No. 17-333

IN THE

Supreme Court of the United States

O. JOHN BENISEK, *et al.*,

Appellants,

v.

LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF MARYLAND AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*, IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 1.75 million members dedicated to the principles of liberty and equality enshrined in the Constitution. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU filed an amicus brief in *Gill v. Whitford*, No. 16-1161, advancing a First Amendment standard for partisan gerrymandering. This brief applies that standard here. The ACLU of Maryland and the New York Civil Liberties Union are statewide affiliates of the national ACLU. The ACLU of Maryland has approximately 42,000 members throughout Maryland.

SUMMARY OF ARGUMENT

Partisan gerrymandering violates "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). The First Amendment, which requires that the government remain neutral in regulating expression, provides a proper framework for

[1] Pursuant to Rule 37, both parties have lodged blanket consents for the filing of amicus briefs on behalf of either party. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities, other than amici curiae, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

reviewing partisan gerrymandering claims. Just as the state may not use its regulatory authority to skew the marketplace of ideas, so too it may not use its regulatory authority to skew electoral outcomes. Three separate three-judge panels have considered the issue of partisan gerrymandering under the First Amendment in the last two years, and each has found that the First Amendment provides a manageable standard for resolving such claims. *Common Cause v. Rucho*, Nos. 16-cv-1026, 16-cv-1164, 2018 WL 341658 (M.D.N.C. Jan. 9, 2018); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wisc. 2016); *Shapiro v. McManus*, 203 F. Supp. 3d 579 (D. Md. 2016). While the details of their approaches differ in some respects, these decisions illustrate that partisan gerrymandering claims are judicially administrable, and that the First Amendment provides a meaningful guide for identifying constitutionally impermissible partisan redistricting.

Locking up the political process and disabling competition for partisan advantage is at odds with the proper role of government in administering elections. The First Amendment demands that the state function as a neutral referee in administering elections, just as it must remain neutral in regulating speech elsewhere. As elaborated more fully in the ACLU amicus brief submitted earlier this term in *Gill v. Whitford*, No. 16-1161, partisan gerrymandering violates the First Amendment where the state draws districts with the intent to favor a particular party and achieves the effect of entrenching—or "freezing"—partisan advantage against likely changes in voter preferences. To make out a prima facie claim, a plaintiff must show: (1) an improper legislative *intent* to secure a partisan advantage; and (2) an impermissible *effect* of entrenching partisan advantage against likely

changes in voter preference. If these two elements are satisfied, the burden shifts to the state to demonstrate that the impairment of First Amendment rights is necessary to advance legitimate state interests.

While amici's test shares elements with that advanced by the court below, it differs in two important respects. First, amici's test requires proof of *entrenchment*, while the lower court required only an intent to disfavor a political party and a causally linked effect that is more than *de minimis*. Second, amici's approach examines intent and effect on a statewide basis, while the lower court limited its analysis to a single district.

Amici's approach offers several distinct benefits over the test applied by the court below. The requirement that litigants demonstrate entrenchment is better suited to determine how much partisanship is too much. It is more firmly grounded in existing doctrine than the lower court's analysis here, which required only a showing that the gerrymander diluted the votes of particular citizens "to such a degree that it resulted in a tangible and concrete adverse effect." J.S. App. 22a. The entrenchment test also uses a more appropriate baseline than the court below, which looked to a pre-existing district as the baseline for measuring the effects of the challenged map. And the entrenchment test identifies when a legislature's map drawing is too partisan, and so, limits judicial intervention to true outliers.

In addition, amici's test focuses on the statewide plan as a whole, rather than on a single district in isolation. There is no reason that a district's preexisting partisan composition should be privileged, and indeed, doing so

may simply bake in prior impermissible gerrymanders. Moreover, in the vast majority of cases, redistricting is done at the statewide level, and the state's intent and the map's effect should also be assessed at the statewide level. To focus only on a single district may lead to multiple lawsuits in the same state, with conflicting remedies, because the composition of every district inevitably has knock-on effects on the districts contiguous to it, and so on throughout the state. Accordingly, partisan gerrymandering should generally be assessed at the statewide level, not by examining a single district in isolation.

As this case was decided on a motion for preliminary injunction, the evidentiary record has not been fully developed and the lower court has not made final factual findings. However, given the evidence already in the record, Appellants may well be able to meet the test outlined here. The evidence in the record suggests: (1) that the state acted with the intent to lock in its preferred political party's advantage on a statewide basis; and (2) that the state accomplished that end by entrenching the majority party against the range of likely changes in constituent preferences. As the standard proposed by amici was not used by the court below, the decision below should be vacated and the case remanded for consideration in line with the test offered by amici.

