No. 16-588

In The Supreme Court of the United States

NEIL PARROTT, *ET AL.*,

Appellants,

v.

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

Appellees.

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

BRIEF OPPOSING APPELLEES' MOTION TO AFFIRM

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Appellants

December 20, 2016

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

INTRODUCTION

Nowhere in their Motion to Affirm ("Mot. Aff.") do Appellees dispute Appellants' claim that this appeal raises "the most important open question in the law of redistricting: What are the constitutional moorings and the judicial standards for adjudicating claims of excessive partisan gerrymandering?" Jurisdictional Statement ("J.S.") 36. Appellees argue instead that Appellants' answer to this question is inadequate. However, Appellees' attempts to show this are misguided, because, as set forth below, they mostly argue against positions that Appellants do not hold. As set forth in the Jurisdictional Statement, this appeal raises a substantial issue warranting the Court's plenary review.[1] The Court should note probable jurisdiction and set this case for oral argument.

I. A Gerrymandering Claim Need Not Proceed Under the Equal Protection Clause or Allege Partisan Injury.

Appellees argue at length that a claim of gerrymandering must be established in a particular way. In Appellees' view, the "essence of any gerrymandering claim" is "the contention that complainants are members of a cohesive political

---

[1] Even Appellees acknowledged to the district court that the issues in this case are substantial. After the Court issued its decision in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), clarifying when a claim is "substantial" for the purposes of convening a three-judge court, Appellees withdrew their objections to a three-judge court. *See* J.S. 9.

group that has suffered unlawful discrimination." Mot. Aff. 1 n. 1. Accordingly, Appellees demand that such a claim provide a means to "detect 'excessive' partisanship in redistricting." *Id.* at 10. This should require a showing of discriminatory intent, which "has always been a core requirement of Equal Protection analysis." *Id.* at 12. Appellees also insist that "a discriminatory effect must be alleged and proven." *Id.* at 13. This would require "allegations pertaining to the demographic composition of Maryland's congressional districts, including specific facts as to any allegedly unfair concentration or dispersion of voters belonging to any particular group." *Id.* at 13-14. Appellees argue that a "political gerrymandering claim does not cease to require evidence of discrimination simply because a plaintiff fails to plead" it. *Id.* at 13.

It is strange for Appellees to insist that a gerrymandering claim must proceed in the way they describe when that approach has never succeeded in any court. More to the point, there simply is no basis for Appellees' assertion that a claim of gerrymandering must allege an injury arising out of partisan affiliation and must do so under the Equal Protection Clause. As Appellants have made clear, they "are not asserting a violation of the Equal Protection Clause and are not proceeding under the jurisprudence of *Davis v. Bandemer*, 478 U.S. 109 (1986)." J.S. 8. Thus, they need not plead discriminatory intent, invidious classification, injury in their capacities as members of a political party, or any of the other elements of such claims.

To support their position, Appellees cite a definition of political gerrymandering as the use of electoral districts, "often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Mot. Aff. 1 n. 1, citing *Vieth v. Jubelirer*, 541 U.S. 267, 272 n. 1 (2004), citing *Black's Law Dictionary* 696 (7th ed. 1999). While this uncontroversial definition of gerrymandering does describe its basic purpose, it does not pretend to specify the necessary elements of a constitutional claim. Nor does the fact that gerrymandering always involves partisan motives mean that partisanship must be the focus of any constitutional challenge.[2] Gerrymandering might conflict with the Constitution in any number of ways. As Appellants explained in the Jurisdictional Statement, courts have long been aware that gerrymandering constitutes a form of self-aggrandizement in which legislators acquire the power to choose legislators. J.S. 17-18. It is this injury that is the basis for Appellants' constitutional challenge.

---

[2] An analogy to the "one person, one vote" cases is again instructive. The creation and preservation of malapportioned districts unquestionably had partisan, sectional, and other political implications. J.S. 23-24; *see Reynolds v. Sims*, 377 U.S. 533, 567 n. 43 (1964) ("legislative apportionment controversies are generally viewed as involving urban-rural conflicts"). But plaintiffs alleging that their congressional districts were malapportioned did not have to plead or prove that they were members of a particular party or that they were rural or urban voters.

