No. 17-333

In the
Supreme Court of the United States

O. JOHN BENISEK, ET AL.
Appellants,

v.

LINDA H. LAMONE, ADMINISTRATOR, MARYLAND STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

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

BRIEF OF GOVERNORS LAWRENCE JOSEPH HOGAN JR., ARNOLD A. SCHWARZENEGGER, JOSEPH GRAHAM "GRAY" DAVIS JR., AND JOHN R. KASICH AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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INTERESTS OF *AMICI CURIAE* [1]

Amici curiae the Honorable Lawrence Joseph Hogan Jr. (R-Md), Arnold A. Schwarzenegger (R-Cal), Joseph Graham "Gray" Davis Jr. (D-Cal), and John R. Kasich (R-Oh) are current and former governors—from both major political parties—who have witnessed firsthand how partisan gerrymandering in their States has robbed citizens of full participation in the democratic process. *Amici* believe deeply in our democratic system and the right to cast a meaningful, undiluted vote on which it rests. Each of us was and is an outspoken critic of partisan gerrymandering because of its pernicious effects. We understand that drawing voting districts is, at bottom, a legislative function. But we respectfully submit this brief to convey one simple message: legislators should not have unfettered power to draw electoral legislative districts immune from searching judicial scrutiny. Rather, there must be, by constitutional design, judicial oversight of redistricting efforts and this Court's independent and neutral review is urgently needed here.

Governor Hogan, in particular, has led several recent reform efforts to rectify the manipulation behind the legislative redistricting in his State—so far, to no avail. Even now, he is poised to propose legislation to the Maryland General Assembly (for

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

the third time) that would create a nonpartisan redistricting commission whose mission would be to ensure fairness in drawing both federal and state legislative districts.

Governors Schwarzenegger and Davis likewise have publicly criticized partisan gerrymandering as "politicians choosing their voters instead of voters choosing their politicians." For his part, in 2008, then-Governor Schwarzenegger invested $2 million of his own campaign funds to support a successful ballot initiative to reform redistricting in California. The initiative passed, and Governor Schwarzenegger has since continued to support bipartisan efforts to fight partisan gerrymandering nationwide, including through the University of Southern California's Schwarzenegger Institute for State and Global Policy, which he helped found in 2012. Joe Garofoli, *Schwarzenegger's bipartisan next political act: Terminating gerrymandering*, San Francisco Chronicle (Sept. 4, 2017), https://goo.gl/Y5WKNT.

Governor Kasich strongly opposes partisan gerrymandering as well. In his view, partisan gerrymandering is "dysfunctional" and "horrific" because it "further polarizes people" and makes legislative "compromise" an "evil." Allan Smith, *John Kasich unloads on 'horrific' gerrymandering*, Business Insider (Apr. 26, 2017), https://goo.gl/Ec9Sf7. He has urged legislative reform in Ohio to reduce the heavy partisanship reflected in the drawing of legislative districts. And, just recently, Governor Kasich joined Governor Schwarzenegger and numerous other Republican elected officials on an *amicus* brief filed with this

Court in *Gill v. Whitford*, No. 16-1161 (Sept. 5, 2017), which supports the invalidation of Wisconsin's partisan gerrymandering plan.

Amici respectfully submit this brief to advocate, based on our firsthand experience, for exacting judicial scrutiny of partisan gerrymanders. And, in applying that scrutiny, we urge this Court to firmly declare that the First Amendment provides for relief from partisan gerrymandering that unlawfully dilutes a citizen's vote based on viewpoint or party affiliation.

As elected officials with statewide constituencies, we have had to reach out to all voters and build consensus with legislators across the aisle in order to win elections and govern effectively. At the same time, as elected officials, we recognize the inherent desire to entrench one's—and his or her party's—political power and the strong allure of partisan gerrymandering as a tool to accomplish that goal. Indeed, the attractiveness of gerrymandering is not confined to legislators—it extends to governors as well, who may be presented with redistricting bills that solidify control of their State's legislature by their own political party.

