No. 17-1295

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

MOTION TO AFFIRM BY THE *COMMON CAUSE* APPELLEES

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QUESTIONS PRESENTED

1. Whether the three-judge panel correctly held that the plaintiffs have standing to challenge the 2016 North Carolina Congressional Plan as a partisan gerrymander?

2. Whether the three-judge panel correctly held that the 2016 North Carolina Congressional Plan is unconstitutional under the Equal Protection Clause, the First Amendment, Art. I, § 2 and/or Art. I § 4?

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INTRODUCTION

The 2016 North Carolina Congressional plan ("2016 Plan" or "Plan") is among the most extreme partisan gerrymanders in our modern history. In a purple state equally split between Democratic and Republican voters, the Plan created *ten* Republican and just *three* Democratic districts. This numerical quota was enshrined, under the heading "Partisan Advantage," in the formal written criteria adopted by the legislature's Joint Redistricting Committee. The consultant hired to draw the map admitted that his express order was to maximize Republican, and minimize Democratic, voting power. The legislators who spearheaded the process boasted publicly that the Plan was intended "to gain partisan advantage" for Republicans because, in their view, "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan] would be a political gerrymander, which is not against the law."

This is beyond unsavory or unfair. It is "incompatible with democratic principles," *Ariz. State Legis. v. Ariz. Indep. Redist. Comm'n*, 135 S. Ct. 2652, 2658 (2015) ("*ASL*"), and it is repugnant to our constitutional order. As the Chief Justice put it, "those who govern should be the *last* people to . . . decide who *should* govern." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441-42 (2014). The District Court agreed and struck down the Plan on four different constitutional theories. On undisputed facts—none challenged on this appeal—it found as follows:

(1) The 2016 Plan had an invidious *partisan purpose*. The North Carolina legislature "intended for the

2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates." To achieve that goal, those "responsible for drawing the 2016 Plan" were "expressly directed" to "ensure Republican candidates would prevail in the vast majority of the state's congressional districts." App.2-3.

(2) The 2016 Plan had a severe and durable *partisan effect*. At the statewide level, it resulted in an extreme 10-3 advantage for the Republican Party. It also "diluted the votes of those [p]laintiffs who supported non-Republican candidates and reside in the ten districts . . . dr[awn] to elect Republican candidates." The plaintiffs who reside in the three packed Democratic districts also suffered injury, including "decreased ability to mobilize their party's base, to attract volunteers, and to recruit strong candidates." App.41-43.

(3) The 2016 Plan had *no legitimate justification*. The defendants "d[id] not argue—and have never argued—that the 2016 Plan's intentional disfavoring of supporters of non-Republican candidates advances *any* democratic, constitutional, or public interest. Nor could they." App.3.

The State of North Carolina and its Board of Elections evidently agree with the District Court, as they have not appealed from the judgment. Only the Republican legislative leaders responsible for this act of gross partisan overreach ask this Court to reverse. Tellingly, they do not contend that the District Court's findings of fact are erroneous (let alone clearly so); nor do they defend their actions as consistent with the Constitution. Instead, they assert only:

(1) that Appellees lacked standing to challenge the 2016 Plan as an "undifferentiated whole"; and (2) that the legal tests that the District Court adopted for judging this extreme gerrymander are insufficiently "limited and precise." JS.2.

Appellants' standing argument is premised on a blatant misrepresentation of the facts: that Appellees filed only "statewide" challenges to the 2016 Plan. That is true of the *League of Women Voters* plaintiffs, but the *Common Cause* plaintiffs also brought "district-by-district" claims of the type that Appellants concede are justiciable. The *Common Cause* plaintiffs include voters from each of North Carolina's congressional districts. Their complaint expressly challenged the 2016 Plan "as a whole, and [as to] *each of its thirteen individual districts*." And the District Court correctly found that they suffered personalized harms that stemmed from the drawing of their own respective districts' lines. Nothing more is needed.

Appellants also critique the legal tests that the District Court employed: too vague, too easily satisfied, too novel, too numerous. As a threshold matter, however, this Court need not endorse each of these tests to affirm the judgment. Now pending before the Court are *Gill v. Whitford*, No. 16-1161, and *Benisek v. Lamone*, No. 17-333, both of which raise constitutional challenges to partisan gerrymanders. Recognition of any theory of unconstitutionality in either of those cases would compel affirmance here, as the District Court's unchallenged findings of fact make out a

constitutional violation under any standard this Court might plausibly adopt.[1]

In any event, Appellants' criticisms of the District Court's legal reasoning fall flat. That the District Court found multiple constitutional provisions violated does not bespeak "doctrinal incoherence," JS.30-31; it reflects how deeply offensive Appellants' actions are to our constitutional order. The District Court did not "divine" the standards that it applied, JS.1, 11; they are grounded in, and faithful to, this Court's precedents. Nor would those standards result in the "invalidat[ion of] nearly every legislatively drawn districting plan in the country," JS.30, as Appellants dramatically assert. Each of those standards requires, at minimum, positive proof that the map-drawers' choices were driven not by "political" considerations *per se*, but by *invidious* intent to burden a disfavored political group's representational rights. This hardly describes every districting plan in the country and, indeed, is likely to occur only in some states under one-party control. In any event, this standard leaves ample room for legitimate "consideration of politics in drawing districts." JS.2.

Appellants deride the District Court's decision as "a cautionary tale about the difficulty of developing

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[1] Even if the Court endorses no theory of unconstitutionality on the facts of *Whitford* or *Benisek*, it should nonetheless summarily affirm or note probable jurisdiction here. The *Common Cause* case is not premised on the standing theory in *Whitford*; nor does it present the preliminary-injunction posture of *Benisek*. The record evidence in this case differs both in kind and quantity from those cases. And the Article I theories adopted by the District Court are not at issue in either *Whitford* or *Benisek*.

coherent, administrable tests in this area." JS.35. This case is indeed a "cautionary tale"—but not about legal doctrine. It is about the outrageous abuses of democracy that will inevitably occur if legislators believe—as Appellants did—that "political gerrymander[s] . . . [are] not against the law," App.96, and that the courts cannot intervene. Unless this Court takes action here, the shocking facts of this case will become the new normal.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is an archetypal purple state, its electorate roughly evenly divided between voters supporting Democratic and Republican candidates. Its congressional delegation formerly reflected this, generally dividing 7-6 or 6-7 in recent years.

