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No. 18-726

IN THE

Supreme Court of the United States

LINDA H. LAMONE AND DAVID J. MCMANUS, JR.,

APPELLANTS,

v.

O. JOHN BENISEK, ET AL,

APPELLEES.

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

BRIEF OF AMICUS CURIAE STEPHEN M. SHAPIRO IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS[1]

Amicus Stephen M. Shapiro resides in the southern, predominantly Democratic, lobe of Maryland's Eighth Congressional District. He is a registered Democrat, but occasionally splits his votes. Amicus filed the original and first amended complaints, pro se with two Republican co-plaintiffs in 2013, and was the petitioner when this case was before this Court in 2015. After the case was remanded in 2016, the plaintiffs focused their challenge more narrowly on the harms to Republican voters who lived in the former Sixth District, and amicus withdrew from the case in November 2016 to avoid potential issues as to his standing. He filed an amicus brief in support of plaintiffs-appellants, now appellees, when this case was before this Court last term, and he is also filing a brief in *Rucho v. Common Cause*, No. 18-422, that offers argument applicable here as well.

Amicus agrees with appellees and the court below that partisan gerrymandering violates the First Amendment. He is filing this brief to make the argument, not made by the district court or by appellees in their motion to affirm, that this Court's racial gerrymandering cases provide a proven and manageable template that courts can readily apply to this First Amendment claim and thereby eliminate the political question and related merits objections raised by appellants.

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[1] This brief is filed pursuant to blanket consents filed by the parties. No person other than amicus and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

In most cases, courts decide whether the case presents a political question before addressing the merits. But to date, in political gerrymandering cases, this Court has found that the political question doctrine precludes the courts from reaching the merits because of a lack of a "manageable standard" for determining whether a gerrymander goes too far and or is acceptable because it is no more than ordinary politics at work. This brief argues that the racial gerrymandering cases, in which the political question doctrine has never been a barrier, provide the standard – did race "predominate" in the line drawing decisions - that fills the gap in this First Amendment case. Because that standard also provides an appropriate and manageable test on the merits, it thereby overcomes the political question objection.

Appellants continue to argue that the political question doctrine precludes the Court from remedying this First Amendment violation. In many previous redistricting cases, the challengers attacked the plan on a statewide basis. Last term in *Gill v. Whitford,* 138 S. Ct. 1916, 1930 (2018), this Court held that such challenges must be brought on a district-by-district basis, by voters in an adversely affected district, which is precisely what has been done here. The concurring opinion of Justice Kagan in *Gill, id.* at 1934-40, as well as the Court's first opinion in this case, *Shapiro v. McManus,* 136 S. Ct. 450, 456 (2015), explained

why the First Amendment is a proper basis on which to challenge partisan redistricting, and appellees' brief in this case solidifies the ruling below that agreed with that conclusion.

This Court's recent decisions rejecting districts that were racially gerrymandered also directly support appellees' position. In prior cases such as *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004), this Court refused to overturn gerrymandering schemes that were assumed to be unconstitutional because the Court was concerned that there was no "discernible and manageable" remedy that it could impose. But the political question doctrine has not caused this Court to shy away from striking down similar racial gerrymanderings when the challenge was made on a district-by-district basis. It has done so by forbidding states from drawing district lines where the racial motive "predominates." That same approach should be applied under the First Amendment when a state does what Maryland did here: move hundreds of thousands of voters to cure a 10,000-person over-population, and where the political party of those who were moved was found by the district court to be the "predominate" reason for choosing them.

Another aspect of the racial gerrymandering cases supports the conclusion that a First Amendment based challenge to political gerrymandering provides a legally supportable and reasonably manageable standard for a court to utilize. Under the race cases, the violation of the Fourteenth Amendment occurs when the decision is made to move voters because of their race. A state can offer limited justifications in order to

satisfy strict scrutiny, but nothing further need be proven by the challengers. That same analysis works equally well for First Amendment challenges such as this because actions based on the political view of those affected are inherently suspect. Thus, when a plaintiff establishes massive, unnecessary shifting of voters among districts based on their actual or perceived political party affiliation, that is all that is needed to establish a prima facie First Amendment violation.

