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 *COMMON CAUSE* APPELLEES

GREGORY L. DISKANT
JONAH M. KNOBLER
PETER A. NELSON
ELENA STEIGER REICH
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000

EMMET J. BONDURANT
Counsel of Record
BENJAMIN W. THORPE
BONDURANT MIXSON & ELMORE LLP
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-4100
bondurant@bmelaw.com

Counsel for Appellees Common Cause, et al.

(*Counsel continued on inside cover*)

EDWIN M. SPEAS, JR.
STEVEN B. EPSTEIN
CAROLINE P. MACKIE
POYNER SPRUILL LLP
301 Fayetteville Street,
Suite 1900
Raleigh, North Carolina 27601

RICHARD H. PILDES
507 Vanderbilt Hall
40 Washington Square South
New York, New York 10012

Counsel for Appellees Common Cause, et al.

QUESTIONS PRESENTED

1. Whether the District Court correctly held that Appellees have Article III standing to challenge the 2016 North Carolina Congressional Plan and its individual districts as partisan gerrymanders?

2. Whether the District Court correctly held that, on the facts of this case, Appellees' claims are justiciable and not "political questions"?

3. Whether the District Court correctly held that the 2016 Plan and 12 of its 13 individual districts violate the First Amendment, Equal Protection Clause, and/or Article I?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Other Authorities

INTRODUCTION

The 2016 North Carolina Congressional Plan ("2016 Plan" or "Plan") is the most overt, and likely the most extreme, partisan gerrymander this Court has ever seen. The official written criteria that governed its creation expressly dictated pursuit of "Partisan Advantage" for the Republican Party and specified a quota of "10 Republican" districts and just "3 Democrat[ic]" ones—despite a near-equal split among the State's voters. To implement this directive, the map-drawer admittedly "packed" as many Democrats as possible into three overwhelmingly blue districts and "cracked" the remainder across ten red ones. The heads of the Joint Redistricting Committee, Appellants here, publicly declared that the Plan enshrined into law their view that "electing Republicans is better than electing Democrats." One even proclaimed: "I acknowledge freely that [the Plan is] a political gerrymander." As the District Court noted, with appropriate distaste, Appellants "d[id] not argue—and never have argued—that [this] express partisan discrimination advances any democratic, constitutional, or public interest." J.S. App. ("A") 110.

Unsurprisingly, the resulting map was extreme in every respect—whether viewed statewide or district-by-district. The only reason the Plan did not contain even fewer Democratic districts, one Appellant admitted, was because it was "not … possible to draw [such] a map." By using computers to generate and analyze thousands of alternative districting plans, *Common Cause* Appellees' experts confirmed that it was all but impossible for a 10-3 split to arise under neutral districting criteria. Just as importantly, they confirmed that the particular districts where the

Common Cause voter-plaintiffs live were extraordinarily packed and cracked. Indeed, the votes of many of those plaintiffs would have carried greater weight in *over 99%* of alternative maps.

Appellants barely even pretend to defend the challenged Plan. They take no issue with any of the District Court's fact-finding and largely ignore the evidence that *Common Cause* Appellees adduced below. Their brief also contains no meaningful discussion of applicable First Amendment, Equal Protection, or Elections Clause doctrine, let alone any attempt to square those doctrines with the obviously illegal features of the Plan. Perhaps this is understandable: for Appellants, the Plan itself is beside the point. This appeal is merely a vehicle for their policy arguments seeking a green-light for *all* partisan gerrymanders.

But Appellants pay a price for ignoring the facts. Justiciability turns not on abstract arguments, but on "the precise facts and posture of the particular case." *Baker v. Carr*, 369 U.S. 186, 217 (1962). And on the facts of this case, judicially manageable standards are easy to articulate and understand. Indeed, in last Term's gerrymandering cases, counsel for all parties acknowledged before this Court that a plan constructed under an *express* policy to favor one party—as the 2016 Plan was—would be unconstitutional. As Justice Alito recognized at the time, that is a "perfectly manageable standard." To hold that the 2016 Plan must nevertheless remain in effect because other cases with other facts might present more complex issues would be the opposite of the judicial caution and minimalism that Appellants profess to value.

Appellants' "political question" arguments also fail on their own terms. On countless occasions, including *Baker* itself, this Court has rejected the notion that the Elections Clause is a textual bar to judicial review of State election regulations. And this Court's existing precedents provide perfectly "discoverable and manageable standards" for adjudicating partisan-gerrymandering claims. Specifically, by burdening the political expression and associational rights of *Common Cause* Appellees, including the North Carolina Democratic Party and individual voters, based on viewpoint and identity, Appellants violated the First Amendment. By intentionally discriminating against Appellees without adequate justification, Appellants violated the Equal Protection Clause. And by nakedly seeking to dictate the outcomes of federal elections, Appellants exceeded the Elections Clause's limited grant of power to the States.[1]

None of these principles is novel, and nothing in this Court's jurisprudence suggests that they are inapplicable to redistricting, alone among all forms of State election regulation. To the contrary, it has long been settled that "[a] statute which is alleged to have worked unconstitutional deprivations of [plaintiffs'] rights is not immune to attack simply because the

[1] *Common Cause* Appellees' method of adapting these generally applicable standards to the present context differs in some respects from that of *League of Women Voters* Appellees. That is to be expected given the "unsettled … contours" of this Court's case law. *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). *Common Cause* Appellees believe in their own approach, but either of Appellees' approaches would provide a "manageable standard," grounded in the Constitution, for resolving partisan-gerrymandering claims.

mechanism employed by the legislature is a redefinition of [political] boundaries." *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

In the end, Appellants' argument for judicial abdication comes down to this: partisan-gerrymandering claims are "politically fraught," and entertaining them would therefore lead the public to view the Court as a partisan body. App. Br. 60-61. Appellants have it backwards. Elected officials of *both* parties commit this sin. *Cf. Lamone v. Benisek*, No. 18-726. And ordinary Americans of *both* parties detest it. *See* Lake Research Partners & WPA Intelligence, *Partisan Redistricting – New Bipartisan National Poll*, Sept. 11, 2017, https://bit.ly/2T24muW (finding that supermajorities of both parties favor this Court acting against partisan gerrymandering, "even if it means their party might not win as many seats").

If Appellants' warning sounds familiar, it should: the exact same argument was made for judicial inaction in *Baker*. *See* 369 U.S. at 267 (Frankfurter, J., dissenting) (asserting that "public confidence" in the Court requires "abstention from … the clash of political forces"). Fortunately, the *Baker* Court rejected that argument and upheld a nonpartisan constitutional principle that virtually all Americans now embrace. As a result, "[n]ational respect for the courts" was greatly "enhanced." *Id.* at 262 (Clark, J., concurring). The Court should do the same here.

STATEMENT OF THE CASE

A. Factual Background

1. The 2011 Plan

North Carolina is a true "purple state," its voters split almost equally between Democratic and Republican congressional candidates. A13-14. Its delegation once reflected this, often dividing 7-6 or 6-7. That changed markedly when the Republican Party captured the General Assembly in 2010, "giving [it] exclusive control over" redistricting. A10. On a party-line vote, it 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 statewide. A13. That advantage grew to 10-3 in 2014, even though Republican candidates received only 54% of the vote. A13-14.

This Court reviewed the 2011 Plan in *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which alleged that two districts were racially gerrymandered. The State's "defense" was that the 2011 Plan was a *partisan* gerrymander, not a racial one. The map-drawer, Dr. Thomas Hofeller, testified that partisanship "was the primary … determinant in the drafting" of that plan, both overall and on a district-specific basis. Hofeller explained that his "primary goal" was "to create as many districts as possible in which GOP candidates would be … successful[]" and "to minimize the number of districts in which Democrats … [could] elect a Democratic candidate." A180. Before this Court, the State's counsel explained that Hofeller "drew the map to draw the Democrats in[to 'packed' districts] and the Republicans out [of them]." Oral Argument Tr.,

Cooper v. Harris, No. 15-1262 (Dec. 5, 2016) at 10-11 (argument of Paul D. Clement).

This Court affirmed the judgment invalidating the two challenged districts as predominantly race-motivated, without disputing the State's admission that its intent regarding the remaining districts and the 2011 Plan overall was "primar[ily]" partisan.

2. Creation Of The 2016 Plan

In February 2016, the District Court in *Harris* ordered a remedial map. The heads of the Joint Redistricting Committee, Rep. David Lewis (R) and Sen. Robert Rucho (R), instructed Hofeller to remedy the two invalidated districts' racial infirmities while "maintain[ing]" a predetermined partisan split of "10 Republicans and 3 Democrats." A14-15; *see also* JA331-32; 336-37.

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." A16, 157-58. As he testified, this variable is highly predictive of future voting patterns. *Ibid.* Hofeller then used that partisanship index to guide his line-drawing, with the goal of "crack[ing]" and "packing" Democrats to minimize their voting strength. A17, 158-59; *see also* JA315. Proceeding district-by-district, Hofeller "divide[d] counties and communities of interest along partisan lines, and join[ed] sections of the state that have little in common." A252.

Lewis then presented for the Joint Redistricting Committee's retroactive approval a set of written "cri-

teria" that Hofeller had employed. A19-21. Several were explicitly partisan. Most obviously, the criterion labeled "Partisan Advantage" stated that "the Committee shall make reasonable efforts to construct districts … to maintain" a "partisan makeup … [of] 10 Republicans and 3 Democrats." JA329. 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…." JA329; A20. The Committee adopted these partisan criteria on party-line votes. A23. The 2016 Plan, Hofeller agreed, "adhered" to them. JA457; A23.

Lewis proclaimed the intentions behind the Plan on the record, both during Committee hearings and on the House floor:

- "[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 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."

- "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."

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

JA313, 310, 460, 308. Rucho agreed, stating that there is "nothing wrong with political gerrymandering" because "[i]t is not illegal." JA337; A22-24.[2]

Based on these statements, both chambers of the General Assembly then approved the 2016 Plan, also "by party-line votes." A24. All these findings of the District Court are undisputed.

