "delegated" the power to district for partisan advantage.

In June, this Court vacated that extraordinary decision in light of *Gill* and remanded for further consideration. That time of reconsideration was short-lived. By August, the same three-judge panel generated a 321-page divided decision finding standing and multiple justiciable tests, and became the first post-*Gill* court to invalidate a districting map as a partisan gerrymander. After enjoining the State from using its districting map in congressional elections after 2018—and initially threatening to enjoin the use of the map in *this November's* midterm elections—the court ultimately accepted plaintiffs'

agreement with appellants that it should stay its decision pending this Court's review.

While this Court's jurisdiction over this case is doubtful, the need for plenary review is plain. If there is indeed a theory of standing for adjudicating generalized partisan grievances and a justiciable test for separating unconstitutional partisan gerrymanders from the run-of-the-mill consideration of partisan advantage by legislatures organized on party lines, they will have to come from this Court. Indeed, while there are very real reasons to doubt whether such standing theories and justiciable tests exist at all, it is even more clear that the answers are not lurking in the 321-page opinion issued below. In reality, this case suffers from the same standing problems that felled *Gill*, as plaintiffs once again seek to vindicate generalized partisan preferences, not constitutionally cognizable individual injuries. And none of the various formulations embraced in the decision below constitutes a judicially administrable test for separating excessive partisan gerrymandering from the run-of-the-mill consideration of partisan advantage by legislatures organized along party lines. In fact, by ultimately concluding that any consideration of partisan advantage in districting is unconstitutional, the majority below parted company with every Justice of this Court ever to consider the matter. In short, the decision below would thrust the courts into a role that no member of this Court has squarely embraced. The need for plenary consideration of this appeal could hardly be plainer.

OPINION BELOW

The Middle District of North Carolina's opinion is reported at 318 F. Supp. 3d 777. App.1-348.

JURISDICTION

The Middle District of North Carolina issued its decision on August 27, 2018. Appellants filed their notice of appeal on August 31, 2018. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reproduced at App.373-374.

STATEMENT OF THE CASE

A. Background

This appeal arises from the most recent round of congressional redistricting in North Carolina, which began in 2016 after an earlier round of redistricting litigation. In February 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map were unconstitutional racial gerrymanders and ordered the General Assembly to draw a new map within 14 days. *See Harris v. McCrory* (*Harris I*), 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris* (*Harris II*), 137 S. Ct. 1455 (2017). The General Assembly immediately set to work.

Because the district court's two-week deadline made time of the essence, the chairmen of the most recent Senate and House redistricting committee—Senator Robert Rucho and Representative David Lewis—promptly engaged expert mapdrawer Dr.

Thomas Hofeller to assist in drawing a new map. App.14-15. In addition to instructing Dr. Hofeller to comply with all state and federal districting requirements and traditional districting criteria, they instructed him not to consider racial data at all, but to consider political data and to endeavor to draw a map that was likely to preserve the existing partisan makeup of the State's congressional delegation. App.15-16.

Meanwhile, the General Assembly appointed a new districting committee, which adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable," ensuring contiguity and compactness, and making "reasonable efforts" to avoid pairing incumbents. App.19-20. The criteria also stated that racial data shall not be used or considered, but that political data may be used, and that "reasonable efforts" shall be made "to maintain the current partisan makeup of North Carolina's congressional delegation"—then, ten Republicans and three Democrats. App.20.

The committee unanimously adopted five of the seven districting criteria and adopted the two dealing with racial and political data and partisan advantage on a party-line vote. App.23. The committee ultimately approved the map drawn with Dr. Hofeller's assistance by a party-line vote, and the General Assembly thereafter enacted the map ("2016 Map"), with minor modifications, on party-line votes. App.24.

As a matter of traditional districting criteria, the 2016 Map compares favorably to the 2011 map.

Indeed, it adheres more closely to traditional districting criteria than any congressional map North Carolina has used in 25 years. The 2016 Map divides only 13 (out of 100) counties and splits only 12 (out of more than 2000) precincts across the entire State. App.25. No county is split between more than two congressional districts. By contrast, the 1992 map divided 44 counties (seven of which were trifurcated into three congressional districts) and split 77 precincts. App.20-21; Dkt.114 at 143.[1] The 1997 map divided 22 counties, the 1998 plan divided 21, the 2001 map divided 28, and the 2011 map divided 40. Dkt.114 at 143. The 2016 Map likewise is more compact "[u]nder several mathematical measures" than the 2011 map and paired only two incumbents. App.25.

The *Harris* plaintiffs nonetheless filed objections to the 2016 Map, including a partisan gerrymandering challenge, but the district court rejected those challenges. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 138 S. Ct. 2711 (2018) (mem.). The map took effect in June 2016, was in place for the November 2016 elections, and will govern the upcoming November 2018 elections as well.

B. Pre-*Gill* Proceedings

1. Shortly after the *Harris* district court approved the 2016 Map, appellees filed the two lawsuits that give rise to this appeal. In August 2016, Common Cause, the North Carolina Democratic Party, and 14

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[1] Unless otherwise noted, "Dkt." refers to docket entries in *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.).

individual voters filed suit against appellants (Senator Rucho, Representative Lewis, and two other legislators) and others, alleging that the 2016 Map is an unconstitutional partisan gerrymander. App.26-27. The next month, the League of Women Voters and 12 individual voters followed suit. App.27.

