IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE., *et al.*,	*	
Defendants.	*	

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REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Despite more than five months of fact discovery and an additional month for expert discovery (*see* ECF 108, 170), Plaintiffs have chosen to forgo any attempt to demonstrate that they suffered harm of constitutional dimension as the result of an action of Maryland decisionmakers specifically intended to burden their representational rights. But Plaintiffs cannot survive a motion for summary judgment on the "basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations." *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968). With no proof of specific intent to burden anyone's representational rights, no proof that any Plaintiff suffered an injury distinct from the disappointment experienced by any Maryland voter who voted for an unsuccessful candidate, and no proof of any causal connection between alleged intent and alleged injury, Plaintiffs have failed to come forward with the requisite proof of their claims. Therefore, summary judgment should be entered in favor of the Defendants.

ARGUMENT

I. THE INTENT OF SOME MARYLAND DECISIONMAKERS TO CREATE A COMPETITIVE SIXTH DISTRICT WHERE A DEMOCRAT COULD WIN IS NOT EQUIVALENT TO AN INTENT TO BURDEN PLAINTIFFS' REPRESENTATIONAL RIGHTS.

While Plaintiffs have repeatedly emphasized that all of their claims relate to the composition of the Sixth District and are not statewide, they have not tethered their claims of intent to any particular border of the Sixth District. Nor have they contradicted Maryland decisionmakers' explanations that the Sixth District's final composition was the result of

myriad factors, most of which were not specific to the Sixth District. Repeatedly and misleadingly relying on the total numbers of people who were assigned to a different district, Plaintiffs have no explanation as to how evidence of the legislature's adherence to stated goals *unrelated* to the Sixth District could somehow constitute evidence of partisan intent in shaping the Sixth District. Plaintiffs' own expert Dr. McDonald summarizes the movements of registered voters in his Table 4, ECF 177-19 at 13, which demonstrates that a significant portion of the population shift highlighted by Plaintiffs occurred because of legislative goals that had nothing to do with the political composition of the Sixth District.

The first of these unrelated legislative goals was described by the court in *Fletcher v. Lamone*: Maryland's Legislative Black Caucus requested that Prince George's County be unified "into Districts 4 and 5," and that request "was fulfilled in the enacted State Plan." 831 F. Supp. 2d 887, 902 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012). As a comparison of the 2002 and 2011 maps reveals, the 2011 enacted plan removed portions of the Fourth District from Montgomery County so that the Fourth District could share Prince George's County with just the Fifth District. (*Compare* ECF 186-14 *with* ECF 186-15.) As a result of that change, Montgomery County residents formerly assigned to the Fourth District needed to be placed in another district. They could not be fully accommodated in the Eighth District, a majority Montgomery County district, because the Eighth District was already overpopulated. (ECF 186-16.) To fully accommodate the removal of the Fourth District, therefore, the population in Montgomery County needed to be reallocated between the Sixth and the Eighth District, the only two districts remaining in Montgomery County. Thus, the need to move the former Fourth District's Montgomery County residents into

another district explains, at a minimum, 68,646 of the registered voters moved into the Sixth District.

Second, Plaintiffs ignore that 68,764 people were moved into the First District after the drafters of the 2011 plan made the decision to respect the "natural geographic border" of the Chesapeake Bay by eliminating the First District's Bay crossing. (ECF 186-2 at 79:15-18 (O'Malley Dep.).)[1] Removing the Chesapeake Bay crossing from the 2011 map prompted a need to add people to the First District to attain population equality. Because the other districts adjoining the First District (the Second and Seventh Districts) had population deficits, the Sixth District was the most suitable district from which to draw that additional population. (*See* ECF 186-16.)

