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

MOTION TO AFFIRM OF LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *ET AL.*

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October 31, 2018

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QUESTIONS PRESENTED

1. Whether the district court correctly found that plaintiffs have standing to challenge particular North Carolina congressional districts on partisan vote dilution grounds because those districts unnecessarily crack or pack plaintiffs?

2. Whether the test for partisan vote dilution claims set forth by the district court—requiring proof of (1) the intent to subordinate adherents of one party and entrench a rival party in power; (2) the effect of such subordination and entrenchment; and (3) the lack of a legitimate justification for such subordination and entrenchment—is judicially discernible and manageable?

3. Whether the district court's unanimous decision that particular North Carolina congressional districts are unconstitutional under this test is correct?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the League of Women Voters of North Carolina states that it is a non-profit corporation that has no parent corporation and issues no stock.

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INTRODUCTION

In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), this Court supplied a roadmap for plaintiffs bringing claims of partisan vote dilution. Because "the dilution of their votes . . . is district specific," these plaintiffs may challenge only their own districts, not a district plan in its entirety. *Id.* at 1930. To establish their standing to sue, the plaintiffs must also show that they were unnecessarily packed or cracked: that "the particular composition of the voter's own district . . . causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." *Id.* at 1931. And if the plaintiffs prove both standing and liability, their remedy is restricted to "revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be." *Id.*

In its thorough decision, the district court scrupulously followed this roadmap. For each North Carolina congressional district in which it found standing to allege partisan vote dilution, the court held that the district had packed or cracked Democratic voters. The court further held that a plaintiff living in each district could have been unpacked or uncracked by an alternative map. App.51-65. Consider District 1 in northeastern North Carolina, into which most of the region's Democratic voters are crammed. It is a textbook example of a packed Democratic district. App.227-31. It is also a needlessly packed district, because in a map generated without consideration of partisanship, the League of Women Voters of North Carolina

("League")[1] plaintiffs in District 1 are placed in a district nearly ten points less heavily Democratic. Dkt.129-2:6. Or take District 2 in central North Carolina, which severs three counties in its quest to avoid Democratic voters and muster a Republican majority. App.231-36. This is quintessential cracking—and unnecessary cracking since in the alternative map, the League member in District 2 ends up in a Democratic district. Dkt.129-2:6.

After carefully heeding the guidance this Court provided in *Whitford*, the district court adopted a test for partisan vote dilution claims that dovetails with this Court's standing analysis. This test "proceed[s] on a district-by-district basis." App.139. It requires, first, that a district be drawn with the *intent* of packing or cracking the opposing party's voters. App.139-46. Second, the district must have the *effect* of packing or cracking these voters, in a durable manner that renders the legislator nonresponsive to her constituents. App.146-52. And third, there must exist no legitimate *justification*, like political geography or compliance with traditional districting criteria, for the packing or cracking. App.152-54.

Moreover, even if these showings are made, the district is not necessarily unlawful. Rather, it only fails the district court's test if the map as a whole *also* purposefully and unjustifiably "subordinate[s]

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[1] The League is an organizational plaintiff in this litigation and has members who support Democratic candidates and policies in every district in North Carolina. Ex.4080. Counsel representing the League also represent twelve individual plaintiffs: William Collins, Elliott Feldman, Carol Faulkner Fox, Annette Love, Maria Palmer, Gunther Peck, Ersla Phelps, John Quinn, III, Aaron Sarver, Janie Smith Sumpter, Elizabeth Torres Evans, and Willis Williams.

adherents of one political party and entrench[es] a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). In other words, the intent, effect, and justification prongs must be satisfied statewide as well as for each individual district. App.155-222. This statewide inquiry prevents liability from arising when a plaintiff can point to packing or cracking but a plan is balanced in its treatment of the two major parties. The inquiry thus plays the same role as the existing degree of minority representation, across a jurisdiction, in a racial vote dilution case. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (*LULAC*). It ensures that a district is struck down only if the map to which it belongs is dilutive too.

Notably, Appellants do not argue that the district court misapplied its test with respect to *any* of the districts it invalidated on partisan vote dilution grounds. And for good reason. The evidence of dilution in this case is overwhelming and irrefutable. To cite a few of the highlights: The committee that approved North Carolina's current congressional plan (the "2016 Plan") ratified a "Partisan Advantage" criterion. It explicitly required "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App.20. The committee's co-chair added that Republicans would have a ten-three edge only because it was not "possible to draw a map with 11 Republicans and 2 Democrats." Ex.1005:50. These facts—amounting to an official state policy to maximize a party's representation—support the facial invalidation of the 2016 Plan, no matter how the broader issue of the justiciability of partisan gerrymandering is resolved.

In the 2016 election, furthermore, Republican candidates won ten out of thirteen seats even though the statewide vote was nearly tied. These results yielded the worst partisan asymmetry, in that year, of any congressional plan in the *country*. App.195. And when Appellees' expert randomly generated thousands of maps using the same (nonpartisan) criteria as the 2016 Plan's drafters, *not one* was as skewed as the Plan. In fact, the typical map slightly favored Democrats, indicating that North Carolina's spatial patterns and districting principles cannot explain the Plan's extreme pro-Republican tilt. App.168-71.

While not contesting any of this evidence, Appellants do contend that Appellees have not proven their standing to allege partisan vote dilution. In making this claim, Appellants ignore both this case's post-*Whitford* remand and *Whitford* itself. They fail to address the district court's meticulous explanations of how particular districts unnecessarily pack or crack Democratic voters. App.51-65, 223-74. They quote pre-*Whitford* statements from plaintiffs who *lack* standing, according to the district court, precisely because their grievances are not district-specific. J.S.18-19. And they ultimately assert that standing does not follow even when districts "may have shifted from Republican to Democrat under plaintiffs' alternative plans." J.S.21. This position, of course, directly contradicts this Court's unanimous holding in *Whitford*.

