IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Stephen M. Shapiro, et al. *Plaintiffs*, v. David J. McManus, Jr., et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

BRIEF *AMICUS CURIAE* OF THE CAMPAIGN LEGAL CENTER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTEREST OF *AMICUS CURIAE*

Amicus is a nonpartisan organization committed to democracy and electoral reform. The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases in the Supreme Court, including the remand above, *Shapiro v. McManus*, 136 S. Ct. 450 (2015), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

INTRODUCTION

"The true principle of a republic is that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486 (1969) (quoting Alexander Hamilton in 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). Yet in our republic, every ten years, our elected representatives choose whom they please to vote for them.

Redistricting, a decennial duty to redraw district lines based on new census data to equalize population among electoral districts, has become one of the most powerful weapons in modern political warfare. It is also, arguably, the most undemocratic. Political gerrymandering, also known as partisan gerrymandering, is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). Our representatives and their parties (armed with fine-grained voting data and sophisticated mapping software)

eliminate political competition, predetermine political success, and wrest unjustified political power from the opposing party by annexing and ousting unwilling voters in and out of their districts every redistricting cycle. As a result, elections preordained by gerrymandered lines make it impossible for citizens to exercise the right at the heart of our constitutional structure: the ability to hold their representatives accountable. *See* THE FEDERALIST NO. 37 at 234 (James Madison) ("The genius of republican liberty seems to demand ... not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people.")

The Supreme Court has recognized the grave constitutional harm that political gerrymandering inflicts. Indeed, in *Vieth v. Jubelirer*, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional. 541 U.S. 267 (2004). As such, the Supreme Court has kept the judiciary's doors decidedly open to hearing such claims. Since the Supreme Court has not yet settled upon the standard for adjudicating partisan gerrymandering claims, that task falls in the first instance on the three-judge courts, such as this Court, to develop them. A dismissal of a complaint here would be tantamount to holding a political gerrymandering claim is lacking justiciability. A trial on the merits would enable the parties to best develop and present the evidence, while developing their best argument for a workable rule by which this Court can determine if the challenged plan violates the First Amendment.

In this case, Plaintiffs allege that Maryland's partisan gerrymander violates their First Amendment rights because it purposefully and effectively eliminated their voting power as Republican voters and therefore unconstitutionally retaliated against them for their political expression. A First Amendment approach holds promise. Justice Kennedy's opinion in *Vieth* suggested that a First Amendment approach might be the best vehicle to adjudicate the

constitutional harm of partisan gerrymandering. Indeed, partisan gerrymanders impinge on First Amendment interests by burdening and penalizing citizens for their participation in the electoral process, their voting history, their association with a political party, and/or their expression of political views.

As this past redistricting cycle demonstrates, the need to develop a meaningful and manageable partisan gerrymandering jurisprudence has only intensified over time. The precision of data now available allows for more surgical gerrymanders and, indeed, recent studies show a significant uptick in the extremity of partisan gerrymanders; national public attention to the problem of partisan gerrymandering is mounting; and citizens are increasingly frustrated with a process that often cheats them of their democratic power and dubious of legislatures' ability to exercise any self-restraint. This, in turn, harms the confidence that the public has in our democracy. "[P]ublic confidence in the integrity of the electoral process has independent significance ... because it encourages citizen participation in the electoral process." *Crawford v. Marion County*, 553 U.S. 181, 197 (2008). Moreover, the lack of a robust partisan gerrymandering jurisprudence has not kept politics and redistricting out of the courthouse. Instead, those challenges are often awkwardly forced into the racial gerrymandering sphere, creating a doctrinal mess, perversely encouraging legislatures to boast of their partisan gerrymandering, and unnecessarily racializing politics.

This brief is intended to provide the Court with an understanding of the increasing urgency for the development of a judicially manageable partisan gerrymandering doctrine, review the recent jurisprudence, and urge this Court to engage in the process of establishing a partisan gerrymandering standard rather than dismiss Plaintiffs' First Amendment claim out of hand. The current state of affairs is neither constitutionally permissible nor impossible to correct.

Courts, ready and able to prevent the grave democratic harms that partisan gerrymanders produce, ought to do so. This Court should not eschew the resolution of a challenge to this undemocratic order, vitally important to our republic, on a motion to dismiss.

ARGUMENT

I. Partisan Gerrymandering Is an Intensifying National and Constitutional Concern that Demands a Legal Resolution.

The imperative for courts to adjudicate political gerrymandering cases, in the hopes of maintaining "[t]he ordered working of our Republic, and of the democratic process" has never been greater. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring); *see also*, *id*. at 317 ("Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.') Existing doctrines that regulate the redistricting process, such as the Voting Rights Act's requirements, the one-person, one-vote principle, and the racial gerrymandering doctrine, have proven insufficient to address partisan gerrymandering harms, leaving constitutional injuries without remedies. Put differently, existing jurisprudence has been stretched and exhausted in an attempt to address the injuries inflicted by partisan gerrymanders. Meanwhile, national attention on this critical issue has increased as the public becomes ever more frustrated with a system that cheats them of their opportunity to actually choose, and hold responsible, their own representatives. This case provides this Court with an opportunity, and a responsibility, to begin to address this democratic crisis.

