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 FOR APPELLANTS

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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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

BRIEF FOR APPELLANTS

OPINIONS BELOW

The district court's summary judgment opinions are available in the Westlaw database at 2018 WL 5816831. J.S. 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). J.S. App. 78a-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

Maryland's 2011 Congressional redistricting plan does not "entrench[] a minority party in power." *Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting). Unlike *Rucho v. Common Cause*, No. 18-422, where North Carolina's electorate is "split almost equally" between major parties, *id.*, Common Cause's Mot. to Affirm 4, here the plaintiffs challenging Maryland's plan belong to a minority party whose members number less than half of the majority party's statewide total. J.A. 1056. This is not a case where a redistricting plan was engineered by a party that "happens to be in power at the right time." *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring). As plaintiffs themselves allege, in Maryland, Democratic majorities have controlled both houses of the legislature since 1920. J.A. 624 ¶ 40.

Nor is this a case where "politicians [have] entrench[ed] themselves in power against the people's will," *Gill*, 138 S. Ct. at 1935, or undermined "the most fundamental of all democratic principles—that 'the voters should choose their representatives, not the other way around,'" *id.* at 1940 (quoting *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (other citation omitted)). Rather, Maryland's 2011 plan was created with the people's input, both at twelve public hearings conducted around the State and via submission of hundreds of written comments. J.A. 657 ¶ 22, 658 ¶ 26. The legislation establishing the plan is the law of Maryland today because it was "adopted by the people,"

Md. Const. art. XVI, § 5(b), in a statewide referendum. J.A. 661 ¶ 39.

Unlike some other redistricting maps this Court has seen, Maryland's 2011 redistricting plan has not "plac[ed] a state party at an enduring electoral disadvantage." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). If anything, Maryland's Republican Party has strengthened since the 2011 redistricting. In 2014, Marylanders elected a Republican Governor who won by a 14% margin among voters residing in the Sixth Congressional District, the district at issue here. J.A. 771. In November 2018, Governor Lawrence J. Hogan, Jr. became the first Republican Governor to win reelection in Maryland since Theodore Roosevelt McKeldin won his bid for a second term in 1954.

Faced with these undisputed facts contradicting the circumstances that typify the abuses of partisan gerrymandering, the three-judge court failed to arrive at a manageable standard that can be applied fairly and predictably, in this or any future case.

Reversal is also required for two other reasons: (1) the three-judge court impermissibly weighed evidence and drew inferences against the non-moving party in its ruling on summary judgment, and (2) in issuing a permanent injunction, it abused its discretion by contradicting this Court's prior decision and failing to take into account harm to the State, the voters, and the public interest.

1. On October 20, 2011, the Maryland General Assembly enacted a Congressional districting plan

based on the results of the 2010 decennial census. 2011 Md. Laws Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (LexisNexis 2017). In June 2012, this Court summarily affirmed a three-judge court's decision upholding the 2011 plan.[1] *Fletcher v. Lamone*, 567 U.S. 930 (2012), *aff'g* 831 F. Supp. 2d 887 (D. Md. 2011). *Fletcher* 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." 831 F. Supp. 2d at 903.

2. More than six years after *Fletcher*, and one day after Marylanders voted in the fourth Congressional election under the 2011 plan, the three-judge district court in this case reached the opposite conclusion and entered summary judgment enjoining the plan, upon finding that state officials "specifically intended to flip control of the Sixth District from Republicans to Democrats and then acted on that intent." J.S. App. 51a. In so ruling, the court below disagreed with its own prior conclusion that, based on the evidence in the summary judgment record, plaintiffs were not "*likely* to prevail on the merits." J.S. App. 113a (emphasis in original); *see also id.* at 100a, 110a-113a.

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[1] During that same period, the 2011 plan also survived two other court challenges. *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 F. App'x 150 (4th Cir. July 12, 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

History of the Sixth District

3.a. The five counties located entirely or partially in the current Sixth District—Garrett, Allegany, Washington, Frederick, and Montgomery—were all part of Maryland's original Frederick County as it existed in 1748, J.A. 947-48, and from 1872 until 1991 some portion of Montgomery County was included in the Sixth District in every legislatively enacted map,[2] *see* J.A. 979-93. The 1991 plan's exclusion of Montgomery County from the Sixth District represented a break from the past. This exclusion continued with the 2002 plan, in which the Sixth District further departed from tradition by stretching, for the first time ever, eastward to the Susquehanna River to take in parts of Baltimore and Harford Counties. With this extension, the Sixth District spanned nearly the entire northern border of Maryland and measured more than 170 miles from end to end. J.A. 995. The 2002 plan's non-traditional, elongated, eastward-reaching version of the Sixth District is plaintiffs' "benchmark district" for assessing their claims. J.A. 767, 779, 1088, 1094. The 2011 plan returned the district to a configuration more consistent with its history, by dispensing with the Baltimore and Harford County extension and restoring significant portions of Montgomery County to the Sixth District. J.A. 997.

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[2] In the 1960s, a *court*-drawn map excluded Montgomery County from the Sixth District. *See Maryland Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 736 (D. Md. 1966); J.A. 955.

b. The 2011 configuration brought the Sixth District's percentage of registered Democrats to a level closer to what existed pre-1991, though the new district's composition was both less Democratic and less Republican than it had been prior to 1991. J.A. 656 ¶ 13; J.A. 666 ¶ 53. According to expert testimony in the record, the political makeup and voting tendencies of the 2011 Sixth District placed it within the range of what independent rating organizations and applicable scholarship considered a "competitive" district. J.A. 860-62 (district qualified as competitive even under analyses of plaintiffs' expert), 881, 887, 1131-32.

Sixth District Registered Voters
(by percentage of total registered voters)

	Democrat	Republican	Other
August 1990	46.05%	45.36%	8.59%
October 2012	44.11%	33.32%	22.57%

The 2011 plan's Sixth District included a significant percentage of third-party and unaffiliated voters (22.57%). J.A. 728. Neither plaintiffs' experts nor the court below ventured any analysis of how those voters' preferences might bear on plaintiffs' claims or how those voters would be affected by the relief requested. J.A. 857, 526-27. But plaintiffs did demonstrate the unpredictability and volatility of the unaffiliated vote, by presenting survey data showing that in 2012 more Sixth District unaffiliated voters preferred the Democratic candidate over the Republican, by a margin of 28% to 15%, but in 2014 a majority of them (54%)

favored the Republican candidate. J.A. 769. The same survey illustrated the disconnect between party registration and voting, by showing that in the 2012 election for the Sixth District seat, only 69% of registered Democrats preferred the Democratic candidate, only 64% of registered Republicans preferred the Republican candidate, and 57% of unaffiliated voters preferred neither of the two major party candidates.[3] *Id.*; *see* J.A. 857.

c. Similar ambivalence and shifting voter preferences have characterized the Sixth District throughout much of its history. In the period from 1911 through 2012, the Sixth District elected seven Democrats to Congress and six Republicans. J.A. 655 ¶ 7. From 1971 through 1992, the district was represented by moderate Democrats Goodloe Byron and his successor Beverly Byron, *id.*; the latter enjoyed the support of three of the plaintiffs in this suit. J.A. 276, 358, 467-69. When Republican Roscoe Bartlett mounted his first challenge to Congresswoman Byron in 1982, he lost by a 49-point margin. J.A. 655 ¶ 8. He did not make another

[3] A Pew Research Center study found that voters' identification as independent or unaffiliated serves as a transition for those moving away from or toward identifying themselves as Republican or Democrat; though "few people switch immediately from Republican to Democratic identification," party affiliation "is an attitude, one which can and does change," and "[m]ost of the movement is from independents who assume a party label or from partisans who no longer identify with their former party." J.A. 857 (quoting Pew Research Center, "Trends in Party Affiliation" (Sept. 23, 2010), http://www.people-press.org/2010/09/23/section-3-trends-in-party-affiliation/ (last visited Jan. 19, 2019)).

attempt until after the 1991 redistricting flipped the Sixth District from Democratic to Republican.

