IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

v.

Case No. 3:15-CV-00421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

THE WISCONSIN ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE,

Plaintiff,

v.

Case No. 3:18-CV-00763-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

THE WISCONSIN STATE ASSEMBLY'S BRIEF IN SUPPORT OF ITS EMERGENCY MOTION TO STAY

The Wisconsin State Assembly moves for an immediate stay of these cases pending the Supreme Court's disposition of *Rucho v. Common Cause* and *Lamone v. Benisek*, both of which the Supreme Court has set for argument in March. *See* Order List, 586 U.S. at _ (Jan. 4, 2019) (attached as Exhibit A). The appeals in *Common Cause* and *Benisek* present issues identical to those before this Court, including whether and when plaintiffs have standing to bring partisan gerrymandering claims, whether such claims are justiciable, and whether plaintiffs can challenge legislative maps as violating their First Amendment right to association. The Supreme Court's resolution of these issues is likely to significantly affect the law applicable to the *Whitford* and *ADCC* cases. Proceeding before the Supreme Court issues its decisions would be an unnecessary waste of the Court's and the parties' time and resources.

This Court has discretion to stay its proceedings in the interest of judicial economy. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (recognizing "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); *see also Texas Ind. Producers & Royalty Owners Ass'n v. E.P.A.*, 410 F.3d 964, 980 (7th Cir. 2005) ("A stay pending the outcome of litigation in another court . . . involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery." (cleaned up)).

Here, judicial economy strongly counsels in favor of a stay because allowing these cases to proceed poses a substantial risk of wasting the Court and the parties' time and effort. There is significant overlap between the issues in *Common Cause* and *Benisek* and those before this Court. Both *Common Cause* and *Benisek* involve partisan gerrymandering claims grounded in the First and Fourteenth Amendments. *See Common Cause v. Rucho*, 318 F. Supp. 3d 777, 799 (M.D.N.C. 2018); *Benisek v. Lamone*, 266 F. Supp. 3d 799, 814 (D. Md. 2017). In fact, other courts have already recognized the overlap between *Whitford*, *Common Cause*, and *Benisek*. The Supreme Court vacated the original decision in *Common Cause* for reconsideration in light of its decision in *Whitford*. *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) (mem). And the district court in *Benisek* recognized the similarities between that case and *Whitford*: "Fundamentally, these cases are two sides of the same coin: both propose a standard by which federal courts might adjudicate claims of unlawful political gerrymandering. Both cases invoke the First Amendment as a source of constitutional authority." *Benisek*, 266 F. Supp. 3d at 814.

The issues currently on appeal before the Supreme Court also overlap with those before this Court. Among the questions presented in *Common Cause* are whether the plaintiffs there have standing and whether the plaintiffs' partisan gerrymandering claims are justiciable. *Rucho v. Common Cause*, Appellants' Jurisdictional Statement at i (Oct. 1, 2018) (attached as Exhibit B). Similarly, a central issue on appeal in *Benisek* is whether the

district court articulated a valid test for whether a legislative map violates plaintiffs' First Amendment associational rights. *Lamone v. Benisek*, Appellants' Jurisdictional Statement, at 16–18 (December 2018) (attached as Exhibit C). All three of those questions bear directly on the issues to be tried in *Whitford* and *ADCC*.

Given the overlap between the issues at stake, whatever the Supreme Court decides in *Common Cause* and *Benisek* will have significant implications for the *Whitford* and *ADCC* cases. One possibility is that the Supreme Court will hold that partisan gerrymandering cases are nonjusticiable, which would obviate the need for any further proceedings here. Another possibility is that the Court will articulate the legal standards governing such claims, which would materially narrow the issues and streamline the preparation of *Whitford* and *ADCC* for trial.

Conversely, if the *Whitford* and *ADCC* cases proceed to trial while *Common Cause* and *Benisek* remain pending, it is likely that the Supreme Court will vacate any decision of this Court for reconsideration in light of its disposition of those cases, potentially requiring a third trial of *Whitford*. *See, e.g.*, *Fisher v. Univ. of Texas at Austin,* 570 U.S. 297, 314 (2013) (vacating decision below and observing that "fairness to the litigants and the courts" requires that a case "be considered and judged" under the correct legal standard). A stay would ensure that if another trial in this matter is

necessary, there will only be one more, under the proper legal standard, and it will occur before a third trial would have occurred absent a stay.

In one week, the parties are set to begin a series of more than forty fact and expert witness depositions. Further, the Assembly's reply in support of its motion to dismiss is due on Friday.[1] Additional expert reports are due later this month and in early February. All of these events will be affected by *Common Cause* and *Benisek*. It would be highly prejudicial to the Assembly to have to prepare legal briefing, sponsor expert reports, and take depositions without the benefit of the Supreme Court's imminent clarification of the governing legal rules. Accordingly, the Assembly respectfully requests that the Court grant this motion and stay these proceedings as soon as possible.

For the foregoing reasons, the Wisconsin State Assembly respectfully requests that the Court immediately stay all further proceedings in *Whitford* and *ADCC* pending the Supreme Court's disposition of *Common Cause* and *Benisek*.

[1] The Assembly plans to file a separate motion to postpone the deadline for its reply brief until the Court has had an opportunity to rule on this motion to stay.

January 7, 2019

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Exhibit A

(ORDER LIST: 586 U.S.)

FRIDAY, JANUARY 4, 2019

ORDERS IN PENDING CASES

17-1625 RIMINI STREET, INC., ET AL. V. ORACLE USA, INC., ET AL.

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

18-96 TN WINE AND SPIRITS ASS'N V. BLAIR, ZACKARY W., ET AL.

The motion of Illinois, et al. for leave to participate in oral argument as *amici curiae* and for divided argument is granted. The joint motion of respondents for divided argument is denied.

APPEALS -- JURISDICTION POSTPONED

18-422 RUCHO, ROBERT A., ET AL. V. COMMON CAUSE, ET AL.

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case will be set for argument in the March argument session.

18-726 LAMONE, LINDA H., ET AL. V. BENISEK, O. J., ET AL.

The motion of David Trone for leave to file a brief as *amicus curiae* is granted. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case will be set for argument in the March argument session.

CERTIORARI GRANTED

18-302 IANCU, ANDREI V. BRUNETTI, ERIK

18-459 EMULEX CORPORATION, ET AL. V. VARJABEDIAN, GARY, ET AL.

18-489 TAGGART, BRADLEY W. V. LORENZEN, SHELLEY A., ET AL.

The petitions for writs of certiorari are granted.

18-431 UNITED STATES V. DAVIS, MAURICE L., ET AL.

The motions of respondents for leave to proceed *in forma pauperis* are granted. The petition for a writ of certiorari is granted.

Exhibit B

No.

In the

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

v.

COMMON CAUSE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

JURISDICTIONAL STATEMENT

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October 1, 2018

QUESTIONS PRESENTED

Earlier this year, while *Gill v. Whitford* was pending before this Court, a three-judge district court invalidated North Carolina's 2016 congressional districting map as a partisan gerrymander. After *Gill* was handed down, this Court vacated that decision and remanded for further consideration in light of *Gill*. That period of reconsideration did not last long. In the decision below, the district court largely readopted its previous reasoning and became the first post-*Gill* court to divine a justiciable test — in fact, four tests — and invalidate a legislatively enacted map as a partisan gerrymander. Although plaintiffs here, like those in *Gill*, sought to vindicate only generalized partisan preferences, the court concluded they had standing. The court then found justiciable standards for partisan gerrymandering claims under the Equal Protection Clause, the First Amendment, and (uniquely in the history of redistricting litigation) the Elections Clauses of Article I. The court found the 2016 map to violate each of those newly articulated tests and enjoined the State from using the map after the November 2018 elections.

The questions presented are:

1. Whether plaintiffs have standing to press their partisan gerrymandering claims.

2. Whether plaintiffs' partisan gerrymandering claims are justiciable.

3. Whether North Carolina's 2016 congressional map is, in fact, an unconstitutional partisan gerrymander.

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs:

Common Cause; North Carolina Democratic Party; Larry D. Hall; Douglas Berger; Cheryl Lee Taft; Richard Taft; Alice L. Bordsen; Morton Lurie; William H. Freeman; Melzer A. Morgan, Jr.; Cynthia S. Boylan; Coy E. Brewer, Jr.; John Morrison McNeill; Robert Warren Wolf; Jones P. Byrd; John W. Gresham; Russell G. Walker, Jr.; League of Women Voters of North Carolina; William Collins; Elliott Feldman; Carol Faulkner Fox; Annette Love; Maria Palmer; Gunther Peck; Ersla Phelps; John Quinn, III; Aaron Sarver; Janie Smith Sumpter; Elizabeth Torres Evans; Willis Williams

Defendants:

Robert A. Rucho, in his official capacity as Chairman of the North Carolina Senate Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Representative David R. Lewis, in his official capacity as Chairman of the North Carolina House of Representatives Redistricting Committee for the 2016 Extra Session and Co-Chairman of the Joint Select Committee on Congressional Redistricting; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; A Grant Whitney, Jr., in his official capacity as Chairman and acting on behalf of

the North Carolina State Board of Elections; North Carolina State Board of Elections; State of North Carolina

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INTRODUCTION

Earlier this year, while *Gill v. Whitford* was pending before this Court, the three-judge district court in this case became just the second federal court since *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to invalidate a districting map as a partisan gerrymander. Although the search for a justiciable test for such claims "has confounded th[is] Court for decades," *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018), the district court here purported to divine *four separate* tests one in the Equal Protection Clause, one in the First Amendment, and, for the first time ever, two in the Elections Clauses of Article I. Each test was more sweeping and less forgiving than the last, culminating in the conclusion that the Elections Clauses prohibit districting for partisan advantage *entirely* because it deprives "the People" of their ability to elect their representatives, and because state legislatures were never "delegated" the power to district for partisan advantage.

In June, this Court vacated that extraordinary decision in light of *Gill* and remanded for further consideration. That time of reconsideration was short-lived. By August, the same three-judge panel generated a 321-page divided decision finding standing and multiple justiciable tests, and became the first post-*Gill* court to invalidate a districting map as a partisan gerrymander. After enjoining the State from using its districting map in congressional elections after 2018 and initially threatening to enjoin the use of the map in *this November's* midterm elections the court ultimately accepted plaintiffs'

agreement with appellants that it should stay its decision pending this Court's review.

While this Court's jurisdiction over this case is doubtful, the need for plenary review is plain. If there is indeed a theory of standing for adjudicating generalized partisan grievances and a justiciable test for separating unconstitutional partisan gerrymanders from the run-of-the-mill consideration of partisan advantage by legislatures organized on party lines, they will have to come from this Court. Indeed, while there are very real reasons to doubt whether such standing theories and justiciable tests exist at all, it is even more clear that the answers are not lurking in the 321-page opinion issued below. In reality, this case suffers from the same standing problems that felled *Gill*, as plaintiffs once again seek to vindicate generalized partisan preferences, not constitutionally cognizable individual injuries. And none of the various formulations embraced in the decision below constitutes a judicially administrable test for separating excessive partisan gerrymandering from the run-of-the-mill consideration of partisan advantage by legislatures organized along party lines. In fact, by ultimately concluding that any consideration of partisan advantage in districting is unconstitutional, the majority below parted company with every Justice of this Court ever to consider the matter. In short, the decision below would thrust the courts into a role that no member of this Court has squarely embraced. The need for plenary consideration of this appeal could hardly be plainer.

