No. 17-1295

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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QUESTIONS PRESENTED

1. Whether the test for partisan gerrymandering claims set forth by the district court — requiring (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?

2. Whether the district court's unanimous decision that the district plan for North Carolina's congressional delegation is unconstitutional under this test is correct?

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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.

INTRODUCTION

Most gerrymanderers try to conceal their pursuit of partisan advantage. But not the architects of the North Carolina congressional plan adopted in February 2016 ("2016 Plan"). Their official criteria baldly declared that, under the Plan, "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." App.15. One of the co-chairs of the 2016 Joint Select Committee on Congressional Redistricting ("Joint Committee"), Representative David Lewis, added at a Joint Committee meeting: "I acknowledge freely that this would be a political gerrymander." Ex.1005:48. He went on: "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.

Most congressional district maps are also reasonably balanced in their treatment of the two major parties. App.136-37. But not the 2016 Plan. In the 2016 election, Republican candidates won ten out of thirteen seats even though the statewide vote was nearly tied. App.131. As a result, the Plan exhibited the largest partisan asymmetry of any congressional map *in the country* examined by Appellees' expert. App.137. Moreover, this extraordinary skew is virtually certain to endure for the rest of the decade. Only if the statewide vote swings by at least nine points in a Democratic direction—producing the best Democratic showing in more than thirty years—will the Plan's pro-Republican bias dissipate. App.139-40.

In many states, too, district maps' asymmetries can be justified by neutral factors such as political

geography or compliance with traditional redistricting criteria. But not in North Carolina. When Appellees' expert randomly generated thousands of congressional plans, using the exact criteria adopted by the Joint Committee (except for "Partisan Advantage"), not one was as skewed as the 2016 Plan. App.106-09. Indeed, the typical map slightly favored *Democrats*, indicating that North Carolina's spatial patterns and redistricting principles cannot possibly explain the Plan's extreme pro-Republican tilt. *Id.*

This is therefore an easy case that warrants a summary affirmance of the district court's unanimous decision to invalidate the 2016 Plan. As the court found, the Plan is an outlier on every relevant dimension: nakedly partisan in its motivation, more significantly and durably biased than virtually every other map, and lacking any legitimate justification for its near-record asymmetry. As long as partisan gerrymandering claims remain justiciable—under any constitutional provision and using any legal standard—the Plan cannot stand.

Notably, Appellants do not dispute any of the district court's factual findings. They concede, in other words, that the 2016 Plan is intentionally, severely, persistently, and unjustifiably asymmetric. Instead, Appellants make two arguments: that no one has standing to challenge the Plan as a whole, and that the tests set forth by the district court are insufficiently "limited and precise." *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). Neither claim has merit.

Starting with standing, Appellants' position is precluded by decades of precedent. On three separate

occasions, this Court has considered partisan gerrymandering suits brought against district maps in their entirety. Lower courts have done the same dozens more times. Yet in *none* of these many cases, spanning more than thirty years, has any court denied standing to plaintiffs who were supporters of the disadvantaged party. And for good reason. Such a denial would mean that statewide claims are not justiciable, while this Court has consistently held that they are.

Black-letter standing doctrine leads to the same conclusion. Partisan gerrymandering inflicts on backers of the disadvantaged party the "concrete and particularized" injury of intentional vote dilution. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). These voters' ability to elect their candidates of choice to the state legislature or congressional delegation is deliberately impaired, solely because of "their voting history, their association with a political party, [and] their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment). This harm is plainly not a generalized grievance since it is incurred only by the disfavored party's adherents—not by unaffiliated voters or devotees of the gerrymandering party. The harm is also caused by the district plan that purposefully cracks and packs the targeted party's voters, and would be cured by the adoption of a balanced map.

That vote dilution plaintiffs may challenge multiple districts simultaneously is confirmed by the Court's cases enforcing the one person, one vote rule and Section 2 of the Voting Rights Act. In a one person, one vote suit, residents of overpopulated districts have standing to attack the entire

malapportioned plan—not just their own constituencies. Likewise, in a Section 2 action, minority voters have standing to dispute all of the districts in the region (which is often the whole jurisdiction) where their electoral influence is abridged. These principles necessarily extend from numerical and racial vote dilution to the partisan vote dilution alleged here.

Turning to the tests identified by the district court, Appellees advocated below, and now address, only the first of them: a three-part inquiry asking whether the district map (1) was passed with the "intent to 'subordinate adherents of one political party and entrench a rival party in power,'" App.94 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)); (2) has exhibited a "bias" against "supporters of [the] disfavored candidate party" that is "likely to persist in subsequent elections," App.129-30; and (3) has "discriminatory effects" that cannot be "justified by a legitimate state districting interest or neutral explanation," App.157. This test is virtually identical to the one endorsed by the district court in *Whitford v. Gill*, 218 F. Supp. 3d 837, 884 (W.D. Wis. 2016) (*Whitford II*), *appeal docketed*, 137 S. Ct. 2289 (2017). It is also deeply rooted in this Court's First and Fourteenth Amendment precedents.[1]

[1] While the district court recognized this test under the Equal Protection Clause, Appellees agree with the district court in *Whitford* that it also captures the First Amendment injury caused by partisan gerrymandering. *See Whitford II*, 218 F. Supp. 3d at 884. A district map that fails the test plainly "has the purpose and effect of subjecting a group of voters . . . to

Appellants complain that the test's intent prong is too readily satisfied. But ease of proof is not the issue here. Rather, what Appellants must establish is that the prong is *judicially unworkable*. Oddly, they do not even attempt to make this showing. The prong also does not (as Appellants assert) come close to banning all political considerations from redistricting. Mapmakers may freely seek to promote electoral competitiveness, to avoid contests between incumbents, to respect politically defined communities of voters, or to achieve proportional representation, all without running afoul of the prong. Even if mapmakers' goal is some degree of partisan advantage, their objective is permissible as long as it does not rise to outright subordination of the opposing party and entrenchment of their own side.

Appellants further bemoan the district court's refusal to set a specific asymmetry threshold. But the court had no reason to make such grand pronouncements, faced as it was with one of the most highly skewed maps in modern American history. The quantitative measures on which the court relied also lend themselves nicely to choosing a threshold, if and when the need for one arises. As for the multiplicity of these metrics (which Appellants criticize as well), the court should be commended for taking into account several kinds of evidence. All of them pointed in exactly the same direction, thus bolstering the court's confidence that the 2016 Plan is indeed one of the most severely and durably asymmetric maps of the last half-century.