This conclusion has additional consequences which also make the First Amendment claim more manageable. Once the lines are drawn for an unconstitutional reason – whether race or political affiliation – the violation has occurred. As a result, there will be no need to await the outcome of future elections to see whether the predictions of the line drawers were accurate, because it is the unconstitutional attempt, not the outcome, that matters. For that reason, these cases should be able to be decided very quickly, possibly in time for the first election after the census, instead of the last, as is the case here. Under this approach, the only relevant inquiries will be the numbers of people moved from each party and whether there is any legitimate justification for the choice of who was moved of the kind that is available in a racial gerrymandering case.

There is also a further benefit to the racial gerrymandering cases once the Court rules that a state violates the First Amendment by making unconstitutional use of a person's political party as the dominant reason for moving that person between districts. Until now, the standard defense

in the racial gerrymandering cases is that the movement of voters was done "as part of a 'strictly' political gerrymander, without regard to race." *Cooper v. Harris,* 137 S. Ct. 1455, 1473 (2017). But if line drawings based on the political party of the voters being moved violates the First Amendment, that will no longer be a defense to a claim of race-based line drawings. Thus, upholding appellees' claim in this case will put an end to the hypocrisy of states defending against claims of racial discrimination by arguing that "it's all political" when the two are inextricably intertwined and equally repugnant to the Constitution because, for all practical purposes, the two are "virtually indistinguishable." *Abbott v. Perez,* 138 S. Ct. 2305, 2314 (2018).

The district court found that, when appellants re-drew the lines for Maryland's Sixth Congressional District in 2011 to adjust for an over-population variance of about 10,000 people, appellants moved 360,000 residents in largely rural Republican precincts out, and 350,000 residents in largely suburban Democratic precincts in, for a net gain of 90,000 Democrats. J.S. App. 5a-11a. Their goal in doing so was, as the district court found, to "flip' the District from one that was reliably Republican to one that appellants expected to be reliably Democratic. *Id.* at 49a. As Justice Kagan remarked at oral argument when the case was previously before this Court, "however much you think is too much, this case is too much.... I mean, how much more evidence of partisan intent

could we need?" Oral Agt transcript, No. 17- 333, at 40-41.

As the district court concluded on remand, "the plaintiffs have amply established the intent element of their claim." J.S. App. 51a. The result was a clear violation of the fundamental First Amendment rights of those affected because the choice of whom to move was predominantly based on their political party affiliation, and the state failed to offer any legitimate justification.

ARGUMENT

APPELLANTS' PARTISAN GERRYMANDERING VIOLATED THE FIRST AMENDMENT, AND IT CAN BE REMEDIED BY THE SAME APPROACH USED IN RACIAL GERRYMANDERING CASES.

A. The District Court Properly Found a First Amendment Violation Here.

Article I, § 2 provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States." In *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964), this Court applied that provision to require that congressional districts within a State have equal populations so that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Then in *Karcher v. Daggett,* 462 U.S. 725 (1983), it struck down a deviation of less than one percent between

the largest and smallest districts. As the Court explained in *Wesberry,* the rationale for strict adherence to the principle of one-person one-vote is the prevent "debasing the weight of appellants' votes," 376 U.S. at 4, which is precisely what the district court found happened here. Because the Constitution forbids a state to do indirectly that which it is forbidden from doing directly, *US Term Limits, Inc. v. Thornton,* 514 U.S. 779, 829 (1995), the political gerrymander engineered by appellants cannot stand.

