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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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Cases **Page(s)**

Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n,
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Benisek v. Lamone,
No. CV JKB-13-3233, 2017 WL 3642928 (D. Md. Aug. 24, 2017) 9-10, 16

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 22, 24

Bethune-Hill v. Va. State Bd. of Elections,
141 F. Supp. 3d 505 (E.D. Va. 2015) ..... *passim*

Common Cause v. Rucho,
240 F. Supp. 3d 376 (M.D.N.C. 2017) 8, 11

Cooper v. Harris,
137 S. Ct. 1455 (2017) 11

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008) 16

Gill v. Whitford,
137 S. Ct. 2268 (2017) (No. 16-1161) 15

McCulloch v. Maryland,
17 U.S. 316 (1819) 3

N.C. State Conference of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016) 7

Page v. Va. State Bd. of Elections,
58 F. Supp. 3d 533 (E.D. Va. 2014) 11

Powell v. McCormack,
395 U.S. 486 (1969) 3

Radogno v. Ill. State Bd. of Elections,
836 F. Supp. 2d 759 (N.D. Ill. 2011) 11

Reynolds v. Sims,
377 U.S. 533 (1964) 5

Shapiro v. McManus,
203 F. Supp. 3d 579 (D. Md. 2016) 9

Vieth v. Jubelirer,
541 U.S. 267 (2004) ..... *passim*

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) ..... *passim*

Statutes and Rules

Alaska Const. art. VI 16

Ariz. Const. art. 4, pt. 2 § 1 16

Ark. Const. 1874, art. 8 16

Cal. Const. art. XXI, § 2 16

Colo. Const. art. V, 48 16

Mont. Const. art. V, § 14 16

N.J. Const. art IV, § 3 16

Pa. Const. art. II, § 17 16

Vt. Stat. Ann. tit. 17, ch. 34A 16

Wash. Const. art II, § 43 16

Other Authorities

Alexander Burns et al., *Despite Recent Wins for Democrats, Gerrymanders Dim Hopes for 2018*, N.Y. Times (Nov. 12, 2017) 21

Anthony McGann, Alex Keena, Charles Anthony Smith & Michael Latner, *Why the Democrats Won't Win the House in 2018*, Conversation (Nov. 23, 2016) 13

Ariane De Vogue, *SCOTUS Grapples with Partisan Gerrymandering*, bproud.com (May 29, 2017) 13

Comm'n on Integrity and Pub. Confidence in State Gov't, *Final Report of the Commission on Integrity and Public Confidence in State Government* at 16 (Dec. 2015)..... 32

Dan Keating & Kevin Uhrmacher, *An Enthusiastic, More Polarized Virginia Electorate Gave Northam the Win*, Wash. Post (Nov. 8, 2017) 30

David Daley, *Ratf***ked: The True Story Behind the Secret Plan to Steal America's Democracy* (2016)..... 6, 7

Dems Hold Double-Digit Lead in Virginia Gov Race, Quinnipiac University Poll Finds; Kaine has Big Lead in Early Look at Senate Race, Quinnipiac University (Apr. 11, 2017) 26-27

Eric H. Holder Jr., Eric Holder: *Gerrymandering Has Broken Our Democracy. The Supreme Court Should Help Fix It*, Wash. Post (Oct. 3, 2017) 12

Gaby Galvin & Casey Leins, *The Most Important Results of 2017 Elections, Explained*, U.S. News (Nov. 8, 2017) 30

Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (2002)..... 6

Jamie L. Carson et.al, *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 Am. Pol. Res. 878 (2007)..... 14

Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. Pol. Sci. 239 (2013) 20, 21

L.A. Times Editorial Board, Editorial, *Fighting Partisan Gerrymandering Is a Job for the Supreme Court*, L.A. TIMES (Aug. 31, 2016)..... 13

Lesli Johnson, Letter to the Editor, *The Chance Is Here to Finally Get Rid of Gerrymandering in Ohio*, ATHENS NEWS (June 7, 2017) 12-13

