IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. SHAPIRO ET AL., PLAINTIFFS, v. DAVID J. MCMANUS, JR., ET AL., DEFENDANTS.	CIVIL ACTION NO. 1:13-cv-03233-JKB THREE-JUDGE COURT

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS

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INTEREST OF AMICUS CURIAE COMMON CAUSE

Common Cause is a nonpartisan democracy organization with over 450,000 members and local organizations in 35 states including Maryland. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform" (Jonathan Winburn, *The Realities of Redistricting* p. 205 (2008)) and continues to be a vigorous opponent of partisan gerrymandering. Common Cause organized and led the coalitions that secured passage of ballot initiatives that created independent redistricting commissions in Arizona and California and of the amendment to the Florida Constitution prohibiting partisan gerrymandering, and is the sponsor of the annual Gerrymander Standards Writing Competition.

SUMMARY OF THE ARGUMENT

States are required by Article I, section 2 of the Constitution to reapportion congressional districts after each decennial census to equalize their populations. *Wesberry v. Sanders*, 376 U.S. 1 (1964). Both political parties have used the reapportionment process as an opportunity and an excuse to gerrymander congressional district lines to gain a partisan political advantage and lock in their hold on political power. Partisan gerrymandering has become so common that state legislators "have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

Although apportionment statutes are facially neutral, partisan gerrymanders are anything but content-neutral. Unlike an apportionment based on neutral principles, in a partisan gerrymander the party in power uses information about the *political party affiliations, political beliefs, and voting*

histories of individual voters to draw district lines to enhance the effectiveness of the votes of its members and supporters and to "burden[] the representational rights of [other] voters for reasons of ideology, beliefs, or political association" by minimizing, diluting or nullifying the effectiveness of their votes in favor of other political parties or candidates. *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring).

There is now wide-spread agreement among members of the Supreme Court on both the left and the right that "[p]artisan gerrymanders are … incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n* 576 U.S. __, 135 S. Ct. 2652, 2658 (2015) (Ginsburg, J.) (alterations adopted); compare *Vieth*, 541 U.S. at 296 (Scalia, J., plurality opinion); with *Vieth*, 541 U.S. at 316 (Kennedy, J. concurring); and *Vieth*, 541 U.S. at 324 (Stevens, J., dissenting).

The State of Maryland contends that even if the Sixth Congressional District was the subject of a partisan gerrymander as the Shapiro plaintiffs have alleged, the complaint must nevertheless be dismissed because allegations of partisan gerrymandering are "non-justiciable" because there are no judicially manageable standards that would enable a court to determine whether the gerrymander of the Sixth District is unconstitutional under the First Amendment or Article I, section 2 of the Constitution. *See* Defendants' Memorandum in Support of Motion to Dismiss ("Defs.' Mot."), at 10.

The Supreme Court has held that the Constitution itself provides judicially manageable standards for adjudicating cases that allege constitutional violations. *Baker v. Carr*, 369 U.S. 186, 226 (1962); *I.N.S. v. Chadha*, 462 U.S. 919 (1983). The Court has also expressly rejected claims that partisan gerrymandering claims are nonjusticiable. *Davis v. Bandemer*, 478 U.S. 109, 118-28 (1986); *Vieth*, 541 U.S. at 309-10 (Justice Kennedy concurring with the four dissenters that partisan gerrymander claims are justiciable); *LULAC v. Perry*, 548 U.S. 399, 413-14(2006) ("We do not revisit the justiciability holding."); *see also Shapiro v. McManus*, 577 U.S. __, 136 S. Ct. 450, 456 (2015) (reversing the

dismissal for want of jurisdiction).

The constitutional standards that govern this case are not new, but are well established under decisions of the Supreme Court interpreting the First Amendment and Article I, sections 2 and 4 of the Constitution.

We start with the proposition that "no right [is] more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 572 U.S. __, 134 S. Ct. 1434, 1440 (2014). Other constitutional rights, even the most basic, "are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. The right of "constituents [to] support candidates who share their beliefs [is] a central feature of democracy" protected by the First Amendment. *McCutcheon*, 134 S. Ct. at 1441.

The First Amendment "has its fullest and most urgent application precisely to … campaigns for political office." *Id*. (internal quotations omitted). It prohibits government from "prescrib[ing] what shall be orthodox in politics," *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), from favoring one political party over another, or from discriminating between voters based on their political beliefs and associations—which "constitute the core of activities protected by the First Amendment" and without which a representative democracy cannot function. *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion).

The First Amendment protects the democratic process in two fundamental and complementary ways. *First*, the First Amendment requires governments to *govern impartially* and to maintain a position of *strict political neutrality*, especially in drawing the lines of electoral districts that apportion political representation and electoral power among the people and thus determine the outcome of elections. *Second*, the First Amendment subjects to strict scrutiny all forms of *content-based discrimination* on the exercise of First Amendment rights, which protects citizens from being singled out

and penalized based on their political beliefs, their political party memberships, affiliations, or how they voted in past elections—or are likely to vote for in the future.

