

IN THE MATTER OF THE 2022
LEGISLATIVE DISTRICTING OF
THE STATE OF MARYLAND

MARK N. FISHER
NICHOLAUS R. KIPKE
KATHRYN SZELIGA,

Petitioners.

IN THE
COURT OF APPEALS
OF MARYLAND
MISC. NO. 25
SEPTEMBER TERM, 2021

**BRIEF OF BIPARTISAN FORMER GOVERNORS MICHAEL F. EASLEY, ARNOLD
SCHWARZENEGGER, WILLIAM WELD, AND CHRISTINE TODD WHITMAN
AS *AMICI CURIAE* SUPPORTING PETITIONERS**

Marina Eisner
AIS No. 1112130271
Christine Sun (*pro hac vice* forthcoming)
Cal. Bar No. 218701
STATES UNITED DEMOCRACY CENTER
1107 17th Street, NW
Washington, DC 20036
(240) 600-1316
marina@statesuniteddemocracy.org
christine@statesuniteddemocracy.org

Jonathan L. Williams (*pro hac vice* forthcoming)
Fla. Bar No. 117574
JONATHAN L. WILLIAMS, P.A.
113 South Monroe St., First Floor
Tallahassee, FL 32301
(850) 706-0940
jw@jonathanwilliamslaw.com

Attorneys for the Bipartisan Former Governors

TABLE OF CONTENTS

Table of Authorities	ii
Interest of <i>Amici Curiae</i>	1
Argument	2
I. The modern practice of extreme partisan gerrymandering harms democracy.....	4
A. Extreme partisan gerrymandering is incompatible with democratic principles.....	4
B. Modern, technologically advanced gerrymandering poses an unprecedented threat to our democracy due to its extraordinary precision.....	8
C. The pressures of contemporary partisan politics drive even government officials who recognize partisan gerrymandering’s harms to engage in the practice.	11
II. Recent decisions limiting partisan gerrymandering in North Carolina and Pennsylvania show why extreme partisan gerrymandering violates the Maryland Constitution.....	12
III. Reliable, objective standards exist to police partisan gerrymandering.	17
Conclusion	18

TABLE OF AUTHORITIES

Cases

Adams v. DeWine,
--- N.E.2d ---, Nos. 2021-1449 & 2021-1449, 2022 WL 129092 (Ohio Jan. 14, 2022)..... 17

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n,
576 U.S. 787 (2015)..... 1, 5

Att’y Gen. of Md. v. Waldron,
289 Md. 683 (Md. 1981)..... 14

Benisek v. Lamone,
348 F. Supp. 3d 493 (D. Md. 2018)..... passim

Common Cause v. Lewis,
No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019) 8

Common Cause v. Rucho,
279 F. Supp. 3d 587 (M.D.N.C. 2018) 6

Cooper v. Berger,
809 S.E.2d 392 (N.C. 2018)..... 7

Duckworth v. Deane,
393 Md. 524 (2006) 16

Harper v. Hall,
--- S.E.2d ----, No. 413PA21, 2022 WL 496215 (N.C. Feb. 14, 2022) passim

In re Legislative Districting of the State,
370 Md. 312 (Md. 2002)..... 2, 8, 9

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006)..... 5, 7

League of Women Voters of Wisc. v. Evers,
929 N.W.2d 209 (Wisc. 2019) 7

League of Women Voters v. Commonwealth,
178 A.3d 737 (Pa. 2018)..... 13, 14, 15, 18

N.C. State Conf. of the NAACP v. Moore,
849 S.E.2d 87 (N.C. Ct. App. 2020) 4

<i>Rucho v. Common Cause</i> , 139 S. Ct. 2484 (2019).....	5, 8
<i>State Bd. of Elections v. Snyder ex rel. Snyder</i> , 435 Md. 30 (2013)	3, 12
<i>Whittington v. Polk</i> , 1 H. & J. 236 (Md. 1802).....	16
Constitutional Provisions	
Ariz. Const. art. 4, pt. 2, § 1	16
Fla. Const. art. III, § 20	16
Fla. Const. art. III, § 21	16
Md. Const. art. III, § 4	16
Md. Const. art. III, § 5	17
Md. Const. art. XIV, § 1	16
Md. Const., Declaration of Rights, art. 1	2
Md. Const., Declaration of Rights, art. 7	13
Md. Const., Declaration of Rights, art. 24	14
Md. Const., Declaration of Rights, art. 40	15
Mich. Const. art. IV, § 6	16
N.C. Const. art. I, § 10	13
N.C. Const. art. II, § 3.....	17
N.C. Const. art. II, § 5.....	17
N.Y. Const. art. III, § 4(c)(5)	16
Ohio Const. art. XIX, § 1(C)(3)(a)	16
Pa. Const. art. I, § 5.....	13
Pa. Const. art. II, § 16	17

