IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al., *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs alleged that Republican voters in the Sixth District were unconstitutionally retaliated against on account of their voting histories and party affiliation. As we demonstrated in our opening brief, that is just what the evidence has shown: Former Governor Martin O'Malley and other state officials specifically intended to draw the lines of the Sixth District to dilute Republicans' votes and thereby prevent them from being able to elect a Republican congressman. The individuals tasked with drawing the map thus moved blocks of Republican voters out of the Sixth District on the basis of their voting histories and political-party affiliation, swapping Democratic voters in their place. And the map-drawers' efforts were successful. Following the 2011 redistricting, Maryland's Sixth District had the single largest swing in partisan composition of any federal congressional district anywhere in the nation, and no Republican candidate for Congress has won an election there since.

The State admits that those responsible for the 2011 redistricting map intended to stack the deck for Democratic candidates in the Sixth District, and it does not deny that the Sixth District was singled out *because* voters there had successfully elected a Republican candidate in each of the prior ten congressional elections. The State nevertheless describes the mapdrawers' efforts to "create the opportunity for a Democratic candidate to win in the Sixth District" as having a merely "incidental effect of burdening Republicans' representational rights." Opp. 28 (emphasis omitted). That is like saying a gambler playing with loaded dice intends only to enrich himself, and not to cheat the house. The practice that the map-drawers used to confer an advantage on Democratic candidates *was* the dilution of Republican votes—they were two sides of the same coin.

At bottom, the State offers no compelling defense for the deliberate dilution of Republican voters in the Sixth District in 2011. For all of the reasons given below and in our opening brief, the motion for an injunction should be granted.

ARGUMENT

A. Plaintiffs have proved the elements of their claim on the merits

As this Court held on the motion to dismiss, a State cannot draw congressional district lines in such a way as "to retaliate against one group for its past electoral success in that district." *Shapiro v. McManus*, 203 F. Supp. 3d 579, 598 (D. Md. 2016). To obtain relief under this theory, Plaintiffs must show that (1) "those responsible for the map redrew the lines of [the Sixth District] with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Id*. at 596-597. As we showed in the opening brief (at 25-30), each of those elements is readily proved here.

1. Specific intent

a. Governor O'Malley explicitly confirmed that it was "clearly [his] intent" and the intent of other Democratic leaders in Maryland to "create a [Sixth D]istrict where the people would be more likely to elect a Democrat than a Republican." Ex. A at 81:1-11, 82:14-18. The means of accomplishing that goal are clear. By "look[ing] at voting histories" and "party affiliation" of discrete blocks of citizens (*id*. at 65:12-13), the map drawers removed Republican voters from the district, replacing them with Democratic voters (*id*. at 27:12-13), helping ensure "the election of [a] Democrat" in future congressional elections (*id*. at 27:15); *see also* Ex. RRR at 16 (Second Supplemental Response 8). As we detailed in the opening brief (at 12-16), contemporaneous public statements and voluminous circumstantial evidence all confirm this intent.

In response, the State says that Governor O'Malley and the other Democratic leaders intended only to "increas[e] the electability of Democratic candidates" in the Sixth

District, but not to burden Republican voters there. Opp. 27. That is not what the evidence shows. Governor O'Malley testified with admirable candor that his and the other Maryland Democratic leaders' "intent was to create a map that was more favorable for Democrats over the next ten years." Ex. A at 81:1-11. And they went about accomplishing that goal by converting the Sixth District "from a majority of Republican voters to a majority of Democratic voters." *Id*. at 25:11-22 (O'Malley confirming that this was his "hope" and "intention"). *Accord, e.g.*, Ex. U at 3 (talking points for Senate President Miller explaining that the 2011 redistricting "gives Democrats a real opportunity to pick up a seventh seat in the delegation by targeting [Sixth District congressman] Roscoe Bartlett"). In other words, the means by which Governor O'Malley and other officials set out to "increas[e] the electability of Democratic candidates" in the Sixth District (Opp. 27) was *by* diluting Republican voters and burdening their representational rights.

For the same reason, the State is incorrect (1) that there is no evidence "that a Maryland decisionmaker took any action for the purposes of punishing or denying a benefit to any of the plaintiffs" or (2) that we have not shown what particular conduct "was the target" of the mapdrawers. Opp. 29. The evidence shows plainly that Governor O'Malley and his fellow lawmakers set out to dilute Republican votes in the Sixth District because those voters had affiliated with the Republican party and had successfully cast their votes for Roscoe Bartlett over the prior two decades. *See, e.g.*, Ex. A at 65:10-15 (Governor O'Malley confirming that the mapdawers targeted citizens based on "voting histories" and "party affiliation"). This much is confirmed by NCEC's proprietary metric, the Democratic Performance Index (DPI), which predicts election outcomes based on precinct-by-precinct voter history. Ex. B at 17:13-22, 226:1-3. Using the DPI and other detailed demographic data (Ex. C ¶ 29; Ex. I), the mapdrawers drew tens of thousands of voters out of the district because of the way they and their neighbors had voted in prior elections. And the resulting dilution of Republican votes was no incidental effect—*it was the goal*.

The State observes that the mapdrawers did not "examin[e]" and were not "aware of any particular Plaintiff's party registration or voter history." Opp. 29. That is beside the point. As the State sheepishly admits in the very same paragraph\, such data can be considered "in an aggregated form" (*id.*), as it was here. Courts routinely adjudicate constitutional claims based on evidence that state officials have targeted groups of citizens rather than specific individuals, as they do (for example) in racial gerrymandering cases. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1466 (2017); *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion). Nor is such group-based proof unique to redistricting cases. *See, e.g.*, *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994) ("persecution of an entire group can render proof of individual targeting entirely superfluous"); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) ("Title VII may be violated even when the plaintiff is not individually targeted.").[1] In cases like this, it is enough to show that the plaintiff is a voter in the challenged district, and that he or she is among the category of voters targeted by the State's unconstitutional conduct.[2]

b. We showed in the opening brief (at 6-10 & n.2) that Governor O'Malley tasked Congressman Steny Hoyer with devising the 2011 congressional plan, and that Congressman Hoyer—a self-proclaimed "serial gerrymanderer" (Ex. FFF) and "power broker in

[1] The State misrepresents the holding of *Laird v. Tatum*, 408 U.S. 1 (1972). *See* Opp. 32. The Court there said only that a plaintiff must show that he "sustained, or is immediately in danger of sustaining, a direct injury as the result of [the challenged] action." *Laird*, 408 U.S. at 13 (internal quotation marks omitted). It did not hold that the State must "direct[] some action against individuals" individually. Opp. 32.

