STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY and DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOLOUSE OLIVER, in her official capacity as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM, in her official capacity as Governor of New Mexico, HOWIE MORALES, in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate, and JAVIER MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

PLAINTIFFS' RESPONSE BRIEF TO LEGISLATIVE DEFENDANTS' ANNOTATED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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INTRODUCTION

Plaintiffs' Annotated Findings Of Fact And Conclusions Of Law (Sept. 15, 2023) ("Pls.AFFCL.") show that Senate Bill 1 ("SB1") is an egregious partisan gerrymander, under the controlling three-part test set out by Justice Kagan in her dissent in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Indeed, to use Justice Ginsburg's words, SB1 is a "max-[Democratic]" gerrymander. *See* Tr. of Oral Arg. 7, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No.16-1161) ("*Gill* Tr."). Specifically, Plaintiffs showed that: (1) the Legislature enacted SB1 with the egregious partisan intent to flip District 2 from a Republican-majority district to a Democratic-majority district, while preserving the already existing Democratic majorities in Districts 1 and 3; (2) SB1 had this egregious partisan effect, creating a near-perfect gerrymander; and (3) Legislative Defendants could not possibly provide a neutral justification for SB1, let alone one satisfying intermediate scrutiny. Indeed, as Plaintiffs explained, their partisan-gerrymandering claim against SB1 bears a striking similarity to—and, in truth, is more powerful than—the partisan-gerrymandering claim against Maryland's Sixth District at issue in *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497–507 (D. Md. 2018), *vacated and remanded sub nom. Rucho*, 139 S. Ct. 2484. Since Justice Kagan concluded that the *Benisek* challenge was an easy case of partisan gerrymandering under her test, this Court should have no trouble concluding that SB1 is likewise a clear partisan gerrymander.

Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law (Sept. 15, 2023) ("Leg.AFFCL."), make only meager efforts to defend SB1 on each of the three elements in Justice Kagan's test. Each of those efforts fail.

Beginning with SB1's egregious partisan intent, Legislative Defendants focus their efforts on the objectively false assertion that legislators' statements regarding their intent in the redistricting process—such as, most notably, Senator Mimi Stewart's especially damning text messages, recounted in Plaintiffs' opening filing—are irrelevant. Yet, Justice Kagan herself in *Rucho* expressly (and repeatedly) relied upon such statements from state officials to conclude that the partisan-intent element was satisfied as to both of the challenged maps there, in addition to other kinds of intent evidence. Indeed, under Legislative Defendants' position here, courts could not even rely on racist statements from legislative leadership during the redistricting process in racial-gerrymandering cases. Legislative Defendants also attempt to immunize the obvious partisan intent with SB1 by claiming that SB1 pursues supposedly neutral communities-of-interest policies, such as dividing the oil industry community of interest among multiple districts, while uniting urban and rural communities in single districts. Such flimsy claims cannot negate the Legislature's obvious partisan intent with SB1, especially when those invocations are obviously self-defeating—citing both the *union* and the *division* of communities of interest in an effort to defeat claims of partisan intent.

Legislative Defendants' arguments with respect to SB1's egregious partisan effect fare no better. Legislative Defendants predominantly claim that the actual 2022 elections results under SB1 show that District 2 is competitive for Democrats and Republicans. But they turn a blind eye to the obvious context: 2022 was a strong year for Republicans nationally, and yet the Democratic candidate for District 2

defeated the Republican *incumbent*, even as Republicans secured garnered 44.9% of the congressional vote (and 0% of the congressional seats) statewide. Thus, SB1 empowers Democrats to win in District 2 even in Republican years, showing its egregious partisan effect. A comparison to *Benisek* is especially apt in this regard as well; there, a Republican challenger narrowly lost to a Democrat *incumbent* in one election under Maryland's gerrymandered Sixth District, yet that did not stop Justice Kagan from easily concluding that Maryland's map had egregious partisan effects.

Finally, Legislative Defendants' perfunctory arguments on the justification element fail. While Legislative Defendants claim that SB1 furthers a variety of "appropriate" policies, their burden is to show that SB1 is substantially related to *important* government interests, which is a more demanding standard. Nevertheless, many of the supposedly "appropriate" policies that Legislative Defendants put forward—such as the oil industry considerations, or the desire to combine urban and rural voters into single districts, discussed above—are clear pretexts for the Legislature's partisan goals and so cannot save SB1 here.

This Court should declare that SB1 is an impermissible partisan gerrymander, enjoin its use in all future elections, and promptly schedule remedial proceedings that will lead to adoption of a remedial map for the 2024 elections.

ARGUMENT

I. The Legislature Enacted Senate Bill 1 With Egregious Partisan Intent, Notwithstanding Its Grab Bag Invocation Of Other Potential Purposes For Its Enactment Of Senate Bill 1

A. Plaintiffs have satisfied the first element of Justice Kagan's controlling test, just like the challengers to Maryland's Sixth District in *Benisek*, which Justice Kagan

understood to present a clearcut case of partisan gerrymandering. *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting). Democrats excluded Republicans from any meaningful involvement and produced SB1 by modifying the New Mexico Citizen Redistricting Committee's ("Committee") Concept H Map—already the most pro-Democratic map from the Committee—into a near-perfect gerrymander. Pls.AFFCL.26–27. Contemporaneous communications from Democratic legislative leaders confirm that the Legislature enacted SB1 with extreme partisan intent, including Senator Mimi Stewart bragging that, with SB1, the Legislature had "improved [the Concept H Map] and now ha[d] CD 2 at 53% dpi [Democratic Performance Index]," with "CD 1 [at] 54%, [and] CD 3 [at] 55.4%." Pls'.Ex.2, at 4. SB1's objective features further demonstrate the Legislature's egregious partisan intent, as expert calculations from both Plaintiffs and Legislative Defendants show that SB1 does, in fact, create a close to 54% Democratic majority in each district, consistent with the statewide Democratic composition of 54.29%. Pls.AFFCL.27, 31–32 (relying on 2020 presidential election vote data). And the Legislature also subordinated traditional redistricting criteria for partisan reasons in key parts of SB1, especially its trisecting of the Southeast region among the districts. *Id.* at 28.

B. In their Annotated Findings Of Fact And Conclusions Of Law,[1] Legislative Defendants *do not* argue that the process to draft SB1 meaningfully included Republicans, *see generally* Leg.AFFCL.16–18, as might weigh against a finding of impermissible partisan intent under the first element of Justice Kagan's controlling

[1] Unlike Legislative Defendants, Executive Defendants chose not to file Annotated Findings Of Fact And Conclusions Of Law. *See* Exec. Defs." Notice Of Non-Filing (Sept. 15, 2023).

test, *see* Pls.AFFCL.22–23, 26 (citing, among other authorities, *Rucho,* 139 S. Ct. at 2510–11, 2520–21 (Kagan, J., dissenting)). Indeed, Legislative Defendants' recitation of the SB1 map-drawing process—especially juxtaposed with the process used by the Committee to adopt its proposed maps—underscores the SB1 map-drawing process's entirely partisan nature. *Compare* Leg.AFFCL.16–18, *with id.* at 11–16. The Committee held a combined 16 public hearings and accepted extensive public comment beginning in early August 2021 before it adopted its proposed maps in mid-October 2021—for a consideration period of approximately two-and-a-half months. *See* Leg.AFFCL.11–16; Pls.Ex.11, at 8–9, 10–11. The Democratic-controlled Legislature, in marked contrast: (1) drew SB1 out of the public eye, *see* Pls.Ex.8, ¶ 4 ("This process was a closed-door, and I believe exclusively Democratic-run, one."); Pls.Ex.32, ¶ 4 (same); (2) rejected any meaningful Republican input into the map-drawing process, Pls.Ex.8, ¶¶ 3–4, 7–11; Pls.Ex.32 ¶¶ 3–4; and (3) approved the map just four days after its public introduction without securing *any* Republican votes, *see* Leg.AFFCL.16–18; Pls.AFFCL.11.

Legislative Defendants' failure to address the partisan process to draw SB1 aside, the arguments that they do make on the impermissible-partisan-intent element of Justice Kagan's test all fail.

First, Legislative Defendants misrepresent what evidence may establish the intent element of Justice Kagan's controlling test. *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting). Legislative Defendants claim that the Court must discern impermissible partisan intent "primarily by the *legislation itself*," Leg.AFFCL.35

(quoting *U.S. Brewers Ass'n v. Dir. of N.M. Dep't of Alcoholic Beverage Control*, 1983-NMSC-059, ¶ 10, 100 N.M. 216, 668 P.2d 1093), without considering "[s]tatements of legislators after the passage of legislation[,]" *id.* at 35, or "[t]he sponsoring legislator's motives or communications with staff[,]" *id.* at 35–36 (quoting *In re 2022 Legislative Districting of State*, 282 A.3d 147, 197 (Md. 2022)).

But Justice Kagan did *not* limit the evidence that may satisfy the intent element of her controlling test to the text of the redistricting legislation itself. *Rucho,* 139 S. Ct. at 2510–11, 2517 (Kagan, J., dissenting). Rather, Justice Kagan repeatedly relied upon statements from the state officials overseeing the redistricting processes in the two States at issue there to conclude that the partisan-intent element was satisfied, in addition to other non-literal-text evidence. *Id.* In *Benisek*, for example, Justice Kagan concluded that Democratic leaders' candid statements, including the governor's statement that he wanted "to create a map that was more favorable for Democrats over the next ten years," indicated their partisan intent. *Id.* at 2010–11, 2017. Further, Justice Kagan's consideration of such statements from state officials is consistent with numerous courts across the country to have adjudicated partisan-gerrymandering claims, which courts similarly relied upon statements from key state officials to find that the map at issue was drawn with impermissible partisan intent. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 388 (Fla. 2015) ("the actions and statements of legislators and staff, especially those directly involved in the map drawing process," are "relevant on the issue of intent" (citation omitted)); *Common Cause v. Rucho*, 284 F. Supp. 3d 780, 788 (M.D.N.C. 2018) ("Plaintiffs

adduced direct evidence of the General Assembly's invidious partisan intent—including statements by the legislators and consultant responsible for drawing the 2016 Plan[.]"); *Texas v. United States*, 887 F. Supp. 2d 133, 165 (D.D.C. 2012) (explaining that the court's "skepticism about the legislative process that created [the challenged district] [was] further fueled by an email sent between staff members on the eve of the Senate Redistricting Committee's markup of the proposed map"), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *see also Easley v. Cromartie*, 532 U.S. 234, 254 (2001) (email from "legislative staff member responsible for drafting districting plans" to state senators relevant in racial-gerrymandering challenge).[2] Indeed, under Legislative Defendants' view, a court could not rely even on racist statements from legislative leadership during the redistricting process when deciding racial-gerrymandering claims. *Contra Easley*, 532 U.S. at 254. This powerful line of on-point authority refuting Legislative Defendants' view explains why ***the State of New Mexico endorsed the use of statements from key state officials as evidence of partisan intent for partisan-gerrymandering claims in the amicus brief in Rucho before the U.S. Supreme Court***. Pls.Ex.29, at 11–12.

Legislative Defendants' citation of non-redistricting cases for the primacy of the literal text of a law to establish legislative intent is completely irrelevant. *See*

[2] Legislative Defendants' dogged efforts to thwart Plaintiffs' discovery requests also demonstrate that they know statements of key legislators are both admissible and highly relevant to prove Plaintiffs' partisan-gerrymandering claim. Indeed, if Legislative Defendants actually believed that such statements were inadmissible or irrelevant here, they would have simply opposed Plaintiffs' discovery requests on relevancy grounds, rather than on an absolutist view of legislative privilege that is unmoored from New Mexico Supreme Court precedent. *See* Pls.' Combined Opp'n To [Five Mots. To Quash] 4–5 (Aug. 17, 2023)

Leg.AFFCL.34–35 (citing *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶¶ 16, 52, 148 N.M. 21, 229 P.3d 494 (interpreting the Public Utility Act); *U.S. Brewers Ass'n*, 1983-NMSC-059, ¶¶ 1, 10 (analyzing constitutionality of the 1979 amendment to the Discrimination in Selling Act); *Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶¶ 1, 16–17, 115 N.M. 308, 850 P.2d 1011 (interpreting the Youth Authority Act); and *Fann v. Kemp,* 515 P.3d 1275, 1285 (Ariz. 2022) (addressing legislative privilege in the context of ballot audit)).[3] A claim that the Legislature has engaged in impermissible gerrymandering is "entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction." *Detzner*, 172 So.3d at 388 (citation omitted). Further, the New Mexico Supreme Court ordered this Court to follow the test that Justice Kagan applied in her *Rucho* dissent, and that test considers statements from legislators to establish partisan intent. Am. Order 3, *Grisham v. Van Soelen*, No.S-1-SC-39481 (N.M. Aug. 25, 2023).

It is, of course, manifestly obvious why Legislative Defendants want this Court to ignore the damning statements that Democratic legislative leaders—including Defendants Senator Stewart, Speaker Egolf, and Senator Cervantes—made to explain their egregious partisan intent. Plaintiffs have direct, smoking-gun evidence of the Democratic-controlled Legislature's partisan intent with SB1 in the form of

[3] Legislative Defendants also cite, Leg.AFFCL.36, *In re 2022 Legislative Districting of State,* 282 A.3d at 197, but the partisan-gerrymandering test that the Maryland Court of Appeals applied to Maryland's state-legislative map as a matter of Maryland state law is incompatible with the controlling test from Justice Kagan's dissenting opinion in *Rucho*, *compare id.* at 196–97, *with Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)—which test Justice Kagan applied *as to Maryland* in *Rucho* itself, *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).

damning public and private statements from key Democratic legislators, *see* Pls.AFFCL.24–25, and Legislative Defendants understand that they will lose on this element of Justice Kagan's test based upon that evidence alone.

In any event, "the text of the legislation," Leg.AFFCL.36, alone does demonstrate that the Legislature drew SB1 with the impermissible partisan intent. SB1's text allocates each precinct in New Mexico to District 1, District 2, or District 3, *see* Pls.Ex.1, at 4–8 (text of SB1) (pdf page numbers), and that allocation creates a 54% Democratic-party composition for District 1, a 53% Democratic-party composition for District 2, and a 55.4% Democratic-party composition for District 3. Pls.AFFCL.27, 31 (citing Senator Stewart's text message and the analyses of three experts in this case, from Plaintiffs and Legislative Defendants). Given the Democratic Party's statewide composition of 54.29%, this is a *near perfect gerrymander* for Democrats. Pls.AFFCL.27, 31–32; *see Gill* Tr.7. Or, in Justice Ginsburg's words, SB1 would be a "max-[Democratic]" gerrymander. *Gill* Tr.7.

Second, Legislative Defendants argue that SB1 "is the product of population changes in New Mexico," rather than the Legislature's partisan intent to entrench Democrats, Leg.AFFCL.22, but this is risible. SB1 made substantial shifts of residents between districts not justified by the need to reach population equality. Pls.AFFCL.32–33 (citing Pls.Ex.2, at 34–41 (hereinafter "Trende Rep."). After the 2020 census, New Mexico's districts were less than two percentage points away from the ideal population—District 1 only needed to gain 11,264 residents, District 2 only needed to lose 8,181, and District 3 only needed to lose 3,082. Trende Rep.32. Yet,

SB1 shifted *505,952 residents* between districts, *more than 20 times what was needed to meet equal-population requirements*. *Id.* at 33. That is comparable to the cracking and packing that Justice Kagan in *Rucho* determined to be evidence of impermissible partisan intent, where Maryland's Democratic officials "moved 360,000 residents out and another 350,000 in" to a district that only needed to lose roughly 10,000 people to achieve population equality. 139 S. Ct. at 2519 (Kagan, J., dissenting).

Third, Legislative Defendants list a grab bag of policy considerations that SB1 purportedly pursues, but this backfires. Leg.AFFCL.20–22, 24. Legislative Defendants' conflicting policy justifications are self-defeating. Under their view, a policy of respecting communities of interest allows the Legislature to either unite a community in SB1 (such as by combining certain communities "due to affinities in lifestyle, culture, immigration status and concerns, and other similar interests," *id.* at 21), or divide a community in SB1 (such as by dividing the oil industry across multiple districts, *id.* at 40–41), with the Legislature's community-of-interest-unitive and community-of-interest-divisive purposes always constituting bona fide defenses against a finding of impermissible partisan intent.

That is obviously not the law. It is trivially easy to comply with redistricting criteria—especially when such criteria are defined as broadly and malleably as Legislative Defendants have articulated them here—to reach *any* political outcome that a gerrymandering Legislature desires, thus such compliance has little relevance (if any) to rebutting an otherwise powerful showing of partisan intent. The district court in *Whitford v. Gill*—which authority Legislative Defendants invoke frequently

in their filing, *see* Leg.AFFCL.35–37—made this precise point, explaining that advances in modern map-drawing technology empower partisan mapdrawers to draw redistricting maps that "atten[d] to traditional districting criteria," while still achieving a strong partisan gerrymander in favor of the mapdrawer's preferred party. 218 F. Supp. 3d 837, 849, 889 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018); *see also Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring) (although compliance with traditional redistricting criteria "might seem [like a] promising" indicator of partisan fairness, they are not "sound as independent judicial standards for measuring a burden on representational rights"); *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737, 817 (Pa. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 891 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *see also Romo v. Detzner*, No. 2012-CA-000412, 2014 WL 3797315, at *8 (Leon Cnty. Fla. Cir. Ct. July 10, 2014). This is also why, in her dissenting opinion in *Rucho*, Justice Kagan recognized that mapdrawers may "manipulat[e] [ ] district lines for partisan gain" even as they otherwise comply with "a State's own (non-partisan) districting criteria." *See* 139 S. Ct. at 2521, 2523 (Kagan, J., dissenting). And the State of New Mexico joined an amicus brief in the U.S. Supreme Court in *Gill*, 138 S. Ct. 1916, making this exact point as well, *see* Pls.Ex.34, at 12–13. So, even if SB1 did pursue the allegedly neutral policy considerations that Legislative Defendants have put forward, that cannot negate a finding that the Legislature drew SB1 with the egregious partisan intent to entrench Democrats, as Plaintiffs' evidence shows. *See* Pls.AFFCL.22–28.

Fourth, and relatedly, many of the redistricting policies that Legislative Defendants invoke are not traditional redistricting criteria, but rather pretextual vehicles crafted to achieve the partisan ends articulated by Senator Stewart in her text messages. *See* Pls.Ex.2, at 4.

Starting with Legislative Defendants' claim that SB1 "[i]ncreas[es] the number of congressional representatives with a direct constituent interest and concerns relating to the extractive industries [e.g., oil] located in southeast New Mexico," Leg.AFFCL.21–22; *see also id.* at 40, this purported concern is obviously pretextual. As Plaintiffs have explained, "Oil Industry Considerations" are merely the Legislative Defendants' clumsy cover for partisan gerrymandering in New Mexico, given that the overwhelming majority of New Mexico's oil wells are located in the Southeast region of the State, Pls.AFFCL.40–41 (citation omitted); *see* Pls.Ex.27 (data source provided to Legislative Defendants' expert Dr. Jowei Chen, *see* Pls.Ex.6, at 8); *see also* Pls.Ex.28, which is both the historical core of District 2 and the region of New Mexico with the highest concentration of Republican voters, Pls.AFFCL.41; *see also id.* at 5–6. Legislative Defendants do not cite *any* authority in New Mexico law supporting the decision to artificially divide up this industry, Leg.AFFCL.21–22. Nor can Legislative Defendants point to any voters who asked to break up the oil and gas industries, *see* Leg.AFFCL.21—22, even as they combed the SB1 hearings for any stray reference to the oil industry made by various legislators, *infra* p.13, and cited comments from the public on other topics and other proposed maps, *see* Pls.AFFCL.12–13. Indeed, one of Plaintiffs' own experts, Brian Sanderoff, admitted

at his deposition that he "d[id] not recall" whether *anyone* at the public hearings on SB1 asked to split up the oil wells among the State's districts, Pls.Ex.25, at 19 (hereinafter "Sanderoff Dep."), nor had he *ever* "heard of people talk[ing] about spreading oil wells in redistricting," *id.* at 64.

