

**IN THE COURT OF APPEALS
OF MARYLAND**

**IN THE MATTER OF THE 2022
LEGISLATIVE REDISTRICTING OF
THE STATE**

MISC. No. 21

**BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER
IN SUPPORT OF NEITHER PARTY**

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INTRODUCTION

Partisan gerrymandering is “incompatible with democratic principles” and the “core principle of republican government . . . that the voters should choose their representatives, not the other way around.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015) (internal citations and quotations omitted). The sophisticated tools that propel today’s extreme partisan gerrymandering enable mapmakers to dilute the voting strength of a disfavored category of voters with extreme precision and entrench favored incumbents, often guaranteeing their preferred electoral outcomes for a decade. Whether done by Democrats, Republicans, or anyone else, partisan gerrymandering impedes the proper functioning of the electoral system and diminishes faith in our democratic institutions.

The political process has continuously failed Maryland’s voters by allowing legislators elected from gerrymandered districts to ignore fair maps and instead draw lines that insulate themselves from the electorate. Objections to the partisan manipulation in Maryland’s maps must not be left to “echo into a void.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Instead, voters may turn to their “state constitution[] [to] provide standards and guidance for state courts to apply” to vindicate their rights against partisan gerrymandering. *Id.* In its forthcoming opinion, the Court should reinforce that partisan gerrymanders are antidemocratic and hold that the Maryland Declaration of Rights provides justiciable, substantive limits on extreme gerrymandering.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Campaign Legal Center (“CLC”) is a nonpartisan, nonprofit organization dedicated to ensuring that the democratic process is free and fair for all voters. CLC has litigated or been involved in approximately 100 voting rights and redistricting cases. CLC represents clients

in numerous cases addressing partisan gerrymandering, and served as lead counsel in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The Court has accepted the Special Magistrate’s findings and ordered that the enacted legislative plan is lawful. Nevertheless, *amicus* respectfully submits that the Court in issuing its opinion in this matter should hold that partisan gerrymandering claims are justiciable and explain their substantive application under the Maryland Declaration of Rights. In doing so, the Court can provide the framework for resolving the Petitioners’ claims and guidance for lawmakers and litigants in subsequent redistricting cycles to limit partisan gerrymandering.

ARGUMENT

Partisan gerrymandering is directly at odds with a well-functioning representative democracy. Both Democrats and Republicans have engaged in extreme partisan gerrymandering across the country this year and for several decades. Both parties seek to skew the redistricting process in a race to the bottom of partisan gamesmanship. The escalating effort by one party to use gerrymandering as a weapon against the other, has many costs to citizens. Presidents from Ronald Reagan to Joe Biden have condemned gerrymandering. President Reagan unequivocally called for “an end to the antidemocratic and un-American practice of gerrymandering congressional districts.”¹ And a range of lawmakers—including both Republican and Democratic Maryland congressional representatives—have criticized how gerrymandering makes lawmakers “eschew principled, bipartisan compromise, and transfer[s] power from voters to political parties.” Br. for Bipartisan Group of Current & Former Members of Congress as amici curiae in support of

¹ Ronald Reagan, Remarks at the Republican Governors Club Annual Dinner (Oct. 15, 1987), available at <http://www.presidency.ucsb.edu/ws/?pid=33559>.

appellees at 10, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (hereafter “*Whitford* Bipartisan Congressmen Br.”).²

Despite longtime bipartisan opposition, politicians continue to engage in partisan gerrymandering. As explained below, partisanship in the redistricting process skews elections, eliminates competition, and prevents popular accountability. State courts, applying protections in state constitutions, can and should adjudicate challenges to extreme partisan gerrymanders. The Free Elections Clause in the Maryland Declaration of Rights, and its guarantees of equal protection and free speech and association provide the standards to constrain excessive partisanship in the redistricting process.

I. Partisan gerrymandering is antidemocratic.

Extreme partisan gerrymandering affronts the basic premise of a republican form of government: that representatives are accountable to, and reflective of, the people. A partisan gerrymander occurs when one controlling political party intentionally neutralizes the effectiveness of the other party’s voters through “‘cracking’ (splitting a party’s supporters between districts so they fall shy of a majority in each one) and ‘packing’ (stuffing remaining supporters in a small number of districts that they win handily).” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 851 (2015). A cracking gerrymander, such as Maryland’s prior congressional plan, is devised to “produce what are known as *wasted votes*—votes that do not contribute to a candidate’s election” by dividing the disfavored “party’s supporters across many districts, in which their preferred candidates lose by relatively narrow margins.” Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of A Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 Stan. L. Rev. 1503, 1506 (2018).

² Available at <https://www.scotusblog.com/wp-content/uploads/2017/09/16-1161-bsac-Bipartisan-Group-of-Current-and-Former-Members-of-Congress.pdf>.

