Nos. 18-422 and 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,
v.
COMMON CAUSE, ET AL.,
Appellees.

LINDA H. LAMONE, ET AL.,
Appellants,
v.
O. JOHN BENISEK, ET AL.,
Appellees.

On Appeal from the United States District Courts for Maryland and the Middle District of North Carolina

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including through work to protect the right to vote and ensure fair and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on electoral practices and redistricting and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center has a significant interest in this case, given the Center's longstanding concern about the growth of extreme partisan gerrymandering—a relatively rare but pernicious redistricting tactic that deeply offends the constitutional principles that form the foundation of our representative democracy. On the basis of its own research and studies undertaken by others, the Brennan Center has identified several readily discernible evidentiary signposts that can help the Court differentiate be-

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

tween lawful redistricting and unlawful, extreme partisan gerrymanders like those that have occurred in North Carolina, Maryland, and a few other congressional maps this past redistricting cycle.

The Brennan Center hopes that its perspective will encourage the Court to overturn North Carolina's and Maryland's unconstitutional partisan gerrymanders, and help the Court define a manageable standard that will limit both the likelihood of such extreme gerrymanders recurring in the upcoming decade and judicial intervention into normal political processes. The continued vitality of our constitutional democracy depends on it.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve a particularly pernicious but relatively rare variety of gerrymandering where a political party manipulates the redistricting process to maximize its seats in a legislative body or delegation and insulate those seats from foreseeable future changes in voter preferences. The Court has recognized that such extreme partisan gerrymanders are "incompatible with democratic principles." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (quotation and brackets omitted) (decrying "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power"); *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality op.) (concluding that "an *excessive* injection of politics is *un*lawful"). The main question facing the Court in the instant cases is how to develop a legal standard

to adjudicate and vindicate those constitutional norms.

The Brennan Center submits this brief to explain how the Court can invalidate the extraordinary constitutional abuses that occur with extreme gerrymandering, while avoiding judicial interference with the large number of maps created through the ordinary "'pull, haul, and trade'" of politics. *See, e.g.*, *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 507 (2006) (Roberts, C.J., concurring in part and dissenting in part) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

Appellees have provided the Court with several manageable legal standards. And by any of these measures, the maps in North Carolina and Maryland are unconstitutional. That outcome is unsurprising. The various standards share, by and large, the same general structure, calling for plaintiffs to demonstrate the map-makers' intent to disadvantage their political opponents, success in disadvantaging their political opponents, and an absence of a legitimate justification for doing so.

Regardless of how the Court ultimately decides to address partisan gerrymandering as a broader problem, the Court can—at the very least—use a version of these common elements to strike down the most extreme partisan gerrymanders. Such a standard would flag a remediable constitutional violation where, as here, the party in control of the redistricting process (1) intentionally sought to maximize its statewide partisan advantage and insulate its seats from changing voter preferences, (2) succeeded in do-

ing so, and (3) lacked any legitimate justification for its mapping decisions.

Under this standard, both North Carolina's and Maryland's maps would be unconstitutional. In both North Carolina and Maryland, politicians *expressly* redrew congressional maps in a one-sided process to create and lock in the maximum possible partisan advantage for their party, an advantage they historically lacked. Indeed, it would be difficult for mapmakers to do anything more extreme from the perspective of partisan advantage than they did in North Carolina and Maryland.

Targeting extreme partisan gerrymanders such as North Carolina's and Maryland's will neither trigger excessive amounts of new litigation, nor authorize judicial interference in healthy political processes. Indeed, extreme partisan gerrymanders like North Carolina's and Maryland's are anomalous, extraordinarily anti-democratic, and impervious to normal political solutions.

The Court can address any remaining concerns about the manageability of this legal standard by incorporating one or more additional limiting factors into its inquiry. The appropriate factors are highly correlated with, and help confine judicial intervention to, extreme partisan gerrymanders. Single-party control of the redistricting process, for example, is a prerequisite for a governing majority to use its domination of the process to entrench itself in power. Further, a recent history of close statewide elections provides both the motive and the opportunity for a temporary majority to undertake an extreme power grab. In addition to these factors, ir-

regularities in the redistricting process may also be useful for separating constitutionally unproblematic maps from problematic ones.

The record in these cases demonstrates the point. Take North Carolina, for example. North Carolina is essentially evenly divided between Republicans and Democrats, as statewide elections have repeatedly demonstrated. Yet during the last redistricting cycle, following a wave election, Republicans gained control of both chambers of North Carolina's legislature. They therefore had the opportunity to manipulate North Carolina's district lines to guarantee themselves large congressional majorities into the future, even if they were to lose a majority of the statewide vote. And they grabbed it. After courts ordered the North Carolina congressional map redrawn to remedy racial gerrymandering violations, Republicans proclaimed that they would redraw the map to be "a political gerrymander," adopting written criteria requiring that any map have a 10-3 Republican advantage, the maximum partisan advantage Republicans believed they could achieve. They shut Democrats out of the congressional map-drawing process and pushed through a map that was intentionally designed to, and effectively did, entrench Republicans in power. That conduct transgressed the boundaries of normal politics, and because it was carried out in a closely divided state by a party enjoying sole control over the redistricting process, this Court should be highly skeptical of appellants' post hoc justifications for the resulting map. A similar, and similarly straightforward, analysis reveals that this Court should also invalidate the Maryland map at issue in *Benisek*.

