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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March 12, 2018

QUESTIONS PRESENTED

In 2016, a three-judge district court invalidated two districts in North Carolina's 2011 congressional districting map on racial gerrymandering grounds and ordered the General Assembly to enact a new map within 14 days. The General Assembly complied, only to have the 2016 map challenged on *partisan* gerrymandering grounds. In the decision below, a three-judge district court once again invalidated North Carolina's duly enacted congressional map, becoming just the second court since *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to purport to divine a justiciable test for partisan gerrymandering and to order a State to draw a new map. Although the plaintiffs here proceeded only on a "statewide" partisan gerrymandering theory, challenging the 2016 map as an undifferentiated whole, the court concluded that all plaintiffs have suffered sufficient injury-in-fact to press their challenges. On the merits, the court not only held that the 2016 map violates the Equal Protection Clause and the First Amendment, but also became the first court ever to invalidate a redistricting map under the Elections Clauses of Article I. This Court granted a stay of the decision below pending the filing and disposition of this jurisdictional statement.

The questions presented are:

1. Whether the district court erred in concluding that the plaintiffs have standing to press their statewide challenges to North Carolina's 2016 congressional districting map.

2. Whether the district court erred in invalidating North Carolina's 2016 congressional districting map as 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

This case marks just the second time since *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that a district court has invalidated a duly enacted redistricting map after purporting to divine a justiciable test for adjudicating partisan gerrymandering claims. Indeed, not content with accomplishing the elusive feat of identifying one such test, the district court purported to divine *four separate* tests—one grounded in the Equal Protection Clause, one in the First Amendment, and, for the first time in history, two tests grounded in the Elections Clauses of Article I. Each of those tests is more sweeping and less forgiving than the last, culminating in the conclusion that Section 4 of the Elections Clauses prohibits districting for partisan advantage entirely because it does not "delegate" to state legislatures the power to take partisan advantage into consideration when drawing districts.

This Court is currently considering whether partisan gerrymandering claims are justiciable in *Gill v. Whitford*, No. 16-1161 (U.S.), and *Benisek v. Lamone*, No. 17-333 (U.S.). Accordingly, the Court should certainly hold this case pending resolution of those cases, as a conclusion that such claims are not justiciable would put an end to this case. So, too, would a conclusion that the *Gill* plaintiffs lack Article III standing to bring so-called "statewide" partisan gerrymandering challenges to a districting plan "as an undifferentiated 'whole,'" *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1265 (2015), as that is the only kind of claim that the plaintiffs pursued here.

But no matter how this Court resolves *Gill* and *Benisek*, there is no way the decision below can stand, as the partisan gerrymandering standards endorsed below are anything but "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). To the contrary, they are fundamentally incompatible with this Court's repeated conclusions that some consideration of politics in drawing districts is both inevitable and permissible, as well as its repeated admonitions that the Constitution "leaves with the States primary responsibility for apportionment of their federal congressional … districts." *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 414 (2006). Accordingly, in the unlikely event that neither *Gill* nor *Benisek* necessitates either reversal or vacatur, the Court should note probable jurisdiction.

OPINION BELOW

The opinion of the Middle District of North Carolina is reported at 279 F. Supp. 3d 587 and reproduced at App.1-224.

JURISDICTION

The Middle District of North Carolina issued its decision on January 9, 2018. Appellants filed their notice of appeal on January 11, 2018. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Sections 2 and 4 of Article I of the U.S. Constitution are reproduced at App.229-30.

STATEMENT OF THE CASE

A. Factual Background

This appeal arises from the most recent round of congressional redistricting in North Carolina, which began two years ago in the aftermath of an earlier round of redistricting litigation.

1. On February 5, 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, CD1 and CD12, 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 extraordinary 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.10. In addition to instructing Dr. Hofeller to comply with the myriad 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.11.

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.15. 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," which at the time was 10 Republicans and 3 Democrats. App.16.

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. The committee ultimately approved the map drawn with Dr. Hofeller's assistance by a party-line vote, and on February 19, 2016, the General Assembly enacted the map ("2016 Plan"), with minor modifications, on party-line votes as well. App.19-20.

As a matter of traditional districting criteria, the 2016 Plan fares well by comparison to the 2011 map. Indeed, the 2016 Plan adheres more closely to traditional districting criteria than any congressional map North Carolina has used in the past 25 years, whether created by a Republican-controlled or Democrat-controlled General Assembly or imposed by judicial order. The 2016 Plan preserves 87 (out of 100) whole counties and splits only 12 (out of more than 2000) precincts across the entire State. App.20. No county is split into more than two congressional districts. By contrast, the 1992 plan that spawned the infamous "serpentine" version of CD12 divided 44 counties (seven of which were split into three congressional districts) and split at least 77 precincts.

