No. 17-_____

In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Plaintiffs-Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections*

Defendants-Appellees.

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

MOTION FOR EXPEDITED CONSIDERATION OF APPELLANTS' JURISDICTIONAL STATEMENT AND FOR EXPEDITED MERITS BRIEFING AND ORAL ARGUMENT IN THE EVENT THAT THE COURT NOTES OR POSTPONES PROBABLE JURISDICTION

Plaintiffs-appellants O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler, Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine hereby move, pursuant to this Court's Rule 21, for expedited consideration of their jurisdictional statement, filed today, appealing the August 24, 2017 order of the United States District Court for the District of Maryland denying their motion for a preliminary injunction (J.S. App. 1a-79a). Given the urgent nature of this appeal, plaintiffs request that defendants be directed to file a motion to dismiss or affirm on or before September 15, 2017; that plaintiffs be permitted to file an opposition to the motion on or before September 19, 2017; and that the briefs be considered at the Court's September 25, 2017 conference. Plaintiffs further request that, if the Court notes or post-

pones probable jurisdiction, it set an expedited schedule for resolving the merits, according to which plaintiffs' brief be due October 9, 2017; appellees' brief be due October 23, 2017; plaintiffs' reply brief be due October 30, 2017; and oral argument be heard on November 6, 2017. Under the proposed schedule, amicus briefs, if any, would be due on the same date as the brief of the parties they support. For reasons explained more fully below, the Court may wish to set this case and *Gill* v. *Whitford*, No. 16-1161 for argument on the same date.

STATEMENT

As explained in the jurisdictional statement, this case is unlike any previous challenge to partisan gerrymandering. It does not invoke the Equal Protection Clause in any respect. It does not rest upon statistical measures of partisan imbalance. It does not ask the Court to adopt any new doctrinal frameworks or approve any new legal standards. This case relies, instead, entirely upon the First Amendment retaliation doctrine, which offers a settled and familiar framework for decision.

1. At issue in this case is the 2011 gerrymander of Maryland's Sixth Congressional district. The evidence developed below demonstrates that Governor Martin O'Malley and other high state officials specifically intended to dilute the votes of Republicans in the former Sixth District because of their past support of Republican Congressman Roscoe Bartlett, who had consistently and safely won election in the district during the past 20 years. The evidence demonstrates further that Republicans' votes were, in fact, diluted: The mapdrawers removed 360,000 residents from the rural portions of the Sixth District, replacing them with 350,000 residents from the densely populated suburbs of Washington, D.C.—a reshuffling that was wholly

unnecessary to correct the minor 10,000-resident imbalance in the district. The result was a massive 90,000-voter swing in favor of Democrats.

The 2011 gerrymander was devastatingly effective. According to two metrics that analyze precinct-by-precinct voter history (including the metric used by the mapdrawers to manipulate the map's lines in this case), there was a 99.7%-100% chance that Congressman Bartlett would win reelection in 2010. But the massive swap of Republican voters for Democratic voters in the 2011 redistricting turned the table 180 degrees, making it 92.5%-94.0% likely that a Democrat would win in 2012. This was the largest swing in a district's partisan complexion anywhere in the country following the 2010 census. And we know from the metrics' focus on precinct-by-precinct voter history that the swing was a consequence of the reconfiguration of the district's lines alone.

The results have been as intended. Whereas Congressman Bartlett won reelection to Congress in 2010 by a 28% margin, he was routed by now-Congressman John Delaney in 2012 by a 21% margin. Congressman Delaney has won reelection ever since. The evidence shows further that, since the redistricting, Republicans' political engagement has plummeted in the counties comprising the old Sixth District. Turnout for Republican primary elections, for example, has dropped by as much as one-third in counties throughout the former district.

2. Plaintiffs sued, alleging that Maryland lawmakers specifically intended to burden their representational rights because of their past support for Congressman Bartlett, and that they suffered actual injury as a result.