A. Modern Technology Allows Legislators to Create Surgical and Extreme Partisan Gerrymanders, and They Do.

Modern technology and advanced political science techniques allow legislators to quickly and easily draw districts with surgical precision—moving individual voters in and out of districts

based on available data about their voting history and expressed partisan preferences—in order to serve the legislature's partisan ends. *See* Royce Crocker, Congressional Redistricting: An Overview, CONG. RESEARCH SERV. (Nov. 21, 2012) (noting that as "technology has improved for analyzing data, many districts are created using smaller and more complicated geographic units or entities"); Drew Desilver, *Chart of the Week: A Century of U.S. Political History*, PEW RES. CTR. (June 27, 2014)[1] ("[D]istricts have become more and more jigsaw-puzzle-like, as sophisticated mapping software and detailed demographic data have combined to make gerrymandering a fine art."); *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.") (citation omitted). The more refined the technology and analysis becomes, the more aggressive, and durable, partisan gerrymandering can (and likely will) be. As one redistricting veteran explained: "There's an old saying: Give a child a hammer, and the world becomes a nail. Give the chairman of a state redistricting committee a powerful enough computer and block-level census data, so that he suddenly discovers he can draw really weird and aggressive districts—and he will."[2] Robert Draper, *The League of Dangerous Mapmakers*, THE ATLANTIC (Oct. 2012).[3]

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[1] *Available at* http://www.pewresearch.org/fact-tank/2014/06/27/chart-of-the-week-a-century-of-u-s-political-history/.

[2] Indeed, it appears that this prediction was borne out in the Maryland plan at issue in this case. In *Fletcher v. Lamone*, a three-judge panel of this Court described this map as one that "completely disregarded" community interests in order to disadvantage an incumbent Republican senator. 831 F.Supp. 2d 887, 905-06 (D. Md. 2011) (Titus, J., concurring in the judgment). In particular, the gerrymander produced gross distortions in District 6. It previously "consisted of predominantly mountain, rural, farming or low density suburban communities that had a broad commonality of interests." *Id.* at 906. Redistricting brought in "several thousand residents of far more densely populated areas" and fractured the existing community. *Id*. The new district paired voters with "an interest in farming, mining, tourism, paper production, and the hunting of bears" with those "who abhor the hunting of bears and do not know what a coal mine or a paper mill even looks like." *Id*.

[3] *Available at* http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/.

Indeed, whether or not technological advancements are to blame,[4] the modern era has seen a marked increase in the extremity of partisan gerrymanders. After analyzing electoral data from 1972 to 2012 using the efficiency gap (one measure of partisan gerrymandering), one study found that "[w]hether one considers aggregated or disaggregated data, it . . . is clear that the scale and skew of today's gerrymandering are unprecedented in modern history." Nicholas Stephanopoulus & Eric McGhee, *Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 876 (2015); *see also* Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 2, 2013[5] (noting that in 2012, "Democrats received 1.4 million more votes for the House of Representatives, yet Republicans won control of the House by a 234 to 201 margin. This is only the second such reversal since World War II."). As Justice Kennedy predicted, absent a robust jurisprudence to check it, "the temptation to use partisan favoritism" has only grown and has had undeniable results. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring).

B. Increased Partisan Gerrymandering, a Matter of National Attention, Strains the Public's Trust in Our Democratic System.

This increasingly hostile partisan gerrymandering process has not escaped the public's notice and a national conversation is ongoing about the harms of partisan gerrymandering on our democracy. *See, e.g.*, Editorial, *It's Up to Voters to End Gerrymandering*, WASH. POST, Jan. 15, 2016[6] (noting President Barack Obama's call to action on partisan gerrymandering in his final State of the Union address: "[T]he practice of drawing our congressional districts so that

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[4] *See* Micah Altman & Michael McDonald, *The Promise and Perils of Computers in Redistricting*, 5 DUKE J. CONST. L. & PUB. POL'Y 69, 77 (2010) (casting some doubt on the theory that technology has directly led to more severe gerrymandering).

[5] *Available at* http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all.

