No. 17-333

In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections*, *and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections*,

Appellees.

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

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Is plaintiffs' First Amendment retaliation challenge to the 2011 partisan gerrymander of Maryland's Sixth Congressional district justiciable?

2. Did the majority below err in holding that, to establish an actionable injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map?

3. Did the majority below err in holding that the *Mt. Healthy* burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders?

4. Regardless of the applicable legal standards, did the majority below err in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016?

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INTRODUCTION

For years leading up to Maryland's 2011 congressional redistricting, plaintiffs were registered Republicans in Maryland's Sixth Congressional District. They were engaged in politics, actively associating with fellow Republicans and casting their votes for Roscoe Bartlett, the incumbent Republican congressman who had represented the district since 1991. Between 2002 and 2010 in particular, voters in the district (including plaintiffs) continued to elect Mr. Bartlett as their congressman.

Democratic government officials—who controlled both houses of the legislature and occupied the governor's mansion in 2011—disapproved. Since receiving an eighth congressional seat in 1963, Maryland had generally sent five or six Democrats and two or three Republicans to the U.S. House of Representatives, roughly reflecting the breakdown of Maryland's electorate. But these officials considered it their obligation in 2011 to bring that to an end—to break the majority in one of Maryland's two Republican districts and ensure a "7-1" House delegation. Early in the process, as Governor Martin O'Malley testified below, "a decision was made to go for the Sixth." 1JA44.

Lawmakers' goal in the Sixth District was a practical one: to dilute Republicans' votes significantly enough to prevent them from reelecting Republican Congressman Bartlett in 2012 or any other Republican after that. There is no doubt about lawmakers' intent on this point—it has been repeatedly acknowledged in officials' public statements (3JA661-664 (¶¶ 40-48)) and in candid admissions by Governor Martin O'Malley in this case (*e.g.*, 1JA79-80).

The objective was achieved. Using big data and cutting-edge redistricting software, mapdrawers meticulously dismantled the Sixth District, removing large swaths of territory dominated by rural Republicans and replacing them with smaller, densely populated areas dominated by suburban Democrats. In total, the mapdrawers cut more than 360,000 citizens out of the district and moved nearly as many back in—vastly more than needed to make the 10,189-person adjustment necessary to comply with the one-person-one-vote rule. The result was more than a 90,000-voter swing in favor of registered Democrats—a complete upheaval for a district in which typically 230,000 voters cast ballots in mid-term elections. The mapdrawers' own analysis at the time showed that Republicans were, as a result, effectively doomed to fail in future congressional elections in the Sixth District. The *Cook Political Report* corroborated this conclusion, calling it the single largest redistricting swing of any district nationwide in 2011. 4JA885-888.

After seeing a closed-door presentation concerning the redistricting plan, one lawmaker gloated to a local reporter: "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." 3JA664 (¶ 46).

The burden on those Republican Marylanders whose votes were deliberately debased by the 2011 redistricting was severe and undeniable. The gerrymander diluted their votes so significantly that Congressman Bartlett, who *won* in 2010 with a 28% margin (4JA1029-30), *lost* in 2012 by a 21% margin (4JA1026). Those living in rural western Maryland,

which borders West Virginia and western Pennsylvania, are now represented by a congressman elected by wealthy suburban Democrats over 150 miles away, just outside Washington, D.C.

What happened in Maryland's Sixth District in 2011—and what is sure to happen all over the Nation in 2021 absent this Court's intervention—is a clear violation of the First Amendment, which forbids States from disfavoring citizens on the basis of their political views. Because plaintiffs had successfully supported Congressman Bartlett and other Republican candidates for office, the Maryland government singled them out for disfavored treatment in the 2011 redistricting. The result was a real and identifiable burden: The gerrymander prevented them from reelecting Congressman Bartlett, disrupted and depressed Republican political engagement in the area, and manifestly diminished their opportunity for political success.

As Judge Niemeyer correctly held below, the First Amendment retaliation doctrine provides a ready-made and justiciable framework for identifying and remedying unlawful partisan gerrymanders like this. But in later denying plaintiffs an injunction, Judge Bredar mischaracterized the nature of the injury inflicted by partisan gerrymanders and refused to hold the State to its burden under *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). This Court should correct those errors, vacate the order below, and remand for further proceedings.

OPINIONS BELOW

The opinion denying the motion to dismiss (J.S. App. 80a-129a) is reported at 203 F. Supp. 3d 579. The opinion denying plaintiffs' motion for a prelim-

inary injunction (J.S. App. 1a-79a) is reported at 266 F. Supp. 3d 799.

JURISDICTION

The district court denied a preliminary injunction on August 24, 2017. Plaintiffs noticed their appeal on August 25, 2017. J.S. App. 130a. The Court has jurisdiction under 28 U.S.C. § 1253. The Court having postponed further consideration of jurisdiction, plaintiffs address the justiciability of their claim in Part I of the Argument.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble."

Article I, Section 2 of the United States Constitution provides in relevant part that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

Article I, Section 4 of the United States Constitution provides in relevant part that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."

STATEMENT

A. Plaintiffs' complaint and the denial of the motion to dismiss

In prior proceedings in this case, this Court held that plaintiffs' First Amendment challenge to Maryland's 2011 gerrymander should have been referred to a three-judge district court pursuant to 28 U.S.C.

§ 2284 because it is "based on a legal theory put forward by a Justice of this Court and uncontradicted by * * * any of [its subsequent] cases." *Shapiro* v. *McManus*, 136 S. Ct. 450, 456 (2015).

On remand, plaintiffs filed an amended complaint that added new plaintiffs and refined their First Amendment claim. J.S. App. 87a. Plaintiffs alleged, *first*, that those responsible for the redistricting expressly considered Republicans' voting histories and political party affiliations (3JA624, 629, 642 (¶¶ 38, 59, 101)), with the acknowledged purpose of disadvantaging those voters because of their past support for Republicans (3JA624, 640-641 (¶¶ 38, 93, 95-97)). Plaintiffs alleged, *second*, that the 2011 redistricting plan did in fact burden Republican voters in the Sixth District by diluting their votes so effectively as to prevent them from electing a Republican representative, as they had in each election over the prior two decades. 3JA624, 638 (¶¶ 38, 85-87). And they alleged, *third*, that defendants cannot meet their burden to show that the consideration of plaintiffs' protected conduct was narrowly tailored to achieve a compelling state interest. 3JA646-648 (¶¶ 120-128).

1. The State moved to dismiss, arguing that plaintiffs' claim is nonjusticiable. The district court, in an opinion by Judge Niemeyer, denied the motion. J.S. App. 80a-111a.

"[W]hen a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens," the majority explained, "the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." J.S. App. 100a. "The practice of *purposefully* diluting the weight of certain citizens'

votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id*. at 101a.

"A plaintiff bringing a garden variety retaliation claim under the First Amendment," the majority went on, "must prove that the responsible official or officials were motivated by a desire to retaliate against him because of his speech or other conduct protected by the First Amendment and that their retaliatory animus caused the plaintiff's injury." J.S. App. 102a. "Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation—a discernible and manageable standard." *Id*. at 104a.

The majority accordingly concluded that a plaintiff bringing a First Amendment retaliation challenge to a partisan gerrymander "must allege that those responsible for the map redrew the lines of his 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." J.S. App. 104a. "[T]his burden is the *injury* that usually takes the form of *vote dilution*." *Ibid*. "But vote dilution is a matter of degree," the majority explained, "and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable

injury." *Ibid.* Thus, "to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." *Ibid.* And "[f]inally, the plaintiff must allege *causation*." *Ibid.*

Crucially, "[t]his standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process." J.S. App. 105a. *First*, "it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts." *Ibid.* "Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed." *Ibid.*

Second, "merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim." J.S. App. 106a.

Finally, "the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have 'an equally effective voice in the election' of a representative." J.S. App. 106a (citation omitted).

Finding that this inquiry was judicially manageable, the court "recognize[d] the justiciability of a

claim challenging redistricting under the First Amendment and Article I, § 2." J.S. App. at 108a.

b. Judge Bredar dissented. J.S. App. 112a-129a. In his view, "[c]ourts are simply not equipped to ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights." *Id.* at 114a. Put another way, according to Judge Bredar, "[c]ourts cannot reliably distinguish between what Plaintiffs would term impermissible 'vote dilution' and the ordinary consequences of an American political process that is organic, fluid, and often unpredictable." *Id.* at 115a. On that basis, Judge Bredar concluded that "Plaintiffs here have [not] discovered a viable solution" to partisan gerrymandering. *Id.* at 129a.

B. Evidence before the district court

The motion to dismiss having been denied, the parties entered discovery. J.S. App. 4a. The evidence demonstrates as follows. See *id.* at 40a-53a.

1. The drafting process

Maryland's 2011 redistricting process was overseen by Governor Martin O'Malley, who set in motion two parallel procedures for the drafting of the map. The first was a superficial, public process led by the Governor's Redistricting Advisory Committee (GRAC). The second was a substantive, backroom process led by Maryland's Democratic congressional delegation and the consulting firm they hired.

Governor O'Malley appointed five members of the GRAC: chairperson Jeanne Hitchcock; Speaker of the House Michael Busch; Senate President Mike Miller; Richard Stewart; and former Delegate James King, the lone Republican. 3JA625 (¶ 43).

The GRAC's mission was "to solicit public input on the map, hold a number of public hearings all around the state, and allow people to voice their concerns, their desires." 1JA36. To that end, it held 12 public hearings around the State during the summer of 2011 concerning both federal congressional and state legislative redistricting plans. 3JA657-658 (¶ 22). About 1,000 members of the public attended the meetings, giving approximately 350 comments. *Ibid*. Because the GRAC was not itself drafting the map, however, there is no evidence that any relevant public comments were actually taken into account by the mapdrawers.

