Nos. 19-70, 19-110

IN THE

Supreme Court of the United States

LARRY HOUSEHOLDER, ET AL.,
APPELLANTS,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, ET AL.,
APPELLEES.

STEVE CHABOT, ET AL.,
APPELLANTS,

v.

OHIO A. PHILIP RANDOLPH INSTITUTE, ET AL.,
APPELLEES.

On Appeals from the United States District Court for the Southern District of Ohio

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF *AMICUS CURIAE* STEPHEN M. SHAPIRO IN SUPPORT OF APPELLEES

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August 12, 2019

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES

Pursuant to Rule 37.2(b), Stephen M. Shapiro respectfully moves for leave to file an *amicus curiae* brief in support of appellees. *Amicus* provided timely notice of his intent to file a brief to counsel for appellants on July 24, 2019 (No. 19-70) and July 25, 2019 (No. 19-110), and to counsel for appellees on July 24, 2019 (same in both Nos. 19-70 and 19-110). Appellants granted consent. Appellees' counsel withheld consent on August 2, 2019.

The attached brief serves the purposes of an *amicus curiae* brief outlined in Rule 37.1 because it brings to the Court's attention relevant argument that appellees are unlikely to bring to the Court, based on consultation with their counsel.

These appeals are from the judgment below in a partisan gerrymandering case. This Court's opinion in *Rucho v. Common Cause*, No. 18-422 (June 27, 2019), holding such claims nonjusticiable, is likely to be dispositive here. But arguments that raise justifications for this Court to reassess *Rucho*'s conclusions could have significance for resolving cases such as these. The argument made in this brief, discussing key precedents of this Court that are now in conflict with *Rucho*—but were not discussed in either the Court's opinion or in the dissent—provide relevant matter that may help the Court in deciding these appeals.

The attached brief focuses on Article I of the Constitution, which allocates the specific authorities and duties that are directly pertinent to electing Representatives and to enacting districts for those congressional elections. This brief lays out this Court's precedents that define these authorities and interpret how the Constitution assigns them among voters, state legislatures, and Congress—and how these definitions and assignments diverge from key statements in *Rucho* that are germane to this case.

Amicus has experience enabling him to offer such argument in a manner helpful to the Court. He has participated in both partisan gerrymandering efforts, and in political and legal efforts to restrain it—in furtherance of his long interest in securing effective representation for himself and other voters. While serving as a Democratic precinct chair in Maryland during the 2011 redistricting process, *Amicus* drew and proposed six maps incorporating varying degrees of political and partisan goals sought by himself and party leaders. *Amicus* used this experience in drafting the original and first amended complaints, with six maps as exhibits—four gerrymandered and two not—in what became *Lamone v. Benisek*, No. 18-726 (June 27, 2019). *Amicus* withdrew as a plaintiff in that case in 2016.

Amicus applied insights he learned from crafting and evaluating gerrymandered maps to craft a standard that would afford courts practical guidance for determining Article I violations, and help state legislatures in designing districts with permissible degrees of partisan considerations.

In light of the foregoing, *Amicus* respectfully requests that the Court grant this motion and accept the attached brief for filing and consideration in these appeals.

Respectfully submitted,

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INTEREST OF THE *AMICUS*[1]

Amicus Stephen M. Shapiro lives in Maryland. His interest is in vindicating rights that preserve effective representation for himself and other voters. He filed the original complaint in what became *Lamone v. Benisek*, pro se, in 2013, and was the petitioner when that case was before this Court as *Shapiro v. McManus* in 2015. After the Court remanded it, plaintiffs narrowed their claims and *amicus* withdrew to avoid challenge to his standing.

SUMMARY OF ARGUMENT

Appellants rely on this Court's recent opinion in *Rucho v. Common Cause*, No. 18-422 (June 27, 2019), which held partisan gerrymandering claims nonjusticiable. Slip op. at 30. But key constitutional issues and conflicting precedents of this Court—conflicts created by but not addressed in its *Rucho* opinion—warrant further review before *Rucho* is applied to this case. The Court should use this case to reassess *Rucho*'s holding with respect to Article I.

The Court observed, based on language from its racial gerrymandering cases, that some partisan gerrymandering comports with equal protection. *Id.* at 12. However, the Court could not define partisan gerrymandering that would be inconsistent with

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[1] *Amicus* provided counsel of record for all parties timely notice of his intent to file. Both appellants granted consent via email. Appellees withheld consent. No person other than *amicus* and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

equal protection or other constitutional provisions. But with respect to congressional districts, this Court's Article I precedents hold that a legislature may not "favor or disfavor a class of candidates" through regulations it enacts under the Elections Clause. *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833–34 (1995)).