3. Effect Of The 2016 Plan

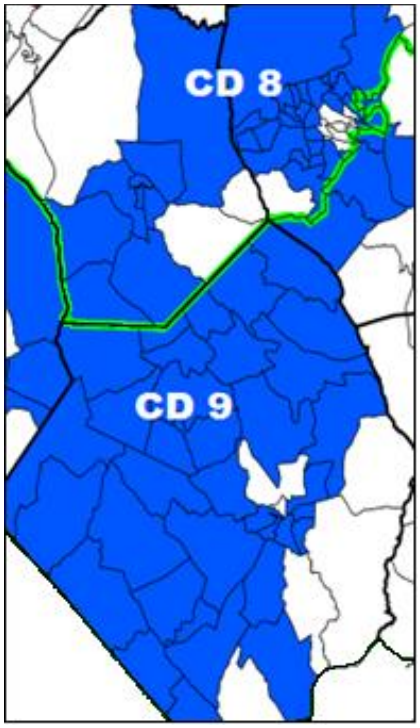
In the 2016 election, Republicans prevailed in all ten cracked districts where the mapmakers "intended and expected [them] … to prevail," and Democrats prevailed in all three packed districts drawn to be "predominantly Democratic." A26. Republican candidates thus won 77% of the total seats despite receiving just 53% of the statewide vote. *Ibid.*

The 2016 Plan's intentional packing and cracking harmed the *Common Cause* voter-plaintiffs by diluting their voting strength in the districts where they live. A51-65, 74, 82-83. The extensive proof of cracking and packing and its resulting dilutive effect was uncontroverted at trial, and the District Court's findings accepting this proof are not challenged on ap-

[2] Appellants now contend that these damning admissions were made "[i]n response to the district court's holding" in *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016). App. Br. 9. Appellants never made this argument below, and it is baseless. In *Harris*, as a defense to the charge of racial gerrymandering, Appellants argued—without success—that politics, not race, dictated the boundaries of the two relevant districts. *Ante* at 5-6. But no court instructed Appellants to execute an invidious partisan gerrymander, and no court "faulted" them for failing to make their invidious intent "evident in the record." App. Br. 9.

peal. *See* A188-91 (statewide findings), 209-14 (same), 223-74 (district-specific findings).

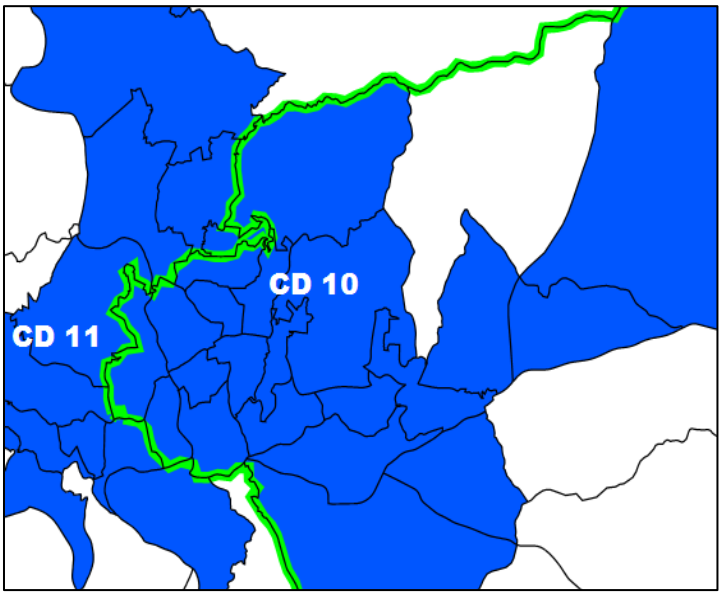
For example, *Common Cause* Appellees Coy E. Brewer, Jr. and John McNeill are Democratic voters in the heavily Democratic Fayetteville area. A57-59. The Plan intentionally cracked that area (shown in blue on the map below) and submerged the pieces within heavily Republican Congressional Districts ("CDs") 8 and 9:

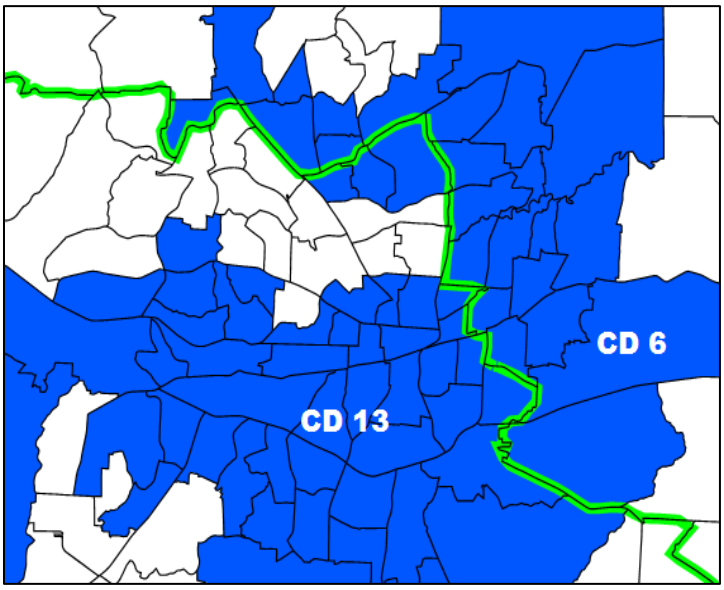


Appellants' own expert "conceded … that [this] area constituted a 'cluster of Democratic' [voters], that the 2016 Plan 'split,'" and that absent this "crack[ing],"

either CD8 or CD9 "would not have been a safe Republican district." A252-53. Due to this cracking, Brewer was relegated to CD8 and McNeill to CD9, intentionally diluting their votes. A57-59, 251-55.

Similar district-specific harms were visited on *Common Cause* voter-plaintiffs across the State. For example, both Appellant Lewis and Appellants' expert conceded that the 2016 Plan "split Buncombe County and the City of Asheville, where Democratic voters are concentrated, between [safe-Republican] Districts 10 and 11" (first map below), A25, and "'cracked' … the Democratic city of Greensboro between Republican Districts 6 and 13" (second map below), A158, 186-87, 216-17, 271.





Common Cause Appellees residing in the resulting districts had their votes diluted, including Democratic voters Robert Warren Wolf (CD10), Jones P. Byrd (CD11), Melzer A. Morgan, Jr. (CD6), and Russell G. Walker, Jr. (CD13). A56-57, 60-61, 62-63, 70, 243-48, 259-66, 270-73.

The 2016 Plan, and the shape of its individual districts, also caused Appellees "associational injury." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring). This proof, too, was uncontroverted at trial, and the District Court's findings accepting it are not challenged on appeal. A69-71. The Plan made it more difficult for the voter-plaintiffs living in cracked districts to raise money, recruit candidates, and enlist volunteers for activities like canvassing.[3] The burden on the North

[3] *See*, *e.g.*, Deposition of Elizabeth Evans, ECF 101-7, at 12-16; Deposition of Melzer Morgan, ECF 101-16, at 23-27; Deposition of John Quinn, ECF 101-22, at 24, 38; Deposition of Douglas

Carolina Democratic Party was even greater. Its representative gave unrebutted testimony that "the way the congressional districts were drawn … ma[de] it extremely difficult" to "get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts." 30(b)(6) Deposition of N.C. Democratic Party, ECF 110-07, at 97-98. He also testified that the way the Plan's districts were drawn made it "harder to recruit candidates" to run in those districts, "given that the deck seems to be stacked." *Id.* at 27; *see also id.* at 41-42 (identifying specific districts in which the Party had difficulty recruiting candidates), 56-57 (identifying fundraising burden), 65-66 (identifying organizational and direct electoral burden). Indeed, in the 2018 election cycle, the Party was unable to recruit any candidate willing to run in the cracked CD3, and so the Republican ran unopposed. *See* N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

B. Proceedings Below

1. Trial and Appeal

In August 2016, *Common Cause* Appellees—15 voters from all 13 districts in the 2016 Plan, the North Carolina Democratic Party, and the nonpartisan organization Common Cause—filed a challenge to the Plan under the First Amendment, Equal Protection Clause, and Article I, §§ 2 and 4. JA205-31. The

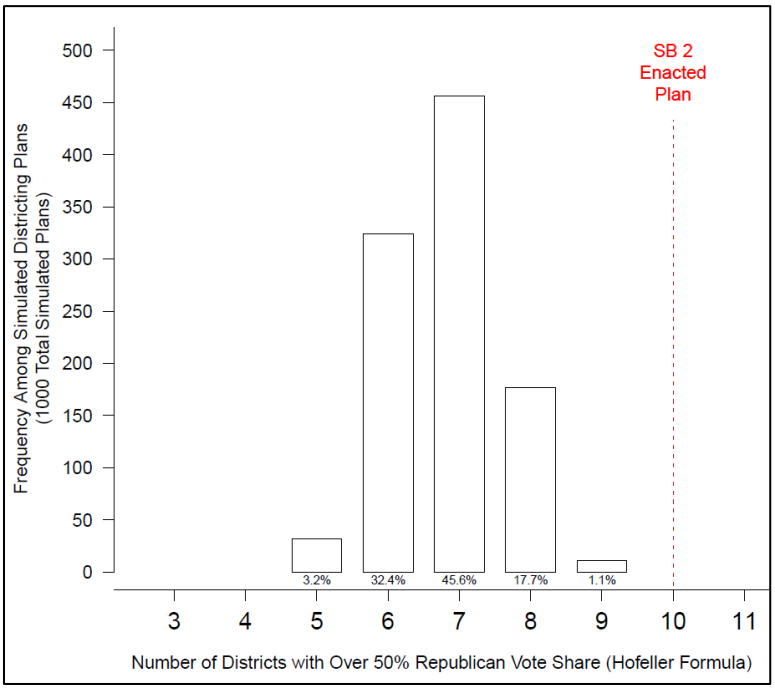
---

Berger, ECF 101-8, at 6-7, 73-74, 79; Deposition of John McNeill, ECF 110-09, at 21-27.

case was consolidated with *League of Women Voters of North Carolina v. Rucho*, No. 1:16-cv-1164 (M.D.N.C.) ("*League*"). JA232-66.

In October 2017, the District Court held a four-day bench trial. As the facts were essentially undisputed, the trial focused on experts. *Common Cause* Appellees presented testimony from Dr. Jonathan C. Mattingly, a mathematician at Duke University, and Dr. Jowei Chen, a political scientist at the University of Michigan. A160, 167; JA364-412 (excerpted testimony). Drs. Mattingly and Chen used computer algorithms to generate thousands of alternative districting maps using only traditional criteria and disregarding partisan data. They then used actual election results from each precinct in North Carolina to simulate elections under each alternative map. The results of these analyses were striking, demonstrating the extreme nature of Appellants' gerrymander. *See* Brief of Eric S. Lander as *Amicus Curiae* (discussing Mattingly's methodology and findings).

