IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN M. SHAPIRO, *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Action JKB-13-3233
DAVID J. McMANUS, *et al.*,	*	
Defendants.	*	

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

INTRODUCTION

This Court has repeatedly upheld the constitutionality of Maryland's 2011 congressional redistricting plan against claims that it was an impermissible partisan gerrymander, *see, e.g.*, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012); *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md.), *aff'd*, 584 F. App'x 140 (4th Cir. 2014), *cert. granted sub nom. Shapiro v. Mack*, 135 S. Ct. 2805 (2015), and *rev'd and remanded sub nom. Shapiro v. McManus*, 136 S. Ct. 450 (2015) (dismissing amended complaint), including allegations that the new 6th Congressional District was designed with the purpose and effect of giving Democratic candidates a partisan advantage. *Fletcher*, 831 F. Supp. 2d at 904. Here, again, the plaintiffs are making the same basic claims,

essentially repeating the same set of facts that failed to sustain the earlier gerrymandering claims. The plaintiffs' First Amendment-based claims suffer the same shortcomings, and similar claims have been considered and rejected by other courts including the Supreme Court. Plaintiffs do not, and cannot, plausibly allege that Maryland's congressional districting plan imposes any burden or restriction on their rights of free expression, or to associate politically, or to petition the government. For all of these reasons, this Court should dismiss the plaintiffs' second amended complaint with prejudice.

STATEMENT OF FACTS

The State Plan for Congressional Redistricting

Maryland's State Plan for Congressional Redistricting (the "State Plan" or "Plan") was adopted in a special session of the General Assembly held October 17 through October 20, 2011. *Fletcher*, 831 F. Supp. 2d at 891. It was passed as an emergency bill and thus went into effect upon the Governor's signature on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. *Id.* Voters approved the congressional districting plan by an affirmative vote of 64%-to-36% in a statewide referendum held at the 2012 general elections.[1]

[1] The official referendum election results for the ballot question regarding the districting plan (Question 5) are available at http://elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html.

The State Plan creates eight congressional districts that are as equal in population as is mathematically possible, with seven of the eight districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. *Id*. at 894. Like the districting plan passed after the 2000 census, the State Plan creates two majority African-American congressional districts. *Id*. at 891. The districts are drawn to protect the cores of existing districts, and some of the districts have not changed substantially since the last redistricting, indicating "that incumbent protection and a desire to maintain constituent relationships might be the main reasons they take their present forms." *Id*. at 903.

Prior Litigation Regarding the State Plan

On December 23, 2011, a three-judge court upheld the constitutionality of the State Plan against challenges alleging (a) population inequality in violation of Article I, § 2 of the United States Constitution, (b) violation of § 2 of the Voting Rights Act, and (c) racial and political gerrymandering in violation of the Fourteenth Amendment to the Constitution. *Fletcher*, 831 F. Supp. 2d 887. The plaintiffs in that litigation, similar to the plaintiffs in this litigation, argued "that the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District, which covers Western Maryland and portions of the Washington, D.C. suburbs." *Fletcher*, 831 F. Supp. 2d at 903. This Court rejected the plaintiffs' gerrymandering claim because they "offer[ed] no reliable standard by which to

adjudicate" the claim, arguing instead "for a sort of hybrid equal protection/political gerrymandering cause of action, which would be judged under the standards applicable to discrimination challenges." *Id.* at 904. Finding this standard similar to one previously rejected by the Supreme Court, the *Fletcher* court rejected plaintiffs' claim. *Id*. (quoting Justice Kennedy's observation that, although "[r]ace is an impermissible classification . . . [p]olitics is quite a different matter" (citation omitted)).

The decision of the three-judge court was summarily affirmed by the Supreme Court on June 25, 2012. *Fletcher*, 133 S. Ct. 29. In January 2012, approximately one month after the three-judge district court's decision in *Fletcher*, Judge Quarles dismissed a separate challenge to the congressional redistricting plan that alleged, among other things, that the State Plan did not preserve agricultural "communities of interest" and thus diluted farm votes. *Gorrell*, 2012 WL 226919, at *3-4. In that opinion, this Court observed that while certain considerations—contiguity, compactness, preserving communities of interest, and respect for political subdivisions—may be legitimate considerations in congressional redistricting, they are not constitutionally required. *Id.* Therefore, the Court determined, Gorrell's allegation that the plan did not preserve "communities of interest" stated no constitutional violation. *Id*. at *4.

