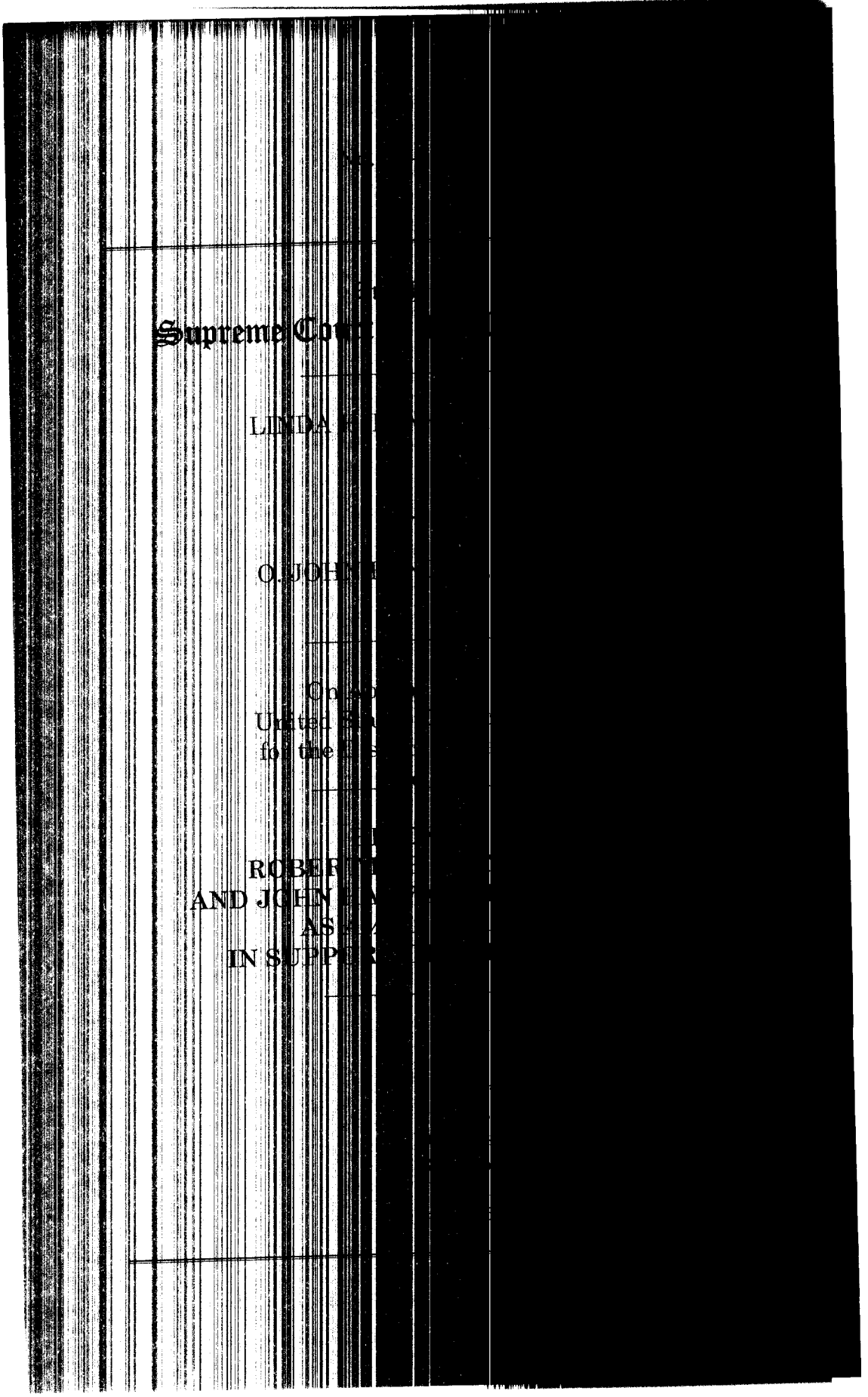

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*, Robert Lee Stone, Jr., and John Harvard Lomax, Jr., are citizens and lifelong, permanent residents of the United States. Both *amici* have had legal training, and both have taught constitutional law and political science at public and private universities in the United States—as is the case with the authors of "Brief of David Orentlicher as *Amicus Curiae* Supporting Neither Party" and "Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* in Support of Neither Party," both filed in the case at bar. In addition, in this case, both *amici* received their doctorates at the University of Chicago.

As American citizens and U.S. political scientists, the *amici curiae* are significantly affected and harmed by the well-known national consequences of gerrymandering. It has already been proven beyond doubt that the resulting corruption, polarization, lack of legislative compromise, partial paralysis, and demagoguery are by no means merely local phenomena, but are national, and all Americans pay a price for them every day. The findings of the professional literature on the subject, i.e. of books and articles in political science, law, and sociology, is voluminous, unambiguous, and definitive.

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[1]The parties have filed blanket consents to the filing of *amici* briefs. No counsel for a party, these or any other *amici*, authored this brief in whole or in part. No party, counsel for a party, or any person other these *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

Federal and state legislators and parties to previous and current gerrymander cases all reach the same conclusions about these negative, national consequences. As pointed out on page 9 of this *amici curiae* brief, "All parties and *amici curiae*" in the Gerrymander Cases "agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved." This point "is obvious to courts and scholars alike." See pp. 7-12 below. Members of the United States Congress, in their brief cited below, refer to "a cascade of nega-tive results" from partisan gerrymandering that include "indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise, and the impossibility of reaching pragmatic, bipartisan solu-tions to the nation's problems" (pp. 13-14 below). As state legislators have further pointed out, "partisan gerrymandering has 'sounded the death knell of bipartisanship' creating a legislative environment that is 'toxic' and 'tribal.'" (p. 14 below)

In brief, the gerrymander is a special case that touches the heart of American government and has widespread, profound consequences across the nation. That is just an empirical fact: every Ameri-can citizen's life today is discernibly worsened by the manifestly unhealthy political atmosphere fostered by gerrymandering. Even if that harm does not suffice to confer standing as litigants, it does entitle informed U. S. citizens, with the help of appropriate legal counsel, to serve as friends to the Court.

CONSTITUTIONAL PROVISION INVOLVED

Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

SUMMARY OF ARGUMENT

Partisan gerrymandering, which is a kind of election-rigging, is widespread in this country and is widely understood to be growing like a noxious cancer that is destroying republican government. This Court has been reluctant to intervene to stop it because the only two grounds for doing so that have been suggested so far (First Amendment and Equal Protection Clause) are inapplicable. Election-rigging does not abridge speech and does not discriminate against protected groups. It harms everyone equally.

The District Court's opinion in the case at bar attempts to make a First Amendment argument that satisfies *Vieth* and its progeny, but that is not possible. Fortunately, the Republican Form of Government Clause in Article IV, Section 4, does provide the correct legal ground.

