No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Table of Contents

Page

TABLE OF AUTHORITIES

Page

CASES

Page

OTHER AUTHORITIES

MISCELLANEOUS

Table of Authorities

INTEREST OF *AMICUS CURIAE*[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a 50-state Congressional and state legislative redistricting effort set to begin next year, in 2020.

The NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, §4 of the Constitution, it is the state legislatures, subject to Congressional supervision, that are entrusted with the responsibility of redrawing the states' Congressional districts. Every citizen should have an equal voice, and the Voting Rights Act and other federal laws must be followed. These federal mandates protect the constitutional rights of individuals, not political parties or other groups.

Second, the NRRT believes redistricting should be clean, a requirement best fulfilled by the traditional redistricting criteria our state legislatures have applied for centuries as the country grew from coast to coast. This means that districts should be sufficiently compact and preserve communities of interest by respecting municipal and county boundaries, avoiding the forced combination of

1. Counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

disparate populations to the extent possible. Clean districts are consistent with the principle that legislators represent individuals living within identifiable communities. Legislators do not represent political parties, and we do not have a system of proportional representation. Article I, §4 of the Constitution tells courts that any change in our community-based system of districts is exclusively a matter for deliberation and decision by our political branches, the state legislatures and Congress.

Third, the NRRT believes that redistricting should make sense to voters. All Americans should be able to look at their district and understand why it was drawn the way it was. Districts do not need to be bizarrely shaped.

SUMMARY OF THE ARGUMENT

Appellees and the lower court adopted the rhetoric of individual rights to overturn a North Carolina redistricting plan that comports with traditional redistricting criteria. Their proposed standard purports to overcome the last remaining obstacle to finally declare partisan gerrymanders unconstitutional. But upon closer examination, the "individual right" to be free of political gerrymandering—or as Appellees would have it, the right to be free from packing and cracking—is in reality nothing more than a political party's group right to proportional representation. As Chief Justice Roberts remarked at oral argument in last Term's partisan-gerrymandering cases, so-called "partisan symmetry" is nothing more than a "convenient label" for "proportional representation, which has never been accepted as a political principle in the history of this country." Oral Argument Tr., *Gill v. Whitford,* No. 16-1161 (Oct. 3, 2017) at 41.

Still, it is worth considering the claims of individual right on their own terms, from the perspective of an individual voter, to see whether individuals lose something palpable when they are "packed" or "cracked." As it turns out, casting a claim of political gerrymandering through the prism of each individual voter's experience yields a kaleidoscope of complication. Voters may well be packed and cracked, reside in uncompetitive districts, and, based on myriad factors, may greatly vary in the representational "weight" they carry with their legislators. Yet none of these substantial variations in voters' political influence, many of which might trace to state action, or might have no connection to state action at all, has ever been deemed an equal protection violation. Additionally, the baseline from which Appellees measure their allegedly individual injuries depends on their political group's claimed right of proportionality. And even that right is defined by extrapolating the results of previous statewide votes. Cracking and packing, then, does not truly represent individual injury. Instead, it ultimately measures injury to a party that roughly coincides with the party's failure to achieve statewide proportional representation.

Should that right to proportional representation nonetheless be adopted? As amicus curiae shows below, this Court should adhere to its longstanding refusal to cross that threshold. Proportional representation is a concept foreign to our republican system of government and anathema to our Founders. Further, experience in Missouri and other states shows that the principle of proportional representation is logically and legally at war with traditional community-based representation; the two cannot co-exist.

In addition to being alien to our system of government, a statutory or constitutional "group right" to proportional representation is unworkable. A proportional representation system overlooks the reality that, as this Court has held, voters can—and often do—move from one party to the other. Voter choices fluctuate, and party affiliation is not enough to tie the interests of a group to the personal interests of voters for preferred candidates. Simply put, the votes of yesterday do not ensure the victories of tomorrow. Finally, if there is to be a nationwide shift to prioritizing proportionality as between the two parties, that decision is for the state legislatures and Congress—not for the courts.

ARGUMENT

I. INDIVIDUAL RIGHTS TO BE FREE OF A POLITICAL GERRYMANDER DO NOT EXIST, AND UPON CLOSER EXAMINATION ARE JUST A RHETORICAL REFORMULATION OF POLITICAL PARTIES' CLAIMED RIGHTS TO PROPORTIONAL REPRESENTATION

Appellees claim to have surmounted what they see as the last remaining hurdle for political gerrymandering plaintiffs after *Gill v. Whitford*, 138 S.Ct. 1916 (2018). Not only has North Carolina packed and cracked voters who say they will always vote for Democrats, Appellees claim to be voters who will be *un*packed or *un*cracked—or at least less packed or cracked—by a remedial map. Believing they have thus solved the problem of standing, Appellees proceed to show how their claims satisfy modified intent-and-effect tests under either or both of the Equal Protection Clause or First Amendment.

