IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NEIL PARROTT, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action 1:15-cv-01849-GLR
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND OPPOSITION TO CONVENING A THREE-JUDGE COURT

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INTRODUCTION

More than three years ago, this Court upheld the constitutionality of Maryland's 2011 congressional districting plan against claims that it was an impermissible racial or partisan gerrymander, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012), and that it improperly failed to adhere to certain "traditional" redistricting principles. *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012). More recently, in *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd*, *Benisek v. Mack*, 584 Fed. App'x 140 (2014), *cert. granted sub nom.*, *Shapiro v. Mack*, No. 14-990, 135 S. Ct. 2805 (June 8, 2015), this Court dismissed a similar challenge to four of

the congressional districts created under the plan based on the shapes and demographics of the districts and on the characteristics of the "discrete segments" each allegedly contained.

The plaintiffs in the present action seek to enjoin the use of the now-established districts for reasons that are substantially the same as those repeatedly rejected by the courts, both as to the specific plan at issue and as to congressional districting in general. Moreover, even if the plaintiffs' claims were otherwise justiciable, which they plainly are not, the plaintiffs have failed to allege facts necessary to establish their standing to bring claims on behalf of all voters. Similarly, the plaintiffs have failed to allege facts that, if true, would show that the districting plan has a discriminatory effect on a cohesive political group, which is necessary to state a claim for political gerrymandering.[1] The plaintiffs' due process claim, like plaintiffs' Article I, § 2 claim, is foreclosed by prior decisions of the Supreme Court. Because the plaintiffs' claims are insubstantial by any standard, their complaint should be dismissed without convening a three-judge district court. *See, e.g.*, *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (finding a claim "insubstantial" where "its unsoundness so clearly results from the previous decisions of this court as to foreclose the

[1] "The term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Vieth v. Jubilirer*, 541 U.S. 267, 271 n.1 (2004) (quoting *Black's Law Dictionary* 696 (7th ed. 1999)). The essence of any gerrymandering claim is thus the contention that complainants are members of a cohesive political group that has suffered unlawful discrimination. The class of "all voters" obviously cannot be regarded as a cohesive political group, except perhaps in certain foreign states with totalitarian governments.

subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy" (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933)). Finally, the plaintiffs' inexcusable, nearly four-year delay in bringing this suit—and the prejudice such delay would create for voters, potential candidates, and the State of Maryland—justifies dismissal on the additional ground of laches.

STATEMENT OF FACTS

The State Plan for Congressional Redistricting

Maryland's State Plan for Congressional Redistricting ("State Plan") was adopted in a special session of the General Assembly held October 17 through October 20, 2011. *Fletcher*, 831 F. Supp. 2d at 891. It was passed as an emergency bill and thus went into effect upon the Governor's signature on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. *Id*. Voters approved the congressional districting plan by an affirmative vote of 64%-to-36% in a statewide referendum held at the 2012 general elections.[2]

The State Plan creates eight congressional districts that are as equal in population as is mathematically possible, with seven of the eight districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. *Id*. at 894.

[2] The official referendum election results for the ballot question regarding the districting plan (Question 5) are available at http://elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html.

Like the districting plan passed after the 2000 census, the State Plan creates two majority African-American congressional districts. *Id*. at 891. The districts are drawn to protect the cores of existing districts, and some of the districts have not changed substantially since the last redistricting, indicating "that incumbent protection and a desire to maintain constituent relationships might be the main reasons they take their present forms." *Id*. at 903.

Prior Litigation Regarding the State Plan

On December 23, 2011, a three-judge court upheld the constitutionality of the State Plan against challenges alleging (a) population inequality in violation of Article I, § 2 of the United States Constitution, (b) violation of § 2 of the Voting Rights Act, and (c) racial and political gerrymandering in violation of the Fourteenth Amendment to the Constitution. *Fletcher*, 831 F. Supp. 2d 887. The decision of the three-judge court was summarily affirmed by the Supreme Court on June 25, 2012. *Fletcher*, 133 S. Ct. 29. In January 2012, approximately one month after the three-judge district court's decision in *Fletcher*, Judge Quarles dismissed a separate challenge to the congressional redistricting plan that alleged, among other things, that the State Plan did not preserve agricultural "communities of interest" and thus diluted farm votes. *Gorrell*, 2012 WL 226919, at *3-4. In that opinion, this Court observed that while certain considerations—contiguity, compactness, preserving communities of interest, and respect for political subdivisions—may be legitimate considerations in congressional redistricting, they are not

constitutionally required. *Id*. Therefore, the Court determined, Gorrell's allegation that the plan did not preserve "communities of interest" stated no constitutional violation. *Id*. at *4.