[6] *Available at* https://www.washingtonpost.com/opinions/its-up-to-voters-to-end-gerrymandering/2016/01/15/213b0e9a-ba45-11e5-b682-4bb4dd403c7d_story.html.

politicians can pick their voters and not the other way around."); Editorial, *The Gerrymandering Jig Should Be Up*, WASH. POST., July 20, 2015[7] (likening Maryland's 3rd district to a "blood spatter" and describing it as "a testament to that arrogance and a study in political cynicism"); Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, *supra*; Robert Draper, *The League of Dangerous Mapmaker*, THE ATLANTIC, *supra*; Karl Rove, *The GOP Targets State Legislatures: He who controls redistricting can control Congress*, WALL ST. J., Mar. 4, 2010.[8]

Public trust in the federal government is at historic lows: "Just 19% of Americans say they can trust the federal government always or most of the time. That's among the lowest levels in over 50 years." *Beyond Distrust: How Americans View Their Government*, PEW RES. CTR., (Nov. 23, 2015).[9] A significant number of Americans see partisan gerrymandering as part of the problem (and a check on it as part of the solution). *See* Andrew Dugan, *Congressional Approval Rating Languishes at Low Level*, GALLUP.COM (July 15, 2014);[10] *see also*, Mileah Kromer and Chris Landers, *Hogan Maintains High Statewide Job Approval Rating: Marylanders Give State High Marks as a Place to Live*, GOUCHER POLL (Feb. 23, 2016) (finding that 75% of Maryland citizens would prefer that an independent commission draw district lines);[11] Public Policy Polling, North Carolinians Want Nonpartisan Redistricting (Feb. 18, 2016) (finding strong

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[7] *Available at* https://www.washingtonpost.com/opinions/the-gerrymandering-jig-should-be-up/2015/07/20/b42e83e6-2f0b-11e5-8f36-18d1d501920d_story.html.

[8] *Available at* http://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

[9] *Available at* http://www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/.

[10] *Available at* http://www.gallup.com/poll/172859/congressional-approval-rating-languishes-low-level.aspx.

[11] *Available at* http://www.goucher.edu/Documents/Poli_Sci/hughes/Spring%202016%20Goucher%20Poll%20Release%20(Tuesday%20Feb%2023)%20FINAL%20FINAL.pdf

bipartisan support for nonpartisan redistricting in North Carolina)[12]; Virginia Survey 2015, UNIVERSITY OF MARY WASHINGTON at 19[13] (finding that 72% of Virginians thought an independent commission should draw district lines, and only 15% believed the legislature should maintain that power).

Indeed, in states where citizens have the ability, they have begun to take the matter into their own hands. In 2000, against a "background of recurring redistricting turmoil," Arizona voters adopted an initiative aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2658, 2661 (2015). The initiative amended the Arizona Constitution to remove redistricting authority from the Legislature and vest it instead in an independent commission, the Arizona Independent Redistricting Commission. *Id.*[14] Californians also created, by initiative, an independent redistricting commission to develop redistricting plans. Bruce Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L. J. 1808, 1823 (2012). And a number of states have provided for the participation of commissions in redistricting. *See Arizona Independent Redistricting Comm'n*, 135 S. Ct. at 2662 (citing Iowa, Ohio, Maine, and Connecticut, as examples); Cain, *supra* at 1813-22. Citizens have adopted these measures in statewide referenda to regain their rights to participate effectively in a free and democratic process. That citizens, where they can, have had to take on the task of reigning in rampant partisan gerrymandering by wresting power from the legislatures demonstrates the imperative of judicial adjudication of such cases.

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[12] *Available at* http://www.publicpolicypolling.com/pdf/2015/PPP_Release_NC_21816.pdf.

[13] *Available at* http://www.umw.edu/news/wp-content/uploads/sites/7/2015/11/UMW-VA-Survey-2015_Topline4.pdf.

[14] That commission was upheld last term by the Supreme Court. *Id.* at 2659.

Partisan gerrymanders have defiantly resisted the characterization of a "self-limiting enterprise." *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment). It is necessary for courts to fully adjudicate partisan gerrymandering claims before already low levels of public trust in our democracy's ability to self-govern further disintegrate.

C. The Lack of a Robust Partisan Gerrymandering Jurisprudence Has Significant Consequences for Race and Politics.

The inability of the Supreme Court to develop a judicially manageably partisan gerrymandering standard has not stemmed the costly litigation that challenges extreme partisan gerrymanders. Rather, it has redirected challenges to partisan gerrymanders towards other available but less appropriate redistricting doctrines, most notably racial gerrymandering. The failure to entertain partisan gerrymandering claims *qua* partisan gerrymandering claims has two pernicious consequences. First, in order to avoid liability for a racial gerrymander, legislatures and their lawyers are incentivized to play up, as much as possible, partisan considerations in the redistricting process and subsequent litigation. Second, those challenging partisan gerrymanders are forced to characterize their injuries in racial, rather than partisan, terms. In some states, state legislatures charged with political gerrymandering first defend districts on the legislative floor based on adherence to racial goals (*e.g.*, an inaccurate assessment of what is necessary to comply with the VRA). After enactment, the State, facing a racial gerrymandering challenge, argues that partisanship, and not race, drove the creation of the districts. *See Wittman v. Personhuballah*, No. 14-504 (U.S. argued on Mar. 21, 2016). These unintended consequences can be avoided if lower courts squarely confront partisan gerrymanders and the First Amendment injuries they inflict, as *Vieth* suggests (*see infra* Section II).