By drawing district lines that divide constituents of the minority political party—in Maryland’s case, Republican voters—the majority political party can amplify and entrench its control over elections by optimizing the number of “wasted votes,”—votes that, by design, do not affect election outcomes. Such line-drawing represents the worst of hyper-partisan, ends-justifies-the-means reasoning, which devolves the political process to a question of who can pick the rules of the game rather than who can win elections with the best policies that attract the most votes.

Modern technology has made the negative effects of partisan gerrymandering much worse. As the North Carolina Supreme Court observed in a recent decision blocking the State’s partisan gerrymander: “the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter preferences shift.” *Harper v. Hall*, 868 S.E.2d 499, 509 (N.C. Feb. 14, 2022). Only recently did software replace pen and paper as the redistricting tool of choice. David Daley, *Ratf***ked: The True Story Behind the Secret Plan to Steal America’s Democracy* 51-60 (2016). While mapdrawers in past decades undertook manual processes relying on imperfect and incomplete data, now redistricting uses sophisticated software programs, super-computing processing capabilities, widely available and precise data of partisan preferences, and granular information to pinpoint block-level accuracy. *See id.*³

The combination of these “technological advances” with the rise in “unbridled partisan aggression” has driven gerrymandering “to new heights.” Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 838 (2015).

³ *See also* Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 Cal. L. Rev. 987, 995 (2021); Royce Crocker, *Congressional Redistricting: An Overview 2*, Cong. Research Serv. (Nov. 21, 2012).

Thus, “[w]hile partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, with almost surgical precision, undermine our constitutional system of government.” *Harper*, 2022 WL 496215, at *1–2 (footnote and internal quotation marks omitted). While some level of partisanship may have been tolerated in prior redistricting cycles, *see, e.g., In re Legislative Districting of State*, 370 Md. 312, 321 (2002), the precision with which partisan gerrymandering occurs today subverts democracy. The Maryland Constitution does not countenance such results.

The core harms of partisan gerrymandering are threefold: extreme asymmetry between the political parties’ ability to translate votes to seats, reduction in competitiveness that increases partisan polarity, and impaired democratic accountability that leads to political dysfunction.

First, partisan gerrymandering enables the line-drawing party to secure seats in the legislative body far outside the expected result based on statewide vote share. The ability for one party to translate fewer votes to more seats creates an asymmetric and exponential benefit that empowers the majority to silence the minority. State courts across the country have recognized that partisan gerrymandering is incompatible with democratic principles, and an excessive and one-sided disjunction between the votes received and the seats won by the line-drawing party. *See, e.g., Harper*, 868 S.E.2d at 547; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 820 (Pa. 2018); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 2022-Ohio-65, 2022 WL 110261 (Ohio Jan. 12, 2022); *Adams v. DeWine*, 2022-Ohio-89, 2022 WL 129092, *18 (Ohio Jan. 14, 2022).

In Maryland’s prior congressional map, for example, Democratic candidates received 65%, 58%, and 63% of the two-party vote in Maryland congressional elections in 2012, 2014, and 2016, respectively. But with these vote shares, they won 87.5% of Maryland’s congressional seats (seven

out of eight) in each election. *See* Brief of the Campaign Legal Center and the Southern Coalition For Social Justice as Amici Curiae in Support of Neither Party at 5-6, *Benisek v. Lamone*, No. 17-333 (U.S. Jan. 29, 2018).⁴ Measuring that vote-to-seat ratio using the efficiency gap, a common metric for evaluating partisan asymmetry, votes for Republican congressional candidates in Maryland were wasted at a rate, on net, thirteen percentage points higher than votes for Democratic congressional candidates during the last decade. *See id.* The partisan skew in favor of Democratic candidates is roughly two standard deviations from the historical mean. *Id.* Indeed, at the time there were only eight plans on record across the country that exhibited more partisan bias than Maryland’s prior congressional plan. *Id.*

The negative effects of this asymmetry are self-compounding because “legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *125 (N.C. Super. Ct. Sept. 3, 2019). And even by simply maintaining previous gerrymanders through subsequent decades—often by appealing to seemingly neutral principles like taking a “least change” approach to redistricting—partisan mapmakers can continue to lock in the partisan gains of the past without renewed map manipulation. *See, e.g.,* Robert Yablon, *Gerrylaundersing*, 97 N.Y.U. L. Rev. (forthcoming 2022)⁵ (explaining that so-called “gerrylaundersing requires no conspicuous cracking and packing of disfavored voters” because mapmakers can preserve the biased results by “preserving key elements of the existing map”).

⁴ Available at <https://campaignlegal.org/sites/default/files/17-333%20ac%20The%20Campaign%20Legal%20Center%20et%20al..pdf>.

⁵ Available at <http://dx.doi.org/10.2139/ssrn.3910061>.

