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

OPPOSITION TO
MOTION TO DISMISS

Michael B. Kimberly, Bar No. 19086
Paul W. Hughes, Bar No. 28967
Jason R. LaFond, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes and Rules

Other Authorities

INTRODUCTION

Following the 2010 census, the State of Maryland enacted a new congressional districting plan (the Plan). The goal of the Plan—openly admitted by members of the Governor's Redistricting Advisory Committee (GRAC) and various legislators—was to "crack" the Republican majority in the old Sixth Congressional District, where voters had, for the past two decades, successfully elected a Republican to the United States House of Representatives. To that end, the GRAC expressly considered Marylanders' political-party registrations and voting histories in making decisions about where to draw the lines for the new Sixth District. In so doing, it set out to prevent Republicans from electing the representative of their choice by moving majority-Democrat areas into, and majority-Republican areas out of, the district. The result was as intended: the Plan diluted the votes of Republicans in the Sixth Congressional District to such a degree that they were unable, as they had in the prior ten contests, to elect a Republican representative from the district in 2012 and 2014.

The 2011 redistricting plan—adopted with the purpose and effect of burdening voters in the old Sixth District by reason of their affiliation with the Republican Party and their voting histories—is a manifest violation of the Constitution's protection of political association and expression. "Under [the Supreme Court's] sustained precedent, conditioning [burdens] on political belief and association plainly constitutes an unconstitutional condition" absent the narrow pursuit of a "vital interest." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 78 (1990). Thus, citizens' "First Amendment interest [in] not [being] burden[ed] . . . because of their participation in the electoral process, their voting history, [or] their association with a political party" is violated

when "an apportionment has the purpose and effect of burdening a group of voters' representational rights" by reason of such participation, history, and association. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment). That is the theory presented in the complaint.

Defendants offer two principal responses to this theory of the case, neither of which is persuasive. *First*, they insist that "the plaintiffs have failed to plead a manageable standard for adjudicating" their claims and that the case therefore "should be dismissed as non-justiciable." MTD 10. That misunderstands the First Amendment theory. Unlike prior attempts to solve the partisan gerrymandering problem, the First Amendment retaliation test does not turn on vague notions of "fairness" or academic concerns about abstract "representational rights," for which there are no "clear, manageable, and politically neutral standards for measure[ment]." *Vieth*, 541 U.S. at 307-308 (Kennedy, J., concurring in judgment).

The First Amendment standard for evaluating the burden imposed by a partisan gerrymander instead asks a single, simple question—one as firmly grounded in settled constitutional doctrine as it is in common sense: Has the State's deliberate dilution of votes imposed a real and concrete adverse impact on supporters of the disfavored political party? That question accommodates the Supreme Court's repeated admonition that vote dilution does not make a constitutionally significant difference *until it actually makes a difference*. The Court need not decide how that standard applies in all cases, but its applicability in *this* case could hardly be clearer: The State's purposeful shuffling of citizens in and out of the Sixth District by reason of their party affiliations and voting histories has succeeded in diluting Republican votes in the old Sixth District

to such a degree that it changed the outcome of the election there in 2012 and 2014, preventing Republicans from electing the representative of their choice as they otherwise would have been able to do. In this way, the Plan has imposed "significant penalties . . . for the exercise of rights guaranteed by the First Amendment" (*Rutan*, 497 U.S. at 74) and—unless the Sixth District's lines are shown to be narrowly drawn to serve a vital state interest—the district lines must be invalidated. There is nothing unmanageable about that straightforward claim.

Second, defendants assert that a congressional redistricting cannot violate the First Amendment unless it *directly* limits citizens' freedom to express their political views, endorse a candidate for office, or otherwise participate in the political process. Because the Plan does none of those things, they reason, it cannot be said to violate the First Amendment. That, too, misunderstands the complaint. It is black-letter law that the States are forbidden not only from directly limiting expressive conduct protected by the First Amendment, but also from *indirectly* burdening such conduct by retaliating against citizens for engaging in it. Thus, the State may not condition benefits or burdens on citizens' political-party affiliations or voting histories. The complaint is founded on just such a retaliation theory—and as to that theory, defendants offer no response at all. The motion accordingly should be denied.

BACKGROUND

A. The allegations

1. Following the 2010 census, the GRAC drafted a proposal for Maryland's congressional-district lines without any meaningful Republican input. SAC ¶¶ 39, 44-48. The proposal was approved by a 4-1 vote over the dissent of its lone Republican

committee member (*id*. ¶ 48) and was sent to Governor O'Malley without public disclosure or comment (*id*. ¶ 45). "In private briefings . . . GRAC members assured Democratic lawmakers that the map would increase the Democratic Party's power in Congress." *Id*. ¶ 96.

Although "[t]he GRAC drew its proposed redistricting map with no input or participation from Republican lawmakers," it did "have access to the Maryland Board of Elections statistical data, which provides highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State." SAC ¶ 46. The voting information available to the GRAC—including voter registration data by precinct, election-day turnout data by precinct and party, and party share of the vote by precinct—"allowed the committee to analyze voting patterns and political affiliation at a granular level." *Id*. ¶ 47.

The bill establishing Maryland's congressional-district lines was introduced in the state senate on a Monday morning, and was passed by the Democrats in both houses without a single Republican vote of support, and signed by the Governor four days later. SAC ¶¶ 49-52. Democratic members of the Maryland legislature proudly defended the partisan nature of the 2011 redistricting as a response to Republican gerrymanders in North Carolina, Ohio and elsewhere. *Id*. ¶¶ 95, 100.