That changed markedly when the Republican Party gained majorities of both houses of the state legislature in 2010, "giving Republicans exclusive control over the decennial congressional redistricting process." App.6. Acting on a party-line basis, the legislature adopted a new map (the "2011 Plan") that yielded a 9-4 Republican supermajority in the 2012 election, even though Democratic candidates received more votes in congressional races statewide. App.10. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the statewide congressional vote. *Ibid.*

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). The *Harris* plaintiffs brought a racial-gerrymandering claim, focusing on two particular districts. The State's "defense" was that the 2011 Plan was the result of *partisan* gerrymandering. At trial, Dr. Thomas Hofeller, who drew the map, testified that partisanship "was the primary . . . determinant in the drafting" and that his "primary goal . . . was to create as many safe [or] competitive districts for Republican[s] . . . as possible." App.117. Before this Court, the State's counsel—who represents Appellants in this appeal—explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out." *Harris* Tr. 10-11 (argument of Paul D. Clement).

This Court affirmed the District Court's judgment invalidating those two districts as racial gerrymanders. As to the remaining districts and the 2011 Plan as a whole, however, the Court did not take issue with the State's admission that the "overarching goal" was to advantage Republicans over Democrats. *See Harris*, 137 S. Ct. at 1492 (Alito, J., dissenting) (acknowledging that the "overall redistricting plan" was designed to "have an increased number of competitive districts for GOP candidates" (cleaned up)).[2]

2. Creation Of The 2016 Plan

In February 2016, the district court in *Harris* ordered a new map. Representative David Lewis and Senator Robert Rucho—both Republicans—"decided

[2] This brief uses the designation "(cleaned up)" where quotation marks, alterations, and/or citations have been omitted.

to again engage Dr. Hofeller to draw the remedial plan." App.10. As Hofeller testified, his prime directive was to eliminate the racial infirmities of the two districts challenged in *Harris* while using political data to "maintain the existing partisan makeup of the state's congressional delegation, which . . . included 10 Republicans and 3 Democrats." App.11.

At Lewis and Rucho's direction, Hofeller used past election results "to create a composite partisanship variable indicating whether, and to what extent, a particular precinct was likely to support a Republican or Democratic candidate." He then used that variable to create a map from the bottom up, assigning counties, voting districts, and even individual precincts to congressional districts with the goal of "cracking" and "packing" Democrats to minimize their voting strength. App.11, 97-98.

At a meeting of the Joint Redistricting Committee, Representative Lewis presented for approval a set of seven written "criteria" that Hofeller used in developing the 2016 Plan. App.14-17. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated:

> The partisan makeup of the congressional delegation under the [2011 P]lan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Another criterion, labeled "Political data," stated that "[t]he only data other than population data to be used . . . shall be election results in statewide contests since January 1, 2008 . . . ." Although the Committee adopted other, neutral criteria on a bipartisan basis, the partisan criteria were adopted by straight party-line votes. App.18. The resulting Plan, its drafters agreed, "adhered to the Committee's Partisan Advantage and Political Data criteria." App.19.

Lewis publicly proclaimed the intentions behind the 2016 Plan (emphases added):

- "[W]e want to make clear that to the extent we are going to use political data in drawing this map, it is to gain partisan advantage . . . . I'm making clear that *our intent is to use . . . the political data . . . to our partisan advantage*." App.17.

- "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because *I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats*." App.17-18.

- "*I think electing Republicans is better than electing Democrats*. So I drew this map to help foster what I think is better for the country." App.19.

- "*I acknowledge freely that [the 2016 Plan] would be a political gerrymander*, which is not against the law." App.17.

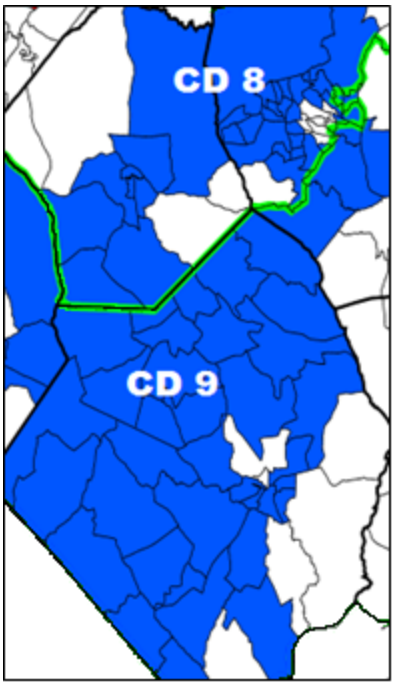
Rucho agreed, stating publicly that there is "nothing wrong with political gerrymandering" because, as he understood the law, "[i]t is not illegal." App.96.

The Republican majorities in both chambers approved the final 2016 Plan "by party-line votes." App.19-20.

3. Effect Of The 2016 Plan

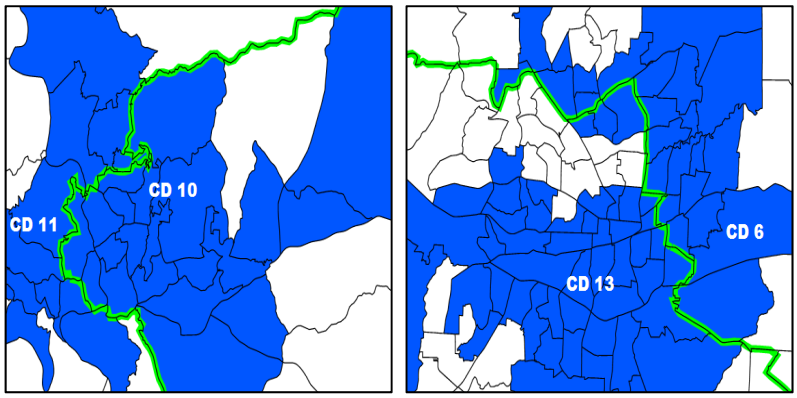
In the 2016 congressional election, as intended, 10 Republicans and 3 Democrats were elected. App.21. Republicans won 77% of the seats despite receiving just 53% of the statewide vote. *Ibid.* Not one district had a competitive race. App.41 n.10.

In addition to disempowering North Carolina Democrats *statewide*, the 2016 Plan's packing and cracking of Democratic voters harmed those voters *at the district level*. App.40-41 n.9, 41-43. For example, the city of Fayetteville (in Cumberland County) and its environs in Hoke and Robeson Counties (shown in blue on the map below) are heavily Democratic. Among its Democratic voters are *Common Cause* plaintiffs Coy E. Brewer, Jr. and John McNeill. Traditional districting principles, which prioritize preserving political subdivisions, would likely have placed Cumberland County in a single district. However, Appellants' own expert "conceded that the 2016 Plan divided numerous political subdivisions . . . including . . . Cumberland County . . . ." App.123.



