No. 16-___

In The Supreme Court of the United States

NEIL PARROTT, *ET AL.*,

Appellants,

v.

LINDA H. LAMONE AND DAVID J. MCMANUS, JR.,

Appellees.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Maryland's gerrymandered congressional districts deprived Appellants of their constitutional right to have their representatives selected "by the People," and unconstitutionally burdened their fundamental right to vote.

2. Whether summary reversal is appropriate because the district court improperly dismissed Appellants' complaint on jurisdictional grounds without considering the merits of their claims.

PARTIES TO THE PROCEEDING

Appellants are Neil Parrott, Ann Marvin, Lucille Stefanski, Eric Knowles, Faith Loudon, Matt Morgan, Ellen Sauerbrey, and Kerinne August, registered voters in each of Maryland's Eight Congressional Districts.

Appellees are Linda H. Lamone, in her official capacity as the State Administrator of Elections, and David J. McManus, Jr., in his official capacity as Chairman of the Maryland State Board of Elections.

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JURISDICTIONAL STATEMENT

Appellants Neil Parrott, Ann Marvin, Lucille Stefanski, Eric Knowles, Faith Loudon, Matt Morgan, Ellen Sauerbrey, and Kerinne August respectfully submit this jurisdictional statement regarding their appeal of a decision of the United States District Court for the District of Maryland, sitting as a district court of three judges. Appellants ask that the Court note probable jurisdiction and set the case for oral argument.

OPINION BELOW

The district court's decision dismissing the complaint, although not yet reported in the Federal Supplement, is reprinted in the Appendix ("App.") at App. 3a-13a, and is available as *Parrott v. Lamone*, No. GLR-15-1849, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016).

JURISDICTION

This case was properly before a three-judge district court pursuant to 28 U.S.C. § 2284(a) because it involves a constitutional challenge to a congressional redistricting plan. The United States District Court for the District of Maryland entered an Order on August 24, 2016, granting Defendants' motion to dismiss Appellants' complaint, for reasons stated in an accompanying opinion. App. 14a-15a, citing App. 3a-13a. Appellants timely filed their notice of appeal on August 29, 2016. App. 1a-2a. This

Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 2 of the United States Constitution provides, in relevant part:

"The 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, cl. 1.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

U.S. CONST. amend XIV, § 1.

STATEMENT

This is a direct appeal from a three-judge district court decision dismissing Appellants' constitutional challenge to Maryland's congressional districts. For the reasons set forth below, the Court should note probable jurisdiction and set this case for oral argument, because Appellants have stated a claim for partisan gerrymandering under Article I, § 2 and the Due Process Clause of the Fourteenth Amendment, and because this appeal raises a substantial and unsettled issue of redistricting law.

In the alternative, the Court should summarily reverse the district court's decision and remand for a full consideration of the merits, because the district court fundamentally erred by dismissing the complaint on jurisdictional grounds.

I. Factual Background.

On October 20, 2011, the Maryland General Assembly passed Senate Bill 1 creating the congressional districts at issue in this lawsuit. This bill reconfigured Maryland's congressional districts into extraordinary shapes, which have since become objects of derision. Maryland's Third Congressional District, for example, has been dubbed "America's Most Gerrymandered District" and described as a "Rorschach test,"[1] a "crime scene blood spatter,"[2] a "monstrosity" and the "Pinwheel of Death,"[3] and, by a federal court, 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); *see* App. 20a-21a. A well-known, mathematical measure of geographical compactness confirms that the Third District is one of the most contorted in the United States. App. 32a. According

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[1] Jeff Guo, *Welcome to America's Most Gerrymandered District*, New Republic, Nov. 8, 2012, https://goo.gl/fL7OLq.

[2] Erin Cox, *'Gerrymander Meander' Highlights Twisted District,* Baltimore Sun, Sept. 19, 2014, https://goo.gl/2ctKg3.

[3] *Why Do Politicians Gerrymander?*, The Economist, Oct. 27, 2013, https://goo.gl/HRyGhe.

to that same measure, Maryland has the least compact congressional districts in the nation. *Id.*; *see* Guo, *supra* note 1 (geospatial analysis firm "ranks Maryland as the most gerrymandered state.")

Criticism of Senate Bill 1 has been universal. Even Michael Busch, Speaker of the Maryland House of delegates and one of the designers of the redistricting bill, said that he "did not like the redistricting," and stated (or understated) that "we could have a done a better job" of keeping communities together.[4] Yet the reason Maryland's congressional district plan was adopted, notwithstanding any such reservations, is plain. Senate Bill 1 is a political gerrymander, created and passed by Democrats in the Maryland legislature as a way to diminish the potential clout of Republican voters. App. 25a; *see Fletcher,* 831 F. Supp. at 905 ("it is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander") (Titus, J., concurring); s*ee* Lazarick, *supra* note 4 (Speaker Busch admitted that the plan was drawn to please incumbent Democrats). Like most such gerrymanders, it works by concentrating voters of the opposing party in as few districts as possible, while engineering majorities favorable to the mapmakers in the rest of the districts. App. 24a. Maryland's congressional gerrymander has been singularly effective in achieving its political purpose.

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[4] Len Lazarick, *Speaker Busch 'Did Not Like Redistricting' Either*, MARYLAND REPORTER, Sep. 15, 2013, https://goo.gl/k2iVhC.

As the court in *Fletcher* observed, "Maryland's Republican Party regularly receives 40% of the statewide vote but might well retain only 12.5% [or one out of eight] of the congressional seats." 831 F. Supp. at 903; App. 25a; *see also* Lazarick, *supra* note 4 (redistricting helped defeat incumbent Republican Rep. Roscoe Bartlett in 2012).

In short, Senate Bill 1 may be the most extreme, and effective, congressional gerrymander in the nation. Unsurprisingly, it has been the subject of near-constant litigation.[5]

II. Appellants' Claims In This Action.

Appellants are Maryland voters who have filed a constitutional challenge to Maryland's notorious gerrymander. App. 16a.

Article I, § 2 of the Constitution requires that members of the House of Representatives shall be chosen "by the People of the several States." Appellants' complaint alleges that Senate Bill 1

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[5] *See Fletcher*; *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 U.S. Dist. LEXIS 6178 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 U.S. Dist. LEXIS 29917 (D. Md. Mar. 5, 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd* 584 F. App'x 140 (4th Cir. 2014), *rev'd sub nom. Shapiro v. McManus*, 136 S. Ct. 450 (2015); *Shapiro v. McManus*, No. 1:13-cv-03233, 2016 U.S. Dist. LEXIS 112732 (D. Md. Aug. 24, 2016) (three-judge court); *see also Whitley v. State Bd. of Elections*, 429 Md. 132 (2012); *Parrott v. McDonough*, Case No. 1445 (Md. Ct. Spec. App. July 23, 2014) (available at https://goo.gl/cQa67S), *cert. denied*, 440 Md. 226 (2014).

violates this provision by transferring the power to select congressional representatives from Maryland's voters to the legislators who drew and adopted Maryland's congressional district plan. The means used to effect this transfer of power, moreover, are purely mechanical. Because "voters do not choose where to live so as to suit the purposes" of legislative mapmakers, those seeking to gerrymander "distort district boundaries to create districts that contain the mix of voters that best achieves their partisan goals." App. 27a. This procedure has nothing to do with traditional democratic practices, like communicating with and persuading voters, taking policy positions, or fundraising and contributing.

In this way, gerrymandering resembles another purely mechanical tactic that diminished voters' control over the outcome of elections: the malapportionment of district populations. Maintaining one's own supporters in underpopulated districts magnifies their political clout when compared to voters who reside in overpopulated districts. This Court repeatedly has recognized this point in its many decisions holding malapportioned districts to be unconstitutional.[6] Like gerrymandering, malapportionment must be understood as a way to circumvent, rather than to practice, democracy.

Yet these two anti-democratic tricks are connected in an even more immediate way. The positive effect that population equality has in

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[6] *See* cases discussed *infra* at pp. 20-24.

ensuring electoral equality between voters in different districts can be undone simply by creating noncompact districts – like those that result from the technique of gerrymandering. Stated differently, the power to control outcomes that legislators lost as a result of this Court's one-person-one-vote jurisprudence can be regained by gerrymandering. As Appellants allege in their complaint, "Maryland's congressional gerrymander circumvents the one-person-one-vote standard, frustrates its purpose, and diminishes its efficacy." App. 26a. Accordingly, insofar as the one-person, one-vote standard is constitutionally required, some minimum level of district compactness must be as well. Appellants logically grounded their gerrymandering challenge in the same constitutional provision that has been held to proscribe congressional malapportionment, the "by the People" clause of Article I, § 2.[7]

The complaint also alleges that Maryland's noncompact districts violate the Due Process Clause of the Fourteenth Amendment by imposing undue burdens on Appellants' fundamental voting rights. App. 28a-29a, 38a. By "ignor[ing] political boundaries," "fragment[ing] political communities of interest," and "confus[ing] voters," gerrymandered districts impose unique burdens on the candidates and voters in those districts. App. 28a-29a. In consequence, "voters in gerrymandered districts have a harder time staying informed about elections." App. 29a. Because these burdens are inflicted "to no public purpose and for no good

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[7] *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

reason," Maryland's district plan burdens Appellants' right to vote in violation of the Due Process Clause. App. 29a, 38a.