Other Authorities

2 <i>Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> (J. Elliott ed., 1876)	5
James Madison, <i>Notes of Debates in the Federal Convention of 1787</i> (W. W. Norton & Co. 1987)	6
Martin O'Malley, <i>I Added a Democrat to Congress but I Hope Supreme Court Ends Partisan Gerrymandering</i> , https://bit.ly/3vDpdXw (Mar. 29, 2018)	11, 12
Nicholas Fandos <i>et al.</i> , <i>A Master Class in Gerrymandering, This Time Led by N.Y. Democrats</i> , N.Y. TIMES, https://nyti.ms/3LOP04I (Feb. 2, 2022)	9
Nicholas O. Stephanopoulos & Eric M. McGhee, <i>Partisan Gerrymandering and the Efficiency Gap</i> , 82 U. Chi. L. Rev. 831 (2015)	9
Nicholas O. Stephanopoulos & Eric M. McGhee, <i>The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering</i> , 70 Stan. L. Rev. 1503 (2018)	4
Robert Yablon, <i>Gerrylaundersing</i> , 97 N.Y.U.L. Rev. (forthcoming 2022), available at https://bit.ly/3tDVqeF	8
<i>The Federalist No. 10</i> (James Madison) (Clinton Rossiter ed., 1961)	6
William A. Galston & Elaine Kamarck, Brookings Inst., <i>Make U.S. Politics Safe for Moderates</i> , https://brook.gs/3CuaEXI (Feb. 23, 2011).....	6

INTEREST OF *AMICI CURIAE*

Amici curiae are former governors from both major political parties who have experienced the corrosive effects of extreme partisan gerrymandering in their states. *Amici* know from their experience how extreme partisan gerrymandering harms democracy, encourages polarization, and makes it harder for governors and the legislature to find common ground on critical issues, such as legislation, budgets, appointments, and other matters of state. As a result of their experience, they have an interest in ensuring that the Maryland Constitution is properly interpreted to limit this harmful practice.

Governor Michael F. Easley was the seventy-second governor of North Carolina, serving from 2001 until 2009. He is a practicing attorney in North Carolina and previously served as both a District Attorney and Attorney General.

Governor Arnold Schwarzenegger was the thirty-eighth governor of California, serving in that role from 2003 until 2011.

Governor William Weld was the sixty-eighth governor of Massachusetts, serving from 1991 until 1997. He is a practicing attorney in Massachusetts, and previously served as a United States Attorney and as Assistant U.S. Attorney General in charge of the Criminal Division, with jurisdiction over election fraud in both offices.

Governor Christine Todd Whitman was the fiftieth governor of New Jersey, serving in that role from 1994 until 2001.

ARGUMENT

The most basic tenet of our representative democracy is that “the voters should choose their representatives.” *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 824 (2015). Maryland recognizes this principle in the very first article of the Declaration of Rights: “all Government of right originates from the People.” Md. Const., Declaration of Rights, art. 1. Thus, as the Court of Appeals has explained, a “fairly apportioned legislature lies at the very heart of representative democracy.” *In re Legislative Districting of the State*, 370 Md. 312, 319 (2002). But all too often, the people’s elected representatives seek to invert that principle, drawing district lines to entrench the party in power, and effectively devaluing the votes of the other party’s supporters.

Gerrymandering has come a long way since 1812, when Elbridge Gerry approved a salamander-like district across Massachusetts that gave the practice its name. Now, high-priced consultants use rich troves of data to help legislative majorities entrench their power with ever-increasing precision and effectiveness. These “modern technologies enable mapmakers to achieve extremes of imbalance that, with almost surgical precision, undermine our constitutional system of government.” *Harper v. Hall*, --- S.E.2d ---, No. 413PA21, 2022 WL 496215, at *1 (N.C. Feb. 14, 2022) (footnote and internal quotation marks omitted).