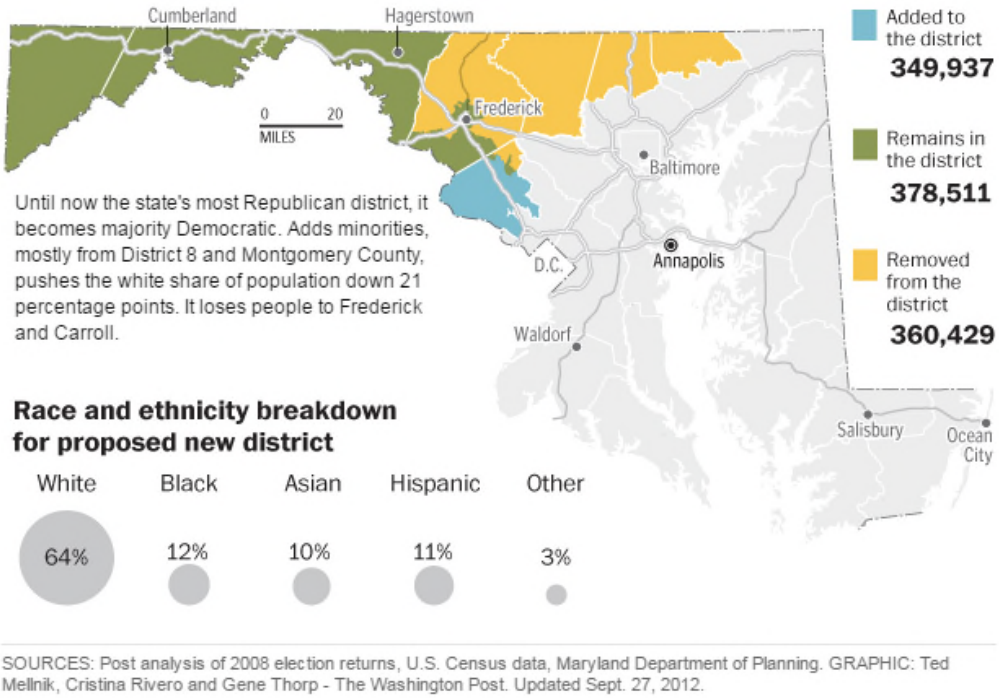
2. The purpose of the GRAC's focus on voting history and party affiliation was unmistakable: The committee set out to "crack" the historically Republican Sixth District by moving Republican voters out of the district and moving Democratic voters in, all to prevent Republican voters in the region from electing the congressional representative of their choice. SAC ¶¶ 3-4, 93-102. Prior to the Plan, the Sixth District

was a relatively rural, conservative, and historically reliable Republican district (SAC ¶ 78) in which registered Republicans comprised 47% of the electorate, outnumbering registered Democrats by a wide margin (*id*. ¶ 84). For the previous twenty years, the people of the Sixth District had elected Republican Roscoe Bartlett to represent them in the House. *Id*. ¶¶ 62, 78. In 2010, for example, Representative Bartlett won re-election in a landslide, by a 28-point margin. *Id*. ¶ 78.

The Plan was openly intended to bring an end to the historical Republican dominance of the Sixth District. SAC ¶¶ 3-4, 93-102. For example, Delegate Curt Anderson, a Democrat who supported the Plan, described a briefing given by GRAC Chair Jeanne Hitchcock about the redrawn Sixth District: "It reminded me of a weather woman standing in front of them saying, 'Here comes a cold front,' and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." *Id*. ¶ 96.

To that end, the Plan removed over 360,000 residents from the mostly-Republican northern counties of the district and added nearly 350,000 residents from predominantly Democratic and urban Montgomery County (SAC ¶ 81)—a massive reshuffling of the Sixth District's composition that could not possibly have been explained by the modest changes in regional population distribution over the preceding decade (*id*. ¶ 120). In particular, the Plan removed from the Sixth District all of Carroll County, which had voted 68% Republican and 27% Democratic in the previous congressional election. SAC ¶ 81. The removal of Carroll County generated a net loss of over 24,000 registered Republican voters from the district. *Id*. The Plan also moved specific, majority-Republican precincts of Frederick County to the Eighth District, while leaving the majority-Democratic precincts of the county in the Sixth District, facilitating a net

loss of more than an additional 12,500 Republicans voters from the district. *Id.* ¶ 82. And the Frederick County precincts that remained in the Sixth District contained over 6,000 more registered Democrats than registered Republicans. *Id.* The transfer of voters from Montgomery County followed an inverse pattern: Of the Montgomery County precincts that were added to the Sixth District by the Plan, registered Democrats outnumbered registered Republicans by a two-to-one margin. *Id.* ¶ 83.



SOURCES: Post analysis of 2008 election returns, U.S. Census data, Maryland Department of Planning. GRAPHIC: Ted Mellnik, Cristina Rivero and Gene Thorp - The Washington Post. Updated Sept. 27, 2012.

In total, the GRAC intentionally transferred over 65,000 Republican voters out of the Sixth District and over 30,000 Democratic voters into the district by reason of those voters' party affiliations and voting histories. SAC ¶¶ 38, 84, 101. As a result, Republican voters, who had comprised 47% of voters in the district before the Plan, comprised just 33% of Sixth District voters after the Plan. *Id.* at ¶84.

The results were crushingly effective. Whereas Republican voters in the old Sixth District had been able to elect incumbent Roscoe Bartlett in each of the past ten

elections (*id.* ¶¶ 4, 62, 78), Democrat John Delaney defeated Bartlett in the 2012 election by a whopping 21-point margin (*id.* ¶ 86), as the 10-term Congressman's share of the vote plummeted from 61% to 38% in a single election cycle (*id.*).

B. Procedural background

1. Plaintiffs filed a complaint alleging that the Plan violates the First Amendment and Article I, Section 2 of the United States Constitution. ECF No. 1. Judge Bredar dismissed the complaint without convening a three-judge court (ECF No. 22), but the Supreme Court reversed the Fourth Circuit's summary affirmance and remanded the case for the convention of a three-judge district court under 28 U.S.C. § 2284(a). After remand, plaintiffs filed a second amended complaint (ECF No. 44) (SAC), which is the subject of the motion to dismiss (ECF No. 51) and continues to allege violations of the First Amendment and Article I.

With respect to both claims, the complaint alleges that the Plan burdens and penalizes plaintiffs by reason of their political party affiliations and voting histories. Borrowing from the Supreme Court's political patronage and First Amendment retaliation cases, the complaint presents a familiar three-step test for determining whether the Plan violates the Constitution. *See* SAC ¶ 7.

It alleges, *first*, that the GRAC expressly considered Republican voters' protected First Amendment conduct, including their voting histories and political party affiliations, in deciding where to draw the lines of the new Sixth District (*e.g.*, SAC ¶¶ 38, 59, 101), and that it did so with the acknowledged purpose to disfavor and adversely affect those voters by reason of their constitutionally protected conduct (*e.g.*, *id.* ¶¶ 38, 93, 95-97). It alleges, *second*, that the Plan did in fact adversely affect and

burden Republican voters in the old Sixth District[1] by diluting their votes so effectively as to prevent them from electing a Republican representative (as they had in each election over the prior two decades) in 2012 and 2014. *Id.* ¶¶ 38, 85-87. And it alleges, *finally*, that defendants cannot meet their responsive burden to show that the Sixth District's lines were narrowly tailored to achieve a vital state interest, rather than the legislature's partisan objectives. SAC ¶¶ 120-128.

