IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, v. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' SUPPLEMENTAL SUMMARY JUDGMENT BRIEF

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INTRODUCTION

According to the Court's decision on the motion to dismiss, the plaintiffs in this case must prove that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 596-97 (D. Md. 2016).

We demonstrated in our prior briefs (Dkt. 177, at 3-16; Dkt. 191, at 2-10) that there is no genuine dispute that those responsible for Maryland's 2011 redistricting specifically intended to dilute Republicans' votes because of their past successful support for Representative Roscoe Bartlett. Thus, all three judges of this Court expressed an inclination, at the July 14, 2017 preliminary injunction hearing, to grant summary judgment to plaintiffs on that issue. *See* 7/14/17 Hr'g Tr. (Ex. A) 44:2-5 (Judge Bredar: "I think you've proven it, frankly, in this record without a further trial."); *id.* 32:6-10 (Judge Russell observing that "much of the evidence supports intent" and indicating that he had no "issue" with that element); *id.* 68:6 (Judge Niemeyer: "[T]he evidence [of intent] is overwhelming."). *See also* S. Ct. Oral Arg. Tr. (Ex. B) 40:15-16 (Justice Kagan: "I mean, how much more evidence of partisan intent could we need?").

We also demonstrated that those responsible for the redistricting plan achieved their specifically intended goal: There is no genuine dispute that Republican votes in the Sixth District were significantly diluted as a consequence of moving large majority-Democratic areas into, and majority-Republican areas out of, the district. *See* Dkt. 177-19 (PI Ex. Q), at 3 (Plaintiffs' expert Dr. Michael McDonald concluding that the redistricting "ha[d] the effect of diminishing the ability of registered Republican voters to elect candidates of

their choice"); Dkt. 177-48 (PI Ex. TT), at 2 (State's expert Dr. Allan Lichtman describing the "obvious" conclusion "that the 2011 Maryland congressional redistricting plan improved Democratic prospects in Maryland's Congressional District 6"). The dilution of Republican votes was so severe that—according to the same metrics used by the mapdrawers themselves to accomplish the gerrymander—it made a previously safe Republican seat essentially out of reach for Republican voters moving forward. As Justice Kagan observed, "the Maryland legislature got exactly what it intended, which was you took a Republican district, like a safe Republican district, and made it into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:13-18.[1]

Finally, we demonstrated that Republican votes in the Sixth District would not have been so badly diluted absent the specific intent to draw a "7-1 map" by flipping the Sixth District. There is no evidence that any of the other considerations in the redistricting necessitated the Sixth District's highly-targeted southward dip into Montgomery County, or that any other consideration otherwise would have resulted in such severe dilution of Republican votes.

Each of these conclusions now finds significant additional support in both the majority and concurring opinions in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). The majority opinion confirmed in clear and certain terms that vote dilution is a cognizable injury in partisan gerrymandering cases like this, and it held that such claims must be brought in exactly the kind of single-district challenge that we have brought here. And both the majority and concurring opinion lend additional support to our contention that plaintiffs'

[1] A plaintiff can also establish actionable vote dilution by "produc[ing] an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight." *Gill v. Whitford*, 138 S. Ct. 1916, 1936 (2018) (Kagan, J., concurring). "The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote." *Id.* We have done just that. *See* Dkt. 177, at 21.

injury inheres not in changed electoral outcomes themselves, but in the gerrymander's burdening of their votes and associational rights, making it harder for them to achieve electoral success. There is strong—indeed, undisputed—evidence of such burdens and causation in this case.

The Supreme Court's disposition of the appeal in this case, moreover, demonstrates the need for a swift resolution to this litigation. If this Court does not enter a final judgment near the end of the year, there is a risk that plaintiffs' claim might be mooted by passage of the 2020 election before relief can be entered. The Court accordingly should enter summary judgment for plaintiffs as expeditiously as possible. Or, if it enters only partial summary judgment, it should set a trial date at the earliest possible time at which the judges of the Court have overlapping availability.

ARGUMENT

I. UNDER *GILL*, PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON BURDEN AND CAUSATION

A. *Gill* confirms that a traditional vote dilution analysis is appropriate to demonstrate injury in partisan gerrymandering cases

Gill involved a statewide challenge to the partisan gerrymander of Wisconsin's 2011 legislative redistricting map. The plaintiffs in *Gill* "identif[ied] their injury as not simply their inability to elect a representative in their own districts, but also their reduced opportunity to be represented by Democratic legislators across the state." 138 S. Ct. at 1924 (quotation marks omitted). Because the legislative gerrymander was a statewide project that affected the composition of the entire state legislature, the plaintiffs argued (and the district court found) that "they should be permitted to bring a statewide claim." *Id.* (quotation marks omitted).

