

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

CAE-22-00506

IN THE MATTER OF
TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA
CLARINO, GEORGE DOOHER, JR., STEVEN EVANS, LINDA FANTON, JERRY
FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY,
JOSEPHINE THOMAS, AND MARIANNE VOLANTE,

Petitioners-Respondents,

– against –

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE
SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, and NEW YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants.

**BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER
IN SUPPORT OF NEITHER PARTY**

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INTRODUCTION

It is a founding principle of American democracy that the power of the government over the people derives from the people themselves. *The Declaration of Independence* para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed.”). Politicians have long sought to circumvent meaningful consent of the governed by exploiting the redistricting process to gain political advantage. The term “gerrymander” has been used to describe this activity since 1812. *See* Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry’s Salamander: The Electoral Consequences of the Reapportionment Revolution* 3 (2002). In recent years, sophisticated tools have enabled mapmakers to dilute the voting strength of a disfavored category of voters with extreme precision and entrench favored incumbents, often guaranteeing their preferred electoral outcomes for a decade. Now, more than ever, such partisan gerrymandering is “incompatible with democratic principles” and the “core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015) (internal citations and quotations omitted). Whether done by Democrats, Republicans, or any other party, partisan gerrymandering impedes the proper functioning of the electoral system and diminishes faith in our democratic institutions.

New Yorkers recognized these harms and, in 2014, voted to enshrine in the New York Constitution an explicit prohibition against partisan gerrymandering. New York voted to amend the New York Constitution to require that “[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5). This Court must enforce the New York Constitution and

invalidate any redistricting plans which constitute a partisan gerrymander, regardless of its adjudication of the legality of the process by which they were created.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is free and fair for all voters. CLC has litigated or been involved in approximately 100 voting rights and redistricting cases. CLC represents clients in numerous ongoing cases addressing partisan gerrymandering, and served as lead counsel in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

QUESTION PRESENTED

If any map-drawing process in the state of New York leads to congressional and/or state legislative maps that constitute partisan gerrymanders, should those maps be invalidated under Article III, § 4(c)(5) of the New York Constitution?

ARGUMENT

Partisan gerrymandering is directly at odds with a well-functioning representative democracy. When given the opportunity, both Democrats and Republicans have engaged in extreme partisan gerrymandering across the country—this year and in the decades preceding. Both parties seek to skew the redistricting process in a race to the bottom of partisan gamesmanship. The escalating effort by the party in power to use gerrymandering as a weapon against the other has many costs to citizens. A range of lawmakers—including both Republican and Democratic New York congressional representatives—have criticized how gerrymandering makes lawmakers “eschew principled, bipartisan compromise, and transfer[s] power from voters to political parties.” Brief for Bipartisan Group of Current & Former Members of Congress as Amici Curiae in Support of Appellees at 10, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161) (hereafter “*Whitford*

Bipartisan Congressmen Br.”).¹ Despite longtime bipartisan opposition, politicians continue to engage in partisan gerrymandering. As explained below, partisanship in the redistricting process skews elections, eliminates competition, and prevents popular accountability. The New York Constitution circumvents these perils through its prohibition on partisan gerrymandering. This Court must enforce that prohibition now.

I. Partisan gerrymandering is antidemocratic.

Extreme partisan gerrymandering affronts the basic premise of a republican form of government: that representatives are accountable to, and reflective of, the people. A partisan gerrymander occurs when one controlling political party intentionally neutralizes the effectiveness of the other party’s voters through “‘cracking’ (splitting a party’s supporters between districts so they fall shy of a majority in each one) and ‘packing’ (stuffing remaining supporters in a small number of districts that they win handily).” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851 (2015). Such line-drawing represents the worst of hyper-partisan, end-justifies-the-means reasoning, which devolves the political process to a question of who can pick the rules of the game rather than who can win elections with the best policies that attract the most votes.

