IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

*

O. JOHN BENISEK, *et al*.,

*

Plaintiffs,

*

v. Civil Action No: 13-cv-3233-JKB

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BOBBIE S. MACK, Chair, *
Maryland State Board of Elections, *et al*.,

*

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' (1) OPPOSITION TO PLAINTIFFS' REQUEST FOR THREE-JUDGE PANEL; AND (2) MOTION TO DISMISS

Nearly two years ago, this Court upheld the constitutionality of Maryland's 2011 congressional redistricting plan against claims that it was an impermissible racial or partisan gerrymander, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012), and that it improperly failed to adhere to certain "traditional" redistricting principles. *Gorrell v. O'Malley*, 2012 U.S. Dist. LEXIS 6178 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, 2012 U.S. Dist. LEXIS 29917 (D. Md. Mar. 6, 2012). In the present action, plaintiffs seek to enjoin the use of the now-established districts on grounds similar to those already rejected by this Court, alleging that, because of the shapes and demographics of four challenged congressional districts, voters in certain areas of those districts will have no say in the election of their Representative and cannot be adequately represented by the winning candidate.

SUMMARY

Plaintiffs have brought this case allegedly on behalf of certain Republican-leaning geographic "segments" (or, alternatively, on behalf of only the Republican voters within them) of the Fourth, Sixth, Seventh, and Eighth congressional districts. Plaintiffs contend that these "segments" have been impermissibly joined through "narrow ribbons and orifices," Am. Compl. ¶ 2, to a larger Democratic-leaning segment in each of the challenged districts, resulting in the abridgment of voters' "representational rights" in the smaller segments. The claims are not organized into separate counts, but plaintiffs generally allege that the combination of the shapes and demographics of the challenged districts violates Article I, § 2 of the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment, and the right of political association guaranteed by the First Amendment. *Id*. Plaintiffs do not contest the population equality of the various districts. *Id*. ¶ 14. Neither do they allege racial discrimination or violations of the Voting Rights Act.

The Amended Complaint presents only insubstantial claims and should be dismissed without convening a three-judge court. First, the constitutionality of Maryland's congressional districts has already been litigated in three lawsuits raising similar objections to those pressed here, and therefore plaintiffs' claims may be barred by *res judicata*. Second, because plaintiffs do not contest the equality of population among the various districts, they have no cause of action under Article I, § 2 of the Constitution. Third, plaintiffs' political gerrymandering claims under the Equal Protection Clause are

non-justiciable, and plaintiffs do not offer a standard that overcomes that obstacle. Fourth, even assuming political gerrymandering claims were justiciable, plaintiffs have not alleged sufficient facts, including intentional discrimination or proof of injury, to establish a plausible entitlement to relief. Fifth, plaintiffs have alleged no facts to show that the current districts burden their rights to associate politically and thus have not established a First Amendment violation.

For all of these reasons, plaintiffs' request for a three-judge court pursuant to 28 U.S.C. § 2284 should be denied and defendants' motion to dismiss should be granted.

APPLICABLE LEGAL STANDARDS

Plaintiffs' amended complaint "challeng[es] the constitutionality of the apportionment of congressional districts" and is therefore subject to the provisions of 28 U.S.C. § 2284. Under that provision "a single district judge" "may dismiss a complaint otherwise subject to § 2284(a) if the judge determines that the constitutional claims are insubstantial in that they are obviously without merit or clearly determined by previous case law." *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 546 (D. Md. 2002), *aff'd sub nom. Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003); *see also Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 607 (4th Cir. 1970) (affirming dismissal by a single federal district judge of reapportionment challenge). Only if the single district judge finds that the constitutional claims are "substantial" is that judge authorized to refer the matter to a three-judge panel.

In *Duckworth*, the Fourth Circuit held that where a plaintiff's "pleadings do not state a claim" upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6), "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." 332 F.3d at 772-73 (citing *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980)); *Gorrell v. O'Malley*, 2012 U.S. Dist. LEXIS 6178, at *5-6 (complaint dismissed by single judge); *see also Fletcher*, 831 F. Supp. 2d at 892 (three-judge court concluding that there is "no material distinction" between the "insubstantiality" standard and the Rule 12(b)(6) standard).