The district court first dismissed the suit without convening a three-judge panel pursuant to 28 U.S.C. § 2284. Following this Court's unanimous reversal and

remand in *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015), a three-judge court was convened, and the State moved to dismiss. The district court, in an opinion by Judge Niemeyer, denied the motion (J.S. App. 80a-129a), holding that the First Amendment retaliation doctrine provides a justiciable standard for decision in partisan gerrymandering challenges. Judge Bredar dissented. J.S. App. 112a-129a.

The parties thereafter entered discovery, and plaintiffs moved for a preliminary injunction. The district court denied the motion (J.S. App. 1a-34a) over a strenuous dissent from Judge Niemeyer (J.S. App. 34a-79a). The majority held that, to establish an actual, more-than-*de-minimis* injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the outcome of every election that has taken place under the challenged map was singularly attributable to the gerrymander, and that the outcome of every future election will be as well. Judge Niemeyer disagreed, explaining that the majority had misconstrued the nature of the injury inflicted by partisan gerrymandering; plaintiffs' injury consists in official "interference with an opportunity to elect a representative of one's choice" (*Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion)), not in particular election results. Judge Niemeyer also accused the majority—in finding that the gerrymander had not effectively manipulated the outcomes of the congressional elections in 2012, 2014, and 2016—of "overlook[ing] the obvious" and adopting a "bizarre" and "abstract" theory of causation "that bear[s] no relationship to the real world evidence" at issue in this case. J.A. App. 34a.

Plaintiffs filed a notice of appeal the day after entry of the order denying their motion for a preliminary injunction (J.S. App. 130a), and they are filing herewith a jurisdictional statement seeking plenary review before this Court of that order.

ARGUMENT

Expedited consideration of the jurisdictional statement, and of the merits if the Court notes or postpones probable jurisdiction, is warranted for three interrelated reasons.

First, this is an appeal from an order denying plaintiffs' motion for a preliminary injunction. As indicated by Judge Niemeyer's energetic dissent, the judges disagreed over proper resolution of the motion, including over fundamental legal questions that underlie it. Yet denying expedited consideration of the jurisdictional statement (and of the merits if the Court orders briefing and argument) would run down the clock, risking the denial of relief by mere passage of time, regardless of whether or not this Court ultimately reverses.

Second, this Court has before it an appeal in *Gill* v. *Whitford*, No. 16-1161, which involves a complementary theory for addressing partisan gerrymanders. At the same time, the cases have their distinctions; for example, this case is a single-district challenge rather than a statewide challenge, and it rests entirely on the First Amendment retaliation doctrine rather than the Equal Protection Clause. Consideration of this case in parallel with *Gill* would present the Court with a broader spectrum of legal arguments and a more substantial record upon which to consider the issues inherent in partisan gerrymandering challenges—a benefit that is particularly important given the underlying issue of justiciability. By contrast, consideration of *Gill* on its own, uninformed by full briefing of the merits in this case, could lead the Court to overlook important arguments or to make stray statements that risk confusing the law or inadvertently foreclosing meritorious claims.

Finally, expedited treatment is warranted because this lawsuit is governed by 28 U.S.C. §§ 2284 and 1253, according to which "every reasonable means should be provided for speeding the litigation." 36 Cong. Rec. 1679 (1903) (statement of Sen. Fairbanks). This case, which has already been considered by this Court once before (see *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015)), has now been pending for four years, hanging like a cloud over Maryland politics. A decision not to expedite this appeal—and especially a decision to hold this appeal for decision in *Gill*—would draw out the litigation for an additional one or two years, including a reopening of discovery. Such an outcome (which could be avoided with expedited appellate review) would be inconsistent with the purposes of Section 2284 and the lower court's request for this Court's guidance.

This Court has expedited appeals like this in the past, on schedules similar to the schedule proposed in this motion. It should do so here.

