No. 17-333

In The Supreme Court of the United States

O. JOHN BENISEK, et al.,
Appellants,
v.
LINDA H. LAMONE, et al.,
Appellees.

On Appeal From The United States District Court For The District Of Maryland

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., THE GEORGIA STATE CONFERENCE OF THE NAACP, LAVELLE LEMON, MARLON REID, CELESTE SIMS, PATRICIA SMITH, AND COLEY TYSON AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The National Association for the Advancement of Colored People (NAACP), founded in 1909, is the nation's oldest and largest grassroots civil rights organization. Its principal objectives are to ensure the political, educational, social and economic equality and eliminate race prejudice and discrimination among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of laws securing civil rights; and to educate the public as to their constitutional rights and the effects of racial discrimination. The NAACP and its chartered units have a long history of advocating to protect minority voting rights and to ensure effective legislative representation for African-Americans and other racial minorities, working in state and federal courts; state legislatures and Congress; municipal, county and state election authorities, as well as state and federal agencies.

The Georgia State Conference of the National Association for the Advancement of Colored People (GA NAACP), a chartered unit of the NAACP, was formed in 1941 to eliminate racial discrimination through democratic processes and ensure the equal political, educational, social, and economic rights of all persons,

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[1] No counsel for a party has authored this brief in whole or in part, and no counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of *amicus* briefs.

in particular African-Americans. GA NAACP, Lavelle Lemon, Marlon Reid, Celeste Sims, Patricia Smith, and Coley Tyson (Georgia redistricting plaintiffs) have brought a lawsuit in the United States District Court for the Northern District of Georgia, *see generally Georgia State Conference of the NAACP, et al. v. State of Georgia*, *et al.*, ___ F. Supp. 3d ___, 2017 WL 3698494 (Aug. 25, 2017), alleging that the 2015 mid-census cycle redrawing of Georgia State House Districts 105 and 111 is an unconstitutional partisan gerrymander. On August 25, 2017, a three-judge panel dismissed that count for failure to provide a judicially-manageable standard with respect to the alleged discriminatory effect. *Id.* at *12-13. The Georgia redistricting plaintiffs have an interest in the instant appeal because it raises foundational issues related to the justiciability and standard of review for partisan gerrymandering cases, directly impacting the adjudication of their constitutional rights.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents a helpful counterpart to the appeal in *Gill v. Whitford*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), argued earlier in this term, to illustrate both the justiciability of partisan gerrymander cases and the manageable judicial standards applicable to these cases. The Court now has before it challenges to both a statewide redistricting and a pinpoint redistricting, challenges brought by both the Democratic Party and the Republican Party, and challenges that

both call for the overarching standard of invidiousness, while at the same time demonstrating the need for flexible legal and evidentiary standards to permit the evolution of effective adjudication of these important claims.

Justiciability of these claims should no longer be in question. For over three decades, a majority of the Court has ruled that partisan gerrymander cases are justiciable, a conclusion consistent with the cognate apportionment cases. There appears to be no precedent for this Court to remove a category of cases from justiciability to non-justiciability. To do so would be particularly anomalous in the face of the universal acknowledgement, among jurists and legal commentators, that partisan gerrymandering is incompatible with our democracy because it denies voters a reasonable opportunity to elect representatives of their choice, and allows representatives to disregard these voters. Three three-judge panels in three different judicial circuits in the past year have now confirmed the justiciability of these cases.

As these cases demonstrate, partisan gerrymanders, and their attendant evils, may come in many guises. It is therefore important for this Court not only to hold that partisan gerrymander cases are justiciable with respect to a statewide apportionment as in *Whitford*, but also to recognize that the evils wrought by this conduct may be accomplished subtly, with surgical precision targeted at one or more districts to accomplish a similarly anti-democratic end, as alleged in this appeal, and as happened in Georgia in 2015. That year,

the Republican-controlled Georgia Legislature carefully manipulated the lines of two swing districts in the State House of Representatives, Districts 105 and 111. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2 (three-judge panel). Elections in both districts were very close in 2012 and 2014, and their racial demographics were shifting to the disadvantage of the white Republican incumbents. *See id*. at *2-3. The 2015 changes, in aggregate, moved African-American voters out of and white voters into both districts. There was a net gain of 2,191 non-Hispanic white residents in District 105, according to 2010 Census data, while there was a net loss of 1,137 non-Hispanic African-American and 1,073 Hispanic residents in District 105. In District 111, there was a net gain of 1,335 non-Hispanic white residents, and a net loss of 1,251 non-Hispanic African-American and 277 Hispanic residents.[2] *Id*.

This dilutive redistricting accomplished its goal. In 2016, the white Republican incumbents in both districts narrowly defeated their black Democratic challengers – in one case by 222 votes. Nevertheless, a federal court dismissed a partisan gerrymandering claim against Georgia, on the basis that the plaintiffs failed to plead a "metric" by which to measure discriminatory effect such as disproportionality, asymmetry, or

[2] *Amici* are not asking the Court to adjudicate the Georgia redistricting case, because it is not before the Court. Rather, they are positing the facts alleged in that case, as if true, for the purpose of providing the Court with a real-life example of a pinpoint gerrymander.

efficiency gaps. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12-13. However, these metrics are relevant only to a statewide analysis and are not applicable to a district-specific challenge. A pinpoint redistricting, however, can violate constitutional principles as much as a statewide partisan gerrymander. Any standards adopted by this Court must be sufficiently flexible to apply to both. Accepting the justiciability of partisan gerrymandering cases but adopting rules that permit subtler but equally pernicious forms of gerrymandering would allow democracy to die by a thousand cuts.

