IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

SURREPLY IN OPPOSITION TO
MOTION TO DISMISS

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A. The First Amendment retaliation doctrine, applied to partisan gerrymandering, incorporates a justiciable measure of burden

According to the complaint, the Governor's Redistricting Advisory Commission drew Maryland's congressional district lines on the basis of citizens' voting histories and political party affiliations, for the express purpose and with the actual effect of diluting the votes of Republican supporters in the old Sixth District. The dilution of Republican votes was so significant, moreover, that it changed the outcome of the election in 2012 and 2014.

Defendants nevertheless accuse us of being "evasive as to what [our] proposed constitutional test actually requires" and of offering a standard that is "indeterminate as to what dilutive effect is generally permitted." Reply 2-3. Thus, in defendants' view, the First Amendment test stated in the second amended complaint "fails to resolve the justiciability problem" because "it is no more substantive than saying districts must be 'fair' or not 'excessively' biased against the disadvantaged party," providing "no guidance to legislatures or courts." *Id*. at 3. That misunderstands both what the justiciability doctrine requires and what our complaint alleges.

As we explained (Opp. 14-16 & n.2), the injury imposed by a partisan gerrymander is *vote dilution*, which "results from electoral structures that cause the votes of individuals to be unequally weighted." Shelley Wittevrongel, *Challenge to the Judicial Manageability of the* Thornburg v. Gingles *Threshold for Determining Minority Vote Dilution*, 13 Hamline L. Rev. 127 (1990). When the voting strength of a political party is diluted, votes cast in favor of that party's candidates translate into electoral success less efficiently than do the votes cast in favor of the dominant party. *Davis v. Bandemer*, 478 U.S. 109, 131 (1986) (plurality). *See also* Opp. 15 n.2.

Vote dilution is not a binary property, however, and admits of degrees. For vote dilution to serve as a justiciable injury, therefore, courts must be able to determine where along the continuum vote dilution becomes "sufficiently serious to require intervention by

the federal courts." *Bandemer*, 478 U.S. at 134 (plurality). That determination must be made using "reasoned distinctions" that are "principled" and "rational." *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality).

The First Amendment retaliation test incorporates the necessary distinction. To make out a claim for First Amendment retaliation, a "concrete harm [must be] alleged and specified"; neither "hurt feelings" nor purely abstract injuries will suffice. *Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011). Thus, a plaintiff asserting a partisan gerrymandering claim under the First Amendment must allege that (1) the legislature drew district lines with an intent to burden the supporters of a particular political party by reason of their party affiliations or voting histories, and (2) the challenged map has diluted the votes of the minority party significantly enough that the dilution has inflicted a palpable and concrete adverse effect—not merely that it offends some vague sense of fairness or crosses some statistical threshold devised by academics in ivory towers.

This concrete-burden standard turns on the same reasoned, manageable distinctions that govern every lawsuit in federal court. *See, e.g.*, *Doe v. Public Citizen*, 749 F.3d 246, 264 (4th Cir. 2014) (the plaintiff's injury, which was "shared by a large segment of the citizenry," was "sufficiently concrete" for the federal courts to address it); *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (similar). And measuring the significance of vote dilution by evaluating whether it produces a concrete, palpable burden makes good sense. After all, majority parties draw partisan gerrymanders for practical reasons, not academic ones—they do it to suppress political support for their adversaries and, ultimately, to change the outcomes of elections. Only when vote dilution is sufficiently significant to bring about such concrete ends should it be actionable in federal court.

The complaint in this case readily satisfies this standard of burden. In particular, it alleges that the vote dilution inflicted by the Plan was so effective at diminishing the

weight of Republicans' votes that it changed the outcome of the elections in the Sixth District in 2012 and 2014. *E.g.*, SAC ¶ 86. It would be hard to conceive of a more concrete manifestation of vote dilution than that. But that is not to say—as defendants impute to us (Reply 4-5)—that the standard itself asks exclusively whether the legislature has succeeded in changing the outcome of an election. As the Supreme Court has explained in the racial gerrymandering context, "loss of political power through vote dilution is distinct from the mere inability to win a particular election." *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986). Vote dilution can manifest in other ways, including, for example, as the suppression of financial and expressive support for the disfavored party. But the Court need not decide the full range of concrete burdens that might support a claim of unlawful partisan gerrymandering under the First Amendment. Such questions are best adjudicated on the facts of individual cases as they arise.

