**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| **STEPHEN M. SHAPIRO**, *et al.*, | * | |
| *Plaintiffs*, | * | |
| v. | * | Civil Action JKB-13-3233 |
| **DAVID J. McMANUS**, *et al.*, | * | |
| *Defendants*. | * | |

* * * * * * * * * * * * * * * * *

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE PLAINTIFFS' SECOND AMENDED COMPLAINT**

The Supreme Court has not held partisan gerrymandering claims to be justiciable, even in theory, under the First Amendment. Even assuming such claims are theoretically justiciable under the First Amendment, the plaintiffs have failed to articulate a reliable and generally applicable constitutional standard against which all districting plans must be measured. Further, the plaintiffs' second amended complaint (the "complaint") fails to allege that the State's redistricting plan imposed any cognizable burden on the plaintiffs' representational rights, but rather makes the claim that the plaintiffs have suffered a First Amendment injury because their preferred candidates have not been successful in Maryland's 6th District due to partisan redistricting. Courts have roundly rejected these sorts of claims. The plaintiffs cannot evade dismissal by labeling their claim of partisan disadvantage as a "punishment" or "sanction," and their reliance on political patronage

cases is unavailing. For all of these reasons, the plaintiffs' complaint fails to state a claim and should be dismissed.

## I. PLAINTIFFS HAVE NOT PROVIDED THE COURT WITH AN ADEQUATE STANDARD TO MAKE THEIR PARTISAN GERRYMANDERING CLAIM JUSTICIABLE.

In their complaint and response in opposition to the defendants' motion to dismiss the complaint ("Pls.' Opp'n"), the plaintiffs are evasive as to what their proposed constitutional test actually requires. In their complaint, the plaintiffs identify the loss of a Republican seat as the "actual effect" of the Plan, alleging that the Plan burdened Republican voters in the former 6th Congressional District by "preventing" them "from continuing to elect a Republican representative" to the House. (Compl. (ECF No. 44) ¶ 7(b)). In their opposition, however, the plaintiffs stray from this language and refuse to land firmly on a "no loss of seat" standard as the constitutional measure for assessing the effect of a redistricting plan. They suggest instead that, under the effects prong of their inquiry, a court must intervene where the plan results in a "concrete adverse impact" (Pls.' Opp'n (ECF No. 68) at 17), "significant dilution of voting strength" (*id.* at 28), or dilution of voting strength to a "constitutionally significant degree" (*id.* at 18). On the other hand, they appear to assert that, in a single-district challenge, the loss of a formerly held seat is the test. (*See, e.g., id.* at 2 ("vote dilution does not make a constitutionally significant difference *until it actually makes a difference.*") (emphasis in original).) Appearing to concede that their proposed standard is indeterminate as to what dilutive effect is generally

permitted without an actual change in party control, plaintiffs assert the standard is nevertheless acceptable to decide this case. (*Id.* at 2). That is wrong.*See Radogno v. Illinois State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at *3 (N.D. Ill. Nov. 22, 2011) (*Radogno II*), *aff'd*, 133 S. Ct. 103 (2012).[1]

Without more, an effects inquiry that prohibits vote dilution amounting to a "concrete adverse impact" fails to resolve the justiciability problem; it is no more substantive than saying districts must be "fair" or not "excessively" biased against the disadvantaged party. *See Radogno II*, 2011 WL 5868225, at *2 (noting Supreme Court's rejection in *Vieth* of a standard based on a showing of "intent to discriminate, plus denial of a political group's chance to influence the political process"). This standard provides no guidance to legislatures or courts. *Id.* at *3-4. It fails to enable courts to reliably determine the magnitude of partisan bias in a given plan, as any acceptable test must do. *League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 414 (2006). Certainly, it does nothing to overcome the primary obstacles that Justice Kennedy identified as barring the justiciability of any partisan gerrymandering claim: (1) the lack of

[1] The court in *Radagno* stated:

> In their Second Amended Complaint, the Plaintiffs have alleged a broad array of facts that, if true, plausibly suggest that the redistricting plan was enacted in large part to give Democrats a partisan advantage. But the challenge is to explain how these facts fit together to violate an administrable and non-arbitrary standard for governing political gerrymandering claims *generally*. "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Stewart, J., concurring), will not do.

comprehensive and neutral principles for drawing electoral boundaries, and (2) the absence of rules to limit and confine judicial intervention. *Vieth v. Jubilerer*, 541 U.S. 267, 306-07 (2008) (Kennedy, J.). In short, unless given substance, proposing a limit against "constitutionally significant vote dilution" and "concrete adverse impact" does not provide a standard, but only a legal conclusion. *See, e.g., Perez v. Perry*, 26 F. Supp.3d 612, 623-24 (W.D. Tex. 2014) (alleging a partisan gerrymander is illegal "because it is so extreme is not a 'clear, manageable, and politically neutral standard' for measuring the burden on representation rights. It is merely a conclusion.").

To the extent the plaintiffs have proposed an actual standard, it is the standard set forth in their complaint prohibiting intentional dilution of a party's voting strength to a degree that actually results in the loss of a formerly held seat. Before addressing the inadequacy of this test as a generally applicable constitutional standard, it bears noting that the plaintiffs in *Fletcher v. Lamone* offered to prove the same, but their partisan gerrymandering claim was held to be non-justiciable. 831 F. Supp. 2d 887, 903 (D. Md. 2011) ("Although this claim is perhaps the easiest to accept factually . . . it is also the plaintiffs' weakest claim legally . . ."), *aff'd*, 133 S. Ct. 29 (2012).

As a general standard, the "no loss of seat" measure is also fundamentally flawed. First, it is arbitrary in the sense that the previous district becomes the norm or baseline against which the fairness of the new district is to be measured. Nothing in the constitution demands this is a starting point, and there is no guarantee that a previous district will be an

appropriate one. *See, e.g., LULAC*, 548 U.S. at 447 (questioning use of prior district as a model to test fairness of new district). Further, without such justification, the districting choices made by a previous legislature should not constrain the discretion of a later one. Second, the test is constitutionally arbitrary in that no individual has a constitutional right to vote in a district that is safe or competitive for that individual's preferred candidates, even where the district has been so in the past. *See, e.g., Davis v Bandemer*, 478 U.S. 109, 131 (1986) ("[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm."). Changes tending to entrench one party in control of a once-competitive district would receive less scrutiny than would changes of the same magnitude in a district held by the minority party. And voters in districts controlled by the opposition party under successive redistricting plans would have no remedy, regardless whether their preferred party had suffered an intentional impairment of its voting strength under the second plan.

A similar comparative standard was proposed by Justice Stevens in his dissenting opinion in *LULAC*, 548 U.S. at 476. Under the "effects" prong of the test, Justice Stevens would have required a plaintiff to demonstrate: "(1) her candidate of choice won election under the old plan; (2) her residence is now in a district that is a safe seat for the opposite party; and (3) her new district is less compact than the old district." *Id.* This proposed standard was dismissed by Justice Kennedy out of hand for failing to "solve the problem

of determining a reliable measure of impermissible partisan effect." *Id.* at 447. As Justice Kennedy implicitly recognized, using the old district as the benchmark for assessing constitutional violations is arbitrary and not rooted in any constitutional principle of fairness. *Id.* ("There is no reason, however, why the old district has any special claim to fairness.").