As a result, Brewer and McNeill suffered personal, district-specific harms. Because of their membership in a disfavored political group and their voting histories, Brewer was relegated to safe-Republican Congressional District ("CD") 8 and McNeill to safe-Republican CD 9, subjecting them to the indignity of an invidious classification, diluting their votes, and preventing them from having an equal opportunity to elect their candidate of choice. *Ibid.*

Appellants' expert also "conceded that the 2016 Plan 'cracked' the naturally occurring Democratic cluster in the City of Asheville and Buncombe County into two . . . 'safe' Republican districts" (below left), App.159, and did the same to the majority-Democratic city of Greensboro and its vicinity (below right). *Ibid.*; *see also* App.97.



Common Cause plaintiffs residing in the resulting districts suffered analogous district-specific injuries, including Democratic voters Robert Warren Wolf (assigned based on his political association and expression to safe-Republican CD 10), Jones P. Byrd (assigned to safe-Republican CD 11), Melzer A. Morgan, Jr. (assigned to safe-Republican CD 6), and Russell G. Walker, Jr. (assigned to safe-Republican CD 13). App.123, 125, 159.

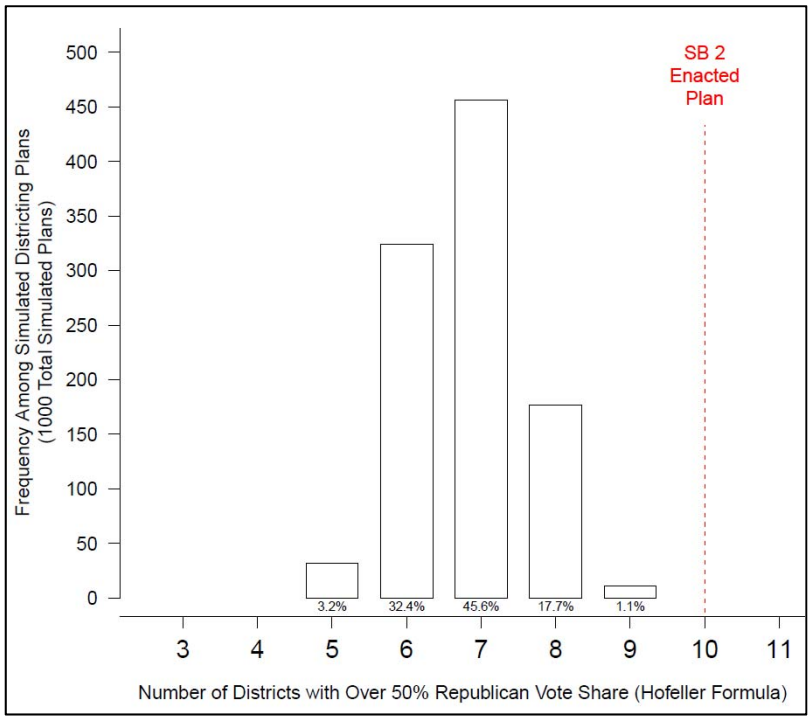
B. Proceedings Below

In August 2016, the *Common Cause* plaintiffs—individual voters from each district in the 2016 Plan, together with the nonpartisan organization Common Cause and the North Carolina Democratic Party—filed a complaint challenging the Plan as an unconstitutional partisan gerrymander. The case was consolidated with *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.), and the defendants' motion to dismiss was denied.

In October 2017, the three-judge District Court held a four-day bench trial. Because the facts surrounding the Plan's enactment were essentially un-

disputed, App.2-3, the trial focused on the testimony of the parties' experts. The *Common Cause* plaintiffs presented testimony from Dr. Jonathan C. Mattingly, a mathematician from Duke University, and Dr. Jowei Chen, a political scientist from the University of Michigan. App.99, 105. Drs. Mattingly and Chen used computer algorithms to generate thousands of alternative districting maps using traditional criteria and disregarding partisan data. Next, they used actual voting results from each precinct statewide to simulate elections under each alternative map.

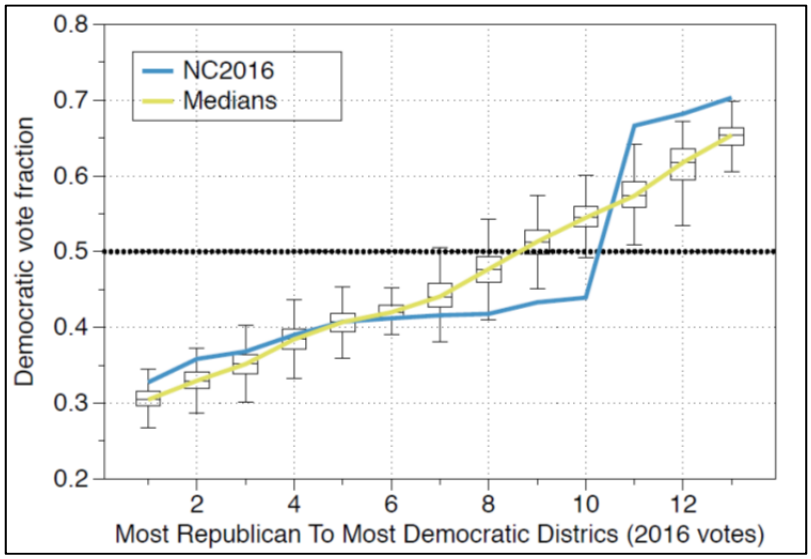
Dr. Chen generated three sets of 1,000 maps using the nonpartisan districting criteria explicitly adopted by the Joint Redistricting Committee and simulated elections under each map. The composition of North Carolina's congressional delegation under these maps formed a bell curve. Under most maps, the split was 7-6 or 6-7, just as North Carolina's delegation had historically divided. *None* of Dr. Chen's 3,000 maps yielded a Republican advantage as great as the 10-3 advantage under the 2016 Plan (shown by the dashed red line). App.106-108.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using only nonpartisan districting criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. App.101.

Dr. Mattingly's simulations also confirmed that the 2016 Plan both packed and cracked Democratic voters. As he explained, this can be shown by plotting the Democratic vote share of each district on a graph, with the most Republican districts on the left and the most Democratic on the right. As the diagram below reflects, with no packing or cracking, the median map in Dr. Mattingly's simulation set (shown in yellow) yields a straight line. The actual results for the 2016 Plan (shown in blue) are quite different. They resemble an "S" curve, with Democratic voters either

packed into overwhelmingly Democratic districts at the top of the "S" or dispersed within safe Republican districts at the bottom of the "S." App.102-103.