Dkt.114 at 143.[1] The 1997 plan divided 22 counties, the 1998 plan divided 21, the 2001 plan divided 28, and the 2011 plan divided 40. Dkt.114 at 143. The 2016 Plan likewise is more compact "[u]nder several statistical measures" than the 2011 Plan, and it paired only two incumbents. App.20.

2. Because the 2016 Plan was enacted on the order of the district court in the *Harris* litigation, that court claimed the power to review the map—not only to determine whether it remedied the racial gerrymander the court had found, but for any and all potential legal or constitutional deficiencies. The *Harris* plaintiffs filed objections to the 2016 Plan, claiming both that the map did not remedy the racial gerrymandering violation because the General Assembly did not "conduct [a] racial analysis" or consider racial data when drawing it, and that the map was an unconstitutional *partisan* gerrymander. *See* Pls.' Objs. and Mem. of Law Regarding Remedial Redistricting Plan at 25, 30-32, *Harris v. Cooper*, No. 1:13-cv-949 (M.D.N.C. Mar. 3, 2016), ECF No. 157. The district court rejected both of those challenges, concluding that the plaintiffs "failed to state with specificity" why the General Assembly's decision *not* to consider race failed to cure the racial gerrymander, and had not provided a "clear and manageable" standard that would render their partisan gerrymandering claim justiciable. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016).

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

At the same time, however, the court essentially invited further challenges to the 2016 Plan, twice stating that its decision "does not constitute or imply an endorsement of, or foreclose any additional challenges to," the plan. *Id.* at *1, *3. The *Harris* plaintiffs filed a jurisdictional statement challenging the partisan gerrymandering aspect of that order, and this Court directed the parties to file supplemental briefs addressing whether the plaintiffs had standing to press that claim, and whether the order denying their objections to the 2016 Plan is appealable. *See Harris v. Cooper*, No. 16-166 (U.S.). The parties filed supplemental briefs on June 6, 2017, and the case has remained pending on this Court's docket since then.

B. The Proceedings Below

The present case arises from two constitutional challenges to the 2016 Plan that other plaintiffs filed shortly after the *Harris* district court implicitly invited future litigation.

1. In August 2016, Common Cause, the North Carolina Democratic Party, and 14 individual voters who collectively reside in each of North Carolina's 13 congressional districts filed suit against various state legislators[2] and others, alleging that the 2016 Plan is an unconstitutional partisan gerrymander. About a month later, in September 2016, the League of Women Voters and 12 individual voters who reside in "most, but not all," of the state's congressional districts followed suit. App.29. Both complaints alleged that the 2016 Plan violates the Equal Protection Clause

[2] Appellants are Senators Robert Rucho and Philip Berger and Representatives David Lewis and Timothy Moore.

and the First Amendment. App.29-30. The Common Cause plaintiffs further alleged that the 2016 Plan violates the Elections Clauses of Article I. *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 …."); U.S. Const. art. I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof …."). Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Plan as a whole, and the Common Cause plaintiffs also "claim[ed] they have standing to assert … district-by-district challenges" to the 2016 Plan as a whole. App.29-30. Both complaints were filed before the State held any elections under the 2016 Plan.[3]

The cases were assigned to a three-judge district court, which consolidated them and originally scheduled trial for June 26, 2017, but subsequently postponed trial on its own motion. Amidst the proceedings below, on June 19, 2017, this Court issued orders agreeing to hear the *Gill* case on the merits and staying the *Gill* district court's order directing Wisconsin to enact a conditional remedial districting plan for its 2018 elections. *See Gill v. Whitford*, No. 16A1149. At that point, appellants promptly filed a motion in the district court asking the court to stay proceedings in this case pending resolution of *Gill*, explaining that it would make little sense to proceed

[3] Congressional elections took place under the 2016 Plan in November 2016, with 10 Republicans and 3 Democrats prevailing—the same partisan makeup as before the 2016 Plan. App.21.

with a trial while this Court was actively considering whether partisan gerrymandering claims are justiciable at all, and, if so, whether the same social science measures pressed by the plaintiffs in this case, including the vaunted "efficiency gap," provide a viable means of identifying viable claims. *See* Dkt.75. But the district court denied the motion and forged ahead, holding a four-day bench trial in mid-October 2017.

2. Approximately three months later, on January 9, 2018, the district court issued a divided opinion holding the 2016 Plan unconstitutional as a partisan gerrymander under the Equal Protection Clause, the First Amendment, and the Elections Clauses.

In an opinion by Judge Wynn, the majority first addressed the threshold question whether the plaintiffs have standing to press their statewide claims. The majority acknowledged that, "[i]n racial gerrymandering cases, a plaintiff lacks standing to challenge a districting plan on a statewide basis," App.30, and it "agree[d] that some of the injuries flowing from partisan gerrymandering are analogous to the injuries attributable to a racial gerrymander," App.33. Nonetheless, the majority—looking to a purported rule of statewide standing recognized in one-person, one-vote cases—concluded that the plaintiffs "have standing to challenge the 2016 Plan as a whole" under the Equal Protection Clause, the First Amendment, and Article I. App.36-38 (citing *Whitford v. Gill*, 218 F. Supp. 3d 837, 927-28 (W.D. Wis. 2016)).

