

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 170697

RIMA FORD VESILIND, *et al.*,
Plaintiffs-Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS,
Defendant-Appellees,

v.

VIRGINIA HOUSE OF DELEGATES, *et al.*,
Defendants-Intervenors.

**BRIEF OF AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF
VIRGINIA IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF *AMICUS CURIAE*

Amicus The League of Women Voters of Virginia (LWV-VA) is a nonpartisan, nonprofit membership organization that works on voting rights and redistricting issues in Virginia. LWV-VA provides its members and the public with information about voting laws and practices, fosters civic engagement, and works to ensure that all eligible voters, particularly those from traditionally underrepresented or underserved communities, have the opportunity and information they need to exercise their right to vote. LWV-VA has been active in efforts to bring about a nonpartisan process for drawing legislative lines, and participates in the Redistricting Coalition of Virginia to help educate and inform voters about the importance of redistricting. LWV-VA has a demonstrated interest in voting rights and redistricting in Virginia.

STATEMENT OF THE CASE

Amicus LWV-VA defers to the Nature of the Case and Material Proceedings Below and Statement of Facts as articulated in Appellants' Brief to the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

Amicus LWV-VA defers to the Assignments of Error as articulated in Appellants' Brief to the Supreme Court of Virginia.

INTRODUCTION

Plaintiffs-Appellants charge that the 2011 Virginia General Assembly redistricting plan violates the Virginia Constitution by subordinating constitutionally required compactness to discretionary criteria such as political advantage. This brief does not repeat those arguments, but seeks instead to place them in the context of the ongoing threat of partisan gerrymandering to the democratic process. The 2011 map represents an extreme partisan gerrymander, and it is unlikely that it could have been created without the explicit intent of maximizing partisan advantage for legislators controlling the map-drawing process. Such blatant pursuit of partisanship is fundamentally undemocratic and cannot be sustained as a legitimate constitutional exercise.

Part I addresses the undemocratic and unconstitutional nature of partisan gerrymandering. Part II illustrates the critical threat posed by the surgical nature of gerrymandering today. Part III examines the danger partisan gerrymandering poses to the effectiveness of the democratic process. Part IV establishes the egregious nature of Virginia's 2011 partisan gerrymander. And Part V demonstrates that Virginia has suffered harms associated with partisan gerrymandering as a result of the undemocratic nature of the 2011 plan.

ARGUMENT

I. Partisan Gerrymandering is Inherently Undemocratic

It is a founding principle of American democracy that the power of government over the people derives from the people themselves. *The Declaration of Independence*, para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just powers from the consent of the governed.”); *see also McCulloch v. Maryland*, 17 U.S. 316, 403 (1819) (“[T]he government proceeds directly from the people; is ordained and established in [their] name.” (quotation marks omitted)). Under our representative system, the people have the right not only to determine who should represent them, but also to hold their representatives accountable to the will of the electorate. *See Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (“[T]he true principle of a republic is that the people should choose whom they please to govern them.” (quoting Alexander Hamilton, 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876))); *The Federalist No. 37*, at 234 (1778) (James Madison) (“The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people.”). Partisan gerrymandering is fundamentally “incompatible” with these principles. *Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015) (quoting *Vieth v.*

Jubelirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment).

Partisan gerrymandering, the practice of drawing legislative districts to “subordinate adherents of one political party and entrench a rival party in power,” *id.*, occurs when one party controls the districting process and intentionally marginalizes the other party’s voters by either “‘cracking’ – ‘dividing a party’s supporters among multiple districts so that they fall short of a majority in each one’” or “‘packing’ – ‘concentrating one party’s backers in a few districts that they win by overwhelming margins,’” *Whitford v. Gill*, 218 F. Supp. 3d 837, 854 (W.D. Wis. 2016). By drawing districts with specific levels of partisanship in the voter population, the party in charge of the districting process can essentially predetermine the electoral results of each district. As a result, elections are determined not by the will of the people, but instead by the will of the map drawer.

It is well recognized that under the federal Constitution, partisan gerrymandering raises a plethora of serious constitutional concerns. Districting plans that are intentionally “employed ‘to minimize or cancel out the voting strength of . . . political elements of the voting population’” invite scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 867 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 751-52 (1973)).