The sole basis for doubt as to the justiciability of partisan gerrymandering cases is the purported lack of "judicially-manageable standards" to guide resolution of these cases, a concept derived from the "political question" cases. There is, however, an accepted, overarching, judicially-manageable standard applicable to these cases – invidiousness. This standard has been a staple of Equal Protection apportionment cases.

Further, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), this Court has set out clear guidelines used to determine invidiousness, which have been applied by courts for decades. The *Arlington Heights* factors of the impact of the official action, the specific sequence of events leading up to the challenged decision, procedural and substantive departures from typical methods and manners of decision-making, and legislative and administrative history, including contemporary statements by members of the decision-making body,

are easily applicable to determining the intent behind district line-drawing in both statewide and pinpoint gerrymandering cases.

The invidiousness standard allows for the promulgation of subsidiary legal standards, which are equally judicially manageable. However, because partisan gerrymandering cases come in different forms, the same set of subsidiary standards that are applicable to statewide gerrymander claims may not be applicable to pinpoint gerrymander claims. For example, some courts in statewide gerrymandering cases have defined invidiousness in the context of the intent to "entrench" a political party, a concept – depending on how it is defined – that may be inapplicable to pinpoint gerrymanders. A broader standard, one that focuses on the intent to minimize or reduce the voting strength of a group of voters, may be more easily applicable to both statewide and pinpoint gerrymanders. Or, perhaps, the "entrenchment" standard should apply to statewide gerrymanders and the "minimization" standard to pinpoint gerrymanders. But in any case, the standards are judicially manageable.

Further, with invidiousness as the overarching standard, the Court must decide whether the invidious intent must be proved to be the predominating motivation for the line-drawing applicable in racial gerrymandering cases or "a" motivating factor – the standard applicable in discrimination cases – or somewhere in between. Again, whether the differences between statewide gerrymander cases and pinpoint gerrymander cases call for a different level of motivation, the

standards are judicially manageable, and the issue should not affect justiciability.

There is also no need for the Court to announce, in this case or in *Whitford*, the precise contours of evidence supporting the *Arlington Heights* guidelines that will be applicable in all future cases. Indeed, it would be a mistake to do so, because one set of evidentiary standards cannot fit all gerrymanders. In the Georgia case, for example, there is substantial evidence of invidiousness, in statements of those involved in the decision-making, the use of race to achieve partisan ends, modification of a plan mid-decade, and the failure to comply with traditional districting principles. However, while quantitative measures such as disproportionality, asymmetry, or an efficiency gap may be relevant evidence of impact in a statewide redistricting (and thus relevant to proving both intent and effect), they are not necessarily relevant in a pinpoint gerrymander of one or a handful of districts, such as that at issue in Georgia. Evidence illustrating impact in pinpoint gerrymandering cases may be offered in different forms, ranging from the results of actual elections to recreation of hypothetical elections to statistical models yet to be developed. Trial courts need only exercise their traditional role as gatekeepers in determining the admissibility of such evidence, as relevant to the facts of the particular case. With this Court's guidance, the lower courts may devise the subsidiary evidentiary standards on a case-by-case

basis, as they evolve over time, precisely the way other constitutional jurisprudence has developed.

There is need, however, for the Court to clarify that the use of race as a tool to effect a partisan gerrymander is an indicium of invidiousness to dispel the notion that jurisdictions can use partisanship as a defense to pernicious racial gerrymanders.

ARGUMENT

I. Partisan Gerrymandering Claims Are Justiciable

For over three decades, a majority of the Court has ruled that partisan gerrymander cases are justiciable. *Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 307-68 (2004) (Kennedy, J., concurring; Stevens, J., Souter, J., Ginsburg, J., Breyer, J., dissenting). The justiciability of these cases is consistent with the Court's ruling in *Baker v. Carr*, 369 U.S. 186 (1962), that cases brought under the Fourteenth Amendment challenging the constitutionality of redistricting decisions did not present non-justiciable "political questions."

The plurality in *Vieth*, who opined that partisan gerrymander claims were not justiciable because of the lack of "judicially-manageable standards," provided not a single example where this Court had moved a category of cases previously ruled justiciable into the non-justiciable category. *Amici* are unaware of a

comparable decision. Barring the judicial review of partisan gerrymandering claims would be particularly anomalous because this Court has itself stated that partisan gerrymanders are incompatible with democratic principles. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (alterations in original) (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)).

This is because such conduct goes "to the adequacy of representation." *Bandemer*, 478 U.S. at 125. From the voter's perspective, partisan gerrymandering has been characterized as denying a particular group "its chance to effectively influence the political process," *id.* at 132-33, and an effective opportunity to elect representatives of their choice in violation of the Equal Protection Clause. *Id.* at 167-68 (Powell, J., concurring and dissenting). Justice Souter has described it as a "fairness" issue, deviating from the constitutional standard that each political group is supposed to have the same chance to elect their representatives. *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

To others, the problem is "conceding to legislatures a power of self-selection," which is in tension with a Constitution "whose most arresting innovation was the dispersion of power." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 304 (1991). Justice Stevens believes that the practice violates the decision-maker's duty to remain impartial. *Vieth*, 541 U.S. at 326 (Stevens, J., dissenting). Justice Kennedy has suggested

that partisan gerrymandering may raise First Amendment issues because political classifications are used "to burden a group's representational rights." *Id.* at 315 (Kennedy, J., concurring in the judgment). As Judge Wynn recently summarized in a three-judge panel's rejection of North Carolina's congressional redistricting: "Partisan gerrymandering runs contrary to both the structure of the republican form of government embodied in the Constitution and fundamental individual rights preserved by the Bill of Rights." *Common Cause, et al. v. Rucho*, United States District Court for the Middle District of North Carolina, No. 1:16-CV-01164-WO-JEP, Doc. 116 at 46.