At the same time that the GRAC's public hearings were being held, Governor O'Malley tasked Maryland's Democratic members of Congress—led by self-confessed "serial gerrymanderer" Steny Hoyer (2JA581)—with drafting the redistricting plan behind the scenes. See 1JA57 ("So I had asked Congressman Hoyer, knowing he had many times been through the redistricting process, * * * [to] lead the effort here to inform the Commission about congressional redistricting."). Accord 1JA198 (Maryland Senate President Miller testifying: "Like I told you, [the map was] drawn—it primarily was drawn by the congressional people.").

Congressman Hoyer, in turn, retained NCEC Services to draw the map. 1JA100. NCEC "specializes in electoral analysis, campaign strategy, political targeting, and [mapdrawing] services" (3JA761) for the Democratic Party (1JA97). NCEC's president, Eric Hawkins, was engaged to analyze Maryland's 2011 redistricting plan and to draw maps. 3JA762 ("Eric Hawkins is drawing the maps.") He did this using software called Maptitude for Redistricting.

1JA100-101. Maptitude allows users, among other things, to "[c]reate districts using any level of geography," "[a]dd political data and election results," and "[u]pdate historic election results to new political boundaries." 3JA659 (¶ 28). With Maptitude, data concerning party affiliation and voter history can be used to accurately predict election outcomes under alternative redistricting plans. *Id.* (¶ 30); 1JA151-152, 218-219 (State's mapdrawing expert testifying that "it's obviously not going to be exact," but "it's pretty close").

Detailed data reflecting Maryland citizens' voting histories and party affiliations were compiled for use in the redistricting process (3JA659 (¶ 29)), including precinct-level data on "voter registration, voter turnout and election results" (1JA175). To evaluate the predicted electoral outcomes of the draft maps, Hawkins (and others) used this data and a proprietary metric called the Democratic Performance Index, or DPI. 1JA93, 126. The DPI is expressed as a number between 1 and 100; a score above 50 indicates a district that is likely to be won by a Democrat, while a score below 50 indicates the district is likely to be won by a Republican. 4JA1124. DPI is, in short, a metric that predicts future electoral outcomes by analyzing "past voting history." 1JA93. NCEC calculates two versions of the DPI, called "federal democratic performance" and "state democratic performance." *Ibid.* The two sometimes differ because voters occasionally "split tickets" and vote for one political party in the federal election and another party in the state election. 1JA93-94.

The evidence shows that Hawkins worked directly with Maryland state officials to draft the

2011 redistricting map. While the DPI belongs exclusively to NCEC (1JA126, 188), references to "democratic performance" and "DPI" appear throughout documents produced by Maryland state lawmakers and their staffers. 3JA789-792. Indeed, all of the map files produced by President Miller's aide Jake Weissmann—the staffer who was "primarily charged with using the Maptitude software to create draft plans" onsite (4JA937)—had the DPI metric built into them. 4JA1087. Contemporaneous email traffic confirms that Weissmann was actively collaborating with Hawkins through the very end of the mapdrawing process (see 3JA823, 825), and the evidence suggests that other NCEC personnel held meetings with O'Malley, Miller, and Busch. 3JA793.

Hawkins drew upwards of ten draft congressional maps and analyzed how they would affect the outcomes of future elections if adopted. 1JA100-101. According to a September 15, 2011 NCEC spreadsheet, Hawkins carefully analyzed at least six of his proposed maps alongside proposals submitted by third parties. 3JA794-797. Each of the six NCEC-drafted options would have resulted in a federal DPI of 52 or greater for the Sixth District. *Ibid.* The maps proposed by third parties (and rejected by lawmakers) would have resulted in a far smaller federal DPI for the Sixth District. *Ibid.* The same NCEC spreadsheet noted that the map proposed by the Maryland Legislative Black Caucus, for example, would have resulted in a federal DPI of 39. 3JA794. As Jason Gleason, the chief of staff to Rep. Sarbanes, explained it, the Black Caucus proposal was "a recipe for 5-3 not 7-1." 3JA822.

After conferring with Maryland legislative staffers and refining his maps (1JA144-147, 86-87;

3JA793-797), Hawkins presented two conceptual blueprints for the redistricting plan: "Congressional Option 1" and "Congressional Option 2." 4JA1089. The DPI score for Option 1 was 50.5; for Option 2, the score was 51.4. *Ibid.* Maryland officials deemed Option 1 "not acceptable" (4JA937) and thus pressed forward with Option 2, which became the model for the map that was ultimately enacted. Compare 4JA1098 (fig. 5, "Congressional Proposal 2"), with 4JA1099 (fig. 6, "Final GRAC Map"). One of the notable differences between Hawkins's Option 2 and the final map is that the fine-tuning of the plan increased the Sixth District's DPI yet further, to 53.0. 3JA826.

After Senate President Miller introduced the final map in the Senate, Democrats jammed the bill through both chambers of the General Assembly in just two days (3JA660 (¶ 34))—lightning fast by any measure, leaving no time for debate. The bill was enacted without the support of a single Republican lawmaker (*id.* (¶ 36)), none of whom even saw the final map until it was introduced in the Senate.

2. Evidence of intent

Governor O'Malley and others involved in the redistricting have candidly acknowledged their intent to dilute Republican votes in the Sixth District to prevent Republican voters there from reelecting Congressman Roscoe Bartlett.

According to Hawkins, the dual "goals" of his consulting arrangement with Congressman Hoyer were to maximize "incumbent protection" for Democrat members of Congress and to increase the DPI of the Sixth District "to see if there was a possibility for another Democratic district." 1JA107-108. That is, Hawkins was retained to draw a map that would

protect Democratic incumbents and unseat at least one Republican incumbent, changing the composition of the delegation from six Democrats and two Republicans (a "6-2 plan") to seven Democrats and one Republican (a "7-1 plan"). 1JA104. Accord 1JA108; 3JA823 (email to Jason Gleason stating that Hawkins "worked out a new version of the 7-1 plan").

Hawkins explored two ways of drawing a 7-1 map: one that cracked the Republican majority in the First District and one that cracked it in the Sixth District. 1JA105-106. Because Maryland lawmakers were concerned that targeting the First District would require "jumping over the Chesapeake Bay," which in their view "didn't make a lot of sense" (1JA77), they ultimately chose to target the Sixth District (1JA44). As Governor O'Malley explained at his deposition: "Was a decision made? I suppose in the sense that we decided not to try to cross the Chesapeake Bay, that a decision was made to go for the Sixth." *Ibid*. Accord, *e.g.*, 1JA232 (Miller document acknowledging that the map "target[ed] Roscoe Bartlett").[1]

Governor O'Malley, time and again, confirmed this express goal. He and others in the party leadership wanted to "re[draw] the lines" of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat" in Maryland's congressional delegation. 1JA44. Thus, Governor O'Malley acknowledged that, in addition to complying with the one-person-

[1] Hawkins also considered an "8-0 map," but this proved infeasible given concern for protecting incumbent Democrats. 1JA104. An 8-0 map (like a map targeting the First District alone) also would have necessitated drawing a district across the Chesapeake Bay. See 3JA824.

one-vote principle and the non-retrogression rule of Section 2 of the Voting Rights Act, "it was also my intent to * * * create a district where the people would be more likely to elect a Democrat than a Republican, yes, this was clearly my intent." 1JA79-80. Accord 1JA57, 78-79.

Governor O'Malley's testimony, sufficient in its own right to establish specific intent, is corroborated repeatedly by statements from other lawmakers. See 3JA661-665 (¶¶ 40-51).

To achieve the goal of diluting Republican votes in the Sixth District (making the district "more likely to elect a Democrat than a Republican" (1JA80)), those responsible for the map moved citizens in and out of the district on the basis of their voting histories and party affiliations. The federal DPI, which "take[s] into account past voting history," was the key metric that Hawkins used to flip the Sixth District. 1JA93. Governor O'Malley also expressly confirmed that, to help "create a district that was more favorable rather than less favorable to Democratic nominees" (1JA67), the mapdrawers "look[ed] at voting histories in addition to voting registration—party affiliation." 1JA69.

3. Evidence of burden

a. Given the relatively modest population growth in the district over the prior decade, the alterations to the Sixth District's lines necessary to comply with the one-person-one-vote mandate were slight. The Sixth District "could have reasonably been immune to substantial changes" after the 2010 census, in other words, because "the benchmark district was located in the northwest corner of the state and needed only to shed 10,189 total population—among

whom are children and other unregistered voters—in order to reach population equality." 3JA767.

But to make good on the goal of ensuring that the Republican majority in the Sixth District would not be able to reelect Congressman Bartlett, the mapdrawers changed the boundaries of the Sixth District so that they extended deeply southward, into the Democratic stronghold of Montgomery County. 1JA106-107. As a consequence, the map moved over 360,000 citizens out of—and nearly as many into—the district, shuffling fully half of its population. 3JA772-773. In total, 189 precincts were interchanged between the Sixth and Eighth Districts. 3JA800. The plan removed all areas of Harford, Baltimore, and Carroll counties that previously were within the Sixth District. 3JA801-802. In Frederick County, the plan removed all but the Democrat-leaning areas of the City of Frederick, southern areas of the county, and a narrow geographic connector to the Sixth District (3JA774-775, 784), splitting the county between two congressional districts for the first time since 1840 (1JA181-182). Carroll County also was split for the first time since 1964. *Ibid.*

These targeted subtractions and additions to the district were highly effective at diluting Republican votes, putting Republicans at a concrete electoral disadvantage. "In the course of redrawing the district, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district." 3JA767. Also added to the Sixth District were 7,643 registered Independent voters. 3JA766. This "massive interchange of territory" upended the political complexion of the district. 3JA808.

