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State Government Committee

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Chairman Grove, Democratic Chair Davidson, and Members of the Committee:

Thank you for inviting me to address you today. It is a great privilege to speak to you about the Constitution and the Voting Rights Act. I applaud you for holding this hearing and for taking a thoughtful approach to redistricting, for the procedures we use to choose the people's representatives implicate fundamental matters of individual rights, federalism, and American democracy.

I have been asked to explain some of the legal background governing redistricting – an area with which I am quite familiar, because I have taught and researched constitutional law and election law for the past seventeen years, and I am a co-author of two books on voting rights and election law. In these remarks, I will give an overview of the following four topics: (1) the authority possessed by different governmental institutions to engage in congressional districting; (2) the Voting Rights Act's prohibition of racial vote dilution; (3) the Equal Protection Clause's limitations on race-conscious districting; and (4) the U.S. Supreme Court's treatment of partisan gerrymandering.

I

The Elections Clause of the Constitution, Article I, § 4, provides, "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations. . . ." Thus, the Constitution vests concurrent authority in the state legislatures and in Congress to determine the procedures for congressional elections, including drawing the districts from which members of Congress are to be chosen. Most election regulations are passed on the state level, but the Elections Clause permits Congress to supplement or override states' regulations. For example, federal legislation requires that members of the U.S. House of Representatives be chosen from single-member districts.[1]

The text of the Elections Clause might be read to suggest that state *legislatures* have the power – unfettered by state constitutions, state courts, state governors,

[1] *See* 2 U.S.C. § 2c.

and even the state's people themselves – to choose the "Manner" of electing members of Congress. Nevertheless, the U.S. Supreme Court has read the clause differently. In the Supreme Court's view, the clause permits states to enact congressional districting plans by legislation, and so whatever procedures states could use to exercise the legislative power may also be employed to enact redistricting plans. Thus, redistricting plans may be subject to an initiative[2] or a gubernatorial veto[3] without offending the U.S. Constitution, and states may even cut their legislatures out of the redistricting process completely by vesting the redistricting power in independent redistricting commissions.[4]

It would seem to follow from these decisions that the legislative power over redistricting is subject to whatever restrictions are imposed on the legislative process by state constitutions.[5] In Pennsylvania, our state supreme court has already held that the state constitution places limits on partisan gerrymandering of congressional districts, and has held that those limits do not violate the General Assembly's powers under the federal Constitution's Elections Clause.[6]

Accordingly, the Constitution vests presumptive authority for congressional redistricting in the state legislatures, but that authority may be limited or even superseded by either Congress or each state's constitution.

II

The Voting Rights Act of 1965 was passed to combat racial discrimination in voting. Some provisions were directed at what became known as "first-generation" barriers: the ban on literacy tests and provisions for federal registration and supervision of elections, for example. Section 2 of the Voting Rights Act, however, applies nationwide and extends broadly to any "voting qualification or prerequisite to voting or standard, practice, or procedure" relating to voting – including redistricting.[7] For that reason, I will focus on that section in these remarks.

Section 2 of the Voting Rights Act outlaws election practices that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or status as a language minority.[8] That standard is violated if, "based on the totality of circumstances," a state's political processes "are not

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[2] *See Davis v. Hildebrant*, 241 U.S. 565 (1916).

[3] *See Smiley v. Holm*, 285 U.S. 355 (1932).

[4] *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

[5] *See* MICHAEL R. DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW: CASES, EXPLANATORY NOTES, AND PROBLEMS 215 (3d ed. 2021).

[6] *See League of Women Voters v. Commonwealth*, 178 A.3d 282 (Pa.), *cert. denied* 139 S. Ct. 445 (2018).

[7] 52 U.S.C. § 10301(a).