Not so fast. That any number of intent-and-effect-based tests can be modified to fit on the chassis of a political gerrymandering claim does not mean that there exists, in the first place, an individual right to be free of political gerrymandering. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76, 100 S. Ct. 1490, 1504, 64 L. Ed. 2d 47 (1980) ("But plainly '[i]t is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,'") (internal citations omitted) (abrogated by statute on other grounds). Step zero must be the identification of the right.

Appellees do, in fact, identify the right they seek to vindicate, but only indirectly, in the "effect" prongs of their proposed tests. The effect of gerrymandering at the level of an individual voter is said to be a loss of "weight" arising from "cracking" or "packing": having one's vote grouped, respectively, with either too few or too many others who voted identically. Yet as shown below, neither cracking nor packing represents a true individual injury. Instead, these phenomena work an injury only when considered from the perspective of a major political party, and are judicially remediable only to the extent the party itself has a constitutional right to proportional representation.

A. Intentional Cracking and Packing Does not Cause a Palpable Injury at the Level of the Individual Voter

Appellees' proposed right to be free from political gerrymandering can be restated under their dilution theory as a right not to live in a district in which their currently chosen political party (assuming they have one) has been cracked or packed. Common Cause Motion

to Aff. at 18. But how is an individual voter harmed by a packed or cracked district? Appellees claim to have an answer. They know they cannot sustain a claim if their packing or cracking injury is merely the defeat of their preferred candidates. Instead, Appellees now cast their cracking or packing injuries as a loss of "weight" of their individual votes. *Id.*

Although it may not be initially apparent, "weight" in this new context does not mean the same thing as "weight" in the one-person, one-vote context. That is clearest when we consider what it means to "lose" that "weight" in each distinct context.

1. In malapportionment cases, "weight" means the ratio between a person's vote and the number of representatives elected. When districts are malapportioned, we know precisely what an individual voter has lost. It is certain that each and every voter in a less populous district has a greater opportunity to elect a legislator than each and every voter in a more populous district. The votes of those living in overpopulated districts are underweighted, or diluted, by the precise ratio of their district's overpopulation. Significantly, the individual injury is complete without any further contingency. The voter's party—if he or she currently identifies with one—is utterly irrelevant. Nor does it matter whether each voter's preferred candidates will end up winning or losing. At the very outset, as soon as the districts are drawn, it is certain that the vote will mean less.

2. "Weight" measures a different quality in a political gerrymandering claim. It does not, as in a malapportionment claim, measure each voter's

opportunity to cast a ballot that counts equally for or against the election of a legislator. "Weight" cannot be the quality of having an equal probability of having one's preferred candidate actually elected (which would require strict partisan parity in a two-candidate race). It cannot be the quality of having a chance to elect one's preferred candidate that is equal to the proportional strength of one's party. *See Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality op.) ("…the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."). Nor is "weight" a measure of the backward-looking reformulation of the "equal chance to win" right. *League of United Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399, 419, 126 S. Ct. 2594, 2610, 165 L. Ed. 2d 609 (2006) ("To be sure, there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best.").

Finally, Appellees do not seem to claim a right to cast votes that are potentially equally outcome-decisive. This would seemingly require maximizing partisan-competitive districts in which every voter had an equal chance of casting the deciding vote, and as the court below recognized, "the Supreme Court has never held that the Constitution entitles voters to competitive districts." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 664 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679 (2018).

3. If none of these *ex ante* or *post hoc* conceptions of "weight" apply, only one option can remain: "weight" for gerrymandering purposes seemingly attempts to

measure the average influence a voter might expect to wield with the winning candidate once the preferences of all voters are aggregated and the election results are known. This is the "loss," then, that an individual voter would need to suffer in fact. And indeed, both the League Appellees (Motion to Affirm at 32) and the decision of the court below (279 F. Supp. 3d at 656) admit that the "effect" test is ultimately premised on whether, as a result of new districts, the legislator is "nonresponsive" or "will not feel a need to be responsive" to "constituents." *See also LULAC*, 548 U.S. at 418 (partisan gerrymandering plaintiffs would need to "show a burden, as measured by a reliable standard, on the complainants' representational rights.").