Both complaints alleged that the map violates the Equal Protection Clause and the First Amendment. App.27. The Common Cause plaintiffs further alleged that the map violates the Elections Clauses of Article I. App.28; *see* U.S. Const. art. I, §2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States …."); *id.* §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …."). Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Map as a whole, and the Common Cause plaintiffs also claimed "standing to assert … district-by-district challenges." *Common Cause v. Rucho* (*Common Cause I*), 279 F. Supp. 3d 587, 609 (M.D.N.C.), *vacated and remanded*, *Rucho v. Common Cause* (*Common Cause II*), 138 S. Ct. 2679 (2018).

The cases were assigned to a three-judge district court. The court consolidated the cases and originally scheduled them for trial in June 2017, but subsequently postponed trial on its own motion. Amidst the pretrial proceedings, this Court agreed to hear *Gill*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.). Appellants filed a motion asking the district court to stay proceedings pending resolution of *Gill*, explaining it would make little sense to proceed with

a trial while this Court was considering whether partisan gerrymandering claims are even justiciable. *See* Dkt.75. But the district court denied the motion and forged ahead, holding a four-day bench trial in October 2017.

2. Three months later, the district court issued a divided opinion authored by Judge Wynn, holding that plaintiffs had statewide standing to press their claims and finding the 2016 Map unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. App.33-34. The majority immediately enjoined the State from using the 2016 Map in future elections and gave the General Assembly a mere two weeks—the absolute minimum time permissible under state law, *see* N.C. Gen. Stat. §120-2.4(a)—to draw, consider, debate, and vote on a new congressional map. App.34.

After the district court refused to stay its order, appellants filed an emergency stay application with this Court. App.34. This Court granted that application and stayed the district court's order pending the filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.). On June 18, the Court issued its decision in *Gill*, which concluded that the plaintiffs lacked standing to bring their statewide challenges to Wisconsin's districting map. 138 S. Ct. at 1930. On June 25, this Court vacated the district court's judgment in this case and remanded for further consideration in light of *Gill*. *See Common Cause II*, 138 S. Ct. 2679.

C. Post-*Gill* Decision

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

1. Starting with the equal protection claims, the court acknowledged that *Gill* rejected a "statewide" standing theory, and that plaintiffs had previously asserted such a theory. *See, e.g.*, App.41-43. The court further conceded that Common Cause and several individual plaintiffs lacked standing for failure to claim anything other than a statewide injury. App.65-67 & n.15. Nonetheless, the court concluded that individual "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts" have standing to press vote-dilution claims under the Equal Protection Clause. App.50.[2]

The court also concluded that these "dilutionary injuries" afforded these same plaintiffs standing under the First Amendment. App.69-70. In addition, the court concluded that various individual plaintiffs had standing to press "non-dilutionary" claims under the First Amendment because, for example, they "had difficulty convincing fellow Democrats to 'come out to

[2] The court concluded the North Carolina Democratic Party had standing in each district, and that the League, "at a minimum," had standing in one district. App.64-65 n.14.

vote'" in certain districts. App.69-70.[3] The court concluded that, "because these injuries are statewide, such Plaintiffs have standing to … challenge … the 2016 Plan as a whole." App.74.

Finally, the court concluded that the Common Cause plaintiffs have standing to press their Article I claims. App.74. Those claims, the court posited, are "premised on federalism" and so "do not stop at a single district's lines." App.74-75. Although the court acknowledged that such a "structural harm does not absolve litigants from … alleg[ing] particularized injuries," it found that requirement satisfied because at least one plaintiff in each district alleged "dilutionary injuries," and because plaintiffs also alleged adequate "non-dilutionary injuries"—*e.g.*, "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions." App.76, 78. "[B]ecause these structural and associational harms have statewide implications," the court concluded, they "are sufficient to confer standing on a statewide basis" under the Elections Clauses. App.83.

2. Turning to justiciability, the court deemed itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to conclude that partisan gerrymandering claims are justiciable. App.86-88. The court further reasoned that partisan gerrymandering is "contrary to the republican system put in place by the Framers," and that no "deference to the policy judgments of the political branches" is warranted in this context

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

because gerrymandering "targets voting rights." App.92, 96. As for the thorny problem of identifying a manageable standard for determining how much consideration of politics is too much, the court declared that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in … partisan gerrymandering" at all. App.118.

3. The court then moved to the merits and began by purporting to find a manageable standard for adjudicating plaintiffs' equal protection claims. To prove such claims, the court concluded, a plaintiff must demonstrate (1) "discriminatory intent" and (2) "discriminatory effects," at which point the burden shifts to the defendant to try to prove that (3) those "discriminatory effects are attributable to the state's political geography or another legitimate redistricting objective." App.138-39. As to intent, although the court had just concluded that *any* amount of districting for partisan advantage is impermissible, it maintained that its equal protection analysis "*does not rest*" on that conclusion. App.119. Instead, the court "assume[d]" for now that plaintiffs must show that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power,'" even as it acknowledged that this Court declined to adopt a "predominant intent" requirement in previous partisan gerrymandering cases. App.145-46. The court then found its "assume[d]" intent standard satisfied in all but one district based on an assortment

of "statewide" and "district-specific" evidence. App.155, 223, 273.

