

Nos. 19-2377 & 19-2420

*In the*  
**United States Court of Appeals**  
*for the*  
**Sixth Circuit**

Anthony Daunt, et al., <i>Plaintiffs-Appellants,</i>	Michigan Republican party, et al., <i>Plaintiffs-Appellants,</i>
v.	v.
Jocelyn Benson, <i>in her official</i> <i>capacity as Michigan</i> <i>Secretary of State, et al.,</i> <i>Defendants-Appellees.</i>	Jocelyn Benson, <i>in her official</i> <i>capacity as Michigan</i> <i>Secretary of State, et al.,</i> <i>Defendants-Appellees.</i>

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On consolidated appeals from final judgments of the  
United States District Court for the Western District of Michigan  
Case Nos. 1:19-cv-614 and 1:19-cv-669

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**BRIEF OF COMMON CAUSE, THE LEADERSHIP NOW PROJECT,  
ISSUE ONE, EQUAL CITIZENS FOUNDATION, THE CENTER FOR  
THE STUDY OF THE PRESIDENCY AND CONGRESS, AND  
REPRESENTUS AS *AMICUS CURIAE* IN SUPPORT OF  
DEFENDANTS-APPELLEES AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Sixth Circuit Rule 26.1, *amici curiae* Common Cause, The Leadership Now Project, Issue One, Equal Citizens Foundation, and the Center for the Study of the Presidency and Congress make the following disclosures:

1. Are *amici* subsidiaries or affiliates of a publicly owned corporation? **No.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

*/s/ Michael B. Kimberly*  
Counsel for *Amici Curiae*

**INTRODUCTION & INTEREST OF THE *AMICI CURIAE*\***

It is an understatement to say that redrawing district lines is susceptible to “manipulation . . . by politicians.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2672 (2015). In fact, partisan redistricting by political insiders is nothing short of election-rigging, and it is deeply “incompatible with democratic principles.” *Id.* at 2658.

Unable to rely on the federal courts to prevent partisan gerrymandering (*see Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)), an increasing number of concerned citizens are addressing the root cause of the problem—the drawing of district lines by conflicted political insiders—by other means. Citizens and lawmakers in more than a dozen States across the country have passed laws or state constitutional amendments—each more or less in the mold of Michigan’s Article IV § 6(1)(B)-(C)—establishing independent redistricting commissions populated by private citizens free from political conflicts of interest. This citizen-driven policy solution shows great promise for addressing the blight of partisan gerrymandering.

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\* All parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4), *amici* state that no party’s counsel have authored this brief in part or in whole, and no person (other than *amici*, their members, and their counsel) have contributed money to fund the preparation or submission of this brief.

Appellants effectively ask this Court to put an end to these efforts. To do so would be a double blow to democracy. First, Michigan voters of all political stripes overwhelmingly supported Article IV § 6(1)(B)-(C). They did so because they understand that the process for drawing congressional and legislative districts must be nonpartisan and transparent if it is to be fair. This Court should not overturn the expressed political will of Michigan voters.

Second, citizen-driven independent commissions are intended to protect the Nation's democratic institutions from the damaging and antidemocratic influence of entrenched political insiders. Recent experience shows beyond doubt that the exclusion of political insiders from independent redistricting commissions is indispensable to the achievement of such commissions' objectives. If the Court were to overturn the expressed will of Michigan voters in this particular instance, therefore, it would inflict a compounding injury by categorically diminishing the value and effectiveness of the franchise moving forward.

The consequences of such a ruling would not be an abstraction. Less democratic elections produce less responsive government institutions, which in turn are less able to govern effectively. And a nation that is not effectively governed cannot thrive; there is overwhelming academic and economic consensus that a society's economic prosperity



is directly correlated with the strength of its democratic processes. It is therefore no overstatement to say that the success of the American experiment is on the line.

Opposing appellants' efforts to undermine democracy is central to the mission of each *amicus* signing this brief.

**Common Cause** was founded by John Gardner in 1970 as a non-partisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, not merely to those of special interests. Common Cause is one of the Nation's leading democracy organizations and has over 1.1 million members nationwide and local chapters in 35 states. Common Cause has been a leading advocate of gerrymandering and campaign finance reforms.

