No. 18-422, 18-726

In The Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, to champion the development of fair and realistic legal solutions, and to assist members on the vast and cutting-edge legal issues facing local government lawyers today. The IMLA provides the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities at

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[1] Appellants and appellees have consented to the filing of this brief through blanket consent. Pursuant to Rule 37.6, counsel represents that no part of this brief was authored by counsel for any party, and no person or entity made any monetary contribution to the preparation or submission of the brief.

present. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization whose 11,000 members serve as appointed chief executives and assistants for cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating for and developing the professional management of local governments throughout the world.

INTRODUCTION AND 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). Because the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," this Court has held that "Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Reynolds v. Sims*, 377 U.S. 533, 555, 560 (1964) (quoting *Wesberry*, 376 U.S. at 17-18).

Indeed, almost immediately after establishing the "one-person one-vote" doctrine, the Court recognized that this vital principle might apply with equal force to redistricting schemes that "designedly . . . would operate to minimize . . . the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). For "[t]he question of the gerrymander is the other half of *Reynolds v. Sims*." *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., concurring in part and dissenting in part). "[T]he astute drawing of district lines [can] make[] [a] district either heavily Democratic or heavily Republican . . . . Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be." *Id.* at 176-77. As Justice Douglas observed: "The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it." *Id.* at 177.

Amici represent local communities—cities, counties, and towns—across the United States. Such localities and municipalities play an essential part in our civic society, our democratic system, our constitutional order, and in the formation of distinct communities of interest. These communities are as diverse and unique as they are integral to the life, liberty, and happiness of a pluralistic, self-governing people.

Partisan gerrymandering "defeat[s] [and] circumvent[s] the sentiments" of these communities, *id.*, carving up localities and cobbling together bits and pieces of neighborhoods for no legitimate government purpose. Even when mapmakers manage to keep some municipalities intact, it becomes "the will of the cartographers rather than the will of the people [that] govern[s]." *Vieth v. Jubelirer*, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting). Studies have confirmed the unfortunate truth that voters recognized long ago: those who hold the districting pen can foreordain the composition and character of a state's congressional delegation without changing the mind of a single voter.

When the state targets certain segments of the population and suppresses their electoral influence because it disfavors their political beliefs and fears the way they will vote, it denies those voters meaningful representation and leads elected officials to ignore the distinct interests of localities as coherent communities. This is the polar opposite of what this Court has recognized as "[t]he very essence of districting": "to produce a different—a more 'politically fair'—result than would be reached with elections as large." *Gaffney v. Cummings*, 412 U.S. 735, 753

(1973). The fact that the redistricting process is committed to political actors, permits the use of political considerations for legitimate purposes, and "inevitably has and is intended to have political consequences" does not mean that "racial or political groups [may be] fenced out of the political process [or have] their voting strength invidiously minimized." *Id.* at 753-54.

Although this Court has acknowledged that partisan gerrymanders "are incompatible with democratic principles," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), and has suggested that partisan gerrymandering is not immune to judicial scrutiny, *see Hunt v. Cromartie*, 526 U.S. 541, 551 n.7 (1999) ("This Court has recognized . . . that political gerrymandering claims are justiciable."), it has declined—for decades—to articulate "the standards that would govern such a claim," *id.* This status quo cannot persist. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("Abdication of responsibility is not part of the constitutional design.").

In the absence of any judicial remedy, legislators have grown bolder and more brazen in their abuses. This legal "no man's land" not only undermines the rule of law in general, it also spills over into adjacent areas of the law, complicating redistricting doctrine for local government lawyers everywhere. Because

many local governments *also* utilize single-member districts, this ambiguity makes it more difficult than necessary to identify the clear "dos and don'ts" of the redistricting process.

Happily, the Constitution already provides well-worn and intuitive standards that are familiar to cities, counties, and citizens alike. Whether the Court decides to ground partisan gerrymandering claims in the First Amendment, the Equal Protection Clause, or both, everyone readily understands that the Constitution prohibits the government from infringing the right to vote, from singling out citizens for disfavor based on their views, or from enacting laws that target particular groups of citizens for no reason other than disapproving their political beliefs.

Voters understand these principles innately, and attorneys navigate these legal doctrines fluently. By harmonizing the legal standards and evidentiary rules at issue in partisan gerrymandering cases with those found in the rest of redistricting jurisprudence, this Court can provide doctrinal consistency and practical tools to local government lawyers everywhere ahead of the next round of redistricting. The result will be less legal confusion, more compliant maps, and more responsive and accountable representation for voters and local communities across the country.

For these reasons, *amici* respectfully request that this Court affirm the judgments below.