As to discriminatory effects, the court began by noting (with considerable understatement) that "there is an absence of controlling authority" in this area. App.151. Forging ahead, the court concluded that a plaintiff proves discriminatory effects whenever "the dilution of the votes of supporters of a disfavored party in a particular district … is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." App.152. Based on its review of various social science metrics—including "uniform swing analysis," "simulation analyses," the "efficiency gap," "partisan bias," and the "mean-median difference," App.191-92, 209—the court found "'strong proof' of the 2016 [Map's] discriminatory effects" based on statewide evidence. App.214. The court also found "district-specific evidence" of discriminatory effects in all but one district. App.227-74. The court then determined that no legitimate redistricting objective could justify the "dilution of … voters' votes," and so held that "each of those twelve districts constitutes an invidious partisan gerrymander in violation of the Equal Protection Clause." App.273-74.

Next came the First Amendment claim. As with the equal protection claim, the court recognized that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." App.282. But the court purported to divine a judicially

manageable "three-prong test" that would identify a First Amendment violation: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan … burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Disregarding its assumption under the Equal Protection Clause, the court concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment. App.287. It further concluded that, under prong two, a plaintiff need only show more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. App.287-88. Finding its virtually zero-tolerance test easily satisfied, the court held that the 2016 Map as an undifferentiated whole "violates the First Amendment." App.299-300.

Finally, the court addressed plaintiffs' claims under the Elections Clauses and concluded that the 2016 Map violates those provisions too. The court did not cite any decision from any court that had found justiciable partisan gerrymandering standards in the Elections Clauses, which appear to grant districting authority to state legislatures, rather than restrain them. Regardless, it concluded that partisan gerrymandering violates Section 2 of Article I because it deprives "the People" of their right to elect representatives, App.306, and violates Section 4 because it "exceeds" the States' "delegated authority,"

App.303. While these purported constitutional violations were in part derivative of the majority's equal protection and First Amendment holdings, *see* App.303, the court again justified them on the theory that partisan advantage is a forbidden consideration that *always* "exceeds" a State's powers and *always* deprives "the People" of their right to elect representatives. *See* App.305-06, 310.

5. Judge Osteen concurred in part and dissented in part. On standing, he concluded that plaintiffs who live in "packed" districts and "concede[] election of the candidate of his or her choice" lack standing because they lack an injury that affects them "in a personal and individual way." App.327, 330. He also "disagree[d]" that plaintiffs "have standing to assert a statewide claim as to the statewide collective effect of any political gerrymandering." App.327-28. And he concluded that the organizational plaintiffs have standing "only to the extent they challenge the districts on the basis of district-specific injury to individual members," and that they may not assert claims "because of other organizational purposes." App.332-34.

On the merits, Judge Osteen expressed doubt whether "there is a constitutional, and judicially manageable, standard" under the Equal Protection Clause "for limiting partisan political consideration by a partisan legislative body." App.322 n.1. He rejected the suggestion that "the Constitution does [not] permit consideration by a legislative body of both political and partisan interests in the redistricting process." App.337. Judge Osteen expressed similar skepticism as to whether plaintiffs' First Amendment

claims are justiciable, and lamented that the majority's test would "foreclose all partisan considerations in the redistricting process." App.322 n.1, 343. He also disagreed that plaintiffs had shown First Amendment injury, noting that they remain "free under the new [districting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.344. Finally, Judge Osteen disagreed that the Elections Clause "completely prohibits" States from districting for partisan advantage. App.347.

6. After concluding that the 2016 Map violates every constitutional provision that plaintiffs invoked, the majority enjoined the State from using the map in future elections after November 2018 and gave the General Assembly three weeks to draw, consider, debate, and vote on a new congressional map. App.318-19. The court noted that it was open to enjoining use of the 2016 Map in the November 2018 midterm elections. App.314-15. But after plaintiffs agreed with appellants that such a remedy would be inappropriate, and further agreed with appellants that the court should stay its decision pending review by this Court, the court entered a stay on the conditions that appellants file this jurisdictional statement by October 1 and seek no extensions on any briefing. App.361.

REASONS FOR PLENARY CONSIDERATION

According to the district court, the decades-long struggle to develop a justiciable test for partisan gerrymandering has ended in a rout. Not only are

judicially manageable standards out there, but there are multiple administrable tests for claims based on not one, but *four*, constitutional provisions, with at least three of the tests prohibiting any consideration of partisan advantage in districting whatsoever. That conclusion is every bit as implausible as it sounds. Indeed, not only have plaintiffs failed to identify a single judicially manageable standard, let alone four; they have not even identified a constitutionally cognizable injury sufficient to confer standing. Instead, as in *Gill*, this case fails at the threshold, as it is and always has been about "generalized partisan preferences," not the kinds of injuries for which individuals can seek redress in court.

Plaintiffs' lack of Article III standing and the absence of judicially manageable standards are mutually reinforcing. As decades of fruitless efforts have proven, trying to identify "judicially discernible and manageable standards" for adjudicating generalized political grievances is an exercise in futility. Indeed, the district court itself all but conceded as much when it abandoned the enterprise of trying to decide "how much is too much" and simply declared partisan gerrymandering *categorically* inconsistent with the Constitution. That, of course, is not and cannot be the law, as it is impossible to reconcile with the reality that the Framers expressly assigned districting to an inherently political body. A test that is manageable only at the expense of deeming every legislative districting exercise in recent history a probable constitutional violation is no test at all.

