No. 18-422, 18-726

In the Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

LINDA H. LAMONE, ET AL.,

Appellants,

v.

O. JOHN BENISEK, ET AL.,

Appellees.

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

BRIEF OF AMICI CURIAE FIRST AMENDMENT AND ELECTION LAW SCHOLARS IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are eleven nationally recognized scholars and teachers of the First Amendment and Election Law. All of them have substantial expertise on the subjects of redistricting and the First Amendment. Each has authored multiple scholarly articles and books on constitutional law and the democratic process. Their scholarship and experience lead them to conclude, for the reasons explained below, that the First Amendment right of freedom of association should be understood to require strict scrutiny of redistricting plans that discriminate based on political-party affiliation—partisan gerrymanders—and that both North Carolina's and Maryland's plans are unconstitutional. A full list of amici, including brief summaries of their credentials and relevant scholarship, appears in the Appendix.

SUMMARY OF ARGUMENT

Amici urge affirmance of the lower courts' decisions that extreme partisan gerrymanders may violate the First Amendment right of association of both individuals and parties, though we propose a legal standard different from that adopted by either of those courts. The First Amendment right to freedom of association protects both an individual's ability to exercise political influence by joining with like-minded others, and the right of expressive associations, including political parties, to be free from discrimination based on the political viewpoint of the group.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief. All parties have filed with the Clerk a letter of blanket consent to the filing of briefs of amici curiae.

There is no more important way in which citizens seek to advance their political beliefs than by associating with political parties. As this Court has long recognized, party-based discrimination is anathema to the First Amendment because it infringes on individual liberty and distorts the electoral process. *See Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion) (recognizing that discrimination based on political party violates the First Amendment right of association because it inhibits "the individual's ability to act according to his beliefs and to associate" and "tips the electoral process in favor of the incumbent party").

Under this Court's precedents, the right to freedom of association does more than just safeguard the right to *join* a political party or other group of like-minded people. It also prohibits state regulations that *discriminatorily burden a political group's ability to influence the electoral process*. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 (1986); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968). Redistricting laws that discriminatorily burden one political party at the expense of another—partisan gerrymandering—effect this type of injury and warrant strict scrutiny. Unless they are narrowly tailored to a compelling state interest, such laws must be struck down.

Recognizing that partisan gerrymandering implicates associational rights is fully consistent with this Court's precedents. The Court has long recognized the relationship between expressive association and voting, applying the same standard to association claims under the First Amendment and right-to-vote claims under the Fourteenth Amendment. *See Anderson*, 460 U.S. at 788-90; *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

Recognition of an association-based partisan gerrymandering claim would not categorically foreclose any consideration of party affiliation in redistricting. But, where party affiliation is used to draw district lines in a manner that discriminates against a political party and its adherents by placing them at a significant disadvantage relative to their statewide voting strength, that would be a severe burden that triggers strict scrutiny. *See id.* at 434. Even then, the state could defend its plan by showing that it is narrowly tailored to further a compelling interest such as ensuring compactness or preserving political subdivisions.

There is ample guidance in First Amendment case law to define when a redistricting plan imposes a discriminatory burden on association that is of such a magnitude to warrant heightened scrutiny. Here, there can be no doubt that North Carolina's plan severely burdens the associational rights of the minority party and its adherents. The packing and cracking of Democratic voters makes it more difficult for their preferred candidates to win congressional elections and impedes citizens' ability to join with like-minded others outside the electoral process – for example, by recruiting candidates, raising money, and otherwise organizing for collective political expression. There is no compelling justification for the discriminatory burden that North Carolina's plan imposes on the non-dominant party and its adherents. While the Maryland case is closer, that plan imposes a substantial burden on the disfavored party and its supporters, in this case Republicans, by entrenching a 7-1 split in favor of the Democratic Party. The evidence of record demonstrates harm to association both inside and outside the electoral process that cannot be justified by Maryland's proffered interests.