ARGUMENT

I. LOCAL GOVERNMENTS PLAY A VITAL ROLE IN OUR CONSTITUTIONAL ORDER AND IN CREATING DISTINCT COMMUNITIES OF INTEREST

This Court has long recognized the critical importance of political power being exercised at the local level—that is, the level closest to those governed. *See, e.g.*, *Avery v. Midland Cnty.*, 390 U.S. 474, 481 (1968). Preserving a space for more local governance "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive' by putting the States in competition for a mobile citizenry.'" *Ariz. State Legis.*, 135 S. Ct. at 2673 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

Each of these enduring and essential aspects of governance aptly applies to our nation's great cities, small towns, and rural counties. This makes the views of local governments especially relevant to the instant cases.

To begin, local governments have a distinct ability to reflect the particular needs and interests of diverse communities across the country. As Justice Brandeis famously argued, decentralization can foster innovation in policymaking. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel

social and economic experiments without risk to the rest of the country.").

Just as the fifty states serve as "laboratories of democracy," the thousands of cities and counties throughout our nation innovate with respect to policy in all sorts of substantive areas. Whether tackling public health challenges, advancing economic development, developing novel strategies for environmental protection, grappling with the challenges of public safety, or addressing so many other policy challenges, our cities, towns, and counties have been true laboratories of democracy, with innovations at the local level often later being adopted by states and the national government when they have succeeded (and cabined when they fail). *See generally* Paul A. Diller, *Why Do Cities Innovate in Public Heath? The Implications of Scale and Structure*, 91 Wash. U. L. Rev. 1219 (2014) (discussing dynamics of local innovation and policy diffusion). Ensuring that all three levels of governance remain empowered in our federal system is vitally important to preserving this experimentation and accountability.

In addition, municipalities offer uniquely democratic benefits of participation. From the original New England town meetings of the founding generation—a tradition that still endures—to communities across the country today, opportunities for ordinary citizens to participate and interact with local officials abound at the local level in ways not possible at the state or federal level. *See* 1 Alexis de Tocqueville, Democracy in America 174 (H. Reeve trans. 1961) ("It is incontestably true that the love and the habits of republican government in the United States were engendered in the townships and in the

provincial assemblies."). In part, this is because there generally are far fewer constituents for each elected official even in our largest global cities, compared to that of state and national politics. Diller, *supra*, at 1257-58. These representation ratios allow local leaders to respond more directly to the people who elect them.

Local governments enhance democracy in another related sense, as Alexis de Tocqueville highlighted when he noted that "[t]own-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it." De Tocqueville, *supra*, at 76. Service on one of our nation's countless city councils, school boards, county commissions, and myriad other local bodies provides an invaluable training ground for public leaders. Eventual leaders in our state and national governments often learn their earliest lessons in the crucible of local government.

Finally, a certain amount of healthy competition among cities promotes efficiency and accountability in governance. *Cf.* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 Yale L.J. 72, 97 (2005) (reviewing empirical evidence that "migration patterns between city and suburbs are significantly affected by tax levels and investment in education"). Our nation's cities, towns, and counties have the flexibility to craft distinct policies to respond to the needs and preferences of mobile residents.

For these reasons and more, county and city boundaries play a key part in the redistricting process. "Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of

interest, particularly when the subdivision plays an important role in the provision of governmental services." *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring). Respect for locality boundaries can improve civic engagement, responsiveness, accountability, and avoid confusion for voters, candidates, and election administrators alike. *See id.* ("[D]istricts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters."). As Justice Powell once wrote:

> Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting. It also is likely to lead to a representative who knows the needs of his district and is more responsive to them.

Id. at 787 n.3 (Powell, J., dissenting) (internal quotations and citations omitted).

Because localities form a natural "community of interest" with common values and concerns that run deeper than party label, they often bring tailored, apolitical solutions to local policy problems. And just as this Court has rightly associated the decentralization and devolution found in our federal system with unique benefits, so too does empowerment of and respect for localities enhance and improve our democracy.

II. PARTISAN GERRYMANDERING DISRUPTS THE REPRESENTATION OF COMMUNITIES AND STIFLES LOCAL DECISION-MAKING

While local governments facilitate civic engagement, responsiveness, accountability, pluralism, local autonomy, and liberty, partisan gerrymandering undermines these critical democratic values.

1. Gerrymandering tears coherent communities of interest apart and strings dissimilar communities together. When a congressional district is "nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State," *id.* at 787, representatives are less attuned to the unique interests of local communities and those communities are less capable of coherently conveying local sentiments "up the chain" to their federal representatives, *see, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 537-38 (E.D. Va. 2015), *affirmed in part and vacated in part*, 137 S. Ct. 788 (2017) (noting that "the splitting of municipal and county jurisdictions drew the ire of citizens, who . . . pointed out the difficulties that citizens have in knowing who to contact, who to hold accountable, and who among several legislators should coordinate or lead the representation of local city and county interests").