Another deficiency with the plaintiffs' standard is that the potential for liability turns on the outcome of individual contests, rather than the degree of partisan bias in the map itself. *See, e.g., LULAC*, 548 U.S. at 465 ("[W]hether a districting map is biased against a political party depends upon . . . the opportunity that the map offers each party, regardless of how candidates perform in a given year."). A test that permits "excessive" partisanship unless it contributes to the loss of an election is fatally unreliable. "Relying on a single election to prove unconstitutional discrimination is unsatisfactory." *Davis v. Bandemer*, 478 U.S. 109, 135 (1986). A results-based test also gives scant guidance to legislatures, except to discourage the creation of competitive districts, where the vagaries of a particular campaign could shift party control of the seat, potentially making the district, or possibly the entire plan, vulnerable to challenge.[2] *See Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 835 F. Supp. 2d 563, 579 (N.D. Ill. 2011) (rejecting as deficient a proposed standard because "[i]t could result in the finding of an equal protection

[2] As stated by the defendants in their motion to dismiss, the current Democratic representative of the new 6th District won re-election in 2014 by a less than 2 percent margin.

violation where Republicans still remain competitive" in the challenged district). And if the election that triggers heightened scrutiny is a close contest, courts would be forced to decide whether the loss of the seat should be attributed to the unfairness of the districting map or to "neutral" factors unrelated to the alleged gerrymander. For all of these reasons, the constitutional standard proposed in the complaint is not the reliable and constitutionally discernible standard necessary to adjudicate partisan gerrymandering claims.

## II. PLAINTIFFS' FIRST AMENDMENT THEORY HAS BEEN REJECTED BY THE COURTS.

Plaintiffs concede that they have not alleged the kinds of restrictions that courts have found necessary to state a First Amendment claim for partisan gerrymandering. (Pls.' Opp'n (ECF No. 68) at 25.) Instead, they rely exclusively on the exact type of injury—an alleged inability to elect a candidate of their choice—that federal courts have consistently held insufficient to state a First Amendment claim. *See, e.g., Committee for a Fair and Balanced Map*, 835 F. Supp. 2d at 574 ("First Amendment rights are not implicated merely because the Adopted Map makes it more difficult for Republican voters to elect Republican candidates"); *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, at *2 (N.D. Ill. Oct. 28, 2011), *aff'd sub nom. League of Women Voters of Illinois v. Quinn*, 132 S. Ct. 2430 (2012) (rejecting First Amendment claim premised on theory that First Amendment forecloses viewpoint based redistricting to influence partisan activity because "the challenged law must actually restrict some form of protected expression"); *Radogno v. Illinois State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5025251, at *7 (N.D. Ill.

Oct. 21, 2011) (*Radogno I*) (rejecting First Amendment claim premised on theory that "Republican voters in some districts are less likely to be successful in electing their preferred candidate" because there is no "connection between the alleged burden imposed on Plaintiffs' ability to elect their preferred candidate and a restriction on their freedom of political expression"); *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *19 (N.D. Ga. May 16, 2006) (allegations that gerrymandering has had "deleterious effects . . . on the ability of a political party and its voters to elect a member of the party to a seat in the state legislature implicates no recognized First Amendment right"); *O'Lear v. Miller*, 222 F. Supp. 2d 850, 860 (E.D. Mich. 2002) (partisan gerrymandering by itself does not support a First Amendment claim), *aff'd*, 123 S. Ct. 512 (Nov. 4, 2002); *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992) (holding that where no device directly inhibits participation in the political process, the First Amendment "offers no protection of voting rights beyond that afforded by the fourteenth and fifteenth amendments" (quoting *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981))); *Badham v. Mar. Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988), *aff'd sub nom. Badham v. Eu*, 488 U.S. 1024 (1989) ("While plaintiffs may be discouraged by their lack of electoral success, they cannot claim that [the redistricting legislation] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected expression.").