2. Defendants moved to dismiss. ECF No. 51. The motion asserts, in the main, that the "the plaintiffs fail to set forth a discernible, manageable standard that would permit this Court to adjudicate their claims" and therefore that the claims "are non-justiciable and must be dismissed." MTD 14. "In developing a manageable standard," defendants argue, "'[t]he challenge is not just administrability; it is constitutional line-drawing.'" MTD 12 (quoting *Radogno v. Ill. State Bd. of Elections*, 2011 WL 5868225, at *4-5 (N.D. Ill. 2011)). "'The law requires an objective, measurable standard that admits of rational judicial resolution *and* is a direct and non-arbitrary implication of accepted constitutional norms.'" *Id.* (quoting same).

Defendants assert that "a fair reading of the complaint suggests that plaintiffs propose, as an appropriate constitutional standard, 'zero tolerance' for partisan consideration in redistricting by a state legislature." MTD 14. Without further explanation, they conclude that, "[i]f this really is what plaintiffs mean to offer as a

[1] Republican voters moved from the old Sixth District to the new First District (the latter of which is currently represented by Republican Andrew Harris) arguably have not suffered the same kind of burden as other Republicans who are now in the Sixth, Seventh, and Eighth Districts. For simplicity's sake—and because it's not pertinent to any of the plaintiffs' cases—that is not a distinction that we belabor here.

standard, for the reasons discussed above, controlling Supreme Court precedent plainly demands the speedy dismissal of the complaint." MTD 15.

Defendants posit that the complaint might alternatively be interpreted to rely on "a 'totality of circumstances' and burden-shifting approach analogous to that employed in racial gerrymandering cases." MTD 15. But, they assert, "the Supreme Court has already concluded that such a standard does not provide a workable approach to deciding allegations of political gerrymandering." *Id*. Thus, "[p]laintiffs' inability to provide an adequate standard by which to adjudicate their partisan gerrymandering claim requires dismissal at the pleading stage." MTD 17.

On the merits, defendants say that "[t]he drawing of district lines—even assuming those lines make some political outcomes more likely than others—imposes no burden on an individual's rights of expression, association, or to petition the government." MTD 18-19. That is because, in their view, "[p]laintiffs have the same rights in their current districts to speak out and associate politically as they would have if they were assigned to other districts," and "[c]hanging district lines has no impact on those rights." MTD 19. Thus, defendants conclude, "the plaintiffs identify no constitutional principle that requires that the Republican Party have two safe districts in Maryland" or that otherwise suggests that "the creation of a competitive or Democratic-leaning district from a previously Republican-leaning or safe district, violates their associational, expressive, or representational rights." MTD 22.

STANDARD OF DECISION

The question presented by defendants' motion to dismiss is whether the complaint has stated a claim upon which relief can be granted. *See* Fed. R. Civ. P.

12(b)(6). In determining the answer to that question, the Court must "assume the truth of the facts as alleged in [the] complaint." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). "[C]ourts should 'be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability' is 'novel' and thus should be 'explored.'" *Wright v. N. Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (quoting 5B Charles Alan Wright et al., *Federal Practice & Procedure* § 1357 (3d ed. 2015)).

ARGUMENT

Defendants' motion to dismiss is based in equal parts on a misunderstanding of the political question doctrine and a misconstruction of the complaint. The simple truth is that plaintiffs' claims can and must be resolved by reference to traditional, manageable legal principals; the complaint here suffers none of the theoretical abstractions or other obstacles that have hindered prior gerrymandering lawsuits.

On the merits, the complaint's request for relief rests on well-settled constitutional norms providing that a State violates the First Amendment no less when it indirectly burdens citizens for engaging in protected conduct than when it restricts such conduct directly. The motion accordingly should be denied, and the case should proceed through discovery and trial as expeditiously as possible.

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE

A. The Supreme Court has held that partisan gerrymandering claims are justiciable

1. The starting point for all federal lawsuits is "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of [Article] III." *Schlesinger v. Reservists Comm. to Stop the*

War, 418 U.S. 208, 215 (1974). Relevant here is the arm of the justiciability inquiry known as the political question doctrine.

The Supreme Court has emphasized two circumstances that implicate the "narrow" political-question exception: those in which there is "'a textually demonstrable constitutional commitment of the issue to a coordinate political department'" and those in which there is "'a lack of judicially discoverable and manageable standards for resolving [the controversy].'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

"The second [circumstance] is at issue here"; it reflects the truism that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion). The rationale underlying that truism is clear: In the judicial sphere, unlike in the political sphere, ad hoc decision-making will not do; "judicial action must be governed by *standard*, by *rule*." *Id.* And the absence of an objective standard typically attends "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll. v. Am. United for Sep. of Church & State*, 454 U.S. 464, 475 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 500 (1975)). In such cases, the "lack of judicially discoverable standards" indicates the commitment of the question to the "political departments," requiring dismissal. *Baker v. Carr*, 369 U.S. 186, 214 (1962).

That is not to say, however, that all cases with political consequences necessarily involve nonjusticiable political questions. *See Davis v. Bandemer*, 478 U.S. 109, 122

(1986) (the doctrine "'is one of political *questions*, not one of political *cases*'") (emphasis added) (quoting *Baker*, 369 U.S. at 217). On the contrary, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action . . . exceeds constitutional authority" simply because the action is "denominated 'political.'" *Id.* When "well developed and familiar" judicial standards for decision are available (*Baker*, 369 U.S. at 226), courts have a responsibility to render judgment—they "cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky*, 132 S. Ct. at 1428 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

2. Plaintiffs allege that Maryland's 2011 redistricting plan is an unlawful partisan gerrymander. Although the Supreme Court has yet to endorse a particular standard for deciding such claims, it has repeatedly affirmed that partisan gerrymandering lawsuits do *not* present nonjusticiable "political question[s]" but rather "justiciable controvers[ies]" amenable to resolution by the courts. *Bandemer*, 478 U.S. at 118, 125-127 (six-justice majority opinion).

In *Bandemer*, the Court considered a claim under the Equal Protection Clause that "each political group in a State should have the same chance to elect representatives of its choice as any other political group" and quickly "decline[d] to hold that such claims are never justiciable." 478 U.S. at 124. Analogizing to racial gerrymandering cases, the Court explained that "[the fact] that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Id.* at 125. The plurality there ultimately rejected the plaintiffs' claim because, although they had shown intentional discrimination against Democrats, they had failed to prove anything more than a *de minimus* effect. *Id.* at 133-134 (plurality). In the sensitive

area of redistricting, the plurality explained, it is "appropriate to require allegations and proof that the challenged [redistricting] plan has had or will have effects that are sufficiently serious to require intervention by the federal courts." *Id*. at 134 (plurality).

