No. 17-333

IN THE
Supreme Court of the United States

O. JOHN BENISEK, ET AL.,
Appellants,
v.
LINDA H. LAMONE AND DAVID J. MCMANUS, JR.,
Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF THE CAMPAIGN LEGAL CENTER AND THE SOUTHERN COALITION FOR SOCIAL JUSTICE AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

Amici curiae the Campaign Legal Center and the Southern Coalition for Social Justice are non-profit organizations dedicated to the protection and promotion of American democracy. The Campaign Legal Center litigates and pursues policy change in areas including campaign finance, government ethics, redistricting, and voting rights. Likewise, the Southern Coalition for Social Justice focuses on voting rights, criminal justice, human rights, and environmental justice, particularly as they apply to communities of color and economically disadvantaged communities in the South.

The Campaign Legal Center and the Southern Coalition for Social Justice currently represent clients challenging district plans in Wisconsin and North Carolina as unconstitutional partisan gerrymanders. *See Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (invalidating Wisconsin's state house map as an unlawful partisan gerrymander), *appeal docketed*, 137 S. Ct. 2289 (2017); *League of Women Voters of North Carolina (LWVNC) v. Rucho*, ___ F. Supp. 3d ___, 2018 WL 341658 (M.D.N.C. Jan. 9, 2018) (*LWVNC II*) (invalidating North Carolina's congressional map as an unlawful partisan gerrymander). Both organizations therefore take an interest in this appeal

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel for Amici affirm that counsel of record for both parties received timely notice of, and consented to, the filing of this brief. Consent from both parties is on file with the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for Amici affirm that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than Amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

because it involves the standard that should be used to adjudicate partisan gerrymandering claims under the United States Constitution. This is precisely the issue at stake in the cases being litigated by Amici.

SUMMARY OF ARGUMENT

Both in *Whitford* and in *LWVNC*, Amici have advanced the same three-part test for partisan gerrymandering. This test is deeply rooted in the Court's First and Fourteenth Amendment precedents. It asks: (1) whether a district plan was enacted with the *discriminatory intent* of benefitting a particular political party and handicapping its opponent; (2) whether a plan has produced a sufficient *discriminatory effect*, in the form of a large and durable partisan asymmetry in favor of the mapmaking party; and (3) whether there exists any legitimate *justification* for this effect, such as a State's political geography or efforts to comply with state or federal redistricting requirements. Liability thus follows under the test only if a map's partisan asymmetry is deliberate, severe, persistent, and unjustified. *See Whitford*, 218 F. Supp. 3d at 883-927; *LWVNC II*, 2018 WL 341658, at *32-60.

Amici's proposed test differs in several respects from the one suggested by Appellants in this case. It applies statewide rather than to a particular district. It assesses discriminatory effect on the basis of partisan asymmetry rather than whether a given district has flipped from one party to the other. And it includes a justification prong in order to preclude liability where there exists an innocent explanation for a plan's asymmetry.

In this brief, Amici first explain how their proposed test would apply to Maryland's congressional plan. The plan would likely be unconstitutional under the test. The plan was enacted with the discriminatory intent of benefitting Democratic candidates and voters and handicapping Republicans. The plan has also produced an exceptionally large and pro-Democratic partisan asymmetry—one that is nearly certain, moreover, to endure for the rest of the decade. And no legitimate justification exists for this asymmetry because it exceeds that of hundreds of simulated Maryland congressional maps, all of which perform at least as well as the enacted plan on every nonpartisan criterion.

Next, Amici discuss the application of their proposed test to congressional plans beyond Maryland's. As unanimously recognized by the district court in *LWVNC*, North Carolina's congressional map violates the test. However, the test would *not* jeopardize the vast majority of congressional plans. Nor would the test be skewed in either party's favor. And judicial intervention is as vital in the congressional as in the state legislative context. This cycle's congressional maps are the most asymmetric, on net, since at least the reapportionment revolution of the 1960s. They are also the most durably skewed, thanks to advances in redistricting technology as well as rising voter partisanship. And they are grievously wounding American democracy by yielding congressional representation entirely out of sync with voters' preferences.

Lastly, Amici identify a series of scenarios where their proposed test leads to different conclusions than

the one suggested by Appellants. These include: (1) where a district has flipped from one party to the other but a plan is not asymmetric; (2) where a district has *not* flipped but a plan *is* asymmetric; (3) where some districts have flipped to one party, and other districts to the other party; and (4) where there is insufficient continuity between maps even to determine whether districts have flipped. All of these scenarios stem from the district-specific nature of Appellants' test as well as its use of the status quo ante as a baseline for comparison. Together, the scenarios indicate that the Court should, at most, adopt a district-specific test *in addition to*—not *instead of*—a statewide test for partisan gerrymandering.