Based on our own political experiences, we can attest to the natural incentives elected officials have to entrench their party's power by adopting partisan-gerrymandered redistricting plans and the natural resistance those officials may have to any effort to police redistricting decisions. Given that experience, our bottom-line conviction is unequivocal: judicial

review is necessary to safeguard our democracy from partisan gerrymandering.

That necessity stems, in turn, from an unfortunate but well-documented reality: gerrymandering is on the rise, and the political branches thus far have had little incentive to stem the tide. Given this reality, it is no answer to conclude, as some have suggested, that the political branches can fully address the problem on their own. We know firsthand that those who draw districts need neutral and independent judicial oversight.

As this Court has recognized, partisan gerrymandering is corrosive of the representative form of government essential to a properly functioning republic. It diminishes both the responsiveness of legislators to all of their constituents' needs and the accountability of those legislators to the full spectrum of citizens in their districts. It also deepens partisan rancor by rendering those elected in gerrymandered districts beholden to the party leaders who drew the district boundaries—not the citizens who live within them. And partisan gerrymandering reduces the kind of "rational, civic discourse" that is essential "to form a consensus to shape the destiny of the Nation and its people." *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623, 1637 (2014) (plurality op.).

Accordingly, we urge the Court to declare and adopt an exacting standard for assessing the constitutionality of partisan gerrymandering to

protect voters' First Amendment rights. As we explain, that can be done while respecting the state legislatures' proper redistricting role.

SUMMARY OF ARGUMENT

A common refrain is that partisan gerrymandering properly should be remedied by the political branches through the political process. As our experiences confirm, however, this proposed solution cannot be the end of the story. The temptation for the political majority to engage in partisan gerrymandering is hard to resist. We understand why: it offers the opportunity to further entrench the political majority's power in a state's legislature and congressional delegation. Indeed, it is not unusual for elected state officials in the majority to feel almost duty-bound to design and enact gerrymandered legislative district boundaries that will solidify the majority's grip on the levers of political power.

Were there any doubt on that score, *Amici* can categorically dispel it. And the compulsion to gerrymander, from our perspective, makes the availability of judicial oversight an imperative. Of course, the judiciary must act within recognized constitutional bounds and respect our systemic separation of powers. But it likewise has an unflinching duty to enforce our constitutional mandates. So it is here. On this record, this Court's intervention is needed to protect voters' constitutional rights and restore our democratic system.

ARGUMENT

I. The Governors' Experience Teaches That Partisan Gerrymandering Impairs The Proper Functioning Of Our Democratic System.

"The first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., dissenting in part), *overruled in part by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365-66 (2010). So motivated, elected officials, once seated, want to stay seated.

Enter partisan gerrymandering, a long-established tool for entrenching and preserving legislative political power and retaining elected office. However unpalatable partisan gerrymandering may be to outside observers, elected officials often feel empowered to draw majority-entrenching gerrymanders as part and parcel of their office. Indeed, "[g]errymandering for partisan advantage is so well ingrained that Justice O'Connor once remarked that refusal by politicians in charge of redistricting to seek party advantage should be grounds for impeachment." Michael Kang, *Gerrymandering And The Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351, 352 (2017) (citing *The Supreme Court in Conference* (1940-1985), 866 (Del Dickson ed., 2001)).

While we oppose partisan gerrymandering and have fought hard to eliminate it, as governors, we can certainly understand the attraction. Presented with the opportunity to enhance one's future

electoral fortunes and those of his or her party, governors will feel intense pressure to sign redistricting bills that promise to solidify electoral majorities for their party's legislators, and fear the backlash that surely will come from their refusal to do so. And unified party control of a State's executive and legislative branches substantially increases the ability of governors and legislators to enact their agenda, unimpeded by any viable political opposition.

Thus, as this case and numerous others around the country reflect, it is naïve to conclude that, absent judicial intervention, the line drawers will rise above the political pressures and rebuff partisan gerrymandering based on democratic values. Governor Schwarzenegger put it succinctly: "As Einstein said, those who created the problem will not be able to solve it." USC Schwarzenegger Institute for State and Global Policy, *Schwarzenegger Calls on the Supreme Court to Say "Hasta La Vista" to Gerrymandering*, (Oct. 11, 2017), https://goo.gl/4kntKh.