[8] 52 U.S.C. § 10301(a).

equally open to participation" by minority groups "in that [their] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[9]

Districting plans can dilute minority voting strength by packing minority voters into a small number of districts or by dividing minority groups into so many different districts that their numbers in each district are too small to be influential. Determining when a given electoral practice amounts to vote dilution, however, can be difficult because there is no clear standard to assess the amount of voting power a minority group should have – what we can call the "undiluted" voting strength. Minorities of all kinds, after all, are often likely to lose in elections where majorities rule, and certainly no group of citizens is guaranteed to win elections in proportion to their numbers in the population. Nevertheless, "rough proportionality" can serve as a baseline to gauge a minority group's "undiluted" voting strength.[10]

Districting plans that reduce minority groups' voting power to a level significantly below the level of rough proportionality are vulnerable to a challenge under § 2 as long as the "preconditions" established by *Thornburg v. Gingles* are met.[11] First, the minority group must be sufficiently large and geographically compact to constitute a majority in a district. That is, there must be an alternative plan available that gives the minority group control of an additional district of compact territory. Second, the minority group must be politically cohesive. Third, the majority must vote sufficiently as a bloc usually to defeat the minority group's preferred candidate. Together, these preconditions establish that the minority group in question has identifiable political preferences, and that it is tougher for the minority group to realize those preferences because its members are subsumed in a district controlled by other voters with different preferences. If all three preconditions are satisfied and the minority group possesses less than roughly proportional representation, the districting plan may well be the cause. As a result, the districting plan could held to deny the minority group equal opportunity in violation of § 2.

Importantly, § 2 is violated by voting practices and procedures that "result[]" in the prohibited vote dilution – even if the persons drawing the district lines have no discriminatory intent.[12] The Voting Rights Act thus requires districting officials to

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[9] 52 U.S.C. § 10301(b).

[10] *Johnson v. De Grandy*, 512 U.S. 997, 1023 (1994).

[11] 478 U.S. 30, 50-51 (1986).

[12] In this way, the Voting Rights Act provides significantly more protection against vote dilution than the Constitution itself does. Although the Fifteenth Amendment prohibits states from abridging the right to vote on account of race, it is not violated unless the state has acted with discriminatory intent. *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion). The Voting Rights Act was amended in 1982 precisely to eliminate the requirement of discriminatory intent. *See Brnovich v. Democratic National Committee*, 594 U.S. __, __, 141 S. Ct. 2321, 2332 (2021) (citing S. Rep. No. 97–417, pp. 2, 15–16, 27); Thomas M. Boyd & Stephen J. Markman, *The*

be conscious of race, and to ensure that their districts do not – even accidentally – dilute the voting power of minorities.

III

On the other hand, too much of a focus on race can make a districting plan vulnerable to a challenge under the Equal Protection Clause as a "racial gerrymander." Federal law thus places states between the Scylla of the Voting Rights Act and the Charybdis of the Equal Protection Clause. Too little attention to race could cause a districting plan to violate the Voting Rights Act; too much could violate the Constitution.

The Supreme Court has held that a districting plan is unconstitutional if its "predominant factor" is race.[13] That is, if race is the most important consideration in deciding which voters to place in which districts, supplanting "traditional race-neutral districting principles," such as compactness and tracking the lines of political subdivisions, then the plan violates the Equal Protection Clause.[14] An excessive focus on race, the Supreme Court has reasoned, promotes the notion "that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls."[15]

Accordingly, even if states are trying to ensure that minorities' voting strength is undiluted, district line-drawers must not subsume other considerations to race. While most "racial gerrymanders" involve districts that connect minority communities in disparate areas of the state, the key is the predominant use of race, not the shape of the district. Whether or not districts look misshapen, they are unconstitutional if race was the predominant factor in drawing the district lines.[16]

IV

My final topic today is the U.S. Supreme Court's treatment of partisan gerrymandering – the practice of drawing district lines to favor a political party. Partisan gerrymandering has been attacked as unconstitutional (usually for violating the Equal Protection Clause), and the Supreme Court seemed to accept that some extreme versions of partisan gerrymandering could be unconstitutional.

1982 Amendments to the Voting Rights Act: A Legislative History, 40 WASH. & LEE L. REV. 1347 (1983).

[13] *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

[14] *Id.*; *see also Shaw v. Reno*, 509 U.S. 630 (1993).

[15] *Shaw*, 509 U.S. at 647.

[16] *See Bethune-Hill v. Virginia State Board of Elections*, 580 U.S. __, __, 137 S. Ct. 788, 798 (2017).

The Court has never held any plan to be an unconstitutional partisan gerrymander, however, and the Court has not even been able to agree on a test for deciding how much partisanship in gerrymandering is too much. Nobody thinks that a districting plan should be held unconstitutional just because the districts were drawn with *some* attention to partisan interests. Legislative districts have historically been drawn, and are now typically drawn, by legislators. And it is unrealistic to think that legislators will be unaware of the political consequences of districting, or that they will be able to put partisanship out of their minds. Moreover, some amount of partisanship has been a part of the districting process in the United States since there have been legislative districts, and so it is inconceivable that the Constitution would outlaw all considerations of partisanship in districting.

