IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Stephen M. Shapiro, et al., *Plaintiffs*, vs. David J. McManus, Jr., et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

BRIEF OF *AMICUS CURIAE*
THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW
IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Brennan Center for Justice at New York University School of Law is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice.[1] It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote of every eligible citizen and to prevent partisan manipulation of electoral rules. The Brennan Center conducts empirical, qualitative, historic, and legal research on redistricting and electoral practices and has participated in a number of redistricting and voting rights cases.

The Brennan Center takes an interest in this case because a ruling dismissing Plaintiffs' claims would undermine the principles of representative government that the Framers embedded in our Constitution and Bill of Rights, and would compromise the rights and privileges of voters, citizens, and residents in Maryland who affiliate, or might affiliate, with a political minority. These groups are entitled to protection against undue and unequal burdening of their First Amendment rights that penalizes them for exercising their freedoms of political speech, association, or affiliation.

[1] This brief is filed solely on behalf of the Brennan Center for Justice and does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States recently made clear that the Constitution should be interpreted "in light of its text, purposes, and 'our whole experience' as a Nation," and that "the actual practice of Government" should inform that interpretation. *NLRB* v. *Noel Canning*, ____ U.S. ____, 134 S.Ct. 2550, 2578 (2014) (quoting *Missouri* v. *Holland*, 252 U.S. 416, 433 (1920)); *see also Evenwel* v. *Abbott*, ____ U.S. ____, 136 S.Ct. 1120, 1123 (2016) (interpreting Constitution based on "constitutional history, this Court's decisions, and longstanding practice" of the States). When it comes to partisan gerrymandering, the text and purpose of the Constitution and the history of American democracy each vigorously supports the existence of a constitutional harm and a judicial role in protecting Americans from the use of illegitimate considerations in the political process.

Partisan gerrymandering is a perversion that cuts at the heart of the anti-manipulation and political neutrality principles embedded in numerous provisions of the Constitution, including the First Amendment and the Elections Clause of Article I, sec. 4. Guarding against manipulation and ensuring neutrality, indeed, were among the most debated issues at the Constitutional Convention in 1787 precisely because they were central to the type of new democracy the Framers envisioned. The Framers intended that the House of Representatives be a miniature of the people as a whole, with accountability to the shifting popular will imposed through "the restraint of frequent elections." The people's rights in such

elections were thought to be "equal and sacred," and essential to avoiding the unrepresentative and inequitable aspects of the British system that the American colonists had just escaped. It was against this backdrop that both the First Amendment and Elections Clause came to be.

Partisan gerrymandering of the sort undertaken by Maryland eviscerates the Framers' vision of representative democracy and the freedoms of speech, assembly, association, and petition guaranteed by the First Amendment. Where the Framers sought to enshrine a fluid, highly representative House, political gerrymanders do the opposite, rigging the process and punishing those who associate with a political party that is out of power. Rather than the responsive House envisioned by the Framers, gerrymandering has resulted in a Congress where there is less and less accountability to constituents, with both parties using technology to entrench themselves with micro-precision in so-called "safe seats". This naked use of illegitimate considerations in redistricting stands on its head the Framers' vision of the role of the House in our democracy and is contrary to the structure and text of the Constitution as well as decades of judicial decisions where courts have protected access to meaningful elections through the closely related First Amendment and Elections Clause.

This Court should look to the nation's constitutional history and protect the freedoms guaranteed by the First Amendment by denying Defendants' motion to dismiss and holding that the Constitution provides redress when a State burdens First Amendment rights or retaliates against citizens for exercising their freedoms

of speech, assembly, association, and petition. Doing so would be an important step to giving life to the Framers' vision of how our democracy ought to work, not only in Maryland but in the many other places in our nation where illegitimate partisan motive is all too frequently the driving force in redistricting decisions made by politicians.

