18-726

No. 18-_____

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

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Are the various legal claims articulated by the three-judge district court unmanageable?

2. Did the three-judge district court err when, in granting plaintiffs' motion for summary judgment, it resolved disputes of material fact as to multiple elements of plaintiffs' claims, failed to view the evidence in the light most favorable to the non-moving party, and treated as "undisputed" evidence that is the subject of still-unresolved hearsay and other evidentiary objections?

3. Did the three-judge district court abuse its discretion in entering an injunction despite the plaintiffs' years-long delay in seeking injunctive relief, rendering the remedy applicable to at most one election before the next decennial census necessitates another redistricting?

PARTIES TO THE PROCEEDING

The following were parties in the court below:

Plaintiffs: O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine;

Defendants: Linda H. Lamone, State Administrator of Elections, and David J. McManus, Jr., Chairman of the Maryland State Board of Elections.

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JURISDICTIONAL STATEMENT

In this case, a fractured three-judge district court adopted unprecedented and unworkable theories of First Amendment retaliation in striking down Maryland's 2011 congressional districting plan on the basis of partisan gerrymandering. Not only do the court's three separate opinions suffer from significant errors, the court's injunction imposes "traditional criteria for redistricting" not found in the Constitution nor any statute, and places unprecedented restrictions on what information legislators may consider in redrawing district lines. Given the multiple and substantially contradictory opinions and theories generated by the three-judge district court, this Court's plenary review is needed to supply Maryland's officials and legislators with essential guidance on what they are permitted to consider in crafting a congressional districting plan.

Last term, on appeal in this same case, this Court undertook plenary review of the three-judge court's denial of plaintiffs' request for preliminary injunctive relief. The lower court had denied relief because it could not conclude that plaintiffs were likely to succeed on the merits and because then-pending *Gill v. Whitford*, 138 S. Ct. 1916 (2018), might "set forth a 'framework' by which plaintiffs' claims could be decided[.]" *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). This Court affirmed the order denying preliminary relief on grounds that included plaintiffs' "years-long delay" in pursuing injunctive relief, their failure to plead their First Amendment claim until 2016, and the reasonableness of withholding relief "to wait for this Court's ruling in *Gill* before further adjudicating plaintiffs'

claims" and thereby avoid "a needlessly 'chaotic and disruptive effect upon the electoral process.'" *Id.* at 1944, 1945 (citation omitted). As it turned out, however, this Court's decision in *Gill* did not articulate the correct standard to apply in evaluating a partisan-gerrymandering claim.

On remand from this Court, the three-judge court decided already-pending cross-motions for summary judgment. By that time, this Court had been asked to review a partisan-gerrymandering decision of a North Carolina three-judge court, which had recognized and adjudicated four distinct varieties of a partisan-gerrymandering claim. *Rucho v. Common Cause*, No. 18-422. Nevertheless, the court below forged ahead, granted summary judgment to plaintiffs, and entered a permanent injunction against Maryland's 2011 plan. The court produced two incompatible majority opinions, and a third opinion concurring in both. In the process, the court recognized a new, additional type of injury for the retaliation claim it had earlier recognized: denial of First Amendment associational rights.

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. App. 1a-77a. Previous opinions are reported at 266 F. Supp. 3d 799 (D. Md. 2017), and 203 F. Supp. 3d 579 (D. Md. 2016). App. 82a-171a, 172a-225a.

JURISDICTION

The district court issued its decision on November 7, 2018. Appellants filed their notice of appeal on November 15, 2018. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

1. This case is the last of several challenging Maryland's 2011 congressional districting plan, enacted in light of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701–8-709 (2017 Repl. Vol.). In June 2012, in an earlier case, this Court summarily affirmed a three-judge court's decision rejecting both racial-gerrymandering and partisan-gerrymandering claims. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). Although the 2011 plan made "it more likely rather than less likely that a Democrat . . . is able to prevail in the general election," Dkt.

186-2, 43:7-10, in *Fletcher*, the three-judge court rejected a claim that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 903.

Now, more than six years after *Fletcher*, a separate three-judge district court has reached the opposite conclusion and found that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." App. 51a. In reaching that conclusion, the district court rejected evidence that the redrawn map met nonpartisan legislative goals and priorities, responded to concerns expressed by Sixth District voters and candidates, and returned that district to a more traditional configuration. Rejecting that evidence as "post-hoc rationalization," App. 55a, the district court found more believable plaintiffs' preferred narrative that Democrats designed the map with "a narrow focus" to "ensure the election" of an additional Democratic representative in the State's congressional delegation. App. 48a. That intent, the court believed, established that plaintiff Republican voters in the Sixth District had met their burden of proving a First Amendment retaliation claim of harm to their representational and associational interests. App. 56a, 64a.

2. It is undisputed that Maryland's 2011 congressional districting plan was the culmination of a months-long process of drafting work by State legislative staffers, followed by public hearings. Dkt. 104 ¶¶ 18-23, 26; Dkt. 186-2, 53:12-54:7. The final map met

significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

a. First, the 2011 plan eliminated a geographic anomaly, first introduced in Maryland's 1991 congressional districting plan and continued in the 2002 plan. That is, beginning in 1991, Maryland's First District had contained portions of both the eastern and western shores of the Chesapeake Bay, separated by no less than four miles of water and connected only by the Chesapeake Bay Bridge. This configuration protected an incumbent Republican representative, who had sought "'a district she believed she could win [in] the next election.'" *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting). The 2011 plan eliminated the Bay Bridge crossing by extending the northern portion of the First District westward into precincts formerly contained within the Sixth District.