1. To begin, expedited consideration of this appeal is warranted for all the reasons that plaintiffs' motion for a preliminary injunction was necessitated in the first place. As the Fourth Circuit recently explained, "restrictions on fundamental voting rights" necessarily risk "irreparable injury" when elections are near. *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). That is because, "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [the challenged] law." *Ibid.*

These concerns apply here with full force. As the Court repeatedly has observed, "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the

franchise." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)). That is what plaintiffs have shown—as the State's expert witness readily acknowledged. See Dkt. 177-48 at 2; Dkt. 177-49 at 39:1-4.

Preliminary injunctive relief, if any, therefore must be granted soon in order to forestall irreparable injury in the upcoming 2018 election. As we explained in proceedings below (Dkt. 191, at 20 n.12) there is yet time to adopt a new map following remand from this Court. To be sure, the candidacy deadline is presently February 27, 2018, but it is not usual to order an extension of such deadlines on motions for preliminary injunctions in circumstances like these.[1] A short extension, should one become necessary, would ensure more than adequate time to order and implement a new map before the June 26, 2018 primary date (perma.cc/3GNS-V8B8).

Against this background, expedited treatment is important to avoid denial of relief by default. To order plenary review in the ordinary course—or to hold the appeal pending disposition of *Gill*—would risk effectively affirming the denial of the preliminary injunction by passage of time, without substantive review of the very serious questions presented here. That would be particularly problematic given the majority's express request for this Court's guidance before "charging ahead" with further discovery and trial (J.S. App. 29a-33a), which we address further below.

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[1] See, *e.g.*, *Beens* v. *Erdahl*, 349 F. Supp. 97, 99-100 (D. Minn. 1972) (extending deadline from May 7 to June 26 to accommodate a new redistricting plan that was approved following this Court's remand). See also *Larios* v. *Cox*, 305 F. Supp. 2d 1335, 1342-1343 (N.D. Ga. 2004) ("[T]he court has broad equitable power to * * * extend [the candidate filing] period if * * * necessary to ensure constitutional elections."); *Republican Party of N.C.* v. *N.C. State Bd. of Elections*, 27 F.3d 563 (4th Cir. 1994) (unpublished) (affirming, in relevant part, a preliminary injunction that "extended by several weeks the deadline for filing notices of candidacy"); *Bradley* v. *Mandel*, 449 F. Supp. 983, 985 (D. Md. 1978) (preliminary injunction extending candidacy deadline from March 8 to July 13).

This Court has previously placed appeals from denials of preliminary injunctions on expedited schedules to preserve the movants' rights. See, *e.g.*, *FTC* v. *Dean Foods Co.*, 383 U.S. 901 (1966) (granting certiorari on February 18 and scheduling oral argument for March 28 in a case involving denial of a preliminary injunction).

The courts of appeals—which are perhaps the better analogue given the pendency of this case on the Court's mandatory docket—also regularly expedite appeals from denials of preliminary injunctions, particularly in election-related cases. Cf. F. Rule App. P. 2 (allowing for expedited appeals). In *League of Women Voters*, for example, the Fourth Circuit scheduled merits briefing and argument over the course of just five weeks; it ultimately reversed the district court's denial of relief with instructions to enter a preliminary injunction. See 769 F.3d at 248-249. See also, *e.g.*, *Feldman* v. *Arizona Sec'y of State*, 840 F.3d 1057 (9th Cir. 2016) (expedited briefing and argument in appeal from denial of a preliminary injunction in election-law case); *Planned Parenthood Ass'n of Utah* v. *Herbert*, 828 F.3d 1245, 1247-1248 (10th Cir. 2016) (expedited briefing and argument, followed by reversal of denial of preliminary injunction, in First Amendment retaliation case). Similar treatment is warranted in this important case, as well.

