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, MARYLAND STATE BOARD OF ELECTIONS,

Appellees.

On Appeal From The United States District Court For The District Of Maryland

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF APPELLANTS

GREGORY L. DISKANT
JONAH M. KNOBLER
PETER A. NELSON
ELENA STEIGER REICH
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
gldiskant@pbwt.com
(212) 336-2000

EMMET J. BONDURANT
Counsel of Record
BENJAMIN W. THORPE
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
bondurant@bmelaw.com
(404) 881-4100

Counsel for Amicus Curiae Common Cause

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

Common Cause files this *amicus curiae* brief in support of Plaintiffs-Appellants John O. Benisek *et al*.[1]

Common Cause was founded by John Gardner in 1970 as a nonpartisan "citizens lobby" whose primary mission is to protect and defend the democratic process and make government accountable and responsive to the interests of ordinary people, and not merely to those of special interests. Common Cause is one of the Nation's leading democracy organizations and currently has over 1.1 million members nationwide and local chapters in 35 states. Common Cause has been a leading advocate of campaign finance and disclosure laws that seek to limit the dominating and corrupting influence of large political contributions and expenditures on political campaigns and governmental policies.

Partisan gerrymanders are "incompatible with democratic principles" (*Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2653, 2658 (2015)) and have long been an issue of particular concern to Common Cause. Common Cause was a leading proponent of the California ballot initiatives that

---

[1] This *amicus* brief is filed in support of Plaintiffs-Appellants with the consent of the parties. Plaintiffs-Appellants and Defendants-Appellees have granted blanket consent. Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part and that no person other than *amicus* paid for or made a monetary contribution toward its preparation and submission.

led to the creation of California's independent redistricting commission that ended partisan gerrymandering of that state's legislative and congressional districts. Common Cause also organized and led the coalitions that secured passage of the ballot initiatives that resulted in the creation of the Arizona Independent Redistricting Commission and the passage of an amendment to the Florida constitution prohibiting partisan gerrymandering. *See League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015). Common Cause is also the sponsor of an annual Gerrymander Writing Competition and symposia aimed at ending partisan gerrymandering.

Common Cause supported the Maryland plaintiffs as an *amicus curiae* in the initial appearance of this case before this Court (*Shapiro v. McManus*, 136 S. Ct. 450 (2015)) as well as on remand to the district court (*Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017)). Common Cause also supported the Wisconsin plaintiffs as *amicus curiae* in *Gill v. Whitford*, No. 16-1161, now pending before this Court.

Most importantly, Common Cause is the lead plaintiff in *Common Cause et al. v. Rucho et al.*, No. 1:16-CV-1026, 2018 WL 341658 (M.D.N.C. Jan. 9, 2018), in which a three-judge district court recently held that North Carolina's 2016 Contingent Congressional Redistricting Plan (the "2016 Plan") violates or exceeds the authority granted States by four separate provisions of the U.S. Constitution: the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Article I, §§ 2 and 4. The *Rucho* Court

reached its decision with the benefit of a full four-day trial, a largely undisputed factual record, and after determining the credibility of testimony offered by multiple expert witnesses.

Common Cause v. Rucho: The District Court's Factual Findings

North Carolina's 2016 Plan is an extreme and overt partisan gerrymander of North Carolina's thirteen congressional districts. The 2016 Plan was based on specific written instructions (the "Adopted Criteria") set forth by a Joint Reapportionment Committee of the North Carolina General Assembly. The Adopted Criteria expressly stated that only "Political Data" would be used to construct congressional districts, and directed that such data be used to maintain the Republicans' existing 10-3 "Partisan Advantage" in the state's congressional delegation:

> *Political Data*: The only data other than population data to be used to construct congressional districts shall be election results in statewide contests since January 1, 2008, not including the last two presidential contests. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2016 Contingent Congressional Plan.
>
> . . .
>
> *Partisan Advantage*: The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3

> Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation.

Common Cause v. Rucho, 2018 WL 341658, at *6.

Representative David Lewis, the Republican co-chair of the Joint Committee and the author of the Adopted Criteria, told the committee that the Adopted Criteria "contemplate[s] looking at the political data . . . and as you draw the lines, if you're trying to give a partisan advantage, you would want to draw lines so that more of the whole VTDs voted for the Republican on the ballot than they did [for] the Democrat." *Id.* As the district court noted, Representative Lewis "further explained that 'to the extent [we] are going to use political data in drawing th[e] map, it is to gain partisan advantage' and 'acknowledge[d] freely that this would be a political gerrymander. . . .'" *Id*.

