No. 18-422

In The
Supreme Court of the United States

ROBERT A. RUCHO, et al.,

Appellants,

v.

COMMON CAUSE, et al.,

Appellees.

On Appeal From The United States District Court For The Middle District Of North Carolina

BRIEF FOR MEMBERS OF CONGRESS FROM THE NORTH CAROLINA DELEGATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

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

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

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

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INTEREST OF *AMICI CURIAE**

Amici, as members of the North Carolina delegation to the United States House of Representatives, are members of a body that has the constitutional authority, under the Elections Clause, to regulate the congressional redistricting process. In 2018, the people elected each of the *amici* under North Carolina's congressional map; accordingly, *amici* have an additional, particular interest in defending the constitutionality of the challenged map. Each of the *amici* was elected by the people of their district, and *amici* proudly represent all of those in their districts, without regard to political affiliation or voting preferences.

The members of the North Carolina delegation joining this brief are Representative George Holding, who represents the Second District, Representative Virginia Foxx, who represents the Fifth District, Representative Mark Walker, who represents the Sixth District, Representative David Rouzer, who represents the Seventh District, Representative Richard Hudson, who represents the Eighth District, Representative Patrick McHenry, who represents the Tenth District, Representative Mark Meadows, who represents the

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* Counsel for all parties have consented to this filing through letters with the Clerk. Under Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. A monetary contribution to fund the submission of this brief was made by the National Republican Congressional Committee.

Eleventh District, and Representative Ted Budd, who represents the Thirteenth District.

INTRODUCTION AND SUMMARY OF ARGUMENT

Litigants and advocates often assert that, in their view, the federal courts are the "'only institution in the United States' capable of 'solv[ing] th[e]'" perceived "problem" of too much politics in the redistricting process. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Gill* plaintiffs' counsel). Such claims of superior—indeed, of *exclusive*—judicial competence contain within them two distinct propositions, both of which "must be [analyzed] with care." *Id*. The first claim is that Congress and the States are incapable, as a practical matter, of addressing this issue; the second is that courts can effectively "solve[] this problem." *Id*. Neither of these claims withstands scrutiny.

Congress and the States have the constitutional authority to address the proper role that political considerations play in the redistricting process and are, in fact, heavily engaged in this complex, sensitive area of policymaking today. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, empowers Congress and the States to make laws regarding congressional elections, which includes the authority to enact rules that regulate the proper role of political considerations in redistricting. Both Congress and the States historically have used this authority to make laws in this area, adopting

various measures that both directly and indirectly address the redistricting issues that plaintiffs have sought to bring to this Court. This is a particularly robust area of policymaking today, as political leaders in Congress and in most of the States actively are contemplating legislation on these topics. This vigorous legislative debate, over a wide array of redistricting proposals, belies any claim that Congress and the States lack the practical ability and the initiative to remedy any problems in this sensitive area of policymaking.

While Congress and the States have the constitutional authority, clear ability, and demonstrated motivation to address the difficult issue of political influence in redistricting, decades of experience demonstrate that federal courts lack institutional competence to engage constructively in this fraught area. In every political gerrymandering case that has come to this Court for decades, plaintiffs have proposed one of two general approaches: either condemning maps that produce disproportionate statewide vote-to-seat ratios as between the two major parties, *see Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Gill*, 138 S. Ct. 1916, or invalidating maps because the drawers had too much intent to seek partisan advantage, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam). The Plaintiffs in this case follow this same pattern, with the League Plaintiffs advocating mainly for the former approach, and the Common Cause Plaintiffs arguing

mainly for the latter. This Court has rejected both approaches as failing to offer a judicially administrable, constitutionally-grounded standard. That no plaintiff has been able to come up with anything better, after all these years, vindicates the Framers' well-considered decision to leave these issues to Congress and the States.

This Court should reverse the district court's erroneous decision and make clear that Congress and the States, not federal courts, have the constitutional responsibility and authority to address issues relating to political considerations that may arise during the redistricting process.

ARGUMENT

I. Under The Constitution, Congress And The States Have The Authority To Decide The Proper Role That Political Considerations Should Play In The Redistricting Process

The assertion that federal courts are the only "'institution in the United States' capable of 'solv[ing] th[e] problem'" of political considerations in the redistricting process, *Gill*, 138 S. Ct. at 1929 (quoting *Gill* plaintiffs' counsel), relies necessarily upon the premise that other institutions in this country are not capable of acting effectively in this area. The Framers of the United States Constitution took a different view, granting to Congress and the States extensive authority to regulate congressional elections and the

redistricting process. *See* U.S. CONST. art. I, § 4, cl. 1. The power that the Constitution affords Congress and the States includes within it ample, flexible tools to regulate the role that political considerations should play in the redistricting process. Congress and the States are well equipped to address the "myriad competing considerations" involved in this sensitive area, *see Gill*, 138 S. Ct. at 1926, and have been extremely active in debating and enacting legislation in this field, including today.