In all events, even assuming that some standard for partisan gerrymandering claims is out there, it is

not found in the 321-page opinion here. More to the point, if a viable theory of standing and a judicially manageable test exist, they will have to come from this Court after plenary review. Under no circumstances can the decision below be the final word, either on the 2016 North Carolina map or on partisan gerrymandering claims more broadly.

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

The first problem with plaintiffs' partisan gerrymandering claims is that they lack standing to bring them. To establish standing, a plaintiff must demonstrate (1) "injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; (3) and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury-in-fact requirement is "first and foremost," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), and requires a "legally and judicially cognizable" injury, *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

A "legally cognizable" injury is one that involves the "invasion of a legally protected interest," which is "concrete and particularized." *Lujan*, 504 U.S. at 560. To be "concrete," the injury must be *de facto*, not merely *de jure*—"that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). And to be "particularized," it must affect the plaintiff "in a personal and individual way." *Id.* Furthermore, to be "judicially cognizable," the "dispute" must be one "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

If these requirements are not met—if a plaintiff alleges only a "generally available grievance about government," *Lance v. Coffman,* 549 U.S. 437, 439 (2007) (per curiam), or asserts an injury "too abstract, or otherwise not appropriate, to be considered judicially cognizable," *Allen v. Wright*, 468 U.S. 737, 752 (1984)—the plaintiff "does not state an Article III case or controversy," *Lujan*, 504 U.S. at 573-74.

Applying those principles in *Gill*, this Court concluded that the plaintiffs—"supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates"—failed to establish standing to challenge Wisconsin's districting map as a partisan gerrymander. 138 S. Ct. at 1923. First, the Court rejected the argument that Article III recognizes injuries based on a "statewide harm to [the plaintiffs'] interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Id.* at 1931. As the Court explained, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative"; conversely, an individual's "abstract interest in policies adopted by the legislature … is a nonjusticiable 'general interest common to all members of the public." *Id.* "To the extent" the plaintiffs claimed injuries to their personal voting interests through "the dilution of their votes," the Court continued, "that injury is district specific" and such claims must proceed district-by-district—*i.e.*, the same way that racial gerrymandering claims must proceed. *Id.* at 1930.

Second, the Court concluded that the plaintiffs had not proven that they were disadvantaged in their

districts. The lead plaintiff, for example, lived in a district that, "under any plausible circumstances, [was] a heavily Democratic district," *id.* at 1924, so the alleged gerrymander "ha[d] not affected [his] individual vote for his Assembly representative" in any way, *id.* at 1933. And the remaining plaintiffs had not "meaningfully pursue[d] their allegations of individual harm," but "instead rested their case … on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1932. All of that underscored "the fundamental problem" in *Gill*: "It [was] a case about group political interests" and "generalized partisan preferences," not "individual legal rights." *Id.* at 1933.

The case suffers from the same basic flaw, as it too has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress. Indeed, to use plaintiffs' own words, "[t]his case has always been about good government," Dkt.144 at 3, not about a violation of an individual right to have his or her vote be given full, undiluted effect. It is thus no accident that all plaintiffs asserted the same "statewide" theory that this Court repudiated in *Gill*, claiming that the ten-to-three ratio of Democrats to Republicans in North Carolina's congressional delegation injures all North Carolina Democrats. As one plaintiff explained, in his view, the "problem with the districts is that the number of Republicans elected is not proportional to the vote that Republicans receive in statewide elections." App.66. Another posited that "the 2016 Plan is 'unfair' to supporters of Democratic candidates … because 'we have 3 representatives [in Washington] versus … 10' Republican representatives." App.66. And another complained that the "problem with the

plan is that statewide it disadvantages Democrats." App.67.

The district court nonetheless found Article III standing. But in reaching that conclusion, the court once again reverted to expansive theories of exceedingly generalized injuries not specific to an individual's right to cast his own undiluted vote, such as "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions," App.78—a "general interest common to all members of the public" if ever there were one, *Gill*, 138 S. Ct. at 1931. And the court once again made clear that, in its view, these injuries "do not stop at a single district's lines," App.74, but rather empower anyone in the State to challenge the entire map. Thus, notwithstanding that "[r]ace is an impermissible classification" while "[p]olitics is quite a different matter," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), the decision below makes it *harder* for racial gerrymandering plaintiffs to vindicate their equal protection rights than for partisan gerrymandering plaintiffs to assert a heretofore-unrecognized claim that a districting map deprives "the People" of their ability to elect representatives. That makes no sense. If a voter has trouble persuading others to "give money to the Democratic congressional candidate in his Greensboro district," App.70, that does not create a concrete and particularized injury to the voter even in Greensboro, let alone furnish standing to challenge the district encompassing Charlotte.