The Supreme Court disagreed, holding that the plaintiffs "ha[d] not shown standing under the theory upon which they based their claims for relief." *Gill*, 138 S. Ct. at 1929. "To the extent the plaintiffs' alleged harm is the dilution of their votes," the Court explain-

ed, "that injury is district specific." *Id*. at 1930. The Court went on:

> An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This disadvantage to the voter as an individual therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be limited to the inadequacy that produced his injury in fact. In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district.

Id. (quotation marks, alteration marks, and citations omitted).

In two respects, the Court's opinion in *Gill* supports plaintiffs' claim in this case. *First*, it confirms that gerrymandering claims are best understood as *vote dilution* claims. The harm of vote dilution, according to *Gill*, "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district." 138 S. Ct. at 1931. At the most basic level, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Bush v. Gore*, 531 U.S. 98, 107 (2000) (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)). The Court in *Gill* thus described vote dilution as a "burden on the plaintiffs' votes," which calls for a district-by-district analysis of how an alleged gerrymander "burdened [the plaintiffs'] individual vote[s]." 138 S. Ct. at 1932-33. That makes sense: "Where an election district could be drawn in which minority voters form a majority but such a district is not drawn," there is a "denial of the opportunity to elect a candidate of choice," which is "a present and discernible wrong." *Bartlett v. Strickland*, 556 U.S. 1, 18-19 (2009). That is exactly the theory that we have pressed in this case.

Second, *Gill* describes the placement of an individual in a "cracked" district (like Republican voters in Maryland's Sixth District) as a "disadvantage to the voter as an individual." 138 S. Ct. at 1930 (quotation marks and alteration marks omitted). Of course, a state law that "places a particular burden on an identifiable segment of [the State's]

voters" and "burdens the[ir] availability of political opportunity" based on their "political preferences" violates individual constitutional rights. *Anderson v. Celebrezze*, 460 U.S. 780, 792-94 (1983) (quotation marks omitted). That is just what a partisan gerrymander does, and—as we demonstrated in our prior briefs and reiterate below—it is just what Maryland lawmakers did in 2011 to Republican voters in the Sixth District.

B. Plaintiffs have undisputed evidence of traditional vote dilution, including causation

As we explained in the preliminary-injunction reply brief (Dkt. 191, at 11), vote dilution occurs when district lines are drawn so that the disfavored political party has "less opportunity . . . to elect candidates of their choice." *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality opinion) (quotation marks omitted). As *Gill* confirms, vote dilution is caused "either 'by the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority voters] into districts where they constitute an excessive majority.'" *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (quoting *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986)).

The most developed body of law on vote dilution arises in the context of racial vote dilution under Section 2 of the Voting Rights Act. To establish that vote dilution has "impeded the ability of minority voters to elect representatives of their choice" (*Gingles*, 478 U.S. at 51), a Section 2 plaintiff must satisfy the so-called *Gingles* preconditions: ***First***, "[the] minority group must be sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quotation marks omitted). ***Second***, "the minority group must be politically cohesive." *Id.* (quotation marks omitted). ***Third***, the majority "must vote sufficiently as a bloc to usually defeat the minority's preferred candidate." *Id.* (quotation marks and alteration marks omitted).

Each of these three elements is directed toward the question of causation. If the

targeted group is not "able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [reasonably drawn] single-member district" in the area, then the drawing of the district's lines "cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. Similarly, if the targeted group cannot "show that it is politically cohesive," then "it cannot be said that the [redistricting] thwarts [its] interests." *Id*. at 51. And if the majority does not "vote[] sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," then cracking the minority group will not "impede[] its ability to elect its chosen representatives." *Id*. (internal citations omitted). When these three conditions are satisfied, however, it follows that a denial of "equal electoral opportunity" is the but-for result of the lines that the legislature drew. *Johnson v. De Grandy*, 512 U.S. 997, 1012 (1994).[2]

As our redistricting expert, Dr. Michael McDonald, explained, this traditional Section 2 vote-dilution analysis fits naturally in partisan gerrymandering cases. *See* Dkt. 177-19 (PI Ex. Q), at 3-4. And that analysis is readily satisfied here.