A. Congress

1. The Elections Clause provides Congress with broad authority to enact laws regulating the congressional redistricting process. *See* U.S. CONST. art. I, § 4, cl. 1 (granting to Congress the authority to "at any time by Law make or alter" regulations relating to the "Times, Places and Manner of holding Elections for Senators and Representatives"). "The power of Congress over the 'Times, Places and Manner' of congressional elections," this Court has explained, is phrased in "'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). Congress thus has "the power to alter [State] regulations or supplant them altogether," *id.* at 8, which includes the authority to adopt measures that limit or control the use of political considerations in the redistricting process, *see Vieth*, 541 U.S. at 275 (plurality op.) ("It is significant that the Framers provided a

remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

Notably, the Founders granted to Congress this authority, at least in part, to authorize it to address the challenges that arise from political considerations in redistricting. Responding to efforts to manipulate districts at the time of the Founding, "the Framers provided a remedy for such practices in the Constitution." *Id*. at 275 (plurality op.); *see Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part) ("Partisan gerrymandering dates back to the founding."). Although some delegates to the Constitutional Convention demanded that the States retain the unfettered discretion to draw congressional districts, the Framers granted to Congress the power to "check partisan manipulation of the [drawing of congressional districts] by the States," in order to prevent partisan abuse and the resulting exclusion of minority interests. *Vieth*, 541 U.S. at 275 (plurality op.); *see also* Saikrishna Bangalore Prakash & John Yoo, *PEOPLE ≠ LEGISLATURE*, 39 HARV. J.L. & PUB. POL'Y 341, 351 (2016) ("There is little doubt that influential framers such as James Madison and Alexander Hamilton believed Congress needed such power in order to prevent a faction from magnifying its control through gerrymandering electoral districts."). A delegate to the Massachusetts convention, for example, praised the fact that Congress' power to restrain the

practice of partisan districting "provides a remedy, a controlling power in a legislature . . . without the influence of [State] commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 Debates on the Federal Constitution 27 (J. Elliot 2d ed. 1876).

2. Congress has exercised its constitutional authority to control and regulate the role that politics plays in the redistricting process. *See Vieth*, 541 U.S. at 276 (plurality op.). While most of those regulations lapsed in the early-to-mid 20th century, Congress recently has shown a renewed, robust interest in this topic, and it actively is considering numerous proposals in this sensitive area of law.

a. After the adoption of the Constitution, States frequently manipulated district lines for political gain. By the 19th century, "the gerrymander was a recognized force in party politics and was attempted in all legislation enacted for the formation of election districts." *See* E. Griffith, *The Rise and Development of the Gerrymander* 123 (1974); *see also* Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 21–55 (2013). In response, Congress enacted standards governing the congressional redistricting process, which aimed—at least in part—at controlling the influence of politics on redistricting. *See* William J. Phelan, IV, Esq., *Political Gerrymandering After* Lulac v. Perry*: Considering Political Science for Legislative Action*, 32 SETON HALL LEGIS. J. 89, 94–98 (2007).

Congressional regulation in this area began in earnest in the mid–19th century. In the Apportionment Act of 1842, Congress enacted federal redistricting standards, compelling the States to establish contiguous, single-member districts for congressional elections. Apportionment Act of 1842, 5 Stat. 491. Congress did this, at least in part, to stifle the States' "practice of opportunistic switching between at-large and districted congressional elections" to "manipulat[e] the rules of representation." James A. Gardner, *Forward: Representation Without a Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 913 (2006). Congress supplemented its districting standards in 1872, mandating that congressional districts contain "as nearly as practicable an equal number of inhabitants." Apportionment Act of 1872, 17 Stat. 492. Congress's 1872 intervention sought to restrict the States' attempts to manipulate district population size for political advantage. *See* Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 29 WM. & MARY L. REV. 1921, 1932–34 (2018). And in 1901, Congress enacted a law requiring that districts be drawn in "compact territory," Apportionment Act of 1901, 26 Stat. 736, in an effort to, at least in part, "guard against gerrymandering." Kurtis A. Kemper, *Application of Constitutional "Compactness Requirement" to Redistricting*, 114 A.L.R.5th 311 (2003).

Congress declined to retain most of the above-described limitations in the 20th century, although it

did, after a period, again require single-member districts. "The requirements of contiguity, compactness, and equality of population [as well as the single-member district requirement] were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued." *Vieth*, 541 U.S. at 276 (plurality op.); *see Wood v. Broom*, 287 U.S. 1, 7–8 (1932). Several decades later, Congress enacted a law again requiring single-member districts. Act of Dec. 14, 1967, 81 Stat. 581, codified at 2 U.S.C. § 2c. Congress "thereby establish[ed] single-member districts as the preferred electoral method" and ended at-large congressional elections. Robert E. Ross & Barrett Anderson, *Single-Member Districts Are Not Constitutionally Required*, 33 CONST. COMMENT. 261, 286 (2018).

b. In recent years, Congress has shown a renewed interest in the question of political considerations in the redistricting process. *Amici* do not discuss any of these bills to praise or criticize any particular proposal, and *amici* believe that several of the bills discussed below are deeply misguided. Having said that, these proposals show that Congress actively is engaged in this area of law. *Amici* stand ready to discuss the regulations of congressional elections with their colleagues, of either party, and would support legislation that they considered to be consistent with the interests of their constituents and the Nation.

