No. 15-680

In The Supreme Court of the United States

GOLDEN BETHUNE-HILL, CHRISTA BROOKS, CHAUNCEY BROWN, ATOY CARRINGTON, DAVINDA DAVIS, ALFREDA GORDON, CHERRELLE HURT, THOMAS CALHOUN, TAVARRIS SPINKS, MATTIE MAE URQUHART, VIVIAN WILLIAMSON, AND SHEPPARD ROLAND WINSTON,

Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, *ET AL.*,

Appellees.

On Appeal from the
United States District Court
for the Eastern District of Virginia

BRIEF *AMICUS CURIAE* FOR ONEVIRGINIA2021: VIRGINIANS FOR FAIR REDISTRICTING IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICUS*[1]

OneVirginia2021: Virginians for Fair Redistricting, is a nonprofit corporation formed under the laws of the Commonwealth of Virginia and granted exempt status under Sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. OneVirginia2021 was organized to initiate a comprehensive effort to remove gerrymandering from the redistricting process in Virginia, through public education, participation in meaningful litigation, and by seeking an amendment to the Constitution of Virginia establishing an impartial Redistricting Commission – independent of the Virginia General Assembly – to draw legislative and congressional district lines, and to use specific, objective and well-defined redistricting criteria in performing the redistricting function.

OneVirginia2021 is interested in this case because partisan gerrymandering undermines the rights of citizens of all political viewpoints. It is destructive to our constitutional democracy and concept of representation because it gives politicians drawing district lines greater influence over who represents voters than the voters themselves. OneVirginia2021 is committed to a fair system of

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[1] This *amicus* brief is filed in support of the appellants with the consent of all parties. Letters confirming the parties' consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, *amicus* submitting this brief and its counsel hereby represent that none of the parties in this case nor their counsel authored this brief in whole or in part and that no person other than *amicus* paid for or made a monetary contribution toward its preparation and submission.

districts that represent the viewpoints of voters no matter where they fall on the political spectrum.

The record in this case creates an opportunity for the Court to clarify that discrimination on the basis of viewpoint can never be a legitimate state interest, and that partisan gerrymandering is no defense to an otherwise well-grounded claim of racial discrimination in the redistricting process.

This *amicus* brief is filed in support of the appellants with the consent of all parties. Letters confirming the parties' consent are being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, *amicus* submitting this brief and its counsel hereby represent that none of the parties in this case nor their counsel authored this brief in whole or in part and that no person other than *amicus* paid for or made a monetary contribution toward its preparation and submission.

STATEMENT OF THE CASE

This case comes to this Court with an uncomplicated record. A divided district court below upheld the 2011 Virginia House of Delegates redistricting plan against a claim of unconstitutional racial gerrymandering, notwithstanding that the legislature adopted a minimum racial threshold of 55% black voting age population (BVAP) for every minority district. That percentage was a fixed, non-negotiable quota in drawing all twelve minority House districts. However, the district court, in a two-to-one split decision, found that race did not predominate based on assertions by the legislative defendant/intervenors (hereafter "Intervenors") that the lines were the product of other factors such as

partisan advantage. *See Bethune-Hill v. Va. State Board of Elections,* 141 F. Supp. 3d 505, 542 (E.D. Va. 2015) (noting that "[t]he Intervenors. . . raised the argument that some of the Challenged Districts have political, rather than racial, justifications").

The Intervenors advanced that argument to this Court in their Motion to Dismiss or Affirm, at p. 28 ("The Court Correctly Rejected the Challenge to HD 63, HD 80 and HD 95 Because Political Considerations Predominated"). More specifically, partisan advantage was the motivation behind the Intervenors' assertion that "HD 95 was crafted carefully to avoid taking HD 94's Republican precincts and instead take Democratic-leaning population left behind. . .to dilute Democratic voting strength in that area." Ints.' Pre-Trial Brief at 18. They also targeted specific Democratic incumbents and, in turn, the voters who support them. "The changes on the eastern border to HD 75 were drawn to load heavily Republican precincts into the district of Democrat William Barlow (who subsequently lost to a Republican in the 2011 election . . ." *Id.* at 25.