The court further suggested that the plaintiffs "have standing to assert district-by-district challenges to the Plan as a whole" because they collectively

"reside in each of the congressional districts included in the 2016 Plan." App.40-41 n.9. Although many plaintiffs "conceded they were able to elect representatives of their choice" both before and after the 2016 Plan was adopted, and although many plaintiffs "reside in districts that since 2002 have elected only a single political party's candidates," the majority nonetheless concluded that all plaintiffs "have suffered cognizable injuries in fact" in their home districts. App.40-41 & n.9. Because the individual plaintiffs had standing, moreover, the majority concluded the organizational plaintiffs had standing "through their members." App.43-44 n.11. In all events, the court reasoned, the organizations had standing in their own right because, for example, they "increase[d] [their] educational efforts" after the 2016 Plan was adopted and therefore incurred increased costs. App.44.

Turning to the merits, the court first addressed the equal protection claim and purported to find a judicially manageable standard for adjudicating it. The court explained that a redistricting plan fails as a partisan gerrymander under the Equal Protection Clause if (1) it is enacted with "discriminatory intent" and (2) produces "discriminatory effects," (3) unless those effects are attributable to a "legitimate redistricting objective." App.88. As to discriminatory intent, the court concluded that prong is satisfied when the state districting body acts with *any* intent to "subordinate adherents of one political party and entrench a rival party in power." App.94. The court acknowledged that a plurality of this Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), declined to adopt a "predominant intent" requirement, and that a

plurality of this Court in *Vieth* deemed such a standard "judicially unmanageable." App.91. But the court nonetheless concluded that a *less* demanding intent standard should govern, because there is never "*any* legitimate constitutional, democratic, or public interest" served when political bodies take political considerations into account when redistricting. App.92 n.16. The court then found its diluted intent standard readily satisfied. As it explained, "when a single party exclusively controls the redistricting process, 'it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.'" App.95.

As to discriminatory effects, the court concluded that prong is satisfied when a plaintiff proves a districting plan "subordinates" the interests of one political party and "entrenches" a rival political party. App.129. According to the court, a plaintiff proves that a plan "'subordinates' the interests of supporters of a disfavored candidate party by demonstrating that the redistricting plan is biased against such individuals," and it "entrenches" a party when "bias" toward that party "is likely to persist in subsequent elections." App.130. Based on its review of various social science metrics—including "partisan symmetry," which measures the "efficiency gap," "partisan bias," and "the mean-median difference"—the court found the discriminatory effects prong satisfied too. App.134. And because the court also concluded that no legitimate redistricting objective could justify the 2016 Plan, it held that "the 2016 Plan constitutes an unconstitutional partisan gerrymander in violation of the Equal Protection Clause." App.165.

The majority next addressed the First Amendment claim. At the outset, it acknowledged with some understatement that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." App.172-73. Nevertheless, the majority purported to divine a judicially manageable standard under that provision too, concluding that a redistricting plan violates the First Amendment when (1) "the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party," (2) "the districting plan burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.176. Echoing its equal protection standard, the majority concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment, and 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.177-78. Because the majority found those two factors easily satisfied here, and also found that the 2016 Plan caused the First Amendment injuries here, it held that "the 2016 Plan violates the First Amendment." App.189.

Finally, the majority addressed the claims under the Elections Clauses of Article I, concluding that the 2016 Plan violated those provisions too. The majority did not cite any decision from any court that had ever found justiciable partisan gerrymandering standards

in Article I, but it concluded that partisan gerrymandering nonetheless violates Section 2 of Article I because it deprives "the People" of their right to elect representatives, App.196, and violates Section 4 because it "exceeds" the States' "delegated authority," App.192-93. While these additional purported constitutional violations were in part derivative of the majority's Equal Protection Clause and First Amendment holdings, *see* App.195-96, the majority 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 their representatives. *See* App.195, 198-99.

3. Judge Osteen concurred in part and dissented in part. First addressing the equal protection claim, he explained that 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.214. Accordingly, he disagreed with the majority's conclusion that "the Constitution forbids a political body from taking into account partisan considerations" at all. App.215.

Likewise, on the First Amendment claim, Judge Osteen expressed alarm "that the majority's adopted test would in effect foreclose all partisan considerations in the redistricting process." App.219. As he observed, "[i]t might be desirable for a host of policy reasons to remove partisan considerations from the redistricting process," but he was "unable to conclude that the First Amendment requires it, or that

Plaintiffs here have proven violations of their speech or associational rights under the First Amendment." App.222. The plaintiffs are "free under the 2016 Plan to 'field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs.'" App.220. Similarly, Judge Osteen disagreed with the majority that the Elections Clause "completely prohibits" States from districting for partisan advantage. App.222.