Appellants' claims in this action differ in important respects from those asserted in other lawsuits challenging Maryland's congressional districts. In particular, Appellants are not asserting a violation of the Equal Protection Clause and are not proceeding under the jurisprudence of *Davis v. Bandemer*, 478 U.S. 109 (1986). In *Bandemer*, this Court held that a plaintiff could state a justiciable claim for partisan gerrymandering under the Equal Protection Clause of the Fourteenth Amendment. 478 U.S. at 113. Yet a majority of the Court could not agree on the appropriate standard to use in adjudicating such a claim, and in the intervening three decades no such standard has emerged. As a result, no claim of partisan gerrymandering has ever succeeded under *Bandemer*.

Appellants' lawsuit instead adopts a new approach to partisan gerrymandering, based on a different constitutional ground. Accordingly, the complaint did not identify Appellants' party affiliations, nor did it base their claim on the premise that they are injured as *Republicans*. Rather, Appellants allege that they are injured as *voters*, because part of their power to select representatives has been exercised by the Maryland legislature, and because their fundamental right to vote has been burdened by the electoral harms inflicted by Maryland's district plan.

III. Procedural Background.

Appellants are eight registered Maryland voters, one from each congressional district in the State. App. 16a, 17a-19a. They filed suit in the United States District Court for the District of Maryland, challenging Senate Bill 1 as a violation of Article I, § 2, and the Due Process Clause of the Fourteenth Amendment. Appellants sought a declaratory judgment that Senate Bill 1 was an unconstitutional gerrymander, a permanent injunction against its use in future congressional elections, and related relief. Appellants also moved pursuant to 28 U.S.C. § 2284 to convene a three-judge panel to hear the case.

Appellees filed a motion to dismiss the complaint and also opposed the motion to convene a three-judge panel. Following this Court's decision in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), however, Appellees withdrew their opposition, and a district court of three judges subsequently was appointed.

On August 24, 2016, the district court granted the motion to dismiss. Appellees argued that Appellants "lack standing because they allege a generalized grievance on behalf of all Maryland voters." App. 6a. The district court acknowledged that Appellants "consistently allege they are asserting a harm that *all* Maryland voters endure." App. 9a. But the district court observed that the "deprivation of the right to vote . . . can constitute an injury in fact notwithstanding that the injury is widespread" (App. 9a), and found "that at this

pleading stage, this harm is adequately concrete and particularized." App. 10a.

However, the district court went on to state that Appellants "must assert more than a concrete and particularized injury – they must also allege 'an invasion of a legally protected interest.'" App. 10a (citations omitted). The district court stated that there was no case "in which a court expressly held that the Constitution protects the right to reside in a district that has not been mechanically manipulated to transfer the power to select representatives away from the people." *Id.* Rejecting the Appellants' argument regarding the malapportionment cases, the district court stated that "nothing in the language of the One Person, One Vote Cases suggests that the Court should apply those cases to claims not asserting unequal population." App. 12a. The district court concluded that Appellants had "not sufficiently alleged standing to assert their claims because have they have not alleged an invasion of a legally protected interest," and dismissed the complaint without considering the merits. *Id.* This timely appeal followed.

REASONS FOR NOTING PROBABLE JURISDICTION

The Court must decide whether it should note probable jurisdiction and set this case for oral argument, or whether it should instead summarily affirm the district court's decision. The Court notes probable jurisdiction in direct appeals and sets the case for oral argument so long as the question

presented is "a substantial one." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). That standard is not demanding. Plenary review is warranted unless

> after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinions below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing would be a waste of time.

STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 304 (10th ed. 2013).

The Court should grant plenary review here because the question presented is substantial. The appeal raises the most important, unsettled constitutional issue in the law of redistricting and seeks to resolve it in a manner consistent with the Court's prior decisions.

While the Court has recognized that partisan gerrymandering is justiciable, and a majority of Justices have expressed the view that it is unconstitutional, no majority has agreed on the appropriate standard for determining whether a partisan gerrymander has violated the Constitution. Appellants maintain that excessive partisan gerrymandering, like that on display in Maryland, violates Article I, § 2 by transferring the power to select Representatives from "the People of the several States" to the government officials who

design and approve congressional districts. This anti-democratic ruse is contrary to the legal principles embodied in the Court's "one person, one vote" jurisprudence. Indeed, as explained below, the Court's equal population rule can be nullified in practice by the noncompact districts used to gerrymander. Appellants thus maintain that a minimum level of district compactness, as determined by known social science methods, is constitutionally required. Appellants' arguments have long been anticipated and discussed in the Court's prior rulings, in the individual opinions of its members, and in the academic literature.

Appellants also maintain that the consequential damage inflicted on voters for no public purpose by the process of creating gerrymandered districts burdens their fundamental right to vote in violation of the Due Process Clause.

I. Excessive Gerrymandering Is Both Justiciable and Unconstitutional.

In *Davis v. Bandemer*, 478 U.S. 109, 113 (1986), the Court first held that a claim of partisan gerrymandering was justiciable. To support this conclusion, the plurality opinion cited a variety of cases where the Court had considered other kinds of challenges to redistricting. *See, e.g., id.* at 119, citing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (rejecting a challenge to multimember districts, but warning that an "apportionment scheme" that "would operate to minimize or cancel out the voting strength of . . . political elements of the voting

population" might not "pass[] constitutional muster"); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (upholding a bipartisan gerrymander, but observing that what is done "in [] arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny").

A majority of the Court in *Bandemer* would have prosecuted a claim involving gerrymandering under the Equal Protection Clause of the Fourteenth Amendment. There was no agreement, however, as to the correct standard to use in determining whether a particular gerrymander violated the Constitution. In the 30 years following that decision, no such standard has been found. Although challenges under *Bandemer* were brought during that time against some of the most egregious gerrymanders in United States history, including the current Maryland gerrymander,[8] no such challenge has ever succeeded.

Referring to the "years of essentially pointless litigation," a plurality in *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004), suggested that *Bandemer* "is incapable of principled application" and should be overruled. Yet the record of failure to date also has inspired a search for appropriate standards with which to judge partisan gerrymandering, both within and without the framework set forth in *Bandemer*. The dissenters in *Vieth* proposed various standards

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[8] *See Fletcher*, 831 F. Supp. at 903-04 (rejecting a *Bandemer* challenge to Maryland's congressional district plan).

for considering gerrymandering claims under the Equal Protection Clause. *See* 541 U.S. at 339 (Stevens, J., dissenting) (based on whether partisan considerations predominated over neutral principles); *id.* at 347-51 (Souter, J., dissenting) (burden-shifting standard based on meeting a five-part test); *id.* at 367 (Breyer, J., dissenting) (weighing the risk of partisan entrenchment, deviations from traditional districting criteria, and the validity of any justification); *see also LULAC v. Perry*, 548 U.S. 399, 475-76 (2006) (Stevens, J. dissenting) (burden-shifting standard based on showing partisan purpose and effect).

Justice Kennedy rejected the standards proposed by the dissenters. *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment). However, he also rejected the plurality's view that gerrymandering is not justiciable and argued that a manageable standard could be found. *Id.* at 311. He further suggested that "[w]here it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the *Equal Protection Clause*." *Id.* at 315.

Vieth left the law of gerrymandering in a parlous condition. Even the members of the plurality acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles" and conceded that "severe partisan gerrymanders violate the Constitution," although they did not believe courts could address that problem. *Id.* at 292

(plurality opinion); *see id.* at 293 (commenting on the argument "that an *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume."). Thus, all nine justices in *Vieth* concurred that severe partisan gerrymandering was unconstitutional, while a majority of justices concluded that such gerrymandering was justiciable.[9] Yet, in that case, Pennsylvania's congressional gerrymander was allowed to stand.

Finding a judicially manageable standard that would allow the Court to address the problem of excessive partisan gerrymandering is the single most important piece of unfinished judicial business in the law of redistricting. Recognizing this fact, both litigants and interested observers have explored the applicability of a variety of constitutional provisions and theories to the problem of partisan gerrymandering. *See, e.g., Shapiro*, 2016 U.S. Dist. LEXIS 112732 at *39-41 (applying a multi-part test to conclude that plaintiffs stated a claim for intentional gerrymandering in violation of the First Amendment and Article I, § 2); *Whitford v. Nichol*, No. 15-cv-421-bbc, 2016 U.S. Dist. LEXIS 47048, *11 (W.D. Wis. Apr. 7, 2016) (denying a motion for summary judgment where plaintiffs sought to show a violation of the Fourteenth Amendment by analyzing "partisan symmetry" in "wasted votes" to

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[9] Indeed, neither *Vieth* nor any subsequent case ever has overruled *Bandemer's* holding that partisan gerrymandering is justiciable. *See LULAC v. Perry*, 548 U.S. 399, 414 (2006) (while a "plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions," a "majority declined to do so. . . . We do not revisit the justiciability holding") (citations omitted).

ascertain an "efficiency gap"); *see* Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. (forthcoming 2017) (draft available at http://ssrn.com/abstract=2815892) (suggesting that the Due Process Clause is the proper basis for a gerrymandering claim); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 719, 721-22 (Jan. 2013) (suggesting that a fiduciary duty of loyalty proscribing partisan gerrymandering reasonably could be grounded in the Equal Protection Clause, the Due Process Clause, the First Amendment, the Elections Clauses, or the Guarantee Clause).

This appeal raises and addresses this important, unresolved constitutional issue.

II. Appellants Have Stated a Constitutional Claim For Partisan Gerrymandering.

A. Gerrymandering Unconstitutionally Transfers Power from Voters to Legislators.

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. The essence of Appellants' 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." To understand this claim, it is important to view political gerrymandering in the proper context. While the motives of those engaged in such gerrymandering are, by definition, partisan, it is misleading to characterize gerrymandering primarily by that motive. Gerrymandering is more than a partisan act. It is a way for government agents to take power from private citizens – in the case of gerrymandering, the power to select legislators. As Appellants have it in their complaint, "[g]errymandering is not primarily something that Democrats and Republicans do to each other. Gerrymandering is something that *legislators* and other state actors do to *voters*." App. 24a.