A third set of plaintiffs claimed that Maryland's plan of congressional redistricting failed to comply with the requirements of compactness, contiguity, and "due regard" for natural and political boundaries found in Article III, § 4 of the Maryland Constitution.

Olson, 2012 WL 764421, at *3-4. This Court rejected that challenge, finding the state constitutional standards inapplicable to congressional redistricting. *Id.*

The Current Lawsuit

In 2014, Judge Bredar dismissed a political gerrymandering challenge to four of the plan's eight congressional districts. *Benisek*, 11 F. Supp. 3d 516. In those proceedings involving plaintiffs' first amended complaint, plaintiffs objected to the combination of geographically and demographically distinct "segments" by means of "narrow orifices or ribbons" to form districts that were alleged to be "de-facto non-contiguous." *Id.* at 519. Judge Bredar's opinion explains that, while political gerrymandering claims are theoretically justiciable, absent a "reliable standard" for measuring the burden on complainants' representational rights, such claims must be dismissed for presenting only a "nonjusticiable political question." *Id.* at 525-26. The geographic or demographic contiguity standard proposed by the plaintiffs was, the court stated, "markedly similar to tests that have already been rejected by the courts," *id*. at 525, and was therefore insufficient to establish a justiciable claim.

Judge Bredar also dismissed the plaintiffs' First Amendment claims, which were based on allegations that the structure and composition of the four districts infringed their First Amendment rights of political association. *Id.* at 526. Judge Bredar, relying on *Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp. 394, 401 (D. Md. 1991) and *Duckworth v. State Board of Elections*,

213 F. Supp. 2d 543, 557-58 (D. Md. 2002), ruled that "nothing [about the congressional districts at issue in this case] . . . affects in any proscribed way . . . [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." *Id.* (alterations and ellipses in original).

After the Fourth Circuit summarily affirmed Judge Bredar's order of dismissal, 584 F. App'x 140, the plaintiffs sought a writ of certiorari on the issue of whether a single judge could dismiss an apportionment challenge for failure to statue a claim, under 28 U.S.C. § 2284. The Supreme Court granted the petition for certiorari, *Shapiro v. Mack*, 135 S. Ct. 2805, and reversed the judgment of the Fourth Circuit, concluding that the three-judge-court statute did not permit a single judge to dismiss a case for failure to state a claim. *Shapiro v. McManus*, 136 S. Ct. 450. The Supreme Court remanded the case for further proceedings.

The Second Amended Complaint

A. The Parties

Plaintiffs are nine residents of the 6th and 8th Congressional Districts. *See* Compl., ¶¶ 13-22. Plaintiff Stephen Shapiro, a resident of the 8th Congressional District under both the former and current districting plans, is alleged to have been a registered Democrat who "occasionally voted for Republican candidates prior to 2011" and "has since continued

occasionally to support Republican candidates and policies . . .." *Id*., ¶ 14. The other eight plaintiffs were registered Republicans prior to 2011, all of whom resided in the 6th Congressional District before enactment of the current districting plan. *Id*., ¶¶ 15-22. Of those, four remain in the 6th District (*id*., ¶¶ 15, 16, 18, and 20) and four, "[a]s a result of the Plan," now reside in the 8th District. *Id*., ¶¶ 17, 19, 21, and 22. The eight Republican plaintiffs voted for Republican candidates prior to 2011 and have "since continued to support Republican candidates and policies and will continue voting for Republican candidates for elective office." *Id*., ¶¶ 15-22. Four are current or former members of their respective counties' Republican Party Central Committees (*id.*, ¶¶ 15, 18, 20, and 21). Plaintiff Maria A. Pycha served as finance director for Dan Bongino, the Republican Party nominee in 2014 for the 6th District, *id*., ¶ 15, while Sharon Strine was the candidate's campaign manager. *Id*., ¶ 22.

The defendants are David J. McManus, Jr., the chairman of the Maryland State Board of Elections, and Linda H. Lamone, the Maryland State Administrator of Elections, both of whom have been sued in their official capacities. *Id.*, ¶¶ 23-24

B. The Allegations

The Second Amended Complaint (hereinafter "the complaint") alleges that the 2011 congressional redistricting plan was enacted in order to punish residents of the former and current 6th District for their history of supporting Republican candidates for the U.S. House of Representatives. *Id.*, ¶¶ 1, 3, 132-33. More specifically, plaintiffs assert that the

Maryland legislature "gerrymandered the boundaries of the 6th District . . . to nullify the ability of Republican voters in the former 6th District to elect a Republican of their choice to Congress . . .." *Id*., ¶ 4. This was achieved, they contend, by dividing a Republican bloc of voters among the 1st, 6th, 7th, and 8th Districts, "giving the Democrats a majority in the new 6th District and allowing them to flip the seat to Democratic control." *Id*., ¶ 6.