A third set of plaintiffs claimed that Maryland's plan of congressional redistricting failed to comply with the requirements of compactness, contiguity, and "due regard" for natural and political boundaries found in Article III, § 4 of the Maryland Constitution. *Olson*, 2012 WL 764421, at *3-4. This Court rejected that challenge, finding the state constitutional standards inapplicable to congressional redistricting. *Id*.

In 2014, this Court again dismissed a political gerrymandering challenge to four of the plan's eight congressional districts. *Benisek*, 11 F. Supp. 3d 516. In that lawsuit, the plaintiffs objected to the combination of geographically and demographically distinct "segments" by means of "narrow orifices or ribbons" to form districts that were alleged to be "de-facto non-contiguous." The *Benisek* opinion explains that, while political gerrymandering claims are theoretically justiciable, absent a "reliable standard" for measuring the burden on complainants' representational rights, such claims must be dismissed for presenting only a "nonjusticiable political question." *Id*. at 525-26. The geographic or demographic contiguity standard proposed by the plaintiffs was, the court stated, "markedly similar to tests that have already been rejected by the courts," *id*. at 525, and was therefore insufficient to establish a justiciable claim.

The Current Lawsuit

The plaintiffs are registered voters in Maryland, each residing in a different one of the State's eight congressional districts. Compl. ¶¶ 8-16. They allege that their lawsuit seeks to vindicate the rights of voters as against legislators and their agents, who are claimed to have "appropriated" the power to elect representative in Congress from voters. *Id*. ¶¶ 31-32. The complaint avers that the districting plan inflicts "particular, intentional harm on partisan and non-partisan voters of every description," based primarily on the alleged diminution of voters' ability to elect preferred candidates when placed in a district where such voters represent a political minority. *Id*. ¶ 36. In addition, the complaint alleges that non-compactness of districts itself produces harm by making more difficult candidates' use of mass media to reach the relevant electorate, increasing the cost of campaigns, and creating voter confusion. *Id*. ¶¶ 48-52. The plaintiffs further contend that applying a "mathematically derived compactness measure to congressional districts can be used as a judicially manageable, discernable, and non-arbitrary standard with which to measure, and deter, excessive partisan gerrymandering." *Id.* ¶ 54.

The complaint asserts two claims. Count I alleges that "Maryland's partisan gerrymander violates Article I, § 2" of the Constitution. *Id.* ¶ 83. Count II alleges that, due to the "electoral harms arising from non-compact districts," the congressional district plan "burdens Plaintiffs' right to vote in violation of their constitutional right to Due Process." *Id.* ¶ 86. For their relief, the plaintiffs seek a declaratory judgment finding the

Maryland districting plan unconstitutional and a permanent injunction against "calling, holding, or certifying any elections" under the plan. *Id*. at 19. The plaintiffs also ask the Court to "[o]rder State authorities to adopt a new congressional districting plan" without unlawful political gerrymandering and "consistent with the compactness standards articulated in . . . [the] Complaint." *Id*.

ARGUMENT

I. STANDARD OF REVIEW

The complaint contests the constitutionality of the apportionment of congressional districts and is therefore subject to the provisions of 28 U.S.C. § 2284. Under § 2284(b)(1), a single district judge "may dismiss a complaint otherwise subject to § 2284(a) if the judge determines that the constitutional claims are insubstantial in that they are obviously without merit or clearly determined by previous case law." *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 546 (D. Md. 2002), *aff'd sub nom. Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003); *see also Maryland Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 607 (4th Cir. 1970) (affirming dismissal by a single federal district judge of reapportionment challenge). Only if the single district judge finds that the constitutional claims are "substantial" is that judge authorized to refer the matter to a three-judge court.

