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

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C. JAMES OLSON, *et al*.,

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Plaintiffs,

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v. Civil Action No: _____

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MARTIN O'MALLEY,

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Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY JUDGMENT, AND RESPONSE TO AMENDED MOTION FOR SUMMARY JUDGMENT

Plaintiffs' complaint should be dismissed or, in the alternative, summary judgment should be awarded to defendant, Martin O'Malley, Governor of Maryland, because the claims plaintiffs raise have no merit and have already been adjudicated and rejected by this Court in *Fletcher v. Lamone*, No. 11-3220, 2011 U.S. Dist. LEXIS 148004 (D. Md., Dec. 23, 2011).[1] This Court in *Fletcher* upheld Maryland's 2011 congressional

[1] Although plaintiffs filed their complaint in the Circuit Court for Anne Arundel County, *see* Exhibit 4, the State, by notice filed simultaneously with this Memorandum, removed the complaint to this Court on the grounds that it raises federal questions that have already once been ruled upon by this Court in the *Fletcher* litigation. A copy of the Court's opinion in *Fletcher* is attached hereto as Exhibit 1. On January 20, 2012, the *Fletcher* plaintiffs filed a notice of appeal to the U.S. Supreme Court, but limited their notice to the portions of the *Fletcher* decision relating to Maryland's adjustment of census figures to account for the home residence of Maryland's prison population. *See* Exhibit 23 (Notice of Appeal, No. 11-3220 (D. Md., Jan. 20, 2011) (appealing "from the portions of the Memorandum Opinion and Order with respect to Counts Three, Four and Six of the complaint"); *cf. Fletcher*, slip op. at 8-20, 2011 U.S. Dist. LEXIS 148004 *8-

redistricting plan against challenges under Article I, Section 2 of the U.S. Constitution and the Fourteenth Amendment—challenges that plaintiffs have conceded are "the same" as two of the three federal claims they raise here. The third federal claim plaintiffs raise here—a claim under Article IV, Section 4's "Guarantee Clause"—is justiciable in theory only and should be dismissed as a political question, just as this Court rejected a similar minimally justiciable partisan gerrymandering claim in *Fletcher*. Finally, plaintiffs' remaining State-law claims rest on provisions of Maryland law that do not apply to, and have no bearing on, congressional redistricting efforts.

Because plaintiffs' complaint fails to state a claim, it is insubstantial and is subject to dismissal by a single district judge under Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 2284. Dismissal is particularly appropriate here, where plaintiffs waited to serve their complaint until just *two weeks* before the deadline for candidates to register for the primary elections that are being held based on the newly drawn congressional lines, thereby risking "great disruption in the election process in Maryland." *See Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970). This Court should avoid unnecessary disruption of the Maryland electoral process and dismiss plaintiffs' complaint expeditiously.

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22 (resolving plaintiffs' claims under the "'No Representation Without Population Act' (Counts 3, 4, and 6)"). Thus, on the issues that this case and *Fletcher* have in common, the *Fletcher* decision is final.

STANDARD

Plaintiffs' complaint "challeng[es] the constitutionality of the apportionment of congressional districts" and is therefore subject to the provisions of 28 U.S.C. § 2284 relating to the creation of a three-judge district court to hear such claims. However, "a single district judge," rather than a three-judge court under 28 U.S.C. § 2284(a), "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 Md. 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). In its most recent opportunity to consider the proper application of the rules governing the appointment of the three-judge court, the Fourth Circuit expressly held that where a plaintiff's "pleadings do not state a claim" upon which relief may be granted within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure, "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Duckworth*, 332 F.3d at 772-73 (citing *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980); *see also Fletcher*, No. 11-3220, slip op. at 7, 2011 U.S. Dist. LEXIS 148004 *7 (three-judge court concluding that there is "no material distinction" between the "insubstantiality" standard and the Rule 12(b)(6)

standard); *see also Gorrell v. O'Malley*, No. 11-2975, slip. op. at 5-6, 2012 U.S. Dist. LEXIS 6178 *5-6 (D. Md. Jan. 19, 2012) (complaint dismissed by single judge) (a copy of *Gorrell* is attached hereto as Exhibit 3).

Under this controlling Fourth Circuit precedent, the single district court judge is called upon to test 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, 129 S. Ct. 1937, 1949 (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*, 129 S. Ct. at 1949. 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."'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). In applying this standard, 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." *Iqbal*, 129 S. Ct. at 1949-50.