Partisan gerrymandering also impinges on First Amendment rights by classifying, burdening, and penalizing citizens on the basis of their political expression. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”). The right to vote is “a fundamental matter in a free and democratic society . . . preservative of other basic civil and political rights.” *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). Partisan gerrymandering undermines the fundamental right of citizens to determine *who* their representatives will be, and their ability to hold their representatives accountable. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (“[R]epresentative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”). For this reason, the “excessive injection of politics” into the map-drawing process is “unlawful.” *Id.* at 293 (plurality opinion) (emphasis omitted).

II. Partisan Gerrymandering Poses a Greater Threat to Democratic Representation Today Than at Any Time in American History.

A. Modern Technology Allows Legislators to Gerrymander Their Districts with Surgical Precision, Creating Near-Certain Partisan Outcomes.

While the majority of legislators have always had the power to draw districts, and thus some ability to control who their voters are, they have never before been able to do so with such sophistication, or with such confidence in their success. Gerrymandering has a long history, with the term first appearing in 1812. See Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 3 (2002). The practice in Virginia dates back even further, to Patrick Henry's unsuccessful attempt at districting for partisan advantage before the first congressional election in 1789. See Micah Altman, Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting From Malapportionment to Voting Rights to Public Participation*, 47 U. Rich L. Rev. 771, 774 (2013). Until recently, however, the practice of redistricting for partisan gerrymandering was relatively unsophisticated. Districts had to be created by hand, with paper maps and protractors. David Daley, *Ratf***ked: The True Story Behind the Secret Plan to Steal America's Democracy* 51-60 (2016). To draw

conclusions about the partisan effect of a particular districting plan, map drawers had to review electoral results and demographic data manually, allowing for only rough predictions about potential outcomes. *Id.*

Today, map drawers have at their fingertips a wealth of data that allows them to predict the performance of a particular districting plan with pinpoint accuracy, all accessible and manipulable with only a few keystrokes at a computer. Using sophisticated mapping software, complex statistical models, and algorithms that allow for the rapid creation of multiple district plans tailored to particular criteria, patterns, and desired outcomes, map-drawers can determine with confidence how a particular plan will perform for the duration of an entire decennial redistricting period. *Id.*; see also *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (“Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months.”).

These technological advances allow map-drawers to target voters with surgical precision. By drilling down to “smaller and more complicated geographic units,” and analyzing the voters who live in those units on the basis of their demographics, voting history, and party affiliation, redistricting professionals are able to move *individual voters* into and out of districts in

order to achieve partisan ends. See Royce Crocker, *Congressional Redistricting: An Overview 2*, CONG. RESEARCH SERV. (Nov. 21, 2012). Unlike the blunt instruments used to gerrymander districts in the past, today's map-drawers are armed with precision scalpels, allowing them to delicately transplant voters from one district to another to maximize their political gain.

The success with which map-drawers are able to predict the electoral outcomes of a particular districting plan is demonstrated by the results of some of the most extreme partisan gerrymanders from the current redistricting cycle. After its 2011 Congressional plan was struck down as a racial gerrymander in 2016, the Republican-controlled North Carolina legislature was ordered to redraw its Congressional districts in 2016. The legislators in charge of the redistricting process explicitly set out to draw a map that maximized their political advantage, with ten Republican-controlled districts and three Democratic-controlled districts. See *Common Cause v. Rucho*, Nos. 1:16-cv-1026, 1:16-cv-1164, 2017 WL 876307, at *4 (M.D.N.C. March 3, 2017). Precisely as predicted by the proponents of the map, North Carolina elected ten Republican Congressional representatives and three Democratic Congressional representatives in November 2016. *Id.*

In 2011, the Republican-controlled legislature in Wisconsin adopted a state assembly district plan drawn to maximize their political advantage. The political operatives that drew the map predicted that with an expected vote share of only 48.6%, the map would win them 59 out of 99 assembly seats. See *Whitford*, 218 F. Supp. 3d at 898. In 2012, Republicans succeeded in winning 61% of the seats with 48.6% of the vote share, and when their vote share improved to 52% in 2014 their seat share increased to 64% of the seats. *Id.* In other words, Republicans controlled almost two thirds of the seats, despite the fact that Democrats won almost 50% of the votes. *Id.* When the Wisconsin map was challenged as a partisan gerrymander, the court found that “it is clear that the drafters got what they intended to get.” *Id.* The success of these gerrymanders, created using the advanced technological methods described above, demonstrates the effectiveness of drawing district lines to ensure partisan advantage.¹