In *Duckworth*, the Fourth Circuit held that where a plaintiff's "pleadings do not state a claim" upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6),

"then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." 332 F.3d at 772-73[3] (citing *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980)); *Gorrell*, 2012 WL 226919, at *5-6 (complaint dismissed by single judge); *Benisek*, 11 F. Supp. 3d at 526 (same); *see also Fletcher*, 831 F. Supp. 2d at 892 (three-judge court concluding that there is "no material distinction" between the "insubstantiality" standard and the Rule 12(b)(6) standard).

Accordingly, under Fourth Circuit precedent, a single district court judge properly tests the substantive merit of the plaintiff's claims by applying the standard of review for a motion to dismiss under Rule 12(b)(6). *Duckworth*, 332 F.3d at 772-73. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This "plausibility" standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. That is, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."' *Id.* (quoting *Twombly*, 550 U.S. at

[3] In *Shapiro v. Mack*, the Supreme Court granted certiorari to determine whether, as the Fourth Circuit held in *Duckworth* and reiterated in *Benisek*, "a single-judge district court may determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is wholly frivolous, but because it concludes that the complaint fails to state a claim under Rule 12(b)(6)."

557). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "are not entitled to the assumption of truth." *Id.* at 678-79.

II. THE PLAINTIFFS' CLAIM UNDER ARTICLE I, § 2 OF THE CONSTITUTION IS INSUBSTANTIAL.

Article I, § 2 of the Constitution requires population equality among the congressional districts of each state such that every person's vote has equal weight. *Wesberry v. Sanders*, 376 U.S. 1 (1964). In general, to assert a claim under Article I, § 2, a plaintiff must allege some avoidable population inequality among a state's congressional districts, which shifts the burden back to the State to explain its reasons for the deviation from strict equality. *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (plaintiffs bear the burden of proving "population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population"); *see also Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) ("parties challenging the plan bear the burden of proving the existence of population differences that 'could practicably be avoided'") (citations omitted); *Anne Arundel Cnty. Republican Cent. Comm. v. SABEL*, 781 F. Supp. 394, 396 (D. Md. 1991) (stating two-part test under *Karcher*).

In theory, a plaintiff may state a justiciable claim without alleging population inequality, but only if the plaintiff is able to provide a reliable and non-arbitrary standard sufficient to make the political gerrymander claim a justiciable issue. *League of United*

Latin Am. Citizens ("*LULAC"*) *v. Perry*, 548 U.S. 399, 418 (2006). Failing that, such a complaint is properly dismissed at the pleading stage. *See*, *e.g.*, *Perez v. Perry*, 26 F. Supp. 3d 612, 624 (W.D. Tex. 2014) (explaining that the Supreme Court has treated lack of an appropriate standard to be a failure to state a claim). Here, because the plaintiffs have not alleged any deviation from precise mathematical equality in the composition of Maryland's congressional districts, and have not provided this Court with a reliable and non-arbitrary standard by which to measure and detect "excessive" partisanship in redistricting, plaintiffs have failed to state a cause of action under Article I, § 2.

Moreover, the plaintiffs' request for an order directing "State authorities" to adopt a new redistricting plan must be dismissed because plaintiffs have declined to name as defendants any state official responsible for creating a congressional districting plan or authorized to adopt one. Article III, § 5 of the Maryland Constitution requires the Governor to prepare a legislative districting plan after each decennial census and then to present it to the General Assembly for its adoption by joint resolution. If the General Assembly does not adopt the plan, the Governor's plan takes effect. Md. Const. art. III, § 5. No provision of Maryland law authorizes the State Administrator or Chair of the State Board of Elections either to prepare or to adopt districting plans. Therefore, an injunction to require the creation and implementation of a new districting plan cannot be granted against the defendants named in the complaint. *See Wright v. North Carolina*, 787 F.3d 256, 261-63

(4th Cir. 2015) (affirming the district court's denial of leave to amend complaint to add state officials who lacked requisite authority and responsibility under state law).