Notably, when legislators take industry interests into account when redistricting, they traditionally do so to *unite* those interests—not divide them. As the U.S. Supreme Court recognized in *Miller v. Johnson*, 515 U.S. 900 (1995), a valid community of interest—like an industry—is one that has "actual *shared* interests," *id.* at 916 (emphasis added), such as would justify including that community together within a district to promote the community's "common thread of relevant interests," *id.* at 920. It should be no surprise, therefore, that splitting the oil industry here actually harms this community of interest, including by diluting its influence in Congress among three separate Representatives. Pls.Ex.18 ¶¶ 10–11. Thus, while Legislative Defendants offer broad, anodyne statements from a handful of Democratic legislators at the SB1 hearings that splitting the oil industry would "enhance[ ]" the "representation and understanding of the oil and gas industries across multiple congressional districts," Leg.AFFCL.40; *see id.* at 21–22, these statements do not credibly support their argument here that the Legislature devised SB1 to ensure greater representation for the oil industry, rather than as a clumsy cover to entrench Democratic in power in all three congressional districts.

The Legislature's criterion of "meld[ing] urban and rural constituencies," *id.* at 20–22, is similarly a pretextual cover for impermissible partisan intent. As with the

oil industry, cracking urban and rural communities of interest between districts does not create more "represent[ation]" for these communities, *id.* at 20, but rather undermines their respective "shared interests" by spreading the community between three different Representatives, thereby diluting the community's influence, *see Miller*, 515 U.S. at 916, 919–20. Nor do courts recognize the desire to combine urban and rural voters into a single district as a traditional redistricting principle. Rather, this criterion often disregards "political subdivision or natural or historical boundary lines" and so is "little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 578–79 (1964); *Hellar v. Cenarrusa*, 682 P.2d 539, 544 (Idaho 1984) (citing *Reynolds*, 377 U.S. at 578). Here, SB1 combines into the redrawn District 2 portions of the Central region—a region that contains Albuquerque, is the most populous region, and is exceedingly Democratic, Trende Rep.25, 34–35—with the "rural" and "agricultural" Southeast region, Pls.Ex.7, which is "the most heavily Republican region," Trende Rep.25. That strained combination of these disparate regions needlessly disregards "political subdivision" and "historical boundary lines," which exposes the Legislature's real motivator here: "partisan gerrymandering." *Reynolds*, 377 U.S. at 578–79; *Hellar*, 682 P.2d at 544.

Legislative Defendants claim that the Democratic-controlled Legislature's intent with SB1 was to create competitive districts, *e.g.*, Leg.AFFCL.17–18, 24, 36–37, but this too is a façade for the Legislature's egregious partisan purposes. The Legislature did not draft SB1 to provide an equal opportunity for Republicans and Democrats to win election in any of the districts. As Senator Stewart's text message

powerfully shows, the Legislature created SB1 by starting with the Concept H Map—the most pro-Democratic map adopted by the Committee—and "improv[ing]" it to more securely flip District 2 to a Democratic-party majority *without* jeopardizing the Democrats' hold on District 1 and District 3, because the Concept H Map's allocation was "not enough for a mid term election." Pls.Ex.2, at 4; Pls.AFFCL.2, 31. So, because "[t]here's only so much dpi to go around"—as a representative for the Center for Civic Policy stated to Senator Stewart, Pls.Ex.2, at 4—the Legislature's plan to sweep the State's districts required it to shift some of the "very large [Democratic] advantages" in Districts 1 and 3 into District 2 (making District 1 and 3 more Republican and District 2 more Democratic) to flip that district for the Democrats, but not so many Democratic voters as would provide a meaningful opportunity for Republicans to win in District 1 or District 3, Pls.Ex.16, at 1–2; Pls.AFFCL.31–32. The end result is a "max-[Democrat]" map, *Gill* Tr.7, with a 54% Democratic-party composition for District 1, a 53% Democratic-party composition for District 2, and a 55.4% Democratic-party composition for District 3, Pls.AFFCL.27, 31—three districts that are all solidly Democratic, *see* Sanderoff Dep.43 (expert for Legislative Defendants stating that he could not think of a New Mexico election where a Republican won in a "54 percent Democratic district"). So, while SB1 does "increas[e] Republican performance in CD-1 and CD-3" and "Democratic performance in CD-2" as compared to the prior map, Leg.AFFCL.24, the Legislature made those adjustments to create the "best-case scenario for a [Democratic] gerrymander[ ]" in the State, Trende Rep.14, not to create any district where Republicans actually had

a fair chance at victory, Pls.AFFCL.31–32; *see Gill* Tr.7. Indeed, like Legislative Defendants here, Maryland also attempted to defend its obviously gerrymandered District 6 in *Benisek* on a supposed desire "to create a competitive district," Pls.Ex.35, at 27–28, yet Justice Kagan concluded that Maryland's map was an obvious partisan gerrymander, Pls.AFFCL.20–21, 39.

Finally, Legislative Defendants state that SB1's "distribution of registered voters by party more closely reflects the state's overall party registrations," Leg.AFFCL.23, but this is an admission that SB1 is a near-perfect gerrymander. Again, as Plaintiffs explained, "the best-case scenario for a gerrymanderer" in New Mexico who wants Democrats to sweep the State's three districts "would be drawing three districts" with a Democratic-party composition of "54.29%," which matches the Democratic Party's statewide composition. Pls.AFFCL.31–32 (using 2020 presidential election vote data) (quoting Trende Rep.14 and also citing Pls.Ex.2, at 4, Brace Rep.74 (pdf page number), Sanderoff Rep.6, and Sanderoff Dep.43). Drawing districts with a Democratic-party composition that matches the Democratic Party's statewide composition ensures that there are "enough" Democratic voters in each district to secure a Democratic victory in all three districts in all but the most extremely pro-Republican conditions, without making any one Democratic candidate "take[ ] the hit"—given the reality that "[t]here's only so much dpi to go around." Pls.Ex.2, at 4. So, when the Legislature "improved" the Concept H Map to make District 1 "54%" Democratic, District 2 "53%" Democratic, and District 3 "55.4%" Democratic, *id.*, it created a "max-[Democratic]" gerrymander, *Gill* Tr.7.

II. Senate Bill 1 Also Has Impermissible Partisan Effects, Notwithstanding Legislative Defendants' Contrary Arguments

A. Plaintiffs further explained in their Annotated Findings Of Fact And Conclusions Of Law that, under the second element of Justice Kagan's test, SB1 has the impermissible partisan effect of "substantially diluting [non-Democratic] votes." *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (citation omitted); Pls.AFFCL.29–42. Justice Kagan's dissenting opinion in *Rucho* explains that a plaintiff challenging a map as an impermissible partisan gerrymander may establish that map's impermissible partisan effects either with qualitative evidence or through a sophisticated social-science analysis—and Plaintiffs satisfy both methods of proof here. Under the qualitative-evidence method, SB1 has impermissible partisan effects because the Legislature meticulously allocated Democratic-party voters in each of SB1's three districts to craft a near-perfect Democratic gerrymander—"improv[ing] the peoples map [the Concept H Map]" to create a "54%" Democratic-party composition for District 1, a "53%" Democratic-party composition for District 2, and a "55.4%" Democratic-party composition for District 3. Pls.Ex.2 at 4; Pls.AFFCL.30–32. Further, SB1 also has impermissible partisan effects under the qualitative-evidence method because SB1 makes substantial shifts in the districts' partisan composition, so as to flip District 2 for the Democrats while preserving the existing Democratic majorities in Districts 1 and 3. Pls.AFFCL.32–35. Under the sophisticated social-science analysis, the same conclusion obtains: Mr. Trende randomly generated one-million maps that do not take partisanship into account in any way, and SB1 is more favorable for Democrats than 99.89% of those one-million

ensemble maps (or 998,897 maps), making it an extreme outlier. Pls.AFFCL.36–37. And notably, given that Plaintiffs have established SB1's impermissible partisan effects under both methods endorsed by Justice Kagan, that makes Plaintiffs' evidence even more powerful than the evidence Justice Kagan found overwhelming in *Benisek* as to Maryland's 2011 map, given that the *Benisek* challengers proceeded only under the qualitative-evidence method. Pls.AFFCl.4, 34–35.

B. Legislative Defendants' arguments as to the partisan effects prong fail.

Starting first with the qualitative-evidence method, Legislative Defendants' arguments are underwhelming, to put it mildly. Leg.AFFCL.37–39.

Legislative Defendants claim that "election results provide the best direct and reliable evidence of vote dilution" under this method of proof and that the 2022 election under SB1 demonstrates that "candidates from either of the major parties can effectively compete" in District 2, since the Democratic candidate from District 2 won by "a mere 1,350 votes" over Republican Representative Herrell. Leg.AFFCL.38. But this ignores essential context surrounding the 2022 election. Pls.AFFCL.39–40. The 2022 election cycle favored Republicans across the country, and Republican congressional candidates in New Mexico garnered 44.9% of the vote statewide. Pls.AFFCL.39–40. Further, Representative Herrell was the *incumbent* from District 2, and, as Mr. Sanderoff agreed in his deposition, incumbents are "[o]ftentimes" "hard to beat" given that they "enjoy an advantage at the polls." Sanderoff Dep.54–55; Pls.AFFCL.39–40. Nevertheless, the Democratic challenger to Representative Herrell still prevailed in SB1's redrawn District 2, demonstrating

that—after SB1—Democrats will win District 2 even in very difficult circumstances. Pls.AFFCL.39–40. As Plaintiffs explained, the qualitative evidence of SB1's impermissible partisan effect is notably similar to the qualitative evidence presented against Maryland's 2011 map in *Benisek*, including as to actual election results, which evidence Justice Kagan found overwhelming. Pls.AFFCL.34–35. There, the Maryland mapdrawers entirely "reconfigured" Maryland's Sixth District to flip it from a Republican-party majority to a Democratic-party majority, while preserving existing Democratic-party majorities throughout the State—just like the Legislature's redrawing of District 2 here. *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting); Pls.AFFCL.34–35. Further, in a favorable year for Republicans nationwide, the Democratic *incumbent* in Maryland's Sixth District narrowly defeated a Republican, after the Democratic gerrymander of this district. Pls.AFFCL.35.

Next, Legislative Defendants cite Mr. Sanderoff's expert report, but this just supports Plaintiffs' qualitative evidence of SB1's impermissible partisan effects. *See* Leg.AFFCL.38. Mr. Sanderoff's "partisan performance measures of the three congressional districts" under SB1 show that this map is a *near-perfect* gerrymander, *contra* Leg.AFFCL.38, as he calculated District 2 to have a Democratic-party composition of 53%, Sanderoff Rep.6, which approximates the 54.29% statewide Democratic-party composition calculated by Mr. Trende, Trende Rep.14, and confirmed by Plaintiffs' expert Kimball Brace, Brace Rep.74 (pdf page number); *see supra* p.16 (also addressing this point). Mr. Sanderoff also asserts that District 2 is

competitive, Leg.AFFCL.38, but, again, his own calculations for District 2 support Plaintiffs' observation that the Democratic legislators carefully moved just enough Democratic voters to flip District 2 without jeopardizing the Democratic-party majorities in Districts 1 and 3, Pls.AFFCL.30–32. This similarly means that Mr. Sanderoff's observation that SB1 increased the Republican-party composition of Districts 1 and 3 is of no help to Legislative Defendants, Leg.AFFCL.38; Sanderoff Rep.9–10: the Democratic-party compositions of those districts also remain around or above 54.29%, Brace Rep.74 (pdf page number); Trende Rep.42, ensuring that Republican candidates do not have a meaningful chance of victory in those districts either, after SB1, Pls.AFFCL.31–32. Indeed, Mr. Sanderoff effectively conceded as much in his deposition, where he stated that he could not think of a race in New Mexico history where a Republican won in a "54 percent Democratic district." Sanderoff Dep.47.

Legislative Defendants' reliance on the expert report and deposition of Mr. Brace does not support a contrary conclusion. Leg.AFFCL.38. Legislative Defendants observe that, based on Mr. Brace's report, SB1 "compares favorably to past congressional districting" in terms of compactness and the number of counties that are split. Leg.AFFCL.38 (citing Brace Rep.10–11 and Brace Dep.13:2–15:7). However, Mr. Brace himself does not actually draw that conclusion from his data, *see generally* Brace Rep.5–7, (providing summary of conclusions, without mentioning compactness and county splits); *id.* 11–15 (discussing county-split and compactness reports, without drawing conclusions), which is understandable, given that SB1's

splitting of nine counties was "the most in New Mexico's history" and that SB1 produced "some of the least compact districts in New Mexico history" under "any metric" of compactness, Trende Rep.76–77; Pls.AFFCL.15. In any event, a plan's *compliance* with traditional redistricting criteria like compactness and county splits has little, if any, relevance to whether that plan has impermissible partisan effects, given that modern map-drawing technology allows partisan mapdrawers to draw easily redistricting maps that comply with such criteria while still achieving a partisan gerrymander. *Supra* pp.10–11 (collecting authorities).

Legislative Defendants then end their discussion of the qualitative-evidence method with a bare assertion that "none of the Plaintiffs reside in a packed or cracked district where the election outcome for a congressional candidate of a given party is certain or foregone." Leg.AFFCL.39 (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (Kagan, J., concurring), although Legislative Defendants fail to disclose that their citation here is from Justice Kagan's concurrence). Yet, Justice Kagan's controlling test in *Rucho* does not require Plaintiffs to show that "the election outcome for a [Republican] congressional candidate . . . is *certain or forgone*" to establish the partisan-effect element under this method of proof, Leg.AFFCL.39 (emphasis added)—even though Plaintiffs have, in fact, shown that, *see* Pls.AFFCL.17, 34, 39–40. Rather, Plaintiffs need only show that SB1 "substantially dilut[es]" their votes, *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting) (citation omitted), as may occur where the challenged map takes "what was once a party stronghold [for Republicans]" and leaves Republican voters with "little or no chance to elect their preferred

candidate," *id.* at 2519. Plaintiffs have met that standard here, given that SB1 transformed District 2 from a reliably Republican district into a district where Republicans lose even in a good Republican year, like 2022. Pls.AFFCL.39–40.

Finally, and notably, Legislative Defendants do not even attempt to respond to Mr. Trende's powerful discussion of the qualitative evidence of SB1's partisan effect that he provided in his report. *See generally* Leg.AFFCL.37–39. As Plaintiffs explained, Mr. Trende's report reveals the specific and substantial shifts that SB1 made to the prior map to crack Republican voters across the three districts while packing Democratic voters into District 2, independently establishing SB1's egregious partisan effects. Pls.AFFCL.32–34 (citing Trende Rep.31–43).

Turning next to the sophisticated social-science analysis—which, as Justice Kagan's opinion makes clear, is not necessary when dealing with a gerrymander that seeks to flip a single district (as opposed to a more complicated gerrymander, such as North Carolina's 13-seat congressional delegation), *see Rucho*, 139 S. Ct. at 2517–19 (Kagan, J., dissenting)—Legislative Defendants' reliance on Dr. Chen's simulations does not help them, even were this Court to conclude that those simulations are admissible expert evidence, Leg.AFFCL.39. Dr. Chen's computer-simulated maps fail to show that SB1 is "*not* a statistical outlier in terms of its partisanship," Leg.AFFCL.25–26, 39 (emphasis added; citation omitted), as those maps were themselves premised on impermissibly partisan criteria, *see* Pls.AFFCL.40–42; *supra* pp.12–13. As Plaintiffs have explained, simulated maps can reveal the presence or absence of an impermissible partisan effect only when they "incorporate the State's

physical and political geography and meet [the State's] declared districting criteria, *except for* partisan gain." Pls.AFFCL.40 (quoting *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting)). Dr. Chen's maps, by contrast, incorporate "Oil Industry Considerations," which criterion has no basis in the State's "declared districting criteria," as discussed above. *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting); *supra* pp.12–13. Rather, Legislative Defendants' counsel reverse-engineered the "Oil Industry Considerations" to force Dr. Chen to create partisan-gerrymandered simulations. Pls.AFFCL.40–41; *supra* pp.12–13. This means that Dr. Chen's maps are *not* politically neutral—unlike Mr. Trende's simulations or those relied upon by Justice Kagan in her *Rucho* dissent, *Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting). And finally, as Plaintiffs also explained, Dr. Chen's simulations are of limited usefulness for the additional reason that they do not account for core retention, although that is a traditional redistricting criterion that the Legislature considered with SB1, as Mr. Brace stated. Pls.AFFCL.42.

Moving to Plaintiffs' expert, Mr. Trende, Legislative Defendants neglect to respond to the merits of his expert report at all, *see generally* Leg.AFFCL.2–3, 9, which report proves SB1's partisan effects under both the qualitative approach and the sophisticated social-science approach, Pls.AFFCL.32–37. Legislative Defendants have moved to exclude this portion of Mr. Trende's report, even as they omitted any responses to it in their initial filing. Accordingly, Plaintiffs intend to respond to the criticisms of Mr. Trende that Legislative Defendants have raised in Plaintiffs' opposition to Legislative Defendants' motion to exclude.

III. Legislative Defendants Cannot Possible Carry Their Burden To Show That SB1's Egregious Partisan Intent And Effects Are Somehow Justified, So As To Save This Map From Invalidation

A. Although Legislative Defendants concede that it is their burden to demonstrate a "legitimate, non-partisan justification to save [the] map," *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting); Leg.AFFCL.42, the record nonetheless shows that there is no possible justification for the Legislature's impermissibly partisan gerrymandering, Pls.AFFCL.42–44. The Legislature's adjustments to the Concept H map—which was already favorable to Democrats—evidence a "max-[Democratic]" gerrymander. *Gill* Tr.7; Pls.AFFCL.43. The Legislature's contemporaneous statements, including the text messages of Senator Stewart, confirm that the Legislature's intent was to create such a gerrymander. Pls.AFFCL.43. And Mr. Trende's simulation analysis confirms that the Legislature configured SB1 to ensure a solid Democratic majority in each of the State's three districts, despite the fact that the Legislature could have easily drawn "compact districts . . . without respect to anything besides traditional redistricting criteria." *Id.* (citation omitted).

B. Legislative Defendants have not carried their burden here, as their own Annotated Findings Of Fact And Conclusions Of Law shows. *See* Leg.AFFCL.39–42. Indeed, this Court can "pass quickly over this part of the test," as the Legislature cannot "offer[ ] much of an alternative explanation for the evidence [of egregious partisan intent and effect] that [ ] [P]laintiffs put forward," *Rucho*, 139 S. Ct. at 2516 n.2—let alone one that satisfies intermediate scrutiny. None of the Legislature's "purported justifications" is sufficient because there are almost a million other ways

to draw "compact districts" that do not have the partisan effect of SB1 but still comply with "traditional redistricting criteria." Trende Rep.9.