ARGUMENT

1. Procedural Posture.

On August 27, 2018, a three-judge panel of the United States District Court for the Middle District of North Carolina, in the case of *Common Cause v. Rucho* (16-cv-1026), the companion case to the case at bar, found that, as a matter of fact, the Congressional district boundaries in that State are examples of egregious partisan gerrymandering. That court found that the boundaries that one party is attempting to impose on the State of North Carolina are intended to thwart competitive, democratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in that case that that partisan gerrymandering is unconstitutional. The gerrymandering politicians then appealed to this Court, and the appeal was docketed by this Court on October 3, 2018. The gerrymandering politicians argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Then, on November 7, 2018, a three-judge panel of the United States District Court for the District of Maryland, in the case of *Benisek v. Lamone* (13-cv-13233), found that, as a matter of fact, the boundaries of the Sixth Congressional district in that State are examples of egregious partisan gerryman-dering. That court found that the boundaries that the other party is attempting to impose on the State of Maryland are intended to thwart competitive, demo-

cratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in this case, too, the partisan gerrymandering is unconstitutional. This appeal was docketed by this Court on December 6, 2018, as *Lamone v. Benisek* (Case 18-726), the case at bar. The gerrymandering politicians again argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Since all partisan gerrymandering pursues the same purpose, in principle the two Gerrymander Cases, as they stand at present, altogether condemn partisan gerrymandering by both major parties nationwide.

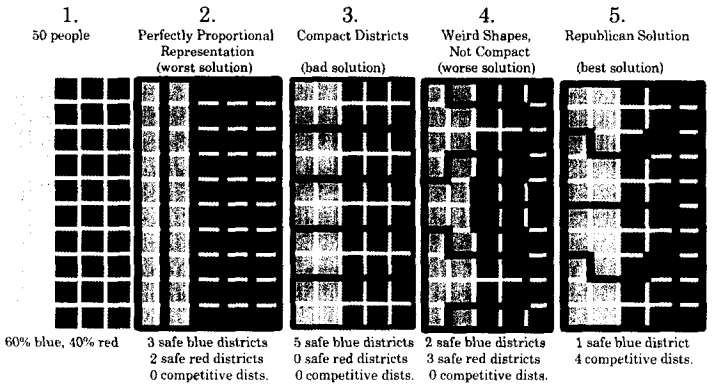
2. What is Partisan Gerrymandering?

All parties and *amici curiae* in the Gerrymander Cases agree on what partisan gerrymandering is. The definition is obvious to courts and scholars alike.

> **Gerrymander**. /jéhriymænder/ géhr/. A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party . . . .
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Gerrymander"

Curious as it may seem, in America politicians are allowed to draw their own election districts. Thus many elected officials can hardly be voted out of office, regardless of what the voters think of them. State legislatures may redraw the districts every ten years, when a new census becomes available. Whichever party controls a State legislature in that year will largely be able to control the electoral results in both Congressional and State elections in that State for at least the next ten years, simply by gaming the system in this way. The incentives are enormous, so both parties do it.

This series of sample districts suggests the wide range of possibilities open to gerrymandering politicians:



In both *Rucho* and *Benisek*, as in most States, the majority party has drawn the lines as shown above in Illustration No. 3 ("bad solution"). Then, in both *Rucho* and *Benisek*, the minority party sues the majority party and asks the courts to impose Illustration No. 2 (proportional representation, the "worst solution"). Neither side wants to

be competitive. In both of the Gerrymander Cases, all parties want the Court to intervene, or to refrain from intervening, in such a way as to insure that elections have predictable outcomes and that those outcomes are favorable to the party in question and insure proportional representation. However, elections with foregone conclusions are called "show" or "sham" elections and are typical of third-world dictatorships. USLegal, *Sham Election Law and Legal Definition* (https://definitions.uslegal.com/s/ sham-election, retrieved March 2, 2019). The very defini-tion of democracy is free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) **Competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.,"** *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting) (emphasis added).

3. How Harmful is Partisan Gerrymandering Really?

All parties and *amici curiae* in the Gerrymander Cases agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved. This too is obvious to courts and scholars alike. Even the gerrymandering politicians in Maryland, through their Attorney General's excellent "Brief of Appellants," in the case at bar admit that partisan gerrymandering threatens democracy itself (and that it is unconstitutional):

> Maryland recognizes that the problem of partisan gerrymandering poses a threat to democracy in the United States and that our courts have an important role, in both

> remedying existing unconstitutional gerrymander and preventing future violations . . . .
>
> --*Brief of Appellants*, at 26-27

Among the opinions and briefs available to the Court in the case at bar, the most insightful, careful, and also eloquent is that of Chief District Judge Bredar (concurring). It bears quotation at length. First and foremost, it is necessary to understand that gerrymandering is a "noxious" "cancer":

> Partisan gerrymandering is noxious, a cancer on our democracy. *See Vieth v. Jubelirer,* 541 U.S. 267, 292 (2004) (plur-ality opinion) (concluding that severe partisan gerrymanders are incompatible with democratic principles); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,* 135 S.Ct. 2652, 2677 (2015) (stating that **to curb partisan gerrymandering is to restore "the core principle of republican government" that "voters should choose their representatives, not the other way around")** . . . ; *Gill v. Whitford,* 138 S. Ct. 1916, 1940-41 (2018)
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 60 (concurring) (emphasis added)

Cancer, if left untreated, kills. Then Judge Bredar points out that partisan gerrymandering is nothing less than "election-rigging":

> [It] amounts to "rigging elections." The present danger of partisan gerrymandering is obvious to courts and scholars alike . . . .
>
> --*Id.*

But it is worse than that, because the problem is growing worse with each passing year:

> The problem of gerrymandering has never been worse in modern American history.
>
> --*Id.*

As this Court has discussed, the problem is driven by technology:

> [T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like) . . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan

> gerrymanders on record . . . . The technology will only get better, so the 2020 cycle will only get worse.
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

What is the big deal? Why does it matter whether one group of politicians or the other is in power at the moment? For the benefit of all parties, this Court has already explained the systemic threat to the entire country of the cancer of election rigging. First, it is in principle outrageous and destroys confidence in the entire political process:

> Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth,* 541 U. S. at 316 (opinion of Kennedy, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.,* at 317 . . . . It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around . . . ."
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

But the practical effects are even worse:

> And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case [*Gill v. Whitford*] are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences.
>
> --*Id.*

The Congressional brief in that case describes a "cascade of negative results" from partisan gerrymandering:

> indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems . . . .
>
> --*Id.*

And the state legislators told a similar story:

> In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal."
>
> --*Id.*

In other words, fair representation of groups, interests, parties, races, classes, and persuasions is minimized or thwarted. The democratic ethos loses vigor.

More and more people figure elections do not count, as least not as much as they used to. A greater sense of political helplessness on the part of ordinary citi-zens can leave a vacuum that more extreme partisans and demagogues of the left and right will gladly fill and exploit. The Gerrymander Cases are conceivably the most important legal cases of the century.

4. Why not Leave the Problem to the Political Branches?

All parties and *amici curiae* in the Gerry-mander Cases agree that only the courts can save the nation from the "noxious cancer." This, too, is obvious to courts and scholars alike. Even the Appellants in the case at bar, the gerrymandering politicians in Maryland, do not argue that election rigging is "nonjusticiable" or that *Lamone v. Benisek* is barred by the "political questions doctrine":

> . . . our courts have an important role, in both remedying existing unconstitutional gerrymanders and preventing future violations by providing clear guidance for legislatures and other districting bodies.
>
> --"Brief for Appellants" at 27

Historically, at least since 1962, federal courts have been decisive in rejecting Justice Frankfurter's admonition at all costs to avoid entering into the "political thicket" of redistricting. Instead this Court has decisively struck down gerrymanders that carved out districts with different population sizes. See *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds*

v. Sims, 377 U.S. 533 (1964). These decisions are among the most important, the most beneficial, and the most widely cited that this Court decided in the Twentieth Century. (The partisan gerrymandering of today is even more destructive than were districts of unequal population.)

