**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**ALEXANDRIA DIVISION**

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| AMY LAMARCA, an individual; JON-CHRISTOPHER BOLLING, an individual; NANCY MCPHERSON, an individual; CHRISTINA REBMAN, an individual; ROLLAND D. WINTER, an individual; and CHRISTOPHER AMBROSE, an individual, | ) | |
| Plaintiffs, | ) | Civil Action No. 1:11-cv-01255-AJT-JFA |
| v. | ) | |
| VIRGINIA STATE BOARD OF ELECTIONS; CHARLES JUDD, in his capacity as Chairman of the Virginia State Board of Elections; KIMBERLY BOWERS, in her capacity as Vice-Chair of the Virginia State Board of Elections; DON PALMER, in his capacity as Secretary of the Virginia State Board of Elections; ROBERT F. MCDONNELL, in his capacity as Governor of Virginia; BILL BOLLING, in his capacity as Lieutenant Governor of Virginia; and KENNETH T. CUCCINELLI, II, in his capacity as Attorney General of Virginia, | ) | |
| Defendants. | ) | |

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 12(B) MOTIONS TO DISMISS**

## I. INTRODUCTION

Plaintiffs Amy LaMarca, Jon-Christopher Bolling, Nancy McPherson, Christina Rebman, Rolland Winter and Christopher Ambrose ("Plaintiffs") respectfully submit that Defendants' Motion to Dismiss should be denied. The motion is premised on the argument that the Virginia Constitution does not mean what it so plainly says. Article II, Section 6 of the Virginia Constitution provides in no uncertain terms that "[t]he General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every

ten years thereafter." Va. Const. art. II, § 6. The provision could hardly be more clear, plain, or mandatory: the General Assembly must draw new congressional districts in 2011—not 2012, 2013, or thereafter. The General Assembly thus has less than two weeks remaining in 2011 during which it may draw new districts. There is no doubt that it will fail to meet this deadline; indeed, by the time of the hearing on these motions, that failure will be manifest. When it does, the General Assembly will be powerless to act, and it will fall to the judiciary to draw new congressional districts in its stead.

Defendants nevertheless invite the Court to ignore the text of the Virginia Constitution and to dismiss the case based on a curiously expansive and unconstrained reading of the constitutional text that would read "2011" to mean "at any convenient point in the future." Based on this flawed theory, Defendants urge the Court to dismiss Plaintiffs' claims as speculative and unripe. Moreover, Defendants contend, Plaintiffs' claim is both barred by sovereign immunity and moot because, in essence, Defendants promise that they will not enforce the existing congressional districts, even though they currently have not enacted a new congressional plan to replace the malapportioned plan.

None of these arguments can withstand scrutiny. Defendants' motion should be denied: (1) the Complaint alleges all the facts necessary to state a claim for relief and is not speculative; (2) Plaintiffs' claims are ripe because the General Assembly certainly will fail to redraw the existing congressional districts on or before December 31, 2011; (3) Defendants' erroneous interpretation of Article II, Section 6 of the Virginia Constitution ignores its plain meaning; (4)

sovereign immunity does not bar Plaintiffs' claim; and (5) Plaintiffs' claim is not and cannot be barred by Defendants' putative promise not to enforce the existing unconstitutional districts.[1]

## II. ARGUMENT

### A. The Governing Standards Are Clear.

To survive a motion to dismiss, a complaint "must contain sufficient facts to state a claim that is 'plausible on its face.'" *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Nevertheless, "a complaint need only give the defendant fair notice of what the claim is and the grounds upon which it rests," *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted), and a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). When deciding a 12(b)(6) motion to dismiss, a court must accept as true "all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). It must assume "that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. All factual allegations must be construed "in the light most favorable to the plaintiff," *Smith v. Smith*, 589 F.3d 736, 738 (4th Cir. 2009) (internal quotation marks and citation omitted), and if the complaint raises a disputed issue of fact, the motion to dismiss must be denied, *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009).