This becomes clearer when considering the positions of hypothetical cracked and packed voters whose votes have allegedly "lost weight." At least the Common Cause Appellees admit, as they must, that under their theory, a voter living in a cracked district suffers a constitutionally cognizable dilution injury even if, in an uncracked district, her preferred candidate would still have lost. Common Cause at 18. The lost weight could only consist of the individual voter's hypothetical loss of influence with the winning candidate. This, in turn, requires courts to assume that the winner will always be less responsive to the voices of the voters who make up a political minority that is smaller than the still-minor group they would have formed in an uncracked district.

Now posit the case of the voter living in a packed district whose candidate would have won anyway in an unpacked district. This, too, is a case of "lost weight" for at least the Common Cause Appellees. Again, from an

individual voter's perspective, it could only consist of the voter's hypothetical loss of influence over his preferred—and winning—candidate. In this scenario, Appellees would apparently ask courts to assume one of two things. Either the winner is less responsive to the voices of the voters making up his winning coalition than he would have been in a closer election, believing that some of the bandwagon can be lost without penalty. Alternatively, the "unpacked" voter might have moved elsewhere. He could have become more essential to a winning candidate in another more competitive district, or could have shored up an already-losing district to form part of a more-substantial minority that might have bargained for more of the opposing-party-winner's attention.

4. In any scenario, numerous assumptions about voter and officeholder behavior and beliefs are clearly necessary to measure a voter's "weight" with the winning candidate, and then decide whether it has actually been "lost" in a way that yields individual injury. This problem is not new. At least as early as *Whitcomb*, this Court struggled to give form to a claim of lost "voting strength" by a distinct racial community who voted Democratic and were included within a large multimember district covering Marion County, Indiana. *Whitcomb v. Chavis*, 403 U.S. 124, 153-154 (1971).

This Court correctly recognized that a constitutional claim, if cognizable, would somehow have to be grounded in the poor performance of Marion County's delegation in representing the discrete racial community. *Id.* at 154-155. It was skeptical that this was or could be shown, as the quality of legislators' performance arguably varied by issue. *Id.* at 155. Additionally, the Court recognized that

the discrete community retained a claim at least to the "partial allegiance" of Marion County's delegation, just as did other Marion County subgroups whose preferred candidates had also lost; merely being "outvoted" was not tantamount to a lack of representation. *Id.*

This Court's skepticism regarding the link between disproportionate representation and an actual injury did not subside after *Whitcomb*. "An individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district." *See Bandemer*, 478 U.S. at 132. *Bandemer* "refuse[d] to presume," without "actual proof to the contrary, that the candidate elected will entirely ignore the interests of the voters." Thus, "without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group." *Id.*

But the plot thickens even beyond the considerations outlined in *Whitcomb* and *Bandemer*: in the real world, the determinants for the post-election "weight" of an individual voter—*i.e.*, the quality that Appellees say gerrymandering diminishes on an individual level—are considerably more complex.

First, common experience tells us that an individual's representational "weight" with the winning candidate is a function of the effectiveness of the voter's association with like-minded voters. This association includes those who may not have voted consistent with the voter in the past election, or who may not even reside within the district.

Voter coalitions form around issues and splinter in ways that do not follow the fault line between our two big-tent parties. Individual voters and their representatives can and do change their minds. And to a great degree, all of this depends on the quantity and quality of voters' interactions with their elected representatives.

Common experience tells us, too, that even without the daily complexities of politics, there are large background variances in representational "weight." Some voters suffer from chronically low representational "weight" simply because they have chosen to live among concentrations of their fellow citizens who are agreeable in every way except party affiliation. Other voters enjoy high representational weight because they live in areas where their preferred candidate usually wins—but not by much—so that, as the voters who theoretically supply the margin of victory, their voices carry great weight.

Further, in contrast to the weight accorded individual votes in properly apportioned districts, this sort of representational "weight," to the extent it is knowable, does not have the quality of something for which a baseline can be identified, and then equalized as between individuals. The average individual in a longstanding political minority geographically ensconced among a political majority will simply not enjoy the same representational weight as the individual voters in the surrounding majority, even without a gerrymander. And all else equal, legislators will not likely accord equal political weight to the wishes of all voters even within their winning majorities. Instead, the voters most likely to desert the coalition may well find themselves with more leverage and, therefore, greater political weight.

Finally, even *bipartisan* political gerrymanders done in the name of party-to-party fairness—*i.e.*, proportionality—will necessarily privilege some voters over others from a representational standpoint if the Court were to accept this theory of representation. *See Gaffney v. Cummings*, 412 U.S. 735, 751 (1973). Voters may well be packed and cracked, creating uncompetitive districts and wide variation in individual voters' "weight," all to serve the parties' goal of statewide proportionality. Yet none of these myriad differences in voter political influence, many of which (as in *Gaffney*) trace to state action, has ever been deemed an equal protection violation.