In prior cases, the Court has declined to set aside partisan gerrymanders because it could not find a method to correct them that was the product of a reasoned legal determination and produced a remedy with judicially manageable standards. The overtly partisan manner in which the district lines are being drawn in many states is recognized by Democrats and Republicans alike as being fundamentally at odds with basic principles of democracy. And, although this Court agreed in *Vieth* that the resulting districts were unconstitutional, 541 U.S. at 292–93 (plurality op.), it nonetheless concluded that such "*statewide* claims are nonjusticiable," *id.* at 292 (emphasis added). For that reason, the Court declined to intervene because no proper remedy had been identified. *Id.* at 316 (Kennedy, J., concurring in plurality's view that partisan gerrymandering is impermissible and agreeing that no solution had yet been found).

Before assessing whether this claim presents a political question, it is first essential to

understand precisely what the First Amendment violation is under this Court's decisions such as *Elrod v. Burns,* 427 U.S. 347 (1976), and *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990). In both cases, the state made employment decisions that adversely affected the plaintiffs based solely on their failure to support the political party of those who made such decisions. The employees in *Elrod* were discharged (or threatened with discharge), while all but one of those in *Rutan* retained their jobs, but were denied promotions or other enhancements in their workplace situation. In finding a First Amendment violation in *Rutan,* this Court ruled that "deprivations less harsh than dismissal" still violated the First Amendment. *Id.* at 75. Indeed, one of the *Rutan* plaintiffs had only been turned down for a job, not fired, because he was of the "wrong" political party, and the Court nonetheless held that his complaint stated a valid claim for relief. *Id.* at 79.

This understanding of the violation as the act of making a decision based on a prohibited First Amendment ground is vital to refuting appellants' main defense on the merits: that appellees cannot show that the First Amendment-based line drawing actually affected the outcome of the congressional races in the Sixth District. Br. 6-8, 14, 16-18, 20-22, 35-37, & 53-56. Such a showing is irrelevant to showing a constitutional injury. The job applicant in *Rutan* did not have to prove that she *would* have gotten the job in order to state a claim, any more than the white firefighters plaintiffs in *Ricci v. de Stefano,* 557 U.S. 557, 562

(2009), had to show that they actually would have been promoted based on their test performance.

The gravamen of the harm in this case is the abridgment of appellees' rights of representation, speech, and association incident to the dilution and debasement of their votes when appellants moved hundreds of thousands of voters from one district to another based on their status as either registered Democrats or registered Republicans. More specifically, the violation here was of the First Amendment rights of the four Republican plaintiffs who were moved out of the Sixth District and into the largely Democratic Eighth District for partisan reasons, and the three Republican plaintiffs who remained, but whose votes and continued opportunity to associate with others with a common political view were similarly diminished. In all relevant respects, the conduct was just as much a violation of the First Amendment as the conduct at issue in the *Elrod* line of cases.

Appellants have countered by arguing that drawing lines predominately on the basis of political parties does not inevitably produce the election outcomes intended by the line-drawers. But even if true, it is legally irrelevant because it is the purposeful movement for partisan reasons that is the constitutional violation. The movement of voters for their partisan views is just as suspect under the First Amendment as the movement of voters for their race is under the Fourteenth. Thus, the fact that the results in successive Congressional elections in the Sixth District all

flipped from Republican to Democratic is of no legal significance because appellees' constitutional rights were violated when the lines were drawn predominantly to dilute the impact of Republican voters. Thus, that violation would not evaporate even if a Republican had nonetheless managed to have been re-elected. In addition, making the outcome of post-redistricting elections immaterial will enable the courts in future cases to determine the legality of a redistricting based on whether the numbers and the shapes of the redrawn districts were done for predominantly partisan reasons, with no need to wait until the next election to determine whether the line drawers actually succeeded.