Mark Joseph Stern, *Blue Wave, Meet Red Wall*, Slate (Nov. 8, 2017)..... 21, 30

Martin Dyckman, *In Redrawing Districts, a Chance to End Gerrymandering*, SMOKY MOUNTAIN NEWS (May 31, 2017) 13

Matt Maisel, *Pennsylvania Divided: Gerrymandering in the Commonwealth*, FOX 43 NEWS (June 5, 2017) 13

Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting From Rural Malapportionment to Voting Rights to Public Participation*, 47 U. Rich L. Rev. 771 (2013) 6

Nicholas Stephanopoulos, *What Virginia Tells Us, and Doesn't Tell Us, about Gerrymandering*, L.A. Times (Nov. 10, 2017)..... 12

Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015)..... 13, 18

Nonprofit Vote & U.S. Elections Project, *America Goes to the Polls 2016* (March 2017) 15

N.Y. Times Editorial Bd., Editorial, *When Politicians Pick Their Voters*, N.Y. Times (May 30, 2017) 13

Public Trust in Government 1958-2017, Pew Res. Ctr. (May 3, 2017) 14

Robert Barnes, *Supreme Court to Hear Potentially Landmark Case on Partisan Gerrymandering*, Wash. Post (June 19, 2017) 12

Robert Kinlaw, *Gerrymandering: What Is It and How Does It Hurt Voters?*, ABC 11 NEWS RALEIGH (June 6, 2017) 12

Royce Crocker, Cong. Research Serv., R42831, *Congressional Redistricting: An Overview* (2012) 8

Sam Wang & Brian Remlinger, *A Solution to Partisan Gerrymandering: Math*, Frederick News-Post, *republished from* the L.A. Times (May 14, 2017) 13

State Legislative Elections, 2016, Ballotpedia 14

Stephen J. Farnsworth, *The 2015 Election in Virginia: A Tribute to Gerrymandering*, WASH. POST (Nov. 5, 2015) 27-28, 28, 29

Steve Chapman, *Is Partisan Gerrymandering Unconstitutional?*, reason.com (Dec. 1, 2016) 13

Summary of Virginia Registration & Turnout Statistics: November General Elections: 1976 – Present, Virginia Department of Elections 29-30

The Declaration of Independence (U.S. 1776) 3

The Federalist No. 37 (1778) 3

Thomas Fuller & Michael Wines, *Some States Beat Supreme Court to Punch on Eliminating Gerrymanders*, N.Y. Times Mag. (June 20, 2017) 12

Va. Exec. Order No. 28 (Sept. 25, 2014) 31

Virginia House of Delegates elections, 2011, Ballotpedia 26

Virginia House of Delegates elections, 2013, Ballotpedia 26

Virginia House of Delegates elections, 2017, Ballotpedia 28, 29

Virginia State Senate elections, 2011, Ballotpedia 26

Virginia Survey 2015, Univ. of Mary Washington (2016) 15

2015 November General: Official Results, Virginia Department of Elections 27, 29

2017 November General: Unofficial Results, Virginia Department of Elections 21, 31

INTEREST OF *AMICUS CURIAE*

Amicus curiae, 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 is 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. Thus, LWV-VA has a demonstrated interest in voting rights and fair 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 Plaintiffs-Appellants' Brief to the Supreme Court of Virginia.

ASSIGNMENTS OF ERROR

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

INTRODUCTION

Plaintiffs-Appellants charge that the 2011 Virginia General Assembly redistricting plan violates Virginia's 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) ("The government proceeds directly from the people; is ordained and established in [their] name . . . ;" (internal quotation marks omitted)). Under our representative system, the people have the right to not only 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 independence on the people."). Partisan gerrymandering is fundamentally incompatible with these principles. *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015),

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 the will of the map drawer(s).

