No. 18-422

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 of the Middle District of North Carolina

BRIEF OF PROFESSOR D. THEODORE RAVE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amicus curiae D. Theodore Rave is the George A. Butler Research Professor and Associate Professor of Law at the University of Houston Law Center. He is an expert in the areas of election law and public fiduciary law. *Amicus* has an interest in the proper interpretation of the constitutional limitations on legislative redistricting and their effects on governance. *Amicus* believes that the U.S. Constitution prohibits legislators from manipulating district lines to entrench themselves and their political allies and to punish their political opponents and that this Court is the only institution that can provide a remedy.[1]

SUMMARY OF ARGUMENT

In *Davis v. Bandemer*, 478 U.S. 109 (1986), this Court held that political gerrymandering claims are justiciable. A majority of this Court reaffirmed that holding in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). But in *Vieth*, several members of this Court raised legitimate concerns about whether the federal courts

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The law school employing *amicus* provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing this brief. Otherwise, no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

are well suited to police such an inherently political process as redistricting.

Reaffirming the justiciability of political gerrymandering claims and affirming the district court in this case will not inevitably involve the federal courts in supervising every redistricting decision. The purpose of this amicus brief is to explain how the Court can create incentives for states to adopt independent redistricting processes to which the federal courts can safely defer.

As this Court, the Framers, and foundational political theory have recognized, elected officials, such as Members of Congress and state legislators, are fiduciaries who have a duty to loyally serve the interests of the people they represent, not their own interests. This commitment to fiduciary government is embedded deep in the constitutional structure. But the process of redistricting is rife with conflicts of interest where incumbent legislators can manipulate the process to entrench themselves and their political allies—a breach of their fiduciary obligation.

Courts are no better at reviewing business judgments than political ones. But when faced with the analogous problem of self-dealing directors in corporate law, courts do not just throw up their hands and declare the whole matter nonjusticiable. Instead, corporate law creates a two-track system of judicial review. Decisions made by conflicted fiduciaries are subjected to exacting scrutiny, but corporate law creates a safe harbor for decisions made or ratified through independent processes. When conflicted directors run their decisions through

an independent process, the taint of self-dealing is cleansed, and reviewing courts can safely defer to the substantive outcome so long as they ensure that the process was independent.

Finding an unconstitutional political gerrymander in this case will not plunge the federal courts ever deeper into the political thicket if this Court creates a safe harbor for redistricting decisions made through independent processes. State legislatures are insufficiently independent from their co-partisans in Congress. But the threat of litigation and skeptical judicial review of districts drawn by conflicted state legislatures will create a powerful incentive for those legislatures to adopt independent processes—like the citizens redistricting commissions in Arizona and California—to engage in the complex and delicate task of redistricting without the temptation to manipulate district lines for partisan entrenchment. Courts can safely defer to the substantive redistricting decisions of these institutions and confine their review to ensuring that the process was fair and independent—a task for which courts are well suited.

If, however, the Court decides to overrule *Bandemer* and *Vieth*, the Court should limit its holding to *congressional* gerrymandering and not reach the justiciability of political gerrymandering claims involving *state* legislative districts. Neither this case nor *Lamone v. Benisek*, No. 18-726, involves state districts, and the contexts are sufficiently different that the Court should not reach the question here.

ARGUMENT

I. Reaffirming The Justiciability Of Political Gerrymandering Claims Will Not Require The Federal Courts To Review All Redistricting Decisions.

Appellants and their *amici* argue that recognizing the justiciability of political gerrymandering claims and affirming the district court here will require massive intervention by the federal courts in practically all redistricting. *See, e.g.*, Appellants' Br. at 55; State of Texas et al. Amicus Br. 1; American Civil Rights Union et al. Amicus Br. 14–16; Judicial Watch Inc. et al. Amicus Br. 7; Wisconsin State Senate et al. Amicus Br. 4, 10; Texas Representative Carl Issett Amicus Br. 20. This need not be the case. And it is not a reason to declare political gerrymandering a nonjusticiable political question. The Court can create incentives for states to adopt independent processes for redistricting decisions. And reviewing courts can defer to the redistricting decisions of sufficiently independent bodies, keeping self-dealing insiders from manipulating district lines and courts from needing to second-guess every redistricting decision.

A. Legislators Are Fiduciaries Who Should Not Manipulate District Lines To Entrench Themselves And Their Political Allies.