The Court in *Rucho* was "unconvinced by that novel approach," which it attributed to the District Court. Slip op. at 29. However, both the approach and language used by the District Court come from these longstanding precedents. *Rucho* is in conflict with *Gralike* and *U.S. Term Limits*, leaving them with uncertain viability. Since *Rucho* did not address these relevant precedents, the Court should use this case to revisit *Rucho*'s rejection of Article I as a source of legal standards to limit partisan gerrymandering, *see id.* at 29–30.[2] This brief shows that standards can be discovered from Article I.

Significantly, the very language that this Court quotes in *Rucho* as affording actionable guidance to *state* courts, *id.* at 31–32 ("no districting plan 'shall be drawn with the intent to favor or disfavor a political party'"), is nearly identical to the language from *Gralike* and *U.S. Term Limits*. That language, which this Court developed and applied in those precedents, supplies the same limits that the Court

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[2] The similar rejection of Article I as a source of partisan gerrymandering standards in *Vieth* v. *Jubelirer*, 541 U.S. 267, 305 (2004), was based on its equal protection analysis; *Vieth* also did not address the Court's key Article I precedents. *See, e.g.*, *id.* at 284–90.

indicated would be actionable in *Rucho*, and which the Court can and should apply in this case.

A cracking and packing standard is similarly discoverable and even more manageable. It gives definition to actions that "favor or disfavor a political party" in the redistricting context. Cracking and packing voters disfavored by a legislature in order to favor its preferred candidates is irreconcilable with *Gralike* and *U.S. Term Limits.* This standard could be readily applied by courts and legislatures.

Article I's bar to cracking and packing has no sounding in a claim for proportionality, nor does its application rely upon any such baseline or variance from it. For example, the constitutionality of an Ohio configuration of ten Republican-leaning districts and six Democratic-leaning districts would hinge only on whether the legislature cracked and packed Democratic voters in individual districts to create it. The proportion of districts leaning to one party or another, or their degree of partisan leaning, is irrelevant. Out of thousands of maps a legislature may draw, it can choose any that do not crack and pack—allowing for a range of political, even partisan, considerations. The relevant question is not whether partisan considerations predominated, akin to racial gerrymandering cases under the Voting Rights Act, but whether the *intent to favor* Republicans *and disfavor* Democrats predominated.

Cracking poses a particular degree of harm to cracked voters, with respect to their influence on the election outcome as well as to their follow-on representation after the election. Justice Alito

described the relevant link between a district's design and representation in his dissent in *Virginia House of Delegates v. Bethune-Hill*, No. 18-281 (June 17, 2019).

ARGUMENT

I. Article I Forbids Favoring or Disfavoring a Political Party Through a District's Design

This Court's Article I precedents are clear: a legislature's authority to regulate congressional elections under the Elections Clause is a *duty* to *facilitate voters' right to choose* Representatives. *Smiley v. Holm*, 285 U.S. 355, 365–66 (1932).

> The question then is whether the [Elections Clause] * * * invests the Legislature with a particular authority, and imposes upon it a corresponding duty * * * * [The Elections Clause] embrace[s] authority * * * in short, to enact the numerous requirements as to procedure and safeguards * * * necessary * * * *to enforce the fundamental right involved*.

Id. (emphasis added). "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Gralike*, 531 U.S. at 523–24 (quoting *U.S. Term Limits*, 514 U.S. at 833–34). Therefore a legislature has no authority to favor the election of candidates of the political party *it* prefers through the design of districts it enacts. *See id.*

The Court's holdings in these cases, and their application to congressional districts, undisputedly follow Article I's mandate: voters—and not state legislatures—choose Representatives. *U. S. Term Limits*, 514 U. S. at 813–14 (recounting the Framers' positions that the People should choose their Representatives); *id.* at 891 (Thomas, J., dissenting) (recounting the Framers' drafting of Article I, § 2). Such choice is *exclusive* to voters. *Id.* at 857, 882 (finding the clause leaves the "selection of the Representatives * * * entirely to the people" with "virtually unfettered discretion"). *See also Wesberry v. Sanders*, 376 U.S. 1, 12–13 (1964) (recounting the Framers' negotiation of the Grand Compromise that they embodied in Article I, §§ 2 & 3). A legislature abridges voters' Article I, § 2 right to choose when it cracks and packs them in order to favor *its* choice.