ARGUMENT

I. The Court Below Correctly Recognized that Partisan Gerrymandering Violates the First Amendment.

Partisan gerrymandering is incompatible with fundamental premises of democracy and with the government's obligation to remain neutral in the regulation of expression. While a majority of the Court has yet to agree on the precise standard for identifying partisan gerrymandering, the Court has consistently identified the practice as constitutionally problematic. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (conceding "the incompatibility of severe partisan gerrymanders with democratic principles"); *id.* at 316 (Kennedy, J., concurring) (acknowledging that "partisan gerrymandering that disfavors one party is [not] permissible"); *id.* at 326 (Stevens, J., dissenting) ("State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial."); *id.* at 345 (Souter, J., dissenting) ("increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine").

In amici's view and as suggested by several members of the Court in *Vieth*, the First Amendment provides a proper framework for reviewing partisan gerrymandering claims. *Id.* at 314 (Kennedy, J., concurring) (identifying First Amendment as "the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering"). In looking for "a manageable,

reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution," *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 414 (2006), courts have increasingly recognized that partisan gerrymandering claims "involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

Where state officials intentionally seek to skew electoral outcomes to freeze their advantage and insulate their majority from changes in voter preferences, their actions violate the First Amendment. At its core, the First Amendment protects rights of political expression, including the right to associate for the advancement of political beliefs, and the right to participate in the electoral process and to cast a meaningful ballot. *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983); *see also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 210 (2008) (Kennedy, J., concurring). Democratic self-government is predicated upon the electorate choosing among candidates in free and fair electoral competitions. Accordingly, for a democracy to function, electoral contests must reflect the voters' judgments, not those of the state. "In a free society the State is directed by political doctrine, not the other way around." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 590 (2000) (Kennedy, J., concurring).

The three courts to have addressed partisan gerrymandering claims in Wisconsin, Maryland, and North Carolina have concurred that the First Amendment provides a manageable standard for resolving such claims.

Whitford, 218 F. Supp. 3d 837; *Shapiro*, 203 F. Supp. 3d 579; *Rucho*, 2018 WL 341658. In *Gill* and *Rucho*, the two cases that have proceeded to a final order on the merits, the courts have found that the First Amendment was violated. *Whitford*, 218 F. Supp. 3d at 884; *Rucho*, 2018 WL 341658, at *69. While the courts disagree about the details of the standard to be applied, these cases illustrate that assessing partisan gerrymandering claims is indeed a judicially manageable task.

In an amicus brief submitted to this Court in *Gill v. Whitford*, No. 16-1161, the American Civil Liberties Union and its Wisconsin and New York affiliates argued that the state has an obligation to remain neutral in its administration of elections, and that this obligation is rooted in the First Amendment prohibition against viewpoint discrimination. Just as the First Amendment requires the government to remain neutral when it regulates the competition of ideas that takes place in a public forum, so, too, it demands neutrality in the administration of the ideological competition of an electoral contest. This obligation is reinforced by the rights of political association and the fundamental right to vote. Partisan gerrymandering, we maintained, presumptively violates this neutrality obligation and triggers heightened scrutiny.

The legal standard we advanced in *Gill* would require plaintiffs to establish two elements to make out a prima facie case of impermissible gerrymandering in violation of the First Amendment. First, plaintiffs must show an improper legislative intent, that is, that the legislature drew the plan for the purpose of securing a partisan advantage. Second, plaintiffs must demonstrate

an impermissible effect: that the plan has *entrenched* the majority's advantage against likely swings in voter preference. If these two elements are satisfied, the burden shifts to the state to demonstrate that the impairment of First Amendment rights is necessary to advance legitimate state interests, which may include concerns about compactness, contiguity, or creating districts that comply with the federal Voting Rights Act, 52 U.S.C. §§ 10101 *et seq.*

Amici's approach shares several critical elements with the test employed by the court below. The court below held that partisan gerrymandering violates the First Amendment when state legislators draw district lines with the intent to favor their party, when the results have that effect, and when there is a causal connection between the districting decisions and electoral outcomes. *See* J.S. App. 21a-22a (citing denial of motion to dismiss). Both amici's proposed test and the test the lower court applied require a showing of impermissible intent to discriminate in favor of the state's preferred political party and a showing that the intent had an impermissible effect. *See* J.S. App. 17a, 22a. And as the court below noted, "the standard that the Western District of Wisconsin has endorsed [in *Gill*] is remarkably similar to the standard endorsed by the majority in *Shapiro II*." J.S. App. 30a (citing *Whitford*, 218 F. Supp. 3d at 884).