1. *Partisan Motivations Are Amplified When Race is the Only Impermissible Motivation in Redistricting*

The current redistricting doctrine (or lack thereof) perversely encourages those involved in the redistricting process to amplify partisan motives, further eroding the public's faith in the legislature's ability of self-governance. While acknowledging that race can be *a* factor in redistricting, *Miller v. Johnson*, 515 U.S. 900, 915 (1995), the Court has held that race cannot be the predominant factor. *Shaw v. Reno*, 509 U.S. 630 (1993). However, current jurisprudence allows States to avoid racial gerrymandering liability if their districts are explainable by politics, rather than race. In *Easley v. Cromartie*, the Court refused to apply strict scrutiny under the Equal Protection Clause to the challenged district because the evidence did not unequivocally show that race, *rather than* politics, predominated the drawing of district lines. 532 U.S. 234, 258 (2001).

This doctrinal backdrop produces perverse incentives both before and after the redistricting process. Ex ante, in order to later rely on an *Easley* defense in any potential racial gerrymandering suit, legislators openly discuss their egregious partisan motivations in redistricting, filling the legislative record with references to partisan objectives. For example, a case concerning North Carolina's gerrymandered districts, which gives three seats to Democrats and ten seats to Republicans even though the state is split roughly evenly between the two parties, is currently pending before a three-judge court. *Harris v. McCrory*, No. 1:13-CV-00949 (M.D.N.C. Feb. 5, 2016). After the court initially found the redistricting plan to be an unconstitutional racial gerrymander, *id.*, at *21, the architects of the plan made sure to assert strong partisan motivations in drawing the remedial plan. Plaintiffs' [Proposed] Objections and Memorandum of Law Regarding Remedial Redistricting Plan at 36, *Harris v. McCrory*, No. 1:13-CV-00949 (M.D.N.C. Feb. 29, 2016) ("[W]e want to make clear that we . . . are going to use political data in drawing this map. It is to gain partisan advantage on the map. I want that

criteria to be clearly stated and understood . . . I'm making clear that our intent is to use — is to use the political data we have to our partisan advantage."); s*ee also* Defendants' Motion for Summary Judgment at 12, *Davis v. Perry*, No. 5:11-cv-00788, 991 F. Supp.2d 809 (W.D. Tex. Jan. 8, 2014) (citing the Director and Counsel to the Senate Select Committee on Redistricting's statement that his "intent during the drawing of Senate District 10 was to enhance the republican character of the district by adding republican voters and removing democratic voters"). Nonetheless, a federal court found that S.B. 10 was the product of racially discriminatory intent. *Texas v. United States*, 887 F. Supp.2d 133 (D.D.C. 2012) (vacated on other grounds).

Ex post, in defending districts against racial gerrymandering claims, jurisdictions and their lawyers routinely justify a gerrymander by arguing that it had a partisan purpose, rather than an impermissible racial one. Examples are countless. *See*, *e.g.*, *Session v. Perry*, 298 F. Supp. 2d. 451, 473 ("Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was 'the entire motivation.'"); Appellants' Brief at 37, *Wittman v. Personhuballah*, No. 14-1504 (U.S. argued Mar. 21, 2016) ("The fact that politics explains Enacted District 3 is unsurprising because Delegate Janis expressly said so repeatedly, in a display of candor rarely seen in redistricting."); Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction at 26, *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 7938787, 835 F.Supp.2d 563 (N.D. Ill. Dec. 15, 2011) ("Examining a map . . . and considering Plaintiffs['] original partisan gerrymandering allegations, the most evident explanation for the changed shape of Congressional District 4 is politics, not race."); Defendants' Memorandum of Law in Support of their Motion for Summary Judgment at 2-3, *Rodagno v. Illinois State Bd. of Elections*, 2011 WL

5636173, 836 F.Supp.2d 759 (N.D. Ill., Dec. 7, 2011) (citations omitted) ("In addition, the General Assembly considered partisan composition with regard to each and every district . . . Indeed, a 'Democratic Index' was created to measure partisan preference . . . at the precinct level, which even allowed for estimated partisanship calculations at the census-block level, to demarcate areas as 'Republican' or 'Democrat' and further defining them by the degree of party affiliation.")

Such blatant public admission of partisan motivations, be it on the floors of legislatures or in courthouses, undermines the public's trust in the integrity of the electoral process and the legislature's ability to exercise "restraint" in the redistricting process. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring). "[P]rotecting public confidence in the integrity of the electoral process" justifies this Court's duty to review Maryland's gerrymandered congressional districts on their merits. *Crawford*, 553 U.S. at 224.