In the 1992 election, Roscoe Bartlett won by just over eight percentage points and thereafter retained the seat through 2012, which constituted the longest period of uninterrupted Republican representation in the District's modern history. J.A. 655 ¶¶ 7, 8. Toward the end of his tenure, most Republicans in the district signaled their readiness for a change. After the 2011 redistricting, seven other Republicans, including two state legislators, challenged Congressman Bartlett in the 2012 primary, which he won despite receiving fewer votes than the combined total garnered by the other candidates.[4] Still, in his 2012 reelection bid, he increased his fundraising by 2,500% compared to the 2010 cycle,[5] before losing in the general election to a self-financed moderate Democrat, John Delaney. The election of a moderate Democrat was a return to the Sixth District's norm prior to the 1991 redistricting's exclusion of Montgomery County.

Development and Approval of the 2011 Congressional Map

4. Maryland's 2011 congressional districting plan emerged from a months-long process of public hearings held across the State, which informed the drafting

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[4] *See* https://elections.maryland.gov/elections/2012/results/primary/gen_results_2012_3_00806.html (last visited Jan. 18, 2019).

[5] *See* http://docquery.fec.gov/cgi-bin/forms/C00255190/835478/ and http://docquery.fec.gov/cgi-bin/forms/C00255190/838435/ (last visited Feb. 7, 2019).

work by state legislative staffers. J.A. 657-58 ¶¶ 18-23, 26; J.A. 61. To assist in preparing the plan, Governor Martin O'Malley appointed a Governor's Redistricting Advisory Committee ("GRAC"), whose members included the General Assembly's Senate President and Speaker of the House; Appointments Secretary Jeanne D. Hitchcock; James J. King, a former Republican member of the House of Delegates; and Richard Stewart, a private business owner. J.A. 657 ¶¶ 18-21.

a. The GRAC held public hearings in all areas of the State. J.A. 657-58 ¶ 22. Stephen Shapiro, one of this litigation's original plaintiffs, told the GRAC that, "based on history and geography," combining "the western third of Montgomery County . . . with Western Maryland . . . would be a reasonable situation and one that existed several decades ago." J.A. 434; *see* J.A. 845-46 (quoting similar testimony from seven others who attended GRAC's public hearings). Constituents also expressed a desire for competitive political districts. J.A. 402. Mr. Shapiro observed that non-competitive districts had "decreased turnout and interest" in the general election "where the result is usually a foregone conclusion." J.A. 435; *see also* J.A. 405-06, 408-09, 410-12, 417 (other commenters expressing affinity and common interests with Montgomery County and distance from Carroll, Harford, and Baltimore Counties).

b. As had been the practice in past redistricting, J.A. 186-87, 189-90, Governor O'Malley solicited the views of the Maryland congressional delegation, including Republicans Roscoe Bartlett and Andy Harris.

J.A. 57-60. Though the congressional delegation contracted with Eric Hawkins to draw a draft map, J.S. App. 14a, 101a, Mr. Hawkins did not have any meaningful contact with the GRAC and could recall only one occasion when he met with state staff, J.A. 144-45.

As for the map that Mr. Hawkins submitted to the GRAC, Governor O'Malley rejected it, J.A. 77, and instead oversaw the preparation of a separate, very different proposal.[6] J.A. 937-38 ¶¶ 8, 9; J.A. 76-77; *see* J.S. App. 102a, ¶ 5. That proposed map rejected major features of the congressional delegation's proposed map: it (1) kept intact Washington County and several cities split by the congressional delegation's map; (2) limited the districts in Prince George's County to just two; (3) ensured that the Fourth District did not include population from Montgomery County, in response to constituent and state legislative requests; and (4) kept intact the I-270 corridor, making the connection between Frederick and Montgomery Counties a major feature of the Sixth District. J.A. 937-38; *compare* J.A. 941 *with* J.A. 997.

The GRAC's proposed map was submitted to the Governor and published for public comment on October 4, 2011, J.A. 660 ¶ 32; between October 4 and 11, 2011, the GRAC received hundreds of public comments, J.A. 658 ¶ 26. The Governor made minor changes to the

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[6] As the three-judge court found, "[t]here is no evidence that Hawkins personally created the final map that was enacted into law." J.S. App. 102a ¶ 5.

GRAC proposal and announced his plan on October 15, 2011. J.A. 660 ¶ 33, 688.

c. Introduced as Senate Bill 1 on October 17, 2011, during a special legislative session, the plan passed with several technical amendments and was signed by the Governor on October 20, 2011. J.A. 660 ¶ 34.

Legislative Priorities Addressed by the 2011 Congressional Plan

5.a. The 2011 congressional plan met significant state legislative goals related to the First, Fourth, Seventh, and Eighth Districts.

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 had been created to protect an incumbent Republican representative, who 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) (Niemeyer, J., dissenting), *aff'd*, 504 U.S. 938 (1992). 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). *Fletcher*, 831 F. Supp. 2d at 891. Because the 2010 Census results showed that both districts were underpopulated compared to the ideal district population, J.A. 670, retaining them as Section 2 districts necessitated shifts that affected boundaries of other districts. In addition, two other districts "with significant and growing minority populations," the Second and the Fifth, *Fletcher*, 831 F. Supp. 2d at 902, were found by the census to be underpopulated and overpopulated, respectively, J.A. 670, thus requiring adjustments elsewhere in the map to attain population equality.

b. In addition to meeting these significant legislative goals, the map adopted as "a major feature of the Sixth district," J.A. 938 ¶ 9, the connection of portions of Frederick and Montgomery Counties that make up the I-270 corridor, "one of Maryland's premier economic regions." J.A. 1052; *see* J.A. 695 (depicting Sixth District in relation to I-270); J.A. 440 (describing

significant increase in commuter rail and automobile traffic along the I-270 corridor prior to the 2011 redistricting); J.A. 844. With I-270 serving as the primary thoroughfare, Frederick and Montgomery Counties account for 21.8% of Maryland's jobs and 25.4% of its total wages. J.A. 1052. About one-third of the 131,000 new residents Frederick County acquired in the decade preceding the 2011 redistricting came from Montgomery County. J.A. 440; *see* J.A. 437, 1052.

The growth along the I-270 corridor was an important interest expressed by constituents during the redistricting process. J.A. 437-43 (Baltimore Sun article); J.A. 403-04, 409, 418-19, 422-23 (public testimony requesting redistricting committee consider the I-270 corridor). Contemporary statements and testimony of Maryland decision-makers confirm the significance of the I-270 corridor as a consideration in drafting the Sixth District. J.A. 710-11; J.A. 43, 52-53 (O'Malley); J.A. 157-58 (Hitchcock); J.A. 193-96 (Senate President Miller); J.A. 937-38 ¶ 9 (Weissmann draft plan preserving the I-270 corridor as "major feature" of Sixth District).

Adding significant parts of Montgomery County in a way that kept largely intact the communities surrounding the I-270 corridor meant that 145,984 registered voters in the former Sixth District were reassigned to the Eighth and 128,992 registered voters in the former Eighth were reassigned to the Sixth. J.A. 773. All told, reconfiguration of the Sixth District reassigned 66,417 registered Republicans to other districts and 24,460 registered Democrats to the Sixth. J.S. App. 102a. Putting aside changes required by the

reconfiguration of the First District (i.e., reversing the extension across the Bay) and Fourth District (including having only two districts in Prince George's County), a net 40,066 registered Republicans were reapportioned out of the Sixth District and 18,420 registered Democrats were reapportioned into the Sixth. J.A. 773. That combined change of 58,486 registered Republicans and Democrats is smaller than the 64,608-vote margin that separated candidates John Delaney and Roscoe Bartlett in the 2012 election. J.A. 1026.

c. The final map also responded to constituents' expressed unhappiness with the contours of the Sixth District under the 2002 map. 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." J.S. App. 19a. 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." *Id.* 20a. Former plaintiff Shapiro described the associational harms caused by the 2002 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." J.A. 435. 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. J.A. 411-12.