Policing such extreme abuses of the redistricting process in the ways discussed will amount to a limited judicial intervention to protect our representative form of government, while safeguarding against interference in normal redistricting processes, which can easily be differentiated by applying the above-referenced factors.

Striking down the aggressive anti-democratic abuses in North Carolina and Maryland will not politicize or delegitimize the federal courts. To the contrary, the Court's confirmation that extreme partisan gerrymanders like North Carolina's and Maryland's are unconstitutional and will be struck down will promote the vitality and integrity of all our nation's governmental institutions, including this Court itself. Politicians have interpreted the absence of judicial limits on partisan gerrymandering as tacit consent to create extreme partisan gerrymanders. A clear pronouncement from this Court barring these gerrymanders will likely have a strong prophylactic effect heading into the next round of redistricting in 2021. Such a pronouncement will also reaffirm long-standing American norms against government action designed to entrench the power of our elected officeholders.

Given the extreme facts of these cases and the stark threats they pose to our core constitutional values, the Court has never been better positioned than it is today to erect basic guardrails around the redistricting process. The Court should affirm the judgments below and hold North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

ARGUMENT

I. EXTREME PARTISAN GERRYMANDERS SUCH AS NORTH CAROLINA'S AND MARYLAND'S ARE RARE, JUDICIALLY MANAGEABLE CONSTITUTIONAL VIOLATIONS.[2]

Appellees have offered the Court a variety of manageable approaches to policing unconstitutional abuses of our redistricting processes. These approaches share several common features, including a near-universal focus on map-drawers' impermissible intent to disadvantage members of an opposing party, their success in doing so, and an absence of a cognizable justification for the map. At a minimum, the Court can use these basic building-blocks of partisan gerrymandering claims to target the problem of extreme partisan gerrymanders.

A clear constitutional standard barring extreme partisan gerrymandering would have three elements: first, the party that controlled the redistricting process intentionally sought to maximize its *statewide* partisan advantage and insulate it from

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[2] Because the Brennan Center previously submitted a brief detailing why the Maryland map at issue in *Benisek* should be deemed unconstitutional, this brief focuses primarily on the facts and circumstances that make North Carolina's extreme gerrymander unconstitutional. *See* Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellants, *Benisek v. Lamone*, No. 17-333 (S. Ct. Jan. 29, 2018) ("*Benisek* Brennan Br."), https://www.brennancenter.org/sites/default/files/legal-work/Benisek_Brennan_Center%20Amicus_Brief.pdf. The legal and institutional arguments presented throughout this brief apply equally to both cases.

normal political swings; second, the party succeeded in doing so; and, third, the party can provide no legitimate justification for its mapping decisions.[3]

A three-part inquiry of this kind is limited and manageable. As the Brennan Center's research demonstrates, this type of legal standard would direct courts' focus to a very narrow set of maps that are extraordinarily anti-democratic and immune to correction through the normal push and pull of electoral politics. This standard would thus ensure that the federal courts do not become overly involved in redistricting processes, while simultaneously focusing the courts' attention on those situations where the need for their intervention is at its highest.

A. The North Carolina And Maryland Maps Are Unquestionably Extreme Partisan Gerrymanders.

As the court below found, the evidence of the North Carolina Republican map-makers' intent to discriminate against voters based on their political viewpoints and entrench Republicans in power could not be clearer. *See* App. 155-87. Their ultimate objective was to retain the same 10-to-3 advantage that

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[3] The Court has clear models for applying each element of this standard, from abundant evidentiary guidelines for assessing legislative intent, *see, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), to substantial social science evidence for evaluating the partisan effects of particular maps, *see, e.g.*, Br. of *Amici Curiae* Political Science Professors in Support of Appellees and Affirmance, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017), https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_PoliticalScienceProfessors_InSupportof%20Appellees.pdf.

Republicans enjoyed over Democrats under a 2011 congressional map that this Court struck down as an unconstitutional *racial* gerrymander in *Cooper v. Harris*, 137 S. Ct. 1455 (2017). The legislators charged with drawing North Carolina's map directed the primary map-drawer to consider "Partisan Advantage," a criterion expressly requiring "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." App. 20. They also included a "Political Data" criterion specifying that, aside from population counts, "[t]he only data … to be used to construct congressional districts shall be election results in statewide contests." *Id.* And they explained that the sole reason for using political data was "to gain partisan advantage." *Id.* at 22.

The Republican map-makers also candidly admitted that their overriding purpose in drawing North Carolina's map was to maximize their party's power. App. 157. Representative Lewis, one co-chair of the redistricting committee, "acknowledge[d] freely that [the map] would be a political gerrymander," and emphasized that "the goal" was "to elect 10 Republicans and 3 Democrats." *Id.* at 22-23; *see also id.* at 157 (emphasizing that the Republicans "did seek a partisan advantage in drawing the map"); *id.* at 159 (admitting map was drawn "in a way to help foster" the election of Republican candidates). Senator Rucho, the committee's other co-chair, echoed Representative Lewis's sentiments. *See id.* at 157. And the map-makers confessed that they did not give Republicans a greater partisan advantage only because it was impossible "to draw a map with 11 Republicans and 2 Democrats." *Id.* at 22, 183. North Caro-

lina's map, in other words, personifies the facially-discriminatory statute that several Justices suggested—and the attorneys for Wisconsin and Maryland conceded—would be unconstitutional during the Court's partisan gerrymandering arguments last Term. *See Gill* Tr. 20-21, 26-27; *Benisek* Tr. 45-48.