Courts and commentators have long recognized the illicit transfer of power away from voters and to legislators and mapmakers that is inherent in political gerrymandering. 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). Justice Stevens expounded on this point in *Vieth*:

> The [] danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no

> part of her constituency at all. The problem, simply put, is that the will of the cartographers rather than the will of the people will govern. As Judge Ward recently wrote, "extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa." *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex. 2004) (concurring in part and dissenting in part).

541 U.S. at 331-32 (Stevens, J., dissenting) (footnotes omitted), citing *Note: A New Map: Partisan Gerrymandering As A Federalism Injury*, 117 Harv. L. Rev. 1196 (Feb. 2004) ("ample evidence demonstrates that many of today's congressional representatives owe their election not to 'the People of the several states' but to the mercy of state legislatures"); *see* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering,* 9 YALE L. & POL'Y REV. 301, 304-309 (1991) (describing gerrymandering as the problem of self-constituting legislatures); *see generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT, §§ 212, 216 (J.M. Dont & Sons 1924) (1690) (because the "constitution of the legislative is the first and fundamental act of the society" without which no one "can have authority of making laws," then if "others than those whom the society hath authorised . . . do choose, or in another way than what the society hath prescribed, those chosen are not the legislative appointed by the people.").

Appellants are right to ground their claim in the plain language of Article I, § 2. Gerrymandering is a straightforward violation of the requirement that representatives be chosen "by the People."[10]

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[10] There also is evidence that the Founders defined "the People" as those residing in a particular (geographical) *place*. They did so in order to ensure that all of the peoples' interests were appropriately represented.

At the Constitutional Convention of 1787, James Madison opposed a 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." JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 375 (Adrienne Koch ed., Ohio University Press, 1966) (1787). This suggests that Madison's notion of "community" encompassed a geographic area, which would not be subjected to manipulation that would reduce the number of "classes," "interests," or "parts" represented. More direct evidence comes from Madison's letter to a friend in 1785 regarding 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).

Alexander Hamilton also 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 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? . . . 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); *see also* No. 57 at 351 (James Madison)

B. The Court's Malapportionment Cases Necessarily Forbid the Manipulation of District Boundaries Required by Extreme Gerrymandering.

Appellants' gerrymandering claim is an analog to, and a necessary consequence of, the Court's "one person, one vote" jurisprudence. The malapportionment cases describe a constitutional violation that arises whenever the purely technical attributes of a legislative district are so severely manipulated as to allow 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); *see also Reynolds v. Sims*, 377 U.S. 533,

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("Who are to be the electors of the federal representatives? Not the rich, more than the poor . . . . The electors are to be the great body of the people of the United States.").

568 (1964) (invalidating Alabama's state districts under the Equal Protection Clause).

The rules set forth in *Baker*, *Wesberry*, and *Reynolds* 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.

It is important to recognize 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 equality of votes in any particular sense. This point is strikingly illustrated by the fact that, while district "populations" must be equal, the Court has never held that any particular population base *must* be used to make that determination. *Compare Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (Texas redistricting based on total population was constitutionally valid); and *Burns v. Richardson*, 384 U.S. 73, 93-94 (1966) (allowing use of registered voter population on the facts before the Court).

Moreover, the Court has never required states "to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" in their apportionment bases. *Burns*, 384 U.S. at 92. Of course, choosing different population bases or including or excluding the various subpopulations mentioned could dramatically alter the measured "population equality" of voter districts. As just one example, a state that reapportioned on the basis of total population could have districts with widely different voter populations, which would belie its claim to adhere to the principle of "one person, one vote." *See Evenwel*, 136 S. Ct. at 1125 (voter populations deviated by more than 40%).

Apparently, the equal population standard does not mandate any particular kind of population equality, as long as *some* defined population is equalized. This fact proves that the real purpose of the equal population standard is prophylactic: It is a practical safeguard rather than an absolute, theoretical norm. What it is designed to prevent is the legislature's abuse of the redistricting process for partisan advantage – in other words, cheating.[11] The kind of cheating that malapportionment allows is brutally simple. Any party that can create or take

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[11] By the same token, in circumstances where the possibility of partisan cheating is remote, the Court has tolerated wide disparities in district populations as essentially harmless. *See U.S. Dept. of Commerce v. Montana,* 503 U.S. 442, 464 & n. 42 (1992) (upholding the statutory method of apportioning representatives among states even though it led to large differences between district populations, in part because the method used was an "apparently good-faith choice" that did not "systematically favor[] a particular party").

advantage of districts with fewer voters has an enormous electoral advantage. It can win more seats with fewer votes. *See Vieth,* 541 U.S. at 331 n. 25 (Stevens, J., dissenting) (discussing population inequalities in England's "rotten boroughs").

The early reapportionment decisions never lost sight of the political self-dealing inherent in malapportionment. They were especially concerned that legislators representing a minority of voters could seize, and retain, power. *See, e.g., Baker,* 369 U.S. at 258-59 (Clark, J. concurring) ("the 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"); *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"); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 669-70 (1964) (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."); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 648 (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); *Roman v. Sincock*, 377

U.S. 695, 707 (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"); *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."); *Davis v. Mann*, 377 U.S. 678, 689 (1964) ("No adequate political remedy to obtain legislative reapportionment appears to exist in Virginia.").

Like malapportionment, extreme gerrymandering is a mechanical manipulation by which legislators may influence the outcome of district elections without having to convince voters to vote for them. The means employed are more complicated, typically involving the use of dedicated computer software. But these means nonetheless consist of no more than technical adjustments to district boundaries. Appellants maintain 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.

C. Gerrymandering Undoes the Prophylactic Effect of the Equal Population Requirement.

Gerrymandering and malapportionment share more than an anti-democratic intent. The two

practices are connected in a more direct way. Simply stated, the grossly noncompact districts characteristic of extreme gerrymandering can destroy the prophylactic restraint that the "one person, one vote" or "equal population" standard imposes on legislative partisans.

This fact can be easily demonstrated.[12] Imagine that Maryland's mapmakers were not constrained to draw geographic districts at all. Suppose instead that each congressional "district" could comprise any set of residents living anywhere in the State. With eight representatives, Maryland would be entitled to define eight such clusters of residents. Suppose as well that these clusters had equal populations. It is evident that the party that gets to select the residents of these districts could engage in a particularly ruthless kind of partisan redistricting. If the party controlling the legislature had, say, a 51%-49% statewide edge over its rival, it could then construct eight districts where it had the same 51%-49% advantage, *and win every congressional election in the State*.

Requiring mapmakers to draw electoral districts based on local, geographic areas, and requiring those districts to have equal populations, frustrates such a tactic, because local majorities tend to differ from statewide majorities. But noncompact districts tilt the playing field back towards self-serving partisans. As districts are allowed to become more and more distorted in the interest of specially selecting the right "mix" of voters to suit partisan mapmakers,

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[12] *See* discussion in Polsby & Popper, *supra* p. 18, at 331.

electoral district plans start to resemble our hypothetical – a world where there are no district boundaries at all, and mapmakers can select any voters anywhere in the State.

Ultimately, the "one person, one vote" standard can be rendered meaningless without the aid of an anti-gerrymandering principle. In consequence, just as the "one person, one vote" standard is a necessary inference from Article I, § 2 of the Constitution, an anti-gerrymandering principle is a necessary inference from that same clause.

D. A Minimum Level of District Compactness is the Appropriate Constitutional Standard.

The constitutional standard identified by Appellants would enjoin the use of congressional districts that do not meet a minimum level of geographic compactness, as determined by well-known social science metrics. This limited standard is the correct one.

Appellants propose the use of a particular measure of geographic compactness. Variously known as the "perimeter," "Polsby-Popper," or "modified Schwartzberg" test, it is one of the most widely used of such measures and is regularly relied on by federal courts. *See* 30a-31a; Polsby & Popper, *supra* p. 18, at 348-51; *Vieth*, 541 U.S. at 349 n. 3 (Souter, J., dissenting) (suggesting that perimeter and other measures could be incorporated in a test for partisan gerrymandering); *Bethune-Hill v. Va.*

State Bd. of Elections, 141 F. Supp. 3d 505, 552-53 and *passim* (E.D. Va. 2015) (three-judge court), *prob. juris. noted*, 136 S. Ct. 2406 (2016) (applying Polsby-Popper to alleged racial gerrymanders). This measure is automatically calculated by most redistricting software, including, it is believed, the program used to draw Maryland's congressional districts. App. 30a.[13]

A requirement that congressional districts could not fall below some minimal level of compactness will prevent the worst kinds of gerrymandering. As explained in the complaint, "voters do not choose where to live so as to suit the purposes" of legislative partisans, so effective gerrymandering requires mapmakers to "distort district boundaries to create districts that contain the mix of voters that best achieves their partisan goals." App. 27a. A restriction on the more extreme forms of such distortions would proscribe the gerrymanderers' primary tool. It is like a criminal law proscribing the use of burglars' tools. *See Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part) (of the factors that "should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges," the "most important . . . are the shapes of voting districts and adherence to established political subdivision boundaries") (citations omitted).

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[13] Although Appellants argue in favor of a particular standard of compactness, there are other measures that effectively could be used for the same purpose. *See* Polsby & Popper, *supra* p. 18, at 339-351 (reviewing workable compactness standards).