Statewide Referendum Approving the Plan

6. After the three-judge court in *Fletcher* issued its decision rejecting racial and partisan gerrymandering challenges to the plan, opponents of the plan petitioned Senate Bill 1 to referendum and it was placed on the 2012 general election ballot. J.A. 661 ¶ 39.

a. In the run-up to the 2012 general election, the referendum was publicized and discussed in the media, including articles cited by plaintiffs in the second amended complaint. *See* J.A. 630 (citing *Gerrymandered? Maryland Voters to Decide*, Wash. Post (Sept. 27, 2012)); J.A. 631 (citing Aaron C. Davis, *For Maryland Democrats, Redistricting Referendum Forces a Look in the Mirror*, Wash. Post (Sept. 30, 2012)); *see also* J.A. 631-35, 638-40 (reproducing maps credited to Washington Post's Sept. 27, 2012 coverage). As required by statute, in the weeks prior to the election, each county's election board provided the county's registered voters a notice "prepared in clear and concise language, devoid of technical and legal terms to the extent practicable, summarizing the [referendum] question." Md. Code Ann., Elec. Law § 7-105(b) (LexisNexis 2017).

b. In a case brought by the referendum's proponents, the Court of Special Appeals of Maryland rejected contentions that the ballot language was misleading or insufficiently informative. *Parrott v. McDonough*, No. 1445, Sept. Term, 2012 (Md. Ct. Spec. App. Jul. 23, 2014) (unpublished), *cert. denied*, 440 Md.

226 (2014), *available at* http://redistricting.lls.edu/files/MD%20parrott%2020140723%20opinion.pdf (last visited Jan. 19, 2019). The court confirmed that the ballot language "adequately conveyed the actual scope and effect" of the 2011 plan, *id.* at slip op. 21, and further concluded that plaintiffs' "concerns regarding whether Question 5 adequately described the scope of the changes arising from Senate Bill 1" were addressed by the notice summary sent to voters as required by Election Law § 7-105(b), *id.*

c. The referendum resulted in voters approving the plan by 1,549,511 votes in favor (64.1%) and 869,568 votes against (35.9%), with majorities favoring it in all but two of Maryland's 24 counties. J.A. 661 ¶ 39. The plan won voters' approval not just in areas of Democratic voting strength, but also in 10 of the 12 counties where registered Republicans outnumbered registered Democrats, including three counties located within the present and former boundaries of the Sixth District: Allegany, Washington, and Frederick Counties.[7] J.A. 1056.

Republican Political Engagement After the 2011 Redistricting

7. Available information for the period since the 2011 redistricting shows a growing and comparatively

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[7] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Jan. 20, 2019).

active Republican electorate in the Sixth District. In the counties included in the former Sixth District, Republican voter registration increased year-over-year from 2010 to 2016, J.A. 1054, and percentage turnout among Republicans increased between the 2008 and 2012 presidential elections, J.A. 1059. Percentage Republican turnout in the Sixth District exceeded Democratic turnout in the 2012, 2014, and 2016 general elections.[8] Although overall turnout in the 2014 gubernatorial primary was down statewide, from 25.35% in 2010 to 21.81% in 2014,[9] Republican turnout in Garrett, Allegany, and Washington Counties exceeded Democratic turnout in the 2014 primary. *Id.* Notwithstanding small variations in contributions to local Republican central committees, contributions to Roscoe Bartlett's campaign committee in 2012 were more than *25 times* those received in 2010.[10]

As for the plaintiffs in this lawsuit, they admit to having maintained or increased their own associational

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[8] *See* https://elections.maryland.gov/elections/2012/turnout/general/2012_Congressional_District.html#Dem; https://elections.maryland.gov/elections/2014/turnout/general/GG14_Turnout_by_party_by_congressional.xlsx; https://elections.maryland.gov/elections/2016/turnout/general/Official%20by%20Party%20and%20Congressional.pdf (all last visited Jan. 20, 2019).

[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.

[10] *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 $1,170,021.87 in same).

activities since 2011. All the plaintiffs voted regularly after the 2011 redistricting. J.A. 274-75, 532-33, 568-69, 357, 464-65, 317, 498. When Plaintiff DeWolf became aware of the referendum effort, he was inspired to take an active role in politics for the first time and became a member of the Washington County Republican Central Committee and a member of the Washington County Republican Club. J.A. 434-35, 541. Plaintiffs Ropp and Strine were also active in local Republican political campaigns both before and after the 2011 redistricting. J.S. App. 26a-27a.

Proceedings in this Action

8.a. Three Maryland residents, only one of whom remains a current plaintiff, filed this action in November 2013—more than two years after the 2011 plan was enacted, more than 15 months after this Court's *Fletcher* affirmance, and one year after the plan was implemented in the 2012 general election and approved by voters in the statewide referendum. J.A. 1, 660, 661. The complaint as initially filed and subsequently amended "did not present the [First Amendment] retaliation theory asserted here." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Although the complaint alleged "infringement of First Amendment rights of political association," Dkt. 11 ¶ 5, it did not specify facts supporting that claim, and plaintiffs denied that their claims "rely on the reason or intent of the legislature—partisan or otherwise," *id.* ¶ 2; *see also id.* ¶ 23. Rather than contend that it was impermissible for districting to consider party affiliation or voting

history, the first amended complaint advocated for districts to be drawn based on "commonality of interest, reflected through demographics *and voting history*[.]" *Id.* ¶ 29 (emphasis added).

b. After a single district judge ordered dismissal, this Court on December 8, 2015 reversed and remanded for further proceedings before a three-judge court. *Shapiro v. McManus*, 136 S. Ct. 450 (2015).

c. In March 2016, plaintiffs filed a second amended complaint, asserting for the first time their First Amendment retaliation claim alleging unlawful vote dilution. J.S. 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." J.S. App. 181a. (brackets in original).

The district court denied defendants' motion to dismiss the second amended complaint in August 2016. J.S. 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." J.S. App. 199a. That decision did not address any claim premised on an injury to plaintiffs' associational rights.

Nine months later, 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. J.A. 25. 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. J.S. App. 82a-83a & n.1.

In denying preliminary injunctive relief, the court concluded 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. J.S. 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." J.S. App. 100a.

d. On August 25, 2017, the plaintiffs appealed the denial of the preliminary injunction. J.A. 30. 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 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). Even if plaintiffs were able to show a likelihood of success on the merits, the Court concluded, "the balance of equities and the public interest tilted against" injunctive relief. *Id.* at 1944.

e. On remand, the parties filed a joint status report informing the three-judge court that "the plaintiffs will not move to reopen discovery" and confirming that the parties' cross-motions for summary judgment were "fully briefed and ripe for decision," with one exception: the parties agreed that they would file supplemental briefs "to allow the parties to address *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Supreme Court's disposition of the appeal in this case, and other subsequent relevant authority." J.A. 1172. Instead of adhering to the parties' agreement regarding the ripeness of

the cross-motions, however, plaintiffs' supplemental brief did not present only argument and analysis addressing this Court's decisions and other relevant authority, but also presented new evidence that was neither part of the summary judgment record, nor disclosed in discovery. J.A. 1176-1205. Plaintiffs sought to introduce the evidence by way of an affidavit of counsel. J.A. 1206-16. Plaintiffs' supplemental briefing continued to press their vote-dilution claim, on which the district court had previously focused. J.A. 1180-98. But plaintiffs also asserted a new claim premised on injury to their associational rights, for which there was little evidence in their prior presentations. J.A. 1198-1204. Attempting to fill that void in their evidence, plaintiffs submitted turnout data retrieved from the Maryland State Board of Elections' website, together with lay opinion testimony from one of their own attorneys purporting to analyze that data to show declines in Republican turnout in comparable elections before and after the implementation of the 2011 map. J.A. 1210-12, 1200-02. 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. J.A. 1202-03, 1214-16.

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. J.A. 1249-50; *see also* Dkt. 215-1. The district court denied the motion to strike without commenting on the validity of the evidentiary objections; instead, the denial rested on the ground that a bench trial obviates the need for strict adherence to evidentiary rules, and the panel could "simply strike the evidence later," if appropriate. J.A. 1251-52.