There is no ground for asserting that gerrymandering claims may only proceed under the Equal Protection Clause. The substantial question raised by this appeal is whether a gerrymandering claim lies instead under Article I, § 2 and the Due Process Clause.

II. Appellees Alternately Misapprehend And Ignore the Relationship Between Malapportionment and Gerrymandering.

Appellees agree with the district court argument that "nothing in [the malapportionment] cases 'suggests that the Court should apply [them] to claims not asserting unequal population.'" Mot. Aff. 7, citing J.S. App. 12a. Appellees claim that "population inequality *is* the representational injury" – in other words the only injury – proscribed by Article I, § 2. *Id.* This assertion simply begs the question, or rather, the substantial question presented by Appellants. The Court has never held that Article I, § 2 applies in no circumstances other than where districts are malapportioned. The whole point of Appellants' constitutional argument, moreover, is that the "one person, one vote" standard must be understood as part of a larger principle that protects voters from extreme, mechanical predations by legislators. In this sense, a claim "asserting unequal population" involves the same kind of injury as a claim of gerrymandering.

Following the district court, Appellees also argue that the "one person, one vote" cases do not support

a constitutional injury based on the mechanical manipulation of districts, because those same cases mandate such manipulation where it is necessary "to achieve the required population equality." Mot. Aff. 6-7, citing J.S. App. 12a. This facile argument misstates the injury in this case. Appellants do not merely allege that they were harmed because districts were "manipulated." Rather, as the district court accurately put it elsewhere, Appellants "assert that the Plan harms all Maryland voters because it mechanically manipulates Maryland's congressional districts *in a manner that transfers the power to select representatives from the people to the Maryland General Assembly*." J.S. App. 9a (emphasis added). Appellees simply ignore the second half of this statement. To be sure, an equal population requirement will mandate that districts be "manipulated" to accomplish this purpose, but doing so ultimately transfers the power to select legislators *back* to the people. It is in the *absence* of an equal population requirement that the power to select legislators is lost to the people, and is acquired instead by those who create and maintain districts. Indeed, this characteristic, wherein legislators are empowered at the expense of voters, is common both to malapportionment and to gerrymandering.

Aside from the foregoing points, Appellees' motion simply fails to engage Appellants' arguments on the connections between gerrymandering and malapportionment. Appellees say nothing about the point that the Court's malapportionment jurisprudence does not mandate the equalization of any particular population. *See* J.S. 21, citing

Evenwel v. Abbott, 136 S. Ct. 1120, 1132 (2016) (allowing use of total population); *Burns v. Richardson*, 384 U.S. 73, 93-94 (1966) (allowing use of registered voters). Appellees do not address the related point that the "one person, one vote" standard must be understood, not as an abstract rule requiring any particular notion of equality, but as a pragmatic restraint on legislators' ability to serve their own interests. J.S. 22; *see also id.* n. 11, citing *U.S. Dept. of Commerce v. Montana,* 503 U.S. 442, 464 & n. 42 (1992) (malapportionment due to law assigning representatives to states was acceptable where it did not favor either party). Appellees do not discuss the argument that the Court's early malapportionment cases reflected this understanding by emphasizing the partisan advantage derived from underpopulated districts. J.S. 23-24. Finally, Appellees make no mention of Appellants' demonstration that extreme noncompactness can be used to circumvent any restraints that the "one person, one vote" rule imposes on partisan mapmakers. J.S. 24-26. This last fact is particularly important, because it shows that gerrymandering is, in a literal sense, a type of malapportionment.

Appellees fail fully to address the issues raised in the Jurisdictional Statement concerning the relation between malapportionment and gerrymandering. Appellants have raised a substantial question warranting the Court's plenary review.