However, since then the federal courts have been very reluctant to strike down gerrymanders that are purely partisan, just as long as the districts in question contain populations of equal size, as in the case at bar. Judicial discomfort and hesitation result in part from the provision in Article I, Section 4, that gives State legislatures the power to prescribe the time, places, and manner of Congressional elections. Also, Congress does have the right under Article I to alter such stipulations. Furthermore, there is no explicit provision in the Constitution for supervision of State election rules by the federal judiciary.

However, the Constitution is not a mutual-suicide pact. It is obvious that the acceleration of the noxious "cancer" will not be stopped or even moderated by Congress, either this year or in the foreseeable future. The direct beneficiaries of malfeasance will not ordinarily be quick to overrule it at their own expense. The fox never guards the henhouse.

The present situation is like a high-stakes football game between two parties in which knives are used, because there is no referee to forbid it. Both sides get hurt by the carnage, but neither side

dares disarm unilaterally. Only the courts can change the rules.

5. The Courts So Far have Articulated No Coherent Standard.

The unintended result of this Court's understandable ambivalence about how to address gerrymandering is that the courts so far have articulated no coherent standard. Again, the excellent opinion of Judge Bredar in the case at bar is instructive:

> As the Supreme Court made clear in Vieth, a legal standard employed to measure the lawfulness of partisan gerrymanders "must be principled, rational, and based upon reasoned distinctions." Vieth, 541 U.S. at 278. Otherwise, it is not justiciable. Note: see Republican Party of N.C. v. Martin, 980 F.2d 943, 950 (4th Cir. 1992) ("Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.") (alteration in original); Hamilton v. Pallozzi, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal.")
>
> --Opinion of Bredar, C.J.,
> United States District Court
> for the District of Maryland in
> *Benisek v. Lamone* (13-cv-3233)

(November 7, 2018), at 61 (concurring)

Judge Bredar reviews the case law:

> From 1986 until today, the Court has rejected stan dard after standard as not workable and, consequently, non-justiciable. See Davis v. Bandemer, 478 U.S. 109 (1986) (articulating, as a plurality, that a justiciable partisan gerrymandering claim requires a showing of intent to discriminate and a denial of a group's chance to influence the political process); Vieth, 541 U.S. at 306 (holding that the Bandemer plurality standard failed and concluding that partisan gerrymandering claims are effectively nonjusticiable); Vieth, 541 U.S. at 317 (Stevens, J., dissenting) (proposing a standard); Vieth, 541 U.S. at 343 (Souter, J., dissenting) (same); Vieth, 541 U.S. at 355 (Breyer, J., dissenting) (same); see also Ra-dogno v. Ill. State Bd. of Elections, No. 11-4884, 2011 WL 5868225, at *2-3 (N.D. Ill. Nov. 22, 2011) (listing rejected partisan gerrymandering standards).

--*Id.*

6. The Opinion of the District Court does Not Meet the Requirements of *Vieth* and its Progeny.

The excellent "Brief for Appellants," written by the Attorney General of Maryland and filed on behalf of the gerrymandering politicians in the case

at bar, shows exhaustively why the opinion of the district court in the case at bar does not meet the requirements of *Vieth* and its progeny. The argument is persuasive. These *amici* need not repeat it here.

Strikingly, the Chief District Judge below agrees with the Appellants on this important point. To return to the instructive concurring opinion of Judge Bredar:

> [In the opinion of the District Court] Judge Niemeyer, joined by my colleague Judge Russell, puts forth an insightful majority opinion, one with which I agree in many respects. Compelling as the opinion is, though, my reading of *Vieth* and its progeny prevent me from joining it.
>
> > I cannot join because Judge Niemeyer's opinion leans on the results of elections in assessing the lawfulness of the Maryland gerrymander. His opinion for the Court considers evidence of electoral outcomes as proof that the gerrymander succeeded—in short, that the map-drawers flipped the Sixth District from red to blue. In considering this evidence, the opinion performs a causation analysis—under both the representational rights and associational rights theories—that would ask future courts to discern whether a given electoral outcome resulted from a legislative manipulation of voters or from the voters themselves changing their minds. Shapiro v. McManus, 203 F. Supp. 3d 579, 602, 606 (D. Md. 2016) (Bredar, J.,

> dissenting); see also id. at 600 ("[T]he courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus voluntarily changed its tune."). The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging—perhaps impossible—to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did. The Supreme Court's requirements for a standard are exacting in this context, so much so that the Court has cast aside numerous attempted standards. Assessing causation by examining the outcome of any given election will always be problematic. And, such a problematic test probably does not satisfy the requirement of Vieth that the tool used to gauge lawfulness be "principled, rational, and based upon reasoned distinction." Vieth, 541 U.S. at 278. Because this problematic causation analysis permeates Judge Niemeyer's opinion, I write separately.
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 62 (concurring)

Judge Bredar explains:

> I concur on narrower grounds, rejecting the representational rights theory once again . . . . First, the representational rights analysis appears to line up with the many other valiant—though nonetheless rejected—attempts at crafting a standard for partisan gerrymandering claims because it does not articulate a sufficiently concrete and measurable standard. Beyond the causation problems connected to reliance on electoral outcomes for proof, it also leaves unanswered the line-drawing question: how much political consideration is de minimis and how much violates the Constitution? See, e.g., Vieth, 541 U.S. at 291 (rejecting as not judicially manageable a standard that weighs factors "with an eye to ascertaining whether the particular gerrymander has gone too far").
>
> --*Id.*

In the opinion of *amici,* the Appellants and Judge Bredar are correct that the opinion below fails to meet the requirements of *Vieth* and requires the courts to decide whether Congressional election results are legally permissible. Obviously, if the legal reasoning of the opinion of the District Couirt in the case at bar were affirmed and turned into a national legal standard, it would violate the Doctrine of Separation of Powers and quickly become a legal and political quagmire. It would require the federal courts to examine each election result to decide whether or not it is permissible—exactly what this Court has so prudently stated so clearly that it will not condone.

There is a second important reason why the reasoning of the opinion of the District Court in the case at bar should not be adopted by this Court. It is based on a Constitutional provision (the First Amendment) that is simply not applicable to redistricting and gerrymandering cases.

In *Vieth v. Jubelier*, 541 U.S. 267 (2004), this Court rejected a claim based on the Equal Protection Clause of the Fourteenth Amendment, and a plurality of this Court (Scalia, J.) opined that all gerrymander claims based on the Fourteenth Amendment, no matter how well crafted, could never show standing. After all, the harm caused by rigged elections is nation-wide, while the Equal Protection Clause protects individual rights from the States.

Similarly, in *Gill v. Whitford*, 585 U.S. ___ (2018), this Court rejected a claim based on the First Amendment, and the majority opinion (Roberts, C.J.) expressed strong doubts that any gerrymandering claim brought under the First Amendment could show standing. After all, the First Amendment, too, is intended to protect individual rights, and partisan gerrymandering is a cancer that destroys the entire electoral system, not just specific individuals. That is quite different. To make a long story short, rigging elections just does not abridge individuals' freedom of speech (First Amendment) and does not discriminate against a protected group (Fourteenth Amendment).

