No. 17-333

In the Supreme Court of the United States

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

v.

LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS, AND DAVID J. MCMANUS, JR., CHAIRMAN OF THE MARYLAND STATE BOARD OF ELECTIONS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ARKANSAS, COLORADO, GEORGIA, INDIANA, LOUISIANA, MISSOURI, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1. Is the partisan-gerrymandering claim proposed by plaintiffs and articulated by the three-judge district court unmanageable and therefore non-justiciable?

2. Did the three-judge district court act within its discretion when it denied plaintiffs' request to preliminarily enjoin Maryland's 2011 congressional redistricting law because the plaintiffs failed to provide sufficient evidence that the redistricting caused them any injury?

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INTEREST OF AMICI CURIAE

"[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). Given this responsibility, the amicus curiae States—Michigan, Arkansas, Colorado, Georgia, Indiana, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, Texas, and Utah—have a vital interest in how the Constitution applies to apportionment decisions. If this Court were to accept the theory that it violates the First Amendment for legislative bodies to consider political factors when drawing district lines, then every state districting decision will be subject to challenge, because "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973).

The States also have an interest under the Constitution in ensuring that the inherently political task of drawing congressional district lines is left to the political branches of our government, at both the state and federal level, and not thrust upon the courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

A controversy is not for the courts to decide if the issue is textually committed to a coordinate political department or if there are no judicially manageable standards for resolving the issue. *Nixon* v. *United States*, 506 U.S. 224, 228 (1993). Both of those conditions exist here.

The Elections Clause, U.S. Const. art. I, § 4, gives Congress, not the courts, the role of acting as a check on the States if they engage in undemocratic redistricting. By textually committing districting to state legislatures and to Congress—each a political branch—the Constitution keeps the courts out of the inherently political issue of how much politics is acceptable in districting. This structural allocation of districting decisions to political branches makes sense, because, as all sides of this debate seem to agree, it is impossible to take all political consideration out of the legislative act of drawing districts.

Partisan districting is also nonjusticiable because no judicially manageable standards exist for determining how much politics is too much. While the lower court here relied on the First Amendment to supply that standard, the First Amendment is particularly ill-suited to parsing out the acceptable level of political considerations in districting. First, the First Amendment would view *any* districting decisions based on political views as forbidden viewpoint discrimination. Second, looking at the impact of the partisanship in districting also runs afoul of the principle that First Amendment claims cannot be based on disparate impact. And third, First Amendment jurisprudence does not allow invalidating a facially neutral law based on some illicit legislative intent. *United States* v. *O'Brien*, 391 U.S. 367 (1968). Because lines on a map are facially neutral as to voter history or party affiliation, the lower court's intent-focused standard fails to account for the fact that intent is irrelevant under *O'Brien*.

Applying First Amendment law to partisan redistricting would not provide a manageable standard, would risk weakening important doctrines (such as those about viewpoint discrimination), and would risk sullying the courts in the eyes of the public as just another political branch. This Court should conclude that partisan gerrymandering claims are not justiciable.

ARGUMENT

I. The Constitution entrusts the inherently political act of drawing district lines to the States and to Congress, not to the courts.

The Elections Clause provides that "[t]he times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators." U.S. Const. art. I, § 4. This Clause gives Congress, not the courts, the power to remedy the issue of partisan redistricting.

The phrase "times, places and manner" was understood at the time of the Founding to include the drawing of district lines. E.g., Brutus, No. 4 (Nov. 29, 1787) (opposing the Clause because "Congress may make the whole state one district"), in 2 *The Founders' Constitution* 251 (Philip B. Kurland & Ralph Lerner, eds., 1987); Debate in New York Ratifying Convention (June 25–26, 1788) (Mr. Duane observing, while debating the Elections Clause, that it is "in the power of each state to regulate" how representatives are apportioned within the state), in 2 *Founders' Constitution* 269. Indeed, those arguing in favor of

including the Elections Clause in the Constitution reasoned that States "might make an unequal and partial division of the states into districts for the election of representatives," and that "[w]ithout these powers in Congress, the people can have no remedy." Debate in Massachusetts Ratifying Convention (Jan. 16–17, 21, 1788), in 2 *Founders' Constitution* 256. This Court has also recognized that the Elections Clause addresses the issue of redistricting. *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658, 2671 (2015) ("we hold that the Elections Clause permits the people of Arizona to provide for redistricting by independent commission"); *id.* at 2670 ("There can be no dispute that Congress itself may draw a State's congressional-district boundaries.").