The importance and urgency of this Court's adopting a legal standard by which to assess partisan gerrymandering cannot be overstated. As Justice Kagan has recently emphasized, "[p]artisan gerrymandering jeopardizes '[t]he ordered working of our Republic, and of the democratic process.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (opinion of Kagan, J.); quoting *Vieth v. Jubelirer*, 541. U.S. 267 at 316 (opinion of Kennedy, J.). The dominant party's incentive and ability to entrench itself in power are stronger than ever, given the increase in partisan polarization[2] and the hardening of partisan attitudes.[3] Enhanced technological tools are now available that enable the dominant political party in any state to draw district lines so that it not only maximizes its immediate electoral gains but also—by drawing enough "safe" seats for itself—ensures that its electoral advantage will persist for years. *See Gill*, 138 S. Ct. at 1941:

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[2] *See*, *e.g.*, Alan I. Abramowitz, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA (Nathaniel Persily, ed., 2015); Sean M. Theriault, PARTY POLARIZATION IN CONGRESS (2008); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273, 276-81 (2011); Pew Research Ctr., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* 18 (2014), http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf.

[3] Michael S. Lewis-Beck, et al., THE AMERICAN VOTER REVISITED, 127 (2011); Larry Bartels, *Partisanship and Voting Behavior*, 44 AM. J. POL. SCI. 35 (2000); Warren E. Miller & J. Merrill Shanks, THE NEW AMERICAN VOTER 146-50 (1996); Nicole E. Mellow, *Voting Behavior: Continuity and Confusion in the Electorate*, in THE ELECTIONS OF 2016, 87, 90-92 (Michael Nelson, ed., 2017).

> Technology makes today's gerrymandering altogether different from the crude linedrawing of the past. New redistricting software enables pinpoint precision in designing districts. With such tools, mapmakers can capture every last bit of partisan advantage, while still meeting traditional districting requirements. . . . Gerrymanders have thus become ever more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides.

Moreover, because partisanship has increased and stiffened, it is even more likely now than before that the effects of such partisan gerrymandering will persist. Such substantial and durable party-based discrimination in redistricting fundamentally undermines our democracy.

ARGUMENT

A. The Right of Association Protects an Individual's Ability to Enhance Her Political Influence by Associating with Others

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Central to the right of association is "the advancement of common political goals and ideas." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The right to expressive association afforded to civic groups, including political parties, arises in part from the individual interest in gathering with others and lending

one's voice to a larger cause. But that is not the only basis for this right. As this Court has recognized, the right of association also limits the state's ability to discriminate against groups that espouse a rival point of view. This Court has thus recognized that the right of association extends to rules regulating the electoral process itself and has applied a balancing test under which rules that impose "severe" burdens trigger strict scrutiny.

Freedom of association is closely linked to the First Amendment's prohibition on content and viewpoint discrimination. This Court has held that, "[a]bove all else, the First Amendment 'means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Police Department v. Mosley*, 408 U.S. 92, 95 (1972). This principle applies with special force where political speech is concerned, to ensure that the dominant political group may not stifle or diminish the collective voice of its opponents. *See* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 Election L.J. 288, 291-93 (2014). This is in keeping with the long line of precedent holding that government discrimination against disfavored viewpoints or speakers contravenes the First Amendment. *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 340-41 (2010) (citing cases).

Consistent with the viewpoint-neutrality principle, the Court's earliest decisions protecting expressive association have restricted government efforts to discourage or punish individuals for joining groups with disfavored viewpoints. The first example is *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), in which the Court found that a discovery request by the

State of Alabama seeking the identities of NAACP members triggered strict scrutiny. The Court explained that the request, if granted, was "likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-63. The associational interest in *Patterson* thus went beyond the right of individuals simply to join the organization; it also included the right of those with a disfavored viewpoint not to be burdened in ways that interfered with achievement of their shared "political goals." *Id*.

So too, in *NAACP v. Button*, 371 U.S. 415 (1963), the Court applied strict scrutiny to a Virginia statute that impeded free expression in the pursuit of associational viewpoints, in that case by inhibiting the NAACP's solicitation of plaintiffs in civil-rights litigation. Such litigation, the Court explained, was "a form of political expression" and particularly "a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community." *Id.* at 429. The Virginia statute threatened to undermine the NAACP's ability to exercise political power to further its members' viewpoints: there "inhere[d] in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.* at 434. It cut off a key "avenue open to a minority to petition for redress of grievances" and thereby to exert political power in furtherance of its viewpoints. *Id.* at 430.

