No. 18-726

In the
Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections*, *and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections*,

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellees.

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

BRIEF OF MICHAEL C. DORF, JOSHUA S. SELLERS, ANDREW M. SIEGEL, AND JOSEPH T. THAI AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nationally recognized constitutional law scholars. They have substantial expertise regarding the First Amendment and redistricting. And they have authored books and articles on constitutional law and democracy. They believe that legislatures engaged in redistricting must operate within constitutional limits, and that one set of those limits is grounded in the First Amendment.[2]

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[1] All parties have given blanket consent to the filing of amicus briefs in this matter. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than amici and their counsel contributed money that was intended to fund the preparation or submission of this brief.

[2] Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell Law School. He is the author, co-author, or editor of six books and over a hundred scholarly articles and essays on constitutional law and related subjects. Joshua S. Sellers is an Associate Professor of Law at Sandra Day O'Connor College of Law, Arizona State University. His principal areas of research and teaching are in election law, legislation and regulation, constitutional law, and civil procedure. Andrew M. Siegel is an Associate Professor of Law at Seattle University School of Law. He is also a Faculty Fellow at Fred T. Korematsu Center for Law and Equality. Joseph T. Thai is the Watson Centennial Chair at the University of Oklahoma College of Law. He teaches, writes, and litigates in the field of constitutional law, including the First Amendment.

SUMMARY OF ARGUMENT

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Equally fundamental is the right "to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Accordingly, legislatures engaged in redistricting must operate within constitutional limits to avoid impinging on those core rights, and courts have a constitutional obligation to police those limits. The fact that redistricting actions have political consequences does not make them non-justiciable political questions. And courts considering challenges to redistricting do so properly under not just the Fifth and Fourteenth Amendments' guarantees of equal protection, but also the First Amendment and the Fourteenth Amendment's Due Process Clause.

"First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314–16 (2004) (Kennedy, J., concurring). Applying the First Amendment to partisan gerrymandering challenges is consistent with that fundamental interest in "not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* Nor does applying the First Amendment to such challenges force courts into

using an unmanageable and ambiguous standard: courts have already devised a manageable standard to apply to the question of redistricting in the equal protection context of racial gerrymandering. Extending that framework to First Amendment claims will not be any less manageable.

ARGUMENT

I. Legislatures Engaged In Redistricting Must Operate Within Constitutional Limits, And Courts Are Empowered To Enforce Those Limits

Judicial responsibility for enforcing constitutional rights applies even in cases with intense political ramifications. While "politics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), that does not mean that courts cannot resolve cases and controversies properly before them "merely because the issues have political implications." *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Nor does the fact that a case involves political rights insulate it from scrutiny or make claims nonjusticiable. *Baker v. Carr*, 369 U.S. 186, 209–10 (1962) ("[T]he right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights."). This is so because "[n]o policy underlying the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *I.N.S. v. Chadha*, 462 U.S. 919, 941–42 (1983); *Baker*, 369

U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."). Nor does potential difficulty in deriving and administering standards render courts impotent or allow them to avoid cases properly before them, even if they might otherwise prefer to do so. *Zivotofsky*, 566 U.S. at 194.

The threshold question, therefore, is whether the act of drawing voting districts is so uniquely political that claims of constitutional infirmity are nonjusticiable. That question has been answered long ago: "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence" because a state cloaks the impairment of voting rights "in the garb of the realignment of political subdivisions." *Baker*, 369 U.S. at 230 (internal quotation marks omitted). This Court saw no problem in concluding that the constitutional rights at issue in *Baker* presented justiciable claims. So too here.

A. The Election Clause does not insulate claims of constitutional harm in the redistricting process from judicial review

The Election Clause, Article I, § 4, gives state legislatures the power to prescribe "The Times, Places and Manner of holding Elections for Senators and Representatives," and Congress the power to "at any time by Law make or alter such Regulations." But the framers did not intend the Election Clause to establish Congress as the exclusive check on the states. To the contrary, if the Election Clause gave

Congress exclusive authority to enforce voting and redistricting laws, courts would necessarily be impotent to examine challenges to *federal* election laws. Yet, this Court has, time and again, held these types of claims justiciable, such as when it subjected the Voting Rights Act of 1965 to judicial scrutiny. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (upholding the Act). More recently, this Court revisited whether certain aspects of the Voting Rights Act "continue[d] to satisfy constitutional requirements." *Shelby County, Ala. v. Holder*, 570 U.S. 529, 536 (2013) (striking down part of the Act). Nowhere in between was it ever held that federal election laws were per se nonjusticiable.