ARGUMENT

I. Maryland's Congressional Plan Would Be Unconstitutional Under Amici's Proposed Test.

In their suit, Appellants challenge only Maryland's Sixth Congressional District: the one district in the State that flipped from Republican control in the 2000s to Democratic control in the 2010s. *See* J.S. 19 (referring to this as "a single-district case"). What would be the outcome if Maryland's entire congressional plan—not just a single district in isolation—were disputed under Amici's proposed test? A trial would be necessary to know for sure, but it is highly likely that the plan would be unconstitutional.

First, as to discriminatory intent, it is clear from the record that the plan's drafters aimed to benefit Democratic candidates and voters on a *statewide* basis. The drafters sought, that is, not simply to flip

the Sixth District from Republican to Democratic control, but to do so in a way that increased the Democratic advantage in Maryland's congressional delegation from 6-2 to 7-1. The drafters would *not* have been satisfied if they had flipped the Sixth District to the Democrats, but another district had switched to the Republicans.

"[T]he State's Democratic leadership," for example, "stated that their reshuffling of voters . . . was specifically intended to flip the Sixth District from Republican to Democratic *so as to create a 7 to 1 Democratic congressional delegation*." J.S. 35a (emphasis added). Similarly, Maryland Governor Martin O'Malley "*wanted . . . to change the overall composition of the U.S. House Delegation to seven Democrats and one Republican* by flipping either the First District, on the eastern shore of Maryland, or the Sixth District, in Western Maryland." J.S. 44a (emphasis added). "[T]he firm hired to draw the map," furthermore, "was given only two instructions—to come up with a map (1) that protected the six incumbent Democrats *and (2) that would produce a 7 to 1 congressional delegation*." J.S. 36a (emphasis added). And when the map was made public, talking points stressed that it gave Democrats "*a real opportunity to pick up a seventh seat in the delegation* by targeting [incumbent Republican congressman] Roscoe Bartlett." J.S. 50a (emphasis added).

Second, as to discriminatory effect, Democratic candidates received 65%, 58%, and 63% of the two-party vote in Maryland congressional elections in 2012, 2014, and 2016, respectively. But with these less than overwhelming majorities, they won *87.5%* of Maryland's congressional seats (seven out of eight) in

each election. *See* Simon Jackman Dataset, *LWVNC v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Apr. 18, 2017) (hereinafter Jackman Dataset).[2]

Converted into partisan asymmetry scores, these vote and seat shares yield an average efficiency gap of 13% in a Democratic direction. That is, votes for Republican candidates have been wasted at a rate, on net, thirteen percentage points higher than votes for Democratic candidates. This is an exceptionally large skew, roughly two standard deviations from the historical mean. In fact, of the 136 congressional maps analyzed by Professor Jackman in the *LWVNC* litigation, spanning the period from 1972 to 2016, only *eight* were more tilted overall than Maryland's current plan. (Of these eight, four exhibited a Democratic advantage and four a Republican edge.) *See id.*[3]

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[2] Professor Jackman compiled an extensive dataset of congressional plans' partisan asymmetry scores (and other characteristics) in the *LWVNC* litigation. Except where noted otherwise, all data in this brief is drawn from this dataset.

[3] Maryland's current plan has also exhibited an average partisan bias of 25% and an average mean-median difference of 3%, both in a Democratic direction. *See* Jackman Dataset. However, while these scores are entirely consistent with the plan's average efficiency gap, they are less reliable because Maryland is a relatively uncompetitive state. Partisan bias and the mean-median difference are most valid in competitive jurisdictions, where the statewide vote is closer than 55% to 45%. *See* Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After* LULAC v. Perry, 6 Election L.J. 2, 18-19 (2007); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 319 (2015).

The durability of the Maryland plan's partisan asymmetry is striking as well. It has registered a pro-Democratic efficiency gap in all three elections in which it has been used. Based on the most recent election results, it would also take a nine-point pro-Republican swing for Republicans to capture even one additional congressional seat. To eliminate the plan's asymmetry entirely, Republicans would need to improve their 2016 performance by *sixteen* points, winning 53% of the statewide vote. This is a showing that Republicans have not approached in Maryland since the wave election of 1994. *See id.*

And *third*, as to justification, Professor Jowei Chen used a simulation technique previously relied upon by several courts, *see, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 344-45 (4th Cir. 2016); *LWVNC II*, 2018 WL 341658, at *38-40, to generate approximately five hundred distinct congressional maps for Maryland. All of these maps were produced without considering election results. All of the maps also matched or surpassed the enacted Maryland plan on every nonpartisan dimension. Their districts were more compact; they split fewer counties and municipalities; they were just as equal in population; and they too included two districts in which (as required by the Voting Rights Act) minority voters would be able to elect the candidates of their choice.