Appellants next pretend not just that *Whitford* never happened—but that the last fifty years of redistricting decisions did not either. Echoing the dissenters in the one person, one vote cases of the

1960s, they maintain that partisan gerrymandering is nonjusticiable because it violates only the Guarantee Clause, can be curbed by Congress, and was accepted by the Framers. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting). But these arguments are no more persuasive today than they were half a century ago. That partisan gerrymandering may offend the Guarantee Clause does not prevent it from breaching other constitutional provisions too. The vanishingly unlikely prospect of congressional intervention does not release courts from their independent obligation to enforce the Constitution. And far from endorsing partisan gerrymandering, the Framers would have been appalled by this archetypal "mischief[] of faction." The Federalist No. 10.

Lastly, almost as an afterthought, Appellants turn their attention to the partisan vote dilution test adopted by the district court. Puzzlingly, they object that the test's intent requirement is too lax, even though it is satisfied only by deliberately "'subordinat[ing] adherents of one political party and entrench[ing] a rival party in power'"—a stringent formulation drawn from this Court's own case law. App.142 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). Still more puzzlingly, Appellants complain about the district court's assumption in the alternative that predominant partisan intent must be shown, even though this higher bar is exactly what they (profess to) want. If anything, Appellants' criticism of the test's effect prong is even stranger. They argue that partisan gerrymandering somehow makes legislators *more* responsive to their constituents. But saying day is night does not make it so. In fact, empirical evidence confirms what common

sense suggests: that gerrymandering sharply skews legislatures (and the laws they pass) in favor of the line-drawing party (and against the will of the electorate). *See, e.g.*, Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017).

The Court should therefore affirm the decision below. The Court could do so summarily since this case's exceptional facts violate any plausible gerrymandering standard. However, the League acknowledges that the importance of the issue may warrant full briefing and argument.

STATEMENT OF THE CASE

I. The 2016 Plan Was Enacted with Discriminatory Intent.

The 2016 Plan is the second congressional map that North Carolina has used in the current cycle. The 2012 and 2014 elections were held under the map that was passed in July 2011 (the "2011 Plan"). This Court held in *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017), that two of the 2011 Plan's districts were unconstitutional *racial* gerrymanders, drawn with race as their predominant motive. In defense of those districts, the 2011 Plan's drafter, Dr. Thomas Hofeller, stated repeatedly that the map as a whole was intended to benefit Republican (and handicap Democratic) candidates and voters.

In his deposition in this case, for example, Hofeller testified that the "'primar[y] goal' in drawing the [2011] districts was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" App.11. Similarly, in his expert report in *Harris*, Hofeller wrote that

"[p]olitics was the primary policy determinant in the drafting of the [2011] Plan." Ex.2035:8. He continued: "The General Assembly's overarching goal in 2011 was to create as many safe and competitive districts for Republican incumbents or potential candidates as possible." Ex.2035:23.

After the 2011 Plan was invalidated in part, the same actors took the lead in designing its replacement. Representative David Lewis and Senator Robert Rucho were again the co-chairs of the Joint Select Committee on Congressional Redistricting (the "Joint Committee"). Hofeller was once more the drafter of the map. Lewis and Rucho verbally instructed Hofeller to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," which "included 10 Republicans and 3 Democrats." App.15. They added that he should exclusively use "political data" in his work: "precinct-level election results from all statewide elections." *Id.*

Following his directions, Hofeller aggregated these election outcomes into a sophisticated multi-year average that, in his expert view, would accurately capture district partisanship "'in every subsequent election.'" App.16-17. Employing this metric, he systematically cracked and packed Democratic voters throughout North Carolina. Where possible, that is, he divided clusters of Democrats that could have anchored congressional districts and submerged the fragments within larger masses of Republicans. And where Democratic concentrations were too large to be split, he wedged them into a handful of districts. This intentional, methodical, and

unnecessary cracking and packing is described in more detail below. *See infra* Statement Part II.

After Hofeller finished drafting the 2016 Plan—alone and in secret—Lewis and Rucho convened a pair of Joint Committee meetings. App.19. At the first session, the Joint Committee approved, on party line votes, the criteria that Lewis and Rucho had previously conveyed orally to Hofeller. App.23. The "Partisan Advantage" criterion stated that "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." App.20. The "Political Data" criterion added that, other than population counts, "[t]he only data . . . to be used to construct congressional districts shall be election results in statewide contests." *Id.*

Also at the first session, Lewis declared about the 2016 Plan: "I acknowledge freely that this would be a political gerrymander." Ex.1005:48. He further "propose[d] that to the extent possible, the map drawers create a map which is . . . likely to elect 10 Republicans and 3 Democrats." *Id.* He remarked as well: "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." Ex.1005:50. And he made clear that "to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage." App.22.

At the second Joint Committee meeting (held the day after the first), Lewis and Rucho finally unveiled the 2016 Plan. App.24. Lewis reiterated that it "will produce an opportunity to elect ten Republican members of Congress." *Id.* The Joint Committee subsequently approved the Plan, again on a party line

basis. *Id.* Two days later, the North Carolina House of Representatives and Senate debated and passed the 2016 Plan, once more on party line votes. *Id.*

II. Particular Districts Intentionally and Unnecessarily Cracked or Packed Democratic Voters.

As noted above, the 2016 Plan cracked and packed Democratic voters on a massive scale; that was the only way to achieve a ten-three Republican advantage in an evenly divided state. The League now summarizes the evidence of this rampant cracking and packing, focusing on nine of North Carolina's thirteen congressional districts. The district court found that District 5 did not intentionally crack Democratic voters, App.242-43, and the League does not contest that finding. In the League's view, Districts 3, 10, and 11 also did not *unnecessarily* crack any plaintiffs. No plaintiffs living in these districts, that is, were uncracked by the alternative map on which the League relies.

