IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BALTIMORE DIVISION

NEIL PARROTT, *et al*.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 15-cv-01849-GLR
LINDA H. LAMONE, *et al*.	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS, AND RESPONSE TO OPPOSITION TO THREE JUDGE PANEL

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Plaintiffs respectfully submit this memorandum of law in opposition to Defendants' Motion To Dismiss Complaint And Opposition To Convening A Three-Judge Court.

INTRODUCTION

On October 20, 2011, the Maryland General Assembly passed Senate Bill 1 creating the congressional districts at issue in this lawsuit. This bill redrew Maryland's congressional districts into shapes so extraordinary that they have become comedic fodder. For example, Maryland's new Third Congressional District has been described as the "Ugliest Congressional District in America," "The Pinwheel of Death," and (by a federal judge) as a "broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 902 n. 5 (D. Md. 2011) (three-judge court), *aff'd* 133 S. Ct. 29 (2012).

Since Senate Bill 1 passed it has been the subject of almost constant litigation. *See Fletcher*; *Gorrell v. O'Malley*, 2012 U.S. Dist. Lexis 6178 (D. Md. 2012); *Olson v. O'Malley*,

2012 U.S. Dist. Lexis 29917 (D. Md. 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd* 584 F. App'x 140 (4th Cir. 2014), *cert. granted* 135 S. Ct. 2805 (2015). While it rejected the plaintiffs' underlying claims, the court in *Fletcher* observed that the allegation of gerrymandering "is perhaps the easiest to accept factually – Maryland's Republican Party regularly receives 40% of the statewide vote but might well retain only 12.5% of the congressional seats." 831 F. Supp. at 903. "[I]t is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander." *Id.* at 905 (Titus, J., concurring).

An effort to reverse the gerrymander by means of a referendum led to further litigation in State court. *See Whitley v. State Bd. of Elections*, 429 Md. 132 (2012) (rejecting challenge to the validity of signatures for referendum petition); *Parrott v. McDonough*, Case No. 1445 (Md. Ct. Spc. App. 2014),[1] *cert. denied*, 440 Md. 226 (2014) (rejecting challenge to designated ballot language on referendum).[2] The plaintiffs had gathered almost 60,000 signatures, which was enough to place the issue on the ballot. However, Secretary of State John McDonough phrased the issue to be voted on ("Question 5") as follows: "Establishes the Boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution." *Id.* at *5. Unsurprisingly, a majority of Marylanders voted "for" Question 5, and the court in *Parrott v. McDonough* refused to invalidate the result. *Id.*

In any event, because Maryland has a referendum process (pursuant to which identified laws can be accepted or rejected) but *not* an initiative process (pursuant to which particular laws

[1] Available at http://redistricting.lls.edu/files/MD%20parrott%2020140723%20opinion.pdf.

[2] Plaintiff Neil Parrott was a party to both of these state court litigations. Complaint, ¶ 30.

can be adopted by popular vote), the legislature remained free, regardless of the outcome of any referendum, to adopt the same bill. Of course, Maryland's legislators knew this. As was reported at the time, "lawyers and leading state Democrats" described the vote on Question 5 as "symbolic," because there was "nothing in the referendum preventing O'Malley and the General Assembly, which is controlled by Democrats, from reenacting the same map next year."[3]

The Claims in This Lawsuit

Plaintiffs in this action are eight Maryland voters, one from every congressional district in the State. Complaint, ¶¶ 8-15. The Complaint alleges constitutional claims arising out of Maryland's atrocious gerrymander.

As explained in the Complaint, gerrymandering necessarily involves the creation of irregularly shaped districts. Because "voters do not choose where to live so as to suit the purposes" of legislative mapmakers, those seeking to gerrymander "must distort district boundaries to create districts that contain the mix of voters that best achieves their partisan goals." *Id.*, ¶ 40. Established mathematical standards for measuring compactness exist. *Id.*, ¶¶ 55, 56, and 58. Applying one of the most widely used and accepted of these measures reveals that Maryland's congressional districts have the lowest average compactness score in the nation, or 11.3 out of a maximum possible score of 100. *Id.*, ¶ 60. By this same measure, Maryland's Third Congressional District is the second-lowest scoring single district in the nation, scoring about 3.2 out of 100. *Id.*, ¶ 61.

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[3] Aaron C. Davis, *For Maryland Democrats, redistricting referendum forces a look in the mirror*, WASHINGTON POST, Sep. 30, 2012, available at https://www.washingtonpost.com/local/md-politics/for-maryland-democrats-redistricting-referendum-forces-a-look-in-the-mirror/2012/09/30/58dd369a-09bb-11e2-a10c-fa5a255a9258_story.html.

The distortions apparent in Maryland's current plan are the result of gerrymandering. Plaintiffs were able to draw an illustrative district plan with an average district score of 40.8, in which most individual districts scored several times better than their ranked counterparts in Maryland's current district plan. *Id.*, ¶ 75. In fact, the lowest scoring district in Plaintiffs' illustrative plan scored better than Maryland's *average* score. *Id.*, ¶ 76. Plaintiffs' illustrative districts all had equal populations, and the plan as a whole split fewer county and precinct boundaries than Maryland's current plan. *Id.*, ¶¶ 70-73.

Art. I, § 2 of the Constitution requires that members of the House of Representatives shall be chosen "by the People of the several States." Plaintiffs claim that Maryland's congressional gerrymander violates this clause by transferring the power to select representatives from the people to those who drew Maryland's congressional district lines. As discussed below, this outcome both is contrary to the intentions of the drafters of the Constitution and is proscribed by the principles established in the Supreme Court's "one person, one vote" jurisprudence. Plaintiffs also allege that Maryland's gerrymander violates their Due Process rights under the Fourteenth Amendment. Plaintiffs request a three-judge panel pursuant to 28 U.S.C. § 2284 and seek declaratory and other related relief.

Defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted, for lack of standing, and on the ground that Plaintiffs' claims are barred by laches. As set forth herein, Defendants' motion should be denied in its entirety and a three-judge panel should be convened.