It is well recognized that under the federal Constitution, partisan gerrymandering raises a plethora of serious 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 v. Jubelirer*, 541 U.S. 267, 314 (2004) (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) ("Representative 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 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 Rural Malapportionment to Voting Rights to Public Participation*, 47 U. Rich L. Rev. 771, 774 (2013). Until recently, however, 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. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). 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, Cong. Research Serv., R42831, *Congressional Redistricting: An Overview* 2 (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 results of some of the most extreme partisan gerrymanders from the current redistricting cycle demonstrate the success with which map-drawers are able to predict the electoral outcomes of a particular districting plan. . 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 for that year's elections. The legislators in charge of the redistricting process had explicitly set out to draw a map that maximized their political advantage, with ten Republican-controlled and three Democratic-controlled districts. *See Common Cause v. Rucho*, 240 F. Supp. 3d 376, 380 (M.D.N.C. 2017). As a result, and precisely as predicted by the proponents of the map, North Carolina elected ten Republican 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 elect Republicans to 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%. *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 "[i]t is clear that the drafters got what they intended to get." *Id*. The success of these gerrymanders, created by the advanced technological methods described above, demonstrates the effectiveness of drawing district lines to ensure partisan advantage.[1]

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[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. While Republican gerrymandering is slightly more prominent after the 2010 wave election 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); *Benisek v. Lamone*, No. CV JKB-13-3233, 2017 WL 3642928 (D. Md. Aug. 24, 2017).

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, noting that "[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 not only continued their extreme partisan gerrymandering, but also flaunted the fact that they are doing so.

For example, , members of the House of Delegates in Virginia "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-852). 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*, 240 F.

Supp. 3d at 378-79. 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. State 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 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, including the instant plan, 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 part

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[2] *See, e.g.*, Nicholas Stephanopoulos, *What Virginia Tells Us, and Doesn't Tell Us, about Gerrymandering*, L.A. Times (Nov. 10, 2017), http://beta.latimes.com/opinion/op-ed/la-oe-stephanopoulos-gerrymander-waves-virginia-20171110-story.html; Eric H. Holder Jr., Eric Holder: *Gerrymandering Has Broken Our Democracy. The Supreme Court Should Help Fix It*, Wash. Post (Oct. 3, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/10/03/eric-holder-redistricting-has-broken-our-democracy-the-supreme-court-should-help-fix-it/?utm_term=.73f8f8e7f24e; Thomas Fuller & Michael Wines, *Some States Beat Supreme Court to Punch on Eliminating Gerrymanders*, N.Y. Times Mag. (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*, Wash. 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/; Lesli Johnson, Letter to the Editor, *The Chance Is Here to Finally Get Rid of Gerrymandering in Ohio,* Athens News (June 7, 2017), https://www.athensnews.com/opinion/letters/the-chance-is-here-to-finally-get-rid-of-gerrymandering/article_5be62f06-4b95-11e7-9b94-17025fb82da8.html; Matt Maisel*, Pennsylvania Divided: Gerrymandering in the Commonwealth*, Fox 43 News (June 5, 2017), http://fox43.com/2017/06/05/pennsylvania-divided-gerrymandering-in-the-commonwealth/; Martin Dyckman, *In Redrawing Districts, a Chance to End*

because efforts to engage in partisan gerrymandering are much more effective now than they have been in the past. Indeed, state legislative redistricting plans from the current decennial cycle exhibit the greatest extent of partisan advantage 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 at a historical low. *See, e.g.*, *Public Trust in*

Gerrymandering, Smoky Mountain News (May 31, 2017), http://www.smokymountainnews.com/archives/item/20061-in-redrawing-districts-a-chance-to-end-gerrymandering; N.Y. Times Editorial Bd., Editorial, *When Politicians Pick Their Voters*, N.Y. Times (May 30, 2017), https://www.nytimes.com/2017/05/30/opinion/gerrymandering-supreme-court.html; Ariane De Vogue, *SCOTUS grapples with partisan gerrymandering*, brproud.com (May 29, 2017), http://www.brproud.com/news/politics/scotus-grapples-with-partisan-gerrymandering/725391516; Sam Wang & Brian Remlinger, *A Solution to Partisan Gerrymandering: Math*, Frederick News-Post, *republished from* the L.A. 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*, Conversation (Nov. 23, 2016), http://theconversation.com/why-the-democrats-wont-win-the-house-in-2018-68037; L.A. Times Editorial Bd., Editorial, *Fighting Partisan Gerrymandering Is a Job for the Supreme Court*, L.A. Times, (Aug. 31, 2016), http://www.latimes.com/opinion/editorials/la-ed-partisan-gerrymandering-20160831-snap-story.html.