In addition to determining whether a complaint is insubstantial due to the claims' "lack of substantive merit," a single district judge may also deem a complaint to be insubstantial "because of the absence of federal jurisdiction" or "because injunctive relief is otherwise unavailable." *Simkins*, 631 F.2d at 290; *see id*. at 295-96 (affirming the

single district judge's dismissal of a redistricting challenge based on both the claims' lack of substantive merit and the inability to grant the requested injunctive relief without disrupting an impending election). Thus, a district judge's decision not to convene a three-judge panel has been affirmed where "[t]he maintenance of such a suit at that time . . . 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).

This Court should dismiss this case without convening a three-judge court because plaintiffs' claims are insubstantial and without merit. Even if all properly pled allegations of fact are assumed to be true, plaintiffs' most recent complaint does not state a plausible claim for relief under any provision of the U.S. Constitution or applicable statute. Because plaintiffs' motion for summary judgment and the affidavits attached thereto do not change that fact, this Court should dismiss the complaint or, in the alternative, render summary judgment for the State.[2]

FACTS

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*, slip op. at 4-5, 2011 U.S. Dist. LEXIS 148004 *4-5. It was signed into law as an emergency bill by the Governor on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. *Fletcher*, slip op. at 5, 2011 U.S. Dist. LEXIS 148004 *5.

[2] Attached to this Memorandum is a list of the exhibits referred to herein. Because there have been many complaints and motions filed in these various related matters, the filings to which defendant is here responding are set forth in bold font.

The State 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. *Fletcher*, slip op. at 11, 2011 U.S. Dist. LEXIS 148004 *11. Like the redistricting plan passed after the 2000 census, the State Plan creates two majority African-American congressional districts. *Id*., slip op. at 5, 2011 U.S. Dist. LEXIS 148004 *5. 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*., slip op. at 35, 2011 U.S. Dist. LEXIS 148004 *39.

This is not the first opportunity that this Court has had to consider challenges to Maryland's 2011 congressional redistricting. Approximately one month ago, the Court upheld the constitutionality of State Plan against challenges to the State Plan on the grounds of population inequality in violation of Article I, § 2 of the U.S. Constitution, violation of § 2 of the Voting Rights Act, and racial and political gerrymandering in violation of the Fourteenth Amendment to the U.S. Constitution. *See generally Fletcher*, 2011 U.S. Dist. LEXIS 148004.

Plaintiffs were closely involved in the *Fletcher* litigation. Although they originally filed their complaint in the Circuit Court for Anne Arundel County (and a nearly identical one in the Maryland Court of Appeals) on November 22, 2011, *see* Exhibits 4, 14, they delayed service of the complaints and instead sought to intervene in

Fletcher. In connection with their motion to intervene, plaintiffs filed a proposed complaint-in-intervention raising the same claims they raised in their State-court complaints cases, and claiming further 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. Exhibit 19 at ¶18 (Complaint, Attachment A to Motion to Intervene, *Fletcher*, No. 11-3220 (ECF Doc. 22-1)). In their motion to intervene, plaintiffs here represented to the *Fletcher* Court that "[t]he subject matter and claims of interest of Petitioners are inextricably related to the claims and interests and subject matter of Plaintiffs' claims" and that "[s]ome of the legal issues pertaining to [the Olson intervenors'] claims are the same as those of the original [*Fletcher*] Plaintiffs. . . ." Exhibit 18 at 2 (Motion to Intervene, *Fletcher*, No. 11-3220 (ECF Doc. 22)).

The three-judge court denied the motion to intervene the day it was filed. Exhibit 2 (Memorandum Opinion, *Fletcher v. Lamone*, No. 11-3220, 2011 U.S. Dist. LEXIS 139306 (Dec. 2, 2011)). The Court denied intervention as of right on the grounds that plaintiffs raised federal claims that were the "same" as the *Fletcher* plaintiffs and had not met their burden of showing that the *Fletcher* plaintiffs would not adequately represent their interests, as is required when the potential intervenors share the "same ultimate objective as a party to the suit," in this case that "Maryland's congressional boundaries must be redrawn to comply with state and federal law." *Id*., slip op. at 3, 2011 U.S. Dist. LEXIS 139306 *6. The Court denied permissive intervention because of the "undue

delay that it is likely to cause in this case." *Id*., slip op. at 4, 2011 U.S. Dist. LEXIS 139306 *7.