Accordingly, a single district court judge properly tests the substantive merit of the plaintiff's claims by applying the standard of review for a motion to dismiss under Rule 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This "plausibility" standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. That is, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "are not entitled to the assumption of truth." *Id.* at 678-79.

FACTS

The State Plan for Congressional Redistricting

Maryland's State Plan for Congressional Redistricting ("State Plan") was adopted in a special session of the General Assembly held October 17 through October 20, 2011. *Fletcher*, 831 F. Supp. 2d at 891. It was passed as an emergency bill and thus went into effect upon the Governor's signature on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. *Id*. The State Plan creates eight congressional districts that are as equal in population as is mathematically possible, with seven of the eight districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. *Id*. at 894. Like the redistricting plan passed after the 2000 census, the State Plan creates two majority African-American congressional districts. *Id*. at 891. The districts are drawn to protect the cores of existing districts, and some of the districts have not changed substantially since the last redistricting, indicating "that incumbent protection and a desire to maintain constituent relationships might be the main reasons they take their present forms." *Id.* at 903.

Prior Litigation Regarding the State Plan

On December 23, 2011, a three-judge panel of this Court (Niemeyer, CJ, Titus, Williams, JJ) upheld the constitutionality of the State Plan against challenges alleging (a) population inequality in violation of Article I, § 2 of the U.S. Constitution, (b) violation of § 2 of the Voting Rights Act, and (c) racial and political gerrymandering in violation of the Fourteenth Amendment to the U.S. Constitution. *Fletcher v. Lamone*,

831 F. Supp. 2d 887. The decision of the three-judge panel was summarily affirmed by the Supreme Court on June 25, 2012. *See* 133 S. Ct. 29. In January 2012, approximately one month after the initial decision in *Fletcher*, Judge Quarles dismissed a separate challenge to the congressional redistricting plan that alleged, among other things, that the State Plan did not preserve agricultural "communities of interest" and thus diluted farm votes. *Gorrell*, 2012 U.S. Dist. LEXIS 6178, at *8. In that opinion, this Court observed that while certain considerations—contiguity, compactness, preserving communities of interest, and respect for political subdivisions—may be legitimate considerations in congressional redistricting, they are not constitutionally required. *Id*. at *9-10. Gorrell's allegation that the plan did not preserve "communities of interest" therefore stated no constitutional violation and was dismissed. *Id*. at *11.

A third set of plaintiffs claimed that Maryland's plan of congressional redistricting failed to comply with the requirements of compactness, contiguity, and "due regard" for natural and political boundaries found in Article III, § 4 of the Maryland Constitution. *Olson v. O'Malley*, 2012 U.S. Dist. LEXIS 29917. This Court rejected that challenge, finding the state constitutional standards inapplicable to congressional redistricting.

Plaintiffs in the Current Lawsuit

Plaintiffs here are three *pro se* litigants allegedly residing in the Sixth, Seventh, and Eighth congressional districts. According to the allegations of the amended complaint, plaintiff O. John Benisek is a registered Republican allegedly living in a Republican-leaning area of the Sixth District that plaintiffs characterize as geographically

and demographically distinct from a larger Democratic-leaning area that forms the rest of the Sixth District, with the two "segments" being connected "though a narrow orifice at the southern end of the Washington-Frederick county line." Am. Compl. ¶ 12(b).

Plaintiff Maria Pycha is a Republican residing in the Seventh District who allegedly resides in a "de-facto non-contiguous"[1] segment of 45,000 voters in northern Baltimore County that is "heavily Republican" and connected "through a narrow ribbon" to a "dominant contiguous section" of 600,000 residents from Baltimore City, Baltimore County, and Howard County that is "overall" majority African-American (59%) and in 2008 voted 80% for President Obama. *Id*. ¶ 12(c).

Plaintiff Steven Shapiro is a registered Democrat residing in the "dominant" segment of the Eighth District, an "overwhelmingly Democratic" segment (allegedly 76% pro-Obama in 2008) containing 470,000 voters in southern Montgomery County that "connects, through a narrow orifice, to 230,000 de-facto non-contiguous residents of northern Frederick Co. and Carroll Co." where President Obama allegedly received 39% of the vote in 2008. *Id*. ¶ 12(d). The amended complaint contains allegations as to the composition of the Fourth congressional district as well, *id*. ¶ 12(a), but no plaintiff is alleged to reside in that district.