This Court, the Framers of the Constitution, and longstanding political theory all recognize that elected officials, such as Members of Congress and state legislators, are fiduciaries for the people they represent. This idea of "political trusteeship" has

ancient roots, dating back to Plato and Cicero, and was well accepted in England by the time of John Locke, who described the legislative power as "only a fiduciary power to act for certain ends." John Locke, *The Second Treatise of Civil Government* § 149 (J.W. Gough ed. 1946) (1690).[2] The Framers thought about government in fiduciary terms, and their intent to impose fiduciary obligations on public officials permeates the constitutional structure. *See generally* Gary Lawson & Guy Seidman, *"A Great Power of Attorney": Understanding the Fiduciary Constitution* (2017); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004). Indeed, the fiduciary theory of government was nearly universally accepted by proponents and opponents of the Constitution alike during the ratification debates.[3] Natelson, *supra*, at

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[2] For accounts of how deeply the fiduciary model of government runs throughout history, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. 699, 708–09 (2013); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 123–25 (2006); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration From the Reign of Trajan*, 35 U. Rich. L. Rev. 191, 211–32 (2001).

[3] Noah Webster was the lone dissenter from the idea that public officials acted in a fiduciary capacity. *See* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 245 n.18 (2007). As James Madison explained in *The Federalist No. 46,* "The federal and State governments are in fact but different agents and trustees of the people." Similarly, several state constitutions at the time of the Framing explicitly recognized that the delegation of power from the people to government officials imposed fiduciary obligations

1086. And this Court recognized in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666–67 (2013), that elected officials are "agents of the people" and owe them "a fiduciary obligation."

Like private-law fiduciaries, legislators bear a duty of loyalty to those they represent. Thus they cannot put their own interests ahead of the interests of the people they represent. That is, after all, what it means to be a fiduciary. Legislators breach their duty of loyalty when they manipulate the machinery of democracy to entrench themselves and their political allies in power and frustrate potential challengers. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 713–19 (2013).

The conflicts of interests in redistricting are well-recognized. Indeed, the process is often described as representatives picking their voters instead of "the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). Reviewing courts should be skeptical when fiduciary legislators act in the face of such a conflict of interest. Although it has not used

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on those officials. *E.g.*, Pa. Const. of 1776, art. IV ("[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."); Va. Const. of 1776, § 2 ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Md. Const. of 1776, art. IV ("That all persons invested with the legislative or executive powers of government are the trustees of the public . . . ."); *see also* Natelson, *Public Trust*, *supra* at 1134–36.

fiduciary language, this Court has long recognized that when it comes to legislation that manipulates the process of elections, we cannot trust conflicted legislators to act in the best interests of those they represent, nor can we count on the political process to correct their self-dealing. *See, e.g.*, *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969). "More exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" is thus required. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

B. The Court Can Create Incentives For Legislatures To Adopt Independent Redistricting Processes By Following Corporate Law's Example.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several members of this Court raised legitimate questions about the federal courts' institutional competence to review redistricting decisions. There is no doubt that redistricting involves inherently political judgments. But this Court's apprehension about its competence to handle political issues is not a reason to declare political gerrymandering claims nonjusticiable and give a green light to manipulation by partisan insiders. Instead the Court can look to the strategies that courts have developed in other areas of law to get around their questionable competence to police fiduciary self-dealing. *See* D. Theodore Rave, *Institutional Competence in Fiduciary Government*, *in Research Handbook on Fiduciary Law* 418, 424–26 (Andrew S. Gold & D. Gordon Smith, eds. 2018).

The same problem arises in corporate law. Courts are no better suited to make business judgments than political ones, but they still manage to police self-dealing by corporate directors. Corporate law gets around courts' limited competence with business matters by adopting a two-track system of judicial review. When shareholders challenge a conflicted director's self-dealing transaction, the reviewing court will closely scrutinize the transaction for "entire fairness," inquiring into the substance of the deal and the fairness of the bargaining process. *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983). Supervision by a court of limited competence looks comparatively attractive when the alternative is leaving the decision in the hands of a conflicted fiduciary. But to take some pressure off the reviewing court, corporate law provides safe harbors that can cleanse the taint of self-dealing if the transaction is approved by an independent decisionmaker. Thus, if a majority of the disinterested directors or disinterested shareholders approve the interested-director transaction, the reviewing court will apply the much more deferential "business judgment rule" standard. *See, e.g.*, Del. Code Ann. tit 8, § 144(a)(1)–(2); *Benihana of Tokyo Inc. v. Benihana Inc.*, 906 A.2d 114, 120 (Del. 2006).

By adopting this two-track standard of review, corporate law channels corporate decisions about conflicted transactions into independent processes to which courts can safely defer. This allows reviewing courts to shift their focus from the substantive fairness of the outcome to the adequacy and independence of the process used to approve it—a

role that courts are institutionally much better suited to play. Rave, *Politicians as Fiduciaries*, *supra* at 703–06.