To no one's real surprise, then, we have seen a wave of elected officials—both Republicans and Democrats—who should have bound themselves to the mast but instead succumbed to the siren song of partisan gerrymandering. Governor Hogan's predecessor, Governor Martin O'Malley—who has since come out in favor of redistricting reform—could not have expressed the inclination toward partisan gerrymandering more bluntly in his deposition in this case: "As a governor, I held that redistricting pen in my own Democratic hand. I was convinced

that we should use our political power to pass a map that was more favorable for the election of Democratic candidates." Josh Hicks, *Martin O'Malley and Larry Hogan are both pushing to end gerrymandering*, Wash. Post (Feb. 7, 2017), https://goo.gl/8jiJZM. And in the challenge to North Carolina's gerrymandered districts, a Republican legislator openly acknowledged that the proposed redistricting plan "would be a political gerrymander" and proposed to "draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats…." *Common Cause v. Rucho*, Nos. 1:16-CV-1026, 1:16-CV-1164, -- F. Supp. 3d --, 2018 WL 341658, at *6-7 (M.D.N.C. Jan. 9, 2018).

Our experiences also reflect that there are very real and concrete harms to our democratic republic that flow from partisan gerrymandering and the way it can effectively entrench one or the other major political party in power. Our public criticisms of partisan gerrymandering likewise follow from its corrosive effects on the electorate. Those effects are historic, well-documented, and manifest in our elected officials and voters alike.

As Chief Justice Marshall explained nearly two centuries ago, the "government of the Union … is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819). As such, legislatures in this country "should be bodies which are collectively responsive to

the popular will." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Partisan gerrymandering, however, is "incompatible with" these fundamental "democratic principles[,]" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015), because it tends to entrench the gerrymandering party in control of the legislature, and that entrenchment short-circuits the "'political processes ordinarily to be relied upon to protect minorities….'" *Vieth v. Jubelirer*, 541 U.S. 267, 311-12 (2004) (Kennedy, J., concurring in the judgment) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). Such "entrenching … undermines the ability of voters to effect change when they see legislative action as infringing on their rights" because, "as James Madison warned, a legislature that is itself insulated by virtue of an invidious gerrymander can enact additional legislation to restrict voting rights and thereby further cement its unjustified control of the organs of both state and federal government." *Common Cause*, 2018 WL 341658, at *20–22 (citing James Madison, *Notes of Debates in the Federal Convention of 1787*, 424 (W. W. Norton & Co. 1987) (1787) ("[T]he inequality of the Representation in the Legislatures of particular States, would produce like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.")).

We each firmly believe that partisan gerrymandering is the cause and effect of an

increasingly toxic political polarization in America. This follows from our own direct involvement in the political and electoral process. First, by definition and by design, gerrymandering leads to less competitive electoral races. *See* Carl Klarner, *Democracy in Decline: The collapse of the "Close Race" in state legislatures*, Ballotpedia (May 6, 2015), https://goo.gl/r5tC8q; *see also* Arnold Schwarzenegger, @Arnold, Twitter (Feb. 23, 2017 9:01AM), goo.gl/Zdp2fX ("The average margin of victory in the House of Representatives [in 2016] was 37%. There are dictators who win by less."); Chris Nichols, *Nothing inflated in Arnold Schwarzenegger's claim on gerrymandering*, Politifact California (March 27, 2017), https://goo.gl/QqX470 (corroborating Governor Schwarzenegger's 37% statistic). This, in turn, makes those elected far more likely to serve the narrow interests of their ideological fellow-travelers in the electorate—or, even more likely, their party leaders. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 470-71 (2006) (Stevens, J., concurring in part and dissenting in part) (partisan gerrymandering creates "locked-in" legislative seats where those elected "need not worry about the possibility of shifting majorities" and "have little reason to be responsive to the political minorities within their district").