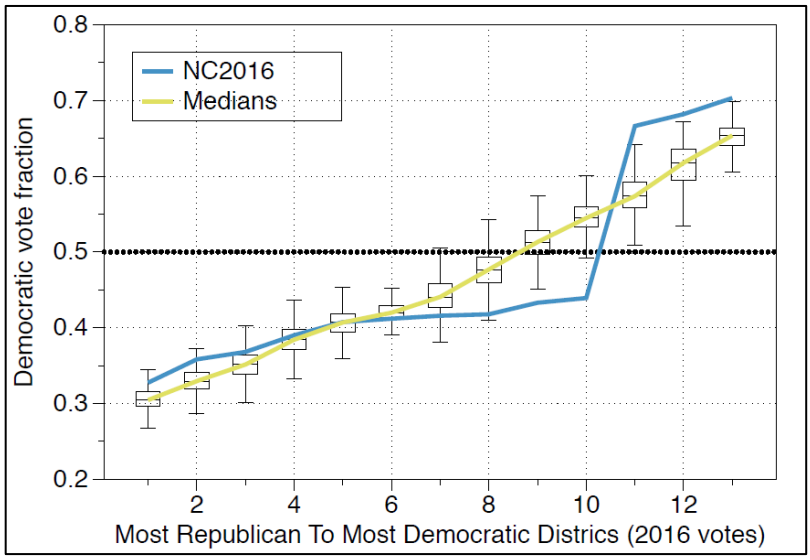
Dr. Chen generated 3,000 alternative maps, under which the composition of North Carolina's delegation formed a bell curve (shown below), mostly split 7-6 or 6-7. JA278. *None* of the 3,000 maps yielded a Republican advantage as great as the 10-3 split of the 2016 Plan (shown by the dashed red line). A167-71; JA276.



Dr. Mattingly, meanwhile, generated over 24,000 alternative maps using traditional nonpartisan criteria. Fewer than 0.7% of them resulted in a Republican advantage as lopsided as 10-3. Thus, on a statewide basis, the 2016 Plan was literally off the charts—an "extreme statistical outlier" that could not be explained by reference to traditional districting criteria. A162, 171; JA378, 395, 410-11.

Dr. Mattingly's work also confirmed the cracking and packing of individual districts. He showed this by plotting the partisan vote share of each district on a graph, with the most Republican on the left and the most Democratic on the right. With no packing or cracking, the median map in Dr. Mattingly's simulation set yields a straight line (in yellow below). By contrast, the plot for the 2016 Plan (in blue) resem-

bles an "S" curve, with Democratic voters packed into overwhelmingly Democratic districts at the top of the "S" or cracked across safe Republican districts at the bottom. A163-66; JA360. Dr. Mattingly explained that this "S" curve is the "signature" of gerrymandering. JA380, 382, 389.



This analysis showed the extreme nature of the gerrymander on a district-specific level. As Appellants conceded, they intentionally packed Democrats into CDs 1, 4, and 12. On the chart above, those districts appear on the far right, as they are the three most Democratic. As reflected by the blue line's placement well above the yellow line for those three districts, the percentage of votes cast for Democratic candidates in the packed CDs 1, 4, and 12 was significantly *higher* than the percentage of votes that would have been cast for Democratic candidates in the corresponding districts in the overwhelming ma-

jority of Dr. Mattingly's 24,000 neutrally-drawn maps. The gerrymander, in other words, rendered those packed districts extreme outliers. A163, JA378-80, 389.

The same is true for the Plan's cracked districts. Consider the blue line's location well below the yellow line for the next three districts from the right (corresponding to the cracked CDs 2, 9, and 13, which had the fourth-, fifth-, and sixth-highest Democratic vote shares). This shows that the percentage of votes cast for Democratic candidates in these Plan districts was, as Appellants intended, significantly *lower* than in the corresponding districts in the vast majority of Dr. Mattingly's 24,000 alternative maps. A163-64.

This district-specific proof was coupled with Appellants' admissions of district-specific cracking and packing, including admissions of cracking "natural Democratic clusters" in CDs 6, 8, 9, 10, 11, and 13. A216. The original trial record thus demonstrated widespread district-specific cracking and packing—and therefore, vote dilution—in districts where the *Common Cause* voter-plaintiffs reside.

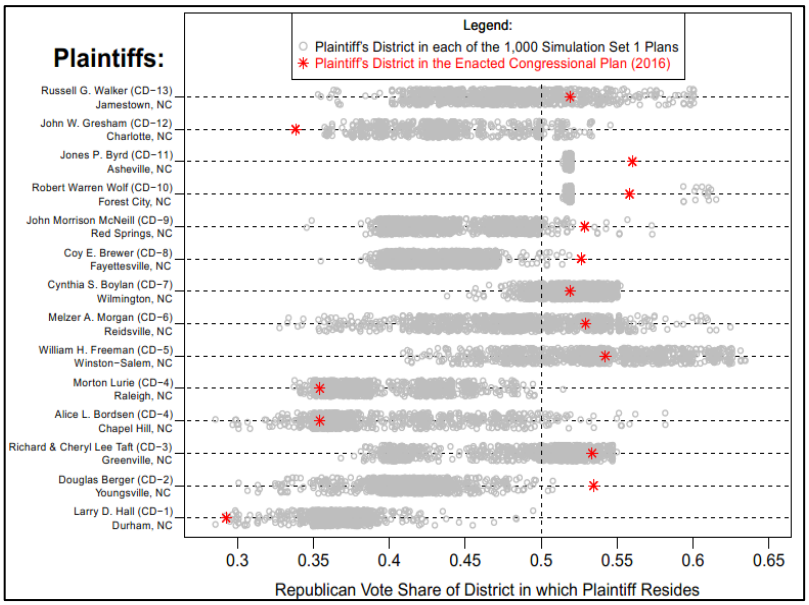
In January 2018, the District Court held the Plan an unconstitutional partisan gerrymander. *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018). This Court stayed that judgment pending appeal. On June 25, 2018, this Court vacated and remanded for further consideration in light of *Gill*.

2. Remand

On remand, the District Court requested briefing on *Gill*'s impact. *Common Cause* Appellees highlight-

ed the ample evidence of district-specific packing and cracking already in the record—as admitted by Appellants and Dr. Hofeller, and as testified to by Dr. Mattingly. They also submitted a supplemental declaration from Dr. Chen. JA265-75. He used each *Common Cause* voter-plaintiff's residential address to determine the district in which that plaintiff would have resided in 2,000 of his alternative maps. He then determined how the partisan vote split of each plaintiff's actual district under the 2016 Plan compared to the vote split of the array of "hypothetical district[s]" in which he or she might have been placed. A51 (quoting *Gill*, 138 S. Ct. at 1931).

The results for one set of 1,000 maps are shown below. JA269. For each plaintiff, the gray horizontal band—actually 1,000 individual gray circles—depicts the range of vote splits across all the alternative districts containing that plaintiff's residential address. The dotted vertical line represents a 50% Republican vote share, with the gray band to the left of that line representing minority-Republican alternative districts and the gray band to the right of that line representing majority-Republican alternative districts. Lastly, the red star indicates the vote split of each plaintiff's *actual* district under the 2016 Plan.



This analysis provides further evidence of the extreme packing and cracking of the 2016 Plan and links it directly to each *Common Cause* voter-plaintiff. The Plan's packed districts (CDs 1, 4, and 12) are identified by red stars to the left of the dotted vertical line. As indicated by the relative positions of these red stars and the corresponding gray bands, each of the *Common Cause* voter-plaintiffs who resides in a packed district under the 2016 Plan would have resided in a less Democratic-leaning (*i.e.*, less packed) district in almost all alternative maps. A51-52, 54, 62; JA270-71, 274. Larry Hall, who lives in CD1, would have been placed in a less Democratic-leaning district in all but three of Dr. Chen's 2000 maps—*i.e.*, 99.95% of the time. A51-52. John Gresham, who lives in CD12, would have been placed in a less Democratic-leaning district over 99% of the time. A62. And in CD4, Alice Bordsen would have been

placed in a less Democratic-leaning district approximately 80% of the time. A54. This shows that the votes of the *Common Cause* voter-plaintiffs in these packed districts were diluted—essentially wasted—exactly as Appellants intended.

The results for the Plan's cracked districts were just as egregious. Each of the *Common Cause* voter-plaintiffs placed in a majority-Republican district under the 2016 Plan (where the red stars are to the right of the dashed line) would have resided in a more Democratic-leaning (*i.e.*, less cracked) district in the overwhelming majority of alternative maps. A52-53, 57-59, 61; JA270-74. And again, for most of these plaintiffs, their actual districts are extreme outliers. For example, Jones Byrd (CD11) would have been placed in a more Democratic-leaning district in *all* 2,000 of Dr. Chen's alternative maps. A61. Douglas Berger (CD2) and Coy Brewer (CD8) would have been placed in more Democratic-leaning districts in 99% of those maps. A53, 57-58. Similarly, Robert Warren Wolf (CD10) would have been placed in a more Democratic-leaning district in 98% of Dr. Chen's alternative maps; John McNeill (CD9), in 97%; Richard and Cheryl Lee Taft (CD3), in 95%; and Russell Walker (CD13), in 90%. A58-59, A53, A62.

Indeed, the chart above shows that many of these cracked voter-plaintiffs would likely have been placed in Democratic-*majority* districts had neutral criteria been used. For each plaintiff's row on the chart, consider how much of the gray mass lies to the left of the dotted 50% line. Each gray circle to the left of that line represents a Democratic-majority district in which the voter-plaintiff would have been placed un-

der one of Dr. Chen's neutrally drawn alternative maps. To take one example, John McNeill, who lives in CD9, was placed in a district gerrymandered to have a 53% Republican vote share. But had neutral criteria been used, he would have been placed in a Democratic-majority district over 80% of the time.

On August 27, 2018, the District Court issued a new opinion. The majority held that at least one plaintiff had standing to challenge each of the Plan's 13 districts under a vote-dilution theory and that the plaintiffs further had non-dilutionary standing to challenge the Plan as a whole. A3. Judge Osteen agreed that at least one plaintiff had standing to challenge 10 of the Plan's 13 districts under a vote-dilution theory, but disagreed that voters living in packed districts suffer dilutionary injury. A330. The District Court also held unanimously that Appellees' claims were justiciable under this Court's precedents. A33-35.

On the merits, the majority held that 12 of the Plan's 13 districts (all except CD5) violate the Equal Protection Clause, because they were drawn with the predominant intent to discriminate against Democratic voters, and did so, without any legitimate justification. A227. Judge Osteen agreed that the nine of those 12 districts that were cracked violate the Equal Protection Clause. A365 n.4. The majority also held that the Plan violates the First Amendment because, *inter alia*, it constitutes viewpoint discrimination without legitimate justification. A283. Finally, the Court held unanimously that the Plan violates Article I, §§ 2 and 4, because it was nakedly intended to "dictate [federal] electoral outcomes." A303.

Because it was impracticable to redistrict in time for the November 2018 elections, the District Court stayed its judgment on the condition, accepted by Appellants, that this appeal be pursued expeditiously.

C. The 2018 Election

The 2018 election was a nationwide "blue wave." Democrats added 40 seats in the House of Representatives, their largest gain since the Watergate election of 1974, and a larger gain than the wave elections of 1982 and 2004. The Democratic popular-vote margin was 8.6%, the greatest on record for a party in the minority heading into an election.[4] But the red wall in North Carolina largely stood fast, thwarting democratic self-correction; election-night returns indicated yet another 10-3 result.[5] *See* Brief of Political Science Professors as *Amici Curiae* (discussing 2018 election results in gerrymandered states).