Another important feature of a First Amendment approach is that the courts will focus on what happened in the most recent redistricting, with no need to go back to prior line-drawings, as the decision in *Elrod, supra,* shows. The dissent there argued that, because most of the plaintiffs had obtained their jobs through the same political patronage system to which they now objected, they had no right to complain. *Id.* at 380. The majority refused to consider the earlier patronage actions as a basis to immunize the current violation, holding that, even though long-standing, "the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments. *Id.* at 373. As applied to this case, it is therefore no defense for appellants (Democrats) to claim that their 2011 gerrymander only evened-up what Republicans had done in prior packing of the Sixth District. And that same logic also should preclude challengers in

these cases from going back to prior redistrictings, even if a statute of limitations or laches did not bar the re-opening. This ban on looking back, plus the irrelevance of showing that the violation actually affected elections, in contrast to affecting voters, will make First Amendment challenges much more manageable and further overcome any political question objection.

Finally, appellants repeatedly assert that applying a First Amendment approach to gerrymandering under *Elrod* forbids any partisan considerations (Br. 27, 33, 34, 45). They even go so far as to claim that "[t]he only political considerations [that could be] reliably excluded would be *failed* attempts to take politics into account." (Br. 36, emphasis in original). Appellants are wrong. First, the Court in *Elrod* specifically left open the possibility of allowing support by a political party to be relevant, but only where it advanced "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." 427 U.S. at 363. *See also, Branti v. Finkel,* 445 U.S. 507, 517 (1990): "Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment."

Second, and perhaps most significantly, the proper First Amendment standard for overturning a redistricting does not remotely resemble the test parodied by appellants. Rather, as we have noted, a challenger must show that improper partisan

considerations "predominated" in the decisional process, a test that appellants never mention in their brief. Moreover, under a proper First Amendment analysis, the state is permitted to offer narrowly tailored justifications, just as this Court has permitted when there are claims alleging racial discrimination, as we now show.

B. The Racial Gerrymandering Cases Provide the Proper Standard for This and Other First Amendment Gerrymandering Cases.

As explained above, the quest for a workable standard and a tailored remedy for political gerrymandering has been answered by appellees' First Amendment claims in this case. When, as here, the dominant reason for massive movements of people among congressional districts is to disfavor certain voters for their affiliation with one political party, an actionable violation of the First Amendment has been established. Applied on a district by district basis, a requisite showing of predominant intent provides a relevant and manageable standard for rectifying the worst partisan gerrymanders. Most significantly, that approach is no less manageable in this context than it is when the Court has used it to decide whether to uphold or reject a claim of racial gerrymandering.

The method of analysis used in racial gerrymandering cases establishes the proper resolution of this and other political

gerrymandering cases. In both kinds of cases, the response of the state is that all redistricting is political, and it can never be otherwise because those who draw the lines will know, or have strong inclinations, as to how every proposal will affect the political alignment of the body for which the election will be held. That is true whether the lines were drawn to disadvantage Republicans, as here, or (largely Democratic) African-Americans in the race cases, because in both situations legislatures make their best guesses, supported by advanced statistics and technology, as to how the new lines will affect the outcome of future elections. [2]

In *Shaw v. Reno,* 509 U.S. 630 (1993), this Court first faced the issue of the circumstances in which the use of race in congressional redistricting was unconstitutional. After noting that statutes establishing legislative districts do not, on their face, make racial classifications, the Court observed, in language equally applicable to partisan gerrymandering, that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race

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[2] There may have been a time in some parts of the country where denying African-Americans the vote was a goal, regardless of their political party. Today everyone recognizes that racial gerrymandering is the equivalent of political gerrymandering. *See Easley v. Cromartie,* 532 U.S. 234, 241 (2001) (only question in case was factual: whether race or politics predominated in drawing district lines).

consciousness does not lead inevitably to impermissible race discrimination." *Id.* at 646 (emphasis in original).

On the other hand if "a district obviously is created solely to effectuate the perceived common interests of one racial group," that would be "altogether antithetical to our system of representative democracy." *Id.* at 648. As the Court amplified, a plaintiff states a valid claim "by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 649.