The extreme asymmetry resulting from partisan gerrymandering is antithetical to the democratic process the Framers envisioned for the American system of representative government. During the founding era, preserving representational equality came to be seen as an important safeguard against political entrenchment. For example, John Adams argued that to prevent “the unfair, partial, and corrupt elections” that marked the English electoral system, the “equal interests among the people should have equal interests” in the American system of representation. John Adams, *Thoughts on Government* at 403 (1776), *reprinted in* 1 *American Political Writing During the Founding Era: 1760-1805* (Charles S. Hyneman & Donald S. Lutz eds., 1983). Equal ability to translate votes to seats is important for the proper functioning of the American system, irrespective of whether the State as a whole significantly favors one party, such as in Maryland. Allowing politicians to use gerrymandering to lock in supermajorities or zero-out minority political representation is counter to the Framers’ original understandings of American democracy. Indeed, the Framers cautioned against “measures [that] are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.” *The Federalist No. 10*, at 77 (James Madison) (Clinton Rossiter ed., 1961).

Second, partisan gerrymandering enables political parties to reduce the number of competitive contests and ensure the election of ideological party patrons. Using recent technological advancements noted above, partisan mapdrawers can focus not only on maximizing their statewide partisan advantage but also on securing as many safe seats as possible. The current redistricting cycle has been characterized by “a rise in the number of hyper-partisan seats at the expense of competitive ones. So far in completed states, the number of single-digit Biden and Trump seats has declined from 62 to 46 (a 26 percent drop).” David Wasserman, *2022 House*

Overview: Still a GOP Advantage, but Redistricting Looks Like a Wash, Cook Pol. Report (Jan. 4, 2022).⁶

The lack of competitive districts undermines the median voters' ability to translate their votes into effective representation. In general, political parties favor running more ideologically extreme candidates. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 627-28 (2002). But competitive elections temper that instinct by forcing party leadership to recognize that a candidate will have to win the more moderate, median voters to succeed in the election. *Id.* at 628. The more competitive the district, the more likely the candidate will be to represent the median voter and the political "community as a whole." *Id.* Without competitive districts, the primary becomes determinative of electoral outcomes, often benefitting more extreme candidates who can attract more ideological voters. *See, e.g., Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (summarizing briefs of bipartisan groups of lawmakers who opposed the anticompetitive effects of partisan gerrymandering).

The result is often the election of hyper-partisan candidates who are less likely to broker bipartisan tradeoffs and are more likely to view their constituency being a base of voters on the far wing of their party.⁷ Partisan gerrymandered legislative bodies comprised of ideologically extreme representatives increase partisan gridlock and rancor. Pragmatic solutions on which both parties

⁶ Available at <https://www.cookpolitical.com/analysis/house/house-overview/2022-house-overview-still-gop-advantage-redistricting-looks-wash>.

⁷ *See, e.g.,* Shane Goldmacher, 'Blood Red': How Lopsided New District Lines Are Deepening America's Divide, N.Y. Times (Feb. 28, 2022), <https://www.nytimes.com/2022/02/27/us/politics/redistricting-partisan-divide.html>; Richard H. Pildes, *Create More Competitive Districts to Limit Extremism*, RealClearPolitics (Apr. 29, 2021), https://www.realclearpolitics.com/articles/2021/04/29/create_more_competitive_districts_to_limit_extremism_145672.html; Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 256 (2006), <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1223&context=nlr>.

can agree—and which many voters favor—become politically untenable in a safe seat environment where cooperation is punished rather than rewarded. *See, e.g., Whitford Bipartisan Congressmen Br.* at 11.

These noncompetitive and hyper-polarized conditions are precisely what the Framers feared from a two-party system. The Framers were concerned with the “mischiefs of faction” and the “instability, injustice, and confusion [it] introduced,” which are the “mortal diseases under which popular governments have everywhere perished.” The Federalist No. 10, at 77 (James Madison). Gerrymandering is the epitome of faction run amok: a classic case of “the public good [being] disregarded” due to hyper-politicized parties that operate in a designed echo chamber of safe seats and anti-competition. *See id.*

Third, partisan gerrymandering reduces popular accountability. It insulates representatives from their voters, allowing incumbents or political parties to strategically consolidate the voters they think will most reflexively reelect their favored candidates and then divide or overconcentrate the remaining voters who would do the opposite. In an environment where politicians can choose their voters instead of the other way around, partisan gerrymandering “[a]t its most extreme ... amounts to ‘rigging elections.’” *Whitford*, 138 S. Ct. at 1940 (Kagan, J., concurring) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring)).

The extreme partisan gerrymandering and resulting lack of accountability that occurs under modern redistricting conditions is repugnant to Maryland’s foundational constitutional tenets that “all Government of right originates from the people,” MD. Const. Decl. of Rts. art. 1, whose participation in democracy “is the best security of liberty and the foundation of all free Government,” *id.* art. 7. This Court has recognized that unchecked redistricting manipulation compromises core democratic principles, emphasizing that a “fairly apportioned legislature lies at

the very heart of representative democracy,” *In re Legislative Districting of the State*, 370 Md. 312, 319 (2002), and that the “right to formal political representation is fundamental to our state and national democracies,” *In re 2012 Legislative Districting*, 436 Md. 121, 126 (2013). Where imperfect gerrymanders and the greater compromise incentives of the past may have made some political redistricting tolerable in Maryland, now mapmakers can and have raised the stakes to use gerrymandering in a way that often enables disregarding their constituents.