On January 9, 2018, the District Court issued an opinion holding unanimously that Appellants had standing to challenge the 2016 Plan on a statewide and district-by-district basis. The court unanimously found that the Plan violates the Equal Protection Clause and Art. I, §§ 2 and 4. A two-judge majority also held that the Plan violates the First Amendment. On January 18, 2018, this Court stayed the judgment pending appeal.

ARGUMENT

I. THE *COMMON CAUSE* APPELLEES HAVE STANDING

Appellants principally argue that Appellees lacked standing to bring their claims. They do not dispute that the causation and redressability elements of standing are met. App.30. Instead, they maintain that Appellees have not sufficiently alleged and shown injury-in-fact. This argument hinges on the assertion that Appellees "proceeded only on a 'statewide' . . . theory, challenging the 2016 [Plan] as an undifferentiated whole" and "complain[ing] only about the interests of their preferred political party writ large." JS.1, 19.

Appellants are doubly wrong. First, as the District Court correctly held, a plaintiff may demonstrate the requisite injury-in-fact by showing membership in a statewide political group that was harmed by the adoption of a unitary districting plan. App.36-39. Second, Appellants' assertion flagrantly mischaracterizes the claims that the *Common Cause* plaintiffs brought. While the *League of Women Voters* plaintiffs "proceed[ed] only on a 'statewide' . . . theory," the *Common Cause* plaintiffs did not. They include individual voters from each of the 2016 Plan's districts. App.41 n.9. They alleged from the outset that the Plan was unconstitutional both "as a whole, and [as to] each of its thirteen individual districts." Am. Compl., ¶ 26, *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C. Sept. 7, 2016). And, as the District Court found, they demonstrated district-specific harm in spades.

Consider the *Common Cause* plaintiffs "who supported non-Republican candidates and reside in the ten districts . . . dr[awn] to elect Republican candidates." App.41. Like all North Carolina Democrats, these plaintiffs were harmed by the adoption of the 2016 Plan as a whole. But, as discussed above, these plaintiffs were also harmed by the way in which *their own* districts were drawn. *Common Cause* plaintiffs Coy E. Brewer, Jr. and John McNeill, for instance, live on opposite sides of the line that Hofeller drew bisecting their Fayetteville-area community. *Supra* at 9-10. As a result of that line, which placed Brewer in safe-Republican CD 8 and McNeill in safe-Republican CD 9, both plaintiffs suffered the personal indignity of an invidious classification; their votes were diluted; and their ability to elect their candidate of choice was impeded—indeed, nullified. *See Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring) ("[P]olitical gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause."). So, too, with the remaining *Common Cause* plaintiffs whose communities were split and who were relegated to safe-Republican districts based on their political association and expression. *Supra* at 10-11. Appellants challenge none of these findings.

That alone dooms Appellants' standing challenge: even under their restrictive "district-by-district" standing test, these voter-plaintiffs unquestionably had standing to challenge their own gerrymandered districts. And, as Appellants concede, once a gerrymandering plaintiff proves "district-specific *injur[y]*," a "statewide *remedy*" is not only permissible, but often is "necess[ary]." JS.18-20. But that is not all. As the District Court correctly found, voter-plaintiffs

from *all* 13 districts (including the three districts packed with Democrats) proved district-specific harms of a "non-dilutionary" nature—including "decreased ability to mobilize their party's base, to attract volunteers, and to recruit strong candidates" and a feeling of being "frozen out of the democratic process." App.42-43; *see Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (plaintiff cognizably injured by election law that made "[v]olunteers . . . more difficult to recruit and retain" and "voters . . . less interested in the campaign"). Appellants do not challenge these findings either.[3]

II. THE DISTRICT COURT'S JUDGMENT THAT THE 2016 PLAN VIOLATES THE CONSTITUTION IS CORRECT

The District Court correctly held that the 2016 Plan violates the Equal Protection Clause, the First Amendment, and Art. I, §§ 2 and 4. Appellants do not challenge the fact-finding supporting these holdings. Nor do they take issue with the District Court's application of the legal standards that it identified. They challenge only those legal standards themselves. These criticisms miss the mark.

A. The 2016 Plan Is Unconstitutional Under Any Standard

The District Court's undisputed findings of fact about this extreme gerrymander make out a constitu-

[3] The organizational plaintiffs also have standing to challenge each district by virtue of the fact that one or more of their members reside there. App.43-44 n.11; *see Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

tional violation under any standard that the Court could plausibly adopt. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance does "not necessarily [endorse] the reasoning by which [the judgment] was reached").

For instance, the District Court held that a plaintiff is not required to prove that invidious partisan intent "predominated" over other considerations in the redistricting process. There are good reasons for this standard. *Infra* at 26. But even if the Court disagrees, the District Court *also* found that "predominance" was established here—a finding that Appellants do not dispute. App.124. Likewise, the District Court held that, under the First Amendment and Art. I, §§ 2 and 4, a partisan-gerrymandering plaintiff is not required to prove that her injury surpasses a particular threshold of severity or duration. Again, there are good reasons for this. *Infra* at 35-36. But even if the Court disagrees, the District Court found that the 2016 Plan imposed a severe and durable harm. App.176 n.37.

Indeed, the direct evidence of this extraordinary gerrymander—including express written and oral declarations of invidious partisan intent—makes out a *per se* constitutional violation. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Justice Kennedy explained that if "a State passed an enactment that declared" on its face that "[a]ll future apportionment shall be drawn so as most to burden" one party, "we would surely conclude"—without more—that "the Constitution had been violated." *Id.* at 311-12. The "standard" that Justice Kennedy hoped would "emerge" in the future was not needed for such a case, but rather, for cases

where "a legislature . . . attempt[s] to reach the same [discriminatory] result *without* [an] express directive." *Ibid.* (emphasis added). This is—admittedly—a case in the former category.

At oral argument in *Whitford* and *Benisek*, Justice Kennedy asked whether an express declaration of partisan favoritism in the districting process would violate the Constitution. *See Whitford* Tr. 26 (hypothetical law stating that "all legitimate factors must be used in a way to favor party X [over] party Y"); *Benisek* Tr. 45 (hypothetical law requiring "partisan advantage for one party [to] be the predominant consideration in any districting"). In both cases, counsel for the defendant agreed that such a law would be unconstitutional. So, for that matter, did counsel for the legislative *amici* in *Whitford*, who also represents Appellants in this case:

> JUSTICE KENNEDY: . . . If the state has a law or constitutional amendment that's saying all legitimate factors must be used in a way to favor party X or party Y, is that lawful? . . . Is that an equal protection violation or First Amendment violation? . . . .
>
> MS. MURPHY: *Yes.* It would be . . . unconstitutional, if it was on the face of it . . . .