Second, partisan gerrymandering also leads to "greater polarization in congressional delegations," Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 Sup. Ct. Rev. 409, 430 (2004)—as Governor Kasich has put it, "[w]e carve these safe districts, and then when you're in a

safe district you have to watch your extremes, and you keep moving to the extremes." Caitlin Yilek, *Kasich wants an end to gerrymandering in Ohio*, The Hill (Dec. 26, 2015), https://goo.gl/r5tC8q.

This polarization paralyzes legislatures, which are increasingly unable to agree on even the most basic provisions that would keep our government functioning, as evidenced by multiple government shutdowns in recent years. *See* David Lauter, *Polarized parties plus inconsistent president equals a looming shutdown*, LA Times (Jan. 19, 2018), https://goo.gl/5yQ1Xa; Wendie Yeung, *Gerrymandering and the Government Shutdown*, Berkeley Political Review (Oct. 23, 2013), https://goo.gl/FLRSVT ("The inability of our elected leaders to keep our government functioning, at the very least, is symptomatic of a much larger problem– the extremely polarized political environment of Washington. Much of this problem of extreme polarization stems from gerrymandering.").

Third, the fall-out from all of this is as inevitable as it is unacceptable. As Governor Kasich has observed, "gerrymandering restricts voters' ability to keep our leaders in check." Edward-Isaac Dovere, *Bipartisan swath of lawmakers files Supreme Court briefs against gerrymandering*, Politico (Sept. 5, 2017), https://goo.gl/28VQLT. Thus disempowered, citizens are driven out of the voting electorate altogether, "resent[ful]" of the "political manipulation … for no public purpose" that they see in partisan gerrymandering. *Davis v. Bandemer*, 478 U.S. 109, 177 (1986) (Powell, J., concurring in part and dissenting in part).

Governor Hogan, in particular, has had a bird's-eye view of some of the most extreme partisan gerrymandering in the country. In 2015, he created a bipartisan redistricting reform commission tasked with studying redistricting in Maryland, and approaches taken by other States, and to recommend a constitutional redistricting amendment that would deter the use of partisan gerrymandering. The final report found that Maryland suffers from some of the worst gerrymandering in the country. Maryland Redistricting Reform Commission, *2015 Report*, 2 (Nov. 3, 2015), goo.gl/pcKmss ("Md. Report"); *see also* Carrie Wells, *Gerrymandering opponents highlight convoluted districts*, The Baltimore Sun (July 16, 2017), https://goo.gl/Tfbn2G ("Maryland is considered one of the more blatantly gerrymandered states.").

The Maryland experience also proves how disruptive and disorienting partisan gerrymandering can be. As Judge Niemeyer pointed out in his dissenting opinion below, Maryland Democrats in the General Assembly "moved 360,000 persons (roughly one-half of the District's population) out of the former Sixth District … and simultaneously moved 350,000 into the 'new' Sixth District," which "accomplished the single largest redistricting swing of one party to another of any congressional district in the Nation." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 817 (D. Md. 2017) (Niemeyer, J., dissenting). The damage to the voting populace followed form: Marylanders and advocacy groups identified the "splitting of communities, unresponsive representatives, voter confusion and apathy" as

problems stemming from gerrymandering. Md. Report at 17.

California had a similar experience in the years leading up to its own redistricting reform—through a ballot initiative—in 2008. Leaving the redistricting pen to the California legislature produced the precise results that commentators predicted and courts have acknowledged. In the two elections leading up to 2008, not one seat in the 120-seat California legislature changed party hands. Jennifer Steinhauer, *Plan on California Ballot for New Districting Panel*, NY Times (Oct. 27, 2008), https://goo.gl/s21hCu. And between the 2001 redistricting and the 2008 election, in 495 California legislative and congressional races, only *four seats* changed party hands. George Skelton, *Prop. 11 foes waging Orwellian campaign*, LA Times (Oct. 9, 2008), https://goo.gl/29PYTe. As Governor Schwarzenegger put it, "'the former Soviet Politburo had more turnover' than pre-reform California, which between 2002 and 2010 held 265 congressional races, of which just one saw a seat change its party control." Lexington, *Arnie lends some muscle to the campaign against gerrymandering*, The Economist (July 22, 2017), https://goo.gl/zzyGg1.

