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 OF *AMICI CURIAE* PROFESSORS CHRISTOPHER ELMENDORF, JOSEPH FISHKIN, BERTRALL ROSS, DOUGLAS SPENCER, AND FRANITA TOLSON IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Professors Christopher S. Elmendorf, Joseph Fishkin, Bertrall Ross, Douglas Spencer, and Franita Tolson are legal scholars whose research and writing focus on redistricting and other aspects of election law.

Professor Christopher Elmendorf currently serves as the Martin Luther King, Jr., Professor of Law at the University of California, Davis, School of Law. He has published numerous articles on these topics in, among other law reviews, the University of Chicago Law Review, the Columbia Law Review, and the Yale Law Journal. He received his J.D. from Yale Law School.

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that the position they take in this brief has not been approved or financed by Appellants, Appellees, or their counsel. Neither Appellants, nor Appellees, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

As required by Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief. Evidence of written consent of all parties has been filed with the Clerk.

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Amici curiae submit this brief to rebut arguments made by Appellants and their *amici*

regarding the nature of the vote dilution "injury" discussed in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Appellants argue that this case suffers from "the same basic flaws" as *Gill*, Appellants Br. at 25, because, like *Gill*, it concerns "'group political interests' and 'generalized partisan preferences' that this Court has no 'responsib[ility]' to 'vindicate.'" *Id.* at 24 (alteration in original). Appellants further argue that the court below erroneously assumed that the baseline against which effect is to be measured is the "overall partisan makeup of the State," *id.* at 43, whereas in Appellant's view a dilution injury per *Gill* is an injury to individuals in a particular legislative district, *id.* at 26, not to a statewide group of voters tied together by their partisan preferences. *Id.* at 25.

Similarly, *amicus curiae* in support of Appellants, the National Republican Redistricting Trust ("NRRT"), argues that although the Constitution "provides rights for definite individuals," Brief of *Amicus Curiae* The National Republican Redistricting Trust in Support of Appellants at 29, Feb. 11, 2019 ("NRRT Amicus Br."), there is no individual right to be free from partisan gerrymandering and that what plaintiffs really are seeking is a "group right to proportional representation" for political parties, *id.* at 2.

These arguments confuse the personal "injury in fact" that plaintiff-voters must show to establish standing in a dilution case with the merits-stage showing of harm to structural democratic values of responsiveness or majority rule that plaintiffs must make to prevail. Appellants and the NRRT seek to turn *Gill*, a case solely about standing, into a case

about the merits of partisan gerrymandering claims in general.

As shown below, these arguments are at odds with this Court's precedents. In vote dilution cases, the "injury" necessary to establish standing is not the same as the "injury" necessary to establish liability. This distinction, which Appellants and the NRRT ignore, is not an anomaly, but rather a requirement that exists whenever plaintiffs seek to enforce structural constitutional values.

SUMMARY OF THE ARGUMENT

The Constitution protects structural values of democratic accountability and responsiveness; it also separates powers among the branches of the federal government to protect a broadly shared interest in liberty. However, not everyone who shares these interests can sue to protect them; a plaintiff must have standing. Whether a plaintiff has standing is analytically distinct from the merits of his claim. Thus, given the breadth of structural interests, the injury necessary for standing will typically be narrower and often different in kind from the constitutional harm to which plaintiff objects.

Vote dilution cases are consistent with the above-described principles. As a review of the genealogy of the Court's vote dilution cases demonstrates, these cases vindicate important structural values of representation and democratic responsiveness. However, as in other areas of constitutional law, not everyone who shares an interest in these structural values can sue to

vindicate them. Rather, only a plaintiff who lives in a challenged district has standing. Yet the type of injury which must be shown to establish standing is different from the structural harm—a harm to democratic responsiveness—which must be shown to prevail on the merits. Thus, there is no merit to the argument that *Gill*'s holding about standing necessitates a district-specific analysis of dilution at the liability stage. On the contrary, in a partisan vote dilution challenge to a state's map of congressional districts—just as in a racial vote dilution challenge to such a map—the liability-stage inquiry into dilutive effect must consider representational opportunities statewide.

ARGUMENT

I. FEDERAL LAW OFTEN PROTECTS STRUCTURAL VALUES, BUT NOT EVERYONE WHO CARES ABOUT THEM HAS STANDING TO SUE WHEN THEY ARE VIOLATED

Many provisions of the Constitution exist to protect structural values, such as accountability and democratic responsiveness, as well as the broadly shared interest in liberty. Yet these common structural values do not confer the right to sue upon all Americans.