2. *Reliance On Racial Gerrymandering Doctrine to Challenge Political Gerrymanders Racializes Politics.*

The blurry boundary between racial and partisan gerrymandering claims also channels redistricting litigation towards the Court's racial gerrymandering jurisprudence, and encourages litigants to seek redress for partisan harms in racial terms. The one-person, one-vote claim is often foreclosed because jurisdictions ordinarily ensure that any deviations are minor (below 10%) and therefore not presumptively unconstitutional. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).[15] The other available option, therefore, is to recast partisan gerrymandering

[15] Extreme cases might allow for some relief for even "minor" deviations, but they are rare. For example, in *Larios v. Cox*, Georgia's redistricting plan was struck down under the one-person, one-vote doctrine where the "9.98% population deviations [were] not supported by *any* legitimate, consistently-applied state interest but, rather, resulted from the arbitrary and discriminatory objective of increasing the political power" of Democrats. 300 F. Supp.2d 1320 (N.D. Ga. 2004), *summarily aff'd*, *Cox v. Larios*, 542 U.S. 947 (2004).

objections to a plan as racial ones, when such a framing is possible. *See* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 297 n.60 (1996) (noting that some racial gerrymandering lawsuits were "stalking horse cases in which disappointed aspirants for elective office use whatever statutory handle is available to challenge the otherwise unreviewable outcomes of the political process").

Litigants often seek to hedge by including a racial gerrymandering allegation in their complaints rather than gambling on a partisan gerrymandering claim alone. This unfairly pits the inchoate partisan gerrymandering doctrine against its mature racial analogue. But since allegations of partisan motivations in the redistricting process harm the core racial gerrymandering claim that race, *rather than* politics *predominated* in the redistricting process, the two claims are not likely to both prevail (as Defendants often point out). *See*, *e.g.,* Defendants' Reply in Support of the Motion to Dismiss at 11, *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 7938552, 835 F.Supp.2d 563 (N.D. Ill., Dec. 15, 2011) (citation omitted) ("Plaintiffs argue unpersuasively that they have not pleaded themselves out of court . . . because they have not alleged that anything other than race played a

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Similarly, the post-2000 redistricting of Madison County, Illinois "demonstrated the worst of politics. The process fell so far short of representing the electorate that it seems the citizens of Madison County were not so much as an afterthought." *Hulme v. Madison County*, 188 F. Supp. 2d. 1041, 1044 (S.D. Ill. 2001). When opponents to the proposed plan registered their objections at a meeting of the redistricting committee, the chair, Democrat Wayne Bridgewater declared, "We are going to shove [the map] up your f------ ass and you are going to like it, and I'll f---- any Republican I can." *Id*. at 1051. At the final meeting where the Board approved Bridgewater's map, he physically tore up a Republican proposed map. *Id*. The plan ultimately adopted was heavily gerrymandered to serve partisan goals: it paired two Republican incumbents, split many more precincts than alternative plans did, and diluted a township's voting strength by spreading it across three districts. *Id*. Even though the plan's total deviation of 9.3 percent technically placed it within the ten percent threshold, plaintiffs nevertheless challenged the plan with a one-person, one-vote claim. It succeeded at the district court, which found that "the apportionment process had a 'taint of arbitrariness or discrimination.'" *Id*. at 1086.

These cases are good examples of how challenges to partisan gerrymanders are redirected to other less appropriate redistricting doctrines. The claims were primarily challenges to blatant partisan gerrymanders. But, in order to strike it down, the litigants and the courts relied on the far more limited doctrinal tools that were more easily available.

role . . . [yet] the Complaint alleges that the Congressional Map. . . represents a partisan gerrymander . . . therefore, Plaintiffs have alleged that partisanship explains the shape of the district.").

Thus, plaintiffs often face a forced choice between the claims of racial and partisan gerrymandering. In the current doctrinal climate, plaintiffs are not irrational in advancing the well-established racial gerrymandering claim and abandoning the more risky partisan gerrymandering claim. *See Fletcher v. Lamone*, 831 F.Supp.2d 887, 904-05 (D. Md. 2011) (Titus, J., concurring) (noting that while plaintiffs alleged a political gerrymander in their complaint, "[i]n their papers and in oral argument . . . the Plaintiffs premised their claim . . . on allegedly improper racial motivations . . . and eschewed the . . . allegations . . . of a partisan gerrymander. Since the Plaintiffs' claims are tethered to a claim of racial animus . . . it is difficult for the Court to address the more basic question of whether Maryland has engaged in improper partisan gerrymandering").

This is "tragic and unfortunate." *Id.* at 904. The polity is harmed when political objections are forced into racial pigeonholes. "[S]urely there is no national interest in creating an incentive to define political groups by racial characteristics." *City of Mobile v. Bolden*, 446 U.S. 55, 88 (1980) (Stevens, J., concurring). Yet so long as the Constitution protects citizens from discrimination in the redistricting process only on the basis of race and not on the basis of political viewpoints, "such an incentive will inevitably result." *Id*. at 89.

II. Partisan Gerrymandering is Justiciable and a First Amendment Theory Should Not Be Rejected on a Motion to Dismiss.

A. The Supreme Court Has Repeatedly Affirmed that Political Gerrymandering Claims are Justiciable.

1. *Davis v. Bandemer*

Since *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court has acknowledged the constitutional harms and dangers posed by partisan gerrymanders and consistently held that the federal courthouse doors are open to resolve claims of political abuse of the redistricting process.