Although this Court denied plaintiffs intervention in *Fletcher*, it granted them leave to file an *amicus* brief, which they did on December 7, 2011. In their brief, plaintiffs made arguments based on the same claims set forth in the removed complaint, namely, that the 2011 Maryland redistricting plan violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and Article IV, § 4 and Article I, § 2 of the U.S. Constitution, and two Maryland State-law requirements (*e.g.*, Section 1-201 of the Election Article and Article III, § 4 of the Maryland Constitution). *See* Exhibit 22 at 3 (Brief of C. James Olson, C. Paul Smith, Ronald George, Carl F. Middledorf, Antonio Wade Campbell and Philip J. Smith as *Amici Curiae*, *Fletcher v. Lamone*, No. 11-3220 (ECF Doc. 42)). With respect to their State-law claims, plaintiffs argued that "[a] fair interpretation of [Article III,] Section 4 [of the Maryland Constitution] is that the principles required to make a proper state election district"—*i.e.*, compactness and due regard to the boundaries of political subdivisions—"should also apply to congressional election districts." *Id*. at 26.

The decision on the merits in *Fletcher v. Lamone* upheld the State Plan on all constitutional and statutory grounds. *Fletcher*, slip op. at 38, 2011 U.S. Dist. LEXIS 148004 *42. Although the three-judge court did not directly address the claim that the U.S. Constitution requires compactness and due regard for political subdivision boundaries, it expressly stated that "[t]he Constitution does not mandate regularity of

district shape." *Id.*, slip. op. at 34, 2011 U.S. Dist. LEXIS 148004 *38 (internal quotation omitted). With respect to plaintiffs' State-law claims, the Court evidently did not believe that the Maryland constitutional provisions relating to compactness and due regard were applicable to congressional redistricting, as it found that the districts had "unusually odd" shapes, *id*, slip. op. at 34, 2011 U.S. Dist. LEXIS 148004 *37, and yet did not find them invalid.

Judge Titus put a finer point on it in his concurring opinion. Judge Titus concurred with the majority opinion despite his obvious distaste for the irregular shapes of the congressional districts in the State Plan, and despite the fact that the Olson plaintiffs had proposed the compactness, contiguity, and political subdivision standards set forth in Article III, §4 of the Maryland Constitution as grounds for rejecting odd-shaped districts. Judge Titus explained, however, that the redistricting criteria contained in Article III, § 4 "pertain[] to reapportionment of the *state* legislature," not Congress, and therefore "were not applied in this case." *Id*. at 45, 2011 U.S. Dist. LEXIS 148004 *50 (emphasis added).

Just five days after this Court had rejected their arguments, plaintiffs, on December 28, 2011, proceeded to serve the complaints they had earlier filed in the Circuit Court for Anne Arundel County and the Maryland Court of Appeals. *See* Exhibit 13 (Affidavit of Service). The two complaints are essentially identical, and assert that six of the eight districts in the State Plan are invalid on the ground they are not compact and do not give due regard to political subdivision boundaries. *Compare* Exhibit 4 *with*

Exhibit 14. Plaintiffs claim that these requirements are imposed by Article IV, § 4 of the U.S. Constitution (Exhibit 4, ¶17 (Complaint for Declaratory Judgment and Other Relief With Respect to the Redistricting of the Maryland Congressional Districts (filed Nov. 22, 2011)), by the Equal Protection and Due Process clauses of the Fourteenth Amendment to the U.S. Constitution, *id*. at ¶17), by Article III, § 4 of the Maryland Constitution (*id*. at ¶¶ 15-16), and by various provisions of the elections laws of Maryland. *See* Exhibit 10 at 10-12 (Memorandum in Support of Plaintiffs' Amended Motion for Summary Judgment, *Olson v. O'Malley*, No. 02-C-11-165635 (Cir. Ct. Anne Arundel Cty., Dec. 29, 2011)).[3]

After filing their complaints, plaintiffs moved for summary judgment on all of their claims, *see* Exhibit 6 at 2-3, Exhibit 7, but later amended their motion to limit its reach to their claims under the Fourteenth Amendment and "Maryland Election laws." Exhibit 9 at 2 (Plaintiffs' Amended Motion for Summary Judgment, *Olson v. O'Malley*, No. 02-C-11-165635 (Cir. Ct. Anne Arundel Cty., Dec. 29, 2011)). In support of their amended motion, plaintiffs attached the affidavit of Del. Ronald George in which Del. George recounts newspaper articles and conversations he had with democratic members of the Maryland House of Delegates at his "place of business" and on the street in Annapolis. These conversations, Del. George avers, show that the intent behind the 2011 State Plan was to accomplish "partisan purposes at the expense of respecting county boundaries and district compactness." Exhibit 12 at 2-3 (Affidavit of Ronald George).