For example, the vesting of "[a]ll legislative powers" in a bicameral Congress, *see* U.S. Const. Art. I, § 1, together with the carefully wrought presentment procedure for its exercise, guarantees that citizenry's liberties will not be abridged without

a considered legislative decision or the legislature's clear delegation of rulemaking authority to a politically accountable executive. *INS v. Chadha*, 462 U.S. 919, 944–51 (1983).[2] Similarly, accountability for the execution of the laws is protected by the Vesting and Take Care Clauses of Article II, which ensure that "[t]he buck stops with the President." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 689 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("The Framers established a single President by design" because it "furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch"), *aff'd in part, rev'd in part and remanded*, 561 U.S. 477 (2010). And the democratic responsiveness of Congress is guaranteed by Article I, Section 2, which provides that the House of Representatives shall be "chosen 'by the People of the several States.'" *See Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (quoting U.S. Const. Art. I, § 2).

Yet a citizen's generalized interest in liberty, accountability, or responsiveness does not confer standing to challenge a separation of powers violation

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[2] *See also Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("[S]tructural protections against abuse of power are critical to preserving liberty."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) ("To prevent tyranny and protect individual liberty, the Framers of the Constitution separated the legislative, executive, and judicial powers of the new national government."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) ("[T]he Constitution diffuses power the better to secure liberty . . . .").

in federal court. *See, e.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (standing "may not be predicated upon an interest . . . held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share").[3] To have standing, a plaintiff must plead and prove, among other things, an "injury in fact." *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). This injury "must affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (plaintiff must have "a personal stake in the outcome of the controversy") (citation omitted).[4]

This "injury in fact" need not be the same as, or even similar in kind to, the type of interest which the constitutional provision at issue was meant to protect. Indeed, this Court has emphasized that the existence of a cause of action and the existence of standing are "distinct concepts" and that "whether a plaintiff

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[3] *Accord Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) ("[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws . . . does not state an Article III case or controversy.").

[4] *See also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881–82 (1983) ("[P]laintiff's alleged injury [must] be a particularized one, which sets him apart from the citizenry at large.").

states a claim for relief 'goes to the merits' in the typical case, not the justiciability of a dispute." *Bond v. United States*, 564 U.S. 211, 219 (2011) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998)).[5] Accordingly, the Court has rejected efforts to find standing based on the merits of a plaintiff's case. *See Schlesinger*, 418 U.S. at 225 (criticizing lower court for finding standing based on a "premature evaluation of the merits of [plaintiffs'] complaint") (footnote omitted); *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153 (rejecting test for standing based on whether plaintiff had a "legal interest" that had been harmed, on the grounds that such a test "goes to the merits"). And, in cases where the structural value is a broad one, the inquiry into injury on the merits will typically be much broader than the inquiry into injury for standing purposes.

Myers v. United States, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), illustrate the distinction between the values at stake in the merits inquiry and the injury necessary to show standing in separation of powers cases. In each of those cases, this Court decided foundational questions about the separation of powers not at the behest of ordinary citizens asserting their interest in liberty or accountability, but rather at the behest of an individual government employee asserting his personal interest in back pay following an allegedly wrongful termination. Surely this

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[5] *Accord Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("[S]tanding 'in no way depends on the merits of the [petitioner's] contention that particular conduct is illegal . . . .'") (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

interest was nowhere near the Framers' minds when they undertook to allocate powers among the three branches of the federal government.

II. VOTE DILUTION HARMS THE STRUCTURAL VALUE OF DEMOCRATIC RESPONSIVENESS, WHICH IMPACTS ALL MEMBERS OF A POLITICALLY ALLIED GROUP OF CITIZENS, YET NOT ALL CITIZENS HAVE STANDING TO SUE

Vote dilution cases follow the same pattern as the constitutional cases discussed above. Like those cases, vote dilution cases protect important structural values—here, representation and responsiveness. *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613, 623–26 (1982) (citing plaintiffs' lack of representation and defendants' lack of responsiveness); *White v. Regester*, 412 U.S. 755, 765–69 (1973) (same). However, not all citizens with an interest in these values can sue to protect them. Only a person who lives in an improperly drawn district has standing because only such a voter has suffered the requisite injury in fact. *See* § II.B, *infra*.

