**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**
**GREENBELT DIVISION**

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| PATRICIA FLETCHER, *et al.* | * | |
| *Plaintiffs,* | * | |
| v. | * | Civil Action No: 8:11-cv-03220-RWT |
| LINDA H. LAMONE, *et al.* | * | |
| *Defendants.* | * | |

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# OPPOSITION TO MOTION FOR THREE-JUDGE PANEL AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS


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Dated: November 18, 2011

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## OPPOSITION TO MOTION FOR THREE-JUDGE PANEL AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Linda H. Lamone and Robert L. Walker, by their undersigned attorneys, oppose plaintiffs' motion for a three-judge panel pursuant to 28 U.S.C. § 2284, and move to dismiss the complaint under Rule 12(b)(6) for failure to state a claim.

## STANDARD

Subsection (b)(1) of 28 U.S.C. § 2284 provides that a three-judge panel need not be convened in a case challenging the apportionment of congressional districts if "the judge to whom the request is presented . . . determines that three judges are not required. . . ." This provision authorizes a district court to forgo a three-judge panel "'[i]f it appears to the single district judge that the complaint does not state a substantial claim for injunctive relief. . . .'" *Simkins v. Gressette*, 631 F.2d 287, 290 (4th Cir. 1980) (citation omitted). In its most recent opportunity to consider the proper application of 28 U.S.C. § 2284(b)(1), the Fourth Circuit expressly held that where a plaintiff's "pleadings do not

state a claim" upon which relief may be granted within the meaning of Rule 12(b)(6) of the Federal Rules of Civil Procedure, "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769, 772-73 (4th Cir. 2003) (citing *Simkins*, 631 F.2d at 295); *see id.*, 332 F.3d at 777 ("Duckworth's complaint . . . cannot survive the demands of Rule 12(b)(6). And, having failed to state a claim at all, Duckworth also failed to present a substantial question. Thus, the district court was justified in acting on the case itself and refraining from referring it to a three-judge district court.").

Under this controlling Fourth Circuit precedent, the single district court judge is called upon to test the substantive merit of the plaintiff's claims by applying the standard of review for a motion to dismiss under Rule 12(b)(6). "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, 129 S. Ct. 1937, 1949 (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*, 129 S. Ct. at 1949. 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."'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). In applying this standard, 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." *Iqbal*, 129 S. Ct. at 1949-50.

In addition to determining whether a complaint is insubstantial due to the claims' "lack of substantive merit," a single district judge may also deem a complaint to be insubstantial "because of the absence of federal jurisdiction" or "because injunctive relief is otherwise unavailable." *Simkins*, 631 F.2d at 290; *see id.* at 295-96 (affirming the single district judge's dismissal of a redistricting challenge based on both the claims' lack of substantive merit and the inability to grant the requested injunctive relief without disrupting an impending election). Thus, a district judge's decision not to convene a three-judge panel has been affirmed where "[t]he maintenance of such a suit at that time . . . would have resulted in great disruption in the election process in Maryland." *Simkins*, 631 F.2d at 295 (citing *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970)).

This Court should dismiss this case because plaintiffs' claims are insubstantial and without merit. Even if all properly pled allegations of fact are assumed to be true, they do not state a plausible claim for relief under any provision of the U.S. Constitution or applicable statute.[1]

**FACTS**

Maryland's State Plan for Congressional Redistricting ("State Plan"), was adopted in a special session of the General Assembly held October 17 through October 20, 2011.

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[1] Plaintiffs have indicated that they intend to file a motion for preliminary injunction on the basis of the claims alleged in Counts 3 and 6 of the Complaint. Because only a three-judge panel may render a "determination . . . of an application for a preliminary injunction," 28 U.S.C. § 2284(b)(3), the single-judge court must first decide whether the Complaint withstands scrutiny under the *Simkins* "insubstantiality" test before referring the motion for a preliminary injunction to the three-judge panel for determination.

It was signed into law as an emergency bill by the Governor on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. The State Plan creates eight congressional districts that are as equal in population as mathematically possible. The revised district map in the State Plan is based substantially on the districts drawn following the 2000 census.