In fact, those charged with the development of the 2011 plan understood that the Sixth District was destined for relatively significant changes due to four key features of geography and demographics: (1) the former Sixth District stretched across nearly the entire northern border of Maryland; (2) the remaining northern border was shared with the First District, which, as just explained, had a population deficit due to the elimination of the Bay crossing; (3) the former Sixth District contained parts of Montgomery County in the opposite corner of the state; and (4) the Montgomery County area was growing in population. For these reasons, it was evident to decisionmakers that those areas were

[1] The previous extension of the First District across the Chesapeake Bay and into Anne Arundel County had been characterized by a member of this Court as an effort made by prior legislatures solely to avoid extending the First District into then-Representative Helen Bentley's district. *Anne Arundel Cty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 409 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992) (Niemeyer, J., dissenting).

"where the congressional lines would change the most." (ECF 186-2 at 79:15-18 (O'Malley Dep.).) Even if one were to accept Plaintiffs' theory that raw numbers of moved voters can be evidence of the legislature's intent, Plaintiffs overstate their case by ignoring the effect of the moves in the First, Second, Fourth, and Seventh Districts. Excluding those moves, only 145,984 residents were moved from the Sixth into the Eighth and only 128,992 were moved from the Eighth into the Sixth, less than half of the number touted by Plaintiffs. (ECF 177-1 at 19.)

Moreover, as explained by Governor O'Malley, the composition of the Sixth District reflects the desire to create a district centered around the I-270 corridor, a growing population center consisting of outer-Washington, D.C. suburbs that link areas of growth in the biotech industry. (ECF 186-2 at 25:2-10; 40:16-41:6.) Governor O'Malley's testimony is supported by objective evidence demonstrating that Maryland decisionmakers prioritized this community of interest by rejecting the Maryland congressional delegation's proposals that would have bisected the I-270 corridor.[2] (ECF 186-11 ¶ 9.) Both Mr. Weissmann and Ms. Hitchcock also recalled that recognizing the changing nature of the I-270 corridor was a feature that drove development of the map. (*Id.*; ECF 186-5 at 58:18-59:22; 83:12-16.) Moreover, others outside the decisionmaking process advocated

[2] There is no evidentiary support for Plaintiffs' claim that Congressional Option 2 was a second map produced by the congressional delegation. Plaintiffs have pointed to the existence of a computer file bearing the title "Congressional Option 2," but as explained in Mr. Weissmann's Second Declaration, attached as Exhibit 54, that appellation did not denote the file's origin and Mr. Weissmann does not remember receiving a second map from the congressional delegation. Moreover, Governor O'Malley and Mr. Weissmann both recalled the submission of a single map by the Maryland congressional delegation. ECF 186-2 at 54:18-55:4; ECF 186-11 ¶ 8; *see also* Ex. 54.

for the reconfiguration of the Sixth District to recognize the growth and changing nature of the I-270 corridor and its impact on western Maryland. (ECF 186-3, MCM000021-22, 31, 32-33, 37-38, 50-51, 71-72.) Accordingly, the contemporaneous explanation of the plan provided to the legislature featured the I-270 corridor as a reason for the Sixth District's configuration. (ECF 104-6.) Commuting pattern and growth data confirm the statements of decisionmakers. (ECF 186-49.)

In the face of consistent evidence from decisionmakers, constituents, the press, maps, and election results that the I-270 corridor was an established community of interest well-known in Maryland, Plaintiffs have repeatedly characterized the contemporaneous explanations as "pretextual." (ECF 177-1 at 22; ECF 191 at 23-24.) Plaintiffs have not identified, however, any competent evidence to support their assertion of pretext.[3] In their

[3] Professor McDonald's declaration purporting to analyze the various maps produced from Mr. Weissmann's laptop, should be disregarded for three reasons. First, its disclosure is untimely. The underlying computer files analyzed by Professor McDonald were produced to plaintiffs on February 9, 2017, Ex. 55, yet Professor McDonald waited more than a month after the supplementation deadline before disclosing this new basis for his opinions to Defendants. Because Plaintiffs made the belated disclosure out of compliance with the scheduling order and well after expert depositions were concluded, with no explanation or showing of good cause, the declaration may be stricken. Fed. R. Civ. Pro. 37(c)(1). Second, the declaration addresses matters that are not the proper subject of Professor McDonald's expert testimony. That is, Professor McDonald has no special expertise in computer forensics, *see* ECF 177-19 at 30-43, on which his declaration nonetheless opines, and, in any event, this second declaration seeks only to testify to facts of which Professor McDonald has no personal knowledge. *C.f.* Fed. R. Civ. Pro. 56(c)(4). Third, and most importantly, Professor McDonald's second declaration is self-contradictory: in places Professor McDonald attributes intent in lowering Democratic Performance Index ("DPI") to specific concerns unrelated to partisan intent, but then in other instances he relies on small shifts in DPI as evidence of partisan intent. *See* Ex. 56, Lichtman Second Declaration at 6. Moreover, Professor McDonald's factual assumptions of the timing and authors of these plans are based on pure speculation, which, as is predictable given his lack of expertise in this arena and lack of any disclosed methodology,