To adopt the reasoning of the opinion of the District Court in the case at bar would be unwarranted. However, it would also be a grave error not

to heed the findings of fact of the district courts in both *Rucho* and *Benisek,* that the partisan gerrymandering they examined and weighed carefully is obviously intentional, improper, illegal, malicious, undemocratic, and unfair. To fail to heed those courts' findings of fact—to fail to affirm the judgment of the U.S. District Court--would shelter even the most egregious partisan gerrymanders from judicial review.

7. There is an Available Standard.

Fortunately, there is an available Constitutional provision: the long-neglected Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

The Republican Form of Government Clause is included in the Constitution for good reasons, and it has a distinguished provenance and a discernible meaning. James Madison in *Federalist* No. 43 (January 23, 1788), explains that a Republican Form of Government Clause, or something like it, is an essential part of any federal governmental system; otherwise a systemic problem arising in any one State will spread to other States. The whole system is based on "the impartiality of Judges," who can stop contagious political diseases from spreading. Support for the importance of enforcing the

Republican Form of Government Clause is one of the few points on which Thomas Jefferson and Alexander Hamilton, and Federalists and anti-Federalists alike, agreed. That great Federalist justice of this Court, Joseph Story, explains the thinking of the Founders:

> The want of a provision of this nature was felt, as a capital defect in the plan of the [Articles of] confederation, as it might in the consequences endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government.
>
> --J. Story, *Commentaries on the Constitution* 3:§1808 (1833)

For example, if Florida or New York were to become a dictatorship, the people of the United States (and the people of the infected State) would have a Constitutional remedy. Under the Articles of Confederation, they had no remedy. And the Clause is the only Constitutional remedy. The same applies to gerrymandering. It is impossible to employ extreme partisan gerrymandering for very long, thereby violating "the most fundamental of all democratic principles," and to retain for long a republican form of government. As both Jefferson and Lincoln might have observed, this is just the common sense of the matter.

What is the specific justiciable legal standard suggested by the Republican Form of Government Clause? This Court could readily discover a standard if it were to rely on the Republican Form of Government Clause and thereby free itself from irrelevant First Amendment and Equal Protection precedents requiring harm to specific individuals. The obvious legal standard that suggests itself is that the States must maximize the thing that is the very definition of democracy: free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) After all, competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.," *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting).

So the legal standard suggested by the text and history of the Republican Form of Government Clause and of the Constitution of 1787 as a whole, is:

> The State legislature may exercise its political discretion to draw district lines in its State as it sees fit. It is of no concern to the courts how the voters vote. The only requirement of the Constitution is that lines must be drawn so as to maximize the number of competitive districts in the State (as shown in Illustration No. 5 above). And "competitive district" is defined the way it is defined in all election-law studies: to the extent reasonably possible, no district may

contain more than 55 percent of voters from any one party.

This proposed standard solves the problem completely while avoiding entanglement by the courts in politics in any way. It is concrete and specific and therefore easily justiciable. Thus, abstracting from the irrelevant rules of First Amendment and Equal Protection law, this proposed standard meets all of the criteria suggested by both the majorities and the minorities in all of the recent precedents: *Davis v. Bandemer* (1986), *Vieth v. Jubelirer* (2004), *League of United Latin American Citizens v. Perry* (2006), *Arizona State Legislature Ariz. v. Indep. Redistricting Comm'n* (2015), and *Gill v. Whitford* (2018).

8. Is there an Argument against Invoking the Republican Form of Government Clause?

Is there a compelling legal argument against invoking the Republican Form of Government Clause in the case at bar, for which the Clause obviously was intended? After all, there must be some reason why the Clause has suffered neglect and abandonment. The reason is not at all that "republican form of government" is a vague term with no ascertainable meaning.

The central importance and meaning of "republican form of government" is already indicated in the "Ordinance of 1787: Northwest Territorial Government," passed by the Confederation Congress, which included the framers of the Constitution of 1787, which was drafted by the same people in the

same year. The Ordinance is placed at the front of the United States Code as one of the "Organic Laws" (constitutional documents) of the United States, together with the Declaration of Independence and the Constitution of 1787. See U.S.C. "Front Matter: Organic Laws" (2019).

In the Ordinance of 1787, it is clear that the principle of republican government is a broad guarantee of political and civil liberty. In order to extend to the new States "the fundamental principles of civil and religious liberty, which form the basis whereon these republics [the extant States], their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitution, and governments, which hereafter shall be formed in said territory," the Confederation Congress required, as "articles of compact" to "forever remain unalterable," the celebrated libertarian articles excluding slavery and assuring freedom of worship, habeas corpus, jury trial, due process, inviolability of contracts, public schools, just dealings with Indians, and federal supremacy. To clinch the point, Congress requires that **"the constitution and government, so to be formed, shall be republican**, and in conformity to the principles contained in these articles." See U.S.C. "Front Matter: Organic Laws" (2019) (emphasis added). Thus, the guarantee of republicanism, which applies to the very constitution and form of government, is the supreme and most fundamental protection of the rights of the people.

Why the most important clause in the Constitution, at least before the Fourteenth Amendment, has been neglected is a long story that would

require a separate article. But the principal culprit was a pro-slavery appointee of Andrew Jackson, Chief Justice Roger Taney, who wanted to suppress the Clause to prevent its use to free the slaves.

There have been only two decisions of this Court since 1789 that have explicitly addressed the Republican Form of Government Clause: *Luther v. Borden*, 48 U.S. (7 How.) 11 (1849) (Taney, C.J.); and *Colgrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J.). The later has been clearly overruled by this Court in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964). In *Baker*, Justice Frankfurter correctly characterized that case as "in effect, a Guarantee Clause claim masquerading under a different label."

So *Luther v. Borden* stands alone as an obstacle. Like Roger Taney's "masterpiece," *Dred Scott v. Sandford,* 60 U.S. 393 (1857), no later decision of this Court has ever overruled it. In *Luther v. Borden*, the losing party invoked the Clause, and Roger Taney rejected the claim, opining in dicta that the Clause may be used by the President and by Congress, but not by the Courts of the United States. Therefore, any use of the Republican Form of Government Clause by any court of the land necessarily must overrule the dicta in *Luther v. Borden.*

However, to invoke the Republican Form of Government Clause, this Court need not overrule the holding in *Luther v. Borden.* The meaning and binding character of a precedent is not its dicta but rather its holding. The holding of an opinion is:

> The legal principle to be drawn from the opinion (decision) of the court. Opposite of dictum. It may refer to a trial ruling of the court upon evidence or other questions presented during the trial.
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Holding"

The holding of an opinion is the application of the legal principles to the specific facts in the case. And the holding of *Luther v. Borden* is not nearly as broad as its dicta. (Even if it were, *Luther v. Borden* cannot nullify the Constitution of 1787 as explained by the Ordinance of 1787.)

In *Luther v. Borden*, the government of Rhode Island had not been reformed, and the franchise had not been expanded since the State's Royal Charter of 1663 and was highly undemocratic. So a group of radicals held an unauthorized constitutional convention on their own and declared themselves to be a revolutionary government. They marched on an armory, but their cannon misfired, and they were arrested and incarcerated. From prison they sued the legitimate government, arguing that the soldiers who had arrested them were guilty of trespass. The State court denied their claim, and the U.S. District Court affirmed. The prisoners appealed to the Supreme Court of the United States, arguing that the legitimate government was less democratic than the one they would have liked to impose, and asked the Supreme Court in effect to dissolve the legitimate government. Seven years later, the Supreme Court judiciously declined to rule in their favor and affirmed the dismissal of their case. This narrow decision in a

unique case cannot provide the basis for forbidding all of the courts of the United States ever after from invoking the very important Republican Form of Government Clause.