Yet the vast majority of these simulated maps (like Maryland's enacted plan in the 2000s) featured two Republican districts, not one. In fact, there were about as many simulated maps with *three* Republican

districts as with one.[4] *See also* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering*, 44 Electoral Studies 329, 337 (2016) (finding that Maryland exhibits the second-largest pro-Democratic skew in the country relative to a simulated map distribution). The enormous pro-Democratic tilt of Maryland's current plan therefore cannot be explained by the State's political geography or efforts to comply with traditional redistricting criteria or the Voting Rights Act. These benign factors are perfectly compatible with—indeed, they typically result in—a fairer map.

In sum, there is little doubt that Maryland's current plan would be unconstitutional under Amici's proposed test. The plan's partisan asymmetry is intentional, large, durable, and unjustified. That it is possible to reach this conclusion, of course, is strong evidence of the test's manageability. If the test were *not* workable, it would not be possible to evaluate a map's legality with any certainty.

The likely invalidity of the Maryland plan also refutes the argument, voiced in the *Whitford* litigation, that Amici's proposed test is biased in favor of Democrats because of their tendency to cluster in cities. Maryland, after all, is a highly diverse and urbanized state whose political geography might be expected "naturally" to benefit Republicans. Yet the Maryland plan's drafters had little difficulty achieving an enormous Democratic advantage—and

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[4] Notably, the authors of the Maryland plan actually considered (and rejected) one such 5-3 plan. *See* J.S. 48a (discussing "a proposal a senior congressional staffer worried would be 'a recipe for 5–3, not 7–1'").

Amici's test has no trouble flagging the map as an egregious gerrymander.

II. Beyond Maryland, Amici's Proposed Test Is Manageable and Would Enable Needed Judicial Intervention.

As noted above, a trial would be necessary to determine the constitutionality of Maryland's congressional plan under Amici's proposed test. A trial recently *did* take place about another congressional plan—North Carolina's—challenged as a partisan gerrymander. The district court's subsequent findings confirmed both the manageability of Amici's test and the unlawfulness of the North Carolina plan. The evidence presented in the litigation also showed the test's limited and balanced reach. The evidence further highlighted the dire need for judicial intervention, as partisan gerrymandering at the congressional level has never been more severe or persistent.

A. Amici's Test Has Been Used Successfully in Litigation over North Carolina's Congressional Plan.

Last Term, this Court struck down two North Carolina congressional districts as unconstitutional *racial* gerrymanders. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). In response, the State redrew its entire congressional map, ignoring racial data altogether in an effort to avoid further liability for racial gerrymandering. This redrawn map then became the target of a *partisan* gerrymandering suit—the *LWVNC* litigation—brought by Amici. The district court denied the State's motion to dismiss, *see LWVNC v. Rucho*, 240 F. Supp. 3d 376, 391 (M.D.N.C.

2017) (*LWVNC I*), and then, after a four-day trial, invalidated the plan, *see LWVNC II*, 2018 WL 341658, at *1. Both of these holdings were unanimous.

Starting again with discriminatory intent, it was present in spades when North Carolina enacted its current congressional plan. One of the official criteria for the plan was actually labeled "Partisan Advantage," and required "[t]he partisan makeup of the congressional delegation" to be "10 Republicans and 3 Democrats." *LWVNC II*, 2018 WL 341658, at *6. Another formal criterion, dubbed "Political Data," elaborated that, "other than population data," only "election results in statewide contests" would "be used to construct congressional districts." *Id.*

The North Carolina plan's architect, Representative David Lewis, also reveled in the map's partisan unfairness. In comments at a public hearing, he "acknowledge[d] freely that this would be a political gerrymander." *Id*. He "propose[d] that we draw the map[] to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." *LWVNC I*, 240 F. Supp. 3d at 378-79. And he declared that "to the extent [we] are going to use political data in drawing the map, it is to gain partisan advantage." *LWVNC II*, 2018 WL 341658, at *6.

Turning to discriminatory effect, Republican candidates received 53% of the two-party vote in North Carolina's 2016 congressional election, but won *77%* of the State's congressional seats (ten out of thirteen). *See id.* at *48. This corresponds to an efficiency gap of 19% in a Republican direction—the single worst score in the country in the 2016 election.

See id. at *49-50. This also corresponds to a pro-Republican partisan bias of 27%—the second-worst score in America in 2016, and the eighth-worst since 1972. *See id.* at *54; *see also* Simon Jackman Expert Rep. at 62-65, *LWVNC v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Apr. 18, 2017) (hereinafter Jackman Rep.); Simon Jackman Rebuttal Rep. at 2-7, *LWVNC v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Apr. 17, 2017) (hereinafter Jackman Rebuttal Rep.).[5]

Expert testimony further established the durability of the North Carolina congressional plan's partisan asymmetry. It would take a six-point pro-Democratic swing for Democrats to capture just one more seat. For the plan's Republican advantage to disappear, Democrats would have to better their 2016 showing by *nine* points, winning 56% of the statewide vote. Democrats have not done this well in a North Carolina congressional election in more than thirty years. *See LWVNC II*, 2018 WL 341658, at *49; Jackman Rep. at 57-59.