B. The First Amendment retaliation test does not depend on the fairness of the status quo ante

Turning to the merits of the First Amendment theory, defendants assert that vote dilution significantly great to change the outcome of an election is not a cognizable burden because "using the old district as the benchmark for assessing constitutional violations is . . . not rooted in any constitutional principle of fairness." Reply 6. That is true, but beside the point—the First Amendment theory does not turn on the "fairness" of the map before or after the gerrymander. Fairness in the gerrymandering context is implicated by the Equal Protection Clause (*e.g.*, *Bandemer*, 478 U.S. at 123-124), not the First Amendment.

Defendants' reasoning on this score is perhaps better understood as the proposition that Republicans were not constitutionally entitled to elect a representative of their choice before 2011, and they therefore cannot claim any such entitlement now. But that, too, misconstrues the constitutional burden asserted here. Our point is not that plaintiffs are, or ever were, constitutionally entitled to electoral success (*see* Opp. 30-31); it's that they

have a right, protected by the First Amendment, to be free from governmental reprisals for their successful past support of Republican candidates from the Sixth District. That conclusion "in no way depends on the proposition that [the pre-2011 Sixth District] was fair." *LULAC v. Perry*, 548 U.S. 399, 482 (2006) (Stevens, J., concurring in part and dissenting in part).

Thus, as the Supreme Court explained in the political patronage context, the fact that the plaintiff has no special "entitlement" to the status quo ante is "immaterial to his First Amendment claim." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990). The question is only whether the government has imposed a burden (here, vote dilution) for an impermissible reason, resulting in a concrete harm. *See id*. ("even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely [to justify its actions]") (citations omitted). That inquiry does not depend on whether the status quo ante was fair, permissible, or required. Indeed, a plaintiff could make out a claim for unlawful gerrymandering under the First Amendment if the legislature did not move district lines *at all*, so long as he could prove that legislature decided not to move the lines by reason of his and others' protected conduct and that declining to move the lines perpetuated constitutionally significant vote dilution.

Defendants complain that this approach "gives scant guidance to legislatures, except to discourage the creation of competitive districts." Reply 6. That ignores the first prong of the test, which gives unambiguous guidance to legislatures: *Don't consider citizens' First-Amendment-protected conduct in deciding where to draw district lines*.

C. The complaint adequately alleges chilling, which is not an element of plaintiffs' claim in any event

Defendants assert that the allegations concerning chilling are insufficient because they address only "potential chilling effects of redistricting legislation" and are otherwise

"vague" and lack "factual enhancement." Reply 15. That is both irrelevant and wrong.

It is *irrelevant* because chilling is not an indispensable element of the First Amendment retaliation test. On the contrary, "'a plaintiff who fails to allege a chilling effect may still state a claim if he alleges he suffered some other harm' that is 'more than minimal.'" *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (citations omitted). *Accord, e.g.*, *Zherka*, 634 F.3d at 645 (individual injury that is "sufficiently tangible [may] serve as a substitute for 'actual chilling'"). Thus, "'alleging harm *and* alleging [a] chilling effect [is] under the circumstances . . . no more than a nicety.'" *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (quoting *Rhodes v. Robinson*, 408 F.3d 559, 568 n.11 (9th Cir. 2005)). Just so here: concrete harm having been alleged, chilling is simply beside the point.[1]

It is *wrong* because the complaint clearly alleges that "[s]ome Maryland voters who would otherwise register as Republicans have been chilled from doing so" by the Plan and "have chosen, instead, to register (against their preferences) as members of the Democratic Party so that they can participate in the Democratic Party's closed primary." SAC ¶ 117. And Republican voters who do not register against their preferences as Democrats, according to the complaint, are "shut out" of the only real opportunity to help select their representative and are therefore "directly discouraged from participating in the political process." *Id*. There is nothing vague or conclusory about those straightforward allegations of historical fact—all the more so given that, "on a motion to dismiss [courts must] 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

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[1] The First Amendment theory presented here is one that has been "put forward by a Justice of [the Supreme] Court and uncontradicted by the majority in any of [its] cases." *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015). The district court cases cited by defendants (at Reply 7-9)—including this Court's decision in *Fletcher*—involved different substantive theories based on different measures of harm. *See* Opp. 26-28. None provides any basis for granting the motion to dismiss.

Dated: June 29, 2016

Respectfully submitted,

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