The Amended Complaint

[1] All of the districts are, in fact, contiguous. By "de-facto non-contiguous," plaintiffs seem to allege that, in certain places, the geographic connection between different parts of a district is narrower than they would like.

Plaintiffs seek relief for an alleged "abridgment of representational rights" in certain parts of the Fourth, Sixth, Seventh, and Eighth congressional districts (Am. Compl. ¶ 2) and would enjoin the use of current district lines for all eight districts for the 2014-2020 elections. *See id.* ¶ 6. They contend that voters in the "smaller segments" of the challenged districts suffer a representational injury unless the smaller segments have "either geographic or democratic/political commonality" with the "dominant (larger)" segments to which they are attached. *Id.* ¶ 3. This is so, plaintiffs assert, because a Representative chosen in such a district would be unable to "ably, effectively, or empathetically represent voters in both sections." *Id.* ¶ 22.

Plaintiffs argue that an individual district should be presumed invalid "if [it] has neither effective geographic nor demographic contiguity." *Id.* ¶ 19. They propose this either/or rule as a "judicially manageable" standard by which to measure the adequacy of representation afforded by a particular district. *Id.* ¶ 18. By *demographic contiguity*, plaintiffs appear to mean, primarily, that voters in the district share similar voting preferences, though plaintiffs also refer to racial composition, income, and occupation in characterizing the demographics of the different "segments." *See, e.g., id.* ¶¶ 12(a)-(d). Thus, plaintiffs' proposed standard would be satisfied either in an individual district that is geographically compact and contiguous or in one where each contiguous area within the district is demographically similar to the rest of the district. The proposed standard does not look outside a particular district to consider the state redistricting scheme as a whole, nor does it involve an assessment of legislative intent.

ARGUMENT

The U.S. Constitution mandates only that congressional districts be drawn to contain equal populations and without intentional discrimination on the basis of race or, in theory, (excessive) partisanship. There are no other constitutional grounds upon which to contest a redistricting plan.[2] Plaintiffs do not contest the mathematical exactness of Maryland's congressional districts (*see* Am. Compl. ¶ 14) (districts "should not be immunized . . . only because there is no population variance . . .") and therefore have not stated a claim under Article I, § 2. Their claims that the Equal Protection Clause has been violated are non-justiciable. Even if such claims were justiciable, plaintiffs have not pled facts that, if proved, would establish that legislators engaged in intentional discrimination against the allegedly "subordinate" geographical segments that were created by the redistricting process or against the Republican voters within them. Nor have plaintiffs alleged sufficient facts to show that they have suffered any kind of constitutional injury. Arguments similar to those asserted in this case, challenging the State's congressional districts because of their shapes and demographics, were considered and rejected by this Court in *Fletcher* nearly two years ago. The same result is warranted here.

[2] First Amendment claims have been considered in some cases as an alternative approach to protect against political gerrymandering, but the same conduct is at issue under either theory. *See, e.g.*, *Washington v. Finlay*, 664 F.2d 913, 927-28 (4th Cir. 1981) (concluding that, if the First Amendment offers protection against vote dilution, its protection does not extend beyond that more directly protected by the Fourteenth and Fifteenth Amendments). Thus, the First Amendment does not provide an additional ground for relief. This is discussed more fully in §V, below.

I. PLAINTIFFS' CLAIMS ARE BARRED BY *RES JUDICATA*.

As described above, Maryland's State Plan of congressional redistricting was approved against all challenges, *Fletcher v. Lamone*, 831 F. Supp. 2d 887, and summarily affirmed by the United States Supreme Court, 133 S. Ct. 29. Because the instant lawsuit plows no new ground it may properly be dismissed under principles of *res judicata*.