Partisan gerrymanders violate the First Amendment rights of both (a) minority parties, by making it more difficult for them to gain a fair share of representation in Congress and in the state's congressional delegation, and (b) individual members and supporters of minority parties or candidates, by diluting or nullifying the effectiveness of their votes and making it more difficult, if not impossible, for them to elect candidates of their choice to the House of Representatives.

In remanding this case to a three-judge district court, the Supreme Court has ruled that the Shapiro plaintiffs have alleged a not-insubstantial claim that partisan gerrymandering is unconstitutional under the First Amendment based on "a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases." *Shapiro*, 136 S. Ct. at 456.

As Justice Kennedy has explained in his concurring opinion in *Vieth v. Jubelirer*,

> [t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering … [because] 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 … Under general First Amendment principles, those burdens [are subject to strict scrutiny and] … are unconstitutional absent a compelling interest.

541 U.S. at 314; *see also id*. at 324 (Stevens, J., concurring in part and dissenting in part); *LULAC*, 548 U.S. at 461-62 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part).

Partisan gerrymanders of congressional districts implicate two other provisions of the Constitution. Partisan gerrymanders violate Article I, section 2 of the Constitution, which requires that members of the House of Representatives shall be chosen *by* "the People." In a partisan gerrymander, State legislators improperly do the choosing of members of the House of Representatives *for* the people.

See Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394, 402-03 (D. Md. 1991) (Niemeyer, J., dissenting).

Partisan gerrymanders also exceed the authority delegated to state legislatures by Article I, section 4 of the Constitution to "determine the times, places and manner of elections" of members of the House of Representatives. This delegation is limited and includes only the power to adopt *procedural rules*; it does not include the power to dictate electoral outcomes, which is the essence of a partisan gerrymander. *See U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 810 (1995); *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

This case is not controlled by the decisions of the Supreme Court in *Davis v. Bandemer*, 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267 (2004); or *LULAC*, 548 U.S. 399 (2006), in which prior attempts to challenge the constitutionality of partisan gerrymanders under the Equal Protection Clause failed. The claims in these cases failed for two principal reasons: (1) they were attacks on the constitutionality of state-wide apportionment plans as a whole; (2) they were predicated on a flawed legal theory that a political party has a constitutional right to proportional representation in the state legislature or in the state's congressional delegation. When the plaintiffs' proportional representation theory was rejected by the Court in *Davis*, 478 U.S. at 130, and again in *Vieth*, 541 U.S. at 288, the plaintiffs were unable to propose a judicially manageable standard of proving, as required by the Equal Protection Clause, that partisanship was the determinative factor in the design of state-wide plans composed of multiple districts only some of which were the subjects of partisan gerrymanders while others were drawn based on neutral principles.

The Shapiro complaint now before the Court differs from the prior cases in at least three material respects. First, it is a challenge to the apportionment of a *single congressional district* (the Sixth

District). It is not an attack on the state-wide apportionment of all eight of Maryland's congressional districts. *See Vieth*, 541 U.S. at 330-31 (Stevens, J., dissenting) ("Although the complaint in this case includes a statewide challenge, plaintiff-appellant Furey states a stronger claim as a resident of the misshapen District 6."): *id.* at 346-47 (Souter, J., dissenting) ("[W]e would have better luck at devising a workable prima facie case if we concentrated as much as possible on suspect characteristics of individual districts instead of state-wide patterns.").

Second, this challenge is *not* predicated, explicitly or implicitly, on a proportional representation theory, which has never obtained the support of a majority of Justices on the Supreme Court. See, *e.g.*, *Davis*, 478 U.S. at 130 ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation") (White, J., plurality opinion); *LULAC*, 548 U.S. at 419 ("To be sure, there is no constitutional requirement of proportional representation") (Kennedy, J.).

Third, and most importantly, this challenge is based on the First Amendment (as well as Article I, sections 2 and 4 of the Constitution) rather than the Equal Protection Clause. The First Amendment provides clear standards for evaluating the constitutionality of a partisan gerrymander that have never been squarely addressed by the Supreme Court. These standards are not the same as those imposed by the Equal Protection Clause.

In *Vieth*, Justice Kennedy explained the difference between challenges to a partisan gerrymander under the Fourteenth Amendment, as in *Davis, Vieth*, and *LULAC*, and a challenge that is based on the First Amendment. He said that,

> [w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for [judicial] intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications…The First Amendment analysis

> concentrates on whether the legislation burdens the representational rights of … voters for reasons of ideology, beliefs or political association.