The modern phenomenon of extreme partisan gerrymandering is not just inconsistent with our founding ideals. It harms the workings of our democracy. As former governors of diverse states, *amici* have experienced how the modern practice of gerrymandering renders our politics more extreme and discourages the kinds of common-sense governing that has made our country work. A legislative branch that attempts to entrench a permanent one-party majority through extreme partisan gerrymandering distorts the separation of powers envisioned by the Framers. It increases the likelihood that governors must veto legislation and that courts must

adjudicate matters regarding legislation or mediate intractable conflicts between the executive and legislative branches. Rather than forming governments where laws can be passed through cooperation, gerrymandering introduces more conflict and intemperance into the legislative process, and often threatens the effectiveness of a state's governor, who is elected to represent the entire ungerrymandered state. Forming consensus, cooperating, finding common ground, and ultimately, governing all become harder.

This is not the way democracy should work, and this Court need not—indeed, must not—sit idly by. The Maryland Constitution establishes that the right to vote is “one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society” and guarantees the “*fair and free exercise of the electoral franchise*” *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 61 (2013) (emphasis added). But when the political party in power uses the districting process to entrench its power—and insulate itself from voters who do not support it—it unfairly tilts the democratic playing field against voters who support the political party not currently in power. As the North Carolina and Pennsylvania Supreme Courts have recently recognized in challenges based on constitutional provisions similar to the ones involved here, extreme partisan gerrymandering violates the principles of free elections and equal protection, and the freedoms of speech and association. Far from engaging in improper politicking or legislating from the bench, protecting voters' rights from entrenched legislative majorities is fundamentally an appropriate judicial activity. These courts have recognized, moreover, that reliable tools exist to detect partisan gerrymandering, ranging from advanced statistical techniques to old-fashioned percipient testimony and common sense.

This Court should join them in protecting the right to an equally effective vote and hold that the Maryland Constitution prohibits extreme partisan gerrymandering.

I. The modern practice of extreme partisan gerrymandering harms democracy.

A. Extreme partisan gerrymandering is incompatible with democratic principles.

In simplest terms, partisan gerrymandering “occurs when the majority party draws districts for the purpose of increasing a party’s political advantage in the legislature.” *N.C. State Conf. of the NAACP v. Moore*, 849 S.E.2d 87, 90 (N.C. Ct. App. 2020). While partisan gerrymandering takes myriad forms, it is “always carried out in one of two ways: the *cracking* of a [disfavored] party’s supporters across many districts, in which their preferred candidates lose by relatively narrow margins, or the *packing* of a party’s backers into a few districts in which their preferred candidates win by overwhelming 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). Map-drawers thus engineer districts to give the party in power a share of seats that exceeds (sometimes vastly) its share of the vote.

Partisan gerrymandering is widely—and rightly—viewed as inconsistent with democratic values. As Judge Niemeyer of the Fourth Circuit Court of Appeals explained when considering a challenge to a previous Maryland gerrymander, “The widespread nature of gerrymandering in our politics is matched by the almost universal absence of those who will defend its negative effect on our democracy.” *Benisek v. Lamone*, 348 F. Supp. 3d 493, 511 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). While “both Democrats and Republicans have decried partisan gerrymandering when wielded by their opponents,” they “nonetheless continue to gerrymander in their own self interest when given the opportunity.” *Id.* The practice has been most politely called “incompatib[le] . . . with our democratic principles,” but more often far worse: “a cancer on our democracy” that “[a]t its most extreme . . . amounts to ‘rigging elections.’” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507

(2019); *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018) (Kagan, J., concurring); *Benisek*, 348 F. Supp. 3d at 525 (Bredar, C.J., concurring). It is an “an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.” *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 456 (2006) (*LULAC*) (Stevens, J., concurring in part and dissenting in part) (quotation marks omitted). And it thwarts the fundamental principle of our democracy. As 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). That is, “the voters should choose their representatives, not the other way around.” *Ariz. State Legislature*, 576 U.S. at 824.

The harms of partisan gerrymandering are not merely theoretical. As former governors from both major political parties, *amici* have seen the ways that extreme partisan gerrymandering distorts our politics.

To begin, extreme partisan gerrymandering promotes factionalism. In principle, representatives should represent *all* the residents of their district—be they Democrats, Republicans, or none of the above. But partisan gerrymandering distorts this relationship by drawing lines to perpetuate the majority party’s power. The problem is not simply that “a representative may believe her job is only to represent the interests of a dominant constituency” within the district. *LULAC*, 548 U.S. at 470 (Stevens, J., concurring in part and dissenting in part). It is that the representative “may feel more beholden to [those] who drew her district than to the constituents who live there.” *Id.* Running afoul of voters back home might result in a few lost votes. Running afoul of the map-drawers may cause the seat to disappear altogether. This dynamic enhances age-old concerns of factionalism that Madison voiced in Federalist 10—that

“measures 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). By tethering representatives’ fates more tightly to the party in power and its leadership, partisan gerrymandering weakens representatives’ bonds with the diverse interests of their districts.