The Court reexamined *Bandemer* in *Vieth*. Although a plurality of justices in *Vieth* would have overruled *Bandemer* and held partisan gerrymandering claims non-justiciable (541 U.S. at 271-306), five justices declined to go that far. *See Wright*, 787 F.3d at 268-269. Instead, Justice Kennedy—in a controlling concurring opinion (*see* footnote 4, *infra*)—refused "to bar all future claims of injury from a partisan gerry-mander" as nonjusticiable. 541 U.S. at 309 (Kennedy, J., concurring in judgment). Thus, "Justice Kennedy . . . left open the possibility that a suitable standard might be identified in later litigation." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015) (*AIRC*).

What is more, Justice Kennedy went on, "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering." 541 U.S. at 314. "After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views," and "[u]nder general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest." *Id*. (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)). Justice Kennedy nevertheless found judicial intervention "improper" in *Vieth* because the plaintiffs there had failed to offer manageable "standards for measuring the burden a gerrymander imposes on representational

rights." *Id*. at 317. But "[i]f workable standards do emerge to measure these burdens," he explained, "courts should be prepared to order relief." *Id*.

The Court next addressed partisan gerrymandering in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). There, the plaintiffs argued that proof of an exclusive partisan motivation for conducting a mid-decennial redistricting was per se unconstitutional; but the Court rejected that theory because, in Justice Kennedy's words, "a successful test for identifying unconstitutional partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id*. at 404 (opinion of Kennedy, J.).

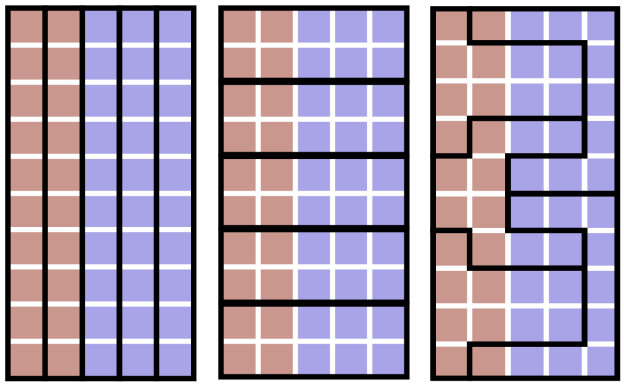
B. The complaint offers an objective, rational standard for determining when an impermissible partisan gerrymander has occurred

The First Amendment theory offers here what was missing in *Vieth* and *LULAC*: a clear and objective standard for identifying a constitutionally significant burden on the plaintiffs' representational rights.

That standard is the product of two principal differences between this case and prior cases. *First*, plaintiffs' complaint challenges the lines of the Sixth District alone. As a consequence, plaintiffs bear the burden of proving an adverse impact only within the limits of the old Sixth District, which is a substantially less complex task than proving burden across multiple districts at once. *See, e.g.*, *Vieth*, 541 U.S. at 346 (Souter, J., dissenting) ("we would have better luck at devising a workable prima facie case if we concentrated as much as possible on . . . individual districts instead of statewide patterns"). *Second*, our theory of the case is predicated on the First Amendment, which brings with it a well-settled framework for decision, including the requirement

that plaintiffs establish a concrete adverse impact. That is exactly what we have here: Maryland's 2011 partisan gerrymander inflicted a constitutionally significant burden because it succeeded in diluting votes of Republican voters to such a degree that it effectively determined the outcome of the election in the Sixth District, preventing Republicans there from electing the candidate of their choice.

This approach is grounded not only in settled First Amendment doctrine, but in the law of partisan gerrymandering itself. "The term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Vieth*, 541 U.S. at 274 n.1 (plurality) (quoting *Black's Law Dictionary* 696 (7th ed. 1999)).[2] The purpose of such "vote dilution" is to ensure that the disfavored group has "'less opportunity . . . to elect candidates of their choice.'"



[2] A graphic depiction demonstrates how vote dilution works. Imagine map-drawers working for a divided government have apportioned a district map so that members of the Red Party and Blue Party are able to translate their votes into electoral success with equal efficiency, as shown in the map on the *left*. This map has what is called "partisan symmetry." But suppose that in the next election, the Blue Party takes power in both the legislature and governor's mansion, and after the following census, it draws district lines to dilute Red Party votes. That is the map in the *middle*; as a result of "vote dilution," the Red Party is unable to translate any of its votes into electoral victory. In the inverse situation—in the map on the *right*—the Red Party takes power and draws district lines to dilute Blue Party votes, so that the Blue Party's 60% vote share translates into just 40% of the congressional delegation. Although the State's political and geographic composition is identical both before and after the two redistricting measures, the outcome of the elections after each differs dramatically based on which party is able to dilute the votes of the other party.

Bandemer, 478 U.S. at 131 (plurality). The proposition that vote dilution ought to be actionable when it actually produces a demonstrable and concrete adverse impact (here, preventing Republicans in the old Sixth District from electing a particular candidate of their choice) is simple common sense.[3]

The concrete adverse-impact requirement recognizes, moreover, that vote dilution is not inherently unlawful. *Cf. LULAC*, 548 U.S. at 419-420 (opinion of Kennedy, J.). Indeed, some degree of vote dilution is inevitable in every redistricting, as map-drawers and legislatures weigh and balance legitimate and competing re-districting policies. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 837 (2015). The question that has stymied courts since *Bandemer* is how to determine when a map's imposition of partisan vote dilution crosses the constitutional line—when the vote dilution of a partisan gerrymander is "sufficiently serious to require intervention by the federal courts." *Bandemer*, 478 U.S. at 134 (plurality).

Under the First Amendment, the answer to that question turns not only on the degree of vote dilution that results from the apportionment, but also on *how* and *why* it has been brought about. As Justice Kennedy stated in *Vieth*, partisan vote dilution crosses the constitutional line when the redistricting plan that inflicts it "has the *purpose and* effect" of diluting the votes of "a group of voters or their party . . . by

[3] To be clear, "'[c]oncrete' is not . . . necessarily synonymous with 'tangible.'" *Spokeo v. Robbins*, No. 13-1339, slip op. 8-9 (May 16, 2016). "Although tangible injuries are perhaps easier to recognize, [the Supreme Court has] confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Id.* at 9 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise)).

reason of their views," and there is no "compelling government interest" that otherwise saves the map from invalidation. 541 U.S. at 314 (emphasis added). As we explained in the complaint (at ¶ 7), that approach breaks down into three inquiries:

1. Did the State consider citizens' protected First Amendment conduct in deciding where to draw district lines, and did it do so with an intent to dilute the votes of those citizens by reason of their protected conduct?

2. If so, did the redistricting map, in actual fact, dilute the votes of the citizens whose constitutionally-protected conduct was taken into account to such a degree that it imposed a concrete adverse impact?