The numbers require little elaboration. On October 17, 2010, there were 208,024 Republican and 159,715 Democrat registered eligible voters in the district, with Republicans comprising 46.7% and Democrats comprising 35.8% of the total. 3JA656 (¶ 10). After the redistricting, on October 21, 2012, however, there were 145,620 Republican and 192,820 Democrat registered eligible voters in the district; Republicans then comprised 33.3% and Democrats comprised 44.1% of the total. 3JA666 (¶ 53).

The result was a straightforward dilution of Republican votes. See 3JA766. As redistricting expert Dr. Michael McDonald explained, "the evidence is incontrovertible" that the lines of the new Sixth District "diminish[ed] the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district." 3JA764. See also 3JA766-770. The State's principal expert, history professor Allan Lichtman, agreed: "the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6 as compared to the prior redistricting plan." 3JA827. Accord 1JA255-256 (Dr. Lichtman describing the dilution of Republican votes in the Sixth District as "obvious").

The practical consequences of this vote dilution were just as the mapdrawers intended. Whereas Congressman Bartlett had consistently won reelection in the Sixth District by double-digit margins over the past two decades, Democrat John Delaney defeated Bartlett by a 20.9% margin in 2012. 3JA655 (¶8), 666 (¶54). And Delaney won re-election in 2014 (3JA666 (¶ 55)), even as the 2014 "elections saw sweeping gains by the Republican Party in the Senate, House, and in numerous gubernatorial,

state, and local races" throughout the rest of the Nation (3JA878). He won again handily in 2016, with a 14.4% margin. 3JA666 (¶ 56).

The evidence demonstrates that these outcomes were more-likely-than-not attributable to the gerrymander. Most notably, two different predictive metrics showed that—because of the huge shift in the district's population from mostly Republican voters to mostly Democratic voters—the chances of a Republican victory in the district dropped from 99.7%-100% in 2010 to just 6%-7.5% in 2012. J.S. App. 53a, 69a. According to the *Cook Political Report*, this was the single "most dramatic alteration[]" in a district's political complexion in 2011 anywhere in the Nation. 4JA885-888.

Take first the federal DPI—the proprietary metric used by the mapdrawers themselves to flip the Sixth District. Prior to the redistricting in 2011, the district's DPI stood at 37.4. 3JA826. An analysis of the DPI conducted by NCEC shows that among the congressional districts with a DPI below 40.0 in 2016, not a single one was won by a Democratic candidate regardless of the specific circumstances of the race. See 4JA1124. But after the redistricting, the district's DPI swung over fifteen points, to 53.0 (3JA826)—which was, of course, the mapdrawers' goal (1JA236). The same chart that shows that Democrats never win districts with a DPI under 40 also shows that Democrats almost always win districts with a DPI over 50. Among the 160 congressional elections in 2016 in districts with a DPI above 50, all but 12 were won by Democrats. See 4JA1124. That is, 92.5% of districts with a DPI above 50 were won by Democrats in 2016. *Ibid.* See also 1JA151-154 (Hawkins testifying on the accuracy of the DPI).

The DPI analysis is corroborated by the *Cook Political Report*'s Partisan Voter Index, which, like the DPI, takes account of past voter behavior to predict future congressional elections outcomes. The State's own expert, Professor Lichtman, described the PVI as a "well respected" metric among those in the field for "dealing with predictions" in elections. 1JA259.

Under the PVI, numerical scores based on voter history are translated into descriptive calls of "solid," "likely," "leaning," and "toss-up" elections. 4JA1107. Seats that are scored "likely" for one party over the other "are not considered competitive." *Ibid*. And although "[l]eaning districts are considered competitive," it is only in "toss-up districts" that "either party has a good chance of winning." *Ibid*. (quoting Charlie Cook, *Cook Political Report*). Like the DPI, the PVI takes account of past voter history. 3JA879.

Prior to the 2011 redistricting, Maryland's Sixth District had a PVI of R+13 (4JA887), resulting in a call of "Solid Republican" (4JA1110). According to a recent academic analysis of the accuracy of the PVI, this "Solid Republican" score meant that there was a 99.7% chance that the Republican candidate would win the congressional election in the Sixth District in 2010. 4JA1107. But in 2012—after Maryland lawmakers fundamentally reconfigured the district's lines—the Sixth District swung 180 degrees, to a score of D+2 and a call of "Likely Democrat." 4JA887.[2] According to the same analysis that showed

[2] Given the substantial pro-Democratic spread in the nationwide popular vote in the preceding two presidential elections, a D+2 score in 2012 reflected a significantly stronger pro-Democratic lean than the pro-Republican lean reflected by an R+2 score. 4JA888-889.

Republican incumbent Roscoe Bartlett was 99.7% likely to *win* in 2010, the Sixth District's new PVI score indicated that Bartlett was 94.0% likely to *lose* to his Democratic challenger in 2012 (4JA1107)—just what the DPI showed. And 2012 was not a blip; subsequent PVI scores show that the Sixth District has remained a Democratic stronghold ever since.

In sum, because tens of thousands of Republican voters were removed from the district and deliberately replaced with tens of thousands of Democratic voters, the district became weighted so strongly in favor of Democratic voters that it became almost entirely out of reach for Republican candidates. And the Democratic candidate for Congress has, in fact, won election and reelection in the district ever since.

b. That is not all. The evidence shows that the 2011 gerrymander has disrupted and depressed Republican political engagement in counties comprising the old Sixth District. As plaintiff Sharon Strine explained, when she went canvassing in support of Republican candidates, "every time we were out [campaigning], we met somebody who said, it's not worth voting anymore, every single time. * * * [T]hey just feel disenfranchised that they can't, they don't have somebody that represents them anymore." 1JA306-307. Plaintiff Lonnie Ropp shared a similar impression: Voters in the former Sixth District stopped voting after the redistricting because "they were confused about the candidates." 1JA328. "They didn't know who they should be engaging. It was a very confusing situation for them." *Ibid.* Plaintiff Ned Cueman described the disruption of Republican-leaning communities as "a chop job." 2JA371. He explained that, after the gerrymander, "I have absol-

utely no connection with what is in this district except the portions of Frederick that were thrown in." *Ibid.*

The data bears out these accounts. Turnout for the Republican primary elections in midterm years—when congressional candidates are at the top of the ticket and most likely to drive voters to the polls—has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary was a robust 42.8%. 4JA1112. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. 4JA1118. Allegany County is no outlier; participation in midterm Republican primary elections dropped similarly between 2010 and 2014 throughout all five counties comprising the old Sixth District. 4JA1112, 1118-19. Turnout has also decreased for midterm general elections in 2014 relative to 2010. 4JA1060, 1067-73, 1079-83. As Judge Niemeyer stated below, "it is not hard to see how the dilution of Republican voters' effectiveness could deter reasonable voters from full participation in the political process." J.S. App. 71a.

4. Evidence of but-for causation

The evidence leaves no room for doubt that the political complexion of the Sixth District would not have been completely reconfigured but for the lawmakers' intent to dilute Republicans' votes.

Governor O'Malley was clear that state officials' effort to change the outcome of future elections in the Sixth District was subordinated only to their concern to comply with the one-person-one-vote doctrine and to avoid "discriminat[ing] in any way against underrepresented minority groups." 1JA54. There is no evidence suggesting that compliance with the one-

person-one-vote standard or Section 2 of the Voting Rights Act, taken alone, would have necessitated *any* dilution of Republican votes in the Sixth District, much less dilution so substantial that it would have changed the outcome of the elections there from 2012 through today.

Nor does the record reveal any other plausible explanations for the reconfiguration of the Sixth District. State officials have occasionally cited the "I-270 corridor" as a "community of interest" as one rationale for the shape of the Sixth District. See*, e.g.*, 3JA708, 710. That is litigation inspired pretext. None of the individuals involved in the redistricting testified that he or she even considered the I-270 corridor when drafting or evaluating the map. When asked whether he had considered "a community of interest related to the I-270 corridor when analyzing potential maps in the 2011 Maryland congressional redistricting process," Eric Hawkins replied, "No." 1JA137. When asked whether he had "at all consider[ed] commuting patterns on I-270 when [he] voted on the proposed congressional map," Speaker Busch likewise responded "No. It never—never crossed my mind." 1JA245.

For her part, GRAC Chair Jeanne Hitchcock confirmed that she was not provided with, and did not request, any information concerning the I-270 corridor during the redistricting process. 1JA165-166. So did Senate President Miller. 1JA196. And Senator Garagiola, in addition to not recalling "any sort of analysis of commuting patterns on I-270," affirmatively "doubt[ed] that that data was made available." 1JA239. None of this is surprising, because the I-270 story makes no sense. See 3JA805-806 (expert report of Dr. Peter Morrison).

C. The denial of injunctive relief

1. At the close of discovery, plaintiffs moved for a preliminary injunction. Judge Bredar, joined by Judge Russell, denied the motion. J.S. App. 1a-34a.