Second, the 2011 plan accommodated the request of the Maryland Legislative Black Caucus to reduce from three to two the number of districts having territory in Prince George's County. *Fletcher*, 831 F. Supp. 2d at 902. This required shifts in population in the Fourth and Eighth Districts, as well as the Sixth District, which borders the Eighth.

Third, the 2011 plan retained as majority-minority districts both of Maryland's Section 2 Voting Rights Act districts (the Seventh and Fourth Districts),

which necessitated shifts elsewhere to accommodate population changes in those districts.

Fourth, the map developed through this process connected Frederick and Montgomery Counties via I-270 and made the I-270 corridor a major feature of the Sixth District. Dkt. 186-11 ¶ 9.

Finally, in addition to meeting these significant legislative goals, Governor O'Malley expressed that "part of [his] intent was to create a map that, all things being legal and equal, would, nonetheless, be more likely to elect more Democrats rather than less. Dkt. 186-2, 47:2-5.

b. The final map also responded to concerns expressed during public hearings. Sixth District voters had "advocated for replacing the part of the Sixth District stretching east into Baltimore and Harford Counties, and perhaps even some or all of Carroll County, with territory from Montgomery County." App. 19a. The residents explained that these changes were needed to "mak[e] it viable for someone to reach the voters, and in terms of better representing the population." App. 20a. A former plaintiff in this action, Stephen Shapiro, described the associational harms caused by the then-existing map and lamented the "decreased turnout and interest" in the general election caused by packing in the Eighth District, which yielded results he characterized as "usually a foregone conclusion." Dkt. 186-3, 66. Other Sixth District Democrats felt "shut out of the process" because "their politics weren't represented at all at the national level." *Id.* at

27. One Democratic candidate explained that the then-existing map made it difficult to campaign because the former Sixth District encompassed a huge swath of geographic territory centered on two different metropolitan areas. *Id.* at 21-24; *see id.* at 12, 16-17.

3. The congressional redistricting statute was enacted in substantially the same form as proposed, and it was then petitioned to statewide referendum, with a sizable majority of voters approving the legislation in the November 2012 election. App. 22a-23a. The plan won voters' support in areas throughout the State, with majorities favoring the plan in 22 of Maryland's 24 counties, including three of the five counties that, prior to the 2011 redistricting, were located wholly or partly within Maryland's Sixth District.[1] Dkt. 104 ¶ 39.

4. The subsequent elections reflected a more invigorated electorate, with the new Sixth District's voters favoring Republicans in some races and Democrats in others. *See* Dkt. 186-19, 11. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, Dkt. 186-50, and turnout among Republicans increased between the 2008 and 2012 presidential elections, Dkt. 186-51. Although turnout in the 2014 gubernatorial primary was down statewide, from

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[1] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

25.35% in 2010 to 21.81% in 2014,[2] Republican turnout in Garrett, Allegany, and Washington Counties outpaced Democratic turnout in the 2014 gubernatorial primary. *Id.* And, notwithstanding small variations in contributions to local Republican central committees, contributions to then-incumbent Republican Congressman Roscoe Bartlett's campaign committee in 2012 were more than *twenty-five times* those received in 2010.[3]

Post-redistricting, plaintiffs maintained or increased their own associational activities. All the plaintiffs voted regularly after the 2011 redistricting. Dkt. 186-20, 11:19-12:10; Dkt. 186-43, 10:21-11:1; Dkt. 186-44, 13:15-17; Dkt. 186-25, 14:17-15:16; Dkt. 186-24, 11:6-12; Dkt. 186-45, 18:12-18; Dkt. 186-36, 12:10-17. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and subsequently became a member of the Washington County Republican Central Committee and the Washington County Republican Club. Dkt. 186-43, at 13:15-14:14; 24:2-5. Plaintiffs Ropp and Strine were also active in local Republican

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[2] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

[3] *Compare* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ (Post-General 2010, reporting $46,091.96 in total contributions for reporting period and election cycle-to-date) *with* http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (Post-General 2012, reporting $1,185,434.87 in same).

political campaigns both before and after the redistricting. App. 26a-27a.

5.a. The plaintiffs filed this action in November 2013. On December 8, 2015, this Court issued its decision reversing dismissal of the first amended complaint and remanding, *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

b. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. App. 84a. They asserted that the drafters of the 2011 plan "purposefully and successfully flipped [the District] from Republican to Democratic control" by "moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations," thereby "diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. App. 172a-225a. The majority held that a judicially manageable standard existed to adjudicate the plaintiffs' vote-dilution (or "representational-rights") claim. Under that standard, plaintiffs must show that (1) "those responsible for the map redrew the lines of" a plaintiff's district "with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated"; (2) "the challenged map diluted the votes of the targeted citizens to such a degree

that it resulted in a tangible and concrete adverse effect"; and (3) "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months after the court's decision, on May 31, 2017, the plaintiffs filed a motion for preliminary injunction and to advance and consolidate the trial on the merits, or in the alternative, for summary judgment. Dkt. 177. After oral argument, the district court denied the request for preliminary injunction, declined to dispose of the parties' fully briefed cross-motions for summary judgment, and entered a "stay pending further guidance" from this Court's disposition of *Gill v. Whitford*, No. 16-1161. App. 83a & n.1.