3. If so, was the map necessary as drawn to achieve some compelling state interest?

When the answers to the first two questions is "yes," and the answer to the third question is "no," the redistricting map's imposition of partisan vote dilution violates the First Amendment. We defend the merits of this First Amendment argument in Part II of this brief. For now, it suffices to observe that this framework rests on objective and rational standards that readily permit judicial determination of the claims presented in the complaint.

On that front, we begin with the irrefutable observation that the first and third elements of our framework are justiciable. Courts regularly adjudicate the question of legislative intent. Indeed, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended" (*Bandemer*, 478 U.S. at 129)—an observation that assuredly applies here. *See* SAC ¶¶ 95-102. Similarly, courts routinely analyze redistricting maps to determine whether they were narrowly tailored to serve a compelling state interest, sufficient to justify some otherwise ill effect. *See, e.g.*, *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273-1274 (2015). With respect to those two elements, "[the

fact] that the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability." *Bandemer*, 478 U.S. at 125.

The only question, therefore, is whether the second element of the First Amendment framework—the element that requires us to show that that the Plan did in fact dilute the votes of Republican voters in the former Sixth District to a constitutionally significant degree—is justiciable in federal court. It plainly is. Indeed, with respect to proving a constitutionally-significant burden, the First Amendment's adverse-impact requirement could hardly be simpler or more familiar.

Setting aside the merits, there is nothing unmanageable about the First Amendment retaliation test. It asks an objective question that can be answered with traditional evidence, by reference to ordinary legal standards. Applying this standard does not require the Court to answer an "abstract question[]," resolve a "generalized grievance[]," (*Valley Forge*, 454 U.S. at 475), "make a nonjudicial policy determination," or "resort to a standard that is not judicially manageable" (*Bandemer*, 478 U.S. at 148 (Justice O'Connor, concurring in judgment)). Nor is plaintiffs' complaint that they have "suffer[ed] in some indefinite way in common with people generally" or with respect to some "indeterminable, remote, [or] uncertain" injury. *Valley Forge*, 454 U.S. at 478 (quoting *Doremus v. Bd. of Educ.*, 342 U.S. 429, 433 (1952)).

"Instead, [plaintiffs] request[] that the courts enforce a specific [constitutional] right" not to be penalized in a *concrete* way. *Zivotofsky*, 132 S. Ct. at 1427. "To resolve [the] claim, the Judiciary must decide if [plaintiffs'] interpretation of the [First Amendment] is correct," which "is a familiar judicial exercise." *Id.* And in cases like this, where a statute "is alleged to conflict with the Constitution, '[i]t is emphatically the

province and duty of the judicial department to say what the law is.'" *Id*. at 1427-28 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

To be sure, the Supreme Court came to a different conclusion with respect to the theory presented in *Vieth*. But none of the manageability problems present in that or other cases is present here: We are not asking the Court to decide whether the vote dilution inflicted by the Plan is a constitutionally significant burden in the abstract, based on some vague notion of "fairness" under the Equal Protection Clause. *Vieth*, 541 U.S. at 291 (plurality). Nor does our standard rest on a made-up "right to proportional representation." *Id*. at 288 (plurality). And while defendants trot out a series of seven other "unacceptable" standards (MTD 12-14), the First Amendment approach does not resemble any of those standards, either.

The complaint, which rests comfortably on longstanding First Amendment law, presents a binary question that turns rationally on observable facts. In this case, the question is simply whether the Plan diluted Republican votes to such a degree that Republicans in the old Sixth District—who previously were able to elect the representative of their choice—were prevented by the gerrymander from doing so in 2012 and 2014. As the complaint makes clear, it did.

Defendants no doubt will object to this measure of a constitutionally significant burden. But their objections—which we tackle in Part II of this brief—are objections *on the merits*. They are not objections concerning the discernability, manageability, or justiciability of the question presented by the First Amendment framework, which the courts have the tools and experience to answer with ease.

II. THE COMPLAINT STATES A FIRST AMENDMENT CLAIM UPON WHICH RELIEF CAN BE GRANTED

The question remains whether plaintiffs have stated a *meritorious* claim under the framework that we have outlined. They assuredly have.

The Supreme Court recently confirmed that "[p]artisan gerrymanders . . . are incompatible with democratic principles." *AIRC*, 135 S. Ct. at 2658 (brackets omitted) (quoting *Vieth*, 541 U.S. at 292 (plurality); *Veith*, 541 U.S. at 316 (Kennedy, J., concurring in judgment)).[4] It is self-evident that "each political group in a State should have the same chance to elect representatives of its choice as any other political group," and "'[d]iluting the weight of votes . . . impairs basic constitutional rights.'" *Bandemer*, 478 U.S. at 124 (plurality) (quoting *Reynolds v. Sims*, 377 U.S. 533, 566 (1964)). Thus, as even the *Vieth* plurality put it, "an excessive injection of politics [in redistricting] is unlawful." 541 U.S. at 293 (emphasis omitted). So it is in this case.

A. The Constitution forbids a State from retaliating against citizens for engaging in conduct protected by the First Amendment

The First Amendment retaliation theory is neither novel nor complex. Because plaintiffs are registered members of the Republican Party and have historically voted

[4] Because Justice Kennedy's concurring opinion in *Vieth* rests on "narrow[er] grounds" than the plurality, it is controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). Every court to address the issue has so held. *See Alperin v. Vatican Bank*, 410 F.3d 532, 552 n.13 (9th Cir. 2005); *Perez v. Perry*, 26 F. Supp. 3d 612, 623 n.6 (W.D. Tex. 2014); *Ala. Leg. Black Caucus*, 988 F. Supp .2d at 1295. Defendants suggest that Justice Kennedy's opinion should be read as adopting the reasoning of the plurality. *See* MTD 13 n.2. That is incorrect. When a justice concurs in the judgment only, as did Justice Kennedy in *Vieth*, the upshot is that the concurring justice *rejects* the plurality's reasoning in favor of an alternative approach. The common ground between Justice Kennedy's opinion and the plurality opinion is slim : They both agreed that the approach put forward by the plaintiffs—but no more—failed as "a manageable standard for assessing burdens on representational rights." *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring in judgment). Justice Kennedy's opinion cannot be understood as holding more than that.

for a Republican representative from the Sixth District, the State retaliated against them by moving them (or others like them) to "crack" the district and thereby prevent them from electing another Republican representative after 2011. That is a textbook violation of the First Amendment, which not only precludes the State from *directly* impinging free speech and associational rights, but also precludes the State from *indirectly* impinging on those rights by retaliating in response to their exercise. It is the latter theory—unconstitutional retaliation—that we assert in the complaint. For their part, defendants address our claim as though we were pursuing a theory of a *direct* constitutional violation. Their arguments on that score are simply not responsive to the theory on which the complaint actually relies.

