No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,

Defendants.

From Wake County

No. 21 CVS 15426

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, *et al.*,

Defendants.

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NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE'S AMICUS CURIAE BRIEF IN SUPPORT OF LEGISLATIVE DEFENDANT-APPELLEES

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INTRODUCTION[1]

This case raises a fundamental question: Whether this State's judiciary should be engaged in surveying the everchanging political system for partisan "fairness." Plaintiff-Appellants urge the Court to remove politics from what is inherently a political process. Plaintiff-Appellants want what they can't have. As a well-known Democratic professor and economist once wrote, "[i]t is, of course, neither possible nor desirable to depoliticize government. Policymaking in a democracy must be political—that is, legitimized by popular support rather than by technical analyses. And American democracy, in particular, was designed to be messy and frustrating." Alan Blinder, *Is Government Too Political?*, 76 FOREIGN AFFS. 115 (1997).

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This Court should decline the invitation to insert the judiciary into questions asking which districting plans, duly enacted by the state legislature, are too political,[2] based on assessments of the conflicting opinions of political scientists and prognosticators attempting to predict the future behavior of American voters. Such predictions and prognostications are often incorrect and do not reflect the fluid nature of voters' complex, nuanced, and unique voting decisions. Human beings, whether jurors or voters, are unpredictable.

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[1] Dennis Polio, Ed Wenger, and Jason Torchinsky of the law firm Holtzman Vogel Baran Josefiak Torchinsky PLLC, and Erin Clark, General Counsel to the NRCC, contributed to the authorship of this brief. Only amicus made monetary contribution toward preparation.

[2] The legislature has already considered this issue and declined to act. Indeed, over the past thirty years, the North Carolina General Assembly has rejected dozens of bills introduced by members of both major parties addressing partisan considerations in redistricting. *See, e.g.*, H.B. 1099 (1989), H.B. 488 (1995), H.B. 52 (1997), S.B. 650 (2003), H.B. 894 (2009), S.B. 28 (2015), H.B. 140 (2019), H.B. 437 (2021).

ARGUMENT

The foundation of Plaintiff-Appellants' claims is that partisan intent in redistricting creates essentially voter-proof maps; *i.e.*, that no matter voters' sentiment, they will be unable to overcome the partisan intent of map drawers. *See, e.g.*, Compl. ¶¶ 3, 12, 29, 84, 85, 88, 90, 99, 113, 126-131, 200, 201, 210, 221 (R pp 32, 36, 42, 60-62, 67, 74-75, 79-81, 108, 110, 112); *see also* Compl. ¶ 88 (R p 61) ("The Enacted Plans . . . guarantee that Republicans will control the North Carolina congressional delegation and General Assembly. As a result, the outcomes of congressional and legislative elections are foreordained, and voters lack the power to hold their leaders accountable.") Plaintiff-Appellants' rationale, and that of every court that has mistakenly found partisan gerrymandering claims justiciable, is deeply flawed for at least one fundamental reason: it rests on the unsteady foundation that maps can be "voter-proof."

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Every judicial decision to the contrary in the last four decades has proven that presumption wrong. This is because any potential "partisan intent" present in map drafting cannot overcome the will of the voters. This is due to the realities of voter attitudes, elections, political campaigns, and political environments. Essentially, "[t]he assumption underlying [Plaintiff-Appellants' cases] is that party affiliation is a readily discernable characteristic in voters and that it matters above all else in an election." *Whitford v. Gill*, 218 F. Supp. 3d 837, 936 (W.D. Wis. 2016) (Griesbach, J., dissenting), *vacated*, 138 S. Ct. 1916 (2019). However, "[p]arty affiliation is not set in stone or in a voter's genes." *Id.* This mutability is precisely

the reason that partisan gerrymandering claims cannot be justiciable. *See Davis v. Bandemer*, 478 U.S. 109, 160 (1986) (O'Connor, J. concurring).

Indeed, the lack of electoral predictability was one of the principal reasons the United States Supreme Court held, finally, that partisan gerrymandering claims are not cognizable in federal court. In *Rucho v. Common Cause*, the Court recognized that "[e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." 139 S. Ct. 2484, 2503 (2019). The Court pointed out that even in its two prior leading partisan gerrymandering cases—*Bandemer* and *Vieth*—the predictions of partisan durability proved to be dramatically wrong. *Id.*; *see also infra* at Sec. I.

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> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Rucho, 139 S. Ct. at 2503-04. Indeed, the unpredictability and mutability of voter preferences and electoral outcomes holds just as true in cases before the state courts. Respectfully, there is nothing that makes state courts better equipped to

predict the unpredictable future of elections than federal courts, and therefore they should decline to do so.

I. JUDICIALLY DETERMINED "VOTER-PROOF" MAPS CONSISTENTLY PRODUCE ELECTORAL UPSETS.

The history of redistricting litigation is wrought with examples of courts getting it wrong. For decades, State and federal courts have stricken electoral maps as unconstitutional partisan gerrymanders after finding that the maps "entrench" a particular political party, only to watch the "entrenched" party subsequently suffer electoral defeat, sometimes in spectacular fashion. This history demonstrates that partisan gerrymandering should not be a justiciable claim. The judiciary is simply not suited to examine such issues.

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a. The 1980's

In *Davis v. Bandemer*, several Democrats filed suit alleging that Indiana's 1981 legislative redistricting plan "constituted a political gerrymander intended to disadvantage Democrats" in violation of the Equal Protection Clause. 478 U.S. at 115. A divided three-judge court found that the plan contained "a built-in bias favoring the majority party, the Republicans," which made efforts to "insulate itself from risk of losing its control of the General Assembly." *Bandemer v. Davis*, 603 F. Supp. 1479, 1486, 1488 (S.D. Ind. 1984). It then held that the plan was unconstitutional. *Id.* at 1495-96. Like Plaintiff-Appellants in the present case, the *Bandemer* district court seemed to believe that the plan would result in a "predestined outcome" and "predictable disadvantaging effect[s]." *Id.* at 1492, 1494.

The U.S. Supreme Court subsequently stayed the judgment of the district court, and eventually reversed it. *Davis v. Bandemer*, 474 U.S. 991 (1985); 478 U.S. 109. Recognizing that redistricting is an inherently political process, the *Bandemer* plurality rejected the notion that an unconstitutional discriminatory effect could be shown by "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[.]" *Id.* at 131. Justice O'Connor, in a concurrence joined by Chief Justice Burger and Justice Powell, wisely took issue with the majority's determination that the claim was justiciable. *Id.* at 144. Specifically, she identified the same elemental problems *Amicus Curiae* does here: factual questions concerning electoral success are impossible for anyone, let alone the judiciary, to determine with any degree of certainty. *Id.* at 156-60. The *Bandemer* plurality eventually held that the results of a single election were insufficient to establish discriminatory effect.