541 U.S. at 315.

Application of the First Amendment to a claim of partisan gerrymandering would invoke familiar constitutional analysis. It would mean that, upon a showing that Maryland's purpose and effect was to burden Republicans in the Sixth District because of their political views, the apportionment of the Sixth District would be subject to strict scrutiny, just as in other First Amendment cases. The State of Maryland would then have the burden of establishing that the partisan gerrymander of the Sixth Congressional District was justified by a compelling state interest that outweighs the burden on the plaintiffs' representational rights.

Partisan gerrymanders are fully capable of judicial redress. The remedy for partisan gerrymandering is the same as in other cases in which a State is found to have penalized citizens based on their political participation in violation of the First Amendment – an injunction to cure the violation. In *Vieth*, in the course of dismissing a First Amendment argument, Justice Scalia overstated the remedy, but his observation has enough accuracy to provide a useful frame of reference. Justice Scalia wrote that if a First Amendment claim were sustained, the ruling

> would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs. What cases such as *Elrod* . . . require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*.

541 U.S. at 294 (emphasis in original).

This passage is an overstatement because, as Justice Kennedy observed, "The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used *to burden* a group's representational rights." *Id*. at 315 (emphasis added). The First Amendment

would not bar "any and all consideration of political interests in an apportionment." *Id*. Rather, it would only bar use of political affiliation in drawing district lines (1) for the purpose and with the effect of "imposing burdens on a disfavored party and its voters," *id*., and (2) only if the State has no "compelling interest" in the lines it has drawn. *Id*. When those two conditions are met, however, Justice Scalia's observation is exactly correct. Absent a compelling state interest, the First Amendment "render[s] unlawful *all* consideration of political affiliation in districting," *id*. at 294 (emphasis in original), when political affiliations are used to burden a disfavored party.

Contrary to Justice Scalia's exaggeration, this does not bar all use of political affiliation in creating legislative districts. For instance, *Gaffney v. Cummings*, 412 U.S. 735 (1973), provides a good example where the First Amendment would not preclude partisan line drawing. In *Gaffney*, the Supreme Court upheld against an equal protection challenge the use of demographic data about voters' political affiliations, political contributions, and voting histories that were not used to deny the minority party a fair share of the seats in the Connecticut legislature, but instead to provide the minority party representation in proportion to its share of the state-wide vote. Such a plan would not be an unconstitutional partisan gerrymander and would survive both a First Amendment challenge and an equal protection challenge.

Justice Kennedy expressed concern in *Vieth* that use of the First Amendment to analyze – and outlaw – partisan gerrymandering "depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Id*. at 315. This case demonstrates that such standards are indeed available. Justice Kennedy's concerns are eliminated by the use of the First Amendment as an analytical tool and a focus on a single district rather than a state-wide plan. The First Amendment

provides well-established standards for invalidating state action that has the purpose and intent of burdening political speech. By focusing on a single district, the Shapiro plaintiffs have eliminated the need to propose a legal standard that would address a state-wide plan composed of multiple districts, only some of which were gerrymandered while others are themselves unobjectionable. The only district lines that would be invalidated are those drawn in violation of the First Amendment.

Application of the First Amendment to partisan gerrymander claims would remedy an abuse of legislative power that is "incompatible with the democratic process" and would be a major step in the direction of creating the "more perfect Union" envisioned by the Framers of the Constitution. Such a ruling would not be a bad thing for democracy, nor for the people of Maryland.

ARGUMENT

I. Partisan Gerrymanders Are an Abuse of Legislative Power and Are Incompatible With Democratic Principles.

There is now a consensus on the part of members of the Supreme Court that partisan gerrymanders are "incompatible with democratic principles." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. at 2658 (Ginsburg, J.) (alteration adopted); compare *Vieth*, 541 U.S. at 296 (Scalia, J., plurality opinion); with p. 316 (Kennedy, J., concurring); and p. 324 (Stevens, J., dissenting).

Partisan gerrymanders are inconsistent with the basic objective of all congressional and legislative redistricting, which is "to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J. concurring opinion) (citing *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)). Partisan gerrymanders have the opposite objective and are instead motivated by a "bare [] desire" on the part of the party in power "to harm a politically [weak or] unpopular group," which is never "a *legitimate* governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534

(1973) (emphasis in original); *City of Cleburne v. Cleburne Living Ctrs., Inc*. 473 U.S. 446-47 (1985).

While the principle of one-person-one-vote has eliminated one of the more egregious forms of gerrymandering, partisan gerrymandering still persists—and has in fact grown far more effective. "Advances in computer technology achieved since the doctrine [of one person, one vote] was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters." *Davis*, 478 U.S. at 168 n.5 (Powell, J., concurring).