The hyperpolarized, hyperpartisan nature of redistricting today reveals the breakdown of the political process in many States and substantiates the absence of any obtainable political relief from partisan gerrymandering. *See, e.g.,* Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional*

Incumbents, 32 Ohio N.U. L. Rev. 227, 258 (2006) (observing that "pervasive incumbent gerrymanders essentially lock into our governance an anti-democratic practice not easily remedied by normal political processes"). Moreover, as we explain the following section, it also highlights the compelling need for exacting judicial scrutiny of partisan gerrymandering, which is largely impervious to legislative remedy precisely because its very purpose and effect is to entrench the beneficiaries of the manipulation. *See, e.g.,* Kang, 116 Mich. L. Rev. at 353 (noting that the "partisan use of government power in this sense, to disadvantage competing parties in the process of democratic contestation [through gerrymandering], is the definition of a process failure begging judicial intervention").

II. The Governors' Experience Underscores The Need For Exacting Judicial Scrutiny Of Partisan Gerrymandering.

This Court rightly has expressed concern about the "dangers of entering into political thickets" such as legislative redistricting. *Reynolds*, 377 U.S. at 566. But it "is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied." *Vieth*, 541 U.S. at 309-10 (Kennedy, J., concurring in the judgment). This is especially true where, as in the case of partisan gerrymandering, the ordinary political processes often provide no avenue for meaningful remedy or reform.

The Court thus has long acknowledged the acute need to intervene—even in areas ordinarily reserved to the political branches—where the political or legislative process has broken down and is incapable of providing a meaningful remedy for an injury of constitutional dimension. "[E]xacting judicial scrutiny" is necessary, the Court has stressed, where legislative action "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Carolene Prods.*, 304 U.S. at 152 n.4. Thus, there is an abiding need to step in to remedy legislative overreach where there is "[n]o effective political remedy…." *Reynolds*, 377 U.S. at 553-54 (intervening in "malapportionment" dispute); *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973) (noting the "Court's efforts" in voting rights cases "to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes"); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 Election L.J. 312, 319 (2015) (asserting that the Court began to intervene in malapportionment disputes because "popular majorities had no political means to correct the offense").

Consistent with these concerns, the Court has noted that the constitutional power reserved to legislatures to draw electoral districts is not without limits—particularly where the redrawn districts are partisan gerrymanders that infringe on the fundamental rights of citizens to vote, associate, and express their political views. *See Bandemer*, 478 U.S. at 127 (plurality op.); *LULAC*, 548 U.S. at 415

(Kennedy, J.) ("Our precedents recognize an important role for the courts when a districting plan violates the Constitution."); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment); *id.* at 292 (Scalia, J.); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change, *so long as that process does not abridge fundamental rights*.") (emphasis added).

As our own experiences demonstrate, the imperviousness of gerrymandering to political change is not just a matter of academic debate. Governor Hogan has fought vigorously to end the Maryland legislature's monopoly over the redistricting process in his State but to no avail. *See* Editorial, *Maryland Democrats' Faux Redistricting Reform*, Wash. Post (May 12, 2017), https://goo.gl/pcZv4r (describing Maryland Republican legislators' failed attempt to pass redistricting reform, which was "killed in committee by Democrats"); Luke Broadwater, *Hogan vetoes redistricting bill, calling Maryland Democrats' measure 'phony'*, The Baltimore Sun (May 8, 2017), https://goo.gl/EKrnVo; Letter from Gov. Lawrence J. Hogan, Jr. to Hon. Thomas V. Mike Miller, Maryland Senate President (May 8, 2017), https://goo.gl/j2VW4H (announcing basis for vetoing Maryland S.B. 1023, and noting that the "legislation is a disingenuous attempt to fix a major problem plaguing Maryland's elections and, if enacted, would be a cynical effort to stifle meaningful redistricting reform just when it appears to be becoming more of a reality"). In 2017, the Maryland General Assembly passed a bill that did provide for the creation of a

temporary independent redistricting commission, but the formation of the commission was contingent upon whether New York, New Jersey, Pennsylvania, Virginia, and North Carolina adopted similar redistricting plans, and it applied only to the drawing of congressional boundaries, not Maryland's state legislative districts. Md. Gen. Assemb. S.B. 1023 (Md. 2017).