OPINION BELOW

The Middle District of North Carolina's opinion is reported at 318 F. Supp. 3d 777. App.1-348.

JURISDICTION

The Middle District of North Carolina issued its decision on August 27, 2018. Appellants filed their notice of appeal on August 31, 2018. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reproduced at App.373-374.

STATEMENT OF THE CASE

A. Background

This appeal arises from the most recent round of congressional redistricting in North Carolina, which began in 2016 after an earlier round of redistricting litigation. In February 2016, a divided three-judge panel for the Middle District of North Carolina concluded that two districts in North Carolina's 2011 congressional districting map were unconstitutional racial gerrymanders and ordered the General Assembly to draw a new map within 14 days. *See Harris v. McCrory* (*Harris I*), 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom. Cooper v. Harris* (*Harris II*), 137 S. Ct. 1455 (2017). The General Assembly immediately set to work.

Because the district court's two-week deadline made time of the essence, the chairmen of the most recent Senate and House redistricting committee Senator Robert Rucho and Representative David Lewis promptly engaged expert mapdrawer Dr.

Thomas Hofeller to assist in drawing a new map. App.14-15. In addition to instructing Dr. Hofeller to comply with all state and federal districting requirements and traditional districting criteria, they instructed him not to consider racial data at all, but to consider political data and to endeavor to draw a map that was likely to preserve the existing partisan makeup of the State's congressional delegation. App.15-16.

Meanwhile, the General Assembly appointed a new districting committee, which adopted seven criteria to govern the redistricting effort. Those criteria included creating districts with populations "nearly as equal as practicable," ensuring contiguity and compactness, and making "reasonable efforts" to avoid pairing incumbents. App.19-20. The criteria also stated that racial data shall not be used or considered, but that political data may be used, and that "reasonable efforts" shall be made "to maintain the current partisan makeup of North Carolina's congressional delegation" then, ten Republicans and three Democrats. App.20.

The committee unanimously adopted five of the seven districting criteria and adopted the two dealing with racial and political data and partisan advantage on a party-line vote. App.23. The committee ultimately approved the map drawn with Dr. Hofeller's assistance by a party-line vote, and the General Assembly thereafter enacted the map ("2016 Map"), with minor modifications, on party-line votes. App.24.

As a matter of traditional districting criteria, the 2016 Map compares favorably to the 2011 map.

Indeed, it adheres more closely to traditional districting criteria than any congressional map North Carolina has used in 25 years. The 2016 Map divides only 13 (out of 100) counties and splits only 12 (out of more than 2000) precincts across the entire State. App.25. No county is split between more than two congressional districts. By contrast, the 1992 map divided 44 counties (seven of which were trifurcated into three congressional districts) and split 77 precincts. App.20-21; Dkt.114 at 143.[1] The 1997 map divided 22 counties, the 1998 plan divided 21, the 2001 map divided 28, and the 2011 map divided 40. Dkt.114 at 143. The 2016 Map likewise is more compact "[u]nder several mathematical measures" than the 2011 map and paired only two incumbents. App.25.

The *Harris* plaintiffs nonetheless filed objections to the 2016 Map, including a partisan gerrymandering challenge, but the district court rejected those challenges. *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 3129213, at *2 (M.D.N.C. June 2, 2016), *aff'd sub nom. Harris v. Cooper*, 138 S. Ct. 2711 (2018) (mem.). The map took effect in June 2016, was in place for the November 2016 elections, and will govern the upcoming November 2018 elections as well.

B. Pre-*Gill* Proceedings

1. Shortly after the *Harris* district court approved the 2016 Map, appellees filed the two lawsuits that give rise to this appeal. In August 2016, Common Cause, the North Carolina Democratic Party, and 14

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[1] Unless otherwise noted, "Dkt." refers to docket entries in *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.).

individual voters filed suit against appellants (Senator Rucho, Representative Lewis, and two other legislators) and others, alleging that the 2016 Map is an unconstitutional partisan gerrymander. App.26-27. The next month, the League of Women Voters and 12 individual voters followed suit. App.27.

Both complaints alleged that the map violates the Equal Protection Clause and the First Amendment. App.27. The Common Cause plaintiffs further alleged that the map violates the Elections Clauses of Article I. App.28; *see* U.S. Const. art. I, §2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States …."); *id.* §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof …."). Both sets of plaintiffs claimed standing to assert "statewide" challenges to the 2016 Map as a whole, and the Common Cause plaintiffs also claimed "standing to assert … district-by-district challenges." *Common Cause v. Rucho* (*Common Cause I*), 279 F. Supp. 3d 587, 609 (M.D.N.C.), *vacated and remanded*, *Rucho v. Common Cause* (*Common Cause II*), 138 S. Ct. 2679 (2018).

The cases were assigned to a three-judge district court. The court consolidated the cases and originally scheduled them for trial in June 2017, but subsequently postponed trial on its own motion. Amidst the pretrial proceedings, this Court agreed to hear *Gill*. *See Gill v. Whitford*, 137 S. Ct. 2289 (2017) (mem.). Appellants filed a motion asking the district court to stay proceedings pending resolution of *Gill*, explaining it would make little sense to proceed with

a trial while this Court was considering whether partisan gerrymandering claims are even justiciable. *See* Dkt.75. But the district court denied the motion and forged ahead, holding a four-day bench trial in October 2017.

2. Three months later, the district court issued a divided opinion authored by Judge Wynn, holding that plaintiffs had statewide standing to press their claims and finding the 2016 Map unconstitutional under the Equal Protection Clause, the First Amendment, and the Elections Clauses. App.33-34. The majority immediately enjoined the State from using the 2016 Map in future elections and gave the General Assembly a mere two weeks the absolute minimum time permissible under state law, *see* N.C. Gen. Stat. §120-2.4(a) to draw, consider, debate, and vote on a new congressional map. App.34.

After the district court refused to stay its order, appellants filed an emergency stay application with this Court. App.34. This Court granted that application and stayed the district court's order pending the filing and disposition of a jurisdictional statement. *See Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (mem.). On June 18, the Court issued its decision in *Gill*, which concluded that the plaintiffs lacked standing to bring their statewide challenges to Wisconsin's districting map. 138 S. Ct. at 1930. On June 25, this Court vacated the district court's judgment in this case and remanded for further consideration in light of *Gill*. *See Common Cause II*, 138 S. Ct. 2679.

C. Post-*Gill* Decision

Just two months later, the district court issued a 321-page divided opinion. The majority opinion authored by Judge Wynn again concluded that plaintiffs have standing to press their partisan gerrymandering claims, that such claims are justiciable under the Equal Protection Clause, the First Amendment, and Sections 2 and 4 of Article I, and that the 2016 Map violates all four of those provisions. App.35-313.

1. Starting with the equal protection claims, the court acknowledged that *Gill* rejected a "statewide" standing theory, and that plaintiffs had previously asserted such a theory. *See, e.g.*, App.41-43. The court further conceded that Common Cause and several individual plaintiffs lacked standing for failure to claim anything other than a statewide injury. App.65-67 & n.15. Nonetheless, the court concluded that individual "Plaintiffs who reside and vote in *each* of the thirteen challenged congressional districts" have standing to press vote-dilution claims under the Equal Protection Clause. App.50.[2]

The court also concluded that these "dilutionary injuries" afforded these same plaintiffs standing under the First Amendment. App.69-70. In addition, the court concluded that various individual plaintiffs had standing to press "non-dilutionary" claims under the First Amendment because, for example, they "had difficulty convincing fellow Democrats to 'come out to

[2] The court concluded the North Carolina Democratic Party had standing in each district, and that the League, "at a minimum," had standing in one district. App.64-65 n.14.

vote'" in certain districts. App.69-70.[3] The court concluded that, "because these injuries are statewide, such Plaintiffs have standing to … challenge … the 2016 Plan as a whole." App.74.

Finally, the court concluded that the Common Cause plaintiffs have standing to press their Article I claims. App.74. Those claims, the court posited, are "premised on federalism" and so "do not stop at a single district's lines." App.74-75. Although the court acknowledged that such a "structural harm does not absolve litigants from … alleg[ing] particularized injuries," it found that requirement satisfied because at least one plaintiff in each district alleged "dilutionary injuries," and because plaintiffs also alleged adequate "non-dilutionary injuries" *e.g.*, "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions." App.76, 78. "[B]ecause these structural and associational harms have statewide implications," the court concluded, they "are sufficient to confer standing on a statewide basis" under the Elections Clauses. App.83.

2. Turning to justiciability, the court deemed itself bound by *Davis v. Bandemer*, 478 U.S. 109 (1986), to conclude that partisan gerrymandering claims are justiciable. App.86-88. The court further reasoned that partisan gerrymandering is "contrary to the republican system put in place by the Framers," and that no "deference to the policy judgments of the political branches" is warranted in this context

[3] The court concluded the North Carolina Democratic Party, the League, and Common Cause suffered non-dilutionary injuries too. App.72-74.

because gerrymandering "targets voting rights." App.92, 96. As for the thorny problem of identifying a manageable standard for determining how much consideration of politics is too much, the court declared that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering" because "the Constitution does not authorize state redistricting bodies to engage in … partisan gerrymandering" at all. App.118.

3. The court then moved to the merits and began by purporting to find a manageable standard for adjudicating plaintiffs' equal protection claims. To prove such claims, the court concluded, a plaintiff must demonstrate (1) "discriminatory intent" and (2) "discriminatory effects," at which point the burden shifts to the defendant to try to prove that (3) those "discriminatory effects are attributable to the state's political geography or another legitimate redistricting objective." App.138-39. As to intent, although the court had just concluded that *any* amount of districting for partisan advantage is impermissible, it maintained that its equal protection analysis "*does not rest*" on that conclusion. App.119. Instead, the court "assume[d]" for now that plaintiffs must show that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power,'" even as it acknowledged that this Court declined to adopt a "predominant intent" requirement in previous partisan gerrymandering cases. App.145-46. The court then found its "assume[d]" intent standard satisfied in all but one district based on an assortment

of "statewide" and "district-specific" evidence. App.155, 223, 273.

As to discriminatory effects, the court began by noting (with considerable understatement) that "there is an absence of controlling authority" in this area. App.151. Forging ahead, the court concluded that a plaintiff proves discriminatory effects whenever "the dilution of the votes of supporters of a disfavored party in a particular district … is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." App.152. Based on its review of various social science metrics including "uniform swing analysis," "simulation analyses," the "efficiency gap," "partisan bias," and the "mean-median difference," App.191-92, 209 the court found "'strong proof' of the 2016 [Map's] discriminatory effects" based on statewide evidence. App.214. The court also found "district-specific evidence" of discriminatory effects in all but one district. App.227-74. The court then determined that no legitimate redistricting objective could justify the "dilution of … voters' votes," and so held that "each of those twelve districts constitutes an invidious partisan gerrymander in violation of the Equal Protection Clause." App.273-74.

Next came the First Amendment claim. As with the equal protection claim, the court recognized that "neither the Supreme Court nor lower courts have settled on a framework for determining whether a partisan gerrymander violates the First Amendment." App.282. But the court purported to divine a judicially

manageable "three-prong test" that would identify a First Amendment violation: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan … burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Disregarding its assumption under the Equal Protection Clause, the court concluded that, under prong one, *any* intent to district for partisan advantage is suspect under the First Amendment. App.287. It further concluded that, under prong two, a plaintiff need only show more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity. App.287-88. Finding its virtually zero-tolerance test easily satisfied, the court held that the 2016 Map as an undifferentiated whole "violates the First Amendment." App.299-300.

