No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, et al.,

Appellants,

v.

WILLIAM WHITFORD, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF CALIFORNIA CITIZENS REDISTRICTING COMMISSION AND FAIRDISTRICTS NOW, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Since this Court issued its decision in *Vieth v. Jubelirer*, the States of California and Florida, which together account for more than one sixth of the population of the United States, have amended their state constitutions to prohibit partisan gerrymandering. California granted authority to an independent commission to draw district boundaries while Florida entrusted its Legislature with that task. The citizens of both States enacted a constitutional rule that districts may not be drawn for the purpose of favoring or disfavoring political parties. A fundamental premise underlying this rule is that neutral decision-makers are able to apply it, in the case of line drawers, or enforce it, in the case of courts, in a non-partisan manner.

The mission of California's Citizens Redistricting Commission and FairDistricts Now, Inc. is to ensure that electoral districts are drawn in a non-partisan manner in California and Florida, respectively. Amici curiae have a strong interest in the outcome of this case because public confidence in their work depends on the proposition that rules requiring non-partisan redistricting can be respected and applied. If this Court were to conclude that no neutral principles for

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[1] Pursuant to Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus curiae briefs have been filed with the Clerk's office.

drawing electoral boundaries exist—that the redistricting process raises little besides "political questions"—that conclusion might undercut amici curiae's institutional mission. Accordingly, while amici curiae take no position on the ultimate outcome of this case, they urge the Court to conclude that neutral arbiters, including commissions and courts, can implement redistricting standards in a non-partisan manner, thereby protecting voters' constitutional rights.

SUMMARY OF ARGUMENT

Neutral, non-partisan principles for drawing electoral boundaries exist. They can be found in the constitutions of the States of California and Florida, which expressly prohibit line-drawing for the purpose of favoring or discriminating against an incumbent or political party. Instead, in these States, map drawers must follow traditional redistricting principles such as contiguity, compactness, and respect for existing political boundaries. In the experience of amici curiae, when those who prepare an apportionment plan seek to avoid partisan considerations, they can produce a plan that is free from invidious discrimination based on voters' political views and associations.

The decisions of California and Florida voters to amend their state constitutions to prohibit partisan gerrymandering strongly suggest that these voters concluded that, absent legal constraints, redistricting to favor or disfavor political parties poses a serious risk of burdening voters' rights. Amici curiae do not, however, propose a standard for determining

whether a State's redistricting plan imposes an unconstitutional burden. Their limited aim is to assist the Court by providing assurance that neutral decision-makers proceeding in good faith can apply redistricting principles in a non-partisan manner.

Thus, while a federal court should intervene in the States' redistricting processes only as a last resort, if it finds that a State's redistricting plan violates voters' constitutional rights, it may provide redress appropriate to that injury: a plan drawn without discriminatory partisan intent, using traditional redistricting principles.

ARGUMENT

I. Amici Curiae's Experiences Show That Neutral Decision-Makers Can Implement Non-Partisan Standards for Drawing Electoral Districts

The constitutions of California and Florida prohibit the drawing of electoral maps with an intent to favor or disfavor a political party. These rules matter. Amici curiae's experiences demonstrate that while applying mandatory redistricting criteria in a non-partisan manner is not a simple task, neutral decision-makers can create apportionment plans in accordance with applicable law and without discriminating against voters based on their political views or associations.

A. California's Citizens Redistricting Commission

In 2008 and 2010, California voters exercised their legislative initiative authority to approve ballot propositions 11 and 20, respectively, which amended their state constitution and statutes. As amended, California's constitution establishes an independent commission—the Citizens Redistricting Commission ("CRC")—to draw state legislative districts and congressional districts. *See Vandermost v. Bowen*, 269 P.3d 446, 455 (Cal. 2012).

California's constitution provides that the CRC shall have fourteen members, composed of five members of the State's largest political party (Democratic), five members of the next largest political party (Republican), and four members from neither of these parties. Cal. Const. art. XXI, § 2(c)(2). To approve a district map, at least three members from each of the three groups (*i.e.*, the two largest political parties in California based on registration and three votes from members who are not registered with either of these two political parties) must vote in favor of it. *See id.* § 2(c)(5).

California law imposes numerous requirements designed to prevent political partisans from "hacking" or infiltrating the Commission. California citizens may apply to serve as commissioners. To be eligible, the applicant must have voted in two out of the last three statewide elections and must have been registered to vote as a member of the same political party, or unaffiliated with any party, for the last five years. Cal. Const. art. XXI, § 2(c)(3). In

addition, an applicant is disqualified if, during the ten years prior to applying, he or she or an immediate family member was elected or appointed to or a candidate for state office; or an employee or consultant to a political party, campaign, or legislative body; or a registered lobbyist; or a contributor of $2,000 or more to a congressional, state, or local campaign. Cal. Gov't Code § 8252(a)(2). These requirements guard against partisan attempts to conceal party affiliation.