The Court has recognized that gerrymanders that "exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines" can "cause[] a severe disruption of traditional forms of political activity." *Bush v. Vera*, 517 U.S. 952, 974 (1996) (O'Connor, J.). In *Vera*, for example, "[c]ampaigners seeking to visit constituents 'had to

carry a map to identify the district lines, because so often the borders would move from block to block'; voters 'did not know the candidates running for office' because they did not know which district they lived in." *Id.*

Both of the partisan gerrymanders before the Court this term dismember established communities of interest and disrupt traditional political activities. In Maryland, "a blatant targeting of . . . the Republicans in Frederick County" led that county to be divided "for the first time since 1840." *Benisek v. Lamone*, 1:13-CV-3233, 2018 U.S. Dist. LEXIS 190292, *86-87 (D. Md. Nov. 7, 2018) (Bredar, J., concurring). One of the plaintiffs testified that voters in the area "were confused about the candidates [and] didn't know who they should be engaging," with Republican organizers spending most of their outreach time simply "trying to ascertain the voter's district." *Id.* at *29 (majority opinion).

Meanwhile, in North Carolina, Appellants' own expert "conceded that the 2016 plan divided numerous political subdivisions," with all but one of the districts "divid[ing] municipalities and communities of interest along partisan lines." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 883, 901, 903, 906, 907, 910, 912, 913, 915, 917, 919, 920, 922 (M.D.N.C. Aug. 27, 2018) (discussing statewide and district-specific examples). Here, too, "[v]oters and advocacy organizations elected not to participate in congressional races because they believed they could not 'have a democratic—small 'D'—democratic impact." *Id.* at 931.

Studies suggest these are more than mere anecdotes. "When a district plan is skewed against a party, its candidates contest fewer legislative seats

and have worse credentials when they do run, its donors contribute less money, and its voters are not as supportive at the polls." Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties* 20-21 (unpublished manuscript available at https://ssrn.com/abstract=3330695). In short, the associational harms one might expect from partisan gerrymandering are quite real. *See Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (suggesting that gerrymanders may cause "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office").

2. Even when mapmakers manage to hew to municipal boundaries, partisan gerrymandering can still inflict harm and undermine local policies, interests, and decision-making. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (holding that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement" to establish a gerrymandering claim). This is because the combination of political polarization and partisan gerrymandering restricts the space for pragmatic community compromises and interferes with the representation of localities—with their distinct sets of preferences—as a whole.

Polarization "means that representatives in Congress nearly always vote the party line." Christopher Warshaw, *An Evaluation of the Partisan Bias in Pennsylvania's Congressional District Plan and its Effects on Representation in Congress*, Expert Report in *League of Women Voters of Pa.,* et al., *v.*

Commonwealth of Pennsylvania, No. 261 MD 2017, 15-16 (Pa. Commw. Ct. Nov. 27, 2017). As this has become more common, studies have shown an increasingly "muted responsiveness to localities" among representatives. *Id.* (citing Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart, III, *Candidate Positioning in U.S. House Elections*, 45 Am. J. of Pol. Sci. 136 (2001)). As a result, "polarization exacerbates the effects of gerrymandering on the political process." *Id.* at 16 n.10.[2]

In other words, partisan gerrymandering is about more than "bloodless concepts like seat and vote shares;" it's about the "distort[ion] [of] legislative representation—the beating heart of a democracy." Nicholas Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 Wm. & Mary L. Rev. 2115, 2118 (2018). Mapmakers possess the ability to swing the ideology of a state's congressional delegation dramatically—"*all without changing the mind of a single voter*." *Id.* at 2120. *See also* Warshaw, *supra*, at 22-23. And because representatives increasingly vote the party line based on national issues rather than local concerns, citizens who are targeted by partisan gerrymanders "are artificially deprived of the opportunity to . . . have their views represented in Congress." *Warshaw*, *supra*, at 15. This has a profound impact on nuanced, local issues

[2] Although polarization compounds the harms of gerrymandering, "[t]he consensus among Political Scientists using pre-2011 redistricting period data is that gerrymandering did not cause th[e] [rise in] polarization [since 1970]. There is not yet a consensus about the effect of redistricting on polarization in recent years." Warshaw, *supra*, at 16 n.10.

and whether voters who belong to distinct communities of interest have any voice *as a member of that local community of interest*.

To be sure, this Court made clear in *Gill v. Whitford* that "[a] citizen's interest in the overall composition of the legislature" and in the "policies adopted by the legislature" may not give rise to a claim. 138 S. Ct. at 1931. But if those interests are "embodied in [the citizen's] right to vote for his representative," *id.*, then it is all-the-more vital that the Court vigorously protect the foundational right from which this democratic representation flows.

First-hand testimony from voters in the cases before the Court reflect the damaging downstream consequences that occur when states violate these rights. As one of the plaintiffs from Maryland testified, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time." *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *71. Voters in North Carolina had similar sentiments, expressing that "they felt their vote didn't count." *Rucho*, 318 F. Supp. 3d at 931. Whether one is a Maryland Republican or a North Carolina Democrat, gerrymandering strips disfavored voters of the opportunity to have their unique voice heard in the halls of Congress.