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disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment).

This Court should therefore summarily affirm the district court's unanimous decision. The 2016 Plan is a textbook partisan gerrymander: a prime example of a map that cannot be lawful if any form of partisan gerrymandering is justiciable.

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 ("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. The 2011 Plan's drafter, Dr. Thomas Hofeller, also stated repeatedly that the map as a whole was intended to benefit Republican (and handicap Democratic) candidates and voters.

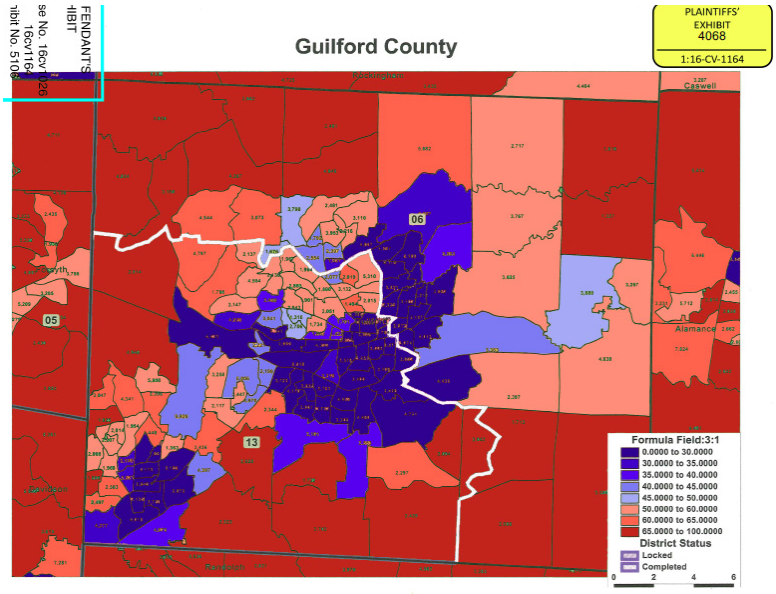
In his deposition in this case, for example, Hofeller testified that the "'primar[y] goal' in drawing the [2011] districts was 'to create as many districts as possible in which GOP candidates would be able to successfully compete for office.'" App.8. Similarly, in his expert report in *Harris*, Hofeller 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.

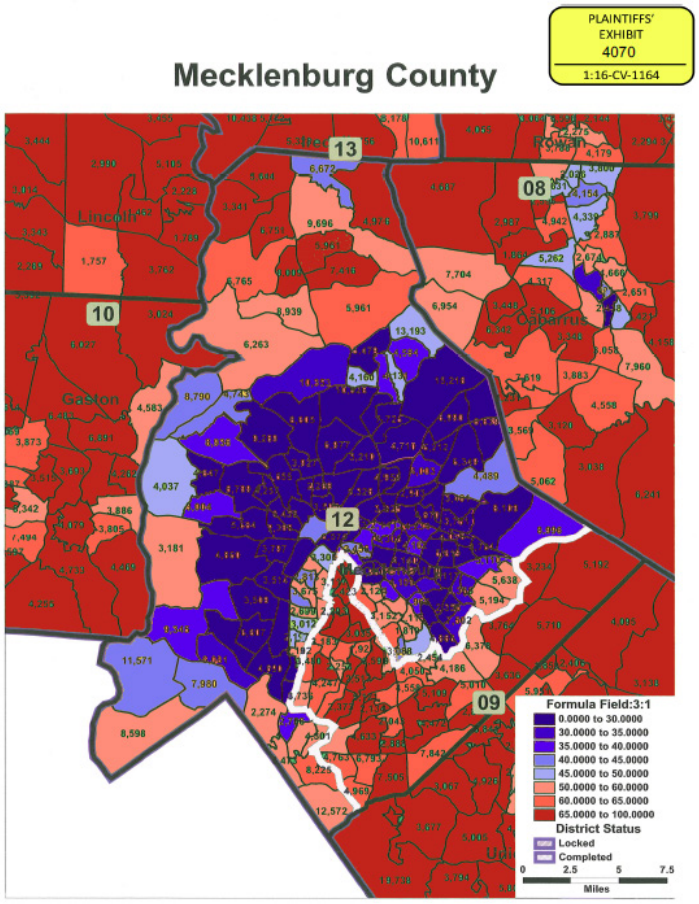
After the 2011 Plan was invalidated in part, the same actors took the lead in designing its replacement. Lewis and Senator Robert Rucho were again the co-chairs of the relevant legislative committee. Hofeller was once more the drafter of the map. Lewis and Rucho verbally instructed Hofeller to "draw a map that would maintain the existing partisan makeup of the state's congressional delegation," which "included 10 Republicans and 3 Democrats." App.11. They added that he should exclusively use "political data" in his work: "precinct-level election results from all statewide elections." *Id.*

Following his instructions, Hofeller aggregated these election results into a sophisticated multi-year average that, in his expert view, would accurately capture district partisanship "'in every subsequent election.'" App.12. Employing this metric, he carefully divided clusters of Democratic voters that could have anchored congressional districts. The first map below, for instance, shows the 2016 Plan's treatment of Greensboro. The heavily Democratic city is split with surgical precision, its two halves submerged, respectively, in the safely Republican Sixth and Thirteenth Districts. App.97, 159; Ex.4068; *see also* Ex.4066 (division of Asheville between the Tenth and Eleventh Districts); Ex.4067 (division of Fayetteville between the Eighth and Ninth Districts).

On the other hand, where concentrations of Democratic voters were too large to be cracked, Hofeller methodically packed them into a handful of districts. The second map below depicts the Charlotte metropolitan area under the 2016 Plan. A Democratic cluster that could yield two Democratic seats is instead enclosed within the highly uncompetitive

Twelfth District. App.97-98; Ex.4070; *see also* Ex.4071 (packing of Greenville in the First District); Ex.4072 (packing of Raleigh-Durham in the Fourth District).