In addition, under both amici's test and that used by the lower court, once a prima facie case has been established, the burden shifts to the state to refute plaintiffs' showing. Under the lower court's standard, the third prong focuses on "but for causation," whereas amici's test employs the justification prong commonly

used in First Amendment, voting rights, and equal protection cases. Both approaches, however, ultimately aim to determine if there are constitutional reasons for the otherwise impermissible effects established by plaintiffs. *See Hartman v. Moore*, 547 U.S. 250, 259-60 (both tests attempt to establish the true motive for a defendant's actions).[2]

However, as elaborated below, the test amici advance differs from that used by the lower court here in two important respects. First, amici's test requires proof of intent to undermine the electoral accountability of the state's preferred party and proof that its map succeeded in entrenching the favored party. By contrast, the lower court requires only an intent to disfavor a political party and a causally linked effect that is more than *de minimis*. J.S. App. 22a-23a. And second, amici's approach examines intent and effect on a plan-wide basis, while the lower court focused its analysis on a single district, without taking into account the statewide plan as a whole. As we show in the final section of this brief, Appellants may be able to

[2] The justification prong in amici's test is guided by the legitimate interests that this Court has previously identified in the redistricting context, including "traditional districting principles such as compactness and contiguity," "maintaining the integrity of political subdivisions," or maintaining "the competitive balance among political parties." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (citations and internal quotation marks omitted). The state must show that the map it drew was necessary to satisfy these legitimate interests. "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

satisfy the test amici propose. Accordingly, amici suggest that this Court adopt the standard we have proposed, and remand this case for review in line with that test.

II. A Partisan Gerrymandering Claim Requires a Showing that the Legislature Acted with Intent to Secure a Partisan Advantage, and that Its Map Had the Effect of Entrenching the Favored Party Against Changes in Voter Preference.

Entrenchment is the touchstone of partisan gerrymandering claims. When the state has drawn districts so as to insulate the majority's partisan advantage from electoral shifts, the state has directly undermined the political process, and violated its First Amendment obligation of neutrality. At the same time, as this Court has noted, some political considerations are inescapable whenever the legislature redistricts. *See Vieth*, 541 U.S. at 298. By focusing on entrenchment, the test amici propose here and in *Gill* offers a standard for determining "how much is too much." *Id.* The focus on entrenchment is better suited to draw that line, and therefore better grounded in existing doctrine, than the lower court's analysis here.

Instead of looking to entrenchment, the court below applied a standard that makes any map that exhibits more than a "*de minimis* amount of vote dilution" potentially suspect. J.S. App. 22a-23a. The lower court ruled that to make out a partisan gerrymandering claim, "the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," *i.e.*, "the vote dilution must make some practical difference." *Id.* at 104a.

While this test properly focuses on intent and effect, it is less demanding than the entrenchment standard that amici propose.

The entrenchment standard properly roots the constitutional inquiry in state conduct that undermines the ability of voters to remove disfavored incumbents. Under this test, entrenchment occurs when a state designs a map so that an electoral majority is resistant to likely changes in voter preferences.[3] In an entrenched system, the state has placed a heavy thumb on the scale to "freeze the political status quo" and lock in the state's preferred party. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). The state compromises the integrity of the democratic process when it manipulates the electoral marketplace to award a legislative "monopoly" to its preferred party. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). "A partisan gerrymander that is intended to and likely has the effect of entrenching a political party in power undermines the ability of voters to effect change when they see legislative action as infringing on their rights." *Rucho*, 2018 WL 341658, at *20.

By entrenching the state's chosen party against meaningful accountability to the electorate, partisan gerrymandering substantially burdens the fundamental rights (1) to "cast a meaningful vote," *Burdick v. Takushi*, 504 U.S. 428, 445 (1992) (Kennedy, J., dissenting); and (2) "to associate for the advancement of political beliefs."

[3] Amici's entrenchment standard does not apply only where one party has entrenched its majority to the detriment of its opponent. It applies more generally when a state, through the drawing of district lines, locks up the distribution of political power. As such, it would apply equally where two parties collude to shield incumbents from being voted out of office, or to impede the ascendance of third-party or independent candidates.

Anderson, 460 U.S. at 787 (quoting *Williams*, 393 U.S. at 30-31). Courts are familiar with the phenomenon of partisan entrenchment. *Ariz. State Legislature*, 135 S. Ct. at 2658. And they have recognized its potentially pernicious effects, including "undermin[ing] . . . representatives' accountability to their constituents." *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 576 (E.D. Va. 2015) (Keenan, C.J., dissenting). Amici's test, by requiring entrenchment, focuses the inquiry on whether the redistricting process fundamentally inhibits the responsiveness that is at the essence of democratic self-government.