This Court's patronage cases similarly recognize that the right of association protects both the individual interest in associating with like-minded others and the collective interest in "the free functioning of the

electoral process." *Elrod*, 427 U.S. at 356. In *Elrod*, the Court held unconstitutional the practice of firing people from certain government jobs because of their party affiliation. After describing the harm to the individual liberty interest arising from this practice, the *Elrod* plurality explained that patronage "tips the electoral process in favor of the incumbent party" by allowing it to "starve [the] political opposition." *Id.* *See also id.* at 371 n.6 ("Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system.") (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 100 (1947)). Later patronage cases go even further than *Elrod* in limiting government consideration of party affiliation. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 74-76 (1990); *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The principle underlying these decisions is viewpoint-neutrality, especially when it comes to government actions that might affect the electoral process. *See* David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment,* 36 Cap. U. L. Rev. 1, 45-47 (2007).

The First Amendment right of association thus implicates both the systemic interest in a fair political process and the individual interest in furthering one's beliefs, both of which underlie the patronage cases. *Elrod* and its progeny also illustrate the centrality of *political parties* to the right of association—and the corresponding harms arising from the dominant party's discrimination against a non-dominant party to entrench itself in power.

These same principles have guided the Court's consideration of state laws directly regulating the electoral process. The Court first held voting itself to be a form of expressive association in *Williams v. Rhodes*,

393 U.S. 23 (1968), striking down an Ohio ballot-access law that disadvantaged new political parties while giving "the two old established parties a decided advantage." *Id.* at 31. Later, in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court struck down an Illinois law providing that a voter could not vote in a party primary if, in the prior 23 months, the voter had cast a ballot in the primary of another political party. The Court held that the law burdened the plaintiff's right of association because it impaired her ability to "associate effectively with the party of her choice." *Id.* at 58. The problem with the statute was not that it rendered the plaintiff unable to associate with the party of her choice: she plainly could, just not in the particular context of the party's primary elections. *Id.* Rather, the fatal problem was that the statute "constituted a 'substantial restraint' and a 'significant interference'" on a "basic function" and "prime objective" of associating with others in the exercise of political power, namely choosing a party's candidates by participating in primary elections. *Id*. *See also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) (recognizing that ordinance limiting contributions and expenditures in ballot measure campaigns impermissibly "hobble[d] the collective expressions of a group," limiting its power to advocate effectively for the political views of its members).

These cases recognize that associational interests are implicated when people lend their individual voices to a broader chorus to advance their shared political viewpoint, both inside and outside the electoral process. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied this principle to discrimination based on *which* chorus of voices one chooses to join.

Plaintiffs in *Anderson* challenged an Ohio statute that required independent candidates seeking a place on the ballot to declare their candidacies before the established political parties had chosen their candidates. *Id.* at 782-83, 799. The Court concluded that this law "burden[ed] voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Id.* at 788. It explained that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment" because it "discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties." *Id.* at 793-94. In short, the Ohio statute placed a "particular burden on an identifiable segment of Ohio's independent-minded voters," hindering the ability of such voters to band together and influence the political process. *Id.* at 792.

Like previous associational-rights cases, *Anderson* was concerned with the discrimination the law imposed on a group of voters' attempting to further their political beliefs through the electoral process. The statute "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," restrictions that "threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794; *see also id.* at 788 n. 8 ("the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and denied and equal opportunity to win votes") (quoting *Williams v. Rhodes*, 393 U.S. 23, 31 (1968)).

Under *Anderson*, courts should weigh the "character and magnitude" of the injury to associational and voting rights against the state's asserted interests. 460 U.S. at 789. While "reasonable, nondiscriminatory" restrictions may generally be justified by the state's "important regulatory interests," the Court held, a stronger state justification is required if the law discriminates against an identifiable political group. *Id*.

The Court later clarified that strict scrutiny applies only to "severe" restrictions, as opposed to "'reasonable, nondiscriminatory'" ones. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788). Since *Anderson* and *Burdick*, the Court has continued to emphasize that advancement of one's beliefs *through a political party* is central to freedom of association. *See* Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. L. Rev. 763, 777, 785 (2016).

