No. 14-1504

In The
Supreme Court of the United States

ROBERT J. WITTMAN, BOB GOODLATTE, RANDY J. FORBES, MORGAN GRIFFITH, SCOTT RIGELL, ROBERT HURT, DAVID BRAT, BARBARA COMSTOCK, ERIC CANTOR & FRANK WOLF,

Appellants,

v.

GLORIA PERSONHUBALLAH & JAMES FARKAS,

Appellees.

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

BRIEF OF ONEVIRGINIA2021 *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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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. The commission would be required to use specific, objective and well-defined redistricting criteria in performing the redistricting function, to invite public participation in the process and to be fully transparent.

OneVirginia2021 is interested in this case because it presents an opportunity to address the destructive impact of invidious partisan gerrymandering on the fundamental process of determining congressional and legislative representation through redistricting. Moreover, the record in this case allows the Court to clarify that admitting to discrimination against voters based on their political viewpoint can never be accepted as an

[1] 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.

adequate defense in equity to an otherwise well-grounded claim of racial discrimination in the redistricting process.

This *amicus* brief is filed in support of the appellees 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).

SUMMARY OF ARGUMENT

This case has importance beyond the issue of race in redistricting. The Court's decision likely will determine whether redistricting will ever again serve its purpose of promoting fair and effective representation through the creation of appropriate and rationally based Congressional and legislative districts, or whether the current, widespread practice of unchecked partisan gerrymandering and electoral manipulation to entrench political power will become a judicially sanctioned rule. The question before the Court is simple. Should partisan gerrymandering, i.e., manipulating districts using political data to rig the outcome of Congressional and state legislative elections, be considered a rational, legitimate and neutral redistricting objective, the assertion of which may be offered as a basis for noncompliance with other constitutional, statutory or longstanding traditional redistricting requirements?

The issue comes to this Court with an uncomplicated record. The district court below found that the Virginia General Assembly engaged in unconstitutional racial gerrymandering in drawing the 3rd Congressional district. The district

court's conclusion that race was the predominant factor motivating the Virginia legislature is a factual finding. See *Hunt* v. *Cromartie,* 526 U. S. 541, 549 (1999); *Lawyer* v. *Department of Justice,* 521 U. S. 567, 580 (1997); *Shaw* v. *Hunt,* 517 U. S. 899, 905 (1996). See also *Anderson* v. *Bessemer City,* 470 U. S. 564, 573 (1985) ("[I]ntentional discrimination is a finding of fact . . ."). Accordingly, this Court should not overturn the district court's determination unless it is clearly erroneous. See *Lawyer, supra,* at 580; *Shaw, supra,* at 910. The conclusion that race predominated was evident in the legislature's complete disregard of traditional redistricting criteria, including the requirements of compactness and contiguity mandated by the Constitution of Virginia. See, Va. Const. Art. II, Sec. 6. The district court noted that the 3rd Congressional District is "the least compact and most bizarrely shaped district in the 2012 plan." *Page v. Virginia State Board of Elections*, C.A. No. 3:13cv678 (E.D. Va., October 7, 2014) (Slip op. at 36). The legislature did not examine compactness scores in creating the district, and a visual test shows it is "well-deserving the kind of descriptive adjectives. . . that have traditionally been used to describe acknowledged gerrymanders." Page, *supra,* (slip op. at 24). (See Map of 3rd Congressional District attached as Appendix I). Moreover, the 3rd Congressional District is not contiguous. It hops across and then back over the James River, stretching water contiguity to ridiculous lengths, and includes precincts in Newport News and Hampton that are completely separated from one another by the 2nd Congressional District.

Racial gerrymandering also was apparent in the wholesale race-based splitting of political subdivisions and voting precincts in the 3rd District - more than any other district. And as the district court noted, "the 2012 plan was not informed by a racial bloc voting or other, similar type of analysis." *Page, supra* at 10. Instead, the General Assembly adopted a minimum racial threshold of 55% black voting age population (VAP) for any minority district, because race was the legislature's "paramount concern" in adopting the 3rd Congressional District. Delegate Bill Janis, the author of the plan, stated on the record that "the primary focus of how the lines were drawn. . . was to ensure that there be no retrogression in the 3rd Congressional District," and that this was "nonnegotiable."