Finally, the court addressed plaintiffs' claims under the Elections Clauses and concluded that the 2016 Map violates those provisions too. The court did not cite any decision from any court that had found justiciable partisan gerrymandering standards in the Elections Clauses, which appear to grant districting authority to state legislatures, rather than restrain them. Regardless, it concluded that partisan gerrymandering violates Section 2 of Article I because it deprives "the People" of their right to elect representatives, App.306, and violates Section 4 because it "exceeds" the States' "delegated authority,"

App.303. While these purported constitutional violations were in part derivative of the majority's equal protection and First Amendment holdings, *see* App.303, the court again justified them on the theory that partisan advantage is a forbidden consideration that *always* "exceeds" a State's powers and *always* deprives "the People" of their right to elect representatives. *See* App.305-06, 310.

5. Judge Osteen concurred in part and dissented in part. On standing, he concluded that plaintiffs who live in "packed" districts and "concede[] election of the candidate of his or her choice" lack standing because they lack an injury that affects them "in a personal and individual way." App.327, 330. He also "disagree[d]" that plaintiffs "have standing to assert a statewide claim as to the statewide collective effect of any political gerrymandering." App.327-28. And he concluded that the organizational plaintiffs have standing "only to the extent they challenge the districts on the basis of district-specific injury to individual members," and that they may not assert claims "because of other organizational purposes." App.332-34.

On the merits, Judge Osteen expressed doubt whether "there is a constitutional, and judicially manageable, standard" under the Equal Protection Clause "for limiting partisan political consideration by a partisan legislative body." App.322 n.1. He rejected the suggestion that "the Constitution does [not] permit consideration by a legislative body of both political and partisan interests in the redistricting process." App.337. Judge Osteen expressed similar skepticism as to whether plaintiffs' First Amendment

claims are justiciable, and lamented that the majority's test would "foreclose all partisan considerations in the redistricting process." App.322 n.1, 343. He also disagreed that plaintiffs had shown First Amendment injury, noting that they remain "free under the new [districting] plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.344. Finally, Judge Osteen disagreed that the Elections Clause "completely prohibits" States from districting for partisan advantage. App.347.

6. After concluding that the 2016 Map violates every constitutional provision that plaintiffs invoked, the majority enjoined the State from using the map in future elections after November 2018 and gave the General Assembly three weeks to draw, consider, debate, and vote on a new congressional map. App.318-19. The court noted that it was open to enjoining use of the 2016 Map in the November 2018 midterm elections. App.314-15. But after plaintiffs agreed with appellants that such a remedy would be inappropriate, and further agreed with appellants that the court should stay its decision pending review by this Court, the court entered a stay on the conditions that appellants file this jurisdictional statement by October 1 and seek no extensions on any briefing. App.361.

REASONS FOR PLENARY CONSIDERATION

According to the district court, the decades-long struggle to develop a justiciable test for partisan gerrymandering has ended in a rout. Not only are

judicially manageable standards out there, but there are multiple administrable tests for claims based on not one, but *four*, constitutional provisions, with at least three of the tests prohibiting any consideration of partisan advantage in districting whatsoever. That conclusion is every bit as implausible as it sounds. Indeed, not only have plaintiffs failed to identify a single judicially manageable standard, let alone four; they have not even identified a constitutionally cognizable injury sufficient to confer standing. Instead, as in *Gill*, this case fails at the threshold, as it is and always has been about "generalized partisan preferences," not the kinds of injuries for which individuals can seek redress in court.

Plaintiffs' lack of Article III standing and the absence of judicially manageable standards are mutually reinforcing. As decades of fruitless efforts have proven, trying to identify "judicially discernible and manageable standards" for adjudicating generalized political grievances is an exercise in futility. Indeed, the district court itself all but conceded as much when it abandoned the enterprise of trying to decide "how much is too much" and simply declared partisan gerrymandering *categorically* inconsistent with the Constitution. That, of course, is not and cannot be the law, as it is impossible to reconcile with the reality that the Framers expressly assigned districting to an inherently political body. A test that is manageable only at the expense of deeming every legislative districting exercise in recent history a probable constitutional violation is no test at all.

In all events, even assuming that some standard for partisan gerrymandering claims is out there, it is

not found in the 321-page opinion here. More to the point, if a viable theory of standing and a judicially manageable test exist, they will have to come from this Court after plenary review. Under no circumstances can the decision below be the final word, either on the 2016 North Carolina map or on partisan gerrymandering claims more broadly.

I. Plaintiffs Lack Standing To Press Their Partisan Gerrymandering Claims.

The first problem with plaintiffs' partisan gerrymandering claims is that they lack standing to bring them. To establish standing, a plaintiff must demonstrate (1) "injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; (3) and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury-in-fact requirement is "first and foremost," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), and requires a "legally and judicially cognizable" injury, *Raines v. Byrd*, 521 U.S. 811, 819 (1997).

A "legally cognizable" injury is one that involves the "invasion of a legally protected interest," which is "concrete and particularized." *Lujan*, 504 U.S. at 560. To be "concrete," the injury must be *de facto*, not merely *de jure* "that is, it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). And to be "particularized," it must affect the plaintiff "in a personal and individual way." *Id.* Furthermore, to be "judicially cognizable," the "dispute" must be one "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

If these requirements are not met if a plaintiff alleges only a "generally available grievance about government," *Lance v. Coffman,* 549 U.S. 437, 439 (2007) (per curiam), or asserts an injury "too abstract, or otherwise not appropriate, to be considered judicially cognizable," *Allen v. Wright*, 468 U.S. 737, 752 (1984) the plaintiff "does not state an Article III case or controversy," *Lujan*, 504 U.S. at 573-74.

Applying those principles in *Gill*, this Court concluded that the plaintiffs "supporters of the public policies espoused by the Democratic Party and of Democratic Party candidates" failed to establish standing to challenge Wisconsin's districting map as a partisan gerrymander. 138 S. Ct. at 1923. First, the Court rejected the argument that Article III recognizes injuries based on a "statewide harm to [the plaintiffs'] interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking.'" *Id.* at 1931. As the Court explained, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative"; conversely, an individual's "abstract interest in policies adopted by the legislature … is a nonjusticiable 'general interest common to all members of the public." *Id.* "To the extent" the plaintiffs claimed injuries to their personal voting interests through "the dilution of their votes," the Court continued, "that injury is district specific" and such claims must proceed district-by-district *i.e.*, the same way that racial gerrymandering claims must proceed. *Id.* at 1930.

Second, the Court concluded that the plaintiffs had not proven that they were disadvantaged in their

districts. The lead plaintiff, for example, lived in a district that, "under any plausible circumstances, [was] a heavily Democratic district," *id.* at 1924, so the alleged gerrymander "ha[d] not affected [his] individual vote for his Assembly representative" in any way, *id.* at 1933. And the remaining plaintiffs had not "meaningfully pursue[d] their allegations of individual harm," but "instead rested their case … on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1932. All of that underscored "the fundamental problem" in *Gill*: "It [was] a case about group political interests" and "generalized partisan preferences," not "individual legal rights." *Id.* at 1933.

The case suffers from the same basic flaw, as it too has always been an effort to vindicate a generalized preference to see more Democrats from North Carolina elected to Congress. Indeed, to use plaintiffs' own words, "[t]his case has always been about good government," Dkt.144 at 3, not about a violation of an individual right to have his or her vote be given full, undiluted effect. It is thus no accident that all plaintiffs asserted the same "statewide" theory that this Court repudiated in *Gill*, claiming that the ten-to-three ratio of Democrats to Republicans in North Carolina's congressional delegation injures all North Carolina Democrats. As one plaintiff explained, in his view, the "problem with the districts is that the number of Republicans elected is not proportional to the vote that Republicans receive in statewide elections." App.66. Another posited that "the 2016 Plan is 'unfair' to supporters of Democratic candidates … because 'we have 3 representatives [in Washington] versus … 10' Republican representatives." App.66. And another complained that the "problem with the

plan is that statewide it disadvantages Democrats." App.67.

The district court nonetheless found Article III standing. But in reaching that conclusion, the court once again reverted to expansive theories of exceedingly generalized injuries not specific to an individual's right to cast his own undiluted vote, such as "difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions," App.78 a "general interest common to all members of the public" if ever there were one, *Gill*, 138 S. Ct. at 1931. And the court once again made clear that, in its view, these injuries "do not stop at a single district's lines," App.74, but rather empower anyone in the State to challenge the entire map. Thus, notwithstanding that "[r]ace is an impermissible classification" while "[p]olitics is quite a different matter," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring), the decision below makes it *harder* for racial gerrymandering plaintiffs to vindicate their equal protection rights than for partisan gerrymandering plaintiffs to assert a heretofore-unrecognized claim that a districting map deprives "the People" of their ability to elect representatives. That makes no sense. If a voter has trouble persuading others to "give money to the Democratic congressional candidate in his Greensboro district," App.70, that does not create a concrete and particularized injury to the voter even in Greensboro, let alone furnish standing to challenge the district encompassing Charlotte.

The district court concluded that plaintiffs suffered district-specific "dilutionary" injuries because

their votes would "carry more weight" in "hypothetical" alternative districts. App.50, 67-68, 77-78 (alteration omitted). But this attempt to comply with Article III fares no better, as, in contrast to one-person-one-vote claims or challenges to the eligibility of other district voters, every voter still has a full right to cast an undiluted vote. In reality, the "injuries" the district court credited are merely a repackaged version of a non-cognizable desire to "influenc[e] the legislature's overall 'composition and policymaking'" and further "partisan preference[s]." *Gill*, 138 S. Ct. at 1931, 1933. Indeed, plaintiffs have sought to prove their "dilutionary" injuries simply by pointing to "alternative" maps that "approximat[e]" the State's proportion of Democrats to Republicans, App.46-50 & n.10 *i.e.*, to maps that they think would make "the overall composition of the legislature" more to their liking, *Gill*, 138 S. Ct. at 1931.

Consider Larry Hall, the majority's leading example of someone who has supposedly endured "dilutionary" injury. App.51-52. In every congressional election in recent memory, including the 2016 election, Hall's candidate of choice has prevailed. Dkt.101-2 at 12-13. In other words, the 2016 Map did not "affect[]" Hall's "ability to vote for and elect a Democrat in [his] district" at all. *Gill*, 138 S. Ct. at 1925. And plaintiffs' "alternative" map would not have changed anything either, as the Democratic candidate in that hypothetical universe would be "expected to obtain approximately 59 percent of the two-party vote." App.230. Like the lead plaintiff in *Gill*, then, Hall's district would have been "heavily Democratic" "under any plausible circumstances." *Gill*, 138 S. Ct. at 1924. Hall thus has no

individualized injury that "actually exist[s]," *Spokeo*, 136 S. Ct. at 1548, but rather seeks to vindicate only non-cognizable "group political interests," *Gill*, 138 S. Ct. at 1933.