To begin, Legislative Defendants admit that it is their burden to show that SB1 is "substantially related to an *important* government interest," Leg.AFFCL.40 (emphasis added) (citation omitted), but then argue only that there are "*appropriate* policy reasons" for SB1,*id.* at 40 (emphasis added). While any appropriate state interest may suffice to justify challenged government action under a "deferential" rational-basis review, *see Griego v. Oliver*, 2014-NMSC-003, ¶ 39, 316 P.3d 865, the intermediate scrutiny "analysis is more probing" and requires the Legislative Defendants to meet the "higher evidentiary burden[ ]" of demonstrating an "*important* government interest," *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 15, 125 N.M. 721, 965 P.2d 305 (emphasis added). Legislative Defendants do not claim that any of the interests they assert are "important," *see Trujillo*, 1998-NMSC-031, ¶ 15, and this Court should hold them at their word. As explained above, Legislative Defendants also have no evidence suggesting that many of these interests—including their purported interests in splitting the oil industry and combining rural and urban areas—were important to New Mexico's actual voters. *See supra* pp.12–14. But even if Legislative Defendants were correct that SB1 advances "appropriate" interests, Leg.AFFCL.40, such interests are insufficient to survive intermediate scrutiny review, *Trujillo*, 1998-NMSC-031, ¶ 15.

In any event, the individual policies that Legislative Defendants put forward as supposed justifications all fail, Leg.AFFCL.40, including for the reasons already

discussed with respect to the first element of Justice Kagan's controlling test, *supra* Part I. Despite bearing the burden on this prong, Legislative Defendants do not even try to explain how, exactly, SB1 "address[es] and reflect[s]" the Legislature' purported policy decisions. Leg.AFFCL.40. That is, Legislative Defendants do not show how their challenged conduct "substantially relate[s]" to their purported interests. *Trujillo*, 1998-NMSC-031, ¶ 15. Although Legislative Defendants cite generally various "policy considerations," they make no showing at all as to why SB1's revisions to the Concept H Map were necessary to better achieve these purported policy goals. Leg.AFFCL.40–42. Legislative Defendants' abbreviated and superficial justifications for SB1 do not demonstrate that SB1's particular redistricting plan "substantially relate[s]" to any important government interest, so Legislative Defendants cannot satisfy the intermediate scrutiny standard. *See Trujillo*, 1998-NMSC-031, ¶ 15

Even had Legislative Defendants tried to meet their burden of showing how SB1's redistricting scheme is substantially related to Legislative Defendants' purported policy considerations, several of those considerations are themselves partisan justifications, rather than "legitimate, non-partisan justification[s]," for SB1. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting). As explained above, the claim that SB1 advances representation of the oil and gas industries is mere pretext. *Supra* pp.12–13. The overwhelming majority of New Mexico's oil wells are located in the Southeast region of the State, such that redistricting the State with the express goal of splitting up the oil and gas industries necessarily splits the Southeast region—thereby cracking the Southeast region's Republican voters across multiple

congressional districts—while diluting the oil and gas industries' influence among three separate Representatives. *Supra* pp.12–13. Legislative Defendants' reference to "unique issues" concerning the "proximity of the U.S./Mexico border," Leg.AFFCL.40, is perplexing given that only District 2 borders Mexico, even under SB1. And the supposed policy interest of incorporating urban and rural constituencies in all of the State's congressional districts has been held to be pretext for partisan gerrymandering. *See supra* pp.13–14 (citing *Hellar*, 682 P.2d at 544).

Next, the *Maestas* decision that Legislative Defendants rely upon, Leg.AFFCL.40, is inapt. In *Maestas*, the Supreme Court rejected a judicially adopted congressional redistricting map and, in doing so, provided specific guidance for courts to consider when adopting a final map. *Maestas v. Hall*, 2012-NMSC-006, ¶ 45, 274 P.3d 66. Its primary mandate was for the district court to avoid adopting a map with "very low population deviations . . . at the expense of other traditional state redistricting policies." *Id.* Additionally, the Court counseled the district court to adopt a "plan that is partisan-neutral and fair to both sides." *Id.* Among other things, the Court criticized the district court's adopted map for causing the Central region to become a "strongly partisan district favoring one party, in effect tilting the balance for that party without any valid justification." *Id.* ¶ 41. "The resulting district [was] oddly shaped in an area where compactness is apparently relatively easy to achieve, suggesting, at least in part, that the district was created to give political advantage to one party." *Id.* As the Court explained, "a more competitive district should have been created if at all practicable to avoid this political advantage to one political party

and disadvantage to the other," as "competitive districts allow for the ability of voters to express changed political opinions and preferences." *Id.*

Legislative Defendants appear to suggest that the Supreme Court's emphasis in *Maestas* on "competitive districts" supports their position here, where the court-drawn map that was eventually adopted to govern the State's congressional districts resulted in disproportionate performance levels, while SB1 "creates more competitive races in each district." Leg.AFFCL.5, 23–24. SB1 does not, however, render the State's districts "more competitive," but rather makes it a near-perfect Democratic gerrymander. *See Maestas*, 2012-NMSC-006, ¶ 41. That is, it constructs the three districts to create a sufficient Democratic majority in each to all-but-guarantee Democratic victory, as Senator Stewart herself effectively acknowledged. Pls.Ex.2, at 4 ("Sanderoff's dpi for your map H is 51.8% [for District 2]. That's not enough for a mid term election so we adjusted some edges, scooped up more of abq [Albuquerque] and are now at 53%. CD 1 is 54%, CD 3 is 55.4%."); *see Benisek*, 348 F. Supp. 3d at 503 ("[I]n the 2016 congressional election, U.S. House Democratic candidates almost never won districts with a DPI below 50%, but won 92.5% of districts where the DPI was above 50%."). Legislative Defendants' own expert, Mr. Sanderoff, admitted that he could not think of a single election in the State's history where a Republic had won in a "54 percent Democratic district." Sanderoff Dep.47. Accordingly, while the margins across the districts may appear more competitive in SB1, they in fact

represent the "best-case scenario" for ensuring that no Democratic candidate faces real competition in any of New Mexico's districts. *See* Trende Rep.14, 41–43.[4]

Legislative Defendants' claim that SB1 is "very similar" to the Concept H Map, such that the Committee's conclusion that the Concept H Map was fair should apply equally to SB1, Leg.AFFCL.40–41, is self-defeating. While the Legislature started with Concept H Map (which was, unsurprisingly, already the most favorable map for Democrats of those the Committee submitted to the Legislature), the Legislature then made targeted edits to that map to render it a "max-[Democratic]" gerrymander. *Gill* Tr.7; *see* Pls.AFFCL.3. Specifically, the Legislature started with a map that created three districts that voted for President Biden with at least 52.5% of the vote, and then made SB1's District 2 even more Democratic by adding to it several precincts from the Concept H Map's District 1 that voted 55.1% for President Biden. Pls.AFFCL.3. The Legislature then offset that exchange by moving several precincts that gave President Trump almost 60% of the vote from District 2 to District 1. *Id.* It did not stop there: to ensure strong Democratic margins in each district, the Legislature moved several precincts that gave President Biden only 34.1% of the vote in the Concept H Map's District 2 into SB1's District 3 in exchange for a block of voters that gave President Biden 50.7% of the vote.

[4] In any event, even if SB1 did result in more "competitive" districts, *Maestas* indicates that competitiveness—like the equal-population principle—does not control "at the expense of other traditional state redistricting policies." 2012-NMSC-006, ¶ 41. As Plaintiffs' explained, SB1 subordinates traditional redistricting criteria for partisan goals, shattering the Southeast region and creating "some of the least compact districts in New Mexico history." Pls.AFFCL.28 (citation omitted).

Finally, the expert testimony that Legislative Defendants rely upon does not help them. They briefly argue that Dr. Chen's simulations support their position that SB1 is not an extreme partisan gerrymander, Leg.AFFCL.41, but as explained above, those maps are not politically neutral and thus are entirely unhelpful for assessing whether SB1 is a partisan gerrymander, *supra* pp.22–23; *see Rucho*, 139 S. Ct. at 2518 (Kagan, J., dissenting). In any event, Dr. Chen did not opine on whether the purportedly non-partisan policy considerations underlying SB1 are "important," or whether SB1's redistricting plan is in fact "substantially related" to those policy considerations. *See Trujillo*, 1998-NMSC-031, ¶ 15. Further, Mr. Brace's testimony similarly does not support Legislative Defendants' argument that SB1 is supported by non-partisan justifications. Although Legislative Defendants state that Mr. Brace "noted the importance of the oil and gas industry to the state of New Mexico and its concentration in southeast New Mexico," Leg.AFFCL.41, they offer no citation for that proposition, which appears completely unsupported by Mr. Brace's expert materials. So, like Dr. Chen, Mr. Brace does not speak to whether SB1's calculated, partisan redistricting is substantially related to any non-partisan justification. *See supra* pp.20–21 (further criticizing Legislative Defendants' reliance on Mr. Brace).

CONCLUSION

This Court should declare that SB1 is an egregious partisan gerrymander in violation of Article II, Section 18 of the New Mexico Constitution and, accordingly, enjoin Defendants from enforcing SB1. This Court should then promptly schedule remedial proceedings that will lead to a prompt adoption of a remedial map.

Dated: September 20, 2023

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SUPPLEMENTAL LIST OF PLAINTIFFS' EXHIBITS

PLAINTIFFS' EXHIBIT 34	Brief for the States of Oregon *et al.* as *Amici Curiae*, *Gill v. Whitford*, No.16-1161 (U.S. Sept. 5, 2017), publicly available at https://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-states-of-oregon.pdf.
PLAINTIFFS' EXHIBIT 35	Memorandum In Support Of Defendants' Cross-Motion For Summary Judgment And Response In Opposition To Plaintiffs' Motion For Preliminary Injunction And, In The Alternative, For Summary Judgment, *Benisek v. Lamone*, No.13-cv-3233, Dkt.186-1, 2017 WL 10702698 (D. Md. June 30, 2017)

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing will be served on all counsel via the e-filing system.

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Plaintiffs' Exhibit 34

No. 16-1161

IN THE
SUPREME COURT OF THE UNITED STATES

BEVERLY R. GILL, *et al.*,
Appellants,
v.

WILLIAM WHITFORD, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF FOR THE STATES OF OREGON, ALASKA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MINNESOTA, NEW MEXICO, NEW YORK, RHODE ISLAND, VERMONT, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Did the district court correctly find that a purpose-and-effects test was a manageable way to determine whether Wisconsin engaged in unconstitutional partisan gerrymandering?

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INTEREST OF THE AMICI STATES

This case is about how to strike the right constitutional balance between ensuring fair elections and respecting the normal political process. The amici States are uniquely qualified to assist the Court in striking that balance. We have a strong interest in ensuring that our elections reflect core democratic principles. Many of us are also defendants in redistricting litigation and have an equally strong interest in ensuring that the courts apply reasonable and manageable legal standards in cases like this one.

The States have a wealth of experience with redistricting and, as explained below, have taken a wide variety of approaches to prevent invidious partisan gerrymandering in that process. That is as it should be in our federalist system, and we do not suggest that any one approach to redistricting ought to be enshrined in constitutional law. But we are united in our conclusion that the Constitution sets outer limits on extreme partisan gerrymandering, that those limits are judicially enforceable and do not intrude on the States' legitimate interests, and that on the facts found by the district court here, Wisconsin's districting map exceeded the outer limits of what is constitutional.

SUMMARY OF ARGUMENT

Intentional partisan entrenchment—that is, deliberately drawing districts for the purpose of keeping one party in power for the long term, and without any neutral justification for the result—has no place in our political system. It discourages voter participa-

tion, increases distrust of government, and reduces the responsiveness of elected representatives. Technological advances have made it easier than ever for mapmakers to draw district lines solely to maximize the political power of a particular party. There is a pressing need for the courts to identify a manageable legal standard that prohibits the most egregious examples of partisan gerrymandering while still respecting the legitimate considerations that inform redistricting decisions.

A purpose-and-effects test is such a standard. It requires proof of both invidious intent and a partisan-entrenching result that cannot be explained by neutral considerations. A proper understanding of this standard's limits should allay the fears voiced by the Texas *et al.* amicus brief that the standard would invalidate numerous state districting maps. The district court correctly struck down Wisconsin's map not because it failed one particular metric in a single year, but because it was invidiously intended to, and did, entrench a single party in power all the way through the next redistricting cycle under any likely electoral scenario, and because the goal of partisan entrenchment was the only explanation for the resulting map

A purpose-and-effects test also leaves ample room for States to continue to experiment with different approaches to redistricting. Many States have taken steps to limit or prevent partisan abuse of the redistricting process, including having nonpartisan or bipartisan groups draw the maps, banning considera-

tion of partisan affiliation or other data in the map-making process, or requiring supermajority votes. The Constitution does not require any of these approaches, but they show—contrary to Texas amici's and the Wisconsin legislature's argument—that partisan politics is not the *sine qua non* of redistricting.

ARGUMENT

Voting forms the foundation of our representative democracy. It serves as a vehicle for voicing preferences and for holding lawmakers accountable to constituents. No other mode of civic participation conveys the will of the people as well as voting. Extreme partisan gerrymandering threatens the benefits that our polity realizes from voting. The courts can and should play a role in protecting those benefits.

A. Extreme partisan gerrymandering harms the States and their citizens, and technological advances have made it easier to accomplish.

Gerrymandering has played a role in American politics since the early eighteenth century. *Vieth v. Jubelirer*, 541 U.S. 267, 274–75 (2004) (plurality op.); Samuel S.-H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1266–67 (2016) (describing historical examples). Both major parties have engaged in partisan gerrymandering. *See*, *e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 410–13 (2006) (opinion of Kennedy, J.) (describing Texas plans that

favored Democrats at one time and Republicans at another).

But what is not a normal or accepted redistricting practice is purposefully entrenching a single political party in power for the long term under any realistic electoral scenario, regardless of whether a majority of voters support that party. Although this Court has not yet agreed on a manageable standard for assessing the legality of partisan gerrymandering, it has recognized unanimously that extreme partisan gerrymandering violates the Constitution. *See Vieth*, 541 U.S. at 292–93 (plurality op.) ("We do not disagree with [the] judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles"; "[t]he issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred"; "an *excessive* injection of politics is *un*lawful") (emphasis in original). And a majority of this Court has never abandoned the view, established in *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), that those constitutional limitations are judicially enforceable. *Vieth*, 541 U.S. at 309–10 (Kennedy, J., concurring in the judgment).

Extreme partisan manipulation of the redistricting process is problematic because it can effectively insulate a political party from any realistic attempt by the populace to unseat it. Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Elec. L. J. 179, 202 (2003). In other words,

political control may be determined by the mapmakers, not the voters. *Id.*

The problem is especially acute when the mapmakers are able to entrench one party in power all the way through the next redistricting cycle, thereby ensuring that the same party gets to draw another noncompetitive map that continues the entrenchment. Extreme partisan gerrymandering thus can be self-reinforcing, because it can "shift the terrain on which all future political activity is negotiated." Justin Levitt, *Essay: Weighing the Potential of Citizen Redistricting*, 44 Loy. L.A. L. Rev. 513, 518 (2011).

Enormous improvements in computer technology have revolutionized the way in which districts can be drawn, allowing even more invidious partisan entrenchment. *See* Laura Royden & Michael Li, Brennan Center for Justice, *Extreme Maps* 3 (2017)[1] ("Technology and a growing flood of money into the redistricting process are, by broad consensus, only making the situation" of partisan gerrymandering "worse."); Theodore R. Boehm, *Gerrymandering Revisited—Searching for a Standard*, 5 Ind. J. L. & Soc. Equality 59, 60 (2016) ("[M]odern technology has substantially facilitated a temporary majority's ability to perpetuate its dominance of a legislative body."). Today, mapmakers can draft and change many different proposed maps in rapid succession using electronic

[1] *Available* at http://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf (last accessed Aug. 31, 2017).

databases, computer software, and statistical techniques. Wang, *supra*, at 1267; *see also Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("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.").

Along with improvements in computer technology, "advances in communication technology have made it possible to gather fine-grained data to micro-target[] district boundaries." Micah Altman & Michael McDonald, *The Promise & Perils of Computers in Redistricting*, 5 Duke J. Const. L. & Pub. Pol'y 69, 77 (2010). States receive and store vast amounts of highly detailed data to use in redistricting—including data from the Census Bureau about race, ethnicity, age, voting history, health coverage, and work status. Catherine McCully, U.S. Bureau of the Census, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census: The View from the States* 5, 17–18, 22 (2014).[2] Mapmakers can supplement the Census Bureau's population information with election-related data including on partisan affiliation and voting history. Kenneth F. McCue, California Inst. of Tech., *Creating California's Official Redistricting Database* 5–8 (2011).[3]

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[2] *Available at* https://www.census.gov/rdo/pdf/TheView FromTheStates_2020.pdf (last accessed Aug. 31, 2017).

[3] *Available at* http://statewidedatabase.org/d10/Creating% 20CA%20Official%20Redistricting%20Database.pdf (last accessed Aug. 31, 2017).

Mapmakers can use mapping programs to evaluate the effects of drawing a line in one place or the next block over, recalculating how the new districts will affect a plan's adherence to various redistricting criteria. McCully, *supra*, at 8; *see also Brown v. Iowa Legislative Council*, 490 N.W.2d 551, 552–53 (Iowa 1992) (describing how factors can be added or removed in computer generated redistricting maps); Richard L. Engstrom & Michael D. McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation & Polarized Voting*, 17 Urb. Law. 369, 373–77 (1985) (explaining the use of regression analyses and other calculations to predict whether voters belonging to particular racial minority group vote for specific candidates). More detailed data and computer-based district mapping provide the means to create maps that "give undue advantage to whichever political party controls redistricting." Wang, *supra*, at 1269. Thus technological tools enable States to draw and evaluate district boundaries "in exquisite details" and "enhance the possibility that gerrymandered districts may be more durable now than they were even ten years ago." *Id.* at 1267–68.

Durable party entrenchment through extreme gerrymandering causes real, identifiable harms to the democratic system, and to individual voters. It undercuts the fundamental premise that our republican form of government is representative. Moreover, by allowing fewer competitive races, it discourages voter participation, makes the public more distrustful of government, and reduces the responsiveness of elected representatives. Boehm, *supra*, at 62; D. Theodore

Rave, *Politicians As Fiduciaries*, 126 Harv. L. Rev. 671, 684–85 (2013); Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 486–87 (2004). And it subverts the very purpose of periodic redistricting, which is to make the legislature more responsive—not less responsive—to voters. *Cf.* Ortiz, *supra*, *at* 476–77 ("Nearly every special feature of the House's design" including direct election, regular reapportionment, and frequent elections, "was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.").

Of course, there are entirely legitimate reasons why a State may have a large number of noncompetitive elections. Voters may simply prefer the policies of one party over the other overwhelmingly. Or voters with similar political views may tend to cluster in the same areas, meaning that district lines drawn based on reasonable geographic considerations will favor one particular party. Or one party may be poorly organized, leading it to field candidates who have no real chance of garnering majority support. Those circumstances by themselves are not constitutionally problematic. On the contrary, they reflect the ordinary democratic process working as it should to reflect the will of the people.

What are problematic, however, are extreme districting maps that are invidiously intended to, and do, ensure noncompetitive elections *despite* the absence of the kinds of normal political considerations described above. Those maps inflict avoidable harms

on the democratic process and on individual voters, and undermine the public's trust in government. The amici States have a strong interest in preventing those harms.