[1] As Plaintiffs stated in their Reply in Support of Motion to Convene Three-Judge Court, Dkt. # 25, there is significant overlap between Defendants' arguments in it opposition to Plaintiffs' Motion to Convene a Three-Judge Court, Dkt. # 12, and in support of its Motion to Dismiss. For the reasons identified in this memorandum, Plaintiffs' Complaint is ripe and not speculative, and its claim, on the merits, is assuredly "substantial." As a result, Plaintiffs respectfully submit, its Motion to Convene a Three-Judge Court should be granted and the Motion to Dismiss should be deferred for consideration by the Three-Judge Panel and, when considered, should be denied on the merits.

A similar standard governs a motion to dismiss under Fed. R. Civ. P. 12(b)(1). The Court must "accept as true all material allegations of the complaint," *Commonwealth of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons*, 632 F.2d 365, 367 (4th Cir. 1980), *aff'd*, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982), and "make all reasonable inferences in the plaintiff's favor." *DeBauche v. Va. Commonwealth Univ.*, 7 F. Supp. 2d 718, 721 (E.D. Va. 1998). When a party presents evidence to support a Rule 12(b)(1) motion to dismiss, "the court . . . weighs the evidence to determine its jurisdiction." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

**B. The Complaint Is Not Speculative and States a Claim for Relief.**

Defendants' central argument in support of their motion is that Plaintiffs' Complaint is too speculative. *See* Dkt. #11, Memorandum of Points and Authorities in Support of Defendants' Rule 12(b) Motion to Dismiss ("Def. Mem.") at 2, 5. But there is no conjecture in Plaintiffs' Complaint, and Defendants' argument is plainly incorrect. The Complaint alleges all the facts necessary to show that the Court has subject-matter jurisdiction over this case and to state a claim under 42 U.S.C. § 1983, the Fourteenth Amendment, and Article I, Section 2 of the United States Constitution. The Complaint alleges that Virginia's congressional districts are currently unconstitutional—an allegation that Defendants' declaration concedes—and that Virginia will not draw new districts before January 1, 2012. Complaint ("Compl.") ¶¶ 22-25, 28, Dkt. # 1; *see also* Def. Mem. Ex. D. ¶ 3, Dkt. # 11-4 (Declaration of Don Palmer, Secretary of the Virginia State Board of Elections) ("Palmer Decl.")

For starters, the simple fact of timing—that the General Assembly has less than two weeks, over the holiday season, to draw new congressional maps before it loses the authority to do so—is evidence that Plaintiffs' claim is neither speculative nor uncertain. *See* Compl. ¶ 21. Moreover, the General Assembly's failure to draw new districts despite having three legislative

sessions in which to do so is further proof that the General Assembly will not draw districts in the last few days remaining in 2011. Compl. ¶ 22. Even if some doubt remained, at this stage of the litigation, the Court must set aside such doubts and construe the allegations in the light most favorable to Plaintiffs. *See Smith*, 589 F.3d at 738. Indeed, by the time of the hearing, the General Assembly's failure to act in 2011 will be manifest and no longer the subject of reasonable dispute. On this record, the Complaint most assuredly states a plausible claim for relief under *Twombly* and certainly presents allegations (which are to be taken as true) that provide a sufficient basis for the Court's jurisdiction. Defendants' motion to dismiss the Complaint as speculative should be denied.

**C. Plaintiffs' Claim Is Ripe.**

For similar reasons, Defendants' contention that the dispute should be dismissed on ripeness grounds should be rejected. The General Assembly has less than two weeks to draw new congressional districts, and despite Defendants' suggestion to the contrary, it is hardly "uncertain" that the General Assembly will fail to draw them by 2012. Indeed, that failure will be plain by the time this motion is heard. Accordingly, Defendants' motion to dismiss the Complaint as unripe due to "future uncertainties" should be denied because (1) no future uncertainties prevent the Court from hearing this case, and delayed consideration will cause further hardship; (2) courts determine if a claim is ripe based on the facts at the time the Court decides the issue, not on the facts at the time the Complaint was filed; and (3) Defendants have not cited and cannot cite any case law or evidence to support their motion.