A. The Genealogy of This Court's Vote Dilution Jurisprudence Makes Clear that Vote Dilution Harms the Structural Value of Democratic Responsiveness

This Court first addressed vote dilution in the context of elections for a single officeholder. *See United States v. Saylor*, 322 U.S. 385 (1944). In the

single-office setting, a practice is dilutive if it interferes with the majoritarian outcome. Subsequently the Court extended the concept of vote dilution to address the composition of legislative bodies. In legislative-body cases—such as the instant case—a practice is dilutive if it impinges on majority rule or renders the body inadequately representative of, or responsive to, a group of citizens with common political interests, an inquiry that requires assessment of the legislative body or districting map as a whole. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) ("*LULAC*") (courts should look "statewide" in determining whether members of a racial or ethnic minority group have achieved a roughly proportional percentage of legislative seats); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (comparing voting power of citizens in different parts of the state).[6]

1. Office-Specific Dilution Cases

In office-specific dilution cases, dilution occurs when some votes count for more than other votes in determining the winner.

For example, in *Saylor*, this Court acknowledged that ballot box stuffing could "dilut[e] and destroy[] [legitimate votes] by fictitious ballots fraudulently cast and counted." 322 U.S. at 386; *see*

[6] Racial gerrymandering cases, while also decided under the Equal Protection Clause, do not focus on responsiveness. Nonetheless, even in those cases this Court has held that plaintiffs can "present statewide *evidence* in order to prove racial gerrymandering in a particular district." *Ala. Legislative Black Caucus v. Ala.*, 135 S. Ct. 1257, 1265 (2015).

also id. at 392 (Douglas, J., dissenting) ("[H]e who bribes voters and purchases their votes corrupts the electoral process and dilutes my vote as much as he who stuffs the [b]allot box.").

Gray v. Sanders, 372 U.S. 368 (1963) recognized that office-specific dilution may occur not only through fraud, by also as the result of *de jure* rules for aggregating votes. *Gray* found Georgia's "county unit" system for aggregating the votes cast in primary elections for statewide office unconstitutional, on the ground that the system diluted the votes cast by residents of more populous counties. Under the county-unit system, the candidate who won the most counties prevailed in the election, rather than the candidate who won the most votes. The county-unit system thus gave outsized influence to residents of lightly populated counties.

It is clear that the value at stake in *Saylor* and *Gray* was majority rule. The class of citizens whose votes were diluted consisted of those who, while eligible to vote for the office in question, had to surmount a higher hurdle than other eligible citizens before their candidate could win. Since *Saylor* and *Gray*, this Court has occasionally alluded to the office-specific form of vote dilution, *e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."), but the main stem of dilution

jurisprudence has concerned representation in multi-member legislative bodies, which we discuss next.[7]

2. Legislative-Body Dilution Cases

In legislative-body dilution cases, dilution occurs when an actually- or potentially-allied group of voters has had its opportunity to win seats "minimized or canceled out."

Reynolds v. Sims, 377 U.S. 533 (1964), famously extended *Gray* by holding that just as dilution occurs when residents of densely populated areas are disadvantaged by the vote-counting rules for a particular office, so too does dilution *at the level of the legislative body* occur when those same residents are disadvantaged by malapportioned legislative districts. *Compare Gray*, 372 U.S. at 379 ("How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"), *with Reynolds*, 377 U.S. at 562 ("[I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted.").

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[7] Appellants' argument that vote dilution cannot occur "[i]f each vote is counted and counted equally," Appellants Br. at 28, mistakenly conflates the office-specific and legislative-body dilution precedents.

In *Reynolds,* as in *Gray*, majority rule was the fundamental constitutional value at stake, and dilution was conceptualized as an interference with majority rule. The only difference was scale: single office (*Gray*), versus legislative body as a whole (*Reynolds*). *See Reynolds*, 377 U.S. at 565 ("[T]o sanction *minority control* of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.") (emphasis added); *id*. at 545 (noting that under the challenged map, "only 25.1% of the State's tot[al] population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives"); *see also* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103 (2000) (agreeing with the *Reynolds* Court that the constitutional injury in the malapportionment cases was an injury to majority rule, but arguing that the case should have been decided on a Republican Form of Government rather than an Equal Protection theory).

