No. 12-1234

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOWARD GORRELL,

Plaintiff-Appellant,

v.

MARTIN O'MALLEY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
(William D. Quarles, District Judge)

APPELLEE'S RESPONSE TO INFORMAL BRIEF OF APPELLANT

DOUGLAS F. GANSLER
Attorney General of Maryland

ADAM D. SNYDER
DAN FRIEDMAN
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
asnyder@oag.state.md.us
Tel: 410-576-6398
Fax: 410-576-7036

Attorneys for Appellee

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APPELLEE'S RESPONSE TO INFORMAL BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

In this action challenging the validity of Maryland's apportionment of its congressional districts following the 2010 census, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. Jurisdiction to hear an appeal from the district court's judgment, which resolved all claims in the action, would be authorized under 28 U.S.C. § 1291. However, as explained below, the appellant, Howard Gorrell, no longer resides in Maryland and therefore lacks standing to pursue his challenge to

Maryland's apportionment plan, either in this Court or in the district court. Accordingly, Article III jurisdiction is lacking, and the appeal should be dismissed.

ISSUES ON APPEAL

1. Does Mr. Gorrell have standing to challenge the constitutionality of Maryland's congressional redistricting when he no longer resides in Maryland?

2. Does the fact that the district court issued its decision the day after Mr. Gorrell filed his response to the Governor's motion to dismiss constitute reversible error when Mr. Gorrell raises no objections to the merits of the court's decision, and when Mr. Gorrell had agreed that the litigation should be expedited?

3. Does the U.S. Marshal's delay in serving Mr. Gorrell's complaint constitute grounds for reversal when the district court rejected Mr. Gorrell's arguments on the merits and not on the ground that entertaining the suit could disrupt election preparations?

STATEMENT OF THE CASE

This case involves a challenge to Maryland's 2011 congressional redistricting plan, but the issues on appeal relate exclusively to the procedural path the case took below. Mr. Gorrell filed suit on October 27, 2011, and alleged that the redistricting plan the Governor signed into law unconstitutionally separates the agricultural community of interest, constitutes a political gerrymander, employs an overly strict

equal population rule, and violates State-law procedures for adopting the plan. *Gorrell v. O'Malley*, No. 11-2975, Dist. Ct. Docket No. 31, 2012 U.S. Dist. LEXIS 6178 (D. Md. Jan. 19, 2012) ("Memorandum Opinion"). Mr. Gorrell, who appeared *pro se* and *in forma pauperis*, moved for default before the complaint and summons had been served on the defendants. That triggered a series of procedural filings that were ultimately resolved when Mr. Gorrell "authoriz[ed]" the court to deny his motion for default and "concurred" with the Governor that the litigation should be expedited in order to obtain a decision before the January 20, 2012 date by which the preparation of absentee ballots was to begin. Dist. Ct. Docket No. 23 at 1, 3.

On December 22, 2011, the Governor moved to dismiss the complaint. Dist. Ct. Docket No. 13; *see also* Memorandum Opinion at 4. That same day, Mr. Gorrell moved to convene a three-judge panel under 28 U.S.C. § 2284(a), to which the Governor responded on January 6, 2012. Dist. Ct. Docket Nos. 17, 27. Briefing of the substantive motions was concluded on January 18, 2012, when Mr. Gorrell responded to the Governor's motion to dismiss. The next day, the district court issued its decision granting the Governor's motion to dismiss and denying Mr. Gorrell's motion to convene a three-judge panel. This timely appeal followed.

STATEMENT OF THE FACTS

Maryland's 2011 Congressional Redistricting Plan

Maryland's State Plan for Congressional Redistricting (the "State Plan") was adopted in a special session of the General Assembly held in October 2011, and became law upon the Governor's signature on October 20, 2011. *See Fletcher v. Lamone*, No. 11-3220, 2011 U.S. Dist. LEXIS 148004, at *4-*5 (D. Md., Dec. 23, 2011);[1] Memorandum Opinion at 3. The new plan creates eight congressional districts that are as equal in population as 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*., 2011 U.S. Dist. LEXIS 148004, at *12.