In denying preliminary injunctive relief, the court held that the plaintiffs "have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief" because they had "not made an adequate preliminary showing that they will *likely* prevail" on the merits of their First Amendment claim. App. 83a. The court deemed plaintiffs unlikely to succeed in carrying their burden of proving it was the alleged "gerrymander (versus a host of forces present in every election) that flipped the Sixth District, and, more importantly, that will continue to control the electoral outcomes in that district." App. 100a.

On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. Dkt. 205. After hearing argument, this Court issued its June 18, 2018 *per curiam* opinion noting its jurisdiction and affirming the district court's denial of the preliminary injunction. *Benisek*, 138 S. Ct. 1942. This Court concluded that, even assuming that plaintiffs were able to show a likelihood of success on the merits, their delay in seeking injunctive relief and the public's interest in orderly elections supported the district court's denial of injunctive relief and stay of proceedings pending this Court's decision in *Gill*. *Id.* at 1944-45.[4]

6.a. On remand, the parties requested leave to brief the district court on how this Court's *Benisek* and *Gill* rulings affected the pending summary judgment motions. The plaintiffs also informed the district court that no further discovery would be necessary. Dkt. 209, 1. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. Dkt. 210, 7-19. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which the evidentiary record was less developed. *Id.* at 19-22.

Attempting to buttress their new associational-rights claim, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections'

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[4] On that same day, this Court also issued its ruling in *Gill*, 138 S. Ct. 1916, vacating and remanding to allow plaintiffs to demonstrate "concrete and particularized injuries" to establish standing to assert their partisan-gerrymandering claims. *Id.* at 1934.

website, together with lay opinion testimony from one of their attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. Dkt. 210-3; Dkt. 210, at 16-17. Plaintiffs also submitted campaign-finance reports retrieved from the Maryland State Board of Elections, which they claimed showed declines in contributions to local Republican Party committees in relevant areas before and after the implementation of the 2011 map. Dkt. 210-3, at 7-8; Dkt. 210, at 17-18. Defendants moved to exclude this evidence because the data was hearsay, outside the affiant's personal knowledge, not part of the discovery record, and not otherwise subject to judicial notice, and because the attorney's lay analysis of election-return data constituted inadmissible lay opinion testimony. Dkt. 215, at 1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections, on the grounds that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. Dkt. 219, 2.

b. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018. *See* App. 1a-77a; 78a-81a. Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both of their First Amendment retaliation theories of vote dilution and impairment of associational rights. App. 4a. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational rights theory alone,

App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, App. 69a-70a.

With regard to the representational-rights claim, Judge Niemeyer applied the standard the district court developed at the motion-to-dismiss stage and concluded that plaintiffs had established each element of their claim. App. 48a. As to intent, he found that Maryland Democratic officials worked with "precise purpose" to "flip the Sixth District from safely Republican to likely Democratic." App. 48a, 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," App. 52a, even if the district had become more electorally competitive, because "Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting." App. 53a. He added that, although not essential to the conclusion, "the fact that the Democratic candidate was elected in the three elections following the 2011 redistricting provides additional evidence" of injury. *Id.*

Finally, as to causation, Judge Niemeyer found that only retaliatory intent explained the Sixth District's boundaries. App. 54a-56a. In so ruling, he rejected as "utter[ly] implausib[le]," the State's evidence of alternative motivations, described above, for the redrawing of the district, including the western extension of the First District into territory previously

occupied by the Sixth District "to prevent the new First District from crossing the Chesapeake Bay," and "grouping residents along the Interstate 270 corridor," who previously resided in separate districts, into the Sixth District. App. 55a. He deemed the State's evidence of alternative motivation irrelevant in light of "the undisputed fact" that "the redistricting operation was guided by the expressed plan to protect existing Democratic seats and flip the Sixth District from Republican to Democratic Control." *Id.*

Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the one the district court established for evaluating plaintiffs' representational-rights claim, except that "in lieu of the harm involving a burden on representational rights, [plaintiffs] must prove a harm involving a burden on their associational rights," namely, "that the challenged map burdened [their] ability to associate in furtherance of their political beliefs and aims." App. 59a. Plaintiffs satisfied that burden, he explained, because several indicators of "voter engagement in support of the Republican Party" in the Sixth District "dropped significantly." App. 62a. These indicators included voter turnout data and fundraising data—including data that was the subject of the State's motion to strike in advance of the summary judgment hearing, *see* Dkt. 215-1; App. 28a, 63a (citing fundraising data submitted with supplemental briefing); App. 74a-75a (concurring opinion of Judge Bredar citing the same).

Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for

injunctive relief. App. 64a-65a. He opined that plaintiffs' delay in pursuing relief need not be considered in determining whether to enter a permanent injunction, and, contrary to this Court's conclusion, *Benisek*, 138 U.S. at 1944, found that the case's "protraction cannot be attributed to the plaintiffs[.]" App. 66a. According to Judge Niemeyer, an election in 2020 with the current map—even if only for one election cycle—would irreparably harm plaintiffs, whereas ordering a new map for the 2020 election would not unduly disrupt the election process, despite the inevitable need to redraw that map yet again to reflect results of the 2020 census. App. 65a-67a.