Implicit in *Reynolds* and *Gray* was the idea that a legislative body is inadequately responsive to the preferences of its constituents if the will of the majority was thwarted. The responsiveness norm was extended in *Fortson v. Dorsey*, 379 U.S. 433 (1965), decided just a year after *Reynolds.* In *Fortson*, this Court recognized that legislative-body dilution may also occur if the rules for translating votes into seats are structured so as to render the body *inadequately responsive* to a distinct political faction

within the citizenry, even if there is no infringement of majority rule. *Id.* at 439 ("It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."). *Fortson* is thus the fount of this Court's racial and the partisan vote dilution jurisprudence. In either type of dilution case—racial or partisan—the inquiry into effects properly considers the entire map of legislative districts, not just a single district in isolation from the rest.[8]

a. Racial Vote Dilution Cases

Racial vote dilution occurs when members of (1) a politically cohesive racial group suffer from (2) a legally insufficient opportunity to wield voting strength, i.e., to secure representation in, or responsiveness from, the legislative body in question.

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[8] This is not to say that the district court erred in the present case by "proceed[ing] on a district-by-district basis." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C 2018). In doing so, the district court followed *Gill's* instruction to evaluate whether particular districts had been gerrymandered, *id.* at 821–27, in the sense of being purposefully drawn for partisan advantage in ways that depart from traditional neutral criteria. By requiring district-specific evidence of gerrymandering, *Gill* usefully limits the reach of any remedy in a partisan vote dilution case, focusing the redrawing of the map on specific districts. But *Gill's* requirement for some district-specific evidence does not vitiate the court's responsibility, at the liability stage of a partisan gerrymandering case, to assess representation or responsiveness under the map as a whole. The district court properly did so in this case. *See id.* at 868.

When such dilution occurs, *all* members of the politically cohesive racial group suffer it, not just those who may reside in a particular (actual or potential) single-member district. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663 (2001). This simple idea ties together nearly 50 years of case law, including cases from the 1970s and early 1980s which were decided on an equal protection theory and more recent cases applying the "results test" of Section 2 of the Voting Rights Act. However, as this section of the brief will explain, while the concept of racial vote dilution as a jurisdiction-wide injury has been present throughout this Court's jurisprudence, it was somewhat tacit in the early cases, owing largely to the fact that the parties had failed to foreground the matter. *Cf. Johnson v. De Grandy*, 512 U.S. 997, 1014–15 (1994) (analyzing dilution at geographic scale agreed to by the parties in the court below). Not until *LULAC*, 548 U.S. 399 (2006), did this Court confront a properly presented argument over the appropriate geographic scale. *LULAC* confirms the dilution inquiry should be jurisdiction-wide.

This Court's initial racial vote dilution cases were decided under an equal protection theory, and while they eschewed any right of minority voters to be proportionally represented in legislative bodies, they placed great weight on the *responsiveness* of the legislative body (or intermediary party organizations) to the minority community. *See, e.g.*, *Whitcomb v. Chavis*, 403 U.S. 124, 148–55 (1971) (acknowledging trial court's findings about the "distinctive substantive-law interests" of the black community, but holding that no unconstitutional dilution had

occurred because black voters were integrated into and represented through the Democratic Party coalition); *White*, 412 U.S. at 766–67 (finding unconstitutional dilution of black vote where, *inter alia*, few blacks had been elected and white-dominated slating organization "did not need the support of the Negro community to win elections [and] did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community"); *id.* at 768–69 (finding unconstitutional dilution of Latino vote where, *inter alia,* Latinos had only rarely been elected in a multi-member district and the legislative delegation was "insufficiently responsive to Mexican-American interests"); *Rogers*, 458 U.S. at 623–26 (finding unconstitutional dilution where county officials were "unresponsive and insensitive to the needs of the black community," and blacks had been "prevented" from "effectively participating in Democratic Party affairs and in primary elections").

Since legislatures serve the people primarily by enacting legislation, and since bills require a majority vote of the legislative body to pass, the emphasis on responsiveness in the early dilution cases cuts strongly in favor of a jurisdiction-wide dilution inquiry. The evidence in these cases went well beyond the circumstances of voters in one actual or potential single-member district. Some of the cases concerned multimember state legislative districts, and the evidence in those cases spoke to the circumstances of voters in the multimember districts, as well as official discrimination (or its absence) statewide. *See Whitcomb*, 403 U.S. at 131–32 (comparing conditions in poor black neighborhoods with conditions

elsewhere in the multimember district); *White*, 412 U.S. at 765–67 (discussing history of official discrimination against blacks in Texas); *id.* at 768 (observing that Mexican-Americans in county served by multimember district and elsewhere in Texas had long suffered discrimination). Other cases concerned at-large elections for local legislative bodies—city councils and county commissions—and here again the evidence was jurisdiction-wide. *See City of Mobile v. Bolden*, 446 U.S. 55, 71–74 (1980) (plurality opinion) (noting local officials' lack of responsiveness, but holding that plaintiffs had failed to prove intentional discrimination); *Rogers*, 458 U.S. at 623–27 (discussing, *inter alia,* lack of responsiveness from county officials, and history of discrimination).