III. Appellees Misstate the Compactness Standard Described by Appellants.

Appellees mischaracterize the compactness standard described by Appellants, often in ways anticipated by the Jurisdictional Statement. Appellees badly misstate this standard when they argue that it "would invalidate a plan that is not as compact as it might be – *i.e.*, as compact as is practicable, as measured by the Polsby-Popper scale." Mot. Aff. 13. But Appellants do not seek to require such "maximum compactness." To the contrary, they described a "requirement that congressional districts could not fall below some minimal level of compactness," so as to "prevent the worst kinds of gerrymandering." J.S. 27. In a similar vein, Appellees assert that Appellants believe "that the [C]onstitution is violated where more compact districts could have been drawn while still respecting" an "arbitrarily chosen set of traditional districting principles." Mot. Aff. 10-11. Not true. The standard Appellants describe does not apply whenever "more compact districts could have been drawn," but only in extreme cases of noncompactness. At the same time, it realistically accommodates the many cross-cutting interests that affect redistricting – even, to a certain extent, a degree of partisan gerrymandering. *See* discussion at J.S. 27.

Appellees stress that compactness is not constitutionally required. Mot. Aff. 7, 11, citing, *e.g.*,

Shaw v. Reno, 509 U.S. 630 (1993).[3] This is true, but Appellants have never maintained otherwise. In the course of describing "all the things that Appellants' standard is *not*," they made clear that it "is not a constitutional requirement that voting districts be compact, and does not create or confer a constitutional right to reside in a compact district." J.S. 28. Rather, the standard "would proscribe only extreme noncompactness" (*id.*), which is not the same as establishing a constitutional requirement that all districts be compact.[4]

---

[3] Nothing in *Shaw* would prevent the application of a compactness requirement to bar egregious gerrymanders like Maryland's Third Congressional District. In *Shaw*, the majority discussed compactness and other districting criteria as "objective factors" that might constitute proof of the racial gerrymandering at issue in that case. 509 U.S. at 647. The Court's pronouncement that these criteria are not constitutionally required was made, and must be interpreted, in that context, and it is not a fair reading of that opinion to suggest that it rejected any rule requiring some minimal level of compactness as a check on extreme gerrymandering.

[4] Attorneys for plaintiffs alleging First Amendment gerrymandering claims in Wisconsin and North Carolina have submitted an *amici* brief also criticizing Appellants' proposed compactness standard. Motion for Leave to File *Amici Curiae* Brief and Brief, dated December 8, 2016. This brief is flawed. First, it was not timely filed. *Am. Cur.* Br. (first page, admitting lateness); *see* SUP. CT. R. 37.2(a) (time to file *amicus* brief). Second, it is misleadingly labeled as a brief "in support of neither party," although it asks the Court to summarily dispose of this appeal and argues against the compactness standard. *Am. Cur.* Br. 12 and *passim*. And third, it is not helpful to the Court. It is inaccurate, as when it claims "[t]here are no alternative maps." *Id.* at 7; *compare* J.S. App. 33a-37a, 42a (alternative map). It misapprehends the compactness standard as being unable to account for unusual political

IV. As the District Court Found, Appellants' Injury Is Concrete and Particularized.

Appellees argue that Appellants' failure to allege harm as partisans means that they are left asserting only "the interest of 'voters' generally," which is not "an injury to themselves that is concrete and particularized." Mot. Aff. 9. Appellees maintain that this is an independent reason, aside from the lack of a cognizable legal right, why Appellants lack standing.

This argument contradicts an explicit finding to the contrary by the district court. Noting that Appellants "allege they are asserting a harm that *all* Maryland voters endure," the district court observed that the "deprivation of the right to vote . . . can constitute an injury in fact notwithstanding that the injury is widespread." J.S. App. 9a. The district court concluded "that at this pleading stage, this harm is adequately concrete and particularized." J.S. App. 10a.

This finding was surely correct. The Court has held that a non-justiciable, generalized interest exists where harm is "not only widely shared, but is also of an abstract and indefinite nature – for example, harm to the 'common concern for obedience

---

boundaries or compliance with federal laws. *Id.* at 15-17; *compare* J.S. 18. Finally, the bulk of it is an extended factual argument about compactness, the consideration of which is inappropriate on an appeal from a motion to dismiss. *Id.* at 12-25.

to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998) (citation omitted). By contrast, where

> harm is concrete, though widely shared, the Court has found "injury in fact." This conclusion seems particularly obvious where . . . large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law.