Anticipating Appellees' arguments, it is important to note all the things that Appellants' standard is *not*. It is not a constitutional requirement that voting districts be compact, and does not create or confer a constitutional right to reside in a compact district. Voting districts would, and in many cases should, be adjusted to account for political boundaries, communities of interest, even incumbent interests, and, of course, for any requirements otherwise imposed by federal voting law, including the anti-discrimination standards of § 2 of the Voting Rights Act. *See* 52 U.S.C. § 10301. Like the "one person, one vote" standard, the anti-gerrymandering standard would proscribe only extreme noncompactness, and it would do so automatically, presuming that the risks posed to democratic practice are simply too great to be justified. Nor have Appellants proposed a "magic bullet" that would end all gerrymandering. In fact, legislators could still engage in whatever presumably more limited gerrymandering they could accomplish with more compact districts, on the theory that such districting is just too deep in the political thicket to be addressed by courts. Indeed, Appellants' limited anti-gerrymandering principle claim would not require courts to review most districting decisions. But it would proscribe Maryland's Third Congressional District.

As a final matter, the suggestion has been made in scholarly articles and repeated in various opinions that a compactness criterion might have a systematic partisan tendency. If the supporters of one party (postulated to be the Democratic Party)

were more densely concentrated in areas where they predominated than supporters of the other party were in those areas where they predominated, a rigorous compactness requirement could concentrate the members of the first party to their electoral detriment. *See, e.g.,* Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 POL. GEOGRAPHY 989 (1998), cited in *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring in the judgment) (describing article as "explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions").

Any such consideration is irrelevant to Appellants' proposed constitutional standard here, because they do not seek to require that all districts be compact. Rather, as explained above, Appellants would ask courts to enjoin only extremely noncompact districts. And no scholarly article or empirical study has ever suggested that proscribing the most egregiously noncompact districts would have a systematic partisan effect. In any event, such important factual matters should not be presumed on a motion to dismiss, but should await proof at trial.

That said, it is hard to think of any other unproven speculation in the social science literature that has gotten as much traction as Mr. Altman's suggestions about the potential effect of district compactness. In his 1998 article, Mr. Altman did not survey any actual partisan populations in the United States. Rather, he merely ran tests on a

hypothetical 20 by 20 checkerboard composed of black and white squares with the help of a computer, and concluded that such a partisan effect was *possible*. 17 POL. GEOGRAPHY at 1002. Any assertion that such an effect is likely to be found in the real world is rank speculation. Indeed, just this year, a district court referred to contrary empirical evidence suggesting that "Democrats and Republicans in Wisconsin have comparable spatial distributions." *Whitford,* 2016 U.S. Dist. LEXIS 47048 at *20; *see* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 11-12, *Whitford v. Nichol*, No. 15-cv-421-bbc, (W.D. Wis. Jan. 25, 2016), ECF No. 68 ("the isolation index for Democratic and Republican voters," which "indicates, for the average Democratic or Republican voter, what share of his or her fellow county residents are also Democrats or Republicans," was generally equal, both across time and recently), citing Edward L. Glaeser & Bryce A. Ward, *Myths and Realities of American Political Geography*, *available at* 20 J. Ec. Persp. 119, 122-23 (2005). Of course, Appellants do not seek a resolution of this factual issue now, but simply maintain that they should have the opportunity at trial to show that there is no such differential effect.

Appellants' practical, limited standard is a workable and judicially manageable way to support the efficacy of the equal population requirement, to prevent legislators from appropriating the power to select congressional representatives, and to end extreme partisan gerrymandering.

III. Gerrymandering Violates Appellants' Due Process Rights.

"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." *Reynolds*, 377 U.S. at 562; *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (voting "is regarded as a fundamental political right, because preservative of all rights.").

Appellants allege that the noncompact districts resulting from Maryland's gerrymander violate the Due Process Clause by burdening Appellants' fundamental voting rights. App. 28a-29a, 38a. Maryland's district plan "ignores political boundaries and fragments political communities of interest," and "confuse[s] 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." App. 28a. Gerrymandered districts "make it harder for candidates and their political campaigns to use mass media to target" their potential voters, which raises the costs of campaigning and "further confuses voters as to who is running for office in their districts." App. 28a-29a. Such districts also compel candidates "to expend resources to educate voters" about the candidates and the issues in their districts and cost more to travel and campaign in. App. 29a. As a result, "voters in gerrymandered districts have a harder time staying informed about elections." *Id.* These

burdens are inflicted for no public purpose. App. 29a.

The "rigorousness of [the Court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "[W]hen those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id.* (citations omitted). "Ordinary and widespread burdens, such as those requiring 'nominal effort' of everyone, are not severe." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring) (citations omitted). Such burdens "call[] for application of a deferential 'important regulatory interests' standard.'" *Id.* (citations omitted). "Burdens are severe if they go beyond the merely inconvenient." *Id.* (citations omitted).

As stated in the complaint, the noncompact districts in Maryland's gerrymandered district plan inflict a number of electoral burdens on Appellants. Whether these burdens are ultimately determined to be "severe" or "ordinary," Appellants' allegations clearly state a claim for a violation of their rights under the Due Process Clause.

REASONS FOR SUMMARILY REVERSING AND REMANDING

The district court also erred by dismissing the complaint for lack of Article III standing. Appellants respectfully request, in the alternative, that the Court summarily reverse the district court's decision and remand this case for a full consideration of the merits of Appellants' claims.

In the decision below, the district court found that the injury Appellants alleged was "adequately concrete and particularized." App. 10a. The district court further stated, however, that no court had "expressly held that the Constitution protects the right to reside in a district that has not been mechanically manipulated to transfer the power to select representatives away from the people" (*id.*) and that "nothing in the language of the One Person, One Vote Cases suggests that the Court should apply those cases to claims not asserting unequal population." App. 12a. The district court concluded that Appellants had "not sufficiently alleged standing" because they had "not alleged an invasion of a legally protected interest," and it dismissed their complaint for lack of subject-matter jurisdiction. App. 12a. Because it dismissed on that ground, the district court stated that it "need not determine" whether Appellants "state claims upon which relief may be granted." *Id.* n. 4.

This was clear error. Appellants, of course, dispute that their claim is not supported by existing law. Even if that were true, however, a dismissal on

that basis is a dismissal for failure to state a claim on which relief can be granted – it is not a failure of jurisdiction. "[T]he absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," which is "the courts' statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). As previously noted, the Court's jurisdiction to hear constitutional gerrymandering challenges is not in doubt. *See supra* note 9 and accompanying text.

The Court repeatedly has emphasized that a jurisdictional determination should not be conflated with the analysis of whether a complaint states a cause of action. The Court has described improper dismissals for lack of subject-matter jurisdiction as "unrefined dispositions" and "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006), citing *Steel Co.*, 523 U.S. at 91; *see Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("In light of the important distinctions between jurisdictional prescriptions and claim-processing rules . . . we have encouraged federal courts and litigants" to facilitate "clarity by using the term 'jurisdictional' only when it is apposite") (citations omitted).

To be sure, if "nothing in the analysis of the courts below turned on" the difference between a jurisdictional and a merits dismissal, a remand to the district court may be unnecessary, and the Court may simply choose to rule on the merits on appeal.

Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010). But special circumstances counsel against that outcome in this case, and suggest that, if the Court does not note probable jurisdiction, it should remand the case to the district court for a full determination on the merits.

Two other cases concerning partisan gerrymandering recently have survived dispositive motions. *See Shapiro*, 2016 U.S. Dist. LEXIS 112732 at *2 (divided district court denying motion to dismiss a claim based on First Amendment); *Whitford v. Nichol*, 2016 U.S. Dist. LEXIS 47048 at *3 (district court denying motion for summary judgment on a claim under the Fourteenth Amendment because of a partisan asymmetry in wasted votes). It simply is not logical that the instant case be dismissed for lack of jurisdiction while those cases go forward. What the district court erroneously asserted here was indisputably true in both of those cases, namely, that no previous court had recognized the right to the relief they sought.[14] If, as the district court stated, the absence

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[14] Indeed, there is a long line of authority squarely rejecting the First Amendment claim. *See, e.g., League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 U.S. Dist. LEXIS 125531, *14 (N.D. Ill. Oct. 27, 2011), *aff'd*, 132 S. Ct. 2430 (2012) (granting motion to dismiss such a claim); *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, *47 (N.D. Ga. May 16, 2006) (three-judge court) ("Supreme Court precedent does not support Plaintiffs' First Amendment political gerrymandering claim"); *Badham v. Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988*), appeal dismissed*, 488 U.S. 804 (1988) (rejecting claim that gerrymandering "penalize[es] Republican voters solely because of their party affiliations, political beliefs and associations").

of such authority is grounds for dismissal for lack of standing, both *Shapiro* and *Whitford* should have been dismissed. Stated another way, just as those courts had jurisdiction over the gerrymandering claims before them, the district court here had jurisdiction over Appellants' claims.[15]

In any event, this case – like *Shapiro*, *Whitford*, and all of the related scholarship concerning this area of the law – attempts to answer the most important open question in the law of redistricting: What are the constitutional moorings and the judicial standards for adjudicating claims of excessive partisan gerrymandering? Appellants respectfully submit that the district court's error in improperly designating its action as a dismissal for

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By contrast, there are no cases rejecting Appellants' theory, although other plaintiffs have presented different kinds of claims under Article I, § 2. For example, a number of cases relied on the language from *Wesberry* stating that Article I, § 2 "means that as nearly as is practicable" one vote "in a congressional election is to be worth as much" as another. 376 U.S. at 7-8. *See, e.g., Badham*, 694 F. Supp. at 674 (rejecting plaintiffs' argument, based on "the concept of 'worth,'" that "Republican votes in California are 'worth' less than Democratic votes"); Complaint and Motion for Temporary Restraining Order and Preliminary and Permanent Injunction at 32, *Pope v. Blue*, No. 3:92cv71-P (W.D.N.C. Feb. 28, 1992) (on file with Appellants) (Article I, § 2 "requires that the vote of each citizen be equally effective and be worth as much as any other vote").