The district court found that the "Legislative Defendants [did] not dispute that the General Assembly intended for the 2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates. Nor could they." *Id*. at *1. "The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data' – past election results specifying whether, and to what extent, particular voting districts had favored Republican or Democratic candidates, and therefore were likely to do so in the future – to draw a

districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts." *Id.* Further, the district court found that the "Legislative Defendants . . . never argued [] that the 2016 Plan's intentional disfavoring of supporters of non-Republican candidates advance[d] *any* democratic, constitutional, or public interest." *Id*. (italics in original).

The district court then made detailed findings of fact in support of its conclusions that the 2016 Plan violated each of four separate provisions of the Constitution.

Equal Protection: The district court found "that Plaintiffs presented more-than-adequate evidence to satisfy their burden to demonstrate that the General Assembly was motivated by invidious partisan intent in drawing the 2016 Plan." *Id.* at *45. And the district court, though not adopting the legal conclusion that "the law requires a finding of predominance, [] nonetheless f[ound] that Plaintiffs" evidence – particularly the facts and circumstances surrounding the drawing and enactment of the 2016 Plan and Dr. Mattingly's and Dr. Chen's analyses – establish that the pursuit of partisan advantage predominated over the General Assembly's non-partisan redistricting objectives" *Id*.

The district court then found "that Plaintiffs' satisfied their burden [to show] discriminatory effects [] by proving the 2016 Plan dilutes the votes of non-Republican voters and entrenches Republican control of the state's congressional delegation." *Id*. at *47. The

court itemized the categories of evidence supporting that conclusion and did not rely on any single metric in reaching its conclusion that the 2016 Plan violated the Equal Protection Clause. *Id*. at *42-48.

First Amendment: The district court found that "[t]he 2016 Plan discriminates against a particular viewpoint: voters who oppose the Republican platform and Republican candidates. The 2016 Plan also discriminates against a particular group of speakers: non-Republican candidates and voters who support non-Republican candidates." *Id.* at *63. In support of this finding, the district court explained in detail the mechanics of viewpoint discrimination central to the 2016 Plan: "The General Assembly's use of Political Data – individuals' votes in previous elections – to draw district lines to dilute the votes of individuals likely to support non-Republican candidates imposes burdens on such individuals based on their past political speech and association." *Id.* Further, the district court analyzed the 2016 Plan under the familiar *Anderson-Burdick* test for evaluating election regulations, holding that "the 2016 Plan's partisan favoritism excludes it from the class of 'reasonable, politically neutral' electoral regulations that pass First Amendment muster." *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 438 (1992)) The district court also found both injury and causation sufficient to support a First Amendment claim under familiar First Amendment analysis: "[T]he 2016 Plan . . . 'adversely affected' such voters First Amendment rights by diluting the electoral power of their votes." *Id*. at *67. "Plaintiffs' evidence

establishe[d] that the 2016 Plan's pro-Republican bias had the effect of chilling the political speech and associations rights of individuals and entities that support non-Republican candidates[,] . . . adversely affected such individuals' and entities' First Amendment rights by diluting the electoral speech and power of voters who support non-Republican candidates[, and] . . . burdened their political speech and associational rights." *Id*. at *69.

Article I, Section 4: The district court found that "the 2016 Plan exceeds the General Assembly's delegated authority under the Elections Clause for three reasons: (1) the Elections Clause did not empower State legislatures to disfavor the interest of supporters of a particular candidate or party in drawing congressional districts; (2) the 2016 Plan's pro-Republican bias violates other constitutional provisions, including the First Amendment, the Equal Protection Clause, and Article I, section 2; and (3) the 2016 Plan represents an impermissible effort to 'dictate electoral outcomes' and 'favor or disfavor a class of candidates.'" *Id.* at *71 (quoting *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)); *see also id*. at *73.

Article I, Section 2: The district court found that "The 2016 Plan also violates Article I, section 2's grant of authority to 'the People' to elect their Representatives." *Id*. at *72. "[P]artisan gerrymanders render Representatives responsive to the controlling faction of the State legislature that drew their districts. . . . By rendering Representatives responsive to state legislatures who drew the districts rather than the People,

the 2016 Plan also upsets the careful balance struck by the Framers in the Great Compromise by 'interpos[ing]' the General assembly between North Carolinians and their Representatives in Congress." *Id*. at *73.