The State Plan includes two majority African American districts located in Maryland's two major areas of African American population. The fourth district, located in the Washington, D.C. suburbs, has an unadjusted African American voting age population of 53.72%, and an unadjusted white voting age population of 28.65%. The seventh district, located in Baltimore and its suburbs, has an unadjusted African American population of 53.75%, and an unadjusted voting age white population of 35.75%.[2]

The districts in the State Plan were created by using the demographic information from the 2010 census performed by the United States Bureau of the Census, as adjusted in accordance with the "No Representation Without Population Act." 2010 Md. Laws, ch. 67. The Act requires that, for purposes of congressional redistricting, individuals

[2] The comparable figures for the other districts are as follows: the first is 83.26% white and 11.05% African American; the second is 59.04% white and 29.58% African American, the third is 66.17% white and 18.74% African American, the fifth is 52% white and 35.31% African American, the sixth is 66.39% white and 11.81% African American, and the eighth is 65.49% white and 11.33% African American. Only the fourth, sixth and eighth districts have higher than 10% Hispanic voting age population—12.49%, 10.12%,and 12.37%, respectively. Figures for African Americans and whites reflect only those who are not also Hispanic. Unadjusted numbers are used because adjusted figures are not available for the Hispanic population.

incarcerated in State or federal prisons must be allocated based on their last known Maryland residence prior to incarceration. Md. Code Ann., Election Law (EL) § 8-701(a)(2). The Act further provides that the State's population for purposes of reapportionment does not include those individuals who were not Maryland residents prior to their incarceration. *Id.* § 8-701(a)(1). The numbers necessary for this adjustment were gathered by the Maryland Department of Planning pursuant to regulations found at COMAR 34.05.01.04.

The adjustments made under the No Representation Without Population Act were minor: A total of 1,321 prisoners who reported that their pre-incarceration residences were outside of Maryland were excluded. Other prisoners, who reported that their pre-incarceration residences were within the State of Maryland, were reassigned to those prior residences.[3] This reallocation, however, caused minor changes in population distribution throughout the State. In no district did the size of the adjustment exceed 1% of the district's population and in most districts the changes were far smaller.

## ARGUMENT

### I. THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT AND IS THEREFORE INSUBSTANTIAL.

The pleading standard established by the Supreme Court requires plaintiffs to allege "sufficient factual matter . . . to 'state a claim for relief that is plausible on its face,'" rather than simply recite the elements of a claim. *Iqbal*, 129 S. Ct. at 1949 (citing

[3] In situations in which it was impossible to determine the prisoner's pre-incarceration residence, pursuant to COMAR regulation, that prisoner was counted as residing in the prison.

*Twombly*, 550 U.S. 544). Count 5 of plaintiffs' Complaint, which relates to the claimed Voting Rights Act violation, simply restates a portion of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, without factual support for the contention that a violation of that Act has occurred.

As the plaintiffs themselves acknowledge, *see* Complaint ¶ 73, a plaintiff claiming a Voting Rights Act violation must satisfy the three factors established in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Thus, to state a "plausible" claim of relief, the plaintiffs must allege "sufficient factual matter," *Iqbal*, 129 S. Ct. at 1949, to show that:

1) the minority group is "sufficiently large and geographically compact to constitute a majority in a single member district";

2) the minority group is "politically cohesive"; and

3) the "white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . .—usually to defeat the minority's preferred candidate."

*Gingles*, 478 U.S. at 50-51. Here, the Complaint does not contain well-pled facts sufficient to show that the plaintiffs are capable of satisfying the three *Gingles* factors.

As to the first factor, the Complaint merely repeats the conclusory allegation that the three majority African American districts in the various competing plans plaintiffs attached with the Complaint are "compact." *See* Complaint at ¶¶ 28, 29, 34, and 43. The maps themselves, however, do not provide support for that claim. Instead, the maps of the three majority-minority districts (Attachments A & D to the Complaint) reflect the fact that Maryland has two separate concentrations of African American population—one

in the suburban counties surrounding Washington, D.C., and one in Baltimore City and its suburbs.

In each plan submitted by the plaintiffs, they propose to build a third majority African American district by taking left over African American voters from the Washington D.C. suburbs and the western Baltimore suburbs and drawing a narrow connection between them. One of the two maps (Attachment A) does this in so blatant a manner that it is obvious from the face of the map itself that nothing but race drives the creation of the district. The second plan (Attachment D) draws a finger between the two populations, rather than a thread, but still does not demonstrate the existence of a third geographically compact minority population. This plan only shows that it is possible to stretch a district far enough to include two distinct geographically compact populations, neither of which is sufficiently large to constitute a majority in a single member district.[4]