Since the lapse of the geographically-based federal districting standards, members of Congress regularly have proposed legislation that would compel the States to re-adopt these requirements and would go further

by prohibiting the States from considering politics in the redistricting process. An exemplar is H.R. 6250, proposed in 2010, which would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting, and it would have, in addition, mandated that "Congressional districts in the State may not be established with the major purpose of diluting the voting strength of any person, or group, including any political party," except where "necessary to comply" with the Voting Rights Act. H.R. 6250, 111th Cong. § 2 (2010); *see also* S. 1880, 115th Cong. § 3203 (2017); H.R. 711, 115th Cong. § 4 (2017); H.R. 712, 115th Cong. § 4 (2017); H.R. 3537, 115th Cong. § 3004 (2017); H.R. 3848, 115th Cong. § 3203 (2017); S. 2483, 114th Cong. § 4 (2016); H.R. 2173, 114th Cong. § 203 (2015); H.R. 2978, 113th Cong. § 5 (2013); H.R. 3846, 112th Cong. § 102 (2012); H.R. 3468, 98th Cong. (1983).

Members of Congress also have introduced several bills built around redistricting commissions. For example, H.R. 3025, introduced in 2009 (and then introduced in every Congress over the last decade), has provisions that would require each State to establish an independent commission that would adopt a redistricting plan; the bill also provides various criteria that the commission would use in redistricting, such as compactness, contiguity, and population equality, while specifically prohibiting considerations of voting history, political party affiliation, or residence of incumbent members. H.R. 3025, 111th Cong. §§ 3, 4 (2009); *see also* S. 2483, 114th Cong. §§ 3, 4 (2016); H.R. 219,

114th Cong. §§ 3, 4 (2015); H.R. 1347, 114th Cong. §§ 3, 4 (2015); H.R. 2173, 114th Cong. §§ 201-04 (2015); H.R. 2655, 114th Cong. § 6 (2015); H.R. 223, 113th Cong. §§ 3, 4 (2013); H.R. 2978, 113th Cong. §§ 3, 4 (2013); H.R. 453, 112th Cong. §§ 3, 4 (2011). H.R. 3846, introduced in 2012, in turn, took a different approach and would have established a national bi-partisan commission, consisting of members appointed by House leadership, which would have produced a redistricting plan for each State. H.R. 3846, 112th Cong. §§ 101–07 (2012).

Just in the last Congress, legislators proposed scores of bills that would have limited the use of political considerations in the redistricting process. H.R. 145, H.R. 711, H.R. 712, H.R. 1102, H.R. 2981, and H.R. 3537 each would have required States to redistrict through independent elections commissions. S. 1880, 115th Cong. §§ 3102, 3201–04 (2017); H.R. 145, 115th Cong. § 5 (2017); H.R. 711, 115th Cong. §§ 3, 4 (2017); H.R. 712, 115th Cong. §§ 3, 4 (2017); H.R. 1102, 115th Cong. §§ 201–04 (2017); H.R. 2981, 115th Cong. § 6 (2017); H.R. 3537, 115th Cong. §§ 1003–10 (2017). Several bills would have limited mid-decennial congressional redistricting. *See* H.R. 5785, 115th Cong. § 8011 (2018); S. 1880, 115th Cong. § 3101 (2017); H.R. 151, 115th Cong. § 2 (2017); H.R. 3537, 115th Cong. § 3002 (2017). H.R. 3057 would have mandated ranked choice voting, permitted the use of multi-member districts, required independent redistricting commissions, and limited mid-decennial redistricting. *See* H.R. 3057, 115th Cong. §§ 101, 321, 301–02, 311–14 (2017). H.R.

3848 would have required independent commissions; it also would have established criteria for the commissions such as compactness and keeping communities of interest together, prohibited consideration of voting history or residence of incumbents, and limited mid-decennial redistricting. *See* H.R. 3848, 115th Cong. §§ 3101–02, 3201–04 (2017); *see also* S. 1880, 115th Cong. §§ 3101–02, 3201–04 (2017). And S. 3123 quoted the *Vieth* plurality's invocation of the Elections Clause, as well as Congress' prior actions in this area in the 19th century, and would have required the adoption of independent commissions that could not take into account political registration, voting history, election results, or the place of residence of incumbents, and would have prohibited any "congressional districting plan that has the purpose or will have the effect of unduly favoring or disfavoring any political party." S. 3123, 115th Cong. §§ 2–4 (2017).

A collection of initiatives now appears to have the full-throated backing of one of this Nation's two major political parties. On January 3, 2019, Representative John Sarbanes introduced H.R. 1, the new House majority's signature bill, which proposed significant regulation of the States' congressional redistricting process. H.R. 1, 116th Cong. (2019). Two hundred and twenty-seven representatives are co-sponsors of H.R. 1, and Representative Sarbanes has promoted the bill as an initiative to "end[] partisan gerrymandering to prevent politicians from picking their voters." Press Release, Representative John Sarbanes, Sarbanes, House Democrats Introduce Once-In-A-Generation Package

of Democracy Reforms (Jan. 4, 2019). Speaker of the House Nancy Pelosi has championed the bill as a signature initiative. *See* Press Release, Speaker Nancy Pelosi, Pelosi Remarks at Press Event on Introduction of H.R. 1, For the People Act (Jan. 4, 2019). As relevant here, H.R. 1 requires independent redistricting commissions, identifies criteria that commissions can and cannot use (including prohibiting the consideration of political affiliation or voting history), and restricts mid-decennial redistricting. H.R. 1 at §§ 2401, 2402, 2411–14; *see also* H.R. 36, 116th Cong. (2019); H.R. 44, 116th Cong. § 2 (2019); H.R. 124, 116th Cong. § 3, 4 (2019); H.R. 130, 116th Cong. §§ 3, 4 (2019); H.R. 131, 116th Cong. §§ 1 *et seq.* (2019); H.R. 163, 116th Cong. § 2 (2019).