STANDARD ON A MOTION TO DISMISS

To survive a motion to dismiss under Rule 12(b)(6), "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)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

Importantly, *Twombly* "does not impose a probability standard at the motion-to-dismiss stage." *SD3, LLC v. Black & Decker (U.S.)*, No. 14-1746, 2015 U.S. App. LEXIS 16412 at *21 (4th Cir. Sept. 15, 2015), citing *Iqbal*, 556 U.S. at 678 (the "plausibility standard is not akin to a 'probability requirement'"); *see Twombly*, 550 U.S. at 555 (assume "all the allegations in the complaint are true (even if doubtful in fact)") (citations omitted). "Courts must be careful, then, not to subject the complaint's allegations to the familiar 'preponderance of the evidence' standard. . . . When a court confuses probability and plausibility, it inevitably begins weighing the competing inferences that can be drawn from the complaint." *SD3, LLC*, 2015 U.S. App. LEXIS 16412 at *21 (citations omitted). It is not the court's "task at the motion-to-dismiss stage to determine 'whether a lawful alternative explanation appear[s] more likely' from the facts of the complaint." *Id.*, citing *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015).

ARGUMENT

Defendants' motion to dismiss should be denied because Plaintiffs' complaint states a valid claim that Maryland's congressional gerrymander violates art. I, § 2 and the Due Process Clause of the U.S. Constitution. As explained in point I, those provisions, and the Supreme Court's malapportionment jurisprudence, establish a constitutional principle that proscribes the

use of purely mechanical manipulations of district characteristics so as to benefit government actors and burden voters. Extreme gerrymandering, like that on display in Maryland, violates that principle.

Defendants fail to apprehend the nature of Plaintiffs' complaint and, as result, much of what they argue in their motion to dismiss is misguided. As explained in point II, Plaintiffs are not invoking the Equal Protection Clause of the Fourteenth Amendment and are not proceeding under Supreme Court precedent utilizing that clause to proscribe (at least in principle) certain kinds of political gerrymandering. As a result, Defendants' arguments that Plaintiffs have not alleged their partisan affiliations or pleaded the elements of an Equal Protection claim are simply irrelevant. Further, the claims Plaintiffs assert, while widely shared by other voters within the State, are concrete and confer standing to sue. Point III establishes that Defendants are not entitled to a dismissal on the ground of laches, and point IV shows that there is no need to name additional parties.

For the reasons set forth herein, Defendants' motion to dismiss should be denied, a three-judge court should be convened, and this matter should go forward.

I. THE COMPLAINT STATES A CLAIM FOR GERRYMANDERING.

A. Plaintiffs Have A Right, Under Art. I, § 2, To Be Free From Mechanical Manipulations Of District Boundaries That Transfer The Power To Select Legislators From The People To The Government.

The Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2. This method contrasts with the original method of selecting Senators, which provided that there

were to be "two Senators from each State, chosen by the Legislature thereof." U.S. CONST. art. I, § 3 (amended 1913).

The essence of Plaintiffs' claim is that the gerrymandering of Maryland's congressional districts apparent in Senate Bill 1 allows Maryland's legislators to steal for themselves a significant portion of the power to select congresspersons, which power should only be exercised "by the People."[4] As set forth below, the drafters of the Constitution imagined that the people were properly represented only when all "classes" and "interests" within a particular community were represented. This conception of representation only works if a community consists of an unedited geographic area – a place.

Gerrymandering defeats the proper representation imagined by the Founders. It also violates the same constitutional provision that was at issue in the Supreme Court's malapportionment cases in the 1960s. Indeed, gerrymandering is unconstitutional for basically the same reason that malapportionment is: they both constitute technical manipulations of district characteristics that give legislators power to choose legislators.

Where such an anti-democratic practice is allowed to endure, it calls into question the basic legitimacy of democratic institutions. As John Locke explained:

> The constitution of the legislative is the first and fundamental act of the society . . . without which no one man, or number of men, amongst them can have authority of making laws that shall be binding to the rest.... [I]f others than those whom the society hath authorised thereunto do choose, or in another way than what the society hath prescribed, those chosen are not the legislative appointed by the people.

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[4] As one court put it, the "final result" of tactical redistricting "seems not one in which the people select their representatives, but in which the representatives have selected the people." *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994) (three-judge court), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §§ 212, 216 (J.M. Dont & Sons 1924) (1690).

For the reasons set forth herein, Plaintiffs have properly stated a timely claim for a violation of their constitutional rights as voters.

1. The Founders Believed That A District Should Encompass A Geographical Place In Order To Ensure That All Of The Peoples' Interests Were Appropriately Represented.

James Madison had an opportunity to expound his views on representation in the debates at the Constitutional Convention of 1787. At one point, the delegates were considering a proposal that would have added a clause "requiring certain qualifications of landed property . . . in members of the Legislature." JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 at 372 (Adrienne Koch ed., Ohio University Press, 1966) (1787) (hereafter, "Notes of Debates"). In the ensuing discussion, the concern was raised that this qualification necessarily would exclude from the public sphere interests that should be included. Rufus King argued that "there might be great danger in requiring landed property as a qualification since it would exclude the monied interest, whose aids may be essential in particular emergencies to the public safety." *Id.* at 374. John Dickinson added that the "best defence lay in the freeholders who were to elect the Legislature. Whilst this Source should remain pure, the public interest would be safe." *Id.*

Madison agreed. He explained that

> It was politic as well as just that the interests & rights of every class should be duly represented & understood in the public Councils. It was a provision every where established that the Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathise, with the rights of the people in every part of the Community. . . . [E]very class of Citizens should have an opportunity of making their rights be felt & understood in the public Councils.

Id. at 375.

In Madison's view, "the three principal classes" of American citizens at the time were "the landed the commercial, & the manufacturing." *Id.* While the landed was then the largest, Madison recognized that the "proportion" of each interest was constantly changing. He predicted that the commercial and manufacturing interests "will daily increase," and that "[w]e see in the populous Countries in Europe now, what we shall be hereafter." *Id.* Accordingly, Madison opposed the qualification based on landed property, because it would have favored landed interests at the expense of the "interests & rights of every class" and "of the people in every part of the Community." *Id.*

But what was the unit within which the "rights of every class" were to be considered? How did Madison define the "community" that was entitled to representation in "every part"? The answer must be that Madison believed that the unit of representation would encompass a geographic area, and that that area would *not* be subjected to significant editing or manipulation that would reduce the number of "classes," "interests," or "parts" represented. That Madison assumed that only a geographical area can constitute a community worthy of representation is supported by a letter he wrote to a friend in 1785 about his ideas for the Kentucky constitution. Discussing the "classing of electors" for purposes of representation, Madison stated that it "cannot be otherwise done than by geographical description as by Counties." MARVIN MEYERS, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 30 (1981).