search for such evidence, Plaintiffs rely primarily on an email communication between two congressional staffers, conducted on their personal email accounts. But that exchange is devoid of any reference to I-270 or the Sixth District. ECF 177-58, Ex. DDD. Moreover, this email is inadmissible hearsay, with no declarant having laid the necessary foundation that it was created as a regularly conducted activity or otherwise satisfies any other exception to the hearsay prohibition. Fed. R. Evid. 801; *see also* Fed. R. Evid. 802(6). Accordingly, Plaintiffs cannot rely on it to defeat summary judgment. *Maryland Highways Contractors Ass'n v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991) ("[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment."); *see also* Fed. R. Civ. Pro. 56(c)(2). Moreover, the email is not probative of the motivations of Maryland decisionmakers in drawing the boundaries of the Sixth District because its content offers mere speculation about some unidentified topic in a presentation that spanned all of the Maryland congressional districts, not just the single district to which Plaintiffs have restricted their claims.

Similarly, there is no foundation whatsoever for Plaintiffs' bizarre statement that Defendants do "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

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turn out to be wrong. The declaration fails to generate a genuine dispute of material fact, and, in any event, its substance is at best oblique to the core legal issue here, which is whether an intent to increase the competitiveness of a district, with the hope that a Democratic candidate would succeed, is equivalent to a specific intent to burden the representational rights of the Plaintiffs. In other words, evidence showing that DPI was intentionally increased does not support Plaintiffs' claim that each of them was targeted, purposefully retaliated against by Maryland decision makers, and thereafter suffered a burden on her representational rights.

elections." Plaintiff's Opp. (ECF 191) at 1. That unsubstantiated proposition is specifically contradicted by Governor O'Malley's sworn testimony. As explained in Defendants' opening memorandum at 27, Governor O'Malley recognized that the historic core territory of the Sixth District was becoming more Democratic in its politics as the population within the territory was reconfiguring itself, and, therefore, he believed that drawing a more competitive Sixth District was sensible and in line with constituent desires. ECF 186-2 at 26:16-21. Governor O'Malley's testimony was once again supported by the record before the GRAC, where constituents voiced their discontent with the configuration of the Sixth District as it was composed after the 1990 and 2000 censuses. These constituents criticized the version of the Sixth District drawn in the two prior rounds of redistricting for having allowed a polarizing candidate not reflective of the area's moderate views to hold a seat that had generally been occupied in the past by a moderate Democrat. *E.g.*, ECF 186-3 at MCM000025-26. And all of that testimony is further supported by actual electoral trends, which, as discussed further below, show that the areas of western Maryland encompassed by the Sixth District were becoming more Democratic.

Moreover, there is no evidence in the record that voters in the First District, who "had successfully elected a Republican candidate" in all but one of "the prior ten congressional elections," (Pls. Opp. (ECF 191) at 1), were subjected to any vote dilution (or any other harm) at all. How voters with similar voting histories and registration patterns were treated elsewhere in the state is relevant to Plaintiffs' claims concerning the Sixth District, because it demonstrates the hollowness of Plaintiffs' reliance on unsupported rhetoric. There is no flip side to the legitimate political aims of recognizing constituent

requests and changing political geography; an intent to "single[] out" voters, *id.*, because of their prior success in electing Republicans is nowhere present on this record. At most, the record supports a finding that metrics incorporating the results of prior elections were available to and known by the mapmakers and that those voting patterns revealed that districts could be drawn to honor constituent requests for a more competitive Sixth District where a Democrat would be capable of winning.