ARGUMENT

Plaintiffs allege that they suffered injuries under the First Amendment and Article I of the Constitution when Maryland lawmakers redrew the State's congressional map in 2011 to surgically remove Republican voters from Maryland's Sixth Congressional District and replace them with Democratic voters. Contrary to the State's assertions, these claims are neither novel nor ungrounded, but, instead, are rooted in the principles of representation and political neutrality that the Framers embedded in the First Amendment and Article I and that courts have long used in a variety of contexts to protect against political manipulation. Partisan gerrymandering of the sort undertaken by Maryland similarly guts the Framers' vision for a representative democracy, upends their understanding of the purpose of the House of Representatives in our system of government, and shreds the principles of electoral neutrality embedded in the text and structure of the Constitution. It is well within the power of this Court to police those abuses.[2]

[2] This brief addresses only the constitutional harm that arises when political actors are able to manipulate district lines to achieve illegitimate partisan ends. It does not address the ancillary questions of what evidence would be sufficient to prove a violation

I. POLITICAL NEUTRALITY IN REDISTRICTING IS ESSENTIAL TO ENSURE THE TYPE OF REPRESENTATIVE DEMOCRACY ENVISIONED BY THE FRAMERS AND MANDATED BY THE CONSTITUTION.

A. The Framers believed it was important to avoid the maladies that afflicted the highly unrepresentative British parliamentary system.

In crafting a constitution for the new nation, members of the founding generation were reacting to a British parliamentary system that was highly unrepresentative.

At the time of the American Revolution, parliamentary districts in the British Isles varied greatly in the proportion of representatives to inhabitants due to rotten boroughs. Bernard Bailyn, *The Ideological Origins of the American Revolution* 165-75 (1971); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 174 (1969). Meanwhile, whole other areas under British rule, notably the American colonies, had no representation at all. *Id.* This mattered little to the British governing class of the day because of their embrace of "virtual representation." Under this theory, representation could never, by definition, be ineffective because of their view that "the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogeneous order with a fundamental common interest." *Id.* In short, while booming English industrial towns like Manchester or

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or, given that this brief is filed in connection with a 12(b)(6) motion, the evidence in this case.

Birmingham, or the fast-growing American colonies, might not have had any representation in the British Parliament, it mattered not since their interests could be represented adequately by the rural gentry and other elites.

The founding generation forcefully rejected British notions of virtual representation—which Madison called "vicious representation," and which for the Framers was equivalent to "taxation without representation." When it came time to draft the nation's new Constitution, ensuring effective actual representation for all was among the major topics debated and resolved by the Framers. Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* 16 (1965) ("In the United States, the idea of representative government was not only accepted but demanded, the memory of 'no taxation without representation' still ringing in the ears of those who developed the earliest legislative patterns.").

The Framers were determined not to recreate the problem of rotten boroughs that existed in the British system. *See Wesberry* v. *Sanders*, 376 U.S. 1, 14–16 (1964) (describing Convention delegates' references to rotten boroughs). Indeed, at the 1789 ratifying convention of North Carolina, delegate John Steele—who would become a member of the House of Representatives the next year—stated that the Constitution would not permit the creation of rotten boroughs, and that if any redistricting laws were passed that were "inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them." *Wesberry*, 376 U.S. 16 (quoting 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d Elliot ed. 1836) at 71).

B. The Framers believed it was essential to the functioning of the new nation that the House of Representatives be highly representative and reflect the opinions of all people.

In rejecting British notions of virtual representation, the Framers embraced a different, more vigorous, American vision of actual representation that saw "the right of representation [as] a natural right." Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 215 (1996) (quoting the author—possibly Thomas Paine—of *Four Letters on Interesting Subjects* (1776)). In considering how this right of representation would be embodied in the nation's new government, John Adams wrote that the representative assembly "should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them." John Adams, *Thoughts on Government Apr. 1776 Papers* 4:86-93. At the Constitutional Convention, James Wilson echoed Adams' sentiments: "The Legislature ought to be the most exact transcript of the whole Society." 1 *Records of the Federal Convention of 1787*, at 142 (Max Farrand ed., 1911) [hereinafter Farrand]. George Mason stressed: "Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel." Farrand, at 134. Mason also stated that the House of Representatives "was, so to speak, to be our House of Commons—It ought to know & sympathise with every part of the community." Farrand, at 50 (according to Madison).