An applicant review panel consisting of one Democrat, one Republican, and one non-partisan member screens applicants to reduce the pool to sixty individuals. Certain designated legislative leaders may thereafter strike, collectively, up to 24 members of the pool. Three Democrats, three Republicans, and two from neither party are then chosen by lottery, and these eight select the remaining six to form the full fourteen-member CRC. Cal. Gov't Code § 8252.

1. California's Standards for Drawing Electoral Districts

The stated purpose of the ballot proposition creating the CRC was to "draw districts based on strict, nonpartisan rules designed to ensure fair representation." Prop. 11, as approved by voters, General Election (Nov. 4, 2008), § 2(d), https://goo.gl/b6TiJW. As California's constitution declares, the CRC is designed to be "independent from legislative influence …." Cal. Const. art. XXI, § 2(c)(1); *see id.* § 2(c)(2); Cal. Gov't Code §§ 8251 *et seq.*; *Vandermost*, 269 P.3d at 455-56.

California's constitution provides that "[d]istricts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party." Cal. Const. art. XXI, § 2(e). On the flip side of the same coin, producing competitive elections or partisan symmetry is not a permissible CRC goal. Instead, the CRC must apply non-partisan criteria in drawing electoral districts, including compliance with the United States Constitution and Voting Rights Act, geographic contiguity and compactness, and respect for existing municipal and county boundaries. *See id.* § 2(d); *Vandermost*, 269 P.3d at 457-58. The CRC must consider the geographic integrity of any local "community of interest," except that such communities shall not include any relationship with political parties, incumbents, or candidates. Cal. Const. art. XXI, § 2(d)(4).

The CRC's redistricting process is open to public review and comment. Cal. Const. art. XXI, § 2(b)(1). The CRC engages in outreach seeking to increase public participation in the process. With limited exceptions, CRC records are public and available for inspection, and all proposed maps must be publicly displayed and available for public comment before final adoption by the CRC. Cal. Gov't Code § 8253(a)(7); *see also Vandermost*, 269 P.3d at 484 (describing the process as "open, transparent and nonpartisan").

2. **California's Experience**

The process to select the fourteen members of the CRC took two years to complete. The applicant

review panel initially received 36,000 applications. It required potential candidates to submit a supplemental application that included essay questions, reference letters, and financial disclosure statements. It received and reviewed more than 4,000 supplemental applications, which it narrowed down to 120 candidates who were invited to interviews with the panel and legal counsel. After interviews, the panel reduced the pool to 60 candidates and the Legislature exercised its right to strike 24 of them. Eight were selected by lottery and those eight chose the remaining six. This lengthy selection process produced a commission that reflects California's diversity and is well-qualified to handle its assigned constitutional role.

The two-year selection process was, of course, only the beginning. The CRC held 34 public hearings in 32 cities throughout California, during which more than 2,700 speakers provided comments. More than 20,000 individuals and groups submitted written comments or proposed maps. The CRC and its committees conducted more than 70 meetings that were open to the public, live-streamed over the Internet, recorded, and transcribed. Although the CRC gathered and processed more information and public input than expected, it published its final maps on schedule, approving the state maps by a vote of 13-1 and the congressional map by a vote of 12-2.

The CRC's final Senate and congressional maps were the subject of legal challenges in the California Supreme Court and federal district court. The courts rejected these challenges to the CRC's maps. *See*

Vandermost, 269 P.3d at 484; *Radanovich v. Bowen*, No. 11-cv-09786 (C.D. Cal. Feb. 9, 2012) (ECF No. 15).

Scholars who have studied the CRC's maps have concluded that the CRC succeeded in adhering to constitutionally-mandated redistricting standards. Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal. J. Politics & Policy 1 (2012); *see also* Barry Edwards et al., *Institutional Control of Redistricting and the Geography of Representation*, 79 J. Politics 722, 724-25 (2017). Kogan and McGhee found that the CRC drew compact districts, respected municipal and county boundaries, and succeeded in "nesting" Assembly districts within Senate districts—all while complying with the Voting Rights Act. *See* 4 Cal. J. Politics & Policy at 5-16. A contemporaneous opinion poll found that of those members of the public who were aware of the CRC's work, those who approved of it outweighed those who did not by a margin of nearly two to one. Raphael J. Sonenshein, *When the People Draw the Lines*, at 71 (League of Women Voters of Cal. 2012), https://goo.gl/ER4RiX.