Like Madison, Alexander Hamilton assumed that an electoral unit comprised an unedited geographical area. Responding to the notion that a faction consisting of the "wealthy and the

well-born" would come to dominate the legislature through abuse of the voting process, Hamilton forcefully emphasized the randomizing nature of geographical communities:

> Are the wealthy and the well-born, as they are called, confined to particular spots in the several States? Have they, by some miraculous instinct or foresight, set apart in each of them a common place of residence? Are they only to be met with in the towns or cities? Or are they, on the contrary, scattered over the face of the country as avarice or chance may have happened to cast their own lot or that of their predecessors?

THE FEDERALIST NO. 60, at 370-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[5]

Gerrymandering amounts to precisely the kind of editing and manipulation of district areas that destroys their character as geographically based communities. Certainly no one looking at Maryland's Second, Third, Fourth, Seventh, or Eighth Congressional Districts would refer to them as "places" or describe them as "communities." Indeed, Michael Busch, Speaker of the Maryland House and one of the designers of Maryland's congressional district plan, publicly admitted the opposite, saying that "I think we could have a done a better job" of keeping communities together.[6] Of course, his admission was not necessary to establish the violence that Maryland's gerrymander does to communities, which is evident to anyone who looks at the district map.

Like the landed property qualifications opposed by Madison at the Convention, gerrymandering tends to (and is meant to) restrict the "interests" and the "parts" of a community

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[5] *See also* THE FEDERALIST NO. 57, at 351 (James Madison) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.").

[6] Len Lazarick, *Speaker Busch 'did not like redistricting' either*, MARYLAND REPORTER, Sep. 15, 2013, available at http://marylandreporter.com/2013/09/15/speaker-busch-did-not-like-redistricting-either-tea-party-upset-at-gop-establishment-boehner/.

that are to be represented. It is wholly contrary to the geographically based districts envisaged by the Founders. Further, as set forth below, gerrymandering is proscribed by existing Supreme Court precedent relating to district malapportionment.

2. The Supreme Court's Malapportionment Cases Logically Proscribe The Kind of Mechanical Manipulation Of District Boundaries Involved In Gerrymandering.

Plaintiffs' gerrymandering claim is an analog to, and a necessary consequence of, the Supreme Court's "one person, one vote" jurisprudence. The Supreme Court's malapportionment cases, properly understood, describe a constitutional violation that arises whenever the purely technical attributes of a legislative district are manipulated so as to afford legislators a way to enhance their odds of reelection without having to convince voters to vote for them.

In *Baker v. Carr*, 369 U.S. 186 (1963), the Supreme Court first held that a justiciable constitutional claim could be based on the fact that legislative district populations were malapportioned. The Court subsequently applied this reasoning to federal congressional districts in *Wesberry v. Sanders*, 376 U.S. 1 (1964). In striking down Georgia's malapportioned congressional district plan, the Court held that, "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8 (citations omitted). The rule enunciated in *Baker* also was applied to state legislative districts in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), which invalidated Alabama's malapportioned house and senate districts. The Court grounded its decision in the Fourteenth Amendment, ruling that "the *Equal Protection Clause* requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*

The rules set forth in *Baker*, *Wesberry*, and *Reynolds* and their progeny have since become bedrock requirements of American constitutional law. The principle that they embody is often described as one of "political equality" summarized in the phrase, "one person, one vote." *See, e.g., Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."). Yet, properly understood, these seminal cases stand for more than that. They stand for the principle that legislators and their agents may not manipulate districts in order to arrogate to themselves the power reserved to the people of choosing their legislators. This principle is the basis for Plaintiffs' claims in this case, and it justifies a finding by this Court that Maryland's congressional gerrymander is unconstitutional.

It is important to realize that, despite their references to "political equality" and to equalizing the "worth" or "weight" of voters' votes, *Baker*, *Wesberry*, and *Reynolds* do not actually mandate true equality of votes in any particular sense. To begin with, variations in state populations, and the formula used to assign representatives to states, ensure that the populations of congressional districts in the House of Representatives will vary considerably. *See* 2 U.S.C. § 2a(b) (specifying the "method known as the method of equal proportions").[7] At the time of the 2010 Census, Rhode Island's two congressional districts each contained at least 526,283 persons, while Idaho's two districts each contained at least 784,132 persons – or almost 50% more

[7] Of course, the varying populations of states ensures that Senators will be elected by wildly varying numbers of voters – from 563,626 in Wyoming to 37,253,956 (or about 66 times that number) in California. *See* http://www.census.gov/2010census/popmap/ipmtext.php?fl=02, select "Wyoming" and "California." That fact is typically discounted as a necessary consequence of a structural feature of the United States Constitution.

persons per district.[8] Montana, moreover, elects a single representative, which means that its "district" consists of the entire population of the state – 989,415 persons in 2010, or a substantial 88% more than reside in a Rhode Island congressional district.[9] Surely, voters in Montana and Idaho can plausibly maintain that their congressional votes are not "equal" to those cast in Rhode Island or in other states.[10]

The State of Montana made this very point in *U.S. Dept. of Commerce v. Montana*, 503 U.S. 442 (1992), where it argued that the statutory method of apportioning representatives led to such wide disparities in district populations between states that it violated the principles of *Baker* and *Wesberry*. Montana prevailed before a three-judge district court, and the Supreme Court acknowledged that "[t]here is some force to the argument that the same historical insights that informed our construction of Article I, § 2, in the context of intrastate districting should apply here as well." *Id.* at 465. The Court nevertheless upheld the federal statute in a unanimous

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8 *See* https://www.census.gov/geo/maps-data/data/cd_state.html, "Congressional Districts by Urban/Rural Population and Land Area," select "113th Congress," select "Rhode Island" and "Idaho."

It is universally held that courts may judicially notice facts on a government website as self-authenticating. *See Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (judicial notice of facts on Justice Department website); *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2690 (2013) (noticing Maine's website); *Golden v. Absolute Collection Servs*., 2013 U.S. Dist. LEXIS 77998 at *2 (M.D.N.C. June 4, 2013) (judicial notice of state website); *Dulaney v. United States*, 472 F. Supp. 2d 1085, 1086 (S.D. Ill. 2006) (judicial notice of Virginia web site and citing other cases for same); *Scurmont LLC v. Firehouse Restaurant Grp*., 2011 U.S. Dist. LEXIS 75715 at *48-49 n.11 (D.S.C. July 8, 2011) ("government websites are generally considered admissible and self-authenticating.").

9 *See* http://www.census.gov/2010census/popmap/ipmtext.php?fl=02, select "Montana."