[3] Plaintiffs appear to have abandoned their claim, raised before this Court in the *Fletcher* litigation, that the State Plan violates Article I, § 2 of the U.S. Constitution. The removed complaint does not include a claim under Article I, § 2. *See* Exhibit 4 (Removed Complaint).

ARGUMENT

Plaintiffs' federal and State claims center on an alleged lack of compactness and due regard for political subdivisions in the six districts they challenge. Assuming that their factual claims regarding the features of these districts are true, they nevertheless have failed to state a claim. The federal constitutional provisions upon which they rely either do not require that congressional districts be drawn with compactness, contiguity, and respect to political subdivision boundaries or, in the case of Article IV, § 4, raise non-justiciable political questions. Likewise, the State constitutional claims fail to state a claim because, by their own terms, they do not apply to congressional redistricting. Nothing in Del. George's affidavit changes that legal landscape and, accordingly, all of plaintiffs' claims should be dismissed or, in the alternative, summary judgment awarded to the State.

I. ARTICLE IV, § 4 AND THE FOURTEENTH AMENDMENT DO NOT REQUIRE THAT CONGRESSIONAL DISTRICTS BE DRAWN WITH COMPACTNESS, CONTIGUITY, AND DUE REGARD FOR POLITICAL SUBDIVISIONS.

Plaintiffs' federal claims rest on the fundamental misconception that Article IV, § 4, and the Fourteenth Amendment "require the State of Maryland to establish congressional districts which are compact and contiguous and which give due regard to political subdivision boundaries." Exhibit 4, ¶17. Plaintiffs cite no case law that actually supports this proposition and none exists because neither Article IV, § 4 nor the Fourteenth Amendment has ever been interpreted to place limitations on the shape or formation of congressional districts.

A. The Supreme Court Has Already Held that the Fourteenth Amendment Does Not Require Compactness, Contiguity, and Due Regard for the Boundaries of Political Subdivisions.

The Supreme Court has expressly rejected the plaintiffs' argument that the Fourteenth Amendment requires that congressional districts be compact, contiguous, and reflect due regard for political subdivision boundaries. In *Shaw v. Reno*, the Court made clear that, although there is much discussion of compactness and contiguity in the context of racial gerrymandering cases, that did not mean that "they 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*., 509 U.S. 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"); 677 (Stevens, J., dissenting) (stating that "[t]here is no independent constitutional requirement of compactness or contiguity"), *and see 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).[4]

[4] Although *Shaw* makes clear that a lack of compactness or contiguity can serve as evidence to support claims of racial or partisan gerrymandering, this Court in *Fletcher* has already upheld the constitutionality of the 2011 State Plan against such claims, *see Fletcher*, No. 11-3220, slip op. at 29-38, 2011 U.S. Dist. LEXIS 148004 *32-42. And while plaintiffs include with their amended motion for summary judgment Del. George's hearsay affidavit concluding that the State Plan was motivated by "partisan purposes,"

Plaintiffs do not discuss or even cite *Shaw v. Reno* anywhere in their complaint or summary judgment papers. Instead, they attempt to establish the constitutional requirement that *Shaw v. Reno* specifically denied through a chain of logic beginning with the statement in *Bush v. Gore*, 531 U.S. 98 (2000), that voting rights are "fundamental rights" and ending with *Gray v. Sanders*, 372 U.S. 368 (1963), and its recognition that states may use compactness, contiguity, and political subdivisions to justify some deviation from the principle that congressional districts be drawn with "equal population." *See* Memorandum in Support of Plaintiffs' Amended Motion for Summary Judgment at 8-10. If "the principles of compactness, contiguity, and the honoring of political subdivision boundaries is 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," *id*. at 10—the argument goes—it must be that the "disregard of the[se] principles" violates "fundamental Constitutional voting rights." *Id.* at 13. For plaintiffs, the logic is simple: "Only a fundamental voting right could have the power to diminish and modify another fundamental voting right." *Id*. at 16.