In subsequent cases, the Court clarified the standard by which the constitutionality of alleged racial gerrymanderings should be determined. This standard has been shown to be manageable, and it can be readily applied to the partisan gerrymandering that was done here. As enunciated in the follow-on case involving the same district as in *Shaw v. Reno,* this Court held that a violation had occurred when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," with the "highly irregular and geographically non-compact" shape of the District as evidentiary support for such a finding. *Shaw v. Hunt,* 517 U.S. 899, 905-06 (1996); *see also Miller v. Johnson,* 515 U.S. 900, 914-15 (1995). Moreover,

the existence of alternative maps by which the legitimate goals of redistricting can be met, without massive movements of disfavored voters, supports both the claim that race (or political party) improperly predominated and increases the likelihood that there is an appropriate and manageable remedy. *Cooper v. Harris*, 137 S. Ct 1455, 1479-80 (2017).

The same massive movement of voters to cure the need for small population shifts here was also present in two recent racial gerrymandering cases in which there was no political question objection. In *Alabama Legislative Black Caucus v. Alabama,* 135 S. Ct. 1257, 1271 (2015), only 1000 individuals needed to be moved to achieve population equality, yet "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics." A similar choice to move large numbers of black and white voters, when only a change of 3,000 out of 730,000 was necessary to retain population equality in North Carolina's District 12, was significant in *Cooper,* 137 S. Ct at 1466. Like those racial gerrymandering cases, this political gerrymandering case clearly involves "excessive" partisan movement of voters, and all three cases demonstrate that appellants are mistaken in their belief (Br. 32, 34) that it is not possible to decide the predominant motive of the line drawers.

This Court has recently recognized the "special challenges" that trial courts have in determining whether the predominant motive for the lines drawn was race, particularly "when the State asserts partisanship as a defense." *Cooper,* 137 S. Ct. at 1473; *id.* at 1488 (Alito, J. concurring in judgment, internal quotations & citations omitted) (race being "highly correlated with political affiliation in many jurisdictions ... makes it difficult to distinguish between political and race-based decisionmaking"). But this Court did not throw up its hands, nor, most importantly for this case, did the difficulty in deciding whether there had been a racial gerrymander cause it to conclude that the case presented a political question.

To be sure, this Court in *Shaw v. Reno* observed that "racial and political gerrymanders are [not] subject to precisely the same constitutional scrutiny." 509 U.S. at 650. However, that observation was based on the inequity principle embodied in the Equal Protection Clause, not the First Amendment as relied on here. More significantly, the challenge here is remarkably similar to the challenge in *Shaw* in other respects. Both cases focus on challenges to lines drawn for a specific district, and are not statewide challenges to the manner in which the state drew all of its district lines as in *Vieth*. Therefore, the narrowing of the remedy needed to repair a single district gerrymandering presents a much more manageable problem

because it does not require the court to re-do the entire state, although the state may choose to do that to comply with other requirements of law.

Second, the focus in both kinds of gerrymandering cases is on the movement between districts of favored and disfavored voters—particularly when they are disproportionate to the need to assure compliance with one person, one vote. The focus may be the absolute numbers – how many people were moved to respond to the known population variance from equality – and relative numbers – how many of each favored and disfavored group (racial or political) were moved in and out. *See Alabama Legislative Caucus*, 135 S. Ct at 1266 (claim supported where appellants "presented much evidence at trial to show that the legislature had deliberately moved black voters into these majority-minority districts").