The diminished responsiveness of representatives to *all* of their constituents is not simply troubling as a matter of structural principles, institutional stability, and enduring constitutional values; it also distinguishes modern cases from the past. One repeated concern of the Court has been accepting—*without any evidence*—the notion that representatives will not be responsive to the needs of

their constituencies as whole. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("An individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters."); *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 469-70 (2006) (Stevens, J., dissenting) ("[T]his Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency.").

As overwhelming statistical and testimonial evidence continue to prove, gerrymandered districts insulate representatives and absolve them of the need to give any weight to the views of those voters who have been stripped of meaningful electoral power. Thus, even when local municipal boundaries are not breached, partisan gerrymandering robs county and city constituencies of the opportunity to have their unique and diverse perspectives heard and dampens congressional concern for local community interests.[3]

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[3] This disconnect manifests in the policies enacted at the both the federal *and state* level, with local prerogatives increasingly steamrolled by legislators more focused on advancing a single ideology than providing space for constituents with diverse views to enact locally tailored solutions based on the needs of the community. For instance, in *Gill v. Whitford*, several *amici* provided examples of the growing number of local policies

In short, partisan gerrymandering frustrates the preservation of local government interests, restricts the freedom of local governments to pursue policies suited to their constituents, and impedes the ability of voters who belong to distinct communities of interest to have their views heard in Washington.

III. *AMICI* SUPPORT A CLEAR AND COHERENT APPROACH TO REDISTRICTING LAW THAT RELIES UPON INTUITIVE STANDARDS AND EVIDENCE

As organizations representing local governments and local government lawyers, *amici* recognize the need for—and advocate for—realistic legal solutions to complex legal problems. Here, too, *amici* believe that the partisan gerrymandering cases before the Court offer an opportunity to clarify the state of the law, apply well-established legal standards, and provide

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being preempted by state legislatures in states with extreme partisan gerrymandering. *See generally* Brief *Amici Curiae* of International Municipal Lawyers Association, *et al., Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017).

Because gerrymandering "dramatically influences the representational distortion of House delegations," Stephanopoulos, *supra*, at 2144, and polarization continues to grow, local concerns have increasingly fallen by the wayside on Capitol Hill as well, *see* J.B. Wogan, *States and Localities are Losing Their Influence in Washington*, Governing (June 2014), available at http://www.governing.com/topics/politics/gov-states-localities-losing-influence.html (last accessed Jan. 18, 2019). Because Congress and state legislatures alike wield the power to override, curtail, or disregard the policies and positions of municipalities across the country, these bodies must possess the utmost democratic and constitutional legitimacy if their intrusions on local autonomy and policymaking are to be justified.

workable evidentiary guidance to courts and lawyers across the country ahead of the next major round of redistricting in 2021.

A. The Ambiguous Treatment of Partisan Gerrymandering Claims Complicates Redistricting Law for Local Governments

Although many redistricting cases and analyses focus on state legislative and congressional representation, local governments (and local government lawyers) must also navigate the various strands of this Court's redistricting case law. From one-person one-vote cases to racial dilution and racial sorting cases, localities often deal with cutting-edge legal questions before claims are brought on a wider basis.[4] In fact, challenges raised to city and county redistricting decisions are especially useful to the development of redistricting case law because they are

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[4] *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (one-person one-vote case regarding population deviations based on illegitimate consideration of partisan advantage); *Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019 (9th Cir. 2016) (equal protection and *Anderson-Burdick* case regarding city's hybrid city council system utilizing ward-level primaries and at-large general election); *Lepak v. City of Irving*, 453 F. App'x 522 (5th Cir. 2011) (one-person one-vote case regarding use of citizen-voting-age population versus total population); *Clark v. Putnam County*, 293 F.3d 1261 (11th Cir. 2002) (racial gerrymandering case); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (racial gerrymandering case regarding whether districts' shapes and demographics provide adequate circumstantial evidence to prevent summary judgment); *Calvin v. Jefferson Cnty. Bd. of Cmm'rs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016) (one-person one-vote case regarding use of prison populations in calculating equal population).

some of the few challenges that are routed through the U.S. Courts of Appeals and subject to this Court's discretionary jurisdiction. *See* 28 U.S.C. § 2284(a) (convening three-judge district courts "when an action is filed challenging the constitutionality of the apportionment of *congressional districts* or the apportionment of any *statewide* legislative body") (emphasis added).[5]

And while redistricting law has a reputation for being complex,[6] a great deal of that complexity is due to this Court's ambiguous treatment of prior partisan gerrymandering claims. *See generally* Brief of *Amici Curiae* Law Professors*, Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). Because the lack of a claim leaves open doctrinal gaps in racial gerrymandering law and the one-person one-vote doctrine, mapmakers and litigants alike engage in "legal arbitrage," distorting the body of law that does exist by using it to fight about conduct governed by a body of law that does not exist. *See* G. Michael Parsons, *Gerrymandering & Justiciability: The Political Question Doctrine After* Gill v. Whitford, 95 Ind. L.J. (forthcoming 2020) (manuscript at 60, available at https://ssrn.com/abstract=3334370) [hereinafter Parsons, *Gerrymandering & Justiciability*]. Even if

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[5] *See, e.g.*, *Public Integrity Alliance*, 836 F.3d 1019 (9th Cir. 2016), *cert. denied,* 197 L. Ed. 2d 518 (2017); *Lepak*, 453 F. App'x 522 (5th Cir. 2011), *cert. denied*, 569 U.S. 904 (2013); *Chen*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001).