There are three elements of *res judicata* in the Fourth Circuit: "(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits." *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004). As to the first element—finality of judgment—there can be no doubt that *Fletcher v. Lamone* is a final judgment on the merits. As to the second element, the *Benisek* plaintiffs are making the same types of claims against the State Plan that the *Fletcher* plaintiffs did. Although not clear in every respect, the *Benisek* plaintiffs' claims focus on the shapes of the congressional districts and the effects that those shapes have on voters. Am. Compl. ¶ 2 ("narrow ribbons and orifices"). Those same types of claims were litigated extensively in *Fletcher*, and there can be no doubt that that the three-judge court carefully reviewed the shapes of the districts. *See e.g., Fletcher*, 831 F. Supp. 2d at 902 ("the shapes of several of the districts are unusually odd"); *id*. at 903 n.3 (likening the shape of the third congressional district to a "broken-winged pterodactyl"). Similarly, the *Fletcher* court carefully analyzed and rejected a claim that the State Plan constituted an unconstitutional partisan gerrymander. *Id*. at 903-04; *see also Robertson v. Bartels*, 148 F. Supp. 2d 443,

448-49 (D. N.J. 2001) (barring a second lawsuit because both suits concerned challenges to a redistricting plan particularly as it affected districts in Essex County, New Jersey). Thus, the second *res judicata* element—identity of cause of action—is present as well.

The third *res judicata* element—identity of parties—can be satisfied by "a non-party whose interests were adequately represented by a party to the original action." *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005). There can be no doubt that the *Fletcher* plaintiffs were "adequate": they were well-financed,[3] well-represented,[4] and advanced every possible theory against the State Plan. *See Fletcher*, 831 F. Supp. 2d at 892 (listing causes of action). In testing the adequacy of prior representation, however, the Fourth Circuit also looks for (1) similarity of interests; and (2) evidence that a "virtual representative for a non-party [did] so with at least the tacit approval of the court." *Id.* (quoting *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)). On those two considerations too, the *Benisek* plaintiffs are adequately represented by the *Fletcher* plaintiffs. The *Fletcher* plaintiffs had exactly the same interest as the *Benisek* plaintiffs: throwing out the plan of redistricting and drawing a new one. Moreover, the three-judge panel gave tacit approval to the *Fletcher* plaintiffs to act as virtual representatives for all those who view themselves as aggrieved by the

[3] *See* Annie Linskey, *Iowa group to fund suit against Maryland's congressional map*, BALT. SUN. (Nov. 10, 2011) available at http://articles.baltimoresun.com/2011-11-10/news/bs-md-redistricting-lawsuit-20111110_1_congressional-map-fund-suit-congressional-district-boundaries (last visited Dec. 11, 2013).

[4] The *Fletcher* plaintiffs were represented by Jason Torchinsky, Esq., of Warrenton, Virginia, an election law expert of national reputation.

redistricting plan. This tacit approval can be readily inferred from the *Fletcher* panel's decision regarding population equality. If, as the *Fletcher* plaintiffs argued, the districts were not equally populated, then eight of the nine plaintiffs were not injured by the redistricting plan in that (by their own computation) those eight lived in underpopulated districts. *See* "Defendants' Memorandum in Support of Motion to Dismiss or, In the Alternative, for Summary Judgment, and Opposition to Motion for Preliminary Injunction" (ECF #33) at 64, *Fletcher v. Lamone*, 8:11-cv-03220-RWT (*citing Wright v. Dougherty County, Georgia*, 358 F.3d 1352, 1355 (11th Cir. 2004) and *League of Women Voters of Nassau County v. Nassau County Board of Supervisors*, 737 F.2d 155, 161 (2d Cir. 1984)). The three-judge panel, however, declined to consider the plaintiffs' lack of injury as a jurisdictional defect but went immediately to the merits of the claim, determining that the adjustment of the census data, as required by the "No Representation Without Population Act," did not create population inequality. *Fletcher*, 831 F. Supp. 2d at 893-97. This choice reflects the *Fletcher* panel's tacit understanding that it was resolving questions about the constitutionality of the State Plan not just at the behest of the nine plaintiffs, but for all who claimed to be aggrieved by the plan.

Thus, because all three *res judicata* elements are present and because the time to challenge the State Plan has long since passed, the *Benisek* case can and should be dismissed.

II. PLAINTIFFS HAVE NOT STATED A CLAIM UNDER ARTICLE I, § 2 OF THE U.S. CONSTITUTION.

Article I, § 2 of the U.S. 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). To assert a claim under Article I, a plaintiff must allege some avoidable population inequality among a state's congressional districts, which shifts the burden back to the State to explain its reasons for the deviation from strict equality. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (plaintiffs bear the burden of proving "population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population"); *see also Tennant v. Jefferson County Comm'n*, 133 S. Ct. 3, *5 (2012) ("parties challenging the plan bear the burden of proving the existence of population differences that 'could practicably be avoided'") (citations omitted); *Anne Arundel County Republican Central Committee v. SABEL*, 781 F. Supp. 394, 396 (D. Md. 1991) (stating two-part test under *Karcher*). Here, plaintiffs have not alleged any deviation from precise mathematical equality in the composition of Maryland's congressional districts and so have not stated a cause of action under Article I.