**1. No Future Uncertainties Prevent the Court from Hearing This Case, and Delayed Consideration Will Cause Further Hardship.**

In reviewing motions to dismiss on ripeness grounds, courts typically decide whether a claim is ripe by weighing two considerations: (a) whether a case is fit for decision, and (b)

whether delayed consideration would cause hardship. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). A controversy is fit for decision when it is "not dependent upon future uncertainties." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992). "The hardship prong is measured by the immediacy of the threat and the burden imposed on the [plaintiffs]." *Id*. at 208-09. Where a plaintiff challenges a statute governing elections, the claim is ripe when it is fairly certain the plaintiff will be subject to the challenged statute. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 301 n.12 (1979) ("[W]aiting until [plaintiffs] invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury . . . [but] little could be done to remedy the injury incurred . . . ."). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (internal quotation marks and citation omitted).

Virginia's current congressional districts are set by Va. Code Ann. § 24.2-301-1. In light of the 2010 Census, it is undisputed that the current malapportioned congressional districts violate the one-person, one-vote principle and therefore are unconstitutional. Indeed, some congressional districts have thousands or even hundreds of thousands more residents than others, and this malapportionment dilutes the weight or strength of residents' votes in violation of Article I and the Fourteenth Amendment of the U.S. Constitution. Compl. ¶¶ 19, 20, 37; *see*, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964). Plaintiffs, who are voters in overpopulated districts, already are injured by Virginia's unconstitutionally malapportioned districts. Certainly, their claim is ripe.

Moreover, there is no doubt that the General Assembly will fail to remedy these unconstitutional districts in the handful of days remaining before December 31, 2011. The General Assembly has two weeks to draw new districts, Va. Const. art. II, § 6, and the Speaker of the House of Delegates has indicated that the General Assembly intends to postpone congressional redistricting until 2012, Compl. ¶ 25. As such, Plaintiffs' claim that the Court must draw new congressional districts is not dependent upon any future uncertainties and is fit for adjudication.

Delaying consideration, moreover, will cause additional hardship to Plaintiffs and other Virginians because, among other reasons, it will prolong their inability to exercise their rights to participate in the election of their congressional representatives. Because Plaintiffs do not know which districts they will live in, they cannot learn about possible candidates, donate to campaigns, or volunteer for candidates (or even consider their own candidacy). Further delay will only exacerbate this injury and cause additional hardship.

The Fourth Circuit's decision in *Miller v. Brown* confirms that Plaintiffs' claim is ripe. 462 F.3d 312, 321 (4th Cir. 2006). In *Miller*, a Republican Senatorial District Committee challenged the Virginia primary election laws as infringing their First Amendment right to exclude Democrats from voting in Republican primaries. The Committee filed its challenge more than two years before the candidate registration deadline, and the District Court dismissed the suit as not ripe and for lack of standing. The Fourth Circuit reversed. It recognized that the window for registering as a candidate would not open for approximately one year and even then, the challenged law would apply only if more than one candidate registered. After admitting that these were uncertainties, the Court held that the Committee's claims were ripe nonetheless because waiting until the eve of the election deadlines or until they passed would disrupt the

election and cause the plaintiffs to continue to suffer an injury, namely preventing the Committee from "formulating a message and selecting the candidates best tailored to their party's interests." *Id*. at 317. The alleged uncertainty that the General Assembly might draw new districts in the next two weeks hardly compares to the myriad uncertainties facing the Republican Committee in *Miller*, and Plaintiffs' interest in participating in a campaign is at least as strong as the Committee's. Plaintiffs' claim, just like the Committee's claim in *Miller*, is ripe.

