No. 18-422

In The Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF FIRST AMENDMENT CLINIC AT DUKE LAW IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The First Amendment Clinic at Duke Law (the "Clinic") has a public mission to protect and advance the freedoms of speech, press, assembly, and petition. Staffed with law faculty with First Amendment expertise and state-certified student attorneys, the Clinic represents clients with First Amendment claims and provides public commentary and legal analysis on First Amendment issues. The Clinic also participates as *amicus* in cases, such as this one, involving First Amendment issues that bear directly on its mission.

As a program of Duke Law School, the Clinic has a special connection to North Carolina. Therefore, in addition to the Clinic's general interest in protecting First Amendment values, it has a specific interest in ensuring that North Carolina elections are conducted in a constitutional manner. The Clinic's *amicus* brief frames the partisan gerrymandering at issue in this case within the larger context of North Carolina's political history. In doing so, it shows that the object of the 2016 redistricting plan is one that has distorted North Carolina elections as far back as the Reconstruction Era.

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[1] No counsel for a 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* made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the clerk.

SUMMARY OF ARGUMENT

Preserving the vitality of democratic governance is central to the meaning and purpose of the First Amendment. This fact has been recognized since the founding era, and is reflected in this Court's First Amendment jurisprudence. This Court has recognized that political speech and association lie at the core of the First Amendment, and the First Amendment accords the exercise of those freedoms through political parties "special protection."

Severe partisan gerrymandering hollows out these fundamental freedoms by placing disfavored political parties at an enduring electoral disadvantage. As a result, the speech and associational rights of persons affiliated with those parties are deprived of the very political force that justifies their position in the hierarchy of First Amendment values. Severe partisan gerrymandering, therefore, is like any other legislation that abridges core First Amendment freedoms on the basis of political viewpoint: it disadvantages those it targets because of their expressed political beliefs.

North Carolina's political history demonstrates the threat that partisan gerrymandering poses to democratic governance and First Amendment freedoms. As early as the Reconstruction Era, political parties in North Carolina have used various means to entrench political power and create a de facto one-party state. Throughout the twentieth century, the Democratic Party used racial and partisan gerrymandering to preserve the dominance it had obtained through the disfranchisement of

African Americans and other devices. Since 2010, North Carolina's Republican Party has followed the example of its Democratic predecessors and has used gerrymandering to entrench its newfound power. The 2016 redistricting plan is the GOP's latest effort to achieve this impermissible goal.

Because the purpose and effect of severe partisan gerrymandering is to discriminate against a class of voters on the basis of their political viewpoint, the Court should subject such gerrymandering to strict scrutiny. The 2016 redistricting plan necessarily fails such scrutiny because there is no legitimate governmental interest in drawing district lines to weaken the political influence of a particular class of voters.

ARGUMENT

I. PRESERVING THE VITALITY OF DEMOCRATIC GOVERNANCE IS CENTRAL TO THE MEANING AND PURPOSE OF THE FIRST AMENDMENT.

a. The Key Role Of The First Amendment In Safeguarding Democratic Governance By Protecting Political Speech And Association Has Been Recognized Since The Founding Era.

As this Court has observed, "the great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment." *New York Times*

Co. v. Sullivan, 376 U.S. 254, 273 (1964). The Act made it a federal crime to defame "the government of the United States, or either house of the Congress . . . or the President . . . with intent to . . . bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." *Id.* at 274 (quoting Sedition Act of 1798, 1 Stat. 596). Critics, among them the First Amendment's original draftsman, James Madison, rejected the Act both as a clear violation of the Amendment and as a blatantly partisan attempt by the Federalist majority in Congress to entrench itself and Federalist President John Adams in office. *See* Peter Zavodnyik, *The Age of Strict Construction: A History of the Growth of Federal Power, 1789-1861* 70–76 (2007) (describing the combination of constitutional and partisan-political objections to the Sedition Act).