Again, the Framers warned against the antidemocratic results that arise from the lack of accountability in elections. Alexander Hamilton explained long ago: “The true principle of a republic is that the people should choose whom they please to govern them.” 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 257 (J. Elliott ed., 1876). To carry out this principle, the Framers thought “it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] *should have an immediate dependence on, and an intimate sympathy with, the people.*” See The Federalist No. 52, at 295 (James Madison) (emphases added); see also The Federalist No. 37, at 4 (James Madison) (“The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those [e]ntrusted with it should be kept in dependence on the people.”). Few forces make representatives less dependent on, and less in sympathy with, their constituents than gerrymandered districts. See, e.g., *Ariz. State Legislature*, 576 U.S. at 815 (discussing the Framers’ concern about the “manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate”); *Wesberry v. Sanders*, 376 U.S. 1, 7-17 (1964) (same). Partisan gerrymandering has, as the Framers feared, increasingly “enable[d] the representatives of the people to substitute their will to that of their constituents.” The Federalist No. 78, at 525 (Alexander Hamilton).

II. Partisan gerrymandering claims are justiciable.

State constitutions and state courts provide voters the means and venue to address the serious and undemocratic harms from partisan gerrymandering. The Court should follow a long line of other state courts in finding that partisan gerrymandering claims are justiciable. Maryland judges this year and in years past have proven that these types of cases are manageable. Further, absent court intervention, there may be no alternative avenue to redress the harms of partisan gerrymandering. Finally, the values underpinning Maryland’s judicial review favor exercising jurisdiction.

First, state courts can apply state constitutional provisions to adjudicate partisan gerrymandering claims. Federal courts have long acknowledged that “partisan gerrymanders . . . are incompatible with democratic principles,” *Ariz. State Legis.*, 576 U.S. at 791, and the U.S. Supreme Court unanimously described them as “unlawful,” *Vieth*, 541 U.S. at 293. Although the U.S. Supreme Court has declined jurisdiction over partisan gerrymandering claims, it also observed that voters’ denunciation of the practice will not be left to “echo into a void” because “state constitutions [can] provide standards and guidance for state courts to apply” to vindicate their rights against partisan gerrymandering. *Rucho*, 139 S. Ct. at 2507.

After *Rucho*, numerous state courts have accepted the U.S. Supreme Court’s invitation to regulate gerrymandering by applying state constitutional provisions that curb politicians’ ability to draw lines for political gain. In some states, often where voters have greater direct authority to amend their state constitution through ballot initiatives and limit gerrymandering, courts have applied new constitutional provisions to ensure fair maps.⁸ In other states, often those that lack

⁸ See, e.g., *League of Women Voters of Ohio*, 2022 WL 110261, at *24-28; *Adams*, 2022 WL 129092, at *9-15; *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re Colorado Indep. Cong. Redistricting Comm’n*, 497 P.3d 493, 515 (Colo. 2021); Final Order

robust citizen initiative opportunities such as in Maryland, courts have limited gerrymandering by engaging in their time-tested role of applying constitutional principles to specific contexts based on text, history, precedent, and pragmatism. *See, e.g., Harper*, 868 S.E.2d at 546; *League of Women Voters of Penn.*, 178 A.3d at 820; *see also Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1371 (Alaska 1987).⁹ As in all other constitutional litigation, the courts in these cases have consistently managed to devise and apply standards to adjudicate partisan gerrymandering claims, evaluate the pertinent evidence from lay and expert witnesses, and reach a conclusion on where to draw the constitutional line.

Second, courts in Maryland have already shown that partisan gerrymandering claims are manageable and justiciable. In recent weeks, Maryland judges have made clear that they are fully equipped to apply workable partisan gerrymandering standards, use established analytical tools to evaluate the evidence presented, and reach a carefully considered outcome. Judge Wilner in this matter tacitly rejected the State’s arguments that partisan gerrymandering claims are nonjusticiable and evaluated the claims on the merits, ultimately ruling that Plaintiffs failed to meet their evidentiary burdens. *See Report of the Special Magistrate, In the Matter of 2022 Legislative*

Establishing Voting Districts for the Senate of Virginia, the House of Delegates of Virginia, and Virginia’s Representatives to the United States House of Representatives at 1–2, *In Re: Decennial Redistricting Pursuant to The Constitution of Virginia, art. II, §§ 6 to 6-A, and Virginia Code § 30-399* (Va. Dec. 28, 2021), www.vacourts.gov/courts/scv/districting/redistricting_final.pdf;⁸ *see also* Decision and Order at 12-15, *Harkenrider v. Hochul*, Case No. E2022-0116CV (N.Y. Supreme Court: County of Steuben Mar. 31, 2022), <https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=f90XPwvzeggle5omoqVNQ=>

⁹ Courts in other states are currently adjudicating similar partisan gerrymandering cases. *See, e.g.,* Complaint, *League of Women Voters of Utah v. Utah State Legislature*, Case No. 220901712 (Mar. 17, 2022) <https://campaignlegal.org/document/lwv-utah-and-mweg-v-utah-state-legislature-complaint>; Complaint, *Alonzo v. Schwab*, Case No. 2022-cv-000090 (Wyandotte County District Court Feb. 14, 2022), <https://campaignlegal.org/document/alonzo-v-schwab-twenty-ninth-judicial-district-wyandotte-county-district-court-civil>.