[2] The State halfheartedly argues the plaintiff O. John Benisek "should be dismissed for lack of standing" because he was not a registered Republican around the time of the redistricting. Opp. 48; *see also id.* at 29. Incorrect. Mr. Benisek has consistently turned out to vote (Dkt. 186-53, at 3) and uniformly cast his ballot for Republican Roscoe Bartlett in the congressional elections before the redistricting (Dkt. 186-36, at 21:15-21). Mr. Benisek's voting history was therefore swept up in the aggregate data that guided the redistricting process, including historical election returns and the DPI. *See* Ex. B at 17:13-22, 226:1-3; Ex. EEE (the "voter file" contains each "precinct's voting history"). It is a violation of the First Amendment to impose a burden on the basis of voter history just as well as it is to do so on the basis of party affiliation.

redistricting" (Ex. GGG)—retained NCEC Services and Eric Hawkins to draft the map. Hawkins, in turn, confirmed his and the Maryland lawmakers' specific intent to draw "another Democratic district" and create a "7-1 plan" by cracking the Sixth District using demographic data and the DPI metric. *See* Opening Br. 10-14 (citing evidence).

The State asserts in response that "the map created for the congressional delegation by Mr. Hawkins and submitted to the GRAC, was not the map adopted by the State." Opp. 11. That is only a half-truth. *Cf.* Opening Br. 13 n.9. The evidence shows that NCEC's fingerprints were all over the map files produced by Senate President Miller's aide, Jake Weissmann, including the final GRAC plan submitted to Governor O'Malley. *See* Ex. HHH (McDonald Supp. Decl.). In particular, the map files all had the DPI metric built into them, which could only have come from NCEC Services (*see* Ex. B at 110:6-20; Ex. L at 180:9-17)—a fact that the State does not deny. What is more, Weissmann's emails show that he was actively collaborating with Hawkins on the map (Ex. III):

Brian Romick <brianromick@gmail.com>
To: Jason Gleason <jason.gleason03@gmail.com>

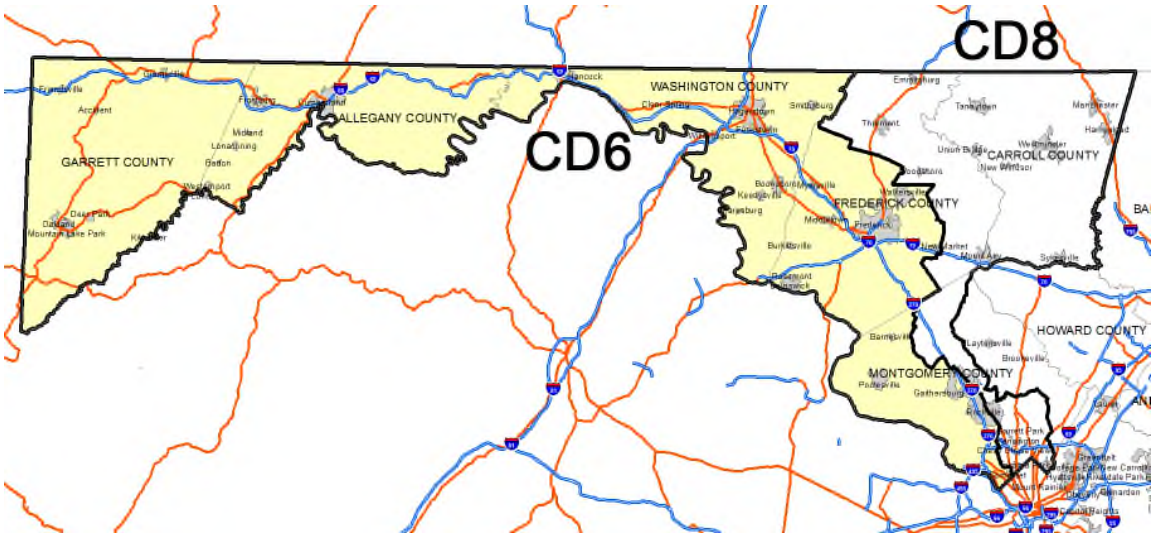
-------- Forwarded message --------
From: "Yaakov \"Jake\" Weissmann" <yweissm1@gmail.com>
Date: Tue, 18 Oct 2011 09:57:31 -0400
Subject: Re: Fw: Map
To: Brian Romick <brianromick@gmail.com>

14-004 in the 3rd is a couple of census blocks with no people in it (probably done to clean it up somewhere along the line by us or Eric). I sent it on to Pat, and let you know if he says anything.

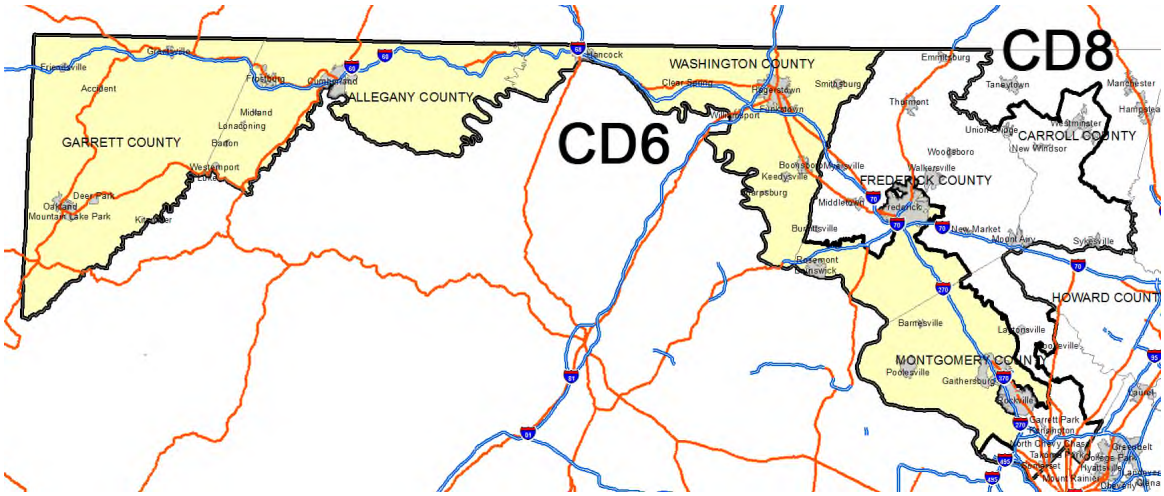
On Mon, Oct 17, 2011 at 9:35 PM, Brian Romick <brianromick@gmail.com> wrote:

> Do you happen to know the answer to this? Thank you.
>
> ---------- Forwarded message ----------
> From: Eric Hawkins <ehawkins@ncecservices.com>
> Date: Mon, 17 Oct 2011 20:47:49 -0400
> Subject: RE: Fw: Map
> To: Brian Romick <brianromick@gmail.com>
>
> Not really sure what this is all about, but those precincts aren't
> included in the third district in the final plan I received from the
> state.
>
> Eric Hawkins
> NCEC Services, Inc.

Weissmann's declaration (cited at Opp. 12) is not inconsistent with this account. The evidence shows that Hawkins produced *two* prototype maps (Ex. HHH at 4, 12-13 (fig. 4 ("Congressional Option 1") & fig. 5 ("Congressional Option 2")), only one of which Weissmann and his colleagues found "unacceptable." Dkt. 186-11, ¶ 9. Although Weissmann's declaration conveniently omits any mention of Hawkins's "Congressional Option 2," it is clear from files produced from Weissmann's own computer that Weissmann and his colleagues had and reviewed the second proposal drawn by Hawkins and that the final GRAC map closely resembled its core structure:



Ex. HHH at 13 (fig. 5, "Congressional Option 2")



Ex. HHH at 14 (fig. 6, "Final GRAC Map")

There is therefore no reason to discount Hawkins's testimony concerning intent.[3]

c. In addition to all of the direct evidence, we marshaled a small mountain of circumstantial evidence (Opening Br. 14-16) showing specific intent, including evidence that it was wholly unnecessary to upend nearly 50% of the district's population to achieve the redistricting objectives identified by Governor O'Malley.[4]

The State ignores most of our evidence, asserting only that the redistricting plan did not dramatically stack the deck and "maintained a Sixth District that was in reach of a Republican candidate." Opp. 28. Elsewhere (*id.* at 39), the State says that the redistricting merely placed Republicans at a "small disadvantage" in the congressional elections in the Sixth District. To support that dubious description of the facts, the State observes (Opp. 28) that the federal DPI for the Sixth District was just 53 percent, and that the Cook PVI was just D+2. But the State's glib recitation of those numbers backfires, because each actually shows that the Sixth District was not competitive at all.

Consider first the DPI—the metric actually used by the mapdrawers to flip the Sixth District. Prior to the redistricting in 2011, the district's DPI stood at 37.4%. *See* Ex. QQ; Opening Br. 18. A chart from a recent article on NCEC's website touting the accuracy

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[3] The State also suggests (quite strangely) that Governor O'Malley personally reviewed Hawkins's maps and "was not satisfied." Opp. 11. There is no evidence of that; all Governor O'Malley said in the testimony cited by the State is that he had hoped the congressional delegation would have moved faster to produce a map with greater consensus support. *See* Ex. A at 78:1-6.

[4] Among the evidence on this score was Speaker Busch's admission that it was not necessary to fundamentally reconfigure the Sixth District's population in order to achieve the GRAC's stated goals. *See* Opening Br. 15 (quoting Ex. RR at 146:12-19). The State accuses us of mischaracterizing Speaker Busch's testimony as part of the State's unrelated laches argument. Opp. 49. It is unclear what this has to do with laches, but suffice to say that our description was no mischaracterization. In fact, the video recording of Speaker Busch's deposition makes it quite clear that the Speaker meant exactly what we said he meant. *See* Busch video recording at 13:23:11-16. For this reason, among others, we are lodging video copies of each video-recorded deposition with the Court, attached as a single thumb drive to the reverse cover of each courtesy copy of this brief.

of the DPI shows that among the congressional districts with a DPI below 40% in 2016, not a single one was won by a Democratic candidate. *See* Exhibit JJJ. But in 2011, as a result of the dilution of Republican voters, the Sixth District's DPI swung almost 16 points in favor of Democrats, from 37.4% to 53% (Ex. QQ)—an acknowledged goal of the redistricting (Ex. V at 27:3-9). The same chart that shows that Democrats virtually *never* win districts with a DPI under 40% shows that Democrats almost *always* win districts with a DPI over 50%. In fact, among the 160 congressional elections in 2016 in districts with a DPI above 50%, all but 12 were won by Democrats. *See* Exhibit JJJ. That is, 92.5% of districts with a DPI above 50% were won by Democrats in 2016. *Id*.; *see also* Ex. B at 202:6-203:15; 204:1-205:15 (Eric Hawkins testifying concerning the accuracy of the DPI). And because the Sixth District's DPI is 53%, it stands to reason that the odds of a Democrat winning there in 2012, 2014, and 2016 were in fact higher. In short, because tens of thousands of Republican voters were removed from the district and replaced with Democratic voters, the district became weighted so strongly in favor of Democratic candidates that it became almost entirely out of reach for Republican candidates.

All of this is corroborated by the *Cook Political Report's* Partisan Voter Index, which, like the DPI, takes account of voter history to predict congressional elections outcomes. The PVI has both a numerical and a descriptive component; statistical scores are translated into "solid," "likely," "leaning," and "toss-up" elections. Exhibit KKK at 628 (James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 49 Political Science & Politics 627 (2010)) (citation and quotation marks omitted). Crucially, seats that are scored "likely" for one party over the other "are *not* considered competitive." *Id*. (emphasis added). And although "[l]eaning districts are considered competitive," it is only in "toss-up districts" that "either party has a good chance of winning." *Id*. (quoting Charlie Cook, *The Cook Political Report*).