This map, Plan 2-297, is one of the three thousand North Carolina congressional maps randomly generated by Appellees' expert, Professor Jowei Chen, without considering any partisan data. App.49. Plan 2-297 was selected from this group because it has the most compact districts, on average, of maps that meet the following criteria: (1) splitting fewer counties than the 2016 Plan; (2) pairing fewer incumbents than the 2016 Plan; (3) containing at least one district with a black voting age population above 40%; and (4) exhibiting perfect partisan symmetry. *Id.* Plan 2-297 thus matches or surpasses the 2016 Plan in terms of all its nonpartisan aims, while treating the two major parties perfectly symmetrically. *Id.*

- *District 1:* District 1 packs Democratic voters in northeastern North Carolina. It splits Pitt and Wilson Counties, in both cases capturing their Democratic precincts and excluding their Republican areas. Hofeller expected District 1 to have a Democratic vote share of 69%. App.227-31. In Plan 2-297, League plaintiffs living in District 1 are unpacked by being placed in a district with a Democratic vote share of 59%. Dkt.129-2:6.[2]

- *District 2:* District 2 cracks Democratic voters in central North Carolina. It splits Johnston, Wake, and Wilson Counties, avoiding Democratic precincts (particularly around Raleigh-Durham) in order to secure a Republican majority. Hofeller expected District 2 to have a Republican vote share of 56%. App.231-36. In Plan 2-297, a League member living in District 2 is uncracked by being placed in a district with a Democratic vote share of 63%. Dkt.129-2:6.[3]

- *District 4:* District 4 packs Democratic voters in Raleigh-Durham. It splits Durham and Wake Counties, in both cases capturing their Democratic precincts and excluding their Republican areas. Hofeller expected District 4 to have a Democratic vote share of 62%. App.238-41. In Plan 2-297, a League member

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[2] The League focuses here on its own members and plaintiffs. The district court also discussed other plaintiffs, whom the League cites only in footnotes. To wit, Larry Hall is another plaintiff who lives in District 1 and is unpacked by Plan 2-297. App.51-52.

[3] Douglas Berger is another plaintiff who lives in District 2 and is uncracked by Plan 2-297. App.52-53.

living in District 4 is unpacked by being placed in a district with a Democratic vote share of 53%. Dkt.129-2:6.

- *District 6:* District 6 cracks Democratic voters in central North Carolina. It splits the Democratic cluster in Greensboro, while avoiding the larger concentration of Democratic precincts in Raleigh-Durham. Hofeller expected District 6 to have a Republican vote share of 54%. App.243-48. In Plan 2-297, a League member living in District 6 is uncracked by being placed in a district with a Democratic vote share of 51%. Dkt.129-2:6.

- *District 7:* District 7 cracks Democratic voters in southeastern North Carolina. It splits the Democratic clusters in Bladen and Johnston Counties and submerges the Democratic concentration in Wilmington. Hofeller expected District 7 to have a Republican vote share of 53%. App.248-51. In Plan 2-297, a League member living in District 7 is uncracked by being placed in a district with a Democratic vote share of 59%. Dkt.129-2:6.

- *District 8:* District 8 cracks Democratic voters in central North Carolina. It splits the Democratic cluster in Cumberland County, while avoiding the larger concentration of Democratic precincts in Charlotte-Mecklenburg. Hofeller expected District 8 to have a Republican vote share of 55%. App.251-55. In Plan 2-297, a League member living in District 8 is uncracked by being placed in a

district with a Democratic vote share of 54%. Dkt.129-2:6.[4]

- *District 9:* District 9 cracks Democratic voters in southern North Carolina. It splits the Democratic clusters in Cumberland and Bladen Counties, while capturing almost exclusively Republican precincts in Mecklenburg County. Hofeller expected District 9 to have a Republican vote share of 56%. App.255-59. In Plan 2-297, a League member living in District 9 is uncracked by being placed in a district with a Democratic vote share of 54%. Dkt.129-2:6.[5]

- *District 12:* District 12 packs Democratic voters in Charlotte-Mecklenburg. It captures virtually all of Mecklenburg County's Democratic precincts, while excluding most of its Republican areas. Hofeller expected District 12 to have a Democratic vote share of 63%. App.266-70. In Plan 2-297, a League member living in District 12 is unpacked by being placed in a district with a Democratic vote share of 54%. Dkt.129-2:6.[6]

- *District 13:* District 13 cracks Democratic voters in west-central North Carolina. It splits the Democratic cluster in Greensboro, while avoiding the larger concentration of Democratic precincts in Charlotte-Mecklenburg. Hofeller expected

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[4] Coy Brewer is another plaintiff who lives in District 8 and is uncracked by Plan 2-297. App.57-58.

[5] John McNeill is another plaintiff who lives in District 9 and is uncracked by Plan 2-297. App.58-59.

[6] John Gresham is another plaintiff who lives in District 12 and is unpacked by Plan 2-297. App.62.

District 13 to have a Republican vote share of 54%. App.270-73. In Plan 2-297, a League member living in District 13 is uncracked by being placed in a district with a Democratic vote share of 51%. Dkt.129-2:6.[7]

III. The 2016 Plan Has Exhibited a Large and Durable Partisan Asymmetry.

Turning from individual districts to the state as a whole, North Carolina's 2012 and 2014 congressional elections were held under the 2011 Plan, while the 2016 election was held under the 2016 Plan. All three of these elections were exceedingly close. Democrats earned a slight majority of the statewide vote in 2012 (51%), while Republicans won small majorities in 2014 (54%) and 2016 (53%). App.188-91, 212-14. Yet Republican candidates captured nine of North Carolina's thirteen congressional seats in 2012, and *ten* seats in 2014 and 2016. *Id.* These ten seats, moreover, were exactly the ones that Hofeller expected Republicans to win. App.188.

Appellees' expert, Professor Simon Jackman, calculated three measures of partisan asymmetry using these election results. (Partisan asymmetry refers to "whether supporters of each of the two parties are able to translate their votes into representation with equal ease." App.191.) First, the *efficiency gap* is the difference between the parties' respective "wasted votes" (ballots that do not contribute to a candidate's election), divided by the total number of votes cast. App.192-93. Second, *partisan bias* is the difference between a party's seat

[7] Russell Walker is another plaintiff who lives in District 13 and is uncracked by Plan 2-297. App.62-63.

share and 50% in a hypothetical tied election. App.205-06. And third, the *mean-median difference* subtracts a party's median vote share, across a plan's districts, from its mean vote share. App.207-08.