After Hofeller finished drafting the 2016 Plan—alone and in secret—Lewis and Rucho convened a pair of Joint Committee meetings. App.14. At the first session, the Committee approved, on party line votes, the criteria that Lewis and Rucho had previously conveyed orally to Hofeller. App.18. The "Partisan Advantage" criterion stated that "[t]he partisan makeup of the congressional delegation" would be "10 Republicans and 3 Democrats." App.15. 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.*

It was at this first session that Lewis "acknowledge[d] freely that this would be a political gerrymander." App.17. He also "propose[d] that to the extent possible, the map drawers create a map which is . . . likely to elect 10 Republicans and 3 Democrats." Ex.1005:48. He further stated: "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.17.

At the second Joint Committee meeting (held the day after the first), Lewis and Rucho finally unveiled the 2016 Plan. App.19. Lewis reiterated that it "will produce an opportunity to elect ten Republican members of Congress." *Id.* To prove his point, he provided the Committee with "spreadsheets showing the partisan performance of the proposed districts in twenty previous statewide elections." *Id.* The Committee subsequently approved the Plan, again on a party line vote. *Id.*

Two days later, the North Carolina House of Representatives and Senate debated and passed the 2016 Plan, once more on party line votes. App.19-20. In case there was any doubt, Lewis informed his fellow legislators: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." App.19.

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

As noted above, 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.131, 155. 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.131.

Appellees' expert, Professor Simon Jackman, calculated three well-established measures of partisan asymmetry using these election results. (Partisan asymmetry refers to "whether the plan allows supporters of the two principal parties to translate their votes into representation with equal effectiveness." App.71.) 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.134-35. Second, *partisan bias* is the difference between a party's seat share and 50% in a hypothetical tied election. App.148. And third, the *mean-median difference* subtracts a party's median vote share, across a plan's districts, from its mean vote share. App.150.

All of these metrics tell the same story about the 2011 and 2016 Plans: They have benefited Republican (and handicapped Democratic) candidates and voters to a staggering 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.135-36, 155. 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.149; 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.150; Ex.4003:8.

To put these scores in historical perspective, Professor Jackman computed the efficiency gap, partisan bias, and mean-median difference for all congressional plans since 1972 with at least seven seats. App.136. As the below chart illustrates, both the 2011 and 2016 Plans are extreme outliers. Ex.4002:27. In fact, the 2011 Plan had the worst average efficiency gap of *any* of the plans in Professor Jackman's database, Ex.4002:10, while the 2016 Plan had the worst efficiency gap in the country in the 2016 election, App.137. The 2011 and 2016 Plans also exhibited nearly unprecedented partisan biases and mean-median differences. Their partisan biases, for example, were the second-largest in the modern era, roughly three standard deviations from the historical mean. App.149.

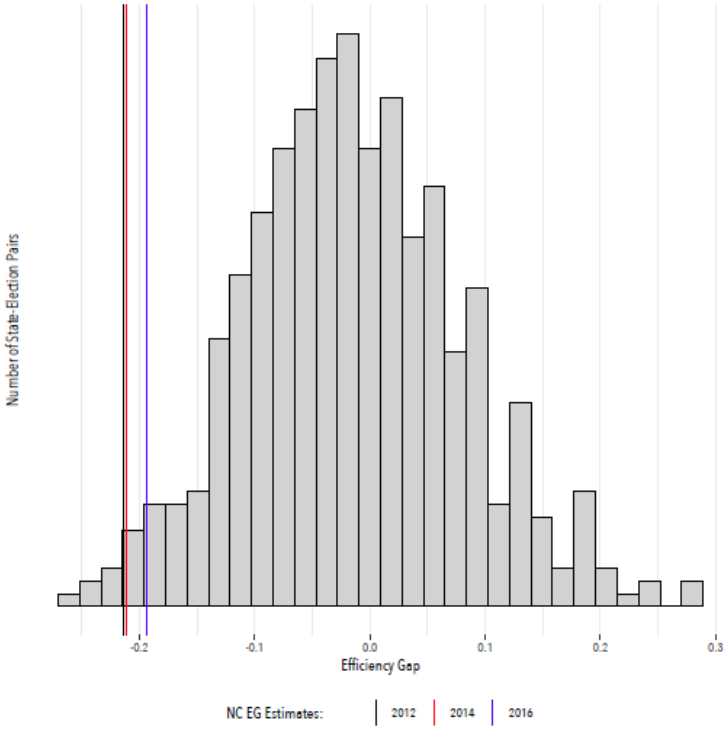


Figure 6: Histogram of efficiency gap estimates in 512 elections, 1972-2016. The three vertical lines indicate where North Carolina's three most recent elections lie in the distribution of efficiency gap scores.

Professor Jackman further testified about the durability of large partisan asymmetries—both specifically for the 2016 Plan and generally for all of the maps in his database. For the Plan, 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.133. 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 efficiency gap to disappear, Democrats would have to improve on their 2016 showing by *nine* points—a wave

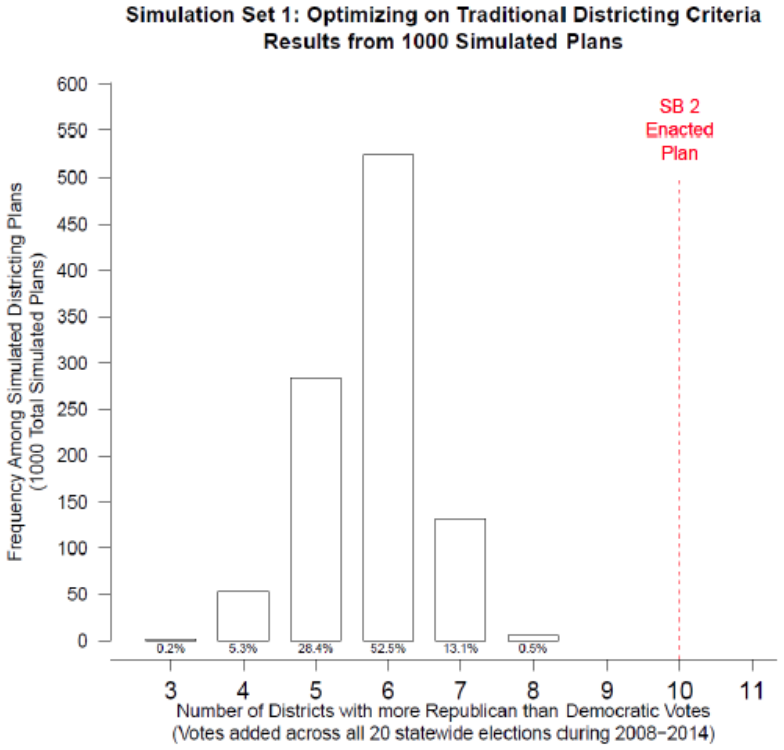
whose only precedent is the post-Watergate election of 1974. App.139.