Most importantly, the entrenchment standard is best suited to limit judicial intervention. It asks, in essence, whether a redistricting plan has made it virtually impossible for voters to "throw the bums out." This limits judicial intervention to only those instances where it is necessary to protect the "responsiveness [that] is key to the very concept of self-governance through elected officials." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1462 (2014). By imposing a high threshold, it provides meaningful limits on the scope of plans subject to challenge, and addresses the Court's longstanding concern with administrable standards. It accounts for this Court's previous opinion holding that some quantum of political consideration, including partisan favoritism, is "generally permissible" in redistricting, *see Vieth*, 541 U.S. at 286 ("partisan districting is a lawful and common practice"), but prohibits legislatures from enacting plans with the intent and effect of "freez[ing] the status quo . . . [against] the potential fluidity of American political life." *Jenness*, 403 U.S. at 439. It makes suspect only those plans that constitute a significant deviation from the state's normal range of partisan balance.

The entrenchment test also uses a more appropriate baseline than the approach taken by the court below. The lower court's test uses a pre-existing district as the baseline for measuring the effects of the challenged map. As elaborated below, this standard may insulate from challenge a map that maintains or exacerbates the status quo, and thus make it more difficult for states to redress prior gerrymanders. *See infra* Section III.B. Entrenchment, by contrast, is measured against the range of maps that could be generated using legitimate districting criteria. It uses as its baseline a redistricting process that generates maps through neutral criteria, and measures a challenged plan based on the extent to which it reflects a substantial departure from the state's neutrality obligations. Only plans that yield the state's preferred outcome under any likely electoral scenario will be barred. This test offers courts both a neutral baseline and a discernible range of permissible plans against which to measure a challenged plan.

III. Partisan Gerrymandering Should Generally Be Assessed on a Statewide Basis, Not as to Single Districts.

The court below assessed whether partisan gerrymandering had occurred solely with respect to a single district, the Sixth District. But except in unusual circumstances, the more appropriate focus for partisan gerrymandering is the plan as a whole.

A. The Harm to First Amendment Rights Is Best Understood as a Statewide Injury.

When creating a districting plan—whether congressional or legislative—following the decennial census, a redistricting authority does not draw individual districts as discrete independent entities, but must adopt a map for the entire state.[4] Redistricting is conducted at the statewide level because adjusting any single district necessarily implicates the rest of the districts within the state. At the most basic level, the requirement of equipopulation demands that the entire map is interrelated. *See Reynolds*, 377 U.S. at 538-39. Making a choice in drawing any particular district line necessarily compels a choice with respect to the next, and so on. To focus on a lone district therefore risks missing the forest for a single tree.

Of course, any individual voter only votes in a single district. But mapmakers may place voters into a particular district to affect *other* districts, in order to

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[4] *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (noting that the Arizona Independent Redistricting Commission "adopted *redistricting maps* for congressional as well as state legislative districts") (emphasis added); Ariz. Const. art. 4, § 1(16), part 2 (independent commission creates "draft map[s]" for both congressional and legislative districting); Iowa Code §§ 42.2(4)(b); 42.3(1)(a) (legislative services agency creates "a plan of legislative and congressional districting" including "[m]aps illustrating the plan"); Md. Const. art. III, § 5 ("Governor shall prepare a plan setting forth the boundaries of the legislative districts"); Wis. Const. art. IV, § 3 ("the legislature shall apportion and district anew the members of the senate and assembly").

achieve a statewide outcome. For example, if a legislature intentionally concentrates supporters of the minority political party into a single district, the aim is likely not merely to alter that district alone, but to remove those voters from the surrounding districts in order to advantage the majority party across the state as a whole.[5]

Focusing on a single district in isolation provides a cause of action only for voters affected by one of the two classic tools of partisan gerrymandering: those who have been "cracked," by being split into multiple districts to dilute their influence. The single-district approach would provide no recourse to voters who have been "packed," or concentrated in a particular district, because their ability to elect their representative of choice is not impaired but, in fact, paradoxically enhanced. A district of all like-minded voters is sure to elect a preferred candidate to office. But this Court has never suggested, much less held, that only voters in a cracked district can seek a remedy for gerrymandering. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) (voters can be diluted by being concentrated "into districts where they constitute an

[5] To be sure, there may be instances in which focus on a single district would be appropriate: when lines are drawn not to achieve statewide results but to punish voters (and the representative they elect) in a particular district. For example, a bipartisan effort to gerrymander away a third-party representative, or a party's attempt to silence the views of its fringe members by taking away one of their seats might be viewed as retaliating against the voters who elected such a representative. In such instances, where the gerrymanders are targeted at a single district (and the representative it elects), this focus might make sense. But that is not generally the case, and it is not the case here. *See infra* Section IV.A-B.

excessive majority"). In most instances, only by looking at an entire statewide map can a court assess the true intent behind the composition of each district and the true effect of the plan as a whole. A gerrymandering jurisprudence that privileges the rights of voters who have been cracked across multiple districts over those who have been packed into a single district—the necessary outcome of the district-specific approach urged by Appellants—addresses only one half of the constitutional problem.