Government 1958-2017, Pew Res. Ctr. (May 3, 2017).[3] Blatant partisan districting only exacerbates this trend of diminishing public trust.

In addition, 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 the opposition party.[4] Without serious competition, legislators have few incentives to work toward political compromise or engage with constituents with whom they disagree.

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[3] http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/.

[4] *See, e.g.*, Jamie L. Carson et.al, *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 Am. Pol. Res. 878-904 (2007).

And, when voters feel they have no impact on election results, they are less likely to engage in the electoral process. Justice Ginsburg recently recognized this direct impact::

> [I]f you can stack a legislature in this way, what incentive is there for a voter to exercise his vote? Whether it's a Democratic district or a Republican district, the result -- using this map, the result is preordained in most of the districts . . . . [W]hat becomes of the precious right to vote? Would we have that result when the individual citizen says: I have no choice, I'm in this district, and we know how this district is going to come out?

Transcript of Oral Argument at 24-25, *Gill v. Whitford*, 137 S. Ct. 2268 (2017) (No. 16-1161); *see also* Nonprofit Vote & 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 a lack of competition and meaningful choices on the ballot . . . .").[5]

To address 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 (2016) (finding that 72% of Virginians would prefer redistricting to be done by independent commission, compared to 14% thinking the legislature should retain control over redistricting). Many states

[5] http://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf.

have moved in that direction. *See, e.g.*, *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2662 (citing Arizona, Iowa, Maine, and Connecticut as examples of states that have adopted independent commissions).[6] But where citizens are unable to take independent action to address partisan gerrymandering, the lack of public confidence persists, which impacts the proper functioning of our democratic institutions by discouraging participation in elections. *Crawford v. Marion Cty. 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); *Benisek v. Lamone*, No. CV JKB-13-3233, 2017 WL 3642928, at *4 (D. Md. Aug. 24, 2017) (Niemeyer, C.J., dissenting) ("[I]t is not hard to see how [partisan gerrymandering] could deter reasonable voters from full participation in the political process.") *juris. postponed pending hearing on merits*, No. 17-333, 583 U.S. ___ (Dec. 8, 2017). As such, courts should not allow excessive

[6] *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.

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 measures the extremity of a partisan gerrymander. It is rooted in the insight 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. Wasted votes are defined, in the case of cracking, to be the 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 851. 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 Virginia House of Delegates map has exhibited a consistent pro-Republican efficiency gap throughout its lifetime,

displaying an average efficiency gap of -9% in elections from 2011 to 2017.[7] *See* Expert Report of Simon Jackman at 7 fig.1, *Whitford v. Gill*, 218 F. Supp. 3d 837 (No. 3:15-cv-00421-bbc).[8] In other words, votes for Democratic House of Delegates candidates were "wasted" at a rate of, on average, nine percentage points higher than their Republican counterparts. This average is almost as extreme as the average efficiency gap exhibited by the Wisconsin State Assembly map in 2012 and 2014 (the average across those two elections was 11%), which was struck down as a partisan gerrymander in violation of the federal Constitution by a three-judge panel in *Whitford*, 218 F. Supp. 3d at 905 (currently under review on appeal to the U.S. Supreme Court (No. 16-1161)).

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[7] This average is 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 lifet 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.

[8] Dr. Jackman's report includes the efficiency gaps for Virginia in 2011 and 2013. Efficieny gaps for Virginia in 2015 and 2017 were calculated by counsel for the purposes of inclusion in this brief.

The notably large average efficiency gap in the Virginia map is 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 where Republicans hold approximately a 55% seat share in the House of Delegates by receiving around 50% of the votes. 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 won 67% of the seats in the House of Delegates with almost exactly 50% of the statewide voteshare in 2013. The possibility of alternate maps shows that, given the choice to create a map that would comply with the required redistricting criteria, legislators prioritized politics.