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[4] Part of the bill file for the State Plan is the Voting Rights Act analysis performed for the State by Dr. Bruce E. Cain. Dr. Cain's report concludes that the demographics of Maryland's African American community support the creation of two majority African American districts, but that a third such district cannot be created without resorting to unconstitutional racial gerrymandering of the type prohibited by *Shaw v. Reno*, 509 U.S. 630 (1993). A copy of Dr. Cain's report is publicly available as an exhibit to the bill review letter provided for Senate Bill 1 at http://mlis.state.md.us/2011s1/ag_letters/sb0001.pdf (last visited November 18, 2011). Dr. Cain's report is admissible pursuant to Rule 803(8) and, as a piece of legislative history, the report "is not a matter beyond the pleadings but is an adjunct to the [challenged legislation] which may be considered by the court as a matter of law" on a motion to dismiss. *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995) (citing 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint)), *vacated and remanded on other grounds by Penn Adver. v. Schmoke*, 518 U.S. 1030 (1996). Because Dr. Cain's report only confirms what is otherwise

The Supreme Court has held that the compactness inquiry under the *Gingles* factors should take into account "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997). This test cannot be met by a plan that reaches out to combine isolated minority communities. As the Court explained:

> The recognition of nonracial communities of interest reflects the principle that a State may not "assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." In the absence of this prohibited assumption, there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates. "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." We do a disservice to these important goals by failing to account for the differences between people of the same race.
>
> * * *
>
> Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than "style points"; it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal "opportunity . . . to participate in the political process and to elect representatives of their choice."

*League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433-34 (2006) (citations omitted). The combination of minority populations from separate urban areas, as in plaintiffs' plans, has been treated as evidence of unconstitutional racial gerrymandering under the 14th and 15th Amendments to the United States Constitution.

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evident from the Complaint and its attachments, the Court need not consider it to conclude that the Complaint should be dismissed as "insubstantial."

*See Shaw*, 509 U.S. at 647; *Miller v. Johnson*, 515 U.S. 900, 908 (1995). As a result, the plans proposed by the plaintiffs, which link the two separate African American communities in the area of Washington, D.C., and Baltimore, are likely unconstitutional themselves and do not demonstrate that it is possible under constitutional and legal standards to construct three compact African American congressional districts in Maryland.

While the Complaint fails to allege a plausible claim under the first *Gingles* criterion, it alleges nothing whatsoever about the other two, namely, that the two African American communities they strain to combine into a third majority-minority district are "politically cohesive," and that the voting habits of African Americans and the white majority are sufficiently polarized that, without the new district, the minority's preferred candidate would be "defeat[ed]." *Gingles*, 478 U.S. at 51. This pleading failure is grounds for dismissal—even if plaintiffs had alleged a sufficiently compact alternative district—because all three factors are necessary preconditions for establishing a vote dilution claim under the Voting Rights Act. *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994).

In conclusion, the Complaint does not present facts in support of any of the three *Gingles* factors, and thus fails to state a claim for violation of the Voting Rights Act.

## II. THE COMPLAINT FAILS TO STATE A CLAIM FOR INTENTIONAL DISCRIMINATION AND IS THEREFORE INSUBSTANTIAL.

Proving claims of racial discrimination in violation of the 14th and 15th Amendments to the United States Constitution places a "demanding" burden on

plaintiffs. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001). They must show that race was not simply "'*a* motivation for the drawing of a majority-minority district,' but 'the "*predominant* factor" motivating the legislature's districting decision,'" *id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996), and *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (emphasis in original)), and that other, legitimate districting principles were subordinated to race. *Bush v. Vera*, 517 U.S. at 959.

The State Plan is the product of the careful consideration of a variety of legitimate districting principles, including equality of population, maintaining the core of existing districts, protecting communities of interest, respecting existing representational relationships, and many others. Plaintiffs recognize that race was not the "predominate factor" in the redistricting in the Complaint itself, which claims that the State Plan was motivated by partisan purposes. Complaint at ¶¶ 42, 44, and 77. Even if proven, however, drawing districts for partisan reasons does not violate the Constitution, even in cases where those partisan efforts have a disproportionate effect on African American voters. *Hunt*, 526 U.S. at 551-52; *see also Bush v. Vera*, 517 U.S. 952, 964 (plurality) (discussing incumbent protection as a permissible factor other than race). And, if the purpose underlying the State Plan was partisan, it could not have been predominantly racial.

Moreover, the plaintiffs must bear the burden not only of demonstrating discriminatory intent but also must propose a map that satisfies the other traditional goals of the redistricting authority:

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification

> correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

*Easley*, 532 U.S. at 258. The Complaint and its attached maps do not meet this standard.