1. Numerosity and compactness

There is no dispute that historical Republican voters are sufficiently numerous and geographically compact to form the majority of a reasonably drawn district in northwest Maryland. As the State's own witness explained, the Sixth District has comprised a consistent core of territory in northwest Maryland since its creation in the Eighteenth

[2] To be sure, *Johnson* held that the *Gingles* preconditions by themselves are not independently "sufficient" to demonstrate the substance of a Section 2 vote dilution claim. 512 U.S. at 1011. The Court stressed that the inquiry does not focus on the three preconditions for their own sake, but on the deprivation of "equal electoral opportunity" in light of all "relevant facts." *Id*. at 1012. But in that regard, the Court expressly framed *Johnson* as an interpretation of Section 2 of the VRA. And *Bartlett* emphasized that the Supreme Court's opinions interpreting "the text of § 2" do "not apply to cases in which there is intentional discrimination" (556 U.S. at 19-20), which is this case. We therefore propose to rely on the *Gingles* preconditions only as a commonsense (and time-tested) guide for identifying causation in partisan gerrymandering cases involving intentional discrimination—certainly not as a standalone framework for establishing liability on the whole.

Century. *See* Dkt. 186-17, at 7-14 (Willis report). And as recent history conclusively demonstrates, it is possible to draw a single-member district in that area in which voters who support Republican candidates are able to elect the representative of their choice. Between 1990 and 2010, they did just that. *See* Dkt. 177-5 (PI Ex. C), ¶ 8. The first precondition accordingly is satisfied.[3]

2. Political cohesion and bloc voting

There is also no dispute that historical Republican voters are politically cohesive and that both Republicans and Democrats both engage in bloc voting.

a. Using self-reported party registration data derived from the Cooperative Congressional Election Study, Dr. McDonald evaluated the Sixth District's congressional elections in 2012 and 2014, in addition to the presidential and senatorial elections in 2012 and the gubernatorial election in 2014. Dkt. 177-19 (PI Ex. Q), at 7-8. He concluded—no surprise—that self-reported registered members of the two major parties are politically cohesive. "Democrats and Republicans have distinct candidate preferences in that at least a majority of registered Democrats prefer the Democratic candidate and at least a majority of registered Republicans prefer the Republican candidate." *Id.* at 8-9. Dr. McDonald thus concluded that he is "confident within prevailing professional standards that registered Democrats in the Sixth Congressional District prefer Democratic candidates and registered Republicans prefer Republican candidates." *Id.* at 9.

The Democratic Performance Index and the Partisan Voter Index both offer further evidence of political cohesion and bloc voting among historical Democratic and Republican voters. Those metrics show that when a district's populace comprises a majority of Republican voters, the district is highly likely to elect the Republican candidate rather than the

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[3] Focus on the ability of Republican voters to form the majority of a reasonably drawn district also clarifies that the benchmark for measuring vote dilution is not necessarily the immediately prior district; it is, instead, the full range of hypothetical districts that could be drawn in the area. It also clarifies that a deliberate perpetuation of a prior partisan gerrymander could also violate the First Amendment.

Democratic one; and when it comprises a majority of Democratic voters, it is highly likely to elect the Democratic candidate rather than the Republican one. *See* Dkt. 191, at 7-9; Dkt. 191-8 (PI Ex. KKK), at 628. This is a necessary premise of the practice of partisan gerrymandering. If voters' partisan identities were *not* stable from election to election, so that Democrats did not generally vote for Democratic candidates and Republicans did not generally vote for Republican candidates, we would not see mapdrawers attempting to achieve partisan advantage by moving voters in and out of districts on the basis of their voting histories and party affiliations. But we do—and with great effect.

There is yet further evidence of generally stable political cohesion and bloc voting in this case: In the elections following the 2011 gerrymander, (1) those precincts that were *retained* in the Sixth District after the gerrymander continued to vote predominantly for Republican candidates for office; (2) those precincts that were *removed* from the district have continued to vote very strongly for Republican candidates for office, and (3) those districts that were *added* to the district have continued to vote strongly for Democratic candidates for office (*see* Stein Decl. ¶¶ 13-15 (Ex. C)):

	TABLE 1: Vote share for Republican candidate as a percentage of all election-night votes cast				
	2008	**2010**	**2012**	**2014**	**2016**
precincts **retained**	53.7%	57.8%	47.8%	59.5%	51.9%
precincts **removed**	61.6%	65.7%	64.2%	71.5%	69.3%
precincts **added**	28.7%	34.7%	30.3%	37.1%	32.1%

These data corroborate the relative stability of voters in the Sixth District over time, so that "dispersal of [Republican voters] into [surrounding] districts" ensured that "they constitute[d] an ineffective minority of voters." *Voinovich*, 507 U.S. at 154.