Madison's argument that the existence of effective means for criticizing those in power is essential to democratic governance was not itself a newly minted partisan objection. In a 1794 speech in Congress, for example, he insisted that "[i]f we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." *Sullivan*, 376 U.S. at 275 (quoting 4 *Annals of Cong.* 934 (1794)). But the Sedition Act crisis impelled Madison to draw out explicitly the links between the First Amendment and American republicanism. In the "Report of 1800" that Madison drafted and the Virginia legislature adopted in defense of the legislature's earlier denunciation of the Act, Madison asserted that "the right of electing the

members of the government . . . [is] the essence of a free and responsible government," and immediately noted that "[t]he value and efficacy of this right, depends" on the freedom of the voters to "examin[e] and discuss[] . . . the candidates." The Sedition Act contradicted the republican premises of the Constitution by providing "those who administer the government" protection against criticism: "Nor can there be a doubt . . . that a government thus intrenched . . . will easily evade the responsibility, which is essential to a faithful discharge of its duty." The Report of 1800, 17 *The Papers of James Madison* 344 (R.A. Rutland ed. 1991). By deterring criticism of the legislative majority that enacted it, the Sedition Act afforded "those in power . . . an undue advantage for continuing themselves in it; which by impairing the right of election, endangers the blessings of the government founded on it." *Id.* at 345.

"Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Sullivan*, 376 U.S. at 276; *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I had conceived that the United States through many years had shown its repentance for the Sedition Act . . . ."). By the close of the founding era, there was a broad consensus that Madison's attack on the Act's constitutionality was correct. *See Sullivan*, 376 U.S. at 276 (quoting an 1836 Senate report stating that the Act's "invalidity was a matter 'which no one now doubts'"). Other leading founders, including Chief Justice Marshall, shared Madison's belief that free government depends on the ability of the people effectively to control their government through the electoral process. *See*

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (the legislators' "identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from [power's] abuse. They are the restraints on which the people must often rely solely, in all representative governments."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (reasoning that "the confidence that" a legislative power "will not be abused" can exist only where those affected by the power are "all represented" in the legislature).

Severe partisan gerrymandering differs from the 1798 Sedition Act in that it does not impose a criminal penalty on those critical of the legislative majority. But such gerrymandering has an almost equally devastating effect on "the value and efficacy" of the rights to criticize the majority, to associate with others to do so, and to oust from office those in power if a majority of voters agree. Like the Sedition Act, partisan gerrymandering confers on its perpetrators "an undue advantage" in retaining power, and diminishes sharply "the influence which their constituents possess at elections," by undermining the practical force of political speech and association by those opposed to the legislative majority, even when they constitute a majority of the voters.

b. Political Expression And Association Are At The Core Of First Amendment Protections: The First Amendment Most Strongly Protects Speech That Is Integral To A Healthful Democracy.

The role of the First Amendment in safeguarding democratic governance is also reflected in this Court's First Amendment jurisprudence. Specifically, in determining the strength of First Amendment protections, this Court has distinguished between categories of speech, types of restrictions, and—to a limited extent—the nature of the regulated speakers. These distinctions demonstrate that the First Amendment most strongly protects speech that is integral to a healthful democracy.

This Court has afforded different protections to different types of speech. Political speech receives greater protection than commercial speech, *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), just as speech in the public interest receives greater protection than speech that is of purely private interest, *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Still other categories of speech are "of such slight social value" that they do not even fall within the First Amendment's scope. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court has justified these distinctions on the ground that "not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985). "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,'" *Connick v.*

Myers, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)), because "it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964). By contrast, "speech on purely private matters does not implicate the same constitutional concerns." *Snyder*, 562 U.S. at 452. Its restriction does not threaten "the free and robust debate of public issues" nor "interfere[] with a meaningful dialogue of ideas." *Id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760). Likewise, commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik*, 436 U.S. at 456.