B. The States

1. The States have broad constitutional authority to regulate redistricting, especially when Congress chooses not to act. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, provides the States with "comprehensive" authority over the congressional election process, and the States are empowered to control the role that politics plays in the process, absent contrary congressional action. *See Smiley*, 285 U.S. at 366. As this Court has explained, "[d]rawing lines for congressional districts is . . . 'primarily the duty and responsibility of the State.'" *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Perry v. Perez*, 565 U.S. 388, 392 (2012)); *accord Growe v. Emison*, 507 U.S. 25, 34 (1993) (the Elections Clause "leaves with the States primary

responsibility for apportionment of their federal congressional . . . districts"). And while arguably not directly relevant to the present case about congressional districts, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802–05 (1995); *but see id*. at 846–57 (Thomas, J., dissenting), the Tenth Amendment reservation of power to the States recognizes—at a minimum—the States' sovereign authority and responsibility to regulate redistricting beyond congressional lines, including at the state legislative level. As this Court has explained, "'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Shelby Cnty*., 570 U.S. at 543 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991)).

Whether emanating from the Elections Clause or the Tenth Amendment, State regulation of redistricting allows numerous sovereigns to develop innovative solutions to the uniquely challenging issue of political considerations in this area. As "'laboratories for devising solutions to difficult legal problems,'" States can confront and resolve the complex questions arising in the redistricting process. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)).

2. Using their vast constitutional authority, many States have adopted, and are considering adopting, a range of measures "designed to insulate the [redistricting] process from politics." *Vieth*, 541 U.S. at 277 n.4 (plurality op.).

Most States have adopted at least some of the traditional redistricting standards as mandatory redistricting requirements, compelling that districts be drawn in a compact and contiguous manner, with respect given to geographic boundaries and/or political subdivisions. *See* Nat'l Conf. of State Legislatures, Redistricting Criteria (2019), *available at* http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx (last visited Feb. 9, 2019); Royce Crocker, CONG. RESEARCH SERV., R42831, *Congressional Redistricting* at 9–10. Such rules are aimed—at least in part—at curbing politically-friendly line drawing. *See supra* at 7–8; *accord Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring).

Several States have specifically forbidden partisan favoritism in the redistricting process. In 2010, Florida voters amended the Florida constitution to provide that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent. . . ." FLA. CONST. art. III, § 20(a); *see generally League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015). In 2018, Missouri amended its state constitution to mandate that its state legislative districts be designed to achieve "both partisan fairness and competitiveness." MO. CONST. art. III, § 3. Iowa law similarly prohibits the legislature from drawing a congressional district "for the purpose of favoring a political party, incumbent legislator or member of Congress. . . ." IOWA CODE § 42.4(5). Delaware likewise requires its General Assembly to create each congressional district (to the

extent more than one district exists in the State) to not "unduly favor any person or political party." DEL. CODE ANN. tit. XXIX, §§ 804(4), 805.

Numerous States have adopted redistricting commissions, of various types and authorities. *See Ariz. State Legislature*, 135 S. Ct. at 2662; *Vieth*, 541 U.S. at 362–63 (Breyer, J., dissenting). Several States employ advisory redistricting commissions, consisting of legislators or non-legislators (or a mix thereof), which create and recommend redistricting plans to the State legislature. *See* C. Daniel Chill, *Political Gerrymandering: Was Elbridge Gerry Right?*, 33 TOURO L. REV. 795, 818–19 (2017). Five States use advisory commissions: Maine, New York, Rhode Island, Utah, and Virginia. *See* Nat'l Conf. of State Legislatures, Redistricting Commissions: Congressional Plans (2019), *available at* http://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx (last visited Feb. 9, 2019). Other States have turned over primary responsibility for drawing redistricting plans to commissions. Several of these States, including Hawaii, Idaho, Montana, New Jersey, and Washington, allow legislative leaders to appoint members to the redistricting commissions. *See id.*; *see also Political Gerrymandering*, 33 TOURO L. REV. 795, 816–17. More recently, Arizona and California have established independent redistricting commissions, the members of which are nominated or selected by non-legislative entities, to create redistricting plans. *See* ARIZ. CONST. art

IV, pt. 2, § 1; CAL. GOV'T CODE § 8252.[†] Last year, citizens in Colorado and Michigan approved constitutional amendments to create a species of such independent commissions in their States. *See* COLO. CONST. art. V, § 44; MICH. CONST. art. IV, § 6. Connecticut, Indiana, and Ohio employ backup commissions to draw district lines if the State legislature fails to enact a redistricting plan. *See* Nat'l Conf. of State Legislatures, Redistricting Commissions: Congressional Plans. And Iowa has undertaken its own redistricting process, whereby non-partisan legislative staff draw district lines with the help of an advisory commission, whose members are selected by Iowa General Assembly leaders. IOWA CODE §§ 42.5, 42.6; *see also* Nat'l Conf. of State Legislatures, The "Iowa Model" for Redistricting (2018), *available at* http://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx (last visited Feb. 9, 2019). Upon submission of the maps to the Iowa General Assembly, the legislature may vote only for or against the plan; it may not amend the maps substantively. *Id*.