The Constitution thus entrusts the States with the authority to draw district lines, and it provides a remedy should that trust be abused—the power of Congress to "make or alter such regulations." U.S. Const. art. I, § 4; *Ariz. State Legislature*, 135 S. Ct. at 2668 ("redistricting is a legislative function"). In short, the Constitution puts the power to draw congressional district lines in a state *political* branch (the state legislature), while simultaneously giving a federal *political* branch (Congress) the responsibility for exercising a check on the States in case they abuse that power.

Consistent with this structural allocation of power by the Constitution to political branches, this Court has repeatedly recognized that drawing district lines is an inherently political act. For example, in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), this Court

observed that "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Id.* at 753. Given this reality, "[p]olitics and political considerations are inseparable from districting and apportionment." *Id.*; see also *id.* ("It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area.").

Indeed, in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), every member of the Court acknowledged the fact that politics is a part of districting: "partisan districting is a lawful and common practice." *Id.* at 286 (four-justice plurality); *id.* at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); accord *id.* at 307 (Kennedy, J., concurring in judgment) (distinguishing race, "an impermissible classification," for "permissible classifications in the redistricting context," such as "[p]olitics"); see also *id.* at 336 (Stevens, J., dissenting) (allowing that "partisanship" can be "a permissible consideration in drawing district lines, so long as it does not predominate"); *id.* at 343 (Souter, J., dissenting) ("The choice to draw a district line one way, not another, *always* carries some consequence for politics . . . .") (emphasis added); *id.* at 360 (Breyer, J., dissenting) ("the legislature's use of political boundary-drawing considerations ordinarily does *not* violate the Constitution's Equal Protection Clause").

The fact that politics is inseparable from districting explains why the Constitution turns to Congress, not to the courts, to provide the remedy if States draw politically "unfair" districts. As Justice Frankfurter put it, the "[a]uthority for dealing with such problems resides elsewhere." *Colegrove* v. *Green*, 328 U.S. 549, 554 (1946) (plurality). After quoting the Elections Clause, he observed "that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility." *Id.*; accord *Davis* v. *Bandemer*, 478 U.S. 109, 144 (1986) (Burger, C.J., concurring in judgment) ("In my view, the Framers of the Constitution envisioned quite a different scheme. They placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives."). In his separate opinion in *Colegrove*, Justice Rutledge read the Constitution's plain text the same way, but felt that he was constrained by precedent: "But for the ruling in *Smiley* v. *Holm*, 285 U.S. 355 [1932], I should have supposed that the provisions of the Constitution, Art. I, s 4, . . . would remove the issues in this case from justiciable cognizance." 328 U.S. at 564 (Rutledge, J., concurring in result) (parallel citations omitted). Returning to that plain text would mean that "partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Bandamer*, 478 U.S. at 144 (O'Connor, J., concurring in judgment). As these justices recognized, the courts are not the solution to every problem.

Neither the passage of the First Amendment nor its incorporation to the States provides any reason to interpret the Elections Clause differently, especially given that partisan gerrymandering was a known issue since the time the Elections Clause was adopted. "The political gerrymander remained alive and well (though not yet know by that name) at the time of the framing," *Vieth*, 541 U.S. at 274 (plurality), yet the people did not change the Elections Clause to give the courts a role in districting when they added the First Amendment to the Constitution. Similarly, "[b]y 1840 the gerrymander was a recognized force in party politics" such that it was "generally attempted in all legislation enacted for the formation of election districts." *Vieth*, 541 U.S. at 274–75 (plurality). But though the people adopted the Civil War Amendments to guarantee "the equal protection of the laws," U.S. Const. amend. XIV, and even more specifically to forbid the use of "race, color, or previous condition of servitude" to deny or abridge the right to vote, U.S. Const. amend. XV, they did not include partisanship as a forbidden consideration. So while those amendments settled once and for all that "[r]ace is an impermissible classification," *id.* at 307 (Kennedy, J., concurring in judgment), they did not address politics, *id.* ("Politics is quite a different matter."). Accord *id.* at 285–86 (plurality) (recognizing that districting is "root-and-branch a matter of politics," in contrast to segregating voters on the basis of race, which is an unlawful purpose).