5. In sum, casting a claim of political gerrymandering through the prism of each individual voter's experience yields a kaleidoscope of complication. Myriad inquiries into the political relationship between and among individual voters and their legislators become necessary. "If there are less appropriate subjects for federal judicial inquiry, they do not readily come to mind." *Whitcomb*, 403 U.S. at 170 (Harlan, separate opinion).

This is not simply a problem of indeterminate social science or a failure of proof that political scientists are on the cusp of curing. Instead, "weight" represents an unknowable quality that is more dependent on the vicissitudes of individual-group politics than on any action of the state. Attempting to maintain some tenuous link to *Whitcomb's* offspring, *Bandemer*, the Appellees and the district court still recite "responsiveness" to "constituents" as part of the effects prong of their proffered dilution test. Yet the absence of facts on this point in the massive record below shows that the concept of responsiveness—always of suspect usefulness—has devolved into a vestigial

utterance. Litigants and courts have long since stopped trying to isolate the quality of representative-constituent "weight," let alone measuring its loss as an injury-in-fact.

Because this "loss of weight" is the only remaining conceivable outcome of packing and cracking at the level of an individual voter, it follows that cracking and packing does not injure the individual right to vote.

B. Cracking and Packing Ultimately Measures Injury to a Party that Roughly Coincides with the Party's Failure to Achieve Statewide Proportional Representation

As shown above, partisan cracking and packing cannot coherently be described as an injury to an individual voter. But when viewed from the perspective of a political party itself, the presence of injury is more palpable. Indeed, over 30 years ago, the first and last decision of this Court in which a majority could be mustered to hold that a partisan gerrymandering claim could be justiciable recognized in a flash of clarity that "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Bandemer*, 478 U.S. at 124.

1. That gerrymandering exists exclusively as a group injury makes sense on several levels. If one takes Appellees' simplified version of American politics as they present it—with two entirely homogenous and unified parties—the concept of vote "weight" depends entirely on the voter and candidate adhering rigidly to one party (and its entire platform of issues and candidate endorsements) or the other. There is no "weight" to gain or lose without

the assumption of the party. Otherwise, there is no basis whatsoever—let alone the "actual proof" demanded by *Whitcomb* and *Bandemer*—for assuming that when a voter's preferred candidate loses, a representational injury will occur.

2. Even more important, the baseline from which Appellees measure their allegedly individual injuries depends on their political group's claimed right of proportionality. If the representational "weight" of a vote is what matters, one must be able to define the baseline value to determine what weight has been "lost" under a given plan of apportionment. *See Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, concurring in judgment, explaining that "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea of how hard it 'should' be… under an acceptable system.").

What is Appellees' baseline? Recall Appellees' admission that a voter in a cracked district may have injury-in-fact if, in an uncracked plan, her candidate would still lose. The injury was presumably the difference between the challenged plan and the "uncracked plan." *Significantly, however, the individual baseline is set by reference to the party's statewide proportional "claim."* That is, it is compared against the proposed alternative map that is alleged to yield more seats for the challenging party and its political allies. Assuming experts are used, the "uncracked plan" is necessarily a plan in which each party's wasted (cracked or packed votes) are as equal as practical. The efficiency gap and other measures are simply ways of moving parties toward statewide proportionality. That is precisely what Justice O'Connor

predicted in her *Bandemer* concurrence: a "group right" that will eventually be whittled down to "some loose form of proportionality." *Bandemer*, 478 U.S. at 157.

Is it really necessary, however, for Appellees to base their supposedly individual injury claims on the party's statewide proportional "claim?" As a practical matter, the answer is yes. Suppose that some other baseline were used to measure the voter's loss-of-weight injury: for each voter, it should be possible to prepare a district to yield his or her "greatest representational weight." This would attempt to ensure that the voter was in the smallest consistently winning coalition in a district where he or she could live, or if that were not possible, in the largest losing coalition (assuming it is possible to decide the point at which being increasingly tightly packed into a winning district becomes less preferable than being slightly cracked in a just-barely-losing district).

First, note that it will probably be the case in this scenario that any such individual-voter-tailored remedy will egregiously lessen the representational weight of many other voters near and far, both within and without his or her party. Indeed, each of these voters would also have his or her own baseline. How would each voter's supposed interest in obtaining his or her best individualized "weight" be accommodated, particularly where the transparent intent of any remedial plan would be to minimize the weight of the voter's political opponents? These conflicts may be unresolvable.