The majority concluded, in the main, that plaintiffs had failed to show that the 2011 gerrymander caused them a real and actionable injury. On this score, the majority held that, in the context of a gerrymander, "the government's 'action' is only 'injurious' if it actually alters the outcome of an election" (J.S. App. 24a) and that to meet their burden to show causation, plaintiffs therefore must prove both "that it was the gerrymander ([and not a] host of forces present in every election) that flipped the Sixth District" in 2012, 2014, and 2016. *Id.* at 17a. Plaintiffs must also prove, according to the majority, that the gerrymander independently "will continue to control the electoral outcomes" in all future elections in the Sixth District. *Ibid.*

The majority concluded that plaintiffs had not satisfied that requirement. It was concerned, in particular, that the close margin of the Democratic victory in 2014, "calls into doubt whether the State engineered an *effective* gerrymander." *Ibid.* Accord *id.* at 27a-28a. The majority acknowledged that "[t]rial testimony and other evidence * * * may yet establish that Plaintiffs have met their burden of proof with respect to causation" so understood, "but the Court is not persuaded that they have done so now, at least not to the high standard set for the granting of preliminary injunctions." *Id.* at 18a.

In reaching this decision, the majority declined "to import into the political gerrymandering context the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S.

274 (1977)." J.S. App. 23a-24a. "The problem," according to the majority, is that "the question of but-for causation is closely linked to the very existence of an injury: if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Id.* at 24a. For this reason, the majority concluded that plaintiffs bear the burden of proving that no other factor independently explains the electoral outcomes under the 2011 redistricting plan. *Ibid.* And the majority concluded that plaintiffs had not proved that negative. *Id.* at 20a-21a.[3]

2. Judge Niemeyer dissented. J.S. App. 34a-79a. In his view, "the record amply proves that the State violated the First Amendment under the standard we previously adopted in this case." *Id.* at 77a. "Indeed, on this record," according to Judge Niemeyer, "there is no way to conclude otherwise." *Ibid.* "The plaintiffs have not only made the requisite showing that they are likely to succeed on the merits, they have actually succeeded well in demonstrating that the State's gerrymandering violated their First Amendment rights." *Id.* at 40a.

As a starting point, Judge Niemeyer rejected the majority's view of the evidence: "[T]he record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they accomplished was caused by their intent." J.S. App. 34a-35a. Judge Niemeyer characterized the majority's contrary conclusion as

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[3] Judge Bredar reiterated his position that plaintiffs' claim is nonjusticiable. See J.S. App. 7a-17a. Judge Russell did not join that portion of Judge Bredar's opinion.

"overlook[ing] the obvious and rel[ying] on abstract notions of the causal relationship between intent and effect that bear no relationship to the real world evidence regarding the conduct at issue." *Id*. at 34a.

After recounting the evidence supporting plaintiffs' motion (J.S. App. 40a-53a), Judge Niemeyer turned to what he believed to be the majority's "two significant errors" of law (*id*. at 74a).

First, according to Judge Niemeyer, the majority misunderstood the nature of the injury that plaintiffs must prove. It is not plaintiffs' burden to show that the outcome of every election was (or will continue to be) dictated by the gerrymander; instead, they must demonstrate that they "experienced a 'demonstrable and concrete adverse effect' on [their] 'right to have 'an equally effective voice in the election' of a representative.'" J.S. App. 68a-69a (citations omitted).

"[W]hile the State's linedrawing need not change the outcome of an election to be culpable" under this standard, Judge Niemeyer explained, "the fact that a Democratic candidate was elected in the three elections following the 2011 redistricting supports the fact that the Republican voters have suffered constitutional injury." J.S. App. 69a-70a. But the majority's view that plaintiffs' "injury takes the form of Bartlett's loss to Delaney" in and of itself reflects "a failure to understand First Amendment jurisprudence, which focuses not on who wins but on the burden imposed on First Amendment rights." *Id*. at 75a. It is enough, in other words, "to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage." *Id*. at 39a.

Second, Judge Niemeyer faulted the majority for refusing to apply the *Mt. Healthy* burden-shifting

framework. "The majority accepts that the defendants here *did in fact intend* to retaliate against voters who had previously voted for Republican candidates in the Sixth District" and that, under the adopted map, "Republicans' voice was diminished and the Democrats *achieved unprecedented electoral success*." J.S. App. 76a. According to Judge Niemeyer, "only one conclusion can be drawn from these accepted facts—that a degree of vote dilution significant enough to place Republican voters at a concrete electoral disadvantage was caused by the conduct that the State specifically intended." *Ibid.* "Yet, somehow," Judge Niemeyer wondered, "the majority holds that these actions *did not cause* the retaliatory harm that the State intended" to bring about, and that "the State's plan was ineffective, despite its intended effect coming to pass." *Ibid.* "[A]pplying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative," Judge Niemeyer concluded, "is directly contrary to the causation standard that the Supreme Court has established for retaliation claims." *Id.* at 77a.

"In sum," Judge Niemeyer concluded, "this fulsome record overwhelmingly shows the plaintiffs' satisfaction of our First Amendment standard." J.S. App. 79a. Reasoning that every other factor favored relief (*id.* at 77a-79a), Judge Niemeyer would have granted a preliminary injunction.

SUMMARY OF ARGUMENT

The district court correctly held that a State violates the First Amendment when it deliberately targets citizens for disfavored treatment in a congressional redistricting by reason of those citizens' support for the opposition political party.

It also correctly held that the courts have principled and manageable standards for identifying when such constitutional violations have taken place. It erred only in its application of those conclusions to the facts of this case and, further, in its refusal to apply the *Mt. Healthy* burden-shifting framework.

I.A. This Court has held many times, in many contexts, that government officials may not intentionally impose burdens on individuals because of their views or politics. If a burden were imposed on citizens "because of [their] constitutionally protected speech or associations," this Court has said, "[their] exercise of those freedoms would in effect be penalized and inhibited." *Elrod* v. *Burns*, 427 U.S. 347, 359 (1976) (plurality). Thus, "[a] burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983). It follows that citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment).

Partisan gerrymandering violates these fundamental First Amendment precepts. In this case, Maryland lawmakers singled out the Republican-voting residents of the old Sixth District for vote dilution *because of* their historical support for Republican Congressman Bartlett. The lawmakers' goal was clear: To dilute Republican voter strength enough to prevent the reelection of Mr. Bartlett and to depress Republican engagement in the area. Their goal was achieved: "Republicans in the Sixth District faced a severe political disadvantage after the 2011

redistricting" (J.S. App. 71a (Niemeyer, J., dissenting)) and, in fact, no Republican candidate has been elected to represent the district since.

B. The State, in response, does not assert that it may intentionally burden its citizens by reason of their political beliefs or voting histories. Its position, instead, is that plaintiffs' First Amendment retaliation claim is nonjusticiable because the burdens of partisan gerrymandering cannot be identified according to principled judicial standards. That is incorrect.

Unlike the equal-protection approach to partisan gerrymandering, the First Amendment retaliation framework does not depend on a unifying definition of "fairness" or require courts to determine when a map has gone "too far." It instead asks whether the State has imposed a real and practical burden (one that is more than de minimis) in retaliation for past political support for the opposition party. Evaluation of the character of such burdens under the First Amendment is familiar to courts. As this Court's ballot-access cases make clear, the inquiry is pragmatic and functional, turning not on statistical measures of imbalance, but on the practical effects of a gerrymander themselves.

C. Partisan gerrymanders can inflict practical burdens in many ways. At their most extreme, they can dilute opposition-voter strength so greatly that they make it effectively impossible for opposition candidates to win, entrenching the dominant party in office. Such burdens are visible to the judicial eye. But demonstrations short of changed electoral outcomes also will suffice: Vote dilution can also place the opposition party at an identifiable "political disadvantage" (J.S. App. 71a (Niemeyer, J., dissenting)), as did the ballot regulation at issue in *Cook* v.

Gralike, 531 U.S. 510, 525 (2001). It also can depress voter engagement and support. Cf. *Rutan* v. *Republican Party*, 497 U.S. 62, 73 (1990). These burdens, too, are identifiable with traditional evidence brought forward to answer objective questions according to familiar legal standards. See *Anderson*, 460 U.S. at 789.

D. Because a First Amendment retaliation claim is personal to the plaintiffs, it must be litigated on a district-by-district basis. In this way, the First Amendment approach to partisan gerrymandering avoids possible complications arising in statewide challenges and dovetails doctrinally with this Court's racial gerrymandering and racial vote-dilution cases. Its recognition would eliminate the need for courts to disentangle race and politics in redistricting cases and better ensure that the right to vote is protected regardless of political persuasion or race.

E. None of the State's counterarguments is persuasive. To begin, the First Amendment approach does not mean "zero tolerance" for politics in redistricting. On the contrary, the great majority of political considerations are entirely permissible under the First Amendment. Nor does the First Amendment approach entail a right to electoral success—it entails only a right to be free from governmental reprisals for successful past support of opposition candidates for elective office. Finally, the prevalence of partisan gerrymandering through American history does not entitle the practice to any deference. In fact, if history shows anything, it is that partisan gerrymandering has been a despised and suspect practice from the earliest days of the Republic.

II. Against this backdrop, the majority committed two core errors requiring vacatur.

A. First, the majority took the position that a First Amendment retaliation plaintiff challenging a partisan gerrymander must show that the gerrymander has dictated the outcome of every election under the challenged map and that the map will continue to dictate electoral outcomes throughout its lifespan—a burden it believed we did not meet. But this Court's cases are clear that *any* practical, more-than-de-minimis burden imposed in retaliation for citizens' protected conduct is actionable.

And in any event, we *have* shown that the 2011 gerrymander has, more likely than not, dictated subsequent electoral outcomes in the Sixth District and that it will continue to do so—just as the map-drawers intended. The majority's view on this point was thus wrong as a matter of both law and fact.

B. Second, the majority refused to apply the *Mt. Healthy* burden-shifting framework, according to which the State should have been required to prove that the map would have been drawn the same absent the intent to burden Republicans. Its error on this issue followed from its error on the first point. In light of the full range of practical burdens that follow from a political gerrymander, there is no basis for refusing to apply *Mt. Healthy* here, and the majority was wrong to hold otherwise.