When deciding whether to consider a challenge to redistricting at the statewide or at the district level, the Court has traditionally looked to the nature of the harm suffered. In the case of malapportionment, where the harm involves how one vote is counted as compared to other votes in the state, the court has assessed claims on a statewide basis. *See, e.g.*, *Reynolds*, 377 U.S. at 560. By contrast, the Court has considered racial gerrymandering claims on a district basis. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). The Court determined this was the appropriate level of analysis for those claims "in light of the nature of the harms that underlie a racial gerrymandering claim," namely, the stigmatic harm of being "'subjected to [a] racial classification.'" *Id.* Only those voters in racially gerrymandered districts "suffer the special representational harms racial classifications can cause in the voting context." *United States v. Hays*, 515 U.S. 737, 744-45 (1995).

The harm of partisan gerrymandering is more akin to malapportionment than to racial gerrymandering. *Cf. Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (finding that racial gerrymandering "controversies implicate a different inquiry"). The goal and effect of partisan

gerrymandering is to maximize party control throughout the state, and therefore calls for a statewide approach in most cases. Considering the effects in only one district misapprehends the nature of the harm wrought by partisan gerrymandering.

As discussed, *infra*, the purpose and effect of the redistricting plan at issue in this case was to entrench a 7-1 Democratic supermajority in Maryland's congressional delegation. It is therefore not only the Republican voters in the Sixth District who are harmed; Republican voters *throughout the state* suffer the same First Amendment injuries, including those who support the Republican Party in each of the other six likely Democratic districts, and those in the Republican-packed First District. Thus, even where voters in a single district challenge a partisan gerrymander, the court should assess the intent, effect, and state interests across the entire districting plan.

B. Existing Maps Should Not Be Treated as Benchmarks to Assess Partisan Fairness.

Every redistricting effort changes prior district configurations. Prior districting lines do not occupy any sort of privileged status. There is no necessary reason that the prior districting configuration should serve as a benchmark. By focusing narrowly on changes in a single district, Appellants' approach requires states to justify virtually any deviations from a previous map—the "benchmark" district—as opposed to challengers having to show entrenchment. Such an approach has several flaws. The "benchmark" district against which changes are compared is nothing more than the district drawn in the previous round of decennial redistricting. There

is nothing presumptively *right* about the district lines drawn in the previous redistricting cycle. Additionally, district lines may necessarily have to be changed so that a previous district cannot practically serve as the "benchmark" district. The clearest illustration of this is when redistricting requires the creation or deletion of an entire district.

District lines are supposed to change every decade to reflect population shifts, and in the process, districts will regularly find themselves with more or less of one party's adherents. There is no reason why any party should be entitled to the partisan composition in any particular district based on a map with defunct demographic information. Operating under a presumption that districts should maintain their existing partisan compositions would defeat a purpose of redistricting, *i.e.*, that the distribution of political power should reflect changing demographics and voter preferences.

Moreover, the single-district approach misstates the kind of protections citizens need in the redistricting process. Citizens are not presumptively entitled to maintain their existing chance at electing their preferred candidates—that is not necessarily what a fair redistricting process is meant to secure. Rather, the Constitution is violated—and judicial intervention is required—when the legislature manipulates lines so as to render it impossible for citizens to exercise their political will. Freezing in place the prior status quo threatens to turn the courts from neutral referees of the redistricting process into guardians of past political outcomes. That is not what citizens are entitled to, nor is it the courts' role to secure it.

Finally, measuring discriminatory effect based on the "benchmark" district privileges the existing map, which may itself have been politically gerrymandered. If so, the entitlement approach would in fact *favor* entrenchment, this time accomplished not through legislative self-dealing but rather through judicial complicity.

C. Focusing on Single Districts Could Open Courts to Numerous Partisan Gerrymandering Cases Each Redistricting Cycle with Overlapping—and Potentially Conflicting—Remedies.