All of these metrics tell the same story about the 2011 and 2016 Plans: Both maps have benefited Republican (and handicapped Democratic) candidates and voters to a staggering, nearly unprecedented, degree. North Carolina recorded efficiency gaps of -21%, -21%, and -19% in 2012, 2014, and 2016 (negative scores being pro-Republican and positive scores pro-Democratic). App.193, 213. That is, votes for Republican candidates were wasted at a rate about twenty percentage points lower than votes for Democratic candidates. North Carolina also registered partisan biases of -27%, -27%, and -27% in 2012, 2014, and 2016, indicating that in hypothetical tied elections, Republicans would have won 77% of the State's congressional seats. App.206; Ex.4003:4. And North Carolina's mean-median differences were -8%, -7%, and -5% in 2012, 2014, and 2016, meaning that, throughout this period, the State's median congressional district was much more pro-Republican than the State as a whole. App.208; Ex.4003:8.

Professor Jackman also testified about the durability of the 2016 Plan's partisan asymmetry. He conducted what is known as "sensitivity testing," swinging the 2016 election results by up to ten percentage points in each party's direction and then recalculating the Plan's efficiency gap for each incremental shift. App.191. This testing indicated that it would take a six-point pro-Democratic swing for Democrats to capture just one more seat. *Id*. For the Plan's asymmetry to disappear, Democrats would

have to improve on their 2016 showing by *nine* points—a wave whose only precedent is the post-Watergate election of 1974. App.197.

IV. The 2016 Plan's Large and Durable Partisan Asymmetry Cannot Be Justified.

The final factual issue addressed at trial was whether the 2016 Plan's partisan asymmetry can be justified by any neutral factor, such as North Carolina's political geography or nonpartisan redistricting criteria. Three sets of district maps established the lack of any legitimate explanation. *First*, as discussed above, Professor Chen used a computer simulation technique to generate three thousand different congressional plans for North Carolina. App.167-71. All of these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan criteria adopted by the Joint Committee. The maps' districts were contiguous and equal in population; they were created without considering racial data; they split as many or fewer counties; and, on average, they were significantly more compact. *Id.*

Yet *not one* of these three thousand maps ever resulted in a ten-three Republican advantage or an efficiency gap as large as the 2016 Plan's. Whether Professor Chen analyzed the maps' partisan implications using Hofeller's full set of twenty prior elections, Hofeller's seven-election subset, or a predictive regression model, *all* of the maps were more symmetric than the Plan. App.167-71, 210-12. In fact, the maps tilted slightly in a Democratic direction, with a median outcome of six Republican seats out of thirteen. Ex.2010:13. Thus, far from justifying the Plan's pro-Republican asymmetry, North Carolina's

political geography and the Joint Committee's nonpartisan criteria seem mildly to favor Democrats.

Second, Hofeller himself, the architect of the 2016 Plan, created two draft maps that performed as well as the Plan in terms of traditional criteria but were far less skewed. Both of these maps' districts were more compact, on average, than the Plan's districts. Ex.4022. The "ST-B" map divided three fewer counties than the Plan; the "17A" map split two more. *Id.* But using Hofeller's own set of twenty prior elections, both maps were expected to yield seven (rather than ten) Republican seats and six (instead of three) Democratic seats. *Id.*

And *third*, during the 2000s, North Carolina used a congressional plan for all five elections that complied with all federal and state requirements. (Indeed, this map was so plainly lawful that it was not even challenged in court.) But unlike its successors in the current cycle, the 2000s plan had an average efficiency gap of just 2%, or very close to perfect symmetry. Ex.4002:63.

V. The District Court Carefully Followed This Court's Decision in *Whitford*.

This litigation began in August 2016, shortly after the 2016 Plan was enacted. The plaintiffs include individual North Carolina voters and Democratic supporters in every congressional district in the State. The plaintiffs also include two groups with longstanding interests in the proper functioning of North Carolina's democracy: the League and Common Cause. The North Carolina Democratic Party—the organization dedicated to advancing the interests of Democratic candidates and voters

throughout the State—is a plaintiff as well. Dkt.12:2-9; Dkt.41:6-11.

Throughout the litigation, the plaintiffs emphasized the 2016 Plan's intentional and unnecessary cracking and packing of Democratic voters in particular areas. At trial, for example, the League introduced a series of screenshots from Hofeller's redistricting software showing how he cracked Democratic clusters in Bladen, Buncombe, Cumberland, Guilford, and Johnston Counties; and packed Democratic concentrations in Durham, Mecklenburg, Pitt, Wake, and Wilson Counties. Exs.4007-15, 4066-77. On remand from this Court, similarly, the League demonstrated that it has members in Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13 who are Democratic voters, who were deliberately cracked or packed by the 2016 Plan, and who would be uncracked or unpacked by Plan 2-297. Dkt.129-1; Dkt.129-2; App.44-50.

Appellants moved to dismiss, Dkt.30, but the district court unanimously denied their motion in March 2017, Dkt.50. Appellants declined to move for summary judgment, so trial took place in October 2017. Only expert witnesses testified: Professors Jackman and Chen, another expert for the Common Cause plaintiffs (Professor Jonathan Mattingly), and two experts for Appellants (Professor M.V. Hood, III and Sean Trende). App.29. In January 2018, the district court unanimously held that the 2016 Plan unconstitutionally dilutes plaintiffs' votes. App.34. This Court vacated the district court's judgment in June 2018, remanding for reconsideration in light of *Whitford*. *Id.*

On remand, the League established that the 2016 Plan intentionally and unnecessarily cracked or packed its members in nine congressional districts. Common Cause made a similar showing for its plaintiffs, but based on thousands of Professor Chen's randomly generated maps rather than a single alternative plan. Dkt.130-2. In its August 2018 decision, the district court, too, diligently followed the roadmap this Court provided in *Whitford*. The district court found that at least one plaintiff was needlessly cracked or packed in each district it struck down on partisan vote dilution grounds. App.51-65. The district court also found that several plaintiffs *lacked* standing under *Whitford* because their alleged injuries did not involve the cracking or packing of specific districts. App.65-67. The district court further adopted a partisan vote dilution test that, like *Whitford*'s standing inquiry, "proceed[s] on a district-by-district basis." App.139. This test requires discriminatory intent, a discriminatory effect, and the absence of a legitimate justification for each district that is invalidated as well as for the plan in its entirety. App.137-222. Lastly, applying the test, the district court held that certain districts unlawfully dilute plaintiffs' votes. App.223-74.