**2. Plaintiffs' Claim Will Certainly Be Ripe When the Court Considers the Motion to Dismiss.**

Courts base their ripeness decisions on the circumstances at the time they make their decisions, not on the circumstances at the time the plaintiffs filed their complaints. *See Anderson v. Green*, 513 U.S. 557, 559 (1995). Holding that a change in the facts after a district court's decision caused a previously unripe dispute to be ripe, the U.S. Supreme Court explained that "ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the District Court's decision that must govern." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 140 (1974). Cases can become ripe not only in the time between a district court's dismissal and appellate review, but also in the time between an initial filing and a court's consideration of ripeness. *See Olajide v. Bureau of Immigration & Customs Enforcement*, 402 F. Supp.2d 688, 691 (E.D. Va. 2005) (defendant's ripeness "argument mistakenly focuses on the date the petition was filed rather than the time the petition is adjudicated"). Here, the Court will decide Defendants' motion after December 31, 2011, and when it does, any "future uncertainties" about the General Assembly's failure to draw congressional districts in accordance with Article II, Section 6 of the Virginia Constitution will be past certainties. At that time, the record will demonstrate that the General Assembly in fact did not draw congressional districts "in the year 2011," violated the Virginia Constitution, and lost its authority to draw

congressional districts until 2021. Ripeness will not be an issue, and the Court will have jurisdiction to adjudicate the merits of Plaintiffs' claim.

**3. Defendants Have Not Cited and Cannot Cite Any Relevant Law or Evidence to Support Their Motion.**

Defendants offer remarkably little authority in support of their position. Defendants rely solely on an inapplicable and unpublished order from the United States District Court for the Western District of Virginia dismissing a "one person, one vote" claim challenging the Virginia Senate districts. Def. Mem. at 3; *see also* Def. Mem. Ex. A, Dkt. # 11-1 (*Carter v. Va. State Bd. Of Elections*, Case No. 3:11-cv-00030, Memorandum Opinion (April 29, 2011)). This is, however, a thin reed that cannot begin to bear the weight the State places upon it. The Court in *Carter* dismissed the suit as unripe approximately *eight months* before the Virginia Legislature's constitutional deadline for drawing new districts. *See id*. Moreover, by the time the opinion was issued, the General Assembly had already approved a Senate redistricting plan, which would then go to the Governor. *See id*.

The contrast with the record before the Court could hardly be more stark. The General Assembly has less than two weeks over the holiday season to draw congressional districts. No congressional plan has been sent to the Governor for his signature. By the time the Court considers Defendants' motion, it will be clear that no redistricting plan will have been passed "in the year 2011." Va. Const. art. II, § 6. In short, the unpublished order in *Carter* has little bearing on this dispute, and the Defendants' failure to proffer to this Court any other supporting authority for their position speaks volumes.

Defendants' only other support for their position is a declaration from Don Palmer, the Secretary of the Virginia State Board of Elections. Def. Mem. at 5; *see also* Palmer Decl. But the declaration hardly supports their position; indeed, it *undermines* it. Mr. Palmer concedes in

his declaration that Virginia's congressional districts are unconstitutional and must be redrawn before the 2012 elections. Palmer Decl. ¶ 3. That concession demonstrates the existence of the on-going constitutional violation. Whatever else might be said of the claims advanced in this litigation, they are plainly ripe. Defendants' arguments to the contrary should be rejected.

**D. Defendants Misconstrue the Plain Meaning of the Virginia Constitution.**

On the merits, Defendants urge the Court to dismiss Plaintiffs' complaint based on a nonsensical reading of the rather plain, clear, and unmistakable text of the Virginia Constitution. The meaning of Article II, Section 6 of the Virginia Constitution is clear on its face: the Virginia General Assembly must draw new congressional districts in 2011, in 2021, in 2031, and every ten years thereafter. Defendants, nonetheless, argue that the provision does not limit the General Assembly to redistricting in those years but apparently authorizes the General Assembly to enact redistricting plans at will, whenever convenient or whenever the political tides shift and empower a new majority to redraw the political boundaries of the state. But Defendants' argument is supported neither by the constitutional text nor its obvious purpose, much less by any applicable case authority.