Regardless of whether the constitutional source of the right is the First Amendment, the Fourteenth Amendment, or the Elections Clause, authorities agree that the consequences of partisan gerrymandering are profound. Lawmakers may choose their voters for the purpose of ensuring a near-certain result, which allows elected officials to disregard the citizenry's needs and concerns. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially-Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 Harv. J. on Legis. 243, 244 (2009). This in turn leads to the voters being denied an "effective voice in policy making," and the ability to protect their rights. *Id*. Even worse, as one commentator has said, "districts intentionally designed to subordinate voters based on party preference are more likely to actually suppress representation of that political viewpoint, whether that suppression is measurable or not." Levitt, Justin, *Intent is Enough: Invidious Partisanship in Redistricting*

(July 14, 2017), William & Mary Law Review, Vol. 59 (Forthcoming); Loyola Law School, Los Angeles Legal Studies Research Paper No. 2017-24, abstract available at SSRN: https://ssrn.com/abstract=3011062.

Partisan gerrymanders come in various guises, although they perpetuate the same evils. While *Whitford* centers on statewide redistricting, this appeal and the Georgia redistricting case focus on a limited number of districts. Of the 7,556 residents surgically moved from Georgia State House District 105 into a neighboring safe Republican district, 2010 Census data indicates that 63.8 percent are African-American or Hispanic; they were replaced by 7,380 residents, of whom only 35.6 percent are African-American or Hispanic. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2. With respect to District 111, more than 30,000 residents were shuttled in and out of four adjoining districts (each of which has a population of less than 55,000), increasing the white population percentage by 2.3 percentage points, and decreasing the non-Hispanic African-American percentage by the same amount. *Id*. at *3. These changes, while relatively small in comparison to a statewide apportionment, had a decisive effect in countering the demographic shifts in the populations of Districts 105 and 111. *Id*. at *2-3.

The reason is obvious: the State House elections in both districts in 2012 and 2014 were close and featured racially polarized voting patterns, both districts were experiencing an increase in the registered voter percentage due to demographic changes, and minority

voters are perceived as reliably supporting Democratic State House candidates. *Id*. The Republican-dominated Georgia Legislature did not want to risk the incumbents in either district losing to a Democratic challenger. The Legislature accomplished its goal by splitting precincts and moving census blocks, for which there are racial data but no electoral information. *See id.* at *12. Moreover, reflecting the hurried and secret nature of this legislation, the adoption of the 2015 mid-census redistricting of Georgia House of Representatives District 105 and 111 (H.B. 566) did not follow the normal legislative procedures. African-American legislators serving on the House Legislative and Congressional Reapportionment and the Senate Reapportionment and Redistricting Committees were excluded from the process of drawing and negotiating the plans ultimately codified in H.B. 566. *Id*. at *2.

The November 2016 races for House District 105 and 111 were each close and proved just how effective these changes could be in district elections. In 2016, the white Republican incumbents in both districts again ran against African-American candidates who were Democrats. *Id*. at *2-3. Despite the adjustments made by the legislature to tilt the outcome and the presence of racially polarized voting patterns, the margins remained uncomfortably close. *See id.* In the election for House District 105, the margin of victory was so close that the race went to recount. The incumbent ultimately defeated her challenger by only 222 votes. *Id*. at *2. In House District 111, the incumbent's margin of victory in that election was only 946 votes, an

even tighter result than in past races. *Id*. at *3. But for H.B. 566, and the mid-decade redistricting, African-American Democrats would likely have won both races in these districts. *Id*. at *2-3; Deposition of Dan O'Connor taken in *Georgia State Conference of the NAACP, et al. v. State of Georgia*, *et al.*, ___ F. Supp. 3d ___, 2017 WL 3698494 (Aug. 25, 2017) ("O'Connor Depo.") at pp. 76-77; 90 available at https://lawyerscommittee.org/wp-content/uploads/2018/01/121317OConnorFull.pdf.

The minority voters in these districts have therefore been deprived of their chance to have an effective voice and to influence their representatives because of their race and presumed political affiliation. It cannot be the law that it is constitutional for one political party to make a series of incremental changes designed for one purpose and one purpose only: to stack the deck by moving opposing party members out of one district and into another whenever an election becomes close. That is the antithesis of a true democracy. Unless pinpoint partisan gerrymandering cases are justiciable, the Court is consigning democracy to die by a thousand cuts. Clearly, partisan gerrymandering is an area where the Court must exercise its paramount authority "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

II. Invidious Intent to Minimize the Voting Power of a Political Element Is a Judicially-Manageable Standard

The sole basis for doubt as to the justiciability of partisan gerrymandering cases is the purported lack of "judicially-manageable standards" to guide resolution of these cases. *See, e.g.*, *Vieth*, 541 U.S. at 277-90 (plurality opinion). However, the overarching standard of an invidious intent to minimize the voting strength of a group of voters is a time-tested, judicially-manageable standard.

That justiciability is contingent on the availability of judicially-manageable standards finds its genesis in *Baker v. Carr*, 369 U.S. 186 (1962), where the Court distinguished the "political questions" inherent in cases brought under the Guaranty Clause[3] from those implicated in cases brought under the Fourteenth Amendment, such as partisan gerrymandering cases. In the former, the Court explained that it had not been able to identify a "set of judicially manageable standards which courts could utilize independently in order to identify a State's lawful government." *Id.* at 223.[4]

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[3] The Guaranty Clause requires the federal government to "guarantee to every State in the Union a Republican Form of Government." U.S. Const. art. IV, § 4.

[4] The leading Guaranty Clause case in this respect is *Luther v. Borden*, 48 U.S. 1 (1849), where the Court was asked to rule in effect that the Dorr Rebellion's alternative government was lawful, superseding Rhode Island's charter government, because the latter limited the vote to landowners. Chief Justice Taney, writing for the Court, rejected the claim, and, in so doing, created the

Discrimination claims brought under the Fourteenth Amendment, however, do not face this obstacle:

> Nor need the appellants, in order to succeed in this [Equal Protection] action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts, they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

Id. at 226.

