Nos. 18-422, 18-726

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

On Appeals from the United States District Courts for the Middle District of North Carolina and the District of Maryland

BRIEF OF PROFESSOR MICHAEL KANG AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

JAMES P. ROUHANDEH
Counsel of Record
DAVID B. TOSCANO
THOMAS DEC
AMANDA RAE SCHWARZENBART
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com

Counsel for Amicus Curiae

March 8, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Michael S. Kang is the William G. and Virginia K. Karnes Research Professor at Northwestern Pritzker School of Law and a nationally recognized expert on redistricting and election law.[2] Professor Kang holds a J.D. from the University of Chicago School of Law and a Ph.D. in Government from Harvard University.

Professor Kang was recognized for the Best Election Law Article of 2017 by the Association of American Law Schools Section on Election Law. *See Gerrymandering and the Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). In the article, Professor Kang argues that legislative redistricting, like all lawmaking, must be supported by a legitimate government purpose; and that because the pursuit of partisan advantage is not a legitimate government purpose, a redistricting plan that has partisan effects that result solely from partisanship should be rejected as unconstitutional.

Professor Kang believes that consideration of his thesis would assist the Court in resolving the issues presented by these appeals.

---

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

[2] The views expressed herein are Professor Kang's alone and do not represent the views of Northwestern Pritzker School of Law.

SUMMARY OF ARGUMENT

Professor Kang submits that, consistent with well-established constitutional norms, the partisan effects of a redistricting plan must result from the mapmakers' pursuit of legitimate government interests, and not solely from their pursuit of a partisan advantage favoring one party over another. Courts should therefore reject a plan as unconstitutional if its partisan effects do not arise from legitimate government objectives. Under this simple standard, courts would not need an exact measure of a plan's partisan effects. The proposed standard would, as a result, be "clear, manageable, and politically neutral." *Vieth v. Jubelirer*, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment).

No Justice of this Court has ever opined that an excessively partisan redrawing of congressional districts is constitutional. *See*, *e.g.*, *Vieth*, 541 U.S. at 292–93 (Scalia, J., plurality opinion); *id.* at 325 (Stevens, J., dissenting); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306, 1310 (2016); *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). But seeking to fashion an objective constitutional standard based on whether the partisan effect of a particular redistricting plan is "excessive" has understandably vexed the courts because of the difficulties of measurement. "Excessiveness is not easily determined." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). By comparison, a standard requiring a showing that the plan was drawn to achieve legitimate government objectives would, as in the "one person, one vote" and Elections Clause cases, be far easier to apply.

As Justice Stevens has said, "any decision to redraw district boundaries—*like any other state action that affects the electoral process*—must, at the very least, serve some legitimate government purpose" beyond "a purely partisan desire." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 448 (2006) ("*LULAC*") (Stevens, J., concurring in part and dissenting in part) (emphasis added). The legitimate government interest standard is familiar to this Court and the lower courts. A decision to endorse that standard here would align the standard for partisan gerrymandering cases with the Court's prior decisions under the First Amendment, the Fourteenth Amendment, and the Elections Clause (U.S. Const. art. I, § 4). There is no reason for the standards to be different.

This Court's "one person, one vote" and Elections Clause decisions demonstrate that recognizing politicians might consider partisan advantage in drawing a district map does not imply that seeking to disadvantage another political party is a legitimate basis for delineating districts. The acknowledgement that legislatures are partisan bodies is a far cry from holding that they may rely on pure partisanship as a legitimate basis for their decisions. *See Trump v. Hawaii,* 138 S. Ct. 2392, 2421 (2018) ("On the few occasions where [the Court has struck down a policy as illegitimate under rational basis scrutiny], a common thread has been that the laws at issue lack any purpose other than a bare desire to harm a politically unpopular group.") (quotation omitted); *see also McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion) ("[T]hose who govern should be the *last* people to help decide who *should* govern.").

The unfortunate and unintended effect of not rejecting outright redistricting with a purely partisan purpose has been to encourage redistricting plans that are openly designed to put voters favoring a particular party at a disadvantage. That, in turn, has generated numerous challenges to redistricting plans that avowedly seek partisan advantage and has led to more frequent review of those plans by this Court. By adopting a purpose-based standard for political gerrymandering, the Court would strongly discourage the growing practice of public officials openly engaging in the partisan redrawing of district lines—thus abating a practice that undermines the perception and reality of free and fair elections and lessening, if not eliminating, the need for challenges to that practice.