b. On the other side of the scales, there is not one iota of evidence to suggest that

historical Republican voters and historical Democratic voters do not vote reliably as blocs from election to election. In saying this, we are mindful that Judges Bredar and Russell expressed some concern that proof of *past* political cohesion and bloc voting may not reliably show *future* political cohesion and bloc voting—which is to say that such proof may not show that the gerrymander has actually changed the outcome of an election. *E.g.*, 7/14/17 Hr'g Tr. (Ex. A) 37:10-12 (Judge Russell: "There were a number of factors that may or may not have contributed to [Representative Bartlett's] defeat."); *id.* 44:14-18 (Judge Bredar: "[H]ow can you make, with sufficient certainty, the causal link between all of this nefarious activity—and I'll use the word nefarious—that you have so expertly proven here, and the actual outcome when there [are other] force[s] at work [in the election]?"); *id.* 45:9-10 (Judge Russell: "[Y]ou can't group these individuals together and expert that individuals have the same mindset.").

Those concerns are answered by both the law and the facts.

Take first the *law*. The Supreme Court has instructed the lower courts to undertake bloc-voting analyses in Section 2 cases, based on the same inference that we are asking the Court to make here: that political attitudes and predispositions are relatively stable from year to year, and therefore that "electoral history" provides an adequate legal basis for identifying actionable vote dilution, including the possibility that vote dilution has changed electoral outcomes. *Cooper*, 137 S. Ct. at 1470-71. Put another way, the Court's Section 2 vote dilution cases teach that an historical bloc-voting analysis is—*as a matter of law*—a sufficiently reliable predictor of future voting behavior to support a finding of vote dilution, and that the targeted minority has suffered the "discernible wrong" of having been denied an "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11 & 19.

Take next the *facts*. Every bit of evidence bearing on this issue demonstrates that blocs of voters in the Sixth District behave consistently from election to election. *See supra*, pages 6-7. The contrary suggestion—that the Sixth District's dramatic swing in favor of

Democratic candidates after 2011 may have been attributable to a massive and unprecedented change in voter attitude rather than the mapdrawers' calculated linedrawing—depends on the unsupported speculation that between 2010 and 2012, tens of thousands of Republican voters spontaneously abandoned their party and began supporting Democratic candidates instead.

Not only is the record devoid of any support for that concern, but contemporary social science literature uniformly refutes it. Academic literature shows that voters are "socialized" into a particular party at relatively young ages, and partisan affiliation tends to harden in early adulthood. *See* Donald Green et al., *Partisan Hearts and Minds, Political Parties and the Social Identities of Voters* 10-11 (2002) (Stein Decl. Ex. C-2). Once formed, these "identities are enduring features of citizens' self-conceptions," and "remain intact during peaks and lulls in party competition." *Id*. at 4-5. In fact, partisan identity remains among the strongest predictors of voter preferences, even more so than gender, class, religion, and often race. *Id.* at 3. For these reasons, it is widely recognized that the distribution of partisan identities among the electorate "provides powerful clues as to how elections will be decided." *See* Donald P. Green et al., "Partisan Stability: Evidence from Aggregate Data," in *Controversies in Voting Behavior* 356 (Richard G. Niemi & Herbert F. Weisberg eds., 4th ed. 2001) (Stein Decl. Ex. C-3). This, again, is a necessary premise of partisan gerrymandering; without it, gerrymandering would not take place at all.

In recent years, moreover, the predictive power of partisan identity has increased as partisan behavior has become even more stable. Based on an analysis of the American National Election Studies' time-series data, for example, the "observed rate of Americans voting for a different party across successive presidential elections has never been lower." Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 Am. J. Pol. Sci. 365, 365 (2017) (emphasis omitted) (Stein Decl. Ex. C-4). As a result, each party has a reliable and predictable "base of party support that is less responsive to short-term

forces." *Id.* (emphasis omitted). Recent increases in partisan "intensity" have further solidified these dynamics: A Pew Research Report notes that "[t]oday, 92% of Republicans are to the right of the median Democrat, and 94% of Democrats are to the left of the median Republican," making crossover votes between the parties even fewer and farther between. *See* Pew Research Ctr., *Political Polarization in the American Public* 6 (2014) (Stein Decl. Ex. C-5).