Similarly, this Court has distinguished between three types of speech restrictions: restrictions on particular viewpoints, restrictions on particular subjects, and restrictions imposed for reasons unrelated to content. Viewpoint-based restrictions, this Court has acknowledged, are an "egregious form of content discrimination" and are presumptively unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–30 (1995). Content-based restrictions, likewise, are subject to a presumption of unconstitutionality, surviving "only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (citations omitted). Content-neutral restrictions, by contrast, receive a more lenient form of scrutiny. *Id.* at 2232 (citation omitted).

Finally, this Court has recognized that the First Amendment accords "special protection" to the

associational freedoms of political parties. *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). In particular, political parties are guaranteed "the freedom to join together in furtherance of common political beliefs" and to "identify the people who constitute the association." *Id.* at 574 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). Acknowledging the fundamental importance of this right, this Court has said that "[r]epresentative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* at 574.

This Court's First Amendment jurisprudence therefore shows that the very speech restrictions that are most hostile to democratic governance are also those that are most offensive to the First Amendment. Indeed, speech protections are measured in reference to "the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder*, 562 U.S. at 452 (quoting *Sullivan*, 376 U.S. at 270). Speech must receive the highest level of protection when its restriction threatens "the free and robust debate of public issues" which our nation and Constitution are profoundly committed to protecting. *See id.* (quoting *Dun & Bradstreet*, 472 U.S. at 760).

c. Partisan Gerrymandering Injures First Amendment Freedoms By Placing Political Parties At An Enduring Electoral Disadvantage.

Severe partisan gerrymandering is particularly offensive to the First Amendment

because it constitutes a *viewpoint-based* burden on the *political* expression of *political* parties. Severe partisan gerrymandering undermines certain political parties' associational rights by placing them at an "enduring electoral disadvantage." *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring). The Constitution can only fully secure the freedom of speech of political parties through protection of their members' freedom of association, since the parties must often "speak through their candidates" in order to "advance a shared political belief." *See Cal. Democratic Party*, 530 U.S. at 587 (Kennedy, J., concurring). Political parties that are victims of severe partisan gerrymandering are "deprived of their natural political strength," rendering them unable to translate voter support into political representation. *Gill*, 138 S. Ct. at 1938. The natural consequence is that the party's ability to recruit candidates, register voters, attract volunteers, and generate support declines. *See id.* In effect, the party's associational freedoms are hollowed out, formally untouched but deprived of much of their value. Severe partisan gerrymandering is therefore like any other legislation that abridges First Amendment freedoms on the basis of political viewpoint: it disadvantages those it targets because of their expressed political beliefs.

II. NORTH CAROLINA'S POLITICAL HISTORY DEMONSTRATES THE THREAT THAT PARTISAN GERRYMANDERING POSES TO DEMOCRATIC GOVERNANCE AND FIRST AMENDMENT FREEDOMS.

Democratic governance rests on the ability of the people to remove from power elected officials and

political groups that have lost the confidence of a majority of the voters. As this Court observed long ago, it is the legislators' "identity with the people, and the influence which their constituents possess at elections . . . on which the people must often rely solely, in all representative governments" to guard against the abuse of governmental power. *Gibbons*, 22 U.S. at 197. Severe partisan gerrymandering poses a direct threat to the processes of democratic governance because it undermines the power of voters over their government. The history of North Carolina illustrates the danger that a legislative majority will use partisan gerrymandering among other anti-democratic measures to entrench itself in power and create, for practical purposes, a one-party state. In the Reconstruction and Post-Reconstruction eras, the Democratic Party used gerrymandering (both partisan and racial), intimidation, voting barriers, and stigmatization to prevent Republicans and Populists from influencing elections. *See infra* Part II.a–c. These practices were not successfully challenged at the time, but in hindsight it is clear that they constituted a massive violation of the First Amendment rights of African Americans, poor whites, and members of opposition parties throughout the era. The Democratic Party then sought, with success, to entrench its ill-gotten power through racial and partisan gerrymandering through much of the 20th century. *See infra* Part II.d. In 2010, the GOP gained control of both the North Carolina Senate and House of Representatives, and following the example of its Democratic predecessors, began gerrymandering to entrench its power. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 803 (M.D.N.C. 2018). The 2016

redistricting plan is the GOP's latest effort to achieve this impermissible goal.