¹ The practice of partisan gerrymandering is not limited to either party, but is a problem whenever one party has unified control over the redistricting process. Democrats are just as guilty of drawing districts for partisan gain in states where they retain control over map-drawing. While Republican gerrymandering is slightly more prominent after the wave election of 2010 allowed Republicans to dominate the districting process in several states, Democrats have also drawn politically gerrymandered maps in states like Rhode Island and Maryland. See, e.g., *Shapiro v. McManus*, 203 F. Supp. 3d 579, 585 (D. Md. 2016) (regarding a challenge to Democratic partisan gerrymandering in Maryland).

B. Partisan Gerrymanders Are More Blatant and More Extreme Than Ever Before.

State legislators are increasingly open about manipulating district maps for political gain, despite the clear anti-democratic nature of their actions. Justice Kennedy voiced his concern with this phenomenon in 2004 – “[w]hether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: ‘We are in the business of rigging elections.’” *Vieth*, 541 U.S. at 317 (Kennedy, J., concurring in the judgment) (citation omitted). Despite this, legislators have continued to engage in extreme partisan gerrymandering, and to flaunt the fact that they are doing so.

Here in Virginia, members of the House of Delegates “baldly admit[ted] to an outright partisan attack on the opposing party” in drawing the state legislative districts in 2011. See Statement of OneVirginia2021 In Response to the Court’s Order of April 21, 2017 at 3, *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015) (No. 3:14-cv-842). In describing the 2016 plan adopted in North Carolina, State Representative Lewis, co-chair of the Redistricting Committee, stated that he proposed drawing maps “to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.” See

Common Cause, 2017 WL 876307, at *2. And in Illinois, the Democratic-controlled General Assembly admitted that they “considered partisan composition with regard to each and every district” and created a “Democratic Index” to analyze voters’ partisan preference and degree of political affiliation down to the precinct and census block level. Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment at 2-3, *Radogno v. Ill. Bd. of Elections*, 836 F. Supp. 2d 759 (N.D. Ill. 2011). Indeed, several states, Virginia included, have openly cited partisan gerrymandering as a legitimate defense to claims of racial gerrymandering. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017); *Bethune-Hill*, 141 F. Supp. 3d at 541-42; *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 548-50 (E.D. Va. 2014). While politics has always been a part of the redistricting process, the threat of partisan gerrymandering to “[t]he ordered working of our Republic and of the democratic process” has never been quite so extreme, or so openly celebrated. See *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). This Court has an opportunity to curb that threat in Virginia by “defin[ing] standards” for the review of districting plans and striking down plans, like this one, that subordinate constitutional requirements. *Id.* at 309-10.

III. Partisan Gerrymandering Undermines Public Confidence in the Electoral System, and Decreases the Effectiveness of the Democratic Process.

Extreme partisan gerrymanders, made possible by the technological advances described above, undermine public confidence in elections.

Partisan gerrymandering is increasingly in the public consciousness,² in

² See, e.g., Thomas Fuller and Michael Wines, *Some States Beat Supreme Court to Punch on Eliminating Gerrymanders*, The New York Times Magazine, June 20, 2017

(<https://www.nytimes.com/2017/06/20/us/politics/some-states-beat-supreme-court-to-punch-on-eliminating-gerrymanders.html>); Robert Barnes, *Supreme Court to hear potentially landmark case on partisan gerrymandering*, The Washington Post, June 19, 2017

(https://www.washingtonpost.com/politics/courts_law/supreme-court-to-hear-potentially-landmark-case-on-partisan-gerrymandering/2017/06/19/d525237e-5435-11e7-b38e-35fd8e0c288f_story.html); Robert Kinlaw, *Gerrymandering: What is it and how does it hurt voters?* ABC 11 News Raleigh, June 6, 2017

(<http://abc11.com/politics/what-is-gerrymandering-and-how-does-it-hurts-voters-/2066622/>); Leslie Johnson, Letter to the Editor, *The chance is here to finally get rid of gerrymandering in Ohio*, The Athens News, June 6, 2017