It is no answer to say that many voters in the Sixth District are independent voters. "Most of those who identify as independents lean toward a party." Pew Research Ctr., *A Deep Dive into Party Affiliation* 4 (2015) (Stein Decl. Ex. C-6). And voters who identify as independents but who lean towards a party generally exhibit voting behavior highly similar to registered partisans. David B. Magleby & Candice Nelson, *Independent Leaners as Policy Partisans: An Examination of Party Identification and Policy Views*, The Forum, Oct. 2012, Article 6, at 1, 17 (Stein Decl. Ex. C-7). Because the DPI depends on past voter history rather than party registration, moreover, independent voters who generally vote for Republican candidates were treated indistinguishably from registered Republicans with the same voting histories. *Cf.* Dkt. 186-41, at 48:10-50:12 (Dr. McDonald explaining how his analysis accounted for independent voters by focusing on election returns rather than party affiliation).

To be clear, none of this is to suggest that individual voters do not think for themselves or meaningfully evaluate and respond to individual candidates. Nor does it suggest that partisan identity is the only factor that influences voter behavior or that voter behavior can be predicted with absolute certainty. That is why we see modest fluctuations in election returns from election to election (*see* Table 1, *supra*, at 8) and why the DPI and PVI do not predict electoral outcomes with certitude. But the social science literature does conclusively corroborate what Dr. McDonald's analysis of the Sixth District demonstrates, what the DPI and PVI logically imply, and what the actual elections returns show: that

partisan identity is stable over time, that it therefore can be used to predict voter behavior with a high degree of confidence, and that moving district lines as the State did in 2011 is a highly effective means of diminishing electoral opportunity, inflicting very concrete and practical effects. Indeed, that is the necessary premise of the Supreme Court's vote dilution cases under Section 2 of the VRA.

C. Vote dilution is an actionable injury independent of changed electoral outcomes

Plaintiffs' theory of injury has all along included unconstitutional vote dilution. Dkt. 44 ¶¶ 7b, 28, 93; Dkt. 68, at 1, 7-8, 15-16. We acknowledged from the outset, however, that vote dilution—even when intentionally inflicted—may not be sufficiently significant to make a practical difference in all cases. We therefore took the position that a partisan gerrymandering plaintiff must prove that intentionally inflicted dilution has resulted in a real and concrete adverse effect, not a de minimis one, before he will be entitled to relief. *E.g.*, Dkt. 68, at 15-16; Dkt. 85, at 4-5. This Court, in denying the State's motion to dismiss, agreed: "[T]o establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference." *Shapiro*, 203 F. Supp. 3d at 597.

In light of the evidence in this case, we have consistently argued that the intentional dilution of plaintiffs' votes amounted to a practical injury *because* it has dictated the outcomes of subsequent elections. We confidently stand by that assertion: Because of the huge shifts in the political composition of the Sixth District's population—overwhelmingly from voters who had previously cast their ballots for Republicans to those who had cast them for Democrats—the *Cook* PVI showed that the chances of a Republican victory in the district dropped from 99.7% in 2010 to just 6% in 2012. Dkt. 191, at 7-9. The DPI—the metric employed by the mapdrawers themselves—similarly showed that the chances of a Repub-

lican victory fell from 100% in 2010 to 7.5% in 2012. *Id*. And, of course, these predictive metrics proved devastatingly reliable in this case: Democrat John Delaney defeated Rep. Bartlett in the 2012 election and has won reelection ever since. Dkt. 177-5 (PI Ex. C), ¶¶ 54-56. This is what gerrymandering is all about: denying the targeted minority a meaningful "opportunity to elect a candidate of their choice." *Bartlett*, 556 U.S. at 11.

But it does not follow from our factual contentions concerning the 2012, 2014, and 2016 elections that, to establish a cognizable burden in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must indispensably show that every electoral outcome is (and will continue to be) unquestionably attributable to the gerrymander. *Benisek v. Lamone*, 266 F. Supp. 3d 799, 808 (D. Md. 2017). As Justice Kagan observed in *Gill*, only a "perfect" gerrymander would ensure that when "a voter resides in a packed district, her preferred candidate will win no matter what," and "when a voter lives in a cracked district, her chosen candidate stands no chance of prevailing." 138 S. Ct. at 1936. But the law does not demand transcendent wrongdoing before a court may grant relief. The Supreme Court's vote-dilution cases recognize that vote dilution and the inability to win elections do not necessarily go hand-in-hand. *Gingles*, 478 U.S. at 31. To be sure, electoral outcomes are probative "evidence" bearing on the question of vote dilution. *Johnson*, 512 U.S. at 1011. But plaintiffs' injury inheres in their diminished electoral opportunity, not in the electoral outcomes themselves.