A. The Plaintiffs' Political Gerrymandering Claims Are Non-Justiciable.

The Supreme Court has determined that, while unlawful political gerrymandering claims conceptually may be justiciable, there are "no judicially discernible and manageable standards for adjudicating political gerrymandering claims. . . ." *Vieth*, 541 U.S. at 281 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *see id.* at 307-08 (Kennedy, J., concurring) ("Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."). The Supreme Court reaffirmed that conclusion in *LULAC*, 548 U.S. at 447 (opinion of the Court by Kennedy, J.) (finding no "reliable measure of impermissible partisan effect"); *see id*. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "no party or judge has put forth a judicially discernible standard by which to evaluate" political gerrymandering claims).

Since *LULAC* and *Vieth*, every court to have considered the issue has rejected political gerrymandering claims or granted judgment for defendants on the pleadings. *See Benisek*, 11 F. Supp. 3d at 526; *Perez*, 26 F. Supp. 3d at 624; *Fletcher*, 831 F. Supp. 2d at 904 (citing cases); *Radogno v. Illinois State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225, at *5 (N.D. Ill. Nov. 22, 2011) (dismissing amended partisan gerrymandering

claims under Rule 12(b)(6) on the ground that "Plaintiffs have not identified a workable standard for partisan gerrymanders"). As the three-judge panel in *Radogno* explained, "The challenge is not just administrability; it is constitutional line-drawing. The law requires an objective, measurable standard that admits of rational judicial resolution *and* is a direct and non-arbitrary implication of accepted constitutional norms." 2011 WL 5868225, at *4 (emphasis in original); *see also Vieth*, 541 U.S. at 295 (rejecting standards that "are not discernible in the Constitution" and have "no relation to Constitutional harms").

The defendants are unaware of a single case finding an Article I, § 2 violation based on anything other than population inequality.[4] Nevertheless, the plaintiffs assert that the Constitution is violated where more compact districts could have been drawn while still respecting, to the same or a greater extent, a partial, and arbitrarily chosen, set of traditional districting principles, as measured by the number of "split counties," "split precincts," or "county fragments" resulting from the actual and comparator plans. *See* Compl. ¶¶ 71-74. In effect, the plaintiffs contend that Article I, § 2 requires population equality *and* the greatest degree of compactness that is practicable, on average, in light of the need to respect

[4] In *Vieth*, the Supreme Court was able to identify only one instance of any relief being granted based on a theory of partisan gerrymandering, but it involved "merely temporary relief" and the case "did *not* involve the drawing of district lines." *Id.*, 541 U.S. at 279 (emphasis in original) (referring to *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992) (preliminary injunction granted in case challenging state's system for electing trial court judges that yielded a judiciary whose members were disproportionately from one political party)).

county and precinct boundaries, the only other factor that plaintiffs would permit mapmakers to consider.[5]

The Supreme Court has been clear, however, that Article I, § 2 itself does *not* require adherence to the redistricting principles that the plaintiffs espouse. In *Shaw v. Reno*, for example, the Supreme Court stated that, although there is much discussion of compactness and contiguity in the context of redistricting cases, that did not mean that such qualities "are constitutionally required—they are not." 509 U.S. 630, 647 (1993); *see also Wood v. Broom*, 287 U.S. 1, 6-8 (1932) (rejecting challenge based on lack of compactness and contiguity in light of repeal of federal statute imposing those requirements with respect to congressional districts); *Duckworth*, 332 F.3d at 778 (quoting *Shaw*, 509 U.S. at 647). Although *Shaw* was a split opinion, all nine justices agreed that "compactness and contiguity . . . are not constitutionally required." *Id*. at 687 (Souter, J., dissenting); *see also id.* at 671-72 (White, J., joined by Blackmun, J., dissenting) (stating that, while "[l]ack of compactness or contiguity" and other "district irregularities may provide strong indicia of a potential gerrymander, . . . *they have no bearing on whether the plan ultimately is found to violate the Constitution*") (emphasis added). Because "compactness" is not a

[5] The plaintiffs' proposed standard is both arbitrary and unreliable to the extent it excludes any consideration of other legitimate factors that may cause legislators to prefer a less compact plan to a more compact one, such as protecting incumbents and constituent relationships, preserving communities of interest, taking account of natural or geographic boundaries, and other factors, including an acceptable level of partisan calculation. *See, e.g*., *Fletcher*, 831 F. Supp. 2d at 903 (suggesting incumbent protection and maintaining cores of existing districts might account in part for district shapes).

constitutional requirement—as to particular districts or the plan overall—demonstrating non-compactness is insufficient to establish, and ultimately irrelevant to, whether a constitutional violation has occurred. *See, e.g.*, *Gorrell*, 2012 WL 226919, at *4 ("That an alternative plan 'is more effective . . . in vindicating some legitimate redistricting interests . . . does not render the State Plan illegitimate.'") (quoting *Fletcher*, 831 F. Supp. 2d at 903).