For his entire database, Professor Jackman studied how maps' *initial* efficiency gaps are related to their *average* efficiency gaps over the rest of their lifetimes. This link is quite strong, meaning that a plan that is highly asymmetric in its first election can be expected to remain asymmetric in the future. App.138-39. Professor Jackman also carried out a series of prognostic tests for the efficiency gap. Notably, the rate of "false positives" (maps with large initial, but small subsequent, efficiency gaps) is *zero* for maps as highly skewed as the 2016 Plan. Ex.4002:45.

III. 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*, Appellees' other expert, Professor Jowei Chen, used a computer simulation technique to generate three thousand different congressional plans for North Carolina. App.105-09. All of these maps matched or surpassed the 2016 Plan's performance in terms of the nonpartisan Adopted Criteria. Their districts were "as equal as practicable" in population, "comprised of contiguous territory," and created without "[d]ata identifying the race of individuals." App.15. Their districts also did at least as well "improv[ing] the compactness" and "keep[ing] more counties and [precincts] whole." *Id.*

Yet *not one* of these three thousand maps ever resulted in a 10-to-3 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.106-09, 152-54. In fact, as the below chart reveals, 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 nonpartisan Adopted 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.

IV. The District Court Unanimously Invalidated the 2016 Plan.

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: Common Cause and the League of Women Voters. 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.

Appellants moved to dismiss, Dkt.30, but the district court unanimously denied their motion in March 2017. The court noted Appellants' admission that, "in adopting the Plan, the General Assembly intended to favor Republican voters and disadvantage voters who voted for non-Republican candidates." Dkt.50:7. Addressing Appellees' proposed three-part test, the court also observed that "several Justices have stated that partisan symmetry has promise for measuring the discriminatory effects of a partisan gerrymander and structuring a remedy." Dkt.50:27.

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). Professor Mattingly corroborated Professor Chen's results using a different simulation technique, App.99-105, while Professor Hood and Trende criticized some of Appellees' methods and metrics.

In January 2018, the district court unanimously held that the 2016 Plan is an unconstitutional partisan gerrymander. Writing separately, Judge Osteen agreed that "Plaintiffs have met their burden of proving a prima facie partisan gerrymandering claim" by establishing "an intent to subordinate the interests of non-Republican voters and entrench Republican candidates in power" as well as "the effect of controlling electoral outcomes to continue a 10-3 Republican control of Congressional seats." App.209. Judge Osteen also "agree[d] that Defendants have not justified the effects of the 2016 Plan." *Id.* His disagreement with the majority was that he would

have required "partisanship" to be "the predominant factor motivating" the 2016 Plan—a requirement he nevertheless found to be satisfied. *Id.*

ARGUMENT

Appellants do not dispute the district court's findings that the 2016 Plan (1) was enacted with discriminatory intent; (2) has produced a large and durable discriminatory effect; and (3) lacks any legitimate justification for this effect. These concessions warrant a summary affirmance by this Court. If partisan gerrymandering is justiciable, a district map that is deliberately, severely, persistently, and unjustifiably asymmetric is plainly unlawful.

Appellants' argument that no one has standing to challenge the 2016 Plan in its entirety is radical in its implications. If accepted, it would mean that statewide partisan gerrymandering claims are not justiciable, even though the Court has held for more than thirty years that they are. Appellants' view of standing also cannot be reconciled with the Court's vote dilution cases. As the Court has recognized, vote dilution necessarily occurs across a *set* of districts, meaning that plaintiffs must be able to attack multiple districts in the same action.

Appellants' complaints about the district court's intent and effect prongs do not undermine their manageability. As to intent, Appellants confuse the ease of showing a discriminatory purpose with this inquiry's workability. They also ignore the many claims that the prong immediately precludes. As to effect, the district court cannot be faulted for declining to set an asymmetry threshold or for considering

multiple asymmetry metrics. The 2016 Plan's skew comfortably clears any plausible hurdle. And this Court has always taken the position that more information is better than less, in redistricting as in other cases.

I. Plaintiffs Have Standing to Challenge the 2016 Plan as a Whole.

1. Beginning with Appellants' standing argument, it is mislabeled as such. If the claim were, in fact, about standing, one would expect that *someone* would be properly situated to challenge the 2016 Plan as a whole: if not the individual voter plaintiffs (who, again, live in every congressional district in North Carolina), then some other voters; if not Common Cause and the League of Women Voters, then some other groups; if not the Democratic Party of North Carolina, then some other political organization. Not so, according to Appellants. In their view, *no one* has standing to attack the Plan in its entirety. J.S.19-21. But in that case, Appellants are not actually raising an objection about standing. Rather, they are taking the far more extreme position that statewide partisan gerrymandering claims are simply not justiciable.

That position would undo decades of the Court's precedents. In *Davis v. Bandemer*, 478 U.S. 109 (1986), six Justices recognized "a claim that [Indiana's] 1981 apportionment discriminates against Democrats *on a statewide basis*." *Id.* at 127 (plurality opinion) (emphasis added). "[U]nconstitutional vote dilution," in other words, may be "alleged in the form of *statewide* political gerrymandering." *Id.* at 132 (emphasis added). Similarly, in his controlling concurrence in *Vieth*, Justice Kennedy contemplated partisan gerrymandering suits proceeding against

whole district plans. He noted that "[i]f a State passed an enactment" explicitly burdening a party's "rights to fair and effective representation," "we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring in the judgment). He also offered two examples of "culpable" gerrymanders, both statewide in nature. *Id.* at 316. "In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat." *Id.* "In three other States, Party Y controls the apportionment process" "capturing less than all the seats in each State." *Id.* And again in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*), the Court considered a claim that Texas's "Plan 1374C"—all of it—"should be invalidated as an unconstitutional partisan gerrymander." *Id.* at 413. "[A] majority declined" to "h[o]ld such challenges to be nonjusticiable political questions." *Id.* at 414.