Prior to the 2011 redistricting, Maryland's Sixth District had a PVI of R+13 (*see* Ex. XX at 8), resulting in a "Solid Republican" score (Ex. LLL). According to a recent academic analysis of the accuracy of the PVI, this "Solid Republican" score meant that there was a 99.7% chance that the Republican candidate would win the congressional election in the Sixth District in 2010. Exhibit KKK at 628. But in 2012—after Maryland lawmakers fundamentally reconfigured the district's lines—the Sixth District swung 180 degrees, to a "Likely Democrat" PVI score. Ex. XX at 8. According to the same analysis that showed Republican incumbent Roscoe Bartlett was 99.7% likely to *win* in 2010, the Sixth District's new PVI score indicated that Bartlett was 94.0% likely to *lose* to his Democratic challenger in 2012 (Exhibit KKK at 628)—just what the DPI showed.

In sum, whereas it was nearly certain (99.7%-100%) that a Republican would win the Sixth District in 2010, it was nearly certain (92.5%-94.0%) that a Democrat would win in 2012, all as a result of redrawing of the district's lines. And it was an express aim of the redistricting to achieve a DPI that brought this about. Ex. V at 27:3-9. Tellingly, no other district anywhere in the country saw so huge a swing in its partisan composition. Ex. XX at 8. It blinks reality to say that the extraordinary swing in the Sixth District's political complexion does not corroborate a specific intent to dilute Republican votes in the Sixth District to prevent them from electing a Republican candidate, thereby burdening their representational rights.[5]

That Democratic incumbent Congressman John Delaney won reelection in 2014 by a 1.5% margin confirms the safety of the Sixth District for Democrats, not the other way around. *Contra* Opp. 22-23. As we explained in the opening brief, 2014 was a wave year for

[5] The State is wrong that remedying this harm would necessarily inflict a "reciprocal" constitutional injury on Democrats. Opp. 33. As the Court explained in its opinion on the motion to dismiss, the First Amendment retaliation doctrine "contains several important limitations," according to which vote dilution alone is not enough to state a constitutional claim. *Shapiro*, 203 F. Supp. 3d at 597-598.

Republican candidates, who "saw sweeping gains . . . in the Senate, House, and in numerous gubernatorial, state, and local races" across the country. Ex. VV ¶ 2. And Congressman Delaney was especially vulnerable in 2014 because first-time incumbents (which he was at the time) lose reelection almost three times more frequently than do repeat incumbents. *See* Gary C. Jacobson & Jamie L. Carson, *The Politics of Congressional Elections* 52-53 (2015). Despite these tremendous political and practical headwinds, Congressman Delaney *still* won reelection in 2014. And in the following election cycle in 2016, he won again by a comfortable 14.4% margin of victory. Ex. C ¶ 56. This is the description, not of a competitive district, but of a safe Democratic district—one that comes up blue every time, regardless of circumstance. We made this point in the opening brief (at 17-18), but the State disregards our evidence without explanation.[6]

Finally, the State implies (Opp. 22-23) that Congressman Delaney won in 2014 only because his Republican opponent, Dan Bongino, was a "flawed" candidate, as demonstrated by the fact that he underperformed relative to Governor Hogan. That is a red herring. Delaney still would have won reelection by more than 1,600 votes even if all of the 570 voters who voted for Governor Hogan but not Mr. Bongino had voted for Mr. Bongino. And the DPI—which comes in two flavors, state and federal—takes account of the possibility that voters will sometimes split tickets between state and federal candidates (Opening Br. 7), an undisputed fact that the State ignores.

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[6] The State misleadingly cites *LULAC v. Perry*, 548 U.S. 399 (2006), for the proposition that it "does not resolve the issue of vote dilution" to show that a particular category of voters "does not win elections" under a gerrymandered map. *See* Opp. 37. The State seems to imply that Republicans' losses in 2012, 2014, and 2016 therefore aren't indicative of vote dilution. But the language quoted by the State from *LULAC* suggests the inverse of what the State implies: The Supreme Court there was explaining that a district might still be a racial minority "opportunity" district for purposes of Section 2 of the Voting Rights Act (and that the minority might therefore suffer unlawful vote dilution) even if the minority group had not won the most recent previous elections, *before* the redistricting. *See LULAC*, 548 U.S. at 428.

2. Concrete burden

We showed in the opening brief (at 16-18) that the vote dilution inflicted upon Republican voters in the benchmark Sixth District was so significant that it changed the outcome of the congressional elections in 2012, 2014, and 2016, resulting in a concrete injury. The DPI and PVI are proof enough of that. *See supra* at pages 7-8; *see also* Opening Br. 16-18 (detailing evidence of vote dilution); *cf.* Ex. MMM (Congressman Delaney acknowledging that his victory in the Sixth District "was probably not on the level" because of "the last redistricting process in Maryland").

a. In response, the State says that we "have adopted an impoverished definition of vote dilution" that fails to account for the "totality of the facts" reflected in the "entire map." Opp. 32-34. "[S]ome assessment of the overall impact to the plaintiff's asserted minority class must be made," the State insists, because "with some outside measure of fairness" or other "limiting principle," remedying harm to one political group will always entail "inflicting reciprocal harm on another group." *Id.* at 34-35.

The State misunderstands our theory. This is not an Equal Protection Clause case, and nothing here turns on the definition of any "minority class" or general notions of "fairness" or "partisan bias." This is a straightforward First Amendment retaliation case, challenging the lines of a *single* district. The crux of the suit is that Republican voters in the Sixth District were unconstitutionally singled out for vote dilution specifically on account of their voting histories and party affiliation.

Vote dilution occurs when district lines are drawn so that the disfavored political party has "less opportunity . . . to elect candidates of their choice." *Davis v. Bandemer*, 478 U.S. at 109, 131 (1986) (plurality opinion) (internal quotation marks omitted). This is not a controversial proposition; as the *Vieth* plurality explained, district lines can be drawn 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) (plurality opinion) (emphasis added)

(quoting *Black's Law Dictionary* 696 (7th ed. 1999)). And both our expert (Prof. McDonald) and the State's expert (Dr. Lichtman) agreed that Republican voting strength *was* diluted in the Sixth District in 2011. *See* Ex. BBB at 2 (explaining that Dr. Lichtman's opinion that the map "improved Democratic prospects" in the Sixth District is the flipside of Dr. McDonald's opinion that the map "diminish[ed] the ability of registered Republican voters to elect candidates of their choice").