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(<http://fox43.com/2017/06/05/pennsylvania-divided-gerrymandering-in-the-commonwealth/>); Martin Dyckman, *In redrawing districts, a chance to end gerrymandering*, Smoky Mountain News, May 31, 2017

(<http://www.smokymountainnews.com/archives/item/20061-in-redrawing-districts-a-chance-to-end-gerrymandering>); New York Times Editorial Board, *When Politicians Pick their Voters*, The New York Times, May 30, 2017

(<https://www.nytimes.com/2017/05/30/opinion/gerrymandering-supreme-court.html>); Ariane De Vogue, *SCOTUS grapples with partisan gerrymandering*, BatonRougeProud.com, May 29, 2017

(<http://www.brproud.com/news/politics/scotus-grapples-with-partisan-gerrymandering>);

part because efforts to engage in partisan gerrymandering are so much more effective now than they have been in the past. Indeed, state legislative redistricting plans from the current decennial cycle exhibit a greater extent of partisan advantage than at any time during the last 40 years. Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 872, 876 (2015) (“Since 1972, the scale and skew of today’s gerrymandering are unprecedented in modern history.”). At the same time, public trust in government is historically low. See, e.g., *Public Trust in Government 1958-2017*, PEW RES. CTR. (May 3, 2017).³ This lack of trust is only exacerbated

gerrymandering/7253915160); Sam Wang and Brian Remlinger, *A Solution to partisan gerrymandering: Math*, The Frederick News-Post, *republished from the LA Times*, May 14, 2017

(https://www.fredericknewspost.com/opinion/columns/a-solution-to-partisan-gerrymandering-math/article_d2369c74-da11-59d8-94f9-16ab304c158b.html); Steve Chapman, *Is Partisan Gerrymandering Unconstitutional?*, Reason.com, Dec. 1, 2016

(<http://reason.com/archives/2016/12/01/is-partisan-gerrymandering-unconstitutio>); Anthony McGann, Alex Keena, Charles Anthony Smith, Michael Latner, *Why the Democrats won’t win the House in 2018*, Nov. 23, 2016 (<http://theconversation.com/why-the-democrats-wont-win-the-house-in-2018-68037>); LA Times Editorial Board, *Fighting partisan gerrymandering is a job for the Supreme Court*, August 31, 2016

(<http://www.latimes.com/opinion/editorials/la-ed-partisan-gerrymandering-20160831-snap-story.html>).

³ Available at <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>.

as citizens become increasingly frustrated with the naked partisan ambition on display in the districting process.

In addition to undermining public confidence, partisan gerrymandering substantially decreases the effectiveness of our democratic processes. Districts drawn to ensure a particular electoral outcome result in decreased competition in general elections because opposition candidates have no incentive to run. Indeed, 42% of state legislative races in 2016 had only one major party candidate competing. *See State Legislative Elections 2016*, Ballotpedia, https://ballotpedia.org/State_legislative_elections,_2016. Lack of competition leads to decreased political accountability for incumbent politicians because there is no serious risk of losing the general election. Where a challenge does arise, it is more likely to occur during a primary, with pressure stemming from political extremes rather than from the opposition party. Without serious competition, legislators have few incentives to work toward political compromise, or to engage with constituents with whom they disagree. And where voters feel they have no impact on the result, they are less likely to engage in the electoral process. *See Nonprofit Vote and U.S. Elections Project, America Goes to the Polls 2016*, at 6 (March 2017) (“Among the

most common reasons voters cite for not voting are lack of competition and meaningful choices on the ballot . . .”).⁴

To solve these issues, a majority of the public supports taking districting out of the hands of self-interested legislatures and placing it into the hands of independent commissions. See, e.g., Virginia Survey 2015, UNIV. OF MARY WASHINGTON at 19 (finding that 72% of Virginians would prefer redistricting to be done by independent commission, compared to 15% thinking the legislature should retain control over redistricting). Many states have moved in that direction. See, e.g., *Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. at 2662 (citing Iowa, Maine, and Connecticut as examples of states that have adopted independent commissions).⁵ But where citizens are unable to take independent action to address legislative incentives to engage in partisan gerrymandering, there is no way to address the lack of confidence the practice engenders. The loss of “public confidence in the integrity of the electoral process [itself] has independent significance” for the proper functioning of our democratic institutions because lost confidence discourages “citizen participation in the electoral

⁴ Available at <http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf>.