The district court in *Common Cause v. Rucho* reached these factual findings regarding Plaintiffs' claims after extensive discovery and with the benefit of a full trial. However this Court settles the legal questions presented by the Maryland case, it should do so with full awareness of the facts relevant to the Legislative Defendants' now-pending appeal of the district court decision in *Rucho*. Despite procedural differences in the cases, however, Common Cause believes that the Maryland plaintiffs – Appellants here – have demonstrated their entitlement to relief under the First Amendment and that the Maryland district court erred in denying the relief sought.

The Partisan Gerrymander of Maryland's Sixth Congressional District

Maryland is a predominantly Democratic state. Registered Democrats outnumber registered Republicans by over a million voters statewide. Approximately 56% of registered voters in Maryland are Democrats, while 26% of voters are registered Republicans. *See* Maryland State Board of Elections, "2012 Presidential General Voter Registration Counts as of Close of Registration – Statewide," available at http://www.elections.state.md.us/press_room/documents/PG12/PrecinctRegisterCounts/Statewide.pdf. Prior to the 2011

redistricting, Maryland was represented in the House of Representatives by an eight-member congressional delegation composed of six Democrats and two Republicans that corresponded closely with the relative share of registered voters in the state.

During the 2011 redistricting cycle, the redistricting process in Maryland was dominated by the Democrats, who then occupied both the Governor's office and a large majority of the seats in both houses of the Maryland legislature. The Democrats used their control over the redistricting process to oust Republican incumbent Roscoe Bartlett by gerrymandering the Sixth District to convert it from a reliably Republican district into a reliably Democratic district.

Maryland's Sixth Congressional District was located along Maryland's northern border with Pennsylvania and was principally composed of predominately rural counties that had voted staunchly Republican for more than a generation. A plurality (46.6%) of the voters in the Sixth District were registered Republicans while 35.8% were registered Democrats. For 20 years, the people of the Sixth District had elected Republican Representative Roscoe Bartlett to represent them in Congress. Bartlett was popular with the people of his district and had easily won reelection in 2010 by a margin of over 28 points.

Although Maryland neither gained nor lost seats in the House of Representatives as a result of the 2010 census, the lines of Maryland's eight congressional districts had to be redrawn to reflect population shifts

within the state. Prior to redistricting, the Sixth District was only slightly overpopulated by approximately 10,000 people, while two of its adjacent districts were underpopulated. The Maryland legislature could easily have brought the Sixth District into compliance with the one-person-one-vote rule simply by shaving a few precincts from its southern border and adding them to either of two adjacent districts.

The Governor and the Democratic majority in the legislature decided instead to take a meat cleaver and chop the Sixth District almost in half. The district court found that the Democratic legislature "transferr[ed] 360,368 Marylanders *out of* the Sixth District and 350,179 Marylanders *into* the Sixth District. . . . In the process, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district. . . . After the 2011 Plan was implemented, a plurality (44.8%) of voters in the Sixth District were registered Democrats, while 34.4% of voters were registered Republicans. . . ." *Benisek v. Lamone*, 266 F. Supp. 3d 799, 809 (D. Md. 2017) (Findings of Fact ¶¶ 6, 7) (emphasis in original). The Democrats gerrymandered the lines of the Sixth District to convert the district from a reliably Republican district into a reliably Democratic district for the entire decade. The result was exactly as the Democrats intended. "In the 2012 congressional election . . . Democrat John Delaney defeated incumbent Republican congressman Roscoe Bartlett by a 20.9% margin" and was reelected in 2014 and 2016. *Id*. at 809-10 (Findings of Fact ¶¶ 9, 10).

Appellants, including John Benisek and other *registered Republican residents of the former Sixth District*, challenged the constitutionality of the Democrats' gerrymander of the Sixth District on First Amendment grounds and also under Article I, § 2 and Article I, § 4 of the Constitution.[2] They alleged that the purpose and effect of the 2011 Plan was to penalize them and other registered Republican residents of the Sixth District because of their Republican Party memberships, party affiliations, and voting histories by diluting the effectiveness of their votes for Republican congressional candidates, while simultaneously enhancing the relative effectiveness of ballots cast by Democratic voters in congressional district elections. They alleged that the gerrymander of the Sixth District burdened their representational rights by depriving them and other Republican residents of the former Sixth District of the opportunity to elect (or re-elect) a Republican candidate of their choice to represent them in the House of Representatives.