Districting of the State, Misc. Nos. 21, 24, 25, 26, & 27 (Md. Apr. 4, 2022). Reviewing a challenge to Maryland’s gerrymandered congressional redistricting plan, Judge Battaglia specifically addressed the justiciability question, ruled that partisan gerrymandering claims are judicially reviewable, applied the applicable standard, and ruled that the map was a partisan gerrymander. *See Szeliga v. Lamone*, Case No. C-02-CV-21-001816, at 93-94 (Anne Arundel County Circuit Court Mar. 25, 2022). Moreover, for each of the last several decades, this Court has adjudicated other constitutional limits on legislative redistricting.¹⁰ Like in those cases, the metrics for measuring partisan gerrymandering are drawn from social science and can be clearly delineated and applied to Maryland’s redistricting plans.

Third, the courts may be the only place where the excesses of partisan gerrymandering can be curtailed. As a panel of federal judges observed regarding Maryland’s previous gerrymandered congressional map, “[t]he widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy.” *See Benisek*, 348 F. Supp. 3d at 511, *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Given that “both Democrats and Republicans have decried [gerrymandering] when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity,” this “cancerous” problem that is “undermining the fundamental tenets of our form of democracy” is often not susceptible to political solutions. *See id.* Thus, “because gerrymanders benefit those who control the political branches,” and will “[m]ore effectively every day ... enable[] politicians to entrench themselves in power against the people’s

¹⁰ *See, e.g., In re 2012 Legislative Districting*, 80 A.3d 1073, 1077 (Md. 2013); *In re Legislative Districting of State*, 805 A.2d 292, 297 (Md. 2002); *Legislative Redistricting Cases*, 629 A.2d 646, 659 (Md. 1993); *Matter of Legislative Districting of State*, 475 A.2d 428, 442 (Md. 1984); *In re Legislative Districting of State*, 317 A.2d 477, 479 (Md. 1974).

will,” it is “only the courts [who] can do anything to remedy the problem.” *Whitford*, 138 S. Ct. at 1935 (Kagan, J., concurring).

Finally, the constitutional values underpinning Maryland court’s judicial review power also support explicitly holding that partisan gerrymandering claims are justiciable. This Court in *Whittington v. Polk* established Maryland’s framework for judicial review and reinforced that courts are entrusted to interpret and enforce the Maryland Constitution. *See* 1 H. & J. 236, 243-46 (Md. Gen. 1802). The *Whittington* Court held that “[t]o do right and justice according to the law, the judge must determine what the law is, which necessarily involves in it the right of examining the constitution, (which is the supreme or paramount law, and under which the legislature derive the only authority they are invested with, of making laws,) and considering whether the act passed is made pursuant to the constitution, and that trust and authority which is delegated thereby to the legislative body.” *Id.* at 244. Aptly for partisan gerrymandering claims, the Court reasoned that the “power of determining finally on the validity of the acts of the legislature cannot reside with the legislature” because “they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other.” *Id.* at 243.

As in other contexts, Maryland courts deciding partisan gerrymandering claims should undertake their longstanding and important role to serve as “the barrier or safeguard to resist the oppression, and redress the injuries” that occur when the legislature violates the Maryland Constitution. *Duckworth v. Deane*, 393 Md. 524, 545 (2006) (quoting *Whittington*, 1 H. & J. at 245). To make the Maryland Constitution’s rights and limitations a reality, “courts have [the]

power and duty to determine [the] constitutionality of legislation,” including redistricting legislation. *See Curran v. Price*, 334 Md. 149, 159 (1994).

III. Extreme partisan gerrymandering violates the Maryland Declaration of Rights

The Maryland Declaration of Rights prohibits extreme partisan gerrymandering. While redistricting by “the political branches” can unavoidably be a “process [that] is in part a political one” that may have to some degree been tolerated in the past, *see In re Legislative Districting of the State*, 370 Md. at 321-22, advancements in redistricting technology have made the severity and precision of partisan gerrymandering exceed constitutional limits.