4. After concluding that the 2016 Plan violates every constitutional provision that the plaintiffs invoked, the majority immediately enjoined the State from using the 2016 Plan in any 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) (the "period of time" to draw a new map if a court finds a duly enacted one deficient "shall not be less than two weeks")—to draw, consider, debate, and vote on a new congressional map. App.202-07. Appellants filed an emergency stay application with this Court, and the Court granted that application on January 18, staying the district court's order pending the timely filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, No. 17A745.

REASONS FOR SUMMARILY REVERSING, VACATING AND REMANDING, OR NOTING PROBABLE JURISDICTION

This Court is currently considering in *Gill* and *Benisek* whether partisan gerrymandering claims are justiciable. In the event the Court concludes that they are not, then obviously the decision below must be

reversed, and the case remanded with instructions to dismiss the plaintiffs' claims. Likewise, in the event this Court concludes that the *Gill* plaintiffs lack Article III standing to pursue "statewide" partisan gerrymandering claims—*i.e.*, claims challenging a districting map "as an undifferentiated whole," on the theory that it impedes the ability of their preferred political party to translate statewide vote totals into statewide gains—then reversal is equally appropriate, for that is the only kind of claim that the plaintiffs pursued here. Indeed, the plaintiffs have never even alleged any district-specific partisan gerrymandering, let alone attempted to prove that they themselves suffered any kind of representational injury in their own districts.

But even if this Court concludes in *Gill* and *Benisek* that there is a justiciable standard under which statewide partisan gerrymandering may be adjudicated, the decision below will still need to be vacated. If there is a justiciable standard out there somewhere, it is not any of the ones identified by the majority here. Indeed, far from endeavoring to craft a "limited and precise" legal standard, the majority announced *four separate tests* for adjudicating partisan gerrymandering claims, each one more sweeping and less forgiving than the last. Each of the tests is an object lesson in the difficulty of fashioning a "limited and precise" test for determining how much partisan motivation is too much. Indeed, the majority found fashioning a caliper to measure excess partisan motivation so difficult that it essentially gave up on the enterprise and ruled quixotically that partisan advantage is *never* a constitutionally legitimate consideration for a state legislature. That startling

proposition is not remotely consistent with this Court's partisan gerrymandering cases—to say nothing of the Fourteenth Amendment or the Elections Clauses.

Suffice it to say, whatever this Court concludes in *Gill* and *Benisek*, it is exceedingly unlikely to embrace a legal standard that endeavors to remove political considerations from the districting process entirely, as any such test would run counter to constitutional text and more than two centuries of constitutional history. Accordingly, while the Court should certainly hold this case pending resolution of *Gill* and *Benisek* and determine how best to dispose of it in light of what those cases hold, the decision below cannot stand no matter what conclusions the Court may reach in either of those cases.

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

The first problem with the plaintiffs' statewide partisan gerrymandering claims is that the plaintiffs lack standing to bring them. Article III limits the federal judiciary to adjudicating "Cases" and "Controversies." U.S. Const. art. III, §2. As this Court has explained, there is "[n]o principle … more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases and controversies." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 37 (1976). One "doctrine rooted in the traditional understanding of a case or controversy" is standing, which "limits the category of litigants empowered to maintain a lawsuit in federal court to

seek redress for a legal wrong" and thereby "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

The plaintiffs, as the party invoking federal jurisdiction, bear the burden of establishing standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" requires the plaintiff to establish: (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.'" *Id.* at 560-61 (quotation marks and alterations omitted). The injury-in-fact requirement is "first and foremost" in the standing analysis. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103, (1998). As the Court has emphasized, a plaintiff's asserted injury must be both concrete and particularized. To be "concrete," the injury must be *de facto*, not merely *de jure*—"that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. And to be "particularized," the injury must affect the plaintiff "in a personal and individual way." *Id.* Accordingly, a plaintiff who asserts merely a generalized grievance "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large[,]" "does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

Applying those principles, this Court has concluded that an individual may not bring a racial gerrymandering challenge to a district in which she does not live, or to a districting plan "as an

undifferentiated 'whole.'" *ALBC*, 135 S. Ct. at 1265. While an individual certainly may have an interest in eradicating any and all racial gerrymandering, that kind of "generalized grievance against governmental conduct of which he or she does not approve," *United States v. Hays*, 515 U.S. 737, 745-46 (1995), "does not state an Article III case or controversy," *Lujan*, 504 U.S. at 573-74. Instead, to satisfy Article III, the plaintiff must allege that the specific district in which she lives was racially gerrymandered, because only someone who lives in a racially gerrymandered district suffers "the special representational harms racial classifications can cause in the voting context." *Hays*, 515 U.S. at 745.