Later, however, irregularities emerged regarding CD9, where the Republican was initially reported to have prevailed by just 900 votes. On February 21, 2019, the election was set aside and a new election was ordered as to CD9. This will give *Common Cause* Appellee John McNeill another chance to vote for the candidate of his choice (albeit with the deck still stacked against him). Meanwhile, Mr. McNeill has no representative in Congress. But for the 2016 Plan's

---

[4] Harry Enten, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, CNN Politics, Dec. 6, 2018, https://cnn.it/2QxAHb5.

[5] N.C. State Board of Election, *11/06/2018 Unofficial General Election Results – Statewide*, https://bit.ly/2JD5HjT.

extreme partisan gerrymandering, this situation is unlikely to have occurred, as Mr. McNeill would have been placed in a Democratic-majority district over 80% of the time.

SUMMARY OF ARGUMENT

As the District Court correctly held, *Common Cause* Appellees have standing to bring their claims; those claims are justiciable; and the 2016 Plan—as a whole and in all but one of its individual districts—is unconstitutional.

Standing. Appellants' standing argument boils down to ignoring this Court's unanimous holding in *Gill* and ignoring *Common Cause* Appellees' evidence.

Gill held that an individual establishes vote-dilution standing by showing that he was "place[d] in a 'cracked' or 'packed' district" so that "his vote … carr[ies] less weight" than it would have carried in an alternative, neutrally-drawn district. 138 S. Ct. at 1930-31. Appellants admitted—indeed, bragged—that the Plan intentionally packed and cracked Democratic voters, and *Common Cause* Appellees proved it was true. Using only traditional, neutral criteria, their experts generated tens of thousands of alternative maps and showed that the Plan's individual districts were extreme statistical outliers, causing extreme dilution of the voter-plaintiffs' votes. *Gill* approved of this technique; the District Court found the evidence compelling; and Appellants do not challenge it here. Indeed, they do not mention *Common Cause* Appellees' expert analyses at all.

As the *Gill* concurrence recognized, partisan gerrymanders also inflict cognizable burdens on voters' and political parties' rights of expression and association. *Common Cause* Appellees, who include the North Carolina Democratic Party, provided unrebutted evidence of these harms. These included markedly diminished ability to fundraise and to recruit candidates and volunteers. Indeed, North Carolina's CD3 was so extreme that, in 2018, no Democrat was willing to run in it.

Justiciability. Without saying so directly, Appellants argue that the Court should overrule its holding in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan-gerrymandering claims are justiciable. They maintain that the Court may not hear this case—or any other case challenging a partisan gerrymander—pursuant to the "political question" doctrine. But this argument is unmoored from the doctrine as this Court defined it in *Baker* and has applied it since. In particular, the doctrine provides no license for the Court to turn away claims because (in Appellants' words) they are "politically fraught" or "divisive." App. Br. 34. Nor does it permit a preemptive bar on entire *categories* of disputes—*e.g.*, "partisan-gerrymandering cases"—without a "discriminating inquiry into the precise facts and posture of the particular case." *Baker*, 369 U.S. at 217.

Appellants argue that partisan-gerrymandering claims present political questions because the Elections Clause (Art. I, § 4) "textually commits" the remedying of unconstitutional districting plans to State legislatures and Congress alone. But the Court has rejected this argument, either expressly or implicitly,

every time it has reviewed a State election regulation since *Baker* and *Wesberry v. Sanders*, 376 U.S. 1 (1964). Accepting it now would not only turn partisan-gerrymandering claims out of court; it would raze this Court's election-law jurisprudence *in toto*.

Appellants also argue that this case presents a political question because there is "a lack of judicially discoverable and manageable standards for resolving it." *Baker*, 369 U.S. at 217. But whatever may be true in other cases, the claims in *this* case could not be simpler or more "manageable." As Justice Kennedy observed in *Vieth*, and as oral argument in last Term's gerrymandering cases demonstrated, extreme districting plans such as the 2016 Plan that require partisan discrimination *on their face* are *per se* unconstitutional.

More broadly, "discoverable and manageable" standards *do* exist in partisan-gerrymandering cases: namely, this Court's well-settled precedents under the First Amendment, Equal Protection Clause, and Elections Clause. The "standards" that *Common Cause* Appellees offer here are just as understandable and applicable as those that this Court applies in any number of constitutional and statutory contexts. And the types of evidence that *Common Cause* Appellees offered to satisfy those standards—alternative maps and probability distributions derived from such maps—are both objective and familiar.

Appellants have one central "manageability" argument that they return to time and again: the District Court's tests do not draw a bright line between a permissible amount of politics and "too much" politics. App. Br. 2, 22. But this complaint misconceives

Common Cause Appellees' claims. The infirmity in the 2016 Plan is not that "political considerations" *per se* played an "excessive" role in its creation. It is that the Plan, and its individual districts, were drawn with the predominant intent to *discriminate invidiously* on the basis of political expression and association. The question, in other words, is not one of degree (how much "politics" is "too much?"), but one of kind (were political considerations used for invidious ends?). If invidious intent is present, harm sufficient to establish standing is all that is required. Contrary to Appellants' claims, while the Court has permitted benign uses of political data in districting, it has never blessed *invidious* political discrimination in districting in any amount—let alone where it predominates over all other motivations, as it did here.

Merits. The 2016 Plan is unconstitutional under three different bodies of well-established case law. The Plan's express imposition of burdens on the basis of political expression and association violates the First Amendment. Its intentional invidious discrimination violates the Equal Protection Clause. And its naked intent to "disfavor a class of candidates" and "dictate electoral outcomes" violates the Elections Clause. Appellants do not even engage with this Court's substantive doctrine on these issues, let alone distinguish the binding precedents on which the District Court properly relied.

ARGUMENT

I. *COMMON CAUSE* APPELLEES HAVE STANDING

The District Court correctly held that *Common Cause* Appellees, including both individual voters and the North Carolina Democratic Party, have standing. First, the voter-plaintiffs pleaded and proved that 12 of the Plan's 13 districts were packed or cracked, establishing vote-dilution injury under *Gill*. A3. Second, *Common Cause* Appellees pleaded and proved tangible burdens on their rights of political speech and association, both on a district-specific and statewide level. A74. Because all of these plaintiffs "allege[d] [and proved] facts showing disadvantage to themselves as individuals," they all "have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1920 (quoting *Baker*, 396 U.S. at 206).

Appellants maintain that *Common Cause* Appellees lack standing because this case is really just about an "abstract interest in policies adopted by the legislature"—a "nonjusticiable 'general interest common to all members of the public.'" App. Br. 24-25. Not so. This case is about the burdens the 2016 Plan imposed on *Common Cause* Appellees' personal votes and personal rights of political speech and association. Appellants' contrary argument both misreads *Gill* and distorts—or outright ignores—*Common Cause* Appellees' allegations and proof.

A. *Common Cause* Appellees Proved Vote-Dilution Injury

Gill expressly recognized that partisan gerrymandering results in vote dilution, and that this is a harm cognizable under Article III. As the Court noted, "the harm asserted by the plaintiffs" in such a case "aris[es] from the burden on those plaintiff's own votes." 138 S. Ct. at 1931. And "that burden arises through a voter's placement in a 'cracked' or 'packed' district." *Ibid.* Because the *Gill* plaintiffs had failed to adduce district-specific proof of packing or cracking, the Court remanded to afford them "an opportunity to prove" that they "live in districts where Democrats … ha[d] been packed or cracked," and thereby establish standing. *Id.* at 1934.

Here, by contrast, *Common Cause* Appellees "alleged, argued, and prove[d] district-specific [vote-dilution] injuries *throughout* the course of this litigation." A41. This proof included the admissions of Appellants themselves and their map-drawer, Dr. Hofeller, that the Plan intentionally cracked and packed the specific districts where the voter-plaintiffs live. It also included the analyses of Drs. Mattingly and Chen, who used tens of thousands of alternative maps to show that the districts in which the voter-plaintiffs live are severely packed and cracked. *Cf. Gill*, 138 S. Ct. at 1930-31 (a voter establishes standing by proving that "the particular composition of [his] district … causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district"). This proof was not "retrofit[ted]" after *Gill,* App. Br. 20, and the District Court's meticulous findings accepting it are not chal-

lenged on appeal. Indeed, Appellants barely even mention *Common Cause* Appellees' evidence, and to the extent that they do, they distort the record.

Appellants falsely analogize this case to *Gill*, where lead plaintiff William Whitford's "ideal map" itself showed that his own district had not been packed or cracked. 138 S. Ct. at 1924-25. That is plainly not true here: as discussed above, the undisputed evidence showed that the *Common Cause* voter-plaintiffs live in districts with Democratic vote shares markedly higher or lower than in the vast majority of alternative maps.

Muddying the waters, Appellants mix and match evidence offered by *Common Cause* Appellees and *League* Appellees, indiscriminately referring to them all as "plaintiffs." But there is an important difference. To prove standing, *Common Cause* Appellees offered tens of thousands of maps showing the full range of alternative possibilities. *League* Appellees relied on one map ("Plan 2-297"), which reflected one alternative scenario. Both are valid ways to show standing, but Appellants cannot simply ignore the thousands of alternative maps offered by *Common Cause* Appellees and base their arguments about the *Common Cause* voter-plaintffs on *League* Appellees' Plan 2-297 alone.

For example, Appellants argue that *Common Cause* plaintiff Alice Bordsen has no standing because the Democratic vote share in her CD4, one of the packed districts, approximately equals the Democratic vote share in the single hypothetical map relied upon by *League* Appellees. App. Br. 26. This cherry-picking ignores Dr. Hofeller's testimony that CD4

was intentionally "packed" with extra Democrats, and it ignores the thousands of alternative maps relied on by *Common Cause* Appellees (and the District Court) that confirm this. Thus, Dr. Chen found that the Democratic vote share in Bordsen's CD4 was higher than the Democratic vote share in 80% of hypothetical districts containing Bordsen's home address. A54; JA271; *see also* A163 (discussing similar results for Dr. Mattingly's 24,000 maps).[6]

Appellants play the same game with *Common Cause* plaintiffs Richard and Cheryl Taft of CD3, comparing the vote share of their actual district under the Plan to the vote share of the corresponding district in *League* Appellees' single Plan 2-297 (which they misleadingly call "*plaintiffs'* proposed plan"). App. Br. 27. But *Common Cause* Appellees did not rely on Plan 2-297 to establish the Tafts' standing; we relied on tens of thousands of alternative maps generated by Drs. Chen and Mattingly. That evidence—which Appellants do not challenge—showed that the Tafts would have been placed in a more Democratic district in over 95% of alternative maps, and that they would have been placed in a Democratic-*majority* district 75% of the time. A53, JA271. Instead, they found themselves in a district that was so rigged it could not even generate a Democratic candi-

[6] Appellants offer a different argument as to *Common Cause* plaintiffs Larry Hall and John Gresham in CD1 and CD12, the other two packed districts. They do not contend that the Democratic vote shares of these plaintiffs' districts were unaffected by the gerrymander, but merely that "their districts would remain majority-Democratic under their own proposed maps." App. Br. 27. But that is true of any packed district, and *Gill* plainly holds that packing, as well as cracking, inflicts vote dilution.

date for Congress in 2018. Any "concessions" *League* Appellees may have made about their own plaintiffs under their single alternative map are immaterial to the standing of the Tafts or any other *Common Cause* voter-plaintiff.