In each of the cases now before the Court, the redistricting plans were designed with an avowedly partisan purpose, and cannot be considered to be the product of legitimate state interests. They present quintessential examples of undiluted partisanship, with clear evidence of a pure partisan purpose in drawing the district lines. *See* Brief for Appellee Common Cause at 7–19, 41, *Rucho v. Common Cause*, No. 18-422; Brief for Appellee League of Women Voters at 6–8, *Rucho v. Common Cause*, No. 18-422; Brief for Appellees at 4–10, 51, *Lamone v. Benisek*, No. 18-726. They, therefore, cannot be sustained under a purpose-based test of constitutionality.

ARGUMENT

I. THE SOLE PURSUIT OF PARTISAN ADVANTAGE IS NOT A LEGITIMATE BASIS FOR REDISTRICTING

Under this Court's redistricting case law, the pure pursuit of party primacy is an illegitimate basis for lawmaking. As Justice Kennedy wrote in *Vieth*: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

In his plurality opinion in *Vieth*, Justice Scalia agreed that "an *excessive* injection of politics [in redistricting] is *un*lawful." 541 U.S. at 293. He also observed that, in seeking to advance legitimate lawmaking interests, the government is entitled to weigh political considerations in redistricting, including potential partisan implications. That observation is not—and should not be allowed to become—a sanction for government officials to pursue an electoral edge for one party at the expense of another. As Justice Stevens observed in *Vieth*, there had not previously been "the slightest intimation in any opinion written by any Member of [the] Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting).[3]

---

[3] In *Cox v. Larios*, Justice Scalia over-appraised the support in *Vieth* for accepting "politics as usual" as a "traditional" criterion that is constitutional if not taken too far. 542 U.S. 947, 952 (2004) (Scalia, J., dissenting); *see Vieth*, 541 U.S. at 316 (Kennedy, J., con-

(….continued)

Amicus submits that a standard requiring that legitimate government interests support redistricting plans is "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). Recent lower court decisions in this and other cases demonstrate the manageability of applying such a purpose-focused standard to partisan gerrymandering. Tracking Justice Kennedy's opinion in *Vieth*, these decisions have inquired "not whether political classifications were used" or how excessive the partisan advantage is, but instead whether the government acted with only the impermissible "purpose . . . of imposing burdens on a disfavored party and its voters." *Id.* at 315.

A. There is agreement that "excessive" partisanship is not a legitimate basis for redistricting.

Although the Court has struggled to articulate a standard of constitutionality for partisan gerrymandering, no member of this Court has opined that the Constitution tolerates excessively partisan redrawing of congressional districts. Where, as here, district lines can be explained only by a partisan purpose, the plans should be declared unconstitutional.

This Court first addressed the constitutionality of partisan gerrymandering in *Davis v. Bandemer*, 478 U.S.

(continued….)

curring in the judgment) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."); *id.* at 351 (Souter, J., dissenting) (proposing that after a plaintiff shows a departure from "traditional districting principles," the defendants must show that "legitimate objectives" other than "naked partisan advantage" justify the redistricting).

109 (1986), when it accepted that the issue is justiciable but articulated an effects-focused standard that so far has not been met. In *Bandemer*, the Court considered an equal protection challenge to the 1981 decennial redistricting of the Indiana state legislature. The district court had found that the Republican-majority legislature drew districts with "simply no conceivable justification" other than "protecting its incumbents and creating every possible 'safe' Republican district possible." *Bandemer v. Davis*, 603 F. Supp. 1479, 1487–88 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986). Nonetheless, a plurality of the Court reasoned that in order to succeed, the plaintiffs needed to prove discriminatory effect by showing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Bandemer*, 478 U.S. at 132 (plurality opinion). The result was to preserve a district map that avowedly served the partisan purpose of keeping a political party in control, which intentionally burdened voting rights. The decision cast doubt on the fairness of the electoral process.

Returning to the question eighteen years later in *Vieth*, the Court again held that partisan gerrymandering cases are justiciable,[4] but rejected the *Bandemer* discriminatory effects standard without articulating a new standard. In *Vieth*, the fractured Court put forward three distinct constitutional rationales and no controlling legal standard. Justice Scalia, writing for a four-member plurality, opined that partisan gerrymandering cases are nonjusticiable despite "the incompatibility of severe par-

[4] *See* 541 U.S. at 309–10 (Kennedy, J., concurring); *id.* at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court are convinced" that "political gerrymandering claims are justiciable.").

tisan gerrymanders with democratic principles" and the recognition that "an *excessive* injection of politics is *un*lawful" in legislative districting. *Vieth*, 541 U.S. at 292–93 (plurality opinion). Justice Kennedy, in a concurring opinion, wrote that "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for identifying unconstitutional partisan gerrymandering." *Id.* at 307–08 (Kennedy, J., concurring in the judgment). Justice Stevens, in his dissenting opinion, denied that "a naked purpose to disadvantage a political minority would provide a rational basis" for a redistricting plan. *Id.* at 336–37 (Stevens, J., dissenting). In his view, the appropriate constitutional question was "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles." *Id.* at 339.