In awarding judgment to plaintiffs, the district court enjoined the State from conducting any further elections under the 2011 map, and directed the State to submit for the district court's approval a new congressional districting plan that redraws the boundaries of the Sixth District "applying traditional criteria for redistricting . . . and without considering how citizens are registered to vote or have voted in the past or to what political party they belong." App. 78a-79a. If the State fails to submit a map, or if the district court declines to approve the map, a court-appointed commission will assume the responsibility of drawing and submitting a map to the three-judge court for approval. App. 79a-80a.

c. On November 15, 2018, the defendants filed a notice of appeal, App. 226a, and filed a consent motion to stay the district court's judgment during the pendency of the appeal, Dkt. 226. On November 16, 2018,

the district court granted in part the stay motion, and stayed the proceedings until the earlier of this Court's disposition of the appeal or July 1, 2019. Dkt. 230.

ARGUMENT

I. The Three-Judge District Court Did Not Set Forth a "Limited and Precise" Test for Adjudicating Partisan-Gerrymandering Claims.

The First Amendment retaliation formula adopted here has one principal disqualifying flaw: it does not resolve the "central problem" for a court attempting to address a claim of partisan gerrymandering. *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality op.). As the plurality emphasized in *Vieth*, and all justices there acknowledged in one way or another, that central problem is determining when the redistricting process, which is "root-and-branch a matter of politics," *id.* at 285, nonetheless "has gone too far," *id.* at 296.

A. The Three-Judge Court's Standards Would Preclude Districting for Proportional Representation, Which This Court Has Long Approved.

The standards employed in the three-judge court's two majority opinions do not amount to a "limited and precise test" for adjudicating partisan-gerrymandering claims, primarily because, however one parses their contradictory analyses, they insist on proscribing

activity that this Court has repeatedly held to be permissible.

In *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), the Court rejected a challenge to a Connecticut proportional districting plan that drew "virtually every" line with "conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." In upholding the plan, the Court refused to hold that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Id.* at 752; *see Gill*, 138 S. Ct. at 1927. But the three-judge court's standard would condemn the maps that this Court upheld in *Gaffney*, which were drawn with express reference to voters' political affiliations so as to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752.

With regard to representational injury, Judge Niemeyer's opinion likened political vote-dilution to the numerical dilution caused by an overpopulated district and reasoned that citizens "have a right under the First Amendment not to have the value of their vote diminished *because of* the political views they have expressed through their party affiliation and voting history." App. 42a. Accordingly, his opinion reaffirmed the intent, effect, and causation standard he first articulated in *Shapiro*, 203 F. Supp. 3d at 596-97. App. 43a. In articulating this standard, the opinion did not define what constitutes a "tangible and concrete adverse

effect" in this context. Instead, it merely referenced similarly indeterminate language—"*the plaintiffs must show only that their electoral effectiveness—i.e., their opportunity to elect a candidate of choice—was meaningfully burdened*," App. 52a—before simply announcing that the element was satisfied in this case, App. 53a. This standard allows for no consideration of party affiliation and thus, it is inconsistent with the decision in *Gaffney*, which allowed consideration of party affiliation to achieve proportional representation.

The three-judge court's associational rights claim suffers from the same defects. In addition to the same "intent" and "causation" elements required for a vote-dilution claim, the associational-rights standard looks to whether "the challenged map burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a, 72a. Specifically, the court concluded[5] that the "atmosphere of general confusion and apathy" that resulted from the redistricting caused (unmeasured and unspecified) decreases in "fundraising, attracting volunteers, campaigning, and generating interest in voting." App. 63a.

But any redistricting, for any reason, risks generating an "atmosphere of general confusion and apathy," *id.*, among those residents who are reassigned to different districts and must therefore shift their associational activities, at least with regard to congressional campaigns, to the new geographic alignment. Thus,

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[5] As discussed below in part II, these conclusions were based on improper resolution of factual and evidentiary disputes.

evaluating associational harm rather than representational harm does not free the court of the significant line-drawing problems posed by the vote-dilution injury, because any redistricting impacts some individuals' associational rights. This problem of line-drawing cannot be averted merely by resorting to the three-judge court's element of partisan intent, which contains no means of distinguishing between permissible and impermissible political considerations.

Finally, as if to underscore the standard's incongruity with this Court's precedent, the three-judge court directed the State "to adopt promptly a new congressional districting plan that addresses the constitutional violations found here with respect to the Sixth District for use in the 2020 elections," App. 67a, and *expressly prohibited* the State from "considering how citizens are registered to vote or have voted in the past or to what political party they belong" in doing so, App. 79a. The State is thus precluded from, for example, adopting a map that seeks to approximate the strengths of Democrats and Republicans statewide (as this Court permitted in *Gaffney*). The three-judge court's opinions and injunction fail to set forth workable standards for adjudicating partisan-gerrymandering claims, because they foreclose considerations that this Court has long held to be permissible.

B. The Three-Judge Court Impermissibly Assumes That Preexisting District Configurations Are the Constitutional Benchmark.

The intent and effects elements adopted by the three-judge court can be evaluated only with reference to the prior map. The three-judge court has stated that legislators may not intend "to flip" a challenged district "from safely Republican to likely Democratic." App. 49a. Judge Niemeyer's opinion reduces the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." App. 50a-51a. It is no less impossible to evaluate whether something was or was not intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," App. 52a, without consideration of the electoral advantages enjoyed under the prior map. So, too, does the associational harm require comparison to associational activity under the prior map to determine whether the new map "burdened the targeted citizens' ability to associate in furtherance of their political beliefs and aims." App. 59a; App. 75a (party members harmed if "severed from their preferred associates" in the prior district); *see* App. 61a-63a (comparing pre- versus post-redistricting data).