Judge Osteen concurred as to almost all of these points. He disagreed, however, that there can be standing (or liability) on partisan vote dilution grounds when a district is packed (rather than cracked). He would therefore have upheld Districts 1, 4, and 12: the three districts in the 2016 Plan that overconcentrated Democratic voters. App.328-31. Judge Osteen also argued that the mere pursuit of partisan advantage is not constitutionally problematic. He would thus have held (not just

assumed) that a *predominant* partisan purpose must be proven in order to establish liability. App.336-40.

ARGUMENT

Appellants do not dispute that the 2016 Plan's official aim was the maximization of Republican partisan advantage. Nor do they deny that the Plan achieved its goal in the 2016 election: a ten-three Republican edge in the face of an evenly divided electorate. These concessions are enough to decide this case without reaching the broader issue of the justiciability of partisan gerrymandering. After all, "[i]f a State passed an enactment that declared" that a district map would be "'drawn so as most to burden Party X's rights to fair and effective representation,'" this Court "would surely conclude the Constitution had been violated." *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment). The 2016 Plan *is* this patently unconstitutional—and no longer hypothetical—law.

Appellants' argument that Appellees lack standing to challenge particular districts on partisan vote dilution grounds misstates the record. Appellants claim that Appellees seek to "vindicate a generalized preference to see more Democrats from North Carolina elected to Congress." J.S.18. But that is simply not true. Appellees' *sole* basis for asserting partisan vote dilution standing is that their *own* districts have been unnecessarily cracked or packed. This was also the district court's only rationale for finding partisan vote dilution standing. This, too, was the standard for partisan vote dilution standing that this Court unanimously adopted in *Whitford*. Appellees and the district court have sought to comply

with this standard, while Appellants have disregarded it.

Appellants' contention that partisan gerrymandering is inherently nonjusticiable is similarly flawed. To hold that the judiciary must exit this domain—an area where its presence is desperately needed—this Court would have to reverse a series of decisions spanning more than thirty years. The Court would also have to credit Appellants' evidence-free speculation about the mutability of voter behavior. In fact, Appellants' own expert testified at length about the stable partisanship of North Carolina voters. And the Court would need to accept a set of propositions (about the Guarantee Clause, Congress, and the Framers) that it has rejected since it entered this field in the 1960s. Appellants have not even tried to explain why these long-buried points should now be exhumed.

Lastly, Appellants' complaints about the district court's test for partisan vote dilution claims are conclusory where they are not self-contradictory. Appellants object *both* to a conventional discriminatory intent prong *and* to one that requires a predominant partisan purpose. But either a regular or a heightened intent showing must surely be made; it is not logically possible to dismiss both thresholds. Appellants also grumble about the variety of social science analyses on which the district court relied. But they do not identify problems with any of these methods, nor deny that they all confirm the 2016 Plan's large and durable asymmetry. And Appellants' odd discussion of responsiveness puts things exactly backwards. Partisan gerrymandering gravely

undermines—it does not somehow promote—legislators' responsiveness to their constituents.

I. Appellees Have Proven Their Standing to Challenge Particular Districts on Partisan Vote Dilution Grounds.

1. In its unanimous decision in *Whitford*, this Court could not have been clearer about how an injury in fact must be proven in a partisan vote dilution case. First, a plaintiff must show that "the particular composition of the voter's own district . . . causes his vote [to be] packed or cracked." 138 S. Ct. at 1931; *see also id.* ("[T]hat burden arises through a voter's placement in a 'cracked' or 'packed' district."); *id.* at 1932 (a plaintiff must "prove that he . . . lives in a cracked or packed district"). And second, a plaintiff must demonstrate that his vote "carr[ies] less weight than it would carry in another, hypothetical district"—in other words, that he could be *un*cracked or *un*packed by a different set of boundaries. *Id.* at 1931.

Applying this standard, the Court suggested that the lead plaintiff in *Whitford* lacked standing. While he did live in a packed district, he could not be unpacked by any (reasonable) alternative configuration. Since "Democrats are 'naturally' packed [in Madison] due to their geographic concentration," "even plaintiffs' own demonstration map resulted in a virtually identical district for him." *Id.* at 1933. Conversely, the Court held that four other plaintiffs *would* have standing if they could "prove[] at trial" what they had "alleged at the pleading stage"—namely, that they were subjected to unnecessary "packing or cracking in their legislative districts." *Id.* at 1931. That is why the Court

remanded the case to the district court instead of dismissing these plaintiffs' claims. *Id.* at 1933-34.

The Court's focus on needless cracking and packing mirrors its approach in the analogous context of racial vote dilution. In that area as well, the Court has long recognized that cracking and packing are the techniques through which equipopulous, single-member districts dilute the influence of targeted voters. *See, e.g.*, *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.) (a district map may "dilute minority voting power if it packed minority voters in a few districts . . . or dispersed them among [many] districts"); *Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). In that area too, the Court requires plaintiffs to prove they could be uncracked or unpacked by a different district map. *See, e.g.*, *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.) ("[A] § 2 plaintiff must at least show an apportionment that is likely to perform *better* for minority voters, compared to the existing one."); *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994). *Whitford*'s standing analysis is thus entirely consistent with existing vote dilution precedent.