Exhibit 12 at 2-3, plaintiffs' complaint does not include a partisan gerrymandering claim. Such a claim would fail in any event, as this Court and the Supreme Court have both made clear that there are "no judicially discernible and manageable standards for adjudicating political gerrymandering claims." *Fletcher*, slip op. at 37, 2011 U.S. Dist. LEXIS 148004 *41 (quoting *Vieth v. Jubilirer*, 541 U.S. 267, 281 (2004) (plurality opinion of Scalia, J.); *see id*. at 307–08 (Kennedy, J., concurring); *see also LULAC*, 548 U.S. 447 (op. of the Court by Kennedy, J.) (finding no "reliable measure of impermissible partisan effect")).

The equally simple response to this argument is, of course, that *Shaw v. Reno* forecloses it, as multiple lower courts—including this one—have observed. *See, e.g.*, *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 778 (4th Cir. 2003) (quoting *Shaw v. Reno*); *Shaw v. Hunt*, 861 F. Supp. 408, 450 (E.D.N.C. 1994) (observing that, in *Shaw v. Reno*, "all nine members of the Court expressly reaffirmed 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"); *Gorrell v. O'Malley*, No. 11-2975, slip. op. at 8-9, 2012 U.S. Dist. LEXIS 6178 *9-10 ("As with contiguity, compactness, and respect for political subdivisions, preservation of communities of interest is one of the 'principles of apportionment . . . [that are] important not because they are constitutionally required—they are not. . . .'"); *In re Legislative Districting*, 370 Md. 312, 353 n.28 (2002) ("The United States Constitution does not contain specific contiguity, compactness, or due regard for political subdivision boundaries requirements.").

But even if that were not the case, the fact that Supreme Court jurisprudence *allows* states to justify some deviation from equal population to achieve compact and contiguous districts or accommodate political subdivision boundaries does not mean that states are constitutionally *required* to do so. Indeed, the Court does not allow such deviations as a matter of constitutional right; to the contrary, "[t]he State must . . . show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Karcher v. Daggett*, 462 U.S.

725, 741 (1983). Compactness, contiguity, and accommodating political subdivisions is an option for states, not a constitutional mandate.

The State Plan maintains much of the compactness, contiguity, and respect for political boundaries reflected in the 2002 districts, and does so while accounting for the population changes over the last decade that rendered the 2002 plan out of compliance with the equal population requirement of the "one person/one vote" principle. That Maryland chose to accomplish equal population without attempting to make the showing allowed by *Karcher* does not mean that the Plan violates the Fourteenth Amendment, as *Shaw v. Reno* makes clear.

B. Plaintiffs' Claims Under the Guarantee Clause of Article IV, § 4 of the U.S. Constitution Raise Non-Justiciable Political Questions.

Nor does Article IV, § 4 of the U.S. Constitution impose any requirements with respect to the drawing of congressional districts. Known as the "Guarantee Clause," the relevant portion of Article IV, § 4 states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government. . . ." In most of the cases in which the Supreme Court has been asked to apply the Guarantee Clause, it "has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992) (citing "*City of Rome v. United States*, 446 U. S. 156, 182, n.17 (1980) (challenge to the preclearance requirements of the Voting Rights Act); *Baker v. Carr*, 369 U. S. 186, 218-29 (1962) (challenge to apportionment of state legislative districts); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118,

140-51 (1912) (challenge to initiative and referendum provisions of state constitution)"). While the Supreme Court "has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," *New York*, 505 U.S. at 185 (citing *Reynolds v. Sims*, 377 U. S. 533, 582 (1964)), the Court has "yet to identify any such claims," *United States v. Vazquez*, 145 F.3d 74, 83 (2d Cir. 1998), and no case has held that the Guarantee Clause imposes requirements on the states for congressional redistricting. There is simply no legal basis for this claim.

II. PLAINTIFFS' STATE-LAW CLAIMS REST ON PROVISIONS OF THE MARYLAND CONSTITUTION AND MARYLAND ELECTION LAW THAT DO NOT APPLY TO CONGRESSIONAL REDISTRICTING.

A. The Provisions of Article III of the Maryland Constitution Relating to Compactness and Due Regard for Political Subdivisions Apply to the Redistricting of the State Legislature, Not Congressional Redistricting.