A. Invidiousness Is an Accepted, Judicially-Manageable Standard

The settled benchmark for discrimination claims brought under the Equal Protection Clause is invidiousness. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (noting that "we have . . . held that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause"). This Court has consistently applied this standard to various types of Equal Protection challenges to redistricting, including racial gerrymandering, "one person, one vote," and vote dilution claims.[5] In the past, this Court has also

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"political question" doctrine. The decision, of course, predated the enactment of the Fourteenth Amendment.

[5] *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 656-66 (1964) (a redistricting plan impairs Fourteenth Amendment rights if it

suggested that invidiousness is relevant to the analysis of partisan gerrymandering claims.[6] A standard emphasizing the offensiveness of the line-drawers' conduct is consistent with the Court's traditional usage of "invidiously discriminatory animus," as acknowledged by Justice Scalia in his discussion of that phrase by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 (1971):

> The nature of the 'invidiously discriminatory animus' *Griffin* had in mind is suggested both by the language used in that phrase ('invidious . . . [t]ending to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating,' Webster's Second International Dictionary 1306 (1954)) and by the company in which the phrase is found ('there must be *some racial, or perhaps*

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employs "invidious discriminations based upon factors such as race or economic status"); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (affirming finding that at-large system was being maintained "for the invidious purpose of diluting the voting strength of the black population").

[6] *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (multimember districts "may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"); *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) ("[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . .") (*quoting Reynolds*, 377 U.S. at 565-66); *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (a redistricting plan constitutes an unconstitutional partisan gerrymander if political classifications "were applied in an invidious manner or in a way unrelated to any legitimate legislative objective").

> *otherwise class-based*, invidiously discriminatory animus,' *Griffin*, 403 U.S., at 102, 91 S. Ct., at 353 (emphasis added)).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 274 (1993).

Not only has the overarching legal standard of invidiousness been firmly established in discriminatory intent claims, but this Court has set clear guidelines for approaching proof of invidiousness through both direct and circumstantial evidence. *Vill. of Arlington Heights*, 429 U.S. at 266-68. These factors include the impact of the official action, the specific sequence of events leading up to the challenged decision, departures from the normal procedure and substantive departures from typical methods and manners of decision-making, and legislative and administrative history, including contemporary statements by members of the decision-making body. *Id.* Having regularly applied the *Arlington Heights* factors, courts are seasoned in analyzing the invidiousness of alleged discriminatory practices. Invidiousness bears all of the hallmarks of a judicially-manageable standard. In the context of partisan gerrymandering, the invidiousness standard would prohibit the drawing of a district's lines for the purpose of advantaging one political party (or candidate) over another, such that the ability of voters to participate equally in the political process is substantially harmed.

B. The Court Should Adopt Such Subsidiary Legal Standards As Are Relevant to the Particular Type of Gerrymander

Partisan gerrymandering claims do not present an absence of judicially-manageable standards, but, rather, as Justice Kennedy has termed it, a search for "subsidiary" standards. *Vieth*, 541 U.S. at 314. In Justice Kennedy's view, that search may be for ways of quantifying the effect of the gerrymander. However, because partisan gerrymander cases come in so many different forms, it is not obvious that the same set of subsidiary legal standards will apply to all partisan gerrymander cases.

1. The Definition of the Type of Intent Applicable to Pinpoint Gerrymander Claims May Be Different from That Applicable to Statewide Gerrymander Claims

The difference between the Wisconsin statewide, post-census redistricting challenged in *Whitford* on the one hand and the district-specific redistrictings in this appeal and in Georgia in 2015 on the other demonstrates the need for flexibility in the definition of the type of intent a partisan gerrymandering plaintiff must prove.

For example, in statewide challenges courts have used variations on "entrenchment" standards. The district court in *Whitford* employed a standard requiring that the legislature possess "an intent to entrench a

political party in power" for the remainder of the decade, or "to make the political system systematically unresponsive to a particular segment of the voters based on their political preference." *Whitford*, 218 F. Supp. 3d 837, 887 & n.170, 896 (W.D. Wis. 2016). The district court in the North Carolina redistricting case ruled that "a plaintiff satisfies the discriminatory purpose of intent requirement by introducing evidence establishing that the state redistricting body acted with an intent to 'subordinate adherents of one political party and entrench a rival party in power.'" *Common Cause v. Rucho*, slip op. at 86 (*quoting Ariz. State Leg.*, 135 S. Ct. at 2658).

The entrenchment standard may be applicable when adjudicating a statewide redistricting plan. It is not necessarily applicable in smaller-scale, subtler, yet equally invidious, gerrymanders, such as the district-specific claim in this appeal and the pinpoint, mid-census redistricting enacted for the purpose of making a handful of highly competitive districts safer for incumbents of a political party that was already enjoying a super-majority, as occurred in Georgia in 2015. In cases such as these, the evil alleged is the simple practice of stacking the deck incrementally in a particular district, a concept the Court has recognized in its racial gerrymandering jurisprudence. *See*, *e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1481-82 (2017) (holding North Carolina Congressional Districts 1 and 12 were racially gerrymandered); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (analyzing whether race predominated in drawing 11 of 12

Virginia House of Delegate districts); *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1264 (2015) (holding that analyzing racial gerrymandering in the context of the state "as a whole" is legally erroneous and the district court erred in concluding that race did not predominate in the creation of Alabama Senate Districts 7, 11, 22, or 26).