The districts in the State Plan were created by using the demographic information from the 2010 census performed by the United States Bureau of the Census, as adjusted in accordance with the "No Representation Without Population Act." 2010 Md. Laws, ch. 67; *see Fletcher*, 2011 U.S. Dist. LEXIS 148004, at *2, *9-*12. The Act requires that, for purposes of congressional redistricting, individuals incarcerated in State or federal prisons must be allocated based on their last known

[1] *Fletcher v. Lamone* was the first of the congressional redistricting challenges to reach decision and the only one to be decided by a three-judge district court. A copy of the decision was included as an exhibit to the Governor's Opposition to Motion for Three-Judge Panel. *See* Dist. Ct. Docket No. 27-6.

Maryland residence prior to incarceration. *See* Md. Code Ann., Election Law § 8-701(a)(2). Mr. Gorrell does not challenge the adjustment of census population figures in accordance with the No Representation Without Population Act, the constitutionality of which was upheld by the three-judge district court in *Fletcher*. 2011 U.S. Dist. LEXIS 148004, at *21.

The revised district map in the State Plan is based substantially on the districts drawn following the 2000 census, with specific alterations to accommodate changes in regional population and interests. Two areas of the State have experienced particularly robust growth over the past decade: (1) the I-270 corridor, where more than 43,000 Montgomery County residents have migrated to Frederick County; and (2) Southern Maryland, where nearly 40,000 Prince George's County residents have moved to Charles County. These shifts are reflected in the State Plan in the form of two districts based in Southern Maryland/Prince George's County (Districts 4 and 5), and two more districts running between Montgomery County and Western Maryland along the I-270 Corridor (Districts 6 and 8). Dist. Ct. Docket No. 27-5, at 4. The changing demographics of Western Maryland were evident in public hearings at which residents of that region testified that they shared common interests with northern Montgomery County. Dist. Ct. Docket No. 27-3, at 6-7. Based in part on that testimony and on demographic trends showing population growth up the I-270 corridor, the Governor's

Redistricting Advisory Committee reoriented the 6th Congressional District from an East-West axis to a Southeast-Northwest axis. *Compare* Dist. Ct. Docket No. 27-2 (previous districts based on 2000 census) *with* No. 27-1 (2011 State Plan).

The re-drawing of District 6 affected the distribution of farmers among the different congressional districts. Whereas the 2002 plan resulted in a concentration of 1,670 farmers—as estimated by the number of members of "Future Farmers of America"—in the sixth district and left no other district with more than 300 farmers, Memorandum Opinion at 3 n.2, the 2011 State Plan distributed farmers more evenly throughout the State, with no district containing more than 600 farmers. Memorandum Opinion at 3.

Mr. Gorrell's Suit

Mr. Gorrell filed suit against Maryland Governor Martin O'Malley on October 27, 2011. As amended on November 10, 2011, Mr. Gorrell's complaint alleged that the State Plan: (1) fails to preserve communities of interest—namely, farmers; (2) is an unconstitutional gerrymander because it splits the agricultural communities of Western Maryland; (3) violates the hearing requirement of Article III, § 5 of the Maryland Constitution; (4) does not comply with guidelines issued by the Governor's Redistricting Advisory Committee; and (5) improperly splits precincts in pursuit of equal population. *See* Memorandum Opinion at 4; Dist. Ct. Docket No. 6. Mr.

Gorrell, who is appearing *pro se* and *in forma pauperis*, Dist. Ct. Docket No. 4, relied on the U.S. Marshal's Office to effectuate service and, believing the complaint to have been served, moved for default on December 15, 2011. Dist. Ct. Docket Nos. 11, 12. On December 22, 2011, Mr. Gorrell moved to appoint a three-judge panel under 28 U.S.C. § 2284(a).

Although the Governor had not yet been served, he appeared in the action and responded to Mr. Gorrell's motion for default on December 22, 2011, to ensure that impending deadlines for the 2012 election cycle would not be disrupted. On the same day, the Governor moved to dismiss Mr. Gorrell's complaint for failure to state a claim, as "insubstantial" under *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), and because the pendency of the claim had the potential to cause "great disruption in the election process in Maryland," *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980). Dist. Ct. Docket No. 13; *see also* Memorandum Opinion at 4. The Governor also moved to expedite the litigation so that it could be concluded before the January 20, 2012 date scheduled to begin the process of preparing the absentee ballots for printing. Dist. Ct. Docket No. 14 at 2; *see also* Memorandum Opinion at 4. On December 27, 2011, the Governor was served with the complaint. *See* Dist. Ct. Docket No. 26. The next day, Mr. Gorrell filed a response to the motion to expedite in which he acknowledged that service had been delayed,

"authorize[d]" the court to deny his motion for default, and "concurred" with the Governor's motion to expedite. Dist. Ct. Docket No. 23; Memorandum Opinion at 4.