Judging individual districts in isolation risks expanding the scope of partisan gerrymandering litigation beyond judicial capabilities. Take the 2010 cycle of redistricting as an example. One form of evidence on which Appellants rely to demonstrate discriminatory effect on Republican voters in the Sixth District is that the district was previously a safe Republican seat, as measured by Cook's Partisan Voter Index (R+13), but was transformed into a likely Democratic one (D+2) after redistricting. 4JA887 (Cook Political Report). But if any material shift in the partisan composition of a district could give rise to liability, Appellants' theory sweeps too broadly: after the 2012 election, Cook's index predicted that 72 congressional districts would have changed hands between the parties, all of which might then be individually vulnerable to challenge under Appellants' theory.[6] Many more state legislative districts could also

[6] *Compare* The Cook Political Report, Partisan Voting Index, Districts of the 113th Congress: 2004 & 2008, (Arranged by State/District) (2012), *with* The Cook Political Report, Partisan Voting Index, Districts of the 111th Congress, (Arranged by State/District) (2011).

be open to challenge on a district-by-district basis under Appellants' theory.

In addition, contiguous districts necessarily exist in relation to one another, so challenging one district—and having it redrawn in remedial proceedings—would inescapably affect how lines are drawn elsewhere. The single-district approach risks multiple lawsuits with different litigants in a single state, each focused on a different district, and addressing only localized symptoms of the overall redistricting. The resolution of one challenge would necessarily have knock-on effects on neighboring districts.

A court seeking to remedy vote dilution of Republican voters in a single district would have two options. One would be to draw in some new Republican voters from neighboring districts. But, for the Republican voters left behind in the neighboring district, this would have the effect of impairing *their* ability to elect their preferred candidates. Another option would be to dislodge some Republican voters from the district into a neighboring district, where they would be able to elect their representative-of-choice. But once again, their like-minded neighbors left behind would see their opportunity to elect their preferred candidates only further diminished. The point is that any changes to a single district necessarily implicate the ability of voters of all parties in neighboring districts to elect their preferred representatives. If multiple single-district cases are brought, a three-judge panel considering a challenge to one district in a state might find itself drawing remedial districts that conflict with those drawn by a peer three-judge panel considering

a challenge to a different district in the same state.[7] Such conflicting remedies would threaten core due process values such as accuracy, finality, and the rights of those affected to be heard. Since in most cases, partisan gerrymandering will require a remedy that is conscious of effects statewide, the inquiry on liability should also be state- or plan-wide, and not take up individual districts in isolation.

IV. Plaintiffs May Be Able to Show a Likelihood of Success on the Merits Under Amici's Test.

While this case is only in its preliminary stage and has not had the benefit of a trial, Appellants appear likely to meet the test that amici propose. The record evidence suggests: (1) that the state acted with the intent to entrench the state's preferred political party on a statewide basis; and (2) that the state accomplished that end. The lower court, however, did not ask these questions or apply this standard, and accordingly, a remand is appropriate. However, in order to better explicate their standard, amici will briefly review how the record evidence might be considered under that standard.

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[7] In a scenario where different districts located in different judicial districts within the same state are challenged in separate lawsuits, two different three-judge panels deciding the cases is highly likely. In setting the composition of a three-judge panel, one of the judges must be the individual district court judge to whom the "request for three judges . . . was presented." 28 U.S.C. § 2284(b)(1). With this requirement, when cases originate in different judicial districts on different dates, it is all but assured that the cases would be heard by different panels.

A. The Evidence in the Record Suggests that Defendants Had the Intent to Secure and Maintain a Partisan Advantage in Redistricting.

Based on the evidence currently in the record, Appellants may well be able to establish that the Defendants acted with unconstitutional intent to entrench their advantage throughout Maryland's U.S. congressional map. Appellants claimed that Maryland sought "to draw a map that would protect Democratic incumbents and unseat at least one Republican incumbent," Pls.' Br. in Supp. of Mot. for Prelim. Inj. (ECF No. 177-1) at 11—and specifically, to create a plan with seven Democrats and one Republican. 1JA104-05 (Hawkins Dep.). The intent here was not merely to entrench a Democrat in the Sixth District, but rather to entrench a ratio throughout the state that heavily favored Democrats. An intent to entrench exists where lines are drawn for the purpose of *locking in* partisan advantage regardless of the voters' likely choices. *See Ariz. State Legislature*, 135 S. Ct. at 2658 ("[P]artisan gerrymandering [is] the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *cf. Rucho*, 2018 WL 341658, at *34 (citing *Arizona State Legislature* for the standard of establishing intent to discriminate in a partisan gerrymandering case). Intent can be established through direct and circumstantial evidence. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488-89 (1997) (discussing the Court's use of *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), in racial gerrymandering cases).

The procedure used in Maryland could support a finding of impermissible intent. Procedural irregularities may suggest that "improper purposes are playing a role" in official decision making. *Arlington Heights*, 429 U.S. at 267. Such procedures may include exclusion of the opposing party from deliberations and "excessive weight on data concerning party voting trends" during the process. *See Vieth*, 541 U.S. at 322 (Stevens, J., dissenting); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017) (mapmaker "deviated from the districting practices he otherwise would have followed" to carry out legislators' instructions).