Plaintiffs similarly fail to carry their burden of proof with respect to the claim that the State Plan results in the "cracking" of minority communities, Complaint at ¶ 60, because the only facts alleged—the maps attached as Attachments E and F—are insufficient to demonstrate discriminatory intent. The line drawn in Attachment F could easily be explained by a desire to achieve population equality, partisan considerations, or other legitimate redistricting goals. That the boundary of a district approximates a "horizontal line" says nothing about whether race was a factor, much less the "*predominant* factor" required in order to sustain such an intentional discrimination claim. *Easley*, 532 U.S. at 241.

Plaintiffs also rely on the irregular shapes of the districts to support their claim of intentional discrimination. Complaint at ¶¶ 61, 63, 65. While lack of compactness or irregularity of districts is relevant to consideration of whether redistricting violates the 14th or 15th amendment, it is not sufficient standing alone. *Bush v. Vera*, 517 U.S. at 962; *see also Kimble v. Willis*, 2004 U.S. Dist. LEXIS 10835 (D.Md. 2004), *affirmed by Kimble v. State Bd. of Elections*, 120 Fed. Appx. 466 (4th Cir. 2005). "The Constitution does not mandate regularity of district shape"; for strict scrutiny to apply, "traditional

districting criteria must be *subordinated to race*." *Bush v. Vera*, 517 U.S. at 962 (emphasis in original).

Comparing this case to other cases where the irregular shape of the district provided evidence of racial discrimination illustrates that this Complaint falls far short. In *Gomillion v. Lightfoot*, upon which plaintiffs rely, Complaint ¶ 61, the boundaries of a city were redrawn to exclude as many African American communities as possible, dramatically lowering the number of African Americans entitled to vote in municipal elections. 364 U.S. 339 (1960). While the resulting shape was relevant to the Court's consideration of the discrimination claim, it was the resulting exclusion of all but "four or five" of the African American voters from the city—"while not removing a single white voter or resident"—that was "essential" to a finding of intentional discrimination. *Id.*, at 341. No similar showing has been attempted or can be made here.

Nor does *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), upon which plaintiffs also rely, Complaint ¶ 61, support plaintiffs' claims. *Garza* made a specific finding that the county supervisors who drew the districts had "intentionally fragmented the Hispanic population among the various districts in order to dilute the effect of the Hispanic vote in future elections and preserve incumbencies of the Anglo members of the Board of Supervisors." 918 F.2d at 769. Plaintiffs make no such allegation here, at least not one that amounts to anything more than the type of "conclusory statements" found insufficient to state a claim in *Iqbal*. Moreover, the decision in *Garza* preceded the Supreme Court's decision in *Hunt*, 526 U.S. 541 (1999), and *Easley*, 532 U.S. 234 (2001), in which the Court made clear that race, not politics,

must be shown to be the "*predominant* factor." As a result, there was no discussion in *Garza* of whether Hispanic voters were associated with one party or the other. However *Garza* would be decided if it arose today, it does not support the conclusion that any division of a minority population is unconstitutional, even if the division results from a focus on party affiliation or other non-racial consideration.

Plaintiffs further argue that the State Plan creates minority influence districts, and that the intentional creation of such districts constitutes racial discrimination in violation of the 14th and 15th Amendments. Complaint ¶ 64. But the Supreme Court has held that the U.S. Constitution allows the creation of influence and crossover districts.

> Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more.

*Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231, 1248 (2009) (plurality opinion of Kennedy, J., joined by Roberts, C.J., and Alito, J.).[5]

The cases cited by plaintiffs are not to the contrary. *Miller* invalidated the connection of "four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors," to create a majority-minority district, but did not address the creation of minority influence districts in areas that naturally have relatively high African

[5] While only two Justices joined this portion of Justice Kennedy's plurality opinion, four dissenting Justices would have gone further, and hold that cross-over districts could be *required* under the Voting Rights Act. *Bartlett*, 129 S.Ct. at 1250-51.

American populations. *Miller*, 515 U.S. at 908. *Georgia v. Ashcroft*, 539 U.S. 461 (2003), was brought to challenge the denial of preclearance for a redistricting plan for the Georgia State Senate that retained the same number of majority-minority districts, but lowered the percentage of minorities in each district from around 60% to just over 50%, and built multiple influence districts. The Supreme Court held that § 5 of the Voting Rights Act allows the states to decide "that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters." *Id.*, 539 U.S. at 483. The Court observed that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts." *Id.* at 482 (citing studies). Thus, far from suggesting that minority influence districts are unconstitutional, the Supreme Court has specifically held that such districts are both constitutional and potentially beneficial.