The same is true of race-based vote dilution claims. A plaintiff cannot bring a vote dilution claim simply by alleging that she is a member of a minority group whose vote has been diluted somewhere in the state, or across the state writ large. Instead, the plaintiff must allege that she is part of a politically cohesive and geographically compact community whose ability to elect its candidate of choice has been burdened. *See Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). To be sure, that injury may come from "packing" too large of a community into a single district to impede its ability to elect two candidates of its choice instead of one, or from "cracking" a community into multiple districts to prevent it from electing even one. *See id.* at 46 n.11. But either way, the voter must allege that *her* opportunity to elect *her* candidate of choice was actually impeded, for this Court has squarely rejected the notion that the "right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to

its individual members." *Shaw v. Hunt*, 517 U.S. 899, 917 (1996).

Those same principles lead inescapably to the conclusion that individuals lack standing to assert "statewide" partisan gerrymandering claims challenging a districting plan "as an undifferentiated 'whole.'" *ALBC*, 135 S. Ct. at 1265. After all, an individual's interest in whether voters in *other* districts have been placed there on account of their politics, or whether *other* voters have been impeded in their ability to elect their candidates of choice on account of their politics, is no more concrete or individualized in this context than in the context of race-based districting. Instead, just as in the race context, that kind of "generalized grievance against governmental conduct of which he or she does not approve," *Hays*, 515 U.S. at 745-46, does not suffice to state an Article III injury.

The majority below purported to derive its contrary conclusion from this Court's malapportionment cases, which it claimed "permit statewide standing." App.39-40. Those cases do no such thing. While the malapportionment cases may have sanctioned statewide *remedies*, the Court still required the plaintiffs in those cases to allege district-specific *injuries* to satisfy Article III. In *Baker v. Carr*, 369 U.S. 186 (1962), for example, the Court found that the plaintiffs had Article III standing because *they* lived in districts that were overpopulated, and therefore effectively enjoyed only a fraction of a vote "in the counties *in which they reside*." *Id.* at 207 (emphasis added). Likewise, in *Gray v. Sanders*, 372 U.S. 368 (1963), the plaintiff had standing because his

own "right to vote [was] impaired" in his home district of Fulton County, Georgia, as a result of overpopulation. *Id.* at 375, 381. And in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the plaintiffs—also residents of Fulton County—suffered concrete and particularized injury because the apportionment plan "grossly discriminate[d] against voters" *in Fulton County* by overpopulating their district. *Id.* at 7. In a jurisdiction with a 5,000-voter district, a 10,000-voter district, and a 15,000-voter district, there is no reason in law or logic that a resident of the first two districts would have standing to bring a one-person, one-vote claim.

The one-person, one-vote cases thus do not recognize expansive theories of statewide standing at all. Instead, they just reflect the unremarkable reality that sometimes a district-specific *injury* necessitates a statewide *remedy*. *Cf. Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally.").

The bottom line, then, is that partisan gerrymandering claims must proceed "district-by-district," just like all other voting rights claims. And that is fatal to plaintiffs' claims here. Plaintiffs complained only about the interests of their preferred political party writ large, *i.e.*, that the statewide "proportion of representatives that [are] Democrat versus Republican [is] way out of line," Dkt.101-5 at 13, or that the "map should be redrawn so that … all the districts [are] split 50/50 between Republicans and Democrats," Dkt.101-1 at 16. Needless to say, those

allegations are insufficient to invoke Article III jurisdiction, as a plaintiff may not "seek[] relief that no more directly and tangibly benefits [the plaintiff] than it does the public at large." *Lujan*, 504 U.S. at 573-74.

The district court nonetheless concluded that plaintiffs demonstrated both "statewide" *and* "district-specific" standing because some (although certainly not all) of the individual plaintiffs live in districts that did not elect their candidate of choice. App.40-41 n.9.[4] But even assuming that alone were enough to state a district-specific injury—a dubious assumption given that individuals do not have a constitutional right to see their candidate of choice of elected—the question is not whether any plaintiff may have had standing to try to assert some sort of partisan gerrymandering claim. The question is whether any plaintiff has standing to assert the partisan gerrymandering claims that the plaintiffs actually brought. And the

[4] In fact, several plaintiffs live in districts that concededly elected their candidates of choice and would have done so no matter how they were drawn. Indeed, many of the plaintiffs live in districts that have elected only a single party's candidates for well over a decade regardless of how the map was drawn, begging the question how any purported "statewide" partisan gerrymandering could have impacted their own representational rights. *See, e.g.*, Dkt.101-1 at 15-16 (plaintiff Love); Dkt.101-3 at 67 (plaintiff Peck); Dkt.101-4 at 21 (plaintiff Fox); Dkt. 101-5 at 17-19 (plaintiff Collins); Dkt.101-13 at 19 (plaintiff Palmer); Dkt.101-2 at 12-13 (plaintiff Hall); Dkt.101-10 at 18 (plaintiff Richard Taft); Dkt.101-11 at 15 (plaintiff Cheryl Taft); Dkt.101-15 at 12 (plaintiff Bordsen); Dkt.101-25 at 10 (plaintiff Gresham); Dkt.101-26. at 11-13 (plaintiff Sumpter); *see also, e.g.*, Dkt.101-12 at 12, 18 (plaintiff Lurie); Dkt. 101-14 at 7, 18 (plaintiff Freeman); Dkt.101-21 at 22-24 (plaintiff Wolf).