10 The foregoing discussion also ignores the complicating factor that, even within a single state, district populations will vary considerably even a few years after the most recent census. For example, data from the American Community Survey show that, in 2013, New York's 5th congressional district had almost 60,000 more residents than its 19th congressional district. *See* http://www.census.gov/mycd/, select "New York."

decision, and its reasons for doing so are instructive. The Court noted that constitutional requirements foreclosed the possibility of "precise mathematical equality" under any method. *Id.* at 463 (citations and internal quotations omitted). But further, the Court upheld the particular method selected by Congress as an "apparently good-faith choice" that "avoids partisan controversy," observing that "[i]ndependent scholars supported both the basic decision to adopt a regular procedure . . . and the particular decision to use the method of equal proportions." *Id.* at 464-65. "Montana does not contend that the equal proportions method systematically favors a particular party, nor that its retention over a 50-year period reflects efforts to maintain partisan political advantage." *Id.* at 464 n. 42. These observations are important. They show that the equal population jurisprudence developed in *Baker* and its progeny is not a matter of some abstract or ethereal notion of equal voting power. Rather, the Supreme Court expressly tied that jurisprudence to a practical consideration of whether legislators are acting in good or bad faith or are engaged in self-dealing.

That the equal population standard is a practical safeguard rather than an absolute, theoretical norm is strikingly illustrated by the fact that the Supreme Court's constitutional jurisprudence has not even specified the population that must be equalized. Ensuring that votes are "equal" could plausibly mean a number of different things. It could require equalizing *total population*; or *total registered voters*; or *total age-eligible citizens*, whether registered or not; or *total age-eligible and otherwise qualified citizens*, meaning those not barred from voting under state laws concerning, for example, felony convictions or mental incompetence; or even the *total number of voters actually voting* in recent elections. The districts that result from applying any one of these standards will differ, often dramatically, from those drawn using another standard.

To date, no single standard has been held to be constitutionally required. *See Burns v. Richardson*, 384 U.S. 73, 81 (1966) (approving on the facts before it "figures derived from registration for the 1964 general elections," while noting that *Reynolds* "carefully left open the question what population was being referred to" and that states were not compelled "to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" in their apportionment bases); *Evenwel v. Perry*, 2014 U.S. Dist. LEXIS 156192 (W.D. Tex.) (three-judge court), *prob. juris. noted, Evenwel v. Abbott*, 2015 U.S. LEXIS 3416 (U.S., May 26, 2015) (constitutional challenge under *Baker* and *Reynolds* to the use of total population, rather than citizen- or registration-based measures, to accomplish state redistricting).

As the foregoing considerations make clear, the "one person, one vote" or "equal population" standard does not mandate a particular kind of equality between persons or votes. Rather, the Supreme Court's malapportionment jurisprudence should be understood as a set of practical constitutional limitations on legislators' ability to entrench themselves in power notwithstanding the wishes of voters.

The original malapportionment cases support this interpretation. In those cases, the Supreme Court repeatedly emphasized the real-world electoral consequences of malapportionment. *See Reynolds*, 377 U.S. at 547 (under proposed legislation, "the 34 smallest counties" would "have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution," while "43% of the State's total population would live in counties which could elect a majority" of the lower house); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 667 (1964) (under reapportionment, "the five most populous

subdivisions, with 75.3% of the State's 1960 population, elect . . . 55.6% of the members in the Maryland House" and counties "with less than one-fourth of the State's population, elect 44.4% of the members of the House of Delegates"); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 648-49 (1964) ("The 10 most heavily populated counties in New York, with about 73.5% of the total citizen population" have only "65.5% of the membership" of the Senate, while the "five counties comprising New York City" are slated to have "36.8% and 37.3%, respectively, of the membership of the two houses."); *Roman v. Sincock*, 377 U.S. 695, 707-08 (1964) ("Under the revised apportionment . . . [a] majority of the members of the House would be elected . . . from districts with only about 28% of the State's total population," and "the change in senatorial apportionment would result in two-thirds of the Senate being elected from districts where only about 31% of the State's population reside."); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 728-29 (1964) (Denver and adjacent counties "contain[ing] about one-half of the State's total 1960 population" are "given only 14 out of 39 senators. The Denver, Pueblo, and Colorado Springs metropolitan areas, containing . . . about 68%, or over two-thirds of Colorado's population, elect only 20 of the State's 39 senators, barely a majority."); *Davis v. Mann*, 377 U.S. 678, 688-89 (1964) ("Under the 1962 senatorial apportionment . . . approximately 41.1% of the State's total population reside in districts electing a majority of the members of that body," while "40.5% of the State's population live in districts electing a majority of the House members."); *see also Reynolds*, 377 U.S. at 571 n. 49 (discussing Congress and noting that "unfair districting within some of the States presently reduces to about 42% the percentage of the country's population which reside in districts electing individuals comprising a majority" in the U.S. House of Representatives).

At the same time, the Supreme Court repeatedly observed how elected officials who benefitted from malapportionment had become entrenched, and how they could and did defeat any effort by the voters to change the existing laws. For example, Justice Clark, concurring in *Baker*, explained that the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination."

> Tennessee has no initiative and referendum. . . . The majority of the voters have been caught up in a legislative strait jacket. . . . [T]he legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless.

369 U.S. at 258-59 (Clark, J. concurring); *see Reynolds*, 377 U.S. at 553-54 ("No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists" and constitutional amendments require "three-fifths of the members of both houses of the legislature"); *WMCA, Inc.*, 377 U.S. at 651-52 ("No adequate political remedy to obtain relief against alleged legislative malapportionment appears to exist in New York. No initiative procedure exists," and existing malapportionment would affect elections to any state constitutional convention); *Maryland Committee for Fair Representation*, 377 U.S. at 669-70 (several reapportionment bills "failed to pass because of opposition by legislators from the less populous counties," a constitutional amendment was "unavailable, as a practical matter" and seats at a constitutional convention "would be based on the allocation of seats in the allegedly malapportioned General Assembly."); *Davis*, 377 U.S. at 689 ("No adequate political remedy to obtain legislative reapportionment appears to exist in Virginia. No initiative procedure is provided for under

Virginia law."); *Roman*, 377 U.S. at 706 ("repeated attempts to reapportion the legislature or to call a constitutional convention" failed, "[n]o initiative and referendum procedure exists in Delaware," and "two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution.").

The Supreme Court's extended discussions concerning the electoral consequences of malapportionment and the way those consequences tend to become permanent over time reveals the true nature of the practice. Malapportionment is, at root, a way to manipulate districts to ensure particular electoral outcomes and to preserve those outcomes over the course of consecutive elections. The ability to vary the number of voters assigned to electoral districts gives an enormous advantage to legislators who control that process. The technique of reaping that advantage is brutally simple: areas where support for the party in power is strong are afforded a large number of sparsely populated districts. Areas controlled by the opposition are given fewer but more populous districts.