A partisan attack also was waged in order to unseat Democrat Delegate Robin Abbott, who had defeated Republican Philip Hamilton in 2009 in the 93rd House District. Rather than draw a district based on traditional and neutral criteria, the district was drawn specifically to prevent voters who elected Delegate Abbott from continuing to maintain the representation in the legislature that their numbers dictated. The new lines were drawn so that Abbott was paired with Republican Delegate Glenn Oder in the heavily Republican 94th House District. For good measure, to ensure an even safer district for

Delegate Oder, the Intervenors' mappers moved several African-American precincts out of the 94th and into the 95th, a minority district that already had a BVAP of 60% and in which the minority representative won at least 65% of the vote in every general election in the past decade. Oder defeated Abbott handily in the 2011 election.

SUMMARY OF THE ARGUMENT

While the record is clear that the leadership of the House of Delegates in the Virginia General Assembly engaged in unconstitutional racial gerrymandering in drawing twelve majority/minority House districts using a uniform racial quota, this case also presents a simple and critical question of law relevant to this Court's political gerrymandering jurisprudence. That is whether gerrymandering to achieve "partisan advantage" is a legitimate state interest. It is not. It is nothing more than unconstitutional discrimination on the basis of political viewpoint.

The use of political classifications to divide voters for the purpose of entrenching political power can never be a legitimate state interest. And the assertion of partisan gerrymandering as an excuse for noncompliance with other constitutional, statutory or longstanding "good government" redistricting requirements should not become a judicially sanctioned rule.

The record reflects numerous other instances of political manipulation and exercises in partisan "incumbency protection" intended to preserve the political advantage in favor of Republicans in the Virginia House of Delegates (despite Democrats

winning each of the last six statewide elections). Incumbency protection, however, has never been deemed to mean guaranteed re-election or lifetime tenure for elected officials. Yet a decade of tenure and uncontested elections are precisely what the Intervenors sought to legislate in the 2011 plan with unabashed racial and partisan manipulation. And unconstitutional racial sorting, through the imposition of a mandatory, inflexible quota, was the predominant tool employed by the intervenors to implement their partisan agenda.

Partisan gerrymandering is an abuse of legislative authority and incompatible with democratic principles. There is no rational justification for such an invidious abuse of power, and this Court should decline to recognize such viewpoint discrimination as an acceptable explanation for engaging in constitutionally prohibited racial discrimination or disregarding traditional redistricting principles.

ARGUMENT

I. PARTISAN GERRYMANDERING UNDERMINES BASIC DEMOCRATIC AND CONSITUTIONAL VALUES

"'[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'" *Arizona State Legislature v. Arizona Independent Redistricting Comm'n, et al.*, 576 U.S. ___, ___ (2015), *quoting Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (plurality opinion) (Kennedy, J., concurring in judgment). Partisan gerrymandering is the deliberate manipulation of legislative district

boundaries where the sole motivation is to advantage or benefit a particular party or group, or cause disadvantage or harm to an opposing party or group. It is a widespread practice that distorts the electoral process, undermines democracy, and renders legislative elections a meaningless exercise.

Such a practice is antithetical to both the First and Fourteenth Amendments as it creates a system that devalues the voting power of individuals holding one set of political ideals and overweighs the voting power of individuals holding a different set of political beliefs. In this way it is even more offensive to the constitution than redistricting schemes that over populate some districts and under populate others arbitrarily. Those systems are unconstitutional simply because of an inequity in voting power. Partisan gerrymandering adds invidious viewpoint discrimination to the pool.

Moreover, partisan gerrymandering has other harmful effects on the democratic process.