Depending on how "entrenchment" is defined, and the particular circumstances of the case, an "entrenchment" standard might be applicable to a district-specific gerrymander case. However, if "entrenchment" is meant to require proof of durable effect of the gerrymander, it would not appear to fit pinpoint gerrymanders, where the evil is not durability, but simply the use of political power for the sole purpose of drawing lines to win the next election. A mid-census cycle line-drawing done for the express purpose of helping one candidate win in one district is no less unlawful than a once-in-a-decade redistricting for the express purpose of entrenching the majority party in power.

There is no need to shoehorn all cases into an "entrenchment" standard, when it is clear that something less than entrenchment is constitutionally prohibited. There is an existing intent standard that would easily apply to both statewide and district-specific cases. In *Burns v. Richardson*, a one person, one vote case, the Court defined a multi-member apportionment scheme as having a discriminatory effect if it is shown that, "'designedly or otherwise . . . under the circumstances of a particular case, [it] would operate to minimize or cancel out the voting strength of racial *or political*

elements of the voting population.'" 384 U.S. 73, 88 (1966) (emphasis added) (*quoting Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). This standard is consistent with this Court's pronouncements in partisan gerrymandering cases that an electoral district "may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized," *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), and that "each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Bandemer*, 478 U.S. at 124.

A standard focused on an invidious intent to minimize or cancel out the votes of certain elements of the voting population based on their political association is more rigorous than the "mere intent to disadvantage" standard offered by the plurality in *Bandemer*, 478 U.S. 109.[7] It also provides courts with the flexibility needed to apply to both statewide and pinpoint gerrymanders because the affected "elements of the voting population" can be located in a single district or throughout the state.

Finally, it is a standard that is compatible with treating partisan gerrymander claims as arising out of the First Amendment, as is the claim in this appeal. The district court in this case ruled that "the plaintiff must allege that those responsible for the map redrew

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[7] *Vieth*, 541 U.S. at 285 (plurality opinion) (characterizing the standard offered by the *Bandemer* plurality).

the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596 (D. Md. 2016) (emphasis in original). The court in the North Carolina redistricting case described the First Amendment claim as one favoring or disfavoring "individuals or entities that support a particular candidate or political party." *Common Cause v. Rucho*, slip op. at 162-63. These formulations are consistent with one focusing on the minimizing or cancelling out the votes of particular political elements.[8]

Ideally, the Court should set a standard in this district-specific gerrymandering case that is sufficiently broad and flexible to apply to cases such as that presented in a statewide gerrymander case. However, if proof of some sort of durable "entrenchment" is deemed essential to a statewide case such as *Whitford*, the Court should make it clear that the different circumstances surrounding pinpoint redistricting may necessitate a different framework from the one used in statewide gerrymandering cases.

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[8] Plaintiffs in other cases have also brought partisan gerrymander cases under the Elections Clause, U.S. Const. art. I, § 2. Although invidiousness is not an express element of such claims, the Clause has been construed as prohibiting the States, in the exercise of their powers under that Clause, from infringing on other constitutional rights. *See generally Common Cause v. Rucho*, slip op. at 177-78 and cases cited therein.

2. There Are Accepted and Judicially Manageable Standards as to the Level of Intent Applicable to Pinpoint Gerrymandering Cases

Assuming invidiousness is the overarching standard, this Court must determine the level of intent necessary to support a claim of partisan gerrymandering. In *Vieth*, the plurality rejected a "predominant" standard as judicially unmanageable because it is "indeterminate" and "vague." *Vieth*, 541 U.S. at 284-85 (plurality opinion). In *Bandemer*, the plurality did not appear to require that the partisan intent be the only or even primary motivation. *Bandemer*, 478 U.S. at 127 (plurality opinion). More recently, the court in *Common Cause v. Rucho* rejected a "predominant" standard as inconsistent with the *Arlington Heights* approach to discriminatory intent. *Common Cause v. Rucho*, slip op. at 84-85.

Again, because of the various forms of partisan gerrymanders, there is a need for flexibility in determining the level of intent sufficient to support the claim. In statewide challenges, given the multiplicity of purposes that inform the statewide plan, the "predominant" standard may be difficult to apply, and it should be sufficient for a plaintiff to prove that partisanship was "a" motivating factor for the line-drawing. *See Arlington Heights*, 429 U.S. at 265-66 & n.11 ("[t]he search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained"). Once invidious intent to gerrymander for partisan purposes is established, "the burden shifts to the

governmental defendant to prove that a legitimate state interest or other neutral factor justified such discrimination," *Common Cause v. Rucho*, slip op. at 145, *i.e.*, that the jurisdiction would have drawn the same lines even without the discriminatory intent. *Arlington Heights*, 429 U.S. at 270, n.21.

The same holds if the claim is viewed under the First Amendment, as the "motivating-factor requirement in First Amendment retaliation claims parallels the intent requirement in Equal Protection Claims." *Common Cause v. Rucho*, slip op. at 163. A plaintiff "must show that her protected First Amendment activities were a 'motivating factor' behind the challenged retaliatory action." *Common Cause v. Rucho*, slip op. at 163 (*quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 & n.2 (1977)).[9]

The *Arlington Heights* standard of discriminatory intent being "a" motivating factor for the line-drawing may be sufficient to support a claim of partisan gerrymandering in the pinpoint context also. However, if a predominance standard is applied to these cases, as some have suggested, these cases would be subject to a

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[9] In this context, the decision of the trial court below, requiring proof of a First Amendment gerrymander claim that "*but for* the gerrymander, the challenged effect (here, the switch in political power in the Sixth District) would not have happened," which could be satisfied only by a showing that the plaintiffs' candidate would have won reelection had the original map remained intact, *Benisek*, slip op. at 18, is not a correct statement of the law. It is contrary to the rule in *Mt. Healthy* that the unconstitutional retaliatory intent need be only "a" motivating factor. *See Benisek*, slip op. at 59-61 (Niemeyer, J., dissenting).

strict scrutiny analysis. Once predominant partisan intent is found, the burden shifts to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest," not merely a legitimate state interest. *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995).