**1. The Virginia Constitution Is Understood According to Its Plain Meaning**

It is beyond dispute that any effort to construe the meaning of a constitutional text must begin with its plain language. Here, Article II, Section 6, of the Virginia Constitution provides as follows:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. *The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.*

Va. Const. art. II, §. 6 (emphasis added). When interpreting this provision, the Supreme Court has already held that "Article II, § 6 speaks in mandatory terms." *Wilkins v. West*, 264 Va. 447, 462, 571 S.E.2d 100 (Va. 2002). There can be no debate that the plain meaning of Article II, Section 6 requires the General Assembly to draw new congressional districts "in the year 2011."

The Supreme Court of Virginia has repeatedly held that "[w]hen constitutional language is clear and unambiguous, a court must give the language its plain meaning." *Scott v. Commonwealth*, 247 Va. 379, 384, 443 S.E.2d 138 (1994); *see also Thomson v. Robb*, 229 Va. 233, 238-239, 328 S.E.2d 136 (1985) (constitutional provision using the word "shall" was unambiguous, had the meaning apparent on its face, and was mandatory). "[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense." *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382 (1932) (internal quotation marks and citation omitted). Where the Virginia Constitution uses "no doubtful or ambiguous words or terms," courts "are limited to the language of the [Constitution] itself and are not at liberty to search for meaning, intent or purpose beyond the instrument." *Harrison v. Day*, 200 Va. 439, 448, 106 S.E.2d 636 (1959); *see also id.* at 451 ("[W]ords in the Constitution are to be given their usual plain or ordinary meaning."). The Court, therefore, must construe Article II, Section 6 according to its plain meaning and, respectfully, must reject Defendants' call to ignore and contradict the plain, obvious and common sense meaning of the words used in the constitutional text.

Article II, Section 6 provides that "[t]he General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter." Va. Const. art. II, § 6. The text plainly commands and authorizes the General Assembly to reapportion ("shall reapportion") and in addition specifically defines the

time frame within which such reapportionment is to occur ("in the year 2011"). There is nothing ambiguous about the duty to reapportion, the General Assembly's power to do so, and the time within which the General Assembly shall act.

For starters, the plain meaning of "shall" is to have the obligation to do something or to be required to do something. This meaning is particularly clear when "shall" is used in a law or regulation. Merriam-Webster's Collegiate dictionary defines "shall" as it is "used in laws, regulations, or directives to express what is mandatory." Merriam-Webster's Collegiate Dictionary at 1143 (11th ed. 2005). Understood according to this plain meaning, "shall" in this provision is consistent with the use of "shall" elsewhere in the Virginia Constitution, where it has been held to constitute a "limitation upon the authority of the General Assembly with respect to the manner" in which it can act. *Thomson*, 229 Va. at 239 (the requirement in Article IX, Section 1 that the "General Assembly shall elect a successor for such unexpired term" of a member of the State Corporation Commission "constitutes an unambiguous limitation upon the authority of the General Assembly with respect to the manner in which SCC commissioners are selected"); *Wilkins*, 264 Va. at 462 ("Article II, § 6 speaks in mandatory terms, stating that electoral districts 'shall be' compact and contiguous"). The plain meaning of Article II, Section 6, therefore, commands the General Assembly to draw new districts in 2011 and 2021.

The constitutional text, moreover, goes out of its way to limit the exercise of that power to a single calendar year: "[t]he General Assembly shall reapportion . . . *in the year 2011* and every ten years thereafter." (Emphasis added). It borders on the absurd to argue that a constitutional command that a thing be done "in the year 2011" means that it could be done "in the year 2012" or whenever convenient or politically attractive. No amount of rhetorical sleight

of hand could justify such a startling construction of the plain and unambiguous constitutional language.