Thus, even if the Republicans in the Sixth District had won an election somewhere along the way, it would not necessarily refute our claim that the gerrymander has "disadvantage[d]" the plaintiffs "as . . . individual[s]" in the electoral process (*Gill*, 138 S. Ct. at 1930 (quotation marks omitted)) in a constitutionally significant manner. If, for example, the 2011 gerrymander had changed only two of the three congressional elections between 2012 and 2016, that still would be a sufficiently serious burden upon plaintiffs' electoral opportunity to warrant relief—it would be no defense for the State to say that it had

succeeded in rigging only two elections when it was really going for all three.

This much is confirmed by the Supreme Court's ballot access cases. In *Anderson*, the Court confronted an early candidacy filing deadline that applied only to independent candidates. Invalidating that discriminatory regulation under the First Amendment, the Court explained that "'the right of qualified voters, regardless of their political persuasion, to cast their votes effectively'" can be "heavily burdened" by voting "restrictions" and "regulation[s]." 460 U.S. at 787-88 (quotation marks omitted). The Court ultimately invalidated the early filing deadline in *Anderson* because—as a matter of common-sense practicalities—it selectively "place[d] a particular burden on an identifiable segment of Ohio's independent-minded voters." *Id.* at 792. Because the deadline applied "unequally" among the political parties, in other words, it "burden[ed] the availability of political opportunity" based on the "political preferences" of voters and was therefore unlawful. *Id.* at 793-94 (quotation marks omitted). Thus, it could not stand.

Consider also *Cook v. Gralike*, 531 U.S. 510 (2001), where the Supreme Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id*. at 514-27. Although "the precise damage the labels may exact on candidates [was] disputed" there, the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id*. at 525. In language that easily could be mistaken for a condemnation of partisan gerrymandering, the Court explained that the Elections Clause does not authorize the States to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Id*. at 523 (quotation marks omitted).

In neither *Anderson* nor *Cook* did the Court require the plaintiffs to prove that the challenged regulations changed the outcome of the election as a precondition to relief. It was enough to show (just as in a vote dilution case like this one) that the regulation had

put the plaintiffs at a concrete "political disadvantage." *Cook*, 531 U.S. at 525.

For the same reasons, it cannot be said that Maryland's 2011 gerrymander of the Sixth District did not inflict a concrete injury under the First Amendment simply because "Congressman Delaney nearly lost control of his seat in 2014." *Benisek*, 266 F. Supp. 3d at 813. Regardless whether the election in 2014 was a close one, the fact remains that the Sixth District was deliberately converted from "a safe Republican district . . . into not the safest of Democratic districts but a pretty safe one." S. Ct. Oral Arg. Tr. (Ex. B) 41:14-18 (Justice Kagan). The gerrymander thus manifestly reduced the effectiveness of plaintiffs' votes and diminished their electoral opportunity, with concrete practical effects. That is an actionable burden on plaintiffs' representational rights.

D. Justice Kagan's *Gill* concurrence confirms that plaintiffs' injury inheres in effects other than changed electoral outcomes

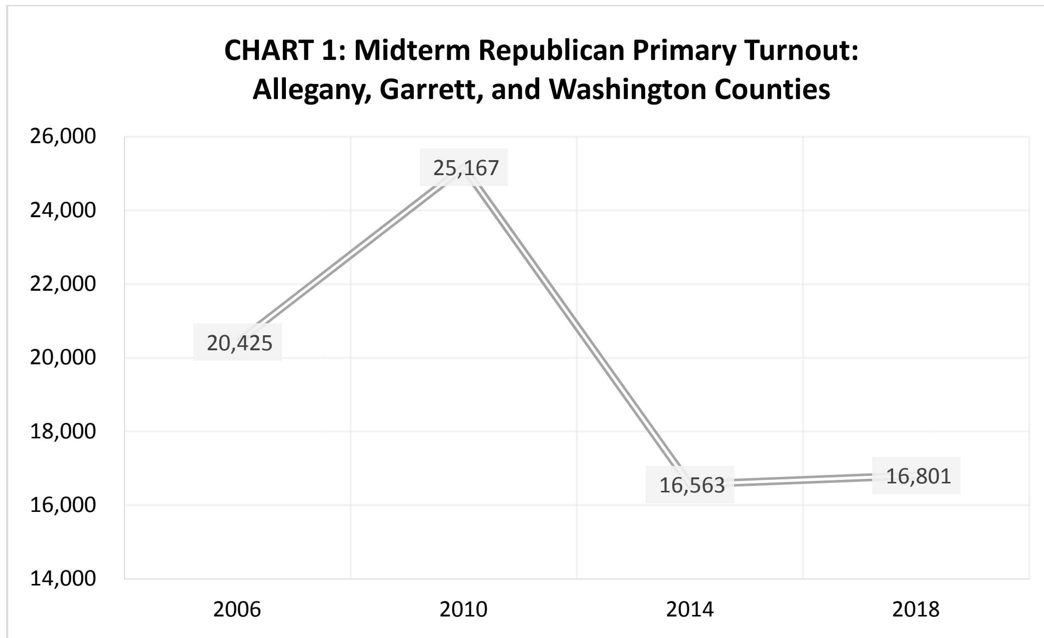
Although we are confident that we have proved beyond genuine dispute that the gerrymander dramatically diluted Republican votes in the district—so much so that it denied them a meaningful opportunity to win the elections in 2012, 2014 and 2016—we have not hitched our wagon to that horse alone. In fact, we have also consistently argued that the 2011 gerrymander has inflicted a more-than-de-minimis injury insofar as it has chilled and disrupted the associational and expressional activities of Republicans in the Sixth District. *E.g.*, Dkt. 44 ¶¶ 112-119; Dkt. 177, at 18-19.