[15] The difference between the disposition of this case and *Shapiro* is more remarkable given that both were decided by the same three-judge panel, after oral argument on the same day. *See Shapiro*, 2016 U.S. Dist. LEXIS 112732 at *64 n. 7 (cross-referring to oral argument in this case).

lack of jurisdiction is more than a naming error. Rather, it will have a negative impact on the Court's ability to resolve the important issues raised by this case. The Court is well served by a full treatment of the merits at trial. Along with any merits decisions in other cases, this will provide the Court with the fullest possible exposition of the factual and legal issues and the judicial options that these cases present.

CONCLUSION

Appellants respectfully request that the Court note probable jurisdiction and set this case for oral argument. In the alternative, Appellants respectfully request that this Court summarily reverse the decision below and remand this case for a full consideration of the merits.

Respectfully submitted,

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October 28, 2016

APPENDICES

APPENDIX A – PLAINTIFFS' NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, BALTIMORE DIVISION, FILED AUGUST 29, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 15-cv-01849-GLR

Neil Parrott, *et al.*,

Plaintiffs,

v.

Linda H. Lamone, *et al.*,

Defendants.

NOTICE OF APPEAL

Notice is given that NEIL PARROTT, ANN MARVIN, LUCILLE STEFANSKI, ERIC KNOWLES, FAITH LOUDON, MATT MORGAN, ELLEN SAUERBREY, and KERINNE AUGUST, Plaintiffs in the above-captioned case, hereby file their appeal, pursuant to 28 U.S.C. §§ 1253 and 2284, to the United States Supreme Court, from the Opinion of the Three-Judge Court (ECF No. 30), entered in this action on August 24, 2016; and from this Court's Order (ECF No. 31), entered in this

action August 24, 2016, granting Defendants' motion to dismiss for the reasons stated in that Opinion.

Dated: August 29, 2016

Respectfully submitted,

s/ Robert Popper

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APPENDIX B –OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 24, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. GLR-15-1849

Neil Parrott, *et al.*,

Plaintiffs,

v.

Linda H. Lamone, *et al.*,

Defendants.

Before Niemeyer, Circuit Judge, and Bredar and Russell, District Judges:

OPINION OF THE THREE-JUDGE COURT

Judge Russell wrote the opinion in which the Court concluded it does not have subject-matter jurisdiction over this action because Plaintiffs do not have standing to pursue their claims.

RUSSELL, District Judge:

Plaintiffs ("Voters")[1] challenge the constitutionality of Maryland's 2011 congressional redistricting law under Article I, § 2 of the United States Constitution and the Due Process Clause of the Fifth and Fourteenth Amendments. Pending before the Court is Defendants', Linda H. Lamone, in her official capacity as the State Administrator of Elections, and David J. McManus, Jr., in his official capacity as Chairman of the Maryland State Board of Elections (collectively, the "State"), Motion to Dismiss (ECF No. 7). The Motion is ripe for disposition. For the reasons outlined below, the Court will grant the Motion.

I

In October 2011, following the 2010 decennial census, the Maryland General Assembly enacted a congressional redistricting plan (the "Plan"), establishing the districts to be used for the election of Maryland's eight representatives in the United States House of Representatives. *See* Md.Code Ann., Elec. Law §§ 8–701 *et seq.* (West 2016). Following its enactment, the Plan has been subject to numerous challenges.[2] On June 24, 2015, Voters brought the

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[1] Voters consist of one voter from each of Maryland's eight congressional districts. They include: Neil Parrott, Ann Marvin, Lucille Stefanski, Eric Knowles, Faith Loudon, Matt Morgan, Ellen Sauerbrey, and Kerinne August.

[2] *See, e.g.*, *Benisek v. Mack*, 11 F.Supp.3d 516 (D.Md.), *aff'd*, 584 F.App'x 140 (4th Cir. 2014), *cert. granted sub nom. Shapiro v. Mack*, 135 S.Ct. 2805 (2015), and *rev'd and remanded sub nom. Shapiro v. McManus*, 136 S.Ct. 450 (2015); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 WL 764421 (D.Md. Mar. 6,

instant challenge, arguing the Plan is an unconstitutional political gerrymander[3] that transfers the power to select representatives from the people -- all Maryland voters -- to the Maryland General Assembly. (ECF No. 1).

On July 20, 2015, the State filed a Motion to Dismiss under Federal Rules of Civil Procedure 8(c), 12(b)(1), and 12(b)(6). (ECF No. 7). Voters submitted an Opposition on September 21, 2015 (ECF No. 13), and the State filed a Reply on October 21, 2015 (ECF No. 17). In accordance with *Shapiro v. McManus*, 136 S.Ct. 450 (2015) and 28 U.S.C. § 2284 (2012), the Chief Judge of the United States Court of Appeals for the Fourth Circuit designated a three-judge court to hear the State's Motion to Dismiss. (ECF Nos. 21, 22). The three-judge court conducted a hearing on July 12, 2016. (ECF No. 29).

II

A

The State advances two principal arguments for why the Court should dismiss Voters' claims. First,

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2012); *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919 (D.Md. Jan. 19, 2012); *Fletcher v. Lamone*, 831 F.Supp.2d 887 (D.Md. 2011), *aff'd*, 133 S.Ct. 29 (2012).

[3] "The term 'political gerrymander' has been defined as 'the 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. Jubelirer*, 541 U.S. 267, 271 n.1 (2004) (quoting Black's Law Dictionary 696 (7th ed. 1999)).

Voters lack standing because they allege a generalized grievance on behalf of all Maryland voters. Second, Voters fail to state a claim upon which relief can be granted because their claims are not justiciable. The Court begins by reviewing the threshold issue of standing.

Motions to dismiss for lack of standing are governed by Rule 12(b)(1), which pertains to subject matter jurisdiction. *See CGM, LLC v. BellSouth Telecomm's, Inc.*, 664 F.3d 46, 52 (4th Cir. 2011). A defendant challenging a complaint under Rule 12(b)(1) may advance a "facial challenge, asserting that the allegations in the complaint are insufficient to establish subject matter jurisdiction, or a factual challenge, asserting 'that the jurisdictional allegations of the complaint [are] not true.'" *Hasley v. Ward Mfg., LLC*, No. RDB-13-1607, 2014 WL 3368050, at *1 (D.Md. July 8, 2014) (alteration in original) (quoting *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009)).

Here, because the State raises a facial challenge, the Court will afford Voters "the same procedural protection as [they] would receive under a Rule 12(b)(6) consideration." *Kerns*, 585 F.3d at 192 (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). As such, the Court will take the facts in Voters' Complaint as true and deny the State's Rule 12(b)(1) Motion to Dismiss if the Complaint alleges sufficient facts to invoke subject matter jurisdiction. *Id.*

B

Article III of the United States Constitution limits the judicial authority of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016), *as revised* (May 24, 2016). Thus, the threshold question in every federal case is whether the court has authority under Article III to entertain the suit. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Courts apply the standing doctrine to resolve this question. *Bishop v. Bartlett*, 575 F.3d 419, 423 (4th Cir. 2009).

The party invoking federal jurisdiction bears the burden of establishing standing. Id. at 424 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [a court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). The Court must dismiss an action when the party invoking federal jurisdiction does not include the necessary allegations in the pleading. *Id.* (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

The standing doctrine comprises constitutional and prudential components. *Id.* at 423 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). To satisfy the constitutional component, a party must have suffered an injury in fact that is fairly traceable to the challenged conduct of the defendant and likely to

be redressed by a favorable judicial decision. *Robins*, 136 S.Ct. at 1547 (citing *Lujan*, 504 U.S. at 560–61). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). A "particularized" injury is an injury that affects the plaintiff "in a personal and individual way." *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). A "concrete" injury is one that is not abstract and actually exists. *Id.* To be concrete for purposes of standing, an injury need not be tangible. *Id.* at 1549.

As for the prudential component of standing, courts generally recognize three circumstances under which a party does not have standing: (1) when the party asserts a harm that "is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," *Bishop*, 575 F.3d at 423 (quoting *Warth*, 422 U.S. at 499); (2) when the party "rest[s] his claim to relief on the legal rights or interests of third parties," *id.* (quoting *Warth*, 422 U.S. at 499); and (3) when the party's grievance does not "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit," *id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

That an injury is widely shared does not necessarily mean that the injury is a "generalized grievance" precluding standing. A widely shared injury can be an injury in fact, but only if the injury is concrete.

Id. at 424–25 (quoting *FEC v. Akins*, 524 U.S. 11, 24 (1998)). The deprivation of the right to vote is a concrete injury that can constitute an injury in fact notwithstanding that the injury is widespread. *Id.* (citing *Akins*, 524 U.S. at 24). Examples of widely shared abstract injuries that do not confer standing include injuries to the "common concern for obedience to the law," *Akins*, 524 U.S. at 23 (quoting *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 303 (1940)), and injuries to "the public's interest in the administration of the law," *id.* at 24 (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940)).