Such excessive partisan gerrymandering violates the freedom of elections, equal protection of the law, and the rights to free speech and association guaranteed by the Maryland Constitution. These rights are enshrined in the Maryland Declaration of Rights—“an enumeration of abstract principles” that require Maryland courts to undertake “the practical application of those principles” through “modifi[cation] by the exigencies of the time or circumstances of the country.” *Anderson v. Baker*, 23 Md. 531, 627 (1865). These rights are vital to “guard against any extravagant or undue extension of power,” *id.* at 628, by the people’s representatives and make real the promise that Maryland’s constitutional “compact is founded on the principle that the people being the source of power, all government of right originates from them,” *Whittington*, 1 H & J at 242.

The peoples’ rights to free elections, equal protection, and free speech and association must be scrupulously protected against partisan gerrymandering, which threatens “the right of suffrage [that] is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society.” *Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007). Because the “right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *DuBois v. City of Coll. Park*, 286

Md. 677, 685 (1980) (quoting *Reynolds v. Sims*, 377 U.S. 533, 536 (1964)); *see also id.* at 684-85 (“[I]n deciding reapportionment cases like the present one, classifications having the effect of diluting a person’s right to vote are subject to careful scrutiny.”).

The State, in its response in this Court and its briefing in the proceedings below, argues that the Maryland Declaration of Rights does not apply to partisan gerrymandering or that such claims are nonjusticiable. Those arguments are unsound. As noted, courts across the country have roundly disagreed with similar contentions and have applied analogous state constitutional provisions to restrict gerrymandering under like circumstances. The State’s flawed reasoning that because the Court has not yet restrained partisan gerrymandering means that it cannot do so should be rejected. In part, the argument fails to account for the accelerated technological advancements that enable gerrymanderers to now undermine democracy with ease and precision in ways that the Court has never before adjudicated. The State’s further reasoning that partisan gerrymandering claims cannot be resolved because gerrymandering was not a problem in Maryland when the Declaration of Rights was adopted is also beside the point. The Declaration of Rights must be applied based on the “exigencies of the time or circumstances of the country” as it pertains to modern day problems, *Anderson*, 23 Md. at 627, and judges conduct this type of review to resolve constitutional questions involving new contexts and technologies unimaginable at the founding era.

Explicitly holding that the Maryland Declaration of Rights curtails partisan gerrymandering will reinforce that the object of redistricting is to establish “fair and effective representation for all citizens,” not to skew elections to favor only some. *See Reynolds*, 377 U.S. at 565.

A. Maryland’s Free Elections Clause proscribes partisan gerrymandering.

Maryland’s Free Elections Clause prohibits extreme partisan gerrymandering. Article 7 of the Maryland Declaration of Rights provides: “That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.” Md. Const. Decl. of Rts. art. 7. Like the numerous state courts that have applied analogous provisions to limit partisan gerrymandering, this Court should hold that the Free Elections Clause prohibits partisan mapmakers from drawing lines that diminish voting strength and effectively decide elections in advance through the precise placement of disfavored voters.

The Free Elections Clause does not have corollary in the U.S. Constitution, and as a result, provides a safeguard that “is even more protective of rights of political participation than the provisions of the federal Constitution.” *Green Party*, 377 Md. at 150; *see also State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 61 (2013) (ruling that the Maryland Constitution guarantees both the “fair and free exercise of the electoral franchise” and is thus “even more protective” of electoral rights than the United States Constitution). It protects “[t]he elective franchise [that] is the highest right of the citizen,” and “one of the primal rights of citizenship.” *Kemp v. Owens*, 76 Md. 235, 241 (1892). To have “free and frequent” elections and ensure that “every citizen ... ha[s] the right of suffrage” under the Free Elections Clause, the Maryland Constitution “requires that every opportunity should be afforded to its fair and free exercise.” *Id.* Laws that “unconstitutionally infringe of the rights guaranteed to all qualified voters” to have a fair and equal chance to affect the political process violate the Free Elections Clause. *Md. Green Party*, 377 Md. at 152; *see also Jackson v. Norris*, 173 Md. 579 (1937) (ruling unconstitutional “a material impairment of an elector’s right to vote” under the Free Elections Clause).

Twenty-six state constitutions have similar provisions to Maryland’s Free Elections Clause.¹¹ Numerous state courts have applied these provisions to constrain burdensome or democracy-skewing laws that make elections less free and fair.¹² Two state supreme courts in particular, in North Carolina and Pennsylvania, recently held that extreme partisan gerrymandering is incompatible with the constitutional guarantee of “free” elections. *Harper*, 2022 WL 496215, at *31-33; *League of Women Voters*, 178 A.3d at 814. The Pennsylvania Supreme Court ruled that the Commonwealth’s Free Elections Clause requires redistricting plans that “provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.” *League of Women Voters*, 178 A.3d at 814, 817. And the North Carolina Supreme Court held that the State’s Free Elections Clause prohibits the “diminution or dilution of a voter’s voting power on the basis of his or her views” as “measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions.” *Harper*, 868 S.E.2d at 547.

¹¹ See, e.g., Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 871 (2021); Samuel S.-H. Wang, et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. Pa. J. Const. L. 203, 234 (2019).