Whitford Tr. 26-27 (emphasis added).

In *Benisek*, Justice Kagan asked a similar hypothetical of her own, and received the same answer from counsel for the defendants:

> JUSTICE KAGAN: . . . Suppose the Maryland legislature passed a statute and said, in the next round of reapportionment, *we're going to create seven Democratic districts and one Republican district*?
>
> MR. SULLIVAN: I think it would have a similar result to the question from Justice Kennedy. It would be [viewpoint discrimination] on its face . . . .

Benisek Tr. 47 (emphasis added).

As these concessions make clear, the facts of this case establish a *per se* constitutional violation. This is for all practical purposes the case that Justice Kennedy wrote about in *Vieth* and that Justices Kennedy and Kagan asked about in *Whitford* and *Benisek*. The written criteria for the 2016 Plan that were formally adopted by the Joint Redistricting Committee included a "Partisan Advantage" criterion calling expressly for a 10-3 Republican supermajority. App.15-16. Moreover, Appellants Lewis and Rucho, who led that committee and instructed the map-drawer, publicly proclaimed that the plan's "intent" was "to gain partisan advantage" for Republicans because "electing Republicans is better than electing Democrats." App.17-19. Given these express public "declar[ations]," this Court may "surely conclude the Constitution ha[s] been violated," *Vieth*, 541 U.S. at 312 (Kennedy, J.), whatever the outcome of *Whitford* and *Benisek* and whether or not this Court endorses the District Court's reasoning in part or in whole.

B. Appellants Improperly Conflate "Political Considerations" With Invidious Partisan Discrimination

A fundamental mistake underlies Appellants' chief complaints about the District Court's legal standards—*i.e.*, that they would bar all "political considerations from the districting process," JS.15, and that they would "invalidate nearly every . . . district plan in the country," JS.30. Specifically, Appellants equate "political considerations" *per se* with invidious discrimination on the basis of political association or expression. In so doing, they improperly "conflate two distinct concepts." Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. (forthcoming 2018) at 2025 n.147, https://bit.ly/2EAkffW. It is the *invidious* use of political association or expression—its use for the purpose "of diminishing or minimizing the voting strength of supporters of a [disfavored] party," App.68—that the District Court's tests deem illegitimate. *See* Levitt, *supra*, at 2013-19, 2024-30 (contrasting "invidious" partisan intent and mere politics); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 368, 383 (2017) (same).

This Court has indeed stated that "political considerations" may legitimately factor into the redistricting process. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). The District Court acknowledged this, observing that this Court "has recognized certain *purposes* for which a state redistricting body may take into account political data or partisan considerations . . . ." App.67-68. For instance, a legislature may

consider party identification to promote proportional representation, *Gaffney*, 412 U.S. at 752, or to avoid pairing incumbents, *Daggett*, 462 U.S. at 740. However, as the District Court noted, this Court has never held that a legislature may act for the naked purpose of invidiously "diminishing or minimizing the voting strength of supporters of a particular party or citizens who previously voted for representatives of a particular party." App.68. "On the contrary," this Court recently held, "such efforts are incompatible with democratic principles." *Ibid.* (quoting *ASL*, 135 S. Ct. at 2658) (cleaned up); *see also Vieth*, 541 U.S. at 307 (Kennedy, J.) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were *applied*. It must rest instead on a conclusion that the classifications . . . were applied *in an invidious manner* or in a way unrelated to any legitimate objective." (emphasis added)).

Indeed, *Gaffney*—which Appellants quote for the principle that "[p]olitics and political considerations are inseparable from districting," J.S.26—expressly distinguished permissible from "invidious" use of political considerations:

> What is done in [districting] . . . to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny . . . . [D]istricts may be vulnerable, if racial or *political* groups have been fenced out of the political process and *their voting strength invidiously minimized*. Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the

> essentially political processes of the sovereign States . . . .
>
> [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, *not to minimize or eliminate the political strength of any group or party*, but to recognize it and, through districting, provide a rough sort of proportional representation . . . .

412 U.S. at 754 (emphasis added).[4]

An analogous distinction appears in this Court's racial-gerrymandering cases. There, too, race may be considered for certain purposes, such as compliance with the Voting Rights Act. *Harris*, 137 S. Ct. at 1464. But race may never be used "invidiously to minimize or cancel out the voting potential of racial . . . minorities." *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). Distinguishing invidious from legitimate uses of a characteristic in the redistricting process is thus

[4] Appellants cite the plurality opinion in *Vieth* for the proposition that even *invidious* partisan discrimination is acceptable, provided it is not "too much." JS.26. That opinion, however, did not garner a majority and is not the law. Moreover, its analysis is based on the same misreading of *Gaffney* as Appellants' here and should not be followed. *See Vieth*, 541 U.S. at 336-37 (Stevens, J., dissenting) ("Until today, . . . there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line."); Kang, *supra*, at 352, 367-70 (discussing the *Vieth* plurality's misreading of this Court's precedents, including *Gaffney*).

a task that courts are familiar with and well-equipped to handle.

This distinction between "political considerations" *per se* and invidious political discrimination resolves the main concerns Appellants raise. First, "[a] requirement that public officials for[go] action *specifically intended* to punish or subordinate opposing partisans leaves ample room for redistricting bodies to engage in plenty of permissible political calculations." Levitt, *supra*, at 2024-28 (emphasis added). And second, the need to prove invidious intent will impose an appropriate hurdle for future plaintiffs, insulating most districting maps from attack. Absent direct admissions of invidious intent such as present here, a plaintiff will have to establish affirmatively through discovery and circumstantial evidence that invidious intent—rather than legitimate political considerations or other neutral criteria—actually drove the map-drawers' choices. Indeed, plaintiffs are unlikely even to mount such a challenge absent the combination of one-party control of the state and anomalous election outcomes like those here.

C. The District Court's Constitutional Analysis Was Correct

The District Court's analysis was a correct application of well-established constitutional law. This Court has been justifiably interested in the development of manageable standards for deciding partisan-gerrymandering cases. But the facts of this case, and of *Whitford* and *Benisek*, demonstrate that established constitutional doctrine already provides manageable *legal* standards. What has been missing is probative *evidence* of invidious partisan gerryman-

dering—not new legal theories. This evidence can take the form of direct proof, such as express legislative admissions and declarations. Or it may include circumstantial evidence, such as that provided by an increasingly rich menu of statistical tests and computational analyses. No more is needed in the way of legal guidance when the evidence—both direct and circumstantial—indicates a constitutional violation, as it does here.