Prior to the adoption of the Seventeenth Amendment, state legislatures chose Senators. U.S. Const. art. I, § 3, cl. 1 (amended 1913); *see also Wesberry*, 376 U.S. at 12–13 (contrasting Article I, §§ 2 & 3); *Smiley*, 285 U.S. at 365–66 (contrasting Article I, §§ 3 & 4). This Court distinguished districting, as being part of a legislature's *lawmaking* authority pursuant to the Elections Clause, *Smiley*, 285 U.S. at 366, from its authority to "act as an *electoral* body, as in the choice of United States Senators," *id.* at 365. *Smiley*'s explicit, mutually-exclusive division of legislative and electoral authority further confirms that the legislature's duty to enact districts affords no authority to thereby intrude upon the choosing of Representatives. A holding that a legislature may use this legislative authority to share in choosing

Representatives would imply that Congress may also use *its* Elections Clause authority to impose districts favoring the election of Representatives of its majority party. *See id.* at 366–67 (holding that the Elections Clause authorizes Congress to enact "regulations of the same general character that the legislature of the State is authorized to prescribe"). This would be absurd but no more impermissible than such acts by a state legislature, as in this case.

In *Gralike*, this Court struck down a ballot design because it placed a negative notation by the name of a candidate with whom the state disagreed on a policy issue. 531 U.S. at 514–15, 523. In *U.S. Term Limits*, this Court similarly struck down state-imposed term limits as abridging voters' right to choose Representatives, 514 U.S. at 820–21, and exceeding the state's authority to set the "manner" of congressional elections, 514 U.S. at 828. This Court held such term limits impermissibly "dictate electoral outcomes" and "favor or disfavor a class of candidates." *See id.* at 833–34. Designing districts to favor candidates of one party and disfavor those of the other in order to affect the outcome describes behavior these cases explicitly forbid.

In short, Article I allocates exclusive authorities and duties as to congressional elections. This is not inconsistent with the Court's remark in *Rucho* that the Equal Protection Clause affords such partisan classes less protection than it affords racial classes of voters and candidates. *See* slip op. at 21. But *Rucho*'s statements that the Constitution does not currently limit enacting districts with the "intent to favor or disfavor a political party," slip op. at 31–32,

and that this practice is "permissible," *id.* at 23, as well as *Rucho*'s holding that courts cannot curb it, *see id.* at 30, cannot be reconciled with Article I.

The Court should reconfirm its consistent teachings of *Smiley*, *U.S. Term Limits*, and *Gralike*—that voters hold exclusive electoral authority to choose Representatives, and that a legislature exceeds its legislative authority and intrudes upon voters' electoral authority when it enacts election regulations designed to favor the class of candidates it prefers. These teachings compel a holding that a legislature may not design districts to favor candidates of the party it prefers.

II. Cracking and Packing is a Discoverable and Manageable Standard for Article I Violations

Cracking and packing[3] disfavored voters among congressional districts cannot be distinguished from the behavior condemned by *Gralike* and *U.S. Term*

[3] Where a legislature enacts a district that splits adjacent or aggregates distant precincts largely comprised of voters having a voting history or registration supporting candidates of the party disfavored by the legislature, and assigns such precincts to one or more districts in a manner that (1) dilutes the influence of such voters; and (2) shows that the legislature's clearly dominant and controlling rationale was to reduce such voters' influence on the election results and thereby favor the legislature's choice of the party of those Representatives. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2552–53 (2018) (quoting *Miller v. Johnson,* 515 U.S. 900, 913 (1995) ("the legislature's dominant and controlling rationale")); *cf. Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (defining cracking and packing in the racial gerrymandering context).

Limits as inconsistent with Article I. This practice is patently irreconcilable with those precedents.

