No. 18-422

In the
Supreme Court of the United States

ROBERT A. RUCHO, *et al*
Appellants
v.
COMMON CAUSE , et al
Appellees

On Appeal from the United States District Court
for the Middle District of North Carolina

AMICUS CURIAE BRIEF OF PHILIP P. KALODNER IN SUPPORT OF NEITHER PARTY

PHILIP P. KALODNER
Counsel of Record
208 Righters Mill Rd.
Gladwyne PA 19035
(610) 649-8749
pkalodner@aol.com

Counsel for Philip P. Kalodner, Amicus Curiae

November 1, 2018

No. 18-422

In the
Supreme Court of the United States

ROBERT A. RUCHO, *et al*
Appellants
v.
COMMON CAUSE , et al
Appellees

On Appeal from the United States District Court
for the Middle District of North Carolina

AMICUS CURIAE BRIEF OF PHILIP P. KALODNER IN SUPPORT OF NEITHER PARTY

PHILIP P. KALODNER
Counsel of Record
208 Righters Mill Rd.
Gladwyne PA 19035
(610) 649-8749
pkalodner@aol.com

Counsel for Philip P. Kalodner, Amicus Curiae

November 1, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

-

CONSTITUTIONAL PROVISIONS

OTHER MATERIALS

INTEREST OF AMICUS CURIAE AND CONSENT OF ALL PARTIES TO FILING OF AMICUS CURIAE BRIEF

Philip P. Kalodner is a lawyer who has studied the issue of partisan gerrymandering and the loss of voter power which it and the geographic concentration of voters of one party has caused, and has developed what he believes is a solution which is consistent with, and indeed required by, this Court's prior decisions.

Because to his knowledge no one else has proposed such an analysis and solution, and this Court now has before it the instant matter which provides an opportunity to consider that analysis and solution, he determined to bring it to the Court's attention as an amicus curiae.

Philip Kalodner has no economic interest in the matter and nothing to gain except as a citizen and voter.

He has sought and obtained the written consent of all parties in this matter to his filing an amicus curiae Brief– Appellants Robert A, Rucho et al, Appellants, and Appellees Common Cause et al and League of Women Voters et al, all of whom have filed or will file blanket consents to the filing of amicus curiae briefs.

SUMMARY OF ARGUMENT

The District Court correctly identified Article I, Section 2 of the Constitution (along with Section 4) as a basis for rejection of the Legislature-enacted Congressional districting plan, but (a) incorrectly interpreted it as doing so by prohibiting any districting made with partisan motivation, and (b) unnecessarily cited as bases for its decision the First and Fourteenth Amendments.

Instead, properly read, Article I Section 2, in its requirement that "The House of Representatives shall be composed of members chosen each second year by the people of the several states..." is dispositive of the matter. It requires that to the extent possible each of the "people" must have a meaningful vote in the selection of the members of the House, i.e. a vote which has a real potential effect in determining the members of the House representing the people of the State.

So read, Article 1, Section 2 provides an affirmative directive as to how districting must be performed

---

No counsel for a party authored the brief in whole or in part and no counsel for a party or party or anyone else other than this amicus made a monetary contribution to fund its preparation or submission

It does not bar partisanship, but limits it. It makes unnecessary a determination of Legislative intent. And it makes unnecessary reliance on the First and Fourteenth Amendments.

The districting methodology which is required to maximize the power of the people to select their Representatives which is described herein if followed in each State will reduce if not eliminate the need for judicial review. It will address and reduce the loss of voting power which occurs by virtue of the geographic concentration of voters of one party as well as by virtue of extreme partisan gerrymandering. And, finally by its recognition that the Constitution mandates a methodology for Congressional districting, (a) it makes unnecessary the remedy which is increasingly being used of transferring the responsibility for Congressional districting from elected state legislatures directly responsible to the voters to appointed commissions and (b) it avoids the resort by state courts to state constitutional provisions with the inevitable disparity of treatment from state to state.