Against this overwhelming record, Appellants now argue in this Court that it was not race that motivated the legislature's actions. Instead, they aver that partisan manipulation was the driving force behind the shape and content of the district in question. Appellants contend that the map was a "political gerrymander," an exercise in "incumbency protection" intended to preserve the "8 to 3 partisan division" in favor of Republicans in the Virginia Congressional delegation. Incumbency protection, however, has never been deemed to mean guaranteed re-election and lifetime tenure for elected officials. Yet lifetime tenure and uncontested elections are precisely what the Appellants claim the majority party in the Virginia General Assembly intended to legislate through unabashed partisan manipulation. Appellants ask the Court to hold that partisan manipulation is a "neutral"

redistricting principle, and that rigging election results to ensure the re-election of their partisans is a "legitimate political objective."

This cannot be. Partisan gerrymandering is an abuse of legislative power and incompatible with democratic principles. There is no rational justification for such an invidious abuse of power, and this Court should decline to recognize partisan gerrymandering as an acceptable explanation for engaging in constitutionally prohibited racial discrimination or disregarding traditional redistricting principles. The district court held that the 3rd Congressional District was an unconstitutional racial gerrymander. That decision should not be disturbed on the basis of the Appellants' claim now that the 3rd District was actually the product of an intentional partisan gerrymander.

ARGUMENT

PARTISAN GERRYMANDERING, i.e., THE INTENTIONAL MANIPULATION OF DISTRICT LINES USING POLITICAL DATA TO FIX THE OUTCOME OF CONGRESSIONAL AND STATE LEGISLATIVE ELECTIONS, IS NOT A RATIONAL, LEGITIMATE OR NEUTRAL REDISTRICTING OBJECTIVE, AND MUST NOT BE ALLOWED TO EXPLAIN OR EXCUSE A VIOLATION OF OTHER IMPORTANT CONSTITUTIONALY MANDATED OR TRADITIONAL GOOD GOVERNMENT REDISTRICTING REQUIREMENTS.

"'[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.'" *Arizona State Legislature v. Arizona Independent Redistricting Commission, 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.

- 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. Compromise is impeded 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? Or when it is difficult to find the correct polling place because of split precincts and localities?

The effectiveness of the majority party's electoral manipulation through partisan gerrymandering, 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. Information taken from the Virginia Department of Elections website[2] reveals that of the 100 races in the House of Delegates, 62 delegates ran unopposed. Voters in

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[2] Voter turnout statistics are available here: http://elections.virginia.gov/resultsreports/registration-statistics/registrationturnout-statistics/ . District by district contests and results are here: http://results.elections.virginia.gov/vaelections/2015%20November%20General/Site/GeneralAssembly.html

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, 128 incumbents sought re-election in the House and Senate on the November ballot. Every one of those 128 incumbents won re-election, most with double figure margins of victory. And Virginia suffered one of the lowest voter turnouts on record, with only 29.1% of registered voters going to the polls. Voter apathy and disinterest have reached record levels.

Against this backdrop of electoral harm, it is especially disturbing that Appellants throughout their brief repeatedly refer to partisan gerrymandering as "incumbency protection," and describe it as a "neutral" and "legitimate" redistricting practice. This is misrepresentation on two grounds. First, incumbency protection has never been construed to mean that districts may be drawn by manipulating electoral outcomes 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 cores of prior districts, and avoiding contests between incumbents."). *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."). Contrary to Appellants' argument, incumbency protection was never intended to guarantee re-election or provide tenure for an elected representative.

Second, the Appellants' arguments push the envelope and take partisan manipulation to its extreme. If the legislature, as Appellants argue here, acts in an excessively partisan manner to fix election outcomes by manipulating voting populations through district line drawing, it cannot be said to have acted in a permissible or lawful manner. As Justice Kennedy observed in *Vieth v. Jubelirer*, *supra* at 267 (2004) (KENNEDY, J., concurring in the judgment):

> 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 "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 is not a case, like *Davis v. Bandemer*, 478 U.S. 109 (1986) or *Vieth v. Jubelirer*, *supra*, where the Court must cobble together circumstantial evidence of intentional political discrimination and disparate impact in order to

ascertain a justiciable claim. This case is thick with direct proof of intentional political discrimination and disparate electoral impact, all of which is conclusively established in the testimony of the legislators at trial and the arguments of Appellants in the court below and in this Court now. When legislators assert, as is claimed here, that partisanship was the primary motivation is 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.