The District Court's Summary Judgment Decision and Injunction

9. The three-judge court awarded summary judgment to the plaintiffs on November 7, 2018, in a decision that featured two majority opinions, one by Judge Niemeyer and one by Judge Bredar, each joined by Judge Russell. *See* J.S. App. 1a-77a; 78a-81a. Applying the First Amendment retaliation framework the court had adopted in denying defendants' motion to dismiss, J.S. App. 199a, Judge Niemeyer's opinion concluded that the plaintiffs were entitled to summary judgment on both their First Amendment retaliation theories of vote dilution and impairment of associational rights, J.S. App. 4a, 42a-43a, 48a-54a, 59a, 61a-64a.

a. Judge Niemeyer's opinion concluded that plaintiffs had established each element of their vote-dilution claim. J.S. 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." J.S. App. 49a.

Addressing injury, Judge Niemeyer concluded that the redrawn Sixth District "did, in fact, meaningfully burden [plaintiffs'] representational rights," J.S. 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." J.S. App. 53a. He further observed that, although not essential to the conclusion, "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. J.S. 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. J.S. 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.*

b. Addressing the associational-rights claim, Judge Niemeyer articulated a standard similar to the

one the district court established for evaluating plaintiffs' vote-dilution 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." J.S. 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." J.S. 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. J.A. 1249-50; *see* Dkt. 215-1; J.S. App. 28a, 63a (citing fundraising data submitted with supplemental briefing); J.S. App. 74a-75a (concurring opinion of Judge Bredar citing the same).

c. Turning to remedy, Judge Niemeyer concluded that plaintiffs had satisfied the requirements for injunctive relief. J.S. 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[.]" J.S. 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. J.S. App. 65a-67a.

d. Judge Bredar's opinion concluded that the plaintiffs were entitled to summary judgment on their associational-rights theory alone, J.S. App. 71a-76a; Judge Bredar criticized Judge Niemeyer's opinion for its causation analysis pertaining to both of plaintiffs' theories, J.S. App. 69a-70a.

e. In awarding judgment to plaintiffs, the three-judge 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 for the Sixth District adhering to two conditions for which the court's opinions cite no applicable authority: the legislature must redraw the boundaries (1) "applying traditional criteria for redistricting" and (2) "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. 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 for approval. J.S. App. 79a-80a. On November 16, 2018, the three-judge court stayed its injunction. J.A. 1350-51.

SUMMARY OF ARGUMENT

I. 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 gerrymanders and preventing future violations by providing clear guidance for legislatures and other districting bodies. This Court can and should determine a manageable standard, one that lower courts can apply to remedy abusive partisan gerrymanders such as those that entrench in power a political party whose adherents enjoy only minority support. This is not such a case, and the decision below fails to supply the much-needed standard.

A. This Court's decisions reflect a consensus that excessive partisanship in districting is impermissible, although officials may use political considerations in crafting a districting plan. The Court has not yet announced a standard for adjudicating a partisan-gerrymandering claim, but the Court has described the essential criteria: an acceptable standard must be clear, manageable, politically neutral, reliably fair, and precise. The First Amendment retaliation test proposed by plaintiffs and adopted by the district court does not satisfy these criteria.

The retaliation test has three elements: intent, injury, and causation. It does not promise to be clear, manageable, politically neutral, reliably fair, and precise because its first element forbids consideration of party affiliation at all, its second element embeds a standardless inquiry into excessiveness, and its third element does nothing more than duplicate its first. Because the first and third elements ask only whether officials took party into account at all, the work of

identifying impermissible political motives must be performed in assessing the element of injury.

The difficulties with the test are apparent from the way the district court applied it to plaintiffs' representational- and associational-injury claims.

In assessing the representational-injury claim, the district court described the injury as one imposing a "meaningful[] burden" on "representational rights." J.S. App. 52a; however, the only burden that the court ever identifies is a species of vote dilution, and, unlike the vote-dilution injury present in one person, one vote claims, the injury here lacks an independent mathematical definition. And although the court allowed that vote dilution is a matter of degree, the court's test did not provide any method for measuring an unconstitutional amount. Rather, the court unhelpfully suggested that, to be actionable, boundary changes in redistricting must have made more than a trivial difference to an aggrieved party's achievement of electoral success.

On the associational-injury claim, the district court was even less precise. It required only a showing that the new plan somehow burdened some group's ability to associate in furtherance of some political goal, perhaps by dampening voters' enthusiasm or making them indifferent to voting. But the court offered no guidance on how to establish that the supposed lack of enthusiasm resulted from the plan, as opposed to some other cause; indeed, the court did not require the plaintiffs here to make such a showing.

Moreover, under the district court's test, a plaintiff would satisfy the injury element just by showing that in creating a districting plan, mapmakers considered political aims *to any degree*—unless the plan survived "exacting scrutiny." J.S. App. 200a (quoting *Elrod v. Burns*, 427 U.S. 347, 362 (1976)). These presumptively improper aims would include incorporating constituent interests, identifying and considering communities of interest, and achieving proportional representation. But the first two of these have long been thought to be inherent in redistricting, while the last has been upheld by this Court. *Gaffney v. Cummings*, 412 U.S. 735 (1973). And, because the district court's approach uses the preceding districting plan as a benchmark, it would even presumptively invalidate efforts to undo a prior partisan gerrymander. The innate shortcomings of the court's test are further exacerbated by the terms of its injunction, which impose restrictive redistricting criteria that are unexplained in the court's opinions and unsupported by applicable law.

B. For at least three other reasons, the First Amendment retaliation approach is ill-suited to separate permissible political considerations from excessive partisanship.

First, it depends on the fiction that when members of one party favor their legislative goals over those of an opposition party, they act with retaliatory intent, and the resulting legislation constitutes retaliation against the opposition party's members. Employing that fiction could make actionable much of the legislation passed by state legislatures and Congress, which

in many instances pass legislation favored by one party and opposed by the other. Here, the record contains no evidence that mapmakers, state officials, or the voters who enacted the plan at referendum, intended to retaliate against anyone for past voting.

Second, the First Amendment retaliation framework developed in the context of executive action, and it is based on the conduct of identified government officials retaliating against individuals known to them to have exercised protected speech or political affiliation. It was never intended to apply to legislation, like the districting legislation challenged here, and there is no precedent for expanding retaliation to the legislative arena.

Third, First Amendment retaliation jurisprudence is even less appropriate for a challenge to legislation approved by the voters at referendum.

II. Reversal is also necessary because contrary to the well-established summary judgment standard, the three-judge court resolved issues of disputed fact by impermissibly drawing inferences against the party opposing summary judgment, engaging in credibility determinations, and weighing evidence. The court also erred by relying on evidence that was subject to unresolved hearsay and other objections to admissibility, instead of resolving evidentiary objections that were material to its ruling.

III. Finally, this Court should reverse because the three-judge court abused its discretion in entering permanent injunctive relief. Whether considering

preliminary or permanent relief, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The court erroneously concluded that harm caused by the plaintiffs' delay had no bearing on whether to grant permanent relief, as opposed to a preliminary injunction. The three-judge court also contradicted this Court's previous finding that the years-long delay in this case was due to circumstances largely within plaintiffs' control. Thus, the three-judge court's analysis disregards the well-established principle that laches can bar constitutional claims, including First Amendment claims.

ARGUMENT

I. THE THREE-JUDGE DISTRICT COURT DID NOT SET FORTH A "LIMITED AND PRECISE" TEST FOR ADJUDICATING PARTISAN-GERRYMANDERING CLAIMS.

This Court can and should determine a manageable standard, one that lower courts can apply to remedy partisan gerrymanders such as "the unjustified entrenching in power of a political party" that "enjoys only minority support among the populace" but "has nonetheless contrived to take, and hold, legislative power." *Vieth v. Jubelirer*, 541 U.S. 267, 365, 360 (Breyer, J., dissenting). This case, however, involves no such circumstance, and the three-judge court's analyses fail to supply the much-needed standard.

A. The District Court's First Amendment Retaliation Approach Does Not Distinguish Between Permissible Political Considerations and Excessive Partisanship.