The complaint asserts that the Plan was the product of an "exclusive process," without meaningful input from Republicans and receiving no Republican support. *Id*., ¶¶ 39, 43-52. It further alleges that the district map does not adhere to traditional districting principles (*id*., ¶¶ 59-60, 120, 123-28, 142), features oddly-shaped districts (*id*., ¶¶ 56, 58-59, 94), and denies Republican voters the ability to elect Republican representatives to Congress in proportion to the party's statewide voting strength (*id*., ¶¶ 105-06). Plaintiffs argue that by enacting the Plan, the legislature violated the First Amendment and Article I, §§ 2 and 4. Compl., ¶¶ 130-34, 136-42. For their relief, plaintiffs ask the Court to declare the Plan unconstitutional and enjoin defendants from using the Plan in the nomination or election of any Member of the U.S. House of Representatives for Maryland's 6th, 7th, or 8th congressional districts. *Id*., p. 39 (Prayer for Relief).

ARGUMENT

I. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This "plausibility" standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. That is, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and "are not entitled to the assumption of truth." *Id.* at 678-79. When resolving a motion to dismiss pursuant to Rule 12(b)(6), a district court may "take judicial notice of matters of public record." *Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (internal quotation omitted)).

II. PLAINTIFFS' CLAIMS UNDER ARTICLE I, § 2 AND THE FIRST AMENDMENT SHOULD BE DISMISSED BECAUSE THE COMPLAINT FAILS TO SET FORTH A JUDICIALLY DISCERNIBLE, MANAGEABLE STANDARD FOR EVALUATING THE PLAINTIFFS' CLAIMS OF AN UNCONSTITUTIONAL GERRYMANDER.

A. Under Controlling Supreme Court Precedent, Plaintiffs Challenging an Alleged Unconstitutional Gerrymander Must Set Forth a Judicially Discernible, Manageable Standard for Adjudicating Their Claims.

Although in theory a plaintiff may state a claim under Article I, § 2 of the Constitution for an unconstitutional political gerrymander, such a claim must be grounded on a reliable and non-arbitrary standard sufficient to make the political gerrymander claim

a justiciable issue. *League of United Latin Am. Citizens* ("*LULAC*") *v. Perry*, 548 U.S. 399, 418 (2006). The Supreme Court has recognized the same necessity as to political gerrymandering claims pursued under a First Amendment theory. *Id.* Here, because the plaintiffs have failed to plead a manageable standard for adjudicating an unlawful partisan gerrymander, their claims should be dismissed as non-justiciable.

The Supreme Court has acknowledged "that partisan districting is a lawful and common practice" that dates back centuries. *Vieth v. Jubilerer*, 541 U.S. 267, 274-75, 285-86 (2004) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *see id.* at 307 (Kennedy, J., concurring) (acknowledging that politics is a permissible classification in the redistricting context); *see also Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . ."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . . ."); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences"). Accordingly, because claims of unconstitutional partisan gerrymandering require consideration of whether a state's districting plan was "so substantially affected by the excess of an ordinary and lawful motive as to invalidate it," *Vieth*, 541 U.S. at 286 (plurality op.), "great caution is necessary when approaching this subject" so as to avoid "unprecedented intervention in the American political process." *Id.* at 306 (Kennedy, J., concurring).

Thus, although unlawful political gerrymandering claims may be justiciable in concept, there have yet to be identified any "judicially discernible and manageable standards for adjudicating political gerrymandering claims. . . ." *Vieth*, 541 U.S. 267, 281 (2004) (plurality op.); *see id.* at 307-08 (Kennedy, J., concurring) ("Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."). The Supreme Court reaffirmed that conclusion in *LULAC*, rejecting a partisan gerrymandering claim arising from Texas's mid-decennial redistricting. The Court assumed the redistricting was motivated by "the sole purpose of achieving a Republican congressional majority," 548 U.S. at 417 (opinion of the Court by Kennedy, J.), but dismissed the claim because no "reliable standard for identifying unconstitutional political gerrymanders" exists. *Id.* at 423; *see also id.* at 447 (finding no "reliable measure of impermissible partisan effect"); *id*. at 511 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "no party or judge has put forth a judicially discernible standard by which to evaluate" political gerrymandering claims).