In *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015), this Court reversed the dismissal of the Appellants' complaint by a single district judge and remanded the case with instructions to convene a three-judge district court to rule on the merits of Appellants' claims. On remand, the district court denied the State's motion to

---

[2] The Article I claims of the Maryland plaintiffs are not at issue in this appeal, but the rubric for deciding such claims presented by the North Carolina district court in *Common Cause v. Rucho* presents an alternate basis on which the Maryland plaintiffs are now entitled to relief. *See* Argument, Section III, *infra*.

dismiss. *Shapiro v. McManus*, 203 F. Supp. 3d 579, 600 (D. Md. 2016).

After the completion of discovery, Appellants moved for a preliminary injunction and to consolidate the hearing with the trial on the merits – as provided by Fed. R. Civ. P. 65(a)(2) – in the hope of obtaining injunctive relief in sufficient time for the legislature to adopt a constitutional plan prior to the 2018 primary and general elections. A divided district court, over a strong 39-page dissent by Judge Niemeyer, refused to consolidate the hearing with the trial on the merits, and denied Appellants' motion for a preliminary injunction. The majority also, and on its own motion, stayed further proceedings pending a ruling by this Court in *Gill v. Whitford. Benisek v. Lamone*, 266 F. Supp. 3d at 801.

The Ruling of the Lower Court

The majority assumed "*that Plaintiffs have adduced sufficient evidence to show that the State crafted the 2011 redistricting plan (and the Sixth District in particular) with the 'specific intent to impose a burden' on Plaintiffs and similarly situated citizens through vote dilution.*" *Id*. at 808 (emphasis added; citation omitted). A divided court, however, denied the Appellants' motion for a preliminary injunction on the ground that the Appellants had failed to show a "strong likelihood of success" on the merits of their First Amendment claims because "the Court is not yet persuaded that it was the gerrymander (versus a host

of forces present in every election) that flipped the Sixth District and, more importantly, that will continue to control the electoral outcomes in that district." *Id*. at 808, 836.

The majority's central holding as to the burden a plaintiff must satisfy under the First Amendment was as follows: "*in the redistricting context, the government's 'action' is only 'injurious' if it actually alters the outcome of an election* (or otherwise works some tangible, measurable harm on the electorate). In other words 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 811 (Conclusions of Law ¶ 6) (emphasis added).

The majority also ruled that "vote dilution is a matter of degree, 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. . . . [and that] Plaintiffs [have not] shown that they suffered any tangible First Amendment burden other than, perhaps, their inability to elect their preferred candidate." *Id*. (Conclusions of Law ¶ 4) (internal quotations omitted).

Judge Niemeyer forcefully dissented. He wrote that "when district mapdrawers target voters based on their prior, constitutionally protected expression in voting and dilute their votes, the conduct violates the

First Amendment, effectively punishing voters for the content of their voting practices." *Id.* at 818 (citing *Shapiro*, 203 F. Supp. 3d at 595-96). Articulating this position, Judge Niemeyer noted that "[t]he First Amendment test focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not the result* of the vote. It is therefore sufficient in proving a violation . . . 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. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right." *Id*. at 818-19 (emphasis in original); and *see also id*. at 833 ("[A] plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election – though such a showing would certainly be relevant evidence of the extent of the injury."); *Id*. at 834 ("[W]hile the State's linedrawing need not change the outcome of an election to be culpable, the fact that a Democratic candidate was elected . . . supports the fact that the Republican voters have suffered constitutional injury."); *Id*. ("Republicans in the Sixth District faced a severe political disadvantage after the 2011 redistricting. This itself is a constitutional injury.").

Further, Judge Niemeyer took issue with the majority's ruling that – to prove causation – the Plaintiffs were required to negate the possibility that the defeat

of twenty-year Republican incumbent Roscoe Bartlett was not the result of his age, voter dissatisfaction with his performance, or a myriad of other neutral factors, but was caused by the partisan gerrymander of the Sixth District. He wrote that, "as to causation, the plaintiffs have established that, absent the State's retaliatory intent, the Sixth District lines would not have been drawn to dilute the electoral power of Republican voters to the same extent. The framework governing our inquiry into causation is set forth in *Mt. Healthy* [v. *Doyle*], 429 U.S. 274 . . . "[O]nce the plaintiffs have established that the government's constitutionally impermissible intent was a motivating factor in [its] decision, the burden shifts to the State to show that, even absent the forbidden intent, it would have reached the same decision." *Id*. at 835 (internal quotations omitted; citations omitted).

SUMMARY OF THE ARGUMENT

The Democratic majority's intentional conversion of Maryland's Sixth Congressional District from a predominately Republican district to a predominantly Democratic district is a textbook example of a partisan gerrymander. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2653, 2658 (2015) (defining partisan gerrymandering as the intentional "drawing of . . . legislative [or congressional] district lines to subordinate adherents of one political party and entrench a rival party in power.").