In *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), for instance, the Republican Party challenged a Connecticut statute prohibiting independent voters from participating in its primary. The Republican Party argued that the statute "impermissibly burden[ed] the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success." *Id.* at 214. The Court agreed, concluding that the statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Id.* at 216. *See also California Democratic Party v. Jones*, 530 U.S. 567 (2000) (recognizing associational rights of major parties); *Eu v. San Francisco Co. Democratic Cent. Comm.*, 489 U.S. 581 (1989) (same).

Of course, not all burdens on political party association violate the First Amendment. *See, e.g., Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 458 (2008) (upholding blanket primary that did not severely restrict party's associational rights); *Clingman v. Beaver*, 544 U.S. 581, 589 (2005) (upholding law prohibiting members of one party from voting in another party's primary because law did not impose a severe burden). But, where the state severely restricts the associational right of a political party and its adherents by imposing *discriminatory* burdens, strict scrutiny applies.

The Court's freedom-of-association cases thus do more than simply protect individuals' ability to associate with like-minded others. They are also concerned with the ability to advance the group's shared viewpoints by *translating that association into political power through the ballot*. *See* Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1249 (2003) ("[I]n protecting political association, the First Amendment protects more than private association. [It] also extends to election laws that burden the individual's right to make free choices and to associate politically through the vote."). Most importantly for these cases, they limit a dominant political party's power to discriminate against a rival group and its supporters by diminishing their collective voice in the electoral process.

B. The Right of Association Forbids Districting that Discriminatorily Burdens Political Association Based on Party Affiliation

As the preceding section demonstrates, this Court's right-of-association cases establish that laws discriminating on the basis on party affiliation trigger strict

scrutiny under the First Amendment. This principle is grounded in both the individual liberty interest in affiliating with others to advance one's beliefs and the collective interest in preventing the dominant political group from impairing the free functioning of the electoral process. In assessing election laws alleged to violate the right of association, this Court has articulated a balancing standard, under which "severe" restrictions are subject to strict scrutiny while "reasonable, nondiscriminatory" ones receive more deferential review.

This Court should apply this established standard to partisan gerrymandering. As Justice Kennedy has recognized, redistricting laws are comparable to other laws that discriminatorily restrict political-party association, including those that accomplish this objective through regulation of the electoral process. *See Vieth*, at 314-16 (citing *Elrod*, *California Democratic Party*, *Eu*, and *Anderson*). Redistricting laws plainly affect opportunities for association: the boundaries of a district define which voters may associate with one another for purposes of advancing their viewpoints by voting for candidates within that district. A districting scheme that discriminates against a particular association of like-minded individuals—and especially a political party, which is the primary means through which individuals organize to advance their political beliefs at the ballot box—will impede the efficacy of that group's efforts to achieve its political aims.

It is well-established that "First Amendment concerns arise where a State enacts a law that has the purpose and 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); *see also id.* (recognizing the "First Amendment

interest of not burdening or penalizing citizens because of . . . their association with a political party").

In the context of redistricting, as in other associational-rights cases, "[t]he inquiry is not whether political classifications were used," but "whether political classifications were used to burden a group's representational rights." *Id.* at 315. Under this Court's freedom-of-association case law, a districting plan that imposes discriminatory burdens on people with a particular viewpoint—for instance, the independent-minded voters in *Anderson* or the supporters of the minority political party in these cases—runs afoul of the First Amendment, because such a plan violates the associational rights of citizens seeking to join their voices with others sharing their viewpoint. Daniel P. Tokaji, *Gerrymandering and Association*, 59 Wm. & Mary L. Rev. 2159, 2191-97 (2018). As Justice Kagan stated in her concurring opinion in *Gill*, "[m]embers of the 'disfavored party' in the State. . . deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." 138 S. Ct. at 1938 (citation omitted). *See also* Tabatha Abu El-Haj, *Networking the Party*, 118 Columbia L. Rev. 1225, 1286 (2018) (association inquiry should focus on "the party's ability to mobilize broad and representative political participation").