In the end, the Complaint cannot meet the standard set in *Iqbal* simply by repeating that the State Plan intentionally discriminates on the basis of race; it must aver "sufficient factual matter" to support that conclusory statement. *Iqbal*, 129 S. Ct. at 1949. This it has failed to do.

## III. THE "NO REPRESENTATION WITHOUT POPULATION ACT" DOES NOT CAUSE THE CONGRESSIONAL PLAN TO BE UNCONSTITUTIONAL.

### A. The Exclusion of 1,321 Incarcerated, Non-Maryland Residents from the Adjusted Population Basis is Constitutionally Permissible and Does Not Create Unequal Districts.

Although plaintiffs make several broad and somewhat inconsistent assertions about the "No Representation without Population Act"[6] and its effect on the State Plan, the nub of their Complaint seems to be that 1,321 prisoners whose permanent residence is outside of Maryland but who were enumerated by the census as being in a Maryland prison, were removed from the adjusted population that forms the basis for redistricting. Complaint at ¶¶ 47-49, 54, 67.[7] This allegation does not state a federal constitutional claim.

The governing Maryland law provides that "[t]he population count used after each decennial census for the purpose of creating the legislative districting plan for the general assembly:

> (1) may not include individuals who:
>
> > (i) were incarcerated in state or federal correctional facilities, as determined by the decennial census; and

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[6] The "No Representation without Population Act" became part of Maryland's law in Chapters 66 and 67 of the Laws of 2010. The portion of the law relating to congressional redistricting is codified at § 8-701 of the Election Law Article.

[7] Paragraphs 47 and 67 claim population differences between districts that are significantly larger than could arithmetically have been caused by the decision to exclude 1,321 incarcerated persons who are non-Maryland residents. *See* Complaint at ¶¶ 47, 67 (claiming overpopulation in District 6 of 6,754 persons and underpopulation in District 7 of 4,832 persons). Plaintiffs have not explained this apparent discrepancy in their pleadings.

(ii) were not residents of the state before their incarceration; and

(2) shall count individuals incarcerated in the State or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the State. [8]

Md. Code Ann., Election Law § 8-701(a).

First, there is no constitutional requirement that a state utilize the total population as determined by the federal census as the basis for its redistricting. *Meeks vs. Avery*, 251 F.Supp. 245, 250 (D. Kan. 1966) (affirming state's use of its own enumeration, which "excluded individuals who were unlikely to be interested in the political, social, and economic problems of the state," instead of federal census data as basis for congressional redistricting); *Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) ("Nothing in the constitution or *Karcher* [*v. Daggett*, 462 U.S. 725 (1983)] compels the states or Congress to use only the unadjusted census figures."); *see also Burns v. Richardson*, 384 U.S. 73, 91 (1966) (permitting use of adjusted census data for state legislative redistricting). [9]

[8] Plaintiffs pointedly do not challenge the constitutionality of—or even mention—§ 8-701(a)(2), which, for districting purposes, allocates prisoners who were Maryland residents prior to their incarceration to the place of their last known address. Because the adjustments to the federal census effectuated by this aspect of the Act are, for the reasons described below, constitutional, the argument that the redistricting map is not based on equal population is insubstantial and ought to be dismissed.

[9] In an analogous situation, the Missouri legislature created slightly different size congressional districts to account for the fact that certain districts had disproportionally high numbers of transient college students and military personnel. *Kirkpatrick v. Priesler*, 394 U.S. 526 (1969). The Supreme Court invalidated the plan of redistricting, not because it proposed to make these adjustments, but because the adjustments were "[a]t best . . . haphazard adjustments" and made "no attempt" to account for the same factors in all districts "in a systematic, not an ad hoc, manner." *Id.*

Indeed, the Fourth Circuit has indicated that courts ought to "respect[]" the state political branches' "choice" of the preferred population basis for redistricting. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996).

Second, there is no obligation that prisoners must be counted in the institutions in which they are incarcerated. The method of enumerating prisoners at their residences rather than in prisons was apparently used in the 1900 census, Nat'l Research Council, *Once, and Only Once, and in the Right Place: Residence Rules in the Decennial Census* 84-85 [Daniel L. Cork and Paul R. Voss, eds., 2006], and the reasons the Census Bureau now counts prisoners where they are incarcerated are technical rather than constitutional. U.S. Census Bureau Report: Tabulating Prisoners at Their "Permanent Home of Record" Address, pp. 10-13 (February 21, 2006). In fact, the Census Bureau released prisoner and other group quarter numbers early in this round of redistricting "so that states can leave the prisoners counted where the prisons are, delete them from the redistricting formulas, or assign them to some other locale." Director's Blog, United States Census Bureau, posted March 10, 2010.http://blogs.census.gov/directorsblog/2010/03/so-how-do-you-handle- prisons.html.