⁵ See also, e.g., Alaska Const. art VI; Ariz. Const. art. 4, pt. 2 § 1; Ark. Const. 1874, art. 8; Cal. Const. art. XXI, § 2; Colo. Const. art. V, 48; Mont. Const. art. V, § 14; N.J. Const. art IV, § 3; Pa. Const. art. II, § 17; Wash. Const. art II, § 43; Vt. Stat. Ann. tit. 17, ch. 34A.

process.” *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (lead opinion) (finding that public confidence in the electoral system is independently significant because it encourages participation); see also *Vieth*, 541 U.S. at 316-17 (Kennedy, J., concurring in the judgment) (finding that the abandonment of legislative restraint represented by extreme gerrymandering threatens the democratic process). As such, courts should not condone excessive partisanship in the electoral process, *Vieth*, 541 U.S. at 316, and should ensure that legal standards meaningfully hold legislatures accountable to the public.

IV. Virginia Engaged in Particularly Egregious Partisan Gerrymandering.

In drawing the 2011 General Assembly maps, Virginia legislators subordinated compactness to political considerations such as incumbency protection and partisan advantage. Social scientists have developed measures of partisan asymmetry to quantitatively measure the severity of partisan gerrymandering. Courts have begun using these tools to assess the extent of the partisan manipulation in drawing electoral maps. See *Whitford*, 218 F. Supp. 3d at 903-06. Quantitative analysis of Virginia’s current General Assembly map shows that even among states that have engaged in partisan gerrymandering, Virginia is in the extreme; and

statements from legislators blatantly express the intent to achieve such an outcome.

A. Measuring Partisan Asymmetry: The Efficiency Gap.

The efficiency gap is a quantitative measure that can be used to understand the extremity of a partisan gerrymander. It is rooted in the insight, discussed above, that partisan gerrymandering always occurs in one of two ways: the packing of a party's voters into a few districts in which their preferred candidates win by overwhelming margins, or the cracking of a party's voters among many districts in which their preferred candidates lose by relatively narrow margins. *Id.* at 854. Both packing and cracking produce what political scientists refer to as "wasted votes" because they do not contribute to a candidate's victory. *Id.* at 903-04. That is, in the case of cracking, votes cast for the losing candidate; and, in the case of packing, surplus votes cast for the winning candidate, above the 50% (plus one) threshold needed for victory. *Id.* at 903 n.274.

The efficiency gap is simply one party's total wasted votes in an election, minus the other party's total wasted votes, divided by the total number of votes cast. Stephanopoulos & McGhee, *supra* at 13. It captures in a single figure the extent to which one party's voters are more cracked and packed than the other party's voters. When a party gerrymanders

district lines, it tries to simultaneously maximize the wasted votes for the opposing party and minimize its own wasted votes. A fair map should include a roughly equal number of wasted votes for each party.

B. The Efficiency Gap in Virginia.

Virginia's efficiency gap data clearly establishes the severity of partisan gerrymandering in the state. The 2011 and 2013 Virginia House of Delegates maps exhibit pro-Republican efficiency gaps of 10% and 16%, respectively.⁶ See Expert Report of Simon Jackman at 7 fig.1, *Whitford*, 218 F. Supp. 3d 837 (No. 3:15-cv-00421-bbc). In other words, votes for Democratic House of Delegates candidates were wasted at a rate from 10 to 16 percentage points higher than the rate at which votes for Republican candidates were wasted. These figures are equal to or exceed the 2012 and 2014 efficiency gaps of the Wisconsin state Assembly map struck

⁶ Both of these efficiency gap figures are well above the 7% threshold that Professor Simon Jackman found to indicate a lasting partisan gerrymander: "Professor Jackman conducted two additional analyses which suggested that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the lifetime of the plan." *Whitford*, 218 F. Supp. 3d at 905. Dr. Jackman was accepted as an expert in political methodologies, statistics, state legislative elections in the United States, computational statistics, public opinion, voter behavior, election forecasting and electoral institutions, and the *Whitford* court accepted and relied upon Dr. Jackman's testimony about the efficiency gap and its characteristics as a measure of partisan gerrymandering. *Id.* at 860-61, 904-05.

down as a partisan gerrymander in violation of the federal Constitution by a three-judge panel in *Whitford*. 218 F. Supp. 3d at 905.