Indeed, such a reading would undermine the obvious purpose of the text. The Virginia Constitution requires redistricting once every ten years, period. Unlike other states where the legislature might be authorized to engage in mid-cycle redistricting, *see League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (reviewing Texas's mid-decade redistricting plan), Virginia's framers carefully cabined the General Assembly's power to a single calendar year ("in the year 2011") precisely to *avoid* politically convenient redistricting whenever one political party or the other might gain the upper hand and find it attractive to redraw political boundaries to consolidate power. The evils of such an approach are patent, regardless of one's political persuasion. And whether it was a good policy, a bad policy, or one of debatable merit, Virginia's constitutional framers thought such a limitation appropriate and fixed it in the constitutional text. Neither the General Assembly, Defendants collectively, nor the Court is in a position to contradict that plain, common sense text and purpose.

Indeed, to do so, as Defendants propose, would render the constitutional text meaningless. Had the Framers intended such a result, they would have drafted the relevant constitutional text to read:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. *The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section ~~in the year 2011 and every ten years thereafter~~ from time to time as it deems necessary.*

Emphasis added.

The Virginia Supreme Court prohibits such an interpretation. "The constitution must be viewed and construed as a whole, and every section, phrase and word given effect and harmonized if possible." *Cnty. Sch. Bd. of Prince Edward Cnty. v. Griffin*, 204 Va. 650, 659, 133 S.E.2d 565 (1963) (internal quotation marks and citation omitted). "Purpose, meaning and force must be accorded . . . to all of [the Constitution's] provisions." *Dean v. Paolicelli*, 194 Va. 219, 226, 72 S.E.2d 506 (1952). If, as Defendants suggest, the General Assembly has the authority to draw new districts in 2012, 2013, 2014, or any other year, the statement in Article II, Section 6 that "[t]he General Assembly shall reapportion the Commonwealth into electoral districts . . . in the year 2011 and every ten years thereafter" would simply suggest that it *might* draw new districts in 2011 just as it *might* do so in any other year. Under this construction, the provision would have no "meaning" or "force" whatsoever. Defendants' suggested interpretation, respectfully, must be rejected.

Defendants' proffered interpretation, applied to other provisions of the Virginia Constitution, demonstrates the folly of the approach. Article IV, Section 2, for example, requires that members of the Virginia Senate "shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November." Like Article II, Section 6, this provision imposes time limits on the Virginia Senate, requiring that its members be reelected every four years. Under the Defendants' proposed interpretation, however, Article IV, Section 2 would have no prohibition on the Virginia Senate choosing to conduct elections every 3 years, 5 years, 10 years, or every year for that matter. Similarly, Article IV, Section 3 requires that members of the Virginia House of Delegates "shall be elected biennially by the voters of the several house districts on the Tuesday succeeding the first Monday in November." According to Defendants' constitutional construction, this constitutional command is merely a

guideline and elections for the House of Delegates could be held at any other interval thought appropriate.

None of this is plausible, consistent with the long-settled rules governing constitutional construction, or appropriate to the construction of a *constitutional* text. In plain and clear terms, the Virginia Constitution commands that the General Assembly "shall" reapportion "in the year 2011." Once the General Assembly fails to do so, its power lapses, and the task falls to the courts. No other reading of the constitutional text is plausible, consistent with the plain common sense meaning of the words used, or consistent with the Framers' obvious policy choices.

**2. Defendants Ignore the Virginia Constitution's Plain Meaning and Argue for a Novel Construction.**

In support of their position, Defendants cite a variety of cases involving statutory not constitutional construction. Def. Mem. at 2. But the short answer to all of this is that "general rules for the construction of constitutional and statutory provisions of doubtful meaning have no application" to unambiguous provisions of the Virginia Constitution. *Gill v. Nickels*, 197 Va. 123, 129, 87 S.E.2d 806 (1955). As the Virginia Supreme Court has made abundantly clear, such interpretive "rules" do not apply to interpretation of the Constitution because it is not for the courts or the legislature to change the Constitution's plain meaning. "If the words [of the Constitution] convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Town of South Hill v. Allen*, 177 Va. 154, 164-65, 12 S.E.2d 770 (1941); *see also id.* at 164 ("[G]eneral rules for the construction of either constitutional or statutory provisions of doubtful meaning have no application."). "There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of

small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a State." *Id*. at 165 (internal quotation marks and citation omitted). In sum, "[t]he simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." *Id*. No further discussion, analysis or debate is warranted or appropriate.