2. Accelerating consideration of the jurisdictional statement and of the merits briefing and argument, if any, is also warranted because the issues presented in this appeal are closely related to the issues presented in *Gill* v. *Whitford*, No. 16-1161. As we explained in our *amicus* brief in *Gill*, these two cases involve complementary theories for addressing partisan gerrymanders. Considering them side-by-side will thus give the Court a broader context in which to consider the constitutional principles common to both—and unique to each.

For example, the plaintiffs in *Gill* challenge Wisconsin's state legislative map on a statewide basis under the Equal Protection Clause. Their theory is organized around the idea that partisan gerrymandering "is *inherently* a statewide activity" and is best adjudicated "on a statewide basis." Mot. to Affirm 4. Wisconsin's principal argument on appeal is that "plaintiffs in a political-gerrymandering case lack standing to bring a statewide challenge." Appellants' Br. 28. Analogizing to racial gerrymandering, Wisconsin argues that plaintiffs "could only possibly have standing to challenge their own districts, based upon an allegation that their legislature's treatment of that district's lines caused them individualized harm." *Ibid.*

None of Wisconsin's concerns in this respect apply to plaintiffs' First Amendment retaliation theory or the facts of the present case. The gerrymander in Maryland's Sixth District was not a "statewide" enterprise, and plaintiffs here challenge the lines of the Sixth District alone. Indeed, statewide statistical measures of partisan symmetry would be out of place in this case; it would be no answer to the injury inflicted upon the seven plaintiffs here, in Maryland's Sixth Congressional District, to observe that far-off voters in Maryland's First Congressional District had successfully elected a Republican, or to conclude that the 2011 congressional map is otherwise "fair" to Maryland Republicans overall, according to a statewide measure of partisan symmetry. The targeted vote dilution alleged and proven in this case is specific to plaintiffs, who have suffered personal injury.[2]

What is more, the theory in *Gill* may require the Court to adopt and approve new legal and factual standards for assessing whether a statewide partisan gerry-

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[2] While the *Gill* plaintiffs cite the First Amendment three times in their merits brief (at 25, 34, and 36), they do not present a First Amendment theory that is distinct from their core equal-protection theory, grounded in the statewide concept of partisan symmetry.

mander has imposed "a *severe* impediment on the effectiveness of the votes" (*Gill* JSA109a-110a (emphasis added)), and whether the effect of a gerrymander is "large and durable" (*id.* at 16a) or, put another way, "sizable" and "persist[ent]" (*id.* at 172a-173a). These standards appear to be new in the law, and their implementation using social science metrics and other statistical measures is untested in litigation.

The theory at issue in this case does not involve any statistical linedrawing. As in any First Amendment retaliation case, plaintiffs must show only that they have suffered an actual, concrete injury. See J.S. App. 104a (a gerrymandering injury must be "tangible and concrete," meaning "the vote dilution must make some practical difference"). This standard turns on practical considerations, is familiar to the courts, and it has long defined the boundaries of the First Amendment retaliation doctrine, without trouble. Considering this case and *Gill* in parallel would thus present an opportunity for the Court to rule on the viability of partisan gerrymandering claims in a fuller and more complete way.

Parallel consideration is particularly important because Wisconsin's jurisdictional statement presents the question whether partisan gerrymandering claims are justiciable as a categorical matter (*Gill* J.S. i) and asserts that "this Court should hold that partisan-gerrymandering claims are nonjusticiable" altogether (*id.* at 40). In its merits brief (at 36), Wisconsin has hedged, inviting the Court to "hold that political-gerrymandering claims are nonjusticiable," but perhaps only "for statewide claims." Either way, Wisconsin insists that, in the years since *Bandemer*, "no litigant has identified" any "comprehensive and neutral principles" for adjudicating partisan gerrymandering claims. *Ibid.* Defendants thus describe "continued litigation on this question" to be "futil[e]" (*id.* at 37) and "fruitless" (*id.* at 23).