The district court concluded that plaintiffs suffered district-specific "dilutionary" injuries because

their votes would "carry more weight" in "hypothetical" alternative districts. App.50, 67-68, 77-78 (alteration omitted). But this attempt to comply with Article III fares no better, as, in contrast to one-person-one-vote claims or challenges to the eligibility of other district voters, every voter still has a full right to cast an undiluted vote. In reality, the "injuries" the district court credited are merely a repackaged version of a non-cognizable desire to "influenc[e] the legislature's overall 'composition and policymaking'" and further "partisan preference[s]." *Gill*, 138 S. Ct. at 1931, 1933. Indeed, plaintiffs have sought to prove their "dilutionary" injuries simply by pointing to "alternative" maps that "approximat[e]" the State's proportion of Democrats to Republicans, App.46-50 & n.10—*i.e.*, to maps that they think would make "the overall composition of the legislature" more to their liking, *Gill*, 138 S. Ct. at 1931.

Consider Larry Hall, the majority's leading example of someone who has supposedly endured "dilutionary" injury. App.51-52. In every congressional election in recent memory, including the 2016 election, Hall's candidate of choice has prevailed. Dkt.101-2 at 12-13. In other words, the 2016 Map did not "affect[]" Hall's "ability to vote for and elect a Democrat in [his] district" at all. *Gill*, 138 S. Ct. at 1925. And plaintiffs' "alternative" map would not have changed anything either, as the Democratic candidate in that hypothetical universe would be "expected to obtain approximately 59 percent of the two-party vote." App.230. Like the lead plaintiff in *Gill*, then, Hall's district would have been "heavily Democratic" "under any plausible circumstances." *Gill*, 138 S. Ct. at 1924. Hall thus has no

individualized injury that "actually exist[s]," *Spokeo*, 136 S. Ct. at 1548, but rather seeks to vindicate only non-cognizable "group political interests," *Gill*, 138 S. Ct. at 1933.

Richard and Cheryl Taft—residents of CD3—are also illustrative. Under the 2016 Map, the Republican candidate in their district was projected to win "55% of the two-party vote share" and ultimately prevailed. App.237. By contrast (sort of), under plaintiffs' alternative map, the "expected Republican vote share" in the Tafts' district is 54.43%. App.238. Thus, regardless of the supposed "gerrymander," the Republican candidate was likely to receive a majority of votes. So just like Hall, the Tafts cannot plausibly "show[] disadvantage to themselves as individuals," let alone show a "disadvantage" that is constitutionally cognizable. *Gill*, 138 S. Ct. at 1929. Instead, their injury is a classic non-district-specific, generalized harm—a reality underscored by the fact that the Tafts *voted for the Republican candidate* who prevailed in CD3 in 2016. *See* Dkt.101-10 at 18; Dkt.101-11 at 15.

Nor do the handful of plaintiffs who claim that their representative may have shifted from Republican to Democrat under plaintiffs' alternative plans have standing.[4] The only "injury" such plaintiffs

[4] Under "Plan 2-297"—the alternative plan that "maximally advances" "non-partisan districting objectives"—plaintiffs maintain that three additional Democrats likely would win congressional seats, while Republicans would retain a majority. App.47-50 & nn.9-10. It is surely no coincidence that plaintiffs' proposed map would achieve proportional representation in relation to the state-wide vote totals in the most recent election.

could claim is their inability to elect their candidate of choice (and their corresponding inability to add another Democrat to the "overall composition of the legislature"). *Gill*, 138 S. Ct. at 1931. But that is not a cognizable injury either, as courts "cannot presume … that the candidate elected will entirely ignore the interests of … voters" who voted for the losing candidate; to the contrary, "[a]n individual … who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate." *Bandemer*, 478 U.S. at 132 (plurality op.).[5]

All of this underscores the more fundamental problem with partisan gerrymandering claims: They simply do not involve a constitutionally cognizable individual injury. Voters do not suffer cognizable injury from the lack of proportional representation in the legislature, as this Court's cases "clearly foreclose any claim that the Constitution requires proportional representation." *Id.* at 130. There is no "vote dilution" in partisan gerrymandering cases because the one-person, one-vote principle already ensures that votes are "equally weighted." *Gill*, 138 S. Ct. at 1930. Moreover, to the extent the voters' real beef is that there will be fewer Democrats for their own representatives to caucus with when they get to Washington, that is not only not a true "vote dilution" claim, but is a claim for which any injury belongs to the Representative, not the voter, and the

[5] Because the individual plaintiffs lack standing, the organizational plaintiffs lack standing through their members. *Contra* App.63-65. And those organizations plainly do not independently have standing, as "[t]he right to vote is 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1929.

Representative's claim would be barred by *Raines v. Byrd*. *See* 521 U.S. at 829-30. Finally, partisan gerrymandering plaintiffs do not suffer any cognizable "associational" injuries, as they are "free … to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.343-46 (Osteen, J., concurring in part and dissenting in part).

In short, after more than two years of litigation, plaintiffs still have not articulated an Article III injury, let alone connected any such injury to the sweeping relief they seek. This Court's opinion in *Gill* underscores that when a plaintiff's real concern is the statewide composition of the legislature or of congressional districts, the plaintiff lacks Article III standing. Rather than grapple with that decision, the district court tried to paper over fatal defects in plaintiffs' standing. Accordingly, if a coherent theory of standing to press partisan gerrymandering claims is to emerge, it will need to come from this Court, as it certainly cannot be found in the decision below.