**The Leadership Now Project** is a non-profit, non-partisan membership organization taking action to fix American democracy. Founded and incubated by a group of Harvard Business School alumni in 2017, Leadership Now's national membership of business, academic, and policy leaders are working to reform and reinvigorate the American political system. Leadership Now is focused in particular on increasing voter participation, ensuring secure elections, ending gerrymandering and moving to independent redistricting, increasing transparency for political spending, and uniting the business community around innova-

tion and ideas for a modern democracy.

**Issue One** is a non-profit, cross-partisan political reform group based in Washington, D.C. It works to unite Republicans, Democrats, and independents to fix America's broken political system. A central program for Issue One is the ReFormers Caucus, a group of former members of Congress, governors, and federal cabinet officials. The Caucus is instrumental in finding commonsense, bipartisan solutions to some of the greatest political reform issues of our time.

**Equal Citizens Foundation** was founded by Harvard Law Professor Lawrence Lessig to bring litigation, engage in public education, and conduct research, all with the goal of promoting equal political rights for our citizens regardless of where they live, how much money they have, or what their political views are. Equal Citizens is committed to the idea that protecting citizens' equal political rights will help end the dysfunction that makes it so difficult for our current government to provide fair and practical solutions to people's problems. Because gerrymandering is anathema to this idea, protecting a state's use of independent commissioners to draw district lines is central to Equal Citizens' mission.

**The Center for the Study of the Presidency and Congress** is a nonpartisan, nonprofit organization dedicated to the evaluation of modern public policy questions informed by the lessons of history. It

aims to promote effective and efficient functioning of government, which includes adequate and just representation of the people. Among the reforms that the Center is pursuing are redistricting reform, to ensure that district borders do not unfairly disadvantage one group based on political affiliation; and ranked choice voting, to promote representation that reflects a broad swath of the electorate.

**RepresentUs** brings together conservatives, progressives, and everyone in between to pass powerful anti-corruption laws that fix America's broken elections. As a non-partisan non-profit launched in 2012, RepresentUs leads and supports campaigns across the United States to take redistricting out of the hands of partisan actors and put voters in control. RepresentUs and its hundreds of thousands of members nationwide recognize that gerrymandering is a corrupt practice that rigs elections and takes the power away from voters.

*Amici* are diverse in their backgrounds and beliefs, but they are united in their conviction that partisan redistricting is unfair, undemocratic, and a threat to a healthy society. American prosperity depends on accountable and fairly elected leaders.

The Court should affirm.

## ARGUMENT

### I. EXPERIENCE SHOWS THAT, TO BE EFFECTIVE, REDISTRICTING REFORMS MUST STRICTLY LIMIT THE ROLE OF POLITICAL INSIDERS

Limiting the role of political insiders in redistricting is a common feature of recent reforms, and it is essential to the achievement of these reforms' objectives.

#### A. Limiting the role of political insiders has been increasingly at the heart of state-level redistricting reforms

Independent redistricting commissions have proliferated in recent years. As of 2019, seventeen States had passed measures designed in one way or another to reduce political manipulation of the redistricting process. These include eight States that have created fully independent citizen commissions;<sup>1</sup> one that has created an independent advisory commission;<sup>2</sup> five that have created commissions that include various combinations of legislators, statewide elected officials, and non-pol-

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<sup>1</sup> Alaska Const. art. VI; Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI; Cal. Gov't Code §§ 8251-8253.6; Colo. Const. art. V, §§ 44-44.6, 46-48.4; Idaho Const. art. III, §§ 2, 4, 5; Idaho Code Ann. §§ 72-1501–1508; Mich. Const. art. IV, §§ 1-6; *id.* at art. V, §§ 1, 2, 4; *id.* at art. VI, §§ 1, 4; Mont. Const. art. V, § 14; Mont. Code Ann. §§ 5-1-101–115; Wash. Const. art. II, § 43; Rev. Code Wash. ch. 44.05.

<sup>2</sup> Utah Code §§ 20A-19-101–104, 20A-19-201–204, 20A-19-301.

iticians;<sup>3</sup> and two that have empowered other non-partisan entities to draw congressional and legislative district lines.<sup>4</sup> The evolution of these redistricting reforms over the past 50 years demonstrates that, if they are to be successful, the role of political insiders must be strictly limited.