"Partisan gerrymanders . . . are inconsistent with democratic principles." *Arizona State Legislature*, 135 S. Ct. at 2658. The Democratic gerrymander of Maryland's Sixth District violates Article I, § 2 and Article I, § 4 of the Constitution. *U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *Wesberry v. Sanders*, 374 U.S. 1 (1964). It is plainly inconsistent with the objective of all redistricting which is to "establish fair and effective representation for all citizens" (*Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004)) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)), and not merely for the supporters of the party in power.

The majority "assumed" that the Appellants had produced sufficient evidence to prove that the Democrats used political data reflecting the political party affiliations and voting histories of voters in the Sixth District to "craft[] the 2011 redistricting plan (and the Sixth District in particular) *with the specific intent to impose a burden on Plaintiffs and similarly situated citizens through vote dilution*." 266 F. Supp. 3d at 808 (emphasis added).

The majority erred by refusing to subject the 2011 Plan to strict scrutiny as required by this Court's core First Amendment jurisprudence that "content-based laws," and especially those that discriminate based on political viewpoint – "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Vieth v. Jubelirer*, 541 U.S.

at 314-15 (2004) (Kennedy, J., concurring); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 870-71 (1982) ("if a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of students . . . ").

The majority also erred in holding that the intentional dilution of the Appellants' votes is not an injury to Appellants' First Amendment rights unless it alters the outcome of the general election. The enactment of the 2011 Plan diluted the Appellants' votes, and erected a barrier that deprived Appellants and other Republican voters in the Sixth District of the opportunity to elect a Republican candidate to Congress. *See N.E. Fla. Chapter of A.G.C. of Am. v. City of Jacksonville*, 508 U.S. 565 (1993).

There is not, as the majority held, a *de minimis* exception to the First Amendment prohibition against viewpoint discrimination. *See Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976) ("This Court's decisions have prohibited [State action] . . . which dampen[s] the exercise . . . of First Amendment rights, slight[ly].").

The ruling of the majority is also inconsistent with the decisions of this Court that have held repeatedly that minor deviations from the one-person one-vote rule in the apportionment of *congressional* districts are prohibited by Article I, § 2 of the Constitution.

Kirkpatrick v. Priesler, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983).

Finally, the district court also erred not only in requiring the Appellants to prove that Representative Bartlett's defeat in the 2012 general election was caused by the gerrymander of the Sixth District, but by placing the burden of proof on Appellants to disprove the possibility that Representative Bartlett's defeat was the result of other factors that are present in every election. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 275, 287 (1977).

ARGUMENT

The denial of the Appellants' motion for a preliminary injunction was predicated on a series of clear legal errors as to fundamental principles of constitutional law and should therefore be reversed as an abuse of discretion. *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014).

The dismemberment of Maryland's Sixth Congressional District is a textbook partisan gerrymander by this Court's own definition. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2653, 2658 (2015) (defining partisan gerrymandering as the intentional "drawing of . . . legislative [or congressional] district lines to subordinate adherents of one political party and entrench a rival party in power").

Partisan gerrymanders are inconsistent with the fundamental objective of all redistricting, which is to "establish fair and effective representation for all citizens." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) (internal punctuation omitted). For this reason, the Court has recognized that "[p]artisan gerrymanders . . . are [also] incompatible with democratic principles." *Arizona State Legislature*, 135 S. Ct. at 2658.

I. The Democratic Gerrymander of the Sixth District Violated the First Amendment

The right to join a political party "for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, *to cast their votes effectively* . . . rank among our most precious freedoms . . . protected by the First Amendment." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (emphasis added). Freedom of political belief and expression are "central" to the First Amendment which "was intended to protect a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen. . . ." *Elrod v. Burns*, 427 U.S. 347, 357, 372 (1976).

The legal standards for evaluating claims under the First Amendment are clearly established. The First Amendment prohibits government from "prescrib[ing] what shall be orthodox in politics." (*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) and, for this reason, from enacting "a regulation providing that no

Republican . . . shall be appointed to federal office." *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947); *see also Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person-one-vote principles, we would surely conclude the Constitution had been violated.").