More generally, as discussed above, Appellants admitted that they intentionally cracked ten districts where *Common Cause* plaintiffs reside for the purpose of subordinating Democrats and guaranteeing the election of Republicans. The extreme effects of this cracking were shown by overwhelming evidence on a district-specific basis. Notwithstanding Appellants' verbal sleight of hand, they challenge none of the District Court's extensive fact-findings on packing and cracking in this Court.

Finally, Appellants argue that, in some districts, the 2016 gerrymander may not have changed the outcome of the election. App. Br. 28. But *Gill* did not hold that the injury in a vote-dilution claim is the deprival of one's preferred election result. The injury, rather, is that the "composition of [a] voter's own district … causes his vote—having been packed or cracked—to *carry less weight*…." 138 S. Ct. at 1930-31 (emphasis added); *see also id.* at 1936 (Kagan, J., concurring); *cf. N.E. Fla. Chapter, Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993) ("The 'injury-in-fact' in an equal protection case … is the denial of equal treatment …, not the ultimate inability to obtain the [desired] benefit."). Moreover, although Appellees are not required to show that their preferred candidates would have won absent the gerrymander, Drs. Chen and Mattingly's analyses show clearly that under a map drawn with-

out partisan discrimination, there would be more than three Democratic districts. Indeed, based on the bell curves they generated, there would likely be six or seven, and maybe more. *Ante* at 13-14.

B. *Common Cause* Appellees Proved Associational Injury

"[P]artisan gerrymanders inflict other kinds of constitutional harm" beyond vote dilution. *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *see also Vieth*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring). The District Court found such non-dilutionary injury here based on undisputed evidence, and it correctly held that these injuries establish standing. Specifically, it found—and Appellants do not dispute—that the 2016 Plan intentionally burdened Appellees' rights of political speech and association.

The *Common Cause* voter-plaintiffs gave unopposed testimony that the Plan "decreased [their] ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70. These are classic injuries-in-fact. *See Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) (election law inflicted cognizable "burden" on association by making "[v]olunteers … more difficult to recruit," "contributions … more difficult to secure," and "voters … less interested in the campaign").

And "what [was] true for" the voter-plaintiffs was "triply true" for the North Carolina Democratic Party. A71 (quoting *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring)). The Party's entire *raison d'être* is to engage in political activity and association and to compete for

seats. It is undisputed that the Plan "weaken[ed]" its capacity "to perform all [these] functions." *Ibid.* The Party was so weakened that it could not even recruit a candidate to run in CD3 in the 2018 election. It is hard to imagine a more concrete injury-in-fact to a political party. *See, e.g.*, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615-16 (1996) (striking down law that hampered party's ability to "convince others to join").

Rather than dispute the District Court's fact-finding, Appellants suggest that these burdens do not constitute injuries-in-fact because Appellees remain "free … to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise [engage in political] expression." App. Br. 19. On countless occasions, however, this Court has found that voters, candidates, and parties have standing to challenge laws that stop short of altogether denying them the franchise, completely barring their candidacy, or flatly forbidding them to speak. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011) (public "matching funds" law injured opponents of candidates receiving such funds, even though they remained free to speak as they wished).

These non-dilutionary effects injured *Common Cause* Appellees both in their individual districts and on a statewide basis. Ignoring the district-specific injury, Appellants dispute that these injuries afford standing to challenge the 2016 Plan as a whole. But this argument fails to acknowledge the difference between vote dilution, at issue in *Gill*, and associational harms. Vote-dilution claims by individuals are dis-

trict-specific because citizens vote only in one district—their own. *Gill*, 138 S. Ct. at 1930. Nondilutionary harms, on the other hand, may be district-specific or statewide, particularly for a political party. Unlike vote dilution, "the associational injury flowing from a statewide partisan gerrymander … has nothing to do with the packing or cracking of any single district's lines." *Id.* at 1938-39 (Kagan, J., concurring). Democrats from Asheville fundraise for candidates in Fayetteville; Democrats from Raleigh conduct voter outreach in Charlotte; and the Party itself does these things statewide—and has a critical organizational interest in the statewide outcome. Where, as here, "the harm alleged is not district specific, the proof needed for standing should not be district specific either." *Ibid.*

II. *COMMON CAUSE* APPELLEES' CLAIMS ARE JUSTICIABLE

Appellants' chief plea is that any partisan-gerrymandering case—whatever its legal theory, and however compelling its facts—should be nonjusticiable. They ask this Court to overrule *Bandemer* and take this momentous step on the flimsiest of bases: a "textual commitment" argument that this Court has rejected ever since *Baker* itself, and a "manageable standards" argument that misconstrues the evil of which Appellees complain and the ability of the courts to redress it.

"[T]he Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012). The "political question" doctrine is "a narrow exception to that rule." *Id.* at 195. Indeed, it is so nar-

row that this Court "has relied on [it] only twice in the last [58] years." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., dissenting). *See Nixon v. United States*, 506 U.S. 224, 226 (1993) (precluding judicial review of Senate impeachment trial); *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (precluding judicial exercise of continuing supervisory jurisdiction over National Guard).[7] This case is a far cry from those.

Appellants repeatedly characterize the claims in this case as "politically fraught," "politically charged," and "politically divisive." App. Br. 2, 4, 21, 34, 36, 61. But the political question doctrine is not implicated "merely because [a suit] ha[s] political implications." *Zivotofsky*, 566 U.S. at 196. This Court *must* resolve a properly presented constitutional claim, even when the presidency itself hangs squarely in the balance. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) ("When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.").

In any event, none of *Baker*'s potential signs of "political question" status is "inextricable from" this case. 369 U.S. at 217. Appellants raise just two of them: (1) a "textually demonstrable … commitment"

---

[7] *See also* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 459 (2017) (explaining that this Court has invoked the political question doctrine in only "two contexts": where the Constitution requires a coordinate branch "to apply legal rules to particular facts," *e.g.*, *Nixon*, and where plaintiffs seek "mandatory prospective relief … concerning military and national security matters," *e.g.*, *Gilligan*).

to another decisionmaker; and (2) a lack of "discoverable and manageable standards" for decision. *Ibid.* Neither applies here.

A. The Elections Clause Is Not A "Textually Demonstrable Commitment" That Precludes Judicial Review

Although they did not raise it below, Appellants' "political question" argument now begins with the first *Baker* factor: "a textually demonstrable constitutional commitment of the issue" to another branch. In particular, they maintain that the Elections Clause, which "delegat[es] … power to the States" to regulate the "Times, Places and Manner" of congressional elections subject to congressional modification, *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995), strips the courts of jurisdiction to address claims that a State has exercised this power unconstitutionally. App. Br. 31-36.

This argument does not leave the starting gate. It was definitively rejected in *Baker*—the same case that established the modern political question doctrine. There, the Court surmised that the lower court's nonjusticiability holding might have turned on "the argument" that "Art. I, § 4" (the Elections Clause) renders "congressional redistricting problems … a 'political question' the resolution of which was confided to Congress." 369 U.S. at 232-33. But this Court found otherwise, concluding that "Article I, … [§] 4 … plainly afford[s] no support for the District Court's conclusion." *Id.* at 234. Two years later, this Court again held 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." *Wesberry*, 376 U.S. at 6-7.

In the half-century since *Baker* and *Wesberry*, this Court has "continually stressed" that, while the Elections Clause gives States "a major role to play in structuring … the election process," they "must act within limits imposed by the Constitution." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see also Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("A State's broad power to regulate the time, place, and manner of elections does not extinguish the State's responsibility to observe the limits established by … the First and Fourteenth Amendments."); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) ("The power to regulate the time, place, and manner of elections does not justify … the abridgment of fundamental rights, such as the right to vote … or … the freedom of political association."). Moreover, this Court has repeatedly invalidated State regulations of congressional elections that exceed constitutional limits. *See, e.g.*, *Jones*, 530 U.S. 567 (striking down "blanket primary" law); *Eu*, 489 U.S. 214 (striking down ban on party endorsements); *Tashjian*, 479 U.S. 208 (striking down restriction on primary voting). In fact, far from construing the Elections Clause as a grant of unreviewable discretion to the States or Congress, this Court has treated the Clause as a fount of judicial *authority* to invalidate State electoral regulations. Point III.C, *infra*.

To now accept Appellants' theory that the Elections Clause is a "textual commitment" that bars ju-

dicial review of State action taken under color of its authority would uproot this Court's entire election-law and voting-rights jurisprudence concerning State regulation of federal elections. Not just *partisan*-gerrymandering cases would become nonjusticiable; so would *racial*-gerrymandering and vote-dilution cases, one-person-one-vote cases, and challenges to everything from white primaries to ballot-access laws. After all, nothing in the text of the Elections Clause singles out partisan gerrymandering and treats it differently from any other theory under which State action taken pursuant to the Clause's authority might be challenged.[8]

With this Court's precedents squarely against them, Appellants resort to two arguments for their "textual commitment" thesis: (1) no one expressly raised the possibility of judicial review of districting legislation at the time of the Founding, App. Br. 32-33; and (2) partisan gerrymandering has taken place for a long time, *id.* 3-4. Neither argument is convincing—let alone compelling enough to jettison generations of settled precedent.

---

[8] In a vague footnote, Appellants suggest that *racial*-gerrymandering claims would somehow escape unscathed "[i]n light of the Reconstruction Amendments." App. Br. 36 n.1. But they say the exact opposite in the body of their brief, arguing that "nothing in the Reconstruction Amendments suggests a revisiting of the original allocation of authority" under the Elections Clause. *Id.* 36. In any event, it is the Fourteenth Amendment that provides the basis for Appellees' Equal Protection claim and, through its incorporation of the Bill of Rights, Appellees' First Amendment claim. Thus, to the extent the Reconstruction Amendments supersede "the textual commitment … in the Elections Clause," *id.* 36 n.1, they do so with respect to the claims in this case.

The first argument proves too much. The courts routinely hear all sorts of challenges to electoral regulations (and other types of government action) that the Founders did not, and could never have, specifically foreseen. And what the Founders *did* say is far more illuminating than what they did not: they explained that the courts "were designed to be an intermediate body between the people and the legislature, in order … to keep the latter within [constitutional] limits" and to prevent "oppressions of the minor party" by "the major voice of the community." Federalist No. 78 (Hamilton). That is precisely what Appellees ask the courts to do here.