Plaintiff's contentions that Article III, § 4 of the Maryland Constitution governs congressional redistricting, like their arguments about contiguity and compactness, are directly foreclosed by existing authorities. Article III, § 4 provides that "[e]ach *legislative district* shall consist of adjoining territory, be compact in form, and of substantially equal population" and give "[d]ue regard . . . to natural boundaries and the boundaries of political subdivisions." (Emphasis added). Although plaintiffs are correct that § 4 does not specifically say that the term "legislative district" does not include "congressional district," its placement between §§ 3 and 5 makes that abundantly clear. Article III, § 3 relates to the division of the State "into legislative districts for the election of members of the *Senate and the House of Delegates*" (emphasis added); it makes no

mention whatsoever of congressional districts and clearly equates the term "legislative district" with the elections of State legislators. Article III, § 5 similarly requires the Governor to "prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the *Senate and the House of Delegates*," (emphasis added). Within this context, there can be no reasonable doubt that the term "legislative district" in § 4 means the districts drawn for the election of members of the State Legislature, not Congress.

The legislative history leading up to the enactment of Article III, §§ 3 through 5 supports what is clear from the plain language of the provisions, namely, that they apply to state legislative redistricting, not congressional redistricting. All three provisions are based on § 3.04 of the proposed Constitution of 1968, while a separate provision of the proposed constitution, § 3.07, would have governed congressional redistricting, had the proposal been enacted. *See In re Legislative Redistricting*, 370 Md. at 320; *State Administrative Board of Election Laws v. Calvert*, 272 Md. 659, 679, 683 (1974). But the proposed Constitution was rejected by the voters in the election of 1968, with the result that individual proposals of the Constitutional Convention had to find their way into the Maryland Constitution in piecemeal fashion. *Calvert*, 272 Md. at 682-83. The provisions of Article III, §§ 3 through 5 did so, having been adopted by the voters in 1970 and 1972. The congressional provisions, by contrast, were never separately proposed for adoption as an amendment to the current Constitution. The legislative

history thus corroborates what is plain from the structure of Article III, §§ 3-5: they apply to *state* legislative redistricting, not congressional redistricting.

Case law confirms this conclusion. This Court in *Duckworth v. State Admin. Bd. of Election Laws* stated expressly that the requirements of Art. III, § 4, of the Maryland Constitution "apply to reapportionment of districts for the Maryland General Assembly" and that "Maryland law does not require that those criteria be used in Congressional redistricting." 213 F. Supp. 2d 543, 552 n.1 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003). Just as plaintiffs ignore *Shaw v. Reno* in their analysis of federal law, they ignore *Duckworth* completely, declining even to acknowledge it as contrary authority. And yet, as plaintiffs are well aware, this Court recently reaffirmed its statement in *Duckworth* in response to plaintiffs making these very same arguments as *amici curiae* in *Fletcher*. Although Judge Niemeyer's decision for the three-judge court does not address the argument directly, its holding that Maryland's 2011 congressional redistricting passed constitutional muster despite "unusually odd" shapes, *Fletcher*, slip. op. at 34, 2011 U.S. Dist. LEXIS 148004 *37, is at least an implicit rejection of plaintiffs' argument compactness and contiguity are requirements of both federal and State constitutional law. Judge Titus, though, made the rejection express, stating in his concurrence that the redistricting criteria "contained in Maryland's Constitution in Article III, Section 4, pertain[] to reapportionment of the *state* legislature" and "were not applied in this case." *Id*., slip op. at 45, 2011 U.S. Dist. LEXIS 148004 *50 (emphasis added). This Court came to the same conclusion in *Gorrell v. O'Malley*, No. 11-2975 slip. op. at 12, 2012

U.S. Dist. LEXIS 6178 *14, where it found "no authority" for applying Article III, § 5 to congressional redistricting.

The Maryland Court of Appeals too has rejected the proposition that Article III, § 4 applies to congressional redistricting. Plaintiffs concede that *In re Legislative Districting of the State* "endorses the view" that § 4 "has no applicability to the congressional districts," but they dismiss that endorsement as "dicta." Exhibit 10 at 14. They cannot, however, dismiss the Maryland high court's more recent ruling on point, which was issued earlier this month *in this very case*. On January 10, 2012, the Maryland Court dismissed the State-court complaint plaintiffs had filed with it, declining to hear the same State-law claims plaintiffs make here. The Court declined to hear the case despite the fact that, if plaintiffs were correct that congressional redistricting qualifies as "legislative districting," the matter would have been subject to its original jurisdiction. *See* Exhibit 17 (Order, *Olson v. O'Malley*, Misc. No. 13, Sept. Term 2011 (Md., Jan. 10, 2012); *see also* MD. CONST. art. III, § 5 (stating that "the Court of Appeals shall have original jurisdiction to review the legislative districting of the State"); Exhibit 16 at 1-2 (Opposition to Motion to Dismiss, *Olson v. O'Malley*, Misc. No. 13, Sept. Term 2011 (filed Jan. 9, 2012) (arguing that the phrase "legislative redistricting" in Art. III, § 5 "applies to all redistricting done by the Legislature, including congressional redistricting plans"). Thus, the Court of Appeals of Maryland has, by clear implication, held that the phrase "legislative districting" means *state* legislative redistricting and does not include congressional redistricting. In sum, there is no basis for applying the compactness,