B. A purpose-and-effects test is manageable and adequately accounts for the States' legitimate interests.

Any test for unconstitutional partisan gerrymandering should require proof of both invidious intent *and* the actual effect of extreme partisan entrenchment that is likely to endure through multiple election cycles and is inexplicable by neutral considerations. The map at issue here cannot satisfy any such test, and the district court's judgment therefore should be affirmed. The concerns raised by Texas amici, and particularly their assessment that maps in dozens of States will be invalid if partisan gerrymandering claims are justiciable, are overstated. Even a map under which one party achieved an entrenched, long-lasting partisan advantage would be constitutional unless the map was adopted with invidious intent and the effect could not be explained by neutral factors. Amici anticipate that such cases will be rare, and that under a purpose-and-effects test, the States will continue to enjoy broad latitude in conducting redistricting.

1. Invidious intent is crucial and is satisfied when a map is chosen for the purpose of entrenching a party against any realistic majoritarian challenge.

Under a purpose-and-effects test, it is not enough for a plaintiff to show that a State's districting map has the *effect* of entrenching one political party in power. Rather, the plaintiff must also show that this was the *purpose* of adopting the map. Although the district court did not articulate the outer limits of what it would take to establish a constitutional violation, it held that the intent component was satisfied here, where the evidence showed that Act 43 was adopted for the deliberate purpose of entrenching a party against any realistic challenge until the next redistricting. J.S. App. 126a.

Those conclusions are correct. Invidious intent is a necessary component of the constitutional standard. This Court's equal protection jurisprudence holds that a law's "disproportionate impact," standing alone, is insufficient to show a constitutional violation. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Instead, "a purpose to discriminate" must be established. *Id.* (quoting *Akins v. Texas*, 325 U.S. 398, 403-04 (1945)); *cf. Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 & n.1 (2017) (explaining the required "legislative intent" showing for a claim of racial gerrymandering under the Equal Protection Clause).

And not just any consideration of voters' political affiliation will establish *invidious* intent. In *Gaffney*

v. Cummings, 412 U.S. 735, 754 (1973), for example, this Court drew a distinction between the use of political affiliation in the redistricting process to "provide a rough sort of proportional representation in the legislative halls of the State," and its use "to minimize or eliminate the political strength of any group or party," suggesting that the former was permissible and that the latter was not.

But the Court need not decide here whether it is ever legitimate to consider political affiliation in districting. Regardless what the outer limits might be, they do not include districting for the *purpose* of entrenching a single party against any realistic majoritarian challenge through the next redistricting. Modifying a political boundary for the purpose of achieving that kind of entrenchment goes too far; that is, the use of political affiliation in drawing boundaries becomes impermissible if the affiliation is "applied in an *invidious* manner or *in a way unrelated to any legitimate legislative objective*." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (emphasis added); *see also id.* at 321, 336–37 (Stevens, J., dissenting) (explaining that "purpose [is] the ultimate inquiry," and that "[u]ntil today, however, there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line"); *id.* at 350 (Souter, J., dissenting) (test for impermissible partisan gerrymandering should include assessment of whether "the defendants acted intentionally to manipulate the shape of the district in order to pack or

crack [the plaintiff's political] group"); *id.* at 360 (Breyer, J., dissenting) (use of political affiliation is "unjustified" when "the minority's hold on power is purely the result of partisan manipulation and not other factors").

Proving intent can be difficult. But the very technologies that have made it easier to engage in intentional partisan gerrymandering also may make it easier to discern intent. The computer tools used to create redistricting maps do not decide on their own to weigh partisan criteria; they weigh the criteria they are programmed to consider. *See* Altman & McDonald, *supra*, at 89. Knowing what inputs the mapmakers were asked to use, what shifts were made, what future scenarios were run, and what other maps were being considered provides direct insight into the intent of those controlling the process. *See Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring in the judgment) (noting that "[t]echnology is both a threat and a promise," and that "new technologies may produce new methods of analysis" that "would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards").

This case provides a good example. Planners developed Act 43 through a process in which they commissioned a number of redistricting plans—all of which complied with traditional neutral redistricting criteria—and then manipulated the political boundaries on those maps to assess the partisan advantage that the modified boundaries would provide. J.S.

App. 126a–140a (setting out findings regarding process through which Act 43 was developed). The map ultimately enacted in Act 43 was selected, and the others rejected, due to its greater capacity to secure one party's legislative majority throughout the decennial period and, thus, its capacity to devalue to the greatest extent possible the votes of individuals whom the mapmakers believed held contrary political viewpoints. *Id.* 140a.

Because it incorporates a requirement of invidious intent, a purpose-and-effects test should leave States with plenty of leeway to experiment with different approaches to redistricting. So long as a districting plan is not adopted for the specific purpose of entrenching a single party in power through the next redistricting, there is no constitutional violation. No sophisticated statistical analysis of a state's maps is required.

2. The test also demands long-term partisan-entrenching effects that cannot be justified by other legitimate considerations.

A purpose-and-effects test also requires proof that the districting map was likely to have its intended effect: that it would ensure that one party remained in power through the next redistricting under any likely electoral scenario regardless of shifts in voter allegiance. The court also would have to find that this effect could not be explained by any legitimate, neutral considerations, such as the State's political geography or its efforts to comply with the Voting

Rights Act. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (identifying as legitimate considerations "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives").

This attention to effects is also an appropriate part of the constitutional standard. As in other kinds of cases, a plaintiff must show "a burden, as measured by a reliable standard, on the complainants' representational rights." *League of United Latin Am. Citizens*, 548 U.S. at 418 (plurality op.). Thus, a districting map is not an unconstitutional partisan gerrymander unless it in fact achieves extreme, long-term partisan entrenchment.

This means that States have ample room to try different approaches to redistricting without running afoul of the Constitution. Here too, the technologies that make it easier to engage in invidious partisan gerrymandering also give the States the tools to avoid liability. States can and do use computer programs to draw multiple maps that satisfy various legitimate criteria, make detailed predictions about electoral results under a range of possible scenarios, and determine whether any particular map gives one party or the other an unfair advantage.

And even if the map a State chooses does appear to give advantage to a party, sophisticated software can help the State determine if the advantage is caused by political geography or some other legitimate consideration. In other words, it can show if the predicted effects of the map on partisan entrench-

ment can be explained by neutral factors, in which case the map should pass constitutional scrutiny. *Cf. Vieth*, 541 U.S. at 312–13 (Kennedy, J., concurring in the judgment) (noting that "new technologies may . . . make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties").

Most importantly, if this Court endorses particular metrics as suggestive of satisfying the effect prong of the test, States will be able to model those metrics and ensure that their maps stay within the bounds this Court sets.

In this case, the district court analyzed the effects of Act 43 with proper deference to legitimate state interests. It found that Act 43 achieved entrenchment of one party against any realistic majoritarian challenge, and its findings are amply supported by the evidence of the actual 2012 and 2014 election results and statistical analyses corroborated by those election results. J.S. App. 145a–154a (setting out findings regarding discriminatory effect and concluding that "[i]t is clear that the drafters [of Act 43] got what they intended to get"). Those statistical analyses showed that the entrenchment would last at least through the decade, and possibly beyond, even if a majority of voters supported candidates from the out-of-power party at historic levels. *Id.* 148a–154a. The court also found that Act 43's party-entrenching effects could not be explained by any legitimate state concerns or neutral factors bearing on the apportionment process,

including Wisconsin's natural political geography. *Id.* at 177a–218a.

Thus, the district court correctly held that Act 43 was unconstitutional.

3. Contrary to concerns expressed by Texas amici, a purpose-and-effects standard is not likely to result in widespread invalidation of state districting maps.

Texas amici suggest that the district court's approach would have invalidated redistricting plans in 36 States over the past few decades. Texas Br. 25. But that assertion is based on just one part of the *effects* analysis, the efficiency gap. Under a proper purpose-and-effects test, effects alone are not enough. Even assuming an efficiency gap alone satisfied the effects prong (and the district court did not so hold), plaintiffs in other states would also have to show that those effects were intended.

Texas amici also err in focusing on a single metric—the efficiency gap—and assuming that if a State's election results in a single year yield a high efficiency gap, the effects prong is satisfied and the map is unconstitutional. Texas Br. 26. A purpose-and-effects test in this context would have to look at a full range of metrics, including not only analyses of available election results, but also projections of the map's likely effect over the course of the whole decade until the next redistricting. And Texas amici ignore that even a large efficiency gap is not a problem if it

can be explained by something other than intentional partisan entrenchment for the long-term—for example, if the members of one party tend to cluster more in particular parts of the State than do members of the other party, or if the State has large numbers of uncontested elections.

Properly applied, a purpose-and-effects standard will invalidate only the most extreme maps, like the one drawn by Act 43, where all legitimate considerations are subordinated to the single goal of long-term partisan entrenchment against any realistic majoritarian challenge. Those maps lie well outside our nation's historical traditions, and we expect that they will be rare—especially if this Court affirms here and thus makes it clear that there are constitutional limits on partisan entrenchment.

More generally, however, Texas amici (as well as the Wisconsin legislature) exaggerate the extent to which exclusive or near-exclusive focus on partisan ends is an inevitable feature of redistricting. Nearly half of the States, including some that joined Texas amici's brief, have taken formal steps that reduce or eliminate the influence of partisan considerations on redistricting. This shows that partisan politics is not a necessary component of the redistricting process.

For example, many States require maps to be drawn by a group that is nonpartisan or bipartisan. Six States—Alaska, Arizona, California, Idaho, Montana, and Washington—have delegated the task of redistricting to independent commissions, on which elected officials may not serve as members. Alaska

Const., art. 6, § 8; Ariz. Const., art. 4, pt. 2, § 1(3); Cal. Const., art. 21, § 2(a)–(d); Idaho Code § 72-1502; Mont. Const., art. 5, § 14; Wash. Const., art. 2 § 43(2). Another six States—Colorado, Hawaii, Missouri, New Jersey, Ohio and Pennsylvania—use bipartisan commissions. Colo. Const., art. 5, § 48(1)(a)-(d); Haw. Const., art. 4, § 2; Mo. Const., art. 3, § 2; N.J. Const., art. 4, § 3, ¶ 1; Ohio Const., art. XI, § 1; Penn. Const., art. 2, § 17(a)-(b).

Even in a number of States where the legislature retains authority over redistricting, the initial task of recommending a map for legislative approval is delegated to a bipartisan "advisory commission." *See*, *e.g.*, Mass. Sen. R. 12[4]; Mass. House R. 17 & 18A[5]; Me. Const., art. IV, Pt. 3, § 1-A; R.I. Pub. Laws 2011, ch. 106, § 1; R.I. Pub. Laws 2011, ch. 100, § 1; Vt. Stat. Ann. tit. 17, §§ 1904, 1906; Va. Exec. Order No. 31 (2011). A districting map drawn through a nonpartisan or bipartisan process should be virtually unchallengeable as a partisan gerrymander, because plaintiffs will not be able to establish the intent prong—the invidious purpose of long-term partisan entrenchment.

Some states (including some which employ the nonpartisan or bipartisan commissions discussed above) also have chosen to limit the use of partisan affiliation to draw district lines, as a matter of state

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[4] *Available* at https://malegislature.gov/Laws/Rules/Senate (last accessed Aug. 31, 2017).

[5] *Available* at https://malegislature.gov/Laws/Rules/House (last accessed Aug. 31, 2017).

law. Nine States—California, Delaware, Florida, Hawaii, Iowa, Montana, New York, Oregon, and Washington—expressly bar state officials from drawing district lines for the purpose of favoring or disfavoring a political party. Cal. Const., art. 21, § 2(e); Del. Code Ann. tit. 29, § 804(4); Fla. Const., art. III, §§ 20, 21(a); Haw. Rev. Stat. Ann. § 25-2(b)(1); Iowa Code Ann. § 42.4(5); Mont. Code Ann. § 5-1-115(3); N.Y. Const., art. 3, § 4(c)(5); Or. Rev. Stat. § 188.010(2); Wash. Const., art. 2, § 43(5). Two of those nine States, Iowa and Montana, prohibit officials from using political data—such as past election results or voters' party registrations—in drawing districts. *See*, *e.g.*, Iowa Code Ann. § 42.4(5); Mont. Code Ann. § 5-1-115(3). Nebraska has a similar restriction. Neb. Leg. Res. 102 (1st Session 2011).

Finally, States also have adopted procedures that make the adoption of extreme partisan gerrymanders unlikely as a practical matter. For example, two States—Connecticut and Maine—require a two-thirds supermajority to approve redistricting plans, thus making it easier for a minority party to block a plan that is unfair. Conn. Const., art. III, § 6; Me. Const., art. IV, pt. 1, § 3.

None of these particular steps is required as a matter of federal constitutional law. As discussed, in most States the legislature draws the district maps. These deliberative bodies can and routinely do redraw their maps free of any invidious purpose, and without presenting the risk of permanent partisan entrenchment that necessitates a judicial response. A

constitutional standard prohibiting the most egregious forms of intentional, long-term partisan entrenchment therefore would still afford the States considerable leeway in their redistricting processes, and would not cause the widespread disruption that Texas amici fear. It would also vindicate the core democratic principles enshrined in our Constitution.

CONCLUSION

The Court should affirm the district court's judgment.

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PLAINTIFFS' EXHIBIT 35

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE., *et al.*,	*	
Defendants.	*	

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Respectfully submitted,

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INTRODUCTION

After ample opportunity for discovery, Plaintiffs' motion and supporting exhibits reveal that they are unable to satisfy "the three elements of intent, injury, and causation" that this Court articulated as forming the basis of Plaintiffs' First Amendment retaliation claim. *See* ECF 88 at 32. Instead, by insisting that the political branches' constitutional authority to undertake redistricting must take place in a vacuum, without regard to the expressed wishes of constituents, Plaintiffs have expressly discarded the "important limitations" this Court has recognized as necessary to "help ensure that courts will not needlessly intervene in what is quintessentially a political process." *Id.*

Plaintiffs have failed to offer any proof (since none exists) to establish the threshold element of intent, *i.e.*, that "the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated." *Id.* at 34. Indeed, Plaintiffs do not make any effort to address whether the legislature intended to burden anyone's rights. Plaintiffs' singular focus on proving that certain State actors were motivated in drawing the boundaries of the Sixth District by a desire to create a competitive or even Democratic-leaning district misses the mark both because (1) it assumes an equivalence that does not exist between a specific intent to burden certain citizens' representational rights and a desire to draw a district with certain characteristics; and (2) it ignores much of the undisputed evidence that exists about the actual intentions of the relevant actors.

Moreover, in failing to make any accounting for the behavior (or even existence) of unaffiliated voters, Plaintiffs have offered no proof of "the tangible and concrete adverse effect" necessary to establish the requisite injury, *id.* at 32, which the Court has described as "dilution of the weight of certain citizens' vote by reason of their views has actually altered the outcome of an election," *id.* at 34. As to the third element of the Court's test, causation, Plaintiffs have expressly disclaimed their duty to demonstrate any causal connection between the elements of intent and injury. Pls.' Mem. (ECF 177-1) at 28-29. In doing so, Plaintiffs effectively concede that they cannot satisfy their burden of proving that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." ECF 88 at 32.

All of Plaintiffs' arguments hinge on a single false premise: that individuals who affiliate with a party have a right to maintain electoral successes gained by their party under prior redistricting maps. Plaintiffs further compound this error by reasoning from a second, independent logical error—that intent can be inferred purely from effect. This Court has squarely rejected that view, and has instead instructed that it is not sufficient to prove that the legislature "was aware of the likely political impact of its plan and nonetheless adopted it." ECF 88 at 34. But Plaintiffs have produced no evidence that any decisionmaker "specifically intended to burden the representational rights of certain citizens," *id.*—the only evidence produced proves merely that the mapdrawers intended to create a more competitive district, one that slightly advantaged Democrats without considering any particular citizen's political conduct. There is no basis in this Court's test or logic for treating as equivalent a specific intent to burden the rights of certain individuals and a

general desire to re-balance the make-up of a district. Doing so would impose an unreasonable and limitless restraint on the redistricting process.

Plaintiffs' alternative map cannot cure these profound deficiencies in their claim. As discussed below, Plaintiffs' expert admits that the proposed alternative map's configuration would affect the political makeup of the district by making it more Republican, which would inflict the same harm on Democratic voters moved into that alternative district that Plaintiffs allege was inflicted on them. In other words, the alternative map simply imposes the alleged injury of which Plaintiffs complain on another group, and it does so for partisan purposes. If Plaintiffs' weak form of intent were adopted as the standard, it would apply equally to condemn an alternative map drawn with the intent to *preserve* Republican voting power.

Ultimately, adoption of Plaintiffs' view would calcify already polarized congressional delegations by prohibiting "vote dilution" even in previously packed and uncompetitive districts. Moreover, it would require mapmakers to prioritize maintaining false political neutrality (at least with respect to party-affiliated voters) over all other considerations. Such proscriptive standards are inconsistent with the Supreme Court's recognition of redistricting as "root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (Scalia, J., plurality op.).

FACTS

The Redistricting Process in Maryland

Although congressional reapportionment is not specifically mentioned in the Maryland Constitution or Maryland Code, as a matter of custom, the congressional

reapportionment plan is developed and adopted via the same procedure that the Maryland Constitution provides for legislative redistricting. Article III, § 5 of the Maryland Constitution sets forth the process by which Maryland Senate and House districts are to be drawn after every decennial census. "[A]fter public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts[.]" *Id.* The Governor must then "present the plan to the President of the Senate and Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census[.]" *Id.* "[T]he Governor may call a special session for the presentation of his plan prior to the regular session," *id.*, and the option of calling a special session has been invoked for consideration of a congressional reapportionment plan. *See, e.g.*, *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 395 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (competing congressional redistricting bills, each drafted by the Governor's Redistricting Advisory Committee, introduced in Senate and House in special session).

It has become customary for the Governor to appoint a Governor's Redistricting Advisory Committee ("GRAC") to assist in the preparation of the plan. *See, e.g.*, *Legislative Redistricting Cases*, 331 Md. 574, 579 & n.1 (1993) (describing then-Governor William Donald Schaeffer's appointment of a five-member GRAC). Because the Governor must present the plans to the President of the Senate and the Speaker of the House of Delegates, these legislative leaders traditionally have served on the GRAC. *See id.* The GRAC conducts public hearings throughout the State, in accordance with the constitutional

mandate for legislative plans, *see id.*, and also receives public comments submitted in written form, *see* Joint Stipulations (ECF 104) ¶¶ 22, 26. The GRAC also solicits and receives plan proposals from third parties (ECF 104 ¶ 23), including, among others, the Democratic members of Maryland's congressional delegation. For decades, as part of the redistricting process, Maryland's Democratic congresspersons have "tend[ed] to caucus" and "to then endeavor to come upon some consensus to present to the Governor" with regard to their opinions about the shape of the congressional districts. Ex. 52 (John T. Willis Dep.) at 174:2-6; 184-88.

Once the Governor introduces the plan to the Senate President and House Speaker, the General Assembly may modify the plan by offering amendments or alternatives. The Governor retains veto power over any plan passed by the legislature. Md. Const., art. II, § 17. Although in other respects congressional redistricting follows the constitutional process for legislative redistricting, congressional redistricting is not considered subject to the provision of Article III, § 5, that authorizes the Governor's legislative redistricting plan to become law if the General Assembly does not act within 45 days.