Notably, First Amendment partisan gerrymandering claims were asserted in both *Vieth* and *LULAC*, and in both cases the Court rejected the plaintiffs' claims for lack of a constitutionally-discernible and judicially manageable standard. *See, e.g.*, *Vieth*, 541 U.S. at 294 (rejecting First Amendment claim for partisan gerrymandering because, if sustained,

such a theory would "render unlawful *all* consideration of political affiliation in districting.") (plurality) (emphasis in original); *LULAC*, 548 U.S. at 416-17 (referencing both types of partisan gerrymandering claims). In *LULAC*, Justice Kennedy's conclusion that the partisan gerrymandering claims failed for lack of a workable standard applied equally to both the equal protection and First Amendment partisan gerrymandering claims the Court was considering. In that context, Justice Kennedy reiterated that a successful claim of partisan gerrymandering "must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id*. at 418.

In developing a manageable standard, "[t]he challenge is not just administrability; it is constitutional line-drawing. The law requires an objective, measurable standard that admits of rational judicial resolution *and* is a direct and non-arbitrary implication of accepted constitutional norms." *Radogno v. Illinois State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at *4-5 (N.D. Ill. Nov. 22, 2011), *aff'd sub nom. Radogno V. Illinois State Bd. of Elections*, 133 S. Ct. 103 (2012) (dismissing amended partisan gerrymandering claims under Rule 12(b)(6) on the ground that "Plaintiffs have not identified a workable standard for partisan gerrymanders"); *see also Vieth*, 541 U.S. at 295 (rejecting standards that "are not discernible in the Constitution" and have "no relation to Constitutional harms"). The three-judge court in *Radogno* identified as many as seven proposed standards that the Supreme Court has deemed unacceptable, *id.* at *2-3:

1. whether evidence shows "intent to discriminate, plus denial of a political group's chance to influence the political process" (standard "rejected by a majority in *Vieth*, 541 U.S. at 281 (plurality opinion)")[2];

2. whether "boundaries were drawn for partisan ends to the exclusion of fair, neutral factors" (standard "rejected by a majority in *Vieth*, 541 U.S. at 290-91 (plurality opinion)");

3. whether "mapmakers acted with the 'predominant intent' to achieve partisan advantage and subordinated neutral criteria," *e.g.*, "where the map 'packs' and 'cracks' the rival party's voters and thwarts the ability to translate a majority of votes into a majority of seats" (standard "rejected by a majority in *Vieth*, [541 U.S. at 284-90]");

4. whether "at a district-to-district level, a district's lines are so irrational as to be understood only as an effort to discriminate against a political minority" (standard "rejected by a majority in *Vieth*, *id*. at 292-95 (plurality opinion)"):

5. "a five-part test requiring a plaintiff to show (1) that he is a member of a cohesive political group; (2) that the district of his residence paid little or no heed to traditional districting principles; (3) that there were specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the 'packing' or 'cracking' or the plaintiff's group, and deviates less from traditional districting principles; and (5) that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group" (standard "rejected by a majority in *Vieth*, *id*. at 295-98 (plurality opinion)");

6. whether "a statewide plan results in unjustified entrenchment, such that a party's hold on power is purely the result of partisan manipulation and not other factors" (standard "rejected by a majority in *Vieth*, *id*. at 298-301 (plurality opinion)"); and

[2] The court in *Radogno* observed that "[a]lthough Justice Kennedy did not join the *Vieth* plurality," because "he did concur in the conclusion that no reliable standard had been identified and that the claim should be dismissed," it is "appropriate to conclude that a majority of the Justices found all the standards discussed in the *Vieth* plurality insufficient." 2011 WL 5868225, at *2 n.2.

7. whether "the sole intent of a redistricting plan is to pursue partisan advantage" (standard "effectively rejected by a majority in *LULAC*, 548 U.S. at 416-20 (Kennedy, J., announcing the judgment of the Court)").[3]

It is against this backdrop that the plaintiffs' claims of an unconstitutional gerrymander must be assessed. As described below, the plaintiffs fail to set forth a discernible, manageable standard that would permit this Court to adjudicate their claims. Thus, the plaintiffs' claims of an unconstitutional gerrymander, under Article I, § 2 and the First Amendment, are non-justiciable and must be dismissed.