II. Plaintiffs' Partisan Gerrymandering Claims Are Not Justiciable.

The flaws with plaintiffs' partisan gerrymandering claims go well beyond standing. Their claims are simply nonjusticiable. While the "general" rule is that "the Judiciary has a responsibility to decide cases properly before it," this Court has long held that the judiciary "lacks the authority to decide" cases presenting "political questions." *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Such claims "are said to be 'nonjusticiable.'"

Vieth, 541 U.S. at 277 (plurality op.). And this Court will find a claim nonjusticiable when there is "a lack of judicially discoverable and manageable standards for resolving" it. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

As Justice Scalia explained for a plurality of the Court in *Vieth*, that is precisely the problem with partisan gerrymandering claims. In reality, the Framers delegated primary authority over congressional districting to state legislatures subject to congressional oversight. While those state legislatures cannot violate judicially manageable standards that prohibit racial discrimination and actual vote dilution, a claim that state legislatures organized on partisan lines engaged in partisan decisionmaking is both nonjusticable and contrary to the Framers' basic design.

The *Vieth* plurality did not arrive at that conclusion lightly. Eighteen years earlier, a majority of this Court had concluded in *Bandemer* that the partisan gerrymandering case before it was justiciable, yet still could not agree on any "judicially discoverable and manageable standards for resolving" it. *See* 478 U.S. at 123. And for the next 18 years, lower courts struggled to identify either the injury partisan gerrymandering causes or a workable test for measuring it. It was only after "[e]ighteen years of judicial effort with virtually nothing to show for it," *Vieth*, 541 U.S. at 281 (plurality op.), that a plurality of the Court concluded that Justice O'Connor had it right from the start: These "challenges to the manner in which an apportionment has been carried out … present a political question in the truest sense of the

term." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring); *see Vieth*, 541 U.S. at 281 (plurality op.).

The 14 years that have passed since *Vieth* have only reinforced that conclusion. Indeed, notwithstanding Justice Kennedy's prominent invitation to identify a "limited and precise rationale" for adjudicating partisan gerrymandering claims, *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring), all 14 more years have produced is more of the same: vague tests that rest on a combination of the kind of "fundamental choices about how this Nation is to be governed" that the Framers did not intend the judiciary to be making, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and sheer speculation about electoral "results that would occur in a hypothetical state of affairs," *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 417-18 (2006) (opinion of Kennedy, J.).

Moreover, these tests inevitably suffer from the problem that they are built around the misguided assumptions that political affiliation is binary and immutable, and that the only factor determining voting behavior is political affiliation. That is "assuredly not true," *Vieth*, 541 U.S. at 288 (plurality op.), and seems less true every day. Voters cast votes for individual candidates in individual districts, "not for a statewide slate of legislative candidates put forward by the parties." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). And as 200-plus years of ever-shifting political power have proven, voters can and do base their votes on candidates, not just the party next to their name. Moreover, members of the same party can differ passionately. Any test that

measures "partisan impact" by blindly assuming that each voter's preference for the Democrat or Republican in her district reflects a preference for every Democrat or Republican across the State thus is flawed from its inception. An individual voter "cannot vote for such candidates," "is not represented by them in any direct sense," and might not support them at all. *Id.* at 153.

The persistent inability to identify a workable test for adjudicating partisan gerrymandering claims is unsurprising given the inevitable connection between a cognizable constitutional injury and a judicially manageable standard for assessing it. This is not a context where anyone suffers a physical or pocketbook injury. Thus, identifying a cognizable constitutional injury requires some sense that there is a manageable constitutional test associated with the injury. As Justice Scalia explained in *Vieth*, "[b]efore considering whether" a "standard is judicially manageable," the Court must first ask "whether it is judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 287-88 (plurality op.). After all, "[n]o test … can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. Yet no one can begin to identify any overarching "substantive definition of fairness in districting," *id.* at 306-07 (Kennedy, J., concurring), in this context without first making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217.

There is no better illustration of that than the decision below. In 321 pages, the best the district court could muster is that partisan gerrymandering

"runs contrary to … the structure of the republican form of government embodied in the Constitution." App.90. There is a name for such claims: They are called Guarantee Clause claims, and this Court has consistently found them nonjusticiable. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). Slapping the label equal protection, or First Amendment—or, worse yet, Elections Clause—on such inherently value-laden claims does not make courts any less "fundamentally under-equipped" to resolve them. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)

Indeed, the district court's reliance on the Elections Clauses demonstrates that it may have gotten things *exactly* backwards. Far from empowering courts to interfere with the political choices States make in districting, Section 4 of Article I reflects "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Section 4—one of the same provisions that the district court found the 2016 Map somehow violates—gives state legislatures "the initial power to draw districts for federal elections," but gives Congress the power to "'make or alter' those districts if it wishe[s]." *Vieth*, 541 U.S. at 275 (plurality op.). The Framers certainly did not give the primary authority to state legislators only to empower courts to police the degree to which state legislatures took partisan advantage into account. To the contrary, the backstop to state legislative excess was another legislative body organized along partisan lines. That deliberate choice by the Framers goes a

long way to demonstrating that too much partisanship in districting is not a constitutional problem for courts to solve.