a. The Reconstruction and Post-Reconstruction Eras

In 1868, Republicans prevailed in the North Carolina legislature under the state's new constitution, which guaranteed voting rights to black men. Michael Kent Curtis, *Race as a Tool in the Struggle for Political Mastery: North Carolina's Redemption Revisited 1870-1905 and 2011-2013*, 33 LAW & INEQ. 53, 71, 78 (2015). Across North Carolina, the Republican Party consisted of blacks and whites that organized together to elect candidates seeking to "act for the good of the people, not the elite." *Id.* at 79. In response to the Republican Party's electoral success in 1868, the elites in the Democratic Party utilized appeals to white supremacy to diminish the Republican Party's power. *Id.* at 80–81.

In 1870, in the wake of the Reconstruction Amendments, the Democratic Party gained control of the North Carolina legislature and immediately began efforts to nullify the Fifteenth Amendment's grant of universal male suffrage. *See* Eric Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* 3–4 (1981). In 1872, the Democrat-controlled General Assembly redrew congressional districts in an effort to neutralize Republican votes. *Id.* To this end, the General Assembly created a district that became known as the "black second": a district composed of ten counties with particularly dense African American populations. *Id.* at 4. Altogether more than one-fifth of North Carolina's

African American population lived in the "black second." *Id.* Having packed North Carolina's predominately African American counties into a single congressional district, the Democrats increased their chances of obtaining victories in the state's several other districts. *Id.*

Having diminished the *statewide* political influence of North Carolina's largely Republican and African American counties, the Democratic Party next sought to deprive those counties of their *local* political influence as well. *See* Curtis, *supra*, at 82–83. To this end, the Democrats passed legislation "essentially abolish[ing] elected county government" by vesting in the state legislature the power to appoint local officials. *Id.* at 82. Of course, the counties that suffered most as a result of this legislation were counties with predominately African American populations, *see id.*, like those that comprised the "black second," which, after the General Assembly's redistricting, had quickly become a "Republican and black stronghold." Anderson, *supra*, at 4–5.

In 1889, the General Assembly also revised North Carolina election law to require voters to prove their "age, occupation, place of birth and place of residency." J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 48 (1974). These requirements disproportionately barred African American men from voting, since those born into slavery often did not know their birth dates and black residences often lacked street names and house numbers. *Id.* The election-law revisions also

"increased the power of the overwhelmingly Democratic election officials and county canvassers." Anderson, *supra*, at 166. This gave corrupt election administrators opportunities to manipulate votes in favor of Democrats and coerce African Americans not to vote for opposition parties. Kousser, *supra*, at 16.

These measures had a devastating effect on the Republican Party. By 1890, Republican representation in the General Assembly was half what it had been before the suffrage restrictions of 1889. Anderson, *supra*, at 185. And the election of 1890 produced Democrat congressional victories in every district but the "black second." *Id.* As one commentator put it, "[t]he rich and inconsistent polity of the 1880s was being transformed . . . into a rational, consistent, and barren one-party system." *Id.*

b. The Republican-Populist Upheaval

Despite the success of the Democratic Party's initial spate of suffrage-restricting legislation, Democratic control "continued to face threats from various independent movements, as well as from Republicans." Curtis, *supra*, at 83. In the early 1890s, both black and white working class voters united under the banner of Republicanism and Populism. *See id.* at 84–85. As this Republican-Populist fusion gained momentum, the still Democrat-dominated General Assembly attempted to undercut it by once again gerrymandering congressional district lines. *See* Anderson, *supra*, at 186. The General Assembly's goal in drawing the lines, as admitted by one senator, was to "make compact districts, and also to make them all Democratic." *Id.*

The Democratic Party's redistricting, however, was unsuccessful at stopping the fusionist insurgency, and by 1894, the Republican-Populist fusion won control of the General Assembly. *See* Curtis, *supra*, at 84. Over the next few years, the fusion legislature abolished the suffrage restrictions of the previous decades, restoring county control over local elections and limiting the power of election officials to interfere with voting. *Id.* With these barriers abolished, voter turnout in predominately African American counties increased "from 18,543 in 1892 to 33,900 in 1896." *Id.* at 85.