1. This Court's decisions acknowledge a widely accepted principle: "excessive" partisanship in creating a districting plan is impermissible, but state officials may take into account political considerations in creating a districting plan. Various justices, with varying views on whether and how best to adjudicate partisan gerrymandering challenges, have agreed that the process of redistricting is "inherently political." *Abrams v. Johnson*, 521 U.S. 74, 117 (1997) (Breyer, J., dissenting); *see Gaffney*, 412 U.S. at 753 ("[P]olitical considerations are inseparable from districting and apportionment.").

The great challenge is discerning how and where to draw a line between acceptable political considerations and what is "excessive." *See Vieth*, 541 U.S. at 293 (plurality); *id.* at 316 (Kennedy, J., concurring); *id.* at 365 (Breyer, J., dissenting). Though the Court has yet to resolve this question, it has described criteria for reaching the correct answer: drawing on principles that are "well developed and familiar," *Baker v. Carr*, 369 U.S. 186, 226 (1962), the necessary test for excessive partisanship in redistricting must be "limited and precise," "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 306, 307-08 (Kennedy, J.), and it must provide a "reliable measure of fairness," *League*

of United Latin Am. Citizens v. Perry ("*LULAC*"), 548 U.S. 399, 414 (2006) (Kennedy, J.).

2. The plaintiffs here and the district court below believe they have found a solution in the form of a First Amendment retaliation claim. Contrary to what this Court has opined, however, the plaintiffs insist that the question "whether mapmakers have gone 'too far'" can be sidestepped by using their approach. *Benisek v. Lamone*, No. 17-333, Reply Br. 9; *see also* No. 17-333, Appellant's Br. 35; No. 18-726, Mot. to Affirm 26. In plaintiffs' view—adopted by the district court—the problem can be solved by using the three elements of "a garden variety retaliation claim," J.S. App. 197a—intent, injury, and causation—and by simply deeming the injury to be vote dilution (for their representational-rights claim) or some "burden on their associational rights" (for their associational-rights claim), J.S. App. 52a, 59a.

a. *But plaintiffs' test does not offer a standard* that promises to be limited, precise, clear, manageable, politically neutral, and reliably fair. Instead, the first element of the test (intent) deems any degree of partisanship excessive, while the second element (injury) perpetuates the existing problem by embedding a standardless excessiveness inquiry. Although the third element (causation) purports to ask a different question, it does no more than duplicate the first element, *intent*.[11]

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[11] The causation element's redundancy is seen in the way the district court applied it here: "In short, the record refutes the conclusion that the actions were taken for any other reason than to

That first element, though phrased in terms of retribution for plaintiffs' past voting and political affiliation, essentially asks whether those who adopted the plan intended to favor one political party over another. It draws no line between acceptable and excessive political consideration. Any degree of partisan intent and almost all political aims of any nature will suffice, because any intent to draw a boundary in a way that marginally benefits one political party, even as it serves another redistricting goal, can be characterized as an intent "to impose a burden" on members of a competing political party "because of how they voted or the political party with which they were affiliated." J.S. App. 43a. Thus, this intent element is likely to be satisfied in *every* redistricting challenge. *See Vieth*, 541 U.S. at 298 (plurality op.); *id.* at 344 (Souter, J., dissenting).

b. Given that likelihood, if the task of separating permissible from impermissible political considerations is to be performed at all, it must be done at the second stage, which addresses the element of injury. Although the three-judge court describes the injury as a "meaningful[] burden [on plaintiffs'] representational rights," J.S. App. 52a, the only burden ever identified or discussed by the court is a species of vote dilution, e.g., J.S. App. 53a-54a. Yet, unlike the vote-dilution injury

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carry out the specific intent expressed." J.S. App. 54a; *see id.* ("[A]s to causation, the plaintiffs have established that, without the State's retaliatory intent, the Sixth District's boundaries would not have been drawn to dilute the electoral power of Republican voters nearly to the same extent.").

assessed in one person, one vote claims, vote dilution under this retaliation theory has no independent mathematical definition. Faced with the reality that any redrawing of a district is bound to cause at least minimal dilution of some party's voting strength, the district court acknowledged that "vote dilution is a matter of degree," J.S. App. 199a, but the court's test does not attempt to measure it. Instead, under its test, the vote-dilution inquiry asks whether the boundary changes "make some practical difference," at least somewhat "'more than *de minimis* or trivial.'" J.S. App. 199a, 198a (citation omitted). Put another way, to some "more than *de minimis*" extent, did the mapmakers "mak[e] it harder for a particular group of voters to achieve electoral success"? J.S. App. at 199a, 200a. But the court makes no attempt to define, either qualitatively or quantitatively, when increased electoral difficulties amount to a burden, and if so, at what point the burden becomes unconstitutional. As an assay of excessiveness, this inquiry is either indeterminate or toothless.

c. The district court's application of its three-part test to the plaintiffs' claim of associational injury differs only at the second stage, assessment of injury, but there its standards are even more open-ended and imprecise. They require only a showing that the redistricting somehow indirectly "burdened" some group of voters' "ability to associate in furtherance of their political beliefs and aims," which might manifest itself in voters' "lack of enthusiasm" or "indifference to voting." J.S. App. 59a, 62a. The district court does not even suggest how to measure the seriousness of this type of

alleged injury. Nor does the court hint at how to determine whether the redistricting was the proximate cause of a voter's "lack of enthusiasm" or "indifference," or whether those are merely sentiments shared by some number of voters, irrespective of redistricting or party affiliation.

Like the vote dilution injury, the district court's element of associational injury is too indeterminate and too easily satisfied to provide a "limited and precise" standard. *Vieth*, 541 U.S. at 306 (Kennedy, J.). As if to confirm this imprecision, the court's discussion of associational injury neither acknowledges nor applies the principle, recited in its earlier decision, that First Amendment retaliation requires a showing of harm "sufficiently serious that it 'would likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" J.S. App. 198a (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)).

d. Thus, at least under the district court's articulation, the injury element of either a representational- or associational-rights claim would be satisfied any time mapmakers took political aims into account, for any reason. The only political considerations reliably excluded would be *failed* attempts to take politics into account, i.e., attempts that did not yield some "practical difference." J.S. App. 199a. This element's representational formula effectively treats as "excessive" any non-trivial difference effected by redistricting, and its associational variant is susceptible to a reading that would render impermissible any redistricting that

indirectly imposes even some *de minimis* burden. Consequently, under the test applied to either variant of a First Amendment retaliation claim, any consideration of politics with "more than *de minimis*" partisan impact is prohibited, unless it survives "'exacting scrutiny,'" J.S. App. 200a (citation omitted), or as plaintiffs insist, "strict scrutiny," Mot. to Affirm 23. *See Vieth*, 541 U.S. at 294 (plurality op.) (noting that "strict scrutiny readily, and almost always, results in invalidation"). Rather than "separate the unjustified abuse of partisan boundary-drawing considerations . . . from their more ordinary and justified use," *id.* at 365 (Breyer, J., dissenting), the district court's First Amendment retaliation standards presumptively outlaw all political considerations, including incorporation of constituent views and identification of communities of interest, long thought to be inherent in redistricting.

3. The First Amendment retaliation framework's inability to discern the point at which redistricting constitutes "unjustified abuse of partisan boundary-drawing considerations," *id.*, manifests itself in the way it would apply in several foreseeable situations. In each, the test is either overinclusive, because it would invalidate otherwise lawful maps, or underinclusive, because it would not afford relief to some victims of partisan gerrymanders.

a. First, by effectively condemning any consideration of political affiliation or voting patterns, the approach would invalidate state efforts to draw district lines to achieve proportional representation. Yet *Gaffney v. Cummings* established that such

proportional schemes are permissible. There, the Court rejected a challenge to a state's 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." 412 U.S. at 752, 754. The Court "reasoned that it would be 'idle' to hold that 'any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it,' because districting 'inevitably has and is intended to have substantial political consequences.'" *Gill*, 138 S. Ct. at 1927 (quoting *Gaffney*, 412 U.S. at 752-53). Since *Gaffney*, this Court has upheld a congressional plan purposely drawn to maintain "partisan balance." *Easley v. Cromartie*, 532 U.S. 234, 239 (2001).