Third and most importantly, the Supreme Court has long since given its constitutional approval to a state's decision not to count prisoners or temporary residents in the population on which redistricting is calculated:

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at 535. By contrast to the facts in *Kirkpatrick*, the Maryland legislature has—in a systematic manner—made precisely the kinds of adjustments approved by courts in *Meeks* and *Detroit*, and by the Supreme Court in *Burns*.

> Neither in *Reynolds v. Sims* [377 U.S. 533 (1964)] nor in any other decision has this Court suggested that States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have found no constitutionally founded reason to interfere.

*Burns v. Richardson*, 384 U.S. 73, 92 (1966). Thus, the Legislature's decision to exclude from the population basis 1,321 prisoners who are not Maryland residents to begin with does not raise any constitutional issues.

Because the adjustments to the census are constitutionally permissible, the resultant districts are of equal population. The Supreme Court has interpreted Article I, § 2 of the United States Constitution to require states "to make a good faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969). The State plan has achieved this goal. Seven of the eight congressional districts have an adjusted population of 721,529 while the eighth has an adjusted population of 721,528. Thus, any claims based on population inequality are wrong, insubstantial, and should be dismissed.

### B. The Allegation that Excluding 1,321 Incarcerated, Non-Maryland Residents that were Excluded from the Adjusted Population Basis fails to State a Claim for Racial Discrimination.

Plaintiffs have also alleged that, of the 1,321 incarcerated non-Maryland residents who were excluded from the population basis, 71.08% are African-American, and this fact, they claim, amounts to a constitutional violation. Complaint at ¶¶ 49-53, 70. Under established Supreme Court precedent, plaintiffs have failed to allege a *prima facie* case of

racial discrimination. To make such a case, plaintiffs must show more than just a disparate impact. Rather, to trigger strict scrutiny, a plaintiff must plead and prove that there was a "discriminatory purpose." *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976). "This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause." *Mobile v. Bolden*, 446 U.S. 55, 66 (1980).[10] "[T]his principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination." *Id.*, 446 U.S. at 67. The plaintiffs have not alleged a racially discriminatory purpose underlying the "No Representation without Population Act," and cannot, as it was intended to protect minority voting rights. Therefore, this Court should dismiss these claims, too, as insubstantial.

## IV. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM OF PARTISAN GERRYMANDERING.

Count 7 of the Complaint makes a mere conclusory allegation that "[t]he state of Maryland's Enacted Congressional District plans is the result of gross partisan gerrymanders, which violate the United States Constitution's Fourteenth Amendment equal protection guarantee by fragmenting cohesive communities of interest and political subdivisions between districts in support of no legitimate, consistently applied state policy." Complaint ¶ 78. This Count patently fails to state a plausible claim because it

[10] Although Congress subsequently amended § 2 of the Voting Rights Act to reject the intent requirement announced in *Mobile*, intent remains a necessary element of a discrimination claim under the U.S. Constitution. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481-82 (1997).

contains no "factual matter" to support the conclusory allegation. *Iqbal*, 129 S. Ct. at 1949. The claim also lacks any legal substance because, in stating what constitutes the alleged "partisan gerrymander," the Complaint merely recites a version of previously proposed standards that have been rejected by the Supreme Court. As a matter of law, there is no judicially approved definition of what constitutes unlawful partisan gerrymandering.

Indeed, the elusive cause of action known as "political gerrymandering" or "partisan gerrymandering" is now, more than ever, the Flying Dutchman of American jurisprudence. Since the redistricting that followed the 2000 Census, the Supreme Court has determined that, although such claims may be conceptually justiciable, there are "no judicially discernible and manageable standards for adjudicating political gerrymandering claims. . . ." *Vieth v. Jubilirer*, 541 U.S. 267, 281 (2004) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Thomas, J.); *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 subsequently reaffirmed that conclusion in *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. at 447 (opinion of the Court by Kennedy, J.) (again finding no "reliable measure of impermissible partisan effect"); *see 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).