The Court accordingly should vacate the order below and remand for further proceedings.

ARGUMENT

I. PLAINTIFFS' FIRST AMENDMENT CLAIM IS JUSTICIABLE

A. The First Amendment forbids a State from burdening citizens for their voting histories or political-party affiliations

It is well settled that the First Amendment prohibits a State from subjecting individuals to disfavored treatment on the basis of their speech or politics, whether it be in the context of hiring or firing employees, granting or terminating contracts, or punishing or rewarding prison inmates. See *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 717 (1996) (public employment); *Board of Cty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 677 (1996) (public contracts); *Ortiz* v. *Jordan*, 562 U.S. 180, 190-191 (2011) (prisoner retaliation).

The same logic describes the constitutional violation inherent in partisan gerrymanders. "Political belief and association constitute the core of those activities protected by the First Amendment." *Rutan* v. *Republican Party*, 497 U.S. 62, 69 (1990) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality)). Indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964)).

Because there is this "right of qualified voters, regardless of their political persuasion, to cast their votes effectively" (*Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)), it stands to reason that "general

First Amendment principles" prohibit a State from subjecting citizens to "disfavored treatment" because of their "voting history" or "association with a political party." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment). That is, citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Ibid*.

"In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights" by reason of those voters' views. *Vieth*, 541 U.S. at 314 (Kennedy, J.). Indeed, "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id*. at 315. Accord *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 461 (2006) (*LULAC*) (Stevens, J., dissenting) (opining that "the First Amendment's protection of citizens from official retaliation based on their political affiliation" proscribes partisan gerrymandering).

B. The First Amendment retaliation doctrine provides a principled and rational framework for judging challenges to partisan gerrymanders

The State has never expressly disagreed with these basic principles. It has never asserted a right to use redistricting to burden voters by reason of their support for the opposition party, nor has it disagreed that partisan gerrymandering, like political patronage, "is inimical to the process which undergirds our system of government and is 'at war

with the deeper traditions of democracy embodied in the First Amendment.'" *Elrod*, 427 U.S. at 357 (plurality). The State instead has taken the position that the First Amendment retaliation framework is nonjusticiable when applied in the redistricting context. That is mistaken.

1. The starting point for federal litigation is "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Among those limitations is the "narrow" political-question doctrine, which arises in two principal circumstances: those in which there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and those in which there is "a lack of judicially discoverable and manageable standards for resolving [the controversy]." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon* v. *United States*, 506 U.S. 224, 228 (1993)).

"The second [circumstance] is at issue here"; it reflects the maxim that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality). Accord *id.* at 321 (Stevens, J., dissenting). In law, unlike politics, ad hoc decision-making will not do; "judicial action must be governed by *standard*, by *rule*." *Id.* at 278 (plurality). The "lack of judicially discoverable standards" indicates the commitment of the issue to the "political departments." *Baker* v. *Carr*, 369 U.S. 186, 214 (1962).

That is not to say, however, that all cases with political consequences involve nonjusticiable political questions; the doctrine "is one of 'political *questions*,'

not one of 'political *cases*.'" See *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986) (emphasis added) (quoting *Baker*, 369 U.S. at 217). Thus, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid*. Put another way, when "well developed and familiar" judicial standards for decision are available (*Baker*, 369 U.S. at 226), courts have a responsibility to render judgment—they "cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky*, 566 U.S. 196 (quoting *INS* v. *Chadha*, 462 U.S. 919, 943 (1983)).

2. a. Application of the First Amendment retaliation doctrine to cases like this one is manifestly justiciable. The doctrine brings with it a timeworn framework for decision that asks objective questions answerable with traditional evidence, by reference to ordinary legal standards. There is, in other words, a discernible and "judicially enforceable right" at issue here, and there are "principled, well-accepted rules" for enforcing that right, consistent with this Court's First Amendment precedents. *Vieth*, 541 U.S. at 308, 311 (Kennedy, J.). In particular, plaintiffs "request[] that the courts enforce a specific [constitutional] right" (*Zivotofsky*, 566 U.S. at 196) not to be subject to disfavored treatment on the basis of their political views. That is a question for the courts and not the Congress. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

b. Prior challenges to partisan gerrymanders have proceeded, in the main, under the Equal Protection Clause, which—applied in this context—asks whether a challenged map is "unfair" or "has gone too far" in its maltreatment of the opposition party

and its adherents. See *Vieth*, 541 U.S. at 291-301 (plurality). In their attempts to develop a framework for answering when a redistricting map "has gone too far" under the Equal Protection Clause, the lower courts have struggled on two fronts.

First, they have strained to define what "fairness" requires in redistricting. *Vieth*, 541 U.S. at 307 (Kennedy, J.). Does fairness in redistricting call for a map that is justified exclusively by neutral redistricting criteria (as argued in *Bandemer*), ensures that the majority party wins a majority of seats (as argued in *Vieth*), or provides for symmetry in election results (as argued in *Gill*)? Answering this question has proved problematic, not only because "[n]o substantive definition of fairness in districting seems to command general assent" among jurists or academics (*id.* at 307 (Kennedy, J.)), but also because it is doubtful whether "'[f]airness' [is] a judicially manageable standard" at all (*id.* at 291 (plurality)).

Second, the lower courts have been unable to agree on an analytical approach for quantifying deviations from perfect fairness in redistricting (however it may be defined), or, in turn, for locating a constitutionally significant line beyond which deviation becomes impermissibly "excessive," "severe," or "extreme" (*Vieth*, 541 U.S. at 292-293 (plurality); *id.* at 365 (Breyer, J., dissenting)). This problem follows, in part, from the first: no test can succeed "unless one knows what [it] is testing *for*." *Id.* at 297 (plurality). But perhaps more fundamentally, a "some, but not *too* much" standard presents an intractable line-drawing challenge: "Excessiveness is not easily determined" in any context (*id.* at 316 (Kennedy, J.)), and especially not a context that depends on purely numeric gradients. According to

some Members of this Court, this line-drawing problem has been confounded by the traditionally statewide nature of equal-protection challenges. Because redistricting maps are never perfectly even and homogeneous in either design or effect, the imbalances of a gerrymandered map are experienced differently in different parts of the State. See *Vieth*, 541 U.S. at 284-290 (plurality).

c. The First Amendment approach is different. The question whether a partisan gerrymander crosses the constitutional line under the First Amendment turns not on a substantive definition of "fairness" or statistical measure of "severity," but on *how* and *why* the map was drawn as it was, and whether the deliberate targeting of citizens on the basis of their political beliefs has resulted in some *practical* burden according to a "pragmatic" and "functional" assessment of the State's conduct and its consequences. *Vieth*, 541 U.S. at 315 (Kennedy, J.).

Applied in this context, the First Amendment retaliation doctrine comprises three inquiries (J.S. App. 104a): (1) Did the State consider citizens' protected First Amendment conduct in deciding where to draw district lines, and did it do so with an intent to dilute the votes of those citizens by reason of their political beliefs? (2) If so, did the redistricting map, in actual fact, dilute the votes of the citizens whose constitutionally protected conduct was taken into account so that it burdened them in a concrete, practical way? And (3) if so, is there a constitutionally acceptable explanation for the map's ill effects, independent from the intent to discriminate on the basis of political belief?

No one disputes that the first and third elements of this framework are justiciable. Courts regularly

adjudicate the question of legislative intent. See Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 William & Mary L. Rev. (forthcoming 2018) (manuscript at 18-20, available at perma.cc/H9X8-M68K) (collecting examples). Indeed, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Bandemer*, 478 U.S. at 129. Courts also routinely address the question whether there are legitimate, alternative explanations for otherwise unconstitutional burdens, as they do in every First Amendment retaliation case. See generally *Hartman* v. *Moore*, 547 U.S. 250 (2006).

The only question, therefore, is whether the second element of the First Amendment framework—the requirement that plaintiffs show that the redistricting plan did in fact burden them in a practical, more-than-de-minimis way—is justiciable in federal court. Given the practical and functional nature of the burdens imposed, it plainly is.

The principal objective of any partisan gerrymander is to dilute the votes of the opposition party. Cf. *Shaw* v. *Reno*, 509 U.S. 630, 640 (1993) (*Shaw I*) ("[T]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."). Mapdrawers pursue this objective for practical reasons and not academic ones; they do it to change electoral outcomes and to depress support for the opposition. It takes no leap of logic to say that plaintiffs challenging a partisan gerrymander under the First Amendment will have made out a claim if they can demonstrate that those practical objectives have been achieved. See J.S. App. 106a.

Nothing about this inquiry suggests that it is committed by the Constitution to the political branches. Identifying the burdens of partisan gerrymanders under the First Amendment turns on the practical effects of gerrymandering themselves, district by district—that is, on how the map has affected the distribution of voters throughout the district, on whether those changes have meaningfully depressed voter engagement and turnout, and whether they have altered (or likely will alter) the outcomes of elections. The question is not whether the adopted map is "excessively unfair" on the whole according to arithmetical measures of statewide imbalance—it is simply whether the map's burdens have "ma[d]e some practical difference" for the targeted voters according to well-accepted, traditional First Amendment standards. J.S. App. 104a.