The three-judge court's standards would invalidate maps such as the one upheld in *Gaffney*, where mapmakers relied on voters' political affiliations to achieve "a rough approximation of the statewide political strengths of the Democratic and Republican Parties," 412 U.S. at 752, and the map this Court upheld in *Easley*, where the drafters necessarily relied on similar information to ensure "the maintenance of a six-six Democrat-Republican split in the congressional delegation," *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 419 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001).

Though the three-judge court acknowledges *Gaffney* and recites that "courts cannot invalidate a redistricting

map merely because its drafters took political considerations into account in some manner," J.S. App. 34a-35a, the decision below compels the opposite conclusion, by effectively prohibiting consideration of political affiliation. Confirmation of this interdiction appears in the judgment, which expressly prohibits mapmakers from "considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. App. 79a. That restriction would preclude adopting maps, such as the ones in *Gaffney* and *Easley*, that seek to approximate the relative voting strengths of Democrats and Republicans statewide. Thus, the First Amendment retaliation approach would invalidate maps of the type previously viewed as "less likely" to inflict "partisan discrimination." *LULAC*, 548 U.S. at 419 (Kennedy, J.) ("[A] congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority.").

b. Second, because the First Amendment retaliation approach uses the prior map as a benchmark in making its injury assessment, it presumptively invalidates mapmakers' efforts to undo previous partisan gerrymanders. As the opinions of Judges Niemeyer and Bredar demonstrate, applying the intent and effects elements of the three-judge court's test requires comparison to the prior district, which in the terminology repeatedly invoked by plaintiffs' expert, serves as the "benchmark." J.A. 766, 767, 772, 773, 775, 776, 779, 1088, 1094. Comparison between the current Sixth

District and its predecessor permeates Judge Niemeyer's analysis of voters' representational rights (J.S. App. 53a-54a) and both judges' analyses of associational rights (J.S. App. 61a-63a, 73a-75a). For purposes of both representational and associational injuries, the identified offending "intent" is "the specific intent to flip the Sixth District" that had been drawn in 2002 "from safely Republican to likely Democratic." J.S. App. 49a. To clarify that the test necessarily hinges on the superior position one party enjoyed under the prior map, Judge Niemeyer's opinion reduced the concept to a zero-sum game: "It is impossible to flip a seat to the Democrats without flipping it away from the Republicans." J.S. App. 50a-51a. Thus, it is impossible to evaluate whether a district was intended to be "flipped" without reference to the previous redistricting plan. Similarly, with respect to the representational vote-dilution injury, a plaintiff cannot show that she was "placed at a concrete electoral disadvantage," J.S. 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." J.S. App. 59a, 75a (party members harmed if "severed from their preferred associates" in the prior district); *see* J.S. App. 61a-63a (comparing pre- versus post-redistricting data).

c. In 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 if that district "was formed for partisan reasons." *LULAC*, 548 U.S. at 446-47 (Kennedy, J.). On the contrary, gauging the constitutionality of a new district by the contours of the old would impair 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 gerrymandered districting map. But claims from voters who were newly in a political minority, due to legislation *curing* a prior partisan gerrymander, would be actionable because claimants would be able to demonstrate that the legislature, in acting to cure a prior partisan gerrymander, could and did "flip" the makeup of their district intentionally. *See* J.S. App. 50a.

If that is so, the State would be unable to "avoid liability," J.S. App. 43a, because its interest in remedying past gerrymandering would conflict with what the three-judge court deems claimants' entitlement to continue enjoying the benefits of a previously gerrymandered but "safely Republican" district, J.S. App. 49a. Legislatures would then be *constitutionally precluded* from attempting to cure past political gerrymanders. Even if the plaintiffs are correct that victims of past gerrymanders could still bring suits to challenge them,

Benisek, No. 17-333, Reply Br. 11, at best, that would mean a state faces the likelihood of litigation irrespective of how it chooses to redraw the lines of a previously gerrymandered district.

Nor would the district court's approach work in a scenario where the political makeup of multiple districts changed in both directions. Instead, it would permit competing, contradictory claims by Republican voters alleging their districts "were intentionally flipped" and by Democratic voters "in the district that changed hands in the opposite direction" claiming "they too were targeted." Br. of Campaign Legal Center, *et al.*, as amici curiae in support of neither party, *Benisek v. Lamone*, No. 17-333 (Jan. 29, 2018) at 25. For example, the retaliation test would authorize claims by allegedly targeted voters in all thirteen of the districts that were "flipped" in Florida's 2011 redistricting, though five of the districts changed in favor of one major party and eight were changed in the other direction. *Id.* at 26.

d. Finally, the retaliation test does not provide a satisfactory answer to the question Justice Alito posed in the *Benisek* oral argument: if legislators "have two possible plans that they're considering," both of them having "exactly the same" population and both "compact" and "contiguous," but one gives the legislature's majority party "a more than de minimis advantage," and the other plan "gives the other party a more than de minimis advantage," is it "unconstitutional" for legislators to "pick the one that favors [their] party"? No. 17-333, Tr. 14-15. Plaintiffs' counsel answered that "it

may well be that that would be a violation," *id.* at 15-16, but under the district court's test it *would* be a violation. That is, under the retaliation framework, when faced with that toss-up between two otherwise equally meritorious maps, legislators are compelled to do what legislators rarely do, which is choose the option that favors the opposition party and disfavors their own party. There can be no better indication that this test does not offer a limited and precise way of determining when partisanship is excessive.

4. The problems of unmanageability inherent in the test are compounded by two components of the three-judge court's injunction that go unexplained in its opinions and lack any authorization in applicable law. That is, the new districting plan mandated by the court must be drawn (1) by "applying traditional criteria for redistricting—such as geographic contiguity, compactness, regard for natural boundaries and boundaries of political subdivisions, and regard for geographic and other communities of interest," and (2) "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." J.S. App. 79a. The court did not cite any legal authority for imposing these requirements. On the contrary, the court acknowledged that Congress has not elected to impose any such requirements in existing statutes governing Congressional redistricting. J.S. App. 34a; *see Vieth*, 541 U.S. at 276-77 (plurality op.).

The injunction's two restrictions are not only devoid of legal authority; they actually threaten to cause

or perpetuate partisan gerrymandering. First, "'traditional' districting principles have rarely, if ever, been politically neutral." *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting). Applying "traditional criteria," such as "compactness and respect for the lines of political subdivisions," for example, may "systematically" disadvantage "political groups that tend to cluster (as is the case with Democratic voters in cities)[.]" *Vieth*, 541 U.S. at 290 (plurality op.) (parentheses in original). Second, the injunction's ban on consideration of political affiliation or voting patterns similarly offers no assurance of political neutrality. This Court has criticized the approach of requiring districts to be drawn without using "political[] data" and "without regard for political impact," because it "may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney*, 412 U.S. at 753. The requirement is also unrealistic, because even without resorting to data, "politicians . . . normally understand how 'the location and shape of districts' determine 'the political complexion of the area.'" *Vieth*, 541 U.S. at 358 (Breyer, J., dissenting) (quoting *Gaffney*, 412 U.S. at 753).

B. Partisan Gerrymandering Is Not Properly Understood as a Form of First Amendment Retaliation.

1. It is not surprising that the First Amendment retaliation approach fails to meet the challenge of separating permissible political considerations from impermissible, excessive partisanship. Legislatively drawn and approved maps are a far cry from the executive

actions traditionally subject to First Amendment retaliation claims. Whereas the redistricting process typically involves legislators taking into account competing views of constituents, whose "various interests compete for recognition," *Miller v. Johnson*, 515 U.S. 900, 914 (1995), the basic premise of the political patronage line of retaliation cases, for example, prohibits *any* consideration of a non-policymaking employee's political views as a basis for termination or other employment action, *see, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

2. To justify their resort to First Amendment retaliation principles, plaintiffs and the district court advance the notion that mapmakers who favor the interests of one party necessarily intend to "punish" voters of another party "by reason of their constitutionally protected conduct." J.S. App. 205a (emphasis omitted). But that construct is only a legal fiction contrived by the plaintiffs, and one that unfairly treats each political party's natural inclination to serve its members' interests as if it were the equivalent of malicious retribution against members of a competing party. Prior to this case, courts have refused to indulge that notion and, instead, have turned away attempts to challenge statutes on First Amendment retaliation grounds, to avoid "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 record here contains no evidence that any legislators or mapmakers, or the people of Maryland who enacted the 2011 plan at referendum, knew how any of the plaintiffs voted in the past,[12] or tried to "punish" them for their past voting.