Redistricting legislation may be petitioned to referendum. Md. Const., art. XVI; *see also Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 732 (D. Md. 1966) (1965 plan petitioned to referendum); *Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 226 F. Supp. 80, 81 (D. Md. 1964) (original plan after 1960 census petitioned to referendum). Typically, the General Assembly passes congressional redistricting legislation as "an emergency law," which "shall remain in force" pending the outcome of a referendum petition. Md. Const., art. XVI, § 2. If the

redistricting legislation were rejected by referendum, the plan would be "repealed thirty days after having been rejected by a majority of the qualified electors voting thereon." *Id*.

Gathering Input for the 2011 Congressional Map

In conformance with custom, in July 2011, then-Governor Martin O'Malley appointed five members to the GRAC, including Senate President Thomas V. Mike Miller and House of Delegates Speaker Michael Busch. ECF 104 ¶¶ 18, 20. The Governor appointed his Appointments Secretary Jeanne D. Hitchcock to chair the GRAC, and appointed as additional members James J. King, a former Republican member of the House of Delegates from Anne Arundel County, and Richard Stewart, a private business owner. *Id.* ¶¶ 19-20.

In accordance with its charge, the GRAC solicited input from Marylanders across the State, and held 12 public hearings during July through September 2011. *Id.* ¶ 22. Governor O'Malley sought to have the redistricting process be as "collaborative[] as possible with as broad a consensus as possible," mindful of the constitutional and statutory mandates governing congressional redistricting. Ex. 2 (Martin O'Malley Dep.) at 16-17. Governor O'Malley kept abreast of the status of these hearings and feedback provided by his constituents through his regular communications with his Appointments Secretary and GRAC Chair, Ms. Hitchcock, and his Chief Legislative Aide, Joseph Bryce. *Id.* at 18:1-21:21.

At hearings conducted in western Maryland, residents testified about the connections between Montgomery County and Frederick County along Interstate 270 ("I-

270") corridor and into western Maryland, and advocated for adjoining Montgomery County with Frederick County and the other western Maryland Counties in the State's Sixth Congressional District. *See* Ex. 3 (Public Test.). These residents testified about transportation patterns between Frederick, Hagerstown, and Montgomery County along I-270 (*id.* at MCM000021-22, 50-51, 71-72); the growing economic and other connections between Frederick and Montgomery Counties (*id.* at MCM000031, 32-33, 37-38, 71-72); Montgomery County's shared natural boundary with the other counties of the Sixth District (*id.* MCM000032-33, 71-72); and the historical connection between Montgomery County and the other counties in the Sixth District (*id.* at MCM000032-33, 47, 71-72; *see also* MCM000217 (testimony of former Plaintiff, Stephen Shapiro)). For example, former Delegate Sue Hecht testified about how as a State delegate she helped develop the technology corridor along I-270, including one company's expansion from Montgomery County into Frederick County. Ms. Hecht recalled former Montgomery County Executive Doug Duncan's statement at the time that "There is no such thing as county lines between . . . Frederick and Montgomery County[.]" Ex. 3 at MCM000052.

These connections between Frederick and Montgomery Counties were not created from thin air, as the Plaintiffs appear to allege, but rather were widely known and supported by data available at the time. As the Baltimore Sun reported in August 2011 (Ex. 4):

> About one-third of the 131,000 people who moved to Frederick County in the past 10 years came from Montgomery County, according to Internal Revenue Service data.
>
> The MARC's Brunswick line, which runs from Washington's Union Station to Martinsburg, W.Va., has seen a 34 percent increase in train ridership in

> the past decade, and there are roughly 10,000 more cars per day on Interstate 270 than 10 years ago.
>
> Nowhere is the growth more apparent than in the rolling developments in Urbana, the first exit off I-270 in Frederick County.

As stated by former Plaintiff Stephen Shapiro in public testimony before the GRAC, "based on history and geography," pairing "the western third of Montgomery County . . . with Western Maryland . . . would be a reasonable situation and one that existed several decades ago." Ex. 3 at MCM000217. Residents also testified that linking Montgomery County with the other counties in the Sixth District would create a competitive political district to allow for "a good race between two quality candidates" that was focused more on "what they're presenting to the people – to the district," with less emphasis on party affiliation. *Id.* at MCM000014; *see also id.* at MCM000028MCM000218 (Mr. Shapiro expressing concern that non-competitive districts had "decreased turnout and interest" in the general election "where the result is usually a foregone conclusion" and advocating for a more competitive Sixth District). Residents of Frederick, in particular, testified about the shifting demographics of Frederick becoming more Democratic in numbers and yet feeling "shut out of the process" because "their politics weren't represented at all at the national level." *Id.* at MCM00040-41. Andrew Duck, a former candidate for Congress in the Sixth District, testified about the difficulties in campaigning for office across the Sixth District and the distinct and different concerns among communities in the western Maryland panhandle and those proximate to the Baltimore region. *Id.* at MCM00035-38; *see also* MCM000026, 30-31, 48.

GRAC members also heard testimony from constituents of Prince George's County who advocated for having "Prince George's County shared between the [Fourth] and the [Fifth] Congressional Districts" and, thus, placing Montgomery County within "the [Eighth] and the [Sixth] Congressional Districts." *Id.* at MCM000141; *see also id.* at MCM000156, 190-91.

These two concerns – residents of western Maryland discussing connections along the I-270 corridor and residents of Prince George's County not wanting their district to cross into Montgomery County – resonated with Ms. Hitchcock, the GRAC chair. Ex. 5 (Jeanne D. Hitchcock Dep.) at 58-59, 83, 84, 92. She was careful to ensure that these concerns were reflected in the final map. *See id.* at 83-84, 91-92. Governor O'Malley was particularly mindful of testimony reflecting the "anticipation that . . . the borders would change the most out that [I-]270 Corridor in a kind of west-northwesterly direction from the nation's capital." Ex. 2 at 21:15-21.

Given the inherent interests of the congressional delegation in the redistricting process, as part of his collaborative process, Governor O'Malley tasked Congressman Steny Hoyer, the dean of Maryland's House delegation, with developing a consensus map among the Democratic members. *Id.* at 47-48. Toward that end, Governor O'Malley shared with Congressman Hoyer certain parameters for the congressional map, including that the map should respond to "the natural migration" that was occurring "north and west out of the Washington suburbs" and should respect the "natural geographic border" of the Chesapeake Bay; and that the "change in lines would mostly be affecting the Western Shore where the greatest numbers of people live and where the population growth was

best." *Id.* It was generally understood "that the population shift in [Maryland] was out [the I-]270 corridor, . . . and that that's where the congressional lines would change the most." *Id.* at 79:15-18.

Although the Plaintiffs have characterized Governor O'Malley's solicitation of input from the congressional delegation as a "behind-the-scenes process," it was public knowledge that the Democratic members of Maryland's congressional delegation were seeking to create a consensus proposal for the congressional map. *See* Ex. 6 (reporting on congressional delegation's efforts). Such input from the congressional delegation is common in redistricting. Ex. 52 (Willis Dep.) at 185-88. It was no secret that this consensus map would, among other considerations, seek to create a newly competitive district for Democrats. *See* Exs. 4, 6.

The congressional delegation hired a consultant from NCEC Services to draw the map they would submit to the Governor. Ex. 7 (Eric Hawkins Dep.) at 35:16-37:10. According to Eric Hawkins, the democratic consultant from NCEC Services who drafted the congressional delegation map, "one of the goals was, because the state was so Democratic, to see if there was a possibility for another Democratic district." *Id.* at 48: 18-21. Mr. Hawkins believed that an additional Democratic seat would "reflect the state's voting behavior," and that if incumbency protection were not at issue, the Democratic voting strength possibly "could support eight Democratic districts." *Id.* at 230-31. Indeed, it would have been possible to draw a congressional map that favored Democrats in all eight congressional districts in 2012. *See* Ex. 8 (Report of Allan J. Lichtman) at 48-49 & Table 19; Ex. 9 (Decl. of William S. Cooper) ¶¶ 14-16 & Exs.; Ex. 10 (Suppl. Decl. of

William S. Cooper) & Exs. As Defendants' expert Dr. Allan Lichtman has demonstrated, Maryland's 2002 map did not reflect the voting strength of the Democratic majority in Maryland; in that respect, the congressional map was significantly less favorable to Maryland's dominant political party than were redistricting plans adopted in other similarly-sized states dominated by one party. Ex. 8 at 44-45 & Table 17. For example, after the 2010 election Massachusetts and Connecticut had 100 percent of their congressional seats held by Democrats, compared to 75 percent in Maryland, despite the three states' very similar democratic performance in the 2008 presidential election. *Id.*

Contrary to Plaintiffs' assertion, the map created for the congressional delegation by Mr. Hawkins and submitted to the GRAC, was not the map adopted by the State. Ex. 11 (Yaakov Weissmann Decl.) ¶ 9; Ex. 2 (O'Malley Dep.) at 78:1-12, 79:11-18. Governor O'Malley was not satisfied with that map. Ex. 2 at 78:1-12. To inform the map drawing process going forward, Governor O'Malley met with each member of Maryland's congressional delegation, including Republicans Roscoe Bartlett and Andy Harris, to solicit their input. *Id.* at 49-52.

Drawing the 2011 Congressional Map

The Governor's Office, led by Mr. Bryce, with the assistance of staff members to Senate President Miller and House Speaker Busch, drafted the contours of the map that ultimately became Senate Bill 1.[1] Ex. 11 (Weissmann Decl.) ¶¶ 7, 9-10, 13. These staffers

[1] Because the congressional map concerned the members of the congressional delegation and was shepherded mainly by the Governor's Office, neither President Miller

worked with the census data provided to them and loaded onto a laptop prepared specifically for the redistricting process by the Maryland Department of Legislative Services. *Id.* ¶ 4. Also available were data reflecting party registration and voting history at the precinct level. *Id.*

The map developed by staffers to the Governor and the GRAC differed materially from the congressional delegation's map in at least four pertinent respects. Unlike the congressional delegation's plan, the map developed by staffers to the Governor and GRAC (1) kept intact Washington County, Frederick City (with the exception of an unintentional split at a fork in the road with zero population), Hagerstown, and Westminster; (2) kept the number of districts in Prince George's County to just two by drawing the Third and the Eighth Districts so that they did not include population from Prince George's County; (3) kept the number of districts in Montgomery County to three by drawing the Fourth District so that it did not include population from Montgomery County; and (4) made the I-270 corridor a major feature of the Sixth District, connecting Frederick with Montgomery County. *Id.* ¶¶ 8-9.

Governor O'Malley also considered various demographic and geographic factors, including electing to respect the natural boundaries of the Chesapeake Bay and not cross it for purposes of drawing the lines of the First District. Ex. 2 (O'Malley Dep.) at 24; Ex. 12 (GRAC presentation) at MCM002457. Governor O'Malley recognized "from the growth patterns on the map, particularly the growth that 270 and into Frederick . . . [that] because

nor Speaker Busch was intimately involved in drawing the district boundaries. *See* Ex. 13 (Thomas V. Mike Miller Dep.) at 81-82; Ex. 46 (Michael Busch Dep.) at 34-35, 38-39.

the growth was mostly westerly out of the Washington suburbs, . . . the entire map on the Western Shore would kind of shift a little bit to the north and to the west." Ex. 2 (O'Malley Dep.) at 24-25. He was keenly aware that the State's "population had shifted and grown," that the "growth was mostly out West," and that "to accommodate that growth, the borders would change most on the western side of the Eastern Shore." *Id.* at 24. He recognized the economic connections along the I-270 corridor, including the reality that many residents of Frederick work "in [the I-]270 Corridor," and that large bio-tech companies are located along that route in both Montgomery and Frederick Counties. *Id.* at 40-41; *see also* Ex. 13 (Miller Dep.) at 19:14-22 (recognizing map reflected obvious growth in the I-270 corridor); Ex. 46 (Busch Dep.) at 141, 169-73 (discussing growth in Montgomery and Frederick Counties). The composition of the Sixth and Eighth Districts reflects this population growth, commuting patterns, and other economic and migratory patterns along the I-270 corridor. Ex. 12 (GRAC presentation) at MCM002463-64, 2466-67.

Further, along with these other considerations, Governor O'Malley intended to develop the "districts in a way that was more advantageous to [the Democratic] party[.]" Ex. 2 (O'Malley Dep.) at 9. In addition to various factors that impact congressional boundary lines, including geographic limitations, population shifts, the one person-one vote constitutional mandate, and respecting the composition of majority-minority districts, Governor O'Malley intended to develop a map that would "make it more likely rather than less likely that a Democrat . . . is able to prevail in the general election." *Id.* at 42-43.

These priorities of Governor O'Malley coalesced into the congressional map that was enacted into law: the First District does not cross the Chesapeake Bay, the districts

west of the Bay reflect population growth north and west out of the Washington, D.C. suburbs, the Sixth District reflects the Frederick-Montgomery County connections along the I-270 corridor, and the Sixth District is a competitive district in which it is "more likely rather than less likely that a Democrat . . . is able to prevail in the general election."

On October 15, 2011, Governor O'Malley submitted his proposed map to the Senate President and House Speaker. ECF 104 ¶ 33. On October 18, 2011, the Senate passed Senate Bill 1, and sent it to the House of Delegates, which passed the bill on October 19, 2011. The Governor signed Senate Bill 1 into law on October 20, 2011. *Id.* ¶ 34.

Senate Bill 1 was petitioned to referendum. *Id.* ¶ 39. The statewide referendum Question 5 on the 2012 ballot asked voters whether they were "for" or "against" the Maryland law "[e]stablish[ing] the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution." *Id.* The referendum passed overwhelmingly, with 1,549,511 votes (64.1 percent) cast in favor of the referendum and 869,568 votes (35.9 percent) cast against the law. *Id.* Only Carroll and Garrett Counties had more votes against than in favor of Question 5. *Id.* Voters in Allegany, Frederick, and Washington County voted in favor. *See id.*

Characteristics of the 2011 Congressional Redistricting Map

Like the two previous congressional redistricting plans, the 2011 plan contains two majority African-American congressional districts, the Seventh and Fourth Districts. *See Fletcher v. Lamone*, 831 F. Supp. 2d 887, 891 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012).

In keeping with a request by the Legislative Black Caucus and others, Prince George's County is now included in only two districts – the Fourth and Fifth Districts – instead of three. *Id*. at 902; Ex. 3 at MCM000141, 156, 190-91. The 2011 plan also resulted in a decrease in the number of congressional districts in Harford County and Baltimore County. *Compare* Ex. 14 (2002 map) *with* Ex. 15 (2011 map).

One of the most visible changes between the 2002 and 2011 maps was the reversal of a choice of the 2002 Governor and General Assembly to "attach[] a portion of Anne Arundel County to the eastern shore by way of the Chesapeake Bay Bridge," "rather than extend District 1 from the eastern shore into Representative [Helen] Bentley's district[.]" *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 409 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (J. Niemeyer, dissenting); *see also* Ex. 2 (O'Malley Dep.) at 24; Ex. 12 (GRAC presentation) at MCM002457.

Making that change required coordinating changes in other districts. The portions of Anne Arundel County in the former First District contained 107,577 people, according to the adjusted census numbers. Ex. 8 (Lichtman) at 51, Table 20; Ex. 9 (Cooper Decl.) ¶¶ 17-19 & Exs. At the time of redistricting, the Second District, which was the only district other than the Sixth to border the northern portions of the First District, was underpopulated by 17,705 people compared to the ideal population. Ex. 16 (census data) at MCM001239. In turn, the Third and Seventh Districts, which bordered the Second, were also underpopulated. *Id.* Instead of extending southward into these underpopulated areas to fill the 107,577 person deficit created by elimination of the Chesapeake Bay crossing, the 2011 map extended the First District's reach into portions of what previously had been

the Sixth District: Harford and Baltimore Counties, with the district continuing from Cecil County's northern border along the border of Pennsylvania into Carroll County. These portions of the 2002 Sixth District contained 106,562 people, nearly matching those lost in Anne Arundel County. Ex. 8 (Lichtman) at 51, Table 20; Ex. 9 (Cooper Decl.) ¶ 18.

The Sixth District now consists of Garrett, Allegany, and Washington Counties in their entirety and then turns south, following the Potomac River and encompassing Frederick City and the development along the I-270 corridor. Ex. 15 (2011 map). Following the natural course of the Potomac River to form the southern border of the Sixth District reflects an historic connection that the waterway forged through commerce and transportation corridors. Ex. 17 (Report of John T. Willis) at 16-17. Indeed, for much of Maryland's history, dating back to the initial Sixth District for the first federal congressional election in 1789, either the entirety or some portion of Montgomery County has been combined with the westernmost counties of Maryland to comprise Maryland's Sixth District. *See id.* App. A, Map 1. For nearly a century from 1872 through 1964, the entirety of Montgomery County was part of the Sixth District along with Allegany, Frederick, Garrett, and Washington counties. *See id.* App. A, Maps 7 through 10. Only in 1966, when the United States District Court for the District of Maryland drew Maryland's congressional districts to comply with the Supreme Court's one-person, one-vote decisions, was Montgomery County removed from the Sixth District. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 736-37 (D. Md. 1966); Ex. 17 (Willis) App. A, Map 11. At that time, the court-drawn map moved Montgomery County from the Sixth District to the Eighth District and moved Carroll

County into the Sixth District, along with small portions of Howard and Baltimore Counties.[2] *Maryland Citizens Comm. for Fair Cong. Redistricting*, 253 F. Supp. at 736-37. Following the 1970 Census, the State placed a small portion of Montgomery County back into the Sixth District. Ex. 17, App. A, Map 12. Following the 1980 Census, the State redrew the Sixth District to include a much larger portion of Montgomery County running along the Potomac River (*id.* App. A, Map 13), similar to how the District is currently drawn.

The southern border choice also allows the Sixth District to capture highly agricultural areas of northwestern Montgomery County where much of the land is under agricultural preservation easement, Ex. 17 (Willis) at 20, and land is used for "horse farms," "corn, soy, pumpkin[,]" "peaches[,]" "blueberries and strawberries," and "Christmas trees." Ex. 18 (Robert Garagiola Dep.) at 42-43. The District similarly groups low-population density portions of Garrett, Allegany, Washington, Frederick and Montgomery Counties together. *See* Ex. 47 (Maryland Population Density by Census Tract, 2010). The Sixth District includes centers of concentrated population surrounding Cumberland, Hagerstown, Frederick City and the expansion of the Washington, D.C. suburbs up the I-270 corridor. The Sixth District therefore reflects Western Maryland's longtime trend in population growth. Ex. 17 (Willis) at 15; *see also* Ex. 8 (Lichtman) at 26-27 & Table 8 (former Sixth District had a majority urban population).

[2] The 1966 court-drawn map placed Carroll County in a district with other counties with which it had not been joined since after the 1860 Census. Ex. 17 App. A, Map 6.

The I-270 corridor is one of Maryland's major transportation routes, connecting many residents of the 2011 Sixth District with their jobs. In 2002, the Maryland Department of Transportation began to plan for the long-term growth in this area and by 2009 an updated analysis of alternatives was available for public comment. In that study, the Department of Transportation recognized the rapid growth in both population and employment occurring in Montgomery and Frederick Counties along the I-270 corridor. *See* Ex. 49 (2009 Executive Summary). Consistent with this study, Census data reflects that in the counties comprising the Sixth District, most residents of the Sixth District commute to other parts of the Sixth District. Ex. 8 (Lichtman) at 18.