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). *Amicus* does not ask the Court to settle on a standard and find that such harm is present in this case, but rather to clarify that openly admitting to invidious partisan discrimination cannot provide a safe harbor to a legislature that has disregarded state constitutionally mandated traditional redistricting criteria, like compactness and contiguity, and other traditional good government considerations, in order to implement a "nonnegotiable" 55% racial threshold.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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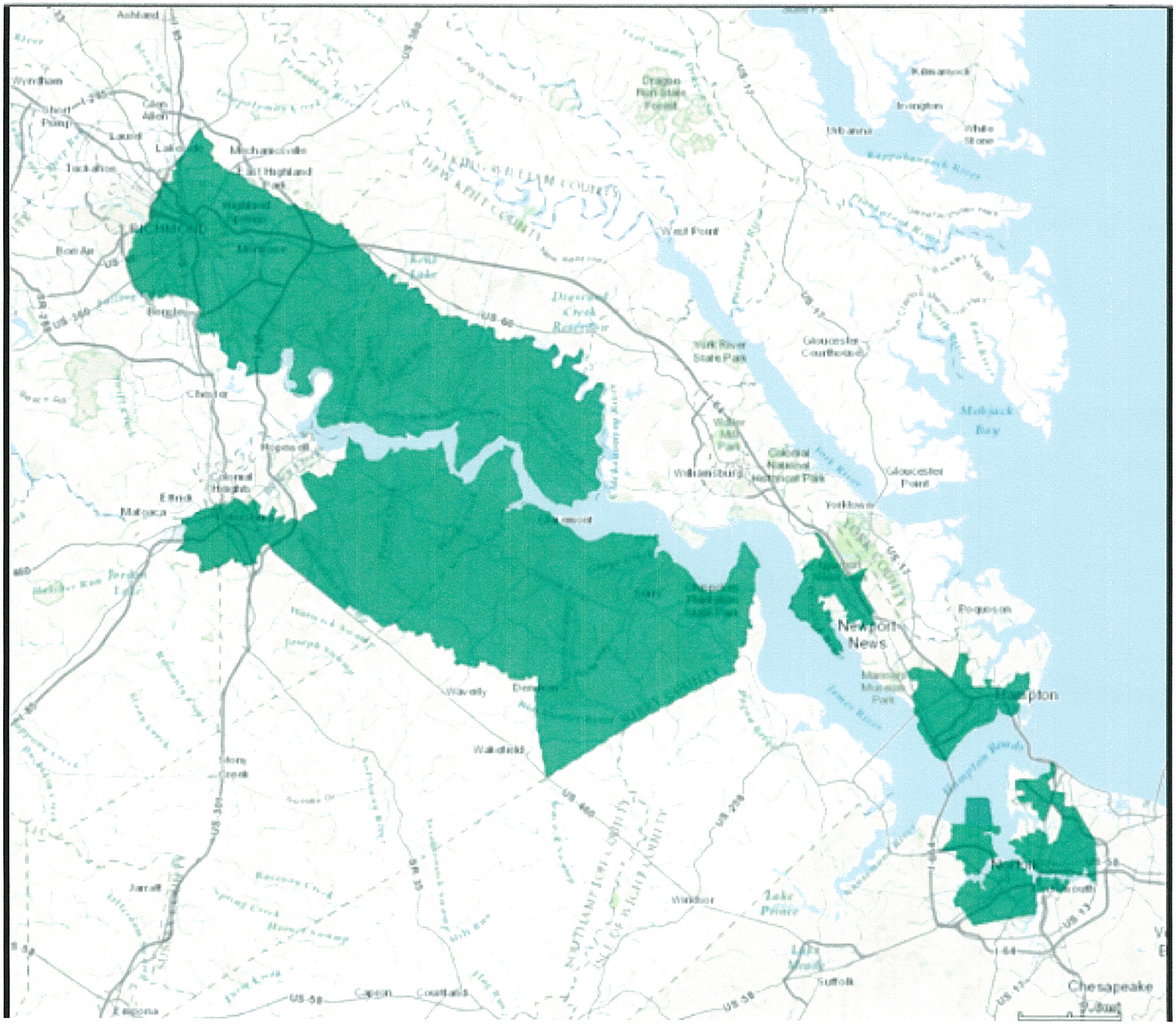

Virginia's 3rd congressional district - since January 3, 2013