Finally, the methodology here described as being mandated by the Constitution, will maximize the number of competitive Congressional districts in each State with more than one House seat, thereby shifting the focus from party primaries which have

moved the parties to their respective extremes to general election competition which will in turn lead to a more effective House. By doing so, it will address the shift of power to the Executive and of the responsibility for contentious social issues to this Court which have resulted from a less effective Congress.

ARGUMENT

I ARTICLE I, SECTION 2 OF THE CONSTITUTION REQUIRES THAT EACH OF THE "PEOPLE" VOTING SHOULD HAVE THE MAXIMUM POSSIBLE POWER TO EFFECT THE SELECTION OF THE MEMBERS OF THE HOUSE OF REPRESENTATIVES

In Wesberry v. Sanders, 376 U.S.1, 7-8, (1964) this Court said:

"We hold that construed in its historical content, the command of Art. 1 Section 2 that Representatives be chosen by 'the people of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

(Significantly, in so holding, this Court noted that "We do not reach the arguments that the

Georgia statute (establishing Congressional Districts of unequal population) violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment (footnote 10)

In Wesberry, this Court held that drawing districts of unequal population was "vote-diluting discrimination... accomplished through the device of districts containing widely varied numbers of inhabitants," explaining "to say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People', a principle tenaciously fought for and established at the Constitutional Convention." id.

This Court's continuing commitment to the principle of Wesberry was noted two years ago in Evenwel v. Abbott, 578 U.S._____14-940, 136 S. Ct. 1120, 1124 (2016): "Over the ensuing decades (since Wesberry), the Court has several times elaborated on the scope of the one-person, one-vote rule. States must draw Congressional districts with populations as close to perfect equality as possible."

Another, and indeed more pernicious form of vote-diluting discrimination, in violation of the principle that "one man's vote is to be worth as much

as another's" occurs when in a Congressional district it can be reliably predicted that the candidate of one party will inevitably win; in such a situation, the voters for the inevitably losing other party will have the power of their votes not only diluted, but eliminated, while the voters for the winning party candidate will have the power of their votes diluted to the extent to which they are not needed to succeed in electing their candidate. (An example of such a situation is one where it can be reliably predicted that the candidate of one of the parties will inevitably obtain 70 to 80% of the vote, and the candidate of the other party between 20 and 30% of the vote; the 20-30% voters have had the worth of their votes diluted to 0, i.e. eliminated, while the 70-80% voters have had the worth of their votes diluted in the same manner as suffered by the voters in a district with a population larger than the population in other districts in the same State, the situation addressed in Wesberry.)

Such an elimination of voting power for the overwhelmed minority party voters or dilution of the power of majority party candidates results both from (a) gerrymandering, i.e. districting for partisan advantage or to protect incumbents, and (b) the geographic concentration of voters of one of the parties, whether urban or rural.

In such a situation, the principle of Art 1 Section 2 that, as declared in Wesberry "one man's vote is to be worth as much as another's"is violated; vote-diluting discrimination occurs because a vote is worth more in one district than in another.

Moreover, that Section 2 contains the standard for the drawing of House districts , i.e. the maximization of voter power, is confirmed by the fact that Section 4 of Article I assigns to the states the setting of "The times, places and manner of holding elections for... Representatives" subject to the right of Congress to override such determinations, but not the determination of the standard to be used in drawing districts; such has been already been established and mandated by the Section 2 requirement that districts must be drawn to maximize voter power. Indeed Congress is itself as bound as the States to the requirement of Section 2 so that in any drawing of Congressional districts by it, should it seek to do so pursuant to Article I Section 4, the power of each voter must be maximized to the extent possible.