Justice Kagan's concurring opinion in *Gill* lends substantial support to this additional way of conceptualizing plaintiffs' injury. In her view, partisan gerrymandering claims are properly litigated as vote dilution claims because gerrymandering directly "burden[s] individual votes" by diminishing electoral opportunity. 138 S. Ct. at 1934. "But," in Justice Kagan's view, "partisan gerrymanders inflict other kinds of constitutional harm as well." *Id* at 1938. "Among those injuries, partisan gerrymanders may infringe the First Amendment rights of association held by parties, other political organizations, and their

members." *Id*. "Members of the disfavored party in the State deprived of their natural political strength by a partisan gerrymander, may," in particular, "face difficulties fund-raising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Id*. (quotation marks omitted). This analysis reflects the same considerations that the Supreme Court found relevant in *Anderson*. *See* 460 U.S. at 792 (inhibition of campaigning, "organizing efforts," "recruit[ment] and ret[ention]" of volunteers, "media publicity," and fundraising are identifiable burdens).

There is clear evidence of just such burdens on plaintiffs' associational rights in this case. To begin, voter engagement in support of the Republican Party has dropped off significantly since the 2011 gerrymander. We submit that the best indicator of this effect is the falloff in turnout for the Republican primary elections in midterm years. Prior to the gerrymander, the Republican primary was the most important election for selecting the district's representative, given that the Republican nominee was highly likely to win the general election regardless of whom the Democrats selected in their own primary. And during the midterm elections, the congressional race was at the top of the federal ticket and thus most likely to drive primary voters to the polls.

Publicly-available primary election data certified by the defendants themselves shows that turnout for the Republican primary elections in midterm years has decreased dramatically since 2011, despite increased party registration. In Allegany County, for example, turnout for the 2010 Republican primary was a robust 42.8%. Dkt. 191-11 (PI Ex. NNN), at 3. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. *Id.* at 9. Allegany County is no outlier; participation in midterm Republican primary elections has dropped precipitously in all three counties that remained entirely in the Sixth District after the 2011 gerrymander:

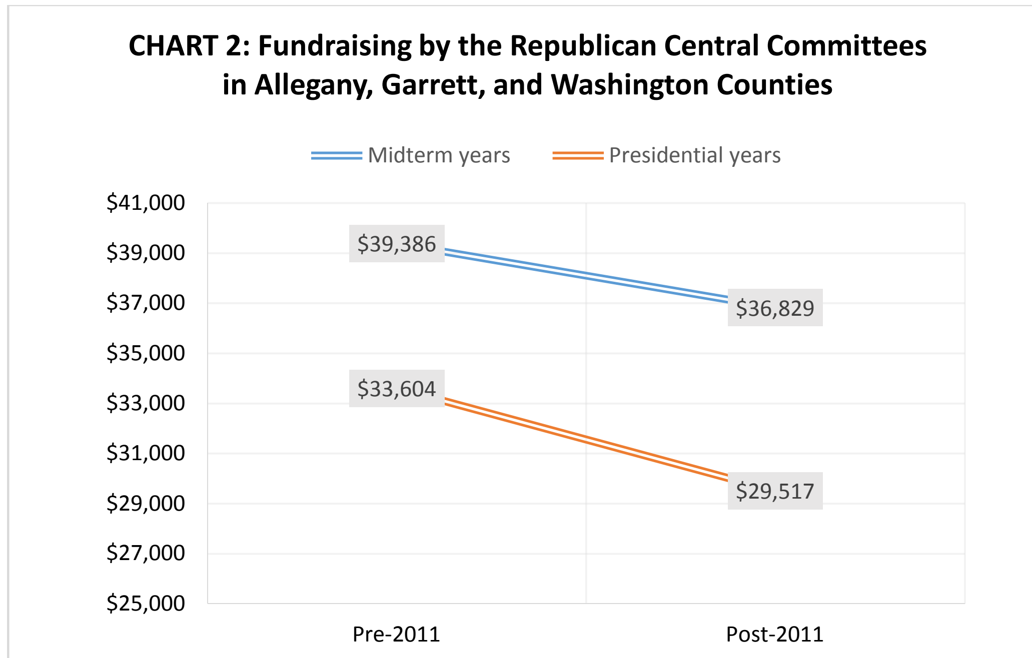


See Stein Decl. ¶¶ 18-22.[4]

Elections returns in the general elections corroborate the same chilling effect. In the 138 voter precincts that were in the Sixth District both before and after the gerrymander, turnout among Republican voters in 2008 stood at 74,299, comprising 53.7% of the total share of election-day votes cast. Stein Decl. ¶ 13. In the next presidential election year in 2012, Republican voter turnout plummeted to 60,969, comprising 47.8% of the total election-day votes cast. Stein Decl. ¶ 13.

Fundraising by the Republican Central Committees in the counties that remained entirely in the Sixth District has also fallen off noticeably since the 2011 gerrymander. According to Maryland State Board of Elections campaign finance filings by those committees, fundraising during midterm election years has fallen by more than 6%. *See* Stein Decl. ¶ 37, Ex. C-11. Fundraising during presidential election years has suffered as well, dropping by over 12%. *Id.* The following graph (*see id.*) shows the effect:

[4] Republican primary turnout fell district-wide as well (Stein Decl. ¶¶ 18-22), but that is expected regardless of chilling, given that so many Republican voters were moved out of the district and replaced with Democratic voters.



As we explained in our prior briefing, moreover, all of this hard data is corroborated by the plaintiffs' on-the-ground experiences. *See* Dkt. 177-1, at 18-19.

This evidence, taken as a whole, substantiates precisely the kind of associational injury that Justice Kagan described in her concurring opinion. Voter support—expressed in terms of both voter turnout and financial support—has been chilled by the gerrymander. As she observed in the same opinion, "[c]ourts have a critical role to play in curbing partisan gerrymandering," and it is especially in circumstances like these, with clear evidence of substantial burdens on representational and associational rights, that "the need for judicial review is at its most urgent." *Gill*, 138 S. Ct. at 1941.

II. IF THE COURT DENIES SUMMARY JUDGMENT IN WHOLE OR PART, THE SUPREME COURT'S DISPOSITION OF THE APPEAL IN THIS CASE CONFIRMS THE NEED FOR A SPEEDY RESOLUTION OF THE CASE

The record in this case irrefutably demonstrates (1) a specific intent to dilute Republican votes in for the former Sixth District, (2) success in bringing that goal about, leading to real and identifiable burdens on plaintiffs' representational and associational rights, and (3) no neutral justification to refute but-for causation. Against this backdrop, the Court should enter summary judgment for the plaintiffs. That is particularly so because the stan-

dard at the final judgment stage requires a less robust showing that it does at the preliminary stage. *See* 7/14/17 Hr'g. Tr. (Ex. A) 98:11-16 (Judge Bredar observing that "51 percent probably carries the day [when] . . . seeking a final permanent injunction" but "probably doesn't carry the day when you're in a preliminary proceeding seeking a PI.").

But if the Court disagrees, and it determines instead that a trial is necessary to resolve genuine disputes in the evidence, we respectfully submit that a trial at the earliest possible date is imperative. As the Supreme Court's disposition of the appeal in this case shows, relief (if any) must be entered sufficiently far in advance of the 2020 elections to ensure that it will not risk undermining "due regard for the public interest in orderly elections." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). For the reasons given in plaintiffs' statement in the joint status report (Dkt. 209), we respectfully request that the Court schedule a trial at the earliest time during which the judges of this Court are able to find overlapping dates on their schedules, and in no event later than October 2018.

CONCLUSION

The Court should enter summary judgment for plaintiffs. If it denies summary judgment, it should alternatively set a trial date at the earliest possible time.

Respectfully submitted.

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