CONCLUSION

For the foregoing reasons, this Court should declare claims of election-rigging using partisan gerrymandering to be justiciable under the Republican Form of Government Clause, adopt the proposed standard for evaluating the constitutionality of partisan gerrymandering, and affirm the judgment of the United States District Court.

March 8, 2019

Respectfully submitted,

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No. 18-726

In The
Supreme Court of the United States

LINDA H. LAMONE, *et al.*,
Appellants,

v.

O. JOHN BENISEK, *et al.*,
Appellees.

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

BRIEF OF ROBERT LEE STONE, JR., AND JOHN HARVARD LOMAX, JR., AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

The *amici curiae*, Robert Lee Stone, Jr., and John Harvard Lomax, Jr., are citizens and lifelong, permanent residents of the United States. Both *amici* have had legal training, and both have taught constitutional law and political science at public and private universities in the United States—as is the case with the authors of "Brief of David Orentlicher as *Amicus Curiae* Supporting Neither Party" and "Brief of Bernard Grofman and Ronald Keith Gaddie as *Amici Curiae* in Support of Neither Party," both filed in the case at bar. In addition, in this case, both *amici* received their doctorates at the University of Chicago.

As American citizens and U.S. political scientists, the *amici curiae* are significantly affected and harmed by the well-known national consequences of gerrymandering. It has already been proven beyond doubt that the resulting corruption, polarization, lack of legislative compromise, partial paralysis, and demagoguery are by no means merely local phenomena, but are national, and all Americans pay a price for them every day. The findings of the professional literature on the subject, i.e. of books and articles in political science, law, and sociology, is voluminous, unambiguous, and definitive.

---

[1]The parties have filed blanket consents to the filing of *amici* briefs. No counsel for a party, these or any other *amici*, authored this brief in whole or in part. No party, counsel for a party, or any person other these *amici curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

Federal and state legislators and parties to previous and current gerrymander cases all reach the same conclusions about these negative, national consequences. As pointed out on page 9 of this *amici curiae* brief, "All parties and *amici curiae*" in the Gerrymander Cases "agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved." This point "is obvious to courts and scholars alike." See pp. 7-12 below. Members of the United States Congress, in their brief cited below, refer to "a cascade of nega-tive results" from partisan gerrymandering that include "indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise, and the impossibility of reaching pragmatic, bipartisan solu-tions to the nation's problems" (pp. 13-14 below). As state legislators have further pointed out, "partisan gerrymandering has 'sounded the death knell of bipartisanship' creating a legislative environment that is 'toxic' and 'tribal.'" (p. 14 below)

In brief, the gerrymander is a special case that touches the heart of American government and has widespread, profound consequences across the nation. That is just an empirical fact: every Ameri-can citizen's life today is discernibly worsened by the manifestly unhealthy political atmosphere fostered by gerrymandering. Even if that harm does not suffice to confer standing as litigants, it does entitle informed U. S. citizens, with the help of appropriate legal counsel, to serve as friends to the Court.

CONSTITUTIONAL PROVISION INVOLVED

Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

SUMMARY OF ARGUMENT

Partisan gerrymandering, which is a kind of election-rigging, is widespread in this country and is widely understood to be growing like a noxious cancer that is destroying republican government. This Court has been reluctant to intervene to stop it because the only two grounds for doing so that have been suggested so far (First Amendment and Equal Protection Clause) are inapplicable. Election-rigging does not abridge speech and does not discriminate against protected groups. It harms everyone equally.

The District Court's opinion in the case at bar attempts to make a First Amendment argument that satisfies *Vieth* and its progeny, but that is not possible. Fortunately, the Republican Form of Government Clause in Article IV, Section 4, does provide the correct legal ground.

ARGUMENT

1. Procedural Posture.

On August 27, 2018, a three-judge panel of the United States District Court for the Middle District of North Carolina, in the case of *Common Cause v. Rucho* (16-cv-1026), the companion case to the case at bar, found that, as a matter of fact, the Congressional district boundaries in that State are examples of egregious partisan gerrymandering. That court found that the boundaries that one party is attempting to impose on the State of North Carolina are intended to thwart competitive, democratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in that case that that partisan gerrymandering is unconstitutional. The gerrymandering politicians then appealed to this Court, and the appeal was docketed by this Court on October 3, 2018. The gerrymandering politicians argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Then, on November 7, 2018, a three-judge panel of the United States District Court for the District of Maryland, in the case of *Benisek v. Lamone* (13-cv-13233), found that, as a matter of fact, the boundaries of the Sixth Congressional district in that State are examples of egregious partisan gerryman-dering. That court found that the boundaries that the other party is attempting to impose on the State of Maryland are intended to thwart competitive, demo-

cratic elections and to assure that incumbents will not be voted out of office. Accordingly, that court found that in this case, too, the partisan gerrymandering is unconstitutional. This appeal was docketed by this Court on December 6, 2018, as *Lamone v. Benisek* (Case 18-726), the case at bar. The gerrymandering politicians again argue that it is unfair to strike down their election rules when this Court has not yet agreed upon a clear rule that states when partisan gerrymandering is permissible and when it is not.

Since all partisan gerrymandering pursues the same purpose, in principle the two Gerrymander Cases, as they stand at present, altogether condemn partisan gerrymandering by both major parties nationwide.

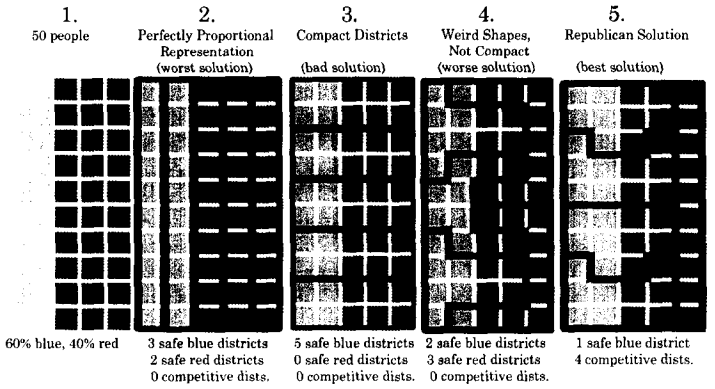
2. What is Partisan Gerrymandering?

All parties and *amici curiae* in the Gerrymander Cases agree on what partisan gerrymandering is. The definition is obvious to courts and scholars alike.

> **Gerrymander**. /jéhriymænder/ géhr/. A name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, as, for instance, to secure a majority for a given political party . . . .
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Gerrymander"

Curious as it may seem, in America politicians are allowed to draw their own election districts. Thus many elected officials can hardly be voted out of office, regardless of what the voters think of them. State legislatures may redraw the districts every ten years, when a new census becomes available. Whichever party controls a State legislature in that year will largely be able to control the electoral results in both Congressional and State elections in that State for at least the next ten years, simply by gaming the system in this way. The incentives are enormous, so both parties do it.