[6] Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization In Redistricting and Voting Cases*, 59 Wm. & Mary L. Rev. 1837, 1852 (2018) ("The most charitable thing to say about the current state of racial gerrymandering law is that it is a big mess.").

the Court were to deviate from its default rule that redistricting laws are justiciable, *Baker v. Carr*, 369 U.S. 186 (1962),[7] this doctrinal vacuum would remain, leaving mapmakers and litigants to "shadowbox" over the real issues at stake, *see* Hasen, *supra*, at 1879.

In short, the law's internal inconsistency, ambiguity, and incompleteness provides the greatest headache to local government lawyers faced with the task of advising clients on the "dos and don'ts" of redistricting law, not the flexibility of any particular "do" or the rigorousness of any specific "don't." Crafting a claim (even a demanding one) that completes the redistricting-law picture would not add complexity but ease it.

As this Court has remarked, "clear distinctions" are preferable to "delphic alternative[s]" where "structural safeguards" and institutional boundaries are at issue. *See Plaut v. Spendthrift Farm, Inc.*, 514

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[7] Creating a new justiciability exception for partisan gerrymandering claims would require a substantial (and troubling) shift in this Court's political-question jurisprudence. *See generally* Brief for Constitutional Law Professors as *Amici Curiae, Gill v. Whitford*, 16-1161 (filed Sept. 5, 2017). As the district court in *Rucho* observed, "a majority of the Supreme Court *never* has found that a claim raised a nonjusticiable political question solely due to the alleged absence of a judicially manageable standard for adjudicating the claim." 318 F. Supp. 3d at 842 n.19.

Indeed, the two cases before the Court are perhaps "the most significant political-question doctrine case[s] of our generation." Parsons, *Gerrymandering & Justiciability*, *supra*, at 3. Before significantly expanding that doctrine, the Court should consider carefully the institutional, federalism, and separation-of-powers implications of such a change. *See generally id.* (arguing that the modern political question doctrine is incompatible with the limits and obligations imposed on judicial power by Article III).

U.S. 211, 239-40 (1995). Vague and equivocal treatment "simply prolongs doubt and multiplies confrontation." *Id.* at 240. The Court's approach to partisan gerrymandering has done precisely this, blurring the lines of lawful behavior and drawing legislators out beyond constitutional boundaries. As such, redistricting law would benefit from advice familiar to local government attorneys everywhere: "Good fences make good neighbors." *Id.*

B. Constitutional Doctrine Already Provides Fair and Intuitive Standards Familiar to Local Government Lawyers

As the district court in *Rucho* noted, partisan gerrymandering "violates a number of well-established constitutional standards—that the government act impartially, not infringe the right to vote, and not burden individuals based on the exercise of their rights to political speech and association." 318 F. Supp. 3d at 853. Whether the Court looks to the Equal Protection Clause, the First Amendment, or both, the Constitution provides well-worn, intuitive standards that are familiar to local governments, local government attorneys, and the public.

Applying these principles to partisan gerrymandering is not some adventuresome departure from this Court's case law, but rather a long-overdue correction that harmonizes the Court's approach to partisan gerrymandering claims with the rest of its fundamental constitutional doctrines and its overall approach to judicial neutrality.[8] As Circuit Judge

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[8] *See generally* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116

Niemeyer observed below in *Benisek*, "[C]itizens have no constitutional right to be assigned to a district that is likely to elect a representative that shares their views," but "they do have a right . . . not to have the value of their vote diminished *because of* the political views they have expressed." 2018 U.S. Dist. LEXIS 190292, at *46.

This antipathy to viewpoint-targeting is standard constitutional fare and "typical of First Amendment violations in other contexts." *Id.* (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982)). The Court does not uphold judicial independence and impartiality by steering clear of such cases, even when they involve political actors or political issues. Rather, the Court protects the Constitution and preserves its own public status by rigorously and consistently honoring these constitutional mandates. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 Harv. L. Rev. 236, 259-60 (2018) (arguing that establishing limits to partisan gerrymandering could help *protect* the Court "against

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Mich. L. Rev. 351 (2017); *Rucho*, 318 F. Supp. 3d at 927 ("How can the First Amendment prohibit the government from disfavoring certain viewpoints, yet allow a legislature to enact a districting plan that disfavors supporters of a particular set of political beliefs? How can the First Amendment bar the government from disfavoring a class of speakers, but allow a districting plan to disfavor a class of voters and candidates? How can the First Amendment protect government employees' political speech rights, but stand idle when the government infringes on voters' political speech rights? And how can the First Amendment ensure that candidates ascribing to all manner of political beliefs have a reasonable opportunity to appear on the ballot, and yet allow a state electoral system to favor one set of political beliefs over others?").

charges of partisanship" and "save the Court from having to referee . . . secondary partisan fights" over other manipulations of electoral rules).