The notably large efficiency gaps in the Virginia map are a reflection of legislators successfully elevating political considerations in the redistricting process to create an entrenched Republican majority in the House of Delegates. Legislators could have created maps without such an extreme partisan advantage by prioritizing constitutionally required criteria, such as compactness, rather than discretionary criteria. Simulations of possible Virginia maps, drawn to prioritize contiguity and compactness, generate an outcome in which Republicans should hold an approximately 55% seat share in the House of Delegates. Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. Pol. Sci. 239, 261 fig. 7 (2013). However, under the current map, Republicans have a 66% seat share. See *Virginia 2017 Elections*, Ballotpedia, https://ballotpedia.org/Virginia_General_Assembly. The possibility of alternate maps shows that, given the choice to create a map that would comply with other required redistricting criteria, legislators opted to prioritize politics. In short, the sizeable efficiency gaps underscore the extent to which the legislators'

subordination of constitutional requirements was unreasonable and not, as the circuit court found, “fairly debatable.”

C. Intent to Achieve Partisan Advantage.

In addition to the large partisan effect, evidenced by the efficiency gap figures, Virginia legislators have openly paraded the partisan motivations behind their redistricting decisions.⁷ There are several instances of Virginia legislators candidly admitting how they intentionally incorporated politics when drawing districts.

Legislators drew the Virginia districts by employing what they considered constitutionally permissible political gerrymandering. See Brief for Appellees at 44, *Bethune-Hill*, 137 S. Ct. 788 (No. 15-680). In fact, “Politics” was one of the 2011 redistricting criteria established by the Virginia General Assembly—the plan “sought to achieve specific political goals.” Defendants-Intervenors’ Pre-Trial Brief at 25, *Bethune-Hill*, 141 F. Supp. 3d 505 (No. 3:14-cv-852). Legislators crafted a general strategy for implementing the redistricting plan: they would “fence in the incumbent’s

⁷ In *Whitford*, the court adopted a 3-part test for evaluating the constitutionality of a redistricting scheme: 1) Was there “intent[] to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation”; 2) Did the plan have that effect; and 3) Can the plan be “justified on other, legitimate legislative grounds.” 218 F. Supp. 3d at 884.

preferred voters or fence out the incumbent's detractors or challengers.”

Bethune-Hill, 141 F. Supp. 3d at 542.

Going even further than generally incorporating political considerations into the redistricting process, Virginia legislators cited specific instances in which districts were crafted to create or shore up partisan advantage:

The alterations to HD95 and HD92 occurred as part of a plan to draw Democrat Robin Abbott out of her district and into a strong Republican district. The changes on the eastern border to HD75 were drawn to load heavily Republican precincts into the district of Democrat William Barlow, (who subsequently lost to a Republican in the 2011 election by 10 percentage points), and to protect Delegates Tyler's and Dances' Democratic seats in a growing sea of Republican control in Southside. Politics also explain the path of HD80, which was carefully drawn to keep Democratic precincts in the territory of Democrat Matthew James and out of the district of Republican Delegate Jones, who authored the plan.

Defendants-Intervenors' Pre-Trial Brief at 25, *Bethune-Hill*, 141 F. Supp. 3d 505 (No. 3:14-cv-852).⁸ Political motivations consumed the redistricting

⁸ Richmond precinct 207 was moved from HD 71 to HD 68 at the request of Republican Delegate Manoli Loupassi because he had quite a “base of support” in that precinct and sought to enhance his political advantage. Several precincts were moved from HD 74 to HD 97, represented by Republican Delegate Christopher Peace, in order to “put some more good Republican precincts in there that the gentleman in the 97th did not want to lose.” The Airport District was moved from HD 77 to Republican Delegate Chris Jones' 76th District: “The Airport District is primarily Republican, so

process to such an extent, and the partisan gerrymandering was so precise, that legislators can point to examples of lines that were maneuvered with directional “zigs” and “zags,” with purely partisan goals in mind. Brief for Appellees at 40, *Bethune-Hill*, 137 S. Ct. 788 (No. 15-680) (“In choosing which of HD93’s former precincts to include in HD95, Delegate Jones sought to accomplish two political goals. First, he drew the district to include ‘heavily Democratic precincts’ to improve the electoral chances of Republicans in surrounding districts. Second, he gave the district an ‘eastward “zig”’ and ‘westward “zag”’ ‘to avoid including the residence of Delegate Robin Abbott,’ who represented HD93.”). In identifying how specific district lines were drawn for political purposes, legislators have implied that these partisan goals were elevated above other considerations.