This series of sample districts suggests the wide range of possibilities open to gerrymandering politicians:



In both *Rucho* and *Benisek*, as in most States, the majority party has drawn the lines as shown above in Illustration No. 3 ("bad solution"). Then, in both *Rucho* and *Benisek*, the minority party sues the majority party and asks the courts to impose Illustration No. 2 (proportional representation, the "worst solution"). Neither side wants to

be competitive. In both of the Gerrymander Cases, all parties want the Court to intervene, or to refrain from intervening, in such a way as to insure that elections have predictable outcomes and that those outcomes are favorable to the party in question and insure proportional representation. However, elections with foregone conclusions are called "show" or "sham" elections and are typical of third-world dictatorships. USLegal, *Sham Election Law and Legal Definition* (https://definitions.uslegal.com/s/ sham-election, retrieved March 2, 2019). The very defini-tion of democracy is free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) **Competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.,"** *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting) (emphasis added).

3. How Harmful is Partisan Gerrymandering Really?

All parties and *amici curiae* in the Gerrymander Cases agree that election-rigging using partisan gerrymandering is extremely harmful to the entire country, not only to the losing voters and not only in the particular districts involved. This too is obvious to courts and scholars alike. Even the gerrymandering politicians in Maryland, through their Attorney General's excellent "Brief of Appellants," in the case at bar admit that partisan gerrymandering threatens democracy itself (and that it is unconstitutional):

> Maryland recognizes that the problem of partisan gerrymandering poses a threat to democracy in the United States and that our courts have an important role, in both

> remedying existing unconstitutional gerrymander and preventing future violations . . . .
>
> --*Brief of Appellants*, at 26-27

Among the opinions and briefs available to the Court in the case at bar, the most insightful, careful, and also eloquent is that of Chief District Judge Bredar (concurring). It bears quotation at length. First and foremost, it is necessary to understand that gerrymandering is a "noxious" "cancer":

> Partisan gerrymandering is noxious, a cancer on our democracy. *See Vieth v. Jubelirer,* 541 U.S. 267, 292 (2004) (plur-ality opinion) (concluding that severe partisan gerrymanders are incompatible with democratic principles); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,* 135 S.Ct. 2652, 2677 (2015) (stating that **to curb partisan gerrymandering is to restore "the core principle of republican government" that "voters should choose their representatives, not the other way around")** . . . ; *Gill v. Whitford,* 138 S. Ct. 1916, 1940-41 (2018)
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 60 (concurring) (emphasis added)

Cancer, if left untreated, kills. Then Judge Bredar points out that partisan gerrymandering is nothing less than "election-rigging":

> [It] amounts to "rigging elections." The present danger of partisan gerrymandering is obvious to courts and scholars alike . . . .
>
> --*Id.*

But it is worse than that, because the problem is growing worse with each passing year:

> The problem of gerrymandering has never been worse in modern American history.
>
> --*Id.*

As this Court has discussed, the problem is driven by technology:

> [T]echnology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like) . . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides. The 2010 redistricting cycle produced some of the worst partisan

> gerrymanders on record . . . . The technology will only get better, so the 2020 cycle will only get worse.
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

What is the big deal? Why does it matter whether one group of politicians or the other is in power at the moment? For the benefit of all parties, this Court has already explained the systemic threat to the entire country of the cancer of election rigging. First, it is in principle outrageous and destroys confidence in the entire political process:

> Partisan gerrymandering jeopardizes "[t]he ordered working of our Republic, and of the democratic process." *Vieth,* 541 U. S. at 316 (opinion of Kennedy, J.). It enables a party that happens to be in power at the right time to entrench itself there for a decade or more, no matter what the voters would prefer. At its most extreme, the practice amounts to "rigging elections." *Id.,* at 317 . . . . It thus violates the most fundamental of all democratic principles—that "the voters should choose their representatives, not the other way around . . . ."
>
> --*Gill v. Whitford*, 138 S.Ct. 1916, 1940-41 (2018) (concurring)

But the practical effects are even worse:

> And the evils of gerrymandering seep into the legislative process itself. Among the *amicus* briefs in this case [*Gill v. Whitford*] are two from bipartisan groups of congressional members and state legislators. They know that both parties gerrymander. And they know the consequences.
>
> --*Id.*

The Congressional brief in that case describes a "cascade of negative results" from partisan gerrymandering:

> indifference to swing voters and their views; extreme political positioning designed to placate the party's base and fend off primary challenges; the devaluing of negotiation and compromise; and the impossibility of reaching pragmatic, bipartisan solutions to the nation's problems . . . .
>
> --*Id.*

And the state legislators told a similar story:

> In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal."
>
> --*Id.*

In other words, fair representation of groups, interests, parties, races, classes, and persuasions is minimized or thwarted. The democratic ethos loses vigor.

More and more people figure elections do not count, as least not as much as they used to. A greater sense of political helplessness on the part of ordinary citi-zens can leave a vacuum that more extreme partisans and demagogues of the left and right will gladly fill and exploit. The Gerrymander Cases are conceivably the most important legal cases of the century.

4. Why not Leave the Problem to the Political Branches?

All parties and *amici curiae* in the Gerry-mander Cases agree that only the courts can save the nation from the "noxious cancer." This, too, is obvious to courts and scholars alike. Even the Appellants in the case at bar, the gerrymandering politicians in Maryland, do not argue that election rigging is "nonjusticiable" or that *Lamone v. Benisek* is barred by the "political questions doctrine":

> . . . our courts have an important role, in both remedying existing unconstitutional gerrymanders and preventing future violations by providing clear guidance for legislatures and other districting bodies.
>
> --"Brief for Appellants" at 27

Historically, at least since 1962, federal courts have been decisive in rejecting Justice Frankfurter's admonition at all costs to avoid entering into the "political thicket" of redistricting. Instead this Court has decisively struck down gerrymanders that carved out districts with different population sizes. See *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds*

v. Sims, 377 U.S. 533 (1964). These decisions are among the most important, the most beneficial, and the most widely cited that this Court decided in the Twentieth Century. (The partisan gerrymandering of today is even more destructive than were districts of unequal population.)

However, since then the federal courts have been very reluctant to strike down gerrymanders that are purely partisan, just as long as the districts in question contain populations of equal size, as in the case at bar. Judicial discomfort and hesitation result in part from the provision in Article I, Section 4, that gives State legislatures the power to prescribe the time, places, and manner of Congressional elections. Also, Congress does have the right under Article I to alter such stipulations. Furthermore, there is no explicit provision in the Constitution for supervision of State election rules by the federal judiciary.

However, the Constitution is not a mutual-suicide pact. It is obvious that the acceleration of the noxious "cancer" will not be stopped or even moderated by Congress, either this year or in the foreseeable future. The direct beneficiaries of malfeasance will not ordinarily be quick to overrule it at their own expense. The fox never guards the henhouse.

The present situation is like a high-stakes football game between two parties in which knives are used, because there is no referee to forbid it. Both sides get hurt by the carnage, but neither side

dares disarm unilaterally. Only the courts can change the rules.