Compounding this problem is partisan gerrymandering’s tendency to push the parties away from the center as parties draw safer districts to secure partisan advantage. Over the past 50 years, the percentage of House incumbents winning with supermajorities has consistently increased, while the ideological composition of the electorate has remained relatively stable. William A. Galston & Elaine Kamarck, Brookings Inst., *Make U.S. Politics Safe for Moderates*, <https://brook.gs/3CuaEXI> (Feb. 23, 2011). Although self-described moderates make up nearly half the electorate, gerrymandered safe districts encourage politicians to cater to often more extreme primary voters, diminishing the influence of moderates in electoral cycles. *Id.* Partisan gerrymandering shifts political parties toward opposite ends of the spectrum instead of meeting in the middle. More divisive party candidates are elected, and bipartisan compromise dwindles.

Partisan gerrymandering also enables representatives and political parties to root themselves in office, free from competition or challenge. This “undermines the ability of voters to effect change when they see legislative actions as infringing on their rights” because “as James Madison warned, a legislature that is itself insulated by virtue of an invidious gerrymander can enact additional legislation to restrict voting rights and thereby further cement its unjustified control of the organs of both state and federal government.” *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 621 (M.D.N.C.) (citing James Madison, *Notes of Debates in the Federal Convention of 1787*, 424 (W. W. Norton & Co. 1987)), *vacated and remanded sub nom. Rucho*

v. Common Cause, 138 S. Ct. 2679 (2018)). It creates “locked-in” legislative seats where office holders “need not worry about the possibility of shifting majorities” and “have little reason to be responsive to the political minorities within their district.” *LULAC*, 548 U.S. at 470–71 (2006) (Stevens, J., concurring in part and dissenting in part).

These entrenched legislative majorities disrupt the finely tuned balance of the separation of powers. *Amici* include former governors who have seen how legislatures attempt to craft, through gerrymandering, a supermajority that effectively eliminates the governor’s use of a veto. *Amici* have also observed how candidates for congressional and legislative districts are compelled to protect themselves from primary challenges. Where governors seek to have the policy priorities they campaigned on enacted for the good of the entire State, a legislature that is designed to maximize partisan advantage is less likely to share those goals. In this way, *amici* have observed as former governors that a legislative map drawn to ensure partisan advantage can block a governor elected statewide from following through on the people’s mandate. Securely ensconced in power by maps they have drawn for themselves, gerrymandered legislative supermajorities have even acted to strip incoming executives of power when the statewide electorate—a whole that cannot be gerrymandered to the legislature’s liking—chooses a governor from the opposing party. *See, e.g., League of Women Voters of Wisc. v. Evers*, 929 N.W.2d 209, 215 (Wisc. 2019) considering constitutionality of laws enacted and appointments confirmed during “extraordinary session” called in December 2018 after a governor from the opposing party was elected but before he took office); *Cooper v. Berger*, 809 S.E.2d 392, 395 (N.C. 2018) (considering constitutionality of law that stripped governor of the opposite party of control over elections). Instead of providing the intended balance on the executive, a legislative supermajority wrought by extreme partisan gerrymandering sequesters and weakens the

executive branch. When a gerrymandered supermajority renders the people’s elected governor powerless it does not simply diminish the governor’s power, but it also thwarts the will of the people who voted that governor into office.

Partisan gerrymandering only gets worse over time, as “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). Indeed, even without substantial changes, simply maintaining previous gerrymanders perpetuates the partisan gains of the past. See Robert Yablon, *Gerrylaunders*, 97 N.Y.U. L. Rev. (forthcoming 2022), available at <https://bit.ly/3tDVqeF> (recognizing that so-called “gerrylaunders” requires no conspicuous cracking and packing of disfavored voters, as it lock[s] in” a favorable position by “preserving key elements of the existing map”). As explained next, however, the modern tools of partisan gerrymandering are making the practice even more damaging to our democracy.

B. Modern, technologically advanced gerrymandering poses an unprecedented threat to our democracy due to its extraordinary precision.