In *Bandemer*, the Supreme Court held, for the first time, that political gerrymandering claims were justiciable. *Id*. at 123. First, it noted that partisan gerrymandering claims are similar to claims that the Supreme Court has recognized in one-person, one-vote and racial gerrymandering cases. In one-person, one-vote cases, the Court said, "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group." *Id*. at 124. In racial gerrymandering cases, the claim is that "an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice." *Id*. at 124. Likewise, in partisan gerrymandering cases, the claim alleges the very same injury—an unjustified diminished chance to elect a representative of choice. *Id*. at 125. Partisan gerrymandering cases differ from racial gerrymandering cases only in that the disfavored group identification is political rather than racial. The Court was not convinced that such a distinction justified "a refusal to entertain" political gerrymandering cases. *Id*.

Further, in *Bandemer*, the Court recognized that a failure to recognize partisan gerrymandering claims would leave serious constitutional injuries without remedies. Before *Bandemer*, one-person, one vote and racial gerrymandering doctrines did not (and, despite *Bandemer*, still do not) address the injuries inflicted by partisan gerrymanders. Indeed, before the racial gerrymandering doctrine was developed, the one-person, one-vote doctrine was plainly insufficient to address the harms of racial gerrymanders. *Id*. at 124 ("In [our racial gerrymander cases], there was no population variation among the districts, and no one was precluded from voting. The claim instead was that an identifiable racial or ethnic group had an insufficient

chance to elect a representative of its choice." (citing *White v. Regester*, 412 U.S. 755 (1973) and *Whitcomb v. Chavis*, 403 U.S. 124 (1971))). Similarly, the Court determined that if it failed to recognize a partisan gerrymandering claim, severe partisan gerrymanders that nonetheless produce equipopulous districts would inflict constitutional injuries without remedies. *Id.* at 125.

Finally, the Court was not convinced that any standards it would craft with respect to partisan gerrymandering claims would be "less manageable than the standards that have been developed for racial gerrymandering claims." *Id*. at 125. While the Court recognized that the inquiry as to when a redistricting map offends the Constitution due to partisan bias is "of necessity a difficult inquiry," the Court was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided." *Id*. at 123, 143. The Court affirmed its faith in the lower courts' "abilities to distinguish disproportionality *per se* and the lack of fair representation" that offends the Constitution. *Id.* at 143, fn. 21.

2. *Vieth v. Jubelirer*

While the Court in *Bandemer* correctly held that partisan gerrymandering claims are justiciable, the Court's first attempt at articulating a specific standard floundered. *Bandemer* required Plaintiffs to show that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. This requirement, focusing on a vague concept of influence rather than an ability to elect candidates, confounded lower courts. The result was near universal rejection of partisan gerrymander claims. *See Vieth v. Jubelirer*, 541 U.S. 267, 279, 283 (2004) (plurality opinion). But, the failure of partisan gerrymandering claims in the years after *Bandemer* should not lead to "counsel of despair." *Vieth*, 541 U.S. at 344 (Souter, J. dissenting). During the years after *Bandemer*, the lower courts were not formulating their own workable standards but rather

attempting to apply *Bandemer's* faulty criteria. *Id.* (noting that *Bandemer*'s near impossible criteria was "the principal reason we have not gone from theoretical justiciability to practical administrability").

Thus, the Court revisited the issue in *Vieth v. Jubelirer* in 2004. A majority of the Court agreed that the impracticability of the specific standard in *Bandemer* did not indicate the unmanageability of partisan gerrymandering claims overall. Thus, a majority of the Court reaffirmed *Bandemer*'s central holding that political gerrymandering claims are justiciable. *See Vieth*, 541 U.S. at 306 (Kennedy, J., concurring); *id*. at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

While a minority of the Justices would have overruled *Bandemer* and found political gerrymandering claims nonjusticiable, *id*. at 281 (plurality opinion), all nine members of the Court agreed in *Vieth* that partisan gerrymanders raise a constitutional question, and that some severe partisan gerrymanders are unconstitutional. *Id.* at 293 (opinion of Scalia, J., joined by Roberts, C.J., O'Connor, & Thomas, J.J.) ("[A]n *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume."); *id.* at 311-12 (Kennedy, J. concurring in the judgment) ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'"); *id.* at 326 (Stevens, J., dissenting) ("State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decision maker's duty to remain impartial."); *id.* at 343 (Souter, J., joined by Ginsburg, J., dissenting) ("However equal districts may be in population as a formal matter, the consequence of a vote cast can be minimized or maximized, and if unfairness is sufficiently demonstrable, the guarantee of equal protection condemns it as a denial of substantial equality.")