The cases cited by Defendants all involve rules of statutory construction, not rules of constitutional construction, and thus are inapplicable here. In *Tran v. Board of Zoning Appeals of Fairfax County*, the court examined the use of "shall" in a statute and held that an agency decision made after a statutory deadline was valid despite its tardiness. 260 Va. 654, 657, 536 S.E.2d 913 (2000). Interpreting the governing statute, the court held that "[c]ourts, in endeavoring to arrive at the meaning of language in a will, contract, or a statute, often are compelled to construe 'shall' as permissive in accordance with the subject matter and content." *Id*. at 657 (internal quotation marks and citation omitted). *Butler v. Commonwealth*, cited by Defendants, also interprets a statute, not the Virginia Constitution. 264 Va. 614, 570 S.E.2d 813 (2002). The Court affirmed the district court's denial of a trial continuance when the jury panel list was not made available 48 hours before trial as required by statute. The Court explained that when it considers "a statute that used the term 'shall'" to direct a public officer, the statute is "deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings." *Id.* at 619 (internal quotation marks and citation omitted). As these opinions explicitly state, the canon of construction invoked by these cases and Defendants applies only to statutes, not to the Virginia Constitution, and thus has little relevance to this case.

### 3. If the Court Finds the Constitution's Plain Meaning Ambiguous or Uncertain, It Should Defer to the Virginia State Courts in the First Instance.

Finally, in the event the Court finds the meaning of Article II uncertain, then Plaintiffs respectfully submit that as a matter of comity on state law issues, the Court should defer to the Circuit Court for the City of Richmond, where the identical issue is pending.

Defendants ask the Court to disregard the plain meaning of Article II, Section 6 and establish a new canon of constitutional construction and a novel construction of the Virginia Constitution. Defendants have raised this identical issue before the Virginia Circuit Court of the City of Richmond in *Little v. Virginia State Bd. of Elections*. *See Little v. Virginia State Bd. of Elections*, Case No. 11-5253, Defendants' Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and Plea of Sovereign Immunity (Dec. 15, 2011). If the Court finds the meaning of Article II ambiguous, uncertain or in need of construction or interpretation, as Defendants suggest, Plaintiffs respectfully submit that the Court should defer to the pending state court action considering the same issue as a matter of federal-state comity. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) (recognizing state courts' interest in adjudicating questions of state law); *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463-64 (4th Cir. 2005) ("whether state law or federal law provides the rule of decision on the merits" is one factor for a federal court to consider when deciding whether to rule on pending matter also before a state court).

## E. Sovereign Immunity Does Not Bar Plaintiffs' Claim.

Defendants argue that sovereign immunity bars this action and would justify its dismissal. This is plainly incorrect. Defendants do not even attempt to challenge Plaintiffs' claims against Don Palmer, Kimberly Bowers, or Charles Judd (all members of the Virginia State Board of Elections) as barred by sovereign immunity. As a result, and regardless of the

merits of their arguments as to the other defendants, Defendants' sovereign immunity argument is not and cannot provide a foundation for a ruling dismissing Plaintiffs' claim against these defendants.[2]

Moreover, Defendants' Eleventh Amendment challenge to Plaintiffs' claim against the Attorney General must also fail. The Attorney General is the chief law enforcement officer in the State, including all election laws, has a special relation to the administration of elections in Virginia, and is hardly immune from suit. When "making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional[,] it is plain that such officer must have some connection with the enforcement of the act." *Lytle v. Griffith*, 240 F.3d 404, 409 (4th Cir. 2001) (quoting *Ex parte Young*, 209 U.S. 123, 157 (1908)). "This 'special relation' requirement ensures that the appropriate party is before the federal court, so as not to interfere with the lawful discretion of state officials." *S. C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332-33 (4th Cir. 2008). Courts look to state law to "determine whether the requisite connection exists." *Id*. at 333.