Nevertheless, advocates of non-justiciability contend that: (1) delegation of supervisory authority over state elections to Congress was appropriate, but that review by Article III courts would be wholly inappropriate given the partisan fray; (2) the framers did not even consider whether federal courts should properly oversee election regulations to ensure no undue advantage to one party or faction; and (3) Congress in fact has exercised its authority to address concerns of partisan gerrymandering. None of these arguments warrants judicial retreat.

First, generalized notions of judicial independence cannot hide the complete lack of any historical or textual support for the argument that the framers were concerned about judicial review of state redistricting. While the framers considered and rejected assigning to the Judiciary other politically fraught tasks, like where to try impeachments, that does not equate to a blanket principle that courts

should have no involvement in politically fraught tasks lest their independence be compromised. Such a broad principle would, of course, run headlong into this Court's repeated assertion that "politically fraught" does not mean "out of the reach of the Judiciary." *See*, *e.g.*, *Baker*, 369 U.S. at 209 (holding that a challenge to a redistricting plan was justiciable). The Article III power to resolve cases and controversies covers claims involving political rights, *id.*, even those with substantial political implications. *Zivotofsky*, 566 U.S. at 196. And ruling against any judicial involvement in constitutional claims related to redistricting "could erode confidence in the courts as much as would a premature decision to intervene." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring).

Second, the argument that the framers did not consider the Judiciary the proper body to oversee election regulations overstates the issue. We do not suggest that federal courts should supervise the minutiae of election regulations. But courts can and should hear cases and controversies when citizens bring claims that their government has improperly targeted them in violation of their constitutional rights. *See id.* at 308–10 (Kennedy, J., concurring) (rejecting certain judicial interventions in redistricting but noting that it is not "alien to the Judiciary to draw or approve election district lines"); *White v. Regester*, 412 U.S. 755, 763 (1973) (noting that reapportionment of congressional seats is subject to strict standards).

Moreover, it is unsurprising that the Constitution does not affirmatively delegate

authority to the Judiciary to review state election laws, given that judicial review itself appears nowhere in the text of the Constitution (although it was widely assumed, *see* Federalist No. 78 (Hamilton)). More fundamentally, however, when the Election Clause was drafted, the Bill of Rights had yet to be written, and even after it was ratified in 1791, the rights contained therein were not binding on the states or enforceable by the federal Judiciary until incorporation under the Fourteenth Amendment.

Third, the fact that Congress has in fact exercised its authority to oversee states is no reason for courts to abstain. Put another way, congressional action does not compel judicial inaction where a state has violated a citizen's rights in an individual case. And even if the framers had envisioned Congress as the primary overseer of state redistricting laws, Congress itself has vested jurisdiction in three-judge, federal district court panels to hear cases "challenging the constitutionality of the apportionment of congressional districts . . . ." 28 U.S.C. § 2284; *Cooper v. Harris*, 137 S. Ct. 1455, 1464 n.2 (2017). Congress clearly sees a judicial role. But if the Election Clause constituted an exclusive delegation of authority to the legislative branch, then is § 2284 an unconstitutional delegation of legislative authority? That cannot be right. Rather, the jurisdictional grant itself underscores the judicial reviewability of such claims; deciding a case involving a challenge to the constitutionality of a redistricting plan is decidedly judicial, not legislative.

The delegation to Congress in the Election Clause (and, later, the Fourteenth and Fifteenth Amendments) was not intended to exclude the Judiciary from all election-related claims, but to include Congress. During both the Founding and Reconstruction, federalism principles were hotly debated, and an explicit grant to Congress was necessary to allow it to act. Without such a delegation, the Tenth Amendment would have prohibited Congress from legislating in the field of elections.

However, since at least *Marbury v. Madison*, 5 U.S. 137 (1803), the Judiciary has not shied away from determining the constitutionality of a statute simply because Congress has been granted power to legislate in a particular area. *Zivotofsky*, 566 U.S. at 196. Indeed, if a constitutional grant of power to Congress were sufficient to insulate it from scrutiny, judicial review itself would be hamstrung, given that the Tenth Amendment prohibits Congress from acting unless it has been specifically delegated power by the Constitution. This Court should not lightly read exclusivity into this, especially where, as here, fundamental constitutional rights that this Court has long held justiciable are at stake.