This disparity continues. In the 2017 cycle, for instance, Democrats won the statewide vote in both the gubernatorial race and in the aggregate of House of Delegates races by an approximately 9-point margin. As a result, Democrats won the governorship. But—despite Democrats' significant edge

in votes—the House of Delegates seems poised to be evenly split along partisan lines. *2017 November General*: Unofficial Results, Virginia Department of Elections, http://results.elections.virginia.gov/vaelections/2017%20November%20General/Site/Statewide.html html (last visited Dec. 12, 2017); Alexander Burns et al., *Despite Recent Wins for Democrats, Gerrymanders Dim Hopes for 2018*, N.Y. Times (Nov. 12, 2017), https://www.nytimes.com/2017/11/12/us/politics/voting-gerrymander-virginia.html ("While Democrats won the governorship by nearly nine percentage points and won a similar margin in total votes in legislative races, it appears likely, unless recounts reverse seats, that they will fall just short of taking control of the state's heavily gerrymandered House of Delegates."); Mark Joseph Stern, *Blue Wave, Meet Red Wall*, Slate (Nov. 8, 2017), http://www.slate.com/articles/news_and_politics/politics/2017/11/gerrymandering_saved_republicans_in_virginia.html ("Democrats walloped Republicans at the polls, but the GOP gerrymander served as a red firewall, preventing the Democratic Party from translating its victory into an advantage in the General Assembly."). While political geography may be consistent with *some* Republican advantage in a neutrally drawn map, *see* Chen & Rodden, 8 Q. J. Pol. Sci. at 261 fig. 7, the translation of an

overwhelming wave of support for Democratic candidates among voters into a tie in the legislature further demonstrates how this map is deeply biased. 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.[9] There are countless 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 v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (No. 15-680). In fact, "[p]olitics" was one of the 2011 redistricting criteria established by the Virginia General Assembly—the plan "sought to

[9] 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.

achieve specific political goals." Defendants-Intervenors' Pre-Trial Brief at 25, *Bethune-Hill v. Va. State Bd. of Elections*, 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 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 v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (No. 3:14-cv-852).[10] Political motivations

[10] 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.

consumed the redistricting process to such an extent, and with such precise gerrymandering that legislators can point to examples of lines that were maneuvered with directional "zigs" and "zags," due to purely partisan goals. Brief for Appellees at 40, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017) (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." (internal quotation marks omitted)). In identifying how specific district lines were drawn for political purposes, legislators have implied that these partisan goals were elevated above other considerations.

Not only did the legislators know that politics had greatly influenced the redistricting process, but they were also cognizant of the greater impacts on

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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: "[t]he Airport District is primarily Republican, so this transfer helped Delegate Jones . . . ." *Bethune-Hill*, 141 F. Supp. 3d at 563-66.

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 such voters: "[t]hus, HD95 was crafted carefully to avoid 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 v. Va. State Bd. of Elections*, 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 prioritized 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 and November 2017 general legislative elections in Virginia demonstrate partisan gerrymandering's effectiveness in allowing politicians to choose their own voters and draw maps to benefit themselves, at significant cost to 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, and possibly beyond.

A. Misalignment Between Voters and Legislators

Legislators choosing voters 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 they approved of the way the state legislature handeled 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 actually or essentially uncontested. *See 2015 November General: Official Results,* Virginia Department of Elections, http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html (last visited Nov. 11, 2017). Additionally, 17 of the 40 Senate seats were uncontested, with most of the remaining barely contested. Stephen J. Farnsworth, *The 2015 Election in Virginia: A Tribute to Gerrymandering*, Wash. 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 (with less than 10% separating the winner from second place). *Id*. In the House, only six of the 100 seats were competitive. *Id*.