Legislators not only knew that politics had greatly influenced the redistricting process; they also were cognizant of the greater impacts on the democratic system. By targeting specific Democratic incumbents, and in turn, the voters who support them, members of the House of Delegates diminished the voice of voters: “Thus, HD95 was crafted carefully to avoid

this transfer helped Delegate Jones.” *Bethune-Hill*, 141 F. Supp. 3d at 563-66.

taking HD94's Republican precincts and instead take Democratic-leaning population left behind by HD93 and reach into precincts surrounded by HD93 to *dilute Democratic voting strength* in that area." Defendants-Intervenors' Pre-Trial Brief at 18, *Bethune-Hill*, 141 F. Supp. 3d. 505 (No. 3:14-cv-852) (emphasis added). Legislators singled out these voters for their voting preferences, purposefully undermining their ability to elect responsive candidates and effectively participate in representative democracy in Virginia. Legislators intended to prioritize partisan political objectives, thereby disregarding constitutional requirements such as compactness, and successfully achieved those objectives.

V. The 2011 Virginia General Assembly Redistricting Plan Has Resulted in Precisely the Harms Associated with Partisan Gerrymandering.

The results of the November 2015 general legislative elections in Virginia demonstrate partisan gerrymandering's effectiveness in achieving its aims of allowing politicians to choose their own voters and draw maps to benefit themselves. These results also demonstrate how partisan gerrymandering can impose significant harm on representative democracy. The election results reflect the reality of partisan gerrymandering: whoever has the power to draw the lines wins, and that party keeps winning for the decade during which the maps are in place.

A. Misalignment Between Voters and Legislators.

When legislators choose their voters, it reduces the incentive to listen and respond to constituents. As a result, the policy preferences and, more importantly, actions of state legislatures do not align with the preferences of Virginia voters. In 2011, 46% of voters voted for Democratic candidates, and in 2013, 49% of voters voted for Democratic candidates. Yet for that entire period, Democrats have held only 32% to 33% of the seats in the General Assembly. See *Virginia State Senate elections, 2011*, Ballotpedia, https://ballotpedia.org/Virginia_State_Senate_elections,_2011; *Virginia House of Delegates elections, 2011*, Ballotpedia, https://ballotpedia.org/Virginia_House_of_Delegates_elections,_2011; *Virginia House of Delegates elections, 2013*, Ballotpedia, https://ballotpedia.org/Virginia_House_of_Delegates_elections,_2013.

This misalignment has real effects on the actual policies of and legislation enacted in the state, as well as voter satisfaction with their senators and representatives. For example, in 2017, only 38% of Virginians said that they approve of the way the state legislature is handling its job. *Dems Hold Double-Digit Lead in Virginia Gov Race, Quinnipiac University Poll Finds; Kaine has Big Lead in Early Look at 2018 Senate Race*, Quinnipiac University at 10, April 11, 2017

(https://poll.qu.edu/images/polling/va/va04112017_Vrw38mbb.pdf/). This low approval rating is not surprising given that legislators drew themselves into districts in which it would be virtually impossible to lose an election. As a result, Virginia voters have been left with unresponsive representatives.

B. Entrenchment of Incumbents and Lack of Competitive Races.

The impacts of partisan gerrymandering in Virginia can be seen in the striking numbers of unopposed and uncontested elections in Virginia. During the November 2015 election, all 100 seats in the Virginia House of Delegates and all 40 seats in the Virginia Senate were on the ballot. Of the 100 House of Delegates races, 62 delegates ran completely unopposed. In nine other races, there was only token third party opposition—meaning a total of 71% of those races were uncontested or essentially uncontested. See Virginia Department of Elections, *2015 November General: Official Results*, <http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html> (last visited June 20, 2017). Additionally, 17 of the 40 Senate seats were uncontested, while others were barely contested. Stephen J. Farnsworth, *The 2015 election in Virginia: a tribute to gerrymandering*, The Washington Post, Nov. 5, 2015 (<https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/the-2015->

election-in-virginia-a-tribute-to-

gerrymandering/?utm_term=.676c94e5aad8). Only five of the 40 Senate districts were competitive (less than 10% separating the winner from second place). *Id.* In the House, only six of the 100 seats were competitive. *Id.* When district lines predetermine the outcome of an election, there is no incentive for opposition candidates to spend the time and money to run a campaign that is doomed to fail.