But malapportionment is only one of a number of basically mechanical methods for subverting elections that take place in districts. Mechanical in this context means that the method does not involve actually convincing voters to vote for a candidate or to engage in any of the other activities associated with democratic practice, such as contributing, fundraising, publicizing views, making political alliances, etc.

Gerrymandering is another mechanical method for subverting district elections. The means employed in reaping an advantage are more sophisticated, typically requiring dedicated computer software; but these means nonetheless consist of purely mechanical manipulations of district characteristics. Maryland's gerrymander does not involve the persuasion of, or any

voluntary or election-related activity by, the people of Maryland. Yet this gerrymander powerfully affects the outcome of Maryland's congressional races, affording the legislators who designed it a significant say in who will be elected. This electoral swindle, moreover, is resistant to correction by ordinary democratic means. There is no initiative process in Maryland. The referendum process is toothless[11] and easily subverted by the political class.[12] Amending the Maryland Constitution requires that a proposal first be passed by three-fifths of both houses, by the same legislators who adopted Maryland's Senate Bill 1. MD. CONST. art. XIV, § 1. Thus, notwithstanding the fact that Maryland's current districts are widely mocked, including by federal court judges; that they have engendered at least seven lawsuits; that they have been editorialized against in newspapers across the region, including the Baltimore Sun,[13] the Washington Post,[14] the Capital Gazette,[15] and the Carroll County Times;[16] that vast majorities of

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[11] Aaron C. Davis, *For Maryland Democrats, redistricting referendum forces a look in the mirror*, WASHINGTON POST, Sep. 30, 2012.

[12] *See Parrott v. McDonough*, Case No. 1445 (Md. Ct. Spc. App. 2014), *cert. denied*, 440 Md. 226 (2014).

[13] Thomas Ferraro, *Redistricting's last best hope in Md.*, Baltimore Sun, April 29, 2015, available at http://www.baltimoresun.com/news/opinion/oped/bs-ed-gerrymandering-maryland-20150429-story.html.

[14] Editorial Board, *The gerrymandering jig should be up*, WASHINGTON POST, July 20, 2015, available at https://www.washingtonpost.com/opinions/the-gerrymandering-jig-should-be-up/2015/07/20/b42e83e6-2f0b-11e5-8f36-18d1d501920d_story.html; Brian Doctrow, *It's time to redraw Maryland*, WASHINGTON POST, Aug. 7, 2015, available at https://www.washingtonpost.com/opinions/its-time-to-redraw-maryland/2015/08/07/b17bca52-30a3-11e5-97ae-30a30cca95d7_story.html.

[15] *Editor's Notebook: Gerrymandering*, CAPITAL GAZETTE, July 21, 2015, available at http://www.capitalgazette.com/opinion/our_say/ph-ac-ce-our-say-0721-20150721-story.html.

Maryland residents would prefer another way of drawing districts;[17] and that even the legislators most involved in concocting Maryland's congressional districts criticized their own handiwork[18] – those districts remain in force.

Plaintiffs respectfully submit that the principles embodied in *Baker*, *Wesberry*, and *Reynolds* render constitutionally infirm any mechanical stratagem involving electoral districts that allows legislators to usurp the peoples' role in choosing legislators. Malapportionment is one such technique. Gerrymandering is another. Accordingly, Maryland's gerrymandered districts should be declared unconstitutional.

3. Unless Districts Have Equal Population, Are Contiguous, And Are Sufficiently Compact To Rule Out Extreme Gerrymandering, The Power To Select Legislators Can Be Taken From The People By The Mechanical Manipulation Of District Properties.

The preceding analysis has described the way in which Maryland's congressional gerrymander is contrary both to the Framers' plan to represent interests as they exist within a particular geographical place, and to the Constitution's mandate that the House of Representatives be elected "by the People." While Plaintiffs have described the basis of their negative claim – that Maryland's gerrymandered districts do not pass constitutional muster – Plaintiffs' position can be put more fully in context by a positive description of what a district

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[16] Barry Rascovar, *Trying to tame the wild Gerrymander*, CARROLL COUNTY TIMES, Oct. 17, 2012, available at http://www.carrollcountytimes.com/cct-arc-a5cb38af-f7cf-5112-b329-1c537511b83e-20121017-story.html.

[17] Len Lazarick, *Voters support independent redistricting commission, poll finds*, MARYLAND REPORTER, Oct. 17, 2013, available at http://marylandreporter.com/2013/10/17/voters-support-independent-redistricting-commission-poll-finds/.

[18] Len Lazarick, *Speaker Busch 'did not like redistricting' either*, MARYLAND REPORTER, Sep. 15, 2013.

free of any mechanical manipulation would look like. In brief, Plaintiffs submit that electoral districts must (1) have equal populations, (2) be contiguous, and (3) possess at least a minimum level of compactness. The reason is that if any one of these criteria is missing, then the district is subject to mechanical manipulation by interested legislators.[19]

In the absence of an equal population requirement, districts would be subject to all of the abuses seen in the days before *Baker* and its progeny. As that avenue of abuse is foreclosed by Supreme Court precedent, it is no longer an issue.

In the absence of district contiguity, political abuses could be just as severe. If voters did not have to reside in a single, spatially defined district, then those charged with constructing districts would be free to select voters residing anywhere in the State in order to fill out their complement of the required number of residents. It would be a simple matter for legislators to arrange voters in these disconnected "districts" in a way that helped their allies and harmed their adversaries. Non-contiguity, however, is not at issue in this lawsuit.

Finally, when districts are not required to meet at least a minimum threshold of geographical compactness, self-interested legislators are free to arrange voters within districts to help their allies and hurt their opponents. The way to do this has been demonstrated by the

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[19] It is significant that the last time Congress regulated the technical features of congressional districts, it recognized the interdependence of these three criteria. Act of Aug. 8, 1911, ch. 5, §3, 37 Stat. 14 (repealed 1929) (representatives "shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants"). *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2669 n. 19 (2015).

The analysis contained in the text is discussed at length in Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 327-32 (1991). The compactness measure Plaintiffs utilize here is the one discussed in that article. *Id.* at 348-51. Contiguity can be defined as existing where a person can travel between any two points in a district without leaving the district. *See id.* at 330-31.

Maryland legislature. Those drawing districts are able to push districts lines wherever they must go into order to "capture" the preferred mix of voters. As compactness constraints are relaxed, districts become increasingly untethered from any sense of place.