The plaintiffs' proposed rule is directly contrary to the reasoning in *Shaw* because the plaintiffs would make "compactness" the determining factor on whether a given districting plan violates the Constitution, regardless of any actual evidence of excessively partisan motive or discriminatory effect. The plaintiffs' rule excludes, for example, consideration of any direct evidence of intent, even though discriminatory intent has always been a core requirement of Equal Protection analysis. *See LULAC*, 548 U.S. at 514 (Scalia, J., concurring) ("A vote dilution claim focuses on the majority's intent to harm a minority's voting power"). Similarly, because the rule takes no account whatever of the partisan makeup (and thus the presumed competitiveness) of the resulting districts, it also fails entirely to address discriminatory effect. Rather, the plaintiffs simply equate a non-compact district with a gerrymandered one, and vice versa, regardless whether the demographic data confirm or refute such a conclusion. *See, e.g.*, Compl. ¶ 48 ("Because gerrymandered districts are non-compact . . ."). As a result, plaintiffs' standard would invalidate a plan that is not as compact as it might be—*i.e.*, as compact as is practicable, as

measured by the Polsby-Popper scale—even if the plan does not produce an actual partisan disadvantage for any particular group. The plaintiffs' compactness standard thus fails at the most basic level to solve the problem that has defeated all other plaintiffs since *Davis v. Bandemer*, 478 U.S. 109 (1986).

To show the extreme difficulty of the challenger's "Sisyphean task," the three-judge court in *Radogno* reviewed the applicable precedent "to identify the standards that a majority of the Supreme Court has rejected." 2011 WL 5868225, at *2. The court identified as many as seven proposed standards that the Supreme Court has deemed unacceptable:

1. whether evidence shows "intent to discriminate, plus denial of a political group's chance to influence the political process" (standard "rejected by a majority in *Vieth*, 541 U.S. at 281 (plurality opinion)")[6];

2. whether "boundaries were drawn for partisan ends to the exclusion of fair, neutral factors" (standard "rejected by a majority in *Vieth*, 541 U.S. at 290-91 (plurality opinion)");

3. whether "mapmakers acted with the 'predominant intent' to achieve partisan advantage and subordinated neutral criteria," *e.g.*, "where the map 'packs' and 'cracks' the rival party's voters and thwarts the ability to translate a majority of votes into a majority of seats" (standard "rejected by a majority in *Vieth*, [541 U.S. at 284-90]");

4. whether "at a district-to-district level, a district's lines are so irrational as to be understood only as an effort to discriminate against a political

[6] The court in *Radogno* observed that "[a]lthough Justice Kennedy did not join the *Vieth* plurality," because "he did concur in the conclusion that no reliable standard had been identified and that the claim should be dismissed," it is "appropriate to conclude that a majority of the Justices found all the standards discussed in the *Vieth* plurality insufficient." 2011 WL 5868225, at *2 n.2.

minority" (standard "rejected by a majority in *Vieth*, *id*. at 292-95 (plurality opinion)"):

5. "a five-part test requiring a plaintiff to show (1) that he is a member of a cohesive political group; (2) that the district of his residence paid little or no heed to traditional districting principles; (3) that there were specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the 'packing' or 'cracking' or the plaintiff's group, and deviates less from traditional districting principles; and (5) that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group" (standard "rejected by a majority in *Vieth*, *id*. at 295-98 (plurality opinion)");

6. whether "a statewide plan results in unjustified entrenchment, such that a party's hold on power is purely the result of partisan manipulation and not other factors" (standard "rejected by a majority in *Vieth*, *id*. at 298-301 (plurality opinion)"); and

7. whether "the sole intent of a redistricting plan is to pursue partisan advantage" (standard "effectively rejected by a majority in *LULAC*, [548 U.S. at 416-20 (Kennedy, J., announcing the judgment of the Court)").[7]

Id. at *2-3.