Partisan gerrymandering is not new. In the first congressional elections, George Washington accused Patrick Henry of trying to gerrymander Virginia’s districts against the Federalists. *Rucho*, 139 S. Ct. at 2494. The practice got its name after Massachusetts Governor Elbridge Gerry in 1812 approved an apportionment with a district that curved about the commonwealth in the shape of a salamander. *Id.* Redistricting is, no doubt, inherently political, and political considerations have always been a part of the calculus. *In re Legislative Districting of the State*, 370 Md. at 321-22. Even accepting, however, that “broad political and narrowly partisan” considerations may be among “countless other factors” considered when redistricting,

as the Court of Appeals has suggested in *dicta* before, *see id.*,¹ modern, tech-driven gerrymandering is so much more sophisticated and effective as to permit partisanship to dwarf all other elements of map drawing.

The combination of “technological advances and 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). Thus, “[w]hile partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance . . . with almost surgical precision.” *Harper*, 2022 WL 496215, at *2 (footnote and internal quotation marks omitted). Indeed, as the North Carolina Supreme Court observed when striking down that state’s gerrymanders earlier this year, “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.” *Id.* In North Carolina, these advances allowed the Republican legislature to craft maps that were “more favorable to Republicans than 99.999% of . . . comparison maps” generated using non-partisan redistricting criteria. *Id.* at *11, *44, *46. In New York, Democrats recently achieved what one respected election-law expert called a “master class in how to draw an effective gerrymander,” producing a disproportionate advantage to Democratic candidates for Congress. Nicholas Fandos et al., *A Master Class in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. Times, <https://nyti.ms/3LOP04I> (Feb. 2, 2022).

¹ None of the state constitutional challenges in 2002 proceeded under any constitutional provision other than article III, section 4, so the Court of Appeals had no occasion to consider the claims presented here. *See id.* at 330 (describing the state-law claims as addressing the “constituent components . . . of Article III, § 4 of the Maryland Constitution”).

Maryland is no stranger to this kind of high-tech partisan gerrymandering. During the last redistricting cycle, the Democrat-controlled Legislature redrew Maryland’s congressional districts to flip the historically Republican Sixth Congressional District in western Maryland to a Democrat. *See Benisek*, 348 F. Supp. 3d at 498. The plan’s proponents did not hide their motives. One Delegate bluntly acknowledged during debate that the goal was to get “more Democrats in the House of Representatives.” *Id.* at 506.

To accomplish Democrats’ goals, an outside consultant was “specifically charged” with protecting Democratic incumbents in Congress and “chang[ing] the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican”; he was “given no additional instructions as to how to draw the map.” *Id.* at 502-03. Using modeling software that could predict with startling accuracy the results of district lines, the consultant devised a plan to move 360,000 residents out of the district and replace them with approximately 330,000 residents of Democratic-leaning Montgomery County. *Id.* at 409, 503. The former Sixth District voters were reassigned to the Eighth District, which remained safely Democratic. *See id.* at 501.

To develop the plan, the consultant used a proprietary Democratic Performance Index (DPI) that drew upon data from many earlier elections to model election results under many different redistricting scenarios. *Id.* at 503. The model’s predictive power was extraordinary. In 2016, Democratic candidates in districts with DPIs above 50 percent won 92.5 percent of races, while “almost never” winning races when the DPI was less than 50 percent. *Id.* After calculating the existing Sixth District’s DPI as 37.4 percent, the consultant provided several options to Democratic leaders whose DPIs exceeded 51 percent—essentially guaranteeing Democratic victory in the reconfigured district. *Id.* In conducting his analysis, the consultant did not consider any traditional criteria for drawing districts—compactness, maintenance of political subdivisions

or communities of interest, and the like; his sole object was to “see if there was a way to get another Democratic district in the state.” *Id.*

The modern practice of partisan gerrymandering thus differs significantly from past practice in ways that make it far more damaging to democracy. Whatever might be said of partisan considerations during redistricting in the past, recent technological advances make partisan gerrymandering a much more potent weapon for legislative majorities to secure their positions and thwart the will of the people.

C. The pressures of contemporary partisan politics drive even government officials who recognize partisan gerrymandering’s harms to engage in the practice.

Left to their own devices, politicians will not stop districting for partisan advantage. As former Governor Martin O’Malley has explained, politicians who gerrymander often feel powerless to stop due to a perceived need to offset the other party’s gerrymanders, particularly for congressional maps. According to former Governor O’Malley, the changes to the Sixth Congressional District’s flowed from “watch[ing] Republican governors carve Democratic voters into irrelevance in state after state in order to help elect lopsided Republican congressional delegations.” Martin O’Malley, *I Added a Democrat to Congress but I Hope Supreme Court Ends Partisan Gerrymandering*, <https://bit.ly/3vDpdXw> (Mar. 29, 2018). This led Maryland Democrats to feel “an obligation—even a duty—to push back” by gerrymandering in Maryland, despite recognizing the harms of gerrymandering discussed above. *See id.* Because Republicans were gerrymandering, O’Malley asserted, Democrats felt pressure to do the same, even if they did not think it was good for democracy. For Republicans, the incentives are the same.