only partisan gerrymandering claims that the plaintiffs brought are statewide claims based on purported injuries to the interests of their preferred political party writ large—*i.e.*, claims that their preferred political party was impeded in its ability to "efficiently" translate statewide vote totals into statewide seat gains because the map "as an undifferentiated 'whole,'" *ALBC*, 135 S. Ct. at 1265, was an unconstitutional partisan gerrymander. Just as in the race context, that is simply not the kind of concrete and particularized harm that Article III demands.[5]

Implicitly recognizing as much, the district court quickly turned to various other purported injuries, noting that the plaintiffs "testified to decreased ability to mobilize their party's base, to attract volunteers, and to recruit strong candidates," and to "feeling frozen out of the democratic process." App.42. But the court did not and could not explain how those purported injuries could give rise to Article III standing to challenge a districting map as an undifferentiated whole in this context—but no other. Adherents to the minority party could suffer similar feelings based on non-districting legislation passed on

[5] For the same reason, the organizational plaintiffs likewise lack standing "through their members," as those members have not demonstrated that they suffered any injury-in-fact on account of any purported "statewide" partisan gerrymandering. *Contra* App.43-44 n.11. Nor do those organizations have standing in their own right. Any right to a "non-gerrymandered" district belongs to the individual voter, not the political party. *Cf. ALBC*, 135 S. Ct. at 1265 (explaining that racial gerrymandering claims are "personal" to "voter[s] who live[] in the district attacked" (emphasis omitted)).

party-line votes, and yet that would not excuse the absence of a concrete and particularized injury. And similar feelings would not suffice in any other kind of districting challenge.

Indeed, the district court not only acknowledged, but embraced the anomalous result that its decision would make it easier to bring partisan gerrymandering claims than to bring voting racial gerrymandering claims, reasoning that partisan gerrymandering claims *should* be easier to bring (and win) because politics is purportedly a consideration *more* offensive to the Constitution than race. App.92 n.16. That startling proposition is irreconcilable with this Court's repeated admonitions that while "[r]ace is an impermissible classification," "[p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). That the district court could justify its expansive theory of standing only by embracing the exact opposite view is reason enough to reject it, and to apply the same Article III rules that apply to every other claim alleging some form of gerrymandering or vote dilution. Because the plaintiffs here did not even try to demonstrate that their *own* districts were drawn in a way that deprived *them* of any representational right, their statewide claims should be dismissed for lack of standing.

II. The Partisan Gerrymandering Standards Adopted Below Are Neither "Limited" Nor "Precise."

Separate and apart from the district court's defective standing analysis, the decision below is fatally flawed on the merits. Even assuming that there is some "limited and precise" theory under which

courts may adjudicate partisan gerrymandering claims, *id.* at 306 (Kennedy, J., concurring), the four separate legal standards established by the district court are neither. Just the opposite: They demonstrate the difficulty of ascertaining how much partisan motivation is excessive and the danger of concluding that any partisan motivation is constitutionally forbidden. The decision below would effectively transfer the redistricting authority away from the state legislatures and to the federal courts in ways that are antithetical to constitutional text and two centuries of experience. If this Court ultimately devises justiciable standards for partisan gerrymandering claims, they will look nothing like the tests employed by the district court here.

A. The District Court's Equal Protection Standard Would Preclude *Any* Intent to District for Partisan Advantage.

The majority below concluded that a redistricting 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.88. Variants of this test have failed to persuade this Court before, and this one is no improvement.

The problems with this standard begin at the first step, for in the majority's view, *any* intent to district for partisan advantage is constitutionally suspect under the Equal Protection Clause. *See* App.93-94. That any-intent standard is reminiscent of the plurality in *Bandemer*, which endorsed a similarly undemanding intent standard. As the *Bandemer*

plurality acknowledged: "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129 (plurality op.). Nearly two decades later, the *Vieth* plurality rejected that test and its "mere intent" requirement. 541 U.S. at 283-84 (plurality op.). And a majority of the Court has rejected even *more demanding* intent requirements, including a "predominant intent" standard and a "sole intent" standard. *Id.* at 290-91 (plurality op.); *see also 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" and would "almost *always*" leave "room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation," and a "sole intent" requirement would fail "[f]or many of the same reasons." 541 U.S. at 284-86, 290-91 (plurality op.).