Similarly, the record does not support any claim that the magnitude of the swing in the Sixth District's DPI or Partisan Voting Index ("PVI") is indicative of a retaliatory intent to burden representational rights, in part because Plaintiffs propose no threshold or magnitude of swing that would or would not be capable of altering the outcome of an election. Plaintiffs appear to assert that they are free to rely on the entire shift, from R+20 to D+2, or any subset of that range, as a sufficient indicator of retaliatory intent. That is, in effect Plaintiffs argue that it is constitutionally impermissible for a legislature to value competitive districts and to seek to create them. Rather, under Plaintiffs' preferred regime, legislatures would be condemned to perpetuate a district's uncompetitive conditions indefinitely, and would be prevented from increasing its competitiveness even marginally, once an uncompetitive district has been established. For example, under Plaintiffs' theory, it would be proof of an unconstitutional, retaliatory intent *if* (1) a legislature intended to increase competitiveness by shifting a district from R+20 to R+3 *and*, as is certainly possible, (2) an election in the newly drawn district is subsequently won by a Democrat.

In framing their argument, Plaintiffs once again willfully misconstrue their burden of proof. They are not required to prove, as they insist on framing it, that the *Sixth District*

was singled out. Instead, to prevail on a First Amendment retaliation theory, Plaintiffs must demonstrate that *they*—Mr. Benisek, Ms. Ropp, Ms. Strine, Ms. O'Connor, Mr. Eyler, Mr. Cueman, and Mr. DeWolfe—were singled out for inappropriate retaliatory treatment by the government. Any such evidence is completely absent from this case. Plaintiffs have offered no evidence, and have not even claimed, that decisionmakers examined the voting history of any of these individuals. Nor is it possible for Plaintiffs to offer such proof. That is, DPI, PVI, and any other metric built with voting history can only be as specific as the precinct level, because we maintain a secret ballot in this country. Tools that are limited to precinct-level analysis cannot produce the individually-targeted information necessary to establish the specific retaliatory intent that Plaintiffs must prove. Plaintiffs' reliance on the treatment of race-based metrics in racial gerrymandering cases is no answer—in the case of race, the Census collects that data on an individual level and metrics built from that information can be traced to an individual. Ex. 57 ("data on race were derived from answers to the question on race that was asked of *individuals* in the United States.") (emphasis added). No comparable Census data are collected or otherwise available for determining an individual's voting history. Moreover, a First Amendment claim is founded on an individual's expressive activity, not on an invidious classification of a group by the government, as in the Fourteenth Amendment cases Plaintiffs cite.[4]

[4] The two non-Fourteenth Amendment cases plaintiffs cite, *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994) and *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) are also entirely inapplicable. In *Kotasz*, the Ninth Circuit based its holding that refugees could be granted admission without evidence of individual persecution in part on statutory language setting forth "membership in a particular social group" as a basis for persecution that might justify admission. 31 F.3d at 851-52. While

Plaintiffs cannot have it both ways, relying on Fourteenth Amendment concepts of intent to support their intent argument (ECF 191 at 8) while eschewing requirements developed in that context for proving group harm (*id.* at 11); having chosen to pursue an individual-rights based claim, they must prove individualized action and effects. Plaintiffs have offered nothing more than evidence of what this Court already has proclaimed insufficient to establish their claim, *i.e.* that the "legislature was aware of the likely political impact of its plan and nonetheless adopted it." (ECF 88 at 34.) In the absence of any proof "that the legislature specifically intended to burden [Plaintiffs'] representational rights," *id.*, summary judgment should be entered in favor of Defendants.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY SUFFERED ANY CONCRETE INJURY MORE THAN DISAPPOINTMENT IN ELECTORAL RESULTS.