Although Mr. Gorrell had agreed to expedite the litigation, on January 13, 2012, he moved to extend the deadline for responding to the Governor's motion to dismiss. Dist. Ct. Docket No. 28. The district court denied the motion, observing that Mr. Gorrell had already agreed to expedite the litigation so that the court could issue its decision before January 20, 2012. The court ordered Mr. Gorrell to file his response to the Governor's motion to dismiss by January 18, 2012, and Mr. Gorrell did so. Dist. Ct. Docket Nos. 29, 30. The district court issued its decision the next day—the day the parties had agreed upon for concluding the litigation. The court granted the Governor's motion to dismiss and denied Mr. Gorrell's motion to convene a three-judge panel. Dist. Ct. Docket No. 31. The district court did not dismiss Mr. Gorrell's complaint on the grounds of timeliness but instead based its decision on the merits of Mr. Gorrell's complaint, rejecting his federal-law arguments concerning communities of interest, political gerrymandering, and splitting of districts, and his State-law arguments concerning the applicability of Article III, § 5 of the Maryland Constitution and other State guidelines to congressional redistricting. *Id.*

Mr. Gorrell Files His Appeal and Moves to Washington State

Mr. Gorrell timely noted this appeal on February 17, 2012. On March 22, 2012, Mr. Gorrell moved to extend the date for filing his informal brief from March 22, 2012, to April 5, 2012. In his motion, Mr. Gorrell indicated that he was moving to Yakima, Washington, where "he has a new job with the Hearing Loss Center of Spokane, Washington," and where his limited access to research materials would make it difficult to file a brief sooner. Appellant's Motion for Extension of Time to File an Informal Opening Brief at 1 (4th Cir. Docket No. 4); *see also* Notice of the Change of Address (4th Cir. Docket No. 5). The Governor, through undersigned counsel, consented to Mr. Gorrell's request for an extension, but alerted Mr. Gorrell that the Governor would seek to dismiss Mr. Gorrell's appeal on the grounds that his relocation to Washington left him without standing to challenge Maryland's congressional redistricting. On April 5, 2012, Mr. Gorrell filed his informal brief, in which he abandons the substantive arguments he raised below and instead presses what he sees as procedural flaws reflected in the timing of the district court's decision.

SUMMARY OF ARGUMENT

Mr. Gorrell's appeal is moot because his relocation to Washington State means that he no longer has standing to challenge Maryland's congressional redistricting under *United States v. Hays*, 515 U.S. 737 (1995), and other governing case law. If the

Court reaches the merits of Mr. Gorrell's appeal, the district court's decision should be affirmed, because Mr. Gorrell does not take issue with the merits of the decision, which is in accord with both federal law and State law. The sole basis for Mr. Gorrell's appeal—that the district court decided the case too quickly and, in so doing, supposedly did not read his response to the Governor's motion to dismiss and otherwise penalized him for the Marshal's Office's delay in serving the complaint—does not provide a basis for reversal when Mr. Gorrell agreed below that the litigation must be expedited and here puts forth no argument that the district court erred in resolving the substantive merits of Mr. Gorrell's claims.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6), inquiring solely whether Mr. Gorrell's pleadings "adequately state a set of facts, which, if proven to be true, would entitle [him] to judicial relief." *Duckworth*, 332 F.3d at 772. If, as the district court concluded, Mr. Gorrell's pleadings do not state a claim, then "by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73. The district court's decisions related to the timing of its decision, the management of its docket, and the schedule it imposed for conducting the

litigation are reviewed under an abuse-of-discretion standard. *See, e.g.*, *United States v. Jones*, 136 F.3d 342, 349 (4th Cir. 1998).

II. THE APPEAL IS MOOT BECAUSE, HAVING RE-LOCATED TO WASHINGTON STATE, MR. GORRELL NO LONGER HAS STANDING TO CHALLENGE MARYLAND'S CONGRESSIONAL REDISTRICTING.