Remarkably, the majority below inferred from the rejection of these *heightened* intent requirements that the *less* demanding "any intent" standard must be resurrected. App.91-94. But that conclusion makes zero sense either practically or legally. If a heightened standard still "almost always" allows for an "election-impeding lawsuit," *Vieth*, 541 U.S. at 286 (plurality op.) (emphasis omitted), a less demanding standard is problematic *a fortiori*. Moreover, because racial gerrymandering cases require a showing that "race was the predominant factor," even though consideration of race is expressly enjoined by the Constitution, *Miller v. Johnson*, 515 U.S. 900, 916

(1995), adopting a less demanding standard for partisan motivation is doctrinally backwards.

The majority below acknowledged that incongruity and then embraced it on the theory that "redistricting bodies can—and, in certain circumstances, should—consider race in drawing district lines," while there is purportedly never "*any* legitimate constitutional, democratic, or public interest" in considering partisan advantage. App.92 n.16. Accordingly, in the district court's view, the Equal Protection Clause—a provision adopted half a century after the eponymous partisan gerrymander without so much as a hint that it was designed to eliminate that practice, and indisputably passed for the principal purpose of prohibiting race-based discrimination—is less offended by divvying up voters on the basis of race than by divvying up voters on the basis of politics. *But see Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

That startling proposition finds no support in this Court's cases. As Judge Osteen highlighted in rejecting that aspect of the majority's test, 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.214; *see also, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may

engage in constitutional political gerrymandering"); *Miller*, 515 U.S. at 914 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition[.]"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.").

Indeed, even Justices who have taken the position that partisan gerrymandering claims are justiciable have acknowledged that *some* degree of districting for partisan advantage is both inevitable and permissible. *See, e.g.*, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting) ("'[S]ome intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent' …. Thus, … 'the issue is one of how much is too much[.]'"); *id.* at 360 (Breyer, J., dissenting) ("The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends[.]"); *Bandemer*, 478 U.S. at 164-65 (1986) (Powell, J., concurring in part and dissenting in part) (explaining that "the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls" does not "amount[]" to unconstitutional discrimination"). That so many members of this Court have refused to adopt the feeble intent standard advanced below is not surprising: If even a heightened intent standard would "almost *always*" encourage enterprising plaintiffs to file "election-impeding lawsuit[s]," *Vieth*, 541 U.S. at 286 (plurality op.), one can only imagine the chaos a far weaker standard would wreak.

The problems with the majority's equal protection standard run deeper still, as it embraced an equally amorphous, indeterminate, and unsustainable "discriminatory effects" test, concluding that "a plaintiff must show that a districting plan's bias towards a favored 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.130. 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 (Kennedy, J., concurring) (recognizing need for partisan gerrymandering standard to "decid[e] how much partisan dominance is too much"). Instead, it concluded that plaintiffs may rely on any and all manner of social science metrics—from the "efficiency gap" to "partisan bias" to "the mean-median difference"—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.134, 156. To say the least, that hardly amounts to a "limited and precise rationale." *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 district court was concerned with non-responsiveness to minority-party constituents, but that problem will be most acute in districts where the majority-party voters outnumber minority-party voters by large numbers. Partisan gerrymandering itself tends to avoid the concentration

of majority-party voters, and so the purported problem tends to ameliorate the purported injury, at least at the level of the districts in which constituents actually live and vote. Beyond that incoherence, the effects test ultimately looks to the "totality of the evidence" because the district court has failed to specify what particular evidence would be legally relevant, leaving States in the dark as to how to draw constitutionally compliant maps.

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

The majority's First Amendment standard fares no better. According to the majority, to prove a First Amendment violation, a plaintiff must show: "(1) that the challenged districting plan was intended to favor or disfavor individuals or entities that support a particular candidate or political party, (2) that the districting plan burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.176. But that test is just as overbroad and incoherent as the majority's equal protection test.

Indeed, just like the majority's equal protection test, the intent prong of that 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; App.214-15 (Osteen, J., concurring in part and dissenting in part) (collecting cases stating same). And the 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.178, 181. The majority's circular "causation" prong, moreover, 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.188-89.

As Judge Osteen correctly observed in rejecting it, "the majority's adopted test would in effect foreclose all partisan considerations in the redistricting process" and render *any* degree of districting for partisan advantage constitutionally verboten, App.219—a proposition that nearly every member of this Court to consider a partisan gerrymandering case has emphatically 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, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs."). And as Judge Osteen further observed, the test would recognize First Amendment injuries even when plaintiffs "are … free … to 'field candidates for office, participate in campaigns, vote for their preferred candidate, or otherwise associate with others for the advancement of common political beliefs.'" App.220.