Plaintiffs have failed to explain how they were harmed in any way different from the injury suffered by every other Maryland voter who was disappointed with the outcome of the 2012 election in his or her district. Although Plaintiffs have pointed to election results as evidence of harm, and pointed to changes in metrics that are used to forecast

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one applicant was able to meet this standard, the *Kotasz* court rejected the claims of an applicant who argued her status as Roma should entitle her to admission because, although Roma are persecuted in some places, she had not offered individualized proof of persecution of Roma in her home country. *Id.* at 854. In *Reeves*, a hostile work environment case, the plaintiff was subjected to degrading and discriminatory conduct on the basis of gender, and while her colleagues never specifically directed these discriminatory remarks to her, the court held that jury could infer that she was subjected to a harsher work environment than those of the opposite gender because of the content of those remarks. 594 F.3d at 813-14. In both cases, proof of individualized discrimination and harm was still required; the plaintiffs were merely allowed to provide evidence of group discrimination in support of their claims.

electoral results, they have not offered any explanation of how either disappointment with election results or a change in election forecasts caused them concrete injury. Even though Plaintiffs include residents of both the current Sixth and Eighth districts, their briefing has studiously avoided any reference to their divergent residential circumstances, and they have offered no explanation of how it could be that the two groups of Plaintiffs, residing within and without the Sixth District, somehow suffered the same harm. Nor have they attempted to identify or describe any separate or distinct harms that might have been inflicted on each group, respectively. Consistently, Plaintiffs have only made reference to suffering from vote dilution, without describing the exact contours of the dilution they allegedly suffered or whether that change was sufficient to alter election outcomes.

Plaintiffs have now expressly clarified that their sole proof of a concrete burden on their representational rights is "[t]he DPI and PVI." (ECF 191 at 11). By so limiting their method of proof, they have committed a textbook error in statistical reasoning, by attempting to prove the real-life circumstances of actual events solely through statistical projections of forecasted results. *See* James A. Henderson, Jr., Richard N. Pearson, & John A. Siliciano, *The Torts Process* 105-07 (6th Ed. 2003) (discussing errors in mathematical modes of proof); *see also*, *e.g.*, Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 Yale L.J. 1254, 1270 (2013) (providing Bayesian framework for rejecting "naked-statistical-evidence hypotheticals" like those presented by Plaintiffs); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1350 (1971) ("mathematical evidence *taken alone* can rarely, if ever, establish the crucial proposition with sufficient certitude to meet the applicable standard of proof"). Both DPI

and PVI are averages of past election results. ECF 186-7 (Hawkins Depo.) at 24:12-16; ECF 177-51 (Pls. Ex. WW). While these metrics have predictive value that may suggest whether a Democrat or Republican is more or less likely to win a particular congressional district, DPI and PVI are not meant to measure or explain actual election results. Far from being a small number, the dozen or so Republicans holding office in districts with DPI at or above 50 demonstrate that such an outcome is probable enough that it *actually occurs* a dozen or so times *each* election.[5] And Plaintiffs have failed to acknowledge that the 94 percent likelihood estimate for Democratic success that they offer on pages 8 and 9 of their opposition is a metric generated for *all* elections, nationwide, for the past 22 years. (Pls.' Ex. KKK at 628.) In other words, the predictive value Plaintiffs cite is not calibrated to any evaluation of Maryland elections happening in the 2010s and is not meant to make a claim about the accuracy of the PVI for any particular election. Plaintiffs cannot generate the necessary proof of concrete injury to their representational rights merely by making general assertions which, when properly examined, actually prove that a Republican is still capable of winning an election in the Sixth District.

In other words, while DPI and PVI are metrics, they are not metrics that measure any quantity that would help plaintiffs prove that the 2012 election, or any subsequent election, was affected by vote dilution of sufficient magnitude to actually alter the outcome. Plaintiffs' exclusive reliance on DPI and PVI effectively means that they have not bothered

[5] This is likely why, when Cook Political Reports evaluates changes in districts it considers "swing" districts, or those capable of switching party control, it looks at a range in PVI from +5R to +5D. Pls.' Ex. XX (ECF 177-52.)

to ask, and cannot answer, questions that are critically important to their claims, including "whose votes were diluted?"; "what was that group's voting strength prior to redistricting?"; and "what other factors influenced the election outcome?" Plaintiffs' failure to offer even a modicum of proof concerning these factors at this stage of the proceeding requires entry of summary judgment in favor of Defendants.