The partisan skew of North Carolina's map is likewise and unsurprisingly immense, and it almost surely will persist over time. *See* App. 187-214 (district court finding that North Carolina's map "dilutes the votes of non-Republican voters—by virtue of widespread cracking and packing—and entrenches the State's Republican congressmen in office").

The first two elections held under the 2016 map confirm Republicans' success in maximizing and entrenching their seats. In the 2016 election, the Republicans "achieved [their] unambiguously stated goal: North Carolina voters elected a congressional delegation of 10 Republicans and 3 Democrats." App. 188. At the same time, the statewide vote was split roughly equally between Republican and Democratic congressional candidates, and a Democrat was elected governor. *Id.* at 189. This advantage persisted through the 2018 election, despite Democrats increasing their share of the statewide vote by nearly 2.3 points.[4] And appellees' experts presented evi-

[4] This figure reflects the statewide vote *excluding* the results of the uncontested race in the Third Congressional District. The fate of the Republicans' tenth seat has yet to be determined. On February 21, 2019, the North Carolina State Board of Elections unanimously called for a new election for the Ninth Congressional District following discovery of an election fraud scheme that favored Republican candidate—and initial winner—Mark Harris. *See* Brian Murphy, *et al.*, *NC State*

dence that this pronounced imbalance would persist for the foreseeable future. *Id.* at 190-97, 209-12. Their analysis showed, for example, that "all [of North Carolina's 13] districts … are 'safe,'" i.e., "highly unlikely to change parties in subsequent elections." *Id.* at 190.

It is equally plain that there is no legitimate justification for North Carolina's map. *See* App. 215-22. As the district court explained, the map-makers "drew a plan designed to subordinate the interests of non- Republican voters not because they believe doing so advances any democratic, constitutional, or public interest, but because, as the chief legislative mapmaker openly acknowledged, the General Assembly's Republican majority think[s] electing Republicans is better than electing Democrats." *Id.* at 6 (emphasis and quotation omitted). In this litigation, the Republican map-makers have claimed that their map was justified by (i) North Carolina's political geography and (ii) the legislature's interest in protecting incumbents. *Id.* at 215. But the map-makers themselves created at least two draft maps that performed as well as their chosen map in terms of these traditional districting criteria and yet were far less skewed. *See generally* Ex. 4022. Notably, using the same non-partisan criteria, appellees' expert also randomly generated thousands of comparator maps—all of which equaled or exceeded the chosen map's performance in terms of the non-partisan

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Board Votes for New Election in 9th District After Harris Calls for New Race, News & Observer (Feb. 21, 2019), https://www.newsobserver.com/news/politics-government/article226561504.html#topicLink=election-fraud-investigation.

criteria, and none of which exhibited its extreme partisan skew. App. 168-71, 220-22.

In short, North Carolina's Republicans devised and carried out a plan to win as many seats as possible and to extend their control over the state's congressional slate through at least the decennial period, without any legitimate justification.

As detailed in the Brennan Center's prior *Benisek* brief, the Maryland map at issue in that case is similarly extreme. It too was avowedly drawn to maximize the Democratic share of the congressional delegation, and abundant record evidence shows that the Democrats' plan was a success and lacked any reasonable justification. *Benisek* Brennan Br. 8-9.

B. Extreme Partisan Gerrymanders Are Relatively Rare.

Even with the widespread and pernicious belief among map-drawers that the courts will not police extreme partisan gerrymandering, *see infra* Section III, the extreme gerrymandering on display in North Carolina and Maryland has appeared only rarely this decade. The Brennan Center studied congressional election results from this decade's races to assess the extent and the durability of "partisan bias"—the degree of systematic advantage one party receives over another in turning votes into seats. Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps* 1, 3 (2017).[5] According to this analysis, only seven states' congressional maps displayed persistent, extreme levels of partisan bias.

[5] https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf.

Id. at 1, 2, 14.[6] Other studies show that approximately a dozen state legislative maps displayed similar levels of partisan bias. *See, e.g.*, Expert Report of Simon Jackman at 73, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. Jan. 22, 2016), ECF No. 58-1.

These studies do not assess the *intent* underlying these extremely skewed maps. But logic dictates that requiring plaintiffs claiming a constitutional violation to demonstrate not only a partisan skew, but also an intent to achieve such a skew could only narrow the set of potentially unconstitutional maps. By setting a legal standard focused on such extreme partisan gerrymanders, the Court thus would not create a large pool of potentially meritorious claims.

C. Extreme Partisan Gerrymanders Are Deeply Anti-Democratic And Offend Basic Constitutional Principles.

While the Court should be hesitant to interfere with ordinary inter-party politics, what happened in North Carolina and Maryland—and what is likely to be at issue in any case where a governing majority that happens to be in charge at the time of redistricting seeks to entrench itself in a perennially competi-

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[6] Two of those states—Ohio and Michigan—have enacted legal reforms that reduce the risk of extreme partisan gerrymandering during the upcoming round of redistricting. *See* Sam Levine, *Ohio Voters Pass Gerrymandering Reform Measure*, Huff. Post (May 8, 2018), https://www.huffingtonpost.com/entry/ohio-gerrymandering-reform_us_5af1a93ee4b0ab5c3d6a0bd2; Paul Egan, *Michigan Voters Approve Anti-Gerrymandering Proposal 2*, Detroit Free Press (Nov. 6, 2018), https://www.freep.com/story/news/politics/elections/2018/11/06/proposal-2-michigan-gerrymandering/1847078002/.

tive state—is not normal, but extraordinary and deeply anti-democratic.