contiguity, and political subdivision requirements interpreting of Article III, § 4 to the congressional redistricting plaintiffs challenge here.

B. Maryland Election Law Statutes Apply to the Conduct of Elections, Not Redistricting.

Nor is there any merit to plaintiffs' argument that the provisions of the Maryland code relating to Election Law have any bearing on redistricting, much less the specific requirements relating to compactness of districts and their relation to political subdivision boundaries which plaintiffs purport to find there. Section 1-201 of the Election Law Article presents the general goals with respect to the "conduct of elections"; it does not touch upon redistricting at all. Section 1-201(3), on which plaintiffs particularly rely, requires that "those who administer elections . . . put the public interest ahead of partisan interests." As its language suggests, this provision governs the various boards of elections and election officials who "administer elections"; it does not relate to the drawing of districts or provide any particular guidelines with respect to the compactness or contiguity of such districts or the weight given to political subdivisions in drawing them.

Furthermore, even if § 1-201 of the Election Law Article did relate to redistricting—and *congressional* redistricting at that—it would still have no bearing on the State Plan, which is itself a law enacted by the General Assembly. State legislation cannot be rendered invalid by reason of inconsistency with a previously adopted, more general law. *Mamsi Life & Health Ins. Co. v. Kuei-I Wu*, 411 Md. 166, 184-85 (2009) (citing *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 40 (1983) ("Ordinarily, a specific

enactment prevails over an incompatible general enactment in the same or another statute."); *Carroll County Education Association, Inc. v. Board of Education of Carroll County*, 294 Md. 144, 152 (1982) ("to the extent the provisions of the two statutes are irreconcilable, the later statute governs."). As with their federal claims, plaintiffs' State-law claims have no merit and must be dismissed.

III. INSUBSTANTIALITY CAN ALSO BE SHOWN IN THIS CASE BECAUSE MAINTAINING THIS SUIT WILL CAUSE GREAT DISRUPTION IN THE UPCOMING ELECTION.

The complaint can be dismissed as insubstantial on an alternate ground, namely, that the close proximity of the upcoming elections forecloses the grant of any equitable relief under *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d at 611, and *Simkins v. Gressette*, 631 F.2d at 290. The State's Plan was enacted during a special session of the General Assembly and signed into law as an emergency measure on October 20, 2011, less than three months before the deadline for candidates to register for the April 3, 2012 primary election. Md. Code Ann., Election Law § 8-201(a)(2)(ii). Early voting begins on March 24, 2012, just nine weeks from now.

More importantly, the State must mail absentee ballots to absent uniformed services and overseas voters by Friday, February 17, 2012, a mere 4 weeks away. 42 U.S.C. § 1973ff-1(a)(8). This Court has previously recognized that "[v]oting by absentee ballot provides these men and women with their only meaningful opportunity to vote in state and federal elections while they are deployed." *Doe v. Walker*, 746 F. Supp. 2d 667,

679 (D. Md. 2010). Thus, any delay that does not give military personnel deployed overseas sufficient time to receive, fill out, and return their absentee ballots "imposes a severe burden on absent uniformed services and overseas voters' fundamental right to vote." *Id*. at 680.

In addition to the potential burden it places on overseas military personnel, this suit imposes a real burden on the State and local boards of election, which must configure new precincts, assign new polling places, prepare and print ballots, and program voting machines in time to meet these deadlines. *See generally* Exhibit 21 (Declaration of Donna J. Duncan (*Fletcher v. Lamone*, ECF Doc. 33-7; filed Dec. 2, 2011)); *see also Simkins*, 631 F.2d at 295 (citing *Maryland Citizens*, 429 F.2d at 611). That process is already well underway, with candidates already having registered under the newly drawn congressional districts on or before January 11, 2012. *See* Md. Code Ann., Election Law § 5-303(a)(2)(providing that candidates must file a certificate of candidacy "not later than 9 p.m. on the Wednesday that is 83 days before the day on which the primary election will be held," which comes to January, 11, 2012); *see also* Exhibit 21. By now, candidates have already filed and are campaigning based on the districts approved by this Court in *Fletcher*.