Alternatively, the Court may adopt a flexible standard as to the level of invidiousness necessary to support a finding of unconstitutional partisan gerrymandering. The focus on the invidiousness of the decision-making relieves the courts of the need to adopt a one-size-fits-all subsidiary standard. The stronger the evidence of invidiousness, the sounder the basis for the Court to determine that the impact of the line-drawing is caused by an unconstitutional intent to minimize the voting strength of a particular political element.

C. The Georgia Case Demonstrates the Sort of Evidence Relevant to Pinpoint Gerrymander Claims

Applying the *Arlington Heights* factors to determining invidiousness in redistricting cases, these factors encompass not only express statements of decision-makers' intent, but also trial-tested evidence such as using race as a proxy for party, deviations from traditional districting principles, redistricting in the middle of a census cycle, and other forms of manipulation that indicate the decision-maker strayed from typical procedures or made substantive choices that

furthered no legitimate governmental interest. Additionally, of course, injurious effect must be proved. *See*, *e.g.*, *League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 422 (2006) (addressing appellants' contention that the Texas Legislature "intentionally sought to manipulate" districts through their population variances). Of course, not all of these elements are going to be present in every case, but some salient factors are laid out below. The Georgia case provides a vivid example of some of these most important factors at play.

1. Statements by Officials Involved in the Line-Drawing Decision

As the court in *Common Cause v. Rucho* noted, "the Supreme Court has never recognized that a legislature may draw district lines for the purpose of diminishing or minimizing the voting strength of supporters of a particular party or citizens who previously voted for representatives of a particular party. . . ." *Common Cause v. Rucho*, slip op. at 62. Thus, direct evidence of invidious intent such as express statements that the purpose of the line-drawing was to favor one political element may be virtually conclusive on the issue.

In the lawsuit brought by the Georgia redistricting plaintiffs, there are express, unequivocal admissions that the purpose of redistricting was to protect Republican incumbents. Indeed, one staff member of the Legislative and Congressional Reapportionment Office (the "Reapportionment Office") confirmed that he generally understood one of his roles to be that of

maintaining Republican control of the Georgia General Assembly. [O'Connor Depo. at pp. 51-52].

Gina Wright, the Executive Director of the Reapportionment Office, is the individual who, at the request and consent of incumbent Republican legislators Chandler and Strickland, redrew the maps for Georgia House Districts 105 and 111 in 2015. [Deposition of Gina Wright taken in *Georgia State Conference of the NAACP, et al. v. State of Georgia*, *et al.*, ___ F. Supp. 3d ___, 2017 WL 3698494 (Aug. 25, 2017) ("Wright Depo."), available at https://lawyerscommittee.org/wp-content/uploads/2018/01/112017WrightFull.pdf]. The changes proposed by Ms. Wright to those districts were then adopted and passed into law by the Republican majority in the Georgia General Assembly through H.B. 566. Ms. Wright freely admitted that the reason for the changes to Districts 105 and 111 was to keep the incumbent Republicans safe in their campaigns for reelection or, in her words, to give them a "political boost." *Id*. at 22, 219.

As Ms. Wright further testified, the "objective [for the redistricting] was to make these districts, if at all possible anyway, better for these incumbents to get reelected. . . ." [Wright Depo. at p. 30]. When asked what the representatives from District 105 and District 111 "wanted to achieve" when they came to her office for help, she confirmed: "[t]hey were looking for a political advantage. . . ." [Wright Depo. at pp. 21-22]. As to her efforts to help Representative Chandler from District 105, Ms. Wright agreed that "part of the conversation was about [Chandler] trying to maximize the

chances of her being able to retain her seat." [Wright Depo. at p. 23]. As to her efforts to help Representative Strickland of District 111, Ms. Wright admitted that it would "be fair to say that the goal was for Representative Strickland in 111 to be able to maintain his seat." [Wright Depo. at pp. 27-29; 175-77].

Ms. Wright also freely admitted that there is a correlation between race and partisanship in the State of Georgia, and that fact was taken into consideration in redrawing the maps for both Districts 105 and 111. [Wright Depo. at pp. 29-32]. Ms. Wright specifically testified that racial demographics were considered when the maps were drawn. [Wright Depo. at pp. 29-32].

2. The Use of Race to Achieve a Partisan End in Line-Drawing

The use of race as a proxy for partisan goals has been a recurring theme in redistricting litigation over the years, which shows no sign of abating.[10]

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[10] *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1476-77 & n.7 (2017) (rejecting State claim that politics alone drove drawing of congressional district, not race: "In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."); *LULAC v. Perry*, 548 U.S. 399, 440 (2006) (rejecting claim that redrawing of Congressional district was primarily for political, not racial, reasons); *Perez v. Abbott*, No. 5:11-cv-00360-OLG-JES-XR, 2017 WL 3495922 at *41 (W.D. Tex. Aug. 15, 2017) (describing State's purpose of adding significant population from Travis County into Congressional District 35 was "to use race as a tool for partisan goals"); *id*., 2017 WL 1450121 at *14-16 (W.D. Tex. Apr. 20, 2017) (rejecting excuse that increasing or maintaining the Spanish surname voter percentage while simultaneously