(internal citations omitted); *id.* at 355 (Breyer, J., dissenting) ("Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy.").[16] Just last Term, the Court reaffirmed the view that "[p]artisan gerrymanders. . . [are incompatible] with democratic principles." *Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (citing *Vieth*, 541 U.S. at 292); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (noting that "no legitimate purposes could explain" the partisan gerrymander in *Cox v. Larios*, 542 U.S. 947 (2004) and "assuming, without deciding, that partisanship is an illegitimate redistricting factor").

Justice Kennedy concurred in the judgment of the Court to affirm the dismissal of plaintiffs' claims because he was not satisfied that the *Vieth* plaintiffs offered judicially discernible and manageable standards to adjudicate political gerrymandering claims and therefore failed to establish any "constitutional flaw." *Id*. at 313 (Kennedy, J., concurring). But Justice Kennedy reaffirmed the justiciability holding, explaining: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Id.* at 311. Given the importance of the rights involved, Justice Kennedy held the courthouse doors open and committed the lower courts to developing potential standards for adjudicating partisan abuse in redistricting, unbound by the unreasonable criteria of *Bandemer*. *Id*. at 311-12 ("Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect

[16] Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782 (2005) ("To be sure, *Vieth* did advance the ball in one critical respect: For the first time, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional.").

minorities.'"(quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938) ("[I]n another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation.")).

Thus, after *Vieth*, the development of a manageable partisan gerrymandering standard is, in the first instance, in the lower courts' hands. Given the urgent need for a meaningful partisan gerrymandering jurisprudence, *see supra* Section I, this is a critical responsibility. *See also Fletcher*, 831 F. Supp.2d at 905 (Titus, J., concurring) ("Never before has the United States seen such deep political divisions as exist today, and while the courts are struggling in their efforts to find a standard, the fires of excessive partisanship are burning and our national government is encountering deadlock as never before. In his concurrence in *Vieth,* Justice Kennedy invited the formulation of standards, and for the sake of the country, one should be developed lest the extreme political divisions plaguing this country continue.").

B. Partisan Gerrymanders Infringe on First Amendment Interests.

Nonetheless, Justice Kennedy did provide lower courts with important insights about possible ways to adjudicate new partisan gerrymandering claims. In *Vieth*, he advanced a doctrinal alternative to the Equal Protection Clause for partisan gerrymandering claims.[17] 541 U.S. at 314 (Kennedy, J., concurring). "After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of

[17] While Justice Kennedy proposed the First Amendment as a viable doctrinal route to challenge partisan gerrymanders, the Court has not had an occasion to consider fully this doctrinal alternative. In the only other partisan gerrymandering case to reach the Court, *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399 (2006), the Court considered only whether Texas's unusual voluntary mid-decade redistricting was an unconstitutional partisan gerrymander. While it denied the plaintiffs' specific claim, it did not foreclose a First Amendment challenge.

political views." *Id*. (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)); *see also Vieth*, 541 U.S. at 324 (Stevens, J., dissenting) (citing *Elrod*, 427 U.S. at 356) ("[P]olitical belief and association constitute the core of those activities protected by the First Amendment."). Indeed, the First Amendment provides a promising analytical approach for addressing partisan gerrymandering claims and this Court should not reject such a challenge out of hand.

"No 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." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The First Amendment is charged with protecting the right to vote, a right "preservative of our other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). It does so by ensuring that citizens can meaningfully "participate in electing our political leaders," *McCutcheon v. Federal Election Comm'n*, 134 S.Ct. 1434, 1441 (2014), and by guaranteeing "the freedom of speech," "the right of the people peaceably to assemble," and the right to "petition the Government for a redress of grievances," U.S. CONST. amend. I. First Amendment rights must be upheld not only for their own sake, but also for their service to the preservation of our democracy:

> (I)mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

New York Times v. Sullivan, 376 U.S. 254, 301 (1964) (Black, J., concurring) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

The First Amendment is of a piece with the rest of the Constitution that creates and promises a democracy constituted by "we the people." U.S. CONST. pmbl. Even the Elections Clause, which grants States the power to regulate the "Times, Places and Manner of holding

Elections for Senators and Representatives", U.S. CONST. art. I, § 4, cl. 1, is but "a grant of authority [to States] to issue procedural regulations," and not "a source of power to dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)). Ultimately, any regulation of the political process cannot disturb the core principle that "the National Government is, and must be, controlled by the people without collateral interference by the States." *U.S. Term Limits, Inc.*, 514 U.S. at 841 (Kennedy, J., concurring).

The freedoms embodied in the First Amendment are meant to facilitate the exercise of voters' independent and informed judgment about what is best for the future of our Republic. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."); *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (citing *Roth v. United States,* 354 U.S. 476, 484 (1957)) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation."). The First Amendment "helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015).