5. The Courts So Far have Articulated No Coherent Standard.

The unintended result of this Court's understandable ambivalence about how to address gerrymandering is that the courts so far have articulated no coherent standard. Again, the excellent opinion of Judge Bredar in the case at bar is instructive:

> As the Supreme Court made clear in Vieth, a legal standard employed to measure the lawfulness of partisan gerrymanders "must be principled, rational, and based upon reasoned distinctions." Vieth, 541 U.S. at 278. Otherwise, it is not justiciable. Note: see Republican Party of N.C. v. Martin, 980 F.2d 943, 950 (4th Cir. 1992) ("Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.") (alteration in original); Hamilton v. Pallozzi, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal.")
>
> --Opinion of Bredar, C.J.,
> United States District Court
> for the District of Maryland in
> *Benisek v. Lamone* (13-cv-3233)

(November 7, 2018), at 61 (concurring)

Judge Bredar reviews the case law:

> From 1986 until today, the Court has rejected stan dard after standard as not workable and, consequently, non-justiciable. See Davis v. Bandemer, 478 U.S. 109 (1986) (articulating, as a plurality, that a justiciable partisan gerrymandering claim requires a showing of intent to discriminate and a denial of a group's chance to influence the political process); Vieth, 541 U.S. at 306 (holding that the Bandemer plurality standard failed and concluding that partisan gerrymandering claims are effectively nonjusticiable); Vieth, 541 U.S. at 317 (Stevens, J., dissenting) (proposing a standard); Vieth, 541 U.S. at 343 (Souter, J., dissenting) (same); Vieth, 541 U.S. at 355 (Breyer, J., dissenting) (same); see also Ra-dogno v. Ill. State Bd. of Elections, No. 11-4884, 2011 WL 5868225, at *2-3 (N.D. Ill. Nov. 22, 2011) (listing rejected partisan gerrymandering standards).

--*Id.*

6. The Opinion of the District Court does Not Meet the Requirements of *Vieth* and its Progeny.

The excellent "Brief for Appellants," written by the Attorney General of Maryland and filed on behalf of the gerrymandering politicians in the case

at bar, shows exhaustively why the opinion of the district court in the case at bar does not meet the requirements of *Vieth* and its progeny. The argument is persuasive. These *amici* need not repeat it here.

Strikingly, the Chief District Judge below agrees with the Appellants on this important point. To return to the instructive concurring opinion of Judge Bredar:

> [In the opinion of the District Court] Judge Niemeyer, joined by my colleague Judge Russell, puts forth an insightful majority opinion, one with which I agree in many respects. Compelling as the opinion is, though, my reading of *Vieth* and its progeny prevent me from joining it.
>
> > I cannot join because Judge Niemeyer's opinion leans on the results of elections in assessing the lawfulness of the Maryland gerrymander. His opinion for the Court considers evidence of electoral outcomes as proof that the gerrymander succeeded—in short, that the map-drawers flipped the Sixth District from red to blue. In considering this evidence, the opinion performs a causation analysis—under both the representational rights and associational rights theories—that would ask future courts to discern whether a given electoral outcome resulted from a legislative manipulation of voters or from the voters themselves changing their minds. Shapiro v. McManus, 203 F. Supp. 3d 579, 602, 606 (D. Md. 2016) (Bredar, J.,

> dissenting); see also id. at 600 ("[T]he courts are not equipped to distinguish those circumstances in which the State has drowned out particular voices from those circumstances in which the chorus voluntarily changed its tune."). The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging—perhaps impossible—to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did. The Supreme Court's requirements for a standard are exacting in this context, so much so that the Court has cast aside numerous attempted standards. Assessing causation by examining the outcome of any given election will always be problematic. And, such a problematic test probably does not satisfy the requirement of Vieth that the tool used to gauge lawfulness be "principled, rational, and based upon reasoned distinction." Vieth, 541 U.S. at 278. Because this problematic causation analysis permeates Judge Niemeyer's opinion, I write separately.
>
> --Opinion of Bredar, C.J., United States District Court for the District of Maryland in *Benisek v. Lamone* (13-cv-3233) (November 7, 2018), at 62 (concurring)

Judge Bredar explains:

> I concur on narrower grounds, rejecting the representational rights theory once again . . . . First, the representational rights analysis appears to line up with the many other valiant—though nonetheless rejected—attempts at crafting a standard for partisan gerrymandering claims because it does not articulate a sufficiently concrete and measurable standard. Beyond the causation problems connected to reliance on electoral outcomes for proof, it also leaves unanswered the line-drawing question: how much political consideration is de minimis and how much violates the Constitution? See, e.g., Vieth, 541 U.S. at 291 (rejecting as not judicially manageable a standard that weighs factors "with an eye to ascertaining whether the particular gerrymander has gone too far").
>
> --*Id.*

In the opinion of *amici,* the Appellants and Judge Bredar are correct that the opinion below fails to meet the requirements of *Vieth* and requires the courts to decide whether Congressional election results are legally permissible. Obviously, if the legal reasoning of the opinion of the District Couirt in the case at bar were affirmed and turned into a national legal standard, it would violate the Doctrine of Separation of Powers and quickly become a legal and political quagmire. It would require the federal courts to examine each election result to decide whether or not it is permissible—exactly what this Court has so prudently stated so clearly that it will not condone.

There is a second important reason why the reasoning of the opinion of the District Court in the case at bar should not be adopted by this Court. It is based on a Constitutional provision (the First Amendment) that is simply not applicable to redistricting and gerrymandering cases.

In *Vieth v. Jubelier,* 541 U.S. 267 (2004), this Court rejected a claim based on the Equal Protection Clause of the Fourteenth Amendment, and a plurality of this Court (Scalia, J.) opined that all gerrymander claims based on the Fourteenth Amendment, no matter how well crafted, could never show standing. After all, the harm caused by rigged elections is nation-wide, while the Equal Protection Clause protects individual rights from the States.

Similarly, in *Gill v. Whitford,* 585 U.S. ___ (2018), this Court rejected a claim based on the First Amendment, and the majority opinion (Roberts, C.J.) expressed strong doubts that any gerrymandering claim brought under the First Amendment could show standing. After all, the First Amendment, too, is intended to protect individual rights, and partisan gerrymandering is a cancer that destroys the entire electoral system, not just specific individuals. That is quite different. To make a long story short, rigging elections just does not abridge individuals' freedom of speech (First Amendment) and does not discriminate against a protected group (Fourteenth Amendment).

To adopt the reasoning of the opinion of the District Court in the case at bar would be unwarranted. However, it would also be a grave error not

to heed the findings of fact of the district courts in both *Rucho* and *Benisek,* that the partisan gerrymandering they examined and weighed carefully is obviously intentional, improper, illegal, malicious, undemocratic, and unfair. To fail to heed those courts' findings of fact—to fail to affirm the judgment of the U.S. District Court--would shelter even the most egregious partisan gerrymanders from judicial review.

7. There is an Available Standard.

Fortunately, there is an available Constitutional provision: the long-neglected Republican Form of Government Clause of Article IV, Section 4. The clause reads:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .
>
> --U. S. Constitution of 1787, Art. IV, Sec. 4

The Republican Form of Government Clause is included in the Constitution for good reasons, and it has a distinguished provenance and a discernible meaning. James Madison in *Federalist* No. 43 (January 23, 1788), explains that a Republican Form of Government Clause, or something like it, is an essential part of any federal governmental system; otherwise a systemic problem arising in any one State will spread to other States. The whole system is based on "the impartiality of Judges," who can stop contagious political diseases from spreading. Support for the importance of enforcing the

Republican Form of Government Clause is one of the few points on which Thomas Jefferson and Alexander Hamilton, and Federalists and anti-Federalists alike, agreed. That great Federalist justice of this Court, Joseph Story, explains the thinking of the Founders:

> The want of a provision of this nature was felt, as a capital defect in the plan of the [Articles of] confederation, as it might in the consequences endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government in repelling domestic dangers, which might threaten the existence of the state constitutions, could not be demanded, as a right, from the national government.
>
> --J. Story, *Commentaries on the Constitution* 3:§1808 (1833)

For example, if Florida or New York were to become a dictatorship, the people of the United States (and the people of the infected State) would have a Constitutional remedy. Under the Articles of Confederation, they had no remedy. And the Clause is the only Constitutional remedy. The same applies to gerrymandering. It is impossible to employ extreme partisan gerrymandering for very long, thereby violating "the most fundamental of all democratic principles," and to retain for long a republican form of government. As both Jefferson and Lincoln might have observed, this is just the common sense of the matter.