With respect to justification, lastly, Professor Chen used his computer simulation technique to produce three thousand separate congressional maps for North Carolina. All of these maps matched or surpassed the enacted plan in terms of its nonpartisan objectives: equal population, contiguity, compactness, and respect for county and precinct boundaries. Yet *not one* of the three thousand maps resulted in a 10-3 Republican edge or a partisan asymmetry as large as

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[5] Because North Carolina (unlike Maryland) is a competitive state, all measures of partisan asymmetry may validly be used. North Carolina also exhibited a very large mean-median difference of 5% in a Republican direction in 2016. *See LWVNC II*, 2018 WL 341658, at *55.

the enacted plan's. In fact, the simulated maps tilted slightly in a Democratic direction, indicating that, if anything, North Carolina's political geography seems mildly to favor Democrats. *See LWVNC II*, 2018 WL 341658, at *38-40, 56; Jowei Chen Expert Rep. at 6-22, *LWVNC v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Mar. 1, 2017).

Like the earlier discussion of Maryland's congressional plan, the district court's findings attest to the workability of Amici's proposed test. The court had no trouble determining—unanimously—that each of the test's prongs was satisfied. The court also expressed no difficulty with the empirical metrics and methods it relied on at each stage of its opinion. Indeed, the court commented that "[a]dvances in statistical theory and application . . . provide courts with more rigorous and probative evidence, thereby decreasing the risk that courts will render a[n] [erroneous] decision." *LWVNC II*, 2018 WL 341658, at *30.

Also like the earlier discussion, the district court's findings rebut the claim that pro-Republican partisan asymmetries should be expected because Republican voters are more efficiently distributed than Democrats. North Carolina is another highly urbanized state with several large cities and a significant minority population. Yet according to Professor Chen's simulations, these facts typically produce a modest *Democratic* advantage when maps are drawn without regard for election results. The drafters of North Carolina's congressional plan thus had to bend over backwards—to flout, not to heed, the State's political geography—to implement such an aggressive Republican gerrymander.

B. Amici's Test Is Limited and Balanced in Its Reach.

While the Maryland and North Carolina cases are illuminating, they still represent only two congressional plans out of the much larger universe that would potentially be subject to Amici's proposed test. To get a better sense of the test's likely implications, it is necessary to examine a wider range of maps. This is possible, fortunately, thanks to the extensive dataset that Professor Jackman compiled in the *LWVNC* litigation. This dataset indicates that Amici's test would result in liability for only a small number of glaring gerrymanders, enacted in similar volumes by both parties.

As mentioned earlier, Professor Jackman examined 136 distinct congressional plans in his *LWVNC* expert analysis. These 136 plans were used in 25 states from 1972 to 2016, for 512 individual elections. *See* Jackman Rep. at 26.[6] Of the 136 plans, 59 almost certainly would have been lawful under Amici's test because they were not enacted by a single party in full control of the state government. Courts designed 33 maps, divided state governments crafted another 17, and commissions drew a further 9. In all of these cases, it is highly implausible that discriminatory intent was present. *See* Jackman Dataset.

This leaves 77 congressional plans (136 – 59) that were enacted by a single party fully in charge of the redistricting process. Of these 77, only 29 exceeded

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[6] Professor Jackman only examined states with seven or more congressional seats, for which partisan asymmetry calculations are more reliable. *See* Jackman Rep. at 19.

Professor Jackman's suggested partisan asymmetry thresholds in their first elections. (He set thresholds by determining the *initial* asymmetry that has corresponded historically to a *lifetime average* asymmetry of at least one congressional seat. *See* Jackman Rep. at 37-54.[7]) And of these 29 plans, 16 were passed by unified Democratic government, and 13 by unified Republican government. *See* Jackman Dataset.[8]

At most 16 Democratic gerrymanders and 13 Republican gerrymanders, then, would have been exposed to liability over the last half-century under Amici's test. It should be stressed, moreover, that these are the far upper limits of the test's potential reach. At least some of these 29 plans would not have proven *durably* asymmetric had they been subjected to sensitivity testing. Some additional fraction would have been no more asymmetric than the distribution of computer-simulated plans—meaning that their skews would have been justified by States' political geographies or legitimate redistricting objectives. *See* Chen & Cottrell, *supra*, at 337 (finding that several

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[7] Specifically, Professor Jackman recommended a 12% initial efficiency gap threshold for congressional plans with fewer than fifteen districts, and a 7.5% initial efficiency gap threshold for maps with fifteen or more seats. *See* Jackman Rep. at 37-54.