States have weighed other initiatives designed to resolve the appropriate weight that political considerations should play in the redistricting process. For example, Ohioans approved a ballot proposal requiring redistricting plans to be adopted with bipartisan support of the Ohio legislature. OHIO CONST. art. XIX, § 1. In particular, the Ohio constitution now requires that

[†] This Court recently upheld the constitutionality of one of these commissions against an Election Clause challenge. *See Ariz. State Legislature*, 135 S. Ct. at 2671.

a redistricting plan be adopted by 60% of the Ohio general assembly, with a majority of the two largest political parties voting in favor of the plan. *Id*. Missourians also voted last year to amend the State constitution to establish the post of a non-partisan state demographer tasked with drawing district lines. MO. CONST. art. III, § 3. The demographer is charged with achieving, among other goals, "partisan fairness" in the redistricting process, whereby state house and senate districts are designed based on the votes cast in the previous three elections for president, governor, and United States senator. *Id*.

Action in this area of law continues apace. Focusing exclusively on the commission-based reforms alone, many States are considering, and recently have considered, multiple bills or constitutional amendments in that area. *See, e.g*., S. 27, 149th Gen. Assemb. (Del. 2017); S. 771, 119th Reg. Sess. (Fla. 2017); H.R. 41, 119th Reg. Sess. (Fla. 2017); S. Res. 6, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); H.R. 3, 154th Gen. Assemb., Reg. Sess. (Ga. 2017); H.R. 515, 29th Leg. (Haw. 2017); H.R.J. Res. Const. Amend. HC0010, 101st Gen. Assemb. (Ill. 2019); H.R.J. Res. Const. Amend. HC0001, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0017, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0021, 100th Gen. Assemb. (Ill. 2017); H.R.J. Res. Const. Amend. HC0023, 100th Gen. Assemb. (Ill. 2017); S. 37, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S. 105, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); H.R. 1317, 121st Gen. Assemb., 1st Reg. Sess. (Ind. 2019); S. 136, 120th Gen. Assemb., 1st

Reg. Sess. (Ind. 2017); H.R. 1014, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); H.R. 1378, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017); H.R. Con. Res. 5011, 87th Leg., Reg. Sess. (Kan. 2017); H.R. 386, 2017 Reg. Sess. (Ky. 2017); S. 90, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 91, 439th Gen. Assemb., Reg. Sess. (Md. 2019); H.R. 67, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 146, 437th Gen. Assemb., Reg. Sess. (Md. 2017); S. 1023, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 367, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 385, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 962, 437th Gen. Assemb., Reg. Sess. (Md. 2017); H.R. 966, 437th Gen. Assemb., Reg. Sess. (Md. 2017); S. 11, 190th Gen. Ct. (Mass. 2017); S. 393, 190th Gen. Ct. (Mass. 2017); H.R. 59, 190th Gen. Ct. (Mass. 2017); Order SD.2198, 190th Gen. Ct. (Mass. 2017); S. 86, 90th Leg. (Minn. 2017); S. 370, 90th Leg. (Minn. 2017); S. 2052, 90th Leg. (Minn. 2017); H.R. 246, 90th Leg. (Minn. 2017); Leg. B. 253, 106th Leg., 1st Sess. (Neb. 2019); Leg. B. 216, 105th Leg., 1st Sess. (Neb. 2017); Leg. B. 653, 105th Leg., 1st Sess. (Neb. 2017); S. 8, 166th Gen. Ct., 1st Sess. (N.H. 2019); H.R. 706, 166th Gen. Ct., 1st Sess. (N.H. 2019); S. 107, 165th Gen. Ct., 1st Sess. (N.H. 2017); H.R. 203, 165th Gen. Ct., 1st Sess. (N.H. 2017); Assemb. Con. Res. 189, 217th Leg. (N.J. 2016); Assemb. Con. Res. 243, 217th Leg. (N.J. 2016); S. Con. Res. 107, 217th Leg. (N.J. 2016); H.R.J. 3, 2017 Reg. Sess. (N.M. 2017); Assemb. B. 262, 242nd Leg. (N.Y. 2019); Assemb. B. 36, 240th Leg. (N.Y. 2017); Assemb. B. 122, 240th Leg. (N.Y. 2017); S. 209, Sess. 2017 (N.C. 2017); H.R. 674, Sess. 2017 (N.C. 2017); H.R. 735, Sess. 2017 (N.C. 2017); S. 2324, 66th Leg. Assemb.