Nor does the sordid history of partisan gerrymandering make it nonjusticiable. First, "[n]either the antiquity of a practice nor the fact of steadfast legislative … adherence to it through the centuries insulates it from constitutional attack." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)). As this Court explained in another Elections Clause case, "[o]ne may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States." *Thornton*, 514 U.S. at 823. Second, while it is true that "various instances of partisan gerrymandering have indeed occurred throughout American history," it "has never been regarded as acceptable … as part of our constitutional tradition or as a feature of democratic governance." Brief of Historians as *Amici Curiae* 33, *Gill v. Whitford*, No. 16-1161. "To the contrary, from its inception to the present day, it has been harshly condemned as an unconstitutional

mechanism for denying voters' essential rights to equal representation." *Ibid.*[9]

B. This Case Does Not Lack "Manageable Standards" For Resolution

Appellants' "manageable standards" argument fares no better. It bears emphasis, as the District Court noted, that this Court has never deemed a case (let alone an entire category of cases) nonjusticiable *solely* because of a purported lack of "manageable standards." A97 n.19; *see* Brief of Constitutional Law Professors as *Amici Curiae* 4-9, *Gill v. Whitford*, No. 16-1161. Nor should the Court take that unprecedented step here. The political question doctrine requires a *case-specific* assessment of manageability—and whatever may be true of other cases involving partisan gerrymanders, there is nothing "unmanageable" about a case such as this. More generally, the legal principles that should govern partisan-

[9] For example, the first gerrymander after the formation of the United States—Patrick Henry's effort to shape the newly-formed congressional districts in Virginia to deny seats to James Madison and other Federalists—was bitterly condemned by the Framers. *See* PAPERS OF JAMES MADISON 11:302 (R. Rutland et al., eds. 1962). George Washington "dreaded" that Henry's districting plan would be "so arranged as to place a large proportion of those who are called Antifederalists" in the new Congress. DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 2:374 (M. Jensen et al., eds. 1976). General Henry "Light Horse Harry" Lee warned that Henry's gerrymander "menace[d] the existence of the govt." by designing "the districts … to conform to the anti-federal interest." *Id.* 2:378. And Edmund Randolph feared that Henry's effort "to arrange the districts" would "tend to the subversion of the new government." PAPERS OF JAMES MADISON, *supra*, 11:339.

gerrymandering claims are well-established, and federal courts apply them successfully in other cases every day. Meanwhile, the unchallenged evidence that *Common Cause* Appellees adduced below is of the type routinely relied upon in judicial proceedings.

1. The Extraordinary Facts Of This Case Demonstrate A Violation Under Any Standard

Appellants ask the Court to use this case as a vehicle to "declare partisan gerrymandering claims nonjusticiable once and for all." App. Br. 2. But "all" partisan gerrymanders are not now before this Court—*this* one is. And however manageable or unmanageable other cases might be, the facts of this case make out a clear constitutional violation under any conceivable standard.

The political question doctrine calls for "case-by-case inquiry," not "blanket rule[s]" or "semantic cataloguing." *Baker*, 369 U.S. at 210-11, 215-16. Courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and determine the issue's "susceptibility to judicial handling … in *th[at] specific case*." *Id.* at 211-12, 217 (emphasis added); *cf. Gilligan*, 413 U.S. at 11-12 (holding that "no justiciable controversy [was] presented … *in this case*," but recognizing that the Court was "neither hold[ing] nor imply[ing] that the conduct of the National Guard is always beyond judicial review"). To go beyond the facts and legal theories raised in a case and rule that an entire category of cases is nonjusticiable would violate "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc. v.*

DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in the judgment).

The claims in *this* case are plainly judicially determinable. Invidious intent is clear—indeed, admitted. North Carolina formally adopted binding written criteria that expressly required preserving a Republican "Partisan Advantage," with a preset quota of "10 Republicans" and "3 Democrats." The declared "intent" was to maximize Republican power because "electing Republicans is better than electing Democrats." Equally clear is the discriminatory effect. Undisputed facts show that Appellants' gerrymander was extreme, both statewide and in its individual districts—a clear statistical outlier. No "value-laden judgments," App. Br. 2, are necessary to decide this case; the constitutional violation is plain for all to see.

As several Justices have suggested, at minimum, districting plans designed under a *facially* discriminatory mandate—as the 2016 Plan was—are unconstitutional. In *Vieth*, for example, Justice Kennedy observed that if "a State passed an enactment that declared" expressly that districts "shall be drawn … to burden" one party, "we would surely conclude"—without further inquiry—"that the Constitution had been violated." 541 U.S. at 311-12.

At oral argument last Term, Justice Kennedy asked again whether a law expressly requiring partisan favoritism in districting would violate the Constitution. *See* Oral Argument Tr., *Gill v. Whitford*, No. 16-1161 (Oct. 3, 2017) at 26; Oral Argument Tr., *Benisek v. Lamone*, No. 17-333 (Mar. 28, 2018) at 45. In both cases, counsel for the State parties agreed

that it would. So did counsel for the legislative *amici* in *Gill*:

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

Gill Tr. 26-27.

Justice Kagan asked a similar question and received the same answer from the defendants' counsel:

> 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: … It would be [viewpoint discrimination] on its face.

Benisek Tr. 47.

Thus, as Justice Alito observed, if nothing else, cases like *this* one can be resolved "manageably":

> JUSTICE ALITO: … It's not a manageable standard that you cannot have a law that [expressly] says draw maps to favor one party or the other[?] *That seems like a perfectly manageable standard.*

Gill Tr. 20:8-15 (emphasis added). That cases with different facts might present different manageability questions is no reason to "stand impotent before an obvious instance of a manifestly unauthorized exercise of power." *Baker*, 369 U.S. at 217. This Court can easily condemn the extraordinary combination of express invidious intent and extreme discriminatory effect present here.

2. Appellants' "Line-Drawing" Argument Is A Red Herring

Appellants' chief argument as to why partisan-gerrymandering cases are not "manageable" is that it is impossible for courts to draw an "identifiable constitutional line" between an acceptable and an excessive amount of politics in districting. App. Br. 22. Courts, they insist, are not institutionally suited to "mak[e] value-laden judgments about how much politics is too much." *Id.* 2.

For starters, Appellants' argument is irrelevant in *this* case. Even if some partisan-gerrymandering cases required line-drawing of this sort, this case does not: the Court need only look at the face of the criteria that the Redistricting Committee formally adopted and the admitted packing and cracking that implemented their plan.

More generally, however, Appellants' argument misconceives the evil in a partisan-gerrymandering claim. *Common Cause* Appellees do not assert—and the District Court did not find—that the 2016 Plan is unconstitutional because "politics" *per se* played too great a role in its creation. Rather, they assert—and the District Court found—that the Plan is unconsti-

tutional because it was enacted with the intent to discriminate invidiously on the basis of political viewpoint and association. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (distinguishing mere use of "political classifications" from use of such classifications "in an invidious manner"). Thus, the question that courts are called upon to answer is not one of degree (was "politics" considered "too much?") but one of kind (were political classifications applied in an invidious manner?). *See generally* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). If the classification is invidious, that is all a plaintiff who has suffered resulting injury-in-fact must show.

This Court has recognized the distinction between invidious and non-invidious uses of political classifications. For example, it has held that "political considerations" may be taken into account in districting to "provide … proportional representation," *Gaffney v. Cummings*, 412 U.S. 735, 753-54 (1973), or to "avoid[] contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). At the same time, the Court has warned that the use of political classifications must be "nondiscriminatory." *Ibid.* In other words, the map-drawers may not employ them to "invidiously minimiz[e]" the "voting strength" of any "political group." *Gaffney*, 412 U.S. at 754; *see also Whitcomb v. Chavis*, 403 U.S. 124, 143-44 (1971) (districts are "subject to challenge" where they "operate to minimize or cancel out the voting strength of racial *or political* [groups]" (quot-

ing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) (emphasis added)); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347 (N.D. Ga. 2004) (striking down plan where "the policy of protecting incumbents" was "applied in a blatantly partisan and discriminatory manner, taking pains to protect only Democratic incumbents"), *summarily aff'd*, 542 U.S 947 (2004).

Appellants would have the Court believe that it has already blessed both the benign *and* the invidious use of political criteria in districting. App. Br. 47. This is simply not true. There is no decision of this Court holding that "a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336-37 (Stevens, J., dissenting). *Gaffney* expressly turned on the fact that the Legislature's purpose in employing political data was benign rather than "invidious[]." 412 U.S. at 754 ("[C]ourts have [no] constitutional warrant to invalidate a state plan … because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it."). *Hunt v. Cromartie*, 526 U.S. 541 (1999), and *Easley v. Cromartie*, 532 U.S. 234 (2001), both recognize that a plaintiff cannot prevail on a *racial*-gerrymandering claim when in fact the State's predominant motive was political. But neither *Cromartie* opinion "held" that the invidious use of political classifications to subordinate a minority party is ever constitutional, *cf.* App. Br. 7, and in *Easley*, political data was expressly used (as in *Gaffney*) to achieve "partisan balance throughout the State." 532 U.S. at 253. Nor could either case have held anything about partisan-gerrymandering claims, since none were before the Court in those cases.

Because the claims in this case challenge invidious partisan discrimination, rather than the presence of "political considerations" *per se*, Appellants' manageability concerns evaporate. Courts are well equipped to decide claims that a challenged action was invidiously motivated. They decide such claims routinely. Determinations of invidious intent do not require courts to assume the role of legislatures or make "value-laden judgments." App. Br. 2. When invidious intent and injury sufficient to establish standing are present, no more is needed.

Appellants demur that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan." App. Br. 48 (quoting *Vieth*, 541 U.S. at 344 (Souter, J., dissenting)). That may be true, but only in the same meaningless sense that it is impossible to eliminate racism from all human hearts or to prevent all tax cheating. That is no excuse for refusing to adjudicate race-discrimination or tax-fraud cases. The same goes here: public officials sworn to uphold the Constitution should be capable of refraining from invidious conduct, if they are told that is the law.[10]

At the same time, if the Court desires to limit judicial intervention to the most extreme cases of invid-

[10] For comparison's sake, when *Shaw v. Reno*, 509 U.S. 630 (1993), was decided, many (including the dissenters) predicted that *Shaw*'s open-ended "bizarreness" standard would spawn constant litigation. But map-drawers quickly got the Court's message, and in the 2000 round of redistricting that followed, there was virtually no *Shaw* litigation. *See* S. Issacharoff, P. Karlan, R. Pildes, & N. Persily, LAW OF DEMOCRACY 937 n.4 (5th ed. 2016).

ious intent, the District Court offered a solution: require the plaintiff to show that invidious intent *predominated* over all other considerations in the redistricting process. A119-20, 142-46. Appellants do not challenge the District Court's factual finding that this was the case here. *See*, *e.g.*, JA146 n.23, 166, 171. Indeed, it is indisputable that minimizing Democrats' political strength was the overriding purpose to which all other considerations were subordinated.