[8] The small and roughly equal numbers of Democratic and Republican gerrymanders follow from the distributions of measures of partisan asymmetry. These distributions are centered on zero (or perfect symmetry) and are normal in shape (meaning most values are near the midpoint and outliers are rare). *See* Jackman Rep. at 27 (showing the efficiency gap distribution); Jackman Rebuttal Rep. at 5 (showing the partisan bias distribution).

current plans are as tilted as would be expected given the spatial patterns of the States' voters).

Amici's test is thus "limited and precise" because it jeopardizes only a small number of outlier plans and plays no favorites between the parties. *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). The test plainly does *not* "commit federal and state courts to unprecedented intervention in the American political process," *id.*, or "throw into doubt the vast majority of the Nation's . . . districts," *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring).

C. Judicial Intervention Is Warranted Because of the Increasing Severity and Persistence of Congressional Gerrymandering.

While Amici's proposed test would flag only a few flagrant gerrymanders, it would (like any standard) make possible some judicial intervention on partisan gerrymandering grounds. Such intervention is sorely needed for several reasons: The severity of congressional gerrymandering has risen sharply in the current cycle. So has the persistence of congressional plans' skews over their lifetimes. And evidence is mounting that gerrymandering does more than award extra seats to the line-drawing party; it also distorts legislative representation and corrodes voter confidence.

Starting with congressional plans' partisan asymmetries over time, Professor Jackman calculated the median absolute value of plans' efficiency gaps from 1972 to 2016. This value fell in the 1970s as the last highly malapportioned plans were eliminated. It

then rose gradually in the 1980s, 1990s, and 2000s, as mapmakers' efforts became increasingly aggressive. The current cycle, though, is different from anything that has come before. In 2012, the typical congressional plan had an efficiency gap of *12%—one-third* higher than the previous record. This extreme asymmetry endured in 2014 and 2016: respectively, the fifth- and third-most skewed election years in the last half-century. *See* Jackman Rep. at 30; *see also* Anthony J. McGann et al., *Gerrymandering in America* 4-5, 97-98 (2016) (reporting similar findings using partisan bias as a metric).

Professor Jackman also studied the durability of congressional gerrymandering by computing the correlation between plans' initial efficiency gaps and their average efficiency gaps over the rest of their lifetimes. In the 1970s, 1980s, and 1990s, this correlation was only moderate (around 0.3). A plan's asymmetry in its first election, in other words, did merely a passable job predicting the plan's subsequent performance. In the 2000s and 2010s, however, this correlation *more than doubled* (to roughly 0.8). Maps that start a cycle skewed now almost always end it that way too. *See* Jackman Rep. at 48-49; *see also* Eric McGhee et al., *The Role of Partisan Gerrymandering in U.S. Elections* 11 (Aug. 2017) (reporting similar findings for congressional and state legislative elections).

Professor Jackman further examined the boost that the line-drawing party receives from control of the redistricting process. This boost was quite small in the 1970s, 1980s, and 1990s, statistically indistinguishable from zero. In the 2000s and 2010s, though, the typical Republican-drawn plan had an

efficiency gap seven points more pro-Republican than a nonpartisan map, and the typical Democrat-drawn plan had an efficiency gap *twelve* points more pro-Democratic. While once the parties frequently failed to profit from control of redistricting, they now extract every drop of partisan advantage when they are able to draw the lines without hindrance. *See* Jackman Rep. at 33; *see also* McGhee et al., *supra*, at 10 (reporting similar findings for congressional and state legislative elections).

What accounts for these troubling trends? One explanation is technological. Today's gerrymanderers are able to rely not just on redistricting software but also on a host of other tools that were unavailable to their predecessors. These include regression models of voter behavior, individual-level data from enhanced voter files, sensitivity testing to ensure the persistence of a party's advantage, and computer algorithms to explore the universe of mapping options. Thanks to these advances, redistricting is no longer a "self-limiting enterprise" in which "an overambitious gerrymander can lead to disaster" in the event of a modest "swing in overall voting strength." *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the judgment). To the contrary, today's gerrymanders are precisely engineered to endure even in the face of such shifts.