Modern technology has made the negative effects of partisan gerrymandering much worse. As the North Carolina Supreme Court observed in a recent decision blocking the State’s partisan gerrymander: “the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire

¹ Available at <https://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-Bipartisan-Group-of-Current-and-Former-Members-of-Congress.pdf>.

decade, even as electoral conditions change and voter preferences shift.” *Harper v. Hall*, 868 S.E.2d 499, 509 (N.C. 2022). Only recently did software replace pen and paper as the redistricting tool of choice. David Daley, *Ratf***ked: The True Story Behind the Secret Plan to Steal America’s Democracy* 51-60 (2016). While mapdrawers in past decades undertook manual processes relying on imperfect and incomplete data, now redistricting uses sophisticated software programs, super-computing processing capabilities, widely available and precise data of partisan preferences, and granular information to pinpoint block-level accuracy. *See id.*²

The combination of these “technological advances” with the rise in “unbridled partisan aggression” has driven gerrymandering “to new heights.” Stephanopoulos & McGhee, *Partisan Gerrymandering and the Efficiency Gap*, *supra*, at 838. Thus, “[w]hile partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, with almost surgical precision, undermine our constitutional system of government.” *Harper*, 868 F.2d at 509 (footnote and internal quotation marks omitted). While some level of partisanship may have been tolerated in prior redistricting cycles, the precision with which partisan gerrymandering occurs today subverts democracy.

The core harms of partisan gerrymandering are threefold: extreme asymmetry between the political parties’ ability to translate votes to seats, reduction in competitiveness that increases partisan polarity, and impaired democratic accountability that leads to political dysfunction.

First, partisan gerrymandering enables the line-drawing party to secure seats in the legislative body far outside the expected result based on statewide vote share. The ability for one party to translate fewer votes into more seats, and the inability for the other party to translate its

² *See also* Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 Cal. L. Rev. 987, 995 (2021); Royce Crocker, *Congressional Redistricting: An Overview* 2, Cong. Res. Serv. (Nov. 21, 2012).

votes into seats, creates an asymmetric and exponential benefit that empowers the majority to silence the minority. The extreme asymmetry resulting from partisan gerrymandering is antithetical to the democratic process the Framers envisioned for the American system of representative government. During the founding era, preserving representational equality came to be seen as an important safeguard against political entrenchment. For example, John Adams argued that to prevent “the unfair, partial, and corrupt elections” that marked the English electoral system, the “equal interests among the people should have equal interests” in the American system of representation. John Adams, *Thoughts on Government* at 403 (1776), reprinted in *1 American Political Writing During the Founding Era: 1760-1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983). And the Framers cautioned against “measures [that] are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” *The Federalist* No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961). While minority voices do not cease to exist in a state such as New York that significantly favors one party, under a partisan gerrymander, they cease to be heard.

The negative effects of the asymmetry arising from partisan gerrymandering are self-compounding because “legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *125 (N.C. Super. Ct. Sept. 3, 2019). And even by simply maintaining previous gerrymanders through subsequent decades—often by appealing to seemingly neutral principles like taking a “least change” approach to redistricting—partisan mapmakers can continue to lock in the partisan gains of the past without renewed map manipulation. *See, e.g.,* Robert Yablon, *Gerrylaundry*, 97 N.Y.U. L. Rev.

(forthcoming 2022)³ (explaining that so-called “gerrylaunders requires no conspicuous cracking and packing of disfavored voters” because mapmakers can preserve the biased results by “preserving key elements of the existing map”). Absent intervention, gerrymandering will therefore compound and create increasingly asymmetrical results over time.