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Indiana's subsequent elections, therefore, were conducted under the map previously declared unconstitutional by the *Bandemer* district court. During the 1986 General Assembly election, this "predestined" and "predictable" Republican-favored map increased the Democrats' proportion of the State House from 39 Democrats and 61 Republicans to 48 Democrats and 52 Republicans. Doug Richardson, *Democrats Celebrate Gains in Congress, State Legislature*, Associated Press, Nov. 5, 1986; *Key Races State By State, At A Glance*, Associated Press, Nov. 6, 1986, PM cycle. Indiana's 1988 General Assembly election was also conducted under the same map, and in that year Democrats again increased their electoral

share in the State House, resulting in an even 50 Democrat and 50 Republican split. They also increased their proportion of the State Senate from 20 Democrats and 30 Republicans to 24 Democrats and 26 Republicans. Anne Hazard, States News Service, Nov. 11, 1988; *see also* Rick Gladstone, *Democrats Gain Strategic Victories In State Legislatures*, Associated Press, Nov. 9, 1988, PM Cycle.[3] In 1990, the last election under the 1981 plan, Democrats took control of the State House with 52 Democrats and 48 Republicans. In other words, despite the district court's predetermination that the map favored Republicans, it was ultimately not politically voter-proof.

The circumstances surrounding the *Bandemer* case show exactly why partisan gerrymandering claims should be nonjusticiable—not only in federal courts, but in state courts as well. It is impossible for any litigant to sufficiently demonstrate a discriminatory effect because it is impossible to make accurate future projections of disproportionate election results. *See also Badham v. March Fon Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (three judge panel) *sum. aff'd* (citing a

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[3] While *Bandemer* concerned legislative redistricting, the 1981 plan's congressional districts are another apt example of voter volatility. *See* Michael Orekes, *The 1990 Elections: The Future - Redistricting; Elections Strengthen Hand of Democrats In '91 Redistricting*, N.Y. Times, Nov. 8, 1990 ("[E]ven lawmakers' best efforts at gerrymandering can have unintended results. In Indiana in 1981 the Republicans had control over drawing district lines, and they set out to oust as many Democrats as possible when national reapportionment cost the state a Congressional seat. But in their zeal the map makers apparently spread the Republican support too thin. In 1980 seven Democrats and four Republicans represented Indiana in Congress. In the first election after redistricting, in 1982, the breakdown was five and five. But in the Congress that convenes next January, the Indiana delegation will be eight Democrats and only two Republicans.").

district court's refusal to referee a dispute over projected disproportionate election results); *see also id.* at 672-73 (rejecting Republicans' challenge to California redistricting plan because Republicans were still able to exercise some political power).

b. The 1990's

In *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.) *sum. aff'd*, 506 U.S. 801 (1992) (mem.), the Republican Party of North Carolina and a group of voters brought an action challenging North Carolina's congressional redistricting plan ("1992 Plan") as a partisan gerrymander. While the three-judge district court seemed to doubt that it would be possible for the plaintiffs to corroborate discriminatory effect under *Bandemer*, it assumed for purposes of the motion to dismiss "that the plaintiffs could, theoretically, prove that the [1992] Plan would establish a 'projected history' of disproportionate results." *Id.* at 396-97.[4] Nonetheless, the district court dismissed the case for failure to state a claim because it found that plaintiffs could not make the showing that they had been consistently degraded in their participation in the political process as a whole. *Id.* Accordingly, the subsequent congressional elections in North Carolina were held under the 1992 Plan, which was allegedly politically gerrymandered to favor Democrats.

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Despite the *Pope* plaintiffs' claims, and the *Pope* court's holding that those plaintiffs could theoretically prove a projected history of disproportionate electoral

[4] As the *Pope* district court succinctly stated, "[t]he gravamen of the plaintiffs' action is that the [1992] Plan adopted by the Democratic legislature *will result* in disproportionately high representation for the Democratic Party in the state's congressional delegation." *Pope*, 809 F. Supp. at 396 (emphasis added).

results, the voters of North Carolina did not vote as "projected" under the 1992 Plan. At the time of the *Pope* litigation, Democrats controlled 8 North Carolina congressional seats and Republicans controlled 4. In the very next election (1994), which was held using the exact same plan, Democrats won only 4 congressional seats and Republicans won 8. During the following election in 1996, North Carolina voters elected 6 Democrats and 6 Republicans to Congress. And in both 1998 and 2000, North Carolina elected 7 Republicans and 5 Democrats to Congress. None of the parties to *Pope v. Blue*, nor the district court, accurately predicted how the voters of North Carolina would behave in subsequent elections.

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The judiciary's inability to predict election results is not limited to claims of partisan gerrymandering in legislative and congressional districts. In the late 1980's the North Carolina Republican Party, unhappy with the statewide election of superior court judges, sued and argued for district-wide elections. *Republican Party v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994), *aff'd as modified sub nom.*; *Republican Party of N.C. v. N.C. State Bd. of Elections*, 27 F.3d 563 (4th Cir. 1994), *remanded sub nom.*; *Republican Party v. Hunt*, 77 F.3d 470 (4th Cir. 1996). Because the Democratic Party held a wide margin in voter registration, the Republicans argued that the Democratic candidates would always win in statewide elections. *See Republican Party*, 841 F. Supp. at 730-31. As a result, the U.S. District Court for the Eastern District of North Carolina held that statewide elections of superior court judges were unconstitutional because they diluted Republican voting power. *Id.* at 732-34. "Reality seemed to support the court's conclusion because only one

Republican had ever been elected to a superior court judgeship in a statewide election." Samuel Latham Grimes, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. Rev. 2266, 2285 (1998). Accordingly, the district court ordered that superior court candidates be elected by voters in their home districts, but also held that they must appear on the statewide ballot just in case the decision was later reversed. *Republican Party*, 841 F. Supp. at 733-34.

Notwithstanding the district court's findings, Republican candidates for superior court were very successful in the 1994 general elections, which were held on a statewide basis. Indeed, they won *every* court of appeals seat and carried the statewide vote in 8 superior court races. Grimes, *supra*, at 2285. Despite the plaintiffs' and the district court's predictions, the new election procedure actually *disadvantaged* Republican candidates in a number of races in which they succeeded on the statewide ballot but lost close races to Democratic candidates in their home districts. *Id.* at 2285 n.174.