1. Equal Protection

The District Court applied a "three-step framework" to Appellees' Equal Protection claims: a districting plan violates that clause where (1) it "was enacted with [invidiously] discriminatory intent"; (2) it "resulted in discriminatory effects"; and (3) "its discriminatory effects are [not] attributable to the state's political geography or another legitimate redistricting objective." App.88-89. Once the plaintiff proves the first two elements, the burden shifts to the defendant to prove the third. *Ibid.* Not only was this framework faithful to the Court's Equal Protection cases, but it "[was] not in dispute" below. App.89.

Intent: The District Court's intent prong flows from the requirement "that a plaintiff seeking relief under the Equal Protection Clause . . . establish that [the] challenged official action can 'be traced to a . . . discriminatory purpose.'" App.89 (quoting *Washington v. Davis*, 426 U.S. 229, 240 (1976)). Importantly, as discussed above, a mere showing "that political classifications were applied" is not enough; the intent must be "invidious." *Vieth*, 541 U.S. at 307 (Kennedy, J.); App.93. As in all Equal Protection cases, this "invidious discriminatory purpose" need not be "ex-

press"; it may also be "inferred from the totality of the relevant facts." App.90 (quoting *Davis*, 426 U.S. at 241-42); *cf. Harris*, 137 S. Ct. at 1473 (in racial-gerrymandering cases, court "must make a sensitive inquiry into all circumstantial and direct evidence of intent" (cleaned up)).

Appellants do not—and could not—challenge the District Court's factual finding that the 2016 Plan was motivated by invidious partisan intent. Instead, they fault the District Court for declining to adopt a "*predominant* intent" standard of the sort that this Court has applied in certain racial-gerrymandering cases. However, as the District Court noted, none of this Court's partisan-gerrymandering decisions have endorsed a "predominant intent" requirement, and several Justices have expressly rejected one. App.91-92. Indeed, in the vast majority of contexts, this Court has held that an Equal Protection plaintiff "need not prove that a legislature took a challenged action with the 'sole,' 'dominant,' or 'primary' purpose of discriminating against [the relevant] group." App.92 (quoting *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)). Rather, it is sufficient that "invidious discriminatory purpose was a motivating factor." *Arlington Heights*, 429 U.S. at 265-66.

Appellants complain that the rejection of a "predominance" requirement wrongly makes partisan-gerrymandering claims easier to prove than racial-gerrymandering claims—even though racial discrimination is more offensive to the Constitution. JS.24-25. This argument ignores that there are (at least) two "analytically distinct" lines of racial-

gerrymandering cases, *Miller v. Johnson*, 515 U.S. 900, 911 (1995), and that the "predominant intent" test only applies in one of them. One line—the "*Gomillion* line," *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960)—requires proof that the map-drawers acted "*invidiously* to minimize or cancel out the voting potential of racial or ethnic minorities." *Bolden*, 446 U.S. at 66 (emphasis added). This Court has never applied a "predominant intent" standard in these cases. It has treated them like all other invidious-intent cases under the Equal Protection Clause, deeming it sufficient that such intent was a motivating factor. A separate line of racial-gerrymandering cases—the "*Shaw* line," *see Shaw v. Reno*, 509 U.S. 630, 642 (1993)—does not require invidious intent. Instead, it requires proof that the map-drawers considered race *per se* in the drawing of district lines and that racial considerations "predominated" over other, non-racial considerations. It is because race-based classifications are uniquely odious that *Shaw* and its progeny prohibit even the well-intended use of race in districting (*e.g.*, for Voting Rights Act compliance)—provided that racial considerations "predominate" over all others and the state cannot offer a compelling justification for its use of race.

Recognizing this distinction causes Appellants' argument to collapse. The District Court's Equal Protection test requires a partisan-gerrymandering plaintiff to prove *invidious* intent, as in *Gomillion*. Part II.B, *supra*. The legitimate use of political classifications does not violate the Equal Protection Clause *even if* political considerations "predominate." The District Court's test, therefore, makes partisan-gerrymandering claims harder to prove than racial

ones. Racial-gerrymandering plaintiffs may show either invidious intent (*Gomillion*) or the predominance of racial considerations notwithstanding the absence of invidious intent (*Shaw*); partisan-gerrymandering plaintiffs can succeed under the District Court's test only by proving invidiousness.

But even if this Court chooses to adopt a "predominant intent" test in this context—either instead of an invidiousness requirement or in conjunction with it—then the judgment should still be affirmed. The District Court unanimously found that the "predominant intent" test is readily met here, App.124, 218, and Appellants do not dispute this finding. Instead, after first insisting that the "predominant intent" test be used, Appellants turn around and criticize that test *itself* as too "vague" and "indeterminate." JS.24. Courts, however, have managed to apply that standard in racial-gerrymandering cases for the last 25 years. Appellants provide no reason why it would be more difficult to apply in this context.

Effects: The District Court held that, to satisfy the effects prong, a plaintiff must show that a plan "subordinates the interests of one political party and entrenches a rival party in power." App.129 (quoting *ASL*, 135 S. Ct. at 2658) (cleaned up). Stated otherwise, a plan's bias must be "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 District Court adopted this standard because it believed it to be less onerous than the effects test in *Davis v. Bandemer*, 478 U.S. 109 (1986), which the Justices in *Vieth* deemed too

stringent, *see, e.g.*, 541 U.S. at 312 (Kennedy, J.), but demanding enough to "ensure that courts do not unduly intrude on state districting efforts," App.128. The District Court found this test met because "the 2016 Plan poses a significant impediment to supporters of non-Republican candidates translating their votes into seats" and "is likely to retain its pro-Republican bias under any *likely* electoral scenario." App.151 (cleaned up). Appellants do not challenge this finding.

If anything, this standard is too demanding. Equal Protection plaintiffs are not ordinarily required to demonstrate *severe* or *persistent* harm. Instead, the Court has found it enough that invidious state action caused a concrete injury-in-fact cognizable under Article III. The *Common Cause* plaintiffs appreciate the desire to avoid undue intrusion into legislative decision-making, but the invidious-intent requirement already serves that purpose. That said, if this Court believes that a heightened effects test is appropriate, Appellants' criticisms of the District Court's standard do not persuade.