The State now appears to take the position (Opp. 37-38) that vote dilution is not real unless it occurs on a map-wide basis. But the State cites no authority for that bizarre proposition. It would be no answer to the injury inflicted upon Plaintiffs in the *Sixth* District to observe that some far-off voters in the *First* District had elected a Republican, or to conclude that the 2011 redistricting map is somehow "fair" to Marylanders on the whole, according to some abstract statistical metric. The point is that the 2011 map diluted Republican supporters' voting strength *in the Sixth District*, giving them less opportunity to elect candidates of their choice *in the Sixth District*. The State's dizzying recitation of social science literature concerning "symmetrically responsive" maps and map-wide "seats-votes curve[s]" (Opp. 38) is therefore irrelevant.[7]

That is not to say, however, that "individuals who affiliate with a party have a right to maintain electoral successes gained by their party under prior redistricting maps." Opp. 2. We recognize full well that vote dilution, in some form, is inevitable in every redist-

[7] Although irrelevant to the theory of this case, the State's assertion (Opp. 11, 23, 37) that the 2011 Maryland congressional map is biased in favor of Republicans borders on ridiculous. As the State tells the tale, "Republicans need only capture 51 percent of the statewide vote in a congressional election to hold 63 percent of the seats" and "need only . . . 43 percent of the vote" to gain a second congressional seat. *Id*. at 23. Yet despite 51% statewide support for Larry Hogan in 2014 (*id*.), Republicans plainly did *not* "regain a second congressional seat" that year, much less did they capture five of Maryland's eight congressional seats (63 percent), as Dr. Lichtman inexplicably predicted they should have. *See* Ex. TT at 6. Anyway, Dr. Lichtman's conclusions on partisan bias were debunked by Prof. McDonald, who corrected several plain errors in Dr. Lichtman's analysis and showed (as common sense suggests) that Maryland's congressional map is biased in favor of Democrats. *See* Ex. BBB at 1-2, 4-11.

ricting, and that it occurs for wide ranges of reasons, including geography and political calculi that have nothing to do with reprisals for prior electoral success. Yet

> even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech*. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."

Shapiro, 203 F. Supp. 3d at 598 (this Court's emphasis) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62,72 (1990)).

b. The State faults Prof. Michael McDonald's vote dilution analysis because, the State says, he "fail[ed] to make any account of the voting behavior of unaffiliated voters" and that his analysis therefore cannot be taken as proof that "the Sixth District is not winnable by Republican candidates." Opp. 36-37. This is a bewildering assertion. For starters, it is not our burden to prove that the Sixth District is "not winnable" by a Republican; rather, our burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016. We have shown that many times over. *See* Opening Br. 16-24, 28-30 (detailing evidence).

In any event, the best way to analyze so-called "crossover votes" of "unaffiliated voters" is to do exactly what Prof. McDonald did: look at actual election results. The State is thus flat wrong to say that Prof. McDonald "acknowledg[ed] that he did not evaluate crossover voting in either Maryland or the Sixth District." Opp. 36 (citing Dkt. 186-41). In fact, Prof. McDonald explained that,

> I'm essentially doing [a crossover] analysis, although it's not framed exactly in crossover votes from Independents, separately from Independents or from Democrats. In order to be able to elect a candidate of their choice in the 2012, '14, or '16 election, we would have been able to observe, if there were sufficient crossover votes, that a Republican candidate would have been

> elected. And so I can infer from the fact that a Republican was not elected in any of those three Congressional elections that there were insufficient crossover votes [to elect the] Republican candidate of choice.

Dkt. 186-41, at 48:10-49:4. The State inexplicably ignores this testimony.

c. Finally, the State says that we have not proved that Plaintiffs "were chilled from voting or registering as a Republican, or that the objective person of ordinary firmness would be so chilled by redistricting." Opp. 38. That is wide of the mark for two reasons.

First, there is clear evidence that participation in congressional elections has in fact been chilled in the Sixth District. But before we explain how that is so, we pause to note "[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one" that turns, not on Plaintiffs' actual conduct, but on how "a similarly situated person of 'ordinary firmness' reasonably would" respond to the challenged conduct. *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) (Niemeyer, J.). The question whether Plaintiffs themselves "maintained consistent voting habits both before and after redistricting" (Opp. 38-39) is therefore irrelevant.

The clearest evidence that ordinary voters have been chilled from participating in congressional elections in the Sixth District is Plaintiffs' own testimony (Opening Br. 18-19), which the State brushes off, without explanation, as "anecdot[al]" (Opp. 41).

The State instead focuses on voter turnout and party registration data. Opp. 41. But those data support *our* case, not theirs. Most notably, turnout for the Republican primary elections in midterm years—when congressional candidates are at the top of the ticket—has decreased dramatically since 2011, despite increasing party registration. In Allegany County, for example, turnout for the 2010 Republican primary was a robust 42.8%. Ex. NNN. But turnout plummeted by more than a third, to 26.7%, in the 2014 Republican primary. *Id*. Allegany County is no outlier; participation in mid-term Republican primary elections dropped uniformly between 2010 and 2014 throughout all five counties comprising the benchmark Sixth District, including Washington County, where

primary turnout likewise fell by more than a third, from 37.2% in 2010 to 25.3% in 2014. *Id*. In short, droves of ordinary Republican voters are no longer bothering to participate in Republican congressional primary elections in the Sixth District after the 2011 redistricting.[8] And no wonder why not: There is little point in helping to select a Republican candidate who is certain to lose in the general election.

Moreover, the State acknowledges that turnout also decreased for mid-term *general* elections in 2014 relative to 2010, but the State discounts the drop because it was slightly greater among Democrats than among Republicans. Opp. 41. That misses the point, which is that gerrymandering discourages political participation by voters of *both* parties in general elections, because would-be voters understand that the fix is in either way. This is, in short, hardly the picture of an "undaunted electorate" (Opp. 41).