(N.D. 2019); S. Con. Res. 4009, 65th Leg. Assemb. (N.D. 2017); S.J. Res. 3, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017); H.R.J. Res. 1019, 57th Leg., 1st Sess. (Okla. 2019); S.J. Res. 8, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 11, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.J. Res. 10, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 11, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 12, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S.J. Res. 13, 79th Leg. Assemb., Reg. Sess. (Or. 2017); H.R.J. Res. 12, 79th Leg. Assemb., Reg. Sess. (Or. 2017); H.R.J. Res. 21, 79th Leg. Assemb., Reg. Sess. (Or. 2017); S. 22, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); S. 243, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); S. 767, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 569, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 722, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 1114, 201st Gen. Assemb., Reg. Sess. (Penn. 2017); H.R. 5087, 2019-20 Leg. Sess. (R.I. 2019); S. 6, 123rd Sess. (S.C. 2019); S. 135, 123rd Sess. (S.C. 2019); S. 230, 123rd Sess. (S.C. 2019); S. 249, 123rd Sess. (S.C. 2019); S. 254, 123rd Sess. (S.C. 2019); S. 341, 122nd Sess. (S.C. 2017); H. 3339, 122nd Sess. (S.C. 2017); H. 4271, 122nd Sess. (S.C. 2017); S. 832, 110th Gen. Assemb. (Tenn. 2017); H.R. 845, 110th Gen. Assemb. (Tenn. 2017); S. 209, 85th Leg. (Tex. 2017); H.R. 369, 85th Leg. (Tex. 2017); H.R.J. Res. 32, 85th Leg. (Tex. 2017); H.R.J. Res. 118, 85th Leg. (Tex. 2017); H.R. 411, 62nd Leg., Gen. Sess. (Utah 2017); H.R.J. Res. 639, 2019 Sess. (Va. 2019); H.R.J. Res. 651, 2019 Sess. (Va. 2019); S. 1206, 2017 Sess. (Va. 2017); S.J. Res. 260, 2017 Sess. (Va. 2017); H.R. 2280, 2017 Sess. (Va. 2017); H.R.J. Res. 651, 2017 Sess. (Va. 2017); H.R. 2445, 84th

Leg., 1st Reg. Sess. (W. Va. 2019); H.R.J. Res. 1, 83rd Leg., 1st Reg. Sess. (W. Va. 2017); Assemb. B. 44, 103rd Leg., Reg. Sess. (Wis. 2017).

Numerous States also currently are debating proposed legislation that would ban favoritism to a political party in redistricting. *See, e.g.*, H.R.J. Res. Const. Amend. HC0010, 101st Gen. Assemb. (Ill. 2019); S. 90, 439th Gen. Assemb., Reg. Sess. (Md. 2019); S. 91, 439th Gen. Assemb., Reg. Sess. (Md. 2019); H.R. 537, 439th Gen. Assemb., Reg. Sess. (Md. 2019); Legis. B. 253, 106th Leg., 1st Sess. (Neb. 2019); Const. Amend. Con. Res. 9, 166th Gen. Ct., 1st Sess. (N.H. 2019); S. 8, 166th Gen. Ct., 1st Sess. (N.H. 2019); H.R. 706, 166th Gen. Ct., 1st Sess. (N.H. 2019); Assemb. B. 262, 242nd Leg. (N.Y. 2019); H.R. 5087, 2019-20 Leg. Sess. (R.I. 2019); S. 6, 123rd Sess. (S.C. 2019); S. 135, 123rd Sess. (S.C. 2019); S. 230, 123rd Sess. (S.C. 2019); S. 249, 123rd Sess. (S.C. 2019); S. 254, 123rd Sess. (S.C. 2019); H.R.J. Res. 25, 86th Leg. (Tex. 2019); S.J. Res. 25, 2019 Sess. (Va. 2019); S.J. Res. 51, 2019 Sess. (Va. 2019); H.R.J. Res. 582, 2019 Sess. (Va. 2019); H.R.J. Res. 639, 2019 Sess. (Va. 2019); H.R. 1396, 66th Leg., Reg. Sess. (Wash. 2019); H.R. 2445, 84th Leg., 1st Reg. Sess. (W. Va. 2019).

In sum, the States actively are debating, and often adopting, various measures designed to control political considerations during the redistricting process. The States, like Congress, are well equipped to carry out their constitutional authority to resolve the complex questions raised by this difficult issue.

II. That Plaintiffs Have Failed For Decades To Identify Any Judicially Administrable Standards In This Area Of Law Vindicates The Framers' Decision To Leave This Issue To Congress And The States

The assertion that only federal courts can "address the problem" of too much politics in redistricting, *Gill*, 138 S. Ct. at 1929, fails for an additional reason: experience has taught that courts are not, in fact, institutionally capable of "solv[ing] this problem." As this court explained just last Term in *Gill*, the difficulties of developing judicial standards that "finally solve the problem of partisan gerrymandering [ ] has confounded th[is] Court for decades." *Id*. at 1933. Fifteen years before that, in *Vieth*, a plurality of this Court concluded that this historical failure to identify judicially administrable standards meant that it was time to declare political gerrymandering claims nonjusticiable. 541 U.S. at 281–301 (plurality op.). Justice Kennedy agreed that there were "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run," but he wanted to give more time to see if plaintiffs could, in fact, identify a "limited and precise," historically-grounded standard. *Id*. at 306–09; *accord LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). Now, fifteen years and many more cases have passed, and yet no plaintiff has come remotely close to identifying any administrable, constitutionally-grounded standard in this area of law, and not for want of trying.