As a result, litigants, scholars, and judges have struggled to craft a test for determining when partisanship in districting crosses the line between the amount of partisanship that is permitted by the Constitution and that which is forbidden. The key question, however, has not been whether the Constitution outlaws partisan gerrymanders, but whether the constitutionality of any particular districting plan is a question to be decided by the courts.

Federal courts are restricted to deciding "cases" and "controversies" fit for judicial resolution, and ever since *Marbury v. Madison*,[17] the Supreme Court has indicated that some questions, "in their nature political" should be reserved for the other branches of government.[18] One class of those "political questions" is comprised of cases for which there are no "judicially discoverable and manageable standards" for deciding them.[19] Scholars, litigants, and judges tried to develop or "discover[]" judicially manageable standards for resolving partisan-gerrymandering claims. But after thirty years of such efforts, in *Rucho v. Common Cause*,[20] the Supreme Court held that partisan-gerrymandering claims could not be adjudicated in the federal courts.[21] Although it would have been possible to create mathematical standards that could be applied mechanically by judges, and although it would have been possible to create a manageable standard focusing on whether the districting decisions were predominantly motivated by partisanship, the Court held that no such standard was to be found in the Constitution. The Constitution, in other words, provided no standard for deciding how much partisanship was too much. It was the classic line-drawing problem: In a state where Party A and Party

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[17] 5 U.S. (1 Cranch) 137 (1803).

[18] *Id.* at 170.

[19] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[20] 588 U.S. __, 139 S. Ct. 2484 (2019).

[21] *Rucho* thus confirmed the conclusion of the plurality in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which arose out of Pennsylvania's congressional redistricting following the 2000 census. In *Vieth*, the plurality held that partisan-gerrymandering claims were non-justiciable. The fifth Justice, Justice Kennedy, agreed that Vieth's claim was not justiciable, but he left open the possibility that judicially manageable standards could be developed in the future. In *Rucho*, a majority of the Court closed that door.

B each received 50% of the cumulative votes in legislative races, would it be constitutional for Party A to win 55% of the legislative seats? If so, what about 60%? 75%? The Constitution does not give us an answer. As a result, the Court held that the decision was not for federal courts to make; it had to be left to the state legislatures or to Congress.

Rucho held that federal courts' limited jurisdiction did not permit them to decide the constitutionality of partisan gerrymanders. Although some of the Court's reasoning suggests that partisan gerrymanders simply do not violate the Constitution,[22] the Supreme Court's holding appears, at least, to deal only with the jurisdictional question. Accordingly, state courts, which do not have the same restrictions on their jurisdiction that federal courts do, may not be affected by the *Rucho* decision. The point is disputed; some scholars maintain that state courts will be able to decide gerrymandering cases that federal courts would consider to be political questions, whereas others argue that if federal courts cannot decide partisan-gerrymandering questions under the federal Constitution, then state courts may not do so either.[23] It would appear clear, though, that the *Rucho* decision says nothing about state courts' ability to hear partisan-gerrymandering claims under *state* constitutions. As I indicated earlier, the Pennsylvania Supreme Court has already held that the Pennsylvania Constitution provides judicially enforceable limits on partisan gerrymandering, and so future challenges to partisan gerrymandering in Pennsylvania would be expected to be brought in state court.

Conclusion

Redistricting is as complex as it is vital. Those who draw district lines must, of course, ensure that no American's right to vote is abridged because of invidious discrimination, but their task does not end there. They must also consider the constitutional rights of all voters, federal statutory law, state-constitutional provisions, decisional law, geography, communities of interest, public policy, and even political philosophy when deciding on a structure for translating the people's wishes into a functioning representative democracy.

I thank you for the honor of addressing this Committee, and I would be happy to answer your questions.

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[22] *See* Michael R. Dimino, *You've Got (Political) Questions? We've Got No Answers*, 71 MERCER L. REV. 719 (2020).

[23] *Compare* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015), *and* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017) (arguing against state courts' power to decide such questions), *with* Michael Solimine, *State Courts as Forums for Partisan Gerrymandering Claims After* Common Cause v. Rucho, June 30, 2019, *at* https://electionlawblog.org/?p=105902 (arguing in favor).