Thus, rather than presenting a novel First Amendment claim, the plaintiffs allege the same type of claim that has been consistently rejected by three-judge courts and

summarily affirmed by the Supreme Court. These cases make clear that plaintiffs challenging redistricting legislation must do more than claim that the alleged vote dilution has reduced their likelihood of electing their preferred representative to the House. Rather, "the challenged law must actually restrict some form of protected expression." *League of Women Voters*, 2011 WL 5143044, at *2. This Court can infer that, by summarily affirming the decisions in *League of Women Voters*, *O'Lear*, and *Badham*, the Supreme Court "necessarily believed to be correct" the district courts' bases for rejecting these claims. *Wright v. North Carolina*, 787 F.3d 256, 267 (4th Cir. 2015); *see also Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 182 (1979) (summary affirmance makes the "precise issues presented and necessarily decided by those actions" binding on lower federal courts, and prevents such courts from reaching "opposite conclusions" on the identical issues) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)).

In their response to the defendants' motion, the plaintiffs assert that their First Amendment claim is not premised on their lack of electoral success in the 6th District, though they have not alleged any other type of representational harm. Thus, they contend, cases that have rejected a First Amendment theory premised on electoral success have no relevance to their argument. Despite the plaintiffs' assertions, however, these cases do address the precise "injury" alleged in the second amended complaint: after the Plan was enacted "Republicans kept *in* the 6th District and those moved *out* of the 6th District were no longer able to elect their preferred representative to the House[.]" (Compl. (ECF No.

44) ¶ 8 (emphasis in original); *see also id.* ¶ 7(b) (alleging that the Plan "prevent[ed] Republicans in the former 6th District from continuing to elect a Republican representative to the United States House of Representatives, as they had in the prior ten congressional elections"); *id.* ¶ 9 (alleging the Plan "prevent[ed] [Republicans] from electing a Republican representative from the 6th District").) Prior to the Plan, the complaint alleges, these Republican voters "were reliably able to elect a Republican representative." (*Id.* ¶ 8.) If not their inability to elect their preferred representative to the House in the past two election cycles, the plaintiffs have failed to allege clearly the precise nature of their First Amendment claim.

Nor have the plaintiffs identified a single gerrymandering case in which a court has recognized their asserted First Amendment right to be free of politically-motivated districting decisions that place them in districts where they are less likely, or even unlikely, to elect their preferred candidate. Indeed, such a theory has no limiting principle and would open the floodgates to First Amendment challenges. Under the plaintiffs' theory, a map could be found to violate voters' First Amendment rights whenever voters are placed so that they are no longer able to elect their preferred representative to the House, even in the absence of any net loss of seats. For example, if the 6th District Republican candidate had won by less than 2% of the vote in the 2014 congressional election, rather than having lost by less than 2% of the vote, Republican voters moved out of the 6th District and into a safe Democratic district would have the same First Amendment claim alleged here: they were

allegedly moved based on their party affiliation and voting history and, as a result, are "no longer able to elect their preferred representative to the House."

Although the plaintiffs repeatedly invoke, and read out of context, Justice Kennedy's concurring opinion in *Vieth*, in which he suggests that the First Amendment "may offer a . . . more prudential basis for intervention" (and in which he himself does not even purport to offer a justiciable standard), the plaintiffs' proposed standard is far from the sort of "limited and precise rationale" that Justice Kennedy was contemplating.[3] *Id.*, 541 U.S. at 307, 315. Contrary to the plaintiffs' asserted theory, to prevail on a First Amendment claim, the plaintiffs must "show a burden, as measured by a reliable standard, on the complainants' representational rights." *LULAC*, 548 U.S. at 418-19 (plurality op.) (rejecting a First Amendment theory based on allegations that "partisan gain" was the sole motivation in redistricting that resulted in the majority party capturing a larger share of the seats). As discussed in Part I, the plaintiffs have failed to identify such a standard.

---

[3] The plaintiffs contend that Justice Kennedy's discussion of a potential but undefined First Amendment challenge in *Vieth* represents a "controlling rationale" that governs this case. (Pls.' Opp'n (ECF No. 68) at 24.) But as the Supreme Court explained, in holding only that the plaintiffs' First Amendment claim was not so wholly insubstantial as to be subject to dismissal on jurisdictional grounds, Justice Kennedy's concurrence on this point represents no more than "a legal theory put forward by a Justice of this Court and uncontradicted by the majority in any of our cases." *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015).