2. Under *Whitford*, in the League's view, plaintiffs plainly have standing to challenge nine of the 2016 Plan's thirteen districts on partisan vote dilution grounds. League members who support the Democratic Party live in, and are cracked or packed by, Districts 1, 2, 4, 6, 7, 8, 9, 12, and 13. They are also unnecessarily cracked or packed, because Plan 2-297 simultaneously uncracks or unpacks them all. *See supra* Statement Part II. These League members have therefore proved that "the particular composition of [their] own district[s] . . . causes [their] vote[s]—

having been packed or cracked—to carry less weight than [they] would carry in [other], hypothetical district[s]." *Whitford*, 138 S. Ct. at 1931. They have proved, that is, the injury the four plaintiffs the Court discussed in *Whitford* merely alleged.

3. Appellants primarily resist this conclusion by dissembling about the district court's decision. As evidence that the court treated partisan vote dilution as a theory "not specific to an individual's right to cast his own undiluted vote," J.S.19, they cite the court's passages about the *First Amendment* and *Article I* harms caused by partisan gerrymandering, *see id.* (quoting App.70, 74, 78). These passages, though, have nothing to do with the court's approach to standing on the basis of partisan vote dilution. Still more misleadingly, Appellants quote a number of plaintiffs who testified about the 2016 Plan in its entirety (instead of the cracking or packing of their own districts). J.S.18-19. But Appellants never mention that these litigants *were held to lack standing*, precisely because "they believe their vote was diluted by the 2016 Plan *as a whole*, rather than by the lines of their particular district." App.65-66.

4. Next, Appellants latch onto three of the many plaintiffs in this case: Larry Hall in District 1, and Richard and Cheryl Taft in District 3. With respect to Hall, Appellants assert that he is "[l]ike the lead plaintiff in [*Whitford*]" because his district is overwhelmingly Democratic. J.S.20. It is true enough that District 1 packs Hall and other Democratic voters. But unlike the "'naturally' packed" Madison-area district in *Whitford*, 138 S. Ct. at 1933, District 1 does so entirely unnecessarily. In Plan 2-297, Hall is placed in a district that is six percentage points less

heavily Democratic than District 1. Dkt.130-2:11. Likewise, the League plaintiffs in District 1 end up in a district that is fully *ten* points less heavily Democratic. Dkt.129-2:6. This district is also far more compact than District 1. *Compare* Ex.5048 (showing Reock and Polsby-Popper scores of 0.34 and 0.20 for District 1), *with* Dkt.129-2:4 (showing analogous scores of 0.47 and 0.33 for District 12 in Plan 2-297). Accordingly, Hall and the other litigants in District 1 do not resemble the lead plaintiff in *Whitford* in the only way that matters. Unlike him, they *can* be unpacked by an alternative map—and *are* unpacked by Plan 2-297.[8]

With respect to the Tafts, the League agrees that they do not have standing on partisan vote dilution grounds. While they are cracked by District 3, they are not uncracked by Plan 2-297 since it places them in a district with almost exactly the same partisan composition. Dkt.130-2:11. The League also concedes that none of its members in District 3 are uncracked by Plan 2-297 either. Of course, the fact that some of the 2016 Plan's districts may be unlawfully dilutive, while others may not be, refutes Appellants' claim that Appellees are attacking the Plan as an undifferentiated whole. If they were, all of the Plan's districts would rise or fall together—which, on this theory, they emphatically do not.

5. Lastly, Appellants fall back on the argument that Appellees lack standing *even if* "their representative may have shifted from Republican to

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[8] Moreover, the unpacking of these litigants facilitates the uncracking of Democratic voters in adjacent districts. Because District 1 becomes less heavily Democratic, in particular, the analogue to District 2 in Plan 2-297 leans in a Democratic rather than a Republican direction. Dkt.129-2:2.

Democrat under plaintiffs' alternative plans." J.S.21. This is because, in Appellants' view, "[t]here is no 'vote dilution' in partisan gerrymandering cases because the one-person, one-vote principle already ensures that votes are 'equally weighted.'" J.S.22. It is worth pausing to appreciate the radicalism of this position. It defies this Court's unanimous conclusion in *Whitford* that plaintiffs *can* bring "allegations that their votes have been diluted," and *do* have standing if their votes, "having been packed or cracked . . . carry less weight than [they] would carry in [other], hypothetical district[s]." 138 S. Ct. at 1930-31.

Appellants' stance is also irreconcilable with the Court's repeated recognitions, in its partisan gerrymandering and racial vote dilution cases, that voters' influence can be diluted not just through malapportionment but through cracking and packing as well. In *Vieth*, for instance, the plurality defined partisan gerrymandering as "intentional vote dilution," 541 U.S. at 298 (plurality opinion), and explained that it operates by "filling a district with a supermajority of a given group" or "splitting . . . a group . . . among several districts," *id.* at 286 n.7. In *LULAC*, similarly, Chief Justice Roberts pointed out that racial vote dilution, too, works by "pack[ing] minority voters in a few districts" or "dispers[ing] them among [many] districts." 548 U.S. at 495 (opinion of Roberts, C.J.); *see also, e.g.*, *De Grandy*, 512 U.S. at 1007; *Voinovich*, 507 U.S. at 153-54; *Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion). All of these precedents would have to be revisited under Appellants' theory of standing, because all of them acknowledge that malapportionment does not exhaust the set of dilutive mechanisms.

II. The Court Should Adhere to Its Consistent Holdings That Partisan Gerrymandering Is Justiciable.

1. Appellants next assert that the whole cause of action for partisan gerrymandering is categorically nonjusticiable. J.S.23-28. But this Court has repeatedly rejected that sweeping claim. In *Bandemer*, six Justices agreed that partisan gerrymandering suits are justiciable. *See* 478 U.S. at 118-27. In *Vieth*, "five Members of the Court" were again "convinced" that "political gerrymandering claims are justiciable." 541 U.S. at 317 (Stevens, J., dissenting). In *LULAC* as well, the Court observed that "a majority [in *Vieth*] declined" to deem partisan gerrymandering suits "nonjusticiable political questions," and refused to "revisit [*Vieth*'s] justiciability holding." 548 U.S. at 414.