The shortfalls that have plagued every partisan gerrymandering test that plaintiffs have proposed to this Court for decades continue in this case. Both sets of Plaintiffs here pepper their jurisdiction-stage briefs with citations to an ever-growing grab bag of constitutional amendments and inapposite doctrines (First Amendment, Fourteenth Amendment, Article I, minority vote dilution, campaign finance, patronage hiring, *Anderson-Burdick*, viewpoint discrimination, Voting Rights Act, on and on, *see* Mot. to Aff. of League of Women Voters of N.C. ("League Mot. to Aff.") 26, 27, 32; Mot. to Aff. by the Common Cause Appellees ("Common Cause Mot. to Aff.") 33–39), and different glosses on familiar, unhelpful elements (did politicians simply have political intent, or predominant political intent? *See* League Mot. to Aff. 33–34; Common Cause Mot. to Aff. 29–30). This is just noise, meant to distract from the fact that Plaintiffs have nothing new to offer. As discussed below, the tests that political gerrymandering plaintiffs have proposed to this Court for decades have been built around one of two central frameworks, neither of which can serve as the basis for a judicially administrable, constitutionally-grounded doctrine: (A) a map is unlawful if it deviates too far from a "proportionate" statewide vote-to-seat ratio as between the two major parties; and (B) a map is unlawful if its drawers sought too much political advantage. Unsurprisingly, these two failed approaches make up the core of the respective submissions of the two plaintiff groups in this case. And these two approaches continue to fail, regardless of how many inapposite

constitutional provisions or judicial doctrines plaintiffs nominally invoke in support.

A. Tests Built Around An Insufficiently "Proportionate" Statewide Vote-To-Seat Ratio

1. In most of the political gerrymandering cases that have come to this Court over the last several decades, plaintiffs have constructed their core theory around the thesis that a political party may not draw a map that intentionally produces an insufficiently proportionate statewide vote-to-seat ratio as between the two major parties. In *Bandemer*, for example, the core of the plaintiffs' complaint was that "Democratic candidates for the State House of Representatives had received 51.9% of the votes cast statewide and Republican candidates 48.1%; yet, out of the 100 seats to be filled, Republican candidates won 57 and Democrats 43." 478 U.S. at 134 (plurality op.). Similarly, in *Vieth*, the plaintiffs' outcome-determinative effects inquiry turned on whether a map's "pack[ing]" and "crack[ing]" of voters "thwart[ed] the plaintiffs' ability to translate a *majority of votes into a majority of seats*." 541 U.S. at 286–87 (plurality op.) (emphasis added) (citation omitted). To be sure, the *Bandemer* plaintiffs and the *Vieth* plaintiffs also would have required proof of partisan intent, *see id.*; *Bandemer*, 478 U.S. at 129 (plurality op.); but as the *Bandemer* plurality explained: "[a]s 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," *id*.

Gill v. Whitford was much the same, with the plaintiffs proposing a test that ultimately turned on insufficiently proportionate statewide vote-to-seat ratio. As this Court properly explained in *Gill*, the core of the plaintiffs' complaint was that the redistricting map at issue "unfairly favor[s] Republican voters and candidates, and that it does so by 'cracking' and 'packing' Democratic voters around Wisconsin." 138 S. Ct. at 1924 (alteration in original) (citation omitted). The plaintiffs contended that this unfairness led Democrats to "waste" more votes on a statewide basis than did Republicans, thus creating too large an "efficiency gap" between the two parties. *Id*. at 1933. In other words, Republicans were over-represented in terms of a statewide vote-to-seat ratio, while Democrats were under-represented. *Id*. The *Gill* plaintiffs (like the *Vieth* and *Bandemer* plaintiffs) would have included other considerations—partisan intent and "justification"—in their proposed tests, but those considerations were mere make-weights. Partisan intent would, of course, do little when a map is drawn by a single political party, for just the reason explained by the *Bandemer* plurality. *See supra* at 24–25. As for "justification," plaintiffs defined this element as analyzing whether it was possible to draw "alternative" maps that were more favorable to the minority party, on a statewide basis. Br. of Appellees 33, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161). As the *Gill* plaintiffs seemingly conceded, this additional step has no

real practical effect because "[d]ue to the near-infinite number of possible district configurations, it is generally possible for plans both to be [more] symmetric and to satisfy all other criteria." *Id*. at 55.

The League Plaintiffs in this case have taken the same basic approach as the *Bandemer*, *Vieth* and *Gill* plaintiffs. The League Plaintiffs have proposed a two-step analysis that, just like the tests discussed above, ultimately boils down to an inquiry into whether the major parties had a sufficiently proportionate statewide vote-to-seat ratio. The first step simply repeats the pro-forma elements that will not screen out any map drawn by a legislature controlled by one political party: partisan intent, cracking and packing of voters (the typical techniques of partisan districting), and no more favorable alternative map being possible. League Mot. to Aff. 2. The real action would take place at step two, where the court would ask whether the plan is "balanced in its treatment of the two major parties" in terms of statewide vote-to-seat ratios. *Id*. at 2–3. And if any doubt remained that the League Plaintiffs were recycling the prior approaches, they put that to rest by explaining that, under their test, their evidence of intent, combined with the fact that the map yielded a "ten-three Republican edge in the face of an evenly divided electorate," is "*enough to decide this case*" in their favor. *Id*. at 19 (emphasis added).

2. Building a political gerrymandering doctrine around the question of whether the map produces an insufficient proportionate statewide vote-to-seat ratio is a non-starter because, among other insuperable

problems, the argument necessarily rests upon the non-existent "right" to proportional representation.