These specific applications of the First Amendment to political expression reflect a broader restriction on the power of government to direct the content of its citizens' expression. The First Amendment prohibits government from regulating speech or other First Amendment-protected conduct "based on its substantive content or the message it conveys." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

"When the government targets not subject matter, but particular views . . . the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination" and therefore presumptively unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted); *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457

U.S. 853, 870-71 (1982) ("If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students. . . .").[3]

A. The gerrymander was content-based and viewpoint-discriminatory.

The manipulation of district lines to target voters based on their unquestionably protected First Amendment expression is, by definition, a content-based regulation covered by the First Amendment. The purpose of *this specific* partisan gerrymander was to *discriminate* intentionally between political parties and voters based on their political beliefs. The party in power entrenched its hold on political power by intentionally

[3] The First Amendment principles that prohibit viewpoint discrimination are well-established and have been applied in a wide variety of cases to prohibit: political patronage and employment preferences (*Elrod*, 427 U.S. 347 (1976); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990)); patronage dismissals of public employees (*Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)); retaliatory firing of public school teachers (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)); firing of public defenders (*Branti v. Finkel*, 445 U.S. 507 (1980)); the award or termination of public contracts (*O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996)), *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996)); access to campus facilities (*Rosenberger*, 515 U.S. 819); denial of a trademark registration (*Matal v. Tam*, 137 S. Ct. 1744 (2017)); the award or termination of public benefits (*Perry v. Sindermann*, 408 U.S. 593 (1972)); access to books in school libraries (*Island Trees*, 445 U.S. 507); and ballot access cases (*Anderson v. Celebrezze*, 460 U.S. 780 (1983)), among others.

drawing district lines in favor of its own candidates and voters and to dilute the voting strength of the opposition party (or parties). *See Arizona State Legislature*, 135 S. Ct. at 2658. This Court's First Amendment jurisprudence requires that such partisan gerrymanders be subjected to strict scrutiny under the First Amendment.

Here, the facts supporting the application of that rule are beyond question. The Democratic majority used political data (the Democratic Performance Index) that reflected voters' political beliefs, party affiliations, and voting histories to dilute the effectiveness of votes of likely Republican voters by "cracking" the Sixth District and distributing Republican voters among districts with safe Democratic pluralities.

That government action is presumptively unconstitutional under the First Amendment. As Justice Kennedy noted in *Vieth*, partisan gerrymanders may – by their very design – "burden[ ] or penaliz[e] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens . . . are unconstitutional absent a compelling government interest." *Vieth*, 541 U.S. at 314 (Kennedy, J. concurring in the judgment).

Partisan gerrymanders are doubly offensive to the First Amendment. They not only dilute the effectiveness of the votes of the opposition, they also enhance the relative effectiveness of the votes of supporters of

the party in power. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *Common Cause v. Rucho*, 2018 WL 341658 at *68.

"The principal inquiry in determining content neutrality [under the First Amendment] . . . is whether the government has adopted a regulation . . . because of disagreement with the message" or the messenger. (citation omitted) *The government's purpose is the controlling consideration*." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (Kennedy, J.) (emphasis added); *see also* Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 Mich. L. Rev. 351 (2017); Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 Wm. & Mary L. Rev. ___ (forthcoming 2018).

In *Vieth*, Justice Kennedy emphasized that "the inquiry" in a partisan gerrymander case, "is not whether political classifications were used," but *how* they were used. He said that "the inquiry . . . is whether political classifications were used to burden a group's representational rights. If a court . . . find[s] 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, unless the State shows some compelling interest." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment) (emphasis added).

"[A] successful claim . . . of partisan gerrymandering" under the First Amendment requires proof of both a partisan purpose (*Mt. Healthy City Bd. of Educ. v.*

Doyle, 429 U.S. 275, 287 (1977)) and a partisan effect – that the gerrymander imposed a "burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC v. Perry*, 548 U.S. 399, 418 (2006) (Kennedy, J.). The purpose of the manageable standard is, as Justice Kennedy explained in *Vieth*, to enable a court "to conclude that the State did impose a burden or restriction on the rights of a party's voters." 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

B. Intentional vote dilution is a "manageable standard" for identifying the burden on Appellants' First Amendment rights.

Vote dilution has long been recognized to be a "manageable standard" by which to measure the effect of an apportionment on the representational rights of voters. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Kirkpatrick v. Priesler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983); *cf. United States v. Classic*, 313 U.S. 299 (1941).

The enactment of the 2011 Plan diluted the votes of Appellants and other Republican voters in the Sixth District *on the effective date* of the plan and was an actual, concrete and particularized burden on or injury to their First Amendment rights. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The majority "assumed" that the Appellants had proved that the gerrymander of the Sixth District had

a partisan purpose – that Appellants had "adduced sufficient evidence to show that the State crafted the 2011 redistricting plan (and the Sixth District in particular) *with the 'specific intent to impose a burden' on Plaintiffs and similarly situated citizens through voter dilution*." 266 F. Supp. 3d at 808 (emphasis added; citation omitted). This "assumption" was fully supported by the evidence and sufficient to establish a presumptive violation of both the First Amendment and the Elections Clause.