Thirty years of experience have only confirmed Justice Powell's observation. State legislatures have become more adept at crafting congressional districts to preordain electoral outcomes. *See, e.g.*, *LULAC*, 548 U.S. at 411–13. The methods that states now use to gerrymander congressional districts offend the core protections of the First Amendment, while observing, to the letter, the equal population requirements of Article I, section 2.

States have broad leeway in apportioning congressional districts based on politically neutral factors, including "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), without violating the First Amendment or Article I. States cannot, however, consider persons' political views or voting history unless, as in *Gaffney*, it does so for a benign purpose and it can carry the burden of demonstrating that a compelling interest makes such distinctions necessary. S*ee Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). Hence, the First Amendment subjects viewpoint-based discrimination in the drawing of legislative districts to the *same* scrutiny that it subjects other state actions that discriminate against particular viewpoints.

The Second Amended Complaint expressly alleges that the purpose and effect of the gerrymander of the Sixth District was to burden the First Amendment rights of Republicans. These allegations are more than sufficient to shift the burden to the State to justify the burden on the plaintiffs' First Amendment rights. It is highly unlikely that Maryland will be able to carry its burden in this regard. "Since … achieving … fair and effective representation of all citizens is concededly the basic aim of legislative apportionment, a legislature's reliance on other apportionment interests [i.e. partisan interests] is invalid, arbitrary and capricious." *Vieth*, 541 U.S. at 311 (quoting *Reynolds v. Sims*). The "bare [] desire" on the part of the Democratic majority in the Maryland legislature to gerrymander the Sixth District "to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534 (1973) (emphasis in original); *see City of Cleburne*, 473 U.S. at 446-47, 452 ("[T]he word 'rational' … includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.").

To be sure, this Court has suggested in other contexts that politics can be a permissible consideration in legislative apportionment, not subject to the scrutiny of the federal courts. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001) (upholding a duopolistic gerrymander); *Gaffney*, 412 U.S. at 751–54 (upholding districting designed to achieve political fairness). Such comments, however, were tethered to equal protection challenges. Moreover, as in *Gaffney*, there are circumstances where politics can permissibly be used for benign reasons in legislative apportionment without violating the First Amendment. As recently as last month, a unanimous Supreme Court made clear that the legitimacy of partisan gerrymandering was an open question, when it "assum[ed], without deciding, that partisanship is an illegitimate redistricting factor." *Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301,

1310 (April 20, 2016). In any event the First Amendment affords a different set of standards for evaluating the constitutional claim than the Equal Protection Clause provides.

Constitutional scrutiny is "claim specific." *Vieth*, 541 U.S. at 294. "An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim *because the underlying rights, and consequently constitutional harms, are not comparable*." *Id.* (emphasis added). The harm of viewpoint-based discrimination, cognizable under the First Amendment, does not present the same problems of quantification as the harm alleged, and which confounded the plurality, in *Vieth*. 541 U.S. at 281–306. The First Amendment's concern with viewpoint-based discrimination is triggered by a switch, not a scale. It is not a question of the degree of the viewpoint-based discrimination. Any viewpoint-based discrimination is sufficient to invoke strict scrutiny.[1] Accordingly, the First Amendment protects voters against all forms of viewpoint-based discrimination, and this Court's decisions articulating that right permit no conclusion other than that partisan gerrymanders contravene it.

As will be more fully explained in Section III below, partisan gerrymanders also violate Article I, section 2 by allowing state legislators to choose representatives *for* the people. They also exceed the power delegated to state legislatures by Article I, section 4 of the Constitution to determine the times, places and manner of elections of members of the House of Representatives because they allow state legislators to dictate electoral outcomes in congressional elections. *Term Limits,* 514 U.S. at 783;

[1] This feature of First Amendment jurisprudence distinguishes this case from political gerrymandering cases brought under the Equal Protection Clause of the Fourteenth Amendment—including *Davis*, *Vieth*, and *LULAC*. Fourteenth Amendment jurisprudence requires plaintiffs challenging gerrymandering to show that the non-neutral, discriminatory principle in play was the "predominant factor" behind the reapportionment. *See, e.g.*, *Miller*, 515 U.S. at 916. The First Amendment requires no such showing where the plaintiffs—as here—show that the discrimination inherent in the consideration and use of data concerning voters' political preference was viewpoint-based and violated the government's duty to govern impartially.

Gralike, 531 U.S. at 523.

II. The Democratic Gerrymander of the Sixth Congressional District Is Invidious and Subject to Strict Scrutiny Under the First Amendment and Cannot Be Justified by a Legitimate, Much Less a Compelling, State Interest.

The primary purpose of "the First Amendment was … to protect [] a democratic system [of government] whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Elrod*, 427 U.S. at 372. "The right to vote freely for the candidate of one's choice is [ ] the essence of a democratic society and any restrictions on that right strike at the heart of representative government." *Reynolds*, 377 U.S. at 555. The casting of a vote is itself the essence of free speech protected by the First Amendment, and affiliation with political parties is the paramount right freely to associate and petition the government, also protected by the First Amendment.