Here, the process was dominated by the majority party, the Democrats. A committee of the Democratic members of the Maryland congressional delegation hired a Democratic consultant to draw maps. J.S. App. 18a. The consultant used a Democratic Performance Index (the "DPI") to predict how a generic Democratic candidate would likely perform in all of the proposed districts statewide. *Id.* at 19a. The work of the consultant informed the map that was proposed by an Advisory Committee consisting of four Democrats and one Republican, and recommended to Governor O'Malley, a Democrat. 1JA198 (Miller Dep.); 3JA657 (Joint Stipulations) ¶ 20. The lone Republican on the Advisory Committee cast the only dissenting vote. 3JA660 (Joint Stipulations) ¶ 32. A few days after the Governor introduced the bill to the legislature, both chambers passed it, with no Republican votes. *Id.* ¶¶ 33-36.

This Court has also relied on statements by decisionmakers regarding the districting process as evidence of an improper purpose. *See Cooper*, 137 S. Ct.

at 1468-69, 1475-75; *see also City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-97 (2003) ("[S]tatements made by decisionmakers or referendum sponsors during deliberation over a referendum may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative."). Here, they show that map drawers, decisionmakers, and members of the legislature intended to maximize and lock in Democratic advantage throughout Maryland. The goal was not simply to flip the Sixth District; it was to ensure a 7-1 Democratic supermajority in Maryland's congressional delegation. The creation of the Sixth District was a *means* to that statewide *end*. Indeed, the map drawers considered and rejected an "8-0 map" because it would have required one district to cross the Chesapeake Bay. 1JA104-05 (Hawkins Dep.); 1JA77 (O'Malley Dep.); 3JA824 (map of potential 8-0 plan).

In a deposition, Governor O'Malley testified that the map drawers' intent was to elect more Democrats than Republicans. *See, e.g.*, 1JA54 (O'Malley Dep.) ("[W]hen we redrew this, yes, we wanted to do it in a way, . . . that will make it more likely rather than less likely that a Democrat, whoever he or she is that wins the party's nomination in any of the congressional districts, is able to prevail in the general election."). He also testified that the focus was on the map as a whole and not just the Sixth District. *See* 1JA67 (O'Malley Dep.) (answering the question of whether Democratic advantage was accomplished by just changing the Sixth District that "[i]t was accomplished by redrawing virtually all of the borders except the [F]irst [District]"). And he testified that their intent was to create a statewide Democratic advantage that would last 10 years, until the next redistricting cycle. 1JA79

(O'Malley Dep.) ("[P]art of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them.").

Other statements in the record also support a finding of intent to favor the Democratic Party by locking in its advantage. The consultant hired to draw model maps testified that the goal was "incumbent protection" by preserving the six already Democratic districts and increasing the number of districts held by Democrats. 1JA104 (Hawkins Dep.). A Democratic legislative delegate gave an interview to the press and stated: "What we're trying to get more, in terms of—currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one. . . ." 3JA664 (Joint Stipulations) ¶ 47. The statements in the record could support a finding that it was the Defendants' intent to entrench Democrats throughout the congressional map.

B. The Evidence in the Record Suggests That the Map Drawn Had the Effect of Entrenching the Democratic Party's Advantage.

Because the evidence in the record as to effect was limited to one district in isolation, it is less developed at this point than that on the intent prong. However, Appellants may also be able to show that the map indeed had its effect of entrenching, or locking in, the Democratic Party's advantage against potential shifts in the electorate's preferences. Under the entrenchment standard, a plaintiff meets the effect prong when a challenged map significantly deviates from the state's normal range of partisan balance in favor of the state's preferred party in

a way that will endure any likely electoral outcome. The question is whether the state has rendered its electoral system non-responsive to changes in voter preferences in order to "freeze the political status quo." *Jenness*, 403 U.S. at 438. While the lower court here did not require such a showing, there are indicators in the record that Appellants may be able to meet this standard on remand.

Here, there is evidence suggesting that the redistricting plan at issue had a statewide entrenchment effect. The Cook Political Report data suggest that each district was drawn as part of a plan to achieve a 7-1 supermajority, featuring districts with the following Partisan Voter Indexes: MD-1: R+14; MD-2: D+7; MD-3: D+7; MD-4: D+23; MD-5: D+11; MD-6: D+2; MD-7: D+23; MD-8: D+10.[8] And after redistricting, the Democratic Party went from winning six congressional districts in 2010 to winning seven congressional districts each cycle in 2012, 2014, and 2016.[9] The Democrats were

[8] The Cook Political Report, Partisan Voting Index, Districts of the 113th Congress: 2004 & 2008, (Arranged by State/District), at 2A.5 (2012).