Needless to say, we disagree. But the point for present purposes is that, if the Court actually wishes to reach that question, it should have briefing and argument in *both* cases, presenting their distinct partisan gerrymandering theories. Maryland doubtless will say (and Judge Bredar would have held, J.S. App. 7a-17a, 112a-129a) that plaintiffs' First Amendment claim is nonjusticiable. The parties are thus certain to brief the issue. Thus, expediting merits briefing and argument in this case, so that the Court can consider these complementary theories of partisan gerrymandering together, would add critical additional context to the fifth question presented in the *Gill* jurisdictional statement. As we intimated in our *amicus* brief filed in support of neither party in *Gill*, it also would help ensure that the Court in *Gill* does not overlook important arguments or make pronouncements that risk confusing the law or foreclose distinct, meritorious claims.

This Court has previously found it appropriate to expedite review to permit parallel consideration of related cases. For example, the Court granted certiorari before judgment and expedited proceedings in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), to permit "consideration of race in university admissions in a wider range of circumstances" alongside *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). See 539 U.S. at 260. See also, *e.g.*, *Taylor* v. *McElroy*, 360 U.S. 709 (1959) (certiorari granted before judgment and proceedings expedited "because of the pendency here" of a closely related case, *Greene* v. *McElroy*, 360 U.S. 474 (1959)).

Grutter and *Gratz*, like this case and *Gill*, involved constitutional questions of surpassing public importance. Consideration of these two cases alongside one another would offer a broader spectrum and more substantial combined record upon which to consider the issues inherent in partisan gerrymandering challenges. The same

treatment is therefore warranted here. For that reason, the Court may wish to set this case and *Gill* for argument on the same date.

3. Finally, expedited treatment is warranted because this case is proceeding under 28 U.S.C. §§ 2284 and 1253, through which Congress "sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction" (*Stratton* v. *Saint Louis Sw. Ry.*, 282 U.S. 10, 14 (1930)) and to "accelerat[e] a final determination on the merits" in important cases (*Swift & Co.* v. *Wickham*, 382 U.S. 111, 119 (1965)).

Despite the applicability of Section 2284 here, this case is well on its way to status as the next *Jarndyce* v. *Jarndyce*. See Charles Dickens, *Bleak House* 85 (1853). The case first commenced in November 2013 and already has been pending for four years. Perhaps unsurprisingly in light of the need to take documents and testimony from high-ranking state officials,[3] discovery has dragged on—so much so that plaintiffs have been forced to seek preliminary injunctive relief rather than proceeding to trial in the normal course.

Declining to hear this appeal on an expedited basis would risk dragging this case out for potentially years longer. The majority below expressed its "willing[ness] to entertain requests by either party to reopen discovery * * * to address the evidentiary gaps and deficits or potential deficits flagged in this [opinion]." J.S. App. 29a. Yet the "gaps and deficits" that the majority perceived in the record are, respectfully, a consequence of the majority's legal errors. If the Court were to reverse on the grounds urged in our jurisdictional statement, no further discovery or substantial

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[3] See *Benisek* v. *Lamone*, 320 F.R.D. 32 (D. Md. 2017) (ruling on custody and control); *Benisek* v. *Lamone*, --- F. Supp. 3d. ----, 2017 WL 412490 (D. Md. Jan. 31, 2017) (ruling on legislative privilege); *Benisek* v. *Lamone*, --- F. Supp. 3d. ----, 2017 WL 959641 (D. Md. Mar. 6, 2017) (ruling on legislative privilege).

additional proceedings would be necessary. If, however, the Court were to decline expedited review of the merits of plaintiffs' claim, further discovery and trial would likely be unavoidable.