Plaintiffs have not identified a single case finding an Article I violation based on anything other than population inequality. Nevertheless, plaintiffs insist that lack of adherence to certain traditional redistricting principles—*e.g.*, compactness or contiguity—does establish a violation of Article I when a district contains areas that are "demographically discordant." Am. Compl. ¶ 22. This is to argue, in effect, that Article

I requires population equality *plus* some unquantified combination of other redistricting principles.

The Supreme Court has been clear, however, that Article I itself does *not* require adherence to the sort of redistricting principles that plaintiffs espouse. In *Shaw v. Reno*, for example, the Supreme Court stated that, although there is much discussion of compactness and contiguity in the context of redistricting cases, that did not mean that such qualities "are constitutionally required—they are not." 509 U.S. 630, 647 (1993). Although *Shaw v. Reno* was a split opinion, all nine justices agreed that principles "such as compactness and contiguity . . . are not constitutionally required." *Id*. at 687 (Souter, J., dissenting); *see also id.* at 671-72 (White, J., joined by Blackmun, J., dissenting) (stating that, while "[l]ack of compactness or contiguity" and other "district irregularities may provide strong indicia of a potential gerrymander, . . . they have no bearing on whether the plan ultimately is found to violate the Constitution"); *id*. at 677 (Stevens, J., dissenting) (stating that "[t]here is no independent constitutional requirement of compactness or contiguity"); *Wood v. Broom*, 287 U.S. 1, 6-8 (1932) (rejecting challenge based on lack of compactness and contiguity in light of repeal of federal statute imposing those requirements with respect to congressional districts); *Duckworth*, 332 F.3d at 778 (quoting *Shaw v. Reno*).

Because Article I imposes no duty to make congressional districts compact or contiguous, it follows that the presence or absence of compactness or contiguity cannot be the test of a district's constitutionality. This is equally true of *demographic contiguity*,

the second half of plaintiffs' proposed "either/or" standard. No court has held this to be a constitutional requirement, and thus an allegation that it is missing does not establish a constitutional violation. *See, e.g.*, *Gorrell*, 2012 U.S. Dist. LEXIS 6178, at *10-11 (dismissing "community of interest" claim for lack of constitutional violation); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296 (D. Kan. 2002) (same). In sum, without an allegation of population inequality, plaintiffs have not stated a violation of Article I, and any claims asserted under that provision must be dismissed.

III. PLAINTIFFS' POLITICAL GERRYMANDERING CLAIMS ARE NON-JUSTICIABLE.

Plaintiffs argue that the design of the four challenged congressional districts burdens the representational rights or voting strength of Republican-leaning "segments" within those districts, Am. Compl. ¶ 22, or alternatively, of the Republican voters only, *id*. ¶ 23, in violation of the Equal Protection Clause. Thus, the amended complaint raises two types of political gerrymandering claims, one based on geography, the other on partisanship. Because courts lack an appropriate constitutional standard for assessing the burden of a particular redistricting plan on a political group's representational rights, both of plaintiffs' gerrymandering claims are non-justiciable.

As a matter of law, there is no judicially approved definition of what constitutes unlawful political gerrymandering. Since the redistricting that followed the 2000 Census, the Supreme Court has determined that, although such claims may be conceptually justiciable, there are "no judicially discernible and manageable standards for adjudicating political gerrymandering claims. . . ." *Vieth v. Jubilirer*, 541 U.S. 267, 281 (2004)

(plurality opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *see id.* at 307-08 (Kennedy, J., concurring) ("Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."). The Supreme Court reaffirmed that conclusion in *League of United Latin American Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 447 (2006) (opinion of the Court by Kennedy, J.) (finding no "reliable measure of impermissible partisan effect"); *see id*. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "no party or judge has put forth a judicially discernible standard by which to evaluate" political gerrymandering claims).