B. The text and history of the Fourteenth Amendment supports judicial review of state redistricting laws

Just like the Election Clause, the Fourteenth Amendment delegates to Congress the authority to legislate in areas that involve state authority: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

§ 5. And Congress has, in fact, regularly acted pursuant to each of these powers. Yet no one would seriously contend that the Fourteenth Amendment is beyond the Judiciary's reach. The fact that the Constitution grants to Congress the power to give effect to a particular right does not thereby preclude courts from executing their Article III authority to ensure that the legislative branches—both federal and state—operate within constitutional boundaries in that particular field. It still falls to the courts to adjudicate disputes between litigants on the basis of that legislation, including when one party alleges a constitutional deficiency.

Moreover, if the Election Clause and the Fourteenth Amendment were intended to imbue Congress with the exclusive authority to regulate state legislatures in the realm of elections, then *no* judicial scrutiny of election laws would be permissible. But one-person-one-vote and racial gerrymandering challenges are indisputably justiciable. *Shaw v. Reno*, 509 U.S. 630, 640–41 (1993). Indeed, state laws relating to the "times, places, and manner of holding elections" have regularly been struck down on constitutional grounds. *See*, *e.g.*, *Williams*, 393 U.S. at 34 (ballot access); *Anderson v. Celebrezze*, 460 U.S. 780 (1983) (same); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (party primary nominations); *Shaw*, 509 U.S. at 641 (vote dilution); *Cook v. Gralike*, 531 U.S. 510 (2001) (ballot language). And the long history of judicial intervention in redistricting confirms that both the Judiciary and Congress have authority to

"respond[] to the problem of vote dilution."[3] *Shaw*, 509 U.S. at 641. Acknowledging this, however, undermines the entire Election Clause exclusivity argument. Even a little yeast leavens the entire batch of dough.

Arguments that the Constitution envisioned an exclusively political check on redistricting are equally unpersuasive where the issue involves legislatures intentionally creating uncompetitive or "safe" districts. In so doing, the majority is seeking to insulate itself from political accountability. "A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office." *Stanson v. Mott,* 551 P.2d 1, 9 (Cal. 1976) (citing Madison, The Federalist Papers, Nos. 52, 53; 10 J. Richardson, Messages and Papers of the Presidents

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[3] That vote dilution constitutes an actual injury is beyond dispute. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), all the members of the Court agreed that a plaintiff can show harm through actual vote dilution. Justice Kagan, joined by Justices Ginsberg, Breyer, and Sotomayor, asserted that a plaintiff might also show injury in the form of an associational harm that burdens "fundraising, registering voters, attracting volunteers," and other forms of political organization. *Id*. at 1938 (Kagan, J., concurring). Because this injury inquiry is primarily a question of standing, the Court here can rule on justiciability using the uncontroversial injury of vote dilution without reaching the question of whether the type of associational harm noted by Justice Kagan also qualifies to confer standing.

(1899) pp. 98—99 (President Jefferson)).[4] And "the entrenchment of one or a few parties to the exclusion of others . . . is a very effective impediment to the associational and speech freedoms . . . essential to a meaningful system of democratic government." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 70 (1990) (citing *Elrod v. Burns*, 427 U.S. 347, 368–70 (1976) (plurality opinion)). The idea that an electoral majority—which benefits from gerrymandered districts and the corollary burdening of an electoral minority's rights—will act as a guardian of minority interests and hold the legislature accountable for that gerrymandering defies the wisdom of the framers and hundreds of years of experience in a representational republic. The ambition of one faction cannot check the ambition of another, Federalist No. 10, when the latter has effectively insulated itself from accountability.