The Court can make a similar move here. Redistricting decisions made by conflicted insiders should be subject to heightened scrutiny and skeptical judicial review. *See id.* 725–28; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 641–43 (2002). But by creating a safe harbor for redistricting decisions made through independent processes, the Court can provide a powerful incentive for states to create independent institutions to make redistricting decisions in the first instance. Rave, *Politicians as Fiduciaries*, *supra* at 723–24. The federal courts will thus not be forced to review the substantive political fairness of almost every redistricting decision as Appellants claim. Instead, the courts can defer to substantive political judgments of custom-designed independent redistricting institutions and focus their review on process. That is, the courts can focus on ensuring that these alternative line-drawers are not themselves conflicted or captured by conflicted insiders and that they are provided with sufficient information and resources to make intelligent and independent decisions on where to draw district lines. *Id.* 728–29.

In finding the districts drawn by the state legislature here unconstitutional, the Court should recognize a safe harbor for districts drawn through independent processes. There is no need, however, for the Court to specify at this time the precise form that independent redistricting institutions must take

to justify deference. States should be free to experiment with different models. The Court need only direct the lower courts to review these institutions to ensure that they are sufficiently independent from conflicted insiders to cleanse the taint of self-dealing. Following the corporate law model thus keeps reviewing courts focused on process, not politics. *See id.*

C. State Legislatures Are Not An Adequate Safe Harbor For Congressional Districting.

Appellants argue that the Framers attempted to solve the conflict of interest inherent in legislative control over districting by placing primary responsibility for drawing congressional districts in the hands of the state legislatures, leaving Congress with a secondary, supervisory role. *See* Appellants' Br. 32. Thus, Appellants and their *amici* argue, the appropriate check on partisan manipulation of congressional districts is Congress. *See id.*; Members of Cong. from N.C. Delegation Amicus Br. 6. While this theory might have worked in a purely Madisonian republic where the state and federal legislatures were independent actors capable of policing each other, the rise of national political parties has undermined this structural check. State legislatures are not sufficiently independent from their congressional delegations to serve as an adequate safe harbor.

The national political parties of today—a feature of our political process that the Framers did not anticipate—align interests and provide vehicles for concerted action across both state lines and different

levels of government. Therefore, instead of the independent actors that Madison envisioned, today we have an interdependent system where well-organized parties can entrench themselves in power. Parties can broker deals or exert pressure on state legislators who oppose a congressional gerrymander by threatening to withdraw support, cut off campaign funding, or even run an opponent in a primary. *See* Rave, *Politicians as Fiduciaries*, *supra* at 686.

Because of this interdependence, we cannot count on ambition to counter ambition, as Appellants attempt to reassure us. See Appellants' Br. 32. We cannot count on state legislators to draw congressional districts without taking the interests of members of Congress into consideration. Nor is there any reason to think that Congress—whose members benefit from this arrangement—will effectively police their political allies in the state legislatures. *See, e.g.*, Richard H. Pildes, *The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 29, 81–82 (2004) ("Far from a detached check on the self-interested behavior of state politicians, party leaders in Congress are often the very catalysts who incite party affiliates in the states to aggressive partisan gerrymandering.").

Despite Appellants' and their *amici's* contention that Congress has attempted to perform its supervisory role, none of the bills that would provide a more independent process have passed, as self-interested actors continue to block the channels of change. *See* Members of Cong. Amicus Br., *supra*, at 7–13. When Congress decides under Article I § 4 to

leave redistricting responsibility in the hands of interested co-partisans in the state legislatures, it breaches its fiduciary duty to act in the interests of the people it represents instead of its own self interest. *See* Rave, *Politicians as Fiduciaries*, *supra* at 724 n. 303.

Given the conflicts of interest inherent in redistricting and the interdependence of Congress and the state legislatures, this is a problem that politics is unlikely to fix on its own. Despite all of the state-level reform proposals that Appellants' amici cite, Members of Cong. Amicus Br., *supra* at 13–21, real reform has occurred almost exclusively in states with direct-democracy mechanisms that allow the people to circumvent the conflicted state legislatures. *See, e.g.*, Ariz. Const. art IV, pt.2, §1; Cal. Gov't Code §8252; Colo. Const. art. V, § 44; Mich. Const. art. IV, § 6; Mo. Const. art. III, §3; N.Y. Const. art. III, § 5b; Utah Code §20A-19-201. Outside of those states, only this Court can unblock the political process. *Cf. Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (finding judicial intervention necessary where an "informed, civically militant electorate" could not convince either the state legislature or Congress who benefitted from malapportionment to draw new districts).

But doing so does not require this Court to micromanage the delicate process of redistricting. It need only set up incentives for political actors to adopt more independent institutions on their own. The threat of heightened judicial scrutiny accompanied by a safe harbor for independent processes would do just that. *See* Rave, *Institutional Competence*, *supra* at 433–44.