The Supreme Court's acknowledgment that courts lack any meaningful, workable definition of partisan gerrymandering followed a long history of futility in lower courts, which have repeatedly rejected partisan gerrymandering claims. As the district court recognized in the case that reached the Supreme Court under the name *LULAC v. Perry*, federal courts have decided "an unbroken line of cases declining to strike down a redistricting plan as an illegal partisan gerrymander." *Henderson v. Perry*, 399 F. Supp.2d 756, 761 (E.D. Tex. 2005) (citing seven such cases); *see Vieth*, 541 U.S. at 279-80 (surveying the known partisan gerrymandering cases and observing that "in *all* of the cases" involving redistricting "relief was denied" (emphasis in original)).[11]

"In the absence of any . . . workable test for judging partisan gerrymanders," *LULAC v. Perry*, 548 U.S. at 420, the Supreme Court has resorted to a simple comparison as a means of confirming the implausibility of a plaintiff's claim. Thus, in that case, the Court showed that the challenged redistricting plan in Texas was "fairer than the [Pennsylvania] plan that survived in *Vieth*," which had "led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote."

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[11] In *Vieth*, the Supreme Court was able to identify only one instance of any relief being granted based on a theory of partisan gerrymandering, but it involved "merely temporary relief" and the case "did *not* involve the drawing of district lines." *Id.*, 541 U.S. at 279 (emphasis in original) (referring to *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992) (preliminary injunction granted in case challenging state's system for electing trial court judges that yielded a judiciary whose members were disproportionately from one political party)).

*LULAC v. Perry*, 548 U.S. at 419. The Texas plan could be deemed "fairer" on its face than the plan upheld in *Vieth*, and, therefore, not constitutionally suspect, because "a congressional plan that more closely reflects the distribution of state party power," as the Texas plan did, "seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority," as the Pennsylvania plan did. *LULAC v. Perry*, 548 U.S. at 419.

The lower court in *Perry* performed an even more telling comparison, showing that with the adoption of the plan approved in *Vieth*, the Republican share of Pennsylvania Congressional seats increased 11% over the next two election cycles (from 52% of seats to 63%), even as Republicans' average percentage of votes cast in major statewide elections decreased during that same period by 3% (from 49% to 46%). *Henderson v. Perry*, 399 F. Supp.2d at 769-70 and n.58. That is, in *Vieth*, "the party that garnered, on average, less than half the vote in statewide races was able to capture nearly two-thirds of Pennsylvania's congressional seats." *Id.* at 770. "In contrast, the plan passed by the Texas legislature resulted in the election of twenty-one Republicans and eleven Democrats to the House of Representatives in 2004," resulting in a 66% to 34% ratio of representation, "when the Republican Party carried 58% of the vote in statewide races and the Democratic Party carried 41% of the vote." *Id.* From this comparison, the court concluded that "if the effects of the Pennsylvania plan did not provide a basis to find excessive partisanship in redistricting, it is hard to see how the effects of the Texas plan make it constitutionally offensive." *Id.*

Using that same form of comparison in this case, this Court can easily confirm that the plaintiffs have not stated a plausible claim of partisan gerrymandering. The Complaint contains no allegation that could possibly be construed to demonstrate or suggest that Maryland's newly adopted Congressional districting will yield electoral opportunities or results that are less fair, or any less representative of the State's electorate, than those produced by either the Pennsylvania plan upheld in *Vieth* or the Texas plan in *LULAC v. Perry*, where the Supreme Court affirmed the rejection of a statewide partisan gerrymandering challenge. Indeed, the Complaint contains no allegation to suggest how Maryland's plan may determine or affect the success of candidates from any political party in future Congressional elections. The Complaint does not allege that Maryland's plan involves what has been called the more "likely vehicle for [objectionable] partisan discrimination," because there is no suggestion that the plan "entrenches an electoral minority," as the Pennsylvania plan did. *LULAC v. Perry*, 548 U.S. at 419. Toward the other extreme, even if the plaintiffs had alleged—as they have not—that Maryland's plan may possibly improve the chances for success of candidates from the political party that claims the majority of Maryland's registered voters, the plan could not plausibly be construed to effect a change that favors the majority party to a degree greater than the Republican party benefitted from either the plan in Texas, where Republicans claim a majority of voters, or the plan in Pennsylvania, where they do not.