In 1980, this Court erected an additional requirement for equal-protection vote dilution cases, namely that plaintiffs prove the dilution was purposeful. *See City of Mobile*, 446 U.S. 55. Congress responded by amending Section 2 of the Voting Rights Act to eliminate the intent requirement and return to the *White v. Regester* framework. *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 404–417 (2012) (contrasting static and dynamic glosses on Congress's codification of *White*); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments To The Voting Rights Act: A Legislative History*, 40 Wash & Lee L. Rev. 1347 (1983), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2674&context=wlulr (recounting history of the 1982 amendments). Since 1982, this Court's racial vote dilution cases have all been

decided under Section 2 of the Voting Rights Act, rather than the 14th Amendment.

The Senate Report accompanying Section 2 of the Voting Rights Act itemized factors that courts should evaluate in determining whether plaintiffs had proved vote dilution. S. Rep. No. 97-417, at 28–29 (1982). These factors, drawn from *White* and other cases decided before *City of Mobile,* do not restrict a court's evaluation to a challenged district. Rather, they expressly direct courts to examine conditions in "the State or political subdivision" whose legislative body is at issue in the case. *See Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986) (citing Senate Report factors, including "the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; [and] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group"). Indeed, in *Gingles*, this Court's first case interpreting the 1982 amendments, the Court expressly relied on these factors and, accordingly, examined both statewide evidence and evidence specific to the multimember districts that the plaintiffs sought to replace. *Id.* at 38–40 (describing, *inter alia*, history of discrimination in the state, and "the extent to which blacks have been elected to office in North Carolina, both statewide and in the challenged districts").

Gingles is best known today for establishing the three-factor threshold showing that racial vote dilution plaintiffs must make (potential remedial

district, minority cohesion, and white bloc voting). *Id.* at 50–51. But equally important was the concurring opinion of Justice O'Connor (joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist), which lucidly explained the essential conceptual questions that any theory of racial vote dilution must answer: what is the proper measure of minority "voting strength," and what is the correct benchmark for an undiluted districting plan, i.e., how much voting strength *should* the minority community wield? *See Id.* at 84–99 (O'Connor J., concurring in the judgment). Though expressing concern that the plurality opinion's gloss on Section 2 of the Voting Rights Act could lead to proportional representation, Justice O'Connor acknowledged that "any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." 478 U.S. at 84.

Notably, the hypothetical with which Justice O'Connor illustrated her points strongly supports a jurisdiction-wide dilution inquiry, one which accounts for the voting strength of *all* minority citizens who are governed by the legislative body at issue, wherever they may live. Justice O'Connor posited "a town of 1,000 voters that is governed by a council of four representatives, in which 30% of the voters are black" and vote as a bloc. *Id.* at 85. She then discussed various districting scenarios, weighing the number of seats the black community would control under each scenario, the security of those seats, and the likelihood that councilmembers elected from other seats would be electorally responsive to black

interests. *Id.* at 85–89. It is clear from this discussion that she understood dilution, in a legislative-body case, as a phenomenon to be assessed at the level of the legislative body as a whole (in this example, the town council). In other words, the court must assess the legislative body's representation or responsiveness vis-à-vis *all* members of the racial-political group in the polity, not just those in a given district, and compare this with representation / responsiveness afforded to the majority group.

This Court employed a similar hypothetical in *De Grandy*, 512 U.S. at 1016–17, indicating that the Court (like Justice O'Connor in *Gingles*) understood that racial vote dilution must generally be measured at the level of the legislative body as a whole because the concept of racial vote dilution concerns the political strength of *all* minority voters in the polity.[9]

LULAC made explicit that the geographic scope of the dilution inquiry must be statewide if a statewide map of districts is at issue. In *LULAC*, a case about congressional districts, the state defendants urged a regional approach, whereas

[9] It is true that when the *De Grandy* Court turned from hypotheticals to the evidence in the record, the Court assessed "rough proportionality"—its benchmark for the absence of dilution—in the general area of one county, rather than looking statewide, even though the case was about state legislative districts (not a county commission). *See* 512 U.S. at 1014–15, 1023. But the Court did so only because "the plaintiffs [had] . . . passed up the opportunity to frame their dilution claim in statewide terms." *Id.* at 1022.

plaintiffs argued for a statewide inquiry.[10] With the question thus framed, this Court announced, "the answer . . . is to look at proportionality statewide." 548 U.S. at 437. Any smaller scale would be "arbitrary," and would run against the Senate Report factors, which (as discussed above) point toward a jurisdiction-wide inquiry. *Id.* at 437–38.