Applying the Court's freedom-of-association jurisprudence to redistricting is fully consistent with the basic principles that have long guided redistricting decisions under the Equal Protection Clause. The Court has applied the same legal standard to both associa-

tion and voting claims for over three decades. *See Anderson*, 460 U.S. at 787-89 & n.7 (recognizing that ballot-access law implicated "overlapping" associational and voting rights and applying same standard to both); *Burdick*, 504 U.S. at 433-34 (applying same standard to both voting and association claims). There is no tension between the Court's freedom-of-association case law and the Court's observation that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). Political gerrymandering does not infringe on associational rights merely by virtue of its consideration of political party affiliation. Instead, political gerrymandering infringes on associational rights when it discriminatorily burdens the proponents of a particular viewpoint, through effects both inside and outside the electoral process.

In *Gaffney*, the Court upheld a redistricting plan that plainly protected associational rights: a statewide plan drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas." *Id.* at 752; *see also id*. ("We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts."). Such a plan, which sought to ensure that the elected representatives roughly mirrored the electorate, cannot be said to place an undue burden on either party. To the contrary, the *Gaffney* plan considered political viewpoint to *avoid* infringement on associational rights. By contrast, a plan that discriminates against one political party and in favor of the other should trigger strict scrutiny under the First Amendment.

As this Court's decisions make clear, state action need not completely "deprive [plaintiffs] of all opportunities to associate with the political party of their choice" in order to warrant First Amendment scrutiny. *Kusper*, 414 U.S. at 58. Instead, the Court looks to whether the action "constituted a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association." *Id.* (quoting *Patterson*, 357 U.S. at 462 and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)). A "significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest" but rather must be narrowly tailored to serve a compelling state interest. *Id.*; *see also Button*, 371 U.S. at 438 ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

Similarly, this Court's voting and associational rights cases call for "[a] court considering a challenge to a state election law" to assess "'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate.'" *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789). When First Amendment rights are "subjected to 'severe' restrictions" by state election laws, the laws will survive only if they are "'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally

sufficient to justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

A state election law, therefore, will not trigger heightened scrutiny on freedom-of-association grounds unless it imposes a sufficiently large and lasting burden on association. As this Court's decisions make clear, a restriction on association is "severe" and warrants strict scrutiny where it is not "reasonable [and] nondiscriminatory." Thus, in both *Kusper* and *Anderson*, the Court applied strict scrutiny where the challenged laws imposed discriminatory burdens on independent-minded voters and candidates. *See Anderson*, 460 U.S. at 793 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties."); *Kusper*, 414 U.S. at 58 (strict scrutiny applied where state law forbade voters from participating in one party's primary within 23 months after voting in another party's primary).

In the context of redistricting, then, there must be a significant *discriminatory* effect on a political party and its adherents for the restriction to be deemed "severe." The mere fact that a redistricting plan yields districts that tend to result in one party's having an electoral advantage over another does not alone demonstrate discrimination or compel strict scrutiny. *Cf. Burdick*, 504 U.S. at 433. A redistricting plan that achieves a "rough approximation" in representation of those parties "large enough to elect legislators from discernible geographic areas" would not trigger strict

scrutiny. *Gaffney*, 412 U.S. at 752. In those circumstances, the character and magnitude of any burden would not justify a finding that associational rights had been severely restricted. *See Burdick*, 504 U.S. at 434 ("[W[hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.") (quoting *Anderson* , 460 U.S. at 788).

But, where redistricting discriminates against a political party and its members by placing them at a significant disadvantage relative to their statewide voting strength, strict scrutiny is warranted. *Cf. Gaffney*, 412 U.S. at 754 ("[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so."). That would include cases in which a state plan undertakes "to minimize or eliminate the political strength of any group or party." *Cf. id*. (holding that state plan may not be invalidated where "it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough proportional representation in the legislative halls of the State").

The constitutional standard amici advocate is different from that employed by either of the courts below. The lower courts adopted slightly different three-part tests, looking to the state's intent to burden the disfavored party and its supporters, the actual effects on association, and causation. *Lamone v. Benisek*, 348 F. Supp. 3d 493, 515 (D. Md. 2018); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 929 (M.D. N.C. 2018).

Amici instead propose application of the familiar *Anderson-Burdick* standard that has been applied in other cases involving voting and association, considering the "character and magnitude" of the burden on the disfavored party and its supporters. If the burden is sufficiently large and lasting to be severe, then strict scrutiny applies. If not, the state's important regulatory interest may justify the burden. This provides an appropriately nuanced standard that considers whether the burdens on associational rights are justified by the state's interests.