James Madison, promoting ratification of the Constitution in The Federalist Papers, emphasized that the House was meant to be a "numerous and changeable body" whose membership would reflect shifting popular will. *The Federalist No. 63*,

at 305 (James Madison) (Terence Ball ed., 2003). Madison said: "[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with the people." *The Federalist No. 52*, at 256 (James Madison).

Anti-Federalist writers agreed. In the Federal Farmer, Melancton Smith called for "[a] full and equal representation . . . which possesses the same interests, feelings, opinions and views the people themselves would were they all assembled." 1 Herbert J. Storing et al., *The Complete Anti-Federalist* 17 (1981). *See also* Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 245 (1941) [hereinafter Elliot] ("The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests.") (Melancton Smith speaking at the New York ratifying convention).

This belief in a truly representative House was not idle rhetoric. Having agreed that a representative assembly should be a "portrait of the people . . . in miniature," the Framers worked to carefully structure the new Constitution to ensure that the House would keep in step with changing attitudes of the constituencies.

One way the House would be kept representative was through frequent elections and turnover of the membership of the House. Article I, Section 2

prescribes periodic election of House members by "the people" every two years. James Madison explained the necessity of short terms to the realization of the Framers' ideal form of a highly representative democracy:

> The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments . . . .

The Federalist No. 37, at 227 (James Madison).

Madison further explained:

> Frequent elections are unquestionably the only policy by which this dependence and sympathy [of the Representatives to their constituents] can be effectually secured. . . . [B]iennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents.

The Federalist No. 52, at 327 (James Madison); *see also The Federalist No. 57*, at 352 (James Madison) ("All these securities [for the fidelity of representatives to their constituents], however, would be found very insufficient without the restraint of frequent elections. Hence, . . . the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people."); 1 Paul Ford, *Pamphlets on the Constitution of the United States* 364 (1888) (James Iredell) ("[E]very two years a new body of representatives with all the energy of popular feelings will come.").[3]

[3] In their original Declarations of Rights, many States were concerned about ensuring effective representation. Various States adopted some form of a provision declaring

The danger of Congress becoming unrepresentative due to the size of districts also worried the Framers and caused extensive debate. If districts had too many people, delegates worried that representatives would "not possess a proper knowledge of the local circumstances of their numerous constituents" and might lack sympathy "with the feelings of the mass of the people." *The Federalist No. 55* (James Madison). These concerns prompted George Washington to propose that the population of districts be decreased from 40,000 persons to 30,000—the only occasion where, as chair, he addressed the convention on a substantive issue. Christopher St. John Yates, *A House of Our Own or A House that We've Outgrown? An Argument for Increasing the Size of the House of Representatives*¸ 25 Colum. J.L. & Soc. Probs. 157, 175–76 & n.112 (1992). Madison attempted to address these concerns with a proposed amendment to increase the size of the House as population grew. David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution* 470 (1996).[4]

"[t]hat the right in the people to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent . . . ." Delaware (Declaration of Rights, 1776) § 6; Maryland (From Constitution, 1776) Art. V; New Hampshire (From Constitution, 1784) Art. 10; Pennsylvania (From Constitution, 1776) Art. IV; New York (From Constitution, 1777) Art. II; Virginia (Declaration of Rights, 1776) Art. V. Those provisions, adopted just a few years prior to the Constitutional Convention, mirror the Elections Clause and reflect the same concerns of representational equality and the ability for citizens to participate in an unfettered electoral process, which in turn would lead to a responsive representative assembly.

[4] These concerns would be echoed when Congress passed the Apportionment Act of 1842, which ended the unrepresentative practice in some states of at-large

C. The Elections Clause addresses the Framers' concern that States might manipulate the electoral process or fix electoral results.

However, while the Framers designed the Constitution to provide for a House that was a miniature of the people, they were also keenly aware that forces might in the future conspire to recreate the unrepresentative aspects of the British system. They were particularly concerned about manipulation of congressional elections by the States, leading to protracted debate at the Constitutional Convention over design of the Elections Clause, which would give States the power to conduct federal elections.[5]

The Elections Clause "proved to be one of the most controversial provisions in the new Constitution" at the ratifying debates. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). On the one hand, as Madison explained, given the vastness of the nation, it made sense to leave the details of the running of elections to states, who were more attuned to local circumstances. X *The Documentary History of the Ratification of the Constitution Digital Edition* 1260 (John P. Kaminski et al. eds. 2009). At the

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congressional elections. As Sen. William Graham of North Carolina explained, single-member districts would guarantee the "personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." Cong. Globe, 36th Cong., 2d Sess. app. 749 (1842).