In all these respects, the three-judge court's opinions test the constitutionality of a redistricting plan by comparing the current districting plan to the status

quo ante. But there is no *constitutional* reason to believe a prior district "has any special claim to fairness," particularly where the old district "was formed for partisan reasons." *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 446-47 (2006) (Kennedy, J.). On the contrary, any standard that invests the prior district with the power to invalidate subsequent legislative acts altering its borders will almost inevitably yield absurd results. Among them are the impairment of a legislature's ability to remedy a past partisan gerrymander. Under the three-judge court's test, claims from those voters whose districts did not change, and are therefore still affected by the prior gerrymander, would be barred, because they could not show that their vote was diluted or their associational opportunities diminished compared to the prior districting map. But claims from voters who were newly in a political minority as the result of legislation *curing* a prior partisan gerrymander would be actionable because claimants would be able to demonstrate that the legislature could and did "flip" the makeup of their district intentionally. *See* App. 50a.

If that is so, the State would be unable to "avoid liability," because its interest in remedying past gerrymandering would be, in the three-judge court's estimation, not a "compelling government interest." App. 43a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders, and remedy for those past ills would be available, if at all, only from the courts. Such a result directly conflicts with "'what has been said on many

occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

If the goal of recognizing a partisan-gerrymandering claim is to remedy excessive or unfair partisanship, then prior districts are more likely part of the problem rather than the solution. Enshrining pre-existing maps as the constitutional touchstone for future redistricting may perpetuate the nationwide political dominance of one party. *See* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 Electoral Studies 329, 336, 337 fig. 4 (2016) (discussing the two major parties' relative control over states' redistricting processes).

The three-judge court's premise, that the constitutionality of a redistricting plan under consideration depends entirely on the configuration of the prior map, will not provide a judicially manageable test for determining partisan gerrymanders.

C. Neither of the Three-Judge Court's Dueling Standards Provides the Requisite Guidance to Legislators on How to Redistrict Within Constitutional Limits.

In adopting a standard based in First Amendment retaliation with no definition of what would constitute

impermissible effects, the three-judge court fell short of establishing a "limited and precise rationale" for adjudicating partisan-gerrymandering claims. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). Judge Niemeyer's opinion identified two types of potential injury: (1) a "meaningful[] burden" on the plaintiffs' "representational rights," which the court also described as "a concrete electoral disadvantage," App. 52a; and (2) a "burden[on] the targeted citizens' ability to associate in furtherance of their political beliefs and aims," App. 59a. The opinion further explained that there no longer need be any showing "that the linedrawing altered the outcome of an election," App. 52a, and thus abandoned a requirement imposed in both of the three-judge court's prior decisions, App. 108a-109a, 202a. As for the newly identified associational harm, the court relied only on (1) a drop in turnout in a single primary election in which the statewide turnout was also depressed, and in which Democratic turnout was lower than Republican turnout, App. 62a; (2) hearsay statements that non-plaintiffs experienced "a lack of enthusiasm," App. 62a; and (3) a singular statement from a singular plaintiff that he felt "'disoriented' by and 'disconnected' from his new congressional district," App. 63a; *see* App. 74a-75a.

Judge Bredar's separate majority opinion does not illuminate. He asserts that adopting a test based in associational harm "poses no line-drawing problem," App. 71a, but requires only a showing that the District "deprives the disfavored group of voters of its 'natural political strength,'" App. 73a (quoting *Gill*, 138 S. Ct.

at 1938 (Kagan, J., concurring). Just as Judge Niemeyer's vote-dilution injury lacks any method to measure how much is too much, Judge Bredar provides no method for determining the "natural political strength" of any political association that would aid courts in determining whether that strength has been diminished, particularly where the decade preceding redistricting has seen considerable shifts in migration, commuting patterns, or demographics within a district. Both alternative paths provided below attempt to identify "a burden," but neither defines that burden "as measured by a reliable standard," something "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do." *LULAC*, 548 U.S. at 418 (Kennedy, J.).

For legislators interested in avoiding "an election-impeding lawsuit contending that partisan advantage was the predominant motivation," *Vieth*, 541 U.S. at 286 (plurality op.), a standard for measuring burden is indispensable. This need is acute because the identified burdens will be present, in some amount, in every redistricting. As explained more thoroughly in Brief for Appellees at 28-30, *Benisek*, 138 S. Ct. 1942 (No. 17-333), defining "vote dilution" as an injury without specifying any means to evaluate the quantity or impact of the asserted dilution does not present a judicially manageable standard. Moreover, here, the court's standard provides no practical limit on potential claims—a political group could bring suit alleging a "concrete electoral disadvantage," even if they consistently win

elections but must expend additional effort in order to do so.

The identified associational harms particular to the facts of this case are similarly unlimited. It will not be hard, after any redistricting, to identify a few members of any political party or association who find themselves newly in a congressional district different from that of their neighbors. Anyone whose residence is reassigned to a new district could feel "disoriented" by redistricting, and disenchantment with the political process is common enough to be found on either side of a district line. The court required no evidence that associations suffered an adverse impact to their membership, or evidence showing exactly how their members' activities were curtailed or limited. To the contrary, ample evidence shows that the newly competitive Sixth District increased participation in political associations and activities among the plaintiffs and in the general electorate. *E.g.*, *supra*, 7-9. If the evidence in this case meets the test for associational harm, then those harms will be present in each redistricting.