1. It is hornbook law that a State may not base a decision to grant a benefit or impose a burden—whether it be firing an employee, granting a contract, or punishing a prison inmate—on an individual's protected First Amendment activity. *See O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights."); *Board of Cty,. Comm'rs v. Umbehr*, 518 U.S. 668, 677 (1996) (the State may not "terminate contracts . . . in retaliation for protected First Amendment activity"); *Ortiz v. Jordan*, 562 U.S. 180, 190-191 (2011) ("First Amendment shields prisoners from 'retaliation for protected speech'").

Put another way, States are forbidden from "adversely affect[ing]" citizens for their speech or association. *Rutan*, 497 U.S. at 73. After all, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Id*. at 77-78.

That is the essential premise the Supreme Court's First Amendment retaliation and political patronage cases, which turn on the proposition that "[o]fficial reprisal for protected speech 'offends the Constitution because it threatens to inhibit exercise of the protected right'" in the first instance. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588, n.10 (1998)). *Accord, e.g.*, *id.* ("the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out"); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1988) ("the First Amendment bars retaliation for protected speech"). According to this settled framework, "a plaintiff need not actually be deprived of her First Amendment rights in order to establish First Amendment retaliation." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

2. That same logic applies naturally to the problem of partisan gerrymandering. The Supreme Court has repeatedly cautioned that the Elections Clause, which authorizes the States to regulate federal elections, is "'a grant of authority to issue procedural regulations, and not . . . a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995)). And among the constitutional constraints that lawmakers may not evade are those imposed by the First Amendment.

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976). Indeed, "[r]epresentative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Cal.*

Democratic Party v. Jones, 530 U.S. 567, 574 (2000). Thus, according to Justice Kennedy, "[u]nder general First Amendment principles," subjecting citizens to "disfavored treatment by reason of their views" is "unconstitutional absent a compelling government interest." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment).

That observation is not novel among the Supreme Court's First Amendment precedents. If a burden were imposed on citizens "because of [their] constitutionally protected speech or associations," the Court has said, "[their] exercise of those freedoms would in effect be . . . inhibited." *Elrod*, 427 U.S. at 359. Thus, "[a] burden that falls unequally on [particular] political parties, . . . impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). It follows that citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment) (citing *Elrod*, 427 U.S. at 347 and *Cal. Democratic Party*, 530 U.S. at 574). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Id*. And "[i]f 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." *Id*. at 315.

3. Measured against this framework, plaintiffs have stated a claim. In drawing the Plan, the GRAC had ready "access to the Maryland Board of Elections statistical

data," including voter registration data by precinct, election-day turnout data by precinct and party, and party share of the vote by precinct, "allow[ing] the committee to analyze voting patterns and political affiliation at a granular level." SAC ¶¶ 46-47. Using this data, the GRAC drew a map that deliberately and purposefully cracked the historically Republican Sixth District by moving Republican voters out of the district and moving Democratic voters in. *Id*. ¶¶ 3-4, 93-102. In total, the GRAC intentionally transferred over 65,000 Republican voters out of the Sixth District and over 30,000 Democratic voters into the district by reason of those voters' party affiliations and voting histories. *Id*. ¶¶ 38, 84, 101. The result was a concrete and demonstrable adverse impact: The votes of Republicans were diluted so significantly that Republican voters—who had for the past 20 years been able to elect a Republican representative to Congress (*id*. ¶¶ 4, 62)—were unable to elect a representative of their choice in 2012 or 2014. *Id*. ¶ 86.

Thus, under Justice Kennedy's controlling rationale in *Vieth*, the GRAC violated the First Amendment rights of Republican Marylanders in the old Sixth District. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment). It gerrymandered the lines of the new district "[by reason] of their participation in the electoral process, their voting history, their association with [the Republican] party, [and] their expression of political views" (*id*.), effectively "conditioning [a burden] on political belief and association" (*Rutan*, 497 U.S. at 78). The Plan thus has "the purpose and effect of burdening [the] representational rights" of Republican Marylanders in the old Sixth District by reason of their political-party association and voting history. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment). That states a violation of the First Amendment absent

evidence that the Sixth District gerrymander is narrowly drawn to serve a vital state interest. *Id*. at 315.

B. Defendants' counterarguments—which misconstrue the complaint as asserting a *direct* First Amendment violation—are misplaced

1. The complaint alleges indirect burdens on protected speech and association, not a direct content-based regulation

a. In response to all of this, defendants—citing a series of non-binding district court cases—assert that "[t]he drawing of district lines . . . imposes no burden on an individual's rights of expression, association, or to petition the government" because "'[p]laintiffs are every bit as free under the new plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression.'" MTD 18-19 (quoting *Kidd v. Cox*, 2006 WL 1341302, at *17 (N.D. Ga. 2006)). That line of argument simply ignores our theory of the case, which rests on the well-settled rule that "a plaintiff need not actually be deprived of her First Amendment rights in order to establish First Amendment retaliation." *Constantine*, 411 F.3d at 500.

It is true that redistricting maps generally do not *directly* restrict political association or participation. We do not contend otherwise; the complaint does not allege that the Plan expressly forbids association with the Republican Party or prohibits the casting of votes for Republican candidates. It focuses instead on the Plan's *indirect* burdening of plaintiffs First Amendment rights. As we have said, the Plan effectively "penaliz[ed]" Republicans in the old Sixth District "for the exercise of protected speech and association rights" (*Rutan*, 497 U.S. at 65, 77 n.9) by diluting their votes through the manipulation of district lines.

Defendants inexplicably ignore our retaliation argument, despite the fact that we invoked it in our briefs before the Supreme Court and again in the second amended complaint. *See* Br. for Petrs. at 35-38, *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (No. 14-990), 2015 WL 4720269, at *35-38; Reply Br. at 16-19, *Shapiro v. McManus*, 136 S. Ct. 450 (2015), (No. 14-990), 2015 WL 6502106, at *16-19; SAC ¶¶ 31-34. Defendants cannot wish this theory away by ignoring it, particularly when it has been "put forward by a Justice of [the Supreme] Court and uncontradicted by the majority in any of [the Supreme Court's] cases." *Shapiro*, 136 S. Ct. at 456.

b. The district court cases cited by defendants address theories of direct First Amendment burdens and are therefore unhelpful to their cause. In *League of Women Voters v. Quinn*, 2011 WL 5143044 (N.D. Ill. 2011), for example, the plaintiffs asserted that the state legislative redistricting plan at issue in that case was a *direct* "content-based restriction" that "abridge[d] or regulate[d] expressive activity" by "attempting to control or influence the kinds of views, opinions and speech that members of the League of Women Voters of Illinois and other state residents placed in those districts are likely to express or hear and receive." *Id.* at *1 (quoting complaint). In making that claim, the plaintiffs in *Quinn* relied, not on *Vieth*, but on *Citizens United v. FEC*, 558 U.S. 310 (2010). The district court in *Quinn* therefore had no occasion to consider the very different First Amendment retaliation theory presented here.