Indeed, extreme partisan gerrymanders, such as North Carolina's and Maryland's, violate at least three related constitutional norms, all of which lie at the heart of our constitutional democracy: government accountability, legislative representativeness, and neutral treatment of political expression and association. Br. for the Brennan Ctr. for Justice at N.Y.U. School of Law as *Amicus Curiae* in Support of Appellees at 21-36, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017) ("*Gill* Brennan Br.").[7] When a court strikes down such maps, it is policing only maps that fall far outside the bounds of legitimate democratic governance. Moreover, it is striking down only those maps that cannot be corrected through the normal political process.

1. Extreme partisan gerrymandering undermines legislators' accountability to the people. *See id.* at 21-27. These gerrymanders create "lock[ed]-in" or "safe" seats, and legislators "elected from such safe districts need not worry much about the possibility of shifting majorities" and "have little reason to be responsive to political minorities within their district." *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also Reynolds v. Sims*, 377 U.S. 533, 570, 576 (1964) (decrying "a minority strangle hold on the State Legislature" and "frustration of the majority will"); *Baker v. Carr*, 369 U.S. 186, 258-59 (1962) (Clark, J., con-

[7] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BrennanCenterforJustice_InSupportofAppellees.pdf.

curring) (noting lack of "practical opportunities" for the "majority of the people" to correct malapportionment at the polls). We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). But a legislature essentially held hostage by one party or the other is not the responsive body the Constitution envisions. This Court's intervention is necessary to preclude that unconstitutional result.

2. Extreme partisan gerrymandering also locks in a legislative delegation that comes nowhere close to reflecting the political diversity of the state's populace, thereby undermining another core value undergirding our democratic system of government: legislative representativeness. *Gill* Brennan Br. 27-33. Representativeness is critically important not only in and of itself, but also because it guarantees that the legislature will be accountable to *all* of the people it represents.

When the governing majority of the day permanently entrenches itself in power, the legislative bodies no longer "think, feel, reason, [or] act like" the people at large. John Adams, Thoughts on Government: Applicable to the Present State of the American Colonies; In a Letter from a Gentleman to his Friend (Apr. 1776). States that may have vibrant political cultures with diverse perspectives are left with one-note legislatures. The debates held in legislative bodies and the policies lawmakers enact into law bear little resemblance to the fuller conversations among voters in homes and public spaces throughout the state.

To be sure—as appellants and their *amici* unrelentingly, if misguidedly, reiterate—the Constitution does not require precise proportionality of the nation's legislative bodies or that every voter be able to elect the candidate of her choice. But that does not mean the opposite is true, i.e., that legislative bodies should bear little resemblance to the polity they represent. Simply put, the Constitution demands at the very least that there not be a gross disconnect between a representative body and the people it purports to represent. That kind of gross disconnect is the product of entrenchment, and tolerating it ignores our nation's foundational precept that "the voters should choose their representatives, not the other way around." *Ariz. State Legislature*, 135 S. Ct. at 2677 (quotation omitted).

3. Extreme partisan gerrymandering also transgresses crucial First Amendment limits on legislative decision-making.

The First Amendment requires the government to remain neutral regarding its citizens' ideological affiliations. "[A]bove all else," the Court has held, "the First Amendment means that government has no power to restrict expression *because of* its message, its ideas, its subject matter or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). That neutrality principle has particular force in the context of elections, because the political acts of voting and associating to advance political causes are quintessential exercises of First Amendment rights. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (noting regulation of voting burdens First Amendment rights); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983) (recogniz-

ing rights of voters "to cast their votes effectively" and "to associate for the advancement of political beliefs" (quotations omitted)). These two rights are related, allowing individuals to band together for purposes of advancing their candidates through the ballot. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Cal. L. Rev. 1209, 1248-49 (2003) (citing *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296 (1981); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)).

Extreme partisan gerrymandering—which involves the government's intentional burdening of the efficacy of citizens' votes "*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 in the judgment) (emphasis added)—is plainly irreconcilable with those First Amendment principles, *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (recognizing that "significant 'First Amendment concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment'" (alteration in original) (quoting *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment))). It is governmental action to disadvantage voters, parties, and political organizations "on account of their political [expression or] association" which, this Court has recognized, contravenes the First Amendment. *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996).

The First Amendment harms caused by extreme partisan gerrymanders are even more damaging be-

cause they undercut the constitutional values of legislative accountability and representativeness discussed above. By selectively impacting the expressive and associational rights of one group, severe partisan gerrymandering limits legislators' "responsive[ness] to the political minorities within their district," locking out of political processes the party that is in the minority when the maps are drawn (much like racial minorities are locked out as a result of a racial gerrymander). *LULAC*, 548 U.S. at 470-71 (Stevens, J., concurring in part and dissenting in part); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality op.) ("those who govern should be the *last* people to help decide who *should* govern"); *id.* at 227 ("responsiveness" to constituent views "is key to the very concept of self-governance through elected officials"). Likewise, by undermining voters' foundational right to associate to further their political beliefs through the "pull, haul, and trade" of ordinary politics, extreme partisan gerrymandering negates their ability to choose a government that represents their diverse needs and interests. *See, e.g.*, *Gill*, 138 S. Ct. at 1938-40 (Kagan, J., concurring); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Citizens Against Rent Control*, 454 U.S. at 296; *Kusper*, 414 U.S. at 57. And as Justice Kagan recognized in *Gill*, "what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations)," because "[b]y placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions." 138 S. Ct. at 1938.