The *Vieth* plurality opinion, while not controlling, has nevertheless guided subsequent discourse on the question of whether partisan motivation could constitute a lawful basis for a redistricting plan. The plurality observed that legislative redistricting is contemplated in the Constitution. *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."). Because partisan redistricting had a place in American politics since the colonial period, the plurality concluded that "partisan districting is a lawful and common practice." *Vieth*, 541 U.S. at 286 (plurality opinion). In their view, although "excessive" partisanship was unlawful, the question was not justiciable because it was impossible to craft a workable standard to assess "[h]ow much political motivation and effect is too much." *Id.* at 297 (plurality opinion). Had the focus in-

stead been on the illegitimate purpose of the legislation, there would have been no such problem.

Importantly, the plurality opinion in *Vieth* did not identify any prior case law expressing constitutional approval for partisan motivations as legitimate reasons for the drawing of district lines. Rather it cited cases which recognized that, as a practical matter, partisan concerns were commonly considered in redistricting, and which passed no judgment on whether such considerations could be a legitimate government interest or a lawful basis for government action *absent additional nonpartisan considerations*. *See* 541 U.S. at 285–86 (plurality opinion) (citing *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics."); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."). Nevertheless, the *Vieth* plurality cited those cases as support for the conclusion that seeking partisan advantage could be a legitimate basis for a redistricting plan, so long as the partisan purpose and effect were not "excessive." 541 U.S. at 293.

In *Vieth*, Justice Kennedy accepted that the excessiveness of a partisan gerrymander could be part of an undefined constitutional standard, and held open the possibility that criteria for a "clear, manageable, and politically neutral" constitutional standard could be developed in the future. 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment). But he also cautioned against "adopting a standard that turns on whether the partisan interests in the redistricting process were excessive," because

"[e]xcessiveness is not easily determined." *Id.* at 316. He suggested that the proper inquiry might instead be purpose-directed, assessing under the First Amendment whether "political classifications were used to burden a group's representational rights." *Id.* at 315. He observed that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . .' we would surely conclude the Constitution had been violated." *Id.* at 312.

There is, of course, a significant difference between taking into account political considerations and pursuing party primacy. The Court has long recognized the practical reality that legislatures are partisan bodies and thus aware of the political aspects of redistricting. *See*, *e.g.*, *Gaffney*, 412 U.S. at 752–53 ("It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. . . . [I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another.").

Recognizing that legislatures are partisan bodies, however, falls far short of supporting the conclusion that pure partisanship is a legitimate basis for drawing district lines. The Court's approval of legislative consideration of partisan concerns in redistricting has been limited to circumstances in which mapmakers were, at least ostensibly, seeking to achieve *fairness* between the political parties. In *Gaffney*, for example, the Court held that a state does not violate the Constitution by attempting "to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican parties." *Id.* at 752. The Court distinguished this from districting plans that "are

employed to minimize or cancel out the voting strength of racial *or political* elements of the voting population," an action that the Court labeled "invidiously discriminatory." *Id.* at 751 (emphasis added); *see also Harris*, 136 S. Ct. at 1306 (citing *Gaffney* for the proposition that "a state interest in maintaining the competitive balance among political parties" is a "legitimate" state interest in redistricting); *Easley v. Cromartie*, 532 U.S. 234, 253 (2001) (approving the use of partisan considerations in a remedial redistricting plan that sought to render each party's share of the state's congressional delegation proportional to its share of the statewide vote in the most recent congressional election).

B. Identifying partisan advantage as an illegitimate basis for redistricting would address the concerns expressed in *Vieth*.

Dissents by Justice Stevens and Justice Breyer in *Vieth* and *LULAC* articulate a standard that addresses the concerns originally framed by Justice Kennedy in *Vieth.* That standard, which asks "whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *Vieth*, 541 U.S. at 336–39 (Stevens, J., dissenting), is "clear, manageable, and politically neutral" and does not turn "on whether the partisan interests in the redistricting process were excessive," *id.* at 307–08, 316 (Kennedy, J., concurring in the judgment).