B. Plaintiffs' Have Failed to Allege a Manageable Standard for Adjudicating Their Partisan Gerrymander Claims.

Although the plaintiffs allege that the State Plan constitutes excessive partisanship, they have failed to set forth a "judicially discernible and manageable standard" for this Court to adjudicate their claim of an unconstitutional gerrymander. Rather, a fair reading of the complaint suggests that plaintiffs propose, as an appropriate constitutional standard, "zero tolerance" for partisan consideration in redistricting by a state legislature. *See* Compl., ¶¶ 7, 31-38. Under this theory, a plaintiff need prove only (a) that districts were drawn with partisan considerations in mind and (b) that the resulting map actually has worked to the disadvantage of the minority party by the loss of a formerly safe seat to the

[3] The court observed that "[a]lthough Justice Kennedy wrote only for himself in the section of the opinion discussing and rejecting the appellants' 'sole motivation' theory, four other Justices effectively concurred in that conclusion. *LULAC*, 548 at 492-93 (Roberts, C.J., concurring in part, concurring in the judgment in part, dissenting in part); *id*. at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part)." *Radogno*, at *7 n.3.

majority party responsible for the map. *Id*., ¶ 7(a), (b). If a plaintiff can make this showing, the State may justify the district plan only "by reference to geography or compliance with legitimate [*i.e*. non-partisan] redistricting criteria." *Id*., ¶ 7(c). If this really is what plaintiffs mean to offer as a standard, for the reasons discussed above, controlling Supreme Court precedent plainly demands the speedy dismissal of the complaint.

An alternative standard that might be inferred from the complaint is a "totality of circumstances" and burden-shifting approach analogous to that employed in racial gerrymandering cases. The complaint includes allegations regarding the shape of the districts (Compl. ¶¶ 56, 58, 59);[4] alleged departures from certain traditional districting principles (*id.*, ¶¶ 59, 60, 123-28); comments from GRAC members and legislators regarding the intended political effect of the Plan (*id.*, ¶¶ 43-52, 95-101); and an alleged lack of proportional representation afforded the Republican Party in light of its statewide voting strength (*id.*, ¶¶ 63, 108). But even assuming plaintiffs were offering this kind of multi-factor, "totality of circumstances" test, the Supreme Court has already concluded that such a standard does not provide a workable approach to deciding allegations of political gerrymandering. *See Vieth*, 541 U.S. at 286-87 (rejecting "totality of circumstances" test

[4] The State's 2002 districting plan was also challenged, in part, on the grounds that certain districts were "just barely contiguous" and violated the Constitution "by virtue of this lack of contiguity." *Duckworth v. SABEL*, 332 F.3d 769, 777 (4th Cir. 2003), *abrogated on other grounds by Shapiro*, 136 S. Ct. 450. That complaint was dismissed under Rule 12(b)(6) for failure to allege facts sufficient to prove actual discriminatory effect. *Id*.

based on the Court's cases applying § 2 of the Voting Rights Act); *id.* at 295-98 (rejecting multi-factor test "ill suited to the development of judicial standards"); *see also Radogno*, 2011 WL 5868225, at *4 (rejecting plaintiffs' standard because it was "the kind of multi-factor 'totality of the circumstances' or 'fairness' test that the Supreme Court has firmly rejected"). Indeed, numerous districting plans have been upheld "despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results." *Vieth*, 541 U.S. at 280-81 (citing cases).

Article I, § 2 itself does *not* require adherence to the redistricting principles that the plaintiffs espouse. In *Shaw v. Reno*, for example, the Supreme Court stated that, although there is much discussion of compactness and contiguity in the context of redistricting cases, that did not mean that such qualities "are constitutionally required—they are not." 509 U.S. 630, 647 (1993); *see also Wood v. Broom*, 287 U.S. 1, 6-8 (1932) (rejecting challenge based on lack of compactness and contiguity in light of repeal of federal statute imposing those requirements with respect to congressional districts); *Duckworth*, 332 F.3d at 778 (quoting *Shaw*, 509 U.S. at 647). Although *Shaw* was a split opinion, all nine justices agreed that "compactness and contiguity . . . are not constitutionally required." *Id*. at 687 (Souter, J., dissenting). Nor is there any "provision of the Constitution or federal law [that] requires states to preserve particular communities when redistricting" based on geography or common interests. *Fletcher v. Lamone*, 831 F. Supp. 2d at 909 & n. 8 (Alexander, J., concurring). Further, the Supreme Court has rejected as unmanageable a "totality of

circumstances" standard based on the alleged dilution of a *majority* party's voting strength. *Vieth*, 541 U.S. at 286-90 (plurality op.).