What is the specific justiciable legal standard suggested by the Republican Form of Government Clause? This Court could readily discover a standard if it were to rely on the Republican Form of Government Clause and thereby free itself from irrelevant First Amendment and Equal Protection precedents requiring harm to specific individuals. The obvious legal standard that suggests itself is that the States must maximize the thing that is the very definition of democracy: free, or competitive, elections that do not have foregone conclusions. (See Illustration No. 5.) After all, competitiveness is nothing less than "the most fundamental of all democratic principles—that 'the voters should choose their representative, not the other way around.," *Arizona State Legislature*, 576 U.S. __ (2015) (Slip Opinion at 35) (Roberts, Chief Justice, dissenting).

So the legal standard suggested by the text and history of the Republican Form of Government Clause and of the Constitution of 1787 as a whole, is:

> The State legislature may exercise its political discretion to draw district lines in its State as it sees fit. It is of no concern to the courts how the voters vote. The only requirement of the Constitution is that lines must be drawn so as to maximize the number of competitive districts in the State (as shown in Illustration No. 5 above). And "competitive district" is defined the way it is defined in all election-law studies: to the extent reasonably possible, no district may

contain more than 55 percent of voters from any one party.

This proposed standard solves the problem completely while avoiding entanglement by the courts in politics in any way. It is concrete and specific and therefore easily justiciable. Thus, abstracting from the irrelevant rules of First Amendment and Equal Protection law, this proposed standard meets all of the criteria suggested by both the majorities and the minorities in all of the recent precedents: *Davis v. Bandemer* (1986), *Vieth v. Jubelirer* (2004), *League of United Latin American Citizens v. Perry* (2006), *Arizona State Legislature Ariz. v. Indep. Redistricting Comm'n* (2015), and *Gill v. Whitford* (2018).

8. Is there an Argument against Invoking the Republican Form of Government Clause?

Is there a compelling legal argument against invoking the Republican Form of Government Clause in the case at bar, for which the Clause obviously was intended? After all, there must be some reason why the Clause has suffered neglect and abandonment. The reason is not at all that "republican form of government" is a vague term with no ascertainable meaning.

The central importance and meaning of "republican form of government" is already indicated in the "Ordinance of 1787: Northwest Territorial Government," passed by the Confederation Congress, which included the framers of the Constitution of 1787, which was drafted by the same people in the

same year. The Ordinance is placed at the front of the United States Code as one of the "Organic Laws" (constitutional documents) of the United States, together with the Declaration of Independence and the Constitution of 1787. See U.S.C. "Front Matter: Organic Laws" (2019).

In the Ordinance of 1787, it is clear that the principle of republican government is a broad guarantee of political and civil liberty. In order to extend to the new States "the fundamental principles of civil and religious liberty, which form the basis whereon these republics [the extant States], their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitution, and governments, which hereafter shall be formed in said territory," the Confederation Congress required, as "articles of compact" to "forever remain unalterable," the celebrated libertarian articles excluding slavery and assuring freedom of worship, habeas corpus, jury trial, due process, inviolability of contracts, public schools, just dealings with Indians, and federal supremacy. To clinch the point, Congress requires that **"the constitution and government, so to be formed, shall be republican**, and in conformity to the principles contained in these articles." See U.S.C. "Front Matter: Organic Laws" (2019) (emphasis added). Thus, the guarantee of republicanism, which applies to the very constitution and form of government, is the supreme and most fundamental protection of the rights of the people.

Why the most important clause in the Constitution, at least before the Fourteenth Amendment, has been neglected is a long story that would

require a separate article. But the principal culprit was a pro-slavery appointee of Andrew Jackson, Chief Justice Roger Taney, who wanted to suppress the Clause to prevent its use to free the slaves.

There have been only two decisions of this Court since 1789 that have explicitly addressed the Republican Form of Government Clause: *Luther v. Borden*, 48 U.S. (7 How.) 11 (1849) (Taney, C.J.); and *Colgrove v. Green*, 328 U.S. 549 (1946) (Frankfurter, J.). The later has been clearly overruled by this Court in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964). In *Baker*, Justice Frankfurter correctly characterized that case as "in effect, a Guarantee Clause claim masquerading under a different label."

So *Luther v. Borden* stands alone as an obstacle. Like Roger Taney's "masterpiece," *Dred Scott v. Sandford*, 60 U.S. 393 (1857), no later decision of this Court has ever overruled it. In *Luther v. Borden*, the losing party invoked the Clause, and Roger Taney rejected the claim, opining in dicta that the Clause may be used by the President and by Congress, but not by the Courts of the United States. Therefore, any use of the Republican Form of Government Clause by any court of the land necessarily must overrule the dicta in *Luther v. Borden*.

However, to invoke the Republican Form of Government Clause, this Court need not overrule the holding in *Luther v. Borden*. The meaning and binding character of a precedent is not its dicta but rather its holding. The holding of an opinion is:

> The legal principle to be drawn from the opinion (decision) of the court. Opposite of dictum. It may refer to a trial ruling of the court upon evidence or other questions presented during the trial.
>
> --*Black's Law Dictionary* (10th ed.), *s.v.* "Holding"

The holding of an opinion is the application of the legal principles to the specific facts in the case. And the holding of *Luther v. Borden* is not nearly as broad as its dicta. (Even if it were, *Luther v. Borden* cannot nullify the Constitution of 1787 as explained by the Ordinance of 1787.)

In *Luther v. Borden*, the government of Rhode Island had not been reformed, and the franchise had not been expanded since the State's Royal Charter of 1663 and was highly undemocratic. So a group of radicals held an unauthorized constitutional convention on their own and declared themselves to be a revolutionary government. They marched on an armory, but their cannon misfired, and they were arrested and incarcerated. From prison they sued the legitimate government, arguing that the soldiers who had arrested them were guilty of trespass. The State court denied their claim, and the U.S. District Court affirmed. The prisoners appealed to the Supreme Court of the United States, arguing that the legitimate government was less democratic than the one they would have liked to impose, and asked the Supreme Court in effect to dissolve the legitimate government. Seven years later, the Supreme Court judiciously declined to rule in their favor and affirmed the dismissal of their case. This narrow decision in a

unique case cannot provide the basis for forbidding all of the courts of the United States ever after from invoking the very important Republican Form of Government Clause.

CONCLUSION

For the foregoing reasons, this Court should declare claims of election-rigging using partisan gerrymandering to be justiciable under the Republican Form of Government Clause, adopt the proposed standard for evaluating the constitutionality of partisan gerrymandering, and affirm the judgment of the United States District Court.

March 8, 2019

Respectfully submitted,

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