Second, note that each individual baseline is bound to differ from the party's statewide proportion-maximizing baseline. Sometimes that difference could be pronounced.

That is because a party seeking to maximize the "efficiency" by which it converts votes into seats will need to minimize wasted votes. In some cases, this may require minimizing the number of voters in districts the party cannot win, even though from the individual perspectives of that party's voters who live in the core of the district and will have to be included, their own representational weight would be greater if they had more allies with whom to collectively garner the political attention of their opposite-party representative. *See, e.g., Bandemer*, 478 U.S. at 154 (O'Connor, concurring in the judgment).

4. In short, Appellees' claims are invariably those of one party—the Democrats—even though individual plaintiffs have been found to fill most of the challenged districts. The Appellees rely on plans—baselines from which they stake their claims that the status quo constitutes a partisan gerrymander—that tend toward a proportional representation for the party itself, and not necessarily to maximizing the asserted interest of the individuals in representational weight. *See, e.g., Bandemer*, 478 U.S. at 154 (O'Connor, concurring in the judgment, explaining how a bipartisan gerrymander intended to achieve party proportionality can harm the rights of independent voters and minority party voters in overwhelmingly adverse districts).

Not only should this be unsurprising, it is inevitable. That is because, as shown above, representational weight as an individual right quickly becomes an incoherent concept upon close scrutiny. On the other hand, party proportionality is a concrete concept, is the only coherent baseline, can be measured mathematically, and is achievable by the only person-in-interest that consistently has the means to plan and litigate: the political party (or,

if the right is recognized, any other mass political group with a claim to effective representation).

There is simply no way around it: Appellees' claims only cohere, and are only measured by Appellants and measurable by a court, as group claims for proportional political representation.

C. Failing to Recognize The "Loss of Weight" as a True Injury for Political Purposes Leaves this Court's Minority Vote Dilution Precedent Undisturbed.

Some may object that if the "loss of weight" from cracking and packing does not constitute injury-in-fact, then minority vote dilution—which has long been analyzed through the same lens—may soon go without remedy. But this Court has long recognized that political and racial classifications are not treated the same way:

> Our Constitution has a special thrust when it come to voting; the Fifteenth Amendment says the right of citizens to vote shall not be 'abridged' on account of 'race, color, or previous condition of servitude.'

Whitcomb, 403 U.S. at 180 (Douglas, dissenting in part and concurring in the result in part).

The Fourteenth and Fifteenth Amendments simply give federal courts "greater warrant" to "intervene for protection against racial discrimination. *Bandemer*, 478 U.S. at 151 (O'Connor, concurring in judgment). Race is "an immutable characteristic." *Bandemer*, 478 U.S. at 156 (O'Connor, concurring in judgment). Where an

individual immutably belongs to a racial minority group "vulnerable to exclusion from the political process," and proof of past and present experience proves that there is a link between *group* voting strength and the individual right to participate in the political process, group-based analysis that is untenable on the basis of politics may well support a dilution claim on the basis of race.[2] *Id.* at 152.

This proof of a link between individual rights and group membership, fortified with express constitutional authority by way of the Civil War Amendments and enforced by the Voting Rights Act, sets minority vote dilution claims apart from partisan gerrymandering theories. If this Court now makes clear that it will not recognize *political* groups' rights masquerading as individual voter dilution claims, it will leave the law prohibiting minority vote dilution undisturbed.

II. A SYSTEM OF PROPORTIONAL REPRESENTATION IS FOREIGN TO OUR SYSTEM OF GOVERNMENT AND CANNOT COEXIST WITH TRADITIONAL DISTRICTING PRINCIPLES

A. Systems of Proportional Party Representation Have No Place in Our Constitutional Order

1. Whether conveniently labeled "partisan symmetry," the "efficiency gap theory," or something else, systems

2. Section 2 of the Voting Rights Act has been construed to provide statutory authority for voter dilution claims based on race. *See* 52 U.S.C.A. § 10301(a). *See generally Thornburg v. Gingles*, 478 U.S. 30 (1986).

of proportional representation are altogether foreign to our system of republican government. In Federalist No. 35, Alexander Hamilton reasoned that proportional representation of "each class" was neither practicable nor necessary, noting that, "[t]he idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution, that each different occupation should send one or more members, the thing would never take place in practice." The Federalist No. 35. Indeed, the Framers understood the dangers of employing mathematical calculations to create a proportional representation system of government, *see* The Federalist No. 55 (James Madison) ("Nothing can be more fallacious than to found our political calculations on arithmetical principles.").