The same goes for *Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991). In noting that the redistricting plan challenged in that case imposed no direct First Amendment burdens, the Court did not consider the kind of indirect-burden theory reflected in

Justice Kennedy's opinion in *Vieth*, which came fifteen years later. And to the extent any of the judges on the *Anne Arundel* court addressed a retaliation framework at all, they endorsed it. Judge Niemeyer, in particular, expressed the view that when the State, "using data about voters' political party registrations, their past voting habits, and their race, [draws] congressional district lines to . . . attempt to control the outcome of future congressional elections" and to "dilute[] the vote of [the disfavored political party]," the State violates Article I, Section 2 of the United States Constitution. *Id.* at 401 (Niemeyer, J., dissenting). That is the essence of the First Amendment retaliation theory later endorsed by Justice Kennedy in *Vieth*.

The decision in *Kidd v. Cox*, 2006 WL 1341302 (N.D. Ga. 2006), is subject to the same distinction. In that case, the Republican-controlled legislature was alleged to have cracked the predominantly Democratic Athens-Clarke County, Georgia, just east of Atlanta. *Id.* at *16. The plaintiffs there alleged that the cracking of Democrats in the county violated their First Amendment rights. *Id.* But there were two apparent problems with that claim. First, the plaintiffs there relied "on ballot access cases [that] presuppose[d that] the redistricting legislation restrict[ed] or limit[ed] their ability to nominate a candidate of their choosing to run for political office." *Id.* at *17. They relied, in other words, on a theory of *direct* burden, like the plaintiffs in *Quinn* and *Anne Arundel.* Second—to the extent that the plaintiffs in *Kidd* relied alternatively on a theory of indirect burden—they failed to prove the kind of "obvious and significant" burden necessary to state a justiciable claim. *Id.* at *18. In fact, the allegedly cracked county was in an area of the State where "Democratic candidate[s] already [had] un-favorable chances of success" in state legislative elections. *Id.* at *16. Thus, the

plaintiffs were able to allege only an abstract burden, which the court found too vague to pass Rule 12(b)(6) muster. *Id*. at *17. As we have explained at length (*supra*, 10-19), the same cannot be said here.

2. A First Amendment retaliation theory does not mean "zero tolerance" for politics in redistricting

Defendants elsewhere characterize the complaint as expressing "'zero tolerance' for partisan consideration in redistricting by a state legislature." MTD 14. *Accord Vieth*, 541 U.S. at 294 (plurality) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting."). But as Justice Kennedy explained in his concurring opinion in *Vieth*, "[t]hat misrepresents the First Amendment analysis." *Vieth*, 541 U.S. at 315.

Under the First Amendment, "[a] determination that a gerrymander violates the law must rest on something *more* than the conclusion that political classifications were applied." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment) (emphasis added). "It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id*. "The inquiry," in other words, "is not whether political classifications were used," but "whether political classifications were used [with the purpose and effect of] burden[ing] a group's representational rights." *Id*. at 315 (Kennedy, J., concurring in judgment).

Thus the States may continue to use data concerning party affiliation and voting history without violating the First Amendment—so long as it is not in a way that leads intentionally to a significant dilution of the voting strength of the disfavored party. A redistricting commission might use such data to ensure proportional representation, for

example (*Cf. Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding against an Equal Protection challenge the use of party affiliation data to ensure each party won seats in proportion to their state-wide vote share)) or to correct a prior unlawful gerrymander. Indeed, Arizona's redistricting commission is required by that State's constitution to pursue competitive districts. *See* Ariz. Const. art. 4, pt. 2, sec. 1.

Beyond that, it would be a mistake to think that the only "political considerations" in redistricting (*Gaffney*, 412 U.S. at 753) are the sort that require map-drawers to take purposeful account of citizens' voting histories and party affiliations. Map-drawers looking to secure political advantage for a dominant political party can, for example, draft maps that avoid drawing incumbents out of their current districts, ensuring they can run for re-election; they can move large businesses in and out of districts to achieve fundraising advantages for particular parties; or they can make running incumbent campaigns less costly by minimizing the media markets that particular districts cover. Such examples of political gamesmanship are of course objectionable in their own right. But whatever their legality under other constitutional provisions or theories, they present different cases and are not necessarily forbidden by the First Amendment retaliation theory presented here.

Against this backdrop, it cannot seriously be said that the complaint reflects "zero tolerance" for political considerations in redistricting.[5]

---

[5] Defendants suggest that our theory might alternatively amount to a "totality of the circumstances" test. MTD 15-16. That is wrong. As we explained in the complaint (¶ 102), we included allegations concerning the strange shape of Maryland's districts and their tendency to divide discrete communities of interest only as circumstantial support for the conclusion that the GRAC and legislature harbored the express goal of diluting the votes of Republicans in the Sixth District by reason of the party affiliation and voting history.

3. The complaint does not allege a right to electoral success

Defendants state the obvious when they assert that there is "no constitutional principle that requires that the Republican Party have two safe districts in Maryland." MTD 22. In saying that, defendants echo the equally obvious statement in *Kidd* that the First Amendment "'does not guarantee political success.'" 2006 WL 1341302, at *17 (quoting *Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988)). That is true—but our point is not that Republicans in the Sixth District are guaranteed political success. It's that the First Amendment (and Article I) forbid the State from guaranteeing them political *failure*.

On that point, let us be crystal clear: Our claim is not that the Sixth District, once Republican, must forever and always remain Republican. Nor is it that the First Amendment entitles plaintiffs to political success in any particular district, in any particular election. On the contrary, it is possible in theory that population and demographic changes within the Sixth District could lead the district to change from Republican to Democratic control (even if, as a matter of fact, they would not have in 2011). Likewise, it is possible in theory that the legislature could enact a map that would flip the Sixth District as an independent consequence of its efforts to comply with the Voting Rights Act or other valid redistricting principles (even if, as a matter of fact, it would not have in 2011). Such outcomes would not be objectionable under the First Amendment. Our claim is only that the Constitution forbids the State from drawing district lines with an eye to citizens' political-party affiliations and voting histories, and with the purpose and effect of diluting the votes of those citizens by reason of such protected conduct. That is a claim based every bit as much on the

process—on the factors that the GRAC considered and the goals it pursued—as it is on the result of the process. The same election results in 2012 and 2014, brought about by constitutionally-acceptable means (or as a result of natural shifts in population in the region) would not have presented a First Amendment problem.