D. North Carolina's And Maryland's Extreme Partisan Gerrymanders Violate Those Constitutional Principles.

The constitutional harms generated by "severe partisan gerrymanders" explain why North Carolina's and Maryland's extreme gerrymanders are "incompatib[le] … with democratic principles" and must be held unlawful by this Court. *Vieth*, 541 U.S. at 292 (plurality op.). The map-makers drew North Carolina's and Maryland's maps to reduce the responsiveness and representativeness of the legislature with respect to a large segment of constituents, specifically because of those constituents' chosen political affiliation. Such action undermines principles of popular sovereignty, governmental accountability, and equal treatment that are embodied in the First and Fourteenth Amendments and lie at the heart of our system of democracy.

Already, this Court "has recognized" that such severe "[p]artisan gerrymanders … [are incompatible] with democratic principles." *Ariz. State Legislature*, 135 S. Ct. at 2658 (second alteration in original) (quoting *Vieth*, 541 U.S. at 292 (plurality op.)). Indeed, *every* Justice in *Vieth* agreed that "an *excessive* injection of politics is *un*lawful." 541 U.S. at 293 (plurality op.). Both this Court and individual Justices, moreover, have on several other occasions specifically identified actions that entrench a political party as constitutionally impermissible. *See, e.g.*, *LULAC*, 548 U.S. at 419-20 (expressing concern with map "that entrenches an electoral minority" and seeking "a standard for deciding how much partisan dominance is too much"); *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting) ("The bottom line is that

courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected."). The Court should take the next step towards realizing those constitutional freedoms here, by holding North Carolina's and Maryland's extreme partisan gerrymanders unconstitutional.

E. Appellants' Contentions That Partisan Gerrymandering Claims Are Non-Justiciable Lack Merit.

Appellants claim that the Court is incapable of discerning a judicially manageable standard for distinguishing between unconstitutional partisan gerrymanders and ordinary political processes. Claiming as much does not make it so: appellees, the Brennan Center, and other *amici* in these and prior cases before this Court have provided *many* viable partisan gerrymandering standards.

Moreover, those tests' multiplicity does not, as appellants would have it, demonstrate the impossibility of this Court's agreeing upon one manageable standard. Rather, the array of tests available in this case reflects only the multi-faceted constitutional problems with extreme partisan gerrymanders.[8] As

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[8] Although several of the tests proposed by appellees and the lower courts in these and other partisan gerrymandering cases are district-specific, the constitutional harms (as with all extreme partisan gerrymanders) are not limited to individual voters or individual districts, but also spread across the entire state. The redistricting party sets out to enhance its *statewide* power by categorizing voters around the state based on their political beliefs and associations, and by shifting district lines on that basis to secure a statewide advantage. Consequently, the district-specific harms on which some of appellees' tests

shown, these extreme maps trammel multiple foundational principles running throughout the Constitution. The standards on offer provide the Court with different avenues to address different facets of this constitutional problem. But all provide a viable route forward. The Court can choose which best addresses the harm before it. By choosing, the Court will then eliminate any lack of clarity that the lower courts might have created by adopting a variety of standards.

II. STRAIGHTFORWARD FACTORS CAN HELP COURTS DETECT EXTREME PARTISAN GERRYMANDERS.

To the extent the Court has any remaining concerns about the manageability of a standard targeting extreme partisan gerrymanders, additional factors exist that can be built into the inquiry to further enhance its manageability. Indeed, several clearly discernible, objective factors are highly probative of extreme partisan gerrymanders. The Court can use these factors to narrow the scope of judicial intervention to extreme cases and signal to litigants what types of claims are likely to be meritorious.

As the Brennan Center explained in both *Gill* and *Benisek*, several objective criteria can act as gatekeepers by helping courts identify political circumstances that are likely to give rise to constitutional violations, and their presence here confirms that North Carolina's and Maryland's maps are unconstitutional partisan gerrymanders. *See Gill*

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focus are simply one facet of a greater constitutional problem whenever politicians deploy an extreme partisan gerrymander.

Brennan Br. 11-19; *Benisek* Brennan Br. 9-12. Those factors include single-party control of redistricting, a recent history of close elections, and significant departures from normal political processes. These intuitive criteria are relevant to and help determine whether the political party in power intended to and did entrench itself and its supporters at the expense of the other party and its supporters. Using these indicia to evaluate partisan gerrymandering challenges will help courts more easily identify potentially problematic redistricting processes. And it will enable both courts and prospective litigants to focus on the most biased, constitutionally offensive maps, leaving the vast majority of redistricting processes untouched.

1. The first criterion—single-party control—is a prerequisite for an extreme partisan gerrymander. Before a party can implement an excessive gerrymander, it must have the means to do so. *See* Anthony J. McGann, *et al.*, Gerrymandering in America 147 (2016). When a single party is in control, a minority party is much less able to influence the redistricting process, and normal political checks and balances are much less likely to safeguard against unconstitutional overreach. *See id.* at 147-48; *cf.* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371, 377 (2004) (explaining that "[w]hen there is unified party control of state government, or when one party has a veto-proof majority in the state legislature, the process is streamlined and a plan is usually adopted quickly"); App. 156 (observing that "when a single party exclusively controls the redistricting process, it should not be

very difficult to prove that the likely political consequences of the reapportionment were intended" (quotation omitted)).