Since *LULAC* and *Vieth*, every court to have considered the issue has rejected political gerrymandering claims or granted judgment for defendants on the pleadings. *See Fletcher*, 831 F. Supp. 2d at 904 (citing cases); *see also Radogno v. Illinois State Bd. of Elections*, 2011 U.S. Dist. LEXIS 134520, at *16 (N.D. Ill. Nov. 22, 2011) (dismissing amended partisan gerrymandering claims under Rule 12(b)(6) on the ground that "Plaintiffs have not identified a workable standard for partisan gerrymanders"). As the three-judge panel in *Radogno* explained:

> The challenge is not just administrability; it is constitutional line-drawing. The law requires an objective, measurable standard that admits of rational judicial resolution and is a direct and non-arbitrary implication of accepted constitutional norms.

2011 U.S. Dist. LEXIS 134520, at *15-16. That court also reviewed seven different standards that had been considered and rejected by the Supreme Court, indicating the magnitude of the task facing any litigant hoping to maintain a political gerrymandering claim. *Id*. at *9-12. Subsequently, in *Fletcher*, this Court ruled that plaintiffs in that case had also failed to devise an acceptable standard.[5] 831 F. Supp. 2d at 904.

Like all others before them, plaintiffs in this case have failed to offer a non-arbitrary standard that addresses the core problem, which is to allow "judges to reliably and objectively sort the 'routine' use of partisanship in redrawing district lines from that which is excessive to the point of violating the Equal Protection Clause." *Radogno*, 2011 U.S. Dist. LEXIS 134520, at *9. Plaintiffs' failure is unsurprising, not only because the task is an extremely difficult one, but also because plaintiffs believe that previous courts, including (apparently) the Supreme Court, have been trying to solve the wrong problem.[6] *See*, *e.g.*, Am. Compl. ¶ 18 ("The standard we propose . . . is more relevant and

[5] "At best, [plaintiffs] appear to argue for a sort of hybrid equal protection/political gerrymandering cause of action, which would be judged under the standards applicable to [racial] discrimination challenges." *Fletcher v. Lamone*, 831 F. Supp. 2d at 904. Finding this standard similar to one previously rejected by the Supreme Court, the *Fletcher* court rejected plaintiffs' claim. *Id*. (quoting Justice Kennedy's observation that, although "[r]ace is an impermissible classification . . . [p]olitics is quite a different matter.") (citation omitted).

[6] In ¶ 18 of the the Amended Complaint, plaintiffs explain: "*Bandemer* and *Vieth* (and *Fletcher*) addressed allegations of discrimination against voters of a political party as a class. The plurality in *Vieth* and the minority in *Bandemer* . . . felt the Judiciary is not equipped to make judgments as to whether a state-wide districting map unconstitutionally burdens members of a political party. Our claim requires no such judgment. The standard we propose to effectively strike the use of narrow ribbons and orifices to link inconsistent segments is more relevant and manageable than determining how much partisanship is too much for a state-wide configuration."

manageable than determining how much partisanship is too much for a state-wide configuration."). Plaintiffs thus concede that their proposed standard does not aid judges in determining "whether a statewide districting map unconstitutionally burdens members of a political party." *Id.* Curbing "excessive" partisanship, which is what the Supreme Court has said the aim must be, is simply not what plaintiffs have set out to do.

Plaintiffs' either/or rule is arbitrary in the sense that neither half of the test—geographic contiguity and compactness, or demographic consistency—represents a constitutional requirement. *See Vieth*, 541 U.S. at 295 (rejecting standards that "are not discernible in the Constitution" and have "no relation to Constitutional harms"). At the same time, the proposed rule does not address intent to discriminate, which has heretofore been a core requirement of Equal Protection analysis. *See LULAC*, 548 U.S. at 514 (Scalia, J., concurring) ("A vote dilution claim focuses on the majority's intent to harm a minority's voting power"). Plaintiffs' either/or standard is derived from their ideas about adequate representation, not from constitutional principles.

Plaintiffs' test is also vague. It is unclear, for example, as to when two segments should be deemed demographically inconsistent or insufficiently contiguous so as to trigger the application of the rule. Are two areas "demographically consistent" when their local industries and incomes are the same, but their racial composition and voting preferences are not? What weight should be given to each of the various demographic factors to determine "consistency"? Is "de facto non-contiguity," rather than distance, lack of accessibility, or other factors, always the critical obstacle to adequate

representation? Or might two nearby and easily accessible areas be adequately represented in a single district even if not technically contiguous? Trying to answer any of these uncertainties makes clear that plaintiffs' "objective standard" is not as straightforward as they claim it to be.