¹² For state courts recognizing a Free Elections Clause claim that protects voters’ free and fair access to the political process, see, e.g., *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932); *Bridgewater v. Hotz*, 281 N.E. 2d 317, 322 (Ill. 1972) (reaffirming interpretation in *Moran v. Bowley*); *Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 758, 762-63 (Del. Ch. 2017); *Chavez v. Brewer*, 222 Ariz. 309, 320 (Ct. App. 2009); *Neelley v. Farr*, 158 P. 458, 466-68 (Colo. 1916); *Gunaji v. Macias*, 130 N.M. 734, 742 (2001); cf. *Pearson v. Koster*, 359 S.W.3d 35, 43 (Mo. 2012).

Maryland's Free Elections Clause is materially the same in text, structure, history, and practical application compared to Pennsylvania and North Carolina,¹³ and this Court should rule it applies in the same way to address the corrosive harms of partisan gerrymandering.

B. Maryland's equal protection guarantee prohibits partisan gerrymandering.

Maryland's constitutional guarantee of equal protection prohibits extreme partisan gerrymandering. Article 24 in the Maryland Declaration of Rights, entitled "Due process," declares: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Const. Decl. of Rts. art. 24. Although Article 24 does not contain the words "equal protection," this Court has long held that the provision embodies an equality guarantee. *See, e.g., Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George's Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979). Article 24's equal protection provision is also not coterminous with the Fourteenth Amendment in the U.S. Constitution because "the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other." *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983); *see also Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (reaffirming that "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." (quoting *Waldron*, 289 Md. at 715)).

The core principle of Article 24 is that "all persons who are in like circumstances are treated the same under the laws." *Hornbeck*, 295 Md. at 640. Partisan gerrymandering violates this

¹³ For example, like North Carolina and Pennsylvania, Maryland's Free Elections Clause traces its roots to the English Bill of Rights of 1689, which declared that "election of members of the parliament ought to be free." *See Harper*, 2022 WL 496215, at *32 (discussing 1 W. & M. Sess. 2 c. 2 (Eng.)).

assurance by “creat[ing] a group of ‘second-class citizens’ comprised of persons who are” favored voters with fully effective voting power, and a separate group of voters who, by design, will have less influence on the political process. *See Green Party*, 377 Md. at 150.¹⁴ As the U.S. Supreme Court recognized in *Reynolds v. Sims* in the malapportionment context, “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. at 555. Partisan gerrymandering is such a “debasement” because it deliberately deprives voters of the disfavored party of “an equally effective voice in the election of members of [their] state legislature.” *Id.* at 565. Applying similar equality principles, this Court has reinforced that the purpose of redistricting is “to ensure that voters are proportionately represented and that their interests are adequately considered by the Legislature.” *McMillan v. Love*, 379 Md. 551, 569 (2004). The equality demand in Maryland’s Declaration of Rights applies to limit partisan gerrymandering in the State for the same reasons as it limits malapportioned districts.

Again, other state courts have applied similar state constitutional equal protection principles to restrain partisan gerrymandering because gerrymandered maps unlawfully favor some voters over others for illegitimate partisan reasons. The North Carolina Supreme Court held that partisan gerrymandering violates equal protection rights because it denies voters from the disfavored party “the same opportunity as those from the favored party to” affect elections. *Harper*, 2022 WL 496215, at *35. The Pennsylvania Supreme Court likewise ruled that partisan gerrymandering offends equal protection principles because equality in the voting context requires “guarantee[ing], to the greatest degree possible, a voter’s right to equal participation in the electoral

¹⁴ As such, this Court has previously recognized that redistricting that treats voters unequally and gives them differential voting strength is likely to implicate Article 24. *See In re 2012 Legislative Districting*, 436 Md. at 159 n.25.

process.” *League of Women Voters*, 178 A.3d at 804. And, previously, the Alaska Supreme Court held that a districting plan violated the Alaska Constitution’s equal protection provision because “a voter’s right to an equally geographically effective or powerful vote . . . represent[ed] a significant constitutional interest.” *Kenai Peninsula Borough*, 743 P.2d at 1372.¹⁵

This Court’s state equal protection cases apply here, and favor the same result as in North Carolina, Pennsylvania, and Alaska. Partisan gerrymanders seek to ensure that the disfavored “population [of voters] is submerged” in dilutive districts, which results in “the right of all of the State’s citizens to cast an effective and adequately weighted vote [being] unconstitutionally impaired.” *DuBois*, 286 Md. at 684. Such partisan and unequal “classifications having the effect of diluting a person’s right to vote are subject to careful scrutiny.” *Id.* at 684-85.