Plaintiffs' inability to provide an adequate standard by which to adjudicate their partisan gerrymandering claim requires dismissal at the pleading stage. In *Vieth*, for example, the plaintiffs had alleged that the districting plan was created "solely to effectuate the interests of Republicans" and "relied exclusively on a principle of maximum partisan advantage . . . to the exclusion of all other criteria." 541 US. at 340. And yet a majority of the Court found such allegations insufficient to state a claim due to the absence of a workable standard. *Id*. at 306-7 (Kennedy, J. concurring) (explaining that a standard is necessary to state a justiciable claim). In other words, a plaintiff must plead a justiciable standard because it is a constituent element of the claim. *See, e.g., Committee for a Fair and Balanced Map v. Illinois Bd. of Elections*, No. 1:11-cv-5065, 2011 WL 5185567, *9 (N.D. Ill. Nov 1, 2011) (explaining that in both *Veith* and *LULAC*, the Court regarded a workable standard as an essential part of the claim).

The three-judge court considering a challenge to the Texas redistricting plan also determined that political gerrymandering claims that did not provide a viable standard are subject to dismissal. *Perez v. Perry*, 26 F. Supp. 3d 612, 624 (W.D. Tex. 2014) (dismissing claims under Rule 12(c) for failure to state a claim). In so doing, the court expressly rejected an argument that the challengers in that case should be permitted to go to trial "and develop the facts from which a standard will emerge." *Id*. The *Perez* court explained that,

> [D]evelopment of a clear, manageable, and politically neutral standard for measuring the burden on representational rights should not depend on development of the factual record. Rather, the development of facts should alter only the application of the established standard and the ultimate conclusion from such application.

Id. at 624. The court also concluded that dismissal was appropriate in light of the Supreme Court's action in dismissing similar claims in *Veith* based on insufficiency of the complaint. *Id*.

For the same reasons, plaintiffs in this case are not entitled to unfold or develop a standard over time or through discovery. Rather, plaintiffs were required to provide a justiciable standard in their complaint or have the complaint dismissed. They have not met that requirement. Accordingly, the defendants are entitled to dismissal of the complaint.

C. Plaintiffs Have Not Alleged That the Location of District Boundaries Imposes Any Restriction on Their Exercise of First Amendment Rights.

In addition to their failure to identify a manageable standard for adjudicating a partisan gerrymandering claim under either Article 1, § 2 or the First Amendment, the plaintiffs also have failed to allege that the Plan imposed any actual restriction on any of their recognized First Amendment rights. For this reason, as well, plaintiffs' have failed to state a claim for relief under the First Amendment.

A threshold requirement for any First Amendment claim is that "the challenged law must actually restrict some form of protected expression." *League of Women Voters v. Quinn*, No. 1:11-cv-5569, 2011 WL 5143044, *2 (N.D. Ill. Oct. 28, 2011) (citing cases). The drawing of district lines—even assuming those lines make some political outcomes

more likely than others—imposes no burden on an individual's rights of expression, association, or to petition the government. As the three-judge court observed in *Quinn*,

> Under the redistricting plan, are LWV's members being in any way prohibited from running for office, expressing their political views, endorsing and campaigning for their favorite candidates, voting for their preferred candidate, or otherwise influencing the political process through their expression? The answer is no.

2011 WL 5143044, *3; *see also Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, at *17 (N.D. Ga. May 16, 2006) ("Plaintiffs are every bit as free under the new plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression.").

This Court dismissed a similar First Amendment gerrymandering claim incident to an earlier congressional redistricting in Maryland for the same reasons in *Anne Arundel County Republican Central Committee v. State Admin. Bd. of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991):

> Plaintiffs' claim also fails under a First Amendment analysis. Nothing about H.B. 10 affects in any proscribed way the plaintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.

That analysis applies here as well. Plaintiffs have the same rights in their current districts to speak out and associate politically as they would have if they were assigned to other districts. Changing district lines has no impact on those rights.