This Court has held repeatedly that proportional representation, "*however phrased*," *Mobile v. Bolden*, 446 U.S. 55, 79 (1980) (emphasis added), is not a lawful basis for a constitutional test, including in the political gerrymandering context. As the *Vieth* plurality explained, in words that apply just as aptly to the submissions of the plaintiffs in *Bandemer*, *Vieth* itself, *Gill*, and the League Plaintiffs, "[d]eny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle." *Vieth*, 541 U.S. at 288 (plurality op.). Justice Kennedy agreed, making this the conclusion of the Court's majority, *id*. at 308 (Kennedy, J., concurring in judgment), adding that the principle that the *Vieth* plaintiffs articulated is based upon a "precept" for which there is "no authority," *id*. The *Bandemer* plurality made much the same point, explaining that this Court's caselaw "clearly foreclose[s] any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130 (citing *Whitcomb v. Chavis*, 403 U.S. 124, 153, 156, 160 (1971)). The Justices joining Justice O'Connor agreed, thereby making this a Court majority on this point as well. *See* 478 U.S. at 145 (O'Connor, J., concurring in the judgment); *accord* The Federalist

No. 35 (Alexander Hamilton) ("It is said to be necessary, that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to. But we have seen that this will never happen under any arrangement that leaves the votes of the people free.").

That plaintiffs sometimes seek to recast their statewide disproportional vote-to-seat ratio argument under the nomenclature of "partisan symmetry" does nothing to salvage their approach. Partisan symmetry is just a different "phras[ing]," *Mobile*, 446 U.S. at 79, of the non-existent right to proportional representation. Symmetry tests hypothesize how the two major parties would do, on a state-wide vote-to-seat ratio, "should their respective shares of the vote reverse." *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.). According to the partisan symmetry approach, each major party should perform as proportionally well under a districting plan as the other major party does when receiving the same number of votes. But, of course, partisan symmetry rests upon the same fundamental flaw that infected the plaintiffs' arguments in cases like *Vieth*, where the complaint was that one of the two major political parties did not win a state-wide majority of seats, despite receiving a majority of the votes. *See supra* at 24, 27. As a matter of the most basic arithmetic, if one party received the majority vote but *less* than a majority of seats, the other party would get *more* than a majority of the seats with the same statewide vote share, thus always violating the symmetry principle.

Or, as the Chief Justice put it at the *Gill* oral argument, "if you need a convenient label for [the partisan symmetry] approach, you can call it proportional representation, which has never been accepted as a political principle in the history of this country." Tr. of Oral Arg. 40–41, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161).

B. Tests Built Around Impermissible Partisan Intent

1. A couple of plaintiffs have attempted to escape the proportional representation trap by advocating for a test based around intent to gain political advantage, without any statewide vote-to-seat ratio inquiry. First came *LULAC*, where the plaintiffs presented a test built around a "sole-intent standard," where a showing of exclusive intent to seek partisan advantage would be enough to render a districting plan unconstitutional, at least in some instances. 548 U.S. at 418 (opinion of Kennedy, J.). The plaintiffs in *Benisek*, in the case that this Court decided last Term, similarly urged an intent-focused approach, arguing that if the plaintiff could show retaliatory intent, the map would be unlawful upon a mere showing of "more-than-de-minimis" impact on voters. Br. of Appellants 35–36, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333).

The Common Cause Plaintiffs here urge much the same intent-focused inquiry. Under their approach, if the plaintiff could show "invidious" intent—that is, intent to gain political advantage—a map is unlawful so

long as it has only a "slight" political effect. Common Cause Mot. to Aff. 28-29, 35.

2. This intent-focused approach is foreclosed by binding caselaw. As noted above, in *LULAC*, this Court faced an argument that the sole justification for the legislature's redistricting was partisan gain, and that this rendered the map unconstitutional. *See* 548 U.S. at 418 (opinion of Kennedy, J.). As Justice Kennedy made clear in explaining why even a *sole* intent for partisan gain was insufficient, "a successful claim"—if a justiciable doctrine is to be discovered—must "show a burden . . . on the complainants' representational rights." *Id*.; *accord id*. at 493–94 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id*. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part). After all, the intent-focused test would, in effect, make considerations of political advantage as forbidden as considerations of race. But as a majority of this Court concluded in *Vieth*, "[r]ace is an impermissible classification," while "[p]olitics is quite a different matter." 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *accord id*. at 286 (plurality op.).

Even beyond this binding precedent, an intent-focused test is a nonstarter because it would be wildly overbroad, "commit[ing] federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment). As the Justices of this Court have recognized, "[a]s 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." *Bandemer*, 478 U.S. at 129 (plurality op.). Even those Justices who have advocated for the creation of a political gerrymandering doctrine have understood that an intent-focused inquiry is unavailing: "In substantiating claims of political gerrymandering under a plan devised by a single major party, proving intent should not be hard . . . politicians not being politically disinterested or characteristically naïve." *Vieth*, 541 U.S. at 350 (Souter, J., dissenting); *accord id*. at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164–65 (Powell, J., concurring in part and dissenting in part). A political gerrymandering doctrine focused on partisan intent would not be "limited and precise," *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring in the judgment), to put it mildly.

* * *

In all, the failure of plaintiffs for decades to propose anything better than the failed approaches already rejected in *Bandemer*, *Vieth* and *LULAC* vindicates the Framers' decision to leave this sensitive policy issue to Congress and the States.

CONCLUSION

This Court should overturn the district court's judgment.

Respectfully submitted,

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