Partisan objectives for a redistricting plan cannot survive careful scrutiny or justify the disparate harms on Maryland voters holding minority political viewpoints. The gerrymanderer’s goal to “subordinate adherents of one political party and entrench a rival party in power,” *Ariz. State Legislature*, 576 U.S. at 791, is simply “constitutionally impermissible” because drawing district lines in a way that “[f]enc[es] out’ from the franchise a sector of the population because of the way they may vote” is no legitimate objective. *Dunn v. Blumstein*, 405 U.S. 330, 355-56 (1972) (citation omitted); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (plurality op.) (observing that partisan objectives for voting restrictions are not legitimate interests). Indeed, partisan gerrymandering “reflects no policy” at all, “but simply arbitrary and capricious action” preferencing some voters over others. *See Vieth*, 541 U.S. at 320 (Kennedy, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)). The Maryland Constitution cannot

¹⁵ The Alaska court reached this conclusion despite explicitly finding that the districts complied with the federal Equal Protection Clause. *Id.* at 1370.

tolerate such unequal treatment. Partisan gerrymandering, like other unequal restraints on the right to vote, is “flatly inconsistent with Article 24 of the Declaration of Rights.” *Green Party*, 377 Md. at 150.

C. Maryland’s speech and association rights prohibit partisan gerrymandering.

The Maryland Constitution’s guarantee of free speech and association also prohibits partisan gerrymandering. Article 40 of the Maryland Declaration of Rights provides the state constitutional right to free speech and association, stating, in relevant part, “that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects.” Md. Const. Decl. of Rts. art. 40. While Article 40 adopts some aspects of the First Amendment and “is often treated *in pari materia* with” the federal constitutional right, “that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart.” *State v. Brookins*, 380 Md. 345, 350 n.2 (2004) (adopting *Pack Shack, Inc. v. Howard Cty.*, 377 Md. 55, 64 (2003)).

Article 40 protects the “freedom to think as you will and to speak as you think,” which “is a means indispensable to the discovery and spread of political truth and is essential both to stable government and to political change.” *Eanes v. State*, 318 Md. 436, 445–46 (1990) (internal citations and quotations omitted). Here, the protected speech involves Maryland voters’ expression of views favoring candidates other than the majority political party, and their associations with voters who share those views. *See Meyer v. Grant*, 486 U.S. 414, 421 (1988) (free speech guarantees “w[ere] fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” (citation omitted)); *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 191–92 (1999) (free speech rights are “to guard against undue hindrances to political conversations and the exchange of ideas”). In addition, the protected speech is the expressive nature of the vote itself, which some Marylanders express in favor of the political

party that the gerrymandering party seeks to silence. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (stating that voters “express their views in the voting booth”).¹⁶

Partisan gerrymandering infringes free speech guarantees in Article 40 because it amounts to viewpoint discrimination, discriminatory retaliation, and unconstitutional restraint on association. *See, e.g., Benisek v. Lamone*, 348 F. Supp. 3d at 514–24 (describing speech harms). The Article 40 harms are similar to those implicated in partisan gerrymandering Free Elections Clause and equal protection claims but are ultimately “distinct from vote dilution.” *Whitford*, 138 S. Ct. at 1938 (Kagan, J., concurring). As other courts have acknowledged, a gerrymandered redistricting “plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person’s vote on the basis of his or her view.” *Harper*, 868 S.E.2d at 552.

Under Article 40, these burdens on Maryland voters’ political speech and association must be subject to heightened scrutiny, under which the Court upholds the speech restriction “only if it is narrowly tailored to serve an overriding state interest.” *See Brookins*, 380 Md. at 355 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995)). Heightened scrutiny is warranted because free political speech is fundamental to a properly functioning democracy. *Id.* Partisan gerrymandering fails to satisfy heightened scrutiny because, as described above, seeking partisan

¹⁶ Numerous courts have suggested that voting itself is protected speech. *See, e.g., Williams v. Rhodes*, 93 U.S. 23, 31 (1968); *Anderson v. Celebrezze*, 460 U.S. 780, 787-89 (1983); *Doe v. Reed*, 561 U.S. 186, 224 (2010) (Scalia, J., concurring) (acknowledging “the existence of a First Amendment interest in voting”); *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 128 (2011) (observing that voting is an “inherently expressive act” because it is the exercise of a “personal right” to express a view on the preferred outcome of an election); *id.* at 133 (Alito, J., concurring) (“Voting has an expressive component in and of itself.”); *see also* Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 Yale L. & Pol’y Rev. 471, 487 (2016) (analyzing cases and concluding that “[v]oting . . . plainly express[es] a point of view and represent[s] a decision to sign on to a particular idea in the marketplace of ideas or support a particular candidate who best represents the voters’ political beliefs”).

advantage is no legitimate interest, and locking certain voters with minority viewpoints out of the political process cannot be a narrowly tailored means of serving any compelling interest. The Court should hold that extreme partisan gerrymandering violates free speech and association guarantees under Article 40 of the Maryland Declaration of Rights.

CONCLUSION

For the foregoing reasons, the Court should hold that extreme partisan gerrymandering is undemocratic, presents justiciable issues for Maryland courts to resolve, and violates the Maryland Constitution's Free Elections Clause, equal protection rights, and free speech and association rights.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 14, 2022, the foregoing document was filed and served electronically by the MDEC system on all persons entitled to service.

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