In short, the issue of how much politics in districting is too much politics is not justiciable, because the Constitution textually commits that issue to Congress in the Elections Clause. See *Nixon*, 506

U.S. at 228 ("A controversy is nonjusticiable—i.e., involves a political question—where there is " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .' ").

II. The First Amendment does not supply judicially manageable standards for resolving how much politics is too much.

As this Court has recognized, finding a judicially manageable standard for partisan redistricting claims is not an easy endeavor. *Vieth*, 541 U.S. at 292 (plurality) (rejecting six proposed standards); accord *id*. at 308; *Bandemer*, 478 U.S. at 113 (rejecting proposed standards). And contrary to the optimism of the panel majority below, the First Amendment does not supply such a standard. Indeed, for at least three reasons the First Amendment is a poor fit for trying to draw a line between an acceptable and an unacceptable amount of political consideration in districting.

The first problem with relying on First Amendment law is that applying First Amendment standards would ban *all* consideration of politics in redistricting. After all, an intent to treat voters differently based on their political views or affiliation is, from a First Amendment perspective, the worst intent possible: it is an intent to engage in viewpoint discrimination on political issues. E.g., *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("the advocacy of a politically controversial viewpoint" is "the essence of First Amendment expression"); *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*,

515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). An intent to favor Republicans over Democrats, or Democrats over Republicans, in drawing district lines would therefore constitute viewpoint discrimination. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment) (addressing election laws that "subject[ ] a group of voters or their party to disfavored treatment *by reason of their views*") (emphasis added). And because it is hard to see how that viewpoint discrimination could be narrowly tailored to a compelling government interest, that means that any consideration of politics would constitute a constitutional violation.

Describing the intent standard as requiring some form of heightened intent does not escape this point. For example, two judges below concluded that the intent element of their intent-injury-causation test would focus on whether political considerations were used "for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed." J.S. App. 110a. But *any* intent to consider politics boils down to an intent to make it harder for certain voters to elect their candidate. If the party in power considers voting history or party affiliation when drawing a district line, it does so for an obvious purpose: to make it more likely that that the party in power will win more seats, and, conversely, to disfavor the other party and to "punish" voters of the other party by making it harder for them to win seats. Simply put, "[t]he reality is that districting inevitably has *and is intended to have* substantial political

consequences." *Gaffney*, 412 U.S. at 753 (emphasis added). Even consideration of "the traditional [districting] criterion of incumbency protection," *Vieth*, 541 U.S. at 298 (plurality), would be barred under the panel's intent test, as incumbency protection could be characterized as "an intent to disfavor and punish [certain] voters"—i.e., voters whose candidate lost last time around—"by reason of their constitutionally protected conduct," J.S. App. 110a (emphasis removed).

Applying a First Amendment-based test would create an across-the-board ban on considering politics in districting, and thus would run contrary to the one point about partisan districting that has shared wide agreement on the Court: the fact that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753; accord *Vieth*, 541 U.S. at 286, 307, 336, 343, 360 (each opinion recognizing that some consideration of politics is permissible). Applying the First Amendment to partisan redistricting would outlaw any consideration of politics, and that means it would not provide a helpful gauge for measuring the real question this Court has grappled with in partisan redistricting cases: "How much political motivation and effect is too much?" *Vieth*, 541 U.S. at 297 (plurality); *id.* at 344 (Souter, J., dissenting) ("[T]he issue is one of how much is too much . . . .").