3. In the jurisprudence of challenges to legislation, First Amendment retaliation principles are not "well developed and familiar," *Baker*, 369 U.S. at 226; rather, they are absent.

a. The First Amendment retaliation framework emerged from, and is designed to work in, the context of government acting in its *executive* capacity, where the government generally lacks authority to take measures implicating protected speech and political affiliation. *See, e.g.*, *Rutan*, 497 U.S. at 77 (government as employer); *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668 (1996) (government as contracting party); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (government as administrator of law enforcement and corrections agencies).

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[12] An individual's voting history is unknowable due to ballot secrecy. *See* Md. Code Ann., Elec. Law § 9-203(4) (LexisNexis 2017). Election results are known and reportable at no smaller unit than the precinct. Md. Code Ann., Elec. Law § 11-402(a), (d)(1)(i) (LexisNexis 2017). Moreover, voting behavior cannot be reliably inferred from party registration. *See* J.A. 769 (table showing that no more than 69% of Democrats and 64% of Republicans preferred their respective party's nominee in the 2012 Congressional election); J.A. 857. It "is assuredly not true" that "the only factor determining voting behavior at all levels is political affiliation." *Vieth*, 541 U.S. at 288 (plurality op.).

b. The retaliation analysis does not work, and was never intended to work, in challenges to legislation enacted by legislators or approved directly by the voters. Unlike those executive contexts where First Amendment retaliation principles have been applied, adoption of a districting statute is *legislating*, which always involves consideration of speech and, typically, political speech. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]" *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Moreover, the structures and processes of state legislatures, like those of Congress, tend to make frequent and explicit reference to members' political affiliations, to a degree that would be impermissible in the executive contexts of government employment, procurement, and law enforcement.

There is no precedent for "expanding" First Amendment retaliation principles "to legislative enactments." *Moser*, 747 F.3d at 840. Instead, for more than a half-century since this Court's decision in *United States v. O'Brien*, 391 U.S. 367 (upholding statute that punished knowing destruction or mutilation of selective service registration certificates), lower courts have rejected First Amendment retaliation claims, like plaintiffs', alleging that facially neutral statutes indirectly burdened First Amendment rights.[13]

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[13] *In re Hubbard*, 803 F.3d 1298, 1313 (11th Cir. 2015) (stating that such challenges do "not present[] a cognizable First Amendment claim"); *see also Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013); *Kensington Vol. Fire Dep't, Inc. v. Montgomery County*, 684 F.3d 462, 467-70 (4th Cir. 2012); *Southern Christian*

c. If First Amendment retaliation analysis is inappropriate for challenging enactments of a legislature, it is even less apt and less workable for a challenge to legislation approved by the voters and, therefore, "adopted by the people," rather than legislators. Md. Const. art. XVI, § 5(b). First, attributing to the voters at large "specific intent" to "punish" a subset of voters for their past voting record would present insurmountable difficulties of proof, challenges that the plaintiffs and the district court here did not even attempt to address. For example, more than 1.5 million Maryland residents voted to approve the 2011 congressional districting plan, including majorities in 10 of 12 counties where registered Republicans outnumber Democrats.[14] J.A. 1056. The record contains no evidence, or even a proffer, suggesting that these results can be attributed to voters' retaliatory intent. The plaintiffs' second amended complaint makes no allegation about the referendum at all, J.A. 612-50, and the district court's decision mentions only that the referendum occurred, J.S. App. 22a-23a.

To presume retaliatory intent on the part of the people, or to ascribe to them vicarious responsibility for views expressed by certain legislators or government officials, would conflict with this Court's

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Leadership Conf. v. Supreme Ct. of La., 252 F.3d 781, 795 (5th Cir. 2001); *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770, 775 (7th Cir. 1999); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1257-59 (4th Cir. 1989).

[14] *See* http://www.elections.state.md.us/elections/2012/results/general/gen_detail_qresults_2012_4_0005S-.html (last visited Jan. 20, 2019).

precedent. For similar reasons, "voters' sentiments" expressed via referendum cannot, without proof, "be attributed in any way to the state actors," like those sued here and typically sued in other redistricting cases. *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 197 (2003).

Rather than presume that referenda are expressions of vengeful or punitive intent, this Court has "assess[ed] the referendum as a 'basic instrument of democratic government,'" and "observed that '[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.'" *Id.* at 196 (quoting *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976), and *James v. Valtierra*, 402 U.S. 137, 141 (1971)). Far from being a rubber stamp for actions of legislators and government officials, "the referendum serves as a negative check" on improvident legislation and affords the electorate an opportunity to "'correct[] sins of commission'" on the part of the legislature. *Arizona State Legislature*, 135 S. Ct. at 2660 (citations omitted). For this reason, referenda provide a recognized means for voters "to check legislators' ability to choose the district lines they run in," *id.* at 2675; *see Vieth*, 541 U.S. at 363 (Breyer, J., dissenting), a check that Maryland voters have previously exercised by invalidating a Congressional redistricting plan through referendum.[15]

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[15] *See* Maryland General Election Returns November 6, 1962 at 17, Question 6, https://elections.maryland.gov/elections/documents/1962_1964_General_Results.pdf (last visited Jan. 19, 2019).

More fundamentally, the district court's First Amendment retaliation framework does not work in a challenge to legislation adopted by referendum for reasons that go beyond problems of proof: aside from the analyses developed in viewpoint discrimination cases, which the district court does not purport to employ,[16] the Constitution does not afford a basis for prioritizing plaintiffs' First Amendment representational and associational interests and subordinating those of the more than 1.5 million voters who exercised their rights in the referendum.

II. THE THREE-JUDGE COURT ERRED BY DEPARTING FROM THE SUMMARY JUDGMENT STANDARD WHEN IT RESOLVED DISPUTES OF MATERIAL FACT, MADE CREDIBILITY FINDINGS, AND WEIGHED EVIDENCE.

A. The Court Resolved Disputed Issues of Material Fact.

1. Irrespective of how the Court resolves the question of the applicable standard and its manageability, reversal is necessary because the three-judge court

[16] Plaintiffs have not asserted a claim of viewpoint discrimination, and with good reason: A statute establishing a districting map is, on its face, neutral as to political affiliation, and the First Amendment is not violated by neutral statutes that may negatively affect some groups or individuals more than others. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 695 (2010) ("'[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))).

committed a more extreme version 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 (1999).[17] Like the three-judge court in *Hunt*, the court below impermissibly 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 lower 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 and timely hearsay and other objections to admissibility.

a. Most fundamentally, like the court reversed in *Hunt*, the court below failed to adhere to the

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[17] On appeal from a grant of summary judgment, this Court "may examine the record *de novo* without relying on the lower courts' understanding." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (citation omitted). When reviewing a ruling on cross-motions for summary judgment, the Court applies the same Rule 56 standard that applies to all motions for summary judgment. *See, e.g.*, *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883-84 (1990); *Hunt*, 526 U.S. at 552, 554.