Moreover, this Court has never required challengers to prove that the outcome of any election in racial gerrymandering cases would have been different: it was the fact that the legislative lines were drawn with race as the "predominant" factor that was the constitutional violation. Just as states are not permitted to use "*post-hoc* justifications" to support what appear to be impermissible race-based districts, *Bethune-Hill v. Virginia State Bd of Elections,* 137 S. Ct. 788, 799 (2017), so too should both the state and the challengers in political gerrymandering cases be precluded from offering evidence as to what

happened in subsequent elections as proof of proper or improper line drawing.[3]

On the other hand, the two kinds of cases differ in some respects. Even though racial considerations are presumptively improper when they predominate, the state may still prevail if it can establish that the racial lines were drawn to "reflect wholly legitimate purposes," such as "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw v. Reno,* 509 U.S. at 646; *see also Alabama Legislative Caucus*, 135 S. Ct at 1263 (permissible reasons include "traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents"). Accordingly, and contrary to appellants' contention (Br. 29, 37-38), the decision below would not overrule *Gaffney v. Cummings,* 412 U.S. 735 (1973), which allowed a bipartisan board that sought to create a politically balanced set of districts. Like all other legitimate purposes, achieving political balance across the state can be as a legitimate justification to counter a claim of partisan gerrymandering. *See Gaffney* at 754 (suggesting the Court may have reached a different conclusion "if racial or political groups

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[3] Appellants spend much of their brief making the irrelevant argument that subsequent events show that the lines drawn in 2011 did not produce the anticipated benefits to Democrats or harms to Republicans, and hence there was no First Amendment violation. Br. 6-8, 14, 16-18, 20-22, 35-37, & 53-56.

ha[d] been fenced out of the political process and their voting strength invidiously minimized").

In addition, in partisan gerrymandering cases, unlike race-based cases, compliance with the Voting Rights Act is not a defense. *See Cooper,* 137 S. Ct. at 1469. Moreover, the "odious" nature of racial classifications, together with their threat "to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *Shaw v. Reno,* 509 U.S. at 643, may warrant a closer examination of the justifications offered by the state than when the violation is based on the political party of the plaintiff. But that is not an excuse for no scrutiny when First Amendment rights are at stake.

The Court has left open the possibility that considerations of race may be lawful to cure prior improper racial line drawings, but only if the state can identify specific discrimination that it is seeking to cure and, even then, it "must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Shaw v. Hunt.* 517 U.S. at 909, 910 *(quoting Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 277 (1986). Whether even that very difficult to meet standard would be open if a challenger sought to re-open prior redistrictings is an open question, but if that were allowed, that same high bar would surely apply, whether the improper reasons were based on the race or political party of the individuals affected.

In short, while these differences on the merits of a racial gerrymandering claim may make the standards for determining a violation of a political gerrymandering different, none of the differences suggest that the remedy available in district by district racial gerrymandering cases would not be suitable for remedying the partisan gerrymandering at issue here. Accordingly, any such differences do not require the Court to find that political gerrymander cases present a political question because of the absence of "discernible and manageable standards" by which to create a remedy, as the *Vieth* plurality concluded in the context of its equality analysis of the state-wide redistricting challenge there. 541 U.S. at 286.

Unstated in the racial redistricting cases is the fact that the remedy focuses only on fixing the last lines drawn and does not also require the state to remedy past violations, which appellants suggest is another defect in the ruling below (Br. 39-41). Thus, if race had also been used in an unconstitutional manner to draw district lines in the past, the remedies for a current violation do not require re-opening the lines drawn years before, although the state would be free to seek to eliminate the effect of prior racial discriminations as part of its remedy.

While in one sense this limitation can be seen as a weakness, it can also be seen as a means of limiting what one court can be expected to do in any given litigation. In this respect, it is rather like

the situation confronted by the Court in *Elrod v. Burns, supra,* in which the political patronage system being challenged had been in place for many years, yet all the Court did (or could realistically do) was to provide relief to plaintiffs claiming current injuries. Thus, in contrast to cases in which the Court is being asked to re-shape an entire state's districting plan, the remedy sought in racial gerrymandering cases and here is much narrower because it focuses only on fixing the harms done in the most recent redistricting. Narrowing the scope of the relief sought significantly lessens the problem of designing an appropriate and manageable remedy, although, over time prior unlawful gerrymanderings may disappear or least be of lesser significance, especially as populations and voter preferences shift.