The second factor—a recent history of close statewide elections—is not a prerequisite for extreme partisan gerrymanders, but it can be a highly probative signal because it helps identify states where map-drawers have the opportunity and incentive to maximize and entrench their power statewide. *See* McGann, *supra*, at 148-49. In highly competitive states with closely fought elections, the geographic distribution of each party's supporters often is more or less even, and therefore—absent deliberate intervention—power is likely to shift back and forth over the course of a decade. If, after redistricting, one party suddenly gains a new advantage and, more importantly, that advantage appears immune to normal political swings, it is highly suggestive of untoward conduct. Moreover, map-makers in states with a history of close elections will have a powerful incentive to undertake a severe, enduring gerrymander—and can easily do so by strategically joining precincts together to engineer a durable entrenchment. In a state without close elections, by contrast, the dominant party can often maintain its majority whether or not it gerrymanders.

Empirical data confirm these intuitions. The Brennan Center's study of congressional election results from this decade's races revealed that the most biased districting maps of this decade, in both Republican- and Democratic-controlled states, share the two objective features discussed above. *Extreme Maps*, *supra*, at 1, 2, 6, 9, 15.

2. Other facts about a state's political geography might, in certain instances, also create both the opportunity and incentive for extreme gerrymandering even in the absence of a history of close statewide elections. For example, regions of a state that contain large and cohesive pockets of a political minority group can assist—or threaten—the majority party's attempts to maximize its seats. In these subregions of a state, map-makers can still eke out an improper partisan advantage by carefully packing and cracking voters for the minority party. Likewise, map-makers must pay particularly careful attention to the ways in which they draw lines in these sub-regions, lest they gift the minority party with unintended additional seats. These incentives to squeeze out an incremental advantage can be especially compelling when, for example, a political party has sole control of the line-drawing process in a state and it is at a nationwide disadvantage in the number of congressional seats for which it can draw the lines.

3. Likewise, a redistricting process that is one-sided or procedurally unusual can be a useful signal that an unconstitutional partisan gerrymander may have occurred. Easily ascertainable factors that can be woven into a judicial inquiry include: whether the majority party conducted the redistricting in secret; whether map-drawers and legislators drew and approved maps with unusual haste (and without providing voters or the other party with sufficient time to evaluate the maps); whether the dominant party altered redistricting rules (including oversight mechanisms) in a way likely to favor that party; and whether the dominant party moved unusually large

numbers of voters from precinct-to-precinct when redrawing the map. *Cf. Arlington Heights*, 429 U.S. at 267-68 (recognizing that "[t]he specific sequence of events leading up [to a] challenged decision," "[d]epartures from the normal procedural sequence," and "[t]he legislative or administrative history," among other things, could be relied upon to show improper purpose); App. 140-41 (citing *Arlington Heights* and explaining that "the historical background" and "the legislative process" of a redistricting plan "may be probative of discriminatory intent" for partisan gerrymandering claims (quotations omitted)); *League of Women Voters of Mich. v. Johnson*, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (similar). These factors all reflect deviations from "normal politics" in the redistricting process and can indicate that the redistricting party sought and achieved unconstitutional goals.

4. Against this backdrop, North Carolina's map, for example, is plainly the product of a deeply broken political process, and precisely the type of outlier that should be held unconstitutional. To start, North Carolina's map satisfies the main prerequisite for a partisan gerrymander—single-party control of the redistricting process. When the challenged map was drawn, Republicans dominated both chambers of North Carolina's legislature. App. 10. And the final map was approved along party lines. *Id.* at 24.

It is little surprise, then, that North Carolina is one of the most heavily gerrymandered Republican states in the country. *Extreme Maps*, *supra*, at 1, 6-10, 12-13, 22, 25, 28. Without any influence over the redistricting process, North Carolina Democrats were unable to protect their supporters' interests,

allowing the Republican majority to place severe burdens on Democratic voters on the basis of their political beliefs and affiliations.

In addition to single-party control, other characteristics of North Carolina's politics and political geography show that Republicans had a strong incentive and opportunity to enact an extreme partisan gerrymander. The statewide electorate is about evenly split between Democrats and Republicans, and, indeed, prior to redistricting in 2010 Democrats held a narrow 7-6 advantage in the state's congressional delegation, with several seats consistently competitive. And certain regions in North Carolina have cohesive Democratic populations that provided Republicans with both the opportunity and incentive to crack and pack in order to maximize the Republican share of the state's congressional delegation. By rejiggering district lines to dilute Democrats' voting strength in congressional elections, Republican mapdrawers guaranteed that they will have a secure grip on a 10-3 majority in North Carolina's congressional delegation for the course of a decade, even, as in 2016, when they receive only about half of the votes and even, as in 2018, when Democrats' statewide vote share increased substantially.

Finally, the record plainly shows that North Carolina Republicans departed from normal politics in the redistricting process, much like Wisconsin Republicans did in *Gill* and Maryland Democrats did in *Benisek*. This departure strongly suggests an untoward objective. North Carolina Republicans in this case exploited their majority position by instituting a secretive, rushed redistricting process that almost entirely excluded Democrats from the map-drawing

exercise. They put in writing ground rules for the redistricting process that required map-makers to maintain the 10-to-3 advantage that Republicans had initially gained through their unconstitutional racial gerrymander. The map that North Carolina Republicans eventually approved was designed behind closed doors by a Republican map-drawer acting on instructions from North Carolina congressional Republicans (and Republicans alone). App. 14-18. The map-drawer also understood that his mandate was to maximize Republicans' seats. *Id.* at 17. By all objective metrics, in other words, North Carolina's map-drawers clearly engaged in unconstitutional partisan discrimination.