- Partisan Gerrymandering reduces and eliminates competition in elections. Unchallenged incumbents have less incentive to ascertain and represent the interests of their constituents.

- Partisan Gerrymandering promotes tunnel vision and polarization. When a general election has been predetermined by district lines there is no incentive in a primary to nominate candidates that will reach out to independents or voters from the other party. The result is the election of

legislators who stand at the extremes of their own parties.

- With candidates who sit on the extremes, and whose only threat to reelection is a more extreme challenger, compromise is thwarted, resulting in greater gridlock in government.

- Partisan Gerrymandering increases voter apathy and confusion, and reduces voter participation – why bother to vote when the outcome is preordained?

The effectiveness of electoral manipulation in the Commonwealth of Virginia under the 2011 redistricting plan, and the harm imposed on our representative democracy, can be seen in the results of the most recent November 2015 general elections. All 100 seats in the Virginia House of Delegates and all 40 seats in the Senate of Virginia were on the ballot during the last election. Of the 100 races in the House of Delegates, 62 delegates ran completely unopposed. Voters in these districts had no choice whatsoever. In an additional nine races, there was only token third party opposition, for a total of 71 essentially uncontested races. Moreover, after retirements, resignations to run for other office, and three primary contest changes, 122 incumbents sought re-election to 140 seats in the House and Senate on the November ballot. Every one of those 122 incumbents won re-election, most with double

figure margins of victory.[2] Unsurprisingly, voter apathy and disinterest reached record levels in the 2015 state legislative elections and Virginia suffered one of the lowest voter turnouts on record, with only 29.1% of registered voters going to the polls.[3]

II. WHILE REDISTRICTING INHERENTLY INVOLVES POLITICS, THE FIRST AMENDMENT REQUIRES THAT REDISTIRCTING BE DONE IN A VIEWPOINT NEUTRAL FASHION

Many different legitimate motivations, some of which involve political considerations, may shape redistricting plans, but the First Amendment makes clear that the legitimacy of any politically related criteria turns on its viewpoint neutrality. "A burden that falls unequally" on the voters of different viewpoints "impinges by its very nature on … the First Amendment." *Anderson v. Celebrezze,* 460 U.S. 780, 793 (1983). *See also Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in judgment) ("If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State

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[2] *See* Virginia State Board of Elections, *District-by-district contests*, *available at:* http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html (last visited Sept. 6, 2016).

[3] *See* Virginia State Board of Elections, *Voter turnout statistics,* available *at:* http://elections.virginia.gov/resultsreports/registration-statistics/registrationturnout-statistics/ (last visited Sept. 6, 2016).

shows some compelling interest."); *Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (holding that States authority over administering elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.").

Thus, there are instances in which political criteria, neutrally applied, may constitute a legitimate government interest. For instance, the Court has recognized that the pursuit of political balance may justify district lines. *See Bush v. Vera,* 517 U.S. 952, 964-65 (1996) (citing *Gaffney v. Cummings,* 412 U.S. 735, 757 (1973), for the proposition that states "may draw irregular district lines in order to allocate seats proportionately to major political parties"); Michael Parsons, *Clearing the Political Thicket: Why Political Gerrymandering for Partisan Advantage is Unconstitutional,* 24 Wm. & Mary Bill Rts. J. 1107, 1139-42 (2016). But the Intervenors' express objective here of manipulating numerous district lines in order to disadvantage much of the electorate because of their political views does not pursue "political balance." It is intended to achieve their own partisan advantage, and specifically to erect barriers to the political process for a large class of its citizens.

In the case at hand, it is especially concerning that Intervenors throughout these proceedings have repeatedly referred to "incumbency protection" as a redistricting objective and consider it to be a neutral and legitimate redistricting practice. However, incumbency protection has never been construed to mean that districts may be drawn with the goal of ensuring the same politicians will be elected and re-elected year after year. At best, incumbency

protection means that map makers should not deliberately draw incumbents out of their districts or pair two or more incumbents together in one district in order to eliminate one of them altogether. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740(1983) ("Any number of consistently applied legislative policies" can qualify as a rational state policy in this context, "including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and *avoiding contests between incumbents*.") (emphasis added). *See also Bush v. Vera*, 517 U.S. 952 (1996) ("And we have recognized incumbency protection, at least in the limited form of 'avoiding contests between incumbents,' as a legitimate state goal.").