First, Appellants complain that the District Court's effects standard is "amorphous" and "indeterminate" because it does not quantify "how much" bias or entrenchment is "too much." JS.27. But this Court's voting-rights cases generally do not insist on a precise numerical threshold for proving a constitutional violation. In *Gomillion*, for example, the Court did not "require that the plaintiffs identify the particular percentage of fenced-out blacks . . . [that] would violate the Equal Protection Clause." App.75. And even in the one-person-one-vote cases—where a

10% rule-of-thumb for state and local population variances has emerged over time—the Court did not require the plaintiffs in *Baker v. Carr* or *Reynolds v. Sims* to identify and justify that 10% threshold before recognizing their claims. *See Vieth*, 541 U.S. at 310-11 (Kennedy, J.) (describing the Court's "more patient approach" in these cases).

Second, Appellants object that the District Court's effects standard permits plaintiffs to rely on "all manner of social science metrics." JS.27. As the District Court correctly noted, however, this Court "long has relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law." App.72; *see, e.g.*, *Harris*, 137 S. Ct. at 1477-78 (relying on expert statistical analysis); *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986) (endorsing "extreme case analysis and bivariate ecological regression analysis").[5]

Appellants' criticism of the District Court for not singling out *one* metric as the *sine qua non* of a partisan-gerrymandering claim also ignores this Court's precedent. As the Court observed just last year, "in no area of our equal protection law have we forced plaintiffs to submit one particular form of proof to prevail." *Harris*, 137 S. Ct. at 1479-81. Individual statistics are "merely . . . evidentiary tool[s] to show that . . . a substantive violation has occurred"; they are not

[5] Appellants' derisive discussion of the "social science" evidence below ignores the evidence that the *Common Cause* plaintiffs relied upon: the large-scale computer simulations of Drs. Chen and Mattingly. Alternative maps of this sort have routinely been accepted as "key evidence" to prove racial gerrymanders. *Harris*, 137 S. Ct. at 1477-79.

"the very substance of a constitutional claim." *Ibid.*; *see also Miller*, 515 U.S. at 912-13 (declining to depart from "accepted equal protection analysis in other redistricting cases" by singling out one form of evidence as "a necessary element of the constitutional wrong or a threshold requirement of proof"). A court facing a partisan-gerrymandering claim—like any other claim—must "weigh each piece of evidence in the case," statistical and otherwise, "and determine whether, taken together, they [are] adequate to show" that the relevant substantive standard is met. *Harris*, 137 S. Ct. at 1481.

That is precisely what the District Court did. Not only did it consider the stark results of the 2016 election (and elections conducted under the related 2011 Plan); it also considered five different forms of statistical and computational analysis performed by three different experts, *all of which* reached the same conclusion. App.156. As the District Court correctly noted, where "a variety of different pieces of evidence, empirical or otherwise, point to the same conclusion—as is the case here—courts have *greater* confidence," not *lesser*, "in the correctness of the conclusion." App.82.

Justification: The District Court found that neither of Appellants' proffered alternative explanations (geographic "clustering" of Democrats and incumbent protection) could explain the discriminatory impact of the 2016 Plan. App.159, 162. Appellants identify no error in this factual finding. Nor could they. Appellants openly admitted the true justification for the challenged plan. Meanwhile, Drs. Mattingly and Chen's map-based simulations controlled for both

"clustering" and incumbent protection and showed that neither could explain the Plan's extreme partisan deviation. App.160-163.

2. First Amendment

As Justice Kennedy recognized in *Vieth*, "[t]he First Amendment may be the more relevant constitutional provision in . . . cases that allege unconstitutional partisan gerrymandering." 541 U.S. at 314. Indeed, Appellants' counsel here conceded in the *Whitford* argument that partisan gerrymandering can be a First Amendment violation: "it is viewpoint discrimination against the individuals who[m] the legislat[ure] is saying you have to specifically draw maps in a way to injure." *Whitford* Tr. 28 (argument of Erin E. Murphy).

This follows inexorably from settled First Amendment precedent prohibiting state-imposed "burdens" on political association and expression based on party identification. *See Vieth*, 541 U.S. at 314 (Kennedy, J.). It is black-letter law that a State "may not regulate" First Amendment activity—such as political association or expression—based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citations omitted). "When the government targets not subject matter, but particular views . . . the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* at 829. Such "content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are

narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

As the District Court observed, the 2016 Plan runs afoul of no fewer than four different strands of First Amendment caselaw. It "discriminates against a particular viewpoint: voters who oppose the Republican platform and Republican candidates." App.172. It also "discriminates against a particular group of speakers: non-Republican candidates and voters who support [them]." App.172; *see Citizens United v. FEC*, 558 U.S. 310, 340 (2010). It "imposes burdens" on supporters of non-Republican candidates "based on their past political speech and association." App.172; *see Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 65 (1990). And "[its] partisan favoritism excludes it from the class of 'reasonable, politically neutral' electoral regulations that pass First Amendment muster." App.172; *see Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Connecting these strands of First Amendment jurisprudence is an overarching principle of government neutrality with respect to political partisanship. For example, this Court has outlawed preferential treatment in public employment on the basis of "partisan political affiliation." *Elrod v. Burns*, 427 U.S. 347, 349 (1976); *see also Rutan*, 497 U.S. at 65. Likewise, "[g]overnment funds . . . cannot be expended for the benefit of one political party" over another. *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980). "Given these stringent limitations on the government's ability to advance ideological motives" in a vast array of official contexts, "it would be strange indeed if a State's administration of elections were not similarly limited."

Benisek v. Lamone, 266 F. Supp. 3d 799, 830 (D. Md. 2017) (Niemeyer, J., dissenting).

Drawing from these cases, the District Court adopted a test requiring proof: "(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 . . . discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.176; *cf. Vieth*, 541 U.S. at 314-15 (Kennedy, J.) ("First Amendment concerns arise where an apportionment has the *purpose* and *effect* of burdening a group of voters' representational rights." (emphasis added)). The District Court found this test met, App.189, and Appellants do not challenge that finding.

Instead, they again object to the test itself. Appellants argue that the District Court's test would "foreclose all partisan considerations in the redistricting process." JS.29. As before, this argument conflates invidious and non-invidious use of partisan classifications. Justice Kennedy dispatched this same misguided critique in *Vieth*:

> The plurality suggests . . . that under the First Amendment[,] any and all consideration of political interests in an apportionment would be invalid. That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether politi-

> cal classifications were used *to burden a group's representational rights*.