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 U.S. at 255). This requirement 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. *Hunt*, 526 U.S. at 553 (quoting *Miller v. Johnson*, 515 U.S. at 916-17). Consequently, "summary judgment is rarely granted in a plaintiff's favor" in "racial gerrymandering claims," *id.* at 553 n.9, even when, "[v]iewed *in toto*, [plaintiffs'] evidence tends to support an inference that the State drew its district lines with an impermissible racial motive," *Hunt*, 526 U.S. at 548-49. Precedent suggests no reason summary judgment should be more easily 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, or even if the summary judgment record "tends to support" plaintiffs' claims, summary judgment is "inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact."[18] *Id.*

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[18] As it turned out, the reversal in *Hunt* was no mere formality. On remand, the three-judge court remained convinced of its previous summary judgment finding that the State "utilized race

at 552, 548, 553 (emphasis in original). Rather than heed these concerns, the decision below both implicitly and expressly manifests *disbelief* of the defendants' evidence. *See, e.g.*, J.S. 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.

b. For example, in addressing injury, the decision disregards defendants' showing, based on plaintiffs' own depositions, that plaintiffs had not suffered chilling or associational injury, but had, instead, become more politically active post-redistricting. *See* Statement *supra* at 17-18. 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.[19] Dkt. 201, at 16. Plaintiffs' descriptions of conversations with unnamed persons 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)(2), "inadmissible

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as the predominant factor" in drawing a district and, after a trial, made the same finding. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420. On appeal, this Court reversed that finding as clearly erroneous and upheld the challenged redistricting plan. *Easley*, 532 U.S. at 258.

[19] 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, at 24, but conceded that post-redistricting he continued his political engagement by voting regularly, J.A. 357.

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).

B. The Court Failed to Resolve Material Evidentiary Objections.

"Before ordering summary judgment in a case, a district court . . . must also rule on evidentiary objections that are material to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010). Yet, rather than either disregard these hearsay statements or rule on defendants' hearsay objection, the summary judgment opinions of Judges Niemeyer and Bredar credit and rely upon, as proof of "harm to [plaintiffs'] associational rights," J.S. App. 60a-61a, plaintiffs' repetition of "unattributed statements," which "cannot be admissible," *Vazquez*, 134 F.3d at 34. *See* J.S. App. 26a ("'we met somebody who said, it's not worth voting anymore'" (quoting Strine Dep. 61)); *id.* 62a (same); *id.* 27a (she frequently met potential Republican voters who "'didn't want to participate that time because it seemed too confusing'") (quoting Ropp. Dep. 37-38)); *id.* 63a (same); *id.* 74a (crediting same hearsay statements). The court employed the statements for "the truth of the matter asserted." *See* J.S. App. 62a (crediting statements 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 inaccurately characterized these hearsay statements as among "undisputed facts of record." J.S. 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* J.A. 1054-58; 1059-83. Instead of acknowledging this evidence, the court below made two choices that distort the record to defendants' detriment: the court (1) looked at Sixth District Republican voters' low turnout in the 2014 primary, J.S. App. 28a, without comparing it to available public record evidence that Democratic turnout was even lower in that same primary,[20] and (2) credited hearsay information on campaign contributions, *id.*, which plaintiffs presented for the first time through an affidavit of counsel 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.

The referenced campaign-finance information was the subject of defendants' motion to exclude on grounds

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[20] *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.

of hearsay, the affiant's lack of personal knowledge, and the widely recognized inaccuracy and unreliability of campaign-finance reports, which render them unsuitable for judicial notice. J.A. 1249-50; Dkt. 215-1. The court's order denying that motion did not indicate whether the court deemed defendants' evidentiary objections valid. J.A. 1251-52. Instead, the order merely cited cases pertaining to bench trials and not involving hearsay objections, before concluding that "the Court can simply strike the evidence later," "[i]f determined to be problematic." J.A. 1252. *See Broadcast Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (Hearsay "is not" "admissible in a bench trial."). 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.[21]

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

C. The Court Improperly Weighed Evidence and Drew Inferences Against the Party Opposing Summary Judgment.

Similar departures from the summary judgment standard plague the court's intent analysis. The decision cites no evidence regarding the intent of the people who "adopted" the 2011 plan through referendum. As in *Hunt*, the court impermissibly gave 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 accepted plaintiffs' characterization of "the mapmakers' intent," J.S. App. 48a, and refused to accept as true, J.S. 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.* J.A. 937-38 ¶¶ 8-9; *see* Dkt. 201, at 3-6 (discussing evidence of varied legislative motives). In so doing, the court weighed evidence. *See*, *e.g.*, J.S. App. 14a-16a, 48a-49a (relying on deposition testimony of Congressional consultant Eric Hawkins, J.A. 90-156, while failing to acknowledge material contradictory testimony in the affidavit of State legislative

staffer Yaakov Weissmann, J.A. 936-39, and elsewhere in the record); J.S. 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, at 6-7, and did so without addressing the hearsay objection, *see* J.S. 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. J.S. App. 54a-56a. This conclusion contradicts the court's previous determination, based on the same evidentiary record, that it was "not persuaded" that plaintiffs "have met their burden of proof with respect to causation." J.S. App. 100a. If, as the court previously acknowledged, it "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. Equitable Principles and the Public Interest Preclude Injunctive Relief.

The Court should also reverse because the three-judge court abused its discretion in (1) erroneously

concluding that harm caused by plaintiffs' delay has no bearing on the appropriateness of a permanent injunction; and (2) 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; J.S. App. 66a. The court also failed to consider that the public interest weighs against granting an injunction at this late stage.

A. The Court Failed to Properly Apply Equitable Principles.

1. 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 1943-44. 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 recognized that "equitable considerations" apply to redistricting cases and may warrant withholding relief "even though the existing apportionment scheme was found invalid." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see Benisek*, 138 S. Ct. at 1944 (diligence is required for injunctive relief "in election law cases as elsewhere").

2. The three-judge court was under the incorrect impression that it need not consider the effect of plaintiffs' delay on "the ultimate remedy," J.S. App. 66a, but that notion disregards well-established equitable principles, including laches, that "can bar constitutional claims" altogether, even First Amendment claims. *Southside Fair Hous. Comm. v. City of N.Y.*, 928 F.2d 1336, 1354, 1355-56 (2d Cir. 1991) (holding plaintiffs' First Amendment claims barred by laches in addition to other deficiencies). The idea that plaintiffs' delay can be forgotten when it is time to consider whether to order a permanent injunction also leads to the unjust result that plaintiffs benefit from the prejudice their delay caused to the defendants' ability to defend the case on the merits. For example, due to these plaintiffs' years of delay in filing and then later amending the complaint, defendants suffered substantial prejudice to their ability to preserve and access material evidence, *see* Dkt. 186-1, at 56 (summarizing evidence), particularly because the initial plaintiffs in this lawsuit disclaimed any reliance on the specific intent of legislators, Dkt. 11 ¶¶ 2, 23.

a. Other courts have applied equitable principles 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 a 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, 102, 103 (4th Cir. 1990); *see Sanders v. Dooly County, Ga.*, 245 F.3d 1289, 1290, 1291 (11th Cir. 2001) (delay of "over six years" sufficient to bar injunctive relief under laches doctrine); *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).

b. 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. Even courts finding an apportionment invalid have nonetheless recognized the public interest in avoiding injunctions that necessitate resort to outdated census data. *Skolnick*, 307 F. Supp. at 694-95 (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 may have been 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.).

c. In June 2018, 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." *Benisek*, 138 S. Ct. at 1944. 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.*, 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 after 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.

d. 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." J.S. App. 66a. That finding 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. Though the three-judge court cited the prayer for permanent injunction that appeared in plaintiffs' 2013 complaint, J.S. App. 66a, as this Court observed, that "initial complaint did not present the retaliation theory asserted here," *Benisek*, 138 S. Ct. at 1944.

B. The Court Failed to Consider the Public Interest.

Whether considering preliminary or permanent relief, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation omitted). In its discussion of remedy, J.S. App. 64a-67a, the district court did not address the impact its injunction will have on those voters, other than plaintiffs, who have participated in four elections under the 2011 plan, including the large majority of voters who approved the plan at referendum and thereby exercised their right to determine " 'what serves the public interest.' " *Eastlake*, 426 U.S. at 678 (citation omitted). Despite "the legal uncertainty surrounding any potential

remedy" due to *Rucho*'s pending appeal, *Benisek*, 138 S. Ct. at 1945, the three-judge court enjoined the State's 2011 congressional districting plan, J.S. App. 78a. Under these circumstances, entering the injunction was an abuse of discretion.

CONCLUSION

The Court should reverse and vacate the judgment of the United States District Court for the District of Maryland.

Respectfully submitted,

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