The reasoning of the Framers applies not only to the federal system but also to the makeup of state legislatures. In our system of government, "[t]he roots of Anglo-American political representation lie in the representation of communities, not individuals …." James A. Gardner, *One Person, One Vote and the Possibility of Political Community,* 80 N.C. L. Rev. 1237, 1243-45 (2002). Accordingly, the American electoral system is based on the notion that individual voters within a district elect their representatives, without having their community adjusted by political scientists or mathematicians attempting to level the playing field by factoring in statewide partisan vote shares.

Indeed, "[b]y the time of the Revolution, the founding generation fully accepted this account of representation. The idea that the political interests of communal groups

of individuals correlated strongly with territory served, for example, as an axiom in Madison's famous defense of the large republic in *The Federalist No. 10*." James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts To Control Gerrymandering,* 37 Rutgers L.J. 881, 935-36 (2006). "The idea that territorially defined local communities may reliably serve as proxies for the shared, collective interests of the individuals who inhabit them has remained a fixture in American political thought ever since." *Id.*

2. Building on those principles, this Court repeatedly has held that the Constitution does not require states to provide proportional representation in legislatures, "however phrased," *Mobile*, 446 U.S at 79, to political, social, or other interest groups, *id*., at 75-76, ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. … [P]olitical groups [do not] themselves have an independent constitutional claim to representation …."); *LULAC*, 548 U.S at 419. A group is not constitutionally entitled to a districting scheme that will afford it "legislative seats in proportion to its voting potential." *White v. Regester,* 412 U.S. 755, 765-66 (1973).

Simply put, "[w]hatever appeal [proportional representation] may have as a matter of political theory, it is not the law." *Mobile,* 446 U.S. at 75. Such "entitlement… simply is not to be found in the Constitution of the United States." *Id.* at 76.

Even in the recent fractured opinions on the subject, a majority of justices of this Court have rejected the notion that the Constitution requires proportional representation.

In *Bandemer*, this Court emphasized that the Constitution requires neither "proportional representation [nor] that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." 478 U.S. at 130. In *Vieth v. Jubelirer*, the Court again rejected the notion that the Constitution requires proportional representation. 541 U.S. 267, 288 (2004) (plurality op.). And, despite *Vieth*'s repudiation of *Bandemer,* it nevertheless reaffirmed that the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." *Vieth,* 541 U.S. at 288.

B. Experience in Missouri and Elsewhere Shows That Party-Proportional Representation is at War With Traditional Districting Principles

1. Proponents of judicial policing of party-proportional representation sometimes appear to suggest that proportionality need not supplant traditional redistricting principles. And if the peculiar record in this case were representative of the rest of the country, that argument may initially appear to have force. After all, Appellees' experts worked from what they claimed were thousands of randomly-generated maps that followed traditional redistricting principles, and then from among those, criticized the challenged 10-3 Republican-favoring map as far outside a purported norm in which Republicans might win just 7 seats. *See, e.g.*, Dist Ct. Op. 155-161. The

implication is that courts can have both: perhaps hundreds or thousands of maps will be consistent with traditional criteria, and of those, a significant portion will still give the Democratic and Republican parties the overall share of seats they are "entitled to" under various party-proportion measuring tests.

But in reality, at least some Appellees ask for a principle that is far more sweeping. Once intent is shown, they would have courts sustain a challenge as soon as "cracking" or "packing" is shown—in other words, so long as there is any "injury in fact" as they have defined it. Common Cause Motion to Aff. at 37. Recall that this includes even cracked plaintiffs whose candidate would still lose, or packed plaintiffs whose candidates would still win. Thus, it is not hard to conceive district-level challenges even to a North Carolina map that had been drawn with just a 7-6 Republican advantage, so long as Democrats could conceive of another 7-6 Republican map which increases their chances of capturing seats—a factor which they can and will re-name as the "uncracking" of "unpacking" of individual voters. The only role for traditional factors would be the state's assumption of the burden of "justifying" the cracking and packing using those factors—a showing that could easily be brushed aside if plaintiffs could rebut by proving that other traditional factors did not require the challenged plan.

In practice, then, judicial recognition of such a zero-tolerance partisan proportionality principle will force political parity to bubble to the top of the redistricting cocktail, while traditional redistricting principles will sink to the bottom. This gradual "paling" of non-proportional factors is almost inevitable, as Justice O'Connor noticed long ago in her *Bandemer* concurrence. 478 U.S. at 157.