The Complaint's allegation that Maryland's plan "fragment[s] cohesive communities of interests and political subdivisions," Complaint ¶ 78, does not state any basis for a finding of partisan gerrymandering, or any other cognizable claim. No provision of the United States or State Constitution, or federal or State law, *requires* the State to preserve particular communities of interest in the drawing of Congressional districts. Although both the Supreme Court and the Maryland Court of Appeals have recognized communities of interest as a legitimate factor that a legislature *may* consider in redistricting, *Miller*, 515 U.S. at 920; *Matter of Legislative Districting of the State*, 370 Md. 312 (2002) (holding districts may be drawn to preserve communities of interest only where it does not interfere with the accomplishment of a constitutional requirement), neither court has required such consideration. Therefore, an allegation of a failure to preserve communities of interest necessarily fails to state a claim on which relief can be granted. Similarly, though a State's plan may attempt to honor the boundaries of political subdivisions, the rigid one person-one vote mandate tends to result in Congressional districts crossing the boundaries of political subdivisions. *See, e.g., Reynolds*, 377 U.S. at 578-79 (noting that, although a "State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible . . . the overriding objective must be substantial equality of population among the various districts"); *Connor v. Finch*, 431 U.S. 407, 419 (1977) ("Recognition that a State may properly seek to protect the integrity of political subdivisions or historical boundary lines permits no more than 'minor

deviations' from the basic requirement that legislative districts must be 'as nearly of equal population as is practicable.'" (citations omitted)).

The Complaint's allegation that the district configurations "support . . . no legitimate, consistently applied state policy," Complaint ¶ 78, evidently refers to a requirement that is found nowhere in the Constitution, pertinent statutes, or applicable precedents. To the extent it relates at all to a political gerrymandering claim, it seems to be a variant of standards that have been proposed but rejected by the Supreme Court. *See Vieth*, 541 U.S. at 295 (rejecting standards proposed in the dissenting opinion of Justice Stevens because they "are not discernible in the Constitution" and have "no relation to Constitutional harms"); *see id.* at 339 (Stevens, J., dissenting) (advocating a form of rational basis analysis for a partisan gerrymandering claim that would apply "if no neutral criterion can be identified to justify the lines drawn"). For these reasons, the plaintiffs' allegation of partisan gerrymandering is not plausible, and it is, therefore, insubstantial.

## V. INSUBSTANTIALITY CAN ALSO BE SHOWN IN THIS CASE BECAUSE MAINTAINING THIS SUIT WILL CAUSE GREAT DISRUPTION IN THE UPCOMING ELECTION.

The Complaint can be dismissed as insubstantial on an alternate ground, namely, that even a three-week delay in filing suit, combined with the close time before the upcoming elections, forecloses the grant of any equitable relief under *Maryland Citizens* and *Simkins*. The State's Plan was enacted during a special session of the General Assembly and signed into law as an emergency measure on October 20, 2011—less than three months before the deadline for candidates to register for the April 3, 2012 primary

election. Md. Code Ann., Election Law § 8-201(a)(2)(ii). Early voting begins on March 24, 2012, just eighteen weeks from now.

More importantly, the State must mail absentee ballots to absent uniformed services and overseas voters by Friday, February 17, 2012, only 13 weeks away. 42 U.S.C. § 1973ff-1(a)(8). This Court has previously recognized that "[v]oting by absentee ballot provides these men and women with their only meaningful opportunity to vote in state and federal elections while they are deployed." *Doe v. Walker*, 746 F. Supp. 2d 667, 679 (D. Md. 2010). Thus, any delay that does not give military personnel deployed overseas sufficient time to receive, fill out, and return their absentee ballots "imposes a severe burden on absent uniformed services and overseas voters' fundamental right to vote." *Id.* at 680.

In addition to the potential burden it places on overseas military personnel, this suit imposes a substantial burden on the State and local boards of election, which must configure new precincts, assign new polling places, prepare and print ballots, and program voting machines in time to meet these deadlines. *See Simkins*, 631 F.2d at 295 (citing *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970)). The close proximity of these deadlines is made more pressing by the fact that Plaintiffs waited until three weeks after the State Plan was signed into law before filing their Complaint. The potential "great disruption in the election process in Maryland," thus, provides an additional grounds and additional support for dismissing this case as insubstantial, as described above. *See Simkins*, 631

F.2d at 295 (citing *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970)).

* * *

This Court should dismiss this case without referring it to the three-judge panel because plaintiffs' claims are insubstantial and without merit. Even if all properly pled allegations of fact are assumed to be true, they do not state a claim for relief that is "plausible" under the pleading standard applied in *Iqbal* or under the substantive provisions of the United States Constitution and applicable statutes. Accordingly, this single-judge Court should dismiss the Complaint and remove even the potential for the pendency of these claims to disrupt preparations for the upcoming primary election.

## CONCLUSION

For the reasons set forth above, the Complaint should be dismissed.

Respectfully submitted,

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