Partisan gerrymandering in Virginia has also contributed to the entrenchment of incumbents. After the November 2015 election, all 40 senate seats were held by the same party that held the seats prior to the election. *Id.* In the house, only three of the 100 seats were represented by a candidate from a different party than the pre-election office-holder—all three were open-seat contests in Northern Virginia. *Id.* Virginia legislators intended to use redistricting to create secure, non-competitive districts for incumbents, drawing districts with the continued election of specific candidates in mind. In November 2015, after retirements, resignations to run for other office, and three primary contest changes, 122 incumbents sought reelection to 140 total seats in the Virginia House and Senate. All 122 of those incumbents won re-election, most with double digit margins of victory—the races were not even close. *See 2015 November General:*

Official Results supra at 25. Virginia's General Assembly maps have been successfully gerrymandered so that the re-election of incumbents is virtually guaranteed—so much so that it actually occurred.

C. Low Voter Turnout Demonstrates the Lack of Public Confidence in Elections.

When the outcome of an election is preordained because of the way districts are drawn, it undermines voters' motivation to cast a ballot. Partisan gerrymandering increases voter apathy and confusion, leading to reduced voter participation. In the 2015 Virginia legislative elections, the state suffered one of the lowest voter turnouts on record: only 29.1% of registered voters cast ballots at the polls. Virginia Department of Elections, *Registration/Turnout Statistics: November General Elections: 1976-Present*, <http://www.elections.virginia.gov/resultsreports/registration-statistics/registrationturnout-statistics/> (last visited June 20, 2017). Faced with a ballot filled with candidates running unopposed, voters lose faith in the democratic system and have little incentive to show up at the polls. In 2014, Virginia Governor Terry McAuliffe signed an Executive Order establishing the Commission on Integrity and Public Confidence in State

Government. Va. Exec. Order No. 28 (Sept. 25, 2014).⁹ The Commission ultimately recommended that “congressional and state legislative districts should be drawn without regard to partisan considerations.” COMM’N ON INTEGRITY AND PUB. CONFIDENCE IN ST. GOV., *Final Report of the Commission on Integrity and Public Confidence in State Government* at 16 (Dec. 2015).¹⁰ Voters’ voices are diminished when election outcomes and elected representatives are not responsive to the will of the voters. The lack of meaningful choice in Virginia makes voting a symbolic, but ultimately hollow action.

CONCLUSION

Though political parties have exploited the redistricting process to gain political advantage for hundreds of years, partisan gerrymandering is more extreme today than ever before. Map drawers are using sophisticated technology to draw districts with surgical precision, and legislators unabashedly flaunt their successes in drawing maps to achieve partisan advantage. It is this same technology that would make it straightforward to

⁹ Available at <https://governor.virginia.gov/media/3328/eo-28-establishment-of-the-governors-commission-on-integrity-and-public-confidence-in-state-government-2ada.pdf>.

¹⁰ Available at <https://governor.virginia.gov/media/5103/integrity-commission-final-report-dec-2015.pdf>.

fulfill the constitutional requirement of compactness while ensuring that the parties are treated symmetrically by the redistricting plan.

Even in this context, the severity of partisan gerrymandering in Virginia is striking. It is doubtful the 2011 Virginia General Assembly map could have been drawn without subordinating other redistricting criteria to partisan priorities. Partisan gerrymandering has ultimately undermined representative democracy in Virginia by allowing politicians to choose their own voters. Removing the power to influence the outcome of elections and hold representatives accountable from the people is antithetical to the founding principles of American democracy.

For the reasons set forth above, this Court should hold that the 2011 Virginia General Assembly redistricting plan is unconstitutional and therefore reverse the decision of the Circuit Court of the City of Richmond.

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I certify that on June 30, 2017, a copy of the foregoing Motion for Leave to File Brief *Amicus* shall be served first class mail, postage prepaid, upon:

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