Attempting to apply First Amendment principles to partisan redistricting would run into a second problem: it would shift the inquiry from individual injury to a disparate impact on a group with particular views, contrary to the "basic tenet of First

Amendment law that disparate impact does not, in itself, constitute viewpoint discrimination." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law* v. *Martinez*, 561 U.S. 661, 700 (2010) (Stevens, J., concurring) (citing cases); see also, e.g., *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994) ("In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *Torres Rivera* v. *Calderon Serra*, 412 F.3d 205, 211 (1st Cir. 2005) ("We have rejected the application of a disparate impact theory in First Amendment political affiliation cases."); *United States* v. *Weslin*, 156 F.3d 292, 297 (2d Cir. 1998) ("First Amendment law does not recognize disparate impact claims."); *Norton* v. *Ashcroft*, 298 F.3d 547, 553 (6th Cir. 2002) ("[T]here is no disparate impact theory under the First Amendment."); *United States* v. *Wilson*, 154 F.3d 658, 664 (7th Cir. 1998) (same); *United States* v. *Dinwiddie*, 76 F.3d 913, 923 (8th Cir. 1996) (same); *Pahls* v. *Thomas*, 718 F.3d 1210, 1235–36 (10th Cir. 2013) ("[D]isparate impact alone is not enough to render a speech restriction content- or viewpoint-based."); *Terry* v. *Reno*, 101 F.3d 1412, 1419–20 (D.C. Cir. 1996) ("There is, after all, 'no disparate-impact theory in First Amendment law.' ").

Because taking politics into consideration inherently reveals an intent to affect electoral outcomes, disparate-impact analysis would be doing all the work for an intent-based test. For example, under the approach taken by the decision below, "a plaintiff must rely on objective evidence to prove that, in redrawing a district's boundaries, the legislature and its mapmakers were motivated by a specific

intent to burden the supporters of a particular political party." J.S. App. 106a. The objective evidence that the panel relies on is data about how the redistricting affected Republicans and Democrats differently. Specifically, the panel relies on the fact that " 'the Plan accomplished a net transfer of over 65,000 Republican voters out of the district and over 30,000 Democratic voters into the district.' " J.S. App. 109a. The panel thus inferred an impermissible intent from the "objective evidence" that the districting plan had a disparate impact on the two parties, violating the principle that disparate impact is not a basis under the First Amendment for finding a discriminatory intent.

And relying on a First Amendment retaliation claim creates a third, even more fundamental problem: legislative intent is irrelevant to the constitutionality of a facially neutral law. In *O'Brien*, O'Brien argued that a statute prohibiting destruction of a draft certificate was enacted for the purpose of suppressing the freedom of speech. 391 U.S. at 376. This Court rejected the suggestion that it might invalidate a statute that is "constitutional on its face." *Id*. at 384. The Court explained that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id*. at 383; see also *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015) ("Every other circuit that has addressed the issue has also held that *O'Brien* bars First Amendment retaliation claims against legislation eliminating state-sponsored collection of union dues through payroll deductions.").

District lines on a map are facially neutral; they say nothing about political views, party affiliation, or voting history. The only way in which these lines on a map separate voters is by the location of their residences. It is easy to see that one would have to go beyond the face of the map itself to uncover political information. For example, if a judge were handed a map for a district in another state that she was not familiar with, the map by itself would not reveal whether the district line had any correlation to the political views of residents. And this facial neutrality means that the lower court's intent-focused test fails under ordinary First Amendment principles. *O'Brien*, 391 U.S. at 383.

As these problems reveal, the First Amendment does not provide a helpful standard for distinguishing between some acceptable level of political considerations and some other level of relying on political concerns too much. Instead, trying to fit the First Amendment into this endeavor risks distorting First Amendment principles. If, for example, this Court were to state that some amount of viewpoint discrimination is permissible, so that the First Amendment could be applied to districting, it would run the risk that lower courts would expand that new principle to other contexts. Similarly, some courts might conclude that disparate-impact analysis, if acceptable here, could be applied to other First Amendment areas. And the trend could well be the same with respect to examining legislative intent as to other facially neutral laws.

Even beyond this distortion of First Amendment jurisprudence, injecting the courts into the political

process of districting would risk tarnishing the courts. *Vieth*, 541 U.S. 267, 306 (Kennedy, J., concurring in judgment) ("A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."). For all of these reasons, the Court should hold that partisan redistricting claims are not justiciable.

CONCLUSION

The Court should vacate the judgment of the district court and order the district court to dismiss the lawsuit for lack of Article III jurisdiction under the political-question doctrine.

Respectfully submitted,

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