There are multiple ways to measure the burden that a particular plan imposes on the electoral opportunities of a political party and its supporters. One of them is the "efficiency gap," which the district court defined as "votes cast for a candidate in excess of what the candidate needed to win a given district, which increase as more voters supporting the candidate are 'packed' into the district, *or* votes cast for a losing candidate in a given district, which increase on an aggregate basis, when a party's supporters are 'cracked'". *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 658 (M.D. N.C 2018). Other metrics of the statewide impact on a party include the mean-median difference[4] and seats-to-votes curve.[5] These and other metrics are more extensively addressed in Plaintiffs-Appellees' briefs and other amicus briefs being filed in support of their position.

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[4] *See* Laura Royden & Michael Li, *Extreme Maps* (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16.pdf., at 4

[5] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987).

Amici do not propose that this Court endorse any one of these proposed metrics as the gold standard, but all of them may provide evidence of the statewide effects of a redistricting plan on the nondominant party and its adherents. So too will actual election results under a redistricting plan where one party is consistently able to garner a share of legislative seats significantly larger than its share of votes *and* the other party a share of seats significantly smaller than its share of votes. Evidence of legislative intent to create or entrench a partisan imbalance likewise will suggest First Amendment harm—for instance if there are statements by legislators urging a plan that that would prevent the opposing party from gaining a majority of seats, even when it receives a majority of votes. When all these indicators point in the same direction, they may show a severe burden on that party, especially when combined with evidence of effects outside the electoral process.

Even if a redistricting plan imposes a significant discriminatory burden on one political party, it could still survive if it is narrowly tailored to serve a compelling government interest. Such a plan could not, of course, be justified by any purported interest in favoring the dominant political party over a less popular one. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). But a districting plan might survive if its disparate impact on one political party were justifiable in light of traditional redistricting principles such as natural geographical boundaries, contiguity, compactness, and conformity to political subdivisions. *See Bush v. Vera*, 517 U.S. 952, 959-960 (1996) (identifying

traditional redistricting principles). This might be the case where, for example, a party's members are arrayed geographically such that a districting plan reflecting the party's statewide voting strength would require non-compact and unusually shaped districts. If a minority party's members were widely dispersed across a state, a statewide districting plan that yielded a proportion of legislative seats lower than the proportion of the party's supporters might be justifiable. The same would be true if a party's members were densely concentrated in several pockets of the state where it possesses super-majorities. Under such circumstances, the state's interest in consistency and contiguity of districts might justify the burden on associational rights.

The standard we advocate does not guarantee any particular quantum of political power. Rather, it protects against significant discriminatory burdens on association, in service of the central First Amendment interest in avoiding viewpoint discrimination. A party may face inherent disadvantages by virtue of geography. A state with only a few congressional districts may adopt a plan that favors one party because such a plan is necessary to avoid non-compact districts or splits of political subdivisions. But a state may not adopt a plan that discriminatorily burdens adherents of a particular viewpoint, such that their avenues to political power are effectively blocked while the dominant party is entrenched.

Nor would our proposed standard foreclose any consideration of political party in drawing lines. Rather, consistent with established voting and association precedent, it would prohibit only those plans that impose a *severe* burden on an identifiable political group that is not narrowly tailored to further a compelling

interest. In this context, that means a plan that discriminates significantly based on political-party affiliation and cannot be justified based on traditional redistricting principles. To make this judgment does not require that the courts assess the substance of individuals' or groups' political viewpoints. Instead, it requires attention to disparities between voting strength and representational strength, informed by attention to traditional districting principles, an area in which this Court has extensive experience. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

C. North Carolina's Redistricting Plan Violates Plaintiffs' Associational Rights

Viewed under the established freedom-of-association standard, the North Carolina case is not close. The state's 2016 Plan imposes substantial and lasting discriminatory burdens on the associational rights of individuals who support one political party, and these burdens are not narrowly tailored to a compelling government interest. Accordingly, the district court's judgment should be affirmed.