These cases should be followed not just because they are precedents but also because they are right. It is implausible, in particular, that racial vote dilution could be justiciable—under both the Voting Rights Act and the Constitution, *see, e.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982)—while partisan vote dilution is not. As noted above, racial and partisan vote dilution both function by cracking and packing targeted voters. Racial and partisan vote dilution both also depend on voter behavior that is predictable and polarized. *See, e,g.*, *Thornburg v. Gingles*, 478 U.S. 30, 52-74 (1986) (discussing racial polarization in voting). And racial and partisan vote dilution both require analyses of individual districts as well as "whether line-drawing in the challenged area as a whole dilutes [a group's] voting strength." *LULAC*, 548 U.S. at 504 (opinion of Roberts, C.J.). These issues cannot be judicially

manageable in the racial context but beyond courts' powers in the partisan arena.

Strongly supporting justiciability, too, is this Court's vigilance against the partisan manipulation of the electoral process in other domains. In its campaign finance cases, for example, the Court has remarked that "those who govern should be the *last* people to help decide who *should* govern." *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014). It is to prevent "such basic intrusion by the government into the debate over who should govern" that the Court scrutinizes regulations of money in politics so stringently. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 750 (2011). The Court prohibits patronage hiring and firing for much the same reason. These practices "starve political opposition by commanding partisan support," and "thus tip[] the electoral process in favor of the incumbent party." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). If anything, this insight applies even more urgently to partisan gerrymandering, which not only influences voters' choices but also determines how their votes are aggregated. The Court's concern about partisan self-aggrandizement should reach its peak when a party can entrench itself directly, without even needing to change voters' minds.

2. Despite these precedents, Appellants contend that partisan gerrymandering is nonjusticiable because voters' partisan affiliations can vary from race to race and year to year. J.S.25-26. But Appellants cite no evidence that partisanship is highly volatile. To the contrary, their own expert line-drawer, Hofeller, testified that "'past voting behavior' . . . is 'the best predictor of future election success.'"

App.11. He added that "'[t]he underlying political nature of the precincts in the state *does not change no matter what race you use to analyze it*,'" so "'once a precinct is found to be a strong Democratic [or Republican] precinct, it's probably going to act as a strong Democratic [or Republican] precinct in every subsequent election.'" App.175. Professor Chen confirmed Hofeller's testimony by examining how well a model including the presidential vote explains the congressional vote in North Carolina elections. The model does so almost perfectly, indicating that North Carolina voters behave nearly identically in races at different electoral levels. Ex.2010:38.

Moreover, the fact that voters' opinions may shift does not distinguish the partisan context from the racial one. Minority voters do not always support the same candidate, nor do nonminority voters always oppose that candidate. That is why racial vote dilution doctrine "does not assume the existence of racial bloc voting," but rather insists that "plaintiffs must prove it." *Gingles*, 478 U.S. at 46. Here, Appellees not only showed that North Carolina voters are impressively stable in their partisan preferences. Appellees further demonstrated that even if the electorate's views *do* change significantly, the 2016 Plan will *still* remain highly skewed in a Republican direction. App.191, 197. Thus, even if Appellants' speculation about voters' volatility is correct, it makes no difference. The Plan will continue to favor Republicans in future elections.

3. Appellants' other justiciability arguments all repeat points that were previously made by the dissenters in the reapportionment cases of the 1960s. Appellants assert that partisan gerrymandering

challenges should really be "called Guarantee Clause claims." J.S.27. Justice Frankfurter similarly contended that one person, one vote suits are "Guarantee Clause claim[s] masquerading under a different label." *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting). In Appellants' view, authority over congressional redistricting is limited to state legislatures and to Congress. J.S.27-28. That was also Justice Harlan's opinion: that judicial intervention in this area is "derogatory not only of the power of the state legislatures but also of the power of Congress." *Wesberry v. Sanders*, 376 U.S. 1, 30 (1964) (Harlan, J., dissenting). And according to Appellants, the Framers accepted partisan gerrymandering and did not want the courts to prevent it. J.S.15, 24-25, 27. Justice Frankfurter thought the same: that population "inequalities survived the constitutional period," and that "[t]he Framers . . . refused so to enthrone the judiciary" by authorizing it to address malapportionment. *Baker*, 369 U.S. at 270, 308 (Frankfurter, J., dissenting).

These arguments are as weak today as they were half a century ago, when this Court rejected them. With respect to the Guarantee Clause, the Court provided the definitive rebuttal in *Baker*. While "appellants might conceivably have added a claim under the Guaranty Clause," "it does not follow that appellants may not be heard on the equal protection claim which in fact they tender." *Id.* at 227-28. In other words, a suit remains justiciable if it implicates issues of republican government, so long as it *also* involves violations of other constitutional provisions.

Justice Clark's concurrence in *Baker* also identified the flaw in Appellants' position that state

legislatures or Congress can stop partisan gerrymandering: that, in reality, they are extremely unlikely to do so. "The people [are] rebuffed at the hands of the Assembly," and "by the votes of [its] incumbents a [fair] reapportionment . . . is prevented." *Id.* at 259 (Clark, J., concurring). Likewise, "[i]t is said that there is recourse in Congress," but "from a practical standpoint this is without substance" since "[t]o date Congress has never undertaken such a task." *Id.* The *Wesberry* Court offered an even more powerful rejoinder to Appellants' view of the Elections Clause. While the provision may empower state legislatures and Congress to fight gerrymandering, it does not disable courts from doing so too. "Nothing in the language of that article . . . immunize[s] state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6.

As for the drafters of the Constitution, it is plainly partisan gerrymandering—not, as Appellants allege, judicial intervention *against* gerrymandering—that is "contrary to the Framers' basic design." J.S.24. The Framers were obsessed with the "mischiefs of faction": the "instability, injustice, and confusion [it] introduced," which are the "mortal diseases under which popular governments have everywhere perished." The Federalist No. 10. Gerrymandering, of course, is the epitome of faction run amok: a classic case of "the public good [being] disregarded" due to "the superior force of an interested and overbearing majority." *Id.* The Framers also wanted the House of Representatives to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52. Again, few forces make House

members less dependent on, and less in sympathy with, their constituents than gerrymandered districts. *See also, e.g.*, *Ariz. State Legislature*, 135 S. Ct. at 2672 (discussing the Framers' concern about the "manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate"); *Wesberry*, 376 U.S. at 7-17 (same).