Similarly, courts have rejected arguments that a districting plan exerts a "chilling effect" on First Amendment rights. *See*, *e.g.*, *Pope v. Blue*, 809 F. Supp. 392, 398 (W.D.N.C. 1992) (allegations that districting plan chilled freedom of speech or association did not state a cause of action); *Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D. Cal. 1988). The *Badham* plaintiffs argued that the districting plan at issue violated the First Amendment by "penalizing Republican voters solely because of their party affiliations, political beliefs and associations and by chilling public debate on issues of public importance." 694 F. Supp. at 675. The court dismissed the penalty argument as inadequate under *Davis v. Bandemer*, 478 U.S. 109 (1986). *Id*. As to the contention that the districting plan chilled political speech, the court rejected the argument as "wholly without merit." *Id.* The court explained that the concept of a "chilling effect" created by an overly broad statute regulating speech was inapposite to a statute, such as a districting plan, that does not regulate speech at all. *Id*. ("While plaintiffs may be discouraged by their lack of electoral success, they cannot claim that [the reapportionment plan] regulates their speech or subjects them to any criminal or civil penalties for engaging in protected activities.").

The allegations, rhetoric, and legal theory asserted here—including the claim of political animus against voters of an opposing party—mirror the arguments that failed in *Badham*. They should be rejected in this case for the same reasons. Moreover, even assuming that political activity is heightened in competitive districts and depressed in non-competitive ones, the First Amendment does not guarantee districts that maximize political

expression. And a competitive 6th District is not what plaintiffs want in any event, but rather a 6th District that is safely Republican, or at least Republican-leaning. The plaintiffs have omitted from the complaint that in 2014, the Republican challenger narrowly failed to unseat the incumbent Democrat in the 6th district, losing by only 1.5 percent, demonstrating that the 6th district is a competitive district.[5] Rather than effect a chill on voters' First Amendment rights, the competitiveness of the 6th district—and the increased competitiveness in three other districts where the margin of safety for Democrats has declined—would be expected to *increase* political activity and expression.

Indeed, the plaintiffs have failed to allege with any specificity how the Plan has chilled political activity and expression in the 6th district or other areas of the State, a failure that is particularly telling given that two election cycles have occurred under the Plan. For example, plaintiffs offer no specifics on how or whether the Plan has discouraged voting or participation in political campaigns, or showing that adoption of the Plan has caused voters to switch political parties, or that the new district lines have inhibited voters from registering as Republicans. *Id*., ¶¶ 113-17. More significantly, the complaint does not allege that the Plan has had any of these chilling effects on the plaintiffs in this case. To the contrary, each of the individuals identified in the complaint continue to support Republican candidates (*id*., ¶¶ 14-22), several are active in the local party central

[5] Official election results are available at http://elections.state.md.us/elections/2014/results/General/gen_results_2014_2_00806.html.

committee (*id*., ¶¶ 15, 18, 20), and two played key roles (*id*., ¶¶ 15, 22), as fundraiser and campaign manager, in the 2014 campaign of the Republican challenger in the 6th Congressional District.

Rather than identify any form of protected expression that has been abridged by the State Plan, the plaintiffs allege that the loss of a safe Republican district establishes that a constitutional violation has occurred. (Compl. ¶¶ 8-9). In so doing, the plaintiffs identify no constitutional principle that requires that the Republican Party have two safe districts in Maryland, or that the creation of a competitive or Democratic-leaning district from a previously Republican-leaning or safe district, violates their associational, expressive, or representational rights. Courts have routinely rejected such allegations. *See, e.g.*, *Kidd*, 2006 WL 1341302, at *19 (allegations that gerrymandering has had "deleterious effects . . . on the ability of a political party and its voters to elect a member of the party to a seat in the state legislature implicates no recognized First Amendment right"; *Committee for a Fair and Balanced Map*, 835 F. Supp. 2d at 574 ("First Amendment rights are not implicated merely because the Adopted Map makes it more difficult for Republican voters to elect Republican candidates"); *Finlay v. Washington*, 664 F.2d 913, 927-28 (4th Cir. 1981) (rejecting contention that the First Amendment protects against "undue infringement" of ability to win elected office). The plaintiffs' efforts to re-brand allegations of partisan disadvantage as a "sanction" or "punishment" for their past support of Republican candidates does not alter the analysis or conclusion.

CONCLUSION

The defendants' motion to dismiss should be granted and the second amended complaint dismissed with prejudice.

Respectfully submitted,

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