The plaintiffs' efforts to distinguish the unbroken line of cases dismissing First Amendment gerrymandering claims also fail. In each of these cases, plaintiffs challenged a district map because it allegedly burdened their First Amendment rights based on their political affiliation. *See, e.g., Radogno I*, 2011 WL 5025251, at *7 (alleging that the redistricting plan at issue "systematically and intentionally unfairly burdens the rights to political expression and expressive association of voters who vote Republican because of their political views"); *Radogno II*, 2011 WL 5868225, at *5 ("The act of drawing district lines to favor the majority party (*i.e.*, "political gerrymandering") *is* the act of discriminating against voters based on their political beliefs.") (emphasis in original). In every case, part or all of the alleged burden was the inability to elect their preferred candidate. In every case, the courts ruled that this conduct and this burden, without more, did not state a First Amendment claim.

Thus, as the defendants argued in their motion to dismiss, merely calling the same process "retaliation" or a "punishment" or "sanction" rather than "gerrymandering" does not change the analysis or present a novel and untested theory of liability. The reasoning in these cases speaks directly to the contentions that plaintiffs have made in their complaint that the new 6th District "punishes" them on the basis of their political affiliation because it no longer affords them the opportunity for electoral success they enjoyed in the former district. As every court to consider such claims has concluded, the burden of campaigning or voting within a district more advantageous to the opposition party, even when

intentionally imposed, is not an alleged harm or penalty against which the First Amendment protects. In arguing that these cases address only "direct" burdens on political activity, plaintiffs have things exactly backwards. It is precisely because plaintiffs in those cases did not plausibly allege any actual restriction on their First Amendment activities—as is true of the complaint here—that the courts concluded no First Amendment cause of action had been stated. "Where there is no impairment of the plaintiff's rights, there is no need for the protection provided by a cause of action of retaliation." *ACLU of Maryland v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (stating that "a showing of adversity is essential to any retaliation claim").

Finally, the plaintiffs' reliance on political patronage cases also is unavailing. *See, e.g.*, *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400, 406 (W.D. Va. 1991) ("nothing in the *Elrod* line of cases indicates that the Supreme Court intended that the election of state legislators should be protected from the effects of a partisan gerrymander"). In the context of patronage dismissals, a court is not trying to distinguish between acceptable and unacceptable levels of partisanship in government employment, but rather between policymaking positions, where political affiliation can be an acceptable criterion, and non-policy positions, where it is not. *Cf. Elrod v. Burns*, 427 U.S. 347, 359, 467 (1976) (plurality op.) (holding political patronage dismissals inhibit protected First Amendment expression and association, and creating a limited exception for policymaking positions); *id.* at 375 (Stewart, J., concurring in judgment) ("The single substantive

question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs."); *see also Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75 (1990) (holding promotions, transfers, and recalls based on political affiliation or support are impermissible infringements on public employees' First Amendment rights). The reasoning in these cases cannot be translated to the very different context of creating legislative districts, where politics always and inevitably plays some role.[4] *See, e.g.*, Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 Cornell J.L. & Pub. Pol'y 397, 407-09 (2005); Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 Wm. & Mary L. Rev. 1, 45-46 (2008).

## III. PLAINTIFFS HAVE NOT PLAUSIBLY ALLEGED THAT THE DISTRICTING PLAN HAS CHILLED THEIR FIRST AMENDMENT RIGHTS.

[4] Of the three briefs of *amicus curiae* filed in support of the plaintiffs' opposition to the motion to dismiss, only Common Cause appears to have embraced the particular standard urged in the second amended complaint. (Brief of Common Cause, ECF No. 78). The arguments advanced by Common Cause illustrate the fundamental difficulty of deriving a standard of fairness based on First Amendment principles in the inherently political context of districting. *See, e.g., id.* at 23-24 (arguing that, subject to limited exceptions, all consideration and use by legislative draftsmen of voting data constitutes a *prima facie* violation of the First Amendment). A standard as unforgiving of political considerations as that proposed by Common Cause "would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, and must be declined for that reason.