Plaintiffs are aware that no court has held either that contiguity, on its own, or that some absolute level of compactness, as such, is constitutionally required, and Plaintiffs are not asking this Court to make such a finding. Rather, Plaintiffs maintain that there is an individual right to vote in a district that is free of any mechanical manipulation, based on district characteristics, that lets legislators help to pick the winners. To be immune to such manipulation, a district should have equal population with other districts; should be contiguous, however that may be usefully defined; and should not be egregiously non-compact, by whatever measure may be used.

B. Plaintiffs' Substantive Due Process Rights Are Violated By Maryland's Gerrymander.

Citizens "enjoy a right to substantive due process. In its simplest terms, that fourteenth-amendment right guarantees citizens the freedom from being subjected to state or local laws, rules, or policies which are contrary to the rights afforded them under the United States Constitution." *Ryder v. Freeman*, 918 F. Supp. 157, 161 (W.D.N.C. 1996). "A state law, rule, or policy will receive strict scrutiny where it places a burden on a citizen's fundamental rights," which include "the right to vote and participate in the electoral process." *Id.*; *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 180 (4th Cir. 1983) ("laws that place conditions on this right [to vote] must promote a compelling state interest."); *Reynolds*, 377 U.S. at 562 ("Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Yick Wo v. Hopkins*, 118 U.S.

356, 370 (1886) (voting "is regarded as a fundamental political right, because preservative of all rights.").

Plaintiffs have alleged that Maryland's gerrymander places significant burdens, both direct and indirect, on their right to vote. "In addition to the general harm inflicted when legislators intrude on powers that should be reserved to voters, Maryland's gerrymander inflicts particular, intentional harm" on voters from every party. Complaint, ¶ 36. This includes the harm to Republicans, Democrats, and others who are deliberately placed in the minority in one or another district (*id.*, ¶ 36(b), (c), and (d)) and harm to "voters of every party who might not prefer a Democratic supermajority in the State's delegation." *Id.*, ¶ 36(d). Further, the non-compact districts that are the hallmark of gerrymandering inflict their own peculiar harms on all voters, including the fragmenting of political communities (*id.*, ¶ 46); confusion of voters "regarding such basic matters as which district they reside in, who represents them, who is running for office in their district, and where they go to vote" (*id.*, ¶ 47); and difficulties and expenses relating to connecting candidates to voters (*id.*, ¶¶ 48-50).

Defendants' only response is to cite cases stating that the Constitution does not require compact districts. ECF 7-1 at 21, citing, *e.g.*, *Shaw v. Reno,* 509 U.S. 630, 647 (1993). As set forth below in part II.A, Plaintiffs admit that the Constitution does not require compactness for its own sake. But Plaintiffs would not require that districts be as compact as "practicable," as Defendants misstate the standard. ECF 7-1 at 12. Rather, Plaintiffs would rule out only the most non-compact districts. Complaint, ¶ 62. The purpose of this rule, moreover, would not be to enforce compactness as such, but only to rule out the worst kinds of non-compactness that allow legislators to acquire the peoples' power to select their representatives.

The Plaintiffs' allegations are more than sufficient to state a claim for the violation of Plaintiffs' substantive Due Process rights.

II. DEFENDANTS' MOTION TO DISMISS MISCONSTRUES THE NATURE OF PLAINTIFFS' CLAIMS, WHICH DO NOT INVOKE THE EQUAL PROTECTION CLAUSE AND ARE NOT BASED ON *DAVIS V. BANDEMER*.

In *Davis v. Bandemer*, 478 U.S. 109, 125 (1986), the Supreme Court held that a plaintiff could state a justiciable claim for partisan gerrymandering, but a majority could not agree on the particular standard that applied in adjudicating such a claim. Writing for a plurality, Justice White proposed that a Fourteenth Amendment Equal Protection claim existed where a plaintiff could "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127. Justice White suggested that

> unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole. . . . [A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Id. at 132-33.

In the 29 years since that decision was issued, no plaintiff has ever prevailed in federal court on an Equal Protection claim that legislative districts were an unconstitutional partisan gerrymander. No court has managed to articulate an agreed-upon standard for assessing such a claim, as was noted in *Vieth v. Jubelirer*, 541 U.S. 267, 279-81 (2004). Indeed, in that case, the plurality opinion urged that *Bandemer* be overruled. *Id.* at 306.[20]

[20] This Court in *Benisek* went so far as to suggest that the Supreme Court in *Vieth* had "reversed *Bandemer*." *Benisek*, 11 F. Supp. 2d at 523-24. Plaintiffs respectfully submit that the

Defendants acknowledge *Vieth* and other cases that discuss the difficulty of articulating a standard for adjudicating the kind of Equal Protection claim envisaged in *Bandemer*. ECF 7-1 (Defendants' memorandum of law) at 11 and following. Defendants, however, have erred in implicitly assuming that that kind of claim is the only available legal framework within which Plaintiffs can allege unconstitutional gerrymandering.

It is understandable that Defendants would take the position that Plaintiffs' only avenue to obtain relief is a legal approach that has never succeeded, and probably never will succeed, in any court. But Defendants have misconstrued the nature of Plaintiffs claim. To be clear, Plaintiffs are not asserting a claim under *Bandemer*. Plaintiffs have not pleaded an invidious classification or a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs have not pleaded their partisan affiliations, nor have they alleged that the harm that they suffer is a result of their membership in a class defined by such an affiliation. As will be explained, Plaintiffs maintain that they, in their capacity as voters, are asserting claims comparable to those that prevailed in *Baker* and *Wesberry*, and that any issues concerning justiciability or proof should be resolved as they were in those cases.