* * *

Although some language in recent cases might be thought to evidence a narrower, district-specific theory of racial vote dilution, that language is best understood not as propounding such a theory, but rather as recognizing (1) that Section 2 of the Voting Rights Act affords certain protections that go *beyond* the right to a racially undiluted vote; and/or (2) that to have standing to bring a dilution case under Section 2, plaintiffs must suffer an "injury in fact" which is more personal and individuated than the dilution injury suffered by a racial or political group.

Regarding the first point, it has long been recognized that Section 2's "results test" offers protection against certain non-dilution injuries. *See Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia,

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[10] No one argued for a nationwide inquiry. A nationwide dilution inquiry would have a certain logic in cases about congressional districting, *see* Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, but because Article I specifies that Members of Congress are to be chosen by the "People of the *several* States" (emphasis added), under rules and subject to voter qualification determined by each state, it makes more sense to assess congressional representation at the scale of individual states.

J., dissenting) ("If . . . a county . . . made it more difficult for blacks to register than whites, . . . § 2 would [] be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate."). The existence of these additional protections, which can be invoked by individual minority voters or small clusters of voters, has occasionally obscured the jurisdiction-wide nature of the vote dilution inquiry.

For example, in *De Grandy*, the Court declined to recognize "rough proportionality" (its benchmark for the absence of dilution) as a safe harbor, because, among other things, that would allow the "rights of some minority voters under § 2 [to] be traded off against the rights of other members of the same minority class." *See* 512 U.S. at 1019. This passage implies a conception of Section 2 of the Voting Rights Act that includes an equal-treatment requirement. The state may not arbitrarily privilege some minority voters at the expense of others. But though Section 2 arguably disallows this, it is not on account of dilution. So long as the minority group as a whole wields the same political strength pre- and post- "tradeoff of rights," there has been no dilution. *Cf. LULAC*, 548 U.S. at 511 (Roberts, J., concurring in part) ("[I]t is [not] our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority . . . .").

The majority opinion in *LULAC* has also seeded some confusion, for after noting the departure from statewide proportionality in that case might be "deemed insubstantial," Justice Kennedy wrote that "that consideration would not overcome *the other*

evidence of vote dilution for Latinos in District 23." 548 U.S. at 438 (emphasis added). Taken at face value, this statement implies that vote dilution is a district-specific rather than statewide matter—contradicting most everything this Court has said about dilution in legislative-body cases since *Reynolds*, as well as most everything that Justice Kennedy himself had said to that point of his *LULAC* opinion. As Chief Justice Roberts sagely remarked in dissent, "Whatever the majority believes it is fighting with its holding, *it is not vote dilution on the basis of race or ethnicity*." *Id.* at 511 (emphasis added). The Chief Justice was absolutely right. If *LULAC*'s holding is correct, it is because Texas had empowered some minority voters at the expense of others for no legitimate reason,[11] thus violating Section 2's equal-treatment norm, not because the "Latinos in District 23" constituted a distinct "protected class" which could suffer "dilution" irrespective of the voting strength that Latinos exercised elsewhere in the state.

Justice Kennedy's plurality opinion in *Bartlett v. Strickland*, 556 U.S. 1 (2009), also contains some language suggestive of a district-specific theory of racial vote dilution. *See id.* at 19 ("[I]t is a *special wrong* when a minority group . . . could constitute a compact voting majority [of a single member district]

[11] *See* 548 U.S. at 440–41 (explaining that "the reason for taking Latinos out of District 23 . . . was to protect Congressman Bonilla from a constituency that was increasingly voting against him," and distinguishing such bad incumbency protection from legitimate efforts to "keep the constituency intact so the officeholder is accountable for promises made or broken").

but, despite racially polarized bloc voting, that group is not put into a district [where it is a numerical majority].") (emphasis added). But *Bartlett*'s holding—namely, that plaintiffs must show that they *could* be drawn into a compact, numerically majority-minority district—is better understood as a standing-like limitation on the category of voters who may sue.