Partisan gerrymanders violate these treasured First Amendment principles by treating voter choices as fixed political facts, rather than as dynamic engines of judgment that produce the "electoral mandate" upon which our republic governs. Thus, partisan gerrymanders offend

the First Amendment because they suppress and undermine the ability of voters to meaningfully "participate in electing our political leaders." *McCutcheon*, 134 S.Ct. at 1441. By dictating political outcomes that instead ought to be dependent on the free exercise of voters' consciences, partisan gerrymanders eliminate voters' voices and their ability to choose their elected representatives, the core principle of our democracy. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("The principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

Penalizing voters based on their voting history or association with a political party is un-American. The First Amendment harms that partisan gerrymanders inflict are similar to those that the Court has recognized as flowing from ballot access restrictions. In *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), the Court found that Ohio's laws, which foreclosed the ability of a new political party to be put on a state ballot, placed "substantially unequal burdens on both the right to vote and the right to associate" for members of that party. Likewise, in *American Party of Tex. v. White,* 415 U.S. 767, 795 (1974), the Court found that a Texas law limiting absentee ballots to only the two major parties discriminatorily burdened the First Amendment rights of a minor party that had secured a candidate on the general ballot. Unconstitutional partisan gerrymanders are similar to such ballot restriction laws. In both situations, the State hollows out any meaningful First Amendment right to vote and to associate for members of the disfavored party. While neither prevents members of the disfavored party from physically casting a ballot, the State has made it pointless for them to do so. Unconstitutional ballot access restrictions sharply limit their ability to cast a ballot for their preferred candidate and severe partisan gerrymanders render even a wealth of options on a ballot utterly meaningless.

"First Amendment concerns arise where an apportionment has the *purpose and effect* of burdening a group of voters' representation rights." *Vieth*, 541 U.S. at 314 (Kennedy, J. concurring) (emphasis added). Unconstitutional partisan gerrymanders pack and crack members of the disfavored party, on the basis of their protected political speech, in order to impose severe burdens on their ability to elect candidates of their choice. As Justice Kennedy recognized in *Vieth*, this type of retaliatory act, with real First Amendment consequences for voters, is constitutionally unacceptable.

C. This Court Must Engage Partisan Gerrymandering Claims and Should Not Dismiss Plaintiffs' Claims on a Motion to Dismiss.

To satisfy federal pleading standards, a plaintiff need only draft a complaint that "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Plausible" does not mean "probable," but only means that plaintiffs' allegations are above the level of mere speculation. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555. For all the reasons above, accepting all Plaintiffs' factual allegations as true, Plaintiffs' First Amendment challenge to the partisan gerrymander in Maryland is certainly "plausible." *See also Shapiro v. McManus*, 136 S.Ct. 450, 456 (2015) ("Whatever 'wholly insubstantial' and 'obviously frivolous,' etc., mean, at a minimum they cannot include a plea for relief based on a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases.").

After *Vieth*, the Justices left it to the lower courts' to analyze and develop new constitutional standards for partisan gerrymandering, at least in the first instance. *See Whitford v. Nichol*, No. 15-cv-421-bbc, 2015 WL 9239016, at *4 (W.D. Wisc. Dec. 17, 2015) ("Until a majority of the Supreme Court rules otherwise, lower courts must continue to search for a judicially manageable standard.") (denying the State's motion to dismiss in a partisan

gerrymandering challenge in Wisconsin). The determination of "manageability" is, at least in part, a factual question that should not be resolved on a motion to dismiss. *Id.* at *9 ("A determination whether plaintiffs' proposed standard is judicially manageable relies at least in part on the validity of plaintiffs' expert opinions . . . A more developed record may show that plaintiffs' claims cannot be legally distinguished from the partisan gerrymandering claims that the Supreme Court has rejected in the past. However, current law does not foreclose plaintiffs' claims.").

The Court need not agree with every part of the theory put forward by the Plaintiffs' in order to find that their First Amendment claim is "plausible" and worthy of further analysis. *See, e.g.*, *id.*, at *15 ("[W]e believe that plaintiffs have overstated defendants' burden in part three of their proposed test. However, this conclusion does not require summary judgment in defendants' favor."). After all, it is plaintiffs' responsibility to make a legally cognizable claim, put forward evidence, and provide legal argument supporting their claim. However, fashioning a determinative standard and adjudicating the case is ultimately the province of this Court.

Under Supreme Court precedent, the Plaintiffs' First Amendment claim is far more than plausible. Adjudication and judicial resolution of partisan gerrymandering claims has never been more important. This Court should not dismiss Plaintiffs' claims but rather join other lower courts that are engaged in the enterprise of establishing a judicially manageable standard for partisan gerrymandering cases such as this.

Under our Constitution, it is 'We the People' who get to have the final say. Through the votes we cast at the polls, we determine who our legislative spokespersons will be. Extreme partisan gerrymandering plans restrict the ability of the people to voice our choices on Election

Day, and in so doing, deprive us of an ability to say what the proper destiny of our nation or State shall be.

CONCLUSION

For the foregoing reasons, this Court should deny the State's motion to dismiss this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 20, 2016, I caused a copy of the foregoing document to be served on all parties by this Court's electronic filing system.

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