4. The complaint adequately alleges a chilling effect

Finally, defendants dedicate a substantial portion of their brief to the issue of chilling, asserting that "courts have rejected arguments that a districting plan exerts a 'chilling effect' on First Amendment rights," and that "the First Amendment does not guarantee districts that maximize political expression" in any event. MTD 20-21. Defendants' contentions miss the point.

At this stage of the litigation, the complaint's well-pled factual allegations must be assumed true. *Fitzgerald*, 555 U.S. at 249. And here, the complaint alleges in plain terms that "[t]he dilution of Republicans' votes in Maryland has chilled and manipulated political participation since 2011." SAC ¶ 112. It goes on to explain that "the Plan has chilled participation in general elections" because "[v]oters who feel that the outcomes of elections are preordained by the legislature's map-drawing [are] discouraged from casting their votes or engaging in the political process." *Id.* ¶ 118. That effect is especially "pernicious" in Maryland "because Maryland employs a closed primary registration system." *Id.* ¶ 115. Consequently, in those districts where Republicans are very likely to lose (including in the Sixth District), "the only real opportunity to influence what person is ultimately elected is the Democratic primary race." *Id.* ¶ 116. That means that "[s]ome Maryland voters who would otherwise register as Republicans have been chilled from doing so . . . so that they can participate in the

Democratic Party's closed primary." *Id*. ¶ 117. Conversely, voters who opt to register as Republicans are prevented, as a practical matter, from influencing the selection of their congressional representative.

It would blink reality to say that those allegations are insufficient to establish that voters' "ability to act according to [their] beliefs and to associate with others of [their] political persuasion is constrained, and support for [their] party is diminished" (*Elrod*, 427 U.S. at 356) as a result of the Plan. That is especially so because it is the whole point of the complaint is that the Plan "tips the electoral process in favor of the incumbent party" to such a degree that "the impact on the [political] process [is] significant." *Id*. The allegations establishing as much are manifestly plausible, and they have "'give[n] the defendant[s] fair notice of what the claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). That is all that is required.

Defendants nevertheless quibble that "the plaintiffs have failed to allege with any specificity how the Plan has chilled political activity and expression in the 6th district or other areas of the State" and "offer no specifics on how or whether the Plan has discouraged voting or participation in political campaign." MTD 21. Such complaining might have some force if this were a fraud case and plaintiffs were required to plead with particularity under Rule 9(b). But it is not. The complaint's allegations concerning chilling are therefore more than sufficient.

C. The lines of the Sixth District are not narrowly tailored to serve a vital state interest

When "significant penalties . . . are imposed for the exercise of rights guaranteed by the First Amendment," the State violates the Constitution "[u]nless [the burden-

some] practices are narrowly tailored to further vital government interests." *Rutan*, 497 U.S. at 74. The strict-scrutiny standard means, more specifically, that defendants may save the Plan from invalidation only if they can show that the lines of the new Sixth District are narrowly tailored to achieve a compelling state interest. The complaint's allegations foreclose such a showing at this stage of the litigation.

There are, of course, a range of compelling interests that at State must pursue in redistricting, including achieving districts of equal population and complying with the requirements of the Voting Rights Act. But as a threshold matter, the "bare desire" of the Democratic majority in the Maryland legislature "to harm a politically unpopular group cannot constitute a legitimate governmental interest." *U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973). *Cf. Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) ("assuming, without deciding, that partisanship is an illegitimate redistricting factor").

The complaint alleges in clear terms that the Plan is *not* narrowly tailored to achieve any of the State's other, compelling interests. "It was possible to fashion a plan that does not crack the 6th District . . . that is as good as or better than the Plan in achieving equal population, compactness, respect for traditional political boundaries, and compliance with the Voting Rights Act." SAC ¶ 120. "In other words, the cracking of the 6th District would not have taken place without the legislature's targeting of Republican voters on the basis of their First-Amendment-protected conduct." *Id*. ¶ 121. Indeed, according to the complaint, the GRAC received several alternative plans from third parties (*id*. ¶ 123), including some that "would have avoided cracking the former 6th District while better respecting traditional political and community boundaries and

achieving equal compliance with the one-person-one-vote standard" (*id*. ¶ 124). Thus, "at least one of the alternative plans would have satisfied all of the constitutional requirements for congressional reapportionment without diluting either party's votes to a constitutionally significant degree." *Id*. ¶ 128. Because those allegations must be accepted as true at this stage in the litigation, the Court must conclude that the Plan fails strict scrutiny review.

III. THE COMPLAINT STATES AN ARTICLE I CLAIM AS WELL

The complaint states a claim not only under the First Amendment, but also under Article I, Sections 2 and 4. *See* SAC ¶¶ 135-142. The Section 1 claim—which turns on the notion that the legislature may not use party-affiliation and voting-history data to dictate the outcomes of elections (*id*. ¶ 140)—survives dismissal for all of the same reasons that the First Amendment claim survives. Article I affords other discernible grounds for holding the Sixth District unconstitutional. *Cf. Gralike*, 531 U.S. at 523 ("the Elections Clause [is] a grant of authority to issue procedural regulations, and not [a] source of power to dictate electoral outcomes").

* * *

As Judge Roger Titus of this Court explained in earlier litigation challenging the Plan, "while the courts are struggling in their efforts to find a standard [to adjudicate partisan gerrymandering claims], the fires of excessive partisanship are burning and our national government is encountering deadlock as never before." *Fletcher v. Lamone*, 831 F. Supp. 2d 925 (D. Md. 2011) (Titus, J., concurring). "In his concurrence in *Vieth*," Judge Titus observed, "Justice Kennedy invited the formulation of standards, and for the sake of the country, one should be developed lest the extreme political divisions

plaguing this country continue." *Id*. As for Maryland's 2011 redistricting plan in particular, "it is clear that the plan . . . is, by any reasonable standard, a blatant political gerrymander," and Judge Titus "would not have hesitated to strike [it] down" in *Fletcher* if the plaintiffs there had pressed a partisan gerrymandering claim.

The partisan gerrymandering claim that was missing in *Fletcher* is presented in this case, and it is founded on a justiciable standard that was expressly endorsed by Justice Kennedy's opinion in *Vieth*. Against this background, the Court should follow Judge Titus's lead, hold that the complaint states a claim upon which relief can be granted, and proceed expeditiously to a trial and judgment on the merits.

CONCLUSION

The complaint states justiciable claims upon which relief can be granted. The motion to dismiss accordingly should be denied.

Dated: May 20, 2016

Respectfully submitted,

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
phughes@mayerbrown.com
Jason R. LaFond, *pro hac vice*
jlafond@mayerbrown.com
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)