The "full participation and honest counting" of elections allowed for a second fusion success in the 1896 election. Anderson, *supra*, at 239. North Carolina emerged with a "Republican governor, a Populist-dominated congressional delegation, a mixed state administration, [and] a fusion legislature." *Id.* at 239. However, the Republican-Populist alliance had a fundamental infirmity: It was united by an aversion to Democratic elitism and not by a commitment to African American suffrage. *See id.* at 194, 240–41. Consequently, the alliance was easily dismantled by white-supremacist propaganda and Ku Klux Klan violence. *See id.* at 240–41. The Democrats used racist rhetoric intended to stir white fusionists' fears of imminent African American dominance. *Id.* Combined with the reality of an increased number of African Americans in public positions, this rhetoric effectively "demoralize[d] white Republicans and neutralize[d] the Populists." *Id.* In this way, the social and political purchase that African Americans had gained as a result of fusion

success became the Democrats' most effective tool for rending the alliance.

c. Disfranchisement And Democratic Party Dominance

In 1898, the Democratic Party won back the General Assembly and began an enterprise of disfranchisement to ensure that its power would stick. *See* Curtis, *supra*, at 85–86. With the Democratic Party at the helm, North Carolina erected several barriers to prevent blacks and poor whites from influencing future elections. *See id.* The new Democratic majority repealed the fusionist legislature's election reform laws, effectively reinstating the barriers of the 1870s and 1880s. *Id.* at 86. The Democrats then enacted legislation that further restricted suffrage. *Id.* Under the new legislation, county election boards were appointed by a state election board which was in turn appointed by the Democratic state legislature. *Id.* At the same time, the legislation "granted virtually unlimited discretionary power" to local election registrars controlled by the state board. *Id.* at 87 (quoting Michael Perman, *Struggle for Mastery: Disenfranchisement in the South, 1888-1908* 167 (2001)). Election ballots were made indistinguishable "by color or party emblem" so that illiterate voters—disproportionately African American men—could not cast accurate votes. *Id.* The legislation also introduced a multi-box voting system whereby each category of contested office had different voting boxes which were distinguishable only by text. *See* Kousser, *supra*, at 50. A vote dropped in the wrong box was thrown out. *Id.* Finally, pursuant to the new voter

registration requirements, a voter had to indicate whether he was required to pay a poll tax. Curtis, *supra*, at 86. A voter who was required to pay a poll tax but indicated that he was not could be indicted by a grand jury. *Id.* at 87.

Having effectively deterred or rendered ineffectual a large portion of Republican votes, the Democratic Party moved to enact a disfranchising amendment to the North Carolina Constitution. *Id.* The amendment conditioned voter registration on the ability to "read and write section[s] of the Constitution," and conditioned voting itself on the payment of a poll tax. *Id.* (quoting N.C. Const. art. VI, § 4, *amended by* 1899 N.C. Sess. Laws. 341–42). However, the amendment also featured a "grandfather clause" exempting from the literacy requirement those who were legally entitled, or whose ancestors were legally entitled, to vote before Reconstruction. *Id.* at 87. The amendment's obvious aim was to disfranchise illiterate voters, disproportionately African American, and poor people—both African American and white—who could not afford to pay the poll tax. *See* Kousser, *supra*, at 65–72. With the help of the new suffrage-restricting legislation, and with significant "[f]orce and fraud," the amendment passed with 128,285 votes against and 182,217 votes in favor. Curtis, *supra*, at 88.