Second, and regardless, chilling is not an element of Plaintiffs' First Amendment retaliation claim. On the contrary, "'a plaintiff who fails to allege a chilling effect may still state a claim if he alleges he suffered some other harm' that is 'more than minimal.'" *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (citations omitted). *Accord, e.g.*, *Zherka v. Amicone*, 634 F.3d 642, 645 (2d Cir. 2011) (individual injury that is "sufficiently tangible [may] serve as a substitute for 'actual chilling'"). Having established the manifest, tangible harm of vote dilution, Plaintiffs bear no further burden to prove chilling.

3. But-for causation

As we explained in the opening brief (at 14-15, 19-24), the Sixth District would not have flipped to Democratic control absent the specific intent to dilute Republican votes in the 2011 redistricting. We showed, in particular, that the State's primary alternative justification for the Sixth District's lines—preservation of the "I-270 corridor" as a community of interest—cannot independently explain the district's suspiciously targeted dive

[8] Republican primary turnout generally decreased in 2012 relative to 2008 as well, but it increased in 2016 (Ex. MMM), likely as a result of a competitive presidential primary.

into Montgomery County, not the least because none of the state officials responsible for the map actually considered the I-270 corridor when drafting, reviewing, and approving the map. Opening Br. 21-23. We also demonstrated that, under the settled First Amendment retaliation doctrine, the burden at the summary judgment stage is on the State to disprove but-for causation, and not the other way around. *Id*. at 28 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). The State's responses to these points (Opp. 42-46) are unpersuasive.

a. On the topic of burden-shifting, the State says (Opp. 42-43) that it is "unclear whether or to what extent *Mt. Healthy* is applicable to First Amendment retaliation claims outside an employment law context." But the principal case that the State cites as a basis for this supposed lacked of clarity—*Hartman v. Moore*, 547 U.S. 250 (2006)—in fact leaves little room for doubt that the *Mt. Healthy* burden-shifting framework *does* apply here. The Supreme Court in *Hartman* held simply that a Section 1983 plaintiff bringing a retaliatory *prosecution* claim must prove that the prosecution lacked probable cause when it brought the allegedly retaliatory charge. *Id*. at 260-261. "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution," the Court held, "while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Id*. at 261.

At the same time, the Supreme Court was careful to explain that outside the "different" context of a retaliatory prosecution case, its precedents have held that "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Hartman*, 547 U.S. at 260. Just so here.

Undeterred, the State claims (Opp. 43) that this Court already held that Plaintiffs bear an affirmative burden of proof on but-for causation in its decision on the State's Rule

12(b)(6) motion. Not true. The issue at the motion-to-dismiss stage was the sufficiency of Plaintiffs' pleadings, not the evidence. And at the pleading stage, the Court was right to require plausible allegations of but-for causation, without which the Plaintiffs would not have stated a claim. But the Court's recognition of a *pleading* requirement says nothing about the shifting of the *evidentiary* burden at later stages in the litigation. As the Sixth Circuit has explained, "it makes little sense to apply [*Mt. Healthy*] at the pleading stage," and it is only "[o]n summary judgment" or at trial that courts must "analyze the causation element of a retaliation claim under the [*Mt. Healthy*] burden-shifting framework." *Thomas v. Eby*, 481 F.3d 434, 441-442 (6th Cir. 2007) (emphasis omitted); *accord, e.g.*, *Johnson v. Eggersdorf*, 8 F. App'x 140, 144 n.1 (2d Cir. 2001) ("*Mt. Healthy* sets forth the appropriate standard for a § 1983 claim at trial, not for a motion to dismiss based on the pleadings." The Court's opinion denying the State's motion to dismiss cannot be understood as having rejected an evidentiary burden-shifting framework that does not apply at the motion-to-dismiss stage.

Finally, the State makes the puzzling claim (Opp. 44) that *Mt. Healthy* does not apply when there are "multiple motives and multiple decisions" the might explain the harm inflicted. In fact, the *Mt. Healthy* framework is meant to apply in *exactly* such cases, where "despite proof of some retaliatory animus in the official's mind," there is evidence "that action would have been taken anyway" for some other lawful reason. *Hartman*, 547 U.S. at 260. The question is only whether the burden is on the State to prove the positive (there *was* an alternative, lawful explanation) or whether it is on Plaintiffs to prove the negative (there was *no* alternative, lawful explanation). The Supreme Court's teachings are clear: It is on the State to prove the positive.

b. The State has not met its burden. It says (Opp. 45) that there were "two such objectives" that explain the cracking of the Sixth District separate and apart from the intent to dilute Republican voters by reason of their past support for Roscoe Bartlett. Those

objectives were "to (1) eliminate the Chesapeake Bay crossing in the First District, and (2) keep the I-270 corridor intact." *Id.* Neither of those explanations holds up.[9]

Although it is true that one of the goals of the redistricting was to avoid a district that jumps the Bay (Ex. A at 79:6-7), Prof. McDonald showed that it would have been possible (indeed, easy) to draw a map that accomplished that goal without so dramatically diluting Republican votes in the Sixth District. *See* Ex. Q at 13, 25 (fig. 8). The State effectively ignores this point, except to say (Opp. 45-46) that Prof. McDonald's alternative map "demonstrates that significant portions of Montgomery County must be incorporated into the Sixth District if the decisions related to incumbent protection and not crossing the Chesapeake Bay are respected." We have never argued otherwise. Our point is that, although Prof. McDonald's map brings some of Montgomery County within the Sixth District, it would not have flipped the district by so substantially diluting Republican votes. Ex. Q at 15 (tbl. 5). So the decision to "eliminate the Chesapeake Bay crossing in the First District" (Opp. 45) cannot explain the flipping of the Sixth District in 2011.

As for the I-270 corridor explanation, we showed in the opening brief (at 21-23) that none of the state officials at the heart of the redistricting actually considered I-270 when drawing, reviewing, or approving the map.[10] The State offers three assertions that might be understood as responses.