Though Plaintiffs would prefer a blinkered approach that ignores context, a few examples of the surrounding circumstances of the elections at issue in this case serve to demonstrate the extent to which Plaintiffs have fallen short of satisfying their burden to prove that the 2011 congressional map "diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." (ECF 88 at 31-32.) First, in Washington County, located entirely within both the former and the current Sixth District, a majority of those voting cast their votes for Congressman Delaney in the 2012 election, (ECF 186-31), with Roscoe Bartlett receiving 4,000 fewer Washington County votes than he had garnered in the prior presidential election year, 2008. (Ex. 58, 2008 Election Results.) Although Roscoe Bartlett carried Allegany and Garrett counties in 2012, when compared with the 2008 election, Bartlett's margin over the democratic candidate was narrowed (in Allegany, his 6610 vote margin in 2008 narrowed to a 3764 vote margin in 2012; in Garrett, his 4782 vote margin in 2008 narrowed to a 4581 vote margin in 2012). *Compare* 186-31 to Ex. 57. This cursory examination of election statistics shows that voter preferences were changing within the territory of the former Sixth District, with or without any movement or reconfiguration of the district. Further evidence of the electorate's changing preferences is the large numbers of election-day votes gained by Governor Hogan

in the Sixth District. That is, if all voters who voted for Governor Hogan in the Sixth District on Election Day had also voted for Dan Bongino, Congressman Delaney would have lost the election by 11,880 votes. Results reported in State_Congressional_Districts_2014_General.csv (available at http://elections.state.md.us/elections/2014/election_data/State_Congressional_Districts_2014_General.csv).

In response to this evidence that Plaintiffs have failed to carry their burden of proof on the harm element, Plaintiffs simply assert that they are not required to provide proof beyond the election results and forecasted probabilities of winning. But, as is evident from the most simple of breakdowns of the election results, there were significant forces at work other than those attributable to acts of Maryland decisionmakers.

Plaintiffs cannot now point to what quantum of vote dilution constituted the harm in this case. Plaintiffs have agreed "that vote dilution, in some form, is inevitable in every redistricting, 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." (Pls.' Opp. (ECF 191 at 12-13).) But Plaintiffs here have admittedly failed to account for the factors of geography and other political calculi that had nothing to do with reprisals for prior electoral success in this case. If one sets aside factors clearly attributable to other causes – the moves necessary to eliminate the Chesapeake Bay Bridge crossing and fulfill a request from the Legislative Black Caucus to remove the Fourth District from Montgomery County – and then isolates only the interchange between the former Sixth and the former Eighth Districts, Professor McDonald's Table Four shows that a net amount of

40,066 registered Republicans were removed from the Sixth District and 18,420 registered Democrats were moved into the Sixth District. Together, that combined change of 58,486 registered Republicans and Democrats is smaller than the 64,608 votes that separated Delaney and Bartlett in the 2012 election.

Having failed to offer any evidence that their alleged vote dilution is of sufficient magnitude to have actually altered the outcome of an election,[6] Plaintiffs have also fallen short of demonstrating that there is any logical way that the allegedly disfavored expressive activity of voting for Republicans could be chilled through redistricting. First, evidence of voter participation in primaries is irrelevant because that is not the expressive activity alleged by Plaintiffs to have triggered the retaliatory action and, moreover, primary participation can be highly candidate-specific. Looking at Alleghany County's 2006 Republican Party primary turnout in 2006, for example, shows only a 31.7 percent turnout, much closer to the 26.7 percent experienced in the 2014 Republican primary. Second, Plaintiffs' own testimony in this instance consists of merely reports about what other voters said to them about their plans to vote—and, for that reason, it is inadmissible hearsay for the purposes of proving that other voters were, in fact, chilled from voting. Fed. R. Evid. 802. Third, Plaintiffs have offered no logical explanation of how an objectively reasonable voter would be chilled from voting in a general election for the candidate or party of their