The power granted by the Elections Clause has not been lost on Congress. To the contrary, Congress' exercise of its Section 4 power is precisely why single-member congressional districting, with all its potential for gerrymandering district lines, remains the dominant practice today. *See* 2 U.S.C. §2c. Accordingly, if Congress wants to try to reduce partisan gerrymandering, it has the power to do so; indeed, in the 115th Congress alone, legislators have introduced several bills and resolutions aiming to do just that. *See, e.g.*, S. 3123, 115th Cong. (2018); H. Res. 364, 115th Cong. (2017); H. Res. 343, 115th Cong. (2017); H. Res. 283, 115th Cong. (2017). That not only belies protests that only the courts can "fix" this problem, but also belies any claim that the Framers intended courts to do so.

III. This Case Underscores That A "Limited And Precise" Test For Adjudicating Partisan Gerrymandering Claims Does Not Exist.

This case only underscores the problems with inserting the judiciary into partisan gerrymandering disputes. Indeed, far from producing a "limited and precise" test, *Vieth,* 541 U.S. at 306 (Kennedy, J., concurring), the district court produced four separate tests, each of which would encourage ever-more redistricting litigation while threatening state-drawn districting maps across the country.

A. The District Court Declined to Establish a Definitive Equal Protection Standard.

The majority first concluded that a districting plan violates the Equal Protection Clause whenever (1) a legislature passes the plan with "discriminatory intent," (2) the plan produces "discriminatory effects," and (3) those effects cannot be attributed to "another legitimate redistricting objective." App.138-39. Variants of this test have failed to persuade this Court before, and this version is no improvement.

The problems begin at the very first step. The district court first suggested that *any* intent to district for partisan advantage should be constitutionally suspect under the Equal Protection Clause, positing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish between an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." App.118. That startling proposition finds no support in this Court's cases. As Judge Osteen highlighted in rejecting the majority's suggestion, this "Court has recognized many times in redistricting and apportionment cases that some degree of partisanship and political consideration is constitutionally permissible in a redistricting process undertaken by partisan actors." App.339; *see also, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("a jurisdiction may engage in constitutional political gerrymandering"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Indeed, even Justices who have concluded that partisan gerrymandering claims are justiciable have acknowledged that *some* degree of districting for partisan advantage is inevitable and

permissible. *See, e.g.*, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part).

Perhaps recognizing that this extreme theory was a nonstarter, the district court alternatively "assume[d]" that, to satisfy the intent prong of its equal protection test, a plaintiff must prove that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power.'" App.145-46. But a majority of this Court has already rejected such "heightened" intent requirements. *See Vieth*, 541 U.S. at 290-91 (plurality op.); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.). As the *Vieth* plurality explained, a "predominant intent" standard is much too "vague" and "indeterminate," as "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." 541 U.S. at 284-86, 290-91 (plurality op.). In all events, when the exercise is to develop a "limited and precise" test, a test that "assumes" without deciding one of its core components cannot crack the code.

The district court embraced an equally amorphous and unsustainable "discriminatory effects" test. According to the majority, "a plaintiff must show that the dilution of the votes of supporters of a disfavored party … is likely to persist in subsequent elections such that an elected representative from the favored party … will not feel a need to be responsive to constituents who support the disfavored party." App.152. The majority did not purport to identify how

much "bias" must exist or persist, or what evidence will suffice to prove that it does. *But see, e.g.*, *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (asking "how much partisan dominance is too much"). Instead, it concluded that plaintiffs may rely on all manner of social science metrics (district-specific or statewide) to try to prove their case under a "totality of the evidence" approach, and ultimately need only demonstrate that the plan has some "discernible discriminatory effects." App.191-92, 214. Again, that is the antithesis of "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

Moreover, the district court's effects test reflects the deeper incoherence of its approach to partisan gerrymandering. The test is premised on the concern that representatives in partisan-gerrymandered districts may be non-"responsive" to minority-party constituents. But that problem will be most acute in districts where majority-party voters already outnumber minority-party voters by large numbers, and partisan gerrymandering itself tends to avoid the concentration of majority-party voters in a small number of districts. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). Thus, if anything, partisan gerrymandering tends to ameliorate the purported problem. And in all events, the district court's inevitable resort to "th'ol' 'totality of the circumstances' test," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting), leaves States in the dark and courts in the driver's seat when it comes to identifying constitutionally compliant maps.

B. The First Amendment Standard Would Preclude *Any* Intent to District for Partisan Advantage.

If the majority's equal protection test would "almost *always*" leave "room for an election-impeding lawsuit," *Vieth*, 541 U.S. at 286 (plurality op.), its First Amendment test is even more problematic. According to the majority, to prove a First Amendment violation, a plaintiff must show: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan in fact burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Rather than assume that some degree of partisan gerrymandering is both inevitable and permissible, the majority wholeheartedly embraced the notion that the intent prong of this test is satisfied whenever districting for partisan advantage is *any* part of a legislature's motivation. *But see, e.g.*, *Hunt*, 526 U.S. at 551 ("a jurisdiction may engage in constitutional political gerrymandering"); App.339 (Osteen, J., concurring in part and dissenting in part) (collecting cases stating same). Furthermore, the district court's effects prong is proven whenever that intent has anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, be it the desire to vote, motivation to engage in political discourse, or "raising money, attracting candidates, and mobilizing voters to support … political causes

and issues." App.288, 291. And its circular "causation" prong asks only whether the impacts of the legislature's intent to district for at least some degree of partisan advantage can be explained by something other than its intent to district for at least some degree of partisan advantage—in other words, it asks only whether the legislature did in fact intentionally district for at least some degree of partisan advantage. App.299.