The plaintiffs acknowledge that State officials by enacting the Plan took no action that directly affected the plaintiffs' representational rights. (Pls.' Opp'n (ECF No. 68) at 25.) The plaintiffs have not alleged that the Plan has had a direct impact on their ability to vote, debate, support the candidate of their choice, associate with other voters of their party, or in any other way directly inhibited expression of their First Amendment rights. Moreover, as the defendants pointed out in their motion to dismiss, the plaintiffs have not alleged that the Plan has caused any of them to change their voting preferences or party affiliation or to stop voting. While the actions of the parties is not dispositive, "the plaintiff's actual response to the [alleged] retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

Further, contrary to the plaintiffs' assertion, they have not adequately alleged that the Plan has chilled other voters' First Amendment expression statewide or in the 6th District. Rather, the complaint alleges generally the potential chilling effects of redistricting legislation (ECF No. 44 ¶¶ 113, 115-16), and alleges generally that "[s]ome Maryland voters" have been chilled from registering as Republicans or participating in general elections (*id.* ¶¶ 117-18). These sorts of vague "'naked assertion[s]' devoid of 'further factual enhancement'" are insufficient to withstand a Rule 12(b)(6) motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

At the very least, the plaintiffs' allegations are insufficient to allege that voters of ordinary firmness would be chilled in their political activity or expression. Again, such a concept has no limiting principle: any voter who resides in a safe district of the opposing party would be "chilled" from engaging in political expression. As the Supreme Court has explained, however, voters who are unable to elect their preferred candidate are "usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. . . . This is true even in safe districts where the losing group loses election after election." *Bandemer*, 478 U.S. at 131-32 (plurality op.); *see Badham*, 694 F. Supp. at 675 (quoting same to reject First Amendment claim). For these reasons, as the three-judge court in *Badham* held, the concept of a "chilling effect" created by an overly broad statute regulating speech is inapposite to a statute, such as a districting plan, that does not regulate speech at all. *Id.*, 694 F. Supp. at 675. While Republican voters of the former 6th District "may be discouraged by their lack of electoral success, they cannot claim that [the Plan] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected activities." *Id.*

## IV. PLAINTIFFS' ARTICLE I, § 2 CLAIM IS INSUFFICIENT.

Article I, § 2 of the Constitution requires population equality among the congressional districts of each state such that every person's vote has equal weight. *Wesberry v. Sanders*, 376 U.S. 1 (1964). On its own, that provision demands nothing else.

*Pope v. Blue*, 809 F. Supp. 392, 397-98 (W.D.N.C. 1992) ("[T]he Court has made it clear that Article I, § 2 only proscribes districts of unequal population. Claims regarding the political makeup of those districts must be judged by the more rigorous standards of the Fourteenth Amendment, as outlined in *Davis v. Bandemer*.") (quoting *Badham v. March Fong Eu*, 694 F. Supp. 664, 674-75 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989)). Here, because the plaintiffs have not alleged any deviation from precise mathematical equality in the composition of Maryland's congressional districts, and have not plead the Fourteenth Amendment, they do not state a cause of action under Article I, § 2. Alternatively, and for all the reasons discussed above, their Article I claim must be dismissed as non-justiciable because they have not set forth an adequate standard against which partisan gerrymandering claims are to be judged.

## CONCLUSION

The defendants' motion to dismiss should be granted and the second amended complaint dismissed with prejudice.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

_/s/ Jennifer L. Katz_____
JENNIFER L. KATZ, Bar No. 28973
JEFFREY L. DARSIE, Bar No. 19485
Assistant Attorneys General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21201

jkatz@oag.state.md.us
jdarsie@oag.state.md.us
(410) 576-7005
(410) 576-6955 (facsimile)

Attorneys for Defendants

June 21, 2016