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In light of the Republican successes in the 1994 statewide general election, the Fourth Circuit Court of Appeals reconsidered *Hunt*, determined that the results of the 1994 elections "were directly at odds with the recent prediction by the district court that Republican electoral exclusion would continue unabated into the future," and remanded the case to the district court for further consideration. *Id.* at 2286 (citing *Republican Party v. Hunt*, 1996 WL 60439, at *1-4 (4th Cir. 1996)). Eventually, the North Carolina General Assembly, likely tired of the uncertainty

created by the judicial decisions, declared that all superior court judges would be elected from local districts starting in 1996, and that starting in 1998, those elections would be non-partisan. Grimes, *supra*, at 2286.

c. The 2000's

Then came *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a case in which a group of registered Democrats challenged Pennsylvania's congressional redistricting plan as an unconstitutional partisan gerrymander in violation of Article I and the Fourteenth Amendment. The *Vieth* plurality, composed of Chief Justice Rehnquist, and Justices Scalia, O'Connor, and Thomas, determined that partisan gerrymandering claims present a nonjusticiable question and would have overturned *Bandemer*. *Id.* at 283-84. Specifically, the *Vieth* plurality held that, *inter alia*, it was impossible to determine the effects of partisan gerrymandering:

> [A] person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race. Political 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. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

Id. at 287 (plurality) (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment)).

With the challenge to Pennsylvania's congressional plan ultimately defeated, Pennsylvania's subsequent congressional elections were held on that map. At the time of *Vieth* in 2004, Pennsylvania had 12 Republican members of Congress and 7

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Democratic members of Congress. During the 2006 elections—just one election cycle after the *Vieth* plaintiffs and the dissenting members of the Court would have struck down the plan as unconstitutional because, *inter alia*, it ostensibly heavily favored and entrenched Republicans—Democrats won 11 congressional seats and Republicans won only 8. In 2008, only 4 years after *Vieth*, Democrats increased their share of the Pennsylvania congressional delegation to 12 Democrats and 7 Republicans. The *Veith* plurality could not have been more prescient.

d. The 2010's

1. Wisconsin

In 2015, a group of Democratic voters in Wisconsin challenged that state's 2012 legislative redistricting plan ("Act 43") as a partisan gerrymander in violation of the First and Fourteenth Amendments. *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018). A three-judge panel of the U.S. District Court for the Western District of Wisconsin agreed, enjoining the Act 43 map and ordering a remedial districting plan. *Id.* at 1926. The district court supported its determination with testimony and expert reports of political scientists who calculated that Act 43 would not yield a change in Republican-held seats even in hypothetical wave elections that favored Democrats; in other words, they concluded that Republicans would be heavily favored "for the lifetime of the plan." *Whitford*, 218 F. Supp. 3d at 860, 898-910. The district court also referred to Act 43 as "lock[ing]-in" Republican victories, *id.* at 886, and "maintain[ing] a comfortable majority" for Republicans in the legislature. *Id.* at 895. The district court found that it was essentially impossible for Democrats to

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ever win more than their then-existing current share of the legislature under that plan. *Id.* at 860, 886, 895, 898-910.

The defendants appealed directly to the U.S. Supreme Court, which, after staying the district court's judgment, 137 S. Ct. 2289 (2017), reversed on standing grounds. *Gill*, 138 S. Ct. at 1934. Accordingly, the map remained in place despite plaintiffs' expert testimony that Democrats could never be electorally successful in the districts as drawn.

Despite the dire predictions, Wisconsin Democrats fared well in subsequent elections. In June 2018, a Democrat won a special election in northeastern Wisconsin's First Senate District, which voted for Republican Donald Trump by a 17-point margin in the 2016 presidential election. Tara Golshan, *Democrats Just Won a Wisconsin Special Election Scott Walker Didn't Want to Have*, Vox (Jun. 13, 2018), https://www.vox.com/2018/6/12/17455922/wisconsin-special-elections-results-june. In January 2018, Democrats flipped a rural state senate district (which Donald Trump carried by 17 points) with a comfortable 10-point margin of victory. David Weigel, *Democrats Flip Traditionally Conservative Wisconsin Senate Seat, Kicking Off 2018 Election Season*, Chi. Trib. (Jan. 17, 2018), https://www.chicagotribune.com/news/nationworld/politics/ct-wisconsin-state-senate-election-20180116-story.html. Further, during the 2018 general election, Democrats flipped an additional state assembly seat. Wis. Elections Comm'n, *2018 Fall General Election Results*, https://elections.wi.gov/elections-voting/results/2018/fall-general (last visited Jan. 28, 2022).

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2. Pennsylvania

In 2018, a smorgasbord of legal challenges to Pennsylvania's 2011 congressional redistricting plan ("2011 Plan"), in both state and federal court, culminated in a fractured Supreme Court of Pennsylvania opinion that struck down the 2011 Plan as unconstitutional under the Pennsylvania Constitution. *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa. 2018), *cert. denied*, 139 S. Ct. 445 (2018). Specifically, the majority of the Supreme Court of Pennsylvania determined that the 2011 Plan violated the Pennsylvania Constitution because, *inter alia*, "Republicans' advantage is nearly *impossible to overcome*" and Democrats' "have been denied any '*realistic* opportunity to elect representatives of their choice[.]'" *League of Women Voters v. Commonwealth*, 178 A.3d 737, 766 (Pa. 2018) (emphases added) (quoting plaintiffs' Petition for Review ¶¶ 118-19) *cert. denied*, 139 S. Ct. 445 (2018). The court enjoined the 2011 Plan's further use, with the very notable exception of the March 13, 2018 special election for Pennsylvania's 18th Congressional District, which was to be conducted under the 2011 Plan. *League of Women Voters of Pa.*, 175 A.3d at 284; *League of Women Voters*, 178 A.3d at 741, n.7.