Throughout their Complaint, Voters consistently allege they are asserting a harm that *all* Maryland voters endure. (*See* Compl. ¶ 31, ECF No. 1) (alleging Voters "are suing as Maryland voters for injuries . . . that *all* Maryland voters endure because of the egregious gerrymandering of the State's congressional districts"); (*id.* ¶ 35) ("Maryland's gerrymander harms all Maryland voters, regardless of their party preferences or how they would vote in a particular election[.]"); (*id.* ¶ 36) ("Maryland's gerrymander inflicts particular, intentional harm on partisan and non-partisan voters of every description[.]"). Voters, however, do not allege that the Plan has deprived all Maryland voters of their right to vote in congressional elections. Instead, Voters assert that the Plan harms all Maryland voters because it mechanically manipulates Maryland's congressional districts in a manner that transfers the power to select representatives from the people to the Maryland General Assembly. While

this alleged harm is not as concrete as the deprivation of the right to vote, the Court concludes that at this pleading stage, this harm is adequately concrete and particularized.

To sufficiently allege standing, however, Voters must assert more than a concrete and particularized injury -- they must also allege "an invasion of a legally protected interest." *Robins*, 136 S.Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). Voters do not cite any cases, and the Court's exhaustive search reveals none, in which a court expressly held that the Constitution protects the right to reside in a district that has not been mechanically manipulated to transfer the power to select representatives away from the people.

Voters have not alleged the Plan created districts of unequal population. Nevertheless, they rely on *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964) (the "One Person, One Vote Cases"), arguing they stand for more than the proposition that congressional districts within a state must have equal populations. Voters assert that "properly understood, [the One Person, One Vote Cases] stand for the principle that legislators and their agents may not manipulate districts to arrogate to themselves the power reserved to the people of choosing their legislators." (Pls.' Opp'n Mot. Dismiss ["Opp'n"] at 12, ECF No. 13). Voters further contend that these cases "should be understood as a set of practical constitutional limitations on legislators' ability to entrench

themselves in power notwithstanding the wishes of voters." (Opp'n at 15).

In *Baker*, the United States Supreme Court held that allegations of disparities of population in state legislative districts raise justiciable claims. 369 U.S. at 206, 237. Two years later, in *Wesberry*, the Court applied *Baker* to strike down Georgia's congressional district plan because it created districts comprising vastly disparate populations. 376 U.S. at 5, 18. The Court held that the constitutional requirement that representatives be chosen "by the People of the several States," U.S. Const. art. I, § 2, "means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry*, 376 U.S. at 7–8. The Court explained that the Constitution's "plain objective" is to make "equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18.

That same year, in *Reynolds*, the Court applied *Baker* to state legislative districts, invalidating Alabama's malapportioned House and Senate districts. *See Reynolds*, 377 U.S. at 577 (1964). The Court held that "as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis," meaning that states must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.*

The plaintiffs' claims in the One Person, One Vote Cases all centered on the population disparities in

legislative districts. *See Baker*, 369 U.S. at 192–93; *Wesberry*, 376 U.S. at 2–3; *Reynolds*, 377 U.S. at 540. That fact alone militates against reading those cases as establishing that the Constitution protects the right to reside in districts that have not been mechanically manipulated. What is more, nothing in the language of the One Person, One Vote Cases suggests that the Court should apply those cases to claims not asserting unequal population. As such, the Court rejects Voters' reading of the One Person, One Vote Cases, finding it untenable.

In sum, Voters fail to identify a constitutional provision or case that establishes a right to reside in a district that has not been mechanically manipulated in a manner that transfers the power to elect representatives away from the people. Thus, the Court concludes that Voters have not sufficiently alleged standing to assert their claims because have they have not alleged an invasion of a legally protected interest.[4] Accordingly, the Court will grant the State's Motion to Dismiss for lack of subject matter jurisdiction.

III

For the foregoing reasons, the State's Motion to Dismiss (ECF No. 7) is GRANTED. Voters' Complaint (ECF No. 1) is DISMISSED, and the Court will direct the Clerk to CLOSE this case. A separate Order follows.

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[4] Because the Court concludes that Voters do not have standing, the Court need not determine whether Voters state claims upon which relief may be granted.

Entered this 24th day of August, 2016

/s/

George L. Russell, III
United States District Judge

APPENDIX C – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 24, 2016

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. GLR-15-1849

Neil Parrott, *et al.*,

Plaintiffs,

v.

Linda H. Lamone, *et al.*,

Defendants.

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 24th day of August 2016, hereby:

ORDERED that the State's Motion to Dismiss (ECF No. 7) is GRANTED;

IT IS FURTHER ORDERED that Voters' Complaint (ECF No. 1) is DISMISSED;

and IT IS FURTHER ORDERED that the Clerk shall CLOSE this case.

/s/

George L. Russell, III
United States District Judge

APPENDIX D – COMPLAINT, FILED JUNE 24, 2015

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. 1:15-cv-1849

Neil Parrott, *et al.*,

Plaintiffs,

v.

Linda H. Lamone, *et al.*,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs are individual registered voters who seek declaratory and injunctive relief to enforce Article I, Section 2 and the Due Process Clauses of the Fourteenth and Fifth Amendments of the United States Constitution.

2. Plaintiffs seek a declaratory judgment that 2011 Senate Bill 1, Maryland's congressional districting plan, is a political gerrymander that violates the Constitution.

3. Plaintiffs seek a permanent injunction prohibiting the calling, conducting, supervising or certifying of

any future congressional elections under Maryland's congressional districting plan. Plaintiffs further ask this Court to order the creation of a new congressional 3 districting plan that will not inflict the various harms on voters' constitutional rights that are currently inflicted by Maryland's notorious congressional gerrymander.

4. Plaintiffs further seek costs and attorneys' fees.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(a)(3) and (4), and 28 U.S.C. § 1331, as this action arises under the U.S. Constitution. Additionally, a three-judge court has jurisdiction in accordance with 28 U.S.C. § 2284(a) because this matter involves constitutional injuries resulting from statewide redistricting.

6. Furthermore, this Court has jurisdiction over Plaintiffs' request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction for Plaintiffs' claim for attorney's fees is based on 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e).

7. Venue is proper in this court under 28 U.S.C. § 1391(b).

PLAINTIFFS

8. Plaintiff Neil Parrott is a citizen and a registered voter of Maryland residing in Hagerstown,

Maryland, in the Sixth Congressional District. Mr. Parrott is also a current member of the Maryland House of Delegates.

9. Plaintiff Ann Marvin is a citizen and a registered voter of Maryland residing in Denton, Maryland, in the First Congressional District.

10. Plaintiff Lucille Stefanski is a citizen and a registered voter of Maryland residing in Havre de Grace, Maryland, in the Second Congressional District.

11. Plaintiff Eric Knowles is a citizen and a registered voter of Maryland residing in Annapolis, Maryland, in the Third Congressional District. Mr. Knowles ran for Congress in that district.

12. Plaintiff Faith Loudon is a citizen and a registered voter of Maryland residing in Pasadena, Maryland, in the Fourth Congressional District. Ms. Loudon ran for Congress in that district.

13. Plaintiff Matt Morgan is a citizen and a registered voter of Maryland residing in Mechanicsville, Maryland, in the Fifth Congressional District. Mr. Morgan is a current member of the Maryland House of Delegates.

14. Plaintiff Ellen Sauerbrey is a citizen and a registered voter of Maryland residing in Baldwin, Maryland, in the Seventh Congressional District. Ms. Sauerbrey is a former member of the Maryland

House of Delegates and twice ran for Governor of Maryland.

15. Plaintiff Kerinne August is a citizen and a registered voter of Maryland residing in North Bethesda, Maryland, in the Eighth Congressional District.

16. All Plaintiffs are injured as a result of the political gerrymander inherent in the State's congressional districting plan.

DEFENDANTS

17. Defendant Linda Lamone is sued in her official capacity as Election Administrator for the State of Maryland. Defendant Lamone is Maryland's chief election official and as such is responsible for the conduct of elections within the State.

18. Defendant Bobbie S. Mack is sued in her official capacity as Chair of the Maryland State Board of Elections. As Chair of the State Board of Elections, Defendant Mack is responsible for supervising the conduct of elections in the State.

FACTS COMMON TO ALL CLAIMS

Maryland's Congressional Districting Plan

19. On October 20, 2011, the Maryland General Assembly enacted Senate Bill 1, establishing the State's congressional districting plan, which Governor Martin O'Malley signed into law later that

day. This plan established the districts to be used for the election of Maryland's eight representatives in the United States House of Representatives through the release of 2020 census information. The districting plan describes each district by identifying the counties, election districts, precincts, and census block designations for the areas that are included in each district.

20. According to an analysis conducted by *The Washington Post* using data obtained from the U.S. Census and the Maryland Department of Planning, the congressional districting plan greatly reconfigured Maryland's congressional districts. Specifically, the new plan removed approximately 1.6 million Marylanders from their previous congressional district and placed them in a different district. According to this same analysis, 49 percent of Marylanders in the Sixth Congressional District were removed from their previous congressional district and placed in a different congressional district, as were 42 percent of Marylanders in the Fourth Congressional District, 40 percent of Marylanders in the Eighth Congressional District, and 33 percent of Marylanders in the Third Congressional District. In total, 27 percent of all Marylanders were removed from their previous congressional district and placed in a different congressional district.

21. According to an editorial by *The Washington Post*: "The map, drafted under Mr. O'Malley's watchful eye, mocks the idea that voting districts should be compact or easily navigable. The eight

districts respect neither jurisdictional boundaries nor communities of interest. To protect incumbents and for partisan advantage, the map has been sliced, diced, shuffled and shattered, making districts resemble studies in cubism."

22. A map showing the configuration of Maryland's congressional districting plan is attached hereto as Exhibit A.

Subsequent Legal Challenges to the Congressional Districting Plan

23. Since its adoption, Maryland's congressional districting plan has been the subject of near constant litigation. Several of these lawsuits have asserted claims of political or partisan gerrymandering.

24. The first lawsuit to assert gerrymandering claims was *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). The plaintiffs in that federal lawsuit argued, *inter alia*, that Maryland's plan was a political gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 892.