This Court has never rejected the contention that what it has recognized as the anti-dilution mandate of Article I Section 2 which precludes the creation of Congressional districts with unequal populations is even more relevant to (a) prohibit the

entire elimination of voting power for those supporting a party's candidate who cannot win because of the structuring of the district, and to (b) preclude the dilution of the voting power of those who support the winning party candidate in such a district, dilution which occurs because the percentage of votes cast for such candidate far exceeds the majority of votes required for his election. This Court has never rejected such a contention as here made because the argument has to the best of this amicus's knowledge never been made. Indeed, the view of the four Justices who advocated a determination of non-justicability in Vieth v. Jubelirer, 541 U.S. 267 (2004)-- that Article I Section 2 does not provide a "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting", id, at 305– was made only in response to an argument that Article I Section 2 precludes partisan intent or excessive partisan intent. Here, the contention is instead that Article I Section 2 precludes only elimination or dilution of voting power, and it is the elimination of such dilution which in turn limits partisan considerations.

The only issue is whether and the extent to which it is "practicable" to eliminate voter power elimination or dilution, an issue to which we will

now turn.

.

II A METHODOLOGY DOES EXIST FOR DRAWING CONGRESSIONAL DISTRICTS WHICH WILL SIGNIFICANTLY INCREASE THE POWER OF VOTERS IN THE ELECTION OF REPRESENTATIVES

Two obvious restraints exist in providing voters in the election of their member of the House of Representatives with less dilution and more power in the exercise of the franchise: (a) the elections to be affected will occur in the future, and the only information we have available is what occurred in the past, and (b) in many, if not most of the States with more than one Congressional district, more candidates for the House of Representatives of one of the parties will inevitably win, no matter how districting is done.

But one central fact on which both those drawing the districts and those opposing such districting agree, and which past history confirms, provides a methodology for dealing with those restraints– past election results can be used to predict to a significant extent future election results, because to a significant degree most voters vote consistently for the candidates of the same political

party. Legislatures drawing districts for partisan advantage rely on past results in drawing districts, and history has proven them largely right in their predictions. And those contesting such districts oppose them as improperly partisan because they also agree that the past can be used to predict the future.

(The simplifying assumption that past voters will be the future voters and that they will act in the same way in their support of a party's candidates for Congress is no more of a stretch than this Court's simplifying assumptions that the number of people in each district will remain the same or grow or diminish in the same ratio as in other districts in the State, and that the equal populations will contain an equal number of voters, assumptions which underlie the requirement of districts with equal population as of the immediately preceding decennial census.)

Using the average of party voting in the past four federal election results as the most available and best predictor of voting in the federal elections in the decade following the redistricting which follows the decennial census, the maximizing of the power of the people in electing Representatives is best served by a two step process:

Voting power is provided <u>all voters</u> , at least to some extent if , as a first step in districting, (a) the

average State-wide percentage of the vote for each party's candidates in the State for the House of Representatives in the past four even year elections is calculated, (b) each such percentage is increased so that the sum of all party percentages equals 100, and c) such revised percentages for each party are multiplied by the number of congressional seats provided the State..

Individual districts can then be created in which it is likely, but by no means inevitable, based upon prior elections that the number of congressmen representing each party in the state would be in accordance with such state-wide party preference as described above.

In creating such individual districts, an additional goal should be to provide voting power to as many voters as possible, i.e. to maximize the number of competitive districts in which either party can possibly win and therefore districts in which every voter has real power.

1. As a first step in achieving both goals to the extent possible, a number of districts should be created in which if past voting patterns were predictive, the candidate of the party with the fewer Congressmen in the State in accordance with the above calculation (the "minority party") would win.. Such would accomplish the first goal, i.e. providing

voting power to all, since in all other districts the likely winner would be the candidate of the party which would have won a majority of congressman in accordance with the above state-wide calculation (the "majority party"), and the state' congressional delegation would be divided in the same manner as if the members of Congress were selected based on the state-wide party preference of voters..

Each district created for estimated victory by the minority party candidate if past election results were predictive, would be one in which the victory of that party candidate would be, based on such past election results, by a minimum of 5% and a maximum of 10%. The minimum is to insure the likelihood of victory for the minority party candidate, while the maximum is to assure that the candidate of the state-wide "majority" party could still win, thereby maximizing to the extent possible the power of all voters in the district. (The 5% minimum and 10% maximum numbers are properly adjusted to reflect the actual range of experience in the district; they are properly adjusted to numbers which based on that experience would achieve the likelihood of victory for the "minority" party candidate while creating a realistic possibility for victory by the " majority" party candidate.)