The First Amendment protects the democratic system of government in two primary and complementary ways: (a) by imposing an affirmative duty *to govern impartially* on the part of government and government officials that requires that state legislators be strictly neutral and refrain from partisanship in enacting the rules and regulations governing elections; and (b) by prohibiting restrictions on the rights of a political party or voters to elect the candidate of their choice that are based on the content of their political beliefs and affiliations or how they voted in past elections.

a. Partisan Gerrymanders Violate the Duty to Govern Impartially.

The First Amendment (and also the Fourteenth) protects the democratic process by imposing an affirmative duty on government officials at all levels to govern impartially, to be politically neutral, and to refrain from exercising their official powers for partisan political purposes.

The Supreme Court explained the connection between the protection of the democratic process

and the duty to govern impartially in *Elrod v. Burns*, 427 U.S. at 355-56. "The free functioning of the electoral process … suffers," the Court said, when government officials violate the duty to govern neutrally and allow partisan considerations to influence their decisions to hire, fire, or promote government employees or to award government contracts. When government officials base their decisions on partisanship, they are using the power of government to "prevent[] support of competing political interests[,] ... starve[] political opposition [and] … tip[] the electoral process in favor of the incumbent party." *Id*. at 356.

The Supreme Court has held in a long line of cases that "government … may not base a decision to hire, promote, transfer, recall, discharge or retaliate against an employee, or to terminate a contract [based] on the individual's partisan affiliation or speech" – unless party affiliation is an appropriate requirement for the job or contract. *Vieth*, 541 U.S. at 324-25 (Stevens, J., dissenting) (citing cases); *see also Branti v. Finkel*, 445 U.S. 507 (1980) (firing of assistant public defenders who did not have Democratic support); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990) (prohibiting preferential consideration of support for the Republican party in employment, promotion, or transfer of state employees or job applicants).

In *Rutan v. Republican Party of Illinois*, for example, the plaintiffs alleged, in reviewing requests for exceptions to a state-wide hiring freeze, that "the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, … has provided financial or other support to the Republican Party and its candidates … has promised to join and work for the Republican Party in the future and … has the support of Republican Party officials at state or local levels." *Id.* at 66. The Supreme Court held that the Governor violated the First Amendment rights of the plaintiffs in basing such decisions on the evaluation of the party affiliation and support of those being considered for

positions.

The First Amendment forbids such *consideration* and *use* of an individual's political preferences as a basis for governmental action. If, as the above cases have held, the free functioning of the electoral process depends on the neutrality and impartiality of government officials when it comes to hiring, firing, promoting, or transferring even a low-level government employee in a non-policymaking position or awarding a government contract, the First Amendment must also require that state officials govern impartially and maintain a position of strict neutrality—and not allow partisan factors to govern—in apportioning both representation and electoral power among the people.

The outcome of a congressional election will largely be determined by how and where district lines are drawn. *Davis*, 478 U.S. at 166 (Powell, J. dissenting). The legitimacy of a congressional election depends on whether the district lines are drawn fairly and impartially, or whether they are rigged in favor of a party or its candidate. Absolute impartiality in the drawing of district lines is "of critical importance … because the franchise provides most citizens their only voice in the legislative process." *Id.* (citing *Reynolds,* 377 U.S. at 561-62). "Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters [equally] … regardless of their political beliefs or party affiliation." *Davis*, 478 U.S. at 166 (Powell, J., dissenting).

b. Partisan Gerrymanders also Discriminate in Favor of Some Voters and Against Other Voters Based on the Content of Their Votes and Their Political Beliefs and Affiliations.

The Court has long emphasized that "[n]o right is more precious in a free country than … [the right to vote]. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry,* 376 U.S. at 17. The right to vote for the candidate of one's choice and the right of "political

belief and association constitute the core of … activities protected by the First Amendment." *Elrod*, 427 U.S. at 356. It is well established that statutes or regulations that "burden[] or penalize[e] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views" are presumptively invalid under the First Amendment, and must be justified by a compelling state interest. *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *see Elrod*, 427 U.S. at 355.

The First Amendment also prohibits "[c]ontent-based regulations [which] are presumptively invalid" and must be justified by a compelling state interest. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 5 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its … content.").

While statutes apportioning congressional districts are *facially* neutral, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly … rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, at 592 (1983); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 642 (1994). A facially neutral apportionment statute is subject to strict scrutiny under the First Amendment if: (a) it is content-based and; (b) it burdens or penalizes citizens based on their exercise of their First Amendment rights to join or support a political party or vote for a candidate of the voter's choice, rather than have the outcome of the election determined by the legislature.