More fundamentally, based only on contiguity, plaintiffs' objective district-by-district standard would validate districts that theoretically violate the constitution (*e.g.*, compact districts intended to "pack" an excessive number of a minority party's voters into a single district, diluting its strength statewide) and would invalidate districts that do not (*e.g.*, a district like the Seventh, a majority-minority district designed to preserve minority voting strength). *See Fletcher v. Lamone*, 831 F. Supp. 2d at 891. A standard that produces such outcomes cannot be regarded as a reliable guide for judges forced to draw a line between "routine" and "excessive" partisanship in redistricting. Plaintiffs' proposed standard therefore fails to solve the justiciability problem, requiring dismissal of their political gerrymandering claims.

IV. PLAINTIFFS HAVE NOT ALLEGED SUFFICIENT FACTS TO STATE A PLAUSIBLE CLAIM TO RELIEF UNDER THE EQUAL PROTECTION CLAUSE.

Even assuming plaintiffs' Equal Protection claims were justiciable, plaintiffs have not alleged the specific facts necessary to support such claims. In *Davis v. Bandemer*, a plurality of the Court concluded that to succeed on their political gerrymandering claim "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U.S. 109, 127

(1986); *see also Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1038 (D. Md. 1994) (stating two-part test from *Davis v. Bandemer*). Here, plaintiffs do not allege facts showing that particular redistricting decisions were the product of intentional discrimination, nor do they allege "an actual discriminatory effect" in the form of a sufficient injury to their representational rights or voting interests.

A. Plaintiffs Have Not Shown Intentional Discrimination.

A gerrymandering claim under the Equal Protection clause of the Fourteenth Amendment requires proof of a purpose to discriminate against a racial or political minority. *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981) (interpreting *City of Mobile v. Bolden*, 466 U.S. 55 (1980)); *Fletcher*, 831 F. Supp. at 897 (proof of "purposeful discrimination" required to state a claim under the Fourteenth Amendment). Plaintiffs have not alleged a legislative intent to burden or disadvantage any particular geographic segments in the State, nor have they explained why a "segment" resulting from the redistricting process itself should be regarded as an "identifiable group" against which legislators were motivated to act.[7] *See Personnel Adm'r of Mass. v. Freeney*, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite

[7] As Justice Stevens explained in his concurring opinion in *Karcher*: "Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context." *Karcher*, 462 U.S. at 754 n.12 (Stevens, J., concurring). The amended complaint does not offer any reason why the entire voting population of each of the "smaller segments" it identifies should be regarded as an "identifiable group."

of,' its adverse effects upon an identifiable group." (citation, internal quotation marks, and footnote omitted)).

This deficiency is not merely a technical failure in pleading. There is, in fact, no reason to think that district lines were drawn so as to discriminate against all residents—Democrats, Republicans, or other—living in these areas. Without any explanation why legislators would want to target voters in these specific areas of the State for special disadvantage, the amended complaint does not state a plausible claim of intentional discrimination against the smaller geographic segments on whose behalf plaintiffs purportedly act.

Similarly, to the extent the amended complaint may be construed to state an ordinary partisan gerrymander claim on behalf of certain Republican voters, those allegations also fall short of what is required to prove intentional discrimination. In ¶ 28 of the amended complaint, plaintiffs do make several general assertions about a background of partisan motivation in the redistricting process, but they allege no specific facts tending to show that the "narrow ribbons and orifices" to which they object were products of partisan calculation. "Conclusory statements" of partisan intent "do not suffice" to show that plaintiffs are entitled to relief. *Iqbal*, 556 U.S. at 678-79.