Id. at 24.

There are many situations in the context of voting rights where harm is "concrete, though widely shared." For example, an unconstitutional poll tax could confer standing on every voter in a state. *See Harman v. Forssenius*, 380 U.S. 528, 533-34 (1965) (state poll tax held to violate the Twenty-Fourth Amendment), *aff'g* 235 F. Supp. 66, 68 (E.D. Va. 1964) (three-judge court) (plaintiffs alleged that they were "citizens of the United States and of the State of Virginia having the requisite residence to vote, [] each suing for himself and others as a class similarly situated."); *see* U.S. CONST. amend. XXIV. Similarly, an administrative burden on voting evaluated under *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), could confer standing on every voter. The fact that these interests are "widely shared" does not make the injuries less concrete. In the same way, although every voter in Maryland is harmed when the power to select representatives is transferred to state legislators, the voters' claims are sufficiently

concrete and particularized to confer Article III standing.

V. Appellants Have Alleged a Connection Between Extreme Noncompactness and Gerrymandering.

Appellees accuse Appellants of making the "conclusory assertion that a non-compact district is necessarily a gerrymandered district"[5] and argue that this "does not meet the pleading standard with regard to proving discriminatory intent." Mot. Aff. 15 n. 4, citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Aside from the fact, explained above, that Appellants are not trying to prove discriminatory intent, Appellees' claim is simply incorrect.

The complaint alleges in detail the causal connection between noncompact districts and gerrymandering. The complaint explains that "[i]n a partisan gerrymander, the party in charge of redistricting creates . . . districts in which the opposing party enjoys a supermajority, and . . . a greater number of districts in which one's own party has a smaller, but significant and winning, majority." J.S. App. 24a. To obtain an electoral advantage, "mapmakers need to arrange both their own partisans and those of their electoral opponents

---

[5] This formulation again misstates Appellants' position. Appellants maintain (and would offer expert testimony to show) that extremely noncompact districts are almost invariably the hallmark of self-interested gerrymandering, which is why they should be proscribed to ensure that representatives are selected by the people.

in particular district configurations." J.S. App. 27a. But "voters do not choose where to live so as to suit the purposes of legislators trying to draw gerrymandered districts." *Id.* This is why "legislators must distort district boundaries to create districts that contain the mix of voters that best achieves . . . partisan goals." *Id.*

The complaint then applies this account of partisan gerrymandering to Maryland's "wildly deformed" congressional district plan, alleging that its "exceedingly non-compact districts" were "caused by gerrymandering." *Id.* It alleges that "Maryland's gerrymandered district plan produces split counties, county fragments, and split precincts." J.S. App. 28a. The complaint amply documents the extent to which these districts are noncompact. J.S. App. 32a, 34a, 36a. The complaint also refers to public and judicial commentary acknowledging that political gerrymandering accounts for the extraordinary shapes of Maryland's congressional districts. The complaint cites a *Washington Post* editorial opining that political motivations caused Maryland's district map to be "sliced, diced, shuffled and shattered, making districts resemble studies in cubism." J.S. App. 20a-21a. The complaint cites statements from *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903-04, 905 (D. Md. 2011), describing the mapmakers' political purpose in creating Maryland's plan. J.S. App. 22a.

The complaint points out that Maryland's district plan "has been the subject of near constant litigation." J.S. App. 21a. The complaint then draws an intuitive, factual inference that further supports

the connection between gerrymandering and "the need to create non-compact districts": "Those who drew and approved Maryland's bizarre-looking districts would not have invited multiple lawsuits for gerrymandering, and would not have held the State up to public ridicule on account of those districts' appearance, if the desired partisan result could have been achieved in some other way." J.S. App. 27a.

The foregoing allegations easily meet the requirement of "facial plausibility," in that they plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). These allegations should be presumed true for the purposes of the motion to dismiss, and Appellants ultimately should have the opportunity to prove them at trial.

CONCLUSION

Appellants respectfully request that the Court deny Appellees' motion to affirm, note probable jurisdiction, and set this case for oral argument.

Respectfully submitted,

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Appellants

December 20, 2016