This Court's jurisprudence calls for assessment of the "character and magnitude" of the burden on voting and associational rights. The discriminatory burden on associational rights here is severe. The 2016 Plan dramatically enhances the voting strength of Republican voters in North Carolina's congressional districts, to the detriment of Democratic voters. For instance, in 2016, Republican candidates won 76.9% of the state's Congressional delegation with only 53.22% of the statewide vote. *Rucho*, 279 F. Supp. 3d at 657. Moreover, as the district court found, the "empirical evidence reveals that the 2016 Plan 'bears more heavily on [supporters of candidates of one party] than another'". *Id.* at 642, *quoting Washington v. Davis*, 426

U.S. 229, 242 (1976). And the district court also found that Plaintiffs' empirical evidence further showed that "the 2016 Plan's pro-Republican bias is not attributable to a legitimate redistricting objective, but instead reflects an intentional effort to subordinate the interests of non-Republican voters." *Rucho*, 279 F. Supp. 3d at 644-45.

The empirical evidence shows that the North Carolina plan's negative effects on the nondominant party were severe. Using the results of the 2016 election, conducted under the 2016 Plan, one of Appellees' experts "calculated an efficiency gap favoring Republican candidates of 19.4 percent," *Rucho*, 279 F. Supp. 3d at 659. Partly by virtue of this disparity in "wasted" votes, Republicans were able to amass an extensive majority of North Carolina's congressional delegation in 2016, even though they had fewer voters statewide than Democrats. Appellees' expert also showed that the plan would likely have an *average* 8% efficiency gap in favor of the dominant party throughout the life of the plan. *Id.* at 660. The plan thus weakens the ability of Democratic voters to associate with each other through the electoral process, compared to their Republican counterparts.

This is the definition of a severe and invidious associational burden: individuals belonging to a group defined by belief or viewpoint are unable, as a result of discriminatory legislation, to associate with one another in a manner that would otherwise enhance their political power. There is overwhelming evidence that these effects were intended. As the district court found, there is no dispute that "the General Assembly intended for the 2016 Plan to favor supporters of Republican candidates and disfavor supporters of non-

Republican candidates. Nor could they. The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant responsible for drawing the 2016 Plan to rely on 'political data'. . .to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts." *Rucho*, 279 F. Supp. 3d at 597.

The undisputed evidence of record also demonstrates that the 2016 Plan diminished expressive association *outside* the electoral process. *Id.* at 679. The district court found that the 2016 Plan has had various "chilling effects on speech and association—[including] difficulty convincing voters to participate in the political process and vote, attracting strong candidates, raising money to support such candidates, and influencing elected officials. . . ." *Id.* at 680. For example, the 2016 Plan has made it very difficult for non-Republicans to get out the vote. Multiple Plaintiffs testified that in "the most recent election, a lot of people did not come out to vote" despite concerted get-out-the vote efforts – "[b]ecause they felt their vote didn't count.'" *Id.*, *citing* Deposition of Elizabeth Evans, ECF 101-7, at 16:4-9. The 2016 Plan similarly chilled the speech and associational rights of voters affiliated with the North Carolina Democratic Party. Because Democratic candidates were unlikely to prevail in districts drawn by the General Assembly to elect Republicans, it "ma[d]e[] it extremely difficult" for the North Carolina Democratic Party "to raise funds and have resources and get the attention of the national congressional campaign committees and other lawful potential funders for congressional races in those districts. . . . For the same reasons, the party had difficulty recruiting strong candidates." *Rucho*, 279 F. Supp. 3d at 680 (al-

terations in original), *citing* Deposition of North Carolina Democratic Party by George Goodwin ["Goodwin Dep."], ECF 110-07, at 98: 1-5; 41:20-42:20; 60:23—61:16; *also citing, e.g*., Deposition of John Quinn, ECF 101-22, at 39:1-3 "[Extreme gerrymandering] makes it harder for me [as a local organizer] to raise money; it makes it harder for me to recruit candidates, makes it harder to just mobilize a campaign."); Deposition of Melzer Morgan, ECF 101-16, at 23 ("[P]eople. . .say [sic] no sense in us giving money to that candidate because [he or she] is unlikely to prevail, notwithstanding the merit of their positions.") *See also* Goodwin Dep., at 44:18-25 ("it makes it extremely difficult to recruit candidates . . . who are of like mind with fellow Democrats whenever the districts are drawn such that the voting history makes it impossible for a Democrat to even come close in those races."); *Id.*, at 56:16-57:10 (discussing the "domino effect" of partisan gerrymandering: "it also makes it difficult. . . to raise funds, to get a message out for those candidates who have policies that support the Democratic platform . . .").