The past election results employed should be

an average of the prior four federal elections. The state-wide votes for House of Representatives candidates should be employed if all congressional races in the state were contested ones; in any precinct in which the voters in past elections did not have the opportunity to vote for a Congressional candidate in a contested race, the votes for the state-wide candidate at the top of the voting ballot should be employed.

2. As a next step, as many districts as is possible should be created in which, on the same basis of past election results, the party with a majority of state-wide votes for House candidates in the past four even year elections would win by a minimum of 5% and a maximum of 10% (subject to the same adjustment for actual experience), thus producing districts in which the majority part would likely win, but the minority party could potentially win.

The above two steps would result in what are properly described as competitive districts, and would all be districts in which all voters would have the potential power to affect the result.

In States like Pennsylvania in which State-wide the past election results would show one party winning on average by 10% or less, the above two steps would complete the districting. All districts

would accordingly be competitive

3. As a final step in those States where there would remain the task of creating districts in which the State majority party would inevitably win, such districts would be created.

(As a hypothetical example,, in a State with 20 Congressional districts and in which, on average in the past four elections, Republican candidates for Congress received 60% of all votes for Congressional candidates in the State, and the Democratic party candidates 40%, 8 districts would be created in which in those past elections on average, the Democratic candidate would have won by 5 to 10%, and as many districts as possible would be created in which the Republican candidate in those past elections would have won by 5 to 10 %. The balance of the districts, probably 4 ,would be ones in which in those past elections the Republican candidate would have won overwhelmingly. The result would be some 16 districts which would be competitive, i.e. in which all voters would have voting power, while all voters in the State would have had power in the selection of the number of districts in which the candidate of their party preference would be the likely winner)

The districts created in accordance with the above two or three step process would not be as

compact (although they can and should be contiguous) as a plan with non-competitive districts could be, and it would inevitably increase the number of municipalities and counties which would be in more than one Congressional district. To the extent, if any, to which the increase in the geographic spread of a district would include a district population more diverse in its interests, the Congressman representing the district would be required to consider interests more like those of the population of the country as a whole, a clearly desirable goal.

Moreover, it would accomplish the Constitutional mandate that the power of voters to select their Congressmen be maximized, and in doing so it would increase to the maximum extent possible the number of Congressional districts which are competitive; by accomplishing the latter, it would result in many more center left and center right Congressman and fewer far left and far right Congressmen and would therefore make possible a functioning Congress better able to cross party lines, and compromise and thereby enact legislation.

III FOLLOWING THE MANDATE OF ARTICLE I, SECTION 2 THAT THE POWER OF VOTERS SHOULD BE MAXIMIZED LIMITS BUT DOES NOT ELIMINATE PARTISANSHIP AND MAKES UNNECESSARY THE DETERMINATION OF THE INTENT OF THE BODY DISTRICTING AND ITS PARTISAN EFFECT

The methodology described above leaves the state Legislature free to select the Congressional districts in which the minority party will be given the 5 to 10% edge and the districts in which the majority party will be given such an edge, and to determine the percentage edge in each district so long as it is within the permitted 5 to 10% range (or within an experience-justified range, as described above). In States in which there will inevitably be districts in which the majority party will inevitably win, the Legislature will be able to determine where those districts will be and their geographic shape. In all those decisions, partisan considerations will be permitted, as will efforts to protect incumbents.

Because limited partisanship will be permitted within the limit set by the mandate of voting power maximization, the Courts will not be required to determine whether partisan intent has existed, or existed to an unacceptable level in the

drawing of districts, nor will they be required to determine whether there has been an unacceptable partisan effect.

