

**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

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

Defendants.

* * * * *

**REPLY TO PLAINTIFFS’ RESPONSE IN OPPOSITION
TO DEFENDANTS’ MOTION TO DISMISS**

Plaintiffs’ Response in Opposition to Defendants’ Motion to Dismiss (“Response”) makes clear plaintiffs’ total reliance upon a single erroneous and unsupportable legal contention, specifically, that the U.S. Constitution requires that congressional districts meet plaintiffs’ proposed standard of contiguity. Not only is the lack of adequate contiguity posited as the source of plaintiffs’ alleged representational and voting injuries, *see* Response ¶ 38, but a requirement of real or “de-facto contiguity” is urged as the sole benchmark against which to measure voters’ adequacy of representation. *Id.* ¶ 46 (encouraging the Court to modify plaintiffs’ proposed constitutional standard “to only require de-facto contiguity, with no option to justify multiple discrete segments”). In addition, plaintiffs have expressly disavowed any intention to state a partisan gerrymandering claim. *See id.* ¶¶ 6, 48. Therefore, plaintiffs

have alleged no constitutional violation unless they can establish, at a minimum, that the U.S. Constitution mandates that congressional districts, in some or all circumstances, be sufficiently contiguous. Because they can offer no legal support for such a proposition, plaintiffs' argument must be regarded as frivolous or insubstantial and dismissed for failure to state a claim.

I. PLAINTIFFS' CLAIMS AND ARGUMENTS ARE NOT NEW.

Plaintiffs attempt to distinguish their case from *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012) by purporting to assert a novel "fair representation" claim not previously considered by this Court. *See* Response ¶ 6. In fact, however, the same claim, supported by very similar arguments, was presented by both plaintiffs (as described in the State's opening brief) and by *amici curiae* in *Fletcher* and implicitly rejected by the three-judge panel without difficulty.¹ Though the *Fletcher* court did not directly address the *amici's* claim that the U.S. Constitution requires compactness and due regard for political subdivision boundaries, the court expressly held that "[t]he Constitution does not mandate regularity of district shape." *Fletcher*, 831 F.

¹ The amicus brief in *Fletcher* argued, among other things, that Article I, § 2 of the U.S. Constitution requires that congressional districts be compact and contiguous and give due regard to natural and political subdivision boundaries. *See* Brief of C. James Olson, C. Paul Smith, Ronald George, Carl F. Middendorf, Antonio Wade Campbell and Philip J. Smith as *Amici Curiae*, *Fletcher v. Lamone*, No. 11-3220 (ECF Doc. 42). The explanation offered by the *amici* in support of this erroneous claim parallels the reasoning offered by plaintiffs here. The amicus brief argues: "The principles of compactness, contiguousness and the honoring of political subdivision boundaries are so important that the Supreme Court has said that these three considerations justify some departure from a state's having to establish perfectly equal congressional districts. . . . Failure to employ and honor these principles undermines the entire process of using election districts to elect Representatives." *Id.* at 18.

Supp. 2d at 903 (internal quotation omitted). When the *amici* later renewed their challenge to the State plan on their own behalf in *Olson v. O'Malley*, 2012 U.S. Dist. LEXIS 29917 (D. Md. Mar. 6, 2012), they abandoned the claim that the State Plan violated the U.S. Constitution, alleging instead that Maryland state law requirements were also applicable to congressional districts. The State's 2002 districting plan was also challenged, in part, on the grounds that certain districts were "just barely contiguous" and violated the Constitution "by virtue of this lack of contiguity." *Duckworth v. SABEL*, 332 F.3d 769, 777 (4th Cir. 2003). That complaint was dismissed under Rule 12(b)(6) for failure to allege facts sufficient to prove actual discriminatory effect. *Id.* As these examples show, the current litigation is not the first time this Court has been asked to consider this general issue or to find in the U.S. Constitution a rule mandating adherence to certain districting principles, contiguity in particular.

II. PLAINTIFFS ARGUMENTS ARE INSUBSTANTIAL AND UNSUPPORTED BY ANY LEGAL PRECEDENT.

Plaintiffs have cited no cases holding that Article I, § 2 of the U.S. Constitution mandates any feature of a state redistricting plan except population equality. Despite this, plaintiffs contend that it remains an open question whether Article I, § 2 may yet be found to require adherence to one or more traditional districting principles, such as contiguity. *See, e.g.*, Response ¶ 24 (asserting that the Supreme Court is open to "further specifics, beyond equal population, constituting fair representation under Article I . . ."), ¶ 25 ("The scope of representational and voting rights under the Constitution, beyond

requirements for equal population, is very much an area of unsettled law . . .”). While that may have been true 20 years ago, under current law this argument is untenable.

As noted in the State’s earlier papers, in *Shaw v. Reno*, 509 U.S. 630 (1993), every member of an otherwise divided Court agreed that the U.S. Constitution makes no demands regarding the shapes of congressional districts. See Memorandum of Law in Support of Defendants’ Motion to Dismiss (“Defs.’ Mem.”) 14 (ECF Document 13-2). Justice Stevens, in dissent, squarely addressed the question that plaintiffs argue is “unsettled”:

Does the Constitution impose a requirement of contiguity or compactness on how the States may draw their electoral districts? . . . [That] question is easy. There is no independent constitutional requirement of compactness or contiguity, and the Court’s opinion . . . does not suggest otherwise.

Shaw, 509 U.S. at 677 (Stevens, J., dissenting). Equally direct was Justice White, who made the point that “irregularities” in district shapes, apart from their usefulness in uncovering legislative intent, have *no* constitutional significance:

But while district irregularities may provide strong indicia of a potential gerrymander, they do no more than that. In particular, they have no bearing on whether the plan ultimately is found to violate the Constitution. Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snakelike, at least as far as the Constitution is concerned and absent any evidence of differential racial impact.

Id. at 677 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); see also *id.* at 647 (majority opinion of Justice O’Connor, noting that traditional districting principles are not “constitutionally required” but may be relevant to the issue of intent to discriminate).

The Court's unanimity on this point was characterized by another federal court as a reaffirmation of "the long-standing rule that adherence to traditional notions of compactness, contiguity, and respect for political subdivisions is not a general constitutional requirement for state redistricting plans." *Shaw v. Hunt*, 861 F. Supp. 408, 450 (E.D.N.C. 1994), *rev'd on other grounds*, 517 U.S. 899 (1996). Therefore, and notwithstanding any "openness" on this issue that plaintiffs may have gleaned from stray comments found in much earlier cases, for at least two decades courts have considered this question well-settled and in a manner fatal to plaintiffs' legal theory in this case.

III. PLAINTIFFS HAVE STATED A POLICY ARGUMENT, NOT A CONSTITUTIONAL INJURY.

Plaintiffs' Response candidly describes the legislative-type process they followed in crafting their proposed "de-facto contiguity" standard, including the various tradeoffs made for the sake of "manageability" and "flexibility," and the policy judgments leading to the inclusion or exclusion of various districting principles. Response ¶¶ 41-42. In light of this discussion, plaintiffs cannot plausibly maintain that their proposed standard is derived from or compelled by any constitutional imperative. Rather, the standard or rule against which they propose all congressional districts should be tested is one shaped according to their own policy preferences and their calculations of what this Court would "accept in light of current case law." *Id.* ¶ 42(c). Accordingly, plaintiffs' allegations that the State Plan violates their proposed standard, if proved, would establish only that the State Plan is inconsistent with plaintiffs' preferences, not the Constitution.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss should be granted without convening a three-judge panel.

Respectfully submitted,

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