Applying that same test in his dissent in *LULAC*, Justice Stevens, joined in relevant part by Justice Breyer, expressed the view that, because the redistricting had the "sole purpose of advantaging Republicans and disadvantaging Democrats," the state had failed its "constitutional requirement that state action must be

supported by a legitimate state interest." *LULAC*, 548 U.S. at 462–63 (Stevens, J., concurring in part and dissenting in part). He cited the overwhelming evidence of purely partisan motivations for the 2003 Texas redistricting plan in concluding that "it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander." *Id.* at 447.

The decisions below demonstrate that a purpose-based standard is manageable. Building on Justice Stevens's and Justice Breyer's standard in *Vieth* and *LULAC*, the panels below reasoned that a core constitutional inquiry in partisan gerrymandering cases should be whether plaintiffs can demonstrate that the illegitimate purpose of partisan advantage—as opposed to any legitimate state interests—resulted in the partisan effects of the redistricting plan at issue. *See*, *e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 923 (M.D.N.C. 2018) (finding that "the dilution of . . . votes is not attributable to the State's political geography or other legitimate redistricting considerations"); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 520 (D. Md. 2018) (finding that no "legitimate redistricting goa[l] . . . explains the dramatic exchange of populations between the Sixth and Eighth Districts").

II. REDISTRICTING SOLELY TO ACHIEVE A PARTISAN ADVANTAGE IS INCONSISTENT WITH THE LONGSTANDING CONSTITUTIONAL NORM AGAINST GOVERNMENT PARTISANSHIP AS A LEGITIMATE GOVERNMENT ACTIVITY

Redistricting for the purpose of achieving partisan advantage is squarely at odds with the Court's holdings

in related areas of constitutional law that partisanship cannot be a legitimate government purpose. As reflected in this Court's First Amendment, Fourteenth Amendment, and Elections Clause jurisprudence, constitutionality should not turn primarily on the degree of harm resulting from partisanship, but rather upon the fact that disadvantaging another party was the sole basis for a map's design. These cases reflect an overarching constitutional norm against government action to seek partisan advantage as a legitimate government activity. The standard in alleged partisan gerrymandering cases should be the same standard as in these other related areas of the law.

A. The Court's First Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

When the government designs an electoral map for the sole purpose of attaining primacy for a political party, the government is intentionally burdening the core First Amendment rights of citizens with competing political beliefs and associations. That does not further legitimate state interests. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In *Vieth*, Justice Kennedy explained partisan gerrymandering implicates "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 the judgment) (citing *Elrod*, 427 U.S. 347 (plurality opinion)). He explained that a First Amendment inquiry would focus on "whether political classifications were used to burden a group's representational rights." *Id.* at 315. In his dissent in *Vieth*, Justice Stevens also suggested a First Amendment analysis: "'[P]olitical belief and association constitute the core of those activities protected by the First Amendment' . . . . It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district." *Id.* at 324–25 (Stevens, J., dissenting) (quoting *Elrod*, 427 U.S. at 356 (plurality opinion)).

Justice Kennedy's reasoning came before the Court in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), which is a prior decision in the case that is now captioned *Lamone v. Benisek*, No. 18-726. The plaintiffs had asserted a First Amendment partisan gerrymandering claim based on Justice Kennedy's concurrence in *Vieth*. The claim invoked Justice Kennedy's reasoning that "if 'a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation,'" and that "[w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention . . . ." 136 S. Ct. at 456 (quoting *Vieth*, 541 U.S. at 315)). This Court reversed the dismissal of the claim by a single district judge because he failed to refer the claim to a three-judge panel. *See id.* Because Justice Kennedy's legal theory was "uncontradicted by the majority in any of [the Court's] cases," the claim invoking it was not "'constitutionally insubstantial,'" and should have been referred to a three-judge

panel. *Id.* (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)). On remand, the three-judge panel appropriately adopted a standard reflecting the longstanding First Amendment norm prohibiting a partisan purpose for state action absent a legitimate state interest. *See Benisek*, 348 F. Supp. 3d at 520 (holding that "the intent to flip party control" was an "illegitimate" basis for redistricting); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 801–02 (D. Md. 2017). That panel's judgment is now before this Court.

The decisions below in *Benisek* are consistent with the longstanding norm against government action for partisan advantage under the First Amendment, as adopted in the Court's government patronage cases. The patronage decisions uniformly reject government employment actions taken because of partisanship, which the Court found to be an illegitimate government purpose, rather than on legitimate hiring criteria. The plurality in *Elrod* explained that by conditioning employment on party affiliation, patronage burdens political belief under the First Amendment and, more broadly, harms the democratic process. *Elrod*, 427 U.S. at 355–56 (plurality opinion).