Justiciability, particularly with respect to the availability of a standard, is inextricably linked to consideration of the merits—i.e., whether a standard manageably defines a violation of a specific constitutional provision based on its text and this Court's precedents. *See Baker v. Carr,* 369 U.S. 186, 198, 211, 214 (1962). "No test * * * can possibly be successful unless one knows what he is testing for." *Vieth v. Jubelirer*, 541 U.S. 267, 297 (2004). Cracking and packing disfavored voters defines and serves to test for an actionable violation of Article I.[4]

This Court in *Rucho* noted that prospective language directing that "no districting plan shall be drawn with the intent to favor or disfavor a political party", slip op. at 31–32, "*can* provide standards and guidance for * * * courts to apply," *id.* at 31 (emphasis added). But these words are nearly verbatim the Court's own interpretation of Article I's limits. *See* discussion of *Gralike supra* p.4. This language cited in *Rucho* could thus be a sufficient legal standard by which to evaluate the districts in this case. Cracking and packing is a more specific

[4] Cracking and packing justiciably violates Article I, aside from any sounding in the Guarantee Clause. *But see Rucho*, slip op. at 30. The Court earlier examined at length whether the prospective applicability of that Clause automatically renders a claim's consideration under other constitutional provisions nonjusticiable. *Baker*, 369 U.S. 223–28. The Court found such applicability no bar to consideration of the claim under other relevant constitutional provisions for which discoverable and manageable standards exist. *Id.* (distinguishing *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150–51).

standard, defining when state action impermissibly favors or disfavors a political party in the redistricting context.

Cracking and packing identifies a discoverable and manageable floor under which the Court should not permit the design of congressional districts to descend consistent with Article I. *Cf. Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (noting the judiciary's duty to determine constitutional violations, while leaving to political officials the "wide range of [constitutional] 'judgment calls'").

Remediation of cracking and packing would not reallocate partisan power indiscriminately; it would strip unauthorized power usurped by a legislature to intrude upon the rightful power of voters. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (Ginsburg, J., concurring); *id.* at 857 (Kavanaugh, J., concurring). Guidance to remediate only what is impermissible could be adopted here. *See* Order at 33–39*, Perez v. Perry,* No. 11-cv-360 (W.D. Tex. Mar. 19, 2012), ECF No. 691 (implementing remediation guidance provided by *Perry v. Perez*, 565 U.S. 388, 392–95 (2012)).

First, cracking and packing is discoverable. It is what a legislature does, intentionally and exclusively, to favor and disfavor both voters and candidates, by party, in order to influence general election outcomes—i.e., to seek to preselect the party of a state's Representatives. This specific exclusive purpose distinguishes cracking and packing from incorporation of other partisan considerations. It is not just a matter of *which* considerations a

legislature incorporates but *how* it incorporates them. Cracking does not accrue merely from incorporating even partisan considerations that are incidental to legitimate representational purposes.

Cracking is identified by looking to how precincts are arranged within and among districts, and their partisan compositions, to determine whether the arrangement dilutes the influence of voters within allegedly-cracked precincts *in order to favor* the legislature's preferred election outcome. *Cf. Miller v. Johnson,* 515 U.S. 900, 911–14 (1995) (contrasting intent and effects-based claims). As proposed, this illicit purpose must be the "clearly dominant and compelling rationale" for the dilution. *See supra* p.7 n.3. Said another way, such dilutive features must be highly unlikely to have been incorporated *but for* the purpose to favor or disfavor.

The inquiry focuses as much or more on the arrangement of precincts and resulting effects on voters *in their challenged districts* than on the arrangement and effects of a prior map—though the change in effects from moving boundaries may be relevant. *See Johnson*, 515 U.S. at 917. For example, the voting history and locations of other precincts that allegedly-cracked precincts are now joined to within a district may be more telling as to intent than those of the adjacent precincts that are now in another district. In other cases, large adjacent areas split so that each half is diluted within its district may tell a compelling story.

Cracking and packing is distinguished from maintaining voters who favor a party, and who may live within a compact area, within one district (i.e.,

"self-packing"). That is not packing. *Contra Vieth*, 541 U.S. at 289–90 (analyzing a much broader definition). It is distinguished from assigning voters among districts for a legitimate purpose, even where such placement may *also* have desired partisan effects. Significantly, such *partisan* considerations are only a subset of the wide range of *political* considerations relevant in redistricting. Examples of political considerations that a legislature may opt to incorporate include which communities of interest should be kept together, which cities or other locations the legislature prefers to be the centers of districts, and whether to avoid contests between incumbents. Cracking and packing are rarely if ever needed to achieve these or many other objectives.[5]

Permissible political considerations could well include even partisan considerations as to how prospective maps might advantage or disadvantage specific candidates or parties—as long as those effects are not achieved through cracking and packing. Including precincts more favorable to a party or candidate, and excluding less favorable territory does not compel cracking and packing—but *this favoritism becomes impermissible at the degree when it does compel it*: at the point it dilutes voters to achieve such favoritism, but to achieve little else

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[5] Cracking and packing districts could remain permissible in pursuit of a legitimate goal. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973). *Gaffney* involved such a goal, related to representation, and *Gaffney* distinguished its justification from one where "racial or political groups have [had] * * * their voting strength invidiously minimized." *Id.* at 754; *see also Karcher v. Daggett,* 462 U.S. 725, 730–31, 740 (1983).

that facilitates representation. *Cf.* Smiley, 285 U.S. at 366 ("to enforce the fundamental right involved").