Although increasing the competitiveness of electoral districts was not a permissible CRC goal, it may not be surprising that increased competition can be a byproduct of following rules that require the line-drawing entity to disregard incumbency and partisan advantage. And observers have found that California districts became more competitive under the CRC's non-partisan plans, *i.e.*, the CRC's districts included more open seats and closer races as compared with prior election years. *See* Eric McGhee

& Daniel Krimm, *California's New Electoral Reforms: The Fall Election* (Nov. 2012), https://goo.gl/Whm3iS. These observations are congruent with studies showing a statistically significant relationship between commission redistricting and one measure of partisan symmetry—the efficiency gap. *See* Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, 2015 University of Chicago Legal Forum 477, 496-500 (2015).

In sum, although the CRC does not claim to have produced district maps that are immune from critique, it has discharged its constitutional and statutory duties to draw districts in accordance with the specified criteria and without a purpose to favor or disfavor any political party, incumbent, or candidate.

B. **FairDistricts Now, Inc.**

In 2010, Florida voters approved Amendments 5 and 6, known as the "Fair Districts" amendments, which are codified as sections 20 and 21 of article III of the Florida constitution. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 139 & n.1 (Fla. 2013). The Fair Districts amendments did not transfer authority to draw districts from the Legislature to an independent commission. Instead, Florida voters enacted redistricting rules for their Legislature to follow. Amicus FairDistricts Now, Inc. was formed as a 501(c)(3) organization to monitor the redistricting process, educate the public about redistricting, and, if necessary, defend and enforce the Fair Districts amendments in court.

1. Florida's Standards for Drawing Electoral Districts

Florida's constitution provides that, in establishing congressional and legislative district boundaries, "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent[.]" Fla. Const. art. III, §§ 20(a), 21(a). This provision does not require the Legislature to create a "fair plan" or competitive districts; rather, it requires a "neutral" plan drawn without the constitutionally-prohibited partisan intent. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 643 (Fla. 2012). Under the Florida constitution, "there is no acceptable level of improper intent." *Id.* at 617; *see also League of Women Voters of Fla.*, 132 So. 3d at 138.

The Florida Legislature must apply non-partisan criteria in drawing electoral districts, including compliance with federal law, contiguity and compactness, and respect for existing political and geographic boundaries. Fla. Const. art. III, §§ 20, 21. Moreover, districts cannot be drawn to deny or abridge "the equal opportunity of racial or language minorities to participate in the political process." *Id.*

2. Florida's Experience

In 2012, after the Eleventh Circuit rejected a litigation challenge to one of the Fair Districts amendments (*Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012)), the Legislature adopted legislative and congressional districts. As Florida's

constitution required, the Florida Supreme Court reviewed the Legislature's districts for the State House of Representatives and Senate. Fla. Const. art. III, § 16. The Court approved the House plan. It rejected the Senate plan as unconstitutional and directed the Legislature to re-draw it. *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d at 684-85.

The League of Women Voters of Florida and other plaintiffs filed separate actions asserting that the Legislature drew its congressional and Senate districts with improper intent to disfavor a political party, thereby discriminating against voters who associate with that party based on their political views. The congressional-districts action proceeded to trial, after which the trial court found that certain members of the Legislature had secretly collaborated with partisan consultants to draw maps with an intent to favor one political party and disfavor another. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 376-77 (Fla. 2015).

The trial court found that, in cooperation and collaboration with the Legislature, partisan consultants arranged for intermediaries to submit, as their own, maps through the public-participation process that the consultants had drawn. The trial court found that this undisclosed arrangement—consultants using shills to submit highly partisan maps in collusion with the Legislature—"made a mockery of the Legislature's proclaimed transparent and open process redistricting …." *Id.* at 377 (italics omitted). The Florida Supreme Court affirmed and remanded for the re-drawing of a remedial map.

After the remand, the Legislature failed to agree on and enact a remedial plan for congressional districts and the trial court directed the parties to submit proposed plans to carry out the voters' intent in approving the Fair Districts amendments. The House, Senate, and plaintiffs each submitted competing plans. Following hearings on the remedial plans, the trial court recommended that the Florida Supreme Court approve the plaintiffs' proposed plan and the Court adopted that recommendation, ruling that the plan would be used for the 2016 elections and congressional elections thereafter until the next decennial redistricting. *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 297-98 (Fla. 2015).