5. The objective factors identified by the Brennan Center can also be easily applied in other cases to distinguish between those maps that pose severe constitutional problems and those maps that do not.

For instance, Maryland's 2011 congressional map challenged in *Benisek* also triggers those readily-observable indicia, raising the prospect that they too are likely outside constitutional bounds. *Benisek* Brennan Br. 14-17. Democrats controlled all three branches of Maryland's government at the time of the gerrymander. *Id.* at 15. Maryland's Democrats likewise had a strong incentive and opportunity to enact an extreme partisan gerrymander in Maryland, given Maryland's political geography. *Id.*

The Maryland Democrats also departed from normal politics in the redistricting process. The map was designed behind closed doors by a Democratic consulting firm acting under instructions from Maryland's Democrats. *Id.* at 16. The map-makers

moved hundreds of thousands more people than were necessary to achieve population equality among the new districts and moved them at a volume that is unusual in comparison to other redistricting processes undertaken during the same time period. Brennan Ctr. for Justice, *Maryland's Extreme Gerrymander* (Mar. 8, 2019).[9] Further, the map was signed into law just three days after it was introduced. *Benisek* Brennan Br. 16. This gave essentially no time for ordinary political forces to act as a check on Maryland Democrats' power grab. In a testament to the degree of Democratic dominance over the process, Democratic state lawmakers were remarkably blunt about the plan's intent, candidly explaining that they supported it because it meant "more Democrats in the House of Representatives." *Id.* at 16-17.

By contrast, under the type of judicial inquiry the Brennan Center proposes, Virginia's 2011 state house map may not warrant close judicial scrutiny, even though it exhibits high levels of partisan bias in favor of Republicans. This is because the Virginia map was drawn under split-party control. Rosalind S. Helderman & Anita Kumar, *Virginia Assembly Approves New Legislative Maps*, Wash. Post (Apr. 7, 2011).[10] Virginia's Democrats could have marshalled the votes necessary to stop the Republicans' seat grab, but they chose not to. *Id.* Virginia's Dem-

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[9] https://www.brennancenter.org/analysis/marylands-extreme-gerrymander.

[10] https://www.washingtonpost.com/local/politics/virginia-assembly-approves-new-legislative-maps/2011/04/07/AFRjhrxC_story.html?utm_term=.5b8cdda90950.

ocratic governor likewise could have vetoed the map, sending the process back to the legislature or to the courts. He did not. In other words, it was not extreme partisan gerrymandering of the sort only the courts can police, but rather a failed political strategy that allowed Virginia's Republicans to take control of the Virginia state house in 2011.

As these examples demonstrate, the Court is well-equipped to help courts distinguish between unconstitutional partisan gerrymanders and normal political processes.

III. INVALIDATING EXTREME PARTISAN GERRYMANDERS WILL ENHANCE THE LEGITIMACY OF THE COURTS AND OUR SYSTEM OF GOVERNMENT.

This Court is not just capable of holding extreme partisan gerrymanders like North Carolina's and Maryland's unconstitutional, however. It is also in the institutional interests of the Court, the federal courts more broadly, and our democratic system of government to do so.

1. As the Court is well aware, the problem of extreme partisan gerrymandering has dramatically worsened in recent years, and it will only get worse over time as technological advances continue making it exponentially easier for map-drawers to gerrymander. *Gill*, 138 S. Ct. at 1935, 1941 (Kagan, J., concurring); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Given the serious constitutional harms caused by extreme partisan gerrymandering, *see supra* at 13-20, that trajectory should be extremely alarming to the Court, *see Reynolds*, 377 U.S. at 566 (the "denial of constitu-

tionally protected rights demands judicial protection").

The Court is the only neutral institution realistically capable of remedying this worsening constitutional problem and providing guidance before the 2021 round of redistricting. While it is theoretically possible for Congress to legislate limits on excessive partisanship, the prospects for such legislation are far from certain. Any legislative relief likely will not arrive in time for the next round of federal redistricting efforts (which start as early as February 2021 in many states), and it will not impact state-level redistricting.

2. Appellants argue that the Court's holding extreme partisan gerrymanders unconstitutional will delegitimize the federal courts, but precisely the opposite is true. The Court's intervention will promote the legitimacy of all our governmental institutions, including the Court itself. *See generally* Guy-Uriel Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236 (2018).

a. Judicial tolerance of extreme partisan gerrymandering "sends a clear message to political elites that partisanship is justifiably the coin of the realm." *Id.* at 274. The Court's failure to intervene, therefore, will only encourage politicians to press their advantage in future rounds of redistricting.

North Carolina perfectly demonstrates the issue. The Court's decision to refrain from policing partisan gerrymandering to date led one of the Republican co-chairs of North Carolina's redistricting committee to openly declare that their map was a "political ger-

rymander" and therefore "not against the law." App. 22. The Court should not tolerate that state of affairs, especially given its unanimous recognition that partisan gerrymandering is, in fact, *un*constitutional. *See supra* at 2, 19.