[5] As ultimately adopted, Article I, Section 4 of the Constitution provides that:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

same time, as discussed below, the Framers were concerned about the possibility that States, given the power to set rules for federal elections, might try to rig the system. Ultimately, the solution the Framers devised was the Elections Clause, which would leave the federal government the ultimate power over electoral rules to guard against electoral manipulation.

Without the Elections Clause, James Madison suggested, "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." Farrand, at 241.

Madison argued:

> [T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. . . . [T]he Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections. . . . It was impossible to foresee all the abuses that might be made of the discretionary power.

Elliot at 403. Rufus King, delegate for Massachusetts, echoed Madison's concerns: "If this power be not given to the [National] Legislature, their right of judging of the returns of their members may be frustrated." *Id.*

The Elections Clause proved to be central to ratification debates as well, with some delegates specifically discussing what we have come to know as partisan gerrymandering in the context of the Elections Clause. For example, during the Massachusetts ratification debates, delegate Theophilus Parsons posited that

factionalism could lead to problematic State election regulations, including district line issues:

> But a state legislature . . . when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value. They might make an unequal and partial division of the State into districts for the election of representative . . . . But the [Elections Clause] provides a remedy—A controuling power in a legislature, composed of senators and representatives of twelve States, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election.

VI *The Documentary History of the Ratification of the Constitution Digital Edition* 1218 (John P. Kaminski et al. eds. 2009); *see also Plain Truth: Reply to An Officer of the Late Continental Army*, Independent Gazetteer, Nov. 10, 1787 (describing necessity of Elections Clause to "prevent undue influence in elections [by state legislatures], which we all know but too often happens through party zeal"); *Remarker*, Independent Chronicle, Jan. 17, 1788 (arguing in favor of the Elections Clause as a way to control "inconveniences [that] might arise from the passion, or obstinacy of one State").

Courts have since made clear that the Elections Clause not only grants power but is an affirmative check on what States can and cannot do when administering elections. *Cook* v. *Gralike*, 531 U.S. 510 (2001) (striking down ballot language designed to place certain candidates for state office at political disadvantage).

D. The First Amendment also is rooted in concerns about electoral manipulation, and courts have long held the amendment requires government neutrality in the political sphere.

A similar interest in ensuring political neutrality and a level playing field also lies at the heart the First Amendment adopted almost contemporaneously with the Constitution. The six textual clauses of the First Amendment form a set of concentric circles with the democratic citizen at the focus. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, then goes on to Free Assembly protection of collective action, and culminates in protecting formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees. And, indeed, courts have long interpreted the First Amendment to protect representational rights, along with the freedom to affiliate, associate, register, or vote as one wishes without retaliation from the States.

Much of the Supreme Court's First Amendment jurisprudence, in fact, has been devoted to the proposition that government must remain neutral regarding its citizens' ideological expression and association. *See, e.g.*, *Police Department of*

Chicago v. *Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."). The political acts of voting, running for office, and registering with a political party are quintessential exercises of free speech and free association. *See, e.g.*, *Anderson* v. *Celebrezze*, 460 U.S. 780, 806 (1983) (recognizing right to run for office as act of political association between candidate and supporters); *Burdick* v. *Takushi*, 504 U.S. 428, 433–34 (1992) (noting regulation of voting burdens First Amendment rights but holding that standard of review varies with circumstances); *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality opinion) (holding that the right of "political belief and association" is at the "core of . . . activities protected by the First Amendment").

The First Amendment forbids content-based and viewpoint-based restrictions, and these restrictions extend to state legislatures' exercise of their powers under the Election Clause to regulate the times, places, and manner of elections. *See Tashjian* v. *Republican Party*, 479 U.S. 208 (1986) (upholding the power of States to set content-neutral procedures for Congressional elections).