The six-part test rejected in *Radogno*, in fact, includes the central feature of the standard plaintiffs have proposed in the current lawsuit. The third element of the test found inadequate in *Radogno* would find a political gerrymander where, among other things, "[a]lternative plans are available that are more compact and split fewer political

[7] The court observed that "[a]lthough Justice Kennedy wrote only for himself in the section of the opinion discussing and rejecting the appellants' 'sole motivation' theory, four other Justices effectively concurred in that conclusion. *LULAC*, 548 at 492-93 (Roberts, C.J., concurring in part, concurring in the judgment in part, dissenting in part); *id*. at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part)." *Radogno*, at *7 n.3.

boundaries." *Id*. at *4. This is, in essence, exactly what the plaintiffs have proposed in this case, with some additional math. As this comparison reveals, the approach that the plaintiffs advocate here is not new, innovative, or sufficient as a matter of "constitutional line-drawing." As the three-judge court observed in *Radogno*, "If judicial adjudication of political gerrymandering were just a matter of isolating a set of factors, even objective factors, that inhere in the redistricting context and suggest that partisan considerations played a substantial role, courts would have solved this problem long ago." *Id*.; *see also Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992) (rejecting as not constitutionally required the suggestion that districts could be drawn according to an objective, algorithmic method).[8]

B. The Plaintiffs Have Not Pled Sufficient Facts to Prove a Discriminatory Effect.

Missing from the complaint are any allegations pertaining to the demographic composition of Maryland's congressional districts, including specific facts as to any allegedly unfair concentration or dispersion of voters in the groups or party said to be harmed. At the same time, the plaintiffs have alleged no facts regarding which districts have been made uncompetitive, and by what mechanism or impermissible manipulation. In short, the complaint contains *no* allegations of discriminatory effect. *See*, *e.g.*,

[8] "In their complaint, the plaintiffs argue that the General Assembly could program a computer to create several redistricting plans that had equipopulous districts, complied with the Voting Rights Act, and in addition formed compact, contiguous districts. While this may be true, the Constitution does not require it." *Pope*, 809 F. Supp. at 398.

Duckworth, 332 F.3d at 775 ("[A]llegations that districts have a bizarre appearance . . . are not probative as to the discriminatory effect that must be proven in political gerrymandering cases . . ."); *Shapiro v. Maryland*, 336 F. Supp. 1205, 1208 (D. Md. 1972) ("If there is some constitutional right to live or vote in a racially balanced district (which is doubtful), plaintiff has not alleged facts to show that his new district is not racially balanced."). Instead of facts that might show how an undue partisan advantage was gained by distorting district shapes, the complaint offers only arguments why, in the plaintiffs' view, non-compact districts should be minimized to the extent practicable. As a result, even assuming their gerrymandering claim were justiciable, the complaint fails to plead the specific facts necessary to establish any entitlement to relief.

This defect is also evident with respect to the remedy that the plaintiffs seek. No facts are alleged that, if proved, would show how the plaintiffs' proposed map would result in significantly more competitive or otherwise "fairer" congressional elections, district-by-district or statewide. What the plaintiffs have actually offered to prove is merely that more highly-compact districts could have been formed without increasing the number of county or precinct boundaries crossed, *see* Compl. ¶¶ 69-79, a fact which is ultimately irrelevant to whether plaintiffs have suffered a constitutional injury, or whether that injury would be remedied by the alternative plan. *See*, *e.g.*, *Gorrell*, 2012 WL 226919 at *3-4 (explaining that, while certain districting principles may represent legitimate goals, this does not mean there is an individual constitutional right to districts drawn to achieve such a goal);

Fletcher, 831 F. Supp. 2d at 903 (existence of alternative plan allegedly superior in vindicating some legitimate redistricting interests irrelevant to validity of State Plan); *Pope*, 809 F. Supp. at 398 (same). The plaintiffs' conclusory assertion that a non-compact district is necessarily a gerrymandered district does not meet the pleading standard with regard to proving discriminatory effect. *See Iqbal*, 556 U.S. at 678-79 ("conclusory statements" are insufficient and "are not entitled to the assumption of truth"). In other words, the plaintiffs argue that non-compactness equals discrimination, but they make no offer to prove it. Accordingly, justiciability aside, the complaint fails to adequately plead a cause of action for partisan gerrymandering and therefore should be dismissed.