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Pennsylvania's 18th Congressional District had been held by a Republican since 2003, who consistently carried the district with at least 58 percent of the vote. Once that congressman retired, a special election was set for March 13, 2018, to fill the seat until the 2018 general election in November. Office of Governor Tom Wolf, *Governor Wolf Sets Special Election For Pennsylvania's 18th Congressional District*

(Oct. 23, 2017), https://www.governor.pa.gov/governor-wolf-sets-special-election-pennsylvanias-18th-congressional-district/. The Democratic candidate, Conor Lamb, won the March 13th special election with 49.8 percent of the vote. Nate Cohn, Josh Katz, Sarah Almukhtar, & Matthew Bloch, *Pennsylvania Special Election Results: Lamb Wins 18th Congressional District* (Apr. 26, 2018), https://www.nytimes.com/interactive/2018/03/13/us/elections/results-pennsylvania-house-special-election. This very district was used as an example by plaintiffs' experts and credited by the Supreme Court of Pennsylvania as a district in which it was "*impossible*" for Democrats to overcome Republican's political "advantage." *League of Women Voters*, 178 A.3d at 766 (emphasis added) (quoting plaintiffs' Petition for Review ¶¶ 118-19; *id.* at 764 n.26; *id.* at 760-61; *id.* at 773 (crediting the testimony of Dr. Jowei Chen); *id.* at 788; *et. seq.* Despite the purported omnipotence and electoral certainty proffered by plaintiffs' experts and the Pennsylvania courts, the Pennsylvania 18th congressional district was unexpectedly won by a Democrat.

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3. Michigan

In December 2017, a group of Michigan voters and the League of Women Voters of Michigan brought a suit challenging Michigan's 2011 congressional and state legislative maps as unconstitutional political gerrymanders under the First and Fourteenth Amendments. *League of Women Voters of Mich. v. Johnson*, 2:17cv14148 (filed Dec. 22, 2017) (hereinafter the "LWV Compl."). In their complaint, the plaintiffs describe Michigan's political maps as a "durable and severe gerrymander" that "preserve[s] and enhance[s] the controlling party's power." LWV

Compl. ¶¶ 1-2. Plaintiffs claimed that "[t]here is *a near zero chance* that the efficiency gaps for the [plan] will neutralize during this decade, let alone 'switch signs' to favor Democrats." LWV Compl. at ¶ 55 (emphasis added). For example, plaintiffs' expert, Christopher Warshaw, an Assistant Professor of Political Science at George Washington University, stated that Michigan's efficiency gaps "are durable, and thus partisan gerrymandering in [the] state legislature[ ] is *unlikely to be remedied through the normal electoral process*." Pls.' Expert Report, Christopher Warshaw at 32 (Jun. 1, 2018) (emphasis added).

The three-judge panel of the U.S. District Court for the Western District of Michigan eventually sided with Plaintiffs, struck down the challenged districts, and ordered the legislature to draw remedial maps for the congressional, state house, and state senate elections. *League of Women Voters of Mich. v. Benson,* 373 F. Supp. 3d 867 (E.D. Mich. 2019). The plaintiffs, however, did not request relief for the 2018 election, apparently to avoid potential *Purcell* issues.[5] *Id.* at 892.

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At the time the Michigan plaintiffs filed their complaint and their "experts" authored their reports, Republicans held 9 congressional seats while Democrats held 5 congressional seats; Republicans held 27 state senate seats while Democrats held 11; and Republicans held 63 state house seats while Democrats held 47. Despite the "durable Republican gerrymander," Michigan Democrats were

[5] The United States Supreme Court "has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam)).

incredibly successful during the 2018 elections. Democrats flipped 2 congressional seats, resulting in an evenly split congressional delegation of 7 Republicans and 7 Democrats. Democrats flipped 5 additional state senate seats, resulting in a closely split state senate of 22 Republicans and 16 Democrats. And Democrats flipped 5 additional state house seats. Clearly, that "durable" Republican gerrymander was not quite as durable as the "experts" led the court to believe.

e. The 2020's

Due to the U.S. Supreme Court's decision in *Rucho*, which held, once and for all, that partisan gerrymandering claims present non-justiciable political questions outside the federal courts' jurisdiction, the current decade has provided no additional partisan gerrymander test cases. But the courts' inability to rely on social-science predictors of voter behavior is not limited to the partisan gerrymandering context. On remand from the U.S. Supreme Court, the U.S. District Court for the Eastern District of Virginia held that 11 majority-minority Virginia House of Delegates districts were racial gerrymanders in violation of the Equal Protection Clause and ordered the legislature to redraw them. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018). The Virginia legislature failed to adopt a remedial map, so a three-judge district-court panel imposed a new map that significantly reduced black voting age population ("BVAP") in many of the challenged districts. *Bethune-Hill v. Va, State Bd. of Elections*, 368 F. Supp. 3d 872 (E.D. Va. 2019). The court reduced the BAVP in two House of Delegates districts—District 63 and District 75—after two political scientists (including one who had

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served as the court's special master) calculated that these districts with reduced BVAP would still allow black voters to continue to elect their preferred candidates. *Id.* at 882-83.

In the House of Delegates election held under the new court-drawn plan, the incumbent black Delegates in District 63 and District 75 were defeated by white candidates. *See* Va. Dep't of Elections, *2021 November General*, at https://results.elections.virginia.gov/vaelections/2021%20November%20General/Site/GeneralAssembly.html (last visited Jan. 27, 2022). Once again, as the U.S. Supreme court noted in *Rucho*, "[e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." 139 S. Ct. at 2503.

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The history of the last four decades, however, clearly demonstrates that, respectfully, the judiciary will never be the best arbiter of questions related to partisan gerrymandering or political harm. They simply cannot predict the future actions of the electorate, mostly because there exists no reliable way to do so. Accordingly, partisan gerrymandering claims cannot be justiciable.

II. VOTER PREFERENCES ARE NOT IMMUTABLE

The foregoing examples underscore a fundamental truth: voters' respective partisanship, partisan affiliation, political positions, and electoral choices are not immutable. This mutability has many causes, but the result is the same—not every

voter casts ballots based solely on partisanship in every instance. *See Bandemer*, 478 U.S. at 156-60 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 287 (plurality opinion); *Rucho*, 139 S. Ct. at 2503-2504.

The changing and dynamic American electorate is nothing new, and indeed has been an elemental feature of American elections. The publication *Dynamics of the Party System: Alignment and Realignment of the Political Parties*, authored by noted scholar James L. Sundquist, provides this:

> Every election sees some change in the distribution of the vote between the parties. A Democrat who dislikes his party's candidate or is attracted by the Republican nominee may vote Republican, or vice versa. A party's record in office, or its stand on particular issues, will attract or repel at least some voter, in every contest.

James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of the Political Parties* 4 (Brookings Inst. Press 2011). It is this dynamism and long-term view of voting preferences that the proponents of partisan gerrymandering claims ask this court to blindly ignore.

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Here, the Plaintiffs ask this Court to act as political scientists and statisticians. They urge this Court to demand that the courts look at cold data and divine that future elections will *always* turn out the way they predict and that, in this State, it is "impossible" for Democrats to *ever* succeed. *See, e.g.*, Compl. ¶¶ 3, 12, 29, 84, 85, 88, 90, 99, 113, 126-131, 200, 201, 210, 221 (R pp 32, 36, 42, 60-62, 67, 74-75, 79-81, 108, 110, 112). The problem with this view of the American body politic is that it brushes off the incredibly dynamic and ever-changing nature of election results and voter behavior. It ignores human nature.