The enactment of a congressional redistricting plan that intentionally – and by its very mechanics – diluted the effectiveness of Appellants' votes was both an actual injury and a threatened injury to Appellants' First Amendment rights. The evidence cited by the majority (and on which Judge Niemeyer relied for his powerful dissent) was all the proof of injury that is required to enable a court "to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

As in *Elrod v. Burns*, "[i]t is clear . . . that the First Amendment interests were either threatened or in fact being impaired at the time" Appellants sought preliminary injunctive relief from the District Court, and therefore "the District Court abused its discretion in denying preliminary injunctive relief." 427 U.S. at 373-74.

C. The State failed to prove that the burden on Appellants' First Amendment rights was justified by a compelling state interest.

The burden imposed by the partisan gerrymander of the Sixth District on Appellants' First Amendment rights, and those of other Republican residents of the former Sixth District, cannot be justified by a *legitimate* state interest, much less by one of paramount and compelling importance.

Partisan gerrymanders violate the duty of government to govern impartially. *See Romer v. Evans*, 517 U.S. 620, 633 (1996). "In the context of redistricting, th[e] [duty to govern] impartially 'is of critical importance because the franchise provides most citizens their only voice in the legislative process.'" *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part, quoting *Reynolds v. Sims)*; *see also Karcher*, 462 U.S. at 748 (Stevens, J., concurring). And naked [p]artisan advantage is not a *legitimate* state interest. *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. ___, 136 S. Ct. 1301, 1307 (2016) (dicta); *Cox v. Larios*, 542 U.S. 947, 947-49 (2004); *Raleigh Wake Citizens' Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016).

II. The District Court Erred in Holding That Appellants Had Failed to Prove That the Gerrymander Burdened Their First Amendment Rights

A. The district court erred in holding that the First Amendment permits a "*de minimis*" amount of intentional vote dilution.

The district court erred in holding that "vote dilution is a matter of degree" and that "a *de minimis* amount of vote dilution . . . intentionally imposed" on a group of voters because of their political views "may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury." *Benisek v. Lamone*, 266 F. Supp. 3d at 811 (Conclusions of Law ¶ 4).

There is no *de minimis* exception to the First Amendment prohibition of viewpoint discrimination. *See Elrod v. Burns*, 427 U.S. at 358 n.11 ("This Court's decisions have prohibited [State action] . . . which dampen[s] the exercise . . . of First Amendment rights, however slight[ly]. . . .") (emphasis added); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 n.8 (1990) ("[T]he First Amendment . . . protects . . . from 'even an act of retaliation as trivial as failing to hold a birthday party.' "); *see also Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring) ("the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties"). Moreover, this Court has applied that same principle in the vote dilution context, holding

repeatedly that Article I, § 2 of the Constitution prohibits *de minimis* amounts of vote dilution in the apportionment of *congressional* districts. *Kirkpatrick*, 394 U.S. 526; *Karcher*, 462 U.S. 725.

B. The district court erred in holding that intentional dilution of Appellants' votes is not an injury unless it altered the outcome of an election.

The district court majority erred as a matter of law both in: (1) focusing exclusively on the effect of the gerrymander *on the outcome of the election* in the Sixth District; and (2) in placing the burden of proof on the Appellants to prove that the Democratic gerrymander of the Sixth District, "versus a host of forces present in every election[,] . . . flipped the Sixth District and, more importantly, that will continue to control the electoral outcomes in that district" not in subsequent elections. *Benisek v. Lamone*, 266 F. Supp. 3d at 808.

If the majority were correct, a voter whose vote has been diluted by the enactment of a malapportioned congressional redistricting plan would never (as the majority concedes) have standing to bring a pre-election challenge to the statute and would have to wait until after at least one, and perhaps several, elections had been held under the unconstitutional plan in order to prove that outcomes of those elections were altered and would have been different, but for the dilution of his or her vote. Under that logic, *Wesberry v.*

Sanders, 376 U.S. 1; *Kirkpatrick*, 394 U.S. 526; and *Karcher*, 462 U.S. 725, would all have to be overruled.