The cognizable harm of cracking and packing upon disfavored voters—and the impact upon the House of Representatives—is striking. Not only does it directly reduce such voters' influence on the election outcome, but it further impacts their follow-on representation after the election. Justice Alito described the representational impacts of a district's design in *Virginia House of Delegates v. Bethune-Hill*, No. 18-281, slip op. at 2 (Alito, J., dissenting) (June 17, 2019):

> Each legislator represents * * * a particular set of constituents with particular interests and views * * * * [that] have an important effect on everything that a legislator does. * * * * [I]t matters a lot how voters with shared interests and views are concentrated or split up. The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.[6]

Id. Few factors can impact "everything that a [Representative] does" to represent constituents, and "the overall work of the [House]," as much as her party and that of her colleagues—and few factors will decide her party as much as how voters favoring or disfavoring a party "are concentrated or split up."

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[6] Justice Story similarly described the duties of Representatives nearly two hundred years ago. *See* Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. IX, § 573 (1833).

A cracked voter's representation is impacted, just as his influence upon the election outcome is reduced. These harms are even more cognizable here, in the Article I context of congressional districts, than in the state legislative districts in *Bethune-Hill*.[7] Legislators here are *Representatives*, and the representation they provide stems from Article I, as does the state legislature's duty to support and not abridge or impair it. *Cf. Smiley*, 285 U.S. at 365–66.

Second, it is manageable for courts to identify cracking and packing and for legislatures to avoid it. *See, e.g.*, J.S. App. 216–17, 224–25, 227–74, *Rucho v. Common Cause*, No. 18-422 (U.S. June 27, 2019); J.S. 7a–12a, 52a–56a, *Lamone v. Benisek*, No. 18-726 (U.S. June 27, 2019); *Perez v. Abbott*, 253 F. Supp. 3d 864, 950–55 (W.D. Tex. 2017).

Cracking and packing, as defined here, does not require experts or judges to examine thousands of alternative maps, review complex social science, predict, await, or analyze results from future elections, or make findings of entrenchment or anticompetitiveness. While a legislature may well use expert analyses in order to crack and pack to maximum effect, detection and avoidance of such behavior is relatively simple.[8] A map does not wind up being drawn to crack and pack voters along racial

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[7] And Article I cannot be interpreted as empowering state legislatures to apply such profound control over everything a Representative does to represent her constituents or, cumulatively, on the overall work of the Peoples' House.

[8] Details on the roles of experts and computer programs can be quite probative of intent. *See, e.g.*, J.S. 243a–249a, No. 19-70.

or partisan lines—without any plausibly legitimate reason—by accident. Judicial overreach into maps not impermissibly cracking and packing is unlikely.

Longstanding jurisprudence has afforded District Courts experience in determining whether reasons for district lines are legitimate or arbitrary. *See, e.g.*, *Johnson*, 515 U.S. at 917; *Voinovich v. Quilter*, 507 U.S. 146, 160–62 (1993)*; Karcher v. Daggett*, 462 U.S. 725, 730–31, 740 (1983); *Roman v. Sincock*, 377 U.S. 695, 710 (1964).

Even though cracking and packing may not be identified with the same mechanical precision as districts with unequal populations, its manageability is comparable to that of standards established by this Court to enforce a wide scope of constitutional provisions. *See, e.g.*, *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (Takings); *INS v. Chadha*, 462 U.S. 919 (1983) (Bicameralism & Presentment); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936) (Case or Controversy; Disposal Power); *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (Commerce). And "courts might be justified in accepting a modest degree of unmanageability to enforce a [clear] constitutional command * * *." *Vieth*, 541 U.S. at 286. *Cf. Kerr v. Hickenlooper*, 759 F.3d 1186, 1193–94 (10th Cir. 2014) (Gorsuch, J., dissenting from the denial of reh'g en banc) ("[P]rinciples and precedents don't always dictate a single right answer.").