The art. I, § 2 claim Plaintiffs assert here regarding legislators' misappropriation of the peoples' power to select legislators has never been addressed by any court. Certainly none of the recent litigation concerning gerrymandering in Maryland has addressed such a claim. *See Benisek*, 11 F. Supp. 3d at 519 (alleging that "the narrow ribbons and orifices" connecting "de-

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Supreme Court did not go that far, as only four votes urged reversal, while Justice Kennedy held out hope that a judicially manageable approach to *Bandemer* might be found. "I would still reject the plurality's conclusions as to nonjusticiability. . . . That no [] standard has emerged in this case should not be taken to prove that none will emerge in the future." *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring). In any case, that point is not at issue here, as Plaintiffs are not making a *Bandemer* claim.

facto non-contiguous" and "demographically inconsistent segments" violated a number of constitutional provisions); *Fletcher*, 831 F. Supp. 2d at 893 (alleging "malapportionment, in violation of Article I, § 2 . . . and racial discrimination, in violation of the Fourteenth Amendment"); *Gorrell*, 2012 U.S. Dist. Lexis 6178 at *8, *11 (alleging district plan "unconstitutionally dilutes farm votes" which is "a community of interest" and alleging "partisan gerrymandering that substantially disadvantages voters of one party"); *Olson*, 2012 U.S. Dist. Lexis 29917 at *4, *11-12 (alleging and then abandoning claims for violations of Guarantee Clause and Equal Protection Clause, and alleging violation of Due Process Clause based on "the contention that the redistricting plan violated the state constitution and statutes"); *see also Anne Arundel Cnty. Republican Cent. Comm. v. SABEL*, 781 F. Supp. 394-95 (D. Md. 1991) (alleging malapportionment in violation of art. I, § 2 and gerrymandering in violation of Fourteenth Amendment); *id.* at 401-03 (dissent arguing that art. I, § 2 should forbid "classifications that are based on how the voters voted and can be expected to vote"); *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 549 (D. Md. 2002) (complaint repeated verbatim "37 of the 40 numbered paragraphs" in the *Anne Arundel* complaint); *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003) (appeal of Fourteenth Amendment claim).[21]

Because Defendants fail to apprehend the nature of Plaintiffs' claims, their arguments in support of dismissing the complaint are wide of the mark.

[21] Further, the many tests for gerrymandering cited and rejected in *Radogno v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 134520 (N.D. Ill. Nov. 22, 2011) all concerned proposed applications of the *Bandemer* standard, which is inapposite to Plaintiffs' claim. *See* ECF 7-1 at 15-17.

A. Plaintiffs Do Not Maintain That Compactness, As Such, Is Required By The Constitution Or That Districts Should Be Maximally Compact.

Defendants cite cases for the proposition that neither contiguity nor compactness is constitutionally required. ECF 7-1 at 13, citing, *e.g.*, *Shaw*, 509 U.S. at 647. Plaintiffs concede that this is true, at least insofar as the Constitution does not mandate that compactness is required for its own sake. In other words, there is no constitutional right to reside in a compact district.

Plaintiffs do maintain, however, that there is a constitutional right to reside in a district that has not been manipulated in a way that transfers the power to choose legislators to government officials. The standard Plaintiffs suggest would rule out only egregiously non-compact districts. Complaint, ¶ 62 (rejecting a district only if it could be made *twice* as compact). This standard may be said to *indirectly* command a low, but minimum, level of compactness, but only as a prophylactic against the worst kinds of manipulation.[22]

Thus, Defendants have simply misstated Plaintiffs' position by arguing that they "contend that Article I, § 2 requires population equality *and* the greatest degree of compactness that is practicable, on average," or that their "standard would invalidate a plan that is not as compact as it might be." ECF 7-1 at 12, 14. That is not Plaintiffs' standard.

B. Plaintiffs' Standard Neither Includes Nor Rules Out Other Possible Characteristics Relating To Electoral Districts.

Defendants further misstate Plaintiffs' standard by arguing that it acknowledges "the need to respect county and precinct boundaries, the only other factor that plaintiffs would permit

[22] Contiguity, which is not at issue in this lawsuit, raises a different set of issues. While it has not been held to be constitutionally required, Plaintiffs submit it could be so held on the right set of facts. If, for example, Maryland had seven contiguous districts, and the eighth district was chopped into a dozen distinct pieces hundreds of miles apart all over the State, Plaintiffs respectfully submit this districting scheme would be subject to a valid constitutional challenge.

mapmakers to consider." ECF 7-1 at 12-13. Defendants then assert that Plaintiffs' standard is "arbitrary" in excluding "other legitimate factors" like "protecting incumbents," "preserving communities of interest,"[23] accounting for "geographic boundaries," or allowing "an acceptable level of partisan calculation." ECF 7-1 at 13 n.5.

Defendants' characterization of Plaintiffs' standard is wrong in every detail. Preserving precinct or county boundaries is not any part of the constitutionally required standard Plaintiffs are arguing for. Plaintiffs' complaint only mentions the fact that their illustrative plan splits fewer precincts and counties than Maryland's current plan (Complaint, ¶¶ 71-74) to head off any possible defense or rebuttal that preserving such boundaries was the true reason Maryland's districts are so non-compact.

At the same time, Defendants err in assuming that Plaintiffs' constitutional standard would exclude consideration of *any* of the factors they mention. This error is probably due to the previously noted assumption that Plaintiffs urge maximum district compactness at the expense of every other goal. As explained above, this is not accurate. Plaintiffs' standard would only reach the most non-compact districts. It would otherwise allow considerable non-compactness, and would not foreclose a legislature's pursuing any of the other interests Defendants have listed.

C. Plaintiffs Are Not Making An Equal Protection Claim And Do Not Have To Plead The Elements Of One.

At several points, Defendants fault Plaintiffs for failing properly to plead an Equal Protection claim. Thus, Defendants argue that Plaintiffs' standard does not consider "any direct evidence of intent," which has "always been a core requirement of Equal Protection analysis."

[23] It is a singular act of bravado for the authors of Maryland's gerrymander to mention this factor.

ECF 7-1 at 14. Plaintiffs do not allege "specific facts as to any allegedly unfair concentration or dispersion of voters in the groups or party said to be harmed," or "show how an undue partisan advantage was gained." *Id.* at 17, 18. Plaintiffs do not "allege that they are Republican voters," or that they were harmed by "their membership in any cohesive political group." *Id.* at 19.

The reason Plaintiffs do not allege invidious classifications based on partisanship is that they are not pleading an Equal Protection claim. Plaintiffs' claims lie under art. I, § 2 and the Due Process Clause.

An analogy to the *Wesberry* line of cases is instructive. The plaintiffs who alleged the malapportionment of congressional districts did not have to plead that they were members of a particular party, although malapportionment undoubtedly had a partisan effect. Such plaintiffs did not have to plead that they were harmed in their capacity as rural or urban residents, or as residents of a particular region, or in any other capacity. All that they needed to plead was that they were voters in a malapportioned district. In the same way, Plaintiffs need only plead that they are voters in congressional districts that are less than half as compact as they could be. Once it is apparent that districts have been manipulated – whether by malapportionment or by extreme non-compactness – in a way that could allow legislators to appropriate voters' power to choose representatives, voters have a claim under art. I, §2.[24]

[24] Defendants argue that it is illogical to argue that gerrymandering transfers power to legislators when two Plaintiffs are legislators. ECF 7-1 at 19-20. In fact, there is no logical problem and Plaintiffs' position is entirely consistent. These two legislators did not participate in, approve of, or vote for Maryland's district plan, and, as voters, they object to the power it gives to the self-interested legislators who designed and adopted it.