In this way "incumbency protection" is a misnomer. What the Court has sanctioned is the recognition of voters' previous choices rather than incumbents' right to be reelected. Having shown preference for certain candidates in the past, it is rational and viewpoint-neutral to allow voters the option to send back to the legislature their prior choices by not drawing them out of their districts or pairing them against one and other. Contrary to Intervenors' argument, the Court has never sanctioned guaranteed re-election or providing continuing tenure for elected representatives in order to ensure a particular party controls the legislature.

III. PARTISAN ADVANTAGE IS NOT A LEGITIMATE REDISTRICTING OBJECTIVE, AND SHOULD NOT BE ACCEPTED TO EXCUSE UNCONSTITUTIONAL RACIAL DISCRIMINATION OR THE DISREGARD OF TRADITIONAL REDISTRICTING PRINCIPLES

Whatever the aims of the individual Intervenor legislators, it can hardly be said that the Commonwealth of Virginia itself has a legitimate state interest in drawing district lines to advantage one set of political views over another. First, partisan advantage is not a *state* interest at all. The state represents the entire body politic composed of myriad viewpoints and cannot claim an interest in which any one party should win a democratic election and ascend to power. Moreover, the reality is that claiming an interest in "partisan advantage" is the same as claiming an interest in "partisan suppression." One cannot exist without the other. Such suppression creates a tangible and particularized harm for each voter whose voting power has been suppressed.

Second, legislation passed for the purpose of disadvantaging a group of citizens is not *legitimate*. *See Romer v. Evans,* 517 U.S. 620, 632 (1996) (noting that when legislation cannot be explained "by anything but animus toward the class it affects[,] it lacks a rational relationship to legitimate state interests"). *See also Harris v. Arizona Independent Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016) (assuming without deciding that partisanship is an illegitimate redistricting factor"). As this Court has

stated, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Romer* at 633. Legislators who openly proffer "partisan advantage" as a justification for manipulating district lines are not seeking to implement fair and effective representation; they have admitted that their plan has no desire to follow the viewpoint neutrality requirements of the First Amendment. There is no rational theory to justify such legislation when, as here, the elements of a redistricting plan are based on facial political classifications for the express purpose of achieving partisan advantage. Thus, they must be rejected.

Justice John Paul Stevens sat for an interview shortly after he retired in 2010 on the occasion of the publication of *Five Chiefs,* his memoir on his time at the Court. The interview was conducted by one of his former Law Clerks, Stanford law professor Jeffrey Fisher and in it he discussed his view that the Court should do more to address partisan gerrymandering:

> Well, it goes back to the fundamental equal protection principle that government has the duty to be impartial. . . Nowadays, the political parties acknowledge they are deliberately trying to gerrymander the districts in a way that will help the majority. . . That's outrageously unconstitutional in my judgment. The government cannot gerrymander for the purpose of helping the majority party; the government should be

> redistricting for the purpose of creating appropriate legislative districts.
>
> * * * *
>
> This is one of the major disappointments in my entire career; that I was so totally unsuccessful in persuading the Court on something so obviously correct. Indeed, I think that the Court's failure to act in this area is one of the things that has contributed to the much greater partisanship in legislative bodies now. . .[4]

While this Court has struggled with the difficult question of how exactly to adjudicate partisan gerrymandering claims, a majority of the Court has clearly recognized that discrimination based on political affiliation presents a justiciable constitutional harm. *See Veith v. Jubelirer, supra* at 316 (Kennedy, J., concurring in the judgment). Moreover, at least five sitting Justices now are in agreement that partisan gerrymandering is unlawful. As Justice Kennedy observed in *Vieth, Id.* at 267:

> Finally, I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed the plurality seems to acknowledge it is not. See *ante*, at 292. ("We do not disagree with [the] judgment" that

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[4]*See* SCOTUSBlog, *An interview with Justice Stevens, available at*: http://www.scotusblog.com/21011/11/an-interview-with-justice-stevens/ (last visited Sept. 6, 2016).