One need only look to the elections of the past decade to see that voter preferences change candidate-to-candidate and year-to-year, regardless of partisan affiliation. In 2016, Donald Trump was elected to the presidency. He won the majority of the vote in 21 congressional districts that Barack Obama carried only 4 years earlier. Nathaniel Rakich, *Election Update: The Swing District Showdown*, FiveThirtyEight (Sep. 12, 2018), https://fivethirtyeight.com/features/election-update-the-swing-district-showdown/; *see also* David Wasserman, *Purple America Has All But Disappeared*, FiveThirtyEight (Mar. 8, 2017), https://fivethirtyeight.com/features/purple-america-has-all-but-disappeared/. Indeed, over 200 counties voted for both Obama and Trump. *See* David Leip, *Atlas of U.S. Presidential Elections*, available at https://uselectionatlas.org. These were two of the most opposite presidential candidates of the modern era in terms of style and ideology, and yet 21 congressional districts and over 200 counties voted for them both.[6]

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And, in 2016, the voters of 12 congressional districts voted to elect both Trump and a Democrat to Congress. Aaron Bycoffe & Nate Silver, *Tracking Congress In The Age Of Trump*, 115th Congress, FiveThirtyEight, https://projects.fivethirtyeight.com/congress-trump-score/ (last visited Jan. 28, 2022). Conversely, Republicans won 23 congressional districts in which Hillary Clinton won the popular vote during that same election cycle. David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2020, 2016, and 2012 Elections*, Daily Kos (Nov. 19, 2020), https://www.dailykos.com/stories/2012

[6] Further, Hillary Clinton won the majority of the vote in 13 congressional districts Mitt Romney carried in 2012. Rakich, *supra*.

/11/19/1163009/-Daily-Kos-Elections-presidential-results-by-congressional-district-for-the-2012-2008-elections. In 2018, the voters of 9 congressional districts who voted for Trump in 2016 elected Democrats to Congress. *Id.* And there are currently 31 Democratic Members of Congress from districts that voted for Donald Trump in 2016. *See* Kyle Kondik, *House 2020: The New Crossover Districts*, Rasmussen Reports (Nov. 29, 2018), http://www.rasmussenreports.com/public_content/political_commentary/commentary_by_kyle_kondik/house_2020_the_new_crossover_districts.

2020 was no different. In that election cycle, Joe Biden, a Democrat, was elected to the presidency. In fact, 77 counties flipped between 2016 and 2020, with Biden winning 59 of them and Trump winning 18. Domenico Montanaro & Connie Hanzhang Jin, *How Biden Won: Ramping Up The Base And Expanding Margins In The Suburbs*, NPR (Nov. 18, 2020), https://www.npr.org/2020/11/18/935730100/how-biden-won-ramping-up-the-base-and-expanding-margins-in-the-suburbs. 2020 also saw 18 congressional seats change party hands, with 14 seats flipping from Democrat to Republican, 3 flipping from Republican to Democrat, and 1 flipping from Libertarian to Republican. David Wasserman, Sophie Andrews, Leo Saenger, Lev Cohen, Ally Flinn, & Griff Tatarsky, *2020 National House Vote Tracker*, The Cook Political Report (last visited Jan. 25, 2022), https://www.cookpolitical.com/2020-house-vote-tracker. 13 of the 386 incumbents running for re-election (3.4%) lost their seats in the general election—all Democrats. *Id.* In 16 U.S. House districts, the opposite party nominee won the presidential and U.S. House of Representatives election in 2020. J. Miles Coleman, *2020's Crossover*

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Districts, UVA Ctr. for Politics (Feb. 4, 2021), https://centerforpolitics .org/crystalball/articles/2020s-crossover-districts/. Republicans won 9 congressional districts in which Joe Biden won the popular vote, while Democrats won 7 congressional districts in which Trump won the popular vote. *Id.* These divergences were at least partly due to split-ticket voting, wherein more Democrats than Republicans who voted in the presidential contest failed to vote for their party's congressional candidate. *Id.*

This volatility is not only present across overlapping seats, but also between subsequent elections for the same office. For example, leading up to the 2020 elections, Democrats were projected by many polls to expand their majority by up to 15 seats due to the perceived unpopularity of then-President Trump. William A. Galston, *Why Did House Democrats Underperform Compared to Joe Biden*, Brookings Inst. (Dec. 21, 2020), https://www.brookings.edu/blog/fixgov/2020/12/21/ why-did-house-democrats-underperform-compared-to-joe-biden/. Democrats ultimately *lost* a total of 13 seats in the 2020 elections and entered 2021 with a narrow 222–213 House majority, the narrowest since the year 2000. *Id.* They lost these congressional races despite a successful Democratic presidential candidate and some successful partisan gerrymandering cases (which were wrongly decided to be justiciable) that changed the districts in a number of states in a way that was assumed to advantage Democratic candidates. *See, e.g.*, *League of Women Voters of Pa.*, 175 A.3d 282, *cert. denied*, 139 S. Ct. 445 (redrawing Pennsylvania's congressional districts prior to the 2020 election).

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In 2021, Republican Glenn Youngkin won Virginia's gubernatorial election in an upset that represented a significant departure from how that commonwealth voted during the 2020 election only one year earlier (and in the prior gubernatorial election). The number of Republican votes during the contest grew by more than 40 percent compared to the 2017 gubernatorial contest, while Democratic votes increased by only 10 percent. Jason Lange & Chris Canipe, *Virginia Governor's Race*, (Nov. 3, 2021), https://graphics.reuters.com/USA-ELECTION/VIRGINIA/gkplgdmzavb/. Compared to the 2020 presidential contest in Virginia, Youngkin won higher shares of voters than former President Donald Trump did across the commonwealth. *Id.* Youngkin won 12 counties that Biden had won just one year earlier, making inroads in traditionally Democratic strongholds such as the suburbs of Washington, D.C. and Richmond, as well as in counties with large Black populations. *Id.* This was a stark reversal of Virginia's electoral voting patterns and represents yet another example of unpredicted and unpredictable voting behavior.