Unsurprisingly, given this unbroken wall of precedent, "courts considering partisan gerrymandering consistently have assumed that standing exists to challenge a statewide plan." *Whitford v. Nichol*, 151 F. Supp. 3d 918, 927 (W.D. Wis. 2015) (*Whitford I*). *See, e.g.*, *League of Women Voters v. Quinn*, 2011 WL 5143044, at *1 (N.D. Ill. Oct. 28, 2011); *Radogno v. Ill. State Bd. of Elections*, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011); *Perez v. Texas*, 2011 WL 9160142, at *9 (W.D. Tex. Sept. 2, 2011); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 539-40 (M.D. Pa. 2002). Indeed, Appellants fail to identify a *single* case denying such standing, for the very good reason that no case has ever done so. Had any court held that litigants cannot dispute a map in its entirety, after all, it would have flouted this Court's

repeated holdings that statewide partisan gerrymandering claims *are* justiciable.

2. Hornbook standing doctrine also leads to the conclusion that plaintiffs in this action may challenge the 2016 Plan as a whole. The individual voters who support the Democratic Party, in particular, have suffered the "concrete and particularized"—and very familiar—injury of intentional vote dilution. *Lujan*, 504 U.S. at 560. Solely because of their political beliefs, their ability to elect their candidates of choice to North Carolina's congressional delegation has been deliberately impaired, thus undermining the delegation's representation of their needs and interests. As the district court put it, "the 2016 Plan diluted the votes of those Plaintiffs who supported non-Republican candidates." App.41. Or in the words of another district court, "plaintiffs' inability to translate their votes into seats as efficiently as Republicans" represents "the invasion of a legally protected interest." *Whitford II*, 218 F. Supp. 3d at 927-28.[2]

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[2] The statewide dilution of Democratic votes was accomplished through the systematic cracking and packing of Democratic voters. In the cracked Sixth, Eighth, Ninth, and Thirteenth Districts, for example, four Republicans are elected even though two Democrats would likely have won office had the clusters of Democratic voters in Fayetteville and Greensboro not been divided. App.97, 159; Ex.4067; Ex.4068. In the packed Fourth and Twelfth Districts, similarly, two Democrats are elected even though four Democrats would likely have prevailed had the Democratic voters in Charlotte and Raleigh-Durham not been so heavily concentrated. App.97-98; Ex.4070; Ex.4072. It is undeniable that the plaintiffs in these districts have been personally subjected to cracking and packing. To quote

This invasion, moreover, is far from innocuous. Legislators elected from highly asymmetric plans fail to "respond to the popular will," App.51, instead casting votes and passing laws that are unreflective of the electorate's preferences. *See, e.g.*, Devin Caughey et al., *Partisan Gerrymandering and the Political Process*, 16 Election L.J. 453 (2017).[3] Nor is the harm a generalized grievance incurred equally by all North Carolinians. Republican voters may well *prefer* for the State's congressional delegation to tilt in their direction, while unaffiliated voters may lack strong views about the delegation's partisan skew. It is only Democratic voters whose ballots have been diluted and whose representation has been abridged. *See Whitford II*, 218 F. Supp. 3d at 929-30.

Wisely, Appellants "do not dispute that, to the extent Plaintiffs suffered an injury-in-fact, the injury was caused by the 2016 Plan." App.30. The Plan diluted the individual Democrats' votes in exactly the same ways that single-member-district maps always cause vote dilution: "by the dispersal of [targeted voters] into districts in which they constitute an ineffective minority of voters or from the

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Appellants, "their *own* districts were drawn in a way that deprived *them* of [their] representational right[s]." J.S.22.

[3] This study also rebuts Appellants' claim that partisan gerrymandering "ameliorate[s]" district-level responsiveness by "avoid[ing] the concentration of majority-party voters." J.S.27-28. Gerrymanderers craft *safe* (just not *too* safe) districts for their party's candidates. App.41 n.10. But even if they drew more competitive districts, "the within-party relationship between vote share and conservatism is almost flat." Caughey et al., *supra*, at 457.

concentration of [these voters] into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986). "Nor do [Appellants] dispute that Plaintiffs' claimed injuries are redressable by a favorable decision of this Court." App.30. Again, properly not. A favorable decision would result in the 2016 Plan's replacement by a balanced map that does *not* dilute Democrats' (or anyone else's) votes. *See, e.g.*, *The Pennsylvania Remedy*, Election Law Blog (Feb. 19, 2018), https://electionlawblog.org/?p=97606 (noting that the remedial map recently adopted by the Pennsylvania Supreme Court is forecast to have a near-perfect score on every measure of partisan asymmetry).

3. Appellants resist the logic of standing doctrine by making a series of incorrect claims about the Court's other lines of redistricting precedent. *First*, they assert that plaintiffs in one person, one vote cases suffer only "district-specific injuries" and thus "must proceed 'district-by-district'" with their suits. J.S.18-19. This would certainly have been news to the litigants in *Baker v. Carr*, 369 U.S. 186 (1962), who lived in just five of the State's ninety-five counties, *id.* at 204, yet had "standing to challenge the Tennessee apportionment statutes" in their entirety, *id.* at 198. It would also have been a surprise to the plaintiffs in *Reynolds v. Sims*, 377 U.S. 533 (1964), who lived in a *single* Alabama county, *id.* at 537, yet won the invalidation of the State's whole malapportioned map, *id.* at 587. Nor can these cases be distinguished on the ground that they involved "statewide *remedies*." J.S.18. *Baker* dealt only with the justiciability of malapportionment, while *Reynolds* explicitly did "not consider . . . the difficult question of the proper

remedial devices which federal courts should utilize." 377 U.S. at 585.

In fact, as the district court recognized, App.36, the analogy between one person, one vote and partisan gerrymandering is virtually airtight. *See also Whitford II*, 218 F. Supp. 3d at 928 ("We believe the situation here is very close to that presented in *Baker v. Carr*."). Malapportionment prevents "a majority of the people of a State" from "elect[ing] a majority of that State's legislators" and stops legislatures from being "collectively responsive to the popular will." *Reynolds*, 377 U.S. at 565. Partisan gerrymandering wreaks exactly the same democratic damage. "[S]tanding in one-person, one-vote cases" extends to all "voters whose votes were diluted." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 n.12 (2016). So does standing in partisan gerrymandering cases. In the malapportionment context, these voters are the roughly half of a State's electorate who live in overpopulated districts and thus are underrepresented in the legislature. In the partisan gerrymandering setting, they are the roughly half of a State's electorate who back the disadvantaged party and thus are legislatively underrepresented as well.