> "partisan gerrymanders [are incompatible] with democratic principles") ; *ante*, at 293 (noting that it is the case, and that the plurality opinion assumes it to be the case, that "an *excessive* injection of politics [in districting] is *unlawful*").

541 U.S. at 316.

This case does not require the Court to answer that difficult question of how to appropriately determine when the "injection of politics" has become "excessive" such that it is a cognizable harm in and of itself. This case merely asks the Court to affirm the logical consequences of its past rulings and hold that in the face of evidence showing race-based redistricting, the state cannot defend a racial sorting by claiming that it was instead viewpoint discrimination.

This conclusion finds support in the recent decision of the Fourth Circuit in *Raleigh Wake Citizens Assoc., et al. v. Wake County Board of Elections, et al.,* No. 16-1270, No. 16-1271, 2016 U.S. App. Lexis 12136 (4th Cir., July 1, 2016), *reh. denied,* July 26, 2016. In *Raleigh Wake*, a North Carolina federal district court rejected a "one person, one vote" redistricting challenge to certain Wake County School Board and County Commissioner districts, holding after a bench trial that the plaintiffs had failed to meet their burden of negating "every conceivable legislative purpose" that might support the redistricting plan. The United States Court of Appeals for the Fourth Circuit reversed, noting that the evidence at trial showed that the population deviations reflected the predominance of "illegitimate reapportionment factors," i.e., "an

attempt to guarantee Republican victory through the intentional packing of Democratic districts." Slip op. at 24-25. The court distinguished *Gaffney v. Cummings, supra,* in which political considerations were considered permissible to follow a "policy of political fairness." *Id.* at 738. Here, however, the challenged redistricting "subverts political fairness and proportional representation and sublimates partisan gamesmanship." Slip op. at 29. The court concluded that the plaintiffs "successfully showed it to be more probable than not that the deviations at issue reflect the predominance of an illegitimate reapportionment factor rather than legitimate consideration." *Id.* at 38. Stated another way, partisan gerrymandering and viewpoint discrimination are not legitimate redistricting criteria. It is impermissible, if not unlawful, and cannot be asserted to offset or justify unconstitutional population deviations, racial sorting, or other equally impermissible redistricting abuses.

This is not a case like *Vieth,* or *Davis v. Bandemer*, 478 U.S. 109 (1986), where the Court must cobble together circumstantial evidence of intentional political discrimination and disparate impact in order to ascertain a justiciable claim. When legislators assert, as is claimed here, that political advantage was a significant motivation in establishing legislative districts, the body cannot be said to have acted legitimately or rationally. Such assertions should not be allowed to explain or justify unconstitutional racial discrimination and the disregard of well-settled traditional redistricting criteria.

Amicus does not ask the Court to settle on a standard and find that such harm is present in this case. Rather, we ask the Court clarify that openly admitting to invidious partisan discrimination cannot provide a safe harbor to a legislature that has engaged in race conscious redistricting, and otherwise has disregarded state constitutionally mandated or traditional redistricting criteria in order to implement a "non-negotiable" 55% racial threshold.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court, enter final judgment, and remand for implementation of a remedial plan. Should the Court order a remand for reconsideration of whether the 2011 House of Delegates redistricting plan violates the Fourteenth Amendment, the Court should order that evidence of partisan gerrymandering or political advantage may not be accepted or considered to explain or justify such unconstitutional racial discrimination.

Respectfully submitted,

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