Around the same time, in 2015, the parties to the Senate-district litigation entered into a stipulation and consent judgment. The Senate conceded in the stipulation that the apportionment plan adopted to establish Senate districts violated Florida's prohibition against drawing districts with intent to favor or disfavor a political party. In accordance with the consent judgment, the Legislature convened a special session to re-draw the Senate districts. Once again, however, the Legislature could not agree on and enact a remedial plan—this time for the Senate districts. In the absence of legislatively-enacted plans, the trial court considered plans submitted by the parties. It selected plaintiffs' proposed plan as the one that best complied with Florida's constitutional redistricting standards. The Senate did not appeal that ruling.

The final Senate and congressional districts are compact, contiguous, and follow recognizable

boundary lines. For example, whereas the congressional map from 2002 split 110 cities and 30 counties into more than one district, the remedial map splits only 13 cities and 18 counties into more than one district. The enacted 2012 map, which the Florida Supreme Court invalidated, would have split more cities and counties into more than one district than does the remedial map. In addition, typical measures of district compactness (Reock, Convex-Hull, Polsby-Popper) indicate that the remedial map's districts are more compact, on average, than the districts from the invalidated 2012 plan.

In 2016, Florida held its first elections using these final districts. More candidates ran for election to Congress and the Senate than ever before. And congressional and legislative elections were more competitive in 2016, as compared with prior election years. For instance, Florida rarely saw serious competition in congressional races before 2016. But that year saw five close congressional races, each of which resulted in a change of party for the district—three districts previously held by Republicans were won by Democrats and two previously held by Democrats went to Republicans. While the districts were not drawn to create partisan symmetry or competition, it is not surprising to find that districts drawn without intent to favor incumbents or political parties have become more competitive.

II. Upon a Finding That a Redistricting Plan Violates Voters' Rights Through Partisan Gerrymandering, Neutral Redistricting Standards Are a Permissible Remedy

The Constitution does not require proportional representation. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006). But it does prohibit redistricting plans that infringe voters' opportunity for equal participation in elections based on their membership in a political party. *Davis v. Bandemer*, 478 U.S. 109, 123-25 (1986); *see also Vieth v. Jubelirer*, 541 U.S. 267, 314-16 (2004) (Kennedy, J., concurring). And no member of this Court has suggested that a State has a compelling interest in—or even a rational basis for—drawing districts for the purpose of entrenching one political party's hold on power. The question, then, is whether a State has indeed burdened voters' constitutional rights and, if so, whether courts can provide a remedy without becoming unduly entangled in political questions. As noted, amici curiae address the second of these questions.

Amici curiae can well understand why courts would and should be reticent to undertake the "unwelcome obligation" to devise and impose redistricting plans. *League of United Latin American Citizens*, 548 U.S. at 415 (quotation marks omitted). To say that neutral decision-makers can apply manageable non-partisan standards is not to say that partisans will not try to influence proceedings. Moreover, courts and commissions can offer no assurance that their application of non-partisan

redistricting standards will not lead to a redistricting plan that benefits one political party over another. *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring). In fact, redistricting unavoidably has political consequences.

None of this is a reason to conclude that federal courts cannot provide a remedy, as a last resort, when a state legislature acts with the intent and effect of burdening voters' representational rights because of their political-party affiliation. There is a world of difference between drawing districts with an intent to crush one's political opponents and drawing districts with an intent to avoid political considerations. Much depends on whether the political consequences that flow from a redistricting plan are "intended or not." *Ibid.*; *see also* Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 Election L.J. 331, 332 (2015) (making a "crucial distinction between intentional and unintentional asymmetries in the transformation of votes to seats"). Drawing districts with an intent to subject one party's voters to unequal representation is incompatible with democratic principles, decreases public confidence in government, and is likely to burden representational rights, no matter how courts measure that burden. The converse is true for drawing districts with an intent to avoid favoring or disfavoring political parties.

Thus, after a court concludes that a redistricting plan violates voters' rights, it need not identify an alternative remedial plan that is substantively "fair"

to all political parties or one that produces partisan symmetry. Rather, amici curiae respectfully submit, it should ensure that districts are drawn without taking political party, incumbency, or candidacy into account. In amici curiae's experience, while application of non-partisan redistricting standards cannot fully eliminate any and all possibility of partisan influence, neutral decision-makers can ensure that they do not act with an intent to burden voters' representational rights because of their political party. Rather than engage in a balancing of political interests, this approach endeavors to avoid political questions at the remedial stage altogether.

CONCLUSION

The experiences of amici curiae demonstrate that neutral redistricting is possible and this Court should refrain from ruling that no neutral redistricting principles exist or that redistricting is inevitably tainted by partisanship.

Courts can provide appropriate redress for injuries caused by a cognizable partisan gerrymander through rules which disallow the drawing of districts for the purpose of favoring or disfavoring political parties.

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