As with its flawed equal protection test, the district court's First Amendment test reflects deeper doctrinal incoherence. The test ignores that there are substantial First Amendment values on both sides of the political ledger. Political parties 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) ("It is the accepted understanding that a party combines its members' power to speak … and broadcast[] messages more widely than individual contributors generally could afford to do, and the party marshals this power with greater sophistication than individuals generally could[.]"). Moreover, by focusing on the legislature's intent to promote partisan advantage (which cannot be a stand-alone First Amendment problem), rather than an intent to discriminate against minority-party voters or to penalize or retard their First Amendment activity, the test does not even appear to be focused on the state action that could arguably violate the First Amendment.

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 for adjudicating such claims. It makes little doctrinal sense and would invalidate nearly every legislatively drawn districting plan in the country and 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. *See, e.g.*, *Bush v. Vera*, 517 U.S.

952, 978 (1996) ("[W]e adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan."); *Miller*, 515 U.S. at 915 ("It is well settled that reapportionment is primarily the duty and responsibility of the State."); *Voinovich v. Quilter,* 507 U.S. 146, 156 (1993) ("[I]t is the domain of the States, and not the federal courts, to conduct apportionment in the first place.").

C. The District Court's Elections Clauses Standard Is 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 overbreadth and doctrinal incoherence. Unsurprisingly, no other court in history has ever reached that conclusion, and to the extent members of this Court have given the argument the time of day, they have rejected it.

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," U.S. Const. art. I, §4. In the district court's view, partisan gerrymandering violates Section 2 because it deprives "the People" of their right to elect Representatives, App.196, and it violates Section 4 because it "exceeds"

the States' "delegated authority under the Elections Clause." App.192.

Indeed, in the district court's view, "'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.195, 199. 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 constitutionally tolerable amount of political motivation in congressional redistricting is precisely zero.

Unsurprisingly, 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). Indeed, this Court has already concluded that the text of the Elections Clauses "leaves *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.).[6] 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 (plurality op.). And no other member of the Court even deemed the plaintiffs' Elections Clauses arguments worthy of mention.

A majority of the Court in *Vieth* likewise emphatically rejected the notion that *any* amount of districting for partisan advantage violates the Constitution—and for good reason, as "[a] decision ordering the correction of all election district lines drawn for partisan reasons would commit … courts to unprecedented intervention in the American political process." *Id.* at 306 (Kennedy, J., concurring); *see also Gaffney*, 412 U.S. at 752 ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."). This Court was "correct to refrain from directing this substantial intrusion into the Nation's political life" then, *Vieth*, 541 U.S. at

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[6] Notably, the very next day after the district court issued its opinion in this case, another district court squarely rejected the proposition that "Art. I, § 4, of the Constitution prohibits any political or partisan considerations in redistricting." Memorandum at 3, *Agre v. Wolf*, No. 17-4392 (E.D. Pa. Jan. 10, 2018) (Brooks, J.), ECF No. 211; *see also* ECF No. 212 at 2 (Shwartz, J., concurring) ("[T]he legal test [the plaintiffs] propose for an Elections Clause claim is inconsistent with established law.").

306 (Kennedy, J., concurring), and that conclusion is no less correct today.

Moreover, the district court's conclusion that Elections Clauses empower courts to police partisan gerrymandering gets matters exactly backwards, as the whole point of Section 4 is to reinforce the primary role of the *legislature* in districting. Under Section 4, state legislatures have "the initial power to draw districts for federal elections," but Congress just as clearly has the authority to "'make or alter' those districts if it wished." *Vieth*, 541 U.S. at 275 (plurality op.); *see also* U.S. Const. art. I, §4. That authority has certainly not been lost on Congress. To the contrary, Congress' exercise of that power is precisely is why single-member congressional districting, with all its potential for gerrymandering district lines, is the preferred option in States with multiple districts. *See* 2 U.S.C. §2c. Thus, the district court's suggestion that the Elections Clause imposes a separate test that makes partisan gerrymandering claims uniquely justiciable in the context of congressional elections gets matters exactly backwards. 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 hard the district court struggled to find a workable test.

In the end, the decision below is a cautionary tale about the difficulty of developing coherent, administrable tests in this area. Indeed, the district court found the challenge of developing a "limited and precise" test sufficiently daunting that it effectively gave up the enterprise and settled for multiple unworkable and overbroad tests. Rather than determine how much partisan gerrymandering is constitutionally excessive, the district court adopted tests premised on the notion that no amount of partisan gerrymandering is permissible. That approach is inconsistent with constitutional text and two centuries of history and would forever shift redistricting from state officials to federal courts. The district court's failures may reinforce that a justiciable test remains elusive, but in no event has the decision below cracked the code on partisan gerrymandering. The decision below cannot stand.

CONCLUSION

For the foregoing reasons, this Court should hold this case pending resolution of *Gill* and *Benisek*, and then reverse, vacate, or note probable jurisdiction.

Respectfully submitted,

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