III. THE PLAINTIFFS LACK STANDING TO ASSERT POLITICAL GERRYMANDERING CLAIMS ON BEHALF OF ALL VOTERS.

Nowhere in the complaint do the plaintiffs allege that they are registered Republican voters, or that the alleged harm they have suffered from voting in non-compact districts is due to their membership in any cohesive political group. Rather, the plaintiffs purport to bring their lawsuit on behalf of themselves as "voters" against their "legislators," who are alleged to gerrymander in their own interests as against all voters in the State. *See* Compl. ¶ 31 ("Plaintiffs are suing as Maryland voters for injuries . . . that all Maryland voters endure . . . ") (emphasis in original); *id.* ¶ 32 (claiming that mapmakers "appropriate for themselves a significant part of the power to elect legislators"); *id.* ¶ 35 (alleging that gerrymandering harms everyone "regardless of their party preferences or how they would vote in a particular election"). Though two of the plaintiffs are alleged to be legislators

themselves, *id*. ¶¶ 8, 13, the complaint alleges that "legislators" as a class discriminated against all voters by enacting the current districting plan.

Apart from the logical incoherence and facial implausibility of these assertions, the plaintiffs do not have standing to assert generalized grievances about the redistricting process that are common to all voters. To establish Article III standing, among other things, a plaintiff must show "an injury in fact—an invasion of a legally protected interest which is 'concrete and particularized.'" *Drake v. Obama*, 664 F.3d 774, 779 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "Moreover, a litigant's interest cannot be based on the 'generalized interest of all citizens in constitutional governance." *Id*. (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974)). Thus, to the extent that the plaintiffs purport to seek relief in the interest of "voters" generally, they do not allege an injury to themselves that is concrete and particularized, nor do they identify a legally protected interest that has been invaded by "legislators."[9] To the extent that the plaintiffs state only a common grievance or "discrimination" that is alleged to be shared by everyone, they fail to allege facts necessary to Article III standing. *See, e.g.*, *Lujan*, 504 U.S. at 573-74 (raising only a "generally available grievance about government" and "seeking relief that no more directly and

[9] Article I, § 4, cl. 1 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ." The plaintiffs' theory that redistricting by Maryland legislators somehow represents a usurpation of a power reserved to the voters is therefore also untenable.

tangibly benefits him than it does the public at large" fails to state an Article III case or controversy); *see also Shapiro v. Maryland*, 336 F. Supp. 1205 (where plaintiff who declined to identify his race lacked standing to assert a racial gerrymandering claim). Accordingly, plaintiffs lack standing to assert political gerrymandering claims on behalf of voters generally and such claims must be dismissed for want of federal court jurisdiction.

IV. THE PLAINTIFFS' CLAIM UNDER THE DUE PROCESS CLAUSE FOR ALLEGED ELECTORAL HARMS CAUSED BY A NON-COMPACT CONGRESSIONAL DISTRICTING PLAN IS INSUBSTANTIAL.

Count II of the complaint purports to seek judicial relief from alleged "electoral harms arising from non-compact districts," which the plaintiffs contend burdens their voting rights in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. Compl. ¶¶ 84-86. This claim, like plaintiffs' Article I, § 2 claim, is foreclosed by prior decisions of the Supreme Court and is therefore insubstantial under any standard. *See*, *e.g.*, *Goosby*, 409 U.S. at 518.

The constitution does not require compact congressional districts, or districts that are more compact relative to other possible options. *Shaw*, 509 U.S. at 647; *Duckworth*, 332 F.3d at 778. Necessarily, then, the Due Process Clause does not guarantee any individual a right to vote in a congressional district that is compact. The constitution protects voters against malapportionment and unlawful discrimination, not against the alleged "burden" on voters due to irregularly shaped districts. Count II must be dismissed.