[9] *See* Md. State Bd. of Elections, *2012 Presidential General Election Results*, Maryland.gov (Nov. 28, 2012, 8:56 AM), http://www.elections.state.md.us/elections/2012/results/general/gen_results_2012_4_008X.html; Md. State Bd. of Elections, *2014 Gubernatorial General Election results for Representative in Congress*, Maryland.gov (Dec. 2, 2014, 3:17 PM), http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_008X.html; Md. State Bd. of Elections, *Official 2016 Presidential General Election results for Representative in Congress*, Maryland.gov (Dec. 9, 2016, 10:56 AM), http://elections.state.md.us/elections/2016/results/general/gen_results_2016_4_008X.html.

thus able to capture over 80% of the seats in a state where the "voting population historically votes roughly 60% for Democrats and 40% for Republicans." J.S. App. 38a.

"Gross statistical disparities" between the challenged conduct and neutral conditions can provide additional evidence of impermissible intent and effect. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *cf. Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960) (evidence of stark impact of facially neutral law may be determinative of intent and effect). Technology now permits computers to generate a wide range of maps in order to test the range of likely statistical outcomes. The benefit of this approach is that it controls for changes to electoral outcomes that are within the normal range of non-entrenched maps, and singles out only outliers. In *Rucho*, such an approach was employed by plaintiffs and accepted by the court in its entrenchment analysis under the Equal Protection Clause. 2018 WL 341658, at *47-57 (crediting two sets of analyses, each finding that the challenged map produced a partisan composition that deviated from the overwhelming majority of maps drawn in the absence of partisan criteria).

If similar analyses were performed in this case and arrived at similar results, they would strongly support a finding of discriminatory effect under amici's test. And indeed, the maps that were actually drawn at the time can serve as proxies for what an expert analysis of the universe of possible maps might show. The DPI data used by the consultant here found that Democrats generally did not win districts when the DPI was below 50%. 4JA1123-24. Ultimately, in the redistricting plan that was adopted, the DPI for the seven districts intended to be Democratic

districts ranged from 53 percent to 74.7 percent. 3JA791 (table showing DPI for all districts in draft statewide congressional map). This did not have to be the case—and, in fact, it was a highly unlikely outcome under a neutral redistricting process. In fact, all of the third-party redistricting submissions featured configurations for the Sixth District that had "much lower DPIs," and which therefore would not have produced the same entrenched 7-1 Democratic supermajority created by the adopted plan. J.S. App. 19a. But the only maps that were seriously considered by the consultant and proposed for adoption all redrew the Sixth District to have a DPI of over 52%, *id.*, effectively guaranteeing a Democratic lock on seven of the state's eight congressional districts.

C. The Burden Should Now Shift to the State To Proffer Its Justification for Drawing This Map.

Once plaintiffs establish a prima facie case of partisan entrenchment, the burden shifts to the state to establish that the redistricting plan was necessary to achieve legitimate state interests. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) ("[A] State may not choose means that unnecessarily restrict constitutionally protected liberty.") (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973)); *see also Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (partisan gerrymandering may violate the Constitution when political classifications are "applied in an invidious manner or in a way unrelated to any legitimate legislative objective"). The Court has identified a range of state interests in the gerrymandering context that may satisfy its burden. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306-07 (2016). The state must

not only prove that it had a legitimate interest in creating the map, but that the means chosen were necessary to meet those interests. *Anderson*, 460 U.S. at 806 ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.") (citing *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("the legitimate state interest . . . must be achieved by a means that does not unfairly or unnecessarily burden" the fundamental rights at issue).

The court below did not reach this question because it found that Appellants had not made a prima facie showing sufficient to shift the burden. But there is evidence in the record suggesting that the state's interest was not legitimate; indeed it was to achieve partisan advantage. For example, Governor O'Malley testified that one of the primary objectives in drawing the map was to maximize Democratic advantage. *See, e.g.*, 1JA32-33; 1JA54 (O'Malley Dep.). There are also indications that the mapmakers may not have used traditional districting principles, such as compactness and contiguity, when drawing the map. *See, e.g.*, 1JA231 (Democratic Caucus Meeting topics) ("The Governor's map is *not* pretty . . . .") (emphasis in original). This evidence should be considered when the case is remanded for reconsideration under the appropriate First Amendment standard.

CONCLUSION

For the foregoing reasons, the Court should adopt the First Amendment standard for assessing partisan gerrymandering proposed by amici in *Gill v. Whitford*, No. 16-1161, vacate the district court's denial of an injunction, and remand this case for consideration in line with that test.

Respectfully submitted,

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