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During the 2018 election, 41 congressional districts across the country—nearly 10 percent of all congressional districts—flipped from Republican to Democrat. Sean McMinn, *Where The Suburbs Moved Left—And How The Shift Swung Elections*, NPR (Nov. 27, 2018), https://www.npr.org/2018/11/27/668726284/where-the-suburbs-moved-left-and-how-it-swung-elections; *see also supra* Sec. I. In fact, some of the biggest county flips in the South in 2018 were in the suburbs of Charlotte, North Carolina,

which include some of the areas at issue in the present case. *Id.* These huge swings over the course of only 2 years cannot be explained only in terms of voter migration. Rather, they are also attributable to cross-party voting from year-to-year and candidate-to-candidate.

Voters defect from parties all the time. "In every election cycle a substantial portion of partisan voters defect and cast their ballots for candidates from the other party." Paul S. Herrnson & James M. Curry, *Issue Voting and Partisan Defections in Congressional Elections*, vol. 36, no. 2 Legis. Stud. Q. 281, 282-83 (2011). There are infinite reasons for these defections, such as presidential popularity, preference for creating divided or balanced government,[7] incumbency favoritism, social contexts, scandals, whether a candidate is a prominent hero or celebrity, and even the physical attractiveness of a particular candidate. *Id.* at 283.

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Issues and issue-based campaigning also lead directly to defection among "partisan" voters. *Id.* at 284. These issues can be "party-owned," *i.e.*, those that differentiate one political party from the other. *Id.* Party-owned issues can also "change quite dramatically across generations as the result of new events and new political issues, as well as the positions the parties take." *Id.* Alternatively, candidates and their allies strategically set issue agendas to advance their candidacy, and research has shown that "voters are fairly responsive to such

[7] Studies have shown that some voters switch their electoral choices based on who is in control of the executive branch in order to balance political power. Michael A. Bailey & Elliott B. Fullmer*, Balancing in the U.S. States, 1978-2009*, Vol. 11, No. 2 State Pol. & Pol'y Q. 158 (2011). This balancing behavior results in voters disfavoring the party in control of the executive when voting in midterm elections at both the federal and state levels. *Id.* at 149.

agenda-setting efforts." *Id.* at 285. Regardless of the type of issue, it can have substantial crossover appeal, causing voters to defect from the party with which they have traditionally identified. *Id.* at 295-97.

Recent studies also suggest that voters weigh ideology differently depending on where they fall on the ideological spectrum. Specifically, moderate voters (those who identify as neither ideologically conservative nor liberal) weigh the ideology of their preferred congressional candidates much less and may not even be able to identify the ideology of their preferred candidate. *See generally* James Adams, *et al.*, *Do Moderate Voters Weigh Candidates' Ideologies? Voters' Decision Rules in the 2010 Congressional Elections*, U.C. DAVIS (Dec. 12, 2013), https://www.vanderbilt.edu/csdi/events/Adams_Paper.pdf. The most recent data suggests that self-identified moderates, and those who are unable to classify themselves ideologically, make up the majority of the U.S. adults. Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, Gallup (Jan. 11, 2018), https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx. Accordingly, most adults in the United States make their voting decisions not based on ideology at all but instead on other more amorphous factors. The malleable nature of voters' preferences results in *real* competition for their votes.

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Further, voting trends change over time. These trends can be based on changes in electoral-district demographic structure, including socioeconomic factors, race, education, age, and so forth. Rob Griffin, Ruy Teixeira, & William H. Frey, *Report: America's Electoral Future, Demographic Shifts and the Future of the*

Trump Coalition, Brookings Inst. (Apr. 19, 2018), https://www.brookings.edu/research/ americas-electoral-future_2018/. Further, elections have been, and will continue to be, swung by unpredictable third-party voter activity. *Id.* This is exactly what happened in 2016, 2020, 2021, and it will continue to happen at unforeseen times in the future. *Id.*

A look at the partisan composition of state legislatures from 1990 through 2000 provides an apt visual representation. In most states during that era, state legislatures enacted redistricting plans as ordinary legislation (rather than by redistricting commission). In 1990, Republicans held 6 state legislatures, Democrats held 29, and 14 were split control.[8] By 2000, Republicans held 18 state legislatures, Democrats held 16, and 15 were split control. A chart depicting this is available at the National Conference of State Legislatures (NCSL), *Partisan Composition of State Legislatures 1990-2000*, http://www.ncsl.org/documents/statevote/legiscontrol_1990 _2000.pdf (last visited Jan. 28, 2022) and is reproduced here:

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[8] Nebraska has a non-partisan unicameral legislature.

NCSL

Partisan composition of State Legislatures 1990-2000

(Partisan composition as reported in January of each year.)

State	1990 Legis Comp.	1992 Legis Comp.	1994 Legis Comp.	1996 Legis Comp.	1998 Legis Comp.	2000 Legis Comp.
Alabama	Dem	Dem	Dem	Dem	Dem	Dem
Alaska	Split	Split	Rep	Rep	Rep	Rep
Arizona	Rep	Rep	Rep	Rep	Rep	Split
Arkansas	Dem	Dem	Dem	Dem	Dem	Dem
California	Dem	Dem	Dem	Dem	Dem	Dem
Colorado	Rep	Rep	Rep	Rep	Rep	Split
Connecticut	Dem	Dem	Dem	Dem	Dem	Dem
Delaware	Split	Split	Split	Split	Split	Split
Florida	Dem	Split	Split	Rep	Rep	Rep
Georgia	Dem	Dem	Dem	Dem	Dem	Dem
Hawaii	Dem	Dem	Dem	Dem	Dem	Dem
Idaho	Split	Rep	Rep	Rep	Rep	Rep
Illinois	Dem	Split	Split	Split	Split	Split
Indiana	Split	Split	Split	Split	Split	Split
Iowa	Dem	Dem	Split	Rep	Rep	Rep
Kansas	Split	Split	Rep	Rep	Rep	Rep
Kentucky	Dem	Dem	Dem	Dem	Dem	Split
Louisiana	Dem	Dem	Dem	Dem	Dem	Dem
Maine	Dem	Dem	Dem	Dem	Dem	Split
Maryland	Dem	Dem	Dem	Dem	Dem	Dem
Massachusetts	Dem	Dem	Dem	Dem	Dem	Dem
Michigan	Split	Split	Split	Split	Rep	Rep
Minnesota	Dem	Dem	Dem	Dem	Split	Split
Mississippi	Dem	Dem	Dem	Dem	Dem	Dem
Missouri	Dem	Dem	Dem	Dem	Dem	Split
Montana	Split	Split	Rep	Rep	Rep	Rep
Nebraska	NA	NA	NA	NA	NA	NA
Nevada	Split	Split	Split	Split	Split	Split
New Hampshire	Rep	Rep	Rep	Rep	Split	Rep
New Jersey	Dem	Rep	Rep	Rep	Rep	Rep
New Mexico	Dem	Dem	Dem	Dem	Dem	Dem
New York	Split	Split	Split	Split	Split	Split
North Carolina	Dem	Dem	Dem	Dem	Dem	Dem
North Dakota	Split	Split	Rep	Rep	Rep	Rep
Ohio	Split	Split	Rep	Rep	Rep	Rep
Oklahoma	Dem	Dem	Dem	Dem	Dem	Dem
Oregon	Dem	Split	Rep	Rep	Rep	Rep
Pennsylvania	Split	Split	Rep	Rep	Rep	Rep
Rhode Island	Dem	Dem	Dem	Dem	Dem	Dem
South Carolina	Dem	Dem	Split	Split	Split	Split
South Dakota	Rep	Split	Rep	Rep	Rep	Rep
Tennessee	Dem	Dem	Dem	Dem	Dem	Dem
Texas	Dem	Dem	Dem	Split	Split	Rep
Utah	Rep	Rep	Rep	Rep	Rep	Rep
Vermont	Split	Split	Split	Split	Dem	Split
Virginia	Dem	Dem	Dem	Split	Split	Rep
Washington	Split	Dem	Split	Split	Split	Split
West Virginia	Dem	Dem	Dem	Dem	Dem	Dem
Wisconsin	Dem	Dem	Split	Split	Split	Split
Wyoming	Rep	Rep	Rep	Rep	Rep	Rep