V. THE PLAINTIFFS' CLAIMS ARE BARRED BY LACHES.

The defense of laches under Federal Rule of Civil Procedure 8(c) provides an additional reason for dismissing the complaint as "insubstantial." *See, e.g.*, *Shapiro v. Maryland*, 336 F. Supp. at 1207 (noting that claims may be found "insubstantial" where "injunctive relief is otherwise unavailable") (citing *Maryland Citizens for a Representative Gen. Assembly*, 429 F.2d at 611). As an affirmative defense to claims for equitable relief, laches requires a defendant to prove two elements: "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Perry v. Judd*, 471 Fed. App'x 219, 224 (4th Cir. 2012) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)); *see also White v. Daniel*, 909 F.2d 99, 102-04 (4th Cir.1990) (precluding untimely § 2 challenge under doctrine of laches)). The defense of laches "applies to redistricting cases as it does to any other," *Arizona Minority Coalition for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908 (D. Ariz. 2005).

These plaintiffs have known the details of the districting plan since its enactment in 2011. *See* Compl. ¶ 19 (stating that plan became law on October 20, 2011). Indeed, the lead plaintiff, Neil Parrott, is a current member of the Maryland House of Delegates and was a member of the General Assembly at the time the plan became law. It has been more than three years since elections were first conducted under the plan in 2012, and more than eight months since a second general election was held in November 2014. Nothing about the plaintiffs' claims or legal theory prevented their bringing this lawsuit at the same time

that other, more timely challenges were raised, during a period when an order affecting the validity of the plan could have been made with less confusion and disruption for voters and candidates, and with less cost, administrative and financial, to the State of Maryland. While these plaintiffs delayed, federal courts, including the United States Supreme Court, have reviewed and decided no less than four previous challenges to the plan, all of which involved at least some issues similar to those belatedly presented in this complaint. *See, e.g., Benisek*, 11 F. Supp. 3d 516; *Gorrell*, No. WDQ–11–2975, 2012 WL 226919; *Fletcher*, 831 F. Supp. 2d 887. Other courts have found that delays of similar length in bringing redistricting challenges were "unexcused" and "unreasonable." *See, e.g., Arizona Minority Coalition*, 366 F. Supp. at 908-09 (finding two-year delay in raising Voting Rights Act § 2 claim inexcusable and unreasonable); *Sanders v. Dooly Cnty., Ga.*, 245 F.3d 1289 (11th Cir. 2001) (waiting over six years after first use of the plan was an inexcusable delay). For the same reasons, the plaintiffs' nearly four-year delay in bringing their claims must be regarded as unexcused.

That delay is prejudicial to election officials, including the defendants, but more importantly it threatens harm to the voters of Maryland, potential candidates, and the public interest. *See, e.g., Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999) (discussing "voter confusion, instability, dislocation, and financial and logistical burden on the State" from additional redistricting and harm due to changing districts after six years and three election cycles). As compared to a timely challenge, if successful, a redistricting lawsuit

brought midway between one census and the next—and after multiple elections have already been conducted under the existing plan—inevitably adds to the disruption, dislocation, and cost of any potential remedy. Because both elements of laches are clearly present in this case, the injunctive relief the plaintiffs have requested is "otherwise unavailable." *Shapiro v. Maryland*, 336 F. Supp. at 1207

In summary, the complaint presents only claims and legal theories that are "insubstantial" and therefore should be dismissed on a motion to dismiss without convening a three-judge court. Not only does the complaint fail to state a claim, it presents only claims that are "obviously without merit or clearly concluded by the Supreme Court's previous decisions." *McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975). Whether non-compact districts *per se* violate the constitution, or whether a "rule of compactness" makes non-justiciable political gerrymandering claims justiciable, are not subjects of controversy. *See, e.g., Goosby*, 409 U.S. at 518. Similarly, plaintiffs' illogical and unsupported theory of a legislators' gerrymander against the voters fails to present a substantial federal claim. *Kalson v. Paterson*, 542 F.3d 281, 290 (2d Cir. 2008) (affirming decision not to convene a three-judge panel where there was "no basis in the case law" for the claim that Article I, § 2 requires districts of equal voting age population).

CONCLUSION

The defendants' motion to dismiss should be granted and the plaintiffs' request to convene a three-judge district court should be denied.

Respectfully submitted,

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