That the "special wrong" needed for standing in a Section 2 dilution case is not the same as the dilution which must be shown at the liability stage becomes clear in Part III.C of Justice Kennedy's *Bartlett* opinion. There, Justice Kennedy indicates that the representation or responsiveness secured by clusters of black voters who may not comprise a majority of a compact single-member district is *absolutely* relevant to the liability-stage inquiry in a dilution case: "[C]rossover voting patterns and [] effective crossover districts[, i.e., districts in which a numerical racial minority joins forces with some whites to elect mutually satisfactory candidates,]. . . . [C]an be evidence [] of diminished bloc voting under the third *Gingles* factor *or of equal political opportunity under the § 2 totality-of-the-circumstances analysis*." 556 U.S. at 24 (emphasis added). The italicized phrase is critical. It indicates that a crossover district should count in the voting-strength (rough proportionality) calculus, even if the minority voters in that district would not have had standing to bring a dilution claim if the state had lumped them into a district with hostile whites. This apparent oddity is a byproduct of the fact that the "special," district-specific injury needed for standing in a Section 2 dilution case is not the same as the jurisdiction-wide injury under Section 2 of the Voting

Rights Act that must be shown to prevail on the merits of a racial vote dilution case.

* * *

In short, the genealogy of the racial vote dilution cases shows that they protect the structural values of representation and responsiveness. Consideration of whether dilution has occurred and whether these values have been abridged requires an examination of representation/responsiveness vis-à-vis all members of the politically cohesive racial group in the jurisdiction, not just those in the particular area where the plaintiffs live.

b. Partisan Vote Dilution Cases

Like the racial vote dilution cases, this Court's rather more limited partisan dilution jurisprudence is rooted in *Fortson v. Dorsey*'s statement that an electoral system could be unconstitutional if it "operate[s] to minimize or cancel out the voting strength of racial *or political* elements of the voting population." 379 U.S. at 439 (emphasis added).

The focus of the partisan vote dilution inquiry "is essentially the same" as that of its racial sibling. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion).[12] The question in both types of

[12] Unsurprisingly given their common point of origin, this Court's partisan vote dilution precedents borrow heavily from the racial vote dilution cases. *See*, *e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (relying on *Whitcomb* and *White*); *Bandemer*,

cases is whether a politically cohesive and distinctive set of voters—defined by party identity and interests in the partisan dilution cases, and racial identity and racially distinctive political interests in the racial dilution cases—has a fair opportunity to wield "voting strength" vis-à-vis the legislative body in question. It follows that in partisan dilution cases, courts should gauge dilution by assessing the "voting strength" of *all* of a party's supporters who may participate in elections for the representative body at issue—not just those who reside in a particular district.

Consistent with a jurisdiction-wide analysis, Justice White's opinion in *Bandemer* described the inquiry in the partisan case *Gaffney* as follows:

> Just as clearly, in *Gaffney v. Cummings*, where the districts also passed muster under the *Reynolds* formula, the claim was that the legislature had manipulated district lines to afford political groups in <u>various districts</u> an enhanced opportunity to elect legislators of their choice. Although advising caution, we said that "we *must* . . . respond to [the] claims . . . that even if acceptable populationwise [sic], the . . . plan was invidiously discriminatory

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478 U.S. at 131–33 (relying on racial precedents to hold that partisan vote dilution claimants, like racial vote dilution claimants, must show a degradation of their ability to influence the political process as a whole).

> because a 'political fairness principle' was followed . . . ."

478 U.S. at 124–25 (underlining emphasis added) (alterations in original) (quoting *Gaffney*, 412 U.S. at 751–52). Thus, the Court recognized that the inquiry runs beyond single districts and is motivated by the structural issue of political fairness.

To be sure, a supplemental, district-specific inquiry may be needed to establish that the plaintiff has standing, or to determine whether certain supporters of a political party were intentionally gerrymandered. But this is separate from the inquiry into dilutive effects. In a legislative-body dilution case, be it racial or partisan, the effects inquiry must focus on representation in, or responsiveness from, the legislative body as a whole.