[6] Plaintiffs have not substantively responded to Defendant's argument that they have failed to provide any explanation of how "vote dilution" constitutes a harm absent any historic or situational context that a particular group is denied access to representational rights as a result of the alleged vote dilution. This topic is addressed thoroughly in Defendant's opening memorandum at 35-38.

choice merely because they had been moved to another district. As explained in Defendants' opening memorandum at pages 39 to 41, a voter of ordinary firmness, knowing that he or she could not be singled out for reprisal because of the secret ballot, would instead, like Plaintiffs here, redouble her political efforts in a competitive election.

III. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF PROVING CAUSATION, EVEN USING THE LOWER STANDARD THEY CLAIM IS APPLICABLE.

While arguing that they should be the beneficiaries of a *Mt. Healthy* defense, Plaintiffs have offered no explanation or argument justifying their failure to meet their threshold burden of proof under that very standard. (ECF 191 at 16-19.) Having failed to adequately define the harm they suffered, Plaintiffs have specifically disclaimed their responsibility to make any showing that the harm they suffered was suffered as a result of the legislature's allegedly impermissible intent. But *Mt. Healthy* requires more than a bare allegation of an intent and effect. Plaintiffs must show that the intent was more than merely "on the minds" of decisionmakers, *Mt. Healthy*, 429 U.S. at 285-86; instead, they must actively demonstrate that the intent had "causal force" enough to change the result, *Greene v. Doruff*, 660 F.3d 975, 980 (7th Cir. 2011).

In *Greene*, Judge Posner explained this threshold burden in the language of sufficient and necessary conditions. 660 F.3d at 978. A necessary condition is one that must be true to produce a result; for example, being a human is a necessary condition for going to college. *Id.* A sufficient condition, by contrast, means that as a result of that condition, something else is bound to happen. *Id.* Dropping a match into a bucket filled with gasoline is a sufficient, but not necessary, condition of starting a fire because a fire

could be started in any number of other ways. *Id.* But, "dropping a lighted match into an empty bucket would be neither a sufficient nor a necessary condition of starting a fire; usually many conditions must concur for an act to have specific causal consequences." *Id.* The *Mt. Healthy* defense is a mechanism that allows plaintiffs to prove that an action is a sufficient condition of a harm, and then to shift the burden to prove that the condition was not a necessary one to plaintiffs. *Id.* at 979. But without proof that an intent is a sufficient condition, the intent could well be the lighted match in the empty bucket, having "played no role" in the harm to Plaintiffs. *Id.*

Here, Plaintiffs have made no showing that any Maryland decisionmakers' intent was a sufficient condition to cause the unarticulated harm they suffered. As explained above, without explaining the nature of the harm, the magnitude of population shift at issue, their own individual circumstances in relation to other Marylanders effected by the map drawing, and what motivated whom to draw what boundaries when, Plaintiffs have given no demonstration that the harm they allegedly suffered was the result of any retaliatory intent of Maryland decisionmakers. Having not only failed to offer such proof, but also actively disclaimed any duty to do so, Plaintiffs are bound by that strategic decision, and summary judgment should be entered in favor of Defendants.

IV. PLAINTIFFS' CLAIMS ARE BARRED IN THEIR ENTIRETY BY THEIR PREJUDICIAL AND UNEXCUSED DELAY.

In response to Defendants' laches defense, Plaintiffs mischaracterize the nature of their First Amendment claim as it was originally pled, by relying on two lines of text. The first comes from the Supreme Court opinion in *Shapiro v. McManus*, 136 S. Ct. 450, 456

(2015), in which the Court quoted the Plaintiffs' own assertion that they had "challenge[d] Maryland's apportionment along the lines suggested by Justice Kennedy in his concurrence in *Veith*." *Id.* at 456 (quoting App. to Brief in Opposition 44). However, although Plaintiffs' original pleadings made reference to Justice Kennedy's concurrence, the complaint did not even suggest a First Amendment retaliation claim, much less one based on legislative motive and intent as it pertained solely to the Sixth District. Rather, their pleadings alleged that the "lack of contiguity" of the Fourth, Sixth, Seventh, and Eighth districts abridged the "First Amendment's protection of *political association* – along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." Am. Compl., ECF 11 ¶¶ 22-23 (emphasis added). The second line of text on which Plaintiffs rely comes from their response to the State's motion to dismiss the first amended complaint and merely states 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*, and which is aggravated by the operation of Maryland's closed primary election system." ECF 18 at 41.