Here, state law shows that the Attorney General is integral to the administration of elections in Virginia. When called upon by the Board of Elections, the Attorney General has "full authority to do whatever is necessary or appropriate to enforce the election laws or prosecute violations thereof" and can "appoint a committee to make an immediate investigation of the election practices in [a] city or county." Va. Code Ann. § 24.2-104. The Attorney

[2] Parties like those named as defendants here are regularly named as defendants in voting rights and redistricting cases. *See, e.g., Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (naming Virginia Board of Elections as defendant); *Duckworth v. State Admin. Bd. Of Election Laws*, 332 F.3d 769 (4th Cir. 2003) (naming state board of elections as defendant); *Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606 (4th Cir. 1970) (naming Governor as defendant).

General also has a duty, being exercised in this case, to defend the Virginia Board of Elections and other election officials from suit, Va. Code Ann. § 24.2-121, and he is responsible for assisting the Board of Elections with voter registration, Va. Code Ann. § 24.2-411.2. The Attorney General's importance to redistricting disputes is particularly acute given the statutory requirement that he be notified of any challenge to the election district boundaries of a county, city, or town. Va. Code Ann. §24.2-304.5. The Attorney General, accordingly, has a special relation to the administration of elections and enforcement of Virginia's election laws. As such, he has a special relation to Plaintiffs' claims and is not immune from suit. Defendants' motion to dismiss the Attorney General under the Eleventh Amendment should be denied.

**F. Defendants' Promise Not to Enforce Existing Districts Does Not Deprive the Court of Subject-Matter Jurisdiction.**

Finally, Defendants raise the surprising argument that because Virginia promises not to enforce its unconstitutional congressional districts, Plaintiffs have no claim. But "[v]oluntary cessation of allegedly illegal conduct does not deprive [a] tribunal of the power to hear and determine [a] case." *Commonwealth of Va. ex rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). "Voluntary cessation of established illegal conduct makes a case moot only if it can be said with assurance that there is no reasonable expectation that the wrong will be repeated because otherwise the defendant is free to return to his old ways." *Id.* at 326. Defendants' argument, therefore, must fail unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Richmond Med. Ctr. for Women v. Gilmore*, 55 F. Supp. 2d 441, 472 (E.D. Va. 1999) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 204 (1968)), *aff'd*, 224 F.3d 337 (4th Cir. 2000). The test for whether Defendants' promise moots Plaintiffs' claim is "a stringent one." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283,

289, n. 10 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)). But here the Defendants barely even attempt to make such a showing and assuredly fall far short of the mark.

Defendants offer a single declaration from one member of the three-member Board of Elections to show that Virginia will not conduct elections using the existing unconstitutional congressional districts. Palmer Decl. ¶ 3. This meager offering is hardly proof (much less evidence that would suffice to meet a "stringent" test) that Plaintiffs' claims are moot. *See Richmond Med. Ctr. for Women*, 55 F. Supp. 2d at 472-73 (sworn affidavits representing the present intentions of attorneys for the Commonwealth of Virginia not to prosecute individuals under a state statute for certain abortion procedures were merely "non-binding unilateral pronouncements" concerning the scope of the statute and not a binding settlement or judicially enforceable agreement).

Indeed, the declaration proves precisely the opposite. Defendants' insistence that the General Assembly can draw new congressional districts despite and in violation of the plain meaning of Article II, Section 6 is itself evidence that Defendants will attempt to enact and enforce an unconstitutional redistricting plan. Whether the state proceeds with the existing malapportioned districts (which are the only districts in existence) or with newly-drawn plans improperly created after "the year 2011" in violation of Article II, Section 6 of the Virginia Constitution (as threatened by Defendants), Plaintiffs' claims are neither speculative nor moot and most assuredly should not be dismissed.

## III. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion to Convene a Three-Judge Court.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of December, 2011, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system and will serve the foregoing via email and overnight commercial delivery service to the following:

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