D. Plaintiffs Are Suing In Their Own Behalf And Are Not Asserting A Generalized Grievance.

Defendants argue in a point heading that Plaintiffs "lack standing to assert political gerrymandering claims on behalf of all voters." ECF 7-1 at 19. Of course, Plaintiffs are not suing on behalf of other voters, as if this were a class action. Plaintiffs are suing for the injury they suffer as voters when their power to select representatives is diminished.

This injury is one endured by every voter in the State. Defendants respond to that point by arguing that Plaintiffs are asserting a "generalized grievance" that is not sufficient to confer standing. *Id.* at 20. But Defendants misuse that term.

The Supreme Court observed that a generalized interest is where harm is "not only widely shared, but is also of an abstract and indefinite nature – for example, harm to the 'common concern for obedience to law.'" *FEC v. Akins*, 524 U.S. 11, 23 (1998). By contrast, where

> harm is concrete, though widely shared, the Court has found "injury in fact." This conclusion seems particularly obvious where . . . large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law.

Id. at 24.

There are several situations in the context of voting rights where harm is "concrete, though widely shared." For example, an unjustified statewide administrative burden on voting, or a State fee that was in the nature of a poll tax, would confer standing on every voter in the State. Indeed, with respect to elections, even so general-seeming an interest as the loss of confidence in their legitimacy has been held to confer Article III standing. *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind. 2012). The fact that these interests are "widely

shared" does not make the injury any less concrete. In the same way, although every voter in Maryland is harmed when the power to select representatives is transferred to state legislators, the voters' claims are not "generalized grievances."

The interest asserted by Plaintiffs as voters is widely shared, but is concrete and specific.

III. DEFENDANTS HAVE NOT SHOWN THAT LACHES MAY BE ESTABLISHED ON THE FACE OF THE COMPLAINT.

It is well-settled that "[l]aches is one of the affirmative defenses generally allowable under Fed. R. Civ. P. 8(c)." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990); *see Fulmore v. City of Greensboro*, 834 F. Supp. 2d 396, 421 (D.N.C. 2011). For this reason it is improper, except in rare cases, to grant a motion to dismiss on the basis of laches. A motion to dismiss,

> which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred. But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense "clearly appear[] on the face of the complaint."

Goodman v. Praxair, Inc., 494 F.3d 458, 464, 466 (4th Cir. 2007) (en banc), citing *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993); *see Lismont v. Alexander Binzel Corp*., 2013 U.S. Dist. LEXIS 163943 (D. Va. Nov. 18, 2013) ("the 'defense of laches usually requires factual development beyond the content of the complaint,' such as evidence regarding the 'unreasonableness of the delay, lack of excuse, and material prejudice to the defendant.'"), citing *Advanced Cardiovascular Sys. v. SciMed Life Sys*., 988 F.2d 1157, 1161 (Fed. Cir. 1993) ("The facts evidencing unreasonableness of the delay, lack of excuse, and material prejudice to the defendant, are seldom set forth in the complaint, and at this stage of the proceedings cannot be decided against the complainant based solely, on presumptions."); *Powell*

v. Bank of Am., N.A., 842 F. Supp. 2d 966, 979 (W.V. 2012) (where, "[s]trictly construed, the face of the complaint does not manifest" the "prejudicial delay" necessary for laches, "resolution of this affirmative defense is . . . inappropriate" on a motion to dismiss).

In the event that the factual basis of a laches argument were ever reached, Plaintiffs would point out that they have been extremely diligent in pursuing every available option to challenge Maryland's infamous gerrymander, including through their state referendum petition and the resulting State litigation. Complaint, ¶ 30. They also would show that there has been no prejudice to Defendants, who have been litigating these districts since their adoption, that Defendants have identified no lost evidence or witnesses, that any disruption to the election process would be no greater than the current disruption caused by Maryland's extraordinary gerrymander, and that in any case only two of five congressional elections have been held under the existing plan.

It is premature to make these fact-based arguments, however. As neither delay nor prejudice is apparent on the face of the complaint, it is inappropriate to dismiss on the grounds of an affirmative defense such as laches.

IV. THERE IS NO NEED TO NAME ADDITIONAL PARTIES.

In the complaint, Plaintiffs ask this Court to "[p]ermanently enjoin Defendants from calling, holding, or certifying any elections under the congressional districting plan." Complaint, Prayer for Relief, ¶ 3. Plaintiffs then ask this Court to "[o]rder State authorities to adopt a new congressional districting plan without unlawful politically gerrymanders consistent with the compactness standards articulated in this Complaint." *Id.*, ¶ 4. Defendants object to the latter

request on the grounds that Plaintiffs have not named "any state official responsible for creating a congressional districting plan or authorized to adopt one." ECF 7-1 at 10.

Of course, if this Court grants the request to permanently enjoin the use of the existing plan as unconstitutional, this will compel those who are authorized to create and adopt a new plan to do so. If a districting plan is determined to be invalid, the Governor could call a special session of the General Assembly to enact a bill reapportioning its members for purposes of elections. MD. CONST. art. III § 5*; Maryland Comm. for Fair Representation v. Tawes*, 228 Md. 412 (1962). The General Assembly may consider a redistricting plan at a special session and may at any time take steps to develop a plan. 76 Op. Att'y Gen. 249 (April 10, 1991). In any event, until the General Assembly acts, this court has the authority, "[i]f the State fails to adopt such a plan by the Court's reasonable deadline," to "order the use of a new congressional districting plan of the Court's choosing." Complaint, Prayer for Relief, ¶ 5. Plaintiffs submit that additional parties are not necessary.

However, if the Court deems that it is necessary or even advisable to name, for example, the General Assembly, Plaintiffs would move to do so. Leave to amend a complaint under Fed.R.Civ.P. 15(a) "shall be freely given when justice so requires." Amendment should be denied only in the presence of prejudice, bad faith on the part of the moving party, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Nolte v. Capital One Financial Corp.*, 390 F.3d 311 (4th Cir. 2004); *HCMF Corp. v. Allen*, 238 F.3d 273, 276 (4th Cir. 2001*); Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999).

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully requests that Defendants' motion to dismiss be DENIED.

Further, because Plaintiffs have pleaded constitutional claims with sufficient plausibility to survive a motion to dismiss, they necessarily have pleaded claims warranting the convening of a three-judge panel.

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Respectfully submitted,

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