Second, partisan gerrymandering enables political parties to reduce the number of competitive contests and ensure the election of ideological party patrons. Using recent technological advancements noted above, partisan mapdrawers can focus not only on maximizing their statewide partisan advantage but also on securing as many safe seats as possible. The current redistricting cycle has been characterized by “a rise in the number of hyper-partisan seats at the expense of competitive ones. So far in completed states, the number of single-digit Biden and Trump seats has declined from 62 to 46 (a 26 percent drop).” David Wasserman, *2022 House Overview: Still a GOP Advantage, but Redistricting Looks Like a Wash*, Cook Pol. Report (Jan. 4, 2022).⁴

The lack of competitive districts undermines the median voters’ ability to translate their votes into effective representation. In general, political parties favor running more ideologically extreme candidates. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). But competitive elections temper that instinct by forcing party leadership to recognize that a candidate will have to win the more moderate, median voters to succeed in the election. *Id.* at 628. The more competitive the district, the more likely the candidate will be to represent the median voter and the political “community as a whole.” *Id.* Without competitive districts, the primary becomes determinative of electoral outcomes, often benefitting more extreme

³ Available at <http://dx.doi.org/10.2139/ssrn.3910061>.

⁴ Available at <https://www.cookpolitical.com/analysis/house/house-overview/2022-house-overview-still-gop-advantage-redistricting-looks-wash>.

candidates who can attract more ideological voters. *See, e.g., Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (summarizing briefs of bipartisan groups of lawmakers who opposed the anticompetitive effects of partisan gerrymandering).

The result is often the election of hyper-partisan candidates who are less likely to broker bipartisan tradeoffs and are more likely to view their constituency as a base of voters on the far wing of their party.⁵ Partisan gerrymandered legislative bodies comprised of ideologically extreme representatives increase partisan gridlock and rancor. Pragmatic solutions on which both parties can agree—and which many voters favor—become politically untenable in a safe seat environment where cooperation is punished rather than rewarded. *See, e.g., Whitford Bipartisan Congressmen Br.* at 11.

These noncompetitive and hyper-polarized conditions are precisely what the Framers feared from a two-party system. The Framers were concerned with the “mischiefs of faction” and the “instability, injustice, and confusion [it] introduced,” which are the “mortal diseases under which popular governments have everywhere perished.” *The Federalist No. 10*, at 77 (James Madison). Gerrymandering is the epitome of faction run amok: a classic case of “the public good [being] disregarded” due to hyper-politicized parties that operate in a designed echo chamber of safe seats and anti-competition. *See id.*

⁵ *See, e.g.,* Shane Goldmacher, ‘Blood Red’: How Lopsided New District Lines Are Deepening America’s Divide, N.Y. Times (Feb. 28, 2022), <https://www.nytimes.com/2022/02/27/us/politics/redistricting-partisan-divide.html>; Richard H. Pildes, *Create More Competitive Districts to Limit Extremism*, RealClearPolitics (Apr. 29, 2021), https://www.realclearpolitics.com/articles/2021/04/29/create_more_competitive_districts_to_limit_extremism_145672.html; Richard H. Pildes, *The Constitution and Political Competition*, 30 *Nova L. Rev.* 253, 256 (2006), <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1223&context=nlr>.

Third, partisan gerrymandering reduces popular accountability. Partisan gerrymandering insulates representatives from their voters, allowing incumbents or political parties to strategically consolidate the voters they think will most reflexively reelect their favored candidates and then divide or overconcentrate the remaining voters who would do the opposite. In an environment where politicians can choose their voters instead of the other way around, partisan gerrymandering “[a]t its most extreme . . . amounts to ‘rigging elections.’” *Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)). Mapmakers can and have raised the stakes to use increasingly effective gerrymandering in a way that often enables politicians to disregard their constituents in favor of self or special interests.

Again, the Framers warned against the antidemocratic results that arise from the lack of accountability in elections. Alexander Hamilton explained long ago: “The true principle of a republic is that the people should choose whom they please to govern them.” 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 257 (J. Elliott ed., 1876). To carry out this principle, the Framers thought “it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] *should have an immediate dependence on, and an intimate sympathy with, the people.*” See The Federalist No. 52, at 295 (James Madison) (emphases added); see also The Federalist No. 37, at 4 (James Madison) (“The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people.”). Few forces make representatives less dependent on, and less in sympathy with, their constituents than gerrymandered districts. See, e.g., *Ariz. State Legislature*, 576 U.S. at 815 (discussing the Framers’ concern about the “manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their

interests over those of the electorate”); *Wesberry v. Sanders*, 376 U.S. 1, 7-17 (1964) (same). Partisan gerrymandering has, as the Framers feared, increasingly “enable[d] the representatives of the people to substitute their will to that of their constituents.” The Federalist No. 78, at 525 (Alexander Hamilton).