***Early efforts at reform.*** In 1936, Arkansas voters used the ballot initiative process to create the first redistricting body designed to be an alternative to the legislature. Ark. Const. art. 8, § 1. Although it took power from legislators themselves to draw their own districts, it handed that power to alternative political insiders: the governor, secretary of state, and attorney general.

Some time later, in 1968, Hawaii and Pennsylvania created balanced redistricting commissions. Haw. Const. art. IV, § 2; Pa. Const. art. II, § 17(b). Elected officials were permitted to participate in these commissions, but the relevant state laws mandated appointment of an equal number of Democrats and Republicans, along with a neutral tiebreaker commissioner.

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<sup>3</sup> Ark. Const. art. 8, § 1; Haw. Const. art. IV; Haw. Rev. Stat. ch. 25; N.J. Const. art. II, § II; *id.* at art. IV, § II; *Id.* at art. IV, § III; Ohio Const. art. XI; *id.* at art. XIX.; Pa. Const. art. II, § 17.

<sup>4</sup> Iowa Const. art. III, §§ 34-39; Iowa Code §§ 42.1-42.6; Mo. Const. art. III, § 3(b).

***Conflict-of-interest bans.*** Recognizing that true reform required a removal of politics from redistricting, States soon began experimenting with redistricting commissions that prohibited service by conflicted political insiders. Montana created the first such commission during its 1972 constitutional convention. Mont. Const. art. V, § 14. The Montana state constitution now mandates partisan balance and prohibits “public officials” from serving.

Washington’s five-person redistricting commission, created soon thereafter in 1983, has similar restrictions. Wash. Const. art. II, § 43. It provides for partisan balance by giving one selection each to the leaders of the majority and minority parties in each chamber of the legislature. The initial four Washington commissioners then select a fifth non-voting chair. None of the five members may have served as elected officials or candidates for elective office during the two years prior to their appointment or worked as lobbyists during the one year prior. Wash. Const. art II, § 43(1-3); Rev. Code Wash. ch. 44.05.050. Idaho placed very similar restrictions on who could serve on the six-person redistricting commission it created by constitutional amendment in 1994. Idaho Const. art. III, § 2(2); Idaho Code § 72-1502.

Alaska did not mandate partisan balance in the 1994 creation of its citizen redistricting commission, but it did pass a conflict of interest restriction. Alaska allows its governor, chief justice, and leaders of the

majority party (but not the minority party) to each select one commissioner. Alaska Const. art. VI, § 6.8. At the same time, it prohibits sitting elected officials and public employees from serving on its redistricting commission.

***Present-day redistricting reforms.*** If there is any single thread running through the most recent phase of redistricting reforms, it is the recognition that successful reform requires significant restrictions on the roles of elected officials and those active in partisan politics.

In 2000, Arizona voters adopted Proposition 106, creating a five-person citizen redistricting commission. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). Citizens interested in serving are welcome to apply, but Arizona created a screening process that eliminates disqualified applicants from the pool before legislators can make commission appointments. The Arizona Constitution also includes expanded categories of individuals who are prohibited from service on the commission. In addition to excluding sitting or recent elected officials and lobbyists—commonly prohibited in other States—officers of political parties and of candidates' campaign committees are likewise barred. Ariz. Const., art. IV, pt. 2, § 1(3). The leaders of the majority and minority parties in each house of the legislature are entitled to appoint one commissioner each, but their options are limited to the pre-screened pool of applicants. *Id.* § 1(6). The

first four appointees choose a neutral fifth member, who may not be a member of the two major parties, to serve as chair. *Id.*

In 2008 and 2010, California voters approved ballot initiatives that surpassed every previous redistricting reform in its exclusion of political insiders from the redistricting process. Cal. Const., art. XXI, § 2. California law tasks the Citizens Redistricting Commission with drawing congressional, Board of Equalization, and state legislative districts. California law bars a range of conflicted individuals from serving on the redistricting commission: current and recent officeholders and candidates, paid campaign staff and consultants, political party committee members, lobbyists, major donors to political campaigns, and relatives and paid staff of either the governor or any elected officials whose districts are being drawn. Cal. Gov't Code § 8252(a)(2). California voters also added a longer lookback period of ten years for those categories. *Id.* § 8252(a)(2)(A).