25. The federal court in *Fletcher* found that Senate Bill 1 appeared to be "political gerrymandering" under U.S. Supreme Court precedent, but held that there was no judicially manageable remedy available under federal law:

> [P]laintiffs allege that Maryland's redistricting plan is an impermissible

> partisan gerrymander. . . . [T]his claim 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. . . Recent cases have reaffirmed the conceptual viability of such claims, but have acknowledged that there appear to be no judicially discernible and manageable standards for adjudicating political gerrymandering claims.

Fletcher, 831 F. Supp. at 903-904 (internal citations omitted). The concurring opinion similarly observed: "[I]t is clear that the plan adopted by the General Assembly of Maryland is, by any reasonable standard, a blatant political gerrymander." *Fletcher*, 831 F. Supp. 2d at 905 (Titus, J., concurring).

26. The second lawsuit to make a claim of political gerrymandering was *Gorrell v. O'Malley*, 2012 U.S. Dist. Lexis 6178, * 11 (D. Md. 2012). In that case, the Court dismissed the plaintiff's claim that Maryland's congressional district plan was an unconstitutional partisan gerrymander, characterizing the claim either as nonjusticiable or as supported only by conclusory allegations. *Id.*

27. A third Maryland lawsuit asserted political gerrymandering claims under the Fourteenth Amendment, but the plaintiffs voluntarily dismissed those claims after the *Fletcher* decision. *Olson v. O'Malley*, 2012 U.S. Dist. Lexis 29917, * 4, fn. 3 (D. Md. 2012).

28. A fourth Maryland lawsuit asserted political gerrymandering in violation of the Fourteenth Amendment, but the claim was dismissed for lack of a judicially manageable standard that could be used to resolve such a claim. *Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D. Md. 2014).

29. No plaintiff to the instant lawsuit was a party to any of the four above-described lawsuits.

30. Plaintiff Neil Parrott was a party to two lawsuits in Maryland state courts concerning a referendum to repeal the congressional districting plan. Specifically, Delegate Parrott was an intervener in *Whitley v. State Bd. of Elections*, 429 Md. 132 (2012), a lawsuit brought by the Maryland Democratic Party to prevent the people of Maryland from voting on the gerrymandering question based on alleged invalid petition signatures. Subsequently, Delegate Parrott initiated a lawsuit against the State of Maryland alleging the language used to describe the referendum on the congressional districting plan was intentionally vague and misleading in violation of Maryland's constitution. The Maryland Court of Special Appeals ruled against Delegate Parrott in an unreported 2014 opinion.[1] In both lawsuits, Delegate Parrott asserted interests or claims under the Maryland Constitution and Maryland state law, but not under the United States Constitution.

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[1] *Parrott v. McDonough.*, Case No. 1445 (Md. Ct. Spc. App. 2014), *available at* http://redistricting.lls.edu/files/MD%20parrott%2020140723%20opinion.pdf.

The Injuries That Are the Bases for Plaintiffs' Claims

31. Gerrymandering is not primarily something that Democrats and Republicans do to each other. Gerrymandering is something that *legislators* and other state actors do to *voters*. Plaintiffs are suing as Maryland voters for injuries – including the loss of decision-making power and other disadvantages peculiar to gerrymandered districts – that *all* Maryland voters endure because of the egregious gerrymandering of the State's congressional districts.

A. Voters' Loss of the Power to Choose Representatives

32. By means of gerrymandering, mapmakers (legislators and their agents) appropriate for themselves a significant part of the power to elect legislators. As a matter both of democratic practice and constitutional law, that power properly belongs to voters.

33. In a partisan gerrymander, the party in charge of redistricting creates (1) a relatively few districts in which the opposing party enjoys a supermajority, and (2) a greater number of districts in which one's own party has a smaller, but significant and winning, majority. By effectively arranging its partisans in this way, the party that controls redistricting can win more combined seats in the legislature than if there were no gerrymander.

34. Maryland has established an effective congressional gerrymander, by virtue of which a significant Republican minority, able to muster about 40% of the vote in any given election, elects only 12.5% of the State's delegation to the House of Representatives.

35. Maryland's gerrymander harms all Maryland voters, regardless of their party preferences or how they would vote in a particular election, by giving State legislators the power to make choices regarding the State's congressional delegation that only the voters should make.

36. 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 partisan and non-partisan voters of every description:

a. It harms Republican voters statewide by diminishing their ability to elect the candidates they prefer.

b. It harms Republican voters deliberately placed in a minority in a district where Democrats were deliberately given a majority.

c. It harms independent or non-partisan voters by stacking the deck in favor of Democrats.

d. It harms Democratic voters deliberately placed in a minority in the one district where

Republicans were deliberately given a supermajority.

e. It harms voters who vote for the Democrat in their own district but who might not prefer a particular Democratic candidate running in *another* district.

f. It harms voters of every party who might not prefer a Democratic supermajority in the State's delegation. There are, in fact, voters who ordinarily vote the party line but who believe that a divided government governs best, and who would not vote to establish a supermajority even of their own party if, say, the option were presented on the ballot.

37. A crucial purpose of the one-person-one-vote constitutional requirement is to ensure that voters retain the power to choose their representatives. To the extent that it transfers this power to Maryland's legislators, Maryland's congressional gerrymander circumvents the one-person-one-vote standard, frustrates its purpose, and diminishes its efficacy.

38. Article I, Section 2 of the U.S. Constitution provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ." Maryland's partisan congressional gerrymander violates this provision by transferring the power to select representatives from the people – including Plaintiffs – to Maryland legislators.

B. Disadvantages Peculiar to Gerrymandered Districts

39. In order to gerrymander, mapmakers need to arrange both their own partisans and those of their electoral opponents in particular district configurations so as to maximize the voting strength of their own partisans.

40. Because voters do not choose where to live so as to suit the purposes of legislators trying to draw gerrymandered districts, those legislators must distort district boundaries to create districts that contain the mix of voters that best achieves their partisan goals.

41. Maryland's congressional districting plan, which is an example of an effective, partisan gerrymander, contains wildly deformed districts.

42. Maryland's congressional districting plan illustrates the need to create non-compact districts in order to gerrymander. Those who drew and approved Maryland's bizarre-looking districts would not have invited multiple lawsuits for gerrymandering, and would not have held the State up to public ridicule on account of those districts' appearance, if the desired partisan result could have been achieved in some other way.

43. The exceedingly non-compact districts caused by gerrymandering inflict a number of burdens on Maryland voters.

44. Gerrymandered districts divide political boundaries and fracture the political communities of interest they delineate.

45. The following metrics are commonly used by social scientists to measure the extent to which a district plan ignores existing political boundaries:

a. A "split county" is any county that is divided by a district line.

b. A "county fragment" is created when any parts of a county, rather than the whole county, are contained within a district.

c. A "split precinct" is any voter precinct that is divided by a district line.

46. Maryland's gerrymandered district plan produces many split counties, county fragments, and split precincts, indicating that the district plan ignores political boundaries and fragments political communities of interest.

47. Exceedingly non-compact districts confuse 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.

48. Non-compact, gerrymandered districts make it harder for candidates and their political campaigns to use mass media to target primarily the voters in their congressional district. Because gerrymandered districts are non-compact, mass media

advertisements tend to reach across district lines to significant numbers of citizens outside the intended district. This further confuses voters as to who is running for office in their districts. It also diminishes the value of mass media advertisements by making them less cost-effective.

49. Exceedingly non-compact districts make campaigning more expensive, given that candidates have to expend resources to educate voters about which district they reside in and which candidates they are voting for; have a harder time traveling the district and convincing their supporters to do so; and have to waste resources on mass media campaigns that reach many voters residing in other districts.

50. Because gerrymandered districts are confusing, mass media advertisements are less effective, and candidates have to work harder and spend more to get information to voters, voters in gerrymandered districts have a harder time staying informed about elections.

51. These burdens are inflicted on voters in gerrymandered districts to no public purpose and for no good reason.

The Necessity for Court Intervention

52. Where partisan mapmakers acquire the technical ability to participate in the selection of legislators, the problem cannot be remedied by ordinary democratic means – that is, by holding more elections. Rather, the problem becomes a chronic,

persistent failure of democracy, which requires action by federal courts.

53. Because Maryland's gerrymander is in the partisan interest of those who drew the district lines at issue, it will not be remedied without the intervention of this Court.

Using District Compactness Scores as a Manageable Standard to Adjudicate Political Gerrymandering Claims

54. Plaintiffs aver that there are judicially discernible and manageable standards for determining whether districts have been gerrymandered. In particular, Plaintiffs aver that a straightforward application of 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.

55. The extent to which Maryland's congressional districts are distorted by gerrymandering can be quantified using the Polsby-Popper compactness scale.[2] This scale is a mathematical test of a shape's compactness. It measures the compactness of an electoral district by dividing (1) the area of the

[2] This standard and its use were described 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 (1991). Mr. Popper is co-counsel for Plaintiffs.

actual district by (2) the area of a hypothetical circle having the same perimeter length as the district.

56. For any district, its Polsby-Popper compactness score may be determined by means of the following formula:

$$\frac{4 \times \pi \times (\text{the area of the district})}{(\text{the perimeter length of the district})}$$

This formula produces scores on a scale from 0 to 1, with 0 being the least compact and 1 being the most compact. These raw scores typically are multiplied by 100 to produce a scale from 0 to 100, with 100 being the most compact.

57. The Polsby-Popper scale does not mandate any particular, fixed, or minimum scores. Rather, it is used only as a way to compare different districts or district plans.