Richard and Cheryl Taft residents of CD3 are also illustrative. Under the 2016 Map, the Republican candidate in their district was projected to win "55% of the two-party vote share" and ultimately prevailed. App.237. By contrast (sort of), under plaintiffs' alternative map, the "expected Republican vote share" in the Tafts' district is 54.43%. App.238. Thus, regardless of the supposed "gerrymander," the Republican candidate was likely to receive a majority of votes. So just like Hall, the Tafts cannot plausibly "show[] disadvantage to themselves as individuals," let alone show a "disadvantage" that is constitutionally cognizable. *Gill*, 138 S. Ct. at 1929. Instead, their injury is a classic non-district-specific, generalized harm a reality underscored by the fact that the Tafts *voted for the Republican candidate* who prevailed in CD3 in 2016. *See* Dkt.101-10 at 18; Dkt.101-11 at 15.

Nor do the handful of plaintiffs who claim that their representative may have shifted from Republican to Democrat under plaintiffs' alternative plans have standing.[4] The only "injury" such plaintiffs

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[4] Under "Plan 2-297"—the alternative plan that "maximally advances" "non-partisan districting objectives"—plaintiffs maintain that three additional Democrats likely would win congressional seats, while Republicans would retain a majority. App.47-50 & nn.9-10. It is surely no coincidence that plaintiffs' proposed map would achieve proportional representation in relation to the state-wide vote totals in the most recent election.

could claim is their inability to elect their candidate of choice (and their corresponding inability to add another Democrat to the "overall composition of the legislature"). *Gill*, 138 S. Ct. at 1931. But that is not a cognizable injury either, as courts "cannot presume … that the candidate elected will entirely ignore the interests of … voters" who voted for the losing candidate; to the contrary, "[a]n individual … who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate." *Bandemer*, 478 U.S. at 132 (plurality op.).[5]

All of this underscores the more fundamental problem with partisan gerrymandering claims: They simply do not involve a constitutionally cognizable individual injury. Voters do not suffer cognizable injury from the lack of proportional representation in the legislature, as this Court's cases "clearly foreclose any claim that the Constitution requires proportional representation." *Id.* at 130. There is no "vote dilution" in partisan gerrymandering cases because the one-person, one-vote principle already ensures that votes are "equally weighted." *Gill*, 138 S. Ct. at 1930. Moreover, to the extent the voters' real beef is that there will be fewer Democrats for their own representatives to caucus with when they get to Washington, that is not only not a true "vote dilution" claim, but is a claim for which any injury belongs to the Representative, not the voter, and the

[5] Because the individual plaintiffs lack standing, the organizational plaintiffs lack standing through their members. *Contra* App.63-65. And those organizations plainly do not independently have standing, as "[t]he right to vote is 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1929.

Representative's claim would be barred by *Raines v. Byrd*. *See* 521 U.S. at 829-30. Finally, partisan gerrymandering plaintiffs do not suffer any cognizable "associational" injuries, as they are "free … to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression." App.343-46 (Osteen, J., concurring in part and dissenting in part).

In short, after more than two years of litigation, plaintiffs still have not articulated an Article III injury, let alone connected any such injury to the sweeping relief they seek. This Court's opinion in *Gill* underscores that when a plaintiff's real concern is the statewide composition of the legislature or of congressional districts, the plaintiff lacks Article III standing. Rather than grapple with that decision, the district court tried to paper over fatal defects in plaintiffs' standing. Accordingly, if a coherent theory of standing to press partisan gerrymandering claims is to emerge, it will need to come from this Court, as it certainly cannot be found in the decision below.

II. Plaintiffs' Partisan Gerrymandering Claims Are Not Justiciable.

The flaws with plaintiffs' partisan gerrymandering claims go well beyond standing. Their claims are simply nonjusticiable. While the "general" rule is that "the Judiciary has a responsibility to decide cases properly before it," this Court has long held that the judiciary "lacks the authority to decide" cases presenting "political questions." *Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012). Such claims "are said to be 'nonjusticiable.'"

Vieth, 541 U.S. at 277 (plurality op.). And this Court will find a claim nonjusticiable when there is "a lack of judicially discoverable and manageable standards for resolving" it. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

As Justice Scalia explained for a plurality of the Court in *Vieth*, that is precisely the problem with partisan gerrymandering claims. In reality, the Framers delegated primary authority over congressional districting to state legislatures subject to congressional oversight. While those state legislatures cannot violate judicially manageable standards that prohibit racial discrimination and actual vote dilution, a claim that state legislatures organized on partisan lines engaged in partisan decisionmaking is both nonjusticable and contrary to the Framers' basic design.

The *Vieth* plurality did not arrive at that conclusion lightly. Eighteen years earlier, a majority of this Court had concluded in *Bandemer* that the partisan gerrymandering case before it was justiciable, yet still could not agree on any "judicially discoverable and manageable standards for resolving" it. *See* 478 U.S. at 123. And for the next 18 years, lower courts struggled to identify either the injury partisan gerrymandering causes or a workable test for measuring it. It was only after "[e]ighteen years of judicial effort with virtually nothing to show for it," *Vieth*, 541 U.S. at 281 (plurality op.), that a plurality of the Court concluded that Justice O'Connor had it right from the start: These "challenges to the manner in which an apportionment has been carried out … present a political question in the truest sense of the

term." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring); *see Vieth*, 541 U.S. at 281 (plurality op.).

The 14 years that have passed since *Vieth* have only reinforced that conclusion. Indeed, notwithstanding Justice Kennedy's prominent invitation to identify a "limited and precise rationale" for adjudicating partisan gerrymandering claims, *Vieth*, 541 U.S. at 306 (Kennedy, J. concurring), all 14 more years have produced is more of the same: vague tests that rest on a combination of the kind of "fundamental choices about how this Nation is to be governed" that the Framers did not intend the judiciary to be making, *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring), and sheer speculation about electoral "results that would occur in a hypothetical state of affairs," *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 417-18 (2006) (opinion of Kennedy, J.).

Moreover, these tests inevitably suffer from the problem that they are built around the misguided assumptions that political affiliation is binary and immutable, and that the only factor determining voting behavior is political affiliation. That is "assuredly not true," *Vieth*, 541 U.S. at 288 (plurality op.), and seems less true every day. Voters cast votes for individual candidates in individual districts, "not for a statewide slate of legislative candidates put forward by the parties." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring). And as 200-plus years of ever-shifting political power have proven, voters can and do base their votes on candidates, not just the party next to their name. Moreover, members of the same party can differ passionately. Any test that

measures "partisan impact" by blindly assuming that each voter's preference for the Democrat or Republican in her district reflects a preference for every Democrat or Republican across the State thus is flawed from its inception. An individual voter "cannot vote for such candidates," "is not represented by them in any direct sense," and might not support them at all. *Id.* at 153.

The persistent inability to identify a workable test for adjudicating partisan gerrymandering claims is unsurprising given the inevitable connection between a cognizable constitutional injury and a judicially manageable standard for assessing it. This is not a context where anyone suffers a physical or pocketbook injury. Thus, identifying a cognizable constitutional injury requires some sense that there is a manageable constitutional test associated with the injury. As Justice Scalia explained in *Vieth*, "[b]efore considering whether" a "standard is judicially manageable," the Court must first ask "whether it is judicially discernible in the sense of being relevant to some constitutional violation." 541 U.S. at 287-88 (plurality op.). After all, "[n]o test … can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. Yet no one can begin to identify any overarching "substantive definition of fairness in districting," *id.* at 306-07 (Kennedy, J., concurring), in this context without first making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217.

There is no better illustration of that than the decision below. In 321 pages, the best the district court could muster is that partisan gerrymandering

"runs contrary to … the structure of the republican form of government embodied in the Constitution." App.90. There is a name for such claims: They are called Guarantee Clause claims, and this Court has consistently found them nonjusticiable. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). Slapping the label equal protection, or First Amendment or, worse yet, Elections Clause on such inherently value-laden claims does not make courts any less "fundamentally under-equipped" to resolve them. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986)

Indeed, the district court's reliance on the Elections Clauses demonstrates that it may have gotten things *exactly* backwards. Far from empowering courts to interfere with the political choices States make in districting, Section 4 of Article I reflects "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker*, 369 U.S. at 217. Section 4 one of the same provisions that the district court found the 2016 Map somehow violates gives state legislatures "the initial power to draw districts for federal elections," but gives Congress the power to "'make or alter' those districts if it wishe[s]." *Vieth*, 541 U.S. at 275 (plurality op.). The Framers certainly did not give the primary authority to state legislators only to empower courts to police the degree to which state legislatures took partisan advantage into account. To the contrary, the backstop to state legislative excess was another legislative body organized along partisan lines. That deliberate choice by the Framers goes a

long way to demonstrating that too much partisanship in districting is not a constitutional problem for courts to solve.

The power granted by the Elections Clause has not been lost on Congress. To the contrary, Congress' exercise of its Section 4 power is precisely why single-member congressional districting, with all its potential for gerrymandering district lines, remains the dominant practice today. *See* 2 U.S.C. §2c. Accordingly, if Congress wants to try to reduce partisan gerrymandering, it has the power to do so; indeed, in the 115th Congress alone, legislators have introduced several bills and resolutions aiming to do just that. *See, e.g.*, S. 3123, 115th Cong. (2018); H. Res. 364, 115th Cong. (2017); H. Res. 343, 115th Cong. (2017); H. Res. 283, 115th Cong. (2017). That not only belies protests that only the courts can "fix" this problem, but also belies any claim that the Framers intended courts to do so.

III. This Case Underscores That A "Limited And Precise" Test For Adjudicating Partisan Gerrymandering Claims Does Not Exist.

This case only underscores the problems with inserting the judiciary into partisan gerrymandering disputes. Indeed, far from producing a "limited and precise" test, *Vieth,* 541 U.S. at 306 (Kennedy, J., concurring), the district court produced four separate tests, each of which would encourage ever-more redistricting litigation while threatening state-drawn districting maps across the country.

A. The District Court Declined to Establish a Definitive Equal Protection Standard.

The majority first concluded that a districting plan violates the Equal Protection Clause whenever (1) a legislature passes the plan with "discriminatory intent," (2) the plan produces "discriminatory effects," and (3) those effects cannot be attributed to "another legitimate redistricting objective." App.138-39. Variants of this test have failed to persuade this Court before, and this version is no improvement.

The problems begin at the very first step. The district court first suggested that *any* intent to district for partisan advantage should be constitutionally suspect under the Equal Protection Clause, positing that "a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish between an 'acceptable' level of partisan gerrymandering from 'excessive' partisan gerrymandering." App.118. That startling proposition finds no support in this Court's cases. As Judge Osteen highlighted in rejecting the majority's suggestion, this "Court has recognized many times in redistricting and apportionment cases that some degree of partisanship and political consideration is constitutionally permissible in a redistricting process undertaken by partisan actors." App.339; *see also, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("a jurisdiction may engage in constitutional political gerrymandering"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Indeed, even Justices who have concluded that partisan gerrymandering claims are justiciable have acknowledged that *some* degree of districting for partisan advantage is inevitable and

permissible. *See, e.g.*, *Vieth*, 541 U.S. at 344 (Souter, J., dissenting); *id.* at 360 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 164-65 (Powell, J., concurring in part and dissenting in part).

Perhaps recognizing that this extreme theory was a nonstarter, the district court alternatively "assume[d]" that, to satisfy the intent prong of its equal protection test, a plaintiff must prove that "a legislative mapdrawer's predominant purpose … was to 'subordinate adherents of one political party and entrench a rival party in power.'" App.145-46. But a majority of this Court has already rejected such "heightened" intent requirements. *See Vieth*, 541 U.S. at 290-91 (plurality op.); *LULAC*, 548 U.S. at 417-18 (opinion of Kennedy, J.). As the *Vieth* plurality explained, a "predominant intent" standard is much too "vague" and "indeterminate," as "there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation." 541 U.S. at 284-86, 290-91 (plurality op.). In all events, when the exercise is to develop a "limited and precise" test, a test that "assumes" without deciding one of its core components cannot crack the code.