As a theoretical matter, it makes sense that one set of criteria is at war with, and must prevail over, the other. As explained in subsection A, traditional redistricting criteria are largely based upon the underlying assumption that legislators provide representation to people in a district, who, fractured though they may be based on different points of view, share local communities, a local history, a local economy, and local political subdivisions. In contrast, partisan proportionality assumes that legislators represent parties, the members of whom are scattered throughout a state. "Districts" only have meaning as ratios of party members who mathematically will or will not assure the party of the correct aggregate representation. The two models of representation are diametrically opposed, then, in their fundamental organizing principles as well as under the legal tests Appellees would ask this Court to adopt.

2. Should there be any doubt about what lies ahead, the Ghost of Redistricting Future could direct this Court on a tour of Missouri's new state legislative apportionment process. Approved by voters who were primarily sold on lowered contribution limits and limits on lobbyist gifts, the new plan mandates that Missouri apply the concepts of wasted votes and "efficiency gap" analysis used by Professor Jackman below and in the *Gill* case.

Specifically, Missouri defined two goals: "partisan fairness" and "competitiveness." Mo. Const. art. III, § 3(1)(b). In a moment of candor, the former term is defined as the group right "that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency." *Id*. Next, "competitiveness" turns out not to mean

that districts will be competitive, but instead, that the "efficiency" achieved by the plan remains durable: "parties' legislative representation shall be substantially and similarly responsive to shifts in the electorate's preferences." *Id.*

Missouri next requires the calculation of an index of recent party performance. *Id.* Using this index, the plan is to minimize the gap in each of the two parties' percentage of "wasted votes," which are defined as votes cast for a losing candidate or for a winning candidate "in excess of the fifty percent threshold needed for victory." Mo. Const. art. III, § 3(1)(b). Crucially, the plan does not pass muster merely by satisfying a threshold efficiency gap of seven or twelve percent, as Professor Jackman proposed in the district court and in *Gill*. Instead, the plan is required to make the gap "as close to zero as practicable."

Further, the resulting plan must be durable. It must survive a series of stress tests in which the partisan split in the statewide vote shifts by various percentages in favor of each party. Each time, the plan must "ensure" that the efficiency gap remains "as close to zero as practicable."

Missouri's Constitution had long recognized the paramount importance of traditional criteria such as contiguity, compactness of districts, and preservation of local communities. Each of those factors were expressly subordinated to the new party-based right to proportional representation. Contiguity was made "subject to the requirements of subdivision… (1)(b)," the efficiency gap test. Mo. Const. art. III, § (1)(c). Preservation of local subdivision boundaries, in turn, was made subject to both the efficiency gap test and contiguity. Art. III, §(1)(d). And

all of these factors were made to "take precedence over compactness where a conflict arises between compactness and these standards." Art. III, §(1)(e).

In short, the drafters of Missouri's constitutional version of the "efficiency gap" method of party-proportional representation expressly recognized that: (1) this is truly a group, not an individual, right; and (2) that achieving their party-proportional goal required the complete subordination of traditional redistricting criteria. Voters living in the shadow of the St. Louis Arch may then constitutionally share a Missouri Senate district with Bootheel voters, unconnected by any contiguous territory. Lacking a local constituency, to whom will the district's senator look? Under the new rationale of the Missouri Constitution, she will have to look to her party. Because Missouri will now balance the "wasted votes" of her excess majority (and of the losing candidate) across the state, other districts may well share similar characteristics. Those senators, too, will look to their parties or to other influences, as their "districts" will simply be a mirage, a legal fiction created to sustain a party's group right. This Court can now part ways with the Ghost of Redistricting Future, but for Missouri, this is reality.

3. Missouri's new procedure does raise a final test for Appellees. Were this Court to recognize an "individual right" to avoid the loss of representational weight (*see* Section I, *supra*), could Missouri's new explicitly-recognized group right work its own invidious partisan-based discrimination? As explained above, individual voters will likely experience substantial gains and losses in the "weight" of their own votes once their interests are subordinated to the overall electoral success of the "party"

they are predicted to support. This loss is the "injury-in-fact" that Appellees claim meets the effects prong of their equal protection test. Common Cause Appellees Mot. to Affirm at 37.

Next, depending on the precise content of the "intent" part of the test, a plan like Missouri's that explicitly seeks to aid the statewide party at the expense of localized pockets of that party's voters could be deemed to discriminate against the localized pocket or wing of the party that is deliberately "submerged" as a necessary set of "wasted" votes.

Finally, could a party's state-recognized "group right" to a form of proportional representation act as justification for this loss? With little discussion, this Court in *Gaffney* declined to intervene in Connecticut's statewide bipartisan gerrymander even though it denied certain district minorities any chance to elect representatives of their choice. 412 U.S. at 754. But would this reasoning be consistent with a newly-recognized individual right to representational weight? If not, then a true individual right of the type that Appellees claim to support would be flatly at odds with the more candidly-named "group right" to "partisan fairness" that true believers inserted into Missouri's Constitution. In fact, as shown above in Section I, Appellees' claimed individual right does not exist, and is a mere rhetorical recasting of the group right that Missouri has recognized, but that this Court has held time and again does not exist.