As Judge Osteen observed in rejecting it, this novel test would "foreclose all partisan considerations in the redistricting process" and render *any* degree of districting for partisan advantage constitutionally verboten, App.343-44—a proposition that members of this Court have squarely and repeatedly rejected, *see, e.g.*, *Vieth*, 541 U.S. at 294 (plurality op.) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting[.]"). Moreover, as with its flawed equal protection test, the district court's First Amendment test reflects deeper doctrinal incoherence. For example, the test ignores that there are First Amendment values on both sides of the political ledger, as the political parties that purportedly stand to benefit from partisan gerrymandering are themselves associations that powerfully promote First Amendment values. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 434 (2001).

Thus, even assuming this Court were to find partisan gerrymandering claims justiciable under the First Amendment, there is no way the standard adopted below can be the right one. It makes little doctrinal sense, would invalidate nearly every

legislatively drawn districting plan in the country, and would essentially substitute the federal judiciary for the state legislatures as the ultimate mapdrawers. That result would be impossible to square with this Court's repeated reaffirmation of the primary role of the States in the redistricting process.

C. The Elections Clauses Standards Are Entirely Novel and Would Preclude *Any* Intent to District for Partisan Advantage.

Finally, the district court's novel conclusion that judicially manageable standards to police partisan gerrymandering have been lurking in the Elections Clauses all along is the *ne plus ultra* of doctrinal incoherence.

Section 2 of Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," *see* U.S. Const. art. I, §2, and Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," *id.* §4. In the district court's view, partisan gerrymandering violates Section 2 because it deprives "the People" of their right to elect Representatives, App.306-07, and it violates Section 4 because it "exceeds" the States' "delegated authority under the Elections Clause," App.303.

Indeed, according to the district court, "'manipulat[ing]' … district lines" for "partisan advantage" *always* "exceeds" a State's powers under the Elections Clause because it is not "fair" or "neutral," and it *always* deprives "the People" of their right to elect their Representatives because the

legislature is purportedly "choos[ing]" for them. App.307, 311. Thus, according to the decision below, the quest for partisan gerrymandering standards in the Equal Protection Clause or the First Amendment—and the need to determine "[h]ow much political motivation and effect is too much," *Vieth*, 541 U.S. at 297 (plurality op.)—matters only for state and local elections. As to congressional elections, a judicially manageable framework has existed all along in the Elections Clauses, and the tolerable amount of political motivation in congressional redistricting is precisely zero.

There is no historical precedent whatsoever for that sweeping proposition, and that "lack of historical precedent" is itself a "telling indication of the severe constitutional problem" it poses. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). This Court has already concluded that the Elections Clauses "leave[] *with the States* primary responsibility for apportionment of their federal congressional … districts." *LULAC*, 548 U.S. at 414 (emphasis added). And those provisions "clearly contemplate[] districting by political entities," which "unsurprisingly … turns out to be root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285-86 (plurality op.). Accordingly, when the plaintiffs in *Vieth* proposed a partisan gerrymandering standard grounded in the Elections Clauses, the plurality emphatically "conclude[d] that neither Article I, §2, nor … Article I, §4, provides a judicially enforceable limit on the political considerations that the States … may take into account when districting." *Id.* at 305. No other member of the Court even deemed the plaintiffs' Elections Clauses arguments worthy of mention. And

since then, other courts have rejected them. *See, e.g.*, *Agre v. Wolf*, 284 F. Supp. 3d 591, 592 (E.D. Pa. 2018) (Smith, J.); *id.* at 631 (Shwartz, J., concurring).

In short, while the Framers generally left state elections to the States, the Framers focused specifically on congressional elections and delegated authority over them to state political bodies subject to oversight by the federal Congress. The idea that such a double delegation to state and federal legislatures is the font for the one and only judicially administrable limit on partisan gerrymandering (with a zero-tolerance standard to boot) strains credulity and underscores how many rocks the district court looked under to find a workable test. In reality, no such test exists, because partisan gerrymandering claims inevitably suffer from elemental standing and justiciability problems that preclude the development of judicially discernible and manageable standards for adjudicating them. But whatever else is true, an administrable test will have to come from this Court and has not yet been identified by the district court here. Thus, the case for this Court's plenary consideration of this appeal could not be clearer.

Finally, even if this Court were to articulate an administrable test for partisan gerrymandering, the 2016 Map would not violate it. If the Court were to identify a limited and precise test designed to ferret out the most extreme partisan gerrymandering, it would not condemn a map that adopted traditional districting criteria and conforms with such criteria to a degree not seen in the jurisdiction for a quarter century; indeed, after years of maps that split anywhere from 21 to 44 counties and upwards of 77

precincts, the 2016 Map divides only 13 counties and splits only 12 precincts. *See* pp.4-5, *supra*. There are multiple reasons for this Court to conclude that policing partisan gerrymanders on direct appeal is no proper role for this Court. But even if the Court someday discerned a test for identifying true outliers, that test would leave the 2016 Map undisturbed.

CONCLUSION

This Court should set this case for plenary consideration.

Respectfully submitted,

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