4. In any event, this Court need not reach the general justiciability of partisan gerrymandering to decide this case. Whatever difficulties might be presented by district plans that are *not* "'drawn so as most to burden [a party's] rights to fair and effective representation'" are not posed by a map, like the 2016 Plan, that *does* overtly aim for, and achieve, maximal partisan advantage. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). This sort of map can and should be struck down under the Court's "'well developed and familiar' standard" that a law is invalid if it "'reflects *no* policy, but simply arbitrary and capricious action.'" *Id.* at 316, 320 (quoting *Baker*, 369 U.S. at 226).

III. The District Court's Test for Partisan Vote Dilution Is Judicially Discernible and Manageable.

1. Lastly, almost in passing, Appellants address the topic to which the district court devoted almost two hundred pages: the articulation and application of its test for partisan vote dilution claims. This test, again, is district-specific; it must be satisfied separately for each challenged district. App.139. To find liability, the test requires that a district (1) be drawn with the intent of cracking or packing the opposing party's voters; (2) have the effect of cracking

or packing these voters, in a durable manner that renders the legislator nonresponsive to her constituents; and (3) lack a legitimate justification for the cracking or packing. App.139-54. As an additional safeguard, the test requires discriminatory intent, a discriminatory effect, and the absence of a valid justification to be proved statewide. Before a district can be struck down, that is, the plan to which it belongs must be shown to be purposefully, severely, durably, and unjustifiably dilutive. App.155-222.

While the district court recognized this test under the Equal Protection Clause, the test also captures the First Amendment injury of viewpoint discrimination. A district that fails the test "has the purpose and effect of subjecting a group of voters . . . to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). The test's inclusion of district-specific and statewide elements, furthermore, parallels the existing doctrinal structures for numerical and racial vote dilution claims. A malapportionment plaintiff must establish not just that her district is overpopulated but also that the total population deviation of the entire map exceeds ten percent (in a state legislative case). *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Similarly, a racial vote dilution plaintiff must demonstrate not just her own cracking or packing but also "the possibility of *additional* single-member districts that minority voters might control." *LULAC*, 548 U.S. at 496 (opinion of Roberts, C.J.). Without such evidence, the plaintiff "does not show vote dilution, but 'only that lines could have been drawn elsewhere.'" *Id.* at 497(quoting *De Grandy*, 512 U.S. at 1015).

2. Appellants' first objection to this test has a heads-I-win, tails-you-lose feel. Either the test's intent prong is too lax, because it is satisfied by any pursuit of partisan advantage, or it is unworkably stringent, because it requires a predominant partisan motivation. J.S.29-30. In fact, neither aspect of this critique has merit. To start, it is hardly easy to prove an "intent to 'subordinate adherents of one political party and entrench a rival party in power.'" App.142 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). Certainly, this Court did not think so when it defined gerrymandering in precisely these terms. It is also false that the Court has previously blessed redistricting for raw partisan gain. The Court has endorsed *other* political aims, like "preserving the cores of prior districts" and "avoiding contests between incumbent Representatives." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). But there has never been "the slightest intimation in any opinion . . . 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).

Nor does this Court share Appellants' skepticism of a predominant partisan intent requirement (which the district court employed in the alternative, App.145-46). While a plurality in *Vieth* was unwilling to adopt such a heightened threshold, a *unanimous* Court did exactly that in *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016). Under *Harris*, a one person, one vote plaintiff challenging a plan with a total population "deviation of less than 10%" must show that the variance "reflects the *predominance* of illegitimate reapportionment factors," such as "partisanship." *Id.* at 1307, 1310

(emphasis added). Relying on this standard, every Justice concluded that the map at issue was lawful, because its "deviations *predominantly* reflected Commission efforts to achieve compliance with the federal Voting Rights Act, not to secure political advantage for one party." *Id.* at 1307 (emphasis added). Every Justice, that is, did what Appellants say cannot be done: apply a predominant partisan intent requirement.

3. Appellants' attacks on the effect prong of the district court's test are equally unpersuasive. They complain that the court did not identify a partisan asymmetry threshold for use in all future cases. J.S.30-31. But lower courts are not in the habit of making such grand pronouncements. To resolve the dispute in front of it, it was enough for the district court to find that the 2016 Plan's skew is exceptionally severe, and thus above any plausible bar. App.193-96. Appellants also protest the district court's consideration of "all manner of social science metrics." J.S.31. But beyond their quantity, Appellants do not flag any issues with these measures. Moreover, as the district court noted, "when a variety of different pieces of evidence . . . all point to the same conclusion . . . courts have *greater* confidence in the correctness of the conclusion." App.132-33.

Finally, Appellants contend that partisan gerrymandering "ameliorate[s]" responsiveness by "avoid[ing] the concentration of majority-party voters in a small number of districts." J.S.31. Responsiveness is indeed "at the heart of the democratic process," *McCutcheon*, 572 U.S. at 227, but Appellants could not be more wrong about how to achieve it. For one thing, gerrymanderers do not

design *competitive* districts for their party's candidates; they draw districts that are *safe*—just not as inefficiently overconcentrated as the packed districts they craft for the opposing party. *See* App.190 ("[A]ll ten Republican-held districts[] in the 2016 Plan are 'safe.'"). For another, in a highly polarized period like the present, legislators' party affiliations are far better predictors of their records than their districts' compositions. *See, e.g.*, Caughey et al., *supra*, at 458. This is why partisan asymmetry is linked so strongly to legislative non-responsiveness. It leads to the election of more of a party's candidates than voters want, who then take more extreme positions than voters support. *See, e.g.*, *id.* at 461-65.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

October 31, 2018 Respectfully submitted,

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