Identifying these kinds of effects is familiar. Courts adjudicating routine First Amendment retaliation cases often must determine as a threshold matter whether the injury alleged is sufficiently concrete and practical to warrant judicial intervention. Generally speaking, "[h]urt feelings or a bruised ego are not by themselves the stuff of constitutional tort." *Zherka* v. *Amicone*, 634 F.3d 642, 645-646 (2d Cir. 2011). There must instead be "a concrete harm sufficient for a federal claim of First Amendment retaliation." *Id.* at 646. "[I]nconsequential" and "insignificant" burdens will not suffice. *Morris* v. *Powell*, 449 F.3d 682, 684-686 (5th Cir. 2006). Thus, "[t]o constitute an actionable First Amendment burden, the * * * adverse impact must be more than *de minimis*." *Common Cause* v. *Rucho*, 2018 WL 341658, at *65 (M.D.N.C. 2018) (partisan gerrymandering challenge). Accord, *e.g.*, *Blair* v. *Bethel Sch. Dist.*, 608 F.3d 540, 544 (9th Cir. 2010) (a "minor

indignity" or "de minimis deprivation[]" is insufficient); *Bell* v. *Johnson*, 308 F.3d 594, 606 (6th Cir. 2002) ("a de minimis injury" is insufficient).

The task of differentiating between substantial practical burdens and insignificant or de minimis ones is thus an accepted judicial undertaking in First Amendment cases. This Court's ballot-access cases show how. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-788. Courts faced with First Amendment challenges to such regulations must evaluate the burdens imposed using "an analytical process that parallels [their] work in ordinary litigation." *Id*. at 789. This requires consideration of "character and magnitude of the asserted injury" measured against "the precise interests put forward by the State as justifications for the burden imposed." *Id*. at 789. After weighing these factors qualitatively, the court is "in a position to decide whether the challenged provision is unconstitutional." *Id*. at 789 (citations omitted).

The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of common-sense observation—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." 460 U.S. at 792. Because the deadline applied "unequally" among the political parties, in other words, it "burden[ed] the availability of political opportunity" based on the

"political preferences" of voters and was therefore unlawful. *Id.* at 793-794. Thus, it could not stand.[4]

Even before *Anderson*, the Court has explained that, in ballot-access cases, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982). Thus, "classification schemes that impose burdens on new or small political parties or independent candidates" may violate "First Amendment interests in ensuring freedom of association" by concretely inhibiting individuals' "association with particular political parties." *Id.* at 964-965. Such regulations impose justiciable burdens "by making it virtually impossible for" candidates from disfavored parties to achieve electoral success as a practical matter. *Id.* at 965 (citing *Williams*, 393 U.S. at 25). That is exactly what a successful partisan gerrymander does. This Court's retaliation and ballot-access cases are thus proof positive that courts have the analytical tools to evaluate the burdens imposed by partisan gerrymanders in a principled, rational way.[5]

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[4] Although *Anderson* was decided by a divided vote, the dissent did not take the position that the burden imposed was non-justiciable under the First Amendment. See 460 U.S. at 806-823. Its position, instead, was that the record did not support the majority's case-specific conclusions. *Ibid.*

[5] We do not mean that partisan gerrymandering claims should be evaluated under the so-called *Anderson-Burdick* balancing test itself. That test applies in lieu of strict scrutiny only to "evenhanded" and "nondiscriminatory" restrictions upon voters' First Amendment rights. *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 189-190 (2008) (opinion of Stevens, J.). By definition, that condition will never obtain in partisan gerrymandering cases.

C. Partisan gerrymanders can inflict concrete burdens in multifarious ways

There are many ways in which a partisan gerrymander might inflict identifiable, actionable burdens: It can change electoral outcomes, place supporters of the opposition party at a manifest political disadvantage, and depress and chill political engagement. Doubtless, there are other concrete harms that intentionally imposed vote dilution might inflict. See *Rucho*, 2018 WL 341658, at *65-69 (detailing the multifaceted practical burdens inflicted by partisan gerrymandering). That said, the point here is not to game out every conceivable practical injury that intentionally inflicted vote dilution might impose. The point, instead, is that, against this fulsome background of judicial experience, Article III courts have principled and well-accepted standards for evaluating the practical burdens imposed by partisan gerrymandering under the First Amendment—standards that both mirror those that courts use in "ordinary litigation" under the First Amendment every day (*Anderson*, 460 U.S. at 789) and provide clear guidance to legislators who must conform their conduct to constitutional norms.

1. A partisan gerrymander most obviously inflicts a more-than-de-minimis injury when it alters the outcome of an election—which is, of course, the goal of all partisan gerrymanders and what happened in this case.

Plaintiffs would suffer a justiciable burden if the State had passed a law in 2011 providing that only Democratic candidates were eligible to win the next congressional election in the Sixth District. Cf. *Rutan*, 497 U.S. at 77 ("[T]he government 'may not enact a regulation providing that no Republican * * *

shall be appointed to federal office.'"). Such a burden would be similar, in practice, to the burden imposed by a successful partisan gerrymander: By significantly diluting the votes in favor of the opposition party, the State effectively fixes future elections for the dominant party's candidates. And "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly" by means of discrimination on the basis of political activity. *Rutan*, 497 U.S. at 77-78.

2. As Judge Niemeyer explained below, however, proving that a gerrymander has actually changed the outcome of an election is just one way of showing that it has "put the [targeted] voter at a concrete disadvantage" in the electoral process. J.S. App. 39a. Another way of proving concrete political disadvantage would be to show that the deliberate reconfiguration of the Sixth District made it nearly impossible for the Republican voters to elect a candidate of their choice, even before an election takes place. See J.S. App. 69a (Niemeyer, J., dissenting) (Republicans "had no real chance" of winning after the gerrymander). This can be done using the same techniques that the mapdrawers themselves use, including metrics like the DPI and PVI. With such evidence, courts are capable of assessing the relevant facts in a principled way to determine whether a real and practical disadvantage has been imposed. See *id.* at 71a (Niemeyer, J., dissenting) (concluding in light of the evidence that "Republicans in the Sixth District faced a severe political disadvantage after the 2011 redistricting"). As the Court indicated in *Anderson* (460 U.S. at 792), that by itself is enough to establish a constitutional burden.

Consider another real-world example. In *Cook* v. *Gralike*, 531 U.S. 510 (2001), the Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id*. at 514-527. Although "the precise damage the labels may exact on candidates [was] disputed" there, the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id*. at 525. In language that easily could be mistaken for a condemnation of partisan gerrymandering, the Court explained that the Elections Clause does not authorize the States to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id*. at 523. Recognizing that concrete "political disadvantage" was a justiciable burden in itself (*id*. at 525), the Court did not require the plaintiffs to prove that the ballot notations changed the outcome of an election as a precondition to relief.

Gerrymandering imposes the same sort of burden as the one that was at issue in *Gralike*. No one could deny that the deliberate dilution of Republican votes in the Sixth District in 2011 placed them (and those who share their political views) at a concrete political disadvantage vis-à-vis the status quo ante: Again, according to the mapdrawers' own predictive metrics, the vote dilution visited upon plaintiffs made it almost certain that their candidate would lose, whereas before the gerrymander, they were likely to win. See *supra*, pp. 16-19. As *Gralike* demonstrates, the courts are capable of identifying and evaluating this kind of harm. If it were otherwise, cases like *Anderson*, *Clements*, and *Gralike* could not have been decided as they were.

3. Partisan gerrymanders can also impose concrete and practical burdens by depressing voters' engagement in the political process. See, *e.g.*, *Rucho*, 2018 WL 341658, at *15, 66 (detailing evidence of chilling in North Carolina). Here, too, the inquiries are familiar: Has the new redistricting map led citizens to reduce their political engagement? Has it inhibited fundraising and recruitment of volunteers? Has it depressed media interest? See *Anderson*, 460 U.S. at 792 (inhibition of campaigning, "organizing efforts," "recruit[ment] and ret[ention]" of volunteers, "media publicity," and fundraising are identifiable burdens).

Alternatively, has the gerrymander led citizens to change their political party affiliations to ensure that they remain able to influence the electoral outcomes? This possibility is particularly likely in a State like Maryland, which conducts closed primaries (3JA645-646 (¶¶ 115-117)), which means that only registered Democrats may vote in the election for the Democratic nominee. In such a State, a partisan gerrymander making a district a lock-in for the dominant party will "pressure [citizens] to affiliate with the [dominant] party" (*Rutan*, 497 U.S. at 73 n.6) so they can participate in that party's primary and thereby retain a voice in the selection of the individual who ultimately represents them. That calls to mind the sort of concrete "interfere[nce] with [citizens'] freedom to believe and associate" as was at issue in *Rutan*. *Id*. at 76.

Questions like these are a mainstay of First Amendment analysis (*e.g.*, *Rutan*, 497 U.S. at 73-76; *Anderson*, 460 U.S. at 792), answerable with ordinary evidence and analysis.

D. The First Amendment approach harmonizes the law of partisan and racial gerrymandering

Because plaintiffs' First Amendment challenge is district-specific, it avoids any concern that plaintiffs are pressing a generalized grievance and harmonizes the law of partisan and racial gerrymandering.

1. The single-district scope of the First Amendment challenge here naturally comports with the Court's Article III standing doctrine.

The Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *United States* v. *Hays*, 515 U.S. 737, 743 (1995). On that basis, it has held that a plaintiff bringing a racial gerrymandering claim under the Equal Protection Clause must have been "'personally denied equal treatment' by the challenged discriminatory conduct." *Id.* at 744. That means that "[a] racial gerrymandering claim * * * applies to the boundaries of individual districts" and must be litigated "district-by-district." *Ala. Legis. Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1265 (2015). That rule applies to vote dilution claims under the Voting Rights Act as well. See *Shaw* v. *Hunt*, 517 U.S. 899, 904 (1996) (*Shaw II*).