Politicians nationwide have been emboldened by this Court's inaction, which they have interpreted as a green light for increased efforts to insulate themselves from the will of voters by manipulating maps. *See Davis v. Bandemer*, 478 U.S. 109, 172-73 (1986) (Powell, J., concurring in part and dissenting in part) ("The failure to articulate clear doctrine in this area … signal[s] the constitutional green light to would-be gerrymanderers." (quotation and footnote omitted)). That effect will only become more pronounced because of the increased polarization of the country and the always-improving technology and data available to make maps ever more extreme.

As this practice spreads, its threats to our democracy will only multiply. As Justice Kagan recognized last Term, "the evils of gerrymandering seep into the legislative process itself," undercutting incentives for legislators to collaborate and form bipartisan partnerships, and breeding distrust, dysfunction, and hostility that spills over into legislative sessions. *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring) (pointing to amicus briefs filed by bipartisan groups of congressional members and state legislators that described the "cascade of negative results" from extreme partisan gerrymandering); *see generally* Br. for *Amici Curiae* Bipartisan Group of 65 Current and

Former State Legislators in Support of Appellees, *Gill v. Whitford*, No. 16-1161 (S. Ct. Sept. 5, 2017).[11]

b. The Court's invalidation of extreme partisan gerrymandering now also will send a clear message reinforcing core American norms against political entrenchment that are currently under assault from more than just gerrymandering.

Take, again, the example of North Carolina. The gerrymandering of North Carolina's congressional map is simply one of many legislative measures designed to entrench the dominant party's power by dramatically changing governmental institutions, including both the political branches and the courts. For example, in December 2016, after incumbent Republican Governor Pat McCrory was unseated by Democrat Roy Cooper, North Carolina's Republican-controlled legislature held multiple special sessions to pass laws limiting the newly-elected governor's powers before he took office. Among other things, the legislature severely restricted Governor Cooper's appointment authority by giving North Carolina's Senate veto power over his cabinet picks and reducing the total number of gubernatorial appointees from 1,500 to 425. Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper's Power*, News & Observer (Dec. 19, 2016)[12]; Tara Golshan, *North Caro-*

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[11] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_BipartisanLegislators_InSupportofAppellees.pdf.

[12] https://www.newsobserver.com/news/politics-government/state-politics/article121885658.html.

lina Republicans' Shocking Power Grab, Explained, Vox (Dec. 16, 2016).[13]

Similar developments played out in Pennsylvania, another (formerly) severely gerrymandered state. In 2018, the Pennsylvania Supreme Court held that Pennsylvania's congressional map violated the Pennsylvania Constitution because it was an extreme partisan gerrymander drawn to discriminate against Democrats and entrench a lopsided 13-5 Republican majority in a state that is 50/50 politically. *See* Katie Meyer, *Pennsylvania Chief Justice Criticizes Impeachment Moves*, NPR (Mar. 22, 2018).[14] In response, Republicans introduced resolutions to impeach several of the Court's sitting justices. *Id.*

These developments are symptomatic of substantial stresses on—if not outright erosion of—longstanding American norms against entrenched power. Striking down egregious gerrymanders designed to entrench the map-drawing party in power will signal that these norms retain their value and their force.

Time and again, the Court has successfully intervened in the political process to vindicate such constitutional norms. *See, e.g.*, Charles & Fuentes-Rohwer, *supra*, at 266-70, 275; Br. of Heather K. Gerken, *et al.*, as *Amici Curiae* in Support of Appellees at 7-10, *Gill v. Whitford*, No. 16-1161 (S. Ct.

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[13] https://www.vox.com/policy-and-politics/2016/12/16/13971368/republican-power-grab-north-carolina-explained.

[14] https://www.npr.org/2018/03/22/596172829/pennsylvania-chief-justice-criticizes-impeachment-moves.

Aug. 30, 2017)[15]; McKay Cunningham, *Gerrymandering and Conceit: The Supreme Court's Conflict with Itself*, 69 Hastings L.J. 1509, 1538-42 (2018). It should do so here too. At this stage, when gerrymandering and the political climate have progressed to such extremes that legislatures have deemed it open season to act in ways that are profoundly antidemocratic, any costs of not intervening far outweigh the risks of intervention.

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Recognizing that extreme partisan gerrymanders are irreconcilable with the Constitution, this Court has long sought a standard that courts could use to provide a reliable and limited answer to the question: "[h]ow much political motivation and effect is too much?" *Vieth*, 541 U.S. at 297 (plurality op.). Armed with the objective limiting factors discussed herein, the Court is readily capable of identifying those rare maps that are intended to and actually will durably entrench a political party in power, all while avoiding judicial interference in normal politics. The conditions that generate those maps are unusual, easily identified, and easily incorporated into a judicial inquiry. Those maps cause the political system to become unresponsive to a particular segment of voters on the basis of their political affiliation. Those maps make the legislature grossly unrepresentative of the state's populace as a whole. And those maps impair voters' First Amendment rights to equal political expression and association.

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[15] https://www.brennancenter.org/sites/default/files/legal-work/Gill_AmicusBrief_HeatherK.GerkenEtAl_InSupportofAppellees.pdf.

Those maps, in other words, subvert our democratic system of government, all while stripping voters of their ability to protect themselves through the electoral process. For the sake of those foundational constitutional principles and the institutional interests of the federal courts, the Court should redress those constitutional harms by holding North Carolina's and Maryland's extreme maps unconstitutional.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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March 8, 2019