The other explanation is voters' rising partisanship, which makes their choices at the polls easier for gerrymanderers to anticipate. From roughly the 1960s through the 1980s, voters were not rigidly partisan. They often switched their votes from one election to the next, and split their tickets even in the same election. But starting in the 1990s and

accelerating ever since, voters have become more and more set in their partisan ways. Only about 5% of voters now change their votes from one presidential election to another, compared to roughly 15% a generation earlier. *See, e.g.*, Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 368 (2017). The frequency of ticket splitting in federal elections has fallen below 10% in the 2010s, compared to 25-30% a few decades before. *See, e.g.*, Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 Pol. Psychol. 505, 513 (2011). And as party has grown ever more potent, candidate-specific qualities have faded in importance. The advantage enjoyed by congressional incumbents, in particular, has tumbled from nine points in the 1980s to less than three today. *See, e.g.*, Gary C. Jacobson, *It's Nothing Personal: The Decline of the Incumbency Advantage in U.S. House Elections*, 77 J. Pol. 861, 863 (2015).

Voters are not the only ones who have become more partisan. Members of the House of Representatives, too, have divided increasingly neatly along party lines. Political scientists measure House members' ideologies by aggregating their roll call votes into a single score on a liberal-conservative axis. *See* About the Project, Voteview, https://voteview.com/about. From 1980 to the present, the ideological gap between the average House Democrat and the average House Republican grew every single year. *See* The Polarization of the Congressional Parties, Voteview, https://legacy.voteview.com/political_polarization_2015.htm. This gap is now larger than at any previous point in American history. Every single House

Democrat is more liberal than every single House Republican, and vice versa. *See id.*

The House's unprecedented polarization exacerbates the effects of congressional gerrymandering. It means that the extra Democrats or Republicans elected due to the practice are not centrists willing to compromise with the other side. Rather, they are liberal or conservative stalwarts highly consistent in their ideological stances. As a consequence, a large efficiency gap in a party's favor does not just result in more of the party's candidates being elected. It also distorts the ideological balance of the State's congressional delegation, shifting it sharply in a liberal or conservative direction—and away from the more moderate preferences of the State's voters. *See* Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. (forthcoming 2018) (manuscript at 17-18); Christopher Warshaw Expert Rep. at 21-23, *League of Women Voters of Pennsylvania v. Commonwealth*, No. 261 MD 2017 (Pa. Commw. Nov. 7, 2017) (hereinafter Warshaw Rep.). Gerrymandering, in other words, subverts the principle that legislators should be "collectively responsive to the popular will." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). It renders congressional delegations responsive not to the electorate but rather to the line-drawing party.

Adding insult to injury, gerrymandering undermines voter confidence as well. A massive 2014 survey asked voters across the country whether they trust their congressional representatives to do what is right. In states with small efficiency gaps, about equal shares of Democrats and Republicans expressed such

faith. But in states with large pro-Democratic efficiency gaps, Republican voters were much less likely to believe that their representatives would choose the correct course. This pattern reversed in states with large pro-Republican efficiency gaps, where Democratic voters were much less trusting of their members of Congress. *See* Warshaw Rep. at 25-27.

The case for judicial intervention, then, is ultimately quite simple. Partisan gerrymandering has become more extreme and more durable, thus intensifying the damage it causes to legislative representation and voters' faith in government. These democratic harms, moreover, can be remedied only by courts, because incumbent politicians have no incentive to fix the system to which they owe their positions. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that stricter scrutiny should apply to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation").

III. Appellants' Proposed Test Would Not Work in Several Other Contexts.

Amici explained above, *see supra* Part I, that their proposed test would likely yield the same conclusion here as Appellants' proposal: namely, liability for the State of Maryland. Under Appellants' test, the State intended to disadvantage Republican voters in the Sixth District, and the State accomplished this goal by flipping the seat from Republican control in the 2000s to Democratic control in the 2010s. Under Amici's test, the State aimed to disadvantage Republican voters *statewide*, the State achieved this objective by

crafting a plan with a large and durable pro-Democratic partisan asymmetry, and the State lacked any legitimate justification for this asymmetry (like political geography or compliance with traditional redistricting criteria or the Voting Rights Act).

Generalizing somewhat, Appellants' and Amici's tests produce the same result in circumstances like those presented here: where a previously symmetric plan is replaced by an asymmetric map whose skew is generated by flipping one or more districts from the disfavored to the gerrymandering party. In several other settings, though, the two tests do *not* produce the same result. Their divergence stems from Appellants' test's focus on the status quo ante (rather than the current plan) and individual districts (instead of the map as a whole). And in these other settings, it is Appellants' test that should not be used, because its outcomes do not correspond to the usual understanding of gerrymandering.

A. Appellants' Test Would Not Work Where Districts Have Been Flipped but a Plan Is Not Skewed.

To start, consider a State whose previous plan was asymmetric and whose current plan is symmetric thanks to the flipping of one or more districts.[9] Assume, for instance, that Republicans won five of Maryland's eight congressional seats in the 2000s—even though the State's electorate is heavily Democratic—and that in this cycle Democrats

[9] All of the points in this section apply equally to the slightly different hypothetical of a State whose previous plan was *symmetric* and whose current plan is also symmetric, notwithstanding the flipping of one or more districts.

controlled the redistricting process and intentionally flipped two districts in order to secure a 5-3 advantage for themselves.