After complaining that a plain "invidious intent" standard is too demanding, Appellants turn around and criticize a "predominant invidious intent" standard as too inexact. App. Br. 48. But "courts routinely engage" in predominant-purpose inquiries "in many areas of constitutional jurisprudence." *City of Indianapolis v. Edmond*, 531 U.S. 32, 46-47 (2000). Especially relevant here, this Court has manageably applied a predominant-intent standard to *racial*-gerrymandering claims for over 20 years. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). In fact, given the frequency with which States raise "party, not race" defenses to racial-gerrymandering claims, courts are already adept at determining whether pursuit of partisan advantage was the predominant force behind the drawing of an individual district's lines. *See, e.g.*, *Harris*, 137 S. Ct. at 1503.

3. The Legal Principles Governing This Case Are Well-Settled And Within The Judiciary's Competence To Apply

Once *Common Cause* Appellees' claims are properly understood, it becomes clear that "judicially discoverable and manageable standards" exist for resolving them. As set forth in Point III, those "standards"—

e.g., the prohibition on unjustified invidious discrimination—come directly from this Court's well-established First Amendment, Equal Protection, and Elections Clause precedents. *Cf. Baker*, 369 U.S. at 226 ("Nor need … the Court … enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar….").

Importantly, *Baker*'s "discoverable and manageable standards" prong does not require an algorithmic test devoid of all human judgment. *See id.* at 283 (Frankfurter, J., dissenting) ("Questions have arisen under the Constitution to which adjudication gives answer although the criteria for decision are less than unwavering bright lines."). If it were otherwise, many—perhaps most—areas of constitutional and statutory jurisprudence would be nonjusticiable. *See, e.g.*, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (forfeiture "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense"); *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (probable cause is "a fluid concept … not readily, or even usefully, reduced to a neat set of legal rules"); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977) (practice violates § 1 of Sherman Act if, "weigh[ing] all the circumstances," it "impos[es] an unreasonable restraint on competition").

Baker's "standards" prong asks only whether the controversy literally "defies judicial treatment," 369 U.S. at 212, in that it would require the courts to dictate "policies … for matters not legal in nature," *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S.

221, 230 (1986)—for example, whether to recognize a foreign government, *Baker*, 369 U.S. at 212-14, or the appropriate "standards for the training … of the National Guard," *Gilligan*, 413 U.S. at 6. None of the tests advanced in this case resembles these quintessentially nonjudicial determinations. Instead, they call for the same familiar modes of inquiry—a search for invidious intent and adverse impact on the plaintiff—that courts make in racial-gerrymandering cases, employment-discrimination cases, and any number of others. These standards "hardly leave[] courts at sea." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

4. The Evidence That *Common Cause* Appellees Adduced To Satisfy These Legal Principles Was Familiar And Compelling

Not only are the proper legal standards well-known to the courts, but the evidence necessary to prove a partisan-gerrymandering claim is also familiar. The alternative maps relied upon by *Common Cause* Appellees are tools regularly used by courts in racial-gerrymandering and vote-dilution cases for analogous purposes. They can provide evidence not only of the district-specific effects of a gerrymander, but also of invidious intent and absence of legitimate justification. *See* Brief of Eric S. Lander as *Amicus Curiae*; Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* 18-24. And they are intuitive and easy for the courts and the public to understand.

Appellants ignore altogether the tens of thousands of alternative maps created by Drs. Mattingly and Chen and the District Court's fact-finding based on them. Instead, they focus on *other* forms of statistical evidence relied upon by *League* Appellees, such as the

efficiency gap, the mean-median difference, and other measures of plan-wide partisan bias. Appellants criticize these measures as lacking a baseline, as prone to false positives, as disguised measures of proportionality, and as unable to provide district-specific evidence. App. Br. 42-46. Because *Common Cause* Appellees did not rely on this evidence below, we leave it to *League* Appellees to respond.

But, crucially, these criticisms are completely irrelevant—*they cannot possibly apply*—to the large-scale simulations based on alternative maps relied upon by *Common Cause* Appellees. Those maps were all drawn atop the actual geography of North Carolina, taking the location of its voters and their voting histories as given. Thus, these alternative maps necessarily account for any natural "clustering" of partisans in particular regions (*e.g.*, urban areas). They are inherently district-specific, because they allow the comparison of a plaintiff's actual district to the full gamut of alternative districts in which that plaintiff's residential address might have been placed. And they do not in any way "measure deviations from proportional representation." App. Br. 50.[11]

[11] In the district court, Appellants lodged only two objections to the maps of Drs. Mattingly and Chen. They allude to just one here: that the premise underlying the hypothetical maps is that voters vote for a party and not a candidate. App. Br. 45-46. Of course, partisan preferences and turnout can vary from year to year, and candidates and issues do matter. But as the District Court noted in rejecting this argument, the challenged premise is the exact "same assumption" on which Appellants drew the gerrymandered 2016 Plan in the first place—and it works. A175; *see* Brief of Political Science Professors as *Amici Curiae*. Appellants, in any event, did not appeal this finding.

In *Gill*, this Court unanimously approved the use of one or more "hypothetical district[s]" to demonstrate cracking or packing on a district-by-district basis. 138 S. Ct. at 1931. As the concurrence explained, it is "not … hard" to demonstrate packing or cracking via "an alternative map (or set of alternative maps) … under which [the plaintiff's] vote would carry more weight." *Id.* at 1936. Notably, the concurrence approvingly cited the *amicus* brief of Dr. Chen and others doing similar work. *See* Brief of Political Geography Scholars as *Amici Curiae* 12-14, *Gill v. Whitford*, No. 16-1161 (describing computer simulation techniques for devising alternative maps). Multiple courts have found Dr. Chen's computational alternative-map analyses persuasive. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *League of Women Voters of Mich. v. Johnson*, 2018 U.S. Dist. LEXIS 202805, at *20-25 (E.D. Mich. Nov. 30, 2018); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D.N.C. 2017); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 818 (Pa. 2018). And, more generally, alternative maps are routinely used as "key evidence" in racial-gerrymandering cases. *Harris*, 581 U. S. at 1477-79; *Easley*, 532 U. S. at 258.

Where a single alternative map is used, as *League* Appellees did, it shows that it is possible to achieve a different electoral result than the map under attack. But because it is just one reference point, it cannot prove that the challenged map is itself discriminatory. On the other hand, the vast array of hypothetical maps generated by Drs. Mattingly and Chen, and relied upon by *Common Cause* Appellees, provides compelling evidence of invidious intent, dilutive ef-

fect, and lack of justification. By taking a large random sample from the universe of all available maps, such a collection establishes a baseline—a bell curve—of what the electoral landscape should look like absent partisan gerrymandering, and it permits the fact-finder to measure the deviation of the challenged map (and its individual districts) from that baseline. Here, the district court found, and Appellants do not dispute, that the 2016 Plan was an "extreme statistical outlier." A171. When the maps are analyzed on a district-specific level, they provide direct evidence of the burden that the gerrymander imposes on particular voters in individual districts. A51-65. Extreme deviations like those found here also permit the inference that the gerrymander was intentional. A165-66. Finally, the array of available neutral alternatives also proves the lack of justification for the gerrymander.[12]

There is nothing unusual about using statistical evidence to show the improbability that a given result was due to chance, or to prove the extremity of a practice's impact. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986) (use of statistical evidence to identify correlation between race and preferred candidates); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (use of statistical evidence to demonstrate intentional exclusion of blacks from grand jury); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (use of statistical evidence to demonstrate intentional racial discrimination in hiring). Alternative maps, and probability

[12] *League* Appellees agree that alternative maps can be used for all of these purposes, but relied upon them principally for the lack-of-justification prong.

distributions associated with large groups of them, are familiar and no more difficult to understand than a bell curve. Courts can use this evidence and draw correct conclusions from it. And most importantly, the District Court did so here—and Appellants do not claim otherwise.

III. THE 2016 PLAN AND ITS INDIVIDUAL DISTRICTS ARE UNCONSTITUTIONAL

For all their potshots at the District Court's legal tests, it is striking that Appellants offer practically no argument that the 2016 Plan is actually constitutional. They do not challenge any of the District Court's fact-finding (let alone as clearly erroneous), and they make no attempt to square the Plan's undisputedly invidious intent and undisputedly extreme effect with settled First Amendment, Equal Protection Clause, and Article I doctrine. Nor could they.

A. The Plan And Its Districts Violate The First Amendment

The First Amendment "safeguards" the "right" of all Americans to "participate in … political expression and political association." *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014). It protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), and it prohibits the governing majority from "prescrib[ing] what shall be orthodox in politics," *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). In this way, the First Amendment serves as "a vital guarantee of democratic self-government." *U.S. Telecom Ass'n v.*

FCC, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

In particular, the First Amendment does not permit the government "to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 572 U.S. at 191. It therefore prohibits State action that distorts "[t]he free functioning of the electoral process" or "tips the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). This includes retaliating against public employees who belong to the out party, *see ibid.*; or permitting "[g]overnment funds [to] be expended for the benefit of one political party," *Branti v. Finkel*, 445 U.S. 507, 517 n.12 (1980); or even "ordering the removal of … books written by" opposing partisans from public libraries, *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982).

"[T]here is no redistricting exception to this well-established First Amendment jurisprudence." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016). Indeed, as six Justices have agreed, partisan gerrymandering strikes at the heart of these First Amendment values. *See Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring); *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *id.* at 324-25 (Stevens, J., dissenting); *see generally* Brief of Floyd Abrams Institute for Freedom of Expression as *Amicus Curiae*.

Here, as the District Court held, the 2016 Plan runs afoul of at least four well-established lines of First Amendment precedent. A275-279. First, the Plan expressly burdens protected activity based on the "motivating ideology … of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 829 (1995). Second, the Plan expressly regulates protected activity "based on the identity of the speaker." *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Third, by "penalizing" individuals "because of … their association with a political party[] or their expression of political views," the Plan constitutes unlawful retaliation for exercise of First Amendment rights. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1416 (2016). And fourth, the Plan does not constitute a "reasonable, non-discriminatory" election regulation. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Appellants make no attempt to reconcile the Plan with these well-established precedents; indeed, they cite no First Amendment case law at all.

The District Court correctly found that these violations caused the North Carolina Democratic Party and the voter-plaintiffs to suffer well-recognized First Amendment harms to political expression and association, including "decreased ability to mobilize their party's base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." A70; *ante* at 11-12, 31-32. These findings were not disputed below and are not challenged here.