This longstanding norm also appears elsewhere in the Court's First Amendment jurisprudence, particularly where one political party exercises control of state government to disadvantage an opposing political party. In *Tashjian*, the Connecticut Democratic Party used its control of state government to force the Republican Party into acquiescing to a primary election law over the party's objection. The Court held that the law was unconstitutional, since it burdened the associational interests of the Republican Party and its members, and recognized that "the views of the State . . . to some extent

represent the views of one political party transiently enjoying majority power." 479 U.S. at 224; *see also Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring) ("[I]t must be recognized that [the State] is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit."). Here, where representatives of one political party use the state government's redistricting authority solely for its own partisan ends, the Court's norm against partisan government should apply with equal force.

B. The Court's Fourteenth Amendment decisions support the norm that government action solely for partisan advantage is illegitimate.

The Court's decisions under the Fourteenth Amendment likewise adopt the norm against government action to achieve a partisan advantage. The Equal Protection Clause prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To show a violation of the Equal Protection Clause, plaintiffs must prove both a discriminatory purpose and a discriminatory effect, upon which the burden shifts to the government to show that the discrimination was justified by a legitimate state interest. *See*, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). It is that same burden-shifting, interest-based analysis that the Court employs under the Fourteenth Amendment's "one person, one vote" doctrine. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). Intent to advantage or to disadvantage a political party cannot be such a legitimate state interest. *See Romer v. Evans*, 517 U.S. 620, 634–35 (1996) ("[I]f the

constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.") (quoting *USDA v. Moreno*, 413 U.S. 528, 534 (1973)).

Within its equal protection jurisprudence, this Court's "one person, one vote" doctrine prohibits even modest population deviations between legislative districts when those deviations are based solely on the illegitimate purpose of providing partisan advantage. To succeed under the "one person, one vote" doctrine, plaintiffs must show that it is more probable than not that a population deviation of less than ten percent is predominantly based on "illegitimate reapportionment factors" rather than "legitimate considerations." *Harris,* 136 S. Ct. at 1304, 1307. Even if the effect of the redistricting is relatively minor, it violates the Equal Protection Clause if it "serve[s] no purpose other than to favor one segment—whether racial, ethnic, religious, economic or political—that may occupy a position of strength . . . or to disadvantage a politically weak segment." *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

In *Harris*, the Court held that an Arizona Commission's redistricting plan did not violate the Equal Protection Clause because the population deviations it generated were based on a legitimate purpose—a good-faith effort to comply with the Voting Rights Act—rather than by a desire to seek partisan advantage. 136 S. Ct. at 1309. Justice Breyer, writing for the Court, reserved the question of whether "partisanship is an illegitimate redistricting factor," but stated that "[n]o legitimate purposes could explain" the population deviations in redistricting in a previous case, *Cox v. Larios*, 542 U.S. 947 (2004). *Id.* at 1310.

In *Larios v. Cox*, Georgia Democrats had redistricted the state with "two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations . . . and the protection of Democratic incumbents." 300 F. Supp. 2d 1320, 1325 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). A three-judge district court held that the partisan gerrymander violated the "one person, one vote" doctrine and that in districting, "each population deviation requires at least *some* plausible and consistently applied state interest to justify it . . . and the defendant's two proffered justifications are plainly impermissible." *Id.* at 1352–53 (emphasis in original).

This Court summarily affirmed. In a concurring opinion joined by Justice Breyer, Justice Stevens reasoned that "the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote." *Cox*, 542 U.S. at 949. Justice Stevens made clear his belief that the "one person, one vote" violation was triggered not by the magnitude of the population deviation, but rather by partisan-motivated redistricting with no legitimate purpose. *See id.* at 949–51.

The Court's racial gerrymandering jurisprudence similarly supports the norm that naked partisan advantage is an illegitimate basis for government action. In *Cooper v. Harris*, a prior version of the districting map at issue in this case was challenged as an unconstitutional racial gerrymander, and the Court held that strict scrutiny applies "if legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . [because] the sorting of voters on grounds of their race remains suspect even if race is

meant to function as a proxy for other (including political) characteristics." *Cooper v. Harris*, 137 S. Ct. 1455, 1473 n.7 (2017) (citing *Miller*, 515 U.S. at 915).