California's commissioner selection process also strictly limits the role of elected officials: California legislators can strike a limited number of applicants after applicants have been screened for conflicts of interest, but legislators do not make any direct appointments. Cal. Gov't Code § 8252(e). Following the screening and striking process, eight applicants are chosen at random, and those eight select the final six commissioners to ensure diversity on the commission. *Id.* § 8252(f)-



(g). Through all of this, guardrails are in place to ensure that the final commission comprises five voters registered with the state's largest party by registration, five who are registered with the second largest party by registrations, and four who are registered with neither of the two major parties. *Id.*

The most recent phase of state-specific efforts came in 2018, when an unprecedented five States passed redistricting reform. The three states that created citizen redistricting commissions greatly limited or completely eliminated the role elected officials play in the process.

In Colorado and Michigan, voters approved new independent redistricting commissions in which commissioners must give final approval to proposed maps.

Michigan voters created an independent citizens redistricting commission that largely mirrors the California approach. *Compare* Mich. Const. art. IV, § 6 *with* Cal. Gov't Code § 8252.

Colorado voters overwhelmingly approved constitutional amendments creating two citizen redistricting commissions: one empowered to draw Colorado's congressional districts and the other to draw general assembly districts. S. Con. Res. 18-004, 71st. Gen. Assemb. (Colo. 2018) & S. Con. Res. 18-005, 71st. Gen. Assemb. (Colo. 2018). The Colorado scheme prohibits from service any person who has been a candidate for the office being redistricted in the previous five years; any elected state

public official, lobbyist, or political party official above the precinct level in the previous three years; and any member of the other redistricting commission. Colorado allows legislators to appoint commissioners but only from a list that has been pre-screened for the conflicts listed above and randomly reduced in size. Colo. Const. art. V, §§ 44.1, 47.

Utah and Missouri also passed redistricting measures in 2018. Utah's Proposition 4 created an advisory redistricting commission that limits the role of elected officials in the redistricting process. The citizen advisory commission is responsible for drawing congressional and state legislative districts. Legislators, in turn, must approve each map without amendment, or reject it. Utah Code §§ 20A-19-201, 20A-19-204. A person is prohibited from service on Utah's citizen advisory commission if they have been, in the four years prior to service, candidates or holders of elected or political party office, lobbyists, paid political party officials, employed by Congress or the Utah Legislature, or in a direct-report position to certain state officials. *Id.*

Missouri's reform is unique; it creates an office of a nonpartisan demographer to draw state legislative districts. The Missouri measure disqualifies for service those who have served in an elected partisan position at any time in the last four years. Mo. Const. art. III, § 3(b). In addition, the leaders of the two major parties in the state senate must select the demographer by mutual agreement. *Id.*

Crucially, conflict-of-interest redistricting reforms are not limited to statewide measures. At least 25 localities likewise have created redistricting commissions that empower individuals who are not elected officials to draw county, city, and school board districts. These jurisdictions are located throughout the country, including in Arizona, California, Texas, Hawaii, Minnesota, New York, New Mexico, and Washington.<sup>5</sup> While each of the 25 jurisdictions have different approaches to conflict-of-interest restrictions, many of them closely resemble Michigan's approach.

A reversal of the denial of preliminary injunctive relief in this case would imperil these promising reforms all across the country. Reforms that include conflict-of-interest limitations are common. A reversal here would therefore impact not only Michigan, but state reforms everywhere. Appellants in effect are asking this Court to return control of redistricting to political insiders, despite that reforms such as these have been cited favorably by the Supreme Court. *See Rucho*, 139 S. Ct. at 2507. The Court should not accept this invitation to subvert the will of Michigan voters and place in legal jeopardy every citizen redistricting commission in the United States.

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<sup>5</sup> *See* California Local Redistricting Project, *Ordinance Database*, [perma.cc/4QZK-77VD](https://perma.cc/4QZK-77VD) (collecting examples). *See also, e.g.*, Austin City Charter art. II, § 3; City of Santa Fe Code of Ordinances ch. 6-18; Long Beach City Charter art. XXV.