The State in *Gill* has argued that these same "principles apply directly to the political-gerrymandering context, meaning that a political-gerrymandering plaintiff could only possibly have standing to challenge the boundaries of the plaintiff's individual district, not the State redistricting plan considered as an undifferentiated whole." Appellants' Br. 29, *Gill* v. *Whitford*, No. 16-1161 (alteration marks, quotation marks, and citations omitted). We take no

position on the correctness of that assertion, except to say that it would not bar to plaintiffs' district-specific First Amendment claim.

Like "the harms that underlie a racial gerrymandering claim," the harms that underlie the claim here "are personal" (*Ala. Legis. Black Caucus*, 135 S. Ct. at 1265), linked inextricably with personal beliefs and personal conduct. As in racial-gerrymandering cases, "[t]he vote-dilution injuries suffered by [plaintiffs in this case] are not remedied by creating [a safe opposition] district somewhere else in the State." *Shaw II*, 517 U.S. at 917. Thus, like an equal-protection challenge to a racial gerrymander, a First Amendment challenge to a partisan gerrymander "applies to the boundaries of electoral districts" (*ibid.*), requiring a plaintiff to have been personally injured on the basis of past protected conduct.

2. Use of the First Amendment retaliation framework in this context helps to close two loopholes that have emerged in this Court's racial-gerrymandering cases. The Court has "acknowledged the problem of distinguishing between racial and political motivations in the redistricting context." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part). "The problem arises from the confluence of two factors." *Ibid.* First, the Court has not (yet) identified a constitutional basis for invalidating partisan gerrymanders. Second, "racial identification is highly correlated with political affiliation," making it "difficult to distinguish between political and race-based decisionmaking." *Ibid.*

This, in turn, has created a double end run around this Court's precedents. First, it has meant that legislators can engage in racial gerrymandering, as long as they successfully dress it up as partisan

gerrymandering, in effect using politics as pretext for race. See, *e.g.*, *Cooper*, 137 S. Ct. at 1473. Second, it has meant that citizens whose representational rights have been trammeled by partisan gerrymanders have often twisted the facts of partisan discrimination to fit the doctrine of racial discrimination. See, *e.g.*, *LULAC*, 548 U.S. at 440-443. See also Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 569 (2004).

This is a disturbing state of affairs. The First Amendment no more permits lawmakers to burden citizens on the basis of their political beliefs than does the Equal Protection Clause permit them to discriminate on the basis of race. And "the evils of political gerrymandering should be confronted directly, rather than through the race-specific approach that the Court has taken in recent years." *Bush* v. *Vera*, 517 U.S. 952, 1004 n.2 (1996) (Stevens, J., dissenting). Application of the First Amendment retaliation principle to partisan gerrymandering would both eliminate the need for courts to disentangle race and politics and better ensure that the right to vote is fully protected, regardless of either political persuasion or race.

E. The State's rejoinders are unpersuasive

In proceedings below, the State leveled several rejoinders, each of which the district court rejected. This Court should do the same.

1. The First Amendment approach does not mean "zero tolerance" for politics in redistricting

Among its several counterarguments before the district court, the State asserted that the First Am-

endment retaliation doctrine, applied to partisan gerrymandering, means "zero tolerance" for politics in redistricting. As Justice Kennedy explained in *Vieth*, "[t]hat misrepresents the First Amendment analysis." *Vieth*, 541 U.S. at 315.

First, it is wrong to say that consideration of citizens' voting histories and party affiliations is the only—or even a legitimate—political consideration in redistricting. No majority of this Court has ever held that a State, through official conduct, may deliberately disfavor particular voters on the basis of their political beliefs. See Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017). Such a holding would be shocking.

The Court has, however, recognized the permissibility of numerous other "political considerations" in redistricting. *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973). Virtually every one of them—apart from discrimination on the basis of citizens' voting histories and party affiliations—is permissible under the First Amendment, ensuring that redistricting remains "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality). The goal of "avoiding contests between incumbent Representatives" (*Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983)), for example, does not run afoul of the First Amendment retaliation doctrine. Neither does a mapdrawing effort to "keep [a] constituency intact so the officeholder is accountable for promises made or broken." *LULAC*, 548 U.S. at 441. Likewise, decisions to "mak[e] districts compact" and "respect[] municipal boundaries" may reflect lawful political considerations rather than an intent to dilute (or maintain the dilution of) votes for the opposition party. *Karcher*,

462 U.S. at 740. Mapdrawers often aim to ensure that influential institutions with a special connection to an incumbent are kept in the incumbent's district. *E.g.*, 3JA665 (¶ 50) (Second District incumbent Dutch Ruppersburger, then a member of the House Intelligence Committee, wanted Fort Meade and Aberdeen Proving Ground in his district); *ibid.* (Fifth District incumbent Steny Hoyer, an alumnus of the University of Maryland, wanted College Park in his district). See also 1JA197-198. This is permissible, too.

In addition, "[a] determination that a gerrymander violates the [First Amendment] must rest on something *more* than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J.) (emphasis added). "The inquiry is not whether political classifications were used," but "whether political classifications were used [with the purpose and effect of] burden[ing] a group's representational rights." *Id.* at 315. Thus, beyond all we have just said, the State may continue to use data concerning party affiliation and voting history without violating the First Amendment, so long as it does so (1) without an intent to burden supporters of the opposition party or (2) otherwise in a narrowly tailored pursuit of a compelling state interest.

2. The First Amendment approach does not entail a right to electoral success

The State asserted next that an attack on intentional vote dilution must fail because Republicans were not constitutionally entitled to elect a representative of their choice before 2011, and they therefore cannot claim any such entitlement now.

That misconstrues the constitutional burden asserted here. The point is not that plaintiffs are, or

ever were, entitled to electoral success or to live in a predominantly Republican district; it's that they have a right, protected by the First Amendment, to be free from governmental reprisals for their successful past support of Republican candidates for elective office. See J.S. App. 107a-108a. That conclusion "in no way depends on the proposition that [the pre-2011 Sixth District] was fair." *LULAC*, 548 U.S. at 482 (Stevens, J., concurring in part).

As this Court has explained in the political patronage context, the fact that plaintiffs have no special "entitlement" to the status quo ante is "immaterial to [a] First Amendment claim." *Rutan*, 497 U.S. at 72. The question is only whether the government has imposed a burden for an impermissible reason, resulting in a concrete harm. "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely [to justify its actions]." *Ibid.* (citations omitted). Thus, finding a violation here does not depend in any way on whether the status quo ante was constitutionally fair, permissible, or required.

3. The prevalence of gerrymandering in American political history is no answer to its unconstitutionality

In *Gill*, the State asserted that gerrymandering has played a role in American politics from the Founding, as though to suggest that a practice so rooted in our Nation's history—one that has withstood the proverbial test of time—is entitled to a presumption of validity. See Appellants' Br. 5-10, *Gill* v. *Whitford*, No. 16-1161. Accord *Vieth*, 541 U.S.

at 274-275 (plurality). We expect the State and its amici to say the same here.

That argument turns the history of gerrymandering on its head. Since the early days of the Republic, partisan gerrymandering has been universally condemned as an offense to democratic ideals. Early editorials first using the term "Gerry-Mander" warned that it had "inflicted a grievous wound on the Constitution," one that "silences" and "disenfranchise[s] the People." *The Gerry-Mander, or Essex South District Formed into a Monster!*, Salem Gazette (Apr. 2, 1813), perma.cc/S8E9-AJFD. Historical broadsides printed around the same time likewise decried gerrymandering as a "malignant" and "diabolical" practice and a "gross usurpation upon [the public's] rights." *Natural and Political History of the Gerry-Mander!* (1812), perma.cc/Q2DP-QQ2L.

This universal disapproval of gerrymandering has persisted unabated throughout American history. According to the leading historical authority on partisan gerrymandering published in 1907, the practice was seen as "a species of fraud, deception, and trickery," a "flagrant wrong," and a "danger to democracy" that aims to "disenfranchise" voters. Elmer C. Griffith, *The Rise and Development of the Gerrymander*, 7-8 (1907), perma.cc/HA2G-PTUX. "This evil is [particularly] insidious because it is cloaked under the guise of law," an "injustice [that] is given the stamp of government." *Id*. at 8.

At the time of Griffith's writing in 1907, however, gerrymandering was seen more as an "art" than a science. Griffith, *supra*, at 4, 19 n.3. Today, it is decidedly the latter. In the face of big data and sophisticated mapdrawing technologies (*Vieth*, 541 U.S. at 312 (Kennedy, J.)), disdain for gerryman-

dering has persisted and grown. This Court itself recently declared that "[p]artisan gerrymanders * * * [are incompatible] with democratic principles." *Arizona State Legis.* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). And as Judge Niemeyer observed below, partisan gerrymandering is "cancerous" and "undermin[es] the fundamental tenets of our form of democracy." J.S. App. 37a.

A practice like this—one that has been met with sustained and universal condemnation from its inception—is not entitled to the deference owed to tradition merely because it has eluded constitutional invalidation for so long. Patronage practices, too, had existed in the Framers' day; yet they met their demise in modern times, in *Elrod* and *Rutan*. The Court cautioned then that constitutional adjudication neither begins nor ends "with the judgment of history." *Elrod*, 427 U.S. at 354 (plurality).

That is especially so here because, to our knowledge, no previous case has challenged a partisan gerrymander under the First Amendment retaliation doctrine. An observation that partisan gerrymandering has withstood repeated challenges under the Equal Protection Clause says nothing about its constitutionality under the First Amendment. And if the wisdom derived from history has anything to add, it is that "segregat[ing] voters by political affiliation so as to achieve pure partisan ends * * * has no place in a representative democracy." J.S. App. 16a. It is time for that long-accepted truth to find its reflection in constitutional doctrine.