Second, Appellants maintain that a racial vote dilution plaintiff "must allege that *her* opportunity to elect *her* candidate of choice was actually impeded," and "must proceed 'district-by-district'" too. J.S.17, 19. But the Court has explained, over and over, that racial vote dilution may be accomplished by cracking *or* by packing minority voters. *See, e.g.*, *LULAC*, 548 U.S. at 495 (opinion of Roberts, C.J.) (noting that a map "could also dilute minority voting power if it packed minority voters"); *Johnson v. De Grandy*, 512 U.S.

997, 1007 (1994) ("[M]anipulation of district lines can dilute the voting strength of . . . minority group members . . . by packing them into one or a small number of districts . . . ."); *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) ("How such concentration or 'packing' may dilute minority voting strength is not difficult to conceptualize."). A minority voter living in a packed district, of course, is *already* able to elect her preferred candidate. Yet under the Court's precedents, she nevertheless has standing because the minority *community* to which she belongs is underrepresented due to the packing.

As for Appellants' view that racial vote dilution claims are district-specific, it is not just sometimes wrong; it is literally never right. "A State with one congressional seat *cannot dilute* a minority's congressional vote." *Bartlett v. Strickland*, 556 U.S. 1, 30 (2009) (Souter, J., dissenting) (emphasis added). This is because cracking and packing, the techniques through which single-member-district plans dilute minority votes, require multiple districts for their operation. Minority voters can be inefficiently dispersed only if there are several districts among which to scatter them; likewise, they can be overly concentrated only if their wins in a few districts are more than offset by their losses elsewhere. For this reason, every racial vote dilution case this Court has heard (outside the at-large electoral context) has involved a challenge to either a multi-district region or a map as a whole. *De Grandy*, for instance, addressed twenty state house districts and seven state senate districts in Dade County, Florida. *See* 512 U.S. at 1014, 1023. In *LULAC*, similarly, the plaintiffs "alleged statewide vote dilution based on a statewide plan," and it thus "ma[de] sense to use the entire State

in assessing [the] proportionality" of their representation. 548 U.S. at 438.[4]

And *third*, Appellants repeatedly cite the Court's racial gerrymandering precedents, J.S.16, 17, 18, 21, even though their "rationale and holding . . . have no application here," *Whitford II*, 218 F. Supp. 3d at 929. Those cases are inapt because—unlike one person, one vote, racial vote dilution, and partisan gerrymandering suits—they do *not* include allegations that any groups' votes have been diluted. They do not contain claims, that is, that either minority or nonminority voters are underrepresented in the legislature. To the contrary, the crux of a racial gerrymandering action is that "race was the predominant factor motivating the legislature's decision" to construct "a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). District-specific standing is a perfect match for this district-specific theory, focused as it is on "harms that are not present in [the Court's] vote-dilution cases." *Shaw v. Reno*, 509 U.S. 630, 650 (1993). District-specific standing,

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[4] Because racial vote dilution claims are never district-specific, plaintiffs bringing them always have standing to challenge districts beyond those in which they live. *See, e.g.*, *Pope v. Cty. of Albany*, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014) ("[T]hat Plaintiffs reside in a[n] . . . area that could support additional [minority-opportunity districts] sufficiently proves standing for a Section 2 claim for vote dilution."); *Barnett v. City of Chicago*, 1996 WL 34432, at *4-5 (N.D. Ill. Jan. 29, 1996) (finding "an individualized injury-in-fact" for minority voters in Chicago, "some of whom live in fractured wards" and "some of whom live in packed wards"); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1690 (2001) (noting that "[c]ourts have routinely granted standing" to "*all* members of the minority group who reside . . . within the state or locality").

though, is incompatible with the multi-district or statewide representational injuries that *are* asserted in every category of vote dilution litigation.

4. Lastly, as the district court pointed out, App.40, it is significant that the 2016 Plan's architects treated the map's drafting as a statewide project. Above all, they wanted a congressional delegation made up of ten Republicans and three Democrats. Any aims for particular districts paled, in their view, compared to the imperative of securing a 10-to-3 Republican advantage. In fact, "[t]o achieve that statewide goal," they were willing to "sacrifice[] a number of district-specific objectives, such as preventing the pairing of all incumbents . . . respecting the lines of political subdivisions, and further improving on the compactness of the districts in the 2011 Plan." *Id.*

In light of the statewide focus of the 2016 Plan's architects, it would be incongruous to force challenges to the Plan to "proceed 'district-by-district.'" J.S.19. The Plan was conceived as a single coherent entity: an interlocking jigsaw puzzle that systematically cracked and packed Democratic voters in order to achieve a large and durable Republican edge. Appellees should be able to confront the Plan as it really is. They should not be limited to individual puzzle pieces when it is the puzzle itself that is the problem.

II. The District Court's Intent Prong Is Limited and Precise.

1. Turning to the district court's three-part test for partisan gerrymandering, its discriminatory intent prong is drawn from this Court's own definition of gerrymandering. The prong asks whether a district map was enacted with the "intent to 'subordinate

adherents of one political party and entrench a rival party in power.'" App.94 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2658). Strikingly, Appellants do not contend that the district court erred in concluding that the 2016 Plan was passed with such intent. Indeed, Appellants' discussion of the court's intent prong does not even *mention* the Plan.

And for good reason. As described above, one of the criteria for the 2016 Plan was labeled "Partisan Advantage," and required "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App.15. The Plan's authors also tolerated three Democratic seats only because it was not "possible to draw a map with 11 Republicans and 2 Democrats." App.18. The Plan therefore *is* Justice Kennedy's hypothetical law from *Vieth*: "an enactment that declared" that an "'apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation.'" 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The Court "would surely conclude the Constitution had been violated" by such a law. *Id.*

2. Most of Appellants' objections to the district court's intent prong stem from a misunderstanding. Appellants seem to think the prong would ban all political considerations from redistricting. But it would do no such thing. For example, the prong would not be violated "when a State purports fairly to allocate political power to the parties in accordance with their voting strength." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). Nor would the prong be offended by motives such as "preserving the cores of prior districts" and "avoiding contests between incumbent Representatives," as long as these goals are pursued

in a "nondiscriminatory" manner. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). A consistent preference for competitive districts would also be perfectly permissible. *See Vieth*, 541 U.S. at 346 (Souter, J., dissenting).