**B. The worst examples of destructive, antidemocratic behavior in redistricting are perpetrated by individuals with clear conflicts of interest**

1. The proliferation of anti-conflict-of-interest provisions in States across the country should not be surprising. As common sense suggests, placing the power to redistrict in the hands of partisan insiders poses a manifest threat to democracy. Indeed, political insiders involved in partisan redistricting rarely hide their antidemocratic motives. As the president of the state senate proudly proclaimed with respect to Maryland's redistricting in the 2000s, for example, conflicted political insiders planned to "break out the machine guns" against their political opponents, using district lines to "bury [them] six feet deep, faces up, so they won't come out for 20 years." *See Mike Miller on Mike Collins: 'Fake News' from a 'partisan hack'*, MarylandReporter.com, [perma.cc/BTC6-FG8H](https://perma.cc/BTC6-FG8H).

The objective in such cases is undeniable: to secure control of state legislatures and federal congressional delegations for one political party, wholly regardless of whether that party actually has the support of the majority of voters of the State. *See, e.g.,* Respondents' Br. 5, *Gill v. Whitford*, 138 S. Ct. 1916 (2018), [perma.cc/7VLE-PXFZ](https://perma.cc/7VLE-PXFZ). And the problem is worsening. Recent advances in technology have allowed elected officials to manipulate districts with unprecedented effectiveness. With these devastating tools in hand, political insiders have

played central roles in some of most efficient gerrymanders in the Nation's history. The result has been less competitive elections and less responsive elected officials. In 2010, for example, just 70 of the 435 U.S. House districts had a competitive partisan balance; after redistricting in 2011, that number declined further, to 53. See FairVote, *Gerrymandering*, [perma.cc/N3KL-666M](https://perma.cc/N3KL-666M).

Competitive elections are integral to holding politicians accountable. When districts are “safe” for a particular politician or party through gerrymandering, it reduces accountability and makes the legislature less responsive. Some gerrymanders have benefitted Democrats and others have benefitted Republicans, but they share one common characteristic: a nearly total lack of regard for the interests of the People in fair representation.

2. Anti-conflict-of-interest provisions are essential to the effective functioning of independent redistricting commissions as a prophylactic against this outcome. Experiences across the country bear this out beyond dispute.

**California.** Michigan's redistricting commission is modeled closely on California's Citizens Redistricting Commission. The redistricting cycle following the 2000 census was the last in which California's legislature was empowered to draw districts. In that final cycle, 20 of California's 32 Democratic representatives each paid Michael

Berman, the redistricting consultant hired to draw the map, \$20,000 to ensure that he would draw a district in which they were likely to win. In 2001, U.S. Rep. Loretta Sanchez stated “I spend \$2 million [campaigning] every election. If my colleagues are smart, they’ll pay their \$20,000 and Michael [Berman] will draw the district they can win in. Those who have refused to pay? God help them.” *See* Editorial, *Prop. 27 would strangle redistricting reform in the cradle*, Orange County Register (Sept. 17, 2010), [perma.cc/H652-BVZG](http://perma.cc/H652-BVZG). Berman was the consummate political insider; among other things, he was the brother of Congressman Howard Berman.

Having been paid his ransom, Berman delivered. In the five congressional elections in which all 53 of California’s U.S. House districts were contested using the districts Berman drew, partisan control of a district changed just one time in one district. That’s *one* out of 265 congressional contests.

***Florida.*** Even States that have banned the use of partisan data in map-drawing have often found their efforts subverted when political insiders are allowed a continued role in redistricting. In 2010, Florida voters enacted what was known as the “Fair Districts Amendments,” banning the use of partisan intent in map-making. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 369 (Fla. 2015). The measure was meant to end partisan gerrymandering. *Id.*

Just one month after the voters passed the Fair Districts Amendments, then-Speaker of the Florida House Dean Cannon met with political operatives at Republican headquarters to discuss matters related to redistricting. *Detzner*, 172 So. 3d at 379. There, Cannon and his political operatives conspired to present several plans to the Florida legislature, making the final result appear compliant with the Fair Districts Amendment. *Id.* at 379-380. Yet email records show that the conflicted political operatives were actively involved in the drafting and submission of several proposed maps as well as strategic planning to help ensure that unbalanced, unfair maps ultimately were enacted. *Id.* at 379-380, 383. Republican legislators worked side-by-side with these operatives at Republican Party headquarters to adjust the maps to favor Republican incumbents. *Id.* at 380-383.