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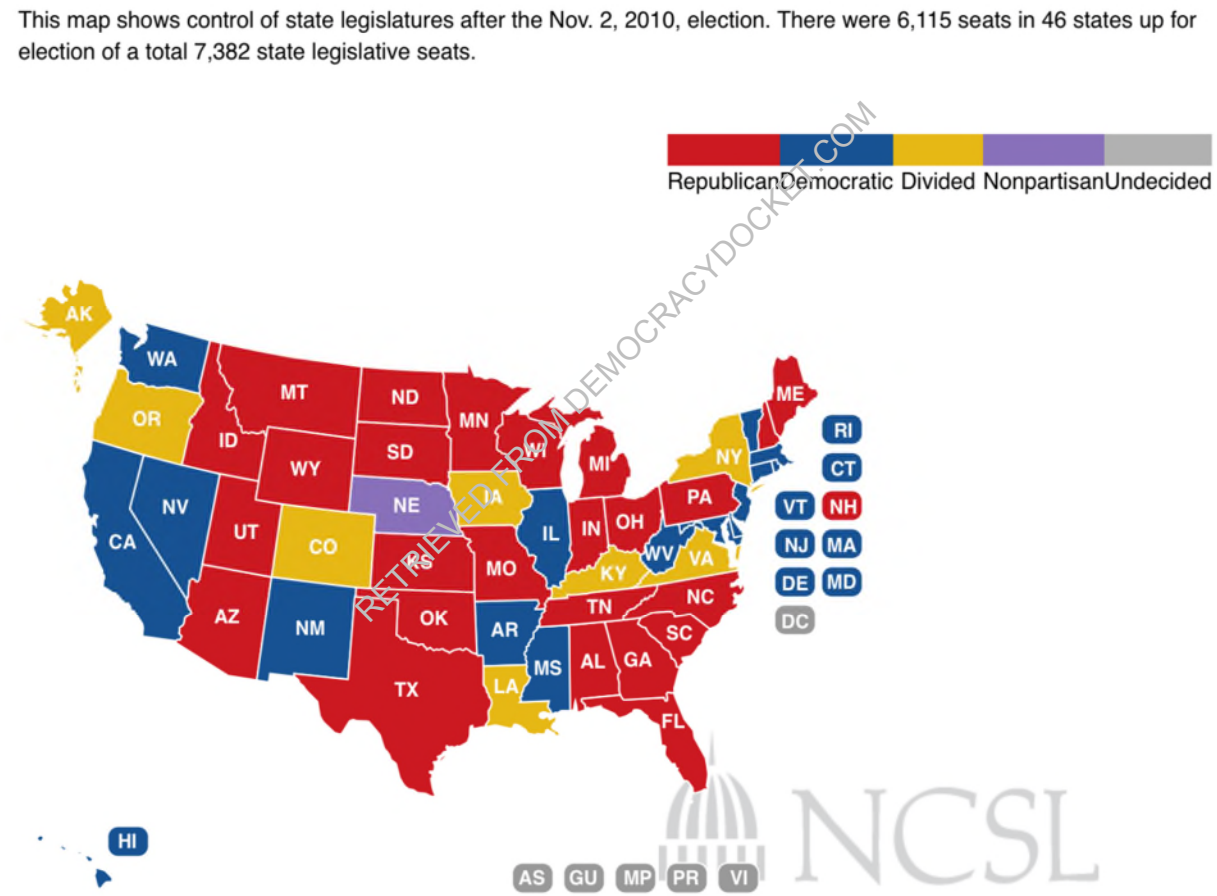
Key:

Rep	= Both legislative chambers have Republican majorities
Dem	= Both legislative chambers have Democratic majorities
Split	= Neither party had majorities in both legislative chambers
	= Nebraska is a non-partisan unicameral legislature

National Conference of State Legislatures

The next decennial election found the Republican party at a near high-water mark. Democrats controlled 16 legislatures, while Republicans held 25 legislatures, and 8 were split control. A visual representation of this distribution, available at NCSL, *2010 Post-Election Party Control of State Legislatures*, http://www.ncsl.org/research/elections-and-campaigns/2010-postelection-control-of-legislatures.aspx (last visited Jan. 28, 2022) is reproduced here:



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Following the 2018 elections, these numbers shifted dramatically again. According to NCSL, there were 30 states with Republican legislative majorities, 18 with Democratic majorities, and 1 with split control. NCSL, *2019 State &*

Legislative Partisan Composition, https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2019_February%201st.pdf (last visited Jan. 28, 2022).

The dissenting opinion in *Whitford v. Gill* recognized that volatile electoral patterns and "wave elections [are] relatively common." 218 F. Supp. 3d at 959 (Griesbach, J., dissenting). In fact, some experts believe that wave elections are now the "norm." *Id.* at 862. This suggests that the trends noted by Sundquist, Bartels, and nearly every unbiased observer of American politics has been that the electorate's voting behavior constantly changes. The *Whitford* dissent even noted that granular trends of volatility do not remain constant throughout the geographic unit that comprises even a single state. *Id.* at 960 (Griesbach, J., dissenting) (noting that in 2012, "President Obama was hugely successful in a few, traditional bastions of Democratic voters—even more successful than in 2008. But in the rest of the state, his support declined"). The implications for elections conducted on a district-by-district basis are obvious. Even changes in the electorate in a national or statewide level say nothing about how voters in a particular area or region of a state might act relative to statewide or national trends. And when voters are located in particular geographic areas, the potential for unique voting behavior in particular districts remains apparent and difficult to predict.