Mr. Gorrell's relocation to Washington State renders this appeal moot. Because Mr. Gorrell is no longer a resident of Maryland, how Maryland draws its congressional boundaries cannot cause him the "injury in fact" that the Supreme Court has stated is part of the "irreducible constitutional minimum of standing" for redistricting challenges. *United States v. Hays*, 515 U.S. 737, 742 (1995); *see also Horsey v. Bysiewicz*, 2004 U.S. Dist. LEXIS 5559, at *17 (D. Conn. Mar. 24, 2004) ("As a non-resident of either state, Horsey has suffered no cognizable injury from the alleged malapportionment of California's or New York's congressional districts."). Just as "a plaintiff from outside [a district which is the subject of a racial gerrymander claim] lacks standing absent specific evidence that he personally has been subjected to a racial classification," *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), Mr. Gorrell's relocation to Washington State—that is, outside of *all* Maryland congressional districts—leaves him without standing to challenge any aspect of Maryland's congressional redistricting.

The Supreme Court has "repeated[ly]" stated that "the doctrine of mootness can be described as 'the doctrine of standing set in a time frame: The requisite personal

interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997)). Although Mr. Gorrell had standing to bring his complaint in the first instance, his relocation outside of Maryland means that he no longer has the standing necessary to support his claims. Accordingly, Mr. Gorrell's appeal should be dismissed as moot.

III. THE DISTRICT COURT PROPERLY REJECTED THE MERITS OF MR. GORRELL'S ARGUMENTS CONCERNING COMMUNITIES OF INTEREST, POLITICAL GERRYMANDERING, SPLITTING OF PRECINCTS, AND THE APPLICABILITY OF MARYLAND CONSTITUTIONAL PROVISIONS GOVERNING STATE LEGISLATIVE REDISTRICTING.

The district court properly concluded that all of Mr. Gorrell's substantive arguments failed to state a claim as a matter of law. The lower court specifically addressed, and rejected, each of those arguments.

A. Preserving Communities of Interest is Not Constitutionally Required.

The district court properly concluded that, even if one were to accept Mr. Gorrell's argument below that the State Plan fails to preserve communities of interest, his complaint still failed to state a claim because "preserving communities of interest is not constitutionally required." Memorandum Opinion at 8. No provision of the United

States or Maryland Constitution, or federal or State law, requires the State to preserve particular communities of interest in the drawing of congressional districts. Though the Supreme Court has recognized communities of interest as a legitimate consideration in redistricting, *see Miller v. Johnson*, 515 U.S. 900, 920 (1995), and the Maryland Court of Appeals permits consideration of communities of interest within the legislative redistricting process at least where it does not interfere with the accomplishment of a constitutional requirement, *see Matter of Legislative Districting of the State*, 370 Md. 312 (2002), neither court has *required* such consideration. *See, e.g.*, *Fletcher*, 2011 U.S. Dist. LEXIS 148004, at *58-*59 n.8 (Williams, J., concurring) ("Although communities of interest is one factor that a legislature may consider in re-districting, no provision of the Constitution or federal law requires states to preserve particular communities when redistricting."). Consequently, an allegation of a failure to preserve communities of interest fails to state a claim for which relief can be granted. *See Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1296 (D. Kan. 2002) (although the preservation of communities of interest is "a legitimate and traditional goal in drawing congressional districts," that "does not mean that there is an individual constitutional right to have one's particular community of interest contained within one congressional district"). Because preserving communities of interest is not required by any pertinent constitutional or statutory provision, the district court

properly dismissed Mr. Gorrell's assertions relating to communities of interest. *See* Memorandum Opinion at 7-9.

B. Mr. Gorrell's Political Gerrymandering Claim is Both Nonjusticiable and Based Entirely on Conclusory Allegations.

The district court properly concluded that, even if the State Plan splits the agricultural communities of Western Maryland, Mr. Gorrell's political gerrymandering claim is both "nonjusticiable" and based on "conclusory" allegations. Memorandum Opinion at 10. Mr. Gorrell's gerrymandering claim largely focuses on claims that the State Plan "will deprive Gorrell and agriculture-related electorates of their civil rights in violation of the Fourteenth Amendment of the United States Constitution." Dist. Ct. Docket No. 6 ¶ 54. No provision of the United States or Maryland Constitution, or federal or State law, requires the State to make special provisions for "agriculture-related electorates" or any other interest group.