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[9] The State elsewhere cites "incumbency protection" as an alternative explanation for the map as drawn. Opp. 45. But Eric Hawkins testified that concern for incumbency protection *limited* the mapdrawers' ability to dilute Republican votes in the Sixth District, not that it necessitated it. *See* Ex. B at 42:18-43:3. We made this point in the opening brief (at 11 n.6), but the State once again ignores it.

[10] The State cites a *Baltimore Sun* article about the relationship between Frederick and Montgomery counties on pages 7 and 8 of its opposition brief, but it offers no evidence that anyone involved in the redistricting actually considered the reported facts. Dr. McDonald's map also shows that respecting this alleged connection would not require such a precision-oriented cracking of Republican voters.

First—ambiguously citing pages 58-59, 83-84, and 91-92 of Jeanne Hitchcock's deposition—the States claims (Opp. 9) that public testimony concerning "connections along the I-270 corridor . . . resonated with Ms. Hitchcock," and that "[s]he was careful to ensure that these concerns were reflected in the final map." That is false. Although Hitchcock recalled the topic of population growth along I-270 being discussed at the public hearings (Ex. F at 83:19-84:14), she did not recall any changes being made to the map based on that testimony (*id*. at 122:21-123:20, 172:21-173:10). And she tellingly did not request or review any information concerning the I-270 corridor (*id*. at 169:16-171:15), as surely she would have if she truly had been concerned to "ensure that [the I-270 corridor was] reflected in the final map." Opp. 9. We made these points in the opening brief (at 5-6, 22), and the State's only answer is to mischaracterize Hitchcock's testimony.

Second, the State offers the declaration of Senate President Miller's staffer Jake Weissmann. Opp. 12, 46. But all Weissmann does is describe an *effect* of the redistricting ("keeping . . . the I-270 corridor as a major feature of the Sixth district"), not its goals. Dkt. 186-11 ¶ 9. Nothing in Weissmann's declaration casts even the slightest doubt on every other witness's testimony that they did not specifically intend to recognize the I-270 corridor as a community of interest in the redistricting. *See* Opening Br. 21-23.[11]

Finally, the State points (Opp. 46) to the GRAC's ex-post PowerPoint presentation as evidence that the I-270 story was real. But the State's principal expert witness, Dr. Lichtman, testified that he was familiar in other redistricting cases with "those responsible for legislation sometimes provid[ing] a pretext or a sham explanation to obscure or conceal

[11] The State suggests that the final 2011 plan did not split as many precincts as demographics expert Dr. Peter Morrison showed, implying that the map is more consistent with respect for communities of interest that Dr. Morrison suggests. Opp. 30-31. Dr. Morrison's supplemental declaration shows that his (slightly corrected) analysis is accurate. *See* Ex. OOO. Even supposing that the State's criticisms of Dr. Morrison were persuasive, the State acknowledges that even under its own approach, the number of split precincts *more than doubled* in 2011 compared with the 2002 redistricting plan. *Id*. The State brushes this off as only a "slight[]" increase without a word of further explanation. Opp. 31.

the [true] explanation for the legislation they've adopted" (Ex. UU, at 126:19-127:8). By all accounts, that is precisely what happened here. *See* Ex. DDD. Once more, we made this point in the opening brief (at 22), and once more the State ignores the evidence.

In the final analysis, nothing can explain the overwhelming dilution of Republican votes in the Sixth District in 2011 aside from a specific intent to burden Republicans' representational rights by reason of their past success electing a Republican congressman.

B. The remaining prerequisites for injunctive relief are satisfied

1. We demonstrated in the opening brief (at 30-32) that, given the fast-approaching filing deadline for the 2018 primaries, this Court must enter an injunction by mid-August in order to avoid irreparable harm to Plaintiffs while at the same time giving adequate opportunity for the State to enact a new redistricting plan of its own. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."). *The State does not disagree*.[12]

Unable to deny the need for an immediate injunction, the State's principal response (Opp. 51-52) is to say that Plaintiffs' "own delays in filing suit and bringing their specific claims for relief have allowed three congressional elections to occur under the plan," and that we therefore "should not now be heard to complain that they will suffer irreparable harm if this Court does not grant them a preliminary injunction halting the operation" of a redistricting plan enacted six years ago.

[12] We do not concede that if a stay of any injunction were entered either by this Court or the Supreme Court, Plaintiffs would be unable to avoid irreparable injury. If an injunction in our favor were stayed, we would seek expedited appellate review and a court-imposed map on remand. *See Wise*, 437 U.S. at 540 (when the "imminence of a state election makes it impractical" for a State to enact a new map, "it becomes the unwelcome obligation of the federal court to devise and impose a reapportionment plan").

That argument is wrong as a matter of both law and fact.

Concerning the law, delay in seeking preliminary injunctive relief is relevant to irreparable harm because, in the mine run of cases involving a single and discrete injury, "a long delay in seeking relief indicates that speedy action is not required." *Skehan v. Bd. of Trustees of Bloomsburg State Coll.*, 353 F. Supp. 542, 543 (M.D. Pa. 1973); *see also Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) ("Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action.").

But in a redistricting case like this one, the asserted injury is repeated in every election, and thus each election represents a standalone irreparable harm. *Cf. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("once [an] election occurs, there can be no do-over and no redress," and the injury is "completely irreparable if nothing is done to enjoin [the challenged] law" before the election), *cert. denied* 135 S. Ct. 1735 (2015). Here, the State does not (and could not possibly) deny that if the 2011 redistricting plan is unconstitutional, each election that takes place under it is a grave and irreparable injury. It also does not deny that speedy action is required with respect to the 2018 election. For this reason, each of the cases cited by the State at pages 51-52 of its opposition brief is inapposite; each involved a single and discrete injury, not a repeating one.

Concerning the facts, the State is simply wrong to suggest that Plaintiffs have been dilatory. The 2012 election took place while Plaintiffs were pursuing relief through the referendum process. Ex. PPP (original plaintiff Steve Shapiro "campaign[ed] to block [the map] through a referendum" and "turned to another remedy—the courts" only after "the referendum failed"); Ex. QQQ (similar). Delay does not undercut a plaintiff's claim of

irreparable harm if he was "reasonably pursu[ing] non-litigation avenues first." *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224, 244-45 (D.D.C. 2014).