A legislature will face difficulty in demonstrating it has *not* acted with the intent the three-judge court prohibited. This Court has long recognized that direct inquiries into legislative "motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Broad and frequent inquiries into legislative motive "'undermine[] the 'public good' by interfering with the rights of the people to representation in the democratic process.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (citation omitted). A search for

retaliatory intent is especially fraught because it raises "the prospect of every loser in a political battle claiming that enactment of legislation it opposed was motivated by hostility toward the loser's speech." *Planned Parenthood of Kan. & Mid-Mo. v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014), *abrogated in part on other grounds by Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015). The three-judge court's standard endorsed a wide-ranging inquiry into legislative intent, relying on such varied sources as statements from legislators who did not hold leadership positions and were not involved in the map drafting, App. 20a-24a; legislators who opposed the proposed plan,[6] App. 24a; deposition testimony of a former Governor, App. 49a-50a; deposition testimony of a consultant who prepared a map *rejected* by Maryland decisionmakers, App. 48a; and Congressional aides' inadmissible e-mails that had no obvious relation to the Sixth District, App. 22a. These evidentiary sources are more problematic than even the legislative testimony admissible in an "extraordinary instance[]." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

The three-judge court describes their requisite intent standard as "retaliatory." Their expansive definition, which would encompass any intent to take an

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[6] *See Bryan v. United States*, 524 U.S. 184, 196 (1998) ("'The fears and doubts of the opposition are no authoritative guide to the construction of legislation.' . . . 'In their zeal to defeat a bill, they understandably tend to overstate its reach.'" (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964))).

action "based on the persons' political affiliation and voting" if such an action "burden[s] their representational rights," does not derive from "well developed and familiar" First Amendment retaliation standards. *Baker v. Carr*, 369 U.S. 186, 226 (1962). Under those standards, a government official must act with "vengeful" intent to punish or fail to reward an individual "for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But here, no government official examined individually the expressive activity of any plaintiffs or any association to which they belong. *See, e.g.*, *Moss v. Harris County Constable Precinct One*, 851 F.3d 413, 421 (5th Cir. 2017) (no retaliation claim where government had no knowledge of the individual's expressive conduct). Moreover, there is no government official to whose intent the map may be attributed. Instead, the 2011 Congressional map was approved directly by the people of Maryland, including majorities in three majority-Republican counties within the Sixth Congressional District.[7]

II. The Three-Judge Court Erred by Departing from the Summary Judgment Standard When It Resolved Disputes of Material Fact and Made Credibility Findings.

In addition to the theoretical flaws in the three-judge court's adopted standards, reversal is necessary because the court committed a more extreme version

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[7] *See* https://elections.maryland.gov/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Dec. 1, 2018).

of the error for which this Court reversed a three-judge court's entry of summary judgment in *Hunt v. Cromartie*, 526 U.S. 541, 548-54 (1999). That is, the court below resolved issues of "disputed fact," "credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due," and otherwise engaged in "'[c]redibility determinations'" and "'the weighing of the evidence,'" which are functions for the trier-of-fact and "not suited for summary disposition." *Id.* at 552, 554 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). But unlike *Hunt*, where the court resolved disputed facts as to only one element of a racial-gerrymandering claim, *i.e.*, the legislature's "impermissible racial motivation," 526 U.S. at 552, the three-judge court here resolved disputed facts pertaining to multiple elements of plaintiffs' claims, and did so by crediting and relying on evidence that is the subject of still-unresolved hearsay and other timely objections to admissibility. The court selectively highlighted facts and drew inferences in plaintiffs' favor, in the face of contradictory evidence favorable to the State, which the court either discounted or chose not to mention.

Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the requirement that "in ruling on a motion for summary judgment, the nonmoving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" *Id.* at 552 (quoting *Anderson*, 477 at 255). As *Hunt* suggests, this has added significance in a redistricting challenge, because of "'the sensitive nature of

redistricting,'" "'the presumption of good faith that must be accorded legislative enactments,'" and "'the intrusive potential of judicial intervention into the legislative realm'"—considerations that tend to "tip the balance in favor of" the need for a trial before "making findings of fact" adverse to defendants. 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995)). Indeed, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9; precedent suggests no reason summary judgment should be more lightly granted to plaintiffs bringing partisan-gerrymandering claims. Thus, even if plaintiffs' evidence "might *allow* the District Court to find" in their favor after a trial, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Id.* at 552-53 (emphasis in original). Rather than heed these concerns and accord defendants the requisite belief and benefit of inferences, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See, e.g.*, App. 50a (stating that "[t]he State's argument . . . rings hollow"). This error infects the three-judge court's conclusions as to all elements of plaintiffs' claims, including injury, intent, and causation.