Mr. Gorrell's complaint made the general statement that the State Plan "gerrymandered the Congressional districts to favor [the] Governor's political party," but included no allegations of fact to support that claim. Such a "'naked assertion,'" "devoid of 'further factual enhancement'" is insufficient to state a claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Even putting these pleading failures aside, Mr. Gorrell's claim was properly dismissed as a matter of law because there is no judicially approved

definition of what constitutes unlawful partisan 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); *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 subsequently reaffirmed that conclusion in *League of United Latin American Citizens* (*LULAC*) *v. Perry*, 548 U.S. at 447; *see id.* at 511 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also Fletcher*, 2011 U.S. Dist. LEXIS 148004, at *40-*41.

Mr. Gorrell failed to satisfy the indispensable requirement that "a successful claim . . . of partisan gerrymandering must . . . show a burden, *as measured by a reliable standard*, on the complainants' representational rights." *LULAC*, 548 U.S. at 418 (emphasis added). Indeed, Mr. Gorrell acknowledged in his complaint that the test for his partisan gerrymandering claim is "unsettled," Dist. Ct. Docket No. 6 ¶ 50, but offered *no* standard—much less the "reliable standard" required by *LULAC*—to

support his partisan gerrymandering claim. Mr. Gorrell's failure to offer a "reliable standard" by which to adjudicate his partisan gerrymandering claim required its dismissal, as other courts have recognized in similar contexts. *See e.g.*, *Radogno v. Ill. Bd. of Elections*, No. 11-4884, 2011 U.S. Dist. LEXIS 134520, at *16 (N.D. Ill. Nov. 22, 2011); *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, No. 11-5065, 2011 U.S. Dist. LEXIS 126278, at *33-*34 (N.D. Ill. Nov. 1, 2011).

C. Article I, § 2 of the U.S. Constitution Requires a State to Achieve Precise Mathematical Equality as Nearly as Practicable, Even if it Means that Congressional Districts Will Cross Precincts.

The district court also correctly concluded that, even if the State Plan had split precincts in pursuit of what Mr. Gorrell calls "rigid equal population rules," Memorandum Opinion at 10, governing Supreme Court jurisprudence requires States to achieve equal population across districts "'as nearly as practicable'" and to make a "'good-faith effort to achieve precise mathematical equality,'" *id.* at 11 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969)). The State Plan achieved this goal; seven of the eight congressional districts have an adjusted population of 721,529 while the eighth has an adjusted population of 721,528. *Fletcher*, slip op. at 11, 2011 U.S. Dist. LEXIS 148004, at *12. It is mathematically impossible to make the district populations more equal. In fact, Mr. Gorrell's claim below was that the State Plan

makes the population of Maryland's congressional districts *too* equal, in that its pursuit of "rigid equal population rules" required the splitting of precincts, which, in turn, allegedly deprives citizens of a "real opportunity to elect representatives of their choice." Dist. Ct. Docket No. 6 ¶ 77.

The Supreme Court has already rejected precisely this type of argument, and has made clear that the splitting of precincts necessary to achieve equal population and "one person, one vote" is permissible: "We do not find legally acceptable the argument that variances [from the equal population requirement of Article I, § 2] are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." *Kirkpatrick*, 394 U.S. at 533-34. Because the Supreme Court requires with "unusual rigor" that "absolute population equality be the paramount objective of apportionment . . . of congressional districts," *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983), the district court properly dismissed Mr. Gorrell's fifth count for failure to state a claim upon which relief can be granted.

D. The Hearing Requirements of Article III, § 5 of the Maryland Constitution Do Not Apply to Congressional Redistricting.

The district court also properly dismissed Mr. Gorrell's claim that the State Plan failed to comply with the hearing requirements of Article III, § 5 of the Maryland Constitution. As the court concluded, Article III, § 5 applies to the creation of State

"legislative districts" and there is "no authority for applying it to congressional redistricting." Memorandum Opinion at 12. *See Duckworth v. State Admin. Bd. of Election Laws*, 213 F. Supp. 2d 543, 552 n.1 (D. Md. 2002) ("Maryland law does not require that [the criteria of Article III, § 4 requiring that due regard be given to the boundaries of political subdivisions] be used in Congressional redistricting."), *aff'd*, 332 F.3d 769 (4th Cir. 2003); *see also Olson v. O'Malley*, No. WDQ-12-0240, 2012 U.S. Dist. LEXIS 29917, at *8 n.4 (D. Md. March 6, 2012) (holding that Article III, § 5 "indisputably govern[s] only state legislative redistricting").