Lastly, the District Court correctly held that this burdening of First Amendment rights was not narrowly tailored to a compelling State interest. A111. Indeed, no Justice of this Court has ever suggested that partisan gerrymandering affirmatively serves any such interest. In the District Court, Appellants "never ... argued … that the 2016 Plan's express partisan discrimination advance[d] *any* democratic, constitutional, or public interest." A110. In a footnote,

Appellants now concoct the notion that the Plan "avoids the concentration of majority-party voters in a small number of districts." App. Br. 50 n.9. This newfound and fanciful "interest" is nothing less than the claim that it is a positive good to crack Democratic constituencies in order to increase Republican power. Nakedly seeking partisan advantage is not a legitimate State interest.

Appellants' criticisms of the District Court's First Amendment analysis miss the mark. First, for the reasons described above, it would not "render unlawful *all* consideration of political affiliation in districting." App. Br. 52, 54. It would ban only *invidious* discrimination on the basis of political expression and association, when not narrowly tailored to a compelling State interest. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring). Second, the District Court did not err by refusing to require some heightened demonstration of effect or burden. "This Court's decisions have prohibited" State action that unjustifiably burdens First Amendment rights, "however slight[ly]." *Elrod*, 427 U.S. at 358 n.11. Harm sufficient to constitute standing is all that is required.

In any event, the injury to *Common Cause* Appellees' First Amendment interests was far from "*de minimis*." App. Br. 55. The voter-plaintiffs and the North Carolina Democratic Party had their voting power diluted to an extreme degree and were significantly impaired in their ability to fundraise and to recruit candidates and volunteers. *See Anderson*, 460 U.S. at 792 (election law inflicted First Amendment harm by making "[v]olunteers … more difficult to re-

cruit," "contributions … more difficult to secure," and "voters … less interested in the campaign").

B. The Plan And Its Districts Violate The Equal Protection Clause

The Equal Protection Clause requires "that all persons similarly situated … be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It has long prohibited State action that intentionally disfavors a class of citizens absent sufficient justification. Where a constitutional right is burdened, that means narrow tailoring to a compelling State interest. *Id.* at 440. The District Court faithfully applied this precedent via its "three-step framework," which required "discriminatory intent," "discriminatory effects," and lack of justification in terms of a "legitimate redistricting objective." A138-39.

The District Court correctly found that the cracking and packing of 12 of the 13 districts in the 2016 Plan was motivated—not just in part, but *predominantly*—by the invidious intent to burden Democrats' political rights. A35. This was not meaningfully disputed below, and Appellants themselves, their mapdrawer, and their experts have all admitted as much. Moreover, Drs. Mattingly and Chen's simulations controlled for both "clustering" of Democrats and incumbent protection and showed that neither could explain the extreme partisan deviation of these districts. A211-12.

The District Court also correctly found that the 2016 Plan had a "discriminatory effect." The easy-to-understand evidence of Drs. Mattingly and Chen's alternative maps—unchallenged on appeal—proved

this convincingly. The District Court believed that the effect prong required a showing of long-term harm—*i.e.*, "that the dilution of the votes of supporters of [the] disfavored party … is likely to persist in subsequent elections." A152. It found that requirement met based on the actual election results under the 2016 Plan and its predecessor plan, as well as the statistical and simulation analyses of multiple highly qualified experts. A168-70. Appellants do not challenge these factual findings.

If anything, this "effect" analysis was too demanding. Setting aside *Davis v. Bandemer*—whose "consistent degradation" test has been roundly criticized—the "effect" inquiry in this Court's Equal Protection cases has been whether the challenged intentional discrimination caused the plaintiff to suffer an Article III injury-in-fact. Faithful application of an invidious-intent requirement (especially with a predominance gloss) will appropriately limit judicial intervention; there is no need to engraft a "durability" requirement foreign to Equal Protection doctrine. Indeed, such a requirement would perversely give legislators *carte blanche* to enact *seriatim* the most extreme gerrymanders, one for each new election cycle.

Finally, the District Court correctly held that Appellants' intentional discrimination was not tailored to any rational—let alone compelling—State interest. A222. Appellants did not contend otherwise below.

Appellants' chief complaint with the District Court's Equal Protection test is that it does not "answer the … question of how much [politics] is too much." App. Br. 47. However, as noted above, *Common Cause* Appellees do not complain of "too much"

politics in the districting process; they complain of invidious discrimination. Appellants also protest that the District Court did not select a quantitative threshold for "[h]ow much [vote] dilution must occur," "[h]ow likely … the dilutive effect [must] be to persist," and "for how lon[g]." *Id.* 50 (emphases deleted). As discussed above, these questions are beside the point. There is no requirement in Equal Protection case law that a violation be of long duration. Similarly, there is no requirement that it be extreme. Injury-in-fact sufficient to establish standing should suffice. But even if these requirements were grafted onto the test, the District Court found, based on undisputed evidence not challenged on appeal, that the dilutive effects of the 2016 Plan were both extreme and enduring. Those findings make this case one of clear unconstitutionality.

C. The Plan And Its Districts Violate Article I

"Through the Elections Clause [Art. I, § 4], the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001). By contrast, Article I, § 2 grants "the People"—and *not* State legislatures—the power to "cho[ose]" representatives. Together, these clauses provide a "safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves," thus "ensur[ing] to the *people* their rights of election." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (citation omitted).

As this Court has made clear, the Elections Clause is not merely a grant of power; it is also a limitation. States have no "reserved" powers to regulate federal elections; they may do only what "the exclusive delegation of power under the Elections Clause" permits them to do. *Gralike*, 531 U.S. at 522-23; *Thornton*, 514 U.S. at 805. Beyond the boundaries of that Clause's delegated authority, "the [S]tates can exercise no powers whatsoever" to regulate congressional elections. *Gralike*, 531 U.S. at 519 (quoting Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858)). When States attempt to do so, their acts are *ultra vires* and "void." *Id.* at 528 (Kennedy, J., concurring).

Although the Elections Clause grants "broad power" to "issue procedural regulations," several limits are clear. *Id.* at 523-24. Namely, the Clause 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." *Ibid*. These limits follow from Article I, § 2, which keeps political officials electorally accountable by assigning the task of "cho[osing]" representatives to "the People" alone. *See Thornton*, 514 U.S. at 833 & n.47. As the District Court unanimously found, the 2016 Plan is *ultra vires* under each of these three tests. A303; *see also A. Philip Randolph Inst. v. Householder*, 2019 U.S. Dist. LEXIS 24736, at *27-31 (S.D. Ohio Feb. 15, 2019) (recognizing that, in partisan-gerrymandering context, Elections Clause provides a basis for challenging both individual districts and "the entire districting plan").

The comparison with *Gralike* is inescapable: there, Missouri adopted a law requiring candidates' positions on term limits to be included on the ballot. This exceeded Missouri's "delegated power" under the Elections Clause because it was "designed to favor candidates" with one position and "disfavor those" with an opposing view—and thereby, to "dictate electoral outcomes." 531 U.S. at 523-26. But Missouri's attempt to bias voters' choices by providing them with selected information was subtle compared to North Carolina's approach. The 2016 Plan *literally* sought to "dictate" the outcome of North Carolina's congressional elections, establishing quotas for the State's delegation ("10 Republicans" and "3 Democrats"), and selecting the party of each individual district's representative, before a single vote was cast.

Appellants make no attempt to explain how the 2016 Plan can satisfy the Elections Clause if the amendment struck down in *Gralike* could not. Indeed, their brief does not even cite *Gralike* (or its predecessor, *Thornton*). Rather than addressing this Court's Elections Clause jurisprudence, Appellants revert to their perennial theme that Article I, §§ 2 and 4 do not specify a quantitative "limit" on "political considerations … [in] districting." App. Br. 56. As explained above, this "line-drawing" critique misses the mark. Appellants also suggest that Appellees' Elections Clause claims are *really* non-justiciable Guarantee Clause claims. But *Common Cause* Appellees' claims are premised on Article I, §§ 2 and 4 and this Court's decisions in *Gralike* and *Thornton*, not the Guarantee Clause. As this Court made clear in *Baker*, the fact that Appellees "might conceivably have added a claim under the Guarant[ee] Clause" does not mean that

they "may not be heard" on the claims "which in fact they tender." 369 U.S. at 226-27.

D. Appellants Offer No Colorable Defense Of The Plan On The Merits

Almost as an afterthought, Appellants assert that the 2016 Plan is constitutional—despite its undisputed invidious motivation, its express viewpoint discrimination, and its extreme packing and cracking—because the resulting map divided fewer counties and precincts than two previous maps did. But this argument is doubly flawed.

First, Appellants fail to mention that the "maps from the 1990s and 2000s" that they supposedly improved upon were horrendously misshapen. App. Br. 58. In North Carolina's 1992 map, for example, eight of the 12 districts were among the most bizarrely shaped in the country. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 571-73 & tbl. 6 (1993) (perimeter measure). One of them—the infamous CD12 that spawned *Shaw v. Reno*—was the second "worst [district] in the nation." *Id.* at 566. That the 2016 Plan may look better than this, at least superficially, is not saying much.

Second, and more importantly, compliance with "traditional redistricting principles" such as compactness and preservation of political subdivisions is no defense to a charge of gerrymandering. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 798-99 (2017). The Constitution "does not prohibit misshapen districts. It prohibits unjustified … classifica-

tions." *Ibid.* The infirmity of a gerrymander, in other words, "stems from the [improper] purpose," not the "manifestation" of that purpose in the form of divided counties or irregular borders. *Ibid.*; *see also Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring) ("With [modern] tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements.").

Appellants also argue—again, as an afterthought—that they "did not set out to pursue partisan advantage at all costs." App. Br. 59-60. Even if true, "at all costs" is not the standard, and Appellants do not dispute the District Court's unanimous finding that invidious partisanship was the Legislature's predominant motivation. In any event, Appellants' assertion is demonstrably false. Appellant Lewis openly admitted that he proposed a 10-3 map only "because [he] d[id] not believe it's possible to draw a map with 11 Republicans and 2 Democrats." Drs. Chen and Mattingly's tens of thousands of alternative plans confirm for all to see that what Lewis said was true: Appellants could not have drawn a more extremely partisan map if they had tried.

CONCLUSION

For the reasons above, this Court should affirm the District Court's judgment.

Respectfully submitted,

EMMET J. BONDURANT II
Counsel of Record
BENJAMIN W. THORPE
BONDURANT MIXSON & ELMORE LLP
3900 One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
bondurant@bmelaw.com
(404) 881-4100

GREGORY L. DISKANT
JONAH M. KNOBLER
PETER A. NELSON
ELENA STEIGER REICH
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Ave. of the Americas
New York, NY 10036

EDWIN M. SPEAS, JR.
STEVEN B. EPSTEIN
CAROLINE P. MACKIE
POYNER SPRUILL LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

RICHARD H. PILDES
507 Vanderbilt Hall
40 Washington Sq. South
New York, NY 10012

Counsel for Common Cause *Appellees*

March 4, 2019