The district court embraced an equally amorphous and unsustainable "discriminatory effects" test. According to the majority, "a plaintiff must show that the dilution of the votes of supporters of a disfavored party … is likely to persist in subsequent elections such that an elected representative from the favored party … will not feel a need to be responsive to constituents who support the disfavored party." App.152. The majority did not purport to identify how

much "bias" must exist or persist, or what evidence will suffice to prove that it does. *But see, e.g.*, *LULAC*, 548 U.S. at 420 (opinion of Kennedy, J.) (asking "how much partisan dominance is too much"). Instead, it concluded that plaintiffs may rely on all manner of social science metrics (district-specific or statewide) to try to prove their case under a "totality of the evidence" approach, and ultimately need only demonstrate that the plan has some "discernible discriminatory effects." App.191-92, 214. Again, that is the antithesis of "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

Moreover, the district court's effects test reflects the deeper incoherence of its approach to partisan gerrymandering. The test is premised on the concern that representatives in partisan-gerrymandered districts may be non-"responsive" to minority-party constituents. But that problem will be most acute in districts where majority-party voters already outnumber minority-party voters by large numbers, and partisan gerrymandering itself tends to avoid the concentration of majority-party voters in a small number of districts. *See Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring). Thus, if anything, partisan gerrymandering tends to ameliorate the purported problem. And in all events, the district court's inevitable resort to "th'ol' 'totality of the circumstances' test," *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting), leaves States in the dark and courts in the driver's seat when it comes to identifying constitutionally compliant maps.

B. The First Amendment Standard Would Preclude *Any* Intent to District for Partisan Advantage.

If the majority's equal protection test would "almost *always*" leave "room for an election-impeding lawsuit," *Vieth*, 541 U.S. at 286 (plurality op.), its First Amendment test is even more problematic. According to the majority, to prove a First Amendment violation, a plaintiff must show: (1) "the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party," (2) "the districting plan in fact burdened the political speech or associational rights of such individuals or entities," and (3) "a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan." App.286.

Rather than assume that some degree of partisan gerrymandering is both inevitable and permissible, the majority wholeheartedly embraced the notion that the intent prong of this test is satisfied whenever districting for partisan advantage is *any* part of a legislature's motivation. *But see, e.g.*, *Hunt*, 526 U.S. at 551 ("a jurisdiction may engage in constitutional political gerrymandering"); App.339 (Osteen, J., concurring in part and dissenting in part) (collecting cases stating same). Furthermore, the district court's effects prong is proven whenever that intent has anything more than a "*de minimis*" "chilling effect or adverse impact" on any First Amendment activity, be it the desire to vote, motivation to engage in political discourse, or "raising money, attracting candidates, and mobilizing voters to support … political causes

and issues." App.288, 291. And its circular "causation" prong asks only whether the impacts of the legislature's intent to district for at least some degree of partisan advantage can be explained by something other than its intent to district for at least some degree of partisan advantage in other words, it asks only whether the legislature did in fact intentionally district for at least some degree of partisan advantage. App.299.

As Judge Osteen observed in rejecting it, this novel test would "foreclose all partisan considerations in the redistricting process" and render *any* degree of districting for partisan advantage constitutionally verboten, App.343-44 a proposition that members of this Court have squarely and repeatedly rejected, *see, e.g.*, *Vieth*, 541 U.S. at 294 (plurality op.) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting[.]"). Moreover, as with its flawed equal protection test, the district court's First Amendment test reflects deeper doctrinal incoherence. For example, the test ignores that there are First Amendment values on both sides of the political ledger, as the political parties that purportedly stand to benefit from partisan gerrymandering are themselves associations that powerfully promote First Amendment values. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 434 (2001).

Thus, even assuming this Court were to find partisan gerrymandering claims justiciable under the First Amendment, there is no way the standard adopted below can be the right one. It makes little doctrinal sense, would invalidate nearly every

legislatively drawn districting plan in the country, and would essentially substitute the federal judiciary for the state legislatures as the ultimate mapdrawers. That result would be impossible to square with this Court's repeated reaffirmation of the primary role of the States in the redistricting process.

C. The Elections Clauses Standards Are Entirely Novel and Would Preclude *Any* Intent to District for Partisan Advantage.

Finally, the district court's novel conclusion that judicially manageable standards to police partisan gerrymandering have been lurking in the Elections Clauses all along is the *ne plus ultra* of doctrinal incoherence.

Section 2 of Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," *see* U.S. Const. art. I, §2, and Section 4 provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," *id.* §4. In the district court's view, partisan gerrymandering violates Section 2 because it deprives "the People" of their right to elect Representatives, App.306-07, and it violates Section 4 because it "exceeds" the States' "delegated authority under the Elections Clause," App.303.

Indeed, according to the district court, "'manipulat[ing]' … district lines" for "partisan advantage" *always* "exceeds" a State's powers under the Elections Clause because it is not "fair" or "neutral," and it *always* deprives "the People" of their right to elect their Representatives because the

legislature is purportedly "choos[ing]" for them. App.307, 311. Thus, according to the decision below, the quest for partisan gerrymandering standards in the Equal Protection Clause or the First Amendment and the need to determine "[h]ow much political motivation and effect is too much," *Vieth*, 541 U.S. at 297 (plurality op.) matters only for state and local elections. As to congressional elections, a judicially manageable framework has existed all along in the Elections Clauses, and the tolerable amount of political motivation in congressional redistricting is precisely zero.

There is no historical precedent whatsoever for that sweeping proposition, and that "lack of historical precedent" is itself a "telling indication of the severe constitutional problem" it poses. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 505 (2010). This Court has already concluded that the Elections Clauses "leave[] *with the States* primary responsibility for apportionment of their federal congressional … districts." *LULAC*, 548 U.S. at 414 (emphasis added). And those provisions "clearly contemplate[] districting by political entities," which "unsurprisingly … turns out to be root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285-86 (plurality op.). Accordingly, when the plaintiffs in *Vieth* proposed a partisan gerrymandering standard grounded in the Elections Clauses, the plurality emphatically "conclude[d] that neither Article I, §2, nor … Article I, §4, provides a judicially enforceable limit on the political considerations that the States … may take into account when districting." *Id.* at 305. No other member of the Court even deemed the plaintiffs' Elections Clauses arguments worthy of mention. And

since then, other courts have rejected them. *See, e.g.*, *Agre v. Wolf*, 284 F. Supp. 3d 591, 592 (E.D. Pa. 2018) (Smith, J.); *id.* at 631 (Shwartz, J., concurring).

In short, while the Framers generally left state elections to the States, the Framers focused specifically on congressional elections and delegated authority over them to state political bodies subject to oversight by the federal Congress. The idea that such a double delegation to state and federal legislatures is the font for the one and only judicially administrable limit on partisan gerrymandering (with a zero-tolerance standard to boot) strains credulity and underscores how many rocks the district court looked under to find a workable test. In reality, no such test exists, because partisan gerrymandering claims inevitably suffer from elemental standing and justiciability problems that preclude the development of judicially discernible and manageable standards for adjudicating them. But whatever else is true, an administrable test will have to come from this Court and has not yet been identified by the district court here. Thus, the case for this Court's plenary consideration of this appeal could not be clearer.

Finally, even if this Court were to articulate an administrable test for partisan gerrymandering, the 2016 Map would not violate it. If the Court were to identify a limited and precise test designed to ferret out the most extreme partisan gerrymandering, it would not condemn a map that adopted traditional districting criteria and conforms with such criteria to a degree not seen in the jurisdiction for a quarter century; indeed, after years of maps that split anywhere from 21 to 44 counties and upwards of 77

precincts, the 2016 Map divides only 13 counties and splits only 12 precincts. *See* pp.4-5, *supra*. There are multiple reasons for this Court to conclude that policing partisan gerrymanders on direct appeal is no proper role for this Court. But even if the Court someday discerned a test for identifying true outliers, that test would leave the 2016 Map undisturbed.

CONCLUSION

This Court should set this case for plenary consideration.

Respectfully submitted,

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October 1, 2018

Exhibit C

No. 18-_____

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,

Appellants,

v.

O. JOHN BENISEK, *et al.*,

Appellees.

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

JURISDICTIONAL STATEMENT

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DECEMBER 2018

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QUESTIONS PRESENTED

1. Are the various legal claims articulated by the three-judge district court unmanageable?

2. Did the three-judge district court err when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections?

3. Did the three-judge district court abuse its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs: O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine;

Defendants: Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chairman of the Maryland State Board of Elections.

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JURISDICTIONAL STATEMENT

In this case, a fractured three-judge district court adopted unprecedented and unworkable theories of First Amendment retaliation in striking down Maryland's 2011 congressional districting plan on the basis of partisan gerrymandering. Not only do the court's three separate opinions suffer from significant errors, the court's injunction imposes "traditional criteria for redistricting" not found in the Constitution nor any statute, and places unprecedented restrictions on what information legislators may consider in redrawing district lines. Given the multiple and substantially contradictory opinions and theories generated by the three-judge district court, this Court's plenary review is needed to supply Maryland's officials and legislators with essential guidance on what they are permitted to consider in crafting a congressional districting plan.

Last term, on appeal in this same case, this Court undertook plenary review of the three-judge court's denial of plaintiffs' request for preliminary injunctive relief. The lower court had denied relief because it could not conclude that plaintiffs were likely to succeed on the merits and because then-pending *Gill v. Whitford*, 138 S. Ct. 1916 (2018), might "set forth a 'framework' by which plaintiffs' claims could be decided[.]" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). This Court affirmed the order denying preliminary relief on grounds that included plaintiffs' "years-long delay" in pursuing injunctive relief, their failure to plead their First Amendment claim until 2016, and the reasonableness of withholding relief "to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs'

claims" and thereby avoid "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1944, 1945 (citation omitted). As it turned out, however, this Court's decision in *Gill* did not articulate the correct standard to apply in evaluating a partisan-gerrymandering claim.

On remand from this Court, the three-judge court decided already-pending cross-motions for summary judgment. By that time, this Court had been asked to review a partisan-gerrymandering decision of a North Carolina three-judge court, which had recognized and adjudicated four distinct varieties of a partisan-gerrymandering claim. *Rucho v. Common Cause*, No. 18-422. Nevertheless, the court below forged ahead, granted summary judgment to plaintiffs, and entered a permanent injunction against Maryland's 2011 plan. The court produced two incompatible majority opinions, and a third opinion concurring in both. In the process, the court recognized a new, additional type of injury for the retaliation claim it had earlier recognized: denial of First Amendment associational rights.

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. App. 1a-77a. Previous opinions are reported at 266 F. Supp. 3d 799 (D. Md. 2017), and 203 F. Supp. 3d 579 (D. Md. 2016). App. 82a-171a, 172a-225a.

JURISDICTION

The district court issued its decision on November 7, 2018. Appellants filed their notice of appeal on November 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. This case is the last of several challenging Maryland's 2011 congressional districting plan, enacted in light of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701–8-709 (2017 Repl. Vol.). In June 2012, in an earlier case, this Court summarily affirmed a three-judge court's decision rejecting both racial-gerrymandering and partisan-gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). Although the 2011 plan made "it more likely rather than less likely that a Democrat . . . is able to prevail in the general election," Dkt.