Relying on such established principles would provide clear rules that are second-nature to local government attorneys, understandable to mapmakers, and obvious to the average citizen.[9] Just as political affiliation can be considered in hiring for *policy-level* government jobs (where the government has a legitimate interest), but not in hiring for *non-policy-level* government jobs (where it does not), *see Vieth*, 541 U.S. at 294 (citing *Elrod v. Burns*, 427 U.S. 347 (1976)), so too can political affiliation be used to advance legitimate redistricting goals (such as consistently creating competitive districts [10] or

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[9] As Chief Justice Roberts noted at oral argument in *Gill v. Whitford*, any decision provided by the Court must be intuitive and sound in clear constitutional principles, lest the "intelligent man on the street" doubt the explanation, thereby risking damage to the "status and integrity" of the Court. *See Gill v. Whitford*, 16-1161, Oral Arg. Tr. 37:11-38:4 (Oct. 3, 2017). "Far from 'impairing' the reputation of the Court," a clear and principled decision restricting partisan gerrymandering is more likely to be received by the public like the Court's celebrated one-person one-vote doctrine—a rule that ultimately "'enhanced the prestige of the Court.'" Parsons, *Gerrymandering & Justiciability*, *supra*, at 66 (quoting John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 121 (1980)).

[10] Appellants in *Benisek* have argued that altering Maryland's Sixth District created a more "competitive" district. Br. for Appellants, *Lamone v. Benisek*, 18-726, at 6 (filed Feb. 8, 2019). But this Court has frequently reminded redistricting litigants that even *legitimate* redistricting policies cannot survive when they are applied inconsistently or in a discriminatory fashion. *See Brown v. Thomson*, 462 U.S. 835, 844 (1983) (noting that the population variations were "entirely the result of the

"allocat[ing] seats proportionately," *Vera*, 517 U.S. at 964-65 (O'Connor, J.) (citing *Gaffney*, 412 U.S. at 751-54)) but not illegitimate redistricting goals (such as partisan advantage, *see Vieth*, 541 U.S. at 307 (Kennedy, J., concurring) (noting that "[a] determination that a gerrymander violates the law must rest on . . . a conclusion that the [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective")). These are well-known standards that local governments and local government lawyers throughout the country encounter and incorporate into their policy- and decision-making *every day* across a range of contexts.

Simply put, mapmakers cannot draw districts to favor Republicans just because the mapmaker "think[s] electing Republicans is better than electing Democrats," *Rucho*, 318 F. Supp. 3d at 801, or "set out to draw . . . borders in a way that [is] favorable to the Democratic party" because the mapmaker would like to see more Democrats elected, *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *10. "[T]hat is not a choice the Constitution allows . . . mapdrawers to make." *Rucho*, 318 F. Supp. 3d at 801.[11]

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consistent and nondiscriminatory application of a legitimate state policy"); *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (permitting population deviations "only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination").

[11] *See also* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. 1993 (2018); Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, *supra*; G. Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for*

To be sure, introducing clear limits on partisan gerrymandering will require "resetting legislators' expectations about what behavior is constitutionally tolerable." Parsons, *Gerrymandering & Justiciability*, *supra*, at 59. But this does not make intervention impossible, inappropriate, or even uncommon. After all, "how 'justiciable' would First-Amendment issues appear today if the process of interpretation and application had been halted in 1912?" *Id.* (quoting Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517, 595 (1966)). New doctrine always creates a new equilibrium—this is how the Constitution's vital checks and balances maintain fidelity to that instrument over time.

Some of our Nation's most profound betrayals of that promise have occurred when this Court has failed to fulfill its own role in maintaining that equilibrium. In *Giles v. Harris*, this Court claimed it could not provide "a remedy for political wrongs" and stood idly by in the face of a sweeping disenfranchisement scheme targeting black voters. *See* 189 U.S. 475, 486 (1903). Once the Court "effectively blessed" the approach, it spread to other states and "virtual[ly] eliminat[ed] black citizens from political participation in the South" for well over half-a-century. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295, 313, 297 (2000). In Louisiana, for example, the number of black voters on the registration rolls dropped from 130,334 to 730 between 1896 and 1910. *See id.* at 303.

Partisan Advantage is Unconstitutional, 24 Wm. & Mary Bill Rts. J. 1107 (2016).