It is clear that there would be liability under Appellants' test in this scenario. The State aimed to disadvantage Republican voters in the two targeted districts, and the State achieved its goal by actually flipping the seats. It is equally clear that there would *not* be liability here under Amici's test. Maryland's current plan is symmetric in the hypothetical, but under Amici's test, a large and durable skew is a necessary element of the cause of action.

It is clear, too, that under this Court's precedents, there *should* not be liability in this scenario. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Court addressed the situation where "a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754. According to the Court, "judicial interest should be at its lowest ebb" here because the State "undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it." *Id.* In *LULAC v. Perry*, 548 U.S. 399 (2006), similarly, Justice Kennedy examined a congressional plan that made "the party balance more congruent to statewide party power." *Id.* at 419 (opinion of Kennedy, J.). He commented that a plan that "more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination." *Id.*

Why does Appellants' test resolve this hypothetical differently from *Gaffney* and *LULAC*? One answer is that the test relies on the previous plan as the benchmark for comparison. Even if (as here) the

previous plan was asymmetric, it is still used as the baseline relative to which the flipping of districts is assessed. The other answer is that the test assumes that flipped districts constitute a discriminatory effect. Even if (again as here) flipped districts are the means by which an existing partisan asymmetry is erased, they still satisfy the test's effect prong. As a consequence, the test fails to distinguish between the enactment of a new partisan gerrymander (via district flipping) and the elimination of an old partisan gerrymander (also via district flipping). Both of these maps are equally liable in the test's eyes.

B. Appellants' Test Would Not Work Where Districts Have Not Been Flipped but a Plan Is Skewed.

Next, take a State whose previous plan was asymmetric and whose current plan is also asymmetric—but was implemented without flipping any districts.[10] Suppose, for example, that Democrats won seven of Maryland's eight congressional seats in the 2000s, and that Democrats continued winning seven of eight seats in the 2010s, without any districts changing hands.

This time there plainly would not be liability under Appellants' test. The State did not intend to disadvantage the Republican voters in any particular districts, nor did the State actually flip any districts from Republican to Democratic control. This time there also likely *would* be liability under Amici's test.

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[10] All of the points in this section apply equally to the slightly different hypothetical of a State whose previous plan was *symmetric* and whose current plan is asymmetric—but was implemented without flipping any districts.

The State aimed to handicap Republican voters statewide, and the asymmetry of Maryland's current plan in the hypothetical is large, durable, and probably unjustified.

And again, according to the Court's case law, there *should* be liability under these circumstances. In *LULAC*, Justice Kennedy described a district plan that "perpetuated much of the 1991 gerrymander" and whose "practical effect . . . was to leave the 1991 Democratic Party gerrymander largely in place." *Id.* at 412 (internal quotation marks and alterations omitted). Justice Kennedy then criticized the test proposed by the *LULAC* appellants because it would not strike down this map. "[T]he test would leave untouched the [map], which entrenched a party on the verge of minority status," and thus "does not have the reliability appellants ascribe to it." *Id.* at 419.

As in the previous hypothetical, Appellants' test goes wrong because of its fixation on the status quo ante and flipped districts. When the previous plan was highly skewed, it makes little sense to use it as the benchmark for comparison. Likewise, flipped districts are not a prerequisite for a discriminatory effect; one can also be achieved when a party merely maintains its preexisting advantage. Appellants' test therefore not only fails to distinguish between the formation of new gerrymanders and the removal of old ones. It also improperly differentiates between current gerrymanders based on what their antecedents happened to be.

This is a flaw, moreover, that is not just conjectural. In Massachusetts, Democrats won every congressional district in the 2000s, and then designed a new plan that has also enabled them to win every

seat in the 2010s. In Michigan, Republicans won nine of fifteen congressional districts throughout most of the 2000s, and then crafted a new map under which they have won nine seats in the 2010s as well. *See* Jackman Dataset. Both of these plans would get off scot-free under Appellants' test, simply because they replaced maps that were themselves gerrymanders and thus had no need to flip any districts. The plans' predecessors would save them from liability.

C. Appellants' Test Would Not Work Where Multiple Districts Have Changed Hands, in Both Parties' Directions.

As a third scenario, consider a State in which multiple districts change hands between its previous plan and its current plan—and in both parties' directions. Assume, for instance, that Maryland Democrats increased their edge from 6-2 in the 2000s to 7-1 in the 2010s not just by flipping the Sixth District from Republican to Democratic control, but *also* by flipping the First District in the same direction and by enabling Republicans to win a seat previously held by Democrats.