186-2, 43:7-10, in *Fletcher*, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 903.

Now, more than six years after *Fletcher*, a separate three-judge district court has reached the opposite conclusion and found that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." App. 51a. In reaching that conclusion, the district court rejected evidence that the redrawn map met nonpartisan legislative goals and priorities, responded to concerns expressed by Sixth District voters and candidates, and returned that district to a more traditional configuration. Rejecting that evidence as "post-hoc rationalization," App. 55a, the district court found more believable plaintiffs' preferred narrative that Democrats designed the map with "a narrow focus" to "ensure the election" of an additional Democratic representative in the State's congressional delegation. App. 48a. That intent, the court believed, established that plaintiff Republican voters in the Sixth District had met their burden of proving a First Amendment retaliation claim of harm to their representational and associational interests. App. 56a, 64a.

2. It is undisputed that Maryland's 2011 congressional districting plan was the culmination of a months-long process of drafting work by State legislative staffers, followed by public hearings. Dkt. 104 ¶¶ 18-23, 26; Dkt. 186-2, 53:12-54:7. The final map met

significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

a. First, the 2011 plan eliminated a geographic anomaly, first introduced in Maryland's 1991 congressional districting plan and continued in the 2002 plan. That is, beginning in 1991, Maryland's First District had contained portions of both the eastern and western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This configuration protected an incumbent Republican representative, who had sought "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting). The 2011 plan eliminated the Bay Bridge crossing by extending the northern portion of the First District westward into precincts formerly contained within the Sixth District.

Second, the 2011 plan accommodated the request of the Maryland Legislative Black Caucus to reduce from three to two the number of districts having territory in Prince George's County. *Fletcher*, 831 F. Supp. 2d at 902. This required shifts in population in the Fourth and Eighth Districts, as well as the Sixth District, which borders the Eighth.

Third, the 2011 plan retained as majority-minority districts both of Maryland's Section 2 Voting Rights Act districts (the Seventh and Fourth Districts),

which necessitated shifts elsewhere to accommodate population changes in those districts.

Fourth, the map developed through this process connected Frederick and Montgomery Counties via I-270 and made the I-270 corridor a major feature of the Sixth District. Dkt. 186-11 ¶ 9.

Finally, in addition to meeting these significant legislative goals, Governor O'Malley expressed that "part of [his] intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less. Dkt. 186-2, 47:2-5.

b. The final map also responded to concerns expressed during public hearings. Sixth District voters had "advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County." App. 19a. The residents explained that these changes were needed to "mak[e] it viable for someone to reach the voters, and in terms of better representing the population." App. 20a. A former plaintiff in this action, Stephen Shapiro, described the associational harms caused by the then-existing map and lamented the "decreased turnout and interest" in the general election caused by packing in the Eighth District, which yielded results he characterized as "usually a foregone conclusion." Dkt. 186-3, 66. Other Sixth District Democrats felt "shut out of the process" because "their politics weren't represented at all at the national level." *Id.* at

27. One Democratic candidate explained that the then-existing map made it difficult to campaign because the former Sixth District encompassed a huge swath of geographic territory centered on two different metropolitan areas. *Id.* at 21-24; *see id.* at 12, 16-17.

3. The congressional redistricting statute was enacted in substantially the same form as proposed, and it was then petitioned to statewide referendum, with a sizable majority of voters approving the legislation in the November 2012 election. App. 22a-23a. The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth District.[1] Dkt. 104 ¶ 39.

4. The subsequent elections reflected a more invigorated electorate, with the new Sixth District's voters favoring Republicans in some races and Democrats in others. *See* Dkt. 186-19, 11. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, Dkt. 186-50, and turnout among Republicans increased between the 2008 and 2012 presidential elections, Dkt. 186-51. Although turnout in the 2014 gubernatorial primary was down statewide, from

[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

25.35% in 2010 to 21.81% in 2014,[2] Republican turnout in Garrett, Allegany, and Washington Counties outpaced Democratic turnout in the 2014 gubernatorial primary. *Id.* And, notwithstanding small variations in contributions to local Republican central committees, contributions to then-incumbent Republican Congressman Roscoe Bartlett's campaign committee in 2012 were more than *twenty-five times* those received in 2010.[3]

Post-redistricting, plaintiffs maintained or increased their own associational activities. All the plaintiffs voted regularly after the 2011 redistricting. Dkt. 186-20, 11:19-12:10; Dkt. 186-43, 10:21-11:1; Dkt. 186-44, 13:15-17; Dkt. 186-25, 14:17-15:16; Dkt. 186-24, 11:6-12; Dkt. 186-45, 18:12-18; Dkt. 186-36, 12:10-17. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and subsequently became a member of the Washington County Republican Central Committee and the Washington County Republican Club. Dkt. 186-43, at 13:15-14:14; 24:2-5. Plaintiffs Ropp and Strine were also active in local Republican

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[2] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

[3] *Compare* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ (Post-General 2010, reporting $46,091.96 in total contributions for reporting period and election cycle-to-date) *with* http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (Post-General 2012, reporting $1,185,434.87 in same).

political campaigns both before and after the redistricting. App. 26a-27a.

5.a. The plaintiffs filed this action in November 2013. On December 8, 2015, this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

b. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. App. 84a. They asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. App. 172a-225a. The majority held that a judicially manageable standard existed to adjudicate the plaintiffs' vote-dilution (or "representational-rights") claim. Under that standard, plaintiffs must show that (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree

that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months after the court's decision, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. Dkt. 177. After oral argument, the district court denied the request for preliminary injunction, declined to dispose of the parties' fully briefed cross-motions for summary judgment, and entered a "stay pending further guidance" from this Court's disposition of *Gill v. Whitford*, No. 16-1161. App. 83a & n.1.

In denying preliminary injunctive relief, the court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. App. 83a. The court deemed plaintiffs unlikely to succeed in carrying their burden of proving it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." App. 100a.

On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. Dkt. 205. After hearing argument, this Court issued its June 18, 2018 *per curiam* opinion noting its jurisdiction and affirming the district court's denial of the preliminary injunction. *Benisek*, 138 S. Ct. 1942. This Court concluded that, even assuming that plaintiffs were able to show a likelihood of success on the merits, their delay in seeking injunctive relief and the public's interest in orderly elections supported the district court's denial of injunctive relief and stay of proceedings pending this Court's decision in *Gill*. *Id.* at 1944-45.[4]

6.a. On remand, the parties requested leave to brief the district court on how this Court's *Benisek* and *Gill* rulings affected the pending summary judgment motions. The plaintiffs also informed the district court that no further discovery would be necessary. Dkt. 209, 1. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. Dkt. 210, 7-19. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which the evidentiary record was less developed. *Id.* at 19-22.

Attempting to buttress their new associational-rights claim, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections'

[4] On that same day, this Court also issued its ruling in *Gill*, 138 S. Ct. 1916, vacating and remanding to allow plaintiffs to demonstrate "concrete and particularized injuries" to establish standing to assert their partisan-gerrymandering claims. *Id.* at 1934.

website, together with lay opinion testimony from one of their attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. Dkt. 210-3; Dkt. 210, at 16-17. Plaintiffs also submitted campaign-finance reports retrieved from the Maryland State Board of Elections, which they claimed showed declines in contributions to local Republican Party committees in relevant areas before and after the implementation of the 2011 map. Dkt. 210-3, at 7-8; Dkt. 210, at 17-18. Defendants moved to exclude this evidence because the data was hearsay, outside the affiant's personal knowledge, not part of the discovery record, and not otherwise subject to judicial notice, and because the attorney's lay analysis of election-return data constituted inadmissible lay opinion testimony. Dkt. 215, at 1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections, on the grounds that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. Dkt. 219, 2.

b. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018. *See* App. 1a-77a; 78a-81a. Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both of their First Amendment retaliation theories of vote dilution and impairment of associational rights. App. 4a. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational rights theory alone,

App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, App. 69a-70a.

With regard to the representational-rights claim, Judge Niemeyer applied the standard the district court developed at the motion-to-dismiss stage and concluded that plaintiffs had established each element of their claim. App. 48a. As to intent, he found that Maryland Democratic officials worked with "precise purpose" to "flip the Sixth District from safely Republican to likely Democratic." App. 48a, 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," App. 52a, even if the district had become more electorally competitive, because "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting." App. 53a. He added that, although not essential to the conclusion, "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence" of injury. *Id.*

Finally, as to causation, Judge Niemeyer found that only retaliatory intent explained the Sixth District's boundaries. App. 54a-56a. In so ruling, he rejected as "utter[ly] implausib[le]," the State's evidence of alternative motivations, described above, for the redrawing of the district, including the western extension of the First District into territory previously

occupied by the Sixth District "to prevent the new First District from crossing the Chesapeake Bay," and "grouping residents along the Interstate 270 corridor," who previously resided in separate districts, into the Sixth District. App. 55a. He deemed the State's evidence of alternative motivation irrelevant in light of "the undisputed fact" that "the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic Control." *Id.*

Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the one the district court established for evaluating plaintiffs' representational-rights claim, except that "in lieu of the harm involving a burden on representational rights, [plaintiffs] must prove a harm involving a burden on their associational rights," namely, "that the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims." App. 59a. Plaintiffs satisfied that burden, he explained, because several indicators of "voter engagement in support of the Republican Party" in the Sixth District "dropped significantly." App. 62a. These indicators included voter turnout data and fundraising data—including data that was the subject of the State's motion to strike in advance of the summary judgment hearing, *see* Dkt. 215-1; App. 28a, 63a (citing fundraising data submitted with supplemental briefing); App. 74a-75a (concurring opinion of Judge Bredar citing the same).

Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for

injunctive relief. App. 64a-65a. He opined that plaintiffs' delay in pursuing relief need not be considered in determining whether to enter a permanent injunction, and, contrary to this Court's conclusion, *Benisek*, 138 U.S. at 1944, found that the case's "protraction cannot be attributed to the plaintiffs[.]" App. 66a. According to Judge Niemeyer, an election in 2020 with the current map—even if only for one election cycle—would irreparably harm plaintiffs, whereas ordering a new map for the 2020 election would not unduly disrupt the election process, despite the inevitable need to redraw that map yet again to reflect results of the 2020 census. App. 65a-67a.

In awarding judgment to plaintiffs, the district court enjoined the State from conducting any further elections under the 2011 map, and directed the State to submit for the district court's approval a new congressional districting plan that redraws the boundaries of the Sixth District "applying traditional criteria for redistricting . . . and without considering how citizens are registered to vote or have voted in the past or to what political party they belong." App. 78a-79a. If the State fails to submit a map, or if the district court declines to approve the map, a court-appointed commission will assume the responsibility of drawing and submitting a map to the three-judge court for approval. App. 79a-80a.

c. On November 15, 2018, the defendants filed a notice of appeal, App. 226a, and filed a consent motion to stay the district court's judgment during the pendency of the appeal, Dkt. 226. On November 16, 2018,

the district court granted in part the stay motion, and stayed the proceedings until the earlier of this Court's disposition of the appeal or July 1, 2019. Dkt. 230.

ARGUMENT

I. The Three-Judge District Court Did Not Set Forth a "Limited and Precise" Test for Adjudicating Partisan-Gerrymandering Claims.