The most significant threat to the enduring dominance of the Democratic Party was the possibility that "robust, interracial political coalitions" would make a resurgence. *See id.* at 88. Conscious of this risk, the legislature created the

white Democratic primary to unite Democrats, Kousser, *supra*, at 73, and "suppress political diversity among white men," Anderson, *supra*, at 274. The theory of the white primary was that, by meeting as an all-white body to decide party nominations, ideological tensions within the party could be resolved and defections to opposition parties in the general elections could thus be prevented. *See* Kousser, *supra*, at 73–74. The white democratic primary proved extremely effective, leading one commentator to call it "[o]ne of the chief reasons for the South's failure to develop a two-party system. *Id.* at 72.

Ultimately, the Democrats succeeded in branding the Republican Party as the "Negro party," *see id.*, and minimizing the effectiveness of the votes of those who were not deterred by the stigma. By the early twentieth century, disfranchisement had effectively instituted a one-party system in North Carolina. Before disfranchisement, partisan competition and election participation was robust—an estimated 83% of North Carolina's black population voted in the 1880 presidential election, with 67% of them voting Republican. *Id.* at 15. Elections continued to be both bipartisan and biracial into the 1890s. The vast majority of whites and blacks voted in the 1896 gubernatorial election, with 40% of voting whites and 67% percent of voting blacks voting for opposition parties. *Id.* at 42. After the disfranchising amendment, however, statewide participation in elections plummeted. Between the 1896 and 1904 presidential elections, black voter turnout in North Carolina decreased by almost 100%, white turnout by 23%, and overall turnout for opposition parties by 53%. *Id.* at 241. By 1908, nearly

half of North Carolinians failed to vote in the gubernatorial election. *Id.* at 226.

North Carolina's Post-Reconstruction era demonstrates that the consequence of one-party rule is to diminish voter participation across the political spectrum. When one party interferes with democratic governance with the object of entrenching political power, elections and civic engagement lose their significance as a means of effecting political change. Even the party in power must face the reality that elections in such a system are mere pretense. A genuine democracy therefore depends on the possibility of meaningful elections, which depends in turn on the freedom from artificial partisan entrenchment.

d. Gerrymandering In The Twentieth And Twenty-First Centuries: A Bipartisan Means of Entrenchment

North Carolina's Democratic Party managed to preserve its power from any meaningful challenge for much of the twentieth century. *See Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992) ("Before the 1970's, North Carolina was essentially a one-party state, with Democrats controlling the state government in all respects."). The party preserved its power in part through racial and partisan gerrymandering. *See* Douglas M. Orr Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 S.E. Geogr. 39, 43 (1969) ("During the first half of the twentieth century there was a steady drift toward unrepresentative, gerrymandered congressional districts in all parts of the state."). The

state's politics began to change "in the 1970's, as voters elected the first Republican governor and the first Republican United States Senator in this century. Republican successes continued in the 1980's," *Pope*, 809 F. Supp. at 394, and the Democratic legislative majority responded with gerrymandering intended to mitigate the rising Republican threat, *see id.* at 397 (noting that "North Carolina's governor does not possess the power to veto legislation, placing the redistricting power wholly in the hands of the invariably Democrat-dominated state legislature.").

In 1982, the General Assembly enacted a redistricting plan "for the election of members of the [state] Senate and House of Representatives." *Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). Under the plan, the state's urban counties were composed of multimember districts, which resulted in a twenty-percent population disparity between legislative districts. Robert N. Hunter Jr., *Racial Gerrymandering and the Voting Rights Act in North Carolina*, 9 Campbell L. Rev. 255, 270 (1987). The plan provoked separate challenges from both black and Republican voters; the challenges were eventually consolidated. *Gingles*, 590 F. Supp. at 351 n.4. The black voters alleged that the plan "impermissibly dilute[d] the voting strength of the state's registered black voters by submerging black voting minorities in multi-member" districts, and "fractur[ed] . . . a concentration of black voters sufficient in number and contiguity to constitute a voting majority . . . with the [intended] consequence" of preventing "an effective voting majority of black

citizens" in the fractured districts. *Id.* at 349–50. The Republican voters complained that the General Assembly's redistricting plan was "partisanly designed to submerge" not only black voters but "Republican voters as well." Hunter, *supra*, at 270–71. The Court ultimately agreed with the black voters, holding that the redistricting plan violated Section 2 of the Voting Rights Act. *Gingles*, 590 F. Supp. at 350. Because the Republican voters sought the same relief, the Court did not reach their claim. *See id.*