D. Courts Can Defer To Districts Drawn Through Independent Processes.

This approach is workable in practice. Of course, not all alternative redistricting processes are created equal, and courts will still have to play a role in policing these processes for capture by insiders. But the point is not to take the politics out of inherently political decisions as Appellants and their amici claim. *See, e.g.*, Appellants' Br. 2, 22; American Civil Rights Union et al. Amicus Br. 4, 14. The point is simply to shift the locus of redistricting decisions away from conflicted actors and towards more neutral processes. Rave, *Institutional Competence*, *supra* at 14.

Successful independent redistricting commissions will likely need to build in roles for partisans on both sides of the aisle and create opportunities for various interest groups to offer input. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1841–43 (2012). But in order to cleanse the taint of self-dealing, they will need to provide a layer of insulation from conflicted incumbents both in how the commissioners are selected and how the commissions operate. Partisans, lobbyists, interest groups, and other political intermediaries will inevitably struggle and bargain for influence and power in whatever alternative process is set up. But once the reviewing court has determined that the process is fair and independent, it can defer to the substantive outcome of these pluralist clashes and compromises. Rave, *Politicians as Fiduciaries*, *supra* at 733–35.

Independent redistricting commissions have been successful in some states, including Arizona and California, and reviewing courts have given the districts they produce great deference. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 685–89 (Ariz. 2009) (scrutinizing whether independent redistricting commission followed mandated procedures, but deferring to substantive outcome); *Vandermost v. Bowen*, 269 P.3d 446, 484 (Cal. 2012) (after rejecting a legal challenge against districts drawn by independent redistricting commission, holding that if a referendum to override the commission qualified for the ballot, the commission-drawn districts, which were the product of "an open, transparent and nonpartisan redistricting process," would be used on an interim basis instead of district drawn by the legislature).

Indeed, this Court has, at least implicitly, recognized that independent redistricting commissions are entitled to more deference than conflicted legislatures. In *Harris v. Arizona Independent Redistricting Commission,* 136 S. Ct. 1301, 1305 (2016), the Court rejected a one-person-one-vote challenge to state legislative districts drawn by an independent redistricting commission. The Court deferred to the commission's decision to deviate from perfect population equality, even though the district court had found that "partisanship played some role." *Id.* at 1306. By contrast in *Cox v. Larios*, 542 U.S. 947 (2004), the Court showed far less deference when a conflicted legislature made similar deviations from perfect population equality for partisan reasons, and summarily affirmed the lower

court's judgment that the districts violated the Fourteenth Amendment. *See also* Cain, *supra* at 1842–43 ("The courts might consider a higher level of deference to redistricting institutions such as independent citizen commissions that are more likely to adopt reasonably imperfect plans.").

When interested state legislators manipulate district lines to entrench their partisan allies, as in this case, the federal courts should be inherently suspicious and apply searching review. But when redistricting decisions are made through independent processes, the taint of self-dealing is cleansed and courts should apply a more deferential standard of review. This two-track system of judicial review is a workable model that creates incentives for states to adopt independent processes for redistricting to which courts can defer. It keeps conflicted legislators out of the business of manipulating district lines and courts out of the business of second-guessing political judgments.

II. If This Court Reverses *Bandemer* and *Vieth*, It Should Limit Its Holding To *Congressional* Gerrymandering And Not Reach Claims Involving *State* Districts.

As this brief has explained, reaffirming the justiciability of political gerrymandering claims will not plunge the federal courts hopelessly into the political thicket. But if this Court nevertheless decides to reverse *Bandemer* and *Vieth*, it should limit its nonjusticiability holding to *congressional* gerrymandering and not reach the justiciability of political gerrymandering claims involving *state*

legislative districts. Contrary to Appellants' suggestion, Appellants' Br. 33 n.6, the contexts of state and congressional redistricting are sufficiently different to warrant the Court staying its hand for at least three reasons.

First, neither this case nor *Lamone v. Benisek*, No. 18-726, involves state legislative districts, so any declaration that political gerrymandering challenges to state legislative districts are nonjusticiable would be dicta.

Second, there is no provision of the Constitution that even arguably textually commits oversight of state legislative redistricting to a coordinate branch of government. *Cf. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (treating textual commitment as one of the most salient factors in the justiciability analysis). The Elections Clause in Article I, § 4 is limited to congressional elections and says nothing at all about state elections. And the Tenth Amendment is entirely silent on the matter (not to mention having nothing to do with coordinate branches of the federal government).

Third, the conflict of interest in state legislative redistricting—and thus the incompatibility with the fiduciary principles of government embedded in the Constitution—is all the more stark. Incumbent state legislators literally draw the districts in which they will seek reelection. The opportunity and temptation for entrenchment is palpable. *See* Rave, *Politicians as Fiduciaries*, *supra* at 724; Rave *Institutional Competence*, *supra* at 430–32. This is a substantial difference from state legislators drawing

congressional districts, and it should be considered in a case that squarely presents the issue.

The Court need not—and should not—weigh in on the justiciability of political gerrymandering claims involving *state* legislative districts to resolve this case.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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