Appellants are not even right that the prong would proscribe "*any* intent to district for partisan advantage." J.S.23. The prong, after all, is satisfied only by the intent to *subordinate* the supporters of the opposing party and to *entrench* the mapmaking party in power. App.94. There is plainly a wide gulf between the garden-variety aim of partisan gain and the more extreme objective of partisan subordination and entrenchment. A party can seek modestly to favor its candidates and voters without trying to rig the political system so it effectively cannot be removed from office.

Appellants are wrong as well that members of this Court have given their imprimatur to redistricting for this sort of partisan advantage. J.S.25-26. In fact, "there has not 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). It is true enough that Justices have often noted the historical prevalence of partisan line-drawing motives. "[T]he vintage of an invidious practice," though, does not "insulate it from constitutional review." *Id.* at 337 n.29. It is also true that no Justice has advocated "the correction of all election district lines drawn for partisan reasons." *Id.* at 306 (Kennedy, J., concurring in the judgment). But the district court's test would not necessitate such "unprecedented intervention in

the American political process." *Id.* Rather, it would reach only the worst of the worst: the handful of outlier maps that are not just intentionally asymmetric, but also severely, durably, and unjustifiably skewed.

3. Appellants' remaining complaint about the district court's intent prong is that it is more easily satisfied than the "predominant intent" and "sole intent" formulations this Court rejected in *Vieth* and *LULAC*, respectively. J.S.24. Crucially, however, those formulations were not rebuffed because of their laxity. The problem with them, rather, was that they were *judicially unmanageable*—unlikely to yield outcomes that would be "principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality opinion). According to the *Vieth* plurality, a "'predominant motivation' test" is "[v]ague" and "indeterminate" because it requires weighing "the relative importance of [partisanship] as compared with all the other goals that the map seeks to pursue." *Id.* at 284-85. Likewise, as Justice Kennedy observed in *LULAC*, "affixing a single label" to "acts arising out of mixed motives" is a "complex" and "daunting" undertaking. 548 U.S. at 418 (opinion of Kennedy, J.).

Since manageability was the dispositive issue in *Vieth* and *LULAC*, one might expect Appellants to have addressed it. But they say not a word about the subject. Fortunately, this Court's precedents leave no doubt about its ability to distinguish plans that aim to "subordinate adherents of one political party and entrench a rival party in power" from maps designed without this motive. *Ariz. State Legislature*, 135 S. Ct. at 2658. In *LULAC*, for instance, Justice Kennedy

found it obvious that the Texas legislature "decided to redistrict" with the "purpose of achieving a Republican congressional majority." 548 U.S. at 417 (opinion of Kennedy, J.). In *Cox v. Larios*, 542 U.S. 947 (2004), similarly, the Court summarily affirmed the invalidation of Georgia state legislative maps that reflected "'an intentional effort to allow incumbent Democrats to maintain or increase their delegation.'" *Id.* at 947 (Stevens, J., concurring).

In *Gaffney*, conversely, the Court rejected a claim that Connecticut state legislative maps were "invidiously discriminatory." 412 U.S. at 752. These maps had been drawn by "a three-man bipartisan Board" that "followed a policy of 'political fairness.'" *Id.* at 736, 738. Again in *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016), the Court unanimously disagreed that "illegitimate considerations were the predominant motivation" behind an Arizona state legislative plan. *Id.* at 1309. This plan had been crafted by an "independent redistricting commission" that had made "'good-faith efforts to comply with the Voting Rights Act.'" *Id.* at 1305, 1309.

4. As these cases indicate, partisan subordination and entrenchment are often a map's goal when it is designed by a single party in full control of the redistricting process. On the other hand, such intent is almost always absent when a plan is enacted by some other actor, like a commission, a court, or a divided state government. *See Vieth*, 541 U.S. at 350-51 (Souter, J., dissenting) ("[U]nder a plan devised by a single major party, proving intent should not be hard," but "a plaintiff would naturally have a hard time showing requisite intent behind a plan produced

by a bipartisan commission."). This fact goes far in demonstrating the manageability of the district court's intent prong. A single, objective piece of information—the institution responsible for redistricting—is both highly probative and readily available in every lawsuit.

Moreover, the prong is not just "precise" in that it would target the right maps; it is also "limited" in that it would not "commit federal and state courts to unprecedented intervention." *Id.* at 306 (Kennedy, J., concurring in the judgment). According to Professor Jackman's dataset of congressional plans, ten of the twenty-four current maps with at least seven seats were crafted by a commission, a court, or a divided state government. Ex.4002:33. Over the entire period since 1972, this proportion rises to 59 out of 136. *Id.* Almost *half* of all congressional plans would thus be virtually *immunized* from challenge by just the first prong of the district court's test. As discussed below, this fraction grows even larger once the test's remaining prongs are also taken into account.

III. The District Court's Effect Prong Is Limited and Precise.

1. Next, the district court's discriminatory effect prong asks whether a district map in fact (1) subordinates one party's backers; and (2) entrenches the other party in power. App.129. Subordination is shown by "demonstrating that the redistricting plan is biased" against the targeted party. *Id.* Election results are relevant to this inquiry, as are well-established measures of partisan asymmetry such as the efficiency gap, partisan bias, and the mean-median difference. App.130-31. Entrenchment, in turn, is established by evidence that "a districting

plan's bias towards a favored party is likely to persist in subsequent elections." App.130. Sensitivity testing is the most useful tool for proving such persistence. App.133-34, 138-40.

Again, Appellants do not contest the district court's findings that the 2016 Plan subordinates Democratic voters and entrenches Republicans in power. J.S.27-28. And again, prudently not. As noted earlier, the 2016 Plan had the worst efficiency gap *in the country* in the 2016 election. App.137. Its partisan bias was also the second-worst of any congressional map *since 1972*. App.149. And for this extraordinary pro-Republican skew to disappear, North Carolina would have to experience its biggest Democratic wave since Watergate. App.139. In any other electoral environment, Republicans would retain their advantage.

2. Appellants object that the district court did not "identify how much 'bias' must exist" before its effect prong is violated. J.S.27. Lower courts, though, are not in the habit of trying to set thresholds for all future cases. To resolve the dispute in front of it, it was enough for the district court to find that the 2016 Plan's partisan asymmetry is exceptionally severe, and thus well above any plausible bar. App.144. Notably, this Court took exactly the same approach in its early one person, one vote decisions. In *Baker*, *Reynolds*, and all the rest of the malapportionment cases of the 1960s, the Court never specified at what point a map's total population deviation becomes presumptively unlawful. Instead, the Court reasoned that "[d]eveloping a body of doctrine on a case-by-case basis" is "the most satisfactory means of arriving at

detailed constitutional requirements." *Reynolds*, 377 U.S. at 578.