For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own deposition testimony, that plaintiffs themselves had not suffered chilling or associational injury, but had, instead, become more politically active

post-redistricting. *See* Statement *supra* at 8-9. As the record also showed, the only evidence purporting to indicate chilling of political activity constituted inadmissible hearsay: plaintiffs' descriptions of what some unidentified persons said or felt about voting.[8] Dkt. 201, 16. Those descriptions convey statements by unidentified out-of-court declarants, offered for "the truth of the matter asserted," and thus are hearsay, Fed. R. Evid. 801(c), "inadmissible at trial" and "cannot be considered on a motion for summary judgment," *Maryland Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991); *accord Vazquez v. Lopez-Rosario*, 134 F.3d 28, 33 (1st Cir. 1998); *see* Fed. R. Civ. P. 56(c)(1)(B), (2), (4). Rather than disregard these hearsay statements, or even venture to address defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," App. 61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible." *Vazquez*, 134 F.3d at 34. *See* App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); App. 62a (same); App. 63a ("she frequently met potential Republican voters who 'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); App. 27a (same); App. 74a (crediting same hearsay statements). The court employed the

[8] The only non-hearsay evidence plaintiffs presented on this subject was deposition testimony of plaintiff Ned Cueman, who described himself as "disoriented" or "disconnected," Dkt. 177-1, 24, but conceded that post-redistricting he continued his political engagement by voting regularly, Dkt. 186-25, 14:17-15:16.

statements for "the truth of the matter asserted." *See* App. 62a (crediting these statements by unidentified declarants as "clear evidence" of "lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion after the 2011 redistricting by voters"). The court never addressed defendants' hearsay objections to these statements nor identified any applicable exception to the hearsay rule. Instead, the court most inaccurately characterized these hearsay statements as among "undisputed facts of record." App. 61a.

Similarly, to demonstrate that Republican political participation in the Sixth District remained comparatively undeterred after the 2011 redistricting, defendants presented evidence showing increases in the district's Republican voter registration and Republican voter turnout in general elections. *See* Dkt. 186-50; 186-51. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: (1) by looking only at Sixth District Republican voters' low turnout in the 2014 primary, App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[9] and (2) by crediting hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel submitted with supplemental

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[9] *Compare* https://elections.maryland.gov/elections/2010/turnout/primary/2010_Primary_Statewide.html *with* https://elections.maryland.gov/elections/2014/turnout/primary/GP14_turnout_statewide_by_party.xls.

briefing filed more than 13 months after the close of discovery, approximately a year after cross-motions for summary judgment were briefed, and two weeks after plaintiffs declined the court's invitation to reopen discovery.

Far from being undisputed, the referenced campaign-finance information was the subject of defendants' motion to exclude on grounds of hearsay, the affiant's lack of personal knowledge, and the information's widely recognized inaccuracy, and because campaign-finance reports are unsuitable for judicial notice. Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. Dkt. 219. Instead, it merely cited cases referring to relaxation of standards governing the court's gatekeeper role for expert testimony in a bench trial (a concept inapplicable to the hearsay objections raised in the motion), before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." *Id.* at 2. None of the court's cited cases suggest any relaxation of the need to exclude hearsay in a bench trial. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial" under Rule 802 and "neither this rule nor any other rule or statute creates an exception for bench trials."). Moreover, because the campaign-finance evidence was submitted in the final round of briefing permitted by the court, long after the close of discovery, defendants had no opportunity to probe the information's veracity through discovery or submit rebuttal evidence. In any

case, the selective campaign-finance information cited by plaintiffs' counsel is unrepresentative of overall campaign contributions since redistricting. For example, other campaign-finance reports on file show that contributions to Roscoe Bartlett's campaign committee *increased* by 2,500% between 2010 and the post-redistricting 2012 election.[10]

Similar departures from the summary judgment standard plague the court's intent analysis. For example, the court repeated the error that necessitated reversal in *Hunt* by impermissibly giving greater weight to plaintiffs' evidence of the "legislature's motivation"—"a factual question"—while failing to accept defendants' alternative "motivation explanation as true, as the District Court was required to do in ruling on [plaintiffs'] motion for summary judgment." 526 U.S. at 549, 551. The court embraced plaintiffs' characterization of "the mapmakers' intent," App. 48a, and refused to accept as true, App. 50a-51a, defendants' showing that changes in the Sixth District's boundaries were driven by legitimate legislative decisions, including the rejection of a Chesapeake Bay crossing; deference to Prince George's County residents' desire for their county to have two districts, neither of them shared by Montgomery County; and heeding constituents' public testimony expressing the importance of having a district to serve the I-270 corridor economic region, *e.g.*, Dkt. 186-11 ¶ 9; *see* Dkt. 201, 3-6 (discussing evidence of varied legislative motives). In so doing,

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[10] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/.

the court weighed evidence. *See*, *e.g.*, App. 14a-16a, 48a-49a (relying heavily on deposition testimony of Congressional staffer Eric Hawkins, Dkt. 177-4, while failing to acknowledge material contradictory testimony in the affidavit of State legislative staffer Yaakov Weissmann, Dkt. 186-11, and elsewhere in the record); App. 13a, 55a (selectively crediting and disbelieving the former Governor's deposition testimony). Once again, the court credited inadmissible hearsay to which defendants had objected, Dkt. 201, 5-6, and did so without addressing the hearsay objection, *see* App. 22a (quoting foundationless hearsay email, Dkt. 177-58).

Perhaps the decision's most conspicuous failure to acknowledge a genuine dispute of material fact appears in its finding that plaintiffs have satisfied the causation element. App. 54a-56a. This conclusion directly contradicts the court's previous determination, based on the same evidentiary record, that it "is not persuaded" that plaintiffs "have met their burden of proof with respect to causation." App. 100a. If, as it previously acknowledged, "the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*," *id.*, then, at a minimum, "the evidence is susceptible of different interpretations or inferences by the trier of fact," and, consequently, "[s]ummary judgment in favor of the party with the burden of persuasion . . . is inappropriate[.]" *Hunt*, 526 U.S. at 553.