The result looks less like a constitutional republic than the tyranny of the (electoral) majority that the framers feared and from which they sought to protect the country. *See* Federalist No. 51. The solution, as Madison said, was a system of checks and balances. When the redistricting process lies entirely in the hands of a legislature—whether

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[4] Not all incumbency protection is problematic under the First Amendment. For example, a goal of avoiding contests between incumbents by not drawing two representatives into the same district does not necessarily raise the same First Amendment concerns. However, incumbency protection could cross the line if used in a partisan way against those who might otherwise challenge an incumbent.

federal or state—a faction that seizes control can insulate itself from political accountability by effectively suppressing the rights of other citizens. *See McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 263 (2003) ("The first instinct of power is the retention of power") (Scalia, J., concurring in part and dissenting in part). To be sure, state legislatures have broad latitude, but it is not boundless. And the Judiciary stands as a vital check on that power.

II. The Constitution Prohibits Discrimination On The Basis Of Political Affiliation

"[A]bove all else, 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 Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases). "[T]he First Amendment is plainly offended" when a legislature attempts to favor one particular viewpoint. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978). And that concern with non-neutrality is at its apex where political speech and association are concerned. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The advancement of common political goals and ideas" is central to the First Amendment's right of free association); *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (striking down a state election law that "suffocates" the "freedom of association protected by the First and Fourteenth Amendments").

A. The First Amendment and the Due Process Clause apply to redistricting

The First Amendment and the Due Process Clause have long been construed to prevent government discrimination or retaliation on the basis of political affiliation in a variety of contexts separate and apart from redistricting. "[I]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Anderson*, 460 U.S. at 787 (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Thus, in *Anderson*, the Court held that a law requiring independent candidates to declare before established political parties had chosen their candidates disproportionately burdened new or small political parties or independent candidates. As a result, the law impinged on First Amendment associational rights because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Anderson*, 460 U.S. at 793–94; *see also Williams*, 393 U.S. at 30 (holding that certain ballot restrictions infringed upon voters' rights of political association, as well as their right to cast effective ballots "regardless of their political persuasion"); *Kusper v. Pontikes*, 414 U.S. 51 (1973). The statute's effect was to "limit[] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," a fact which "threaten[ed] to reduce diversity and competition in the

marketplace of ideas." *Anderson*, 460 U.S. at 794; *id.* at 788 n.8 (noting that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes"); *NAACP v. Ala.,* 357 U.S. at 462–63 (applying strict scrutiny to a discovery request into the identities of NAACP members because if granted, it was likely to adversely affect the NAACP's and its members' ability "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate"); *NAACP v. Button,* 371 U.S. 415, 429 (1963) (applying strict scrutiny to a Virginia statute that limited the NAACP's ability to solicit plaintiffs for civil rights litigation because such litigation was "a form of political expression," as well as a "means for achieving the lawful objectives of equality of treatment . . .").

This is so because "political belief and association constitute the core of those activities protected by the First Amendment." *Rutan*, 497 U.S. at 69 (quoting *Elrod*, 427 U.S. at 356). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Elrod*, 427 U.S. at 357. Thus, in *Elrod*, the Court held it unconstitutional to fire people from certain government jobs based on party affiliation, because doing so "tips the electoral process in favor of the incumbent party" and "starv[es the] political opposition." *Id.* at 356; *see also Rutan*, 497 U.S. at 74–76; *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Accordingly, state legislation—including election laws—may not improperly "burden[] a political party's First and Fourteenth Amendment right of

association." *Cal. Democratic Party*, 530 U.S. at 586; see *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (holding that no person can be excluded from the franchise "because of the way [she] may vote" and invalidating a Texas constitutional provision prohibiting members of the military stationed in Texas from voting in Texas elections, which Texas justified by arguing that military members were likely to have different political preferences than long-term residents).

To date, this Court has not directly ruled on the question of whether First Amendment and Due Process Clause challenges to redistricting decisions also present justiciable controversies, but there is no reason to conclude that they do not. *See Eu*, 489 U.S. at 222 ("To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments."). While appellees ask this Court to squarely confront the application of the First Amendment and Due Process Clause to the specific case of partisan gerrymandering, the principle itself is well established in the law. *See supra.* "The general principle . . . is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The Court there went on to cite cases in which government regulation was struck down for favoring (or disfavoring) a particular viewpoint in the areas of commercial speech (*Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983)); regulation of public utilities (*Consol. Edison Co. of New York v.*

Pub. Serv. Comm'n of New York, 447 U.S. 530, 536 (1980)); and picketing (*Carey v. Brown*, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 96)). Indeed, "[t]he First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992).