Far from putting the State on notice of Plaintiffs' late-filed First Amendment retaliation claim, these passages only underscore that Plaintiffs' original and first amended complaint relied solely on how the *shape of the districts* impacted their ability to influence the political process through political association, and did not rely on legislators' specific intent to retaliate against Republican voters in the former Sixth District or the indirect harms now alleged by Plaintiffs. Even giving the pro se filings a liberal construction, Plaintiffs cannot seriously contend that their complaint, which expressly disclaimed that

their claim relied on "the reason or intent of the legislature" ECF 11 ¶ 2, could be understood to assert a claim that turns upon legislative motive and intent. A judge of this Court has noted the evolution of the Plaintiffs' initial First Amendment claim into the one they are pursuing now, years later: "Since [the original Complaint was dismissed], Plaintiffs' theory of the case has evolved, and they now contend that the burden they (along with other Maryland voters) have suffered is not a direct restraint on their political activity but rather an indirect sanction for engaging in First Amendment–protected conduct." ECF 88 at 52 (Bredar, J., dissenting); *see also id.* at 40 n.1 ("On remand, Plaintiffs sought—and received—this Court's permission to amend their Complaint substantially, and it is Plaintiffs' modified constitutional theory that now confronts the Court.").

As to prejudice, Plaintiffs merely argue that witnesses' failing memories help the State, not Plaintiffs. Thus, they ignore their own reliance on the inability of former GRAC members to recall with specificity the data they reviewed or the GRAC process, which Plaintiffs have falsely characterized as a sham. Further, Plaintiffs prefer not to acknowledge that, after waiting years to bring their claims based on specific intent, they attempted to benefit from confusion and uncertainty concerning document preservation in light of the turnover in administration, by filing frivolous spoliation claims. And Plaintiffs further seek to benefit by disclaiming any burden of production or proof on the causation element of their claim; under their theory, Defendants must meet Plaintiffs' bare speculation with affirmative proof of alternate causation, with only the evidentiary record that has been eroded by Plaintiffs' willful delay. Not only was the State concretely prejudiced when it was required to respond to Plaintiffs' frivolous spoliation claims, but

the passage of time also rendered the State unable to amass the entire administrative record to support Governor O'Malley's (uncontradicted) testimony concerning his priorities in redistricting, including not crossing the Chesapeake Bay, pulling the Fourth Congressional District out of Montgomery County, and preserving the I-270 corridor in Montgomery and Frederick Counties. Plaintiffs sat on their rights and now, throughout their practice in discovery and their unique (although ultimately unsuccessful) efforts to shirk their legal burdens, have actively used that delay to disadvantage Defendants.

CONCLUSION

For the reasons discussed above and in Defendants' opening memorandum, summary judgment should be entered in favor of Defendants.

Respectfully submitted,

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Dated: August 1, 2017

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TABLE OF EXHIBITS

Exhibit No. Title

54. Declaration of Yaakov Weissmann (August 1, 2017)

55. Electronic Mail Correspondence Among Counsel (June 5, 2017 through June 12, 2017) and Letter from Mary Scanlan to Stephen Medlock (February 9, 2017)

56. Second Supplemental Expert Report of Allan J. Lichtman (July 12, 2017)

57. United States Census, "Race", available at https://www.census.gov/topics/population/race/about.html (last accessed July 31, 2017)

58. Maryland State Board of Elections, "Official 2008 Presidential General Election results for Representative in Congress - Congressional District 6" (last accessed August 1, 2017)