Political Composition of the Sixth District

The Sixth District is characterized by a competitive political geography where no ideology or political party maintains a firm grasp. According to party registration statistics as of the 2010 general election, no party captured a majority of the registered voters residing in the 2011 Sixth District. Ex. 19 (Report of Michael McDonald) Table 1. According to Plaintiffs' expert Dr. McDonald, Democrats are the plurality of registered voters in the Sixth District, accounting for 44.8 percent of 2010 registered voters, while Republicans constitute 34.4 percent and unaffiliated voters make up the remaining 20.8 percent of such voters.[3] According to analysis done by at least one Republican candidate, the Sixth District contains "a larger than average number of Independents who typically

[3] Dr. McDonald does not explain why he omits Green, Constitution, and Libertarian Party voters from his table, or whether he includes them in one of the three categories he does report. His results are therefore not directly comparable to the statewide statistics.

identify as fiscal conservatives." Ex. 20 (Sharon Strine Dep.) Ex. 3 at BEN_002076. In comparison, according to statewide registration figures as of the 2010 gubernatorial election, the Maryland electorate as a whole was 56.4 percent Democratic party affiliated, 26.7 percent Republican party affiliated and 15.2 percent unaffiliated. *See* Ex. 21 at MCM003841.

Election results underscore the competitive nature of the district. The mean of the two-party vote across all statewide elections since 2012 is 47.1 percent Republican in the Sixth District, as compared to 39.1 percent Republican statewide. Ex. 8 (Lichtman) at 7, Table 1. In the political science literature, a district is usually categorized as competitive when this mean is between 45 and 55 percent. *Id.* at 36 & n.79.

The Sixth District historically has been characterized by moderate policies and politicians. Only in the last two decades, when it was stretched across nearly the entirety of the northern Maryland border, has the Sixth District been skewed toward one party, and elected one of the most conservative Republican politicians in the House of Representatives. Through the majority of the Twentieth Century, Sixth District voters elected moderate Democrats and Republicans, including David J. Lewis, a Democrat who introduced the Social Security Act in the House of Representatives, *see* https://www.ssa.gov/history/tally.html, and Charles Mac Mathias, Jr., a moderate Republican who later represented Maryland in the United States Senate.[4] For two decades during the 1970s and 1980s, Democrats Goodloe Byron and Beverly Butcher Byron

[4] *See* Govtrack, "Sen. Charles Mathias, Jr.," https://www.govtrack.us/congress/members/charles_mathias/407259.

represented the Sixth District. Some of the Plaintiffs eligible to vote at that time recall voting for Representative Beverly Byron, and one Plaintiff recalled doing so because "she and her husband were both proficient at providing good representation." Ex. 24 (Charles Eyler Dep.) at 15-17; *see also* Ex. 25 (Ned Cueman Dep.) at 17; Ex. 20 (Strine Dep.) at 14. Former constituents have described Representative Byron as a "moderate Democrat . . . who supported the military while also supporting the common sense programs that support working and middle class citizens." Ex. 26 (Andrew Duck Decl.) ¶ 11; *see also* Ex. 13 (Miller Dep.) at 147 (describing Rep. Beverly Byron as a "moderate" politician). Prior to the 1990 redistricting cycle, when the Sixth District was composed of a significant portion of Montgomery County, registered Democrats in the district slightly outnumbered registered Republicans (ECF 104 ¶ 13), making the District competitive and thus unlikely to be represented by a politician on an extreme end of the political spectrum.

After the 1992 redistricting plan went into effect, registered Republicans in the Sixth District outnumbered registered Democrats, and that trend continued after the adoption of the 2002 redistricting plan added greater numbers of registered Republicans into the district. ECF 104 ¶¶ 10-12, 14. In contrast to the historic moderate representation of the Sixth District, Roscoe Bartlett, the Republican who represented the Sixth District in Congress from 1993 through 2012, was among the most conservative members of the U.S. House of Representatives in his last term in office. Ex. 8 (Lichtman) at 37; *see also id.* at 28-30 (listing Representative Bartlett's voting record).

Notably, the western Maryland counties have not always held the same political positions as the other counties included in the former Sixth District. In the 2012 election,

for example, Frederick County joined the majority of Marylanders in approving the Civil Marriage Protection Act, which was rejected by residents in Carroll and Harford Counties. Ex. 27 (election results). In that same election, the residents of Frederick, Allegany, and Washington Counties voted together to approve gaming expansion, while residents in Caroll and Harford Counties rejected the measure. *Id.* And although in the 2008 general election Roscoe Bartlett won Garrett, Allegany, and Carroll Counties by wide margins, in Frederick County, the most populous County in the former Sixth District, he garnered only 52 percent of the vote. Ex. 28 (2008 election results).

Post-Redistricting Congressional Elections in the Sixth District

John Delaney, the current representative of the Sixth District, like Beverly Byron before him, is considered a moderate or conservative Democrat as compared to other members of his party. *See* Ex. 8 (Lichtman) at 37; Ex. 2 (O'Malley Dep.) at 26:7-11, 29:11-16, 8311-20. In the 2012 congressional primary, Representative Delaney defeated Rob Garagiola, a more progressive state senator with name recognition who was favored by the Democratic Party establishment. *See* Ex. 29. Although Congressman Delaney handily defeated the incumbent Roscoe Bartlett in the general election, the conventional wisdom at the time was that then-Representative Bartlett, an 85-year old viewed as being on the far right of his party, lacked a robust fundraising apparatus, *see* ECF 104-13, and was facing waning popularity within his own party. Indeed, Representative Bartlett faced a competitive field in the Republican primary that year, and won only a plurality of the vote (43.6 percent). Ex. 30 (2012 primary election results). In the general election,

Representative Bartlett lost Washington County, which he had won in the 2008 general election (with roughly equivalent turnout), and underperformed in Allegany County as compared with the prior presidential election year. *Compare* Ex. 31 (2012 election results) *with* Ex. 28 (2008 election results).

The competitiveness of the Sixth District was further confirmed in 2014 when, despite his incumbent status, Congressman Delaney nearly lost reelection as the Republican candidate Dan Bongino came within 1.5 percentage points and 2,774 votes of unseating him. Ex. 32 (2014 election results). Representative Delaney's near miss is even more remarkable because Mr. Bongino lived in Severna Park, well outside the Sixth District, to which some would-be supporters objected. Ex. 20 (Strine Dep.) at 18, 36 (30% of those polled "cared" that he did not live in the District) & Ex. 7. Mr. Bongino was also at a severe fundraising disadvantage compared to Representative Delaney, who self-funded his race. *Id.* at 37:8-10; Ex. 2 (O'Malley Dep.) at 26. And at least some voters in the Sixth District who were willing to vote Republican were not aligned behind Mr. Bongino's candidacy, as evidenced by Governor Hogan outperforming Mr. Bongino in the Sixth District.[5] Other election-specific factors may have affected the outcome of the race as well, including (1) an artificial boost to Democratic turnout in Frederick County from a

[5] Looking only at Governor Hogan's election day vote count (the only data available by congressional district), he received 92,500 votes in the Sixth District, while Mr. Bongino's total vote count was 91,930. *Compare* Results reported in State_Congressional_Districts_2014_General.csv (available at http://elections.state.md.us/elections/2014/election_data/State_Congressional_Districts_2014_General.csv *with* Ex. 32 (2014 D6 election results).

contentious city council race with an unpopular Republican candidate, *see* Ex. 33, (2) "complaints" about Mr. Bongino's campaign from, among others, a group of Second Amendment voters, Ex. 20 (Strine Dep.) Ex. 9, and (3) intra-party squabbling that led to a Republican state delegate encouraging her likely voters to vote for Congressman Delaney over Mr. Bongino. *Id.* at 43:14-44:8. Yet, despite Mr. Bongino's flawed candidacy, he came within a few thousand votes of unseating an incumbent Congressman who the Frederick News-Post described "as pragmatic and not political, and there's no question he has represented the county well during his first term in office." Ex. 33.

Statistical Measures Show the Congressional Plan Lacks Partisan Bias

In addition to being a competitive district, the Sixth District is part of a congressional plan that lacks features of partisan bias. Under multiple measures, the Maryland 2011 congressional plan returns symmetric results for Republicans and Democrats, or, paradoxically, the plan is biased toward Republican performance. Under the hypothetical model used by many redistricting experts, including Plaintiffs' experts, Republicans need only capture 51 percent of the statewide vote in a congressional election to hold 63 percent of the seats. Ex. 8 (Lichtman) at 8, Table 2. Such performance by Republicans is not merely hypothetical—Republicans actually captured 51.0 percent of the vote in the 2014 gubernatorial election, resulting in the election of current Governor Larry Hogan. Ex. 22 (2014 election results). And to regain a second congressional seat under the model, Republicans need only a congressional election where they achieve 43 percent of the vote. That is, the model predicts a party gaining 43 percent of the statewide vote in

Maryland, whether that party is Democratic or Republican, will capture 25 percent, or two, of the seats under the plan. Ex. 23 (Lichtman Suppl.) at 5. Other measures of fairness that have been proposed include analyses of the "efficiency gap," or measures of "wasted" votes. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015), *available at* https://www.brennancenter.org/sites/default/files/events/Efficiency_Gap_Stephanopoulos_McGhee_2015.pdf. Dr. Lichtman and Stephanopolous and McGhee propose two such calculations; both also support the conclusion that the plan is unbiased or biased slightly in favor of Republican votes. Ex. 8 (Lichtman) at 10; Ex. 23 (Lichtman Suppl.) at 5-6; Stephanopoulos & McGhee, 82 U. Chi. L. Rev. at 880. Across multiple measures, Republicans are at no systemic disadvantage in leveraging their votes into congressional seats, and under some measures they are at an advantage.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The "facts must be viewed in the light most favorable to the non-moving party," but "only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S.

574, 586-87 (1986). "[G]enuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir. 1993) (citations omitted). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott*, 550 U.S. at 380.

II. PLAINTIFFS HAVE FAILED TO COME FORWARD WITH SUFFICIENT EVIDENCE TO RAISE A GENUINE ISSUE FOR TRIAL ON ANY OF THE ELEMENTS OF FIRST AMENDMENT RETALIATION.

A. Plaintiffs Have Failed to Raise a Genuine Issue for Trial that the Governor or GRAC Acted With the Specific Intent to Retaliate Against Plaintiffs for Their First Amendment Expression.

Plaintiffs have offered proof only that "the likely political consequences of the reapportionment were intended," Pls.' Mem. (ECF 177-1) at 26 (quoting *Davis v. Bandemer*, 478 U.S. 109, 129 (1986)), a showing that does not suffice to establish the requisite intent, for at least two reasons the Court has already identified. First, this Court expressly rejected the notion that such awareness of political consequences could equate to a specific intent "to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated." ECF 88 at 34. Second, while plaintiffs also note that it is undisputed that Maryland decisionmakers had access to various forms of data to assess the political behavior of certain precincts, this Court also cautioned that "the use of data reflecting citizens' voting history and party affiliation" alone was not sufficient to support the First Amendment retaliation cause of action. *Id.* at 33. Plaintiffs have therefore failed to satisfy their burden of establishing the

requisite intent. Moreover, there being no evidence that would support such a finding of intent, summary judgment should be entered in favor of State defendants.

Under the Court's articulation of the intent element, Plaintiffs must provide "objective evidence" of "specific intent," *id.*, which the Supreme Court has defined as an "intent to bring . . . to pass" "a result which the law seeks to prevent." *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905). In this case, the proscribed "result" is vote dilution that is "sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have 'an equally effective voice in the election' of a representative." ECF 88 at 34. To be liable for First Amendment retaliation, the decisionmaker must have acted "in retaliation for [the voter's] exercise of the constitutional right of free speech." *Perry v. Sindermann*, 408 U.S. 593, 598 (1972). In assessing whether an action was retaliatory, it is "the government's reason" for acting that is the proper object of consideration. *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016).

Plaintiffs have made no effort to satisfy this Court's test or the pertinent Supreme Court precedent. That is, Plaintiffs have not attempted to offer objective proof that Governor O'Malley or any other state decisionmaker intended to burden any of the Plaintiffs' representational rights because of their party affiliation. Instead, Plaintiffs point only to Governor O'Malley's and other decisionmakers' statements that they intended, along with other considerations, to develop a map that would "make it more likely rather than less likely that a Democrat . . . is able to prevail in the general election." Ex. 2 (O'Malley Dep.) at 42-43. That aspiration arose in the particular context of Maryland politics in 2010, when Democrats had a 29.7 percent lead over Republicans in statewide

voter registration, *see* above at page 18-19, there had been no Republican senator elected since 1987, and no Republican presidential candidate had captured Maryland's electoral college votes since 1988. Herbert C. Smith & John T. Willis, *Maryland Politics and Government* 270, 304 (2012). Moreover, the hope of increasing the electability of Democratic candidates was formed after two successive congressional elections where none of the seven incumbents received less than 57.8 percent of the vote, and no Democratic incumbent received less than 61 percent. Exs. 34, 35 (2008 and 2010 election results). The GRAC also heard testimony from constituents who had felt shut out of the process, as Democrats in a district that had been maintained as an overwhelmingly Republican district despite the strong statewide Democratic majority. *See* discussion above at page 8. As Governor O'Malley explained, "just as Frederick has grown with the growth of the Washington suburbs, and in that growth become more Democratic as well as more Independent, . . . the Sixth District, when the borders were drawn, however they were drawn, would likely pick up more Democratic votes and more Independent votes." Ex. 2 (O'Malley Dep.) at 26:16-21. Plaintiffs have offered no explanation, and certainly no proof, of why the intent to recognize the changing political geography of Maryland is equivalent to an intent to burden the representational rights of these plaintiffs.

The objective facts establish that it was Maryland decisionmakers' intent, "all things being legal and equal," *id.* at 47:3, to create a competitive district reflecting the reality that Maryland's "population had shifted and grown," *id.* at 24:9, including "the growth [along] 270 and into Frederick where actually they have more biotech jobs than in all of Baltimore now," *id.* at 26:3-5; while at the same time respecting the desire not to "jump the

Chesapeake Bay," *id.* at 24:16. On all measures of political strength posited as actually available to Maryland decisionmakers, the new plan maintained a Sixth District that was in reach of a Republican candidate. The proof is in the numbers. It is undisputed that the enacted Sixth District had a federal NCEC Democratic Performance Index score, the data available to Eric Hawkins and Maryland mapmakers, of 53 percent and that the Cook Political Voting Index scored the Sixth District as a +2 Democratic advantage for the 2012 election. In the run-up to the 2012 election, at least nine Republicans held seats in districts with the same or greater Democratic advantage. *See* Pls.' Ex. XX (ECF 177-52) at 4.[6] As Mr. Hawkins testified, enhancing the Democratic performance of a district "doesn't necessarily mean that a Republican wouldn't win there," although any change to a district "makes it more difficult for the incumbent." Ex. 7 (Hawkins Dep.) at 228:3-13. After redistricting, Mr. Hawkins would "have called that district a marginal district, because it wasn't overwhelmingly Democratic." *Id.* at 230:3-6. The objective facts suggest that Maryland decisionmakers intended to create a new opportunity for Democratic electoral success, but that does not equate to an intention to burden Plaintiffs' representational rights.

The intent to create the opportunity for a Democratic candidate to win in the Sixth District, even if it were to have the incidental *effect* of burdening Republicans' representational rights, cannot be the basis of a First Amendment retaliation cause of action

[6] That the degree to which the Sixth District leans Democratic according to these indices is no guarantee of continued Democratic victories is further evidenced by the statewide victory of Governor Hogan in 2014, as the percentage of Republican voters statewide is significantly lower than the percentage of Republican voters in the Sixth District. Ex. 50.

because, among other reasons, it is not retaliatory. The plaintiffs have produced no evidence, objective or otherwise, that a Maryland decisonmaker took any action for the purposes of punishing or denying a benefit to any of the plaintiffs.

Furthermore, Plaintiffs have not even offered an explanation of the conduct they allege was the target of Maryland decisionmakers' alleged ire. Was it their voting frequency or whether they voted early, absentee, at the polls, or provisionally? Those are the only points of information that can be derived from voting history. Was it their party affiliation? Plaintiffs have not pointed to any evidence that any Maryland decisionmaker examined or was aware of any particular Plaintiff's party registration or voter history. *See, e.g.*, Ex. 13 (Miller Dep.) at 188-89 (denying that he knew any of the Plaintiffs). Mr. Benisek, for example, was unaffiliated with any political party at the time of the 2010 gubernatorial election and testified only that he re-registered as a Republican "[p]rior to 2011." Ex. 36 (O. John Benisek Dep.) at 19:22; Ex. 53 (Mary Wagner Decl.) ¶ 5 & Ex. A. Therefore his expressive conduct, at least with respect to registration, was not before any Maryland decisionmaker, even in an aggregated form.

And, although party registration was one datapoint available to the mapdrawers, they considered it along with many other factors and never in units smaller than census block levels. Ex. 11 (Weissmann) ¶¶ 4-5. Plaintiffs have offered no proof that any decision was made to locate any particular Plaintiff within or outside of the new Sixth District based on party affiliation. Moreover, Plaintiffs lack any basis for their contention that Democratic performance could have any bearing on retaliation against "Republicans[]" (Pls.' Mem. (ECF 177-1) at 26). Democratic performance is, as more accurately described

by Mr. Hawkins, "an average of how statewide candidates perform over time in competitive elections . . . weighted differently for different election years." Ex. 7 at 24:12-16. In other words, it is a compilation of election data. Given the secret ballot, there is no way for the government or anyone else to retaliate against someone on the basis of their cast vote or to look at election results and determine who is or is not a Republican.

Further, it is relevant to intent that Maryland decisionmakers expressly recognized their ability to draw a map that might produce eight Democratic representatives, but did not. Ex. 11 (Weissmann) ¶ 12 (8-0 map not seriously considered); Ex. 7 (Hawkins Dep.) at 230-31 (testifying it would have been possible to draw an 8-0 map); Ex. 8 (Lichtman) at 48-49 & Table 19; Ex. 9 (Cooper) ¶¶ 14-16 & Exs.; Ex. 10 (Cooper Suppl.) & Exs.

Moreover, although Plaintiffs' expert Dr. Morrison contends that the percentage of census designated places that are split in this plan is 59 percent (Ex. 37 at 66-68),[7] the

[7] Dr. Morrison's unfounded assertion cannot create a genuine dispute of material fact. During his deposition, Dr. Morrison made clear that he had no factual support for this statement, because he had abdicated responsibility over this part of his analysis to a graduate assistant recommended by Plaintiffs' counsel. Mr. Amos, the graduate student, performed work that, in the words of Dr. Morrsion, "required GIS skills that I understand but don't actually possess." Ex. 40 (Peter Morrison Dep.) at 10:7-8. Although Dr. Morrison claimed that he "gave [Mr. Amos] detailed instructions on how to do" the requested analyses, Dr. Morrison could not (1) identify the source of the data used in the table, *id.* at 136-38; (2) recall why the 111th Congress was selected as a comparator, *id.* at 140:21; (3) confirm whether his own table referenced census designated place definitions in the 2000 or 2010 census, *id.* at 148:17-21; (4) recall what definition he or Mr. Amos had used to produce the table, *id.* at 151:18-20; or (5) name any city or town included either in the Sixth District or Table 3 of his report, *id.* at 152:20-153:6. Because the Plaintiffs failed to produce any actual evidence to support Dr. Morrison's assertion concerning split census designated places, Dr. Morrison himself had no support for that assertion, and because the publicly available census data is clearly to the contrary, Ex. 38, Plaintiffs have failed to create any genuine issue for trial.

actual percentage is only nine percent, up only slightly from the previous four percent. Ex. 23 (Lichtman Suppl.) at 3; Ex. 38 (Maryland Congressional Districts by Place (113th Congress)). Even that overstates the actual splits, as all major cities were maintained as intact for all practical purposes. Ex. 39 (Shelley Aprill Decl.) ¶¶ 5-7. Rockville and Frederick were technically split because of very small areas of overlapping precinct and municipal boundary lines, or, in Frederick's case, due to a mismatch between metes and bounds descriptions and the municipal boundary lines. *Id.* ¶¶ 5-6. The total adjusted census population involved in these splits was four people. *Id.* ¶ 7. These de minimis and unintentional (Ex. 11 (Weissmann) ¶ 11) splits support the conclusion that Maryland decisionmakers made careful efforts to keep communities intact.