Eventually, of course, the Court did settle on a population deviation threshold. *See Connor v. Finch*, 431 U.S. 407, 418 (1977) (holding that "'under-10%' deviations" are "considered to be of prima facie constitutional validity"). Since partisan asymmetry is as quantifiable as malapportionment, the same sequence is feasible here. After hearing a number of partisan gerrymandering cases, the Court could conclude that a certain level of skew is sufficient to show a party's electoral subordination. In this litigation, for example, Professor Jackman suggested as a cutoff an average partisan asymmetry, over a district plan's life, of at least one congressional seat. Ex.4002:51-54. The Court could follow this recommendation, or it could set a higher or lower bar. At present, though, the crucial point is not where the line is drawn. It is that the line *can* be drawn because partisan asymmetry, like malapportionment, is a measurable concept.

3. Appellants also complain about the district court's "rel[iance] on any and all manner of social science metrics—from the 'efficiency gap' to 'partisan bias' to 'the mean-median difference.'" J.S.27. Appellants' disdain for empirical measures is not shared by the Court. To the contrary, Justice Kennedy expressed optimism in *Vieth* that "new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties." 541 U.S. at 312-13 (Kennedy, J., concurring in the judgment). That is precisely what Appellees' tools do. The asymmetry metrics that

Appellants mock reveal the *size* of a district map's partisan skew. Sensitivity testing shows whether this skew is *durable*. And computer simulations establish whether the skew can be *justified* by a State's political geography or legitimate redistricting objectives.

As for the multiplicity of these tools, it has never been the Court's approach to search for a single holy grail. Rather, in every other redistricting domain, the Court has employed a range of useful techniques. In the malapportionment context, for instance, the Court has variously cited plans' *total* population deviation, *see, e.g.*, *White v. Regester*, 412 U.S. 755, 761 (1973), *average* population deviation, *see, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 319 (1973), and proportion of the population that could elect a legislative majority, *see, e.g.*, *Swann v. Adams*, 385 U.S. 440, 442-43 (1967). In the racial vote dilution setting, likewise, the Court has endorsed two procedures for calculating racial polarization—"extreme case analysis" and "bivariate ecological regression"—referring to them as "complementary methods of analysis" that are "standard in the literature." *Gingles*, 478 U.S. at 52, 53 n.20. As the district court noted, this inclusive attitude makes perfect sense. "[W]hen a variety of different pieces of evidence . . . point to the same conclusion . . . courts have *greater* confidence in the correctness of the conclusion." App.82.

4. The district court's effect prong is thus "precise" because it uses tools that reliably identify the most severely and persistently skewed plans. The prong is also "limited" because it insulates all other maps from liability. According to Professor Jackman's dataset, fourteen of the twenty-four current congressional plans with at least seven seats either were not enacted

under unified government or are forecast to have a lifetime average partisan asymmetry of less than one seat. *See* Br. of CLC and SCSJ at 13-14, *Benisek v. Lamone*, No. 17-333 (U.S. Jan. 29, 2018). Over the entire period since 1972, this ratio increases to 107 out of 136. *Id.* Accordingly, suits against the vast majority of congressional maps would be futile under the district court's test, because the maps either did not intend or did not achieve the subordination of a party's supporters.[5]

IV. The District Court's Justification Prong Is Limited and Precise.

1. The third and final prong of the district court's test is justification: whether a district plan's "discriminatory effects are justified by a legitimate state districting interest or neutral explanation." App.157. Alternative district maps are the most probative evidence at this stage of the analysis, especially ones produced without considering election results but matching or surpassing the enacted plan on all nonpartisan criteria. App.160-65. If these alternative maps are less skewed than the enacted plan, then its asymmetry cannot be explained by the State's political geography or valid redistricting goals. *Id.*

Appellants either have overlooked the district court's justification prong or do not dispute its articulation and application. In any event, there is nothing they could plausibly contest. With respect to the spatial patterns of North Carolina's voters,

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[5] Moreover, Professor Jackman's dataset does not take into account sensitivity testing. Even more congressional plans are not intentionally, severely, *and durably* asymmetric.

"Legislative Defendants have not provided *any* persuasive basis for calling into question . . . Dr. Chen's methods, findings, and conclusions." App.160. These conclusions, again, are that randomly generated North Carolina congressional maps tilt slightly in a Democratic direction, and that the State's political geography thus cannot justify the 2016 Plan's extreme pro-Republican skew. App.106-09, 152-54; Ex.2010:32. With respect to incumbency protection as well, "Legislative Defendants failed to offer any analyses rebutting Dr. Chen's rigorous quantitative analysis." App.164. This analysis "show[ed] that the General Assembly's goal of protecting incumbents did not explain the 2016 Plan's pro-Republican bias." *Id.*

2. The district court's justification prong is "precise" because it applies a technique—the simulation of large numbers of alternative maps—that is ideally suited for evaluating the nonpartisan explanations that are asserted for an enacted plan's asymmetry. The computer algorithm is simply adjusted to incorporate the defendant's proffered rationales: compactness, respect for political subdivisions, compliance with the Voting Rights Act, and so forth. The maps produced by the algorithm are then compared to the enacted plan. If most or all of them are less skewed, then the enacted plan's tilt cannot be justified by the nonpartisan factors. *Cf. Harris*, 137 S. Ct. at 1479 (noting that "an alternative districting plan" "can serve as key evidence" and is "often highly persuasive").

The district court's justification prong is "limited," too, because it further shrinks the pool of maps that could be found unlawful. At the congressional level, many of the plans currently in

effect are about as asymmetric as the median simulated map for the State. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering*, 44 Electoral Stud. 329, 337 (2016). At the state legislative level, the same was true for many state house and state senate plans in the 1990s and 2000s. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering*, 8 Q.J. Pol. Sci. 239, 263 (2013). All of these maps would be valid under the district court's test. Even if they were highly skewed, they were no *more* skewed than expected given their States' spatial patterns and legitimate redistricting objectives.

CONCLUSION

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

April 27, 2018 Respectfully submitted,

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