There is one other important benefit from upholding the political gerrymandering claim here. In this Court's most recent racial gerrymandering cases, states defended their laws on the ground that politics, not race, was the predominant motivating factor and hence the laws were constitutional. This Court in *Cooper v. Harris,* noted the "special challenges for a trial court" in sorting out the predominant factor where both race and politics point in the same direction. 137 S. Ct. at 1473. To the extent that courts rely on irregular shapes to discern racial motivations, "such evidence loses much of its value when the State asserts partisanship as a defense, because a

bizarre shape—as of the new District 12—can arise from a 'political motivation' as well as a racial one." *Id.*

The proper response is to attack the premise frontally. It is little short of hypocritical in situations where race and political party are "virtually indistinguishable," *Abbott v. Perez, supra,* for a state to argue "that politics alone drove decisionmaking." *Cooper* at 1476. Allowing legislatures to draw district boundaries based on the political party of the voters being moved from one district to another is just as offensive to the First Amendment as racial gerrymandering that this Court has struck down in *Shaw* and its progeny is to the Equal Protection Clause. And once this Court establishes that both reasons for line drawings are unconstitutional, trial courts will no longer be faced with the task of sorting out a predominant motive when both reasons are unlawful. Moreover, treating the two kinds of gerrymandering as functionally the same will end the necessity of bringing several rounds of cases to attack the same gerrymandering, which is what happened to the same North Carolina Districts at issue in the *Shaw* and *Cooper* cases.

Finally, nothing in *Vieth* precludes the relief that was ordered below. First, *Vieth* was a statewide challenge analyzed as an Equal Protection claim. As such, it presented the more difficult question of deciding when inequality in drawing district lines across an entire state went

too far. Because this case is a challenge to a single district, the Court only need assure itself that the voters moved in and out of the Sixth District were chosen primarily for partisan reasons, and that a remedy can be devised to cure that wrongdoing, without having to take on the redistricting of the entire state.

To be sure, *Vieth* declined to apply the lessons from racial gerrymandering to political gerrymandering, in part because the plurality there saw race as more immutable than political affiliation. Accepting that conclusion does not support appellants because both kinds of gerrymandering assume that the targeted class is not subject to persuasion or change in its voting patterns. But perfection in prediction is not necessary to establish a constitutional violation where there is an improper reason for movement of voters – either race or political party. Immutability is especially irrelevant today when experts have a very high rate of success in predicting how likely voters are to perform as expected, when the basis for the movement of voters is race or political party.

Appellants' defense also overlooks the fact that even within areas where blacks (or Republicans) are in a significant majority, they never represent 100% of those whom the legislature has moved. And to the extent that those affected by a political or racial gerrymander do not vote the way that is anticipated—and that is certainly their right—that mainly means that the

gerrymandering is less successful than desired, but the improper classification remains. *Cf. Heffernan v. City of Paterson,* 136 S. Ct. 1412, 1418 (2016) (*incorrect* belief that government employee had supported candidate for mayor did not insulate defendant from *Elrod* claim for unlawful First Amendment retaliation). Moreover, no matter the outcome in a given election under partisan gerrymandering, the state, not the people, would have had a major hand in picking the winner, contrary to the Constitution.

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Appellees have established that their First Amendment rights have been violated by appellants' partisan gerrymandering of Maryland's Sixth Congressional District, which moved massive numbers of Republican and Democratic voters, when only modest changes were needed. Moreover, it did so with the avowed goal of adding one Democratic member to the State's delegation to the House of Representatives. Political gerrymanderings of this kind undermine our democracy and, as shown by the racial gerrymandering cases, nothing precludes the courts from ordering district-by-district relief to remedy the constitutional violation in this and similar cases

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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