The Court's "narrative of nonintervention" would arise again in *Colegrove v. Green*, where a plurality cited *Giles* with *favor* for the proposition that the issue was not fit for "judicial determination." *See* Charles & Fuentes-Rohwer, *supra*, at 243 (discussing *Colegrove v. Green*, 328 U.S. 549 (1946)). In short, the same arguments raised against partisan gerrymandering claims today have been raised throughout our Nation's history. The Court relied upon them "when it refused to intervene to protect African Americans against widespread racial discrimination in the political process and when it refused to intervene to address the problem of grossly malapportioned districts." *Id.* at 240. The Court would eventually rise to meet the task before it in prior eras, and it must do so again in our own time.

Nor is resetting legislators' expectations imprudent. Quite the contrary. At present, the Court's approach sends a signal to elected officials (and to our next generation of leaders) that there is success to be had in brazen suppression, that there is power to be found in dismantling democracy, and that accountability to the voters is merely the fate of the unsavvy—a fool's game from a bygone age. [12] Representative democracy cannot long survive when the values and principles that make it possible are not

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[12] *See* Zachary Roth, *Voting Fight Shifts to Local Level in North Carolina*, NBC News (Aug. 8, 2016), http://www.nbcnews.com/politics/elections/voting-fight-shiftslocal-level-north-carolina-n625751 (noting that the "head of a leading conservative think tank" in North Carolina is "publicly urging" county election officials to "impose new schemes to limit access to the polls" because "making voting harder is just 'partisan politics'—and that's fair game") (last accessed Jan. 18, 2019).

modeled, imparted, and passed along. Here, an ounce of prevention is worth a pound of cure. By doing "a little now—rein[ing] in partisan gerrymandering," the Court can "do a lot less later—by deterring [other, more extreme] bad behavior it would otherwise have to deal with on the merits." *Id.* at 241.

In fact, the Court faces a unique opportunity this term to minimize litigation, streamline the shift to compliant maps, and reset expectations on a broad scale. *Every* map in the United States—congressional, state, and local—must be revisited following the upcoming 2020 census with or without this Court's guidance. *Amici* believe clarification by the Court would substantially benefit those tasked with drawing new maps following the census and would obviate the need for litigation that localities might otherwise face in future years based on the current amorphous state of the law. With a coherent political gerrymandering claim (or claims) in place, mapmakers will better understand what practices are and are not permissible and local government lawyers will better understand how the various strands of this Court's redistricting jurisprudence interact with one another so as to minimize or eliminate the risk of a lawsuit—political, racial, or otherwise.

C. Permitting a Variety of Evidence Would Improve Administrability

Given the diverse contexts in which a partisan gerrymandering claim could arise, *amici* also urge the Court to employ a consistent evidentiary approach to such claims and permit both plaintiffs and defendants to rely upon a variety of types of evidence in bringing and defending claims. This Court held in *Cooper v.*

Harris that a racial gerrymandering claim rests upon fundamental constitutional standards, and while certain types of evidence (such as an alternative map) may be particularly persuasive or useful in supporting such a claim, the Equal Protection Clause does not demand any "special evidentiary prerequisite." 137 S. Ct. 1455, 1479-80 (2017). This should be the case in the partisan gerrymandering context as well.

Expert evidence, for example, should be permitted to maintain or defend a claim. Such evidence will often be the best evidence available in the pursuit or defense of a partisan gerrymandering claim. *See, e.g.*, *Rucho*, 318 F. Supp. 3d at 870-80, 893-94 (relying on "extreme statistical outlier" analyses to support findings of discriminatory intent and effect). Expert evidence has not flummoxed lawyers or judges in racial dilution cases, racial sorting cases, or any other number of cases in which such evidence is deployed. *See id.* at 853-58 (citing examples of judicial reliance on statistical and social science evidence as proof of a violation of a constitutional standard).

Moreover, this kind of evidence is becoming increasingly intuitive and accessible in the redistricting context. It does not take special technical training to understand that a map is an outlier when it is more partisan than 99% of almost 25,000 neutrally-drawn maps. *See id.* at 872. And data and studies about the impact of maps are being made available to the public online with greater and greater frequency.

That said, such studies need not be mandatory, either as a threshold showing or as a defensive necessity. For example, the district court in *Benisek* relied upon the Democratic Performance Index (DPI)

and the Cook Partisan Voting Index (PVI) to find that the plaintiffs' "electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened" by intentional state action. 2018 U.S. Dist. LEXIS 190292, at *59-61. As Judge Niemeyer observed, such analyses are sophisticated and dependable tools in their own right, commonly used by the mapmakers themselves. *See id.* at *13-14 (noting that the DPI metric was used by the consultant that designed Maryland's plan); *id.* at *25-27 (noting that the PVI metric is a "well-respected" measure, and observing that "[w]hen the Cook Report has rated a district 'Solid Republican' on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; . . . when a district has been rated as 'Likely Democratic,' the Democratic candidate has won 94% of the time") (citing James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010)).