The only intent evident on this record concerning political composition is to create a competitive district that, under all metrics known or available to Maryland decisionmakers, was similar in composition to districts held by Republican congressional representatives around the country; in other words, to allow Democrats to have "'an equally effective voice in the election' of a representative." ECF 88 at 26-27 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). Such an intent cannot be equated with an intent to burden the representational rights of registered Republicans, and certainly cannot be equated with an intent to burden the representational rights of Plaintiffs who brought this suit. Otherwise, under Plaintiffs' interpretation, the standard articulated by this Court (ECF 88) provides no guidance to legislators and their mapmakers concerning whether and how they can ever intend to draw newly competitive districts or whether they must intend to preserve non-competitive districts created under a prior plan, even in the face of shifting

demographics. Nor would the standard guide the "political entities" who make districting decisions in what has always been "root-and-branch a matter of politics," *Vieth*, 541 U.S. at 285 (plurality op.), about whether and to what extent they can respond to calls for change from a growing number of constituents who live in a non-competitive district.

Although a government may not indirectly burden First Amendment expression, the government cannot be said to retaliate unless it directs some action against individuals due to their conduct. *See Laird v. Tatum*, 408 U.S. 1, 11–14 (1972) (to establish standing, plaintiffs must allege government acted against them as the result of First Amendment expression). When the government has not formed an intent specific to the plaintiffs or any class to which the plaintiffs belong, no retaliation can be found.

B. Plaintiffs Have Failed to Raise a Genuine Issue for Trial that the 2011 Congressional Redistricting Plan Resulted in a Demonstrable and Concrete Injury.

Plaintiffs have adopted an impoverished definition of vote dilution that is inconsistent with that term's common legal usage and, in so doing, they have failed to articulate a First Amendment harm. Plaintiffs have articulated their conception of vote dilution as drawing a district "in a manner that has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district." Pls.' Mem. (ECF 177-1) at 27 (quoting McDonald at 3). Such a formulation directly contradicts this Court's caution that the First Amendment retaliation standard "does not . . . include a presumption of fairness of the status quo ante." ECF 88 at 35.

Moreover, the harm identified by Plaintiffs cannot be remedied without inflicting reciprocal harm on another group. Plaintiffs' expert, Dr. McDonald, has proposed an alternative map that purports to demonstrate that the Sixth District may be maintained as a safe seat for Republicans that nevertheless accomplishes other redistricting goals (including not crossing the Chesapeake Bay and reducing the number of districts located within Prince George's County) by adding enough residents from the former Eighth District to achieve population equality. *See* Ex 19 (McDonald Report) at 15, 25. As Dr. McDonald acknowledges, however, under his suggested alternative map, "[t]he Democratic voters that were formerly within the Eighth District would have their ability to elect a candidate of their choice diminished[.]" Ex. 41 (Michael McDonald Dep.) at 62:21-63:2. Because Maryland decisionmakers' long experience campaigning in the state and familiarity with their own districts make them aware of "the likely political consequences of" any electoral map, *Davis v. Bandemer*, 478 U.S. at 129, Plaintiffs' proposed remedy of moving easily identifiable Democratic precincts from the Eighth District into the Sixth District in order to maintain a Republican super-majority there would constitute First Amendment retaliation against Democratic voters. That result, which would be a mirror image of the harm Plaintiffs claim to have suffered, cannot be the measure of harm articulated by this Court.

When identifying vote dilution as the type of representational harm suffered under Plaintiffs' alleged cause of action, this Court drew on case law developed in the one-person one-vote and Voting Rights Act § 2 contexts. ECF 88 at 27-28. But Plaintiffs have not attempted to relate their claimed harm to any concept of vote dilution that has evolved out

of those prior cases. An examination of that case law reveals why thoughtful analysis requires rejection of Plaintiffs' simple assertion that a reduction in the number of Republicans relative to the number of Democrats in a district inflicts constitutionally cognizable harm on Republicans. As the Supreme Court has explained, single-member districts present more complicated claims of vote dilution because plaintiffs challenging such districts are claiming "not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some." *Johnson v. De Grandy*, 512 U.S. 997, 1012-13 (1994). There is an inherent difficulty in distinguishing permissible from impermissible vote dilution because "some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size." *Id.* at 1015. Merely affixing "the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution . . . ." *Id.* at 1015-16. Instead, testing for the presence of vote dilution demands at least some analysis of the "totality of the facts," *id.* at 1013, surrounding the minority's position vis-à-vis the entire map; in the case of racial minority-majority districts, the measure is "rough proportionality." *Id.* at 1023.

Proportionality is not an appropriate measure of fairness in assessing the strength of political party votes, however, because the American political system is not designed to produce proportional results in party representation, unlike parliamentary systems where seats are awarded on a party-share basis. Instead, the American electoral process produces a seats-votes curve, observed over many years and elections, that is not directly proportional but instead reflects a natural majoritarian bias. Ex. 23 (Lichtman Suppl.) at

4-5 & Chart 1. "Nor do political groups have any right to a district map under which their candidates are likely to win seats in proportion to the party's overall level of support in the State." ECF 88 at 17 (citing *Davis v. Bandemer*, 478 U.S. 109, 130 (1986); *Vieth*, 541 U.S. at 288). However, absent the numerical dilution that results from one-person, one-vote violations and multimember district dilution, some assessment of the overall impact to the plaintiff's asserted minority class must be made. Failure to circumscribe potential plaintiffs' claims with some outside measure of fairness would "mandate bizarre results," *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1045 (D. Md. 1994), such as the reciprocal harms inflicted by remedial plans discussed above. Plaintiffs have not done any such an assessment or offered any rational limiting principle in this case; failure to offer that type of proof should be fatal to their claim.

1. Plaintiffs Provide No Explanation of What Distinguishes Permissible from Impermissible Vote Dilution in the Partisan Context.

Plaintiffs' expert Dr. McDonald's analyses provide nothing that would assist in establishing why the harm to Plaintiffs is not equivalent to the harm inflicted on "any population group of substantial size" in the course of redistricting. *Johnson v. DeGrandy*, 512 U.S at 1015. All Dr. McDonald has done is make an extended demonstration that the Sixth District has been generally Democratic performing in three congressional elections. But, according to Dr. McDonald, (1) a Republican won the 2014 gubernatorial election in the Sixth District by a margin of 14 points; (2) a Republican outperformed the statewide republican vote for 2014 Attorney General by 7.3 points and came within one percentage

point of winning the District; (3) in the 2012 Senate race the well-known, popular incumbent Ben Cardin won only 50 percent of the vote, underperforming his statewide average by 6 points; and (4) again in the 2012 Senate race, a third-party candidate was twice as popular in the Sixth as statewide. Ex. 19 at 10, Table 3; Ex. 42 (SBE election results). In all of his analysis, Dr. McDonald does not explain the effect of the Democratic migration into Frederick and Washington Counties during the relevant time period. Nor does he mention that Washington County, which was wholly contained in both versions of the Sixth District, had a 7.8 point increase in Democratic votes from the 2008 to the 2012 congressional elections. Ex. 8 (Lichtman) at 33, Table 12. Dr. McDonald also fails to account for any incumbency effects or specific electoral circumstances of the elections. Ex. 41 (McDonald Dep.) at 52:3-10.

Perhaps the most puzzling omission in Dr. McDonald's so-called vote dilution analysis is a failure to make any account of the voting behavior of unaffiliated voters. *Id.* at 48:5-6 (acknowledging that he did not evaluate crossover voting in either Maryland or the Sixth District). While Dr. McDonald does provide a crude proxy of polarization analysis, which he himself acknowledges is "a challenging approach to determine partisan polarized voting since the estimates are preelection candidate preferences and not post-election vote choice," he makes no effort to analyze the effects of crossover voting, either presently or historically. Ex. 19 (McDonald report) at 8. This omission is striking when a cursory examination of Dr. McDonald's Table 2 reveals that the candidate capturing the plurality of the unaffiliated vote preference was successful in all but one instance, the 2014 House race. *Id.* at 8, Table 2. Where "a crossover district would also allow the minority

group to elect its favored candidates," there has been no impermissible vote dilution. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017). In failing to analyze the behavior of unaffiliated voters or crossover voting more generally, Plaintiffs offer no evidence that the Sixth District is not winnable by Republican candidates (who may or may not be the candidates of choice of Republican *or* unaffiliated voters in any given election).

Dr. McDonald also made no assessment of totality of the circumstances or any analysis whatsoever of the probability that a Republican could win the election in the future. Ex. 41 (McDonald dep.) at 34:14-35:6. He instead relied on actual election results to reach his conclusions that the map had the effect of "diminishing the ability of registered Republican voters to elect candidates of their choice compared to the previous, benchmark district," Ex. 19 (McDonald report) at 3, which constitutes Dr. McDonald's definition of "vote dilution," *id.* But "[t]he circumstance that a group does not win elections does not resolve the issue of vote dilution." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006).

Not only have Plaintiffs failed to analyze the totality of the facts related to the Sixth Districts' Republican voters, but analysis of those facts leads to the conclusion that those voters have suffered no diminution in *opportunity* to elect a candidate of their choice, or at least not a diminution sufficient to alter the outcome of an election. Examination of any measure of partisan fairness proposed by Plaintiffs' or Defendants' experts in this case yields a result within the normal range. Ex. 8 (Lichtman) at 5-11; Ex. 48 (McDonald response) at 10-11 (efficiency gap even under his methodology within zone of chance identified by Stephanopolous and McGhee); Ex. 23 (Lichtman suppl.) at 5-6. The political

science literature concurs, with both Stephanopolous and McGhee and Rodden and Chen demonstrating that Maryland's map is within the zone of expected variation in seats-votes distribution. *See* Stephanopolous & McGhee, *Partisan Gerrymandering and the Efficiency Gap*; Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. Pol. Sci. 239 (2013), http://www-personal.umich.edu/~jowei/florida.pdf. Analyses conducted using Dr. McDonald's own preferred methodology show the map to be symmetrically responsive to swings in Republican or Democratic votes up and down the seats-votes curve. Ex. 23 (Lichtman suppl.) at 5-6, App., Chart 1.

2. Plaintiffs Have Not Demonstrated the Identified Vote Dilution Burdened Their First Amendment Expression.

An inquiry into the totality of the facts in a First Amendment case may also properly encompass the extent to which a First Amendment right was actually burdened by alleged retaliatory action. Although Plaintiffs have not bothered to identify any instance of their First Amendment speech or expression that formed the basis of the alleged retaliation, given the information available to government officials, it must be either voting in elections at all or registering as a Republican. But plaintiffs have offered no proof that they were chilled from voting or registering as a Republican, or that the objective person of ordinary firmness would be so chilled by redistricting. Indeed, Plaintiffs maintained consistent voting habits both before and after redistricting. *See* Ex. 20 (Strine) at 11:22-12:10; Ex. 43 (Jeremiah DeWolf Dep.) at 10:16-18; Ex. 44 (Kat O'Connor Dep.) at 13:15-17; Ex. 25 (Cueman) at 15:10-16; Ex. 24 (Eyler) at 11:6-12; Ex. 45 (Alonnie Ropp Dep.) at 18:12-18;

Ex. 36 (Benisek) at 12:15-17. Moreover, multiple Plaintiffs notably increased their political involvement after redistricting. Jeremiah DeWolf, for example, "started to become politically active" after redistricting and "joined [Dan Bongino's] campaign to try to effect change." Ex. 43 (DeWolf) at 14:7-12. Sharon Strine also started working on local campaigns in 2010 when "the census was coming up" and she "knew [she] had to step up." Ex. 20 (Strine) at 49:14-16. In the 2014 election cycle, Ms. Strine again "stepped up as campaign manager" for Dan Bongino's Congressional campaign, reaching out to an estimated 60,000 voters "between festivals, knocking on doors, parades, anything you can imagine." *Id.* at 59:14, 61:10-62:16. Similarly, Alonnie Ropp began volunteering for the Frederick County Republican Committee in 2011 to "educate the public on the new realities within [the redistricting] map" and "spent the 2012 and even the 2014 election really educating voters on the differences." Ex. 45 (Ropp) at 61:1-2, 64:15-17. Thus, not only did redistricting not stymy Plaintiffs' political expression, but in several cases spurred increased involvement in local politics. Mr. Benisek even switched his status from an unaffiliated voter in elections preceding redistricting to Republican in elections following redistricting. Ex. 36 (Benisek) at 19-20; Ex. 53 ¶ 5 & Ex. A.

The only harm identified by Plaintiffs is something else—a small disadvantage in the ability to elect a candidate of shared party affiliation to the House of Representatives. Without evidence that a slight diminution in ability to elect a preferred candidate to one specific office has any chilling effect whatsoever on protected speech activities of voting or party registration generally, that harm alone is not one cognizable by the First Amendment.

First Amendment harms do not need to be direct restraints on speech, but they must demonstrate *some relation* to a suppressive effect on speech, constituting a "means of coercion, persuasion, and intimidation" implemented in response to speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). When acknowledging that failure to promote could produce a chilling effect on speech, the Supreme Court noted that employees subjected to patronage practices would feel "a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

No such chilling effect logically proceeds when voters are moved into a district where their ability to elect a same-party candidate is reduced by some undefined quantum. A person of ordinary firmness would not respond to a diminution in her current ability to elect a same-party representative with a decrease in voting frequency or disaffiliation with her party because such action would not achieve her aim of electing a same-party representative. Nor would it result in more favorable treatment during the redistricting process—the voter who ceases to vote or changes party affiliation would not be rewarded with districting that favored his preferred candidate by the government. A person of ordinary firmness would redouble their effort, which, as discussed above, is exactly the sentiment expressed by Plaintiffs and others in this case. *See, e.g.*, Ex. 26 (Duck) ¶¶ 14-16 (describing political efforts he and fellow Democrats in western Maryland undertook to register Democratic voters and enhance the political strength of Democratic voters in order to restore the Sixth District to one that more closely resembled the district prior to the

1990s, when Democrat Beverly Byron held the seat). That reaction is logical because it is completely within the power of the individual voter to undo the aims of the government, if she believes them to be incorrect and can persuade a majority of her fellow citizens to join her. This is especially true in Maryland where the map can be (and in this case was, successfully) petitioned to referendum and where subsequent gubernatorial elections can switch the party in charge of redistricting.

Moreover, unlike most First Amendment cases, there is publicly available evidence that contradicts Plaintiffs' unsupported anecdotes of chilling and demonstrates the relative constancy of voting behavior in counties encompassed in the former Sixth District. For example, in Allegany, Carroll, Frederick, Garrett, and Washington Counties, Republican voter registration uniformly increased in each year, measuring at the general election, from 2010 to 2016. Ex. 50. Similarly, Republican turnout increased between the presidential election year of 2008 and the presidential election year of 2012 in each of the counties in absolute terms, and decreased only very slightly in percentage terms in Frederick County, which had experienced a 4,194 voter increase in registration over the same time period. Ex. 51. And, while turnout was down across the board in the 2014 gubernatorial election compared to the 2010 election, Republican turnout outpaced Democratic turnout in every one of the six counties originally wholly within the Sixth District. *Id.* In the face of this overwhelming evidence of an undaunted electorate, and with no explanation as to how a departure from political proportionality that is entirely consistent with general electoral behavior in the United States could prove injurious, Plaintiffs have failed to offer any viable method of proving a burden to their representational rights. Any proof they have offered

of a burden on their representational rights has been merely a plea for proportional representation, which is exactly the proposition rejected by the pluralities in *Bandemer* and *Vieth*. Judgment should be granted in favor of State defendants on this ground alone.

C. Plaintiffs Have Failed to Raise a Genuine Issue for Trial that the Governor's and GRAC's Alleged Retaliatory Animus Was the "But-For" Cause of any Election Outcome.

Having failed to adequately describe any harm suffered by any plaintiff, and having failed to establish that Maryland decisionmakers acted with any retaliatory intent, Plaintiffs unsurprisingly abandon any effort to prove that the alleged intent caused the supposed harm. Instead of explaining how the map would have been drawn so as not to dilute their votes if Maryland decisionmakers did not harbor a retaliatory intent against them, Plaintiffs have instead disclaimed the requirement that they prove intent. As support for their position, Plaintiffs cite *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977), which sets forth "a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused," *id.* at 575, by allowing defendants to demonstrate as a defense, that, even when there are multiple proximate causes, the cause-in-fact of the injury is not constitutional in dimension. *Mt. Healthy* does not relieve Plaintiffs of their obligation to prove causation.

First, as indicated by divergent federal appellate decisions involving various factual scenarios, it is altogether unclear whether or to what extent *Mt. Healthy* is applicable to

First Amendment retaliation claims outside an employment law context.[8] *See, e.g.*, *Hartman v. Moore*, 547 U.S. 250 (2006) (rejecting *Mt. Healthy*'s application in retaliatory prosecution); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) ("but-for" causation required in prisoner retaliation claim); *Goff v. Burton*, 7 F.3d 734, 737 (8th Cir. 1993) ("but-for" causation required in prisoner retaliation claim); *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 876 (8th Cir. 2007) (applying *Hartman* in retaliatory arrest claim); *but see, e.g.*, *Rauser v. Horn*, 241 F.3d 330, 333-34 (3d Cir. 2001).

Second, even assuming that *Mt. Healthy* applies to other types of non-employment claims, it does not apply to this one, at least not in the manner implied by Plaintiffs. Under this Court's opinion, it is undeniably Plaintiffs' burden to prove by a preponderance of the evidence that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." ECF 88 at 32. This measure is one type of "'but-for causation' or a showing that 'the adverse action would not have been taken' but for the officials' retaliatory motive." *Id.* at 29 (quoting *Hartman*, 547 U.S. at 260).

Third, *Mt. Healthy* was developed in the context of a claim "in which two motives were said to be operative in" a single "decision to fire an employee." *McKennon v.*

[8] All of the cases cited by plaintiffs in support of the proposition that *Mt. Healthy* applies to this claim arise in the employment law context, even those labeled "political discrimination," and some are not First Amendment retaliation cases at all. *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598 (7th Cir. 2012) (ADA and ADEA case); *Wagner v. Jones*, 664 F.3d 259 (8th Cir. 2011) (adjunct law professor applicant); *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009) (assistant district attorney demotion); *Acevedo-Diaz v. Aponte*, 1 F.3d 62 (1st Cir. 1993) (municipal employee terminations).

Nashville Banner Pub. Co., 513 U.S. 352, 359 (1995). Here, there are multiple motives and multiple decisions, including decisions to no longer allow the First District to cross the Chesapeake Bay. In other words, *Mt. Healthy* applies to "unitary events" where "the defendant does not dispute that it acted in response to the plaintiff's conduct." *Greenwich Citizens Comm., Inc. v. Ctys. of Warren & Washington Indus. Dev. Agency*, 77 F.3d 26, 33 (2d Cir. 1996). That is not the case here, where the dispute is over a series of decisions that resulted in a number of different acts of line drawing by different people and the ultimate enactment of a plan that was ratified by referendum.