Nor, of course, because the mandate of maximum voting power in the "people" in the selection of members of the House of Representatives is contained in the body of the Constitution will the Courts be required to determine the implication of the First and Fourteenth Amendments in the drawing of Congressional districts, as they may well be still required in consideration of the drawing of state legislative districts.

If, in consideration of the drawing of state legislative districts this Court were to deem applicable the "equal protection" and "privileges and immunities" clauses of the Fourteenth Amendment, the standard should be of the same nature as is established by Section 2 for the election of Congress, i.e. providing voting power to all voters to the extent practicable in the same manner as here proposed for Congress; as in the case of Congress, no inquiry need be made as to the extent of partisan motive because excessive partisanship would be precluded by the affirmative requirement of providing voting power to all.

Finally, it should be noted that were this Court to determine that the drawing of state

legislative districts was non-justiciable under the federal Constitution, and therefore a matter for State courts in applying state constitutions, it would have no effect in Congressional districting as mandated by Article I.

IV MAKING THE PROVIDING OF VOTING POWER TO ALL TO THE EXTENT PRACTICABLE A CRITERIA SECOND ONLY TO THE REQUIREMENT OF EQUAL POPULATION IN EACH DISTRICT WOULD PROPERLY LIMIT BUT NOT ELIMINATE HONORING TRADITIONAL DISTRICTING CONSIDERATIONS

The traditional considerations in Congressional (and State legislative) districting have been that the district be (a) contiguous, (b) compact, c) honor local governmental boundaries, and (d) protect incumbents.

First and foremost it should be noted that the Article I Section 2 Constitutional requirement of equal population, which this Court has already recognized, and its secondary requirement that within such equal population districts voter power should be maximized to the extent practicable which this Brief argues this Court should here recognize, necessarily take precedent, and must be honored

even if, and the extent to which , the result is to limit the use of the traditional criteria.

The requirement that each district must be contiguous can still be met.

But districts drawn to maximize voter power will undoubtedly be less compact, will likely require the crossing of more local government boundaries, and will necessarily limit the protection of incumbents.

As to the argument for geographic compactness as a critical goal, it made sense when the congressional districts contained only 30,000 people as they did when the election of Congress began and when a congressman could visit his constituents only by horseback or horse drawn carriage. It is far less compelling when a district contains, as it now does, 700,000 and when visits can be conducted by auto, telephone and the internet, inter alia. Moreover, it inexplicably reflects a concern for ease of travel to constituents in multi-district states that does not and cannot exist for the far greater travel required of congressman in single district states.

And to the extent to which the argument for compactness is informed by the expectation that 30,000 people will have similar concerns in the consideration of congressional legislation, such is

hardly expected to be true when the population is 700,000 and growing; indeed, the resulting need for the Congressman representing the district to consider more diverse voter interests, more clearly reflecting the interests of the population of the country as a whole, is a clearly desirable goal.

The argument for honoring county and municipal government boundaries, presumably informed by the anticipation that those individual government entities had different and specific interests in federal legislation has no persuasive force when federal legislation does not generally, perhaps almost never, applies differently to such different governmental entities within a state. And, again, whatever sense it made when a congressional district contained 30,000, it hardly makes sense when, because the district contains 700,000, practically all congressional districts contain governmental entitles with different interests. On too many occasions, the argument for a particular districting on the basis that it better honors local government boundaries is being advanced by proponents whose only real interest is their respective partisan advantage.

Finally, the argument that districting may be properly informed by a desire to protect incumbents runs directly afoul of the perception which drives the

recurring campaign for term limits, i.e. that a change in congressional office holders is to be desired for fresh thinking and new energy. Moreover, while districting driven by the need for compactness and the honoring of county and municipal boundaries may only unintentionally lead to creating districts in which the candidates of the same party always win, the protection of incumbents requires the intentional creation of districts in which the incumbents' party inevitably wins, thereby intentionally limiting the power of the voters who prefer a candidate opposing such incumbent. The extent to which the protection of incumbents has informed districting is demonstrated by a recent study which concludes that in only some 72 of the 435 congressional districts is there a better than a 1 in 6 chance that the incumbent or a candidate of the same party will lose. The same study suggests that if districts were drawn to be competitive, i.e. to maximize the power of each voter in the district, there would be 242 competitive districts. FiveThirtyEight: The Atlas of Redistricting, published January 25,2018. https://projects.fivethirtyeight.com

As noted above, under the methodology here suggested for maximizing voter power, the drawer of Congressional districts may still provide some incumbents with absolute protection, i.e. in districts

which are necessarily non-competitive, and many incumbents limited protection, i.e. in districts in which their party has a designed 5 to 10% advantage.