California's experience similarly reflects the inefficacy of the ordinary political process as a means to address and rectify partisan gerrymandering. In 2008, the citizens of California, through a ballot initiative, amended the State's constitution to require the creation of an independent redistricting commission.[2] But prior to 2008, the California legislature repeatedly tried and failed to pass redistricting reform—despite substantial popular support for it in the State. *See, e.g.,* Assemb. Const. Amend. No. 4, 2007-2008 Cal.

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[2] The ballot initiative avenue pursued by California citizens is unavailable in many States, *see* University of Southern California Initiative & Referendum Inst., *Comparison of Statewide Initiative Processes*, 2-3 *available at* https://goo.gl/FpDoXG (noting that only 18 States have an initiative process available for amending their constitutions), and every state legislature (except California's) has the power to override initiative-enacted laws. *Id.* at 26-27. And while constitutional amendment is an available route for change, it is a very steep hill to climb. *See, e.g., Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 388 n.3 (Mo. 2014) (acknowledging the difficulty of amending a state constitution and noting that "the amendment process is still cumbersome and much more difficult" than legislative changes (internal quotation marks omitted).

Leg., Reg. Sess. (Cal. 2007) (bill seeking to modify California Constitution by creating an independent redistricting commission; died in the California Assembly); Assemb. Const. Amend. No. X1-5, Cal. Leg. 2005-2006, 1st Ext. Sess. (Cal. 2005) (same); Assemb. Const. Amend. No. 31 Cal. Leg. 2003-2004, Reg. Sess. (Cal. 2004) (same).

To be sure, these legislative or ballot-driven efforts try to address the problem. But they cannot be held out as the only cure. Legislative self-interest can nullify efforts like Governor Hogan's and not every affected State has the ability or resources to mount a ballot initiative like California's. In many States, neither elected leaders nor citizens are willing or able to remedy partisan gerrymandering. In any event, the potential availability of legislative action or ballot initiatives does not resolve the more fundamental issue: who must implement what our Constitution demands? In our view, we do not have to look far for the answer. It is—and must be—this Court.

Indeed, where the Constitution forbids a state action, the Court has an unflagging duty to stop it. As the Court has unequivocally acknowledged, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds*, 377 U.S. at 566.

Here, as Appellants have demonstrated, the First Amendment imposes limits on the redistricting power of state legislatures when it is wielded to punish—or benefit—based on the ideology or viewpoint of a state's citizens. *See Vieth*, 541 U.S. at

314 (Kennedy, J., concurring in the judgment) ("In the context of partisan gerrymandering, … First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights"); *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (noting that Justice Kennedy's First Amendment theory articulated in *Vieth* remains "uncontradicted by the majority in any of our cases"). And, as Appellants likewise have shown, First Amendment limits in the politically sensitive area of legislative redistricting are properly implemented by the Court under the burden-shifting framework it established in *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977). This framework, through its burden-shifting, carefully accounts for the need to respect the state's power to draw legislative district boundaries, on the one hand, while protecting from invidious government discrimination the right to free expression of the voters who live within those boundaries.

* * * * *

Simply put, *Amici* can state with conviction that partisan gerrymandering is a serious problem that distorts our elections and political processes in ways that transgress settled First Amendment limits and impair a properly functioning democratic republic. Worse still, the tentacles of this gerrymandering reach even deeper, disrupting the very processes by which voters might reverse these negative effects through their votes and their pressure on elected officials—pressure that, given the powerful allure of gerrymanders, is likely to fall

on deaf ears. The Court, therefore, should now firmly and expressly declare what many of its members have observed: the First Amendment forecloses partisan gerrymandering that unlawfully dilutes the right to vote based on one's viewpoint or party affiliation.

CONCLUSION

For the reasons noted, a judicial remedy is called for here to root out partisan gerrymandering and safeguard our democratic system.

Respectfully submitted,

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