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Simply put, voters do not cast ballots in a vacuum, and there are innumerable reasons why they vote for certain candidates—only one of which might be partisan affiliation. Moreover, voters in different parts of a state may vote for different candidates in different levels of elections. Voter behavior is simply

inherently unpredictable and volatile from election-to-election and candidate-to-candidate. This means that, contrary to what the Plaintiff-Appellants may argue, there is real competition in nearly every district for the support of voters every election cycle.

For decades, academic scholars have studied political trends over time, and there is somewhat of a consensus that change is constant. *See, e.g.*, Jeffrey M. Jones, *U.S. Political Party Preferences Shifted Greatly During 2021*, Gallup (Jan. 17, 2022), https://news.gallup.com/poll/388781/political-party-preferences-shifted-great

ly-during-2021.aspx; Herbert P. Kitchelt & Philipp Rehm, *Secular Partisan Realignment in the United States: The Socioeconomic Reconfiguration of White Partisan Support since the New Deal Era*, Pol. & Soc'y, Vol. 47(3) 425–479 (2019), available at https://votingissocialwork.org/wp-content/uploads/sites/2468/2020/09/Secular-partisan-realignment.pdf. What Plaintiff-Appellants ask the Court to do is require that judges ignore long-term trends of constant change and assume that each subsequent election is predictable based on the previous election or by the identity of voters. On that basis, they say, courts should make determinations of the constitutionality of redistricting maps using numbers from the last several elections. They ask that the court enshrine in North Carolina law this use of "social science" to predict the future, and then apply it, in perpetuity, to every map drawn in the State. This Court should reject such a short term and rigid view of the American—and North Carolinian—electorate, and instead approach this request

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with skepticism about the ability of judges to accurately predict future political trends.

III. PARTISAN GERRYMANDERING CLAIMS SHOULD NOT BE JUSTICIABLE IN NORTH CAROLINA

Every litigant that has advanced a partisan gerrymandering claim—including Plaintiff-Appellants in the present case—has asked that courts consider the political intent and partisan impact of voting maps. They claim that assessing redistricting's partisan effect on elections or electability of candidates is a necessary part of any justiciable standard under which such claims could be weighed. Indeed, in order to adjudicate partisan gerrymandering claims as Plaintiff-Appellants demand, this Court must "assess the effects of partisan gerrymandering," *Vieth*, 541 U.S. at 287 (plurality opinion) (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring in judgment)), which remains something the U.S. Supreme Court has concluded is neither possible nor practicable. *See Rucho*, 139 S. Ct. at 2503-04; *see also Bandemer*, 478 U.S. at 156-60 (O'Connor, J., concurring). The mutability of voters' partisanship and electoral choices, *see supra*, make this impossible to accomplish in partisan redistricting challenges. *Id.* The only logical conclusion is that partisan gerrymandering claims are not justiciable. *See Rucho*, 139 S. Ct. at 2503-04; *see also Vieth*, 541 U.S. at 287 (plurality opinion) (citing *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

Justice O'Connor put it perfectly over 30 years ago: "To allow . . . courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as

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to which neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring). This is because "[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." *Vieth*, 541 U.S. at 287. "[A]sking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise." *Rucho*, 139 S. Ct. at 2503-04. *See also supra*.

Indeed, even Justice Kennedy, who repeatedly refused to foreclose the possibility of finding a justiciable standard to adjudicate partisan redistricting challenges, expressed wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006); *see also Gill*, 138 S. Ct. at 1928; Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1365 (1987) (noting that the *Bandemer* plurality's standard requires judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy"); *Vieth*, 541 U.S. at 283 (plurality opinion).

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The Plaintiff-Appellants present to this Court a claim that "partisan gerrymandering" is an unbounded exercise that will always control the outcome of elections. Not only has every judicial conclusion about the future outcomes of

elections been wrong, but the fundamental truth about "partisan gerrymandering" was well understood by Justice O'Connor. She wrote:

> [T]here is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat. – rights they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious. More generally, each major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

Bandemer, 478 U.S. at 152 (O'Connor, J., concurring). Justice O'Connor's words are no less true now. Based on her observations after her many years as an elected official, her words have proven prescient—as noted above, the last four decades are replete with faulty judicial predictions and electoral experiences that buck trends. This Court should accept her conclusion and determine that there is no basis for judicial intervention in these kinds of cases.

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State courts have similarly recognized the inherent difficulty in predicting voters' unpredictable behavior. Following the 2020 census and the subsequent redistricting completed by the Oregon legislature, a group of plaintiffs challenged Oregon's new congressional map as a partisan gerrymander—a statutory prohibition in that state. *Clarno v. Fagan*, No. 21CV40180 at *1-2 (Or. 2021). Despite the statutory prohibition on partisan gerrymandering in Oregon, the 5-

judge panel denied the plaintiffs' arguments that the enacted plan "will result in an impermissible partisan effect," and declined "to infer from that effect that the Legislative Assembly drew the districts with a partisan purpose." *Id.* at *9. That panel ultimately decided that the plaintiffs did not prove partisan effect while stopping short of "deciding whether partisan effect can ever be proof of partisan purpose." *Id.* The panel noted, however, that the metrics that would be required to show such an effect would require a court to subjectively determine which variables and metrics to use and which were impermissible. *Id.* at 11-13.

Also, following the 2020 census and 2021 redistricting cycles, the Wisconsin legislature drew maps which the governor vetoed, and the legislature then failed to override his veto. *Johnson v. Wis. Elections Comm'n.*, 2021 WI 87, at *17 (Wis. 2021). The Wisconsin Supreme Court was then tasked with overseeing the redistricting process. *Id.* at *18-19. In weighing the factors that it would consider in managing the map drawing process, the Wisconsin Supreme Court determined that it would not judge maps for partisan fairness. *Id.* at *39. Indeed, that court, heavily relying on *Rucho*, determined that there were no judicially manageable standards by which to determine the fairness of the partisan makeup of districts because "measuring a state's partisan divide is difficult." *Id.* at *39-52. The same is true in this case.

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CONCLUSION

For the foregoing reasons, the Court should conclude that partisan redistricting claims are not justiciable under North Carolina law.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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