The maps that these political consultants drafted and revised were not mere suggestions. The maps that they proposed—the maps that were supposed to be drafted without partisan motives—were the maps that were eventually enacted by the legislature. The political insiders’ proposed changes systematically benefited Republicans.<sup>6</sup>

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<sup>6</sup> As is often the case, Speaker Cannon and his political operatives attempted to cover up their efforts to inject partisanship into the districting process. Apart from avoiding and deleting emails, they even tried to plant their gerrymandered map in the redistricting record as a submission by an independent citizen. The individual in question, Alex

**Ohio.** Ohio's most recent redistricting cycle similarly exemplifies the partisan manipulation that permeates the process when it is controlled by elected officials and those closest to them. Using an almost comical euphemism, political consultants hired by Republican state legislators drew Ohio congressional districts in a hotel room the consultants nicknamed "the bunker." See Rich Exner, *Emails, documents are stark reminder of Ohio's secret gerrymandering process*, Cleveland.com (Nov. 1, 2017), [perma.cc/U5AA-CRHX](https://perma.cc/U5AA-CRHX).

Early in the process, national and Ohio Republicans determined that Ohio's 16-district U.S. House map should produce a preordained outcome of 12 districts represented by Republicans and four represented by Democrats for the entire decade. See Plaintiffs' Proposed Conclusions of Law and Post-Trial Brief, at 38, *Ohio A. Philip Randolph Institute v. Householder*, 1:18-cv-00357 (D. Ohio Mar. 23, 2019), [perma.cc/84WL-X4LG](https://perma.cc/84WL-X4LG). Consistent with this goal, access to the bunker was strictly limited to Republican political operatives, the chief of staff to the Republican Speaker of the Ohio House, and their invitees. *Id.* at 34. None of the five public hearings organized by the redistricting

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Posada, denied ever having designed or submitted this map. The map was (surprise!) identical to the one drafted by the political operatives and enacted by the Republican-dominated legislature. See generally Kathleen McGrory and Michael Van Sickler, *Emails detail GOP consultants' mission to circumvent Fla.'s gerrymandering ban*, Tampa Bay Times (Nov. 24, 2014), [perma.cc/SWT7-DE2R](https://perma.cc/SWT7-DE2R).



committees of each chamber of the legislature included any consideration of the maps operatives drafted in the bunker. *Id.* at 35.

Republican operatives treated communities as chess pieces in a game to guarantee political outcomes. Tom Whatman, executive director for then-House Speaker John Boehner’s political organization, conceived (for example) of the “Hamilton County Sinkhole” strategy. *Id.* at 34-35. The purpose of this strategy was to create a “packed” Democratic district in Hamilton County that would make it easier for Republicans to win surrounding districts. The “Sinkhole” and other efforts succeeded with the scientific precision that political insiders had hoped for: In the four House elections conducted using these maps, Democratic candidates won 47, 40, 42, and 47 percent of the vote. Yet in each of those years, the maps drawn in the bunker gave Democrats just 25 percent of the seats (four of 16).

Conflicted operatives also used district lines to grant favors to political donors. For example, drafters surgically placed several Timken Corporation plants, part of the Timken headquarters, and the Timken technology center in Representative Jim Renacci’s district by carving them out from the surrounding industrial areas. One likely reason for these extraordinary efforts was the \$124,000 that Timken executives and board members had contributed to Renacci’s campaign. *See Robert Wang, 16th District lines drawn around Timken plants, CantonRep-*

.com, perma.cc/AA7V-P9LT. Perhaps not surprisingly, Jane Timken is the current chair of the Ohio Republican Party.

**Maryland.** Redistricting abuses by political insiders are an equal opportunity problem. A collaboration between then-Governor Martin O'Malley and longtime incumbent Democrats in the General Assembly and Congress resulted in one of the most egregious gerrymanders in the country in 2010. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 507 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). With little regard for communities of interest, Democrats approved a new Sixth Congressional District by connecting residents of sparsely-populated rural western Maryland with the distant, densely-populated, and overwhelmingly Democratic Washington, D.C. suburbs. *Id.* “The result of the wholesale recomposition of the Sixth District was precisely as intended and predicted”: it flipped from a safe Republican district to a safe Democratic district. *Id.* at 507.