E. The Administrative Guidelines Applicable to Third-Party Plan Proposals Do Not Apply to the Enacted State Plan.

Mr. Gorrell's final argument below was that the State Plan is invalid because plans allegedly considered by the Governor in drawing the State Plan were not submitted by the date set in the Guidelines for Congressional and Legislative Redistricting Third Party Plan Proposals. As Mr. Gorrell conceded below, however, there is no law governing the way in which the State's plan for congressional redistricting is developed. *See* Dist. Ct. Docket No. 6 ¶ 8. In this round of redistricting, as is traditional, the Governor appointed a committee, the Governor's Redistricting Advisory Committee, to hear testimony from the public and to recommend a plan. *Fletcher*, 2011 U.S. Dist. LEXIS 148004, at *2-*3. The Committee set a deadline for submission of third-party plans that would allow time for

consideration of those plans by the Committee before creating a recommended plan for the Governor. Neither the Committee nor the Governor, however, qualifies as a "third party" to the redistricting process. There is no requirement that any person submit a plan to the Committee rather than directly to the Governor, or that a plan submitted directly to the Governor be sent by any particular date. Nor is there any constitutional or statutory limit on what the Governor may consider in drawing the plan that is submitted to the General Assembly for enactment. For these reasons, the district court properly dismissed Mr. Gorrell's Count 4 as failing to state a claim on which relief may be granted. Memorandum Opinion at 12-13.

IV. NONE OF MR. GORRELL'S PROCEDURAL COMPLAINTS CONSTITUTES GROUNDS FOR REVERSING THE JUDGMENT OF THE DISTRICT COURT.

Mr. Gorrell does not take issue with the district court's analysis of the merits of *any* of his claims. The only arguments he presents on appeal are procedural—namely, (1) that the district court's decision was "very premature in that it did not consider the totality of [Mr. Gorrell's] reply brief by not reading it," Informal Brief at 2; (2) that "disruption of [the] upcoming election" was not an appropriate basis for dismissing his claims, *id*. at 9; and (3) that the district court failed to give "specific instruction" to the U.S. Marshal's office for "delivering summons" to the Governor, *id*. at 10-12. None of these procedural complaints constitute grounds for reversing the judgment of the district court.

A. There is No Basis for Mr. Gorrell's Assertion that the District Court Failed to Read His Response to the Governor's Motion.

Mr. Gorrell's first procedural argument—that the district court decision was "very premature in that it did not consider the totality of [Mr. Gorrell's] reply brief by not reading it," Informal Brief at 2—cites no authority for the proposition that a district court's failure to read and, presumably, acknowledge an appellant's response constitutes reversible error. Nor could there be. The question before this Court is whether the district court properly concluded that Mr. Gorrell's complaint failed to state a claim. If the lower court had erred—whether by misunderstanding Mr. Gorrell's argument, misrepresenting it, or ignoring it altogether—it behooves Mr. Gorrell, on appeal, to point out how the decision is substantively flawed. In this respect, though, he is silent; he raises no objection to the substance of the district court's ruling. In the absence of any argument that the district court reached an erroneous conclusion, whether the district court considered Mr. Gorrell's response is simply irrelevant.

Nor is there any evidence here that the district court actually *did* fail to consider Mr. Gorrell's response. True, it rendered its decision the day after Mr. Gorrell filed his response, but that does not mean that the lower court failed to consider the points Mr. Gorrell made in his response. To the contrary, the lower court's decision demonstrably addresses the subjects Mr. Gorrell covered in his response; rather, the court simply was

not persuaded by his arguments. *See Scott v. United States*, 2010 U.S. Dist. LEXIS 74833 (D. Md. July 26, 2010) (rejecting as a grounds for reversal the argument "the Fourth Circuit did not read [a litigant's] reply brief" in a related case because "the fact that Scott's conviction was affirmed is not evidence that the Fourth Circuit disregarded his reply brief; rather, it reflects the Fourth Circuit's determination that this Court's use of the term 'bulge' [during the suppression hearing to refer to the Officer's detection of an unidentified object in Scott's waistband] was not plain error and did not cause a fundamental miscarriage of justice").

Mr. Gorrell cannot claim that he did not have an opportunity to press his arguments below; he filed repeated motions—substantive and procedural—and, as the district court observed, he did an "admirable job of stating what he views as the factual, legal and equitable flaws in the Governor's plan." Memorandum Opinion at 13 n.10. He evidently has abandoned those "views" before this Court, however, and his failure to raise a substantive objection to how the district court resolved the merits of his claim requires that the district court judgment be affirmed.