In this case, the discriminatory burden is not narrowly tailored to a compelling government interest. For example, as the district court found, the political geography of North Carolina "does not explain the 2016 Plan's pro-Republican discriminatory effects. . ." 279 F. Supp. 3d at 669. "In sum, we find that the North Carolina] General Assembly drew and enacted the 2016 Plan with intent to subordinate the interests of non-Republican voters and entrench Republican control of North Carolina's congressional delegation. . . .[and] that a variety of evidence demonstrates that the 2016 Plan achieved the General Assembly's discriminatory partisan objective. *Id.* at 672. Put another way, the discriminatory burden on associational rights of non-Republican candidates and voters was

not the necessary byproduct of other governmental interests, but rather the purpose and primary consequence of the Act.

D. Maryland's Redistricting Plan Violates Plaintiffs' Associational Rights.

Although the Maryland redistricting plan presents a closer case, the evidence presented is sufficient to affirm the district court's conclusion that it violates the associational rights of the Republican Party and citizens who wish to associate with it. As the district court properly recognized, the 2011 congressional plan was "specifically intended . . . to achieve a 7 to 1 Democratic majority" in the state's delegation. *Lamone*, 348 F. Supp. 3d at 502. The dominant party achieved this objective principally through the redrawing of the Sixth Congressional District. Over 700,000 voters were moved to redraw this district, which retained only one-half of its previous population. *Id.* at 499. The Cook Political Report concluded that this district went from "R+13" to "D+2", the largest swing of any district in the country. *Id.* at 508.

The Maryland record does not contain the same empirical documentation of statewide injury to the nondominant party's electoral opportunities that is present in the North Carolina case. It does, however, contain evidence of harm to the associational rights of the Republican Party and its members outside the electoral process. Plaintiff Sharon Strine, for example, testified to the effects of the redrawn Sixth District on her efforts to engage Republican voters. Working on behalf of the Sixth District's Republican candidate in 2014, she spoke to thousands of people and reported on the difficulties in motivating people to engage politically. *Id.* at 508 (quoting Strine's statement that people feel "disenfranchised," believing that "it's not

worth voting anymore" because of the redrawn district). The record evidence also documents that Republican voters' participation palpably declined – for example, going down from 48% of registered voters in 2010 to 35% in 2014 in Garrett County, from 43% to 27% in Allegany County, and from 37% to 25% in Washington County. *Id.* Republican fundraising also declined in these counties, all of which were in the Sixth District both before and after the 2011 redistricting. The Republican Central Committees in these counties received 6.5% less in the 2014 cycle than in the previous midterm election cycle. *Id.* at 509. In 2012, those committees experienced a 12% drop compared to the prior election cycle. *Id.* at 509.

The Maryland record thus demonstrates a tangible effect on the associational rights of the Republican Party and its supporters, both inside and outside the electoral process itself. Without empirical evidence of the magnitude of the impact on Republicans statewide – for example, metrics like the efficiency gap, mean-median difference, or seats-to-vote curve – this evidence may not be sufficient to characterize the burden as "severe." But under the *Anderson-Burdick* standard, lesser burdens on association must still be justified by the state's important regulatory interests. And in the Maryland case, the state has utterly failed to justify its redrawing of the Sixth District. As the district court explained, the geographic features of the region cannot explain the dramatic changes that the legislature adopted. *Id.* at 520. To the contrary, all the evidence of record points to one explanation only for the way in which Democrats redrew that district: to maintain a 7-1 Democratic advantage throughout the life of the plan. Because the state has failed to demonstrate an important interest or even a rational basis

for the redrawn Sixth District, this Court should affirm the district court's judgment.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted,

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APPENDIX

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* Where provided, institutional affiliations are for informational purposes only and are not intended to indicate endorsement by the institution of the views of the individual amicus.

the Conflict Between Liberty and Equality, 26 Can J. L. Juris. 293 (2013).

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