Partisan gerrymanders are content-based. Unlike non-partisan apportionments that are based on traditional redistricting principles, in a partisan gerrymander the ruling party distributes political

representation and electoral power among voters based the *content* of the political beliefs, political party affiliation or membership, and voting history of individual voters in a district. Indeed, the complaint alleges that the Maryland plan explicitly relied on content-based data about voting patterns and party registration in gerrymandering the lines of the Sixth District to guarantee the election of a Democrat to Congress.

Partisan gerrymanders discriminate against voters based on their exercise of First Amendment rights. In a partisan gerrymander, the ruling party uses ideological information to discriminate between voters based on their political beliefs and party affiliations. A partisan gerrymander uses such data to draw district lines with the purpose and effect of "burdening or penalizing citizens" who are affiliated with or likely to vote for other parties or candidates "because of their participation in the political process" by diluting or nullifying the effectiveness of their votes. *Vieth*, 541 U.S. at 314-15. At the same time, a partisan gerrymander rewards voters who are members of the ruling party or likely to vote for its candidates by enhancing the effectiveness of their votes and making it more likely that ruling party voters will be able to elect a candidate of their choice to represent them in Congress.

In *Vieth*, Justice Kennedy gave two examples of partisan gerrymanders that would violate the First Amendment:

> In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still the total effect of Party's Y's effort is to capture more new seats than Party X captured. Party X's gerrymander was more egregious. Party Y's gerrymander was more subtle. In my view, however, each is culpable.

Vieth, 341 U.S. at 316. Such culpability arises from the party's control of the process, and its consideration and use of political preferences to disfavor voters affiliated with the other party such that the majority entrenches control over electoral outcomes through the apportionment process.

The First Amendment limits regulations that subject voters to disfavored treatment *because* the State favors or disfavors a particular political viewpoint, candidate, or party. It is easy to see why. No court would entertain the thought that a State could use its Elections power to intentionally disfavor certain religious views in preference to others. *See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (finding that "the First Amendment enjoins the employment of organs of government for essentially religious purposes"). A state legislature could not apportion legislative districts to disfavor non-Catholics and ensure the election of a Catholic because the state favors Catholicism's views on abortion or climate change. Analogously, a state may not bias the election of a member of a political party because it disfavors the views of party members about, for example, abortion or climate change.

The First Amendment protects the freedom of conscience to author one's own view of the right and the good, be it religious or secular, and to support that view in the democratic contest. A state may no more influence the outcome of elections to disfavor one political view, and to favor another, than to punish or reward a religious view. Each constitutes impermissible viewpoint-based discrimination. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *cf. Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding Ohio ballot restrictions unconstitutional because they unequally burdened the First Amendment rights of voters who supported minor parties); *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) (holding Texas law limiting absentee ballots to only the two major parties discriminatorily burdened the First Amendment rights of a minor party that had secured a candidate on the general ballot).

Viewpoint-based discrimination is anathema to the First Amendment, and the prohibition of such discrimination unites much First Amendment jurisprudence. States may not prescribe what is orthodox in politics. *Barnette*, 319 U.S. at 642. Nor may states distort the "free trade in ideas," *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), by selecting among viewpoints in the public fora and requiring those it favors or burdening those it disfavors, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on … the message it conveys."); *R.A.V.*, 505 U.S. at 386 ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."); *id.* at 430–31 (Stevens, J., concurring) (internal citations omitted) (finding that viewpoint discrimination "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue"). The First Amendment's prohibition on viewpoint-based discrimination supplies the rationale for subjecting content-based speech regulations to strict scrutiny, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). This paramount First Amendment concern arises across a variety of state actions; unites this Court's decisions about election regulations, time, place, and matter restrictions, and political patronage; and, accordingly, is implicated by partisan gerrymanders.

The question is not close. In *Reed*, this Court subjected a small town's ordinance restricting "temporary directional signs" directing the public to a church or other event to strict judicial scrutiny because the restriction was content-based and thus presented the "danger of censorship." 135 S. Ct. at 2229. Notably, the Court did not seek to determine the effectiveness of the sign ordinance at suppressing speech—the content-based nature of the restrictions imposed by the ordinance were sufficient to warrant strict scrutiny. A First Amendment jurisprudence that, to guard against viewpoint-based discrimination, would subject a town's "directional signage" ordinance to strict scrutiny, but which would not subject a

state apportionment of congressional districts that dilutes the votes of certain individuals *because* of their political views or voting history to *any* scrutiny, has simply lost the forest for the trees.