Dismissal is, thus, appropriate here, where plaintiffs waited to serve their complaint until just *two weeks* before the deadline for candidates to register for the primary elections that are being held based on the newly drawn congressional lines. Plaintiffs' delay in the adjudication of their claims risks "great disruption in the election

process in Maryland," just as it did in *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, some forty years ago. 429 F.2d at 611. This Court should avoid the unnecessary disruption of the Maryland electoral process and dismiss plaintiffs' complaint expeditiously, particularly when they have already once had the opportunity in *Fletcher* to raise and argue the very same claims they raise here.

CONCLUSION

For the reasons set forth above, plaintiffs' removed complaint should be dismissed or, in the alternative, summary judgment granted for the State.

Respectfully submitted,

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Dated: January 24, 2012

EXHIBIT LIST

Federal Court Decisions

Exhibit 1: *Fletcher v. Lamone*, No. 11-3220, 2011 U.S. Dist. LEXIS 148004 (D. Md., Dec. 23, 2011)

Exhibit 2: Memorandum Opinion, *Fletcher v. Lamone*, No. 11-3220, 2011 U.S. Dist. LEXIS 139306 (Dec. 2, 2011)

Exhibit 3: *Gorrell v. O'Malley*, No. 11-2975, 2012 U.S. Dist. LEXIS 6178 (D. Md. Jan. 19, 2012)

Circuit Court for Anne Arundel County (*Olson v. O'Malley*, No. 02-C-11-165635)

Exhibit 4: Complaint for Declaratory Judgment and Other Relief With Respect to the Redistricting of the Maryland Congressional Districts (filed Nov. 22, 2011)

Exhibit 5: Affidavit of C. Paul Smith (Nov. 21, 2011)

Exhibit 6: Plaintiffs' Motion for Summary Judgment (filed Nov. 22, 2011)

Exhibit 7: Memorandum in Support of Plaintiffs' Motion for Summary Judgment (filed Nov. 22, 2011)

Exhibit 8: Writ of Summons (issued Dec. 2, 2011)

Exhibit 9: Plaintiffs' Amended Motion for Summary Judgment (filed Dec. 29, 2011)

Exhibit 10: Memorandum in Support of Plaintiffs' Amended Motion for Summary Judgment (filed Dec. 29, 2011)

Exhibit 11: Affidavit of C. Paul Smith (filed Dec. 29, 2011)

Exhibit 12: Affidavit of Ronald George (filed Dec. 29, 2011)

Exhibit 13: Affidavit of Service (filed Dec. 29, 2011)

Maryland Court of Appeals (*Olson v. O'Malley*, Misc. No. 13, Sept. Term 2011

Exhibit 14: Complaint for Declaratory Judgment and Other Relief With Respect to the Redistricting of the Maryland Congressional Districts (filed on or about Nov. 22, 2011)

Exhibit 15: Affidavit of Service (Dec. 28, 2011)

Exhibit 16: Opposition to Motion to Dismiss (filed Jan. 9, 2012)

Exhibit 17: Order (filed Jan. 10, 2012)

Fletcher v. Lamone, No. 11-3220 (D. Md.)

Exhibit 18: Motion to Intervene (ECF Doc. 22, filed Dec. 1, 2011)

Exhibit 19: Complaint, Attachment A to Motion to Intervene (ECF Doc. 22-1, filed Dec. 1, 2011)

Exhibit 20: Memorandum in Support of Motion to Intervene (ECF Doc. 22-3, filed Dec. 1, 2011)

Exhibit 21: Declaration of Donna J. Duncan (ECF Doc. 33-7, filed Dec. 2, 2011)

Exhibit 22: Brief of C. James Olson, C. Paul Smith, Ronald George, Carl F. Middledorf, Antonio Wade Campbell and Philip J. Smith as *Amici Curiae* (ECF Doc. 42, filed Dec. 7, 2011)

Exhibit 23: Notice of Appeal (ECF Doc. 60, filed Jan. 20, 2012)