The government may not intentionally administer elections in a non-neutral fashion to debase or dilute any person's vote for partisan purpose. *Celebrezze*, 460 U.S. at 793 ("A burden that falls unequally on [particular] political parties, . . . impinges, by its very nature, on associational choices protected by the First Amendment."); *Vieth* v. *Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in judgment) ("If a court were to find that a State did impose burdens and restrictions

on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest."); *Elrod*, 427 U.S. at 359; *Anne Arundel County Republican Central Committee* v. *State Administrative Board of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991) (Niemeyer, J., dissenting).

Elections are a formal, structured marketplace of expression. Each candidate seeks to persuade voters that his or her ideas (and the ideas of the party to which the candidate belongs) should win support. Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly. *See Tashjian*, 479 U.S. at 216–17; *Celebrezze*, 460 U.S. at 793.

II. PARTISAN GERRYMANDERS THWART THE FRAMERS' DESIGNS FOR A REPRESENTATIVE HOUSE AND UNRIGGED AND NEUTRALLY ADMINISTERED ELECTIONS.

A. Partisan gerrymanders are unrepresentative and undemocratic.

For 12(b)(6) purposes, this court must assume that the Maryland General Assembly redrew the Sixth Congressional District, not using any legitimate neutral principle, such as following municipal boundaries or preserving communities of interest, but with one illegitimate political objective in mind—converting the seat to one where Democrats would have an upper hand. This sort of illegitimate action is precisely what the Framers worried would happen.

The Framers sought to protect against "a predominant faction, in a single State, [that] should, in order to maintain its superiority, incline to a preference of a particular class of electors." *The Federalist No. 61* (Alexander Hamilton). The

Framers' vision of a representative democracy with a House that would be responsive to the people's will is thwarted by partisan gerrymandering. *See* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 314 (1991) ("[I]ntent to gerrymander is the intent to do something undemocratic."); JoAnn D. Kamuf, *"Should I Stay or Should I Go?": The Current State of Partisan Gerrymandering Adjudication and a Proposal for the Future*, 74 Fordham. L. Rev. 163, 202 (2005) ("Gerrymanders severely inhibit the role of voters in democratic institutions and subvert conceptions of the balance of power understood by the framers, and courts must step in to protect the process.").

Abusive partisan gerrymanders grant decisive power to citizens who have expressed favored political views and make it as difficult as possible for citizens with disfavored views to elect like-minded candidates. Accordingly, allowing partisan gerrymanders undermines the representational, political neutrality, and anti-manipulation values at the heart of the First Amendment and Article I.

Partisan gerrymanders also frustrate the Framers' plan for the House to reflect fluid popular majorities, and the Framers' intent that Representatives remain accountable through frequent elections.

The Supreme Court has recognized that manipulations of the electoral process are contrary to our understanding of a truly representative democracy. "Partisan gerrymanders . . . are incompatible with democratic principles." *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, ____ U.S. ____,

135 S. Ct. 2652, 2658 (2015) (brackets omitted) (quoting *Vieth*, 541 U.S. at 293 (plurality)); *id.* at 316 (Kennedy, J., concurring in judgment)). And the Court has stated that partisan gerrymanders violate the Constitution: "[A]n excessive injection of politics [in redistricting] is unlawful." *Vieth*, 541 U.S. at 292 (plurality) (emphasis omitted); *see also Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986) (plurality) ("[E]ach political group in a State should have the same chance to elect representatives of its choice as any other political group . . . . 'Diluting the weight of votes . . . impairs basic constitutional rights.'") (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964)).

B. Barring partisan gerrymandering is consistent with longstanding judicial enforcement of political neutrality in elections.

Contrary to Defendants' insistence, there is nothing new in the idea that governments must not act in a retaliatory manner when it comes to elections. In other First Amendment cases, the Court has repeatedly ruled that viewpoint-based regulations of speech cannot be defended as mere time, place, or manner regulations. *See, e.g.*, *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972) (holding that regulation based on non-neutral subject matter rather than time, place and manner restrictions "is never permitted"); *Carey* v. *Brown*, 447 U.S. 455, 470 (1980).