Because, as the Court has recognized, "racial gerrymandering is highly correlated with political affiliation," *id.* (quoting *Easley*, 532 U.S. at 242), legislatures commonly sort voters by race for the purpose of achieving partisan advantage, s*ee* Bruce E. Cain & Emily R. Zhang*, Blurred Lines: Conjoined Polarization and Voting Rights,* 77 Ohio St. L.J. 867, 871, 888 (2016) ("In the context of conjoined polarization, race and politics are mirror images of each other and can be used interchangeably for redistricting."). Look no further than the *Common Cause* decision now before the Court. After it was struck down as an unconstitutional racial gerrymander, the legislature redrew the map with the sole intent of benefitting Republicans at the expense of other political parties—and the redrawn map was functionally equivalent to its predecessor, seeking to preserve Republican advantage in 10 of the 13 congressional districts in the state. *Common Cause*, 318 F. Supp. 3d at 882 ("[T]he facts and circumstances surrounding the drawing and enactment of the 2011 Plan—the partisan effects of which the Committee expressly sought to carry forward in the 2016 Plan—further establish that the General Assembly drew the 2016 Plan to maximize partisan advantage."). The petitioners pursue the same defense as before: that their sole motivation in drawing the map was to benefit Republican voters at the expense of voters belonging to other political parties.

The Court rightfully does not allow racial gerrymandering, but as this case demonstrates, if the sole pursuit of partisan advantage was a legitimate state interest, legislatures would have free rein to achieve the same re-

sults under the guise of achieving partisan objectives. This surely was not the Court's intent in *Cooper*, which supports the norm that the sole pursuit of partisan advantage is not a legitimate state interest.

C. The Court's Elections Clause decisions support the norm that government action solely for partisan advantage is illegitimate.

The constitutional norm against purely partisan government action also drives the Court's decisions related to the administration of elections. The Elections Clause, U.S. Const. art. I, § 4, delegates authority to states to establish procedures for congressional elections. The Court has made it clear that this clause is a delegation of authority to adopt only procedural regulations for congressional elections; it does not permit states to favor or to disadvantage particular candidates. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995). States are not permitted to dictate electoral outcomes based on candidates' political positions because such action would constitute an illegitimate purpose and would be inconsistent with the constitutional norm against government action solely in support of partisan advantage. *See Cook v. Gralike*, 531 U.S. 510, 526–27 (2001); *Thornton*, 514 U.S. at 833–34 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.").

In *Cook*, the Court overturned a Missouri constitutional amendment requiring each candidate's position on congressional term limits to be printed on the ballot because the amendment had the purpose of favoring cer-

tain candidates over others. 531 U.S. at 524. The Court found that the law violated the Elections Clause because its purpose was to "dictate electoral outcomes" based on candidates' positions. *Id.* at 526 (quoting *Thornton*, 514 U.S. at 833–34); *see id.* at 524–27; *see also Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) ("[A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But . . . States may not infringe upon basic constitutional protections.").

Similarly, courts have emphasized the illegitimacy of government election administration with a partisan purpose in striking down voter identification laws and early voting restrictions on nonracial bias grounds. In *Obama for America v. Husted*, the Sixth Circuit affirmed a district court's injunction against an Ohio law limiting early voting because the law discriminated between classes of voters. 888 F. Supp. 2d 897 (S.D. Ohio 2012). The court in *Husted* drew upon this Court's holding in *Bush v. Gore* that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 910 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

Consistent with the constitutional norm established in these cases, the panel below in *Common Cause* held that redistricting of congressional districts for partisan advantage violates the Elections Clause. *See Common Cause*, 318 F. Supp. 3d at 941. The panel concluded that the North Carolina 2016 redistricting map "disfavor[ed] the interests of supporters of a particular candidate or party in drawing congressional districts," showed bias toward a specific political party, and was an "impermissible effort to 'dictate electoral outcomes' and 'disfavor a class of candidates.'" *Id.* at 937 (quoting *Thornton*, 514 U.S. at 833–34). The panel held that the redistricting

"violates the Elections Clause by 'infring[ing] upon basic constitutional protections.'" *Id.* at 938 (quoting *Kusper*, 414 U.S. at 56–57).

III. REQUIRING THE GOVERNMENT TO ESTABLISH THAT THE PARTISAN EFFECTS OF REDISTRICTING WERE THE INCIDENTAL RESULT OF ITS PURSUIT OF LEGITIMATE STATE INTERESTS WOULD PROVIDE A CLEAR AND ADMINISTRABLE STANDARD AND A MEANINGFUL CHECK ON ILLEGITIMATE PARTISAN GERRYMANDERING

An electoral map with partisan effects that can be explained only by the intent to achieve partisan advantage violates the Constitution. However, a map with partisan effects that can be explained as the necessary consequence of the government's pursuit of legitimate state interests—such as respect for traditional political boundaries and subdivisions, compactness and contiguity, the preservation of communities of interest, and compliance with the Voting Rights Act—should be upheld. Focusing the constitutional inquiry on the requirement of a legitimate state interest in redistricting, rather than on the excessiveness of the partisan effects, would render unnecessary the need to define excessiveness of partisan effect that has proved so vexing for the courts since *Vieth*.