In this case, from Ohio, the District Court found that predominantly-Democratic Cincinnati was split in half, with each half paired with a predominantly-Republican area to create two Republican-leaning

districts. J.S. 264a, *Householder*, No. 19-70. The District Court looked to the "historical voting patterns of the precincts included in, or excluded from, the district." *Id.* *See also id.* at 270a-271a. The District Court found no legitimate reason for this division of Cincinnati. *Id.* at 265a–267a.

The District Court also found that cracking and packing "support an inference of partisan intent," *id.* at 234a (citing *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018) (noting the typical use of circumstantial evidence to find the "legislature's dominant and controlling rationale")). Incorporating this reasoning and standard, a finding of cracking and packing as defined in this brief, *see supra* p.7 n.3, requires a finding of the legislature's "clearly dominant and controlling rationale."

The District Court further looked to the effects on subsequent election results and made findings as to entrenchment and competitiveness. *See, e.g.*, *id.* at 267a–271a. While this inquiry added to the evidence of cracking and packing, such evidence was not and should not typically be critical to finding cracking and packing—and the utility of such evidence in further confirming a cognizable violation in other cases may well be outweighed by the costs of delay and litigation expense for parties, and perhaps the impact on manageability for the courts.

III. Cracking and Packing can Similarly Test for Equal Protection and First Amendment Violations

The Equal Protection Clause requires a state to treat its citizens "alike." *City of Cleburne v.*

Cleburne Living Ctr., 473 U.S. 432 ,439–40 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Whether treatment is "fair" is irrelevant. Cracking disfavored voters to minimize their influence on the election outcome has the intent and effect of making their influence *unlike* that of favored voters—which is impermissible. *See id.* The degree of harm is within the definition of cracking. *See supra* p.7 n.3. It makes no difference if Appellants had chosen to crack less forcefully among individual districts, with a goal to tilt more seats Republican, or to crack more voters to tilt less seats more firmly. *Cf. Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 136 (1992) ("[T]he level of the fee is irrelevant.").

Arbitrary cracking, without any legitimate rational basis,[9] save to do what Article I forbids, is an equal protection violation. No classification than party more keenly aids in violating Article I. And while failing rational basis scrutiny for the lack of a basis related to voters' representational rights—or any other legitimate basis—even higher level scrutiny is warranted, as the deference of rational basis review is due when a classification is "relevant to interests the State has the authority to implement." *See Cleburne*, 473 U.S. at 441–42. Here, the classification is beyond the interests the State has Election Clause authority to implement, and party has no legitimate relevance to districting.

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[9] *See Cleburne*, 473 U.S. at 446–47 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U. S. 528, 534 (1973) (precluding a basis that is "a bare desire to harm a politically unpopular group"). A legitimate basis should relate to facilitating the election or voters' representation, as that is the scope of the legislature's authority to legislate here. *See Smiley*, 285 U.S. at 365–66.

The First Amendment similarly prohibits disadvantaging voters based on their past and future votes. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 86 (1990) (rejecting harm imposed for "membership in unpopular organizations"); *Elrod v. Burns*, 427 U.S. 347, 359–60 (1976) (plurality) (rejecting harm imposed for insufficient "support for the favored political party"). Cracking defines a particular degree of this prohibited action, akin to the difference between mere disfavoring and cracking in the Article I context. Thus, cracking voters to minimize their influence because they previously voted for candidates of the party disfavored by the legislature—and are presumed likely to do so again—violates the First Amendment. The extent of the disadvantage imposed by cracking, which in this case—involving congressional districts—includes the Article I harms, affords a reasoned distinction from political considerations other than cracking, which less purposefully disadvantage voters, as well as from cracking voters within state districts, not subject to Article I. The Court could thereby reserve the question of the First Amendment's applicability to situations beyond the cracking of congressional districts.

* * * * *

This case is a unique opportunity for the Court to consider these issues and precedents. It is before this Court with a full record from a three-judge District Court. Future partisan gerrymandering cases will not come here with such a record, as they will be dismissed by single-judge District Courts, and the Courts of Appeals will summarily affirm—

both without any review of the merits. Relatedly, the Court has a duty to review all matters that could affect the resolution of this case, as it is before the Court on direct appeal. Scope is only discretionary for cases before the Court on petition for certiorari.

CONCLUSION

The Court should postpone jurisdiction and set the case for briefing and argument on the issues raised herein.

Respectfully submitted,

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