II. THE DENIAL OF INJUNCTIVE RELIEF WAS BASED ON LEGAL AND FACTUAL ERRORS

Assuming the justiciability of their claim, plaintiffs have proved their entitlement to relief. In

holding otherwise, the majority below misconstrued the nature of plaintiffs' injury and refused to apply the *Mt. Healthy* burden-shifting framework. These errors require vacatur of the order below.

A. Plaintiffs proved a constitutional burden

We begin with the majority's most fundamental error: its mistaken belief that, to establish entitlement to relief in a First Amendment challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander changed the outcome of every election held under the challenged map.

1. As we have explained (*supra*, pp. 36-43), First Amendment retaliation plaintiffs challenging a partisan gerrymander must establish vote dilution amounting to a real and practical burden on their representational rights. The interference with plaintiffs' participation in the election of their representative, and the interference with their associational rights, must rise to the kind of "demonstrable and concrete adverse effect" required in all First Amendment retaliation cases. J.S. App. 106a. Accord, *e.g.*, *Zherka*, 634 F.3d at 646.

We demonstrated an actionable burden in this case in the most straightforward of ways: by showing that the 2011 Maryland gerrymander accomplished precisely the practical objectives that the map-drawers intended it to. That is, the gerrymander has changed the outcomes of the elections in 2012, 2014, and 2016, flipping a solidly Republican district to a Democratic one; and it has disrupted and depressed Republican political engagement in the area.

The evidence on these points is beyond reasonable dispute. Because of the huge shifts in the political composition of the Sixth District's popula-

tion—overwhelmingly from voters who had previously cast their ballots for Republicans to those who had cast them for Democrats—the *Cook* PVI showed that the chances of a Republican victory in the district dropped from 99.7% in 2010 to just 6% in 2012. See J.S. App. 53a, 69a (Niemeyer, J., dissenting). That conclusion was consistent with the metric employed by the mapdrawers themselves, which similarly showed that the chances of a Republican victory fell from 100% in 2010 to just 7.5% in 2012. *Ibid*. And, of course, these analyses were borne out in experience: Democrat John Delaney defeated Bartlett in the 2012 election and has won reelection ever since. 3JA666 (¶¶ 54-56).

We showed, in addition, that the gerrymander interfered with plaintiffs' associational rights by depressing political engagement among Republicans in the former Sixth District. See *supra*, pp. 19-20.

2. In holding that plaintiffs had not proven a practical and concrete burden on their First Amendment rights, the majority committed both legal and factual errors.

As for legal error, the majority held that, to show an actionable burden in this case, plaintiffs were required to prove that the 2011 gerrymander "flipped the Sixth District" in 2012, 2014, and 2016, "and, more importantly, that [the gerrymander] will continue to control the electoral outcomes in [the] district" in all future elections until a new map is drawn. J.S. App. 17a. According to the majority, in other words, the dilution of plaintiffs' votes imposes a practical burden "if but only if" the outcomes of every election between 2012 and 2020 are necessarily "attributable to gerrymandering." *Id*. at 24a-25a.

That makes no sense. To be sure, in proving that the vote dilution inflicted upon plaintiffs is not de minimis, electoral outcomes are "relevant evidence of the extent of the injury." J.S. App. 68a (Niemeyer, J., dissenting). And as we have said all along, the intentional dilution of plaintiffs' votes amounts to a practical, actionable injury in this case *because* it has dictated the outcome of subsequent elections. But it does not follow that, to establish a cognizable burden in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must indispensably show that each and every electoral outcome is (and will continue to be) singularly attributable to the gerrymander. Any more-than-de-minimis burden on First Amendment rights is actionable, "[h]owever slight that burden may appear." *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (opinion of Stevens, J., joined by Roberts, C.J. and Kennedy, J.). See also *Rutan*, 497 U.S. at 75 n.8.

According to the majority's alternative view, a gerrymander that dramatically diminishes plaintiffs' chance of electoral success, depresses voter engagement, and in fact changes the outcomes of three out of four elections would inflict too trivial a burden upon citizens' representational rights to be actionable under the First Amendment. That bizarre conclusion cannot be squared with *Anderson*, *Clements*, *Gralike*, or *Rutan*.

Even if we were wrong about that, the majority's factual error would require reversal all the same. As Judge Niemeyer explained, the majority refused to acknowledge the self-evident causal link between the 2011 gerrymander and the subsequent electoral outcomes, instead crediting "other, unnamed factors [that] might have coincidently caused those effects."

J.S. App. 76a-77a. That implausible speculation—in effect, that Republican voters, independent of the gerrymander, may suddenly have switched loyalty en masse to the Democratic Party in 2012—is flatly contradicted by the evidence, to say nothing of common sense.

The State has stipulated that, by using party-registration and voter-history data, redistricting software is capable of accurately predicting the outcomes of historical elections under alternative maps. 3JA659 (¶¶ 28, 30). It is a necessary premise of that stipulation that voters' party loyalties are stable from election to election; otherwise, there would be no utility in metrics like the DPI and PVI. American voters simply are not the fickle political "floaters" that the majority imagined. See Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 367 (2017). And indeed, those Republican dominated areas removed from the Sixth District have continued to vote overwhelmingly in favor Republicans since 2011. See J.S. 28 n.2.[6]

In hypothesizing otherwise, the majority believed that Congressman Delaney's 1.5% victory in 2014 "calls into doubt whether the State engineered an *effective* gerrymander" because it was a close race.

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[6] Even if there were some measure of fluctuation in voters' party loyalties from election to election (a supposition unsupported in the record), it would not bar relief. In the one-person-one-vote context, the Court has recognized that the "inevitable statistical imprecision of the census" and "the well-known restlessness of the American people" means that perfect compliance with one-person-one-vote is impossible. *Karcher*, 462 U.S. at 732-735. But the Constitution does not require perfection of evidence or certainty of proof. *Ibid.*

Id. at 17a. But that gets matters backward. Twenty-fourteen was a wave year for Republican candidates across the country; they "saw sweeping gains * * * in the Senate, House, and in numerous gubernatorial, state, and local races" across the country. 3JA878. And Congressman Delaney was especially vulnerable in 2014 because first-time incumbents (which he was at the time) lose reelection three times more frequently than do repeat incumbents. See Gary C. Jacobson & Jamie L. Carson, *The Politics of Congressional Elections* 52-53 (9th ed. 2015). Despite these tremendous political headwinds, Mr. Delaney *still* won reelection in 2014, following it up with a 14.4% margin of victory in 2016. 3JA666. This is a description, not of an *in*effective gerrymander, but of a devastatingly efficient one.[7]

In sum, the majority's conclusion that the 2011 gerrymander did not inflict an actionable burden on plaintiffs' First Amendment rights was clear error under any legal standard. Any other view "reflects nothing more than an effort to skirt around the obvious—that the Democrats set out to flip the Sixth District; that they made massive shifts in voter population based on registration and voting records to accomplish their goal; *and that they succeeded*." J.S. App. 39a (Niemeyer, J.) (emphasis added).

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[7] The PVI for the forthcoming 2018 elections stands at D+6, suggesting another Democratic margin of victory around 15%. See David Wasserman & Ally Flinn, *Introducing the 2017 Cook Political Report Partisan Voter Index*, Cook Pol. Rep. (Apr. 7, 2017), perma.cc/QFX3-6ZTH; *Partisan Voting Index: Districts of the 115th Congress*, perma.cc/MJ9A-BJR4.

B. The *Mt. Healthy* burden-shifting framework required the State to disprove but-for causation

The majority also erroneously declined to apply the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

The causation necessary to support a First Amendment retaliation claim is "but-for causation, without which the adverse action would not have been taken." *Hartman*, 547 U.S. at 260. This Court's cases generally provide that, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Ibid.* (citing *Mt. Healthy*, 429 U.S. at 287). In this way, "[t]he cases have * * * taken the evidence of the motive and [injury] as sufficient for a circumstantial demonstration that the one caused the other." *Ibid.*

Under *Mt. Healthy*, therefore, the burden is on defendant to prove that there *was* an alternate, lawful explanation for the challenged action, rather than on the plaintiff to prove there was *no* alternate, lawful explanation. This makes sense, for it is the defendant who knows better (and is better situated to prove) the causes of his own conduct and the effects that it produces. See *Rucho*, 2018 WL 341658, at *69 (applying *Mt. Healthy* framework to a First Amendment challenge to the 2016 North Carolina partisan gerrymander).

The majority's refusal to apply the *Mt. Healthy* burden-shifting framework in this case was error. In effect, the majority required plaintiffs to prove that there is no state of affairs in which those responsible

for the map would have drawn the district's lines as they did absent their unlawful intent to burden Republican voters. As Judge Niemeyer concluded, "applying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative, is directly contrary to the causation standard that [this] Court has established for retaliation claims." J.S. App. 77a.

In its motion to affirm (at 19-22), the State asserted that *Mt. Healthy* should not apply here because redistricting is "complex," involving "manifold choices" by "multiple decisionmakers." But, as we said then, there is no "complex cases" exception to *Mt. Healthy*. Although *Hartman* set retaliatory prosecutions aside as a special category of cases to which the *Mt. Healthy* framework does not apply, the Court reaffirmed the rule applicable outside that unique context that, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Hartman*, 547 U.S. at 260. That rule should apply here.

Plaintiffs having proved (1) that state officials specifically intended to dilute plaintiffs' votes because of their past support for Congressman Bartlett and (2) that the mapdrawers succeeded in diluting their votes significantly enough to impose a concrete and practical injury, the burden should have shifted to the State to prove whether or not it had an independent and lawful justification for drawing a map that brought about those harms. The majority was wrong to hold otherwise.

CONCLUSION

The order below should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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