This prisoner’s dilemma makes the prospect that politicians—even those who recognize partisan gerrymandering’s harms—will self-correct remote, at best. Recognizing the intractable nature of the problem, Governor O’Malley called for the Supreme Court to put an end to partisan

gerrymandering in 2018 in *Rucho*. *Id.* Although the Supreme Court determined that the United States Constitution did not permit it to intervene, it nevertheless condemned extreme partisan gerrymandering as “incompatible with democratic principles” and pointed to state constitutions as a source of relief. 139 S. Ct. at 2506-07. Adopting theories similar to the ones advanced here, supreme courts in North Carolina and Pennsylvania have done just that.

II. Recent decisions limiting partisan gerrymandering in North Carolina and Pennsylvania show why extreme partisan gerrymandering violates the Maryland Constitution.

Heeding the Supreme Court’s counsel in *Rucho*, the petitioners in this case assert that articles 7, 24, and 40 of the Maryland Declaration of Rights allow the courts to police partisan gerrymandering. They are correct. The right to vote is “one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society.” *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 61 (2013) (quotation marks and brackets omitted). It is the “highest right of the citizen, and the spirit of our institutions requires that every opportunity should be afforded for its free and fair exercise.” *Kemp v. Owens*, 76 Md. 235, 241 (1892). Analyzing similar provisions in their own state constitutions, the supreme courts of North Carolina and Pennsylvania have sharply limited the role of partisan considerations in redistricting. They have recognized that when the legislature diminishes voters’ ability to elect representatives based on partisan affiliation, it infringes upon the right to vote, violates equal protection principles, and discriminates based on viewpoint. This Court should do the same.

Under article 7 of the Declaration of Rights, a provision with no federal counterpart, Marylanders have a right to “free and frequent” elections, and all qualified voters possess the “right of suffrage.” The Court of Appeals has already recognized that article 7 guarantees both the “*fair and free* exercise of the electoral franchise” and is thus “even more protective” of political-process rights than the United States Constitution. *Snyder*, 435 Md. at 61 (emphases

added and quotation marks omitted). Interpreting their states’ similar constitutional provisions, the North Carolina and Pennsylvania Supreme Courts have both found extreme partisan gerrymandering to be incompatible with the guarantee of “free” elections. *Harper*, 2022 WL 496215, at *31-33; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018).² All three states’ provisions trace their roots to the English Bill of Rights of 1689, which declared that “election of members of the parliament ought to be free.” *Harper*, 2022 WL 496215, at *32 (quoting 1 W. & M. Sess. 2 c. 2 (Eng.)); see John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 11759, 1797-98 (1992) (showing the similarity between the three states’ free elections clauses). Notably, the English provision was a response to the same kind of unfairness involved in extreme partisan gerrymandering: “efforts to manipulate parliamentary elections by diluting the vote in different areas to attain electoral advantage.” *Harper*, 2022 WL 496215, at *32. As the North Carolina and Pennsylvania Supreme Courts have already recognized, that same concern justifies concluding that extreme partisan gerrymandering violates the guarantee of free elections.

In addition to embracing the kinds of concerns that animated article 7’s creation, limiting partisan gerrymandering comfortably fits the text, as the North Carolina and Pennsylvania Supreme Courts have recognized. Rather than specifying by jot and tittle every kind of election manipulation that might violate the Constitution, the framers’ choice of the word “free” reflects a choice “to espouse broad principles rather than narrow rules” that would “address every possible contingency.” See *Harper*, 2022 WL 496215, at *32. Read in conjunction with the right to equal protection, North Carolinians’ right to “free” elections means that “each voter must have

² Pennsylvania’s constitution provides that “[e]lections shall be free and equal.” Pa. Const. art. I, § 5. Under the North Carolina Constitution, “[a]ll elections shall be free.” N.C. Const. art. I, § 10.

substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis.” *Id.* at *33. Likewise, in *League of Women Voters*, the Pennsylvania Supreme Court concluded that the “plain and expansive sweep” of the phrase “free and equal” required electoral process to “guarantee, to the greatest degree possible, a voter’s right to equal participation in the electoral process.” 178 A.3d at 804. This guarantee to each voter of “an equally effective power to select the representative of his or her choice” was irreconcilable with partisan gerrymandering. *Id.* at 814.