During the 1990s, gerrymandering disputes in North Carolina were primarily a by-product of the preclearance procedures of section 5 of the Voting Rights Act. In 1990, North Carolina gained a 12th seat in the U.S. House of Representatives as a result of the 1990 census. *Shaw v. Reno*, 509 U.S. 630, 633 (1993). The General Assembly presented a reapportionment plan to the U.S. Department of Justice that featured one majority-black congressional district. *Id.* The Justice Department objected to the plan under section 5, and the legislature then submitted a revised plan with a second majority-black district. *Id.* Some districts in the revised 1992 plan had a "dramatically irregular shape," *id.* at 633, and the plan was challenged both by white North Carolina voters who alleged that the plan was "an unconstitutional *racial* gerrymander," *id.* at 636, and by the Republican Party and individual voters who alleged that the plan was an unconstitutional partisan gerrymander, *Pope*, 809 F. Supp. at 394. This Court summarily rejected the GOP challenge, *id.*, but ultimately struck down the 1992 reapportionment plan as an unconstitutional racial

gerrymander, *Shaw v. Hunt*, 517 U.S. 899, 902 (1996). The Court subsequently upheld a 1997 revised plan against a racial-gerrymandering challenge. *Easley v. Cromartie*, 121 S. Ct. 1452, 1456 (2001).

In 2000, North Carolina gained another seat in Congress as a result of the census and the General Assembly enacted a new redistricting plan which was in effect from 2001 to 2010. *Rucho*, 318 F. Supp. 3d at 802. "Unlike the 1992 Plan, the 2001 Plan did not generate significant federal litigation," and "[i]n all but one of these elections, the party receiving more statewide votes for their candidates for the House of Representatives also won a majority of the seats." *Id.* at 802–03.

In 2010, the Republican Party gained a majority in both the North Carolina Senate and House of Representatives, and quickly established committees dedicated to redistricting. *See id.* The Republican-controlled General Assembly redrew congressional districts in 2011 with the goal of "minimiz[ing] the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Id.* at 803 (quoting Dep. of Thomas B. Hofeller 127:19–22, Jan. 24, 2017, ECF Nos. 101-34, 110-1). After producing its intended effect in two consecutive congressional elections, *id.* at 804, the 2011 Plan was struck down as an unconstitutional racial gerrymander, *Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016). The 2016 Plan, which followed, is the subject of the present litigation.

The 2016 Plan, with its deliberate and severe partisan gerrymandering, is the latest iteration in a long and unfortunate part of North Carolina history.[2] That history demonstrates the harm done to democratic governance when a temporary legislative majority entrenches itself in power: the ability of the people to control their government through voting is sharply diminished when the legislature can negate the choices of the majority of the voters through manipulating electoral districts. The temptation to abuse legislative power in this manner is bipartisan, and the *Democratic* Party's successful use of gerrymandering and other partisan devices, for over a century, to lock in place its political dominance illustrates the consequences of ignoring the current *Republican* legislative majority's parallel efforts. Partisan gerrymandering, whichever party wields it, is fundamentally anti-democratic, and the harm it causes is even greater now because of new technology that enables the creation of more precise and effective gerrymandering schemes based on past election data. *See id.* at 803–04. As Justice Kagan has noted, "technology makes today's gerrymandering

[2] The post-2010 legislative majority has followed its Democrat predecessors in attempting to disadvantage voters of opposing views through other means as well as gerrymandering. In 2016, North Carolina's General Assembly enacted an election law "that restricted voting and registration in five different ways," each of which "target[ted] African Americans with almost surgical precision." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Noting that African Americans in North Carolina tend not to vote Republican, and that the legislature, before enacting the law, "requested data on the use, by race, of a number of voting practices," the Fourth Circuit concluded that the law was passed "with racially discriminatory intent in violation of the Equal Protection Clause . . . and § 2 of the Voting Rights Act." *Id.* at 219.

altogether different from the crude linedrawing of the past," enabling "pinpoint precision in designing districts" and allowing "mapmakers [to] capture every last bit of partisan advantage, while still meeting traditional districting requirements." *Gill*, 138 S. Ct. at 1941 (Kagan, J., concurring).