Moreover, nothing in the text of the First or Fourteenth Amendments suggests that redistricting should be treated differently than other claims of electoral discrimination. Indeed, the incorporation of the First Amendment to apply to state action flows through the same section of the Fourteenth Amendment that guarantees a citizen freedom from racial discrimination. Fourteenth Amendment, § 1; *Williams*, 393 U.S. at 30–31 (noting that First Amendment rights are "entitled under the Fourteenth Amendment to the same protection from infringement by the States"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). To hold that legislatures may intentionally burden citizens' rights on the basis of First Amendment-protected activity would thus require arbitrarily drawing a line between the Equal Protection and Due Process Clauses, prohibiting states from redistricting in violation of the former, but not the latter. This Court should not invent such a distinction here. Just as a legislative intent to punish a person based on their membership in a racial group is constitutionally suspect, so too is legislative intent to punish or retaliate against a person based on their political affiliation or past voting behavior.

In *Buckley v. Valeo*, the Court acknowledged that the Election Clause clearly gives Congress authority to regulate federal elections. 424 U.S. 1, 13 n.16 (1976). The pivotal constitutional question, however, concerned "whether the specific legislation that Congress has enacted interferes with First Amendment freedoms or invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment." *Id.* at 14. The Court thus linked the First and Fifth Amendments as both applying to election laws and found no problem with adjudicating the claim. Indeed,

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring).

In addition, the line between equal protection, due process, and First Amendment concerns in the context of partisan gerrymandering is not always clear. An equal protection claim may be "closely intertwined with First Amendment interests." *Mosley*, 408 U.S. at 95. Indeed, equal protection cases often have undertones of due process concerns, and vice versa. *See*, *e.g.*, *Williams*, 393 U.S. at 34 (finding that a state ballot access scheme "imposes a

burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause"). In *Thornburg v. Gingles*, the Court articulated a three-pronged test for vote dilution in the context of a claim brought under the Equal Protection Clause and the Voting Rights Act. 478 U.S. 30, 51 (1986). The second prong asks whether a minority group was politically cohesive such that the minority's voting power was diluted. *Id*. "Politically cohesive" is another way of saying "votes in a particular way." The constitutional problem in *Gingles*, therefore, lay not only in discrimination based on race, but also based on how the targeted minority affiliates politically. Accord *Shaw v. Reno*, 509 U.S. at 641 (recognizing that the Fourteenth Amendment is triggered "[w]here members of a racial minority group vote as a cohesive unit").[5]

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[5] Appellants nevertheless suggest that no viewpoint targeting could have occurred here because ballots are secret, "[e]lection results are known and reportable at no smaller unit than the precinct," and "voting behavior cannot be reliably inferred from party registration." Appellants' Brief at 46, n. 12. First, the fact that redistricting targeted an entire group and not a pre-known individual is irrelevant. *See*, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (noting that apportionment schemes can cause justiciable harm that is "individual and personal in nature"). Second, whether attempted targeting was actually effective is relevant to an injury or causation analysis, not whether a legislature intended to target a group based on their behavior. Third, even under an injury or causation inquiry, Appellants' argument might have had some force in the era before modern polling and big data, which now provide an extremely precise and accurate picture of voting behavior. The ruthless efficiency

B. Dilution of votes on the basis of political affiliation cannot be cured by allowing other protected activity

The fact that minority parties can still organize or engage in other forms of speech does not cure the First Amendment violation caused by diluting their vote or by burdening their associational rights. This Court has "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *Cal. Democratic Party*, 530 U.S. at 581 (citing *Spence v. State of Wash.*, 418 U.S. 405, 411, n.4 (1974); *Kusper*, 414 U.S. at 58). "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 151–52 (1939). In other words, a state may not target a person or group for disfavored treatment based on political affiliation and then escape scrutiny simply because the state has not explicitly prohibited political organizing or directly impaired a person's ability to pull the lever for the candidate of her choice.

Nor does the fact that a redistricting plan may have been affirmed by a referendum insulate it from constitutional scrutiny. *See* Appellant Brief at 49. To the contrary, referenda are subject to the same constitutional limitations as laws enacted by a legislature. *Hunter v. Erickson*, 393 U.S. 385, 392

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of such techniques makes gerrymandering all the more pernicious today.