A. A constitutional standard based on a requirement that an acceptable plan be designed to further legitimate state interests would provide a manageable and meaningful check on the redistricting process.

Applying the proposed standard, the government would need to demonstrate that the partisan effects of a redistricting plan were the incidental result of the government's pursuit of legitimate state interests rather than an effort to provide an advantage to one political party at the expense of another. A redistricting plan could be upheld if the government successfully showed that the partisan effects of redistricting were indirect but necessary results of legitimate state interests. If plaintiffs established both partisan intent and effects, and the government could not explain the partisan effects of its redistricting plan as the product of legitimate state interests, a map would be struck down as the unconstitutional result of lawmaking based on the "naked purpose to disadvantage a political minority." *Vieth*, 541 U.S. at 336–37 (Stevens, J., dissenting); *cf. Romer*, 517 U.S. at 632–36 (1996) (ruling that bare animus to disadvantage a group, even outside a fundamental right or protected class, does not qualify as a legitimate state interest); *USDA v. Moreno*, 413 U.S. at 534–35 (concluding that equal protection "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest").

Such a standard would be familiar. As highlighted in Point II, *supra*, constitutional standards based on partisan purpose already control in related areas of law under the First Amendment, the Fourteenth Amendment, and the Elections Clause. In considering a challenge to

partisan redistricting under the "one person, one vote" doctrine in *Harris*, the Court concluded that a plaintiff must show that "it was more probable than not that the use of illegitimate factors significantly explained deviations from numerical equality." 136 S. Ct. at 1310. Similarly, prior to *Vieth*, *Bandemer* required courts to assess whether a redistricting plan constituted "intentional discrimination against an identifiable political group." 478 U.S. at 127. In addition, courts have long assessed legislative purpose in the context of racial discrimination claims under the Fourteenth Amendment. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding a zoning ordinance did not violate the Constitution because there was no proof that "discriminatory purpose was a motivating factor in the Village's decision"). As evidenced by its application in related contexts, the proposed standard would be "clear, manageable, and politically neutral." *Vieth*, 541 U.S. at 307–08 (Kennedy, J., concurring in the judgment).

A redistricting body might attempt to cloak an impermissible partisan purpose in a pretextual rationale, but courts have shown themselves to be adept at analyzing whether explanations are genuine or pretextual. In egregious cases, like those presented by the 2001 Georgia House of Representatives and 2002 Georgia Senate redistricting plans at issue in *Cox*, lower courts have had no trouble determining that the partisan effects of the redistricting resulted solely from a government purpose to advantage one political party. In *Whitford v. Gill*, the district court found that it could distinguish between the impermissible partisan purpose that predominated and the pretextual recitation of compactness and contiguity that was facially consistent with the final redistricting plan. *Whitford v. Gill*, 218 F. Supp. 3d 837, 891–96, 922–27 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct.

1916 (2018). In that case, although the electoral districts were largely compact and contiguous, the court rejected the State of Wisconsin's claim that the redistricting plan could be justified in terms of legitimate state interests because the redistricting body had considered and intentionally rejected numerous alternative maps that achieved the same degree of compactness and contiguity in favor of maps with greater and more durable partisan effect. *Id.*[5]

The necessary inquiry into illegitimate partisan purpose also may be helpfully informed by empirical measures of partisan effect such as the "efficiency gap" metric put forward by Eric McGhee. *See* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis. Stud. Q. 55 (2014). As recognized below and in *Whitford*, empirical measures of partisan effect are probative as to the true purpose of the redistricting body in implementing the redistricting plan at issue.

In addition to empirical measures of a partisan effect, other indicia of impermissible intent can be helpful in identifying partisan purpose: the settings for computers in the design of maps, the timing of the redistricting effort (e.g., mid-decade versus constitutionally mandated decennial redistricting), the deviation from prior proce-

[5] This Court vacated the district court's judgment in *Gill* based on the plaintiffs' failure to demonstrate standing, and remanded the case to provide the plaintiffs the opportunity to prove standing consistent with its opinion. *See Gill*, 138 S. Ct. at 1933–34. On remand, the district court "delay[ed] the trial and any decision on the merits" pending this Court's decisions in these cases (*Common Cause* and *Benisek*). *Whitford v. Gill*, No. 18-cv-763-jdp, 2019 WL 294800, *1 (W.D. Wis. Jan. 23, 2019).

dural norms in the redistricting process, the proportion of same-party incumbents forced to compete in the same district, the use of partisan experts in drawing redistricting, the choice of a plan based on the relative partisan effect of various proposed maps as compared to the selected redistricting plan, and the contemporaneous statements from individuals involved in the redistricting process as well as their subsequent testimony.