4. Missouri's experience, then, lifts the veil on the claimed individual right to an equally-weighted vote. It is not only a group right in disguise, it is at war with

traditional redistricting principles because it is based on legislators' representation of parties rather than communities. This back-door attempt at proportional representation is foreign to our republican form of government and demonstrates the danger of embracing Appellees' theory.

III. A CONSTITUTIONAL "GROUP RIGHT" TO PROPORTIONAL REPRESENTATION IS UNWORKABLE

1. In addition to being alien to our system of government, a statutory or constitutional "group right" to proportional representation is unworkable. As the Court's most recent decision in *Gill v. Whitford* demonstrates, a partisan gerrymandering claim is really "about group political interests, not individual rights." 138 S.Ct. at 1933. However construed, this focus on group interests impliedly—and wrongly—assumes that individuals exercise their right to vote as members of a party rather than as citizens. As Chief Justice Roberts recognized during oral argument in *Gill*, voters in United States elections cast their votes for a wide variety of reasons separate from party affiliation. *See* Tr. at 34 ("Sometimes people vote for a wide variety of reasons. Maybe the candidate, although he's of a different party, is a friend, is a neighbor. Maybe they think it's a good idea to have the representatives from their district to balance out what they view would be necessary -- likely candidates from other districts.").

2. Appellees' proposed standard purports to mix all voters across a state and assume they would consistently vote for candidates from a political party regardless of the

district where they live, the candidates running, the issues, the party platform, and any other election-specific reasons. It assumes that voters are unchanging in the candidates they support and only support candidates of a certain party. But individual voters are not monolithic, faceless automatons who merely pull the lever for a particular party year after year and disregard the candidates and issues. To the contrary, voters choose to split tickets, some citizens identify as independents, districts change over time, candidates' views can vary widely even under the same party banner, and each election presents different issues. As this Court has held, "[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold." *Vieth*, 541 U.S. at 287.

A proportional representation system overlooks the reality that "voters can—and often do—move from one party to the other." *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring). This is because "[p]arty affiliation is not set in stone or in a voter's genes…" *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting) ("The assumption underlying Plaintiffs' entire case is that party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election."). Yet for every election, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change - everything changes." *Vieth*, 541 U..S. at 289. Unlike the immutable characteristic of race, voter choices fluctuate, and party affiliation is not enough to tie

the interests of a group to the personal interests of voters for preferred candidates. Simply defining the group to be afforded the right to proportional representation depends on the impossible task of predicting voter behavior over the life of a districting plan. The votes of yesterday do not ensure the victories of tomorrow.

This is not the only uncertainty. In addition to the two major parties, there are innumerable smaller interest and affinity groups that make up those parties, yet it is unclear in appellees' party-based entitlement plan how those other groups would be treated in a system of proportional representation. Why should parties be privileged over other ideologically-comprised groups who organize members for elections? Additionally, different candidates and issues will be presented in each cycle, changing the membership of any conceivable "group" as well as the representational relationship between the group members and the elected official. It is impossible to predict how decisive a vote will be in any future election, or how responsive the resulting winner will be.

3. Appellees would ultimately have this Court embrace a Quantum Theory of Voting. Just as quantum mechanics posits the electron as a sort of probability, crystallizing as a definite particle only by the fleeting observation of an outside agent, a "group" –and by extension its associated group right—can spring into existence only when litigants and courts choose to look for it, and by the very act of looking bring it into reality. Quantum Voting will prove unworkable and unmanageable for both legislatures and the courts. In the first place, as explained above, the constitution provides rights for definite individuals; it does not provide clouds of voters with probability-derived

rights to certain numbers of seats. Second, a claim of political gerrymandering based on "partisan symmetry" necessarily abandons the concept of representation of individual communities and replaces it with a theory based on group rights inhering to the benefit of political parties and factions.

Instead, this Court should allow state legislatures to continue to apply the traditional, community-based districting standards that have prevailed since the Founding. Those standards, which include compactness, contiguity, equality of population, and preserving natural government boundaries, are best designed to comport with the Framers' constitutional design and strengthen our system of republican government. Happily, those traditional standards will also keep courts from experimenting with Quantum Voting, identifying groups and their "fair" shares of the legislature.

CONCLUSION

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

Respectfully submitted,

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