North Carolina's historical experience also shows the harm that severe partisan gerrymandering inflicts on the speech and associational rights of voters. Over time, a successful effort by a legislative majority to armor itself against the results of truly democratic elections weakens the opposing party and lowers the level of participation by voters of all views. First Amendment freedoms need not be formally abridged if their practical effect can be neutralized. This reality, that partisan gerrymandering which gives rise to an enduring electoral advantage strikes at the core of democratic governance, demonstrates the stark incompatibility of severe partisan gerrymandering with the First Amendment.

III. THE FIRST AMENDMENT REQUIRES STRICT SCRUTINY IN CASES OF SEVERE POLITICAL GERRYMANDERING.

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 69 (1990) (internal quotation marks and citation omitted). Partisan gerrymandering that has the "purpose and effect of imposing burdens on a disfavored party and its voters" selects those it disfavors on the basis of the political beliefs and associations they have manifested. *Vieth*, 541 U.S. at

315 (Kennedy, J., concurring). This Court has "applied heightened scrutiny to laws that are viewpoint discriminatory even as to speech *not* protected by the First Amendment." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 125 (2011) (emphasis in original). It would clearly be inconsistent with First Amendment principle and precedent to exempt from searching review viewpoint discriminatory legislation aimed at the core First Amendment activities of political speech and association.

The gerrymander at issue in this case is both impermissible in purpose and severe in effect. The record shows that appellants relied on political data to draw congressional district lines with the goal of "ensur[ing] [that] Republican candidates would prevail in the vast majority of the State's congressional districts." *Rucho*, 318 F. Supp. 3d at 801. The record further shows that the gerrymander had its intended effect, resulting in Republican victories in 10 of the 13 congressional districts drawn by the 2016 Plan, despite the fact that Republicans carried only a slight majority of the statewide vote. *Id.* at 811. This electoral disadvantage significantly reduces the ability of voters opposed to the legislative majority to effectively exercise their associational rights. *See Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring) (burdens on associational rights include "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)"). Indeed, the appellees have testified to their "decreased ability to mobilize their party's

base, persuade independent voters to participate, attract volunteers, raise money, and recruit candidates." *Rucho*, 318 F. Supp. 3d at 829. Furthermore, as a general matter, the impact of partisan gerrymandering on political parties is well documented. *See* Nicholas O. Stephanopoulos & Christopher Warshaw, The Impact of Partisan Gerrymandering on Political Parties 13–20 (Feb. 7, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3330695.

This Court has consistently refused to uphold viewpoint-based restrictions on political speech and association unless those restrictions are narrowly tailored to serve a compelling governmental interest. *See, e.g.*, *Rosenberger*, 515 U.S. at 828–29. Because the purpose and effect of severe partisan gerrymandering are to discriminate against a class of voters on the basis of their political viewpoint, the Court should subject such gerrymandering to strict scrutiny. *See Vieth*, 541 U.S. at 324 (Stevens, J. dissenting) ("[D]iscriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny."). As the court below noted, "[n]either the Supreme Court nor any lower court has recognized any [governmental] interest furthered by . . . 'the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.'" *Rucho*, 318 F. Supp. 3d at 848 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015)); *accord Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in

order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."). The 2016 Plan therefore fails strict scrutiny. Given its severity and its viewpoint discriminatory purpose, however, the 2016 Plan is unconstitutional under any doctrinal framework.

CONCLUSION

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

Respectfully submitted,

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