The Appellants' representational rights were injured-in-fact (*see Lujan*, 504 U.S. 555) by the *enactment* of a congressional redistricting plan that was "crafted . . . with the 'specific intent to impose a burden' on Plaintiffs and similarly situated citizens through vote dilution." 266 F. Supp. 3d at 808. Their votes were actually diluted on the effective date of the 2011 Plan when the Sixth District was "cracked." Some Republican residents of the former Sixth District were left stranded in the new Sixth District with a newly-created Democratic plurality, while other Republican residents were deported to surrounding districts with safe pluralities of Democratic voters.

The adoption of the 2011 Plan was both an actual and a threatened future injury to Appellants' First Amendment rights, was sufficient to entitle them to preliminary injunctive relief, and did not depend on the outcome of the 2012 election. *See Elrod*, 427 U.S. at 373-74.

The enactment of 2011 Plan also created a legal barrier whose purpose and effect is to make it more difficult for Appellants to elect Republican candidates to Congress. This Court has repeatedly held that,

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the [disadvantaged] group . . . need not allege that he

> would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

N.E. Fla. Chapter of A.G.C. of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993); *see also Clinton v. City of New York*, 524 U.S. 417, 433 n.2 (1998); *see also Quinn v. Millsap*, 491 U.S. 95, 103 (1989); *Clements v. Fashing*, 457 U.S. 957 (1982); *Turner v. Foche*, 396 U.S. 346 (1970) (all holding that individuals have standing to challenge statutes or regulations that deprived them of the opportunity to run for or to be appointed to a public office, without having to prove that they would have been successful).

This Court has never held that a presidential candidate – or that candidate's supporters – are not injured by and cannot challenge the constitutionality of a state ballot-access statute or regulation unless they can prove that – but for having been denied access to the ballot – their preferred candidate would have won the primary, much less the general election. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983). The district court erred in imposing an artificially high burden for proof of injury here.

C. The district court erred in placing the burden of proof on Appellants to prove the outcome of the election was not the result of other factors.

The district court further erred by placing the burden on Appellants to refute *any* possible alternative explanation for the electoral outcomes under the 2011 Plan. Once Appellants proved that partisanship was "*a* substantial factor or . . . *a* motivating factor" in the decision of the Maryland legislature to gerrymander the Sixth District, the burden of proof shifted to the State to disprove causation – to prove that the lines of the Sixth District would have been drawn in the same way for reasons having nothing to do with Appellants' party affiliations and voting histories. *Mt. Healthy*, 429 U.S. at 287 (emphasis added).

The majority erred by placing the burden on the Appellants to prove that Representative Bartlett's defeat by a 20 point margin in 2012 was "engineered through a gerrymander" and was not "the result of neutral forces and voter choice." 266 F. Supp. 3d at 811 (Conclusions of Law ¶ 6).

The majority compounded this error by ruling that the Plaintiffs were required to establish that partisan gerrymander of the Sixth District not only "flipped the Sixth District [but] more importantly, . . . will continue to control the [future] outcomes in that district." 266 F. Supp. 3d at 808. This Court has held that "*[t]he loss of First Amendment freedoms, for even minimal periods*

of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (emphasis added).

III. The Democratic Gerrymander of the Sixth District was also Prohibited by Article I, § 2 and by Article I, § 4 of the Constitution

In addition to establishing a clear violation of the First Amendment, the record also established that the partisan gerrymander of the Sixth District also violated both Article I, § 2 and the Elections Clause in Article I, § 4 of the Constitution. *Common Cause v. Rucho*, 2018 WL 341658, at *70.

States have no inherent, sovereign, or reserved powers over *congressional* redistricting. *Thornton*, 514 U.S. at 833-34; *Cook*, 531 U.S. at 523. States' only powers over the drawing of congressional district lines are those that have been delegated to state legislatures by the Elections Clause in Article I, § 4. *Id*.

This Court has held that the Elections Clause is a *limited* delegation "of authority to issue *procedural* regulations" for the conduct of congressional elections and is not "*a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade [other] important constitutional restraints*." *Cook*, 531 U.S. at 523 (emphasis added); *Thornton*, 514 U.S. at 833-34.

The partisan gerrymander of Maryland's Sixth Congressional District violated all three of these limitations. *Common Cause v. Rucho*, 2018 WL 341658, at *70.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

GREGORY L. DISKANT
JONAH M. KNOBLER
PETER A. NELSON
ELENA STEIGER REICH
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
gldiskant@pbwt.com
(212) 336-2000

EMMET J. BONDURANT
Counsel of Record
BENJAMIN W. THORPE
BONDURANT, MIXSON
& ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
bondurant@bmelaw.com
(404) 881-4100

Counsel for Amicus Curiae Common Cause