The judiciary similarly has long taken action to check electoral manipulation under the closely related provisions of the Elections Clause. In *Cook* v. *Gralike*, the Supreme Court held that electoral mechanisms designed to "place their targets at a

political disadvantage" are outside States' Elections Clause authority. 531 U.S. at 525 (invalidating indication on ballot of candidates who exceeded "suggested" term limits approved by voters). According to the Court, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id.* at 523. Indeed, as the Chief Justice and Justice O'Connor noted in their concurrence in *Cook*, 531 U.S. at 530–32, the Elections Clause mirrors the First Amendment in forbidding content-based, let alone viewpoint-based, time, place, or manner regulations. *Cf. Tashjian* v. *Republican Party*, 479 U.S. 208 (1986) (upholding power to set content-neutral procedures for Congressional elections).[6]

Use of the neutrality principles of the First Amendment to bar partisan gerrymandering also is consistent with the parallel development of the Supreme Court's "one person, one vote" cases under the Equal Protection Clause where the Court made clear that population deviations in redistricting plans can be struck down if they are motivated by an illegitimate purpose, such as political manipulation. In *Cox* v. *Larios*, 542 U.S. 947 (2004), for example, the Court

[6] *See also Anne Arundel County Republican Central Committee* v. *State Administrative Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (Niemeyer, J. dissenting) (State violates the Elections Clause when, "using data about voters' political party registrations, their past voting habits, and their race, [the State draws] congressional district lines to . . . gerrymander in an attempt to control the outcome of future congressional elections [and] dilute[] the vote of [the disfavored political party]").

affirmed a district court decision striking down the use of population deviations to pack Republican voters into a small number of districts. In an opinion concurring in the affirmance, Justice Stevens, joined by Justice Breyer, relied on the "one person, one vote" principle in approving the decision to invalidate a redistricting plan that sought to give an electoral advantage to incumbents from one party over other candidates. *Larios,* 542 U.S. at 949 (Stevens, J., concurring in the affirmance).

III. THE NEED TO GUARD AGAINST ELECTORAL RIGGING AND A LACK OF POLITICAL NEUTRALITY IS ALL THE MORE IMPORTANT TODAY.

Judicial oversight of redistricting is all the more important today because of one thing that the Framers did not foresee, namely the emergence of political parties operating at both the state and federal levels that work in tandem to manipulate the electoral process and undermine the Framers' vision of a representative House. Although the Framers recognized the possibility of parties or factions dominating the system, their check—the Elections Clause—has increasingly been neutralized by the fact that the same political players control Congress as well as state legislatures. In today's environment of increasingly antagonistic two-party politics, the judiciary alone can check legislative abuses of power that violate First Amendment freedoms.

The evidence of partisan gerrymandering and its effects is stark and abounding. Madison expected that "[e]very new election in the states, [will be] found to change one half of the representatives." *The Federalist No. 62*, at 303

(James Madison). In 2014, however, general election candidates defeated incumbent Representatives not fifty percent of the time, as Madison expected, but *less than five percent* of the time. Of the 390 incumbents on the ballot in November 2014, 377 were re-elected.[7] Professor Pamela Karlan blames this phenomenon in substantial part on redistricting: "It used to be that . . . once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents. . . . Congressmen are more likely to die or be indicted than they are to lose a seat."[8] Fiercely partisan redistricting does not simply protect incumbents—it allocates 95% or more of House seats to one party or the other. Many districts are designed to make it a fool's errand to challenge the candidate of the party the district was designed to elect. Statistician Nate Silver estimated that of the 435 districts in the House of Representatives, there are only 35 "swing districts"—districts "in which the margin in the presidential race was within five percentage points of the national result."[9] In 2014, the Pew Research Center observed that "there are only 14 truly competitive House elections this

[7] Steven S. Smith, Jason M. Roberts, and Ryan J. Vander Wielen, *The American Congress*, Cambridge University Press, 2015 (9th ed.).

[8] Jeffrey Toobin, *Drawing the Line*, The New Yorker (Mar. 6, 2013), http://www.newyorker.com/magazine/2006/03/06/drawing-the-line-3 (quoting Pamela Karlan).