In 2017, a wave election year, there were still 33 seats in the House of Delegates (fully one-third of the chamber) where a candidate ran completely unopposed, and five with only an uncompetitive third party challenger. *Virginia House of Delegates elections, 2017*, Ballotpedia, https://ballotpedia.org/Virginia_House_of_Delegates_elections,_2017. When district lines predetermine the outcome of elections, 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. The following examples illustrate the effects of Virginia legislators creating secure, non-competitive districts to benefit specific candidates and incumbents. After the November 2015 election, all 40 Senate seats were held by the same party that held the seats prior to the election. Farnsworth, *supra*. 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. Farnsworth, *suprald*. 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*. In the 2017 wave election, 93 incumbents stood for election to retain their seats in the House of Delegates; results are still uncertain, but as of this writing 83 have retained their seats. *See Virginia House of Delegates elections, 2017*, *supra*. Virginia's General Assembly maps have been successfully gerrymandered so that the re-election of incumbents is virtually guaranteed.

C. Low Voter Turnout Can Demonstrate 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. *Summary of Virginia Registration & Turnout Statistics: Novemeber General Elections: 1976 – Present*, Virginia Department of

Elections, http://www.elections.virginia.gov/resultsreports/registration-statistics/registrationturnout-statistics/ (last visited Nov. 15, 2017).

To be sure, turnout in Virginia increased in 2017—likely as a result of national political conditions unique to this year. *See, e.g.*, Dan Keating & Kevin Uhrmacher, *An Enthusiastic, More Polarized Virginia Electorate Gave Northam the Win*, Wash. Post (Nov. 8, 2017), https://www.washingtonpost.com/graphics/2017/local/governor-turnout-analysis/?utm_term=.65f73636ef79 ("Higher enthusiasm and polarization were the key features of Tuesday's gubernatorial election in Virginia, suggesting that President Trump has energized voters on all sides."); Gaby Galvin & Casey Leins, *The Most Important Results of 2017 Elections, Explained*, U.S. News (Nov. 8, 2017), https://www.usnews.com/news/national-news/articles/2017-11-08/democrats-sweep-virginia-local-elections-with-anti-trump-momentum. However, despite substantial shifts toward Democrats from the 2015 elections, "the GOP gerrymander served as a red firewall, preventing the Democratic Party from translating its victory into an advantage in the General Assembly." *Stern*, *supra*. In 2017, a year in which turnout surged, likely due to national political conditions, only approximately 47% of registered voters—43% of the citizens voting age population—cast ballots at the polls. *Compare*

2017 November General: Unofficial Results, Virginia Department of Elections, http://results.elections.virginia.gov/vaelections/2017%20November%20General/Site/Statewide.html (last visited Nov. 15, 2017) *with 2017 November General*: Unofficial Results, Virginia Department of Elections, http://results.elections.virginia.gov/vaelections/2017%20November%20General/Site/Statistics/Registration.html (last visited Nov. 15, 2017). While individual elections may produce anomalous turnout results, as Virginia experienced in 2017, the evidence is clear that over time, faced with a ballot filled with candidates running unopposed and outcomes pre-ordained by gerrymandering,voters lose faith in the democratic system and have little incentive to vote.

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).[11] Redistricting was one of the issues that the Commission felt necessary to address. The Commission ultimately recommended that "congressional and state

[11] https://governor.virginia.gov/media/3328/eo-28-establishment-of-the-governors-commission-on-integrity-and-public-confidence-in-state-government-2ada.pdf.

legislative districts should be drawn without regard to partisan considerations." Comm'n on Integrity and Pub. Confidence in State Gov't, *Final Report of the Commission on Integrity and Public Confidence in State Government* at 16 (Dec. 2015).[12] 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 and 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 success in drawing maps to achieve partisan advantage. It is this same technology that would make it straightforward to fulfill the constitutional requirement of compactness while ensuring that the parties are treated symmetrically by the redistricting plan.

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[12] https://governor.virginia.gov/media/5103/integrity-commission-final-report-dec-2015.pdf.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 14, 2017, a copy of the foregoing Brief of *Amicus Curaie* shall be served via email and first class mail, postage prepaid, upon:

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