

**IN THE COURT OF APPEALS OF MARYLAND**

C. JAMES OLSON, et al.,

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Plaintiffs

\*

Vs.

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Case # Misc. 13

MARTIN O'MALLEY,

\*

Defendant

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**OPPOSITION TO MOTION TO DISMISS**

Come now the Plaintiffs, C. James Olson, et al., by and through their attorney C. Paul Smith, and in opposition to Defendant Governor Martin O'Malley's Motion to Dismiss state the following:

1. Defendant raises two basic arguments in support of his Motion to Dismiss. First, he argues that Article III, Section 5 of the State Constitution does not confer on the Court of Appeals original jurisdiction to review congressional redistricting. Second, in Defendant's footnote 2, he makes an implied *res judicata* argument, which seems to imply that Plaintiffs should be barred from challenging the congressional redistricting. Plaintiffs will address both of these arguments.

2. Article III, Section 5. The plain wording of the third paragraph of Article III, Section 5 gives the Court of Appeals "original jurisdiction to review the legislative districting of the State." This language broadly refers to all redistricting, and does not differentiate between congressional districting and redistricting for the State Senate and House of Delegates. The third paragraph reads as follows:

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

There is no question that original jurisdiction is conferred on the Court of Appeals with respect to State redistricting for State Senators and State Delegates. But Section 5 makes no specific mentioning of the State redistricting of congressional districts. The question then is: Does Section 5 confer on this Court original jurisdiction to hear a challenge of the State's redistricting of congressional districts?

3. The Defendant asserts that Section III applies only to redistricting for State Senators and State Delegates, and that this conferral of original jurisdiction does not extend to State redistricting of congressional districts. However, the language of Section 5 does not make this limitation. Defendant argues that because the first two paragraphs in Section 5 specifically address redistricting for State Senators and State Delegates, therefore the last paragraph of Section 5 cannot refer to redistricting for Representatives in Congress. Plaintiffs' disagree with this reasoning. It is important to note that the language of Section 5 does not exclude congressional redistricting plans from the application of original jurisdiction. Neither does any other Article of the Constitution address the Legislature's congressional redistricting duties and responsibilities and powers. Article III of the Maryland Constitution provides the basis for the Legislature to redraw congressional districts after each decennial census. Therefore, Article III is precisely the best place to put the provision conferring original jurisdiction on the Court of Appeals to exercise original jurisdiction over all redistricting plans passed by the Legislature, including State redistricting plans for congressional districts. The function of State legislative districting includes both congressional districting and districting for the State Senate and House. The plain language of paragraph three in Section 5 applies to all redistricting done by the Legislature, including congressional redistricting plans.

4. Defendant cited *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 678-84 (1974) as supportive of its limited view of the application of the third paragraph in Section 5. However, the Court's holding and discussion in that case did not address the issue before the Court in this case. In *State Administrative Board of Election Laws v. Calvert* the Court discussed some of the legislative history of the third paragraph of Article III, Section 5. But that discussion did not address whether the bestowal of original jurisdiction on the Court of Appeals applied to congressional redistricting; rather the focus of that discussion was on whether the original jurisdiction provided in paragraph 3 was "exclusive."

5. In addition, the same reasons to provide a fast track for final judicial review of State redistricting for State Senators and Delegates also apply to State redistricting for Representatives in Congress. The fact that Section 5 has been held to pertain to State redistricting issues does not mean that it cannot and does not apply to congressional redistricting matters.

6. Your Plaintiffs submit that Section 5 does apply to congressional redistricting matters, and that it is in the interest of judicial economy for this Court to interpret Section 5 in accordance with its plain language. Doing so will facilitate a prompt adjudication of a matter of important public concern and a matter that will likely not be resolved until the Court of Appeals is given an opportunity to address it. Therefore it is proper and appropriate for the Court of Appeals to take original jurisdiction in Plaintiffs' case .

7. Res Judicata. Although Defendant has not specifically asked for dismissal of Plaintiffs' complaint on the basis of *res judicata*, because Defendant did raise the issue in footnote 2, Plaintiffs will briefly address this argument.

8. In footnote 2 of Defendant's motion, a reference is made to a comment by Judge Titus in his concurring opinion that the arguments raised by Plaintiffs in their *Amici* brief in *Fletcher v.*

*Lamone* (decided on December 22, 2011) (2011 U.S. Dist. LEXIS 148004) “found no traction” with that three-judge panel. This refers to the fact that in their *Amici* brief in the *Fletcher* case, that these Plaintiffs argued that the U. S. District Court could exercise pendent jurisdiction and strike down the congressional redistricting based upon the violation of Maryland law, including violation of Section 1-201 of the Election Article. Although these Plaintiffs asked the federal Court to address the State issue, the three-judge panel made no mention of the issue; the panel neither acknowledged nor adjudicated this state law issue. Conversely, the three-judge panel did specifically address the Equal Protection Clause political gerrymandering issue that was one of the *Fletcher* plaintiffs’ issues, and which was addressed by these Plaintiffs in their *Amici* brief. Accordingly, these Plaintiffs are not pursuing the Equal Protection Clause political gerrymandering issue here. Plaintiffs’ gerrymandering complaint in this case asserts that the redistricting plan violates Maryland law—a totally different legal issue than the Equal Protection Clause issue that was decided in *Fletcher v. Lamone*.

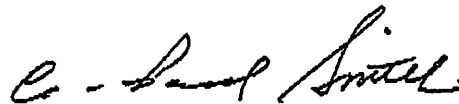
9. While Defendant does not specifically argue that *res judicata* should apply to preclude Plaintiffs from raising their state issues before this Court, the implication from Defendant’s footnote 2 is to raise the *res judicata* defense. However, *res judicata* does not apply here because Plaintiffs’ issues are different from the issues adjudicated in *Fletcher v. Lamone*.

10. The doctrine of *res judicata* bars a party from re-litigating a matter where the parties, the subject matter and the issues were previously adjudicated to a final judgment. See, e.g., *Mackall v Zayre Corp.*, 293 Md. 221, 443 A.2d 98, 102 (1982); *Nicholson v. Unsatisfied Claim & Judgment Fund*, 265 Md. 453, 290 A.2d 384, 386 (1972); and *Polansky v. Orlove*, 252 Md. 619, 251 A.2d 201, 204 (1969). *Res judicata* does not apply to Plaintiffs’ suit before this Court because the issues here are different from the issues involved in *Fletcher v. Lamone*. Thus,

while both cases involve the recent congressional redistricting, *Fletcher v. Lamone* did not address the question of whether the new redistricting plan violates Section 1-201 of the Election Article of the Maryland Code. Of course, these Plaintiffs were not a party to the *Fletcher* litigation, and therefore these Plaintiffs did not have the ability to control what issues the *Fletcher* plaintiffs raised in that case. Similarly, although Judge Titus made a reference to Article III, Section 4 of the Maryland Constitution in his concurring opinion in *Fletcher*, the *Fletcher* holding did not adjudicate the meaning and application of Article III, Section 4.

Accordingly, Defendant's Motion to Dismiss should be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this, the 7<sup>th</sup> day of January, 2012 that a copy of the foregoing Opposition to Motion to Dismiss was served by facsimile and by First Class mail to Dan Friedman, Esquire and Kathryn M. Rowe, Esquire, Assistant Attorneys General, 104 Legislative Services Building, 90 State Circle, Annapolis, MD 21401; and Steven M. Sullivan, Esquire and Adam D. Snyder, Esquire, Assistant Attorneys General, Civil Division, 200 St. Paul Place, 20<sup>th</sup> Floor, Baltimore, MD 21202.



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C. Paul Smith