Even if *Mt. Healthy* were the correct framework to analyze this claim, Plaintiffs have failed to offer the initial proof of causation required under that standard. *Mt. Healthy* is not a burden-shifting framework as that term is traditionally understood, because it requires more than proof of a prima facie case in the first instance. Instead, "plaintiffs must bear the threshold burden of producing sufficient direct or circumstantial evidence from which a jury reasonably may infer that plaintiffs' constitutionally protected conduct . . . was a 'substantial' or 'motivating' factor behind their dismissal." *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 66 (1st Cir. 1993); *accord Eng v. Cooley*, 552 F.3d 1062, 1072 (9th Cir. 2009) (*Mount Healthy* defense is "distinct from[] plaintiff's burden" to prove action was a substantial or motivating cause). It is not enough to prove that an intent was "on the minds" of the individuals responsible for the decision. *Mt. Healthy*, 429 U.S. at 285-86. If the motivating factor "while in the picture, . . . had no actual causal force; present or absent, the result would have been the same" and plaintiffs would fail to meet their burden. *Greene v. Doruff*, 660 F.3d 975, 978-80 (7th Cir. 2011).

Even if it were appropriate to conflate an intent to make the Sixth District more competitive with an intent to burden the representational rights of Plaintiffs, as Plaintiffs do, they are simply factually incorrect in their statement that "[n]ot a single fact witness identified any other objectives capable of independently explaining the decision to push the Sixth District, piecemeal, into Montgomery County." Pls.' Mem. (ECF 177-1) at 28. An objective comparison of the 2002 and 2011 maps manifestly reveals two such objectives: to (1) eliminate the Chesapeake Bay crossing in the First District, and (2) keep the I-270 corridor intact. *See also* Ex. 12 (GRAC Presentation). Fact witnesses including Ms. Hitchcock (Ex. 5 at 81, 83-84), Governor O'Malley (Ex. 2 at 24-25, 40-41), Senate President Miller (Ex. 13 at 19-20, 42-44), and Mr. Weissmann (Ex. 11 ¶¶ 9-10) have provided testimony that support these aims and contemporaneous explanations of the map included both objectives, Ex. 12 (GRAC Presentation). Moreover, fact witnesses have stated that respecting concerns of the congressional delegation, including incumbency protection, were among the main motivating factors of the shape of the districts. *See* Ex. 2 (O'Malley) at 49-52 (discussing meeting with members of the congressional delegation to solicit their input); Ex. 11 (Weissmann) ¶ 10 (identifying incumbency protection as a priority of the decisionmakers); Ex. 7 (Hawkins) at 41 (identifying incumbency protection as the first priority of the congressional delegation); ECF 104 ¶ 50-51 (Senate President Miller recognizing that different members of Congress wanted to represent certain areas of the State). And Plaintiffs' own expert demonstrates that significant portions of Montgomery County must be incorporated into the Sixth District if the decisions related to

incumbent protection and not crossing the Chesapeake Bay are respected. Ex. 19 (McDonald report) at 25.

Plaintiffs have made no effort to demonstrate how a general intent to see a map that was more competitive for Democrats translates to the specific harm of vote dilution they allege. There is no such evidence to offer. As is objectively demonstrable, once 107,577 people were removed from the former Anne Arundel County portions of the First District to avoid that district crossing the Chesapeake Bay, similar numbers of people would need to be added to the Sixth District from Montgomery County. Ex. 8 (Lichtman) at 50, Table 20. Moreover, including the I-270 corridor substantially in a single district was an express aim of the mapmakers (*see, e.g.*, Ex. 12), and this motivation is again objectively demonstrable from the decision to alter the map proposed by the Congressional delegation in just this way. Ex. 11 (Weissmann) ¶ 9.

Plaintiffs again seek to reduce their burden by stating that they have demonstrated that the changes to the Sixth District "made it 'more likely than not' that a Democrat would win in 2012." Pls.' Mem. (ECF 177-1) at 29. But that showing is unconnected to the harm they must prove. Instead they must show that it was action taken by State decisionmakers, *for the purposes of retaliating* against Plaintiffs, that caused vote dilution of a magnitude that actually altered the outcome of the election. As discussed above, at pages 32-42, they cannot meet this burden of proof, which remains theirs under this Court's articulation of the causation standard and under the *Mt. Healthy* framework.

III. PLAINTIFFS' FIRST AMENDMENT RETALIATION CLAIM IS BARRED BY LACHES BECAUSE PLAINTIFFS' INEXCUSABLE DELAY IN BRINGING THE CLAIM HAS PREJUDICED THE STATE.

Plaintiffs unreasonably delayed bringing their First Amendment retaliation claim, and they did so to the detriment of the State. Thus, their claim is barred by laches. Laches, which arises from a "lack of diligence by the party against whom the defense is asserted, and . . . prejudice to the party asserting the defense," *Costello v. United States*, 365 U.S. 265, 282 (1961), "can serve as a defense to First Amendment claims," *Perry v. Judd*, 840 F. Supp. 2d 945, 953 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012).

The initial complaint in this case, filed more than a year after the first election under the Plan, did not bring any claims challenging or in any way dependent on legislative motive and intent. Rather, the pleadings highlighted that the standard offered "for determining the adequacy of representational rights" "d[id] not rely on the reason or intent of the legislature – partisan or otherwise" in drawing the districts. Am. Compl. (ECF 11) ¶ 2. Nor did Plaintiffs' original First Amendment claim have anything to do with alleged retaliation or indirect burdens on First Amendment rights. *See id.* ¶ 5 (alleging that the "structure and composition of the abridged sections" of the 4th, 6th, 7th, and 8th congressional districts infringed upon plaintiffs' direct First Amendment rights of political association).

Not until March 3, 2016, nearly four years after the first election under the Plan, did any plaintiff allege that Maryland lawmakers retaliated against Republican voters in the former Sixth District by diluting their votes such that they were unable to continue to elect

a Republican to represent them in Congress.[9] *See* Sec. Am. Compl. (ECF 44) ¶¶ 7-7.c. Plaintiffs' claims changed so substantially that two of the original three plaintiffs who lived in the Eighth District both before and after the plan have since been dismissed from the lawsuit for lack of standing. (ECF 105.) The third original plaintiff, O. John Benisek, similarly should be dismissed for lack of standing because leading up to and at the time of the 2010 gubernatorial election, Mr. Benisek was not a registered Republican.[10] *See* Ex. 53. Thus, he could not have suffered any concrete and particularized harm arising from Maryland lawmakers' alleged dilution of the weight of "certain citizens' votes . . . *because of* the political views they have expressed through their voting histories and party affiliations[.]" ECF 88 at 28 (emphasis in original). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring a "concrete and particularized" injury to establish standing).

Moreover, Plaintiffs delayed bringing their First Amendment retaliation claim despite knowing about the plan at least since the 2012 election when it was petitioned to referendum. Ex. 36 (Benisek) at 32; Ex. 25 (Cueman) at 29-30; Ex. 43 (DeWolf) at 13-14; Ex. 24 (Eyler) at 24; Ex. 44 (O'Connor) at 25-26; Ex. 45 (Ropp) at 58-60; Ex. 20 (Strine)

[9] To the extent the initial plaintiffs were busy litigating their case before the Supreme Court, that accounts only for Mr. Benisek of the seven current plaintiffs. The other plaintiffs could have brought separate suit during that time and been in the same posture as today, where all original plaintiffs have been or should be dismissed for lack of standing.

[10] The 2010 general election would have been the last source of data "compiled for primary and general elections" prior to the 2011 redistricting process. *See* Pls.' Mem. (ECF 177-1) at 4 (citing Department of Planning memorandum concerning data compiled for redistricting).

at 53-55. Such "inexcusable or inadequately excused delay" gives rise to a laches defense. *Giddens v. Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966).

Plaintiffs' delay in bringing their First Amendment retaliation claim has prejudiced the State, particularly because the initial plaintiffs to this lawsuit disclaimed any reliance on the specific intent of legislators. As Plaintiffs have repeatedly asserted, their cause of action requires discovery of lawmakers' specific intent, which they were permitted to probe through depositions taken nearly six years after the law was enacted. In many instances, deponents could not recall the events of nearly six years ago and could not recall all of the sources of data presented to them or that they requested to view. *See, e.g.*, Ex. 13 (Miller) at 20-21, 115-17, 136-37.

Plaintiffs have sought to take advantage of this by relying on deponents' inability to recall or provide answers to highly specific questions. *See, e.g.*, Pls. Mem. (ECF 177-1) at 5 (highlighting Ms. Hitchcock's inability to recall specifics about the redistricting process). Plaintiffs further compound this problem by misrepresenting that testimony. For example, in their memorandum, Plaintiffs state: "Asked whether 'it was necessary to move 30 percent of Marylanders from one congressional district to another in order to achieve the GRAC's goals with respect to congressional redistricting,' Speaker Busch answered straightforwardly, 'No.'" *Id.* at 15. In actuality, Plaintiffs' counsel asked, "*Do you know* whether it was necessary to move 30 percent of Marylanders from one congressional district to another in order to achieve the GRAC's goals with respect to congressional redistricting?" Ex. 46 (Michael Busch Dep.) at 146:12-16 (emphasis added). And, rather than the one word answer Plaintiffs misleadingly provide, Speaker Busch's actual answer,

six years after the fact, was "No. You know, I – I don't know that it was necessary." *Id.* at 146:19-20.

Further, by the time Plaintiffs first articulated the current version of their claim, Governor O'Malley's administration had left office with no litigation hold in effect. As a result of the administration turnover, many State officials and employees involved in redistricting left State service at that time, long before there was notice that documents beyond the Plain itself would be relevant. These intervening events prejudice the State's ability to defend this lawsuit and have led to frivolous spoliation claims and accusations of discovery misconduct. (ECF 153-1.)

IV. THE PLAINTIFFS HAVE FAILED TO ESTABLISH THE REQUIRED ELEMENTS TO OBTAIN A PRELIMINARY INJUNCTION.

For the reasons discussed above, Plaintiffs are not entitled to a preliminary injunction, because they have not established that they are "likely to succeed on the merits" of their claims. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Further, Plaintiffs have failed to establish the other required elements of a request for preliminary injunctive relief: that they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.* As the Supreme Court has cautioned, "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. Plaintiffs must satisfy all four factors to be entitled to relief. *Id.* at 20. The grant of a preliminary injunction involves "the exercise of a very far-reaching power, which is to be applied only in [the]

limited circumstances which clearly demand it." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc) (internal citation and quotation marks omitted).

A. Plaintiffs Have Made No Showing of Irreparable Harm.

Plaintiffs contend that they and other similarly situated voters will suffer irreparable injury absent an immediate injunction entered on or before Friday, August 18, 2017. In making this assertion, Plaintiffs fail to acknowledge the obvious: that their own delays in filing suit and bringing their specific claims for relief have allowed three congressional elections to occur under the plan. Moreover, Plaintiffs exacerbated their initial delay in filing suit by initially disclaiming any reliance on the specific intent of the legislature in bringing their First Amendment claim and then amending their complaint in March 2016 to rely primarily on the specific intent of the legislature. As they have repeatedly asserted, the claim Plaintiffs waited until March 2016 to bring necessitated extensive discovery into the legislative motive and intent of various legislative actors, including depositions of sitting legislators and a former governor, document production by State entities and officials and Maryland's congressional delegation, and the exchange of expert reports concerning these issues.

The Plaintiffs should not now be heard to complain that they will suffer irreparable harm if this Court does not grant them a preliminary injunction halting the operation of a duly enacted State statute that was ratified by the people of Maryland nearly five years ago and has already survived constitutional challenge. *See, e.g.*, *Preston v. Bd. of Trs. of Chicago State Univ.*, 120 F. Supp. 3d 801 (N.D. Ill. 2015) (finding plaintiff failed to

establish irreparable harm where he did not move for a preliminary injunction until 15 months after the alleged First Amendment violation); *Doe v. Banos*, 713 F. Supp. 2d 404 (D.N.J. 2010), *aff'd on other grounds*, 416 F. App'x 185 (3d Cir. 2010) (delay in seeking preliminary injunctive relief undermined claim of immediate and irreparable harm); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (finding no irreparable injury where plaintiffs waited three months after their complaint was filed to seek preliminary injunction); *Shady v. Tyson*, 5 F. Supp. 2d 102 (E.D. N.Y. 1998) (considering delay in denying injunctive relief).

To mitigate their own delays in bringing these claims, Plaintiffs place the responsibility for speedy action at the feet of this Court and the State, by contending that any delay from this Court will result in the State's inability to enact a new map in time for the 2018 congressional election (the fourth election under the plan). Plaintiffs thus suggest that the parties must finish briefing their novel claim, and this Court must render its decision, and order a remedy, all in the next six weeks. Their argument assumes that this Court will enjoin the State from continuing to implement the congressional districting legislation that has already been implemented in three congressional elections, and will require that the State redraw its congressional map in time for the 2018 election, but will not grant a stay of the injunction pending Supreme Court review. Given that the Supreme Court has yet to provide any guidance to legislatures on whether and when a partisan gerrymander violates the Constitution, it is not reasonable to force the State to expend enormous resources in a procedure that may or may not ultimately be determined lawful or necessary, particularly in light of the Supreme Court's recent grant of a stay of the three-

judge panel's final judgment in *Gill v. Whitford*, --S. Ct.--, 2017 WL 2621675 (June 19, 2017).[11]

Contrary to Plaintiffs' suggestion, their request for preliminary relief finds no support in the Fourth Circuit's decision in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014), which granted in part the plaintiffs' motion to preliminarily enjoin certain changes to voting procedures that ultimately were found to violate § 2 of the Voting Rights Act. Unlike Plaintiffs here, the plaintiffs in *League of Women Voters* acted without delay, by bringing their challenge to the voting restrictions at issue the very same day they were signed into law by the then-governor of North Carolina and moving for a preliminary injunction before the first statewide election that would be held under the new restrictions. 769 F.3d at 232. Moreover, that case involved changes to electoral procedures that deprived citizens of their ability to vote. Here, in contrast, the Plaintiffs do not allege that their ability to vote is threatened by the challenged law; as discussed above they have all acknowledged that they have voted consistently since the plan went into effect.

[11] Although the Supreme Court denied a stay of the final judgment in *McCrory v. Harris*, 136 S. Ct. 1001 (2016), that case involved a racial gerrymandering claim, not a partisan gerrymandering claim, and the Court ultimately affirmed the three-judge court, unanimously as to one of the two challenged districts in that case. *Cooper v. Harris*, 137 S. Ct. 1455 (2017). Moreover, in both *McCrory* and *Whitford*, injunctive relief was ordered after a final judgment, following a bench trial, which was preceded by full briefing and resolution of summary judgment motions. *See* Dkts. Neither case provides support for Plaintiffs' contention that this Court must rush to judgment. In *McCrory*, the three-judge court issued its decision four months after the bench trial concluded, and in *Whitford*, the court issued its decision six months after the trial. *See id.*

B. The Balance of Equities Does Not Weigh in Favor of Plaintiffs.

Plaintiffs also have failed to establish that the balance of equities tips in their favor. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Moreover, rather than merely requiring that the State not implement newly-enacted voting restrictions or resurrect previously-implemented procedures, Plaintiffs seek an injunction requiring that the State expend considerable resources to draw a new congressional plan, pass the plan through the General Assembly in a special session, and have it signed into law by the Governor within two months. *Cf. League of Women Voters* 769 F.3d at 247-48 (finding balance of equities tipped in plaintiffs' favor because the challenged changes to North Carolina's voting laws involved systems that "have existed, do exist, and simply need to be resurrected" or "merely require[d] the revival of previous practices or, however accomplished, the counting of a relatively small number of ballots").

C. A Preliminary Injunction Is Not in the Public Interest.

Given the irreparable harm suffered by a state when a court enjoins implementation of a duly enacted statute, the public resources required to enact new legislation, and the lack of guidance from the Supreme Court on whether and when a partisan gerrymander violates the First Amendment, a preliminary injunction would not be in the public interest. Further, given the Supreme Court's grant of a stay in *Gill v. Whitford*, and the Court's

decision to postpone further consideration of the question of jurisdiction until hearing the merits of the case, --S. Ct.--, 2017 WL 1106512 (June 19, 2017), the public interest would best be served by awaiting final resolution in that case before ordering any remedy in this case.

CONCLUSION

For the reasons discussed above, the Plaintiffs' motion for preliminary injunction and, in the alternative, summary judgment should be denied, and the Defendants' motion for summary judgment should be granted.

Respectfully submitted,

Dated: June 30, 2017

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STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

REPUBLICAN PARTY OF NEW MEXICO, DAVID GALLEGOS, TIMOTHY JENNINGS, DINAH VARGAS, MANUEL GONZALES, JR., BOBBY and DEE ANN KIMBRO, and PEARL GARCIA,

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOLOUSE OLIVER, in her official capacity as New Mexico Secretary of State, MICHELLE LUJAN GRISHAM, in her official capacity as Governor of New Mexico, HOWIE MORALES, in his official capacity as New Mexico Lieutenant Governor and President of the New Mexico Senate, MIMI STEWART, in her official capacity as President Pro Tempore of the New Mexico Senate, and JAVIER MARTINEZ, in his official capacity as Speaker of the New Mexico House of Representatives,

Defendants.

SECOND DECLARATION OF KEVIN M. LEROY

I, Kevin M. LeRoy, declare under penalty of perjury as follows:

1. I am counsel for Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings in the above-captioned case.

2. On September 20, 2023, Plaintiffs Manuel Gonzales, Jr., Dinah Vargas, David Gallegos, and Timothy Jennings filed their Response Brief To Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law, along with Plaintiffs Republican Party Of New Mexico, Bobby and Dee Ann Kimbro, and Pearl Garcia.

3. Plaintiffs included Exhibits to their Response Brief To Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law, drawn from a publicly available sources.

4. The Exhibits attached to Plaintiffs' Response Brief To Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law are true and correct copies of those publicly available sources.

5. Specifically, attached as **Plaintiffs' Exhibit 34** to Plaintiffs' Response Brief To Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law is a true and correct copy of Brief for the States of Oregon *et al.* as *Amici Curiae*, *Gill v. Whitford*, No.16-1161 (U.S. Sept. 5, 2017), publicly available at https://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-states-of-oregon.pdf.

6. Attached as **Plaintiffs' Exhibit 35** to Plaintiffs' Response Brief To Legislative Defendants' Annotated Findings Of Fact And Conclusions Of Law is a true and correct copy of Memorandum In Support Of Defendants' Cross-Motion For Summary Judgment And Response In Opposition To Plaintiffs' Motion For Preliminary Injunction And, In The Alternative, For Summary Judgment, *Benisek v. Lamone*, No.13-cv-3233, Dkt.186-1, 2017 WL 10702698 (D. Md. June 30, 2017), which is also publicly available at the PACER site for the U.S. District Court for the District of Maryland.

I declare under penalty of perjury under the laws of the State of New Mexico that the foregoing is true and correct. N.M. R. Civ. P. Dist. Ct.1-011(B).

Dated: September 20, 2023

/s/Kevin M. LeRoy
KEVIN M. LEROY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing will be served on all counsel via the e-filing system.

Dated: September 20, 2023

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