(1969). A state cannot hide behind the "majority rules" trope "where constitutional imperatives intervene." *Cal. Democratic Party*, 530 U.S. at 584. And in cases where a referendum upholds or affirms legislation, courts can still look to the legislature itself to determine discriminatory intent. *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196–97 (2003) ("[S]tatements made by decisionmakers or referendum sponsors . . . may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative.").

C. The same manageable standard currently used for equal protection claims should also be used for First Amendment and due process claims

Because this Court has not explicitly held that the First Amendment and Due Process Clause impose judicially enforceable limits on redistricting, states have frequently relied on a "partisanship defense" when confronted by an equal protection challenge to a redistricting plan. Under this defense, the state argues that it did not target based on race but rather on partisan principles. As a result, courts have often struggled to determine whether there is a valid constitutional claim in cases where "racial identification is highly correlated with political affiliation," making it "difficult to distinguish between political and race-based decisionmaking." *Cooper*, 137 S. Ct. at 1488 (citing *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)).

A framework that places the First Amendment and Due Process Clause on equal footing with the Equal Protection Clause in evaluating

gerrymandering claims eliminates the ability of states to hide behind the defense that they are burdening individuals "only" on the basis of political affiliation rather than race. Under this unified Fourteenth Amendment theory, a court no longer needs to attempt to divine whether a legislature intended to discriminate on the basis of race or political affiliation. Both are improper.

Using this equal protection framework also has the advantage of providing a substantive, manageable standard to guide courts in adjudicating First Amendment challenges to redistricting. When evaluating a claim of racial gerrymandering, a court must find more than that the legislature was merely aware of race; it must find "that race was the predominant factor motivating the legislature's decision" to draw district lines where it did. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). And courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* But that does not mean that the standard is not administrable. *Cooper*, 137 S. Ct. at 1473 (noting that "a trial court has a formidable task" in assessing racial motivation, but nevertheless holding racial gerrymandering claims justiciable).

So too with First Amendment claims. Some awareness of the political geography of a state is inevitable when drawing district lines. *Gaffney*, 412 U.S. at 753. C*f. Miller*, 515 U.S. at 916 (recognizing that "[r]edistricting legislatures will . . . almost always be aware of racial demographics"). By entrusting redistricting to the state legislatures, the Constitution envisions that some politics will be part

and parcel of the process. For example, some minority and majority parties in a legislature might agree to "pack" certain districts so that both sides can have safe seats.[6] Or, in a split state government—where one party holds the governorship and the other holds the legislature—both sides might engage in horse trading involving multiple pieces of legislation. Or, some incumbents might want to retain communities of interest. These few examples of the type of "complex interplay of forces that enter a legislature's redistricting calculus," *Miller*, 515 U.S. at 915–16, are far removed from the type of systematic and discriminatory targeting that does raise constitutional issues.

We therefore do not suggest broadly applying the First Amendment and Due Process Clause in a way that would allow courts to intervene in the redistricting process simply because some politics were involved. Rather, as in the equal protection context, a plaintiff bringing a claim of improper partisan gerrymandering must show that political affiliation was the "predominant factor motivating

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[6] Like most facially neutral legislation, such arrangements could have the effect of diluting the vote of a particular person in a particular district. And as this Court recently held, an injury analysis in a gerrymandering claim is conducted on a district-by-district basis. *Gill*, 138 S. Ct. at 1931. The intent inquiry, however, is done at the state level. *See*, *e.g.*, *Miller*, 515 U.S. at 913 (looking at the "legislature's dominant and controlling rationale in drawing its district lines"). Thus, even where there is harm in the form of vote dilution, there is no constitutional deficiency unless a plaintiff can overcome the presumption of "the good faith of a state legislature" and show discriminatory intent. *Id*. at 915.

the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 916; *see also* Michael C. Dorf, *The Supreme Court Gives Partisan Gerrymandering the Green Light—or at Least a Yellow Light*, Findlaw (May 12, 2004), https://supreme.findlaw.com/legal-commentary/the-supreme-court-gives-partisan-gerrymandering-the-green-light-or-at-least-a-yellow-light.html. Mere consideration of politics would not suffice to show intent to burden the constitutional right of association. Using this framework, which the Court has already established, a ruling here that the First Amendment and Due Process Clause also reach the legislative act of redistricting would not put courts in the business of overseeing elections. It would merely extend an already-known standard to a "fixed star in our constitutional constellation." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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