For this reason, the district court placed proceedings below in abeyance, to await this Court's "guidance" on the merits. J.S. App. 13a, 16a, 29a, 31a. The majority wished, in particular, to "insure that it is proceeding on the correct legal foundation," lest it "charg[e] ahead only to later learn that" that plaintiffs' claim is "no longer viable." *Id.* at 33a. The majority hoped it might receive that guidance from this Court's disposition of the appeal in *Gill*. But given the substantive gaps between the two cases, that is unlikely. If, for example, the Court decides *Gill* on grounds inseparable from the statewide nature of the claim in that case, the court below will receive little or no relevant guidance at all.

Meanwhile, because the majority left the door open for an ultimate grant of relief (*id.* at 29a), uncertainty hangs over Maryland congressional politics. See, *e.g.*, Editorial, *O'Malley makes the case for Hogan's reforms*, Balt. Sun (June 1, 2017), perma.cc/6MKP-5E8S. It was to avoid just such circumstances that Congress provided for three-judge court review and immediate appeal to this Court in the first place. See Leland C. Nielsen, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495, 499-500 (1975) (explaining the one purpose for speedy resolution of cases subject to Section 2284 is to avoid "disruption" imposed by pending lawsuits). Sections 2284 and 1253 are thus meant to ensure "expedite[d] decision of important cases." David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 11 (1964) (citing 81 Cong. Rec. 3153, 3254-55, 3268, 3273 (1937)). See also 148 Cong. Rec. S2142 (2002) (proceedings under Section 2284 ensure "prompt and effi-

cient resolution of the litigation"). It would run counter to Congress's goal "to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction" (*Stratton*, 282 U.S. at 14) to deny expedited treatment of this appeal.

For these reasons, the Court has previously expedited mandatory appeals from orders and judgments of three-judge district courts. See, *e.g.*, *Raines* v. *Byrd*, 520 U.S. 1194 (1997) (noting probable jurisdiction, granting the motion to expedite, requiring completion of merits briefing within four weeks, and scheduling oral argument one week following completion of briefing); *United States* v. *Eichman*, 494 U.S. 1063 (1990) (noting probable jurisdiction, granting the motion to expedite, requiring completion of merits briefing within six weeks, and scheduling oral argument one week following completion of briefing). It should do so here as well.

PROPOSED SCHEDULE

Plaintiffs propose the following schedule:

- September 15, 2017 — defendants' motion to affirm or dismiss
- September 19, 2017 — plaintiffs' opposition to defendants' motion to affirm or dismiss

This schedule would permit consideration of the jurisdictional statement at the Court's September 25, 2017 conference. For purposes of this motion, plaintiffs waive the 14-day waiting period provided for by Rule 18.7.

In the event the Court notes or postpones probable jurisdiction, plaintiffs propose the following schedule for merits briefing and argument:

- October 9, 2017 — plaintiffs' brief & any supporting amicus briefs
- October 23, 2017 — defendants' brief & any supporting amicus briefs
- October 30, 2017 — plaintiffs' reply
- November 6, 2017 — oral argument

This schedule, although accelerated, is consistent with schedules established in prior expedited cases. In addition to the schedules in the expedited cases cited in the foregoing pages, for example, the Court in *United States* v. *Booker*, 543 U.S. 220 (2005), moved from the filing of the government's certiorari petition, through merits briefing, to oral argument within 10 weeks. An argument in early November is consistent with such a schedule and would preserve plaintiffs' ability to obtain relief in time for the 2018 primaries in the event that this Court reverses.

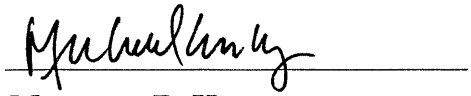
In all events, the Court should note probable jurisdiction, as the need for further proceedings below may be obviated by this Court's immediate review.

CONCLUSION

For the reasons stated, plaintiffs respectfully request that the Court expedite consideration of the jurisdictional statement according to the schedule proposed above and that, in the event the Court notes or postpones probable jurisdiction, it expedite briefing and oral argument according to the schedule proposed above.

September 1, 2017

Respectfully submitted.



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