B. The District Court Dismissed Mr. Gorrell's Complaint on the Merits, Not Because its Pendency Would Disrupt Preparations for the Upcoming Election Cycle.

Mr. Gorrell's second procedural argument—that the district court "ignored [the] timing of congressional redistricting," Informal Brief at 8—rests on the assumption

that the lower court had dismissed Mr. Gorrell's complaint on the grounds that it would cause "disruption of [the] upcoming election." *See id.* at 9. To this end, Mr. Gorrell seeks to distinguish *Simkins v. Gressette*, 631 F.2d 287 (4th Cir. 1980), and *Maryland Citizens for a Representative General Assembly*, 429 F.2d 606 (4th Cir. 1970), on the grounds that the plaintiffs in these prior redistricting cases delayed their challenges until the eve of the election cycle without "good reason for delay." Informal Brief at 9.

The Governor did argue below that the delay in service of Mr. Gorrell's complaint supported dismissal "on an alternate ground, namely, that the close proximity of the upcoming elections forecloses the grant of any equitable relief under [*Maryland Citizens* and *Simkins*]." Dist. Ct. Docket No. 13-1, at 7. The district court, however, did not rule on that basis. Rather, the lower court reached the merits of Mr. Gorrell's claims and concluded that they had no basis in the governing law. It is thus irrelevant that Mr. Gorrell may have a good reason for the delay in service, or that there is no basis (as he claims) for dismissing his complaint on the grounds that its pendency "would have resulted in great disruption in the election process in Maryland." *Simkins*, 631 F.2d at 295 (citing *Maryland Citizens*, 429 F.2d at 611).

C. That the District Court Failed to Give "Specific Instruction" to the U.S. Marshal's Office for "Delivering Summons" to the Governor is Irrelevant, Because the District Court Dismissed Mr. Gorrell's Claims on the Merits.

Mr. Gorrell's final contention on appeal—that "the district court failed to give specific instruction to the United States Marshals Service for delivering summons," Informal Brief at 10—fails for the same reason, namely, that the district court did not base its decision on the timeliness of Mr. Gorrell's complaint, but on its merits. As Mr. Gorrell describes in his brief, he was entitled as a litigant proceeding *in forma pauperis* to rely on the Marshal's Office for service and, in this instance, his complaint was, according to Mr. Gorrell, "stalled in the [Marshal's] Baltimore Office for 4.9 weeks." *Id.* at 11; *see also* Dist. Ct. Docket No. 4 (order granting Mr. Gorrell IFP status), Fed. R. Civ. P. 4(c)(3).

If the district court had dismissed his complaint on the grounds that the close proximity of the upcoming election foreclosed the grant of any equitable relief under *Maryland Citizens* and *Simkins*, Mr. Gorrell might well have grounds to complain. There is support for the proposition that a *pro se* plaintiff should not be penalized by the Marshal's delay in service. *See Robinson v. Clipse*, 602 F.3d 605, 608 (4th Cir. 2010) (holding that "the period of time before the district court authorized service by the Marshals Service does not count against Robinson for purposes of determining the limitation period"); *Graham v. Satkoski*, 51 F.3d 710, 713 (7th Cir.1995) (Because

litigants proceeding *in forma pauperis* must rely on the Marshal for service, "delays in service attributable to the Marshal automatically constitute 'good cause' preventing dismissal under Rule 4(m).").

The district court, however, did not rule on the basis of the untimeliness of Mr. Gorrell's complaint or its service. Rather, the lower court reached the merits of Mr. Gorrell's claims and concluded that they had no basis in the governing law. It is thus irrelevant that Mr. Gorrell may have a good reason for the delay in service, or that there is no basis (as he claims) for dismissing his complaint on the grounds that its pendency "would have resulted in great disruption in the election process in Maryland." *Simkins*, 631 F.2d at 295 (citing *Maryland Citizens*, 429 F.2d at 611).

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

/s/
ADAM D. SNYDER
DAN FRIEDMAN
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202

asnyder@oag.state.md.us
Tel: 410-576-6398
Fax: 410-576-7036

Attorneys for Appellee

Dated: April 23, 2012

CERTIFICATE OF SERVICE

I certify that on April 23, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy by first class mail, postage prepaid, at the address listed below:

Mr. Howard L. Gorrell
1620 Collins Road
Selah, Washington 98942

/s/
Adam D. Snyder
Assistant Attorney General