This outcome was the result of efforts by the Governor's Redistricting Advisory Commission, which was stacked with political insiders. Those insiders, in turn, worked closely with Democratic congressional incumbents and a partisan consultant to draw their map. *Benisek*, 348 F. Supp. 3d at 502-503. Despite 12 public hearings across Maryland, Commission Chair (and O'Malley's chief legislative officer) Jeanne Hitchcock could not recall a single example of public input resulting in

a change to the proposed map. The explanation for the total irrelevance of public input was plain: O'Malley and other insiders didn't *care* what voters wanted because they saw it as their duty to draw the Sixth Congressional District to favor Democrats. *Id.* at 517-518.

This is what happens when political insiders are allowed to play a role in redistricting—a complete undermining of democratic elections. And these are just a few examples among scores more. The Court should not clear the path for continued abuses.

## **II. AMERICAN SOCIAL AND ECONOMIC PROSPERITY DEPENDS ON HEALTHY DEMOCRATIC INSTITUTIONS**

Conflicts of interest in redistricting undercut the fundamental premise that our republican form of government is representative. By ensuring fewer competitive races, gerrymandered maps discourage voter participation, make the public more distrustful of government, and reduce the responsiveness of elected representatives. Theodore R. Boehm, *Gerrymandering Revisited—Searching for a Standard*, 5 Ind. J. L. & Soc. Equality 59, 62 (2016); D. Theodore Rave, *Politicians As Fiduciaries*, 126 Harv. L. Rev. 671, 684-685 (2013); Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 486–87 (2004). Gerrymandered maps thus turn the very purpose of periodic redistricting—to make the legislature *more* responsive, not less so—on its head.

The cost to American society of gerrymandering—that is, of

redistricting by conflicted political insiders—is far greater than an abstract injury to our national democratic values. Unfairly drawn districts also encourage extreme partisanship. To the extent that incumbents in these gerrymandered districts are worried about electoral consequences, it is in the primary election, not the general election. And because primary elections draw out fewer, more extreme voters than general elections, it is politically advantageous for incumbents to take more extreme partisan positions. More extreme partisan positions means less flexibility for reaching compromises and more legislative gridlock. Not only do gerrymandered maps produce less responsive government bodies, in other words, but they make it harder for those bodies to do the complicated work of governing. *See* Michael E. Porter, et al., *A Recovery Squandered* at 22, Harvard Business School (Dec. 2019), [perma.cc/EL93-Z2K5](https://perma.cc/EL93-Z2K5) (“These structural problems, chiefly plurality voting and partisan primaries, ensure that moderates need not apply; that those who seek compromise are punished; and that Independents and third parties are locked out.”).

For these reasons, allowing the participation of conflicted individuals in redistricting also inflicts a massive economic cost. The World Bank shows a strong correlation between effective democratic institutions and economic opportunity and growth. *See* Daron Acemoglu, et al., *Democracy Does Cause Growth*, NBER Working Paper No. 20004 (Mar.

2014), [perma.cc/C4QP-KPD7](https://perma.cc/C4QP-KPD7). There are proven “positive effects of democracy on economic reforms, private investment, the size and capacity of government, and a reduction in social conflict.” Daron Acemoglu, et al., *Democracy and Economic Growth: New Evidence*, ProMarket (Feb. 6, 2018), [perma.cc/6JXQ-562S](https://perma.cc/6JXQ-562S).

According to a recent Harvard Business School Report, political dysfunction is the single greatest obstacle to U.S. economic growth. See Porter, *Recovery Squandered*, *supra*. “Unhealthy competition in the political system, stemming from rampant optimization of self-serving rules and structures,” the report explains, “is the root cause of the decades-long inability of our government to make progress on America’s most pressing economic and social problems.” *Id.* at 19.

In sum, gerrymandering creates unnaturally uncompetitive districts that suppress democracy and injure our economy. Redistricting reforms like Michigan’s are an essential tool for combatting this problem—and for those reforms to work, conflicted political insiders must be barred from participation.

## CONCLUSION

The court should affirm the judgments below.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Appellate Rules 29(a)(4)(G) and 32(g)(1), the undersigned counsel for *amici curiae* certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 4,742 words. This brief additionally complies with the typeface and typestyle requirements of Rule 32(a).

February 10, 2020

*/s/ Michael B. Kimberly*

### **CERTIFICATE OF SERVICE**

I hereby certify that that on February 10, 2020, the foregoing brief was served electronically via the Court's CM/ECF system upon counsel of record, all of whom are registered CM/ECF users.

February 10, 2020

*/s/ Michael B. Kimberly*