Unfortunately, this is precisely what the Georgia Legislature did when redrawing Georgia State House of Representatives Districts 105 and 111 in 2015. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12. The evidence in that case demonstrates that the Reapportionment Office knew that Districts 105 and 111, through recent demographic shifts, were becoming perilously close to having a 40 percent African-American voter registration. [O'Connor Depo. at pp. 140-41, 156]. Personnel in the Reapportionment Office confirm that as a significant metric to maintaining Republican control over a district; indeed, once the African-American population of a district reached that level, it virtually ensured that Democrats would win the district. [O'Connor Depo. at pp. 141-42, 153-56]. The Reapportionment Office also knew that, as a result of this metric, both Representatives Chandler and Strickland had come very close to losing their reelection campaigns in 2014. [O'Connor Depo. at pp. 65, 66, & 141-42; Wright Depo. at pp. 193-96; Wright Depo. Exhibit 38]. The math was simple: to preserve the safety of these Republican incumbents in any reelection challenge, would require cutting the African-American percentage of the population in the districts, and specifically the African-American

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and intentionally minimizing Latino voters' ability to elect in State House Districts 78 and 117 was partisan gerrymandering); *id*., 2017 WL 962947, at *59 (W.D. Tex. Mar. 10, 2017) (describing "mapdrawers as willing to disadvantage minorities to gain partisan advantage . . . and that they were willing to use race to gain partisan advantage . . . and limit the number of Democrat districts overall").

registered voters in Districts 105 and 111. And that is precisely what the Georgia Legislature did.

Employing race to further partisan interests is *per se* evidence of an invidious politically discriminatory intent. This may occur by using racial data as a proxy for partisan performance, intentionally packing or cracking minority communities, using arbitrary numerical racial thresholds not based on evidence of minority voters' ability to elect candidates of their choice, splitting voting precincts or voting tabulation districts using racial data, artificially inflating the minority percentage in a low-turnout district to benefit the other political party, or other means.

It is important for the Court to clarify that using race as a proxy for party is an indicium of invidiousness in partisan gerrymander cases because courts have not been uniform in their response to the defense of partisanship in racial discrimination cases.[11]

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[11] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (stating that the "use of race as a proxy" for "political interest[s]" is "prohibit[ed]"); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006) (finding that the Texas redistricting plan bore "the mark of intentional discrimination" on the basis of race when the legislature used racial considerations to achieve a partisan result); *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (discussing the rapid increase in minority populations in Texas such that "the party currently in power is 'facing a declining voter base and can gain partisan advantage' through a strict voter ID law" was evidence that could support a finding of intentional discrimination based on race); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) ("intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes

Discriminating on the basis of race to achieve a partisan goal should not be a defense against a racial discrimination claim. Even if partisanship were a legitimate goal, using a suspect classification as the means of achieving that goal is unconstitutional. *See*, *e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (holding that a North Carolina law preventing sex offenders from using social media for the purpose of protecting vulnerable victims was unconstitutional because it was unnecessarily burdensome on First Amendment rights); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (identifying the standard under Title VII when a plaintiff proves that her gender

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discriminatory purpose"); *Perez v. Abbott*, 2017 WL 962947, at *63 (W.D. Tex. Mar. 10, 2017) (finding that the redistricting plan was intentionally discriminatory because the legislature drew the plan on the basis of race "using race as a proxy for voting behavior"); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 727-28 (S.D. Tex. Jan. 6, 2017) (finding that "[b]y clearly and explicitly intending to diminish Latinos' voting power for partisan ends, Pasadena officials intentionally discriminated on the basis of race"); *contra Rodriguez v. Harris Cty., Tex.*, 964 F. Supp. 2d 686, 804 (S.D. Tex. 2013) (declining to find racial considerations "steered the redistricting process" because "proclivities" of Latinos to vote Democratic and Anglos to vote Republican, "without more, cannot transform partisanship into race discrimination"); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1248 (C.D. Cal. 2002) (California legislature had non-racial goals such as "protecting incumbents" and "advancing partisan interests" and the redistricting plan was therefore not intentionally discriminatory); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1296-98 (S.D. Fla. 2002) (finding that the "Republican-controlled legislature intended to maximize the number of Republican congressional and legislative seats through the redistricting process" and engaged in a "raw exercise of majority legislative power" but did not intentionally discriminate on the basis of race).

played a motivating part in an employment decision); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (Nebraska law prohibiting teaching any language other than English through eighth grade, enacted to promote civic development, violated the Fourteenth Amendment). In the context of a partisan gerrymandering claim, it is itself an indication that the jurisdiction is acting unconstitutionally.

3. Modifying a Plan Mid-Decade

If a legislature modifies a legitimately drawn, legislatively-enacted plan compliant with the one person, one vote principle, and enacts an unnecessary mid-census redistricting plan solely for the purpose of making swing districts less competitive to the benefit of the party in power, that is an indicium of an invidious partisan motive.

Again, the 2015 Georgia State House redistricting plan is an instructive example of a mid-census redistricting enacted with such an invidious intent. There, the Georgia Legislature needlessly redrew district boundaries that complied with the one person, one vote principle and had survived scrutiny by the Department of Justice. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2. Its purpose in doing so was to move the goal posts to help white Republican incumbents who had narrowly defeated black Democratic challengers in swing districts that were experiencing an increase in minority voter registration percentage

due to demographic changes.[12] *Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *2-3. In the case of State House District 105, Representative Joyce Chandler won by 554 votes in 2012 and 789 votes in 2014, and has since acknowledged that her district is becoming increasingly "diverse." In the 2016 election, under the new lines, Chandler prevailed by 222 votes. *See id*. at *2.

4. Deviation from Traditional Districting Principles

While a jurisdiction can engage in invidious discrimination even if it complies with traditional districting principles, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017), failure to comply with such principles is evidence of discriminatory intent. Those traditional principles include, among other things, considerations of maintaining population

[12] While this Court confirmed in *League of United Latin American Citizens v. Perry* (*LULAC*) that the Constitution does not prohibit mid-decade redistricting *per se*, mid-decade modifications of the swing districts by the same party that drew the lines merit scrutiny, particularly when that party has already achieved super-majority status. In *LULAC*, the Supreme Court stated that (1) partisan gain was not necessarily the "sole motivation" for the entire redistricting plan, *id.* at 417; (2) the Republican legislature was replacing a court-ordered plan, which had previously entrenched the Democrats, a party on the verge of minority status, *id.* at 416, 419; and (3) the new plan made the "party balance more congruent to statewide party power." *Id.* at 419. As noted above, the facts of the Georgia redistricting are easily distinguishable from those in *LULAC*.

equality, geographic compactness, and avoiding the splitting of precincts and counties.