And after Plaintiffs filed suit, it was infeasible to request injunctive relief for the 2014 or 2016 elections. The 2014 election cycle passed while the Fourth Circuit had jurisdiction over Plaintiffs' appeal from the initial dismissal of their complaint. And the 2016 cycle commenced long before the Fourth Circuit issued its mandate, returning the case to this Court on February 3, 2016 (Dkt. 37). Indeed, the 2016 primaries took place before Plaintiffs even filed their second amended complaint (Dkt. 44).

Thus, the 2018 election cycle is the first election cycle for which injunctive relief has been possible in this case. And it has been only in the last couple of months that (1) Plaintiffs have had the evidence necessary to demonstrate their entitlement to relief and (2) the impending harm has become unavoidably pressing. As other courts have held, "waiting to file for preliminary relief until a credible case for irreparable harm can be made is prudent rather than dilatory." *Arc of Cal. v. Douglas*, 757 F.3d 975, 990-91 (9th Cir. 2014); *cf. Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 39 (2d Cir. 1995) (delay caused by "good faith efforts to investigate" does not refute irreparable harm).

2. So far as the balance of hardships and public interest are concerned, the State says little of substance. It first asserts that it will suffer an "irreparable injury" if enjoined from "effectuating [a] statut[e] enacted by representatives of its people." Opp. 54 (quoting *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)). But that is a spurious argument in a case like this one, where the claim is that state lawmakers have attempted to *silence* rather than effectuate the will of their constituents. It is not irreparable harm to forbid the enforcement of a statute like that. The State next contends (Opp. 54) that it will have to "expend considerable resources to draw [and enact] a new congressional plan." Even if true, that hardly outweighs the harm to the thousands of voters in the Sixth District who would be made to cast votes in an unconstitutional election. Indeed,

"'upholding constitutional rights [always] serves the public interest.'" *League of Women Voters*, 769 F.3d at 248 (quoting *Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003)).[13]

C. The First Amendment claim is not barred by laches

Finally, the State says (Opp. 47) that injunctive relief should be denied altogether because "Plaintiffs unreasonably delayed bringing their First Amendment retaliation claim," which is therefore "barred by laches." That is wrong in all respects.

To begin, the State is incorrect that it was "[n]ot until March 3, 2016" that Plaintiffs brought their First Amendment claim. Opp. 47. Indeed, it was an express premise of the Supreme Court's decision reversing the dismissal of the *pro se* amended complaint (Dkt. 11) that Plaintiffs all along have "challenge[d] Maryland's apportionment along the lines suggested by Justice Kennedy in his concurrence in *Vieth*," including that the 2011 map violates the First Amendment because it "impose[s] burdens and restrictions on groups or persons by reason of their views." *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (internal quotation marks omitted). That much is confirmed by Plaintiffs' opposition (Dkt. 18) to the State's first motion to dismiss (Dkt. 13), which argued that the First Amendment claim "rests on the impact on Republican voters, due to their party affiliation, resulting from the intentional structure and composition of the challenged districts." Dkt. 18, at 41.[14]

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[13] The State also asserts (Opp. 54-55) that "the public interest would best be served by awaiting final resolution" of Wisconsin's appeal in *Gill v. Whitford* (S. Ct. No. 16-1161). We address that issue in our separate brief on the appropriateness of a stay.

[14] The State is, in this respect, wrong that the original complaint "did not bring any claims challenging or in any way dependent on legislative motive and intent." Opp. 47. Although the original complaint was not a model of clarity on this point, it is well understood that "a *pro se* complaint, however inartfully pleaded," "is to be liberally construed" and "must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (internal quotation marks omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

To be sure, the Plaintiffs filed a revised, counseled complaint (Dkt. 44) when the case returned to this Court—but the amendments to the complaint (to which the State consented) did not introduce a new First Amendment claim beyond the one based on Justice Kennedy's *Vieth* opinion, which the Supreme Court held was included in the original *pro se* complaint. Thus, any delay in this litigation is attributable, not to dilatory conduct, but to the Fourth Circuit's now-abrogated decision in *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003) and the ensuing appellate proceedings before the Court of Appeals and the Supreme Court.

Nor, in any event, has the State offered any proof that the delay has caused it prejudice. *See Giddens v. Isbrandtsen Co.*, 355 F.2d 125, 128 (4th Cir. 1966) (party asserting laches must prove prejudice). On this point, the State observes only that the First Amendment claim "requires discovery of lawmakers' specific intent" and that several such lawmakers "could not recall the events of nearly six years ago and could not recall all of the sources of data presented to them or that they requested to view." Opp. 49. That may be so, but Plaintiffs bear the burden of proof on intent, so fading memories would *help* the State, not hurt it. *See Costello v. United States*, 365 U.S. 265, 282 (1961) (the defendant "was not prejudiced by the Government's delay in any way which satisfies this requisite of laches" because the loss of memories and evidence "worked to [the defendant's] benefit, not to his detriment"); *cf.* Dkt. 153, at 8-11 (motion detailing lost email evidence).

There is, in sum, no basis for denying injunctive relief on the basis of laches: Plaintiffs have pressed their First Amendment claim from the start, as the Supreme Court recognized in its opinion abrogating *Duckworth*. And either way, the delay in these proceedings has prejudiced Plaintiffs (if anyone), not the State. The laches defense accordingly should be rejected.

D. The Court should treat the July 14 hearing as a full hearing on the merits and grant a permanent injunction and final judgment

We argued in the opening brief (at 33-35) that the Court should consolidate the forthcoming hearing with a full hearing on the merits. *See Singleton v. Anson Cty. Bd. of Educ.*, 387 F.2d 349, 351 (4th Cir. 1967). Discovery is complete, the facts are clear, and there is nothing to be gained by interposing additional motions practice between the forthcoming hearing and a final judgment. The State does not disagree.

The Court accordingly should treat the July 14 hearing as a full hearing on the merits, enter a permanent injunction and final judgment for Plaintiffs, and bring these proceedings to a close.

CONCLUSION

The Court should permanently enjoin the State from enforcing Maryland's 2011 redistricting plan.

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Respectfully submitted,

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