Now there would be three viable partisan gerrymandering claims under Appellants' test. Republican voters in the First and Sixth Districts could sue, because their seats were intentionally flipped. And so could Democratic voters in the district that changed hands in the opposite direction, because they too were targeted, successfully, by the State. Under Amici's test, in contrast, there would be just one plausible claim here: the traditional one by Republican voters challenging the plan in its entirety.

While the Court has never considered such a situation, Amici's test would seem to handle it better than Appellants' proposal. From an efficiency standpoint, Amici's test would give rise to a single (statewide) lawsuit, not three separate (district-specific) disputes, all requiring their own factual development and legal analysis. More importantly, Amici's test would permit only Republican voters to sue—the voters against whom the plan as a whole is skewed. The test would *not* allow Democrats to argue that, somehow, they are the victims of partisan gerrymandering when their preferred candidates win seven of eight congressional seats.

This situation, too, is far from fanciful. In Florida, Republicans were in charge of redistricting in 2011, and they flipped five congressional seats from Democratic to Republican control (Districts 3, 11, 17, 19, and 25), as well as eight seats in the opposite direction (Districts 5, 9, 14, 18, 21, 22, 23, and 24). *See id.* This apparently means that voters in *thirteen* different districts would be able to bring suits under Appellants' test—most of them Republicans even though it is Democrats against whom the Florida map is tilted overall. The one claim that would not get off the ground, in this festival of litigation, is the attack by disadvantaged Democrats on the asymmetric plan in its entirety.[11]

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[11] And while Florida has a large number of congressional seats, almost all States have even more legislative districts. In a legislative plan with dozens or even hundreds of seats, there could easily be many more than thirteen viable claims under Appellants' proposed test. *Cf. Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033 (N.D. Ala. 2017)

D. Appellants' Test Would Not Work Where District Continuity Cannot Be Determined.

As a final scenario, take a State whose current plan bears little relation to its previous plan, either because the State gained or lost congressional seats or because the current plan's drafters used very different criteria than the previous plan's. Suppose, for example, that Maryland Republicans were responsible for designing the State's current plan, and that in order to convert a 6-2 Democratic advantage to a 5-3 Republican edge, they radically overhauled the previous district configuration.

Now it is unclear if anyone would be able to sue under Appellants' test. The intent to injure Democratic voters, located in districts that formerly elected Democratic candidates, would still be present. But owing to the lack of district continuity in the hypothetical, it would no longer be possible to identify specific seats that flipped from Democratic to Republican control. Old districts that were moved from one side of the State to the other, that were shattered into several pieces, or that were combined into entirely new arrangements, could not be matched one-to-one with new districts. Amici's test, on the other hand, faces none of these obstacles. The degree of district preservation in a map is irrelevant to whether the map is intentionally, severely, persistently, and unjustifiably asymmetric.

The facts in *Vieth* and *LULAC* were reasonably close to this situation. In both cases, the Court

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(evaluating thirty-five separate racial gerrymandering claims on remand from this Court).

confronted plans that were dramatically different from their antecedents. *See LULAC*, 548 U.S. at 455 (Stevens, J., concurring in part and dissenting in part) ("The overall effect of [the challenged map] was to shift more than *eight million* Texans into new districts . . . ."); *Vieth*, 541 U.S. at 289 (plurality opinion) (contrasting the challenged plan to the prior "judicially drawn district map 'free from partisan gerrymandering'"). Yet in neither case did the Court so much as hint that the plans should be insulated from liability because of their novelty. And rightly not. If anything, a map that is drastically redrawn is *more* worrisome than one that largely preserves the status quo, because the extreme disruption may be a sign of an invidious motive. At the very least, the map reconstituted from scratch should not automatically be deemed valid.

And once more, this situation is not at all uncommon. In Illinois, Democrats had full control of the redistricting process in 2011, and they designed a plan far different from (and more pro-Democratic than) the map enacted by divided government in 2001. *See Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 571-74 (N.D. Ill. 2011). In North Carolina, Republicans were responsible for redistricting in 2011 (and 2016), and their highly pro-Republican plans also had little in common with the map crafted by Democrats in 2001. *See LWVNC II*, 2018 WL 341658, at *3-8. In both of these States, the lack of continuity between the previous plan and the current plan makes it hard to say which specific districts changed hands. And in both States, the right response to this difficulty is not to shield the maps from liability, but rather to employ

a test that does not require the identification of flipped districts.

CONCLUSION

For the foregoing reasons, the Court should hold that claims of congressional partisan gerrymandering are justiciable. The Court should also, at most, adopt Appellants' district-specific test *in addition to*—not *instead of*—a statewide gerrymandering test.

Respectfully submitted,

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