In the lawsuit brought by the Georgia redistricting plaintiffs, there are numerous examples of the failure by the General Assembly to comply with traditional districting principles in drawing the maps for Districts 105 and 111, and the only real explanation for the failure to do so was the goal of protecting Republican incumbents. [Wright Depo. at pp. 22 & 219; Expert Report of Jowei Chen, filed in *Georgia State Conference of the NAACP, et al. v. State of Georgia*, *et al.*, ___ F. Supp. 3d ___, 2017 WL 3698494 (Aug. 25, 2017), ECF Doc. No. 63-1 ("Chen Expert Report") at pp. 26-32].

The 2015 Plan, for example, created more significant population deviations for both Districts 105 and 111, [Chen Expert Report at pp. 26-28], and worsened the geographic compactness of both Districts 105 and 111. [Chen Expert Report at p. 29]. Additionally, in House District 111, the 2015 Plan substantially increased the number of split precincts from two to five. Indeed, the 2015 Plan split precincts, counties, and cities. [Chen Expert Report at pp. 29-32]. Thus, there was a significant violation of traditional districting principles in redrawing Districts 105 and 111. [Chen Expert Report at pp. 26-32].

5. Injurious Effect

Disproportionality in the results of statewide elections – *i.e.*, the gap between a party's vote share and

seat share in a state – does not in and of itself prove an unconstitutional statewide partisan gerrymander. *Bandemer*, 478 U.S. at 130-31. However, when combined with other factors, it can support the conclusion of an invidious intent to minimize the voting strength of a discrete political element. The same is true of other statewide measures of impact such as asymmetry (the extent to which the percent of votes of one party does not translate to the percent of votes achieved by the opposing party) or the efficiency gap.

Such statewide measures of impact, however, are not applicable to pinpoint gerrymanders, because proof of impact in such cases does not involve a comparison with other districts, but only the actual or projected election result. In Georgia in 2012 and 2014, white Republican incumbents barely beat African-American Democrats in districts where the minority registered voter percentage was steadily increasing due to demographic changes. In 2015, the Legislature responded by cutting neighborhoods of African-American Democratic voters out of those districts. *See Georgia State Conf. of the NAACP*, 2017 WL 3698494, at *12. A quantification of statewide disproportionality, asymmetry, or efficiency gap would not instruct on the discriminatory impact of the line-drawing. Rather, the proof of impact would be in the form of past election results and/or projected future election results, *i.e.*, showing that elections were tight, that specific groups were targeted for exclusion or inclusion in the district, and that the line-drawing party continued to win, or could be projected to win. *See Bandemer*, 478 U.S. at 141

(plurality opinion) (combining the district configurations "with vote projections to produce future election results. . . .").

Again, the Georgia case provides illustrative proofs. The Reapportionment Office was successful in achieving its goals. Both Chandler and Strickland won their subsequent reelection challenges, something the Reapportionment Office admits would not have happened but for the changes to the district maps in 2015. [O'Connor Depo. p. 90].

Under no circumstances, however, should the burden be placed on plaintiffs pressing claims of partisan gerrymandering to prove that their candidates have already lost elections solely because of the challenged line-drawing. Such a requirement would delay suit until after the gerrymander had governed at least one election and thus allow legislatures to reap the benefits of their invidious intent. This is particularly so in the case of pinpoint gerrymanders, where changes may be implemented with every new legislative election cycle, as they were in a succession of Georgia Legislative sessions.

D. The Court Should Allow the Contours of Subsidiary Legal Standards and Evidence Relevant to Gerrymander Cases to Evolve

Because partisan gerrymander cases come in so many forms, there is no need for the Court to announce all subsidiary legal and evidential standards that are

applicable to all cases. Indeed, it would be a mistake to do so. The same evidence that is relevant to a statewide redistricting on the heels of a census cycle is unlikely to apply to a mid-decade manipulation of the lines of a single district. The courts, guided by general legal standards set forth by this Court, may devise the subsidiary standards on a case-by-case basis, as they evolve over time, precisely the way other constitutional jurisprudence has developed.

This is what happened in the cognate area of one person, one vote cases after *Baker v. Carr*, 369 U.S. 186 (1962). In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court declined to employ a specific substantive standard in the course of concluding that Alabama's apportionment plans violated the Equal Protection Clause, instead simply declaring that "the deviations from a strict population basis are too egregious . . . to be constitutionally sustained." 377 U.S. at 568-69. While Chief Justice Warren declared in *Reynolds* that "mathematical nicety is not a constitutional requisite" when adjudicating one person, one vote cases under the Equal Protection Clause, *id.* at 569, the Court would later reverse course and determine that certain numerical thresholds were in fact appropriate. By not defining the limits of the one person, one vote principle at the outset, *Carr* and *Reynolds* gave lower courts latitude to rein in severe malapportionment in the short term while allowing the Court to develop workable and easily-communicable legal and evidential standards in future cases.

Particularly in regard to the use of statistical methods to prove impact – whether in statewide or pinpoint claims – trial courts can exercise their role as gate-keepers, applying the time-tested standards of *Daubert*. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

CONCLUSION

For the foregoing reasons, the Court should hold that partisan gerrymandering claims are justiciable and subject to a judicially-manageable standard of invidiousness applicable to the variety of gerrymanders, including the pinpoint gerrymander enacted by the Georgia Legislature in 2015.

Respectfully submitted,

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