While pretextual explanations can be discredited, under the Court's current standards, many legislators do not even bother with a pretext. In view of this Court's decisions which have served to effectively encourage rather than discourage partisanship in designing plans, members of redistricting bodies have with increasing frequency openly acknowledged that the motivation underlying a redistricting plan was to entrench one political party at the expense of another. *See, e.g.*, *LULAC*, 548 U.S. at 453 ("According to former Lieutenant Governor Bill Ratliff, a highly regarded Republican member of the State Senate, 'political gain for the Republicans was 110% of the motivation for the Plan, . . . it was the entire motivation.'") (quotation omitted) (Stevens, J., concurring in part and dissenting in part).

Legislators have not infrequently advanced a facially neutral rationale, but then have felt free to speak in more candid terms that provide direct evidence of partisan intent. For example, in the run-up to the 2012 presidential election, Pennsylvania House Republican leader Mike Turzai asserted that Pennsylvania's voter-identification law, which had purportedly been designed to protect the integrity of the ballot from voter fraud, was "gonna allow [Republican presidential nominee Mitt] Romney to win the state of Pennsylvania, done." Mac-

kenzie Weinger, "Pa Pol: Voter ID Helps GOP Win State," *Politico* (June 25, 2012) (quoting Rep. Turzai).[6]

While a purpose-focused standard would provide a meaningful check against partisan gerrymandering, it would not prevent political bodies from playing their traditional role in redistricting. Just as under the "one person, one vote" doctrine, it would neither burden political actors with a standard of conduct that would be difficult to meet nor pose a risk that all redistricting decisions would become subject to judicial challenge. As Justice Breyer explained in *Vieth*, "[t]he use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends." 541 U.S. at 360 (Breyer, J., dissenting). Under the purpose-based standard *Amicus* advocates, an inquiry into legislative purpose will arise only when a plaintiff is able to present evidence of a partisan bias in a redistricting plan, and would lead to the overturning of a redistricting plan only if a state is unable to put forward a legitimate government interest explaining the redistricting plan's partisan effect. Just as the courts are not flooded with "one person, one vote" cases, under the same proposed standard only a small minority of redistricting plans are likely to raise serious questions regarding their constitutionality under a purpose-based standard.

[6] *Available at* www.politico.com/story/ 2012/06/pa-pol-voter-id-helps-gop-win-state- 077811

B. Requiring the government to ground its decisions in a legitimate purpose would provide essential support for well-established constitutional norms.

While such a standard might directly invalidate only a relatively limited number of redistricting maps where the government cannot articulate a legitimate, non-pretextual purpose for the redistricting plan, the rule would provide a strong motivation for government officials to adhere to constitutional principles and to internalize a "sense of constraint" on partisan excesses in the redistricting process. This is precisely what has taken place in the context of racial gerrymandering, where, following *Shaw*, legislatures internalized the principles underlying that decision and have generally conformed the redistricting process to those principles. *See* Richard Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 68–70 (2004). If the Court imposes a clear rule prohibiting partisan gerrymanders, legislators would be less likely to describe redistricting in terms of "cannibaliz[ation]" of the other party, *see Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), or assert that redistricting is "the business of rigging elections," *see* John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, Winston-Salem J. (Jan. 27, 1988) (quoting State Senator Mark McDaniel criticizing the North Carolina legislature). Instead, legislators would need to identify and articulate a basis for redistricting that adheres to democratic principles. Driven by the law requiring them to do so, legislatures would be far more likely to design districts that actually do conform to those principles.

CONCLUSION

Amicus respectfully proposes that the Court endorse the purpose-based standard set forth in this brief for resolving challenges to partisan gerrymandering, and submits that application of this standard is a basis for affirming the decisions below in *Rucho v. Common Cause*, No. 18-422 and *Lamone v. Benisek*, No. 18-726.

Respectfully submitted,

James P. Rouhandeh
Counsel of Record
David B. Toscano
Thomas Dec
Amanda Rae Schwarzenbart
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
rouhandeh@davispolk.com

Counsel for Amicus Curiae

March 8, 2019