Independent, nonpartisan organizations have relied on similar kinds of modeling to demonstrate how gerrymandering can diminish the weight of invidiously targeted votes and undermine voters' equal opportunity to exercise the franchise and impact the political process. For example, FairVote predicted the outcome in 361 of 435 congressional seats ahead of the 2016 election with 100% accuracy using no information other than 2010-2014 election results and whether an incumbent was running in the race.[13]

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[13] FairVote, *Monopoly Politics 2018*, at 2, available at https://fairvote.app.box.com/v/MonopolyPolitics2018 (last accessed Jan. 18, 2019) [hereinafter, "FairVote, *Monopoly Politics 2018*"].

These projections were made in *November 2014—two years* before the election—and were only updated to account for races in which representatives announced they would not be seeking reelection in 2016.[14] "In these districts, the challengers [were] powerless to affect the outcome, regardless of their funding, their qualities as candidates, or their ability to motivate supporters."[15]

Members of Congress elected from such "safe" seats (with a 10-percent advantage, for example) "need not worry much about the possibility of shifting majorities, so they have little reason to be responsive to political minorities in their district." *LULAC*, 548 U.S. at 470–71 (Stevens, J., dissenting in part). Pretending that such partisan gerrymanders are not readily identifiable or do not substantially impact the ability of targeted voters to meaningfully affect the political process would be sheer judicial fiction.

Of course, if a representative resides in a district that is particularly favorable based on natural geography or other legitimate redistricting considerations, a partisan gerrymandering claim cannot lie. *See Gill*, 138 S. Ct. at 1933. Similarly, the mere fact that one candidate wins and one candidate loses any given race does not, standing alone, prove or negate the existence of an invidious suppressive effect. This is the same evidentiary approach local government attorneys encounter in the Court's racial dilution case law. *See Thornburg v. Gingles*, 478 U.S.

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[14] Andrew Douglas, *FairVote's Monopoly Politics 2016 Projections Updated*, FairVote (Sept. 22, 2015) http://www.fairvote.org/fairvote_s_monopoly_politics_2016_projections_updated (last accessed Jan. 18, 2019).

[15] FairVote, Monopoly Politics 2018, *supra*, at 2.

30, 57 (1986) (noting that the "loss of political power through vote dilution is distinct from the mere inability to win a particular election").

In other words, it simultaneously can be true that a voter possesses no right to live in any particular district or win any particular election, and that the same voter possesses the right not to have the electoral odds intentionally stacked against her. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 n.8 (1990) (noting that the Constitution protects citizens "from even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights"); Kang, *supra*, at 383 ("Party members may not have any constitutional entitlement to electoral success, but they should have a constitutional expectation against the government actively trying to burden their representational interests based on their partisan affiliation and beliefs.").

Evidence need not prove impossibility (and, therefore, an ability to divine the future) in order to prove the existence of a meaningful burden. The evidence need only show that the gerrymander was intended to dilute the influence of the targeted voters and that the gerrymander's success is assured under any likely electoral scenario.[16] These elements can be

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[16] *See Rucho*, 318 F. Supp. 3d at 867 ("[A] plaintiff must show that the dilution . . . is likely to persist in subsequent elections."); *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *60 ("Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so.").

proven through a variety of evidence, and the Court should not foreclose this evidence just as it does not foreclose it in other redistricting cases.[17]

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By adopting a consistent and understandable evidentiary approach and relying on well-established, familiar, and coherent constitutional standards, the Court can provide local governments and their lawyers a clear lay of the land heading into the next round of redistricting, forestall a range of racial and political gerrymandering claims that might otherwise arise,

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[17] That the Court already allows defendants in racial sorting cases to rely upon a range of evidence to prove that politics, not race, predominated in the linedrawing process demonstrates that courts are more than capable of receiving and considering a host of different circumstantial and direct evidence in deciding whether the "essential basis" used in forming a district was racial or political. *See Bethune-Hill*, 137 S. Ct. at 799. If political considerations are found to predominate, the only remaining intent question is whether that political purpose is legitimate or illegitimate. *Compare Easley v. Cromartie*, 532 U.S. 234, 239-47 (2001) (legitimate interest in pursuing a 6-6 "partisan balance"), *with Rucho*, 318 F. Supp. 3d at 808 (illegitimate interest in pursuing a 10-3 "partisan advantage"). This question parallels that already ably managed in the racial gerrymandering context, where courts distinguish between legitimate and illegitimate racial considerations in redistricting. *Compare City of Rome v. United States*, 446 U.S. 156, 177 (1980), *abrogated in part by Shelby Cnty.*, *Ala. v. Holder*, 133 S. Ct. 2612 (2013) (legitimate interest in preventing racial dilution and securing equal opportunity to elect), *with Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (illegitimate interest in racial maximization). *See also Gill v. Whitford*, 16-1161, Oral Arg. Tr. 7:8-9 (Oct. 3, 2017) (JUSTICE GINSBURG: "[Doesn't] max-Republican . . . have the same problem that 'max-Black' did?").

and help preserve the faith and voice of voters residing in distinct, local communities across the country.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the judgments below.

Respectfully submitted,

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