The prohibition on political gerrymanders that discriminate according to viewpoint is reflected by the standard this Court has applied to review other First Amendment challenges to election regulations. In *Burdick v. Takushi*, the Supreme Court recognized that all election laws invariably impose some burden on individual voters and subjected such laws to different levels of scrutiny depending on the nature and relative severity of the burden alleged. 504 U.S. 428, 434 (1992). If the election regulation imposes only "reasonable, *nondiscriminatory* restrictions 'upon the First and Fourteenth Amendment rights of voters,'" the restriction is subject to a sliding scale under which a severe burden is subject to strict scrutiny, and the level of scrutiny declines in proportion to the severity of the burden. A "State's important regulatory interests are generally sufficient to justify" a "reasonable, *nondiscriminatory* restriction." *Id.* (emphasis added) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Conversely, if the regulation is not politically neutral but is instead discriminatory, then it "must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal quotation omitted); *see id.* at 438 (holding that strict scrutiny was not the appropriate standard to evaluate Hawaii's ban on write-in ballots because the restriction was "politically neutral" and not "content based").[2]

Further, partisan gerrymanders invoke the First Amendment's guarantees because that amendment proscribes state actions that retaliate against or penalize persons because of their political affiliations. In *Elrod v. Burns*, this Court held that the First Amendment forbids government entities from dismissing non-

[2] *Burdick*'s bifurcated standard of scrutiny is also a recurring theme in First Amendment jurisprudence as applied to exercises of the Elections power: laws that unintentionally burden activity protected by the First Amendment are subject to less scrutiny than laws that purposefully do so. *Compare Burdick*, 504 U.S. at 434, *with Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990), *superseded* by statute as stated in 135 S. Ct. 853 (2015) and *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

policy employees because of their political views or partisan support. 427 U.S. at 356. The *Elrod* Court found that "[c]onditioning public employment on partisan support prevents support of competing political interests …. Patronage thus tips the electoral process in favor of the incumbent party." *Id. Elrod* reaffirmed that states may not impose burdens based on political viewpoint because that would impermissibly distort competition in the electoral process and the marketplace of political ideas. *See id.* at 357. Accordingly, *Elrod* subjected the patronage-based employment dismissals to strict judicial scrutiny. *Id.* at 363.

These complementary lines of First Amendment analysis show that congressional reapportionment statutes must not target certain views for disfavored treatment. Like any election regulation, congressional apportionment statutes must be non-discriminatory. *Burdick*, 504 U.S. at 434. Further, like some zoning regulations, reapportionment statutes regulate the location of activity protected by the First Amendment and, accordingly, must be scrutinized to ensure that the state's interest is unrelated to disfavoring a specific viewpoint. *Compare Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986), *with Davis*, 478 U.S. at 166 (Powell, J., concurring) (finding that because "the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria … [and] the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.").

Partisan gerrymanders, though, cannot avoid such scrutiny; they constitute viewpoint-based discrimination *par excellence*. Like the patronage-based dismissals considered in *Elrod*, partisan gerrymanders assign cognizable burdens on persons *because* of their political views. The brunt of the burden is the same basic, cognizable injury that this Court has recognized in the past: diminution of voting power. While gerrymanders allow persons to cast ballots, they discriminatorily diminish the value of that

vote and thereby harm protected activity. *Cf. Gray v. Sanders*, 372 U.S. 368, 380 (1963) (holding that, even though urban voters could vote in primary elections for state-wide office, the county-unit method for counting those votes unconstitutionally diminished the "true weight" of their votes); *Smith v. Allwright*, 321 U.S. 649, 658–60 (1944) (holding that, even though black Texans could cast ballots in general elections, Democratic party qualifications that prevented them from voting in Democratic primary elections abridged their right to vote). The bare vote dilution, however, is not the whole of the injury. Political gerrymanders dilute the power of individuals to participate in the electoral process *because* of their political viewpoint as reflected by their party affiliation and voting history. Such discrimination offends the First Amendment.

III. The Maryland Legislature Violated Article I, Section 2 of the Constitution and Exceeded the Authority Granted by Article I, Section 4 of the Constitution by Gerrymandering the Sixth District to Dictate the Outcome of the General Election and Choose Who Should (or Who Should Not) Represent the People of the Sixth District in Congress.

Article I, section 2 of the Constitution limits the Elections power. The Constitution confers the power to choose members of Congress on the people, not on the state legislators. U.S. Const. Art I, § 2, cl. 1; U.S. Const. Amend. XVII; *see also Ex parte Yarbrough*, 110 U.S. 651, 663–64 (1884). This principle abides in the bedrock of our constitutional structure. *U.S. Term Limits*, 514 U.S. at 783 (It is a "fundamental principle of our representative democracy, … that the people should choose whom they please to govern them.") (internal quotation omitted). It is the beginning of republican liberty. *Ariz. State Legislature*, 135 S. Ct. at 2674–75 ("The genius of republican liberty seems to demand … 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." (quoting THE FEDERALIST NO. 37 (James Madison))). And it is evinced by one of the first choices at the constitutional convention that the people, not the state legislatures, would choose the Members of the House of Representatives, unlike the Senate, which would be chosen by the state

legislatures. *See generally* 1 RECORDS OF THE FEDERAL CONVENTION, at 48, 132 (Max Farrand ed., rev. 1966).