The First Amendment retaliation formula adopted here has one principal disqualifying flaw: it does not resolve the "central problem" for a court attempting to address a claim of partisan gerrymandering. *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). As the plurality emphasized in *Vieth*, and all justices there acknowledged in one way or another, that central problem is determining when the redistricting process, which is "root-and-branch a matter of politics," *id.* at 285, nonetheless "has gone too far," *id*. at 296.

A. The Three-Judge Court's Standards Would Preclude Districting for Proportional Representation, Which This Court Has Long Approved.

The standards employed in the three-judge court's two majority opinions do not amount to a "limited and precise test" for adjudicating partisan-gerrymandering claims, primarily because, however one parses their contradictory analyses, they insist on proscribing

activity that this Court has repeatedly held to be permissible.

In *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the Court rejected a challenge to a Connecticut proportional districting plan that drew "virtually every" line with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." In upholding the plan, the Court refused to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752; *see Gill*, 138 S. Ct. at 1927. But the three-judge court's standard would condemn the maps that this Court upheld in *Gaffney*, which were drawn with express reference to voters' political affiliations so as to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752.

With regard to representational injury, Judge Niemeyer's opinion likened political vote-dilution to the numerical dilution caused by an overpopulated district and reasoned that citizens "have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." App. 42a. Accordingly, his opinion reaffirmed the intent, effect, and causation standard he first articulated in *Shapiro*, 203 F. Supp. 3d at 596-97. App. 43a. In articulating this standard, the opinion did not define what constitutes a "tangible and concrete adverse

effect" in this context. Instead, it merely referenced similarly indeterminate language—"*the plaintiffs must show only that their electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened*," App. 52a—before simply announcing that the element was satisfied in this case, App. 53a. This standard allows for no consideration of party affiliation and thus, it is inconsistent with the decision in *Gaffney*, which allowed consideration of party affiliation to achieve proportional representation.

The three-judge court's associational rights claim suffers from the same defects. In addition to the same "intent" and "causation" elements required for a vote-dilution claim, the associational-rights standard looks to whether "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a, 72a. Specifically, the court concluded[5] that the "atmosphere of general confusion and apathy" that resulted from the redistricting caused (unmeasured and unspecified) decreases in "fundraising, attracting volunteers, campaigning, and generating interest in voting." App. 63a.

But any redistricting, for any reason, risks generating an "atmosphere of general confusion and apathy," *id.*, among those residents who are reassigned to different districts and must therefore shift their associational activities, at least with regard to congressional campaigns, to the new geographic alignment. Thus,

[5] As discussed below in part II, these conclusions were based on improper resolution of factual and evidentiary disputes.

evaluating associational harm rather than representational harm does not free the court of the significant line-drawing problems posed by the vote-dilution injury, because any redistricting impacts some individuals' associational rights. This problem of line-drawing cannot be averted merely by resorting to the three-judge court's element of partisan intent, which contains no means of distinguishing between permissible and impermissible political considerations.

Finally, as if to underscore the standard's incongruity with this Court's precedent, the three-judge court directed the State "to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections," App. 67a, and *expressly prohibited* the State from "considering how citizens are registered to vote or have voted in the past or to what political party they belong" in doing so, App. 79a. The State is thus precluded from, for example, adopting a map that seeks to approximate the strengths of Democrats and Republicans statewide (as this Court permitted in *Gaffney*). The three-judge court's opinions and injunction fail to set forth workable standards for adjudicating partisan-gerrymandering claims, because they foreclose considerations that this Court has long held to be permissible.

B. The Three-Judge Court Impermissibly Assumes That Preexisting District Configurations Are the Constitutional Benchmark.

The intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map. The three-judge court has stated that legislators may not intend "to flip" a challenged district "from safely Republican to likely Democratic." App. 49a. Judge Niemeyer's opinion reduces the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." App. 50a-51a. It is no less impossible to evaluate whether something was or was not intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," App. 52a, without consideration of the electoral advantages enjoyed under the prior map. So, too, does the associational harm require comparison to associational activity under the prior map to determine whether the new map "burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a; App. 75a (party members harmed if "severed from their preferred associates" in the prior district); *see* App. 61a-63a (comparing pre- versus post-redistricting data).

In all these respects, the three-judge court's opinions test the constitutionality of a redistricting plan by comparing the current districting plan to the status

quo ante. But there is no *constitutional* reason to believe a prior district "has any special claim to fairness," particularly where the old district "was formed for partisan reasons." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 446-47 (2006) (Kennedy, J.). On the contrary, any standard that invests the prior district with the power to invalidate subsequent legislative acts altering its borders will almost inevitably yield absurd results. Among them are the impairment of a legislature's ability to remedy a past partisan gerrymander. Under the three-judge court's test, claims from those voters whose districts did not change, and are therefore still affected by the prior gerrymander, would be barred, because they could not show that their vote was diluted or their associational opportunities diminished compared to the prior districting map. But claims from voters who were newly in a political minority as the result of legislation *curing* a prior partisan gerrymander would be actionable because claimants would be able to demonstrate that the legislature could and did "flip" the makeup of their district intentionally. *See* App. 50a.

If that is so, the State would be unable to "avoid liability," because its interest in remedying past gerrymandering would be, in the three-judge court's estimation, not a "compelling government interest." App. 43a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders, and remedy for those past ills would be available, if at all, only from the courts. Such a result directly conflicts with "'what has been said on many

occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

If the goal of recognizing a partisan-gerrymandering claim is to remedy excessive or unfair partisanship, then prior districts are more likely part of the problem rather than the solution. Enshrining pre-existing maps as the constitutional touchstone for future redistricting may perpetuate the nationwide political dominance of one party. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 Electoral Studies 329, 336, 337 fig. 4 (2016) (discussing the two major parties' relative control over states' redistricting processes).

The three-judge court's premise, that the constitutionality of a redistricting plan under consideration depends entirely on the configuration of the prior map, will not provide a judicially manageable test for determining partisan gerrymanders.

C. Neither of the Three-Judge Court's Dueling Standards Provides the Requisite Guidance to Legislators on How to Redistrict Within Constitutional Limits.

In adopting a standard based in First Amendment retaliation with no definition of what would constitute

impermissible effects, the three-judge court fell short of establishing a "limited and precise rationale" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Judge Niemeyer's opinion identified two types of potential injury: (1) a "meaningful[ ] burden" on the plaintiffs' "representational rights," which the court also described as "a concrete electoral disadvantage," App. 52a; and (2) a "burden[on] the targeted citizens' ability to associate in furtherance of their political beliefs and aims," App. 59a. The opinion further explained that there no longer need be any showing "that the linedrawing altered the outcome of an election," App. 52a, and thus abandoned a requirement imposed in both of the three-judge court's prior decisions, App. 108a-109a, 202a. As for the newly identified associational harm, the court relied only on (1) a drop in turnout in a single primary election in which the statewide turnout was also depressed, and in which Democratic turnout was lower than Republican turnout, App. 62a; (2) hearsay statements that non-plaintiffs experienced "a lack of enthusiasm," App. 62a; and (3) a singular statement from a singular plaintiff that he felt " 'disoriented' by and 'disconnected' from his new congressional district," App. 63a; *see* App. 74a-75a.

Judge Bredar's separate majority opinion does not illuminate. He asserts that adopting a test based in associational harm "poses no line-drawing problem," App. 71a, but requires only a showing that the District "deprives the disfavored group of voters of its 'natural political strength,' " App. 73a (quoting *Gill*, 138 S. Ct.

at 1938 (Kagan, J., concurring). Just as Judge Niemeyer's vote-dilution injury lacks any method to measure how much is too much, Judge Bredar provides no method for determining the "natural political strength" of any political association that would aid courts in determining whether that strength has been diminished, particularly where the decade preceding redistricting has seen considerable shifts in migration, commuting patterns, or demographics within a district. Both alternative paths provided below attempt to identify "a burden," but neither defines that burden "as measured by a reliable standard," something "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do." *LULAC*, 548 U.S. at 418 (Kennedy, J.).

For legislators interested in avoiding "an election-impeding lawsuit contending that partisan advantage was the predominant motivation," *Vieth*, 541 U.S. at 286 (plurality op.), a standard for measuring burden is indispensable. This need is acute because the identified burdens will be present, in some amount, in every redistricting. As explained more thoroughly in Brief for Appellees at 28-30, *Benisek*, 138 S. Ct. 1942 (No. 17-333), defining "vote dilution" as an injury without specifying any means to evaluate the quantity or impact of the asserted dilution does not present a judicially manageable standard. Moreover, here, the court's standard provides no practical limit on potential claims—a political group could bring suit alleging a "concrete electoral disadvantage," even if they consistently win

elections but must expend additional effort in order to do so.

The identified associational harms particular to the facts of this case are similarly unlimited. It will not be hard, after any redistricting, to identify a few members of any political party or association who find themselves newly in a congressional district different from that of their neighbors. Anyone whose residence is reassigned to a new district could feel "disoriented" by redistricting, and disenchantment with the political process is common enough to be found on either side of a district line. The court required no evidence that associations suffered an adverse impact to their membership, or evidence showing exactly how their members' activities were curtailed or limited. To the contrary, ample evidence shows that the newly competitive Sixth District increased participation in political associations and activities among the plaintiffs and in the general electorate. *E.g.*, *supra*, 7-9. If the evidence in this case meets the test for associational harm, then those harms will be present in each redistricting.

A legislature will face difficulty in demonstrating it has *not* acted with the intent the three-judge court prohibited. This Court has long recognized that direct inquiries into legislative "motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Broad and frequent inquiries into legislative motive "'undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (citation omitted). A search for

retaliatory intent is especially fraught because it raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The three-judge court's standard endorsed a wide-ranging inquiry into legislative intent, relying on such varied sources as statements from legislators who did not hold leadership positions and were not involved in the map drafting, App. 20a-24a; legislators who opposed the proposed plan,[6] App. 24a; deposition testimony of a former Governor, App. 49a-50a; deposition testimony of a consultant who prepared a map *rejected* by Maryland decisionmakers, App. 48a; and Congressional aides' inadmissible e-mails that had no obvious relation to the Sixth District, App. 22a. These evidentiary sources are more problematic than even the legislative testimony admissible in an "extraordinary instance[ ]." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

The three-judge court describes their requisite intent standard as "retaliatory." Their expansive definition, which would encompass any intent to take an

[6] *See Bryan v. United States*, 524 U.S. 184, 196 (1998) (" 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' . . . 'In their zeal to defeat a bill, they understandably tend to overstate its reach.' " (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964))).

action "based on the persons' political affiliation and voting" if such an action "burden[s] their representational rights," does not derive from "well developed and familiar" First Amendment retaliation standards. *Baker v. Carr*, 369 U.S. 186, 226 (1962). Under those standards, a government official must act with "vengeful" intent to punish or fail to reward an individual "for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But here, no government official examined individually the expressive activity of any plaintiffs or any association to which they belong. *See*, *e.g.*, *Moss v. Harris County Constable Precinct One*, 851 F.3d 413, 421 (5th Cir. 2017) (no retaliation claim where government had no knowledge of the individual's expressive conduct). Moreover, there is no government official to whose intent the map may be attributed. Instead, the 2011 Congressional map was approved directly by the people of Maryland, including majorities in three majority-Republican counties within the Sixth Congressional District.[7]

II. The Three-Judge Court Erred by Departing from the Summary Judgment Standard When It Resolved Disputes of Material Fact and Made Credibility Findings.