[9] Nate Silver, *As Swing Districts Dwindle, Can a Divided House Stand?*, N.Y. Times, (Dec. 27, 2012, 9:46 AM), http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand/.

year."[10] To be sure, gerrymandering is not the sole cause of this effect, but political operatives know that it plays a significant and (to them) valuable role, as evidenced by the massive amounts that both parties pour into efforts to control state legislatures in the lead up each redistricting cycle.[11]

There is no lack of means for States that wish to preserve or improve one party's representation in House seats; it is easy to gerrymander districts. Manipulating districts to protect incumbents can result in a significant disconnect between the proportion of voters who are loyal to a party, on the one hand, and that party's share of seats in the House of Representatives, which was designed to reflect the attitudes of the whole of the people. This issue impacts both major parties. In 2014, Democrats won 47% of the two-party vote but only 43% of the seats.[12] Political analyst David Wasserman reasoned that "Democrats are winning way too many of their districts by 100,000 votes and losing too many districts by 20,000 or

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[10] Drew DeSilver, *For Most Voters, Congressional Elections Offer Little Drama*, Pew Research Center (Nov. 3, 2014), http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressional-elections-offer-little-drama/.

[11] David Daley, *The GOP Rigged the House: Even a Massive Donald Trump Defeat Wouldn't Give Democrats Control* (April 1, 2016), http://www.salon.com/2016/04/01/no_democrats_wont_take_the_house_pretending_otherwise_isnt_just_bad_journalism_its_punditry_as_fantasy/.

[12] Rebecca Ballhaus, *Deep Loss by Democrats Obscures Party's Numbers Problem*, Wall Street Journal, Nov. 24, 2014, *available at* http://blogs.wsj.com/washwire/2014/11/24/loss-by-democrats-obscures-partys-numbers-problem/.

30,000 votes."[13] The disconnect is even more pronounced in States like Maryland, where political leaders have drawn districts specifically intended to benefit one party. In 2014, 57% of the votes in House races went to Democrats, yet Democrats won 87.5% of the House seats—taking all but one of Maryland's eight seats.[14]. Pennsylvania is another example: in 2012, voters in House races in the Keystone State cast 2,701,820 votes for Democrats (50.7% of the total vote) and 2,626,995 votes for Republicans (49.3% of the total vote). If the 18 House seats up for grabs in the 2012 Pennsylvania election were divided in proportion to the total vote, one would have expected nine of the seats (50%) to go to Democrats and the other nine (50%) go to Republicans. Yet Pennsylvania elected five Democrats (27.8%) and thirteen Republicans (72.2%).[15] Similarly, in 2014, North Carolina Democratic candidates only secured three out of 13 seats (23%) despite the fact that the Democratic candidates across the State won roughly 44% of the vote.[16]

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[13] *Id.*

[14] *See* Ballotpedia, *United States House of Representatives elections in Maryland, 2014, available at* https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Maryland,_2014 (last visited May 19, 2016).

[15] Nathan S. Catanese, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J.L. Ethics & Pub. Pol'y 323, 329 (2014).

[16] Lee Fang, *Gerrymandering Rigged the 2014 Elections for Republican Advantage*, The Nation (Nov. 5, 2014), http://www.thenation.com/article/gerrymandering-rigged-2014-elections-republican-advantage/.

We have "a system of government that relies upon the ebbs and flows of politics to 'clean out the rascals.'" *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting). A House in which 400 seats are essentially locked up by one party or the other is not the responsive body the founding generation had in mind. *See* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & Pol. 653, 675 (1988) (noting that representatives in gerrymandered districts can "pursue their self-interests at the expense of their constituents' interests with less fear of being unseated"). An entrenched legislature lacks the essential democratic feature of accountability to the people. By honoring the Framers' representational goals and principles of political neutrality and anti-manipulation they embedded in the Constitution, the judiciary can ensure that the House functions as the Framers intended.

CONCLUSION

Defendants' motion to dismiss seeks to preclude judicial review of even the most drastic partisan gerrymanders through which state legislatures violate the First Amendment freedoms of their voters, citizens, and residents and abuse their power under the Elections Clause. Such partisan gerrymandering undermines a central part of the Framers' vision for the nation's democracy. Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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