Although Article I, Section 4 of the Constitution grants to the legislatures of the states the power to determine the "times, places and manner of elections" of members of the House of Representatives, the Constitution does not authorize state legislators to determine the outcomes of congressional elections by gerrymandering the districts. *Term Limits*, 514 U.S. at 783; *Gralike*, 531 U.S. at 523.

As a matter of first principle, state legislatures lack the power to skew, much less supplant, the people's choice of their representatives in the national government. *See Cook*, 531 U.S. at 523 (finding that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (internal quotations omitted)); *Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring) (finding "beyond dispute, that … the National Government is, and must be, controlled by the people *without collateral interference by the States*") (emphasis added); *Anne Arundel Cty. Republican Cent. Comm.*, 781 F. Supp. at 402-03 (Niemeyer, J., dissenting) ("[N]o classification of the people can be made to advance the state legislature's preference for one class to the detriment of another, and clearly the state may not attempt to dictate the outcome of congressional elections.").

IV. This Court Has Ample Authority to Remedy the Maryland Legislature's Partisan Gerrymander of the Sixth Congressional District.

The critical factor which both identifies and distinguishes partisan gerrymanders from the legitimate use of legislative power to apportion congressional or state legislative districts is the *consideration* and *use* by legislative draftsmen of information that reflects the political affiliations and beliefs of voters to draw district lines for the purpose and with the effect of "*subjecting a group of voters or their party to disfavored treatment by reason of their views*." *Vieth*, 541 U.S. at 314 (Kennedy, J.

concurring) (emphasis added).[3]

The facts alleged by the *Shapiro* plaintiffs in their Second Amended Complaint are more than sufficient to state a claim under both the First Amendment and under Article I, section 2 of the Constitution. The complaint alleges that "the Democratic-controlled Maryland legislature violated the First Amendment and Article I of the federal Constitution

> when it used data reflecting the political party memberships, party registrations, and voting histories of Republican and Democratic voters in the 6th and surrounding districts to gerrymander the 6th District for the purpose and with the effect of enhancing the effectiveness of votes cast in favor of Democratic candidates and diluting the effectiveness of votes cast in favor [of] Republican candidates in the general election for a representative from the 6th District.

Complaint, ¶ 3; *see also* ¶¶ 6, 8, 46, 77-88, 93, 101.

For the reasons discussed above, the consideration and use of that data "reflecting political party memberships, party registrations, and voting histories" of Maryland voters to rig the Sixth Congressional District constitutes a *prima facie* violation of the First Amendment. Absent a compelling state interest in that line drawing, this Court can redress that unconstitutional government action by declaring the political gerrymandering of the Sixth Congressional District invalid and requiring that the boundaries of the Sixth District will be redrawn based on neutral factors, without regard to the political party membership, affiliation, or voting histories of voters in the Sixth District or adjacent districts. *See LULAC*, 548 U.S. at 442. The declaratory and injunctive relief plaintiffs seek removes the unconstitutional infringement on their federal constitutional rights and redresses the complained-of

[3] Compare *Gaffney*, 412 U.S. 735, which was the opposite of this case. As discussed in Section I, *supra*, a redistricting plan like the one in *Gaffney*, that does not use information about voters' political affiliations, political contributions, or voting histories to favor the majority party over the minority party in the drawing of district lines, is *not a partisan gerrymander*.

injury. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *FEC v. Akins*, 524 U.S. 11, 25-26 (1998).

CONCLUSION

The First Amendment and Article I provide judicially manageable standards for adjudicating plaintiffs' constitutional claims. Unlike challenges based solely on the Equal Protection Clause of the Fourteenth Amendment, the plaintiffs need not show that partisan gerrymandering was the predominant reason for the changes to the composition of the Sixth Congressional District (although it was). Where the majority in power entrenches its political control by considering and using data regarding the political preferences of a state's citizenry to burden the effectiveness of the votes of the minority party or parties' members and to enhance the effectiveness of the votes of its own members, that runs afoul of the First Amendment. The consideration and use of such data to penalize persons with certain political histories and preferences triggers strict scrutiny, placing the burden on the State to show a neutral, legitimate rationale for the redrawing of the district. Because the State has no *legitimate* interest in enhancing the effectiveness of the votes of one political preference over the effectiveness of the votes of an alternative political preference, the 2011 political gerrymandering of the Sixth Congressional District cannot be sustained.

Respectfully submitted, this 19th day of May, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 19, 2016, I caused a copy of the foregoing document to be served on all parties by this Court's electronic filing system.

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