For essentially the same reasons, extreme partisan gerrymanders violate the people’s right to equal protection under article 24 of the Declaration of Rights. *See Att’y Gen. of Md. v. Waldron*, 289 Md. 683, 715 (1981) (recognizing that government action may constitute “an unconstitutional breach of the equal protection doctrine under the authority of Article 24” even if it does not violate the federal equal-protection guarantee). Extreme partisan gerrymandering denies equal protection of the laws because it denies voters from the disfavored party “the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner votes of the favored party a governing majority.” *Harper*, 2022 WL 496215, at *35. Indeed, the entire goal of partisan gerrymandering is to empower voters of the favored party to elect more representatives than their numbers would justify under a plan not infected with partisan bias. Just as the equal protection principle of one-person, one-vote prevents states from drawing lines to favor certain areas of the state over others, equal protection demands that voting strength not be diminished based on partisan affiliation. *Id.* at *34. The Pennsylvania Supreme Court has similarly recognized that equality in the voting context requires “guarantee[ing], to the greatest degree possible, a voter’s right to equal participation in the

electoral process” and thus prohibiting partisan gerrymandering. *League of Women Voters*, 178 A.3d at 804.

Finally, drawing district lines to give one party’s voters more electoral power than the other’s violates article 40’s guarantee of the right to freedom of speech and association. *See Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 622-23 (2002) (explaining that article 40’s free-speech guarantee exceeds the First Amendment’s in some cases). The freedom of speech includes “not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right.” *Adams v. Univ. of N.C.-Wilmington*, 640 F.3d 550, 560 (4th Cir. 2011). Applying this principle, the North Carolina Supreme Court held that extreme partisan gerrymandering “penalize[s] people for the exercise of” freedoms of speech and association by “drawing district lines in a way that dilutes the influence of certain voters based on their prior political expression.” *Harper*, 2022 WL 496215, at *36. Extreme partisan gerrymandering thus represents a form of viewpoint discrimination that “triggers strict scrutiny” because it “subjects certain voters to discrimination based on their views” and “distorts the expression of the people’s will.” *Id.*

Robust judicial enforcement of these rights in the gerrymandering context is particularly important because Maryland voters have no ability to amend the Constitution without the legislature’s consent. In other states, voters have taken matters into their own hands through the constitutional initiative process by either forbidding partisan gerrymandering, *see* Fla. Const. art. III, §§ 20-21; N.Y. Const. art. III, § 4(c)(5); Ohio Const. art. XIX, § 1(C)(3)(a), or removing the power to draw districts from the legislature altogether, *see* Ariz. Const. art. 4, pt. 2, § 1; Mich. Const. art. IV, § 6. But in Maryland, absent a constitutional convention, only the General Assembly—the same entity that draws districts—has the power to propose constitutional

amendments. *See* Md. Const. art. XIV, § 1. It is thus “no answer to say that the responsibility for addressing partisan gerrymandering is in the hands of the people,” particularly when the aim of partisan gerrymandering is to insulate elected officials from the voters’ will. *Harper*, 2022 WL 496215, at *2 (reasoning that absence of a citizens-initiative process supported recognizing a partisan gerrymandering claim despite the absence of an express ban on the practice). In Maryland, as in North Carolina, “the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the [Maryland] Constitution.” *See id.* Far from engaging in politics, protecting the people of Maryland from extreme partisan gerrymandering is nothing more than the judiciary acting within its long-established role as “the barrier or safe-guard to resist the oppression, and redress the injuries” that occur when the legislature violates the constitution. *Duckworth v. Deane*, 393 Md. 524, 545 (2006) (quoting *Whittington v. Polk*, 1 H. & J. 236 (Md. 1802)).

Nor is there any tension, as the defendants have argued, between the Maryland Constitution’s prescription of certain standards for legislative districts in article III, section 4, and recognizing that the Constitution proscribes extreme partisan gerrymanders. *See* Md. Const. art. III, § 4 (requiring that legislative districts “consist of adjoining territory, be compact in form, and of substantially equal population” and exhibit “due regard” to the “boundaries of political subdivisions”). Nothing in article III, section 4 suggests that its limitations are exclusive. Were that so, the General Assembly would be free to engage in invidious racial discrimination when drawing districts or in other pernicious and unconstitutional behavior. That plainly cannot be the law. Indeed, article III, section 5, which provides for judicial review of legislative districting plans, contemplates that the Court of Appeals will broadly examine whether the plan is “consistent with requirements of the . . . Constitution of Maryland,” not just article III, section 4.