B. Plaintiffs Have Offered No Proof of Inadequate Representation.

Plaintiffs' contention that certain voters are harmed when geographically separate and demographically dissimilar areas are combined in a single district is based on their assumption that, under such circumstances, the candidate chosen to represent the district

cannot do so adequately. Am. Compl. ¶ 22. This alleged harm, however, is wholly speculative: they allege no facts to flesh out their assertion that they are, have been, or will be inadequately represented by the members of congress elected from these districts. Such an injury cannot be presumed, but requires "actual proof." *See, e.g.*, *Davis v. Bandemer*, 478 U.S. at 132 (White, J., plurality op.) ("An individual or a group of individuals who votes for a losing candidate is 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. We cannot presume in such a situation, *without actual proof to the contrary*, that the candidate elected will entirely ignore the interests of those voters." (emphasis added)); *LULAC v. Perry*, 548 U.S. at 469-70 (Stevens, J., dissenting) ("Indeed, this Court has concluded that our system of representative democracy is premised on the assumption that elected officials will seek to represent their constituency as a whole, rather than any dominant faction within that constituency") (citing *Shaw v. Reno*, 509 U.S. 630, 648 (1993)). Thus, without specific facts to show that the "representational" interests of voters in the smaller segments have been harmed, plaintiffs have not established an injury or a right to relief.

C. Plaintiffs Have Not Alleged Facts Sufficient to Prove an Injury to Their Voting Interests.

To establish a claim for dilution of a group's voting strength, plaintiffs must allege more than that a particular set of voters is unable to elect candidates of their choice. *See, e.g.*, *City of Mobile*, 446 U.S. at 111 n.7 (Marshall J., dissenting) ("When all that is proved is mere lack of success at the polls, the Court will not presume that members of a

political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking."); *White v. Regester*, 412 U.S. 755, 765-66 (1973) ("it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."); *see also Anne Arundel County Republican Central Committee v. SABEL*, 781 F. Supp. at 401 (noting various means to influence politics other than electoral success). Here, plaintiffs have not pled any facts to identify a voting injury beyond the practical inability of the smaller segments, or their Republican voters, to elect candidates of their choice. *See, e.g.*, Am. Compl. ¶ 31 ("Representatives from [the challenged districts] will essentially be elected by the voters of the dominant sections in the primaries."). Such allegations are insufficient as a matter of law to state a claim for vote dilution. As this Court observed in *Anne Arundel County Republican Central Committee* (a bipartisan challenge contesting the division of the County into multiple congressional districts):

> Nothing the plaintiffs have presented to this Court indicates that their vote will necessarily be any less powerful in any of the four congressional districts in which they will now reside. Nothing prevents the plaintiffs from joining the local organizations of the political parties of their choice and having whatever power they had previously to influence the political process. Thus, assuming arguendo that they present a justiciable issue, the plaintiffs fail to make a *Davis* showing of vote dilution.

781 F. Supp. at 401.

For whatever theory plaintiffs purport to advance, they have failed to plead the necessary facts to support that theory. As a result, their claim for political gerrymandering must be dismissed.

V. PLAINTIFFS HAVE NOT STATED A PLAUSIBLE FIRST AMENDMENT CLAIM.

Paragraph 23 of the Amended Complaint alludes to what is claimed to be a disproportionate or selective impact on "areas with highly Republican voting history." Based on this alleged impact, plaintiffs assert that the challenged districts violate "the First Amendment's protection of political association." Am. Compl. ¶ 23; *see also id*. ¶ 2 (claiming districts' structures "impermissibly abridge" right of political association). That is the sum total of their First Amendment allegations.

Such "[t]hreadbare recitals" of a cause of action "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678-79. Specifically, plaintiffs' mere allusion to the right of political association does not state a plausible claim that this freedom has been infringed by the current congressional districts. *See Kidd v. Cox*, 2006 U.S. Dist. LEXIS 29689, at *54-55 (N.D. Ga. 2006) (drawing of district lines does not impede the rights of political expression, association, or belief). The same kind of First Amendment claim was made incident to an earlier congressional redistricting and was rejected by this Court:

> Plaintiffs' claim also fails under a First Amendment analysis. Nothing about H.B. 10 affects in any proscribed way the plaintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.

Anne Arundel County Republican Central Committee, 781 F. Supp. at 401. That analysis applies here as well. Plaintiffs have the same rights in their current districts to associate politically as they would have if they were assigned to other districts. Changing district lines has no impact on such rights. The location of district boundaries may influence plaintiffs' choices about with whom they ought to associate, but that would be true of any redistricting plan, not only plans to which these plaintiffs object. Therefore, plaintiffs have not stated a viable First Amendment claim.

CONCLUSION

For the reasons set forth above, plaintiffs' request for a three-judge panel should be denied and defendants' motion to dismiss should be granted.

Respectfully submitted,

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