In addition to the theoretical flaws in the three-judge court's adopted standards, reversal is necessary because the court committed a more extreme version

[7] *See* https://elections.maryland.gov/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

of the error for which this Court reversed a three-judge court's entry of summary judgment in *Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999). That is, the court below resolved issues of "disputed fact," "credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due," and otherwise engaged in "'[c]redibility determinations'" and "'the weighing of the evidence,'" which are functions for the trier-of-fact and "not suited for summary disposition." *Id.* at 552, 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). But unlike *Hunt*, where the court resolved disputed facts as to only one element of a racial-gerrymandering claim, *i.e.*, the legislature's "impermissible racial motivation," 526 U.S. at 552, the three-judge court here resolved disputed facts pertaining to multiple elements of plaintiffs' claims, and did so by crediting and relying on evidence that is the subject of still-unresolved hearsay and other timely objections to admissibility. The court selectively highlighted facts and drew inferences in plaintiffs' favor, in the face of contradictory evidence favorable to the State, which the court either discounted or chose not to mention.

Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the requirement that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Id.* at 552 (quoting *Anderson*, 477 at 255). As *Hunt* suggests, this has added significance in a redistricting challenge, because of "'the sensitive nature of

redistricting,'" "'the presumption of good faith that must be accorded legislative enactments,'" and "'the intrusive potential of judicial intervention into the legislative realm'"—considerations that tend to "tip the balance in favor of" the need for a trial before "making findings of fact" adverse to defendants. 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995)). Indeed, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9; precedent suggests no reason summary judgment should be more lightly granted to plaintiffs bringing partisan-gerrymandering claims. Thus, even if plaintiffs' evidence "might *allow* the District Court to find" in their favor after a trial, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Id.* at 552-53 (emphasis in original). Rather than heed these concerns and accord defendants the requisite belief and benefit of inferences, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See*, *e.g.*, App. 50a (stating that "[t]he State's argument . . . rings hollow"). This error infects the three-judge court's conclusions as to all elements of plaintiffs' claims, including injury, intent, and causation.

For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own deposition testimony, that plaintiffs themselves had not suffered chilling or associational injury, but had, instead, become more politically active

post-redistricting. *See* Statement *supra* at 8-9. As the record also showed, the only evidence purporting to indicate chilling of political activity constituted inadmissible hearsay: plaintiffs' descriptions of what some unidentified persons said or felt about voting.[8] Dkt. 201, 16. Those descriptions convey statements by unidentified out-of-court declarants, offered for "the truth of the matter asserted," and thus are hearsay, Fed. R. Evid. 801(c), "inadmissible at trial" and "cannot be considered on a motion for summary judgment," *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998); *see* Fed. R. Civ. P. 56(c)(1)(B), (2), (4). Rather than disregard these hearsay statements, or even venture to address defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," App. 61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible." *Vazquez*, 134 F.3d at 34. *See* App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); App. 62a (same); App. 63a ("she frequently met potential Republican voters who 'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); App. 27a (same); App. 74a (crediting same hearsay statements). The court employed the

[8] The only non-hearsay evidence plaintiffs presented on this subject was deposition testimony of plaintiff Ned Cueman, who described himself as "disoriented" or "disconnected," Dkt. 177-1, 24, but conceded that post-redistricting he continued his political engagement by voting regularly, Dkt. 186-25, 14:17-15:16.

statements for "the truth of the matter asserted." *See* App. 62a (crediting these statements by unidentified declarants as "clear evidence" of "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters"). The court never addressed defendants' hearsay objections to these statements nor identified any applicable exception to the hearsay rule. Instead, the court most inaccurately characterized these hearsay statements as among "undisputed facts of record." App. 61a.

Similarly, to demonstrate that Republican political participation in the Sixth District remained comparatively undeterred after the 2011 redistricting, defendants presented evidence showing increases in the district's Republican voter registration and Republican voter turnout in general elections. *See* Dkt. 186-50; 186-51. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: (1) by looking only at Sixth District Republican voters' low turnout in the 2014 primary, App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[9] and (2) by crediting hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel submitted with supplemental

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[9] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

briefing filed more than 13 months after the close of discovery, approximately a year after cross-motions for summary judgment were briefed, and two weeks after plaintiffs declined the court's invitation to reopen discovery.

Far from being undisputed, the referenced campaign-finance information was the subject of defendants' motion to exclude on grounds of hearsay, the affiant's lack of personal knowledge, and the information's widely recognized inaccuracy, and because campaign-finance reports are unsuitable for judicial notice. Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. Dkt. 219. Instead, it merely cited cases referring to relaxation of standards governing the court's gatekeeper role for expert testimony in a bench trial (a concept inapplicable to the hearsay objections raised in the motion), before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." *Id.* at 2. None of the court's cited cases suggest any relaxation of the need to exclude hearsay in a bench trial. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial" under Rule 802 and "neither this rule nor any other rule or statute creates an exception for bench trials."). Moreover, because the campaign-finance evidence was submitted in the final round of briefing permitted by the court, long after the close of discovery, defendants had no opportunity to probe the information's veracity through discovery or submit rebuttal evidence. In any

case, the selective campaign-finance information cited by plaintiffs' counsel is unrepresentative of overall campaign contributions since redistricting. For example, other campaign-finance reports on file show that contributions to Roscoe Bartlett's campaign committee *increased* by 2,500% between 2010 and the post-redistricting 2012 election.[10]

Similar departures from the summary judgment standard plague the court's intent analysis. For example, the court repeated the error that necessitated reversal in *Hunt* by impermissibly giving greater weight to plaintiffs' evidence of the "legislature's motivation"—"a factual question"—while failing to accept defendants' alternative "motivation explanation as true, as the District Court was required to do in ruling on [plaintiffs'] motion for summary judgment." 526 U.S. at 549, 551. The court embraced plaintiffs' characterization of "the mapmakers' intent," App. 48a, and refused to accept as true, App. 50a-51a, defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions, including the rejection of a Chesapeake Bay crossing; deference to Prince George's County residents' desire for their county to have two districts, neither of them shared by Montgomery County; and heeding constituents' public testimony expressing the importance of having a district to serve the I-270 corridor economic region, *e.g.*, Dkt. 186-11 ¶ 9; *see* Dkt. 201, 3-6 (discussing evidence of varied legislative motives). In so doing,

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[10] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/.

the court weighed evidence. *See*, *e.g.*, App. 14a-16a, 48a-49a (relying heavily on deposition testimony of Congressional staffer Eric Hawkins, Dkt. 177-4, while failing to acknowledge material contradictory testimony in the affidavit of State legislative staffer Yaakov Weissmann, Dkt. 186-11, and elsewhere in the record); App. 13a, 55a (selectively crediting and disbelieving the former Governor's deposition testimony). Once again, the court credited inadmissible hearsay to which defendants had objected, Dkt. 201, 5-6, and did so without addressing the hearsay objection, *see* App. 22a (quoting foundationless hearsay email, Dkt. 177-58).

Perhaps the decision's most conspicuous failure to acknowledge a genuine dispute of material fact appears in its finding that plaintiffs have satisfied the causation element. App. 54a-56a. This conclusion directly contradicts the court's previous determination, based on the same evidentiary record, that it "is not persuaded" that plaintiffs "have met their burden of proof with respect to causation." App. 100a. If, as it previously acknowledged, "the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*," *id.*, then, at a minimum, "the evidence is susceptible of different interpretations or inferences by the trier of fact," and, consequently, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate[.]" *Hunt*, 526 U.S. at 553.

III. Plaintiffs' Unreasonable Delay in Earlier Phases of this Case Precludes Injunctive Relief.

The Court should also note jurisdiction and reverse because the three-judge court abused its discretion both in (1) erroneously concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction, and (2) directly contradicting this Court's finding that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. App. 66a. Entry of an injunction is "a matter of equitable discretion," and success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek*, 138 S. Ct. at 1943. This principle applies equally to requests for preliminary and permanent injunctions. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). This Court has long recognized that these principles apply to election law cases, including redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("equitable considerations" may justify withholding ultimate relief in redistricting case, even where plan violates constitution); *accord Benisek*, 138 S. Ct. at 1944 (principle that diligence is

a requirement for injunctive relief is "as true in election law cases as elsewhere").

Contrary to the three-judge court's assumption that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," App. 66a, other courts have applied equitable principles, including laches, in withholding injunctive relief for constitutional violations when, as in this case, the relief would apply "for only the last election in the decade" prior to completion of the next decennial census. *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 695 (N.D. Ill. 1969) (three-judge court); *Maryland Citizens for Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (same). In the face of "inexcusable and unreasonable" delay, "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290 (11th Cir. 2001) ("over six years" delay justified denying injunction of districting plan); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (three-judge court), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

Proximity to an upcoming census creates a presumption against ordering a map redrawn, because "two reapportionments within a short period of two years would greatly prejudice the [jurisdiction] and its citizens by creating instability and dislocation in the electoral system," "imposing great financial and logistical burdens," and jeopardizing "fair and accurate representation for the citizens" through the use of stale

census data. *White*, 909 F.2d at 104. Courts have recognized the public interest in avoiding injunctions that would necessitate resort to such data, even after a finding in plaintiffs' favor on a claim as well-established as one-person, one-vote. *Skolnick*, 307 F. Supp. at 695 (three-judge court finding plan unconstitutional for lack of population equality but declining to impose injunction); *see Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (Even where prior district boundaries were racially motivated, the "passage of six years" "does caution against wholesale alteration" of district lines "based on out-of-date census figures when the process will in any case have to be done in the immediate future" because of a new census.).

Since the June remand, no circumstance has arisen to alter this Court's evaluation of the balance of equities and weighing of the public interest in light of plaintiffs' dilatoriness. *Benisek*, 138 S. Ct. at 1944. This Court concluded that plaintiffs did not "show reasonable diligence," not only in belatedly requesting a preliminary injunction, but more significantly, in "fail[ing] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id.*

The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs'

own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, it has been seven years, and four general elections, after the 2011 map was adopted, and nearly five years since the original complaint was filed. The loss of the additional election cycle was the direct consequence of plaintiffs' late-filed request for preliminary injunction, an optional litigation strategy that plaintiffs opted to pursue instead of pressing their claim for permanent injunction.

The three-judge court sought to justify its entry of injunctive relief, notwithstanding plaintiffs' delay, by declaring that this case's protracted procedural history "cannot be attributed to the plaintiffs, but to process." App. 66a. That finding directly contradicts this Court's assessment that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. The three-judge court's observation that plaintiffs presented a claim for permanent injunction in their 2013 complaint, App. 66a, does not absolve plaintiffs, because that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944. And, though there remained time to

implement a new plan for the 2020 election when the three-judge court entered its injunction, the court ignored this Court's caution to consider "the legal uncertainty surrounding any potential remedy" when evaluating the impact to the state election system. *Id.* When the three-judge court entered its judgment, App. 78a, a jurisdictional statement had already been filed by defendants in a North Carolina redistricting case, where a three-judge court recognized four separate theories of a partisan-gerrymandering claim, and defendants seek review on grounds including nonjusticiability and lack of standing, among others. Even as those four different standards were poised for review by this Court, the court below added a fifth, and enjoined the State, while the exact contours of these plaintiffs' novel cause of action remained undefined. Under these circumstances, the injunction ordered was an abuse of discretion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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