II. Partisan gerrymandering violates the New York Constitution.

The New York Constitution has an explicit anti-gerrymandering provision which this Court must use to prevent the asymmetrical results, hyper-partisanship, and lack of accountability that inevitably arise from extreme partisan gerrymandering. In 2014, voters in New York ensured that the state’s constitution would “provide standards and guidance for state courts to apply” to vindicate their rights against partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507. New Yorkers passed an amendment to the New York Constitution including the requirement that “[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5). Materials that were released advocating for the adoption of the amendment demonstrate that voters understood that this language would address and even “[e]nd partisan gerrymandering.”⁶ And the United States Supreme Court noted that nearly identical language in the Florida Constitution provided significant guidance for the state court to assess whether there was a partisan gerrymander. *See Rucho*, 139 S. Ct. at 2507.

The New York Constitution’s anti-gerrymandering “principle shall be used in the creation of state senate and state assembly districts and congressional districts” without regard for whether

⁶ See, e.g., Vote Yes for Progress, *Five Reasons to Vote Yes*, available at <https://web.archive.org/web/20140821174000/http://www.voteyes4progress.org/5-reasons/> (encouraging voters to vote yes on the amendment “to establish new rules that remove partisan scheming and create impartiality”).

the maps in question were created by the commission or by the legislature. *Id.* § 4(c); *see also id.* § 4(b) (“All such amendments shall comply with the provisions of this article.”). It follows that regardless of whether this Court finds that the process undertaken to create the congressional and state legislative maps was proper, the anti-gerrymandering provision applies, just as it will in future redistricting cycles regardless of the ultimate mapdrawers’ identity.

It is imperative that this Court properly weigh the ramifications of any potential partisan gerrymanders before it in order to enforce the New York Constitution and to prevent the severe harms of partisan gerrymandering from coming to pass in New York over the next decade and for years to come. If one or more of the maps before this Court were indeed drawn for the purpose of favoring or disfavoring either party, this Court should join the numerous state courts that have applied state constitutional provisions to invalidate partisan gerrymanders and ensure fair maps.⁷ In its forthcoming opinion, regardless of the adjudication regarding the legality of the process to create the congressional and state legislative maps, this court must apply the justiciable, substantive limits on partisan gerrymandering in the New York Constitution.

CONCLUSION

For all the foregoing reasons, Campaign Legal Center respectfully submits that this Court should hold that extreme partisan gerrymandering is undemocratic and violates the New York

⁷ *See, e.g., League of Women Voters of Ohio v. Ohio Redistricting Commission*, Nos. 2021-1193, 2021-1198, & 2021-1210, 2022 WL 110261, at *24-28 (Ohio Jan. 12, 2022); *Adams v. Dewine*, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *9-15 (Ohio Jan. 14, 2022); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colorado Indep. Cong. Redistricting Comm’n*, 497 P.3d 493, 515 (Colo. 2021); Final Order Establishing Voting Districts for the Senate of Virginia, the House of Delegates of Virginia, and Virginia’s Representatives to the United States House of Representatives at 1–2, *In Re: Decennial Redistricting Pursuant to The Constitution of Virginia, art. II, §§ 6 to 6-A, and Virginia Code § 30-399* (Va. Dec. 28, 2021), www.vacourts.gov/courts/scv/districting/redistricting_final.pdf.

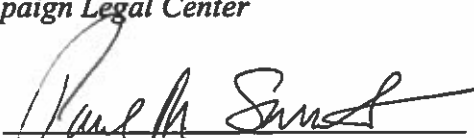
Constitution, and invalidate any congressional or state legislative map that constitutes an extreme partisan gerrymander.

Dated: Washington, DC
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Respectfully submitted,

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