See Md. Const. art. III, § 5. Both North Carolina and Pennsylvania have similar constitutional limitations on the form of legislative districts; yet, both states’ high courts recognized constitutional limitations on partisan gerrymandering. *See* N.C. Const. art. II, §§ 3, 5 (requiring legislative districts to provide equal population, be contiguous, and not split counties); Pa. Const. art. II, § 16 (requiring legislative districts to be composed of compact and contiguous territory as nearly equal in population as practicable”).

In sum, Maryland voters’ right to be free from the harms of extreme partisan gerrymandering draws firm support from articles 7, 24, and 40 of the Declaration of Rights. Recent decisions from North Carolina and Pennsylvania interpreting those states’ analogous constitutional provisions—born of the same history and democratic principles—confirm that this is so. Extreme partisan gerrymandering is not only harmful and inconsistent with our democratic ideas, but it is also violates the Maryland Constitution.

III. Reliable, objective standards exist to police partisan gerrymandering.

Not only have other state courts agreed that partisan gerrymandering is limited by their respective constitutions, but they have also recognized that “there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander.” *Harper*, 2022 WL 2022, at *38. Of particular use have been various statistical measures of partisan fairness, including “efficiency gap,” “mean-median difference,” “partisan bias,” and declination, particularly when these measures of partisan fairness show significantly more partisan bias than a state’s maps exhibit historically. *Id.* at *38; *Adams v. DeWine*, --- N.E.2d ---, Nos. 2021-1449 & 2021-1449, 2022 WL 129092, at *14 (Ohio Jan. 14, 2022). Extreme partisan gerrymandering also may become apparent when comparing the enacted map to a sample of computer-generated maps created without partisan considerations. *See Harper*, 2022 WL 496215, at *44 (finding North Carolina’s congressional map to be a partisan gerrymander because it was “more carefully

crafted to favor Republicans than at least 99.999%” of a non-partisan sample of computer-generated maps). Other times, more old-fashioned indicators such as witness testimony, obvious dramatic and unnecessary changes to district boundaries, and comparing a district to neutral redistricting criteria may show unconstitutional partisan gerrymandering. *Benisek*, 348 F. Supp. 3d at 499-507; *League of Women Voters*, 178 A.3d at 816. Thus, courts have the tools necessary to ascertain when legislative majorities abuse their power through partisan gerrymandering.

CONCLUSION

As former governors of diverse states, *amici* have experienced how extreme partisan gerrymandering distorts our democracy. It makes our politics more divisive and thwarts the kinds of common-sense compromises that make government work. Like courts in North Carolina and Pennsylvania, this Court should hold that extreme partisan gerrymandering violates the Maryland Constitution.

Dated: March 14, 2022

Respectfully submitted,

/s/ Marina Eisner

Marina Eisner

AIS No. 1112130271

Christine Sun (*pro hac vice* forthcoming)

Cal. Bar No. 218701

STATES UNITED DEMOCRACY CENTER

1107 17th Street, NW

Washington, DC 20036

(240) 600-1316

marina@statesuniteddemocracy.org

christine@statesuniteddemocracy.org

Jonathan L. Williams (*pro hac vice* forthcoming)

Fla. Bar No. 117574

JONATHAN L. WILLIAMS, P.A.

113 South Monroe St., First Floor

Tallahassee, FL 32301

(850) 706-0940

jw@jonathanwilliamslaw.com

Attorneys for the Bipartisan Former Governor

CERTIFICATE OF SERVICE

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

Strider L. Dickson
AIS No. 0212170219
Brenton H.J. Conrad
AIS No. 2012170014
McAllister, DeTar, Showalter & Walker LLC
706 Giddings Avenue, Suite 305
Annapolis, Maryland 21401
Telephone: 410-934-3900
Facsimile: 410-934-3933
sdickson@mdswlaw.com
bconrad@mdswlaw.com

Steven M. Sullivan
Attorney No. 9706260005
Andrea W. Trento
Attorney No. 0806170247
Assistant Attorney General
Office of the Attorney General
200 Saint Paul Place, 20th Floor Baltimore, Maryland 21202
ssullivan@oag.state.md.us
(410) 576-6325
(410) 576-6955 (facsimile)

/s/ Marina Eisner
Marina Eisner