B. Notwithstanding the Breadth of the Structural Harms Caused by Vote Dilution, Standing in Vote Dilution Cases is District-Specific

Like cases in other areas, vote dilution cases reflect the distinction between the values sought to be protected and the category of individuals who can sue to vindicate those values. Thus, even though, as shown above, the inquiry into whether vote dilution has occurred is statewide (in cases about statewide maps of legislative districts), if the plaintiff does not live in a gerrymandered district, he does not have standing.

In *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that voters in urban counties had standing to sue for the alleged malapportionment of the Tennessee's General Assembly, in which rural districts tended to be much less populous than urban ones. The plaintiffs alleged that their votes were being "debase[d]," *id.* at 188, in violation of the Equal Protection Clause, "vis-a-vis voters in irrationally favored counties," *id.* at 207–08. Given these allegations, the Court held that the plaintiffs had "alleged such a personal stake in the outcome of the controversy," *id.* at 204, as to give them standing.[13]

In so holding, the Court was careful to distinguish between the merits of the plaintiffs' case and the question of standing. The Court expressly stated that "[i]t would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it." *Id.* at 208.

Baker's analysis of standing was reaffirmed in in *Wesberry v. Sanders*, 376 U.S. 1 (1964), which involved allegations that disparities among the populations of Georgia's congressional districts resulted in the "debasing [of] the weight of [plaintiffs'] votes." *Id.* at 4. "The reasons which led to these

[13] *Compare Lance v. Coffman*, 549 U.S. 437, 441–42 (2007) (plaintiffs lacked standing where their sole complaint was that provision of Colorado Constitution prohibiting redistricting more than once a decade violated United States Constitution; "This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

conclusions in *Baker* [regarding standing, jurisdiction, and justiciability] are equally persuasive here." *Id.* at 6.

Consistent with its decisions in malapportionment cases, the Court held in *United States v. Hays*, 515 U.S. 737 (1995), that plaintiffs who challenged a congressional district as an unconstitutional racial gerrymander, on the grounds that it assigned voters to a newly-drawn black-majority district on the basis of race, had to live in the challenged district in order to have standing. Only plaintiffs who lived in the challenged district, the Court held, had suffered the personalized injury in fact necessary to confer standing. *Id.* at 745. By contrast, a plaintiff who lives outside such a district "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve," which would not suffice to create standing. *Id.*[14]

Given the decisions in *Baker* and *Hays*, it came as no surprise that, in *Gill*, this Court held that plaintiffs alleging vote dilution on partisan grounds lacked standing because they had failed to prove that they lived in an improperly drawn district. In that case, the plaintiffs, voters who supported Democratic candidates, alleged that Wisconsin's legislative districting plan diluted their voting power by

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[14] *See also Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016) (members of Congress did not have standing to challenge three-judge court's decision holding that one district was an unconstitutional racial gerrymander these members of Congress neither lived in nor were running for election in that district).

"cracking" large, cohesive groups of Democratic voters into multiple districts in which they were a minority and, where Democratic voter concentrations were too large to "crack," "packing" them into a small number of overwhelmingly Democratic districts. 138 S. Ct. at 1923–24. The Court observed, however, that only one of the named plaintiffs had testified at trial and that he had conceded that the district in which he lived would have a Democratic majority under any of the competing districting plans offered by the parties. *Id.* at 1924–25.

On these facts, the Court held that the plaintiffs had failed to prove standing, because they had not proved the requisite personal injury in fact. *Id.* at 1929–33. *Gill's* treatment of the standing issue is thus consistent with this Court's prior vote dilution cases.

Appellants and the NRRT seek to make much of the statement in *Gill* that "a person's right to vote is 'individual and personal in nature,'" and accordingly that "[t]o the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific." *Id.* at 1929–30 (citations omitted); *see* Appellants' Br. at 24 (discussing the concept generally and quoting *Gill*, 138 S. Ct. at 1930); NRRT Amicus Br. at 2, 29 (focusing on *Gill's* discussion of individual rights). But these statements concern standing—whether the *Gill* plaintiffs were in the category of people who can sue to vindicate the structural right to responsiveness that underlies the vote dilution cases. Because the Court has consistently treated the issue of standing as separate from the merits, *Gill*'s remarks about the nature of

the named plaintiffs' injuries say nothing about the nature of the liability-stage inquiry in a partisan dilution case.

CONCLUSION

For all the reasons stated above, *amici curiae* Professors Christopher Elmendorf, Joseph Fishkin, Bertrall Ross, Douglas Spencer, and Franita Tolson respectfully submit that the lower court correctly analyzed standing on a district-level basis, and dilution on a statewide basis.

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