541 U.S. at 314-15 (emphasis added).

Appellants also maintain that the District Court set the injury bar too low by requiring a "chilling effect or adverse impact [that is merely] more than *de minimis*." App.178. But "[t]his Court's decisions have prohibited [state action] . . . which dampen[s] the exercise . . . of First Amendment rights, *however slight[ly]* . . . ." *Elrod*, 427 U.S. at 358 n.11 (emphasis added). For example, "the unconstitutionality of [a] tax on Republican [voter] registration" (but not Democratic registration) "would not depend on the magnitude of the tax . . . . A two-cent tax on Republican registration is just as unconstitutional as a two-hundred-dollar tax or two-million-dollar tax." Levitt, *supra*, at 2017. The same is true when a state intentionally dampens the exercise of First Amendment rights through redistricting legislation: the proper inquiry is not whether the burden surpasses a particular threshold, but simply "whether political classifications were used to burden a group's representational rights." *Vieth*, 541 U.S. at 315 (Kennedy, J.).[6]

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[6] It is thus no flaw that the District Court's test "would recognize First Amendment injuries even when plaintiffs '[remain] . . . free . . . to field candidates for office, participate in campaigns, vote for their preferred candidate, or . . . associate with others . . . .'" JS.29. *See Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (restriction on primary voting caused First Amendment injury even though it did not "deprive [voters] of all opportunities to associate with the political party of their choice").

It is not the magnitude of the harm, but the requirement of an *invidious* classification—*i.e.*, that the map-drawers intentionally sorted voters by political party for the purpose of burdening a group's representational rights—that will cabin future First Amendment challenges. However, if the Court were inclined to demand more, it could look to the *Shaw* line of racial-gerrymandering cases and graft onto this standard a requirement that invidious partisan sorting be the *predominant* intent behind the districting plan. While a "predominant intent" requirement would be anomalous in this Court's First Amendment jurisprudence, *see* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 431-32 (1996), it may further alleviate concerns about unduly involving the courts in legislative decisions. And, once again, the District Court unanimously found that a "predominant intent" standard would be met on the facts of this case. App.124, 218.

3. Article I Claims

Finally, the District Court held that the 2016 Plan exceeds the limited power of the states under both Art. I, § 2 and § 4. Section 2 grants "the People"—not the states—the authority to elect their Representatives; Section 4, the Elections Clause, limits the states' authority over federal elections to setting their "Times, Places and Manner." As the District Court observed, "the two provisions are closely intertwined." App.190; *see U.S. Term Limits v. Thornton*, 514 U.S. 779, 821 (1995) ("[T]he Framers . . . conceived of a Federal Government directly responsible to the people, possessed of direct power over the peo-

ple, and chosen directly, not by States, but by the people."); *ASL*, 135 S. Ct. at 2672 ("The [Elections] Clause was . . . intended to act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interest over those of the electorate.").

The states have no "reserved" or "sovereign" authority to adopt laws or regulations concerning federal elections, such as the 2016 Plan. *Thornton*, 514 U.S. at 802-05. Rather, "the States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause." *Cook v. Gralike*, 531 U.S. 510, 523 (2001). The Clause "delegates but limited power over federal elections to the States." *Id.* at 527 (Kennedy, J., concurring). To the extent state legislation concerning congressional elections goes beyond what the Elections Clause authorizes, the "power [to enact it] does not exist." *Thornton*, 514 U.S. at 805.

The Elections Clause, again, authorizes states to prescribe only "[t]he Times, Places and Manner of holding [federal] Elections." The 2016 Plan obviously does not regulate the "Times" or "Places" of voting. "Manner," meanwhile, embraces matters "like notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Gralike*, 531 U.S. at 523-24 (cleaned up). That is, the Elections Clause is a grant of authority to regulate the *procedures* surrounding elections. It is "not . . . a source of power" (1) "to dictate electoral outcomes," (2) "to favor or disfavor a class of candidates," or

(3) "to evade important constitutional restraints." *Id.* at 523; *see also Thornton*, 514 U.S. at 833-34.

The 2016 Plan, as the District Court unanimously found, violates each of *Gralike*'s limits on valid "Manner" regulations. First, "the General Assembly's express intent to draw a redistricting plan that would elect . . . 10 Republicans and 3 Democrats" makes the Plan an "attempt[] to dictate electoral outcomes." App.200. Second, the use of a "Partisan Advantage criterion" shows that the Plan was "intended to disfavor non-Republican candidates . . . and favor Republican candidates." App.202. Third, the Plan "infring[es] upon basic constitutional protections," not only by violating the Equal Protection Clause and the First Amendment, but also by contravening Art. I, § 2's grant of authority to "the People" to elect their representatives, App.195-196, "by 'interpos[ing]' the General Assembly between North Carolinians and their Representatives in Congress," App.199 (quoting *Gralike*, 531 U.S. at 527 (Kennedy, J., concurring)).

Appellants object that the District Court's reliance on Art. I, §§ 2 and 4 is "[e]ntirely [n]ovel." JS.31. Actually, it follows *a fortiori* from this Court's holding in *Gralike*. In *Gralike*, Missouri adopted a law requiring congressional candidates' positions on the issue of term limits to be printed next to their names on the ballot. The Court held that this exceeded "Missouri's delegated power" under the Elections Clause because it was "plainly designed to favor candidates" with one position on term limits "and to disfavor those" with an opposing view, and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. The question was "not [even] close." *Id.* at 530 (Kennedy, J., concurring).

But Missouri's attempt to place a thumb on the electoral scales was subtle compared to North Carolina's sledgehammer approach. Here, the General Assembly directly sought to engineer the outcome of North Carolina's congressional elections, selecting the partisan composition of the state's delegation in advance and denying voters any meaningful say. If *Gralike* was easy, then this case should be a pushover. *See* Kang, *supra*, at 392 ("[W]hether the ballot notations [in *Gralike*] represent attempts to 'dictate electoral outcomes' is . . . a closer call than whether partisan gerrymandering does.").

Appellants again object that the District Court's Elections Clause analysis would bar "any political consideration[s]" from the districting process. JS.33. The answer to this remains the same: it bars only the use of political classifications for purposes beyond the grant of power in the Elections Clause—in particular, *invidious* uses of partisan classifications.

Finally, Appellants argue that the District Court's Elections Clause holding "gets matters exactly backwards, as the whole point of the [Clause] is to reinforce the primary role of the *legislature* in redistricting," as opposed to the courts. JS.34. But this Court rejected that very argument generations ago:

> [W]e made it clear in *Baker* [*v. Carr*] that nothing in the language of [the Elections Clause] . . . immunize[s] state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction . . . . *The right to vote is too important in our free society to be*

> *stripped of judicial protection by such an interpretation of Article I.*

Wesberry v. Sanders, 376 U.S. 1, 6-7 (1964) (emphasis added).

CONCLUSION

The Court should affirm the judgment or note probable jurisdiction.

Respectfully submitted,

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