V THE SUBSTANTIAL LIMITATION OF PARTISAN GERRYMANDERING WHICH WOULD BE THE RESULT OF MAXIMIZING THE POWER OF EACH VOTER WOULD AVOID THE ADOPTION OF ALTERNATIVE UNSATISFACTORY SOLUTIONS

As this Court's docket reflects, there is an increasing public concern over partisan gerrymandering in the drawing of Congressional districts..

Absent the adoption by this Court of an affirmative test and methodology for Congressional districting as here proposed, there will likely be continued resort to two alternatives already being employed and another threatened to be employed, none of which will necessarily provide the desired elimination of excessive partisan gerrymandering and each of which has an undesirable effect:

The two which have already been resorted to are (a) the application to State courts employing State Constitutional provisions to strike Legislative

Congressional districting and (b) the replacement of state legislatures by independent Commissions to perform districting. The one being advocated is the substitution of multi-member Congressional districts for single member districts.

Before noting the additional undesirable effects of each, it must be noted than none will work as long as the focus remains on elimination of excessive partisan intent rather than, as here advocated, the establishment of an affirmative test, i.e. the maximization of the power of each voter to the extent practicable. It does not matter who does the districting, whether it be the state legislature, a commission or a state court; excessive partisanship remains a threat unless there is an affirmative standard as here suggested which, by its nature eliminates excessive partisanship. Nor would the use of multi-member districts eliminate the possibility that they would be drawn with excessive partisanship.

And, while not eliminating the possibility of excessive partisanship, each of the proposed alternative solutions presents has at least one undesirable effect:

1. Substituting a commission for the legislature to perform districting places an important legislative function in the hands of those

not answerable to the people in elections.

If, as here argued, the federal Constitution establishes an affirmative standard for Congressional districting, then any commission to which the state transfers the drawing of Congressional districts would be as bound to that standard as would the state legislature.

2. Resort to state courts to apply state constitutional standards to determine whether there has been excessive partisanship in the drawing of federal Congressional districts threatens (a) the possibility, as was the situation recently in Pennsylvania, of a districting which a federal court determined did not violate the federal Constitution but which a state Supreme Court struck down as a violation of the state constitution Agre v. Wolf, 284 F. Supp. 3d 591 (E.D. Pa. 2018), appeal to Supreme Court dismissed as moot 17-339 (2018), League of Women Voters Of Pennsylvania v Commonwealth of Pennsylvania, 178 A3d 737 (Pa. 2018), *cert. denied* sub nom. Turzai v Brandt 17-1700 (2018). , and (b) varying inconsistent standards being applied in determining Congressional districting, with some state courts finding applicable state constitutional standards and others finding none.

If, as here argued, the federal constitution establishes an affirmative standard for

Congressional districting, there is no room for the application of state standards.

3. The use of multi-member congressional districts would eliminate the relationship between a single congressman and the population of a single district.

CONCLUSION

The Court should either (a) set this case for plenary consideration and direct the parties to address the argument here presented that Article I Section 2 of the Constitution mandates the maximization of voter power and that the methodology here proposed satisfies that mandate, or (b) remand the mater to the District Court with instructions to it to consider such mandate and such methodology.

Respectfully submitted,

Philip P. Kalodner
208 Righters Mill Rd
Gladwyne PA 19035
(610) 649-8749
pkalodner@aol.com
Attorney for Amicus
Philip P Kalodner