58. The Polsby-Popper scale is one of the most widely used measures of electoral district compactness. Social scientists discussing or testifying about district compactness routinely utilize this measure, and courts routinely accept its use. Most redistricting software used by state legislatures will automatically calculate each district's Polsby-Popper scores.

59. On information and belief, Maryland's state legislature drew its congressional districts using the

Maptitude software program, which automatically calculates each district's Polsby-Popper scores.

60. Maryland's congressional districts have an average Polsby-Popper compactness score of 11.3. This is the lowest (worst) average compactness score for congressional districts of any state in the nation.

61. Maryland's Third Congressional District has a Polsby-Popper compactness score of 3.22. This is the second lowest-scoring congressional district in the nation (only slightly better than North Carolina's Twelfth Congressional District.)

62. A compactness measure like the Polsby-Popper scale can easily be applied to restrain partisan gerrymandering. Plaintiffs respectfully submit that a proposed district plan cannot be constitutional if it is so badly gerrymandered that another district plan, consistent with all other applicable legal requirements, could be drawn in which the average compactness score is higher, and in which the compactness score of at least one district is at least *two times* higher than its ranked counterpart in the proposed plan.

63. It always may be determined whether a district plan meets this simple, bright-line standard.

64. This standard will prevent the worst excesses of partisan gerrymandering and the creation of the most wildly contorted districts. Indeed, the situations where it will apply – where overall compactness can be improved while the compactness

of a particular district is improved by a factor of two – will be restricted to very bad gerrymanders, like Maryland's.

65. This standard is still practical and forgiving. It allows legislators considerable leeway to account for other legitimate redistricting interests, like the creation of districts containing bona fide communities of interest.

66. This standard applies a non-arbitrary, consistent rule that will prevent the most egregious kinds of gerrymandering.

67. This compactness standard can be applied consistently with every other federal and state legal requirement concerning redistricting.

Comparing Maryland's District Plan With an Illustrative Plan

68. The scores for each of Maryland's current congressional districts on the PolsbyPopper scale (out of a possible 100) are:

District	Compactness
1	16.0
2	6.2
3	3.2
4	9.2
5	31.6
6	7.1
7	8.7
8	8.1

Average 11.3.

69. Plaintiffs have attached as Exhibit B a hypothetical district map. Its PolsbyPopper scores are:

District	Compactness
1	12.9
2	53.8
3	44.3
4	43.3
5	51.1
6	35.8
7	43.7
8	41.7

Average 40.8.

70. All of the congressional districts in Plaintiffs' district plan have populations that are as equal as mathematically possible and as equal as Maryland's current district plan.

71. Plaintiffs' district plan has *fewer* split counties than does the current Maryland district plan. Specifically, Plaintiffs' district plan has 8 split counties, and the current Maryland plan has 9 split counties.

72. Plaintiffs' district plan has *significantly fewer* county fragments than does the current Maryland district plan. Specifically, Plaintiffs' district plan has 20 county fragments, and the current Maryland plan has 25 county fragments.

73. Plaintiffs' district plan has *far fewer* split precincts than does the current Maryland district plan. Specifically, Plaintiffs' district plan has 110 split precincts, and the current Maryland plan has 172 split precincts.

74. Because Plaintiffs' plan has fewer split counties, significantly fewer county fragments, and far fewer split precincts, than Maryland's current plan, Plaintiffs' plan is superior to Maryland's plan in preserving local political boundaries and the communities of interest they contain.

75. Compared to the districts in Maryland's current plan, the districts in Plaintiffs' district plan are vastly more compact. Ranking the districts in each plan in order of compactness from lowest to highest, the percentage difference in ranked compactness scores is as follows:

Maryland's Current Plan		**Plaintiffs' Plan**		**Percent Increase in Compactness in Plaintiffs' Plan**
Dist.	Compact-ness	Dist.	Compact-ness	
3	3.2	1	12.9	402%
2	6.2	6	35.8	577%
6	7.1	8	41.7	590%
8	8.1	4	43.3	534%
7	8.7	7	43.7	500%
4	9.2	3	44.3	481%
1	16.0	5	51.1	320%
5	31.6	2	53.8	171%
AVG	11.3	AVG	40.8	363%[3]

76. The *lowest* scoring district in Plaintiffs' district plan (at 12.9) scores better than 6 of Maryland's current districts – indeed, it scores better than Maryland's current *average* of 11.3.

77. The dramatic improvement Plaintiffs were able to achieve in the compactness of every single district is explained by the simple fact that Maryland's district plan is the most gerrymandered and least compact in the nation.

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[3] District scores are rounded. Averages and percentages are based on actual, not rounded, scores.

78. The dramatic improvement demonstrated by Plaintiffs' illustrative plan also proves that the non-compactness of Maryland's current districts *is not due to the unusual shape of the State of Maryland*. Rather, this non-compactness is due to the deliberately bizarre district lines Maryland legislators drew in order to gerrymander, as any visual review of its district plan confirms.

79. Maryland's congressional districts are so gerrymandered and non-compact that the results achieved by Plaintiffs in drawing an alternative easily could be replicated. In other words, countless other plans could be drawn in which (1) equal district population was achieved, (2) the integrity of communities was more respected than it is in Maryland's current district plan, and (3) district compactness was improved by many multiples of the current compactness scores.

CAUSES OF ACTION

COUNT 1: Restricting the Power of the People to Choose Their Representatives in Violation of Article I, Section 2.

80. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

81. Article I, Section 2 of the U.S. Constitution provides in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."

82. In the case of a partisan congressional gerrymander like that in Maryland, the power to select representatives is transferred, in significant part, from the people to interested mapmakers in the legislature.

83. Maryland's partisan congressional gerrymander violates Article I, Section 2 by transferring the power to select representatives from the people – including Plaintiffs – to Maryland legislators, and should be enjoined.

COUNT 2: Burdening the Right to Vote in Violation of the Due Process Clauses of the Fourteenth and Fifth Amendments.

84. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

85. Voting is a fundamental right protected by the Due Process Clauses of the Fourteenth and the Fifth Amendments to the U.S. Constitution.

86. By inflicting electoral harms arising from non-compact districts, gerrymandering burdens Plaintiffs' right to vote in violation of their constitutional right to Due Process.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully pray that this Court:

1. Assume jurisdiction and request a three judge panel pursuant to 28 U.S.C. § 2284;

2. Issue a declaratory judgment finding that the congressional districting plan illegally and unconstitutionally injures Plaintiffs and is unlawful;

3. Permanently enjoin Defendants from calling, holding, or certifying any elections under the congressional districting plan;

4. Order State authorities to adopt a new congressional districting plan without unlawful politically gerrymanders consistent with the compactness standards articulated in this Complaint;

5. If the State fails to adopt such a plan by the Court's reasonable deadline, order the use of a new congressional districting plan of the Court's choosing;

6. Order Defendants to pay Plaintiffs' reasonable attorney's fees, including litigation expenses and costs, pursuant to 52 U.S.C. § 10310(e) and 42 U.S.C. § 1988;

7. Retain jurisdiction to issue any and all further orders that are necessary to satisfy the ends of justice; and

8. Award Plaintiffs any and all further relief that this Court deems just and proper.

Dated: June 24, 2015

Respectfully submitted,
s/ Robert D. Popper

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EXHIBIT A

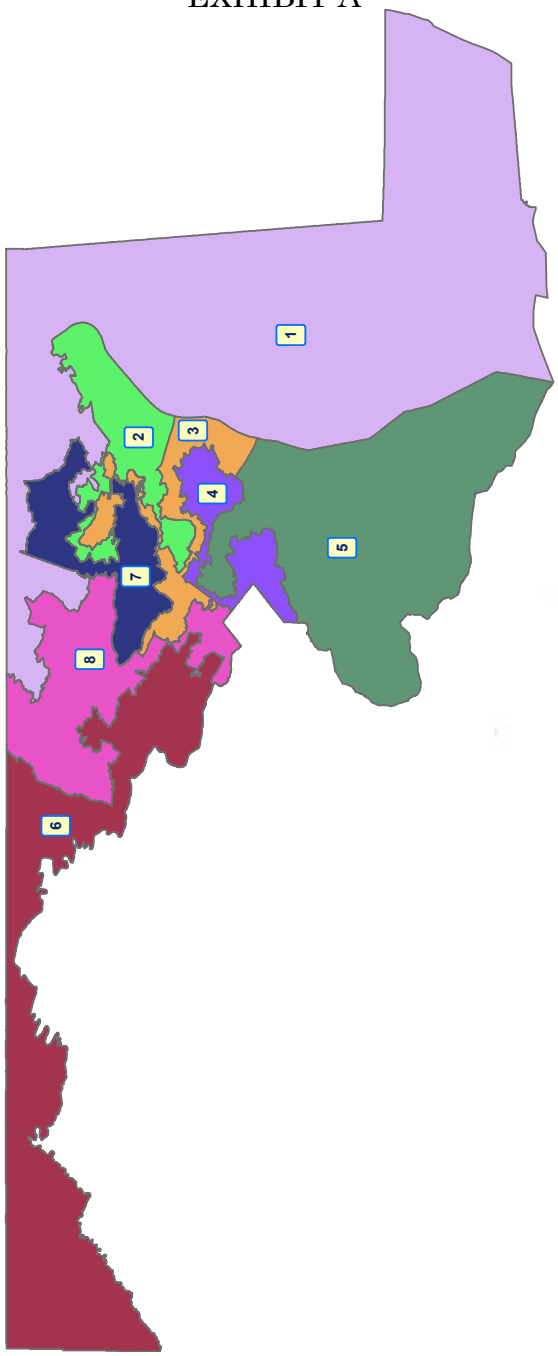

EXHIBIT B