III. Plaintiffs' Unreasonable Delay in Earlier Phases of this Case Precludes Injunctive Relief.

The Court should also note jurisdiction and reverse because the three-judge court abused its discretion both in (1) erroneously concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction, and (2) directly contradicting this Court's finding that "years-long delay" in this case "largely arose from a circumstance within plaintiffs' control." *Benisek*, 138 S. Ct. at 1944. App. 66a. Entry of an injunction is "a matter of equitable discretion," and success on the merits of a claim does not automatically entitle plaintiffs to injunctive relief "as a matter of course." *Benisek*, 138 S. Ct. at 1943. This principle applies equally to requests for preliminary and permanent injunctions. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) ("An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course."). Like preliminary injunctions, permanent injunctions are governed by "the four-factor test historically employed by courts of equity." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). This Court has long recognized that these principles apply to election law cases, including redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("equitable considerations" may justify withholding ultimate relief in redistricting case, even where plan violates constitution); *accord Benisek*, 138 S. Ct. at 1944 (principle that diligence is

a requirement for injunctive relief is "as true in election law cases as elsewhere").

Contrary to the three-judge court's assumption that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," App. 66a, other courts have applied equitable principles, including laches, in withholding injunctive relief for constitutional violations when, as in this case, the relief would apply "for only the last election in the decade" prior to completion of the next decennial census. *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 695 (N.D. Ill. 1969) (three-judge court); *Maryland Citizens for Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (same). In the face of "inexcusable and unreasonable" delay, "a challenge to a reapportionment plan close to the time of a new census, which may require reapportionment, is not favored." *White v. Daniel*, 909 F.2d 99, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290 (11th Cir. 2001) ("over six years" delay justified denying injunction of districting plan); *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (three-judge court), *aff'd sub nom. Chandler v. Harris*, 529 U.S. 1084 (2000).

Proximity to an upcoming census creates a presumption against ordering a map redrawn, because "two reapportionments within a short period of two years would greatly prejudice the [jurisdiction] and its citizens by creating instability and dislocation in the electoral system," "imposing great financial and logistical burdens," and jeopardizing "fair and accurate representation for the citizens" through the use of stale

census data. *White*, 909 F.2d at 104. Courts have recognized the public interest in avoiding injunctions that would necessitate resort to such data, even after a finding in plaintiffs' favor on a claim as well-established as one-person, one-vote. *Skolnick*, 307 F. Supp. at 695 (three-judge court finding plan unconstitutional for lack of population equality but declining to impose injunction); *see Chen v. City of Houston*, 206 F.3d 502, 521 (5th Cir. 2000) (Even where prior district boundaries were racially motivated, the "passage of six years" "does caution against wholesale alteration" of district lines "based on out-of-date census figures when the process will in any case have to be done in the immediate future" because of a new census.).

Since the June remand, no circumstance has arisen to alter this Court's evaluation of the balance of equities and weighing of the public interest in light of plaintiffs' dilatoriness. *Benisek*, 138 S. Ct. at 1944. This Court concluded that plaintiffs did not "show reasonable diligence," not only in belatedly requesting a preliminary injunction, but more significantly, in "fail[ing] to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Id.*

The findings supporting that conclusion apply equally to plaintiffs' request for permanent injunctive relief. First, "[a]lthough one of the seven plaintiffs . . . filed a complaint in 2013 alleging that Maryland's congressional map was an unconstitutional gerrymander, that initial complaint did not present the retaliation theory asserted here." *Id.* Second, the "newly presented claims" required, beginning in 2016 and at plaintiffs'

own insistence, "discovery into the motives of the officials who produced the 2011 congressional map." *Id.* Third, "plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief," *id.*, now has caused additional delay in their pursuit of permanent injunctive relief. Instead of "six years, and three general elections, after the 2011 map was adopted, and over three years since the plaintiffs' first complaint was filed," *id.*, it has been seven years, and four general elections, after the 2011 map was adopted, and nearly five years since the original complaint was filed. The loss of the additional election cycle was the direct consequence of plaintiffs' late-filed request for preliminary injunction, an optional litigation strategy that plaintiffs opted to pursue instead of pressing their claim for permanent injunction.

The three-judge court sought to justify its entry of injunctive relief, notwithstanding plaintiffs' delay, by declaring that this case's protracted procedural history "cannot be attributed to the plaintiffs, but to process." App. 66a. That finding directly contradicts this Court's assessment that "the delay largely arose from a circumstance within plaintiffs' control: namely, their failure to plead the claims giving rise to their request for preliminary injunctive relief until 2016." *Benisek*, 138 S. Ct. at 1944. The three-judge court's observation that plaintiffs presented a claim for permanent injunction in their 2013 complaint, App. 66a, does not absolve plaintiffs, because that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944. And, though there remained time to

implement a new plan for the 2020 election when the three-judge court entered its injunction, the court ignored this Court's caution to consider "the legal uncertainty surrounding any potential remedy" when evaluating the impact to the state election system. *Id.* When the three-judge court entered its judgment, App. 78a, a jurisdictional statement had already been filed by defendants in a North Carolina redistricting case, where a three-judge court recognized four separate theories of a partisan-gerrymandering claim, and defendants seek review on grounds including nonjusticiability and lack of standing, among others. Even as those four different standards were poised for review by this Court, the court below added a fifth, and enjoined the State, while the exact contours of these plaintiffs' novel cause of action remained undefined. Under these circumstances, the injunction ordered was an abuse of discretion.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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